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Legal Reformulation of *Nusyūz* in Marriage From The Perspective of *Critical Legal* Studies

Fitri Maulina Alviani [a,1],* Nabil Nizam [b,2]

[a] Islamic State University of Sunan Kalijaga Yogyakarta, Jalan Marsda Adisucipto Yogyakarta 55281, Indonesia
[b] Islamic State University of Sunan Kalijaga Yogyakarta, Jalan Marsda Adisucipto Yogyakarta 55281, Indonesia
[1] fitrimaulinaalviani@gmail.com *; [2] nabilnizam@gmail.com

* corresponding author

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ABSTRACT

The problems of Islamic family law over time, seem increasingly complex. Included in this is nusyūz which so far has been taken for granted by society in the provisions of positive law in Indonesia. This article seeks to examine the problems of nusyūz normativity based on the critical legal studies (CLS) paradigm, namely one of the substitutions for the legal school of realism that is present in the classification of the post-modern era of law. There are two main topics of discussion: First, the ratio legis of nusyūz in Indonesian legislation from a CLS perspective; and Second, the reformulation of the upcoming nusyūz law in marriage legislation in Indonesia. This article argues that the ratio legis nusyūz in Indonesian legislation in terms of the trashing, deconstruction, and genealogy approaches of CLS still has a legal construction that is not in favor of justice and social interests as well as the reformulation of the upcoming nusyūz law in marriage legislation in Indonesia based on a philosophical, sociological, and juridical foundation can be implemented through the formation of new

Author correspondence email: fitrimaulinaalviani@gmail.com
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laws in the form of laws governing marriage law or Islamic material law or by making changes or revisions to the Compilation of Islamic Law.

1. Introduction

The problems of Islamic family law over time have become increasingly complex. Due to the rapid advancement of information technology, it is easier for people to get various perspectives on the law. Perceptions that lead to public awareness of the law of an act are no longer taken for granted, but are more skeptical with various logics behind them.

This includes the problem of nusyūz that has been taken for granted by the community in the provisions of positive law in Indonesia. Various views that are more skeptical, responsible, and constructive are increasingly showing their existence in criticizing the conception of nusyūz as stated in Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law (KHI).

Not only in the form of journals, scientific magazines, and law books, criticism related to nusyūz has also been carried out by the government through the Ministry of Religious Affairs in 2004 through a draft law called the Counter Legal Draft KHI (CLD- KHI).

According to Wahid in Abul Khair, the CLD-KHI emerged as a follow-up to the mandate of Law Number 25 of 2000 concerning the National Development Program for 2000-2004 (Propenas 2000-2004 Law) and the Draft Law on Applied Law for Religious Courts. At the time, CLD-KHI was also proposed to be made into a law, but because there were still many pros and cons in the community, by Maftuh Basyuni - the Minister of Religious Affairs at the time - the draft was frozen and not submitted (Khair 2016).

Regardless of the condition of the CLD-KHI's unenforceability in the past, at least this shows that opposition to the conception of KHI in general and the conception of nusyūz in particular has been going on for a long time and has even been opposed by renowned Islamic law experts in the government. One of the ideas and concepts of nusyūz offered is found in Article 48 of the CLD-KHI, which basically explains that nusyūz is an act that can be committed by both the wife and the husband (Maisyal 2016).

It is completely different from the provisions of Article 80 paragraph (7) and Article 84 KHI which adheres to the concept of nusyūz only owned by the wife. Article 80 paragraph (7) KHI elaborates that nusyūz can be a condition that the husband does not need to support his wife, while Article 84 KHI elaborates that the meaning of the wife's nusyūz is the non-performance of the obligation to be physically and mentally devoted to the husband (vide Article 83 paragraph (1) KHI).

Islamiyati once explained that the meaning of filial piety outwardly is to show (manifest) actions that are loyal, submissive, respectful, and obedient to the husband. As for the meaning of filial piety inwardly is the condition of the soul, the basis of belief, and factors in a sincere heart to remain loyal, respectful, and submissive to the husband (Islamiyati 2013). The obligation of filial piety, according to Rofiq, is determined based on the provisions of Surah Al-Nisā' verse 34 which states: Ahmad Rofiq, Hukum Islam Di Indonesia (Jakarta: Raja Grafindo Persada, 2000), p. 167.

اَلرِّجَالُ قَوَّامُوْنَ عَلَى النِّسَآءِ بِمَا فَضَّلَ اللّٰهُ بَعْضَهُمْ عَلٰى بَعْضٍ وَّبِمَآ اَنْفَقُوْا مِنْ اَمْوَالِهِمْ ۗفَالصّٰلِحٰتُ قٰنِتٰتٌ حٰفِظٰتٌ لِّلْغَيْبِ بِمَا حَفِظَ اللّٰهُ ۗوَالّٰتِيْ تَخَافُوْنَ نُشُوْزَهُنَّ فَعِظُوْهُنَّ وَاهْجُرُوْهُنَّ فِى الْمَضَاجِعِ وَاضْرِبُوْهُنَّ ۚفَاِنْ اَطَعْنَكُمْ فَلَا تَبْغُوْا عَلَيْهِنَّ سَبِيْلًا ۗاِنَّ اللّٰهَ كَانَ عَلِيًّا كَبِيْرًا

Men are the protectors of women because Allah has favored one over the other and because men provide for them. Pious women should be obedient and take care of themselves when their husbands are not around, just as Allah takes care of them (pious women). And if you fear that a woman is disobedient, then counsel her, separate her from her husband, and if necessary beat her. But if they obey you, then do not seek to transgress. Verily, Allah is the Most High, the Most Great.

Based on Surah Al-Nisā' verse 34 which explains the husband's position to earn a living, if the wife is not devoted (nusyūz), then the wife does not deserve to earn a living. This also applies if in the future the wife's nusyūz is challenged or proven in a trial case in a religious court (Mansari; Fatahillah 2021).

Not a few academics, experts, and activists who are involved in the field of law enforcement have criticized the wife's nusyūz provision. Maisyal believes that the provisions of Article 84 KHI directly contradict the perspective of gender justice. It is not fair to impose one legal consequence on one thing that is paired, but the other one is not at all (Maisyal 2016).

The issue of nusyūz has basically been studied a lot, both from academics, legal experts, legal practitioners, to gender activists, however, if it refers to the applicable positive law Article 84 KHI still exists. This implies that it is still necessary to carry out new scientific evidence that is better and more comprehensive in accordance with legal needs and a sense of justice in society.

This research seeks to examine the problem of nusyūz based on a completely different perspective from previous studies, then add a follow-up based on future legal reformulation. We can explicitly identify two legal issues (research problems) that become the gap between das sollen and das sein, namely those related to - to borrow Soerjono Soekanto's term in Dimyati - legal principles and legislative systematics (Dimyati 2016).

First, as described by I Dewa Gede Atmadja that legal principles are the thoughts or main ideas behind a rule, then in looking at the problem of this research, the main problem raised is how the idea of normativity of nusyūz in legislation is contrary to the idea of normativity that should be (Atmadja 2018).

There is a legal doctrine that is an elaboration of the humanist legal school in the 1970s, namely critical legal studies. The main idea underlying the presence of this legal teaching is the argument that the legislative process (substantively) is nothing but a political process in which there are tendencies of interest (Atmadja and Budiartha 2018). The postulate of this argument is explicitly the antithesis of the pure legal teaching that has been promoted by Hans Kelsen and Hans Nawiasky (Kelsen 2011).

Because the rules in legislation are highly political, it is not excessive to direct the legislative process to the formation of constructive law, which is directed towards social interests and stability. This rationale cannot be separated from the bitter experience of humanists who feel that the liberal legal style in the United States has led American society to oligarchic individualism (K, Sambas, and Alfin 2016).

The basic construction of critical legal studies (CLS) as described above, when faced with the main idea of normativity of nusyūz in Articles 80 and 84 KHI, there will be a gap. Based on the CLS perspective, the political constellation of Islamic law formation - especially the issue of nusyūz - should not be implemented partially. Considering that Surah Al-Nisā verse 128 also describes the husband's nusyūz actions, that is, if a wife fears that her husband might be unfaithful or indifferent to her, then efforts can be made to reconcile between them. It is better to choose peace, even though naturally men tend to be stingy. If you mend your relationship and fear Allah, then indeed Allah is All-Knowing of what you do.

Second, related to the problem of systematic research of legislation. This refers to the inconsistency of the nomativity of Article 80 KHI faced with the provisions of Article 79 paragraph (2) KHI which outlines that the rights and obligations of the wife and husband in marriage should be balanced. No party should have domination and discrimination in the household and in social life.

Contrary to what Article 80 paragraph (7) KHI suggests, a husband may waive his obligation to provide for his wife if it is known that she is nusyūz. When a contrario construction of legal thinking from the Continental Europeans (mafhūm mukhālafah) is carried out, it cannot be found the law of husband's nusyūz and its legal consequences. This means that in this case Article 80 paragraph (7) KHI does not equally regulate the issue of nusyūz in accordance with the instructions of Article 79 paragraph (2) KHI, whereas in addition to KHI, Article 31 paragraph (1) of Law Number 1 Year 1974 concerning Marriage also implies the rights and position of husband and wife which should be balanced.

Another issue that is still within the scope of statutory systematics is the form and position of Presidential Instruction in KHI which is only implied in Article 7 paragraph (2) of Law Number 12/2011 on the Formation of Legislation (UUP3). Based on the provisions of the article in the law a quo, the form of Presidential Instruction that has been formed is nothing but regeling which is equivalent to a Presidential Regulation.

Materially, Presidential Regulations should regulate specific matters related to the duties of the government as an executive, not abstract general norms for the community. This is what Sirajuddin describes as the difference between regeling and besceking, there are different norms between each legal product. It should be in accordance with the provisions of the principles of the formation of good laws and regulations, as outlined in Article 5 of UUP3, a regulation must have compatibility between the type of regulation and the content of the regulated material (Sirajuddin, Fatkhurohman, and Zulkarnain 2015).

Based on this last problem, descriptive research cannot be carried out alone, but it is necessary to express the idea of reformulating the law of nusyūz. The first research problem is a 'touchstone' that substantively tests the normativity of nusyūz based on CLS. It is explicitly explained that the purpose of this writing is to identify the ratio legis of the provisions on a wife's nusyūz towards her husband in Indonesian legislation and then analyze its relevance from the perspective of critical legal studies. Additionally, this research aims to practically provide future reformulations concerning the provisions on nusyūz in Indonesian legislation.

As an effort with novelty, this article observes that several similar topics – as outlined below – have not boldly examined Islamic legal provisions based on a more radical legal approach such as Critical Legal Studies that emerged in the West. The closest perspective is the research conducted by Al Fitri, Alamsyah, Sadari, and Is Susanto using a gender equality approach. In their study, Al Fitri et al. view that the provisions on a wife's nusyūz as regulated in Articles 80, 84, and 125 of the KHI do not a contrario regulate how a husband can also commit nusyūz (Fitri et al. 2021).

Ahmad and Rozihan, in their other writing, attempt to analyze the normativity of the KHI based on the Qur'an regarding nusyūz with the perspective of mafhūm mubādalāh (reciprocal interpretation) by Faqihuddin Abdul Kodir. By focusing on the concept of nusyūz from a mubādalāh perspective and the impact of the mafhūm mubādalāh method on nusyūz, Ahmad and Rozihan find that the husband can also be identified as committing nusyūz. Consequently, the husband must also be aware that marriage is a process towards sakinah, mawaddah, and rahmah (Ahmad and Rozihan 2021).

Ucun et al., in their article titled "Interpretation of Nusyūz According to Hasbi Ash-Siddiqie in Tafsir An-Nur: An Analytical Study of Surah An-Nisa Verse 34," describe the

issues of literal interpretation that seem to give legality to husbands for committing violence against their wives. By using the interpretative perspective of Hasbi Ash-Siddiqie, Ucun et al. conclude that the intent of hitting a wife is with a blow that does not cause pain, but merely serves as a warning (Hopidoh, Fadli, and Sodikin 2024).

Specifically on the topic using the perspective of Critical Legal Studies, there is an article by Abd. Azid et al. which mentions that this school of thought has made significant contributions to revisiting several past fiqh provisions, including those related to family law (Azid, Ariffin, and Ramli 2020). The jurisdiction of the study, which is still global, has not yet been contextualized with Islamic law that is also manifested in positive law. Therefore, this writing's position becomes important in the context of practical application with Indonesia as its jurisdiction.

2. *Research Method*

As a scientific accountability in the writing of this article, the arrangements related to nusyūz and critical legal studies that apply as independent variables, it is necessary to establish a series of relevant legal research methods. In terms of the non-field characteristics of the data sources (legal materials), the type of normative legal research is considered relevant. The approach used is specifically its own, namely the statutory approach, conceptual approach, and philosophical approach. The use of a statutory approach relates to the starting point of the object of research problems which includes the provisions of Article 84 KHI, the *ratio legis* of its regulation, as well as its relation to other laws and regulations, through harmonization and synchronization. The conceptual approach includes legal principles, rules, and relevant legal theories, while the philosophical approach serves to identify the legal politics behind the regulation of nusyūz in Indonesian legislation and the ideal view based on critical legal studies.

The determination of the type and approach of legal research in this article is then also detailed with the allocation of determining legal materials which include primary, secondary, and tertiary legal materials. The collection technique is in accordance with what Yaniawati (2020) suggests - based on literature study research in general - which includes the process of editing, organizing, and concluding. After all legal materials were collected, the legal materials were analyzed in two stages. First, it deals with identifying the ratio legis of the nusyūz provision using legal content analysis. Second, with regard to finding the relevance of the ratio legis of the nusyūz provision with critical legal studies, a syllogistic legal reasoning technique will be used (Efendi, 2018).

Results and Discussion

a. *Ratio Legis Nusyūz in Indonesian Legislation from the Perspective of Critical Legal Studies*

Tracing the ratio legis on the normativity of nusyūz is expected to provide clarity regarding the spirit, main idea, or meaning behind its regulation. Given that the ratio legis has a role as an explanation of the purpose of a norm in legislation (Dyrda 2018). Another term used by Campbell in Black's Law Dictionary to describe the meaning of ratio legis is the reasons a law is formed (Black 1968).

The reasons used as the foundation for the formation of the law - as the meaning of ratio legis - in this case can be signaled normatively either through original intent, asbāb al-Nuzūl, ratio decidendi of decisions related to research variables, legal principles or

even through authentic and systematic interpretation of legislation. If the ratio legis of the nusyūz law has been found, then this section will analyze it using the CLS trashing, deconstruction, and genealogy approaches.

The normativity of nusyūz regulated in the legislation as described in the previous discussion is Article 80 paragraph (7) and Article 84 KHI. Article 80 paragraph (7) states that the husband's obligation to bear maintenance, kiswah, and maskan, including the wife's care and medical expenses, can be canceled if the wife commits nusyūz. It can be understood that teleologically, the paragraph in this Article is part of the discussion of the husband's obligations.

Article 80 paragraph (7) KHI is a condition that reduces the husband's obligation to his wife. As described by Rofiq, Article 80 KHI as a whole has an original intent based on the provisions of Surah al-Nisā' verse 34.15 Based on this, it is not excessive to assume that there is a legal construction method of mafhūm mukhallafah related to the act of nusyūz.

Given that Surah al-Nisā' verse 34 elaborates "Men are the protectors of women because Allah has favored one over the other and because men provide for them". It appears that the majority of scholars from the Shafi'iyyah make the wife's obedience a condition of maintenance, meaning that the wife's disobedience means that the husband is not obliged to provide maintenance.

Corroborating this analysis, Ibn Rushd as quoted by Muchtar and Sutarso stated that he outlined five conditions for wives to receive maintenance from their husbands (Muchtar and Sutarso 2021):

1. The valid marriage contract between husband and wife;
2. An attitude of submission to one's husband, even if there has been no sexual intercourse between the two;
3. The wife's willingness to follow wherever the husband decides to live;
4. The wife already has a mature condition. Given that Aisyah was married to the Prophet Muhammad at a young age, then Aisyah was not yet a dependant of the Prophet's maintenance; and
5. Wife's obedience to husband.

Ibn Hazm, with an opinion that contradicts the Shafi'iyyah, explained that maintenance is the husband's obligation that must be given during the marriage, whether or not there is nusyūz based on the provisions of Surah Al-Baqarah verse 233:

وَالْوٰلِدٰتُ يُرْضِعْنَ اَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ اَرَادَ اَنْ يُّتِمَّ الرَّضَاعَةَ ۗوَعَلَى الْمَوْلُوْدِ لَهٗ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوْفِ ۗ لَا تُكَلَّفُ نَفْسٌ اِلَّا وُسْعَهَا ۚ لَا تُضَاۤرَّ وَالِدَةٌ ۢبِوَلَدِهَا وَلَا مَوْلُوْدٌ لَّهٗ بِوَلَدِهٖ وَعَلَى الْوَارِثِ مِثْلُ ذٰلِكَ ۚ فَاِنْ اَرَادَا فِصَالًا عَنْ تَرَاضٍ مِّنْهُمَا وَتَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا ۗوَاِنْ اَرَدْتُّمْ اَنْ تَسْتَرْضِعُوْٓا اَوْلَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ اِذَا سَلَّمْتُمْ مَّآ اٰتَيْتُمْ بِالْمَعْرُوْفِ ۗ وَاتَّقُوا اللّٰهَ وَاعْلَمُوْٓا اَنَّ اللّٰهَ بِمَا تَعْمَلُوْنَ بَصِيْرٌ

Mothers are to breastfeed their children for two full years, for those who wish to complete breastfeeding. Fathers are obliged to provide sustenance and clothing in a ma'rūf manner. No servant should be burdened with more than he can bear. The mother should not suffer because of the father, nor should the inheritance. If both (husband and wife) want to stop breastfeeding the child before two years with sincerity and consensus, there is no sin on them. If you want to breastfeed the child through someone else with

proper payment, there is no sin on you. Fear Allah and know that Allah is All-Seeing in all that you do (Muchtar and Sutarso 2021).

Based on Ibn Hazm's opinion above, it is interesting to note Mukhammad Suharto's opinion that nusyūz is only an act of defiance that can be committed by the husband or wife. The legal consequences of nusyūz based on Surat al-Nisā' verses 34 and 128 only imply giving advice, separating, beating, and reconciling the two parties. The legal principle contained therein is the principle of peace between the two parties and maintaining the marital relationship (Suharto 2016).

A more specific case-by-case look at the asbāb al-nuzūl of verse 34 shows that the prohibition of wife disobedience does not require a husband to retaliate by hitting his wife, which may even be considered wrong to teach her a lesson. As for the asbāb al-nuzūl of verse 128, it shows that the husband's nusyūz does not need to be a specific action, even if a husband just dumps his wife, it is considered nusyūz.

Based on some of the provisions of nusyūz in Surat al-Nisā' above, at least in the act of nusyūz wife there is a ratio legis for a husband to act as an educator and protector for his wife. The perspective of the wife should realize what mistakes she has made against her husband, so that she can learn through being advised, separated, or even beaten. It can be seen here that there is a principle of respect for the wife towards the husband as the head of the family.

The context of nusyūz committed by the husband is also the same, the Qur'ān seems to imply that women are very easily hurt, even if the action is only to throw them out. Here, it can be seen that the provisions of Surah al-Nisā' verse 128 want to emphasize the principle of behaving gently towards wives. As a general view of the three CLS approaches in viewing the normativity of nusyūz in KHI, the following is a summary:

Table 1. Critical Legal Studies Analysis on Ratio Legis Nusyūz Article 80 paragraph (7) and Article 84 of the Compilation of Islamic Law

Approach	Scope of Study	Analysis Result
Trashing	Philosophical foundation	The philosophy of giving alimony to wives is still patriarchal by identifying the reason for giving alimony as the wife's obedience.
Deconstruction	Theories of Legal Construction	The legal construction theory of Surat al-Nisā' verse 34, which is considered as the basis of normativity of nusyūz in KHI, through mafhūm mukhallafah, is inconsistent and unfounded. This can be seen from the inconsistency in the norming of nusyūz, which only belongs to the wife, while there is no term for husbands who disobey their wives. Inconsistency with the principles of marriage law outlined in the general normativity of the rights and obligations of husband and wife. The norm contradicts the principle of divorce being made difficult. This is based on the proof of nusyūz which must be carried out in a religious court.
Genealogy	Historicity of Law Formation	History dominated the formation of KHI among the Syafi'iyyah in Indonesia who took it for granted.

4.1. Analysis of the Trashing Approach to Ratio Legis Nusyūz of the Compilation of Islamic Law

Before analyzing based on the first approach in CLS, it is necessary to emphasize that the ratio legis of Article 80 paragraph (7) and 84 KHI is nothing but a mathematical calculation based on the husband's obligation to provide maintenance. The husband is considered qawwām over his wife because of his obligation to provide alimony, and disobedience to the husband will lead to his disobedience to alimony (Marni, Hanani, and Nofiardi 2023).

It can be seen that by not conceptualizing the term nusyūz committed by the husband against the wife - given that the wife's nusyūz is a term for the wife's non- performance of her obligations, while the husband's abandonment of his obligations towards his wife is not also embedded with the term nusyūz, it can be seen that the legal principles do not have a balance.

The trashing approach basically wants to tear down legal theoretical buildings that are not based on the stability of the social system (Fadjar 2014). These legal theories are related to the realm of legal studies in the field of philosophy behind the emergence of a law. This is related to the style of thought of the jurists who participated in the formulation of Article 80 paragraph (7) and Article 84 KHI.

The unbalanced position of nusyūz norming for the husband seems to imply a violation of the principle of equality before the law. Perhaps in this case, the argument of lex specialis derogat lex generalis (special law overrides general law) can be explained, because KHI is a special law in the field of civil affairs for Muslims. However, it is necessary to elaborate on the requirements for a norm to be declared special as described by Bagir Manan:

a. The requirement that the general law be applied first, if there are some compelling circumstances that indicate there should be a special provision, then the special law is applied;
b. The condition that the specific law has the same hierarchical quality in legislation; and
c. The same material scope requirements of the common law (Manan 2004).

It appears that in the context of nusyūz, Article 80 paragraph (7) and Article 84 KHI may only fulfill the first aspect, given that the Marriage Law also needs to provide flexibility in norms due to the codification of marriage law that is not only in one religion. Judging from the second requirement, KHI does not have the same quality degree as a law, because it is in the form of a presidential instruction (presidential regulation). Finally, nusyūz is not regulated at all in the Marriage Law so that nusyūz is a completely new norm, not the same scope.

Based on this, the legal construction of nusyūz is strongly influenced by the viewpoint of Islamic jurists at the time KHI was formed, the dominance of which was Syafi'iyyah. This norm is certainly contrary to the development of a more modern society with the observance of human rights and the spirit of equality before the law.

Women today, are not human beings with strata below men. Not a few of the women in the household who participate, even become the financial support of the household. If

the method of construction of Islamic law based on the fiqh rule al-hukmu yadūru ma'a al-'Illati wujūdan wa 'adaman is applied, while the illah used is the effort to provide maintenance, it will be even more dangerous. Women will assume that with the loss of the need to earn a living from the husband, then obedience and obedience are not necessary.

Article 80 paragraph (7) and Article 84 KHI should be seen as a natural condition in the household that may occur in every couple, while the settlement is regulated by law. This implies a return to the meaning of nusyūz in accordance with the ratio legis of the original revelation of Surat al-Nisā' verse 34 and verse 128. Nusyūz is considered a condition of exalting the ego of one party in the household against the other.

It should also be noted that the standard norm or condition under which a husband can be declared nusyūz in Surah al-Nisā' verse 128 is more severe than the provision for nusyūz of the wife in verse 34. It would not be an exaggeration to say that the approach to resolving the husband's nusyūz is also lighter and easier.

The analysis of the trashing approach to the ratio legis nusyūz KHI has finally outlined that the mathematical logic related to the wife's obedience to the husband, because the wife has been provided for, is incorrect. A wife is supported by her husband, because she is the wife of her husband based on the provisions of Surat al- Baqarah verse 233.

4.2. An Analysis of the Decontruction Approach to the Ratio Legis of Nusyūz in the Compilation of Islamic Laws

The second step in analyzing the ratio legis of nusyūz in the provisions of Article 80 paragraph (7) and Article 84 KHI is the deconstruction approach, which when viewed lexically means rearrangement, or reshaping. Deconstruction is not just destroying the legal order and concepts that have been established as the status quo, but CLS deconstruction steps try to improve (Badan Pengembangan dan Pembinaan Bahasa, 2016)·.

The legal conception to be undermined in the context of nusyūz is the binary division of roles between husband and wife. The husband is mainstreamed as the one who is more capable of earning a living, while the wife seems to be the one who should only be concerned with household matters.

This analysis will describe three main issues of normativity of nusyūz in Article 80 paragraph (7) and Article 84 KHI, namely:

a. First, the theory of Islamic law is the basis of KHI's interpretation through mafhūm mukhallafah. It can be seen that by using Surah al-Nisā' verse 34 as the basis for providing alimony - even though the nash ẓahir does not at all regulate the consequences of the wife's nusyūz is the relinquishment of the obligation to provide for the husband, then the wife should have the right to nusyūz as long as she is able to provide for herself. Especially if in a household where the husband is actually being supported by the wife, it should apply that the wife must be obeyed by the husband;
b. Second, that several articles that form the basis of marital relations - such as Article 31 paragraph (1) of the Marriage Law and Article 79 paragraph (2) of KHI, which essentially states that the rights and obligations of wives are equal-are at odds with the normativity of nusyūz in Articles 80 paragraph (7) and 84 KHI. As it is known that the rules for the formation of legislative norms should be carried

out systematically by reducing the norms from general-abstract to individual-concrete;22 and

c. Third, that the procedural law of proving nusyūz, which requires the existence of valid evidence as required by Article 84 paragraph (4) KHI, does not at all lead to the principle of making divorce difficult (vide: General Explanation of the Marriage Law). The reality in the field proves that nusyūz is used as an argument for divorce or even the husband's counterclaim in the religious court.

4.3. An Analysisi of the Genealogy Approach to the Ratio Legis of *Nusyūz* in the Compilation of Islamic Laws

Genealogy means lineage or growth line, which in the context of the CLS approach is an exploration of how the legal style is applied to a norm (Badan Pengembangan dan Pembinaan Bahasa, 2016). The legal style in question is the historicity and ideological underpinnings behind legal normativity. The ideological foundation that opposes individualism, liberalism, and the capitalist system is what caused CLS to be born (Atmadja 2018). The contextualization of this article's approach is to identify the idea of thinking about the norming of Article 80 paragraph (7) and Article 84 KHI to then seek its relevance to contemporary legal ideas or thoughts that are more contextual.

The Compilation of Islamic Law itself through the authentic interpretation of the Explanation of KHI describes that in the fields that are the subject of KHI regulation, such as marriage, inheritance, and waqf are taken from the Syafi'i maẓhab, while specifically in the case of waqf, some fiqh from maẓhabs other than Syafi'i is added.

Specifically on the issue of nusyūz, which is included in the field of study of marriage law, it is known that the Shafi'i maẓhab is officially used in the normativity of KHI. Obviously, there is one of the scholars from the Shafi'i maẓhab who determines that the wife's nusyūz is a condition that determines the fulfillment of maintenance from the husband to the wife, namely Imam Taqiuddin Abu Bakar (Mupida 2019).

Muhammad ibn Idris al-'Abbās or known as Imam Shafi'i, according to Bedong as quoted from Hasan Bisyri, his style of thought is more plural because he participated in two legal teachings that at that time faced each other, namely the madrasa al-ra'yi which was dominated by the Hanafiyyah maẓhab and the madrasa hadith which was dominated by the Malikiyyah maẓhab (Bedong 2018).

The Al-Ra'yi Madrasah as described by Abdul Majid Khon prioritizes reason in the process of legal discovery (ijtihād), due to the lack of access to legal sources other than the Qur'an. The Hadith Madrasah, on the other hand, prioritizes the law in the text - in this case the hadith - while also using the Qur'an as a basis for ijtihad (Khon 2013).

Imam al-Syāfi'i's ijtihād method as described by Syaroji is based on five things (Syaroji 2017):

a. The Qur'ān goes through the clearly implied meaning of the lafaz, if it is not sufficient to understand, then the figurative meaning is used;
b. Sunnah, which is both words, actions, and taqrīr that rely on the Prophet Muhammad;
c. Ijmā', which is the agreement of scholars on a ruling that has not been or is not explicitly determined in the Qur'an or Sunnah;

d. Qiyās, which is the analogy of a problem that has not been determined with a problem that has been determined based on the similarity of the illah; and
e. Istidlāl, which is the determination of the law of a matter based on general rules in Islamic law.

The genealogy of Islamic legal thought on nusyūz from the Shafi'iyyah, which was directed by Imam Taqiuddin Abu Bakr, is at least difficult to find evidence in the Qur'an and Sunnah. Unless there is ijmā' (consensus) regarding the agreement of previous scholars, then this idea may be irrelevant. Regarding the maintenance of the wife, even according to Mughniatul, there is a hadith that implies that it should be given to the wife even after committing adultery - as long as she has not been divorced (Ilma 2019):

عن جابر رضي الله عنه قال, قال رسول الله صلي الله عليه و سلّم واتّقوا الله في النّساء فإنّهنّ عندكم عوان و لكم عليهنّ أن لا يوطئن فروشكم أحدا تكرهونه فإن فعلن فاضربوا هنّ ضربا غير مبرّح و لهنّ رزقهنّ و كسوتهنّ بالمعروف (رواه مسلم)

Jabir R.A stated that the Messenger of Allah said "Be pious in the affairs of women, for they are helpers with you, and you have rights over them. That is the right not to allow anyone you do not like to step on your bed, and if they do, then hit them with a blow that does not hurt, and for them there is the right to get sustenance (nafkah) and clothing in a good way ". (H.R. Muslim).

b. Reformulation of the Future Nusyūz Law in Indonesian Marriage Legislation

Like a proposal in the formation of legislation, this part of the discussion will explain the idea of reformulating the law of *nusyūz* based on three considerations, namely philosophical, sociological, and juridical. After the three considerations are outlined, then technically it will be explained how the new *nusyūz law is* formulated in aregulation.

1. The Philosophical Basis for the Reformulation of *Nusyūz* in Islamic Marriage Law in Indonesia

The philosophical foundation in the context of the formation of legislation, accordingto Appendix I of Law Number 12 of 2011 concerning the Formation of Legislation(UUP3) is the reasons or considerations for the formation of regulations that heed thephilosophy of the nation, legal ideals, legal awareness, and outlook on life in society. Another term to mention the philosophical basis for the formation of laws and regulations is legal politics, namely the intention of law formation in accordance withthe ideals of law enforcement in the Unitary State of the Republic of Indonesia (Winardi and Sirajuddin 2019). Giventhat in accordance with the fourth paragraph of the Preambule of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), law formation should be directed at:

a. Protection of the entire nation and all Indonesian blood;
b. Promotion of the general welfare;
c. The intelligence of the nation's life; and
d. Participate in efforts to implement world order based on independence, lasting peace and social justice.

The reformulation of the law of nusyūz is associated with the philosophical foundation of the formation of the legislation above, which will be found in accordance with the efforts to protect all Indonesian people and all Indonesian blood. This is understandable because the current nusyūz law has led to gender discrimination (Maisyal 2016).

Regarding discrimination as a philosophical basis, it is also necessary to consider the

provisions of Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia which states that everyone has the right to protection, guarantees, certainty and equality before the law. It is difficult to accept that even though in the Qur'an itself - as well as being the philosophical basis based on the First Principles of Pancasila - nusyūz is determined proportionally for husbands and wives (vide: Surat al-Nisā' verses 34 and 128).

Apart from the philosophical foundations that are clearly outlined in Pancasila and the 1945 Constitution of the Republic of Indonesia, it is actually also outlined in the Marriage Law and KHI. The authentic interpretation of the Marriage Law (Explanation of the Marriage Law) outlines that marriage law in Indonesia - including for Muslims - has the principle of making divorce difficult. Given the provision of nusyūz in Article 84 paragraph (4) KHI which states that nusyūz must be proven based on valid evidence, not a few nusyūz are used and included in a lawsuit in court.

Another principle contained in the authentic interpretation of the Marriage Law also states that the husband and wife must have equal positions, rights and obligations. The elimination of the obligation to provide maintenance for the husband because his wife is disobedient (nusyūz) has implied that the husband's position is superior to the wife. Obedience should be a joint commitment that is not only inclined to the husband alone, whether or not he is given maintenance.

The KHI also basically has the same basic principles of marriage, but with various specificities. Let us turn to the philosophical basis of the provisions of Surah al-Baqarah verse 233 and the hadith narrated by Muslim which has been quoted in the previous discussion. The existing regulations (KHI) should make every effort to realize the obligation to provide for the husband for his wife, considering that there is not a single text that describes that the wife's obedience is the cause of providing maintenance.

2. Sociological Foundations of the Reformulation of Nusyūz in Islamic Marriage Law in Indonesia

Annex I of UUP3 outlines that the sociological basis is empirical considerations based on the needs of society that make the formation of a regulation important and urgent. This is what is often used as the basis for considering the formation of academic papers in every legislation, which is certainly related to the effectiveness or identification of public legal awareness.

The conception of nusyūz, which is understood as the status quo, needs to be reformulated, because in terms of the normativity of Article 84 KHI, which implies that nusyūz must be proven by valid evidence, there are no cases filed based on nusyūz. Almost always the issue of nusyūz in the household is combined into one either in a lawsuit (petition) or through a counterclaim. This is evident from the classification of cases described in each of the Annual Reports of the Religious Courts Agency (Dirjen Badilag, 2021).

3. The Juridical Basis for the Reformulation of Nusyūz in Islamic Marriage Law in Indonesia

The juridical foundation according to the provisions of Appendix I of UUP3 is the basis of consideration that seeks to overcome legal problems that occur while still referring to existing laws and regulations. In terms of their form, these legal problems consist of vague norms, norm inconsistencies, and legal vacuum.

First, regarding the vague legal norms, Article 84 KHI outlines the issue of nusyūz as a condition of non-performance of the wife's obligations in the household. This article also points out that the wife's obligation is to be inwardly and outwardly devoted to her husband to the extent permitted by Shari'ah. There is no definite benchmark for this abstract norm, while on the other hand the legal proof must be carried out before the religious court and there is no regulation that accommodates the procedural law of law enforcement in the field of nusyūz.

Second, the inconsistency of norms can be seen from the contradiction in the principle of balanced marital rights and obligations between husband and wife as described in Article 31 paragraph (1) of the Marriage Law and Article 79 paragraph (2) KHI. The obligation to obey, help each other in Article 80 paragraph (7) and Article 84 KHI is not implemented at all. The wife in this case is regulated by the provisions of nusyūz, while the husband is not.

In addition, in terms of the form of legal products, it should be based on Article 10 of UUP3 - because of the scope of general and abstract arrangements, KHI should be in the form of a law. Similar to the presence of the Marriage Law which is enforced through the Herzien Inlandsh Reglement (HIR), the KHI should be in the form of a law as material law and Law No. 7 of 1989 concerning Religious Courts as its formal law. Third, the problem of legal vacuum can be seen from the substance of the regulation of nusyuz itself which is hinted at through Surat al-Nisa' verses 34 and 128. The Compilation of Islamic Law does not even regulate the contextual substance of the issue of nusyuz in accordance with asbab al-Nuzul. Instead, the context is shifted to the burden of discussing maintenance.

4. Framework for Reformulating the Future Law of Nusyūz

After analyzing the ratio legis and identifying the philosophical, sociological, and juridical foundations of the law of nusyūz in marriage, the final stage of this article is to reformulate the formulation for future regulations. This formulation is technically implemented in two alternatives:

a. First, through the establishment of a new law containing material religious law with the nomenclature of the Islamic Law Code. This effort does not at all rule out some existing laws and regulations relating to Islamic law, rather with the presence of this law, the codification of Islamic material law will further ensure legal certainty. Given that so far there have been many laws with a codification style, such as the Civil Code (KUHPer), Criminal Code (KUHP), Commercial Code, Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA), and so on. The issue of the lack of codification of Islamic law is now apparent from the existence of the Compilation of Sharia Economic Law, which is even regulated only based on Supreme Court Regulation Number 2 of 2008; and
b. Second, through efforts to amend or revise the KHI that has been in effect. This effort is a complicated matter considering that from the beginning the KHI legal product has already been wrong by using a presidential instruction (presidential regulation). This second alternative reformulation may eventually legitimize the problem of inconsistency in the principle of content of legislative material.

The technical substance proposed for reformulation is by forming a new section in the chapter on the rights and obligations of husband and wife in KHI - or other similar regulations - while removing the old provisions relating to nusyūs.

Conclusion

The entire explanation of this article writing ultimately emphasizes that the perspective used is limited only based on the doctrine or teachings of critical legal studies, so perspectives from other legal study schools are still very possible. It is concluded that ratio legis nusyūz in Indonesian legislation from the perspective of critical legal studies still has a legal construction that is not in favor of justice and social interests. In addition, the rationale for determining the law of nusyūz through the trashing approach is difficult to identify its validity both through interpretation and construction of Islamic law; and. The reformulation of the upcoming nusyūz law in Indonesian marriage legislation based on philosophical, sociological, and juridical foundations can be implemented in two ways. First, by implementing the formation of a new law through a law that regulates marriage law or Islamic material law. Given that this is also an effort to codify Islamic material law which has been separated in various laws. Second, by making changes or revisions to the KHI.

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