

## PROGRESSIVE LAW PARADIGM IN ISLAMIC FAMILY LAW RENEWAL IN INDONESIA

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**Abstract:** This paper discusses the progressive legal paradigm in renewal Islamic family law in Indonesia. Starting from the complexity of family problems in the contemporary era, the presence of progressive legal thinking is one of the foundations in order to provide certainty and justice in society. The results of this study indicate that legal reform progressive in the field of Islamic family law can be noticed from law enforcement through court decisions. Various judges' decisions have created jurisprudence and are used as guidelines for Religious Court judges in deciding cases. This can be seen from the decisions of the constitutional justices, including regarding the restrictions on polygamy, the status of children out of wedlock and the age of marriage which was later successfully revised with the issuance of Law 16 of 2019 concerning Amendments to Law 1 of 1974 concerning Marriage. In the context of progressive legal reform in Indonesia, judges use reinterpretation of religious texts (fiqh), and understand the social context of modern society dynamics. For this reason, judges are required to be more courageous not only to be bound textually, but also to put forward the goal of realizing justice and benefit in the midst of society. Thus, the main legal objectives will be realized, namely substantive justice, benefits, and legal certainty because the law is basically for humans, not for the law itself.

**Keywords:** progressive law; renewal; Islamic family law; Indonesia

**Abstrak:** Tulisan ini membahas tentang paradigma hukum progresif dalam pembaruan hukum keluarga Islam di Indonesia. Berangkat dari kompleksitas persoalan keluarga di era kontemporer saat ini, kehadiran pemikiran hukum progresif merupakan salah satu landasan dalam rangka memberikan kepastian dan keadilan di tengah masyarakat. Hasil penelitian ini menunjukkan bahwa pembaruan hukum progresif dalam bidang hukum keluarga Islam dapat dilihat dari penegakan hukum melalui putusan pengadilan. Berbagai putusan hakim telah melahirkan yurisprudensi dan dijadikan pedoman bagi hakim Pengadilan Agama dalam memutus perkara. Hal ini tampak pada putusan hakim konstitusi, di antaranya mengenai pembatasan poligami, status anak luar nikah dan usia perkawinan yang kemudian berhasil direvisi dengan terbitnya UU 16 Tahun 2019 tentang Perubahan Atas UU 1 Tahun 1974 tentang Perkawinan. Dalam konteks pembaruan hukum progresif di Indonesia, maka hakim menggunakan reinterpretasi teks keagamaan (fikih), dan memahami konteks sosial dinamika masyarakat modern. Untuk itu, dibutuhkan hakim yang lebih berani untuk tidak terikat hanya pada tekstual, tapi lebih mengedepankan tujuan dalam mewujudkan keadilan dan kemaslahatan di tengah masyarakat. Dengan demikian tujuan hukum yang utama akan terwujud, yaitu keadilan substantif, bermanfaat, dan tercipta kepastian hukum. Sebab pada dasarnya hukum adalah untuk manusia, bukan untuk hukum itu sendiri.

**Kata kunci:** hukum progresif; pembaruan; hukum keluarga Islam; Indonesia

## Introduction

The realization of issuing Islamic family law-based regulation in Indonesia which is embodied in Law 1 of 1974 concerning marriage and the Compilation of Islamic Law (KHI) is a milestone in the success of reforming the product of Islamic legal thought.<sup>1</sup> This form of success shows that Islamic law has the power of adaptability, universality and flexibility in the Indonesian legal system. With the existence of this Islamic family law product, it has made a positive contribution to the country while strengthening the commitment of Muslims to the nation-state of Indonesia. However, along with the changing times, various family problems that arise in the community have implications for demands for legal reform.

The space for democratization that has rolled out after the reformation has caused the existence of Islamic family law products to require modification to adapt to modern era. The issue of family law carried out by the state has so far been inadequate in finding and answering contemporary problems that occur in society. The law has met a dead end in realizing substantive justice, especially when faced with the absence of a text that has been a reference for law enforcers. Therefore, the idea of reforming Islamic family law with a progressive dimension is a relevant idea in responding to demands for changes in the midst of society.<sup>2</sup>

According to YUSDANI, the emergence of the term progressive law in the renewal of Islamic legal thought is a challenge and demand for reality, for the awareness of contemporary Muslim thinkers in an effort to break down the stagnation wall of Islamic legal thought (fiqh). The formulation of Islamic family law as contained in fiqh books is not a standard formula that cannot change, but must be seen as an interpretation or formulation of the scholars of time who needed criticism in accordance with the demands of change. This is important so that Islamic family law does not undergo fossilization, and in turn will lose its actuality and be abandoned by Muslims.<sup>3</sup>

This is in line with the context of national law development, that the orientation of legal reform no longer leads to reform in the form of positivity and codification, but has shifted to the concept of progressive legal thought.<sup>4</sup> In Indonesia, progressive law is the result of SATJIPTO RAHARDJO's thought in an effort to reform the ideal law in the context of national law development. According to SATJIPTO,<sup>5</sup> in positivistic legal thinking, law enforcers are trapped in mere procedural aspects, so that the law is far from justice and truth. For this reason, progressive legal thinking becomes important in order to free from positivistic thinking by

<sup>1</sup> Nurul Mu'arifah, "Positivisasi Hukum Keluarga Islam Sebagai Langkah Pembaharuan Hukum Islam Di Indonesia: Kajian Sejarah Politik Hukum Islam," *Al-Manahij: Jurnal Kajian Hukum Islam*, Vol. XIII, No. Desember 2019, p. 243–58, <https://doi.org/10.24090/mnh.v13i2.2692>

<sup>2</sup> Maulidi, "Paradigma Progresif Dan Maqashid Syariah: Manhaj Baru Menemukan Hukum Responsif," *Jurnal Asy-Syir'ah*, Vol. 49, No. 2, 2015, p. 251–64

<sup>3</sup> YUSDANI, "Usul Fikih Dalam Hukum Islam Progresif," *Madania: Jurnal Kajian Keislaman*, Vol. 1, No. 3 2003 the progressive Islamic law has a basic concept of ushul fiqh setting out ijtihad based contextual concept that comes from the essential of Islamic basic values (maqâsid as-syarî'ah, p. 59-70

<sup>4</sup> Derita Prapti Sulaiman, "Pembangunan Hukum Indonesia Dalam Konsep Hukum Progresif," *Hermeneutik : Jurnal Ilmu Hukum*, Vol. 2, No. 1, 2018, p. 128–39, <https://doi.org/10.33603/hermeneutika.v2i1.1124>.

<sup>5</sup> SATJIPTO RAHARDJO, "Reformasi Menuju Hukum Progresif Sebaiknya Pikiran Untuk Merekonstruksi," 2004, p. 238–41.

placing laws for humans. Furthermore, Romli added that in the paradigm of national law development, the progressive legal model is one of the attainments of the ideal of a just law.<sup>6</sup>

Meanwhile, various family issues regarding human rights (HAM) and gender equality are still heatedly discussed. According to Nasifah, substantially the existence of family law has not succeeded in increasing the status and position of women. The existing legal policies are still biased which have the potential to cause gender injustice.<sup>7</sup> The issue of gender and human rights has been carried out by liberal groups, such as Siti Ruhaini, who stated that the dominance of the positivistic-formalistic flow of law has placed the law tending to be black and white, a-historical and not contextual. In this case, a contextual progressive law with the involvement of experts, especially women is needed in constructing legal products that are substantially contradicting gender bias and protecting children's rights.<sup>8</sup> Meanwhile, in historical records, progressive legal thought in Islamic thought has been well known by Muslim thinkers in the past and has been practiced in the Muslim world. Because it must be admitted, classical fiqh literature is not sufficient to answer contemporary problems that continue to grow.

This paper takes an important part in explaining the roots of the emergence of

progressive legal thinking in the reform of Islamic family law in the Muslim community. Furthermore, it explains how the challenges faced in efforts to reform progressive Islamic family law as well as explain the progressiveness of reforming Islamic family law in Indonesia.

### **Progressive Islamic Law Paradigm in Islamic Family Law in the Muslim Community**

The discussion of progressive law in Islamic legal thought is inseparable from the historical roots of Muslims in the post-codification of Islamic law. Development of Islamic law has stagnated after the codification of Islamic law (tadwin). This stagnation is caused by the inability of Islamic law to dialogue with the ever-evolving reality. As a result, Islamic jurisprudence is far behind the development of human civilization in general, and the dependence of Muslims on references to intellectual thought in the classical and medieval ages is the only inevitable choice.<sup>9</sup>

This phenomenon a negative impression on Muslims, first; there is an assessment that Islam is seen as a religion that is less sensitive when responding to the conditions of the times rapidly developing. So that there is a wide gap between the Muslim and the Western community; Second, there is an opinion that Islam is a normative and traditional religion, so that Islam in general and Islamic law (fiqh) in particular are often accused and simultaneously sued as the cause of the emergence of extremism. These two things encourage Muslim scholars to continue to study and to explore fiqh products contextually, with progressive legal dimension.<sup>10</sup>

<sup>6</sup> Romli Artasasmita, "Tiga Paradigma Hukum," *Jurnal Hukum Prioris*, Vol. 3, No. 1, 2012, p. 1–26.

<sup>7</sup> Durotun Nafisah, "Positifisasi Hukum Keluarga Islam Di Indonesia Dalam Perspektif Gender," *Al-Manahij: Jurnal Kajian Hukum Islam*, Vol. VII, No. 1, 2013, <https://doi.org/10.24090/mnh.v7i1.575>

<sup>8</sup> Siti Ruhaini Dzuhayatin, et.al "Menuju Hukum Keluarga Progressif, Responsif Gender, Dan Akomodatif Hak Anak," *PSW UIN Sunan Kalijaga, The Asia Foudation*, 2013, p. 471, <http://digilib.uin-suka.ac.id/20159/>

<sup>9</sup> Ahmad Bunyan Wahib, "Reformasi Hukum Keluarga Di Dunia Muslim," *Ijtihad*, Vol. 14, No. 1, 2014, p. 1–19.

<sup>10</sup> Anjar Nugroho, "Rekonstruksi Pemikiran Fikih: Mengembangkan Fikih Progresif-Revolusioner," *Al-Manahij: Jurnal Kajian Hukum Islam*, Vol. IX, No. 1 Juni,

Basically, the position of Islamic law is clear that the value of the universality of Islamic law has been able to adapt and to answer various problems that arise in society. Even the position of Islamic law is not in the position of being trapped and bound by the past, but on the contrary, it is able to see the present and the future. This is in line with the rules of *ushul al-fiqh*: “The law rotates (is born and changes) along with the presence or absence of *‘illat*. This rule suggests the elasticity of *fiqh* or Islamic law. It can also be said that *fiqh* is a product of socio-historical conditions.<sup>11</sup>

However, reconstructing progressive Islamic law is not enough with the courage of a *mujtahid*, but still adhering to the building blocks of Islamic law. Philosophically, one of the foundations of the building of Islamic law is benefit (*maslahah*). The idea of *maslahat* as the foundation of Islamic law has developed and is recognized by Imam Malik, ash-Syatibi, al-Ghazali, Izzudin ibn abd Salam, and so on. In essence, *maslahah* is a “value” to be achieved in the formation of law. As emphasized by Najmuddin at-Thufi, an Islamic scholar who lived in the 13th century AD. One of the theories at the core of *maslahat* teachings is that God sent down the law in order to fulfill human benefit. Religious sacred texts are only limited to *wasilah* (read: intermediary), while the main objective is to achieve the goal itself. He added that *maslahat* is an independent argument (*dalil mustaqil*) in establishing law. The *hujjah* (argumentation) of *maslahat* does not need supporting arguments, with the argument that *maslahat* is based solely on

reason.<sup>12</sup> If investigated further, the idea of *maslahat at-Thufi* turns out to have the same spirit as the progressive legal teachings offered by the Indonesian legal scholar, Satjipto Rahardjo, whose philosophical basis is that law is for humans.

Next, methodologically, namely the approach of *fiqh* proposals which becomes a very fundamental foundation in answering contemporary problems in society in the effort to achieve *maslahat* justice. In line with the rules of *ushul al-fiqh*: (Law is rotating (born and changing) along with whether or not According to Abdullah Seed, thinking methodologically becomes a foothold in the framework of progressive *ijtihadists* to reinterpret traditional religious foundations or products of Islamic law to accommodate contemporary life, especially in addressing contemporary Muslim *fiqh* issues. In addition, Muslim thinkers are required to adhere to the *maqhasid syariah* framework as the goal of establishing Islamic law, namely, maintaining religion, soul, reason, descent and property.<sup>13</sup>

The explanation above shows that progressive *ijtihadists* are required to master the basics of Islamic law, both philosophically with *maslahat* theory, and thinking methodologically by

2015, <https://doi.org/10.24090/mnh.v9i1.508>

<sup>11</sup> Toha Andiko, “Pemberdayaan Qawa'id Fiqhiyah Dalam Penyelesaian Masalah-Masalah Fikih Siyasah Kontemporer,” *Al-Adala*, 2014.

<sup>12</sup> At that time, his thought about *maslahat* was very controversial and tended to go against the existing and well-established current of thought. One of his ideas which until now is still considered controversial and against the current is the necessity of *maslahat* to annul religious sacred texts (such as the al-Quran and al-Hadith) when it contradicts the values of benefit (*maslahah*) that develop in society. See, Sarifudin, “Hukum Islam Progresif: Tawaran Teori *Maslahat At-Thufi* Sebagai Epistemologi Untuk Pembangunan Hukum Nasional Di Indonesia,” *Jurnal Wawasan Yuridika*, 2019, <https://doi.org/10.25072/jwy.v3i2.269>.

<sup>13</sup> Toha Andiko, Suansar Khatib, Romi Adetio Setiawan, *Maqashid Syariah Dalam Ekonomi Islam*, 2018, <https://doi.org/10.1051/mateconf/201712107005>.

mastering fiqh proposals in an effort to reconstruct a more acceptable and compatible Islamic legal building in contemporary issues. From this concept, there is an agreement with the main thought of progressive legal teaching put forward by Sacipto Raharjo. The similarity lies in the necessity to carry out rule breaking in times of legal impasse and conflicts between legal texts and the spirit of public justice, or in at-Thufi terms it is called benefit (*maslahah*). Although it must be admitted that the epistemological sources of the two theoretical structures are different, one comes from God's revelation, while the other comes from the Greek philosophy of natural law.

As an example of reforming family law with a progressive legal dimension, it can be seen from the experiences of several Muslim countries in the world. The country of Turkey was one of the first countries to raise the main issue of gender equality and justice. Of these issues, the issue of polygamy has become one of the important issues as the beginning of family law reform. Article 74 explains that the husband is allowed to be polygamous on the condition that he treats his wives fairly. However, the situation and socio-political development of the Turkish state after 1920, has made a shift in society in various fields, including reforming family law by prohibiting polygamy as contained in the 1926 Turkish Civil Law. This prohibition on polygamy is carried out on the principle of *ijtihad* through text reinterpretation, namely interpretation. Reiterates to Surah an-Nisa' (4): 3, that the justice required for polygamy is not only in terms of living (*nafaqah*), but also includes love.<sup>14</sup> The same thing has also been

done in several other Muslim countries, for example the Tunisian State which absolutely prohibits polygamy. This Tunisian state imposes restrictions on polygamy with tough conditions, and several other countries impose sanctions or punishment if they commit violations.<sup>15</sup>

What the Turkish state has done by prohibiting polygamy by reinterpreting holy verses is a step to seek and to find answers to the needs and demands of the times. This step can be said to be the adaptation of the shari'a to the changes that occur in society, as the situation of the Turkish state before the declaration of Modern Turkey.<sup>16</sup> This sharia adaptation is carried out by adjusting sharia to the development of society so that Islamic law is compatible with modern society. Therefore, it is not uncommon to make new legal provisions at the expense of old legal rules that have been practiced. Legal reforms in the form of sharia adaptation can take the form of modifying old provisions or replacing old provisions with new ones.

On the other hand, the Turkish state is a good example for other Muslim countries, because modern legal reforms are not always successful. Modern Turkey's decision to fully secularize by adopting Swiss family law in 1927

Vol.12, No. 1, 2015, p.1–15, <https://doi.org/10.21831/hum.v12i1.3648>.

<sup>15</sup> Toha Andiko, "Hukum Keluarga Di Dunia Islam : Studi Kasus Pengaturan Alasan-Alasan Poligami Di Indonesia," *Nuansa*, Vol. XII, no. 2, 2019, p. 293–306.

<sup>16</sup> The New Turkish State (Republic of Turkey) which was declared in 1923 then carried out the secularization of government, including in the field of law and justice. In 1924, one year after the declaration of modern Turkey, the religious justice system was abolished. In 1927 Turkey also replaced family law by adopting the Swiss Civil Code. In this area of family law, Modern Turkey is completely secularized. See. Ahmad Bunyan Wahib, "Reformasi Hukum Keluarga Di Dunia Muslim," *Ijtihad*, Vol. 14, No. 1, 2014, p.1–19.

<sup>14</sup> Vita Fitria, "Hukum Keluarga Di Turki Sebagai Upaya Perdana Pembaharuan Hukum Islam," *Humanika*,



met “failure”. Several results of legal reform efforts must be canceled because they do not get strong support from the community. From this phenomenon, it can be concluded that in legal reform, social engineering efforts are needed by considering the legal tradition (legal culture) which represents the need for law and the importance of law in society. So that the fruits of legal reform can be implemented in society without any pressure to be repealed, because historical facts explain that there are laws that cannot be imposed (non-transferability of law) on society.<sup>17</sup>

In the context of progressive law, the case of polygamy based on the letter an-Nisa (4): 3 on the condition that acting fairly is considered incompatible with the situation with the times. Therefore, forbidding polygamy is a form of progressive legal reform by considering factors of socio-historical conditions that will give fiqh features that differ from one place and another.

### **Progressive Legal Challenges in Renewal Islamic Family law in Indonesia**

In Indonesia, the presence of progressive law is a response to the domination of positivist-formalistic thinking which considers the truth of law to be textual truths. For positivists, law is viewed only from one perspective, namely, that law is *ius constitutum*, namely the command of law giver (order of lawmakers), so that the values that are based on formal law that is deposited by the state are what is said by law. For the progressive legal group, they see that legal truth is truth based on contextual facts (order of fact). Therefore, the progressive

legal paradigm exists as an attempt to free from formalistic shackles.

Until now, the attempt to acknowledge Islamic family law products has become a guideline for religious judges in deciding cases in court. It contains regulations regarding marriage, inheritance, waqf and other fields. These Islamic family law regulations generally apply to all citizens of the Republic of Indonesia. The factors of the absence of statutory regulations and the weak substance of legal positification have caused law enforcement to be far from a sense of justice amidst the complexity of family problems as a logical consequence of the dynamics of life that arise in society.

A group called the Counter Legal Draft (CLD)-KHI team has ever criticized the product of Islamic family law. A group of liberal groups represented by feminists by raising the issue of equality of men and women, gender biased laws that tend to make women in a subordinate position, and contradicting several articles with the structure and cultural patterns of society. This group criticized them by offering changes (revisions) to the various formulations of the articles in the Islamic Law Compilation (KHI). More specifically, several issues have become important issues that are considered contrary to human rights and gender, namely polygamy, underage marriage and arbitrary divorce, marriage registration, minimum age restrictions for marriage, interfaith marriages, engagement, divorce, and child issues. All of which became the subject of heated debate, resulting in the birth of CLD KHI and the HTPA RUU after the reformation.<sup>18</sup>

<sup>17</sup> Ahmad Bunyan Wahid, “Reformasi Hukum Keluarga Di Dunia Muslim,” *Ijtihad*, Vol.14, No. 1, 2014, p. 1–19.

<sup>18</sup> Yushadani, “Kontroversi Seputar Pembaharuan Hukum Keluarga Islam Di Indonesia,” *Al-Ahwal: Jurnal*

According to Islamy, the movement and discourse of liberalism in Islamic thought related to criticism of the formulation of the post-reformation KHI articles cannot be said to be effective. Historical facts show that these various movements and discourses are merely contestations of open scientific discourse in the public sphere as a result of the opening of the taps of post-reform democracy. This is because the formulation of articles contained in the KHI is sociologically considered relevant to the conditions of Indonesian society, although there are several articles on KHI that appear to be gender biased, but these are not problematic and are not urgent to be revised.<sup>19</sup>

On the other hand, family problems that have been growing lately certainly require legal certainty with a one-stop solution. Like the KHI (compilation of Islamic law), which is only a reference book and a benchmark for judges in deciding laws in court. Therefore, in the context of reforming Islamic law in Indonesia, it is appropriate for the KHI to be fought for justification and legitimacy so that it can be promulgated at a higher legal hierarchy for example by Law, Presidential Decree, or Government regulations. Although this step will definitely face challenges from the Islamic Phobic group and secular groups who do not want Islamic law to take the largest share in national law.

When referring to experiences in various Muslim countries in the world, including in Indonesia, the process of updating Islamic

law products is influenced by political configuration, as can be seen in the process of forming Islamic family law, both Law 1 of 1974 concerning Marriage and KHI (Compilation of Islamic Law). The role of state domination is very active in addition to the role of elements of society, because the formation of family law products in Indonesia is actually a government program in the context of realizing the unification and certainty of Islamic family law that applies to Muslims in Indonesia.<sup>20</sup> So it is not surprising that the two products of family law are considered to be products of the New Order law, because they were born during the New Order era.<sup>21</sup>

Explained that in reforming a law in a country there are political contestations that have the potential to influence the development of legal products that apply in that country and also produce products that have certain characters. The existence of a democratic political climate will be able to produce legal products that respond to the needs of society. Meanwhile, the authoritarian political climate will give birth to orthodox legal products.

As it can be seen from the problem of family law reform described above, law enforcement is an important step in efforts to develop a law with a progressive dimension. In this case, judges have an important role in providing legal decisions with a progressive legal dimension as part of legal reform efforts, particularly family law.<sup>22</sup> Judges are required

*Hukum Keluarga Islam*, Vol. 8, No. 1, 2015, p. 25, <https://doi.org/10.14421/ahwal.2015.08102>.

<sup>19</sup> Athoillah Islamy, "Eksistensi Hukum Keluarga Islam Di Indonesia Dalam Kontestasi Politik Hukum Dan Liberalisme Pemikiran Islam," *Al-Istinbath : Jurnal Hukum Islam*, Vol. 4, No. 2, 2019, p.61–75, <https://doi.org/10.29240/jhi.v4i2.1059>.

<sup>20</sup> Athoillah Islamy, *Eksistensi Hukum Keluarga Islam...*, h.61-75.

<sup>21</sup> Nurrohman, "Reformasi Dan Transformasi Hukum Keluarga Islam : Model Dan Implementasinya Di Indonesia," n.d.

<sup>22</sup> Mukhlis, "Pembaharuan Hukum Perkawinan Di Indonesia," *ADLIYA: Jurnal Hukum Dan Kemanusiaan* 11, no. 1 (2019): 59–78, <https://doi.org/10.15575/adliya.v11i1.4852>. Lihat juga Khoiruddin Nasution, "Metode

to get out of the trap of formal justice which ignores the substantial justice used by the positive school. Thus, the law will appear to be always moving, changing, following the dynamics of human life. This is what is meant by “liberation”, which is to free oneself from legalistic-positivistic types, ways of thinking, principles and theories of law. With the characteristic of “liberation”, progressive law prioritizes “goals” rather than “procedures”.

The demand for judges, both Supreme Court and Constitutional justices to act progressively through legal interpretation is because the formulation of articles in laws and regulations has been often so vague, that justices must interpret them in the context they are facing. The legal objectives to be achieved are such as justice, certainty, and congruence, are still too general, giving the justices the opportunity to develop their own interpretation of the law's purpose. Justices in this case have the authority to take the initiative to find justice-oriented laws by creating jurisprudence.

The essence of legal discovery lies in the freedom of judges who are free to make decisions in accordance with the situation at hand, not based on the outward appearance of the applicable laws but on the basis of wisdom and justice. From this it can be said that judges have implemented the concept of progressive law that carries out law not only according to legislation, but a tool to describe the basic humanity that functions to provide justice to humans. The assumptions that underlie the progressiveism of law are firstly, the law exists for humans and not for itself, the second law

is always in the status of *law in the making* and is not final, the third law is an institution that has human moral values.

Law enforcement through judge's decisions (*judge made law*) is a process to bring legal ideas into reality. The idea of progressive law is pro-justice and pro-people law, meaning that in punishing legal actors are required to prioritize honesty, empathy, concern for the people and sincerity in law enforcement.<sup>23</sup> The main idea of progressive law is to free humans from the shackles of law. According to progressive law, the function of law is to provide guidance, not just shackle, it is humans who are more important and are not attached to existing laws and regulations.<sup>24</sup>

According to Satjipto Rahardjo, the legal idealist is a judge. Apart from carrying out his duties as a judge, he must also be a sociologist and leave the courthouse to hear the noise of the people, not be imprisoned by legal texts. It is hoped that the presence of legal actors can do something that is visionary, sensitive to moral values and justice, honest and trustworthy, so that they can produce legal decisions that are more pro-justice and the welfare of the people at large. In this case, judges are expected to be able to place the law not limited to the letters that must be applied in handling cases, but what is important is that the decision has a toughness, provides a sense of security, provides protection, justice, and is not isolated and takes into account the aspects that will arise later day.

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Pembaruan Hukum Keluarga Islam Kontemporer,” *Unisia* 30, no. 66 (2007): 329–41, <https://doi.org/10.20885/unisia.vol30.iss66.art1>.

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<sup>23</sup> Mukhammad Luthfan Setiaji and Aminullah Ibrahim, “Kajian Hak Asasi Manusia Dalam Negara the Rule of Law : Antara Hukum Progresif Dan Hukum Positif,” *Lex Scientia Law Review*, Vol. 2, No. 2 2018, P, 123–38, <https://doi.org/10.15294/lesrev.v2i2.27580>.

<sup>24</sup> Mukhidin, “Hukum Progresif Sebagai Solusi Hukum Yang Mensejahterakan Rakyat,” *Jurnal Pembaharuan Hukum*, Vol. 1, No. 3, 2003, P. 267–86.



Based on the explanation above, it takes the courage of a judge with a high level of morality and integrity when making a decision to create a just law for everyone. Next, judges are required to take creative, innovative steps and if necessary carry out “legal mobilization” or “*rule breaking*”. Because, even though the practice of law enforcement by judges through legal discovery has developed based on progressive legal principles, the legal-positivist tradition is still the mainstream of judges, and the strong political influence, at least is the reason that progressive law enforcement has not been maximized.<sup>25</sup> Although it is recognized that the progress and deterioration of the law is not solely in the hands of legal operators, but also users and even legal experts.<sup>26</sup>

### **Progressiveness of Islamic Family Law Renewal in Indonesia**

The emergence of legal thinking with a progressive dimension is admittedly not new. The progressive legal thought developed by Sapipto is a crystallization of thoughts on the portrait of law that is far from justice for all people. Starting in 1980 until now it has experienced significant developments, especially in the post-democratization era with a populist responsive tendency in every effort to form legislation.<sup>27</sup> Philosophically, the idea of progressive law wants legal entity to be a living part, developing by adjusting the social life of the community. Sapipto explains that

law has power if the law runs dynamically, thus rejecting legal methods that cause legal dynamics to disappear because the law becomes static and stagnant.

The notion of progressive law put forward by Sapipto came back to the fore after the reformation along with the legal reform agenda in Indonesia. As a rule of law, demands for post-reform legal reform are a constitutional mandate in ensuring the fulfillment of gender equality and justice in society. In the 1945 Constitution states that the state guarantees and protects human rights, without differentiation of race, religion, sex or gender. To support the government's commitment to the national law development agenda, Islamic family law products derived from Islamic law are an integral part. In the agenda of legal reform that is just for everyone. In this case, the agenda for legal reform by prioritizing a progressive legal paradigm is an effort in the context of realizing the goal of developing a national law with substantive justice for society.

In the context of a *nation-state*, the existence of Islamic family law in the midst of social change in Indonesia can be understood to function as a potential value substance to provide roots for the growth of *pure legal obedience* as a reality and process of cultural transplantation and sincere towards the existing constitution and legislation.<sup>28</sup> For this reason, efforts to reform progressive family law products always go hand in hand with a process of dialogue between Islamic law and social reality. So that Islamic law is not considered a fossilized framework of

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<sup>25</sup> Sigit Irianto, “Hukum Progresif Dalam Perkembangannya Melalui Lembaga Peradilan,” *Hukum Dan Dinamika Masyarakat*, Vol. 4, No. 0854, 2007, p.194–205.

<sup>26</sup> Sigit Irianto, *Hukum Progresif Dalam...*, P.194–205.

<sup>27</sup> Eko Hidayat, “Kontribusi Politik Hukum Dalam Pembangunan Hukum Progresif Di Indonesia,” *ASAS*, 2019, <https://doi.org/10.24042/asas.v10i02.4536>.

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<sup>28</sup> J.M. Muslimin, “Hukum Keluarga Islam Dalam Potret Interrelasi Sosial,” *AHKAM : Jurnal Ilmu Syariah*, Vol. 15, No. 1, 2019, h. 48, <https://doi.org/10.15408/ajis.v15i1.2846>.

understanding, but Islamic law remains consistent with its attitude which has flexibility and creativity. as shown from the experiences of earlier thinkers to this day.

It is admitted that the issue of human rights and gender equality in the public sphere that is aimed at the product of Islamic family law is still an actual, controversial issue and has become an agenda for thematic discussions among ulama, legal practitioners, women activists and academics. The reality of law related to gender has become a sensitive social problem, so that the law is sometimes blind, neutral, and biased. This sensitive attitude is a form of response and responsibility for the social inequality that occurs. Meanwhile, legal opinion has been dominated by a positive-formalistic stream which tends to be black and white, a-historical and not contextual.<sup>29</sup>

The reality in society shows that women are still subordinated in almost all lines of life. In fact, violence perpetrated by husbands against wives is not only physical violence, but also psychological, economic and sexual violence. Based on data from KOMNAS HAM 2020, it shows that in the period 12 years, violence against women increased by 792% (almost 800%). This means that violence against women in Indonesia for 12 years has increased almost 8 times. This fact is an iceberg phenomenon, which means that in the actual situation, the condition of Indonesian women is far from having an unsafe life.<sup>30</sup> Meanwhile,

existing statutory regulations have not been able to be maximally enforced. In normative regulation regarding domestic violence has been set in legislation (Act No. 23 of 2004 on the Elimination of Domestic Violence). It is hoped that law enforcement against violence perpetrated by husbands against wives can be carried out optimally, either by means of penal and non-penal countermeasures so that obstacles in resolving violence perpetrated by husbands against wives can be overcome.<sup>31</sup>

The phenomenon of violence against wives is a small part of the shift in weak understanding of the meaning of family formation due to current modernization. In Islam, the formation of a family is a structure in society that is special, binding to one another. It contains responsibility and at the same time a sense of belonging and mutual hope (*mutual expectation*). The value of love based on religion makes a strong family structure. In contrast to modern society which tends to think and act pragmatically, so that marriage is prioritized as a function of sexual, reproductive and recreation. As a result, a marriage that only focuses on seeking pleasure rather than thinking about responsibilities will give birth to a weak marriage structure causing various family problems, such as divorce and domestic violence.<sup>32</sup> Therefore, modern society needs to make Islam a concept in the formation of a family because the system and

<sup>29</sup> Masnun, "Perempuan Dalam Bingkai Hak Asasi Manusia Dalam Hukum Keluarga Islam," *MUSAWA*, Vol. 15, No. 1, 2016, h. 55–68.

<sup>30</sup> <https://www.komnasperempuan.go.id/read-news-catatan-tahunan-kekerasan-terhadap-perempuan-2020>, "Read News," n.d., <https://www.komnasperempuan.go.id/read-news-catatan-tahunan-kekerasan-terhadap-perempuan-2020>.

<sup>31</sup> Sutan Siregar and Pranjono Pranjono, "Penegakan Hukum Terhadap Tindak Kekerasan Yang Dilakukan Oleh Suami Terhadap Istri," *Jurnal Muqoddimah : Jurnal Ilmu Sosial, Politik Dan Hummaniora*, 2019, <https://doi.org/10.31604/jim.v3i2.2019.74-83>.

<sup>32</sup> Mufliha Wijayati, "Perempuan Dalam Persidangan KAsus Perceraian," *TAPIS Jurnal Penelitian Ilmiah*, 2012. Lihat juga Toha Andiko & Fauzan, "Dilema Perceraian Suami Muslim Pegawai Negeri Sipil Di Propinsi Bengkulu," *Al Ulum*, Vol. 19, No. 1, 2019, h. 103–28.

its foundation comes from the principle of Tauhid, which is to make God as the maker of rules to be carried out in everyday life.<sup>33</sup>

Regarding the reform of Islamic family law which has a progressive dimension in family matters, it can be seen from the important issues that have been developing. In general, the issues raised in the family sector include legal materials such as law enforcement of marriage, inheritance, wills, and the political field. state and government, such as the relationship between religion and state, constitutional rights of citizens, culture, gender, human rights, the position of women and others. From these issues, based on the experiences in Muslim countries such as Turkey and other Muslim countries, the issue of human rights and gender equality is one of the important issues for progressive ijtihadits. Paraprogressive ijtihadits in its framework tries to formulate a set of Islamic laws that can serve as a basis for reference. Alternatives and solutions for the creation of a just society that upholds human values, respects women's rights, gender equality in the family, justice without any discrimination in the context of realizing the benefit of all mankind.

The progressive ijtihadits in their framework are based on the basic concept of jurisprudence by putting forward the concept of contextual based ijtihad (progressive ijtihadist) which is based on essential Islamic basic values (maqâshid as-syarî'ah). Islamic basic values such as justice, equality, equality, and others are translated and integrated in such a way as to respond to contemporary humanitarian

issues in the field of family law, such as human rights, gender equality, the rights of minorities, on that basis. The proposed concept of progressive Islamic jurisprudence intends to develop and offer humanist Islamic fiqh (transformative anthropocentric) by upholding prophetic values.<sup>34</sup>

Meanwhile, considering that Islamic law has historically developed outside state institutions, one of the means in reforming Islamic family law with a progressive legal dimension can be carried out through court decisions. Court decisions are a product of Islamic legal thought apart from fiqh, laws and fatwas. According to Ahmad Rofiq,<sup>35</sup> The court decision is categorized as a product of Islamic legal thought which has a fairly high level of dynamics. This is possible because the decisions handed down by the court involve the role of judges who carry out law enforcement functions. Judges in carrying out their functions are required to explore, follow and understand legal values and a sense of justice that lives in society.

According to Arif Budiman, a judge becomes the spearhead through his courage and creativity to act progressively in finding laws against legal formulations that are often vague. The ability of a judge to interpret a case in the context he is facing will contribute to the development of Islamic law in Indonesia, because a judge's decision will serve as jurisprudence for other judges. The judges' findings contributed positively to the development of Indonesian Islamic Civil

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<sup>33</sup> M. Saeful Amri and Tali Tulab, "Tauhid: Prinsip Keluarga Dalam Islam (Problem Keluarga Di Barat)," *Ulul Albab: Jurnal Studi Dan Penelitian Hukum Islam*, 2018, <https://doi.org/10.30659/jua.v1i2.2444>.

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<sup>34</sup> Moh Dahlan, "Pendekatan Antropologis Dalam Paradigma Usul Fikih," *Madania: Jurnal Kajian Keislaman*, Vol. 19, No. 1, 2015, p. 47–59.

<sup>35</sup> Ahmad Rofiq, "Pembaharuan Hukum Islam Di Indonesia, (Yogyakarta:Penerbit Gema Media,2001), cet.1

Law. The judge's decision has strategic value because it will give color to law enforcement in Indonesia. In practice, these court decisions are then used as jurisprudence by judges in the Religious Courts.<sup>36</sup>

The jurisprudence issued by the judges is a form of legal reform efforts and shows the flexibility of dynamic Islamic law. The rule of the judge is the key in exploring and finding laws that are more contextual to Indonesian conditions. Thus, the progressive reform of the field of Islamic family law carried out by judges has a strategic role in the development of national law. The independence of judges is the key in exploring and finding laws that are more contextual to Indonesian conditions. The jurisprudence issued by judges is a form of legal reform efforts and shows the flexibility of dynamic Islamic law.

In the context of the progressive reform of family law with a progressive dimension, it can be seen from several decisions of the Constitutional Court judges, including:

First, the Constitutional Court Decision Number 46/PUU-VIII/2010 which annulled Article 34 paragraph (1) of Law Number 1 of 1974 concerning Marriage on the basis that the article contained elements of the elimination of extramarital children (even though blood relations between an out-of-wedlock child with a biological father can be proven scientifically and other evidence according to law), as well as against the values of justice and legal certainty as set forth in Article 28B paragraph (2) and Article 28D

paragraph (1) of the 1945 Constitution.<sup>37</sup>

Second, the verdict of the Constitutional Court justices. 12/PUU-V/2007 which strengthens the provisions on limiting polygamy on the condition that the first wife's permission. The Constitutional Court is of the opinion that monogamy is the principle of marriage in the Marriage Law No.1 of 1974. Polygamy is permitted only if the request for it fulfills the conditions which do not conflict with Islamic teachings. In this case, the Constitutional Court refers to the interpretation of Islamic marriage law that polygamy is not included in the category of worship in sharia. Polygamy included in this aspect of social relationships (*mu'amalat*) in sharia and the legal status of origin is permissible. Therefore, the provisions for limiting polygamy in the Marriage Law No. 1 of 1974 does not contradict the clause on religious freedom in the 1945 Constitution. Even the restrictions on polygamy in Law 1 of 1974 are in line with the objectives of marriage in Indonesia, namely to form a family that is *sakinah, mawaddah and rahmah*.

Thirdly, messenger of the Constitutional Court of the Republic of Indonesia Number 22/PUU-XV/2017 which received the request for a change of article 7 of Law No. 1 of 1974 concerning Marriage by increasing the minimum age of marriage for women and men to be 19 years old. Even the DPR Plenary Session Monday, September 16 2019 has approved the Limited Amendment to Law No. 1 of 1974 concerning Marriage. Important changes made to article 7 of Law no. 1 of

<sup>36</sup> Achmad Arief Budiman, "PENEMUAN HUKUM DALAM PUTUSAN MAHKAMAH AGUNG DAN RELEVANSINYA BAGI PENGEMBANGAN HUKUM ISLAM," *Al-Ahkam* Vol.24, No. 1 April 2014 (n.d.),h. 1–30.

<sup>37</sup> Sarifudin Sarifudin and Kudrat Abdillah, "Putusan Mahkamah Konstitusi No. 46/Puu-Viii/2010 Dalam Bingkai Hukum Progresif," *Jurnal Yuridis*, Vol. 6, No. 1, 2019, p. 94, <https://doi.org/10.35586/jyur.v6i1.788>.



1974 concerning Marriage, among others, is to increase the minimum age limit for equal marriage for women and men to the age of 19 years. This amendment to Article 7 also provides an exception rule if underage marriage must be made, the exception must be provided with very urgent reasons and sufficient evidence.<sup>38</sup>

The decision of the Constitutional Court shows that the justices of the Constitutional Court have derived a progressive legal concept in the form of invalidating the discriminatory law text, then moving more realistically by considering the values of justice that live in the soul of society. The courage in seeking the truth and substantive justice has led him to *rule breaking* efforts against existing regulations. The position of progressiveness lies in the spirit of the Constitutional Court justices to continue to explore and to seek substantive justice even though it must be by “going beyond” the text of the laws and regulations (*rule breaking*), thus fulfilling a sense of legal justice in society.

In the context of Islamic legal thought, the Constitutional Court’s decision in its consideration has accommodated the reform of Islamic law (fiqh), especially in the field of family law which has an empirical-historical vision of humanity and nationality in Indonesia. In this case, fiqh needs to be oriented towards solving humanitarian problems. fundamental and nationalism as a whole. Thus, progressive Islamic jurisprudence can be said to be a new formula (interpretation) of Islamic law that is in accordance with the social life of society.

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<sup>38</sup> “Perjuangan Mengakhiri Perkawinan Anak Di Indonesia Membuahkan Hasil,” accessed September 28, 2020, <https://www.jurnalperempuan.org/warta-feminis/perjuangan-mengakhiri-perkawinan-anak-di-indonesia-membuahkan-hasil>.

## Conclusion

The progressive legal paradigm is an idea implying law essentially aimed to realize substantive justice which emphasizes general benefits, and provides benefits to humans, not law for the law itself (formal legality). As for efforts that must be made in the framework of reform Islamic family law which has a progressive legal dimension, which starts from a comprehensive understanding of law enforcement from legal practitioners, especially judges on the dynamics of local communities in the modern era. Judges are required to reinterpret or comprehend the texts contextually and the prevailing laws and regulations, and the courage of the judges in trying to decide cases that do not understand the existing rules. This effort has partly shown results, such as provisions on the regulation of polygamy requirements in the Marriage Law No.1 of 1974 and KHI, the rights of children outside of marriage based on the MK judge’s decision in 2010, and the equal age of marriage for men and women based on Law no. 16 of 2019 concerning amendments to Law no. 1 of 1974. Thus, the presence of progressive Islamic family law in the midst of social change in Indonesia, is able to provide a sense of security and protection, justice, gender equality, balance between human rights and human obligations, and welfare for the wider community as well as to uphold prophetic values. Therefore progressive Islamic family law is able to answer the challenges and problems of contemporary law and to contribute to the development of national law.

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