

## **JUDGE'S DISCRETION IN ISLAMIC FAMILY LAW: INDONESIAN RELIGIOUS COURTS EXPERIENCE<sup>1</sup>**

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### **Abstract**

*Tension between Islamic legal tradition and the modern nation state's role in establishing dan reforming law has become the global controversies and conflicts in Muslim countries over the last decades including Indonesia. Since the enactment of Law No.1/1974 on Marriage, then Compilation of Islamic Law (Kompilasi Hukum Islam/KHI) under President Instruction No.1/1991, dualism of the validity of marriage has been arising in Indonesian Muslim society. The dualism has led to ambivalence towards law enforcement among judges of religious courts in dealing with the petitions for the legalization of marriage while the Law restricts the petitions to marriages before the enactment of Law No.1/1974. In this case, judges of religious court have deviated from the state law by granting legalization to marriages occurred after the enactment of Law No.1/1974. Such deviation is known as judge's discretion. Despite judges of religious courts seem to adhere to the Islamic legal tradition than the State law in the case of legalization of marriage; they have deviated from Islamic legal tradition or state law in terms of the fulfillment of divorced wife's rights, joint property, custody, and inheritance. Their discretion is merely to provide the justice to the litigants when the application the letter of the law is contradictory to justice. In this way, they have also taken a part in reforming the Islamic Family Law.*

*Key words: judge, discretion, justice.*

### **I. Introduction**

*Under civil law system in which codification becomes the main feature as the impact of legal positivism or legisme, the sole source of law is state legislation. In this case, judge is merely the loudspeaker of state law. However, when judges find that the state law can't provide justice to the justice seekers based on their consideration on facts during the hearing, they must be brave to deviate from the state law. Law is merely an instrument to create justice, while justice is the ultimate purpose of law. In this case, judges of religious courts among those who are brave. They have used their discretion in the field of Islamic Family Law. In this way, they have also taken a part in reforming the law.*

*Indonesia as the ex-colony of Netherland has adhered to the civil law system.<sup>3</sup> Since its independence, the state has succeeded in codifying Islamic law, particularly Islamic Family Law, as manifested in Law No.1/1974 and KHI. One of significant reform introduced in both of Law No.1/1974*

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<sup>3</sup> Indonesia adheres to juridical positivism stream. According to juridical positivism, law is state legislation, and law prevails due to its positive form provided by authoritative institution (state). Marzuki Wahid, *Fiqh Indonesia: Kompilasi Hukum Islam dan Counter Legal Draft Kompilasi Hukum Islam dalam Bingkai Politik Hukum Indonesia*, (Cirebon: ISIF, 2014), p. 4.

and KHI is that every marriage is registered according to the regulation,<sup>4</sup> and marriage conducted without marriage registrar supervision has no legal force.<sup>5</sup>

Although the state law requires marriage to be registered by marriage registrar in order to have legal force, unregistered marriages have been the common practice in Indonesian Muslim society. According to the living law in the society which is based on Islamic legal tradition as contained in books of fikih, the registration is not a condition of marriage validity.

Tension between the state law and the living law on the validity of marriage has led to ambivalence towards law enforcement among judges of religious court. The judges have to use their discretion in granting the petitions for the legalization of marriage. Judge's discretion on the legalization of marriage has led to a conclusion that their discretion demonstrates their weakness in enforcing the state law and they do not enjoy strong position in society.<sup>6</sup> This paper tries to discuss how such discretion could be justified in Indonesian legal system that tends to adhere to civil law system and on what cases judges of religious court use their discretion.

To discuss the topic above, the author starts with the discussion on judge's discretion in Indonesian legal system. The discussion is important to explain the position of judge in Indonesia not as the loudspeaker of state law despite Indonesia tends to adhere to civil law system. Then the author discusses on what field of Islamic Family Law judges of religious courts use their discretion. This is to explain that judges of religious court have used their discretion on broader sphere and not restricted to legalization of marriage, and to know the reasons behind their discretion. Finally, the author will summarize some important points in conclusion.

### **Judge's Discretion**

The word discretion is a noun that means the power or right to decide or act according to one's own judgment, freedom of judgment or choice.<sup>7</sup> In the context of judge's authority in dealing with case, discretion is a freedom to decide attitude and policy, freedom of thought and freedom to act against a case he/she deals with.<sup>8</sup>

Right of discretion is related to the obligation to choose among two or more choices as regulated by law (restricted discretion) or even to choose either applying law or deviating from law (*contra legem*). The latter is regarded as violation by those who support positivism stream because law enforcement is impossible to be different with the state law. Right of discretion also emerges when the law does not regulate clearly what to do with certain case (free discretion). This is related to the principle of *ius curia novit*, that judge is prohibited to refuse a case due to the vacuum of law or unclear law.<sup>9</sup>

Judge independence is clearly guaranteed in Art. 5 (1) Law No. 48/2009 on Judicial Authority that judge must trace, follow, and understand the legal values and sense of justice living in the society. Chapter IX Art. 24 (1) of Indonesian Constitution (UUD 1945 amendment product) declares that Judicial Authority is independent authority to run judicature in order to enforce law and justice (see also Art. 1 (1) Law No.48/2009). The phrase "enforce law and justice" means that the duty of judge is not only to enforce law but also provide justice. Ideally, law and justice are inherent as one unity.

<sup>4</sup> Art. 2 (1) Law No.1 (1974) , Art. 4 KHI.

<sup>5</sup> Art. 6 (2) of KHI. It is only KHI that clearly declares unregistered marriage has no legal force.

<sup>6</sup> Euis Nurlaelawati, *Modernization, Tradition, and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, (Amsterdam: Amsterdam University Press, 2010), hal. 224.

<sup>7</sup> See dictionary.reference.com/browse/discretion, accessed on October 10, 2014 at 9.10 am.

<sup>8</sup> Darmoko Yuti Witanto, S.H and Arya Putra Kuta Waringin, S.H, M.H, *Diskresi Hakim: Sebuah Instrumen menegakkan keadilan substantif dalam perkara-perkara pidana*, (Bandung: Alfabeta, 2013), p. 67.

<sup>9</sup> *Ibid*, p.68.

*Enforcing law is a process to reach the justice, while justice is the goal of law enforcement. Law in this case should be interpreted as not only state law but also the living norms in society.<sup>10</sup>*

*Despite judicial activism is limited by law, judge is not merely the loudspeaker of law who enforces the law rigidly, judge applies law as long as the law can provide justice. When the law can't provide justice and will lead to injustice, judge must be brave to deviate from it. The fundamental base in deciding case is for the sake of justice and not for the sake of Law.<sup>11</sup>*

*Despite the judge's discretion, judges must take a part in maintaining unified legal framework and unified legal opinion. It is necessary to create uniform legal base and uniform legal perspective among judges to avoid the high disparity of verdicts.<sup>12</sup>*

*According to Gustav Radbruch's theory, the purpose of law consists of justice, legal certainty,<sup>13</sup> and utility. Judge is often faced by two difficult choices when justice and legal certainty can't be unified in a judgment. In this case, judge has got to decide a choice by sacrificing one for the sake of other. If judge faces tension between justice and legal certainty, he/she should takes judgment which provides utility to law and society in general.<sup>14</sup> Judge's position between justice and legal certainty is neither loudspeaker of law nor lawmaker.<sup>15</sup> This is due to judge's decision on particular case binds to the case only and to the litigants involved in the case. The decision does not prevail as general rules applied to all similar cases.<sup>16</sup>*

*Tension between justice and legal certainty is also faced by judges of religious courts, particularly in dealing with the legalization of marriage. In this case, they have used their discretion to grant petitions for the legalization of marriage not restricted to marriages before Law No. 1/1974. On what reason they rely on to use their discretion will be discussed in the next section.*

### ***Judge's Discretion in Islamic Family Law cases***

*After discussing how judge's discretion in Indonesian legal system in previous section, this section will discuss how judges of religious courts use their discretion in dealing with cases in the field of Islamic Family Law.*

### ***Discretion on legalization of marriage***

*According to the explanation of Art. 49 (22) Law No. 7/1989 and Art. 7 (3d) of KHI, legalization of marriage is restricted to marriage occurred before the enactment of Law No. 1/1974. In fact, there are numerous petitions for legalization of marriage occurred after Law No.1/1974 filed to the religious courts. Giri Menang Religious Court, West Lombok, West Nusa Tenggara is one of the busy courts in dealing with the legalization of marriage. The average number of legalization of marriage to be heard by the court reaches 2000 cases in a year, with 99.9 percent consists of marriages after the enactment of Law No. 1(1974). Both the Supreme Court and the local government*

<sup>10</sup> *Ibid*, p.19.

<sup>11</sup> *Ibid*, p.25. See also Art. 2 (1) Law No. 48/2009, Yahya Harahap explains that judge's role in enforcing truth and justice towards concrete case includes interpreting, making new law (judge made law), seeking new principles, conducting *contra legem*, and hearing case by case. M. Yahya Harahap, S.H, *Beberapa Permasalahan Hukum Acara pada Peradilan Agama*, (Jakarta: Yayasan al-Hikmah, 1993), p.63-5.

<sup>12</sup> Harahap, *Beberapa Permasalahan Hukum Acara pada Peradilan Agama*, p.74.

<sup>13</sup> Legal certainty includes certainty in the letter of law and certainty due to law. The former means that every legal norm must be formulated in clear and distinct sentences to avoid multiple interpretations, while the latter means that law provides certainty. Syafrudin Kalo, "Penegakan Hukum yang Menjamin Kepastian Hukum dan Rasa Keadilan Masyarakat: Suatu Sumbangan Pemikiran," *Majalah Komisi Yudisial*, Ed. May-June, 2014, p. 12.

<sup>14</sup> Witanto and Waringin, *Diskresi Hakim*, p. 25.

<sup>15</sup> *Ibid*, p. 26.

<sup>16</sup> As an exception, a verdict of cassation case may become a jurisprudence or *stare decisis* if the verdict containing judge made law value and constantly followed in similar case by many verdicts. Harahap, *Beberapa Permasalahan Hukum Acara pada Peradilan Agama*, p.74.

have supplied budget in supporting the court to carry out circuit court to give mobile service to the society to get legal identity through legalization of marriage.<sup>17</sup> The program involves religious court, religious affairs office, and civil registration office which is known as Integrated Service Program for Legal Identity. The program is sponsored by Australia Indonesia Partnership for Justice (AIPJ), and legalization of marriage is the main service of the program to get legal identity such as certificate of marriage, certificate of birth, and certificate of divorce.<sup>18</sup>

The great number of unregistered marriage in society demonstrates the living law (legal awareness) in the society on the validity of marriage; that registration of marriage is not a requirement for the validity of marriage according to religious doctrine. Marriage is valid provided that it has met the conditions and components of marriage according to Islamic legal tradition. This living law is then understood as representative interpretation<sup>19</sup> to Art. 2 (1) Law No.1/1974 that the legal marriage must be conducted according to religious law and beliefs of the bride and groom. Moreover, the provision that every marriage is registered according to the regulation is separately formulated in Art. 2 (2) Law No.1/1974.<sup>20</sup> However, for those who insist on registration of marriage as the requirement for valid marriage, paragraph (1) and (2) of Art. 2 Law No.1/1974 are one unity. As a result, there is dualism of law on the validity of marriage.

The provision on the validity of marriage became one of controversial issues during the formation of Law No.1/1974. According to Art. 2 (1) Bill of Marriage 1973, registration of marriage become the decisive factor on the validity of marriage, regardless of the marriage conducted according to the Law or marriage law of the bride and groom including Islamic law, customary law, *Huwelijks Ordonantie vor de Christen Indonesien (HOCl)* which is colonial product of law that regulates marriage for Indonesian Christian, and *Burgelijk Wetboek (BW)* which is colonial product of law on civil law.<sup>21</sup> Such provision had been contested by Muslim society during the formation of Law No.1/1974.

Besides the above reason, based on the author's experience in dealing with petitions for the legalization of marriage,<sup>22</sup> there are different grounds why the couples do not conduct their marriage before marriage registrar so that they could have certificate of marriage. Those grounds include the

<sup>17</sup> Interview with Huda Lukoni, a judge at Giri Menang Religious Court, October 12, 2014.

<sup>18</sup> Art. 7 (3a) of KHI enables unregistered marriage before and after Law No.1/1974 to be legalized for the sake of divorce.

<sup>19</sup> The term "representative interpretation" means the interpretation which is largely accepted by the society although it is not guaranteed as the "authoritative interpretation." To be authoritative, according to Abou El Fadl, an interpretation of law should meet at least five authoritative requirements: 1) honesty, 2) diligence, 3) comprehensiveness, 4) reasonableness, and 5) self-restraint. See Khaled M. Abou El-Fadl, *Speaking in God's Name: Islamic Law, Authority, and Women*, (Oxford: Oneworld, 2001), p. 55-56, as quoted by Ahmad Ali MD, "Metodologi Penerapan Hukum Islam Berkeadilan Gender," in *Jurnal Mimbar Hukum dan Peradilan*, Edisi No. 76, 2013, p. 163-5. For the interpretation on registration of marriage as a component of marriage see Muhammad Isna Wahyudi, *Pembaruan Hukum Perdata Islam: Pendekatan dan Penerapan*, (Bandung: Mandar Maju, 2014), p. 36-8.

<sup>20</sup> The present formulation of Art. 2 (1) Law No. 1/1974 is proposed by Development Unity Party faction (Fraksi Partai Persatuan Pembangunan) as the consensus between Development Unity Party faction and Indonesian Republic Army faction. The formulation triggered sharp conflict between Development Unity Party faction and Indonesian Democratic Party faction during the discussion on the Bill of Marriage 1973 at the House of Representatives that lasted 6-20 December 1973. Taufiqurrohman Syuhari, *Legislasi Hukum Perkawinan di Indonesia: Pro-Kontra Pembentukannya Hingga Putusan Mahkamah Konstitusi*, First Edition (Jakarta: Kencana, 2013), p. 132-7

<sup>21</sup> *Ibid.*, p. 109.

<sup>22</sup> During the author's duty at Kotabumi Religious Court, North Lampung, the author involved in some circuit courts dealing with the petition for legalization of marriage in remote areas.

low legal awareness, poverty, legal smuggling, the negligence of marriage registrar assistance (P3N), and the status of widow or widower from unregistered marriage.<sup>23</sup>

The low legal awareness of the couples is closely related to the level of study, backwardness, and living in remote area. These factors are still easily found in Indonesia. The importance of marriage registration is not well understood by those who conduct unregistered marriage. In Lombok, marriage before *tuan guru* (religious leader) is worthier than marriage before the marriage registrar, according to the society.<sup>24</sup> Except the legal smuggling, the rest of grounds are beyond the couples' capability.

Ignoring social facts such as the living law on the validity of marriage, the low legal awareness of the society, poverty, and the negligence of marriage registrar assistance (P3N), and restricting petition for the legalization of marriage to marriages before the enactment of Law No. 1/1974 based on the explanation of Art. 49 (22) Law No. 7/1989 and Art. 7 (3d) of KHI will be contradictory to social justice.

The impact of unregistered marriage towards right and duty both of husband and wife, marriage property, and the status of children born from the marriage must be considered by judge in dealing with the legalization of marriage so that the judgment can provide utility to the justice seekers.

Relying on the above considerations, judge must be brave to deviate from the explanation of Art. 49 (22) Law No. 7/1989 and Art. 7 (3d) of KHI by granting petitions for the legalization of marriage that occurred after the enactment of Law No. 1/1974.

Regarding legalization of marriage, the author tends to view the case employing ideal law and realistic law theory. The ideal law is the idealized law, while the realistic law is law resulting from the synergy between the ideal law and the prevailing law in society. The ideal law contains universal sense of justice, while the realistic contains local and temporal justice. The former is impossible to be applied in certain society and in certain time without considering legal awareness of the society of the time. The process of synergy, thus, is unavoidable to make law meets the sense of justice of the society.<sup>25</sup>

Based on the theory above, registration of marriage as requirement for valid marriage is the ideal law, while the legalization of marriage is the realistic law. The question arises is that how long will the realistic law be applied in Indonesian Muslim society. The question is not a simple question. As long as tension between state (government) and religion (religious leaders/ulama) continues, the synergy is unavoidable instrument. Therefore, the institution of *itsbat* or legalization becomes the solution to the unfinished relation between the state and religion.

The dualism of law enforcement in the field of Islamic family law becomes the historical legacy of the muslim countries after accepting western law system with half-hearted adoption, except Turkey that wholly adopts the western law. The muslim countries adopt Western law to modernize its marriage law only in formal legislation (codification), while the substance of law is still derived from Islamic law to which the society adheres, besides some changes which are not contradictory to the principles of Islamic law.<sup>26</sup>

The dualism of law on the validity of marriage, to some extent, has exposed the problem of law enforcement. Regarding law enforcement, at least there are three components which are interconnected. Those components include the legal structure, the legal substance, and the legal

<sup>23</sup> See Muhamad Isna Wahyudi, *Berbagai Argumentasi Hukum dalam Pengesahan Nikah*, at [http://aipj.or.id/in/legal\\_identity/article/76](http://aipj.or.id/in/legal_identity/article/76).

<sup>24</sup> Interview with Huda Lukoni, a judge at Giri Menang Religious Court, October 13, 2014

<sup>25</sup> Edi Riadi, "Paradigma Baru Hukum Waris Islam di Indonesia," in *Problematika Hukum Kewarisan Islam Kontemporer di Indonesia*, Ed. Muchit A. Karim, (Jakarta: Badan Litbang dan Diklat Kementerian Agama RI, 2012), p. 62.

<sup>26</sup> Edi Riadi, *Dinamika Putusan Mahkamah Agung Republik Indonesia dalam Bidang Perdata Islam*, (Jakarta: Gramata Publishing, 2011), p. 98.

culture as proposed by Lawrence M. Friedman. In the case of legalization of marriage, the legal culture is more dominant than the two others component. Legal culture includes view, custom, and behavior of the society regarding thought, values, and hope towards the prevailing system of law, or in other words, legal culture is the climate of social thought on how the law applied, trespassed, or obeyed.<sup>27</sup>

One of the ways to change legal culture maintained by the society is by enlightening the society. At this point, legal education plays an important role to change the legal culture/legal awareness of the society. Therefore, legal education should be the component of law enforcement as proposed by Barda Nawawi Arif in his inauguration speech as Professor of Law at Diponegoro University.<sup>28</sup>

Moreover, Indonesia as developing country faces the high cost of education for its citizens, while the level of education can influence the legal awareness of the society. Many ideas of legal reform introduced by scholars are not well delivered to and understood by the society. As a result, there is a tendency to maintain the tradition due to lack of knowledge that will lead to ineffective law reform and dualism of law.

### **Discretion on the fulfillment of rights of divorced wife**

In dealing with talak divorces (divorce initiated by husband), judges of religious court sometime find that the wife as the defendant does not claim her rights as the consequence of talak. While according to Art. 149 of KHI, in the case of talak, a husband is obligated to provide *mut'ah*, maintenance during the waiting period (*nafkah iddah*), and child maintenance. Art. 41(e) of Law No. 1/1974 also enables judges to use their discretion to obligate husband to give maintenance to his ex-wife.

According to Art. 189 (3) R.Bg/Art. 178 (3) HIR (the principle of *ultra petita*), judge is prohibited to grant anything that the litigants do not claim. However, realizing that a great number of justice seekers at religious court consists of those who are from the lower-class society, and most of them do not understand both the procedural law and substantive law related to the case of divorce, and considering the impact of divorce to the wife and children, judges of religious courts tend to use their discretion to sentence the husband to fulfill his duties as the consequence of talak according to his capability provided that the wife is not guilty (*nusyuz*).<sup>29</sup> Such discretion also used in case the husband is found guilty, while it is found difficult to maintain the relationship of the couple, in order to give fair judgment for the wife when judges grant the husband's petition for talak. Moreover, such fulfillment must be paid by the husband before his talak pronouncement at the hearing court. If the husband has not paid the fulfillment, judge may postpone the hearing of talak pronouncement (*ikrar talak*) until the husband is ready to do his duty.

Judge's discretion on the fulfillment of maintenance during waiting period is also applied to divorce initiated by wife (*cerai gugat*), despite KHI doesn't give such right to wife. In case, wife files divorce claim due to the violence and cruelty of husband, judges may use their discretion to sentence the husband to provide *nafkah iddah* to her wife in order to fulfill the sense of justice,<sup>30</sup> and because the obligation of *iddah* is to ascertain the condition of womb (*lil istibra'*) that related to the husband's interest.

<sup>27</sup> Kalo, "Penegakan Hukum ...," *Majalah Komisi Yudisial*, Ed. May-June, 2014, p. 11.

<sup>28</sup> Witanto and Waringin, *Diskresi Hakim...*, p. 66.

<sup>29</sup> According to Art. 152 of KHI, the ex-wife is entitled to *iddah* maintenance, except she is guilty (*nusyuz*).

<sup>30</sup> Mahkamah Agung RI, Direktorat Jenderal Badan Peradilan Agama, *Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama Buku II*, 2013, p. 150. The book has been the manual for judges of religious courts in conducting their duty. It contains procedural law and technical guidance for court administration.

### **Discretion on joint property**

According to Art. 97 of KHI, widow or widower of divorce has right to get half of joint property, provided that there is no other provision in marriage contract. In fact, in legal practice of religious courts judges, the application of the Law on joint property cases is different. The share of joint property is sometime one-third and two-third or one-fourth and three-fourth.

Such sharing, for example, can be found in verdict of cassation number 266 K/AG/2010<sup>31</sup> July 12, 2010 that shared the joint property three-fourth for the wife and the rest for the husband. The verdict based on argumentation that during marriage, the husband did not provide maintenance to his wife, the husband made his wife depressed, the joint property was resulted from the wife's effort, and the husband disobeyed religious teaching. It will be contradictory to sense of justice to share the joint property according to KHI which shares the joint property fifty-fifty for both the husband and the wife. In this case, judges have used their discretion to create the justice when the letter of Law is unable to provide the justice.<sup>32</sup>

### **Discretion on child custody**

According to Art. 105 (a) of KHI, custody for child who has not been mumayyiz (under 12 years) is the mother's right. However, in practice, verdicts on child custody are not always in line with the provision. Judges, in this case, will emphasize on the principle the best interest of the child. Judges need to consider the mother's behavior, her activity, and the child's feeling.<sup>33</sup> If the mother is incapable to guarantee the best interest of the child, right of custody (*hadhanah*) will be given to the father.<sup>34</sup>

Among the reasons used by Supreme Court to provide custody to father include: 1) the mother has converted to other religion, 2) the mother has bad behavior, 3) the mother has married with other man, and 4) the mother neglects her duty to child.<sup>35</sup>

### **Discretion on inheritance**

Islamic Law of Inheritance constitutes the subject in which judges of religious court have made some reforms. In this case, the Supreme Court plays an important role in leading the reform. The reforms in the application of Islamic law of inheritance are as follow:

1. According to Art. 209 (1) and (2) of KHI, adopter parent receives obligatory testament from the adopted child with the maximum share is one third from the inheritance of adopted child, provided that the adopter does not receive testament and vice versa. In fact, the application of obligatory testament has been extended to give share to non muslim relative and step child. It was the Supreme Court's verdict number 368 K/AG/1995, 10 July 1998, that pioneered to give share to non muslim child, and then the verdict number 51 K/AG/1999, 29 September 1999, that gave share to non muslim in position as child of pre-deceased heir. At the recent time, the obligatory testament has been used to give share to step child as can be found in Supreme Court's verdict number 489/K/AG/2011, 23 December 2011.
2. According to Art. 176 of KHI, if daughter together with son as heirs, she is entitled to half of share of that of son. In practice, according to the Supreme Court judge, Mukhtar Zamzami, there are many religious courts' verdicts that provide equal share to male and female heirs based on

<sup>31</sup> The verdict can be download at [http://putusan.mahkamah\\_agung.go.id/main/pencarian/?q=266+K%2FAG%2F2010](http://putusan.mahkamah_agung.go.id/main/pencarian/?q=266+K%2FAG%2F2010).

<sup>32</sup> Direktorat Jenderal Badan Peradilan Agama, *Majalah Peradilan Agama*, First Edition, May 2013, p. 27. See also verdict of Bukittinggi Religious Court number 278/Pdt.G/2005/PA.Bkt, 27 May 2006.

<sup>33</sup> *Ibid*, p. 49.

<sup>34</sup> For example, see verdict number 2/Pdt.G/2013/PA.Kbj, 14 May 2013, and verdict number 39/Pdt.G/2012/PTA.Yk, 8 November 2012.

<sup>35</sup> Edi Riadi, *Dinamika*, p. 174.

*the reality that women have role and responsibility as big as men in the modern time. There were at least 12 verdicts of the Supreme Court since 1958 to 1991 that provided equal share to male and female heirs.<sup>36</sup>*

*Judge's discretion in Islamic Family Law as discussed above, generally speaking, emphasizes on justice when the Law can't provide justice. Law enforcement should consider the living law and legal culture to capture attitudes, beliefs, values, hopes and thought of the society towards law in the prevailing legal system.<sup>37</sup>*

### **Conclusion**

*As the state that adheres to civil legal system, Indonesia does not strictly limits judges as merely the loudspeaker of law. Indonesian Constitution and Law No. 48/2009 enable judges to use their discretion by declaring the function of judiciary is to enforce law and justice and for the sake of justice, besides judge must trace, follow, and understand the legal values and sense of justice living in the society.*

*Despite judge's discretion on legalization of marriage, to some extent, shows the ineffective law reform on the validity of marriage and the law has failed to be a tool of social engineering, judge's discretions in other areas of Islamic Family Law show that judges of religious courts among those who are brave to deviate from Law to provide justice to the justice seekers.*

*Some reforms introduced by Supreme Court to Islamic law of inheritance through jurisprudences which are constantly followed in similar case by many judges of religious courts are quietly accepted by Indonesian Muslim society without resistance. In this case, judges of religious court have taken a part in reforming the law when such reform is difficult to be forced by the state through legislation.*

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<sup>36</sup> "Disertasi Menggugat Hukum Waris," *Gatra Magazine*, 1 Februari 2012, p. 78. Among the verdicts that provide equal share to male and female heirs are verdict of Makasar Religious Court Number 338/Pdt.G/1998/PA.Upg, Number 230/Pdt.G/2000/PA.Mks, and verdict of Medan religious court Number 92/Pdt.G/2009/PA.Mdn.

<sup>37</sup> Kalo, "Penegakan Hukum ...." *Majalah Komisi Yudisial*, Ed. May-June, 2014, p. 12.



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