

# Method of Islamic Law in Construct of Jurisprudence Contemporary in Indonesia.

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## Abstract

Different methods in memproduct Islamic law is a natural thing occurred among the scholars'. Factors which led to the difference in this method is partly because of differences in environmental conditions in which the scholars' was. Legal jurisprudence and methods of their establishment which has been constructed by the scholars' Salaf (History) almost all come from Arab countries that in fact the environmental conditions different from Indonesia. Therefore, in determining the law jurisprudence in Indonesia needed more methods in accordance with the conditions of Indonesia. The methods that have been established by the scholars 'Salaf, among others: ijma', qiyas, istihsan, istishab, maslahah mursalah, and sad dzari'ah. Additionally in building contemporary jurisprudence Joseph Qordowi offers intiqa'i methods, and insya'i. This paper wants to answer the question: How does Islamic law determination method in building contemporary jurisprudence schools in Indonesia?

**Keywords:** *Methods, Islamic Law, Fiqh Contemporary, Indonesia*

## A. Introduction

Fiqh is a product of Islamic law set by the scholars' through the process of ijtihad based on the arguments of al-Quran and al-Hadith. In this jurisprudence memproduct the scholars' schools to use approaches and methods that vary according to the circumstances and character of the area in which they live. Suppose Imam Hanafi, because he lived in Iraq at that time there was difficulty to access the arguments hadith from the central area of the circulation of hadith (Mecca and Medina), then he is more selective in using hadith and more interested in developing methods of qiyas and istihsan. This is in contrast to Imam Malik who lives in Medina, he is very easy to access the traditions of the Prophet, so in developing better prioritize schools fiqhnya he postulates tradition of the use of qiyas and istihsan.

In subsequent development, schools of jurisprudence built by Imam Malik becomes different when brought to Andalus (Spain). Because the region is very much at the center Andalus circulation traditions, as well as the condition of society civilized Andalus was already high, then the development of jurisprudence there is more fertile with mursalah maslahah method (method oriented on the development of sense considering the benefit of the people).

From the historical data proves that the method used by scholars in establishing schools of jurisprudence is strongly associated with the circumstances and character of existing areas.

Indonesia is a country that the circumstances and character of the area is not entirely the same with the Arab countries in which built schools of jurisprudence and its methods. Therefore, Indonesia requires separate schools of jurisprudence with methods adapted to the circumstances and character of Indonesia today, so terbangunlah contemporary schools of jurisprudence in Indonesia.

The method of determination of the law jurisprudence used by the scholars 'Salaf, among others: ijma', qiyas, istihsan, istishab, maslahah mursalah, and sad dzari'ah. In addition to these methods Qordowi Yusuf in his book *Al Ijtihad al Mu'ashir* offers intiqa'i and insya'i as a method to solve contemporary problems that arise today.

Of the various concepts such methods writer will choose which method is more suitable to be applied in Indonesia. Therefore, the questions to be answered in this article are: How does Islamic law determination method in building contemporary jurisprudence schools in Indonesia?

## B. Method of Determination of Islamic law.

### 1. Ijma'

Ijma' is an agreement of the mujtahid of the ummah of Muhammad SAW. at a time after his death on the law syar'i / Islamic law (Zuhaili, 1986: 489).

Another opinion, that ijma' is an agreement of the mujtahid current race, after the death of the Prophet sallallaahu' alaihi wa sallam against a law syar'i. "

The definition of ijma' must meet the following elements:

1. The existence of the mujtahid (one who seeks earnestly to establish Islamic law); ie people who are qualified and have the competence to decide a statute of Islamic law. In this case a mujtahid must meet

- the requirements set forth, among others, must master the Arabic language, mastered the verses of the Koran and the Hadith related to the law, as well as master and qowaid usul fiqh.
2. The agreement of the mujtahid. That is all mujtahid have agreed on an issue, with no one dissenting. If they found someone with a differing opinion it can not be said to ijma '.
  3. The agreement came after the death of the Prophet Muhammad, so that in case an agreement on a case at the time of the prophet was alive and he quieted then it was not called ijma 'but called the sunnah taqriri.
  4. Agreement of the mujtahid is still in a generation, so that in case an agreement on the matter by a mujtahid different generation then it can not be called ijma '.
  5. Object case agreed only limited issues of Islamic law, so that those cases that outside corridor Islamic law can not be dikategorikn as ijma '. For example, the consensus of the companions of the codification of the Koran in a codex. In this regard the Prophet did not command, but for some reason masalahah they agreed unanimously to codify the Koran in a codex.

Assessment of the fuqoha, that in connection with the consensus there are two kinds, namely ijma 'Qoth'i and ijma' Dzonni. Ijma 'Qoth'i is ijma' are known to exist among the people of this with certainty, as ijma 'on the obligatory prayers five times and the prohibition of adultery. Ijma 'of this kind no one is denying the writ and its existence as evidence, and dikafirkan people menyelisihinya if he was not among those who do not know.

While it is intended by the ijma 'Dzonni is ijma' is not known except to be searched and studied (tatabbu '& istiqro'). And the scholars have been at odds about the possibility of permanent ijma 'of this type, and the words most rojih in this issue is the opinion of Shaykh al-Islam Ibn Taymiyyah said in Al-Aqidah Al-Wasithiyah "and ijma' are unacceptable for certain is ijma'nya as-salafush-pious, because after they occur deviation and this people have been scattered. "

In this case, it is understood that this people may not agree to a proposition shohih menyelisihi and shorih and not mansukh because this race does not agree unless the above truth. When a student of Islamic law found an ijma 'which he menyelisihi truth, then the possibility is that the proposition does not shohih or not shorih or mansukh or whether the issue is a disputed issue that is outside the dimensions of knowledge.

When someone does ijma 'the following requirements shall be met, so that the resulting law really qualify as products that conform to religious teachings. Terms ijma 'of which, first, fixed through shohih path, namely with fame among the' ulama or menukilkannya are people who tsiqoh and extensive knowledge. Secondly, it is not preceded by a blunder that has been fixed in advance, if it is preceded by it then it is not the ijma 'because the words are not canceled by death utter.

## 2. Qiyas

Qiyas legal means to equate something that no legal provisions to something existing legal provisions for equality 'illat (legal motivation) between the two. (Abu Zahrah, tth: 218. See also Sha'ban, 1987: 155).

In another sense, that means measuring a Qiyas on something else, and then equalize between the two. According to scholars of Usul Fiqh, Qiyas is likening a law, an event that no event nashnya with the law something that already exists because there are similarities illat nashnya laws of both events. (Abdul Wahhab. 1996: 92-93).

In fuqoha Qiyas agreed that implementation must meet pillars, namely:

- a. Al-ashl, is something that the law contained in the texts, commonly referred to Maqis 'Alaih (which is the norm) or mahmul' Alaih (which is used as a dependent), or musyabbah Bih (used as penyerupaan);
- b. Al-far'u, namely that the law can not be in the texts, and the law is equated to the Al-ashl.
- c. Hukmu'l-ashl law is Syara 'contained nashnya according to al-ashl (origin), then branches (al-far'u) was likened to the original in terms of the law.
- d. Al-illat are certain circumstances that serve as the basis for the law ash (origin), then branches (al-far'u) was likened to the original in terms of the law.

If a mujtahid facing a legal problem that is not found in the Qur'an, al-Sunnah, and ijma ', then qiyas is a method in which to seek legal certainty of such a problem. In this case the first step taken by a mujtahid is researching 'illat of the formulation of the laws that already exist, then also examined' illat of new problems that the law has not been found. If it is true there are similarities' illatnya it can be concluded that the law of both these problems is the same. For example, equate drugs with illat khamr because they are the same, that is intoxicating.

### 3. Istihsan

Istihsan is the removal of a mujtahid of demands qiyas jali (clear) to qiyas is silent (cryptic), or of the rules of a general nature to the law contained an exception for the proposition that crossed his mind that the movement is much stronger. (Khallaf, 1977: 79).

By the meaning (interpretation ghramatikal), that means istihsan consider good or looking good. According to scholars of usul fiqh, is leaving the law established the law of the other, on an event or events specified based on the arguments of Personality '.

Thus in a nutshell, is the act of leaving one istihsan law to other laws is because there is an argument of Personality 'which requires it to leave. In the long study dimisalkan events legal abandonment of hand amputation for theft at the time of Caliph Umar bin Khattab RA , and should a thief should be cut off his hands. It is a legal origin. But then the law is left to other law, such as not cutting off the hands of thieves.

This is the next law, with a particular proposition reinforcing. At first the event or events that have been set based on the legal texts, the thieves should be cut off his hands. Later found other texts that requires you to leave the laws of the event or events that have been set, the move to another jurisdiction. In this case, even if the first proposition is considered strong, but interest requires displacement law.

From understanding and examples of the above can be said that it is actually a displacement istihsan proposition towards more powerful proposition on the consideration of the benefit. This istihsan process can be broadly categorized into two groups, namely: displacement of qiyas jali towards qiyas is silent and the exception from the rule of a general nature for their indication of this (Zaidan, 1993: 282). The first category is called istihsan qiyasi, while the second category is called istihsan istitsna'i. Qiyasi istihsan example, about the case of waqf land that has been used before diwaqafkan public roads, if applied qiyas jali then the road should be closed, even though the land is the only access road. Therefore, the solution should be applied qiyas khofi so that the road remain impassable. As an example istihsan istitsna'i is about splash urine beyond the ability to be avoided, then it is forgivable.

### 4. Maslahah Mursalah

Maslahah mursalah is the benefit / goodness that is not defined in the Shari'ah to realize, nor any arguments of Personality 'certain whether mendukung nor reject it (Khallaf, 1977: 84).

Not all of the benefit was stated in the Qur'an and al-Hadith, even today a lot of things that bring maslahah in life but are not found in the Quran and al-Hadith nor contrary to Quran and al- Hadith, such as recording the marriage contract. On the basis of maslahah mursalah it is justified, even required.

### 5. Istishab

Istishab is an event to enforce the law in accordance with the law of origin (the original state), as long as there is no proof that the law determines another different with the original rule. (Zuhaili, 1986: 859). For example, people who are already berwujud then he doubted whether it has been canceled or not, the law is not canceled wujudnya over yet proven clearly that she had canceled. Another example, the nature of water is essentially pure, therefore as long as the water does not admixture defiled the applicable law remain chaste.

### 6. Sadd dzari'ah

Sadd al-dzari'ah is an original work that contains the benefit / goodness but ended on a mafsadat / damage (al-Syathibi, 1975: 198). That is, someone doing a job that basically allowed because it contains goodness, but the objectives to be achieved end on a malfunction. For example, someone dug wells are hidden in public places that will lead others to fall into the well. Digging wells to take water will bring good, but the action it will bring damage to others because it is done in public places with hidden.

Another example is the practice of buying and selling of death, namely selling the goods as if it did not exist. Eg a person buys a car for \$ 100 million in credit, then at the same time he sold the car to the seller originally for 75 million in cash, so that the person (first buyer) brings money 75 million, but he had to pay off debts when maturing loans is set at 25 million again. The practice of buying and selling like this bring harm to the purchaser, because as if the goods sold are not traded there, while the seller of the goods received multiple advantage. According to Imam Malik practice of buying and selling as it was forbidden, because it is nothing more than the multiplication of debt.

### 7. Intiqa'i.

Intiqa'i is legal jurisprudence determination method performed by expressing the opinions of scholars and their previous arguments that used them then compare and choose the opinion that a stronger argument and more in line with current conditions. Intiqa'i method is in principle an application tarjih; ie conduct a comparative study between the opinions of the scholars' prior to re-examine the arguments relied upon them,

which in turn can have opinions that deemed stronger proposition and hujjahnya in accordance with the measuring instruments used in tarjih.

In relation to this, Yusuf Qaradawi does not agree with those who say that we should hold to the opinion in fiqh (understanding) because it is the attitude of taqlid without accompanied arguments. According to Qaradawi, should be held at a comparative study of the opinions it and re-examine the arguments of the texts or arguments ijthihad that opinion. Thus ultimately knowable and have the opinion that the strongest argument and Legal Affairs Committee in accordance with the rules, such as having relevance to life today.

Based on the above, it essentially reflects the opinion of gentleness and affection to humans, and to approach the ease stipulated by Islamic law. In this case a higher priority shar'i realization of the purposes for the benefit of man, and reject distress tyentunya be something that is the goal of human life in this world.

In a historical perspective, the activities carried out by the Legal Affairs Committee Legal Affairs Committee of experts on future resurgence of Islamic law different activities in a period of decline tarjih Islamic law. At the time of kemundurannya, activity tends to activities that the main task was pathetic leksi opinion of jurists in the internal environment of certain schools, such as syafi'iyah, Malikiyah, and so forth. For the period of the rise of Islam, tarjih means selecting various opinions from various schools of thought, both Sunni wing or not. Thus are cross sects.

The conditions of intiqai'i is:

- a. Should the opinion it is better suited to current conditions.
- b. There must better reflect the opinion of grace in life.
- c. Should that opinion does not bring trouble.
- d. Should it more mainstream opinion in realizing the intentions Personality ', bringing maslahah, and does not incur damage in life. (Qordowi, 1985: 115).

We all know that among the scholars' there are various opinions about a legal issue, and few issues as agreed by them. In addressing this issue a contemporary jurists should be able to choose the opinion that a stronger argument between those opinions after holding the comparison carefully.

Examples of methods intiqai'i is a problem wudlu cancellation of a man by contact with women who are not mahram (Ibn Rushd, Vol.1: 27-28). In this case the void menghukumi Shafi'i, Hanafi imam menghukumi not void unless jima '(intercourse), while the imam Malik menghukumi canceled on condition that creates a feeling a touch of lust. This difference of opinion was triggered by their understanding of the pronunciation laamastum an-Nisa 'in paragraph 6 letter of al-Maidah (QS.5: 6).

Imam Shafi'i intrinsically understand the pronunciation; which means touch. He saw no strong indicator to turn pronunciations laamastum an-Nisa 'to the meaning majazi, therefore the wording should be interpreted as literal; ie touch of the hand. This is in accordance with the rules of jurisprudence: "The meaning is strong on a sentence is essential" (as-Suyuti, 1996: 86).

While Imam Hanafi looked at their strong indicator to turn pronunciation laamastum an-Nisa 'is from the intrinsic meaning to meaning majazi. Pemalingan meaning of this seemingly can not be separated from understanding the hadith narrated by Imam Abu Dawud which means as follows: "From Aisyah ra., He said, the real Prophet, kissed one of his wives and then out to the prayer and did not perform ablution again". (HR. Abu Dawud).

From understanding the hadith shows that the Prophet did not perform ablution again though he would kiss his wife when praying. The hadith seems to be used as an indicator by Imam Hanafi in turn meaning pronunciation laamastum an-Nisa 'of intrinsic meaning to majazi; namely jima '(intercourse). Meanwhile Imam Malik saw that the pronunciation laamastum an-Nisa' in the above verse is the pronunciation of 'am (general), which means a typical (special). In this case the touch referred to in the pronunciation is specially touch that creates a feeling of lust (sexual), or deliberately seeking a sense of impotence.

In addressing such dissent, after explores some of the opinions of the scholars' and the reasons / argument, then Ibn Rushd choose the opinion of Imam Hanafi who interpret pronunciations laamastum an-Nisa 'with the meaning jima'. According to him, the arguments presented Imam Hanafi more powerful than others.

## 8. Insyai'i

Insyai'i is a legal determination method of jurisprudence - with certain methods of ijthihad - to take a new legal conclusion in a problem that has never been expressed by scholars in the past. The problem may well have never been addressed at all by them or have already been discussed but a contemporary jurists have different legal decisions with the decision scholars' previous.

This could occur because the times are always needs solving legal problems by considering the circumstances present. So that could be a problem that exists today has never existed in the days preceding legal experts, or whether the issue had never been there, but the decisions they no longer correspond to the circumstances of today's kontemprer (Qordowi, 1994: 32-33).

Examples of methods *insya'i* as presented by Joseph Qordowi is on leased land zakat. What are obliged to pay zakat tenant or landowner. In this case Qordowi Yusuf asserted that the tenant should issue a zakat plants or fruit produced from the leased land earlier if it has reached nisab, by reducing land rent paid to the owner of the land, because land rent is considered as debts to be borne by the tenant. Thus he only issued zakat net result of these plants.

The landowners who leased it should also issue a zakat of land lease payments received if the number reached one nisab by reducing the land tax to be paid. So they both left out of the results received zakat respectively.

Such opinion has never been expressed by legal experts before. In this case the majority of them found zakat plants and fruits of the earth rented prescribed for those who rent alone, while according to Abu Hanifah zakat is imposed on landowners who lease. (Qordowi, 1985: 127).

From the above examples it is clear that Joseph Qordowi decide new legal product that is different from the previous decision of the jurists who only require the charity to one among the tenants or landowners. In this case Joseph Qordowi decided a law was based on *maslahah* so the results are fair both to tenants and landowners. The new law decision made Qordowi Joseph is an implementation of the method *insya'i*.

Another example is the *miqat* Hajj and Umrah pilgrims who boarded the plane. *Miqat* is already established in the hadith which means as follows: "It was narrated from Ibn Abbas ra, indeed the Prophet Muhammad. Determining *miqat* for the people of Medina in Dzal Hulaifah, for residents of Sham al-Juhfah, to residents of Yemen in Yalamlam, and for residents of Najad in Qarn. So places that for *miqat* them, and for all who pass through these places from other than its inhabitants who will perform Hajj and Umrah. If anyone living in places that are not mentioned above, *miqatnya* where he lived, so that residents of Makkah *miqatnya* enough of Makkah ". (HR. Bukhari).

According to Sheikh Abdullah bin Zaid al-Mahmud (chief justice Qatar Religion), that *miqat* allowed from Jeddah for pilgrims who boarded the plane. This is a decision based on methods *insya'i* law jurisprudence, because in ancient times there is no air. Sheikh Abdullah argued that the stipulation *miqat* wisdom Hajj in certain places because these places are at the entrance to Mecca and are all located on the edge of the Hijaz. Therefore Jeddah be a way for the pilgrims who boarded the plane and the grounds *dharurat* they need to determine *miqat* on earth to start the Hajj and Umrah *ihram*, then allowed the *miqat* in Jeddah. It *diiyaskan* also with the determination of Umar bin Khatthab about *miqat* for the people of Iraq in Dzatul Irbil.

### **C. The Mazhab of Fiqh Contemporary**

#### **1. Mean of Mazhab**

According to the understanding of language, derived from the pronunciation *dzahaba madzhab* meaning away or argue. Meanwhile, according to the term schools are thinking, flow, method, or Islamic law expert opinion based on the Quran and al-Hadith (Yanggo, 1997: 71).

#### **2. Mean of Fiqih**

According to the understanding of language, *fiqh* means deep understanding. While the meaning of the term, *fiqh* means the science of Islamic law which is practically taken from the detailed arguments (Kamaluddin, tth.:31). Two important elements in the sense of the jurisprudence is that jurisprudence is related to the legal practice drawn from the practical and detailed arguments. *Amalan* practically meant that the jurisprudence relating to *amaliyah* routinely carried out by someone, such as prayer, fasting, and charity. While the detailed arguments which meant that the jurisprudence drawn from the arguments clearly and specifically refers to a particular issue, such as the argument of the necessity of Jum'ah prayer and ban buying and selling at the time. The Word of God in the letter Jumu'ah verse 9 which means as follows: "O ye who believe when you are called upon to pray Jum'ah then made haste to remember Allah and leave buying and selling. That is better for you, if you know "(QS.62: 9).

#### **3. Mean of contemporary**

Contemporary means today, today, or today (KBBI, 1995: 82). So something contemporary say the intention is something to suit the circumstances of today, or is relevant to the circumstances of today.

Thus the question of contemporary schools of jurisprudence in this article are your thoughts / schools of Islamic law that are tailored to the circumstances of today.

### **D. The importance of school of Fiqh Contemporary.**

Today many of the Muslims who consider enough with the results of previous law thinking of experts contained in the books of classical jurisprudence. They were amazed by the inheritance of Islamic heritage were full and firm in their belief by experts of jurisprudence we were charismatic in times past, they found nowadays no longer needed thought the new law, because no one problem left over from the opinions of scholars 'History. All the problems we have encountered are now essentially we can find in the books of *fiqh* classic that has been

documented neatly, even in these books have loaded the things expected to happen, so what happens now is already tercaver in the books the.

Indeed, we must admit that the values of heritage left by our predecessors was incredible, especially the legacy of centuries the glory of Islam, in which the development of Islamic sciences reached the stage of perfection at the time. The scholars' can reach all areas of science, not just the affairs of faith and worship, but they are also experts in the fields of philosophy and science, such as al-Kindi, al-Farabi and Ibn Sina (Nasution, 1982: 13). Nevertheless, we must be aware that their ideas were limited to matters that occurred at that time, even if there is the result of thinking about things that are predicted to occur is very limited when compared to the development of contemporary problems that occur today ,

Remember that the days ticked by human civilization continues to develop, giving rise to new problems that have not been recognized by ulama'-ulama 'History never even terdetik in their hearts, even maybe if we tell them, it has been considered an impossible , Well how would envisaged law regarding these new realities? Such as cloning and IVF issues that today actually become reality. This has encouraged us to meproduk contemporary jurisprudence law.

#### **E. Method of Determination of Islamic Law Construct in Jurisprudence of Fiqh Contemporary in Indonesia.**

After reviewing more about the methods of determination of Islamic law as it has been presented above, the method is more suitable in contemporary jurisprudence set in Indonesia is intiq'a'i and insya'i.

##### **1. Method for Building Intiq'a'i school of Fiqh Contemporary in Indonesia.**

As has been presented earlier that method in the establishment of schools of jurisprudence intiq'a'i do in case of legal issues of jurisprudence that is disputed by the scholars', and set one of them a stronger argument and more appropriate to the situation and conditions. In Indonesia issues like this very much, so the solution through intiq'a'i method is indispensable.

One example that every year there is the problem of the determination of the start of Ramadan and the beginning of Shawwal moon is not visible. Some of the scholars' Indonesia using ru'yah and others using the method of reckoning. This difference of opinion is not a new thing among the scholars of fiqh.

In this case the majority of scholars (including Imam Hanafi, Imam Malik, Imam Shafi'i and Imam Ahmad) argues, in case the new moon / month closed cloudy / can not be seen, the number of months must be enhanced up to 30 days. Meanwhile Mutharif ibn al-Syakhir (d. 714 AD; including large Successors) argues, if there is such a case should be returned to the reckoning (calculation) travels moon and sun.

The clash of ideas for their lack of clarity pronunciation faqduru on the hadith of Ibn 'Umar. : "Fa in ghumma alaikum faqduru lah" (if it turns out in a closed upon the guess-kirakanlah / count "(HR. Bukhari). The scholars' who interpret pronunciations faqduru to "count "and does not relate to another hadith then they use the reckoning in determining the start of Ramadan and the beginning of Shawwal. While the scholars 'who interpret faqduru with "perfected", they relate the hadith above with other traditions also narrated from Ibn' Umar, as follows: "fa in ghumma alaikum fa akmilu al idda tsalatsina "(hence if the moon turns closed on you, then complete the number to thirty days" (HR. Bukhari).

According to them, the pronunciation faqduru the first hadith is interpreted with "fa akmilu al idda tsalatsina" (perfected number of the months to 30 days) in the second hadith. In addressing these issues ulama 'of fiqh Indonesia, represented by all the Islamic organizations that exist, should be able to sit down together to take agreement (ijma') through intiq'a'i method, by comparing and taking one of the two opinions are stronger argument and more according to the climatic conditions in Indonesia, resulting in the overall benefit for Indonesian Muslims.

As consideration, in addressing the above issues Ibn Rushd further strengthen jumhur opinion (the majority of scholars') which categorizes the first hadith as mujmal / global and tradition both as mufassar / details (Ibn Rushd, vol.1: 208). Because mujmal meaning is not clear, while mufassar meaning is clear, the above problems in setting mujmal traditions that should be brought to the traditions mufassar, so that meant faqduru the one in the above hadith is to improve the number of the months and thirty days. Thus it is evident after considering the arguments that there is associated with the case of determining the start of Ramadan and the beginning of Shawwal is Averroes further strengthen ru'yah method of the reckoning.

Another example method intiq'a'i in contemporary jurisprudence schools in Indonesia is the guardian of marriage, which is one of the pillars of marriage in Indonesia. Among the scholars' schools of jurisprudence there is a difference of opinion regarding the status of guardian in the marriage ceremony is a must or not. In this regard Imam Shafi'i and Imam Malik said that marriage is not valid without a guardian. While David adh-Dzahiri priests say otherwise, that the marriage of a man and a woman were done without lawful permanent guardian of their origin kufu (comparable). Meanwhile Imam Abu Hanifa distinguish between widows with girls.

According to marriage for widows do not need a guardian for women, while girls need a guardian. This difference of opinion was triggered by arguments that are not definitive (firmly) related to the guardian of marriage, among others, paragraph 234 surat al-Baqarah which means as follows: "Then if it had run' iddahnya, then there is no sin on you (the trustees ) let them do unto them according to the worth. Allah knows what you do "(Qur'an, 2: 234). While the traditions associated with, among other things: "Not valid marriage except with a guardian" (HR. Tirmidhi).

Verse and the hadith above indicates the necessity guardian in marriage. Thus the opinion of Imam Malik and Imam Shafi'i. Meanwhile Imam Hanafi and David, judging that the verse is not firm, so it can not be used as the argument of their male guardians. While the traditions that used the argument of Imam Shafi'i and Imam Malik status according to them are not authentic so it can not also be used as the argument of the necessity of a guardian in marriage.

Another reason given by Imam Hanafi and Imam David concerning the validity of a marriage without a guardian are the arguments of al-Quran verses 232 surat al-Baqarah which means as follows: "So do you (the trustees) prevents them from mating again by going to her husband, if there has been a willingness among them in a way that Ma'ruf "(Qur'an, 2: 232). The verse is understood by them, that women should be given the freedom to determine their own future husband, so the role of guardian is no longer required.

Another postulate be relied upon is the hadith narrated from Ibn Abbas which means as follows: "The woman who was a widow was more entitled to him than his godfather, while a woman who was a girl asked permission of him" (Muslim). The tradition is understood by them that the woman who was a widow no longer need of guardians. Verse and the hadith above proposition made by Imam Hanafi and Imam Daud to allow women to marry without a guardian on condition kafa'ah (comparable) or widowed.

In response to these problems, scholars of fiqh Indonesia decided the necessity of a guardian in marriage, as can be seen in the Compilation of Islamic Law as the following: "Wali marriage in marriage is a pillar that must be met for the bride who act to marry" (KHI Article 19). Decision of law scholars' Indonesia about the necessity of guardians, as stated in article 19 of the Compilation of Islamic law is seemingly made after comparing the two arguments together with the arguments there, and then choose one of the opinion that a stronger argument and more appropriate to the situation and the condition of Indonesian society. the need their guardian in marriage in Indonesia today is a very appropriate provision taking into account the common good. Because if the wedding in Indonesia may be made without a guardian it is concerned that there is chaos in the family and household of the newly built.

## **2. Method Insyai in jurisprudence of Fiqh Contemporary in Indonesia.**

As has been presented earlier that the method insyai in building schools of jurisprudence do if there is a problem that has not been determined jurisprudence ruling by the scholars' previous. Or already existing law provisions, but the need for a new legal provision because it no longer corresponds to today's circumstances. In Indonesia the problem like this a lot, so the solution through insyai method is indispensable.

One example pengeterapan insyai method in Indonesia is about marriage registration required by scholars of fiqh Indonesia as stated in Law No. 1 of 1974 on Marriage as follows: "Every marriage is recorded in accordance with the legislation in force (Marriage Law, article 2, paragraph 2). Further more detailed compilation of Islamic law asserts as follows: "To be guaranteed order of marriage for Muslims every marriage must be recorded" (KHI, chapter 5). "To meet the provisions of Article 5, every marriage should take place in the presence and under the supervision of the Registrar of Marriage Employees" (KHI, article 6, paragraph 1). "Marriage is done outside the supervision of the Registrar of Marriage Officer does not have the force of law" (KHI, article 6, paragraph 2).

At the time of the Prophet Muhammad. marriage registration is not required. Similarly, at the time companions and the scholars' schools. This recording is not required may be due to the level of human honesty that time can still be unreliable, so it's not a case of betrayal between husband and wife in the family. This is different from Indonesian society today often occurs between a husband and wife reneged on the marriage they have done if without registration.

Another example of the method insyai is about giving legacy through the step-son was borrowed as we can see in the Compilation of Islamic Law as follows: Against the adopted children who do not receive a testament given was borrowed as much as 1/3 of the estate people adoptive parents (KHI, article 209, paragraph 2). In that article expressly stated that the adopted child can receive the inheritance of his adoptive parents through was borrowed. The decision is a product of new jurisprudence generated by the scholars' jurisprudence Indonesia.

Actually the problem was borrowed can rely upon the word of God surat al-Baqarah verse 180 which means as follows: "prescribed for you, if one of you arrival (signs) death, if he left an estate that much, intestate's mother father and dear relatives in Ma'ruf (this is) an obligation on those who fear Him ". (Qur'an, 2: 180).

For the scholars' who do not consider this verse dinasakh. Among scholars there is a difference of opinion on this testament verse, whether it dinasakh with paragraph inheritance or persist. Those who say that

paragraph dinasakh then no longer need to talk about it. As for those who say the verse does not dinasakh then they link it with the obligation intestate, especially for those who are prevented from mewaris. mereka understand that God requires that someone will die in order to bequeath his property to the father-mother and relatives.

Dear mother and relatives were mentioned in that paragraph would not include a foster child. Even the relationship with the foster child foster father expressly been disconnected from the family line since the fall of paragraph 4 letter al-Ahzab which means as follows: "God did not make your adopted sons as own son (himself). That is only your words in your mouth only. And Allah is telling the truth and He shows the right way "(QS.33: 4).

Clearly, according to the paragraph above that the adopted children did not have a family lines. Therefore if the obligation intestate in paragraph 180 of the surat al-Baqarah connotations was borrowed, then obviously the adopted child does not include a category that gets part was borrowed. In this regard ulama 'contemporary jurisprudence Indonesia gave the new decision, which gave part of the property through the stepson was borrowed, as can be seen in the Compilation of Islamic Law article 209 paragraph 2 of the above.

These statutes Indonesian fiqh scholars seem to be taken after considering masalah. In this case was borrowed initially apply only to the parents and relatives are extended for a foster child who is not mentioned in paragraph and opinion among the scholars' previous. Therefore, the decision to give part of the possessions of the children adopted through the wajibah will be thought out contemporary schools of fiqh scholars' Indonesia with insya'i method.

That Islamic law determination method that can be done by legal experts as a solution in building contemporary jurisprudence schools in Indonesia. Through methods such insya'i intiqai'i and expected all the legal issues of jurisprudence that emerged in Indonesia today can be solved completely.

## F. Conclusions

The method used by the scholars' predecessor in building schools of jurisprudence can not escape the effects of the circumstances and character of the area in which they live.

The situation and conditions as well as environmental characteristics Indonesia is not entirely the same with the circumstances and character of the Arab region that is central to the production of jurisprudence and methods of their establishment by the scholars' previous schools of jurisprudence. Hence the need for a special method for the scholars' Indonesia to build schools of contemporary jurisprudence by adjusting the situation and conditions in Indonesia today.

Since most of the problems existing jurisprudence in Indonesia today already has laws in the books written by the scholars' History with a variety of existing differences, the more precise method used in building contemporary jurisprudence schools in Indonesia is intiqai'i , By using this method ulama 'contemporary jurisprudence Indonesia describe the opinions of the scholars' which is to reveal the proposition as well as the reasons they put forward, then choose the one-more powerful argument and more suited to the climate of Indonesia.

Furthermore, if the problems facing scholars' Indonesia is not found in the work of heritage scholars' previous or present but necessary adjustments in line with the changing circumstances as well as the existing character of the area, then the method required by the scholar 'Indonesia is insya'i. By using this method, scholars' contemporary jurisprudence Indonesia establish a new law adapted to the circumstances and character of Indonesia.

Thus, the method of determination of Islamic law which is more suitable for building contemporary jurisprudence madhab in Indonesia is intiqai'i and insya'i.

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