

Research Article

Policy of Islamic Family Law in Textual and Historical Approach

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Abstract.

The policy of family law in Indonesia is based on principles stipulated in the Civil Code (Kitab Undang-Undang Hukum Perdata or KUHPerdata) and several other laws that regulate marriage, divorce, children's rights, and joint property in marriage. In formulating policies, a classic approach has been traditionally used. This research employs a library method, which involves collecting relevant texts and manuscripts for analysis and conclusions. The following are some important family law policies in Indonesia: marriage, divorce, children's rights, and joint property in marriage. Fiqh not only faces difficulties in resolving various social problems and issues but also struggles in defining itself, particularly in the context of formulating legal methods to address these problems. As an initial step toward reconstructing fiqh, this article attempts to propose a solution in fiqh methodology, namely a unified approach to Shari'ah and social inference. In essence, this method aims to bridge and "integrate" the textual (normative) and contextual (historical-empirical) approaches simultaneously within an "Islamic" scientific research model. The offered conclusion is that both textual and historical approaches are crucial in formulating policies of Islamic family law.

Keywords: policy, Islamic family law, approach

1. Introduction

The current modern era has placed fiqh (Islamic law) in a problematic and challenging position. Fiqh not only faces difficulties in resolving various social problems and issues but also continues to evolve with the changing times, especially in the context of formulating legal methods to address these problems. In Coulson's view, this problem is one of the reasons behind the "conflict and tension" between theory and practice in the history of research and application of Islamic law[1]. On the other hand, this acute problem has also stimulated various efforts for renewal in this field.

From a general perspective, there are at least three levels to be undertaken in the effort to reconstruct fiqh. First, the methodological renewal level, which necessitates contextual interpretation of classical fiqh texts, not treating them as dead texts; adopting

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a methodological approach (manhaj); and verifying fundamental (usul) and branch (furu') teachings. In this level, at least two efforts can be pursued: deconstruction (al-qat'iyah al-ma'rifiyah) and reconstruction (al-tawasul al-ma'rifi). Second, the ethical renewal level, which requires avoiding formalization and legalization of fiqh, but rather reaffirming it as social ethics. Third, the philosophical renewal level, which leads fiqh to be constantly open to the philosophy of science and contemporary social theories. Cohesiveness in these three levels is the idealism in which the renewal of Islamic law is expected to achieve a continuum of success.

As an initial step towards the reconstruction of fiqh, this article attempts to propose a solution in fiqh methodology, namely an unified approach to shari'ah and social inference[2]. In essence, this method aims to bridge and "integrate" the textual (normative) and contextual (historical-empirical) approaches simultaneously within an "Islamic" scientific research model.

Research on this topic has been conducted before, including academic literature on the Politics of Islamic Family Law in Indonesia[3], the Existence of Islamic Family Law in Indonesia within the Context of Legal Politics and Islamic Thought Liberalism[4], the Positivation of Islamic Family Law as a Step towards the Renewal of Islamic Law in Indonesia: A Study of the History of Islamic Legal Politics[5], the Politics of Islamic Family Law[6], and Building a Theory of Islamic Legal Politics in Indonesia.[7] This article focuses on the discussion of Islamic family law policy from the textual and historical perspectives.

2. Methods

This article uses the library research method,[8] where the researcher collects data related to the discussion and then analyzes it comprehensively to get the results of the research[9]. This research was conducted by collecting literature, material or articles related to family law policies or politics and then comprehensively analyzed.

3. Results and Discussion

3.1. The Issue of Textuality

In the perspective of usul fiqh (principles of Islamic jurisprudence), there are at least three patterns (tariqat) or methods of ijtihad (independent legal reasoning), namely bayani (linguistic), ta'lili (causative: reasoning by analogy), and istislahi (teleological) [8]. These three, with modifications here and there, are common patterns used in discovering

and forming the civilization of fiqh from one era to another. With various patterns and epistemic bases, thousands of fiqh books have been born and compiled, containing various branches of derivations.

The bayani ijthad pattern is an effort to discover law through linguistic interpretation. This method's focus is primarily on mining the meaning of the texts. However, it has weaknesses when confronted with new issues that can only be derived from meanings far from the text. This implementation pattern has been used by mujtahids (Islamic legal scholars) until the Middle Ages to formulate various legal decrees. They only reproduced meanings and did not produce new ones. As a development, in the contemporary era, there have been attempts to rethink this method by using tools of philosophy of language that allow the creation of new meanings. One of the proposed approaches is the productive interpretation proposed by Gadamer.[8] Productive interpretation as a model of hermeneutics has its relevance in the attempt to interpret the discoveries of Islamic law. The mechanism of Gadamer's productive interpretation begins with considering a text not limited to the past (the time it was written), but open to the present and future to be interpreted according to a generation's viewpoint. As a historical matter, understanding is closely related to history, a combination of the past and the present.

However, this effort seems to have limited development due to the lack of social analysis specification and the absence of a clear operational mechanism, which are among the factors limiting its growth and interest in this method. On the other hand, the second ijthad pattern, ta'lili (causative),[9] aims to expand the application of the law from the original case to related branch cases that share the same illat (legal cause). In the epistemology of Islamic law, this pattern is applied through qiyas (analogical reasoning). The rational basis for applying this pattern is the strong conviction of a mujtahid performing qiyas that there is an attribute (wasf) in the original case, which serves as the reason for the applicable law, and the same attribute exists in the branch case, leading to the application of the same law to the branch case.

Islamic law studies that have developed so far have been predominantly normative. This impression is not entirely unfounded because if we examine it from the beginning and fundamentally, usul al-fiqh itself - which is essentially the foundation of Islamic discovery methods - is always defined as "a set of rules for deriving practical legal rulings from its detailed evidence." [10,11] The phrase "its detailed evidence" is never left out from all definitions of usul al-fiqh. This creates the impression and proves that the study of Islamic legal methodology is indeed focused on and limited to text analysis. Furthermore, the above definition also suggests that in Islam, the law can only be sought and derived from the divine texts (law in book). Meanwhile, the empirical social reality

that lives and operates in society (living law) receives less proportional attention within the framework of classical Islamic legal methodology. [13]

The weakness of empirical social analysis, or the lack of empiricism, has been indicated by many parties as a fundamental drawback in the way of thinking and approach to the method of discovering Islamic law.[12] Out of the three models of discovering Islamic law that are elaborations of the classical *usul fiqh* mentioned above, they are real illustrations of all the difficulties in giving balanced proportion to empirical studies in the study of Islamic law. The study of *usul al-fiqh* still revolves around a doctrinal-normative-deductive approach and remains *sui generis*. [13]

This difficulty has remained a challenge that has not been fully answered over time. Although attempts to address this challenge have been made, including through methodological proposals by classical Islamic legal thinkers such as al-Ghazali with his inductive method and the purpose of law, and asy-Syatibi with his thematic induction, according to some observers, even though they have paved the way for the development of empirical analysis, in practice and most of their writings, they still tend to be centered on normative-textual analysis.[14] Similarly, the efforts of contemporary thinkers, such as Fazlur Rahman and Muhammad Sahrur, in renewing their thoughts have not provided a definitive answer to the question and issue mentioned above[15]. This means that despite the extensive efforts made to expand the meaning of texts through various ways, the fundamental tendency of textuality and the lack of empirical analysis in the method of discovering Islamic law remain unresolved. At least methodologically, Islamic law still leaves a space (gap) between itself and the surrounding reality.

The textuality of the method of discovering Islamic law (*usul al-fiqh*) mentioned above is certainly not a coincidence. On the contrary, it is a characteristic that arises from a particular paradigm, epistemology, and orientation of study. Further elaboration can be traced back to the fact that the majority of Muslims still adhere to theistic subjectivism [16] which implies a belief that the law can only be known through divine revelation that is formalized in the words reported by the Prophet, namely the Quran and the Sunnah. It is this belief that seems to have guided the focus of the discourse of Islamic law towards the analysis of these sacred texts.

The excessive tendency towards textuality in the method of discovering law has, in turn, created difficulties and inadequacies for Islamic law itself in responding to and embracing waves of social change. The characteristic of classical *fiqh* studies that are oriented towards law in the book and pay little attention to law in action – as a consequence of the methodological tendency of textuality – is likely to always lag

behind history and may even be left behind to some extent because it is no longer relevant to the actual situation of its people.[17]

The limitations of the classical methods ultimately led Islamic studies to face a methodological crisis that affected almost all areas of Islamic studies, including law. In such a situation, the emergence of an alternative proposal that could overcome the shortcomings of the previous methods was highly anticipated. Especially in Islamic law, the presence of a new methodology was hoped to provide a more viable path to bridge the above-mentioned textuality problem towards the contextualization of the method of discovering Islamic law.

3.2. Textual and Historical Approach

The methodological crisis in Islamic scholarship, rooted in the lack of empirical dimensions and the absence of comprehensive systematization, was recognized by Muslim thinkers as an issue that urgently needed intellectual therapy.[18] However, these shortcomings could not be simply covered or replaced by applying modern Western social sciences. This was because the methods and approaches of modern Western social sciences were also experiencing a severe epistemological crisis. While the Islamic scholarship was trapped in textual analysis and lacked appreciation for the social-empirical dimension, Western scholarship, on the other hand, was confined by positivism and failed to consider the normative dimension (revelation) in its methods and approaches.[2]

Bringing religious elements into the domain of secular knowledge, according to Abu Sulayman, meant a process of restoring revelation and reason that needed to “stop” and be acquired through a particular methodological process.[19] It is essential to note that this integration is not an eclectic mixing [2] of classical Islam and modern West, but rather a reorientation of all fields of human knowledge in line with new categories and criteria based on Islam.

What Louay Safi attempted in “Towards A Unified Approach to Shari’ah and Social Inference” and other scholars,[20] is within the framework mentioned above. In his proposal, Safi first explains that every form of knowledge cannot be free from certain assumptions or value-free; how revelation also contains a certain “rationality,” and how both the reality of revelation and empirical reality can be sources of knowledge[20] According to him, science and scientific activity are the result of a certain ontology that connects scientific efforts with individuals and their environment and complements it

with motivational bases. Conversely, scientific activity presupposes a number of statements about the nature of existence, a truth that must be acknowledged before engaging in various empirical studies. Therefore, separating religious truth (metaphysics, revelation) from the realm of science—especially in the field of social sciences—is an opinion that cannot be justified.[20]

It should be emphasized that the “social science” referred to by Safi in the “unified approach to shari’ah and social inference” includes humanities and social sciences in general. Therefore, it is not limited to sociology alone but also encompasses history, anthropology, politics, and others with their “historical,” empirical, and precise meanings. This is evident when Safi presents the uniqueness of “social science” in comparison to naturalistic methods.[20] Rejecting revelation in scientific analysis thus becomes irrelevant, especially in the field of humanities and social sciences. Consequently, sources of knowledge must be explored from both revelation and empirical-historical reality. Nevertheless, this integration (unified model), as recognized by Safi, is not meant to harmonize (mix) the two traditions (Islamic and Western scholarship) eclectically. Instead, it aims to integrate knowledge obtained from revelation with knowledge obtained from human experience.[2]

Furthermore, how can we formulate the fundamental framework and methodological steps for integrating normativity (revelation) and rationality (empiricism)? According to Safi, this can be achieved by first making textual and historical-empirical inferences and then creating an integrated analysis between the two. These two inferences are carried out through a distinctive inference procedure, as explained by Safi as follows:

3.2.1. Textual Inference Procedure

The textual inference procedure is intended to derive rules and concepts from revelation systematically and adequately. There are four steps to be taken in this procedure:

1. Identify relevant texts (the Qur’an and Sunnah) related to the issue under discussion. However, this identification is not merely an inventory but also includes thematic linguistic analysis and in-depth understanding.
2. Comprehend (interpret) the meanings of the textual statements adequately and relevantly, both individually (lexical) and in relation to each other (contextual).
3. Provide explanations (ta’lil) of the texts, which involve identifying the efficient cause (‘illah) as the basis for the commands or instructions in the texts. This aims to identify the general characteristics shared by various different objects, justifying

the use of the same terms and as a starting point for finding universal principles governing various Sharia statements.

4. Construct general rules and concepts derived from the texts. This can be achieved through a continuous process of abstraction, so that the rules/concepts resulting from the derivation can be incorporated into other rules with higher levels of abstraction.[2]

However sophisticated the system of rules and concepts derived from revelation may be, it is not enough to justify specific actions, due to two reasons.[2] *First*, the system itself consists of general and universal rules, and applying them to particular cases requires further consideration and specification. This can be done by including information about the individual or collective characteristics and interactions. *Second*, the application of universal rules requires knowledge of existing conditions. The application of rules is possible when the theoretical conditions of an action correspond to its actual conditions.

1. Historical Inference Procedure[2]

- (a) Analyze individual actions that are part of the social phenomena under discussion. The aim here is to understand the goals, motivations, and rules of these actions. Goals refer to the objects presented by the actor, motivations are the psychological driving forces of the actor, and rules are the technical procedures (social laws) that must be followed to achieve the goals of actions.
- (b) Classify various forms or types of actions based on similarities or differences in their components (goals, motivations, and rules). Actions with the same goals will form a homogeneous group, while actions with different goals will be divided into a heterogeneous population.
- (c) Identify universal rules that govern the interactions among the different groups identified in the second step. To draw universal rules or laws of interaction, patterns of cooperation and conflict, dominance and submission, social growth, and decline should be studied comparatively beyond time and geography boundaries.

Systematizing the universal rules obtained from the previous steps is intended to eliminate internal inconsistencies within the resulting rule system.

After conducting textual and historical (social-empirical) inferences, a unified inference procedure between the two can be established. According to Safi, this is because

both have general patterns of scientific inference. The integrated inference can be done through the following procedure:[2]

1. Analyze the texts or phenomena into their basic components, namely statements (discourse) and actions (phenomena).
2. Group similar statements or actions under one category.
3. Identify the rules that unify various categories.
4. Identify the rules and general objectives that build interactions or inter-relations among the different categories.
5. Systematize the rules obtained through the previous procedures (eliminate contradictions).

The integration of textual and historical inference patterns is not limited to similarities in the analysis procedures but can also extend to the structure of actions and discourse. Both actions and discourse actually have systems of rules, motifs, and objectives that allow for their unification, coherence, comparison, and contrast.[2] It is in this context that further exploration can be sought regarding the relationship patterns between revelation on one hand and empirical reality on the other.

4. Conclusion

The endeavor of renewing Islamic law through an integrated approach of historical and textual inference is an intellectually ideal achievement, although it still feels abstract and not fully manifested. The nature of the method of discovering Islamic law seems to be a trademark that may need to remain unchanged. However, this needs to be balanced with proportional appreciation for the social reality that must be brought into the analysis of legal conclusions. By incorporating empirical reality into the analysis of legal discovery, there is a better guarantee that Islamic law in Indonesia can be more creative and relevant in the midst of modern social regulation processes.

The proposal of a textual and historical approach is deliberately directed towards an effort to reconstruct an understanding in a new area where there are no legal texts, while respecting traditions proportionally and reducing the impression of intellectual arrogance. This is achieved through the integration of system theory and action theory in its analytical framework. Substantially, this is recognized as being different from the proposals for the renewal of Islamic legal thought put forward by Fazlur Rahman,

Muhammad Sahrur, and their colleagues. Nevertheless, the paradigm of reading the Qur'an that underlies this scholarly work still uses the categories of qath'i and dhanni - a category that is highly controversial in the study of Qur'anic sciences.

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