



## OBSTACLES TO LEGAL DISCOVERY RELIGIOUS JUDGE

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<p><b>Received:</b> October 8<sup>th</sup> 2021 <b>Accepted:</b> November 10<sup>th</sup> 2021 <b>Published:</b> December 21<sup>th</sup> 2021</p>	<p>This research was conducted by examining the decision of the Gorontalo Religious High Court in an effort to find out the obstacles faced by the Religious High Court judges in their efforts to find the law.</p> <p>This research is a normative research, which is descriptive analytical in nature which examines legal findings made by judges and analyzed based on the system of norms in the laws and regulations and their application which is described based on variables related to the focus to be studied.</p> <p>The results of the study show that the obstacles faced in the legal discovery activities of judges are in the form of legal structure factors related to the composition of the Judiciary and the judicial duties of the Court which is the first and main task of the court, the legal substance factor can be seen from the use of legal sources in deciding cases and other factors. the legal culture is that legal positivism still dominates the way of thinking of judges in court so that it affects the legal discovery efforts made by judges.</p>

**Keywords:** Barriers to Legal Discovery, Religious Court Judges

### INTRODUCTION

Law cannot be separated from human life. Every human being has interests, which in their social life require protection of their interests. The protection of interests is achieved by creating guidelines or rules of life that determine how humans should behave in society so as not to harm others and themselves (Mertokusumo, 1999). In other words, in social life, the law as a series of rules is indispensable in order to provide protection for the interests of the community itself.

Humans in interacting with each other in community life often cause conflict. In any society there are various interests among its citizens. Some of these interests are compatible with each other, but there are also conflicting interests. In the event that two or more conflicting interests meet, a conflict of interest occurs. This is what in juridical terms is called a dispute (Ali, 1997).

Talking about the law in general, we (society) only look at the rule of law in terms of rules or regulations, especially for practitioners. While we are aware that the law is not perfect. It is impossible for the law to regulate all activities of human life completely. Sometimes the law is incomplete or sometimes the law is not clear. On issues that are considered unclear, it is possible (open) an interpretation to be carried out. Judges cannot and should not postpone or refuse to make a decision on the grounds that the law is incomplete or unclear. In this case the judge as law enforcer must seek, explore and study the law. Judges must find the law by making legal discoveries (*rechtsvinding*). The results of legal findings by judges are law because they have binding power as law and are stated in the form of decisions and legal findings by judges are sources of law.

In judicial practice, there are 3 (three) terms that are often used by judges, namely discovery of law, formation of law or creating law and application of law. Among these three terms, the term legal discovery is most often used by judges, while the term law formation is usually used by the legislature (DPR). In further developments, the use of the three terms is intermingled, but the three terms lead to an understanding that the legal rules contained in the law are not clear, therefore a legal discovery or legal formation is required by a judge in deciding a case.

According to Jazim Hamidi (2005) that legal discovery has a very broad scope of legal work, because legal discovery can be made by anyone, be it individuals, scientists, legal researchers, judges, prosecutors, police, advocates, lecturers, notaries and lawyers. etc. However, according to Sudikno Mertokusumo, the professions that make the most legal discoveries are judges, because every day judges are faced with concrete events or conflicts that must be resolved. The discovery of the law by the judge is considered a matter of authority because the discovery of the law by the judge is a law that has binding power as law because the results of the discovery of the law are poured in the form of a decision. (Mertokusumo, 2007).

Judges as the core apparatus in a judicial institution are the foundation for determining the fate of people who seek justice and truth. Knowledge of the law from various aspects for a judge has a big influence on the type of concrete law that will be imposed. As stated by Satjipto Raharjo; even though the judge has decided the case, it does not

necessarily provide justice, even though justice is what is desired (Arto, 2001). Judges find the law through the sources mentioned above. If it is not found in these sources, then he must look for it using interpretation and construction methods. The method of interpretation is the interpretation of the text of the law, still sticking to the sound of the text. Meanwhile, the judge's construction method uses logical reasoning to further develop a legal text, in which judges are no longer bound and adhere to the sound of the text, but on condition that the judge does not ignore the law as a system (Ali, 1996). Previously known as the *Sens clair* doctrine which said that a judge's discovery could only be made if the regulations did not yet exist for an in concrete case or the regulations already existed but were not yet clear. But now the *Sens clair* doctrine has been abandoned a lot, because now a new doctrine has emerged which assumes that judges in every decision always make legal discoveries because the language of law is always too poor for the highly nuanced human mind. In the current era of globalization, many things continue to develop and require interpretation, while many laws and regulations are static and slow in adapting to changing conditions.

Based on the results of initial observations and interviews of researchers with one of the judges (Paputungan, 2019) it was found that things that affect the weakness of the judge's decision are the lack of facts, lack of analysis of the facts so that the correct facts are not sharp and often the analysis is lacking and this affects the assessment of facts. The lack of sharpness in the use of the induction method means that conclusions in a legal matter are still lacking so that the thought process that starts from a number of individual phenomena, the data that is processed is also minimal. Therefore, the researcher tries to examine the obstacles in his legal discovery efforts so that the resulting law fulfills the aspects of legal certainty and justice.

### RESEARCH METHODOLOGY

This research can be categorized as empirical research, which is descriptive analytical study about the discovery of the law made by judges then constraints faced by judges in legal discovery As for the approach taken in this study is a conceptual approach and analytical approach. This approach is carried out in order to see cases that have been decided by the court and then analyze the legal discovery efforts used by judges in considering their decisions and the obstacles.

Data collection is carried out by means of a literature study (including interviews with resource persons of the judges in court), (Ahmad, 2021) on legal materials, both primary legal materials, secondary legal materials, and tertiary legal materials carried out by reading, viewing, listening, as well as the search for legal materials through the internet. The data obtained is then analyzed using descriptive analysis and prescriptive analysis to describe or explain the Decisions of the High Religious Courts, especially in terms of the material law used in making decisions. This is done so that it can be seen to what extent the decisions were made.

### RESEARCH RESULTS AND DISCUSSION

In carrying out its main tasks, the High Court of Religion of Gorontalo has a vision and mission that is in line with the vision and mission of the Supreme Court of the Republic of Indonesia which has been stated in the Strategic Plan of the High Court of Religion of Gorontalo for 2015-2019, namely: "Supporting the Realization of a Supreme Judicial Body within the Court High Religion Gorontalo". Based on these provisions, the religious court is a judicial environment under the Supreme Court as an independent judicial authority to administer justice. The Gorontalo Religious High Court is part of the religious court environment as well as the front guard. The Supreme Court has main duties as regulated in laws and other regulations.

From the results of the study, all cases received by the Gorontalo Religious High Court were in the form of lawsuits, and none of them were in the form of requests. In handling lawsuit cases that entered the Gorontalo Religious High Court in 2015-2019 the most were inheritance cases as many as 27 cases, then divorce cases as many as 21 cases, divorce cases sued 20 cases, sharia economic cases 6 cases followed by polygamy cases 4 cases, property together and grants 2 cases each, cancellation of heirs, resistance to execution and other cases 1 case each. This illustrates that there is a lot of dissatisfaction among Muslims towards the settlement of inheritance cases at the court of first instance. Then the issue of divorce became a case that was mostly handled at the Gorontalo Religious High Court. It can be seen that these three types of cases dominate the problems in society. On the other hand, cases of polygamy permits and Sharia economics must also be the focus of the judges' analysis.

There is no doubt that the main task of a judge is to adjudicate according to the law every case brought to him in the fairest way possible, not to discriminate between people based on ethnicity, religion, race and class, position and wealth (Sudirman, 2007). In essence, the task of judges to hear cases is to uphold justice and the law. Ideally the two principles are mutually integrated and complement each other. Enforcing the law is a process to achieve justice, while justice is the goal to be achieved in law enforcement itself.

As the spearhead of law enforcement, the position of a judge is very important as well as prestigious. Based on the considerations and decisions, the law is enforced and justice is given to those who are entitled. In their authority, justice seekers entrust their fate to judges, and because of that, the quality of judges is as crucial as their existence in forming and upholding legal authority.

The responsibility for producing quality decisions rests with the judges, then the court concerned as an institution. the judge's decision as a judge's crown in an artificial understanding can be interpreted as the dignity and authority of a judge can be seen from his decision. That decision describes the profile of a judge.

Based on the results of the study, it is illustrated that judges in the religious courts face challenges or in other words the obstacles to making legal discoveries in deciding a case that is submitted to him of a substantial nature:

### 1. Legal Structure

For the realization of legal protection and justice to become a reality, judges are given the authority and responsibility *ex officio* to decide more than what is requested.

- a. Disconnect something unsolicited
- b. Making legal breakthroughs and reforming Islamic law
- c. Sufficient legal basis not stated by the parties
- d. Assist in the implementation of decisions through perfect and executable orders.

In line with the affirmation of Article 24 of the 1945 Constitution, that the judiciary that can perform its function as a law enforcement institution as well as the function of law discovery, and even the creation of law within the framework of enforcing human rights is a judiciary that can exercise its power freely, independently and regardless of power intervention. other countries ( *independence of judiciary* ). Theoretically, such a judicial institution depends on the choice of the legal and judicial system.

In the family tradition of the *civil law system* , positive norms in the statutory system are seen as the most important formal source of law. In such a world of thought, the existence of written law becomes very important. The meaning of written law in its context is often limited in denotation, namely only in the form of law. As a result, the law needs to be made as complete as possible in order to be able to accommodate and anticipate any behavior that violates the law.

This judicial task is the implementation of the mission of providing fair legal services to justice seekers while maintaining the independence of the judiciary which is the first and main task of the court.

### 2. Legal Substance

Religious courts in Indonesia are a judicial environment that has its own specifications and uniqueness because it is subject to two legal systems with different sources. If viewed from the origin, the purpose for which it was formed and organized and the functions carried out by the religious court, then it is an Islamic sharia court, because it is based on ideology and is subject to Islamic sharia law. Meanwhile, if viewed from the status that was formed and administered by the state, then it is a state court, and because it is based on the constitution, it is subject to state law.

The struggle between the two legal systems gave birth to a state court in the field of Islamic sharia which in the Indonesian constitutional system was later called the Religious Court. Therefore, the most difficult task is carried out by judges in the religious court environment, because apart from being subject to state law, they must also be subject to Islamic law.

In the Law on Religious Courts, one of the conditions regulated that to be appointed as a judge is a sharia scholar or legal scholar who has knowledge of Islamic law. In the explanation of the law, it is not explained what a sharia scholar is like. But what is understood so far is that sharia scholars are people who master Islamic law. One of the obstacles for judges to carry out *ijtihad* is that it can be seen from the use of legal sources in deciding cases .

Legal considerations are the basis or basis for judges in deciding each case. In addition to containing the rationale for logical considerations, it also contains other considerations in the form of interpretation and legal construction of the panel of judges on the dispute that is being tried. The description of the considerations must be arranged in a systematic and comprehensive manner.

The quality of a decision and the level of intelligence and intellect it possesses will be reflected at the same time at stake on how the judge formulates the *ratio decidendi* in his decision. Legal reasoning and formulating legal arguments will describe the precision and intellectual level judge. Judges in formulating decisions do not only dwell on formal syllogisms, not just interpreting mechanically, but as intellectual work that requires comprehensive analysis and interpretation.

### 3. Legal Culture

The reality in the community shows that most Indonesian juries hold the view that judges are law enforcers (regulations), not law creators. This can be seen from their legalistic perspective, prioritizing legal certainty and formal procedures or through judges' decisions that do not reflect legal breakthroughs. This is in accordance with the legal system adopted in our country, the Continental European legal system or commonly referred to as the *civil law system* . In this system the task of judges is to be skilled and professional in applying existing regulations to concrete events.

Lawmakers generally believe that the laws they produce are capable of accommodating and anticipating legal violations related to the content contained in these regulations. If you follow John Austin's conception of the will theory, this belief can be justified considering that the legislators have ensured that the law is made by accommodating the full will of all stakeholders. (Austin, 1982) Therefore, it is certain that the resulting law has accommodated a sense of justice and contains guarantees of benefit if implemented. Judges who encounter concrete (empirical) events that are brought before the trial, naturally only need to apply the law. So, implementing the law by itself has guaranteed the upholding of justice and benefit.

Judges in examining, adjudicating and deciding a case, must first use written law as the basis for their decision. If the written law is not sufficient, it is not appropriate to the problem in a case, then the judge will seek and find his own law from other legal sources such as jurisprudence, doctrine, treaties, customs or unwritten law. Law No. 48 of 2009 Article 10 paragraph (1) concerning Judicial Power stipulates " *that the Court is prohibited from refusing to examine, hear, decide on a case that is submitted with no or unclear legal arguments, but is obliged to examine and*

*try it*". The provisions of this article mean that the judge as the main organ of the Court and as the executor of judicial power is obligatory for the judge to find the law in a case even though the legal provisions are absent or unclear.

The complexity of the legal problems faced requires judges to be more observant, careful, and wise in deciding a case. However, this is the reality, and it must be admitted that the method or mechanism of judges in deciding cases is different. However, different backgrounds of thought, socio-cultural factors, and even different religious truth and justice values have caused judges to have different views in deciding cases.

The results of the study show that legal positivism is still a mainstream among judges in handling cases. This paradigm gives birth to a positivistic way of thinking among judges in handling cases. In general, judges still follow the legal way of thinking positivism and it is rare to find judges who dare to break through following a non-positivistic way of thinking.

Legal positivism still dominates the way judges think in court. The implication is that judges cannot explore to find material truth in order to present a law that is fair, true and protects the interests of the community.

### DISCUSSION

The reality on the ground shows that the number of judges in the Religious High Court is not ideal, this can be seen in the results of several studies of the Religious Courts that it is illustrated that legal personnel are still minimal, while on the other hand, the number of cases continues to increase, and this can affect the quality of the judiciary. judge's decision.

Related to the task of judges as justice providers for people seeking justice, they should be able to carry out their duties professionally. The process of becoming a judge begins with an attitude, namely the belief to uphold justice in society. The role of judges' *ijtihad* is the ability to explore all efforts in determining decisions against those they face to decide cases fairly to justice-seeking communities.

Professional judges are judges who are able to decide fairly through systematic and comprehensive legal reasoning, professional judges have high capability and integrity in carrying out their duties and responsibilities in realizing justice, not only formal justice but legal justice and substantial justice through their decisions. .

### CONCLUSION

Obstacles encountered in the judge's legal discovery activities because it is caused by several factors, namely the legal structure factor related to the composition of the Judiciary and the judicial duties of the Judiciary which is the implementation of the mission of providing fair legal services to justice seekers while maintaining the independence of the judiciary which is the first and main task of the court, the legal substance factor that one of the The obstacle for judges to make discoveries is that it can be seen from the use of legal sources in deciding cases and the legal culture factor that legal positivism still dominates the way of thinking of judges in court so that it affects the legal discovery efforts made by judges. .

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