



The Concept of Istihsan Abu Hanifah in Indonesian Islamic Family Law (Review of Marriage Registration as an Accumulative Condition)

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Abstract

Development will never stop. It will always flow along with the continuity of time. Meanwhile, Islam as a religion must also follow developments so that later it is not said to be a dead religion. There are many ways and methods that can be used so that Islam can always be side by side in development. One of them is that the concept of Istihsan popularized by Imam Abu Hanifah is very worthy to be guided in making legal decisions. Marriage registration which was originally not obtained as a condition of marriage, then after developments turned out to be prominent and became a law. It's just that in Indonesia this is only used as an administrative requirement. The effect is also understood to be less important and gives a positive meaning to marriage. So the concept of Istihsan needs to be used as a measure in responding to the requirements in the marriage law in Indonesia. This study uses a literature study that refers to library data. As a result, the Istihsan concept suggests that marriage registration is not only an administrative requirement in a marriage. However, it needs to be added to the standard conditions for the validity of a marriage. This, refers to the benefit and main purpose of a marriage.

Keywords: Istihsan; Family Law; Marriage Registration.

A. Introduction

The concept of Istihsan actually, when examined from its historical roots, is not only found to be purely a product of Imam Abu Hanifah's thoughts. It is a legal proposition that was used by scholars before Imam Abu Hanifah popularized it as a concept. Ahmad Hasan said that the use of Qiyas was initially very simple. Not too many boundaries that we know today. It is still an analog case. So that sometimes its use is very widespread, until in the end it results in decisions that are unfair and far from benefiting. From that, it needs to be resolved in another way that is more meaningful and closer to the goal of syarak, namely by means of Istihsan.¹

Before Imam Abu Hanifa, there were already scholars who used to use it. For example, Iyas bin Muawiyah, a judge in the Umayyad government. He often said that qiyas should always be used as a basis for legal considerations. But according to him, it must always refer to the element of benefit to human life. If not, he said, then it

¹ Mohammad Hafid, "Telaah Interkoneksi Konsep Istihsan dan Konsep Maqasid al-Syariah," *An-Nawazil: Jurnal Hukum dan Syariah Kontemporer* 3, no. 2 (2021): 86-106.

must be resolved by means of Istihsan. Because according to him, he never found the law but what is considered good by humans.²

Only then did Abu Hanifah appear. It was he who popularized it as a method of istimbat Islamic law. This can be seen in the case of the ijthad of Iraqi clerics who emphasized the law on killing women who betrayed them by killing women in enemy territory. They said that women who betrayed should not be killed because the Prophet forbade the killing of women in enemy territory. According to Imam Abu Hanifah, this kind of qiyas is considered illogical and provides justice and benefit. Because why shouldn't treasonous women be killed, while women who commit adultery should be killed by stoning?³

Imam Izzuddin Bin Abd al-Salam said that Allah swt. establish a rule patterned command for humans in order to realize a benefit, both in this world and in the hereafter. This is collected in several rules that are united in one goal. Then there are exceptions where when its application can touch difficulties and anxiety that can shift the intended benefit. This attitude is a form of mercy, compassion and respect for humans. Another expression of exclusion is said to be a comparison and a substitute for qiyas.⁴

Wisely, from the concept of al-Istihsan which was popularized by Imam Abu Hanifah as a foothold in the process of extracting and establishing Islamic law, as well as being wise to the urgency of the position of family law studies and research, especially in the focus of Indonesian marriage law, especially marriage registration which is considered new and the same. cannot be found in classical fiqh, the researcher believes that it is very important to raise the title: "A Study of the Concept of Istihsan Abu Hanifah in Indonesian Family Law." ⁵

B. Method

In this case, the researcher took the library research method. Meanwhile, the primary data sources for the study were ushul fiqh and fiqh books from the Hanafi madhab and ushul fiqh and fiqh books from various schools and schools of codification of ushul fiqh. Secondary data sources are data that are supporting and complementary materials for the study in writing this thesis. Furthermore, this data is called indirect data or not original. This means that contemporary study books are complementary in the study of the problems to be studied. Data collection techniques in this study were carried out by library research, namely research conducted by reading written sources such as books and books related to the problems raised. In

² M Iqbal Juliansyahzen, "Pemikiran Hukum Islam Abu Hanifah: Sebuah Kajian Sosio-Hostoris Seputar Hukum Keluarga," *Al-Mazaahib: Jurnal Perbandingan Hukum* 3, no. 1 (2015).

³ Mursyid Musthofa An-Najmi, "Istihsan dalam pandangan Madzhab Imam Hanafi dan Imam Syafii dan penerapannya," 2019.

⁴ azhar Azhar, "Konsep Istihsan Abu Hanifah Dalam Pandangan al-Syafi'," *Jurnal Raudhah* 6, No. 1 (2018).

⁵ Farid Naya dan Ekonomi Islam IAIN Ambon, "Mengurai Titik Temu Antara Istihsan dan Pembaharuan Hukum Islam," 2016.

analyzing the data, the writer uses the method of descriptive analysis and the method of content analysis.⁶

C. Results and Discussion

1. Definition of al-Istihsan

a. Definition of al-Istihsan Etymologically (Language)

Istihsan language comes from the word Hasan which means good as opposed to qobah which means bad. Then three letters are added, namely alif-sin and ta', bewazan istif'al, so that it becomes *istahsana-yastahsinu-istihsaanan*. Noun (mashdar) which means to think and believe something is good (either physically or in value) the opposite of *istiqbah*, considers something to be bad.⁷

b. Definition of al-Istihsan in Terminology (Terms)

In terms of terminology, there are differences of opinion between ulama' madhhab (Islamic jurists) in the definition and understanding of Istihsan. Each scholar has its own definition. Because Imam Abu Hanifah himself did not leave a trace of a conceptual definition. Many of them guessed the definition of Istihsan used by Abu Hanifah. Only researchers are satisfied with the definition expressed by the successor scholars of Imam Abu Hanifah as follows The first definition offered is the definition of al-Karhi (340 H.), namely:

"The transfer of a person from a legal statement of a problem with a similar one in a different law because there are stronger considerations that require switching from the first one".

According to al-Jasshos, there are two meanings in the use of the concept of al-Istihsan by the madhhab imam. First, ijihad within the size limitation that is not determined by sara'. For example, limits on the size of mut'ah, wife's income, hunting ransom at the time of ihram and others. The size and limits set by the mujtahid (legal expert) are a form of the Istihsan application. In the sense that taking and applying based on the limits set by him is part of the Istihsan process. From that, we can conclude that Istihsan is definitively not related at all to the imtimbat basis, so it is said to be one of the foundations for establishing Islamic law, and as a comparison to qiyas. Departing from this understanding, it is not only the hanafiyah who use and apply it.⁸

Second, something related to qiyas. This can be translated into two forms, first, prioritizing one of the origins (dalil) which is stronger than the others in a fara '(case) where there are two origins (dalil) as a form of al-Istihsan. This is part of the mentarjih of one of the two qiyas which has two or more possibilities. So that qiyas which is more influential and closer to the goals of syara' must be put forward. Second, mentakhsis (exclude) the law even though it also contains the same god.

⁶ Hadari Nawawi, *Metode Penelitian Bidang Sosial*, Yogyakarta: Gajahmada University Press, 1991, Cet. V,

⁷ Al Fairuz Abadi, *Al Qomus Al Muhith*, hal. 1189

⁸ Abu Bakar al-Jasshos, *Ushul al-Jasshos*, juz 2, hal. 340-341 (Bairut dar al-Kutub al-Ilmiyah, cetakan pertama, 1420 H/2000 M)

Qiyas which is meant by al-Jasshos here is the general guidance of the text or general rules and what is meant by illat here is the motive for the existence of a rule. Qiyas is not meant in the narrow sense found in ushul fiqh as well as illat.

Al-Dabbusi defines al-Istihsan as part of the comparative proposition of qiyas jali, so that qiyas is not said to be Istihsan and vice versa. The definition presented by al-Dabbusi further narrows and limits Istihsan as a comparison of qiyas and ignores other uses used by al-Jasshos and al-Sarakhsi. Imam al-Bazdawi further sharpens the comparison of qiyas with Istihsan by limiting Istihsan to one of the two qiyas. He emphasized that Istihsan is one of the two Qiyas which was later named Istihsan because it is more important and stronger in use.⁹

Al-Sarakhsi (490 H) offers two understandings of the concept of al-Istihsan, first agrees with al-jasshos, namely ijihad and taking the strongest opinion in limiting things that are left to us in determining the levels and sizes such as mut'ah and others. . But the second understanding he agrees with al-Badzawi by making al-Istihsan as a proposition against qiyas zahir and its use must take precedence because it is stronger and more meaningful.¹⁰

As for the generations after al-Sarakhsi, the majority of them deny the definition of the first form offered by al-Sarakhsi which is most likely the essence of the notion of al-Istihsan desired and used by Imam Abu Hanifah. They prefer the understanding offered by al-Dabbusi which makes al-Istihsan a comparison of qiyas. We can see the definitions offered by Sadr al-Syariah (747 H), Al-Kaky (749 H), Ibn al-Humam (861 H.), Ibn Amir al-Haj (897 H.), Ibn Abidin (1251 H.). They offer a definition similar to that offered by al-Dabbusi. It is this definition that is developing and popular at that time, so that al-Istihsaan is understood and used as one of the arguments in establishing Islamic law.

The definition offered by al-Karkhi is the best definition ever found in the Hanafi school, because this definition permeates and overshadows all existing al-Istihsan classifications. Abu Zahrah stated firmly that this definition is the clearest and most accurate definition in describing the essence of the concept of al-Istihsan, considering that this definition can overshadow all forms and styles of al-Istihsan, besides being able to display its essence, because the essence of al-Istihsan is to transfer a law. of the general rules that should apply due to other factors that are closer to the principles of Maqasid al-Shariah, so that prioritizing it is the strongest way in exploring the law. Then he also emphasized that this definition can give us an idea that the concept of al-Istihsan regardless of its shape and style is a partial form of

⁹ Abu zaid al-dabbusi, taqwim al-adillah, tahqiq kholil, hal. 404 (bairut, dar al-kutub al-ilmiyah, cetakan pertama 1421 H.)

¹⁰ Mohammad bin Ahmad al-Sarkhosi, Ushu al-Sarkhosi, Tahqiq Rafiq al-Ajam, juz 2, hal. 190 (Bairut daru al-ma'rifah, cetakan pertama, 1418 H/1997)

general rules that are used as a guide and footing by mujtahids or legal experts in order to establish a law with the aim of finding the spirit and principles sharia.¹¹

In addition, the above statement is reinforced by the opinion of Abu Ishaq al-Syairozy regarding the definition offered by al-Karkhi, and the definition which leads to the taking of the strongest argument from several existing arguments. accept that. Abu Hamid al-Ghazali, also gave the same comment as Abu Ishaq al-Syairozy's comments on this matter. He added that the only difference is in the use of istihsan lafadz and its specialization as a method of extracting law independently.

An example of this can be seen in the following statement, if a person vows to donate his wealth, then in qiyas he is allowed to give all things of value to wealth, only according to Abu Hanifah specifically on zakat assets by sticking to Istihsan with the Qur'an (nash) (take their wealth as a form of sadaqah) . He turned away from the demands of qiyas with another argument in the form of the Qur'an in which this transfer process is known as Istihsan.

Some Hanafiyah scholars mean that istihsan is القياس الخفي (hidden Qiyas). Al-hulwani al-hanafi said, that al-istihsan is turning away from qiyas to a stronger proposition, either in the form of the Koran, sunnah, or ijma '. Imam al-Sarakhsy, in his connection with al-Istihsan's explanation stated that there are two kinds of istihsan in terms of Islamic jurists (fiqh). First, doing ijtihad and rationalization in terms of determining something that is not explicitly determined by sharia, or everything whose determination is left to reason and ratio.¹²

The level of obligation to pay mut'ah is not explicitly stated by Allah, but is related to the conditions of rich and poor and is also required to apply ma'ruf which indicates that what is meant by ma'ruf here is something that is considered ma'ruf by reason. and ratio. And also in other words of Allah there is also a mention of the word ma'ruf which is submitted to reason and ratio contained in the word of Allah Qs. Al-baqarah, 23.

According to al-Sarakhsi, regarding the above there are no scholars who disagree and deny their existence. Second, it is a proposition that rivals qiyas dhahir after conducting in-depth research, so that the proposition must be used as a guide because its strength is superior to qiyas dhahir. In his book al-mabsuth, Imam al-Sarakhsi, states that essentially istihsan is two qiyas, the first is something with a weak influence which is then called qiyas, and the second is a strong influence even though it is in disguise, which is then called istihsan.

2. Sharing the Concept of al-Istihsan

a. Istihsan Seen from the Aspect of Diversion

¹¹ Ushul fiqh, Muhammad abu zahrah, hal. 251

¹² Shadr al-Syariah, al-Taudhih dengan Syarahnya al-Talwih karya al-Taftazani, juz 2, hal. 171 (bairut, dar al-kutub al-ilmiyah, cet. Pertama, 1416 H/1996 M),

There are three examples in this case.¹³

- 1) Divert Qiyas Zhohir takes Qiyas Khofi. For example, in the case of agricultural waqf land (rice fields). Judging from the perspective of qiyas, the obligation to irrigate the land (rice fields) does not automatically include the waqf of the agricultural land, moreover, it is not mentioned when the waqf is made. The reason is because qiyas zhohir, which is qiyas waqf to buying and selling where if there is a transaction on an item, then there is a transfer of ownership according to the contract that was agreed upon. However, when viewed from the perspective of Istihsan, the obligation to irrigate the waqf land (rice fields) is included in the waqf contract. The reason is to divert/ignore the results of qiyas zhohir taking the results of qiyas khofi. Because the purpose of the waqf is to utilize the results of the agriculture. And the rice field will not produce / bring benefits if it is not irrigated.
- 2) Diverting texts that are general in nature, take special laws. For example, in the case of Umar ra who canceled the law of cutting off the hand of a thief because it happened during a famine/famine season. Even though the verse of cutting hands is quite clear (5/38). Also on the sale and purchase of greetings. Based on general argument it is not possible. Because the Prophet said: "Do not sell what you do not have" [HR. Ahmad] . However, because there is a special argument, the sale and purchase of greetings is allowed. The Prophet's words "Whoever trades greetings, then the size, scale and time must be clear" [HR. Bukhari]
- 3) Diverting / ignoring the law of kulli takes the law of istitsna'i (exception). For example in people who eat while fasting because they forget. The general rule is that the fast is invalid because one of the pillars, namely the alimsak, has been damaged. However, because there is a special argument that excludes him, his fast is not invalidated. That is the words of the Prophet: "Whoever forgets when he is fasting and then he eats or drinks, he should complete his fast. Verily it is food and drink that Allah has given."

b. Istihsan is seen from the sanad/backrest used in the transfer/abandonment.

There are several forms in this case, including:¹⁴

- 1) Istihsan whose sanad / backing is in the form of a strong quwwatul atsar / history. For example, in the case of the remaining drinking water of carnivorous birds such as eagles, eagles or vultures. Judging from the glasses of qiyas then the water becomes unclean. That is when it is given to wild animals. Because there are similarities in illatnya, namely the same as animals whose meat is forbidden to eat. However, when viewed from the perspective

¹³ Hafid, "Telaah Interkoneksi Konsep Istihsan dan Konsep Maqasid al-Syariah."

¹⁴ Syawaluddin Hanafi, "Urgensi Pemikiran Syams Al-Aimmah Al-Syarakhsi Tentang Al-Istihsan Dalam Menjawab Problematika Hukum Dalam Masyarakat," *Tasamuh: Jurnal Studi Islam* 12, no. 2 (2020): 340.

of istihsan, the law of water is sacred but makruh. Because birds drink with their beaks. And its beak is sacred because it is a kind of dry bone. This is different from wild animals that drink with their tongues containing saliva from their unclean/unclean flesh.

- 2) Istihsan whose backing is in the form of benefits. For example in the case of 'al ajir al musytarok' (workers who are tied to many people) such as a tailor, who loses/lost materials. From the point of view of qiyas, he is not obliged to replace it if it is not for his negligence. However, when viewed from the perspective of istihsan, he is obliged to replace it to keep people's property rights from being wasted.
- 3) Istihsan whose backing is Ijma. For example, in the case of the Istishna contract (order). According to Qiyas, the contract should have been cancelled. Because the object of the contract does not exist when the contract takes place. However, this transaction model has been known and valid throughout the ages, so it is seen as ijma' or 'urf 'aam that can defeat the qiyas argument. This means a transfer from one argument to another, which is stronger.
- 4) Istihsan whose backing is Qiyas. For example in the case of women who need special treatment. In essence, the entire woman's body is aurat. However, it is permissible to see part of his body out of necessity. Like for the sake of treatment by a doctor. Here there is a kind of conflicting rule, that a woman is nakedness, looking at her will bring slander. While on the other hand, masyaqqah will occur if it is not treated. In this case used illat, at taysir (make it easy).
- 5) Istihsan whose backing is Emergency. For example, in a well that fell unclean. If the well is drained it is very unlikely. Because the tools used must be contaminated again with the najis. But with emergency considerations it can be done.
- 6) Istihsan whose backing is in the form of 'Urf (culture/customs). For example, people who swear not to eat meat (lahman). But then he ate fish. Based on qiyas he has broken his oath because the Qur'an mentions fish with the word "lahman toriyyan" 28. However, according to 'urf, fish is different from meat.

3. Proof of Istihsan in Islamic Law Sources

There are three attitudes and views of scholars in using Istihsan as a source of Islamic law. There are those who reject istihsan as a source of Islamic law altogether. They are a group of scholars who deny qiyas such as Daud Azh Zhohiry, Mu'tazilah and some Shiites. There are those who make istihsan a source of Islamic law. They are a group of Hanafi clerics, especially the central figure, Abu Hanifah. And the other is a group that sometimes uses istihsan and sometimes rejects it, like Imam Shafi'i.¹⁵

Some consider it a source of law. Among the scholars who consider it as a source of law are Imam Hanafi and Imam Malik (although he does not really distinguish between istihsan and Maslahah Mursalah, so he states that istihsan has penetrated up to 9/10 of the science of fiqh. As for the reasons he put forward, among others: a) The

¹⁵ Azhar, "Konsep Istihsan Abu Hanifah Dalam Pandangan Al-Syafi'."

word of Allah swt in Surah Azzumar verse 18 which means: "Those who listen to the words then follow what is best of them. They are those whom Allah has guided, and they are the people who have reason." b) The Messenger of Allah said: "What the Muslims see is good, it is also good with Allah." c) Ijma' of the people in the context of istihsan regarding the permission to enter public baths, without restrictions on the time and use of water and the cost.¹⁶

4. Studying the Application of Abu Hanifah's Istihsan Concept in Family Law in Indonesia

a. Marriage Registration in Indonesia

RI Law on Marriage No. 1 of 1974 was promulgated on January 2, 1974 and was enforced simultaneously with the issuance of implementing regulations, namely Government Regulation no. 9 of 1975 concerning the Implementation of Law no. 1 of 1974 concerning Marriage. According to the Marriage Law, marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One Godhead (Article 1 of the Marriage Law). Meanwhile, marriage and its registration are contained in Article 2 of the Marriage Law, which reads: (1) Marriage is legal, if it is carried out according to the law of each religion and belief; (2) Each marriage is recorded according to the applicable laws and regulations. Article 2 paragraph 1 confirms that a marriage is said to be valid if it has been carried out in accordance with the rules and beliefs of each religion. This means that for Muslims, a marriage is said to be valid according to their religious law if it has fulfilled the pillars and conditions of marriage contained in the Qur'an, Hadith and the opinions of exemplary scholars.¹⁷

The relation with the obligation to register marriages is explained in Chapter II Article 2 PP No. 9 of 1975 concerning marriage registration. For those who marry according to the Islamic religion, the registration is done at the KUA. The procedure is described in Articles 3 to 9 of PP No. 9 of 1975. That is, every person who is going to get married will notify orally or in writing his marriage plan to the registrar at the place where the marriage will take place, no later than 10 working days before the marriage takes place. Then the registrar employee examines whether the marriage conditions have been met and whether there are no obstacles to marriage according to the law. Then after the fulfillment of the procedures and requirements for notification and no obstacles are found for marriage, the registrar announces and signs the announcement regarding the notification of the will to enter into marriage with how to paste an announcement letter in a place that has been determined and is easy to read by the public.¹⁸

¹⁶ Arif Nur'aini dan Muttaqin Muhammad Ngizzul, "Istihsan Sebagai Metode Istimbath Hukum Imam Hanafi Dan Relevansinya Dalam Pengembangan Ekonomi Syariah," *Tribakti: Jurnal Pemikiran Keislaman* 31, no. 1 (2020): 1-16.

¹⁷ Rachmadi Usman, "Makna Pencatatan Perkawinan Dalam Peraturan Perundang-Undangan Perkawinan Di Indonesia," *Makna Pencatatan Perkawinan Dalam Peraturan Perundang-Undangan Perkawinan Di Indonesia*, 2017.

¹⁸ Usman.

The law as mentioned above, in essence, does not provide firmness and coercion for the community to register marriages. That is, if a person does not register his marriage, it is not considered a form of crime and is also not considered a condition for the validity of the marriage. Marriage registration is indeed a form of reform of Islamic law in Indonesia, especially with regard to family law. And since its enactment in 1974 through Law no. 1 of 1974 concerning marriage, the procedure for legalizing marriage is still misunderstood by most Indonesian Muslims. Therefore, it is very clear that there is a dichotomy between what is understood as a condition for the validity of marriage according to the community and the government.¹⁹

In fact, if you look at the concept of Istihsan, which has been described at length previously, it has a very bad influence on the existence of marriage. Because leaving a marriage unrecorded is the same as allowing a cohabitation with an unstable legal status. This kind of condition is really detrimental to the parties involved, especially the wives and children. They will lose the rights that should be obtained from the legal consequences of marriage. His wife, has no legal right to report if anything happens. So is his son. It can even be said that a child born out of wedlock is not related to his or her child, if there is no proof of marriage registration. So that the existing law cannot reveal the purpose of sharia which is also really the spirit of the Istihsan concept.²⁰

The marriage under the hands itself is a marriage carried out according to fiqh without recording by the Marriage Registrar (PPN). In this case, marriage registration is an administrative obligation for citizens who carry out marriages. In an orderly state, all matters relating to the population must be recorded, such as births, deaths, as well as marriages (al-nikah). This registration is further stated in the official certificates contained in the register of records. Marriage registration is the same as recording important things in a person's life such as a birth certificate as proof of birth, Identity Card as proof of citizenship, etc. As for marriage, it is related to inheritance rights and descendants (al-nasab), so marriages must be recorded to prevent legal conflicts in the future.²¹

Meanwhile, Article 5 paragraph (1) of the Compilation of Islamic Law also states that "in order to ensure the orderliness of marriage for the Islamic community, every marriage must be recorded." This provides clarity of direction that the main purpose of the registration of marriages is to create order related to state administration which is expected to lead to the creation of social order. With this orderly state administration, it is hoped that marriage events in Indonesia can be controlled so that no parties (especially women) are harmed. In other words, the legislation was not made without a purpose. A person will experience failure to obtain legal certainty,

¹⁹ Nenang Julir, "Pencatatan Perkawinan di Indonesia Perspektif Ushul Fikih," *JURNAL ILMIAH MIZANI: Wacana Hukum, Ekonomi, dan Keagamaan* 4, no. 1 (2018): 53–62.

²⁰ Hafid, "Telaah Interkoneksi Konsep Istihsan dan Konsep Maqasid al-Syariah."

²¹ M Zamroni, *Prinsip-Prinsip Hukum Pencatatan Perkawinan di Indonesia* (Media Sahabat Cendekia, 2019).

simply because they cannot show authentic evidence of a person's personal identity. So it is clear, even though this marriage registration is not mentioned in classical fiqh, the product of classical scholars' thinking, it is certainly very urgent to be considered again by the state and included as a condition for the validity of the marriage.²²

The validity of a marriage contract must meet the provisions of the Marriage Law (UUP) Article 2 paragraph (1) regarding religious procedures, and paragraph (2) regarding the simultaneous registration of the marriage by the Marriage Registrar (PPN). Thus, the provisions of paragraphs (1) and (2) should serve as a cumulative requirement for registration of marriage, not just an alternative requirement. This means that marriages that are only carried out according to Islamic fiqh without being registered by the Marriage Registrar (PPN), are not considered legal marriages. Because the marriage certificate (marriage) becomes a very decisive thing about the truth of a problem if it is litigated. Besides that, in the international environment, the Civil Registry Deed has legal recognition.²³

Then the marriage certificate has a legal aspect to be used as evidence if a death event occurs in the family, for example a husband dies, leaving a wife and three children, who will appear together as heirs of the husband (who died). How to prove that the heir is the legal wife of her husband who has died. Similarly, how to prove that the three children are really legitimate biological children (her lineage to their parents). In this case, there will be no difficulties if you already have authentic evidence in the form of a marriage certificate made by an authorized official. In other words, it can be explained that with a marriage certificate, the wife left by her husband has a handle (evidence) that shows that she really is the widow of the husband who has died. Based on the explanation above, it is clear that the legal aspect of marriage registration is to obtain legal certainty in terms of marriage and the lineage of children. All these events were recorded, because as a source of certainty the marriage under the hands did not have a legal relationship with his father at the time of the conflict and quarrel that ended in divorce even though the divorce was also under hands.²⁴

Looking at the concept of Istihsan promoted by Imam Abu Hanifah above and referring to its parts, it is clear that the rules for registering marriages in Indonesia really provide justice and create benefits that are truly meaningful for the continuation of marriages. It is proven by the facts that have been presented previously. This is clear, entering the concept of Istihsan in the section that refers to the principle of benefit. Besides that, are not the results of the Law and the Compilation of Islamic Law also part of the Indonesian ijma'ulama which is the

²² Dyah Ochterina Susanti, "Urgensi Pencatatan Perkawinan (Perspektif Utilities)," *Rechtidee* 11, no. 2 (2016): 166-81.

²³ Mohd Haramen Salmia Dan Muhammad Rafi'i, "Konsep Istihsan Dalam Pembaharuan Kehidupan Ummat Islam Di Indonesia: Meninjau Beberapa Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia," *Jurnal Ar-Rahmah* 1, No. 2 (2021): 33-48.

²⁴ Liky Faizal, "Akibat Hukum Pencatatan Perkawinan," *ASAS* 8, no. 2 (2016).

greatest of several elements in it. This is also part of the application of the Istihsan concept in the form of Istihsan with ijma'.²⁵

Istihsan, as stated earlier, wants to lead that all messages brought by Islam are universal under the principle of rahmatan lil 'alamin (bringing mercy to the universe). That is, all human actions can only be justified using religious justification as long as it brings benefits to the public interest (li tahqiq mashalih al-'ammah), not individual or casuistic benefits. This is different from the fiqh formulated by the fuqaha 'which is influenced by space and time.²⁶ So, it is possible that the opinion of a scholar in the past brought benefits in his time, but applied in current conditions will cause harm. Therefore, it must be distinguished and not contradicted. Especially if those who are supported cause misery for the wife who is abandoned by her husband without clear responsibilities. So, in this case the author explains that it is not fiqh that is irrelevant, but the fault lies with the people who put the fiqh written for that time, for the sake of today.²⁷

Syarifuddin emphasized that all regulations that he wanted to create must of course still refer to the general benefit. This public benefit must be the key and barometer of every legal stipulation. The public benefit, according to him, can be viewed from two perspectives. The first aspect brings benefits to the lives of the people and the second avoids the harm (damage, difficulty and evil) of people's lives. Based on this, Indonesian Islamic law must place state law as an inseparable part of the process of creating benefit, not then confront it with Islamic law which is still in the classical fiqh books. Thus, Indonesian Islamic law also does not rule out the possibility to carry out theological justification of the assessed state laws and regulations, of course after going through a deep confirmation process, in accordance with the spirit of al-Shari'ah. One thing, which needs to be used as a tool or method in this regard, is clearly the Istihsan concept popularized by Imam Abu Hanifah, which is more specifically located on the Istihsan concept with Maslahah.²⁸

D. Conclusion

The conclusion is that Islamic law in Indonesia which discusses underhand marriage is contained in Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law (KHI). And in the marriage regulations it is explained that the main purpose of the existence of marriage registration is to create order related to state administration which is expected to lead to the creation of social order. Therefore, marriage in Indonesia is legal if the conditions and pillars of marriage have been fulfilled, but also must be recorded by the state. With this orderly state

²⁵ Naya dan Ambon, "Mengurai Titik Temu Antara Istihsan dan Pembaharuan Hukum Islam."

²⁶ Hafid, "Telaah Interkoneksi Konsep Istihsan dan Konsep Maqasid al-Syariah."

²⁷ Salmia dan Rafi'i, "Konsep Istihsan Dalam Pembaharuan Kehidupan Ummat Islam Di Indonesia: Meninjau Beberapa Fatwa Dewan Syariah Nasional Majelis Ulama Indonesia."

²⁸ Amir Syarifuddin, *Pelaksanaan Hukum Kewarisan dalam Lingkungan Adat Minangkabau*, Jakarta : Gunung Agung, hlm. 164

administration, it is hoped that marriage events in Indonesia can be controlled so that no parties (especially women) are harmed. Because if you look at the current condition of Indonesian Muslims, the problems are so complex, including the issue of violence against women (wives), then the explanation of marriage that does not need to be recorded can be reconsidered for its validity so that the value of *maslahat* in it will be felt by prioritizing the benefit that is general.

Based on these considerations, the author argues that marriage registration can be considered as part of Islamic law. If the understanding as above can be accepted, along with developments and needs that exist in the Indonesian context, then the pillars of marriage that are a requirement for a valid marriage in Indonesia are not only five conditions, as previously mentioned. However, the number can be six, which is added with the provisions for registration of marriages carried out by authorized officers according to the provisions of the applicable laws and regulations. In this case, the Marriage Registrar from the Office of Religious Affairs for Muslims and Civil Registry for non-Muslims.

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