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## The Strengthening Of Islamic Law Compilation As Material Law In Indonesian Religious Court

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### ABSTRACT

Islamic law is an inseparable part of national law in Indonesia. Islamic law has a great opportunity to become national law. One form of Islamic law that has become national law is Islamic Law Compilation. This article examined the existence of Islamic Law Compilation and opportunities for its development, the material content and legal force. This research concluded that: first, although its legal force is still debated, in practice, the Islamic Law Compilation has been used as material law or reference by judges in Indonesian religious courts in deciding cases. Second, the material for Islamic Law Compilation can be deepened and expanded by using a strong ushul fiqh method and can refer to the jurisprudence of judges' decisions, contemporary fatwas from muftis or world religious institutions and scientific studies in the field of Islamic law. Third, to increase the power of law, the Islamic Law Compilation can be fought so that it can become a law.

**Keywords:** *Islamic Law Compilation, Indonesia, Fiqh, Law*

### ABSTRAK

Hukum Islam merupakan bagian yang tidak terpisahkan dari hukum nasional yang ada di Indonesia. Hukum Islam mempunyai peluang yang besar untuk menjadi hukum nasional. Salah satu bentuk hukum Islam yang sudah menjadi hukum nasional adalah Kompilasi Hukum Islam. Artikel ini mengkaji tentang eksistensi Kompilasi Hukum Islam dan peluang pengembangannya muatan materi dan kekuatan hukum Kompilasi Hukum Islam. Tulisan ini menyimpulkan bahwa: pertama, walaupun kekuatannya masih diperdebatkan, akan

tetapi dalam praktek, Kompilasi Hukum Islam ini telah dijadikan hukum materil atau rujukan oleh hakim di pengadilan agama Indonesia dalam memutuskan perkara. Kedua, materi Kompilasi Hukum Islam dapat diperdalam dan diperluas dengan menggunakan metode ushul fikih yang kuat dan dapat merujuk yurisprudensi putusan hakim, fatwa-fatwa kontemporer dari mufti atau lembaga keagamaan dunia dan kajian-kajian ilmiah dalam bidang hukum Islam. Ketiga, untuk meningkatkan kekuatan hukum, maka Kompilasi Hukum Islam dapat diperjuangkan agar dapat menjadi undang-undang.

**Kata Kunci:** Kompilasi Hukum Islam, Indonesia, Fiqh, Undang-Undang

## INTRODUCTION

In history of Indonesian law, the presence of Islamic law in national law is a struggle for existence. The existence theory, which formulated the past, present and future state of Indonesian national law, asserted that Islamic law exists in Indonesian national law, both written and unwritten. Islamic law exists in various fields of legal life and legal practice.

The theory of existence, in relation to Islamic law, is a theory that explained the existence of Islamic law in national law, namely: (1) Islamic law is an integral part of Indonesian national law. (2) The independence of Islamic law is recognized, has the power and authority and is given the status of national law. (3) National law and Islamic legal norms that function as filters for national legal materials in Indonesia. (4) Islamic law is the main ingredient and element.<sup>1</sup>

Existentially, the position of Islamic law in national law is a sub-system of national law. Therefore, Islamic law has the opportunity to contribute the formation and renewal of national law. Sociologically, the position of Islamic law in Indonesia involves awareness of diversity for the community, which is more or less related to the issue of legal awareness, both religious norms and legal norms, always demanding obedience.

Indonesia is a legal state where the Indonesian national legal system recognized written law. To fill the vacuum of family law for Muslim citizens, Islamic law regulations are needed which are regulated in the form of statutory regulations.

Efforts to completely reform and reformulate fiqh in the field of family law in Indonesia were only carried out in 1991, with the emergence of the Islamic Law Compilation which contains laws on marriage, inheritance and waqf. Meanwhile, Law Number 1 of 1974 only contains marriage laws which are not only applied to Muslim citizens, but also to other citizens.

The formation of Islamic Law Compilation lasted for six years, namely from 1985 to 1991. After receiving input from various parties and socialization to the wider community, on June 10, 1991 the Islamic Law Compilation was stipulated as Presidential Instruction (Inpres) No. 1 of 1991 to serve as a guide in the field of family law for the community, including judges of Religious Courts throughout Indonesia. With the Islamic Law Compilation, the judges of the Religious Courts have the same

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<sup>1</sup> Said Agil Husin al-Munawwar, MA, *Hukum Islam & Pluralitas Sosial* (Jakarta: Penamadani, 2004), pp.13-14.

guidelines and their decisions can be uniformed, so that this can then eliminate unrest in the community due to the various decisions of Religious Courts for the same case. The diversity of Religious Courts judges decisions is due to the variety of law sources taking originating from the many classical fiqh books. This Islamic Law Compilation, although in the form of Presidential Instruction, is still a guide, reference and source of material law for religious court judges in deciding family law cases in Indonesia.

At the end of 1980s there were two important events regarding the development of Islamic law and justice in Indonesia. First, in a workshop held in Jakarta, on February 25, 1988, Indonesian ulama received three drafts of the Islamic Law Compilation. On June 10th, 1991 the draft compilation was legalized by the Government in the form of Presidential Instruction to the Minister of Religion for use by government agencies and the public who need it. The instruction was carried out by Decree of Religion Minister Number 154 dated July 22 th, 1991.

Second, on December 29th, 1989, Law No. 7/1989 on Religious Courts was ratified and promulgated.<sup>2</sup> This event is a series of interconnected and complementary. The Islamic Law Compilation is compiled and formulated to fill the void of substantial law (covering the laws of marriage, inheritance, and endowments), which is enforced by the Religious Courts. Meanwhile, Law Number 7 of 1989 regulated the power of courts within the Religious Courts in the fields of marriage, inheritance, grants, wills, endowments, and alms, especially for people who are Muslim.

The existence of Islamic law in Indonesia always takes two forms, namely normative law which is implemented consciously by Muslims, and formal law which is legislated as positive law for Muslims. The first uses a cultural approach, while the second uses a structural approach. The legal process of Islamic law in the second form uses two ways. First, Islamic law is formally legislated for Muslims. Second, Islamic law materials are integrated into national law without formally cornering Islamic law, such as Law No. 1/1974 on Marriage and Law No. 3/2006 on Religious Courts.

One of Islamic Laws that are outlined in material form is the Islamic Law Compilation, which in its journey there are still problems. These problems include the extent to which the Islamic Law Compilation material can answer and resolve problems related to Islamic law in accordance with the demands and developments of society, because there is criticism directed at the Islamic Law Compilation material is that the material for the Islamic Law Compilation is still in the form of extremely taklid against the books of fiqh. On the other hand, a very basic problem is that the basis for implementation of Islamic Law Compilation is still weak, namely the Presidential Instruction.

The Islamic Law Compilation is one aspect of Islamic law in Indonesia. The Islamic Law Compilation is considered as one of the many great works of Indonesian Muslims in order to give a more positive meaning to the life and revival of Indonesian Muslims. The Islamic Law Compilation is not absolute as God's revelation and is not

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<sup>2</sup> Muchtar Zarkasyi, "Kerangka Historis Pembentukan UU Nomor 7 Tahun 1989", *Mimbar Hukum: Aktualisasi Hukum Islam*, Nomor 1 Tahun 1:1-15.

a work that has reached a final result. The Islamic Law Compilation is more open in accepting improvement efforts to achieve better success in the future.<sup>3</sup>

Nasrullah Ali Munif stated that the active role of government is very dominant in formulating the construction of law and the direction of Islamic Law Compilation objectives. Mochammad Muslim added that the New Order's legal political intervention had a major role in the formulation of Islamic Law Compilation.<sup>4</sup>

Meanwhile, Marzuki Wachid explained that the political dynamics of government policies were very active in the formation of Islamic Law Compilation. In addition, the role of community is also very large in the formation of Islamic Law Compilation.<sup>5</sup> Athoillah Islamy argued that there is no domination of government orthodoxy in the process of forming the Islamic Law Compilation.<sup>6</sup>

According to Khisni, there are three functions of Islamic Law Compilation in its position as a legal instrument. First, as a national codification and unification of Islamic law. Second, as a guide for Religious Court judges in resolving various cases within their authority. Third, as a guide for the community regarding applicable Islamic family law.<sup>7</sup>

Meanwhile, regarding the existence of Islamic Law Compilation in the midst of the liberalism movement of Islamic law on the formulation of Islamic Law Compilation Articles, there are also relevant studies. According to Sadari, to realize a modern and civil Islamic family law, it is necessary to renew the construction of various articles of Islamic Law Compilation. This reform can be carried out by reviewing the construction of various articles of the Islamic Law Compilation in the perspective of human rights, democracy, nationalism and the constitution in Indonesia.<sup>8</sup>

Asni in her dissertation stated that there are several things in the Islamic Law Compilation that are gender biased and not in line with the spirit of the pattern of gender relations in Indonesia. Asni emphasized the need for a re-examination of several articles that are gender biased while still referring to maqasid al-syariah and the spirit of gender relations in Indonesia.<sup>9</sup>

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<sup>3</sup> Abdurrahman, *Kompilasi Hukum Islam di Indonesia* (Jakarta: Akademika Pressindo, 1992), pp.5-8.

<sup>4</sup> Mochammad Muslim, "Pengaruh Konfigurasi Politik Hukum Orde Baru terhadap Kompilasi Hukum Islam (KHI) di Indonesia," *Al-Daulah*, Vol. 4, No.1(2014): 231-232, DOI: <https://doi.org/10.15642/ad.2014.4.01.220-242>.

<sup>5</sup> Marzuki Wahid, *Fiqh Indonesia: Kompilasi Hukum Islam dan Counter Legal Draft Kompilasi Hukum Islam dalam Bingkai Politik Hukum Indonesia* (Cirebon: ISIF, 2014), pp.161.

<sup>6</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: 161-176, DOI : 10.29240/jhi.v4i2.1059.

<sup>7</sup> A. Khisni, *Transformasi Hukum Islam Ke Hukum Nasional* (Semarang: Unisulla Press, 2011), pp.110.

<sup>8</sup> Sadari, "Studi Islam dalam Kajian Hukum Keluarga Islam di Indonesia," *Indonesian Journal of Islamic Literature and Muslim Society*, Vol.1, No.1 (2016): 82-83.

<sup>9</sup> Asni, *Pembaharuan Hukum Islam Di Indonesia: Telaah Epistemologis Kedudukan Perempuan Dalam Hukum Keluarga* (Jakarta :Kementerian Agama Republik Indonesia, 2012), pp.287-288.

Abul Khoir in his research looks more at the paradigmatic basis of the Islamic law liberalism movement on the existence of Islamic Law Compilation. He argued that the liberalism movement of Islamic law thinking towards the Islamic Law Compilation as carried out by the Counter Legal Draft Team for the Islamic Law Compilation is more based on the liberal paradigm. This is different from the paradigm of the Islamic Law Compilation which is more based on *ushul fiqh* and classical *fiqh* opinions.<sup>10</sup>

## METHODOLOGY

This research is a qualitative research in the form of literature review. This writing is descriptive analytical, using normative legal research methods, namely legal research conducted by researching library materials.

## RESULTS AND DISCUSSIONS

### The Existence of Islamic Law Compilation

Compilation is linguistically taken from the Latin Language *compilare* which means to collect scattered rules together. A similar term is *codification*. The term *compilare* was later developed into *compilation* in English or *compilatie* in Dutch. Then it is used in Indonesian as '*kompilasi*' which means the translation of the two words. Thus, in terms of language, compilation is an activity of collecting various written materials taken from various books and writings on a particular legal issue. That is, collecting material from various sources made by several different authors to be written in a particular book, with the hope that it can be found and used easily, both inside and outside the court.<sup>11</sup>

The term *codification* or bookkeeping is usually synonymous with *taqwin* or *taqnin*. *Qanun* comes from Greek which was adopted into Arabic through the Syriac language, which means "*measuring instrument*", then means "*rules*". In Arabic the verb *qanna* means to make law or to legislate. Thus *qanun* can mean law, rule, regulation, statute or code.<sup>12</sup>

The term *qanun* began to be mentioned by *al-Mawardi* in his book *al-Ahkam al-Sulthaniyah*. Then the use of *qanun* in modern times was first used during the Ottoman period with *al-majallah al-ahkam al-'adliyah*, which means *the Book of the Law of Justice or The Book of Rules of Justice*, often also interpreted as civil code. The term *qanun* has become popular since its use in Turkey. *Al-Majallah* is the earliest example of Islamic law in the form of a law (modern law model of the roman law system) which at the same time has coercive power like the law in general. Here, in general, the term *qanun* is used for laws relating to society, not worship, especially laws or public law. In addition, *qanun* means law or matters containing law.<sup>13</sup>

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<sup>10</sup> Abul Khair, "Telaah Kritis Counter Legal Draft KHI (Reorientasi Hukum Keluarga Islam Indonesia)," *al-Risalah*, Vol.2, No.1 (2016): 35-36.

<sup>11</sup> A. Hamid S., Attamimi, "Kedudukan Kompilasi Hukum Islam dalam Sistem Hukum Nasional", in Amrullah Ahmad, et.all., *Dimensi Hukum Islam dalam Sistem Hukum Nasional* (Jakarta: Gema Insani Press, 2006), pp.152-153.

<sup>12</sup> A. Qodri Azizy, *Elektisisme Hukum Nasional: Kompetisi Antara Hukum Islam dan Hukum Umum* (Yogyakarta: Gama Media, 2002), pp.58.

<sup>13</sup> *Ibid*, pp.59.

Since the birth of Religious Courts, judges do not have a standard book that can be used as a same reference. So practically, from the same case, different decisions can be born if handled by different judges so that there is no legal certainty. That is why in 1985 the government initiated the projection of Islamic Law Compilation. This project is realized in the form of Joint Decree between the Chief Justice of the Supreme Court and the Minister of Religion in Yogyakarta. The target of the Islamic Law Compilation project is to prepare draft law books in the fields of marriage, inheritance distribution, *waqf* management, alms and *infaq*.<sup>14</sup>

The Islamic Law Compilation, according to Abdurrahman, is a summary of various legal opinions taken from various books written by *fiqh* scholars which are commonly used as references in the Religious Courts to be processed, developed and compiled into a single collection. The legal materials have been processed through certain processes and methods, then formulated in a form similar to legislation, namely in certain articles. This material is determined to be valid and can be used by judges of the Religious Courts in examining, adjudicating and deciding a case submitted to him as a guide.

Abdurrahman explained that judging from the activity plan concerned, compilation means gathering legal materials needed as guidelines in the field of material law within the Religious Courts. These materials are taken from various books that are commonly used as references in legal decisions made by judges and other materials related to it.<sup>15</sup> Hamid S. Attamimi explained that what is meant by compilation is a set of provisions of Islamic law which are written and compiled regularly.<sup>16</sup>

The Islamic Law Compilation consists of three books. The first book is about marriage (*munakahat*), the second book is about inheritance (*faraid*) and the third book is about *waqf*. Within its systematic framework, each book is divided into several chapters and then for certain chapters it is also divided into several sections which are further detailed in chapters.

Overall the Islamic Law Compilation consists of 229 chapters with different distributions for each book. The largest portion is in the marriage law book, starting from article 1 to article 170. Then the inheritance law starting from article 171 to article 193, will starts from article 194 to article 209 and grants from article 210 to article 214. The most little of the Law of *Waqf*, starting from article 215 to article 227. In addition, an article on transitional provisions and closing provisions. This difference arises not because the scope of material is different, but only because of intensity and unraveling of each legal issue regulation. Marriage law because it has been worked out to the details and such things can be done by imitating the existing arrangements in the legislation on marriage. On the other hand, because inheritance law has never been worked out that way, it only appears in outline and in a fairly limited number.<sup>17</sup>

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<sup>14</sup> Munawir Sadzali, "Peradilan Agama dan Kompilasi Hukum Islam", in Mufti AM, *Pembaharuan Hukum dalam Kompilasi Hukum Islam di Indonesia* (Manado: IAIN Manado), pp.73.

<sup>15</sup> Abdurrahman, *op.cit*, pp.14.

<sup>16</sup> A. Hamid S., Attamimi, *op.cit*, pp.148.

<sup>17</sup> Abdurrahman, *op.cit*, pp.63.

Tahir Azhari argued that the issuance of Presidential Instruction No. 1 of 1991 concerning the Islamic Law Compilation is the right action because it contains an order from the President to his assistants, in this case the Minister of Religion, to distribute the Islamic Law Compilation to High Court of Religion and Religious Courts with the intention that it can be used as a guide in deciding cases of citizens who are religious. Islam which deals with matters of marriage, inheritance, and endowment.<sup>18</sup>

Abdullah Kalib said that there is no prohibition for the President to issue instructions to his ministers as assistants to the President, provided that the vision and objectives of the instructions do not conflict with Pancasila, the 1945 Constitution, Decrees of the People's Consultative Assembly and existing laws. Furthermore, he stated that the implementation of the Islamic Law Compilation with a Presidential Instruction was quite strong in its position in the context of creating order, justice and legal certainty.<sup>19</sup> Therefore, it does not matter if the Islamic Law Compilation becomes the material law of religious courts and has legal authority and can even be enforced for Muslims through the authority of Religious Courts.<sup>20</sup>

Meanwhile, Fajrui Falakh argued that the Islamic Law Compilation does not have the authority to serve as material law for cases submitted to the Religious Courts. The position of the Islamic Law Compilation is similar to the position of various *fiqh* books which are used as references by religious judges in deciding cases in Religious Courts. There is no prohibition for religious judges to make the Islamic Law Compilation as one of the references or guidelines in deciding cases in the Religious Courts.<sup>21</sup>

### **The Position of Islamic Law Compilation in Indonesian Law**

The Islamic Law Compilation was compiled on the initiative of state authorities, in this case the Chief Justice of Supreme Court and the Minister of Religion through a Joint Decree and received the recognition of scholars from various elements. Officially the Islamic Law Compilation is the result of consensus (*ijma'*) of scholars from various groups through media workshops held nationally, which later received legalization from state power.<sup>22</sup>

There are two views regarding the existence of the Islamic Law Compilation as a source of law. The first view, stated that the Islamic Law Compilation is written law and the second view is the opposite, namely that the Islamic Law Compilation is an unwritten law. However, the judges in the Religious Courts did not question two different views. This is because they do not distinguish the existence of Islamic Law

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<sup>18</sup> Thahir Azhari, "Kompilasi Hukum Islam sebagai Alternatif", *Mimbar Hukum*, No.4 Tahun/II/1991: 15.

<sup>19</sup> Abdullahi Kalib, "Beberapa Catatan tentang Efektivitas Kompilasi Hukum Islam," in Mahfud MD., et.all. (editor), *Peradilan Agama dan Kompilasi Hukum Islam dalam Tata Hukum Indonesia* (Yogyakarta: UIN Press, 1993), pp.130.

<sup>20</sup> M. Yahya Harahap. "Materi Kompilasi Hukum Islam", in Mahfud MD., *op.cit*, pp.60.

<sup>21</sup> M.Fajrui Falakh. "Peradilan Agama dan Perubahan Tata Hukum di Indonesia," in Mahfud MD., *op.cit*, pp.30.

<sup>22</sup> Cik Hasan Bisri, *Kompilasi Hukum Islam dalam Sistem Hukum Nasional* (Jakarta: PT. Logos Wacana Ilmu, 1999), pp.8.



Compilation as a source of written law or not. This is because when the law is decided by the judges of the Religious Courts, it becomes binding law and can become jurisprudence.<sup>23</sup>

Apart from the discourse on the existence of Islamic Law Compilation as a source of positive law, the presence of Islamic Law Compilation has eliminated the pluralism of legal decisions within the Religious Courts. This is because the Islamic Law Compilation has become the same reference. In addition, the existence of the Islamic Law Compilation is a product of Islamic law transformation into positive law that applied and is binding on Muslims in Indonesia.

With regard to the position of Islamic Law Compilation in the national legal system, it is measured by the elements of the national legal system as stated above. *First*, the ideal and constitutional basis of Islamic Law Compilation is Pancasila and the 1945 Constitution. This is contained in the preamble to the Presidential Instruction and in the general explanation of Islamic Law Compilation. It was drafted as part of the national legal system that guarantees the survival of religion based on the One Godhead which is also the embodiment of the legal awareness of Indonesian people and nation. *Second*, it is legalized by legal instrument in the form of Presidential Instruction implemented by Decree of Religion Minister, which is part of a series of applicable laws and regulations. *Third*, the Islamic Law Compilation is formulated from the order of Islamic law which is sourced from the Qur'an and Sunnah. This is the core of Islamic law which includes various dimensions: sharia, *fiqh*, fatwas, *qanun*, *idara*, *qadha*, and *'adat*. It is the embodiment of Indonesian-style Islamic law. *Fourth*, the channels in the actualization of the Islamic Law Compilation include courts within the Religious Courts, as can be interpreted teleologically from the general explanation of Islamic Law Compilation.<sup>24</sup>

From the point of ideal law view, the presence of Islamic Law Compilation is a series of national legal history that can reveal the various meanings of Indonesian Islamic community life, especially regarding: (1) The existence of legal norms that live and participate and even regulate social interaction. (2) The actual normative dimension is due to the occurrence of functional explanations of Islamic teachings that encourage the fulfillment of legal needs. (3) The early structural response gave birth to the stimulation of the Islamic Law Compilation, and (4) Indonesian scholars anticipate the three things above with the agreement that Islamic Law Compilation is a written formulation of Islamic law that lives in line with the legal conditions and Indonesian society.<sup>25</sup>

### Development of Islamic Law Compilation Materials

According to Hasballah Thaib, the reform of Islamic law in Indonesia is a bit late in development compared to Islamic countries in Middle East and North Africa.

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<sup>23</sup> Dadang Hermawan and Sumardjo, "Kompilasi Hukum Islam sebagai Hukum Materil Pada Peradilan Agama," *Yudisia: Jurnal Pemikiran Hukum dan Hukum Islam*, Vol.6, No.1 (2015): 39, DOI: <http://dx.doi.org/10.21043/yudisia.v6i1.1469>.

<sup>24</sup> Abdurrahman, *op.cit*, pp.9-10.

<sup>25</sup> Gani Abdul Abdullah, *Pengantar Kompilasi Hukum Islam dalam Tata Hukum Indonesia* (Jakarta: Gema Insani Press, 1994, pp.63.

This delay is caused by several factors: *first*, there is still strong opinion that *taklid* is still sufficient to answer contemporary questions, besides many scholars feel that they are more likely to follow the opinion of previous scholars than to follow the opinion of the crowd, but are hesitant to be wrong. *Second*, the Islamic laws in Indonesia in today's socio-political context always invite polemics at the midpoint between the religious paradigm and the state paradigm. If considered as a paradigm of the state, Islamic law must be ready to face a pluralistic society. *Third*, the perception of some people who identify *fiqh* as the result of religious intellectual work whose truth is relative to the sharia which is a product of Allah and is absolute.<sup>26</sup>

In Islamic Law Compilation in the field of marriage, there are renewals of legal material that are different from the opinions in classical school of jurisprudence.<sup>27</sup> However, as said by Hallaq, the reform of legal material carried out by modern Muslim countries, including the field of family law, is generally partial and is only a temporary solution to developing legal problems. These new ideas still contain methodological weaknesses in *ushul fiqh*.<sup>28</sup> The renewal of Islamic law material carried out is generally the result of a selection (*takhayyur*) of the existing schools of jurisprudence, then the most appropriate one is selected. The use of this kind of *takhayyur* methodologically contains weaknesses because the methodological consistency of each school in making legal inferences from its sources is neglected, only to obtain appropriate legal material. Methodologically, these legal materials should be born as a result of the process of inferring the law from its sources with consistent reasoning. In other words, the reforms carried out generally do not use *ushul fiqh* as a consistent method of reasoning, but only see and select the appropriate *fiqh* legal products.

Efforts to reform Islamic marriage law materials need to be initiated by a systematic study of the theory and methodology of Islamic law, even the philosophical foundations of Islamic law. Thus, the reform of the marriage law is epistemologically accountable and has a strong footing. By reviewing *ushul fiqh* for the reform of marriage law, it is possible for the reform to be carried out consistently and systematically and always be able to answer the challenges of modern society. In the discourse of contemporary Islamic legal thought, it is stated that the real problem faced is not only in what Islamic law material is in accordance with the context of today's society.<sup>29</sup> Thus, departing from the search for *ushul fiqh* which is the basis for the Islamic Law Compilation in the field of marriage, reform of Islamic marriage law can be formulated in a more systematic and contextual manner.

This can also be done in reforming Islamic law in other fields, such as inheritance, *waqf*, sharia economics and others. In addition to the *ushul fiqh* method that must be strengthened, it can also take from other actual sources, such as

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<sup>26</sup> Hasballah Thaib, *Tajdid Reaktualisasi dan Elastisitas Hukum Islam*, paper presented in Seminar para Hakim dan Panitera Peradilan Agama in Sumatra Utara di Medan, June 12<sup>th</sup> 2002, pp. 12.

<sup>27</sup> Mark Cammack, "Islamic Law in Indonesia's New Order", *The International and Comparative Law Quarterly*, Vol. 38, No. 1 (January 1989): 53.

<sup>28</sup> Wael B. Hallaq, *A History of Islamic Legal Theories, an Introduction to Sunni Ushūl al-Fiqh* (Cambridge: Cambridge University Press, 1997), pp.211.

<sup>29</sup> Ratno Lukito, *Hukum Sakral dan Hukum Sekuler: Studi tentang Konflik dan Resolusi dalam Sistem Hukum Indonesia* (Jakarta: Pustaka Alvabet, 2008), pp.110.

jurisprudence of judges' decisions, contemporary fatwas from muftis or world religious institutions and scientific studies in the field of Islamic law.

### **Development of Legal Power for Islamic Law Compilation**

Judging from the national legal system, the Islamic Law Compilation is faced with two views: *first*, as an unwritten law as indicated by the use of legal instruments in the form of Presidential Instructions which are not included in the sequence of laws and regulations that are the source of written law. *Second*, the Islamic Law Compilation can be categorized as a written law which showed that the Islamic Law Compilation contained laws and rules which in turn are raised to become laws. Presidential Instruction No. 1 of 1991 is seen as one of the products of political power that flows the Islamic Law Compilation in the ranks of law. In the end, it was the people who used the Islamic Law Compilation who tested the courage of this view and made it a written law.<sup>30</sup>

Based on that basis, the Islamic Law Compilation has power to cover all the problems it regulates in all areas of Islamic law. If the religious court has made the Islamic Law Compilation as a guide in proceedings and as a source of law, it has practically become positive law on the basis of convention, in this case a tacit agreement (*ijma'*).

A legal norm that contains regulations, whether set forth in Laws, Government Regulations, Presidential Decisions or Ministerial Decisions, the legal object is always general (not addressed to certain people, but to all groups) and the things it regulates are always abstract. Thus, Presidential Instruction No. 1 of 1991 dated June 10, 1991 contains norms with individual goals (addressed to the Minister of Religion) and with concrete, specific, and repeated actions (to disseminate).<sup>31</sup>

In establishing legal policies in Indonesia, the government has made Islamic law a part of national law through the Islamic Law Compilation as stated in Presidential Instruction Number 1 of 1991 concerning the Islamic Law Compilation, stipulated on June 10, 1991. In the Presidential Instruction it is stated that the Compilation of Law Islam can be used as a guide in solving problems in the field of marriage law, inheritance and *waqf* by government institutions and the community who need it. Based on this legal basis, the Islamic Law Compilation is also a guide for Religious Court judges in examining, adjudicating and deciding cases.

Legal products issued by the president include Presidential Regulations, Decrees and Instructions. The legal products of Presidential Decrees and Presidential Instructions have long been known as one of the terms of prevailing laws and regulations in Indonesia. Meanwhile, the Presidential Regulation only became known in Indonesia after the enactment of Law Number 10 of 2004 concerning the Establishment of Legislation.

In Law Number 10 of 2004 concerning the Establishment of Legislation Article 7, which regulated the order of legislation, it is stated that the order of legislation in

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<sup>30</sup> Gani Abdul Abdullah, *op.cit.*, pp.64.

<sup>31</sup> A. Hamid S., Attamimi, *op.cit.*, pp.152-153.

force in Indonesia is: The 1945 Constitution, Laws/Government Regulations Substitute Laws, Government Regulations, Presidential Regulations and Regional Regulations.

In 2011 a new law was issued to replace Law Number 10 of 2004 concerning the Establishment of Legislations, namely Law Number 12 of 2011 concerning The Establishment of Legislation. The law stated that the order in force in Indonesia is The 1945 Constitution, MPR Decrees, Laws/Perppu, Government Regulations, Presidential Regulations, Provincial Regulations and Regency/City Regional Regulations.

To improve Presidential Instruction Number 1 of 1991 concerning the Islamic Law Compilation into regulatory material that can be made by the president based on Law Number 12 of 2011 concerning the Establishment of Legislation, it is implied that it is not only regulatory, but also non regulation, such as decision. A State Administrative Decision is a written determination issued by a State Administration Agency or Official containing legal actions for State Administration based on applicable laws and regulations, which are concrete, individual and final, which have legal consequences for a person or entity civil law.

The logical consequence is that an instrument of ratification by the state is required which is determined by law. So the source of law in Law Number 12 of 2011 which accommodates the Islamic Law Compilation to be used as a source of law. As a state of law, of course we need legitimacy so that it can be used as a legal basis for positive law in Indonesia. Legal products to facilitate Presidential Instruction Number 1 of 1991 concerning the Islamic Law Compilation, by the President, are in the form of; (1) Submitting draft laws to the DPR to be enacted into laws, (2) Government Regulations in Lieu of Laws, (3) Government Regulations, and (4) Presidential Regulations.

In connection with these two notes, in order for the Islamic Law Compilation to have binding power or in legal terms to have coercive power, those who want the power of the Islamic Law Compilation, which is currently still in the form of a Presidential Instruction, need to be upgraded to become a law.

This is different from the notion that required the interests and freedom of judges related to the opportunity to develop ideas in the field of Islamic law, especially for religious judges or judges in general in accordance with the instructions of Law number 7 of 1989 which stated that courts may not refuse to examine and decide on a case that was brought to him on the pretext that the law is not clear, but it is obligatory to examine it. This was reinforced when the idea emerged of a Islamic Law Compilation which when speaking on a juridical basis stated that the juridical basis on the importance of judges paying attention to public legal awareness was Law Number 14 Year 70 article 20 (1) which stated that Judges as law and justice enforcers are obliged to explore, follow and understand the legal values that live in society.

From the various instructions above, it can be understood that it is an opportunity for judges to maximally explore the basic potentials of various problems that occur in society and then have a dialogue with the basic principles contained in the al-Quran and Sunnah. After that, it is realized in the form of norm formulation that can be used as a standard for people's lives. The new problem that has arisen now is that the emergence of Presidential Instruction Number 1 of 1991 concerning the Islamic Law Compilation seems to make judges complacent not to bother digging or

finding the law and simply reading what is in the Islamic Law Compilation, so that the nuances of classical thought used as capital in dealing with the problems that occurred at that time received less attention.

The spirit to explore the values that develop in society, especially for judges who are formally the spearhead in determining dispute issues in the judiciary, is as mandated by Munawir Sadzali whose content is that he asks for attention regarding article 209 of the Compilation of Laws. Islam stipulates that religious judges are required to explore the legal values that live in society, so that their decisions will not conflict with the spirit of justice. This means that judges are still required to perform *ijtihad*. The Islamic Law Compilation must be seen as a standard book for religious judges in Indonesia in determining their *ijtihad* so that it cannot kill the development of judges' thinking.<sup>32</sup>

## CONCLUSION

This paper concluded that: *first*, although its legal force is still debated, in practice, the Islamic Law Compilation has been used as material law or reference by judges in Indonesian religious courts in deciding cases. *Second*, the material for the Islamic Law Compilation can be deepened and expanded by using a strong *ushul fiqh* method and can refer to the jurisprudence of judges' decisions, contemporary fatwas from muftis or world religious institutions and scientific studies in the field of Islamic law. *Third*, to increase the power of law, the Islamic Law Compilation can be fought so that it can become a law. Thus, the Islamic Law Compilation will be effective and have coercive power.

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<sup>32</sup> Munawir Sadzali, *op.cit.*, pp.5.

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