

## The Misyar Marriage and Family Law Reform in Indonesia

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**Abstract:** This article aims to examine the thought of misyar marriage according to Yusuf Al-Qardhawi, and aims to prohibit the practice of misyar marriage in Indonesia. So this research examines the law of misyar marriage from Al-Qardawi's perspective and its contribution to the reform of family law in Indonesia. This article includes library research. This research is descriptive analytical. The primary data in the research are the Qur'an, Hadith, Yusuf Al-Qardhawi's works, Law Number 1 of 1974 concerning National Marriage Law, and the Compilation of Islamic Law. The secondary data are scientific works, research, journals that are relevant to the research topic. Using Gustav Redbruch's theory of legal objectives and *masalah mursalah*, the data analysis in this study uses inductive thinking techniques then the author makes data analysis with qualitative analysis. The result of this article is that misyar marriage according to Al-Qardhawi is a marriage that is not in accordance with the purpose of the ordinance of marriage, namely to form a family that is *sakinah mawaddah* and *rahmah*, but there is a gap in Law Number 1 of 1974, concerning Marriage in Article 2 Paragraph (1) "Marriage is valid, if it is carried out according to the laws of each religion and belief". When referring to this article, it can be said that it is valid, so that in order to provide assertiveness to prohibit the practice of misyar marriage and marriage practices that are not in line with the principles of marriage, it is necessary to provide a clear definition of marriage.

**Keyword:** Misyar; Yusuf Al-Qardhawi; Family Law in Indonesia

**Abstrak:** Artikel ini bertujuan untuk meneliti pemikiran nikah misyar menurut Yusuf Al-Qardhawi, serta bertujuan untuk melarang praktik perkawinan misyar di Indonesia. Sehingga penelitian ini meneliti hukum nikah misyar perspektif Al-qardawi dan kontribusinya dengan pembaharuan hukum keluarga di Indonesia. Artikel ini termasuk penelitian pustaka (library research). Penelitian ini bersifat deskriptif analitis. Adapun data primer dalam penelitian adalah Al-Qur'an, Hadis, Karya-karya Yusuf Al-Qardhawi, UU Nomor 1 Tahun 1974 tentang Hukum Perkawinan Nasional, dan Kompilasi Hukum Islam. Adapun data sekunder berupa karya ilmiah, penititan, jurnal yang relevan dengan topik penelitian. Menggunakan teori tujuan hukum Gustav Redbruch dan *masalah mursalah*, analisis data dalam penelitian ini menggunakan teknik berpikir induktif kemudian penulis membuat analisis data dengan analisa kualitatif. Hasil artikel ini bahwa perkawinan misyar menurut Al-Qardhawi merupakan perkawinan yang tidak sesuai dengan tujuan pensyariaan perkawinan yaitu untuk membentuk keluarga yang *sakinah mawaddah* dan *rahmah*, namun terdapat celah didalam Undang-Undang Nomor 1 Tahun 1974, tentang Perkawinan pada Pasal 2 Ayat (1) "Perkawinan adalah sah, apabila dilakukan menurut hukum masing-masing agamanya dan kepercayaannya itu". Jika merujuk pasal tersebut dapat dikatakan kabsahannya, sehingga dalam rangka untuk memberikan ketegasan untuk melarang praktik nikah misyar dan praktik nikah yang tidak sejalan dengan prinsip perkawinan di Indonesia.

**Kata Kunci:** Nikah Misyar; Yusuf Al-Qardhawi; Hukum Keluarga di Indonesia

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## A. Pendahuluan

Misyar marriage is one of the forms of marriage that has been recognized in society. Misyar marriage is a form of marriage in which the woman does not demand the rights that should be obtained in marriage, namely physical maintenance, the woman has revoked her rights against the man who wants to marry her and the woman only demands mental maintenance (Mughaniyah, 2001).

The practice of misyar marriage originated in Saudi Arabia, where Saudi Arabia is facing a trend of misyar marriage or marriage without responsibility. Critics consider this part of promiscuity. Misyar marriages are rampant in Saudi Arabia because they are claimed to be halal even though they are not bound by responsibility and are carried out in secret. Reporting from the Straits Times in (Intan, 2021) These marriages are considered a boon for poor men who cannot afford expensive weddings. The practice of nikah misyar has been growing since 1996.

The practice of misyar marriage in Indonesia has occurred in several regions, (Ana, n.d.) Then it has also occurred in Jember Regency as described in Amir Fiqh Alqadafi's research. (Maymun & Meidina, 2023). The practice of misyar marriage occurs in Surabaya, as from research, Nasiri (Nasiri, 2016) There are several locations in Surabaya and its surroundings that are the research sites in this dissertation, namely: first, Palm Spring Elite Housing Area. Second, Simpang Darmo Permai Housing Area, and third, Bulak Setro Baru Housing Area. Apart from Surabaya, mut'ah model marriages are also found in big cities such as Jakarta, Bandung, Semarang, Surabaya.

This misyar marriage model is a marriage that is seen as an alternative for wealthy career women who do not want to be preoccupied with their husband's affairs, because in this misyar marriage practice, the husband and wife do not live in one house like husband and wife. The wife lives in her own house, as does the husband. Everything, such as the cost of living, clothing, shelter and food are all borne and controlled by the wife. Even the problem of bed relations and divorce, everything is arranged by the wife. The husband is only a friend to confide in and satisfy lust when the wife is in need. (Nasiri, 2016).

The academic problem in this research is that in the provisions of the legislation it is stated that "marriage is valid, if it is carried out according to the laws of each religion and belief". (Indonesia, 1974) Based on this understanding, it can be understood that misyar marriage is valid and can be implemented in Indonesia, as is the case with the phenomenon that has occurred. With regard to misyar marriage, like other forms of marriage, this misyar marriage also raises debate among contemporary scholars because this model of marriage is newly recognized today. Scholars who forbid misyar marriage, such as Sheikh Nashiruddin Albani, Ali Qurah Daqi and Abdul Sattar Jali, argue that misyar marriage does not realize the objectives of the Shari'ah in marriage. While one of the scholars who allowed it was Yusuf Qardhawi (Nurhakim & Fadly, 2011).

Yusuf Al-Qardawi is a scholar who masters in various disciplines both naqliyah and 'aqliyah, including fiqh, ushul fiqh, Sufism to mathematics and philosophy. As a philosopher, his inclination towards philosophy is even very coloring his intellectual works, including his own tafsir book, Hadyu al-Islam fi Fatawa Mu'asirah and the book al-Ankihah al-Fasidah. (Thabathaba'i, 1991) According to Yusuf Qardhawi,

misyar marriage is permissible because misyar marriage is a solution for unmarried women, virgins who have expired their marriage period, of course, by choosing a man who is truly good in character, and between the two parties they are both *riḍho*. It is not appropriate for people to obstruct the path that is permissible by Shara'. According to him, if a marriage is carried out in accordance with the pillars and conditions, it is valid. (Thabathaba'i, 1991).

There are several studies that discuss *nikah misyhar*, including those conducted by (Intan, n.d.), this study explains that according to Saudi scholars, at that time the highest religious authority of the Saudi Kingdom legitimized *nikah misyar* in a kind of edict. This means that this marriage is legally valid even though it is not recorded in the civil registry and without the need to provide a dowry. The consequence of this practice is that the woman will not get a number of rights as in a normal marriage. They are not obliged to live with their husband and receive no financial support. Furthermore, research by (Saepullah & Hanafiah, 2017) This research reveals that in the case of Indonesia, marriage practices such as the *misyar* marriage model are practiced in many Indonesian communities, many husbands are found to come to the wife's house and the wife provides a house for the two of them. Even the women help to provide for their livelihood. If we refer to the practice of *misyar* marriage in the Middle East, then actually this kind of marriage practice can also be said to be *misyar* marriage, it's just that people don't say it that way. Furthermore, research by (Ana, n.d.) This study concludes that the practice of *misyar* marriage in Indonesia has occurred in several regions, as mentioned in Umi Ana's research that the practice of *misyar* marriage in the community of Bukit District, Bener Meriah Regency. Research GAP of this article with the above research there are differences, this article focuses on analyzing *misyar* marriage from Al-Qardawi's perspective and its contribution to family law reform in Indonesia.

## B. Methods

The method used in this article is qualitative, which reveals Yusuf Al-Qoardhawi's thoughts on *nikah misyhar*. This article is a type of library research using the approach of studying the thoughts of figures. This research is descriptive analytical. The primary data in the research are the Qur'an, Hadith, the works of Yuduf Al-Qardhawi, Law Number 1 of 1974 concerning National Marriage Law, and the Compilation of Islamic Law. The secondary data is in the form of scientific works, research, journals that are relevant to the research topic. The data analysis technique in this qualitative writing uses inductive thinking techniques which are analyzed with Gustav Redbruch's theory of legal objectives and *maslahah mursalah*.

## C. Discussion

### Legal Construction of Misyar Marriage in Al-Qardhawi's Thought

In essence, a *misyar* marriage is entered into by a man with a valid contract, fulfilling all the pillars and conditions, but the wife has to give up some of her rights such as having a place to live, or a place prepared by her husband, and from the right to maintenance, which is a fair share between her and other wives. She must be willing to live in her parents' house with her family, if the husband does not travel to the area where she is, which he should do one day a week, for example, or a few days a month. (Syakir, 2002, p. h. 65) The word *misyar* comes from the Arabic *sara*,

sira, sirah tasayaram, masdar and also masirah, which means walking and traveling. From the terminology point of view, misyar marriage is a marriage in which the groom lives in the bride's house but the bride does not move to the groom's house. According to Ahmad Al-Tamini, misyar is a marriage that is built with a valid contract according to the sharah and fulfills its pillars, but the spouses are at odds in terms of residence and maintenance.

According to Ibn Mani'ia, misyar marriage is a marriage that fulfills the conditions and pillars, but the two partners are happy with each other and the intention is that the wife does not have the right to share the night shift. (Muhammad To'maah al-Qudhah, n.d.) Wahbah zuhaily sees misyar in the prevalence that occurs among the Arab community, namely usually this marriage is made by a man who already has a wife, but due to certain conditions, or conditions the second wife does not get some of her rights as guaranteed in Islam. This definition builds on what happens to men from petro-dollar countries. They usually marry women in developing countries, while they also have wives back home. (Zuhaily, 2000, p. h. 170)

Another contemporary scholar who is quite concerned with the misyar polemic is Yusuf al-Qaradhawi, who defines misyar as a marriage in which the husband comes to the wife's residence and the wife does not move to live together in the husband's house. This definition seems to be inspired by an incident that happened to a woman who lived not far from Yusuf al-Qaradhawi's neighborhood. (Al-Qardhawi, n.d.-b, p. h. 9) When he discusses the misyar polemic. He analogizes it to the case of a woman whose husband died. From this first husband, the woman had two children and enough money for herself and her two children. Due to her young age, she then married a man who lived in a different city from her, the man did not live under the same roof with them, but only visited occasionally, he also did not provide material support because the woman had sufficient assets and even more. From here, she defines misyar as a marriage in which the husband does not live with the wife, which means that the wife loses her marital rights.

Yusuf al-Qardhawi had no idea that the fatwa issued in response to the issue of misyar marriage would stir Qatar and other Gulf countries. When he visited Syria for about two weeks, he felt the impact of it all. He thought that differences of opinion were normal as a response to a newly emerging phenomenon. It is experienced by all levels of society, both by ordinary people and educated people. Differences of opinion sometimes end with a single perception, but sometimes it will also continue, causing divisions and barriers. (Al-Qardhawi, 1999, p. h. 1)

He emphasized that differences in furu (matters of fiqh) are nothing new. Differences of opinion will not cause problems for people whose faith is strong as long as it revolves around differences in viewpoints, only disputing the level of evidence used by each party to strengthen its opinion by not merely following the whims of passion. So if such differences occur, the best solution will be found. However, if the difference arises because of emotion and just following the passions, it will only make the problem worse and further away from the real truth.

According to Yusuf al-Qardhawi, religious scholars have no reason to prohibit a woman from marrying in this marriage model (misyar), namely by tanazul of some of her rights, if her intention is really purely for her own good. There are several factors that make a person willing to reduce his rights, including his aim to get

something that is more beneficial to him, as was done by one of the Prophet's wives, Saudah bint Zam'ah.

She was the first wife the Prophet married after Khadijah. Saudah was an old woman, she felt that the Prophet would not treat her as intimately as before. She was very worried that if the Prophet divorced her, her title as Ummul Mukminin would be lost. She was also afraid that on the Day of Judgment, she would not be able to accompany the Prophet in Paradise. For this reason, she quickly gave tanazul (leniency) to the Prophet, and he gave the right to another wife of the Prophet, namely Aisha.

Yusuf al-Qardhawi emphasizes that he prefers that this tanazul not be mentioned in the contract, it is enough that the two parties understand each other and understand each other by themselves, even if the tanazul is mentioned in the contract, this does not invalidate the contract. According to him, fulfilling the conditions is an obligation, as Allah has commanded. (Al-Qardhawi, 1999, p. h. 10)

When Yusuf al-Qardhawi was asked about misyar marriage, he said: "I do not care about terms; what concerns me and matters is the ruling and its essence, not the term or name. In the rules of shara', we know the term: "What is considered in a contract is its purpose and meaning, not its memorization and terminology. They call it misyar marriage whatever they want, the important thing is that in the marriage contract the conditions and pillars must be fulfilled. The first pillar of marriage is ijab and qabul, which are carried out by people who have the right to carry them out. In addition, ijab and qabul are expected to be known by the public so that it can be distinguished between marriage that is carried out legally and adultery or illicit relations.

In terms of public notification, religion has set a minimum limit, which is the presence of two witnesses and a guardian (according to the views of Imam Malik, Imam Shafi'i, and Imam Ahmad). The next thing to note is that the marriage period should not be limited by time and the bride and groom must have the intention of perpetuating their marriage. Regardless of the man's attempt to keep the marriage a secret in order to prevent his family from finding out, if the conditions for the validity of the marriage contract have been fulfilled, then according to the majority, the marriage is valid. According to the Malikiyah scholars, what invalidates the marriage is if the contract includes a condition that the witness keep the marriage a secret. But if the man's request to keep the marriage a secret comes after the marriage contract has been done, then the marriage is still valid, because this kind of marriage was done correctly. (Al-Qardhawi, n.d.-a, p. h. 403)

Then a man must pay the dowry, whether it is a large amount or a small amount, although after the dowry is given to his future wife, the wife may tanazul "give back" some of the dowry or even all of it, according to the words of Allah swt: (Al-Qardhawi, n.d.-a, p. h. 395)

﴿يُرِيْمُ اٰيٰتِهٖمْ مَّوْلٰكُفَاَسْفُدْ مَّتَمَّ عٰيٰتِنَا مَكْلٰنَ يَطْنَ اَفِئَّةً مَّلْحٰذْنَ هِنْفَدْصَءَاَسِنَا اُوْتَاوْ

*"Give the bride price (dowry) to the woman (whom you marry) as a willing gift. Then if they give you part of the dowry gladly, then eat (take) the gift as (food) that is pleasant and of good consequence."* (al-Nisa :4)

If a man marries a woman without giving her a dowry, the marriage contract is still valid. But the woman has the right to a mahr misl (equalized mahr). And after

the fulfillment of the 4 (four) things above ijab and qabul performed by the bride and groom, there is advertising or public notification so that the marriage is known to the public or only known to a limited audience, the marriage is not limited in duration, and the dowry is fulfilled, which even if after the contract the wife returns it, then the marriage according to Shara is considered valid. If, at the time of the marriage contract, the woman gives a concession by not asking for any of her rights except the right to sexual intercourse, this condition is not permissible at the time of the contract, because it defeats the purpose of the marriage contract, so the contract is invalid.

A fuqaha' does not have the right to annul a misyar marriage contract because the pillars and conditions have been fulfilled or to consider this marriage to be a form of zina, because of tanazul. This is because a woman is an adult who knows what is in her best interests and what she thinks (in terms of the positives and negatives) of marrying the man she chooses, even if he only spends time with her on certain limited occasions, it is better than being lonely all year round. (Al-Qardhawi, n.d.-a, p. h. 395)

Yusuf al-Qardhawi said that this misyar marriage is not a good marriage. And he began this sentence with announcements and halaqah "I am not one who invites from misyar marriage, and I am not one who favors misyar marriage, and I do not preach inviting misyar marriage, every thing in affairs I ask with questions about the issues of misyar marriage will expand differences of opinion. And that will narrow the heart and corrupt the religion and will cause hatred.. (Al-Qardhawi, 1999, p. h. 3)

Those who oppose misyar marriage say that this kind of marriage cannot fulfill the purpose of marriage in Shara, because this kind of marriage is only an outlet for lust and is limited to seeking pleasure. In Islam, marriage has more goals than that, marriage is used as a vehicle so that the human species is maintained, as a means of finding peace, and as a place of mutual love and compassion. This is in accordance with what Imam Ahmad has narrated in the matter of *zawa>j al-Naha>riya>t wallaya>liyya>t* (marriage that only lasts for a few days or for a few nights). He said: Such a marriage is not a marriage in the Islamic sense, because it is in accordance with the hadith of the Prophet (peace and blessings of Allaah be upon him). "A believer's faith is not complete unless he loves his brother as he loves himself."

This kind of marriage is not a marriage that is recommended by Islam, but marriage is allowed because of the urgency of needs, the impact and development of society and because of changing times, provided that the marriage contract must be carried out because if the contract is omitted, the marriage is canceled. (Al-Qardhawi, n.d.-a, p. h. 401)

Thus misyar marriage is not haraam in his view, because the aim is to honor and purify women, and also to consider the benefits and harms, the benefits and harms. As he says, "Call this marriage what many people call it, but what matters to me is that the pillars and conditions of the marriage bond are fulfilled". (Al-Qardhawi, 1999, p. h.11).

In Yusuf al-Qardhawi's opinion, which says that the jurists have no reason to cancel this kind of marriage contract that has fulfilled the pillars and conditions of marriage, according to the author, it is very reasonable, because the fulfillment of the conditions and pillars of marriage is the essence of the emergence of the law of

marriage itself, with neither the conditions nor the pillars of marriage fulfilled, there is no law of marriage. With the fulfillment of the pillars and conditions of marriage, this will also lead to shara' consequences in the form of determining the halal or permissibility of relations between men and women. (Wahhab, 2000, p. h. 180)

In addition, if the conditions and pillars are fulfilled, the marriage becomes valid and from there the scale of obligations and rights of marriage arises. (Sabiq, 1992, p. h. 48) In dealing with problems for which there is no legal decision in the Qur'an, hadith and ijma', or problems for which no legal fatwa has been given by previous scholars, then without hesitation he performs new ijtihad collectively using the deductive analogy method. (Shiddiqy, 1996, p. h. 228) This deductive method is a way of thinking by drawing a conclusion starting from general statements to specific statements using reasoning or ratios. (Sudjana, 1999, p. h. 5-6)

In the context of nikah misyar, this form of thought is relatively new when compared to nikah mut'ah and nikah muhallil. Both have a history in the life of Muslims since the time of the prophet. Meanwhile, misyar marriage has only emerged and developed in the era of the life of Muslim societies that have begun to modernize. However, this misyar marriage is a phenomenon that has been well known among the community since long ago. Yusuf al-Qardhawi defines misyar marriage as where a man goes to the woman's side and the woman does not move or be with the man in his (male) house. Usually this kind of marriage occurs with the second wife and the man who carries out this kind of marriage already has a wife living together in his house. (Al-Qardhawi, 1999, p. h. 5)

The purpose of this kind of marriage is to relieve the husband of the obligation to the second wife to provide housing, provide maintenance, and give her the same rights as the other wife (the first wife). This "discount" is only obtained by a man from a woman who really needs the role of a husband in protecting and protecting her (even though in the material field the husband cannot be expected). (Al-Qardhawi, n.d.-a, p. h. 394)

Yusuf al-Qardhawi's reason for allowing this marriage is that he considers that in this era, the obstacles to marriage are very diverse, most of which arise from the woman herself. From this then emerged the awanis, namely: (1) Single women of old age, who have passed the time for marriage; (2) Women who are still living with their parents, and are unable to fulfill the nature of building a family and being a mother; (3) Women who experience divorce, this phenomenon is very much; (4) Widows who are left dead by their husbands alone or together with abundant wealth; (5) Career women, working and working alone, such as teachers, instructors, doctors, pharmacists, lawyers or other professions that have a steady income. (Al-Qardhawi, n.d.-a, p. h. 397).

With the awanis mentioned above, all of them did not demand material rights from their husbands. They want to enter into this marriage based on their intentions which are purely for their own good. She is a sensible, mature, intelligent person who knows what is beneficial and what is harmful and does not fall into the category of those who must be protected, such as children, the insane and the foolish.

Based on Yusuf al-Qardhawi's reasons above, it can be seen that misyar marriage in essence aims to fulfill biological needs (sexual instincts) as well as to honor and keep from slipping into adultery. As with the awanis who are women who are materially well-off so they do not demand material rights from their husbands,

where marriage for them is the most important thing is legal status and status in social life. Marriage for the awanis when viewed from the law of marriage is mandatory. (Thalib, 1974, p. h. 49)

Those who oppose these marriages say that if they are only a solution for the rich who are too late to marry, what about the poor who cannot afford to marry? Yusuf al-Qardhawi said to them: "Our inability to deal with a problem does not require us to do nothing at all, nor to try to find the next solution." Dealing with part of a problem is better than nothing. In this case, all we have to do is try according to our abilities, because each of us has a limit. This will give others the opportunity to do what we have done. Everything we return to our respective intentions. (Al-Qardhawi, n.d.-a, p. h. 412)

There are some opinions that say that why don't we find a solution, go straight to the root, namely by making it easier to carry out ordinary marriages in accordance with Shara. In this way, the reasons for not marrying due to the high cost of the dowry can be minimized, or we establish a waiver of the dowry (a gift from a prospective husband to a prospective wife), and relax the conditions set by Allah SWT. In choosing a life partner (in terms of his morals and so on).

Yusuf al-Qardhawi replied, "What I have done is a collective responsibility. I have tried for more than 30 years to make people understand this issue through pulpits, papers, mosques, television and radio. But the taqlid that has been imprinted on their understanding cannot just disappear. Even though, for example, I was able to find a solution for people who find it difficult to find a mate, we still see a lot of widows (whether their husbands died or they were divorced)."

When they (unmarried women) find that the misyar marriage model is one solution (of course by choosing a man who is truly of good character and with whom they are both happy). Whereas today is an age where the door to haram deeds is wide open. Yusuf al-Qardhawi hopes that what is done can be a solution and as a true path of guidance. Allah swt, is the one who tells the truth and the best Guide. (Al-Qardhawi, n.d.-a, p. h. 413)

### **The Contribution of Al-Qardawi's Thought to Family Law in Indonesia**

This misyar marriage is the result of the thinking of an Islamic figure, Yusuf al-Qardhawi. He defines misyar marriage as where a man goes to the woman's side and the woman does not move or be with the man in his (male) house. Usually this kind of marriage occurs with the second wife and the man who carries out this kind of marriage already has a wife living together in his house.

The purpose of this kind of marriage is to relieve the husband of the obligation to the second wife to provide housing, provide maintenance, and give her the same rights as the other wife (the first wife). This "discount" is only obtained by a man from a woman who really needs the role of a husband in protecting and protecting her (even though in the material field the husband cannot be expected). (Al-Qardhawi, n.d.-a, p. h. 392)

This research is analyzed using Gustav Redbruch's theory of legal objectives, that every law to be enacted must contain the values of justice in it, either essential or distributive justice, without any distinction from any basis. Gustav Radbruch stated that in legal objectives it is necessary to use the principle of priority of the three basic values that are the purpose of law. namely justice, certainty, expediency.



Based on the analysis of justice in law, misyar marriage is not in accordance with legal justice, this is because there is an imbalance regarding the rights and obligations of husband and wife in the household. In misyar marriage, the husband is not responsible for the place of residence and is not obliged to provide maintenance, and there is no obligation to live with the spouse forever, but to stay only for a few days. This clearly results in an imbalance or unfairness in the rights and obligations in the household.

Furthermore, Gustav Radbruch explained that the second barometer of legal objectives is legal certainty, Yusuf al-Qardhawi stated that misyar marriage is a solution for women who have no husbands, virgins who have expired their marriage period, of course by choosing a man who is truly good in character, and between the two parties have been equally pleased. So people should not obstruct the path that is legalized by shara'.

The concept of marriage that has been outlined by Law No. 1 of 1974 contains the understanding that as a country based on Pancasila, where the first principle is God Almighty, marriage has a very close relationship with religion / spirituality so that marriage not only has physical / physical elements but mental / spiritual elements also have an important role. Forming a happy family is closely related to offspring which is also the purpose of marriage, where the maintenance and education of children become the rights and obligations of parents. (Sudarsono, 2010, p. h. 9) Based on the concept of marriage as stated in Article 1 of Law Number 1 of 1974 concerning Marriage, misyar marriage is not in harmony or in accordance with the concept of marriage in Indonesian marriage law, because misyar marriage removes the rights and responsibilities of the husband to his wife and vice versa.

The concept of the validity of marriage in Indonesia is regulated in Law No. 1 of 1974 concerning Marriage and the Compilation of Islamic Law, that Article 2 Chapter II KHI is "Marriage according to Islamic law is marriage, which is a very strong contract or *mîtsâqan ghalîzhan* to obey the commands of Allah swt., and carrying it out is an act of worship". (Direktorat Jendral Bimbingan Masyarakat Islam dan Penyelenggaraan Haji, 2004, p. h. 128) Based on the Compilation of Islamic Law, that Article 2 Chapter II KHI, that misyar marriage is a valid marriage, because it is carried out with the existence of the pillars and conditions of marriage. In misyar marriage there is no statement of time limit, in this case it can be interpreted as marriage forever.

When we look at marriage law in Indonesia regarding the validity of marriage, it is stated in the Marriage Law Article 2 paragraph (1) that marriage is valid, if it is carried out according to his religion and belief. (Rofiq, 1995, p. h. 71) So for Muslims, the provisions regarding the implementation of a marriage contract properly still have a very decisive position for the validity of a marriage. The purpose of a valid marriage here is a marriage conducted by Indonesian Muslims, fulfilling both the pillars and conditions of marriage, as regulated and determined by Law Number 1 of 1974. (Basyir, 1999, p. h. 8) Based on the Marriage Law Article 2 paragraph (1), that *nikah misyar* is carried out in accordance with Islamic law which fulfills the pillars and conditions of marriage, so that it can be considered valid if it refers to this.

So in order to provide legal certainty in the regulation of marriage, there is a need for changes in the law. This is so that it is not understood in a textualist and multi-

interpretative manner. Article 2 paragraph (1) of the Marriage Law states that a marriage is valid if it is conducted according to the religion and belief, and should be reformulated into a marriage is valid if it is conducted according to the religion and belief and recorded in accordance with the legislation. So that the reformulation of the article will provide more legal certainty to the marriage regulations in order to reject marriage practices that are not in accordance with the purpose of marriage.

The third legal objective of Gustav Radbruch is legal expediency (*zweckmaeszigkeit*). That based on Yusuf al-Qardhawi's reasoning regarding the permissibility of misyar marriage in essence aims to fulfill biological needs (sexual instincts) as well as to honor and keep from slipping into adultery. As with the awanis who are women who are materially well-off so they do not demand material rights from their husbands, where marriage for them is the most important thing is legal status and status in social life. Marriage for the awanis when viewed from the law of marriage is mandatory.

Yusuf Qardhawi issued a fatwa that this misyar marriage is halal because it is based on the willingness of both parties and the wife knows well what is good for her. Meanwhile, according to the objectives of Islamic law, this marriage practice is valid when viewed from the terms of the pillars. However, the absence of maintenance and the arrival of the husband which is only occasionally makes misyar marriage not in accordance with the applicable provisions in Islamic law.

Based on the analysis of the purpose of the law, that the practice of misyar marriage if implemented in Indonesia, the value of the benefit is less and the value of the evil is more, so that it will result in harm to the wife, who loses her rights as a wife, such as the right to maintenance, the right to residence, and even the right to inheritance.

Furthermore, this research is analyzed using the theory of *maslahah muralah*, that based on the analysis of *maslahah mursalah*, the misyar marriage conceptualized by Yusuf Al-Qardhawi must be rejected, because it does not achieve a condition said to be *maslahah*, this can be seen in the concept of misyar marriage which eliminates special civil rights given to women, resulting in an imbalance of justice to women who are wives.

The author agrees that *nikah misyâr* is haram, in order to provide a broader benefit. Because in misyar marriage, the husband loses his responsibility regarding the right to support and provide shelter to his wife, on the other hand, the husband does not always live with his wife, so that if he has children, the husband cannot participate in caring for a child produced in marriage.

In order to provide strict rules regarding the prohibition of misyar marriage and marriage practices that are not in line with the principles of marriage in Indonesia, it is necessary to have a written rule as well to create legal certainty regarding regulations in Indonesia, so in this case it is necessary to propose an improvement or amendment to Law Number 1 of 1974 concerning Marriage in Article 2 Paragraph (1) "Marriage is valid, if it is carried out according to the laws of each religion and belief". Paragraph (2) "Every marriage shall be recorded in accordance with the prevailing laws and regulations". Based on this article, there will be multiple interpretations of the regulations regarding the validity of marriage in Indonesia, because *nikah misyar* is a marriage that is justified by some Muslims.

In order to provide firmness to prohibit the practice of nikah misyar and marriage practices that are not in line with the principles of marriage in Indonesia, it is necessary to amend Article 2 of Law Number 1 Year 1974 concerning Marriage to read "a valid marriage is one that is carried out in accordance with each religion and recorded in accordance with the legislation".

#### D. Conclusion

Al-Qardawi's thinking with Family Law in Indonesia, that misyar marriage according to Al-Qardhawi is a marriage that is not in accordance with the purpose of the ordinance of marriage, namely to form a family that is *sakinah mawaddah* and *rahmah*, but there is a gap in Law Number 1 of 1974 concerning Marriage in Article 2 Paragraph (1) "Marriage is valid, if it is carried out according to the laws of each religion and belief". When referring to this article, it can be said that it is valid, so in order to provide assertiveness to prohibit the practice of misyar marriage and marriage practices that are not in line with the principles of marriage in Indonesia, it is necessary to amend Article 2 of Law Number 1 of 1974 concerning Marriage to "a valid marriage is one that is carried out in accordance with each religion and is registered in accordance with the legislation".

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