



## Enforcement Of Islamic Family Law In Review Of Supreme Court Jurisprudence

Alfiansyahputra

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### ABSTRACT

*The Contra opinion on the jurisprudence of the Supreme Court judge on Islamic family law greatly interferes with the existence of the enforcement of justice, because the legal basis is often contrary to the text of legislation. The study analyzed whether and to what extent the jurisprudence of the Supreme Court can enforce Indonesian Islamic Family Law. This type of research is library research, data needed secondary data. The approach method is doctrinal juridical, and the data is analyzed qualitatively. The research product explains that MA jurisprudence is one of the products of Islamic legal thought from the judiciary, judges play an important role in enforcing Islamic law because judges cannot be separated from ijtihad to find law through understanding and meaning of the law. The existence of jurisprudence is used as the basis for legal considerations of PA judges in resolving cases, able to strengthen the strengthening of law and solving problems of Islamic family law fairly and correctly based on the basic principles of Islamic Sharia.*

### INTRODUCTION

Jurisprudence is the decision of the highest judge on a case followed by a judge below him in resolving the same case. Jurisprudence is the product of judges of the Supreme Court (MA) in resolving legal cases whose legal basis is not described in detail in the legislation. The role of jurisprudence makes the task of judges not only to apply the law, but also in charge of interpreting, exploring and applying legislation in order to uphold justice and human happiness. The existence of jurisprudence really helps people to get legal certainty and Justice.

The role of MA jurisprudence is very important in the development of law in Indonesia including Islamic Family Law (Law of familie). Islamic Family Law is a law that regulates human relations in the family (husband, wife, children, and siblings) starting from marriage to the division of inheritance

according to Islamic teachings. Islamic Family Law consists of Islamic marriage law, Islamic inheritance, Waqf, infaq, zakat and Sadaqah which are based on the rules of Islamic law. In its development, the implementation of Islamic Family Law, not only based on religious institutions, but also based on laws and regulations set by the state, contains obligations and prohibitions, as well as sanctions for violating them. It started with the Marriage Act no. 1/1974, which then appeared other legislative arrangements, such as; PP No. 9/1975 on the implementation of Marriage Law, KHI Inpres No. 1/1991 first book on Marriage Law, and Law No. 7/1989 jo law no. 3/2006 on religious Justice. Sirajudin in his research entitled construction of Islamic Family Law in Indonesia: analysis of the law of Indonesia No. 1 of 1974 on marriage and KHI, explained that Islamic Family Law is very useful in an effort to create a harmonious and orderly community life, especially in family life. The

Indonesian state appreciates Islamic Family Law in the form of Islamic law legislation, in order to provide an umbrella and legal certainty for Muslims. MA jurisprudence in Islamic Family Law is a product of Islamic law derived from the decisions of judicial judges. During this time, many disputes of Islamic Family Law are resolved through the decision of the Supreme Court, for example; custody of children after divorce, distribution of inheritance rights of children of different religions, the status of the biological relationship of the father to the child out of wedlock, compulsory wills for adopted children, and others. However, the product of the Supreme Court Judge's decision drew a lot of contradictory opinions, because it was textually contrary to the Basic Rules of Islamic Family Law, causing a reaction in the community. The Contra opinion on the decision of the Supreme Court judge, considered that the judge's decision was very disturbing the existence of the application of Islamic Family Law in the community, even hurting legal justice.

Eko Setiawan, in his research entitled dynamics of renewal of Islamic Family Law in Indonesia, explained that Islamic Family Law is experiencing a very significant development, therefore it is necessary to reform Islamic family law that does not violate sharia/Islamic law. Reform of Islamic family law that is not in accordance with Sharia/Islamic law is a form of error, although its purpose is to establish kemashlahatan and uphold justice.<sup>6</sup> Thus the existence of MA jurisprudence as one form of legal products in the settlement of marital legal disputes needs to be tested whether it is in accordance with Islamic law or not.

Based on the above explanation, if understood, there is a legal issue (legal issues), namely the conflict between the rules of Islamic Family Law contained in the legislation (Das Sollen) with the jurisprudence of the Supreme Court in the determination of Islamic Family Law disputes that pose a controversial because it is contrary to the rules of Islamic Family Law textually (Das Sein). Therefore, research on the enforcement of Islamic Family Law through the jurisprudence of the Supreme Court is very important and feasible. The formulation of the problem is how far the existence of Supreme Court jurisprudence can enforce Islamic Family Law in Indonesia?

The purpose of this study is to analyze the existence of the jurisprudence of the Supreme Court in an effort to enforce the rules of Islamic Family Law (Islamic Family of Law) for the people of Indonesia. The benefits can be known how far the existence of

the Supreme Court jurisprudence can enforce Islamic Family Law in Indonesia.

## **METHOD**

This type of research is library research, taking library data that discusses research themes, namely MA jurisprudence, law enforcement and Islamic Family Law. The approach method is doctrinal juridical, juridical approach<sup>7</sup> means an approach method that seeks to examine the basis or guidelines of Islamic Family Law, for example; Marriage Law No.1/1974, and the rules of implementation, KHI Inpres No. 1/1991 book I on the rules of marriage for Muslims and Law No.3/2006 on religious Justice (PA). The doctrinal approach is a research approach that seeks to examine the rules of Islamic Family Law and its enforcement. This study requires secondary data, consisting of primary legal materials (regulation of Islamic Family Law), secondary (literature related to legal studies) and tertiary (literature related to non-legal materials). Data collection using documentation studies and literature studies (reading materials). The data that has been collected will be analyzed using sentences / qualitative, deductive legal logic (from special to general), interpretation/legal interpretation of legislation and legal meaning, as well as descriptive analytical (analysis of data exposure of research results). Data processing methods are done through the identification and organizing of data, then conceptualize and synthesize data, then do the analysis and edit, and the last is to conclude the data.

## **RESULTS AND DISCUSSION**

### **Enforcement Of Islamic Family Law In The Existence Of Supreme Court Jurisprudence**

Jurisprudence is the result of the discovery or creation of law from the decision/determination of the court, where jurisprudence is a product of Islamic legal thought derived from judicial decisions made by judges based on examination before the trial. Technically, the court decision is called al-qadla ' or Al-hukm, which is the law that comes from the determination or decision of the judicial institution (al-wilayah al-qadha'). There are also those who define that al-qadla ' or al-hukm is Islamic law that comes from the obedience/decision of the judge in charge of resolving a case in the judiciary. According to the ideal parameters, the position of the judge is equal to the degree of a mujtahid or mufti, because both establish and enforce Islamic law, which can be used as a reference for other judges in deciding the same case or case.

The role of judges is very important in the enforcement of Islamic law, judges can not be separated from *ijtihad*, especially *Ijtihad tatbiqi*, IE *ijtihad* derived from the efforts of judges in applying Islamic law, in order to resolve the case he faced fairly and satisfactorily to the parties *pencara Justice*. *Ijtihad* Islamic law, should not be done by every muslim, but must be done by a *mujtahid* who is qualified and has the authority and competence in establishing Islamic law. In addition, the establishment of Islamic law must also be carried out in accordance with the procedures or rules that are justified by *syara*".<sup>19</sup> in general, the area of *ijtihad* includes two things, namely the law that is not or there is no rule in *nash* and the law that *dhanni* (uncertain and requires interpretation). As for the laws that have been appointed by *nash qath'i* (definite and clear), it is not permissible to *berijtihad*. According to Abdul Wahhab Khallaf explained that the spirit of *berijtihad* on *nash qath'i* has been crystallized in a rule of *fiqh*, namely; *la masagha lil ijtihad fima fih nash sharih qath'i*, meaning that it is not permissible to attempt to *Ijtihad* from what has been explained in a definite and clear proposition (*qath'i*). Thus the judge may *berijtihad* or issue jurisprudence on the issue of *dhanny*, which has not been clearly described in the legislation and requires interpretation.

*Ijtihad hakim* is an attempt by the judge in determining the case he handled based on the meaning or interpretation of legislation, because the characteristics of a case, where a case must have certain characteristics. The result of *ijtihad* is what is called jurisprudence, meaning that it has permanent legal force and can be used by other judges when handling the same case. The background of judges doing *ijtihad* or jurisprudence is as explained in law No. 4 of 2004 Article 16 of the judicial authority; "The court may not refuse to examine, try and decide a case brought on the pretext that the law does not exist or is less clear, but is obliged to examine and judge it". The above article explains the position of judges as enforcers of justice, it is not allowed to reject cases submitted by the public, on the grounds that the rules are incomplete and unclear. However, the judge must be able to find the law of each case presented to him. Therefore, what the judge should do in resolving the case in court is;

1. The judge positions the case in the right and correct proportion.
2. Furthermore, the judge confirms by looking at the rules in the law : if there are rules of law, then the case is judged according to the rules of law, if the law is less clear or less perfect, then the judge

performs the interpretation behind the sound of the text of the law, if there are no rules of law, then the judge conducts legal construction, *rechtsverfijning*, or *argumentum a contrario*.

3. Other efforts of judges, can confirm the case being tried by looking at the jurisprudence and legal arguments of religious texts, customary law or local law prevailing in the community

Starting from the above explanation, it can be explained that the purpose of jurisprudence is to explore and formulate laws in order to resolve cases with full justice, enforce laws in the community and not unsettle citizens. Hence the provisions of *Ijtihad hakim* resulting in the jurisprudence of Islamic law are based on the following circumstances :

1. The text of Revelation is a perfect book of law, so the task of man is not to create the law, but to explain and detail the law of God for human life. Therefore, the task of the judge is to detail, explore, formulate and find the law that is in the revelation of God as the main source. In addition, the judge also has the authority to actualize the application of God's revelation so that it can become a living law in society.

2. Revelation of God in explaining the teachings of Islam or the substance of the law is more using a *mujmal* or global approach, meaning only general explanations, principles, or there are sounds of verses that are difficult to understand, cause double meaning, contain a deep philosophy, there is a hidden purpose behind the sound of text arguments, so it is necessary to try interpretation.

3. Faced with this, the judge must be given the freedom to make efforts to find the law, for example; through *heurmenetika* studies or studies of interpretation/interpretation of laws that are appropriate to the conditions of Social Development. Especially if there is no jurisprudence, then the judge deserves to be given freedom in the application of Islamic law.

*Ijtihad hakim* called jurisprudence is an attempt by judges to reform Islamic Family Law, in order to synchronize between the teachings of *fiqh* with the development of the state of Indonesian society, because the law will always accompany human life. *Fiqh*, which is the result of Islamic legal thinking from the scholars of the past, also needs to be re-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 purpose, namely to provide peace, order, order and happiness of the community.

Islamic Family Law has undergone legal reform since the promulgation of the compilation of Islamic

law Inpres No.1 of 1991 to resolve the issue of Islamic Family Law in Indonesia. KHI is a compilation/collection of Islamic law, which serves to renew the Islamic Family Law through unifying the perception of the imam madhab in solving the problem of Islamic Family Law in society, which is adapted to Indonesian culture that does not contradict the Quran and Al-Hadith.<sup>23</sup> the existence of KHI will encourage judges to berijtihad in resolving cases in the judiciary, so that jurisprudence is formed. This jurisprudence can be used as a basis for legal consideration for other judges in resolving similar cases, because KHI is a combination of legal products between Islamic Family Law and the social structure of Indonesian society.

Jurisprudence, which is one of the reforms of Islamic Family Law, aims to achieve the goal of forming Islamic law, namely bringing prosperity while maintaining religion, soul, intellect, property and nasab. It was done for the sake of Justice.<sup>25</sup> the principle of justice is always carried out for the sake of upholding the Justice of Islamic Family Law, both should always be implemented by judges in establishing jurisprudence.<sup>26</sup> thus the existence of jurisprudence can enforce justice in the application of Islamic Family Law.

The existence of the Supreme Court Judge's decision called jurisprudence against Islamic Family Law in Indonesia is :

1. Jurisprudence serves as one of the references for the consideration of judges for judges of the first instance in deciding matters relating to Islamic Family Law.
2. Jurisprudence can display the following powers of explanation of the rules of Islamic Family Law due to differences in interpretation / interpretation of the law.
3. Able to establish religious law (Islam) as a benchmark in solving family law problems.
4. Able to direct and provide guidance on problem solving Islamic Family Law through harmonization approach between state law and religious law.

Based on the explanation above, it can be understood that the existence of MA jurisprudence can be used as one of the methods of updating Islamic Family Law. The reason is, because law always develops according to the construction of conditions and people's thoughts. In addition, jurisprudence, which is the result of the discovery of the Supreme Court Judge's law, is also able to strengthen the strengthening of Islamic family law fairly and correctly. Reform of Islamic Family Law is an effort to develop law based on the basic principles of Islamic law that upholds the spirit of

justice and justice as the ideal of Al-Magashid Sharia law.

## CONCLUSION

The existence of MA jurisprudence can enforce Islamic Family Law, because it can solve the problems of Islamic family law fairly in the community. The seeker of justice can accept the decision of the judge as expected, although textually there is jurisprudence contrary to Islamic law, but the purpose of the determination is solely to provide certainty and legal protection and kemashlahatan. The existence of MA jurisprudence can act as Islamic Family Law as the basis for legal consideration of PA judges in resolving the same case. In addition, it is also able to strengthen the strengthening of Islamic family law that does not contradict the values in the Qur'an and Al-Hadith that uphold the values of justice and justice as the ideals of magashid Sharia law.

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