

# INTEGRATIVE COLLECTIVE *IJTIHÂD* OF CONTEMPORARY ISLAMIC FAMILY LAW: A Review of *Tanwirul Afkar* Magazine

## by Ma'had Aly Situbondo

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**Abstract:** This study examines the development of *istinbâth al-ahkâm* related to the problems of contemporary Islamic family law contained in the *Tanwirul Afkar* magazine by Ma'had Aly Situbondo. This research is a qualitative research with data analysis using a content analysis approach. As a legal study, this research is included in Normative Islamic Law research by making Islamic legal norms as the object of research. Data were taken from the exploration of *Tanwirul Afkar* magazine. The results of this study, Ma'had Aly Situbondo carried out the development of *istinbâth al-ahkâm* in order to respond to the problems of Islamic family law so that legal decisions are relevant and in accordance with the demands of modern society today. *Istinbâth al-ahkâm* developed by Ma'had Aly Situbondo with three patterns, first; *istinbâth al-ahkâm al-jama'iy bi at-taqâsim*, namely collective *ijtihâd* with division of tasks in tracing the source of legal decisions, second; carrying out scientific integration without being tied to a particular school of thought, and third; the application of *ushuli* reasoning which makes *ushul fiqh*, *fiqh* principles, and *maqâsid al-syarî'ah* as tools in analyzing and answering problems. Based on this, Ma'had Aly Situbondo has characteristics or distinctive features in the *istinbâth al-ahkâm* that is developed, namely collective-integrative *ijtihâd* and the application of *ushuli* reasoning.

**Keywords:** integrative collective *ijtihâd*; contemporary Islamic family law; *Tanwirul Afkar* magazine

**Abstrak:** Penelitian ini mengkaji pengembangan *istinbâth al-ahkâm* terkait problematika hukum keluarga Islam kontemporer yang terdapat dalam majalah *Tanwirul Afkar* karya Ma'had Aly Situbondo. Penelitian ini merupakan penelitian kualitatif dengan analisis data menggunakan pendekatan *content analysis* (kajian isi). Sebagai kajian hukum, penelitian ini termasuk penelitian hukum Islam normatif dengan menjadikan norma-norma hukum Islam sebagai obyek penelitian. Data-data diambil dari eksplorasi majalah *Tanwirul Afkar*. Hasil penelitian ini, Ma'had Aly Situbondo melakukan pengembangan *istinbâth al-ahkâm* dalam rangka merespon problematika hukum keluarga Islam agar putusan hukum relevan dan sesuai dengan tuntutan kehidupan masyarakat modern saat ini. *Istinbâth al-ahkâm* yang dikembangkan Ma'had Aly Situbondo dengan tiga pola, pertama; *istinbâth al-ahkâm al-jama'iy bi at-taqâsim*, yaitu *ijtihâd* kolektif dengan pembagian tugas dalam pelacakan sumber putusan hukum, kedua; melakukan integrasi keilmuan dengan tidak terikat kepada mazhab tertentu, dan ketiga; penerapan nalar *ushuli* dimana menjadikan *ushul fiqh*, *kaidah fiqh*, dan *maqâsid al-syarî'ah* sebagai perangkat dalam menganalisa dan menjawab permasalahan. Dari hal ini, Ma'had Aly Situbondo memiliki karakteristik atau ciri khas dalam *istinbâth al-ahkâm* yang dikembangkan, yaitu *ijtihâd* kolektif-integratif dan penerapan nalar *ushuli*.

**Kata kunci:** *ijtihâd* kolektif integratif; hukum keluarga Islam kontemporer; majalah *Tanwirul Afkar*

## Introduction

Fatwas are typically drafted by religious institutions in Indonesia. Few Islamic educational institutions, particularly those based in Islamic boarding schools (*pesantren*), conduct *istinbat al-ahkâm* (Islamic legal assessment) to address contemporary issues.<sup>1</sup> Ma'had Aly Salafiyah Syafi'iyyah Sukorejo Situbondo (Ma'had Aly Situbondo) is one such Islamic educational institution within the *pesantren* environment that contributes to resolving religious issues that require immediate legal certainty.<sup>2</sup> As a solution to new problems, fatwas are required to be relevant and in line with the demands of modern society. This is because the condition of the world, its people, and its customs are constantly changing and evolving,<sup>3</sup> is not static in one pattern, but will continue to change in the direction of the day, era and changes in circumstances to another,<sup>4</sup> as stated by Ibn Khaldûn.<sup>5</sup>

Ma'had Aly Situbondo is known as an institution focused on developing *istinbâth al-ahkâm* and a specialized institution in the fields of *fiqh* and *ushul fiqh*. It is expected to respond to ongoing social dynamics and be able to actualize *fiqh* values in real life, as well as being able to develop ritual and social piety. Its graduate profile states that they are able to read and understand the book *Fath al-Wahhâb* or its equivalent, and can solve *fiqh* problems using the *qawlî* and *manhajî* approaches (*istinbâth al-ahkâm* methodology).<sup>6</sup>

<sup>1</sup> Iswandi Syahputra, "ACTIVITIES ON TWITTER AND THE 212 DEFEND ISLAM RALLY THROUGH THE PERSPECTIVE OF THE INDONESIAN ULEMA," *Al-Jâmi'ah: Journal of Islamic Studies* 58, no. 2 (2020): 323–54, <https://doi.org/10.14421/ajis.2020.582.323-354>.

<sup>2</sup> Rr. Suhartini, "Problem Kelembagaan Pengembangan Ekonomi Pondok Pesantren," in *Manajemen Pondok Pesantren* (Yogyakarta: Pustaka Pesantren, 2005), 233.

<sup>3</sup> Ibn al-Qayyim Al-Jawziyah, *'l-lâm Al-Muwaqqi'în 'an Rabb Al-Âlamîn* (Riyadh: Dâr ibn al-Jawzî, n.d.), 470.

<sup>4</sup> Fajar Rachmadhani, Mualimin Mochammad Sahid, and Ahmad Wifaq Mokhtar, "IMPLEMENTATION OF THE CHANGE IN ISLAMIC LAW (TAGHAYYUR AL-AHKÂM) DURING COVID-19 PANDEMIC IN THE PERSPECTIVE OF MAJELIS TARJIH MUHAMMADIYAH IN INDONESIA," *Malaysian Journal of Syariah and Law* 10, no. 1 (2022): 108–17, <https://doi.org/https://doi.org/10.33102/mjsl.vol10no1.345>.

<sup>5</sup> Abdurrahmân ibn Khaldûn, *Muqaddimah Ibn Khaldûn* (Damaskus: Dâr Ya'rib, 2004), 38.

<sup>6</sup> M. Sulthon, Imam Syafi'i, and Auliya Ghazna Nizami, "Contemporary Fiqh in Indonesia: The Dynamics of *Istinbâth*

Therefore, Ma'had Aly Situbondo, projected as a forum for developing contemporary *fiqh* experts (*faqîh zamânih*), applies a different approach to addressing the various problems it faces. While Islamic boarding schools generally address all issues with a *fiqh*-oriented approach (*fiqh* texts), this one optimizes the use of *ushul fiqh* as a tool to address these issues.<sup>7</sup>

Beginning in mid-1997, the thoughts and *istinbâth al-ahkâm* of Ma'had Aly Situbondo were poured out in the *Tanwirul Afkar* bulletin. In its development, the results of this thinking were recorded in several books according to the topics raised, including; *People's Fiqh: The Link between Fiqh and Power*, *Fiqh Reality: Ma'had Aly's Response to Contemporary Islamic Legal Discourse*, *Fiqh Today: Traditional Fatwas for Modern People and Progressive Fiqh*.<sup>8</sup>

At the end of 2012, specifically starting with the 501st edition, the *Tanwirul Afkar* bulletin was no longer published in its regular Friday form. Instead, it was published monthly with several additional interesting columns and in-depth discussions. This change in *Tanwirul Afkar* was part of the Ma'had Aly Situbondo's maximum effort to prepare a cadre of *fiqh* experts who were expected to contribute to addressing all forms of religious issues currently developing in society.<sup>9</sup>

The studies discussed relate to current issues facing society. Each issue is addressed holistically, comprehensively, humanistically, and moderately. The elaboration of text and context as a basis for responding to each contemporary problem makes

<sup>7</sup> Al-Ahkâm at Ma'had Aly Salafiyah Shafi'iyyah Sukorejo Situbondo," *Ahkam: Jurnal Ilmu Syariah* 24, no. 1 (2024): 119–34, <https://doi.org/10.15408/ajis.v24i1.32174>.

<sup>8</sup> Musahadi, "ELEMEN LIBERAL DALAM KAJIAN FIKIH DI PESANTREN: Studi Atas Ma'had Aly Salafiyah Syafi'iyyah Sukorejo Situbondo," *Jurnal Ilmu Syari'ah Dan Hukum* 47, no. 1 (2013), <https://doi.org/http://dx.doi.org/10.14421/ajish.2013.47.1.%25p>.

<sup>9</sup> Ainol Yaqin, Moch. Cholid Wardi, and Achmad Mulyadi, "Actualization of Moderation in Reasoning at Ma'had Aly Salafiyah Syafi'iyyah Sukorejo Situbondo and Its Influence on *Istinbâth* of Islamic Law," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 17, no. 2 (2022): 434–57, <https://doi.org/10.19105/al-ihkam.v17i2.5962>.

<sup>10</sup> "Profil Ma'had Aly Pondok Pesantren Salafiyah Syaf'iyyah Sukorejo Situbondo Jawa Timur," 2016.

the studies in this bulletin highly practical, dynamic, and progressive. It is not merely based on the school of thought (*qawl*) but also on the school of thought (*manhaj*).<sup>10</sup> The study discussed in *Tanwirul Afkâr* magazine is not without its problems regarding Islamic family law in Indonesia.

Current issues regarding family law problems studied by Ma'had Aly Situbondo include the concept of *ihdad*, then current discussions regarding Marital Rape (rape in marriage), the phenomenon of Childfree, Forced Marriage, Interfaith Marriage, Challenging Polygamy, Division of Gono-gini Assets, Marriage Registration: Jurisprudence Vis A Vis State, Divorce Your Wife in Court, Protect Children of Adultery (Reflection of the Constitutional Court Decision), and various other issues.<sup>11</sup>

From this, the author is interested in conducting research on *istinbâth al-ahkâm* Ma'had Aly Situbondo. The purpose of this research is to analyze the development of *istinbâth al-ahkâm* Ma'had Aly Situbondo related to the problems of contemporary Islamic family law contained in *Tanwirul Afkâr* magazine.

## Method

This research is a qualitative research method, using a content analysis approach for data analysis. As a legal study, this research is considered normative Islamic law<sup>12</sup> because it makes Islamic legal norms the object of research.<sup>13</sup> In this case, the area studied is the *istinbâth al-ahkâm* Ma'had Aly Situbondo regarding Islamic family law issues contained in *Tanwirul Afkâr* magazine.

<sup>10</sup> Wawan Juandi and Abu Yasid, "Discourse of Islamic Jurisprudence in Indonesian Ma'had Aly between Taqlîdî and Manhajî," *Journal of Indonesian Islam* 10, no. 1 (2016): 139–58, <https://doi.org/10.15642/jiis.2016.10.1.139-158>.

<sup>11</sup> Tim Buletin *Tanwirul Afkâr*, "Fikih Progresif Bunga Rampai Pemikiran Santri Ma'had Aly Dalam Buletin *Tanwirul Afkâr*" (Situbondo: Ibrahimy Press, 2015).

<sup>12</sup> Sutisna dan Abdurrahman Misno, *Metodologi Penelitian Hukum Islam Berbasis Metode Ushul Fiqh* (Bogor: UIKA PRESS, 2019), <https://books.google.com/books?hl=en&lr=&id=IN2DwAAQBAJ&oi=fnd&pg=PA1&dq=konsep+keadilan+menurut+hukum+islam&ots=dqHnEaGg-9&sig=F5NCdfloAkShoBQP-otcG-cyT4>.

<sup>13</sup> Faisal Ananda Arfa, *Metodologi Penelitian Hukum Islam* (Bandung: CItapustaka Media Printis, 2010).

## Result and Discussions

### Personal and Collective *Istinbâth al-ahkâm*

The division of *istinbâth* in terms of the perpetrator consists of two types, namely: *istinbâth fârdiy* (personal) and *istinbâth jamâ'iy* (collective). *Istinbâth fârdiy* is individual or private in nature, that is, carried out independently by a *mujtahid* in determining the law of a problem, both in terms of methods and procedures as well as in relation to the process of making a decision.<sup>14</sup> This type of *istinbâth* is now difficult to find, because a *mujtahid* must have several adequate disciplines as a requirement and capital to carry out *istinbâth al-ahkâm*.<sup>15</sup>

*Jamâ'iy* is *istinbâth* conducted in groups or collectively, by a group of *mujtahids* (experts) with varying levels of expertise. This type is more feasible and feasible today to address the deficiencies or weaknesses of each *mujtahid* (expert) and to pool various potentials to achieve adequate *ijtihâd* results.<sup>16</sup> Currently, a different kind of *ijtihâd* is needed, as this type has quite stringent requirements for a scholar to fulfill. Therefore, contemporary scholars have made a new breakthrough, namely *istinbâth jama'iy*, because collective or shared opinions are closer to the truth than individual opinions.<sup>17</sup>

According to Abdul Majid as-Sausah asy-Syarafi, *istinbâth jama'iy* is an optimal effort by the majority of jurists to arrive at a temporary conclusion regarding a particular Islamic law through the *istinbâth* process and have found a point of collective understanding, or the majority of them

<sup>14</sup> Bayu Arif Mahendra et al., "Formalizing Fiqh Al-Aqalliyat for Muslim Minorities Perspectives of Abdallah Bin Bayyah, Taha Jabir Al-Alwani & Jamâl Al-Dîn 'Atiyyah," *Madania* 28, no. 2 (2024): 229, <https://doi.org/10.29300/madania.v28i2.6472>.

<sup>15</sup> M. Pauzi, Darul Hipni, and Anwar M. Radiamoda, "The Importance of The Ijtihad Jama'i Method in Contemporary Fiqh Formulations," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 23, no. 1 (2023): 13–20, <https://doi.org/10.30631/alrisalah.v23i1.1322>.

<sup>16</sup> Bambang, "Ijtihad and the Dynamics of Islamic Legal Interpretation: An Epistemological Exploration in the Contemporary Context," *Nusantara: Journal of Law Studies* 3, no. 1 (2024): 56–67, <https://doi.org/10.5281/zenodo.17373912>.

<sup>17</sup> Yûsuf Al-Qardhâwî, *Al-Ijtihâd Al-Mu'âshir Bayna Al-Indhibât Wa Al-Infirâth*, 2nd ed. (Bairut: Al-Maktab al-Islamiy, 1998).

have elaborated their opinions to produce a joint legal agreement.<sup>18</sup> According to Wahbah az-Zuhaili, it is a legal agreement of scholars on a particular issue based on the results of previous scholars' legal decisions by distributing the arguments that are used as legal basis by them and selecting the strongest arguments and those that have relevance to current and real interests. *Istinbâth jama'iy* is different from *ijma'*, because *ijma'* requires a collective and contemporaneous agreement of scholars, while *istinbâth jama'iy* does not have to be agreed upon massively, so that some scholars already fulfill the category.<sup>19</sup>

### **Tanwirul Afkar Magazine as a Result of *Istinbâth al-ahkâm* Ma'had Aly Situbondo**

The results of the *ijtihâd* from the Tanwirul Afkar bulletin have reached over 500 publications, under the motto "Comprehensive, Moderate, and Responsible." The Tanwirul Afkar bulletin collection was then published in several books, namely; People's Fiqh: The Link between Fiqh and Power,<sup>20</sup> Fiqh Reality Ma'had Aly's Response to Contemporary Islamic Legal Discourse,<sup>21</sup> Fiqh Today<sup>22</sup> and Progressive Fiqh.<sup>23</sup> The discussion in these books is systematized into a number of sub-chapters which are grouped according to their themes.

At the end of 2012, specifically starting with the 501st edition, the Tanwirul Afkar bulletin was no

longer published as a regular friday issue. Instead, it became a monthly magazine with several additional interesting columns and in-depth discussions. This change was part of the maximum effort of Ma'had Aly students, who were being prepared as cadres of *fiqh* experts, who were expected to contribute to addressing all forms of religious issues currently developing in society. Furthermore, based on Education Law No. 30 of 2012, Ma'had Aly is considered an independent post-pesantren higher education institution.<sup>24</sup>

As mentioned above, Tanwirul Afkar is a collection of works produced by Ma'had Aly Situbondo in conducting *istinbâth al-ahkâm*, as an effort to answer contemporary *fiqh* issues. These works were then published as a book, the first of which was presented to the public entitled "People's Fiqh: The Linkage of Fiqh to Power" published by LKIS Yogyakarta in 2000. This book is a filter of more than seventy Tanwirul Afkar themes that have been published (from 1997-1999). Themes that are worthy of being presented to the public were selected. The arrangement does not follow the chronology of publication, but is grouped *maudlu'i* (thematic). Starting from the area of inter-religious relations, politics-power, socio-economics, culture, family areas, to matters of worship rituals.<sup>25</sup>

In this book there are fifty-two themes of *fiqh* articles classified into Fiqh vis A vis Religions in the first chapter, then the second chapter Fiqh vis A vis Politics-Power, then Fiqh vis A vis Socio-Economic Struggles in the third chapter, then the fourth chapter Fiqh vis A vis Cultural Products, and Fiqh vis A vis Family is in the fifth chapter, and the sixth chapter closes with Fiqh vis A vis Religious Rites.<sup>26</sup>

Meanwhile, related to family law studies, including the themes: Islamic dating, engagement, forced marriage, kafa'ah, pregnancy outside marriage, abortion under religious pretext, wife divorcing

<sup>18</sup> Abdul Majid As-Sausah Asy-Syarafiy, *Al-Ijtihâd Al-Jamâ'iy Fî at-Tasyîrî* Al-Islâmiy (Qatar: Wazârah al-Awqâf wa asy-Syuûn al-Islâmiy, n.d.).

<sup>19</sup> Wahbah Az-Zuhaily, *Tagayyur Al-Ijtihâd* (Damaskus: Dâr al-Maktabiy, 2000).

<sup>20</sup> This book, which collects the works of Ma'had Aly Sukorejo students, is published in the Tanwirul Afkar Bulletin, published by LKIS Yogyakarta in 2000.

<sup>21</sup> This book, also compiled from the research of Ma'had Aly students in the Tanwirul Afkar bulletin, is organized into chapters, each with its own theme, specifically contemporary issues. Published by Pustaka Pelajar Yogyakarta in 2005.

<sup>22</sup> This book is a summary of the third Tanwirul Afkar bulletin, published by Erlangga Publishers in 2007.

<sup>23</sup> This book is an accumulation of intensive studies by Ma'had Aly students from 1997-2014 which were included in the Tanwirul Afkar bulletin from the first edition to the five hundredth edition (1-500).

<sup>24</sup> Tanwirul Afkar Magazine issue 501, November 2012

<sup>25</sup> Tim Redaksi Tanwirul Afkar Ma'had Aly Salafiyah Syafi'iyyah Sukorejo, *Fikih Rakyat Pertautan Fiqh Dengan Kekuasaan* (Yogyakarta: LKIS, 2000).

<sup>26</sup> Tim Redaksi Tanwirul Afkar Ma'had Aly Salafiyah Syafi'iyyah Sukorejo.

husband, female genitalia, male-female handshake, marriage ala Dawud adz-Dzahiri, celebrating birthdays, *fiqh* regarding oral sex, sex education, interfaith marriage, secret marriage, and AIDS as a disgrace to marriage.<sup>27</sup>

The second book is entitled «*Fiqh Reality: Ma'had Aly's Response to Contemporary Islamic Legal Discourse*», was published by Pustaka Pelajar Yogyakarta in 2005. This book is Ma'had Aly's work in an effort to respond to every legal event that occurs in society. Where every Friday the editorial team of the *Tanwirul Afkar* bulletin, consisting of Ma'had Aly students, publishes a sheet of intensive study results regarding contemporary legal issues.<sup>28</sup>

This book contains thirty-seven studies divided into five chapters. The first chapter covers Political Jurisprudence, the second chapter deals with Socio-Economic Jurisprudence, the third chapter deals with Medical Jurisprudence, the fourth chapter with Cultural Jurisprudence, and the fifth chapter with Women's Jurisprudence. The book also covers Family Law, including: Female Labor, Injustice in Mawaris Jurisprudence, Reinterpreting Ihdad, Husband Beating Wife, and Challenging Polygamy.<sup>29</sup>

The third book, entitled “*Fiqh Today: Traditional Fatwas for Modern People*”, consists of four series. *Fiqh Today 1: Controversial Fiqh*, the first series presents controversial discussion themes that went viral in the public sphere and sparked pro and con reactions among the wider community. Then, entitled *Fiqh Today 2: Political Fiqh*, the second series contains all kinds of *fiqh* issues related to politics. This book presents *fiqh* perceptions of discourses such as fanaticism towards political parties, Islamic campaigns for women's leadership in Islam, and so on. The third edition, *Fiqh Today 3: Family Fiqh*. The discussion themes in this book are: Wearing a Hijab with a Wig, Should Women Be Circumcised?,

Iddah Only for Women?, Parental Intervention, Wives Supporting Their Husbands, Preventing Infidelity, Controlling Nusus, Questioning Marriage Traditions, Marriage by Representative, Marriage Must Use a Guardian?, *Mut'ah* Marriage is *Haram*, Division of Gono-gini Assets.<sup>30</sup>

Next, entitled *Fiqh Today 4: The Jurisprudence of Sufism*, the book explains the ins and outs of Sufism from a *fiqh* perspective. The Sufism described in this book is an effort to cleanse the heart from various despicable attitudes and behavior so that a servant can become closer to his *khaliq* in everyday social interactions.<sup>31</sup>

Furthermore, under the title “*Progressive Fiqh*,” it represents the results of studies contained in the *Tanwirul Afkar* bulletin from seven generations (500 editions), printed in two volumes. Furthermore, Ma'had Aly also printed the aforementioned *Tanwirul Afkar* bulletin, titled “*Contextual Fiqh*,” divided into five volumes, from 1 to 500.<sup>32</sup>

Meanwhile, studies related to family law include: criminalizing actors in unregistered marriages, marriage via technology media, marriage registration: Islamic jurisprudence vis a vis the state, expensive dowry, is it appropriate?, marriage contract in front of a corpse, divorce your wife in court, not having *iddah*, when the wife does not want to be reconciled, *iddah* is obligatory for men, designing new Islamic jurisprudence, suing triple divorce, domestic violence: sexual harassment, domestic violence: remember she is your wife, women choose parents or husband, and straightening out the concept of *kafa'ah*.<sup>33</sup>

The next publication, *Tanwirul Afkar* magazine, became a monthly publication from issue 501 onward, with the addition of several interesting columns and in-depth discussions. This change was part of the Ma'had Aly students' maximum effort to prepare

<sup>27</sup> Tim Redaksi *Tanwirul Afkar* Ma'had Aly Salafiyah Syafi'iyah Sukorejo.

<sup>28</sup> Redaksi *Tanwirul Afkar*, *Fiqh Realitas Respon Ma'had Aly Terhadap Wacana Hukum Islam Kontemporer* (Yogyakarta: Pustaka Pelajar, 2005).

<sup>29</sup> Redaksi *Tanwirul Afkar*.

<sup>30</sup> Abu Yasin, *Fiqh Today Fatwa Tradisional Untuk Orang Modern 3: Fikih Keluarga* (Jakarta: Penerbit Erlangga, 2007).

<sup>31</sup> Abu Yasin, *Fiqh Today Fatwa Tradisional Untuk Orang Modern 4: Fikih Tasawuf* (Jakarta: Penerbit Erlangga, 2007).

<sup>32</sup> Tim Buletin *Tanwirul Afkar*, “*Fikih Progresif Bunga Rampai Pemikiran Santri Ma'had Aly Dalam Buletin Tanwirul Afkar*.”

<sup>33</sup> Tim Buletin *Tanwirul Afkar*.

as cadres of *fiqh* experts, expected to contribute to addressing all forms of religious issues currently emerging in society.<sup>34</sup>

Until now (2025) *Tanwirul Afkar* magazine has printed more than 570 editions with various contemporary discussion topics raised. Studies related to family law in this edition include: Protecting Children of Adultery, *Mut'ah* Mask of Prostitution, Wedding Party, Divorce Controversy in Court, Abortion for Rape Victims, Releasing *Ihdad*'s Snare, Castration is Not a Solution, Jurisprudence of Sexuality; LGBT Discourse Between Orientation and Action, Fetish and Online Sexual Phenomena, Marital Rape, Rape in Marriage, Childfree; Free from Ideology.

### **Stages Carried Out by Ma'had Aly in *Istimbâth al-ahkâm***

In its formulation process, the Ma'had Aly Situbondo follows several stages. First, the topic selection stage, where the entire team, especially the Editor and Managing Editor, seeks and selects issues. Sources suitable for study and discussion typically include questions or religious consultations from the public, newspapers, the internet, and other information media. From these sources, the Ma'had Aly *Tanwirul Afkar* crew gathers numerous issues related to Islamic jurisprudence.

To determine a topic to be discussed in a scientific session, the entire crew gathers. In this forum, a topic is agreed upon that meets the *Tanwirul Afkar* discussion criteria: topical, interesting, unique, urgent, concerning a wide audience, and so on.

Second, the scientific session stage. The *Tanwirul Afkar* scientific session can be described as a *bahsul masail* discussion, where the issue to be discussed is first reviewed in detail. The person responsible for presenting the topic is someone who has experienced the problem, or a student from Ma'had Aly Situbondo who represents them. Following the presentation, questions were opened to the participants of

the scientific session to clarify any remaining unclear explanations, and so on until the issues were truly clarified according to the perceptions of the Ma'had Aly Situbondo students.

Afterward, the scientific session participants were spread out to seek answers to the questions arising from the problem descriptions outlined above. The session participants were divided into several groups: some students sought answers in the Shafi'i school of thought, others in the Hanafiyah, Malikiyah, Hanabilah, Hadith and Explanation books, *Tafsir* books, and contemporary books. And when discussing Sufism, some students were also spread out in books on Sufism and morals.

To facilitate reference tracking, the *Tanwirul Afkar* scientific session never uses any other room for discussion except the library, whether manual or digital. Once they have completed their research, they are invited to return to the discussion room to collectively discuss their findings.

This is where the exchange of ideas occurs between groups. This exchange among students of Ma'had Aly Situbondo is called «Thought Transactions.» If there is no disagreement among the four schools of thought and schools of interpretation and hadith, the students of Ma'had Aly Situbondo strive to strengthen it with the foundation of *ushul fiqh* (Islamic jurisprudence) or *qawa'id fiqh*, so that the structure of *fiqh* published by Ma'had Aly Situbondo is more philosophical and argumentative. Conversely, if the opinions of the schools and groups are diverse, the presence of *ushul fiqh* and *qawa'id* is absolutely necessary to determine which opinion is more argumentative and beneficial to the community.

Third, the data validity stage, cross-checking the data presented in the forum for further study. This is done because misunderstandings sometimes arise regarding the text of the referenced book. Data cross-checking is carried out only by the Managing Editor Team, selecting truly necessary references and discarding those that appear to be forced into data, so that the Managing Editor only has truly relevant data. While validating the

<sup>34</sup> *Tanwirul Afkar* Magazine issue 501, November 2012

data, the Managing Editor translates the Arabic references into Indonesian. However, sometimes the Managing Editor only writes a summary of each relevant reference, which is then elaborated by the Editor in communicative Indonesian.

Fourth, the writing stage. Writing here refers to the final, comprehensive writing stage. After the Managing Editor submits all relevant data, the Editor standardizes the various data to create a *Tanwirul Afkâr* style. Furthermore, the Editor is tasked with re-systematizing the incoming writing from the Managing Editors, ensuring it is organized and easy to understand.

Fifth, the Proofreading stage. After being translated according to *Tanwirul Afkâr*'s language, the next step is proofreading by the Managing Editors. To do this, all Managing Editors gather again and read the editor's work, then correct any errors found.

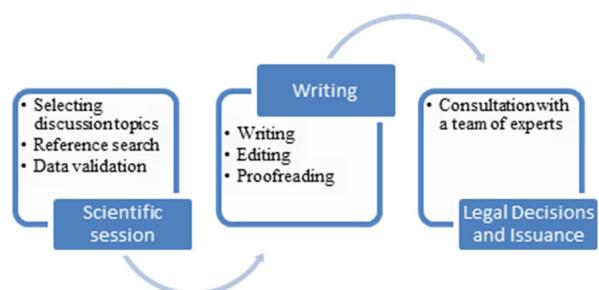
Sixth: Editing. The editor doesn't have much work to do once all the above steps have been completed. The editor only edits the systematics, the connection between the first and last discussion, the sharpness of the analysis, and the validity of the data. Sometimes the editors are given notes to change the systematics, complete references, and add analysis, and sometimes there are no changes at all except a few wording changes.

Seventh: the final stage is consultation with the expert team, this stage rarely occurs unless there is a deadlock at the Editorial and Editorial level. However, if it is deemed sufficient to be resolved at the Editorial level, the Expert Team is never involved. This was also conveyed by one of the lecturers at Ma'had Aly, the process of publishing the *Tanwirul Afkâr* bulletin consists of several stages, namely: the discussion topic selection stage, the scientific session stage, the data validity stage, the Writing stage, the re-correction stage, the editing stage, the consultation stage with the expert team and finally the publication stage.<sup>35</sup>

<sup>35</sup> Izzul Madid, lecturer and Management Team of *Tanwirul Afkâr* Magazine, Interview, Sukorejo, October 26, 2024

Table 1: Stages carried out by Ma'had Aly in *Istînbâth al-ahkâm*

No	Stage	Explanation
1	Selection of Discussion Topics	At this stage, a selection of problems is carried out and an agreement is made on a topic to be discussed
2	Scientific Session	The next stage is the distribution of trial participants and tracking of reference sources
3	Data Validity	The next stage, review and cross-check the data/references that have been submitted in the forum
4	Writing	The next stage, formulated and written comprehensively by the Editor in <i>Tanwirul Afkâr</i> 's style
5	Re-Correction	The next stage, the written results are corrected again by the Executive Editor team
6	Editing	The final stage, the editor edits the systematics, the connection between the first and last discussion, the sharpness of the analysis, and the validity of the data
7	Consultation with a Team of Experts	This stage is carried out if there is a deadlock at the Editor and Editor level



Scheme I: stages carried out in formulating laws

#### Characteristics of *Istînbâth al-ahkâm* Ma'had Aly Situbondo

The characteristics of *istînbâth al-ahkâm* at Ma'had Aly Situbondo are as follows:

First, it is carried out collectively (*istînbâth Jama'iyy*). Every formulation of Islamic legal issues is carried out through collective discussion to reach a consensus. Each generation of Ma'had

Aly Situbondo forms a management team with its respective functions and roles in formulating the issues being studied.

In the first book, entitled «People's Fiqh: The Linkage of Fiqh to Power,» with the following editorial composition: Person in Charge: KH. Hariri Abdul Adzim, KH. Hasan Basri, Lc., Expert Staff: Drs. KH. Afifuddin Muhajir, Muhyiddin Khatib, Editorial Board: Imam Nakha'i, Abdul Jalil, Dedy Wahyudin, Managing Editors: Asep T. Rahman, Asep T. Akbar, Layout: Mahfudz, Editorial Team: All Students

In the second book, In the second book «Fiqh Reality Ma'had Aly's Response to Contemporary Islamic Legal Discourse», the editorial team consists of the fourth generation, Person in Charge: K.H. Hariri Abdul Adhim, K.H. Moh. Hasan Basri, Lc., K.H. Afifuddin Muhajir, M.Ag, Muhyiddin Khatib; Expert Staff: Dr. Wawan Juandi, M.A, Imam Nakha'i, M.H.I; Editors: Thahir Hajary, Abd. Walid; Editor: Abdul Walid, Sada'i; Managing Editors: Zainul Huda, M. Kurdi, Badruddin Kamal, Samsul Arifin; Editorial Team: All Ma'had Aly Students.

Furthermore, in the third book, «the Fiqh Today» book is the result of intensive study by the 5th batch of Ma'had Aly, the editorial composition of the embryo of this book: Person in Charge: K.H. Hariri Abdul Adhim, K.H. Moh. Hasan Basri, Lc., K.H. Afifuddin Muhajir, M.Ag; Expert Staff: Dr. Wawan Juandi, M.A, Dr. Abu Yasid, LL.M, Ach. Muhyiddin Khatib, M.H.I; Editor: Imam Nakha'i, M.H.I; Editor: Thahir Hajary, Abd. Walid; Managing Editors: Zainul Huda, Gus Hafidh, Wahid Hasyim, Fudhaly; Editorial Team: All Ma'had Aly Students.<sup>36</sup>

Including those that have been in the form of magazines since edition 501, starting from the 8th batch of students, where the management of the Tanwirul Afkar bulletin as the person in charge: KH. Ach. Hariri Abd Adhim, BA., KH. Moh. Hasan Basri, Lc. Dr. KH. Afifuddin Muhajir, M.Ag. Expert Staff: Dr. Wawan Juandi, M.A., Prof. Dr. H. Abu Yasid, LLM., Dr. KH. Ach. Muhyiddin Khatib, M.H.I., Dr.

Imam Nakho'i, M.H.I., Agus Hafidh, M.H.I. Editor-in-Chief: Muhammad Rizqil Azizi, Doni Ekasaputra. Managing Editor: Kholilurrohman, Asror Baisuki, Agus Fauzi, Miftahul Ulum. Editorial Team: All Ma'had Aly Students. Editor: Nur Wahyudi, Abd. Aziz, WS.

Second, scientific Integration and Multi Schools. Ma'had Aly Situbondo in understanding and studying books, both classical and contemporary, is carried out collectively and applies a division of tasks in tracking references from various cross-disciplinary disciplines. Here there are people whose job it is to study tafsir books, hadiths, books written by sect imams and their followers, sharah books according to their respective tasks which have been divided and determined.

Techniques in formulating Islamic law are divided into several groups which have their respective tasks. Groups in the fields of *tafsir*, *hadith*, Islamic school of jurisprudence, *mu'ashirah* or contemporary, *ushul fiqh-fiqh* rules and sufism if necessary.

The *madzhab fiqh* group is divided into four by tracking the Hanafiyah, Malikiyah, Syafi'iyah and Hanabilah books, where they are responsible for searching for and studying the opinions of the jurists, the arguments used and their arguments or logical reasoning. The *tafsir* group collects and links verses related to the issue in question, examines the reasons for the *nuzul* of the verse, understands *makkiyah* and *madaniyah* verses, distinguishes between *nasikh* and *mansûkh*, and understands the thinking of the *mufassirs* in interpreting them. The *hadith* group is responsible for tracking, collecting, and linking hadiths related to the issue in question, detecting the reasons for *wurûd* (excuse of ruling), studying *takhrij* (interpretation of hadith), distinguishing the quality of hadith, and so on.

Next, the *mu'ashirah* group is responsible for tracking and analyzing contemporary books, fatwas (religious rulings) of contemporary scholars, and their reasoning. The *ushul fiqh* and *fiqh* principles group is responsible for seeking and exploring theories, principles of *ushul fiqh*, and *fiqh* rules related to the issue under discussion. After

<sup>36</sup> Abu Yasid, *Fiqh Today Fatwa Tradisional Untuk Orang Modern 1: Fikih Kontroversial* (Jakarta: Penerbit Erlangga, 2007).

searching and studying classical and contemporary turâs books, they present their findings in a discussion forum.

The next step, they collectively analyze and carry out *tarjih* results of the study using classical and contemporary theories, rules of *ushul fiqh*, *fiqh* rules and *maqâshid al-syarâ'ah*. Then, they formulate Islamic law regarding the case or problem in question, choosing an opinion that is appropriate to the situation, conditions and presents benefits.<sup>37</sup>

This model has implications for the reference sources used for each issue under study. This can be seen in the results of studies related to family law.

Third, the application of *ushuli* reasoning, namely Ma'had Aly Situbondo, seeks to understand the *nusûsh al-syarâ'ah* and its meanings in determining Islamic law. In this stage, an analytical approach is used, including linguistic principles, the foundations of sharia, *maqâsid al-syarâ'ah*, the context of *nusûsh* (*asbab an-nuzûl* or *al-wurûd*), and linking the text to other texts.

The book "People's Fiqh" states that the framework applied by Ma'had Aly Situbondo utilizes three *istinbâth* methods: revitalizing *ushul fiqh* (Islamic principles of *fiqh*), diversifying texts, and expanding the scope of *ta'wil* (interpretation).<sup>38</sup> The revitalization of *ushul fiqh* can be described as optimizing the use of *qawâ'id ushûliyyah*, which in the Nahdlatul Ulama (NU) *istinbâth* method is included as one of the supporting tools of the *Manhajiy* method. Meanwhile, the *Manhajiy* method itself, which is said to be one of the *istinbâth* methods, is optimizing the use of *qawâ'id ushûliyyah*, which in the NU tradition of Islamic law formation is also one of the supporting tools of the *Manhajiy* method.<sup>39</sup>

<sup>37</sup> Redaksi Tanwirul Afkar, *Fiqh Rakyat, Pertautan Fiqh Dengan Kekuasaan* (Yogyakarta: LKiS, 2000).

<sup>38</sup> Redaksi Tanwirul Afkar.

<sup>39</sup> A. Ma'ruf Asrori, ed., *Ahkamul Fuqaha; Solusi Problematika Aktual Hukum Islam, Keputusan Muktamar, Munas Dan Konbes Nahdlatul Ulama (1926-2010 M)* (Surabaya: Khalista & LTN BPNU, 2011).

Then regarding the mention of the *istinbâth* method of text diversification, and the extensification of the *ta'wil* area as one part of the *Manhajiy* method because both are still within the realm of *ushul fiqh*. Text diversification means issuing a counter text with the measure of *maslahah* (the interests of the people). If a text brings benefits, whatever its status, then the hadith can still be used as a source of law which has the right to determine the existence of *takhsis*, *nasakh* and other rights in full, as regulated in *ushul fiqh*. This method of working, if necessary to find a theoretical precedent, can use the rule: *I'mâlu ad-dâlîlâini khairun min ihmâli ahadihima* (using two arguments at once is better than discarding one of them).<sup>40</sup>

This pattern requires legal decisions and decisions to be made with benefit as the legal basis. Ma'had Aly Situbondo does not consider who expressed the opinion, or which book it comes from (authentic or not, classical or contemporary), but rather which opinion is most capable of realizing benefit within society.<sup>41</sup>

The extensification of the *ta'wil* domain is the expansion of the use of *ta'wil* (changing a word from a close meaning to a distant meaning for a compelling reason). In this case, Ma'had Aly Situbondo adheres to the principle that if a text, in its true meaning (the spontaneously understood meaning), does not support *maslahah*, then it takes the *ta'wil* path. Because in principle, *ta'wil* is taking a further meaning but remains within the corridor of the word. The risk posed by *ta'wil* does not involve discarding the text, but is limited to suspending the closer meaning. The way *ta'wil* works is almost the same as that carried out by Imam Hanafi with his *istihsan* theory. Because

<sup>40</sup> Tim Redaksi Tanwirul Afkar Ma'had Aly Salafiyah Syafi'iyah Sukorejo, *Fikih Rakyat Pertautan Fiqh Dengan Kekuasaan*.

<sup>41</sup> Imam Syafi'i and Tutik Hamidah, "MASLAHAH CONTROVERSIES AS SOURCES, METHODS AND OBJECTIVES (COMPARATIVE ANALYSIS STUDY OF THE FOUR MADHAB)," *Al-'Adalah: Jurnal Syariah Dan Hukum Islam* 7, no. 1 (2022): 19–38, <https://doi.org/https://doi.org/10.31538/adlh.v7i1.1642>.

*istihsan* is abandoning *qiyyas jali* to take *qiyyas khafi* for consideration of *maslahah*.<sup>42</sup>

A text has the potential to have more than one meaning. Therefore, it is necessary to expand the scope of *ta'wil* or to extensify the scope of *ta'wil*. The extensification of the scope of *ta'wil* means opening the door wide open to *ta'wil* when a text, with its clear meaning, does not reflect the welfare of humanity, or does not reflect peace among humanity; and there is a contradiction between two texts.

Table 2: Characteristics of *istinbâth al-ahkâm* in Ma'had Aly Situbondo

No	Characteristic	Explanation
1	Done Collectively ( <i>istinbâth Jama'iy</i> )	In carrying out <i>istinbâth al-ahkâm</i> , Ma'had Aly Situbondo formed a management structure where each member has their respective duties/tasks in <i>istinbâth al-ahkâm</i>
2	Integration of Science and Multi-Schools	The characteristic of <i>istinbâth al-ahkâm</i> Ma'had Aly Situbondo, in tracing references, applies cross-disciplinary knowledge, where the designated group looks for answers in books on Islamic jurisprudence across schools of thought, books of interpretation, contemporary books and books on sufism and morals.
3	Application of Ushuli Reasoning	The following characteristic, Ma'had Aly Situbondo in carrying out <i>istinbâth al-ahkâm</i> applies ushuli reasoning, namely by making <i>ushul fiqh</i> , the principles of <i>fiqh</i> , and <i>maqâsid al-syar'iyyah</i> as tools in analyzing and answering problems

### Implementation of *Istinbâth al-Ahkâm* Ma'had Aly Situbondo

#### Marital Rape<sup>43</sup>

In studying this problem, Ma'had Aly Situbondo carried out *istinbâth min an-nushûsh* regarding verses

<sup>42</sup> Tim Redaksi Tanwirul Afkar Ma'had Aly Salafiyah Syafiiyah Sukorejo, *Fikih Rakyat Pertautan Fiqh Dengan Kekuasaan*.

<sup>43</sup> "Marital Rape", in Tanwirul Afkar Magazine issue 549, May 2021

about marriage, the purpose, function of marriage, roles and mutuality between husband and wife. By understanding the meaning of the text, relating the *nashsh* to other *nashsh* and understanding the interpretations of the scholars.<sup>44</sup>

First, the purpose of the marriage bond is explained in Surah ar-Rum [30]: 21:

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ (٢١) [الروم/٢١]

"And among the signs of His power is that He created for you wives from your own kind, so that you would be inclined and feel at ease with them, and He made among you a feeling of love and affection. Indeed, in that there are truly signs for a people who think".<sup>45</sup>

Second; guidance and reciprocity, Allah says in Surah al-Baqarah [2]: 187;

أَحَلَّ لَكُمْ لَيْلَةَ الصِّيَامِ الرَّفَثُ إِلَى نِسَائِكُمْ هُنَّ لِبَاسٌ لَكُمْ وَأَنْتُمْ لِبَاسٌ لَهُنَّ [البقرة/٧٨]

"It is permissible for you on the night of the fasting month to mix with your wives; they are clothes for you, and you are clothes for them."<sup>46</sup>

Third; treat each other well. Regarding this, Allah SWT. Says:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا يَحِلُّ لَكُمْ أَنْ تَرِثُوا النِّسَاءَ كَرْهًا وَلَا تَعْضُلُوهُنَّ لِتَذَهَّبُوا بِعَيْنِ مَا أَتَيْتُمُوهُنَّ إِلَّا أَنْ يَأْتِيَنَّ بِفَاحِشَةٍ مُبِينَةٍ وَعَالِمُوْهُنَّ بِالْمَعْرُوفِ فَإِنْ كَرِهُتُمُوهُنَّ فَعَسَى أَنْ تَكْرُهُوْهُ شَيْئًا وَيَجْعَلَ اللَّهُ فِيهِ خَيْرًا كَثِيرًا [٩١] [النساء/٩١]

"O you who believe, it is not lawful for you to inherit women by force and do not cause them trouble because they want to take back some of what you have given them, unless they do truly vile work. And

<sup>44</sup> Wahbah Az-Zuhailiy, *Ushûl Al-Fiqh Al-Islamiy* (Damaskus: Dar al-Fikr, 2005).

<sup>45</sup> Al-Qur'an, 30: 21.

<sup>46</sup> Al-Qur'an, 2: 187.

associate with them properly. Then if you don't like them, (then be patient) because maybe you don't like something, even though Allah has given it a lot of goodness.”<sup>47</sup>

Fourth, according to the interpretation of scholars, Wahbah Zuhaili in his *tafsir al-Munir* defines the phrase “*wa asyiruhunna bi al-ma'ruf*” as “improving speech, living, and place.” *Al-ma'ruf* refers to good behavior that is beyond reproach according to sharia, custom, and *muru'ah*.<sup>48</sup> Meanwhile, Ibn Kathir, in his *tafsir*, argues that the meaning of “*wa asyiruhunna ma'ruf*” (good deeds) is to treat one's wife as well as possible. When speaking to her, speak politely. When socializing with her, engage in natural intercourse, without coercion.<sup>49</sup>

This interpretation is in line with the following Hadith:

حَدَّثَنَا مُحَمَّدُ بْنُ يَحْيَىٰ، حَدَّثَنَا مُحَمَّدُ بْنُ يُوسُفَ، حَدَّثَنَا سُفْيَانُ عَنْ هِشَامٍ بْنِ دُعْرَوَةَ عَنْ أَبِيهِ عَنْ عَائِشَةَ، قَالَتْ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «خَيْرُكُمْ خَيْرُكُمْ لِأَهْلِهِ، وَأَنَا خَيْرُكُمْ لِأَهْلِي، وَإِذَا مَاتَ صَاحِبُكُمْ فَدَعُوهُ»

“From Aisha, the Messenger of Allah said: “The best of you are those who are best to your spouses, and I am the best to my spouse, and when any of your relatives die, leave off mentioning their bad things.”<sup>50</sup>

Scholars have formulated that mutual understanding (*mu'asyarah bi al-ma'ruf*) is the most important ethic in husband-wife relations. This ethic extends not only to the performance of domestic duties but also to sexual relations.<sup>51</sup> Therefore, coercion in sexual relations and any

form of violence in sexual relations contradict the principle of mutual understanding (*mu'asyarah bi al-ma'ruf*).<sup>52</sup>

As well as the Hadith of the Prophet regarding etiquette before sexual intercourse:

قال صل الله عليه وسلم لا يقنن أحدكم على امرأته كما تقع البهيمة وليكن بينهما رسول قيل وما الرسول يا رسول الله قال القبلة والكلام رواه أبو منصور الديلمي

“Don't let one of you relate to his wife like a livestock comes to its partner, but let there be a ‘conveyor’ between the two. He was then asked, What is a conduit, O Messenger of Allah?, he answered; kisses and affectionate words.” (HR. Dailami)<sup>53</sup>

From this, coercion is defined as an invitation to commit an act accompanied by a threat. Some conditions for coercion (*ikrah*) include the perpetrator having the power to carry out the threat, while the object of the coercion (the victim) lacks the ability to refuse. Furthermore, the victim strongly suspects that if they refuse, the threat will actually be carried out. The threats here are in the form of dangerous things, such as killing, beating (hitting), and so on.<sup>54</sup>

Therefore, marital rape necessitates coercion and violence against a partner, which contradicts the aforementioned command of mutual understanding (*mu'asyarah bi al-ma'ruf*). Although the violence does not reach the level of physical violence, it does at least involve unconscious psychological violence on the partner, the impact of which can be more painful than physical violence.<sup>55</sup>

<sup>47</sup> Al-Qur'an, 4: 19.

<sup>48</sup> Wahbah Az-Zuhaily, *At-Tafsîr Al-Munîr Fî Al-Aqîdah Wa Asy-Syar'âh Wa Al-Manhaj* (Damaskus: Dar al-Fikr, 2009).

<sup>49</sup> Abu al-Fida' Ismail bin Umar bin Katsir al-Qurasyi ad-Dimisyiqi, *Tafsîr Al-Qur'an Al-Karîm*, 2nd ed. (Riyadh: Dar Thaibah, 1999).

<sup>50</sup> Muhammad bin Isa bin Saurah At-Tirmidzi, *Sunan At-Tirmîzî* (Bairut: Dar at-Ta'shil, 2014), 126.

<sup>51</sup> Imam Syafi'i, Ruqyatul Faiqoh, and Fronzoni Vasco, “CONCEPT OF MISAQAN GHALIDZAN IN CONTEMPORARY INTERPRETATION OF QURAISH SHIHAB THOUGHTS,” *MILRev: Metro Islamic Law Review* 2, no. 2 (2023): 115–33, <https://doi.org/10.32332/milrev.v2i2.7807>.

<sup>52</sup> Faqihuddin Abdul Qodir, *Qira'ah Mubadalah*, ed. 2019 ICRISOD (Yogyakarta, 2019), 350.

<sup>53</sup> Abu Hamid Muhammad bin Muhammad al-Ghazali, *Ihyâ 'Ulûm Ad-Dîn* (Indonesia: al-Haramain, n.d.), 350.

<sup>54</sup> Sayyid Bakar bin Sayyid Muhammad Syata Ad-Dimiyatiy, *I'ânah at-Thâlibîn*, Jld. III (Bairut: Dâr al-Kutub al-Islâmiyah, 2009).

<sup>55</sup> Riskyanti Juniver Siburian, “Marital Rape Sebagai Tindak Pidana Dalam RUU-Penghapusan Kekerasan Seksual,” *Jurnal Yuridis* 7, no. 1 (2020): 149, <https://doi.org/10.35586/jyur.v7i1.1107>.

## Divorce Your Wife in Court<sup>56</sup>

In analyzing this issue, Ma'had Aly Situbondo examines the verses of the Quran and Hadith, compares the opinions of scholars, conducts *tarjih* (religious assessment) in light of current realities, and adds provisions to safeguard the well-being of husband and wife. First, the Prophet's Hadith:

حَدَّثَنَا أَحْمَدُ بْنُ يُونُسَ حَدَّثَنَا مُعَرِّفٌ عَنْ مُحَارِبٍ قَالَ قَالَ رَسُولُ اللَّهِ -صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ- «مَا أَحَلَ اللَّهُ شَيْئًا أَبْغَضَ إِلَيْهِ مِنَ الطَّلَاقِ».

From Muharib, Rasulullah SAW said: "Allah does not justify acts that are disgraceful to Him except divorce."<sup>57</sup>

From the words of the Prophet it is clear that Allah SWT don't want a divorce. Life in an abundance of love in knitting together the integrity of the household is more loved by Allah SWT rather than divorce which causes misery and hatred. Allah SWT justifying divorce as a way out if the two parties cannot be united. This does not mean that Allah makes it easy for humans to perform divorce. The first offer was to reconcile both parties. When no common ground can be found, then *firqah* (separation) between husband and wife is carried out.<sup>58</sup>

Allah says:

وَإِنْ خَفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِنْ أَهْلِهِ وَحَكَمًا مِنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلَيْهِمَا خَيْرًا (٣٥) [النساء ٣٥]

"And if you fear a dispute between them, then send a judge from the man's family and a judge from the woman's family. If they intend to reconcile,

<sup>56</sup> Tim Buletin Tanwirul Afkar, "Fikih Progresif Bunga Rampai Pemikiran Santri Ma'had Aly Dalam Buletin Tanwirul Afkar."

<sup>57</sup> Abi Dawud Sulaiman bin As'yast As-Sijistani, *Sunan Abî Dâwud* (Riyadl: Bait al-Afkar ad-Dauliyah, 2009).

<sup>58</sup> Puji Kurniawan, Ahmatnijar, and Muhammad Ridwan, "THE TRANSFORMATION OF ISLAMIC FAMILY LAW IN THE DIGITAL ERA : A Sociological Legal Analysis of Marriage and Divorce Regulations in Indonesia," *Madania: Jurnal Kajian Keislaman* 28, no. 2 (2024): 179–90, <https://doi.org/http://dx.doi.org/10.29300/madania.v28i2.5146>.

Allah will surely give success to the husband and wife."<sup>59</sup>

The message conveyed by this verse is that God desires that married couples remain intact. Therefore, before a divorce can be pronounced, a process must go through.

Allah says:

فَإِذَا بَلَغَنَ أَجْلَهُنَّ فَأَنْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ وَأَشْهِدُوا ذَوَيْ عَدْلٍ مِنْكُمْ [الطلاق ٢/٢]

"And when they are nearing the end of their *iddah*, then reconcile them well or let them go well and testify with two fair witnesses among you."<sup>60</sup>

In this verse, Allah commands the divorcee and the person who is seeking reconciliation to testify with two witnesses. According to the principles of Islamic jurisprudence, the wording "amar" (command) indicates an obligation unless there are indications that deviate from its original meaning.<sup>61</sup>

Second analysis, the opinion of the ulama regarding the command above shows that divorce is obligatory, the Shafi'iyah and Hanafiyah *ulama* direct the advice in the verse above to the Sunnah of witnessing divorce. Some scholars say otherwise, they require testimony regarding divorce. Looking at the editor of the verse which is in the form of a warning without anything that distracts from its original meaning. So the warning still shows the meaning of obligation. This opinion is followed by the Shiite Imamiyah.<sup>62</sup>

Following the opinion that requires witnesses in *talak*, then the *talak* pronounced by the husband simply not in the presence of other people is invalid. If this opinion is confronted with the Hadith of the Prophet:

<sup>59</sup> Al-Qur'an, 4: 35

<sup>60</sup> Al-Qur'an, 65: 2

<sup>61</sup> Az-Zuhailiy, *Ushûl Al-Fiqh Al-Islamiy*.

<sup>62</sup> Abu al-Qasim Mahmud bin Umar Az-Zamahsyari, *Al-Kasîsyâf 'an Haqâiq Gâwâmid at-Tanzîl Wa Uyûn Al-Aqâil Fi Wujûh at-Ta'Wîl* (Riyadl: Maktabah al-Ubaikan, 1998), 143.

عَنْ أَبِي هُرَيْرَةَ قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «ثَلَاثٌ جَدُّهُنَّ جَدٌ: وَهَزَلُهُنَّ جَدٌ: النَّكَاحُ وَالْطَّلَاقُ وَالرَّجْعَةُ»

From Abu Hurairah, the Prophet Muhammad (peace be upon him) said: "There are three things that if done seriously will become real, and likewise if done jokingly, they will become real, namely marriage, divorce and reconciliation." (HR. Tirmidzi)<sup>63</sup>

Third, considering the current state of the country, it is highly relevant that divorce be witnessed. Witnessing the divorce can avoid future conflict and unwanted claims. For example, if one of the parties dies, the surviving party may claim the marriage still exists. The goal is simply to reap the inheritance. However, the spirit of witnessing is to obtain legal force.<sup>64</sup>

Therefore, this legal force cannot be achieved if the witness is not presented before an official government institution, namely a religious court. Therefore, divorce should be carried out through a religious court. In line with this line of thinking, the Indonesian government, through its authorized institutions, has enacted a regulation that divorce can only be conducted before a religious court after the religious court has attempted and failed to reconcile the parties.<sup>65</sup>

The government's decision is based on the general public interest. A government policy that aligns with the public interest must be obeyed. Furthermore, differences of opinion among religious scholars regarding the obligation to provide evidence can be resolved by a government decision requiring divorce proceedings to be conducted in a religious

court.<sup>66</sup> This is in accordance with the following principles:

حُكْمُ الْحَاكِمِ يَرْفَعُ الْخِلَافِ

"Government decisions can resolve disputes and establish binding rules."<sup>67</sup>

Table 3: Implementation of *Istibnâth Ma'had Aly* in Islamic Family Law

No	Topic	Implementation
1	Marital Rape, Rape Within Marriage	Analyzing primary postulates (the Quran and Hadith) with the <i>ushul fiqh</i> approach and interpretations/opinions of <i>ulama</i>
2	Divorce Your Wife in Court	Studying the evidence of the Quran and Hadith, comparing the opinions of scholars, carrying out <i>tarjih</i> by looking at current realities and adding provisions in order to maintain the interests of husband and wife

## Conclusion

Ma'had Aly Situbondo developed *istibnâth al-ahkâm* in order to respond to the problems of contemporary Islamic family law so that legal decisions are relevant and in accordance with the demands of modern society today. Examined from decisions related to the problems of contemporary Islamic family law that have been produced and published in the magazine *Tanwirul Afkar* by Ma'had Aly, *istibnâth al-ahkâm* developed by Ma'had Aly Situbondo with three patterns. First is *istibnâth al-ahkâm al-jama'iyy bi at-taqṣīm* (collective formulation activities by forming management and dividing tasks). Second, carrying out scientific integration without being tied to a particular school of thought and studied from various disciplinary perspectives. Third, the application of *ushuli* reasoning (by using *ushul fiqh*, *fiqh* rules, and *maqâshid al-syarî'ah* as

<sup>63</sup> At-Tirmidzi, *Sunan At-Tirmizi*.

<sup>64</sup> Harry Yuniardi et al., "CRITICISM OF TAKLIK TALAK AS AN EFFORT TO PROTECT WOMEN'S RIGHTS IN INDONESIAN MARRIAGE LAW," *Madania: Jurnal Kajian Keislaman* 28, no. 2 (2024): 203–14, <https://doi.org/http://dx.doi.org/10.29300/madania.v28i2.5924>.

<sup>65</sup> *Compilation of Islamic Law in Indonesia*, KHI Article 115, Ministry of Religious Affairs of the Republic of Indonesia, Directorate General of Islamic Community Guidance, Directorate of KUA and Sakinah Family Development, 2018

<sup>66</sup> Faiz Zainuddin and Imam Syafi'i, "Environmental Jurisprudence; Environmental Preservation Efforts In Islam," *Nusantara: Journal of Law Studies* 2, no. 1 (2023): 23–30, <https://doi.org/https://doi.org/10.5281/zenodo.17388745>.

<sup>67</sup> Abu al-Abbas Ahmad bin Idris as-Sanhaji Al-Qarafi, *Anwâr Al-Burûq Fî Anwâr' Al-Furûq* (Bairut: Dar al-Kutub al-Ilmiyah, 1998), 179.

tools in analyzing and answering problems in contemporary Islamic family law).

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