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HARMONIZATION OF ISLAMIC LEGAL INSTITUTIONS INTO THE INDONESIAN LEGAL SYSTEM

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Abstract
This research aims to analyse the basic principles of the development of Islamic law which is open to accepting the integration of various elements of social change and community traditions as long as they do not conflict with the Qur'an and al-Hadith which then become part of the National law. This research is a type of qualitative research with a normative juridical approach. The technique used is library research. The results of this research can be concluded: First, the presence of Islam in the archipelago is accompanied by the teachings it carries, namely in the form of shari'ah and various results of the ijtihad of scholars who have been packaged in fiqh; Second, Islamic law that intersects with muamalah affairs is very flexible and elastic, so it is easily accepted by the wider community; Third, the great traditions of Islam can blend with local traditions which can then give birth to qanun, where Islam encourages innovation in world affairs while still paying attention and tolerance to legal values that live in society; Fourth, social changes that occur in Indonesian society are another aspect of the basic principles that encourage the integration of Islamic fiqh values into the national legal system, thus forcing new innovations that are considered to provide legal certainty, justice and benefit for the community.

Keywords: *harmonization; institutions; Indonesian legal system*

Abstrak
Penelitian ini bertujuan untuk menganalisis prinsip dasar pengembangan hukum Islam yang terbuka dalam menerima pembauran pelbagai unsur perubahan sosial dan tradisi masyarakat selama tidak bertentangan dengan al-Qur'an dan al-Hadist yang selanjutnya menjadi bagian dari hukum Nasional. Penelitian ini termasuk jenis penelitian kualitatif dengan pendekatan yuridis normatif. Teknik yang digunakan adalah studi kepustakaan (*library research*). Hasil penelitian ini dapat disimpulkan: Pertama, kehadiran Islam di bumi nusantara disertai dengan ajaran yang dibawanya, yaitu berupa syari'ah dan berbagai hasil ijtihad para ulama yang sudah dikemas dalam fiqh; Kedua, hukum Islam yang bersinggungan dengan urusan muamalah sangat fleksibel dan elastis, sehingga mudah diterima oleh masyarakat luas; Ketiga, tradisi besar Islam dapat berbaur dengan tradisi lokal yang kemudian dapat melahirkan qanun, di mana agama Islam mendorong untuk berinovasi dalam urusan dunia dengan tetap memperhatikan dan toleransi terhadap nilai-nilai hukum yang hidup dalam masyarakat; dan Keempat, perubahan sosial yang terjadi dalam masyarakat Indonesia merupakan aspek lain dari prinsip dasar yang mendorong terjadinya pembauran nilai-nilai fiqh Islami ke dalam tata hukum nasional, sehingga memaksa adanya inovasi-inovasi baru yang dipandang dapat memberikan kepastian hukum, keadilan dan kemaslahatan bagi masyarakat.

Kata-Kata Kunci: *harmonisasi; pranata; tata hukum indonesia*

Introduction

Based on the study of Islam in Indonesia, the jargon "Islam comes and Islam develops" is known. The results of historical searches, both through various literature and symbols of the traditions of Muslim communities, can reveal that Islam came to Indonesia in the 7th century, while Islam began to develop and become a political force around the 13th century. If the arrival of Islam is linked to the theory of death, namely the fact of the existence of tombs, which is a symbol, tradition and characteristic of Muslims in preserving the dead, which was never known in the tradition of Hindu-Buddhist society, then it is certain that the 7th century was a milestone in the history of Islam in the archipelago.

Furthermore, in the 7th century, in daily life, Muslims have wholeheartedly felt and directly implemented religious practices, both with regard to worship *mahdhah (habl min Allah)* and worship ghair *mahdhah* (*habl min al-Nas*), which includes muamalah and uqubah. The religious practice itself is almost dominated by the Syafi'iyah doctrine, considering that the spreaders of Islam who came to the archipelago on average brought the teachings and understanding of the Syafi'i school of fiqh. In addition, the spirit and values of Syafi'i fiqh understanding, according to Rachmat Djatnika, are more and very close to the personality and culture of the Indonesian people. Along with the development, the influence of Hanafy, Maliki, and Hanbali madhhabs also began to enter and be accepted by the community.

Gradually (*tadrij*), especially in the 13th century, Islamic law began to develop as positive law and became a political force. It is evident that Islam and various regulations that intersect with Islamic law have been recognised and considered and even regulated by the ruling government, especially those related to Islamic family law, such as marriage, headship, inheritance and waqf.

Along with its development, the acceptance and application of Islamic law can be seen in the early days of the Islamic kingdom. Similarly, during the Islamic sultanate period, Islamic law was officially enacted as state law (positive law). Especially during the time of the Great Sultanate, the socialisation of Islamic law was so great that he called himself "Abdul Rahman *Khalifatullah Sayidin Panatagama*".[1] Similarly, during the Islamic sultanate in Banten, namely the reign of Sultan Ageng Tirtayasa, there was almost certainly no difference between religious law and customary law

Islam was brought to the archipelago through the cold hands of the scholars (notabene as traders), carried out in a peaceful and soothing manner, so that Islam quickly gained sympathy and could be accepted as an idiology and a new religion without coercion. This is the greatest strength and basic capital as an adhesive, which makes Islam the largest religion in the archipelago and until now Muslims continue to maintain ukhuwwah within Muslims themselves,

[1] Ahmad Rofiq, *Hukum Islam Di Indonesia* (Jakarta: PT. Raja Grafindo Persada, 1995).

without being disturbed by differences in furu'iyah issues. While the great mission it carries is for rahmatan lil a'lamin, so that all religious entities get the same recognition, respect and protection except in matters of aqidah.

Based on historical records of legal development in Indonesia, after the entry of Islam into the archipelago, Islamic law became an established and institutionalised law in people's lives. This is proven in historical records, that Islamic law has been valid in the archipelago, long before the Dutch colonial came under the authority of the sultans.[2] So, in essence, Islamic law in Indonesia is the legal norms derived from Islamic sharia that grow and develop in the lives of people throughout the stretch of Indonesian history. It was born from the marriage of normative (shari'ah) with Indonesian local content as a whole. [3]

This is different from countries in the European hemisphere, which were once subdued by Islamic rule and once topped the times of glory, but the culture and religious traditions that were built were not well preserved and protected, including maintaining ukhuwah Islamiyah and serving to commemorate the great events that became milestones of Islamic history as it happened in Indonesia. Call it Spain, Russia, and other countries that once gave birth to many great scholars. Although the problem is not necessarily due to furu'iyah and other trivial issues.

The presence of Islam in the archipelago was accompanied by the teachings it brought, namely in the form of shari'ah and various results of the ijtihad of the scholars that have been packaged in fiqh. In accordance with the basic character of fiqh which is *zhan-nishbi*, making Islam more flexible and well accepted in the archipelago. In relation to the process of integrating Islamic law into Indonesian National Law, there are several theories that can be used as an analytical knife in examining the process of institutionalisation of Islamic law.

The historical fact of the formation of Indonesian national law provides a description that Islamic law is one of the important supporting elements in addition to customary law and Western law. Islamic law has contributed legal norms and values that apply in the life of Indonesian society. It cannot be denied by any argument that Islamic law has an important and strategic position in the formation and preparation of Indonesian national law. One of the efforts to incorporate Islamic law into the national legal system is through transformation.[4]

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2 Mohamad Rana, "Pengaruh Teori Receptie Dalam Perkembangan Hukum Islam Di Indonesia," *Mahkamah (Jurnal Kajian Hukum Islam)* 3, no. 1 (2018): 17–34, https://doi.org/10.24235/mahkamah.v3i1.2745.

3 Abd. Halim Barakatullah, *Hukum Islam Menjawab Tantangan Zaman Yang Terus Berkembang, Cet. 1* (Yogyakarta: Pustaka Pelajar, 2006), h.68.

4 M. Fahmi Al Amruzi, "Membumikan Hukum Islam Di Indonesia," *AL-BANJARI: Jurnal Ilmiah Ilmu-Ilmu Keislaman* 14, no. 2 (2015): 172–84.

Observing the perspective of Islamic law in the national legal system in order to carry out legal development can at least appear in three forms: First, Islamic law appears in the form of positive law that only applies to Muslims. In this case, Islamic law plays a role in filling the void of positive law. Second, Islamic law contributes to the preparation of national law as a source of value. Third, Islamic law aims to be rahmatan lil alamin. The second and third forms are more suitable because in this form Islamic law is easily applied and/or integrated. Politically, Indonesia provides great opportunities for Islamic law in developing Islamic political aspirations, including efforts to legislate Islamic law. Efforts to implement Islamic law in Indonesia are carried out by carrying out the mandate in the Compilation of Islamic Law (KHI), namely implementing and supervising its application in the community, then other regulations were also born such as the Perwakafan Law, Sharia Banking Law, Hajj Management Law, Zakat Management Law and Religious Courts Law[5].

Previous research shows that the explanation of Islamic legal institutions in the Indonesian legal system is diverse and varied. The difference between research conducted by researchers and other studies is that researchers focus on reviewing Islamic legal institutions based on historical aspects, so that it can be found that the blending of various elements of social change and community traditions can be accepted as part of the acculturation of Islamic law as long as it does not conflict with the Qur'an and al-Hadist. The research conducted by Aqil Irham[6] argues that the relationship between Islam and blending is something absolute, this can be seen in Surah al-Hujurat verse 13 which means the necessity for humans to socialise or do blending. Then research conducted by Suhardin[7], where in his research provides an overview that Islamic law revealed by Allah SWT aims to prevent chaos in society and bring benefits, directing to truth, justice and wisdom and explaining the path that must be travelled. Furthermore, Mundaki[8] argues that Islamic law contributes values that encourage development, order, peace and prosperity for the nation and state.

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5 Sofyan Mei Utama, "Kedudukan Ahli Waris Pengganti Dan Prinsip Keadilan Dalam Hukum Waris Islam," *Jurnal Wawasan Yuridika* 34, no. 1 (2016): 68–86, https://doi.org/10.25072/jwy.v34i1.109.

6 Aqil Irham, "Islam Dan Pembauran Sosial: Rekonstruksi Fenomena Multikulturalisme," *ISLAM REALITAS: Journal of Islamic & Social Studies* 1, no. 2 (2015): 155–64, https://doi.org/http://dx.doi.org/10.30983/islam_realitas.v1i2.45.

7 Suhardin, "Modernisasi Dan Reformasi Dalam Pembinaan Hukum Islam Dan Pranata Sosial Di Negara Islam (Telaah Komparatif Indonesia Dan Malasyia)," *Jurnal Al Tasyri'iyyah* 2, no. 1 (2022): 1–12.

8 Mundakir Mundakir, "Eksistensi Hukum Islam Di Tengah Dinamika Pranata Sosial Indonesia," *YUDISIA : Jurnal Pemikiran Hukum Dan Hukum Islam* 8, no. 2 (2017): 179–98, https://doi.org/http://dx.doi.org/10.21043/yudisia.v8i2.3235.

As for the opinion of Muh. Alfian[9], his research provides an explanation that Islamic law is a dynamic and creative force, this can be seen from the instructions of the Prophet Muhammad SAW to the companions in facing the sociological reality of the people at that time

As from the description of previous studies, the research conducted by researchers is a form of strengthening previous studies related to Islamic legal institutions. The strengthening can be seen from the blending of Islamic law with local traditions which can then give birth to qanun and or laws and regulations in a national legal system, where Islam encourages innovation in world affairs while still paying attention and tolerance to legal values that live in society, so that the harmonisation of Islamic legal institutions into the Indonesian legal system makes Islam a blessing for all nature (*rahmatan lin 'alamin*).

Methods

This research is a type of qualitative research with a normative juridical approach. The technique used is library research[10]. Furthermore, the data that has been collected is compiled and then concluded objectively[11]. This research is expected to provide an overview in examining the norms of Islamic law formulated by fuqaha and linking and revealing the possibility of blending into local traditions and eventually institutionalising and giving birth to legislation in a national legal system

Results and Discussion

Acculturation of Islamic Law and Local Culture

Islam requires an acculturative ability towards the locality of the society in which it is received. It must be emphasised that the meaning of acculturation here does not mean that Islam and local culture are seen as two variables that are completely parallel, but must be seen as a dynamic relationship, in the sense that there is a possibility of correction[12]. The presence of Islam in the archipelago was accompanied by the teachings it brought, namely in the form of shari'ah and various results of the ijtihad of the scholars who had been packaged in fiqh. In accordance with the basic character of fiqh which is zhan-nishbi, making Islam more flexible and well accepted in the archipelago. In

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9 Muh Alfian, "Pembaharuan Dan Progresif Dalam Eksistensi Pembinaan Hukum Islam Serta Pranata Sosial," *Jurnal Hukum Caraka Justitia* 1, no. 1 (2020): 1–20, https://doi.org/http://dx.doi.org/10.30588/jhcj.v1i1.698.

10 Moh. Nazir, "*Metode Penelitian*" (Bandung: Ghalia Indonesia, 2003), h.193.

11 Suerjono Sukanto dan Sri Mamudji, "*Penelitian Hukum Normatif Suatu Tinjauan Singkat*", Cet. 11 (Jakarta: PT. Raja Grafindo Persada, 2009), h.13.

12 Hamzah Junaid, "Kajian Kritis Akulturasi Islam Dengan Budaya Lokal," *Jurnal Diskursus Islam* 1, no. 1 (2013): 56–73, https://doi.org/https://doi.org/10.24252/jdi.v1i1.6582.

relation to the process of integrating Islamic law into Indonesian National Law, there are several theories that can be used as an analytical knife in examining the process of institutionalisation of Islamic law[13].

The presence of Islam in the archipelago is also accompanied by the teachings it brings, namely in the form of sharia and various results of the ijtihad of the scholars that have been packaged in fiqh. In accordance with the basic disposition of fiqh, namely zhan-nishbi, Islam was made more flexible and well received in the archipelago. In relation to the process of integrating Islamic law into Indonesian National Law, there are several theories that can be used as analytical tools in examining the process of institutionalising Islamic law.

For academics and the ruling government, knowing and using these theories is very important in determining legal policy, so that there is synchronisation between the *free* will and *political will of the ruler*, the upper flow and the aspirations of the lower flow, so that if the two directions provide mutual strength, it will be able to create good law.

Firstly: *Receptio in Complexu*, which is a legal theory that states that the law for Indonesians follows their religion, which is Hindu according to Hindu Law, Muslim according to Islamic Law, and Christian according to Christian Law. With this theory, it can be recognised that the applicable law for Muslims is Islamic law, although there are still shortcomings here and there. This *Receptio in Complexu* theory is very beneficial for Muslims, because wherever Muslims are domiciled, including in areas where Muslims are a minority, they can practice and implement Islamic law. This theory emerged as a recognition from a Dutch "*dedengkot*", namely Cornelis Christian van Den Berg, who then received resistance from the customary law baron, van Volenhopen through the *Receptie Theorie.*

This Reception Theory is not directly proportional to Receptio in Complexu. The theory states that Islamic law is only applicable as law if it has been recognised by customary law. Clearly, this theory places customary law above Islamic law as well as the Syncretic Theorie, which asserts that Islamic law can be accepted if customary law requires it. Hazairin refers to this reception theory as the Devil's theory, because it defies Allah, defies the Qur'an, defies the Prophet's Sunnah and defies the faith of Muslims.

Second: *Receptio a Contrario Theorie.* This theory can explain the relationship between major traditions and minor traditions. In this context, a law, including customary law, can only be accepted if it does not conflict with Islamic law. This theory places Islamic law above customary law. In aculturation theory, it is known that there is a process of blending between large elements and small elements, between large traditions, namely fiqh with local customary elements, namely small traditions, which in Islamic doctrine gave birth to the rule *al-'adah muhakkamah.* Along with the acceptance and application of Islamic law in the bases of Islamic

[13] N Nasrudin, "Kontribusi Ekonomi Syariah Dalam Pemulihan Ekonomi Indonesia Di Masa Pandemi Covid-19," *Asy-Syari'ah* 23, no. 2 (2021): 320, https://doi.org/10.15575/as.v23i2.15552.

communities, local customary law also often adapts to Islamic law, so that in resolving inheritance cases, for example, it is not uncommon for customary law and Islamic law to be used together. The emergence of several theories, such as *Receptio in Complexu theory, Receptie theory, Receptie Exit theory or Receptie a Contrario*, initiated by experts, marks a diverse picture of the implementation and application of Islamic law. Although on the other hand, there is still a struggle between Islamic elites and customary elites in order to recognise and strengthen the application of law in Indonesian Islamic society.

Islamic Social Institutions in the Legal System

Since the Islamic sultanate era, the Dutch East Indies government, the Old Order era, the New Order era, until the Reformation era, there has been a dynamic renewal of Islamic legal thought. The birth of the reform is inseparable from several considerations. Firstly: Before the birth of Law Number 1 of 1974 concerning National Marriage, Indonesian Muslims had used their religious law, namely many practising the Syafi'i school of fiqh, both before and since independence. Second: With the birth of Law Number 1 of 1974 which applies to all Indonesian citizens, including Muslims, the provisions stipulated in the Civil Code (*Burgerlijk Wetboek*), the Christian Indonesian Marriage Ordinance (*Howelijks, Ordonnantie Christen Indonesiers S. 1933 No.74*), the Mixed Marriage Regulations (Reg. 1933 No.74).), the Regulation on Mixed Marriages (*Regeling op de gemengde Huwelijken S. 1898 No. 158*), and other regulations governing marriage, including fiqh munakahat material to the extent that they have been regulated in this Law, are declared invalid. However, the article still provides an exception for fiqh munakahat material that has not been regulated therein to continue to apply. Third: Although the fiqh munakahat material in question is of the Shafi'i madhhab, there are still different opinions, especially when confronted with other madhhabs. Issuing different opinions in fatwas is still possible, but deciding cases with different opinions is very difficult and causes legal uncertainty[14].

Based on the context of the Compilation of Islamic Law, Islamic law reform is seen as a mandate of the state constitution to replace Dutch colonial legal products that are still valid and to replace some legal products that are deemed not in accordance with the demands of the times. Islamic law in the Indonesian context, especially in family law reform, includes four categories, namely: fiqh, fatwa, jurisprudence, and law. The Compilation of Islamic Law is an Indonesian-style fiqh formulation that is used as a guide and reference for Indonesian Muslims. KHI as a formulation of fiqh, requires to be interpreted in

[14] Amir Syarifuddin, "*Hukum Perkawinan Islam Di Indonesia: Antara Fiqh Munakahat Dan Undang-Undang Perkawinan*" (Jakarta: Kencana Prenada Media Group, 2014), h.21-22.

accordance with the context. This can be seen in some of the legal provisions in KHI[15].

Meanwhile, in the Indonesian context, Islamic law reform has become an issue of the most discussed modernisation movement. However, in the process it is inseparable from the various aspects that surround the idea of Islamic law reform in Indonesia. In this context, there are two factors that can influence, namely internal and external factors. The internal factor is the difference between Muslims themselves in interpreting the renewal of Islamic law, both substantively and methodologically. While external factors are the social life of the surrounding community, even including the factor of state power[16].

Juridically, the renewal of Islamic legal thought and social institutions has become part of the national legal system. From time to time the provisions can be identified as follows[17]:

Firstly: During the era of the Islamic Sultanate and the Dutch Government, Islamic legal institutions were recognised and established, such as Staatblad No. 152 of 1882 concerning Islamic Courts (Peradilan Agama) for Java and Madutra and Staatblad No. 116 of 1937 concerning Kerapatan Qadhi for Kalimantan. This institution was adopted from wilayat al-qadha which was developed during the Islamic reign, both during the time of the great companions, the Ottoman period and the Abbasid period. In addition, there is already a Preyer Compendium, which is a provision of marriage law that applies to Muslims and the kepenghuluan institution, which has an office in the Mosque Porch.

Secondly: In the early days of independence, the Ministry of Religious Affairs was formed and established, an institution that at that time dealt with religious courts and marriage registration regulations. The implementation of Islamic marriage law applicable to Indonesian Muslims after independence is inseparable from the dynamics of the ups and downs of the recognition and enforcement of Islamic law in Indonesia. The implementation of Islamic marriage law has increasingly gained a place, namely with the birth of various regulations that regulate and order Islamic marriage law in the Indonesian legal system such as Staatsblad Number 64 of 1947. The staatsblad stipulates that marriages performed based on religion or services before religious servants as well as marriages performed by commanders and by people who according to the law have actually carried out a pangreh/municipal employee function (*openbare bestuursfunctie*) are considered valid

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15 A. Intan Cahyani, "Pembaharuan Hukum Dalam Kompilasi Hukum Islam," *Al-Daulah : Jurnal Hukum Pidana Dan Ketatanegaraan* 5, no. 2 (2016): 301, https://doi.org/https://doi.org/10.24252/ad.v5i2.4850.

16 Muhammad Nur, "Pembaruan Hukum Islam Di Indonesia," *MIMIKRI: Jurnal Agama Dan Kebudayaan* 3, no. 1 (2017): 123.

17 Siska Lis Sulistiani, *Kedudukan Hukum Anak, Cetakan Kesatu* (Bandung: Refika Aditama, 2017), h.134.

Thirdly: The New Order era, which was a continuation of the Old Order era, also saw the birth of several regulations on civil matters, both through laws and other regulations. For example, Law No. 1/1974 on National Marriage, Government Regulation No. 9/1975 on the Implementation of Law No. 1/1974, which was published in Supplement to State Gazette No. 3050. The government regulation contains 10 chapters and 49 articles that regulate general provisions, marriage registration, procedures for implementing marriage, marriage certificates, divorce procedures, cancellation of marriage, waiting periods, having more than one wife (polygamy), criminal provisions and closing. In addition, Government Regulation No. 28 of 1977 concerning Perwakafan, Law No. 7 of 1989 concerning Religious Courts, as well as the Presidential Instruction of the Republic of Indonesia in 1991 concerning the Compilation of Islamic Law (KHI), which is widely referred to as Indonesian fiqh. In this era, Bank Muamalat was also born as part of the aspirations of the undercurrent at that time, especially those who did not accept the interest system in conventional banking.

Fourthly: The era of the Reform Order. This period saw the birth of Law No. 39/1999 on Zakat Management which has been amended through Law No. 23/2011, Law No. 21/2008 on Sharia Banking, Law No. 6/2006 on the amendment of Law No. 7/1989 on Religious Courts, Law No. 50/2009 on the second amendment of Law No. 7/1989 on Religious Courts, Presidential Decree No. 8/2001 on the establishment of the National Zakat Agency (BAZNAS), which is the official and only agency established by the government. BAZNAS has the task and function of collecting and distributing zakat, infaq, and sadaqah (ZIS) at the national level, Law No. 41/2004 on Waqf, and the birth of the Indonesian Waqf Board (BWI). This waqf body was formed in order to develop and advance waqf in Indonesia.

Progressive Islamic Law Innovation Marriage Field[18]

Firstly: A Muslim is not allowed to marry a non-Muslim woman. This is stated in Article 40 of the Compilation of Islamic Law which reads: "Marriage is prohibited between a man and a woman due to certain circumstances; because the woman concerned is still bound by one marriage with another man; a woman who is still in the iddah period with another man; a woman who is not Muslim. Similarly, a Muslim woman as stipulated in Article 44 KHI is prohibited from marrying a man who is not Muslim. The provision of the prohibition of Muslim men marrying non-Muslim women is based on preventive efforts (*syadz al-dzari'ah*) of the occurrence of harm, due to social changes that occur in society, thus causing hidden problems, that the madarat

[18] Siska Lis Sulistiani, h.48.

will be greater than the maslahat. In the rules of fiqh, it is explained that the damage must be stopped, *dar'ul mafasid muqaddamun ala jalbil mashalih*, rejecting damage takes precedence over bringing benefits.

Second: The obligation to carry out marriage registration in every marriage in Indonesia. The provision for registration is contained in Article 2 paragraph (2) of Law Number 1 Year 1974, which reads: "Every marriage shall be recorded in accordance with the applicable laws and regulations". The registration of marriage is not only for administrative order but also for the inner peace of the wives, because their rights are definitely protected by the existence of a valuable letter in the form of a Marriage Certificate.

Third: Marriage Agreement. Law Number 1 Year 1974 only regulates in general terms the marriage agreement. This provision is considered inadequate in accordance with the demands and developments of emancipation which have led to a pattern of marital life in equality within the limits of natural nature. Also in connection with the institutionalisation of joint property in marriage, KHI considers it necessary to further elaborate the rules of the marriage agreement. Other agreements as long as they are not contrary to Islamic law. Regarding other forms of marriage agreements can include: First, matters relating to the position of property in marriage; Second, in polygamous marriages regarding residence, turnover time and household expenses.

Fourth: Taklik talak, which is a divorce that is contingent upon a commitment made by the husband after the marriage contract. Taklik talak is included in the agreement article, which once promised cannot be revoked. This is stated in Article 46 paragraph (3) KHI which states that the taklik talak agreement is not an agreement that must be held in every marriage. However, once taklik talak has been promised, it cannot be revoked. The legal implication of taklik talak is that if the husband denies the taklik talak pledge, it can be categorised as a violation, and the violation can be used as one of the reasons by the wife to file a divorce suit against her husband to the Religious Court.

Fifth: The permissibility of marrying a pregnant woman. The regulation of pregnant marriages stipulated in Article 53 KHI is still placed in the opinion of the legal category "may". Not "must" as adhered to by life based on customary law. Basically, the definition of the permissibility of pregnant marriage regulated in KHI, more or less moves away from a compromise approach with customary law. The compromise, in terms of the reality of "ikhtilaf" in fiqh teachings, is also linked to sociological and psychological factors. From the various factors presented, a conclusion is drawn based on the principle of "istishlah", so that from the combination of the factors of ikhtilaf and 'urf, the KHI formulator believes that the "maslahat" of allowing pregnant women is greater than prohibiting them.

Sixth: Tightening Polygyny. Basically, the rules of limitation, stipulation of conditions and the necessity of intervention by the authorities stipulated in Law No. 1/1974 are reinforced by KHI. The regulation of polygyny (KHI calls it

polygamy) in the KHI is a step forward in the actualisation of Islamic law in the field of polygyny. The decision to actualise and limit the freedom of polygyny itself is based on reasons of public order. Moreover, the legal status of polygynous marriage is "permissible". The permissibility, when traced to its historical background, depended on the situation and conditions of the early days of Islam. For this reason, polygyny is tightened with several provisions, which must be based on the following reasons: (a) the wife is unable to fulfil her duties; (b) the wife is disabled or has a permanent illness that cannot be cured; (c) the wife is barren.

Seventh: Prevention of Marriage. Prevention of marriage basically takes over all the provisions set out in Chapter III of Law No. 1/1974. There is only one additional affirmation in the form of prevention on the grounds of "religious differences". So far, prevention of marriage on the grounds of religious differences has often been rejected by the Religious Courts on the grounds that Law No. 1/1974 does not mention it as a reason for prevention. The provisions of the prevention of marriage are: Firstly, the prevention of marriage aims to avoid marriages prohibited by Islam; Secondly, to achieve legal certainty and public order; Thirdly, prevention must be subject to the intervention of the authority (Religious *Court);* Fourthly, as long as there is no decision of the Religious Court, no marriage may take place.

Field of Inheritance

Institutionalisation of Joint Property

Islamic law basically does not regulate the joint property of husband and wife in marriage. Islamic jurists represented by the four madhhabs, both the Shafi'iyyah group (as the most widely followed legal understanding by Indonesian scholars) and other Islamic jurists, none of them discuss joint property in marriage as understood by customary law[19].

Based on article 35 paragraph (1) of Law Number 1 Year 1974, it is stated that the joint property is property obtained during marriage[20]. This formulation of joint property is implicitly found in article 171 sub (e) KHI. The mention of joint property is revealed in the sentence frame, that the inheritance property is inherited property plus part of the joint property after being used for the needs of the heir (muwaris-pen) during illness until death, the cost of managing the body (tajhiz), payment of debts and gifts to relatives[21].

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19 Saidun, "Pelembagaan Harta Bersama Di Indonesia Dalam Perspektif Hukum Islam," *Al-Mabsut Jurnal Studi Islam Dan Sosial* 11, no. 2 (2017): 2, https://doi.org/https://doi.org/10.56997/almabsut.v11i2.269.

20 Sudarsono, "*Hukum Perkawinan Nasional", Cetakan I* (Jakarta: Rineka Cipta, 1991), h.297.

21 Cik Hasan Bisri, "*Kompilasi Hukum Islam Dan Peradilan Agama Dalam Sistem Hukum Nasional*", ed. Logos (Bandung, 1999), 195.

Furthermore, it can be understood that the joint property is part of the inheritance property and separate from the innate property (personal property) of each. Personal property remains private property and is fully controlled by the owner (husband or wife). Joint property becomes the joint rights of husband and wife and is completely separate from personal property. The joint property can be in the form of tangible and intangible objects. Tangible property can be in the form of movable and immovable objects, including securities. Meanwhile, intangible assets can be in the form of rights and obligations.

The joint property is calculated from the date of marriage, regardless of the husband or wife who seeks, also regardless of whose name the property is registered. Likewise in distribution, without mutual consent, the husband or wife may not alienate or transfer the joint property. However, to cover debts that are used for the benefit of the family, the payment is charged to the joint property.

As for the polygynous marriage (beristeri more than one)[22] form of joint property is separate between the husband and each wife. If the marriage is broken (divorce)[23], the position of joint property is divided in half: each party gets half the share. The joint property is recognised as part of the inheritance, so that in the event of a divorce, it is separated first between joint property and inherited property (ghawan), then the joint property is divided and divided in half between husband and wife. Part for one of the deceased husband or wife became tirkah. Furthermore, each husband or wife who became heirs received a share of his muwaris as stipulated in Surah al-Nisa 'verse 12[24]. Thus, the inheritance received by the heirs include inherited property plus a share of the joint property.

Father Part Formulation

The father's share of inheritance has changed, namely by determining one third (1/3) of the father's share, if the muwaris does not leave children. The determination of 1/3 of the share is regulated in Article 177 KHI, which is solely based on the spirit of paying attention to the principle of legal certainty for the father's share. Whereas this provision is not known in any classical fiqh.

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22 Dalam Undang-Undang Nomor 1 Tahun 1974, Peraturan Pemerintah Nomor 9 Tahun 1975, Peraturan Pemerintah Nomor 10 Tahun 1983, Peraturan Pemerintah Nomor 45 Tahun 1990, Dan Inpres Nomor 1 Tahun 1991 Disebut Dengan Poligami., n.d.

23 Dalam Undang-Undang Nomor 1 Tahun 1974, Peraturan Pemerintah Nomor 9 Tahun 1975, Peraturan Pemerintah Nomor 10 Tahun 1983, Peraturan Pemerintah Nomor 45 Tahun 1990, Dan Inpres Nomor 1 Tahun 1991 Disebut Dengan Poligami.

24 Dalam Surah Al-Nisa' Ayat 12 Allah SWT Mengakhirinya Dengan *'alimun Halimun*. Kata *'alimun* Mengisyarahkan Bahwa Ketentuan Waris Itu Didasarkan Kepada Kemaha-Tahuan Allah Tentang Hikmah Dan Manfaatnya. Sedangkan Kata *Halimun* Menunjukkah Bahwa Allah Tidak Akan M, n.d.

Peace in Division

The division of inheritance can be pursued through peace by mutual agreement. The provision is contained in Article 183 KHI, that peace can be made after being agreed upon by the heirs regarding the number of parts that deviate from the provisions of article 176 KHI, and after each realises its share. In this case the heirs must first know and realise the share they should receive, for example 1/2 1/4, 1/8, 1/3 and 1/6. Or female heirs know and realise that the share they receive is half that of equal male heirs.

Ordering the Inheritance of Immature Children

In order to control the inheritance obtained by an immature child, a "guardian" is appointed, as stipulated in Article 184 KHI, which outlines that: Firstly, to ensure the preservation of the integrity of the inheritance that belongs to the minor child, a guardian is appointed; Secondly, the appointment of a guardian is based on a decision of the Religious Court; Thirdly, guardianship lasts until the Fourth, the guardian should be from the child's family as far as possible (Article 107 paragraph 4 KHI); Fifth, guardianship covers the self and property of the child (Article 107 paragraph 2 KHI); Sixth, the guardian is responsible for the property under his guardianship (Article 110 paragraph 3 KHI); Seventh, the guardian is prohibited from binding, burdening and alienating the property under his guardianship (article 110 paragraph 2 KHI); Eighth, the guardian's accountability must be proven by books that are closed once a year (article 110 paragraph 4 KHI).

Successor Heirs

Substitute heirs are heirs or descendants who take the place of heirs who have died first. This is regulated in Article 185 KHI, which is said to be a form of institutionalisation of Plaatsvervulling (replacement of place) in a modified manner. Regarding the legal reach of the successor heir, the Religious Chamber of the Supreme Court has provided guidelines based on the Supreme Court Rakernas in 2010 and 2011 Balikpapan, which was later outlined in SEMA No. 3 of 2015 that the successor heir is only limited to the degree of grandchildren[25]. In the Circular Letter, the provision is added that if the testator does not have children, but has siblings who died first, then the sons of the siblings as heirs, while the daughters of the siblings are given a share with a mandatory will. The acceptance of this AWP institution is not unanimous, but in a modified form. In this case, the share of the replacement heir must not exceed the share of the heir who is equal to the one being replaced. For example, if the AWP is alone

[25] Oyo Sunaryo Mukhlas, *Hukum Kewarisan Islam, Cetakan Kesatu* (Bandung: Gunung Djati Press, 2022), h.216.

and his father has only one sister, then the estate is divided in half between the AWP and his father's sister (his aunt).

Less than 2 Hectares of Farmland

Maintaining the integrity of the inherited land. In the event of inheritance in the form of agricultural land with an area of less than 2 hectares, then the inherited land must be maintained intact. This is regulated in Article 189 KHI as follows: First, in Article 189 paragraph (1) it is stated "If the inheritance in the form of agricultural land whose area is less than 2 hectares, then the inheritance is to be maintained in its original unity and utilised for the common benefit of the heirs concerned". Secondly, Article 189 paragraph (2) further explains "If the provision (paragraph 1) is not possible because among the heirs concerned there is a need for money, then the land can be owned by one or more heirs by paying the price to the entitled heirs in accordance with their respective shares".

Modelling Compulsory Wills

The event of child adoption results in new legal provisions, where if there is a disaster that results in the death of the adoptive parents, there will be a social change regarding the distribution of the inheritance left by the adoptive parents or the adopted child himself. The existence of a person who dies is certainly closely related to the property left behind. In Indonesia, the mandatory will is used as a basis by the Compilation of Islamic Law to provide part of the testator's estate to adopted children who are not given a will by the testator (his adoptive parents), or adoptive parents who are not given a will by the testator (his adopted children)[26].

Based on Islamic Law, the status of adopted children is different from biological children in the distribution of inheritance. The biological child is entitled to inheritance, while the adopted child is not an heir so he is not entitled to inheritance[27]. In Islam, adopted children do not attach the nasab of adoptive parents to their adopted children. So that it does not affect marriage or mahram and inheritance. Adopted children are also not recognised as the basis and cause of inheritance because the main principle of inheritance is blood relations or arham[28]. As explained by the Compilation of Islamic Law (KHI) adopted children are children in terms of maintenance for daily life, education costs and so on, the

[26] Ade Kurniawan Akbar, "Pengaturan Wasiat Wajibah Terhadap Anak Angkat Menurut Hukum Islam," *Jurnal Al Imarah: Jurnal Pemerintahan Dan Politik Islam* 4, no. 1 (2019): 5, https://doi.org/http://dx.doi.org/10.29300/imr.v4i1.2193.

[27] Mila Yuniarsih, "Wasiat Wajibah Bagi Anak Adopsiuntukmendapat Harta Waris," *Ma'mal : Jurnal Laboratorium Syariah Dan Hukum* 3, no. 1 (2022): 38, https://doi.org/https://doi.org/10.15642/mal.v3i01.119.

[28] Muhammad Lutfi Syarifuddin, "Waris Terhadap Anak Adopsi Dalam Perspektif Islam," *An-Nuha : Jurnal Kajian Islam, Pendidikan, Budaya Dan Sosial* 7, no. 1 (2020): 98.

responsibility shifts from their original parents to their adoptive parents based on court decisions[29].

Furthermore, Article 209 paragraph (2) KHI regulates the obligatory will. In this case, the obligatory will contains the meaning of "a testamentary act that legally must be considered to exist, even though the will never existed". The mandatory will regulates the will because of the humanitarian relationship between the adopted child and his adoptive father/mother, so that the child and the adoptive father/mother can mutually receive mandatory wills. Yahya Harahap called Article 209 KHI as a strategy to place the status of adopted children outside the heirs by modelling through "wasiat wajibah". The incident of Zaid bin Haritsah was very strong in the memory of the formulators of KHI, so that no one dared to include adopted children into the heir lane.

Conclusion

Referring to the rule of Al-Muhafazah 'Ala Qadim al-Shalih Wa al'akhdz bi jadid al-Ashlah, grounded Islamic law must be maintained and preserved by developing it towards values that are useful and beneficial. With a strong spirit and responsibility as well as harmonious cooperation between ulama and umara, the values of Islamic law can blend and become a binding force as part of the legal system in Indonesia. The social changes that occur in Indonesian society are another aspect of the basic principles that encourage the integration of Islamic fiqh values into the national legal system, thus forcing new innovations that are considered to provide legal certainty, justice and benefit for the community. All the aromas of the blending are reflected in various free will and political will stipulated in various regulations by the ruling government, both in the fields of marriage, inheritance, waqf and zakat.

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[29] Abd Hadi Moh. Nashiruddin Amin, "Injauan Hukum Islam Terhadap Pengangkatan Anak (Adopsi) Dan Pembagian Harta Warisannya," *Ummul Qura* 15, no. 1 (2020): 16.

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