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# Abdullah Saeed's Progressive *Ijtihad* in the Application of *Rechtsvinding* Judges in Religious Courts

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## Abstract

Every court judge has their perspective in deciding a case. A judge always strives to make legal discoveries as a form of justice and legal certainty. However, legal discovery efforts are not always uniform. Therefore, it is necessary to reconstruct the methodology for making legal discoveries. Through Abdullah Saeed's contextual approach with progressive ijtihad packaging to connect the disconnection of the spirit and soul of divinity, so that justice based on the almighty God, conscience, and common sense as the pinnacle of law can be felt by justice seekers. This research is library research using various literature sources as research data sources. The research findings of legal discovery by judges are only needed in *inconcreto* cases. Judges still stand on the general legal approach in reading Islamic law. The need to raise living laws to positive laws whose level of applicability is binding is to use *rechtsvinding* / legal discovery in the Religious Court. Thus by taking into consideration: First, homogenize the understanding of judges in finding a law, Second, the methodology of Islamic law and override the general methodology in reading unwritten law, as well as written law with the spirit of the Islamic spirit *sholihun likulli zaman*.

**Keywords**
Religious Judge, Abdullah Saeed, Progressive Ijtihad

**Abstrak**

Setiap hakim pengadilan memiliki cara pandang masing-masing dalam memutus suatu perkara. Seroang hakim selalu berupaya untuk melakukan penemuan hukum sebagai bentuk keadilan dan kepastian hukum. Namun upaya penemuan hukum tidak selalu dilakukan seragam. Oleh karena itu diperlukan rekonstruksi metodologi dalam melakukan penemuan hukum. Melalui Pendekatan kontekstual Abdullah Saeed dengan kemasan ijtihad progresif untuk menyambungkan keterputusan ruh dan jiwa ketuhanan, sehingga keadilan yang berlandaskan ketuhanan yang maha esa, hati nurani, dan akal sehat sebagai puncak hukum dapat dirasakan oleh para pencari keadilan. Penelitian ini merupakan library research menggunakan berbagai sumber kepustakaan sebagai sumber data penelitian. Temuan penelitian penemuan hukum oleh hakim hanya dibutuhkan saat kasus inconcreto. Hakim masih berpijak pada pendekatan hukum umum dalam membaca hukum Islam. Perlu menaikkan *living laws* ke *positif laws* yang kadar keberlakukannya mengikat adalah dengan menggunakan rechtsvinding/penemuan hukum di Pengadilan Agama. Dengan demkian dengan melakukan pertimbangan: Pertama, menyeragamkan pemahaman hakim dalam menemukan suatu hukum, Kedua, metodologi hukum Islam dan mengesampingkan metodologi umum dalam membaca hukum tidak tertulis, maupun hukum tertulis dengan semangat ruh keislaman *sholihun likulli zaman*.

**Kata Kunci:**
Hakim Agama; Abdullah Saeed; Ijtihad Progresif

## Introduction

The Religious Court is one of the actors of judicial power in resolving certain cases specifically for Muslim justice seekers to uphold law and justice.[1] The *masadirul ahkam* al-Qur'an, hadith, *ijma'*, and *qiyas*,

[1] Article 18 of Law No. 48 of 2009 Concerning Judicial Power, Law No. 3 of 2006 Concerning Amendments to Law No.7 of 1989 in article 2. Law No. 3 of 2006 and second amendment with Law No. 50 of 2009 on Religious Courts

have been conditioned binding judge decisions and as a source of law born from in-depth analysis, comprehensive, mature, unhurried, visionary, and scientific accountability.[2] Not all cases are regulated, sometimes it is written but it is not clear or even appropriate, resulting in a legal vacuum.[3]

This is where rechtsvinding is carried out through the ex officio rights of judges mandated in Law No. 48 of 2009 concerning "Judicial Power" that the court is prohibited from refusing to examine, hear and decide a case filed because "the law does not exist or is unclear" because judges are always considered to know the law (ius curio): 48 of 2009 concerning "Judicial Power" that the court is prohibited from refusing to examine, hear and decide a case submitted because "the law does not exist or is unclear" because judges are always considered to know the law (*ius curia novit* means the court knows the law) because the law is found, not made.

Law discovery is the process of law formation by judges or other legal officers who are given the task of implementing the law or applying general legal regulations to concrete legal events. The process of concretization/individualization of legal regulations (*das sollen*) is general and binding on certain concrete events (*das sein*) to achieve justice, legal certainty, and benefits these three elements must compromise.[4]

However, since Islamic law has been codified, it has not been able to accommodate all dimensions of the seekers of justice, many decisions are only completed in the frame of words on paper that cannot be implemented, and protracted, causing new cases to continue, giving birth to mutual hatred, resentment that increasingly envelops among justice seekers. There are still many cases that are appealed and cassated which shows that most of the *judex factie* decisions are not accepted by the justice seekers even though the case

[2] M. Natsir Asnawi, *Hermeneutika Putusan Hakim, Pendekatan Multidisipliner Dalam Memahami Putusan Peradilan Perdata*, (Yogyakarta: UII Press Yogyakarta, 2014).

[3]Abdul Mannan, "Penemuan Hukum Oleh Hakim dalam Pratek Hukum Acara di Peradilan Agama. *Jurnal Hukum dan Peradilan*", (2 Juli 2013), p. 190

[4] Ishaq, *Pengantar Ilmu Hukum*, (Jakarta: Sinar Grafika, 2007), p. 7.

has been decided.[5] The above is due to the dynamism of society not accompanied by legal codification, regulation/decision the most powerful test tool is society through its values and beliefs.

But the obstacle is that not all judges can do it, for reasons of large number of cases, work demands, co-opted by superior sanctions, assuming that the legal codification is complete, so assuming taqlid legal codification is the safest path. The absurdity lies in the problem of understanding based on the absence of uniformity of patent methodology for religious judges to make legal discoveries from the main source (al-Qur'an and Hadith), only a few judges are qualified to produce decisions that are used as jurisprudence, and other judges are only *taqlid* and some others consider matters relating to religion to be too sacred which are prone to flow justification, so *taqlid* is the safest position.

The absurdity of discovering codified Islamic law with common law methodology because there are more variants that it cuts the horizontal path of manhaj from the initial source (Qur'an hadith). Whereas the Indonesian legal system does not apply civil law absolutely and neither does it apply common law absolutely but a mixed legal system (mixed system) between the two or residual law (customary law or religious law) and socialist law such as the existence of the Marriage Law in Indonesia, the judges above only stick to the codified law and rule out residual law and socialist law.

So this is where the placement of progressive *ijtihad* Abdullah Saeed is an effort to connect the horizontal line of the divine element and the conscience of faith that is deliberately broken in the effort to find the law above. Progressive Ijtihad Abdullah Saeed has an educational background (west-east) and lives in Muslim Australia so it gives birth to an alternative methodology packed with contextual interpretations that do not deny logic/*ra'yi* and also history.

So researchers try to analyze, criticize, and present a new perspective on how Abdullah Saeed's progressive ijtihad? How do religious judges do rechsving? How is the idea of Abdullah Saeed's Progressive Ijtihad paradigm to approach rechtsvinding for judges or other law enforcement? to produce ideal and more precise decisions,

[5]Arto. A. Mukti. *Teori Dan Seni Menyelesaikan Perkara Perdata di Pengadilan.* (Depok: Kencana, 2017).

containing divine spirit, justice, expediency, and legal certainty.[6] The pinnacle of law is conscience and common sense so that each judge can give birth to the progress face of the decision as a mujahid *mujaddid* outside the codified law, one of which is the inheritance decision No.85/Pdt.G/92/V/PA.MTR Jo. 19/Pdt.G/1993/PTA.MTR jo. 86 K/AG/194 In the Supreme Court decision No. 86K/AG/1994.[7] Thus, the rechtsvinding of Religious Court judges with the idea of Abdullah Saed's progressive ijtihad thinking is very important and interesting to be studied further.

## Methods

This research is library research using various sources of literature as a source of research data. This research is library research that the author conducts based on literature data related to the subject matter discussed with the concept of Abdullah Saeed's Progressive Ijtihad as an Effort to Approach Rechtsvinding Religious Court Judges. Primary data sources are obtained from the literature that discusses the concept of Rehtvinding / legal discovery. Secondary data is taken indirectly related to the issues discussed where the content supports legal materials or primary data or materials that contain information about primary law. Data is collected by documentation method in the form of notes, books, and newspapers. Data analysis is carried out using systematic analysis by organizing data into categories, breaking it down into units, synthesizing, compiling into patterns, choosing which ones are important and which will be studied then making conclusions.

## Result and Discussion

[6] *Ibid*, p. 83.

[7] The first level court PA Mataram, Appeal, and Up to cassation at the Supreme Court which has permanent legal force, this has become a point of progress for researchers to become the basic material to measure its application in the world of legal discovery (*rechtsvinding*), besides that here researchers why take the basis of this decision because from the beginning the paradigm of this decision has been made as Jurisprudence by subsequent judges if found with the same case.

The judge starts the pre-understanding at the constating stage, here the judge constitutes whether or not the events submitted are true or not and whether the judge's activities here are logical. mastery of the law of evidence for judges is needed at this stage, continuing to the qualification stage, the judge qualifies, including the legal relationship between the parties seeking justice. using: 1) Analytical or geometric techniques, 2) Equatable technique, 3) Syllogism technique, and 4) Progressive Ijtihad technique. The steps are as follows:

*First*, Judge >>> identifies the mufassir's tradition of the regulatory text under review>>> link to the modern context/case (macro context 2) >>>> analyze the consistency of the tradition = look for existing justifications>> consider the dominant interpretation of the text tradition>>> examine using the fundamental question, whether influenced by *mazhab* (theology, law, *tariqat*) >>>> if there is a significant difference between modern and pre-modern = the judge has the flexibility to interpret more logically and even radically.

*Second*, Judge >>> identifies the text problem from (political, economic, social, intellectual in macro 1 and macro 2 contexts) >>> find the relevant >>> map the differences and similarities of macro 1 and macro 2 contexts >>> squeeze the two >>> produce = universal or specific values >>> the result = the value can change or remain >>> the result = the greater the similarity of the macro 1 and macro 2 key texts = the key message of the 2 contexts remains as it is macro 1 and macro 2 contexts = a wide variant of the 2 contexts, makes it more likely that the key message occurs or actually occurs >>> and is practiced differently in macro context 2, if the value conveyed by the key text does not appear to be universal.

*Third*, in the Constituent Stage, the judge determines the law against the person concerned (the parties or the defendant), the judge uses syllogism, which is to conclude from the major premise in the form of the rule of law.

***Abdullah Saeed's Progressive Ijtihad Thought***

Progressive Ijtihad, Saeed mentions that:[8] Progressive *ijtihadists* come from a variety of backgrounds and intellectual orientations. They can be considered as the intellectual descendants of the modernists

[8] Abdullah Saeed, *Islamic Thought: An Introduction,* (London and New York: Routledge, 2006), p. 142-150.

along the following lines: modernists → neo-modernists → progressives. Various names are used today for progressives, which can include liberal Muslims, progressives, Muslims, *ijtihadists*, transformationists, or even neo-modernists.[9]

Someone who claims to be a progressive Muslim with the characteristics: (1) The field of Islamic law requires substantial reform according to the needs of this Sat. (2) The need for fresh ijtihad in contemporary issues. (3) Combining traditional Islam and modern Western thought. (4) Believes that social, intellectual, moral, legal, economic, or technological changes must be reflected in Islamic law. (5) Not constrained by legal dogmatism, certain theology in its study. (6) Focusing his thoughts on social justice, gender, human rights, and harmonious relations between Muslims and non-Muslims.[10] As a result, a progressive Muslim is required to master the basics of Islam and contemporary problems which are then captured through a methodological thinking process in finding answers or solutions. This pattern is what Saeed calls progressive *ijtihadist*.

1. *Progressive Ijtihad*

Context-based ijtihad" is an approach to understanding legal problems in their historical context and their current (modern) context by unpacking the root of the problem (previous ijtihad methodology) Progressive ijtihadists try to connect with the current context. Saeed presents seven main approaches, namely:

a. The concept of Revelation of the Qur'an and Divine in the interpretation, there are 4 levels of revelation of the Qur'an, First, (*Allah-al-Lauhil mahfuzh-Heaven* of the World-Angel Gabriel). Second, Angel Gabriel-Heart of Prophet Muhammad-Externalization-Socio-Historical Context). Third, the Prophet Muhammad narrated, read, conveyed, taught, explained, and applied it amid the Companions (Text-Context-Extended Text) and at this stage, the Qur'an began to be understood and interpreted by Muslims. Fourth, After the death of the Prophet, the inspiration of God continued to take

[9] Tariq Ramadan, *Western Muslims and the Future of Islam.* (New York: Oxford University Press, 2004), p. 24-28.

[10] Anik Faridah, "Trend Pemikiran Islam Progresif, (Telaah atas Pemikiran Abdullah Saeed)", *al-Mabsud,* 7 (2013), p. 6.

place in Muslims, along with the efforts practiced and the process from one generation to the next.

b. The interpretation of the Qur'an continues, in its development starting with the model of interpretation *al-ma'tsur* (interpretation by history), and interpretation *bil ro'yi* (interpretation by human ratios), this *bil ro'yi* model is what is needed by the people today with the challenges of the times that continue to be dynamic and develop.
c. Recognizing the flexibility of the Qur'an, especially concerning its different styles of recitation, and its naskh *mansukh*.
d. Considering an interpretation of Qur'anic texts to be mere approximations, especially texts related to ethical-legal verses.
e. Recognizing the complexity of the meaning of the Qur'an, we can see the difference between the viewpoints developed by textualists and contextualists. Textualists consider the text to be single-meaning and limited by literalism so that no one can interpret it at will. Contextualists, on the other hand, assume that the Qur'anic text is complex and can be interpreted dynamically and diversely.
f. Focusing on the socio-historical context of the revelation of the Qur'an.
g. The hierarchy of values contained in ethical-legal verses.[11]

2. *Rechtsving of Religious Court Judges*

In legal rechtsvinding, first look at the procedures so that the steps taken have the spirit of legal objectives based on God Almighty.[12] Legal discovery can be divided into 2 stages, including (1) The stage before ex-ante decision-making / based on assumptions and predictions), namely the process of searching and thinking that precedes the act of making legal decisions. Various pro and con arguments against a particular decision are weighed against one another to find the most appropriate side. (2). Stage after decision

[11] Abdullah Saeed, *Paradigma, Prinsip, dan Metode Penafsiran Kontekstualis atas al-Qur'an, Intepreting the Qur'an; Towards a Contemporary Approach*, vvi-x

[12]Mukti Arto, *Penemuan Hukum Islam Demi Mewujudkan Keadilan, Penerapan Penemuan hukum, Ulta Petita & Ex Officio Hakim Secara Proporsional*, (Yoyakarta: Pustaka Pelajar, 2018), p. 37.

making. Or legitimization at this stage the decision is given motivation/consideration and substantial argumentation by compiling rational reasoning that can be accounted for.[13] Sudikno Mertokusumo quoted by Achmad Ali stated three stages of the judge's duties:[14]

a. At the Constituent stage, the judge constitutes whether or not the events presented are true. For example, is it true that A has broken the window of B's house so that B has suffered losses? Here the parties (in civil cases) and the public prosecutor (in criminal cases) are obliged to prove through the use of evidence. In this constatir stage, the judge's activities are logical. Mastery of the law of evidence for judges is needed at this stage.
b. Qualification stage, the judge qualifies, what legal relationship does the action of A belong to? In this case, it is qualified as a tort (Article 1365 BW).
c. The decision stage, as for the decision-making technique, can choose 3 (three) types of decision-making techniques and application of law, namely:
    1) Analytical technique / juridical geometry. Judges must master the procedural law commonly used in large cases and usually in property law (*zaken rech*). This method starts from specific things and then concludes general things (deductive conclusions). In legal considerations, the judge must first master the subject matter in a real and accurate manner, and then compile a basic argument question on its relevance to the subject matter.
    2) Syllogism technique/inductive reasoning method, starting from general things to specific things. The law of logic called syllogism is the main basis of this flow, and the judge concludes the existence of a major premise, namely the rule of law, and a minor premise, namely the event.

[13] Alef Musyahadah R, *Hermeneutika Hukum Sebagai Alternatif Metode Penemuan Hukum Bagi Hakim Untuk Menunjang Keadilan Gender*", p. 300.

[14] Panggabean, H.P. *Penerapan Teori Huk um Dalam Sistem Peradilan Indonesia*. (Jakarta: Pustaka Sinar Harapan, 2002). p. 218.

3) As for the analysis, the judge usedthe interpretation methods: (1) Subsumptive, (2) grammatical, (3) Historical, (4) Systematic, (5) Sociological/teleological, (5) Comparative, (6) futuristic, and (7) Restrictive.

The obstacle to legal discovery is that only a handful of judges are brave and master Islamic law outside of written law, and as a result, they only rely on textualist regulations and then use them authoritatively *taqklid* so that the decision products are stagnant, sometimes they cannot be applied or executed and instead give birth to hatred and ongoing problems. They stutter and consider it too sacred to touch the roots of Islamic law and how to find it, assuming that codified texts such as the Marriage Law, and KHI are perfect. They forget the source of the law and how to issue the law making them remain the mouthpiece of the law and as court officers only.

Religious judges conduct legal discovery using authoritative texts that provide space for inclination towards general regulatory text methodology, with methodical legal discovery struggling between variants of methodology (written law) and the sikon of the parties) and do not open space for exploration of development argumentatively in the source (al-Qur'an hadith) even though Roberto Macelan stated that in practice judges often develop written law.[15]

But ,the Qur'an and hadith are only as justification and formal procedural fulfillment with language packaging "for the sake of realizing justice based on God Almighty but the tactical steps are worth zong. Whereas the existence of positive laws departs from living laws - religions - sources - opinions - practices which are then codified as M.Noor Harissuddin states fiqh / Islamic law in Indonesia as living laws that live during society are strived to become positive laws that are binding on the community, the key here is the Religious judge, Indicators of judges as above can be traced from various facts at least the author analyzes some of the exposure of the previous chapter with factual reasons that cause weak or small discretion of judges to interpret codified law, including:

[15] Choky R. Ramadhan, "Konvergensi *Civil Law* dan *Common Law* di Indonesia dalam Penemuan dan Pembentukan Hukum", p. 218-2019.

1. *No uniformity in methodology*

This is one of the initial reasons for the lack of uniformity of understanding between the functional structure of judges in the trial counsel and the functional structure in the legal remedies area. Ahmad Ali analogized: one case object highlighted from the perspective of 3 judges in the trial will produce the same results and can be different. This result will become a decision product as well as a law, but the structure between the head of the panel and members also gives a bias to the results.[16] They have their paradigm-building perceptions, but during the deliberation council (MM) their arguments are scientifically tested and explored, by expressing their opinions clearly by pointing to the legal basis.

If there is a dissenting opinion, the conclusion is by voting, but not all of them are smooth as the guidelines. This is one of the effects of seniority among judges. [17] Those who get the least votes will be sidelined, even though the argument is strong and still written in the decision. besides that, seniority here also dims the legal argumentation for juniors so that it gives birth to the construction of the thought that "the more senior is more experienced and knows more wisdom" This is where the problem lies that seniority should be put aside to get a progress decision based on scientific argumentation rather than structure influencing the results, this is a fact that must be dismantled immediately, their weakness is due to the absence of a methodological uniformity binder. So the alternative

[16]Ali, *Menguak Tabir Hukum….*, p. 114.

[17] See Book II Book II. Administrative and Technical Guidelines for Religious Courts on page 41 letter C "Consultative Meeting of the Panel of Judges" is described in four points: (1) Consultative meetings of the Panel of Judges are confidential (Article 19 paragraph 3 of Law No.4 of 2004). The court clerk may attend the deliberation meeting of the Panel if deemed necessary and approved by the Panel of Judges. (2). The President of the Tribunal shall invite Judge Member II to express his/her opinion, followed by Judge Member I and finally the President of the Tribunal shall express his/her opinion. (3). All opinions must be expressed clearly, by pointing to the legal basis, then recorded in the agenda book, (4).In the deliberation meeting, each Judge is obliged to submit written considerations or opinions on the case being examined.

understanding can be overcome by formulating a methodology to minimize the disagreement because the nature of the judge is subjective and internally authoritative.

2. *Weak human resources for judges since recruitment*

The expression "the judge's background determines the face of the verdict" also applies to the Religious Court, which is the face of Indonesian Muslims who resolve their disputes in the religious courts. recruitment of prospective judges (CAKIM), for example, the formation of the 2017 Religious Court, passed 543 prospective judges,[18] with a special requirement that they must be able to read and understand the yellow book, if they are unable to do so, they are declared invalid.[19] This multiple-choice question was chosen by the Supreme Court because the examination process is easier, and faster and the results can be seen immediately after the Field Ability Test.[20]

The results of Haris Kurnia's research, this system is deemed inappropriate to explore the legal knowledge of judges, Haris said "It could be that the score obtained is the result of mere luck, different if using the essay question method which can explore all the legal knowledge of prospective judges. In the interview test, the questions in the psychological test have not been specifically directed at the implementation of the judge's function. Nationally, the number of quotas that must be filled by SKD is 3x. 1) The material of the exam questions is quite difficult. 2) The use of a computer system (CAT) that is considered unfamiliar. 3) Relatively short exam time. 4) The passing grade is quite high. 5) More focus on the preparation of the Field Ability Selection (SKB).

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[18] Surat Pengumuman MA RI Nomor: 01/Pansel/MA/07/2017 Seleksi Penerimaan Calon Hakim di Lingkungan Mahkamah Agung RI tahun Anggaran 2017

[19] *Ibid..,*

[20] Haris Kurnia Anjasmara, "Perbandingan Pengisin Jabatan Hakim antara Indonesia dengan Jepang", *Jurnal Yurisprudence*. Vol. 9. No. 2, (2019), p. 197.

There is an imbalance in that the undergraduate qualifications required to become PA judges include alumni of Bachelor of Laws (general), so there is a slight imbalance. Many of them (Bachelor of Laws) passed the SKD because the questions were related to basic scientific skills, but the ability to read Islamic law and the yellow book was less competent.[21]

3. *With the demands of many cases, and performance, Taklid is the safest route.*

Maclean revealed that one of the causes of weak or small discretion of judges to interpret codified law is: the low creativity of judges in examining cases because they are burdened with a very large pile of cases. Then with so many cases, judges often formalize the law (procedural/material) with the race "If the case is ordinary without any dispute that must be divided fairly, why bother looking for the law, let alone legal discovery".

PA technical demands to improve the quality of service, as the letter of the Supreme Court of the Republic of Indonesia Directorate General of Religious Courts (BADILAG): Number: 1924.c/DJA/0T.01.3/VII/2018, Subject: Improvement of Work and Services of Religious Courts, addressed to the Head of PA at the First and Appeal levels within the Religious Courts. Here it is required regarding the Quality Assurance Accreditation certificate (SPAM).

"One Day Publish & One Day Minutation" is one of the Supreme Court's programs in mid-2018 to improve performance and judicial services, once a case is decided, the case file must be minuted, the minutes and decision must be uploaded in electronic-based applications such as the Case Tracking Information System (SIPP) application, and the Supreme Court Decision Directory within 1 x 24 hours this system regulates the acceleration of services for justice seekers.[22] If the system is too pressing and is not balanced with the quality of human resources of judges who are qualified in

[21] Hayati, *Akseptabilitas Sarjana Hukum Islam*…, p. 121.

[22] https://badilag.mahkamahagung.go.id/seputar-peradilan-agama/berita-daerah/suka-duka-one-day-publish-dan one-day-minutation-pa-maninjau-26-3, Di Akses Juni 2020

exploring dynamic values in the community, then what happens is that complaints will increase, trust will fade, because judges are only formalists, no different from being mere mouthpieces of codified rules, disputes are decided in writing but cannot be implemented or even give birth to new cases, the dignity and subtlety of justice are only limited to mere paper scribbles.[23]

In addition to this, judges are confined to sanctions if they leave the outlined path, so it is only for the sake of easing the task, not the elements of benefit, justice, and legal certainty in society. Then if the judge has a subjective orientation, he/she will feel that it is a waste of time/time to make legal discoveries. Finally, the safest way is taqlid as a written rule that is condensed.

Here also on the subject matter, the assumption is that the judge does not have to bother making legal discoveries, just follow the existing written rules as understood by the sens-clair (Ia doctrine du Sinclair, after all, if the party does not accept the decision, there are still legal remedies (appeal or cassation). In addition, if the case is decided and then the party makes a legal appeal, and the judge decides out of the condensed legal path without including strong understanding and argumentation, the judge himself will be reprimanded and given a written warning or sanction as above by the PTA and MA.

So there is no other safe path except to be devoted to the wheels of existing written regulations without having to make legal discoveries or construct legal values in society, because even though the decision contains Islamic legal reform if it does not reach the Supreme Court's decision everything will not be used as Jurisprudence. Likewise, even though the primary level judges make legal discoveries, the understanding of the appeal/cassation judges is different from the primary level, it will still be canceled by the higher structure, namely the PTA / MA, because there is no uniformity of understanding and methodology if so then Islamic law will not move forward, it will only run in place without moving from its initial

[23] Arto, *Teori dan Seni…*, p. 2-3.

codification position, so don't blame it if the general methodology presents more variants than Islamic law.

M. Noor Harisuddin offers 2 models of Ijtihad Jam'i (Hasby As-Shiddiqi), this is done amid the difficulty of ijtihad independently carried out by personal mujtahid.[24] Furthermore, Noor Harissuddin provides an overview of living laws and positive laws:

**Table 1.** Table The difference between living laws and positive laws

| **Fiqh as living laws** | **Fiqh as positive laws** |
|---|---|
| Still, a discourse during society | Already established by the government |
| There are many madhab opinions | Only one opinion is chosen |
| Not binding | Binding |

Departing from the table above, to raise living laws to positive laws whose level of applicability is binding is to use *rechtsvinding* / law discovery, the key is done by Religious Court judges. Because every decision product is a law, it does not have to wait for the legislator to use its duties, thus Islamic law will be sholihun *likulli zaman*. So that by being able to make considerations: First, to homogenize the understanding of PA judges and to minimize the occurrence of *ikhtilaf* in examining-deciding cases, both at the level of appeal and cassation, Second, to use the perspective of Islamic legal methodology and override the general methodology in reading unwritten law, as well as written law with the spirit of the Islamic spirit *sholihun likulli zaman*.

## Conclusion

For religious judges to get out of the path of the mouthpiece of the air - the law as doctrine sens-clair (He doctrine du Sinclair) legal discovery by judges is only needed when the case is *inconcreto* or regulations already exist but are not clear judges no place of legal discovery. Judges still stand on the general legal approach in reading

[24]Harissudin, "Diskursus Fikih Indonesia…, p. 178.

Islamic law so this is where absurdity occurs. When they take a step by vertically equalizing the position of general law and Islam, this is where they have cut the horizontal line (al-Qur'an and Hadith) and how to make it happen. Then, when they are confronted with the principal (al-Qur'an and Hadith) they are nervous and unable to, even though Islamic law in Indonesia is living laws that live during society and strive to become positive laws that are binding on society.

The need to raise living laws to positive laws whose level of applicability is binding is to use rechtsvinding / legal discovery in the Religious Courts. Because every decision product is law, it does not have to wait for the legislator to use his duties, thus Islamic law will be sholihun likulli zaman. With this in mind: First, to homogenize the understanding of PA judges and to minimize the occurrence of ikhtilaf in examining-deciding cases, both at the level of appeal and cassation, Second, to use the perspective of Islamic legal methodology and override the general methodology in reading unwritten law, as well as written law with the spirit of the Islamic spirit *sholihun likulli zaman*.

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