Islamic Law Reform in Religion's Court Decision

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Abstract: The decision of the Religious Courts is one of the treasures of Islamic law in Indonesia in addition to fiqh, fatwa and qanun. Therefore, the product of the court decision made by the judges is aligned with the results of ijtihad based on the intensity of social change that occurs in society while the law is clear less. The aim of this reasearch is to study the renewal of court decisions, especially in the field of family law, namely the division of joint property between husband and wife due to divorce which is not divided equally in proportion, child custody for those determined by the child's choice not on the basis of the wishes of the mother and father, and the granting of property rights inheritance of different religions. The method that used in this study is to analyze the method of judges in deciding the family's civil case, both the basis of consideration and the legal basis that used. The results of the analysis and study show that the reform of Islamic law in the decisions of the religious court is carried out by the maslahah (welfare, usefulness) methot that considering the legal objectives and the legal basis derived from the Holy Quran, Hadith, and formal sources of law.

1 INTRODUCTION

The ruling of the religious court (Idri 2009) is one of the treasures of Islamic law, as well as other Islamic law, namely *fiqh*, *fatwa* and *qanun*. The decision of the religious court made by the judges of religion (Islam) in examining, resolving and deciding cases that occur among people who are Muslim, whare is the product of the judges' thinking about the case under investigation. (Kiljamilati 2016) In Islamic law, mobilizing all the ability to find law is called *ijtihad*. *Ijtihad* is basically divided into two, namely *ijtihad intiqai* which is to make the opinion of the ulama as one of the opinions of the judges in deciding cases, and *ijtihad insyai* namely finding new law in deciding a case because there is no law governing it (Al-Qardhawi, 1996, pp. 19–32) (Fatima 2016).

Decisions taken by judges, whether single judges or panel judges do not escape the dynamics of social change that occurs in society. Social changes that are so fast cannot be accommodated by law so that in the hands of the judge the law is enforced and applied through the *ijtihad* (Mannar, 2006, p. 154) (Feener 2013) (Cammack 1996). Therefore, juridically the judge is prohibited from rejecting a case with no legal reasoning or unclear as stated in Article 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power.

As a product of ijtihad, the verdict of a religious court judge experienced his own dynamics at least if seen in the last 10 years (2007-2017). The decision of a religious court whose legal sources are absent or unclear by the judge is done by finding a law (*ijtihad*). As stated above, the form of *ijtihad* judge in this ruling concerning family law takes the form of *ijtihad insyai*, namely the judge applies the law to a concrete case when the law does not exist.

This study found that the decision of the religious court in the field of family law used *ijtihad insyai* earlier. Some of the judges' decisions in the field of family law are the sharing of joint assets between husband and wife because divorce is not divided equally between the husband and wife, but the share of one party is greater, the custody of the child for those who have been *mumayyiz* is determined based on the child's choice not based on the mother's wishes and fathers and the granting of rights to property of *muwaris* who are of different religions with the way of *wasiat wajibah***.** Based on the explain before, this study attempts to analyze whether the judge's decision as an *ijtihad* is still in the corridor of the Quran and Hadith and what method of *ijtihad* is the judge in making changes to Islamic law, especially in the field of family law so that legal reform occurs.

Studies on the reform of Islamic law, especially in the field of family law, have been carried out by

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researchers and academics. Some coverage and substance have similarities and some are clearly different. For example, there is a research that concluded that family law reform in Indonesia was carried out through family law legislation consisting of 12 changes which included marriage, inheritance, endowments and wills (Malarangan, 2008) (Nurlaelawati 2014). And also described that the reform of Islamic law was carried out through 4 channels, namely fiqh, fatwa, judge's decisions and legislation (Muhamamdong, 2013). There is also previous research that stated that the reform of Islamic law was initiated by a number of scholars and academics, namely Hasbi Assiddiqi, Hazairin, Munawir Sadzali, Ibrahim Hosen, Ali Yafi and Sahal Mahfud (Budiarti A, 2014). And finally one of dissertation which concluded that the contextual interpretation of judges on the legal text was better able to fulfill the sense of justice than textual interpretation (Riadi, 2011). The decision of the Supreme Court of Indonesia which puts forward contextual interpretation is more progressive and responsive to the sense of justice for the parties and on the contrary the decision of the Supreme Court which departs from textual interpretation cannot fulfill the sense of justice for litigant parties.

2 METHOD

This study use *ijtihad* of judges in renewing Islamic Law. The task of the judge in examining and completing the case is to find the law. Every legal event and fact found in the trial will be constricted, qualified and constituent by the judge with the existing or created law. When the judge concluded that the case he examined was concrete, then the judge would look for the law to be applied later. Judges' actions in applying this law are then called the *ijtihad* in the Islamic law. *Ijtihad* is actually not limited to legal discovery, but is preceded by a legal search process to apply.

Definitively, *ijtihad* is a truly effort of a *mujtahid* to find the *dhanni syara* law (Mahbubi, 1998, p. 259). Based on this definition, *ijtihad* is carried out when the law is not found in the Quran and Hadith. The scholars of *ushul fiqh* then expand the meaning of *ijtihad* not only the law which is not contained in the Qur'an and the Hadith but also against the arguments that the *dilalah* and the *wurud* are *dhanni* (Khallaf, 2003).

Ijtihad has several ways. Some scholars proposed to agree on the methods of *ijtihad* and some did not agree. The method of *ijtihad* that agreed upon by the *ushul fiqh ulama* is *qiyas*. Whereas what was not agreed is *istihsan*, *maslahah mursalah*, *al-urf*, *istishab*, *syar'u man qablana* and *madhab sahabi* (Riadi, 2011, p. 8). In practice, the decisions of religious courts in the field of family law use the method of *ijtihad* in the form of *qiyas* and *maslahah mursahlah*.

The settlement of cases carried out by a judge in a religious court begins with reading the identities of the parties, if both are present then the peace process is carried out through mediation, if the mediation is unsuccessful, the plaintiff's claim is read, hearing the respondent's answer, proof of the claim by the plaintiff and the defendant until finally found the law is by the judge. In summary, the process of examining the case is carried out in three stages, namely to consternate, qualify and constituent. Concerning means the process of classifying facts that are considered true and facts that are considered wrong in the trial. In the constituent stage, the judge sees, knows and confirms the occurrence of a legal event based on valid evidence. In the qualifying stage the judges act to assess the events that have been proven to be proven that the event entered into what relationship and at the stage of constituent judges make their legal determination(Sururie & Burhanudin, 2013, p. 9). In this stage the judge actually mobilizes all his abilities (*ijtihad*) seeking the law to be applied also creates a law when the law is not found.

When a judge applies the law, he will look for it in legislation. If the judge does not find a clear law (*sharih*) he will use an interpretation method in the form of an analogy (*qiyas*) or a contrario interpretation and historical interpretation (*asbab an-nuzul*) of the articles in the legislation. In the world of law, the process of seeking the law is then applied to concrete cases called legal discovery (rechvinding). Sometimes in the process of legal discovery, the law is incomplete or unclear. When the law is unclear or non-existent, the judge will do the creation of law or the formation of law (rechtschrifing) through the *maslahah mursalah* method.

In cases where the law is unclear (*sharih*) the judge conducts an analogy (*qiyas*). *Qiyas* is analogous to a case of law with other laws contained in the text because of the similarity of *illat*. The similarity in *illat* is what constitutes the basis for the establishment of a new law on existing laws. *Qiyas* is used to issue laws implied by the soul and spirit of the *nash* by first checking whether it is illat for the law of the *nash* (Husen, 2003, pp. 15–16). If the illat law is stipulated by the *nash*, *qiyas* is called *qiyas jali*,

whereas if the illat of the law is not stipulated by the *nash*, *qiyas* is called *qiyas khafi*.

Maslahah mursalah is a law-setting method that can be used in establishing law. Etymologically, maslahah mursalah is a way to take more humanity and prevent loss. *Maslahah* is the realization of the objective of the law, namely to maintain religion, maintain the right to life, maintain common sense, protect offspring and protect wealth (Al-Ghazali, n.d., pp. 216–217).

In practice, cases decided by a judge are based on a clear legal basis, then the judge applies the law to the case, there is a clear legal basis but the judge does not use the source of the law (contra legem) and the case is clear but the judge finds no law so the judge creates the law (rechtschrifing or *ijtihad*) using the method as stated above.

3 RESULT AND DISCUSSION

In family law, the judge's decision with a pattern of legal reform can at least be divided into two parts, namely the judge's decision that overrides the existing legal sources, such decisions are called contra legem and the judge's decision to find a new law because the law does not regulate it or is called legal discovery. Judges' decisions that override existing sources of law are called contra legem. Contra legem is a judge's decision after making a consideration of a case that is examined by the panel of judges, by excluding rules and regulations in deciding the case. Regulated laws and regulations are deemed to be incompatible with the objectives of the law when applied to cases that have been considered by judges with rational considerations (Fanani, 2014, p. 130).

Judges' decisions that are contradictory can be found in decisions regarding joint assets. For example in the Decree of the Religious Court of Mojokerto Number: 0521/Pdt.G/2013/PA.Mr. The panel of judges ruled that the division of property was divided into 1/3 for husbands and 2/3 for wives. The sharing of this joint property deviates from the provisions contained in Article 97 of the Compilation of Islamic Law (KHI), that widows or widowers live each of them with the right to a half of joint property. If the panel of judges guides the provisions in the KHI, then the distribution of assets should be divided by ½ for each party.

Judges' decisions in the division of shared assets which give a larger portion to the wife than to the husband are based on several considerations, namely: that determining the share of husband and wife on joint property cannot be seen normatively legalistic but must be viewed casuistically and dynamically in the understanding that must be seen from the contribution of each husband and wife in accordance with their proportion and position, where the land came from the defendant's mother. The Assembly considered that applying Article 97 of the Compilation of Islamic Law in letterleg was irrelevant, therefore the panel considered 1/3 to be part of the plaintiff 2/3 to be a defendant.

Decisions that are contradictory in the field of shared property are also found in the Decision of the Cimahi Religious Court Number: 2168/Pdt.G/2013/PA.Cmi concerning the sharing of shared assets. In the verdict, the panel of judges gives a larger share of joint assets to the husband as much as 2/3 and the wife gets a share of the joint property as much as 1/3. The panel of judges gave consideration in the case that although it was not explicitly stated in the KHI or explanation, the provisions of Article 97 of the KHI must be understood in the perspective of the husband and wife's role in obtaining the property, namely as the head of the household, the husband acts as the breadwinner and obtaining assets (Article 80 KHI) while the wife acts as the organizer of daily household needs as well as possible and is dedicated to her husband (Article 83 KHI). In the event that the role does not go as it should, then the provisions of Article 97 can be deviated. This is followed by the Supreme Court of the Republic of Indonesia as among other things in the Supreme Court's ruling Number: 266 K/AG/ 2010 which stipulates the division of shared assets deviates from the provisions of Article 97 of the KHI. In this consideration it was stated that the Panel of Judges had obtained the facts in court, in essence, the Plaintiff often left the Defendant and left without the Defendant's permission. This means that the Plaintiff has not fulfilled his obligation to serve his husband and organizes his daily household needs as well as possible. Because because it turns out that the Plaintiff often fails to fulfill his obligations and it does not appear that the Defendant as a husband neglects the obligation to make a living and provides all the necessities of a married life, the Panel of Judges believes that the sharing of joint assets as stipulated in Article 97 of the KHI is not appropriate in this case.

Based on these considerations, the writer can see that the legal discovery method used by the judge in this case is a method of legal discovery with interpretation. The interpretation method is divided into three types, namely: the literal rule, the golden rule, and the mischief rule. Whereas in Indonesia, the types of interpretation methods used are subsumtive

methods, grammatical interpretation, historical interpretation, systematic interpretation, sociological or teleological interpretation, comparative interpretation, futuristic interpretation, restrictive interpretation, and extensive interpretation(Ali, 2011, p. 127).

Regarding this case, the author considers that the interpretation method used in considering the share of joint assets is a method of sociological or teleological interpretation. This method establishes the meaning of the law based on the purpose of society. This means that a rule or law is still valid, but actually it is not valid to be applied in certain cases.

Thus, Article 97 of the Compilation of Islamic Law remains valid, but for case Number 2168/Pdt.G/2013/PA.Cmi, the article is no longer relevant to be applied, so the panel of judges is obliged to contra legem and legal (renewal) updates for the sake of the creation of the purpose of the law itself.

In addition to joint property cases, ijtihad judges in their decisions regarding child custody found decisions that were patterned by law makers with certain methods. For example, in a childcare institution that was decided by the West Jakarta Religious Court Number 228/Pdt.G/2009/PA.JB stated that custody of children under the age of 12 years (children) fell into the hands of his father. According to the law, child care (hadhanah) for children under 12 falls into the hands of their mother. In the Compilation of Islamic Law Article 105 letter (a), states that in the event of a divorce, the care of a child who has not been mumayiz or not yet 12 years old is the right of his mother. Then, in Article 156 letter (a), due to the break up of marriage due to divorce is a child who has not yet had the right to get hadhanah from his mother. When parenting is a basic right of the mother, the scholars conclude that the mother's relatives are prioritized over the relatives of the father (Wahbah, 2008, p. 680).

The consideration of the panel of judges in this case was that between the Plaintiff and the Defendant there was no agreement on the maintenance of the child named the children of the parties, then based on the provisions of article 41 of Act Number 1 of 1974 concerning Marriage which reads: "either mother or father is still obliged to maintain and educate their children, solely based on the interests of children; whenever there is a dispute regarding the control of children, the Court gives its decision ". Because the one who determines maintenance (foster care) is the Court, in this case the West Jakarta Religious Court. So the Panel of Judges considered that a child named Febby Indana Zulva was born on February 14, 2001, although he was still underage but at this time the child was in the care of the defendant and the child was also in school near the residence of the defendant, the Panel of Judges considered that because of the age of the child it is difficult to adapt to the new environment and it is not proven that the defendant has neglected and abandoned the child, and in order to maintain the child's mental development and in the interest of the child as stipulated in article 2 of Law No. 23 Regarding Child Protection, the custody or maintenance (*hadhanah*) rights of children named children of the parties born on February 14, 2001 are stipulated to the Defendant (his father).

Likewise, in the case of a judge's decision concerning the granting of inheritance rights to a different religious family through obligatory wasiat as stated in the decision of the Kabanjahe Religious Court 2/Pdt.G/2011/PA-Kbj. According to KHI, a different religion becomes a barrier to receiving inheritance. This is stated in Article 171 point which states "heirs are people who at the time of death have a blood relationship or marital relationship with the heir, are Muslim and are not obstructed by law to become heirs".

In consideration of the panel of judges, the heirs of different religions (Jayanta Ginting) have the right to obtain inheritance from their fathers who are Muslims based on wasiat obligah, not the capacity as heirs but in the capacity as recipients of wills even though not inherited. The judge in handling the case Number: 2/Pdt .G/2011/Pa-Kbj has conducted legal reform.

Initially, this new legal reform was spearheaded by the Jakarta High Religion Court with its decision Number 14/Pdt.G/1994/PTA. JK and the Supreme Court of the Republic of Indonesia with its decision Number 368 K/AG/1995. This case began in the Central Jakarta Religious Court in its decision No. 377/Pdt.G/1993/PA. JP argued that non-Muslim girls are not including heirs of the inheritance of their parents who are Muslims and are not entitled to get any portion of the inheritance her parents. At the appeal level, the Jakarta High Religion Court ruled in Number 14/Pdt.G/1994/PTA.Jk, that non-Muslim heirs were entitled to obtain a share of the inheritance of their Muslim heirs. The non-Muslim girl is not included as an heir, but the child has the right to get a share of the inheritance left by his heir who is a Muslim through obligatory *wasiat*, and he is given 3/4 part. At the appeal level, the appeal was strengthened by the Supreme Court's decision in its appeal decision Number 368K/AG/1995, but the share was not ¾ part, but 1/3 part (Noor, 2018, p. 3).

Wasiat obligah is a testament that is required by the state to someone who is a Muslim who when he did not declare his will during his lifetime. In Indonesia, the procedure of giving a will is carried out by the Religious Courts for parties who file inheritance claims in which one or more parties are prevented from receiving inheritance rights. Then the Religious Court determines the existence of obligatory wasiat to the Heirs and gives them a maximum of 1/3 part. Based on the above description, the findings of the judge in deciding the case of family dispute above are carried out by analogy method (*qiyas*), or the interpretation of a contrario as in the decision concerning the dispute of joint property and is carried out by law formation (rechtchriffing) by *istihsan* and *maslahah mursalah*.

4 CONCLUSIONS

This study concludes that the style of reform of Islamic law (family law) in the judge's decision occurs in the decisions of religious courts in the field of joint property, childcare (*hadhanah*) and religious differences. The legal renewal is carried out by the *qiyas* method (interpretation) of the articles which are deemed unsuitable for the purpose of law, namely justice and using the *maslahah* method, namely the panel of judges seeks the value of usefulness (as a legal objective) for justice seekers so that they get the favor of the judge's decision.

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