

The formulation of Fiqh Nusantara in Indonesia

M. Noor Harisudin

Universitas Islam Negeri Kiai Haji Achmad Siddiq Jember

E-mail: mnharisudinujember@gmail.com

DOI: 10.18326/ijtihad.v21i1.39-57

This article discusses how Fiqh Nusantara, an Islamic jurisprudence in Indonesia was formed and formulated. Data were obtained through library research, classic literature commonly used in Islamic boarding schools, fatwas of the Indonesian Council of Ulama, Nahdlatul Ulama, and Muhammadiyah. The Fiqh Nusantara contextualization in Indonesian locus – known as Fiqh Nusantara– is posed from distinctive genealogy and characteristics compared to Fiqh that has developed in the Middle East. One of the characteristics of Fiqh Nusantara is that it has strengthened the unity of the Republic of Indonesia as indicated by its various contributions in the national legal system. Additionally, it has been resulted in a dialogical process in which many fatwas developed and lived in the community. It is responsive to recent developments of fiqh and it is not derived from one school of thought. It is created through collective efforts (collective ijtihad) in the form of fiqh which is open to variety of opinions. However, Fiqh Nusantara as an Islamic law in Indonesia has not yet penetrated the domain of *mabdah* (sincere worship to the God). For Fiqh Nusantara activists, it was only applicable to the changing domain of fiqh (*mutagbayirat*) and not to the fixed domain of fiqh (*tsawabit*).

Artikleni mengkaji bagaimana Fiqh Nusantara, hukum Islam di Indonesia dibentuk dan diformulasikan. Data diambil dari penelusuran pustaka, literatur kalisik yang banyak digunakan di pesantren, fatwa Majelis Ulama Indonesia, Nahdlatul Ulama, dan Muhammadiyah. Kontekstualisasi Fiqh Nusantara dalam lokus keindonesiaan, dikenal dengan Fiqh Nusantara, diakibatkan dari geneologi dan karakteristik yang berbeda dibandingkan dengan fiqh yang berkembang di Timur Tengah. Salah satu karakteristik Fiqh Nusantara adalah penekanan pada kesatuan Republik Indonesia sebagaimana diindikasikan oleh berbagai kontribusi pada sistem hukum nasional. Terlebih, sistem hukum tersebut dihasilkan dari proses dialektis dimana banyak fatwa muncul dan tumbuh dalam komunitas tersebut. Hal ini merupakan respon pada perkembangan mutakhir dari fiqh dan tidak berasal dari satu madzhab. Upaya tersebut tercipta melalui ijtihad kolektif dalam kerangka fiqh yang

terbuka pada berbagai opini. Namun, fiqh Nusantara sebagai hukum Islam di Indonesia belum masuk pada domain *mabdlah* (ritual ibadah khusus pada Allah). Bagi aktivis Fiqh Nusantara, hal tersebut hanya berlaku pada perubahan domain fiqh *mutaghyirat* (berubah) dan belum termasuk dalam domain fiqh (*tsawabit*).

Keywords: *Fiqh Nusantara; fiqh formulation; Islamic law; living law; positive law*

Introduction

The term Fiqh Nusantara refers to Indonesian jurisprudence, a term used by Ash-Shiddieqy in the 1940s. This term was socialized in 1961 which later received a warm welcome from the Islamic scholars in Indonesia. It was later highlighted during the 33rd Congress of Nahdlatul Ulama (NU), the biggest Islamic organization in the world, in 2015, in which the main theme of the congress was on conceptualizing the idea of Islam Nusantara. However, the idea of Fiqh Nusantara was not discussed comprehensively since the dominant political sphere of the congress made this topic marginalized (Siddiqi, 1997, pp. 215–216; Feener, 2007, p. 182; Harisudin, 2020, p. 2).

Theoretically, *Islam Nusantara* is the Islamic teachings nurtured throughout Indonesia. This Islam Nusantara then constructed local characteristics which are different from the rest of the world, for example Islam in the Middle East. After the congress, the term Islam and Fiqh Nusantara became an interesting academic topic nationally and internationally. It attracted considerable attention since the Indonesian daily lives were inseparable from fiqh (Said, 2008, p. 107). Jurisprudence study institutions emerged, and were present in the community to strengthen the position of fiqh in living laws, in which some of them were incorporated into positive laws (Harisudin, 2016).

Fiqh Nusantara was an important element in the development of the legal system in Indonesia. Its transformation from living laws to positive laws underlined its fundamental contribution. Without denying the legal norms of other religions, the presence of Fiqh Nusantara was essential in the Indonesian legal system. As it should be, it did not tarnish legal pluralism which has become an agreement among the founding fathers of this nation. However, phobias against the Fiqh Nusantara grew stronger along with the phobia of Islam. It came from inside and outside Islamic communities worrying that it would replace the Unitary State of the Republic of Indonesia to be an Islamic State (Vaezi, 2006). Such

fear was unnecessary because it was pronounced by those who were submissive and obedient to national consensuses such as Pancasila, the platform of Unity in Diversity, the Unitary State of the Republic of Indonesia, and the 1945 Constitution. In other words, this jurisprudence would accommodate both national consensuses and religion as a pillar to maintain harmony between various elements of national law.

Fiqh Nusantara had existed in Indonesian long before Ash-Shiddieqy declared it in the 1940s. It could be traced back that this concept has existed since the ulamas first attempted to form fiqh based on the diverse socio-cultural context of the archipelago. It was pioneered by Sheikh Nawawi al - Bantani, Sheikh Mahfudz at-Tarmasi, Sheikh Soleh Darat as-Samarani, KH. Ihsan Jampes, Syekh Yasin al-Padangi, Sheikh Muhammad Arsyad al-Banjari, and other (Sya'ban, 2017, p. ix). Further, it was introduced by Walisongo when Islam arrived in Indonesia in its early period. Thus, Fiqh Nusantara did not only reflect the dynamics of Islamic law in the past, but also it has designated Indonesian Islamic law in the present and in the future. Therefore, Fiqh Nusantara is - borrowing Arkoun's language - "open fiqh corpus" to the future social development. It is not surprising that Fiqh Nusantara - part of the Islam Nusantara-could cover the dimensions of the past, present, and future.

The urgency of this research encompasses portrayal of the characteristics of Fiqh Nusantara in Indonesian context that are likely distinctive from the characteristics of fiqh in other countries.

Methodology

This article is a literature study that analyses Indonesian Islamic law thoughts. Data of the research are conducted from three Indonesian Islamic institutions; Nahdlatul Ulama (NU), Indonesian Council of Ulama (Majelis Ulama Indonesia/MUI) and Muhammadiyah. Those data are from classic literature commonly used by Nahdlatul Ulama (also mostly used in Islamic boarding schools or pesantren), fatwas of the Indonesian Council of Ulama, and Muhammadiyah. Those data are analysed to comprehend in detail a characteristic of Indonesian Islamic law that differs from Islamic law of Middle East. This special character then is known as Fiqh Nusantara which is resulted from dialectic thought and consideration of social, cultural and geographical of Indonesia.

Defining Fiqh Nusantara

The term Fiqh Nusantara was derived from the word “fiqh” and “Nusantara”. It referred to the standardized fiqh. It has been inevitable that the meaning of fiqh has developed over time. Al-Ghazali indicated that the meaning of Fiqh was very broad in the early days of Islam. However, it has become limited since the 4th Century of Hijri. Initially, the term fiqh referred to a broad understanding of Islam. Therefore, someone was called as Fakih if he had a deep understanding of Islam.

This sense of meaning was apparent in the life of the Prophet. At one time, the Prophet Muhammad prayed for Ibn Abbas, “*Allabuma faqqihu fiddin* (O Allah, give him religious understanding)”. It indicated that the Prophet did not assert an understanding of law but a deep understanding of religion in general (Saad, 1957, p. 363). It was supported by Abu Hanifah who stated that fiqh was “*ma’rifah an-nafs ma laba wa ma alaiba*” (one’s knowledge of his rights and obligations). Thus, fiqh covered all aspects of life such as Aqedah, law, moral standard, and conduct of life (Sirri, 1996, p. 13).

Thus, it could be stated that fiqh was classified into two perspectives on its scope of meaning: fiqh in a broad sense and in a narrow sense. In its narrow sense, it referred to Islamic law. Meanwhile, in a broad sense, it referred to Islamic knowledge in multiple dimensions such as *aqedah*, sharia and morals (mysticism). This broad meaning was in accordance with the meaning stated in al-Fiqh al-Akbar by Imam Abu Hanifah which included the problems of aqedah, law, and morals in it. This book was written to answer *qadr* experts’ beliefs about the basic principles of Islam such as aqedah, oneness of God, afterlife, prophethood and so on that was considered in line with the science of kalam, instead of law. Therefore, Abu Hanifah called it al-Fiqh al-Akbar. It was fiqh which covered theological problems as well as law (Hasan, 1970, pp. 3–4).

The definition of fiqh in its narrow meaning has been debated by many scholars. Azizi, for example, stated that fiqh was a law that included *al-ahkam al-khamsah* underlining that the five laws were closer to the religious ethics of Islam. Its main characteristic was the realization of the value of worship, which was full of rewards, torments, and consequences hereafter. Meanwhile, Josep Schaht explained that fiqh was Islamic law as a set of religious rules, the totality of Allah’s commands united in the behavior of Muslims in all aspects

(Azizi, 2003, pp. 14–15; Schat, 2003, p. 1).

These two definitions emphasized fiqh as *al-abkam al-khamsah* and the internalization of fiqh values in the personality of Muslims. The intended *al-abkam* was *wajib*, *sunah*, *mubah*, *haram* and *makruh*. Hanafiyah added two laws by distinguishing *fardlu* with *wajib* and *makruh tanzihi* with *makruh tabrim* (Harisudin, 2017b).

Another definition of fiqh was stated by Wahab Khalaf. It was an *amaly* law of shar'i extracted from detailed arguments. Meanwhile, other scholars defined fiqh as “science of the law of shar'i derived from efforts”. The first definition emphasized the practical shar'ia law, the second one - in addition to the first, emphasized the method of extracting fiqh through efforts (Khalaf, 2004). At least, those definitions underlined that fiqh was shar'ia law and it was the product of efforts. This actually represented the dynamic characteristic of fiqh. Jurisprudence was different from the law of *i'tiqadiyah* (tauhid) which was dogmatic and unchangeable. In the realm of fiqh, the existing laws were changeable and some of them were fixed. The discussion of changeable fiqh refers to *mu'amalah's* fiqh, while the unchanging fiqh was included in *mabdlah worship* (Harisudin, 2017a, pp. 32–36).

Worship was jurisprudence, which remained constant and enduring. Prayers, fasting, and pilgrimage to Mecca were themes that did not change. Its 'changes were at the level of *rukhsah* which was minimal in accordance with the ability of mukallaf. This *rukhsah* increasingly gained its ground in the case of *al-aqalliyat* in which Muslim was a minority population. In such circumstances, Islamic jurists provided concessions so that Muslims could carry out Shari'a easily and conveniently (Harisudin, 2018a, p. 48). In countries such as America, Britain, Australia, China, and Taiwan, for example, *al-aqalliyat* fiqh was applied. Hence, Muslims could not only practice Sharia, but also they could be accepted by non-Muslim communities. Although it was considered easy for some reasons, it indeed reflected the nature of *rahmatan lil alamin* of Islam. In some emergency conditions and in very difficult situation and contexts, jurisprudence provided a leeway as a *rukhsah* for a Muslim (Mawardi, 2010).

If it was not responsive to these changes, fiqh would be left behind. As a result, it became infertile because it produced laws that were not in accordance with the objectives and *maqasid al-shari'ah*. This fiqh dictum should be read again (re-reading) to gain the spirit

of Islamic law. Similarly, it was discussed by Ibn al-Qayim al-Jauziyah (1980, p. 99) in his book “‘Ilam al-Muwaq’i’in” as follows:

“The attitude of keeping the previous quotation from the established law was a form of heresy in religion and the incomprehension of the aims and objectives of Muslim clerics and salaf scholars in the past”.

Besides, Abidin (1954, p. 113) also contended that:

“Mufti should not be frozen by (only accepting) what is quoted in the books of dahir al-riwayah, regardless of the times and people of that period. If it happens, then many rights will be sacrificed, and the harm will be greater than the benefits”.

It was important to note that being *taqlid* to fiqh dictum without considering its context certainly would bring *madllarat* to humans and their lives since it was made by considering the situational context to provide the benefit for Muslim. Therefore, updating fatwa was part of the fiqh effort to provide benefit for humans not only in hereafter but also in the world. Thus, by definition, Islam Nusantara was Islam that has been living and developing in Indonesian. It was not Islam that lives and develops from Indonesia or grows and develops for Indonesia. Islam that has lived in Indonesia in the past few centuries forms its own characteristics which make it - in some respects - different from Arab Islam, which has been the epicentre of the civilization of Islamic world

Meanwhile, the term Nusantara refers to an area called Azra which includes Indonesia, Singapore, Thailand, Malaysia and Brunei Darussalam. Strictly speaking, the term Nusantara in Azyumardi Azra’s view is Southeast Asia, an area far beyond what Gajah Mada fought for during the Majapahit empire (Harisudin, 2017b, pp. 532–533).

In my opinion, the term Islam Nusantara as intended, is not Islam with such a wide territory as Azra views, but Islam Nusantara is Indonesian Islam. Darmadi (2016, p. 186) called it “... Islam of the archipelago”, may connote different things for different people. It may mean Islam that is rooted in local values, or the kind of Islam that has been promoted by scholars, traders and missionaries with peace, not war”. Indonesian Islam as in this sense was echoed at the 2015 NU Congress in Jombang. Wijaya also said that “Nusantara” represented the period of the existence of the region which is now called Indonesia. In other words, Islam Nusantara is another name for Indonesian Islam as stated by Qomar,

not Southeast Asian Islam (Qomar, 2015).

Thus, Fiqh Nusantara is a fiqh that lives in the midst of Indonesian society. Fiqh Nusantara is a fiqh that develops in Indonesia with its distinctive characteristics in accordance with Indonesian culture. Muhajir (2016), a fiqh and ushul fiqh expert conveyed that:

“If Islam Nusantara exists, Fiqh Nusantara would exist. Fiqh Nusantara is the understanding and perspective of Islam in the Nusantara as a result of the dialectic process involving shari’a texts and culture as well as the reality in the local context”.

Muhajir (2016) has attempted to contextualize the Islamic discourse of the Fiqh Nusantara. Since Islam Nusantara was too wide in scope and vulnerable to be subjected to unending criticism, he clarified Islam Nusantara in the context of his fiqh by saying that it was Islam that grew and developed in the archipelago. He was an important figure in NU who at the 2015 NU Congress in Jombang East Java also rejected the Congress process because it was considered “unfair.” He was different from other NU leaders who rejected the term of the Islam Nusantara; he focused his conception of Islam Nusantara on what was called Fiqh Nusantara.

Meanwhile, Rahman did not explicitly mention Fiqh Nusantara. He used the term “Jurisprudence in the Islamic Context of the Nusantara”. However, he focused on fiqh which was related to the existing traditions such as the recitation of *dhikr*, *tahlil*, the birthday of the Prophet, *diba*, *barzanji*, *munjiyat* prayer, and so forth. In this case Rahman (2016, p. 75) wrote:

“In the perspective of fiqh reasoning, those religious practices do not mean making local culture and traditions as worship, but filling them with Islamic teaching for the purposes of da’wah. Cultural practices are only as a container or instrument, while the element of worship is in both the form and the content of those texts”.

Rahman’s emphasis on the aspect of the locality was not thoroughly incorrect. However, he did not comprehensively explain Fiqh Nusantara since it was not a matter of fiqh locality. The locality expressed in the form of proverb found in some kingdoms in Indonesia “the king of fair kings is worshiped, king of despots is denied”, “Culture is based on syara which was derived from al- Qur’an was an undeniably distinctive feature in the Fiqh Nusantara. However, this was a small part of Fiqh Nusantara used in the Indonesian context.

Furthermore, Afifudin also pointed out that the dimensions of Islamic universality remained within the frame of Fiqh Nusantara. Because, in his view, Fiqh Nusantara means understanding, practice, and application of Islam in *mu'amalah* fiqh resulted from the dialectics between texts, shari'a, and 'urf, culture, and reality in Nusantara (Indonesia). His argument reflected his criticism for some particular groups; one of them was the Islamic Defenders Front which strongly denied Fiqh Nusantara because it was considered as a fiqh which opposed Arabian Islam.

As a result, the definition of Fiqh Nusantara included the following keywords: First, it was a fiqh existing in the Nusantara as a dynamic *Mu'amalah* fiqh. Mahdlah's jurisprudence was not in the "domain" of Fiqh Nusantara. Secondly, Fiqh Nusantara was a fiqh resulted in dialectical process involving 'urf, diverse and typical culture and reality in Archipelago societies. This scope of definition presumably could avoid misunderstanding about Fiqh Nusantara, as well as Islam Nusantara.

Six formulations of Fiqh Nusantara in Indonesia

First, Fiqh Nusantara could be formulated as it was the product of efforts outside the domain of *Mahdlah* worship. It meant that the pre-Indonesia clerics were aware that their efforts did not cover the domain of mahdlah worship which was constantly unchanging over time such as prayer, pilgrimage to Mecca, fasting, and *zakat*

The scheme indicated that fiqh covered all aspects of life; both private and public. It was underlined by Sholeh (1996, p. 103):

“The prime source of law concerning with worship was *tanqif* (following the provisions and procedures set by the Shari'a). Therefore, it is not justified to worship God except by following the law directed by Allah in His Book and the guidance of His Messenger, Muhammad Saw. It is because its acceptance is primarily right of God asking His servants to obey based on His rububiyah nature towards them. Its procedures, traits and taqarrub should only be done in a way that has been prescribed and permitted. He says: Do they have allies other than Allah who are prescribed for those religions that are not permitted by Allah SWT “.

Meanwhile, Sayid Muhammad bin Sayid Alwi al-Maliki (1995, p. 43) also underlined that:

“And among the existing rules are the rules of worship stating that Allah should not be worshiped except by the way prescribed by Allah SWT. Therefore, all kinds of worship are tauqifi, which is unknown except by Allah Himself since He knows what He is pleased with and what He is not pleased with. Allah has stated it in His Book through His messenger. Therefore, worship must be based on the Qur’an, Sunnah and in line with the *salafus salih* “.

Therefore, efforts in the domain of worship performed by a small number of the ‘ulama’, was often called misguided. It was obviously applicable for the case of Mas’udi’s *efforts* about the hajj outside Dzulhijjah which was widely criticized. His controversial idea was to overcome the frequent occurrence of the death of pilgrims in Mina (one place of Mecca). In Mas’udi’s view, it dealt with organizing the overloaded number of pilgrims. He proclaimed this idea in the 1990s (Mas’udi, 2004).

For Masdar, the hajj took place in the *mumassa* period, which included Jawaz and Afdloliyah. Hajj could be performed in Jawaz period, which consisted of the month of Shawwal, Dzulq’ah and Dzulhijjah. Meanwhile, the afdlalyah was Dhul-Hijjah. He (2004) said:

“... During these periods, the Prophet once performed the Hajj, which was on 9-13 Dzulhijjah. But it did not mean that outside those dates, we could not carry out the pilgrimage. Legitimate Hajj was carried out from 1 Shawwal to 13 Dzulhijjah or even some say to the end of Dhul-Hijjah”.

Mas’udi’s progressive idea also discussed the hadith saying that Hajj was wukuf in Arafah on the 9th of Dhu al-Hijjah. Furthermore, he (2004) said:

“... In my opinion, this hadith means that the pilgrimage is essentially wuquf in Arafah. Meanwhile, this hadith does not explicitly mention the fixed time. It speaks about activity: the essence of the Hajj is wuquf in Arafat. It does not explain about the places “.

However, this idea contradicted the principle that efforts were not allowed for worship domain. The idea did not get much response. It just disappeared when the Government of Saudi Arabia managed to build more adequate Hajj facilities from year to year. Meanwhile, the number of people who died in Mecca during the post-Hajj pilgrimage in 2000 was also not as much as in previous years. Therefore, Mas’udi’s ideas were losing momentum, even though it was very important as an effort to redefine fiqh in the future.

Second, ulama assumed that Islamic law would strengthen and not weaken the Republic of Indonesia and the Pancasila. Thus, Islamic law was not in opposition to them. It was complementary and it helped to refine the national legal system (Rahman, 2016, p. 75). The principle of Indonesian unity as reflected in Pancasila has become the collective awareness of the ulama of the Nusantara in their effort to synchronize Islamic law with positive law in Indonesia. This effort has been demonstrated by Muhajir.

He is an expert in the field of Jurisprudence who also acted as Katib Syuriah PBNU in the period of 2009-2014. He proposed three potential problems in implementing the Sharia law in Indonesia (1) whether or not Pancasila was a Shari'a *tukhalifus* or in contrary with the Shari'a, (2) whether or not Pancasila was a Shari'a *tuwafiqus* or in line with Shari'a (3) whether or not Pancasila was really the Shari'a itself. To answer these inquiries, Muhajir (2016) stated that Pancasila was Syari'a itself (*as-syari'atu bianiba*).

What Muhajir has done was a progressive leap because by stating that Pancasila was Shari'a itself, then all the legislation stipulated by the state could be considered as the sharia law, which should be obliged. For instance, the violation of the traffic rules, it could be understood that the doer has violated the sharia law. Positive law should not be contradicted to the shari'a as long as both of them did not conflict to each other. It was important to note that positive law was implemented proportionally. The task of the Islamic jurist in the future was to synchronize them.

Some jurisprudence and *usul fiqh* rules were used by Nusantara ulama to strengthen the positive law. For example *bukmu al-bakim ilzaamun wa yarsaul khalifa*. The government's decision is binding and eliminates the difference of opinion of the ulama (Amin, 2011, p. 378). In addition, it was commonly understood that if imam obligated the obligatory subject, then it should be understood as *muakad* obligation. If he obligated a sunnah, then it became mandatory. If he stated the subject as *mubah*, it became obligatory as long as it concerned with public issues, such as smoking prohibition case. These rules referred to obedience to *ulul amri*, in addition to obedience to Allah and the Prophet.

“O ye who believe, obey Allah and obey the Messenger (Him) and *ulul amri* among you. then if you have different opinions about a case, then leave it back to Allah (the Quran) and the Messenger (sunnah), if you truly believe in Allah and the day after. this is more important (for you) and more beneficial” (QS. Nisa: 59).

Third, the ulama of Nusantara understood the importance of reconceptualising the law in accordance with the changing times, places and conditions. It was agreed that: “Changes of the law depend on changes in times, places and circumstances.” “It is undeniable that there are changes and differences in fatwas according to changes in conditions, situations, motivations and goals”. In addition, the law also changed along with the changes concept of *problem*. As it was mentioned in *Majalah Islami*, “Indeed the law changes along with the change of *maslahah*. Indeed efforts is dlauri in nature seen from the aspect of *problem*”. Meanwhile, the *problem* would change along with the change of times, places and people. Therefore, Mahmud Syaltut emphasized that, “*Problem* changes along with the change of times, places and people. Therefore, it is necessary to have efforts” (Al-Anshari, no date; As-Syaukani, 1945, p. 223; Syaltut, 1979, p. 546; Al-Jawjiiyyah, 1980, p. 3).

Regarding those social changes, there were at least two theories in Islamic law. The first was the theory of immortality. It meant that Islamic law was eternal, constant and unchanging over times since it was initially revealed. Therefore, it could not be adapted to social change. This theory was advocated by, for example, Hizb ut-Tahrir Indonesia (HTI) which has now been dissolved in Indonesia.

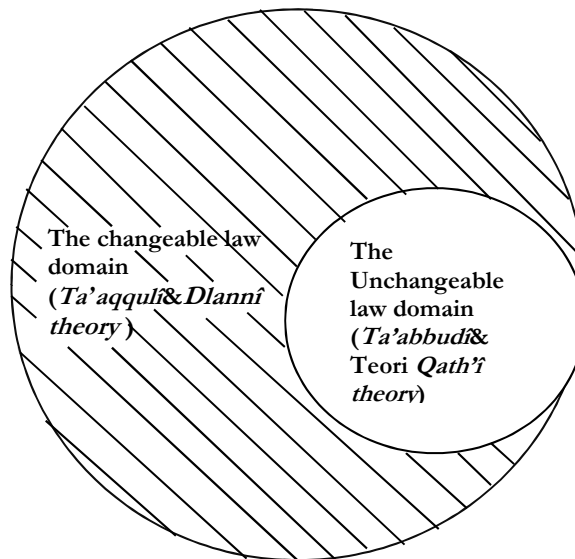
Secondly, it was the theory of adaptability (change). It meant that Islamic law was adaptive to social change, and it required a progressive *ijtihâd* responding to social change. It was important to note that adaptability referred to “the possibility of expanding the existing laws” and “openness of a set of laws for change” (Rayner, 1966, pp. 43–44; Mas’ud, 1996, pp. 1–2). Comparably, the theory of adaptability was considered more acceptable in its argument. Meanwhile, the theory of legal immortality was weak in some respects since the space and time greatly contributed the process of legal inference (*istinbat al-hukm*) for the *mujtahid*. Yusuf al-Qardlawi in his book entitled *al-Fatawa al-Shadzdzah* categorized the law which did not consider the context of time, place, and conditions as *shadz laws* (strong/legitimate legal opponents).

It was commonly known that Islamic teachings did not only have static (*tsawabit*) but also dynamic elements (*mutaghayirat*). As the static one (*tsawabit*), Fiqh Nusantara certainly could not be tampered with and questioned because it has been taken for granted. For example, the rules governing five daily prayers, pilgrimage, how to pay alms which were included in the

scope of Ta'bbudi. In a fiqh of worship, it was stated that, “*Allahu la yu'badu illa bima syuria*”, *which* means that Allah should not be worshiped except as it was prescribed. Meanwhile, in its dynamic aspect, Fiqh Nusantara could be contextualized. It was this Mutaghayirat characteristic that was called as ma'qul al-ma'na (acceptable to reason). The potential changes occurring in this aspect were due to the influence of its local context. The examples of these were the jurisprudence governing the practice of buying and selling, customs, and marriage.

In other words, this change of law in accordance with local context was included in “urf”. The Indonesian local context has made Fiqh Nusantara different from fiqh applied in other places due to the different existing urf. This was the idea stated by Ash-Shidiqi as an inspiration to introduce the Indonesian fiqh. This urf certainly should be the valid and comprehensible urf. So that it could be the guidance for Muslims in their daily lives. Certainly, the intended urf was the valid and not the *facas* urf. Thus, traditions that did not conflict to Islam could be used as guidance for Muslims in their daily lives.

Figure 1. constant law (*thawabit*) and dynamic law (*mutaghayirat*)



Moreover, adjusting the fatwa to the dynamic change of times, places and circumstances was inevitable. The rapid changes of reality became the sociological context for the change

of the law. Therefore, the ‘urf such as food, clothing culture changed over time that should be responded by the legal changes (Harisudin, 2016).

One of the examples of this change was the revision of the NU ulama fatwa on the use of firecracker as a form of syiar in the 1930s. Initially, it was considered sunnah to welcome the coming Ramadan. However, this decision was revised at the NU Congress in Lirboyo Kediri in 1999 which considered it as an illegitimate culture. This change departed from the fact that there was not any electricity in the 1930s and the firecrackers were not harmful. Before 1999, there were fundamental changes that were in the contrary to these conditions.

In another congressional decision, NU declared that wearing suits, ties and shoes was prohibited since it resembled to the infidel Dutch clothes who colonized Indonesia. The hadith stating that *man tasyabbaha biqaumin jabuwa minhum* has become the basis for the prohibition. Therefore, the modern NU ulama would agree on the allowance to wear those clothes in offices, student graduations, and other occasion since it was not identical to those of the infidels, and it has become a popular culture.

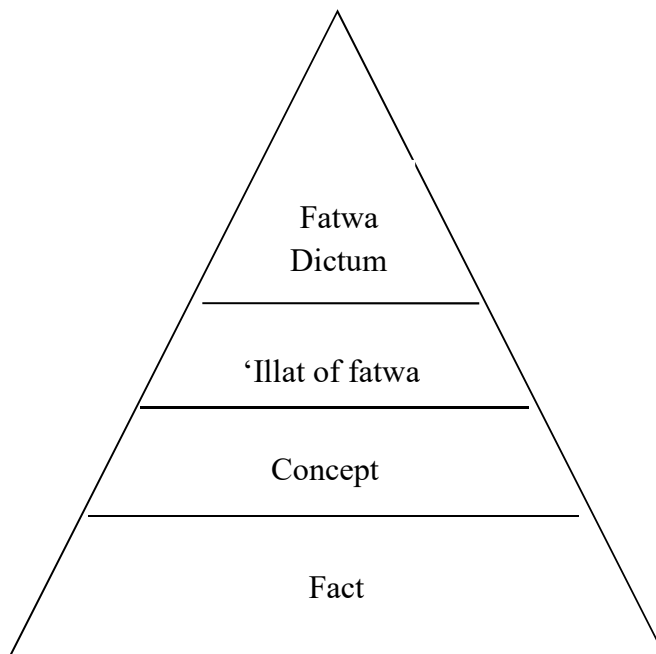


Figure 2. fiqh nusantara changes

Some of NU's bahtsul masail seemed to follow these rules so that the Nusantara ulama really matched them with the problem theory in the present time. What was once considered problem might not be problem in the present. On the contrary, those of which was now considered problem were not necessarily problem in the past. The world continued to change. Therefore, *qaul rajih* in the past could become a *qaul marjuh* in the present by considering its problem. Likewise, the *qaul marjuh* in the past could be done in the present due to the same consideration. However, based on the same scheme, legal changes emerged from the facts that are synthesized into a concept. Further, through in-depth research, it would be determined whether it could be a reason of law (*'illat*) or not as the basis for acting or establishing dictums of Islamic law. The Islamic law in Indonesia or the *fiqh Nusantara* was formulated in this context.

Fourth, *Fiqh Nusantara* was generally generated through efforts *jama'i*. It was carried out collectively by mujtahids who had competence in the science of religion. It was carried out jointly by a group of mujtahid (experts) having different potential knowledge. Ali Hasballah defined it as "any efforts agreed upon by a doer to solve the existing problem". Further he stated that: "it involved most of the *fiqh* experts to formulate the *yar'i* law by means of *istinbat* and they all or most of them agreed in their deliberation (Ismail, 2011, p. 19). This type of efforts was more likely and even feasible to cover up the weaknesses of individual doer. In addition, it was resulted from various potentials to obtain adequate results. In the present context, effort was generally carried out collectively as it was obvious in the Indonesian Ulema Council, the Bahtsul Masail Institute of Nahdlatul Ulama, the Muhammadiyah Tarjih Council, and the Persis Hisbah Council. Unlike the former ulama that carried out efforts independently, the present efforts should involve a lot of expert on *fiqh* since its result would be more accountable. In the guidelines for determining the fatwa of the Indonesian Ulema Council which was established based on the Decree of the Board of Governors of the Indonesian Ulema Council: U-596/MUI/X/1997 on October 2, 1997 mentioned in Chapter II, the general basic characteristics of fatwa were stated in point two:

"... Fatwa determination activities are carried out collectively by an institution called the Fatwa Commission".

Likewise, the Indonesian Ulama Council emphasized in point four that:

“... In a matter where there is no legal opinion among the schools, the application of fatwas is based on the results of *efforts jama’i* (collective) through the method of *bayani, ta’lili (qiyasi, istisbani, ilbaqi), istislahi* and *sad dzari’ah*.

Thus, this method differed from the old efforts model which was carried out individually which was commonly known as efforts fardi. Efforts fardi was an effort carried out independently by a mujtahid, both in terms of methods and procedures for determining the law of an existing problem and its decision-making process. This type of Mujtahid was very difficult to perform since it required sufficient knowledge in multiple disciplines and various resources (Hasaballah, no date, pp. 107–108).

Fifth, the Fiqh Nusantara products were not derived merely from one school of Islamic thought. although some scholar differed in their opinion on the usage of the *talfiq* method (combine several opinions in practicing Islam). Etymologically, *Talfiq* meant folding something into one or bringing things together. Operationally, it meant “doing charity to solve a problem based on the law resulted from a combined school of thoughts (Zahro, 2004, p. 138). Zahro said that the ordinary members of Nahdlatul Ulama applied fiqh which was not derived from *talfiq* especially for practical matters. Meanwhile, the educated people permitted *talfiq* as long as it was codified in a single *qadliyah* as it was stated by al-Qarafi from Maliki madzhab. Meanwhile, Muhammadiyah members were more flexible. Muhammadiyah then used the Majelis Tarjih’s decision as their guidance.

The Indonesian Ulema council was “more liberal”. Although they kept considering the madzhab firmly based on the Qur’an and al-Hadith, they absolutely permitted *Talfiq*. This was in line with the opinion from KH. Ibrahim Hosen. He stated that *talfiq* was permitted since there was no Shari’a text in the Qur’an and as-Sunnah which obliged someone to be bound in one school or forbid to change their school. Furthermore, it was because the prohibition on *talfiq* would confuse the ummah and it was not in line with the principle of convenience and benefit. Moreover, KH. Ibrahim Hosen stated that the ban on *talfiq* was resulted from the fanatic *khalaf* cleric’s paradigm that had made the jurisprudence frozen and stiff. Instead, allowing *talfiq* would open space for the dynamic and responsive fiqh. Ibrahim Hosen also rejected *Talfiq* codified in a single *qadliyah*.

Therefore, the *ijtima* of the *ulama* in the Indonesian Ulema Council, the NU Bathsul Masail Institute, the Majelis Tarjih Muhammadiyah or the Persis Hisah Council model could be described. It was the Indonesian Ulema Council that explicitly called for it. It was stated in the guideline for determining their fatwas which were based on the Decree of the Board of Directors of the Indonesian Ulema Council: U-596 /MUI/ X/1997, October 2, 1997.

Sixth, Fiqh Nusantara was the result of the dialogical process of various group and opinion in civil society. Therefore, Fiqh Nusantara was not a particular individual and group monopoly (Harisudin, 2016). It was resulted from a process of dialogue among various parties which were sometimes in opposition to one another. However, they made agreements in their dialogical process to formulate Fiqh Nusantara. Consequently, it did not exaggerate that there were religious differences, tensions, even conflicts among jurisprudence schools as the representation of the dynamic Islamic movement and universalism (Sirri, 1996, p. 13).

Strictly speaking, fiqh Nusantara was dynamic. It was in line with the dynamic of fiqh theory (Harisudin, 2018a, p. 7, 2018b). According to Sirri, fiqh should be dynamic for at least three reasons. First, the existence of globally applicable *nash*, whose implementation required interpretation and further elaboration. Second, a new law could be formulated for a new phenomenon or event by applying an analogy to the legal *nash* having the same *illat*. Third, there were general rules and principles of *problem* which were in accordance with *maqasidus sharia* such as *istihsan*, *istishab*, *problem mursalah*, *sad dzari'ah*. If these three considerations were applied to current issues, anticipatory attitudes would emerge. The fatwa created by the previous scholars could be developed dynamically and creatively to find answers about the ideal of Islam that continuously demanded new ethics and paradigms.

The dynamic of Fiqh Nusantara could be seen in several opinions of social organization as part of civil society. Latief (2010, p. 55), for example, mentioned the opinion of Nahdlatul Ulama and Persis about the non-compulsory professional zakat, while the Indonesian Ulema Council and other Islamic organizations had made it as an obligation. Likewise, it was applicable for the law governing the profit raised by bank as it had been decided by Muhammadiyah, and the Nahdlatul Ulama decision. According to Nahdlatul Ulama, it could be considered as: (a) forbidden (*haram*), (b) voluntary (*mubah*), and (c) *syubhat*.

The dialogical process in formulating Nusantara Jurisprudence could be seen in the different opinions stated by Sunan Giri and Sunan Gunung Jati. Sunan Giri (two pious people of Walisongo) banned the usage of Gamelan as a means of Syi'ar meanwhile Sunan Gunung Jati allowed it. KH Hasyim Asy'ari denied the usage of *kentongan* (bamboo percussive instrument) to announce the time for praying in mosques, while KH Muhammad Fakhri Maskumambang allowed it since it was identical with bedug (a big percussive instrument made of wood and cow leather like a giant drum). Interestingly, Hasyim was a Rois Akbar of NU and Maskumambang was his vice in NU (Harisudin, 2017b, pp. 32–36).

Conclusion

Fiqh Nusantara is an Islamic Jurisprudence that lives, grows and develops in Indonesia and forms its distinctive characteristics. It is resulted from the efforts of Ulama outside worship domain which strengthens the Unitary State of the Republic of Indonesia. It is responsive to recent developments, and it is not derived from one school of thought. It is created through collective efforts in the form of fiqh which is open to variety of opinions in Indonesia. This formulation makes the Fiqh Nusantara different because of its different locus and epoch: Indonesia. However, Fiqh Nusantara as an Islamic Law in Indonesia has not yet penetrated the domain of *mahdlab*. For Fiqh Nusantara activists, the rule was only applicable to the changing domain of fiqh (*mutaghayirat*) and not to the fixed domain of fiqh. Based on this conclusion, Fiqh Nusantara is potential to develop in the Indonesian contexts, which are dynamic. For instance, issues such as marriage, Islamic laws, politic, and social interactions are continuously changing and dynamic to respond to the global changing. Thereby, more investigations on Fiqh Nusantara with its relationship to other social aspects in Islam are encouraged to carry out since this jurisprudence is dynamic.

References

- Abidin, I. (1954) *Nasbr al-'arf fi bina' ba'd al-ahkam ala al-'urf, Juz II*. Istanbul: Maktab Sanayi'.
- Al-Anshari, Z. (no date) *Ghayat al Wushul Syarh Lubb al Ushul*. Surabaya: Al-Hidayah.
- Al-Jawjjiyyah, I. al-Q. (1980) *I'lam al-Muwaqi'in 'an Rabb al-Alamin*. Kairo: Maktab al-Islam.
- Al-Maliki, S. M. bin S. A. (1995) *Manhajus Salaf fi Fahmi Naushus, baina Nadlariyah wat Tathbiq*.

- Amin, K. H. M. (2011) *Himpunan Fatwa Majelis Ulama Indonesia Sejak tahun 1975*. Jakarta: Erlangga.
- As-Syaukani (1945) *Irsyad al-Fukhul*. Beirut: Dar al-Malayin.
- Azizi, A. Q. (2003) *Reformulasi Bermadzhab: Sebuah Ikhtiar Menuju Efforts Saintifik-Modern*. Jakarta: Teraju.
- Darmadi, D. (2016) 'Tears and Cheers in Jombang: Some Note on the 33rd Nahdlatul Ulama Congress', *Studia Islamika*, 23(1).
- Feener, R. M. (2007) *Muslim Legal Thought in Modern Indonesia*. Cambridge: Cambridge University Press.
- Harisudin, M. N. (2016) 'Diskursus Fikih Indonesia, Dari Living Laws menjadi Positive Laws', *Jurnal al-Manahij*, 10(2).
- Harisudin, M. N. (2017a) *Fikih Rasional*. Surabaya: Pena Salsabila.
- Harisudin, M. N. (2017b) 'Islām wa fiqh Nusantara: al-Tanāfus 'alā al-huwīyah wa 'alāqat al-sultāh wa al-ramz al-dīnī li jam'iyah Nahdlatul Ulama', *Studia Islamika*, 24(3).
- Harisudin, M. N. (2018a) *Dinamika NU di Taiwan*. Surabaya: Pustaka Radja.
- Harisudin, M. N. (2018b) *Membumikan Islam Nusantara*. Surabaya: Pena Salsabila.
- Harisudin, M. N. (2020) *Fiqh Nusantara, Pancasila dan Sistem Hukum Nasional di Indonesia*. Jakarta: Pustaka Kompas.
- Hasaballah, M. A. (no date) *Ushul at Tasyri al-Islami*. Beirut: Dar al-Fikr.
- Hasan, A. (1970) 'The Early Development of Islamic Jurisprudence', *Islamic Research Institute*.
- Ismail, S. M. (2011) *Al-Jamai wa Abammiyatuhu fi Muwajahati Musykilatul as-'Asbr wa Daurul Majami'i al-Fiqhiyyah fi Tatbiqih*. Mesir: Darus Salam.
- Khalaf, W. (2004) *Ilmu Ushul Fiqh*. Indonesia: Al-Haramain.
- Latief, H. (2010) *Melayani Umat: Filantropi Islam dan Ideologi Kesejahteraan Kaum Modernis*. Jakarta: Gramedia.
- Mas'ud, M. K. (1996) *Filsafat Hukum Islam: Studi tentang Hidup dan Pemikiran Abu Ishaq Al-Sytsibi, Terjemahan oleh Absin Muhammad*. 1st edn. Bandung: Pustaka.
- Mas'udi, M. F. (2004) *Masdar F. Mas'udi: Pelaksanaan Haji Perlu Ditinjau Ulang*', *Islamim Lib*. Available at: <https://islamlib.com/kajian/masdar-f-masudi-waktu-pelaksanaan-haji-perlu-ditinjau-ulang/>.

- Mawardi, A. . (2010) *Fikih Minoritas*. Yogyakarta: LKiS.
- Muhajir, A. (2016) 'Meneguhkan Islam Nusantara Untuk Peradaban Indonesia dan dunia', in Sahal, A. and Azis, M. (eds) *Islam Nusantara dari Ushul Fiqh hingga Paham Kebangsaan*. Jakarta: PT Mizan Pustaka.
- Qomar, M. (2015) 'Islam Nusantara: Sebuah Alternatif Model Pemikiran, Pemahaman dan Pengamalan Islam', *Jurnal el Harokah*, 17(2).
- Rahman, Z. (2016) *Fikih Nusantara dan Sistem Hukum Nasional Perspektif Kemaslahatan Kebangsaan*. Yogyakarta: Pustaka Pelajar.
- Rayner, S. E. (1966) *The Theory of Contracts in Islamic Laws: A Comparative Analysis with Particular Reference to the Modern Legislation in Kuwait, Bahrain, and the United Arab Emirates*. London, Dordrecht, and Boston: Graham and Trotman.
- Saad, I. (1957) *Al-Thabaqat al-Kubro*. Beirut: Dar al-Fikri.
- Said, A. A. (2008) *Pergolakan di Jantung Tradisi*. Jakarta: LP3ES.
- Schat, J. (2003) *Pengantar Hukum Islam, terj. Joko Supono*. Yogyakarta: Islamika.
- Sholeh (1996) *Raf'ul Haraj fis Syariah al-Islamiyah Dlawabituhu wa Tatbbiqatuhu*. Darul Istiqomah.
- Siddiqi, N. (1997) *Fiqih Indonesia: Penggagas dan Gagasannya*. Yogyakarta: Pustaka Pelajar.
- Sirri, M. (1996) *Sejarah Fikih Islam*. Surabaya: Risalah Gusti.
- Sya'ban, A. G. (2017) *Mahakarya Islam Nusantara*. Jakarta: Pustaka Compass.
- Syaltut, M. (1979) *Tafsir al-Qur'an al-Karim*. Kairo: Dar as-Suruq.
- Vaezi (2006) *Agama Politik, Nalar Politik Islam, terj. Ali Syahab*. Jakarta: Citra.
- Zahro, A. (2004) *Tradisi Intelektual NU*. Yogyakarta: LKiS.

