Istinbáth

Jurnal Hukum dan Ekonomi Islam

Vol. XX, No. YY, 20ZZ
p-ISSN: 1829-6505 ; e-ISSN: 2654-9042
Available Online at http://www.istinbath.or.id

TAQNIN FIKIH
Transformation of Marriage Law in Indonesia

Ahmad Fernanda [1*], Salma[2], Rahmat Hidayat[3]

[1] Universitas Islam Negeri Imam Bonjol Padang, Indonesia ; ahmad.fernanda@uinib.ac.id
[2] Universitas Islam Negeri Imam Bonjol Padang, Indonesia; salma@uinib.ac.id;
[3] Universitas Islam Negeri Imam Bonjol Padang, Indonesia; rahmathidayat@uinib.ac.id;

*correspondence author: ahmad.fernanda@gmail.uinib.ac.id

Abstract: Indonesia has a pluralist background, so realizing one rule accommodating all interests is a challenge. Among them is the unification of the rules on marriage. The purpose of this study is to explore historically the growth and development of *taqnin* from time to time, *taqnin of* marriage law in Indonesia, the legality of post-taqnin marriage law, challenges and opportunities, and challenges of taqnin. This literature research method uses quantitative with an exploratory analysis approach, namely analyzing fikih *munakahat* products transformed into positive law. Data processing by managing *library* materials (*library research*). Secondary data sources are Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law (KHI) and books and articles based on OJS (*Open Journal System*). Techniques for analyzing the data obtained were exploratory and descriptive analysis using the techniques of reduction, display, and verification. The results showed that, based on historical aspects, *taqnin* had been pursued since the *abasiyah daulah* but has experienced ups and downs in its implementation. *Second*, The transformed legal product is *dynamic*. *Third*: *Munakahat* jurisprudence has gone through the process of taqnin to have the legality of state law, so it becomes the primary source in marriage issues. *Fourth*: The opportunities and challenges faced are internal and external.

Key words: fiqh, marriage, taqnin, transformation

A. Introduction

Indonesian marriage law is often regarded as a fixed and unshakable foundation. However, who would have thought that behind the strength of the law, there is a wave process in fundamental change, triggering a radical transformation in the face of marriage law in the country (Ma'rifah, 2019). This emerged through the process of taqnin to legislate fiqh into national law; an in-depth exploration of transformation opens the door to a reality that may be astonishing, breaking down old paradigms and presenting deep questions about the future of the institution of marriage in Indonesia (Azani, 2021). In a legal revolution that shakes traditional foundations, the transformation of marriage law in Indonesia not only creates a wave of change but also dismantles old paradigms, forcing

us to face the fact that the institution of marriage, as we know it, has undergone a radical metamorphosis that creates an unexpected legal reality (Asti, 2022).

Taqnin al-Ahkam is a term for the reformulation of Islamic law that refers to efforts to organize or codify fiqh from various *fuqaha* opinions into the form of state law, including civil, criminal, administrative, and other issues (Nurozi, 2022). This topic has sparked controversy among Islamic jurists, especially when considering modern law's and positive law's influence on more traditional Islamic legal traditions (Jailani, 2018). The process involves selecting an opinion from the many legal opinions of the *fuqaha*, then selecting which one is considered more effective in implementation by taking into account the social customs that have been deeply rooted in society so that the law can be applied to an objective legal landscape to prioritize the interests of society as a whole (Ashar, 2022). In the context of Islamic law, this principle is known as *siyasah dusturiyah* as the scope of rules regarding individuals with other individuals, individuals with groups, groups with groups, even countries with other countries and between various state institutions within the framework of state administration (Hasanuddin, 2021).

It is important to remember that this changing form of Islamic law is often debated within the Muslim world (Nafisah, 2013). Some may support the modernization and adaptation of Islamic law, while others may be more conservative and wish to maintain the traditions of Islamic law in a more traditional form. How Islamic law is integrated into the country's legal system can vary significantly in many countries. It is a complex and evolving issue in modern Muslim societies. Many academics have studied taqnin to answer every existing problem regarding the concept, implementation, history, and form of *qanun* contained in the Aceh regional regulation. Like the article written by M. Noor Harisudin entitled Taqnin of Indonesia Islamic Law Dynamic, the results of this paper describe the efforts to legislate fiqh into positive law so that judges can use it as a legal basis (Harisudin, 2015). Ahmad Yani and Megawati Barthos' article entitled Transforming Islamic Law in Indonesia from a Legal and Political Perspective concludes that the transformation of fiqh into rules passed by the state takes a long time and drains the mind; this is because Indonesian society has different cultures and religions (Barthos, 2020). Kamsi's article entitled "Politics of Islamic Law in Indonesia: Indonesianization of Islamic Law" describes how the role of politics in providing space for Islamic law as official state law by adjusting to traditional customs in Indonesia (Kamsi, 2020)

Khairuddin Tahmid and Idzan Fautanu discuss the *taqnin* entitled Institutionalization of Islamic Law in the National Legal System: A Case Study in Indonesia; the results of this paper explain that not all Islamic law can be legislated into positive law, but some aspects have been applied, both in terms of Islamic legal material or only making it a formulation and principle in making national law (Fautanu, 2021). Kasman Bakry and Edi Gunawan discussed the early history of efforts to implement Islamic law in Indonesia, entitled The Implementation Of Islamic Law At The Early Spread Of Islam In Indonesian Archipelago. The findings show that efforts to legislate Islamic law have started since the 7th century when Islam entered the archipelago, but initially, the law that the community could accept was only *insaniyah* law *(*fellow humans) because the entry of Islam did not directly teach about monotheism and the laws in it; even some kingdoms applied Islamic law in the material law of the kingdom in their kingdom (Gunawan, 2018)

Jaenudin's article entitled, Ulama Views on *Taqnin Ahkam,* provides an understanding that there are differences in the views of Islamic law experts in accepting *qanun* legal

products as a new term in the application of more modern Islamic law (Jaenudin, 2017). Efendi has studied the development of *qanun* in Indonesia, entitled The Position of Qanun in the Field of Natural Resources in the National Legal System. The results of his study explain that *qanun* as a source of instrument and *rule of model* in resources in the order of rules has the same position as regional regulations; its sustainability can be accepted in the legal order if it does not contradict formally or materially to the law above it. Also, *qanun* can be further elaborated on in the materials from the previous law (Efendi, 2014). Moch. Cholid Wardi's article entitled Legislation of Islamic Law (Against the Concept of *Taqnin* in the Realm of Substantivistic and Formalistic). The findings are that Indonesia, as a pluralistic country, has difficulties in applying it; this is inseparable from the views of legal experts in placing Islamic law into state law; these views become two large groups, namely formalistic or normativistic and substanticistic or cultural groups (Wardi, 2018)

This article complements the dimensions of the discussion of several previous articles that discuss *taqnin* or legislation of Islamic law into positive state law, but what distinguishes it from previous articles is that the author examines in depth what *munakahat* fiqh products, especially marriage problems, have gone through the *taqnin* process to produce legality to be used as a source by judges in marriage matters. This research is essential to study considering that Islamic law that has been legislated into national law takes the results of the ijtihad of fiqh scholars so that it is known which opinions are taken to be included in the material law legalized by the state.

B. Method

The research method in exploring fiqh products that the state has legislated is a qualitative method with a *narrative analysis* style, namely trying to analyze what fiqh products have been transformed into positive law, especially civil rights that govern the entire Islamic community in Indonesia. The data sources in this study are secondary sources using the Marriage Law No. 1 of 1974 and the Compilation of Islamic Law (KHI). Other secondary sources are books and articles based on OJS (*Open Journal System*). Technically, the data obtained is analyzed by descriptive analysis using reduction, display, and verification techniques.

C. Result and Discussion

Historical Growth and Development of *Taqnin* from Time to Time

From its generality, it can be understood that the emergence of efforts to make sharia law apply in everyday life certainly existed at the time of the Prophet Muhammad; one of the legal products of *qanun* that existed at the time of the Prophet Muhammad was the charter of Medina; the *rule* became a *rule of social* for Arab communities who were Muslim and non-Muslim (Pulungan, 2018). Besides, it was a social rule, but the Medina Charter became the first state constitution in Islamic countries and even the world (Sahidin, 2019). The existence of this constitutional charter is a solution to the prolonged conflict between tribes in Arabia by making them brothers from the same area. However, some groups refused to convert to Islam then but still obeyed the agreement with Rasulullah SAW (Burhanuddin, 2019). When the Prophet Muhammad died, the person who was the reference source in determining Islamic law did not exist. However, many of the companions memorized the Qur'an to determine the law, and many of them died during the war (Ishak, 2020). At the time of the Companions, taqnin was not carried out because the problems that occurred could be overcome by the Prophet's companions with the

ability of ijtihad; on the other hand, the territory of Islam had not expanded so that other Islamic regions could still adjust to the existing laws

During the Abbasid Caliphate, which had a great style and contribution that spread the territory of Islam to various parts of the world, the need to uniformize the law must be done and codified to be used as a reference in determining a law. On the other hand, the number of legal products (fiqh) produced from the thoughts of Islamic *mujtahids* makes the government do taqnin, which contains Islamic law that can be applied (Harisudin, 2016). Abu Muhammad Ibn al-Muqaffa was the first Islamic figure to propose *tannin,* which made Islamic law not only *Living Law* but became *positive law*; at that time, he served as secretary of state during the reign of Abu Ja'far al-Mansur of Bani Abbasyiah (Misnan, 2021). Based on his thinking, in order to avoid the occurrence of judges in the judiciary who have different fiqh from the fiqh used by the surrounding community, it is possible that judges issue decisions, causing new problems for the community. Of course, with the occurrence of such cases, it is necessary to have a law or fiqh that the government officially uses in regulating the community in various problems so that judges can get a precise foothold from the *qanun* produced by the government from various fiqh in Islam (Santoso, 2023). Another reason Ibn al-Muqaffa was eager to do taqnin and codification of Islamic law in the state was to avoid fanatical attitudes (*ta'asub*) of the followers of fiqh scholars who could be feared to ignite a civil war in order to uphold justice (Misnan, 2021). *Unfortunately,* Ibn al-Muqaffa's idea was not supported by the government because codified laws would make judges taklid and lazy to think (Fachrudin, 2017)

Slowly, Ibn al-Muqaffa's idea was accepted by the caliph when he died because he was accused of being a rebel and sentenced to death by the caliph Abu Ja'far al-Mansur (Faizin, 2020). A few years later, he met Imam Malik to make a book containing laws that contained all regulations on civil, criminal, economic, and other issues to serve as guidelines in the state. However, the request was rejected by Imam Malik for fear of being opposed by the people of Baghdhah, who at that time became the centrist Abbasid Caliph (Wardi, 2018). The ingenuity of the second Abbasid caliph managed to persuade Imam Malik to overcome all his worries, so the *taqnin al-ahkam* product by Imam Malik was born, namely the Kitab al-Muwatha', a book that not only contains laws but also contains *ahkam* traditions so that the rules published are still under the auspices of the Hadith of the Prophet Muhammad SAW. Unfortunately, the application is not as easy as what was promised by the caliph; even though there has been a codification of Islami law, Imam Malik's concern that the people of Baghdhah disputed the fiqh products he produced through deep thought because the community has long practised Imam Hanafi's fiqh products, which have been practised for generations, even though there is no book to guide them (Misnan, 2021)

The refinement of the *taqnin* process took place during the time of the Ottoman Caliphs, the effort being pursued by Caliph Sulaiman I. The development of taqnin became more concrete (1520–1560 M). At that time, he earnestly implemented the Qanun name in the royal legal system. This effort earned Sultan Sulaiman the nickname Sulaiman al-Qanuni. Qanun Name regulated various aspects, including army salaries, non-Muslim police, police affairs, criminal law, land law, and the laws of war. When the kingdom was still victorious, it also codified civil laws such as marriage, divorce, and others known as *Qanun Majalah al-Adliyah*. The style of the Ottoman Turkish Qanun is still attached to Imam Hanafi's Jurisprudence (Sakhowi, 2022). The *taqnin* process also occurred during

the Mughal Empire in India; this period produced Islamic law legalized by the kingdom known as Fatwa alamghirriyah and turned into Anglo-Mohammadan Law after the British took part in changing the Islamic legal order in India (Mohsi, 2020). One of the changes in implementing Islamic law is that the judges appointed are not from among Muslims. They are sent by the British government and accompanied by *muftis* to assist judges in resolving Muslim cases (Schacht, 2010). The country known as the Mecca of Islam, Saudi Arabia, also enlivened *taqnin* to legitimize religious law into national law based on the Mazhab Ahmad bin Hambal; King Abdul Aziz initiated this. By order of the king, a special team was formed to form a national law consisting of Qari (chairman of the high court of shari'ah in Mecca) and its members. Unfortunately, the law was rejected by many scholars.

Indonesia, the country with the most Muslims in the world, has the spirit to carry out the process of *taqnin* in various aspects of the law. It was marked since the beginning of the establishment of this nation, as seen from the idea of regulating the obligation to implement sharia for Muslims in the Jakarta Charter. In the New Order era, the government accommodated several aspects of Islamic law with the emergence of Marriage Law No. 1 of 1974 and the birth of Government Regulation (PP) No. 9 of 1975. 1975 Government Regulation on Waqf in 1977 became Law No. 41 of 2004 concerning Waqf, Religious Courts Law No. 7 of 198. It changed to Law No. 50 of 2009, Inpres (presidential instruction) No. 1 of 1991, which resulted in the compilation of Islamic law (KHI), and Permen (Ministerial Regulation) No. 2 of 2008 concerning the compilation of Sharia economic law to become a legal umbrella in the economic activities of the Islamic community. The development of this economic law gave rise to new rules related to the problem of Muslim activities in the realm of banking, thus giving birth to Law No. 21 of 2008 concerning Sharia Banking. In 2008, Sharia banking and many Islamic laws were still transformed into positive ones in Indonesia. All the rules of Islamic law that have been formulated into Indonesian positive law are not separated from the results of *fuqaha* thinking. The method used is not based on detribalizing one view of *fuqaha*. However, rather than a comparative effort of all fiqh products, the *target* is done, namely choosing the proper Islamic law to be applied and used as state law (Harisudin, 2016).

Taqnin Products in Indonesia Marriage Law

While the term taqnin can be equated with legislation and results in drafting laws that have legal consequences, there is still debate surrounding taqnin or legislation in the context of sharia in Indonesia. Although the general population of Indonesia is Muslim, the country adheres to the ideology of Pancasila, which has its characteristics and uniqueness from Muslim countries in the world. As a result, there is a polemic between the formalistic-normative group that wants taqnin of Islamic law textually and the substantive-cultural group that wants taqnin as a basis for thinking adapted into law (Wardi, 2018). The purpose of the lagality of the Islamic law that is transformed into state law is to provide legal clarity for both judges as executors, and the people who live the law besides judges can be guided by the law so that there is no need to re-explore new laws (Santoso, 2023)

Legislation of Islamic law (fiqh) in Indonesia can be identified based on two main methods: the scholarly method (academic legislation) and the participatory democratization method (political legislation). This approach is different from the concept of receptive during the colonial period, which relied on indoctrination without

considering democratic strategies or participation into account. Legislating Islamic law that prioritizes these two methods should not only affect the acceptance of legal products by the community but also provide certain validity. Both majority and minority Muslim countries have carried out transformation and efforts to legislate Islamic family law into positive law because Muslim scholars strive for Islamic law to become a source of law recognized by the state so that the law can be a reference for the state (Islamy, 2019). Then, this family law reform can be traced to the process of family law legislation in Islamic countries. The process shows a movement to transform fiqh into law with contemporary methods so that it can adjust the rules to the socio-political conditions accommodated by the state (Zubaida, 2012). The *taqnin* process itself has characteristics in producing a law, including family law issues (Setiawan, 2014)

First: Conventional Characteristics

Fuqaha determines that the problem can be understood in Islamic law by directly exploring the reference sources, namely the Qur'an and Hadith. The *fuqaha* known as *mujtahid muthlaq* imams who have *ushul fiqh* capabilities even gave birth to their *ushul fiqh* methods to produce legal products by their *istinbath* methods, such as Imam Hanafi, Maliki, al-Syafi'i, Hambali, and others. These characteristics are traditional, and it is difficult for a modern Islamic state to use them in the *taqnin* process. This difficulty is not without reason; there are several weaknesses in its application in the *taqnin* process, namely the foundation in *ushul* fiqh has been compiled by the imams of the madhhab so that they gave birth to fiqh books with their characteristics, so, for now, the scholars are still based on the imams of the madhhab in making legal findings. On the other hand, the weakness of conventional characteristics in determining Islamic law is *atomistic* (*atomistic approach*) or persial, meaning that classical scholars in determining a law take several arguments or even just one argument without linking other arguments that are still relevant and related to the problem. Another impact of the use of atomistic or persial nature opens up opportunities for a scholar to choose arguments that are considered to support his personal opinion.

Another weakness i*n history* is the lack of approaching the *asbabun nuzul* or *asbabul wurud of* the arguments used from the Qur'an and Hadith. The rigid nature of the resulting law also creates a gap in conventional characteristics. The fiqh products produced through ijtihad of scholars focus on the *Nash* used as a reference without considering other scientific aspects such as sociology, anthropology, psychology, etc. It proves that the *mujtahids* separated tafsir and its methodology in producing legal products, so fiqh only has one view of one discipline. The methodology of tafsir also helps *mujtahid* answer various legal issues. The weakness is *that local traditions and culture* will influence each mujtahid when colouring the resulting fiqh. The political element is also a shortcoming, such as the political interests of the ruler in applying Islamic law.

Second: Contemporary

Contemporary characteristics are methods Muslim countries use in reforming Islamic law so that legislation can be carried out so that the law can be applied in state law and recognized as one of the official sources of law in a modern Islamic state. Some approaches to legislating Islamic law, such as *astakhayyur*, choose the view of one of the classical fiqh scholars, either from the Imam Mazhab or not. The solution in choosing the opinion of these scholars is using *tarjih*, which is choosing the opinion of *fuqaha* based on the strength of the evidence, the method of *istinbath,* and effectiveness in implementation

through the view of *urf.* The talfiq approach can also be used by combining the opinions of scholars (two or more) in legislating into national law.

The first product produced in the transformation of fiqh into law in the form of law was the birth of Marriage Law No. 1 of 1974, which was the answer to the anxiety related to the problems of existing laws in marriage and then explained again with the Compilation of Islamic Law published in 1991 by the Presidential Instruction in 1991, not only marital problems but also regulating inheritance and waqf in Indonesia (Harisudin, 2016). Many fiqh products have been transformed into marriage regulations, such as Article 2 (1) in the Marriage Law and KHI Article 4, explaining that marriage is said to be religiously and state-valid if it is by the provisions of their respective religious laws. This article has implemented Islamic law, which states that the conditions for the validity of marriage must come from Islam.

The issue of witnesses in fiqh is a condition and pillar in the implementation of marriage; the jumhur *fuqaha* also agree, but the only difference is the position of witnesses as a condition or pillar of marriage and differences in understanding of the condition of the witness (Yullianti, 2011). This law has been transformed into the positive legal rules of the Marriage Law in Article 26 and KHI Article 24 (1) and (2), which is an application of the necessity of witnesses in the implementation of marriage; even marriage without a valid waki can lead to the cancellation of marriage. As for the conditions of witnesses used as conditions and pillars of marriage in KHI Article 25, witnesses must have fairness, aqil baligh, not impaired memory, and not be deaf or deaf. Suppose you look at the second condition of the witness described in KHI. In that case, it is based on the opinion of most scholars, except that Imam Hanafi does not require fairness in the category of witnesses. This approach is based on the view that, according to the Hanafi madzhab, an individual considered wicked still has the right to testify. However, their testimony can be rejected if they are accused of lying. However, when a person considered ungodly attends and listens to the testimony, the possibility of accusations of lying becomes irrelevant. Therefore, in that context, the person is considered a fair witness, and then the testimony of two women is also accepted (Al-Sarkhasi, 1995)

The majority of *fuqaha* agree that marriage does not have legal force if the wali does not play a role in the contract; this is based on the hadith of Aisha *r.a., "Marriage is not valid in the absence of a wali and two fair witnesses*.". So from this hadith, it is implemented in KHI Article 19 that the wali becomes a pillar in marriage. Because KHI makes the wali a pillar of marriage, this aligns with the opinion of the jumhur *fuqaha* (*the* majority of *fuqaha*) (Mughniyah, 2011). In contrast to the jumhur, Imam Hanafi argues that wali in marriage is only for women who have not reached puberty or have not yet perfected their minds; as for women who have reached puberty and have perfect minds, they have the right to marry themselves without the involvement of a wali (Al-Sarkhasi, 1995). Of course, the woman requires that the man has the same level (*sekufu'*), or the dowry given by the man is equal to the mahr *mitsil*. The problem arises if the woman does not fulfil the previous conditions and there is still a wali who has the right to marry her, then the wali has the right to ask the judge for *fasakh* so that the marriage is not valid (Mughniyah, 2011)

Classical fiqh scholars did not pay special attention to the issue of marriage registration because the proof that someone was married was by holding a wedding

banquet (Sadat, 2023). The purpose of *walimah is* to hold a sign and notification to the community that a man and woman have officially become husband and wife, so there is no need to require marriage registration as valid proof that someone is married. However, the vast territory of Islam has even formed a state. Hence, marriage registration and a marriage certificate are essential to do as state administration and become proof that someone has legally become husband and wife (Nelli, 2023). The concept of dowry in Islam is a gift from a man who is married as proof and a symbol of respect for the woman he loves. Based on KHI Article 30, which requires a man to give a dowry to a woman, this is in line with the opinion of the majority of scholars that it is the man who gives the dowry to the woman, not the other way around. However, scholars differ in their opinion on providing a limit to the size of the dowry. Imam Hanafi believes the minimum dowry is 10 dirhams (Al-Sarkhasi, 1995). Imam Malik believes the minimum dowry should be¼ dinars or 3 dirhams (Anas, 1998). Imam al-Shafi'i and Imam Hambali believe there is no minimum limit in giving dowry to women; this is assessed by the ability of the man (Az-Zuhaili, 2007). In response to the difference in the minimum limit, KHI Article 31 uses the opinion of Imam al-Shafi'i and Imam Hambali that the freedom in giving dowry as long as it is not burdensome for the man marriage, Then the hot issues in marriage, such as polygamy, are also regulated in the Marriage Law and KHI. In the Marriage Law, Article 3 (1) explains that men are required to have one wife by the principles of marriage, but paragraph (2) opens the door for men to be polygamous. KHI Article 55 also gives a positive signal for men who want to have more than one wife. So, both positive laws regarding the permissibility for men to commit polygamy by Islamic fiqh law (Ashidiqie, 2021). The permission is accompanied by the condition that it can be fair. Problems will arise when men want more than one wife if men cannot be fair; even men will instinctively have difficulty understanding the concept of fairness for previous wives (Latupono, 2020). This concept of justice is also demanded in KHI Article 55 (2), that justice is an absolute price for men who want to be polygamous; if they cannot be fair, then they are prohibited from having more than one wife

One of the other principles related to marriage is the principle of monogamy. However, not only does Islamic law provide an opportunity for men to have more than one wife, but positive law in Indonesia does, too. The minimum number of men allowed to marry women based on KHI Article 55 (1) is only four people simultaneously. This rule of law has followed the opinion of most scholars, limiting men to four wives (Shiddiq, 2021). It turns out that some scholars have their limitations on polygamy, such as the al-Zahiri Mazhab. As a follower of the Zhiri Mazhab, Ibn Hazm elaborated on the understanding of lafaz *wawu* in al-Qur'an Surah an-Nisa: 3 that it means "and" and means to increase, so it means two and three and four become two plus 3 plus 4 total 9. Hence, the limit for polygamous men is up to 9 women. This Prophet is based on the Sunnah of the Prophet when he died; he also left nine wives (Hazm, 2007). Even quite shockingly, the minimum limit of women who can be polygamous reaches eighteen. (Hosen, 2003). The Khawarijh and some Shi'ah groups understand this large number that the meaning of "*matsna," a* repeated number, means two, so if it is associated with the verse, it is understood that *matsna (*two-two) means four*, tsulasa* (three-three) means six and *ruba'a* (four-four) means eight so that the total becomes 19 women (Hosen, 2003). Thus, the understanding of classical Islamic law has a striking difference in determining the number of women to be polygamous. (Mustofa, 2013). So, if it is feared that he cannot be fair in

polygamy, a man should be enough with one wife who will accompany him throughout his life (Setiyanto, 2017)

A compulsory testament is a gift of property (wasiat wajibah) from a deceased person given to a testamentary beneficiary who is not included in the group of heirs whose distribution process involves a judge even without any written or unwritten evidence from the deceased (Ad-Dimasyiqi, 2004). The problem with the minimum amount limit in bequeathing property in KHI Article 195 is that the minimum limit of the property to be bequeathed is only $^1/_3$ of the property left behind. People who are entitled to receive wasait wajibah property are only adopted children and adoptive parents (Harahab, 2010). At first glance, the maximum amount of *compulsory* bequest is by the *majority of fuqaha* based on the hadith of the Prophet Muhammad SAW: "*When Sa'd bin Abi Waqash, a companion of the Prophet when he was sick, was visited by the Prophet. Sa'd asked, 'I have a lot of wealth, but I have only one daughter who will receive my inheritance. Should I donate two-thirds of my wealth?' The Prophet replied, 'No.' Sa'd asked again, 'What if I donate one-third?' The Messenger of Allah replied, 'The amount of one-third is better if you leave your child in a state of sufficiency'*" (Misno, 2019)

When examined more deeply, related to the law of wasait wajibah, most *fuqaha* are more elastic and situational. The wills that were originally sunnah can become obligatory if there are rights that must be paid to humans (Al-Jaziri, 2011).

Will: Slightly different from *most scholars,* Mazhab al-Zahiri asserts that any type of will, including the obligatory will, must be immediately fulfilled and given to the rightful person before the property is distributed to the heirs (Hazm, 2007). Their reasoning is based on the hadith narrated by Imam Bukhari and Muslims: "*From the path of Malik from Nafi', as Ibn Umar said, the Messenger of Allah SAW has said: A Muslim should not delay putting his will in writing if he has something to bequeath. It is not proper for a Muslim to stay two nights without writing his will*" (Misno, 2019).

The explanation of the validity of divorce is written in Marriage Law Article 39 and KHI Article 115, which state that divorce is valid and has legal force if the court has decided it after a series of peace efforts by the judge. This appears contradictory to the law of klasih fiqh (Said, 2017). According to most scholars, the husband has the prerogative to divorce, even allowing men to divorce (*thalaq*) when they are not in court and through a trial process by a judge (Asmuni, 2020). If reviewed in depth, the validity of divorce upon a judge's decision has similarities with the Shi'a Imamiyyah Mazhab (Hasan, 1879). This Mazhab emphasizes that the validity of divorce is not in the hands of men but judges who will weigh and decide whether a married couple deserves to separate (Riyanton, 2022)

Table 1. *Munakahat* jurisprudence that has been processed into positive law

No.	Material Law	Classical Islamic Law	Islamic law, after being legislated	Characteristic method of Taqnin
1	Marry	It is obligatory to marry a fellow Muslim (Jumhur Ulama Fikih)	Marriage Law No. 1 of 1974, Article 2 paragraph (1) and KHI Article 4	Conventional characteristics

No.	Material Law	Classical Islamic Law	Islamic law, after being legislated	Characteristic method of Taqnin
2	Witness	Witnesses are required for the marriage contract	Marriage Law No.1 of 1974 Article 26, Government Regulation No.9 of 1975 Article 10 paragraph (3) and KHI Article 24 paragraphs (1) and (2)	Conventional characteristics
3	Witness requirements	Must be Muslim, puberty, reasoning, perfect sensory organs needed when witnessing, two men or 2 women 1 man (Jumhur scholars except Imam Hanafi, who does not require fairness as a condition of witness)	KHI Article 25	Contemporary characteristics (*takhayyur*)
4	Wali	There must be a wali in the marriage contract (themajority of scholars except Imam Hanafi allow a woman who has reached puberty or is a widow to marry herself without a guardian).	Marriage Law No.1 Year 1974 Article 50-52 and KHI Article 19	Contemporary characteristics (takhayyur)
5	Polygamy	Permissible (majority of scholars)	Marriage Law No.1 Year 1974 Article 3 paragraph (2) Government Regulation No.9Year 1975 Article 43 and KHI Article55	Conventional characteristics
6	Polygamy requirements	Must be fair in terms of both physical andmental maintenance and have a limit of up tofour wives (majority of scholars except Imam Zahiri, Imam Ibn Hazm, and the Khawarijh group).	KHI Article 55 paragraph (2)	Contemporary characteristics (*takhayyur*)
7	Marriage Registration	There is no explicit mention in fiqh, but marriage registrationcan be equated with *walimah* in terms of its purpose, namely as a sign and	Marriage Law No.1 Year 1974 Article 2 Paragraph (2), Government Regulation No.9Year 1975 Article2 and	Contemporary characteristics (*mashlahah*)

No.	Material Law	Classical Islamic Law	Islamic law, after being legislated	Characteristic method of Taqnin
		proof to the community thatsomeone has legally become husband and wife.	KHI Articles5-7	
8	Mahar	The majority of scholars make it obligatory for a man to give a dowry to a woman he wants to marry as a form of love and respect.	KHI Article 30	Conventional characteristics
9	Minimum Mahar Limit	According to the ability of the man (Imam al-Sayfi'i and Imam Hambali), except Imam Hanafi, the minimum dowry limit is 10 dirhams, Imam Malik¼ dirhams / 3 dinars.	KHI Article 31	Contemporary characteristics (takhayyur)
10	Wasiat Wajibah	The majority of scholars agree that the law of Wasiat Wajibah is conditional.	KHI Article 194	Conventional characteristics
11	Limitation on the amount of compulsory bequest	1/3 of the estate left behind	KHI Article 195 paragraph (2)	Conventional characteristics
12	Legal Divorce	The validity of divorce must be based on a judge'sdecision, provided there are witnesses Shia Imamiyah scholars).	Marriage Law Article 39, Government Regulation No.9 of 1975 Articles 16- 18 and KHI Article 115	Contemporary characteristics (takhayyur)

Data sources: Marriage Law, Government Regulation No.9 of 1975, KHI, Kitab al- Mabsuth, Kitab al-Mughni, Kitab al-Umm, Kitab al-Mabsuth fi Fiqh al-Imamiah

The Legality of Post-Taqnin Marriage Laws

The classical *fuqaha* were not familiar with the term *taqnin*, as it is the *most* recent concept in making fiqh the law of the land. In the context of its implementation, judges have a responsibility to adhere to a particular opinion when they render a judgment. They are not allowed to violate that opinion, even if they have their ijtihad. When a ruling has been promulgated, it becomes binding on judges, and they must abide by the ruling because it has become applicable to Sharia law and is recognized by the state. This means that judges' rulings should not contradict the law, even if they have their ijtihad on the issue set out in the case law. This led to a split among scholars, with some allowing this practice while others prohibited it (Yazid, 2017)

At present, the concept of *qanun is* seen as the formalization of Islamic law, a sharia rule codified by the government, which has a binding nature and applies generally. Some parties consider the birth of *qanun* or Islamic law legislation in the modern era as progress

in developing and enforcing Islamic laws. Some scholars see it as an essential step in the decision-making process of judges when facing similar problems in various judicial institutions (Mohsi, 2020). *Qanun* is a legislative product that is an integral part of the national legal system. Therefore, the principles in forming regional laws and regulations also apply in *qanun*. Thus, *qanun* must stay consistent with laws and regulations that have a higher level (Efendi, 2014). If the *qanun* has become a national

Law has a stronger legal force and applies generally because Muslims and non-Muslims must obey it, so the purpose of enacting Islamic law is to create peace and peace in social life.

Opportunities and Challenges in Implementation

At first glance, the validity of fiqh transformed into law has a good impact, especially on legal practitioners. It makes it easier for them to refer to the law and creates legal unification across different judicial institutions. However, on the other hand, a challenge that focuses more on the negative impact is that Islamic law, with all its diversity and complexity, can sometimes be simplified and formalized in legislation. Efforts to affirm and formalize Islamic law not only contradict the fluid and relative nature of Islamic law but can also hinder the development of diverse Islamic law. This can lead to legal rigidity, the cessation of ijtihad efforts, and the emergence of new issues surrounding taklid in the interpretation of Islamic law (Khalil, 2009)

Challenged by Indonesia's social structure, the idea of actualizing Islamic law is still a subject of ongoing debate among Muslims. There are supporters and opponents of various views. Various theories of the actualization of Islamic law in Indonesia include formalistic-legalistic, structuralistic, culturalistic, and academic approaches. There is a more extreme group that proposes realizing an Islamic state as an appropriate method for the actualization of Islamic law. On the other hand, some emphasize political struggle and criticize cultural struggle with a focus on fostering public understanding. The main challenge in efforts to formalize or legislate Islamic law in Indonesia is the need for common ground or integration of the correct concept of actualization of Islamic law. The author argues that if efforts to legislate Islamic law are to succeed, the approaches mentioned need to be distilled and integrated with Indonesia's national legal system. Thus, the strategy of the struggle for the legislation of Islamic law can achieve better success.

Substantial challenges in the effort to transform fiqh into legislation need to direct the process. Some may consider it harmful. The aim is to assess the effectiveness of fiqh in its application to legislation. The concept of private or civil law should also not cover all areas, as some private material in Islamic law is very sensitive, and its regulation can result in social, religious and sara conflicts. However, legislative efforts on Islamic law materials are still needed in response to the objective demands that indicate the implementation of Islamic law in Indonesia. Culturally, this can be a challenge in *Taqnin's* efforts *in* Indonesia, but it also faces challenges in the cultural context of Indonesian society. Historical facts show that various legal systems influence cultural diversity in Indonesia. Therefore, in terms of culture, efforts to actualize Islamic law in Indonesia have encountered various obstacles and challenges. Efforts in the legislation of Islamic law into positive law become an endless polemic; another challenge that will be an obstacle is the outbreak of *a taqlid* attitude and close the opportunity for judges to make ijtihad in Islamic law.

D. Conclusion

The development of fiqh, which transforms into positive law in a country, is a sign of progress in law. This positively impacts law enforcers and the people who will implement it because there is clarity in the law that will be applied. The taqnin process has occurred in various Islamic worlds, including Indonesia. Some laws have been turned into favourable laws that apply to all citizens, especially Muslims.

A clear example of this transformation is Law No. 1/1974 on Marriage and the publication of the Compilation of Islamic Law. This shows that laws that previously only existed in fiqh are slowly starting to become part of state law. This includes aspects such as the validity of marriage, witnesses, guardianship, polygamy, mandatory wills, and divorce. The validity of the laws in fiqh became essential when they passed the taqnin stage and transformed into favourable laws. While there are opportunities to develop more laws from fiqh into laws that are legally recognized by the state, the challenges faced in making fiqh the law of the land are not few.

References

Ad-Dimasyiqi, S. A.-A. M. B. A. (2004). *Fiqih Empat Mazhab*. Bandung: Hasyimi.

Al-Jaziri, A. (2011). *Fikih Empat Mazhab*. Bandung: Pustaka Azzam.

Al-Sarkhasi, S. (1995). *al-Mabsuth*. Beirut: Dar al-Ma'rifah.

Anas, M. bin. (1998). *al-Muwatha'*. Beirut: Dar al-Fikr.

Ashar, M. Y. J. W. A. (2022). Islamic Law and National Law (Comparative Study of Islamic Criminal Law and Indonesian Criminal Law). *Al-Hurriyah: Jurnal Hukum Islam*, *6*(2), 18–30. Diambil dari https://ejournal.uinbukittinggi.ac.id/index.php/alhurriyah/article/view/4952

Ashidiqie, M. L. I. I. (2021). Poligami dalam tinjauan syariat dan realitas. *Al-Ahwal Al-Syakhsiyyah: Jurnal Hukum Keluarga dan Peradilan Islam*, *2*(2), 199–218. https://doi.org/10.15575/as.v2i2.14332

Asmuni. (2020). Perceraian Dalam Perspektif Fikih Klasik Dan Kompilasi Hukum Islam. *Warta*, (224), 1–16.

Asti, S. L. S. A. M. M. J. (2022). Islamic Law Legislation In An Effort To Reform Indonesia's National Law. *Al-Risalah Jurnal Ilmu Syariah dan Hukum*, *22*(1), 93–104. Diambil dari https://journal3.uin-alauddin.ac.id/index.php/al_risalah/article/view/30562

Az-Zuhaili, W. (2007). *Fiqih Islam Wa Adillatuhu*. Gema Insani.

Azani, M. (2021). The Development of Islamic Law in Indonesia Through Traditional Theory and Legal Changes. *Jurnal Mahkamah : Kajian Ilmu Hukum Dan Hukum Islam*, *6*(2), 113–128. https://doi.org/10.25217/jm.v6i2.1626

Barthos, A. Y. M. (2020). Transforming Islamic Law in Indonesia from a Legal Political Perspective. *Al-Ahkam*, *30*(2), 159–178. https://doi.org/10.21580/ahkam.2020.30.2.6333

Burhanuddin, M. (2019). Conflict Mapping Piagam Madinah (Analisa Latar Belakang Sosiokultural Piagam Madinah). *Jurnal Al-Ijtimaiyyah*, *5*(2), 1. https://doi.org/10.22373/al-ijtimaiyyah.v5i2.5233

Efendi. (2014). Kedudukan Qanun Bidang Sumber Daya Alam Dalam Sistem Hukum Nasional. *Jurnal dinamika hukum*, *8*(14), 30.

Fachrudin, L. L. H. F. (2017). Taqnīn Al-Ahkām Dalam Lintas Sejarah. *Al-Mashlahah: Jurnal Hukum Islam dan Pranata Sosial*, *8*, 659–673.

Faizin, H. Y. S. Y. E. R. A. H. (2020). Ibn Al-Muqaffa's Proposal for Taqnīn and its Synchronization with Islamic Law Codification in Indonesia. *Samarah*, *4*(2), 504–527. https://doi.org/10.22373/sjhk.v4i2.7864

Fautanu, K. T. I. (2021). Institutionalization of Islamic Law in Indonesia. *Al-'Adalah*, *18*(1–16). Diambil dari http://ejournal.radenintan.ac.id/index.php/adalah/article/view/8362

Gunawan, K. B. E. (2018). The Implementation Of Islamic Law At The Early Spread Of Islam In Indonesian Archipelago. *Jurnal Ilmiah Al-Syir'ah*, *16*(2), 113–125. Diambil dari http://journal.iain-manado.ac.id/index.php/JIS/article/view/685

Harahab, D. B. N. H. I. Y. (2010). Pengaturan dan Implementasi Wasiat Wajibah di Indonesia. *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada*, *22*(2), 311–329. Diambil dari https://jurnal.ugm.ac.id/jmh/article/view/16229

Harisudin, M. N. (2015). The Taqnin of Indonesian Islamic law dynamic. *Journal of Indonesian Islam*, *9*(1), 79–100. https://doi.org/10.15642/JIIS.2015.9.1.79-100

Harisudin, M. N. (2016). Diskursus Fikih Indonesia : Dari Living Laws Menjadi Positive Law. *Al-Manhaj*, *X*(1), 1–14.

Hasan, M. bin. (1879). *Al-Mabsuth fi Fiqh al-Imamiah*. Beirut: Dar al-Ilmiyah.

Hasanuddin, H. (2021). Pelaksanaan Taqnin Al-Ahkam Di Negara Kesatuan Republik Indonesia. *SYARIAH: Journal of Islamic Law*, *3*(1), 125. https://doi.org/10.22373/sy.v3i1.306

Hazm, I. (2007). *al-Muhalla*. Jakarta Selatan.

Hosen, I. (2003). *Fiqh Perbandingan Masalah Pernikahan*. Jakarta: Pustaka Firdaus.

Ishak, Z. A. M. H. I. M. I. bin. (2020). Kodifikasi Wahyu. *HUMANISTIKA : Jurnal Keislaman*, *6*(2), 210–230. https://doi.org/10.55210/humanistika.v6i2.370

Islamy, A. (2019). Eksistensi Hukum Keluarga Islam di Indonesia dalam Kontestasi Politik Hukum dan Liberalisme Pemikiran Islam. *Al-Istinbath: Jurnal Hukum Islam*, *4*(2), 161–176. https://doi.org/10.29240/jhi.v4i2.1059

Jaenudin. (2017). Pandangan Ulama Tentang Taqnin Ahkam. *'Adliya*, *11*(105).

Jailani, A. (2018). LEGISLASI QANUN JINAYAT ACEH DALAM SISTEM HUKUM NASIONAL. *Ar Raniry : International Journal of Islamic Studies*, *4*(2), 221. https://doi.org/10.20859/jar.v4i2.138

Kamsi. (2020). Politics of Islamic Law in Indonesia: Indonesianization of Islamic Law. *Asy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum*, *52*(1), 1. https://doi.org/10.14421/ajish.v52i1.304

Khalil, R. H. (2009). *Tarikh Tasyri". Sejarah Legislasi Hukum Islam*. Jakarta: Sinar Grafika Offset.

Latupono, B. (2020). Kajian Juridis Dampak Poligami Terhadap Kehidupan Keluarga. *Bacarita Law Journal*, *1*(1), 15–27. https://doi.org/10.30598/bacarita.v1i1.2788

Ma'rifah, N. (2019). Positivisasi Hukum Keluarga Islam sebagai Langkah Pembaharuan Hukum Islam di Indonesia: Kajian Sejarah Politik Hukum Islam. *Al-Manahij: Jurnal Kajian Hukum Islam*, *13*(2), 243–257. https://doi.org/10.24090/mnh.v13i2.2692

Misnan, M. (2021). Sejarah Kodifikasi Hukum Islam (Taqnin) Di Negara Islam. *Al-Usrah : Jurnal Al Ahwal As Syakhsiyah*, *9*(01), 72–82. https://doi.org/10.30821/al-usrah.v9i01.10400

Misno. (2019). Wasiat Wajibah Untuk Anak Angkat Dalam Khi Dan Fikih. *ADLIYA: Jurnal Hukum dan Kemanusiaan*, *11*(1), 99–118. https://doi.org/10.15575/adliya.v11i1.4854

Mohsi, M. U. I. M. M. R. (2020). TAQNĪN AL-AHKĀM (Telaah Sejarah Legislasi Hukum Perdata Islam dalam Hukum Nasional Indonesia). *Ulumuna: Jurnal Studi Keislaman*, *6*(1), 85–109. https://doi.org/10.36420/ju.v6i1.3957

Mughniyah, M. J. (2011). *Fiqh Lima Madzhab*. Jakarta: Penerbit Lentera.

Nafisah, D. (2013). Positivisasi Hukum Keluarga Islam di Indonesia dalam Perspektif Gender. *Al-Manahij: Jurnal Kajian Hukum Islam*, *7*(1), 39–52. https://doi.org/10.24090/mnh.v7i1.575

Nelli, D. H. A. K. J. (2023). Legal Comparison on Dowry In Islamic Countries. *Journal of Asian Studies: Culture, Language, Art and Communications*, *4*(1).

Nurozi, A. (2022). Comparative study of the process of Islamic law legislation in Indonesia with Malaysia and its implementation into legislation regulations. *Jurnal Hukum Islam*. Diambil dari https://e-journal.uingusdur.ac.id/jhi/article/view/498

Pulungan, J. S. (2018). Relasi Islam dan Negara: Studi Pemikiran Politik Islam dalam Perspektif al-Qur'an. *Intizar*, *24*(1), 185–202. https://doi.org/10.19109/intizar.v24i1.2187

Riyanton, T. U. M. H. (2022). Kesesuaian Fiqih Talak Syi'ah Imamiyyah Dengan Aturan Perkawinan Di Indonesia. *Asy-Syari'ah*, *23*(2), 245–260. https://doi.org/10.15575/as.v23i2.12109

Sadat, M. W. I. Z. S. A. (2023). Identification of Dowry (Mahr) in Islam. *Sprin Journal of Arabic-English Studies*, *2*(02), 38–46. https://doi.org/10.55559/sjaes.v2i02.41

Sahidin, R. R. S. (2019). Analisis Historis Manajemen Dakwah Rosulullah Saw dalam Piagam Madinah. *Jurnal Tamaddun : Jurnal Sejarah dan Kebudayaan Islam*, *7*(2), 362–387. https://doi.org/10.24235/tamaddun.v7i2.5503

Said, M. H. (2017). Doktrin Syi'ah Dalam Masalah Imamah Dan Fikihnya. *Al-Fikra : Jurnal Ilmiah Keislaman*, *8*(2), 334. https://doi.org/10.24014/af.v8i2.3815

Sakhowi. (2022). Taqnīn Method of Qānūn Jināyah and Problems of Its Implementation in Aceh, Indonesia. *JIL: Journal of Islamic Law*, *3*(2), 193–211. https://doi.org/10.24260/jil.v3i2.817

Santoso, L. (2023). Eksistensi Taqnin dalam Negara Hukum Modern dan Relevansinya dalam Dinamika Legislasi di Indonesia. *El-Dusturie*, *2*(1). https://doi.org/10.21154/el-dusturie.v2i1.6746

Schacht, J. (2010). *Pengantar Hukum Islam,*. Bandung: Nuansa.

Setiawan, E. (2014). Dinamika Pembaharuan Hukum Keluarga Islam. *de Jure*, *6*, 138–147.

Setiyanto, D. A. (2017). Poligami Dalam Perspektif Filsafat Hukum Islam (Kritik Terhadap Hukum Perkawinan Di Indonesia). *Al-Ahwal: Jurnal Hukum Keluarga Islam*, *10*(1), 49. https://doi.org/10.14421/ahwal.2017.10105

Shiddiq, S. (2021). *Studi Perbadningan Mazhab Dalam Fikih*. Jakarta: Prenada Media.

Wardi, M. C. (2018). Legislasi Hukum Islam (Telaah terhadap Konsep Taqnin dalam Ranah Substantivistik dan Formalistik). *NUANSA: Jurnal Penelitian Ilmu Sosial dan Keagamaan Islam*, *15*(2), 427. https://doi.org/10.19105/nuansa.v15i2.2065

Yazid, I. (2017). Taqnin al-ahkam; Sejarah, Keabsahan dan Tantangan di Indonesia. *Al Maslahah Jurnal Hukum dan Pranata Sosial Islam*, *12*, 193–208.

Yullianti, I. (2011). Transformasi Fiqh Empat Madzhab Ke Dalam Kompilasi Hukum Islam Tentang Saksi Nikah. *'Adilya*, *12*(105), 61–84.

Zubaida, S. (2012). *Law and Power in the Islamic World*. London: LB. Tauris.