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 problems 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 have a need for law. The existence of law to regulate and improve human life. Law with various schools of thought which aims to lead humanity towards a life that is maslahah and justice. In Islamic Jurisprudence, this kind of legal objective is known maqashidus syari’ah, namely the ultimate goal of implementation of Islamic law. Islamic Sharia regulates all aspects of human life in
the world, both in relation to the Creator, Allah which is called *muamalah whit Allah* and in relation to each other, which is referred to as *muamalah ma’annas*.¹

Islamic law is a set of religious rules, the totality of God’s commands that govern the behavior 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, law shari’a is his man-discovered law and not man-made law. This is evident in Coulson’s expression, God plans, but humans formulate it. Thus it can be understood, that the law is not always a ready-to-use item, but must be sought and found. Therefore, legal discovery is something that 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 clearly responded to in the text which is God’s dialogue with humans. This is in accordance with the expression of Islamic jurists *Al-Nusus Mutanahiyah wa Al-Waqi’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

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³ Munawir Haris, P. 2.
alternation of day and night, changes in situations and conditions, differences in environment, all of that encourage development and variety of actions, that’s for sure fiqh must also develop and dynamically follow that development and diversity.\textsuperscript{5}

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

In the course of its history, Islamic law is a dynamic and creative force. This is evident from the emergence of a number of schools of law which have their own style according to the sociocultural and political background in which these schools of law grow and develop.\textsuperscript{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. Like wise with Islamic law itself, where it 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 a large number of 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 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 as the most important period as a whole because of 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 its meaning only (As-Sunnah) which is then conveyed to humans.

At the time when the Prophet lived in Makkah for a period of thirteen years, the revelation emphasized the aspects of aqeedah and morals, and did not convey practical laws except for a few and were usually of a general nature. This revelation is very important, because aqidah is the main basis of laws tafshili (detailed) in the Shari’at. The limitations of practical laws at this time were because the Muslims did not yet need them. And when the state was formed greetings first, namely Medina, which was 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 both 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, in terms of the types of law that are prescribed, and in terms of explanation of the laws 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.

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7 Munawir Haris, p. 5.
As time went on, 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 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-mursalalh or istislah (Imam Malik), Istihsan (Imam Hanafi), comparison (Imam Shafi'i), istishab (Imam Ahmad bin Hambal) and others in digging the law.

The existence of ijtihad is actually needed by Muslims after the death of the prophet, where the demands of the times and changes in human behavior due to the development of life and technology. Ijtihad became the basis of Muslim law regarding the legal status of a new issue which had never been found in the time of 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 approach used is a conceptual approach and a historical approach. A conceptual approach is used to find out the concept of ijtihad as one of the methods in the discovery of Islamic law. While the legal history approach is used to find out the position of ijtihad in Islamic law when humans, especially Muslims, when they 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

1. 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 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 method of finding the law is called the term "istinbath". 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 Istittsmar". If you look at the purpose of learning Usul Fiqh for password the most important thing in studying this science is to be able 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 Ushuliyyah others.10 Ushul Fiqh experts stipulate that in order 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 ushul fiqh, then it is necessary to discuss both as methods of taking Islamic law. Istinbath means

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8 Taufiq Adnan Amal, Islam dan Tantangan Modernitas; Studi Atas Pemikiran Hukum Fazlur Rahman. (Bandung: Mizan, 1989), hlm. 33-35.
removing the law from its postulates. Istinbath This uses certain 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 and rules lughawiyah. The syar’iyah 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 as istinbath. However, ijtihad is only done on matters that are not found in the evidence shorih and clear, so that more in-depth efforts are needed to issue the law. As for the ijtihad methods themselves, some are agreed upon and some are not agreed upon by the scholars. The ijtihad methods agreed upon by the scholars are consensus’ and comparison, while the unanswered method is mashlah-mursalah, istihsan, urf, istishab and sad al-dzari’ah.11

2. The Method of Discovery of Islamic Law through Ijtihad

The law discovery method is not only known in the constellation of Islamic law, but in Western law it is far more advanced. However, Western jurists prefer the use of 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

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 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. Methodology, according to an expert, 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 that discuss about istinbath law (legal excavation methodology), named ushul fiqh. Usul fiqh is the only field of Islamic knowledge that is important in understanding Islamic law from its original source; al-Qur’an and al-Hadith. Through studies usul 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, there are at least five principles that allow Islamic law to develop with the times. These principles are: 1) Principles consensus'; 2) Principles Qiyas; 3) Principles Mashlahah Mursalah; 4) The principle of preservation Urf; and 5) The principle of changing law with changing times. These five principles clearly show how flexible Islamic law is. With the passage of time and place, the dynamic and creative

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development of Islamic law in its early days later transformed into schools of thought that were well-known among the Islamic community itself.

To understand the Islamic shari’a brought by the Prophet, scholars take care to put forward two forms of approach, namely through the rules of language and through the approach maqashid al-syari’ah (the purpose of syar’i in setting the law). With that, the goal of Islamic law will be achieved, which is the benefit of the world and the hereafter. Therefore, the knowledge of ushul fiqh becomes important to know and understand in order 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 true 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 has developed in the Islamic world, such as rational knowledge, sensory knowledge (empiricism) and knowledge obtained through inspiration.

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: First, the difference in giving the meaning of language. Second, in the acceptance of a Hadith. Third, solution nash which contradict each other. Fourth, the difference in the use of qiyas. Fifth, differences in
using certain postulates, for example istihsan, istishab and istislah. Sixth, differences in the use and position of a pronunciation.\footnote{Noor Ahmad, \\textit{Efistemologi Syara’ Mencari Format Baru Fiqh Indonesia}, (Yogyakarta; Walisongo Press, 2000), p. 7.}

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. Determining which is better (istihsan), 2. Determining which interests are considered good (istislah) and 3. analogical reasoning (qiyas).\footnote{Baso Hasyim, “Pemikiran Hukum Islam dalam Paradigma Keilmuan Moderen”, Jurnal \\textit{Al-Risalah} Vol. 10 No. 1 Mei 2010, p. 56.}

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, but 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 two 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 in order to find a format of Islamic law that suits Indonesian society.

As previously explained, that Islamic law is \textit{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.\footnote{Munawir Haris, p.7.}

The first method, namely the linguistic interpretation method, is a legal discovery method that operates by interpreting the texts of the Koran and hadith. Thus, the linguistic method is used in relation to cases where there is already a

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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, namely: First, in terms of the level 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 suffer in a statement.

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 seeks to investigate 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 which underlies the law on maqashid al-shari'ah. The causation method tries to dig the cause of the law of 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 to the cause of the law). If there are no parallel cases, then the legal basis for the cause of the law can’t be done. Therefore legal discovery can be made on the basis of law the final case law, that is maqashid al-shari'ah. In other words, done ta'lil al-ahkam bi maqasid al-shari'ah.\textsuperscript{17}

The third method, alignment, is a method that seeks to harmonize various possible legal arguments apparent contradict each other. For this reason, the alignment method then developed a theory copy and throw him away Simply, 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 which contradict 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,

\footnote{\textsuperscript{17} Munawir Haris, p. 10.}
namely; First, consensus’, is the agreement or suitability of the opinions of experts regarding a problem at a certain place at a certain 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 syari’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 second period of the khulafaur-rashidun. Now ijma’ only means agreement and conformity of opinion somewhere regarding the interpretation of certain verses (laws) in the Qur’an.18

Second, comparison, is to equate the law of events that have no provisions, because between the two events there are aspects of 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 it. So the intoxicating drink is qiyas with khamr so it is prohibited to be drunk and traded to the public.

Third, instigation, is to draw conclusions from two different things. An example is drawing conclusions from the customs and religious laws that were revealed before Islam. Customs that are 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 and the safety of the congregation because the Shari’a applies in general and humans have the same character to get safety.

Fifth, Istihsan, is the method of determining the law of a problem and leaving the other, is because of the existence of indications that are stronger and more specific in other words that istihsan is a way of setting the law by deviating from existing provisions for the sake of justice and social interest.

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

Seventh, customs or al’urf, namely the habits of the majority of 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.

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 actually 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. Some of these traditions and customs are not contrary to religious values, and some are contrary to religion. To traditions that conflict with this religion, scholars make adjustments without changing the essence of the culture carried but elements of conflict with religious teachings can be eliminated. A clear example of this method

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22 Hamka Haq, *Filsafat Ushul Fiqh*, (Makassar; Yayasan Al-Ahkam, 2000), p. 27.
23 Baso Hasyim, 58-59.
is the handing over of offerings that were originally close to the act of shirk, by scholars renewed into *selametan* which is rich in friendship values and strengthens brotherhood.

**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 use of 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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