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Graduate School of State Islamic Institute of Tulungagung  
East Java, Indonesia



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## Preface

### Director of Graduate School of IAIN Tulungagung

The Graduate School of State Islamic Institute of Tulungagung has conducted an *Conference on Contemporary Issues in Philosophy and New Islamic Civilization*” (CCI-PHONIC), on November 19, 2018. The conference was in the form of Call for Papers in which all papers must be written and presented in English. All incoming papers must be published in international proceedings.

The international conference was held in the auditorium on the 5th floor of the Tulungagung IAIN Graduate School building and was attended by more than 350 participants consisting of lecturers, students and audiences of science studies. The International Conference program focusing on interesting actual themes was moderated by Dr. Mulia Ardin M.Fil. The invited Keynote Speakers of the Conference were: 1). Prof. Zain Musa, Musa Asiah Foundation Cambodia and Royal Academic Cambodia, with a paper entitled *Cham Houses in Cambodian Islamic Civilization : A philosophycal Anthropology Study*. 2). Dr. Nek Mah Binti Bathrie, Singapore, with a paper entitled, *Philosophy of Mosque Madrasah Education System in Singapore*. 3). Prof. Dr. Maftukhin, M.Ag, Indonesia, with a paper entitled, *Developing Philosophy Subject in Indonesia Schools*. 4). Prof. Dr. Mujamil Qomar, Indonesia, with a paper entitled, *A Critical of Islamic Education Philosophy Studies in Indonesia*. 5) Dr. Akhmad Rizqon Khamami, Indonesia, with a paper entitled, *Fethuleh Gulen and Contemporary Islamic Thought*. 6). Dr. Zaini Fasya, M. Pd.I, Indonesia, with a paper entitled, *Philosophy of Kindness in the Qur'an*.

The themes was reinforced by a number of parallel discussions of 23 papers grouped in four studies, namely: (1). *Philosophy of Education and Literature*, (2). *Philosophy of Islamic Economic and Civilization*, (3). *Philosophy of Islamic Law and Humanities* dan (4). *Philosophy of Religion and Social Science*.

The study of philosophy was very important to always be grounded considering philosophy has an important role in building the foundation of thinking to find solutions in overcoming the problems of human life. Philosophy really helps every human being to have insight and way of thinking deeply, healthy reasoning accurately and precisely. With the philosophy of the problems and challenges faced by the Indonesian people can be solved. Lecturers have an important role in developing renewal-style thinking, as the main educator in academic development on campus, of course it was necessary to have an intellectual moral awareness to actualizing and contextualizing philosophy in various dimensions of life.

In the context of education in Indonesia, philosophy has a major role in the development of a critical philosophy of Islamic education in Indonesia. The persistent efforts of Islamic education thinkers in realizing their awareness to build mind-sets, paradigms, approaches,



methods, procedures and mechanisms for development of Islamic education need to be continued, in order to be able to build concepts and theories of Islamic education productively and functionally.

In response to the above-mentioned fact, the proceedings of the *Conference on Contemporary Issues in Philosophy and New Islamic Civilization* (CCI-PHONIC), was a manifestation of the responsibility of Graduate School of IAIN Tulungagung to encourage the scientific dynamics of actualizing philosophy in all segments of life.

The Director of Graduate School of IAIN Tulungagung expresses his gratitude to all those who have contributed to the process of publishing this international proceeding, especially to the foreign reviewers of the proceedings.

Tulungagung, November 19<sup>th</sup> 2019

Direktur Pascasarjana IAIN Tulungagung,

Ttd

Prof. Dr. H. Akhyak, M.Ag

## Acknowledgement

### Rector of IAIN Tulungagung

All praise belongs to Allah SWT, the great universal universe. God who bestows the ocean of knowledge and depth of ratio so that His existence can be understood. The gift of knowledge is manifested in the history of people which creates a rational civilization, so that it represents His grandeur and greatness.

Prayers and greetings may always be bestowed upon His Majesty- the honorable Prophet- the selected person for his wisdom, so that all people in this world are able to be introduced to the source of truth and knowledge.

Following up on *Conference on Contemporary Issues in Philosophy and New Islamic Civilization*” (CCI-PHONIC), on November 19, 2018, at the 5th floor of the Graduate School Building in the State Islamic Institute of Tulungagung, East Java, Indonesia, it is necessary to publish a codified publication of the results of the discussion in an international proceeding. In the introduction section of this proceeding, I would like to remind you about the mission of *Da'wah* and Civilization which became both the vision and orientation of developing IAIN Tulungagung.

First, the term *Da'wah* and Civilization was deliberately chosen to mark the distinguishing factors of the IAIN Tulungagung campus with other campuses within both PTKIN and public campuses environment. Those two terms are interrelated, integral and inseparable. *Da'wah* is a spirit and an action which guides people to get wisdom and breadth of knowledge. Meanwhile, civilization is the embodiment of the vast ocean of knowledge. Without *da'wah* there can be no civilization, and conversely, that there has never been found a great civilization unless human culture is able to be recognized, developed and disseminated into the sources of knowledge. Building a campus that develops the vision of *Da'wah* and Civilization means to realize the campus as the center of developing knowledge and its distribution in order to build the splendor of human civilization. Both the development of science and the embodiment of civilization are either as manifestations of servitude to God or as recognition of the greatness of God. That is the reason why the campus of IAIN Tulungagung is expected to be different from the other campuses.

Second, the term *Da'wah* and civilization represents the orientation of scientific development at IAIN Tulungagung. Unlike the other institutes within PTKIN, IAIN Tulungagung develops the concept of knowledge integration which has different paradigm, uniqueness and excellence. Through *Da'wah* and Civilization, IAIN Tulungagung develops a more holistic concept of scientific integration without breaking into the framework of labeling science with religious doctrine. The development of the concept of scientific integration at IAIN Tulungagung is characterized by an attitude of cosmopolitanism towards science. This means that the concept of integration should be started with accepting and celebrating the entire epistemology of scientific knowledge. The development of knowledge should always be started with strengthening the epistemology and methodology bases. The concept of integration is operationalized in the realm of axiology, namely the ethical and moral dimensions of science. People need to be aware of

their existence as the representatives of God carrying messages of wisdom for human history and civilization. To celebrate the methodology is tantamount to instill the commitment of all academicians at IAIN Tulungagung to take part in developing, exploring, and disseminating knowledge. Each individual working at IAIN Tulungagung should also be aware of his existence to spread the wisdom and benefit for human culture and civilization. Through this concept of integration, it is expected that every academician at IAIN Tulungagung, carries out a scientific prophetic mission, which is to spearhead the development of science as a means of understanding both the universe and humans and remembering the ethical position as a disseminator of wisdom and benefit for the people.

Third, the concept of *Da'wah* and Civilization marks the commitment of IAIN Tulungagung as an institute which is rooted from the society and its history. Yet, like other institutes, IAIN Tulungagung also has its own historical roots. It was born and grew up in a typical sub-culture of the Mataraman community, which has a strong commitment to Islam and tightly holds Javanese identities. Compared to the other subcultures, the Mataraman subculture is unique in terms of the authenticity of the Buddhists and the traditions that develop in their communities.

In accordance to the cultural basis and ecosystem of the people who really appreciate Javanese tradition and culture, IAIN Tulungagung develops an official policy to be accommodative of the richness of the cultural treasures and traditions developed among the people. The richness of cultural treasures is one of the important assets for IAIN Tulungagung, because it can be a living laboratory for scientific development at IAIN Tulungagung. Through both academic and non-academic efforts, IAIN Tulungagung continues making the community's cultural ecosystem as an inseparable part for the development of the mission of *Da'wah* and civilization.

I, as the Rector of IAIN Tulungagung, expect that the publication of this International proceeding of the *Conference on Contemporary Issues in Philosophy and New Islamic Civilization* (CCI-PHONIC), can be as an important effort done by IAIN Tulungagung to interpret the goal of *Da'wah* and Civilization on this Archipelago. Amen, ya Rabb al-Alamin

Tulungagung, November  
21<sup>th</sup> 2019

Rektor of IAIN  
Tulungagung

TTd

Prof. Dr. Maftukhin, M.Ag

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## HIGHLIGHTING LAW PROBLEMATIC OF THE WESTERN FAMILY (A Critical Perspective of Spirituality Values in Islamic Family Law)

Ahmad Muhtadi Anshor dan Muhammad Ngizzul Muttaqin

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**Abstract:** *As a country that adheres to secular ideology, the West Country certainly has its own principles in the provisions of family law. This is certainly different from its legal products with Islamic family law that prioritizes the values of spirituality. This study aims to provide a critique of western family law products in the perspective of the values of spirituality in Islamic family law. The research method used in this study is a qualitative method with data collection techniques of literature study of book literature, journals relating to western family law and Islamic family law. While data analysis uses content analysis. The findings in the study show: 1) There are differences from the initial concept between western family law and Islamic family law, 2) Between western family law and Islamic family law have different dimensions, western family law only has an individualistic dimension, while family law has a very broad dimension.*

**Keywords:** *Western Family Law; Islamic Family Law.*

### A. Introduction

Marriage as an inner and outer bond between the two parties is built very strongly based on religious values. While the purpose of the marriage contract is to form a happy, prosperous, and eternal family forever. Marriage in practice is always inseparable from the social, legal, and religious aspects. Even the implementation of the marriage contract to the celebration of the wedding party always collaborate between social, legal and religious elements. Every marriage is not only based on recognized biological needs, but as a natural process of human life. Likewise, it is also governed by the provisions of the Islamic Family law which contains the basic values that are psychiatric and spiritual including life and mind. That is, the values in Islam must be the basis in carrying out life in the household.<sup>66</sup>

However, there is another perspective in the study of family law (marriage). The concept of marriage used by western countries is a concept taken from the concept of Catholic canonic law. In the history of its emergence, marriages in Europe are customary marriages that are not written down and continue to be passed down for generations. This happened during the Pre-Christian period, where in the concept of traditional Western wedding marriages were to combine the economy between the bride and groom and be negotiated privately and internally without involving the public at large.<sup>67</sup>

While the implementation of marriage law in Western countries until now adheres to civil marriage law. Where in practice, religious marriage laws cannot be enforced and recognized by western countries. This practice is also carried out in several countries, such as Sweden, the Netherlands and Denmark<sup>68</sup> This is certainly in the view of people who adhere to a belief, the view of western marriage law is considered to be a secularist.

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<sup>66</sup> Santoso, "Hakekat Perkawinan Menurut Undang-Undang Perkawinan, Hukum Islam, Dan Hukum Adat," *YUDISIA* 7, no. 2 (2016): 412.

<sup>67</sup> Sri Wahyuni, "Liberalisasi Hukum Perkawinan Di Negara-Negara Barat," *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 48, no. 1 (2014): 2.

<sup>68</sup> Lihat dalam, Caroline Soergjerd, *Reconstruction Marriage: The Legal Status of Relationship in Changing Soceity* (Cambridge: Intersentia, 2012).

Secularism is a system that separates spiritual and temporal authority. This separation was carried out in western countries by separating between church and state and between the power of God and the emperor.<sup>69</sup> This ideology which then gave rise to a model of absolute monarchical government. Where the State's power becomes absolute without regard to spiritual values and moreover social and human values.

From the explanation above, it has been interesting for the writer to make a criticism in the academic form using the perspective of religious spirituality values, namely Islamic thought about family law (*al-ahwal al-syakhsyah*). This aims to provide an understanding and thought of the relevance of religious teachings (especially Islamic family law) in various problems and problems encountered at all places and times.

This criticism in the author's view is to find out at what level these two laws can be collaborated. The problem of the process of collaboration and acculturation of these legal products in practice cannot be avoided. The cause is not solely due to the flow of information and globalization, and technology, but also influenced by science. This can be traced by several developments in western law which are acute and collaborative of Islamic law. Because in terms of its uniqueness, although Islamic law in some cases does not have a humanitarian law (capital punishment), but Islamic law has a characteristic and values that can be taken to be applied at a different place and time.<sup>70</sup>

### **B. Western Family Law**

Western family law considers that marriage is the uniting of men and women to live together voluntarily. Besides marriage is an agreement between men and women to have a marital relationship. In another sense it is stated that the marriage of the western state is a customary law that has been descending. This marriage is a negotiation and agreement between the two parties. So this family continuity process is a mutual agreement, including in case of divorce.<sup>71</sup>

A problem of western marriage law can be traced from the separation of marriage law from the aspects of the constitution and aspects of religiosity (religion). Evidence of the liberalization of the law of western marriage can be traced to the State of Sweden, one of which is the provision of pre-marital sexual relations during the Protestant period. This family law regulation in Sweden began in the XVIII century, where the State gave freedom to make choices in marriage. The choice is to do based on civil marriage or religious marriage celebration.

In the next period in the XIX century (1906-1919) became the first golden era of reform in the social field. One reform that is a problem is the existence of liberal and individualistic legal expressions that divorce can be carried out only with the agreement of one of the parties (husband or wife). In addition to the rules of divorce, it also regulates the regulation of children born outside of marriage.

A further development related to marriage law in Sweden is the development of an irreligious, ahistorical, and anti-national society in 1967. One of the legal products is the provision on the ability to have abortion for women. The climax of the problem was in 1970-1987, where marriage was no longer in the public sphere, but only a civil agreement between the two parties (could make a marriage contract with oneself). It also regulated the provisions of living together without marriage ties allowed. Whereas the year 1994 regulates same-sex marriages, and in 2009 regulates gender-neutral marriages.

The problems of western marital law can also be traced to the legal products of European countries, Germany, Britain and France for example. Where in these countries also do a separation between civil marriage and religious marriage. While in America the concept of marriage also separates civil and religious marriages, even today same-sex marriages continue to be echoed.<sup>72</sup>

### **C. Values of spirituality in Islamic Family Law**

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<sup>69</sup> Samoel P. Huntington, *The Clash of Civilizations and The Remaking of World Order* (Sidney: Touchstone, 2001), 46.

<sup>70</sup> JNJ Anderson, *Hukum Islam Di Dunia Modern* (Surabaya: Amar Press, 2002), 65.

<sup>71</sup> Caroline Soergjerd, *Reconstruction Marriage: The Legal Status of Relationship in Changing Society*, 64.

<sup>72</sup> Sri Wahyuni, "Liberalisasi Hukum Perkawinan Di Negara-Negara Barat,": 18-24.



Islamic family law is a family law that breathes religion (Islamic law) and is promoted by a country into positive law. The concept of the relationship between religion and state is actually a manifestation of the spirit to realize religious values in state life. This model of combining religious and state values aims to bind the community to a norm that is considered a collective agreement that is divine (given). This is so that the state is given authority as a guardian of values that can sustain the goal of creating norms in society in the life of the nation and state.<sup>73</sup>

The product of Islamic family law is always correlated with a religious value.<sup>74</sup> Like the limitation of divorce in marriage, this is intended to provide a lesson that in forming the family needed a good communication. Regulations on the terms and conditions of marriage are intended to maintain the sacredness of law and religion. Prohibition of same-sex marriage is intended to maintain God's provisions. Some provisions in Islamic family law, such as the maintenance of living, inheritance, and child care, all aim at realizing godly values.

In the concept of Islamic family law also adheres to an institution in a family that is mutually responsible. Where in the implementation of husband and wife household is given a right and obligation to be upheld and implemented together.<sup>75</sup> This is none other than to realize the mission of the Islamic religion, namely the creation of a pair of lovers who live happily and realize *sakinah*, *mawaddah*, and *rahmah*.<sup>76</sup>

Marriage in Islam has the substance of the protection of human dignity (especially women). Women are highly elevated, such as the provisions of the period of the *iddah*, where this provision has the substance to protect the woman when in divorce it turns out she already has a fetus from her marriage.

Marriage in Islamic law also has the substance of realizing God's purpose, namely to give birth and take care of offspring as future generations. Because marriage in the eyes of Islam is a sacred shield to prevent men and women from having sexual relations so that they do not fall into adultery. The main purpose of marriage is to lose offspring, foster love, support one another, comfort one another, guide one another, educate one another, and help one another. Thus, marriage is not only aimed at mere sexual relations, but has the substance of human values and divine values.<sup>77</sup>

#### **D. Criticism of Western Family Law Perspective on Spirituality Values of Islamic Family Law**

The family as the smallest institution in the state building, where the main foundation of the country is built by the quality of each family. In addition, the family also influences community life, so that a good family will bring out a good society, and a good society will create a good family, full of harmony, and sovereignty.<sup>78</sup>

In this modern era, modern thoughts have emerged. Starting from the patriarchal family model that oppresses women, to the emancipatory family law thinking (equality of husband and wife) as a step to create a harmonious and mutually respectful family.

The liberalization of Western family law thinking is the discovery of the legality of same-sex marriage. This is certainly in the perspective of Islamic family law is not in accordance with Islamic values. Where is the inevitability of God to create men and women as if denied by the legality of same-sex marriage. In addition, the purpose of *shari'ah* (*maqashid shari'ah*) cannot be realized, because the main goal in Islamic family law is to create offspring based on a contract recognized by the state and religious law.

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<sup>73</sup> JM. Muslimin, "Hukum Keluarga Islam Dalam Potret Interrelasi Sosial," *Jurnal Ahkam* XV, no. 1 (2015): 40.

<sup>74</sup> Konsep ini dalam hukum Islam disebut dengan *maqashid syari'ah*, lebih lanjut lihat, Ahmad Raisuni, *Al-Bahs Fi Maqashid Al-Syari'ah Nasy'atuha Wa Tatawwuruha Wa Mustaqbaluha* (Ribath: Mathba'ah al-Najah al-Jadidah al-Dar al-Baidhah, 2007).

<sup>75</sup> Janet Halley & Kerry Rittich, "Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism," *THE AMERICAN JOURNAL OF COMPARATIVE LAW* 48 (2010): 769.

<sup>76</sup> Quraish Shihab, *Pengantin Al-Qur'an* (Jakarta: Lentera Hati, 2007), 82..

<sup>77</sup> M. Saeful Amri dan Tali Tulab, "Tauhid: Prinsip Keluarga Dalam Islam (Problem Keluarga Di Barat)," *Ulul Albab: Jurnal Studi Dan Penelitian Hukum Islam* 1, no. 2 (2018): 102.

<sup>78</sup> Maria Rosaria Marella, "The Non-Subversive Function of European Private Law: The Case of Harmonisation of Family Law," *European Law Journal* 12, no. 1 (2006): 86.

This is supported by western sociology which says that the family is only a container to vent the desire for sexuality. Some sociologists even say "a their overnight parking place is mainly for sex relationships", that family institutions are only friends at night. As a result, the family is only an outlet and is not based on love and mutual love. In the end this understanding creates divorce that is no longer unstoppable.

Another development of family law practices in the west is the rise of a pair of men and women without any legal marriage ties. This practice is called "cohabitation", a life practice that ignores the legality of law and religious values. In its development this group always experiences an increase in each year. Finally, the United States Department of Housing and Urban Development canceled traditions and changed the rules for marital agreement.<sup>79</sup>

Another phenomenon in western family law practice is a husband and wife who decide not to have children (children). In some European countries such as Germany, there are many couples who do not have children. In his view, having children will only interfere with family stability and will also change the comfort that has been obtained by husband and wife. This is reinforced in an opinion that building a family is an agreement and planning freely, meaning that the continuity of the family becomes a decision of the couple's personality without any intervention from state or religious law.<sup>80</sup>

Furthermore, if seen in most Western lives, old age is a phase of life that is no longer dependent on children. The emotional connection between parent and child is not as close as that taught by religion. The difference is because for Western people the child is not the most important thing in life, so the birth of the child and the future of the child are not something that is special.

The attitude of westerners towards children is caused by career and financial factors, the perception of westerners that getting married and having children will hamper their careers and the amount of expenses for the needs of marriage and raising children. After all, when it comes to having sex with one another as the opposite sex is far more important than thinking about having children, from there parents only pay for and care for the child fully up to 18 years. The rest of the children are required to be independent. Thought that ultimately decreased to his children and even continues.

Family practice as explained above that according to the author the need to mix the legal provisions and the substance of religious law. Something that does not have an attachment to religion, then someone will act of their own accord without any boundaries and signs. Many westerners claim that marriages in the west are very tightly regulated, the bureaucracy does not support and make it easier for people to get married, it may be true because many couples get together one roof without marital status, but the government is letting when they see this.

The next factor influencing Western family law is trauma in divorce. This then supports a one-roofed living practice without marriage ties. The western view that remarriage after divorce is something that is very difficult, so it is better to have a relationship without marriage but can meet biological needs and be responsible for all the consequences. Even so the practice of living together without a bond for the western person remains responsible if then he has a child.

Westerners' lives are also colored by the proliferation of nursing homes. This is certainly a result of a family law product. Because there is no law that regulates between parents and children, so children do not have special obligations to parents and vice versa. This practice is very supportive of the movement of not having children and the elimination of child civil relations, so the practice of nursing homes when they are old seems to have been able to answer the future of their parents.<sup>81</sup>

From the explanation above, an analysis can be drawn that there is a real difference between regulations (western law) and Islamic law (Islamic family law). The most fundamental difference is the nature of the two laws, namely secular western law and Islamic law (Islamic family law that is normative-religious. Western law is based on a Roman law, while the Roman law was decided by Emperor Justianus when he was a Christian .

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<sup>79</sup> Sri Wahyuni, "Liberalisasi Hukum Perkawinan Di Negara-Negara Barat,": 29.

<sup>80</sup> Aliansi Nasional untuk Orang tua Pilihan, dengan tujuan yang sama untuk mendidik orang tentang orang tua yang bukan orangtua sebagai pilihan gaya hidup yang sah, mendukung mereka yang memilih untuk tidak memiliki anak, meningkatkan kesadaran akan masalah kelebihan populasi. Dikutip dari <http://en.m.wikipedia.org> Selasa 21 April 2020, 09.03 WIB.

<sup>81</sup> Sri Wahyuni, "Liberalisasi Hukum Perkawinan Di Negara-Negara Barat,": 30.

This Roman law originated from the views of famous judges during the reign of the emperor Antonius, which was written on their native religion. They had lost influence on the students at that time, before they were influenced by Christianity. So basically Roman law is a man-made law for human benefit which is the first law that is considered mature by humans. Therefore, European or Roman law becomes a law that can be changed at any time if the conditions so wish. Meanwhile, Islamic law is fundamentally considered as God's law, so that in principle the text cannot be changed, even though Islamic law is renewed, but it still has religious normative values and character.<sup>82</sup>

Criticism of Western family law and practice is very strange when juxtaposed with Islamic family law. Family law provides a very strict arrangement for the people who will get married. The strict regulation in Islamic Family Law can be seen from the arrangements before the marriage, the process of implementing the marriage, until after the marriage. This arrangement in Islamic family law aims to provide protection for all parties, whether husband, wife, or offspring, to arrangements for property in marriage.

Another form of protection in Islamic family law is the provision of violations in domestic life. This provision further regulates family life related to the rights of obligations for family members. Provisions regarding rights and obligations in household life have the purpose of efforts to eliminate losses in the form of violations of the rights and obligations of family members.<sup>83</sup>

#### **E. Conclusion**

From the explanation and analysis presented by the author, it can be concluded that in substance in western and Islamic marriages there are very clear differences. If Islam views marriage as an inner and outer bond between men and women to continue their offspring and can live together happily and eternally. However, western law considers that marriage is a container to vent a desire for sexuality.

While in the sociological aspect, the two laws also have very clear differences. Western marriage law seems to be merely individualistic. Whereas Islamic family law has very broad dimensions. In addition to the legal aspects, Islamic family law also has other dimensions such as social, humanitarian, and also divinity.

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<sup>82</sup> Fathi Yakan, *Islam Ditengah Persekongkolan Musuh Abad 20* (Jakarta: Gema Insani Press, 2004), 85.

<sup>83</sup> Lebih lanjut lihat dalam, Yunanto, "Penegakan Hukum Spiritual Terhadap Pelanggaran Dalam Hukum Keluarga," *Jurnal Hukum Progresif* 7, no. 1 (2019).

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