

CONTEMPORARY WAQF AND FAMILY IN MUSLIM COUNTRIES: LEGAL REVIEW IN TAHIR MAHMOOD'S PERSPECTIVE

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Abstract

The purpose of this study is to describe contemporary waqf and family law in Muslim countries in the perspective of Tahir Mahmood. This research method uses a literature review approach whose main source is a book by Tahir Mahmood, entitled "Family Law Reform in the Muslim World", published by N.M. Tripathi PVP, Ltd., Bombay, in 1972, with a total of 336 pages. This literature review concludes that broadly speaking, the legal system in force in Muslim countries consists of three parts, namely: a system that still applies sharia as human law (principal) and seeks to apply it in all aspects of human relations as a whole, abandon sharia and replace it with a completely secular law, and a system that tries to take a moderate path between the two extreme legal systems, namely implementing Islamic law in full and a system that completely rejects Islamic law. Based on the three patterns of application of Islamic law in Muslim countries, it shows that the differences in the system and form of renewal of Islamic law are not only caused by the political system adopted, but also by the historical, sociological and cultural differences of each Muslim country. The ijtihad mechanism in positivizing legislation of waqf and social problems has been carried out by sharia law reformers to answer some contemporary legal issues through the use of takhayyur and talfiq.

Keywords: *Family law, waqf, Muslim countries, and Tahir Mahmood.*

Introduction

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Sharia is a fundamental element in Islam that aims for the benefit of humans with an orientation to social justice, because Islam is a religion of rahmatan lil ‘alamin. As a universal, comprehensive, and universal religion, Islam should be able to answer and counter any problems that arise.¹ Because the more advanced the era and the more modern an era, the problems will be more numerous and more complex, this results in a necessity for Islamic law to be able to answer contextual problems by always being sourced and guided by the sources of Islamic law itself. This statement is in line with the fiqh rules which read “al hukmu yaduuru ma’a ‘iltraini embodiment wa ‘adaman”. In the theory of sociology of law is also contained, as said by A.P. Craabree LLB “law is clothes the living body of society”.²

Law is a community dress that must be in accordance with the size and stitching of the community’s needs. In essence, the law follows the needs of the community and reflects the benefit. Amin Abdullah also argued, in his book *Philosophy of Kalam in the Era of Postmodernism*, concluding that Islamic civilization is nothing but the accumulation of the struggles of adherents of Islam when dealing with the dialectical process between the “normativity” of the teachings of the first revelation and the “historicality” of the experience of the human caliphate on earth which has always existed fickle.³

Talking about sharia, of course, cannot be separated from Islamic law itself and fiqh, and talking about these two things cannot be separated from the discussion of family law, which

¹ Mahsun Fuad, “Hukum Islam Indonesia: Dari Nalar Partisipatoris Hingga Emansipatoris (Indonesian Islamic Law: From the Concept of Participatory to Emancipatory,” in *Islam Nusantara: Dari Ushul Fiqh Hingga Paham Kebangsaan*, 2016.

² Dadan Muttaqien, “Telaah Terhadap Draf KHI Perspektif Sejarah Sosial Hukum,” *Al-Mawarid* 14 (2005), <https://doi.org/10.20885/almawarid.vol14.art7>.

³ Mohammad Aristo Sadewa, “Meninjau Kurikulum Prototipe Melalui Pendekatan Integrasi-Interkoneksi Prof M Amin Abdullah,” *Jurnal Pendidikan Dan Konseling (JPDK)* 4, no. 1 (2022).

nowadays is very complex, starting from the problem of marriage as the beginning of a problem, domestic violence, to polygamy. This problem does not only occur at the national level, it has even become a matter of thought and debate in the international arena, especially among the Muslim world. Therefore, it is hoped that this book entitled *Family Law Reform in the Muslim World* can help knowledge seekers as solving problems regarding family law.⁴

Tahir Mahmood uses a descriptive method in his research which is complemented by research literature and uses historical, sociological and cultural approaches.⁵ The Muslim countries included in the series of discussions in this book are countries in North Africa, West Africa, South Africa, and South Asia and East Asia.⁶ In some of these countries there has been a codification of laws, namely efforts to make the law in Muslim countries as a single legal entity that is universally enforced.⁷ It is also known as positivization of Islamic law (normative) in some Muslim countries.⁸ Tahir Mahmood wrote this book starting from his concern about several survey results regarding Islamic law and more specifically along with the times, there are many problems that arise in family law that have not yet been brought to light.⁹

⁴ Tahir Mahmood, *Family Law Reform in the Muslim World* (Bombay: N.M.Tripathi PVT, Ltd., 1972).

⁵ Lilik Andaryuni, "Poligami Dalam Hukum Keluarga Di Dunia Islam," *Sipakalebbi* 1, no. 1 (2013).

⁶ Jerg Gutmann and Stefan Voigt, "The Rule of Law and Constitutionalism in Muslim Countries," *Public Choice* 162, no. 3–4 (2015), <https://doi.org/10.1007/s11127-015-0237-z>.

⁷ Ahmad Imam Mawardi, "The Urgency of Maqasid Al-Shariah Reconsideration in Islamic Law Establishment for Muslim Minorities in Western Countries," *International Journal of Innovation, Creativity and Change* 12, no. 9 (2020).

⁸ Chokri Kooli, "Review of Assisted Reproduction Techniques, Laws, and Regulations in Muslim Countries," *Middle East Fertility Society Journal*, 2019, <https://doi.org/10.1186/s43043-019-0011-0>.

⁹ Mohd. Nasir, "Book Review: Tahir Mahmood, *Religion, Law and Society across the Globe: Musings of a Seeker after Truth*," *Studies in People's History* 4, no. 1 (2017), <https://doi.org/10.1177/2348448917694241>.

Therefore, family law in some Muslim-populated countries is transformed into positive law (it means is the Marriage Law).¹⁰ This positivity must prioritize the principles and rules of sharia law over the law itself. Meanwhile, the positivization of sharia law and/or reform of Islamic law in the format of family law legislation began in 1917 with the ratification of the ottoman law of family rights (*Qanun al-Haqq al-'Aila* or the Law on family rights) by Turkish government.¹¹ Why does Turkey have an important role in the history of Islamic law, especially in West Asia?

The reason is: Turkish civil law was originally based on the Hanafî school, but later also accommodated other schools, such as in *Majallah al-ahkâm al-adhiya* which had been prepared since 1876, but in it there were no rules regarding family law. Due to the development of society's need for law, Turkey immediately made family law and formalized it into law, in addition, Turkey also often amended or reformed the law in line with volatile political conditions at home and abroad.¹² So it is not surprising that Turkey is used as the main reference by other Muslim countries in carrying out family law reforms.¹³

Furthermore, in order to dig deeper into the conclusions of the discussion regarding the contents of the book *Family Law Reform in The Muslim World*, it can be seen and read in the following discussion.

Discussion

¹⁰ Republik Indonesia, "Undang-Undang Tentang Perkawinan," *Peraturan Pemerintah Republik Indonesia Nomor 26 Tahun 1985 Tentang Jalan* 2003, no. 1 (1974).

¹¹ Nathalie Bernard-Maugiron and Chibli Mallat, "Islam and Public Law: Classical and Contemporary Studies," *Journal of Law and Religion* 15, no. 1/2 (2000), <https://doi.org/10.2307/1051534>.

¹² Arzu Oguz, "The Role of Comparative Law in the Development of Turkish Civil Law," *Pace Int'l L. Rev.* 17 (2005).

¹³ Yuni Roslaili, Aisyah Idris, and Emi Suhemi, "Family Law Reform in Indonesia According to the Maqashid Al-Shari'a Perspective (A Case Study of Law No. 16 of 2019)," *Gender Equality: International Journal of Child and Gender Studies* 7, no. 2 (2021), <https://doi.org/10.22373/equality.v7i2.9397>.

The Biography of Tahir Mahmood

Dr. Tahir Mahmood, Member, Law Commission of India, is a renowned jurist specializing in Islamic Law, Hindu Law, Religion and Law and Law Relating to Minorities. He has been Dean, Faculty of Law, University of Delhi, Chairman, National Commission for Minorities, Member, National Human Rights Commission and Jurist-Member, Ranganath Misra Commission. Dr. Mahmood is well-known in India and abroad for his expertise in religion and the law, human rights and civil liberties, especially the law relating to the educational rights of Minorities. He is a globally noted authority on Islamic Law, Legal Systems of the Arab World and Hindu Law, subjects on which he has written and edited more than two dozen books and 500 research papers. His academic work which focuses on his progressive interpretation of these laws is widely acclaimed and has been cited by the Supreme Court of India and many State High Courts in more than 20 judgments besides being prescribed by many Indian and foreign Universities for higher legal studies. He has inaugurated, attended and presided over many international conferences and seminars all over the world and has delivered numerous lectures at internationally renowned Universities including the Universities of Harvard, Cambridge, London, Iowa and many others. As an expert on family laws, he has advised the International Commission of Jurists and many foreign governments. He is associated in different capacities with a number of notable Indian and foreign academic, legal and human rights organizations, prominent amongst them being the International Society on Family Law, Paris, the Vienna Christian-Islamic Round Table, the International Consortium of Religion and Law Studies, Milan, the Institute of Muslim Minority Affairs, Jeddah and the Committee for Drafting the Model Constitution for Islamic Countries, Kuala Lumpur. He is also the academic founder of many law schools in India including the Amity Institute of Advanced Legal Studies of which he is the Honorary Chairman.

Professor Mahmood speaks Urdu, Hindi and English and has a fair knowledge of Arabic and Persian and is a strict vegetarian.¹⁴

Family Law Problems in Muslim Countries

One of the trends in family law reform in the modern Islamic world is the imposition of legal sanctions. The move from classical law which tends to have no legal sanctions, for example, switches to state product laws and regulations which not only limit and complicate, but even prohibit and categorize a problem surrounding family law as a criminal act.

In the case of polygamy, for example, although the implementation of legal sanctions for polygamy has not become a general portrait of the laws/laws in force in Muslim countries, its existence is increasingly being considered and remains one of the hot topics of the Muslim world today. The application of legal sanctions is one of the characteristics of family law laws in modern Muslim countries. In general, these legal sanctions are related to violations of various issues surrounding marriage,¹⁵ divorce, maintenance, treatment of wives, post-divorce women's rights, and inheritance rights.¹⁶ To get a clearer picture, the following details a number of these problems:

1. Underage marriage (problem on age limit for marriage)

This issue has at least received attention from 4 Muslim countries, namely Bangladesh, Iran, Pakistan, Yemen (South). The

¹⁴ Christian W. Troll, "Bsteh, Andreas, Und Tahir Mahmood (Hrsg.): Intoleranz Und Gewalt. Erscheinungsformen, Gründe, Zugänge," *Anthropos* 101, no. 2 (2006), <https://doi.org/10.5771/0257-9774-2006-2-590>.

¹⁵ Habibah Nurul Umah, "Fenomena Pernikahan Dini Di Indonesia Perspektif Hukum-Keluarga-Islam," *Jurnal Al Wasith: Jurnal Studi Hukum Islam* 5, no. 2 (2020).

¹⁶ . Gunarto, Syarief Husien, and Akhmad Khisni, "Reconstruction of the Inheritance Rights of Illegitimate Children in Indonesia Based on the Values of Justice," *Scholars International Journal of Law, Crime and Justice* 4, no. 4 (2021), <https://doi.org/10.36348/sijlcj.2021.v04i04.006>.

Family Law applicable in these four countries explicitly imposes legal sanctions for violations of this issue.

In Bangladesh, a person who marries a minor can be sentenced to a maximum imprisonment of 1 month; or a maximum fine of 1000 taka; or both at once. Whereas in Iran, anyone who marries or marries someone who is under the minimum marriageable age can be sentenced to imprisonment from 6 months to 2 years.

In Pakistan, a man (over 18 years old) who marries a child under the age of marriage is punishable by a maximum imprisonment of 1 month; or a maximum fine of 1000 rupees; or both at once. The same sanction will also be imposed on the party organizing it; instruct; or preside over the marriage of the underage (marriage) bride. Likewise for those (every man whether as a parent or guardian or other party who has the capacity/legal right or not) who advocate; or permit the marriage to take place; or neglect to prevent underage marriages. Meanwhile, any party (male) who refuses to comply with the decision issued by the Court (related to underage marriage) while he knows that the decision prohibits the act he has committed can be sentenced to a maximum of 3 months in prison.

Meanwhile, based on the Family Law applicable in Yemen (South) all perpetrators/parties related to the violation (supporters) carry out marriages that are contrary to Law No.1. 1974 (among others regarding the minimum age for marriage: 18 (male) and 16 (female) and a maximum age difference of 20 years, unless the prospective wife has reached the age of 25 years), a maximum fine of 200 dinars may be imposed; or imprisonment for a maximum of 2 years; or both at once.¹⁷

Meanwhile in Indonesia, the age limit for marriage for women is 16 years and 21 years for men. If there is a violation or deviation in this matter, the prospective bride and groom can ask for a dispensation from the Court or other official requested by the parents of the man or woman.

¹⁷ Mahmood, *Family Law Reform in the Muslim World*.

2. Forced marriage

Iraq and Malaysia are countries that include legal sanctions in their Family Laws in this matter. In Iraq, the legal provisions are broken down according to the perpetrator. For example, any party to forced marriage, other than the first-line family, can be sentenced to a maximum of 3 years in prison along with a fine; if the perpetrator is a first-line family member, the punishment is imprisonment for a maximum of 3 years without a fine; if the perpetrator is one of the prospective bride and groom, it can be sentenced to a maximum of 10 years in prison or a minimum of 3 years in prison.

Sanctions that seem a little lighter are imposed by Malaysia. According to the Family Law there, anyone who forces someone to marry outside the reasons permitted by sharia law can be subject to a maximum fine of 1000 ringgit or imprisonment for a maximum of 6 months or both at once.¹⁸

3. Prevention of marriages that are permitted by sharia

It seems that only Malaysia has explicitly applied the penalty in this one case. Anyone who prevents someone from marrying outside the reasons permitted by sharia law, according to Malaysian Family Law, can be sentenced to a maximum fine of 1000 ringgit or a maximum imprisonment of 6 months or both.¹⁹

4. Prohibited Marriage

While the Family Laws of other Muslim countries tend to only contain a number of prohibited forms of marriage and stipulate the annulment of the marriage, Somalia and Sri Lanka seem to take a more advanced step, by criminalizing violations of this. In Somalia, the perpetrator (male) who remarries his ex-wife who was divorced by triple *talaq*, before the ex-wife has completed her *'iddah* period from her divorce from another man (husband) and has had

¹⁸ Mahmood.

¹⁹ Mahmood.

biological relations with the husband who divorced her, can be sentenced to a maximum imprisonment of 6 months and a maximum fine of 1000 SO Sh.

Sri Lanka imposes a maximum prison sentence of 3 years for any Muslim man who knowingly marries, or has or attempts to obtain (right) sexual relations with women prohibited by sharia to marry. The same punishment also applies to Muslim women (over 12 years old) who intentionally marry, or allow to have sex with a man prohibited by sharia to marry him.

Sri Lankan law also imposes sanctions on every Muslim woman who during her *'iddah* binds the marriage cord or participates as a bride in a marriage ceremony, and anyone who supports or assists in the implementation of the marriage bond or the implementation of the marriage ceremony. The perpetrators can be sentenced to a maximum fine of 100 rupees.²⁰

5. Registration and registration of marriage

It is no exaggeration to say that this issue is one of the most widely regulated in the Family Laws of Muslim countries. There are at least 5 family laws that contain provisions on this issue, namely Indonesia, Iran, Yemen (South), Jordan, and Sri Lanka.

In Indonesia, criminal sanctions can be imposed on officers (registrar) who register the marriage of a husband who will be polygamous without the court's permission. In this case, the punishment is imprisonment/imprisonment for a maximum of 3 months or a maximum fine of Rp. 7,500,-. Meanwhile in Iran, legal sanctions are applied in cases of marriages carried out without registration. The party concerned (married man) is threatened with imprisonment of 1 – 6 months.

Yemen (South) imposes a maximum fine of 200 dinars; or imprisonment for a maximum of 2 years; or both at once against all perpetrators/parties related to the violation (perpetrators & supporters) marrying or registering marriages that are contrary to Law No.1/1974. Meanwhile in Jordan, the bride (who holds the

²⁰ Mahmood.

marriage), the executor and witnesses related to the marriage unregistered (without the registration of the authorities) are subject to imprisonment under the provisions of the Jordanian Penal Code and a maximum fine of 1000 dinars.

It is interesting to note that Sri Lanka, although not a majority Muslim population, tends to include more criminalization laws in the Muslim Family Law that is enforced there. One example, making false data on records, books, permits, documents, copies about marriage and divorce can be subject to imprisonment of max. 3 years.²¹

6. Marriage outside the Court

In Iraq, men who marry out of court can be sentenced to imprisonment for a minimum of 6 months & a maximum of 1 year; a minimum fine of 300 dinars & a maximum of 1000 dinars. Doing a marriage out of court while the previous marriage is still ongoing/intertwined can be sentenced to a minimum of 3 years in prison & a maximum of 5 years.²²

7. Dowry and wedding expenses

In South Asia (the Indian subcontinent) the issue of dowry, delivery and marriage costs often becomes a critical issue and raises social problems, as a result of the strong influence of (non-Islamist) traditions prevailing in society, this seems to motivate Bangladesh and Pakistan to pay attention and outlines the rules of legal sanctions in this matter.

In Bangladesh, giving or taking or conspiring to give or take marriage favors is punishable by a maximum imprisonment of 1 year; or a maximum fine of 5000 taka; or both at once. The same punishment applies to anyone who asks the parents or guardian of the bride or groom for a marriage gift. Meanwhile in Pakistan, violations of the law on dowry, expenses and wedding gifts (Dowry

²¹ Mahmood.

²² Mahmood.

and Bridal Gifts [Restriction] Act 1976) are punishable by up to 6 months in prison; or a minimum fine equal to the maximum limit regulated by this Law; or both at once. In the meantime, if the dowry, various consignments and gifts given or received are not in accordance with the provisions of this law, they will be handed over to the federal government to be used for the marriages of poor girls as regulated in this law.²³

8. Polygamy and wife's rights in polygamy

Polygamy is the problem most subject to legal sanctions by Family Law in modern Muslim countries. Outside of countries that impose regulations that make it difficult for polygamy to move without imposing legal sanctions on the perpetrators, at least 8 Muslim countries have imposed legal sanctions on polygamy issues in their Family Laws. The eight countries are Iran, Pakistan, Yemen (South), Iraq, Tunisia, Turkey, Malaysia and Indonesia. Further details regarding the provisions for criminalizing the practice of polygamy will be presented specifically in the next discussion.²⁴

9. Divorce before the court and registration

Iran, Malaysia, Egypt, Pakistan, Jordan, and Sri Lanka include legal sanctions in their articles of Family Law related to divorce/divorce issues before the court and divorce registration. In Iran, for example, husbands who divorce or withdraw their *talaq*/divorce without registration are punishable by prison terms of 1 – 6 months.

According to the provisions of Family Law in Malaysia, the imposition of divorce outside and without the court's permission is subject to a fine of 1000 ringgit; or imprisonment for a maximum of 6 months; or both at once. Meanwhile in Egypt, based on the Law on Personal Status 1929 which was reaffirmed in the amendment of Law No. 100 1985 Article 23 A, husbands who do not register for divorce can be sentenced to imprisonment of up to

²³ Mahmood.

²⁴ Mahmood.

6 months; or a fine of 200 pounds; or both at once. Likewise, a registration officer who refuses or does not carry out the task of registering a divorce may be subject to a maximum imprisonment of 1 month and a minimum fine of 50 Egyptian pounds.

In Pakistan, to divorce a wife without submitting a written application to the authorized chairman; or and without giving a copy to the wife, can be sentenced to a maximum imprisonment of 1 year; or a maximum fine of 1000 rupees; or both at once. Meanwhile, Jordan imposes penalties under the country's Penal Code against husbands who divorce their wives (out of court) without taking the step of registration. While in Sri Lanka, making false data on records, books, permits, documents, copies about divorce can be subject to a maximum prison sentence of 3 years.²⁵

Regarding divorce, the Ministry of Religion of the Republic of Indonesia noted that in 2005, there were 55,509 divorce cases.²⁶ There are 13 components that cause divorce. Some of them are caused by the husband's polygamy practice, infidelity, problems meeting economic needs, early marriage, differences in political beliefs between husband and wife, and problems of different religions in the marriage bond.²⁷

10. The rights of the wife who divorced her husband

Tunisia seems to be moving on its own on this one issue. According to Tunisian law, a husband who evades the obligation to provide support or compensation for 1 month can be sentenced to 3 to 12 months in prison and a fine of between 100 and 1000 dinars.²⁸

²⁵ Mahmood.

²⁶ Mufti AM, "Pembaharuan Hukum Dalam Kompilasi Hukum Islam Di Indonesia," *Jurnal Ilmiah Al-Syir'ah* 7, no. 1 (2016), <https://doi.org/10.30984/as.v7i1.57>.

²⁷ Kementerian Agama RI, *Kompilasi Hukum Islam Di Indonesia*, ثبثبثبث, vol. 2018, ثبثبثبث.

²⁸ Mahmood, *Family Law Reform in the Muslim World*.

11. The issue of women's inheritance rights

It must be admitted, perhaps, only Libya that specifically pays attention to the issue of women's inheritance rights. Under the law in force in Libya, the waiver (not giving) of a woman's inheritance rights can be punished with imprisonment until the woman's inheritance rights are granted/fulfilled. Sri Lanka is listed as the country with the most legal sanctions in Muslim Family Law; while Libya (on the inheritance rights of women) and Somalia (the ban on marrying an ex-wife who has been divorced three times before the conditions are met) are by far the countries that have the least sanctions in their family law.²⁹

Islamic Law Compilation in the Scope of *Waqf* and Social Problems

Along with the times and the dynamics of society which, among other things, lead to changes in the pattern of human interaction, a number of social problems have emerged.³⁰ These problems are generally not adequately accommodated in the compilation of Islamic Law. The social problems in question are issues of injustice, inhumanity, and discrimination which are found mainly in the two main subjects of the Islamic law compilation, namely marriage law and inheritance law. In addition, there are also several important issues that have not been accommodated in the law of *waqf*.³¹

In the field of marital law, it must be fair to admit that in the Compilation of Islamic Law, there are several problematic articles from the point of view of the justice of the relationship between

²⁹ Mahmood.

³⁰ Junaidi Junaidi and Mila Surahmi, "Issue Of Grant Property Withdrawal In Article 712 Of Sharia Economic Law Compilation And Article 212 Of Islamic Law Compilation," *Nurani: Jurnal Kajian Syari'ah Dan Masyarakat* 21, no. 1 (2021), <https://doi.org/10.19109/nurani.v21i1.7977>.

³¹ Eva Niswah, "The Forms of Intellectual Property Rights Waqf as a Part of Productive Waqf," *International Journal of Social Science and Religion (IJSSR)*, 2022, <https://doi.org/10.53639/ijssr.v3i1.64>.

men and women.³² Among the problems that do not support the spirit of justice include: the age limit for marriage, marriage guardians, marriage witnesses, husband and wife rights and obligations, *nikah*, polygamy, and interfaith marriages.

The articles which are considered to be full of injustice can be explained as follows:

First, the minimum age for marriage is regulated in Article 15 paragraph (1). This article is considered unfair because it has set a minimum age for women to marry lower than the age of men. This article clearly treats men and women in a discriminatory manner, namely based solely on the needs and interests of men (patriarchal ideology).³³

Second, about marriage guardians. The discussion on marriage guardians is explained in articles 19, 20, 21, 22, and 23. Among these articles, those that tend to be gender biased are articles 19, 20 paragraph (1) and 21 paragraph (1). Guardianship rights are only owned by men who are male. There is not the slightest room for a mother to become a marriage guardian for her daughter, for example when the father is absent. If the father is not allowed to appear as a guardian, then the right of guardianship falls on the grandfather. If the grandfather *'udzur*, then the right of guardianship does not automatically transfer to the mother, but passes to the son or biological brother of the woman. This guardianship hierarchy has been regulated by the Islamic law compilation in article 21 by completely closing the opportunity for women to become guardians. For this reason, practically it must be emphasized that the article on guardianship in the compilation of Islamic law should not differentiate between men and women. If a

³² Hendri Hermawan Adinugraha and Ade Yusuf Mujaddid, "Contextualization of The Istiṣhāb Wa Sadd Al-Ẓarī'ah Towards Islamic Economic Practices in Indonesia" 14, no. 2 (2021): 98–117.

³³ Irem Ebetürk, "Global Diffusion of Laws: The Case of Minimum Age of Marriage Legislation, 1965–2015," *European Journal of Cultural and Political Sociology* 8, no. 3 (2021), <https://doi.org/10.1080/23254823.2021.1887749>.

man has the authority to marry himself and is authorized to be a marriage guardian, then it should be the same for women.³⁴

Third, about witnesses. Provisions regarding witnesses in marriage are regulated in articles 24, 25, and 26. However, what is considered to be gender biased is only article 25 which completely excludes the possibility of women being witnesses to marriages. By using gender equality parameters, men and women should have the same opportunity to appear as marriage witnesses.³⁵

Fourth, the head of the household is only carried on the shoulders of a husband, and not on the wife. Article 79 of the compilation of Islamic law states that the husband is the head of the family and the wife is the housewife. As with *fiqh* in general, the Islamic Law Compilation never considers the capability and credibility of the wife to assume the status of the head of the family. The position of “head of the family” has been given free and automatically to husbands.³⁶

Fifth, the regulation regarding *nusyuz* in the compilation of Islamic law is contained in article 84 paragraph (1). However, in this *nusyuz* issue, the compilation of Islamic law still looks gender biased.³⁷ This is because the problem of *nusyuz* in the compilation of Islamic law only applies to women, while men (read: husbands) who do not fulfill their responsibilities are not regulated and are not

³⁴ Muhammad Andri, Mahmutarom HR, and Ahmad Khisni, “The Ideal Age of Marriage as an Effort to Establish an Ideal Family,” *UNIFIKASI: Jurnal Ilmu Hukum* 7, no. 1 (2020), <https://doi.org/10.25134/unifikasi.v7i1.2695>.

³⁵ Paisol Buridian, “Public Debatable Position of Woman as Witnesses in Marriage: The Perspective of Islamic and Constitutional Laws,” *Italian Sociological Review* 8, no. 3 (2018), <https://doi.org/10.13136/isr.v8i3.216>.

³⁶ Wahyuni Retnowulandari, “A Review of The ‘Head Of The Family’ Concept From The Family Law, Gender Perspective,” *SHS Web of Conferences* 54 (2018), <https://doi.org/10.1051/shsconf/20185402008>.

³⁷ Rahmat ramadhan Rahmat, “Analisis Kompilasi Hukum Islam Pasal 84 Tentang Nusyuz Istri Perspektif Mazhab Hanafi Dan Mazhab Syafi’i,” *Comparativa: Jurnal Ilmiah Perbandingan Mazhab Dan Hukum* 2, no. 1 (2022), <https://doi.org/10.24239/comparativa.v2i1.21>.

considered *nusyūz*.³⁸ Therefore, this article seems to restrict the freedom of women's rights and does not place husband and wife relations equally.³⁹

Sixth, giving a dowry from a husband to his wife. The question is, won't this dowry make men (husbands) more powerful in front of women (wives). There is an assumption that clumps up in a husband's subconscious that he has "bought" (genitals, vagina) his wife, so he can freely treat her. This "purchase" transaction through the dowry will be clearly revealed when reading article 35 paragraph 1 which reads, husband whose wife is mentally *qabla al-dukbūl* is obliged to pay half the dowry that has been determined in the marriage contract.⁴⁰ In *fiqh*, although it is still being debated, there is an opinion which states that the husband's right to his wife is *haqq al-tamlīk* and not *haqq al-intifā*.

Seventh, polygamy. In the compilation of Islamic law, polygamy is still possible. This view can be refuted for the following two reasons: [1] the principle of marriage in Islam is monogamy and not polygamy. Therefore, polygamous marriage is clearly against this principle. [2] Polygamous marriage in practice is very painful for the wife. Several studies have found a fact that most polygamous marriages are held secretly without the knowledge and permission of the wife. With this fact, the act of lying that is so painful has occurred. Honesty and openness that should be the main foundation in the household then become fragile.⁴¹

³⁸ Mardiah Mardiah, "Nusyūz Dalam Surat An Nisa Ayat 34 (Tinjauan Analisis Keadilan Gender)," *Al Qalam: Jurnal Ilmiah Keagamaan Dan Kemasyarakatan* 16, no. 3 (2022), <https://doi.org/10.35931/aq.v16i3.967>.

³⁹ Rizqa Febry Ayu, "Reformation of Islamic Family Law in Indonesia: The Nusyuz Resolution Process," *Al Hurriyah: Jurnal Hukum Islam* 6, no. 2 (2022), <https://doi.org/10.30983/alhurriyah.v6i2.4644>.

⁴⁰ Mahmoud Abd El Hakam El Khen, "To What Extent May an Egyptian Christian Husband Divorce His Wife by His Unilateral Will (An in-Depth Background and Analytical Study in Egyptian Law)," *Humanities and Social Sciences Reviews* 7, no. 4 (2019), <https://doi.org/10.18510/hssr.2019.7497>.

⁴¹ Hafiz Muhammad Sani, Abida Shams, and Bakht Shaid, "Historical Background of Polygamy and Its Significance in Modern World (Research

Eighth, interfaith marriage. Religious differences in the Islamic Law Compilation are seen as a barrier for a pair of young men and women who want to enter into a marriage. This means that both male and female Muslims are not allowed to marry non-Muslims. This view, of course, contradicts the basic tenets of Islamic teachings, namely pluralism. Based on the rationale of pluralism, it is not appropriate to make religious differences (*ikhtilâf ad-dîn*) a barrier (*mâni*) for the holding of an interfaith marriage. In addition to injustice in the law of marriage, the compilation of Islamic law also does not reflect justice in the law of inheritance. In inheritance law, the legal provisions of Islamic Law seem to ignore the rights of children who are in the womb. Compilation of Islamic law only takes into account the share of children who have been born. In fact, children who are in the womb actually have a heavier burden, both from a psychological and financial aspect.⁴²

Therefore, it is appropriate that the compilation of Islamic law to formulate the concept of the division of inheritance for children who are in the womb. Another injustice is seen in Article 172 of the compilation of Islamic law, which among other things states that a newborn baby or child who is not yet an adult has a religion according to his father or his environment. Implicitly, this article states that a mother's religion has no value at all to her child, both in the eyes of society and in the eyes of God. In fact, the mother's position in the family is very important as an educator and encroacher on the future of her children. This not only ignores the role and position of the mother in the family and society, but also ignores the religion that the mother holds in front of her children. The same thing also happened in Article 186 of the compilation of Islamic law. This article expressly states that children born out of wedlock only have an inherited relationship with their mother and

Study in the Light of Comparative Religion and Historical Evidences),” *Al-Idah* 39, no. 1 (2021), <https://doi.org/10.37556/al-idah.039.01.0716>.

⁴² Haifaa Jawad and Ayse Elmali-Karakaya, “Interfaith Marriages in Islam from a Woman’s Perspective: Turkish Women’s Interfaith Marriage Practices in the United Kingdom,” *Journal of Muslim Minority Affairs* 40, no. 1 (2020), <https://doi.org/10.1080/13602004.2020.1737415>.

the family from their mother's side. Meanwhile, the status of children born due to unregistered marriages is not regulated in relation to inheritance relationships.⁴³

Therefore, it is important to review the definition of whether a marriage is legal or not. In addition to the nuances of injustice, inheritance law also contains several technical obstacles that are difficult to implement. These technical obstacles, among others, are contained in articles 192 and 193 which do not explain explicitly which ones are 'awl' and which ones are *radd*. If it is not immediately explained, of course it will be difficult for the judges in court to resolve the issue of Muslim family inheritance.⁴⁴

Meanwhile, in terms of *waqf* law, the compilation of Islamic law also cannot be said to be perfect considering that there are still many important issues that have not been accommodated.⁴⁵ Among these problems is the provision of non-Muslim *waqf* that needs to have a place in the compilation of Islamic law given that there are several cases that indicate the possibility of this happening.⁴⁶ The regulation can at least confirm whether or not non-Muslims are allowed to endow their property for the benefit of Muslims.⁴⁷

⁴³ Ermi Suhasti, Siti Djazimah, and Hartini, "Polemics on Interfaith Marriage in Indonesia between Rules and Practices," *Al-Jami'ab* 56, no. 2 (2018), <https://doi.org/10.14421/ajis.2018.562.367-394>.

⁴⁴ Mohamad Abdun Nasir, "Religion, Law, and Identity: Contending Authorities on Interfaith Marriage in Lombok, Indonesia," *Islam and Christian-Muslim Relations* 31, no. 2 (2020), <https://doi.org/10.1080/09596410.2020.1773618>.

⁴⁵ H Sunandar, A S Suhayib, and ..., "The Political Dynamic of Waqf Law in Indonesia," ... *Journal of Archaeology of ...*, 2020.

⁴⁶ Islamiyati Islamiyati et al., "The Legal Reform Of The Waqf Law Resolution Based On Pancasila," *Diponegoro Law Review* 4, no. 2 (2019), <https://doi.org/10.14710/dilrev.4.2.2019.226-243>.

⁴⁷ Asep Saepudin Jahar, "Bureaucratizing Sharia in Modern Indonesia: The Case of Zakat, Waqf and Family Law," *Studia Islamika* 26, no. 2 (2019), <https://doi.org/10.15408/sdi.v26i2.7797>.

The rules regarding cash *waqf* also need to be accommodated in the compilation of Islamic law.⁴⁸ This is because the development of the Islamic banking world is quite rapid, so that the vision and perspective of humans in “investing” their wealth in the way of Allah has also changed.⁴⁹ For example, the regulation concerning a person or group of people or a business entity that intends to endow money in the form of deposits, then the profit sharing from these deposits is used to help victims of natural disasters or to finance the education of the poor. *Waqf* in this form is of course very useful and in accordance with the main purpose of *waqf* in Islam.⁵⁰

Legal Systems and Methods Used in Muslim Countries

Broadly speaking, the legal system that applies in Muslim countries or where the majority of the population is Muslim, consists of three parts:⁵¹

First, a system that still applies sharia as human law (principal) and tries to apply it in all aspects of human relations as a whole. Here, Islamic law is understood textually-literally as stated in legal texts (al-Qur’an and al-Hadith). Examples of family law that are enforced are the authority of divorce only for men, the application of polygamy and others. Among the countries that have so far maintained this model are Saudi Arabia and the northern region of Nigeria.

Second, a system that abandons sharia and replaces it with a completely secular law. The Muslim country which, at least officially,

⁴⁸ Muhammad Zubair Abbasi, “The Classical Islamic Law of Waqf: A Concise Introduction,” *Arab Law Quarterly*, 2012, <https://doi.org/10.1163/157302512X629124>.

⁴⁹ Siska Lis Sulistiani, “The Legal Position of Waqf for Non-Muslims in Efforts to Increase Waqf Assets in Indonesia,” *Samarah* 5, no. 1 (2021), <https://doi.org/10.22373/sjkh.v5i1.9161>.

⁵⁰ MTS Mohammad, “A Proposal for a New Comprehensive Waqf Law in Malaysia,” *Waqf Academy*, 2000.

⁵¹ Amir Mu ’allim, “Pengaruh Pengelolaan Wakaf Di Mesir Terhadap Pengelolaan Harta Wakaf Pendidikan Di Indonesia,” *AKADEMIKA* 20, no. 1 (2015).

has turned completely secular is Turkey, which is very different or in contrast to Saudi Arabia. In 1926 Swiss law.

stipulated as a substitute for sharia, even including regarding family law, monogamy is applied as a substitute for polygamy; and divorce is based on a judge's decision based on certain reasons, which is the same for a husband or wife who is litigating to be applied as a substitute for *talaq* unilaterally imposed by the husband or imposed by agreement of the two husbands and wives concerned.

Third, a system that tries to take a moderate path between two extreme legal systems, namely implementing Islamic law in full and a system that completely rejects Islamic law. Examples of countries seeking to compromise the two systems include Egypt, Sudan, and Jordan. However, specifically in the applied family law, the portion that is often given is Islamic law as understood by the first group.

The three patterns of application of Islamic law in the Muslim world above show that the differences in the system and form of Islamic law reform are not only caused by the political system adopted, but also by the historical, sociological and cultural differences of each Muslim country.⁵²

Furthermore, in their research on the renewal of Islamic law in Muslim countries, J. N. D Anderson and John L. Esposito concluded that the methods generally developed by Islamic reformers in dealing with legal issues still rely on an ad-hoc and disaggregated approach using the principles of *takbayyur* and *talfiq*.⁵³ *Takbayyur* is a method of jurisprudence which because in specific situations it is permissible to leave one's school of law to follow another. Meanwhile, according to Abdullah Alwi Haji Hassan, what is meant by *takbayyur* is the adjustment of several doctrines of the

⁵² Novalini Jailani and Hendri Hermawan Adinugraha, "The Effect of Halal Lifestyle on Economic Growth in Indonesia," *Journal of Economics Research and Social Sciences* 6, no. 1 (2022), <https://doi.org/10.18196/jeress.v6i1.13617>.

⁵³ Hanifah Musa Fathullah et al., "Innovative Fiqh Approach in Halal Logistics Operation," *International Journal of Academic Research in Business and Social Sciences* 10, no. 5 (2020).

school law regarding the needs and demands of society and the state.⁵⁴

Ideally, the use of *takbayyur* and *talfiq* as a mechanism of *ijtihad* in positivizing legislation has been carried out by sharia law reformers to answer some contemporary legal issues.⁵⁵ Some of them use *talfiq*, which is the amalgamation of several doctrines from various schools of thought and the opinions of several jurists which are then combined into a law to solve certain expected legal problems or a method of combining various schools of thought to form a single regulation. For example, in Egypt, there is a *waqf* law (*waqf* of land built by mosques) which has been introduced since 1946. This law is intended as a renewal and innovation. Although previously there was *ikhtilaf* (differences of opinion among scholars/*fuqaha*), but through the *talfiq* method, finally this *waqf* can be positivized into law, on the grounds that it is based on *maslahah* (public interest) and does not conflict with the texts.⁵⁶

In codifying laws, legislators and decision makers should always refer to primary sources in various schools of thought that are considered authoritative and legitimate. So that they can determine and decide every issue of sharia law wisely and wisely without reducing the freedom in interpreting each text, with the aim of adapting sharia-based laws to today's demands. Such as the provisions of several conditions for polygamy in neighboring Malaysia.

This *ijtihad* approach method is not much different from the classical *ijtihad* method as has been done by previous scholars and

⁵⁴ Abdullah Alwi Haji Hassan, "Ijtihad Dan Peranannya Dalam Pengharmonian Pengamalan Undang-Undang Syariah Di Dunia Islam Masa Kini," *Jurnal Syariah* 15 (2007).

⁵⁵ Hendri Hermawan Adinugraha, "Jurnal Ilmiah Ekonomi Islam , 4 (01), 2018 , 63-75 Al-Maslahah Al-Mursalah Dalam Penentuan Hukum Islam" 4, no. 01 (2018): 63–75.

⁵⁶ Kuart Ismanto, "The Concept Of Maqā Ṣ Īd Al- Syarī ' Ah Al- Ghazali As A Halal Industry Development" 197, no. 8 (2021): 180–97, <https://doi.org/10.5281/zenodo.5090788>.

jurists.⁵⁷ Although this *ijtihad* is only technical in nature, because it often uses deductive methods from the use of *al-qiyas* (analogy) and aims totally at *maslahah*. It must be admitted that this method has been able to answer various problems of the *ummah* from time to time. The opening of the door to *ijtihad* and the renewal of the use of the *takbayyur* method may provide ample space for judges and decision makers to *ijtihad* in accordance with the problems at hand, especially when facing problems with the formation of family laws or *mu'amalat* including the formulation of laws regarding Islamic Financial Institutions, both Micro and Macro, are increasingly widespread and are in great need by contemporary Muslims.

Conclusion

Based on a literature review, it was found that the problems of family law in Muslim countries are related to underage marriages (the problem of marriage age limits), forced marriages, prevention of marriages that are permitted by sharia, prohibited marriages, registration and registration of marriages, marriages outside the court, dowry and marriage expenses, Polygamy & wife's rights in polygamy, divorce before the court and divorce registration, the rights of the wife who is divorced by her husband, and the issue of women's inheritance rights. Broadly speaking, the legal system in force in Muslim countries consists of three parts, namely: a system that still applies sharia as basic law and tries to apply it in all aspects of human relations as a whole, a system that abandons sharia and replaces it with a completely secular law, and a system that tries to take a moderate path between the two extreme legal systems, namely the full application of Islamic law and a system that completely rejects Islamic law. Based on the three patterns of application of Islamic law in Muslim countries, it shows that the differences in the system and form of renewal of Islamic law are not only caused by the political system adopted, but also by the

⁵⁷ Adinugraha, "Jurnal Ilmiah Ekonomi Islam , 4 (01), 2018 , 63-75 Al-Maslahah Al-Mursalah Dalam Penentuan Hukum Islam."

historical, sociological and cultural differences of each Muslim country. The *ijtihad* mechanism in positivizing legislation has been carried out by sharia law reformers to answer some contemporary legal issues through the use of *takhayyur* and *tafiiq*.

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