

THE ROLE OF SUPREME COURT JURISPRUDENCE IN DEVELOPMENT OF ISLAMIC FAMILY LAW IN INDONESIA

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Abstract

The development of Islamic family law is carried out in all countries where the majority of the population is Muslim. New ideas in the field of Islamic family law are generally stated in the form of legislation. In Indonesia, the final court decision in the field of Islamic family law decided with the judges of Indonesian Supreme Court. The decision of Supreme Court judge will be jurisprudence. This study aims to examine the role of Supreme Court's jurisprudence in development of Islamic family law. The research conducted was library research. This study concluded: First, Judges of the Supreme Court in the Islamic civil field have a very important role in the development of Islamic family law in Indonesia. Judges can make breakthroughs or reform the thoughts of Islamic family law as outlined in the decisions they issued. Second, decisions of Supreme Court judges that have permanent legal, fixed and final will be used as jurisprudence or references by judges in the Religious Courts.

Keyword: *Islamic Family Law, Jurisprudence, Judge, Supreme Court*

Abstrak

Pengembangan hukum keluarga Islam dilakukan di semua negara yang mayoritas penduduknya beragama Islam. Pemikiran-pemikiran baru dalam bidang hukum keluarga Islam umumnya dituangkan dalam bentuk undang-undang. Khusus di Indonesia, putusan pengadilan tingkat akhir dalam bidang hukum keluarga Islam berada di hakim Mahkamah Agung bidang perdata Islam. Putusan hakim Mahkamah Agung akan menjadi yurisprudensi. Penelitian ini bertujuan untuk mengkaji tentang signifikansi yurisprudensi Mahkamah Agung dalam pengembangan hukum

keluarga Islam. Penelitian yang dilakukan melakukan penelitian kepustakaan. Penelitian ini menyimpulkan: *Pertama*, Hakim Mahkamah Agung Republik Indonesia bidang perdata Islam mempunyai peranan yang sangat penting dalam pengembangan hukum keluarga Islam di Indonesia. Hakim dapat membuat terobosan atau pembaharuan pemikiran hukum keluarga Islam yang dituangkan dalam putusan yang dikeluarkannya. *Kedua*, putusan-putusan Hakim Mahkamah Agung yang sudah berkekuatan hukum tetap akan dijadikan yurisprudensi atau rujukan oleh hakim di lingkungan Peradilan Agama.

Kata Kunci: Hukum Keluarga Islam, Yurisprudensi, Hakim, Mahkamah Agung

Pendahuluan

Family law has an important position in Islamic law studies. This is due to an understanding that family law is the main gate in entering the subsequent provisions of Islamic law.¹In the mid-20th century, family law underwent several reforms. The first country to do this was Turkey then followed by Egypt and various other countries in renewal of family law. The change from conventional *fiqh* to contemporary family law laws is caused by existing regulations. Some conventional *fiqh* are considered unable to provide solutions to existing contemporary problems. The main purpose of this family law reform is to solve problems that cannot be answered by conventional *fiqh*.²

Complex challenges in the modern era have encouraged reformers to carry out legal reforms. According to Anderson, there are two patterns of legal reform in the modern Islamic World. *First*, Sharia is gradually being neglected from everyday life such as commercial law, criminal law, and others, then follow foreign laws. *Second*, family law which is considered sacred will undergo significant changes by reinterpreting it.³Almost all Islamic Countries have made reforms in the field of Islamic family law. New ideas in Islamic family law are generally stated in the form of legislation as a form of Islamic legal literature.

In Indonesia, this new thought is contained among others in the fatwas of ulama and court decisions, including in decisions of Supreme Court of Indonesian Republic. The Religious Court is one of the law enforcement institutions that have a strategic role in creating an orderly law in Indonesia. This is because the competence of religious courts is related to existence of Muslim community which quantitatively makes up the majority in Indonesia. Thus, if the religious judiciary can function optimally in law enforcement, it is certain that Islamic law will contribute to law enforcement and justice in Indonesia.

¹Eko Setiawan, "Dinamika Pembaharuan Hukum Keluarga Islam di Indonesia", *De jure: Jurnal Syariah dan Hukum*, Volume 6, Number 2, Desember 2014, 138, <https://doi.org/10.18860/j-fsh.v6i2.3207>.

²Lilis Hidayati Yuli Astutik and Muhammad Ngizzul Muttaqin, "Positifkasi Hukum Keluarga di Dunia Muslim melalui Pembaharuan Hukum Keluarga", *Islamika: Jurnal Ilmu-Ilmu Keislaman*, Vol. 20, Number 01, Juli 2020, 55, <https://doi.org/10.32939/islamika.v20i01.562>.

³J.N.D. Anderson, *Law Reform in the Muslim World*, (London: University of London the Athlon Press, 1976), 1-2.

The decision of Supreme Court Judge or jurisprudence has an important meaning in the application and development of law in Indonesia, including Islamic family law. Islamic family law is a real law implemented by the community, and is always evolving along with changing situations and conditions.

Islamic family law is a law that regulated human relations in the family (husband, wife, children, and brothers) starting from marriage to the distribution of inheritance according to Islamic teachings.⁴ Islamic family law consists of the law of marriage, inheritance, *waqf*, *infaq*, *zakat* and *shadaqah* which is based on the rules of Islamic law. Family law is one area of Islamic law which is still maintained and continued to be developed according to the needs of the community. In its development, the application of Islamic family law is not only based on religious institutions, but also based on laws and regulations established by the state, containing obligations and prohibitions, as well as sanctions for those who violate them.

The independence of judiciary given central role to apply what is in the law. In this position, the legal dynamics process can be carried out. The judiciary is not only important for deciding a case in society and being a social control, but also this institution has the potential as an institution that created dynamics between law and community development when the legislature is unable to keep up with the changes that always exist in society. Islamic family law is very useful in effort to create a harmonious and orderly community life, especially in family life. Indonesia appreciates Islamic family law in the form of Islamic law legislation to provide a legal basis and certainty for Muslims.⁵

The jurisprudence of Supreme Court in Islamic family law is a product of Islamic law derived from the decisions of judicial judges. So far, many Islamic family law disputes have been resolved through Supreme Court judges' decisions, for example cases of post-divorce child custody, division of inheritance rights for different religion children, biological relationship status of fathers to children out of wedlock, mandatory wills for adopted children, and others. Judges of Supreme Court have a great opportunity to develop ideas about Islamic family law through the decisions they make. The decisions of Supreme Court judges will become jurisprudence that will be one of references for judges in deciding cases.

According to Rifyal Ka'bah, national law is a law built by the state and applied to all citizens of the country. The formation of national law must reflect the moral norms of society which are used as legal norms that bind all citizens in the life of society and state.⁶ According to Paul Scholten, as quoted by Bustanul Arifin, the making of national laws must be carried out by understanding the values and beliefs held by the community where the law will be applied.⁷

⁴Wahbah al-Zuhaili, *al-Fiqh Al-Islamiy wa Adillatuhu*, Vol.VI, (Beirut: Dar Al-Fikr, 1989), 6.

⁵Sirajudin, "Konstruksi Hukum Keluarga Islam di Indonesia: Analisis terhadap Undang-Undang RI No. 1 Tahun 1974 tentang Perkawinan dan KHI, *Jurnal Hukum Islam Istimbath*, Vol. 14, No. 2, Desember 2015, 174, <https://www.neliti.com/publications/41806/konstruksi-hukum-keluarga-islam-di-indonesia-analisis-terhadap-undang-undang-ri>.

⁶ Rifyal Ka'bah, *Penegakan Syariat Islam di Indonesia*, (Jakarta: Khairul Bayan, 2004), 216.

⁷ Bustanul Arifin, *Pelembagaan Hukum Islam di Indonesia*, (Jakarta: Gema Insani Press, 2001), 36.

In Yahya Harahap's research, jurisprudence as law has been adapted by the Supreme Court as a way of establishing law in Indonesia.⁸ According to Ismail Sunny, in the formation of national law through jurisprudence by the Supreme Court, Islamic law, whether in the form of unwritten law or which has become positive law, has been used as the basis for decisions and or at least a source of value.⁹

Abdurrahman explained that the Supreme Court, through jurisprudence, raised Islamic law from unwritten law to positive and binding law. Through jurisprudence, the Supreme Court has played a role in the positivization of Islamic law in Indonesia. This role is authoritative institutionalization of Islamic law.¹⁰ Bagir Manan argued that the institutionalization of Islamic law through legislation does not fully meet the needs of Muslims. Therefore, it is necessary to institutionalize Islamic law through jurisprudence, namely through the decision of the Supreme Court which elevates Islamic law or the values of Islamic teachings to be institutionalized in positive law that is binding and can be enforced by the state.¹¹

This article examined the role of Supreme Court jurisprudence in the development of Islamic family law in Indonesia. The type of research in writing this article is normative legal research. This article is the result of normative juridical research using two types of approaches, namely the normative jurisprudence approach and the conceptual approach. The analytical technique used in this research is content analysis.

Development of Islamic Family Law in the World

The reform of family law can be traced in the positivization of family law in Islamic Countries. The positivization of family law is a movement and pressure from almost all groups to make amendments to classic family law towards contemporary family law. This movement was spearheaded by liberal, modernist, feminist groups as well as conservative intellectual groups.¹²

According to Noel J. Coulson, Islamic law reform is carried out in 4 forms. *First*, the codification or grouping of similar laws into the law book. Islamic law becomes state legislation which is known as the *siyasa* doctrine. *Second*, Muslims are not bound to only one particular school of law (*mazhab*), which called the doctrine of selection (*takhayyur*) which opinion is the most dominant in society. *Third*, development of law in anticipating the development of legal events that arise, which is called the *tathbiq* doctrine or the application of law to new events. *Fourth*, the change of law from the old to the new which is called the *tajdid* doctrine (reinterpretation).

⁸ Yahya Harahap, *Peran Yurisprudensi Sebagai Standar Hukum Sangat Penting pada Era Globalisasi*, (Jakarta: PP-IKAHI, 1992), 136.

⁹ Ismail Sunny, 'Kompilasi Hukum Islam Ditinjau dari Teori Hukum', in Tim Ditbinbapera, *Berbagai Pandangan Mengenai Kompilasi Hukum Islam*, (Jakarta: Yayasan Al Hikmah, 1996), 56.

¹⁰ Abdurrahman, 'Peran Mahkamah Agung dalam Pelaksanaan Kompilasi Hukum Islam', in *Suara ULDILAG Nomor 3*, (Jakarta: Mahkamah Agung, 2003), 73.

¹¹ Bagir Manan, *Hukum Positif di Indonesia*, (Yogyakarta: UII Press, 2004), 5-6.

¹² Sami Zubaida, *Law and Power in the Islamic World*, (London: LB. Tauris, 2012).

In research on the renewal of Islamic law in Islamic Countries, JND Anderson and John L. Esposito concluded that the method generally developed by Islamic reformers in understanding legal issues still relies on ad hoc and disaggregated approach using the *takhayyur* method and *talfiq*.¹³ *Takhayyur* is a method of jurisprudence which due to specific circumstances is permitted to leave one's legal school to follow another. *Talfiq* is a method of combining various schools of thought to form a single rule.

Some reforms of family law can be found in countries where the majority of population is Muslim.¹⁴ In the context of family law reform, which is the modernization of family law, there are at least three views from various countries. *First*, countries that have a secular ideology, where family law comes from Western Law, such as the Soviet Union, Turkey, and Albania. *Second*, countries that apply classical Islamic family law originating from classical *fiqh* books, such as Saudi Arabia, Kuwait, Afghanistan, and Yemen. *Third*, countries that have an understanding of classical family law which have been renewed and made into rule of law, such as Indonesia, Malaysia, Jordan, Brunei Darussalam, and Marocco.

According to JND Anderson, Muslim countries have three typologies in reforming family law: (1) Countries that still regard sharia as a basic law that must be applied; (2) Countries that revise sharia law and replace it with secular Western law; (3) A state that combined sharia law and secular law.¹⁵ Countries that apply family law are divided into three groups. *First*, a country that implements family law based on several officially recognized schools of thought. *Second*, the state is making a complete change to family law with more progressive and modern laws. *Third*, countries that apply family law through a process of renewal and positivity through legislation.

Countries that are part of the first group to apply conventional law from the opinion of *madzab* are Saudi Arabia and Yemen. Saudi adheres to the Hanbali school of thought and Yemen adheres to the Zaidi, Shafi'i, and Hanafi schools. Family law in this first group is based on the *al-Quran*, *Hadith*, *fiqh* and does not carry out codification and legal legislation. Countries in the second group are countries that have abandoned sharia and using modern law from Western Countries, namely Turkey and Albania. The Civil Code in Turkey is intended to replace sharia law which was implemented in 1926. This second group is also followed by countries that have Muslim minorities, such as Zanzibar, Kenya, and Tanzania which apply family law based on Western Law.

Meanwhile, countries that are included in the third group are countries that have updated their family law provisions based on the modern legislation and positification process. This country is Cyprus, where this country established and codified its family law in 1951. While countries from Southeast Asia are

¹³J.N.D. Anderson, *Law Reform in the Muslim World*, 42.

¹⁴Athoillah Islamy, "Eksistensi Hukum Keluarga Islam di Indonesia dalam Kontestasi Politik Hukum dan Liberalisme Pemikiran Islam", *Al-Istinbath: Jurnal Hukum Islam*, Volume 4, Number 2, November 2019, 162, DOI: 10.29240/jhi.v4i2.1059.

¹⁵J.N.D. Anderson, *Law Reform in the Muslim World*, 100-101.

represented by Indonesia, Malaysia, Singapore, and Brunei Darussalam. Other countries that into this third group are Algeria, Iran, and Lebanon.¹⁶

Development of Islamic Family Law in Indonesia

In Indonesia, concrete efforts to develop Islamic family law began in the 1960 which led to issued of Law Number 1 of 1974 concerning Marriage. Before marriage law was regulated, marital affairs were regulated through various laws, including customary law, traditional Islamic law, Christian marriage ordinances, mixed marriage laws and so on according to the religion and customs of each population. The next attempt to reform family law occurred during the time of Religion Minister, Munawir Syadzali. This effort was marked by issuing of Islamic Law Compilation (Kompilasi Hukum Islam) on June 10, 1991 which material covered the rules of marriage, inheritance and *waqf* intended for Muslims.

In Indonesian context, Islamic law can be understood as regulations taken from revelation and formulated in four products of legal thought, namely *fiqh*, fatwas, court decisions and laws that are guided and enforced for Muslims in Indonesia.¹⁷ In modern times, especially in the 20th century, the forms of Islamic legal literature are fatwas, religious court decisions, and *fiqh* books. The first is the laws that apply in Muslim countries, especially regarding family law. While the second is a compilation of Islamic law which is actually an Indonesian innovation. Compilation is not codification, but also not a *fiqh* book.

The opinion of scholars towards the promulgation of family law materials in Muslim countries has given rise to pro and contra views. Among the scholars there are those who still want to maintain the old legal provisions, both concerning the methodology and legal substance.¹⁸ With the enactment of Law Number 1 of 1974 concerning Marriage and Law Number 7 of 1989 concerning the Religious Courts, Indonesian Muslims have had adequate laws and regulations to regulate family matters (marriage, divorce, and endowments).

Meanwhile, there are some Indonesian scholars who have not agree to the various rules in two laws because they are considered not always in accordance with is stated in *fiqh* books. However, some other scholars actually feel proud of the issuing of these two laws because they are considered a major progress in the development of Islamic legal thought in Indonesia. Moreover, with the agreement on the results of Islamic Law Compilation by Indonesian scholars in 1988 which followed by Presidential Instruction No. 1 dated June 10, 1991 to disseminate and apply the contents of the compilation wherever possible. This has marked a new chapter in the development of Islamic thought in Indonesia, especially in the field of family law.¹⁹

¹⁶Sri Wahyuni, "Pembaharuan Hukum Keluarga Islam di Negara-Negara Muslim", *Al-Ahwal: Jurnal Hukum Keluarga Islam*, Volume 6, Number 2, 2013. 214-215, DOI: 10.30595/kosmikhukum.v11i1.729.

¹⁷Ahmad Rofiq, *Hukum Islam di Indonesia*, (Jakarta: Raja Grafindo Persada, 1995), 5.

¹⁸John Donohue, *Islam dan Pembaharuan Ensiklopedi Masalah-Masalah*, (Jakarta: Rajawali Press, 1995), 365.

¹⁹M. Mudzhar, "Dampak Gender terhadap Perkembangan Hukum Islam", *Jurnal Studi Islam*, Vol.1, 1999, 173.

According to Islamic law experts in Indonesia, the current renewal of Islamic law is caused by several factors,²⁰ including family law:

1. To anticipate a legal vacuum because the norms contained in *fiqh* books do not regulate it, while the community's need for law related to recent problems is very urgent to apply;
2. The influence of globalization, science and technology so that there needs to be a rule of law that regulated it, especially problems which there is no legal regulation;
3. The impact of reforms in various fields that provide opportunities for Islamic law to become a reference material in making national law;
4. The influence of the renewal of Islamic legal thought carried out by mujtahids, both at the international and national levels.

The renewal of Islamic family law in Indonesia caused by changes in conditions, situations, places and times as a result of the factors that have been stated above. This change is in line with the theory of *qaul qadim* and *qaul Jadid* put forward by *Imam Shafi'i*, that the law can also change due to changes in the legal arguments applied to certain events in implementing *maqâsyid al-shari'ah*. The process of reforming Islamic family law has occurred for long time, proceeding with the conditions and situations and in accordance with the demands of the times. This is because some of the norms contained in *fiqh* books are felt to be no longer able to provide solutions to new problems that occur. In this regard, Anderson said that family law is considered the core of sharia because this part is considered by Muslims as a gateway to enter further into the religion and society.²¹

Several Indonesian Islamic law experts offer new concepts in order to contextualize Islamic teachings with the needs of Indonesian people. Various efforts were made in updating Islamic law to suit the demands of times. Family law gets larger share of development, because it is still relevant for Muslim communities and needs to be updated according to community needs. In other criminal or civil areas, its development takes a different form, and has even been abandoned.²² The implementation of Islamic civil law is influenced by several things, namely:

1. The belief of Muslims in the authority of al-Quran, Sunnah and *fiqh* or the opinion of scholars about Islamic civil law. This means that the law can be enforced based on factors of faith and piety.
2. The culture of public awareness to apply Islamic civil law in real life. This is manifest in the habits of people who act in accordance with the legal provisions that exist in the norms, rules, or values that live in society in accordance with Islamic teachings, and do not violate the rules in society.
3. State policy or legal politics. Islamic civil law cannot be enforced without government intervention. The government also benefits from the existence of Islamic civil law, for example, it can inspire the values of Islamic law in the formation of national law and fill legal voids. The government uses

²⁰Abdul Manan, *Reformasi Hukum Islam*, (Jakarta: Raja Grafindo Persada, 2006), 154.

²¹J.N.D. Anderson, *Law Reform in the Muslim World*, 42.

²²Khoirudin Nasution, *Hukum Perdata (Keluarga) Islam Indonesia dan Perbandingan Hukum Perkawinan di Dunia Muslim*, (Yogyakarta: Tazzafa dan Academia, 2013), 4.

Islamic law as a form of legal protection and human rights for citizens so that the country's goals can be achieved, especially in Indonesia, which the majority are Muslims.

4. *Ulama* who act as tools to socialize Islamic civil law, can provide examples of behavior, attitude and pattern of life based on Islamic teachings.
5. The judicial institution, in this case the Religious Courts, is authorized to settle Islamic civil disputes, including formulating the basis of Islamic civil law in the form of jurisprudence or *ijtihad*. Without judges' *ijtihad*, Islamic law will not play a role in resolving cases in society.

Jurisprudence as a Source of Law

Jurisprudence in Latin is called *juriprudentia* which means a judge's decision, contains a self-made regulation to settle a case that is given authority to him.²³The Supreme Court is one of the actors of judicial power as referred to The 1945 Constitution of Indonesian Republic. The composition of Supreme Court consists of leader, member judges, and a secretary.²⁴Jurisprudence of the Supreme Court is decisions of judges or courts that are permanent and justified by the Supreme Court as a court of cassation, or decisions of the Supreme Court itself which have permanent legal force.²⁵ The definition of jurisprudence must contain the following elements:²⁶

1. There is a supreme judge's decision. The status of judge here is a judge of Supreme Court as the highest judge.
2. There are legal cases which legal rules have not been explained in detail in the legislation.
3. There are judges under it, namely judges of the first level court and high court judges to use the decision of the highest judge.
4. There is the same case. Judges of first courts and judges of high courts may use the jurisprudence of the Supreme Court if the cases they are handling are the same.
5. Has permanent legal force (*in crach*), meaning that jurisprudence is the result of decision by Supreme Court judge who already has permanent legal force and cannot be changed except by a new decision. In addition, it must go through a material test from special team determined by Supreme Court.

Jurisprudence is the decision of highest judge on a case which is followed by a judge below him in resolving the same case. Jurisprudence is a product of Supreme Court judges in resolving legal cases which legal basis is not explained in detail in the legislation. The role of jurisprudence makes the task of judges not only to apply the law, but also to interpret, explore and apply legislation to uphold

²³Pipin Syarifin, *Pengantar Ilmu Hukum*, (Bandung: Pustaka Setia, 1998), 120.

²⁴Law Number 5 of 2004 concerning the Supreme Court.

²⁵Badan Pembinaan Hukum Nasional (BPHN), *Peningkatan Yurisprudensi sebagai Sumber Hukum*, (Jakarta: Badan Pembinaan Hukum Nasional, 1992), 12.

²⁶Islamiyati, at.all, "Penegakan Hukum Perkawinan Islam Melalui Yurisprudensi Mahkamah Agung", *Majalah Hukum Nasional*, Number 22, Year 2018, 91-92. <https://doi.org/10.33331/mhn.v48i2.104>.

justice.²⁷The existence of jurisprudence really helps the community to get legal certainty and justice.

Jurisprudence is carried out through the method of interpretation and legal discovery to fill legal voids and resolve legal disputes so as not to disturb the public. The existence of jurisprudence is very helpful for judges in handling legal cases submitted to them, while the legislation has not clearly regulated it. Judges as enforcers of justice, not all of them are given the authority to make jurisprudence. Those given the authority of the government in making jurisprudence are the judges of the Supreme Court who are domiciled in national capital. This is because the judge of Supreme Court is the highest judge in charge of receiving the final case of the cassation submitted by the applicant or plaintiff to obtain justice and legal protection as expected.²⁸

According to Islamic law, a judge plays very important role in carrying out the obligation to enforce the law. A judge cannot be separated from *ijtihad*, especially *ijtihad tathbiqui*, namely the judge's effort to apply the law according to the case he is facing by exploring the value of justice that lives in society. *Ijtihad* in Islamic law is carried out by people who have the authority and competence in developing Islamic law as *mujtahids*, and are carried out based on correct procedures or rules.

There are three basic considerations for the judge in determining the case submitted to him, namely:²⁹

1. Sociological, meaning legal considerations based on people's assumptions about a customary norm, or judges' decisions based on a sense of community justice. This showed that judges also use values, rules, norms, or views that come from the laws that live in society. The benchmark used is based on benefit or according to the size of goodness and benefit, not harm or loss.
2. Philosophical, meaning considerations based on the principle of justice, because justice is the spirit of the judge's decision in making decisions in legal cases. Judges in considering a sense of justice can use distributive and or cumulative justice. This means that apart from justice which is based on the law, it is also based on the parts that should be given, maybe they are not the same with each other. Justice that gives to each person is based on his services, or the distribution according to their respective rights.
3. Juridical, meaning legal considerations that come from the rules in legislation. Legal considerations are the legal basis for judges in making decision. This relates to the judge's efforts in revealing facts, evidence, witnesses or others at trial. Thus, the decision handed down by the judge will have legal and correct force.

The recognition of jurisprudence as a source of law further emphasizes the duties and authority of judges in making legal discoveries. Judges are not only able to apply laws, but judges are also able to form laws. Especially when the rules

²⁷Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, (Yogyakarta: Liberty, 1996), 37.

²⁸Islamiyati, at.all, "Penegakan Hukum Perkawinan Islam Melalui Yurisprudensi Mahkamah Agung", 92-93.

²⁹R. Soeroso, *Pengantar Ilmu Hukum*, (Jakarta, Sinar Grafika, 1993), 63-64.

contained in the law are not clear, the existing law is not in accordance with the circumstances or the law does not regulate the problems at hand. In developing the application of jurisprudence as a source of formal law, jurisprudence should be placed in its function, namely as a guideline for handling cases or similar disputes.

If in a new decision the judge applies the rules that have been applied by the previous judge, it is not because the previous decision has binding force. This can happen because the judge agrees with the considerations put forward in the jurisprudence. Jurisprudence is used as a source of law by judges in deciding similar cases as long as the law is seen as good law and suitable to be applied in the case at hand.

At this time, the judiciary has been placed as an independent institution, meaning that it is free from political influence and executive interference. Judges have the freedom to exercise their authority. However, this does not mean that the judge's freedom is without control. It's just that the control is also carried out by the judicial power itself through appeals and cassation. The appellate court can overturn the decision of the court of first instance and the Supreme Court can overturn the decision of the court of appeal and the court of first instance. In countries that adhere to a civil law system, including Indonesia, decisions that are overturned by the Supreme Court are usually decisions that do not meet the legal rules that should or do not meet the requirements of rationality. Decisions that already have permanent legal force.³⁰

The Significance of Jurisprudence in Judges' Decisions

Jurisprudence is one of law sources used by judges in resolving the same case. The existence of jurisprudence makes judges domiciled as independent institutions to enforce justice without the intervention of other parties. Jurisprudence is a product of Supreme Court judges in resolving legal cases whose legal basis is not explained in detail by legislation. Jurisprudence is used by judges in handling cases, if the law does not regulate the basic basis for resolving the case. Judges who are considered legal experts are creative in formulating laws through the interpretation of laws.³¹

The legal basis used as a juridical basis for jurisprudence is Article 27 paragraph (1) of Law Number 14 of 1970 which explained that judges as law and justice enforcers are obliged to explore, follow, and understand the legal values that live in society. This is confirmed by Article 28 paragraph (1) of Law No. 4 of 2004 which explained that judges are obliged to explore, follow and understand legal values and a sense of justice that live in society. This legal basis explained that judges in carrying out their absolute authority may use sources of legislation legality and its interpretation and sources in the form of legal values that live in society.³²The judge may not refuse to settle the case submitted to him based on that there are no rules governing it. Judges are authorized to make their own rules if the provisions of the legislation have not been found.

³⁰Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, (Jakarta: Prenadamedia Group, 2015), 280.

³¹Soerjono Soekanto, *Beberapa Permasalahan Hukum dalam Kerangka Pembangunan di Indonesia*, (Jakarta: UI Press, 1984), 148.

³²Cik Hasan Bisri, *Hukum Peradilan Agama di Indonesia*, (Jakarta, Raja Grafindo Persada, 2011), 253.

Jurisprudence is carried out through interpretation and legal discovery methods to fill legal voids and resolve legal disputes so as not to disturb the public. The existence of jurisprudence is very helpful for judges in handling legal cases submitted to them, while the legislation has not clearly regulated it. Judges as enforcers of justice, not all of them are given the authority to make jurisprudence. Those given the authority of the government in making jurisprudence are the judges of Supreme Court who are domiciled in national capital. This is because the Supreme Court judge is the highest judge in charge of receiving the final case of the cassation submitted by the applicant or plaintiff to obtain justice and legal protection as expected.³³

Legal decisions originating from judges of Supreme Court are the legal product of judges in resolving legal disputes under their authority, which are followed by judges at lower levels in resolving the same case. This is called jurisprudence. The decision of the judicial judge is located as a source of law because judges are considered as legal experts as well as law enforcers. The existence of judicial decisions provides an opportunity for judges to exercise *ijtihad* in resolving the cases they are trying. The level of judicial decisions dynamics is relatively high and can develop laws to obtain justice.³⁴

The decision of Religious Court is not a final decision. Against this decision, an appeal and cassation can be filed. The decision in the cassation level product of the Supreme Court is the final decision. In essence, the decision of Supreme Court is not decision of Supreme Court Institution, but is decision of Supreme Court Judge. However, the decision of Supreme Court Judge, although not an institutional product, is formally a product of Supreme Court's institution because the material of decision cannot be changed by other Supreme Court Judge. This decision cannot be changed by the leadership of Supreme Court, but must go through legal remedies for a judicial review request (*Peninjauan Kembali*) to Supreme Court institutionally.³⁵

The Role of Supreme Court Jurisprudence in Development of Islamic Family Law

In the field of Islamic civil law, the Supreme Court has made legal discoveries when deciding on the granting of *wasiyat wajibah* as a substitute for inheritance rights for non-Muslim children. The Supreme Court has also ruled that custody of a child who is still a minor is given to his father. This Supreme Court decision has provided its own legal style in providing legal considerations for child care that are different from the provisions of the Islamic Law Compilation.

The courage of Supreme Court judges in deciding the case can be a precedent and jurisprudence for Religious Court judges in order to judge a case properly. Changes in the context of time and place are influential factors in

³³Islamiyati, at.all, "Penegakan Hukum Perkawinan Islam Melalui Yurisprudensi Mahkamah Agung", 92-93.

³⁴Muhammad Daud Ali, *Hukum Islam dan Peradilan Agama*, (Jakarta: Raja Grafindo Persada, 1997), 357.

³⁵Hasbi Hasan, "Dinamika Yurisprudensi Mahkamah Agung Dalam Bidang Perdata Islam", *De Jure; Jurnal Syariah dan Hukum*, Volume 3 Number 2, Desember 2011, 157, <https://doi.org/10.18860/j-fsh.v3i2.2146>.

determining the law. In this context, the development of Indonesian Islamic Law is necessity. So far, the substance of Islamic law, which is represented by the rules regarding marriage, inheritance, *waqf*, *zakat*, and others, has shown a form of renewal that has the character of Indonesian locality. The accommodation of reformed values in these various regulations can be followed by judges of Religious Courts to build a more constructive Islamic Law. If judges can carry out their functions as law enforcers and synergize with other law enforcement pillars,³⁶

The development of law the Supreme Court has strategic value for Islamic law development in Indonesia. This is because in Indonesian state structure, the Supreme Court is one of the high state institutions responsible for law enforcement and development. The Supreme Court oversees the judicial power bodies in four judicial circles, which include: the General Courts, Religious Courts, Military Courts, and State Administrative Courts. In addition, in the judicial system in Indonesia, the Supreme Court is the highest judicial institution. In such a position, the legal decisions of Supreme Court judges can become jurisprudence for other judges in deciding the same case, especially in courts at lower levels.

The Supreme Court has carried out the role of reforming Islamic law, because the Islamic law material contained in *fiqh* and statutory regulations needs to be re-actualized. On the one hand, the legislation is not complete or does not regulate it, and on the other hand the need for solving these problems is very urgent. Therefore, Supreme Court as a judicial institution can play a role in building new laws that are in accordance with developments in society.³⁷

The decision of the Supreme Court has a strategic role because it can determine the nature of legal values and justice. In subsequent developments, the decision of Supreme Court will determine the face of law in Indonesia and influence the shift in legal thinking that aims to achieve justice. Court judges are required to always explore, follow and understand the legal values that live in society.³⁸This legal value can be used as a rule of law in upholding justice. In this role, the Supreme Court has carried out its function of forming law or known as judge made law.³⁹

In general, *ijtihad* and law discovery in contemporary Indonesian legislation are closely related to the development of Islamic law culture. In this case, Muslims are faced with two possibilities, namely positive Islamic law which is limited to legal issues that apply to Muslims only, or Islamic law values that can be applied to all citizens. Both alternatives will affect the formation of national law in the future. The findings of Supreme Court judges contributed positively to the development of Indonesian Islamic civil law. The Supreme Court's decision has a strategic value because it will provide color for law enforcement in Indonesia. In practice, these decisions are then made into jurisprudence by judges in Religious Courts.

Judges' *ijtihad*, called jurisprudence, is an attempt by judges to reform Islamic family law, in order to synchronize the teachings of *fiqh* with development

³⁶Lawrence M. Friedman, *American Law*, (New York: W.W. Norton & Company, 1984), 5-6.

³⁷Abdul Manan, *Reformasi Hukum Islam di Indonesia*, 202-203.

³⁸Abdurrahman, "Kewajiban Hakim untuk Menggali Nilai Hukum yang Hidup dalam Masyarakat", *Suara Uldilag*, Number 3, 62-63.

³⁹Lie Oen Hock, "Yurisprudensi sebagai Sumber Hukum", dalam Din Muhammad (ed.), *Pustaka Peradilan*, Vol.VIII (Jakarta: Mahkamah Agung, 1995), 20.

of Indonesian society conditions, because law will always accompany human life. *Fiqh*, which is the result of Islamic legal thought from ancient scholars, also needs to be actualized and reconstructed in order to solve the problems of Islamic family law today. So that the law can be enforced and in accordance with its objectives, namely to provide peace, order, and community happiness.⁴⁰

Jurisprudence which is one of the means of reforming Islamic family law aims to achieve the goal of establishing Islamic law, namely to bring benefit while maintaining religion, soul, mind, property and descendants. This was done to uphold justice.⁴¹The principle of benefit is always carried out in order to uphold the justice of Islamic family law. Both of these things should always be implemented by judges in determining jurisprudence.⁴²Thus the existence of jurisprudence can uphold justice in the application of Islamic family law. The existence of Supreme Court judges decisions called jurisprudence on Islamic family law in Indonesia are:

1. Jurisprudence is positioned as one of the judges' reference points for judges of the first instance in deciding cases related to Islamic family law.
2. Jurisprudence can display the following strengths and explanations about the rules of Islamic family law due to differences in legal interpretation.
3. Able to confirm religious law (Islam) as a benchmark in solving family law problems.
4. Able to direct and provide instructions on problem solving Islamic family law through a harmonization approach between state law and religious law.

The existence of Supreme Court jurisprudence can be used as a method of reforming Islamic family law. The reason is because the law always develops in accordance with the construction of conditions and people's thoughts. In addition, jurisprudence which is the result of legal discovery by Supreme Court judges is also able to strengthen the Islamic family law in a fair and correct manner. The renewal of Islamic family law is an effort to develop a law based on the basic principles of Islamic law that upholds the spirit of justice, benefit and *maqashid al-syariah* values.

Conclusion

This article concluded: *first*, family law is part of Islamic law which is still applied in all countries where there are Muslims. New ideas in the field of Islamic family law are generally expressed in the form of state laws or regulations.

Second, Judges of Supreme Court in Islamic civil field have important role in the development of Islamic family law in Indonesia. Judges can make breakthroughs or reform Islamic family law ideas as outlined in the decisions of

⁴⁰Islamiyati, "Eksistensi Yurisprudensi Mahkamah Agung (MA) dalam Penegakan Hukum Keluarga Islam Indonesia", *Law, Development & Justice Review*, Volume 3, Number 1, April 2020, 10, <https://doi.org/10.14710/ldjr.v3i1.7349>.

⁴¹Mohamad Abdun Nasir, "Membedah Anatomi Pembaharuan Hukum Islam Di Indonesia", *Jurnal Istinbath*, No. 2, Vol. 1 Juni 20014, 206-207.

⁴²Ahmad Khoirul Fata & Mustofa, "Menyoal Kontekstualisasi Hukum Islam tentang Poligami", *Jurnal Al-Ulum* Volume. 13, Number 2, Desember 2013, 415-434, <https://journal.iaingorontalo.ac.id/index.php/au/article/view/173/175>.

the cases they handle, if the laws governing the case are deemed no longer relevant or there is no law governing the case. The decisions of the Supreme Court Judges in practice will be used as jurisprudence or references by judges in the Religious Courts. *Third*, the judge's decision or jurisprudence can be one of considerations in drafting laws in the future.

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