

Conflict in Islamic Jurisprudence: Noel J. Coulson's Historical Approach and His Contribution to the Study of Islamic Law

Konflik dalam Yurisprudensi Islam: Pendekatan Sejarah Noel J. Coulson dan Kontribusinya terhadap Studi Hukum Islam

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Abstract: Islamic jurisprudence (*fiqh*) has a long history and has stagnated since the Middle Ages, whose impact is still being felt today. Various innovations have been braved enough to violate the boundaries of doctrine between schools of thought in Islamic judicial decisions in its development. It is this issue that Noel J. Coulson describes in *Conflict and Tension in Islamic Jurisprudence*. This article reviews the approach used by Noel J. Coulson to Islamic jurisprudence by asking two main questions. First, how are Noel J. Coulson's approach and method in Islamic jurisprudence research? Second, how is Noel J. Coulson's contribution to the development of Islamic law studies? The writer answered these two questions by using a bibliographic type of research. The author finds that Noel J. Coulson dissects the development of Islamic jurisprudence by using historical and sociological approaches. Noel J. Coulson argues that traditional *fiqh* (classical to the medieval era), contemporary *fiqh* and decisions in Islamic law courts constitute an actual legal entity. The author argues that Noel J. Coulson's historical approach to Islamic law is still relevant so that Islamic law is not considered stagnant.

Keywords: Conflict, Islamic Jurisprudence, Historical Approach, Noel J. Coulson, Islamic Law.

Abstrak: Yurisprudensi Islam memiliki sejarah yang cukup panjang dan sempat mengalami stagnasi pada masa pertengahan yang masih dirasakan dampaknya sampai sekarang. Pada perkembangannya, terdapat berbagai inovasi yang terbilang cukup berani melanggar batas-batas doktrin antar mazhab dalam putusan-putusan peradilan Islam. Isu tersebutlah yang dipotret oleh Noel J. Coulson dalam *Konflik dalam Yurisprudensi Islam*. Artikel ini mengulas pendekatan yang digunakan oleh Noel J. Coulson terhadap yurisprudensi Islam dengan mengajukan dua pertanyaan utama. Pertama, bagaimana pendekatan dan metode Noel J. Coulson dalam penelitian yurisprudensi Islam? Kedua, bagaimana kontribusi pemikiran Noel J. Coulson terhadap perkembangan studi hukum Islam? Dua pertanyaan ini penulis jawab dengan menggunakan jenis penelitian bibliografi. Penulis menemukan bahwa

Noel J. Coulson membedah perkembangan yurisprudensi Islam dengan menggunakan pendekatan sejarah dan sosiologi. Noel J. Coulson berpendapat bahwa fikih tradisonal (era klasik sampai pertengahan), fikih kontemporer dan keputusan-keputusan dalam peradilan hukum Islam merupakan sebuah kesatuan hukum aktual. Penulis berargumentasi bahwa pendekatan sejarah Noel J. Coulson terhadap hukum Islam masih tetap relevan, sehingga hukum Islam tidak dianggap sebagai suatu hal yang stagnan.

Kata Kunci: Konflik, Yurisprudensi Islam, Pendekatan Sejarah, Noel J. Coulson, Hukum Islam.

A. Introduction

Islamic jurisprudence recorded in various Islamic law literature is a product of civilization. In the Middle Ages, the product of the developing civilization experienced stagnation (*jumūd*) and was final. However, in its development, there has been a shift with the emergence of innovations that are bold enough to violate some doctrinal boundaries between schools in Islamic jurisprudence.¹ This shift occurs because many dynamic components cannot be equated with the medieval context. Therefore, the historical approach is helpful for reading and explaining the spirit of reform of the Qur'an as the primary source of Islamic law in photographing the development of Islamic law appropriately and proportionally according to the needs of the times.² In addition, historical analysis can describe the social level of the emergence of Islamic law its acceptance and rejection at the level of practice in society.³ This historical approach to Islamic Law is what Noel James Coulson (referred to as Coulson) later photographed in *Conflicts in Islamic Jurisprudence*.⁴ Coulson's contribution cannot be separated from the depth of Coulson's study of Islamic law in the classical era, the middle era, to the contemporary era.

Several previous studies discuss the thoughts of Coulson's Islamic Law. Hamzah focuses on Coulson's thoughts in Islamic Jurisprudence relating to politics and the relationship of Islamic law to its application in state regulations. After

¹ Wijayanto, "Corak Berhukum Progresif (Studi Pola Kepemimpinan Umar bin Khattab Relevansinya dengan Hukum Indonesia)" (Essay, Lampung, UIN Raden Intan, 2018), 63.

² Danu Aris Setiyanto, "Pemikiran Hukum Islam Imam Malik Bin Anas (Pendekatan Sejarah Sosial)," *Al-Ahkam: Jurnal Ilmu Syari'ah dan Hukum* 2, no. 2 (2017), 177.

³ Hamzah, "Konflik dan Ketegangan dalam Hukum Islam antara Stabilitas dan Perubahan," *Al Daulah: Jurnal Hukum Pidana dan Ketatanegaraan* 4, no. 2 (2015), 148.

⁴ Noel J. Coulson, *Konflik dalam Yurisprudensi Islam, translated by H. Fuad* (Yogyakarta: Navila, 2001).

tracing Coulson's works, Hamzah concludes that Coulson seeks to resolve conflicts and tensions in Islamic Law with six contradictory traits. The trick is to come up with new ideas to respond to the times through studying the social, political and cultural factors behind the birth of a product of Islamic law thought, its impact on society and the interaction between legal thinkers and the environment.⁵ Research by Mushtaq states that he affirms Coulson's thoughts on Sharia laws that have gone through the codification process, in the realm of the relationship between Islamic Law and the application of formal law in a country, become the domain of professional secular lawyers more than being a domain for fiqh's experts (Muslim scholar).⁶

According to Akhwan Fanani, Coulson's idea is open to criticism. The six conflicts traits in the development of Islamic jurisprudence proposed by Coulson are a sharp analysis of the history of Islamic law development. It can be used for introspection for Muslims to develop further Islamic legal thought.⁷ Sadiq and Husayni Tasyi put forward other research and criticisms. By analyzing Coulson's view in seven ways, Shadiq and Tasyi argue that Coulson does not have a comprehensive understanding of sharia and how sharia can be achieved.⁸ Another criticism of Coulson's thought is also found in Fuad's research. Fuad criticized Coulson's opinion on the sunnah and investigated the evidence underlying his ideas about it. Fuad found that Coulson's approach to studying the sunnah was unrelated to a proper scientific methodology. According to Fuad, Coulson follows a particular way of choosing examples for studies that support his opinion and is less objective about other examples. Fuad added that the evidence that Coulson chose was invalid to prove his theory of the sunnah, so Coulson's opinion on the sunnah was just accusations and suspicions.⁹

⁵ Hamzah, "Konflik dan Ketegangan dalam Hukum Islam antara Stabilitas dan Perubahan."

⁶ Muhammad Mushtaq Ahmad, "The Doctrine of Siyāsah in the Ḥanafī Criminal Law and Its Relevance for the Pakistani Legal System," *Islamic Studies* 52, no. 1 (2013): 29–55.

⁷ Akhwan Fanani, "Perspektif Coulson terhadap Rumusan Dialektika Hukum Islam," *Al-Ahkam* 22, no. 2 (11 Oktober 2012), 121.

⁸ Seyyed Sadeq Seyyed Hosseini Tashi, "Molāḥazāti bar Maqāleh 'Ārmān-Garāyi va Vāqe'-Nigāri' az Majmū'eh Maqālāt Tazādd va Ta'āroḍ dar Fiqh al-Islāmī," *Fiqh* 26, no. 97 (March 2019), 55.

⁹ Ibn Ahmad Abu al-Ni'mah, "Shubuhāt al-Mustashriq Nūwil Jayms Kūlsun Ḥawl al-Sunnah al-Nabawīyah Dirāsah Taḥlīlīyah Naqdiyāh min Khilāl Kitābih Tārīkh al-Tashrī' al-Islāmī," *Majalah Majma'* 18 (2016): 173–210.

On the other hand, the historical approach to Islamic law is not as new as other Western scholars offer. The historical approach to the study of Islamic law is also recorded in the works of Eastern Muslim scholars such as Muhammad bin Abi Zahrah in *Nazrah Tarikhiyyah fī udūsi al-Mazāhib al-'Arba'ah* (historical perspective on the emergence of the four schools of thought). Through this book, Abu Zahrah describes the emergence of the four leading schools of *fiqh* (Hanafi, Maliki, Shafi'i, and Hanbali) in historical chronology. It started with the emergence of *ijtihad* (an earnest effort to decide a case) in the era of the companions of the Prophet Muhammad, the emergence of polarization of *ijtihad* thought, to the emergence of the *fiqh* school and its spread.¹⁰ This research must be completed again because it describes how Coulson thinks about the historical approach and the methods to study Islamic law.

Based on previous studies, this article further studies Coulson's thoughts on developing Islamic jurisprudence. By using Coulson's "*Konflik dalam Yurisprudensi Islam*" as primary data and other scientific works, both in the form of journals, books, and research results of scholars, which are related to the focus of this paper, the author tries to describe Coulson's approach and method in Islamic jurisprudence research. This bibliographic research with a historical approach also discusses the contribution of Coulson's thought to the development of Islamic studies, especially in legal studies and Islamic jurisprudence. In the end, the author criticizes Coulson's historical method and approach to studying Islamic law.

B. Noel J. Coulson and His Works

Prof. Noel James Coulson (1928-1986) was a professor in Eastern Law. Coulson is active in conducting studies and research in Islamic Law, both classical, medieval and contemporary.¹¹ Coulson is a lecturer in eastern laws at the University of London. One of his most famous works is *A History of Islamic Law*. The work contains the history of the development of Islamic law written by Western scholars. Coulson's career began to attract much attention when he met a Western scholar

¹⁰ Muhammad Abu Zahrah, *Nazrah Tarikhiyyah fī Hudūsi al-Mazāhib al-'Arba'ah* (Beirut: Darul Qadiri, 1990), 20.

¹¹ Ian Edge, "Obituary: Noel Coulson," *Bulletin of the School of Oriental and African Studies, University of London* 50, no. 3 (1987), 532-35.

concerned with the study of Islamic Law, namely Joseph Schacht. Schacht has a work that is quite monumental and has become a reference for Western scholars who study Islamic Law.¹² Coulson later taught at the School of Oriental and African Studies (SOAS) in London. Coulson spent his career until his death at this institution.

Discussions about the historical approach and Coulson's method of studying Islamic jurisprudence cannot be separated from Coulson's other works, especially "*A History of Islamic Law*", published in 1964. At that time, Western researchers primarily used revisionist and double approach revisionist in Islamic studies.¹³ *A History of Islamic Law* was written by Coulson while serving as Dean of the Faculty of Law at Ahmadu Bello University, Nigeria. This book results from Coulson's research on Islamic law written with a historical approach and social studies. Coulson tries to photograph Islamic law from the time of its emergence by photographing the process of the existence of Islamic laws at the time of the Prophet Muhammad with the revelation of the Qur'an. Coulson divides into three periods in the history of the development of Islamic Law, starting from the time of the Prophet Muhammad, legal doctrines and practices in the Middle Ages and Islamic Law in modern times.¹⁴ This book can be said to be a kind of history of Islamic Law (*tārīkh tasyrī 'al-Islāmī*) in the style of Western scholars.¹⁵ Through this book, Coulson tries to criticize the Western-style approach, which is revisionist and tries to compare several judges' decisions with the texts of Islamic Law sources to some decisions which explicitly seem to contradict the texts of Islamic Law sources.¹⁶

Coulson's thoughts cannot be separated from the thoughts of his teacher, Joseph Schacht,¹⁷ contained in *An Introduction to Islamic Law*. Schacht was one of

¹² Akh Minhaji, "Noel James Coulson dalam Perspektif Orientalisme Hukum Islam," in *Konflik dalam Yurisprudensi Islam* (Yogyakarta: Navila, 2001), 3.

¹³ Joseph Schacht, *An Introduction to Islamic Law* (Oxford [Oxfordshire]; New York: Clarendon Press, 1982). As quoted by Akh Minhaji in "Noel James Coulson dalam Perspektif Orientalisme Hukum Islam."

¹⁴ Noel J. Coulson, *A History of Islamic Law*, Reprinted, Islamic Surveys 2 (Edinburgh: Univ. Press, 1991), 13.

¹⁵ Khudari Beik, *Tārīkh Tasyrī' al-Islāmī* (Cairo: Darul Fikr, 1964), 52.

¹⁶ Coulson, *Konflik dalam Yurisprudensi Islam*, 13.

¹⁷ Joseph Schacht (15 March 1902-1 August 1969) is an English-German professor. Professor of Arabic and Islamic Studies at Columbia University in New York. Schacht is one of the leading western scholars in Islamic law. His work entitled *Origins of Muhammadan Jurisprudence* (1950) is still considered essential in studying Islamic law among western scholars. Schacht published the book *An Introduction to Islamic Law* in 1964, the same year as Coulson's *A History of Islamic Law*.

the most influential people in Coulson's thinking, especially when they first met at Kable College, Oxford. Schacht discusses the development of Islamic law from a historical perspective, starting from the presentation of pre-Islamic data on legal institutions to the social environment of the Arabian Peninsula.¹⁸ Schacht uses the historical method in compiling his data and compiling legal themes. In contrast to his teacher, Coulson chose to focus on how to examine the six opposing traits during Islamic Law.¹⁹

The primary data in this paper (*Konflik dalam Yurisprudensi Islam*) is a translation of Coulson's work entitled, *Conflict and Tension in Islamic Jurisprudence*. Fuad Zein²⁰ translated the book and published it in 2001. This book is a collection of Coulson's series of lecture materials for his students. Coulson divides this book into seven discussions: introduction, revelation and reason, unity and diversity, authority and freedom, idealism and realism, law and morality, and stability and change. Meanwhile, in the Indonesian translated version, the book contains an additional introduction to the translator and Akh Minhaji's writing entitled *Noel James Coulson in the Orientalism Perspective of Islamic Law*. Coulson's other works include *Succession in The Muslim Family*, published in 1971; *Commercial Law in the Gulf States*; *The Islamic Legal Tradition*, published in 1984; and *Contract Law in Saudi Arabia and the Gulf States*, published in 1980.

C. Coulson's History Approach: Examining Six Conflicts in Islamic Jurisprudence

In studying Islamic law, Coulson is concerned with the history of Islamic law and has exceptional attention to the development of Islamic law in the contemporary era, mainly through judicial decisions of Islamic jurisprudence. For Coulson, many exciting things made him break several theories of Western scholars who previously studied Islamic Law through a revisionist approach. However, Akh Minhaji argues that Coulson's approach to studying the development of Islamic jurisprudence is not much different from that of orientalist and other Western scholars. However, Coulson presented quite different findings from previous

¹⁸ Schacht, *An introduction to Islamic law*, 6-8.

¹⁹ Minhaji, "Noel James Coulson dalam Perspektif Orientalisme Hukum Islam.", 4.

²⁰ Fuad Zein is a lecturer at the Faculty of Sharia and Law, UIN Sunan Kalijaga Yogyakarta, Indonesia.

researchers with a similar approach.²¹ Some of the findings presented by Coulson in this book, on the one hand, are often considered “acceptable” and “on the track” to several research results and thoughts that have developed among Muslims. On the other hand, Coulson’s findings contradicted some of the findings of other Western scholars during Coulson’s time.

According to Coulson, Islamic jurisprudence is a comprehensive process of intellectual activity to ascertain and reveal the limits of God’s will and transform it into a system of rights and obligations that can be carried out according to the law (judicial decrees). Coulson argues that a series of conflicts in Islamic legal thought must be adequately understood within these limits.²²

Coulson uses a historical approach in photographing the development of Islamic jurisprudence. Several things that characterize the historical approach in the study of Islamic law are the codification of the rule of law, the application of law to events that occur, changes that occur due to changes in the context of the people who experience it, and those who follow the rules in the codification of the law.²³ The importance of studying social history in Islamic law is because the reality in the lives of Muslims in this field has become an integral part of Islamic law itself. People’s problems are almost always viewed from this perspective. The study of the social history of Islamic law is very much needed to understand the situation, condition, and psycho-social society at the time the Qur’an and hadith were revealed as sources of Islamic law. In turn, this understanding will be advantageous in the proper and proportional application of Islamic law according to the needs of the times.²⁴

The six conflicts presented by Coulson here are not an approach to conflict theory, as developed among Western scholars, as a product of the diversity of popular philosophies of life and political ideologies. The six conflicts are revelation and reason, unity and diversity, authority and freedom, idealism and realism, law

²¹ Coulson, *Konflik dalam Yurisprudensi Islam*, 1.

²² Coulson, *Konflik dalam Yurisprudensi Islam*, 2.

²³ Ajub Ishak, “Ciri-Ciri Pendekatan Sosiologi dan Sejarah dalam Mengkaji Hukum Islam,” *Al-Mizan* 9, no. 1 (Juni 2013), 138.

²⁴ Ajub Ishak, “Ciri-Ciri Pendekatan Sosiologi dan Sejarah dalam Mengkaji Hukum Islam,” 138.

and morality, and stability and change. Coulson moderated these six conflicts as a casuistic approach to the development of Islamic law. The six conflicts in Islamic jurisprudence are recorded in various books of *fiqh* in the classical period to the contemporary era, which has never been completely separated from the doctrines of Islamic jurisprudence in the classical period.²⁵ The six conflicts presented by Coulson are the six characteristics contained in Islamic Jurisprudence. The use of the term “conflict” in this book aims to show the contradictions in the characteristics of Islamic law, which Coulson then finds common ground between each of these conflicts.

1. Revelation and Ideas

According to Coulson, Islamic law is unique. Its uniqueness is because Islamic law combines God’s law and the law born by *fiqh* experts (*fuqahā’*). This depiction of Coulson is quite contradictory. On the one hand, God’s will have the attribute of His Omnipotence. Nevertheless, on the other hand, there is human nature in the *fiqh* experts who continue to develop in their behaviour. It is the first basis for the conflict between Islamic Law, revealed as a revelation from God and human thought (*fiqh* jurists). Based on that, Coulson tries to break this gap through the respective “duties” of God’s revelation and human reason. Coulson limits the definition of revelation to the two sacred texts of Islam, the Qur’an and hadith. The definition of hadith presented by Coulson is the decision of the Prophet Muhammad as the leader of the Islamic community. Both together cannot be said to be a comprehensive law. Although both contain a collection of Islamic Law decisions that gradually address the specific problems, they are widely distributed on various topics. Even according to Coulson, both are far from a description of a collection of legal writings and to be called a simple legal system is not.²⁶

Coulson then presents Imam Shafi’i as a figure who becomes the “mediator” in this contradiction between revelation and reason. On the one hand, Imam Shafi’i stood firmly behind the divine principle that inspired the traditions

²⁵ Coulson, *Konflik dalam Yurisprudensi Islam*, 5.

²⁶ Coulson, *Konflik dalam Yurisprudensi Islam*, 5.

as recorded in the traditions. On the other hand, Imam Shafi'i also accommodates human reason to determine the rule of law where the situation is not explicitly mentioned in revelation or hadith. As for a reason referred to by Imam Shafi'i, this is not free reason as understood by *ahl al-ra'yi*.²⁷ It is because reason in this position cannot be wholly separated from God's will, which is recorded in revelation. With this kind of opinion, Imam Shafi'i has recognized the authority of man (reason) in addition to the authority of God (revelation). The function of reason is to regulate new cases by enforcing the new case on the principle of God's revelation, which has governed the same case; this process is often called the *qiyās* (analogy) process.²⁸ In addition, Coulson also raises *istihsān*²⁹ as an alternative to solving cases when analogies are not considered to bring justice. According to Coulson, the reason is no longer merely a gift from God in *istihsān* theory but also has a role in processing decisions to produce justice and the public interest (*maslahah*).³⁰ In summary, these two theories (*qiyās* and *istihsān*) are classical legal theories that perfectly reveal the idea of law as a comprehensive system of God's commands. At this point, Coulson tries to find the intersection of the conflict between revelation and reason.

2. Unity and Diversity

The core of the discussion in this conflict of unity and diversity is Coulson's review of two madrasas in the early development of *fiqh*, namely the Madrasah of Kufa and the Madrasah of Madinah.³¹ In this discussion of unity and diversity, Coulson highlights the unity of sources of Islamic Law in the form of sacred texts (the Qur'an and sunnah) and tries to juxtapose them (to avoid contradicting

²⁷ Often referred to as Madrāsatul Kuffah, one of the most important figures is Ab anīfah, the pioneer of the Hanifi school. The hometown of this madrasa is in Iraq. See: Mannā' al-Qaṭān, *Tārīkh Tasyrī' al-Islāmī* (Kairo: Maktabah Wahbah, 2001), 289.

²⁸ Coulson, *Konflik dalam Yurisprudensi Islam*, 8.

²⁹ Linguistically it means "looking for something good". Ahl Al-Ra'yi often uses the method to solve legal cases when no legal texts contain certain legal cases.

³⁰ Coulson, *Konflik dalam Yurisprudensi Islam*, 9.

³¹ The meaning of language is school. However, what is meant in this discussion is Madrasah in terms of the history of the development of *fiqh* (Islamic law). The school of thought is the parent of different ways of taking the law. The Madrasa of Kufa, whose people are often referred to as Ahlu Ra'yi, which relies more on logic, and the Madrasa of Medina, whose people are called *ahl al-hadith*, relies more on the behaviour of the people of Medina. Muhammad Abu Zahrah, *Nadrah Tarikhiyyah fi Huduts al-Madzahib al-'Arba'Ah* (Beirut: Darul Qadiri, 1990), 24.

words) with the diversity in interpretation of these texts and their methodologies which results in various sect. Coulson presents the conflict between unity and diversity in the doctrine of Islamic Law as a natural and logical consequence of the fundamental conflict discussed earlier, namely God's revelation, which shows constant factors and human reason, which shows variable factors. In Islamic Jurisprudence, at least according to classical teachings, it is believed that Shari'ah law exists as a single understanding and uniform rules of behaviour prescribed by God for all His creatures. However, the efforts of human reason in understanding and describing this ideal law are relative. Consequently, the various results of juridical thinking about the contents of the shari'ah have been accepted as one reality.³² Coulson presented unity as a command or will of God and diversity as a form of varied interpretation adopted by jurists, at least in classical times.

In discussing the conflict between unity and diversity in Islamic Jurisprudence, Coulson presents the diversity of schools, especially the legal doctrines of the Sunni group, which are summarized in four significant schools of thought (Hanafi, Maliki, Shafi'i, and Hambali). To bring together the sides that seem to have gaps in this conflict of unity and diversity, Coulson presents a general theory about the diversity of understandings between schools united in a consensus (*ijmā'*). This *ijmā'* theory represents the essential criteria for legal authority in Islam and supports the entire structure of the legal theory. In this theory, the principle is a unanimous agreement between *fiqh* jurists who have the authority to issue legal opinions, occupy a level of authority below the text and are absolute.³³

Coulson presents evidence of Islamic jurisprudence in the contemporary era, proving that modern judges and jurists can independently determine legal regulations and decisions by interpreting Islamic holy texts (revelation). It is a sign that the issue of closing the door to *ijtihad* is not entirely accurate. By opening the door to *ijtihad*, it is possible to give a decision that is considered "fairer" in the context of the case at hand. As recorded in the Syrian Family Law

³² Coulson, *Konflik dalam Yurisprudensi Islam*, 10.

³³ Coulson, *Konflik dalam Yurisprudensi Islam*, 26.

passed in 1953, there is a triple *talāq* ruling.³⁴ Which is no longer considered a termination of the marital relationship and is only counted as one divorce, which the husband can withdraw. It is intended to allow both to calm down and think clearly. According to classical *fiqh*, its decision is quite deviant from the divorce law.³⁵

3. Authority and Freedom

In the previous discussion, it has been described how variations in juridical decisions in Islamic law appear, which, although different, are still within the scope of the primary source of Islamic law in the form of revelation in sacred texts. The question raised by Coulson next is about the authority of these Islamic laws on legal practice and the extent to which Islamic jurists are free to exercise their authority in determining the law. It is done by Coulson at the same time to compare general attitudes and views that have prevailed since the early Middle Ages to the modern era in the generally accepted interpretation of God's revelations or the interpretation of new cases, whether a judge or jurist has personal freedom to decide, or obliged to follow the authority that has been recognized by the jurists before?³⁶

In short, Coulson raised the issue of "the closing of the door of *ijtihād*", which was then echoed to be reopened by reformers of Islamic thought in the contemporary era. At this point, Coulson also highlights the grouping of the ulama into schools based on the belief of a scholar to one of the leaders or pioneers of the school that he felt was suitable for his time. It creates conditions in which the followers of the madhhab conform to their legal decisions and extols the virtues of the authority of the madhhab leader.³⁷ An example is that out-of-court divorce has no legal consequences in the Tunisian Personal Status Law of 1957. A husband who wishes to divorce his wife must appear before the court and divorce her in court.³⁸

³⁴ Saying the word divorce three times at one time.

³⁵ Coulson, *Konflik dalam Yurisprudensi Islam*, 57.

³⁶ Coulson, *Konflik dalam Yurisprudensi Islam*, 59.

³⁷ Coulson, *Konflik dalam Yurisprudensi Islam*, 51.

³⁸ Coulson, *Konflik dalam Yurisprudensi Islam*, 58.

4. Idealism and Realism

Coulson highlights the idealism of traditional *fiqh* doctrine, with the legal practice that is never separated from social reality. Coulson tries to explain it by asking the main question to what extent pure doctrine can be translated into the actual practice of law.³⁹ Coulson raises several cases in dissecting this fourth conflict. One of them is about a person's testimony in the prosecution of a murder case, which requires the presence of two witnesses who meet the requirements of testimony stating that they saw the defendant leaving the victim's house with a gun covered in blood, the victim was found alone at the crime scene and was not found or seen by the others. In classical *fiqh* doctrine, judges are forbidden to conclude that the accused is the perpetrator of the murder. This kind of evidence can only be understood as "suspicion".⁴⁰ The certainty of the decision can only be ascertained through the oath process of fifty people who reinforce it carried out by the victims' families. This kind of practice is considered ideal for saving judges from being burdened with legal decisions because decisions are based on the plaintiff's oath (if the lawsuit is accepted) or from the defendant's side (if the defendant's defence is accepted). Nevertheless, there is the potential to punish innocent people in practice or vice versa.⁴¹

In simple terms, the gap between idealism and realism in Islamic law can be expressed by the difference between legal doctrine and legal practice. Through a realistic approach to the role of law in society, it means that in the past and present, idealism in matters of doctrine and practice must be subordinated to the interests of the state and society at that time. Although the classical era of *fiqh* doctrine is still seen as an ideal life for its time, and there are real criticisms, classical *fiqh* doctrine and its idealism remain the central point of Islamic law thought. All that can be concluded is that all-natural decision-making processes

³⁹ Coulson, *Konflik dalam Yurisprudensi Islam*, 74.

⁴⁰ In Arabic it is called "Allaus," as stated in *Fatḥ al-Qarīb al-Mujīb fī Syarḥ Alfāz al-Taqrīb*. Allaus has closest meaning to "suspicion," or "hint proof" in legal terms. For more, see Muḥammad Ibn al-Qāsim al-Gazzī al-Garābilī, *Fatḥ al-Qarīb al-Mujīb fī Syarḥ Alfāz al-Taqrīb au al-Qaul al-Mukhtār fī Syarḥ Gāyat al-Iḥtiṣār*, (Bairūt: Dār Ibn-Ḥazm, 2005), 277.

⁴¹ Coulson, *Konflik dalam Yurisprudensi Islam*, 80.

do not permanently injure idealism in classical *fiqh* doctrine. All these processes are part of the existing system of Islamic law.⁴²

5. Law and Morality

In the primary material source of shari'a (the Qur'an), there is no clear and consistent distinction between morals and the rule of law. Just like the ethical formulation of Islamic Law, the Qur'an sets out the main issues to distinguish what is right and what is wrong, sound, harmful and appropriate and inappropriate. In general, the teachings in the Qur'an can be understood merely to indicate a standard of behaviour that is acceptable or not by God and then accompanied by a statement of the consequences of liking or disliking God.⁴³

At the theoretical level, Coulson highlights the totalitarian nature of sharia and a comprehensive regulation concerning behaviour that covers every aspect of human life, regulating the individual's relationship with God, with the state, neighbours, and even with his conscience. According to Coulson, the difference between legally enforceable rules and morally desirable rules is not between obeyed or disobeyed rules. The value of ethical standards cannot consistently be implemented by judicial practice in court. At this point, Coulson considers that there is a gap between law and morals in Islamic jurisprudence.

Coulson highlights the emergence of *hiyāl* cases in this gap,⁴⁴ which Coulson describes as a "legal trick". The appearance of *hiyāl* to circumvent the law is a form of moral violation, although later, it is legally acceptable. In addition, Coulson also highlights *muḥallil*⁴⁵, practices that have occurred and are recorded in Islamic Jurisprudence, which *fiqh* prohibits because they injure morals. Coulson also highlighted the emergence of a ruling in Tunisian law in 1957, which stated that polygamy was prohibited. It is based on the possibility of fair dealing

⁴² Coulson, *Konflik dalam Yurisprudensi Islam*, 88.

⁴³ Coulson, *Konflik dalam Yurisprudensi Islam*, 100.

⁴⁴ *Hiyāl fiqhī* is an attempt to cheat the provisions in *fiqh*. In the rules of *ushūl fiqh* it is stated: "Any legal strategy that results in the cancellation of something that is true or justifies something void, then the law is haram."

⁴⁵ The term is used for people who become "*halāl*" for a woman divorced three times by her husband and wants to be remarried. *Fiqh* provisions state that if three *talaqs* have occurred, then the ex-husband cannot remarry as long as someone else has not married and has had sexual intercourse after the marriage has occurred, is then divorced, and the 'iddah period has expired.

as a condition for polygamy in the Quran, which is impossible to achieve. On the one hand, it is more in favour of women's morals, and however, on the other hand, it can be implemented as a fundamental law.⁴⁶

Furthermore, according to Coulson, in contemporary Islamic jurisprudence, there has been a revival of legal moralism, especially in the field of family law. When the court determines that the divorce is for the right reasons or the polygamy offered does not harm the wife's rights, it can be considered an effort to implement ethical standards rooted in the doctrine of the Shari'a. In fact, according to Coulson, the root of ethical standards of sharia doctrine has long been ignored by the practice of sharia courts. Based on the legal provisions pioneered by contemporary Islamic jurists in the Middle East region, religious (Islamic) courts are expected to carry out their duties as guardians of the morals of society.⁴⁷

6. Stability and Change

In the discussion of stability and change, Coulson is trying to consider the general understanding of the phenomenon of change in the contemporary era and the importance of this conflict in terms of the development of jurisprudence. In this discussion, all the contradictory characteristics are summarized by Coulson, thus forming a distinct characteristic in Islamic Jurisprudence.⁴⁸

The stability referred to by Coulson in this sixth conflict is the stability of classical *fiqh* doctrines and the stability of Islamic jurisprudence in the previous period. Meanwhile, what is meant by change is a change in development in the substance of Islamic law. Coulson explained that developments in the substance of family law, as determined through the process of Islamic jurisprudence, have carried quite a strong meaning. One of them is the elevated status of women, and it is reflected in women's freedom from marriage obligations that their guardians must sign. In addition, changes in the substance of family law for women also occur in granting the right to apply for a divorce if the husband commits a

⁴⁶ Coulson, *Konflik dalam Yurisprudensi Islam*, 116.

⁴⁷ Coulson, *Konflik dalam Yurisprudensi Islam*, 118.

⁴⁸ Coulson, *Konflik dalam Yurisprudensi Islam*, 120.

marriage violation. Coulson views that the progress of Muslim women toward the ideals of gender equality is a fundamental evolutionary process of Muslim society.⁴⁹

Furthermore, Coulson explained the classical doctrine, which deals with the essence of God's revelation, which is comprehensive and has a decorative principle. In classical doctrine, any rule of law must come from God's revelation, either directly by mentioning it in sacred texts or through a process of analogy. Gradually, this gave way to the attitude that the human mind has the freedom to dictate the rule of law, except in matters that have been regulated in the text. Therefore, no further justification is needed for a legal regulation other than the basis of social values and the wishes of the broader community outside the norms that have explicitly been stipulated in sacred texts.⁵⁰

According to Coulson, the views of the *fiqh* experts in classical times deserved to be fully obeyed and should not be taken lightly. However, the right to dissent is undeniable for the courts of today's era. Such a statement can be equated with the rejection of the doctrine of *taqlid* in a broad sense. Courts in today's era are no longer bound always to follow either the substantive doctrines of traditional authorities or the principles of legal thought, which are the formal basis of courts. For Coulson, this kind of thing shows that the law returns to the freedom of legal speculation called "ra'yu", as has happened in the early days of the development of *fiqh*.⁵¹

D. Coulson's Thoughts: Criticisms and Contributions to the Study of Islamic Law

Coulson dissects classical *fiqh* doctrines through various findings of judicial decisions in the contemporary era, which seem "bold" and are considered contradictory to classical *fiqh* doctrines. For example, Tunisia's 1957 Personal Status Law states that out-of-court divorce has no legal effect and contradicts the provision of divorce (*talāq*) in classical *fiqh*. In classical *fiqh*, *talāq* is a privilege possessed by a husband to break the marriage bond, even without cause. Divorce is

⁴⁹ Coulson, *Konflik dalam Yurisprudensi Islam*, 121.

⁵⁰ Coulson, *Konflik dalam Yurisprudensi Islam*, 129.

⁵¹ Coulson, *Konflik dalam Yurisprudensi Islam*, 133.

permissible (*mubāh*) but is hated by God, and it opens the opportunity for a husband to use talak arbitrarily to break the marriage bond.

Coulson saw that the 1957 Tunisian legal provisions were not contradictory to the introductory *fiqh* provisions on divorce but an innovation in Islamic jurisprudence that accommodated the needs of the people of his time.⁵² From one of the examples of cases raised by Coulson, he tries to find the connection and roots of ties with traditional *fiqh* doctrines. Interestingly, Coulson can present this conflict rather than as a problematic contradiction. Coulson views traditional Jurisprudence (classical *fiqh* era to medieval times), contemporary *fiqh*, along with decisions in Islamic law courts as an actual legal entity. Although Coulson brought up the concept of conflict in the development of Jurisprudence, he describes sides that seem to be opposites but have a common ground and knit them back together into a unified legal system that is still developing.

The novelties offered by Coulson in *Konflik dalam Yurisprudensi Islam* are things that seem contradictory; when they are examined to seek their roots in the classical *fiqh* doctrine, there's no contradiction in the literal meaning. Coulson's interesting theory is *al-siyāsah al-syar'iyah* which Coulson calls an attempt at the dichotomy between law and morality.⁵³ The implication is that Islamic law can survive in family law, while Western legal ideas can displace laws relating to the state and the economy.

One thing that needs to be underlined in reading Coulson's work is that Coulson still carries the boundaries of Western scholars who seem dichotomist in studying law and morals (ethics). For most Western scholars, ethics that do not interfere with the rights of others is not a violation of the law. In contrast to Islamic law, the law of adultery in *fiqh*, for example, implies that adultery is prohibited for anyone because adultery is defined as sexual relations between two people outside of marriage (and not with their slaves when there were slaves). It is closely related to the morals instilled by Islamic law to form a society that is obedient and adheres to private ethical norms. Even if it does not injure the rights of others, it is still considered a violation if it is done. In addition, Coulson does not distinguish or at

⁵² Coulson, *Konflik dalam Yurisprudensi Islam*, 59.

⁵³ Coulson, *Konflik dalam Yurisprudensi Islam*, 84.

least provide quite clear definitions of the differences in the use of the terms *fiqh*, Islamic Law, and Shari'ah. It is important to underline because, for activists in the study of Islamic law, the different definitions of the above terms can carry different meanings.

In addition, Coulson considers *taqlid* as a phase of decline in the development and debate of Islamic Law. Coulson emphasizes the pattern of modernism thinking as a variable that makes Islamic law dynamic again. Coulson's descriptions show an excellent appreciation for the renewal of Islamic law as a starting point for the revival of freedom of thought and the search for the fundamental values of sharia in the practice of implementing Islamic law. However, this Coulson's view is opposed by Wael B. Hallaq. According to Hallaq, Islamic law has never experienced stagnation in the sense of stagnation in legal innovation. In the study of Islamic law, the dynamics of *ijtihad* still exist, even though Islamic law thinkers do not claim to be *mujtahids*. Thus, Hallaq argues that the issue of closing the door to *ijtihad* in the practice of Islamic law has never actually occurred.⁵⁴

E. Conclusion

Through his works, Coulson conducts a study of the social history of Islamic law. The social history of Islamic law is a study of Islamic law thought that views Islamic law as a product of thought and results from the interaction between a thinker of Islamic law and the surrounding environment (socio-cultural and socio-political context). This aspect is crucial in the historical approach to the study of Islamic law.⁵⁵ Coulson points out that the task of Islamic jurists in this modern era is the same as that of their medieval predecessors, namely, to ensure that the primary ethical criteria and norms in Islam function in society.⁵⁶ The empirical-historical-inductive approach model, at this time, is still reasonably needed to explain and answer legal problems, considering the understanding of the source texts of Islamic law (the Qur'an and sunnah) is not absolute and final but has a relativity side that

⁵⁴ Fanani, "Perspektif Coulson terhadap Rumusan Dialektika Hukum Islam," 121.

⁵⁵ Setiyanto, "Pemikiran Hukum Islam Imam Malik bin Anas (Pendekatan Sejarah Sosial)," 177.

⁵⁶ Muhammad Ilyas and Zainab Ameen, "Analytical Review of Noel James Coulson Book's A History of Islamic Law," *Journal of Islamic Civilization and Culture* 3, no. 1 (2020): 168-189.

follows the context of the actors who carry out the understanding and translation of the text to the rule of law. Historical data on the study of Islamic law of this kind is expected to be a means to encourage the emergence of original and creative (and innovative) thoughts among experts in Islamic law or Islamic studies in general.⁵⁷

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⁵⁷ Ajub Ishak, "Ciri-Ciri Pendekatan Sosiologi dan Sejarah dalam Mengkaji Hukum Islam," 140.

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