

## HISTORY, TYPOLOGY, AND IMPLEMENTATION OF ISLAMIC LAW IN INDONESIA: Combination of Sharia and *Fiqh* or the Result of Historical Evolution?

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**Abstract:** This paper highlights the history, typology and implementation of Islamic law in Indonesia as well as proves that the law is a translation of both sharia and *fiqh*, rather than a historical evolution, as claimed by Ignaz Goldziher (1850 - 1921 AD) and some of his Muslim followers; nor does the law separate elements of ritual, *muamalah*, and politics as argued by Christian Snouck Hurgronje (1857-1936 AD), a stance that has deformed Islamic law in Indonesia considering it an inferior legal institution. Focusing on Islamic civil law which is extracted from relevant literature sources, this paper shows that, to some extent, the influence of orientalists' views is manifested, for example, in the books of Interfaith Jurisprudence and the Counter Legal Draft of Islamic Law Compilation (CLD - KHI) which have ample of "historical evolution" claims. In fact, the history, typology and implementation of Islamic law in Indonesia have so far not only been for the benefits in the world, but also in the hereafter. Thus, reforming Islamic civil law in line with the West's human rights values, as done by CLD-KHI initiators, whom are greatly influenced by Ignaz Goldziher's and Muhammad Anna'im's "evolution of history", is like considering Islamic law limited to law for the world only, without any ukhrawi values.

**Keywords:** Orientalism, Islamic Law, History, Typology, Implementation

**Abstrak:** Tulisan ini menyoroti sejarah, tipologi dan implementasi hukum Islam di Indonesia serta membuktikan bahwa hukum merupakan terjemahan dari syariah dan *fiqh*, bukan evolusi sejarah, seperti yang diklaim oleh Ignaz Goldziher (1850 - 1921 M) dan beberapa pengikut Muslimnya; hukum juga tidak memisahkan unsur ritual, *muamalah*, dan politik sebagaimana dikemukakan oleh Christian Snouck Hurgronje (1857-1936 M), suatu sikap yang telah mendeformalasi hukum Islam di Indonesia dengan menganggapnya sebagai lembaga hukum yang inferior. Berfokus pada hukum perdata Islam yang disarikan dari sumber-sumber literatur yang relevan, makalah ini menunjukkan bahwa, sampai batas tertentu, pengaruh pandangan orientalis

diwujudkan, misalnya, dalam buku-buku *Fiqih* Antar Agama dan RUU Kontra Hukum Islam. Kompilasi (CLD - KHI) yang memiliki banyak klaim "evolusi historis". Padahal, sejarah, tipologi dan implementasi syariat Islam di Indonesia selama ini tidak hanya untuk kemaslahatan di dunia, tetapi juga di akhirat. Dengan demikian, pemberian hukum perdata Islam yang sejalan dengan nilai-nilai HAM Barat, seperti yang dilakukan oleh para pengagas CLD-KHI, yang sangat dipengaruhi oleh "evolusi sejarah" Ignaz Goldziher dan Muhammad Anna'im, seperti menganggap hukum Islam terbatas pada dunia saja, tanpa nilai *ukhrawi*.

**Kata Kunci:** Orientalisme, Hukum Islam, Sejarah, Tipologi, Implementasi

## Introduction

Islamic law determines and influences a worldview, deeds and behavior of its adherents, including Indonesian Muslims. Therefore, Islamic law can be understood as a form of manifestation of the word's sharia and *fiqh*. This understanding is different from that of some western orientalists and alumni who restrict to religious rules concerning human relations in worldly matters; or sharia is understood as the result of a complex history.<sup>1</sup> Thus, to them Islamic law is only about marriage, inheritance, and *waqf* because these activities are related to world affairs, while worship is not, because it is a matter of the hereafter.

This can be seen, for example, in the understanding of Christian Snouck Hurgronje (1857 - 1936 AD), a Dutch orientalist who studied Islam and the customs of the archipelago, especially Aceh, as well as an advisor to the Dutch government at that time.<sup>2</sup> Snouck strictly separated three main problems in the religious life of Indonesian Muslims; ritual, *muamalah* and politics, which all had implications for the deformalization of Islamic law in Indo-

nesia making Islamic law an inferior legal institution, while the depoliticization of Islamic politics weakened the political ideology of Islam, whose impact is still virtually felt today.<sup>3</sup>

In addition, other scholars such as Ignaz Goldziher (1850 - 1921 AD), a Hungarian orientalist who studied Islam,<sup>4</sup> argued that the classical theory of sharia is a result of a complex history,<sup>5</sup> making Islamic law to always evolve in history. This view affects Abdullah Ahmed Anna'im, an influential figure in Indonesia, who considers sharia a result of interpreting the Scripture (*al-Quran* and *al-Sunnah*) and other traditions.<sup>6</sup> Sharia is not Islam as a whole, but rather a result of interpretation of passages in a particular historical context,<sup>7</sup> and sharia is a result of early Muslim jurisprudents' *ijtihad* of passages.<sup>8</sup> In short, sharia is *fiqh* or Islamic law itself, not as a source or spirit that serves as a foundation for rules, implementation and interpretation. As a result, some of the primary teachings considered *qat'i*

<sup>3</sup> Saidin Ernas, "Pandangan Sonouck Hurgronje Tentang Islam Dan Implikasinya Terhadap Praktik Hukum Dan Politik di Indonesia," *Dialektika* 12, no. 2 (2019): 130-42.

<sup>4</sup> See: Richard Gottheil, "Ignaz Goldziher," *Journal of the American Oriental Society* 42 (1922): 189-93; Dietrich Jung, "Islamic Studies and Religious Reform. Ignaz Goldziher-A Crossroads of Judaism, Christianity and Islam..," *Der Islam* 90, no. 1 (2013).

<sup>5</sup> Noel James Coulson, *A History of Islamic Law*, p. 4.

<sup>6</sup> Abdullahi Ahmed A Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (New York: Syracuse University Press, 1990), p. 11.

<sup>7</sup> Ibid., p. xiv.

<sup>8</sup> Ibid., p.11.

<sup>1</sup> Noel James Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), p. 4.

<sup>2</sup> Pieter Sjoerd van Koningsveld, "Conversion of European Intellectuals to Islam: The Case of Christiaan Snouck Hurgronje Alias 'Abd Al-Ghaffar," *Muslim Minorities*, 2016, 88; Jajat Burhanudin, "The Dutch Colonial Policy on Islam: Reading the Intellectual Journey of Snouck Hurgronje," *Al-Jami'ah: Journal of Islamic Studies* 52, no. 1 (2014): 25-58; Harry J Benda, "Christiaan Snouck Hurgronje and the Foundations of Dutch Islamic Policy in Indonesia," *The Journal of Modern History* 30, no. 4 (1958): 338-47.

(certain) are harmonized with human rights values of the Western world.

In Indonesia, the two streams of scholarship, in recent decades have influenced local scholars, as evident in the books *Interfaith Jurisprudence*<sup>9</sup> and the *Counter Legal Draft Compilation of Islamic Law*<sup>10</sup> which interpret religious teachings not in line with the mainstream of *fiqh* experts.<sup>11</sup> For this reason, this paper will discuss Islamic law in Indonesia in terms of history, typology and implementation as well as prove that Islamic law has developed as a form of translation of sharia and *fiqh*, not as historical evolution, nor does it separate worldly and hereafter elements in the law itself.

## **Islamic Law in Historical Trajectories**

<sup>9</sup> Mun'im Sirry, ed., *Fikih Lintas Agama* (Jakarta: Paramadina, 2003).

<sup>10</sup> Siti Musdah Mulia, "Counter Legal Draft Kompilasi Hukum Islam: Upaya Implementasi CEDAW Dalam Perkawinan," *Jurnal Perempuan* 45 (2006): 65-77; Tim Pengarusutamaan Gender, *Pembaruan Hukum Islam, Counter Legal Draft Kompilasi Hukum Islam* (Jakarta: Depag RI, 2004).

<sup>11</sup> Examples of *Fikih Lintas Agama*, see Hartono Ahmad Jaiz, *Mengkritisi Debat "Fikih Lintas Agama"* (Jakarta: Pustaka Al-Kautsar, 2004); Siti Hardianti Liputo and Sofyan AP Kau, "Kritik Atas *Fikih Lintas Agama*: Studi Atas Pemikiran Kaum Revivalis," *Al-Mizan* 15, no. 1 (2019): 127-54; Agus Sunaryo, "Teologi Inklusif Nurcholish Madjid Dan Pengaruhnya Terhadap *Fikih Lintas Agama* Di Indonesia," *Al-Manahij: Jurnal Kajian Hukum Islam* 6, no. 1 (2012): 1-14; while examples of Counter Legal Draft Kompilasi Hukum Islam see M Syafi'ie, "Hak Non-Muslim Terhadap Harta Waris (Hukum Waris Islam, KHI Dan CLD-KHI Di Indonesia)," *Al-Mawarid Journal of Islamic Law* 11, no. 2 (2010): 26064; Nirmalasanti Anindya Pramesi, "Implementation of *Maqasid Syari'ah* in the Concept of Reforming the Indonesian Marriage Law Based on Gender Equality: Study of the Counter Legal Draft Compilation of Islamic Law," *International Journal of Advanced Research in Islamic and Humanities* 3, no. 1 (2021): 1-10; Athoillah Islamy, "Eksistensi Hukum Keluarga Islam Di Indonesia Dalam Kontestasi Politik Hukum Dan Liberalisme Pemikiran Islam," *Al-Istinbath: Jurnal Hukum Islam* 4, no. 2 (2019): 161-76.

Islamic law entered Indonesia in the same period as the arrival of Islam. Islam and its laws came in a tolerant, peaceful, and integrated manner with local traditions so their penetration was well accepted and did not cause tension. This cultural amalgamation eventually influenced the syncretic pattern of Islamic law that is practiced and developed in Indonesian society.<sup>12</sup>

Although Indonesia does not constitutionally proclaim itself as an Islamic state, yet the majority of its population is Muslim. Since the days of Islamic kingdoms, part of Islamic law has been implemented in the archipelago. Evidence of the existence of a Religious Court in the archipelago is found in the book of *Cirebon Pakeum*. The same are found in the sultanates of Aceh, Pasai, Demak, Pajang, Mataram, Pagaruyung, in Dang Tuanku Bundo Kanduang, Padri with Imam Bonjol (Minangkabau), even in Brunei Darussalam, the Malay Peninsula and Malacca. Aspects of Islamic law implemented at that time were marriage, *waqf*, inheritance, donations and alms. Law is considered alive in two aspects, namely a) Sociologically Islamic law has been applied in Indonesia and can be seen from people's lives and Islamic law development in society from the era of the kingdom, to the Dutch colonial era, to the era of independence. b) Juridically some aspects of Islamic law had been implemented,<sup>13</sup> as seen in the existence of the Religious Court during the Dutch colonial period. Until now the promulgation of Islamic law has been done gradually.

Islamic law in the historical aspect can be traced back to a time when Ibn Battuta, a wanderer, stopped at Samudera Pasai in 1345 AD, where he admired the development of Is-

<sup>12</sup> Fathullah Asni, "The Development of Islam and Mazhab Al-Syafi'i during the Post-Arrival of Islam in the Malay Archipelago," *International Journal of Academic Research in Business and Social Sciences* 9, no. 3 (2019).

<sup>13</sup> Dedi Supriyadi, *Sejarah Hukum Islam: Dari Kawasan Jazirah Arab Sampai Indonesia* (Bandung: CV Pustaka Setia, 2010), p. 292-293.

lam in the kingdom. He also admired Sultan al-Malik al-Zahir's expertise in discussing various Islamic issues in terms of worship, faith and others.<sup>14</sup> According to Ibn Battuta, Sultan al-Malik al-Zahir is not only a king of Pasai, but also a jurist who comprehends Islamic law. The Kingdom of Pasai at that time embraced *Shafi'i* school of Islamic law.<sup>15</sup>

It was from the Pasai Kingdom that the *Shafi'i* school was spread to all Islamic kingdoms in Indonesia. The Islamic jurists of the Malacca kingdom, founded (1400-1500 AD), even came to Samudera Pasai to seek answers to various kinds of religious law problems that occurred in their homeland.<sup>16</sup> It is clear that before the Dutch colonizers instigated their power in Indonesia, Islamic law had lived, grown and developed as a law in society, in addition to the customary law of the people living in the archipelago.

Furthermore, the development of Islamic law can be seen in terms of the Religious Courts from time to time since 1882 until the birth of the Marriage Law No. 1 of 1974, followed by the passing of Law 7/1989 and the enactment of the Compilation of Islamic Law (KHI) with Presidential Instruction of the Republic of Indonesia Number 1/1991.

The Religious Court is a court for Muslims which has also been a symbol of jurists' thoughts for a long time. Historically, the Religious Court was a continuous form of the chain of Islamic justice since the time of the Prophet. This Islamic judiciary continues to

develop over time, with ups and downs, and is in line with the growth and development of Islamic societies in many parts of the world. During Umar bin Khatab leadership, Islamic judiciary was separated from government control and the judges had guidelines about their tasks outlined in the *Risālah al-Qadā*.<sup>17</sup> During the Umayyad, Abbasid and Usmani caliphates, the growth of the Religious Court continued to develop, including in Indonesia, until the late twentieth century.<sup>18</sup>

Islamic jurisprudence provides three ways of appointing judges. First, *tawliyah*, which is an appointment of a judge / *qādī* carried out by a priest / head of state or those authorized. The priest here functions as *walī al-amr*, a mandate holder and has the authority to give orders. If a ruler is an infidel, the *tawliyah* given to a Muslim is valid, like the appointment of religious court heads by Dutch residents in the past. Second, if there is no ruler, a community through *ahl al-hall wa al-'aqd* (individuals considered to have the authority to appoint and dismiss someone from a position), can appoint a judge. Third, in the absence of a judge, two disputants can appoint *tahkim* of someone they trust, called *muḥakkam*, to act as a judge, with a condition that both parties will abide by the decisions taken by the *muḥakkam* and the problem is not criminal matters.<sup>19</sup>

From the order of judge appointment above, it can be concluded that Islamic law in the archipelago has been practiced for three periods of religious courts since the pre-Dutch East Indies government. First, the *tahkim* period, where two parties to a dispute ask for protection from people, they trust to settle

<sup>14</sup> Aglaja A Yankovskaya, "Accounts of the 14th Century Arab Traveller Ibn Battuta on the Malay Archipelago: The Problem of Interpretation of the Source.," *The Actual Problems of History and Theory of Art* 1 (2011): 292-97; Aglaja Iankovskaia, "At the Edge of the World of Islam: Ibn Baṭṭūṭa in the Malay Archipelago," *Entangled Religions* 11, no. 5 (2020).

<sup>15</sup> Syaifuddin Zuhri, *Sejarah Kebangkitan Islam Dan Perkembangannya di Indonesia* (Bandung: Al-Maarif, 1979), p. 204-205.

<sup>16</sup> Muhammad Daud Ali, *Hukum Islam: Pengantar Ilmu Hukum Dan Tata Hukum Islam di Indonesia* (Jakarta: Raja Grafindo Persada, 2014), p. 232.

<sup>17</sup> See: "Risālah 'Umar fī al-Qadā' Ilā Abī Mūsā al-Ash'arī," in Abū al-'Abbās Muḥammad ibn Yazīd al-Mubarrad, al-Kāmil fī al-Lughah wa al-Adab (Cairo: Dār al-Fikr al-'Arabī, 1997), pp. 15-17.

<sup>18</sup> Cik Hasan Bisri, *Peradilan Islam Dalam Tatanan Masyarakat Indonesia* (Bandung: Remaja Rosdakarya, 1997), p. 41-43.

<sup>19</sup> Zayn al-Din Al-Malibārī, *Fath Al-Mu'īn Bi Sharh Qurrat Al-'Ayn* (Bandung: Al-Ma'arif, nd), p. 137.

their cases, and they are willing to accept the decisions.<sup>20</sup>

In the early period of Islam in Indonesia, a time when people were not familiar with the teachings of Islam, Muslims appointed *mubaligh* or a religious leader they trusted in their society for *tahkim*. Then, after the formation of an independent community, the appointment of judges belonged to the second period, *ahl al-hall wa al-'aqd*, an institution consisting of experts who express their views about a problem to seek truth. This institution appointed a scholar for the position of *qādī* in resolving every case that occurs in the community.<sup>21</sup>

In the past, this practice was found in customary courts, where judges were appointed in customary meetings. The latest development is the third period, *tawliyah*. Philosophically, it can be seen that during this period it was known as the delegation of authority, that is, handing over the authority to try to the judiciary. During the period of Islamic kingdoms in the archipelago, judges were directly appointed by Sultans of each region.<sup>22</sup> For example, in Minangkabau, West Sumatra, a *Nagari* chief was in charge of resolving religious disputes. In Banten there was a court headed by a *qādī* as the sole judge. In Cirebon, it can be proven by the existence of a book containing a collection of marriage laws and inheritance according to Islam for areas around Cirebon, Semarang, and Bone Goa (Makassar), and the existence of the Papakem Cirebon. Trials were carried out by seven Ministers as representatives of three scholars: Sultan Anom, Sultan Sepuh and Panembahan Cirebon. All cases heard by the ministers were decided according to the Javanese Law. The book used as a guideline in deciding cases is the Papakem Ci-

rebon, a collection of ancient Javanese laws, which contains *Kitab Hukum Raja Niscaya*, *Jaya Lengkara*, *Undang-Undang Mataram*, *Kontra Manawa*, and *Adilulah*. In the Papakem Cirebon there is one thing that cannot be denied, namely the influence of Islamic teachings. In several places such as Aceh, Jambi, East Kalimantan, South Kalimantan, South Sulawesi and others, religious judges were usually appointed by local authorities. In some other areas, such as North Sumatra, North Sulawesi, religious courts did not have separate positions, but religious officials continued to carry out judicial duties. In Aceh, *qādī* or judges usually handled religious matters in the field of marriage (civil), and the same goes for South Sulawesi, where each kingdom had the highest *syaraq* (parewa *syaraq*), namely *kali* (*qādī*).<sup>23</sup>

From this description, it is clear that politically there had been a judiciary body, whose judges used Islamic law. Previously the judiciary was entirely in the hands of tribal chiefs. Village and tribal leaders settled all matters amicably and peacefully. Whatever its form, what is certain is that the judiciary was already in place in society. Where there is law, there are judges, where there are judges, of course there are courts. All are to adjudicate violations of rights and interests which sometimes are in conflict with each other.

The influence of Islamic law in various aspects of people's lives has occupied an important position in the hearts of its adherents, especially in the law of kinship / marriage. Various kinds of laws with their scope and authority, still leading to the same position, served as an institution that carried out duties of a king or sultan.

Basically, the authority scope of matters related to family law includes marriage law and inheritance law. Hence, with the arrival of Islam to Indonesia, the legal system changed. In fact, Islamic law has influenced Muslims' ways

<sup>20</sup> Abdul Aziz Dahlan, *Ensilopedia Hukum Islam*, Vol. 3 (Jakarta: PT Ichtiar Baru van Hoeve, 1997), p. 1750.

<sup>21</sup> Ibid, p. 1060.

<sup>22</sup> Zaini Ahmad Noeh, "Kepustakaan Jawa Sebagai Sumber Sejarah Perkembangan Hukum Islam," in *Dimensi Hukum Islam Dalam Sistem Hukum Nasional*, ed. Amrullah Ahmad (Jakarta: Gema Insani Press, 1996), p. 72.

<sup>23</sup> Ibid, p. 296-298.

of life, especially in relation to issues of marriage law (family). This occurred due to the support system run by an indigenous or self-governing government, so positions in the religious field were inseparable from public fields.

In the history of Islamic law in Indonesia, the phase in which Islamic law came into effect during the kingdom era is important for the establishment of Islamic law in the country. This is because after the collapse of the Hindu and Buddhist kingdoms, which subsequently were replaced by Islamic kingdoms (sultanates), in reality, Islamic law had existed formally as positive law in some regions of the archipelago. This can clearly be seen in people's behavior that has become a tradition of Islamic kingdoms which was full of religious values. The title given to a sultan as adipati alogo sayidina panotogomo (warlord and religious leader) also indicates that kings are leaders who practice religious law. This also shows that governments and a religion at that time were an inseparable unity. Therefore, it can be understood that long before the Dutch established their power in Indonesia, Islamic law had been in use in society, as an independent law that grew and developed side by side with the customs of the people living in the archipelago.<sup>24</sup>

The implementation of Islamic law in Indonesia started to face obstacles at the end of the 16<sup>th</sup> century, with the arrival of Dutch colonists in Indonesia. The colonizers made this colonization effort slowly and systematically. This situation is understandable, because besides colonialism, they also came for missionary purposes. In the early days of colonialism, it was common for people to think that the original law of the indigenous people was Islamic law, although in practice sometimes

Islamic law was used as secondary law in religious courts.

## Theories and Implementation

The theories referred to here are the ones that have been experienced, recognized and applied to Islamic law in Indonesia. These theories prove that Islamic law exists and has its theories. These theories remain valid for the application of Islamic law at present or in the future, as long as they are still competent and can be tested.

### 1. *Shahada theory (Creed theory)*

The shahada theory (Creed theory) is a theory that requires implementing Islamic law to those who have said the two parts of the shahada as a logical consequence of the shahada. This theory is based on al-Quran: verses (1): 5; QS (2): 179; QS (3): 7; QS (4): 13, 14; QS (4): 49; QS (4): 59; QS (4): 63; QS (4): 69; QS (4): 105; QS (5): 44, 45, 47, 50; QS (24): 51 and 52.<sup>25</sup>

This theory is a continuation of the principle of tawhid in the Islamic law philosophy. The monotheism principle states that every person who has pledged himself to believe in Allah, they must obey what has been decreed by Allah and His Messenger. This means that every Muslim is obliged to carry out the laws derived from *Al-Quran* and the *Sunnah*.<sup>26</sup>

This theory is the same as the theory of legal authority presented by H.A.R. Gibb in his book, *The Modern Trend of Islam*.<sup>27</sup> Based on this theory, if a Muslim has acknowledged Islam as his religion, then they are supposed to accept Islamic law as guidance. Sociologically, they obey and accept the authority of Islamic law over themselves. This theory illustrates

<sup>24</sup> Ghofar Shidiq, "Syari'ah Sebagai Dasar Pengembangan Ilmu Hukum Indonesia (Upaya Membangun Ilmu Hukum Yang Rabani)," in *Menggagas Hukum Progresif Indonesia* (Yogyakarta: Pustaka Pelajar, 2006), p. 157.

<sup>25</sup> S Praja Juhaya, *Filsafat Hukum Islam* (Bandung: UNINUS, 1995), p. 133.

<sup>26</sup> Ibid.

<sup>27</sup> H.A.R Gibb, *Modern Trends in Islam* (Chicago: Chicago University Press, 1947).

that Islamic law is applied to Muslim societies. Islamic law is followed by Muslim societies because of the orders of Allah and His Messenger.<sup>28</sup>

## 2. *Theory of Complete Acceptance of Islamic Law (Receptie in Complexu)*

As previously explained, the theory of complete acceptance of Islamic law (Receptie in Complexu) states that every Muslim applies Islamic law fully and completely because they have embraced Islam. Linguistically Receptie in Complexu means "complete acceptance or perfect reception". This theory was developed by L.W.C. van den Berg (1854-1927)<sup>29</sup> who argued that religious laws apply to adherents of certain religions.<sup>30</sup>

Van den Berg was in Indonesia from 1870 to 1887. According to him, for the Muslim community, Islamic law is fully applicable because they have believed in Islam, even though there are still irregularities in its implementation. The irregularities here are religious teachings that have been mixed with local traditions, such as during funerals and weddings. van den Berg was a legal expert who argued that Islamic law had been in practice in Indonesia. It was van den Berg who convinced the Dutch judges to enforce Islamic

<sup>28</sup> RO Winstedt, "Modern Trends in Islam. By HAR Gibb. 5½ x 9. Pp. I-xii+ 1-141. The University of Chicago Press and Cambridge University Press. 14s.," *Journal of the Royal Asiatic Society* 80, no. 3-4 (1948): 195; Alfred Guillaume, "Modern Trends in Islam. By HAR Gibb. (The Haskell Lectures in Comparative Religion Delivered at the University of Chicago, 1945), pp. xii, 141. Chicago: University of Chicago Press; London: Cambridge University Press, 1947. 14s.," *Bulletin of the School of Oriental and African Studies* 13, no. 1 (1949): 229-30.

<sup>29</sup> Khoiruddin Buzama, "Pemberlakuan Teori-Teori Hukum Islam Di Indonesia," *Al-'Adalah* 10, no. 2 (2012): 467-72; Abdullah Jarir, "Teori-Teori Berlakunya Hukum Islam di Indonesia," *Al-Ahkam* 14, no. 2 (2018): 77-90.

<sup>30</sup> Yaswirman, *Hukum Keluarga Adat Dan Islam: Analisis Sejarah, Karakteristik, Dan Prospeknya Dalam Masyarakat Matrilineal Minangkabau* (Padang: Andalas University Press, 2006).

law in marriage and inheritance with the help of religious headmen, *qādī*. He stated that the law applicable to indigenous people is the law of their religion,<sup>31</sup> because the law that lives and develops in society is Islamic law.

This theory emerged from his observations in the colonial legal politics that enforced Islamic law for Muslim natives as stated in R.R., Staatsblad 1854: 129 and Staatsblad 1855: 2 Articles 75, 78, and 109, and Staatsblad 1882: 152 concerning reorganization of judicial institutions. In principle, this reorganization aims to form a Religious Court in addition to the Landraad (District Court).<sup>32</sup>

## 3. *Receptie Theory*

Receptie theory was coined by Christian Snouck Hurgronje (1857-1936), an advisor to the Dutch East Indies government in 1898 on Islam, which was later developed by C. van Valenoven and Ter Haar. According to this theory, customary law basically applies to the indigenous people. Islamic law only applies if a community has accepted Islamic rules as customary law.<sup>33</sup>

This theory originated from Snouck's wish that the natives did not cling to Islamic teachings, because if they followed Islamic teachings, it would be difficult for the Western civilization to influence them. Therefore, Snouck advised his government as follows:

<sup>31</sup> Tjoen Soemardjan, *Hukum Islam Di Indonesia: Perkembangan Dan Pembentukan* (Bandung: Rosdakarya, 1991), pp. 117-120.

<sup>32</sup> Yaswirman, *Hukum Keluarga Adat Dan Islam: Analisis Sejarah, Karakteristik, Dan Prospeknya Dalam Masyarakat Matrilineal Minangkabau* (Padang: Andalas University Press, 2006), p. 65.

<sup>33</sup> Irmawati, "Teori Belah Bambu Syahrizal Abbas: Antara Teori Reception in Complexu, Teori Receptie, Dan Teori Receptio a Contrario," *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah* 2, no. 2 (2017): 170-86; Ahmad Khumaidi Ja'far, "Teori-Teori Pemberlakuan Hukum Islam di Indonesia," *ASAS* 4, no. 2 (2012); Jarir, "Teori-Teori Berlakunya Hukum Islam di Indonesia"; Buzama, "Pemberlakuan Teori-Teori Hukum Islam Di Indonesia."

**First**, for religious rituals in the true sense (religion in the narrow sense), the Dutch East Indies government had to ensure unconditional freedom for Muslim communities to carry out their religious teachings.

**Second**, for social activities, the Dutch East Indies government had to respect the customs practiced in society by providing opportunities for the colonized people to increase their standards of living by providing assistance to those friendly to the Dutch East Indies government.

**Third**, for the constitutional field, the Dutch East Indies government had to prevent the natives from activities that could link them with the Pan-Islamism movement, whose aim is to garner strength to fight the Dutch colonialism.

**Fourth**, this theory should be disseminated by dividing Indonesia into 19 customary jurisdictions with customs varied from one another. Article 134 of IS states, "For the indigenous people, if their law so wishes, Islamic law can be enforced if a customary law community has accepted it". This article is commonly referred to as the receptie article.<sup>34</sup>

Efforts the Dutch government should make to impede the application of Islamic law are as follows:

**First**, reject the problems of *hudūd* and *qīṣās* to be included in the criminal law. The criminal law implemented should be taken directly from the *Wetboek van Strafrecht* of the Netherlands which had been in effect since January 1919 (*Staatsblad* 1915 No. 732).

**Second**, Islamic teachings that govern matters of state administration should be completely eliminated. Studies of religion and verses of the holy-Quran and Hadith on political issues as well as the state should be banned.

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<sup>34</sup> Tjoen Soemardjan, *Hukum Islam Di Indonesia: Perkembangan Dan Pembentukan* (Bandung: Rosdakarya, 1991), p. 124.

**Third**, for the application of *muamalah* law concerning marriage and inheritance law, its scope should be narrowed. Islamic inheritance should not be in use. These steps should be taken:

- A. Reduce the authority of the Religious Courts in Java, Madura and South Kalimantan in adjudicating inheritance issues.
- B. Give authority to landraad to examine inheritance cases.
- C. It is not justified to settle a case with Islamic law if the place where the case occurs does not acknowledge customary law.<sup>35</sup>

This receptie theory is based on assumptions and thoughts of its initiator who argued that indigenous peoples' culture is the same or close to that of European's, so the colonization of Indonesia would run smoothly and not be resistant to the Dutch East Indies government. Therefore, the Dutch government approached groups able to revive customary law and encouraged them to get customary law closer to the Dutch government.<sup>36</sup>

Western authors and people who share their beliefs always argue in their books that customary law and Islamic law in Indonesia, especially in Minangkabau, are two conflicting elements. This is understandable, because the conflict theory they created in analyzing the relationship between the two legal systems is aimed at bringing into conflict and dividing the Indonesian people so that their power in Indonesia would remain strong. Therefore, the colonial attitude towards the two legal systems can be likened to a person splitting a bamboo, lifting one part (adat) by pressing the other part (Islam). This attitude is clearly illustrated in one sentence by Van Vollenhoven, that customary law as a legal instrument for the bumi putera group must be defended and cannot be

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<sup>35</sup> H Ichtiyanto, "Pengembangan Teori Berlakunya Hukum Islam Di Indonesia," in *Hukum Islam di Indonesia, Perkembangan Dan Pembentukan*, ed. Eddi Rudiana Arief (Bandung: PT. Remaja Rosdakarya, 1994), p. 125.

<sup>36</sup> Alfian, ed., *Segi-Segi Budaya Masyarakat Aceh* (Jakarta: LP3ES, 1977), pp. 207-209.

suppressed by Western law. Because, if Western law suppresses customary law, Islamic law will prevail. This should not be the case in the Dutch East Indies.<sup>37</sup>

Therefore, what is often referred to as a conflict between customary law and Islamic law is an issue created by colonial law politicians, one of whom is B. Ter Haar, who is a master architect in limiting the authority of the Religious Courts in Java and Madura. According to Ter Haar, it is impossible to work together, let alone unite between customary law and Islamic law, because the starting points are different. While customary law originates from laws in society, Islamic law is from *fiqh* books (result of human reasoning). Because of the different legal starting points, conflicts often arise which can sometimes be resolved, but oftentimes they cannot. Because of this, Islamic law cannot be accepted theoretically, resulting in Religious Courts authority in Java and Madura being limited, even to the smallest fields.<sup>38</sup>

The description on the contradiction between customary law groups and Muslim circles in Aceh, Minangkabau and South Sulawesi put forward by Western writers, is as if they were two separate groups and impossible to reconcile, even though in reality this is not the case because in the customary law groups there are also pious individuals, while among ulama there are people who are experts on *adat*.<sup>39</sup> They construct this contradiction between Islamic civil law and customary civil law in matters of marriage and inheritance.

According to Dutch writers, the most classic example of conflict between Islamic civil law and customary law in Minangkabau is the inheritance issue. They describe this conflict as if it could not be resolved. However, this is not

always the case, for the agreement made by alim ulama and ninik mamak in Bukit Marapalam after the Paderi war in the 19th century has brought forth a strong and harmonious formula regarding the relationship between customary law and Islamic law. The formula, among others, reads:

“Adat bersendi syara’, syara’ bersendi kitabullah (*al-Qur'an*).<sup>40</sup> The formula is codified through a meeting of Four Kinds (ninik mamak, imam-khatib, cerdik-pandai, mantidubalang) in Alam Minangkabau. The meeting was held in Bukit Tinggi in 1952, and the formula was strengthened at the Conclusion of the Minangkabau Customary Law Seminar which was held in Padang in July 1968. In the meeting and seminar, it was emphasized that the distribution of the Minangkabau people's inheritance, for (1) high inheritance from ancestors from the maternal line is carried out based on customs, and (2) livelihood assets, called lower inheritance, are inherited according to *syara'* (Islamic law). The Minangkabau Customary Law seminar in 1968 also appealed to all judges in Sumatra and Riau to pay attention to the agreement.<sup>41</sup> Thus the customary law considered contrary to Islamic law and irreconcilable has actually been resolved by the Minangkabau themselves.

#### 4. Receptie Exit Theory

Initiators of this theory is Hazairin, a Professor of Law at the University of Indonesia, who rejects the theory created by Christian Snouck Hurgronje. Hazairin argues that the receptie theory is in fact a demon theory because it is contrary to *al-Qur'an* and the *Sunnah*. He further states that the receptie theory is already broken, and it is no longer valid as well as has been dismissed from the Indone-

<sup>37</sup> Bustanul Arifin, *Pelembagaan Hukum Islam Di Indonesia* (Jakarta: Gema Insani Press, 1996), p. 171.

<sup>38</sup> Ter Haar, *Hukum Adat Dalam Polemik Ilmiah* (Jakarta: Bhratara, 1973), p. 29.

<sup>39</sup> Deliar Noer, “Kajian Masyarakat Islam Di Indonesia,” *Panji Masyarakat* 280 (1979): 19.

<sup>40</sup> Asrinaldi Asrinaldi and Yoserizal Yoserizal, “Problems with the Implementation of Adat Basandi Syarak Syarak Basandi Kitabullah Philosophy,” *Masyarakat, Kebudayaan Dan Politik* 33, no. 2 (2020): 162–73.

<sup>41</sup> Mochtar Naim, *Menggali Hukum Tanah Dan Hukum Waris Minangkabau* (Padang: Center for Minangkabau Studies Press, 1968), p. 241.

sian legal system since 1945, after Indonesia became independent and the enactment of the 1945 Constitution as the basis of the state; The contribution of religious law that becomes law in Indonesia is not only that of Islam, but laws of other religions also apply to its adherents.<sup>42</sup> Hazairin's theory is known as receptie exit theory, thus based on this theory it can be stated that:

**First**, the receptie theory is already broken, can no longer be applied, and has been dismissed from the Indonesian legal system since 1945, after Indonesia's independence and the enactment of the 1945 Constitution and the Indonesian Constitution. Likewise, this situation was after the Presidential Decree of 5 July 1959 to return to the 1945 Constitution.

**Second**, based on article 29 of the 1945 Constitution, the Republic of Indonesia is required to form an Indonesian national law based on religious laws.

**Third**, religious laws which are the source of Indonesia's national law are not only Islamic law, but also other religious laws that apply to their adherents. Civil and criminal laws derived from religious laws are mixed into Indonesian national law. That is the Indonesian law which is based on Pancasila.<sup>43</sup>

Hazairin's receptie exit theory was later developed and continued by his student, Sayuti Thalib. Based on this theory, the law that applies to Muslims is Islamic law. Customary law will only apply if it is not in conflict with Islamic law. This argument is then called receptio a contrario theory.<sup>44</sup>

## 5. *Receptie a Contrario Theory*

A description of receptie a contrario theory is as follows: Islamic law applies to Muslims, it is in line with their beliefs, legal ideals, and inner and moral ideals. Meanwhile, customary law will only apply to Muslims if it is not in conflict with Islamic law.<sup>45</sup>

The theoretical framework is the opposite of the receptie theory. The difference between receptie exit and a contrario theories is in their starting points. Hazairin's receptie exit theory is formulated based on real circumstances since Indonesia's independence, the establishment of the Republic of Indonesia, the formation of the Pancasila as a state foundation, the 1945 Constitution in the Preamble and Chapter IX and the understanding of Article II of the Transitional Rules which is to prioritize the basis and spirit of independence without merely formally accepting the understanding of the transitional rules. The receptie a contrario theory is based on the fact that an independent Republic of Indonesia, that is in accordance with moral ideals, inner ideals, and awareness of the law of independence, which means that there is freedom in practicing religious teachings and laws.<sup>46</sup>

With the formation of the Department of Religion and Religious Courts, it means that the government has recognized the receptie a contrario theory. However, when viewed from the legal theory of Islamic law perspective of Indonesia, Islamic law remains an unwritten law.

## 1. *Recoin Theory (Receptio Contextual Interpretatio)*

<sup>42</sup> Sukiati Sukiati, "Hazairin's Legal Thought and His Contribution towards the Indonesian Legal System," *Journal of Indonesian Islam* 6, no. 1 (2012): 93–124.

<sup>43</sup> Afdol, *Kewenangan Pengadilan Agama Berdasarkan UU No.3 Tahun 2006 Dan Legislasi Hukum Islam di Indonesia* (Surabaya: Airlangga University Press, 2006), p. 51.

<sup>44</sup> Tjoen Soemardjan, *Hukum Islam Di Indonesia: Perkembangan Dan Pembentukan* (Bandung: Rosdakarya, 1991), p. 132.

<sup>45</sup> Sayuti Thalib, *Receptio a Contrario: Hubungan Hukum Adat Dengan Hukum Islam* (Jakarta: Bina Aksara, 1980), p. 45–49.

<sup>46</sup> Afdol, *Kewenangan Pengadilan Agama Berdasarkan UU No.3 Tahun 2006 Dan Legislasi Hukum Islam di Indonesia* (Surabaya: Airlangga University Press, 2006), p. 52.

Recoin theory was initiated by Dr. Afdol, a legal expert from Airlangga University, Surabaya. According to him, recoin theory is required to continue the previous theories (theories of Receptie in Complexu, Receptie, Receptie exit, and Receptie a Contrario).

Recoin's core point is to interpret textual verses of *al-Qur'an* contextually. According to Afdol, the theory is based on the results of his research on Islamic inheritance law, for example, regarding the distribution of inheritance between boys and girls. Boys get twice the share of girls. Girls get half of the boys. With the premise that every law Allah creates for humans must be just, it is impossible if Allah makes unjust legal rules, so is the case with the inheritance issue of the boys and girls. Rationally, the verse can be considered unfair if it uses a textual interpretation, but the results will be different if the verse is interpreted contextually. In special cases, the verse can also be interpreted that the share of the daughter is at least half that of the son. This contextual interpretation by Afdol is called the theory Recoin.<sup>47</sup>

Basically, this theory has the same substance as thinkers, such as Hasbi Ash-Shiddieqi with his Indonesian-style *fiqh*,<sup>48</sup> Gusdurst with his Indigenousization,<sup>49</sup> and Munawir

Sadjali with his Reactualisation,<sup>50</sup> although all of these are different terms.

The theories above show that Islamic law also has theories from the start and these various theories also show that the existence of Islamic law is so strong in Indonesia. However, the implementation theory is limited to certain fields.

## **Islamic Law Practiced in Indonesia**

In terms of its implementation, Islamic law as norms adhered to by society can be divided into two types. First, Islamic law requires state power to implement it, such as with regards to marriage, inheritance, endowments, economics, commercial law, banking, international relations and health. Without national legal system rules, these Islamic legal norms will not receive proper and effective acceptance by society. Second, the law does not require state power on laws relating to manners, attitude, and *mahdah* worship such as prayer and fasting. Islam, for example, teaches greetings, how to enter public places, visit, carry out and attend parties. All of these are related to Islamic morals. The same goes for provisions on how to purify, bathe, wudu, pray, and fast.<sup>51</sup>

As quoted by Niyazi Berkes and Ziya Gökalp, Turkish sociologists, Islamic law have two dimensions, some are purely *diyānī* while others are *qadā'i* and *diyānī* at the same time. It is called *diyānī* because it relies heavily on the obedience of individuals who become subjects of law. As a law originating from divine provisions, Islamic law is based on personal beliefs.

<sup>47</sup> Afdol, *Authority of Religious Courts Based on Law No.3 of 2006 and Legislation of Islamic Law in Indonesia* (Surabaya: Airlangga University Press, 2006), pp. 53-54.

<sup>48</sup> Masnun Tahir, "The Thought of TM Hasbi Ash-Shiddieqy: Sources of Islamic Law and Its Relevance to Islamic Legal Thought in Indonesia," *Al-Ahwal: Journal of Islamic Family Law* 1, no. 1 (2016): 117-52; Khairunnas Jamal and Dalimunthe's Moon Dimple, "Hasbi Ash-Shiddieqy's Thought Patterns Against Indonesian *Fiqh* (Between Moderation and Purification)," *Akademika: Journal of Religion and Education* 16, no. 1 (2020): 25-38.

<sup>49</sup> Ainul Fitriah, "Abdurrahman Wahid's Thought About the Indigenousization of Islam," *Theosophy: Journal of Sufism and Islamic Thought* 3, no. 1 (2013): 39-59.

<sup>50</sup> Cipto Sembodo, "The Re-Actualization of Islamic Law: Munawir Sjadjali and the Politics of Islamic Legal Interpretation Under the New Order Indonesia," *Al-Jami'ah: Journal of Islamic Studies* 43, no. 1 (2005): 99-129; Yunahar Ilyas, "Reactualization of Islamic Teachings: A Study on Munawir Sjadjali's Legal Thought," *Al-Jami'ah: Journal of Islamic Studies* 44, no. 1 (2006): 223-40.

<sup>51</sup> Badri Khaeruman, *Islamic Law in Social Change* (Bandung: Pustaka Setia, 2010), p. 27.

In this case, a person feels strongly religiously bound to carry it out without any authority to intervene, except from the divine consciousness that grows within him/her.<sup>52</sup>

Apart from being *diyānī*, some Islamic laws are also *qadā'ī*. It is called *qadā'ī* because it deals with judicial matters. *Qadā'ī* is an adjective derived from *qadā* which means court. Islamic law that is *qadā'ī* is no longer limited to a person's decision, but is related to the interests of others, and therefore, must be implemented by society through state power. Laws that are *diyānī* in social life can be handled professionally by a mufti or someone of an equal position. Laws that are *qadā'ī* can be handled professionally by *qādī* or a judge through a judicial institution that decides cases based on applicable laws. A judge's decision is legally binding, while a *mufti's* or *qādī's* decision is still a decision that comes from divine revelation and human *ijtihad*.<sup>53</sup>

So, Islamic law that has been implemented in Indonesia is provisions concerning human relations with respect to matters relating to marriage, inheritance, and *waqf* and other Islamic civil laws. It cannot be said that the law has evolved, as claimed by Ignaz Goldziher, al-Na'im and some of their followers in Indonesia, which is then deconstructed. The law is also not separated from elements of ritual, *muamalah* and politics as initiated by Christian Snouck Hurgronje (1857-1936 AD), resulting in de-formalization of Islamic law in Indonesia and making it an inferior legal institution. The law cannot be seen from worldly aspects only, but also ukhrawi aspects. The ultimate goal of Islamic law is to encourage Muslims to practice their religion which is not only to obtain benefits in the world, but also in the hereafter. Thus, reforming Islamic civil law to make it in line with the West's human rights values as practiced by CLD-KHI's formulators, is the

same as considering Islamic law a merely world law, without ukhrawi values. In the name of freedom, interfaith marriage is legalized, whereas, if viewed from a hereafter perspective, there is a *da'wa* purpose and the purpose of preserving offspring, as discussed by scholars of *maqāṣid al-shari'a*.<sup>54</sup>

## Conclusion

This paper has showed that Islamic law can be understood as a a translation of the words *sharia* and *fiqh* at the same time, not as a historical evolution as claimed by Ignaz Goldziher (1850-1921 AD) and some of his Muslim followers; nor does the law separate elements of ritual, *muamalah*, and politics as argued by Christian Snouck Hurgronje (1857-1936 AD), a stance that has deformalized Islamic law in Indonesia considering it an inferior legal institution. Unfortunately, these views have influenced some local scholars, for example, in the books of Interfaith Jurisprudence and Counter Legal Draft of Islamic Law Compilation (CLD - KHI) which are full of Ignaz Goldziher's "historical evolution" claims. In fact, the history, typology and implementation of Islamic law in Indonesia have so far not only been for the benefits in the world, but also in the hereafter. Thus, reforming Islamic civil law in line with the West's human rights values, as done by CLD-KHI initiators whom are greatly influenced by Ignaz Goldziher's and Muhammad Anna'im's "evolution of history", is like con-

<sup>52</sup> Niyazi Berkes, *Turkish Nationalism and Western Civilization: Selected Essays* (New York: Columbia University Press, 1959), p. 200.

<sup>53</sup> Badri Khaeruman, *Islamic Law in Social Change*, P. 28.

<sup>54</sup> Discussions on *maqāṣid al-Shari'a* see Edi Kurniawan, "Distortion Against Al-Shariah Maqasid Al-Syatibi In Indonesia," *Al-Risalah* 18, no. 2 (2018): 189-90; Edi Kurniawan et al, "Early Marriage, Human Rights, and the Living *Fiqh*: A Maqasid Al-Shari'a Review," *Al-Risalah* 20, no. 1 (2020): 7; Busyro, "Using Zakah for the Establishment of Islamic Centers and Maqasid Al-Syari'ah's Relativities," *Al-Risalah* 19, no. 1 (2019): 75-80; Eko Saputra and Busyro Busyro, "Kawin Maupah: An Obligation to Get Married After Talak Tiga in the Tradition of Binjai Village in Pasaman District: A Maqasid Al-Shari'ah Review," *QIJIS (Quidus International Journal of Islamic Studies)* 6, no. 2 (2018): 181-220.

sidering Islamic law limited to law for the world only, without any ukhrawi values.

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