SOCIAL HISTORY APPROACH TO ISLAMIC LAW

M. Atho Mudzhar
State Institute of Islamic Studies Yogyakarta

Abstrak

Tulisan ini berangkat dari satu asumsi dasar bahwa hukum Islam sesungguhnya bukanlah sistem hukum matang yang datang dari langit dan terbebas dari alur sejarah manusia. Sebagaimana sistem-sistem hukum yang lain, hukum Islam tidak lain adalah hasil dari interaksi manusia yang berarti pula subjek untuk adanya satu perubahan. Pemahaman seperti inilah yang menjadi dasar perlunya pendekatan sosio-historis terhadap kajian hukum Islam.

Cara pendekatan terhadap hukum Islam yang lebih mempertimbangkan variabel-variabel sosial dan sejarah yang mempengaruhi pembentukan sistem hukum Islam ini sesungguhnya merupakan keharusan mengingat kenyataan penampilan hukum Islam itu sendiri di berbagai belahan negara Islam yang tidak seragam sebagai akibat dari faktor-faktor sosio-kultural dan sosio-politikal yang melingkupinya. Dalam tulisan ini empat produk literatur hukum Islam ditampilkan yaitu : fikh, putusan-putusan pengadilan agama, hukum dan peraturan yang dikeluarkan dalam negara-negara Islam dan fatwa-fatwa para ulama. Terlepas dari perbedaan karakteristik yang ditampilkan oleh masing-masing literatur, keempat produk ini mengarah kepada suatu bukti epistemologis yang sama bahwa hukum Islam pada kenyataannya tidak resistan dari pengaruh-pengaruh sosial yang melingkupi perkembangannya. Perubahan-perubahan yang terjadi dalam dataran substantif hukum Islam di berbagai belahan dunia Islam menjadi penguat dari fakta bahwa hukum Islam pada dasarnya merupakan *resultante* dari interaksi antara para ulama dan faktor-faktor sosial yang ada disekitarnya. Klaim bahwa hukum Islam sebagai hukum sakral yang tidak bisa berubah dengan demikian tidak dapat dipertahankan lagi.

ملخص

تبدأ هذه المقالة من مبدأ بأن الاحكام الاسلامية ليست نظاما ناضجا تأتى من

السماء وتخلو من سلاسل تاريخ الانسان. مثل الأحكام الأخرى ليست الأحكام الاسلامية إلا نتيجة اختلاط الناس فلا حيلة لحدوث التبديل فيها. يكون هذا الفهم مبدأ لاحتياج الطريقة الاجتماعية التاريخية فى دراسة الأحكام الاسلامية.

إن طريقة دراسة الأحكام الاسلامية التى تهتم بالأحوال الاجتماعية والتاريخية المؤثرة فى تنظيم الأحكام الاسلامية طريقة لازمة الاستعمال. وهذا بالالتفاط إلى وجوه الأحكام الاسلامية فى كثير من البلدان الاسلامية المتنوعة نتيجة لتنوّع الأسباب الحضرية والسياسية. وتذكر هذه المقالة أربع منتجات الأحكام الاسلامية المكتوبة وهى : الكتب الفقهية وتقريرات محكمات الاسلام والأحكام ثم النظم أخرجتها البلدان الاسلامية وفتاوى العلماء. دون الاهتمام إلى اختلاف صفاتها، تسوق المنتجات الأربع إلى وجود دليل ابستمولوحى بأن الأحكام الاسلامية فى حقيقتها لا تخلو من تأثير الحقائق الاجتماعية حولها. وجود تغييرات أساسية فى الأحكام الاسلامية فى البلدان الاسلامية يعزّز الرأى بأنها تكون نتيجة اختلاط العلماء والأحوال الاجتماعية حولها. فلذلك، القول بأن الأحكام الاسلامية أحكام طاهرة لا غير قابلة للتغيير قول غير صالح.

I. Introduction

It works both ways : the literature of Islamic Law may indicate the social history of the Muslims, and the latter may also indicate the former.

Social history approach to Islamic law is an attempt to understand the product of Islamic legal thinking in terms of its socio-cultural and socio-political surroundings. The assumption is that any Islamic legal exercise is the result of the interaction between the *faqih* or the *mufti* and his socio cultural and socio-political surroundings. This approach is arguable for at least two reasons. First, it views Islamic law in its proper position as a result of human interaction that is subject to change. Secondly, it may encourage *fuqaha* and *mufti*s not to hesitate to make changes in Islamic law whenever necessary. Although this approach is not intended to perform *istinbat*, for the object of any history study is something of the past, it shows the historical evidence that such changes have been con-

stantly practiced in the past. This article will endeavor to discuss parts of the historical evidence.

II. Forms of Islamic legal literature

There are at least four types of Islamic legal literature : *kutub al-fiqhiyyah* (books on Islamic jurisprudence), decrees of The Islamic courts, law and regulation by Muslim countries, and *fatwas* (legal pronouncement of jurisconsults). Each of these has its own characteristics and deserves proper attention.

Kutub al fiqhiyyah are usually comprehensive in nature and cover all aspects of Islamic law; revisions of any part of them are considered disturbing their comprehensive nature. The Islamic court decrees, tend to be more dynamic than the *kutub al fiqhiyyah* as they are responses to real problems of society and binding to the parties concerned. Laws and regulations adopted by Muslim countries are also binding to even a more wider spectrum of society and not only formulated by *fuqaha* and *ulama* but also politicians and Muslim Scholars on secular fields.

The *fatwas*, the fourth type, are casuistic in nature as they are scattered responses to questions and most of them are not compiled. *Fatwas* are not binding neither to the questioners nor to the Muslim public at large. *Fatwas* are necessarily dynamic in nature for they are responses to the contemporary problems.[1]

Throughout the history, out of four types discussed, the books of *fiqh* have dominated the development of the history of Islamic law. Although *fatwas* and court decrees have never diminished in number, they are rarely well documented. Law and regulations adopted by Muslim countries have been playing important roles only in the 19th and 20th centuries, for the concept of modern state itself is relatively new to the Muslim world. Let us now examine the relationships between each type of these Islamic legal literatures with the society.

III. Socio-cultural factors and the books of fiqh

There is no need to elaborate how the *fuqaha* in the past were influenced by their social and cultural environments in their legal thingking. The most vivid evidence was that *Shafi'i*, the founder of the *Shafi'i* school of Islamic law, had *qaul qadims* (old opinions) and *qaul jadids* (new opinion). The *qaul qadims* were given as he lived in Baghdad and the *qaul jadids* were given in Egypt. Dozens even hundreds of the *qaul*

qadims were replaced by *qaul jadids* that were more suitable to the new social environtments, only in about five-year time span. If one reads the *fiqh* book of Mahalli, for example, one finds many statements of the *qaul qadims* and the *qaul jadids*.

It is well accepted that in the early stages of the development of Islamic law in the 8th century there grew two geographically based schools of Islamic law : the *ahl al-ra'y* and the *ahl al-hadith*. The former was pionered by Abu Hanifah and based in the cities of Kufah and Baghdad. The latter was pioneered by Malik b. Anas and based in Madina. Because of its urban environments and the fact that Kufah and Baghdad were distant from the center of *hadith*, Madina, the *ahl al-ra'y* developed a rational school of Islamic law and gave priority to rational thinking over *hadith* narrations. On the contrary, *the ahl al-hadith*, being in a simple town of Madina which was also the center of *hadith* circulations, developed a more traditional school of Islamic law loaded with *hadith* quotations. In fact *Al-Muwatta*, the work of Malik b. Anas, is a compilation of *hadiths* and a book of fiqh at the same time.[2]

If one goes further to the 12th century, one finds a book of fiqh entitled *Bidayah al-Mujtahid* (The Beginning of A Mujtahid) by Ibn Rushd of Cordova, Spain. Cordova was then a busy city with 21 suburbs, 13000 residential houses, 70 public libraries, a number of bookstores, mosques, palaces, and well constructed roads with lanterns on the sides. By those days standard and compared to European cities at the time, Cordova was a metropolitan city. The complexity of the urban life of Cordova combined with the fact that Ibn Rushd himself, was a philosopher who indeed was fond of rational thingking, produced the *Bidayah al-Mujtahid*, which is full of rational arguments and comparative in nature. One knows that such a comparative approach to Islamic law has developed rather extensively only in the modern times as the urbanism of the Muslim world grew.[3]

A different picture is found in the southeast Asian countries in the 19th and 20th centuries, where the local *'ulama* preferred books of *fiqh* written somewhere else in the past to develop their own *fiqhs*. Perhaps this was due to the poor quality of the *'ulama* and their inferiority complex caused by their being distant geographically from the center of the Muslim world, the Middle East. As a result, they adopted *al-Muharrar* of al-Rafi'i (d.1226 A.D.), *al-Taqrib* of Abu Shudja' (d. 1215 A.D.) the *Muqaddimat al hadramiyah* of Ba Fadl, and the *Qurrat al-ayn* of alMalibari

(b. 975 H), all of which were written in a distant past and outside the land of the Southeast Asian countries.[4]

It is evident that geographical and socio-cultural factors have significant influence on the development of the books of *fiqh* and, likewise, geographical and sociocultural restrictions determine the kind of *fiqh* books adopted.

IV. Socio-cultural factors and the laws of Muslim countries

There are a number of Muslim countries that have adopted laws which are interesting to students of Islamic law. The first to mention is Tunisia. In 1956 this country promulgated the Tunisian Code of Personal Status with radical provisions on marriage. Article 18 of the code stipulated that poligamy was forbidden and punishable by one year inprisonment and fine of 240,000 frank. This stipulation was apposed by many *'ulama* both inside and outside Tunisia, for it contradicted the statement of the Qur'an permitting poligamy. The Tunisian goverment, however, had their own reasons. They believed that the permission for poligamy was granted only if the husband could do perfect justice to his wifes. Since in practice such a justice could never be realized, they concluded that the basic stand of the Qur'an was to prohibit poligamy.[5]

A question may arise now as to whether Tunisia has gone beyond the boundaries of Islamic law while at the same time it claims itself to be an Islamic state ? How do we judge Tunisia by this code ? The judgement is not easy to make, indeed. Perhaps it is not even necessary to do. What is important is to understand the social development that had been taking place prior to the promulgation of the code. It is apparent that in the period of 1885 to 1912 some 3,000 Tunisian students were sent to Paris to study. In the meantime there were 34,000 French colonists in Tunisia in 1906, and 144,000 in 1945; these colonists introduced modern agriculture and education to Tunisians. On the return of the students they made educational reforms through the Zaituna and Sadiqi colleges which later led to the birth of the Khaldunniyah college that produced the Young Tunisians movement. Thus, whit hall these cultural contacts with the French, the Tunisians never felt to have gone beyond the teachings of Islam when they prohibitted poligamy.[6]

Another question may arise as to how Indonesians would view the Tunisian case. In the 1960's the Indonesians saw the Tunisians go beyond the spirrit and letter of the Islamic law. In the 1970's however, after the promulgation of the Marriage Law No. I/1974, the Indonesians also

started restricting poligamy. In fact, nowdays, poligamy is practically prohibitted for public servants and the armed forces personnel. Thus, Indonesia has been moving closer to Tunisia.

The second country to mention here is India. In 1937 India promulgated the Muslim Personal Law (Shari'at) Application Act which stipulated matters of marriage, divorce, inheritance, and endowments for Muslims. Under the law divorce for Muslims was to proceed according to the Hanafi school of law. Since in the Hanafi school divorce initiated by a wife is almost impossible, many wifes made statements to the effect that they no longer embraced Islam so that they automatically became divorced under the rule of *fasakh*. This practice had been considered so detrimental to the preservation of the Islamic community that in 1939, under the encouragement of Ashraf 'Ali Thanawi, India promulgated The Dissolution of Marriges Act which stipulated that divorce for Muslims was to proceed under the Maliki school of law that gave wifes the rights to iniate divorce. Thus, Indian Muslims changed their *madhab* affiliations on the matter from one school to another because of certain socio-cultural surroundings.[7]

The third country is Pakistan. In 1961 this country promulgated the Muslim Family Law Ordinance which stipulated that marriages had to be registered. Although the registration did not influence the validity of marriage, failure to do so would cause problems in the future. On divorce, the law stipulated that divorce was effective only after two months after registration. These stipulations contradicted the classical schools of Islamic law as represented in the classical *fiqh* texts, while Pakistan continued to claim itself to be an Islamic state.[8]

The fourth country to mention is Egypt. Although modernization programs had been launched in Egypt since the beginning of the 19th century, reforms of laws on personal status took place only in 1920 and amended in 1929. In 1979 Egypt progmulted the Jihan Law which introduced a lot of reforms compared to the previous laws. Although the Jihan Law was later replaced by the Law of Personal Status of 1985, most of its reformative ideas were preserved. A number of issues may be cited here to show how they contradict the classical texts of *fiqh*. The law stipulated that an unintended *talaq* pronouncement is neither valid nor effective, that the pronouncement of three *talaq*s is illegal and has no effect, that divorce has to be registered, and that a grand child should take the share that would have been recieved by his or her parents in inheritence under the rule of *wasiyyat al-wajibah* (obligatory bequest).[9] At different points

Egypt took different stands on the same legal issue. Once it took the stand that interests are forbidden, but at other times it permits them such as in the case of unpaid debts as shown in the decree of the Supreme Justice of May 4, 1985. All these point to the fact that, triggerred by the socio-cultural surroundings, the Egyptian Muslims have jumped from one legal stand to another without having to feel that they have gone beyond the boundaries of Islamic law.

The above discussion shows how laws adopted by Muslim countries in the world have been conditioned by and closely related to the socio cultural and socio-political surroundings.

V. Socio-cultural factors and court decrees

To show how socio-cultural factors have influenced court decrees, some evidences from India and Africa will be presented here. In India, in 1897, there was a case involving Aga Mahmud versus Kulsum Bebe, in which Kulsum as a widow demanded the court that she be given a portion of her late husband's property for her expenses of a full year in addition to her share of inheritance. The court granted her demand on the basis of the Qur'anic verse 240 of Surah al-Baqarah which says : " Those of you who died and leaves wifes behind, (make) a bequest in favor of their wives of maintenance for a year without turning (them) out".

In the meantime classical *fiqh* texts maintained that the above verse had been repealed by the verse 12 of Surah al-Nisa' which alloted a certain amount of share to widows. The verse stated that widows recieved the share of one fourth of inheritance of their late husband property if they were not survived by any child, otherwise the share was one-eighth. On the basis of this interpretation of the classical *fiqh* texts, Kulsum's demand was rejected by the Appeal Court. This shows that in India court decisions have moved from one legal position to another without having to feel that they have gone beyond the boundaries of Islamic law.[10]

In west Africa, the *Jazirat al-maghrib*, a system of land rentals has been practiced for centuries called Khamasa in which the cultivator takes the share of four-fifth of the produce and the rest goes to the land owner. Most of the proponents of the Hanafi, the Shafi'i, and the Maliki schools of law maintained that such a system was forbidden in Islam because it involved transactions unclear in value. The value of the one-fifth of produce that goes to the land owner is not certain and fluctuates from time to time both because of the quality of the harvest and the price. Therefore, such transactions involve speculations and belong to the category of *riba*

(usury). However, because the practice of the Khamasa had been established for so long, people of West Africa did not see any speculative element in such a system. Soon court decisions followed the practice of the society; court decrees recognized the Khamasa as justified in the view of Islamic law. This is to say that court decrees pertaining issues of Islamic law were influenced by the socio-cultural surroundings.[11]

VI. Socio-cultural factors and fatwas

A *fatwa* is an Islamic legal opinion given by a jurisconsult (*mufti*) as a response to a question. Usually *fatwas* are issued by individual *'alim*; lately they have been issued by institutions such as the Council of Indonesian Ulama (the CIU). To show how socio-cultural factors influence *fatwas*, a couple of the *fatwas* of the CIU will be disscused here. Although these *fatwas* are of modern times, the nature of the discussion can be inferred to classical *fatwas*.

One of the *fatwas* of the CIU was on inter-religious marriages. The *fatwa* was issued on June 1, 1990 and stated that a Moslem, either man or woman, was forbidden to marry a non-Muslim. The interesting part of the *fatwa* was that it went beyond the statement of the Qur'an, for in the Qur'an a Muslim man may marry a woman of the *ahl-kitab* (people of the book). The reason was that such interreligous marriages conceived more harms (*mafsadah*) that benefits (*mashlahah*). A number of socio-cultural factors had contributed to the issuance of the *fatwa*. First, the *'ulama* were disturbed by articles in the Jakarta daily newspapers concerning inter-religious marriages involving Muslims and non-Muslims. Secondly the *'ulama* recieved letters from certain individuals asking the legal status of such marriages. Thirdly, rumor has it that in the 1960's the Christians had a plan to convert Indonesia in 50 years and in 1970's claims were made by foreign reporters that some two million Indonesian Muslims had converted to Christianity. These were some of the social surroundings found at the time. The *'ulama* considered the issue to have reached such a point that for the sake of the Muslim community's growth they wanted to make sure that any possibility of conversion to christianity was checked; inter-religious marriages would open such a possibility. It seems clear now that the nature of inter-religious relations had an influence on the *fatwa* of the CIU.

The second *fatwa* to be mentioned here is on family planning, particularly on the issue of the use of IUDs in family planning practice (Intra Uterine Devices). In 1971 some 11 leading Indonesian *'ulama* is-

sued a *fatwa* stating that the use of IUDs in family planning was forbidden in Islam. In 1983 the National Conference of *'ulama* on Population, Health, and Development attended by some 50 *'ulama* issued another *fatwa* lifting the ban stating that the use of IUDs in family planning was justified. The conference maintained that the second *fatwa* was not a revocation to the first one but rather a correction of the argument. The *'ulama* argued that in 1971 the use of IUDs had been prohibitted on the ground that their insertion involved the sight of the *'aurah* (the private area of woman's body), and the prohibition was methodologically classified *as hurrima li dhatih* (forbidden on the essence). The *'ulama* explained that in the 1983 *fatwa* the line of the argument of the 1971 *fatwa* was corrected that the prohibition was not on the essence but as precautionary actions to prevent further *violations (li sadd al-dhari'ah*). They further explained that in the science of *usul al-fiqh* whatever forbidden on the essence could not became permitted expect in emergency circumstances threatening the life of human beings, but whatever forbidden for preventive purposes could become permitted if the need arose. They concluded that in the case of the use of IUDs in family planning in Indonesia the need was obvious, the pressure of population increase in Indonesia was so high that family planning was the only practical way to reduce the pressure; here IUDs were the only practical way to reduce the pressure; because IUDs were considered by experts as one of the most effective and the least expensive means of contraception. It must be noted that in 1981 there were 2 million IUD users; in 1982 the number increased to 2.4 million, and in 1983 to 2.9 million. Therefore, the lifting of the ban of the use of IUDs was functioning to give psycological release to the millions of Muslims using IUDs.[12]

The above discussion shows that in both *fatwas*, on interreligious marriages and the use of IUDs in family planning, the Indonesian *'ulama* were interacting very closely with their social surroundings. In other words, socio-cultural factors had contributed to the issuance and the content of those *fatwas*.

VII. Conclusions

Two following conclusions may be drawn from the above discusion :

1). Throughout the history it is evident that Islamic law which is claimed by many as immutable divine law is in fact a result of the interactions between Muslim Scholars and their socio-cultural and

sociopolitical surroudings. This is true for all types of Islamic legal documents: *kutub al-fiqhiyyah*, court decrees, laws adopted by Muslim countries, and *fatwas*.

2). The Social history approach to Islamic law seems appropriate to be developed to remind one of the wordly interpretational nature and the dynamics of Islamic law. For centuries Islamic law has been static and being treated as such; it is now time to place Islamic law in its proper position as ever changing products of human thingking. Only in very few cases are the statements of the Qur'an and Hadith on law final.■

Notes

[1]The Practice of compiling *fatwas* into volumes started only in the 12th century. In the Hanafi school the earliest volume on *fatwas was Dakhirat al-burhaniyyah* of Burhan al-din b. Maza (d. 570H/1174 A.D.), followed by al-Khaniyyah of the *fatwas* of Qadi Khan (d. 592H/1196 A.D.), *al-Sirajiyyah* of Siraj al-din al-Sanjawi (d. 6th century H), and the *Tatar Khaniyyah* of the *fatwas* of Ibn 'Ali al-din (d. 800H/1397 A.D.). In the Maliki school among the first volume of *fatwa* compilations was *al-Mi'yar al-maghrib* of al-Wansharisi (d. 914H/1508 A.D.). In the Hanbali school the first volume was *the Majmu' al-fatawa* or the *Fatawa al-Kubra* of Ibn Taimiyah. In the 17th century the wellknown volume of *fatwa* compilations was the *Kitab Fatawa 'Alamaghiriyyah* of India.

[2]See Muhammad Khudari Bek, *Tarikh al-tashri' al-Islami* (Mathba'a Sa'adah, Egypt, 1954), pp. 141-146; also N.J. Coulson, *A History of Islamic law* (Edinburg University Press, 1964), pp. 36-52.

[3]On the comparison between European and Spanish cities at the time, see Phillip K. Hitti, *History of Arabs* (The Macmillan Press, 9th edition, 1970), p. 526.

[4]The books of *fiqh* originated from *Kitab al-muharrar* of alRifi'i *are Minhaj al-talibin* of al-Nawawi (d. 676 H) with its summaries and commentaries namely *Kanz al-raqhibin* of Mahalli (d. 864 H) and Sharh *Kanz-al-raqhibin* of Qalyubi and Umayra, *Manhaj al-tullab and Fath al-wahhab* both are of al-Ansari (d. 926 H), *Tuhfat al-muhtaj* of Ibn Hajar (w. 973 H), *Mughni al-muhtaj* of alSharbini (d, 977H), and *Nihayah al-muhtaj* of al-Ramli (d. 1004 H). The books of *fiqh* originated from the *Taqrib* of Abu Shudja are *al-Iqna'* of al-Sharbini (d. 977), *Kifayat al-akhyar*, of alDimshqi (d. 829 H), *Fath al-Qarib* of Qasim al-Ghuzzi (d. 918 H), *Taqrir* of 'Awwad, *Tuhfat al-habib* of Bujayrimi (d. 1100 H), and *Hashiah al-bajuri* of al-Bajuri (d. 1277 H). The books of fiqh originated from the *Muqqadimmat al hadramiyya* of Ba Fadl of the 16th century A.D. are *Minhaj al-qawim* of Ibn Hajar al-Haytami (d. 1338 H/1919 A.D.), *Sharh 'ala Ba Fadl* of Mahfuz al-tarmasi (d.1338 h/1919 A.D.) *Bushra al-karim* of Sa'id b. Ba'shin, and *al-hawash al-maddaniyyah* of Sulaiman al kurdi (d. 1194 h/1780 A.D.) The books of fiqh originated from the *Qurrat al-'ayn* of Zayn al-din al-malibari are *Fath al-mu'in* of al-

Malibari himself, *Nihayat al-Zayn* of Nawawi al-Bantani of the 19th Century A.D., *I'anat al-talibin* of Sayyid Bakri al-dimyatib.(1300 A.D.), and *Tarshih al-mustafidin*, see Mohamad Atho Mudzhar, "Fatwas of the Council of Indonesia Ulama : A Study of Islamic Legal thought in Indonesia 1975-1988", Ph.D. dissertation, University of California at Los Angeles, USA, 1990, p. 37.

[5]Tahir Mahmood, *Family Law Reform in the Muslim World* (The Indian Law Institute, New Delhi, 1972), pp. 99, 101, and 108.

[6]Ira M. Lapidus, *A History of Islamic Societies* (Cambridge University Press, New York, 1989), pp. 698-699.

[7]Tahir Mahmood, *Family Law Reform*, pp. 170-171, 182.

[8]David Pearl, "Executive and Legislative Amendements to Islamic Family Law in India and Pakistan", in Nicholas Heer (ed.), *Islamic Law and jurisprudence* (University of Washington Press, Seattle and London, 1990), p. 151-152.

[9]Tahir Mahmood, *Personal Law in Islamic Countries : History, Text and Comparataive Analyisis* (Academy of Law and Religion, New Delhi, 1987), pp. 27-33.

[10]Noel J. Coulson. *Conflicts and Tensions in Islamic Law* (The University of Chicago Press, Chicago), p. 50.

[11]Ibid, p. 70; also 'abd al-rahman al-Jaziri, *Kitab al-fiqh 'ala al-madhahib al-arba'a* vol. III (Dar al-fikr, Beirut, n.d), p. 2-4.

[12]For further discussion on both and other *fatwas*, see Mohamad Atho Mudzhar, "fatwas of the Council of Indonesian Ulama", *op.cit.*