

The existence of ‘Urf in the Resolution of Marriage Disputes in Islamic Law: A Living Law Perspective

Muhammad Luthfi¹, Yaris Adhial Fajrin², Hasnan Bachtiar³

¹ Muhammadiyah Malang University, Malang, Indonesia, email: muhammadluthfi@umm.ac.id

² Muhammadiyah Malang University, Malang, Indonesia, email: yaris@umm.ac.id

³ Deakin University, Melbourne, Australia, email: hasnan.bachtiar@deakin.ac.id

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Abstract

‘Urf or customary law is a law that lives, develops, and is implemented by society. In the practice of marital disputes, people tend to implement customary law, or ‘urf, first before resolving them through formal mechanisms regulated in statutory regulations. This research aims to analyze ‘urf or customary law in marriage disputes from the living law aspect. This research is normative legal research that prioritizes conceptual and statutory approaches. The research results confirm that the position and existence of ‘urf or customary law in marriage disputes is permissible as long as it does not conflict with Islamic law, guarantees benefits, and contributes to the successful implementation of Islamic law. Legal efforts to resolve marriage disputes through ‘urf are viewed from a living law perspective because, as a law that applies and its value is appreciated by society, in marriage disputes, the role of ‘urf or customary law is important to bring justice to the parties in dispute. Apart from that, legal efforts to resolve marital disputes through ‘urf from a living law perspective can also be the first attempt to resolve marital disputes, and if efforts through ‘urf or customary law are not successful, then efforts can be made to resolve them through procedures in the KHI and statutory regulations.

Keywords: *Living Law; Marriage Disputes; ‘Urf.*

1. INTRODUCTION

Marital disputes are common and inevitable in the legal context of marriage. As a legal relationship entered into by both parties, marriage inherently has the potential to give rise to various disputes that need to be anticipated and resolved in accordance with applicable legal provisions.¹ As clarified in Article 2 of Law No. 1 of 1974 concerning Marriage (Marriage Law), it states that in the legal context of marriage, two laws are applicable simultaneously, namely the national law or state law, especially related to the registration of marriage, and religious law, which regulates various aspects of marriage not covered by the state law.² The role of religious law (especially Islamic law) in the legal context of marriage is also emphasized in the Compilation of Islamic Law (KHI), which specifically regulates and enforces provisions of Islamic Sharia in relation to

¹ Nuryamin Nuryamin et al., “Putusan Hakim Dalam Menuntaskan Sengketa Perkawinan Poligami Di Indonesia,” *Justisi* 9, no. 2 (2023): 133–44, <https://doi.org/10.33506/jurnaljustisi.v9i2.2303>.

² I Y Nugroho, “Pendekatan Ushuliyah Terhadap Penjatuhan Sanksi Pidana Bagi Pelaku Nikah Siri: Telaah Pasal 143 RUU Materiil Peradilan Agama Bidang Perkawinan,” *Al-Adillah* 2, no. 1 (2022): 68–74.

marriage. Problems related to ‘urf in Islamic Law, especially in this research, are related to the resolution of disputes related to marriage using the urf approach, even though in general the resolution of disputes related to marriage has been regulated expressly in the Compilation of Islamic Law (KHI), such as divorce, which the Compilation of Islamic Law (KHI) regulates in detail in terms and procedures. However, in practice in society, the resolution of disputes related to marriage is also commonly carried out based on ‘urf, namely by looking at and referring to customary practices in society. The importance of Islamic law in resolving marriages is also increasingly evident in the role of the Religious Court, which is regulated in the Compilation of Islamic Law (KHI). Nevertheless, in practical terms within society, in relation to marital disputes, the role of customary law or customary practices in society is also significant, alongside religious law (especially Islamic law) and national law. This can be seen in one type of marital dispute, namely divorce, which in 2023 reached approximately 516,000 couples who divorced.³ Another common marital dispute that often occurs is a dispute related to property (community property), which accounts for around 22 % of the total marital disputes in general.⁴ The various marriage disputes are generally processed through procedures as stipulated in their respective religious laws, especially for couples who adhere to Islam, where they resolve them through the Islamic Law Compilation (KHI) implemented by the Religious Court. Nevertheless, there are also communities that trust and resolve marriage disputes through customary law or traditional laws prevalent in the community. Customary law or customary practices in society, from the perspective of Islamic Law, are commonly referred to as ‘urf. The application of customary law in society related to marriage disputes also serves as an alternative for the community because the practice of customary law and traditions is considered easier and does not require specific procedures as through the Religious Court.⁵ Furthermore, resolving marital disputes through customary or traditional laws is also considered to provide greater justice and align with the values believed by the community.

Based on the description above, this research focuses on addressing two legal issues, namely: (i) the position and existence of ‘urf or customary law in marital disputes, and (ii) legal efforts to resolve marital disputes through ‘urf from the perspective of living law which accommodates the values of tradition and the principles of general law. The living law perspective serves as a crucial analytical tool for examining the existence of ‘urf or customary law in relation to marital disputes that occur in society.

Research on marital disputes has been conducted by three previous studies, namely: first, the study conducted by Oktaviani (2021), which discusses the role of traditional institutions in resolving marital disputes in the Lima Puluh Kota District.⁶ The novelty

³ Sekar Langit Nariswari, “Angka Perceraian Tertinggi Dalam 6 Tahun Terakhir, Banyak Pasangan Hilang Rasa,” 2023.

⁴ Asep Ubaidillah, “Review Peran Notaris Dalam Pembagian Harta Gono Gini Pada Proses Perceraian,” *Qonuni* 2, no. 01 (2022): 43.

⁵ Muhamad Imam Muddin, “Inheritance System Mayorat on the Komering Tribe in ‘urf Perspective,” *Nusantara: Journal Of Law Studies* 1, no. 1 (2022): 21–32, <https://juna.nusantarajournal.com/index.php/juna/article/view/14>.

⁶ Witia Oktaviani, “Konflik Dan Sengketa Perkawinan Di Kecamatan Kapur IX Kabupaten Lima Puluh Kota,” *Sakea* 6, no. 1 (2021): 72 = 75.

of the research conducted by Oktaviani (2021) lies in the traditional institution, namely the “nirik mamak,” playing a crucial role as the primary means of resolving marriage disputes before resorting to legal avenues through the Religious Court. Second, the study conducted by Laela and colleagues (2022) analyzes the importance of mediation in anticipating divorces.⁷ The novelty of the research conducted by Laela et al. (2022) lies in the consideration of mediation practices as relevant to minimize the occurrence of divorce. Thirdly, the study conducted by Sasmiar et al. (2023) explores the implementation of mediation in resolving disputes over shared property.⁸ The novelty of this research is that, despite the presence of unsuccessful mediation, there is actually a higher percentage (80 %) of successful mediations in resolving family property disputes amicably. The novelty of the research that the author conducted is the proportionality between traditional values and generally applicable legal values associated with the ‘urf approach to resolving marital disputes. Subsequent research was conducted by Zulkifli and Muhsin (2023), discussing the resolution of marriage disputes in Malaysia through *Majlis Sulh*. The novelty of Zulkifli and Muhsin’s (2023) research lies in the fact that *Majlis Sulh* serves as a means of resolving marriage disputes in Malaysia, bridging the gap between state law and the evolving customary law. The resolution of marriage disputes in Malaysia through *Majlis Sulh*, emphasizing negotiation, is considered more effective and optimal because it prioritizes a values-based approach that is evolving within the community.

Further research was conducted by Nasohah (2024), which generally discusses the development of Islamic law in Southeast Asia. One of the novelties of Nasohah’s (2024) research is that the development of Islamic law in Southeast Asia, particularly in marriage law, essentially emphasizes three different legal relationships collaboratively, namely state law, religious law, and customary law that evolve within the community.

Unlike the three previous studies, this research, which focuses on the analysis of ‘urf or customary law in marital disputes from the perspective of living law, has never been deeply analysed by the three previous researchers. Therefore, this study is considered original.

The research that examines the analysis of ‘urf or customary law in marital disputes from the perspective of living law is a type of normative legal research. Normative legal research is a type of research whose analysis is based on authoritative legal materials, particularly legislation and regulations.⁹ The primary legal materials in this research include: the Marriage Law, especially Article 1 number 1, the Compilation of Islamic Law (KHI), especially Articles 1 to 7, and Supreme Court Regulation No. 1 of 2016 concerning Mediation Procedures in Courts (Supreme Court Mediation Regulation). Secondary legal materials include: journal articles, books, and research results discussing ‘urf (customary law), living law, and marital disputes. Non-legal materials include language dictionaries. The approach used is conceptual and legislative. The analysis of

⁷ A Surasa, E Herningsih, and N Laela, “Penyelesaian Sengketa Perkawinan Melalui Mediasi Sebagai Pencegahan Terjadinya Perceraian,” *Khazanah Multidisiplin* 3, no. 2 (2022): 165–74.

⁸ Suhermi Utami, Tiara Setyaranti and Sasmiar, “Penyelesaian Sengketa Harta Bersama Secara Mediasi,” *Zaken* 4, no. 1 (2023): 144–62.

⁹ J. Ibrahim J. Efendi, *Metode Penelitian Hukum Normatif Dan Empiris* (Jakarta: Kencana, 2016).

legal materials is carried out qualitatively-prescriptive, aiming to provide legal solutions to the legal issues presented.¹⁰

2. ANALYSIS AND DISCUSSION

2.1. The Position and Existence of ‘Urf or Customary Law in Marriage Disputes

Dispute is a common aspect in human life. Basically, a dispute is a condition in which one party disagrees with another about something, after which both parties present their claims and justifications for their respective truths.¹¹ Referring to the Great Dictionary of the Indonesian Language (KBBI), “sengketa” is interpreted in three different meanings, although all three are interrelated.¹² The first meaning is a difference of opinion that leads to a dispute. The second meaning related to disputes is conflicts or disagreements initiated by each party. The third meaning emphasizes that a dispute is a conflict resolved by specific parties, such as the judiciary.

Referring to the three meanings of disputes mentioned above, it can be concluded that the three meanings of disputes, as emphasized by KBBI, essentially have the same essence. Nevertheless, from the three definitions of disputes as stated by KBBI, it can be inferred that a dispute is a difference of views or opinions that leads to a conflict and is based on claims and justifications of their respective truths, ultimately requiring a third party as a mediator and arbiter in a dispute. In human life, disputes are common and are a part of human activities.¹³ The dispute as part of human life is also common in the context of marriage.

Marriage, as defined by Article 1 of the Marriage Law, essentially has several fundamental substances, namely: (i) a spiritual and physical bond, (ii) between a man and a woman, (iii) intended to form a lasting household based on the Almighty God. Referring to the three fundamental substances regarding marriage mentioned above, it can be concluded that marriage is a legal relationship between two parties based on a spiritual and physical bond and conducted between a man and a woman.¹⁴ As a legal relationship between a man and a woman, marriage commonly involves conflicts that may lead to disputes. However, it is important to note that the purpose of marriage is to establish a lasting household, which means that, as much as possible, marital disputes should be approached with a familial mindset to minimize the potential for separation or divorce. Nevertheless, if the marital dispute points towards divorce as the primary

10 I Made Pasek Diantha, *Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum* (Jakarta: Kencana, 2017).

11 Surini A Sjarif Astari Nadinne, Fitriani A Sjarif, “Sengketa Harta Bersama Setelah Terjadinya Perceraian (Analisis Putusan Mahkamah Agung Nomor 1710 K/Pdt/2020),” *Indonesian Notary* 4, no. 2 (2022): 1108–11011.

12 Pusat Bahasa Departemen Pendidikan Nasional, *Kamus Bahasa Indonesia* (Jakarta: Departemen Pendidikan Nasional, 2008).

13 Sri Turatmiyah et al., “The Ineffectiveness of Mediation in Divorce Disputes: A Case Study in the Palembang Religious Court,” *Asy-Syir’ah: Jurnal Ilmu Syari’ah Dan Hukum* 55, no. 2 (2022): 351, <https://doi.org/10.14421/ajish.v56i2.1232.documentation>, and interviews with litigants and judges involved in divorce cases at the Palembang Religious Court. Relying on the legal effectiveness theory, the study found that over a span of three years (2020, 2021, and 2022

14 Amiruddin Asrul Hamid, Titi Martini Harahap, Resi Atna Sari Siregar, Syaipuddin Ritonga, “Sociological Analysis of the Concept of Divorce In Marriage Law in Indonesia,” *Journal of Religious, Social and Cultural* 1, no. 1 (2022): 42–51.

solution that brings benefits to the parties involved, then divorce is possible as the last resort for resolving a marital conflict.¹⁵

The definition of marriage as stated in Article 1 of the Marriage Law also implies that in Indonesia, marriage is subject to two laws simultaneously, explicitly. These two laws are the state law related to the registration of marriage and religious or belief-based law related to the validity and various other aspects of marriage regulated by the provisions of religious law.¹⁶ The importance of religious law in marriage makes the marriage law for Muslims in Indonesia specifically regulated through the Compilation of Islamic Law (KHI). Referring to various provisions in the KHI, it specifically regulates the application of Islamic Law in various aspects, especially concerning marriage. Nevertheless, both the Marriage Law (UU Perkawinan) and the KHI have not provided further explanations regarding the role of customary law or adat law in their efforts to resolve legal disputes related to marriage.

Hukum kebiasaan atau adat dalam konteks Hukum Islam lazim disebut sebagai *'urf*. In Islamic Law studies, *'urf* is mentioned as one of the sources of Islamic Law that is practiced in facing specific conditions (*fiqh*). Examining its concept, *'urf* is something recognized and understood by every individual in a society, still in practice, and possesses values of goodness. Specifically, *'urf* in its manifestation can be realized in an action existing in society (*amali*) or in a statement containing certain values (*qouli*). In the teachings of Islam itself, *'urf* is not inherently prohibited, as stated in Surah Al-A'raf: 199 *العرف* the statement affirms that it is permissible for every Muslim to engage in or perform a customary practice as long as it remains within the boundaries of goodness.¹⁷ This is also reinforced by the history of Imam Ahmad, stating that everything considered good by the Islamic community (and in accordance with Islamic law) is also considered good by Allah SWT.¹⁸ This emphasizes that *'urf* or customary and traditional law is something certain and can be applied as long as it does not contradict Islamic Sharia law.

Regarding the limitation on whether a *'urf* can be applied, it can refer to the viewpoint of Imam Al-Qarafi, who asserts that even though *'urf* is a certainty, its validity can be abandoned if it contradicts the provisions of Islamic law.¹⁹ This view is also strengthened by Imam Ibn Qayyim Al-Jawziyya, who stated that custom (*'urf*) remains important in the development of Islamic law, especially when there is a change in a fatwa that requires examining and referring to the prevailing customs in society.²⁰ From the expert perspectives outlined above, it can be concluded that although *'urf* (customary practices) can be applied in various aspects related to the implementation of Islamic law,

15 Asrul Hamid, Titi Martini Harahap, Resi Atna Sari Siregar, Syaipuddin Ritonga.

16 Rosdalina Bukido et al., "Harmonization of Customary and Islamic Law in the Gama Tradition of the Muslim Mongondow Community of North Sulawesi," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 22, no. 2 (2022): 239–54, <https://doi.org/10.18326/IJTIHAD.V22I2.239-254>.

17 Moh Rosyid and Lina Kushidayati, "Anticipating Disaster: The *'urf* Perspective of Rebo Wekasan Ceremony in Kudus, Central Java," *Al-Ihkam: Jurnal Hukum Dan Pranata Sosial* 17, no. 1 (2022): 91–112, <https://doi.org/10.19105/AL-LHKAM.V17I1.5705>.

18 Rosyid and Kushidayati..

19 Watni Marpaung Faisar Ananda, *Metodologi Penelitian Hukum Islam*, 2nd ed. (Surabaya: PRENADA MEDIA GROUP, 2018).

20 Zainal Muttaqin, "Formalization of Islamic Law in Indonesia in the Framework of Social Engineering Theory by Roscoe Pound," *El-Mashlahah* 11, no. 2 (2021): 97–115, <https://doi.org/10.23971/elma.v11i2.2825>.

its application must not contradict Islamic Sharia. The ‘urf contains values of goodness, and its existence is still preserved and acknowledged by the community.

In relation to the forms, ‘urf can essentially be classified into three forms, which include: the aspect of acceptance, scope, and nature. In terms of acceptance, only ‘urf that aligns and does not contradict Islamic law can be applied. ‘Urf in this category is commonly referred to as valid ‘urf that can be applied.²¹ In terms of its scope, there are two types of ‘urf, namely those that apply universally and ‘urf that is specific in nature, only applicable to certain times and regions.²² In terms of its nature, ‘urf consists of actions or habits carried out continuously by the community, as well as the values of goodness manifested in the speech, literature of a society, to expressions of the community that hold values of goodness. Referring to the three forms mentioned above regarding ‘urf, it can be concluded that ‘urf grows and develops according to the specific community.

In the context of Islam, ‘urf essentially has three objectives, namely: ‘urf should prioritize benefits, ‘urf should be related to the context and practices of a specific community, and ‘urf can support the discovery and formulation of Islamic Law in a practical (in concreto) manner.²³ ‘Urf must prioritize the principle of benefit, meaning that in a ‘urf, there must be a benefit so that ‘urf is not just a mere habit but a habit that contains benefits. ‘Urf must also be associated with a specific context and a specific community of society. This is related to its implementation that ‘urf must refer to and observe the practices existing in a particular community. In its further function, ‘urf can also support the discovery and practices of Islamic Law.²⁴

Based on the analysis of the ‘urf above, it is then related to the application of ‘urf in the form of customary law and traditional law in marital disputes, which is something that can be implemented even though the application of ‘urf must be in harmony and not in contradiction with Islamic Sharia. This ensures the welfare and, at the same time, supports the implementation of Islamic Sharia. If analysed carefully, marital disputes essentially encompass various aspects such as disputes over shared property (marital assets), disputes over child custody, disputes leading to divorce, and various other disputes.²⁵ Although marriage disputes are regulated in the Marriage Law (KHI), in practice, Indonesian society also applies various customary or traditional laws that are applicable to each community. The main reason for the application of customary or traditional laws in each community to resolve marriage disputes is because they are more family-oriented, oriented towards reconciliation, and their procedures are more substantive and less formal-procedural compared to the processes in Religious Courts.²⁶

21 Muttaqin.

22 Gelar Ali Ahmad Nurul Hikmah, *Hukum Waris Islam*, 1st ed. (Surabaya: Unesa University Press, 2017).

23 Titin Samsudin et al., “The Change of Adultery Accusation to Continuous Dispute in The Gorontalo Religious Court, Indonesia,” *Resmilitaris* 12, no. 3 (2022): 3732–42.

24 Muzakkir, “Integrasi Hukum Adat Dalam Hukum Perkawinan Di Indonesia,” *Jurnal Hukum Samudra Keadilan* 17, no. 1 (2022): 61–69, <https://doi.org/10.33059/jhsk.v17i1.5609>.

25 Abdul Kodir Alhamdani, *Hukum Harta Bersama Di Indonesia: Analisis Hukum Progresif Dan Kemaslahatan* (Purwakarta: Guemedia Group, 2023).

26 Efrilius Kantriburi, Ketut Sudiarmaka, and Komang Febrinayanti Dantes, “Akibat Hukum Terhadap Pembatalan Pernikahan (Studi Putusan Mahkamah Agung Ri Nomor 1644 K/Pdt/2020),” *Jurnal Komunitas Yustisia* 5, no. 3 (2022): 284–96, <https://doi.org/10.23887/jatayu.v5i3.51906>.

The example of the application of ‘urf in the form of customary or traditional laws that apply in marriage disputes is in resolving the potential for divorce within a marriage. In practice, when facing the potential for divorce, customary or traditional laws that apply in each community in Indonesian society emphasize preventive efforts. These efforts aim to prevent the couple from resorting to divorce as much as possible.²⁷ The family-based approach referring to this ‘urf is commonly employed in addressing potential marital disputes that may lead to divorce. Substantively, this practice can be considered to accommodate one of the principles in marriage law, namely the principle of making divorce more difficult to occur.²⁸ The principles aimed at complicating the occurrence of divorce are intended to open the opportunity for reconciliation for both spouses and, as much as possible, avoid divorce. From the example case of the application of ‘urf, which is a customary or traditional law applicable in marriage disputes, it can be concluded that ‘urf has accommodated three objectives of its application: to ensure the well-being of society, not contradicting Islamic law, and contributing to the success of the application of Islamic law. In the example above, this involves the application of principles to complicate the occurrence of divorce with the goal of providing an opportunity for reconciliation for the disputing spouses.

The example of the application of ‘urf in the form of customary or traditional law in marital disputes above is a preventive effort to ensure that efforts for peace and family harmony can be realized for the parties involved. However, if the application of ‘urf in the form of customary or traditional law in the aforementioned marital dispute does not result in reconciliation or reunion for both parties, then the process of marital dispute can be carried out in accordance with the provisions of the Islamic Law Compilation (KHI) and existing regulations.

Based on the above analysis, it can be concluded that the position and existence of ‘urf or customary law in marital disputes are allowed as long as they do not contradict Islamic Sharia, ensure well-being, and contribute to the successful implementation of Islamic Law. In practice, ‘urf or customary law in marital disputes is optimized in preventive efforts with a family-oriented approach to ensure that the parties can accept the results of the family-oriented approach. However, if the application of ‘urf or customary law in marital disputes that prioritizes an approach is not agreed upon by the parties, then the process of marital dispute can proceed in accordance with the provisions of the KHI and relevant regulations that direct the resolution of marital disputes through the Religious Court.

2.2. The Legal Efforts to Resolve Marriage Disputes Through ‘Urf: A Perspective from Living Which Accommodates Traditional Values and General Legal Principles

²⁷ Niko Ary Hidayat, “Sengketa Harta Bersama Pada Kasus Mantan Suami Yang Tidak Memberikan Nafkah Selama Perkawinan (Studi Putusan Mahkamah Agung Nomor 1636 K/Pdt/2018),” *Indonesian Notary* 4, no. 1 (2022): 449.

²⁸ Mohamad Abdun Nasir, “Negotiating Muslim Interfaith Marriage in Indonesia: Integration and Conflict in Islamic Law,” *Mazahib Jurnal Pemikiran Hukum Islam* 21, no. 2 (2022): 155–86, <https://doi.org/10.21093/mj.v21i2.5436>.

The marriage law in Indonesia fundamentally adheres to a legal pluralism system. Legal pluralism itself accommodates the existence of more than one applicable legal system.²⁹ The pluralistic legal system in marriage law in Indonesia accommodates two legal systems, namely the state legal system in the registration of marriages and the religious legal system, which in this case is the Islamic legal system. The application of both state law and Islamic law in Indonesian marriage law is essentially based on aspects of marriage that fall entirely within the domain of religious law and belief. Nevertheless, in relation to the registration of marriages, state law is still enforced to ensure legal certainty for citizens when recording marriages. Legal pluralism in marriage law that accommodates both state law and Islamic law, in practice, can also be said to still not accommodate customary law or traditional law prevailing in society. Customary or traditional laws in fact apply and are implemented by the community in every marital activity.³⁰ This raises issues because, explicitly, the Marriage Law and the Compilation of Islamic Law (KHI) only facilitate the enforcement of two legal systems, namely Islamic law and state law, in the practice of marriage. Customary law or traditions, commonly referred to in Islamic law as ‘urf, essentially have relevance to the application of Islamic law. Islamic law itself also facilitates the application of ‘urf, as long as it does not contradict Islamic Sharia. It can be said that the relationship between ‘urf and Islamic law is complementary. In practice, Islamic law also acknowledges the existence and significance of ‘urf as a customary law practiced by society. On the other hand, ‘urf must also be evaluated based on Islamic law, particularly by referring to the standards of Islamic Sharia. In this regard, the relationship between ‘urf and Islamic law is essentially complementary.³¹ This implies that even though the Marriage Law only accommodates the application of Islamic law and state law, with the close relationship between ‘urf (customary practices) and Islamic law, the validity of Islamic law in marriage inherently accommodates the validity of ‘urf or customary law in marital events.

The existence of ‘urf or customary law in marriage events in practice also accommodates various efforts to resolve marital disputes based on customs and customary law. ‘Urf or customary law is often used in the resolution of marital disputes because it is perceived as more effective and satisfying for the parties involved in the marital dispute.³² Although the Islamic community also adheres to Islamic Sharia, in the context of resolving marital

29 Fradhana Putra Disantara, “Konsep Pluralisme Hukum Khas Indonesia Sebagai Strategi Menghadapi Era Modernisasi Hukum,” *Al-Adalah: Jurnal Hukum Dan Politik Islam* 6, no. 1 (2021): 1–36, <https://doi.org/10.35673/ajmpi.v6i1.1129>. the primary and secondary legal materials used are inventoried in order to obtain proper legal review; and provides a conceptual analysis of the legal issues discussed. The results of the study stated that as a novelty concept; The concept of typical Indonesian legal pluralism provides equality for the enactment of state law, transnational law and customary law so that they can run together based on the 1945 Constitution of the Republic of Indonesia in the era of legal modernization. Then, the concept of typical Indonesian legal pluralism can be used as a strategy to integrate customary justice into the national legal system through aspects of legal development. Thus, this research is expected to be useful theoretically; namely as a scientific development of customary law, and practical benefits; namely as a reference for drafting regulations on customary villages by local governments. Therefore, researchers recommend that the Indigenous Peoples Bill be a priority in the 2021 National Legislation Program (Prolegnas

30 Muzakkir, “Integrasi Hukum Adat Dalam Hukum Perkawinan Di Indonesia.”

31 Khairuddin Hasballah et al., “Patah Titi and Substitute Heirs: A Study of Legal Pluralism on the Inheritance System in Aceh Community,” *Ahkam: Jurnal Ilmu Syariah* 21, no. 2 (2021): 299–324. Islamic jurisprudence (fiqh

32 Fathul Hamdani and Ana Fauzia, “Tradisi Merariq Dalam Kacamata Hukum Adat Dan Hukum Islam,” *Jurnal Hukum Lex Generalis* 3, no. 6 (2022): 433–47, <https://doi.org/10.56370/jhlg.v3i6.245>.

disputes, society sometimes tends to have more trust in and prefer the ‘urf’ or customary law approach to settle marital conflicts.

There are two arguments as to why society prefers the ‘urf or customary law approach in resolving marital disputes: first, ‘urf or customary law is considered a common practice, and its values have been manifested in the community’s way of life, making it easily understood by the people. In the context of marital disputes, society finds it easier to reconcile through the ‘urf or customary law approach compared to the formal-procedural approach through the Religious Court. Second, according to the perception of society, ‘urf or customary law is easier and more practical to apply. The implementation of ‘urf or customary law depends only on the commitment of both parties to resolve marital disputes.³³ This is certainly different from resolving marital disputes through the Islamic Marriage Law (KHI), which is continued through the Religious Court that has specific procedures, and the resolution of marital disputes also awaits decisions and initiations from the Religious Court institution. From the two arguments above, it can be concluded that the ‘urf or customary law approach is preferred by the community first in relation to marital disputes because it is more practical, effective, and can be more easily understood by the parties involved in marital disputes.

Regarding the community’s tendency to prefer the ‘urf or customary law approach, this is because the ‘urf or customary law approach is inherently more in line with the characteristics or legal spirit of the local community. The characteristics or legal spirit of the local community in legal theory are commonly known by the term “*volkgeist*.” The term “*volkgeist*” was introduced by Friedrich Karl von Savigny, a German jurist who adhered to the historical school of thought (Historical School).³⁴ In the perspective of Friedrich Karl von Savigny, *volkgeist* is the law that originates from the spirit of the nation and the “spirit of society.”³⁵ The law, in the perspective of Friedrich Karl von Savigny, is not formed by design but through an unintentional and gradually accepted, internalized, and implemented process by society.³⁶ This affirms that the law is accepted not because it is a law enacted by the ruler, but rather it is accepted because its values and spirit are in line with the values embraced by society. Therefore, in the view of Friedrich Karl von Savigny, the law is considered cessation, meaning it constantly moves, changes, and applies in accordance with the national spirit embraced by society.³⁷

The Volkgeist perspective regarding law essentially suggests something simple, that society tends to apply laws whose values align with the prevailing values in the community. Conversely, when there are legal values that do not resonate with the spirit of the society, those laws may not be enforced in practice by the community. This further emphasizes that, from the Volkgeist theory standpoint, the law can be considered as a

33 Imelda J. Loppies, “Persepsi Masyarakat Terhadap Adat Perkawinan Suku Biak Di Kampung Yendidori Distrik Yendidori Kabupaten Biak Numfor,” *Gema Kampus* 14, no. 1 (2019): 2.

34 M. Zulfa Aulia, “Friedrich Carl von Savigny Tentang Hukum: Hukum Sebagai Manifestasi Jiwa Bangsa,” *Undang: Jurnal Hukum* 3, no. 1 (July 2020): 201–36, <https://doi.org/10.22437/ujh.3.1.201-236>.

35 Aulia.

36 Aulia.

37 Aisyatul Azizah and Rosita Risma Yanti, “Pseudo Demokrasi Dalam Perspektif Keadilan Bermartabat,” *Sinda* x, no. x (2022): 1–11.

mirror reflecting the values of the society.³⁸ The theory regarding *volkgeist* in legal practice is further known as living law. Living law is a legal system that is alive and enforced by society. The concept of living law is inherently inseparable from the understanding of *volkgeist* because living law also considers the validity of laws based on the society's desire for certain values that align with the personality of the community.³⁹ Reviewed in relation to the concept of 'urf, living law essentially clarifies the existence of 'urf, where customary law or 'urf can only be applied as long as it is recognized and simultaneously applied by society. In this regard, the validity of a 'urf in relation to living law essentially has relevance to the *fiqh* principle that states, "al-'adah muhakkamah," which means that anything containing a value of goodness and repeatedly practiced by society can be qualified as customary law.⁴⁰ In the context of its applicability, 'urf is also based on the principle that, الأصل في الأشياء الإباحة إلا ما دل الدليل على تحريمه. The translation to English is: "which means everything is allowed and permissible as long as there are clear and strict Sharia provisions prohibiting it."⁴¹

Reviewed from the aspects of living law and *volkgeist* above, it can be concluded that 'urf or customary law prevailing in society is often the primary choice for the community in marital disputes because 'urf or customary law is a living law that aligns with the values believed and experienced by the community, one of which is the value of family. In relation to marital disputes, the aspect of 'urf or customary law as a prevailing and living law in society has been facilitated in the Mediation Regulation in Court. Article 26 paragraph (1) of the Mediation Regulation in Court essentially emphasizes that the role of religious or traditional figures is also considered in the mediation process in court. This means that, in essence, the Mediation Regulation in Court seeks to facilitate 'urf or customary law, as a living law in society. Based on the analysis above, it can be concluded that legal efforts to resolve marital disputes through 'urf, from the perspective of living law, are important. As a law that is applied and internalized in its values by society, the role of 'urf or customary law, becomes crucial in bringing justice to the disputing parties in marital conflicts. Furthermore, the legal efforts to settle marital disputes through 'urf, viewed from the perspective of living law, can also serve as the initial step in resolving such conflicts. If the attempt through 'urf or customary law proves unsuccessful, then resolution through procedures in the Islamic Law Compilation (KHI) and legal regulations can be pursued.

3. CONCLUSION

The position and existence of 'urf or customary law in marital disputes are allowed as long as they do not contradict Islamic Sharia, ensure welfare, and contribute to the success of the implementation of Islamic law. In practice, 'urf or customary law in marital

38 Aulia, "Friedrich Carl von Savigny Tentang Hukum: Hukum Sebagai Manifestasi Jiwa Bangsa."

39 Harison Citrawan, "The 'Life' in the Living Law: Law, Emotion and Landscape," *Journal of Contemporary Sociological Issues* 1, no. 2 (2021): 124, <https://doi.org/10.19184/csi.v1i2.25443>.

40 Dicky Eko Prasetyo, "Inventarisasi Putusan Peradilan Adat Sendi Sebagai Upaya Memperkuat Constitutional Culture Dalam Negara Hukum Pancasila," *Jurnal Hukum Lex Generalis* 2, no. 3 (2021): 249–73.

41 Syaikh Sulaiman Ahmad Yahya Al-Faifi, "Ringkasan Fikih Sunnah Sayyid Sabiq" (Jakarta: Pustaka Al-Kautsar, 2009).

disputes is optimized in preventive efforts with a family-oriented approach to ensure that the parties can accept the results of the family-oriented approach. Nevertheless, if the application of 'urf or customary law in marital disputes that prioritizes an approach is not agreed upon by the parties, then the process of marital dispute can proceed according to the provisions in the Islamic Family Law (KHI) and related regulations that direct the resolution of marital disputes through the Religious Court.

The legal efforts to resolve marital disputes through 'urf, viewed from the perspective of living law, are important because, as a law that is applicable and embraced in its values by society, the role of 'urf or customary law becomes crucial in bringing justice to the disputing parties in marital conflicts. However, in an effort to implement 'urf as an effort to resolve marital disputes, it is also necessary to look at whether or not a 'urf existing in society is in conflict with general legal principles. This is because if a 'urf existing in society conflicts with general legal principles, then it is better for marriage disputes to be resolved through the provisions contained in the Marriage Law and in the Compilation of Islamic Law (KHI).

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