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Understanding of Legal Reform on Sociology of Islamic Law: Its Relevance to Islamic Family Law in Indonesia

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Abstract: This article analyses the understanding of legal modernization in the sociology of Islamic law in Muslim countries regarding Islamic family law in Indonesia. The theory of legal modernization arises from the long history of Islamic legal theory since the Dutch era related to the enactment of Islamic law, both in terms of the struggle between customary law, Islamic law, and state law. The work for the emergence of legal theories such as Receptie theory becomes a filter for Islamic law in its application to Muslim communities in Indonesia. The results of this study indicate that the modernization of law in the form of KHI applies to the Indonesian Muslim community and requires the nation to be more mature in responding to modernity. However, there is an intersection between modernization and legal secularisation in the Islamic world, such as in Turkey, Egypt, Sudan, and Syria. Legal modernization from fiqh towards positivisation has given birth to formulations in Islamic family law in the form of sociological dynamics in contemporary Indonesian Islamic society.

Keywords: Legal Modernization, Sociology of Law, Islamic Law, Islamic Family Law

Abstrak: Artikel ini mengabstraksi pemahaman modernisasi hukum dalam sosiologi hukum Islam di negara Muslim kaitannya dengan hukum keluarga Islam di Indonesia. Teori modernisasi hukum ini muncul dari histori teori hukum Islam sejak zaman Belanda yang begitu panjang terkait pemberlakuan hukum Islam, baik dari segi sejarah pergulatan antara hukum Adat, hukum Islam, dan hukum Negara. Pergulatan muculnya terori hukum seperti *teori Receptie* menjadi filter bagi hukum Islam dalam berlakunya bagi masyarakat Muslim di Indonesia. Hasil penelitian ini menunjukkan bahwa modernisasi hukum dalam bentuk KHI yang berlaku bagi masyarakat Islam Indonesia, yang menuntut bangsa untuk semakin dewasa dalam menyikapi modernitas, meskipun terdapat persinggungan antara modernisasi dan sekularisasi hukum di dunia Islam, seperti di Turki, Mesir, Sudan, dan Syria. Moderasi hukum dari fikih menuju positivitasi telah melahirkan rumusan dalam hukum keluarga Islam dalam bentuk dinamika sosiologis di masyarakat Islam Indonesia modern.

Kata Kunci: Modernisasi Hukum, Sosiologi Hukum, Hukum Islam, Hukum Keluarga Islam

Introduction

The emergence of legal modernization theory departs from the history of Islamic legal theory that has emerged since the Dutch era regarding the enactment of Islamic law, both in terms of the history of the struggle between customary law, Islamic law, and state law.[1] Snouck Hurgronje, the proponent of the *Receptio in Complexu* theory, and also Van Den Berg stated that Islamic law was acceptable to the Indonesian Muslim community;[2] this *Receptie* theory limited the Islamic law applicable to the Indonesian Muslim Muslim community by their respective customs.[3]

The sociology of law is close to the community, the emergence of the principle of modernization,[4] where the primitive society used to develop according to the flow of the times. Indonesian Islamic civilization in its history, before various traditions entered the archipelago, people living on the islands only believed in laws derived from the values of "chthonic" law or natural law.[5]

From here, researchers have arisen about the history of Islamic legal theory in Indonesia,[6] analyzing it from various approaches in line with the development of science. What is most interesting in this article about the product of legal sociology developed by predecessors can be seen in the works of sociologists and jurists in the century before the development of legal sociology. In sociology, the theory of modernization is a framework for reading social reality in relation to economics, politics, and law in society.[7] The relationship between law and society is sociologically explored in the works of Weber and Durkheim. The results on law by classical sociologists were the pioneers of the development of legal sociology today, such as Petrazycki Leon, Eugen Ehrlich, Georges Gurvitch, and Hans Kelsen; they are all inventors of legal theories.[8]

Weber's view can be described as an external approach to law by studying the empirical characteristics of law. Furthermore, Durkheim argued that the sociology of law should be developed alongside and in close contact with the sociology of morals, studying the development of the value system reflected in law.[9] In contrast, Ehrlich developed a sociological approach to the study of law by focusing his analysis on social life and social networks by distinguishing between "positive law", which consists of norms that require state officials from law enforcement. The "living law" is composed of the rules of behaviour that people actually obey and dominate social life. This pillar of legal sociology thinking has relevance to issues of modernization of Indonesian Islamic law that cannot be separated from its society.[10]

The emergence of legal modernization also has to do with various legal theories that enter the realm of Islamic law.[11] Many legal theories are also absorbed by Islamic law, such as the theory of

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[1] Kien Thi Pham, Bui Xuan Dung, and Thanh Quang Ngo, "The Impact of Globalization and Modernization of Laws and Theories on the Modernization of Philosophy in Vietnam: Mediating Role of Modern Societies," *Heliyon* 8, no. 9 (2022).

[2] Sirman Dahwal and Dimas Dwi Arso, "Studi Tentang Teori-Teori Hukum Islam Yang Berhubungan Dan Mendukung Keberadaan Peradilan Agama Di Indonesia," *Al Imarah: Jurnal Pemerintahan Dan Politik Islam* 8, no. 1 (2023): 117–36.

[3] J N D Anderson, *Hukum Islam Di Dunia Modern* (Surabaya: Amarpress, 1990), 5.

[4] Bernard Adeney-Risakotta, "Traditional, Islamic and National Law in the Experience of Indonesian Muslim Women," in *Narratives of Muslim Womanhood and Women's Agency* (Routledge, 2018), 82–97.

[5] Ratno Lukito, *Tradisi Hukum Indonesia*, vol. 1 (the institute for migrant rights press, 2012), 3.

[6] Jefik Zulfikar Hafizd, "Sejarah Hukum Islam Di Indonesia: Dari Masa Kerajaan Islam Sampai Indonesia Modern," *Jurnal Tamaddun: Jurnal Sejarah Dan Kebudayaan Islam* 9, no. 1 (2021).

[7] Muhsin Aseri, "Politik Hukum Islam Di Indonesia," *Al Qalam: Jurnal Ilmiah Keagamaan Dan Kemasyarakatan*, 2018.

[8] B Arief Sidharta, *Teori Murni Tentang Hukum, Filsafat Hukum Mazhab Dan Refleksinya* (Bandung: Remaja Rosda Karya, 1994), 40.

[9] Jan-Erik Lane, "Max Weber's Theory of Civilizations Today: The Rule of Law Instead of Capitalism," *Arts and Humanities Open Access Journal* 1, no. 14–9 (2017).

[10] Sidharta, 43.

[11] Eribo Nosakhare Monday, "The Concept of Sovereignty in Political Philosophy," *Zamfara Journal of Politics and Development* 2, no. 2 (2021): 8.

Austin. Austin's legal science material is positive law and briefly as the law or the law set by politicians in power against the people they control. According to other figures such as Hans Kelsen, it is called a pure theory of law or can also be referred to as an imperative school.[12] Among the various schools of law that have developed in the modern world is the legal school of sociology in legal studies. According to jurists of this school, less attention is paid to legal history as a mutual influence between law and society. According to Anderson, it is a marvellous description of Islamic law that it has evolved throughout its history, although it has not radically influenced its legal theories. According to this theory, it is not society that controls the law but rather the direction that presents norms and guidelines based on God's revelation (divine law) and Muslims are bound to implement them.[13]

The modern era is a response to Western progress,[14] so the Islamic world began to rise from various aspects, especially the reformation of thought so that Islamic thought has a dialectic between *at-turāts wa at-tajdīd* (traditions and modernization), continuity and change, and *al-ijtihād wa at-taqlīd* which has become a central issue among modern-day Muslim scholars.[15]

Law and society in modern sociological legal theory

This paper applies the modernization theory in the sociology of law with an empirical study approach as a social reality that appears in society. The study of law in society is known as the sociology of law, which empirically examines the theory of interaction between law and legal institutions about social change.[16] In addition to the term sociology of law, there is another term for the type of legal sociology research, which is known as sociological jurisprudence, which researches the effectiveness of the law, the social impact of the law, and research on legal history, using the concept of law as an institution and doctrine (rules) formulated in the law.[17] Legal modernization in the modern Islamic world is found in Sami Zubaida in Law and Power in the Islamic Word. Further, the work of J. N. D. Anderson, Law Reform in the Muslim Word, supports this discussion because Sami Zubaidah himself refers to Anderson's work. According to Anderson, Muslims are also confronted with the problems and prospects of modernization between Sharia and secularism.[18] Historically, they have become an exclamatory issue, which has impacted on the legal systems of states in the Islamic world.

Legal modernization, according to Sami Zubaidah, is to make the law into standard codified state law, taking what is left of legal authority away from religious power and ending the pluralism of sharia law from historical traditions.[19] Legal modernization in Islamic countries has always generated debate among modernist-progressive and traditionalist-conservative circles; this modernization cannot be separated from the social movements surrounding the state.[20] Turkey and Egypt have become the

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[12] Anderson, 6.

[13] Anderson, 7.

[14] Gutomo Bayu Aji and Mulawarman Hannase, "Islam, Politik, Dan Demokrasi Di Asia Tenggara: Sebuah Pengamatan Awal Tentang Konteks Dan Praktik Moderasi Agama," *Jurnal Masyarakat Dan Budaya* 24, no. 3 (2022).

[15] Ahmad Minhaji, "Sejarah Sosial Pemikiran Hukum Islam: Sebuah Pengantar Dalam Ontologi Hukum Islam" (Yogyakarta: PPS UIN Suka, 2010), 30.

[16] Andrew R Burke et al., "Impact of Adolescent Social Experiences on Behavior and Neural Circuits Implicated in Mental Illnesses," *Neuroscience & Biobehavioral Reviews* 76 (2017): 280–300.

[17] Kristen Stilt, Salma Waheedi, and Swathi Gandhavadi Griffin, "The Ambitions of Muslim Family Law Reform," *Harv. Women's LJ* 41 (2018): 301.

[18] Norman Anderson, "Law Reform in the Muslim World," 1976, 172.

[19] Sami Zubaida, *Law and Power in the Islamic World* (Tauris, 2003), 121.

[20] Ahmad Zayyadi and Muhammad Fauzinudin Faiz, "Masa Reformasi: Etatisasi Hukum," *Indonesian Journal of Islamic Law* 2, no. 2 (2020): 20–34.

mecca for reform and social activities in progressive Muslim countries, including Indonesia. Legal modernization coincided with legal modernization in Turkey, which had a significant influence on the modernization of Islamic law in the Muslim world, including Indonesia.[21]

Family law has a strategic position in the development of legal modernization in the Islamic world. According to Tahir Mahmood, there are three categories of countries based on their family laws.[22] *First*, countries that apply traditional Islamic family law countries that fall into this category are Saudi Arabia, Yemen, Kuwait, Afghanistan, Mali, Mauritania, Nigeria, Sinegal, and Somalia. *Second*, countries with secular family law include Turkey, Albania, Tanzania, the Muslim minority of the Philippines and Russia. *Third*, countries that implement updated family law. This third category is a country that conducts substantive renewal and or modernization of regulations, in this case, the Indonesian state.[23] Legal reform or legal modernization was first undertaken in Turkey, followed by Lebanon and Egypt. Brunei, Malaysia and Indonesia also fall into this category.[24]

Turkey has played an essential role in the history of law, especially in West Asia.[25] Turkish civil law was initially based on the Hanafi school but later also accommodated other schools, like in *Majallāt al-ahkām al-Ādliyah*, which had been in preparation since 1876 but which contained no provisions on family law. Legal rules relating to marriage and divorce were initiated in 1915.[26] The material change in that year was the authority (right) to demand a divorce, which, according to the Hanafi school, was only the husband's authority. Even the wives who felt bound by the Hanafi school were the first to urge the Turkish government to reform the law. As we know, the sociology of law discusses the mutual influence between changes in law and society and vice versa; changes in society can cause changes in direction.[27] As we know, that the sociology of law discusses the mutual influence between changes in law and society and vice versa; changes in society can cause changes in direction. Legal change is synonymous with legal reform. However, the sociology of Islamic law is essentially the same as the sociology of law, but the object of study is the reciprocal relationship between Islamic law and Muslim society. In this case, Turkey and Egypt can be seen in the changes in the orientation of the Muslim community in applying Islamic law, changes in Islamic law itself also because of the Muslim community, and changes in Muslim society caused by the enactment of new provisions in Islamic law.[28]

According to Coulson, whose commentary on The Ottoman Law of Family Right is an essential landmark in the modernization efforts of Islamic family law, the Ottoman Family Law is a vital tool for modernizing Islamic family law.[29] Tahir Mahmood wrote, that Civil Law based on the Hanafi school was prepared in 1876 in Turkey; Turkish civil law was also based on the Hanafi school, but

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[21] Lilis Hidayati Yuli Astutik and Muhammad Ngizzul Muttaqin, "Positifikasi Hukum Keluarga Di Dunia Muslim Melalui Pembaharuan Hukum Keluarga: Hukum Keluarga Islam," *Islamika: Jurnal Ilmu-Ilmu Keislaman* 20, no. 01 (2020): 55–65.

[22] Fathonah K Daud and Aden Rosadi, "Dinamika Hukum Keluarga Islam Dan Isu Gender Di Iran: Antara Pemikiran Elit Sekuler Dan Ulama Islam," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, 2021, 205–2020.

[23] Syed Tahir Mahmood, "Family Law Reform in the Muslim World," *(No Title)*, 1972,3.

[24] Andi Ariani Hidayat and Qadriani Arifuddin, "Implementasi Hukum Islam Dalam Masyarakat Indonesia (Pendekatan Sosiologi Hukum)," *Bustanul Fuqaha: Jurnal Bidang Hukum Islam* 1, no. 4 (2020): 725–39.

[25] Ahmad Zulfikar, "Kepemimpinan Dan Kontribusi Sulaiman Alqanuni Di Turki Utsmani (Suatu Tinjauan Sejarah)," *Rihlah: Jurnal Sejarah Dan Kebudayaan* 6, no. 1 (2018): 87–106.

[26] Sri Astuti A Samad, "Kajian Hukum Keluarga Islam Dalam Perspektif Sosiologis Di Indonesia," *El-Usrah: Jurnal Hukum Keluarga* 4, no. 1 (2021): 138–52.

[27] Anderson, *Hukum Islam Di Dunia Modern*, 57.

[28] Maula, 13.

[29] Ahmad Hidayat Buang, "Reformasi Undang-Undang Keluarga Islam," *Jurnal Syariah* 5, no. 1 (1997): 35–50.

later also accommodated other schools, *Majallāt al-Ahkām al-'Adliyah* which has been prepared since the year 1876.[30]

Speaking of modern legal modernization, Joseph Schach, in the Law, Unity and Variety in Muslim Civilization,[31] also observes the reform of law in the contemporary Islamic world. He said that the method used by the modernists who legislated was to indulge in free eclecticism and free reasoning, which they demanded far more than was used in the period of Islamic legal development. On the one hand, modernist lawmakers tend to reject the religious character of the sacred chapters of the law. On the other hand, they tend to resort to arbitrary and forced interpretations of the Qur'an and hadith wherever it suits their needs. In material terms, they were bold reformers who wanted to modernize.[32] Formally, they tried to avoid any semblance of sacred or religious law. Their theories and arguments came from the West, but they did not want to reject holy law as the Turks did overtly.[33]

Modernist movements in the Islamic world, such as those spearheaded by Jamaluddin al-Afghani and Muhammad Abduh in Egypt, were also influenced by Western secularism, science, economics, law and civilization.[34] The modernization of family law in Turkey is a milestone in the history of family law modernization in the Islamic world and has had a significant influence on the development of family law in other countries. With the presence of Turks in Europe, such as France, England, the Netherlands, and Germany, the study of Islamic Law began to be introduced and even Turkish contacts with Muslim countries in Asia and Africa.[35]

In addition to Turkey, the Islamic countries colonized by the West, especially Europe, the life of Westerners entering the Arab world influenced the way of life and cultural traditions of the Muslim people. One example is that women began to be given freedom in community activities such as working, studying, etc. This argument shows the integration and negotiation between law in the book and law in action between law and society. Although until now, including Indonesia, it still needs to be ready to accept the issues of legal modernization that have emerged in the Islamic world because some people think there is political-legal intervention from the West.

Modernization of Islamic Family Law and Its Relevance for Indonesian law

In a study of the modernization of Islamic law in the Islamic world, J.N.D. Anderson and John L. Esposito said that the method generally developed in legal modernization to deal with legal issues still relies on an ad-hoc and disaggregated approach by using the principle of *takhayyur* by creating the technique of jurisprudence which in specific situations is allowed to leave the legal madhhab to follow another *madhhab* and also *talfīq*, which combines various *madhhabs* to form a single rule.[36]

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[30] Khoiruddin Nasution, *Hukum Perdata (Keluarga) Islam Indonesia Dan Perbandingan Hukum Perkawinan Di Dunia Muslim: Studi Sejarah, Metode Pembaruan, Dan Materi & Status Perempuan Dalam Hukum Perkawinan/Keluarga Islam* (Fakultas Syari'ah, Universitas Islam Negeri, 2009), 166.

[31] Stewart Macaulay and William C Whitford, "The Development of Contracts: Law in Action," *Temp. L. Rev.* 87 (2014): 793.

[32] Oly Viana Agustine, "Implementasi Noken Sebagai Hukum Tidak Tertulis Dalam Sistem Hukum Nasional," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 8, no. 1 (2019): 69–84.

[33] Kenneth Cragg, "Unity and Variety in Muslim Civilization (Book Review)," *Middle East Journal* 10, no. 3 (1956): 313.

[34] Hamilton Alexander Rosskeen Gibb, *Modern Trends in Islam* (University of Chicago Press, 2022), 34.

[35] Saba Habachy dalam Kata Pengantar Buku J. N. D. Anderson, *Hukum Islam di Dunia Modern,* Alih Bahasa: Machnoun Husen, (Surabaya: Amar Press, 1991), hlm. xxiv.

[36] Anderson, "Law Reform in the Muslim World," 94.

The legal system that prevailed in the Islamic world was divided into three systems. *First*, a system that still enforces sharia (divine law) as the fundamental law and seeks to apply it in all aspects of human relations. Usually, this system has a tendency for Islamic law to be understood in a textual-literal manner. For example, in Islamic family law, men's authority over divorce, polygamy, and double shares in inheritance is different from that of women. The countries that still maintain the above family law system are Saudi Arabia and Northern Nigeria, including Indonesia, as explained in the Compilation of Islamic Law in Indonesia, which refers to the Middle East. *Second*, a system that abandons sharia and replaces it with secular law, such as Turkey. In 1926, Swiss law was enacted as a substitute for Islamic law. This law is very different from Islamic law, such as the application of monogamous marriage as a substitute for polygamy and the enactment of laws by human rights, CEDAW, and international law.[37] *Third*, a system that tries to take a moderate between two extreme legal systems, namely implementing Islamic law in total and a system that completely rejects Islamic law, such as Egypt, Sudan, and Jordan. The three methods of Islamic law in the Muslim world above indicate that differences in systems and forms of legal modernization are not only caused by the political system adopted but also by historical, sociological and cultural differences in each country. In Indonesia, a debate between religious law and legal secularism is still visible in the debates and views of figures and politicians.

Historically, the emergence of Islamic family law in Indonesia through Law No. 14 Year 1970 became the basic rule for the Religious Courts. Furthermore, its position, authority or jurisdiction and organization have been regulated and elaborated in Law No. 7 of 1989 jo Law No. 3 of 2006, which has the power to hear certain cases such as marriage, inheritance, wills, grants, waqf, infaq, sadaqah, zakat and sharia economic disputes. However, the existence of the Religious Courts is not accompanied by a definite and unified positive legal tool or means as a reference. However, some of the material law under the jurisdiction of the Religious Courts has been codified by Law No. 1 of 1974 and Government Regulation No. 9 of 1975, containing rules of material law in the field of marriage law.

In legal sociology, sometimes judges, in making decisions, must refer to codivide law. However, on the other hand, sometimes judges still use the basis of uncodified law, which comes from *fiqh* books. Therefore, in the past, there were often Religious Court decisions that sometimes highlighted the book of Mazhab Fiqh; one decision differed from another on the same issue, or a different judge had a different sentence.[38] This phrase is a reflection of classical fiqh, which tends to be diverse and even controversial from one opinion to another. Therefore, the Compilation of Islamic Law is an effort to modernize the classical *fiqh* towards written law and legal certainty that is more rational, professional, evolutive, and adaptive according to the living conditions of Indonesian Islamic society so that there is a balance between law and community for those who apply to modern Indonesian Islamic society carried out by its pioneers in Indonesia. In the future, there is a need for the concept of a current legal state with a rational-legal idea towards the politicization of law in Indonesia.[39] Recognition of KHI formally in the form of Presidential Instruction No. 1 of 1991 as a support in the framework of the institutionalization of Islamic law in Indonesia.[40] The emergence of the Religious

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[37] Amir Mu'alim, *Konfigurasi Pemikiran Hukum Islam* (UII Press, 2001), 7.
[38] Cik Hasan Bisri, *Kompilasi Hukum Islam Dan Peradilan Agama Dalam Sistem Hukum Nasional* (Jakarta: logos, 1999), 90.
[39] Achmad Gunaryo and Mu'ammar Ramadhan, "Pergumulan Politik & Hukum Islam: Reposisi Peradilan Agama Dari Peradilan" Pupuk Bawang" Menuju Peradilan Yang Sesungguhnya,", 2006, 227.
[40] Gunaryo and Ramadhan.

Courts, the Marriage Law and KHI are part of the development of modernization of Islamic law in Indonesia. According to Amin Summa in his book Islamic Family Law in the Islamic world, all Islamic countries and Muslim-populated countries, both majority and minority, have enacted Islamic family law in the Muslim family environment.[41]

In Muslim minority countries, Islamic family law is usually uncodified law as in majority countries, for example in Burma, Philippines and Thailand. Compare this with Muslim countries such as the codified law in Turkey known as Fifty Years of Personal Law Reform 1915-1965 and in Sudan, known as Reform and Protection of Personal Law 1916-1986; in Lebanon, known as the Law on Family Rights 19170-1962; in Pakistan with Reform and Protection of Personal Law 1947-1987; in Syria with The Code of Personal Status 1953 as Amandemen did in 1975, and Indonesia, known as The Law on Marriage 1974 Compilation of Islamic Law (KHI).[42]

From here comes the assessment that codivide law is a sign and characteristic of legal modernization that regulates and serves modern life. Modern legal reform began in the 19th Century, but Islamic family law in most Islamic countries remained unchanged. In the 19th Century, the modernization of family law can be seen in the attempt to replace Islamic law with Western law. However, also by changes in Islamic law itself based on a reinterpretation of the Islamic legal tradition by its reasoning and practice.[43] The purpose of codification of law is none other than to maintain the authenticity of the law in the context of the country and make changes or moderation as in European countries. Legal codification usually truncates the meaning of sharia in the context of the text but draws out its substance and legal character. In this sense, it can be said that the fiqh and historical forms of sharia also deal with mundane, profane matters.[44]

In the Islamic world, such as Egypt, the impetus for legal modernization efforts by legislating family law since the beginning of the 20th Century was like the occurrence of social reforms to provide security and some freedom to women and children under modern conditions, and the subsumption of family affairs under the legislative power and control of the modern state and its administration. The case of Egypt is very instructive compared to other Arab countries, ranging from politics to social reform, but where conservative religion has power and influence, especially in recent decades in the modern era, including Indonesia, which was initially also a traditional society.[45]

According to Munir Fu'ady, there are two typologies of society: traditional and modern. The theory of legal modernization and its development in the community requires the interaction between law and the development of society; Roscoe Pound stated that law functions as a tool of social engineering.[46] According to Marc Galenter, as quoted by Munir Fu'ady, the characteristics of legal modernization are that there are uniform rules, both in substance and implementation. The law is transactional, which means that rights and obligations arise from agreements without being influenced by age, class, religion, gender, and race. Its main characteristic is that it is universal, which means that the law can be accepted by society.[47]

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[41] Muhammad Amin Suma, *Hukum Keluarga Islam Di Dunia Islam* (RajaGrafindo Persada, 2004), 165.
[42] Suma, 167.
[43] Suma, 171.
[44] Suma, 134.
[45] Zubaida, *Law and Power in the Islamic World*, 151.
[46] Munir Fuady, "Teori-Teori Dalam Sosiologi Hukum," 2013, 109.
[47] Otje Salman Salman and Anthon Freddy Susanto, *Beberapa Aspek Sosiologi Hukum* (Alumni, 2008), 110.

Several typologies of modern societies have given birth to theories of legal modernization, oriented towards developed and mature legal orders, which have in common with the legal order of the secular world, in which the administration of law is based on rational thinking and has legal certainty.[48] The problem of the orientation of ancient law to legal modernization, as Fu'ady said, has the direction of the evolution of old law into legal modernization with several characteristics such as laws that are more rational, protect fundamental human rights, oriented to technology to industrialization, more universalistic, predictive, legalistic, effective, adaptive and professional which are more measurable, clear and specific.[49]

According to Rahardjo, codivide law marks the hallmark of legal modernization that must regulate and serve modern life.[50] n the development of legal modernization theory it is also very identical to the theory of sociological jurisprudence built by Roscoe Pound, that law functions as a tool of social engineering. This means that the law is static and conservative. At the same time, society tends to be dynamic, so there is a tendency for a tug-of-war between the law and the development of society as a system.[51] Therefore, the school of sociological jurisprudence has also had a significant influence on the development of Islamic family law, including in Indonesia, which has a majority Muslim population.

In addition to the theory of legal modernization, the school of sociological jurisprudence also contributes, especially to the development of law in Indonesia. Modern legal thought that is considered to be able to meet current demands is now growing in the United States, which emphasises the function and role of law in society. As built by Roscoe Pound, who said the law is a tool of social engineering.[52] This means that a good law is a law that is by the law that lives in society. Islamic law is also a living law in the community, which means that the majority of the community uses it and is in line with state regulations.[53]

Discussing legal issues can be quickly obeyed and run if it is by the community's aspirations. The law can be effective where it becomes a big part of the aspirations of the community and is responded to positively by the state, including what Robert Seidman, Ann Seidman and Nalin Abeysekere offer on ROCCIPI, that the law in society must also have an aspect rule as a body of law must influence the behavior of society. In the implementation of ROCCIPI about the modernization of Islamic family law in Indonesia, it must also be an opportunity in the community.[54] Furthermore, the effectiveness of the law can run if it is balanced with capacity, which means that the perpetrators of legal roles in society can carry out the rules that have been determined, and there is no inequality. As well as the Counter Legal Draft in KHI must be able to reach all of these elements of society and can be accepted objectively and rationally.

Furthermore, the law must have excellent and effective communication between the legislators and the community. This is the balance between law and society, as offered by Roscoe Pound and

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[48] Emiritus John Gilissen and Emiritus Frits Gorle, "Sejarah Hukum Suatu Pengantar, Terj," *Fredi Tengker. Ke-4. Jakarta: Refika Aditama*, 2009, 66.

[49] Fuady, "Teori-Teori Dalam Sosiologi Hukum,"115.

[50] Satjipto Rahardjo, *Ilmu Hukum* (Citra Aditya Bakti, 2000), 72.

[51] Fuady, "Teori-Teori Dalam Sosiologi Hukum," 37.

[52] Erwin Arifin, "Konsep Mazhab Sociological Jurisprudence Dalam Hubungannya Dengan Perkembangan Hukum Di Indonesia," *Dalam Buku Filsafat Hukum Mazhab Dan Refleksinya. Bandung: Remaja Karya*, 1989, 82.

[53] Sobhi Mahmassani and Filsafat Hukum dalam Islam, "Alih Bahasa Ahmad Sudjono, Cet. Ke-2, Bandung: PT" (Al-Maarif, 1981), 160.

[54] Seidman, Seidman, and Abeyeskere, 120.

Enhric on sociological jurisprudence. The practical law is by the conditions of society so that there is a balanced communication between lawmakers and the community.[55] Furthermore, in theory, ROCCIPI, a process is a form of hypothesis on the extent to which legal products can be accepted in society. The negotiation process in realising an effective law that is accepted by community is a long process. Due diligence in the community is developed based on experience, and then enacted. Therefore, the law needs an ideology as the spirit of the legal trunk to convince and empower people.

In addition, according to Soerjono Soekanto, legal effectiveness is determined by the legal factors themselves, law enforcement factors, facilities and facilities, community factors, and cultural factors. From here, the actual development of legal modernization or towards legal modernization can be seen and analyzed through the factors above. In Indonesia, the modernization of Islamic law was fully implemented and reflects the influence of legal modernization in the Muslim world. However, the dominant positive law in Indonesia is none other than the codification of Shafi'i fiqh with an Indonesian personality.

Historical-Sociological Approach Towards Islamic Codivide Law in Indonesia

Islamic law entered Indonesian society with the entry of Islam into Indonesia around the 11th to 13th centuries AD.[56] Muslim merchants from Gujarat, Arabia, and Bengal brought them. At that time, they also introduced Islamic law, even limited to the rule of social, trade law, and marriage law. Meanwhile, the VOC only introduced Roman law in the early XVII century through the colonial Dutch East Indies. Before Islamic law entered Indonesia, the Indonesian people adhered to customary law, which had various systems and was pluralistic.[57] In its development, Islamic law, during the Dutch colonial period until independence, left traces of the history of Islamic legal theory in the archipelago. The theory of Islamic law known then was the theory of *receptio in complexu* pioneered by Lodewijk van den Berg (1927), meaning that each resident applies their respective religious laws. For the Indonesian Muslim community, the respective teachings of the law still apply, including other religions such as Hinduism, Buddhism, Catholicism, and Christianity.[58]

Van den Berg's theory was formalized through Dutch colonial government regulation Number 152 of 1882,[59] establishing Religious Courts in Java and Madura. For Muslims, the enactment of Islamic law, especially for Religious Courts, still refers to fiqh books originating from the Arab Middle East. Then, through Circular Letter of the Bureau of Religious Courts No. 8/1/ 735 dated 18 February 1958 as the implementation of PP No. 45 of 1957 concerning establishing Religious Courts or Sharia Courts outside Java-Madura. In the application of the Religious Courts, judges are encouraged to use the 13 yellow books as guidelines in decision-making.[60] Legal codification in KHI, which comes from

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[55] Seidman, Seidman, and Abeyeskere.

[56] Hafizd, "Sejarah Hukum Islam Di Indonesia: Dari Masa Kerajaan Islam Sampai Indonesia Modern."

[57] Ahmad Azhar Basyir, "Hukum Islam Di Indonesia Dari Masa Ke Masa," *Unisia*, no. 16 (1992): 9–13.

[58] Suparman H Usman and H Busthanul Arifin, *Hukum Islam: Asas-Asas Dan Pengantar Studi Hukum Islam Dalam Tata Hukum Indonesia* (Gaya Media Pertama, 2001), 111.

[59] Abdul Ghofur Anshori and Sobirin Malian, "Filsafat Hukum Kewarisan Islam: Konsep Kewarisan Bilateral Hazairin,", 2005, xii.

[60] (1) *Al-Bājūrī*, (2) *Fathu Al-Mu'īn*, (3) *Syarqāwy 'Alā At-Tahrīr*, (4) *Qalyūby/Mahally*, (5) *Fathu Al-Wahhāb* dengan syarahnya, (6) *Tuhfah*, (7) *Targīb Al-Mustagfirīn*, (8) *Qawanīn Asy-Syarī'ah li As-Syayyīd bin Yahyā*, (9) *Qawanīn Asy-Syarī'ah li As-Syayyīd Sadāqah Dahlān*, (10) *Syamsūri fī Al-Farā'id}*, (11) *Bugyah Al-Mustarsyidīn*, (12) *Al-Fiqh 'Alā Maz|ahib Al-Arba'ah* dan (13) *Mugny Al-Muhtāj*. Dirjen Binbaga Islam*, Sejarah Penyusunan Kompilasi Hukum Islam di Indonesia,* (Jakarta: Departemen Agama RI, 1991/1992), 140.

classical *fiqh* books.[61] The work of the *fuqaha* is based on the Qur'an and hadith with a more detailed, practical and systematic formulation so that the decisions of the Religious Courts have similarities in findings and avoid disparities in decisions.[62]

In the study of legal modernization in the Compilation of Islamic Law on marriage,[63] which is systematically arranged, only focuses on Book 1 on Marriage. Issues regarding marriage, such as marrying different religions, polygamy, nikah sirri are increasingly complicated issues and require serious attention. Although the Indonesian Islamic community had a Compilation of Islamic Law as a response to the empirical reality of Indonesian Islamic society and Marriage Law, it has yet to fully answer the problems of marriage for the Islamic community in Indonesia. Generally, the Compilation of Islamic Law has two meanings: *first*, as the result of an effort to collect various opinions in one particular field. *Secondly*, as an object such as a book containing a collection of existing opinions on a particular field of issue.[64] Compilation of Islamic Law is a concrete result of the sociological Indonesian Islamic community to carry out the direction of legal modernization, which initially only came from a collection of classical books, to be codified or known as codivide law in modern legal sociology. In modern sociology, the history of the preparation of the Compilation of Islamic Law is carried out through the stage of collecting Islamic legal raw materials, both written and unwritten or, in other words, the collection taken by examining the law in book and also by collecting data that is actually (*das sein*) applied in community life conducted using interviews. From here, the actual steps in preparing legal codification in the Compilation of Islamic Law have made efforts to modernize the law, legal reform, and contextualization of law in Indonesia.

Codification here is a form of legal modernization efforts, with a specific type of law recorded entirely and systematically in one law book in response to the life of Indonesian society.[65] The existence of a law book in the form of the Compilation of Islamic Law is compiled in line with existing laws and regulations in Indonesia. Specifically, the Civil Code and Law No. 1 of 1974 on marriage.[66] The Compilation of Islamic Law were formed, totaling 229 articles, composed of three groups of legal materials, namely marriage law with 170 articles, inheritance law including wills and grants in 44 articles, and waqf law with 14 articles. From the beginning of legal modernization in the form of KHI that applies to the Indonesian Islamic community, then 2004 counted 13 years from 1991-2004, the Indonesian Islamic community was required to be more mature in responding to modernity.

The emergence of modernization and secularisation of law in the Islamic world has influenced Islamic societies in Indonesia, such as in Turkey, which Egypt, Sudan, and Syria later adopted to the Indonesian Islamic community, which gave birth to the formulation of Islamic family law in the form of legal codification. Legal modernization efforts in the field of family law are a form of sociological

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[61] Hafizd, "Sejarah Hukum Islam Di Indonesia: Dari Masa Kerajaan Islam Sampai Indonesia Modern."

[62] Khoiruddin Nasution, *Islam Tentang Relasi Suami Dan Isteri (Hukum Perkawinan I): Dilengkapi Perbandingan UU Negara Muslim* (ACAdeMIA, 2004), 3.

[63] Gary F Bell, "Codification and Decodification: The State of the Civil and Commercial Codes in Indonesia," in *Codification in East Asia: Selected Papers from the 2nd IACL Thematic Conference* (Springer, 2014), 39–50.

[64] Muhammad Karsayuda, *Perkawinan Beda Agama: Menakar Nilai-Nilai Keadilan Kompilasi Hukum Islam* (Total Media Yogyakarta, 2006), 94.

[65] Kompilasi Hukum Islam di Indonesia Abdurrahman and Kompilasi Hukum Islam di Indonesia, "Jakarta: CV," *Akademika Pressindo*, 2007, 9.

[66] Khomaini Khomaini, "LEGAL CODIFICATION RELEVANCE WITH THE NATIONAL LEGAL SYSTEM," *The 4th International and Call for Paper* 1, no. 1 (2018).

dynamics in modern Indonesian Islamic society.[67]

Based on the above statement, gender-equitable family law tools are necessary for the people in Indonesia.[68] The government has made changes to family law, both at the level of the Supreme Court, the Ministry of Religious Affairs, and the President. The Constitutional Court in Indonesia has even begun to open spaces to reopen discussions related to existing family law. National legal policies such as the Domestic Violence Law, the Criminal Code, Law No. 7 of 1984 on CEDAW, the 1945 Constitution, and the Human Rights Law all constitute a set of laws that can be an opportunity to support the reform movement. Some jurisprudence is recognized to have begun to complicate the space for polygamous practices. Modern legal reform aims to emphasize six other principles: agreement (*al-tarādhi*), equality (*al-musāwah*), justice (*al-'adālah*), benefit (*al-maslahat*), pluralism (*al-ta'addudiyyah*) and democracy (*al-dimuqrāthiyyah*).[69]

Conclusion

The historical roots of the emergence of legal modernization from modern legal sociology are integrated with various legal theories that enter the realm of contemporary Islamic law. It was absorbed by Islamic legal scholarship, such as the Austin theory, a positive law determined by the state's ruling stakeholders, especially in Muslim countries, including Indonesia. According to experts, the pure theory of law, also called the imperative school, is the history of sociology in studying Modern Islamic law from uncodive law to codivide law. The approach used is legal modernization in legal sociology with contextualization through a historical approach towards Islamic codivide Law in the Muslim world to Indonesia.

The historical development of Islamic legal theory in Indonesia is a very long journey. Including the running of other theories, such as legal sociology, is also in line with the development of the history of this Islamic legal theory. The theory of legal modernization is also an effort to provide a clear legal umbrella regarding controversial marital law issues in society, such as polygamy, nikah sirri, interfaith marriage, and so on, so that the move towards codivide law aims to protect women's rights, both in the domestic family and public. Challenge and response is the prospect and relevance of legal modernization in the Muslim world, including the future of Indonesian Islamic law, which is more modern and applicable to the needs of a more advanced and civilised Indonesian Muslim society.

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[67] Eko Setyo Utomo, *Advokasi Pengarusutamaan Gender* (Yogyakarta: IHAP, 2005), 135.
[68] Muhammad Nasir, Aulia Rizki, and M Anzaikhan, "Pembaharuan Hukum Keluarga Islam Kontemporer," *TAQNIN: Jurnal Syariah Dan Hukum* 4, no. 02 (2022).
[69] Utomo, 318.

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