

## THE JUDGE'S ROLE IN ISLAMIC FAMILY LAW REFORM IN INDONESIA

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### Abstract

*There is no eternal on the earth, said the Greek philosopher Heraclitus (540- 480 BC), except the change. This famous phrase greatly affect many aspects, not least the development in the field of Islamic family law in Indonesia. Family law reform has become a sort of primary petition in every era given the dynamics of community life continues to grow rapidly. Therefore, the law is not adaptive and do not have a range beyond its time not unlike the dead artifacts in the museum's history. While the law is the law of life that has a historical footing and strong social legitimacy in tune with the pulse of public life. That's the law of political design is aspired by all the people in the coming era.*

**Keywords :** Reform, Islamic Family Law, The Judge's Ruling, Religious Courts, Legal Discovery, Creation of Law

### ملخص البحث

يروى عن الفيلسوف اليوناني هيراكليتس أن الشيء الوحيد الثابت في هذه الدنيا هو التغيير. ونجد لهذه المقولة صدى في تغير الأحكام القانونية في مجال الأسرة المسلمة في إندونيسيا، وهو ما جعل من الدعوة لتجديد تلك الأحكام دعوة شبه دائمة على مر الأوقات، نظرا للحركية الاجتماعية المطردة. ولا تخلو تلك الدعوة للتجديد من إشكاليات عدة تتعلق بالسياق السياسي القانوني لتقنين الشريعة الإسلامية في إندونيسيا، وهو ما تناقشه هذه المقالة بالتفصيل.

الكلمات الدالة : التجديد ، قانون العائلي الإسلامي ، قرار القاضي ، محكمة شرعية ، إيجاد الحكم ، إبداع الحكم

### Introduction

Advances in science and technology fast-moving information often give birth to new complex problems and require adaptive legal framework. While the norms contained in the books of fiqh as written in the past has lost its context and requires a new interpretation of contemporary space.

Many factors underlying that Islamic family law reform becomes inevitable. Rashid Ridho argued that if the law is not enacted by the barrel to the interests of the community, then it should be immediately updated with the new law in accordance with the circumstances, time and place in society who implement the law it.<sup>1</sup>

Imam Shafi'i's theory of *qaul qodim* and that of *qaul jadid* also stated that the law may change over *illat* (legal reasoning) changing the law in establishing an incident that similar to *maqasid al-shariah*.<sup>2</sup> Ibn al-Qayyim popular call in a rule: "*Taghayyur al-Fatwa wa bi Ikhtilafuha Hasab Taghayyur al-Azminah al-Amkinah wa al-Ahwal al-Niyyat wa al-Awaid*" (Change fatwa and the difference is based on the change of time, place, social conditions, motivation and traditions).<sup>3</sup> That is, the basic concepts of text and downs in the scriptures is to enforce the benefit. When the benefit as the objectives of the law that has lost its context, it is no longer relevant to be implemented. Similarly, if the texts are accompanied by *illat* have lost footing their phenomenologic, then the law is also considered complete.

Abdul Manan explained that cause of the need to reform of Islamic law for several reasons. *First*, to charge the law void because the norm in fiqh is not set, while the needs of the community against the law in facing a new problem is urgent. Indeed, there is no legal vacuum term because fact what happens is void laws. This argument is corroborated by the opinion of the Roman philosopher in the 19th century, Cicero, in the popular phrase "*ius ibi societas potatoes*" (where there is no community law). That is, in the existing community legal value that grows in the form of customs and beliefs. *Second*, the influence of economic globalization and science and technology so that there should be laws that govern it, especially problem no legal rules. *Third*, the effect of reforms in many fields that provide opportunities the Icelandic law to make a reference in national law. *Fourth*, the influence of Islamic legal thought reform undertaken by the mujtahid both international and national levels, especially concerning the development of knowledge and technology.<sup>4</sup>

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<sup>1</sup> Abdul Manan, *Reformasi Hukum Islam di Indonesia; Tinjauan dari Aspek Metodologis, Legislasi, dan Yurisprudensi*, (Jakarta: RajaGrafindo, 2006), p. 156.

<sup>2</sup> Ahmad Nakhrowi Abdul Salam, *Imam Syafi'i Mazhab Qadim wal Jadid*, Disertasi (Cairo: Al Azhar University, 1994), pp. 30-32.

<sup>3</sup> Ibnu al-Qayyim, *I'lam al-Muwaqqi'in 'an Rabb al-Alamin*, vol. III (Kairo: Mathba'ah al-Muniriyah), p. 1.

<sup>4</sup> Abdul Manan, *Reformasi Hukum Islam...*pp. 153-154.

## Law Reform Limitation

Islamic history or rather the history of Islamic culture since its inception has paved the renewal tradition as the main road. This is because the reform movement is very much encouraged by the Qur'an (QS.7: 170 and QS.11: 117) and the traditions of the Prophet Muhammad are narrated by Abu Dawud: "*Allah will send these people (Muslims ) at the beginning of every century who will renew (improve) the affairs of religion.*"<sup>5</sup> Therefore, it is fair in the tradition of Islamic thought has always born the reformers, for instances Abdulkarim Soroush, Abdullah Ahmed An Na'im, Ali Shariati, Amina Wadud, Asghar Ali Engineer, Fatima Mernissi, Muhammed Abed Aljabiri, Muhammad Abduh, Muhammad Shahrour, and others.

In Islam the word reform known as *tajdid* which is a form of words *masdar-jaddada yujaddidu*. In Arabic also known *tajdid* term '*aks al-qadim* (*tajdid* is the opposite of *qadim*).<sup>6</sup> *Tajdid* and *reconciliation* are two terms that are often used side by side. Although both almost have similar meanings but substantially more appropriate word *tajdid* used to discuss legal reform. *Tajdid* updates have meaning, whereas *reconciliation* means purification.<sup>7</sup>

Lawrence Friedman argued that the conversation particulars of legal reform can not be separated from the three domains, namely the structure, substance and legal culture.<sup>8</sup> While jurists mostly agreed reform law contains at least two meanings. *First*, in an effort to update the positive law (modern law). *Second*, in an effort to use the law, ie by way helped organize social change according to the needs of people.<sup>9</sup> Qualification law reform shows that the development of the law is not limited to the activities of legislation, but rather on efforts to make the law as a tool of social engineering. Having regard to the definition of "renewal" and the opinion of legal experts on legal reform. The notion that legal reforms have a hard effort to reform device structure, substance and legal culture that the law is more adaptive and responsive to the problems that occur in the community.

Reforming law itself has a diverse counterpart. In Indonesia, there who use the term legal development, legal changes, legal guidance, legal modernization

<sup>5</sup> Mukhtar Zamzami, Paper "*Pembaruan Hukum*", 2010. p. 5.

<sup>6</sup> Abdul Manan. *Reformasi Hukum Islam...* p. 146.

<sup>7</sup> Bustami Muhammad Saad, *Maqsum Tajdid Ad-Din*, (Kuwait: Dar ad-Da'wah), p. 27.

<sup>8</sup> Soetandyo Wignjosoebroto, *Hukum yang Tak Kunjung Tegak: Apa yang Salah dengan Kerja Penegakan Hukum di Negeri Ini?*, in "*Dialektika Pembaruan Sistem Hukum Indonesia*", (Jakarta: Komisi Yudisial RI), p. 4.

<sup>9</sup> Satjipto Rahardjo, *Hukum dan Perubahan Sosial*, (Bandung : Alumnus, 1983), p. 93.

and reform of the law which is a translation of *legal reform*. Although many kinds of terms that are used, if it refers to the sense of renewal itself, the term is more appropriate because of legal reform better describe the effort constructing a legal system that can accordance with themselves on the dynamic changes occurring in society.<sup>10</sup>

## Family Law

The term is derived from the family law *Familierecht* translated from Dutch language, or of English *law of family*. Family law is defined as the overall conditions governing the legal relationship concerned with blood kinship and family as a marital relationship.

Given the wide range of literature that explores the specifics of Islamic family law, there are some terms that are commonly used family law as a counterpart. In Arabic the term Islamic family law called *al-Ahwal al-Syakhsiyah*. In it regulate family life that starts from the beginning of the formation of the family. Sometimes also commonly referred to as *Nidham al-Ussrah* that said *al-Ussrah* itself has meaning nuclear family. In Indonesian Islamic family law term is sometimes also called the law of marriage or legal individuals.<sup>11</sup>

Wahbah Zuhaili<sup>12</sup> defines a family law or commonly known as *al-ahwal al-shakhsiyah* as follows:

أحكام الأسرة من بدء تكوينها إلى نهايتها من زواج وطلاق ونسب ونفقة وميراث، ويقصد بها تنظيم علاقة الزوجين والأقارب بعضهم ببعض

R. Subekti also defines family as the law governing the matter legal relations arising from family relationship, marriage and their relationship in the field of property law between husband and wife, the relationship between parents and children, guardianship and *curatele*.<sup>13</sup>

In the literature of jurisprudence hardly found true classic nomenclature family law (*al-ahwal al-syakhsiyah-personal law*), even though the discussion that became the contents of these terms have been proposed. This reinforces the notion that the term arises from another legal system and then used in the

<sup>10</sup> Satjipto Rahardjo, *Membangun dan Merombak Hukum Indonesia*, (Yogyakarta : Genta Publishing, 2009), p. 15.

<sup>11</sup> Khoiruddin Nasution, *Pengantar dan Pemikiran Hukum Keluarga (Perdata) Islam Indonesia*, (Yogyakarta: Tazzafa & ACAdemia, 2010), pp. 5-7.

<sup>12</sup> Wahbah Zuhaili, *al-Fiqh al-Islami wa Adillatuhu*, (Beirut: Darul Fikr al-Mu'ashir, 2001), p. 33.

<sup>13</sup> R. Subekti, *Pokok-Pokok Hukum Perdata*, (Jakarta: PT Intermedia, 1987), p. 16.

codification of Islamic law.<sup>14</sup> This assumption is stronger when it is known these terms appear in the future when the European influence is quite strong against Islamic countries. According N.J. Coulson, the 19th century onwards, lasting more intimate contact between Islam and Western civilization, so the legal developments influenced slowly and be the discussion in Islamic law.<sup>15</sup>

The emergence of the term family law in the Islamic world the first time in 1893 when a prominent Egyptian judge, Muhammad Qadri Pasha compiled the rules of family law in his essay *al-Ahkam al-Shar'iyat fi al-Ahwal al-Syakhsyiyat ala Madhhab al-Imam Abi Hanifa al-Numan*. This compilation contains 646 chapters which contains the rules of the Hanafi school of law based on marriage, divorce, dowry, prohibition, wills and inheritance.<sup>16</sup> The compilation is heavily influenced by the formulation in the Western tradition, especially in the preparation of legal rules in the form of articles, as also happened in the codification *Majallah al-Ahkam al-Adliyah*.<sup>17</sup> The use of terminology family law (*al-ahwal al-syakhsyiyah-personal law*) as initiated by Muhammad Qadri Pasha is continued in a series of other family law codification in various parts of the Islamic world, such as in Jordan, Syria, Tunisia, Morocco, Iraq and Pakistan.

In year 1917 Turkey enacted laws family law entitled *Qanun al-Qarar al-Huquq Ailah al-Usmaniyyah*. This law contains 156 articles on family law, minus the provisions regarding inheritance. Unlike the compilation Qadri Pasha based on the provisions of the Hanafi school of law, this law actually cross-sect by using the principle *tahayyur* (*eclectic choice*) as the starting point approach.<sup>18</sup> Although this legislation did not last long, because of the political upheaval Turkey, but it has an important position in the development of Islamic family law in the Islamic world.

### The Gate of Family Law Reform

Observing the various typologies of family law reform in Indonesia there are three of the most prominent efforts and become gate of starting point update. *First*, through legal political legislation in the House. The legislature

<sup>14</sup> Majalah Digital Peradilan Agama Edisi VII, *Pembaruan Hukum Keluarga Islam di Indonesia*, Ditjen Badilag MA RI, Jakarta, 2015.

<sup>15</sup> N. J. Coulson, *A History of Islamic Law*, (Edinburg: Edinburg University Press, 1964), p. 149.

<sup>16</sup> Lama Abu Odeh, *Modernizing Muslim Family Law: The Case of Egypt in Vanderbilt Journal of Transnational Law*, Vol. 37, 2004, p. 1101.

<sup>17</sup> Joseph Schacht, *An Introduction to Islamic Law*, (Clarendon: Oxford University Press, 1982), p. 101.

<sup>18</sup> Tahir Mahmood, *Statutes Personal Law in Islamic Countries (History, Texts and Comparative Analysis)*, (New Delhi : Academi of Law and Religion, 1995), p. 82.

has a key position in the design and updating of various laws and regulations relating to family law.

As a guideline, the government has formulated the National Long-Term Development Plan (Rencana Pembangunan Jangka Panjang-RPJPN) 2005-2025 in designing the construction of the law. In it called that reforming legal materials should pay attention to the plurality of the prevailing legal order and the impact of globalization in order to increase certainty and legal protection, law enforcement and human rights, legal awareness and legal services with a core of justice and truth, order and welfare within the framework of the implementation of the more orderly state, regular, smooth, and globally competitive.<sup>19</sup>

The spirit of RPJPN must be able to be translated to produce family law legislation across the ages, accommodating towards pluralism of society, and justice. For example, Indonesia has Law No. 1 of 1974 on Marriage, which until now has not been updated. Since promulgated on January 2, 1974 and effective from October 1, 1975, the Act survived for 40 years without experiencing amendments except for a few times a judicial review by the Constitutional Court Decision.

M. Atho' Mudzhar speculated on the reasons why the Act was last so long. *First*, people may feel the law is still inadequate to address the growing now. *Second*, it may also actually happens is that the status quo between the parties that want to maintain the law and those who want to change it. For those who want to eternalize, particularly from the conservative Islamic religious figures, to look that the content of the law is relatively close to the Islamic law. Some even say that the law is a manifestation of Islam in Indonesia in the field of marriage law.<sup>20</sup> So if the Marriage Act has been adequate so no need to update?

There are four attributes that should be contained in the law of the legislation is no exception Law No. 1 In 1974, the *attribute of authority*, the *attribute of universal application*, *attribute of obligation*, and the *attribute of sanction*. Apparently in Law No. 1 of 1974 has not set the *attribute of sanction* or how the threat of sanctions imposed for violations. So underhand marriage, polygamy illegal, smuggling age of marriage, and so forth.

Perhaps the idea of sanctions for violators of family law will be opposed by conservative religious leaders as the criminalization of religious law concerning

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<sup>19</sup> Asri Umar, *Rencana Pembangunan Jangka Panjang Nasional Tahun 2005-2025*, ( Jakarta : Citra Utama, 2007).

<sup>20</sup> M. Atho Mudzhar, *Pembaruan Hukum Perkawinan di Indonesia*, Paper presented in Forum Diskusi Hukum pada Direktorat Jendral Peradilan Agama, Mahkamah Agung RI, pada tanggal 4 Agustus 2015 di Kantor Ditjen Badilag, Jalan Jendral Ahmad Yani Kav. 58 Bypass, Jakarta. p. 1.

marriage. But indeed in some other Muslim countries it is already underway. In Jordan, for example, based on the Rights of the Family Law (*Qanunu huquq al-'Ailah* or the *Law of Family Rights*) No. 92 1951 last amended by Law No. 61 in 1976, stated in Article 17 paragraph (3) that if a marriage ceremony has taken place without registered to the office or an authorized officer, the man who led the implementation of the marriage contract and the parties to a marriage contract as well as the witnesses were threatened with punishment as stipulated in Article 279 the Code of Criminal Jordan namely the confinement body between one and six months and a fine of not more than 100 Jordanian Dinar. By contrast, in Article 17 paragraph (4) stated that the Marriage Registration Officers who are not officially record a marriage ceremony that has taken place legally and had paid the registration fee according to the terms and conditions of existing, threatened with punishment as set forth in the Book of Laws Jordan is criminal confinement Article 279 bodies between one to six months and a fine of not more than 100 Jordanian Dinar and removed from office.<sup>21</sup>

In Indonesia, the initiation of the inclusion of sanctions is still weak. Though the law was created to comply and maintain public order. Plural violations of family law should be a concern legislature to accommodate the positive things that are applied in the legislation Muslim countries.

Similarly in Pakistan, based on Muslim Family Law Ordinance (MFLO) in 1961 with all the changes in Article 5 obligations stipulated registration of marriages and the failure of the parties to a marriage to keep records is punishable by a maximum imprisonment of three months entity and a fine of 1000 rupees , In Malaysia in Negeri Perak, based on Islamic Family Law which came into force in 1984, there are at least 21 (twenty one) setting penalties and the threat of imprisonment or fines. One is in Article 33 which states that a resident or citizen of Negeri Perak who did the ceremony outside the Negeri Perak within six months of the marriage ceremony was not registered their marriages before Officials (Office) Registrant Marriage, Divorce, and referred to the nearest Muslims or representatives abroad then it is punishable by a fine of 1000 Ringgit of Malaysia and or imprisonment of six months.<sup>22</sup>

*Second*, reform family law can be done through scientific study and research. There have been many Muslim scholars and professors in college who intensely conduct studies and scientific research focusing on family law. Results of these studies are proved useful utility and is able to solve problems in the

<sup>21</sup> *Ibid.* pp. 5-6.

<sup>22</sup> *Ibid.* pp. 6-7.

community. The academics are also a lot of the informant and explaining the appropriate expertise in the legislature in the capacity of giving opinion in the formulation of the draft legislation. Even being a teacher teaching for judges who will give birth to law enforcement updates.

At the end of the 20th century, the scholars of the world actively establishing scientific groups and centers of Islamic studies. One is the famous Islamic Studies at Al Azhar University, Cairo, founded in 1961. Its members consist of the great scholars with extensive science in the field of law and legislation. The study results disseminated to predominantly Muslim countries, including Indonesia.<sup>23</sup>

*Third*, reform family law through the judge's decision. Judiciary institution has an important position in the Indonesian legal system because it performs functions that essentially completes the provisions of any written law through the legal establishment (*rechtsvorming*) and legal discovery (*rechtsvinding*). However, the indicators of the success of the development of law in Indonesia has been seen from the number of laws produced by the legislature. Admittedly, in the history of law is strongly influenced by the politics of national law. Similarly, Islamic law in Indonesia, it was always under the influence of political forces. Therefore, the configuration of the establishment of Islamic law in Indonesia is always accompanied by *vested political interests*.<sup>24</sup>

Sentence actually also have a greater role in Islamic family law reform in Indonesia. One of the reason, because the law does not regulate or less complete, legal materials in jurisprudence has lost its context, so that judges diligence in establishing a case. Islamic family law reform through a court decision can be seen through the decision on was borrowed, substitute heirs, heirs of different religions, and so forth, all of which is a new thing in the development of Islamic law.

Codification actually become a major feature in countries that follow the civil law tradition. Indonesia as the former Dutch colony which adheres to the civil law tradition, tend to follow the civil law tradition. Nevertheless, the legal tradition in Indonesia also recognizes the legal source outside the legislation. In practice, Islamic family law reform in Indonesia it is mostly done through a verdict that became jurisprudence.

Soetandyo Wignjosoebroto distinguish between legal reform in the sense of *legal reform* with legal reform in the sense of *law reform*. Legal reforms in the *legal* sense *legal reform* only as a subsystem context and serves as a *tool of*

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<sup>23</sup> Abdul Manan, *Reformasi Hukum Islam...*, p. 197.

<sup>24</sup> Sirajuddin, *Legislasi Hukum Islam di Indonesia*, (Bengkulu : Pustaka Pelajar Offset, 2008), p. 122.



*social engineering*. The law only became part of the political process that may also progressive and reformative. Legal reform here can be narrowed as the reform legislation. As the political process of legal reform involves only the thoughts of politicians or too little of the professional elite who have access to the lobby. Indonesia according Soeytandyo included in this category. It is air different from the legal reform in the sense of *law reform*. In this form of the law is a matter for the judges and other law enforcement agencies and the general public. May have been created in the form of legislation, but the law is not sacred above all. In this draft law is the product of political activity of the people are sovereign, which is driven by the interests of a sovereign people who may be inspired by the need for economic, social norms, or the values of the culture of the people I deal itself.<sup>25</sup>

Legal reform in the sense of *law reform* over the course relevant to the spirit of Article 5 paragraph (1) of the Act (Act) No. 48 of 2009 on Judicial Power. In that sense, the judge has a central role to reform the law on the laws that have been outdated or anyway not yet explicitly regulated by adhering to the philosophical responsibility for the judge to explore, follow, and understand legal values and sense of justice in society. Therefore, judges should be encouraged to venture into the 'activist' to perform *judicial activism* which can simply be defined as the application, the invention and creation oriented law to justice. *Judicial activism* is still a prolonged controversy throughout the world. Same controversy when debating which should come first between *legal justice*, *social justice* and *moral justice*.

Thus the urgency of the discovery of the law for the creation of a justice, judge very vulnerable position to be highlighted when only fixated on dogmatic rules in applying the law. In fact, the provisions of Article 22 of the Algemeen Bepalingen (AB) a judge can be prosecuted when refusing to examine and hear the case on the grounds the law is unclear or vague.

### **Problem of Civil Law School**

However, large problem facing the Indonesian legal system that embraces the culture of *civil law system* is when the judges did not fully implement sound legislation. It becomes worry among judges because it had surfaced when the House of Representatives seeks to insert Article criminalization to the judge when deciding the case was not based on law.

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<sup>25</sup> Soetandyo Wignjosoebroto, *Pembaruan Hukum Masyarakat Indonesia Baru*, in : Donny Donardono, *Wacana Pembaharuan Hukum di Indonesia*, (Jakarta: Ford Foundation & HuMa, 2007), p. 94.

Here the problem when a law has been transformed into a law which is the main principle in the culture of *the civil law system*, including Indonesia. The presence of this style legal system should not be obeyed because of me merupakan absolute historical product that was brought by the Dutch Colonial, which later manifest into aspects of the substance, structure, and culture of Indonesian law until now.<sup>26</sup>

If the observed *civil law* system contains many little issues that affect the governance Indonesia law. *First*, the culture *civil law* legal system must be in writing or poured in the form of legislation (principle of legism). Legislation has advantages in meeting the objectives of certainty, but it also has drawbacks because it would be inflexible, rigid, and static. Writing is a limitation, and limitations on something that is abstract (restrictions in the context of the material) and dynamic (restrictions in terms of time) as well as the *value consciousness* of society into a law would logically lead to the consequences of dropping the substance of the legislation on constituent materials (values of society), and thus the phenomenon of *legal gaps* and *legal conflict* will always be a consequent of the further it can not avoid.

A law did have an update mechanism (*legal reform*) as an effort to minimize the nature of undynamic. But everyone also knows that updating a law through the legislative process and the process of adjudication by a judge is not an easy case to do. Legislative process can not be denied is also a manifestation of the process of political struggle and to generate a new law will not be able to take place in a short time because it takes effort to achieve an agreement on the groups with the vision and mission are different.

While the update by judges through its decision (adjudication) also can not be done optimally, because culture *civil law system* require judges to base ourselves strictly to the sound of the legislation so that it caused the judge in culture *civil law system* can not stray too far from what is written in the law, although the law is outdated.<sup>27</sup>

*Second*, the culture of *the civil law system* basing itself on the philosophy of legal positivism. Thus, in the *civil law system* there is the concept that the main objective being targeted by the law is not justice but a certainty. Because the philosophy of positivism priority to things that are clear and definite (positive) above all on the grounds that the only thing that can definitely be used as a measure of truth.<sup>28</sup>

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<sup>26</sup> Ade Maman Suherman, *Pengantar Perbandingan Sistem Hukum*, (Jakarta: Raja Grafindo Persada, 2004), p. 68.

<sup>27</sup> Majalah Digital Peradilan Agama Edisi II, Quo Vadis Penemuan Hukum?, (Jakarta: Ditjen Badilag Mahkamah Agung RI), pp. 24-25.

<sup>28</sup> Harun Hadiwijoyo, "Seri Sejarah Filsafat Barat 2" (Yogyakarta: Kanisius, 1980),p. 109.

Because the law as the only source of law in *civil law* judges make in applying the law against legal events that concrete does not play its role independently. The role of the judge merely as a mouthpiece or funnel legislation (*Bouche de la loi*), so it can not change the strength of the law, adding and or reduce it.

Transformation of law in the form of legislation *as such* without giving freedom to the judge to dig legal values in society in real life have led to *legal gaps* in the development of law in Indonesia. In another dimension, the discovery of law in Anglo-Saxon countries (*common law*) does not matter because it is the duty of judges. The position of judge is autonomous as *judge made law*. The principle adopted is *the binding force of precedent*. The opinion of judges based on the attitudes of individuals, despite a collective decision. The judge also bound by the judge's ruling earlier that he regarded as his own decision in prosecuting similar cases. So that the final verdict based on the factors in him.

Observing the development of the legal requirements are constantly changing, some legal experts as Satjipto Rahardjo trying to dismantle the *civil law* tradition is static and fixed on normologi copies listed in the legislation. Through progressive legal theory introduced, in a country that adheres to the civil law system, are not forbidden for a judge berijtihad perform legal discovery. In fact, according to Bagir Manan in the event of legal discussions in the Directorate General for Religious Courts (08/27/2013) judges it a sin to not perform ijtihad because judging from some normative references in religious judge ijtihad work is worth the reward. If ijtihad actually gets two rewards, salahpun still earn a reward. Vinding law by judges become imperative, especially when legislation often outdated and no longer able to accommodate the cutting-edge issues. Or Similarly the law too far jump so as not *applicable*.<sup>29</sup>

### The Verdict Worth Updates

Although in Indonesia products judiciary has yet to fully positioned as the most important part of the legal establishment as that occurs in some countries such as the USA and the UK that embraces *the common law system*, but social change so quickly takes the role judges as forming laws.

Religious courts as part of the implementing judicial authority has a duty to enforce the law and justice with regard to family law disputes. So far the judicial role of religion in Indonesia is far more progressive than the institutions that are

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<sup>29</sup> Majalah Digital Peradilan Agama Edisi II, p. 26.

like a neger-majority country Muslim. Legal products produced by institutions of religious courts have indicated that Islamic law is not only produced through the *ijtihad* of the scholars but also by judges through decisions. Here are a few worth verdict updates that deviate provisions of the law because of several considerations.

a. Community property

Decision No. 278 / Pdt.G / 2005 / PA.Bkt dividing section treasures together to wife of  $\frac{3}{4}$  of joint property. While husband by  $\frac{1}{4}$  section. The method used in this verdict is a historical interpretation (subjective) and the *ma'qulun-nash* (logic nash) with an inquiry about law purposes (*maqasid ash-shari'ah*). The interpretation of the provisions of Article 97 Compilation of Islamic Law to see the elements of philosophical birth article the above-mentioned substantially to provide protection of the rights of the wife to be divorced, because in general the wife had no income (In accordance with the religion) and time daily spent tasks home stairs are not light duty compared to her husband, is associated with social fact that the wife was the one who active role in finding a living / acquire joint property.

b. Inheritance

Updates law also applies in the case of inheritance. P envoy No. 338 / Pdt.G / 1998 / PA.Upg and No. 230 / Pdt.G / 2000 / PA.Mks states that a girl has the amount of inheritance rights together with the boys with a ratio of 1: 1. Decision inheritance in the two cases is a leap towards Article 176 KHI to do Further interpretation of the article KHI 183 which states "Experts beneficiaries may agree to peace in the division of property heritage, after each realize her/his parts ". This ruling not merely aim to make a fair decision, but rather to create peace and harmony.

In 2010 a fundamental change to the settings substitute heirs. Under Article 185 KHI, there is no limit on the lineage that can be a substitute heirs. For comparison, in Egypt which impose was borrowed (in Indonesia using substitute heirs), is only given to the grandson of the daughter and granddaughter / descent to the bottom of boys (Article 76 of the Law Probate Egypt No. 71/1946). Provisions in Egypt together with the provisions in Morocco (Article 374 *Mudawwanah Ahwal al-Shakhsiiyyah*). S edangkan in Algeria, Pakistan and Syria did not provide restrictions on was borrowed. KHI does not provide restrictions on substitute heirs, even substitute heirs may be applied to the brothers (Appeal Decision No. 677 K / AG / 2009 dated 12 April 2010).

Case of inheritance of different religions also attracted scrutiny. Through the decision was No. 368 K / AG / 1995 and No. 51 K / AG / 1999 Supreme Court gives form part was borrowed to family members of different religions . Consideration of the judge in the case of inheritance of different religions diverse enough to adjust to the fact at trial. For example, the heir to his wife marriage has lasted long enough, and the wife has devoted himself in the family with her husband in a long time. So decent and fair to acquire his rights as a wife for a share of a legacy in the form was borrowed and part of joint property. In addition, the heir and family members of different religions also live in harmony peace and mutual tolerance or even taking care of the testator during life.

Now the space was borrowed increasingly experiencing expansion. According to Article 209 KHI, was borrowed given to the adopted child or the adoptive parents. This implies the expansion was borrowed by law. *First*, indicates emotional intimacy (child / parent figure, stepchildren) to the heir as one of the foundation granted the right to enjoy *tirkah* through the institution was borrowed. This is clearly different from the provisions of inheritance in classical jurisprudence that only give inheritance rights on the basis nasab relationships, marriage and *wala'* (freed slaves). Secondly, m eniadakan disqualification heir because of religious differences. This provision has to break the pillars of the law of inheritance in classical fiqh and KHI. The granting of the rights to the heirs of non-Muslims to enjoy the inheritance through was borrowed, indirectly eliminating the *mani'* *'al-irtsi* / barrier inheritance rights because of religious differences.

c. Marriage Through ( by) Phone

South Jakarta Religious Court Decision No. 1751 / P / 1989 dated April 20, 1989 on marriage over the phone is a novelty in Islamic jurisprudence as the development of science and technology.

Abdurrahman Al-Jaziri in his book *al-Fiqh 'ala Mazahib al-Arba'ah* quoting mujtahid scholars that the consent agreement and k abul must unite assemblies. If not unified assembly then marriage is not valid. Interpretation *iittihad* (united) manifold assemblies. One of them is *iittihad al-majlis* and interpreted consent granted should be done within the time contained in the covenant ceremony, not two separate intervals. In a sense, there is continuity between consent and granted time, though not together in one place. Said Sabiq in his book *Fiqh as-Sunnah* also explained the meaning of consent and the united assembly for granted that emphasize

understanding of disconnection should not be granted as the embodiment consent and willingness of both sides to get married.<sup>30</sup>

Of course there are many religious court ruling confirmed that the role of judges is very urgent in the dynamics keluarga legal reform in Indonesia. Without being stuck to the view of the sect, the judge as far as possible using a broad perspective in establishing a law. Thus, the value of justice contained in a norm can be explored to the fullest for the benefit of the wider community. The judge may use methods mu'tadil mutawazin or wasathi as a moderate, balanced, or middle. This method is acceptable Personality 'and sense, because keeping everything already fixed it in the Shari'ah. In addition, this method pay attention to the demands of the development on the basis of mashlahah mursalah , including urf (custom) generally, as a form of practice the spirit of the Shari'ah without "bumping" nash. This is the method used by the shabat, tabi'in, and the priests schools at any time and period. This method seeks me ngakomodir authenticity and modernity at the same time in the same space.

## Conclusion

In the treasures of the main functions of a judge jurisprudence there are three, namely applying the law ( *bouche de la loi* ), discovered the law ( *rechtsvinding* ) and create law ( *rechtschepping* ). Thus, the work of Islamic family law reform is part of the functions and authority of the judges of religious courts. Therefore, judge should be able to contribute to interpret laws contextually so that the spirit of fairness, public interest and benefit contained in the positive law can be realized.

If the written law does not set a concrete event then judges a role in creating new laws by digging, follow and understand the value of living in the community. Therefore, a good law is the law in accordance with the *living law*. In fact, the judge must dare to make *contra legem* if the articles of the positive law contrary to the public order and the general welfare.

## BIBLIOGRAPHY

Coulson, N. J.. 1964. *A History of Islamic Law*. Edinburg: Edinburg University Press.

<sup>30</sup> Satria Effendi M. Zein, *Problematika Hukum Keluarga Islam Kontemporer; Analisis Yurisprudensi dengan Pendekatan Ushuliyah*, ( Jakarta: Kencana, 2004), pp. 3-5.

- Hadiwijoyo, Harun. 1980. *"Seri Sejarah Filsafat Barat 2"*. Yogyakarta: Kanisius.
- Mahmood, Tahir. 1995. *Statutes Personal Law in Islamic Countries (History, Texts and Comparative Analysis)*. New Delhi : Academi of Law and Religion.
- Majalah Digital Peradilan Agama Edisi II. 2013. *Quo Vadis Penemuan Hukum?*Jakarta: Ditjen Badilag MA RI.
- Majalah Digital Peradilan Agama Edisi VII. 2015. *Pembaruan Hukum Keluarga Islam di Indonesia.*, Jakarta: Ditjen Badilag MA RI.
- Manan, Abdul. 2006. *Reformasi Hukum Islam di Indonesia; Tinjauan dari Aspek Metodologis, Legislasi, dan Yurisprudensi*. Jakarta: RajaGrafindo.
- Mudzhar, M. Atho'. 2015. *Pembaruan Hukum Perkawinan di Indonesia*, Makalah disajikan sebagai pengantar diskusi dalam Forum Diskusi Hukum pada Direktorat Jendral Peradilan Agama, Mahkamah Agung RI, pada tanggal 4 Agustus 2015 di Kantor Ditjen Badilag, Jalan Jendral Ahmad Yani Kav. 58 Bypass, Jakarta.
- Nasution, Khoiruddin. 2010. *Pengantar dan Pemikiran Hukum Keluarga (Perdata) Islam Indonesia*, Yogyakarta: Tazzafa & ACAdemia.
- Odeh, Lama Abu. 2004. *Modernizing Muslim Family Law: The Case of Egypt in Vanderbilt Journal of Transnational Law*, Vol. 37, 2004.
- Qayyim, Ibnu al-. *I'lam al-Muwaqqi'in 'an Rabb al-Alamin*. vol. III. Cairo: Mathba'ah al-Muniriyyah.
- Rahardjo, Satjipto. 1983. *Hukum dan Perubahan Sosial*. Bandung : Alumni.
- Rahardjo, Satjipto. 2009. *Membangun dan Merombak Hukum Indonesia*. Yogyakarta: Genta Publishing.
- Saad, Bustami Muhammad. *Mafhum Tajdid Ad-Din*. Kuwait: Dar ad-Da'wah.
- Salam, Ahmad Nakhrowi Abdul. 1994. *Imam Syafi'i Mazhab Qadim wal Jadid*, Disertasi pada Universitas Al Azhar, Cairo, 1994.
- Schacht, Joseph. 1982. *An Introduction to Islamic Law*. Clarendon: Oxford University Press.
- Sirajuddin. 2008. *Legislasi Hukum Islam di Indonesia*. Bengkulu : Pustaka Pelajar Offset.
- Subekti, R.. 1987. *Pokok-Pokok Hukum Perdata*. Jakarta: PT Intermedia.
- Suherman, Ade Maman. 2004. *Pengantar Perbandingan Sistem Hukum*. Jakarta: Raja Grafindo Persada.
- Umar, Asri. 2007. *Rencana Pembangunan Jangka Panjang Nasional Tahun 2005-2025*. Jakarta: Citra Utama.
- Wignjosebroto, Soetandyo. 2007. *Pembaruan Hukum Masyarakat Indonesia Baru*, dalam: Donny Donardono, *Wacana Pembaharuan Hukum di Indonesia*. Jakarta: Ford Foundation & HuMa.

Wignjosoebroto, Soetandyo. 2010. *Hukum yang Tak Kunjung Tegak: Apa yang Salah dengan Kerja Penegakan Hukum di Negeri Ini?*, in "Dialektika Pembaruan Sistem Hukum Indonesia", Komisi Yudisial, Jakarta.

Zamzami, Mukhtar. 2010. Makalah berjudul "Pembaruan Hukum", 2010.

Zein, Satria Effendi M..2004. *Problematika Hukum Keluarga Islam Kontemporer; Analisis Yurisprudensi dengan Pendekatan Ushuliyah*. Jakarta: Kencana.

Zuhaili, Wahbah. 2001. *al-Fiqh al-Islami wa Adillatuhu*. Beirut: Darul Fikr al-Mu'ashir.