

THE PARADIGM OF JUDGE'S THOUGHTS IN THE SETTLEMENT OF ISLAMIC INHERITANCE CASES AND THEIR IMPLICATIONS ON FAMILY LAW RENEWAL IN INDONESIA

(Study on Supreme Court Decision Number 72I K/Ag/2015,
Supreme Court Decision Number 218 K/Ag/2016, and
Supreme Court Decision Number 33I/K/AG/2018)

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ABSTRACT

Judges do not only act as mouthpieces of the law and carry out normative and procedural laws and regulations, but also promote a sense of justice in the community. Several Supreme Court decisions such as Supreme Court Decision Number 72I K/Ag/2015, Supreme Court Decision Number 218 K/Ag/2016, and Supreme Court Decision Number 33I/K/AG/2018, have illustrated the existence of progressive *ijtihad* that does not only adhere to positivistic legal reasoning but also to progressive legal reasoning by using the legal discovery method in the form of legal interpretation with a philosophical, empirical and juridical approach. In practice, the decisions mentioned above can be used as permanent jurisprudence by judges in all judicial bodies. The legal values contained in jurisprudence can be used as legal rules in upholding justice and legal certainty. The judge's decision has two important dimensions. First, the decision is a solution for solving Islamic inheritance cases for the disputing parties and outside the parties. Second, as a legal regulation for the future (*ius constituendum*).

Keywords: *Judge's Decision, Ijtihad, Progressive, Jurisprudence.*

A. INTRODUCTION

Court decisions are the thought process of judges, both single judges and panel judges (Hutajulu, 2015). In the judge's decision, the judge makes legal discoveries in the case he is examining. The process of finding this law in the study of *ushul fiqh* is called *ijtihad* (Anwar, 2018; Hidayatullah, 2020). In the process of finding the law, the judge uses the method of thinking by interpreting the normative provisions that lead to the judge's decision by aligning

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the law with the demands of the times or the situation and conditions of the community (Alhamdani, 2021; Mulyadi, tt.; Y. H. Nugroho et al., 2018).

Judge's *ijtihad* is needed to bridge the theory of formal justice with substantive justice. In an effort to make efforts to achieve the value of justice, judges are free to make interpretations, find laws, even according to progressive schools, judges are allowed to create laws if reality requires it (Alhamdani, 2021; Witanto & Kutawaringin, 2013). Or at least provide a reinterpretation between formal truth and material truth so that it becomes a responsive and progressive truth. Thus the discovery of law by judges or judges' *ijtihad* is very important in contributing to the founding, development and renewal of national law.

The development of law in Indonesia cannot be separated from the influence of social changes and existing social institutions, either directly or indirectly. These changes must be directed by law so that they can realize the needs and benefits of mankind without ignoring the sense of justice (Soekanto, 1994). Law is important for human life in society because the main elements in society want it. The main elements in question are that every individual human being has a desire to live together; Living and living together in society is a comprehensive unit; and Life and social life is a system and each sub-system influences each other (Pasamai, 2011; Salam, 2015).

Eugen Ehrlich with the theory of Sociological Jurisprudence, sparked and proposed that in the life of the nation and state there should be a balance between the desire to carry out legal reforms through legislation with awareness to pay attention to the reality that lives in society (Aprita, 2021; Cahyani, 2021; Huijbers, 1982). The reality that lives in society is often referred to as "*living law and just law*" which is an "*inner order*" that is reflected in people's lives (Hernowo et al., 2021; Zayyadi, 2020). The essence of Eugen Ehrlich's thinking is that "A good law is a law that is in accordance with the laws that live in society" (M. R. Hakim, 2016; Lutfiana, 2021; Maylissabet, 2019; Rahardjo, 2010; Sibuea & Haryono, 2015).

The law is not only interpreted as the building of written regulations, but also the building of ideas, culture, and ideals (A. Dewi, 2019; Ilyas, 2018; Zulfadli et al., 2017). Satjipto Raharjo (2010) states that legal thought needs to return to its basic philosophy, law for humans (Asnawi, 2016; Prayitno, 2018; Supriyono, 2017). With this philosophy, humans become the determinant and point of legal orientation. The law is in charge of serving humans, not vice versa. Therefore, the law is not an institution that is separated from human interests.

The quality of law is determined by its ability to serve human welfare (Prayitno, 2018). Related to this thought, it is appropriate for judges to function as inventors of law, especially in concrete cases (Rahardjo, 2010).

The paradigm of judges is just a trumpet of the law, it seems that it has begun to be eliminated in judicial practice in Indonesia (Ali, 2009). Judges have a role, Abdul Manan (2006) explained, that the role of judges in making new laws, or judge-made laws, when they do not find the legal rules in the legislation or the rules are found but are regulated in general terms, should be focused on the goals and philosophical interpretations; upholding truth and justice (Alhamdani, 2021; Manan, 2006), not enforcing laws and regulations in a narrow sense and only acting as the mouth of the law and as an inanimate creature (*bouche de la loi*) (Alhamdani, 2021; A. Hakim, 2017; Irianto & Sidharta, 2009). Such is the central and dominant position and role of the value of justice for the law, that Gustav Radbruch stated "*rechct ist wille zur gerechtigkeit*" (law is the will for justice) (Halim & Salim, 2019; Sisworo, tt.).

Progressive judges' Ijtihad has been reflected in Supreme Court Decision Number 721 K/Ag/2015, Supreme Court Decision Number 218 K/Ag/2016, and Supreme Court Decision Number 331/K/AG/2018. In these decisions it was decided that heirs of different religions also get their share through the provision of a mandatory will.

Related to the description above, in the area of settlement of Islamic inheritance, judges decide cases not only based on the normative law contained in the Act, but also considering the sense of justice and benefit. The existence of justice requires the role of judges in its implementation (Cendana, 2017; S. S. Nugroho, 2019). The concretization of justice is only possible if the judge understands the social realities that occur in society.

The judge in deciding a case must first consider what is in the evidence submitted by the litigant (Ahyani, 2016; Dewi & Monita, 2020; Latiki, 2016), so the judge must listen to all the statements of the parties (Almitra, 2020; Butarbutar, 2011; Prasetya, 2020; Septiawan, 2018). In dealing with Islamic inheritance cases, judges are very important in making decisions that don't just listen to one party.

In deciding cases, judges have their own considerations in giving decisions, both at the first level, appeals and cassation (Artana et al., 2019; Dwiatmodjo, 2012; Setyanegara, 2013). This is strongly influenced by subjective factors and objective factors of judges. This is as

expressed by M. Trapman who stated that "judges have objective considerations in an objective position" (Fauzi, 2018).

Many Islamic inheritance problems are resolved only at the first level decision, in the Religious Courts, but not a few have reached the level of cassation to the Supreme Court in seeking the most just decision. In giving decisions there are different thoughts and considerations of judges. In this case, there are judges' decisions regarding the settlement of Islamic inheritance which still adhere to the principles adopted in law or procedural justice, and some are based on considerations of benefit (substantive justice).

B. METHOD

The author uses qualitative research methods (Faisal et al., 2021), type of research is library research (Maksum et al., 2021), progressive legal theory with the approach of "*Triangular Concept of Legal Pluralism*" modified by Werner Menski (Pasaribu & Sirait, 2018; Triana, 2015). This method is the most relevant for dealing with various legal issues in today's era of globalization, except for the proportional and simultaneous use of the three legal approaches; normative, empirical, and philosophical.

C. DISCUSSION

I. Paradigm of Judge's Thought in the Settlement of Islamic Inheritance Cases

Departing from the legal approach "*Triangular Concept of Legal Pluralism*", the concept of the triangle of legal pluralism modified by Werner Menski, that there is no more relevant method to deal with various legal issues in the current era of globalization except by using proportionally and simultaneously the three legal approaches: Normative, Empirical, Philosophical (Ali, 2009; Mudzhar, 1998). The ideal type of law is the type of law that optimally establishes harmonious interactions between three main components: *Ethical values*, *Social norms*, and *Posted state-made legal rules or state-made law* (Mudzhar, 1998).

Whether the decision is granted or rejected is entirely up to the ability and belief of the judge when deciding the case, but the decision made by the judge must reflect aspects of justice and benefit (philosophical dimension), legal certainty (juridical and normative dimensions), and aspects of benefit (sociological or empirical dimensions).

The approach mentioned above finds its relevance with the progressive legal paradigm and the theory of *Maqashid al-Shari'ah* which is the knife of analysis in this study. The

progressive legal paradigm and *Maqashid al-Shari'ah* are perspectives that prioritize the legal objectives to create a just and prosperous society. The paradigm of progressive legal thought is a legal concept that is full of morals. As an implication, progressive law is sensitive to changes that occur in society and the laws that apply in society. The law was formed for the benefit of humanity as a whole by prioritizing justice for the entire community. The principle of legal certainty remains a reference but does not have to conflict with the principle of justice. When the two are in conflict, the legal objectives are prioritized. Thus the judge's decision presents substantive justice. The positivistic paradigm based on textual-normative legality alone has begun to shift to a more progressive legal direction.

The progressive judges' *ijtihad* can be seen in Supreme Court Decision Number 721 K/Ag/2015, Supreme Court Decision Number 218 K/Ag/2016, and Supreme Court Decision Number 331/K/AG/2018. The decisions of the Supreme Court are progressive decisions regarding the granting of mandatory wills to heirs of different religions which have been used as guidelines for judges in religious courts to issue mandatory wills. With this mandatory will, it is hoped that it will bring back peace in the family. Don't let a family split up just because of property issues. In addition, the mandatory will is also able to provide a reflection that Islam is a religion that is subtle and not rigid. Islam as *rahmatan lil'alam* is able to provide justice to anyone regardless of religion, ethnicity, degree and class (Hanum & Syahr, 2016).

The shift in judges' thinking in resolving Islamic inheritance cases shows the dynamics of thinking that is progressive and responsive to the development of society in seeking justice. The progressive paradigm initiated by Satjipto Raharjo (2010) is an idea that can change the judges' thinking so that they are not shackled in legal positivism which so far has not provided a sense of justice and morals for the disputing parties. This moral content makes progressive law capable of being sensitive and responding to changes that occur in society and changes that occur with law.

When dealing with those that are contrary to morals, the judge must appear with his courage to free people from negative situations that are contrary to morals. This is because the progressive legal paradigm is full of morals, ethics, legal ideals and the purpose of the law itself (Mukhidin, 2014; Zulfadli et al., 2017).

The method applied by the judge to several decisions in the previous explanation in resolving Islamic inheritance cases using progressive legal thinking is the method of finding

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systematic interpretation of law using a philosophical, juridical, and sociological approach, in order to realize social justice and substantive justice. From the aspect of the philosophical approach, it can be argued that the progressive legal paradigm will increasingly find its relevance to the study of *Maqashid al-Shari'ah* in Islamic legal philosophy.

Progressive law that puts forward substantive justice stands on three main ideas, namely:

- a. Free oneself from legalistic-dogmatic, analytical-positivistic ways of thinking and legal theory and prioritizes goals over how to achieve goals (procedural);
- b. Prioritizing morality and social justice rather than the formulation of rigid and static laws and regulations;
- c. It is largely determined by the quality and integrity as well as the ability of law enforcers, especially judges (Nurnazli, 2019).

Judges do not only act as mouthpieces of the law and not only carry out normative and procedural laws and regulations, but also promote a sense of justice in the community (M. R. Hakim, 2016; Hoesein, 2013). Since 2009 the positivistic paradigm which is based solely on textual-normative legality has begun to shift towards a more progressive law.

2. Implications of the Judge's Decision on Islamic Inheritance Cases on Renewing Family Law 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 a traditional way of thinking to a modern one by applying relevant and integrated legal discovery methods.

Regarding the renewal of family law in Indonesia, this study strengthens the opinion conveyed by Edi Riadi, that decisions that prioritize contextual interpretation with a progressive paradigm are more equitable than textual interpretations that tend to be positivistic. Although legislation is the main technique for carrying out legal reform, renewal of rules and principles, discovery or renewal of rules can also be carried out using other legal sources - decisions of judicial bodies (*jurisprudence*) (Kusumaajmadja, 1976).

Legal reforms are principally carried out as a response to advances in science, perspectives and technological advances, thus it demands changes to the laws governing them. Changes in the social conditions of the Indonesian people from patrilineal and matrilineal traditions to bilateral ones cause changes to what is considered justice and the benefit to be achieved.

The discovery of law by judges related to Islamic inheritance cases has 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 judicial bodies. The legal values contained in jurisprudence can be used as legal rules in upholding justice and legal certainty. Because basically jurisprudence is not only limited to efforts to improve the quality of judges' decisions under it, but also acts as an instrument to renew the law through improving, modernizing, replacing old laws with new ones, both in terms of legal substance, as well as the construction of judges' thinking in applying the law about Islamic inheritance cases that are different from the normative rules.

Jurisprudence as a source of law has a very important meaning and position, because it can be used as a reference in terms of: *First*: the formation of laws; *Second*: Making decisions on the same matter by other judges on matters that have not been regulated or the law has not been found; and *Third*: Developing legal knowledge through judicial decisions (Kartini, 2015; Lotulung, 1998; Simanjuntak, 2019). For this reason, the judge's decision must at least contain philosophical, sociological and juridical values.

The implications of the judge's decision on Islamic inheritance cases in the explanation above have two important dimensions, namely:

a. Theoretical Implications

The judge's decision on the case of Islamic inheritance is the need for reformulation of the formulation of Article 171 letter c KHI "*Heirs are people who at the time of death have blood relations or marital relations with Islamic heirs and are not hindered by law from becoming heirs*" (Wulandari, 2017; Zuhroh, 2017).

In order to achieve the values of justice in the law, it is not only carried out based on normative approaches alone. Laws and regulations do not stand alone. It is not fully autonomous without considering aspects outside the law. If the approach to legal life is only by using legal benchmarks, the results obtained are not satisfactory. As in creating justice that is substantial the legal approach is not juridical but there are sociological and philosophical aspects that must be explored in creating justice.

b. Practical Implications

The decisions of judges at the Judiciary include the need for further regulation of inheritance cases, especially for the distribution of inheritance for Muslim and non-Muslim

heirs. The amount of distribution of inheritance and obligatory wills is determined by prioritizing a sense of justice and the criteria for the heirs who are entitled to get a share of the inheritance from the heirs by looking at harmonious relations, devotion and management efforts as long as the heir lives regardless of the religion he embraces.

Based on the explanation above, the judges' decisions have two important dimensions: *first*: the decision is a solution for solving Islamic inheritance cases for the disputing parties and outside the parties, and *second*: as a legal regulation for the future (*ius constituendum*). With the judge's decision, the law will move dynamically and harmoniously in accordance with the current situation and conditions in dynamic people's lives which need to be stated in laws and regulations.

D. CONCLUSION

The conclusions of this study are as follows: 1). Supreme Court Decision Number 721 K/Ag/2015, Supreme Court Decision Number 218 K/Ag/2016, and Supreme Court Decision Number 331/K/AG/2018, have illustrated the existence of progressive *ijtihad* which does not only adhere to positivistic legal reasoning but also to progressive legal reasoning, using the legal discovery method in the form of legal interpretation with a philosophical, empirical and juridical approach; 2). In practice, the decisions mentioned above can be used as permanent jurisprudence by judges in all judicial bodies. The legal values contained in jurisprudence can be used as legal rules in upholding justice and legal certainty. The judge's decision has two important dimensions, *first*: The decision is a solution for solving Islamic inheritance cases for the disputing parties and the parties before, and *second*: as a legal regulation for the future (*ius constituendum*). With the judge's decision, the law will move dynamically and harmoniously in accordance with the current situation and conditions in dynamic people's lives which need to be stated in laws and regulations.

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