

ANALYSIS OF JUDGES' DECISIONS REGARDING ISLAMIC INHERITANCE CASES AND ITS IMPLICATIONS FOR FAMILY LAW REFORM IN INDONESIA

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ABSTRACT

There is a disparity between the decisions of the Religious Courts, the High Religious Courts and the decisions of the Supreme Court related to Islamic inheritance cases since first-instance and appellate-level decisions tend to use normative law, whereas at the cassation level decision has used a progressive legal paradigm. Therefore, this study aims to look at the judge's decision regarding inheritance cases and its implications for legal reform. This research is a qualitative research, a type of library research with the approach of the Legal Pluralism Triangle Concept by Werner Menski. This study uses the theory of legal discovery, maqasyid as-shari'ah, and progressive legal theory, and draws conclusions using inductive thinking. The results of this study indicate that the decisions of the Religious Courts and the High Religious Courts still use a conservative legal paradigm which tends to only serve as mouthpiece for laws, in contrast to the decisions of the Supreme Court which have described the existence of ijtihad by using a progressive or contextual legal paradigm. The implication of the decision on Islamic inheritance for family law reform in Indonesia is that the Supreme Court's decision can be used as jurisprudence and as a reference for realizing the unification of Islamic inheritance law in Indonesia today.

Keywords: *Judge's Decision, Court, Islamic Inheritance, Family Law.*

Received : September 24, 2022 – Revised : October 27, 2022 – Accepted : November 17, 2022

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A. INTRODUCTION

The court's decision is a judge's thought process (*qadi*) about law, both single judges and panel judges. In the judge's decision, the judge made a legal discovery in the case he was examining. The process of discovering this law in the study of *ushul fiqh* is called *ijhtihad* (al-Amidi, 2003; Fitriyani, 2022), in the process of finding law, judges use the method of thinking by interpreting normative provisions that lead to a judge's decision by aligning laws with the demands of the times or the situation and conditions of society (Badriyah, 2022; Pradikta et al., 2021).

The judge's paradigm is just a trumpet. The law is slowly being eliminated in judicial practice in Indonesia (A. Ali, 2009). Judges have a role in making new laws (Agustine, 2018; Manan, 2006; Taquiuddin, 2017), or laws made by judges, when they do not find legal rules governing them or only find legal provisions in general, here judges should be focused on philosophical goals and interpretations, upholding truth and justice (Alhamdani, 2021; Maharani et al., 2019; Manan, 2006), not enforcing laws and regulations in the narrow sense and merely playing the role of being the mouth of the law (Ekapaksi & Ali, 2022; Harun, 2017) and does not act as an inanimate being (*bouche de la loi*). Such is the centrality and dominance of the position and role of the value of justice for law, so that Gustav Radbruch stated "*rechct ist wille zur gerechtigkeit*" law is will for justice (Halim & Salim, 2019; Sisworo, tt.).

The role of judges is very important in finding law in various cases, including settlement of cases in the field of Islamic inheritance. Judges should decide cases not only based on normative law contained in statutory regulations, but also must consider a sense of justice and benefit.

The existence of justice requires the role of judges in its application (Cendana, 2017). The concretization of justice is only possible when the judge understands the social reality that occurs in society.

The judge in deciding a case must first consider various evidences submitted by the litigant, so the judge must listen to all the statements of the parties (Manan, 2013; Siahaan, 2022). Now that in dealing with cases of Islamic inheritance, it is very important for judges to make decisions that do not only hear one side. As for deciding cases, judges have their own considerations in giving decisions, both at the first level, appeal and cassation. This is strongly influenced by subjective and objective factors of judges (Nurnazli, 2019).

Many problems of Islamic inheritance are resolved only at the first level of decisions, namely at the Religious Court, and at the appeal level at the High Religious Court, but not a few also reach the cassation level to the Supreme Court in seeking the most just decision. In giving a decision there are different thoughts and considerations of judges. In this case, there are judges' decisions regarding the settlement of Islamic inheritance cases that still adhere to the principles espoused in law or procedural justice, and some are based on considerations of benefit.

The disparity between the decisions of the Religious Courts, the decisions of the High Religious Courts and the decisions of the Supreme Court related to Islamic inheritance cases are based on various reasons and their respective grounds. At first level and appellate level decisions tend to use normative or textual law in deciding cases of Islamic inheritance, while at cassation level decisions tend to use progressive or contextual law. This is what then gives a variety of new phenomena related to court decisions in cases of Islamic inheritance.

Referring to the various existing problems, this article aims to further examine the basis for judges' considerations in deciding cases

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regarding Islamic inheritance and also its implications for family law reform in Indonesia, highlighting the divergence of several judges' decisions or more specifically on jurisprudence. This is very important and interesting to research and analyze since in making and taking decisions in a case it cannot be separated from the philosophical, sociological, and normative aspects that underlie the judge's thoughts. In addition, the *ijtihad* of various judges will certainly provide their own insights in efforts to modernize and transform law in Indonesia. This research is a continuation of research that has existed before, such as a study conducted by Susylawati (Susylawati, 2014), Zuhroh (Zuhroh, 2017), Husien and Khisni (Husien & Khisni, 2017), who has conducted studies related to Islamic inheritance by looking at various decisions in the Religious Courts.

B. METHOD

The author uses qualitative research methods, research that is used to examine the condition of natural objects, where the researcher is the key instrument (Faisal et al., 2021; Sugiyono, 2014) and the type of research is library research (Maksum et al., 2021) with the "Triangle Concept of Legal Pluralism" approach modified by Werner Menski (Pasaribu & Sirait, 2018; Triana, 2015), This method is most relevant for dealing with various legal issues in the current era of globalization, except for the use of the three laws in a proportional and simultaneous approach; normative, empirical, and philosophical. Conclusions in this study use inductive thinking, data analysis methods by starting from specific data, then general conclusions are drawn (Hadi, 2012).

C. RESULT AND DISCUSSION

I. Judge's Law Discovery Method in Settlement of Islamic Inheritance Cases

Ijtihad is a key word in understanding legal findings. In the history of Islamic justice there are many examples of cases related to legal discovery, one of which was carried out by Caliph Umar ibn al Khattab. His courage is based on the consideration that the Qur'an speaks more to legal values that are oriented towards benefit (Fathony, 2019; Usman, 2015). The text is a medium to express the value of the benefit. As al-Qur'anic legislation exists within a certain period of time, its application needs to be harmonized at different times (Rahman, 1995).

Regarding Islamic inheritance cases, the task of the judge in this case is more correct to say that the judge resolves Islamic inheritance cases by conducting legal discovery (*rechtsvinding*) and applying the law (*rechtstoepassing*). The judges' decisions in this study are:

The categories of inheritance decisions on different religions include: Decision of the Palembang Religious Court Number 1854/Pdt.G/2013/PA Plg. Decision of the Religious High Court Number 05/Pdt.G/2015/PTA. and Supreme Court Decision Number 721 K/Ag/2015. Yogyakarta Religious Court Decision Number 0042/Pdt.G/2014/PA.Yk. Yogyakarta Religious High Court Decision Number 16/Pdt.G/2015/PTA.Yk. and Supreme Court Decision Number 218 K/Ag/2016. Banten Religious High Court Decision Number 0078/Pdt.G/2017/PTA.Btn. and Decision of the Supreme Court Number 331/K/AG/2018. From the decisions above, it can be analyzed that the decisions of the religious court and the High Religious Court regarding Islamic inheritance law do not provide mutual inheritance rights between people of different religions (between Muslims and non-

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Muslims). While the Supreme Court's decision, the judge continued to give part of the heir's inheritance to the defendants who proved that the defendants had different religions from the heirs, the judge stated that the widows and children had no right to become heirs of the heirs, but were entitled to a share through a mandatory will.

Category of decisions regarding substitute inheritance: The judges are often different, creating disparities in decisions which then do not result legal certainty for justice seekers. In Decision Number 236/Pdt.G/2011/PA.Mtp, Decision Number: 04/Pdt.G/2012/PTA.Bjm, and Decision Number 676 K/Ag/2012. In deciding the case of substitute heirs, judges differ. In their analysis, some judges considered that even though Article 185 paragraph I of the Compilation of Islamic Law (KHI) had not been revoked or revised by the government, based on the results of the National Work Meeting (Rakernas) the Supreme Court in Balikpapan decided that there was no substitute heir for side relatives but heir's replacement only for grandson. As for the analysis of Decision Number 676K/Ag/2012, in this case, the panel of supreme justices in deciding the case contradicted the decision of the panel of judges at the appellate level. Whereas the Banjarmasin Religious High Court has ruled out the Compilation of Islamic Law in giving a decision on the aquo case, namely not recognizing the change of heirs, so that the grandson does not receive inheritance from his grandfather as a substitute for occupying the father or mother who has died earlier than the heir. These considerations, according to the panel of cassation judges, are contrary to the basics of justice constructed by Islamic law. Then, the replacement of heirs based on the Compilation of Islamic Law is not a deviation from Islamic law or Indonesian positive law, because it has been practiced since the Compilation of Islamic Law was in force until now, and there are no

crucial problems for the Indonesian Islamic community, even the Indonesian Islamic community can accept the existence of change of heirs as heirs.

The categories of inheritance decisions for stepchildren and adopted children include: Supreme Court Decision Number 489 K/AG/2011 This is an improvement from the Malang Religious Court decision Number 297/Pdt.G/2010/PA.Mlg which was later upheld by the High Religious Court decision Surabaya with Number 104/Pdt.G/2011/PTA.Sby. Thus, there is a difference between *Judex Facti* decisions made by the Religious Courts and the High Religious Courts with the *Judex Juris* decisions made by the Supreme Court. *Judex Juris* gave the remaining portion of the inheritance to stepchildren and adopted children, after scrutinizing it not through a mandatory will, but placing these stepchildren and adopted children as *ashabah* group. It can be seen that the total portion received by the step-children and adopted children is more than 1/3 of the inheritance, namely 7/8 of the inheritance (the remainder of the share of Mrs. D as the wife who gets 1/8 of the inheritance). According to the *Judex Juris* decision, the position of this stepdaughter and adopted child is placed in the same position as that of a biological child who can apply the *Hijab Nuqshan*, thereby reducing Mrs. D's share as wife from 1/4 share to only 1/8 share. It's just that, on the other hand, the stepchildren (2 boys and 2 girls) and adopted children (1 girl) all get the same share, regardless of gender.

Referring to the description of the decision above, it can be stated that the Supreme Court Decisions have illustrated the existence of progressive *ijtihad* which does not only adhere to normative legal reasoning, and does not only seek formal truth but also seeks material truth. In addition, it also integrates contextual and textual interpretations,

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so that the decision can reflect justice and problems, although sometimes there is a struggle between the principles of legal certainty and legal justice in society. This also shows that judges in trying a civil case cannot be separated from normative issues and legal philosophy, because the task of adjudicating is always related to justice, benefit, legal certainty and legal benefits. Different from decisions of The Supreme Court, The Religious High Court still tends to use normative or textual law in its decisions. The contents of the decision have not dared to depart from the contents of the text contained in the law, so that the judges of the Religious Courts and the judges of the Religious High Court appear to be only mouthpieces for the law.

Furthermore, based on the analysis of some of the judge's decisions mentioned above, it can be understood that the decisions of the Supreme Court justices regarding Islamic inheritance have reflected the purpose of law, namely to realize benefit and justice. The principle of benefit and justice can be traced from the recognition of equal rights and obligations of the litigants. These judges' decisions fundamentally emphasize the value of justice, but that does not mean the judges ignore the principle of legal certainty and usefulness. Judges integrate textual and contextual interpretations, so that the legal products produced by judges prioritize justice without ignoring the certainty and benefits of law for the litigants. The aspect of legal certainty is reflected in the solution decided by the judge as a way out of legal problems for the parties, and binds the disputing parties to jointly comply with and implement the results of the judge's decision.

The philosophic aspect is very fundamental in the settlement of cases regarding Islamic inheritance which are resolved by the judiciary

because this is inseparable from the aspect of benefit and justice. The juridical aspect is reflected in the carefulness of judges in finding concrete events from abstract laws and regulations. Laws and regulations are used to measure and determine the truth about assets whether the assets are inherited assets, joint assets or testamentary assets.

2. Paradigm of Judge's Decision in Settlement of Islamic Inheritance Cases

Decisions of the Religious Courts and the High Religious Courts tend to use normative or textual law using a conservative legal paradigm and only serve as a mouthpiece for laws, in contrast to the decisions of the Supreme Court which have described the existence of *ijtihad* using a progressive or contextual legal paradigm. This is due to that the judges at the first level and appellate still adhere to *fiqh* and statutory law by adhering to the arguments of *qath'i*, (may not be changed and there is no doubt in it). As long as the law is contained in the text or text of the law, the judge does not dare to make decisions outside of the text of the law. In contrast to the Supreme Court judges who have used a progressive legal paradigm that takes into account the aspects of justice, benefit, certainty and expediency. *Maqashidas-Syariah* really animates the products of the Supreme Court's decision in cases of Islamic inheritance.

As for the cause of the disparity in the decisions above, the judges of the Religious Courts and the High Religious Courts still use a conservative thinking paradigm according to the author:

- a. Judges of first instance and appellate are still not confident in making progressive decisions, for fear that their decisions will be annulled at cassation level.
- b. There is still a lack of judges at the Religious Courts and High Religious Courts who continue their education to the

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highest level, thus affecting the paradigm of judges' thinking which tends to be conservative.

- c. There is no courage for the judges of the Religious Courts and the High Religious Courts to make decisions that are outside the text of the law.

The reasons for the causes mentioned above certainly move from the level of understanding of judges towards legal reform. Law must continue to develop and be able to respond to the challenges of the times. Deeper legal understandings regarding the existence of human rights, a democratic state, and Pancasila must become basic legal knowledge that is comprehensively understood by judges so that they are able to produce legal products in the form of decisions that are always based on justice, advantage, benefit and law certainty in society.

The Supreme Court judges' decisions at the cassation level use a progressive thinking paradigm, this is because starting from the recruitment of Supreme Court judges, and they have gone through the *Fit and Proper test* stage which screens prospective Supreme Court judges based on educational criteria and experience in the field of law. This certainly affects the thinking of judges who prioritize philosophical and progressive reviews in making decisions. In addition, the justices of the Supreme Court also have a very good understanding of law, not only Islamic law but also positive law, western law, and customary law that applies in society. Supreme Court judges in making decisions are certainly more daring to find the roots of problems that occur in society in order to make legal breakthroughs that are expected to be able to provide justice, benefit, benefit and legal certainty.

3. Implications for Family Law Reform in Indonesia

Legal reform is not enough to just replace old legal products with new legal products. However, the most important thing is to change the paradigm of judges' thinking from traditional ways of thinking towards modern thinking by applying relevant and integrated legal discovery methods, the goal is none other than to create justice and benefit in creating legal products.

Regarding family law reform in Indonesia, this research reinforces the opinion that Supreme Court decisions that prioritize contextual interpretations with a progressive legal paradigm are more just than textual interpretations that tend to be normative. Even though legislation is the main technique for carrying out legal reform, renewal of principles and principles, discovery or renewal of norms can also be carried out using other legal sources, decisions of judicial bodies (*jurisprudence*) (Kusumaajmadja, 1976).

In principle, legal reform is carried out as a response to scientific advances, perspectives and technological advances, thus demanding changes to the laws that govern them. Changes in the social conditions of the Indonesian people from patrilineal and matrilineal traditions to bilateral ones, have caused changes in what is considered as justice and benefit to be achieved.

The discovery of law by the Supreme Court judges related to Islamic inheritance cases has played a very large role in the development and renewal of family law in Indonesia. In practice, the decisions mentioned above can be used as permanent jurisprudence by judges in all jurisdictions of the judiciary. The legal values contained in jurisprudence can be used as legal principles in upholding justice and legal certainty. Since basically jurisprudence is not only limited to efforts to improve the

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quality of the judge's decisions under it, but also acts as an instrument to renew the law through repairing, modernizing, replacing old laws with new ones, both in terms of legal substance, as well as the construction of the judge's thinking in applying the law regarding the matter of Islamic inheritance which is different from its normative rules.

Jurisprudence as a source of law has a very important meaning and position (Ali, 2022; Simanjuntak, 2019), inasmuch as it can be used as a reference in terms of: Forming laws, Making decisions on the same problem by other judges on matters that have not been regulated or the law has not yet been found, Developing knowledge of law through judicial decisions (Lotulung, 1998).

a. Theoretical Implications

The judge's decision regarding the case of Islamic inheritance stated that there is a need for legal reformulation in order to achieve the values of justice in the law, not only based on normative approaches. Laws and regulations do not stand alone. It is not fully autonomous without considering aspects outside the law. If the approach to legal life only uses statutory benchmarks, the results obtained will not be satisfactory. As in creating justice that is substantial in nature the legal approach is not juridical in nature but there are sociological and philosophical aspects that must be explored in creating this justice.

b. Practical Implications

The judge's decisions departing from the Religious Courts include the need for further regulation regarding Islamic inheritance cases, especially for the distribution of inheritance for Muslim and non-Muslim heirs, regarding substitute inheritance and also regarding inheritance for

stepchildren and adopted children. The amount of distribution of inheritance and obligatory wills is determined by prioritizing a sense of justice and the criteria for heirs who are entitled to receive a share of the inheritance from the heir by looking more closely at harmonious relations, devotion and caring efforts during the life of the heir.

D. CONCLUSION

Decisions of the Religious Courts and Religious High Courts tend to use normative or textual law using a conservative legal paradigm; judges are only mouthpieces for laws, in contrast to Supreme Court decisions which have described the existence of *ijtihad* using a progressive or contextual legal paradigm. The Supreme Court's decision which has described the existence of progressive or contextual legal *ijtihad* does not only adhere to normative or textual legal reasoning but also adheres to progressive or contextual legal reasoning using the legal discovery method in the form of legal interpretation with a philosophical, empirical and juridical approach. The implication of the judge's decision on Islamic inheritance cases for family law reform in Indonesia is that the Supreme Court's decision can be used as jurisprudence and as a reference for realizing the unification of Islamic inheritance law in Indonesia today. The legal value contained in jurisprudence can be used as a rule of law in upholding justice and legal certainty. The Supreme Court judge's decision has two important dimensions: The decision is a solution for solving Islamic inheritance cases for the parties to the dispute as well as outside the parties; as a legal regulation for the future (*ius constituendum*).

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