

# Reconstruction of Indonesian Islamic Law Compilation Using Madhhab Perspective Based on Justice Value

Suhadi<sup>1\*</sup>, Anis Mashdurohatun<sup>2</sup>, Gunarto<sup>2</sup>

<sup>1</sup>Doctorate Student of Faculty of Law Sultan Agung Islamic University Semarang, Indonesia

<sup>2</sup>Faculty of Law Sultan Agung Islamic University Semarang, Indonesia

DOI: [10.36348/sijlcrj.2022.v05i03.005](https://doi.org/10.36348/sijlcrj.2022.v05i03.005)

| Received: 13.02.2022 | Accepted: 19.03.2022 | Published: 22.03.2022

\*Corresponding author: Suhadi

Doctorate Student of Faculty of Law Sultan Agung Islamic University Semarang, Indonesia

## Abstract

The purpose of this study is to describe the weaknesses of the Islamic Law Compilation (KHI) Practiced in Indonesia by examining and analyzing its contents and their problems from the perspective of the *madhhab* and reconstructing the KHI which contains Islamic law in the perspective of the *madhhab* based on the value of justice using the sociological juridical method. Informants as sources of research data are scholars, lecturers, judges, MUI, Islamic organizations, FKUB, Shi'i, Sunni, and Salafi Wahabi leaders. Data collection techniques with interviews and documentation. Data analysis goes through the stages of data collection, data reduction, data display, and verification. The results of the study found that (1) KHI only contains family law even though Islamic law is very complex and is not limited to family law. (2) Family law which is the formulation and result of the existing *ijtihad* of Indonesian ulama does not need to be revised because of its suitability and acceptance of various schools of thought in Indonesia. (3) Islamic law is always based on valid and recognized *madhhabs* and *madhhabs* in this world based on the 2004 Amman Treatise and 8 others, namely Sunni, Shi'i, Dhahiri, and Ibadli (Hanafi, Maliki, Shafi'i, Hambali, Dhahiri, Zaidi, Ja'fari, Ibadli). (4) There are 3 schools of thought that live and develop in Indonesia with their derivative mass organizations (Sunni Syafi'i, Sunni Hambali/Salafi - Wahabi, and Shi'i). (5) The three schools of thought in Indonesia are prone to conflict and can trigger disharmony and national disintegration. (6) The need for regulation of the recognition and harmony of various schools of thought in Indonesia through the KHI channel by reconstructing the 1991 Indonesian KHI with additions; recognition, protection, and harmony of various schools of thought with national insight as a complement to the contents of Islamic law and a unifying and harmonious forum that is based on justice-based law.

**Keywords:** Islamic Law, *Madhhab*, Justice.

**Copyright © 2022 The Author(s):** This is an open-access article distributed under the terms of the Creative Commons Attribution **4.0 International License (CC BY-NC 4.0)** which permits unrestricted use, distribution, and reproduction in any medium for non-commercial use provided the original author and source are credited.

## INTRODUCTION

In the development of Islamic law in Indonesia, it should be noted that Islamic law has been successfully codified in the form of legislation in force in Indonesia or it can be said that Islamic law has successfully entered the Taqin phase (the promulgation phase). This phase started from the enactment of the Marriage Law No. 1/1974 until the birth of the 1991 Islamic Law Compilation (KHI) due to the many provisions of family law that needed to be transformed into laws.

The 1991 Islamic Law Compilation consists of three books, namely: Book I on Marriage, Book II on Inheritance, and Book III on waqf. This system is merely just a codification of legal fields that are

discussed in several books. Within its systematic framework, each book is divided into several chapters where several chapters are divided into several sections which are further explained in the chapters.

Overall, the 1991 Islamic Law Compilation consists of 229 articles with different distributions for each book, the largest portion being the Marriage Law section, Then the Law of Inheritance, and the Book of Waqf Law in the last place.

KHI 1991 leaves an empty gap because it only contains NTCR (marriage, talaq, divorce, and reconciliation), inheritance, and waqf and it applies uniformity to all Indonesian Muslims of various schools of thought. Based on this, it is necessary to have the idea of the whole of the 1991 KHI to acknowledge and

ratify as well as to harmonize the diversity of schools of fiqh in Indonesia including Sunni, Shi'a, and Salafi Wahabi which are arranged in such a way based on the recognition, respect and protection of the three *madhhabs* along with the provisions of the permissibility and the prohibitions are based on Pancasila, the 1945 Constitution, the Unitary State of the Republic of Indonesia and Bhinneka Tunggal Ika.

Based on the framework above, the idea of codifying *madhhabs* in Indonesia and compiling them in the new Indonesian Islamic Law Compilation will open a progressive paradigm that a school of jurisprudence will always be seen in relation to space, time, and place. In the Indonesian context, the government is as Ulil Amri who must be obeyed and has the authority to regulate and determine the choice of differences in a problem in various schools of thought even though it is not entitled to force a Muslim to embrace a particular school (Cahyani, 2016). This is in line with the demands and demands of the Qur'an and in accordance with the rules of Usul Fiqh which emphasizes that all things set by the government in the form of regulations are binding and eliminate various disagreements.

This then underlies the idea that the state can regulate the diversity of its people in the form of recognition of diversity as well as recognition of their worship procedures as outlined in the form of codification and compilation.

As it is known that the law is sovereign as the commander-in-chief to create the order of life, harmony, order, and social order in society. These legal guidelines and provisions are not only embodied in symbols, signs, and the like of it but are primarily formulated through language, particularly the legal language of the community (Kamsi, 2020). Legal language is an editorial language (words) created and used to formulate and state law in a particular society. For example, in the context of this research, it is the language of the Islamic law that adheres to the various schools of thought of Islam.

Law can only exist and run effectively in the midst of society when it is formulated and elaborated through rules, guidelines, and regulations that are firm and reflect the values that live in a society (Wahyu, 2018), and must be well communicated to the legal subjects in question. In the context of Islamic law, Muslims benefit greatly from the existence of their holy books and their turas books which store primary and authentic documents about law and justice. Furthermore, it is the obligation for the Islamic generation to study, develop and capture its substance according to the context of its time to be described in more detail in legal postulates.

In this case, reformulating the formulation of Islamic law in Indonesia in formal legal rules called the Compilation of Islamic Law in the perspective of the various schools and schools of thought in Islam that actually exist in Indonesia, namely the Sunni, Shia, and Salafi-Wahhabi schools and mass organizations that affiliation to both, of course, is a necessity.

Based on the background of the problem above, this research contains the following 2 (two) problem formulation, namely:

1. What are the weaknesses of 1991's Indonesian Islamic Law Compilation (KHI) from the perspective of *madhhab*?
2. How is the reconstruction of 1991's Indonesian Islamic Law Compilation (KHI) from the perspective of *madhhab* based on justice value?

## METHOD OF RESEARCH

This study uses a constructivist legal research paradigm approach. The constructivism paradigm in the social sciences is a critique of the positivist paradigm. According to the constructivist paradigm of social reality that is observed by one person cannot be generalized to everyone, as positivists usually do.

This research uses descriptive-analytical research. Analytical descriptive research is a type of descriptive research that seeks to describe and find answers on a fundamental basis regarding cause and effect by analyzing the factors that cause the occurrence or emergence of a certain phenomenon or event.

The approach method in research uses a method (*socio-legal approach*). The sociological juridical approach (*socio-legal approach*) is intended to study and examine the interrelationships associated in real with other social variables (Toebagus, 2020).

Sources of data used include Primary Data and Secondary Data. Primary data is data obtained from field observations and interviews with informants. While Secondary Data is data consisting of:

1. Primary legal materials are binding legal materials in the form of applicable laws and regulations and have something to do with the issues discussed, among others in the form of Laws and regulations relating to the freedom to express opinions in public.
2. Secondary legal materials are legal materials that explain primary legal materials.
3. Tertiary legal materials are legal materials that provide further information on primary legal materials and secondary legal materials.

Research related to the socio-legal approach, namely research that analyzes problems is carried out by combining legal materials (which are secondary data) with primary data obtained in the field. Supported

by secondary legal materials, in the form of writings by experts and legal policies.

## RESEARCH RESULT AND DISCUSSION

### 1. Weaknesses Of 1991's Indonesian Islamic Law Compilation (KHI) From The Perspective Of *Madhhab*

The Compilation of Islamic Law (KHI) contains various potential criticisms directed not only at the existence of KHI but also at its legal substance which is deemed no longer adequate in solving various complex public problems. This is because the construction of KHI since its creation has brought with it various weaknesses.

The results of studies that have been carried out regarding this problem previously stated that KHI has a main weakness in the formulation of its vision and mission. Several articles in the KHI are principally at odds with the basic principles of Islam's universality value, such as the principles of equality (*al-musâwâh*), brotherhood (*al-ikhâ'*), and justice (*al-'adl*), as well as the basic ideas for the formation of civil society. such as pluralism, gender equality, human rights, democracy, and egalitarianism. In this case, it became one of the conclusions of the weaknesses of the 1991 KHI or KHI-Inpres so that a lawsuit emerged from the TPG - MORA (Gender Mainstreaming Team) and as an alternative, they carried out a gender-based and human rights-based KHI (Gunawan, 2016).

In addition, it is also pointed out by legal experts, in the KHI there are a number of provisions that are no longer in accordance with national laws and international conventions that have been mutually agreed upon. Not to mention, when examined from a methodological point of view, the legal style of KHI still impresses as a legal replica of the product of *fiqh ijtiâh* ulamas of Alaf Shafi'i *madhhab*. The legal construction of the KHI has not been fully framed in the perspective of the Indonesian Muslim community with various schools of thought, but rather reflects the adjustments of *fiqh*, especially the Sunni-Shafi'i schools of thought.

This research is here to reread KHI after a dozen years have passed and to rearrange it in a new perspective (covering the vision and mission) that is more in line with the conditions of current society. The expected KHI is a set of provisions of Islamic law which will always be the basic reference for the creation of a just society, which upholds human values, respects the rights of various schools of thought, is evenly distributed in the nuances of mercy and respect, recognizes and protects various schools of thought from the Nation's perspective.

In terms of legal legislation, KHI has a problem with its legal force in Indonesian regulations and laws because the form is still in the form of

Presidential Instructions or Presidential Decree and not presidential Regulation. The difference between decisions, regulations, and instructions is that a decision (*beschikking*) is always individual, concrete, and valid once completed (*enmahlig*). Meanwhile, a regulation (*regels*) is always general, abstract and applies continuously (*dauerhaftig*). Thus, a Presidential Decree (*Keppres*) is different from a Presidential Regulation (*Perpres*). Presidential Decrees are legal norms that are concrete, individual, and once completed (example: Presidential Decree No. 6/M of 2000 concerning the Appointment of Ir. Cacuk Sudarjanto as Chairman of the Indonesian Bank Restructuring Agency) (Muhazir, 2021). Meanwhile, Presidential Regulations are legal norms that are abstract, general, and continuous (example: Presidential Regulation No. 64 of 2012 concerning Provision, Distribution, and Determination of Gas Fuel Prices for Road Transportation). This excludes the Presidential Decree which is still in effect and regulates general matters, for example, Presidential Decree No. 63 of 2004 concerning Security of National Vital Objects, then based on Article 100 of Law no. 12 of 2011 concerning the Establishment of Legislation, the Presidential Decree must be interpreted as a regulation. This refers to the provisions of Article 100 of Law 12/2011 which reads:

*"All Presidential Decrees, Ministerial Decrees, Governor Decrees, Regent/Mayor Decrees, or other official decisions as referred to in Article 97 which are regulatory in nature, which existed before this Law came into effect, must be interpreted as regulations, as long as they do not conflict with the Law."*

Thus, a Presidential Decree is different from a Presidential Regulation because the nature of the Decree is concrete, individual, and once completed, while the nature of the Regulation is abstract, general, and continuous. If the Presidential Decree regulates general matters, it must be interpreted as a regulation.

Regarding the legal force and enforcement of a Presidential Decree, can be traced back to the material regulated in the Presidential Decree. If the Presidential Decree is concrete, individual, once completed, then the contents of the Presidential Decree only apply and bind to certain people or parties referred to and regarding the matters regulated in the Presidential Decree.

And it will be different if the Presidential Decree contains content that is abstract, general, and continuous, then the Presidential Decree applies to everyone and remains in effect until the Presidential Decree is revoked or replaced with new rules.

In regard to this, Jimly Asshiddiqie (2017) said that if the legal subject affected by the decision is concrete and individual, then it is said that the legal norms or rules contained in the decision are individual-concrete legal norms. However, if the relevant legal subject is general and abstract or not concretely certain,

then the legal norms contained in the decision are referred to as abstract and general legal norms. Decisions that are general and abstract are usually regulatory (regeling), while those that are individual and concrete can be decisions that are or contain administrative decisions (beschikking) or decisions in the form of judges' verdicts which are usually referred to as decisions. Therefore, the three forms of decision-making activities can be distinguished by the terms: (1) Regulation produces regulations (regels). The results of these regulatory activities are called "regulations". (2) Stipulation results in stipulations or decisions (beschikking). The results of this administrative decision-making activity are referred to as "Decision" or "Stipulation"; and (3) Judgment or court produces a verdict (vonnis).

The Presidential instructions are "policy rules" or "beleidsregels", which are forms of policy regulations that cannot be categorized as ordinary forms of legislation. Called "policy" or "beleids" or policies because they cannot be formally called or are not in the form of official regulations. For example, a circular letter from a Minister or a Director-General addressed to all levels of civil servants within the scope of his responsibility can be stated in an ordinary letter, not in the form of official regulation, such as a Ministerial Regulation. However, its contents are regulatory (regeling) and provide instructions in the context of carrying out staffing duties. Circulars of this kind are commonly called "policy rules" or "beleidsregel". In addition to this, Michael Allen and Brian Thompson said that policy regulations or "policy rule" which can also be referred to as "quasi legislation" can be grouped into 8 (eight) groups, namely:

- a. Procedural rules;
- b. Interpretative;
- c. Instructions to Officials;
- d. Prescriptive/Evidential Rules;
- e. Commendatory Rules;
- f. Voluntary Codes;
- g. Rules of Practices, Rules of Management, or Rules of Operation;
- h. Consultative Devices and Administrative Pronouncements.

These policy rules can indeed be made in various forms of written documents that are guiding, guiding, giving policy directions, and regulation of the implementation of tasks and work. In practice in Indonesia, these policy rules can be made in the following forms:

- a. Circular letters, such as Bank Indonesia's Circular Letters;
- b. A warrant or instruction, such as a Presidential Instruction (Inpres);
- c. Work manual;
- d. Implementation Instructions (jutilak);
- e. Technical Instructions (juknis);
- f. Guidebook or "guidance" (guidance);

- g. Terms of Reference (TOR);
- h. Work Design or Project Design (Project Design);
- i. And so on.

Based on the description above, we can see that presidential instructions are only limited to providing direction, guiding, guiding in terms of carrying out tasks and work. Meanwhile, there are presidential decrees which are regulatory (regeling) (which is equated with presidential regulations) and some are stipulating (beschikking)..

## **2. Reconstruction of 1991's Indonesian Islamic Law Compilation (KHI) From The Perspective Of *Madhhab* Based On Justice Value**

In the history of Indonesia, in the past there were various beliefs that spread on every island in the archipelago, therefore it is not an exaggeration to say that every ethnic group had its own religious beliefs. From Sabang to Merauke, it becomes a picture of a beautiful country, rich, harmonious, and united in peace. Many religions and beliefs are believed to be unifying differences together with its myriad of languages, customs, characters differences that equate each other as Indonesians who have committed to one homeland, one nation, and one language, namely The Nation of Indonesia. Then it has been strengthened with the National consensus to name this country as the Unitary State of the Republic of Indonesia (NKRI).

Jusuf Kalla at the opening of the Halaqah Ulama and Scholars in Jakarta mandated that the harmony of national and state life must be maintained for the sake of the integrity of the Unitary State of the Republic of Indonesia (NKRI) (Radarbangsa, 2021). In the midst of various cultural, ethnic, religious, and racial differences, tolerance is the key to the harmonization of the nation's life. He emphasized that this harmony cannot be separated from tolerance. This means mutual respect for all. Furthermore, the Vice President said that mutual respect was shown between the majority and minority groups in Indonesia. In fact, this mutual respect is only found in Indonesia. In the context of respect, no other country is the same as Indonesia. 15 national holidays are holidays. Because of this, Indonesia as the country with the largest Muslim population does not suffer the same fate as countries in the Middle East or Central Asia.

He acknowledged that the Islamic world was rife with acts of violence and even civil war. However, this is considered not necessarily because of religious differences (Arifin, 2021). He said that the action was carried out by people who did not know how to practice Islam properly and correctly. The role of the ulama is important to straighten out such teachings. The vice president assessed that the role of the ulama was not only to interpret what was in the holy book but also to implement it.



In connection with this implementation, closely related to the form of the Compilation of Islamic Law itself, which is a codification that unites several legal references across schools of thought, the compilation of the Islamic Law deserves appreciation because apart from aiming at law uniformity, it also does not ignore the cultural reality of Indonesian society. Through confrontation and with consideration of benefits and local wisdom ('urf), the Compilation of Islamic Law formed a new "*madhhab*" which later became a guideline and reference for resolving disputes and cases in the Religious Courts. Compilation's attention to the culture of society is what makes the Compilation of Islamic Law a progressive legal product. Progressiveness in the form of unification is indeed not entirely successful, because society is always changing and the law must also follow the development of society. Therefore, thinking must return to the awareness that the Compilation of Islamic Law is only a product of thought (*fiqh*) and to achieve the goals of law namely justice, certainty, and benefit, and *ijtihad* must always be carried out with the aim of guarding the dynamics of a society that is always developing and changing.

In Indonesia, positive law does not comprehensively regulate Islamic aspects. For example, Law Number 1 of 1974 concerning marriage regulates general and universal matters (across religions, races, and ethnicities). Not infrequently, religious court judges carry out legal reconstruction based on the opinions of *fiqh* scholars in deciding marriage cases that are their authority, and not infrequently the judge's decision is contra legal to the applicable positive legal rules. It is undeniable that legal politics in the Marriage Law does not favor one particular group or religion (Keri, 2019). The breadth of the treasures of Islamic *fiqh* is a source of law in the form of a doctrine that is very valuable for efforts to ensure justice and the benefit of society, especially when grammatical interpretation contradicts the conscience of justice.

The legal construction through the various *ikhtilaf* opinions of these scholars certainly finds urgency when judges are dealing with the heterogeneity of Indonesian society. The difference in ethnicity between one region and the other, resulting in differences in values and culture, even on the extent of the geographical area it can become a law to change because at first, it was not possible to apply a rule of law. One of the diverse opinions of scholars can be a relevant alternative solution. This is where the 1991 KHI reconstruction effort from the perspective of various schools of thought in the archipelago found its momentum.

From all the explanations above, it can be applied in an effort to reconstruct the 1991 KHI from the perspective of *madhhab* in the Nation of Indonesia can be done by legitimating the law using presidential

regulation and restructuring its content to suit the current era by dividing it into 14 chapters, namely: Creed, Prayer, Fasting, and Determination of the Beginning and End of Ramadan and Eid., Zakat, Hajj, and Umrah, Marriage, Waqf, Inheritance, Economics, Implementation of Rituals of Worship and Commemoration of Islamic Holidays, Halal Products, Financial Institutions and the Tourism Sector, Freedom of Expression, Association, Gathering and Teaching *Madhhab*, Understanding, and Streams in Islam and Prohibition, and Closing Terms. by using this structure instead of the current KHI which only consisted of 3 chapters, the law can better cover the entirety of the Ummah's need and not only covering the civil part only.

In regard to this, There are 2 forms of justice in the reconstruction of the KHI shown above, namely justice in recognizing and respecting the diversity of schools of thought in Islam and justice in law enforcement against all deviations and violations in accordance with the law on mass organizations.

The benefit of this is to strengthen the identity and awareness of the Islamic community as part of a nation consisting of various tribes, customs, and religions, especially the various schools of thought in Islam so as to foster awareness of *Ukhuwwah Wathaniyyah* and *Ukhuwwah Islamiyyah*, create a sense of security and protection from minorities. *madhhab* in Islam in a large house of the Unitary State of the Republic of Indonesia (NKRI) and strengthen and strengthen Islamic unity which in the next stage as a great asset Strengthening the unity and integrity of the nation that drives the life of the nation and state that is safe, peaceful in prosperity and prosperity and Islam appears by strengthening the moderate facial charisma of the archipelago without losing its Islamic identity so that religious moderation is increasingly rooted and sustainable in the archipelago.

This reconstruction also contains the value of Progressiveness, namely regulating the governance of Islamic religious life in the diversity of schools in a harmonious, mutually respectful social life, under the auspices and protection of a Just law that is not merely a rigid, standardized rule as in the official report on trials but rather contain harmony, mediation, and kinship for the better to all.

## CONCLUSION

Based on the discussion above, it can be concluded that (1) KHI only contains family law even though Islamic law is very complex and is not limited to family law. (2) Family law which is the formulation and result of the existing *ijtihad* of Indonesian ulama does not need to be revised because of its suitability and acceptance of various schools of thought in Indonesia. (3) Islamic law is always based on valid and recognized *madhhabs* and *madhhabs* in this world based on the 2004 Amman Treatise and 8 others, namely Sunni,

Shi'i, Dhahiri, and Ibadli (Hanafi, Maliki, Shafi'i, Hambali, Dhahiri, Zaidi, Ja'fari, Ibadli). (4) There are 3 schools of thought that live and develop in Indonesia with their derivative mass organizations (Sunni Syafi'i, Sunni Hambali/Salafi - Wahabi, and Shi'i). (5) The three schools of thought in Indonesia are prone to conflict and can trigger disharmony and national disintegration. (6) The need for regulation of the recognition and harmony of various schools of thought in Indonesia through the KHI channel by reconstructing the 1991 Indonesian KHI with additions; recognition, protection, and harmony of various schools of thought with national insight as a complement to the contents of Islamic law and a unifying and harmonious forum that is based on justice-based law.

## REFERENCES

- Arifin, Z. (2021). Performance Of Islamic Law In Indonesia In The Fields Of Civil, Private Law, Public Law And Ethics. *Syariah: Jurnal Hukum dan Pemikiran*, 21(1), 45-58.
- Asshiddiqie, J. (2017). Telaah Kritis Mengenai Perspektif Historis-Evolusioner Dalam Studi Hukum Dan Perkembangan Sosial Di Indonesia. *Jurnal Hukum & Pembangunan*, 18(3), 254-266.
- Cahyani, I. (2016). Pembaharuan Hukum Dalam Kompilasi Hukum Islam. *Al Daulah: Jurnal Hukum Pidana Dan Ketatanegaraan*, 5, 301-313.
- Gunawan, E. (2016). Eksistensi Kompilasi Hukum Islam di Indonesia. *Jurnal Ilmiah Al-Syir'ah*, 8(1).
- Kamsi, K. (2020). Politics of Islamic Law in Indonesia: Indonesianization of Islamic Law. *Asy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum*, 52(1), 1-29.
- Keri, I. (2019). Legislasi Hukum Keluarga Islam Berdasarkan Kompilasi Hukum Islam. *Ekspose: Jurnal Penelitian Hukum dan Pendidikan*, 16(2), 361-375.
- Muhazir, M. (2021). Islamic Law Politics in The Contemporary Era (Revealing The Struggle for The Positivization of Islamic Law in Indonesia). *Al Hurriyah: Jurnal Hukum Islam*, 6(1), 12-24.
- Radarbangsa. (2021). *Halaqah Satu Abad NU, Jusuf Kalla: NU Entrepreneurship-nya Tinggi*, Taken From <https://www.radarbangsa.com/news/35486/halaqah-satu-abad-nu-jusuf-kalla-nu-entrepreneurship-nya-tinggi>, on 04 February 2022.
- Pratama, T. G. W. (2020). The Urgency for Implementing Crytomnesia on Indonesian Copyright Law. *Saudi Journal of Humanities and Social Sciences*, 5(10), 508-514.
- Widodo, W., Budoyo, S., & Pratama, T. G. W. (2018). The role of law politics on creating good governance and clean governance for a free-corruption Indonesia in 2030. *The Social Sciences*, 13(8), 1307-1311.