

## THE DYNAMICS OF ISLAMIC FAMILY LAW IN INDONESIA

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### ABSTRACT

*This study aims at reviewing the history and the dynamics of Islamic family law in Indonesia in order to provide a new analysis and its proposed revision in responding to the rapidly-changing problems in the Indonesian contemporary era. In addition, the efforts to develop Indonesian Islamic family law require a new perspective in order to provide new nuances which is more accommodating to the universal human values such as justice, human rights, plurality, democracy, gender and others. The significance of remapping the history and the dynamics of Indonesian Islamic family law is to determine the analysis and development model of Indonesian Islamic family law which is more adaptive to contemporary issues today. The current study employs the library research method. The data sources are in the form of documents taken from the relevant journal manuscripts, books, and online articles. The results of the study indicate that the Indonesian Islamic family law has developed its aspects of legal products and new approaches in the discourse of Islamic legal studies. The new approaches to address the problems of contemporary Indonesian Islamic family law is involving the values of justice and benefit.*

**Keywords:** Dynamics, Problems, Islamic Family Law, Islamic Law

### 1. Introduction

Marriage is one of the most important dimensions of human life in this world (Muttaqin & Fadhilah, 2020: 103). Marriage is the method chosen by Allah SWT as a way for humans to get generation and preserve their life (Atabik & Mudhiyah, 2014: 286). Each partner must be ready to contribute a positive role to achieve the goal of marriage (Iskandar, 2017: 86). According to Indonesian Law number 1 year 1974 marriage is defined as physical and spiritual bond between a man and a woman as husband and wife, of which aim is to form a happy and eternal household based on the guide of Almighty God so that life in this world can be preserved well" (Gustiawati & Lestari, 2016: 34).

Family law has an important position in Islam. Family law is considered the core of shari'ah (Muttaqin, 2020: 152). It relates to the Muslims' believe that family law is the entrance to other further Islamic teachings. Discussing the background issue of Indonesian Islamic Law is important because not all Indonesian Muslims know that the history, the events, and the causes of the issue of Islamic family law are considered highly controversial.

The issue of Islamic family law is considered very important in the midst of the Muslim community because of their deep concerns on the family regulation including marriage, inheritance and so forth which cannot be treated using civilian law. As the result the Indonesian Moslem expect special the Islamic family law to apply. The issue of Indonesian Law Number 1 Year 1974 concerning marriage and Compilation of Islamic Law is the answer to the anxiety, uncertainty, and expectation of Indonesian Muslim community as a guide and reference in overcoming domestic and daily problems (Riadi, 2019: 124).

In modern era, especially in the twentieth century, apart from fatwas, religious court decisions, and books of fiqh, literary forms of Islamic law have grown into two types. The first is the laws that apply in Muslim countries, especially regarding to the family law. The second is a compilation of Islamic laws which is actually an Indonesian innovation. Compilation is not a codification and a book of fiqh (Setiawan, 2014: 140).

The promulgation of family law in Muslim countries has generated pros and cons among the Islamic scholars. Some scholars want to maintain the old legal provisions, while the other would like reform both the methodology and legal substance. For example, with the enactment of Indonesian Law Number 1 Year 1974 concerning Marriage and Indonesian Law Number 7 Year 1989 concerning the Religious Courts, finally Indonesian Muslims have adequate laws to regulate the family, marriage, divorce and inheritance matters.

Meanwhile, there are some traditional Indonesian ulama who do not fully understand and agree to the various rules in the two issued Indonesian laws mentioned above because they considered that the content of the laws were not in accordance with the books of fiqh. However, some other scholars feel proud of the issue of the two laws because the laws are considered a major advance in the development of Islamic legal thought in Indonesia. Finally the Compilation of Islamic Law was agreed and confirmed by the majority of Indonesian scholars in 1988 which was then followed by Presidential Instruction Number 1 dated 10 June 1991 to be disseminated and extensively be applied. This agreement has marked a new era in the development of Islamic thought in Indonesia, especially in the field of family law.

In relation to the the above discussion, the current article is carried out to discuss on the development of Islamic family law in Indonesia and its renewal thoughts. Both will be discussed simultaneously in this paper because studying the history of law is the same as studying the law itself.

## **2. Development and Renewal of Pre-colonial Islamic Family Law**

Reviewing the history of Islamic family law in Indonesia cannot be separated from the history of the arrival of Islam into Indonesia. Regardless the different opinion from where and when Islam entered Indonesia, it cannot be denied that Islamic law, especially family law, has become a law that has developed and integrated into the daily lives of Muslims at that time. Here are some historical facts presented to reveal this.

From the goodwill remarks carried out by a Moroccan Arab Muslim traveler, Ibn Battuta, in 1345 AD to Samudera Pasai, he was very impressed with the development of Islam there and the abilities possessed by Sultan Malik al-Zahir (King of Samudera Pasai ) in various matters of religion and fiqh . Even the Islamic jurists of the Islamic kingdom of Malacca came there to ask for laws regarding various legal problems.

In addition, Islamic law has also taken root in the Islamic Kingdom of Mataram. During the reign of Sultan Agung, for example, the *qisas* law lived and had a big influence in the kingdom. Islamic law is used to adjudicate state matters, such as cases endangering the existence of the kingdom. Not only in the palace, Islamic law also spread in the midst of society. For example, Cirebon has developed Islamic law dealing with family matters. In

Priangan, there is a religious court which hears subversive cases guided by the pillars established by the rulers who are also religious leaders in the kingdom.

Furthermore, Islamic law is also experiencing rapid development in the Kingdom of Banjar, South Kalimantan, especially since the conversion of Sultan Banjar to Islam. The progress of the development of Islamic law in Banjar was indicated with the existence of *mufti* and *qadhi* who served as royal advisors in religion especially in handling problems related to family and marriage law. They also resolve criminality/*jinayah* cases. Even at this time in the development of Islamic law, they were familiar with the codification of Islamic law, albeit in a simple form which became known as the Sultan Adam law.

Those historical facts show the existence of Islamic law since the arrival of Islam until the arrival of the colonialists. From these facts, it is evident that Islamic law is a law that has lived and been firmly upheld by the Indonesian Muslim community for quite a long time, not only limited to family law as private law (*al-ahwal al-syakhshiyah*), but also the public jurisdiction (criminal and state administration) (Hidayat, 2014: 3-4).

### **3. The Development and Renewal of Islamic Family Law during the Colonial Period**

The historical reality above also continued during the colonization period. From the research conducted by the Dutch government which was part of the *Vereenigde Oost Indische Compagnie* (VOC), it was evident that the applicable law for Indonesian Muslims was Islamic law. Therefore, this forced them not to oppose the law that lived and was carried out by the Indonesian people, after they previously failed to apply the colonial law called the legal unification. The colonial support to Islamic was embodied in the Jakarta Statute of 1642, stating that regarding the inheritance of Muslims Indonesians, Islamic law must be used. In addition, the well-known law book called the Freijer Compendium was a set of legal rules in the matters of Islamic marriage and inheritance compiled by D.W. Freijer as the request of the VOC government, reflected a manifestation of legal reality in the society. Before the Freijer Compendium was enacted and applied, it had been reviewed and improved by Indonesian Islamic leaders and scholars.

In addition, there are other legal rules in relation to Islamic law that had been followed by Indonesian Muslims before the arrival of the VOC. Among them are the Mogharraer (Moharrar) law books for the Semarang District Court. This book contains Javanese laws that are carefully adapted from the Moharrar Islamic law book which compiled God's laws, natural laws, and the indigenous laws. This book contains not only civil law, but also criminal law. Likewise, the Cirebon Papakem book contained a collection of old Javanese laws. There were also regulations made for the Bone and Goa areas in South Sulawesi on the initiative of BJD Cloutwijk.

In general it can be said that Islamic law during the VOC era was employed as in previous times. It showed that the VOC provided an opportunity for the implementation of Islamic law. However, this support was done for the continuity of their colonization in Indonesia. If it is analyzed, why they seemed to compromise with the Islamic law because VOC was a trading company organization. VOC did not want to take risks and problems. They prefer to compromise and adapt to the environment they face. For them the most important thing is to take as much as possible the agricultural products in Indonesia. Therefore, to achieve this

mission there is no need to interfere with the religious matters of the indigenous people (Ali, 2000: 43).

In the early period of Dutch colonial rule as a successor of VOC rule in the archipelago, they still recognized the existence of Islamic law as the applicable law for Indonesian Muslims. During his reign, Daendels (1800-1811) issued a regulation stating that the religious law of "Javanese" (the reference for Indonesians) should not be disturbed especially concerning marriage and inheritance. The religious law had to be recognized by the Dutch government.

Before being handed back to the Dutch, Indonesia was once controlled by the British (1811-1816). Islamic law did not change from the previous period. Thomas S. Rafles, who was the Governor General of England at that time, stated that the law applied to the Indonesian people was Islamic law. It can be concluded that Islamic law, including the family law in the early Dutch colonial era and the British era, was still the law which was carried out by the Indonesian people, especially in the settlement of civil cases.

The gradual change began when Indonesia was handed back by the British to the Dutch Colonial. The Dutch made laws regarding the government policies, judicial arrangements, agriculture and trade in their colonies in Asia. This law had an influence in almost all fields including the Indonesian law which later affected the further development of Islamic law. These initial efforts was in line with the Christianization mission launched by the Dutch, which was deliberately carried out to eliminate the influence of Islam from a large part of Indonesian society. This departs from their assumptions about the superiority of Christianity over Islam. They assume the superiority was not only in terms of religion, but even more ironically, they thought that Islamic law in Indonesia was an old law because Islamic law was viewed as an ancient heritage of Arab. They thought the law was inhuman and uncivilized. This was the reason to launch what was known as "conscious law politics" in Indonesia, the legal politics to organize, change and replace Indonesian law to the Dutch law.

As stated above, the Dutch pioneered this effort gradually as it was seen from the note delivered by Mr. Scholten van Ond Hearlen to the Dutch government. Mr. Scholten was the head of the commission appointed by the Dutch to adapt the Dutch law to the special circumstances in Indonesia. In his memorandum, he stated that in order to prevent opposition and resistance, the violation of the indigenous law and the religion of Islam had to be avoided. As a result, Indonesian might live within the environment of their religious law and local custom. The rules made in article 75 Regerings Reglement (RR) were assumed to be the influence of Scholten's opinion. The third paragraph of this article stated that "in the event of a civil dispute between Indonesians Muslim an Indonesian judge had to employ the Islamic law of Gondsdiengstig".

The influence of Scholten's opinion was not only indicated in Article 75 paragraph 3 and 4 above, but also in articles 78 and 109. Article 78 paragraph 2 stated that "that in the event of a civil case between fellow Indonesians / those who are equated with Indonesians, then they are subject to the decision of the religious judge / head of their community according to their old religious laws / regulations". Whereas Article 109 stated that "the provisions as mentioned in articles 75 and 78 also apply to those who are equated with Indonesians, namely Arabs, Moors, Chinese and all those who are Muslim, as well as people who are not religious." This fact showed that the existence of Islamic law was still recognized by the Dutch colonial government, but in its application it was still under the supervision of their judges.

With the emergence of the articles which have been mentioned above, especially article 78 paragraph 2, the Dutch government established a religious court (RC) based on Stbl. 1882 No.152 and 153. The RC was later given name to Priesterraad (council / priestly court). This Stablat, which was the decision of the Dutch King No.24, did not clearly define the RC's authority. Therefore, the RC itself determined the matters under its authority based on what had existed so far, such marriage, all kinds of divorce, dowry, livelihood, validity of children, guardianship, inheritance, grants, charity/*sadaqah*, *bait al-mal* and *waqf*.

Throughout the 19th century AD the Dutch East Indies jurists and cultural experts there still kept opinion that in Indonesia that Islamic law was applicable. The opinion was stated by the Salomon Keyzer (1823-1886), an expert on language and culture of Netherlands. This thesis was later developed by Lodewijk Christian van Den Berg (1845-1927). According to him, Muslims had carried out Islamic legal receptions as a whole in a unity. Therefore, this opinion was called the Receptie in Complexu theory. To follow up this opinion, Van Den Berg in 1884 wrote the principles of Islamic law according to the Hanafi and Shafi 'i schools to make it easier for Dutch government officials to respond the growing interests of Islamic law in Javanese society. Two years later, he wrote on family law and Islamic inheritance in Java and Madura with its various deviations (Hidayat, 2014).

The development of Receptie in Complexu was due to the policy not to interfere the religious affairs of the natives which was adopted by the Dutch, which was actually just a strategic time shielding. Apart from the reason of time shielding, basically the Dutch did not have sufficient knowledge on Islam, Arabic language, and Islamic social system. The reluctance not to interfere in Islamic issues was reflected in article 119 of the Dutch East Indies (RR) regulation, stating that "Every citizen is free to follow his religious opinion, and they do not lose the protection of the community and its members for violations of the general rules of religious law".

It can be concluded that the recognition of the existence of Islamic law by the Dutch government showed that long before the Dutch came, the Indonesian indigenous people had already applied the Islamic law as contained in the *fiqh* books taught by the clerics who spread Islam in Indonesia. On the contrary, the freedom to impose Islamic law is merely the Netherlands strategy to keep ruling the Indonesian people because they did not find the right way to carry out their true mission.

In the next effort, realizing their weakness to fully master Islam, in 1889 the Dutch appointed an expert staff namely Snouck Hungrouje who would give them advice. Since then there were many ideas on Islamic politic in Indonesia. In regard to the goal to break out Islam, Snouck suggested the Dutch government to be aware of Islam not as a religion, but as a political doctrine. For this purpose, Snouck was assigned to learn the intricacies of Islamic in Mecca and then changed his name to Abdul Gaffar.

In order to carry out their mission, the Dutch initially felt the need to enact Dutch law for all groups of the population, including the Bumi Putera (legal unification). Because this policy was considered to be less strategic, this effort was thwarted by the Dutch legal experts including Snouck himself. Instead, he sought a more tactical and refined path. Therefore, initial efforts made were shaping opinions and disrupted the image of Muslims via Receptie theory. This theory originated in his investigation of Acehese and

Gayo people in Banda Aceh as contained in his books 'De Atjehers and Het Gayoland'. He argued that what applies to Muslims in those two areas is not Islamic law, but customary law. Basically the customary law had been influenced by the Islamic law, but this influence had legal force only if it was truly accepted by customary law. So, Islamic law is considered to be non-existent. Islamic law would be meaningful and beneficial for its adherents if the Islamic law has been accepted by the customary law.

The influence of this Receptie theory with the support of many legal scholars, especially after being developed by Cornelisvan Vollenhoven with the discovery of his customary law and Bertrand Terkar BZN, in the end succeeded in changing and replacing the theory of Receptie in Complexu. The systematic change of RR to Indische Staats Regeling (IS) in 1919, was indicated in paragraph 134 of the second verse stating that "In the event that a civil case occurs between fellow Muslims, it will be resolved by the Islamic religious judge if the case has been accepted by their customary law and as long as it is not determined otherwise by the Ordonantie".

This change in regulation has implications for the changes of the RC's authority in Java and Madura. Previously it had authority to solve the inheritance issues, but then it was narrowed down to issues of marriage. The issue of inheritance was transferred to the State Court based on Stblt 1937 No.116 and 610. Likewise, the *qadhi* and supreme *qadhi* was established in South Kalimantan based on Stbl. 1937 No. 638 and 639 with the same authority as the RC in Java and Madura (Arifin, 2005: 52).

The details of the cases under the RC authority according to Stblt 1937 No.116 are: (a) Disputes between Muslims husband and wife; (b) Matters concerning marriage, divorce, reconciliation, between Muslims requiring the intermediary of Islamic religious law; (c) Giving a divorce decision; (d) Stating that the conditions for the the suspended talak (ta'lik talak) already exist; (e) The dowry case; (f) Cases concerning the living necessities of the wife which are obliged to be provided by the husband.

Meanwhile, the RC outside of Java, Madura and South Kalimantan still apply Islamic law without any restrictions. The enactment of the rules stipulated by the Netherlands caused strong reactions and protests from the Muslims, for example the reaction expressed by the Association of Pengulu and Employees (PPDP) and the Islamic Council of A'la Indonesia (MIAI). Basically what they criticize was the theory of Receptie. To reduce this reaction, the Dutch government implemented religious politics by establishing a high religious court (Hof Voor Islamietische Zaken) or the High Islamic Court in 1938. Anyway, this effort was coldly greeted by Muslims because it was only a diversion from the real problem (Hidayat, 2014).

In the era of the Japanese government (1942-1945) there was no fundamental development in legal aspects. Based on the decree No. 1 of 1942 issued by the Japanese Army government, it was stated that all government agencies and their powers, all laws, legal systems and all old government regulations were deemed to remain valid indefinitely as long as they were not conflicted to the Japanese Army regulations. The authority which had existed in the era of the Dutch was still honored by the Japanese government. Only the name of the court was tailored to the Japanese language, such as the public court in the Dutch period named Raad van Justitie was replaced into Tihoo Hooin and the religious court which was given the name

Priesteraad was replaced into Soorjo Hooin. One thing which can be noted in the Japanese era was the RC and its authority.

The Islamic Nationalist leaders, through Abikusno Tjokro Soejono, expected the RC's position to be strengthened and its authority to resolve inheritance disputes between Muslims was returned as it was before 1 April 1937. On the other hand, Secular National leaders such as Sartono expected RC to be abolished. In a letter to the Japanese government he wrote "It is sufficient that all cases are submitted to an ordinary court which can seek the consideration of a religious expert". Another Secular Nationalist leader, Soepomo, who served as advisor on legal matters of the Japanese colonial government, was against the reinstatement of PA authority. Basically Islamic law or religious laws, institutions, and customs are not against the principles of propriety and justice that are generally recognized. The point is that it does not conflict with the principles of appropriateness and justice of the Dutch judges who controlled the court at that time. This means that the Netherlands is still monitoring the enforcement of Indonesian Islamic family law. Furthermore, in the same article in verse four it was stated that "The laws of religion, and customs are also used by European judges at a higher court if an appeal case occurs" (Halim, 2004: 73).

#### **4. Reform of Islamic Family Law in Post-Independence Indonesia**

After Indonesia's independence on August 17, 1945, the theory of Receptie which was based on the IS article 132 paragraph 2 was used, because it contradicts to the 1945 Constitution as the implementation of the first principle of Pancasila, God Almighty. However, based on the 1945 Constitution and its transitional regulations, the law existed in the old Dutch East Indies era was still applicable.

Since Indonesia's independence, the Receptie theory still has its influence until the enactment of Law No.1 of 1974 concerning Marriage. This is revealed from Article 4 paragraph 1 of Government Regulation (GR) No. 45 of 1957 dealing with the establishment of the Syar'iyah Courts outside Java, Madura and South Kalimantan / East Kalimantan. In this article it is stated that "the Syar'iyah Court examines and decides disputes between husband and wife who are Muslim and all cases which are according to the living law is decided according to Islamic law with regard to marriage.... ". So in this article, the influence of Receptie theory can still be seen on the words "according to living law".

Actually this is a problem for the Indonesian government itself after being free from colonialism. The Dutch legal politic and the Receptie theory that has brought this nation to the contradiction of the legal system which was deliberately conditioned by the Dutch government. The effort to find a common ground among the three legal systems, Western (Dutch) law, customary law and Islamic law, which were placed in opposing and contradicting positions during the Dutch East Indies government, is still being carried out (Hidayat, 2014: 10).

Long before the issue of Law no. 1 of 1974 concerning Marriage, the Indonesian government through the Minister of Religion, had set up a committee to investigate the law of marriage, divorce and reconciliation. This committee succeeded in compiling two draft of Marriage Laws: first, the draft of non-Muslim marriage law which was completed in 1952 and the second draft of the Muslim marriage law which was completed in 1954. In 1958 the Minister

of Religion delivered both bills to parliament. However, at the same time, another non-Muslim marriage bill was also proposed based on the suggestion of Mrs. Sumari (PNI member in parliament). The two bills contradicted each other. The bill submitted by the Minister of Religion is based on religion, while the one proposed by Mrs. Sumari is secular in character. After deliberations in parliament both bills failed to be passed. Meanwhile, the MPRS No. II of 1960 stated that the marriage law needed to be regulated properly, and in the religious, customary and other factors needed to be considered. This was how the Indonesian government and Muslims continued to strive formulating a marriage law.

During the 1967-1971 session, the parliament discussed two marriage bills. One was from the Ministry of Religion regarding to the Bill on Marriage Regulations for Muslims and the other was from the Ministry of Justice on the Bill on the Basic Conditions of Marriage. Talks on the two draft bills had stalled because the Catholic party refused to talk about them. Finally, in July 1973 the Indonesian government submitted another marriage bill to the DPR as a result of the 1971 General Election. Meanwhile the two previous bills were withdrawn. Finally, through a hot debate in the DPR and heated responses from Muslims because the new marriage bill was secular in nature, the ABRI and PPP factions came to mutual agreement below: (a) Islamic religious law in marriage will not be reduced; (b) Law No.22 of 1946 concerning Marriage Registration, Divorce and Referral and Law No. 14 of 1970 concerning the Principles of Power; (c) A judiciary that places religious courts on par with other courts is guaranteed; (d) Matters that are contrary to Islam and cannot be adjusted to this law are eliminated.

After the agreement was made, the discussions became smooth and achieved results with the promulgation of Law No.1 of 1974 concerning Marriage which was written in the State Gazette of 1974 Number 1. There are several things to be noted in relation to the passing of this Marriage Law. *First*, the emergence of Law No.1 of 1974 has ended the influence of Receptie theory because Article 2 paragraph 1 of this Law strongly states that: "Marriage is legal if it is carried out according to the legal provisions of each religion and belief". There is no need again for provisions marriage in Islam to be previously accepted by customary law because the Islamic marriage law automatically applies.

*Second*, from the point of view of renewing the thought of Islamic family law, Indonesia has made progress by issuing Law no. 1 of 1974 and its implementing regulations of PP. 9 of 1975. The law explains that there is a requirement for marriage registration and the minimum age for couples to get married is 19 years for men and 16 years for women. There are conditional restrictions on divorce implemented before the court. Limiting the committing polygamy to an extent that is difficult to do. It is said to be more advanced, because in classical *fiqh* books it has never been raised by *fiqh* scholars.

*Third*, in terms of the development of family law, Law no. 1 of 1974 is a result of several long processes in the history of Islamic family law in Indonesia which cannot be separated from one to another. In this case, Law no. 1 of 1974 still has weaknesses in several aspects: *first*, it can be seen in article 63 paragraph 2 stated that: "every decision of the RC is confirmed by a public court". Even though this provision is purely administrative in nature, this is the influence of the fiat execution institution created by the former Dutch government to supervise the RC, whose rank is considered lower than the PC. On the other hand, this can be said to be a weakness, because the RC does not yet have a bailiff agency, so the decision needs to be confirmed by the PC. But on the other hand this is a challenge for the RC to improve itself, so that the equality

desired by Law no. 14 of 1970 can be realized as it should. Finally the equality is achieved with the passing of Law no. 7 of 1989 concerning Religious Courts. Since the issue of this law, the RC has been at level as other courts in Indonesia.

*Second*, with the enactment of Law No.1 of 1974, legal certainty cannot be realized automatically because there is an opinion stating that the Marriage Law is a state marriage law which is applicable for the citizen in general, while for Muslims, they may specifically refer to Islamic marriage law contained in *fiqh* classic books. Before the existence of the Islamic Law Compilation (ILC) in 1991, indeed the judges in RC still used various books of *fiqh* which had been determined based on the 1958 religious court bureau letter No. B / I / 735. The absence of a *fiqh* uniformity had created its own problems. A similar case could be judged and decided differently because of different reference used. This problem had become the underlying reason of formulating a specific rule (jurisprudence) as a single reference called ILC.

For that purpose, as a first step, a joint decision was made between the head of the Supreme Court and the minister of religion with No. 07 / KMA / 1985 and No. 25 of 1985 on the appointment of the implementation of Islamic law development projects through jurisprudence. With this joint decree, the committee began to carry out this compilation project. In the formulation of the ILC, several internal routes were taken: (a) Studying *fiqh* books; (b) Interviewing the Islamic scholars; (c) RC jurisprudence; (d) Conducting comparative law studies to other countries; (e) Making workshop/seminar on legal materials for RC.

The legal development worked under this route are the fields of the authority of the RC such as marriage law, inheritance law, *waqf*, grants, alms, *bait al-mal* and others. Based on the two-year after the joint decree schedule set for the implementation of this project, the appointed committee carried out its duties to formulate a ILC draft, which then was discussed at the workshop. After the deep discussion, the ILC formulation was legalized in the plenary meeting of the workshop. The ILC consisted of three books as currently available, namely book one on marriage, book two on inheritance and book three on *waqf*. For the dissemination of this ILC, the Presidential Instruction No. 1 of 1991 was released on June 10, 1991 which was then followed up by the decision of the Minister of Religion No. 154 of 1991 regarding with the implementation of Presidential Instruction No. 1 of 1991.

The workshop held in Jakarta on the formulation of the ILC was considered the culmination point of the development of *fiqh* in Indonesia. The workshop was presented by *fiqh* scholar figures from Islamic organizations, universities, the general public and it was estimated that all levels of *fiqh* scholars participated in the discussion. Therefore, it could be considered as *ijma'* of Indonesian ulama (Riadi, 2019: 126-127).

As the characteristic a *fiqh* which is constantly evolving according to the times and places, the formulation of ILC is not the end of a long journey of the development and renewal of Islamic family law in Indonesia. Re-studies may be carried out on the provisions in the ILC, as long as it is at the level of its jurisprudence on the arguments which are not considered *qath' i*. Historically, Islamic family law has risen since from the official recognition of the religious court (RC) as one of the implementers of "*judicial power*" in law through Article 10 of Law no. 14 of 1970. Furthermore, the position, authority or jurisdiction and organization have been regulated and elaborated in Law No. 7 of 1989, Law no. 3 of 2006, which gives the authority

to adjudicate certain cases: (1) marriage, (2) inheritance, (3) will, (4) grants, (5) *waqf*, (6) *infaq*, (7) *shadaqah*, (8) zakat and (9) shari'ah economy, for Indonesian Muslim.

As a matter of fact the existence of a religious court has not been accompanied with comprehensive positive legal instruments or means which is valid as a reference. Although the material law which becomes the jurisdiction of the religious courts has been codified in Law No. 1 of 1974 and Government Regulation no. 9 of 1975, but basically the points regulated in it are just the general points. As a result, the judges, who should have referred to the law, then referred to the doctrine of *fiqh*. Consequently, there is a different legal decisions between RC on the similar issue due to the expression of *different judge different sentence*. From the above reality, the government then took a shortcut initiative to equip religious courts with a unified legal infrastructure through in the form of compilation of Islamic law (ILC).

According to the theory of legal sociology, AP Craabree LLB states that "*law is clothes the living body of society*". The law is a society's clothing which must fit the size and stitches of society's needs. Essentially, the law follows the needs of society and reflects the benefit and obligations arising from marriage between them. In relation to the above theory, Islamic family law which is contained in various legal regulations, if examined in depth, still contains many weaknesses as a logical consequence of the dynamics of life. Moreover, considering the needs and complexities of today's society's problems, efforts must be made to actualize them or renew them, for example, the strengthening demand for equality of men and women or removing gender-biased laws which tend to make women in subordinate positions, as well as clashes with several articles with the structure and cultural patterns of society.

Those factors may be the cause of the lack obedient of the community to the existing family laws. Therefore, the legal reform on the contextualization process becomes a necessity. The contextualization of the current Islamic law can be reformulated by improving or adding certain points to suit the demands of community development. In this case what needs to be considered is the text, the context of the text, and the contextual of Indonesian society. Those three aspects must be used as a basis for the contextualization process, so that local cultures and the community needs are not eliminated (Setiawan, 2014: 145).

## 5. The Model of Family Law Renewal in the Modern Era

The method of renewal and the concept of family law in Muslim countries are discussed as follows (Mahmud, 2010: 20-48):

### a. *Intra-doctrinal Reform*

The Prophet Muhammad has said that disagreement among the *mujtahids* is a blessing. This cross opinion is evidenced by the development of the study and determination of elastic Islamic law which has led to a divergent opinion among the Islamic *jurists*. The different determination of Islamic law is evidenced with the existence of schools of thought in *fiqh*, such as the Hanafi, Syafi'i, Maliki, and Hambali schools.

The family law reform through the *intra-doctrinal* method is attributed to the opinion of certain schools of thought which is recognized and adhered by the majority of people in a country. This method is used in several countries, such as Egypt, which adheres the Shafi'i school and then switches to the Hanafi school, and Indonesia which adopts the Shafi'i school.

**b. *Extra-doctrinal Reform***

The use of *extra-doctrinal reform* method in family law reform comes from the opinion of Imam Madzhab. This opinion is carried out using another approach which is adaptable to society. Some of the results of updating using the *extra-doctrinal reform* method are *mandatory wills*, prohibition on polygamy.

**c. *Regulatory Reform***

Muslims are always in touch with other traditions, including the contact with Western tradition. This contact has influenced the family law in several ways such as the existence of various administrative procedures in which the State which implements this provision has implemented administrative elements in positification of family law, for example the registration of marriages. Several countries which have implemented the family law reform using the *regulatory reform* method are Pakistan, Indonesia, Brunei Darussalam, Malaysia, and Singapore.

**d. *Codification***

*Codification* is a renewal method by compiling and recording the legal material systematically and completely. This reform is adopted from Western countries. The contact between Muslims and Western society during the colonial period was the beginning of the adoption of this method. Finally, several Muslim countries created a codification by adopting some material of Islamic law as a basis for reform. Some Islamic countries which have implemented the family law reform using the *codification* method are Lebanon, Syria, Jordan, Morocco, Tunisia, and Iraq.

**6. Conclusion**

The development of Indonesia Islamic family law has its ups and downs, especially when associated to the authorized institutions namely Religious Courts jurisdiction in which before the colonialization period, the authority of the Islamic Court was still wide, but during the colonialization the authority was gradually reduced. The reduction through theory of Receptie greatly hampered the development of Islamic family law in Indonesia and the effect was still lasting after Indonesian independence. The issue of Law no. 1 of 1974 had ended Receptie theory and the existence of Islamic law as the living law in the community was recognized again and became the reference in the resolution of Religious Court case entirely. The peak of

the Islamic family legal thought in Indonesia occurred when the formulation of ILC was legally recognized by Presidential Instruction No.1 of 1991 and become the single references in the Religious Court. Furthermore, in responding to developments and challenges in the modern era, the Indonesian family law uses some renewal methods to respond to contemporary problems.

## **7. References**

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