

# Asy-Syarī'ah

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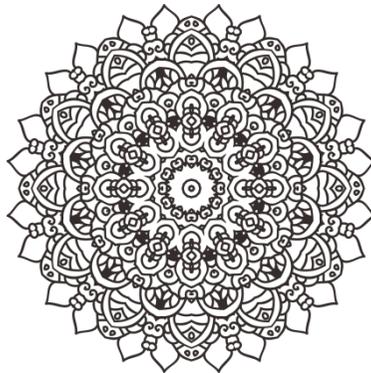
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## THE ROLE OF RELIGIOUS COURT IN ISLAMIC LAW REFORM IN INDONESIA

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**Abstract:** Law, including Islamic law, will evolve with the changes of time, place, situation and tradition. New social problems grow gradually and pose challenges to Islamic law. Reconstruction and reform are inevitable for Islamic law to respond to the current issues. The Islamic law reforms in Indonesia performed through legal enactment, legal opinion (fatwa), and the Religious Courts decisions. New formula for Islamic law in addressing contemporary issues can be built through three processes: conservation, innovation process, and creation. The Supreme Court of the Republic of Indonesia fully supports the development of Islamic law in Indonesia. The reform of Islamic law by the Supreme Court has been carried out through several instruments, such as the issuance of Perma and SEMA, agreement among justices within the Chamber of the Religious Courts, and creation of jurisprudence.

**Keywords:** *reform, reconstruction, jurisprudence*

**Abstrak:** Hukum, termasuk hukum Islam, akan berubah seiring dengan perubahan waktu, tempat, situasi dan tradisi. Masalah sosial baru yang tumbuh secara bertahap tumbuh dan menimbulkan tantangan bagi hukum Islam. Rekonstruksi dan reformasi tidak dapat dihindarkan agar hukum Islam merespons masalah saat ini. Ada tiga tipologi reformasi hukum Islam di Indonesia yang dilakukan melalui pengesahan hukum, pendapat hukum (fatwa), dan keputusan pengadilan dari keputusan Pengadilan Agama. Formula baru untuk hukum Islam dalam menangani masalah kontemporer dapat dibangun berdasarkan tiga proses: proses konservasi, proses inovasi, dan proses penciptaan. Mahkamah Agung Republik Indonesia sepenuhnya mendukung pengembangan hukum Islam di Indonesia. Reformasi hukum Islam oleh Mahkamah Agung telah dilakukan melalui beberapa instrumen, seperti penerbitan Perma dan SEMA, kesepakatan di antara para hakim di Kamar Pengadilan Agama, dan penciptaan yurisprudensi yang diambil dari kasasi.

**Kata kunci:** *reformasi, rekonstruksi, yurisprudensi*

## Introduction

Islamic law originating from the teachings of Islam as a universal religion is not limited by space and time. Islamic law emerges to bring happiness to all humankind. Therefore, Islamic law is expected to answer the growing social problems facing humanity. This is following the Islamic legal maxim (*ushul fiqh*) stating that the law will change with the changes of time, place and tradition.

As the time goes by, there have been various changes and tends to deviate from the true meaning of Islamic law original text, and has made Islamic law lost its relevance to the reality of social life. Therefore, there is a need for a new format to reconstruct sharia sciences to address contemporary problems so Islamic law can meet the demands of the present societies. Reconstruction means rebuilding (comprehension) based on the original state while retaining primary and original values to answer contemporary issues.

Contemporary Islamic law is a perspective of the Islamic law that addresses all legal issues, both present, and future, which contain some new cases as an idea of the development of the dynamics of existing Islamic law. On that basis, we need to understand that the reform of Islamic law holistically rests on the foundations of religious text, constitution, and philosophical and sociological basis.<sup>1</sup> The Supreme Court and the Religious Courts, supported by three other courts that exercise judicial power in Indonesia, have a chance to take apart to reform Islamic law as embedded in their jurisdiction and oversee its process.

## Public Perception towards Indonesia's Islamic Courts

Since about 15 years ago, the religious courts have received a lot of positive recognition about its progress from outside communities both domestically and internationally. It is said that since the introduction of the One-Roof System under the Supreme Court, the religious courts have succeeded systematically and phenomenally in carrying out internal reforms and social-oriented justice reforms.

Recognition of the progress and modernity in the religious courts can be traced since 2001 when The Asia Foundation released a publication entitled 'Survey Report on Citizens' Perception of Indonesia's Justice Sector; Preliminary Findings and Recommendations.' In the survey results, it is said that the Indonesia's religious court is the most honest and effective state institution. In addition, the religious court is also

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<sup>1</sup> A. Malthuf Siroj, *Pembaruan Hukum Islam Di Indonesia Telaah Kompilasi Hukum Islam* (Yogyakarta: Pustaka Ilmu, 2017), P. 25.

perceived as a good institution with criteria as follows: does its job well, trustworthy, timely, and helpful.<sup>2</sup>

There was also a survey conducted in 2007 by the Center for Islamic and Community Studies (PPIM) The State Islamic University (UIN) Syarif Hidayatullah Jakarta, funded by the Australian Australia Legal Development Facility (IALDF) AusAID, which was released in a publication entitled 'Providing Justice to the Justice Seeker: A Report on the Indonesian Religious Courts Access and Equity Study–2007.' The survey emphasized that more than 80% of respondents from justice seekers are satisfied with the service provided by the Religious Courts.<sup>3</sup>

Subsequently in 2010, Cate Sumner and Tim Lindsey in their book 'Courting Reform; Indonesia's Islamic Courts and Justice for the Poor' stated that the religious courts in Indonesia can be seen as one of the most successful judicial institutions in Indonesia, even though it has been ignored by the State. Furthermore, Cate Sumner who is a legal activist from Australia and Tim Lindsey who is a Professor at Melbourne Law School, University of Melbourne, said that in the context of socially oriented justice reform, religious courts can be used as an example not only for other courts in Indonesia but also for other Islamic courts in Southeast Asia.<sup>4</sup>

The statements were also confirmed by another western scholar, Prof. Mark Cammack, Professor of Southwestern Law School, Los Angeles USA. In his book entitled 'Islamic Law in Contemporary Indonesia: Ideas and Institutions', Cammack opined that although religious courts still have some weaknesses, this judicial institution is relatively a success story in a dysfunctional legal system in Indonesia.<sup>5</sup>

After that, Tim Lindsey also in his book 'Islam, Law and the State in Southeast Asia, Volume I: Indonesia', which was published in 2013 says that the religious courts as the largest judicial branch in Indonesia is an institution that is seen as an exception to the dysfunctional justice system. In general, according to him, the religious courts are seen as an institution that is not corrupt and provides good services to justice seekers. Tim Lindsey also underlines that such public perceptions of religious courts have persisted over the past decade.<sup>6</sup>

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<sup>2</sup> The Asia Foundation, "Survey Report on Citizens' Perception of the Indonesian Justice Sector; Preliminary Findings and Recommendations, Jakarta, August 2001," 2019. available at <https://asiafoundation.org/resources/pdfs/IndoLaw.pdf>, accessed on July 12, 2019

<sup>3</sup> Cate Sumner, *Providing Justice to the Justice Seeker: A Report on the Indonesian Religious Courts Access and Equity Study-2007* (Jakarta: Mahkamah Agung and Aus AID, 2008), P. 24.

<sup>4</sup> Cate Sumner and Tim Lindsey, *Courting Reform; Indonesia's Islamic Courts and Justice for the Poor* (New South Wales: Lowy Institute, 2010), p. 59.

<sup>5</sup> Mark E Cammack, *The Indonesian Islamic Judiciary* in R. Michael Feener and Mark E. Cammack (Eds), *Islamic Law in Contemporary Indonesia; Ideas and Institutions* (Cambridge: Harvard University Press, 2007), P. 86.

<sup>6</sup> Tim Lindsey, *Islam, Law and The State in Southeast Asia, Volume I: Indonesia* (New York: I.B. Tauris, 2013), P. 53.

Also in 2013, the Indonesian Center for Law and Policy Studies (PSHK) released a 2013 Public Service Satisfaction Survey results. The survey results prove that religious courts were satisfying for about 65% of respondents the services provided compared to the similar services in the general courts.<sup>7</sup>

Finally, in 2014, the Court Information Openness Research Report (2014) conducted by the Indonesian Judicial Monitoring Society (MaPPI) at the University of Indonesia's Faculty of Law emphasized that the religious courts have the highest degree of information availability compared to other courts in Indonesia.<sup>8</sup>

From the aforementioned data, It can be said that in terms of public services in Indonesia's Religious Courts, people have a high confidence and trust to the Islamic Courts. Long-time ago, people might have unpleasant perception towards the Islamic Courts in Indonesia, such as backward institution, low-level capability of human resources and others. But nowadays, the Religious Courts in Indonesia have become a modern institution that has set an example in the fields of public services and social reform.

## Islamic Law Reform through Court Decisions

The reform of Islamic law has a very essential purpose, namely realizing *maqashid al-sharia* (the purpose of Islamic law), a doctrine introduced by al-Syathibi in his book, *al-Muwafaqat*.<sup>9</sup> Al-Syathibi argues that Islamic law aim is to realize the goodness for all humankind both in the world and in the hereafter.<sup>10 11</sup>

M. Hatta Ali<sup>12</sup> said that the development of Islamic law in Indonesia is inseparable from the Islamic legal system which has unique characteristics that are different from other legal systems. According to him, Islamic law has at least three important characteristics: *firstly*, perfect, round and complete; *secondly*, harmonious i.e. maintaining balance and aligning between the ideal facts and ideals of law (*rechtsidee*); and *thirdly*, dynamic which means that Islamic law has the ability to move and evolve, has the power to life and able to shape itself to adapt to the times.<sup>13</sup>

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<sup>7</sup> Pusat Studi Hukum dan Kebijakan Indonesia, "Laporan Survey Kepuasan Pelayanan Publik Pengadilan 2013," 2019. available at <https://www.pshk.or.id/wp-content/uploads/2015/09/12-Pen-Ringkasan-Survey-Layanan-Informasi.pdf>, accessed on 7 July 2019.

<sup>8</sup> MaPPI FHUI, "Laporan Penelitian Keterbukaan Informasi Pengadilan (2014)" (Jakarta: MaPPI FHUI, 2014) available at <http://mappifhui.org/wp-content/uploads/2016/02/MaPPI-Laporan-KIP-2014.pdf>, accessed on 7 July 2019, P. 41.

<sup>9</sup> See Al-Syathibi, *Al-Muwafaqat Fi Ushul Al-Sharia* (Egypt: Maktabah Tijariyah Kubro al-Qahirah, 1975), P. 6.

<sup>10</sup> *Ibid.*

<sup>11</sup> Al-Syathibi, *Al-Muwafaqat Fi Ushul Al-Sharia*.

<sup>12</sup> Chief Justice of the Supreme Court of the Republic of Indonesia.

<sup>13</sup> Amran Suadi and Mardi Candra, *Politik Hukum Perspektif Hukum Perdata Dan Pidana Islam Serta Ekonomi Sharia* (Jakarta: Prenada Media Group, 2016), P. ii.

Meanwhile, Abdul Manan<sup>14</sup> argues that three fundamental issues can provide the life force of Islamic law: *firstly*, the elasticity of Islamic law in accommodating new phenomena in society. *Secondly*, the development of Islamic law to become national law is known as the nationalization of Islamic law in Indonesia. *Thirdly*, the Islamic law reform is by following the growing need of the community for the existence of the living law to respond to various contemporary problems in actualizing Islamic law in today's life that continues to change towards a more practical and pragmatic one.<sup>15</sup>

If we analyze the background of Islamic law reform, there are at least two reasons why the reforms take place. First, the flow of modernization that has given rise to a number of new challenges that must be responded as an integral part of the dynamic of Islamic law. Second, the emergence of Muslim scholars who always strive to realize Islamic law that is relevant for the changing and developing era.

Yusuf Qaradhawiy, for example, emphasizes the significance of serious studies in contemporary Islamic law. So when the question of whether Islamic law can deal with the modern era arises, the answer is certain. Islamic law can deal with the modern era by opening the door of *ijtihad* in the broader sense. *Ijtihad* here means using all the abilities to bring up Islamic law sourced from Al-Quran and Hadith. *Ijtihad* also means maximum effort in producing sharia law from its basic sources through serious thought and research.<sup>16</sup>

According to Yusuf Qaradhawiy, the reform of Islamic law is as a result of several important factors, such as <sup>17</sup>*First*, to fill the legal vacuum. Norms contained in fiqh books do not stipulate or regulate the new phenomena lately emerging, whereas the society urgently needs the presence of law to respond to new problems. *Second*, the influence of economic and science globalization, resulting in new events that need legal rules that govern them. *Third*, the influence of reforms in various areas that provides opportunities for Islamic law as a reference in making national law. *Fourth*, the influence of Islamic law reform carried out by Islamic reformers (*mujathid*).

The reform of Islamic law in Indonesia in the last two decades has a considerable opportunity compared to previous years due to some of factors, such as:

*First*, The Indonesian political climate that often becomes a barrier in manifesting the idea of legal reform seems to be conducive and open to any form of change, including in the area of law. Crisis of legitimacy regularly occurring among political elite often becomes a real opportunity for the emergence of legal reform; *Second*, Middle class consisting of intellectuals, university students and professionals have become

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<sup>14</sup> Former Chief Chamber of the Religious Courts at the Supreme Court of Indonesia.

<sup>15</sup> Suadi and Candra, *Politik Hukum Perspektif Hukum Perdata Dan Pidana Islam Serta Ekonomi Sharia*, P. iii.

<sup>16</sup> Yusuf Al-Qardhawi, *Dasar Pemikiran Hukum Islam* (Jakarta: Pustaka Firdaus, 1987), P. 47.

<sup>17</sup> Al-Qardhawi, P. 102.

stronger; *Third*, There is complete spirit to move forward towards the creation of civil society; *Fourth*, The emergence of the development of legal theories which support changes in law in order to find the relevance between law and the social conditions of Indonesian society, such as the theory of *sociological jurisprudence* in western law and the theory of *'urf* and *mashlahah* in Islamic law.<sup>18</sup>

The reform of Islamic law will be successfully carried out when the steps needed are carefully performed in order to fulfill the purpose of Islamic law. Ibrahim Hosen, proposes four steps need to be taken in reforming Islamic law, as follows:<sup>19</sup> a) Promoting *ijtihad* institution; b) Putting *fiqh* in its true proportion; c) Promoting opinion that ordinary people do not need to be bound by a particular school of thought/law; and d) Developing tolerance (*tasamuh*) in following school of thought/law (*mazhab*).

As one of the sources of Indonesian national law, the Islamic legal system has provided complete foundations for the formation, reform, and application of the law in Indonesia.<sup>20</sup> The legal sub-system is the raw material in the formation of a comprehensive national legal system development through national legal politics.<sup>21</sup>

The Islamic legal system as one of the sources of the national legal system has a significant contribution to the formation of legal regulations, legal management, and the application of laws reflecting justice, legal certainty and legal benefits. Islamic law is a complete law, regulating all aspects of human life.

Regarding the efforts in reforming Islamic law in Indonesia, there are some typologies of law reforms, as follows: *First*, Through legal formation (enactment). This can be done through the enactment of laws in the forms of Laws/Acts, Government Regulations, Regulations of Minister of Religion, Regulations of Financial Service Authority (OJK), Supreme Court Regulations, Qanun (Acts in Aceh), and other. *Second*, Through fatwa (legal opinion) issued by institutions such as a) The MUI Fatwa Commission and Tarjih Fatwa Commission; b) Muhammadiyah through The Tarjih Assembly; and c) Nahdathul Ulama through Bahtsul Masail; *Third*, Persis through Hisbah Council *Ijtihad*, and others. *Forth*, Through court decisions (judgments) of the Religious Courts in the fields of a) Muslim Family Law; b) Sharia Economic Law; and c) Islamic Criminal Law (specifically for Mahkamah Sharia in Aceh).

Furthermore, a new formula for Islamic law in addressing contemporary issues can be built on the basis of three typologies that need to be further developed. In this case,

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<sup>18</sup> Muhammad Syafiri Antonio and Et.al, *Ensiklopedia Leadership & Manajemen Muhammad SAW, Jilid VII* (Jakarta: Tazkia Publishing, 2010), P. 145-146.

<sup>19</sup> Panitia Penyusunan Biografi, *Prof. K.H. Ibrahim Hosen Dan Pembaharuan Hukum Islam Di Indonesia* (Jakarta: Putra Harapan, 1990), P. 103-104.

<sup>20</sup> Suadi and Candra, *Politik Hukum Perspektif Hukum Perdata Dan Pidana Islam Serta Ekonomi Sharia*, P. 1.

<sup>21</sup> Otong Rosadi and Andi Deswan, *Studi Politik Hukum, Suarta Optik Ilmu Hukum* (Yogyakarta: Thafa Media, 2013), P. 89.

the process can be performed through the following process: 1) Conservation process (maintenance); 2) Innovation process which defined as a responsible attitude to the society's legal need; 3) Creation process by which mujtahids use the concepts of *mashlahah mursalah*, *al-istihsan*, *maqashid al-sharia* and so on;

Meanwhile, the Supreme Court's response in addressing the reform of Islamic law can be seen through the role of the Religious Courts in applying Islamic law in real cases through several instruments, such as: *Firstly*, Supreme Court Regulation (Perma) in order to fill the legal vacuum, such as Perma No. 2/2018 on the Compilation of Sharia Economic Law, Perma No. 14/2016 on the Settlement Procedures of Sharia Economic Disputes; *Secondly*, creating agreement within justices in the Chamber of the Religious Courts through Chamber Plenary Meeting in order to create legal unity and legal certainty. The agreement is then formalized in the form of Supreme Court Circular Letter (SEMA), such as SEMA No. 11/2016; *Thirdly*, developing legal jurisprudence taken from cassation decisions that can be followed by judges in lower courts.

In addition, if we look at the judgments of cassation cases decided by justices from the Religious Courts Chamber, it is clear that the Supreme Court has been able to play a major role in the reform of Islamic law in Indonesia. The reform takes place in fields of family law, sharia economic law (*muamalah*) and inheritance law. Some reforms in Islamic family law mostly concerns on gender equality, human rights, polygamy, women's rights after divorce, child custody, matrimonial property, and others.

The same is true in inheritance law. The reform in this law relates to cases when the heirs are of different religions, cases of *dzawil arham*, cases of adopted children and others. The issues of justice, gender equality, and human rights are the factors determining the dynamics of Islamic law reform in the Supreme Court.

The Supreme Court continuously conducts assessment and reform of the Islamic law in Indonesia. The reform is mainly driven by the desire of justices and judges to display the image of Islamic law that is more humanistic and responsive to the changing era. It is undeniable that the strategic role of the Supreme Court has encouraged the reform of Islamic law in Indonesia. Through its jurisprudence, the Supreme Court provides guidelines for the creation of new legal norms, the application of the law, and legal reforms that are in line with the development of society. Together with other institutions, the Supreme Court can make a significant contribution to the reform and development of Islamic law in Indonesia in the future.

## **Conclusion**

Based on the aforementioned explanation, it can be concluded that: The reform of Islamic law is an effort to renew the existing rules and/or regulations in response to the changing society. The reform of Islamic law is a step to reconstruct the provisions of the

branch (*furu'*) while maintaining the provision of original text/basic principles (*ashl*) in Islamic law. The reform of Islamic law is carried out carefully by paying attention to the essence of Islamic law so that society can accept it and take benefit from it.

The Supreme Court as the highest court in Indonesia has a strategic role to play in guarding and promoting Islamic law reform in Indonesia. Through its jurisprudence, the Supreme Court provides a construction of Islamic law that is more responsive and adaptive to the legal development in society.

Based on the above conclusions, some suggestions that can be put forward are as follows: *First*, Islamic institutions such as the MUI, Muhammadiyah, Nahdhatul Ulama, Persis, and other institutions are expected to be more optimum in performing legal reform that can be accepted by the society. *Second*, the Supreme Court that has a strategic role needs to be encouraged to always carry out Islamic law reform in Indonesia.

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