

# The Chance on Islamic Family Law: Study in Indonesia

*by* Ali Abubakar

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## THE CHANCE ON ISLAMIC FAMILY LAW STUDY IN INDONESIA

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**Abstract:** This article investigates the Islamic family law which creating a debatable law in Indonesia legal system. The law has covered of private life of the citizen of Indonesia. Furthermore, Constitutional Court has directly intervened the Islamic family law in Indonesia. The fortuitous of expansion of Islamic family law seems to extensively uncluttered. Numerous issues such as place, time, motivation, situation, and typical Indonesian traditions that are dissimilar from the Arabs are the authenticities that should assist as of the underwriting variables towards the Islamic family law improvement. In accumulation, several current authorized decision representations and its developments that have been initiated by authorities have produced a potential space that necessitates more special treatment because it serves as a contraption that can yield a law. Most concepts that have been made by Islamic intellectuals are still stared as a group of suggestions – not yet accomplishment the state of practical submission. Therefore, their growth in various stages – reaching from basic guidelines to applied norms-needs to be showed.

**Keywords:** Islamic Family Law, Indonesian Law, Marriage Law, Constitutional Court.

**Abstrak:** Artikel ini mengkaji hukum keluarga Islam yang menyebabkan perdebatan hukum dalam sistem hukum Indonesia. Undang-undang tersebut telah membahas kehidupan pribadi warga negara Indonesia. Selanjutnya, Mahkamah Konstitusi secara langsung telah mengintervensi hukum keluarga Islam di Indonesia. Ekspansi hukum keluarga Islam tampaknya sangat kacau. Masalah-masalah, seperti tempat, waktu, motivasi, situasi, dan tradisi khas Indonesia yang berbeda dari orang Arab merupakan keaslian yang seharusnya menjadi variabel-variabel yang dipertimbangkan dalam perbaikan hukum keluarga Islam. Beberapa representasi keputusan resmi saat ini dan perkembangannya yang telah diprakarsai oleh pihak berwenang telah menciptakan ruang potensial yang memerlukan perlakuan lebih khusus, karena berfungsi sebagai alat yang dapat menghasilkan undang-undang. Sebagian besar konsep yang telah dibuat oleh para intelektual Islam masih dipandang sebagai sekumpulan saran, yang belum memenuhi syarat praktis. Oleh karena itu, perkembangannya dalam berbagai tahap perlu ditunjukkan, mulai dari pedoman dasar hingga norma-norma yang berlaku.

**Kata Kunci:** Hukum Keluarga Islam, Hukum Indonesia, Hukum Perkawinan, Mahkamah Konstitusi.

### Introduction

Among the numerous problems frequently discussed by Islamic jurists is the separation of Muhammad's functions between as a Prophet or Apostle and as the head of a state. Sunnah as a reflection of the former must be carried out as it is, while the sunnah that represents

the latter should be seen through adjusting the context to particular places and times. In general, the former is much related to the issues of ritual practices (*Ibadah* / God worshiping) which are regarded static or fixed in nature; probability of changes and development does not seem to appear in this domain although diversity does exist. Contrawise, a study on Muhammad's function as the head of state will experience progressive changes because it involves changes of variables such as time, place, circumstance, motivation, and tradition.<sup>1</sup> However, due to the nature of dimensionality of Islamic law,<sup>2</sup> Muhammad's gait as the head of state is inseparable from the textual content of revelation which is rigid in nature; such particular content will stay unchanged across space and time. This content is called "value" (e.g. Syamsul Anwar), or *maqāṣid al-syarī'ah* (al-Ghazali, al-Syāṭibī, al-Ṭūfī, IbnuAsyūr) or — *ratio legis* (Fazlur Rahman). The law can experience changes in adjustment to space and time under the same textual content in use as a guide.

The notion or stipulation that the domain of value, or *maqāṣid al-syarī'ah*, or *legis ratio* will not change receives strong supports from the scripts or texts of the Qur'an and especially the Hadith (books of Muhammad's traditions) which provide such detailed legal provisions that they are considered final and can no longer be disturbed or mattered.<sup>3</sup> This is how certain questions are answered; for example, the Indonesian Constitutional Court Decision of 2010 that regulates on the civil relation between a child out of wedlock and his or her father. Such issue is answered through referring to the Prophet's Hadith which states that such a child is (only) associated with his mother.

The two paragraphs above illustrate at least three theories that are assigned to look into the issues on Islamic family law (*aḥwāl al-syakhsīyyah*), namely (1) the legal standing of family law in Fiqh (Islamic Jurisprudence): whether it is purely ritual (God worship) or partially ritual; which will have the impacts on (2) the authority to make the law; (3) the values, *maqāṣid al-syarī'ah*, or *ratio legis* which must be conserved; and its relation to (4) the changes in terms of space and time - this paper confines them to the context of Indonesia.

### The Dynamic Variable in Islamic Family Law

Muhammad Iqbal stated that "movement" or dynamics is the essence of the universe. It is the spirit of dynamics which flows within and generates the Islamic jurisprudence / law. The Islamic scholars state that one of the distinguished characters of Fiqh is *harakah* (movement or dynamics); the rests are divine, perfect, elastic, universal, systematic, and *ta'abbudī* (ritual or God-worship) and *ta'aqqulī* (logic or thoughts).<sup>4</sup> Such dynamic characteristic manifests in adjustment to the position of Fiqh as the results of the interpretation of the Qur'an (and the Hadith of the Prophet). The Qur'an is a divine revelation that is absolute, universal, eternal, singular, ideal, and global. Unlike the Qur'an, the Fiqh bears the opposite characteristics such as relative, local, temporal, numerical,

1 Ibn Qayyim al-Jawziyyah, *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn*, Vol. III (Beirut: Dār al-Fikr t.t.) 3.

2 According to Muhammad Tahir Azhary there are 5 qualities that characterize the nature of Islamic law, namely; (1) bidimensional, (2) fair; (3) individualistic and social, (4) comprehensive, and (5) dynamic. Muhammad Tahir Azhary, *Negara Hukum*, Edition 2, Print II (Jakarta: Kencana 2004) 81.

3 This means that the Islamic scholars must explain the position of their theories when being confronted with the authority of the text. That is why the experts involved in the discussion on *maqāṣid al-syarī'ah*, for instance, they had different opinions in placing the position of the Qur'an and the Hadith in their theories. Al-Ghazali stated that *maqāṣid al-syarī'ah* is found through text (directly) and logics. Al-Syāṭibī chose the theory of *istiqrā' man'nawī* (induction of theorem), while al-Ṭūfī mentioned that *maqāṣid al-syarī'ah* takes precedence over nas / scriptures.

Fathurrahman Djamil, *Filsafat Hukum Islam*, Print III (Jakarta: Logos 1999) 46-53. See also 4

Muhammad Syukri Albani Nasution, *Filsafat Hukum Islam* (Jakarta: RajaGrafindo Persada 2013) 39-47. See also Hasbi Ash Shiddieqy, *Falsafah Hukum Islam*, Print I (Jakarta: Bulan Bintang 1975) 105-107



practical, and partial; for it appears as the product of the understanding of the revelation.

Based on this notion, the characteristic of *Fiqh* is always progressing. Even though, the features of *Fiqh* do not move in a uniform way; some go fairly fast, while others tend to move rather slowly. Even to a small part of *Fiqh*, its dynamics tends to only be interpreted as “diverse” rather than “developing”. In light of the chapters discussed in classical *Fiqh* books, such as those on the issues of worship, *jinayat*, *aḥwāl al-syakṣiyyah*, and *muamalah*, it appears that the field of worship does not experience development; there happens diversity (*tanawwu*) only. Sequentially explored, the *jinayat* field experiences a slight development; not as much as that in the field of family law. The field of jurisprudence that receives very rapid development is *muamalah*.

The domain of worship becomes static due to its *ta’abbudī* nature (obligatory; to be followed as it is without a need to question its reasoning), while the *muamalah* domain moves dynamically because of its *ta’aqqulī* nature (rational reasoning). The other two domains, namely *jinayat* and family law are subject to both *ta’abbudī* and *ta’aqqulī* influence. Nonetheless, it can be said that family law receives greater attention than *jinayat* law does because, unlike *Fiqh jinayat*, family law is applicable to hundreds of millions, or more, of the world’s Muslims population.<sup>5</sup> In other words, the quantity of doctrines that are not allowed to receive changes is comparable the ones that always keep adjusting to the situation and conditions. Unfortunately, the latter are even more likely to be treated in *ta’abbudī* position; causing its development to move even more slowly.

For example, Islamic scholars believe that marriage is a sacred contract between men and women, and it is a *sunnatullah* (Allah’s established natural law) that every Muslim must go through. The sacredness of marriage brings about a presumed sacredness of the existence of the *arkan* (requirements) of marriage, namely the *akad* or *ijabkabul* (statement of mutual consent, or contract), *wali* (guardian of the bride’s party), bride and groom, and witness. The sacredness is understood to the extent that - for example in Indonesia - the words to be uttered during *ijabkabul* are so rigid - because they have been passed down from one generation to the others or they are dictated in classical books. The old fashion language that makes the *ijabkabul* phrasing has much shifted away from currently accepted language. Likewise, the procedure becomes very rigid to the extent that there should be no pause between the statement of *ijab* (handover) and *kabul* (acceptance).

The sacredness of the marriage also impacts on the community perspective towards one of the most crucial things in modern times, namely the urgency of marriage registration. A marriage ritual held by a community member in his house or village is considered to have been final (religiously valid) because the terms and conditions of the marriage as required by the scriptures are fulfilled despite that it is not registered at the office of religious affairs. Then, the community simply thinks that marriage registration is no longer required because it is not something sacred; not obliged by religion. Only later do they feel pushed to acquire the marriage document when they are confronted with the need to get birth certificates for their children as part of schooling requirements. Only few people understand the importance of having marriage documents for their personal, family, community and civic life. Likewise, the value of marriage sacredness also unexpectedly tends to result in a mere formal procession of marriage while its substance is dry; for example, the presence of two witnesses is understood to be merely a requirement of their presence, not as evidence.

5 Anderson, J.N.D, *Hukum Islam di Dunia Modern*, [translated by Machnun Husein] (Surabaya: Amar Press 1990) 27.

The community has not yet arrived at a deep understanding on the meaning of marriage as a legal instrument to provide protection to their property, dependents, and or offspring - which is the goal (*maqāṣid*) of marriage. Roughly saying, the assumption that marriage is largely understood as a part of *ta'abbudī* causes most community members to ignore the essential purpose of marriage as required by the Qur'an, namely as means to achieve tranquility, compassion, and prosperity.<sup>6</sup> The same thing also happens to other aspects of the family law domain; namely divorce, *nasab* (family line recognition), *nafkah* (living support), and inheritance.<sup>7</sup> Thus, these are why the flow of dynamics in the field of family law has become fairly slow.

The conditions above are partly due to the Islamic scholars' understanding which on one hand highly value the *ta'abbudī* aspects of the family law and on the other hand failed to catch-up with the development of modern life situation and conditions; thus, weakening its focus on the aspect of *maqāṣid al-syarī'ah*, some characteristics of which are *ta'aqqulī*. The renewal or amendment of some parts of the family law was actually initiated by the government (the executives) under the purpose of adjusting to the demands of time. Later on, after studying and analyzing the issues of such regulation, Islamic law scholars and academics brought up legitimate postulates over the government policy. Nothing actually is wrong with this because Islamic tenets require that the government as the state authority holder should exert policies to support the implementation of Islamic Sharia. This is what is called by Ibn Taimiyah<sup>8</sup> and al-Mawardi<sup>9</sup> the domain of *al-siyāsah al-syar'īyyah* (legal policy). However, the government policy will develop more precisely and rapidly if it is preceded by the studies that are aimed at positivizing Islamic family law in the modern era perspective. In other words, positivizing of Islamic family law lies indeed under the authority of the government. For its best impacts however, careful preparation such as involving Islamic scholars, academics and legal experts to study and analyze the matters is required.

Some experts record several models of Islamic family law reform that have been carried out. Amir Syarifuddin proposes six possible forms of the relationship between the law (Islamic family law produced by state authority) and the *Fiqh*, namely; (1) the law directly cites the provisions contained in classical *Fiqh*; (2) the law is only administratively regulated; containing no provisions in *Fiqh*; (3) the law is not contained in classical *Fiqh*; regulated as a law for reasons of benefit; (4) explicitly, the law is not in line with *Fiqh*, but it is not wrong to accept it under certain reinterpretation and for the people's benefit.<sup>10</sup> Anderson suggests four approaches; (1) *tahsis al-qaḍā or siyāsah al-syar'īyyah*; a form of procedural regulation corresponding to the developing era without changing the substance of the

6 Loose conclusion of the verse: "And among His signs (of might) is that He created mates for you from your own kind in order that you may find comfort in them, and He put between you the feeling of love and compassion; in such, there indeed exist the signs for those who use their thoughts." (QS. ar-Rum: 21).

7 According to Wahbah al-Zuhaylī, it is the five features that family law covers atau al-aḥwāl al-syakhshiyyah. See also Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuh*, Vol. VI, Print III (Damaskus: al-Fikr 1989) 19. Meanwhile, according to al-Khumayni, the definition of huqūq al-usrah, al-aḥwāl al-syakhshiyyah, or aḥkām al-usrah is a set of legal rules that govern the personal relationships among family members in their specific context within civil relationship of one family. According to al-Khumayni, the core legal point in the field of aḥkām al-usrah is marriage (muṣāharah) and blood relations. Please refer to Ahmad al-Khumayni in Muhammad Amin Summa, *Hukum Keluarga Islam di Dunia Islam* (Jakarta: Rajagrafindo Persada 2004) 19-20.

8 Ibnu Taymiyyah, *al-Siyāsah al-Syar'īyyah fī Islāh al-Ra'ī wa al-Rā'iyah*, [tahkik Lajnah Ihyā' al-Turath al-'Arabī], (Beirut: Dār al-Afāq al-Jadīdah 1403 H/1983 M).

9 Mawardi, Abū Ḥasan 'Alī bin Muḥammad bin Ḥabīb al-, *Kitāb al-Aḥkām al-Ṣulṭāniyyah wa al-Wilāyah al-Dīniyyah*, Print I, (Kuwait: Dār Ibnu Qutaibah 1409 H/1989 M).

10 Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia* (Jakarta: Kencana 2007) 29.

law; (2) *takhayyur* or choosing one of the many views of *mazhab* (schools of Islamic jurisprudence) or *talfiq*, namely by extracting various *Fiqh* opinions into a single problem; (3) reinterpretation of texts or propositions; and (4) using alternatives, for example the use of administration without touching the sharia aspects.<sup>11</sup>

Tahir Mahmood offers several methods; they are (1) *extra doctrinal reform*, namely the merging of several main schools or the taking a school of thought rather than the main school; (2) *intra doctrinal reform*, a legal reform through interpreting the passage of texts with a new approach or method; (3) *regulatory reform*, a form of legal positivation that is administrative in nature; and (4) *codification*, positivation of existing laws contained in classical *Fiqh*.<sup>12</sup>

A seemingly more serious offer was proposed by Syamsul Anwar.<sup>13</sup> He proposes three stages or layers of Islamic legal norms. The first layer is the search for philosophical values (*al-qiyām al-asāsīyyah*) from the texts or *nas* - then this lays down the basis for the second layer towards forming the bridging norms (*al-uṣūl al-kullīyah*). This norm will establish *al-qawā'id al-fiqhiyyah* or *al-naẓariyyah al-fiqhiyyah*. The third layer subsequently gives birth to concrete legal rules (*al-aḥkām al-far'īyah*). The pattern developed by Syamsul Anwar seems to merely touch the *Fiqh* very slightly. Hence, the method is developed to directly refer to the texts extracting the main values which are then transposed into a more practical level. Employing such methods, the reform of Islamic law - especially the Islamic family law - will give birth to both the matters that are agreed not to change and those that are always dynamic and changing through times and places.

#### Direction of Islamic Family Law Regulations in Indonesia

This paper will highlight several laws and regulations, including the decisions of state institutions related to Islamic family law which results from the development of some *ta'aqqulī* aspects and the efforts to attain *maqāṣid al-syarī'ah*. Some of these problems are considered important because they are considered as a transformation of classical *Fiqh* - without leaving out its substance - as a commandment from Allah and the Prophet Muhammad. Below are three products of "state *Fiqh*"<sup>14</sup> which have come up at legislation level in Indonesia.

#### Jointly Shared Assets

Simply termed, shared assets are the property jointly owned by husband and wife that they obtain throughout the period of their marriage. Article 35 of the Law No. 1 of 1974 states, "Property acquired during marriage becomes a jointly shared asset (verse [1]); The inherent assets of each husband and wife and the property acquired by each as a gift or inheritance are under the ownership of each as long as the parties do not determine otherwise (verse [2]). Article 37 states, "If the marriage is terminated due to divorce, the joint assets are regulated according to their respective laws".

Joint asset is actually not recognized in *Fiqh*. There is indeed a term called *syirkah* which means "joint ownership", but this term is introduced in the broader field of *muamalah*; not found in the field Islamic family law, especially that on the matters of husband and wife

11 Anderson, J.N.D, *Hukum Islam di Dunia Modern*, [translated by Machnun Husein] (Surabaya: Amar Press 1990).

12 Tahir Mahmood, *Family Law Reform in the Muslim World* (New Delhi: the Indian Law Institute 1972) 267-270.

13 Syamsul Anwar, *Hukum Perjanjian: Studi tentang Teori Akad dalam Fikih Muamalat*, Print II (Jakarta: Raja Grafindo Persada 2010) 15.

14 Another popularly used term for this is "state school of Islamic Jurisprudence" as referred to by Marzuki and Rumadi in his book - Marzuki and Rumadi, *Fikih Mazhab Negara: Kritik atas Politik Hukum Islam di Indonesia* (Yogyakarta: LKIS 2001).



relations. The term “joint assets” derives from certain cultures in Indonesia that are likely to be different from other cultures.<sup>15</sup> Every culture has its own law that originates in the structure and functions that exist in the culture itself. Joint asset is born out of Indonesian particular culture, not recognized in classical *Fiqh*. However, the Law Number 1 of 1974 concerning Marriage, and the Presidential Instruction Number 1 of 1991 concerning Compilation of Islamic Law which is known as *Fiqh*-based legislation accepts this term without rejection from the *ulamas*. Such acceptance might depart from assumption that shared assets have become the spirit of the legal culture of Indonesian society. Its existence is a picture of the sense of Indonesian societal justice.

Then a question arises: Does *Fiqh* not recognize the justice between husband and wife in the matters of wealth? The answer to this is that such regulation is not stipulated in *Fiqh*, and it leads to a notion that the value of justice for property distribution between husband and wife is not contained in it. Justice is what the Qur’an and the Prophet’s Hadith universally intend to manifest; not only in the context of simply “putting a balance” between two things, but to a wider extent – even to provide justice for oneself. “O believers, be the enforcers of justice and testify what you have witnessed for the sake of Allah, even though be it against yourselves, parents, and relatives.”<sup>16</sup> Justice is the value or *ratio legis* that Allah requires and it should always exist in *Fiqh*. At the time of the Prophet and even today in some Arab countries, only men (husbands) who work for a living; while the wives act as housewives at homes. It means that the assets in their household are acquired by the husbands only. The wives have no role in earning a living. Such patrilineal tradition of the Arabs — not *Fiqh* — plays a role in shaping these circumstances. Therefore, when one party (husband or wife) dies, there emerges no problem in the matters of property because all assets are the property belonging to the husband. In case that the wife dies, the assets that she bequeaths are the ones that she had owned prior to the time of marriage. The absence of jointly owned assets between husband and wife in the Arabian Peninsula reflects the justice of the people that lived at that time. Therefore, the value of justice in the Arabian Peninsula was manifested in the form of the absence of shared assets; while in Indonesia it was applied in the form of special norms as regulated in the Law No. 1 of 1974 concerning Marriage and the Compilation of Islamic Law.

#### Position of Female Offspring

“Indonesian Islamic Jurisprudence”<sup>17</sup> places the position of girls equal to boys in terms of their potential to spend all the inheritance and to exclude all relatives. Among the examples of such case is the Edict of the Muara Bulian Religious Court Number 008 / Pdt.P / 2014 / PA.Mbl which decides a daughter to be the only heir of her biological mother, while the two male siblings of her mother (uncles of the daughter) are not. In its legal considerations, the Panel of Judges of the Muara Bulian Religious Court was aware that Islamic legal experts had different opinions on such case; some experts state that the heirs were both the inheritor’s biological daughters and siblings. Some others state that the presence of her daughters annihilates her siblings; thus, only the daughters become the heirs. The Panel of Judges referred this case to the Qur’an Surah An-Nisa verse 12 and - especially - verse 176 which regulates on *kalālah*.<sup>18</sup> Based on this, the Panel of Judges

15 Harta seperti ini disebut dengan beragam nama dalam aneka budaya di Indonesia, misalnya hareuta sihareukat (Aceh), hartasuarang (Minangkabau), guna kaya, tumpang kaya, atau kaya-kaya (Sunda-di Kabupaten Sumedang), sarikat (Sunda-di Kabupaten Kuningan), harta pencaharian (Jakarta), barang gana atau gono-gini (Jawa), drube gabro (Bali), barang perpantangan (Kalimantan), barang cakara (Bugis dan Makassar), dan ghuna ghana (Madura).

16 Al-Qur’an “Surah An-Nisa Ayat 135”

17 Adopting the term used by Nouruzzaman Shiddieqi in *Fiqh Indonesia: Penggagas dan Gagasan* (Yogyakarta: Pustaka Pelajar 1997).

18 “They ask you to pronounce a ruling (on *kalalah* [those who have left behind no lineal heirs]). Say:

argued that the daughter nullifies the inheritor's siblings for the following reasons:

1. The word *walad* in these verses is more accurately interpreted as a boy or/and a girl; not limited only to boys. Thus, the meaning of *kalālah* is that if a dead person leaves a father and children (both male and female), the inheritor's siblings are prevented from being the heirs;
2. Article 181 of the Compilation of Islamic Law states that "if a person dies without leaving a child and father, each of his or her brothers and sisters of the same mother receive one sixth part. If they come in two or more people, they share a third part together ". The Judge believes that a contrary (*mafhum mukhālafah*) understanding of the article shows that if the inheritor leaves children — both male and female — and father, so neither the brother/s nor the sister/s deserve the inheritance;
3. The Indonesian Supreme Court's Jurisprudence Number 86 K / AG / 1994, July 27, 1995 bears a legal regulation, reading: *As long as the sons and daughters are present, inheritance rights of people who have blood relations with the inheritor except parents, husband and the wife becomes void (veiled).*

In addition to these considerations, the Panel of Judges considered that the presence of daughter annihilates the inheritance rights of the inheritor's siblings; more compatible to the culture of Indonesian society. The Panel of Judges argued that "families in Indonesian society generally tend to adopt the 'nuclear family' model, consisting of father, mother and children – excluding the relatives. This has become a standard and socially accepted form and family structure in Indonesia. The Panel of Judges' opinion was made on the basis of the *Fiqh* rules so-called *al-ādah muḥakkamah* (customary value can be made a law).

From the *maqāṣid al-syarī'ah* point of view, placing daughters on equal terms with sons in terms of *hijab* (hindering) siblings from receiving inheritance is seen to be more appropriate because social change has transformed from the original structure of extended family to nuclear family (core family). In the former form, if a father dies, the responsibility to take care and to provide support for the children will go to the grandfather or uncles because they live in the same house, or at least they live nearby or in the same neighborhood. In the context of extended family, the grandfather and uncles play significant roles in raising the children. Adversarily, nuclear family which only consists of husband and wife and children applies differently. If the husband dies, the responsibility to take care for the children will turn to the wife. Grandfather and especially uncles of the children can be said to have played no significant roles. In this case, the presence of daughters as a veil (hindrance) to siblings from being the heirs seems to be more appropriate.

There emerges a question whether this provision violates the Qur'an or the Hadith of the Prophet. As of the consideration of the judge of the Muara Bulian Religious Court above, in the case that the heirs comprise daughters and siblings, it refers to the Qur'an Surah An-Nisa verses 12 and 176. These anyhow have resulted in a controversy amongst the Companions since the time of the Prophet. Most Prophet's companions interpreted the word *kalā* stated in both verses as "someone who does not leave a son (male offspring or *al-walad*) and father (*al-walid*)". Ibn Abbas interpreted it as a person who does not have

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"Allah pronounces for you the ruling (that is): should a man die childless but have a sister, she shall have one half of what he has left behind; and should the sister die childless, his brother shall inherit (all hers), but if the heirs are two sisters, both shall have two-thirds of what she has left behind. And if they (the heirs) are sisters and brothers, then the male shall have the share of two females." (QS. An-Nisa: 176).

children (both male and female).<sup>19</sup> Umar bin Khattab agreed with Ibn Abbas, but later he changed his mind because he was confronted by other companions. Out of curiosity, Umar once directly asked the meaning of *Kalālah* to the Prophet Muhammad several times, but he was never answered explicitly. According to the Prophet, the diction that builds up verse 176 of Surah An-Nisa is already sufficient,<sup>20</sup> saying “*It suffices you with the verse which was revealed in the summer at the end of Surah An-Nisa.*”<sup>21</sup>

The scholars of Islamic Jurisprudence tend to take in the opinions of the majority of the Prophet’s Companions; in this case, the word ‘*kalālah*’ is interpreted as inheritors who do not have sons and father. In case that the heirs were girls only, without sons, then the inheritor’s siblings would become ‘*asabah*’. According to Islamic Jurisprudence, only male descendants deserve to inherit in case of the absence of biological children. In other words, female descendants cannot become *aṣābah* (the one who inherits all the inheritance of the parents). This understanding comes from the interpretation of the word *walad* stipulated in Surah An-Nisa [verse] 176.<sup>22</sup> The majority of the Prophet’s Companions interpreted the word *walad* as sons; not including female offspring. Such interpretation can certainly be influenced by the Arab patrilineal tradition that draws bloodlines through men. The traditional norm is strengthened to the extent of differentiating the essence of origin of men and women. Ibn ‘Arabi wrote that the essence of the word ‘*al-walad*’ refers to its origin, namely *sulbi* (marrow) of a man; both directly (*dunyā*) and indirectly (*ba’id*). On that basis, the word *al-walad* only includes male offspring; not female.<sup>23</sup> Rashid Riḍā, the author of the *Tafsīr al-Qur’ān al-Ḥakīm*, reinforces this interpretation by quoting an Arabic poetry:

بنونا بنو أبنائنا وبناتنا بنوهن أبناء الرجال الأبعاد

Meaning: Our descendants are the offspring of our sons and daughters; while the offspring of daughters are descended from other men.<sup>24</sup>

Hence, the Qur’anic verses actually allow different opinions in the case of the position of female heirs. This means that the issue has entered the realm of *ijtihad* which bears relative correctness; thus, employing the considerations of common merits, child protection, *maqāṣid al-syarī’ah*, or *ratio legis* is very possible. The two problems above (shared assets and women’s position) are examples of the emergence of typical Indonesian *Fiqh* that can be understood through *maqāṣid al-syarī’ah* approach. The same case can be traced into the Compilation of Islamic Law which gives substitute inheritance rights to the inheritor’s grandchildren whose father (inheritor’s son) already passed away.<sup>25</sup> The position of

19 Ṭabarī, *Tafsīr al-Ṭabarī Jāmi’ al-Bayān ‘an Ta’wīl al-Qur’ān*, Vol. VI (t.tp.: Dār Hijr t.t.) 475-484.

20 Al-Jaṣṣāṣ, *Aḥkām al-Qur’ān*, Vol. III (Beirut: Dar Ihya’ at-Turas al-‘Arabi 1412 H/1992 M) 17-18; Al Yasa Abu bakar, *Ahli Waris Sepertalian Darah: Kajian Perbandingan terhadap Penalaran Hazairin dan Penalaran Fikih Mazhab* (Jakarta: INIS 1998) 94.

21 Mālik bin Anas, *al-Muwatṭa’*, [narrated version of Yaḥyā bin Yaḥyā al-Laysi al-Andalusī], P. II, (Beirut: Dār al-Gharbī al-Islāmi, 1417 H/1997 M), *Kitāb al-Farā’id* (Hadits 1467). See also Nawāwī, *Ṣāḥiḥ Muslim bi Syarḥ al-Nawāwī*, Print I, Vol. XI (Kairo: Maṭba’ah al-Miṣriyyah 1347 H/1929 M) 56-57;

22 They ask you to pronounce a ruling (on *kalalah* [those who have left behind no lineal heirs]). Say: “Allah pronounces for you the ruling (that is): should a man die childless but have a sister, she shall have one half of what he has left behind; and should the sister die childless, his brother shall inherit (all hers), but if the heirs are two sisters, both shall have two-thirds of what she has left behind. And if they (the heirs) are sisters and brothers, then the male shall have the share of two females. Allah clearly reveals (such ruling) to you in order that you do not go astray. Allah has full knowledge of everything” (QS. An-Nisa: 176).

23 Ibnu ‘Arabi, *Aḥkām al-Qur’ān*, Vol. I (Beirut: Dār al-Kutub al-‘Ilmiyyah t.t.) 433-434.

24 Rasyid Riḍā, *Tafsīr al-Qur’ān al-Ḥakīm*, Print II (Kairo: Dār al-Manār 1366 H/1947 M) 405.

25 Christine G. Schenk, ‘Islamic leaders and the legal geography of family law in Aceh, Indonesia’ (2018) *The Geographical Journal* 184.1: 8-18. See Also Islam, Muhammad Hifdil, ‘Islamic Law In Indonesia



substitute heirs changes the definition of offspring in Islamic Jurisprudence, which was initially understood as horizontal into vertical in reference to the Compilation of Islamic Law. Likewise, the Compilation of Islamic Law grants inheritance right to adopted child or foster parents to receive at most one-third of the inherited assets. Article 209 of the Compilation stipulates that adopted children or foster parents, despite the ability to show a will left by the inheritor, will receive a *wasiatwajibah* (automatically granted will) as much as one third of the assets of the inheritor. Roughly saying, the inheriting right of adopted children was recognized at the time of *Jahiliah* (pre-Islam Arabic tradition); and, such right was then deleted in classical Islamic jurisprudence. In modern Indonesia, however, such right is reclaimed and filed into Indonesia's state document. This does not mean that the Compilation of Islamic Law refers to or revives the *Jahiliah* tradition; rather, it is to consider the circumstances and interests of adopted children or foster parents.

Similar thing also happens in several majority Muslims populated countries such as Egypt, Malaysia, Pakistan, Brunei Darussalam, and Turkey. For instance, the Egypt Law of 1929 provides that a wife has the right to file a divorce claim against her husband if the second marriage of the husband causes her a suffering; and the Law of 1979 stipulates that the husband's second and next marriage is only justified if the wife or wives and prospective wife is or are already informed about the husband's other marriages and as long as she or they has or have already agreed. If happening otherwise, the wife has the right to claim for the termination of the marriage. Analogously, in the matter of inheritor's testament (will), Article 76-78 of the Law Number 71 of 1946 concerning Egyptian Testament Law stipulates that an inheritor may bequeath his assets to any individual by will without approval or permission from the heirs. This justifies the permission to grant a testament to an individual who originally has no right to receive inheritance or the *dzawil arham*.<sup>26</sup>

Family Law in Malaysia has experienced continuous development since the enactment of the Islamic Family Law in Wilayah Persekutuan territory (Kuala Lumpur, Putra Jaya and Labuan) in 1984 with the Act number 303 following the enactments of the Islamic Family Law of 1983 (Kelantan State) and the 1984 Act of the Islamic Family Law (Negeri Kedah). Amendments and updates of such acts continued being made during the 1990s and 2000s both at the local (state) and federal levels. These updates led to the approval of the Islamic Family Law for Wilayah Persekutuan through the Act of 2006, but it has yet to be enacted up to the present. Therefore, the currently applied regulation in these three cities is till the one of 1984 which was then amended in 1994.<sup>27</sup>

In Pakistan, through *The Muslim Family Laws Ordinance* of 1961, the country established a rule that polygamy is legally granted under prior permission by both the *Arbitration Council* and the wife. Violation of this rule is punishable by imprisonment or fines.<sup>28</sup> In Brunei Darussalam there are formal provisions regarding engagement; if the male cancels the engagement through either written or verbal notice, the man must then pay the already agreed dowry plus a voluntary amount of money in compensation for the marriage preparation cost. If the cancellation is made by the woman, then the engagement prize must be returned along with some voluntary amount of money. All these "fines" can be sued through the court.<sup>29</sup> Regarding polygamy, long before

(Tradition, Thought, Political Law and Legal Products)' (2018) *As-Syari'ah: Jurnal Hukum Islam* 4.1: 31-50. See Also Nasution, Hotnidah, Implementation Of The Principle Of Ultra Petitem Partium In Deciding Children Livelihood In Divorce Lawsuit In Religious Courts' (2018) *AHKAM: Jurnal Ilmu Syariah* 18.1.

26 Kurniati, 'Hukum Keluarga di Mesir' (2014) in *Al-Daulah*, Vol. 3, Number 1, June 28.

27 Ahmad Rofii, Globalisasi HAM dan Hukum Keluarga Islam di Malaysia' (2015) in *Al Manahij*, Vol. IX, Number 2, Dec: 308-311.

28 Tahir Mahmood, *Personal Law in Islamic Countries (History, Text and Comparative Analysis)* (New Delhi: Academy of Law and Religion 1987) 137.

29 Intan Cahyani, A, 'Hukum Keluarga Islam di Brunei Darussalam' (2015) in *Jurnal Al Qadāu*, Vol. 2 Number 2: 153.



Indonesia regulated this issue through the Law number 1 of 1974 concerning Marriage, Turkey had established it since 1926. Turkey was the first Muslim country to formally ban polygamy through the Turkish Civil Law of 1926. Article 112 stipulates that the second marriage is declared invalid by the Court on the basis that the person has already lived a valid marriage life.<sup>30</sup> The progress taking place in various countries shows the presence of dynamicity element in field of Islamic family law that allows further development.

#### Decision of the Constitutional Court

The decision of the Constitutional Court (MK) Number 46 / PUU-VII / 2010 issued on February 17th, 2010 stipulates that the Law No. 1 of 1974 concerning Marriage is contrary to the 1945 Constitution if the clause "A children born out of wedlock only has a civil relationship with his or her mother and the mother's family and the man as the child's father under an evidence that can be proven by science and technology and or other evidences acceptable to the law that can show blood relationship, including civil relations with his father's family" is skipped.<sup>31</sup> The judges of the Constitutional Court argued, "it is inappropriate and unfair when the law regulates that a child born out of wedlock only has a civil relationship with the woman as his or her mother." It is also equally inappropriate and unfair when the law frees a man from his responsibility as a father after committing a sexual relation that leads to pregnancy and the birth of a child - and at the same time eliminates the legal right of the child from being the child of the man". The decision is purely intended as an effort to provide legal protection for children. If it is made otherwise, then the group who is harmed is the children; while, the children are not guilty because their births do not happen at their own will. Children born out of wedlock often encounter unfair treatment and receive negative stigma amidst the community. As a result, they are potential to suffer from socio-psychological losses that actually can be prevented through recognizing the children's relationships with their biological fathers.<sup>32</sup>

The Constitutional Court's decision reaps a lot of criticism from many Islamic scholars because it is considered to have violated the Islamic Jurisprudence which sets that such a child must be referred to his or her mother. Among these criticisms was an official decision of the MPU (Islamic Scholars Council) Aceh through its issuing the Fatwa number 18 of 2015 concerning the *Nasab* (parental line) for Children Born out of Wedlock which provides as follows:

1. Children of adultery are children that result from extramarital relationships.
2. Children of adultery do not have any civil relationship with the men who have caused their births.
3. Children of adultery do not deserve inheritance rights, income, and guardianship from the men who have caused their births.
4. The position of the children of adultery before God is the same as those born in a legal marriage.

30 Vita Fitria, 'Hukum Keluarga di Turki sebagai Upaya Perdana Pembaharuan Hukum Islam' retrieved on 24 April 2018: 9 <<http://media.neliti.com>>

31 Muhammad Siddiq Armia, 'Ultra Petita and the Threat to Constitutional Justice: The Indonesian Experience' (2018) 26(2) Intellectual Discourse 903-930. See also Muhammad Siddiq Armia, 'Implementing Islamic Constitutionalism: How Islamic Is Indonesia Constitution?' (2018) 15(2) Al 'Adalah Journal 437-450.

32 The decision of the Constitutional Court (MK) Number 46/PUU-VII/2010 on 17 Februari 2010. Muksalmina, 'Tinjauan Fatwa MPU Aceh No. 18 Tahun 2015 tentang Nasab Anak yang Lahir di Luar Nikah (Anak Zina) terhadap Keputusan Mahkamah Konstitusi Nomor 46/PUU/VIII/2010 tentang Status Anak Lahir Luar Nikah', Thesis, Unpublished (Banda Aceh: Fakultas Syariah dan Hukum UIN Ar-Raniry 2017) 38-40.

5. The living support for children of adultery is borne by his mother and / or his mother's family.

The decision of Aceh MPU seems to be based on the ulama's *ijmak* (consensus) which stating that the *nasab* (bloodline) of a child born out of wedlock is only referred to his mother and his mother's family, and the child is intervened to bear his or her biological father's family line. Such consensus was made in reference to the Hadith of Abu Daud underlying that the bloodline of a child of adultery is referred his mother or his mother's family. Another Hadith, namely Bukhari, mentions that 'Utbah (living in Medina) claimed that the son of Zam'ah (living in Mecca) who was born of his female slave was the child of 'Utbah (the result of intercourse with 'Utbah). When Sa'd (brother of 'Utbah) would take the child, a son of Zam'ah defended the child and uttered, "He is my brother, the offspring of my father's slave. He was born in my father's bed. When this case reached Prophet Muhammad, he said, "This child goes under your guardianship, O the son of Zam'ah. The child belongs to the owner of the bed, and for an adulterer is stone. Then the Prophet said to Saudah binti Zam'ah, "You must wear veil before him". The Prophet said this because he saw the boy's resemblance to Utbah". In the book of Abu Daud, there reads a phrase, "there is no acknowledgment in Islam (to a child of adultery). The time of Jahiliyah (pre-Islam Arabic tradition) has passed bye. The child belongs to the bed owner."

The points that need highlighting out of the Hadith are; first, the Prophet knew that the child in question was biologically owned by 'Utbah, but the Prophet gave it to Zam'ah (because Zam'ah admitted it). Second, at the time of *Jahiliyah* there was a trend tradition of recognizing an adopted child which caused the child to bear the family line of the foster father – and, civil and legal relation between them applied like that between biological father and child. At the time of the Prophet, some remnants of the *Jahiliyah* era such as conflicts over acquisition of children especially boys still remained. The case above showed how the Prophet resolved such matter according to Islamic law.

The aversion of the Arabs to recognize children at the time of *Jahiliyah* and at the beginning of Islam was reinforced by data which revealed the Arabs' strong habits to adopt boys. Prophet Muhammad himself adopted Zaid bin Harithah and — because of the Arabs tradition of that time-Zaid was referred as Zaid bin Muhammad until the banning of such tradition through the revelation of Qur'an Surah Al-Ahzab [verse 4 and 40].<sup>33</sup> Generally saying, the status of and living support for adopted children of that time was very much protected. This is much different from the current situation in Indonesia; where it is frequently reported that a baby is found dumped by his or her parents on the roadside; there are many homeless, stranded or abandoned children who live in the streets without parents. What do we think about the status and fate (future) of such children?

From the *maqāṣid al-syarī'ah*, or *ratio legis* point of view, providing protection to children is one of the purposes of establishing the syariah. Therefore, the Constitutional Court's decision that grants a status (recognition) to children born out of wedlock actually fulfills the demands of general messages of the Qur'an. The Prophet's habits cited above are also intended to provide protection to children. Today, if a child does not have civil status that legally come under a family, the child will find it difficult to enter or continue schooling, and to deal with many other administrative stuffs. Even worse, the child's status in the community will be indefinable. Malaysia has come to a solution to such typical problem by issuing birth certificates for children out of wedlock by granting them a particular family

A. Hamid Sarong, Hukum Islam dan Sistem Pengangkatan Anak di 33  
Indonesia (Yogyakarta: Kaukaba 2016) 53

name “Abdullah” by tagging the phrase ‘bin or binti Abdullah’ at the end of their name.

In light of the three cases of “Islamic Jurisprudence” in Indonesia, it appears that the development of Islamic Jurisprudence in the country tends to observe the situation and conditions according to Indonesian cultural context. These considerations result from rational reasoning which - can be called - differ from *Fiqh*, and even from the scriptures. Despite that, these considerations as a matter of fact cannot be judged as deviating from the scriptures. In case that the scriptures are reinterpreted both deductively and inductively, the values based on which the considerations are made will come up.

### Conclusion

From the afore stated exposition, it appears that the field of Islamic family law studies includes ontological, epistemological, and axiological aspects. In Indonesia, the chance of development (read: not just enforcement) of Islamic family law appears to widely open. Multiple factors such as place, time, motivation, situation, and typical Indonesian traditions that are different from the Arabs are the realities that should serve as of the “contributing variables” towards the Islamic family law reform. In addition, various existing legal decision models and its developments that have been initiated by experts have produced a prospective space that requires more attentions because it serves as a “machine” that can produce a law. Most theories that have been made by Islamic scholars are still regarded as a bunch of offers – not yet reaching the state of practical application. Therefore, their development in various levels – ranging from basic rules to practical norms-needs to be conducted.

Apart from that, the study can be developed towards the field of legal reform authority. This can be started by opening discussions on scrutinizing two aspects of Muhammad’s life between his role as a Prophet or Apostle and his function as the head of state; so it does with the practices performed by the Companions of the Prophet who once served as the caliphs. The themes of the study will cover: (1) separation of the two qualities of Islamic tenets namely *ta’aqulī* and *ta’abbudī*; (2) the values and their practices; viewed as a unity; (3) the areas of government authority in the making of law. Furthermore, this will lay down the basis of Islamic family law reform through *al-siyāsah al-syar’iyyah* point of view.

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