

***Mut'ah* Marriage Law in Perspective of  
Sayyid Husain Al-Thaba'thabaí and Their Relevance with  
Family Law in Indonesia**

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**Abstract**

This study aims to examine Al-Thaba'thabaí 's thoughts on *Mut'ah* marriage and its relevance to family law in Indonesia. This research is a type of library research by descriptive-analytical approach. The primary data in this study are the Qur'an, Hadith, books by Al-Thaba'thabaí, the 1945 Constitution, Law Number 1 of 1974 concerning National Marriage Law, PP. Number 9 of 1975 as the implementing regulation of Law no. 1974, and INPRES No.1/1991 on the Compilation of Islamic Law (KHI). This study uses deductive thinking techniques and the data analysis uses *maqashid sharia* theory. The results show that Al-Thaba'thabaí 's thoughts on the permissibility of *Mut'ah* Marriages are not relevant to the purpose of marriage and the purpose of making legislation. As the purpose of making the law is the value of justice, usefulness, and legal certainty, besides the law is also made to create benefit in society. Al-Thaba'thabaí's thought regarding *Mut'ah* Marriage must be rejected because it violates the values of the legal objectives, namely justice, benefit, and legal certainty, and also harms the values of benefit. To provide firmness to prohibit the practice of *mut'ah* marriage in Indonesia, it is necessary to amend Article 2 of Law Number 1 of 1974 concerning Marriage to "a legal marriage is

carried out following their respective religions and registered following the legislation. invitation".

**Keywords:** *Mut'ab* marriage; Husain Al-Thaba'thabai; family law in Indonesia

## Introduction

Marriage is part of religious law and is the sunnah of the Prophet SAW. In the pages of Islamic history, especially on the *Tasyri* Date side, there are two kinds of marriage. The first is called the *Daim* Marriage (ordinary marriage, i.e. without a time limit), and the second is called the *Mut'ab* Marriage (a marriage that is limited to a certain period).<sup>1</sup>

*Daim* marriage is practiced and believed to be a legal marriage model by all Muslims. While *mut'ab* marriage is practiced and believed to be a lawful and legal marriage model by some Muslims, especially in the Shi'i Imamiyah sect or sect, and is declared unlawful and invalid by the majority of other Muslims, especially among the Sunnis. Specifically for Indonesian Muslims, the same rules are also formulated in Article 4 of the Compilation of Islamic Law which reads "Marriage is legal if it is carried out according to Islamic law", and Article 2 paragraph (1) of Law Number 1 of 1974 concerning Marriage states that a valid marriage carried out according to the law of each religion and belief.<sup>2</sup>

Islamic religious law that is understood, believed, and practiced by some Muslims (including possible Indonesian Muslims), then both *daim* marriages and *mut'ab* marriages are specifically carried out or practiced by citizens. Indonesia, which is Muslim with a Shi'ite school of thought, both are legal according to the laws in force in Indonesia.

Then, it should be noted that concerning marital problems, in Indonesia at this time a phenomenon appears, namely the birth of a type of marriage model called contract marriage. Before researching the reality of contract marriage in the community, it was not clear whether this marriage model was categorized as *daim* marriage or *mut'ab* marriage, or maybe not both. Information about it has recently been found in the mass media, both in print and electronic media. Based on information from the mass media, both printed and electronic, contract marriages have been widely practiced by some people in several areas in Indonesia, both in urban areas and in poor areas.

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<sup>1</sup> Mustafa Sa'id Al-Khin, *Asr Al-Ikhtilaf Fi Al-Qawaid Al-Ushuliyah Fi Ikhtilaf Al-Fuqaha'* (Beirut: Muassasat al-Risalat, 1981).

<sup>2</sup> Government of the Republic of Indonesia, *Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law* (Bandung: Citra Umbara, 2012).

The areas where such contract marriages occur are in Indonesia, especially in Cisarua Bogor, in Cianjur Regency, West Java,<sup>3</sup> in Jepara Regency, Central Java,<sup>4</sup> in Kalisat Village, Rembang sub-district, Pasuruan district, East Java,<sup>5</sup> and in Singkawang, Bengkayang district, West Kalimantan.<sup>6</sup>

The law of *Mut'ah* marriage has the pros and cons. Both of which are strong in terms of *istidlal*.<sup>7</sup> Normatively, both are based on the Qur'an, al-Sunnah, the opinions of friends and rational arguments. According to the rules of *ijtihad*.<sup>8</sup> Actually, there is a way out if there are two contradictory arguments, namely employing *jam'u*, *tarjih*, *naskh* and *mauquf*.<sup>9</sup>

Almost all Sunni scholars' view, *mut'ah* marriage as a form of marriage that is forbidden in Islam based on the Qur'an, authentic Hadith, and reason. This is due to their thinking that the marriage that is commanded (permitted) in the Qur'an is permanent. The Hadith of the Prophet also shows its prohibition with the affirmative phrase "until the Day of Resurrection" and other logical reasons. The prohibition of this marriage with the appointment of several narrations.<sup>10</sup> Many hadiths explain the law on the prohibition of Mut'ah marriage, including in the book of Sahih Bukhari chapter 38 on *Maghāzi* and marriage, Sahih Muslim chapter on marriage, and others. Likewise, the opinion is also supported by the schoolers namely Hanafi, Maliki, Shafi'i, Hambali, and the number of friends and *Thabiin*.

Concerning *mut'ah* marriage, one of the figures who has thoughts about mut'ah marriage is Al-Thaba'thabai. Muhammad Husain Al-Thaba'thabai.<sup>11</sup> According to *Aṭ-Ṭabaṭaba'i* in An-Nisa verse 24, it is the legal basis for *Mut'ah* marriage and this understanding has been quoted by previous people, namely

<sup>3</sup> Yandi, "Kawin Kontrak Di Jepara," n.d., <http://www.freelists.org/archives/ppi/01-2006/msg00036.html>.

<sup>4</sup> Sri Endah Kinasih, "Kawin Kontrak Di Desa Kalisat Jawa Timur," n.d., <http://forum.wgaul.com/archive/thread/t-20899-kawin-kontrak.html>.

<sup>5</sup> Ibid.

<sup>6</sup> Antara News, "Kawin Kontrak Di Singkawang, Kabupaten Bengkayang, Kalimantan Barat," n.d., <http://www.antara.co.id/arc>.

<sup>7</sup> Muhammad Roy Purwanto, "Different Qiraat and Its Implication in Different Opinion of Islamic Jurisprudence," *Al-Mawarid* 8, no. 2 (2013).

<sup>8</sup> Muhammad Roy dan Jauhari Purwanto, *Perubahan Fatwa Hukum Dalam Pandangan Ibn Qayyim Al-Jauziyyah* (Yogyakarta: Universitas Islam Indonesia, 2017); Muhammad Roy Purwanto, *Reformulasi Konsep Mashlahah Sebagai Dasar Dalam Ijtihad Istislahi* (Yogyakarta: Universitas Islam Indonesia, 2017).

<sup>9</sup> Muhammad Roy Purwanto, "Nalar Qur'ani Al-Syâfi'i Dalam Pembentukan Metodologi Hukum: Telaah Terhadap Konsep Qiyas," *An-Nur: Jurnal Studi Islam* 1, no. 1 (2004): 1; Purwanto, *Perubahan Fatwa Hukum Dalam Pandangan Ibn Qayyim Al-Jauziyyah*.

<sup>10</sup> Muhammad Ibrahim Jannati, *Fiqh Perbandingan Lima Madhab* (Jakarta: Cahaya, 2007). p. 476

<sup>11</sup> Tabataba'i, Al-Mizân Fi Tafsir Al-Quran, Volume IV (Beirut: Muassasah al-Islam, 1991), p. 576.

the commentators among the companions and *tabi'in* such as Ibn Abbas, Ibn Mas'ud, Ubay bin Ka'ab, Qatada, Mujahid, Sa'in, Ibn Jubair, al-Hasan and others, including the school of priests of *Ahlul Bait 'alaihissalam*.<sup>12</sup>

*Mut'ah* marriage models and *daim* marriages (including contracts outside the contract) are legal marriages. So, as long as the basis used as a measuring tool to assess the validity of a marriage is Law No.1 of 1974, of course, there is no choice but to state that there is a form of contract marriage that can and should be declared valid. If the registrar's officials remain in view and their stance refuses to register, then the solution is firstly, by submitting the case of contract marriage to the Court following the Supreme Court's jurisprudence on interfaith marriages. Secondly, by formulating a new marriage law that contains rules regarding contract marriages. As long as the basis used as a measuring tool to assess the validity of a marriage is Law No.1 of 1974, of course, there is no choice but to state that there is a form of contract marriage that can and should be declared valid. If the registrar's officials remain in view and their stance refuses to register, then the solution is first by submitting the case of contract marriage to the Court following the Supreme Court's jurisprudence on interfaith marriages.

Regarding to the phenomena above, there are some relevance previous researchs. Firstly, Mardjudo, Abd. Basyir (2012) concered *Mut'ah* Marriage in the Perspective of the Indonesian Ulema Council and the Compilation of Islamic Law of Doctoral (S3) thesis, State Islamic University of Alauddin Makassar. The findings of this study explain that according to the Indonesian Ulema Council, *mut'ah* marriage is against Marriage Law No. 1 of 1974 and the Compilation of Islamic Law. In addition, *mut'ah* marriage also causes unrest among the community, especially parents. Meanwhile, according to the Compilation of Islamic Law, *mut'ah* marriages include unregistered marriages, while recording is proof of the legal certainty of marriage. Because it is not recorded, the *Mut'ah* marriage will cause problems. In addition, *mut'ah* marriages have a very detrimental impact on women and also on children born as a result of relations from *mut'ah* marriages. It is recommended that all forms of marriage must be recorded by the officer. Officers are expected to always see the marriage that took place whether it has been recorded or not. Because there are people who think it is not important to register a marriage, or because they are so busy that they forget to go to the place of marriage registration.<sup>13</sup>

Secondly, RR Dewi Anggraeni and Muhammad Affan Gofar focused on Perspective on Contract Marriage in National Law and Islamic Law and the

<sup>12</sup> Mahmud Syaltut, *Al-Fatawa, Dirasab Li Musykilah Al-Muslim Al-Mu'ashir Fi Al-Hayah AlYaumiyyah Al-'Ammah* (Kairo: Dar El-Shorouq, 2004), p. 467.

<sup>13</sup> Abd. Basyir Mardjudo, "Nikah *Mut'ah* Dalam Perspektif Majelis Ulama Indonesia Dan Kompilasi Hukum Islam" (Univeritas Islam Negeri Alauddin Makassar, 2012).

Legal Consequences It Causes, *MIZAN: Journal of Islamic Law*, FAI Ibn Khaldun University (UIKA) Bogor. Vol. 3 No. 2 (2019), they found that there were legal consequences for wives regarding marital status, namely not being recognized by the state because the state does not regulate contract marriage, the wife only gets social and economic status. Regarding joint property, because contract marriage is not recognized, then the marriage cannot be prosecuted. Other legal consequences for children based on Article 42, 43 Paragraph 1 regarding the position of the child, the child only has a civil relationship with his mother, the child does not have an inherited relationship with his father, because a child in contract marriage is considered an unrecognized child out of wedlock.<sup>14</sup>

The novelty of this study with other studies is that this study examines Al-Thaba'thaba'i thoughts about mut'ah marriage and its relevance to family law in Indonesia, using a statute approximation approach with *maqashid sharia* theory.

This research is a type of library research by descriptive-analytical approach. The primary data in this study are the Qur'an, Hadith, books by Al-Thaba'thaba'i, the 1945 Constitution, Law Number 1 of 1974 concerning National Marriage Law, PP. Number 9 of 1975 as the implementing regulation of Law no. 1974, and INPRES No.1/1991 on the Compilation of Islamic Law (KHI). This study uses deductive thinking techniques and the data analysis uses *maqashid sharia* theory.

## Discussion

### Marriage in Islamic Law and Positive Law

Marriage is a general Sunatullah and applies to all His creatures, both in humans, animals, and plants. It is a way that Allah SWT, has chosen as a way for His creatures to reproduce, and preserve their life.<sup>15</sup> As the Word of Allah QS. Al-Zariyyat [49]: 49 namely:

وَمِنْ كُلِّ شَيْءٍ خَلَقْنَا زَوْجَيْنِ لَعَلَّكُمْ تَذَكَّرُونَ ﴿٤٩﴾

"And We created everything in pairs so that you may remember the greatness of Allah."

Sayyid Sabiq in his book *Fiqh Sunnah* defines marriage as follows:

الرَّوْحِيَّةُ اللَّهُ الْخَلْقِيُّ التَّكْوِينِيُّ أُمَّةٌ لَا أُمَّةَ الْإِنْسَانِ أَوْ لَمْ الْحَيَوَانَ أَوْ لَمْ النَّبَاتِ

<sup>14</sup> RR Dewi Anggraeni dan Muhammad Affan Gofar, "Perspektif Kawin Kontrak Dalam Hukum Nasional Dan Hukum Islam Beserta Akibat Hukum Yang Ditimbulkannya," *MIZAN: Journal of Islamic Law* 3, no. 2 (2019).

<sup>15</sup> Tihami dan Suhari Sahrani, *Fiqh Munakahat* (Jakarta: Rajawali Pres, 2013), p. 6.

"Marriage is one of the *sunnatullah* that generally applies to all God's creatures, both humans, animals, and plants.<sup>16</sup>

The word marriage in the Qur'an is sometimes used to refer to a marriage contract, but sometimes it is also used to refer to a sexual relationship. The word of God in the QS. An-Nisaa' [4] verse 3:

وَأِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَاثَ وَرُبْعَ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ذَٰلِكَ أَدْبَىٰ أَلَّا تَعُولُوا ﴿٤﴾

"And if you are afraid that you will not be able to do justice to (the rights of) an orphaned woman (if you marry her), then marry (other) women that you like: two, three or four. Then if you are afraid that you will not be able to do justice, then (marry) only one, or the slaves you have. that is closer to not doing wrong."

Another example is the word of Allah QS. An-Nisa' [4]: 22, which read:

وَلَا تَنْكِحُوا مَا نَكَحَ آبَاؤُكُمْ مِنَ النِّسَاءِ إِلَّا مَا قَدْ سَلَفَ ۚ إِنَّهُ كَانَ فَحِشَةً وَمَقْتًا وَسَاءَ سَبِيلًا ﴿٢٢﴾

"And do not marry women your father has married, except in the past. Verily, it is a very abominable act and is hated by Allah and the worst way (to be taken)."

The two verses above are understood to parse and interpret solely to carry out the marriage contract (marriage), not meaning *al-wath'u* or *al-jima'u* (having sexual relations). *Wath'u* or *al-jima'u*.<sup>17</sup> as Allah says in QS. Al-Baqarah [2] verse 230:

فَإِنْ طَلَّقَهَا فَلَا تَحِلُّ لَهُ مِنْ بَعْدُ حَتَّىٰ تَنْكِحَ زَوْجًا غَيْرَهُ ۚ فَإِنْ طَلَّقَهَا فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يَتَرَاجَعَا إِنْ ظَنَّا أَنْ يُقِيمَا حُدُودَ اللَّهِ ۗ وَتِلْكَ حُدُودُ اللَّهِ يُبَيِّنُهَا لِقَوْمٍ يَعْلَمُونَ ﴿٢٣٠﴾

"Then if the husband is mentally retarded (after the second divorce), then the woman is no longer lawful for him until she marries another husband. Then if the other husband divorces her, there is no sin for them (the former first husband and wife) to remarry if both think they will be able to carry out Allah's laws. These are the laws of Allah, He will explain to a people who (want to) know."

This verse explains that marriage is defined as *al-wath'u* or *al-jima'u* (having sexual relations). If a wife has divorced her first husband twice, then she

<sup>16</sup> Sayyid Sabiq, *Fiqh Sunnah*, ed. Terj. Nor Hasanuddin, Jilid 3 (Jakarta: Pena Pundi Aksara, 2007), p. 10.

<sup>17</sup> M. Quraish Shihab, *Wawasan Al-Quran, Tafsir Maudhu'i, Atas Pelbagai Persoalan Umat, Cetakan Ke-6*, (Bandung: Mizan, 1997), p. 191.

can still reconcile with her first husband. If the husband has dropped *talaq* for the third time, then the husband cannot remarry his ex-wife, unless there is a *muhallil*. It means, the ex-wife must marry another man (second husband), divorce, perform of *iddah*, then she can marry again with the first husband.<sup>18</sup>

The scholars have different opinions in understanding the meaning of marriage, some interpret it essentially and *majaziy*, as follows:

The first opinion (Imam Shafi'i) is authenticated by Abu Thayib, Mutawali, and Qadi Husayn: that marriage is essentially used to refer to a marriage contract, and sometimes it is used *majazily* to mention sexual relations. This is an authentic opinion of the Shafii School.<sup>19</sup>

The second opinion (Imam Hanafi): argues that marriage is essentially used to refer to sexual relations. But sometimes it is used *majaziy* to refer to the marriage contract.<sup>20</sup>

Chapter 1 Article one of Law no. 1 of 1974 states that marriage is an inner and outer bond between a man and a woman as husband and wife to form a happy and eternal family (household) based on God Almighty.<sup>21</sup>

Based on above understanding, it can be concluded that marriage is an inner and outer bond between a man and a woman as husband and wife with a very noble goal, namely to form an eternal and happy family based on the One Godhead.<sup>22</sup>

The formulation of the meaning of marriage By "inner and outer bond" it is meant that marriage is not enough only to have an "outward bond" or "inner bond" but must be both. A "birth bond" is a visible bond. Expressing the existence of a legal relationship between a man and a woman to live together, as husband and wife, in other words, can be called a "formal relationship". On the other hand, an "inner bond" is an informal relationship, an invisible bond. Although it cannot be seen as real, the bond must exist. Because without the inner bond, the outer bond will become fragile.<sup>23</sup> Based on the formulation of the meaning of marriage above, it can be concluded that marriage must be based on inner and outer ties, and in practice, there is no time limit.

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<sup>18</sup> *Ibid.*, p. 192.

<sup>19</sup> Abu Bakar bin Muhammad Al-Husaini, *Kifayah Al-Akhyar* (t.k: t.p, n.d.), p. 455.

<sup>20</sup> Abdurrahman Al-Jaziri, *Al-Fiqhu 'Ala Madzhabibi Al-Arba'Ab Juz 4* (Kairo: Darul Hadis, n.d.), p. 7.

<sup>21</sup> Achmad Asrori, "Batas Usia Perkawinan Menurut Fuqaha Dan Penerapannya Dalam Undang-Undang Perkawinan Di Dunia Islam," *Jurnal Al-Adalab* XII, no. 2 (2015), <http://ejournal.radenintan.ac.id/index.php/adalah/article/view/215/363>.

<sup>22</sup> K. Wantjik Saleh, Indonesian Marriage Law (Jakarta: Ghalia Indonesia, 2000), p. 17.

<sup>23</sup> *Ibid.*, p. 15

### ***Mut'ah* Marriage**

The definition of *fiqh* scholars also mentions marriage is a gate to meet biological needs. So as if the purpose of marriage is only for privilege'. This definition illustrates that the price woman only lies in womanhood biologically (physically).<sup>24</sup> Marriage according to the law is carried out in order to form a *sakinah* family as the purpose of marriage.<sup>25</sup>

The word of *mut'ah* is an Arabic term derived from the word *ma-ta-'an* etymologically contains several meanings including:

1. Pleasure, as contained in the word of God: (Surah 3:14).
2. Equipment, as the word of Allah SWT, (QS.5:96)<sup>26</sup>

*Mut'ah* marriage is the marriage of an intelligent and conscientious woman with a Muslim man, with a certain dowry for a certain period, and the man accepts this agreement.<sup>27</sup>

*Mut'ah* marriage in legal terms is usually called "Marriage for a certain period" in the sense that at the time the contract is declared, the marriage bond is valid until a certain period when that time has come, the marriage is terminated automatically without going through a divorce.

Meanwhile, Muhammad Rawwas Qal'ahji, *mut'ah* marriage is: *mut'ah* marriage is a marriage until a certain time limit, if that time limit has arrived then there will be separation (between husband and wife by itself)."<sup>28</sup>

### **The Purpose of *Mut'ah* Marriage**

The purpose of marriage is to maintain oneself.<sup>29</sup> This goal can be realized through all types of marriage, whether permanent marriage, *mut'ah* marriage, or marriage with slaves.

*Mut'ah* marriage and permanent marriage, in terms of substance there should be no difference. Each of them is a marriage, through the process of consent and *qabul* although with a different formula, in addition, both require a

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<sup>24</sup> Widya Sari, Muhammad Arif, and dan Elkhairati, "Pemikiran Ibrahim Hosen Tentang Konsep Pernikahan Dan Kontribusinya Terhadap Pembaruan Hukum Perkawinan Di Indonesia," *Al-Istinbath Jurnal Hukum Islam* Vol 6, no. 1 (2021): p. 138.

<sup>25</sup> Melinda Rahmawati dan Heni Ani Nuraeni, " Peran Dispensasi Kawin Dalam Peningkatan Angka Pernikahan Dini Di Wilayah Kotamadya Jakarta Barat," *Al-Istinbath Jurnal Hukum Islam* Vol 6, no. 1 (2021): p. 7.

<sup>26</sup> Amir Syarifudin, *Islamic Marriage Law in Indonesia*, 5th Edition (Kencana, 2014), p. 100.

<sup>27</sup> Jannati, *Comparative Fiqh of the Five Madhabs*, p. 465.

<sup>28</sup> Muhammad Rawwas Qal'ahji, *Mausu'ah Fiqhi 'Umar Ibn Khatthhab* (Kuwait: Maktabah Fallah, 1981), p. 597.

<sup>29</sup> Ja'far Subhani, *The Warm And Controversial In Fiqh*. Terj, Irwan Kurniawan (Jakarta: Lentera Basritama, 1999), p. 103.



dowry. Marriage is a natural decree, which has never disappeared and will not disappear from human society. The continuity of this natural provision will not experience a collision except with the act of adultery, a strong act to prevent the realization of a household building. The act of adultery makes it hard for humans to get married and directs the potential for lust to adultery. So, one of the goals of *Mut'ah* marriage is to prevent the spread of sex communism that attacks society in this modern era.

Apart from the above objectives, *mut'ah* marriage is a means for pleasure, biological distribution, the desire to have children, the desire to get satisfaction, and others that are intertwined between men and women. It is very unreasonable if there is an understanding that *mut'ah* marriage is just a game with women or vice versa. For the sake of spreading the truth, *mut'ah* marriage is indeed sufficient for the above purpose for people who want to elevate Islamic law which contains convenience and love, such as talaq and polygamy.

### **Sayyid Husain Al-Thaba'thaba'i Thoughts About Mut'ah Marriage**

The full name of al-Allamah Al-Thaba'thaba'i is Muhammad bin Husain bin al-Sayyid Muhammad bin Husain al-Mizra Al Asghar Shaykh al-Islami Al-Thaba'thaba'i al-Tabrizi al-Qadhi. The nickname Al-Thaba'thaba'i was ascribed to one of his grandfathers named Ibrahim Al-Thaba'thaba'i bin Ismail al-Dibaj. Allamah is an honorary title in Arabic, Persian, and other Islamic languages meaning highly educated.<sup>30</sup> While the nickname Sayyid indicates that he is a descendant of the Prophet and specifically this title in this sense is used in Persia.<sup>31</sup> Allamah Al-Thaba'thaba'i was born in Tabriz, Iran on 29 Zulhijjah 1321 H/ 1892.

Sayyid Muhammad Husain Al-Thaba'thaba'i was born in the city of Tabriz, on 29 Zulhijjah 1321 H/1892 AD. He was born into a family of scholars and descendants of the Prophet Muhammad who for fourteen generations had produced prominent scholars. His mother died when he was five years old, four years later his father died. Since then, to carry on with his daily life, a wali (caretaker of the parents' estate) handed over Al-Thaba'thaba'i and his younger daughter to a male servant and a female servant.<sup>32</sup>

*Mut'ah* marriage or contract marriage is a marriage practice that was permitted by the Prophet in the early days of Islam and scholars agree that the Qur'an Surah an-Nisa verse 24 is about *mut'ah* marriage.

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<sup>30</sup> Tabataba'i, Al-Mizān Fi Tafsir Al-Quran, Volume IV, p. 267.

<sup>31</sup> Ibid. p. 288

<sup>32</sup> Tabataba'i, This is Islam, an Effort to Understand All Islamic Concepts Easily (Jakarta: Pustaka Hidayah, 1992), p. 17.

﴿ وَالْمُحْصَنَاتُ مِنَ النِّسَاءِ إِلَّا مَا مَلَكَتْ أَيْمَانُكُمْ ۖ كَتَبَ اللَّهُ عَلَيْكُمْ ۖ وَأُحِلَّ لَكُمْ مَا وَرَاءَ ذَلِكَ أَنْ تَبْتَغُوا بِأَمْوَالِكُمْ مُحْصِنِينَ غَيْرَ مُسْفِحِينَ ۖ فَمَا اسْتَمْتَعْتُمْ بِهِ مِنْهُنَّ فَآتُوهُنَّ أُجُورَهُنَّ ۖ فَرِيضَةً ۖ وَلَا جُنَاحَ عَلَيْكُمْ فِيمَا تَرَضَيْتُمْ بِهِ مِنْ بَعْدِ الْفَرِيضَةِ ۚ إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا ﴾

"And (it is also forbidden for you to marry) a married woman, except for the slaves you have (God has set the law) as His decree for you. and it is lawful for you other than this (namely) to seek wives with your wealth to marry them, not to commit adultery. So the wives you have enjoyed (interfered with) between them, give them the dowry (perfectly), as an obligation; And there is no reason for you in what you have given up for one another, after determining the dowry, verily Allah is Knowing, Wise."

Both Sunnis and Shiites agree that this verse deals with the law of *Mut'ah* marriage. Based on An-Nisa verse 24 and its *asbab an-nuzul*, both Shia and Sunnis believe that the practice of *Mut'ah* marriage is a lawful marriage.

However, the debate and difference of opinion between the two are whether the permissibility of *mut'ah* marriage is still lawful until now or the permissibility of *mut'ah* marriage has been *mansukh* and has become unlawful. Therefore, there are differences of interpretation among the commentators in interpreting the letter an-Nisa ' this verse 24.

According to Al-Thaba'thaba'i, the an-Nisa' verse 24 is the legal basis for *mut'ah* marriage and this understanding was quoted by previous people, namely the commentators among friends and tabi'in such as Ibn Abās, Ibn Mas'ūd, Ubay bin Ka'āb, Qatādah, Mujāhid, Saddy, Ibn Jubair, al-Hasan and others, including the school of Imams of Ahlul Bait.<sup>33</sup>

According to Al-Thaba'thaba'i in this commentary, it is clearly stated that what is meant by *اسْتَمْتَعْتُمْ* is for the term *mut'ah* marriage without a doubt.<sup>34</sup> This verse is a Madaniyyah verse contained in the Qur'an Surah an-Nisa' verse 24, which was revealed in the middle of the time after the Prophet Muhammad migrated from Mecca to Medina. This can be proven by other verses, and there is no doubt that this *mut'ah* marriage took place and was carried out by the Companions at that time. Many narrations explain this event, what is clear is that this marriage, which was given the name of *mut'ah* marriage, was already amid the companions of the Prophet. This marriage is not disclosed except by the term *mut'ah*.<sup>35</sup>

﴿ فَمَا اسْتَمْتَعْتُمْ بِهِ مِنْهُنَّ فَآتُوهُنَّ أُجُورَهُنَّ ۖ فَرِيضَةً ۖ وَلَا جُنَاحَ عَلَيْكُمْ فِيمَا تَرَضَيْتُمْ بِهِ مِنْ بَعْدِ الْفَرِيضَةِ ۚ إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا ﴾

<sup>33</sup> Tabataba'i, Al-Mizān Fi Tafsir Al-Quran, Volume IV, p. 277.

<sup>34</sup> Tabataba'i, p. 271.

<sup>35</sup> Tabataba'i, p. 272.

"So the wives you have enjoyed (interfering) with them, give them the dowry (perfectly), as an obligation."

According to Al-Thaba'thaba'í in this verse, amir به back to what is indicated by the word of God مَا وَرَاءَ ذَلِكَ لَكُمْ something that carries the meaning of acquiring. So مَا in this verse is للتوقيت that is to set or limit. and said مِنْ مِّنْ muta'alliq to the word أَسْتَمْتَعْتُمْ So that means:

أَسْتَمْتَعْتُمْ النِّبْلَ فَفَاتُوهُنَّ أَجُورَهُنَّ بِفَرِيضَةٍ

"When you have enjoyed by getting themselves, then pay their dowry as an obligation."<sup>36</sup>

Then مَا on lafaz أَسْتَمْتَعْتُمْ possible it can also be said maushul and lafaz أَسْتَمْتَعْتُمْ is his silab maushul. While dhomir on lafaz به back to مَا maushul so that the meaning is:

أَسْتَمْتَعْتُمْ النِّبْلَ فَفَاتُوهُنَّ أَجُورَهُنَّ بِفَرِيضَةٍ

"And those whom you have enjoyed are women, so pay them as an obligation."

So based on the explanation above according to Al-Thaba'thaba'í what is meant by the word of Allah:

فَمَا أَسْتَمْتَعْتُمْ بِهِ مِنْ مِّنْ فَفَاتُوهُنَّ أَجُورَهُنَّ بِفَرِيضَةٍ وَلَا جُنَاحَ عَلَيْكُمْ فِي مَا تَرَاضَيْتُمْ بِهِ مِنْ بَعْدِ  
الْفَرِيضَةِ إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا ﴿١٤﴾

It is a tafri' or previous discussion branch of the word of Allah that preceded it, because because of in life فَمَا as tafri' juz'i over kulli (the top half of the whole) without a doubt. So what has been discussed earlier, means the word of Allah:

وَأُحِلَّ لَكُمْ مَا وَرَاءَ ذَلِكَ أَنْ تَبْتَغُوا بِأَمْوَالِكُمْ مُحْصِنِينَ غَيْرَ مُسْفِحِينَ

"And it is lawful for you other than that (namely) to seek wives with your wealth to marry them, not to commit adultery."

Thus the word of God فَمَا أَسْتَمْتَعْتُمْ until the end is tafri' juz'i over kulli or tafri' juz'i from parts of the kulli. So Al-Thaba'thaba'í without hesitation explains that what is meant by this verse is mut'ah marriage.<sup>37</sup>

<sup>36</sup> Tabataba'i, p. 271.

According Al-Thaba'thaba'i, it is clear that the error of those who consider this verse to be related to *da'im* marriage is not *mut'ah* marriage. Because holding a period of marriage demands to having fun from him. Perhaps some of them mentioned that the letters and in *اَسْتَمْتَعْتُمْ* is for *litta'kid* (affirmation) and the meaning is you are having fun or with the meaning of.

According to this meaning based on its legal size and following the meaning of the demand for the condition of <sup>1</sup> with the meaning of, it is not according to the reply that accompanies it, according to Al-Thaba'thaba'i what is meant by the word of Allah:

فَقَاتُوهُنَّ أَجُورَهُنَّ ۚ

*"Then pay the dowry to them in full."*

Indeed, the dowry is obligatory because of the contract and does not depend on the meaning of having fun, and the obligation of the dowry is to be paid half because of the contract and half because of *dukbūl*.<sup>38</sup> Based on the verses that were revealed previously, it has been mentioned about the obligation to give a dowry according to its size so that it is not obligatory to repeat the discussion because it has been mentioned in the word of Allah: The verse about the dowry in Surah an-Nisa' (4): 4.<sup>39</sup>

وَأَتُوا النِّسَاءَ صَدَقَتِهِنَّ نِحْلَةً فَإِنْ طِبْنَ لَكُمْ عَنْ شَيْءٍ مِّنْهُ نَفْسًا فَكُلُوهُ هَنِيئًا مَّرِيئًا ۝

*"Give a dowry (dowry) to the woman (whom you marry) as a gift willingly"*.

Al-Thaba'thaba'i rejects all opinions that say the letter an-Nisa' verse 24 which is the argument for the permissibility of *mut'ah* marriage has been manskh. According to him, there is no verse that manskh it, because of what the Sunni scholars have said which states that this verse has been masked by surah al-Mu'ninun verse 5-7, the verses of divorce, the iddah verse, and the inheritance is not appropriate because it is not following the Nasikh mansūkh rules. In Al-Mu'minūn Verses 5-7

وَالَّذِينَ هُمْ لِأُزْوَاجِهِمْ حَافِظُونَ ۝ إِلَّا عَلَىٰ أَزْوَاجِهِمْ أَوْ مَا مَلَكَتْ أَيْمَانُهُمْ فَإِنَّهُمْ غَيْرُ مَلُومِينَ ۝ فَمَنْ أَتَبَغَىٰ وَرَاءَ ذَلِكَ فَأُولَٰئِكَ هُمُ الْعَادُونَ ۝

*"And those who guard their private parts, Except for their wives or their slaves; then verily in this they are blameless. Whoever seeks behind it, then they are the transgressors."*

<sup>37</sup> Tabataba'i, p. 271.

<sup>38</sup> Tabataba'i, p. 273.

<sup>39</sup> Tabataba'i, p. 274.

According to Al-Thaba'thaba'í this verse cannot interpret the letter an-Nisā' verse 24 regarding mut'ah marriage because it is not following the *nasikh mansūkh* rules. Because the in Al-Mu'minūn was revealed in Mecca while the An-Nisā' verse 24 regarding *mut'ah* marriages was revealed in Medina, according to Al-Thaba'thaba'í, *surah* Al-Mu'minūn was revealed earlier than the verse regarding *mut'ah* marriages, so the makiyyah verse can't be *mansukh* by the *Madaniyyah* verse.<sup>40</sup>

According to Al-Thaba'thaba'í as above in the divorce verse, '*iddah* and inheritance cannot be *mansūkh* verses about marriage *mut'ah*, because of the relationship between the marriage verse *mut'ah* with the verses of divorce, '*iddah* and inheritance are the relationships of 'ām and khāṣ or muṭlaq and muqayyad are not *nāsikh-mansūkh* relations.<sup>41</sup>

As stated in the verse on inheritance, it refers to marriages that are '*ām* (general) namely da'im marriages and *mut'ah* or munqathi marriages, then the sunnah specializes by setting aside one of them, namely *mut'ah* marriages, as well as the case with divorce verse.<sup>42</sup>

If the verse regarding *mut'ah* marriage can be a *mansukh* with the verse '*iddah*, according to Al-Thaba'thaba'í, this opinion is not clear at all, because according to him in *Mut'ah* marriage, there is also '*Iddah* but the count of '*iddah* in *mut'ah* marriage is different from '*iddah* in *mut'ah* marriage. However, according to Al-Thaba'thaba'í, if there is a difference in '*iddah* between *daim* marriage and *mut'ah* marriage, this is interpreted with *takhsis* (specialization) instead of *nāsikh* (deleted/copied).<sup>43</sup>

### Sayyid Husain Al-Thaba'thaba'í Thoughts and Its Relevance to Family Law in Indonesia

The analysis used in this study is the theory of *maqashid al-shari'ah*. Syatibi explained that *maqashid* sharia have been directly mentioned in the Qur'an and Sunnah or deduced from this by several scholars. All these things indicate the urgency of fulfilling *maslahah (jalb al-masalih)* of all mankind and to save them from harm (*daf'u al-mafasid / dar'u al-mafasid*).<sup>44</sup>

Al-Syatibi did not explain the definition of *maqashid* sharia in his book, he immediately explained the details of the contents *maqashid* sharia from the distribution. Syatibi shared *maqashid* be two, *qasdu al-syari'* (God's purpose) and *qasdu al-mukallaf* (purpose of *mukallaf*). Syatibi mentions that *maqashid* sharia is a

<sup>40</sup> Tabataba'i, p. 274.

<sup>41</sup> Tabataba'i, p. 274.

<sup>42</sup> Tabataba'i, p. 274.

<sup>43</sup> Tabataba'i, p. 274.

<sup>44</sup> Syarial Dedi, "Ushul Fiqih Menurut Paradigma Filsafat Ilmu (Kajian Ontologi, Epistemologi, Dan Aksiologi)," *Al-Istinbath Jurnal Hukum Islam* vol 5, no. 2 (2020).

reference used to determine the law so that there is conformity with the objectives of shari'a'. As-Syatibi formulated the concept of maqas{id khomsah or the five objectives of sharia:

1. *Hifẓ Din* (maintaining religion)
2. *Hifẓ Nafs* (care for the soul)
3. *Hifẓ Nasl* (care for offspring)
4. *Hifẓ Mall* (maintain the property)
5. *Hifẓ 'Aql* (maintaining Intellect)

Thoughts The concept of allowing mut'ah marriage by Al-Thaba'thabai when viewed from the side of benefit and harm, then mut'ah marriage can be said to have more negative aspects, this is what women suffer from. In Al-Thaba'thabai's concept of mut'ah marriage, husband and wife do not inherit from each other, this is contrary to Islamic law in general. Islamic Shari'ah regulates the inheritance relationship between husband and wife and the arrangement of its parts.

The secret behind the arrangement of mutual inheritance relationships given to women is to raise women's self-esteem, as during the jahiliyyah period women were objects that were used as inherited assets. Therefore, Islam came to give justice to women by giving a share of inheritance to women, namely half of the men.

The concept of *mut'ah* marriage which was conceptualized by Al-Thaba'thabai in the study of *maqashid* sharia analysis could not fulfill the conditions to be said to be *maqasid* sharia, because in the concept of *mut'ah* marriage there were inherent civil rights. to women in the form of abolished inheritance rights. That the husband and wife in a *mut'ah* marriage do not inherit from each other.

Then, regarding to the right to support the wife, in a *mut'ah* marriage, the husband is not obliged to provide for the wife, because it has assumed that the property given is sufficient at the beginning when there is an agreement regarding the time and dowry that has been determined at the beginning before the marriage is carried out.

Then regarding to child right custody, children who are born in *mut'ah* marriages are still related to their biological fathers, but in mut'ah marriages, if the agreement for the marriage period is completed, there will be a separation between the father and mother. In the event of separation of the parents, the child becomes crippled and less than perfect in his upbringing. Parenting is very closely related to child growth, as Heri Haryanto said in his research that the family is the most important institution in the process of child development. In

a family, children get the rules or norms, values , and education that are needed to deal with the environment in which they live.<sup>45</sup>

Through education, each individual is expected to understand and learn the norms that exist in society. Family care provides the basis for the formation of character behavior, morals, and children's education. If in the process of interaction, parents tend to be open, then the interactions that exist in the family-run harmoniously and dynamically will then lead to cooperation within the family. Harmonious interaction will be able to facilitate the child's socialization process. However, if the interaction process that is established is not harmonious, the child's socialization process will also be hampered, it will have an impact on the child's behavior pattern. Often heard cases of deviations in the behavior of children whether in childhood.<sup>46</sup> From this research, it can be understood that parental care is very influential on the development and growth of children, especially in the emotional and mental development of children.

Based on analysis *maqasid* sharia to maintain property or *hifz mall* (maintaining property) on the wife's property rights in the form of inheritance rights and livelihood rights and also to maintain *hifz's nasl* (maintaining offspring), then the mut'ah marriage conceptualized by Al-Thaba'thabaí must be rejected, because the formulation of the concept of marriage does not reflect the purpose of the law in it.

To provide strict rules regarding the prohibition of the practice of *mut'ah* marriage in Indonesia, it is also necessary to have a written rule to create legal certainty regarding regulations concerning regulations in Indonesia, so in this case, it is necessary to propose an amendment or amendment to Law No. 1 of 1974 concerning Marriage in Article 2 Paragraph (1) "Marriage is valid if it is carried out according to the law of each religion and belief". Paragraph (2) "Every marriage is recorded according to the prevailing laws and regulations". Based on this article, there will be multiple interpretations of the regulations regarding the validity of marriage in Indonesia, because *mut'ah* marriage is a marriage that is justified by some Shia Muslims.

To provide firmness to prohibit the practice of *mut'ah* marriage in Indonesia, it is necessary to amend Article 2 of Law Number 1 of 1974 concerning Marriage to a legal marriage is carried out following their respective religions and registered following the legislation. invitation".

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<sup>45</sup> Hari Harjanto Setiawan, "Family Parenting Patterns in the Child Development Process," Information 19, no. 3 (2014): p. 285.

<sup>46</sup> Setiawan, p. 286.

## Conclusion

Al-Thaba'thaba'i thoughts on family law in Indonesia, Al-Thaba'thaba'i's thoughts on the permissibility of *mut'ab* marriages are not relevant to the purpose of marriage and the purpose of making legislation. As the purpose of making law is the value of justice, usefulness, and legal certainty, besides that the law is also made to create benefit in society. Al-Thaba'thaba'i's thought regarding *mut'ab* marriage must be rejected because it violates the values of the legal objectives, namely justice, benefit, and legal certainty, and also harms the values of benefit. To provide firmness to prohibit the practice of *mut'ab* marriage in Indonesia, it is necessary to amend Article 2 of Law Number 1 of 1974 concerning Marriage to "a legal marriage is carried out following their respective religions and registered following the legislation. invitation".

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