

## Historical Analysis of the Influence of Pre-Islamic Traditions in Jurisprudence and the Importance of Recontextualization

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### Abstract

This research attempts to provide readers with a contextual understanding of jurisprudence (*fiqh*) to encourage flexible and dynamic thinking. This study uses library research as its research methodology. The results indicated that Islam has theological significance to the content of older works, including the Torah, the Injil, and Zabur. The backdrop context of the birth of Islam is influenced significantly by the Arab Jahiliyah period. It is of great importance to Jewish and Christian theology. Despite the presence of Arab Jahiliyah, the teachings of Islam align with the traditions and culture of Arab Jahiliyah. Jurisprudence is intricately linked to the historical and socio-political context in which it was developed. The recontextualization of jurisprudence in today's period is necessary to ensure the sustainability of Islamic teachings. This research's conclusions distinguish it from others by focusing on issues connected to fundamental and historical assumptions about Islamic teachings.

### Abstrak

Penelitian ini secara spesifik bertujuan untuk memberikan pemahaman kepada para pembaca agar dapat memahami fikih secara kontekstual, sehingga dapat berfikir luwes dan dinamis. Adapun metodologi penelitian yang digunakan di dalam penelitian ini adalah *library research*. Hasil penelitian menunjukkan bahwa Islam memiliki relevansi ajaran dengan

apa yang terdapat di dalam kitab-kitab terdahulunya, seperti Taurat, Injil dan Zabur. Pun demikian halnya dengan konteks latar belakang kemunculan Islam, di mana Arab Jahiliyah dalam hal ini memiliki peran penting dalam Sejarah eksistensi agama Islam. Sehingga dapat disampaikan bahwa secara esensial memiliki relevansi yang cukup signifikan dengan ajaran-ajaran Yahudi dan Nasrani. Pun demikian halnya dengan eksistensi Arab Jahiliyah, bahwa ajaran yang terdapat di dalam Islam memiliki korelasi dengan tradisi dan budaya Arab Jahiliyah. Fikih, pada praktiknya erat sekali kaitannya dengan latar belakang historis dan sosial politik yang hidup pada masa di mana fikih itu dirumuskan. Dengan demikian, apa yang dimaksudkan dengan rekontekstualisasi fikih pada era dewasa ini menurut hemat kami merupakan sesuatu yang dibutuhkan agar ajaran Islam tetap lestari. Hasil penelitian tersebut sekaligus menjadi pembeda dengan hasil penelitian lainnya, di mana dalam penelitian ini kami memfokuskan pada persoalan terkait adanya asumsi terhadap ajaran Islam secara fundamental dan historitas.

**Keywords:** Islamic jurisprudence, history, recontextualization, pre-Islamic traditions.

## Introduction

Islam, as the final and complete religion of the teachings of Tawhid revealed by God, is a basic assumption that must be believed by anyone who believes in the essence of the teachings of Tawhid. The Islam that we experience today has a long history that is quite interesting to know, both from a socio-political, socio-economic, and socio-religious perspective and any other perspective. In this case, *fiqh* acts as one of the normative Islamic teachings, which is significant and urgent in terms of orderly living in Muslim communities and the world. As we all know, *fiqh* is the result of analysis by *mujtahids* and *ulama*, or we could also call it a product of Islamic law, which continues to exist and is

realized in the lives of Muslim communities until today and until the end of their lives.

From a historical point of view, *fiqh* cannot be separated from the traditions and culture that developed in Saudi Arabia at that time. It is closely related to the place where Allah revealed the Koran to Muhammad, namely in Mecca, Saudi Arabia. Apart from that, if we fully understand the meaning of the Al-Qur'ân and al-Hadith, we will realize that Islamic teachings through the Al-Qur'ân and al-Hadith often pay attention to, adapt, and adopt existing life before Islam came, namely the traditions and culture that lived in the Jahiliyyah Society (pre-Islamic Arab Society).<sup>1</sup>

Therefore, as we have mentioned above, Islam is God's final mission in teaching humanity the importance of monotheism and realizing life based on the will of God, the creator of this universe. So what is contained in Islamic teachings through the Qur'ân and al-Hadith is God's effort to straighten out patterns of life that are considered deviant from God's will, God's efforts to renew the teachings of Tauhid which are no longer relevant, God's efforts to guiding humanity to reach eternal life safely based on God's will, namely *shirât al-mustaqîm*.

The existence of *fiqh* is the result of the codification of Islamic law, which is packaged systematically and includes various types of discussion relating to all aspects needed in human life so that they can live in an orderly manner according to God's will. However, as time goes by, the complexity of studies in *fiqh* has become increasingly visible and cannot be denied. In the past, during the time of the Prophet Muhammad's life, the companions of the Prophet Muhammad benefited from his presence during their lives. They could ask the Prophet Muhammad directly about problems they did not understand and/or wanted to know about a sure thing. Even though they were not together with the Prophet Muhammad—such as when Islam began to spread widely in parts of the Arabian Peninsula—they still had the opportunity to consult on many things with the Prophet

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<sup>1</sup> Suko Susilo, "Kontribusi Perempuan dalam Pembaharuan Sistem Sosial di Masa Nabi Muhammad Perspektif Anthony Giddens", *Asketik*, No. 1 (2023), 48.

Muhammad. It was also the case during the *Khulafâ' al-Râsyidîn* period when the Prophet Muhammad was already nothing. They could easily handle the complexities of life at that time because they had an actual track record of the life patterns that the Prophet Muhammad had taught them, even though many new problems had never occurred before or had not been taught by the Prophet Muhammad while he lived with them. However, the closeness of time and the complexity of the problems that emerged at that time were still relative.<sup>2</sup> Until finally, Islam spread widely to all corners of the world, including Indonesia. Today, we find extraordinary complexity in existing *Fiqh* studies.<sup>3</sup>

Apart from our description of history, we must realize how important it is to consider socio-cultural conditions in formulating laws, in this case, *fiqh*. We briefly touched on several *Fiqh* issues that are relevant to our meaning. The essence of limiting polygamy to four wives. It must be acknowledged that these restrictions are a tangible manifestation of God's efforts to regulate marriage patterns that existed during the life of the Prophet Muhammad and perhaps originated from previous life patterns (the pre-Islamic period/Jahiliyyah period), where there were no restrictions on the number of wives who could be married, and collected (Polygamy).<sup>4</sup> Even the Prophet himself, during his lifetime, had more than four women as wives.<sup>5</sup> Then Allah emphasized that there is a maximum limit for a man's ability to carry out polygamy, namely a maximum of four wives, as stated in Q.S. Al-Nisâ' [4]: 3. Second, during the time of the Prophet Muhammad's companions they often had discussions with Jews who had converted to Islam, thus based on the assumption that there was a command from Allah regarding the ability to do this,

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<sup>2</sup> Ahmad Sopian, dkk., "Pembaruan Prinsip Moderasi Islam dalam Era Globalisasi dalam Dakwah Islam", *EDUCATE*, No. 02 (2023), 127.

<sup>3</sup> Ongky Alexander, dkk., "Konsep Rahn (Gadai) dalam Islam dan Peraturan Perundang-undangan Indonesia Kajian Fikih Muamalah", *HUTANASYAH*, No. 1 (Agustus, 2023), 42.

<sup>4</sup> Yuli Imawan, dkk., "Mentoring Poligami Berbayar Coach Hafidin dalam Perspektif Islam", *TAJDID*, No. 02 (Oktober, 2023), 32.

<sup>5</sup> Muhammad bin Faris al-Jamil, *Azwâj al-Nabi Muhammad*, Cet. 2 (Beirut-Lebanon: Jadawal, 2016), 10.

as stated in Q.S. Al-Nahl [16]: 43. Third, Imam al-Syâfi'I has two models of *fiqh*, namely Qaul Jadîd and Qaul Qadîm, where Qaul Jadîd was the result of al-Syâfi'I's revision when he was in Egypt based on several opinions he had stated while in Baghdad (*qaul qadim*).<sup>6</sup>

Thus, in general, we can say that from what we have described, as exemplified by the Prophet Muhammad, his companions, and the *ulama* who exist today in formulating Islamic legal products, always consider the existence of the text and the context. The understanding from these assumptions is that Islamic teachings have a significant connection with the living traditions of pre-Islamic Arab society (Arab Jahiliyyah). Therefore, efforts to contextualize Islamic law related to efforts to recontextualize Islamic law are something that must be done, especially for parties who have an essential role in the sustainability of Islamic Law that is expected by the Muslim community at large, namely Islamic law that is just, flexible and relevant to current developments.

### Concept of Pre-Islamic Tradition

The term 'pre-Islamic tradition' consists of three things that have continuity between one another: 'tradition,' the phrase 'pre-Islamic,' and the word 'Islam.' The word tradition linguistically means "customs passed down from generation to generation (from ancestors) which are still carried out in society; assessment or assumption that existing methods are the best and correct. Meanwhile, in terms of terminology, the word tradition means a certain habit that exists in human life, where this habit continues to exist from generation to generation and has become ingrained in each individual realizing this tradition so that based on such assumptions, it makes a particular tradition is difficult to eradicate from each and certain group."<sup>7</sup>

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<sup>6</sup> Herdiansyah, "Qaul Qadim dan Qaul Jadid asy-Syafi'I (Tinjauan Sejarah dan Sosiologi Hukum Islam)", *Jurnal Indragiri*, No. 1 (Januari, 2023), 46.

<sup>7</sup> Azzam Nabil Hibrizi dan Syafika Saffanah, "Peran Komunikasi Antarpribadi dan Komunikasi Organisasi dalam Menjaga Tradisi Ruwat Bumi di Desa

The word Islam linguistically comes from Arabic, namely إسلام - يسلم - أسلم, which can be interpreted as "surrender; submit (أسلمت); receive (يسلم - سلم); regardless of danger; congratulations (يسلم - سلم); obey; surrender (أسلم)." Meanwhile, in terms of terminology, it means "the religion taught by the Prophet Muhammad. which is guided by the holy book Al-Qur'an which was revealed to the world through God's revelation.

Meanwhile, the term pre-Islamic can thus be interpreted as "the period before Islam came". This period is also known as the Jahiliyyah period, where social order, culture, and literacy were not prioritized. When the Arab people are associated with this term, it shows those who are still considered peripheral in terms of tradition and culture.<sup>8</sup> However, if the term pre-Islamic is indicated for any period before Islam came, then it is related to religions other than Islam, such as Christianity and Judaism, where both religions were predecessors of Islam itself.<sup>9</sup> Thus, what is meant by the term pre-Islamic traditions are the customs and habits of life that developed and were established in the period before Islam came, especially in this case relating to the Jahiliyyah Arabs and/or relating to adherents of the Celestial religion and other religions.

#### Concept of Jurisprudence

The term *fiqh* has become well known in the realm of Islamic law in Indonesia. It is because *fiqh* in the Indonesian context results from legal formulations related to Islamic law. More broadly, the scope of *fiqh* not only discusses matters about Islam and all the problems that Muslims may face. Thus, *fiqh* can be understood as legal formulations from expert studies of their sources, namely the Qur'an and the Sunnah. This study intends to produce a legal formulation that can be used as a basic basis

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Karang Sari, Kecamatan Karanganyar, Kabupaten Pekalongan", *Jurnal Komunikasi dan Budaya*, No. 02 (Desember 2023), 116.

<sup>8</sup> Lintang Tranggono dan Nurwahidin, "Analisis Perkembangan Historiografi Timur Tengah Dan Islam: Pra Islam, Islam Klasik, & Modern", *Syntax Literate: Jurnal Ilmiah Indonesia*, No. 05 (Mei, 2023), 3869.

<sup>9</sup> Mukhlisin Purnomo, *Sejarah Kitab-Kitab Suci*, (Yogyakarta: Forum, 2022), 215.

for every Muslim to live life in this world according to what has been outlined by the Shari'ah through the Prophet Muhammad, which was then continued by friends and scholars afterward.

However, as an opening to the study of jurisprudence described in this paper, we consider it necessary first to explain the matters correlated with jurisprudence before discussing the details of the discussion contained in jurisprudence. The word *fiqh* is the result of absorption from Arabic, which has officially become standard Indonesian, where the word comes from the word (الفقه), which means "science; understanding of something (الفهم).<sup>10</sup> Meanwhile, in terms of terminology, the word *fiqh* means "Knowledge of the laws of the Shari'ah (Islam) which is practical (practice), where this knowledge is obtained from the results of understanding (istinbat) of its detailed postulates."<sup>11</sup>

Thus, it can be understood that there are several derivative terms resulting from what the author has described in this definition, namely legal reviewers (*mujtahid*), essential references in the study (naş), legal enactment as a result of these efforts (mukhattâb) which then has the status of a person. Who are subject to the legal burden of carrying and complying with it (mukallâf).

A *mujtahid* is a person who researches an issue of Islamic law. This research refers directly to its sources, namely the Al-Qur'ân and al-Sunnah. Therefore, several conditions must be fulfilled by an Islamic law researcher for him to be worthy of being called a mujtahid. However, for the context of today's era, because many *ulama* have preceded the *ulama* that exist in the current era with a lot of study results that have been formulated by them, in terms of legal exploration, the *ulama* of the current era (contemporary *ulama*) have several additional references that can be used as a primary basis in the process of studying an Islamic legal issue,

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<sup>10</sup> Wahbah al-Zuhaili, *Al-Fiqh al-Islâmiy wa Adillatuh*, Jilid 1, Cet. 2 (Damaskus: Dâr al-Fikr, 1985), 15.

<sup>11</sup> Ibid, 16.

namely al-Qur'ân, al-Sunnah, al-Ijma', al-Qiyâs, and several other propositions.<sup>12</sup>

Naş is the most critical legal reference source in studying an Islamic legal issue (*fiqh*), where the text consists of the Qur'an and al-Sunnah. Themukallâf is a person who has reached puberty and has perfect intelligence (*tamyîz*). By fulfilling these conditions (*baligh* and *tamyîz*) a person is subject to the burden of implementing Islamic law formulated in *fiqh*. In other words, this person is the target of the implementation of an Islamic law imposed by God on his believing servants.

In practice, the discussions contained in *fiqh* are very complex, including matters relating to worship (*'ubudiyah*), socio-economics (*mu'âmalah*), civil law (*munâkahah*), social-politics (*siyâsah*), and criminal law (*jinâyah*). Likewise, with the postulates which are used as a reference source by the *ulama* in formulating laws which will later be called *fiqh*, there are several types of significant classifications, where the classification is closely related to the possibility of differences of opinion (*ikhtilâf*) or agreement—the opinion of the *ulama* (*ittifâq*) in understanding these arguments.

### Recontextualization Concept

The use of the term recontextualization is closely related to context, which in language means a situation related to an event. Thus, recontextualization can be interpreted as an effort to re-examine a particular problem and then adapt it to its context (contextualization). The application of the concept of recontextualization, in this case, has significant relevance to efforts to reinterpret established religious teaching, where this is done by looking at and paying attention to the context of the

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<sup>12</sup> Muhammad Asadurrohman, “Hukum Waris Beda Agama (Studi Metode Istinbath Hukum Abdul ‘Aziz bin Baz, Abdullah Ahmed an-Na’im, dan Yusuf al-Qardhawi)”, *SKRIPSI*, (Tulungagung: UIN Sayyid Rahmatullah Tulungagung, 2019), 52.

situation at the time the learning was revealed and then comparing it with the reality of life that is currently going on in adulthood. Recontextualization will produce a legal conclusion that is contextual, not doctrinal.<sup>13</sup>

### Prophet Muhammad and Arab Society

Religion is a teaching. Religion in Arabic is known as "*al-dîn*," which means belief, obedience, and revenge. Meanwhile, philosophy, which is attributed to Sanskrit, consists of two words, "a" and "gama." A, means 'no', and gama means 'chaotic.' The definition of religion is "the path or method taken to seek God's pleasure. In religion, something is considered powerful, namely God, the *Dhat*, who owns everything that exists and controls all of nature and its contents."<sup>14</sup> Furthermore, it seems that religion in the religious studies discourse is a discussion that requires many pages of paper to fill in, but at least a small amount of this long discussion can be taken, which would include a general definition. That religion is defined as an *ilâhiyyah* revelation conveyed by a Prophet and recorded in a holy book, a legal system for people who believe in it, congregational worship, and belief in the Almighty God (Allah).<sup>15</sup>

Islam is a complete religion God reveals to humanity through the Prophet Muhammad, His messenger. In this case, the Qur'an is a miracle that contains guidance and matters relating to God's guidance for humans. The Prophet Muhammad Al-Qur'ân can be conveyed and is eternal to this day. The Al-Qur'ân as a source of pure law from God is, in many ways, something abstract, meaning that support (tool) is still needed so that humans can understand the content of the verses of the Al-Qur'an properly and correctly. The Prophet Muhammad is God's

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<sup>13</sup> Meiselina Irmayanti dan Abdul MuktaDir, "Hermeneutika Paul Ricoeur dan Penerapannya dalam Konteks Indonesia", dalam *Komunikasi dan Kajian Media*, *Komunikasi-dan-Kajian-Media.pdf* (researchgate.net), 42-43.

<sup>14</sup> A, Susanto, *Filsafat Ilmu: Suatu Kajian Dalam Dimensi Ontologis, Epistemologis, dan Aksiologis*, Cet. 1 (Jakarta: Bumi Aksara, 2011), 125.

<sup>15</sup> Samsul Maarif, *Studi Agama di Indonesia; Refleksi Pengalaman*, Edisi Revisi, (Yogyakarta: CRCS, 2016), 15.

trusted assistant. It has an essential role in explaining what needs to be clarified regarding the understanding of the Quran, which is still felt to require further knowledge so that it can be said to be following actual understanding. During the time of the Companions, when the Prophet Muhammad was still around their lives, every problem that arose was always submitted to the Prophet Muhammad to gain lessons and understanding so that a problem could be solved. However, after the death of the Prophet Muhammad, every problem arises because life is increasingly moving and developing, changes in people and living conditions, and it is even possible for a problem to become more complex and complicated. In situations like this, the Al-Qur'ân and al-Sunnah are the main pillars used as references to determine laws for issues that arise. However, if an answer cannot be found from both of them, then *ijtihâd* is an alternative used to fulfill the need to determine the law for each problem.<sup>16</sup>

Thus, al-Qur'ân, al-Sunnah, the companions, and *ulama* have an important role in fulfilling the need for legal determination on problems that are increasingly developing and emerging. It is hoped that by using it as a reference in establishing law, it can produce a law that is not lame because it is not based on them and also does not produce a law that is blind because it does not position itself and does not look in detail at the essential meanings contained in the classic text. In other words, referring to the Al-Qur'ân and al-Sunnah, the role of the Companions and the scholars who follow them will produce a legal conclusion that is perfect and following God's will.

In reality, Islam has a long history before it came to us today, and as we have all experienced, the process of spreading it was carried out by the Prophet Muhammad through covert means until finally, it was openly disseminated.<sup>17</sup> More than that, in the world of civilization, we are familiar with the term "history",

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<sup>16</sup> Totok Jumantoro dan Samsul Munir Amin, *Kamus Ilmu Ushul Fikih*, (Jakarta: Amzah, t.th.), 114.

<sup>17</sup> Akhirudin and Ahmad Syaefuddin, "Model Dakwah dalam Polarisasi Komunitas (Kajian Sejarah Dakwah Rasulullah Saw.)", *Maslahah*, No. 02 (Oktober, 2023), 25.

which is the embodiment of concrete evidence spread through written documents about the process of life and everything related to humans and the process of spreading Islam itself. In many pieces of literature, history is explained as a field of science that needs to be studied to inform people today about the realities of past life.<sup>18</sup> It is not a waste of work if people today still study matters related to history. It is hoped that this can become a mirror, a lesson, a benchmark for life, and if possible, it can even be used as a basis for improving life that is felt to be less than good and carrying out a profound analysis of the realities of past life, to become a substantial building with a solid foundation.

Looking at the history of the revelation of the Qur'an, many verses touch on certain issues, such as one of the methods used by God to straighten out the behavior of people's lives at that time, where the term Jahiliyyah was still inherent. It is where the role of the Qur'an through the Prophet Muhammad tries to overcome acts of violence and at the same time, uphold the values of justice. However, nowadays, it is not uncommon to find neglect of justice, which is one of the important roles in the existence of the Qur'an itself, they prioritize spiritual aspects rather than social ones. In this case Zuhairi Misrawi<sup>19</sup> believes that Muslims today should be more intense and focused in discussing matters related to justice, they should be able to make justice the main paradigm in social and state life. Therefore, in the realm of jurisprudence, what should be realized is the spirit of justice which is the essential value of the text, not the text itself immediately.

Let's try to look back, and history records that the Qur'an is essentially considered to have a tendency to defend women. It was, of course, motivated by the conditions of Arab society at that time, where women were truly in their lowest position, then the Qur'an gradually tried to restore the rights of oppressed

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<sup>18</sup> M. Nasron, dkk., "Sejarah Peradaban Islam sebagai Ilmu Pengetahuan", *Ta'rim*, No. 2 (Mei, 2023), 37.

<sup>19</sup> Zuhairi Misrawi, "Nuzulul Qur'an dan Keadilan Sosial", dalam Sayed Mahdi dan Singgih Agung (ed.) et. al., *Islam Pribumi: Mendialogkan Agama, Membaca Realitas*, (Jakarta: Erlangga, 2003), 30-34.

women.<sup>20</sup> From there, in *fiqh* literature, you can find related marriage rules and matters related to marriage. Therefore, in the issue of divorce, for example, one of the reasons for limiting the number of divorces to three divorces was the end result of the process of erasing the reality of Arab society at that time which was arbitrary in imposing divorce and referring to one's wife without limits. So that this is considered a burdensome situation for women, the Qur'an plays a role in eliminating such a situation. The Influence of the Subjectivity of Jurisprudence Writers and the Politics of Islamic Law

El-Fadhl, in this case, emphasizes that no single legal expert claims to be an authority on God's law, even though they claim to be defenders of God's law. They stated that rulers should rely on and consult with legal experts when drafting and implementing legal provisions and did not claim that they should control the government or regulate society directly. The rulers must obey the legal experts (as bearers of God's law), and the people must obey the rulers as long as they do not violate God's law.<sup>21</sup> In other words, el-Fadl wants to say that authority within the scope of Islamic law is essential to achieve stability in religious life in accordance with God's will. However, authority is not interpreted as complete (absolute) control, thereby making legal experts arbitrary in their position as law enforcement. Thus, authoritarianism cannot be justified, let alone maintained in today's conditions.

In this section, el-Fadl emphasizes and motivates that, essentially, the legal decisions and regulations of the authorities are not binding on legal experts. Legal decisions and ruling regulations may have had binding legal force at that time, but they were not an integral part of the formal doctrine of Islamic

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<sup>20</sup> Badriyah Fayumi, "Islam dan Pemberdayaan Perempuan", dalam Sayed Mahdi dan Singgih Agung (ed.) et. al., *Islam Pribumi: Mendialogkan Agama, Membaca Realitas*, (Jakarta: Erlangga, 2003), 151-153.

<sup>21</sup> Khaled M. Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority, and Women*, Terj. R. Cecep Lukman Yasin, *Atas Nama Tuhan; Dari Fikih Otoriter ke Fikih Otoritatif*, (Cet. I: Jakarta: Serambi Ilmu Semesta, 2004), 32.

law.<sup>22</sup> Thus, freedom of study and opinion for contemporary legal experts must be upheld and supported to create legal decisions that are more relevant to current conditions.

Likewise, Ali Harb, in this case, emphasized that primary texts cannot be said to be the result of final understanding because there is no basis at all for being able to say that the results of one's interpretation of primary texts are final. Based on this assumption, Ali Harb believes that primary texts will always provide an opportunity for anyone "competent" to question and reinterpret even established results. So that this process can produce research results that have not been said or thought about before.<sup>23</sup>

It is based on the assumption that every result of a person's reading has a high subjective influence. Therefore, the reconstruction process can't let go of the existence of mature understanding and the history that includes it. Reading can produce mature foundations for reconstructing knowledge of objects, thoughts, reasoning, truth, and methods used in searching for truth. However, in terms of truth, each reader certainly has a claim to the standards of truth resulting from the reading process, namely the benchmarks they apply in their respective reading methods. The exclusive style of thinking has a tendency to shackle the existence of the text to the meaning it has produced, as well as limit the use of reading methods to only one method. So that this thought produces an understanding of absolutism and fanatical human civilization. It differs from the inclusive style of thinking, which assumes plurality in the use of methods in understanding the text, this understanding can produce flexible and varied reading results.<sup>24</sup>

Politics is a way for anyone who wants their aspirations and/or all kinds of wishes to be realized and considered by many people. If the term politics is added to the word Islam, it will produce a more narrow meaning, namely one of the technical

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<sup>22</sup> Ibid, 33.

<sup>23</sup> Ali Harb, *Al-Ta'wil wa al-Haqiqah; Qira'at Ta'wiliyyah fī al-Thaqāfah al-'Arabiyyah*, (Beirut: Dar at-Tanwīr, 2007), 12.

<sup>24</sup> Ibid, 19.

means in terms of *da'wah*, or efforts to ground Islam so that it can be easily accepted and practiced by the wider community. It is also the case with Islamic legal politics; essentially, this term is a strategy considered the most relevant in implementing Islamic law through government bureaucracy.

At a glance, we can describe the law as a binding rule for a group of people who live in a group or as a rule that regulates the order of life among them. It remembers several famous adages in legal discourse, namely *Ubi Societas ibi Ius*, which can be interpreted as "law that arises based on social conditions. "Where the existence of a legal object (society) requires the emergence of a law itself."<sup>25</sup> Or an adage that states that "The law is for humans, not humans for the law". The second adage can be understood from two points of view; the first point of view is the embodiment of what is meant in the first adage. Meanwhile, the second point of view provides an understanding that humans are very dependent on the law in this case.

These two points of view are very closely related to these two adages. A law is necessary to regulate human life in a social group. In the second adage, it can be explained that the word "law for humans" indicates that law is defined as a rule that arises for the sake of order and the benefit of humans themselves. Meanwhile, it is said "not humans for the law" because law enforcement here is defined as managing a law already existing within a human group. Law enforcers are nothing more than managers of the realization of a law for the benefit of humans in the group.<sup>26</sup>

In the sociological discourse on law, if a legal rule is felt not to have a positive impact or is even felt to be an obstacle to the progress and benefit of a member of a human group, then serious consideration should be given to the effectiveness of a law. It is

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<sup>25</sup> Ahmad Tahali, "Hukum Adat di Nusanara Indonesia", *Jurnal Syariah Hukum Islam*, No. 2 (Oktober, 2018), 69.

<sup>26</sup> Ulfa Budiana and Muhammad Djafar Saidi, "Efektivitas Penegakan Hukum Pajak Bagi Wajib Pajak Hotel, *Al-Azhar Islamic Law Review*, No. 1 (Januari, 2020), 59.

even possible to change a legal rule for effectiveness, which is felt to support public order better.<sup>27</sup>

How many contemporary academics are very intense in prioritizing legal sociology in enforcing laws? As stated by Munir Fuadi in his book, one of the significant roles of legal sociology is to solve various legal problems. He further noted that many legal issues today are no longer satisfactory if they are only resolved by the legal sector in a normative manner, the proof is that justice is increasingly far from expectations. "Because of this, a more comprehensive approach is needed, especially asking for help from sociology to solve various legal problems society faces."<sup>28</sup>

Not much different from the reality of contemporary Islamic law today, the discourse of legal studies is truly positioned as a study that regulates order and supports the need for legal certainty for a group of people. It is different from the concept of classical Islamic legal studies, where society is required to follow the rules that have been formulated, in this case *fiqh*.<sup>29</sup>

### The Importance of Recontextualizing Jurisprudence

Talking about Islamic law means discussing the existence of Islamic law and the long history that covers it, both in terms of products, production processes and/or tools for producing a legal product itself. It cannot be separated from the attachment to time and place. It is commonplace in the discourse of Islamic legal thought that a law arises based on the conditions in which society exists. That was one of the backgrounds of Nurkholis Mdjid's thoughts, and he wrote 'Cak Nur' about the need to reinvigorate Islamic thought that existed in Indonesia then.<sup>30</sup> There was a

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<sup>27</sup> Muhammad Yusuf, "Efektivitas Pelaksanaan Hukum Jinayat di Aceh", *Samarah; Jurnal Hukum Keluarga dan Hukum Islam*, No. 1 (Januari, 2019), 120.

<sup>28</sup> Munir Fuady, *Teori-teori dalam Sosiologi Hukum*, Cet. 1, (Jakarta: Kencana, 2011), 1.

<sup>29</sup> Soleh Hasan Wahid, "Dinamika Fatwa dari Klasik ke Kontemporer (Tinjauan Karakteristik Fatwa Ekonomi Syariah Dewan Syariah Nasional Indonesia, DSN-MUI), *Yudisia; Jurnal Pemikiran Hukum dan Hukum Islam*, No. 2 (Desember 2019), 193.

<sup>30</sup> Cak Nur is a nickname given to Nurkholis Madjid. Budhy Munawwar-Rachman, *Ensiklopedi Nurcholis Madjid; Pemikiran Islam di Kanvas Peradaban*,

time when the condition of the Indonesian nation, especially the Indonesian Muslim community, had stagnated Islamic thought, including Islamic law in this case.

Islam essentially has two dimensions that cannot be separated: esoteric and exoteric.<sup>31</sup> In its esoteric dimension, religion transcends space and time, transcends rationality, is transcendent and absolute. Meanwhile, in its exoteric dimension, religion exists in a structured form, in space and time, and is rational, limited, and relative.<sup>32</sup> It means that there are fundamental differences between the two. Namely, teachings that are *ilâhiyyah* in nature. In this case, their implementation is absolute, as has been conveyed through holy *naş*.

Meanwhile, in the second model, namely the relativity of Islamic law, Islamic teachings are closely related to the time and place where the law exists. The consequence is that we cannot avoid variations in interpretation, which gives rise to variations in legal transactions caused by the interpretation process. It is because, in this realm, every competent person conducts an in-depth study to independently produce legal products.

The development of science, in this case Islamic thought, always experiences changes from time to time. It is motivated by an urgent need for change to get something better than before. The cycle of life seems to be a *sunnatullâh* that we cannot deny, developing along with the increasing number of humans as one of the world's jewels, giving birth to increasingly new thoughts and continuing to strive to develop life in various ways so that it becomes better and better.

A reality of life in the Islamic world that we all need to understand, and indeed it is a warm message that is always

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Edisi Digital, Jilid 1 (Jakarta: Democracy Project Yayasan Abad Dekokrasi, 2011), xxvii.

<sup>31</sup> The distinction between these two terms in the terms used by Cak Nur is 'profane and ukhrawi'. Where there are significant differences, it is necessary to differentiate between the two. Budhy Munawwar-Rachman, *Ensiklopedi Nurcholis Madjid*

<sup>32</sup> M. Arfan Mu'ammam and Abdul Wahid Hasan (eds.), *Studi Islam Kontemporer Perspektif Insider/Outsider* (Yogyakarta: IRCiSod, 2017), 5.

presented to researchers of Islamic thought, is that based on historical records, Islam is understood very rigidly, as if it were something sacred for its adherents to undertake in-depth study. So that we know the reality of life today based on such an understanding, which results in stagnation of thought, even to the level of sacralization of everything related to Islam, without exception in the realm of *fiqhiyyah*, which is essentially the result of serious studies carried out by previous scholars. It is also conveyed by several scholars, both Muslims and non-Muslims, that the problem of the epistemology of Islamic studies, which in its initial development was based on idealism which made sacred texts the only source of truth, in subsequent developments moved towards empiricism by looking at that Islam cannot only be seen from its sacred texts, because Islam has become a culture in the behavior of its adherents, the study of Islam in the modern era has developed into various scientific approaches, such as anthropology, sociology, history and others.<sup>33</sup> It is no exception to Cak Nur; his anxiety about the reality of Islamic life and the state is focused on problems like that.

In this case, Cak Nur believes Islam is the only religion that remains relevant in every context of the realities of life it faces, including the modern era. Cak Nur emphasized that the most fundamental thing that needs to be used as a basis for thinking about the future is how to reaffirm pure classical Islamic values and translate them in the context of existing space and time. From such a perspective, the call to return to the Qur'an and Sunnah becomes more relevant to use as raw material for living life in modern times without putting aside the noble values of Islamic teachings.<sup>34</sup>

Apart from what we have said, in this case, al-Qarḍāwī differentiates between the renewal of Islamic law and *ijtihād*. According to him, reforming Islamic law is an action in which

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<sup>33</sup> M. Arfan Mu'ammam and Abdul Wahid Hasan (eds.), *Studi Islam Kontemporer Perspektif Insider...*

<sup>34</sup> Nurcholish Madjid, *Islam Kemodernan dan Keindonesiaan*, dalam <http://nurcholishmadjid.org/arsip-karya/read/4-1987-04-islam-dan-modernitas>, 7, diakses tanggal 08 Oktober 2019.

there must be a collaboration of ideas, such as thoughts, mental attitudes, and attitudes of action, namely knowledge, faith, and charity. Meanwhile, *ijtihâd* is more emphasized in the field of scientific thinking.<sup>35</sup>

In terms of *ijtihâd*, al-Qarḍâwi strongly recommends Muslim intellectuals, who fulfill their scientific capacity as *mujtahîd*, to carry out *ijtihâd* on contemporary problems. Al-Qarḍâwi considers that nowadays, *ijtihâd* has a large and significant contribution to the life needs of Muslims. He does not overstate the opinion that the law of *ijtihâd* for Muslim intellectuals who have fulfilled the requirements for *mujtahîd* must be done in this contemporary era. He argues that according to Islamic logic, there will never be or happen something that is needed by humans and then forbidden by God. So if it has been determined that there is a need for *ijtihâd*, then the law allowing *ijtihâd* must also remain in place.<sup>36</sup>

According to him, this can be proven in real terms by paying attention to living conditions in parts of the world from time to time up to the current era, that there have been very significant changes in life and social development after the world industrial revolution. It is on this basis that al-Qarḍâwi emphasized that *ijtihâd* is a work that the Messenger of Allah may do. This has also been done by the next generation of *ulama*, namely the madhhab imams in particular, so no one can prohibit (close) something that was permissible in the past. It can even be said that the current era's need for *ijtihâd* is more significant than in previous eras. Likewise, we have to realize the discourse of opening the door to *ijtihâd*, not just declare it without realizing it.<sup>37</sup>

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<sup>35</sup> Abdul Aziz Dahlan (ed.), *Ensiklopedi Hukum Islam*, Cet. 6, (Jakarta: Ichtiar Baru van Hoeve, 2003), 1449.

<sup>36</sup> Yusuf Al-Qarḍâwi, *Al-Ijtihâd fî Asy-Syarî'ah Al-Islâmiyyah; ma'a Nadzrati Tajlîliyyah fî al-Ijtihâd al-Mu'âshir*, Cet. 1 (Kuwait: Dâr al-Qalâm, 1996), 109.

<sup>37</sup> In the Indonesian context, especially Muslim elites in general are still too sensitive to carry out *ijtihâd* independently or collectively. They are only limited to sorting out what has been presented by classical scholars whose capabilities are recognized. It is based on the principle of humility, where they feel unable to carry out *ijtihâd* fundamentally, and they are satisfied with the results of the formulations of the *ulama* which are presented in many books of

However, the discourse on closing the door to *ijtihâd* cannot actually be completely blamed due to several factors, including the assumption of concern for people who want to enter the field of *ijtihâdiy*, even though they cannot carry out *ijtihâd*, so that if *ijtihâd* is allowed it will only cause sheer confusion in the world of law. Such an assumption would be relevant to one of God's words: "So have you ever seen a person who makes his desires his god and Allah allows him to go astray based on His knowledge and Allah has sealed the hearing and eyes of his heart and put a cover over his sight? So who can guide him after Allah (allow him to go astray?)."<sup>38</sup>

Nevertheless, al-Qarḍâwi considers that if the prohibition on *ijtihâd* is carried out excessively, this is not much different from allowing it excessively. Thus it will only cause muḍarat (danger). Therefore, in terms of *ijtihâd* al-Qarḍâwi recommends that each of us behave in a straight line.<sup>39</sup> He based his recommendation on God's words: "These are God's laws, so do not violate them."<sup>40</sup>

M. Abdurrahman, in this case, believes that Islamic thinking is nothing more than a process of rationally searching for the meaning of texts, where texts must be read and understood openly and earnestly, paying attention to existing socio-political conditions, that a legal product can be rebuilt indefinitely, allowing the law to be updated for the modern era of constant change. Therefore, the role of politics (government) in religious life takes a strategic position in implementing the principles God desires.<sup>41</sup>

## Conclusion

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*fiqh*. Fathor Rahman, "Geneologi *Fiqh* Progresif dilingkungan Pesantren Salaf", *al-Ahwal*, No. 1 (April, 2018), 44.

<sup>38</sup> Al-Qur'an, 45: 23.

<sup>39</sup> Yusuf Al-Qarḍâwi, *Al-Ijtihâd fî Asy-Syarî'ah Al-Islâmiyyah*, 173.

<sup>40</sup> Al-Qur'an, 2: 229.

<sup>41</sup> Moeslim Abdurrahman, "Setangkai Pemikiran Islam", dalam Sayed Mahdi dan Singgih Agung (ed.) et. al., *Islam Pribumi: Mendialogkan Agama, Membaca Realitas*, (Jakarta: Erlangga, 2003), vii-xiii.

Islam surpasses Judaism and Christianity as a comprehensive religion. Therefore, the goal of monotheism in the context of realizing God's unity, guaranteeing ma'ruf, and eradicating evil is shared by both the teachings of Islam and the teachings of the past. One could even argue that Islam is the idealized version of both Christianity and Judaism. Similarly, there is a connection between Islam and pre-Islamic Arab society; the Koran was initially revealed in Saudi Arabia to ameliorate the state of life, which was seen to be in poor condition. As a result, Islam frequently permits the continuation of a number of Arab Jahiliyyah customs that are deemed pertinent to its educational goal. However, Islam progressively eradicated many of the customs and cultures of Jahiliyyah Arab society, even to the point of total annihilation. Every Muslim scholar has subjectivity about every written work they produce. It is especially true in the socio-political sphere, where nearly all written works are influenced by subjective factors, including the author's subjectivity and the subjectivity of their interests. Due diligence demands that we take into account the socio-political context in which fiqh was written at the time it was composed.

Thus, we should be able to comprehend the complexity of life, the relativity of law, the flexibility of Islamic teachings, and other flexibility in understanding Islamic teachings, especially those related to fiqh, once we have a firm understanding of the historical context of Islam, the primary goal of Islamic teachings, their universality, and the concept of the "God of law" in every profane fiqh provision. Therefore, someone will be able to act sensibly, inclusively, and dynamically based on such presumptions, and they will be able to see the significance of continuously recontextualizing jurisprudence in order to stress proportionality in social and religious life.

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