

The Relevance of Ihdad Regulations as a Sign of Mourning and Human Rights Restriction



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ABSTRACT

Ihdad is a form of mourning carried out by families. The *sharia* mandates *ihdad* for women who have lost their husbands. There is no *fiqh* regarding *ihdad* for husbands. It often gives rise to the perception that there is a tendency to discriminate against women. However, customary law has regulations for mourning periods for husbands. This article aims to determine the relevance of Islamic law in regulating the mourning period for women and men with the value of protecting human rights. The research was carried out normatively by comparing *sharia*, positive legal regulations in Indonesia, notably the customs of the Banjar community, and regulations in Malaysia. The theories underlying this research include customary law theory, *al-maslahah*, and human rights protection. The results of this research illustrate that Islamic *fiqh* does not regulate *ihdad* for husbands. In Indonesia, KHI regulates the mourning period (*ihdad*) not only for wives but also for husbands. Meanwhile, in Malaysia, there is no *ihdad* for husbands, and the rules are explicit in the Enactment of the Islamic Family Law. The customary law of the Banjar community regulates the mourning period for the husband by not remarrying and not interfering with inheritance matters during the mourning period for a period of one hundred days. Customary laws that do not conflict with *sharia* and meet the requirements for implementing *'urf* can be implemented. *Ihdad* is and will continue to be relevant to protecting human rights by prioritizing the values of *maslahah* and respect. The rules in Indonesia and Malaysia are based on Islamic law, considering religious and humanist values in the form of leniency.



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1. Introduction

The interplay between religion and human rights is intricate and inseparable. Numerous studies reveal a strong connection between religion and all fundamental aspects of human rights, such as the connection between religion and

the rights to health, religious freedom, and employment,¹ various regulations limiting marriage rights due to religious differences,^{2,3} religious and educational contributions,⁴ cultural and religious harmony,⁵ the requirement of a single religion in the family.⁶ Religion has good values that guide human life. However, the increasing complexity of human needs and behavior creates a clash with religion under the pretext of human rights. States frequently struggle to address intricate issues due to significant disagreements over the drafting and implementation of laws. This is because the manifestation of religion or belief has the possibility of impacting the rights and interests of other people.

The issue of *ihdad* provisions in Islamic teachings is no exception, which provides various 'restrictions' for women whose husbands die. It has given rise to much debate between the fulfillment of human rights in marriage and religious regulations, which in some Islamic countries are even legitimized in law. It might also give rise to jealousy as to why religion only regulates *ihdad* for women, not for men, even though both have the same possibility of the condition of their husband/wife dying. Religion provides an important source and scale of dignity and responsibility, feeling shame and honor, restraint and regret, restitution, and reconciliation that human rights regimes need to survive and thrive in any culture.⁷

Understanding the fundamental rationale behind the *ihdad* rule is crucial in this context. The marriage bond is interpreted as a bond that is an excellent agreement, a strong agreement, or a severe agreement, not an agreement that can be played with and is difficult to break. For someone Muslim, marriage begins with a contract, which indicates establishing a sacred bond, namely a marriage bond, to form a new order called a household. The marriage contract is a sign of the legal

¹ Lucy Vickers, 'Freedom of Religion or Belief and Employment Law: The Evolving Approach of the European Court of Human Rights', in *The European Court of Human Rights and the Freedom of Religion or Belief* (Brill | Nijhoff, 2019), pp. 235–59 https://doi.org/10.1163/9789004346901_012

² Benedict Douglas, 'Love and Human Rights', *Oxford Journal of Legal Studies*, 43.2 (2023), 273–97 <https://doi.org/10.1093/ojls/gqac034>

³ Nerisma Eka Putri, Khaidir Ali Junid, and Muhammad Azkia Fahmi, 'Marriage Between Religions Based on Human Rights Perspectives', *SAPIENTIA ET VIRTUS*, 9.1 (2024), 372–84 <https://doi.org/10.37477/sev.v9i1.540>

⁴ Robert Jackson, 'Human Rights in Relation to Education about Religions and World Views: The Contribution of the Council of Europe to Classroom Religious Education', *Journal of Religious Education*, 66.2 (2018), 85–97 <https://doi.org/10.1007/s40839-018-0062-z>

⁵ Eva Lindhardt, 'Human Rights Education as a Framework for Transmitting Religion as Cultural Heritage', *Human Rights Education Review*, 5.1 (2022), 5–27 <https://doi.org/10.7577/hrer.4452>

⁶ Haifaa Jawad and Ayse Elmali-Karakaya, 'Interfaith Marriages in Islam from a Woman's Perspective: Turkish Women's Interfaith Marriage Practices in the United Kingdom', *Journal of Muslim Minority Affairs*, 40.1 (2020), 128–47 <https://doi.org/10.1080/13602004.2020.1737415>

⁷ *Religion and Human Rights*, ed. by John Witte and M. Christian Green (Oxford University Press, 2011) <https://doi.org/10.1093/acprof:osobl/9780199733453.001.0001>

relationship between husband and wife.⁸ The marriage bond is a very close and strong bond. The Qur'an calls it *mitsaqan ghalizhan*. This is as stated by Allah SWT in the Al-Qur'an surah (Q.S) An-Nisa: 21.⁹

However, even though marriage maintained tremendously as well, it is possible that the marriage bond could end due to various reasons, such as divorce and death, which cannot be avoided.¹⁰ The death of one partner in a household certainly has an impact on the life of the partner left behind. This impact is psychological in the form of a sense of loss, deep sadness, and so on. In addition to the psychological effects, the bereaved spouse must also acknowledge the juridical impact, which manifests as various legal obligations and regional traditions that continue after the spouse's death.¹¹

According to Islamic teachings, a wife whose husband dies must perform iddah. Iddah is a waiting period during which a woman cannot remarry after her husband dies within a specified time frame. In addition to this, women who lose their husbands are also required to observe *ihdad*. According to linguists, *ihdad* comes from the word *ibadah*, which means prohibition. Abu Yahya Zakaria Al-Anshary as quoted by Tihami and Sohari Sahran mentioned *al-ihdad* which implies prevention. It is said that "a woman who is grieving" when the woman does not wear perfume and jewelry. *Ihdad* is also known as *al-hidad*. The meaning of *ihdad* is to express a sense of mourning and to steer clear of actions that could lead to defamation. Terminologically, *ihdad* is the waiting of a woman to dress up, and included in this understanding is a certain period in certain circumstances. Thus, *ihdad* prohibits a woman from staying somewhere except her own home.¹²

According to the ulama, *ihdad* is mandatory because it follows the provisions outlined in Q.S. Al-Baqarah: 234 which reads: "As for those of you who die and leave widows behind, let them observe a waiting period of four months and ten days. When they have reached the end of this period, then you are not accountable for what they decide for themselves in a reasonable manner. And Allah is All-Aware of what you do." Thus, there are rules for iddah (waiting time), in which

⁸ Nurul Miqat and others, 'The Development of Indonesian Marriage Law in Contemporary Era', *De Jure: Jurnal Hukum Dan Syar'iah*, 15.1 (2023), 54–66 <https://doi.org/10.18860/j-fsh.v15i1.17461>

⁹ Imam Syafi'i, Ruqoyatul Faiqoh, and Vasco Fronzoni, 'Meaning Of Mitsaqan Ghalidzhan In Study Contemporary Interpretation Quraish Shihab Thoughts', *MILRev: Metro Islamic Law Review*, 2.2 (2023), 115 <https://doi.org/10.32332/milrev.v2i2.7807>

¹⁰ Yohanes S Lon, 'The Legality of Marriage According to Customary, Religion and State Laws: Impacts on Married Couples and Children in Manggarai', *Jurnal Dinamika Hukum*, 19.2 (2019), 302 <https://doi.org/10.20884/1.jdh.2019.19.2.2429>

¹¹ Rafidah Mohamad Cusairi and Mahdi Zahraa, 'Procedure of Issuing Religious Divorce and Resolving Matrimonial Disputes at Shari'ah Councils in the Uk', *Arab Law Quarterly*, 32.1 (2018), 1–32 <https://doi.org/10.1163/15730255-12321043>

¹² Abdul Azis, 'Iddah for Husbands: A Political Analysis of Islamic Family Law', *Al-Qadha: Jurnal Hukum Islam Dan Perundang-Undangan*, 10.1 (2023), 34–49 <https://doi.org/10.32505/qadha.v10i1.5905>

there is an obligation to iddah (mourning time) that is provided for women whose husbands have died.

However, this obligation does not apply to men. In classical jurisprudence studies, it is not stipulated that husbands must undergo a period of mourning. People often perceive this as a form of oppression against women, specifically wives. It can even be faced with the context of restrictions on human rights. Referring to Article 16 of the Universal Declaration of Human Rights (UDHR), the right to marriage is standardly recognized. According to this, adult men and women have the right to marry and start a family without any restrictions due to race, nationality, or religion. People have the same rights in marriage, at the time of marriage, and at the time of dissolution of the marriage. However, according to Islamic teachings, marriage has legal requirements. So, it isn't easy to comply with human rights standards fully.¹³

Islam provides many rules for women to do and not do things with the basis or aim of respecting women themselves. However, in an era that is starting to develop, the rules given by religion are 'not really in line' with the standards or general laws adhered to by world society. Ziba Hosseini (2019) stated in a study that the construction of gender rights treats men and women equally. This can be caused by theological constructs – that God has given men authority over women; and the other is sociological - ancient thinking, where strong men are considered more robust and must protect and provide, while women are weak and obedient.¹⁴ The same thing was expressed by Tsoaledi Daniel (2014), that gender roles are socially and culturally constructed so that they disadvantage women compared to men.¹⁵ It is even said to affect the quality of marriage.^{16,17}

The broad interpretation of the human rights narrative serves as a tool to attack religious issues. Restrictions on human rights, especially for women, are increasingly widespread, and the assessment is entering religious spaces. The author certainly understands that human rights are provided as part of something

¹³ Paweł Bucóń, 'The Right to Marry and the Right to Establish a Family in the Universal, European and Polish Dimension', *International Community Law Review*, 25.6 (2023), 627–41 <https://doi.org/10.1163/18719732-bja10118>

¹⁴ Ziba Mir-Hosseini, 'The Challenges of Islamic Feminism', *Gender a Výzkum / Gender and Research*, 20.2 (2019), 108–22 <https://doi.org/10.13060/25706578.2019.20.2.486>

¹⁵ Tsoaledi Daniel Thobejane and Janet Khoza, 'Gender Role Expectations within the Institution of Marriage', *Journal of Social Sciences*, 41.3 (2014), 455–59 <https://doi.org/10.1080/09718923.2014.11893380>

¹⁶ Subrata Dasgupta and Jayanti Basu, 'Marital Quality and Gender Role Stereotype', *Psychological Studies*, 56.4 (2011), 360–67 <https://doi.org/10.1007/s12646-011-0105-y>

¹⁷ Jean Atkinson, 'Gender Roles in Marriage and the Family', *Journal of Family Issues*, 8.1 (1987), 5–41 <https://doi.org/10.1177/019251387008001001>

guaranteed by law in the concept of the rule of law (*rechtsstaat*).¹⁸ However, this does not mean that discrimination against women does not exist at all. Sexism directed towards women who hold negative values also exists, and to make matters worse, it is often intertwined with religious contexts, leading to confusion about which forms of sexism constitute genuine restrictions on human rights and which do not. Sexism toward women is also demonstrated in the justice system. Iim Halimatusa'diyah (2024) revealed in previous research that feminist assessment practices are necessary to ensure women's access to justice in cases of polygamy, divorce, and post-divorce alimony.¹⁹ Ulrike Schultz et al. (2018) describe the differences in treatment in countries where women often have different moral standards than men.²⁰ This treatment causes gender inequality in the justice system and limits women's access to justice.²¹

Therefore, in the case of *ihdad*, which is only intended for women and limits women's rights for a certain period, it needs to be researched by looking at social conditions and laws/standards that continue to develop. The question of whether religious law is relevant to positive legal standards often triggers assumptions and accusations against the teachings of a particular religion. This kind of research has been carried out by several researchers, for instance, research by Fatima Shalehah (2022), which states that the provisions of *iddah* and *ihdad* for career women are still a way to respect and condole and function as protection for women from their various activities for a certain period.

The research results are almost the same as those carried out by Ahmad Khoiri et al. (2020), in which women who work during the *iddah* period do not violate the provisions of the *iddah* period and continue to observe it. Meanwhile, during the *iddah* period, women were prohibited from marrying another man, were forbidden from leaving the house unless there was an emergency, and were required to fulfill their *ihdad*.²² Apart from that, in his research, Sofian (2023) verified that the laws of *Iddah* and *ihdad* in Islam are a form of flexibility in Islamic religious law that aims to protect women's rights, and the existence of *iddah* can

¹⁸ Leli Tibaka and Rosdian Rosdian, 'The Protection of Human Rights in Indonesian Constitutional Law after the Amendment of the 1945 Constitution of the Republic of Indonesia', *FIAT JUSTISIA: Jurnal Ilmu Hukum*, 11.3 (2018), 266 <https://doi.org/10.25041/fiatjustisia.v11no3.1141>

¹⁹ Iim Halimatusa'diyah and Windy Triana, 'Sexism and Women's Access to Justice: Feminist Judging in Indonesian Islamic Judiciary', *Women's Studies International Forum*, 103 (2024), 102883 <https://doi.org/https://doi.org/10.1016/j.wsif.2024.102883>

²⁰ *Women in the Judiciary*, ed. by Ulrike Schultz and Gisela Shaw (Routledge, 2013) <https://doi.org/10.4324/9780203720028>

²¹ Brettel Dawson, Ulrike Schultz, and Gisela Shaw, 'Gender and Judicial Education', *International Journal of the Legal Profession*, 21.3 (2014), 255–57 <https://doi.org/10.1080/09695958.2015.1066944>

²² Ahmad Khoiri and Asyharul Muala, 'Iddah Dan Ihdad Bagi Wanita Karir Perspektif Hukum Islam', *JIL: Journal of Islamic Law*, 1.2 (2020), 256–73 <https://doi.org/10.24260/jil.v1i2.71>

still offer benefits, so it must be implemented.²³ Based on several studies above, many studies express agreement with the laws of *iddah* and *ihdad* for women from the perspective of Islamic religious teachings.

However, no research has examined how *iddah* is regulated by positive law in a country. This study aims to provide an overview of the relevance of religious law—Islam in Indonesia and Malaysia—by comparing the rules in the positive law of each country. This research also examines the absence of *ihdad* rules for men in *fiqh*. Interestingly, in the customs of some Banjar communities in South Kalimantan, husbands whose wives die also undergo a period of mourning for a certain period. Indeed, no particular term in the Banjar language defines the husband's mourning period, so in this study, it will be referred to as the husband's *ihdad*.

Under positive law, Indonesia regulates the mourning period not only for wives but also for husbands. However, the book of *fiqh* does not contain these highly progressive provisions. Malaysia differs from Indonesia even though the rules are equally flexible. Meanwhile, customary community rules are more binding, so the provisions of customary law—traditions in a community unit—can fill the void of unregulated religious teachings. Of course, within the framework of local wisdom, which does not conflict with religion. Based on the gaps mentioned earlier, this study looks at the possibility of new insights from comparing rules and traditions that can answer claims that *iddah* and *ihdad* are irrelevant to the universal fulfillment of human rights standards.

2. Research Method

This research is normative, supported by minor empirical data to support literacy data.²⁴ Data regarding the customs of the Banjar community in South Kalimantan was obtained by using husbands and community leaders as research subjects. The study uses a legal approach to examine the regulation of *ihdad* in Indonesia and Malaysia. This approach involves a thorough analysis of the legal rules within the Banjar community. A theoretical approach is also used to examine legal issues based on several relevant theories, including customary law theory, *al-maslahah*, and human rights protection. Analyses are conducted by comparing the provisions of *ihdad* according to sharia, the regulations on positive law in Indonesia in general, the customs of the Banjar community, and the regulations in Malaysia. The conclusion-drawing technique is a deductive technique used to

²³ Ganjar Yusup Sofian and Efan Chairul Abdi, 'Komparasi Analisis Hukum `Iddah Dan Ihdad Perspektif CEDAW Dan Perspektif Maqāṣid As-Syarī'ah Kontemporer Jasser Auda', *As-Syifa: Journal of Islamic Studies and History*, 2.2 (2023), 144–56 <https://doi.org/10.35132/assyifa.v2i2.533>

²⁴ 'Introduction', in *Handbook on Legal Methodology* (Intersentia, 2018), pp. 1–8 <https://doi.org/10.1017/9781839702389.002>

provide descriptions and reflections,²⁵ rules and traditions for implementing *iddah-ihdad* for wives and husbands, as well as answering accusations that there is a lousy relevance between religious teachings and the fulfillment of generally recognized human rights standards.

3.Results and Discussion

Ihdad: Comparison of Sharia, Regulations in Indonesia and Malaysia

Sharia asserts that the majority of ulama base the time of *iddah* on the hadith of Umm Salamah, the Prophet Muhammad SAW's wife, in addition to its mention in Q.S. Al-Baqarah. Imam Shafi'i, in his book *Al-umm*, said, "Allah SWT does not mention *ihdad* in the Qur'an. Indeed, the Qur'an does not mention *ihdad*, except when Allah SWT commands a woman whose husband has died to perform *ihdad*, thereby establishing the law as the same obligation. In other words, the strength of the law based on the hadith of the Prophet is the same as that established in the Qur'an.²⁶ In this case, *iddah* is an obligation regulated in the Al-Quran, while *ihdad*—which is one of the provisions in the *iddah* period, is based on the hadith.²⁷

This hadith demonstrates that performing *ihdad* is a requirement for a woman whose husband has died. Enjoy the mourning period by not wearing any decorations or eve and using eyeliner for treatment. The prohibition is pronounced two to three times. For the majority of ulama, this means that *ihdad* is obligatory. Al-Qurthubi's interpretation aligns with the mourning period, mandating women to abstain from all jewelry, including clothes, eyeliner, perfume, and nail dye, and refrain from applying oil or perfume to their heads during this period. In addition, Ibn Jarir at-Thabari mentions jewelry for the face and palms and includes what is on both of them, such as rings, kohl, bracelets, and *khidab* (hand dye).

The original Sharia law stated that *ihdad* was only intended for women. Madhhab scholars agree that a woman whose husband dies is obliged to observe *ihdad* (mourning), whether young or old, Muslim or non-Muslim, except for the Hanafi madhhab. This school of thought says that dhimmis and young women are not obliged to perform *ihdad* because both of them are people who are not obliged to do so. According to Sayyid Sabiq, this is mandatory for someone whose husband dies. During the *iddah* period, the goal is to demonstrate loyalty and safeguard the husband's rights. Even though the formulation of some of the definitions above is different, the main point remains the same, namely that

²⁵ *Research Methods for Law*, ed. by Mike McConville and Wing Hong (Eric) Chui (Edinburgh University Press, 2017) <https://doi.org/10.1515/9781474404259>

²⁶ Diana Farid and others, 'Harmonizing the Iddah Period for Women Divorced Outside the Court According to KHI and Fiqh Law', *JUSTISI*, 10.1 (2023), 55–67 <https://doi.org/10.33506/jurnaljustisi.v10i1.2455>

²⁷ Rahayu Mulia Romadoni, 'The Iddah Period as a Reason for Cancellation of Marriage', *Lentera Hukum*, 6.2 (2019), 233 <https://doi.org/10.19184/ejllh.v6i2.11253>

women who have lost their husbands are not allowed to wear jewelry, dress up, or do other things that can arouse men's lust.²⁸

According to the current view of *fiqh*, *ihdad* is a form of respect for a partner, in this case, if the wife is left behind by her husband or vice versa, the husband is left behind by his wife as a means of preventing slander. However, currently there has been a shift in the concept of *ihdad* which is adapted to current phenomena, so perfume, colored clothes, and make-up have become very ordinary things. Because if a woman looks terrible, it will have a harmful impact on her. This shift in the concept of *ihdad* uses a *maqashid al-syariah* perspective,²⁹ women can wear perfume and jewelry and leave the house in proportion as necessary as before their husbands died. The impact of the *ihdad* applied is the absence of marriage during the mourning period.

Imam Abu Daud and Imam Nasai narrated that the Prophet Muhammad SAW said wives should not wear preen. However, it is permissible to clean oneself by bathing, cleaning the dirt on the body, and chewing betel leaves. Regarding the prohibition on leaving the house, some scholars argue that a woman is not obligated to remain at her husband's house, and therefore, she is free to leave the house where she is observing iddah. The legal basis for this opinion is Q.S. Al-Baqarah: 240, "Those of you who die leaving widows should bequeath for them a year's maintenance without forcing them out. But if they choose to leave, you are not accountable for what they reasonably decide for themselves. And Allah is Almighty, All-Wise." According to the law, *ihdad* is intended for women with a time limit and in a regulated manner. However, there has been a shift in the concept of *fiqh* with various adjustments. This is based on fairness. This means that what is strictly regulated not to remarry within a specific time limit is iddah, not *ihdad*.

Malaysia has several Islamic family law sub-marriage acts that apply to each state's legal provisions. In Malaysia, the Islamic Family Law is enacted by 13 states and one federation, including Johor, Kedah, Kelantan, Malacca, Negeri Sembilan, Penang, Pahang, Perak, Perlis, Sabah, Sarawak, Selangor, Terengganu, and the Federal Territories Kuala Lumpur Federation. The enactment is the result of translating and adapting the content of the principles of marriage and divorce in the Syafi'i Sect. However, the enactment of the law is not inflexible. It can adjust to

²⁸ Muhammad Nurohim, Yusuf Hanafi Pasaribu, and Asmaiyan Asmaiyan, 'The Relationship between a Wife's Satisfaction in the Iddah Period with Marriage and Divorce', *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan*, 21.2 (2021), 208–18 <https://doi.org/10.30631/alrisalah.v21i2.778>

²⁹ Mohd Suhadi Mohamed Sidik, Md Noor Saper, and Nurul'Ain Mohd Daud, 'The Application of Maqasid Shariah Elements in Family and Marriage Counseling', in *Proceedings of the 1st Progress in Social Science, Humanities and Education Research Symposium (PSSHRS 2019)* (Paris, France: Atlantis Press, 2020) <https://doi.org/10.2991/assehr.k.200824.160>

the changing times because the enactment is the leading guide, especially for Muslims, especially in matters of marriage and divorce.³⁰

In Malaysia, the provisions of iddah are generally regulated by the Enactment of the Islamic Family Law above. However, the Islamic Family Law in each state only explains the connection of iddah with other conditions, such as the lineage of children inside and outside the iddah period, the presumption of death for the husband, and the consequences of the implementation of the iddah period based on sharia—See Sections V and VIII of Act 303-Islamic Family Law (Federal Territories) Act 1984, or see Sections V and VIII of Sarawak Ordinance 43 Year 2001-Law Ordinance-Islamic Family Law 2001. As for the detailed iddah, time is not regulated. Similarly, in the case of *iddah*, the existing enactments have not regulated specific guidelines or legal provisions for law enforcers and judges in determining iddah. This situation leads to different interpretations, which can cause disharmony in rule implementation.³¹

According to Islamic law, Malaysia sets the iddah period for women or wives whose husbands have died for four months and ten days. Therefore, it is obligatory for women or wives whose husbands have died to undergo iddah, and it is also obligatory for him to perform the period of mourning during the waiting period—the period of iddah. According to the Islamic Development Department of Malaysia, the law of iddah in Malaysia, based on *syarak*—a law connected to Islamic teachings—is mandatory for women who are divorced or have lost their husbands. For women who celebrate Eid due to the deaths of their Muslim husbands, specific arrangements are in place. They must obey the following: first, it is forbidden to accept the proposal of Ajnabi—foreign men. Second, it is not permitted to marry a foreign man. If the marriage occurs while the couple is already married, it is invalid and requires separation.³²

Thirdly, individuals can only leave the house, including for travel, within the prescribed limits. Essential needs that allow people to leave the house include work, receiving treatment, purchasing necessities (if a family member or other trusted person cannot do so), and other urgent needs, as long as they adhere to the rules and manners prescribed by Islam. Fourth, it is permissible to relocate or reside in a different house, where it is not customary to stay for the duration of a marriage. However, if danger or harm can threaten the safety of life and property,

³⁰ Shofiatul Jannah and Roibin Roibin, 'The Urgency of Determining the Post-Divorce Iddah Payment Period in Indonesian Religious Courts', *Jurnal Ius Constituendum*, 8.3 (2023), 424 <https://doi.org/10.26623/jic.v8i3.7606>

³¹ Jamaluddin and others, 'Proposed Improvement for Divorce Resolution in Aceh And Malaysia: A Comparative Study', *Academic Journal of Interdisciplinary Studies*, 10.1 (2021), 193–203 <https://doi.org/10.36941/ajis-2021-0017>

³² Mufrod Teguh Mulyo and others, 'The Power of Husband-Wife Communication in Building Family Resilience and Preventing Divorce: A Study of Maslahah Mursalah', *Al-Manahij: Jurnal Kajian Hukum Islam*, 2023, 125–36 <https://doi.org/10.24090/mnh.v17i2.7651>

it is allowed to go out and leave the house until the threat or harm disappears or can be overcome.³³

Fifth, it is obligatory to mourn during the time of *iddah*. During that time, the wife must leave all things with decorative elements, whether on clothes or the body. It is included in the prohibition of decorating and using hair oil and other acts considered decorative in the eyes of the local community. Quite differently, the Mufti of Malaysia said that women who died other than their husbands could perform *ihdad* (leave adorning themselves as a sign of mourning) for three days or less. If done excessively, then the law is illegal. In addition, in Malaysia, it is also known to arrange so that the wife is not encouraged to visit the funeral at the cemetery to respect the *ihdad* during the *iddah* time set by *syarak*. If the *iddah* time is over, then it is permissible for the wife to visit her husband's grave as long as she can maintain her morals and manners.³⁴

However, the provisions of *ihdad* as above are subject to Islamic law. Whereas the enactment of the Malaysian Islamic Family Law is not regulated in detail, and the period of *iddah* is not explicitly mentioned. This is in contrast to Indonesia, where the determination of the *iddah* period is outlined in the positive law, namely KHI, with the calculation of its length according to the woman's condition. Similarly, the provisions of *ihdad* are explicitly regulated in Indonesia. Malaysia also does not recognize the rules of *ihdad* for men, either in society or through positive legal regulations.³⁵

Malaysia regulates the implementation of *ihdad* based on strict sharia. The provision of *ihdad*, which is interpreted as a time of mourning in society, is a form of special responsibility that needs to be carried out by a wife in the event of the death of her husband. Still, the ulama gives some relief (*rukhsah*) in implementing this *ihdad*. However, this sometimes causes a lack of understanding and a more lenient interpretation among some women in understanding the requirements of *ihdad*. Furthermore, this can lead to deviations from sharia provisions. Moreover, it is essential to note that there are no definitive legal rules. A comprehensive understanding and observance of *ihdad* is necessary to implement the provisions outlined by the sharia and encourage the authentic application of Islamic law.³⁶

³³ Nurul Husna Mansor and others, 'Curbing Promiscuous Sex through the Practice of Fasting: An Islamic Approach', *Jurnal Akidah & Pemikiran Islam*, 24.2 (2022), 205–40 <https://doi.org/10.22452/afkar.vol24no2.6>

³⁴ Saad Abdulwahhab Alshekh, Raihanah Abdullah, and Mahamatayuding Samah, 'ظاهرة عقد الزواج ، الخارجيّ في قانون الأحوال الشخصيّة العراقيّ: دراسة تحليلية', *Malaysian Journal of Syariah and Law*, 7.1 (2019), 125–44 <https://doi.org/10.33102/mjsl.v7i1.118>

³⁵ Mek Wok Mahmud and others, 'Analisis Terhadap Peruntukan Penentuan 'Iddah Dalam Enakmen Undang- Undang Keluarga Islam Malaysia', *Akademika*, 90.3 (2020), 49–62 <https://doi.org/10.17576/akad-2020-9003-05>

³⁶ Nabilah Nurshuhada Zainal Abidin and others, 'Pensyariatan Ihdad Dan Larangan Sepanjang Tempoh Menurut Perspektif Islam [Legislation Of Ihdad And Prohibition Throughout The Period

Indonesia regulates waiting times - *iddah* refers to Islamic law, which is regulated in positive law in the Compilation of Islamic Law (KHI). Article 153 stipulates that if a wife's marriage dissolves, she must apply a waiting period, known as *iddah*, unless it is due to *qobla al dukhul*,³⁷ and the breakdown is not due to her husband's death. Further provisions stipulate that a waiting period of 130 (one hundred and thirty) days applies if the marriage dissolves due to death, even if it is *qobla al dukhul*. Meanwhile, if the widow is pregnant and the marriage dissolves due to death, the waiting period continues until she gives birth. The number of days during the *iddah* period is regulated according to religious law. Meanwhile, the mourning period is regulated in Article 170 KHI. Paragraph 1 mandates that a widow whose husband passes away must grieve during the *iddah* period to express her grief and prevent slander. Interestingly, the rules in Indonesia regulate *ihdad* for husbands. Paragraph 2 of the same article states that husbands whose wives have died must hold a mourning period according to appropriateness. KHI has regulated the need for a mourning period, not only for wives but also for husbands.

According to Spinoza's coherence theory of truth, knowledge is considered valid if a proposition relates to ideas from previous true propositions. Truth is not formed between decisions and facts or reality but rather the relationship between the decisions themselves.^{38,39} A truth is not only formed because of coherence or consistency between realities but also because a statement is consistent with previous statements.⁴⁰ According to this theory, *ihdad* provisions found in paragraphs 1 and 2 of Article 170 KHI, apply equally to both women and men. It can be said that a husband whose wife dies also does not have the freedom to get married after his wife dies immediately. There are several purposes of *ihdad*, including 1) as a sign of condolence, to prevent slander from arising, and, at the same time, as a period of mourning for him because his partner died. This is aligned with Article 170 of the Compilation of Islamic Law, which governs the mourning period. Additionally, it serves as a factor in preserving harmonious family ties between the deceased husband's family and the wife's extended family.

However, this provision is very progressive and has not been found in the book of *fiqh*. Despite the implication that men should perform *ihdad* similarly to women, KHI does not specify a specific time frame for husbands to perform *ihdad*. Of

From The Perspective Of Islam]', *Jurnal Islam Dan Masyarakat Kontemporari*, 24.1 (2023), 139–53
<https://doi.org/10.37231/jimk.2023.24.1.778>

³⁷ *Qobla al Dukhul* is a divorce that takes place following the execution of a legal marriage contract, in which the wife files for divorce before her husband engages in sexual relations with her.

³⁸ Yoram Stein, 'The Coherence of Spinoza's Theological-Political Treatise', *Philosophies*, 6.1 (2021), 20 <https://doi.org/10.3390/philosophies6010020>

³⁹ Jan Woleński, 'Against Truth as Coherence', *Logic and Logical Philosophy*, 4.0 (2003), 41 <https://doi.org/10.12775/LLP.1996.002>

⁴⁰ Valterri Viljanen, 'The Young Spinoza on Scepticism, Truth, and Method', *Canadian Journal of Philosophy*, 50.1 (2020), 130–42 <https://doi.org/10.1017/can.2019.7>

course, different interpretations can exist regarding the appropriateness of the husband's *ihdad* period. For some social groups, a month may suffice, while for others, a year may be necessary, and so on. Furthermore, the husband's *iddah* period remains unspecified, leaving no specific benchmark. On the other hand, the *ihdad* rules for wives align with the wife's *iddah* period.

Compared to the KHI, which regulates *ihdad* for men in general, implementing *ihdad* in the Banjar traditional community, South Kalimantan, is regulated more specifically. The time allocation and purpose of *ihdad* for husbands in the Banjar community are unique and are used as a benchmark for *ihdad* for men in the local community. History reveals that the Banjar tribe, residing in South Kalimantan, drew inspiration from Malay and Javanese cultures to shape their own culture. Subsequently, forces loyal to Buddhism, Ciwa, and Islam merged with the Banjar kingdom. The Banjar people base their daily lives on their religion (Islam), local customs, and their environment, all of which combine to form recurring patterns of behavior.⁴¹

The Banjar people of South Kalimantan are synonymous with Islamic society and adhere to Islamic teachings. Yet, sometimes, they are also colored by customs originating from the teachings of their ancestors, which are influenced by animism and dynamism. The customs of some Banjar people also serve as guidelines and family etiquette.⁴² Banjar customs are social procedures that its citizens must obey, and if anyone violates them, they are considered "uncivilized" or "not aware of customs." Remember Soekanto's concept of customary law, which states that customary law is a complex set of customary rules, most of which are unwritten, uncodified, coercive, and have sanctions, so they have legal consequences.⁴³ Ter Haar then explained customary law as all the rules embodied in the decisions of legal officials with the authority and influence to implement them spontaneously and with complete obedience.⁴⁴

As unwritten law, customary law is another word for customary law, which can be grouped into two, namely, customary law in written form or recorded customary law (*beschreven adatrech*), which is the result of research by experts and is then recorded in written form monograph. Second, existing legal documentation (*gedocumenteerd adatrecht*) is a recording of customary law carried out by

⁴¹ Hasan Hasan, 'Islam Dan Budaya Banjar Di Kalimantan Selatan', *ITTihad*, 14.25 (2016) <https://doi.org/10.18592/ittihad.v14i25.865>

⁴² A. A. Nugroho and others, 'The Existence and Way of the Banjar Tribe Adapting in the Era of the Covid-19 Pandemic', 2023, pp. 290–95 https://doi.org/10.2991/978-94-6463-206-4_43

⁴³ Islam Qerimi, Ahmet Maloku, and Elda Maloku, 'Customary Law and Regulation: Authenticity and Influence', *Journal of Governance and Regulation*, 11.4, special issue (2022), 289–99 <https://doi.org/10.22495/jgrv11i4siart9>

⁴⁴ Tody Sasmitha Jiwa Utama, 'Between Adat Law and Living Law: An Illusion of Customary Law Incorporation into Indonesia Penal System', *The Journal of Legal Pluralism and Unofficial Law*, 53.2 (2021), 269–89 <https://doi.org/10.1080/07329113.2021.1945222>

authorized officials.⁴⁵ Customs generally regulate family, community, and state life. When statutory regulations transform customary law, essentially a valid custom, into written law, it transforms into state law and becomes positive law. Hessbruegge's research revealed that most citizens in the world's newest country depend more on customary law and local authorities to manage their conflicts rather than relying on state civil institutions and other statutory laws.⁴⁶

However, numerous community customs continue to endure and persist as customary law, embodying the cultural values that have grown within the local community. One of the Banjar community's customs is to provide a mourning period for husbands whose wives have died. Husbands observe the mourning period, known as *ihdad*, by refraining from certain activities for a designated period, symbolizing their mourning for their wife's death. Based on field research to verify literature data regarding *ihdad* in the Banjar community, various forms of husband's *ihdad* were observed in several Banjar communities in South Kalimantan, including delaying remarriage. Some Banjar people in South Kalimantan believe that if a husband dies, his wife will not immediately remarry. The intention is to postpone the marriage as a sign of mourning and respect for the late wife's family, particularly for those who still have parents.

Second, delaying the distribution of inheritance, inheritance assets, whether in the form of joint assets, inheritance, or other forms related to the late wife, are not immediately taken care of (played with) or distributed until the end of the *ihdad* period, or the distribution will be carried out after the *ihdad* period. The time of *ihdad* is considered finished. Indeed, there is sometimes a dilemma in society between dividing inherited assets according to religious orders and the fear that if they are not distributed, it will cause problems in the future with feelings of social guilt because an atmosphere of sadness still surrounds their family. The two forms of husband's *ihdad* in some Banjar communities, as described above, differ from the wife's *ihdad* in Islam, which involves leaving all jewelry, including clothes, eyeliner, perfume, and nail polish, and refraining from smearing the head with oils or perfumes during times of mourning.

As a custom/ *'urf*⁴⁷ that exists among some Banjar people living in South Kalimantan, the husband's *ihdad*, when viewed from its form, it can be categorized as *'urf amali*,' in the form of customs already known to the surrounding community. Meanwhile, if viewed from its legal validity, if seen from the form of

⁴⁵ Iwan Erar Joesoef, 'The Idea of Customary Law Community Representation in the Regional Representative Council', *Unnes Law Journal*, 6.1 (2020), 119–42 <https://doi.org/10.15294/ulj.v5i2.26984>

⁴⁶ Jan Arno Hessbruegge, 'Customary Law and Authority in a State under Construction: The Case of South Sudan', *African Journal of Legal Studies*, 5.3 (2012), 295–311 <https://doi.org/10.1163/17087384-12342014>

⁴⁷ Lailita Fitriani and others, 'Eksistensi Dan Kehujjahan Urf Sebagai Sumber Istimbath Hukum', *Al-Hikmah*, 7.2 (2022), 246 <https://doi.org/10.30651/ah.v7i2.8088>

the husband's *ihdad*, it can be classified as '*urfasiid*', namely a habit that is contrary to Islamic teaching.⁴⁸ Because in Islamic teachings, there is no prohibition on a man whose wife dies from remarrying, there is no obligation for men to perform *iddah* and *ihdad* like women. Marriage is a command that must be fulfilled if it is harmonious and meets the conditions. In *fiqh*, two circumstances allow for postponing marriage: if the person concerned is in a state of *ihram* and if the person concerned is still in a state of *iddah* (for women).

Some Banjar people do not specify the exact days for the husband's *ihdad*. Still, they generally believe it to be 100 (one hundred) days, marked by a *berratus* ceremony, following which the mourning period concludes. Since this period marks the end of the husband's mourning period, all forms of prohibition cease to apply, prompting some of them to initiate discussions about inheritance division. However, when the husband enters into an arranged marriage and agrees to wed a deceased wife's relative, they no longer discuss the inheritance division, particularly regarding joint assets, and some even cease the conversation entirely. *Ihdad* husband is a community custom passed down from generation to generation in the Banjar community. The custom of *ihdad* in this community is carried out with the aim of, among other things, respecting and maintaining friendship and harmony with the family of the deceased wife, recovering from the loss of a loved one, and completing the responsibility of taking care of the family after the death of his wife; and showing loyalty as husband and wife and not offending the late wife's family.

As previously mentioned, the purpose of the husband's *ihdad* primarily serves the interests of benefit, which the Islamic perspective perceives not only as external comfort but also as inner comfort. Therefore, the customs of some Banjar people, in the form of *ihdad*, towards their husbands with the above objectives should be maintained. However, as has been done so far, there should not be a 100-day time limit. The length of *ihdad* should be adjusted to the husband's abilities based on *maslahah* considerations because the abilities and needs of each individual are different. Because the husband is required to wait for a hundred days, there can be no loss. The rules of *ushul fiqh* state that a loss must be eliminated. This is regulated in the KHI by only mentioning appropriateness.

Although Banjar society has passed down the mourning period for men from generation to generation, this does not mean society can thoroughly enforce it. Therefore, there are no physical sanctions given by society to husbands who do not carry out their husband's *ihdad*, but social sanctions in the form of labeling them less civilized automatically occur in society. This suggests that society continues to uphold its ancient cultural legacy. This custom has been proven to influence people's behavior, including husbands, responses to the situation after

⁴⁸ Tarmizi Tarmizi, 'Uruf in Islamic Law Perspective', *Journal of Islam and Science*, 7.2 (2020), 99 <https://doi.org/10.24252/jis.v7i2.16374>

the death of their wives by performing *ihdad*. The validity of customary law stems from the community agreement, also *known* as the social contract.⁴⁹ Customary regulations can be considered the primary source law, implemented spontaneously by individuals and organizations in their interactions because of a sense of legal obligation.⁵⁰

The development of customary law in indigenous communities has given them a comprehensive understanding of the values they hold dear for managing their lives. This understanding enlightens traditional law researchers, revealing that customary law embodies the profound essence of life. It crystallizes various societal beliefs and ideologies, which are only comprehensible through a case-by-case analysis of customary communities. Additionally, Indonesian positive law regulates *ihdad* for men, although the details of its implementation remain unclear. Furthermore, it's acceptable if it doesn't clash with religious law. The following is a comparison of the *ihdad* stipulation:

Table 1. Comparison of *Ihdad* Stipulation in Indonesia, Malaysia, and Banjar Customary Law

	Source of Law	Object	Legal force
Indonesia	Islamic Sharia and Compilation of Islamic Law (KHI).	1) <i>Ihdad</i> for women is regulated in detail. 2) <i>Ihdad</i> for men is not detailed and is only based on merit.	Binding, obligatory but there is progressiveness in <i>fiqh</i>
Malaysia	Islamic Sharia and the Enactment of Malaysian Islamic Family Law.	1) <i>Ihdad</i> for women is not regulated explicitly and in detail. 2) There are no <i>ihdad</i> rules for men.	Binding, obligatory, but there is relief (<i>rukhsah</i>).
Banjar Indigenous People	Islamic Sharia and unwritten customary law.	1) <i>Ihdad</i> for women according to Islamic law. 2) <i>Ihdad</i> for men is regulated in more detail	Not wholly enforced but carried out from generation to generation and can include 'social' sanctions.

The Relevance of Maslahah Ihdad and Human Rights Issues

Discrimination against women and gender equality are not new issues; from the start, there has been debate about whether the human rights that were initially formulated were men's rights.⁵¹ Cultural construction also places unequal pressure on men and women. Only later in the era did the echo for equal roles and rights for women become more prevalent. The UDHR challenges ancient customs. Resolution 843 affirms the supremacy of the UDHR over any customs and

⁴⁹ Amos O Enabulele and Bright Bazuaye, 'Validity and Enforceability of Customary Law in Nigeria: Towards a Correct Delimitation of the Province of the Courts', *Journal of African Law*, 63.1 (2019), 79–104 <https://doi.org/10.1017/S002185531800030X>

⁵⁰ Francesco Parisi, 'Customary Law', in *The Encyclopedia of Public Choice* (Boston, MA: Springer US), pp. 460–63 https://doi.org/10.1007/978-0-306-47828-4_71

⁵¹ Rhoda E. Howard-Hassmann, 'Universal Women's Rights Since 1970: The Centrality of Autonomy and Agency', *Journal of Human Rights*, 10.4 (2011), 433–49 <https://doi.org/10.1080/14754835.2011.619398>

demands the abolition of archaic customs, laws, and practices, especially in marriage and family law, which are inconsistent with existing rules.⁵²

Unlike universal equality of rights, gender equality in Islam is not equality where all must receive the same treatment but rather the fulfillment of rights according to the level of need and nature.⁵³ The provisions for men and women in Islam are also not just ancient traditions. Acknowledging Cathryne Schmitz, that the fulfillment of rights must include not only individual opportunities but also changes in communities and countries, both personal and political aspects.⁵⁴ However, this does not mean that all restrictions are a definite oppression of women's rights. Islam has a variety of rules for marriage obligations and prohibitions. This includes the *iddah* period, where it is not permissible for a wife to marry within a certain period. In this case, of course, universal human rights that are not in harmony with state and religious law will be difficult to enforce in their entirety. For example, consider the case in Oman, where Oman has doubts regarding several provisions outlined in Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) because they conflict with Islamic law. Therefore, the court may enforce the CEDAW articles to assert rights, except for provisions that Oman expresses objection to.⁵⁵

Marriage in Islam is a sacred thing, any factors that are not in accordance with Islamic teachings will have a fatal impact if carried out. It's not just about *iddah* and *ihdad*; there are many proposals for respecting human rights that become even more extreme when compared with Islamic law. For instance, Article 23 of the International Covenant on Civil and Political Rights, which contains the express right to marry, must be interpreted in a non-discriminatory manner and must not be limited exclusively to opposite-sex couples.^{56,57} If the case of same-sex marriage is said to require rights, then regulations such as *ihdad* will encounter many conflicts with human rights standards that emphasize rights. Demands for

⁵² Roland Burke, 'Universal Human Rights for Women', in *Women and the UN* (London: Routledge, 2021), pp. 71–87 <https://doi.org/10.4324/9781003036708-5>

⁵³ Machrus Ali Syifa', Ahmad Tholabi Kharlie, and Mualimin Mochammad Sahid, 'Juridical Study of the Constitutional Court's Decision No. 22/PUU-XV/2017 Regarding Restriction of Marriage Age in the Perspective of Maslahah Theory by Muhammad Sa'îd Ramadân Al-Bûtî's and Gender Equality in Islam', *AL-'ADALAH*, 17.1 (2020), 111–30 <https://doi.org/10.24042/adalah.v17i1.6316>

⁵⁴ Cathryne L. Schmitz and Shirley Gatenio Gabel, 'Women, Human Rights, and Gender Equality', *Journal of Human Rights and Social Work*, 8.4 (2023), 359–60 <https://doi.org/10.1007/s41134-023-00288-7>

⁵⁵ Fahad Al Aghbari and others, 'Rights of Women in the Establishment and Dissolution of Marriage in Oman: Between CEDAW and Sharia Perspective', *Legality: Jurnal Ilmiah Hukum*, 32.1 (2024), 33–50 <https://doi.org/10.22219/ljih.v32i1.31493>

⁵⁶ Paula Gerber, Kristine Tay, and Adiva Sifris, 'Marriage: A Human Right for All?', in *Marital Rights* (Routledge, 2017), pp. 21–46 <https://doi.org/10.4324/9781315091464-2>

⁵⁷ Kees Waaldijk, 'The Right to Marry as a Right to Equality', in *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development* (Brill | Nijhoff, 2021), pp. 457–72 https://doi.org/10.1163/9789004459892_024

expanding marriage rights to same-sex couples have not produced a consensus among those who accept these rights.⁵⁸

In another study that juxtaposed human rights with the noble values of the state, Pancasila, it was found that, philosophically, same-sex marriage is contrary to the values contained in Pancasila as a fundamental norm in Indonesia. On the other hand, sociologically, same-sex marriage does not align with the culture of a nation whose citizens uphold religious values. Substantially, there are no regulations covering same-sex marriage.^{59,60} So at what point will this freedom continue to seek satisfaction.

Meanwhile, the provisions of *iddah* in Indonesia and Malaysia are regulated by the positive laws of each country. Indonesia regulates *ihdad* in more detailed portions. The regulation of *ihdad* considers the fundamental rights of women to marry, travel, dress up, and work until the end of the *iddah* period. Also, the provisions of *ihdad*, based on hadith, have experienced various developments that make things easier for women. More important than that, the reasons for the *ihdad* rule should be more widely discussed rather than debating how the implementation of *ihdad* limits women's rights.⁶¹

The rules of *ihdad* are closely related to *al-maslahah*. *Al-maslahah* means goodness, usefulness, appropriateness, harmony, and appropriateness. The word *al-mashlahah* is contrasted with *al-mafsadah*, which means damage. Islamic law is a sharia that realizes justice and the benefit of mankind in this world, the world, and the hereafter. Benefits in the Islamic view are not only assessed in terms of physical pleasure but also terms of spiritual pleasure. Its function is to uphold and achieve the goals of sharia, which include the protection of religion, soul, mind, lineage, honor, and property. Everything that can guarantee and protect the existence of these six things includes *al-maslahah*. In the scientific discourse of *ushul fiqh*, *maslahah* is the goal of sharia (*maqasid al-syariah*).

Imam al-Syatibi gave signs to achieve the goals of sharia, containing five principles of sharia law: preserving religion (*hifzh al-din*), taking care of the soul (*hifzh al-nafs*), preserving offspring (*hifzh al-nasl*), preserving the mind (*hifzh al-'aql*),

⁵⁸ I-Ching Lee and Wei-Fang Lin, 'Us versus Them: The Debates on the Legislation of Same-Sex Marriage (1994 – 2015) in Taiwan', *Journal of Homosexuality*, 69.4 (2022), 655–76 <https://doi.org/10.1080/00918369.2020.1848148>

⁵⁹ La ode Dedihasriadi, Ju-Lan Hsieh, and Wahyudi Umar, 'Same-Sex Marriage as a Human Rights Freedom in Indonesia: The Perspective of Pancasila and the Marriage Law', *Jambura Law Review*, 4.2 (2022), 214–26 <https://doi.org/10.33756/jlr.v4i2.14067>

⁶⁰ Alison L. Gash, 'A Public Debate on Same-Sex Marriage', in *Below the Radar* (Oxford University Press, 2015), pp. 51–88 <https://doi.org/10.1093/acprof:oso/9780190201159.003.0003>

⁶¹ Zanariah Noor, 'Wanita Islam Dan Cedaw: Isu-Isu Berkaitan Dengan Undang-Undang Kekeluargaan Islam Di Malaysia', *Jurnal Syariah*, 31.1 (2023) <https://doi.org/doi.org/10.22452>

and preserving property (*hifzh al-maal*).⁶² Maslahah, as part of maqasid al-syariah, is an instrument for producing Islamic law as a solution to the problems of everyday life. Maslahah is defined as everything that can ensure and protect the existence of these five elements. On the other hand, anything that can disturb and damage these five things is considered *mafsadah*.

In this instance, *ihdad* serves as more than just a symbolic or ceremonial expression of grief following a husband's death. However, it is intended precisely to protect the honor of a woman who has just lost her husband, who, before he died, was obliged to look after, protect, and provide for her. This is based on religious values. During the iddah period, *ihdad* can uphold the principles of religious teachings, such as safeguarding the soul by upholding honor and facing death, preserving the lineage in the event of a pregnant woman's abandonment, fostering a mindset to consistently act virtuously by sharia, and preserving property, including inheritance matters.

Therefore, the prohibitions in *ihdad* cannot be interpreted as restrictions or even gender discrimination. Moreover, the KHI regulates the implementation of *ihdad* on a man whose wife dies, referring to customary law. Even though it is not specified in the Qur'an and hadith, *ihdad* is regulated by positive law or can refer to local customary law. In this case, positive law and customary law act as mediators when an aspect of freedom conflicts with religious teachings. The law is used to make compromises or other balanced accommodations.⁶³ Or referring to other research, which states that the husband's *ihdad* is related to *qiraah mubjadi*, which explains the method of interpretation with parallel subject texts. In this context, existing texts discussing women and men have the same meaning. The main objective of carrying out *ihdad* is to remember, respect, and protect the feelings of the family of the deceased. If *hikmatuttasyri* is like that, then the law of *ihdad* does not only apply to women but also to men.⁶⁴

Moreover, according to various sociolegal studies, the constitution and human rights law protect religious freedom. Even those who experience restrictions on expressing their religious beliefs can file discrimination claims.^{65,66} This implies

⁶² Mudofir Abdullah, 'Marriage In Islam and the Problem of Gender Equality: A Philosophical Perspective', *Ulumuna*, 22.1 (2018), 57–76 <https://doi.org/10.20414/ujis.v22i1.333>

⁶³ John Bowers, 'Accommodating Difference; How Is Religious Freedom Protected When It Clashes with Other Rights; Is Reasonable Accommodation the Key to Levelling the Field?', *Oxford Journal of Law and Religion*, 10.2 (2022), 275–97 <https://doi.org/10.1093/ojlr/rwab008>

⁶⁴ Laili Izza Syahriyati, 'The Concept Of 'Ihdad Husband Who Lived With Their Wife (Analytical Study Of Qiraah Mubadalah's Interpretation)', *Nurani: Jurnal Kajian Syari'ah Dan Masyarakat*, 20.2 (2020), 187–94 <https://doi.org/10.19109/nurani.v20i2.5536>

⁶⁵ David Perfect, 'Religion or Belief Legal Cases in the Workplace', in *Research Handbook on Inequalities and Work* (Edward Elgar Publishing, 2024), pp. 126–40 <https://doi.org/10.4337/9781800886605.00019>

that upholding religious regulations is contingent upon their non-violation of state regulations and human rights, both of which are indisputable.⁶⁷ In some countries, even the formulation of state regulations looks at religious teachings' values. In a specific case, in research by Maksimus Regus (2022), explaining the 'legitimacy' of limiting human rights when a public safety emergency occurs, such as limiting the right to freedom, is justified by considering public health due to the COVID-19 pandemic.⁶⁸ In other cases, there are restrictions on the age of marriage. Combined with human rights, of course, this is a limitation of rights. Meanwhile, considering the reasons for mental and physical health, it is necessary to regulate age restrictions. The rules can be classified into *al-dharurriyah* (primary) interests and must be fulfilled to achieve salvation.⁶⁹

Apart from that, returning to the discussion of *ihdad*, which is also applied to men according to customary law, this is an essential factor that shows that the provisions prohibiting *ihdad* are also born from the appreciation of religion in a community group. Customary law does not compel individuals to adhere to religious teachings. The crystallization of various life values contained in customary law gives customary law a high awareness. Customary law regulates not only the relations between society members but also the relationship between nature and God.

In Islam, the word customary means habit or practice. Meanwhile, a reasonable person defines 'urf as repeated practice. Thus, 'urf is part of custom because custom is more general compared to 'urf. 'urf is not a natural habit like most customs but arises from thought and experience, although some scholars understand the words customary and 'urf as two words that are not different. Five prerequisites exist for the practice of 'urf, such as its consistent application and societal recognition; its universal applicability, not limited to a specific group or individual; and its compatibility with the sharia text or ijma. The 'urf is not new; it does not conflict with the applicable 'urf.⁷⁰

⁶⁶ Rachel C. Schneider and others, 'How Religious Discrimination Is Perceived in the Workplace: Expanding the View', *Socius: Sociological Research for a Dynamic World*, 8 (2022), 237802312110709 <https://doi.org/10.1177/23780231211070920>

⁶⁷ Lucy Vickers, 'Religious Discrimination in the Workplace: An Emerging Hierarchy?', *Ecclesiastical Law Journal*, 12.3 (2010), 280–303 <https://doi.org/10.1017/S0956618X10000414>

⁶⁸ Maksimus Regus, Marianus Tapung, and Marianus S. Jelahun, 'Beyond the Right to Have Freedom: Religion and Belief in the Context of COVID-19 Health Emergency Regulation in Indonesia', *Journal of Human Rights and Social Work*, 7.3 (2022), 277–84 <https://doi.org/10.1007/s41134-022-00215-2>

⁶⁹ Darlin Rizki, Frina Oktalita, and Ali Sodikin, 'Maqasid Sharia Perspective in Changes the Marriage Age Limits for Women According to Law Number 16 of 2019', *Al-Istinbath: Jurnal Hukum Islam*, 7.2 (2022), 501 <https://doi.org/10.29240/jhi.v7i2.4016>

⁷⁰ Andriyaldi Andriyaldi, 'Al-'Urf Theory and Its Relevance to Contemporary Jurisprudence Issues', *Al Hurriyah: Jurnal Hukum Islam*, 6.2 (2022), 29 <https://doi.org/10.30983/alhurriyah.v6i2.4784>

Based on its validity as a legal proposition, *'urf* is grouped into two, namely *'urf sahih* and *'urf fasid*. *'urf sahih* are customs that apply in society and do not conflict with Islamic law. Judging from its scope, *'urf sahih* can be divided into two categories: *'urf al-am*, habits that generally apply in society. Second, *'urf al-khas* is a custom that applies locally. In this case, the Hanafi Sect, Maliki, and Ibn Qayyim from the Hanbali Sect argue that *'urf* can be used as independent *hujjah*. Meanwhile, the Syafii Sect of thought believes that *'urf* cannot be *hujjah* unless it has backing from the of *syarak* argument.⁷¹ No elements of the implementation of the mourning period in the Banjar traditional community were found to be contrary to sharia; in fact, the implementation was based on religious appreciation. Most people have believed in and practiced this mourning period for men for generations.

In taking care of the Muslim community, the Prophet and his companions had no desire to go against current societal customs and were in line with the preaching mission they carried. The reason is that customary law can provide solutions related to the community's will, which aims to maintain and realize human benefit. In fact, according to Ibnu Qayyim Al-Jauziah, accepting and making *'urf* a sharia proposition in determining the law needs to be done if no text explains the law or the problem being faced.⁷² It can be seen that the legal attitude of accepting or rejecting customs depends on the elements of *masalahah* and *mafsadat*, meaning that as long as the custom is beneficial and does not cause harm, then the custom can continue to be applied.

Therefore, Islamic law does not interpret the provisions of *ihdad* for women as restrictions on human rights or discrimination. The focus lies on a more significant issue of respect. Also, customary law can be implemented, which becomes *'urf* as long as it does not conflict with the sharia and provides benefits. Debating human rights without considering the benefits of a whole concept will not solve societal problems. Hoko Horii (2020) mentions that overlooked blind spots are a problem encountered more frequently in human rights. Without addressing these blind spots, human rights frameworks risk becoming self-defeating and failing to achieve their goal, namely protecting human agency.⁷³ Likewise, religious teachings chosen by each individual, whose rights are also guaranteed to be protected, must be protected without forcing the universal application of human

⁷¹ Aliya Karima and others, 'Kepentingan Terbaik Anak Pemohon Dispensasi Pernikahan Dalam Penafsiran Hukum Oleh Hakim', *Al-Syakhsiiyyah: Journal of Law & Family Studies*, 5.2 (2023) <https://doi.org/10.21154/syakhsiiyyah.v5i2.7082>

⁷² Ismail Ismail and others, 'The Contribution of 'Urf to the Reform of Islamic Inheritance Law in Indonesia', *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan*, 22.2 (2022), 165–78 <https://doi.org/10.30631/alrisalah.v22i2.1243>

⁷³ Hoko Horii, 'A Blind Spot in International Human Rights Framework: A Space between Tradition and Modernity within the Child Marriage Discourse', *The International Journal of Human Rights*, 24.8 (2020), 1057–79 <https://doi.org/10.1080/13642987.2019.1690468>

rights, which suppresses religious teachings. Meanwhile, religious provisions have a transparent background and provide benefits for their adherents.

4. Conclusion

Based on analysis above, it indicates that the family practices *ihdad* as a form of mourning. According to Islamic law, the hadith on the provisions of *ihdad* is addressed to women whose husbands have died. Through its adaptation of Sharia law, Malaysia adheres to the same principles, albeit with some concessions in implementing *ihdad*. In contrast to Indonesian law, which regulates *ihdad* in detail, Malaysia only regulates a few things related to the iddah period in the Enactment; the rest is subject to sharia. In Indonesia, *ihdad* regulations are more detailed for women but also apply to men. This is regulated in the KHI, although men's *ihdad* period is not regulated as concretely as women's *ihdad*. The implementation of *ihdad* for men can also be found in customary law, which implements the appreciation of religious values. As long as there are no elements found to conflict with sharia, the implementation of customary law is based on religious appreciation. It provides *maslahah*, then it can be implemented. Apart from that, if the mourning period for men based on customary law is also believed and implemented by the majority of society for generations, it meets the requirements, then '*urf*' can be implemented. Meanwhile, the issue of discrimination against women in *ihdad* is no longer valid because it can be carried out by both men and women. In addition, *ihdad* is not an ancient ceremonial tradition. *Ihdad* is and will continue to be relevant to protecting human rights by prioritizing the values of *maslahah*, respect for family, and loyalty.

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