

# The Renewal Movement of Islamic Family Law in Indonesia (Politics of Islamic Law from Old Order until Reformation)

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**Abstract** – Historically, the regulation of Islamic Family Law had been a long time presented since Islam came in Nusantara with a classic pattern that is implementation of *madzhab fiqh asy-syafi'iyah* massively. However, based on institutional politics especially after forming NKRI the renewal phase in Islamic Family Law started move from Old Order to Reformation with the various considerations. The movement of that renewal movement more unique to re-read after CLD-KHI be used as the new law of marriage, but the response was negative from the Islamic community so that appear social and politic “uproar” and at the end that planning was canceled by government. The impact of liberal consideration and fundamentalism conservative was continued until now in order to reach their positions in political and social seats, so that this problem should be “re-read better” in order to plan innovation of Islamic Family Law in Indonesia.

**Key Words:** *Renewal Movement, Islamic Family Law, Indonesia*

## 1. Background

Indonesia is a complex country with the amount of Muslim as the majority community<sup>1</sup>. The implication is Indonesia needs law regulations in order to manage their life; marriage, hajj, zakah distribution, wakaf, Islamic economy and so many. Politically, that needs in society bring a religion existence (Islamic law) in politics and law in Indonesia outside Dutch law and the tradition.

1. Central Bureau of Statistics August 2010, total population Indonesia based on 237.556.363 people; 119.507.580 male and 118.048.783 female with the growth rate, 1,4% per year, While based on religion in 2010, 85,1% Muslim 9,2% Protestant, 3,5% Catholic, 1,8% Hindu, and 0,4% Buddha. See web-in [www.bps.go.id](http://www.bps.go.id)

That law creation in family law is the presence of UU 1/74 about Marriage and the president' instruction number 1/91 about KHI based on research of the experts in Indonesia they are; academics, ulama, and Muslim bureaucrat. One of the law product that contradictory with *fiqh* is the permission of a wife to propose divorce in Religious Court. Ulama stated that a wife that request a divorce from her husband without any clear reason it categorized as a proof of transgression and included in great sin (Ibn Hibban, 1993).<sup>2</sup>

The change of *fiqh* paradigm is about the Islamic marriage law in Indonesia, it supported by the theorem:

إن النصوص تنهاهى ولكن الحوادث لا تنهاهى

Meaning: *Truly the religion reasons will be exhausted, while law events never be exhausted (Abu Zahrah, 1989)*

So that, the stagnation in thinking will be produced weak law product. Therefore, the seriousness to reformulate about *fiqh* thought in Islamic family law should be continued. There are many not responsive law products; the bias gender of marriage guardian, unregistered marriage, the child recognition of unregistered marriage and so on. The products awaken the experts in next era to criticize the UU of marriages and KHI through the spirit of evaluation and revision.

The renewal of Islamic family law in Indonesia should be progress and not stop in one time, because

2. Hadits Muhammad SAW riwayat Ibnu Hibban dan di *shahih*-kan oleh Syu'aib :

أخبرنا أحمد بن علي بن المثنى قال : حدثنا عبد الأعلى بن حماد قال : حدثنا وهيب عن أيوب عن أبي قلابة عن أبي أسماء عن ثوبان عن النبي صلى الله عليه و سلم قال : أيما امرأة سألت زوجها طلاقها من غير بأس فحرام عليها رائحة الجنة. قال شعيب الأرنؤوط : إسناده صحيح على شرط مسلم

For every wife that want to divorce to her husband without any clearly reasons so haram to fragrant surge ”

the real law is always move in presence the *mashlahat* of the people in the world and hereafter. So that, to revise law products in line with the time, place and the situation. Even though, the renewal of law not scripturalist and negate the complex contexts, especially in human right (HAM) and gender equality.<sup>3</sup> Hence, in this paper would explain the dialectics of Islamic family law renewal in Indonesia, specifically renewal movement aspect so will find the solution of responsive renewal for Muslim in Indonesia.

## 2. The Renewal Movement History

### 2.1. Old Order Era

Old order era held since 1945 after independent day until 1967. In this era, there is no science discussion and the legislation about the renewal of Islamic family law in form of regulation (UU) because of the politic busyness between Islam politics and national politics, especially about the idea of Islamic country that summaries in 2 choices; Islamic concept (Piagam Jakarta) or Pancasila. The result is Pancasila was the main chosen in rational dialectics and social evidence from participants to accommodate the plural Indonesia society and after pancasila accepted by Indonesian, so that to present the goddesses for Muslim and to accommodate the great inoperative ideas so it is formed Ministry of Religious Affairs as the big house of Muslim in Indonesia.<sup>4</sup>

Although, Muslim had Ministry Religious Affairs the terms of family law in that era still follow Dutch Colonial, where (1) for original Indonesian apply tradition. (2) for original Islamic Indonesian apply Islamic marriage law (3) for original Christian (Java, Minahasa and Ambon) apply *Huwelijks Ordonnantie Christen Indonesiaers* (HOCI) (4) for Europe and Chinese generation Indonesian apply *Burgerlijk Wetboek* (BW) dan (5) for combination marriage apply mixture marriage (Staatsblad 1898 No. 158)

atau *Regeling op de Gemengde Huwelijken*. (Wirjono Prodjodikoro, 1984)

The Dutch determination was adopted above, described that there is law renewal for Christian Indonesian that is HOCI and for Indonesian Europe and Chinese generation Indonesian apply (BW), that legalized determination give the easy and concrete solution form country to solve the problems in family law. It is contradictory with Muslim as majority religious where Islamic law very not codificated and the problem solution in family was done with *tahkim* by ulama. It means that Islamic law family was equated with tradition law that applied not writtenly in the society and ulama as the highest authority in order to solve the problems of family law.

At the end, that condition got the attention for government in 1946 by applying UU 22/1946 about marriage registration, divorce and reconciliation that applied in Java and Madura, then Emergency Government Republic Indonesia in Sumatera the regulation (UU) was also applied for all over Sumatera (Nani Soewondo, 1968). In order to implementation that UU, so that the country launched the Minister of Religion's instruction 4/1947 about pointing the employee of Marriage Registration (PPN), with the duty was to avoid children underage married, to explain the duty of a polygamy husband, to manage the reconciliation for a couple that have a problem in family, to explain ex-husband and ex-wife and their children if they are divorce, explain about "*iddah* and manage the divorce couple to reconciliation again. The determination applied until 1954 because in that era government was launched UU 32/1954 for all over Indonesia.

In fact, the journey of the renewal of family law in Indonesia not stop in that place, because in August 1950, the woman in the parliaments request urgently about re-consideration the regulation of marriage permanently. At the end, in 1950 by the Minister of Religion's instruction No. B/2/4299 dated 1/10/50 was formed the committee of investigation of regulation marriage registration, divorce and reconciliation (Asro Soisroatmodjo, 1978).

In 1952, the committed able to settle their job, produce the concept of UU that applied for all classes and religious and also the specific regulations to manage the religious itself. In 1/12/52 the committee

3. In 2013 Indonesian workers abroad (TKI) 6,5 people that administered in 142 countries. See Wiji Nurhayat, , 14/03/2013, see <http://www.finance.detik.com>

4. Politically, the establishment of Ministry Religion seen as compensation tolerance manner of vices Islam, crossed out seven words in piagam Jakarta; the deity in a duty to execute the *syari'at* for every religion and Moh Slamet Anwar stated that the mission of ministry of religion is "hold a nation" in order to religion nation. See: <http://e-dokumen.kemenag.go.id>

delivered the RUU of marriage to all central and local organizations with the in order to give the opinion about RUU until 1/2/53.

In 1954, the committee was successes to design RUU about marriage delivered by Ministry of Religious at the end September 1957 with the next renewal. But, at the first in 1958 there was no movement from the government to continue, so that the lawmakers from the woman that led by Soemari was proposed RUU marriage in 1958, one of the suggestions is monogamy asas as Indonesia marriage, this suggestion got the the reaction from the government and society.

That product got the controversy from Muslim especially traditionalist group that assumed the *syariat* regulation clearly encounter all the regulation, so that regulation of Islamic family law is not needed again. They think, the regulation from the God (*syariat*) is for all era and country. As the result, all the new materials that produced in 1953 until 1958 was not discussed again by the government and lawmaker (J. Prins, 1982). While, the suggestion from Soemari et al in October 1959 was not apply because got the reaction from Indonesian Legislative Assembly (DPR) and Islamic Party especially the idea of monogamy in a marriage.

Beside the internal factor above, the *discontinuance* spirit of Islamic family law renewal also occurred by external, that is the changing of institution system in Indonesia as the effect of Presiden *Decrit* 5/6/59 as the solutive step between Islam and Nasionalis group. So that, in the old order era all of that is end (1967), There was no Islamic law in family law codificated or legislated so it can be as the main reference for Muslim in Indonesia.

## 2.2. New Order Era

Politic law in this era going to establishment of UU 1/1974 run into long and hard journey that occurred in the Old Order Era, it started by the parlemen meeting DPR GR 1967-1971 got the proposal of RUU marriage from two department; RUU Muslim Marriage that proposed by Ministry of Religious in Mei 1967 and RUU about the main determination of marriage that proposed by Ministry of Justice in September 1968. But, because of there was a specific proposal from Ministry of Religious so come up the rejection from Katolik fraction with the total number 8:500 with the rationalizations;

*“the marriage regulation way was determined by RUU is not appropriate with Indonesia that is Pancasila, it means that there was changing of national principle. National was not based on Pancasila again but based on religion where it is suitable with the principle of Piagam Jakarta “. (H.M. Rasjadi, 1974)<sup>5</sup>*

In fact, argumentation between Muslim and Cristian continue until alteration of parlement after legislative election in 1971 and in July 1973, the government re-entering RUU about marriage to DPR, the result of election in 1971 get it back RUU that proposed in Ministry of Religious in 167 and Ministry of Justice in 1968. However, the rejection about RUU occurred in internal Islam itself because of the pasal in RUU considered contradict with Islam, Pancasila and UUD 1945. The determinations or pasals in RUU that contradictory were;

- a. Legitimation of marriage (pasal 2 ayat 1), where they assumed that legalilty of marriage fulfilled by principle (*rukun*) in a marriage; solemnization of marriage done by brides and witnessed by two bystander, and marriage registration.
- b. Marriage prohibition because of adopted children (pasal 8 c) and marriage prohibition for three times for divorce couple two times (pasal 10). This two determinations was not instruction by Allah in QS QS. an-Nisa’ ayat 22 until 24.
- c. Diferrence Religion is not obstacle of marriage (pasal 11). In Islam, different religion as the main obstacle in marriage based on QS. Al-baqarah ayat 221 and QS. Al mumtahanah ayat 10.
- d. Waiting period for a widow to married again is 306 days (pasal 12). It is contradict with the regulation of *iddah* that explained in Islam, where the waiting period of a widow is there *quru’*, after give birth and 4 months 10 days for widow that left by husband (Taufiqurrohman Syahuri, 2013).

The polemic more complex with the assumption that RUU marriage is for *receptive theory* Snouck Hurgronje with the aim to ban Islamic law in Indonesia by leaning Islamic law into tradition law (Sajuti Thalib, 1985) and West law (Neng Djubaedah, 2009) through material sub “ marriage registration” and at the

5. President’s instruction No. R.02/P.U/VII/1973, 31th July 1973 about RUU marriage.

end by bargaining the politics between Islam group represented by Partai Persatuan Pembangunan (PPP) and government represented by militer group gain the deal to ban some pasal about the regulations and considered contradictory with the Islamic principles, in 22/12/73 DPR legalized RUU as UU and signed by President No. 1 Year 1974 date January 2<sup>th</sup> 1974.

In order to get the best place in society, there was design of regulation PP 9/75, PMA3/75 changed with PMA 2/90 about how to register marriage and divorce. Regulation Ministry of Home Affairs No. 221a year 1975 about registration and divorce a Marriage. In order to give the understanding deeply for society about how to apply the regulations above, so that designed the regulations more clearly for government employees (PNS) as the main example in a society PP 10/83 about marriage and divorce and it changed in PP 45/90.

To solve the problem in family, applied UU No. 7 Year 1989 about Religion Justice. But, in the implementation there are many judges that felt difficult in taking decision because of there are many science about *fiqh* Islam. So, President's instruction 1/91 about KHI was implemented. This is the main debating about sciences in Indonesia especially family law by unification law approach that contradictory with the history of *fiqh* Indonesia *asy-Syafi'iyah madzhab*.

Abdul Gani Abdullah (1994) noted there were three notes from president' instruction about KHI, namely; (1) instruction to share KHI and also the duty of Islamic society in order to functionalized normative doctrine (2) the formulation of problem in KHI attempted to terminate double perception from Islamic law in Pasal 2 ayat 1 and 2 UU 1/74 and also UU 7/89 as the perfectly law implementation. (3) show the firm of the implementation are in government institution and society.

### 2.3. Reformation Era

This period occurred since President Soeharto stepped down in 1998 and replaced by President BJ. Habibie for 1 year 5 months (1998-1999), then Abdurrahman Wahid for 1 year 8 months (20<sup>th</sup> October 1999 s.d 23<sup>th</sup> July 2001), Megawati Soekarno Putri for 3 years 3 months (23<sup>th</sup> July 2001 until 20<sup>th</sup> October 2004) and Susilo Bambang Yudhoyono for two periods or 10 years (20<sup>th</sup> October 2004 until 19<sup>th</sup> October 2014) and

the last President Joko Widodo where the writings still completed, because it might be there was decision of MK about *judicial review* for Indonesia University student about prohibition marriage in different religion.

In this era, there were two spirits of the renewal Islamic family law; *first* the issue of deletion or revision marriage law, especially PP 10/83 year 1999-2000 second, the appearance of movement in order to revise the regulation.

The government was amending UU 7/89 by applying UU 3/2006 that ave the authority and higher status to Ministry of Religious. By applying that UU so that, Ministry of Religius added in three parts; *zakah, infaq and ekonomi syari'ah*.

Beside that, government also preparing other action that is Team Gender (PUG) as UU family law that revised UU UU 1/74 in Megawati Soekarnoputri era. This team works under supervision from Minister of Regulation, with the mean object is the content of KHI. Therefore, because of the formulation was contradictory with KHI so that the draft called as *Counter Legal Draft-Islamic Compilation Law (CLD-KHI)*, the content were 116 pasal in one book about marriage, 8 bab and 42 pasal in two book about inheritance, and 5 ba 20 pasal in three books about wakaf.

But in fact, CLD-KHI was resistance as the explained in the chapter before including in ulama and academics, so Ministry of Religious made a decree to dissolve that team work<sup>6</sup> as considered liberal and contradictory with syariat Islam. After the failure of CLD-KHI as the UU, the renewal run through advocacy by proposing law material in UU No. 1 Year 1974 in Constitutional Court.

### 3. The Means of Different Argument

It is better if difference argument be created as the renewal model (*liyatafqqahu fi ad-din*), enrich sciences of Islam in Indonesia so that it can be give the optimal functions for the universal. The main concept "Bhineka Tunggal Ika" unity in diversity and also agree in disagreement. The difference should be created as *rahmat* for all who are think, because of able to give understanding for them so that Muslim are able to unite

6. Decree Ministry of Religious No. MA/274/2004 about Counter Legal Draft KHI, date 14<sup>th</sup> October 2004 and Decree of Ministry Religious No. MA/271/2004 12<sup>th</sup> October 2004.

in diversity with concept Islamic law; *jalb al-mashalih wa dar'u al-mafasid*, presenting the goodness and encounter the damage.

Religion text that assumed as sacral and absolute in packaging and containing by conservative-fundamentalist Islam, but it is contradict with Islam liberalism where the text not to limit the freedom of thinking, so that assumed that mind is same as sacred as God's revelation and the mind has a big right in huge interpreting on the will of God, so it is as the reconciliation way was through understanding about politic law as the mediator.

The point of explanation above is between Islam and country that have relationship should always together from the first until the end, as explained by Yudian K. Wahyudi (2007) there were five couple characteristics of Islamic law; first, Islamic law tend to *Ilahi* at once *wadh'iy* (human; positive and secular); second, Islamic law tend to absolute at once relative; third, Islamic law tend to universal but locally. Fourth, Islamic law tend to eternal temporal. Fifth, Islamic law *harfiyyah ma'nawiyah*. Therefore, because of Islamic law coupled above, the model of relationship should be interwoven in order to create the development of law between Islam and country (national) with the symbiotic paradigm; reciprocal relationship where religion need a country and country need a religion in order to guide moral (Abd. Salam Arief, 2004).

Perspective moderation unite between ideality and reality, as explained above able to convince every group about the certainly of the renewal of Islamic law in Indonesia especially family law.

The way to renewal can be seen as stated by Fathurrahman Djamil (1996) namely; first, the effort of the eclectic expedient; Second, effort of (the procedural expedient. Third, effort of the expedient of administrative orders and the last effort of the expedient of reform by judicial decision).

The process built orderly above, put it first in methodology framework (*manhajiyah*) that is re-reading text, context and substantive. It means that, when someone try to talk about text, so universally and visionary as the reference while, about context the point of view used human thinking for example culture, religion, and ras that summarized as plurality. From this process it is better to do the "maturation academic

or thinking", so that it can be create substantive from the text that used in the world for all human.

The argumentation that synergized between text movement and context in order to face the law pluralism and culture through politics law way so that it can be presence substantive, that can lean through behavior and policy from Muhammad SAW when he is in the Madina that face the heterogen and plural society. Until now, that product still as interesting discussion for many researchers in the world in order to describe country, democracy, and Human Right (HAM) Islamic model was Piagam Madina. Heterogenity and plurality in the Madina involved religion, ethnic, culture and ras. All unite in one in friendliness of Islam that basedon constitution Piagam Madinah as the reference.

In the context of religion plurality, Al-Burey (1986) noted that Islam recognize the freedom in religion not only in normative but also in practical. Katimin explained that Piagam Madinah give the autonomy warranty for every group of religion, tradition, culture and also equality of human right that consists of democracy (Katimin 2004). So, as the national constitution in Piagam Madinah consist of the meaning and strategic function because of the freedom that warranty constitutionally (Rahmad Asril Pohan, 2014).

The analogy that can build through the historic reference was between Muslim and country was never be separated, it can be symbiotic paradigm because of guarding by constitution, Indonesia is the country sociologically as same as Madinah that heterogen and plural, even more plural than Madinah. So that, in connecting the communication that impeded by other concern group it can be done through the policy of country through the politics.

This is the solution in order to provide the difference of principal between liberalism and fundamentalism Islam in Indonesia so that it can be give benefit each other in order to develop law in Indonesia.

#### 4. Conclusion

The renewal movement of Islamic family law in Old Order was done by ulama in the parliament by launched UU 22/46 about regulation marriage registration, divorce and reconciliation that apply in Java, Madura and

Sumatera until present as the reference in applying UU 22/46 all over Indonesia. This renewal got the positive response from the woman in parliament in August 1950 that importunate the government to re-consider the regulation of marriage permanently, and based on Minister of Religion's instruction No. B/2/4299 date 1<sup>st</sup> October 1950 formed supervision of the regulation marriage registration, divorce and reconciliation

Debatable of law materials continuing until Presiden's instruction date 5<sup>th</sup> Juli 1959 and all the process was stop automatically.

The renewal movement of Islamic family law in New Order Era was done by executive started by parliament meeting DPR-GR 1967-1971 that got proposal RUU about Muslim Marriage that proposed in Minister of Religion in Mei 1967 and RUU about the main terms of marriage that proposed by Ministry of Justice in September 1968. In the context of RUU proposal from Ministry of Religion got the rejection from Catholic and debat argumentation between Islam and Christian in the parlement until the alteration of the parlemen member after legislative election in 1971 and in July 1973 The government re-entered again RUU about Marriage to DPR as the result election in 1971 withdraw RUU before that proposed by Ministry of Religion in 1967 and Ministry of Justice in 1968.

The renewal movement in family law assumed will be well organize, in fact there was rejection from Muslim itself in the parliament because of not appropriate with *fiqh*. As the result, by bargaining the politics of Islam that represented by PPP and government that represented by Military the result was there were pasal that banned about the regulation as the triggers of debating and it can be seen as contradictory with the principles of Islam, and in 22th December 1973 DPR approved RUU as UU

The first marriage in Indonesia signed by President in No. 1 year 1974 date 2<sup>th</sup> Januari 1974. In the Era-90 the spirit revision of family law came in government. So that, come up KHI as the law materials that used in Religious Court in order to solve the problem in Islamic family law in Indonesia.

In the reformation era, the renewal movement in family law runs into two paths, first MK *judicial review* and Team Gender (PUG) as UU family law that revised UU 1/74 Ministry of Religion was created Counter Legal Draft - Islamic Compelation Law (CLD-KHI), the

content were 116 pasal in one book about marriage, 8 bab and 42 pasal in two book about inheritance, and 5 ba 20 pasal in three books about wakaf.

But, the PUG movement got the rejection because assumed as liberal, so that Minister of Religion made a decree to dissolve the team work.

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