

# The Role of State in Islamic Family Law Reform: A Case Study of Indonesia

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## ABSTRACT

Islamic family law reform in Indonesia has occurred over a long period of time, progressing with conditions and situations and in accordance with the demands of the times that have passed. This is because the norms contained in the books of Islamic jurisprudence are not suitable or are no longer able to provide solutions or answers to new problems that occur, especially in the field of family law which has a principled area and a flexible area. The progressiveness of Islamic legal reform in Indonesia played by the state through the Courts, Law, Laws, Ulama and scientists has the same goal in realizing a life of benefit and justice and unraveling gender habits in marriage law. The study method used in this writing is qualitative descriptive (*library research*). The reform does not only concern Islamic law as a fatwa, but more importantly about fiqh as Islamic law implemented by the state based on legislation that originates from divine law and human legislation. Therefore, in the context of efforts to reform Islamic family law in Indonesia, it is not just historical. However, through intellectual activity creatively, critically and dynamically until the Compilation of Islamic Law is realized.

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## 1. INTRODUCTION

The dynamics of reform in Islamic law essentially start from what already exists and changes as a product of interaction in community life. Although the process of Islamic legal reform is seen as autonomous, it also interacts with other elements of society and can be said to be interrelated. When Islamic law interacts with the social life of a society, it is always faced with internal and external problems. For this reason, the concept of development in Islamic law requires an attitude that adapts to the social context of the interacting society.<sup>1</sup>

The condition of society in Indonesia which is diverse with the number of Muslims as the majority group, has implications for the need for legal rules that regulate the needs of their lives that are relevant

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<sup>1</sup> Muhammad Nur, "Pembaharuan Hukum Islam di Indonesia," *Jurnal MIMIKRI* Vol.3 No.1 (2017): 122.

outside of Dutch law and customary law. The need for legal rules in question such as marriage law, implementation of the hajj, distribution of zakat, management of waqf, Islamic economics, and others.<sup>2</sup> If national legal policies are not sensitive to religious and customary laws, it will have a major impact on the loss of national, regional and local identity.<sup>3</sup>

The high hegemony of state law in the era of strong globalization and millennialization today will have implications for the madness of centralization of state law. One of the legal products that is considered to be contrary to Islamic jurisprudence is the permission of wives to sue and file for divorce at the Religious Court. For scholars, a wife who asks for a divorce without a clear and firm reason is evidence of disobedience and a major sin.

The above explanation shows that stagnation in thinking will produce weak legal products. Therefore, seriousness in reformulating Islamic jurisprudence thinking about Islamic family law in Indonesia is an inevitability that must be followed up. There are several legal products that are considered unresponsive, such as the status of guardians in marriages that are considered gender biased, unregistered marriages in the name of religion, recognition of children from unregistered marriages, and others, which inspire experts in the next era to sue the Marriage Law and KHI through a spirit of evaluation and revision. Based on the explanation above, the author wants to study more deeply about "The Role of the State in Islamic Family Law Reform: Indonesian Case Study" using a qualitative method with a library research approach. The data sources are obtained by referring to sources in the form of books and journals on the role of the state in Islamic law reform.

From the description above, this paper limits the main problems, namely analyzing the reasons for family law reform, the periodization of Islamic family law reform in Indonesia and the scope of family law reform.

## 2. METHOD

This research uses a literature review method. Data was obtained by collecting previous research, main reference books, and other supporting literature relevant to the study of Islamic family law. The sources include academic journals, research reports, theses, dissertations, and books that discuss key themes in Islamic family law. Data analysis was carried out through content analysis by examining, interpreting, and comparing the various sources to identify patterns, similarities, differences, and significant findings that contribute to the research objectives. This method ensures a comprehensive understanding of the topic and provides a strong theoretical foundation for the study.

## 3. RESULTS AND DISCUSSION

### Islamic Family Law Reform: Needs and Challenges

Dialectics Family law reform in Indonesia needs to be continuously improved and not just stop there, because in reality the law always moves to bring benefits in this world and the hereafter for humanity, so it is not impossible for modifications to occur to legal products that always exist according to changes in time, place and circumstances.

In carrying out the family law reform, it certainly cannot be separated from the influence of national law reform in Indonesia. Because the legal reform that is considered to give new color to the life of the nation and state is the reform that resulted in four changes to the 1945 Constitution of the Republic of Indonesia which brought nuances to the Indonesian state system. While efforts to reform Islamic family law to be in accordance with the development of the times in order to create public order are one of the real evidences.<sup>4</sup>

The existence and entity of Islamic law, has an important position for the rate of development of its society in the future. This era is not only the starting point for the modernization of development in the early days of independence, but is also very closely related to the process of legal thought struggle between Muslims when facing the fate of Islamic law. Then supported by factors of fiqh values that are powerless to respond to the development of the times, sociological factors, modernization of development and the

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<sup>2</sup> Sakirman, "Epistimologi Ushul Fiqh Dalam Konstruksi Historis," *Empirisma: Jurnal Pemikiran Dan Kebudayaan Islam* 25, no. 1 (2016), <https://doi.org/10.30762/empirisma.v25i1.187>.

<sup>3</sup> S Sakirman, "Konstruksi Metodologi Tafsir Modern: Telaah Terhadap Tafsir Al-Manar, Al-Maraghi, dan Al-Misbah," *Hermeneutik: Jurnal Ilmu Al-Qur'an Dan Tafsir*, no. Query date: 2023-08-24 21:33:18 (2019), <http://journal.iainkudus.ac.id/index.php/Hermeneutik/article/view/3912>.

<sup>4</sup> Qodariah Barkah, "Kebijakan Kriminalisasi Dalam Reformasi Hukum Keluarga Di Indonesia," *Journal Nurani* V.17, No 1 (2017): 16.

development of Islamic legal thought today. Of course, in carrying out the reform of Islamic family law in Indonesia, it cannot be separated from the influence of legal politics.<sup>5</sup>

Islamic family law has become a discourse in Islamic legal studies since the 20th century AD. In Indonesia, in historical records, the issue of family law reform has emerged since long ago, before independence was achieved. At the moment 1928 Women's Congress, this issue arose because of the many cases that befalls women throughout their lives marriage. Such as, underage marriage, marriage forced marriage, polygamy, arbitrary divorce and ignoring women's rights, and so on. In 1937 the colonial government The Netherlands then drafted a marriage law modern called the Marriage Registration Ordinance.<sup>6</sup> This step taken at the strong insistence of women's organizations. there was a time. This Marriage Registration Ordinance applies to indigenou, Arab and non-Chinese Asian populations, who are in Indonesia. Remarkably, this ordinance establishes the rule of monogamy and giving equal rights to divorce to women and men. However, this ordinance only applies to those who choose the rules for registering their marriage.<sup>7</sup>

Efforts to reform family law continued until 1974. A number of figures in a public hearing with the People's Representative Council (DPR) at that time, demanded the immediate formation of a law regulating marriage, which must regulate the following matters: first; there must be an agreement between the prospective husband and wife to prevent forced marriage; second; the determination of a minimum age limit for marriage, considering the importance of family welfare in a marriage; third; Marriage is based on monogamy with very strict exceptions; fourth; equal rights in filing for divorce between husband and wife; and fifth; fair distribution of joint property in the event of a divorce.<sup>8</sup>

The phenomenon of the development of Islamic family law is proven by the increasing number of efforts to reform Islamic legal thought carried out by Muslim scholars supported by the conditions and situations of the development of the era which are very complex. Reform of Islamic Family Law as an offer in resolving various family problems and has an important position in Islam because it is considered the core of sharia formed from the family.<sup>9</sup>

The reform of Islamic family law is essentially not just to teach Muslims so that in the future they can implement it well in their households. However, the purpose of codification and reform of Islamic law aims to provide solutions to solve family problems that occur. It's just that the existence of laws has not been understood and interpreted in terms of wisdom and philosophy, resulting in the assumption that Islamic law is no longer representative in resolving civil cases of Islamic families.

Historically, various family law regulations in Indonesia were personally explained by scholars based on their reading and learning from their teachers. On this side, the progressiveness of the law was hampered because the explanations of the scholars were considered sacred and could not be disputed, let alone evaluated and revised. It is undeniable that the era of stagnation (stuck) of knowledge had occurred in the past due to the sacralization of the community towards scholars, both personally and in their thoughts.

### Reasons for Family Law Reform in Indonesia

Indonesia as a UN member state that has ratified the UN convention on women (CEDAW) as stipulated in Law Number 7 of 1984, Law Number 39 of 1999 concerning Human Rights and Law Number 23 of 2004 concerning the Elimination of Domestic Violence, the Indonesian government is obliged to embody the provisions of the convention. Therefore, the Indonesian government must prevent all forms of discrimination against women.

<sup>5</sup> Abdul Manan, *Reformasi Hukum Islam di Indonesia* (Jakarta: RajaGrafindo Persada, 2006).

<sup>6</sup> S Sakirman, "Akibat Hukum Dalam Praktik Nikah Sirri Menurut Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan," *Muslim Heritage*, no. Query date: 2023-08-24 21:33:18 (2017), <https://jurnal.iainponorogo.ac.id/index.php/muslimheritage/article/view/1046>.

<sup>7</sup> Barkah, "Kebijakan Kriminalisasi Dalam Reformasi Hukum Keluarga Di Indonesia.": 17.

<sup>8</sup> Alfitri, "Pembaruan Hukum Keluarga di Indonesia Melalui Kompilasi Hukum Islam Bagian," *Tarbiyah Islamiyah*, 2019, <https://tarbiyahislamiyah.id/pembaruan-hukum-keluarga-di-indonesia-melalui-kompilasi-hukum-islam-bagian-1/>.

<sup>9</sup> Moch. A. F. Rahim, "Pembaruan Hukum Keluarga Di Indonesia Melalui Kompilasi Hukum Islam," *Open Science Framework.*, 2021, <https://doi.org/10.31219/osf.io/wdt79>.

Family law has an important position in Islam. Family law is considered the core of sharia. This is related to the assumption of Muslims who view family law as a gateway to enter further into the Islamic religion. Basically, something will not be formed because there is no underlying thing, just as Islamic family law will never exist without something behind it. This discussion is important because not all Indonesian people are Muslim so the history, events and causes of the birth of Islamic family law are considered very controversial.<sup>10</sup>

Islamic family law is very important in the midst of Muslim society because of problems regarding family and so on that cannot be equated with non-Muslims, so that society wants a special Islamic family law, especially with the development of the era that is increasingly developing so that methods are needed for legal renewal. The birth of Law Number 1 of 1974 concerning Marriage and KHI (Compilation of Islamic Law) is the answer to the anxiety, uncertainty and demands of the Muslim community to be a guideline and reference in overcoming problems surrounding family law.<sup>11</sup>

Islamic family law reform emerged as a form of *ijtihad* movement in developing Islamic law and establishing legal provisions that are able to answer new problems and developments caused by the advancement of modern science and technology. Establishing legal provisions that are able to answer new problems and developments contains two elements. First, establishing laws for new problems for which there are no legal provisions and second, establishing or seeking new legal provisions for a problem for which there are already legal provisions but which are no longer in accordance with the current state and welfare of humanity. What is meant by "not in accordance with the current state and welfare of humanity" is that the old legal provisions which are the result of the *ijtihad* of previous scholars are no longer able to realize the needs and welfare of today's society. For this reason, it is necessary to establish new legal provisions that are more able to realize the welfare of the people which is the goal of sharia by considering new knowledge generated by the advancement of modern science and technology.<sup>12</sup>

The reform of Islamic family law in Indonesia was caused by changes in conditions, situations of place and time as a result of the factors that have been stated above. This change is in line with the theory of *qaul qadim* and *qaul jadid* put forward by Imam Syafi'i, that the law can also change due to changes in the legal arguments applied to certain events in implementing the *maqasyid* of sharia.

Islamic family law is Islamic law that regulates the internal relations of members of a Muslim family, especially those related to the issues of *munakahah*, *sustenance*, *hadhanah* and inheritance. The description above, which is meant by the reform of Islamic family law, is the maximum effort made to create a formulation of Islamic family law that is adaptive to the development of the times and of course must fulfill the pillars of renewal, namely the objectives, *ijtihad*, actors of renewal, areas of *ijtihad*, factors causing legal renewal and legal functions.

### **Periodization of the Formation of Family Law in Indonesia**

The development of Islamic family law in Indonesia cannot be separated from the development of Islamic Courts as an institution that has the authority to resolve problems in marriage and other civil matters. The map of the development of Islamic courts which also includes the development of Islamic Family Law in Indonesia can be divided into four periods, namely;

#### **1. The Period Before Dutch Colonization**

The spread of Islam in Indonesia was pioneered in the period of the 1st to 5th century H – 7th to 8th century AD, but all were drowned in the maritime hegemony of Sriwijaya centered in Palembang and the Hindu-Javanese kingdoms such as Singasari and Majapahit in East Java. According to JC Van Leur, based on various travel stories it was found that since 674 AD there had been Arab colonies in northwest Sumatra, namely in Barus, a famous camphor producing area.<sup>13</sup>

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<sup>10</sup> Saefullah, "Abortus dan Permasalahannya (Suatu Kajian Hukum Islam)," dalam *dalam Chuzaimah T. Yanggo, ( buku ke-2 Problematika, t.t., 114.*

<sup>11</sup> Sakiman Sakirman, "Contemporary Fiqh Methodology in the Theory of the Limitation of Dialectics Space and Time According to Muhammad Syahrur," *HUNafa: Jurnal Studia Islamika* 14, no. 2 (2017): 301–26, <https://doi.org/10.24239/jsi.v14i2.484.301-326>.

<sup>12</sup> Izomiddin, *Pemikiran dan Filsafat Hukum Islam*, (Jakarta: Prenadamedia Group, 2005).

<sup>13</sup> Badri Yatim, *Sejarah Peradaban Islam: Dirasah Islamiyyah II* (Jakarta: RajaGrafindo Persada, 2010).

With the entry of Islam into Indonesia for the first time in the first century of Hijri or coinciding with the seventh century AD, which was brought directly from Arabia by traders from Mecca and Medina, who were also missionaries who spread Islam in the Indonesian archipelago.

In daily practice, people began to implement the teachings and rules of Islam that came from the books of Islamic jurisprudence. The books of Islamic jurisprudence contain rules and procedures for worship, transactions, marriage, and the judicial system called qadha. The institution of qadha as mentioned in the books of Islamic jurisprudence has not been fully implemented so that the settlement of people's cases is resolved through tahkim, namely the parties to the case voluntarily submit their case to a religious expert, either a faqih, ulama, or mubaligh to be resolved with the provision that both parties to the dispute will comply with the decision given by the religious expert.

At this time, every case resolution was resolved through tahkim with customary law territory (customary court) whose judges were appointed by clan meetings, countries and the like. After the formation of Islamic kingdoms in Indonesia, the Religious Courts that handled Muslim problems were handed over to the Swapraja Court institution, which was also known as the Serambi Court, Surambi Court, Mosque Court and the like. In the Mataram Kingdom of Yogyakarta, the Surambi Court has existed since the time of Sultan Agung.

The Surambi Court handles issues related to people's lives, such as marriage, wills, inheritance, grants and so on by referring to the Al-Qur'an and Sunnah of the Prophet Muhammad SAW, namely the books Muharrar, Mahalii, Tuhfatul Muhtaj, Fath-ul Mu'in, and Fathul Wahab.

## 2. Dutch Colonial Period

The Dutch entered Indonesia in 1595 and formed the Dutch Company Association called Vereenigde Oost Indische Compagnie (VOC) in 1602, they still recognized and did not castrate Islamic law in Indonesia as evidenced by the Batavia Statute of 1642. However, in the following periods, in addition to carrying out physical colonization, the Dutch also castrated Islamic law. On August 3, 1928, the Dutch adopted the Compendium Freijer (a law book containing the rules of marriage law and inheritance law according to Islam), with this textual revocation, the applicable marriage law is customary law, except for Christians who are subject to the Javanese, Minahasa and Ambon Christian Marriage Law. Furthermore, they issued the receptie theory, which states that what actually applies in Indonesia is the original customary law. Islamic law only has power if it has been accepted by customary law and is born as customary law, not as Islamic law.<sup>14</sup>

## 3. Japanese Occupation Period

After General Ter Poorten unconditionally surrendered to the Japanese military commander for the Southern region on March 8, 1942, the Japanese government immediately issued various regulations. One of them was Law Number 1 of 1942, which confirmed that the Japanese government continued all powers previously held by the Governor General of the Dutch East Indies. This new provision of course had implications for the continued position of the validity of Islamic law as in its last condition during the Dutch occupation.<sup>15</sup>

Nevertheless, the Japanese government continues to implement various policies to attract the sympathy of Muslims in Indonesia. Among them are:<sup>16</sup>

1. The promise of the Japanese Military Commander to protect and advance Islam as the majority religion of the population of Java.
2. Establishing Shumubu (Office of Islamic Religious Affairs) which is led by Indonesian people themselves.
3. Allowing the establishment of Islamic mass organizations, such as Muhammadiyah and NU.

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<sup>14</sup> Aldy Darmawan, "Reformasi Hukum Keluarga Islam di Indonesia," *Sakena: Jurnal Hukum Keluarga* Vol. 8 No. (2023): 87–89.

<sup>15</sup> Ramly Hutabarat, *Kedudukan Hukum Islam dalam Konstitusi-Konstitusi Indonesia* (Jakarta: Pusat Studi Hukum Tata Negara UI, 2005).

<sup>16</sup> Andi Herawati, "Perkembangan Hukum Islam Di Indonesia (Belanda, Jepang, dan Indonesia Merdeka sampai sekarang)," *As-Shahabah: Jurnal Pendidikan dan Studi Islam* Vol. 3, No (2017): 53.

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4. Approved the establishment of the Indonesian Muslim Consultative Assembly (Masyumi) in October 1943.
5. Approved the establishment of Hezbollah as a reserve force to accompany the establishment of PETA.
6. Attempting to meet the demands of Islamic figures to restore the authority of the Religious Court by asking a customary law expert, Soepomo, in January 1944 to submit a report on the matter. However, this effort was later "rejected" by Soepomo on the grounds of complexity and delaying it until Indonesia's independence.

Thus, it can be said that there was no change in the position of Islamic law during the Japanese occupation of the country. However, the Japanese occupation was better than the Dutch in terms of new experiences for Islamic leaders in regulating religious issues by acquiring the existence of Islamic law independently through the Islamic Court institution which was changed from Priesterrad to Sooryoo Hooiin and the Court of Appeal from Hof voor Islamietsche to Kaikyoo Kootoo Hooiin.

#### 4. Independence Period

Based on its history, family law in Indonesia has experienced ups and downs in line with the ups and downs until the struggle for independence of the Republic of Indonesia during the Western colonial era. During the Islamic Kingdom in Java (lasting around 1613-1882), *al-ahwal al-syakhsyiyah* (family law), showed the birth of a new reality, namely the peaceful acceptance of Islamic social norms by the majority of the population of the archipelago. Islamic family law as an independent law has become a living reality in Indonesian society through the Islamic kingdoms that stood in Indonesia under their respective powers.<sup>17</sup>

After Indonesian independence, the form of Islamic family law reform was signaled by the birth of the first law on marriage, Law Number 22 of 1946 concerning Marriage Registration, Divorce and Reconciliation. Based on the consideration that marriage, divorce, and reconciliation as regulated in *Huwelijksordonantie S. 1929 Number 348 Jo-S. 1931 Number 467, Vorszenlandsehe Hueelijksordonantie Buitengzuesten S. 1932 Number 482* were no longer appropriate to the situation while the formation of new regulations regarding this matter could not be implemented in a short time which was carried out through three stages. Then followed by other regulations such as PP Number 10 which regulates Marriage and Divorce Permits for Civil Servants (PNS), which was stipulated on April 21, 1983.<sup>18</sup>

The position of Islamic law during the independence period experienced significant progress. Although the majority of Indonesian people are Muslim, it is not easy to enforce Islamic law in Indonesia. Slowly but surely, there was a formatization of Islamic law, as a consequence of choosing Pancasila as the state ideology.

During this period of independence, Islamic law experienced two periods, namely the persuasive-source and authoritative-source periods. The persuasive period is the period of acceptance of Islamic law as persuasive, namely a source in which people must believe and accept it. All the results of the BPUPKI session are persuasive sources for the 1945 Constitution, so that the Jakarta Charter is also a persuasive source for the 1945 Constitution. Although the 1945 Constitution does not contain the seven words of the Jakarta Charter, Islamic law applies to the Indonesian people who are Muslim based on Article 29 paragraphs (1) and (2).

The second period, authoritative-source began when the Jakarta Charter was placed in the 1959 Indonesian Presidential Decree. In the considerations of the presidential decree, it was stated "that we believe that the Jakarta Charter dated June 22, 1945 embodies the 1945 Constitution and is a series of unity in the constitution." Thus, the legal basis of the Jakarta Charter and the 1945 Constitution were stipulated in one regulation, namely the Presidential Decree, which in terms of Indonesian constitutional law, both have the same legal standing.

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<sup>17</sup> Alfitri, "Pembaruan Hukum Keluarga di Indonesia Melalui Kompilasi Hukum Islam," *Mahkamah Agung Republik Indonesia Direktorat Jenderal Badan Peradilan Agama*, t.t.

<sup>18</sup> Darmawan, "Reformasi Hukum Keluarga Islam di Indonesia."

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Entering the new order, national development in various fields continued to be pursued, including in the legal field which required the creation of new Indonesian law. The law must be in accordance with the ideals of Pancasila law and the 1945 Constitution and serve the national interest. The form of legal formalization carried out in Indonesia was by trying to transform Islamic law into statutory regulations. In statutory regulations, the position of Islamic law became clearer. From here, national Islamic legal legislation emerged, namely Law No. 1 of 1974 concerning Marriage and Law No. 28 of 1977 concerning Endowment of Land Ownership. Article 2 paragraph (2) of Law No. 1 of 1974 stipulates that a marriage is valid if it is carried out according to the respective religious laws.<sup>22</sup> With this provision, there was a change in law from racial ethnicity (colonial period) to law based on religious beliefs.

When the reform era replaced the New Order (1998), the desire to make Islamic law positive was very strong. The development of Islamic law during this period progressed. In real terms, Islamic law began to be actualized in social life. Its scope became very broad, not only in civil law matters but also in the realm of public law. This was influenced by the emergence of the law on Regional Autonomy. The regional autonomy law in Indonesia was initially Law No. 22 of 1999 concerning regional government, which was later amended through Law No. 31 of 2004 concerning regional autonomy. According to the provisions of this law, each region has the authority to regulate its own territory including in the legal field. As a result, many regions implemented Islamic law for the development of Islamic law. Although Islamic law did not develop through the structural party channel, Islamic law in the reform era as a continuation of the previous era was able to develop rapidly through the cultural channel. This happened as a logical consequence of the progress of Muslims in the fields of economics and education. The development of Islam in the reform era was followed by the development of Islamic law culturally. This situation was supported and invited by the birth of several laws as laws.<sup>19</sup>

The development and progress of Islamic legal thought in Indonesia only occurred since the issuance of Law Number 1 of 1974 concerning marriage law. Mahadi stated that with the issuance of this law, the receipt theory that was enforced in the previous period ended. To strengthen this opinion, Mahadi quoted article 1 paragraph 1 which states that "marriage is valid if it is carried out according to the provisions of the law of each religion and its beliefs". Thus, Islamic law becomes a direct source of law without having to go through customary law in assessing whether a marriage is valid or not. So, in terms of formal juridical terms, Islamic law has been in effect and implemented by the Indonesian Muslim community.<sup>20</sup>

Islamic legal thought in matters of marriage developed very interestingly in the pre-marriage law period and in the period after.<sup>21</sup> The Marriage Law is a regulation that must be implemented in Indonesian society, including for Muslims who have been bound by the fiqh of munakahat. Amir Syarifuddin, an expert in Indonesian Islamic law, stated that the marriage law in several articles is different from what is contained in the fiqh of munakahat according to the Imam Syafi'i school of thought, which has been practiced by Indonesian Muslims. It is even different from the fiqh books that are always referred to by Indonesian scholars.<sup>22</sup>

During the New Order, the drafting of laws and regulations on marriage was a continuation of efforts during the Old Order. In 1966, the MPRS with Decree No. XXVIII/MPRS/1966 stated in Article 1 paragraph (3), that it was necessary to immediately create a Law on Marriage. In 1967 and 1968, the government submitted two draft bills to the DPRGR, namely (1) a bill on Muslim marriage; (2) a bill on the basic provisions of marriage. However, both bills did not receive approval from the DPRGR because one faction rejected it and two factions abstained, although the rest accepted it.

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<sup>19</sup> Sudirman Tebba, *Islam Pasca Orde Baru* (Yogyakarta: Tiara Wacana, 2001).

<sup>20</sup> Mahadi, *Hukum Waris Bagi Umat Islam* (Jakarta: Proyek Peningkatan Badan Pembinaan Peradilan Agama, 1980).

<sup>21</sup> Ahmad Rofiq, *Hukum Islam Di Indonesia* (Jakarta: Grafindo Persada, 1995).

<sup>22</sup> Amir Syarifuddin, *Ushul Fiqh* (Ciputat: Logos Wacana Ilmu, 1997).

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### Scope of Family Law Reform

Gender-fair family law is indeed felt to be a necessity for the people of Indonesia. The government's "political will" to make changes to family law, both at the Supreme Court, the Ministry of Religion and the President, already exists. The Constitutional Court in Indonesia has even begun to open up spaces to reopen discussions on existing family law. National legal policies as explained in the previous section, namely Law Number 23 of 2004 concerning Domestic Violence, the Criminal Code, Law Number 7 of 1984 concerning CEDAW, the Constitution of the Republic of Indonesia 1945, Law Number 39 of 1999 concerning Human Rights, are a set of laws that can be an opportunity to support the movement for reform. Some jurisprudence is even acknowledged to have begun to complicate spaces for polygamy practices.<sup>23</sup>

Today, human equality is seen as essential to justice, but this leaves much room for differing views on the fairest way to accommodate differences. By choosing justice as gender equality before the law, modern Muslims are not importing a ready-made package of legal solutions. In Indonesia, provisions relating to marriage have been regulated in state laws and regulations that specifically apply to Indonesian citizens in the form of Law Number 1 of 1974 and its implementing regulations in the form of Government Regulation Number 9 of 1975.

This law is the material law of marriage, while the formal law is stipulated in Law Number 7 of 1989 in conjunction with Law Number 3 of 2006 in conjunction with Law Number 50 of 2009 concerning Religious Courts. Meanwhile, the complementary regulation that will be a guideline for judges in the Religious Court institution is the Compilation of Islamic Law in Indonesia which has been stipulated and disseminated through Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law.<sup>24</sup>

Islamic legal thinking on marriage issues developed very interestingly in the pre-marriage law era and in the period afterward. The marriage law is a regulation that must be implemented among Indonesian society, including for Muslims who have been bound by the fiqh of munakahat. However, the marriage law in several articles is different from what is contained in the fiqh of munakahat according to the Imam Syafi'i school of thought, which has been practiced by Indonesian Muslims. It is even different from the fiqh books that are always referred to by Indonesian scholars.<sup>25</sup>

In matters in the form of administrative regulations, such as marriage registration and marriage certificates, it is not a problem for Indonesian Islamic law experts, even though it is not contained in fiqh books. However, provisions that differ from the rules contained in fiqh books are widely debated. Quoting from Amir Syarifuddin, he revealed several differences in legal material contained in the marriage law with that contained in fiqh books. Such as, among others, the issue of the age limit for marriage, which states 19 years for men and 16 years for women. This is different from the legal provisions contained in fiqh books which allow marriage with children without any age limit provisions.<sup>26</sup>

The marriage law also allows women who have reached the age of 21 to marry without a guardian, whereas in the books of the Shafi'i school it is stated that women in any case, big, small, virgin or widow are not legally married without a guardian. The marriage law only allows polygamous marriages if they have permission from the Religious Court and after fulfilling certain requirements, whereas in the Shafi'i school as well as in most other fiqh books, polygamy is permitted without permission from anyone and also without requirements other than the requirement of fairness in sleeping turns. The marriage law stipulates that the implementation of divorce must be witnessed in front of a court hearing, whereas in the fiqh of the Ahlu Sunnah scholars including Shafi'i it is stated that divorce is valid without the requirement of a witness, therefore it can be done at any time.<sup>27</sup>

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<sup>23</sup> Zulhamdi, "PEMBAHARUAN HUKUM ISLAM DI INDONESIA DAN TOKOH-TOKOHNIA," *Jurnal Ilmiah ISLAM FUTURA* Vol. 19. N (2019): 9.

<sup>24</sup> Barkah, "Kebijakan Kriminalisasi Dalam Reformasi Hukum Keluarga Di Indonesia."

<sup>25</sup> Sakirman Sakirman, Yulia Rizki Amanda, dan Le Thi Thao, "Effectiveness of Marriage Age Limit According to Law Number 16 of 2019 in East Lampung," *MILRev: Metro Islamic Law Review* 1, no. 2 (27 Desember 2022): 164–75, <https://doi.org/10.32332/milrev.v1i2.6206>.

<sup>26</sup> Abu al-Hasan al-Mawardi, *Al-Ahkam Al-Sulthaniyah* (Dar al-Fikr: Beirut, t.t.).

<sup>27</sup> Zulhamdi, "PEMBAHARUAN HUKUM ISLAM DI INDONESIA DAN TOKOH-TOKOHNIA."

What is meant by Islamic family law is the law that regulates the relationship between Muslim family members regarding matters of marriage, maintenance, child care (hadanah) and also inheritance. The issue of wills and gifts is also included in this understanding, as regulated in family law in Indonesia known as KHI (Compilation of Islamic Law).

The compilation of Islamic law which was formally ratified through Presidential Instruction Number 1 of 1991 is a reflection and peak of the development of Islamic legal thought in Indonesia. This statement is based on the holding of a national seminar, which was attended by Islamic scholars from Islamic organizations, Islamic scholars and higher education institutions, from the general public and even from all levels of Islamic scholars participating in the discussions, so it is worthy of being considered as an *ijma'* of Indonesian scholars.

Islamic Family Law Reform in Indonesia is inseparable from the important phenomenon that has been seen in the Muslim world since the beginning of the 20th century AD. There is a spirit and effort to reform family law in countries with Muslim majorities. Islamic family law reform was first carried out by Turkey, then followed by Lebanon and Egypt, Brunei, Malaysia and welcomed by Indonesia to carry out progressive Islamic family law reform efforts.<sup>28</sup>

Islamic family law reform in Indonesia has been going on for quite a long time, progressing with conditions and situations and in accordance with the demands of the times that have passed. This is because the norms contained in the books of fiqh are not suitable or are no longer able to provide solutions or answers to new problems that occur, especially in the field of family law. It should be noted simply, fiqh has two areas, there is a principle area and a flexible area. Likewise with family law, of course there is a principle area and a flexible area. The principle area is similar to natural law, which cannot and is not possible to be changed, such as the pillars of marriage and the second area is the flexible area, or more precisely called the area of difference, this aspect tolerates differences in determining its law, such as the tightening of polygamy requirements.<sup>29</sup>

Based on the description above, Islamic family law in Indonesia, especially in the field of marriage, long before the Compilation of Islamic Law was made, there were laws related to marriage that were in effect, including: Law Number 1 of 1974 concerning the Principles of Marriage (Marriage Law); Government Regulation Number 9 of 1975 concerning the implementation of Law Number 1 of 1975; Government Regulation Number 10 of 1983 concerning Marriage and Divorce Permits for Civil Servants; Law Number 7 of 1989 concerning Religious Courts and Compilation of Islamic Law (KHI).<sup>30</sup>

In its development, both Law No. 1 of 1974 concerning marriage and PP no. 9 of 1975 have not been able to clearly accommodate the provisions of family law for Muslims in Indonesia. Starting from the emergence of thoughts of Muslim figures related to breakthroughs regarding Indonesian fiqh, especially those carried out by Hazairin (1905-1975) and TM Hasbi Ash-Shiddieqy (1906-1976), this step then became real with the initiative between the Supreme Court (MA) of the Republic of Indonesia and the Ministry of Religion of the Republic of Indonesia regarding the project of developing Islamic law through jurisprudence, a project that will be responsible for the formation of the KHI. This project not only involves the legislative and executive circles, but also involves Muslim scholars and intellectuals who have expertise in the field of Islamic law.<sup>31</sup>

The main points of the material for the renewal of Islamic marriage law in Indonesia include: The purpose of marriage is to form a happy and eternal family. (Article 1 of the Marriage Law, Articles 2 and 3 of

<sup>28</sup> A. Zayyadi, "Kontribusi Turki dan Mesir Terhadap Sejarah Pembaruan Hukum Keluarga Islam di Indonesia," *Al-Manhaj: Journal of Indonesian Islamic Family Law* Vol. 2, No (2020): 45.

<sup>29</sup> H. Riadi, "Pembaharuan Hukum Keluarga Islam di Indonesia (Ditinjau dalam Undang- Undang No. 1 Tahun 1974)," *SCHOLASTICA: Jurnal Pendidikan Dan Kebudayaan* Vol. 3, No (2021): 24.

<sup>30</sup> Ahmad Rajafi, "SEJARAH PEMBENTUKAN DAN PEMBARUAN HUKUM KELUARGA ISLAM DI NUSANTARA," *Aqlam: Journal of Islam and Plurality* Vol.2, No. (t.t.): 14, <https://doi.org/10.30984/ajip.v2i1.507>.

<sup>31</sup> Muchamad Coirun Nizar, *PERUBAHAN KETENTUAN PERKAWINAN DALAM UNDANG-UNDANG PERKAWINAN PASCA REFORMASI PERSPEKTIF KAIDAH FIQH dalam PROGRES HUKUM KELUARGA ISLAM DI INDONESIA PASCA REFORMASI (Dimensi Hukum Nasional - Fiqh Islam - Kearifan Lokal*, ed. oleh M Ahmad Rajafi (Jakarta: CV. ISTANA AGENCY Istana Publishing, 2020).

the Compilation of Islamic Law); The measure of the validity of a marriage is religion and must be recorded by a Marriage Registrar. (Article 2 of the Marriage Law and Articles 4,5,6,7 of the Compilation of Islamic Law); The principle of marriage is monogamy. (Articles 2,3,4 of the Marriage Law and Article 55 of the Compilation of Islamic Law); The minimum age of the prospective bride and groom is 19 years for men, and 19 years for women. (Articles 6,7 of the Marriage Law and Article 15 of the Compilation of Islamic Law); Divorce is made difficult. (Articles 38,39,40 of the Marriage Law and Articles 113,114,115,116 of the Compilation of Islamic Law); The principle of deliberation between husband and wife. (Articles 30,31,32,33,34 of the Marriage Law and Articles 77,78,79 of the Compilation of Islamic Law).

The development of Indonesian society, the memorization culture that occurred at the beginning of Islam shifted to a written culture, this is because the written culture is a characteristic of modern society, and all forms of letters are authentic deeds. After the marriage bond is formed into a deed. So, witnesses can no longer be relied on because humans can die, humans can also forget and make mistakes, for that evidence is needed that can be recognized by the state and this evidence is called a deed. For that, one form of Islamic family law renewal is the inclusion of marriage registration based on marriage rules that must be met. According to Indonesian Islamic law experts, the renewal of Islamic law is caused by several factors, including: first, to fill the legal vacuum; second, the influence of economic globalization and science and technology; third, the influence of reform in various fields, so that Islamic law has the opportunity to be used as a reference in national law; and fourth, the influence of the renewal of Islamic legal thought, both by Islamic law experts in various countries and national Islamic law experts, especially concerning the development of science and technology and gender issues.<sup>32</sup>

Historically, the momentum of the development of Islamic family law in Indonesia after the reformation was captured in several events, including: the issuance of Law No. 41 of 2004 concerning waqf, the formulation of the CLD KHI, several requests for judicial review of several articles in Law No. 1 of 1974 concerning marriage, and most recently the issuance of Law No. 16 of 2019 concerning amendments to Law No. 1 of 1974 concerning marriage.

Changes to provisions in religion that are *ijtihadi* in nature are inevitable due to changes in human conditions and situations in all times and places. Changes to the provisions of marriage in the marriage law in Indonesia are marked by several events including the formulation of the CLD KHI, a request for a judicial review of Law No. 1 of 1974 concerning marriage, and Law No. 16 of 2019 concerning amendments to Law No. 1 of 1974 concerning marriage.

### **Reform Methods In Indonesia**

Islamic law experts in Indonesia state that a number of factors underlie the current renewal of Islamic law, including: (1) the need to fill the legal gap left by the norms of *fiqh* books along with the continuing development of the legal needs of society; (2) the influence of economic globalization and science and technology; (3) the influence of renewal in various fields that provide opportunities for Islamic law to become a reference for national law; and (4) the influence of renewal of Islamic legal thought, both from foreign and domestic Islamic law experts, especially those related to advances in science and technology and gender issues.

Experts have determined that there are several characteristics or traits of the method of determining Islamic law (*fiqh*) in this case, also known as *Usul Fiqh* and classical and medieval *fiqh*, hereinafter referred to as conventional *fiqh*. These characteristics apply to the renewal of Islamic law in the field of family law. Conventional refers to an idea that has spread to become a norm.

This idea has become a general guideline because it has been known and introduced from the past to the present by educators in formal and non-formal educational environments, as well as by teachers in elementary madrasahs and universities. Meanwhile, the modern approach refers to the process of

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<sup>32</sup> Abdul Manan, *Reformasi Hukum Islam di Indonesia* (Jakarta: Raja Grafindo Persada, 2006).

development and birth of Islamic family law through codification - through laws, compilations, royal decrees, judges' decisions, and so on initiated by Turkey in 1917 and Egypt in 1920.<sup>33</sup>

Viewed from the perspective of gender equality and justice, Islamic legal reforms are both progressive and non-progressive. Reform is called progressive if it takes into account gender sensitivity. Although family law reform can be broadly divided into two, namely; intra and extra doctrinal reform, the methods and techniques vary. There are at least seven methods used by the Islamic world, namely: 1) making all schools of thought in Islam equal (musawat al-madzahib) 2) istihsan 3) masalih al-mursalah. 4) siyasah syar'iyah 5) istidlal 6) legislation 7) codification.<sup>34</sup>

This method is often also known as the contemporary method. However, academics who study this use different terminology in some respects. For example, some scholars and researchers refer to siyasah syar'iyah and/or takhshash alqadla as administrative procedure approaches. Similarly, some scholars refer to what other scholars call reinterpretation as ijihad. Scholars also differ in the way they classify things. While some scholars distinguish between talfiq and takhayyur, others combine the two.<sup>35</sup>

There are five techniques used, namely: 1) ijma 2) qiyas 3) individual and collective ijihad. 4) eclectic choice. 5) combining two legal rules from different schools of thought into one/talfiq. Tahayur (choosing suitable opinions) and talfiq (combining two or more opinions taken from various schools of thought), which method in the classical fiqh tradition, especially among the Shafi'iyah, is considered unethical. Because it is considered to simplify or play with religion.

The methods used by experts to implement Islamic family law reform can generally be summarized into two categories based on the findings of experts regarding contemporary methods of Islamic family law reform: First, intra-doctrinal reform, where the reform implemented still refers to the concept of conventional fiqh, including takhayyur by choosing one of the fiqh scholars, including non-madhab scholars. This concept is also known as tarjih which means seeking the strongest opinion and talfiq means combining the views of several scholars. Second, extra-doctrinal reform, in theory no longer refers to conventional fiqh but to texts from the Qur'an and the Sunnah of the Prophet Muhammad through restoration or reinterpretation of the text.<sup>36</sup>

In analyzing the methodological issues related to the reform of Islamic family law, there is a new method offered by Khoiruddin Nasution, namely the thematic-holistic method which is claimed to be more effective when applied. The thematic method is an understanding of the text of the Qur'an by selecting verses that discuss certain themes and topics. Not only that, consideration of the context of the verse (asbabun nuzul) is also needed. The holistic method is to understand the text of the Qur'an and the Sunnah as a whole and no longer partially. Then the key principles and spirit of the text are traced.<sup>37</sup> It should be underlined that not all Muslim communities view and respond to the existence of contemporary Islamic family law positively, in fact they tend to respond negatively.<sup>37</sup>

In the progressive reform of Islamic law, there are still many people who reject the substance of Islamic family law. Because the rejection is based on three factors, namely: First, family law is considered not in line with the philosophical, legal and sociological values of society. Second, society does not understand the substance of contemporary Islamic family law. Third, family law is still considered not in accordance with the prevailing social system.

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<sup>33</sup> Panji Nugraha Ruhiat dan Si'ah Khosiyah Mohamad Salman Podungge, "Hukum Perkawinan dan Kewarisan dalam Tata Hukum Mesir dan Sudan," *Al-Ahwal Al-Syakshiyah: Jurnal Hukum Keluarga dan Peradilan Islam* 3, no (2022): 30.

<sup>34</sup> Moh. Rofqil Bazikh Nur Fauziyah Laili, "METODE REFORMASI HUKUM KELUARGA ISLAM DI DUNIA MUSLIM PERSPEKTIF KHOIRUDDIN NASUTION," *Jurnal Restorasi Hukum Jurnal Pusat Studi dan Konsultasi Hukum Fakultas Syari'ah dan Hukum* Vol. 6, No (t.t.): 34-36.

<sup>35</sup> Muhammad Husni Abdulah Pakarti dkk., "The Role of Family Law in Confronting Polygamy Practices in Contemporary Society," *Syakhshiyah Jurnal Hukum Keluarga Islam* 3, no. 2 (2023): 132, <https://doi.org/10.32332/syakhshiyah.v3i2.7614>.

<sup>36</sup> Azhar Basyir, *Refleksi atas Persoalan Keislaman Seputar Filsafat, Hukum, Politik dan Ekonomi* (Bandung: Mizan, 1996).

<sup>37</sup> Nur Fauziyah Laili, "METODE REFORMASI HUKUM KELUARGA ISLAM DI DUNIA MUSLIM PERSPEKTIF KHOIRUDDIN NASUTION.": 27-30.

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#### 4. CONCLUSION

Islamic family law reform has become a discourse in the study of Islamic law. This discourse has become a phenomenon since the 20th century AD, this is evidenced by the increasing number of efforts to reform Islamic legal thought carried out by Muslim scholars supported by the conditions and situations of the development of the era which are very complex. Islamic family law reform as an offer to solve various family problems. Family law has an important position in Islam. Family law is considered the core of sharia. The renewal of family law methods is a must considering that classical fiqh is unable to answer current issues. At least, there are five points of implementation of the renewal of family law methods in Muslim countries. Starting from takhayyur, talfiq, takhsis al-qadha', siyasah syar'iyah, to reinterpretation of texts. Khoiruddin Nasution then provided an alternative method in the form of thematic-holistic. A method adopted from the tradition of interpreting the texts of the Qur'an and sunnah. The thematic method attempts to find texts that have uniform topics to be discussed later. Meanwhile, the holistic method is an effort to read the entire text in its entirety and not partially. This is the latest method of family law renewal.

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