

# The Islamic Legal Maxims in Consideration of Religious Court Judge

Syaifuddin Zuhdi<sup>1\*</sup>, Rizki Widyawati<sup>2</sup>

<sup>1,2</sup>*Law Science Department, Universitas Muhammadiyah Surakarta*

<sup>\*</sup>*Corresponding author. Email: sz123@ums.ac.id*

## ABSTRACT

Court decisions are statements of the judges stated in written form and expected to generate conviction on the truth of legal cases in the proper application of legislation in cases that have been judged. A decision of legal considerations should contain main issues, juridical analysis of all facts that can be disclosed during the trial process, and include sources of law that are not written in laws and regulations, including Islamic law in fiqh. The purpose of the research is to know the legal basis of using Islamic legal maxims and to know the point of views from the judges regarding the use of Islamic legal maxim in legal considerations of Religious Court decisions. The approach method in this research uses the type of empirical juridical legal research, namely the type of sociological legal research or field research, The data sources were obtained from two religious courts, namely the Klaten religious court and the Surakarta religious court, using interview techniques to six resource persons. the data is processed using a deductive method and then analyzed with the Islamic legal principles. Article 27 of Law Number 14 of 1970 concerning the Basic Provisions of Judiciary becomes the principle for the use of Islamic legal maxim by Religious Court Judges because the judges are required to explore legal values that live and exist in the society in line with the existence of Islamic legal maxim which are unwritten sources of law that exist in fiqh books, then the decisions are made very varied and dynamic because the judges use all of legal theories that are included in the decision so that it becomes a characteristic possessed by the Religious Courts because they are not used in other courts.

**Keywords:** *Islamic legal maxim, Legal considerations, Court decisions, Qawaid fiqhiyyah*

## 1. INTRODUCTION

Divorce law is civil code, because divorce law is a part of marriage law which is part of civil law[1]. Divorce is the breaking of a marital bond between a husband and a wife with a court decision because there is no reason between the two to live in harmony as husband and wife[2].

The Religious Courts are the first level courts to investigate, decide, and resolve cases between people who are Muslim in the aspect of marriage, inheritance, testament, grants, endowments, and *sadaqah* based on Islamic law[3]. Then the relation in this case that the Religious Courts are one of the implementers of judicial power for people seeking justice, especially in marriage cases, they can only investigate disputes that occur among people who are Muslim, as regulated in Article 1 paragraph (1) and explained again in Article 65 Law No. 7 of 1989 concerning the Religious Courts[3].

The procedural law of the Religious Courts regulates the procedures for complying with material civil law through the intermediaries judges or procedures to execute before the Religious Courts and how judges react in order to the law runs as it should according to Article 54 Law No. 7 of 1989 concerning the Religious Courts[4]. One of the sources of material law within the Religious Courts is the Islamic Law Compilation, which start applied in 1991 and has produced various decisions, especially in cases of divorce, which refer to the Islamic Law Compilation.

Meanwhile, what is called a court decision is a statement by the judges that has been written and considered valid if it is enunciated in an open trial session to the public by the chief of judge as a result of the application case investigation with a legally power[5] and is expected to be able to generate conviction in the truth of legal within proper application of legislation to cases that have been tried.[6]

In a legal consideration decision should contain the main problem, a juridical analysis of all facts that can be published during the trial process that begins with a lawsuit, lawsuit respond, claim, rebuttal, and conclusions related to witness statements which are one of the evidence and application of legal provisions on case that have been stated by the parties or in other words, namely legal considerations that can be applied in that case. The reasons that become legal considerations should be contained or arranged in a reasonable (objective), systematic and interconnected. The judge can conclude whether or not a lawsuit is proven by considering one by one the *petitum* or all parts of the claim.

A judge is a person who adjudicates a case in a judicature or court considered to understand the law[7]. The freedom of judicial power is also often identified with the freedom of judges. Likewise, the court's decision is identified with the judge's decision. Therefore, the ability and judges wisdom in formulating decisions that reflect justice is the achievement of law enforcement and justice.[8] Judges must be able to overcome all obstacles and difficulties in order to achieve a fast, simple and low cost justice in accordance with Article 5 paragraph (2) of Law no. 14 of 1970, both technical and juridical.[9]

The judge's consideration is the most important part, the judge's consideration is contained in legal considerations or regarding the law which contains the reasons and basis of the decision which has legal force and contains an Article of the relevant legislation or contains sources of law that are not written in the legislation including Islamic law in *fiqh* which can be used as a basis for deepening a case based on Article 50 paragraph (1) of Law no. 48 of 2009 concerning Judicial Power on the rounds that the law regarding the case is not clear or unclear, and may not conflict with the principles and joints of the judiciary based on God Almighty[10].

Religious matters are considered not to be confused or messed up with state issues. However, in the empirical reality of a modern state, even religious matters cannot be separated from state matters. The reason is that state managers are ordinary people who are bound by various norms that live in society, including religious norms.[11] The relationship of society with a set of values and norms that are believed in the formation of law (*rechtsvinding*) will reflect the values and power of the law itself. Judges at the Religious Courts in resolving a case are not based on positive law only, but also use Islamic law by including arguments positive law and Islamic law, namely the Qur'an, Hadith, *Ijma*, and the Book of *Fiqh*. [12]

Legislation that has been made positive law by the state is a source of law for judges in deciding cases and judges may not deviate from this provision. If the judge considers that the legal regulation is not clear, he is required to interpret different articles if there is a judge who can be placed in a concrete case. If the case at hand

has no law, the judge is required to create a new law by *ijtihad* to explore the laws that live in society[6].

The Judges in making decisions based on *fiqhiyah* rules, because religious courts are the domain of people who are Muslim, and if a case is not regulated in the Qur'an and Hadith then it is regulated in *fiqhiyah* rules, so commonly the judges in deciding divorce cases using *fiqhiyah* rules in the judge's consideration[13].

The rules of *fiqh* according to Ali Ahmad al-Nadwi [14] are the provisions that become legal basis in general rules, then from these rules it can be known the law regarding something that is under its scope. The rules of *fiqh* are rules that are inseparable from Islamic law and part of the study of *fiqh* because they have an overall important meaning. Without an understanding of the rules of *fiqh*, one's understanding of Islamic law does not show insightful[15].

The legal maxims of Islamic Jurisprudence (*al-Qawa'id al-Fiqhiyyah*) which are treated by many scholars as the *maqasid* literature, are statements of principles that are derived from the detailed reading of the rules of *fiqh* (Islamic jurisprudence) on various themes. These detailed expositions enabled the jurists, at a later stage of development, to reduce them into abstract statements of principles[16].

Based on this explanation, it can be said that there is a relationship between legal considerations and Islamic law in a decision on the the Religious Courts, but in its application the existence of Islamic legal maxim is sometimes not used as a legal argument in legal considerations by Religious Court Judges.

The Religious Court of Klaten, The Religious Court of Surakarta, and the Religious Court of Karanganyar have decided nearly 2,000 religious cases involving divorce. Based on the data obtained by the author, it is known that 10% of the verdict in the Klaten Religious Court Class IB, Klaten Surakarta Religious Court, and Karanganyar Religious Court in their legal considerations do not use Islamic legal maxim, while the rest in these verdict use Islamic legal maxim in legal considerations by the panel of judges.

**Table 1.** The Verdict of Surakarta Religious Court in 2020[17]

Month	Using the Islamic Legal Maxim	not using the Islamic Legal Maxim	Total Verdict
October	49	26	75
November	41	16	57
December	44	15	59

Based on the data that the author got above, there are differences in the use of Islamic legal maxim on the verdict of the Religious Courts, for example the verdict number 1473/Pdt.G/2019/PA.Ska on the judge's consideration does not use Islamic legal maxim related to the divorce case, but it is different from the verdict number 1052/Pdt.G/2019/PA.Ska where the judge uses Shari'a instructions in the form of *Qaidah Fiqhiyah* and Allah's instructions in the Qur'an letter Al-Baqarah verse 227 as legal considerations for divorce cases which is handled by that Religious Courts. From this, we can see that in the same case, were found different legal considerations by the judges of the Religious Courts, Some judicial verdict in their law consideration there are those who use the rules of Islamic law but also there are who do not use the rules of Islamic law as a legal argument in legal considerations of a case.

The existence of that thing makes the author want to directly research the reasons or legal basis of judges using the Islamic Legal Maxims in legal considerations, where in the Constitution itself it is not clearly stated that the legal basis for judges can decide a case using the fiqhiyah rules. Then the author also wants to know the views of the Religious Court Judges regarding the use of Islamic arguments in the form of Islamic legal maxim in legal considerations that contained in a case verdict.

## 2. METHOD

The research uses an empirical juridical research approach because it wants to know about the basics of using Islamic legal maxim in the legal considerations of the judges in making the Religious Courts verdict and the views of the judges regarding the use of Islamic legal maxim in legal considerations of Religious Court verdict. The data used are primary data obtained from interviews with religious court judges, secondary data obtained from related literatures about the Islamic legal maxim and the Consideration of Religious Court

## 3. RESULT AND DISCUSSION

### 3.1 The Basis of The Application of Islamic Legal Maxim In The Legal Considerations Of The Panel Of Judges

The verdict of the judges on a case is a crown, because on the verdict contains the statements of the judges which are stated in written form. The court verdict has three powers, namely contract power, evidentiary power, and executorial power[18], In that verdict, the judges should pay attention to certainty (*rechtsecherheit*), justice (*gerechtigheit*), and expediency (*zwachmatigheit*) because these are very fundamental and close to court verdict. Therefore, the judges should be professional in deciding a case, where the decision must contain legal certainty, the art of language (beauty), justice, and the

benefit of the litigants so that the resulted verdict will be useful, especially for justice seekers.

When deciding a case, the judges will find the law (*rechtsvinding*), apply the law (*rechtstoepassing*), and create law (*rechtsschepping judge made law*). Bismar argues that Islamic law is a very close connection between law and morality (morals), so closely that the rules of decency were made for the first time in the history of law consciously they are equalized its duty with legal rules, then refer to the pattern of thinking about law that has long been used among the founders of school in Islamic law called *al-ahkam al-khamsa*[6] Through the definition of *al-ahkam al-khamsa* referred to as five types of rules, where the law originates and arises from society is the law that is born by decency in society. Therefore, if there is a legal vacuum (regulation) or regulations that do not reflect religious and moral values, so the judge must be able to explore religious values and moral values that live in society to be used as the base for his decision.

In legal considerations, the judges can use unwritten legal sources such as the Compilation of Islamic Law (KHI). The methodological base of KHI in the marriage aspect is a linguistic analysis of the existing texts, then *Al-Qiyas* and a new method based on *maslahah*[19]. The using of language analysis used by KHI does not only use linguistic rules (*al-qawaa'id al lughawiyyah*) an sich, but is also accompanied by other considerations and arguments[20].

In making a verdict, the judges have the freedom to make a verdict, the freedom of the judge does not mean that a judge can take an action arbitrarily against a case he is handling, but the freedom meant that the decision of the judges can see various written and unwritten regulations to be used as a decision. as a legal consideration or in other words that the freedom of judges to decide cases must refer to applicable laws or regulations and limited by legal and moral signs, so that in principle the freedom of judges cannot legalize all actions. So a judge in carrying out his duties through judicial power is not bound by anything and must not be pressured by anyone, But free to make an award[21].

Based on the interviews results that the authors get, the use of Islamic legal maxim in the judge's consideration does not have a specific basis, because if its use is specifically regulated, the judge is no longer free. In accordance with their duties, the judges are free to judge and free to decide cases, therefore no official benchmark is made.

Seeing from the above opinion that the use of Islamic legal maxim in legal considerations is not bound by a special regulation contained in the law, but the judge has the freedom to use other sources of law in the verdict as long as it does not violate the applicable procedural law, this is stated in Article 39 paragraph (4) of Law No. 48 of 2009. Article 24 of 1945 Constitution becomes the

juridical and philosophical basic which states that the judicial power as an independent institution and free from all forms of interference from outside, from the article states that judicial power is the power of an independent state to administer justice to enforce the law and justice based on Pancasila and the 1945 Constitution for the constitutional state implementation of the Indonesia Republic.

Although there is no legislation or a rule that explicitly regulates the use of Islamic legal maxim in legal considerations, but by notice at Article 27 of Law Number 14 of 1970 and Article 50 paragraph (1) of Law Number 48 of 2009 concerning Judicial Powers, that article has a relationship with the use of Islamic legal maxim, although it is not clearly stated.

Article 27 of Law Number 14 of 1970 states that the judges should understand, follow, and explore the legal values that live and exist in society based on positive law but also unwritten law contained in laws and regulations, including the rules of Islamic law contained in *fiqh*. This is in line with the rules of Islamic law which is a source of law not written in *fiqh* books that originate and arise from the society and become a source of law, especially for people who are Muslim. From this understanding it is also related to Article 50 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, that the article states that the judge's decision can be sourced from unwritten legal sources used by judges to be the basis for adjudicating a case that is being handled.

Therefore, the use of law rules aimed as a completeness of the legal arguments that described in the verdict to be more actual, concrete, perfect and can be accounted for as a law enforcer because the existence of Islamic legal maxim is a supporting factor or strengthens the legal arguments against a judge's verdict and awareness to grow an attitude solely seeking the pleasure of Allah SWT, because this is the highest and most perfect morals in human life[22] That is the importance of Islamic legal maxim which are included in the legal considerations of a judge and used to decide various cases in the Religious Courts.

### **3.2 The views of the Judges regarding the use of Islamic legal maxim in legal considerations**

The use of Islamic legal maxim in legal considerations in the decisions of the Religious Courts has so far been very varied and dynamic. The use of Islamic legal maxim applied by the judges to court decisions, especially on legal considerations, has been appreciated by the Supreme Court because in the same way the judges use other rules in decisions, such as in joint property, judges use the legal rules that have been applied in the Civil Code. As stated by one of judge in Religious Court of Klaten

*“Mahkamah Agung sangat mengapresiasi penggunaan kaidah-kaidah hukum islam, hal ini sebagai bentuk intepretasi dan penggunaan nalar dari hakim, sehingga tidak hanya berdasarkan sumber-sumber formil saja”[23]*

In the use of Islamic legal maxim used by the Judges in the verdict of the Religious Courts, it becomes a characteristic inherent in the verdict of the Religious Courts where the legal considerations contain postulates taken based on the Qur'an, Hadith, or the opinions of scholars in the form of verses of the Qur'an 'an or hadith applied by the judges in their legal considerations. This is related to one of Islamic personality principles that applies on the Religious Courts in accepting cases, where only Muslim people are allowed to settle cases in the Religious Courts.

Islamic law is the basis for the judges to decide a case using the Islamic legal maxim because the Qur'an, Hadith, *Ijma*, then *Qiyas* are the basic of Islamic legal that should be guided in making verdict. So with regard to Islamic legal it is very necessary because we as Muslims basically have to refer to Islamic law, especially the Qur'an and Hadith, if the law has not been found using *Ijma* and *Qiyas*, that is where Islamic legal maxim, especially those related to *fiqh* are included in the legal considerations.

One of the judge in religious court said :

*“Penggunaan kaidah hukum Islam yang digunakan hakim menjadi ciri khasnya putusan Pengadilan Agama yang mana ada dalil dalil yang diambil dari Al Qur'an, Hadist, ataupun pendapat para ulama karena Pengadilan Agama menerapkan hukum Islam, jadi hal tersebut yang membedakan.”[24]*

In principle, the Islamic legal maxim applies to the Islamic Law Compilation. In making verdict, the judges use applicable laws, for example Law No. 1 of 1974 concerning Marriage and Government Regulation No. 9 of 1975 concerning Marriage where all of these are written laws that are officially made, but on the other hand the judges also use the Islamic Law Compilation. The Islamic Law Compilation is a codification of Islamic law which has been codified by Indonesian scholars or has been put together in the form of a compilation. Then it is allowed to use both or use only one on the grounds that if the judge considers that using just one of them is representative, then there is no need to add more because the judge sees that in making a verdict it is quite short but clear and not long-winded or not long.

The Islamic legal maxim in the form of verses from the Qur'an or hadith that are used by judges in their legal considerations besides their existence are characteristics inherent in the Religious Courts. So, one of the theories in the Religious Courts is that in accepting cases using an Islamic personality, only people who are Muslim are allowed to settle cases in the Religious Courts.

The application of Islamic legal maxims, beside instructions from the Supreme Court, its existence in the verdict of the Religious Courts is a characteristic that is not found in other verdict of judicial circles, because the use of texts by citing the arguments of *fiqh* beside to strengthening the arguments of the judges, it can also add insight to increase human resources of the judges. Decisions as a court product should be high quality and in accordance with the valid procedural law, so that justice seekers will know that verdict is made beside concentrate on procedural law also strengthened by *syar'i* arguments that touch the legal values that live in society.

The use of Islamic legal maxims was appreciated by the Supreme Court that the elder of the Religious Courts, Dr. H. Syamsuhadi Irsyad, SH M.Hum [25] hopes that the judges of the Religious Courts in making verdict beside using the Law also added verses from the Qur'an or hadith in their legal considerations. From this we can see that what has been ordered by the Supreme Court is true where the Supreme Court also orders to be used the verses of the Qur'an or hadith in legal considerations.

It is strengthened by the issuance of a Notification Letter by the Religious Courts Bureau of the Religion Ministry of Indonesia Republic in 1958 with No. B/1/753 dated February 18, 1998, in which the notification letter stated that when investigating and deciding a case to obtain legal unity, it is recommended that judges of the Religious Courts/*Shari'ah* Courts use various books of *fiqh*.

Based on it, the judges will continue to preserve Islamic law that has existed for a long time by incorporating Islamic legal maxims as the legal basic for the judge's consideration to the case which is handling in order to become a perfect legal union on the resulting verdict. It is evidenced by the data obtained by the author above. that the use of legal rules is still used by the judges in legal considerations in making Religious Court Verdict. Religious Court verdict that often do not use Islamic legal maxim, namely *verstek* verdict and marriage dispensations, it is due to there is no opponent for the judges to add legal considerations.

Ali Ahmad al-Nadwi argues that the rules of jurisprudence have functions that are very important in the development of the law of Islam, including in its Islamic Family Law.[14] Despite this , the scholars of different opinion about the possible absence of The Islamic Legal Maxims (*qawâ'id fiqhiyyah*) be used as evidence in making laws on issues that arise as a result dinamisitas society . Imam al- Juwayni argues that The Islamic Legal Maxims (*qawâ'id fiqhiyyah*) can be used as a proof of independent law,[14] namely by making it a stand- alone legal argument , without using two main arguments , namely the Qur'an and Sunnah. The opinion is based on the aspect of backing . That *qawa'id fiqhiyyah* is a way to simplify the dive paragraph al- Quran and al- Sunnah. The reason why , with the understanding and

mastering of the rules means have to understand and master a few verses and the Sunnah that is included in it.[26] With so when postulated by one The Islamic Legal Maxims (*qawâ'id fiqhiyyah*) means has been postulated by some verses of the Koran and the Sunnah of the Prophet Muhammad which is included in the rules of the Islamic Law . This opinion is rejected by Imam al- Hamawi by saying that *qawâ'id fiqhiyyah* can not be used as an independent evidence because each rule is in general, *aghlabiyyah* or *aktsariyyah* (in general) so that each rule has exceptions ( *al- mustatsnayât* ) [27].

Although there is controversy in among scholars about the possible absence of postulated to The Islamic Legal Maxims (*qawâ'id fiqhiyyah*) , but not be denied that *qawa'id fiqhiyyah* plays great in helping *jurists* , *Mufti* , and *Qadhi* in solving the question of law in society.

Because it works as an integrator of sporadic particulars together with their meanings, the existence of legal maxims, whether opinion or actuality, emerged as a result of particulars. The concept, on the other hand, must exist before the particulars because it will serve as the foundation for the jurist to establish the rules. Its viewpoint is identical to the Qur'an's towards the Sunnah, with the holy Quran's content being more powerful than its manifestation [28].

The principles as a forerunner to the *furu'* (details) imply that the details pre-existed or influenced the development of *usul al-fiqh*. Its position is similar to that of a child to a parent, a fruit to a tree, and a plant to a seed. On the other hand legal maxims are concerned with jurisprudential issues only. By comprehending the various – problems in Islamic jurisprudence principles, the *mujtahid* can get at it. The rules are not maxims when the jurists apply them to specific rules. However, they are considered maxims if they convey the rules using general statements that include many specific rules [29].

The used of Islamic Law Compilation as a material source in the Religious Courts is one source of the implementation and application of Islamic law in the Religious Courts. The compilation was made based on Presidential Instructions with the purpose to make it easier for Religious Court judges to find unwritten legal support for strengthening the basis for consideration of the cases decisions which is handled, considering there is no special procedural law that used in Religious Courts because until now Religious Courts are still using civil procedural law.

The existence of KHI has created a legal standard, namely with a standard legal norms, basic, both for the Religious Courts and for the Muslim society. The use of the Islamic Law Compilation makes it very easy for Religious Court judges to find legal sources to strengthen the settlement of ordinary cases to certain cases that are not clearly regulated in civil procedural law.

The Islamic Law Compilation is expected to become a material law for religious judges to obtain legal certainty. By using the Islamic Law Compilation as the material law of the Religious Courts, it will minimize uncertain decisions, therefore this should be avoided, then the use of KHI can provide a unity legal basis and uniformity of legal views in realizing law enforcement certainty. Based on that things, the existence of the Islamic Law Compilation should be realized into State Law by optimizing the role of the Religious Court judges because the role of a judge is very influential because only judges have the authority to make or create laws through court decisions.

#### 4. CONCLUSION

There is no legal basic binding on the use of Islamic legal maxim in the legal considerations of the judges in deciding a case, but from the above discussion it can be concluded or can be related to Article 27 of Law Number 14 of 1970 concerning Basic Provisions of the Judiciary and Article 50 paragraph (1) Law Number 48 of 2009 concerning Judicial Power. The use of Islamic legal maxim in the decisions of the Religious Courts is a complement that strengthens legal considerations, even its use becomes a hallmark of the Religious Courts because they are not used in other courts

#### AUTHORS' CONTRIBUTIONS

Syaifuddin Zuhdi and Rizki Widyawati have made substantial contributions to the conception, acquisition of data, and analysis of data. And Syaifuddin Zuhdi made the final touch for publishing this article

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