

Research Article

Legalisasi Islamic Law with analytic philosophy approach Model of language analysis

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ABSTRACT: Legalization of Shari'a is related to the establishment of a religious society. Shari'a is derived because there are causes that expect it to be derived and its application is dependent on the existence of the continuous changes on the society's reality and the events that are always new event. Therefore, the Shari'a takes something from the institutions and cultures of society to serve as law.

Law makers are not limited to the text set by the Qur'an, but they include the results of ijtihad with qiyas and so on. On this basis, scholars need the reorientation of the theory of law limitation: There is a law that is set by the Qur'an which is limited to a specific time only, and there is a law that is set by the Qur'an which is applied generally based on the existing context.

Keywords: Asbab an-Nuzul, Shari'a, mujtahid, teks, method

INTRODUCTION

The Qur'an is gradually derived according to the ongoing case to guide the reality of human life. It aims to provide solutions faced by humans in general. The attention of the revelation is very great in providing problem solving that happened. Hence, the nash of the religion both in the form of the Qur'an and the Hadith is related to the atmosphere and causes of the revelation both in the form of case and the case that is happening (Majid, 1997)ⁱ

Events and cases occurred which become the cause of the revelation have their own context, as well as become one of the most important necessity in understanding God's will that is contained in the nash. Neglecting such matters can lead to a distortion of the intended meaning of the essence so that it creates tension of the reality of human behavior that has been standardized.

The knowledge of *asbab nuzul* must be followed by the knowledge of Arabs and the customs when the nash is derived. In this case Asy-Syatibi stressed: "Not all conditions around that the revelation nor the context that is directly related to the meaning of nash is derived," Therefore the knowledge that is included to this category is knowledge of Arabic customs, speech and their deeds and the conditions that took place at the time of the revelation were derived (Asy-Syaibi)ⁱⁱ

One of the Muslim scholars who questioned the authority of *asbab nuzul* in general was Muhammad Sa'id al-Asymawi. He is an alumnus of the Faculty of Law of the University of Farouk II in 1955. He was a judge in Cairo and Alexandria's state courts and eventually served as head of the high court (al-Asymawi, 1993)ⁱⁱⁱ

Al-Asymawi considers that the rule: *al-Ibrah bi umum al-lafzi la bi husus as-sabab*, (al-Maliki, 1981).^{iv} is not a *syar'i* method. It is only the conclusions of the fuqaha. This rule is made in the darkness of civilization and the stagnation of

thought.^v Therefore, he accused all scholars of the field of exegesis, fiqh and hadith who hold on to the general principle of *lafadz* have interpreted the Qur'an out of the context, and they have separated the verses of the Qur'an from the causes of its derivation so that they only use the structure language in accordance with its *lafadz* form only.^{vi} In contrast to al-Asymawi, who hold on to the principle: *Al-Ibrah bikhusus as-sabab la bi umum al-lafzi*^{vii}, so that by reason of sociological-historical ijtihad fiqh caliph Umar which is not in accordance with the rules of law contained in the text of the Quran, such as not to cut the thieves' hands are considered to be a new breakthrough that is very important in line with the existing reality.

Fahmi Salim, (2012) infiltrated many different Islamic laws due to different times as the result of the custom changes in the society, or the forced conditions or the destruction in the era. It happens if the law remains applied as it is, then it causes real difficulties and dangers for humans. It will also potentially violate the rules and principles of shari'a which are built on the basis of relief and danger elimination.^{viii}

It seems that al-Asymawi, (1983) holds on to the rule of causes because the intention of localizing the Shari'a law is only applicable to the event which becomes the cause of the derivation only. This means that for the case happening at the present reality, new ijtihad is required on that verse, and the legal conclusion must be different from the law born by the special cause behind it. The Mujtahids have the authority to determine the Shari'a without the intervention of God. The laws set in the Quran are not universally applicable and absolute. Because *asbab nuzulnya* has been applied, the rules of shari'ah should not be enforced publicly. The Qur'an is no longer a source of the Shari'a law. Shari'a law-making authority is transferred to Muslims. It is the people who are the source of the law for all forms of khilafah, imamah, siyasah,

ministries, legislative councils and so on.^{ix}

THE BASIS OF THE THEORY AND THE METHOD

In the history of thought, there is no concept born in the position of fitrah without the influence of space, time or thought of a person. The type of scientific thought of a person including al-Asymawi's is inseparable from the social, cultural and political phenomena surrounding it. An intellectual thought that triggered from anxiety cannot be separated from its surrounding problems. The thought, especially the religious thought cannot be separated from several contexts, time context, space context, historical context, social context, cultural context, psychological context and religious context.

The emergence of opinions in the Islamic legal methodology and its legal conclusion (fiqh), does not come out of a vacuum. They are the interpretation of legal principles liberally to obtain an answer to a problem arising in the society in accordance with the existing reality. In this context, then a different form or model of interpretation and meaning cannot be separated from the meaning of language or semantic, that is the knowledge related to the origins and shifts in meaning. In the philosophy of language, it is stated: "The meaning of a word is determined by the use of it in a sentence, and the meaning of a sentence is defined by its use in a language, and then the language is defined by the its user in everyday life." (Rizal, 1998)^x

Language relates to human experience, and has the role to influence it. The language forms the minds of the people who use it, because of the interaction between civilization and the linguistic forms used. From this condition, there are three types of theories about meaning: the referential theory, ideational theory, and behavioral theory. (Rizal, 1998)^{xi}

The model used in this study is qualitative, because the object is thought. The study was analyzed using logic language analysis built on the ability of logical argument making. (Muhajir, 1996)^{xii} which is based on pure empirical theory. Then, this study was compared with other opinions.

Therefore, when al-Asymawi did interpretation of the nash and text of a rule, it is different or deliberately different as a form of criticism on the previous scholars' interpretation. It will certainly result in different laws/ fiqh, even it is very likely to produce a fiqh which is contradictory with the existing fiqh. Then, the rule: *al- Ibrah bi umum al-lafzi la bi husus as-sabab*

"The guidelines are generally the text, not especially the cause," held on to by the jumhur cannot be accepted by al-Asymawi. Instead, he holds on to the rule:

Al-Ibrah bikhusus as- sabab la biumum al-lafz. "The guidance is especially the cause, not generally the text." (Ibrahim, 1990)^{xiii} In line with the rule: "*la yunkiru taghyir al-hukmi bi taghyir al- azman wa al amkan wa al- ahwal,*" Therefore, it is inevitable that shari'a law changes according to the reasoning of reality that exists.

A. RESEARCH RESULTS

The influence of the trend of interpretation of the Qur'an using the hermeneutical method gave birth to the view that the existing reality is as the cause of the derived Qur'an. The Shari'a specified by the Qur'an is not absolute because it is related and bound to a particular event triggered by a cause.

This view is being seen as identical to all the verses in the Qur'an that brought the lesson that the law was preceded by a certain cause. There is also expressed in some verses of the Qur'an that it is suddenly derived, without cause, including the verse that mentioned that the law is brought without a special cause. According to Fahmi Salim (2012) quoting Imam al-Wahidi (W.468 H), The book of *asbab an-nuzul* only counted 472 verses, equivalent to about 7.5% of the total verses of the Qur'an which has a total of 6236 verses. Imam Suyuti (W 911 H) is only able to recite 888 verses of *asbab an-Nuzul* which is about 14% of the whole verses of the Qur'an.^{xiv} From the 888 verses that are related to modern muamalah law, according to Abdul Wahab Khallaf (1968), there are only 228 verses with the details as follows:

1. Family law, the law governing the family began its formation, the relationship between husband and wife and the kinship system, 70 verses.
2. The civil law, around 70 verses
3. Criminal law, 30 verses
4. Procedural law, namely the law relating to the court, testimony and oath and others related to the procedure in the court, 13 verses.
5. Laws of legislation, namely the laws related to government regulation and its subjects. This law is meant to regulate the relations of the state and its people and to determine the rights of individuals and society, totaling 10 verses.
6. Constitutional law and relations between States, 25 verses
7. Economic and Financial Laws to regulate wealth relations between rich and poor, and between the State and the people, and how to seek and distribute them. There are about 10 verses.^{xv}

Al-Asymawi argues that almost all verses of the Qur'an except few of them have a special cause to be derived. Realistic studies and observations on al-Qur'an texts revealed that every verse or cluster of several verses were derived because of a special cause that demands them to be derived. Only very few of the verses of the Qur'an that are derived for no particular reason.^{xvi} As Hasbi stated: "The event which caused that the Qur'an derived to explain its law on the day that the event happened and the atmosphere in which the Qur'an was derived, and to speak of the cause, whether it was derived immediately after the cause, or later because there is wisdom." Thus, among the verses of law which are derived after an event or a cause or a question, there are only few verses of the law which causes to be derived are not by the *mufasssir*. For this reason, it has to be understood that from that every cause explained by the *mufasssir*, there is no cause which we may accept, for some of them and their source are not valid. (Hasbi

1974)^{xvii}

Furthermore, al-Asymawi described: "After the death of the Prophet, the process of revelation of the Qur'an and Hadith was completed. The authority of the law establishment that used to guide the believers, their basis to accept the law and their obedience to the law He made, it is now the duty of the caliphs and fuqaha to understand that the authority of the law establishment has been transferred to the Muslims. It is the people who should be the source of the authority for all the caliph, priesthood, riyasah, ministerial, legislative and other paradigms. Al-Asymawi proclaimed two things by arguing that the ijthihad of the Caliph Umar around the cessation of the zakat rations for the converts on his time and the cessation of the hand-cutting punishment on the famine period on his time.

First, the need for the text of the Qur'an to permeate the new legal events is based on the guidance contained in the text structure or sociological context when the text is expressed (*asba>b nuzu>l*).

Second, the scholars need to accept the theory of law limitation. It means that the law of the Qur'an is limited only to its time. Like Caliph Umar who totally stopped hand-cutting punishment, not because the implementation requirement is not met. Likewise, after Umar of the history of Muslims was never preached hudud punishment applied in Islamic khilafah countries. No one dared to accuse Umar had been a kafir or Muslims who was an apostate for doing ijthihad to stop the punishment.(Al-Asymawi, 1983)^{xviii}

Al-Asymawi also argued with the statement of an expert fiqh mazhab Hanafi, Ibnu Abidin (1784-1836): "Many of the provisions of the Islamic law are not the same because of the differences of time due to the changes of the society's customs, or the forced condition (emergency), or as the result of the breakdown of the times."

IJTHIHAD WITH ASBAB AN-NUZUL ANALYSIS

Islamic jurists like Al-Ashmawi states that the word shari'a in Islam has undergone a change as it did in the old testament/law in Jew. For the first time, the word Shari'ah used in Islam means the way or method of Islam. Then the word is transformed to every religious law. Therefore, Shari'a means "every single thing contained in the Qur'an, such as the ays, the rules of Worship, the legislation of law and muamalah." In other languages, shari'a means all religious laws, rules of worship, legal legislation, and everything contained in the hadith of the Prophet, all opinions of fiqh, mufassir, commentators' views, and lessons from religious figures.^{xix}

He only gives examples on the problem of Islamic criminal law. He states that in the terminology of fiqh/ jurisprudence, penalty is a punishment determined by the maker of shari'a for the commission of sin. His punishment is not limited to the punishment determined by the Qur'an, but includes the punishment conveyed from the prophet Muhammad, and the punishment has been set by his companions. Therefore, the meaning of punishment maker is not limited to the Qur'an or the prophet Muhammad, but includes the result of ijthihad with

qiyas. It is like the six kinds of punishment, namely the punishment of stealing, accusing adultery, committing adultery, drinking alcohol, robbing, and apostasy. From the 6 kinds pf punishment mentioned by al-Asymawi, there are only two kinds which are discussed here:

1. Punishment for Stealing

In the Qur'an, it is mentioned:^{xx} "men who steal and women who steal, cut both hands (as) vengeance for what they do and as punishment from God. and Allah is Mighty and Wise."

The meaning of stealing in the category of evil is to take treasures in a hidden or closed way, and with this meaning, corruptor (*al-Mukhtalis*) and reiver (*al-Muntahib*) are not included in this category.^{xxi} Narrated from the Prophet Muhammad, he said: "The people's hands who betray and corrupt is not cut," and the Prophet also said: "The robber's hands are not cut." Narrated from Ali bin Abi Talib, when he was asked about corruptor and robber, he replied: In this case, there is nothing (not cut).^{xxii}

In the theft, it is required that the stolen item be a valuable item, and its value must be clear in size, and there is not a thing of the thief that indicates the thief as a legitimate owner, and it has been proven that the thief moved the stolen goods from the original place to another place. About the value of the stolen items, according to asy-Syaukani quoted by (Marsum 1979), there are several opinions. Some say 2 dirhams, 5 dirhams, 10 dirhams; ¼ dinars and some say 4 dinars.^{xxiii} This difference of these values is due to minimum value (nisab) of the stolen goods in is mentioned differently in the the Prophet's hadiths. A'isyah's hadith stated 3 dirhams, Ibn Masud's mentioned 5 dirhams, while Sufyan As-Sauri said 10 dirhams, and the hadith which states that the thieves' hands are not to be cut unless the value of the stolen goods reach ¼ dinars. There is also a hadith of the prophet which stated that the prophet cut the the hands of the thieves who steal a rope. There were scholars who declared that the price of the rope was 1 dinar. The others said that the price was 4 dinars.^{xxiv}

To be called as a thief, there was an opinion that he must consecutively do theft as mentioned in the Qur'an as a trait (profession) or the nickname of his repeated action. There were scholars who thought that the thief had interest or necessity on what he stole, for example because of hunger, he stole something to eat. Caliph Umar ra. once refused to punish theft by Arab youth who stole other people's horses because Umar knew that he did that because he was very hungry and he had an urgent need to fill his stomach.^{xxv} This example shows that the punishment of stealing (hand-cutting punishment) requires conditions that are very difficult to realize.

2. The punishment of committing adultery

The prohibition of committing adultery and its punishment is determined in some period. First: *And against the two who have done wickedness among you, give punishment to both of them.*(QS.An-Nisa,4: 15). In this verse, the kind of punishment is to be locked up in the house until death or until God gives

them a way. *Second: The woman who commits adultery and the man who commits adultery, so every one of them will be whipped a hundred times, and let no mercy on either of them that prevent you from practicing the religion of Allah, if you believe in Allah, and the Hereafter, let the execution of their punishment is witnessed by a group of believers.* (QS.An-Nisa,4: 16)

The verse above shows the law of committing adultery of being whipped 100 times, each to man and woman, although the prophet Muhammad ended the punishment by stoning. Concerning this stoning, in the letter of al-Azab, it is mentioned: *“The man and woman when they commit adultery, throw stone at them as punishment from Allah and Allah is glorious and wise.”*^{xxvi}

This verse has been removed by revoking several verses but the penalty is still valid; and the stoning sentence is the most important form of textual adjudication which punishment is still in effect. In the case of the verse which is stated to have been in *nasakh*, it is not part of a clear system (method) of the Qur'an.

The Prophet Muhammad set the punishment for a young man who had committed adultery to be whipped and exiled, and set the punishment for the couple who commit adultery to be thrown with stones. The hadith of Ubadah ibn S}amit Muslim history expressed:^{xxvii} *“The virgins who commit adultery were punished of 100 times whipping and exiled for 1 year. While for the widower who commits adultery to a widow, the punishment is being whipped 100 times and stoned.”* The major scholars have the opinion that the punishment of adultery is whipping, including the muhsan adulterer by returning the law to the verse of the Qur'an and considering that there is no certainty of the narrated hadith after the derived verse which explains the whipping punishment because the Prophet established the stoning punishment before the verse of QS an-Nur, 24: 2 is derived.

The next study, (Lutfi Thomafi) explained about adultery. It is very difficult to say that there is adultery, considering the various conditions and the pillar set. If the crime of adultery happens and the event can be confirmed, it is more like the behavior of sexual intercourse which is open and clear. It is like the adultery in a localization which is open, and the sexual activities can be seen. If the meaning of adultery is the event when that men put their genitals in the women's genitals -like the eyeliner is put into its place, without any cloth to separate them, it is impossible to prove the adultery, except that it is open adultery. In the face of modern law, which the facts are covered in front of the ruler because of the fear to feel ashamed toward the society, the adultery will not be proven. If adultery is done in hidden way or the pillars of it are not fulfilled and/ or without the testimony of 4 reliable witnesses, then the act of adultery is detached from the predetermined punishment and it becomes the worst religious sin in the world and the hereafter.^{xxviii}

For example, in the Islamic crime, it is explained that the proof of the offense of adultery can only be done with the

perpetrator's confession and with 4 men witnesses who clearly explain everything with clear details. The confession has two conditions: It must be done straightforwardly and it must not show lies. If a man confesses his adultery in the case of his cock is impotent, or his pubic flesh is clogged into woman's, it is included as *syubhat* (unclear condition), because of this condition, he cannot be whipped.

In relation to the testimony of 4 men, (women witnesses are not legitimate), they have to come together, sit on a place of witness before the judge. They one by one gave their witness clearly saying there was an 'adultery', by explaining how to do it, where, when and how the incident of adultery happened at that time. This is very difficult to do, and almost impossible, because when the witness sees people committing adultery, it is also included as an immoral action.(Marsum, 1979)^{xxix}

MUJTAHID AUTHORITIES DISCUSSION IN ESTABLISHING LAW

The debate of *fasba > b nuzu > l an-nas*, whether the main guidance which is generally *lafadz* or particularly a cause is not *rigit*. It must be placed in a more proportional frame of mind in the context of their respective epistemology and axiology. What becomes the priority in realizing *Islamic Law is suitable for all time and place* is not the legal-formal, *qat'i-d}anni*, liberal, or lateral. It is how to realize where there is benefit, the law is enforced. And how the dimensions of Islamic legal axiology are indeed implemented in real terms according to the needs of society. Therefore, it is important that fatwa institutions be empowered to be able to analyze legal materials in accordance with the dynamics of society and to accommodate justice, mercy and welfare in accordance with the purpose of law determined by most *nash*, because every sacred text as a sacred teaching has a cause and a relationship and even interrelation with the whole series of reality that continues to occur around us and continues to develop change. And the change is sure to happen.

Therefore, the task of the mujtahids in the *istinbat* of law now is to interpret the universal values of Islamic teachings which are hidden behind the majesty of the sacred text. Text *or-an-nas}* is to take a silent position, even though it is associated with the context of the dynamics of the society's culture that continues to develop. On this basis, human reasoning with the guidance of the spirit of the text is expected to be a mediator between the silent text and the reality of science development that continues to happen without time limit. In the historical study, the facts show that the *istinbat* and *ijtihad* of Islamic law conducted by the experts of *fiqh* also pay attention to the reality of people's life. Legalization of law in the context of reality is a form of development of Islamic law in accordance with the needs of society of the law as a solution to the existing problems. Such example is practiced by the companions of Umar bin al-Khattab who always establish the law based on the considerations of reality. Umar is reluctant to distribute *zakat* to *mu'allaf* since the legal basis is inadequate because the position of Islam is getting stronger, unlike at the time of Rasulullah and the companions of Abu Bakr ra before.

Umar did not apply the law of hand-cutting punishment during his reign because of the weak and unstable economic conditions of the society to accept this *lawan*. (Ibrahim, 1990)^{xxx}

When the Rasullullah explained about *miqat* (hajj place), they said about the places he appointed, such as Yalamlam for those who came from Yemen and equivalent with it including Indonesia, it is *miqat* / the place for anyone who arrived there. Therefore, when an aircraft passes above the *miqat* area, it does not mean that the passengers have arrived at the *miqat*. The purpose of the *miqat* determination is none other than that, at the time of Rasulullah, these areas were the gateway to enter the city of Mecca, whereas now, Jeddah is the gate/entrance for the aircraft. In the air, it is very difficult for someone to change clothes and perform ihram sunnah. Therefore, there is no problem in making Jeddah as a *miqat*, as Umar ra. had made Zat ireq as a *miqat makani* for the people of Iraq. (Shihab, in al-Munawir, 1995)^{xxxii}

When Umar bin Abdul Azis was the Governor of Madinah, he was willing to give a legal decision for the lawsuit if the prosecutor could propose two witnesses or a witness with the prosecutor's pledge. This pledge was as the replacement of the position of witness who was absent. However, when he was the Governor of Syam, he was reluctant to give legal decision on the proposed formula of witnesses in Medina. When he was asked about the change, he replied "we see that the people of Syam are different from the people of Medina." (Shihab, 1995)^{xxxiii}

Imam Abu Hanifah allowed to take legal decisions by proposing witnesses with unknown identity of justice. He viewed the aspect of justice of a witness according to his physical only. However, at the time of Abu Yusuf and Muhammad al-Syaibani, his loyal disciples, they must not give the legal decision with the testimony of such witness. The reason was that at that time, there were widespread lies and dishonesty, which cannot be trusted. (Abu Yazid, 2005)^{xxxiiii}

When Imam Ash-Shafi'i moved, he left his old (*qaul qadim*) which was built with effort in Iraq. After he moved to Egypt, he built a new fiqh which was called *qaul jaded* until he died. The difference of the two ijthad cannot be separated from context of the reality of life of Iraqi and Egyptian which were different. (Abu Yazid, 2004)^{xxxv}

At his time, it was natural that Shafi'i modified the results of his ijthad providing the fact that the society's life changed and was different. (Jaih Mubarak, 2002)^{xxxvi} "*Al-Isla>mu sa>lihun li kulli zamanin wa makani.*" Supported by the principle: "*Tagayyur al-Ahka>m bi Tagayyuri al-Amkina>t wa az-Zaman,*" (Munawir, 1995)^{xxxvii}

The text category in the ijthad discourse was often questioned; whether the text may be reached by the *istinbat* practice of the law or not. The popular theories in Islamic legal methodology were, "*la ijthad>da fi> muqa>balati annas*," there is no ijthad in a matter that deals with the text (*qat'i*). Oral- *Ijthad>du fi>>ma> la nas}sja fi>>hi*; ijthad is only on the provisions of the law which do not have nash

(which *isqat'i*). These theories are clearly the limitation to ijthad that it is limited only on the issues that have no clear and explicit text provisions.

The nash which *dalalah* is *qath'i* turns out that in its implementation (in fiqh), it becomes *z}annias* well. Ulama *usu>l* calls it *Qat'iyun bi'itiba>rin wa z}anniyyun bi'itiba>rin ukhra>*. For example, it is about washing head when performing ablution, whether the head is washed a small part, quarter part or the whole part. Based on the verses of the Qur'an, the law of prayer is mandatory, but the practice of prayer becomes *z}anni*, then the way of different prayers is born. The distribution of zakat is *qat'i* based on at-Taubah, 9: 60, but the meaning of each as *na>f 8 isz}anni*. In fact, it could be because it is considered that one of the as *na>f 8* does not exist anymore. Sacrifice by slaughtering livestock as directed in the "*wanhar*" in al-kausar letter, may be due to the decreasing population of livestock or large number of livestock that suffer from human-harmful diseases. Sacrifice is substituted paying the price of livestock. In the law of hand-cutting for thieves, the question arises; what the meaning of the hand is, from which part we cut the hands, whether the hands of all thieves are cut. If it turns out that he still steals after his hands are cut, then the punishment is that his left foot is cut. Then, it can be questioned based on which premise/dalil that the thief's left foot is cut at his second theft, while the verse of the Qur'an only mentioned the hand-cutting punishment. And then, what if the thief has repented and so on? The thief should be punished, but the law of cutting hands may be a form of punishment. The adulterer must be punished, but the law of stoning may be only a form of punishment for the adulterer and many other examples because the *d}urufis* different. It can be replaced with another form in the condition that it is not ignoring the ijthad. Then, where is the certainty (*qath'i*) located? From the words: *Li kullin ja'alna> min-kum syir'atan wa minha>ja*, the expression of the experts is born: *qat'iyun fi jami>'i al-ah}wa>l au fi ba'di al-ah}wa>l*.

Therefore, the role of ijthad in the nash which is *qath'i* is still very possible. Author admit that the nash that is *qath'i* only concerns the general guideline not its operational details. That the adulterer was sentenced to be thrown by stones a hundred times is *qath'i*. However, there are some questions; whether the adulterer is hit one hundred times or whether the adulterer is hit one time with one instrument that consists of one hundred materials to hit him/ her. Then, must the adulterer be punished by hitting? or can it be replaced with other forms of law to make them learn a lesson. In the hadith: "In every 40 goats, the zakat is a goat". This nash is supposed to be *qath'i* because of *mutawatir*. However, in its practice, Abu Hanifah changed the meaning with the "price" of a goat with the argument that zakat is meant to cover the needs of the poor. (Wahbah, 2008)^{xxxviii} Women who are menstruating are prohibited from carrying out tawaf for Hajj. It turned out the scholars *intat}bi>qip* performed ijthad. There is a view that they still cannot do it until they are sacred. The other scholars allow it by paying for a camel's *dam* and some others allow it without paying *dam*. Indonesian scholars responded by

allowing women to use pills to postpone menstruation.

Abdullah Ahmed an-Na'im (2001) argues that the considerations of maslahan can put aside a rule as a separate case that can be ignored by formulations of usul al-fikih. although it is done by rejecting the clear and detailed text of the Qur'an and sunnah(qat}'i).The various acts of Umar's friends cannot be considered as bad. Contemporary Muslims (read: the mujtahid) have the ability to formulate Usul fiqih and have the right to do ijihad even when it comes to the issues that are ruled by the Qur'an and Sunnah texts clearly (q}'i), as long as the results of ijihad corresponds to the essence of the purpose of the Islamic message^{xxxviii}

Masdar Farid reveals revolutionarily that basically there is no Shari'a that is absolute, and a priori applies to all d}uru>f time, place and circumstances). As a way or way of achieving a goal, Shari'a must be dynamic and contextual. A suitable package of shari'a as a tool to achieve a goal within ad}uru>fof a particular social and also to achieve the same goal in the differentdu}ru>f It applies not only to shari'a formulated by humans, but also to the Shari'ah offered by God as an expression of His abundant mercy to man. In fact, the principle of relativity and contextuality of shari'a is very clear. In the Qur'an, the principle is acknowledged explicitly in the verse: *Li kullin ja'alna> min-kum syir'atan wa minha>ja. For each of you (as a different community) we have different syar> i'at and methods.* (Al-Ma'idah, 6: 48)However, because of the formalistic dogmatic religious framework as expressed above, the obvious principle of contextuality becomes blurred. Consequently, what is actually relative has been made to be absolute, and which is actually dynamic has been made to be static. Shari'a which means the way and how (was}ilah) to achieve the goal, has been made to be absolute like the purpose (g}ayah). (Masdar Farid, 1993)^{xxxix} Therefore, it should be realized that in order to realize lafadz of nas} which dalalah isqat}'I we must negate another meaning on the basis of mutawatir, not ihtimal from many aspects, and this is very difficult. Therefore, the role of ijihad in the nash which is qath'i is still very possible in achievingal-Islam S}a>lihun li kullizama>nin wa maka>nin. We admit that the nash that is qath'i only concerns the general guideline not its operational meaning. That the adulterer was sentenced to be thrown by stones a hundred times is qath'i. Then are the other punishments that will be more effective to give them a lesson? If only a whip, in addition that it is a very mild punishment, it may also not be able to give a lesson. Ah, it is only a whip, it does not hurt! Furthermore, there are some questions; whether the adulterer is hit one hundred times or whether the adulterer is hit one time with one instrument that consists of one hundred materials to hit him/ her. In the hadith: "In every 40 goats, the zakat is a goat". This nash is supposed to be qath'i because of mutawatir. However, in its practice, Abu Hanifah changed the meaning with the "price" of a goat with the argument that zakat is meant to cover the needs of the poor. Women who are menstruating are prohibited from carrying out tawaf for Hajj. It turned out the scholars in tat}bi>qi do ijihad. There is a view that they still cannot do it

until they are sacred.The other scholars allow it by paying for a camel's dam and some others allow it without paying dam. Indonesian scholars responded by allowing women to use pills to postpone menstruation. (Fatwa MUI/12/1/1979)^{xl}

Various examples of legal applications related to the reality of society mentioned above arouse our central role on how the application of text is implemented in line with current conditions. In our present time where it has been very far from the history, and between the process of the birth of the text and the social reality of the society.It is the era of information technology in which the number of changes can no longer be measured geometrically, rather than it requires super advanced arithmetic tools.Then ijihadtools require the support of various sciences. In this psychological condition, we cannot develop the setback knowledge by reducing the role of reason to answer the existing religious social problems. Thus, each period requires a renewal to update the details of the affairs and religious law.

CONCLUSION

The debate of asba>b nuzu> l an-nas, whether the main guidance which is generally lafadz or particularly a cause is not *rigit*. al-Qur'an no longer speaks after the era of the derivation of the Qur'an ends. This means that there is noasba>b nuzu>l an-nasany longer. Based on this condition, when mujtahid establishes the law, it is not limited to the text set by the Qur'an or the Prophet Muhammad, but it includes the results of ijihad with qiyas and so on. Therefore, the shari'a law established is relatively in line with the existing reality. In relation to this, there needs to be a clear separation between the shari'a laws established in the Qur'an or the hadith in certainty because there are many verses or hadiths or other deeds that support the certainty, with the laws based on a special verse or inferred from the temporal rules. Here, the openness of shari'a over clear texts (sarih) by implementing ijihad from the other view of which results outside the law has been determined.Therefore, there will be no allegation that the dispute with the new opinion or fiqh of ijihad result is a form of debauchery in the religion and getting out from jama'ah in which the perpetrator will be punished as kafir.

On this basis, further analysis on the textual and contextual language is needed. First, the nash on the Qur'anis needed in order to absorb new legal events to rely on the guidance contained in the text structure or sociological context when the discourse is expressed asba> b nuzu> i). And second, the scholars need to have reorientation on the theory of the limitation of the law, in which there is a kind of law established by the Qur'an that is limited only to its time.The other law that is not established by the Qur'an is applicable in general in accordance with the existing conte.

I. GLOSARIUM

Asbab an-Nuzul	because down verses
Mujtahid	is the person who establishes the law
Shari'a	s the law established
Nas	legal text

Syar'i	legal determination
<i>al- Ibrah bi umum al-lafzi la bi husus as-sabab</i>	the principle used is generally not a special cause
<i>Al-Ibrah bikhusus as-sabab la biumum al-lafzi</i>	the principle is used especially since it is not a common word
Fiqh	Islamic Law
<i>la yunkiru taghyir al-hukmi bi taghyir al- azman wa al amkan wa al- ahwal</i>	here is no doubt that the law changes according to its conditions
<i>Mufassir</i>	commentator
<i>khalifah</i>	caliph
<i>Al-Qur'an</i>	koran
<i>Cambuk</i>	whip
qat'i-d}anni	definitely-uncertain
istinbat	establish the law
Mu'allaf	people who are weak in faith
Miqat	where to start the hajj
Pendapat lama	old opinion
Pendapat baru	new opinion
<i>Al-Isla>mu sa>lihun li kulli zamanin wa makani</i>	Islam according to the time
<i>la ijtiha>da fi> muqa>balati an-nas},</i>	there is no ijtiha to the definite law
<i>al- Ijtiha>du fi>>ma> la nas}s}a fi>>hi</i>	Ijtiha only applies to laws that have no definite legal provision
<i>Dalalah</i>	instructions
<i>d}uruf</i>	place or environment
<i>wanhar</i>	sacrifice
<i>Li kullin ja'alna> min-kum syir'atan wa minha>ja,</i>	each of our groups make laws that are in line with their method
<i>qat'iyun fi jami>'i al-ah}wa>l au fi ba'di al-ah}wa>l.</i>	legal certainty for all or part
<i>tat}bi>q</i>	determination
<i>wasilah</i>	intermediaries
<i>g}ayah</i>	aim
<i>dam</i>	fine

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For Zolkeflee bin Haron, Dosen University of Technology, Faculty of civil Engineering, Skundai, Malaysia terimakasih atas kerjasamanya berkenan mengedit article ini.

To the auditor we wish to publish the article in the journal. We can only communicate via email. Therefore, we are deeply grateful for the attention and sincerity to publish it.

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