

Pre-islamic Patriarchal Heritage As A Cultural Obstacle To Family Law In Constitutional Democracy

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Abstract

The tension between the principle of gender equality in constitutional democracy and the social reality of patriarchal societies poses a significant challenge in Muslim-majority countries. Despite the establishment of a contemporary legal framework aimed at safeguarding women's rights, gender-biased marriage practices persist. This study analyzes the characteristics of pre-Islamic Arab marriage practices as the historical roots of patriarchal culture and evaluates their influence on the effectiveness of family law in Indonesia. The present study employs a normative juridical method, utilizing a historical approach and content analysis of primary and secondary sources. The findings indicate that various pre-Islamic practices, including *istibdha'*, *maqthu'*, and the prevalence of guardianship, reflect a mindset that perceives women as objects. Despite the adoption of the principle of protecting women's rights in Indonesian positive law, such as the Marriage Law, remnants of the *Jahiliyyah* mentality impede its implementation, as evidenced by the prevalence of circumvention through unregistered marriages and the exploitation of polygamy rights. In conclusion, the existence of progressive laws alone is insufficient; there must also be a concomitant deconstruction of the legal culture in society. Constitutional democracy necessitates not only the establishment of regulatory frameworks but also the implementation of consistent law enforcement mechanisms to address the lingering effects of patriarchy, which impedes the attainment of substantive gender justice.

Keywords: Constitutional Democracy; Gender Equality; Patriarchal Culture; Pre-Islamic Marriage.

1. Introduction

The issue of gender equality in Islamic family law in Indonesia is gaining attention. Various Muslim feminist movements are demanding a reinterpretation of regulations that are considered to be unfair to women. The Compilation of Islamic Law (KHI) in Indonesia has granted women several rights, including the right to receive a dowry and financial support from their husbands, the right to file for divorce if they do not receive justice in their marriage, the right to joint property acquired during the marriage, and the right to refuse polygamy. However, in practice, many still position women as the weaker party in marriage [1].

The most significant obstacles to the implementation of gender equality in Indonesia are deep-rooted cultural, religious, and social influences. For instance, the dissolution of marriage is frequently initiated unilaterally by husbands without providing women with an opportunity to exercise their rights in the process. Although positive law in Indonesia

provides a legal mechanism for women to seek divorce through the courts, this process is often complicated by cultural and religious stereotypes [2].

When evaluated through the lens of historical analysis, patriarchal culture can be understood as a vestige of the pre-Islamic Arab *Jahiliyyah* period. The social landscape of Arabia prior to the advent of Islam was characterized by a social order that was devoid of established rules, guided instead by norms, principles, and religious tenets. This period in history is often referred to as the *Jahiliyyah* era. At that time, Arab society exhibited a paucity of humanity and moral principles. Consequently, the Prophet was sent to reform these inhumane morals and characteristics. During the *Jahiliyyah* era, women occupied a very low position in society. They regarded women as domestic animals, or even as inferior, due to the dearth of social respect accorded to women. Men were permitted to enter marital contracts and terminate them at will. During that period, women were regarded as a social disgrace to their families. A particularly egregious tradition was practiced by a tribe in Arabia, who, due to a deeply entrenched belief that women bring misfortune, would bury their daughters alive [3].

A comprehensive understanding of the matrimonial practices among the Arab populace prior to the advent of Islam is imperative for a nuanced exploration of the historical role of women. A thorough examination of the continuity and changes in marriage practices from the pre-Islamic period to the early Islamic period illuminates the influence of social and religious norms on women's lives. Moreover, a comprehensive understanding of these marriage practices is imperative for a nuanced analysis of the persistent challenges to gender equality in contemporary Muslim societies. Even though Islam emerged as a reformative force to elevate the status of women, the enduring legacy of patriarchy continues to exert its influence on contemporary social norms.

In the contemporary era, numerous nations have instituted constitutional democratic systems. This system underscores the imperative that laws and constitutions must be an articulation of the will of the people and democratic principles [4]. The main characteristics of constitutional democracy are the separation of powers, the rule of law, and the protection of civil rights [5], including human rights that uphold gender equality [6]. The present study aims to identify the characteristics of pre-Islamic marriage practices and to evaluate the extent to which these patterns influence the effectiveness of family law implementation in Indonesia. The present article puts forth the notion that the enforcement of constitutional democracy in gender issues necessitates more than mere regulatory reform; it must also address the deconstruction of legal culture, which remains influenced by pre-Islamic values.

2. Method

This research is of a qualitative nature and adheres to the principles of normative jurisprudence. Data collection was carried out through a literature study or library research, in which primary and secondary data sources were examined. The primary data sources utilized in this study were the Quran, Sunnah, and classical books related to marriage in pre-Islamic times. Concurrently, secondary data sources encompass literature and research journals pertinent to the subject matter. The approach employed in this study is a historical approach, as it examines the history of marriage in the era preceding the advent of Islam. This approach is then expanded with an analysis oriented towards gender equality and constitutional law to ascertain its relevance in contemporary times. Research data analysis

employs content analysis methodologies to ascertain the manner in which historical norms intersect with constitutional principles concerning gender equality.

3. Result and Discussion

3.1. Results

Marriage Practices of the Arab Nation in Pre-Islamic Times

Prior to the advent of Islam, as previously discussed, marriage was a prominent custom during the *Jahiliyyah* era. Initially, pinang marriage was observed. A pinang marriage (Shadaq) is defined as a marital union in which a man expresses his intention to marry a woman by proposing through a male guardian who facilitates the transaction by offering a dowry and subsequently entering the marital bond with the woman. Secondly, the *Istibdha* marriage, in which a husband instructs his wife, who is menstruating, to engage in relations with another man. Following the revelation of his wife's pregnancy, the husband engages in sexual intercourse with her. This union is intended to yield favorable and superior progeny. Thirdly, *rahthun* marriage, otherwise referred to as polyandry, is a marital arrangement in which a woman engages in sexual intercourse with fewer than ten men. In the event of a pregnancy, the men who have engaged in sexual intercourse with the woman convene at her residence to ascertain the paternity of the infant she has delivered. The paternal figure of the infant is determined by the maternal figure's selection of one of the men she finds appealing. The selected individual has no option but to acquire her wishes. Fourthly, the practice of marriage among women who do not categorically reject the prospect of intimate relations with numerous men. Flags are placed in front of their houses as a sign that the houses are available for entry. In the event of a pregnancy, the men who have engaged in sexual relations with the woman convene and seek the counsel of a shaman specializing in divination. This shaman will assess which man most closely resembles the baby and thereby assign the child to the appropriate man. The chosen man is not at liberty to refuse [7].

Zahidin et al. (2023) expanded the existing literature by incorporating a more comprehensive array of marital practices that took place during the *Jahiliyyah* period. Among these figures was *Maqthu'*. The occurrence of Mathu's marriage transpired in the aftermath of his father's demise, wherein a stepchild entered matrimony with his stepmother. Moreover, the practice of *Khadan* marriage was observed during the *Jahiliyyah* period. *Khadan* marriage is defined as the union of a man and a woman in private, without the formalization of a marriage contract or, in contemporary terms, cohabitation. During that period, such behaviors were not regarded as criminal or immoral, provided they were conducted in secrecy [8].

The subsequent topic is *Badal* marriage. *Badal* marriage is a nuptial union in which husbands exchange their wives. The exchange of a dowry or a formal proposal is not a prerequisite for this union. Rather, the primary requirement is an agreement between the two husbands. An additional form of matrimony observed within the Arab cultural context is known as *Syighar* marriage. *Syighar* marriage is a distinct matrimonial arrangement that contrasts with the *Badal* marriage previously delineated. *Badal* marriage agreements are typically established between spouses, whereas *Syighar* marriage agreements are generally concluded between in-laws and their brothers [9].

Next is *Nikah Zhai'inah* or *Sabiah*, which is the marriage of the victors with female captives from the defeated side in the war [9]. The final type of marriage under discussion is *Mut'ah* marriage, which was permitted in the early days of Islam until the Prophet

Muhammad forbade it. Mut'ah marriage, also referred to as contract marriage, is a type of marriage that is entered into for a specific duration, primarily for the purpose of fulfilling sexual desire rather than procreation [10]. It can be concluded that Mut'ah marriage is adultery wrapped in the traditions of the Arab *Jahiliyyah*.

Prior to the advent of Islam, women were similarly devoid of the autonomy to select their future spouses. Given that women were regarded as commodities belonging to their fathers and guardians, it was these figures who wielded the authority to determine a woman's marital partner. The age at which individuals entered into matrimony during that period is not easily ascertained. This phenomenon can be attributed to the presence of a variety of marriage systems within the community. It is noteworthy that certain tribal communities may have adopted a more youthful matrimonial age, while others have opted for an advanced age at marriage [11].

Regarding the giving of dowries in pre-Islamic times, dowries had to be given to the tribe or family of the bride as compensation and as a means of creating stability in the bond and relationship between the two families [12]. The dowry is understood as payment for sexual intercourse and is often interpreted as the purchase price of a woman from her guardian, thereby giving the husband the freedom to do anything to his wife [13]. At other times, the dowry is also considered compensation to the guardian who has cared for the woman. In the days of ignorance, the dowry was a substitute for money owned by the family, so that it became the property of the clan or tribe or was controlled by the woman's family [14].

In the Arabian Peninsula prior to the advent of Islam, polygamy was also a social norm. According to historical accounts, tribal chiefs at that time had multiple wives, a practice that was subsequently restricted by Islam [15].

In that era, the practice of divorce among Arabs did not adhere to the Islamic restriction of three divorces. According to the account of Urwah bin Zubair, as interpreted by Ibn Adil, in bygone eras, men had the prerogative to divorce their wives at will and without any restrictions. Prior to the initiation of the three-month waiting period, the divorced wife would be taken back, then divorced again, then taken back again, and so on repeatedly with the intention of causing her emotional distress [16]. Concurrently, the legal framework conflated gender roles, granting men the exclusive prerogative to initiate divorce proceedings and subsequently reconcile, while women were systematically denied the right to file for divorce. If a husband who had previously divorced his wife expressed a desire to reconcile, the woman was unable to decline the request. The husband was also entitled to initiate divorce proceedings and subsequently reconcile with his wife, without any restrictions on the number of times he could do so [17].

In the pre-Islamic era, the practice of "dzihar" was understood to be tantamount to a husband declaring divorce and thereby prohibiting marital relations with his wife. The implication of this statement was that relations between husband and wife were forbidden forever. However, after the advent of Islam, the practice of *dzihar* was also prohibited, and Allah, in His infinite wisdom, established the concept of *kafarat* to prevent the recurrence of this transgression [18].

Historically, the practice of *ila'* was also prevalent in the *Jahiliyyah* period. According to Islamic law, *ila'* is an oath taken by a husband to his wife not to have sexual relations with her for an indefinite period. At that time, *ila'* was practiced by Arab society to punish wives due to the stigma that wives were inferior to husbands. Husbands practiced *ila'* in pre-Islamic

times for an indefinite period, causing suffering for wives because their rights were not properly fulfilled [19].

The Implications of Marriage Practices on the Status of Women in the Pre-Islamic Era

Pre-Islamic Arab society exhibited a profoundly patriarchal culture, manifesting in both social and political spheres. This historical context gave rise to a state of gender inequality. At that time, gender relations in society generally accorded men a very dominant role in various fields, including the institution of marriage. Within the context of the family system, men wielded the authority to arrange marriages for their daughters with other men, often disregarding their daughters' personal preferences and inclinations. In the marital context, husbands possessed the prerogative to terminate their marriages and subsequently enter new marriages with their wives at their discretion, independent of their wives' consent. Concurrently, women were susceptible to being acquired through voluntary or coercive means [20].

The historical prevalence of male dominance over female individuals, a phenomenon often referred to as "the gender hierarchy," has been identified as a contributing factor to the suboptimal social status of women in many societies. Consequently, the issue of women's rights was disregarded. During this period, women were subject to the authority of men, whether these men were brothers, fathers, or husbands. The concept of men's rights over women during that period can be likened to the notion of men holding ownership rights over property [21].

The status of women in pre-Islamic times was comparable to that of slaves, lacking any rights or dignity. According to the prevailing norms of the time, female heirs were not entitled to receive any portion of the inheritance from the property bequeathed by their parents or spouses. In the event of divorce, husbands were at liberty to terminate their marriages and repudiate their wives at will. In this paradigm, husbands wielded the authority to accuse their wives of illogical wrongdoing and subject them to public disgrace, a tactic that effectively deterred potential suitors. This dynamic enabled husbands to evade financial responsibility and potential retribution, while maintaining a sense of autonomy and freedom from accountability [22].

3.2. Discussion

The Legacy of Pre-Islamic Patriarchy and the Challenge of Gender Equality

Marriage practices in the pre-Islamic era showed extreme patriarchal dominance, which regarded women as objects that could be bought and sold, far removed from the universally recognized principle of gender equality. This pattern was not only found in existing forms of marriage, but also in women's rights to dowry, divorce, polygamy, and even inheritance.

Marriage practices in pre-Islamic times, such as *istibdha'*, *maqthu'*, *rahthun*, *khadn*, and *syighar* marriages, demonstrated injustice and inequality towards women in marriage. Marriage was conducted solely for the purpose of satisfying sexual desires and producing good offspring, without using a marriage system that upheld the dignity of women; instead, their existence was exploited. For example, in the case of *istibdha'* marriage, women did not have the power to refuse their husband's wishes to have children from a man of high social status. Wives are treated like borrowed goods that can be lent to anyone according to the husband's wishes. The objectification of women also occurs in *maqthu'* marriages. Women are treated like goods that can be inherited by their families. Instead of obtaining inheritance

rights upon the death of their husbands, women are treated as part of the inheritance for their husbands' families [23]. Although Islam and Marriage Law No. 1 of 1974 have been introduced to empower women, the stigma of women as second-class citizens and the standardization of domestic roles for women are still commonly found in society. A wife seems to have to do all the household chores such as cooking, taking care of children, cleaning the house, and so on, while the husband is only responsible for earning a living [24].

The practice of *syighar* and *maqthu'* marriages in the *Jahiliyyah* period positioned women as commodities to be exchanged between men. This mentality is reflected in the misunderstanding of some people about the rights of guardians. The Compilation of Islamic Law requires the consent of the prospective bride, but deep-rooted patriarchal culture often places the consent of the guardian above that of the woman herself, which in extreme cases can lead to child marriage. In his research, Mohsi (2020) explains that the community's textual understanding of *fiqh* has led to a misunderstanding of *wali mujbir*, which assumes that the guardian has a central position over his daughter, including determining whom she marries [25].

A similar situation occurred with the practices of polygamy and divorce during the *Jahiliyyah* period, which demonstrated the imbalance of power in marital relationships. Polygamy at that time was practiced with the aim of increasing the number of offspring for the benefit of the tribe, expanding power and political influence, and as a form of female slavery [26]. Similarly, the right of men to divorce their wives without restriction indicates a lack of legal protection and power for women over crucial decisions in their lives, including choosing a husband before deciding to marry, which in the days of ignorance was in the hands of the guardian. Although this practice was abolished after the advent of Islam, the perception of women as being under the authority of men is still manifested in the contemporary era in the form of domestic violence, excessive control over economic access and double burdens in the household, and the non-involvement of wives in household decision-making [27].

The Role of Constitutional Democracy in Promoting Gender Equality

The concept of constitutional democracy has been widely adopted by countries around the world and has become a symbol of the development of contemporary systems of government characterized by the recognition and equality of human rights. Constitutional democracy simply means sovereignty or power that is limited by the rule of law. Constitutional democracy is a concept formed by combining the principles found in the concepts of "democracy" and "constitution." Democracy (democratie) contains the principles of popular sovereignty, while the constitution contains the principles of the rule of law (nomocratie) [28]. Although democracy is considered a symbol of contemporary government, it has existed and developed since Plato's time as a response to the dictatorship of Greek rulers [29], which primarily emphasizes the values of justice, recognition of diversity, orderly governance, minimization of violence, and peaceful resolution of disputes [30]. The Constitution, which represents the Rule of Law, according to C.F. Strong, is a set of principles relating to government power, the rights of the governed, and the relationship between the two [29], where the constitution is agreed upon by the entire community regarding common goals and ideals, the foundations of government, and the form of institutions and constitutional procedures.

According to Islamic doctrine, the concept of establishing a constitution was initially promulgated by the Prophet Muhammad SAW during his tenure as leader of the city of

Medina. At that time, Medina was comprised of a diverse array of ethnic groups, races, and religious affiliations. This multicultural environment prompted the Prophet Muhammad SAW to establish a set of guidelines that would be universally recognized by all groups, thereby ensuring their collective well-being and security. The Prophet initiated the Aqabah I agreement in 620 AD and the Aqabah II agreement in 621 AD. It was from these two agreements that the Medina Constitution, also known as Al-Shahifah, came into existence in 622 AD. Subsequent to this, Al-Shahidah underwent extensive study by Western and Muslim scholars, who referred to it by various terms, including: *The Constitution of Medina* was authored by W. Montgomery Watt; the *Charter* was written by R.A. Nicholson; the *Treaty* was penned by Philip K. Hitti; and the *Piagam* was composed by Zainal Abidin Ahmad. In Islamic political thought, the concept of democracy is encapsulated by the terms "shura" or "musyawarah." The practice of Shura, as exemplified by the Khulafaurasyidin, entailed the resolution of conflicts between Muslims and non-Muslims, as well as the process of ijtihad in concluding a law that grants freedom of opinion to the ulama [29].

As delineated above, constitutional democracy is predicated on a set of principles, values, and objectives that affirm the balance between sovereignty and the law. According to Jimly Asshiddiqie's formulation, the principles of constitutional democracy are as follows: The fundamental principles of justice include the guarantee of equality, the recognition of differences, the existence of binding laws, and the existence of dispute resolution mechanisms [28]. In the global standard framework, the spirit of constitutional democracy can be seen in the formulation of Sustainable Development Goal 16, which reads: Peace, Justice, and Strong Institutions. Although it does not explicitly mention the importance of constitutional democracy, the goals and ideals of peace, justice, and strong institutions are principles and values contained in the concept of constitutional democracy and can only be achieved if this concept is implemented in good governance practices.

In the context of gender equality issues, the concept of constitutional democracy has greatly influenced perceptions, worldviews, and socio-cultural aspects in various countries, especially Muslim countries, regarding how they view the status of women in marriage. In Pakistan, for example, the provisions of the Family Law Ordinance of 1961 emerged from a long period of democratic turmoil. These provisions address marriage registration, the prohibition of marrying underage women, and polygamy, all of which have significantly altered societal perspectives on male dominance in marriage [31]. Another example is Indonesia, where patriarchal culture and the protection of women's status in marriage are reflected in the enactment of Law No. 1 of 1974, the Compilation of Islamic Law (KHI), Law No. 23 of 2004, and Law No. 12 of 2022 on Criminal Acts of Sexual Violence. A non-democratic country that has felt the effects of constitutional democracy is Iran, where in 1927 the people began to demand changes to women's rights, which were then regulated by several laws, starting with the Iranian Civil Code in 1930, the Marriage Law in 1931, and the Family Protection Act in 1967. Although today Iran's regulations have reverted to fairly radical Sharia law, the previous regulatory changes significantly altered women's perceptions of their position in marriage, leading many of them to abandon the practice of mut'ah marriage, which is detrimental to women [32]. Overall, these examples show that constitutionalism and democracy play a major role in minimizing patriarchal culture and protecting women's rights. While constitutional democracy is widely regarded as a utopian concept that has the potential to actualize the equal rights of women, it is important to acknowledge the challenges that are likely to be encountered in the process. Muslim countries are confronted with persistent and

emerging challenges stemming from the discord between the principles of women's status in pure Sharia values and the prevailing cultural and customary practices that do not align with Islamic values. In Islamic marriage, for instance, the guardian plays a pivotal role in the marriage contract. This guardian's consent is necessary for the woman to marry the groom and is intended to ensure the woman's well-being and protection [33]. However, over time, there are those who understand Sharia only in terms of text without context, thus transforming it into a misguided traditional understanding. The presence of guardians has often been transformed into a patriarchal hierarchical culture, where guardians impose their will to marry off girls to men of their choice and, in some countries, this practice is even carried out on underage girls. According to UNICEF data, around 12 million girls worldwide are married before the age of 18, with this phenomenon being particularly prevalent in South Asia and Sub-Saharan Africa [34]. This phenomenon has deprived women of their rights (education, health, bodily autonomy) and even their most fundamental right, which is the right to dream of living the life they desire.

An additional illustration of this phenomenon is the practice of polygamy. In Islam, polygamy is permitted under certain conditions. These conditions include the ability to be fair, the existence of certain circumstances, such as wars that claim many male lives, and other serious reasons [35]. However, in society, the permissibility of polygamy is often considered value-free, and its practice is facilitated by all means without clear justification. The practice of *nikah siri*, for example, which means secret marriage or unregistered marriage, is often used as a way to circumvent strict polygamy regulations [36]. This can threaten women's rights, such as the right to financial support, inheritance rights, and legal protection within the household [37]. In Indonesia, for example, despite the existence of Marriage Law No. 1 of 1974, which regulates polygamy, as well as provisions in the Compilation of Islamic Law, the practice of unregistered marriages remains rampant.

The existence of various challenges in implementing a good and proper constitutional democracy is a concern for all societies in various countries and therefore more serious steps must be taken to abandon patriarchal culture and realize justice and equality for women's rights. Among the steps that need to be taken are: (1) Promoting access to and quality of education for women, especially in countries that still adhere to patriarchal culture. (2) Providing more space and opportunities for women to participate in politics and government, expand their careers, and provide certainty of their roles in society and the household. (3) Effectively implementing institutions for the protection of women and establishing a National Human Rights Commission for Women. (4) Effectively revitalizing, dynamizing, and organizing the roles and outputs of institutions related to women's issues in the international community as a concern of the United Nations. (5) Making continuous efforts to raise awareness about moral and ethical education in the family, the output of which is to form a *sakinah, mawadah, warahmah* family.

As previously mentioned, the most fundamental aspect that will greatly influence the status of women in marriage is the practice of moral-ethical democracy within the household. This is preceded by a description of the steps of constitutional democracy in the context of state administration. This manifests in the form of discussion rights and the freedom of opinion for all family members. Consequently, a democratic family contributes to the cultivation of future generations who, in turn, perpetuate democratic values within society.

4. Conclusion

This study concludes that pre-Islamic marriage practices, such as *istibdha'* marriage and unlimited polygamy, were extreme manifestations of a patriarchal social structure that treated women as commodities. Islam came to deconstruct this order, and this spirit of reform has been adopted into Indonesia's modern legal system through the Marriage Law and the principles of constitutional democracy. However, this study finds that the main challenge today is not the absence of laws, but rather the weak effectiveness and implementation of laws due to strong cultural resistance. The legacy of pre-Islamic mentalities still influences the behavior of people who often seek loopholes in the law, so that the goal of legal protection for women is often not achieved in practice. Therefore, this study contributes to the argument that the harmonization of Islam and constitutional democracy in Indonesia cannot stop at the legislative stage. Synergistic efforts are needed to build a gender-conscious legal culture. Strategic steps forward must focus on strengthening law enforcement institutions, public education to erode patriarchal interpretations of religion, and guaranteed access to justice for women. Thus, the law will not only be an ideal text on paper but will live as a norm that regulates and protects women's rights in everyday social reality.

Finally, as an Indonesian citizen, the author would like to propose an ideological concept that can realize gender equality in an appropriate and proportional manner based on constitutional democracy, namely the ideology of Pancasila. Pancasila consists of five points that prioritize morality, as reflected in the first principle of Pancasila, namely "Ketuhanan yang Maha Esa," so that cultural ideologies that are not in line with Indonesian culture can be controlled by an Indonesian-style ideology.

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