

## IJTIHAD, FATWA, AND CULTURE; STUDY OF USHŪLU'L FIQH ON ISLAMIC LAW ELASTICITY

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### ABSTRACT

*Islam has a means of observation and law research which is known as Ijtihad. Later, the results of both observation and research are informatively formed in Fatwa. However, ijtihad and fatwa cannot be separated from the cultural influence as a background of it. This is the reason why ijtihad, fatwa, and culture become related to each other. The discussion of Islamic Law is not freely discharged from ijtihad as a process. Moreover, the person who is applied Ijtihad must be professionally knowledgeable about the exact problem background in order to solve it. The whole knowledge must be derived from Islamic legal sources, the Qur'an and the As-Sunnah. As a consequence, the synergy of ijtihad as a process, making legal decision to be fatwa, as well as cultural development factor is needed in formulating divine law. The product of ijtihad which is informed as a fatwa will naturally change and develop along with the development of culture. This is depicted in a familiar quotation of the Islamic law, "The change of law depends on how times, spaces, customs, also cultures change". Ijtihad is applied in order to find the right way to solve problems as well as to find advantages in every new event that are happened due to the development of social culture. This proves the elasticity of Islamic law in facing towards the problems when it presently occurs. The past law will not the same as the present. Therefore, the exploration of problem should be done through a good process of ijtihad so that the divine law can be revealed.*

**Key Word:** Ijtihad, Fatwa, Culture, Law Change

### INTRODUCTION

Islam as a religion has a law discussion device that gives the scholars of Islamic law an independence to create and find exact solution for any facing problem. Specifically, this independence is given to those whom are called mujtahid, people who are capable in observing, renovating, deciding, and also interpret law (*istinbâth*). The word *mujtahids* precisely reported by RasulullahSaw as follow:

عَنْ أَبِي هُرَيْرَةَ قَالَ قَالَ رَسُولُ اللَّهِ ﷺ: إِيَّاكُمْ يَخْلُقُ اللَّهُ أُمَّةً عَلَى أَسْكَمَةٍ سَنُجَنِّدُكُمْ لَهَا دِينَهَا

Meaning: Narrated Abu Hurairah, The Prophet said, "Allah will raise for this community at the end of every hundred years the one who will renovate its religion for it." (HR. Abu Dawud)

People who renovate the religion matter based on the Islamic legal theory are distinguished as mujtahid.

The subject of this religion matter is not only occurred during The Prophet lived, but also in the present life because it develops as time goes by. On Islamic legal theory, there is an expression which stated that 'while syariah texts are limited, events and problems are unlimited.' This emphasizes the idea that legal process must put elasticity or flexibility in it. The law itself should be able to adjust based on particular space, time, condition, and custom of certain society. As a result, both law elasticity and flexibility point up the nature of Islamic law that is *shāliḥ li kullizamāninwamakānin* (appropriate and proper based on space and time factors).

Nevertheless, the process of legal interpretation is surely done according to the legal sources of Islam, Al-Qur'an and the As-Sunnah of Rasulullah Saw. Besides, the use of sense and mind of human in exploring or analysing law sources is positively required. This process must not be done by any pressure from specific community nor law interpretation which is only for one-sided.

Consequently, it is prominent for those whom concern in law field, especially those whom take parts in Islamic law, to deepen the ability of thinking, to be open-minded, as well as to be wise in making decision. Some people analogize them as doctors. Doctors usually write down the prescription according to the problem observation and later give the correct treatment for the patients; at least the medicine can relieve the pain. It is also similar to those in law field. This endeavor is done in order to create benefits for people, neither benefits for individual nor certain communities.

#### Research Method

In order to make Islamic law as a basic in practical level, on the Study of UshulFiqh, there is a discussion described as *ijtihad*. The wide range of *ijtihad* dimension leads it to approach the branches of law observation scopes. Fatwa is a part of it. As mentioned in the quotation "*the change of law depends on how times, spaces, customs, also cultures change*", to start the discussion, it is required to give the limit of definition from several terms: *ijtihad* and fatwa as activities, while culture as one of determination factors in law change.

#### THE DEFINITION OF IJTIHAD

As we all know, *ijtihad* has a special place in the Study of UshulFiqh. It becomes an activity for people whom work in law field in order to interpret and decide the law. There are a lot of definitions founded. Nadia Syarif (1985: 21) states that from many definitions that we find, the distinctive matter is merely on the term level, not in meaning level.

*Ijtihad* is etymologically derived from verb *jahada-yajhadu-jahdanor juhdan* in Arabic which means employment or effort in performing a certain activity. Some people also distinguish between *al-jahdu* (hardship and difficulty) and *al-juhdu* (power and strength) (Mandzur, tt: [9] 708). While, on UshulFiqh study, *ijtihad* etymologically means undertaking effort and endeavour in performing some task (Zaidan, 1976: 401). Yusuf Qaradzawi, on language level, relates word *ijtihad* to word *jihād*. According to him, the purpose of *ijtihad* is a struggle to find right guidance and religion in accordance with the purpose of Prophet Muhammad's delegation. While word of *jihād* is aimed to a struggle to defend and protect the religion. *Ijtihad* is concerned on ideas and observation, while *jihād* is focused on deed and behavior. Thus, it is comprehended as a connection line between one to another. As a result, *ijtihad* is fairly considered as a *jihād* way in knowledge area while *jihād* is considered as a practical *ijtihad* model. (1996: 6).

*Ijtihad* has terminologically various meanings. Some of them are as follow:

1. Muhammad Zakaria Bardisyi (tt: 459) defines *ijtihad* as to represent struggles for a faqih (Islamic religious lawyer) to do *istinbāth* (observe, renovate, interpret) on practical syariah legal that is acquired from the detailed proof.



2. WahbahZuhaili (1986: [2] 1039) concludes from any definition of UshulFiqh scholars, that leads him to state that ijtiḥād is a process of *istinbāḥ* (observe, renovate, interpret) towards sharia laws which is produced by the detailed proof.
3. Abu Zahrah(1958: 379)specifically mentions from fuqaha (plural word of *faqih*) definition. He states that ijtiḥād is employing effort, such as *istinbāḥ* (observe, renovate, interpret) or to apply the law.

According to what have been defined above about ijtiḥād, it can be concluded that ijtiḥād is an effort or a struggle to do a process of *istinbāḥ* (observe, renovate, interpret) the law, which is based on sharia proof.

The meaning of ijtiḥād as a term leads to an important process that must be passed through by the law experts because the law requires the result of conclusion which based on explorative reading of problem and the source of legal documents. WahbahZuhaili(1986: [2] 1039)describes the reason behind the use of ijtiḥād which based on Al-Qur'an and As-Sunnah. In addition, as described on QS. An-Nisa: 105, it is written *litaḥkumabaina al-nāsibimā'arāka'lLāh*, which means "(the Book in truth) so you may judge between the people by that which Allah has shown you (revelation)". The same topic is also defined by Prophet Muhammad Saw compiled by Amr bin Ash, "If a judge decides the law, he does ijtiḥād in his decision which is right, he will get two rewards, however if he decides the law using ijtiḥād and it is a wrong decision, he will get merely one reward". This shows that ijtiḥād has a prominent role in observing and interpreting the law application which is aimed to notice the objects of advantage and disadvantage for common people. Moreover, this is done to give legal information to people, so that they can uphold and be aware of the law.

#### THE DEFINITION OF FATWA

Fatwa is derived from verb *afā-yuftī-iftā'* anin Arabic. Al-Jauhari(1990: [6] 2452) adds that there are two words based on the root of word *afā*, those are *futyā* and *fatwa*. Further, IbnuMandzur(tt: [5] 3348) states that fatwa is an information or explanation related to the legal matters. At first, fatwa is derived from root word *fatā* which means a strong young man. It is depicted fatwa as an opinion which strengthen the legal conclusion.

From the explanation above, fatwa can be described as an information or explanation which is practically divided into three components: (1) Fatwa (product); (2) Mufti (subject); dan (3) *Mustafti*(object). Fatwa is the result of verdict, mufti is referred to the (Islamic scholar who is) interpreter (the Islamic law), while *mustafti* is the person who asks the explanation or the one who asks something. These three elements definitely show that fatwa will not exist if there is no problem to be asked. However, the question here is not merely in a verbal form, but also a new problem which appears to change position of the question itself. The component of fatwa can be seen on QS. An-Nisa: 176:

يَسْأَلُونَكَ عَنِ الَّذِينَ يَخْلِعُونَ بِأَكْلِهِ...

Meaning: "They ask you for legal verdict. Say: Allah directs (thus) about Al-Kalalah(those who leave neither descendants nor ascendants as heirs) ..."

Technically, most of Islamic law experts define their own definition about fatwa. Some of them are as follow:

1. Al-Qarafi (2005: 44) depicts that if someone make fatwa, it means that he gives the information of Allah laws based on the sharia proof.
2. Hamdan (1380 H: 4) explains that mufti is a person who interpret the information of Allah laws based on proof so that the law can be revealed. According to Hamdan, fatwa is law information from Allah based on sharia proof so people in general are able to understand.
3. Nadia Syarif(1985: 44)points up fatwa as something that is spread by mufti as the answer of certain question or as an explanation about certain laws, though it is not a specific verbal question.

From those definitions, fatwa is an informative answer by mufti as the answer of direct questions from somebody or problems that occur in general people. Fatwa also has an essential role on Islamic law progress. As a result, someone who has the capability of it must consider to give a correct and appropriate answer. It resembles to how *ijtihad* produce the results in order to maintain the five Islamic laws: religion, soul, mind, property, and descents.

#### THE DEFINITION OF CULTURE

Culture considerably becomes one of debatable term lists by most of the experts. Somehow, in culture, there are vital elements that can be concluded as general depiction.

Online Etymology Dictionary writes that culture is derived from Latin word *cultura*. It means care, labor; cultivation, worship. On the other hand, in Arabic, culture is defined as *tsaqāfah* from root word *tsaqafa*. Khatib(1979: 23) ever mentions that word *tsaqafa*, on Arabic etymology, is meant as an experience or intelligence, capability of fast knowledge comprehension, as well as ability to straighten the bent.

According to terminology of this word, there is still no agreement reached from the experts to define the exact meaning. Two anthropologists, Kroeber and Kluckhohn collect 164 various definition of culture (via Helen Spencer-Oetey, 2012: 1). According to Spencer-Oetey(2012: 2) on her compilation of quotations on 'What is Culture?' she defines several main definitions of culture:

1. Tyler, as quoted by Avruch: "Culture ... is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society."
2. Kroeber and Kluckhohn as quoted by Adler, stated:  
"Culture consists of patterns, explicit and implicit, of and for behavior acquired and transmitted by symbols, constituting the distinctive achievements of human groups, including their embodiment in artifacts; the essential core of culture consists of traditional (i.e. historically derived and selected) ideas and especially their attached values; culture systems may, on the one hand, be considered as products of action, on the other, as conditional elements of future action."
3. Helen Spencer-Oetey adds,  
"Culture is a fuzzy set of basic assumptions and values, orientations to life, beliefs, policies, procedures and behavioral conventions that are shared by a group of people, and that influence (but do not determine) each member's behavior and his/her interpretations of the 'meaning' of other people's behavior."

From the explanation above, we can describe the elements of culture as (1) Culture is an ability or habit that owned by human, (2) culture is a product, (3) culture has capability to affect behaviors.

According to these three elements, there will be a connection link between *ijtihad*, fatwa, and also culture. This supposes to give the specific explanation on the development of Islamic law according to the culture development.

#### Results and Analysis

As explained before, *ijtihad* is process that be done by the Islamic law experts. It is definitely done by following the term and conditions which has been agreed within the experts. Meanwhile, fatwa is a product or result of analysis which is done by the experts in Islamic law in answering and solving the problem in society. Therefore, we can see that the relation between *ijtihad* and fatwa is considered as a process and its result. Since fatwa is an information so the product of *ijtihad* should be widely represented to public society. It purposes to offer solution to public about the facing issues. This answer will depend on what things are being faced, who is facing the problem, when and where is the problem happened, as well as what culture background that the society has.



The answers or the *ijtihad* products are crucially relied on the problem background which is analyzed by the experts. Al-Qarafi(2005: 113)ever mentions on his book:

" ... It is also happened to us when some people whose origin is different from us, so we should not decide a fatwa, except, (we) know very well about their real origin condition. (we should) consider about their custom, not try to insist them to follow our custom."

That opinion gives a description of a vital relation of problem background to the law answers. This also creates a prominent rule in Islamic law, which is "*The change of law depends on how times, spaces, customs, also cultures change*".

As mentioned earlier, the elements of culture are (1) Culture is an ability or habit that owned by human, (2) culture is a product; (3) culture has capability to affect behaviors. It makes culture becomes one of affecting factors of law change. On the study of Islamic legal theory, those three elements of culture are included into '*urfor* custom discussion. Those influences are more described, as follow:

1. Habits which are acted by human will constantly change as time goes by.
2. Habits which are existed will be a product that assisting human during their lives.
3. Actions that are done by human towards habits will give a perspective of behaviour upon an individual or even others.

In the result, *ijtihad* process naturally will face the development of the existing culture. If an expert is not able to go through *istinbâth* (observe, renovate, interpret) the law by analyzing the culture, so that the law will stuck in a same place. However, it is essential to notice that culture analysis is not pulled the influence of culture in Islamic law. Culture is analyzed as a policy determination material based on the existing legal documents. So that, the elasticity and flexibility on Islamic law is not totally applied. It should be put in law problem matter though which is still vague and needs to be explored. As *ijtihad* is done to sharia texts that are *dzanni*(vague) and not to be applied on sharia texts which are *qath'i*(clear, definite).

The balance of *ijtihad-fatwa* and culture becomes gradually crucial and susceptible if it is not to be noticed. The goal of sharia is to bring advantages to people but it will not be achieved if the change factors of law is not analyzed well. As Qaradzawi(1988: 17-18)stresses out the extraordinary points of fatwa in *ijtihad* process is to fix the present issues that be faced by people. Every single human will face problems from what he/she does; consequently, *ijtihad* process holds a prominent role in answering any question based on the problems. IbnulQayyim, as quoted by FauzanMuhammadi(2013: 10-11), explains that, "the change of fatwa along with its differences depend on the change of time, place, condition, intention, as well as custom". From what Qayyim has explained, it relates to the preceding expression that described the change of law depends on time-place, condition, or else. Furthermore, he describes that this discussion is a meaningful study because (it often) happens mismanaging of the problems solution due to the lack of knowledge about certain matters, so it creates an unpleasant policy (not based on advantage for people)

## THE PRESENT DEMAND OF LAW AND CULTURE

Law and culture are two things that should work together. Islam does not ignore the fact that culture keeps growing and developing in some way because the process of it also gives an independent for mujtahid or mufti to naturally explore about it. It makes the Islamic law does not stop growing, somehow it makes it develop more and more as the culture does. Ahmad bin Muhammad Al-Zarqa, quoted by Fauzan(2013: 10), explains that the law change is a consequence of habit or condition change. If a custom or tradition changes, so does the law terms.

The change of time will determine the development of the islamic law. The experts will be demanded to keep using natural aspect on their *ijtihad* process. *Ijtihad* turns into

an eternal activity. It means that the process of curiosity and solving the problem will be always done and tried. It leads to a control of culture development. It does not mean that culture contains a negative matter. Culture or habit that produced by human being must have two sides, like a coin, whether it is positive or even negative side. Ijtihad and *Istinbâth* will filter the human habits that are not appropriate to sharia terms. It is because the need of the experts to keep doing ijtihad is really important. As a result, if the negative culture issues can be controllable, it will give a good impact to people in general.

Ijtihad is a natural activity and a process of finding the knowledge. Therefore, the experts are demanded to not randomly solve the problem without comprehending reliable and proper sources. Qaradzawi (1996: 178-185) gives the details on what should be done by mujtahid, as follow:

1. Ijtihad should be done as needed. It is because ijtihad is employment an effort and endeavour to find reliable law answers for people. Therefore, the spirit of ijtihad must be whole-heartily done.
2. To make sure that ijtihad is not done in *qath'i* (clear) law areas, but on vague law areas. So that, the mujtahid will not change *halal* things to *haram*, vice versa.
3. Keeping the stable of *qath'i* and *daznni* texts based on its position.
4. Balancing the discussion between hadith and fiqh as well as its ushul.
5. Having self-awareness towards present culture that is not originated from Islam. It means that the ijtihad activity will not be misusing, like using it as a renovating process in order to strengthen the cultures that are not suitable with Islam values.
6. Taking things that are benefits and suitable with sharia goals.
7. Putting self in present time and condition since ijtihad is a process that is done according the exact time where the mujtahid lives, not the past time.
8. Moving from individual ijtihad to community. A community opinion is stronger than individual has.
9. Staying as open-minded one towards the fault of past mujtahid. Do not do provocative rejection because Rasulullah Saw himself told that a failed mujtahid will get a reward, even just one.

## CONCLUSION

Law is not a limited rule. Islam provides rules of life for human in order to arrange a better life. As a result, what human has done will be consequently put into the law. These laws is then managed in Islam through an observation process based on Al-Qur'an and As-Sunnah, if it is knowledgeable, while vague law problem will be done by *istinbâth* by understanding proofs and background of the problem. It purposes to find divine law wisdom to people in general.

Ijtihad, fatwa, and culture are three important points in the law process of observation, renovating, and interpreting. Ijtihad is done to solve the law problem from new events. Later, it will produce law products, policies or solutions which are informative known as fatwa. The person who interprets it or mujtahid or mufti, must have a wide range of knowledge when analyzing particular problems relating to the changing of culture and turns those observations into an analysis linked to previous existing sharia documents.

Culture becomes a noticeable matter because the law changes when the culture does. However, the law change towards the culture is not meant that the law admits the particular legal culture. If the culture is not suitable with the sharia, the culture will be rejected. If it is proper to what sharia has been told, it must be kept and defended or even improved. Islam does not reject the culture, but it will be a consideration point in ijtihad process. That is why *'urf* or custom turns into one of sources for the Islamic law.

As a conclusion, sharia of Islam leads the point of making the law to create a benefit for people in general because those benefits will keep purposes which are contained in the Islamic legal theory. As stated by Al-Ghozali (1997: [1] 416-417):

"In the end, that benefit will be the expression to open other benefits and defend the disadvantage to come. This action is the real goal for human being as it continuation is relied on how human achieve the meaning and purposes of the sharia. The purposes of sharia are keeping the religion, spirit, mind, descent, and property. As a consequence, any action to keep those five things is considerably benefit. While for those actions that fade those five elements are disadvantages."

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