

THE DISCOURSE OF INDONESIAN FIQH Methodological Bid of Family Law Reform

Marzuki Wahid

IAIN Sheikh Nurjati, Institut Studi Islam Fahmina Cirebon, and Lakpesdam-NU

Email : marzukiwahid@yahoo.com

Abstract

The following article discusses the methodology bid and that of family law reform. This discussion is an affirmation that the Indonesian fiqh which is constructed based on reality Indonesia. Most of the Indonesian fiqh still littered the pages bahtsul masa'il decision, the Majelis Legal Affairs Committee, the board hisbah, MUI's fatwa, and in the form of motion religiosity Indonesia's diverse Muslim communities. Others fiqh of Indonesia have entered into a state structure, which is a positive law. Fiqh Indonesia as positive law is a political and social construction, not merely theological formulation, but also the factors of non-theological is a logical consequence of the building fiqh who live in the midst of true nation-state based on Pancasila and justified by the state's political decision , Therefore, approved or rejected a formulation of Islamic law in the legislative process is not as theologically correct or incorrect, but because of the victory of the political configuration and the dominant actors who are able to influence the legislature and the Government as the legislators and the public as a support group or a suppressor. On that basis, the creation of a public space free (free public sphere), controversy or public debate about Indonesian fiqh is actually very productive. In this debate konterks Shari'ah understood in the context of Indonesian-ness, defined and redefined in the public space nationality how Shari'ah take a constructive role in the big house Pancasila.

Keywords : Methodology, Indonesian Fiqh, Islamic Family Faw, and Reform.

ملخص البحث

تناقش هذه المقالة قضايا منهجية في تجديد قانون العائلة الإسلامي. ويعد هذا النقاش امتداداً لما أصبح يعرف بالفقه الإندونيسي؛ حيث يتم استئزال النصوص أخذاً بالاعتبار السياق الإندونيسي الواقعي. إن القسم الأكبر من الفقه الإندونيسي لم يزل منتشرًا في صفحات صادرة عن الجامعات الفقهية الكبرى كمجامع الجمعيات الإسلامية مثل نهضة العلماء وبحوثها للمسائل، والمحمدية ومجلس ترجيحها، وديوان الحسبة، وفتاوى مجلس العلماء الإندونيسي، وغيرها، ناهيك عن قسم آخر من هذا الفقه الذي يمكن معاشته مباشرة في الحياة الدينية للإندونيسيين ولم يسجل بعد. ومن جهة أخرى، فإن قسماً آخر من هذا الفقه الإندونيسي تراه وقد أصبح قانوناً رسمياً ضمن القوانين التي تصدرها المجالس

التشريعية بدولة إندونيسيا. وهذا الأخير ليس مجرد صياغة قانونية للتعاليم الدينية، وإنما هو صياغة اجتماعية سياسية في نفس الوقت، يتأثر بأيدولوجية الدولة (المبادئ الخمسة أو البانشاسيلا) وتعكسه القرارات التشريعية المختلفة. إن الوعي بهذه الأمور يدفعنا للقول بأن الصياغات القانونية للتعاليم الدينية كانت ولم تزل معبرة عن معادلة القوة السياسية في مجتمع ما. من أجل هذا تناقش المقالة تجديد فقه العائلة الإندونيسي في هذا السياق عبر الدعوة إلى فتح المجال العام، باحتمالات جدله وخلافه، أمام مناقشة هذا الفقه، وهو ما يجعل الفقه الإسلام حيا في المجتمع الإندونيسي الأكبر المؤسس على البانشاسيلا.

الكلمات الدالة: المنهجية، فقه إندونيسيا، القانون العائلي الإسلامي، تجديد الفقه

Introduction

“Fiqh Indonesia” (Indonesian Fiqh) is actually not a new idea. Many researchers noted that at least since the 1940s, Prof. Dr. TM. Muhammad Hasbi ash-Shiddieqy been screaming about the importance of fiqh which is more suited to the needs of the country and the nation of Indonesia. The reason, in order fiqh not to be treated as foreign goods and antique goods. This is revealed in his article titled “Mendedahkan Pengertian Islam.”¹

This idea was voiced back in his article titled “Menghidupkan Hukum Islam dalam Masyarakat” published in *Majalah Aliran Islam*. In that paper in the real right that the existence of Islamic law on a practical level has reached the level of clinical decadence. He has seemed like an isolated figure, not air meaning, and not useful.²

In 1961, Prof. Hasbi emphasize the fundamental importance Fiqh of Indonesia. In ber scientific oration entitled “‘Sjari’at Islam Mendjawab Tantangan Djaman”, he explicitly downloading declared:

.... Jurisprudence growing in our society now is jurisprudence from Hijazi, Egypt and India, which is formed on the basis of the customs and habits of the people of Hijaz, Egypt and India. Thus, the specific characteristics of the Muslim community thinks ruled out, because of the forced application of foreign jurisprudence into local communities through taqlid.³

Until 1961, in the assessment of Prof. Hasbi the Indonesian scholars have not been able to bring that personality Indonesian fiqh. Indonesia is expected

¹ Nouruzaman Siddiqi, “Muhammad T.M. Hasbi ash-Shiddieqy dalam Perspektif Sejarah Pemikiran Islam Di Indonesia”, *Al-Jami’ah*, No. 35, (1987), p. 50.

² Nouruzaman Siddiqi, *Fiqh Indonesia: Penggagas dan Gagasannya*, (Yogyakarta: Pustaka Pelajar, 1997), pp. 215-216.

³ Hasbi Ash-Shiddieqy, *Syari’at Islam*, p. 43.

Fiqh Prof. Hasbi is fiqh who has “ideals taste “of Islamic law with its own characteristics that are different from the characteristics of the Arab community, because Islam does not mean Arab, let alone the Arab past. Fiqh of Indonesia in his view is “ personality of Indonesian fiqh.”

Beside Prof. Hasbi, Prof. Hazarin also noted ever utter importance *national schools* or *Indonesian school* of Indonesian plus Shafi *sect* or school of Islamic law. There are three major renewal projects undertaken by Islamic law schools of Indonesia of Hazarin, namely: *First*, Zakat and *Baitul Mal* in the characteristics of Indonesian society. *Second*, reform marriage law and initiated the bilateral system in the reality of Indonesian society. *Thirdly*, the national Programme initiated inheritance law. ⁴

Moreover, Prof. Hazarin’s thought about *mawali concept*, has also been adopted in KHI, namely Article 185 KHI, Inheritance Law, about the heir replacement. In the article, stated: “Heir that passed away earlier than the heir, then position may be replaced by children, unless they are the 173. “

Recorded in the history of Indonesian fiqh contributor to the formation of Munawir Sadjali, KH. Ibrahim Hosen, KH. Achmad Siddiq, KH. Azhar Ahmad Basyir, KH. Abdurrahman Wahid, KH. MA Sahal Mahfudh, KH. Masdar F. Mas’udi, KH. Husein Muhammad, and they are always based on reality diligence by the people of Indonesia as well as venture out of the fiqh or jurisprudence of Arab Middle East as recorded in the pages of the yellow book.

The Foundation of Indonesian Fiqh

In this latter context, namely *ijtihad* based on the reality of the people of Indonesia, I dare say that the Indonesian Fiqh actually existed long before Prof. Hasbi voice it. Precisely, since courage scholars Nahdlatul Ulama (NU) which decided that the Indonesian state can be called *Darul Islam*. This decision was given on the 11th Conference in London, June 9, 1935 M / 19 Rabi al-Awwal 1355AHNU has given the legal status of Indonesia which was still controlled by the Government of the Netherlands East Indies invaders with “*Darul Islam* “(land of Islam). The argument is even though it was Indonesia is still dominated by the colonial Dutch, but in the history of the archipelago never fully occupied by

⁴ Hazairin, *Tujuh Serangkai Tentang Hukum*, (Jakarta: Tintamas, 1974), p. 23.

Muslims and Muslims can freely run shari'ah religion.⁵

The decision has Indonesia as *darul Islam* by NU in 1935 is the basic foundation of the building Fiqh of Indonesia. NU although did not explicitly articulate the importance of Fiqh of Indonesia, but NU directly to and even has laid an important foundation for building Fiqh of Indonesia, namely the validity of the Indonesian state in fiqh perspective. This is done through decisions muktamar and bahtsul masa'il, which made long before scholars were voiced. Useless voice or yell importance Fiqh of Indonesia and try to build it, when the reality of the state of Indonesia which everyday merges with the breath we are still seen as not part of our Islamic. Fiqh that is built on the foundation of doubt has become Muslim countries would be fragile. Instead, fiqh emerged from the building in Islamic countries is valid will certainly find based on sturdy and socio-theological roots.

The Substance of Indonesian Fiqh

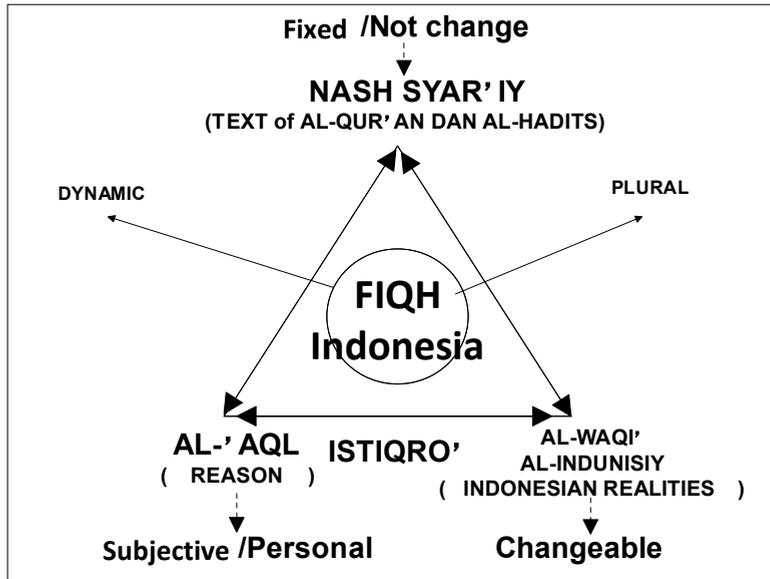
Nowadays the problem is not whether or not Fiqh of Indonesia. It was finished answered by the history of Indonesia, which simultaneously produces fiqh with a variety of themes. Recognized or not, today's Muslim Indonesia have been running its own jurisprudence, fiqh is not Arab, not fiqh of Middle East, not the American jurisprudence, or not Europe fiqh,

Indonesia is very rich indeed has an understanding of Islamic law. NU with its *masa'il bahstul*, Muhammadiyah with its *majlis tarjih*, Persis with its *hisbah council*, the MUI fatwas, and other Islamic organizations with decision-making mechanisms religion respectively, as well as the Indonesian cleric either individually or collectively, either in schools or in the colleges, all of them producing an understanding of Islamic law in the landscape of Indonesian. Understanding Islam spread to different heart of community life. This reality is a wealth of understanding of Islamic law, especially when associated with the practice of Islamic law which is fused with the pulse of the culture of Indonesia. Variety practice of Islamic law in Indonesia is comparable to many kinds of culture itself in every corner of Indonesia.

Variety of Indonesian fiqh This is a concrete manifestation of Islamic law as

⁵ Abu Hamdan Abdul Jalil Hamid (Editor), *Ahkam al-Fuqaha' fiy Muqarrarat Mu'tamarat Nahdlatul Ulama 1-15, Juz II*, (Semarang: PBNU – CV Toha Putra, 1960), pp. 61-62. K.H.A. Aziz Masyhuri, *Masalah Keagamaan Hasil Muktamar dan Munas Ulama Nahdlatul Ulama Kesatu-1926 s/d Kedua Puluh Sembilan 1994*, (Surabaya: Kerjasama PP RMI dengan Dinamika Press, 1997), p. 138.

a *people law* (law of society). As *people law*, Islamic law is autonomous, populist, and responsiveness. Moreover, because of its interaction with the intellect and social reality, the substance of fiqh character dynamic, flexible, plural, and subjective. Construction of fiqh can not in uniform, nor require a political decision of a state authority.⁶ Indonesian fiqh formation process can be explained in the following chart:



Dialogic intensive interaction between *an-nushush ash-syar'iiyyah* (religious texts) with reason (intellect) of Mujtahid, and *al-waqa'i al-indunisiyyah* (reality of Indonesia) will produce Indonesian fiqh. This interaction is done through a process *istinbath* (Dialogic interaction between *an-nushush ash-syar'iiyyah* with reason), *istidlal* (Dialogic interaction between *an-nushush ash-syar'iiyyah* with *al-waqa'i*), and *istiqro'* (Dialogic interaction between *al-waqa'i* with reason).

In the book "*Fiqh Indonesia*",⁷ I affirm the definition of Fiqh of Indonesia. In my opinion, Fiqh of Indonesia is the accumulation of cross intensive and interactive dialogue between contextual understanding of Islamic law with the wisdom of the people of Indonesia and all flesh culture in the landscape

⁶ Compare with Marzuki Wahid dan Rumadi, *Fiqh Madzhab Indonesia, Kritik atas Politik Hukum Islam di Indonesia*, (Yogyakarta: LKiS, 2001).

⁷ Marzuki Wahid, *Fiqh Indonesia: KHI dan CLD-KHI dalam Lanskap Politik Hukum Indonesia*, (Bandung: ISIF-Marja, 2014).

of the state of Indonesia based on Pancasila and the 1945 Constitution “Fiqh of Indonesia” actually has existed since the Indonesian Muslim community theologically accept Indonesia as a country that does not conflict with Islam, first accept Pancasila and the 1945 Constitution as the state and its Constitution. This theological acceptance is the beginning of the unification of Islam to Indonesia, which was to later become “Islam Indonesia,” instead of “Islam in Indonesia.”

This paradigm of viewing Islam is not Arabism, but the values and teachings of universal humanity (*al-Basyariyyah*), justice (*al-'adalah*), benefit (*al mashlahat*), mercy (*ar-Rahmah*), equality (*al-Musawah*), and brotherhood (*al ukhuwwah*) that is based on the revelation of divinity and monotheism, as contained in the Qur'an and Sunnah.

In the book of *I'lâmu al-Muwaqqi'în*, Ibn Qayyim al Jawziyah said:

*“Indeed shari’a built on the foundation of wisdom and benefit of mankind in the world and the hereafter. All the provisions of Shari’ah was fair, grace, beneficiaries, and sage. Any views or legal provisions which deviate from the basics is not part of the Shari’ah, although obtained through interpretation. Shari’ah is the justice of God among His servants, the love of God among His creatures, His naungannya-on this earth.”*⁸

The teachings and values can be applied wherever and whenever Muslims are. In addition to worship spirituality and faith, everything can be done to adjust the local cultural and social changes that occur. Islam in this paradigm greatly appreciate the local culture, including the culture of Indonesia, even found *al-'âdatu muḥakkamah* (customs / traditions can be used as legal). Being Muslim, in this paradigm, there should be Arab or following Arabism. Together the local culture though, along with Pancasila and the 1945 Constitution of the underlying, someone could become true Muslims. This is the “Indonesian Islam.” Indonesian Islam in fact has long been practiced, changed following the change in Indonesia.

In this context, al Qarafi al-Maliki in the book of *al-Furuq* says:

“Do not tied to what is written in books all your life. If someone comes from another area who asked for a fatwa law unto you, so do not pull into your culture. But first ask the tradition / culture, then decided to consider the tradition / culture and not on the basis of buda Yamu or that is in the books of your book. Standardize

⁸ Ibnu Qayyim al-Jawziyyah, *I'lâm al-Muwaqqi'în 'an Rabb al-'Ālamîn*, (Kairo: Maktabi Al-Islam, 1980), p. 149.

*themselves on texts books that existed throughout life is a mistake of religion and ignorance in understanding the desired destination of the scholars of the past. “*⁹

The Methodology Bid of Indonesian Fiqh

In accordance with its definition-- accumulation of cross intensive and interactive dialogue between contextual understanding of Islamic law with the wisdom of the people of Indonesia and all flesh culture in the landscape of the state of Indonesia based on Pancasila and the 1945 Constitution, the main challenge Fiqh of Indonesia is Islam that respects the building presenting Indonesia with all national character, culture, and progress in democracy and uphold human rights, including women's rights.

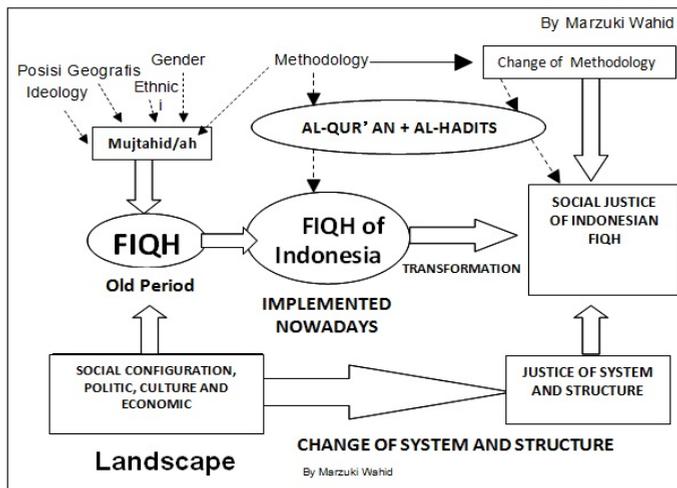
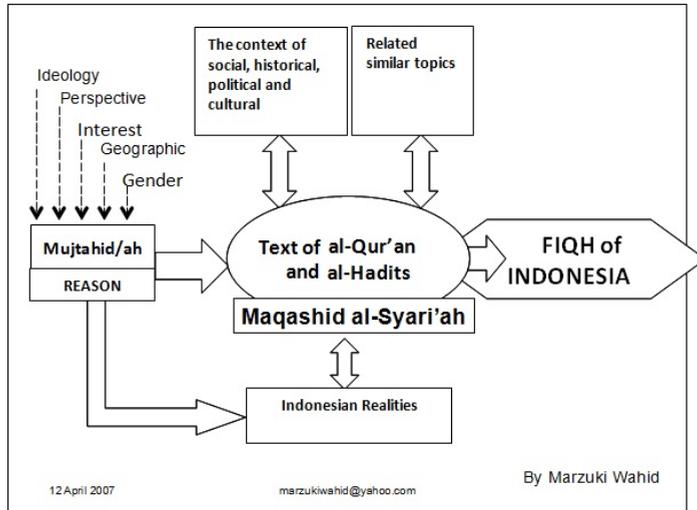
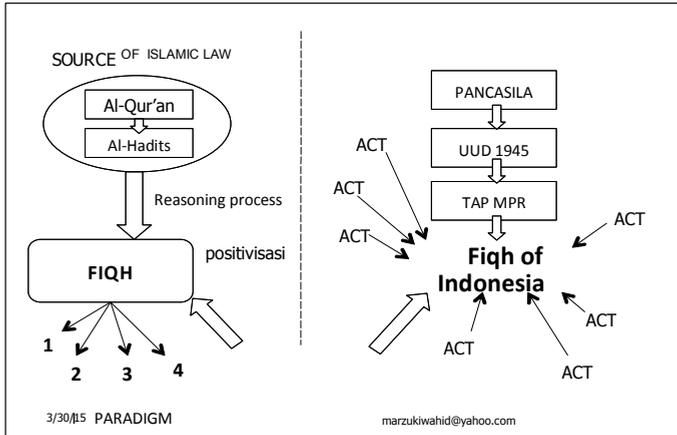
This challenge is aimed at the same time as the real answer to the agenda of the formalization of Islamic Shari'ah by Islamist group still considered exclusive, re-oriented to the inclusion of the Jakarta Charter and the establishment of an Islamic state, *the Islamic caliphate*, ignoring the plurality of cultures and the exclusion of women's rights.

In this context, we thought it be necessary to change the framework of the establishment of Islamic law from theocentrism to anthropocentrism, from elitist to a populist, of deductive to inductive, and from *eisegesis* to *exegesis*. “¹⁰These changes are necessary because the Indonesian people to consider the reality of different cultures with the Arab and Middle East, also pay attention to the condition of many Indonesian woman are different from the initial presence of Islam in Arabia.

The results of the reasoning then “grounded” to the landscape of Indonesia, especially the context of legislation in force, ranging from the basic state Pancasila, the 1945 Constitution, MPR, and other legislation. This corresponds to the principle that the law legislation which came later must not conflict with the provisions of the previous law. Reason nature can be explained in chart as follows:

⁹ al-Qarafi, *al-Furûq*, Vol.I, p. 177.

¹⁰ In the book *Pembaruan Hukum Islam: Counter Legal Draft Kompilasi Hukum Islam* described «eisegesis is the act of bringing in thought or ideology itself into texts, and then pull it out and claim it as God intended.» Meanwhile, exegesis, is the act of interpreters to make every effort possible to put the texts as «objects» and the interpreter as a «subject» in a balanced dialectic. «Read the Gender Mainstreaming Team Ministry of Religious Affairs, *Pembaruan Hukum Islam: Counter Legal Draft Kompilasi Hukum Islam*, Jakarta, 2004, pp. 22-23.



Updating Indonesian Fiqh Regarding Family Affairs

In the political history of Indonesian law - an independent, landmark family law reform Islam was first marked by the promulgation of marriage law (Act No. 1 of 1974) in the early half of the New Order regime.¹¹ Twelve years later, in the latter half of the New Order regime, compiled Compilation of Islamic Law (Presidential Decree No. 1 of 1991) –then called KHI-Instruction substantive legal -as Religious Courts. Twelve years later, in 2003, after the fall of the New Order regime, the Ministry of Religious Affairs filed a Draft Law Applied Law Religious Courts (HTPA) to the House of Representatives (DPR). This HTPA bill KHI-Instruction materials enhance and improve the status of Presidential Decree into law.¹²

In response to the bill HTPA, on October 4, 2004 Working Group on Gender Mainstreaming of Religious Affairs (MORA PUG WG)¹³ launched the formulation of Islamic law texts called the *Counter Legal Draft* Compilation of Islamic Law (CLD-KHI). This text-in recognition of the editorial team of CLD-KHI¹⁴ --offer a number of ideas of Islamic family law reform bill drafted in the Marriage Law of

¹¹ In 1950, the government tried to propose marriage bill, but it failed due to the refusal of society, including faith-based women's organizations. On July 31, 1973, the Government conveyed Marriage Bill to the House. Discussion on Parliament colored nstrasi demo, protests, and riots in the courtroom of the House. However, on December 22, 1973 approved the Marriage Act of Parliament. Next, in 1989 Law No. 7 of 1989 on the Religious Courts was passed. In this Act, the right of religious court set to hear the case of marriage, inheritance, wills, grants endowments, and charitable.

¹² Since September 2002, The Department of Religion established the Agency for the Assessment and Development of Islamic Law (BPPHI) assigned brewing KHI material to be upgraded from Presidential Decree Law on Religious Courts Law Applied as a reference and official guidelines (substantive law) to the Religious Court judges in Indonesia. See "Compilation of Islamic Law would Enhanced So Act", GATRA, September 19, 2002. Read <http://www.gatra.com/artikel.php?pil=23&id+20700>. Read juag "Islamic Marriage Law draft bill will be submitted to the State Secretary," Tuesday, November 9, 2004 in <http://www.tempointeraktif.com/hg/nasional/2004/11/09/brk,20041109-07,id.html>

¹³ Working Group of Gender Mainstreaming is a unit of work that is appointed by the Minister of Religious Affairs for the implementation of the planning, preparation, implementation, monitoring and evaluation of national development policies and programs are gender perspective in order to realize gender equality in family life, social, nation and state in the Ministry of Religion. Read Presidential Instruction No. 9 of 2000 on Gender Mainstreaming in National Development.

¹⁴ In accordance with the point, the book published CLD-KHI Gender Mainstreaming Team of Religious Affairs entitled "*Renewal of Islamic Law:Counter Legal Draft Compilation of Islamic Law.*" As the offer of renewal of Islamic family law thought Musdah Mulia Siti emphasized in a speech of launching CLD- KHI, October 4, 2004 in Jakarta.

Islam, the Islamic Inheritance Law Bill, and Bill Law Islamic of waqf. Of the 178 chapters, there are 23 points on offer Islamic legal reform. Through comparison with KHI-Instruction, following Islamic family law reform bid CLD-KHI version:

The marriage law

No.	Discussion	KHI - Instruction No. 1 of 1991	CLD-KHI
1	Marriage	Its implementation is worship (Article 2)	Marriage is not category of <i>'ibâdah</i> , but <i>mu'amalat</i> (contracts based on the agreement of both parties) (Article 2)
2	Of guardians	A harmonious marriage (Article 14)	Not a harmonious marriage (Article 6)
3	Recording of marriage	Excludes harmonious marriage (Article 14)	A harmonious marriage (Article 6)
4	Testimony of women in marriage	Women are not allowed to be a witness (Article 25)	As men, women may be a witness to the marriage (Article 11)
5	Minimum age of marriage	16 years for the candidate's wife, 19 years for the prospective husband (Article 15)	A minimum of 19 years, does not distinguish between the age of prospective wives and prospective husband (Article 7)
6	Marriage of a girl (woman who has never been married)	Regardless of age, girls are given in marriage by a guardian or a representative (Article 14)	The girl at the age of 21 years can marry herself (Article 7)
7	Dowry	Given by the husband to the prospective candidate's wife (Article 30)	Mahar can be given by the candidate's wife to prospective husbands or vice versa (Article 16)

8	The position of husband and wife	The husband is the head of the family and the wife is a housewife (Article 79)	Position, rights, and obligations of a husband and wife are equal (Article 49)
9	Livelihood	Husband obligation (Article 80 Paragraph 4)	Liabilities with a husband and wife (Article 51)
10	Agreement period of marriage	Not regulated	Regulated, so the marriage is declared broke simultaneously with the expiration of the agreed marriage (Article 22, 28, and 56 pts [a])
11	Mating of different religions	Absolutely not allowed (Article 44 and 61)	Sure, as long as the limits to achieve the goal of marriage (Article 54)
12	Polygamy (<i>ta'addud al-zawjât</i>)	May, with a number of requirements (Articles 55-59)	Forbidden, haram <i>li gairihi</i> (Article 3)
13	◁ <i>Iddah</i> (waiting period, the transition period)	◁ <i>Idda</i> only for the wife (Article 153)	◁ <i>Idda</i> for both a husband and wife (Article 88)
14	◁ <i>Iddah</i> of divorce	Based on the occurrence of <i>dukhûl</i> (Article 153)	Based on the contract, not <i>Dukhûl</i> (Article 88).
15	Mourning	Mourning only for the wife (Article 170)	Besides his wife, mourning also charged for the husband (Article 112)
16	<i>Nushuz</i> (defiant of liability)	<i>Nushuz</i> only made possible by the wife (Article 84)	<i>Nushuz</i> can also be done the husband (Article 53 [1])

17	<i>Khulu`</i> (divorce at the initiative of the wife)	<i>Khulu`</i> expressed as <i>Thalaq bâ'in Sughra</i> , so it should not be reconciled but must be with a new marriage contract (Article 119)	<i>Khulu`</i> and <i>Thalaq</i> are the same, so it may refer (<i>Thalaq raj'iy</i>) (Articles 1 and 59)
18	Rights reconciliation (reunited in marriage)	Rights refer only owned the husband (Article 163)	Husband and <i>ist e ri</i> has the right to refer (Article 105)

Inheritance law

No.	Discussion	KHI Inpres 1 of 1991	CLD-KHI
1	Different religion inheritance	Religious differences an obstacle (<i>mani`</i>) process heir-inherited (Articles 171 and 172)	Different religion is not a barrier (<i>Mani`</i>) process heir-inherited (Article 2)
2	Bastard	Only to have the relationship of inheritance from his mother, even if the biological father is well known (Article 186)	If known biological father, the child remains have inheritance rights of the biological father (Article 16)
3	<i>Awl</i> and <i>radd</i>	Used (Article 192 and 193)	Deleted.
4	Division of inheritance for boys and girls	Part boys and girls is 2: 1	The same proportion, 1: 1 or 2: 2 (Article 8 [3]).

Law of Endowment

No.	Discussion	KHI Inpres 1 of 1991	CLD-KHI
1	Intellectual property rights as endowments goods	Not regulated	Regulated (Article 11)

These offers do seem different from the provisions of Islamic law into KHI-Instruction, Bill HTPA, and a general understanding of the evolving jurisprudence in Indonesia. As Islamic law, CLD-KHI formulation is based on primary sources of Islam, the al-Quran and al-Hadith with its own reasoning. CLD-KHI, even, based on the texts of yellow book of pesantren commonly used as a reference. The question arises to be revealed in this paper, how Islamic legal reasoning version CLD-KHI resulting in offers of Islamic family law reform that is different from the previous formulation? Where the main point CLD-KHI problems that become public controversy until finally suspended by the Minister of Religion?¹⁵

This important explanation put forward to show that the differences of view of the formulation of Islamic law basically does not solely because of the theological reasoning, but there are a number of political and social factors that accompany the thought arises. Non-theological factor is a logical consequence of the building of Islamic law who live in the midst of true nation-state based on Pancasila and justified by the political decisions of the country. Thus, the success or failure of Islamic law legislation not because theologically right or wrong, but rather a logical consequence of the configuration of political forces that support or reject, either in the legislature, government, as well as in the public arena, on the proposed formulation of Islamic law.

Reasons of CLD-KHI: Democratic, Pluralist, and Gender Justice

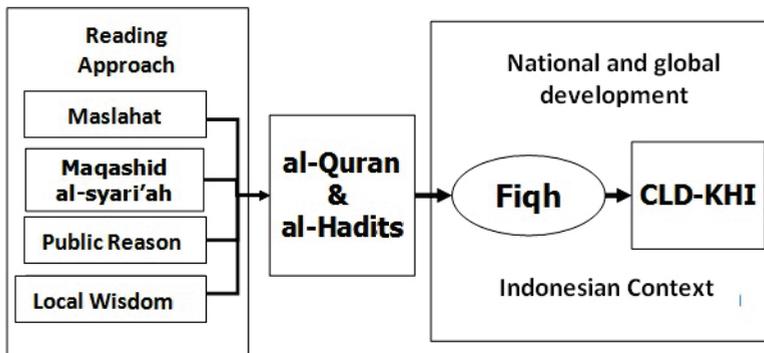
Among the distinguishing reason Team of CLD-KHI with other groups is

¹⁵ The termination only be done by a statement to the media, there was no official letter from the Ministry of Religious Affairs. Before the freeze, a bag pressure the Indonesian Mujahidin Council (MMI) and the Indonesian Ulema Council (MUI) through letter No. B-414 / MUI / X / 2004 dated October 12, 2004, Minister of Religious Affairs Said Aqil Almunawwar issued a warning letter n Omor MA / 271/2004 dated October 12, 2004 to the Chairman of the Working Group PUG MORA as the Advisor to the Minister of Religious Affairs Religious Organizations International Relations Development. In essence, the letter shows that the Working Group PUG not disseminate CLD-KHI manuscript on behalf of the Department of Religion and submit the original manuscript CLD-KHI to the Minister of Religious Affairs. Read "Siti Musdah Mulia Stand Up For Her Convictions," The Jakarta Post, March 23, 2007. The ban is opposed by a number of NGO Women and the Social Organization. Among these are Masruchah (Secretary General of Indonesian Women's Coalition) and Maria Ulfah Anshor (Chairman of the PP Fatayat NU). Maria Ulfah said that the CLD-KHI is a positive thing and gave new wind to see the religious discourse, terutama Islam in Indonesia. Freezing is tantamount to restricting civil rights or the rights of citizens to create and air-p fikir. CLD-KHI is the scientific findings and the results of a study that does need to be socialized. Read "Menag Maftuh Basuni CLD-KHI Freeze Proposed Tim Gender Affairs," Wednesday, October 27, 2004. Read <http://jurnalperempuan.com/yjp.jpo/?act=berita%7CX28.10.04>

that they interpret the verses of al-Quran and al-Hadith benefit approach, local knowledge, *maqashid al-Shari'ah*, and the public mind. This is reflected in the rules of *usul fiqh* which is used in formulating the provisions of Islamic law.¹⁶ Team of CLD-KHI also dig the Islamic law of classical Islamic intellectualism treasury (yellow book) of various schools of jurisprudence.¹⁷

Actually all provisions of Islamic law in the CLD-KHI extracted and formulated from Islamic sources are authoritative, al-Quran and al-Sunnah, as well as the intellectual treasures of classical Islam (yellow book), but the assessment team CLD-KHI tailored to the needs of , experience, and traditions of the people living in Indonesia, and the experience of Western civilization and the Muslim communities in other countries. This interpretation workflow can be described as the following chart:

Interpreting Islam of CLD-KHI



¹⁶ Some of the rules of *usul fiqh* is used [1] *al-'ibrah bi al-maqāshid la bi al-lafdz* (the legal decision-making is done from *maqashid* [objectives, context] conceived, instead of letters / characters verses of the Koran or al-Hadith); [2] *Jawāz al-naskh al-Nushūsh bi al-mashlahāt* (provision text of al-Quran and al-Hadith can be changed / deleted by the logic of welfare); [3] *Tanqīh al-Nushūshbi 'Aql al-Mujtama'* (public mind has the authority to amend the texts of al-Quran and al-Hadith); [4] *takhsh ī bi al sh-sh ī takhsh'aql wa bi al-'urf* (sense and tradition has the authority to specialized texts al-Quran and al-Hadith); and [5] *al-'ibrah bi khusus al-sabab la bil umum al-lafdz* (legal decision making of the text is always related to the context of the decline, not based on the generality of the text of the Qur'an and al-Hadith). Read the Gender Mainstreaming Team Ministry of Religious Affairs, *Pembaruan Hukum Islam: Counter Legal Draft Kompilasi Hukum Islam*, Jakarta, 2004, pp. 23-24.

¹⁷ Recognition of Imam Nakho'i, teachers Ma'had Aly Boarding Salafiyah Syafi'iyah Asembagus Situbondo, East Java as a contributor CLD-KHI, she worked for 3 months with the help of her students are looking for a reference in the yellow book. "The results are stunning, from all the points that were outlined in the CLD-KHI reference contained in the yellow book. "Read" "Poligami No, Kawin Kontrak Yes, "TEMPO, October 17, 2004, pp. 117-118.

The principle difference between reason of CLD-KHI with KHI-Instruction is also located on the perspectives and approaches used and the juridical establishment of the legal landscape is used as a foothold. CLD-KHI team openly in academic texts mention that the perspective used in formulating Islamic family law is gender equality, pluralism, human rights, and democracy.¹⁸ According to him, "This approach will deliver Shari'a in addition to public law that can be accepted by all people, will also be compatible with modern democratic life."¹⁹

The results of the reasoning then "grounded" to the landscape of Indonesia, especially the context of laws and regulations that apply. This corresponds to the principle that the law legislation which came later must not conflict with the provisions of the previous law. Before CLD-KHI made, the Assembly has amended the 1945 Constitution as much as four times.²⁰ The most important substance of the amendment is to put democracy, equality, and human rights in a very strategic position. A number of important laws have also been established, such as Law No. 7 of 1984 on Ratification of CEDAW (*Convention on the Elimination of All Forms of Discrimination Against Women*, on the Elimination of All Forms of Discrimination against Women), Act No. 39 of 1999 on Human Rights, Law No. 23 on the 2002 on Child Protection, Law No. 23 on the 2004 on the Elimination of Domestic Violence, Act No. 12 of 2005 on the Ratification of ICCR (*International Covenant on Civil and Political Rights*, the International Covenant on Civil and Political Rights), mor Law No. 11 of 2005 on the Ratification of the ICESCR (*International Covenant on Economic, Social, and Cultural Rights*, the International Covenant on Economic, Social, and Cultural) ,Within the framework of this legislation, a draft version of Islamic law CLD-KHI diremaksikan in the form of chapters and verses.

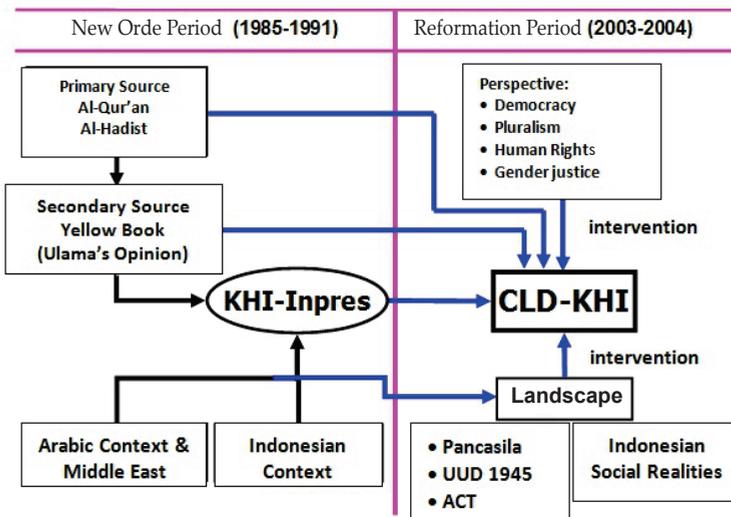
This can be explained that the reason of natural chart as follows:

¹⁸ Team of Mainstreaming Gender Ministry of Religious Affairs, *Pembaruan Hukum Islam: Counter Legal Draft Kompilasi Hukum Islam*, Jakarta, 2004, p. 3.

¹⁹ *Ibid.* pp. 3-4.

²⁰ Read Lindsey Team, "Indonesian Constitutional Reform: Towards Democracy Muddling," *Singapore Journal of International and Comparative Law* (2002) 6.

The Reason of CLD-KHI



The reason of legal establishment working under the umbrella vision of Islamic law that aspired CLD-KHI. CLD-KHI team stated there are six vision of Islamic law that aspired to, ie “pluralism (*ta’addudiyyah*), nationality (*muwâthanah*), human rights (*huqûq al- iqâmat al-insâniyyah*), democratic (*dîmûqrathiyyah*), benefit (*mashla h at*), and gender equality (*al-Musawah al-jinsiyyah*).”²¹ The six basic principles of a framework that animates all the provisions of Islamic law CLD-KHI version.

In accordance with the perspective used, idealized vision, and approaches used, CLD-KHI not only offer points of Islamic law which is different from the KHI-Instruction, but also changing the paradigm of marriage, the relationship between men and women, as well as the procedure of marriage, divorce, divorce, and refer to the direction of a just and democratic relationships, both between husband and wife, or between parents and children. Moreover, in the con text of the legal political, CLD-KHI mem osisikan Islamic law into the national legal framework and changes in gender relations in the post-New Order Indonesia society. Changes in gender relations, both in the national and global scale, requires the formulation of Islamic law which is in accordance with those changes. CLD KHI position itself as an answer to those needs.²²

²¹ Team of Mainstreaming Gender Ministry of Religious Affairs, *Pembaruan Hukum Islam: Counter Legal Draft Kompilasi Hukum Islam*, Jakarta, 2004, pp. 25-29.

²² Changes in gender relations in public life after the New Order, both in the national and global scale, for example: many women become public leaders (presidents, ministers, director generals, governors, regents / mayors, district, village, police chief, and others -Other), many women work outside the home and become the foundation of the family economy, the level of education of men and women were equal, many women became heads of household, and so on.

Concluding Remarks

The methodology bids and reform family law confirms that the Indonesian fiqh, fiqh which is constructed by the reality Indonesia with whole blood cultures flesh and his state. Most of the Indonesian fiqh still littered the pages *bahtsul masa'il decision*, the *Majlis Legal Affairs Committee*, the *board hisbah*, MUI fatwa, and in the form of motion religiosity Indonesia's diverse Muslim communities and diverse.

The Other side, fiqh of Indonesia has entered into a state structure, which is a positive law. Fiqh Indonesia as positive law is a political and social construction, not merely theological formulation. Non-theological factor is a logical consequence of the building fiqh who live in the midst of true nation-state based on Pancasila and justified by the political decisions of the country. Thus, approved or rejected a formulation of Islamic law in the legislative process is not as theologically correct or incorrect, but because of the victory of the political configuration and the dominant actors who are able to influence the legislature and the Government as the legislators and the public as a support group or a suppressor.

From the creation of a public space free (*free public sphere*), controversy or public debate about Indonesian fiqh is actually very productive. In this debate Shari'ah understood in the context of Indonesian-ness, defined and redefined in the public sphere of nationality. Which debate and following this debate are not only Muslims, but also among non-Muslims as part of a component of the Indonesian nation. They participated think about how Shari'ah take stalls in a large house of Pancasila.

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