IJTIHAD AS A METHOD OF LEGAL DISCOVERY IN THE ISLAMIC LEGAL SYSTEM

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Abstract

Although the existence of the Qur'an and Al-Hadith is an authentic source and the basis of law in Islam, this does not close the role of Muslim intellectuals in exploring and establishing the laws needed to solve all problems in the lives of Muslims. Especially on new issues along with the development of science and technology. This research uses the method of literature law by analyzing the legal status of Ijtihad based on literature sources in Islamic legal science. The result obtained in this study is that one of the legal products that can be a source of law in Islam is through the mechanism of Ijtihad as a solution to legal problems in society. Ijtihad is an Islamic appreciation and recognition of the existence of the human mind in solving all problems, one of which is related to Islamic law.

Keywords: *Ijtihad, the discovery of the law, Islam.*

Introduction

Humans need law. The existence of law to regulate and improve human life. Law, with various schools of thought, aims to lead humanity towards a life of *maslahah* and justice. In Islamic Jurisprudence, this kind of legal objective is known as *maqashidus shari'ah*, the ultimate goal of implementing Islamic law. Islamic Sharia regulates all aspects of human life in the world, both about the Creator, Allah,

which is called muamalah with *Allah* and concerning each other, which is called *muamalah ma'annas.*[1]

Islamic law is a set of religious rules, the totality of God's commands, that govern the behaviour of Muslim life in all its aspects.[2] This understanding shows that Islamic law is the foundation set by Allah for all the activities of Muslims. According to experts Ushul fiqh, Islamic law is an instruction-discourse (*kitabullah*) God to His servants. As kitab, humans are "only" in charge of recognizing and finding it through the signs given by God. In other words, shari'a is man-discovered law and not man-made law. This is evident in Coulson's expression: God plans, but humans formulate it. Thus, the law is not always a ready-to-use item but must be sought and found. Therefore, legal discovery is inherent in every legal system, including Islamic law.[3]

On the other hand, the need to find laws is closely related to changes and developments in human civilization. Often, there are many events that are not responded to in the text, such as God's dialogue with humans. This is in accordance with the expression of Islamic jurists *Al-Nusus Mutanahiyah wa Al-Waqa'i Ghayr Mutanahiyah.* Thus, ijtihad, which is the principle of movement (the principle of movement) in the structure of Islam, must be carried out to find the legal construction of the emerging reality. This then encouraged Islamic jurists to seek and formulate legal discovery methods. The various methods formulated by these experts are then used as a guide and reference for finding legal formulations related to cases that occur in society.[4]

Fiqh is laws practice, namely the laws relating to the actions of the mukallaf. These actions are not always in one pattern, a certain model and a certain size. The alternation of day and night, changes in situations and conditions, and differences in

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[1] Munawir Haris, "Metodologi Penemuan Hukum Islam, Ulumuna; Jurnal Studi Keislaman", Vol. 16 No. 1 Juni 2012, 2.

[2] Josept Schacht, *An Introduction to Islamic Law,* London: Oxford University Press, 1983, p. 38-39.

[3] Munawir Haris, 2.

[4] Muhammad Iqbal, *The Reconstruction of religions thought in Islam*, Stanford: Stanford University Press, 79.

environment all encourage development and variety of actions; that's for sure: fiqh must also develop and dynamically follow that development and diversity.[5]

In the history of Islamic law, the development of fiqh also experienced such ups and downs. In his book entitled "Introduction to the Study of Shari'ah, " Abdul Karim Zaidan writes that the period fiqh is classified into six periods, from Rasulullah Salallahu 'Alaihi Wassalam until now. Most of the authors of the books fiqh say period fiqh with period Islamic *tasyri'*. This difference in terms also still raises debate among writers and scholars of Islamic law. The use of the word tasyri', which means the determination of Sharia, is the sole prerogative of Allah SWT. Their argument regarding the naming of these periods with Islamic *tasyri'* is that law fiqh or fiqh itself originates from the texts of the Shari'a and the sources it requires and that the legal Steinbach from these sources is based on the permission of the Shari'ah or is implied by the texts.

Throughout its history, Islamic law has been a dynamic and creative force. This is evident from the emergence of a number of schools of law which have their style according to the sociocultural and political background in which these schools of law grow and develop.[6] This dynamic and creative development is at least driven by three main factors: First, religious encouragement. Islam is a source of norms and normative values that govern all aspects of the lives of Muslims, so the need to ground norms and values or even integrate them into the lives of Muslims always comes to the surface. Likewise, Islamic law itself where is a basic need of Muslim society. Second, with the expansion of the political domain of Islam during the caliph Umar, social shifts occurred, which in turn created many new problems related to Islamic law. Third, the independence of Islamic jurists from political power. This independence causes them to be able to develop legal thinking, without

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[5] Abdul Karim Zaidan. *Pengantar Studi Syari'ah; Mengenal Syari'ah Islam Lebih Dalam*, (Jakarta: Robbani Press, 2008), 135.
[6] A. Khudori Sholeh (ed), *Pemikiran Islam Kontemporer*, (Yogyakarta: Jendela, 2003), 5.

encountering obstacles, pressure and obstacles. Study fiqh developed in accordance with their respective understandings.[7]

In the first period in the history of the development of Islamic law, which is the time of the Prophet Muhammad SAW and is considered the most important period because the establishment of shari'ah Divine happened at this time, the existing fiqh is fiqh revelation. Shari'a laws came down to Muhammad with their pronunciation and meaning (Al-Qur'an) or by their meaning only (As-Sunnah), which is then conveyed to humans.

At the time when the Prophet lived in Makkah for thirteen years, the revelation emphasized the aspects of aqeedah and morality, and did not convey practical laws except for a few and were usually general. This revelation is essential because aqidah is the primary basis of laws *tafshili* (detailed) in the shari'a. The limitations of practical laws at this time were because the Muslims did not yet need them. When the state was formed first, namely Medina, led directly by Rasulullah SAW, the community's need arose for this practical law to become the foundation for upholding the affairs of Islamic society and a reference for this new country. And at this time, the stipulation of Shari'at refers to practical aspects related to individual life and society.

The character of establishing Shari'ah at this time is: First, gradually. Gradual (*tadarruj*) in this stipulation has several forms, namely in terms of time, the types of law prescribed, and the explanation of the statutes globally, which are then given details. Second, eliminating difficulties. Third, copy. At this time, the prophet also performed ijtihad. However, his ijtihad did not become a source of shari'a determination and was independent of revelation. The prophet's ijtihad still refers to revelation.

As time passed, and the death of the Prophet's companions, then authority tasyri' fell into the hands of generations or Thenor' or 'inand so on. After the time of

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[7] Munawir Haris, 5.

the Companions, in order to solve the legal problems faced by Muslims, the scholars still adhere to the Qur'an, the Sunnah and consensus friends. However, because the legal issues faced by Muslims are always developing and are new legal issues, the laws of which are not found in the Qur'an, al-Sunnah and consensus', then the scholars use several methods istinbath law including *maslahah-mursalah* or *istislah* (Imam Malik), *Istihsan* (Imam Hanafi), comparison (Imam Shafi'i), *istishab* (Imam Ahmad bin Hambal) and others in digging the law.

Muslims need the existence of ijtihad after the death of the prophet, where the demands of the times and changes in human behaviour are due to the development of life and technology. Ijtihad became the basis of Muslim law regarding the legal status of a new issue that had never been found when the Prophet Muhammad and the Companions were still alive. In the current context, Muslims still need the results of the ijtihad of the ulama' as a source of reference in Islamic law, but because the scholarly capacity is not commensurate with the scholar of *madzhab*, the scholars who currently exist do not have the courage to perform ijtihad, even though the human need for Islamic law continues to grow.

Methods

This research uses a literature study method by tracing classical and contemporary jurisprudence reference sources to determine the position of ijtihad in Islamic legal discourse. Thus, the approaches used are conceptual and historical. A conceptual approach is used to discover the concept of ijtihad as one of the methods in discovering Islamic law. The legal history approach is used to find out the position of ijtihad in Islamic law when humans, especially Muslims, need new legal norms in solving legal problems that at that time did not find authentic sources and/or propositions, either in the Qur'an or al-Hadith.

Discussion

Dynamics of the Development of Ijtihad in the Islamic World

With the crystallization of these schools, the right to perform ijtihad began to be limited and, in turn, was declared closed by the ulama', who were fanatical about their previous teachers. As a result, something like this happened to the consensus that no one may claim to have the qualifications to exercise absolute ijtihad. So, theoretically, ijtihad is not declared closed, but the qualifications are formatted in such a complicated way.[8]

In scientific terms, Usul Fiqh's method of finding the law is called the term "Steinbach". Istinbath means removing the law from the proposition, the way istinbath This provides rules relating to the issuance of law from the proposition.[9] Imam Al-Ghazali in his book Al-Mustashfa, included in chapter III with the title "Thurukul Istitsmar". If you look at the purpose of learning Usul Fiqh for password the most important thing in studying this science is to know and practice the principles of how to get the law out of its proposition.

Thus, the law discovery method constitutes *thuruq al-istinbath* namely the methods adopted by a mujtahid in issuing laws from his proposition, either by using the rules of language (linguistics) or by using rules *Ushuliyah* others.[10] Ushul Fiqh experts stipulate that to issue a law from its argument, one must first know the rules *syar'iyyah* and rules *lughawiyah*.

Istinbat and ijtihad are part of the discussion of knowledge useful fiqh; then it is necessary to discuss both as methods of taking Islamic law. Istinbath means removing the law from its postulates. Istinbath This uses specific rules related to the issuance of law from the existing arguments. Cleric ushul fiqh stipulates that the provisions for extracting law from its arguments must first know the rules *syar'iyah*

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[8] Taufiq Adnan Amal, *Islam dan Tantangan Modernitas; Studi Atas Pemikiran Hukum Fazlur Rahman.* (Bandung: Mizan, 1989), 33-35.

[9] Asjmuni A. Rahman, *Metode Penetapan Hukum Islam*, (Jakarta: PT. Bulan Bintang, 2004), 1.

[10] A. Djazuli, *Ilmu Fiqh Penggalian; Perkembangan dan Penerapan Hukum Islam,* (Jakarta: Kencana Prenada Media, 2005), 17.

and *lughawiyah*. The Syariah rule means the general provisions adopted by *syara'* in determining the law and the purpose of determining the law for legal subjects (mukallaf) and it is also necessary to know about the determination of the arguments used in determining the law, the sequence of arguments, the purpose of determining the law and so on. Understand the scope of law advice' starting from the understanding and distribution, *wadh'i* law, judges, I would be damned, *Mahkum Alaih*, and others. While rules *lughawiyah* means derived from expert provisions *lughat* (language) which is used as a backup by members proposal in understanding meaning lafadz according to the instructionslafadz and the arrangement, 'am and check, *musytarok*, absolute and *muqoyad*, *nasakh-mansukh* and *muhkam mutasyabihat*.

The ijtihad has almost the same meaning asistinbath. However, ijtihad is only done on matters not found in the evidence *short and clear, so* more in-depth efforts are needed to issue the law. As for the ijtihad methods themselves, some are agreed upon and the scholars do not agree upon some. The ijtihad methods agreed upon by the scholars areconsensus' and comparison, while the unanswered method is *mashlahah-mursalah, istihsan, urf, istishab* and *sad al-dzari'ah*.[11]

The Method of Discovery of Islamic Law through Ijtihad

The law discovery method is not only known in the constellation of Islamic law but is far more advanced in Western law. However, Western jurists prefer using the term legal formation rather than the term legal discovery. In Western law, a judge who acts as the legislator in terms of legislation does not mention any provisions to settle a case that occurs. Judges have the power to form law, but the position of judges is not the holder of legislative power. Therefore, the judge's decision does not have the force of law that applies like other general regulations. Thus, the judge's decision only applies to the parties concerned.[12]

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[11] Amir Syarifuddin,*Ushul Fiqih,* (Jakarta; Logos Wacana Ilmu, 1997), 40-41.
[12] C.S.T Kansil, *Pengantar Ilmu Hukum dan Tata Hukum Indonesia. (*Jakarta: Balai Pustaka, 1989), 65.

In the Islamic world, of the many patterns of Islamic thought which have a reformist character, of course, have implications for aspects of Islamic law, both methodologically and discursively. Therefore, the method of reforming Islamic law is not a method that is separate from the renewal of thought.

Istinbath Law is a way of taking law from its source. This term is more popularly known as the legal excavation methodology. According to an expert, methodology can be interpreted as a discussion of theoretical concepts of various methods related to a knowledge system. If Islamic law is seen as a system of knowledge, then what is meant by the methodology of Islamic law is the discussion of the basic concepts of Islamic law and how Islamic law is studied and formulated.[13]

Disciplines discussing istinbath law (legal excavation methodology), named *ushul fiqh*. *Usul fiqh* is the only field of Islamic knowledge necessary to understanding Islamic law from its source: al-Qur'an and al-Hadith. Through studies of *ushul fiqh*, we can understand the rules, the general principles of Islamic law, how to understand a proposition and its application in human life.

According to Hasbi Al-Shiddiqey, in the paradigm *Ushul fiqh* classical, at least five principles allow Islamic law to develop with the times. These principles are 1) the Principles of consensus'; 2) Principles of Qiyas; 3) Principles of Mashlahah Mursalah; 4) The principle of preservation Urf; and 5) The principle of changing the law with changing times. These five principles clearly show how flexible Islamic law is. With the passage of time and place, Islamic law's dynamic and creative development in its early days later transformed into schools of thought that were well-known among the Islamic community.

To understand the Islamic shari'a brought by the Prophet, scholars take care put forward two forms of approach, namely through the rules of language and through the approach maqashid al-syari'ah (the purpose of syar'a in setting the law). With that, the goal of Islamic law will be achieved, which is the benefit of the world

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[13] Ghufron A. Mas'adi, *Pemikiran Fazlur Rahman tentang Metodologi Pembaharuan Hukum Islam,* (Jakarta: Raja Grafindo Persada, 1998), 2.

and the hereafter. Therefore, the knowledge of *ushul fiqh* becomes important to know and understand to dig and apply the laws of *syara'* in accordance with the demands of the times.

Epistemological studies are an in-depth discussion of all processes of constructing actual knowledge. In other words, epistemology is a science that examines how to acquire knowledge. If this meaning is brought into the discussion of Islamic law, then what is meant by the epistemology of establishing and applying Islamic law is how to know the messages *syar'i* through the written word in the middle of the community's life that continues to grow.

Since the Islamic world came into contact with Greek philosophy in the Middle Ages, well-known Islamic philosophers such as al-Kindi, al-Farabi, Ibn Shina, al-Ghazali and Ibn Rushd emerged. Since then, the theory of knowledge, such as rational knowledge, sensory knowledge (empiricism), and knowledge obtained through inspiration, has developed in the Islamic world.

Broadly speaking, since the earliest period, after the death of Rasulullah, the scholars have formulated the sources of Islamic law (the Koran and Hadith). However, in subsequent developments a kind of difference occurred in formulating the two sources above, namely when dealing with elements of human autonomy. These differences occur because of the difference in giving the meaning of language. Second, in the acceptance of a Hadith. Third, solutions Nash contradicts each other. Fourth, there is a difference in the use of qiyas. Fifth, differences in using certain postulates, for example istihsan, istishab and istislah. Sixth, there are differences in the use and position of pronunciation.[14]

M. Arkoun mentioned that the mujtahid scholars in the second and third centuries of hijriyah had applied independent reasoning procedures to deduce (istinbath) law by departing from the texts (nushus). There are three procedures: 1.

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[14] Noor Ahmad, *Efistemologi Syara' Mencari Format Baru Fiqh Indonesia*, (Yogyakarta; Walisongo Press, 2000), 7.

Determining which is better (*istihsan*), 2. Determining which interests are good (*istislah*) and 3. analogical reasoning (*qiyas*).[15]

Thus, epistemologically, Islamic law is actually rich in methodology of reasoning and formation of law, which is excavated from the Koran and Sunnah. Although there is debate among scholars regarding interaction our-nash with human thought, all of them are firmly summarized in two key words of Muslim thought, namely ijtihad as a personal effort in formulating teachings, and imitation as a sincere submission to the teachings of a teacher. The keywords (ijtihad and taqlid) are two collective meanings that can coexist within a scholar. Hasbi Ash Shiddieqy, a reformer in the 20th-century Indonesian Islamic mind, especially in the field of Islamic law, has reflected on these two keywords to find a format of Islamic law that suits Indonesian society.

As previously explained, Islamic law is *Kitabullah*. The human position can only seek and find it. This then encourages the development of methods of discovery of Islamic law. In history, there are many methods of discovering laws. The methods can at least be classified into three models, namely the linguistic interpretation method, the causation method, and the alignment method.[16]

The first method, the linguistic interpretation method, is a legal discovery method that interprets the Koran and hadith texts. Thus, the linguistic method is used in relation to cases where there is already a legal text, but the legal text is still unclear (unclear), because it contains legal verses which *Mutashabih*. The pattern of study used in the linguistic interpretation method produces four taxonomies of legal statements from legal texts: First, in terms of clarity. Second, in terms of patterns of appointment to the intended law. Third, in terms of the breadth and narrowness of the scope of the legal statement. Fourth, in terms of formula form soffer in a statement.

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[15] Baso Hasyim, "Pemikiran Hukum Islam dalam Paradigma Keilmuan Moderen", Jurnal *Al-Risalah* Vol. 10 No. 1 Mei 2010, 56.
[16] Munawir Haris, p.7.

The second method, namely the causation method, is an important method of legal discovery because it seeks to construct laws for cases where there is no legal text. The causation method investigates the foundation on which Islamic law is enforced. In this case, this causation method is then categorized into two models, namely those that underlie the existence of the law on 'fragrance, and those which underlie the law on *maqashid al-shari'ah*. The causation method tries to dig the cause of the lawof parallel case law to apply to new similar cases. What the judge or legal expert is doing here *isbina' al-hukm 'ala al-'illah* (legal basis tothe cause of the law). If there are no parallel cases, then the legal basis forthe cause of the law can't be done. Therefore legal discovery can be made based on law the final case law, *maqashid al-shari'ah*. In other words, done *ta'lil al-ahkam bi maqasid al-shari'ah*.[17]

The third method, alignment, is a method that seeks to harmonize various possible legal arguments contradict each other. For this reason, the alignment method then developed a theory copy and throw him away, copy is the removal or replacement of a provision shari'ah by other provisions provided that the latter appears later and the two provisions are stipulated separately. As fort hrow him away is the method used when two appear nash, which is apparent and contradicts each other.

In a review of the epistemology of Islamic law, there are approximately seven methods used by mujtahid scholars to define and apply Islamic legal thought, namely: First, consensus', is the agreement or suitability of the opinions of experts regarding a problem at a certain place at a specific time. More specifically, consensus' is the decision of the heart or the agreement of the mujtahids of the Ummah of Muhammad. at one time, after the death of the Prophet against a shari'ah law'. Consensus' in the sense that the agreement of all jurists is currently difficult to achieve considering the vast part of the world inhabited by Muslims, the diversity of history, culture and environment. Therefore, true ijma' was only possible during the

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[17] Munawir Haris, p. 10.

second period of the *khulafaur-rashidun* . Now ijma' only means agreement and conformity of opinion somewhere regarding interpreting certain verses (laws) in the Qur'an.[18]

Second, the comparison is to equate the law of events with no provisions because, between the two events, there are aspects of the *illat* equation (cause or reason).[19] Qiyas is a measure of reason to compare one thing with another. For example, there is a ban on drinking *khamr*. What causes the drink to be prohibited is *illat* that is intoxicating. Therefore, any intoxicating drink, whatever it is made of, is the same as *khamr*, that is, it is forbidden to drink. So the intoxicating drink is qiyas with *khamr* so it is prohibited to be drunk and traded to the public.

Third, instigation, is to conclude two different things. An example is concluding the customs and religious laws revealed before Islam. Customs common in society and do not conflict with Islamic law (such as joint property or joint property) and religious law that was revealed before Islam but were not abolished by Islamic law, can be drawn legal lines to become Islamic law.[20]

Fourth, *Maslahah al-Mursalah*, is a way to find the law of something that does not contain provisions, both in the Koran and books of hadith, based on considerations for the benefit of society or the public interest. *Maslahah al-Mursalah* in the epistemology of Islamic law essentially includes: 1) the safety of religious beliefs; 2) mental health; 3) sense safety; 4) family and offspring safety; 5) the safety of property[21] and the safety of the congregation because the Shari'a applies in general and humans have the same character to get safety.[22]

Fifth, *Istihsan* is the method of determining the law of a problem and leaving the other because of the existence of stronger and more specific indications.[24] in

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[18] Mohammad Daud Ali. *Hukum Islam Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia*, (Jakarta: Raja Grafindo Persada, 1998), 109.
[19] Ahmad Hanafi. *Asas-Asas Hukum Pidana Islam*, (Jakarta: Bulan Bintang, 1993),. 33.
[20] Mohammad Daud Ali, 110.
[21] Muhammad Abu Zahra, *Ushul Fiqhi*, (Jakarta; Pustaka Firdaus, 2000), 425.
[22] Hamka Haq, *Filsafat Ushul Fiqh*, (Makassar; Yayasan Al-Ahkam, 2000), 27.

other words that istihsan is a way of setting the law by deviating from existing provisions for the sake of justice and social interest.[23]

Sixth, *Istishab* is to establish the law of something according to the circumstances that happened before until there is evidence that changes it. In other words, *istishab* is to continue the application of the law that already exists because there is no other provision that cancels it.[24]

Seventh, customs or *al'urf*, namely the habits of most people, both in words and deeds. Al 'Urf is a method of establishing Islamic law as long as it does not conflict with the texts. Scholars accept it as a legal argument that is not independent but must be related to other sunnah arguments. [25]

The role of good culture and customs is very important in harmonizing religious guidance with the nature of the human mind that has been expressed in cultural traditions. In the Indonesian context, the existence of cultural traditions causes religious teachings to be more alive and develop according to the needs of mankind. Since the beginning of its presence, Islam in Indonesia has positioned the traditions and customs of the community as a field of *da'wah*.[26] Some of these traditions and customs do not contradict religious values, and some are contrary to religion. Scholars adjust traditions that conflict with this religion without changing the essence of the culture carried, but elements of conflict with religious teachings can be eliminated. A clear example of this method is the handing over of offerings that were initially close to the act of shirk by scholars renewed into selametan, which is rich in friendship values and strengthens brotherhood. [27]

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[23] Muwaffiq Jufri, "Nuansa Maqhasid Al-Syariah Dalam Undang-Undang Nomor 39 Tahun 1999 Tentang Hak Asasi Manusia," *Istinbath* 14, no. 1 (2017): 1–14.

[24] Agung Ali Fahmi: Muwaffiq Jufri; Ansori, "Bentuk Penerapan Dan/Atau Penyerapan Hukum Islam Dalam Produk Hukum Daerah Di Madura," *Simposium Hukum Indonesia* 1, no. 1 (2019): 57.

[25] Baso Hasyim, 58-59.

[26] Moh. Nayu and Agung Ali Fahmi, "Efforts to Realize a Halal Lifestyle in Madura Through The Synergy of Islamic Boarding Schools and The Halal Center of University Trunojoyo of Madura," *Trunojoyo Law Review* 4, no. 2 (2022): 98–111.

[27] Yusmita Syarif and Ansori, "The Urgency of Establishing Regional Regulations on Thematic Tourism in Sumenep Regency," *Trunojoyo Law Review* 4, no. 2 (2022): 133–148.

Conclusion

The development of thought in exploring and discovering religious law in Islam must indeed be recognized as a prestigious development from the role of Muslim intellectuals in religion. Al-Qur'an suggestions related to Islamic respect for science are well answered through the method of discovering Islamic law by means of Ijtihad. This is evident from the many mujtahids who were born since the early days of the development of Islam. Besides that, the term legal discovery in Islam is believed to be superior to the term law formation, which developed in the West. The term legal discovery through the means of Ijtihad will be able to find laws that are still based on the original teachings of Islam.

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