

## Who Speaks for Islamic Family Law? Debates on Islamic Law Compilation (KHI) in Indonesia

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### Abstract

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This article discusses a debate within the formulation of Islamic Family Law in Indonesia, especially the various figures behind. Involving in that case is how far the practice of law negotiation implemented to respond unsatisfied groups over the formulation offered within the formal legislation (UU Marriage Number. 1/1974 and Islamic Law Compilation [KHI]) or non-formal (Counter Legal Draft [CLD]-KHI and Laws Draft [RUU]-HMPA). A history noted that Islamic Family Law was featured with discourses and the dynamic of that development. These features were not coming from an empty space, but through a long discussion. The point of debate was divided into two aspects, theoretical and practical. Both of them were having different interest and as a representation of their own group. Authority's contestation has done between the state and Islamic scholars in responding the practice of polygene, interfaith marriage and unregistered marriage. Government's need to give a serious punishment for these practices was strongly abandoned by classical Islamic scholars. A different point of view is also happened between two Islamic organizations in Indonesia, namely Nahdlatul Ulama (NU) and Muhammadiyah. The root of the problem was coming from the different point of views in which NU tends to hold a traditional values and Muhammadiyah tends to hold modern values. Both of them were having the different approach in the formulation of Islamic Family law in Indonesia. In the implementation of Islamic family law in Indonesia, Islamic majority has an effort to control public space law through a hope that Islamic family law could survive within an Indonesian law. However, that effort will not success in changing the landscape of State law without any negotiation process. This article investigates the development of Islamic family law in Indonesia, both in the process of development and the offered decisions. Further, this article also reveals the actors influenced the draft of law, from the process to the debate of formulation. Through using social historical approach, this article shows that conservatism is strongly influencing the decisions of Islamic Family Law in Indonesia. The proof of conservative behavior lied on the rejection over the decision of Islamic family law, even though various approaches have offered.

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**Keyword:** Islamic Family Law, Debates KHI, and Indonesia

### A. Introduction

In Indonesia, Islamic family law has been discussed by many experts theoretically and practically. In the first level, many discourses were focused on the classical Islamic law (*fiqh*), while the second discourses focused on how the classical Islamic law could survive within the system of Indonesian national law. Otherwise, the development of discourses is far away from any expectations.

The reason behind is that in reality the other disciplines, such as economy, politic, sociology—either from Islamic or conventional perspective—, were growing faster than Islamic law family was. Otherwise, if compared to the other countries such as Morocco, Egypt and Turkey<sup>2</sup>, the development of discourses is not that “significant”.<sup>3</sup>

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The basic reason is a keep growing assumption that Islamic Family Law had already final. All serious matters regarding to the family law had have been discussed in the classical *fiqh* which becomes a main reference when a new problem appears. There are two major views for this growing assumption. First, historically Indonesian Islamic scholars, as well as practitioners, were used to cite classical *fiqh* as a regular custom. Second-this is an annoying assumption-it is a reluctant action to reform-refresh the previous law. Therefore, Islamic family law in Indonesia is hard to grow. As noted that there are some experts who are aware for the ineffectiveness of these views, but for particular reasons-such as a matter of number and situation-their voices are not sounded and looked like a foam.<sup>4</sup> One of remarkable example for the stagnancy of Islamic family law is the case of apostasy after marriage. Lawfully, that case has no legal provision, therefore the marital status, child custody and so on so forth are unclear.<sup>5</sup> The impacts were what scholars called as anomaly as well as a law crisis—because the law had already out of date—, as well as a wilderness among Muslim communities in Indonesia.

Therefore, either formal legislation (Marriage law No. 1 year. 1974 and KHI) or non-formal legislation (CLD-KHI and RUU-HMPA) were crucial for conducting negotiation of law. A reality shows that Islamic family law is growing weaker without any negotiation conducted. There are two possible ways for surviving Islamic family law; namely renewing on the development and institutionalization. In other expression, the meaning of negotiation is an ability to synergize the legislated Islamic family law. Among marriage law, KHI, CLD-KHI, and RUU-HMPA, were needed to be integrated as an effort to gain Islamic family law.

### **KHI (Compilation of Islamic Law): History and Implementation**

From historical point, the establishment of KHI as one of legislated Islamic family law grabbed many attentions for the reason of lacking Islamic material law in Indonesia. Clearly, a judge in the Religious Court (PA) may get difficulties in deciding a case, such as inheritance, marriage, benefaction, grant, and alms when the judge has no guideline regulation. In this case, the meaning of guideline regulation is a formulation of Islamic law family of Indonesia. Hence, as the consideration, Compilation of Islamic Law (KHI) formulated.

The process of formulating KHI is running smoothly. There are some supported factors; juridical, political-ideological and religiosity. The first and the second reason come from the support of two powerful institutions: Minister of Religious affair at that time, Munawir Sadzali, as an executive supporter and chairman of Religious Court-Supreme Court (MA), Bustanul Arifin, from judicative. Third is an enormous support from Muhammadiyah (one of biggest community organization in Indonesia) through 42<sup>th</sup> conference.<sup>6</sup>

In the implementation, in one side KHI has been successfully producing classical law of *fiqh* as a recognized law in Indonesia. However, in the other side and theoretically KHI is not really answering the problems of Indonesian Muslim, moreover on the issues of human right (HAM) and gender equality. The fact about lacking critical analysis in the implementation of Middle-East classical *fiqh* toward the context of Indonesia is showing about KHI's incomprehensibility. As a note: the discourses of KHI have been coming into the issues about "Formal Islamic Radicalism" that is vividly visible.<sup>7</sup>

<sup>2</sup> Sadari, "Hak Perempuan Pasca Perceraian: Analisis Perbandingan Hukum Keluarga Islam di Indonesia dan Dunia", in the *Istinbath Jurnal Hukum*, STAIN Jurai Siwo Metro, majoring Syari'ah and Economic Islam, Volume 12, Nomor 2, November 2015, 216.

<sup>3</sup> Tahir Mahmood, *Personal Law in Islamic Countries: History, Text and Comparative Analysis* (New Delhi Academy of Law and Religion: Times Press, 1987).

<sup>4</sup> Quoting a speech from a Syi'a scholar, see Asaf A.A. Fyzee, *A Modern Approach to Islam* (Bombay: Asia Publishing House, 1963), 86-87.

<sup>5</sup> Euis Nurlaelawati, "For The Sake of Protecting Religion: Apostasy and Its Judicial Impact on Muslim's Marital Life in Indonesia," *Journal of Indonesian Islam* 10, no. 1 (2016): 89.

<sup>6</sup> PP Muhammadiyah, *Keputusan Mukhtamar Muhammadiyah ke-42* (Yogyakarta: Berita Resmi Muhammadiyah, 1991), specific number. Marzuki Wahid, *Fiqh Indonesia: Kompilasi Hukum Islam dan Counter Legal Draft Kompilasi Hukum Islam dalam Bingkai Politik Hukum Indonesia*, 1<sup>st</sup> Printing (Bandung: Marja, 2014), 157.

<sup>7</sup> Marzuki Wahid, *Fiqh Indonesia: Kompilasi Hukum Islam dan Counter Legal Draft Kompilasi Hukum Islam dalam Bingkai Politik Hukum Indonesia*, 1<sup>st</sup> Printing (Bandung: Marja, 2014), 158.

## The Other Side of KHI

Based on the assumption that an idea is connected to the condition of place where the idea produced, as a result then is Indonesian scholars understanding toward the *fiqh* is fully connected—accustomed to Indonesian condition. Meaning, despite the like to classical *fiqh*, they also heavily connected to the context of Indonesia. For many scholars, this is happened unconsciously as well as Indonesian community today identifies the notion of beauty with the white-skin.

However, there are some scholars think consciously about that condition. In the other words, there is an effort to show what may be called as “Indonesian *fiqh*”. This proper name is not a combination for their understanding on classical *fiqh* that combined—one of them—with Indonesian condition, geographically, politically, socially, psychologically and so on so forth intentionally. Since it is intended, the result may be different. There are some figures behind Indonesian *fiqh*—further influenced the school of Indonesian *fiqh*—namely Hasyim Asy’ari, M. Hasbi al-Siddiqi, Hazairin, Achmad Siddiq, Abdurrahman Wahid, and Sahal Mahfudh.<sup>8</sup> Frequently, they are mentioned as scholars who preserved Indonesian culture—tradition.

Among of them, Hasbi al-Siddiqi may be classified as a pioneer.<sup>9</sup> This can be seen from a statement in which ‘*adat*’ or custom could be a foundation of legal law for Indonesian Muslim communities as long as it is not in the contradiction with Islamic spirit. Hasbi, in this case, affected by Van Den Berg (1845-1927) through the theory of reception in complex stating that: Indonesian Muslim has accepted (perception) Islamic law comprehensively.<sup>10</sup> Further, Berg also concluded about the tendency of Indonesian Muslim for fully practicing Islamic law—as a consequence to be a Muslim—even though in the implementation there are some deviations.<sup>11</sup> It is likely from this statement that Hasbi’s idea is rooted. At the same time, Hasbi—together with Hazairin (1905-1975) and some of his students, Sajuti Talib, H. Mohammed Daud Ali, Bismar Siregar, and M.Tahir Azhary—are well—known through theory of *reception in contrario*.

Further, the idea about Indonesian *fiqh* school continued by Sadzali (1925-2004) through the term “the dynamic of Islamic law”.<sup>12</sup> There are Busthanul Arifin (born 1929) who offered the important of effort (*ijtihad*) to reproduce Indonesian *fiqh*,<sup>13</sup> A. Qodri Azizi (1955-2008) through Islamic Law Positivization,<sup>14</sup> and Yudian Wahyudi (born 1960) through Indonesian *fiqh* reorientation.<sup>15</sup> Once more is: Agus Moh. Najib (born 1971) developed a model of Indonesian *fiqh* methodology.<sup>16</sup>

Nonetheless, the number of scholars with the second idea is less than first scholars. As the result, when both of groups were encountered and produced KHI, what happened were also anomalies. That may affect today that many of Religious Court do not consider that guidance regulation to solve the issues.

<sup>8</sup> Due Islamic schools are mostly the representation of classical Arabic society, however this school used to be implemented in Indonesia, see Hazairin, *Hukum Islam dan Masyarakat* (Jakarta: Bulan Bintang, 1963).

<sup>9</sup> T.M.Hasbi Ash Shiddieqi, *Sjaari’at Islam Mendjawab Tantangan Zaman* (Yogyakarta: IAIN al-Djami’ah al-Hukumijah, 1961).

<sup>10</sup> Zainuddin Ali, *Hukum Islam: Pengantar Ilmu Hukum Islam di Indonesia* (Jakarta: Sinar Grafika, 2008), 80.

<sup>11</sup> Dedi Supriyadi, *Sejarah Hukum Islam: dari Kawasan Jazirah Arab sampai Indonesia* (Bandung: Pustaka Setia, 2007), 331.

<sup>12</sup> Islamic Community needs a regulation and paternal law adjusted with the condition of environment, historical and cultural background of Indonesia. Therefore, an idea about Indonesian *fiqh* could be implemented, see Munawir Sjadzali, *Islam, Realitas Baru dan Orientasi Masa Depan Bangsa* (Jakarta: UI Press, 1993).

<sup>13</sup> One of implementation of Indonesian *fiqh* is through controlling the legal law, without the control Indonesian *fiqh* is hard to be implemented, see at Busthanul Arifin, *Pelembagaan Hukum Islam di Indonesia: Akar Sejarah, Hambatan, dan Prospeknya* (Jakarta: Gema Insani Press, 1996).

<sup>14</sup> Currently, the legalization of Islamic law needs to be accepted academically and democratically. Academically, the law shall pass through an academic disciplinary process of science of law (*jurisprudence*), and politically within the corridor of democracy. See, A. Qodri Azizi, *Eklektisme Hukum Nasional: Kompetisi antara Hukum Islam dan Hukum Umum* (Yogyakarta: Gama Media, 2002), See also the revision edition entitled, *Hukum Nasional: Eklektisisme Hukum Islam dan Hukum Umum* (Jakarta: Teraju, 2004).

<sup>15</sup> Indonesian *Fiqh* is a continuum idea of “returning to al-Qur’an and as-Sunnah” which has possibility to open an *ijtihad*. The idea of Indonesian *fiqh* tries to integrate Islamic law principle and tradition (*urf*) in Indonesia, therefore there is a point of agreement between Islamic puritans, who rejected a traditional law previously, and those who defends the tradition. See, Yudian Wahyudi, *Hasbi’s Theory of Ijtihad in the Context of Indonesian Fiqh* (Yogyakarta: Pesantren Nawasea Press, 2007).

<sup>16</sup> The formulation of Indonesian *Fiqh* methodology produced not only a material law based on community social- cultural, but also a systematic philosophical framework. See, Agus Moh. Najib, *Pengembangan Metodologi Fikih Indonesia dan Kontribusinya bagi Pembentukan Hukum Nasional* (Jakarta: Ministry of Religious Affair RI, 2011).

That was mentioned by Euis Nurlaelawati through her research, *Modernization, Traditional, and Identity: The Compilation of Islamic Law and Legal Practice of Indonesian Religious Court*, showed that since 2000 – 2005 the intensity for using KHI in the religious court is extremely low.<sup>17</sup> In this matter as mentioned by Euis that the main problem lied to the contents of KHI that was dominated by classical *fiqh*. Therefore, it seem like a curiosity when the contents used to respond—moreover to solve a problem in the court—various issues in Indonesia. Meaning, one may not only blame to the judge, but also paying a critical attention to KHI per se.

The double standard of KHI had discussed by Ratno Lukito in his book, *Sacred and Secular Laws: A Study of Conflict and Resolution in Indonesia*, as pluralism law. Law in Indonesia, as mentioned by Ratno, is pluralistic not monolithic within the plurality, there are two aspects: politic and conflict, in which the government needs to respond it equally. When the solution is not balance, there will be a contradiction, therefore in this level, the discussion about negotiation—solution—will find its manifestation.<sup>18</sup> The manifestations of plurality law are the positive law, the customary law, the Islamic law and so on so fort that needs a negotiation approach.<sup>19</sup>

For that reason, this article tries to explain about whoever in the competency for the formulation of Islamic family law in Indonesia—including within KHI—should hold the principle of negotiation law, personally socially, religiously, culturally institutionally and politically. For the reason that only through the process of encountering, integrating, interconnecting, respecting and supporting, the negotiation process could be implemented.

The manifestation from negotiation is the process of bargaining between the law and the reality in the communities.<sup>20</sup> Meaning, every changing in the communities needs to have a cooperative response. Communities have a dynamic pattern and could be seen as performing one meaning, while the law is performing another meaning, when both of meanings connected, there will be an encountering meaning. Hence, in this point the negotiation takes a place, namely bridging two different meanings, but interconnected,<sup>21</sup> through the transformation and the reciprocal relation.<sup>22</sup> That should be done without coercing or monopolizing,<sup>23</sup> in which the process also needs a sacrifice.<sup>24</sup>

Further, negotiation process is similar with Euis Nurlaelawati term in her research of, “*Hukum Keluarga Islam ala Negara Penafsiran dan Debat atas Dasar Hukum Kompilasi Hukum Islam di Kalangan Otoritas Agama dan Ahli Hukum*”,<sup>25</sup> as triangular model. Both of them are identical in term of making law formulation, thus it is important to consider other values, such as the state and the custom.

<sup>17</sup> Euis Nurlaelawati, *Modernization, Traditional, and Identity: The Kompilasi Hukum Islam and Legal Practice of Indonesian Religious Court*, a dissertation in Utrecht Dutch University, written at 2005 and promoted at November 2007, 300 of pages together with an appendix.

<sup>18</sup> Ratno Lukito, *Sacred and Secular Laws: A Study of Conflict and Resolution in Indonesia*, translator: Inyik Ridwan Muzir, “*Hukum Sakral dan Hukum Sekuler: Studi tentang Konflik dan Resolusi dalam Sistem Hukum Indonesia*”, within the book of 559 pages.

<sup>19</sup> Ratno Lukito, “The Role of Custome in the Formation of Islamic Law”, 5 *McGill Journal of Middle East Studies*, 1997, 5.

<sup>20</sup> Quoting a speech from Sy’a scholar, see Asaf A.A. Fyzee, *A Modern Approach to Islam* (Bombay: Asia Publishing House, 1963), 86-87.

<sup>21</sup> Theory of “fusion horizon” (*horizont-verschmelzung; fusion horizon*) and the theory of “hermeneutical circle” (*hermeneutischer Zirkel; hermeneutical circle*) are Hans Georg Gadamer’s idea which is explaining that within textual interpretation one should rehabilitate their understanding. This regards to a theory of “fusion or horizon assimilation”, meaning within an interpretation one should aware about two horizons (1) “knowledge atmosphere” or reader horizon (2) “understanding atmosphere” or reader horizon. Both these horizons appear on the understanding and interpretation processes. A reader began from hermeneutic atmosphere, and giving an attention that a text may has a horizon that probably different from reader horizon. These horizons, according to Hans Georg Gadamer, should be communicated, therefore “the tension between the horizons the text and the reader is dissolved”, see Hans Georg Gadamer, “Teks and Interpretation”, in B.R. Wachterhauser (ed.), *Hermeneutics and Modern Philosophy* (New York: Albany State University of New York Press, 1986), 396. See also, Sahiron Syamsuddin, *Hermeneutika dan Pengembangan Ulumul Qur’an*, 1<sup>st</sup> Printing (Yogyakarta: Pesantren Nawesea Press, 2009), 48.

<sup>22</sup> Hans Georg Gadamer, *Wahrheit und Methode: Grundzüge einer philosophischen Hermeneutik* (Tübingen: J.C.B.Mohr, 1990), 269, see also, Tata Sukayat, *Internalisasi Nilai-Nilai Agama melalui Kebijakan Publik: Dakwah Struktural Bandung Agamis* (Bandung: Rieksa Utama Jaya, 2011), 231.

<sup>23</sup> Tata Sukayat, *Internalisasi Nilai-Nilai Agama melalui Kebijakan Publik: Dakwah Struktural Bandung Agamis* (Bandung: Rieksa Utama Jaya, 2011), 230.

<sup>24</sup> Tata Sukayat, *Internalisasi Nilai-Nilai Agama melalui Kebijakan Publik: Dakwah Struktural Bandung Agamis* (Bandung: Rieksa Utama Jaya, 2011), 231.

<sup>25</sup> Euis Nurlaelawati, “*Hukum Keluarga Islam ala Negara Penafsiran dan Debat atas Dasar Hukum Kompilasi Hukum Islam di Kalangan Otoritas Agama dan Ahli Hukum*”, in *Ay-Syir’ah Jurnal Ilmu Syari’ah dan Hukum*, Vol.50, No.1, Juni 2016, 203-204.

Leon Buskens for the example stated that Morocco in order to organize the Muslim communities, the state was formulating an inclusive Islamic law in which the state and the custom were integrated.<sup>26</sup> John R. Bowen has also done similarly. He saw that either in French or Indonesia, family law is strongly influenced by the custom norm.<sup>27</sup> Once more again, that is Hooker through a conclusion about the urgency of KHI in taking aside to the state for a law sustainability.<sup>28</sup> So far, this article views about the urgency in investigating the process of law developed in Indonesia generally, as well as legislation debate on the Islamic family law within the negotiation framework.

## B. Islamic Family Law: Discourses and the Development

Islamic family law in Indonesia grabs many critiques; moreover there is an ambiguity on the level of law foundation.<sup>29</sup> However, positive responses over KHI were also need to be appreciated. Meaning, whatever KHI was, it was a product within a particular time—New Order—which is important to be appreciated. KHI should also be seen as an effort of progressive-reformist communities, as well as UUP No. 1/1974 that progressive-nationalist. This positive reaction needs also to be implemented on CLD-KHI and RUU-HMPA: *first*: it is progressive-transformative nuances,<sup>30</sup> and the *second* are progressive, nationalist, reformist, and transformative. As additional information; the two first is a form of formal legislation, and the two last is non-formal—both of legislations come from different political condition.

There are two main reasons for the appreciations. *First* since there is no a complete product of reasoning (*ijtihad*), either KHI, CLD-KHI or RUU-HMPA are not the product of reasoning (*ijtihad*), thus the product is tied to the time and place. Along with the limitation of reasoning—that has limitations—the product of KHI needs to be appreciated. Meaning, within the certain condition and limitation, the process of reasoning gives a space for the process of complementary.<sup>31</sup> The complementary process called as the dialectic of law. Presenting the dialectic is necessary to meet the dynamic community demand. Therefore, that is not exaggerating when the four legislations get an appreciation.<sup>32</sup> Specifically it could be seen as follow:

### 1. Formal Legislation : Marriage Law No. 1/1974 and KHI

The establishment of the Marriage law No. 1/1974 was coming from a long process. Since the beginning, it was formulated in the 1950s. Then, after couple of years, it was proposed by House of Representative (DPR) in the form of draft bill (RUU). Since on the 5 July 1959, DPR had frozen by presidential decree, DPR's proposal also automatically rejected. The draft bill has proposed for the second time in the 1967. Further, the draft bill also submitted to DPRGR and rejected. Only on the 31 July 1973, marriage draft bill legalized. Indeed, in the process of legalization featured with turmoil—As disagreement impact from the opposite group of legalized the law—Otherwise, the trial of validation was carried out on 22 December 1973 as the day of the legalization of the Marriage Law No. 1/1974.<sup>33</sup>

The unintended consequence from the law legalization was a massive protest from Muhammadiyah in the previous months. Through “Suara Muhammadiyah”, a news paper published by the organization, it is written that Marriage Law was far away from the spirit of Islam and gives such impression as veiled by Christianization.<sup>34</sup>

<sup>26</sup> Léon Buskens, “An Islamic Triangle: Changing Relationship between, Syari’ah, State Law, and Local Customs”, *ISIM Newsletter*, 5 (2000), 8.

<sup>27</sup> John R. Bowen, “Shari’a, State and Social Norms in France and Indonesia”, *ISIM Papers* (Leiden: ISIM, 2001), 1-24.

<sup>28</sup> See, M.B. Booker, “The State and Syari’ah in Indonesia 1945-1995”, in Timothy Lindsey (ed.), *Indonesia, Law and Society* (Melbourne: the Federation Press, 1998), 107.

<sup>29</sup> See, Euis Nurlaelawati, “Hukum Keluarga Islam ala Negara Penafsiran dan Debat atas Dasar Hukum Kompilasi Hukum Islam di Kalangan Otoritas Agama dan Ahli Hukum”, dalam *Ay-Syir’ah Jurnal Ilmu Syari’ah dan Hukum*, Vol.50, No.1, Juni 2016, 200.

<sup>30</sup> See, Marzuki Wahid, *Fiqh Indonesia: Kompilasi Hukum Islam dan Counter Legal Draft Kompilasi Hukum Islam dalam Bingkai Politik Hukum Indonesia*, 1<sup>st</sup> Printing (Bandung: Marja, 2014), xv. Further, RUU-HMPA is a continuum of *ijtihad* from KHI and CLD-KHI that tends to seek a middle way.

<sup>31</sup> See, Said Agil Siradj who wrote an introduction in the book of Marzuki Wahid, *Fiqh Indonesia: Kompilasi Hukum Islam dan Counter Legal Draft Kompilasi Hukum Islam dalam Bingkai Politik Hukum Indonesia*, 1<sup>st</sup> Printing (Bandung: Marja, 2014), xv.

<sup>32</sup> Sadari, “Quo Vadis Hukum Keluarga Islam dalam KHI dan Upaya Desakralisasi untuk Relevansi Seiring Modernitas dan Keindonesian”, in *Indo-Islamika, Jurnal Kajian Interdisipliner Islam Indonesia*, Vol.5, No.1, Januari-Juni, 2015.

<sup>33</sup> Arso Sosroatmodjo dan A. Wasit Aulawi, *Hukum Perkawinan di Indonesia*, printed. 1<sup>st</sup> (Jakarta: Bula Binatang, 1975), 9-10.

<sup>34</sup> Hamka, ‘RUU Perkawinan yang Mengguncang’, *Suara Muhammadiyah*, 1973, Rasyidi, ‘RUU Perkawinan: Kristnisasi dan Ekspansi yang Terselubung’, *Suara Muhammadiyah*, 1973.

On the other word, most of formulation in the Marriage Law has no a strong Islamic foundation, and threatening Islam in Indonesia. Beside news paper, Muhammadiyah also issued an official letter for the draft law would not be submitted to DPR. Indeed, when the draft bill legalized, they immediately protested for the demand that two articles in the UUP would be revised; namely polygene and interfaith marriage.<sup>35</sup>

As a matter of categorization, the marriage law intentionally has no Islamic label for the acceptance reasons among communities. When a chosen category was Islamic Law Marriage, the secular group will not accept it. If so, there will be difficulties to consider the law as an idea accepted by Indonesian. Meaning, the accentuation here is on the point of accepted or not. However, there are groups that disagree with the article in the Marriage Law.<sup>36</sup>

Further, the disagreements from groups were not only a fictitious. The climax of disagreement was on the Compilation of Islamic Law (KHI) in the last period of New Order. KHI was formulated based on a joint agreement of the Chief of the Supreme Court and the Minister of Religious Affairs dated March 21, 1985. The drafting process carried out for six years and precisely done on June 10, 1991, KHI was legally passed as an official guide in the field of material law for judges within the Religious Courts throughout Indonesia. The scope field covers three areas formulated in the article 229: Marriage law (*munakahat*), Inheritance law (*mawarits*), and benefaction law (*waqf*).<sup>37</sup>

Within the development, KHI seem to be more accepted than the UUP, indeed among religious communities to avoid mentioning Muhammadiyah in particular. The basic reason is that KHI contains three representative dimensions. Namely; *first* is a dimension of maintaining intellectual traditions among scholars (*ulama*), *second* is a dimension of transformation within the product of state power and *third* is a dimension for the development of the judicial power over the judicial cases.<sup>38</sup>

Further, based on three mentioned dimensions, especially the first point, in the process of formulation, KHI is similar to classical *fiqh*. Meaning, the main references used are classical *fiqh*. Indeed, these references are frequently taken for granted without a significant critical thinking. The serious consequence from this approach is an imbalance situation between what is formulated and needed by Indonesian. Simply writing, even though KHI has been seeing as an ideal legislation than UUP, the formulation of KHI is still incomplete. The basic factor is lacking of critical reading over classical *fiqh* as the main reference. Through seeing the imbalance condition, the process of negotiation is absolutely needed.

For the example is a case of polygene and interfaith marriage. From the perspectives of democracy, nation-state, civil society, or even in the constitution, both cases show no more than just an asymmetric relationship. The main reason is the notion of discrimination over women. Moreover to talk about women's case, discussing about humanity issue is still weak. This problem could be traced from Abdurrahman Wahid who encouraged KHI to respond Islamic law dynamically. The main reason from this appeal is responding the dynamic of Islamic community in Indonesia as well as the Islamic law per se.<sup>39</sup>

In the other places, KHI was also becoming a serious discourse among modernist and feminist. The main issues proposed that KHI was taken from classical schools, especially Syafi'i, that heavily normative and textual. Further, they argued that KHI is normatively gender blind and giving less protection for women's right.<sup>40</sup> As the consequence, KHI in the Book 1, for Marriage Law that consists of 19 chapters and 170 articles,<sup>41</sup> is considered as discriminative over woman.

<sup>35</sup> Susan Blackburn, "Marriageable Age: Political Debates on Early Marriage in Twentieth Century Indonesia", *Archipel*, 1977, 14, 132-136.

<sup>36</sup> June S.Katz and Ronald S.Katz, "Legislating Social Change in A Developing Country: The New Indonesian Marriage Law Revisited," (1978) 26 *American Journal of Comparative Law* 309, 313-314.

<sup>37</sup> See, Muhammad Zain dan Mukhtar Alshodiq, *Membangun Keluarga Humanis: Counter Legal Draft Kompilasi Hukum Islam yang Kontroversial itu*, 1<sup>st</sup> Printing (Jakarta: Grahacipta, 2005), 1-2.

<sup>38</sup> Cik Hasan Bisri, et. al, *Kompilasi Hukum Islam dan Peradilan Agama*, 1<sup>st</sup> Printing (Jakarta: Logos Wacana Ilmu, 1999), vii.

<sup>39</sup> Abdurrahman Wahid, "Menjadikan Hukum Islam sebagai Penunjang Pembangunan" in *Agama dan Tantangan Zaman: Pilihan Artikel Prisma 1975-1984*, 1<sup>st</sup> Printing (Jakarta: LP3ES, 1985), 79.

<sup>40</sup> See, Euis Nurlaelawati, Arskal Salim, "Gendering the Islamic Judiciary: Female Judges in the Religious Courts of Indonesia", dalam *Al-Jami'ah*, Vol. 51, No. 2, 2013 M/1435 H, 248.

<sup>41</sup> Member of IKAPI, *Himpunan Peraturan Perundang-Undangan: Kompilasi Hukum Islam*, 1<sup>st</sup> Printing (Banduang: Fokusmedia, 2012), 6-55, see also a book such as: Abdurrahman, *Kompilasi Hukum Islam di Indonesia*, 4<sup>th</sup> Printing (Jakarta: CV Akademika Pressindo, 2010), 113-155, Muhammad Zain dan Mukhtar Alshodiq, *Membangun Keluarga Humanis: Counter Legal Draft Kompilasi Hukum Islam*

## 2. Non-Formal Legislation: CLD-KHI and RUU HTPA/HMPA

The discourse and the development of Islamic Family Law after KHI is Counter Legal Draft (CLD)-KHI. It is established on October 4, 2004 by Pokja PUG or *Kelompok Kerja Pengarusutamaan Gender Departemen Agama RI* (Working Group for Gender Mainstreaming of Indonesian Religious Affair). Pokja PUG is a unit work established by minister of Religious Affair For the implementation of planning, preparation, implementation, monitoring, and evaluation of policies and programs of national development with a gender perspective. The program initiated for the purpose of realization of gender equality and justice in the family life, the community, the nation and the state within the Ministry of Religious Affairs (Kemenag).<sup>42</sup>

CLD-KHI initiated based on the perspective of Democracy, pluralism, human rights, and gender equality. These perspectives initiated for the reason of less intention of KHI. In the other words, the initiated project to CLD-KHI is a renewal of Islamic family law in the form of the Draft Bill on Islamic Marriage Law, the Draft Bill Law on Islamic Inheritance, and the Draft Bill on Islamic *wakaf*.<sup>43</sup> The leader of this program is Siti Musdah Mulia, and one of draft from CLD-KHI is Book 1 on Marriage Law that consists of 19 chapters and 116 Articles.<sup>44</sup>

The concrete critique of CLD-KHI over KHI is written on the Book 1 of Marriage Law. Within that book, it is clear that CLD-KHI is strongly disagreeing with polygamy. The main reason is that polygamy humiliated woman's dignity. Beside, CLD-KHI was also strongly criticizing interfaith marriage. KHI's decision to prohibit a Muslim marrying a non-Muslim was considered by CLD-KHI as ineffective. This is written on the article 52 and 53. As for KHI, the prohibition mentioned in the article 44 and 61 about "Banning interfaith Marriage". After the launching of CLD-KHI, there are various ideas. The renewal of Islamic Law formulated by CLD-KHI was not running smoothly due the strong critique and controversies from public. Responding that condition, on 12 October 2004, minister of religious affair Said Agil Husin Munawwar banned the distribution of draft of CLD-KHI and taking the original draft of CLD-KHI. Said Agil Husin Munawwar's policy then reinforced by his successor, Muhammad Maftuh Basyuni, by freezing the CLD-KHI on 26 October 2004.<sup>45</sup> From this historical point, it can be stated that this dismissal has been ending the history of CLD-KHI up to present.

Further, the banning over CLD-KHI got a strong critique from women activist. However, the critiques were turning around between progressive Muslim and conservative Muslim. The critique was not deepening into the legislative level. Based on the controversy, it shows that each legal actor has their own legal interests; therefore the legal contestation is unavoidable. One lesson learned for the legal order in Indonesia is a negotiation process. For the reason that when the negotiation neglected, there were legal contestation, imposing legal truth partially and finally it caused legal disintegration as happened between KHI and CLD-KHI. In the other word, conducting negotiation is a significant effort for the development of Islamic Family Law in Indonesia to be harmonious and humanist.

Along with the controversy over CLD-KHI, Depag initiated laws named as a Draft Bill namely *Rancangan Undang-Undang Hukum Terapan Peradilan Agama* 'the draft Law on Applied Religious Court' (RUU-HTPA) for Marriage. That has began since September 2002 by Indonesia Religious Affair Department (Depag)—Now Ministry of Religious Affair of Republic of Indonesia (Kemenag)—through initiated Agency for Assessment and Development of Islamic Law (BPPHI) assigned to analyze KHI for upgrading its status from Presidential Instruction (Inpress) to Draft Bill of Applied Law of Religious Courts (RUU HTPA).

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*yang Kontroversial itu*, 1<sup>st</sup> Printing (Jakarta: Grahacipta, 2005), 145-219, Cik Hasan Bisri, *et al*, *Kompilasi Hukum Islam dan Peradilan Agama di Indonesia*, 1<sup>st</sup> Printing (Jakarta: Logos Wacana Ilmu, 1999), 139-194.

<sup>42</sup> See President Instruction RI No.1 Year 2000 about Gender Mainstreaming in the National Development.

<sup>43</sup> In accordance with the purpose, a book of CLD-KHI published entitled "Pembaharuan Hukum Islam: Counter Legal Draft Kompilasi Hukum Islam." Renewing a thought in the Islamic family law distinguished by Siti Musdah Mulia on the greating for the launching of CLD-KHI, 4 October 2004 di Jakarta.

<sup>44</sup> Muhammad Zain and Mukhtar Alshodiq, *Membangun Keluarga Humanis: Counter Legal Draft Kompilasi Hukum Islam yang Kontroversial itu*, 1<sup>st</sup> Printing (Jakarta: Grahacipta, 2005), 221-273.

<sup>45</sup> See, "Siti Mudah Mulia Stand Up for Her Conviction," The Jakarta Post, 23 March 2007. See, "Menag Maftuh Basyuni Bekukan CLD-KHI Usulan tim Gender Depag," Rabu, 27 Oktober 2004. <http://jurnalperempuan.com/yjp.jpo/?act=berita%7CX28.10.04>.

On the planning, the law would be considered as a reference and official guidelines regulation (*Material Law*) for judges of Religious Court in Indonesia.<sup>46</sup> In the 2003, specifically after the fallen of New Order, the material result of BPPHI over RUU HTPA brought by Religious Affair Department and submitted to president for the renewal of Islamic Family Law. Finally, the president brings about RUU HTPA and submitted to House of Representatives (DPR).

RUU HTPA is an accomplishment version from KHI that expected to upgrade the status from presidential instruction to law. Increasing the status is a mandatory from law number 25 Year 2000 about National Development Program (*Propenas*) Year 2000-2004. The Increasing Status RUU HTPA has some obstacles in the parliament level, in the (DPR). The obstacle happens for RUU HTPA, even though the name was changed to Draft Bill of Judicial Material Law (RUU HMPA) for Marriage on the 2013. The stagnation process should not be happen since the draft was submitted to DPR twice; on the period of Yusril Ihza Mahendra (2006) and Hatta Rajasa (2007) as the Secretary of the State.<sup>47</sup>

Further, when RUU HTPA approved as RUU-HMPA,<sup>48</sup> there will be consequences. That is related to penalty either civil or criminal. In this article, when a person is breaking the rule through polygamy and marrying the second wife secretly, he will be threatened through some laws in the RUU-HMPA. This new formulation considered as a new formulation, therefore the law is controversial. Criminal penalty threat for breaking RUU-HMPA is also a fine and Prison confinement. It can be seen in the article 145 about polygamy. The text is as follow:

*“Setiap orang yang melangsungkan perkawinan dengan istri kedua, ketiga, atau keempat tanpa mendapat izin terlebih dahulu dari pengadilan sebagaimana dimaksud pasal 52 ayat 1, di denda paling banyak Rp.6.000.000,- (enam juta rupiah) atau hukuman kurungan paling lama enam bulan”, dan dalam Pasal [143] tentang pelaku nikah siri yang berbunyi “Setiap orang yang dengan sengaja melangsungkan perkawinan tidak dihadapan Pejabat Pencatat Nikah, sebagaimana dimaksud dalam pasal 5 ayat 1, dipidana dengan pidana denda paling banyak Rp.6.000.000,- (enam juta rupiah) atau hukuman kurungan paling lama enam bulan”.*

“Any person who marries a second, third, or fourth wife without the prior permission of the court as referred to in the article 52, paragraph 1, shall be punished in a fine of no more than Rp.6.000.000, - (six million rupiah) or a maximum imprisonment of six months”, And in the Article [143] concerning the person who do unregistered marriage, the law says "Every person who deliberately marries not in the presence of the Official of Recorders as referred to in the Article 5 paragraph 1 shall be punished by a fine of not more than Rp.6.000.000, - (six million Rupiah) or a maximum imprisonment of six months".

Some of the examples considered as crucial in the Islamic Family Law and there are still a contestation between state authority and Islamic scholars' (*ulama*) authority. In the other word, the government's need to carry out the legalization of Islamic family law has blocked by *Ulama*'s understanding consider the marriage as sacred.<sup>49</sup> As the result then, the marriage law has considered as an absolute truth and accepts no critique.<sup>50</sup>

Lawyers' responses over the situation were varied, between agree and disagree. Who agree with RUU-HMPA were Siti Musdah Mulia and Patrialis Akbar. The reason behind that RUU-HMPA was seen as effective law to protect the need of women and children from unregistered marriage. Among of them is also Nasaruddin Umar who considers that the purpose of RUU-HMPA was to protect the dignity of marriage, therefore the aspects connected to the child such as inheritance, custody, identity card, passport, health insurance and so on so fort can be guaranteed.

<sup>46</sup> “Kompilasi” Hukum Islam akan Ditingkatkan jadi UU”, GATRA, 19 September 2002. See, <http://www.gatra.com/artikel.php?pil=23&id=20700>. See, “Draft RUU Hukum Perkawinan Islam akan Diajukan ke Sekneg,” Selasa, 09 November 2004 dalam <http://www.tempointeraktif.com/hg/nasional/2004/11/09/brk,20041109-07,id.html>.

<sup>47</sup> Compared with an interview with Najib Anwar, “Kasubdit Keluarga Sakinah Direktorat Urusan Agama Islam Depag RI”, *Majalah FORUM Keadilan*, No. 45, 15 Maret 2009, 16.

<sup>48</sup> See, RUU-HMPA in Marriage Year 2008, see also, Eli Hakim Silaban and Partner Personal Library Law and Regulation Collection Series, *Draft Rancangan Undang-Undang (RUU) Hukum Materil Peradilan Agama (HMPA) Bidang Perkawinan* Year 2008.

<sup>49</sup> See the sacred-ization and desacredization of Islamic Family Law in an article of Sadari, *Sakralisasi vis a vis Desakralisasi Hukum Keluarga Islam di Indonesia: Studi Hududi untuk Relevansi Modernitas dan Keindonesiaan*, 1<sup>st</sup> Printing (Tangerang: Young Progressive Muslim, 2004).

<sup>50</sup> Fatma Amilia, “Al-Ahwal Asy-Syakhsiyah” in KDT (Katalog Dalam Terbitan) M.Nur Kholis Setiawan, Djaka Soetapa, *Meniti Kalam Kerukunan: Beberapa Istilah Kunci dalam Islam dan Kristen*, Writing team: Dialogue Centre PPs UIN Sunan Kalijaga Yogyakarta dan PSAA Faculties of Theologia UKDW Yogyakarta, 1<sup>st</sup> Printing (Jakarta: Gunung Mulia, 2010), 253.



Mahfud MD also has similar support, he saw that unregistered marriage harmed the right of children and women because a woman from the unregistered marriage gains less right legally and therefore it is affected to the inheritance right, either for the spouse or for the children. Otherwise, the group who disagree perceived that banning unregistered marriage is unnecessary. The reason behind is that Islam allow that marriage. There are some figures supporting this view such as Idrus al-Gadri, Hasyim Muzadi, Homaidi Hamid, Arwani Faisal, Ayik Hariansyah, and so on so forth. Besides criticizing that unregistered marriage is accepted in Islam as the first reason, they also focused on the criminalization as the second reason. They pointed out that the law shall not criminalize the unregistered marriage, but simply be rearranging it wisely. The third reason is that the adultery was not criminalized; therefore criminalizing unregistered marriage is imbalance. The fourth is that the marriage is civil affair; therefore the law for imprisoning is tyrannical law. The fifth reason as mentioned by Ayik Hariansyah: the articles in the RUU-HMPA consider as in contradiction with Islamic *Shari'a*, for the example is criminalizing a person who does unregistered marriage and polygamy, indeed unregistered marriage is legal, otherwise it is not registered in the marriage registrar.

The different point of view shall not come to disintegration. Meaning, it will be better when the contra group opens dialogical space to the group of pro—and vice versa—and then rearranging a new formulation together that could be accepted each other. To carry out the negotiation is not easy, but it does not mean impossible. Otherwise, when Indonesian lawyers have no integrative connection, it will be impossible for the law in Indonesia to gain the level of “protecting”.

A significant aspect to create a ‘harmony’ is an agreed methodology. Meaning, whoever, especially the lawyers need to agree a method to investigate the dynamic of Islamic community and their problems. It is clear that there are methodological approaches, but the writer views that *ushul fiqh* (principle of Islamic Jurisprudence) is more compatible as proposed by Syatibi. Further, this method proposed also by Yudian Wahyudi when responding the dispute between RUU-HMPA. He suggested that understanding the phenomena shall be based on *maqashid syariah* (the goal of Sharia) in which its position is within *ushul fiqh*.

To harmonize Islamic law with national law,<sup>51</sup> as explained by Yudian, RUU-HMPA needs to promote a spirit of *syadd al-dzari'ah* (*preventive action*). Indeed, its purpose is protecting children’ right through marriage law. Further, to prevent the stagnancy of RUU-HMPA, whoever involved within the discussion needs to establish *ijtihad jama'i* (collective effort), and not as *fardli* (individual). The reason behind is an acceptance for public—and has no disintegration effect—for formulating the law.

Supporting Yudian, this paper also emphasizes that formal legislation of (UUP No. 1/1974 and KHI) and non-formal legislation (CLD-KHI and RUU-HMPA) need for law negotiation responses for completing one other. Formulating the law is not a field contestation for personal satisfaction and set aside common need (religion, nation and State). Indeed, the pluralism of law as a foundation should be preserved and negotiated, therefore traditional law and modern law could be in harmony and humanist. This is the point in which the existence of law, both Islam and national, finds its most effective form, wise and reasonableness.

Behind the problem of RUU-HMPA, minister of Religious Affair on 27 February 2009 stated interestingly that the draft of RUU-HMPA is none. According to Director of Islamic Community Guidance of Kemenag, Nasaruddin Umar, the Ministry was waiting for president’s answer. This is odd since the minister said about no draft, but Ministry of Religious Affair was waiting draft approval proposed one year before.

During waiting process, Depag has done for several activities. One of them is conducting seminar, such as on 11 February 2010 at UIN Syarif Hidayatullah Jakarta by Center for Islamic Law and Civil Society (PPHI2M). Within the ceremony, the chairman, Abdul Gani Abdullah, said that the Draft Law (RUU) will be a complementary of UU No. 1/1974 about marriage. The reason behind is that the draft has processed to National Legislation Program (Prolegnas). Within that year also, 16 February 2010, Suryadharma Ali clarified that the draft has arrived to Prolegnas and Nasaruddin also reaffirm that officially the draft has arrived to Setneg a year before. Afterward, on the Wednesday 17 February 2010, the draft has arrived to Prolegnas and DPR, but before discussed by councilor, the draft should be submitted to State Secretariat by Kemenag. In the other words, the draft of RUU-HMPA as mentioned was not legalized yet. However, the rumor about the draft sparkled and caused controversies.

<sup>51</sup> See a paper of Yudian Wahyudi, *Rancangan Undang-Undang Hukum Materiil Peradilan Agama bidang Perkawinan dari Maqashid al-Syariah ke Fikih Indonesia (Sebuah Catatan Metodis)*, 4.

This is clear that publics are in debate on the draft which is unclear. As a result, on February 19, 2010, Suryadharma Ali insisted the journalist for stopping issued the controversy of RUU and stated that the draft is none or illegal draft.

### C. The Controversy of Islamic Family Law in Indonesia: Roles and Practices on Several Cases.

The regulation of Islamic Family Law was accumulated into two legislations, formal and non-formal. However, community's need to consider the law is weak. Meaning, they seem to be reluctant for implementing the legislation. Interestingly, when compared between the formal (UUP and KHI) with the non-formal (CLD-KHI and RUU HMPA), they preferred for the non-formal. Considering this phenomenon—the massive violation over the legislation of Islamic Law Family—as something went wrong.

In the practical level, the violation could be seen in the practices of polygene, interfaith marriage, and underage marriage done arbitrarily. Arbitrary means the community tends to underestimate the requirements proposed by legislation, including KHI which is allowed polygene. Likewise RUU-HMPA: communities were also neglected the law—without feeling guilty—saying about criminalizing the doer of polygene. Therefore, this is a clear-cut statement saying that the legislation of Islamic law in Indonesia was lacking its momentum, to avoid saying irrelevant in the Indonesian context.

It is clear that community's response is a challenge over Islamic Law in Indonesia. Therefore, this article tries to offer a negotiation process and gradual socialization of Islamic law over community. Otherwise, the implementer is not only the state, but also involving lawyer, institution, community organization, women right activist, and those who in concern on the formulation of Islamic Law. The aim is to reduce miscommunication among parties in which the victim is community.

Negotiation and socialization process in this article is going through academic process with the lawyers as the object of discussion—meaning to bridge the tension among them. Moreover, the main actors as trigger within communities for abandoning Islamic law in the formal and non-formal legislation have identified. The main actors are those who in debate between traditionalist group and modernist groups weakening law supremacy, lack of justice and responsibility. The first actor is “Nahdlatul Ulama” (NU), and the second actor is “Muhammadiyah”. Both of these organizations are more respected and obeyed than the state law. Organization's influence is significant, especially with the conference “*muktamar*” of NU and the decision of Preference Council “*majelis Tarjih*” of Muhammadiyah.

This article emphasizes that the legislation of Islamic law has been strongly connected to the debate of the scholars among these organizations.<sup>52</sup> Indeed, the matter of debates also connected to the classical dispute among them. A traditional group represented by NU and modernist group represented by Muhammadiyah. Both of these organizations tried to evolve within the discussion of Islamic Law in Indonesia. The root of dispute was coming from different historical experience. NU, as the biggest Islamic organization in Indonesia, holds a strong principle for protecting classical thought, whereas Muhammadiyah is holding a contrary principle seeing that the stagnancy of Islamic community is due “blind following” over classical muslim generation.<sup>53</sup> Therefore, since established on 18 November 1912, Muhammadiyah has been spreading its idea over nationalist group through appealing toward the Muslim for “returning to al-Qur'an and as-Sunnah”, through considering and developing the practices of Islam in the modern age.

Ahmad Dahlan, the funding father of Muhammadiyah in Indonesia, also considered this thought. Islamic purification mentioned by Dahlan is a requirement to returning the glory of Islam and seeing the practice of *tasawuf* (ascetic) as ineffective practice.<sup>54</sup> Through these problems, Dahlan established what well-known today as Muhammadiyah.

<sup>52</sup> See, Euis Nurlaelawati, “Hukum Keluarga Islam ala Negara Penafsiran dan Debat atas Dasar Hukum Kompilasi Hukum Islam di Kalangan Otoritas Agama dan Ahli Hukum”, in *Ayy-Syir'ah Jurnal Ilmu Syari'ah dan Hukum*, Vol.50, No.1, June 2016, 200, 205.

<sup>53</sup> Lihat Martini van Bruinessen, “Tradition for the Future: The Reconstruction of Traditionalist Discourse within NU”, in George Fealy and Greg Barton (eds.), *Nahdlatul Ulama, Traditional Islam and Modernity in Indonesia* (Monash: Monash Asia Institute, 1996), 163.

<sup>54</sup> Mitsuho Nakamuro, *The Crescent Arises Over The Banyan Tree: A Study of the Muhammadiyah Movement in a Center Java Town* (Ithaca: Cornell University Press, 1976), 10; Howard M. Federspiel, “The Muhammadiyah: A Study of an Orthodox Islamic Movement in Indonesia,” *Indonesia* 9 (1970), 64-67; and John David Legg, *Indonesia*, 3rd edition (Sydney: Prentice-Hall of Australia, 1980), 64-65.

This is a one stop idea with his focused mission to solve Indonesian community through “returning to al-Qur’an and as-Sunnah”.<sup>55</sup> Further, Dahlan’s decision is also criticized by communities named traditional Islam and in this age, Nahdlatul Ulama established.<sup>56</sup>

Considering the debate, Euis Nurlaelawati seen that there are two points as roots of problems, choosing references and point of view.<sup>57</sup> NU tends to protect the status quo of classical references to solve the problems. Within the references, it is narrated that whoever cited Quran and Hadist without considering classical references is in rushed. Indeed, many of them called it as an astray and mislead.<sup>58</sup>

Muhammadiyah was plotted differently. For Muhammadiyah, in order to understanding Islam clearly; anyone should refer to Qur’anic verses, and encouraging every single Muslim to interpret the Qur’an, without exception. Within this organization, the true “Islam” is what written in the Qur’an and prophet traditions.<sup>59</sup> Muhammadiyah and the lawyer expert tend to criticize the judges in the court constitution that over-quoting classical *fiqh*, without any critical thinking.

Further, the dispute between these groups also influenced in the room of KHI. Many said that in the process of discussing KHI, the involved scholars are affiliated in NU. Otherwise, within formulating the law, the main reference is not on the book of *al-Umm* written by Syafi’i, but the books after *Syafi’iyah*—to distinguish from Syafi’i—this statement strengthened through an interview conducted by Euis Nurlaelawati over Ichtianto on 7 Augusts 2003 about interfaith marriage which is involved a male Muslim and female non-Muslim allowed by Syafi’i,<sup>60</sup> but disallowed on the KHI.

In this paper, the writer hold a theory of “fusion horizon” (*horizont-verschmelzung; fusion horizons*) and the theory of “hermeneutical circle” (*hermeneutischer Zirkel; hermeneutical circle*). This theory located any person to interpret the text, whatever it is, dynamically. When interpreted the important of self consciousness—as interpreter—but also for the text. However the horizon of knowledge is not only the interpreter, but also the text. For the example is a condition where the text produced for the first time. Indeed, frequently, the horizon between the interpreter and text are different, therefore the horizon is necessarily needed.<sup>61</sup>

Based on that theory, both NU and Muhammadiyah should negotiate to solve the problem of the law and negotiating the references. Therefore, the differences should not be a locus of debate, but as social modal to reformulate the law and to solve the problems. Within this point, a Muhammadiyah scholar, Rifyal Ka’bah, noted that whoever sees in detail will easily understand that Muhammadiyah—which Nu as a conservative one—is more traditional than NU.<sup>62</sup> Therefore, focusing on the differences is unnecessary.

Further, Ka’bah is also criticizing Muhammadiyah Preference Council. So far, the council was over focusing on the al-Quran and Hadist, indeed who have capabilities and integrities to interpret the sources are a few. Related to the Quran and Hadis, Ka’bah has no objection. The problem is the limited human resources of Muhammadiyah about the Quran and Hadis. In the other words, Ka’bah wants to say about the important of negotiation between Muhammadiyah and NU and neglecting the egoism.

<sup>55</sup> See, Yudian Wahyudi, *Dinamika Politik “Kembali kepada al-Qur’an dan Sunnah” di Mesir, Maroko dan Indonesia* (Yogyakarta: Pesantren Naweesa, 2010), 55. According to Yudian, an idea about Indonesian *fiqh* is a continuum of an idea of “Returning to al-Qur’an and as-Sunnah”.

<sup>56</sup> Greg Fealy, “Wahhab Chasbullah, Traditionalism and the Political Development of Nahdlatul Ulama, Traditional Islam and Modernity in Indonesia (Australia: Monash University, 1996).

<sup>57</sup> See, Euis Nurlaelawati, “Hukum Keluarga Islam ala Negara Penafsiran dan Debat atas Dasar Hukum Kompilasi Hukum Islam di Kalangan Otoritas Agama dan Ahli Hukum,” in *Ary-Syir’ab Jurnal Ilmu Syari’ah dan Hukum*, Vol.50, No.1, June 2016, 207.

<sup>58</sup> Rifyal Ka’bah, *Hukum Islam di Indonesia, Perspektif Muhammadiyah dan NU* (Jakarta: Universitas Yarsi, 1999), 231-232.

<sup>59</sup> Rifyal Ka’bah, “Fiqh Muhammadiyah Ketinggalan dari NU”, Suara Hidayatullah, Mei 2000, 4.

<sup>60</sup> See, Euis Nurlaelawati, “Hukum Keluarga Islam ala Negara Penafsiran dan Debat atas Dasar Hukum Kompilasi Hukum Islam di Kalangan Otoritas Agama dan Ahli Hukum,” in *Ary-Syir’ab Jurnal Ilmu Syari’ah dan Hukum*, Vol.50, No.1, June 2016, 210.

<sup>61</sup> Both of these horizons, according to Hans Georg Gadamer should be communicated, and therefore “*the tension between the horizons the text and the reader is dissolved*”, see Hans Georg Gadamer, *Texts and Interpretation*, in B.R. Wachterhauser (ed.), *Hermeneutics and Modern Philosophy* (New York: Albany State University of New York Press, 1986), 396. See also, Sahiron Syamsuddin, *Hermeneutika dan Pengembangan Ulumul Qur’an*, 1<sup>st</sup> Printing (Yogyakarta: Pesantren Naweesa Press, 2009), 48.

<sup>62</sup> Rifyal Ka’bah, “Fiqh Muhammadiyah Ketinggalan dari NU”, Suara Hidayatullah, Mei 2000, 4.

The relation with KHI is that Muhammadiyah together with NU involved in the formulation of Indonesian Family Law as well as using classical references. Meaning, classical book is not the main reference, but as point of departure. Further the Qur'an and hadist should also be involved.<sup>63</sup>

Otherwise, NU should also do the same during *bahsul masail* (discussing the problems) conducted. The discussion should also consider a contemporary issue in order to gain a strong solution.<sup>64</sup> Otherwise, NU should also improve community services like what Muhammadiyah did for PKU (General Suffering Rescuer) and so on so forth.<sup>65</sup> Therefore, both organizations are not only talking about eschatological issues, but also a mundane problem.

Shortly, the writer argues that the effectiveness of Islamic law family in Indonesia has connected with both of these organizations. This is based on the assumption that the communities trusted these organizations better than expert legislation in the central government, therefore it is necessary to link the spectrum with recognized legislation—such as UUP, KHI, and two others. The purpose is creating the acceptance space for Islamic family law within the Muslim communities and establishing a clear law. A concrete example is a divorce problem. In the NU, a person is unnecessary to go to religious court for divorce, whereas in KHI—and others—obligated a person to go to a religious court.<sup>66</sup>

### 1.a. Polygene

This article prefers to use a term “polygene” instead of “polygamy” since linguistically; the preferred meaning is coming from polygene.<sup>67</sup> The term refers to a man married more than a woman, and not a man or a woman married more than one. Polygene is a practice of a man—only man and excluded woman—married more than one wife, while the term polygamy refers to both man and woman. Since the subject of discussant is man who has more than one wife, therefore the term polygene is appropriate.<sup>68</sup>

Regarding the distinction meanings, KHI prefers to use none of them. It has a definitive term namely “who has wife more than one person” or a man who marry more than one. This can be seen in the book I of KHI: Marriage Law Chapter IX, about Marriage more than one person in the Article 55.<sup>69</sup> The problem of polygene is not a new phenomenon in the Islamic law. The practice of polygene is as old as human being and this practice can be seen from human ancestors specifically a man who have many wives.<sup>70</sup>

<sup>63</sup>Euis Nurlaelawati, *Modernization, Tradition And Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian religious Courts*, (ICAS/Amsterdam: Amsterdam University Press, 2010), 106-107.

<sup>64</sup>Rifyal Ka'bah, *Hukum Islam di Indonesia, Perspektif Muhammadiyah dan NU* (Jakarta: Universitas Yarsi, 1999), 228-235. See, M.B. Hooker, *Indonesian Islamic: Social Change through Contemporary Fatawa* (Honolulu: Allen & Unwin and University of Hawaii Press, 2003), 57-60.

<sup>65</sup> See, Yudian Wahyudi, *Dinamika Politik “Kembali kepada al-Qur'an dan Sunnah” di Mesir, Maroko dan Indonesia* (Yogyakarta: Pesantren Naweesea, 2010), 57.

<sup>66</sup> M. B. Hooker, *Indonesian Islamic: Social Change through Contemporary Fatawa* (Honolulu: Allen & Unwin and University of Hawaii Press, 2003), 196.

<sup>67</sup> Many books wrote by scholars use the term polygamy and not a polygene, but the term used refers to the practice of polygene, see Siti Musdah Mulia, *Islam Menggugat Poligami* (Jakarta: Gramedia, 2004). Indeed, the term polygamy in this context is not diverged, but this dissertation research an overlapping term and biased gender, see Islah Gusmian, *Mengapa Nabi Muhammad Berpoligami: Mengungkap Kisah Kehidupan Rumah Tangga Nabi Bersama 11 Isterinya*, 1<sup>st</sup> Printing (Yogyakarta: Pustaka Marwa, 2007), 28-29.

<sup>68</sup> See Islah Gusmian, *Mengapa Nabi Muhammad Berpoligami: Mengungkap Kisah Kehidupan Rumah Tangga Nabi Bersama 11 Isterinya*, cet. e-1 (Yogyakarta: Pustaka Marwa, 2007), 25-26.

<sup>69</sup> See IKAPI Member, *Himpunan Peraturan Perundang-Undangan: Kompilasi Hukum Islam*, 1<sup>st</sup> Printing (Bandung: Fokusmedia, 2012), 21, see also a book: Abdurrahman, *Kompilasi Hukum Islam di Indonesia*, cet. ke-4 (Jakarta: CV Akademika Pressindo, 2010), 126, Muhammad Zain dan Mukhtar Alshodiq, *Membangun Keluarga Humanis: Counter Legal Draft Kompilasi Hukum Islam yang Kontroversial itu*, 1<sup>st</sup> Printing (Jakarta: Grahacipta, 2005), 168, Cik Hasan Bisri, *et al*, *Kompilasi Hukum Islam dan Peradilan Agama di Indonesia*, 1<sup>st</sup> Printing (Jakarta: Logos Wacana Ilmu, 1999), 156.

<sup>70</sup> Musthafa al-Siba'i noted that within a communities living in ancient age such as Yunnan, China, India, Babylonia, Assyria, Egypt did a polygene. According to Saba, the practice of polygene has no limited number of wives and reached more than hundred in one time (without divorce and death factors) for one man (husband). In the Old Testament, it is mentioned that the prophets have also practiced a polygene, see Musthafa al-Siba'i, *Wanita di Antara Hukum Perundang-Undangan*, terj. Chadidjah Nasution (Jakarta: Bulan Bintang, 1977), 100. Christian religion, according to Murtadha Muthahhari, has no certainty prohibited polygene, this is also showed that Al-Masih stood for Musa as, in which in the Moses law (Taurat) that recognized polygene. See,

Including those are within the figures of pre-Islamic prophecy.<sup>71</sup> Even though the phenomenon is ‘pre-dated’, the problems and the solution of polygene have not yet done and overlapping. Therefore, the problem is still relevant to be investigated perpetually.

In the context of Indonesia, as explained previously, the first investigation had done by KHI.<sup>72</sup> There are regulations coming from KHI, namely (a) marrying more than one person and limited for four wives only (b) the main requirement for a man marrying more than one wife is character of just over the wives and children. (c) When the stipulation of (a) and (b) unfulfilled, a man was forbidden to have more than one wife. After KHI is the period of CLD-KHI.<sup>73</sup> Through different logic and approach, CLD produced some rules as follow: (a) the basic principle of marriage is monogyny (*tawahbud al-zamy*), (b) A marriage out of basic principle on the decision (a) considered as illegal lawfully. Among of them is also a moderate view allowing polygene<sup>74</sup> through several terms and conditions (a) the second, third, and fourth wife is a widow who has orphanage, (b) an anxious feeling for unequal share toward orphanage. When the term (a) and (b) was unfulfilled, there is no reason to allow polygene.

However, through many formulations of polygene, there was still a crucial aspect; that is inappropriate intention of the doers with the spirit of polygene allowance and that is many. That is imbalance, meaning the permission of polygene is similar with no permission.<sup>75</sup> Puspo Wardoyo, a businessman, explained two basic reasons for his polygene. According to him, polygene brings about fortune and happiness. That is also Fauzan Al-Anshari, a proselytizer activist of Majelis Mujahidin Indonesia (MMI), he stated the seven reasons behind his polygene. Namely; allowed in Islamic teaching, polygene is the nature of man, helping woman, avoiding adultery, learning for a man (husband), giving wives their right for more leisure time from their tasks as wife, and doing a demographic jihad (through producing many children). One more is Aa Gym, an Islamic preacher and businessman. He reveals two reasons behind his polygene; namely it is better than *Teman Tapi Mesum* [T\*TM] (Friend but indecent) and as an emergency exit. From the explanation above, that is not exaggerating to say that their intention is coherence with the spirit of polygene.

### 1.b. Interfaith Marriage

A controversial issue beside polygene is an interfaith marriage. Indonesia is a plural country; there are many religions and identities such as Islam, Hindu, Buddha, Catholic, Protestant, and Confucianism. A further question is how to respond those who has an interfaith love and planned to marry? So far, the problem of interfaith marriage is unsolved. Considering about an unfinished law formulation and increasing number of the practice of interfaith marriage, there was a problem for Islamic scholars in Indonesia.

Murtadha Muthahhari, *The Right of Women in Islam* (Taهران: WOVIS, t.th), 345. Animism Religion (Christian) in Africa that found also the practice of polygene, see Musthafa al-Siba'i, *Wanita di Antara Hukum Perundang-Undangan*, translated by. Chadidjah Nasution (Jakarta: Bulan Bintang, 1977), 103-104, surely many times needed for a serious investigation to unpack the practice of polygene.

<sup>71</sup> A term *ta'addud al-zanjat* which refer to the practice of polygamy is a representation rooted on classical *Fiqh*. Historically speaking, the term *ta'addud al-zanjat* interpreted as the practice of polygamy in the classical *fiqh* is a practice of polygene, both of them are different meaning. See, Islah Gusmian, *Mengapa Nabi Muhammad Berpoligami: Mengungkap Kisah Kehidupan Rumah Tangga Nabi Bersama 11 Isterinya*, 1<sup>st</sup> Printing (Yogyakarta: Pustaka Marwa, 2007), 29.

<sup>72</sup> The characteristic of polygene interpreted from a KHI on the first Chapter IX who has more than one wife 55, See member of IKAPI, *Himpunan Peraturan Perundang-Undangan: Kompilasi Hukum Islam*, 1<sup>st</sup> Printing (Bandung: Fokusmedia, 2012), 21, see also in the book, like : Abdurrahman, *Kompilasi Hukum Islam di Indonesia*, 4<sup>th</sup> Printing (Jakarta: CV Akademika Pressindo, 2010), 126, Muhammad Zain dan Mukhtar Alshodiq, *Membangun Keluarga Humanis: Counter Legal Draft Kompilasi Hukum Islam yang Kontroversial itu*, 1<sup>st</sup> Printing (Jakarta: Grahacipta, 2005), 168, Cik Hasan Bisri, *et al*, *Kompilasi Hukum Islam dan Peradilan Agama di Indonesia*, 1<sup>st</sup> Printing (Jakarta: Logos Wacana Ilmu, 1999), 156.

<sup>73</sup> The characteristic of Polygene interpreted in the CLD-KHI on the Chapter II Basic, Principle and Marital Purposes Part One on the Basis Paragraph 3. See Muhammad Zain dan Mukhtar Alshodiq, *Membangun Keluarga Humanis: Counter Legal Draft Kompilasi Hukum Islam yang Kontroversial itu*, 1<sup>st</sup> Printing (Jakarta: Grahacipta, 2005), 225.

<sup>74</sup> See also Muhammad Shahrur *Nabw Ushul al-Jadidah li al-Fiqh al-Islam* (Damaskus: *al-Abali li ath-Thiba'ah wa an-Naysr wa at-Tawzi*, 2000), 232 and 303. See also in Muhyar Fanani, *Fiqh Madani: Kontruksi Hukum Islam di Dunia Modern* (Yogyakarta: LKiS, 2009), 287.

<sup>75</sup> Islah Gusmian, *Mengapa Nabi Muhammad Berpoligami: Mengungkap Kisah Kehidupan Rumah Tangga Nabi Bersama 11 Isterinya*, 1<sup>st</sup> Printing (Yogyakarta: Pustaka Marwa, 2007), 43.

The data found in the April 1985 until 1986 shows there are 239 cases of interfaith marriage which involved 112 Muslim men and 127 Muslim women,<sup>76</sup> and therefore the formulation of interfaith marriage needs to be discussed and finalized. The meaning of final here is not prohibiting that marriage as proposed in KHI—in this point, those who do interfaith marriage seen as go against the law since it is prohibited by KHI—but it should be negotiated for common agreement as well as seeking for the solution of legal law for interfaith marriage.

The deviation form and breaking the rule are rooted on the debate and assumption that every religion teaches about being good, and therefore the prohibition of interfaith marriage is inappropriate. The reason behind is that: every single person has a good purpose through different ways. Within this problem, Setiawan stated that it is the problem of all religions. Every religion has exoterically a different teaching and rites. That problem could be communicated for an understanding in the differences. One of problem in the religious teaching is an obligation for marriage.<sup>77</sup>In the Islamic tradition, this problem has been specifically discussed in the classical law arguing that interfaith marriage is allowed with *abli kitab* (who holds a book).<sup>78</sup> As a note: KHI prohibits a marriage with an *abli kitab* since currently it hard to find this community as well as it is hard to describe and classify a person from *abli kitab*.

Simply writing, whoever needs to frame this case—including polygene—in the negotiated way. Therefore, an effort was not focused on the material debate, but also on the process of negotiation. That is important to accept and support each other comprehensively and holistically. Hence, KHI supported through negotiation will be beneficial to formulate the problem of law in one place, and as a solution over community problem in the other places.

#### **D. Conservative Domination versus need for change: a Relevant Factor**

The revision of Islamic law in Indonesia comes up from many supports; one of them is Muhammadiyah group. In many cases Muhammadiyah perceived to be more rigid than NU, but for the legal legislation of KHI, it comes one step forward. The real evidence from the decision is the result of 42<sup>th</sup> Muhammadiyah Conference in Yogyakarta which insisted the government to legalize KHI soon.<sup>79</sup>

Unlike Muhammadiyah, NU is passive. In the other word, NU tends to convoy that institutionalization of Islamic law is unnecessary. The regulation regarded to the family law has been considered as sufficient to solve the community problems. Therefore, moving onward for institutionalization, as suggested by Bustanul Arifin considered as unnecessary.<sup>80</sup> Moreover toward the legalization of Islamic law has proposed by A. Qadri Azizi.<sup>81</sup>

However, as the time went by and specifically after a claim saying that NU is source of TBC (*tabayunl, bid'ah* and *keburafat*—[superstition, heresy, and falsehood] by particular group, and NU has shifted behavior. It could be seen from the support for an institutionalization of Islamic law that had neglected beforehand. This is despite the fact that NU is holding a flexible principle and more accepted by communities. In the same time, NU is also eagerly contributed the ideas for the formulation of Islamic law in Indonesia until the accomplishment of RUU-HMPA. Within the development, NU has also successfully integrated to Indonesian law such as customary and western law.

<sup>76</sup> See, Atho Mudzar, *Islam and Islamic Law in Indonesia: A Socio-Historical Approach* (Jakarta: The Center for Research and Development of the Ministry of Religious Affairs, 2003), 113.

<sup>77</sup> M. Nurkholis Setiawan, *Tafsir Mazhab Indonesia*, 1<sup>st</sup> Printing (Yogyakarta: Nawsea Press, 2007), 66-67.

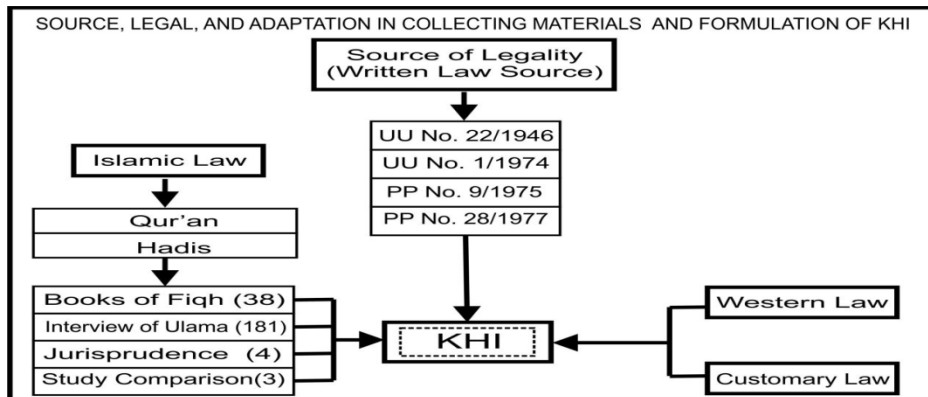
<sup>78</sup> See, Euis Nurlaelawati, “Hukum Keluarga Islam ala Negara Penafsiran dan Debat atas Dasar Hukum Kompilasi Hukum Islam di Kalangan Otoritas Agama dan Ahli Hukum,” In the *Asy-Syir'ah Jurnal Ilmu Syari'ah dan Hukum*, Vol.50, No.1, June 2016, 208-209.

<sup>79</sup> PP Muhammadiyah, *Keputusan Muktamar Muhammadiyah ke-42* (Yogyakarta: Berita Resmi Muhammadiyah, 1991), Special Number. Marzuki Wahid, *Fiqh Indonesia: Kompilasi Hukum Islam dan Counter Legal Draft Kompilasi Hukum Islam dalam Bingkai Politik Hukum Indonesia*, 1<sup>st</sup> Printing (Bandung: Marja, 2014), 157.

<sup>80</sup> Busthanul Arifin, *Pelembagaan Hukum Islam di Indonesia: Akar Sejarah, Hambatan, dan Prospeknya* (Jakarta: Gema Insani Press, 1996).

<sup>81</sup> A. Qodri Azizy (1955-2008), *Eklektisme Hukum Nasional: Kompetisi antara Hukum Islam dan Hukum Umum* (Yogyakarta: Gama Media, 2002), See also the edition revision entitled, *Hukum Nasional: Eklektisme Hukum Islam dan Hukum Umum* (Jakarta: Teraju, 2004).

Therefore, an image that NU is the most influential Islamic organization in Indonesia has proved. Surely, that image comes gradually. There are some steps for the process of integration—a combination between Islamic, customary and western law—namely as follow:<sup>82</sup>



The scheme above is showing about three strong distinctions on the making of KHI in Indonesia, namely Islamic law, customary law and western law. From these distinctions, NU has a strong domination. This can be seen from an obligation of investigating thirty eight (38) of *fiqh* books from the various schools, and seeking for 160 relevant problem of Islamic family and so on so forth. Related to the *fiqh*, there are also a demand to do an interview over 181 scholars spreading in the ten areas and Religious Supreme Court in Aceh, Medan, Padang, Palembang, Bandung, Surakarta, Surabaya, Banjarmasin, Ujung Pandang, and Mataram. Indeed, an implementation is taking from PTKIN lecturer. So far, that is a proper claim to say that NU has a dominant position in the formulation of KHI.

Further is a period of fading NU domination. That is a time when the research for court product in the Religious Court. There are sixteen (16) books from four discourses. First is a collection of Religious Court Decision (PTA). Second is a collection of religious court Binding Law. Third is a collection of religious court binding law. Fourth is Law Report on the 1977s up to 1984s. A similar thing is a comparative Islamic family law implemented in Morocco, Egypt, and Turkey. That is one package for various aspects, such as history, pluralism of Indonesia community vertically and horizontally.<sup>83</sup> Two other steps were taking by non-NU, otherwise the nuance of NU is still dominant due it holds the first step.

So far, it is necessary to be analyzed that NU has successfully integrated a moderate view. However, the model of integration is still limited on the NU's view. Meaning, to gain stability among feminist and modernist—not a Muhammadiyah—NU is still having a difficulties. That has been proven through the formulation that NU tends to support classical *fiqh*. That is rooted on the lacking of both feminist view and the analyst of community need in Indonesia. Therefore, a nuance of a biased gender within KHI becomes unavoidable. When NU was cooperating to both of these groups, the produced law would probably be different.<sup>84</sup>

What did happen among NU, KHI, and Muhammadiyah—for several aspects—have triggered an unsatisfactory. First, it is coming from what they identify themselves as PUG (*Pengarus-Utamaan Gender*/Gender mainstreaming). PUG decided to offer a new formulation countering KHI on 2004. They called it as Counter Legal Draft KHI or CLD-KHI. This is the climax of disappointment toward KHI that considered as discriminative over human right, especially toward women.

<sup>82</sup> Cik Hasan Bisri, *et.al*, *Kompilasi Hukum Islam dan Peradilan Agama di Indonesia*, 1<sup>st</sup> Printing (Jakarta: Logos Wacana Ilmu, 1999), 10., See, Sadari, *Sakralisasi vis a vis Desakralisasi Hukum Keluarga Islam di Indonesia: Studi Hududi untuk Relevansi Modernitas dan Keindonesiaan*, 1<sup>st</sup> Printing (Tangerang: Young Progressive Muslim, 2004), 118.

<sup>83</sup> In detail, Islamic family law implemented in Morocco (featured with Maliki school), Turki, Including Turkic in the Cyprus (featured with Hanafi school), and Mesir (featured with Syafi'i and Hanafi school), can be seen in Tahir Mahmood, *Personal Law in Islamic Countries: History, Text and Comparative Analysis* (New Delhi Academy of Law and Religion: Times Press, 1987).

<sup>84</sup>At that time, slavery allowed and women subordinated easily. A best thing for Islamic Family Law is changing a negative tendency for a discrimination based on the religion and gender. See Abdullah Ahmed an-Na'im, *Dekontruksi Hukum Islam (Toward an-Islamic Reformation: Civil Liberties, Human Right and International Law)*, translator: Ahmad Suaedy and Amiruddin Arrani (Yogyakarta: LKiS and Pustaka Pelajar, 1994), 299-303.

Secondly is from National Commission of Human Right (Komnas HAM). Together with Indonesia National Commission for Children Care (KPAI) and *National Human Right Institution* (NHRI), they were strongly disappointed over KHI. Besides threatening women's right, that is also threatening the children.<sup>85</sup> Further, related to HAM and Islamic Family law, this issue was commonly spoken internationally. The last issue has also be major theme of "*Musawah : A Global Movement for Equality and justice in the Muslim Family*" organized on 13-18 February 2009. This event has successfully attracted more than 300 prominent women activist from 45 Muslim countries. They were exchanging the experience, conducting dialog, seeking for relevant and contextual solution for the end of women discrimination in their countries, especially household. A discrimination based on sex has produced various violent<sup>86</sup>, reduced, and neglected human right. Women right is also human right, therefore they were participated.

Woman activists (*feminist*) agreed that contemporary world is moving forward, however the reality shows that woman position is still less than man. They are located as second class of human creature deserved to be discriminated in the private and public space. This is also showing the fact that the system and the family laws in many countries are containing a material which is unreliable for protecting woman's right.

For the example is the article 15 verse 1 of KHI about the minimum limit of marriage age. Woman's age for marriage is less than man. Woman is allowed to marry at the age of (16) year, while for man is (19). For feminist activist, this is a clear evidence for discrimination. A primary question has much to do with the differentiation. Through that distinction, there is a structured effort to domesticate woman as well as blocking them for higher education. Through the formulation of age limitation law, women prefer to choose to marry instead of continuing for higher education. Feminist argued that this is a clear institutionalized discrimination.

Likewise also Woman National Commission (Komnas Perempuan), they agree that the article is containing a structuralized discrimination done by state consciously. Clearly, that discrimination is in contrast with the spirit of law, either Islamic or general law. The spirit of law is protecting common good for an individual, society and protected their right.<sup>87</sup> However in the article 15 verse 1 of KHI had written discriminatively about a minimum age for marriage between man and woman. That is not an exaggerating to say that KHI's decision is considered as discriminative and therefore the state should revisit the formulation to establish a relevant decision. For the purpose that KHI would find a new momentum for the development, relevancy and anti-discrimination.<sup>88</sup>

Through different ways, al-Naim shows the root of asymmetric problem between Islamic law and human right (HAM) lied on the limited verse used that is *Madaniyah* verses.<sup>89</sup> Therefore, as suggested by al-Naim, in this contemporary age, Islamic law should be investigated and reconstructed through the perspective of Makkiah's verse. The reason behind is that Islamic law could be egalitarian and prioritizing human being solidarity without any discrimination.<sup>90</sup> A *Madaniyah* verse used frequently as foundation of Islamic law is at-Taubah (9): 29 a verse about "*war-qital*". Many groups that perceived as modernist group are still using classical approach. Classical approach identified as textual, hence when this approach used as foundation of Islamic law, the result may be asymmetric with the spirit of Human Right. Indeed, Naim suggested that within reading the text, whoever should not stop on the textual framework. Critical and creative readings were necessarily needed for the purpose that a discriminative text could be contextualized and within the spirit of Human Right.

<sup>85</sup>NHRI in the democratic age is necessarily needed through the function as check and balance of HAM organized by State. Based on the Paris Principle, NHRI has five responsibility, monitoring, giving an advise and balancing the government, building a regional cooperation, facilitating education and knowledge about HAM toward public, receiving a complain and petition on the violation of HAM of Kamala Chandrakirana, "National HAM mechanism for Indonesian women", *Newsletter Komnas Perempuan*, ed. 5, September 2010, 4.

<sup>86</sup> See Sadari, *et.al*, "KDRT dalam Perspektif Fiqh" in the *Ragam Kajian Kekerasan dalam Rumah Tangga*, 1<sup>st</sup> Printing, Cirebon: Fahmina-Institute, 2012.

<sup>87</sup> Izzudin bin Abd as-Salam, *Qawaid al-Abkam fi Masbalih al-Anam*, 1<sup>second</sup> Printing, Juz. 2 (Ttp.: Dar al-Jil, 1980), 73.

<sup>88</sup> Muhyar Fanani, *Membumikan Hukum Langit: Nasionalisasi Hukum Islam dan Islamisasi Hukum Nasional Pasca Reformasi* (Yogyakarta: Tiara Wacana, 2008), 192.

<sup>89</sup> See Muhyar Fanani, *Membumikan Hukum Langit: Nasioanalisis Hukum Islam dan Islamisasi Hukum Nasional Pasca Reformasi* (Yogyakarta: Tiara Wacana, 2008), 193.

<sup>90</sup> See Abdullah Ahmed an-Na'im, *Dekontruksi Hukum Islam (Toward an-Islamic Reformation: Civil Liberties, Human Right and International Law)*, alih bahasa: Ahmad Suaedy dan Amiruddin Arrani (Yogyakarta: LKiS and Pustaka Pelajar, 1994), 343-346. See, Sadari, *et.al*, "KDRT dalam Perspektif Fiqh" dalam *Ragam Kajian Kekerasan dalam Rumah Tangga*, 1<sup>st</sup> Printing, Cirebon: Fahmina-Institute, 2012.



Al-Naim, within this discourse, tried to reformulate an interpretation framework proposed by his lecturer, Mahmud Muhammad Taha.<sup>91</sup> Hence, through the detailed framework, the *syariah* principle is not in contrast from a whole norm of Human Right,<sup>92</sup> but at some points regarded to women' right and non-Muslim including State law are not.<sup>93</sup> However, Naim's effort was unaccepted among Muslim community since it is perceived as strongly radical and liberal.

This article then concluded about a serious contestation for Islamic family law in Indonesia. There are traditionalist, modernist and feminist group. All of them are using different approaches and methodologies, therefore a study using negotiation approach may integrate all the views. Within the same times, the legislation of Islamic family law could be reformulated as community work that able to be reinvestigated, reformulated and revised. Therefore, formal or non-forma legislation should be located as a product of contemporary generation that could be revised the form, the content and the essence for the future generation. Formulating a formal legislation of KHI is a first step from controlling a mess and uncertainty regulation in the history of Religious Court.<sup>94</sup>

Simply writing, a new reformation in the body of KHI is a compulsorily obligated. Beside to answer a dynamic problem of Indonesian Muslim, a reformation is also necessary to protect the existence of KHI. Indeed, KHI will be irrelevant when ignoring a renewable idea. Once more again is: state support. Without state support, any reformation formulated will be blowing in the wind. Related to the approach, adaptation, modification and negotiation would be as main priority and therefore the policy for comparative, integration of local tradition and so on so forth could operate properly.

## E. Conclusion

From the discussions, the writer pointed out an idea that Islamic family law—manifested in the formal legislation (UU Marriage No. 1/1974 and KHI) and non-formal (CLD-KHI and RUU HMPA)—is not the result from unfinished debate among lawyers represented by modernist and traditionalist groups. The final decision of Islamic family law was based not only on particular ideas, but also unsatisfactorily contestation of law. Within this point, a proposed law was no longer based on common good for communities, but it is representing particular group interest within the discussants. Two Islamic organizations in Indonesia, NU and Muhammadiyah, are clear evidence. They have a different point of view in their intervention of formulation of Islamic family law in Indonesia. NU has a strong argument and assumption that the value of tradition is significant, while Muhammadiyah is dissimilar. *First* Nu has a jargon stating that “*whoever directly quoting Quran verses to support the argumentation considered as astray and mislead*”, and Muhammadiyah argues that: “*returning to the Qur'an and -Sunnah*”. NU featured with classical *fiqh* and Muhammadiyah with Qur'an and sunnah.

Through epistemological gap, they claimed their preference as a better approach for solving a problem. Probably, this is may be true only for the follower of these organizations. However, from the perspective of KHI, both of them are similar, conservatism. In fact, either NU or Muhammadiyah do not contribute a significant point for KHI but a discriminative formulation. Especially these are for the problem of polygene, interfaith marriage, unregistered marriage, and underage marriage. Indeed, these problems are problematic within feminist mainstream.

Further, the contested ideas within the formulation of Islamic family law are traditionalist, modernist and feminist groups. When these groups are combined equally—meaning they could be integrated without neglecting each other—the result may solve the problems. However, the main problem is that all groups are in dispute. Therefore in this context, the writer mentioned the process purely as “negotiation”. Indeed, KHI also needs wise state's response and adaptive toward tradition and community development. The purpose of KHI' formulation is that the formulation deserved for the proper need.

<sup>91</sup> Abdullah Ahmed an-Na'im, *Toward an-Islamic Reformation: Civil Liberties, Human Right and International Law* (Syracuse: Syracuse University Press, 1990), 179, Abdullah Ahmed an-Na'im, “al-Qur'an, Syariah dan HAM: Kini dan di Masa Depan”, *Jurnal Islamika*, No. 2 October-Desember 1993, 114. See too, Muhyar Fanani, *Membumikan Hukum Langit: Nasioanalisis Hukum Islam dan Islamisasi Hukum Nasional Pasca Reformasi* (Yogyakarta: Tiara Wacana, 2008), 193-194.

<sup>92</sup> See, Abdullah Ahmed an-Na'im, *Islam dan Negara Sekular: Menegosiasikan Masa Depan Syariah*, terj. Sri Murniati, 1<sup>st</sup> Printing (Bandung: Mizan, 2007), 177.

<sup>93</sup> See, Muhyar Fanani, *Membumikan Hukum Langit: Nasioanalisis Hukum Islam dan Islamisasi Hukum Nasional Pasca Reformasi* (Yogyakarta: Tiara Wacana, 2008), 197.

<sup>94</sup> Cik Hasan Bisri, *et.al, Kompilasi Hukum Islam dan Peradilan Agama di Indonesia*, 1<sup>st</sup> Printing (Jakarta: Logos Wacana Ilmu, 1999), 77.

In sum, when the cultural laws maintained systematically by state, the element of law, and Islamic community in Indonesia, therefore Islamic family law could support state development. In particular, it is the problems of Islamic family law in the context of Indonesia.

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