RECONSTRUCTION OF THE KAFAAH CONCEPT IN MARRIAGE

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Abstract: Kafaah in marriage aims to create a complete and harmonious family. However, the old construction of kafaah contains discriminatory and problematic nuances. This can be seen from the criteria for kafaah, which are all physical-material, except for religion and piety. Humans are polarized into primordial partitions: beautiful-ugly, rich-poor, aristocratic-ordinary people, and free-slave. This polarization gives birth to discriminatory attitudes in society. In fact, Islam came to eliminate discriminatory social barriers. Through the maqāshid al-syārī’ah approach, this research seeks to reconstruct the concept of kafaah in several aspects, namely: reorienting the purpose of applying kafaah, repositioning kafaah rights, reviewing kafaah criteria and classifying kafaah. Maqāshid al-syārī’ah is presented here not as a doctrine to understand a particular context of Islamic law, but as a method to reconstruct the existing concept of kafaah. The goal is to produce a new concept of kafaah that is more substantive and humanist. From the results of the study, several conclusions were found. First, Kafaah legality is ijtihad because there are no valid texts found. Second, The construction of kafaah is influenced by the patrilineal system of Arab society. Third, Reconstruction of the concept of kafaah is carried out in two ways: (1) to include other criteria other than the seven criteria set by classical fiqh. (2) to compare the kafaah criteria between prospective husbands and prospective wives holistically. This things needs to be done to fulfill the current sense of justice and benef of the Muslim family.

Keywords: reconstruction; kafaah; maqāshid al-syārī’ah.


Kata kunci: rekonstruksi; kafaah; maqāshid al-syārī’ah.
Introduction

Islam was revealed to society with an institutionalized culture, not in a vacuum. The laws it contains are normative, but most of them are historical. This is a logical consequence of Islam as the last sharia. Therefore, Islamic law is designed to use flexible and elastic tools to reach the dynamics of human society throughout time. The texts of the Quran and hadith do not add up, while legal cases are popping up all the time. Therefore, the Quran and Hadith have dynamic, elastic, and flexible characteristics and are open to reinterpretation.

The product of the interpretation of legal verses and traditions in the treasures of Islamic scholarship is called fiqh. As a product of thought, the truth of fiqh is not absolute. On the contrary, most of it is relative. Moreover, fiqh is generally born to answer actual problems in particular space and time dimensions. Therefore, the validity of fiqh is limited by the context of space and time. With this typology, the essential character of fiqh is temporal and can accept changes due to changes in space and time.

One of the historical fiqh products is kafaah in marriage. Kafaah is the equivalence (mumatsalah, mu’adah) between husband and wife in certain aspects to avoid defects.

Previous scholars from the four schools of thought have discussed kafaah with almost the same concept. They agree on the importance of kafaah in marriage. The urgency lies in achieving the goals of marriage, namely: forming a sakinah, mawaddah, and rahmah family. That is a family that lives in harmony in love and affection.

However, the formulated concept of kafaah creates a division in society. Society is divided into social classes. These social classes ultimately become the dividing gap between the people themselves. The poor cannot marry the rich, the manual workers cannot marry the office workers, the prince cannot marry the common people, and so on. Kafaah construction like this has the potential to perpetuate oligarchy and aristocracy. The rich will get richer, and the poor will get poorer. This is not in accordance with the objectives of Islamic law.

This research which focuses on the theme of kafaah, is not the first research conducted. Many previous researchers have investigated similar themes. These themes can be grouped into four foci. First, research focuses on the position of kafaah in a normative marriage. Among these studies is research conducted by Muhammad Zaidan, which focuses on two things: the aspects taken into account in kafaah and the impact that arises from neglecting kafaah in marriage. Second; research that focuses on the effect of kafaah on family integrity, such as Ma’ayir al-Kafaah fi al-Zawah wa atsaruha fi Istiqrar al-Usrah which focuses on two problems, namely: the normativity and

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5 Article 3 of the Compilation of Islamic Law affirms: Marriage is aimed at realizing a sakinah, mawaddah and rahmah household life.
history of kafaah, and the influence of kafaah on family integrity. Third; the influence of customs on kafaah, such as the research of Ali Mubarak al-Safran al-Marr, entitled: Aatsar al-Urf fi Ma'ayyir al-Kafaah fi al-Nikah, Dirasah Maqashidiyyah. This research using the Maqashid approach, examines the role of customs in expanding the scope of kafaah. Fourth; research that compares the concept of kafaah according to Islamic law and kafaah according to positive law, such as the research conducted by Huda Ghiadhan with the title: al-Kafaah fi al-Zawaj fi al-Fiqh al-Islami wa Qanun al-Ahwal al-Syakhlyiyah al-Urduni and research by Ali Muhammad Maqbul, entitled: al-Kafaah al-Mu'tabarah bi al-Nikah Dirasah Fiqhiyyah Muqaranah. The first study compares kafaah to Islamic jurisprudence and positive law in Jordan. In contrast, the second study with the same approach compares the criteria taken into account in kafaah according to the four schools of thought.

From the four classifications above, it can be seen that there are similarities in some research focuses but differences in some other focuses. Likewise, in terms of the approaches used, there are the same but different in terms of the research focus. Thus, this research differs from previous research and contains an element of novelty in the focus and approach used.

Method

This study uses the Maqashid al-syâri‘ah approach as an analytical knife. This approach has been promoted by Imam Haramain al-Juwaini,6 al-Ghazali and reached its peak in the hands of al-Syathibi.7 According to the maqashid theory, every law prescribed by Allah must contain worldly and hereafter benefits. Sharia8 laws are enforced solely for the good of humans9 by maintaining (hifz) religion, soul, lineage, property, and reason.10

According to this theory, the text is a medium for conveying messages. Messages in the text must represent the benefit of humans. Therefore, the highest essence of the texts is a benefit, while the texts and the laws they contain are the media.11 If the text zhanni no longer realizes human benefit, it cannot be applied and must be reinterpreted.12 In this regard, Fathi al-Duraini said: The legal texts cannot be applied if they cannot realize the benefit.13

In this study, Maqâshid al-syâri‘ah is positioned as a method for rereading the old concept of kafaah. This rereading is needed to reconstruct the idea of kafaah that better reflects the sense of justice and the present benefit. This reconstruction produces laws that align with the benefits of space and time.

Result and Discussion

6 In his book, Al-Burhan fi Usul al-Fiqh, he explains that the purpose of Islamic law is to protect faith, soul, mind, family and property.

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13 Al-Duraini, al-Manahij,..., p. 10.
Construction of Classical Fiqh Perspective Kafaah

The issue of kafaah in marriage has been discussed by previous scholars. Their attention is focused on several things: the legality of kafaah, the holder of the right to kafaah, the position of kafaah in marriage, the criteria for kafaah, and the legal consequences of the absence of kafaah.

a. Kafaah Legality

Scholars have discussed kafaah from the legal aspect. They agreed that there was no evidence from the Quran or authentic hadith. The hadiths regarding kafaah are all weak, so scholars differ on their legality. According to Imam Malik, kafaah is not required in marriage except in matters of religion. This is also the opinion of Ibn Umar and Ibn Mas’ud from among the companions, as well as the opinion of Ibn Sirin and Ibn Abdul Aziz from the tabi’in.14 This opinion is based on the letter al-Hujurat verse 13:

"O humankind, indeed, We created you from a male and a female and made you into nations and tribes so that you may know one another. Verily, the most honorable of you in the sight of Allah is the most pious among you. Verily, Allah is All-Knowing, All-Knowing."

According to the majority of scholars, kafaah is required in marriage. They argue with the hadith of the Prophet narrated by Imam al-Hakim15:

"From Ibn Umar RA. said: 'The Messenger of Allah. The Prophet said: Some of them are equal to some of them, and some are equal to some non-Arabs, except ironers and cuppers."

According to al-Kamal bin al-Humam, as quoted by Wahbah Zuhaili, the traditions used as the legal basis for the legality of kafaah in marriage are all in the status of dha’if. However, these narrations are mutually reinforcing so that these traditions increase their status to the Hasan degree.16

According to most scholars, the Hasan hadith can be used as evidence in determining the law.

b. Right Holder to Kafaah

Scholars agree that the holder of the right to kafaah is a woman and her guardian. Men are required to be equal to women or at least close to equal. While women are not required to be equal or close to men.17 This is in line with the philosophy of kafaah in marriage, which is to avoid disgrace and shame from his wife and family.18 This provision arises from a patriarchal culture that is gender biased. The protection of women in the issue of kafaah shows that the relationship between men and women at

17 Wahbah al-Zuhaili, al-Fiqh al-Islami wa Adillatuh, (Damaskus: Dar a-Fikr, 1989), juz 7, p. 239.
18 Wahbah al-Zuhaili, al-Fiqh al-Islami..., juz 7, p. 239.
that time was subordinate, where men were the ordinate, and women were the subordinates. Positioning like this is not under God's will to make humans, men and women, equal. The Prophet likened all human beings to the same level in humanity, like the teeth of a comb, flat, no one is higher or lower. Currently, women have been treated as equal to men. Therefore, it is no longer relevant to distinguish humans based on gender.

c. Kafaah's Position in Marriage

Is kafaah a legal requirement for marriage (syarath al-shihhah) or just a luzum condition? Most scholars agree that kafaah is not a condition for a valid marriage but only a condition for luzum. This means marriage without kafaah is legal. However, if the wife or one of her guardians objects to the marriage, they can file a faskh. However, if the wife or guardian is satisfied with the absence of kafaah, the marriage already has permanent legal force (usually).19

d. Legal Consequences of Marriage Without Kafaah

The ownership of women and their guardians over this kafaah resembles the right of khiyar in buying and selling. If the wife marries a man who is not commensurate with her, her guardian can apply for Faskh to the Religious Court. On the other hand, if the wali marries her to a man who is not worthy, the wife has the right to apply for Faskh.20 In a hadith narrated, a woman came to the Prophet saying that her father married her to her brother’s son (who was not worthy), so the Prophet left this matter to the woman.

e. Kafaah Criteria

Because there are no explicit texts, the mazhab scholars differ in determining the criteria for kafaah. Malikiyah scholars only view two things, namely religion and not being flawed as criteria. Hanafiyyah scholars set six criteria: Islam, religious obedience, independence, lineage, property, and work. According to Shafiiyyah scholars, there are five: religion, 'iffah, independence, lineage, and safety from defects. Meanwhile, according to the Hanabila scholars, there are five, but they differ in terms of criteria from the Syafi'iyyah scholars. The five criteria are religion, independence, lineage, economic status (wealth), and work. Suppose you collect all the criteria taken into account in kafaah according to the scholars of the four schools of thought. In that case, there are seven: religion, obedience, lineage, not disabled, independence, property, and work. Each criterion will be explained as follows:

a. Religion

Kafaah in religion is the only criterion that must be met in marriage. The prospective husband and the prospective wife who will be married must have religious similarities; both are Muslims. The existence of religion as a criterion of kafaah is absolute. If these religious criteria are not met, the marriage cannot take place, and the marriage is invalid if forced.

b. Piety

Adevout Muslim family is an essential factor in shaping the character of pious and intelligent children. The family is the first school where children

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19 Sayyid Abu Bakr, Iánah al-Thalibin..., juz 3, p. 330
learn about various knowledge, skills, noble values, and faith.  

A good education for children will only be achieved when the father and mother who educate them are pious people. Therefore, Islam prioritizes the aspect of piety in selecting a life partner. In a hadith narrated by Imam Bukhari and Muslim, the Prophet said:

عَنْ أَبِى ىُسٌَْسَةَ عَنِ اننَّبِىِّ قَالَ حُنْكَ ُ انْ َسْأَةُ لأَزْبَعٍ نِ َانِيَاًَنِحَسَبِيَاًَنِجَ َانِيَاًَنِدٌِنِيَا فَاظْفَسْ بِرَاثِ اندٌِّنِ حَسِبَجْ ٌَدَاكَ .

Women who are religious and good at guarding themselves against immoral acts are not commensurate with men who like to commit immorality (fasiq) and like to do (bid’ah) heresy.

This provision is based on, among other things, verse 18 of the letter al-Sajadah:

أَفَ كَانَ مُؤْمِنًا كَ كَانَ فَاسِقًا ۚ لَسْخًَُنَ.

A pious and religious woman should not marry a man who is wicked or weak in religion. Because family life between husband and wife influences each other, it could be that a pious wife is influenced by her wicked husband or vice versa.

c. Riches

Wealth is an essential factor in marriage. A person who is not economically capable is not encouraged to marry.  

Because getting married gives rise to rights and responsibilities, primarily to provide for his wife and children. In classical fiqh literature, wealth (mal, yasar) is one of the criteria for kafaah. A poor man should not marry a rich woman because they are not worth it.

d. Work

In classical fiqh, women from wealthy families have good jobs and careers.

e. Nasab/breed

Nasab is one of the four factors a person marries a woman. There are different understandings regarding this lineage object. In classical fiqh literature, lineage is associated with tribes or qabilah. Non-Arabs are seen as disproportionate to Arabs, Arabs from the Quraysh tribe are taller than Arabs from other tribes, and even the Quraysh from the descendants of Bani Hashim and Bani Abdul Muthallib are higher than the Quraysh from other descendants.

In Indonesian society, lineage generally distinguishes between ordinary-blood descendants and blue-blood descendants.

f. Social status/Freedom-slave

When the slavery system still swept the world, enslaved people became the lowest social strata. Enslaved people have laws that are different from free people in terms of criminal and civil law. One of the civil rights that distinguishes

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23 Al-Imam Taqiy al-Din Abi Bakr bin Muhammad al-Husaini al-Hilishi al-Dimasyqiy, Kifayah al-

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the two is kafaah. Enslaved people do not favor free people; therefore, they should not marry. If they get married, then their slave status will change. Currently, slavery is prohibited by international law, which all countries have also ratified. Therefore, kafaah based on these criteria cannot be carried out and is no longer relevant to the present benefit.

g. Physical Perfection/No Defect.

In classical fiqh literature, physical disability is used as one of the reasons for the annulment of marriage. Physical disabilities that prevent a person from exercising his rights over his partner can be used as a reason for a marriage annulment. People who suffer from physical disabilities, such as not having a penis, vagina, or paralyzed legs and arms, are not commensurate with physically perfect people. Therefore they should not marry because it will cause harm. At the same time, one of the goals of Islamic law is to eliminate harm.

**Kafaah Reconstruction of Maqashid al-Syar'Iah Perspective**

a. Need for Reconstruction

The conception of kafaah in marriage has been constructed by scholars from classical to medieval times. The conception was based on the culture and situation representing the benefit of space and time. A legal product resulting from ijtihad must reflect the benefit of the community. However, each space and time has its benefits. Laws for a specific place or time are not necessarily suitable for different places and times. Therefore, the law must change if the benefit of society changes.

The need to reconstruct the concept of kafaah is based on the fact that the existing construction of kafaah can no longer be fully maintained. Because there has been a dynamic in society that demands legal changes so that the law can serve the benefit of the times. Since the Companions' time, previous scholars have reconstructed the law to fulfill human benefit. Umar bin Khattab reconstructed the regulations regarding three divorces at once, which in the previous period resulted in the law falling for one divorce, changed to three divorces. He made this change for two reasons. First, there has been a shift in the behavior of Muslims, where loyalty to their partners can no longer be relied on. Second, there is concern that Muslims will fall back into the jahiliyyah tradition, where the husband can divorce his wife and refer her at any time without any limitation. These social changes are considered in carrying out legal reconstruction related to divorce.

b. Reposition of Kafaah Rights

In the construction of classical thought, kafaah is positioned as the right of women and their guardians. This is in line with the purpose of kafaah itself: to prevent women from unequal partners to maintain their and their family's perfect name. This provision is in line with the family system that has been the basis for determining the construction of kafaah so far, namely the Patrilineal Arab community. In a patrilineal family system, the domination of men over women is genuine. Men occupy a superior position, while women occupy an inferior position. Under the shadow of a family system like this, the wife's fate is determined mainly by the
husband. Therefore, the legal instruments that apply to society are constructed based on a patriarchal system. At present, the majority of the nations of the world adhere to a bilateral kinship system in which men and women are treated equally. The rights and obligations of husband and wife have been regulated and protected by law. The wife's position is no longer subordinate to her husband but partners equally. Therefore, the right of kafaah has been given to both parties. This is following the principle of equality before the law brought by Islam.

c. Reorientation of the Purpose of the Enforcement of Kafaah.

Applying kafaah in marriage, as described in the classical fiqh conception, is to avoid disgrace from women and their families. This goal is undoubtedly relevant for its time, but if taken in the present context, it has lost its relevance. The application of kafaah should not only be related to the contract. However, it must be in a new context, namely, realizing the purpose of marriage to form a sakinah, mawaddah wa rahmah family. This goal can only be realized through the commitment of both parties.

d. Kafaah Classification

As mentioned above, the seven criteria for classical fiqh construction kafaah can be classified into two groups: kafaah muthlaqah and ghairu muthlaqah. Kafaah muthlaqah (absolute kafaah) is the equivalence that must be fulfilled in marriage between a husband and wife. Kafaah Muthlaqah is a religion. Kafaah in religion is the only criterion that must be met in marriage. The prospective husband and the prospective wife who will be married must have religious similarities; both are Muslims. If these religious criteria are not met, the marriage cannot take place, and if it is forced, the marriage is invalid.

While kafaah ghairu muthlaqah are elements of equivalence that do not have to be in marriage but are highly recommended to maintain women's dignity (wives).

Islam has never discriminated against people into groups of rich or poor, people or rulers, let alone beautiful and ugly. The mention of rich and poor groups or the people or rulers in the Quran and Hadith is intended to explain their respective societal obligations. While in marriage, the marriage order is associated with the best choice according to individual judgment. This means that any woman can marry any man she wants, regardless of her lineage, social status, or the physical perfection of the potential partner. The prospective wife can ignore these criteria. The opposite is also true for men. He can marry any woman regardless of breed, social status, beauty, wealth, etc. This is the first offer.

e. Holistic Kafaah

Allah created everything with its advantages and disadvantages. The same is true of the creation of man. Everyone is created with advantages and disadvantages. Deficiencies in humans do not mean imperfections in the creation process. On the contrary, creation with these short comings contains great wisdom for collective human life. With weaknesses and
strengths inherent in each person, humans are destined to live side by side and need each other. This mutual need factor encourages people to work together and help each other to fulfill their needs. Allah confirms:

وَإِنَّ فَضْلَيْنِ بَيْنَكُمْ عَلَىٰ بِعْضٍ فَقَمِّلنَّا بَرَاتِيٰنَ رَزْقُهُمْ عَلَىٰ مَا مَلَكَتْ إِيمَانَهُمْ فَهُمْ فِيهِ سَوَاءٌ ۚ أَفَبِنَعْ َتِ اللَّه تِجْحَدًَنَ

"And Allah has favored some of you over others in terms of sustenance, but those who have been extra (of their sustenance) do not want to give their sustenance to the enslaved people they have, so that they both (feel) the sustenance. Why do they deny Allah's favor?"

Based on these advantages and disadvantages, kafaah must be built to realize a holistic kafaah. Equivalence between a prospective husband and a prospective wife is determined by several criteria in each candidate. Because it may be that someone is gifted with advantages in certain aspects but has shortcomings in others. The strengths and weaknesses of the prospective husband and future wife are then weighed and compared holistically to find equivalence between the two. For example, a beautiful, intelligent woman with higher education, pious but not prosperous, can be judged commensurate with a rich man, shalih, even though he is not highly educated and less handsome. This concept of kafaah establishes equivalence criteria holistically, not partially. In the example above, the future wife, although not from a wealthy family, has beauty, intelligence, and higher education advantages that the prospective husband does not have.

On the other hand, the future husband, although not highly educated and less handsome, has advantages in terms of wealth. The necessity of paying attention to the elements of kafaah holistically is based on the spirit of the letter al-Baqarah verse 237:

وَلَا تَنْسَوا أَفْصَلَ بَيْنَكُمْ الْبَيْقَةَ

And the hadith of the Prophet narrated by the Muslim Imam:

عن أبي هريرة رضي الله عنه مرفوعاً: لا يفرق مؤمن مؤمنة إن كره منها خلفاً رضي عنهما أخر أو قال: غيره.

From Abu Hurairah -rafiyallâhu 'anhu- marfû,’ “Let a believer not hate a believer! Because, if he does not like one woman's temperament, of course, he likes the other."

From the verses and hadith above, an understanding can be drawn that the elements of advantages must be considered in each prospective husband and wife and weighed against the shortcomings they have. In a marriage, prospective husbands and prospective wives must have what they want from their partners to realize happiness. This happiness will be realized if each partner has what his partner needs to realize his happiness. What is lacking from the prospective wife to complete her happiness can be fulfilled by her future husband, and vice versa. Thus, happiness will be obtained for each prospective husband and wife. Moreover, happiness is the marriage's highest goal (al-Maqshud al-A'zham).

Conclusion

The primary purpose of marriage is to achieve happiness, which in the language of religion is symbolized in three words: sakînah, mawaddah, and rahmah. All barriers
that can hinder achieving goals in various forms and sources must be removed to achieve this. Some of these barriers are sourced from out-of-date religious understandings, and some are sourced from cultural constructions. Like the construction of kafaah in marriage presented by classical fiqh books, it is time for the existence of kafaah construction to be reviewed because it can no longer accommodate justice in husband-wife relations. The purpose of Islamic law is to achieve equal justice among humankind. With this reconstruction, it is hoped that everyone's dream of marriage can be realized.

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