

Dynamic Development of Family Law in Muslim Countries

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Abstract: *Dynamic Development of Family Law in Muslim Countries.* This article examines the dynamics of the development/renewal of Islamic family law in Muslim countries. The aim is to obtain a concrete picture of the development, from its original form, i.e conventional fiqh, to become positive law and apply it in Muslim countries. This research is classified as library research using a combination of historical and socio-anthropological approaches. Data were obtained from several secondary sources in the form of laws and regulations, books, articles, and many other documents related to the topic under study. The results of this study indicate that the role of the state in enforcing a legal system is absolute, in the sense that a law can be applied when it has been legislated as positive law. Apart from that, this study also found the fact that three models are applied in the development of family law in Muslim countries, namely; *First*, the state still applies the conventional legal system (*fiqh*). *Second*, the state carries out legal reforms within the school of thought. *Third*, the state makes its family law that is separate from religious norms to keep up with changes and developments in society.

Keywords: legal politics, Muslim countries, marriage law.

Abstrak: *Dinamika Perkembangan Hukum Keluarga di Negara-negara Muslim.* Artikel ini menelaah dinamika perkembangan/pembaruan hukum keluarga Islam di negara Muslim. Tujuannya untuk memperoleh gambaran yang konkrit tentang perkembangan hukum keluarga Islam, dari bentuk aslinya yang berupa fiqh konvensional hingga menjadi hukum positif dan berlaku di negara-negara Muslim. Penelitian ini tergolong penelitian pustaka yang menggunakan kombinasi antara pendekatan historis dan pendekatan sosio-antropologis. Data diperoleh dari sejumlah sumber sekunder yang berupa peraturan perundang-undangan, buku, artikel dan sejumlah dokumen lain yang terkait dengan topik yang diteliti. Hasil penelitian ini menunjukkan bahwa peran negara dalam pemberlakuan suatu sistem hukum sangat mutlak, dalam arti suatu hukum akan dapat diterapkan manakala telah terlegislasikan menjadi hukum positif. Selain dari itu, penelitian ini juga menemukan fakta bahwa ada tiga sistem yang diterapkan dalam perkembangan hukum keluarga di negara muslim, yaitu; *pertama*, negara masih menerapkan sistem hukum konvensional (fikih) secara mutlak. *Kedua*, negara melakukan reformasi hukum dalam bermadzhab. *Ketiga*, negara membuat hukum keluarga tersendiri yang terpisah dari norma agama (sekuler) guna mengikuti perubahan dan perkembangan masyarakat.

Kata kunci: politik hukum, negara Muslim, hukum perkawinan.

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Introduction

The development and renewal of Islamic law in several Muslim countries began in the nineteenth century when Islamic law began to come into contact with European law and integrate with several Western theories and approaches.¹ This was put in place so that the different opinions that occurred among the clergy could be reconciled in a legal form of legislation, and the variance of *ikhtilâf* (differences of opinion) could be minimized. After going through the legislative process and becoming positive law, Islamic law changes its status from non-formal law (both material and substance) to positive law.

The study of political relations with changes in Islamic law in Muslim countries is not a new thing. Many previous researchers have conducted studies on this topic, including Ahmad. B. Wahid, through his research entitled: *Reform of Islamic Law in the Islamic World*, examines Islamic family law cases in some Muslim countries thematically and does not relate them to legal politics in each country.² Another researcher, Dian Mustika, through her research entitled *Registration of Marriages in Family Law Laws in the Islamic World*, provides an overview of the issue of registration of marriages which is a form of renewal and reform of family law carried out by Muslim countries. The goal is to achieve legal certainty and legal protection for marriage. Even though marriage, as an obligation, is legalized in a statutory regulation, in practice, however, there are different views on this matter. In various Muslim countries, the registration of marriages is mandatory, while others are only enforced as an administrative requirement and are not related to the validity of marriages.³

¹ Agus Hermanto and others, 'Penerapan Batas Usia Pernikahan di Dunia Islam: Review Literature', *At-Tabdzib: Jurnal Studi Islam dan Muamalah*, 9.2 (2021), 23–33.

² Ahmad Bunyan Wahib, "Reformasi Hukum Keluarga di Dunia Muslim," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 14, no. 1 (30 Juni 2014): 1, <https://doi.org/10.18326/ijtihad.v14i1.1-19>.

³ Dian Mustika, 'Pencatatan Perkawinan dalam Undang-Undang Hukum Keluarga di Dunia Islam', *INOVATIF | Jurnal Ilmu Hukum*, 4.5 (2011) <<https://online-journal.unja.ac.id/jimih/article/view/534>>.

Another researcher, Ahmad Asrori, through his research entitled: *Marriage Age Limit According to Fukaha and Its Application in Marriage Laws in the Muslim World*, reviews another issue in marriage law, namely the opinion of *madhhab* scholars regarding the minimum age limit for marriage and its application in marriage law in several Islam country. Through his research, Asrori found that in fiqh books, jurists differ on the age limit for someone to be called *bâligh* (maturity). Differences of opinion regarding the concept of *bâligh* have resulted in differences in its application in several Muslim countries.⁴

On another aspect, Ismail Marzuki, through his research entitled: *Politic of Islamic Family Law in Tunisia*, explained that Islamic family law politics in Tunisia emerged after the country broke away from the Ottoman Empire. Marzuki also concluded several things: *First*, Tunisia in carrying out family law politics was influenced by the Maliki and Hanafi schools (intra-doctrinal reform). *Second*, political Islamic family law in Tunisia also uses a pattern of amendments and modifications to laws (regulatory reform). *Fourth*, Tunisia has also carried out codification which can be seen from efforts to codify Islamic law in *al-Majallah fil Ahwâl al-Syakhsiyyah lil Jumbûriyyah al-Tunîsiyyah*.⁵

This paper examines the same topic as previous research topics, namely Islamic family law, but with a different scope, focus, and approach. This research examines in depth the development of Islamic family law in several Muslim countries as an effort to implement the messages of Syara to form positive legal rules that are official and binding. In other words, if the focus of previous studies was more on certain themes, this research focuses on the general development of Islamic Family Law in the Muslim World, to identify what forms of change have colored the development of this law from time to time.

⁴ Ahmad Asrori, 'Batas Usia Perkawinan Menurut Fukaha dan Penerapannya dalam Undang-Undang Perkawinan di Dunia Muslim', *Al-Adalah*, 12.2 (2015), 807–26 <<https://doi.org/10.24042/adalah.v12i2.215>>.

⁵ Ismail Marzuki and Lathifah Munawaroh, 'Politik Hukum Keluarga Islam di Tunisia', *Al-Adl*, 12.1 (2019), 76–93 <<https://doi.org/10.31332/aladl.v12i1.1384>>.

Research Methods

This research is classified as literature research using a combination of historical and socio-anthropological approaches. Data were obtained from many secondary sources in the form of legal documents, books, articles, and several other documents related to the topic under study. Based on these data, an analysis was then carried out using a combination of the historical approach and the socio-anthropological approach to obtain a textual interpretation model that could be applied in any Muslim country.

Results and Discussion

Islamic Law Renewal Methods

The discussion on Islamic Family Law is a discussion of Islamic law. This is because Islamic Family Law is also part of Islamic law, which specifically regulates matters of marriage, divorce, inheritance, and wills.⁶ So the discussion about developments/updates in Islamic Family Law is essentially the same as the discussion about developments/updates in Islamic Law.

Khoiruddin Nasution said that there are two forms of methods in reforming Islamic law, namely; 1) intra-doctrinal reform, and 2) extra-doctrinal reform. In the first method, intra-doctrinal, reform of Islamic law takes place by combining the opinions of several *madhhab* imams or taking the opinion of *madhhab* imams outside of the schools they adhere to. Whereas through the second method, extra doctrinal reform, legal renewal is carried out by providing a completely new interpretation of the existing texts. This is what is then called *ijtihad*.⁷ Related to this second method, Ferdinand de Saussure, as quoted by Syafiq Hasyim, mentions two kinds of methods in reading texts, namely; 1) *tazammuni* (synchrony), i.e reading a text by associating it with past and present realities, or in other words contextualizing the text between the past context and the current development context. 2) *Isqâthi* (diachrony),

⁶ al-Ab Luwis Ma'luf, *al-Munjid Fi al-Lughah Wa al-'Alam* (Bairut: Dar al-Masyriq, 1986).

⁷ Khoiruddin Nasution, *Hukum Perkawinan dan Warisan di Dunia Muslim Modern* (Yogyakarta: Academia, 2012). p. 160.

reading a text with a meaning that has developed in contemporary times and breaking it with all the ties of past meanings. This last method is relevant to technological advances and the development of people's lifestyles which will always demand actual and responsive innovation so that law will always develop dynamically.⁸

In a slightly different formulation, but in more detail, the scholars put forward four kinds of methods that can be used in reforming Islamic family law; They are: *First, takhayyur*, i. e. choosing one from several fiqh scholars' opinions, including scholars outside the school of thought. This method is also known as *tarjih*. *Second, talfiq*, combines some opinions of scholars (two or more) in determining the law on a problem. *Third, takhsish al-qadlâ*, namely the right of the state to limit the authority of the judiciary, both in terms of person, territory, jurisdiction, and stipulated procedural law. *Fourth, Siyâsa shar'iyya*,⁹ namely the ruler's policy of implementing regulations that are beneficial to the people and do not conflict with *shari'a* (a reinterpretation of the texts of al-Quran and Sunnah).

In the view doctrinal aspect, legal changes of fiqh are justified; Even become a necessity if the sociological conditions of society require it. This means that Islamic law is dynamic and does not come from space. Among the characteristics of Islamic Law showing its flexibility are the principles attached to it, namely: *jalbu al-mashâlih wa daf'u al-mafâsid* (take advantage and eliminate harm), *shâlihun li kulli zamân wa makân* (bring goodness to every time and place), *'adam al-haraj* (removing difficulties), *taqlîl al-takâlîf* (lightening the burden), *al-tadarruju fi al-tasyrî'* (gradual enforcing the law).¹⁰ It is based on these principles that changes in Islamic law are allowed.

⁸ Syafiq Hasyim, *Hal-Hal Yang Tak Pernah Terfikirkan Tentang Isu-Isu Perempuan dalam Islam* (Bandung: Mizan, 2001), p. 21.

⁹ More information and discussion about *siyâsa shar'iyya*, see Abdul Qodir Zaelani, *Politik Hukum 'Umar Bin al-Khaththâb dan Relevansinya dengan Pengembangan Hukum Keluarga di Indonesia*, (Diss. UIN Raden Intan Lampung, 2020).

¹⁰ Abu Ameenah Philips Bilal, *Sejarah Evolusi Fikih Aliran-Aliran Pemikiran Hukum Islam* (Bandung: Nuansa Cendekia, 2015), p.180

Ibn Qayyim al-Jauziyyah,¹¹ as well as several other scholars, mention five kinds of things that can bring about changes and differences in law, namely: differences in place, time, conditions, motivation, and culture.¹² Their statement is based on a *qâidah fiqhiyah* (legal principle) which reads: *taghayyar al-ahkâm wa ikhtilâfûha bi taghayyuri al-amkân, wa al-azmân, wa al-ahwâl, wa al-niyât, wa al-awâ'id* (laws change and differ according to changes in place, time, circumstances, intentions, and traditions).¹³ Based on the above rules changes in Islamic law generally occur due to five factors namely place (*al-makân*), time (*al-zamân*), situation (*al-ahwâl*), desire (*al-niyât*), and tradition (*al-'âdat*). Yusuf Qardhawi even added the five factors to ten namely: 1. Change of place (*taghayyur al-makân*) 2. Changes in time (*taghayyur al-zamân*) 3. Changes in circumstances (*taghayyur al-hâl*) 4. Changes in habits or tradition (*taghayyur al-'urf*) 5. Changes in information or knowledge (*taghayyur al-ma'lûmât*) 6. Changes in human needs (*taghayyur hâjat al-nas*) 7. Changes in human capabilities (*taghayyur qadrat al-nâs*) 8. Changes in social, economic and political situations (*taghayyur al-audâ', al-ijtimâ'iyah, wa al-iqtisâdiyyah, wa al-siyâsiyah*) 9. Changes in opinions and thoughts (*taghayyur al-ra'y wa al-fikr*) 10. General disasters (*umûm al-bala'*).¹⁴ Based on these principles, the occurrence of legal differences between one country and another is a natural thing due to differences in schools of law and socio-anthropological differences in these countries.¹⁵

¹¹ Ibn Qayyim al-Jauziyyah (691-751H) was a Sunni Imam, scholar, and jurist who lived in the 13th century. He was an expert on the Hanbali school of jurisprudence, an expert on Qur'anic interpretation, hadith, Nahwu science, Ushul, on Kalam (theology), as well as a student of Shaykh al-Islam Ibn Taimiyyah in the field of Jurisprudence. Some of his great works include *Tahdzîb Sunan Abî Dawud, I'lam al-Muwaqqi'în an Rabbil 'Alamîn, Ighâtsatul Lahfan fi Hukmi Thalâqi al-Ghadlban, Ighâtsatul Lahfan fi Mashâ'id al-Syaithan, Badâ'i'ul Fawâ'id, Amsalul Qur'an dan Buthlanul Kimiya' min Arba'ina Wajban*.

¹² Muhammad Sidqi al-Burnu, *al-Wajîz Fi Idah Qawâid al-Fiqhiyyat al-Kulliyât* (Riyad: Muassasat al-Risalat, 1983), p. 286; Ahmad Ibn Muhammad al-Zarqa, *Sarh Qawâid al-Fiqhiyyat* (Damaskus: Dâr al-Qalam, 1989), p. 227.

¹³ Abbas Sofwan, "Interelasi Qowaid Usul dan Fiqhiyah Sebagai Landasan Hukum Islam yang Universal," *Legitima: Jurnal Hukum Keluarga Islam*, 1.1 (27 Desember 2018): 1–19, <https://doi.org/10.33367/legitima.v1i1.640>.

¹⁴ Yusûf al-Qardawi, *Mujibat Taghayyur al-Fatwâ Fi 'Asrinâ*, II (Mesir: Dar al-Shuruq, 2011), p. 39.

¹⁵ Tati Rohayati, 'Kebijakan Politik Turki Utsmani di Hijaz 1512-1566 M', *Buletin al-Turas*, 21.2 (2015), 84-365. Compare Qodir Zaelani. "Pembaruan Hukum Keluarga: Kajian Atas Sudan–Indonesia." *Al-'Adalah*, 10.1 (2012): 331-342.

It has been mentioned above that laws can change because of customs or habits influences. *Ādat* is a matter that is repeated and continues to occur, which is not a rational relationship. The expression "*things that repeatedly and continuously occur*" refers to all levels of coverage, namely both collective and individual, both words and deeds, both positive-constructive and negative-destructive.¹⁶ Although not all customary elements in society can be adopted as a whole, the actualization of law, however, is often brought closer to the conditions of the community and its context. As a rule, says that changes in the law are caused by changes in the time and place where it is located.¹⁷

Ādat, or in another term it is called *'urf*, are two kinds, namely *al-'urf al-lafdzî* (customs relating to expressions), and *al-'urf al-'amali* (customs relating to actions). *Al-'urf al-lafdzî* is the custom of the people to use certain *lafadz* (expressions) to express something so that the meaning of that word is understood and comes to mind by the people. For example, the word *walad*, according to Arabic means children, including boys and girls. But in daily Arabic conversation, the word *walad* is more commonly interpreted as boys only. Another example is the word *lahwun*; According to the language, the word *lahwun* means meat, including all kinds of meat, such as meat of land animals and water animals But in daily conversation, it means land animals only, not including the meat of aquatic animals (fish).¹⁸ Meanwhile, *al-'urf al-amali*, is a community custom relating to people's actions in matters of their life that are not related to the interests of other people, such as the habit of taking off work on certain days of the week, certain habits that require the serving of certain foods or drinks or certain clothing on certain occasions.¹⁹ Other examples such as buying and selling in society without saying *shighat* sale and purchase agreement. Yet according to Syara', *shighat* of buying and selling is one of the pillars of the contract. But because

¹⁶ Ahmada bin Ali al-Mubarakî, *al-'Urf Wa Atsaruhu Fi al-Syari'ah Wa al-Qânûn* (Jakarta: Amzah, 2011), p. 76.

¹⁷ Abdul Aziz al-Syinawi, *Biografi Imam Abu Hanifah* (Solo: Aqwam, 2013).

¹⁸ Sarjana, Sunan Autad, and Imam Kamaluddin Suratman, 'Konsep 'Urf dalam Penetapan Hukum Islam', *Tsaqafah*, 13.2 (2017), 279–96 <<https://dx.doi.org/10.21111/tsaqafah.v13i2.1509>>.

¹⁹ al-Syinawi, p. 190

buying and selling without *shighat* has become a habit in society and there is no bad effect, Syara', then, allows it.²⁰

Furthermore, it needs to be emphasized here, according to the rules of *usul fiqh* references to changes in the law are very dependent on the presence or absence of legal '*illat* (reasons). '*Illat* is something suspected to contain a legal purpose. Where there is '*illat*, there is law, and vice versa, if there is no '*illat*, then there is no law. As in the rule, "The law circulates in its '*illat*, whether it exists or not".²¹ However, '*illat* is not the only legal reference, because there are other rules that can be used as legal references, for example, the *maslahah* (benefit). The purpose of law or *maqâshid al-shari'ah*, according to Islamic jurisprudence scholars, is to protect religion, soul, mind, wealth, and honor. Because the purpose of the law is abstract, and cannot be observed, it is necessary to use '*illat* as a benchmark for the existence and absence of benefits,²² as the rule of *fiqhiyah* reads: "The law follows a stronger benefit".

Dynamic Development of Islamic Law (*Fiqh*) in Muslim Countries

Broadly speaking, *fiqh* (Islamic law) is divided into two, classical *fiqh* and contemporary *fiqh*. The word classic in Arabic is called the term *salaf* which means earlier. The term *salaf* is sometimes intended to refer to the generation of companions, *tabi'*, *tabi' tabi'in*, the 3rd-century leader, and their followers in the 4th century consisting of *Muhadditsîn* (Hadith experts).²³ *Salaf* also means the righteous scholars who lived in the first three centuries of Islam. This Classical *Fiqh*, at the time, was considered a compendium that was unrivaled and even occupied the third source of law, besides the Qur'an and al-Hadith, and was the most competent source of law in regulating the life of Muslims.²⁴

²⁰ Imam Pamungkas, *Fikih Empat Madzhab* (Jakarta: dl-Makmur, 2015). p. 67

²¹ Nurdhin Baroroh, 'Metamorfosis "illat Hukum" dalam *Sad Adz-Dzari'ah* dan *Fath Adz-Dzari'ah* (Sebuah Kajian Perbandingan)', *Al-Mazahib: Jurnal Perbandingan Hukum*, 5.2 (2018) <<https://doi.org/10.14421/al-mazaahib.v5i2.1426>>.

²² Hamidah Titik, *Fikih Perempuan Berwawasan Keadilan Gender* (Malang: UIN Maliki Press, 2011), p. 96

²³ Thablawy Mahmud Sa'ad, *al-Tasawwuf Fi Turâts Ibnu Taimiyyah* (Mesir: al-Ha'i al-Hadits al-Mishriyyah al-Ammah li al-Kitâb, 1984), p. 103.

²⁴ Ahmad Rajafi, 'Sejarah Pembentukan dan Pembaharuan Hukum Keluarga Islam di

Classical Islamic law which is plotted to become a product of Islamic jurisprudence regulates the implementation of ritual worship and Muslim behavior to five basic principles (mandatory, *sunnah*, *harâm*, *makrûh*, *mubâh*), and private laws (*muâmalât*). This is understandable because at that time the Companions of the Prophet did not yet need a certain scientific tool to manage their lives. They simply need to see and imitate the daily behavior of the Prophet's life, because in him lies the most ideal form of Islamic law. The Companions of the Prophet can enjoy the most appropriate and complete implementation of Islamic life; ranging from issues of worship, and social interaction, to economic, business, and political issues.²⁵

During the post-generation of the Companions, which is more popularly known as *Tâbi'in*, there was a geographical division of the Islamic world, namely Irâq, Hijâz, and Syria. Each region had an independent legal tendency. In Iraq, there are two groups of fiqh namely in Basrah and Kûfah. In Syria, no legal activities are known except through the works of Abû Yûsuf. Meanwhile, in the Hijâz there are two very prominent centers of legal activity, namely Mecca and Medina. Of the two, Medina is more famous and became a pioneer in the development of Islamic law in the Hijâz. Mâlik bin Anas or Imâm Mâlik (d.179 h./795 AD), the founder of the Mâliki school of thought, was the last exponent of the Medina class of jurists. Meanwhile, among the Kûfa fiqh experts, there is the name Abû Hanîfah.

Several years later there emerged the name Muḥammad bin Idris al-Shâfi'î, or Imâm Shâfi'î (died 204 H/ 820 M.) the founder of the Shâfi'iah school of thought who was one of Imâm Mâlik's students. After that came the name Abû Abdillah Ahmad bin Hanbal (died 241 H./ 855 M.), a student of Imâm Shâfi'i, who later founded the Hanbali school. It was during the emergence of the four founders of the school of fiqh that the term fiqh was used specifically and a collection of their works was studied

Nusantara', *Aqlam: Journal of Islam and Plurality*, 2.1 (2018) <<https://doi.org/10.30984/ajip.v2i1.507>>.

²⁵ Ismail Keri, 'Legislasi Hukum Keluarga Islam Berdasarkan Kompilasi Hukum Islam', *Ekspose: Jurnal Penelitian Hukum dan Pendidikan*, 16.2 (2019), 361-75 <<https://doi.org/10.30863/ekspose.v16i2.97>>.

specifically and became the basis for the development of a systematic discipline of Islamic law, side by side with other Islamic disciplines.

The emergence and development of schools of fiqh at this time, according to Qodri Aziziy, was because many scholars began to follow a system of finding laws from certain schools, which did not only refer to the opinion of the Imam (*fi aqwâl*) but also touched on its methodological aspects (*fi al-manhaj*).²⁶ The opinions of the great scholars who were called *Imâms*, such as Abû Hanîfah, Mâlik, Shâfi'î, and Ahmad ibn Hanbal, were then spread by their students to various countries which then formed schools of thought.²⁷ According to Munawwar Kholil, these schools of thought were born starting from the many scholars who followed an opinion that was believed, for example, the words of Imam Syafi'i "*idzâ shahha al-haditsu fa huwa madzhabi*" (if a hadith is valid, then it is my school) which then became the basis for the establishment followed by the next generation of jurists.²⁸

The influence of the *madhhab* is so strong and difficult to remove. It affects differences in the application of law in every Muslim country due to the differences in the basis of the *madhhab* that was adhered to in the early days.²⁹ One example of the impacts of schools of thought differences can be seen in differences of opinion in family law, especially in understanding the concept of maturity (*bâligh*). According to Hanâfi scholars, boys are considered mature when they are 18 years old and girls are 17 years old. The Shâfi'î school gives a limit of 15 years for men and 9 years for women. Hanbali, both boys, and girls 15 years old. Meanwhile, Maliki scholars mark maturity by growing hair in several places/members of the body. Differences of opinion regarding the concept of *bâligh*, later on, resulted in differences in its application in several Muslim countries.³⁰

²⁶ Qodry Azizy, *Reformasi Bermazhab* (Teraju: Mizan, 2004), p. 45.

²⁷ E. Abdurrahman, *Perbandingan Madzhab* (Jakarta: Erlangga, 1991), p. 32.

²⁸ Moenawar Cholid, *Kembali Kepada al-Qur'an dan Al-Sunnah* (Jakarta: Bulan Bintang, 1956), p. 78.

²⁹ Muslim Ibrahim, *Pengantar Fikih Muqarran* (Jakarta: Erlangga, 1991), p. 95.

³⁰ Achmad Asrori, p. 20.

It should be emphasized here that, in substance, there are no major differences between the four existing schools of jurisprudence (Hanâfi, Mâlikî, Shâfi'î, and Hanbalî). This is because epistemologically the thinking of the *madhhab* scholars always refers to the Qur'an and Sunnah as the main sources and the emerging differences only revolve around methodological and detailed matters (*furû' iyyah*), as anticipation and responses fiqh experts on legal issues in each era.³¹ When law cannot be found in the two main sources, the *madhhab* priests then make efforts to find the law separately with different methods and approaches. There are times scholars refer to the texts of the Qur'an and Sunnah, but on the other occasion, when they find new problems, they use ratio considerations. Some schools of thought adhere to the hadith of the prophet so that every case is decided based on the text of the hadith. While others tend to use reason or '*aqli* propositions (*birra'yî*) or combine the two, Syara' texts and ratio considerations.

Entering the new Islamic government which was centered in Andalusia (Spain) around the 9th century AD, classical Fiqh began to face challenges. This was because Muslims, at that time, began to realize that classical fiqh was incapable of answering all the real problems that existed in society. So it is necessary to engage in a new discourse of scientific and social philosophy based on the rationalist-empirical pattern of thought. This phenomenon then indirectly reconstructs classical fiqh scholarship which is considered no longer compatible with Ummat's issues.

With the widespread view that classical Fiqh is no longer able to provide solutions to empirical reality, then fiqh appears in the second category, namely contemporary fiqh, which is interdisciplinary and contextual in nature.³² Starting from theological rules (*i'tiqâdi*) and normative ethical codes then it proceeded towards *fiqh* (Islamic Jurisprudence) and then formed generatively towards legal rules which are then called *al-Qanûn Islâmî* (Islamic Jurisprudence).³³ The long

³¹ Mun'im Ahmad Sirry, *Sejarah Fikih Islam* (Surabaya: Risalah Gusti, 1995).

³² Muhammad Dahlan Al Barry, *Kamus Ilmiah Populer* (Surabaya: Arkola, 1994), p. 240

³³ Syafaul Mudawam, 'Syari'ah - Fiqih - Hukum Islam: Studi tentang Konstruksi Pemikiran Kontemporer', *Asy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum*, 46.2 (2012) <<https://doi.org/10.14421/ajsh.2012.46.2.%p>>.

journey of the history of Islamic law and contemporary fiqh discourse is a continuation of the legal order of the classical period in a new format. Simultaneously, in this modern period, the literature on Islamic law in Muslim countries has also increased, from previously only fiqh books, scholars' fatwas, and *Qâdhi* (court) decisions, now it increased with the existence of statutory regulations made by the government. In Indonesia, there is also what is called the Compilation of Islamic Law (KHI), which is not the result of codification, but also not a book of fiqh. KHI is purely the result of innovation by Indonesian clerics and is the result of a compromise between those clerics who still want to maintain old legal provisions, both in terms of methodology and legal substance, and reformers who want changes.

The attitude of the pros and cons among the ulama towards the material in the laws and regulations made by the government, however, should not be misunderstood that the ulama rejects the codification of Islamic law. Because after all, the existence of a law; including family law, that relies on Islamic teachings and applies officially is the dream of all Muslims. This is because the problems that arise in Muslim families are not always the same as those experienced by non-Muslim families; so the desire to have their own rules that are officially recognized by the government is a natural thing.³⁴ So, even if there are pro and contra attitudes towards a regulation drawn up by the government, it is only about the methodological and approach aspects, not about the legal substance.

Furthermore, narrowing down to Islamic family law, it can be said that every country in the Islamic world, in drafting regulations relating to family law, does not have uniformity in terms of the approach or method used. Even though the normative application of Islamic family law has been manifested in several opinions of the Imams of schools of thought,³⁵ it is undeniable that there will be changes in its application

³⁴ Eko Setiawan, 'Dinamika Pembaharuan Hukum Keluarga Islam di Indonesia', *De Jure: Jurnal Hukum dan Syar'iah*, 6.2 (2014) <<https://doi.org/10.18860/j-fsh.v6i2.3207>>.

³⁵ Wahbah al Zuhaili, *Usul al-Fiqh al-Islamy* (Bairut: Dâr al-Fiqr, 1986). h. 89.

due to the culture and lifestyle of the community.³⁶ There are countries, which is implementing the Islamic family law system, still adopt shari'ah absolutely and adhere to the normative system while referring to one particular school of thought.³⁷ But there are also countries carrying out reforms (changes in the law) here and there to adapt to the demands of the times, and even those who abandon fiqh altogether and draw up their regulations based on rational considerations or foreign theories. For Muslim countries that adhere to a textualist approach, the resulting Family Law will appear in a conservative classical fiqh format. Whereas for countries that apply a contextualist approach, the law that is born will take the form of contemporary fiqh.³⁸ Through this interactive approach to making legal decisions, it can be said that legal contextualization makes the process of legal analysis objective, and beneficial and brings more accurate and actual values of justice.³⁹

There are many models, methods and approaches taken in several Muslim countries in compiling their Family Law materials which are then formalized in the form of laws and regulations. Among the forms of models, methods, and approaches in question, the most popular is the *talfiq* method. The *talfiq* method is an effort to reform law by combining several opinions of *madhhab* priests, who then choose the opinion with the strongest argument and then apply it in the form of statutory regulations.⁴⁰ Muslim Ibrahim defines the *talfiq* method as a science that collects conflicting opinions of scholars on a specific problem, studied it in depth and objectively to find out the strongest opinions supported by the strongest arguments, and which are most in line with the spirit, foundations and general principles of Islamic shari'ah.⁴¹ Similar to this definition, Muhammad Syaltut explained that

³⁶ Sabarudin Ahmad, 'Menelusik Ketegasan Hukum Keluarga Islam di Pakistan', *Al-Maslahah: Jurnal Ilmu Syariah*, 2020 <<https://doi.org/10.24260/al-maslahah.v15i1.1386>>.

³⁷ Zainuddin Ali, *Hukum Islam* (Jakarta: Sinar Grafika, 2006).

³⁸ Syaikh, *Perbandingan Madzhab Fiqh (Perbedaan Pendapat di Kalangan Madzhab)* (Yogyakarta: CV. Aswaja Pressindo, 2013), p. 56.

³⁹ al-Syinawi, p. 90.

⁴⁰ Jaya S. Praja, *Perbandingan Madzhab dengan Pendekatan Baru* (Bandung: Pustaka Setia, 2008), p. 75.

⁴¹ Abdurrahman, *Perbandingan Madzhab* (Jakarta: Sinar baru Algesindo, 2000), p. 60.

what is meant by the term *talfiq* is gathering the opinions of mujtahid Imams along with their arguments on a disputed issue and comparing and discussing these arguments to find the opinion with the strongest argument.⁴² The country that applies such approach to the Islamic family law is Saudi Arabia.

Furthermore, there are also Islamic countries using a reformative approach, namely making changes to family law through the legislative process without eliminating the principles in normative fiqh rules. This approach refers to a rule that reads *al-muhâfadzatu 'alâqadîmi al-shâlih, wa al-akhdu bi al-jadîdi al-ashlah* (maintaining an old rule is good, but adopting new ideas that are more accurate and relevant is better).⁴³ Examples of countries implementing reformist methods are Egypt, Jordan, and Indonesia. In these countries, innovations have emerged which have been made to align the provisions drawn up with the demands of the needs of society, as well as the values of benefit and justice to be achieved. In Indonesia, an example of this change is the case of registering marriages and limiting the minimum age for marriage. Marriage registration and the minimum age limit for marriage in the fiqh concept are not part of the pillars or conditions of marriage. However, to achieve benefit and eliminate harm, these two things are used as conditions and included in statutory provisions.

Apart from the two approaches above, other Muslim countries implement a family law legislation system with a secular legal system. Examples are Turkey and Tunisia. In this country, classical family law (*fiqh*) materials that are considered irrelevant are changed and replaced with new rules that do not refer to the views of the Fuqaha Madzhab but only rely on rational considerations that are considered more relevant and bring benefit.⁴⁴

The model of change in the first and second Family Law above falls into the category of intra-doctrinal reform, an effort to reform the law

⁴² Syaik Muhammad Syaltout, *Perbandingan Madzhab dalam Masalah Fiqh* (Jakarta: Bulan Bintang, 1996), p. 50.

⁴³ Edy A Efendi, *Dekonstruksi Islam: Madzhab Ciputat* (Bandung: Zaman Wacana Media, 1999), p. 56.

⁴⁴ Abdul Sami' Ahmad Imam, *Kitâbul Mujaz Fi Fiqh* (Kairo: Dârul Sabah), h. 280.

by analyzing actual matters relating to family law and then associating it with material that already exists in Islamic Law (*fiqh*). Meanwhile, the third model can be classified as extra-doctrinal reform, namely a form of legal renewal that is carried out by a country by using other approaches outside of Islam, especially theories that come from the West.⁴⁵

Conclusion

Family law in the Islamic world began to develop in the 9th century, which began with the emergence of schools of *fiqh* which developed from one generation to the next. The legal provisions in this *fiqh* in modern times are legislated and applied to each country with some significant differences. There are countries that in their application of law refer to the conventional system. Some countries carry out *madhhab* reforms; and there is also a state that draws up family law according to its method and approach, separate from the legal principles that have been established among the schools of *fiqh*. Despite all these differences, it cannot be denied that the role of the state is very dominant in enforcing a law, in the sense that a law will only work in a country when it has been legislated into positive law that is legally binding.

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⁴⁵ Wahbah Zuhaily, *al-Fiq al-Islâmy Wa Adillatuhu* (Beirut: Dâr al-Fiqr, 1989), p. 132

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