

The Urgency Of Ijtihad By Judges In Effort Law Invention At The Religion Court In Indonesia

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Abstract: The presence of renewals in Islamic law, resulting in the emergence of various changes in the social order of Muslims either in relation to ideology, political, social, cultural and so on. It later brings new challenges that must be answered, and therefore ijtihad must be continuously made to find a solution to the various problems of new law which is required by Muslims. The type of research is a normative-judicial and empirical research. Normative research is trying to examine the problem of law invention by the judge in the Religion Courts with a case approach. Ijtihad has a very urgent role in efforts to carry out duties as law enforcer and justice by digging, follow and understand the legal values that live and develop in the peoples and accommodate the developments of Islamic law. The method of ijtihad by judges in the Religion Court use maqashid al-sharia and maslahah and isthsan method. At the practical level, so characteristic inherent in the religion courts persists, then should any verdict must include argument of Islamic law sources.

Index Terms: Court, Decision, Judge, Islamic Law

1 INTRODUCTION

Al-Quran is a guide for mankind in their life. One of the wisdom of the revelation of some verses of the Qur'an that are global is to meet human needs are increasingly growing and complex as the development that happened. The flexibility that given by God in the form of an opportunity to provide an understanding to the verses of the Qur'an, means providing the opportunity to perform *ijtihad* on texts, both textually and contextually. Thereby, *ijtihad* is a way to solve the growing problem based on the existing realities while hold on to the Qur'an and hadith. By looking the contents of the Qur'an which gives emphasis to always solve the problems of life based on the Quran and hadith, and by looking the condition of Muslims is increasingly growing by the development and complexity of the problems faced, and then requires the dynamic of developments in terms of legal products. According to Rashid Ridha says that the law can be different because the difference of time, environment, situations and conditions. Empirically, there are two conditions that require legal breakthrough namely; *first*, if the applied legal norms experiences deadlocked and unable to penetrate the purpose of the law, *second*; if the law experiencing the gap between existing legal norms with the expected law purpose so that the existing legal norms cannot provide legal protection, fulfill the sense of fairness, fulfill the rights of victims, prevent injustice, as they should. To anticipate this to be done legal breakthroughs through reinter-pretation and redefinition of verse, hadith, the existing legal text by returning to the basic principles and redevelop through the principles of law and legal theory in order to presenting the real law function.

Legal breakthrough must be carried out according to the law and must not violate the law. In judicial practice, legal breakthrough may occur either in the procedural and material laws. *First*, a breakthrough in the procedural law is between prohibitions that the judge should not to decide more than the required and *ex officio* right by judges granted by law to the judge to decide more than required for the realization of justice. The invention of law is an integral part of the judge's duties as a whole. Judges must have a culture of law invention (*ijtihad*) and *ijtihad* must be a culture of judges, because the true judge is also *mujtahid*. A mandate that is carried by the judge to the legislation is implemented correctly and fairly, and if the application of the legislation would lead to injustice, then the judge is obliged to the justice (*moral justice*) and disregards the laws or regulations (*legal justice*). A good law is legal according to the laws of life in society (*the living law*) which would fit well or as a reflection of the prevailing values in society (*social justice*). Justice is meant here is not justice that is formal, but the justice that is both material and substantive accordance to the conscience of the judge. Judge as controller and law determiner in ahead of trial, can give a *human* touch to the laws and regulations, so it will still be used within the framework of law enforcement with the spirit of humanitarian. In fact, legislators only set general rules only, and consideration of concrete matters submitted to the judge. Based on the view that judges, especially in the religion court is lacking in the legal breakthrough, which they have always focused on teaching or ideology that is *legism* already indoctrinated into their thinking without trying to get out of the *legism* view. Beside that the presence of judge's fear so reluctant to do *ijtihad* because fear to be examined by a higher court or fear of public blasphemy and observers as *ijtihad* or law invention is contrary to the provisions of written legislation. In this context, it is understood that to formulate the decision is not only to match the construction of case with the language and logic of mere regulations. Moreover, necessitates the judge to make the reasoning are adequate with a variety of existing technical, then study it in a social context with a variety of consideration the juridical, psychological and philosophical nuanced, before it finally came to the conclusion and its command.

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2 METHOD OF RESEARCH

The type of research is a normative-juridical and empirical research. Normative research is trying to examine the problem of law invention by the judge in the Religion Courts with a *case approach*. Case approach is conducted by studying the cases relating to the issues faced and become a court decision which has had permanent legal force, and the main subject is *ratio decidendi* or *reasoning*. Through the study legal dogmatic, legal theory and Islamic law. While empirical research is to try to see the law in a real sense related to the how judge's decisions associated with law invention. This research was conducted in the province of South Sulawesi. The populations of this study are all judges in the religion court and religion leaders. Further, the sample of research was determined in accordance with the quota and data required and the representative of population characteristic. The sampling technique is done by *random sampling* with consideration of the representation of homogeneous population characteristics. Religion court judges sampled in this study as many as 10 covering the Religion Court of Class IA Makassar, the Religion Court of Sungguminasa, the Religion Court of Pangkajene and Soppeng and PTA of Makassar. Meanwhile, the religion leaders are 2 as support material. Data have been obtained from the research results, inventoried, and then carried out categorization and subsequently analyzed by using qualitative analysis techniques and *case approach* by interpreting law material descriptively.

3 RESULT AND DISCUSSION

3.1 The Essence of Ijtihad as a method of Law Invention

In general, judges in the Religion Courts textually are only put the arguments based on the Quran and Hadith, but merely put without analyzing the basis of the inclusion of such arguments. Whereas should the consideration of syariah must animate and coloring the consideration of judge as a whole. Syariah argument is an ideological foundation and hallmark of Religion Courts as an Islamic court. The judge may take legal sources both the Qur'an, hadith, or the books of fiqh, which can be used as the basis and reference, both in the field of formal law in examining the case as well as in the field of material law in deciding the case. Based on interviews with K.H. Hasbuddin Halik, Lc, that is an obligation for judges in deciding the case in the religion courts using Islamic law, but they have trouble, because the judges are more familiar with the positive law than Islamic law. As well as stated by Nur Muhammad Huri that the phenomenon of religious judge laziness uses the arguments of syariah, but this is a characteristic of the religious judge before and should be maintained, and the decision quoting the relevant arguments in administer that no longer exist in the decision in general. At the beginning of the establishment of the Religion Courts, judges are appointed at that time is indeed the scholars who truly understand Islamic law until the roots, whereas in the present context is not. While the function of syariah argument for judges are; *first*, as a source of primary law which animates and coloring the consideration of judge as a whole or case encountered; *second*, as reinforcement on the consideration of a judge after taking from other legal sources as well as the relevant science that does not conflict with Islamic law; and *third*, as a supplement of legal considerations, in order to reflect the identity of the

Islamic court. Efforts to keep the existence of the Islamic syariah and apart from the rigidity and out of date, then *ijtihad* as an effort to make law breakthroughs must be done in maximum. By *ijtihad*, re-actualization of Islamic values remain actual and can be maintained in practical life, since in addition to enforcement of truth and justice is also to enforce the laws of God through the adjudication as God's representatives on earth to provide benefit to mankind. Indeed, *Ijtihad* is one of the most important elements in the teachings of Islam. Through *ijtihad*, the problems without solution in the Qur'an and Hadith can be solved by the competent authority and one of which is authorized to perform law invention (*ijtihad*) is judges in the religion courts so that the existing Islamic law and dynamically as the times. As we know that, from the eighth to the thirteenth century, Islam is a religion that has a teachings and matchless culture. This opens the eyes of European in the darkness age, and which subsequently led them to the *Renaissance* and then the era that gave birth to the rapid advancement of science and technology. To keep the existence of Islamic law at the present time, the judge has a major role in setting the law through the courts. Judge is a person who may be authorized by law to deal with cases submitted to the court. Judge faced with various problems that demand a resolution, and the obligation to decide cases fairly with based on belief in God Almighty. In line with the main task of judge is to uphold the truth of justice, and also Islam ordered each man to do justice or justice in any action and acts committed (Q.S 4:58):

"Surely God told you to convey the message to those who deserve it and when you judge between people you judge with justice. With that, Allah has given the best possible teaching you about the implementation of mandate and legal justice. Surely, God is seeing and hearing."

Based on the verse above is obtained a description that the real purpose of the law is justice. The law is merely the instrument, but a lofty purpose is justice and truth. According to Bismar in Antonius Sudirman that "Thank God, justice is established in a beloved country is in animated by the divine and noble and oath articulated, "For the sake of justice based on God". Therefore, they enforce the rule of law (legislation) rather than equity classified as traitors. In the context of law invention (*ijtihad*) that law cultural or customary is also known as one of method to invent a law (*ijtihad*) by the scholars of Usul Fiqh by terms *Urf*. *Urf* (customs) that does not conflict with Islamic law can be confirmed still hold true for the people concerned. *Fiqh* divides *urf* into two are *urf shahih* is customs which have been accepted by the public, and justified by considerations of common sense, bringing good, resist damage and do not violate the provisions of the texts. Then, *urf fasid* is customs that have been established in people's lives, but it cannot be accepted by the consideration of common sense, bringing damage and contrary to the texts. The dynamics of legal and social dynamics are moving so quickly deserting the conditions under which a legislation passed or declared valid, so that in practice many rules that are inconsistent with the existing social conditions. In facing this condition, needed a role of judge to provide solutions that are constructive for the implementation of law in the context of social change. As cases that often arise in the people related to inheritance cases in which there bequest or grant elements,

and in Bugis' people known as "*ampikale*". The linkage of law with social dynamics is moving centrifugally, by itself the law must evolve and balancing the movement centrifugally towards the formation of substantive values proportionally to the dynamics of social, legal and not just an empty box are without meaning and benefits. In this level, then the law must have the spirit of human values that embodied in justice, ensure certainty and has benefits value. Thus, the judiciary can be a locomotive of law reform, the role and function of judges in addition to the management of the judiciary is very important and strategic, because in essence the judge is an essential ingredient in implementing and discovered the law, which is based on justice and expediency. Judge not merely legislation funnel, but further than that judge is a spokesman for the law and justice for the people. Implementation of *ijtihad* as a source of law by the judge in the Religion Courts, in this study that the decisions of the judges surveyed are basically not making *ijtihad* as one of the sources of law in deciding the case. This is reinforced by the opinions expressed by Hasbi that *ijtihad* can basically be used as a source of law in deciding the case, but cases that entered basically still be solved through the material laws that exist in the religion courts. Therefore, the use of *ijtihad* by the judge as a source of law is essentially to fill the legal vacuum in the religion courts. Material law of religion courts is still very limited, and this is where it takes the role of judges in utilizing the institution of *ijtihad*.

3.2 The Method of Judge Ijtihad in Decide the Case in the Religion Court

In the context of law enforcement and justice, the principal task of the judge is authorized to investigate, decide and resolve the case on the first level among people who are Muslims in the field of Islam civil. In the process of hearing, the judge shall be guided by formal law (*procedural justice*) and material law (*substantial justice*). The mastery of law material by the judge is needed as a tool oriented to the *legal justice*, *moral justice* and *social justice*, in addition to be synchronized with the behavior that is honest, fair and morality. Law as a protective means of human interests should be implemented properly. In searching for appropriate legal and perform the invention to provide a concrete decision on the cases that are exposed to the judge, the judge will process all sources of existing law, both in the written or unwritten laws. The authority of the judges in performing law invention (*ijtihad*) is solely to provide a sense of justice, or at least can touch the sense of justice. It must be recognized that the sense of justice it is within the abstract, but achieving must still be done with the maturity of science and sharpness of intuition, given a verdict after a pronounced no longer belongs only to judges who decide, but belonged to the seekers of justice and society as broad. As this, the judges in the religion courts must be able to interpret a role in the actual legislation that the laws are applied in accordance with the needs and the times. In addition, the judge must also be able to apply the law according to the benefit of society, and in interpreting the law to seek a new law should not be separated from the basic principles of Islamic law, philosophy of the nation (Pancasila) and the purpose of the legislation was enacted. Based on research conducted on some verdict in the Religion Courts, it can be disclosed that the use of *ijtihad* method that intended relatively are casuistry, depending on events and legal facts revealed in the judicial process. From some of the verdict in

the Religion Court studied, after an inventory and categorization of the use of invention methods (*ijtihad*) by the judge in the Religion Courts of *maqashid al-sharia* with *istihsan* and *maslahan* methods. In this study, the authors do not intend to assess the use of law invention methods are used, but only to uncover and analyze the legal considerations of judges in relation to the method of law invention used in its legal considerations. Because no single theory which obligate or require judges to use the types and methods exist, judges are given the freedom to choose the method that will be used in the legal considerations of the cases they handle. Therefore, it cannot be determined the method of law invention on how can be used by judges in performing law invention (*ijtihad*), because in each case has the type and different characteristics or varied so that the judge will use a method of law invention in accordance with case (*cased by case*). This is in line with the argument of Soedikno quoted Nurul Qamar that the general rule on the question of what methods, and where and in what concrete events and where, the judge should use a particular type of method, it does not exist. Further, it said that the legislators did not give priority to one method to invent the law. Therefore, the judge will ultimately impose their choice based on considerations which method most convincing judges. Selection of the method to use entirely is the autonomy of judges in law invention.

3.3 The Constraints of Judge in Ijtihad of Law Invention

There is no doubt that the principal task of the judge is to administer according to the law of each case brought to them by the fairest, do not discriminate between people based on ethnicity, religion, race and class, position and wealth. In essence, the task of the judge to administer the case is justice and law. Ideally, these two principles united with each other and complement each other. Enforcing the law is a process to achieve justice, while justice is the goal to be achieved in the enforcement of the law itself. Speaking about the verdict, lately verdict in the religion courts in Indonesia are many criticism due to the legal considerations is mostly textual, difficult to invent the law and little review of references from original sources such as the Qur'an and Hadith and views of fuqaha. The results of study, author presenting that the inclusion of sources or arguments that sourced from Islamic law are very rare and generally uses KHI and if there is the inclusion of the sources of Islamic law was merely include but are not analyzed properly. As described, Tim Lindsey, a professor from the University of Melbourne, based on a number of decisions which examined conclude that the religion courts in Indonesia was only at the level of symbols (*largely symbolic in its religiosity*) is not in the content. This conclusion is based on his observations of the decision of the religion court that in its application the material law is sometimes very contrary to the doctrines of *fiqh* contained in the classics. Thus, provoke the question of whether the decisions are Islamic or not. In the context of Indonesia, the religion courts is one of the jurisdictions that have specifications and unique because it is subject to two different legal systems. When reviewed from the origin of the goals established and organized and functions carried by the religion courts, it is the Islamic courts, as based on ideology is subject to the Islamic law. Meanwhile, when reviewed from the status established and organized by state, then it is a state court, and based on the constitution is subject to the state law. The struggle between the two legal systems that gave birth to the state courts in the field of Islamic law

which is in the Indonesian administrative system was then called the religion courts. Therefore, the most difficult task in by the judges in the religion courts, because in addition to be subject to the state law, it also be subject to the Islamic law. Because the religion court also called the *shariah court* is a justice system that is set up and organized by the authorities/the state on the basis of God's command in Islam and is an integral part in the religious practice of Islam based on shariah principles for conducting judicial to enforce Islamic law and resolve disputes between the parties litigant, which is based on Islamic principles and *Rahmatan Lil Alamin* and respect for human rights. In the implementation of judicial power by judges in the religion courts which distinguish the judicial is the mastery of shariah law science. Shariah law in question is covering main source (*ushul*), and reaches out detail material (*furū*). About the main source according to Imam Al-Mawardi, there are four that must be mastered by the judge who could then be authorized to become a judge or mufti:

- a. Al-Qur'an; a judge should really know the laws material that remain in force, in addition to law material that have been repealed, amended or not enforced anymore. In other words, a judge must know the legal developments, in addition to having to know absolutely legal interpretation method.
- b. Hadith; a judge should really know the law material such as hadith, levels and quality.
- c. Interpretation and jurisprudence of *Salaf* (the companions of the Prophet and tabi'in); a judge should really know the problems that have been agreed unanimously by the companion and tabi'in, enacted in general as well as having binding properties, in addition to the problems that have not received agreement.
- d. *Qiyas*, a judge must perform analogical reasoning that open the way to restore or associate *far'* (tribe or part of a problem) that has not been declared of legal, with something principal legal promulgated law materials are authentic (*manthuq/manshus*) based on legal material has obtained the unanimous agreement, has been in force in general, as well as binding.

As the fourth of mastery above, the judge has the legal authority to perform *ijtihad* in Islamic law. Islamic law scholar who has reached the level of mastery as described can be called *mufti* or a judge. But if it does not meet either of these requirements, they cannot be appointed as a judge. But the reality on the field shows that one of constraints is a lack of mastery of the judges about Sharia law. As we know that one of the constraint faced by judges in doing *ijtihad* is the lack of control over Shariah law. In legislation of the religion court, a requirement that is set to be appointed as a judge is a shariah scholar or law scholars who master Islamic law. As the explanation of the law, not explain what is meant by sharia scholars that like. But what is understood so far that sharia scholars that the person who master the Islamic law. Law consideration is the foundation or basis for the judge in deciding each case. In addition containing the basic reason those logical-rational considerations, also includes other considerations such as interpretation and legal construction of the judges of the dispute administered. Description consideration should be compiled systematically and comprehensively. The quality of a decision and the level of intelligence and intellect will be reflected on how judges

formulate the *decidendi ratio* in their decision. Legal reasoning as well as the formulation of legal argumentation will describe the precision and judge intellectual level. Judge in formulating the verdict is not only focused on mere formal syllogism, nor merely interpret mechanically, but as an intellectual work that requires comprehensive analysis and interpretation. In addition to the unique of religion courts, the quantity of cases charged also affect the quality of the decision of the Religion Court. Number of cases handled by the courts of first and appellate levels in the religion courts continually increasing from year to year. Increasing the number of cases also occurs in case of an appeal, and that decrease is the number of reconsideration cases. With the increased number of cases both in quality and in quantity, it is automatically demand, readiness, harmony and seriousness over the judiciary religion, both of the elements of judges, substitute clerks, until process server for the sake of providing excellent service to the justice seekers and ultimately will provide satisfaction for people, especially for justice seekers. Based on interviews with a judge in the Religion Court of Sungguminasa that the increase in cases show the public awareness of increasing that when have a legal problem must come to the court, in addition, be evidence that public confidence in the judiciary, where justice seekers believe that the problem can be solved in the court and they can also get justice. And also, expressed by a judge in the Religion Court of Watansoppeng, as interviews with H.Hasbi that the region court in each region is faced with a lack of judges, irrespective of whether or not professional, as the case in the Religion Court of Soppeng only have 10 (ten) judges, so the role of the judge as a determinant of justice seeker is still needed in adding to the case that goes from year to year always has increased very significantly. Judges who are less able to influence the making of the verdict, because when they are faced with many cases is not balanced with the judges, apart from that a judge cannot be argued that the decision there cannot give satisfaction to the justice seekers because many cases handled. Inadequate number of judges is reinforced by research conducted by the Supreme Court with the finding that in the religion court has judge deficit in the first level. In 359 Religion Court/Shariah Court, ideally there were 5539 judges, but the number that existed at this time 3078 judges. Thus, it takes an additional 2461 judges. Currently, of the 359 courts in the first level in the religion court consists of 56 Religion Court Class 1A, 100 Class 1 B and 203 Class II. Based on the calculation of the workload, ideally on each the Religion Court Class 1 A consists of 25 judges, Class 1 B consists of 15 judges and Class II consists of 13 judges. While the reality on the field shows that the number of judges in each the Religion Court has not been ideal, as seen in some of the research findings of the Religion Courts that judge is still minimal, whereas the other hand, the number of cases continues to rise. The verdict is a portrait of professionalism of judges in deciding a case. Sydney Smith had argued that "*nation fall when judges are unjust*", which means that a nation would fall if the judges decide unjustly. Professional judge is a judge who is able to decide in just through legal reasoning systematic and comprehensive, professional judges who have the capability and high integrity in carrying out their duties and responsibilities in achieving legal justice and social justice through their decisions. Indeed, duties and responsibilities of a judge is very noble, but also very heavy, because the justice seekers have given full trust to the judiciary in the hope of providing justice,

and they do not want to know how much cases are being handled. So, there is no reason for judges, any existing conditions, still must carry out its duties and responsibilities in a professional manner in order to realize the values of equity for justice seekers.

4 CONCLUSION

Ijtihad has a very urgent role in efforts to carry out duties as law enforcer and justice by digging, follow and understand the legal values that live and develop in the peoples and accommodate the developments of Islamic law. The method of *ijtihad* by judges in the Religion Court use *maqashid al-sharia* and *maslahah* and *istihsan* method. Constraints faced by judges in an effort to perform *ijtihad* is a lack of judge's mastery to the Shariah laws which is the material law of the religion courts, or other hand that the decisions of the religion courts is the lack of Islamic law sources and it is apparent from the rarity of shariah arguments of the judge's decision, although it is a characteristic. *Ijtihad* by judges in their verdict must be placed proportionally so that Islamic law continues to live and exist throughout the ages. The use of *ijtihad* method by judges who can answer the challenges of era by staying in line with Islamic law. At the practical level, so characteristic inherent in the religion courts persists, then should any verdict must include argument of Islamic law sources.

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