

Islamic Law as Legal Tradition and Cultural Identity of the People of Indonesia

Prawitra Thalib, Faizal Kurniawan, Hilda Yunita Sabrie
Private Law Department, Faculty of Law, Universitas Airlangga, Indonesia

Keywords: Benefits, Islamic, Law, Business, Norms.

Abstract: Islamic Law in Indonesia has become the identity of the Indonesian society. Islamic Law has grown and developed prior to the establishment of the State and have deeply rooted in all aspects of community life. Although Indonesia is not an Islamic State, it is not a barrier in applying Islamic law in Indonesia, due to the values contained in Islamic law which represent as a pulse in every aspect of Indonesian public life, where in these values are sometimes interpreted into norms by the contemporary legal experts. Islamic Law in Indonesia using a parameter of benefit about whether or not a law required in a particular issue, besides its primary role to ensure that every Islamic law being standardized is not conflicting with the Quran and Sunnah, by applying the Islamic law into every attempt of making or any interpretation of a law, hence it can be ascertained that the law meets the standards to be applied into Indonesian society. As such, it is not feared that the law will lead to new problems or incurring a conflict of norms in the application.

1 INTRODUCTION

Among the traditions and religions that exist in this world, no one can give influence and impact of such a large and deep in various aspects of human life as well as Islam. As an Islamic belief, it is not just a series of worship and command or everything relating to morals affairs. It also regulates the rules of human relationships as well as the rights and obligations of each individual human being in all circumstances and conditions. The dynamism of Islam in responding to all demands at times when it faces an endless stagnant period, Islam is regarded unable to solve new problems that arise along with the times, which indirectly has triggered a setback of Muslims in present time. Shibli Syumayyil have carefully suggests that a setback of Muslims at the present time is caused by deviation in the Islamic teachings by Muslims, not from the teachings of Islam itself (Muthahhari, 1995).

Islamic law has become the identity of Indonesia long before of the republic of Indonesia establish on 1945, Indonesia is not Islamic state, although majority of Indonesia citizens is moslem that living peace with other non-Islam citizens, Islamic law is not laws formal in Indonesia, but in certain aspects life Islamic law fixed applied in the life of the

moslem community Indonesia covering the aspects of family, marriage, heirs and economic Islamic. As time progress and technology so implementation of contemporary Islamic law in Indonesia always growth follow the development and legal issues that appears. Islamic law is perennial fixed and rigid but on one side Islamic law can being flexible and dynamic they can adjust with the developments of the times, as for who became instrument renewal Islamic law this is Islamic legal a maxim or qowaidh fiqiyah.

Islam has a good ability of adaptability in facing all the demands of the times, therefore the Qur'an as a source of supreme law in Islam, only regulate matters of the principal issues wherein further interpretation carried out by the Apostle through his Sunnah and Ijtihad efforts by muftis and scholars, therefore the role of sense is very decisive in this effort. Due to the above, in a sense of Islam as a blessing from Allah SWT. Need to be kept, maintained and protected. As for the notion that in line with the development period, which brought changes towards progress in a society represents anything comes from the West is the most misleading ideas. The reason is, long before the Western found the momentum of alteration, the Eastern world, in particular the Islamic world, have led the world through a tremendous influence in

knowledge development at that period of time. However, due to the deviation occurred in the Islamic teachings as stated previously by Syibli Syumayyil (Ridwan,2007). Then Muslims are not leading the development of the times anymore. Consequently, the momentum was taken over by the Western world. Therefore, it can be said that science and knowledge can lead men towards the perfection, however on the other hand the human's character and greediness can bring people towards destruction and misuse of the existing moral values. Character-building and human greed is what makes science as a tool for its own sake and as a means to satisfy their lust. A Muslim should be developed in line with the development of time, and must fight against the destruction and deviation from the Islamic teachings.

The discussion on Islamic law and qowaid fihiyyah (foundation of fiqh) are two of the most important thing, especially in comprehending any Islamic law. This is due to the mastery of the rules of fiqh will be a common thread to the settlement or from any emerging problems suitable to the different place, time and habits. Therefore the actual qowaid fihiyyah would make the Islamic law always flexible in response to any social, economic, political, cultural and legal issues. Pertaining to the above view, a question of whether there is an obligation for Muslims to formally. Impose Islamic law emerges, With regard to this issue, it can be affirmed that there is no necessity to establish an Islamic State. It is clearly envisaged in Q.S. A Maidah ayat 44, that Islam requires each follower to follow and apply Sharia Law, but not to be performed in the form of establishing an Islamic State or in form of formal Islam. The reason if Islamic law is believed to be general. However. The Islamic law is specifically embodied in fiqh and can be applied differently according to the place, time and situation. Therefore, fiqh can be changed according to the conditions under which fiqh be applied. It can be proved in the history of Islam wherein there is a fact that the fiqh can vary from one place to another and between one time period to another. For example during the reign of the first Caliph Abu Bakr As-Siddiq and Umar bin Khatthab as the second caliph. In the government period of Umar there were a lot of ijthad-ijthad created as the renewal of Islamic law, such as termination of almsgiving or charity to muallaf (persons converted to Islam), the distribution of inheritance that is possible to be equal parts between men and women, even a prohibition on marriage between Muslims and the scribes. It means that at some level of certain law in the social life of society, the existence of an

Islamic law that are built exclusively is made possible in compliance with the demands of the time, appropriate, the circumstances, but the general values of Islam is not allowed to be eliminated. The same thing also apply in the application of contemporary Islamic law. It does not matter whether the country's form is monarchy or republic as long as the values of Islam in general is within the system of the State then it is not an issue. Therefore on this issue the rules of fiqh namely "al ibrah fil Islaam bil bil madzhar Jawhar laa "meaning the basic guidelines in fighting Islam is the substance not the symbols. Hence, al-Shahrastani is absolutely correct when he stated that the sword was not drawn because of religious matter, yet the sword will be drawn because of political problems in every age (Shahrastani et.al.). This inclusive view may be important considering that Indonesia is ideologically established and built as a religious country, not as an Islamic State. In this concept Indonesia is not a Country that is blank of religion but also not based on a certain religion. All religions are protected for their rights and obligations by the State without differentiating the number of adherents. Therefore, based on Pancasila, Indonesian Muslim already feel accommodated for their rights and obligations, and are able to perform their religion without any obstacle. As a result, Muslims do not need Indonesian Islamic State because Indonesia as Pancasila-based country which is a religious country may be accepted as a concept that is in line with the fiqh siyasah that ties Muslims without any exception.

In fact, understanding the Islamic law can not be separated from the terminology of qowaid fihiyyah, in which by etymology the word qowaid comes from the Arabic word al-Aqidah which means the foundation that later emerging the word qaidah, meaning the basis, while qowaid is the plural of qaidah, hence it has the meaning of basics. (Warson, 1997) As to the terminology of fihiyyah derived from the Arabic language fiqh sourced from Q.S. At-Taubah verse 122, "liyatafaqqahu fiddin" which means to deepen their knowledge about religion, .. tafaqqahu ... this is what emerge the concept of fiqh as an al-fahmu or understanding. As the result, fiqh can be considered as an understanding about syariah (sharia), or the science of understanding sharia as the rules stipulated by Allah for His mankind.

Fiqh talks over Islamic law, therefore if Islamic law is inseparable from qowaid fihiyyah then qowaid fihiyyah will not be separated from the fiqh because fiqh is a product of Islamic law. Overview on the specificity of fiqh and public qowaid

fiqhiyyah can be described as follows, fiqh is a general understanding of the principles of Islam and the laws contained therein. An understanding of the legal issues are divided specifically according to the assessment of each certain legal issues. For instance marriage law is stipulated in fiqh munakahat, the inheritance law is arranged in fiqh faraidh, the civil law is set in fiqh muamalah, and many other areas of law regulated in different fiqh. Each branch of fiqh have a separate discussion that is different from one another, for example fiqh muamalah governing civil cases only while the fiqh faraidh regulate the issue of inheritance, both fiqh that stand on their own without interfering each other, because the field of understanding and addressing issues are legally different, this is why fiqh is said to have special characteristic (Thalib, 2013) The basic science of fiqh as an understanding derived from Q.S. At-Taubah paragraph 122 "liyatafaqqahu fiddin" which means "to deepen their knowledge on the religion", is what underlies the birth of al fiqh formulation as an al-fahmu or al science, fiqh can specifically be regarded as an understanding or knowledge of the sharia, the science that is used to understand sharia as the rules of Allah God Almighty for His mankind. However it is important to understand that Sharia is general, absolute, eternal, holy and sacred because it comes directly from Allah, therefore it can not and should not be modified by any human. As to fiqh is a science that is specific, relative and greatly influenced by the condition of the place and time (qabil lin niqash, qabil lit taghyir) (Fanani, 2009).

Currently, the science of fiqh often be attached to hermeneutics. It was because same as fiqh hermeneutics, basically not intended to develop rules and procedures in order to understand the text of law, however hermeneutics have a philosophical goal which try to connect the thoughts and intent as well as the direction and purpose of a text between contemporary readers in the past and with the current readers (contemporary), this is then attracted to what is called a tripartite hermeneutical process or three hermeneutical process consists of understanding, interpretation and hermeneutics. The first process including understanding (exegesis) research on the original meaning of the text based on the time and place of origin, while the second process is interpretation, which is trying to track the contemporary meaning of the original meaning contained in the text. In other words, this process trying to translate the original meaning of the text based on the time and accurate origin into a meaning adapted to the existing traditions which is currently developing, followed by a hermeneutics process,

which is an effort that seeks to formulate the rules and methods used in the relocation process from where the original understanding leading to the current or contemporary meaning. Both the science of fiqh and hermeneutics has been proven to be used as an attempt to understand the texts of scripture that once referred to by humans. This is what causes both have a the links between each other.

Islamic law and qowaid fiqhiyyah are interrelated with each other, it is due to the dynamism of Islamic law embodied in fiqh is highly dependent on qowaid fiqhiyyah, in this case the characteristics of the generality of the principles make Islamic law can be applied to all conditions in every time and age. Qowaid fiqhiyyah makes fiqh becomes a specific science, relatively and greatly influenced by the condition of the place and time (qabil lin iqash, qabil lit taghyir), how it could not be, indirectly the development of society, culture, science and technology have influenced the development of Islamic law, shariah can not be changed because it is eternal, changing the shariah is tantamount to changing the existing provisions in the Quran and Sunnah, but the interpretation of the Shariah can be adjusted with the times, where it is bridged by qowaid fiqhiyyah as a parameter in understanding the meaning contained in the Quran and Sunnah which is outlined in fiqh, as a form of contemporary application of Islamic law.

2 METHODOLOGY

Research Subject. Islam has two main sources of law, Quran and Sunnah, which is often mentioned as the primary propositions of Islamic law (Weiss, 1992) beside Quran and Sunnah, there are also some supporting propositions of Islamic law, those are ijma', qiyas, istihsan, masalah mursalah, urf and syar'un man qoblana, which are alternative ways to understand the true meaning contained in the Quran and Sunnah. Talking about Islamic law, there are two main forms, sharia and fiqh. Sharia is Islamic law in an extensive meaning which covers aspects of faith, morals and amaliyah, and the norm in Islam, so that's why it is more extensive. Meanwhile fiqh is more practical as Islamic law, comes from the detailed propositions or tafsily which regulates a particular field of law (Hidayatullah), in other words it can be understood that sharia is the law of God which is sent to humans as the guidelines of life when dealing with God, human and the environment, whereas science which discuss the sharia we called as fiqh (Shomad, 2010). So we can

say that fiqh as a specific Islamic law. As to the differences between sharia and fiqh can be described as follows, (Thalib, 2013).

- i. Sharia has an extensive scope covering all the actions and deeds of human, while fiqh refers only to what is understood as a human's action generally that is based on legal or illegal thing;
- ii. Sharia is the rule that contains several provisions in Quran and sunah that covers three main components; they are aqidah, ahlaq and fiqh while fiqh is only one of sharia components;
- iii. Sharia has perfect and unchangeable characteristics, while the fiqh has characteristics that always changes by the changing of time, space and place where fiqh is applied;
- iv. Sharia is based on the revelations that only comes from the Quran and Sunnah, whereas fiqh is the result of jurists' reasoning and deduction based on the knowledge evolution that passes continuously with the changing times;
- v. Sharia has several action levels covers the allowed and forbidden matters, while the fiqh only regulates legal and illegal actions.

Data Collection. Yusuf Musa explained the three differences between sharia and fiqh in his book entitled *al Madkhal li Dirasah al Fiqh al Islami* included, (Supriyatni, 2011).

- i. In some cases, sharia has more extensive coverage than fiqh, because sharia covers all the religious aspects such as aqidah, worship and law, while fiqh only regulate the actions;
- ii. Looking from the subject, Allah SWT is the subject of sharia or al Syar'i, while in fiqh is human or al faqih, therefore the truth of sharia as the creation of Allah SWT is perfect and eternal, while fiqh is changeable in accordance with the understanding of the faqih which is caused by social, cultural and historical factors;
- iii. From the use of the term, we can also find difference, the term "Sharia" has been used since the beginning of the development of Islamic history, while the term "fiqh" has just used after the branches of Islamic divinity arose in the second century of Hijriyah.

The phenomenon of the contemporary Islamic legal thought is a response to social conditions after the falling of the Ottoman Empire, the emergence of the Islamic reform movements such as the Tanzimat and Salafism has influenced the development of

contemporary Islamic law, the influence of secularism and colonialism, also the defeat of the Arabic states to Israel in the Six Day War in June 1967 which led to the signing of the Camp David agreement, all factors have given effect to the development of Islamic law either directly or indirectly, and led the Islamic world in conditions such as loss of a role model globally, it caused Moslems were scattered systematically and lived in their own way. This then led to the fact of thinking about the need to reform the Islamic law, so it could deny the skeptical thought that Islamic law was obsolete..

3 DISCUSSION

As a perfect religion, Moslems believe that Allah created humans accompanied by the creation of laws and rules that serve as guidelines to regulate their life, in this case there are two conceptions of law in general, the first is the law which derived by God directly which is the origin of Islamic law and the second is a human-made laws. The concept of Islamic law itself is basically an attempt to understand which one is good and which one is bad, this is because human as a mortal creature will never know which one is good and which one is bad unless guided by Allah SWT through the intercession of His Messenger, this two concepts are later known as husn (good) and qubh (bad) (Laldin, 2006).

Sharia is the road leading to the oasis, in this case sharia is interpreted as law of Allah which was revealed to the Prophet Muhammad, while fiqh is the thought result of mujtahid or Islamic law experts who interpret the real meaning of the law contained in the Sharia those are the Qur'an and Sunnah, so this can also be defined fiqh as sharia in the strict meaning. Imam Hanafi defined fiqh as someone's knowledge about his rights and obligations included laws relating to faith, morals and amaliah. This concept arose because in the time of Imam Hanafi lived, fiqh was not the separated branch of science from other Islamic sciences, while the separation of aspects of Islamic teachings occurred and fiqh became one of sharia branches along with other branches of science such as Sufism and ushul fiqh. Therefore it can be understood that the discussion in the fiqh science are all matters relating to all human activity aspects to the Creator, the human activity to one another or human to the State, while the aspect related to the moral development was assessed separately in tassawuf as a separated part of the fiqh science (Zuhaili, 1993).

Through the separation so the definition of fiqh as a science which discussed sharia becomes limited to the knowledge of sharia law related to human deeds based on the propositions in the Quran and Sunnah as a result of *istinbat* or *ijtihad*. While the term *siyasah* derived from the word "sasa" which has meaning to drive, control, controller, way to control, manage, handle and govern, besides *siyasah* can also mean government, politics and administration. So based on that, *siyasah* can be defined as an attempt to make a political or governmental policies or efforts to regulate, control or govern a government or the administration of a government (Khalaf, 1994), the term *siyasah* is not found in the Quran, but can be found in some Sunnah (Ridwan, 2007).

According to Ashiddiqy, Islamic law has characters immortal, eternal and unchanging and categorized in three categories: First, *takamul* means perfect, comprehensive and complete. It means that Islamic law configures people in a comprehensive provision, although they are from different nations and tribes, but they are an unseparated unity. Second, *wasathiyah* (harmony) means Islamic law takes the middle path, the balanced path and not biased, not tend to the right by concerning the psychiatric aspects or to the left by concerning the differences. Islamic law always aligns between reality and facts with the ideal of purposes. Third, *Harakah* (dynamic) means Islamic law has the ability to move and develop, has the power of life and be able to establish themselves in accordance with the development and progress of the times. Islamic law is strayed from deep and broad sources, giving the human a number of positive laws and can be used at any place and time (Ash-Shiddiqy).

The major problem on understanding of Islamic law to be applied in Indonesia are basically related to attitude toward tradition (*turats*) on one hand and the attitude toward modernization (*hadatsah*) on the other hand. If the traditional thought needed to address the modernization with the *priori* for conservation, the opposite is modern thought needed to address the tradition as something that must be eliminated to achieve the progress, because the tradition is assumed as a barrier blocking the progress of the process itself. In this case, the concept of Contemporary Islamic law is stuck in a critical dispute between tradition and modernization where both face each other as a form of contemporary challenges.

Secularization in modern times has slowly influenced contemporary culture at this present time. Since the 18th century, science and technology in

human society have made people move into a more effective and efficient. The development of technology beginning with the invention of the steam engine by James Watt has provided a significant effect, especially in terms of technology. When in modern times appear personal things that separate away from the public sphere. It will have developed the thought of secularization automatically which separates the private affairs with public affairs. Talking about secularization was originally pioneered by the separation between the powers of Church and State, which automatically religious life of the people is no longer regulated by the State. It is true that secularization has partially contributed to the development of contemporary Islamic law, but remember that Islamic law must not lose its true spirit as God's revelation that comes from Allah SWT. The purity of Islamic law derived from the religion of Islam must be maintained, the norms contained in the Quran and Sunnah must be applied into all aspects of life of Moslems in every place, epoch, and time, *qawaid fihiyyah* attempts to bridge the contemporary meaning effort of the values contained in the texts (Quran and Sunnah), so that Islamic law remains alive in contemporary dimensions without diminishing its meaning and essence as a revelation.

The scope of the fiqh is very extensive, it is because fiqh includes various branches (*furu'*), which causes the need for the main foundation which serves as the root that sustains those branches, the stronger the roots, the stronger the branches and surely can produce shade leaves, beautiful flowers and plentiful fruit, in addition, strong roots will make a solid tree that no need to worry if its branches buffeted by strong winds. Similarly, branches of fiqh in Islamic law will be stronger and no need to worry when the storm of the times and technology come. Because its branches stand on the solid roots, then the branches will also be sturdy. Contrarily, if the roots are weak, the branches definitely would collapse if storms attack no matter how good and beautiful the branches. In consequence, it is true if the book *al Faraid al Bahiyah* mentioned that "indeed branches of fiqh can only be mastered with the rules of fiqh, so memorizing the rules is very important (Abd. Rahman). The phrase above illustrates that a *mujtahid* can know the contemporary law problems by understanding and exploring the principles of fiqh.

About the principles of fiqh, we can say that *qawaid fihiyyah* can accommodate the *syara'* laws of the various different issues, so Nadwi stated that

the universal fiqh foundation contained general syara' law, to the various events also within the scope of the qowaid fiqhiyyah (Ali Ahmad al – Nadawi). We can conclude that qawaid fiqhiyyah in the formation of Islamic law has roles as follows (Hidayatullah, 2012).

- i. Deepening of the rules of fiqh will make an Islamic law expert can really understand the science of fiqh and capable to analyze a wide range of contemporary issues, which can be prescribed by the law of the problem later;
- ii. Understanding of the qowaid fiqhiyyah can facilitate the process of determining the law against a new problem, by postulating the existence of equations illat and not contrary to the provisions laid down in advance;
- iii. Understanding of the qowaid fiqhiyyah make Islamic law always flexible, because qowaid fiqhiyyah serves as a filter that ensures in order that contemporary fiqh which has been made to solve the problems of the contemporary is not contrary to the provisions contained in the nash (Quran and Sunnah).

The Four-Imam (Hanafi, Hambali, Maliki dan Syafii) really realized of the importance of understanding the qawaid fiqhiyyah, this is because the science of fiqh rules is one of the most important branches of science sharia, when studied by someone it will make that person will be a faqih or someone who master the science of fiqh, even according to famous ulamas the secrets of fiqh in essence lies on the rules that it contains, besides mastering fiqhiyyah qawaid will ease a mujtahid to issue a fatwa, so it can not be denied that the main cause of backwardness of Islamic law developments is caused by a lack of attention to the science of qowaid fiqhiyyah.

Basically the rules of fiqh which are established and agreed upon by the ulama are many, but in practice, famous ulamas remain guided to five main basic principles or better known with the term qawaid sasiyyah al khams, this five basic principles then generate various branch rules which are still a part of the overall qawaid fiqhiyyah, in its progress, then IbnNujaim added one new basic principle to the previous five-basic principles, so it was named as qawaid al kubra, however the use of five basic principles qawaid asasiyyah al khamsis more popular than the use of basic principles qawaid al kubra, this five-basic principles a guideline which ensures that the human created fiqh must not contrary to what Allah SWT has determined, values in fiqh rules are universal, afford to adapt to the time and all problems attached to it, the rules can

generate the branch rules that are more specifically related to the issue to be resolved. The basic rules of the science of jurisprudence consist of (Ibnu Nujaim)

- i. First Rule, "All matters depend on the intention".
- ii. Second rule, "Confidence can not be eliminated or removed by doubt".
- iii. Third Rule, "Every adversity will give conveniences".
- iv. Fourth Rule, "harm and danger must be eliminated".
- v. Fifth Rule "Tradition must be affirmed".

Five points above are the rules of the principal called the qawaid asasiyyah al khams. (Prawitra 2016)

As to the explanation of each application of the five rules of fiqh that can describe below:

- i. Explanation of the first rule, "All matters depend on the intention", this rule emphasizes the importance of intention in doing any business, if the intention is good, the result will be good, but on the contrary, if the intention is not good then the result will not be good. In conducting an ijihad, it is important to understand that such efforts must be begun in good intentions, so that the results of ijihad will be good, but if ijihad is done not with good intentions then it will certainly have a bad impact, in another word ijihad is conducted because need a solution, not because orders or requests from the interests of people which does not give the goodness for the majority of people. Sample of application of these rules is, to conduct istinbath to validity of financial transactions using electronic cards, the Al-Quran and Sunnah do not organize it in detail, but there are basic commerces that can be used as guidance in making the new rules through the efforts of ijihad, then in this case ijihad is conducted to accommodate the interests of Moslems toward financial transactions using card because the times are allowing payments using card, ijihad is done solely for the good of the Muslims in the deal, not because of the request of bank or other hand, because the intention is to facilitate Muslims trade and as long as no directions in Al-Quran and Sunnah and not contradict to the two main sources so the fiqh of electronic transaction are allowed according to Islamic sharia.
- ii. The second rule, "Confidence can not be eliminated or removed by doubt," means the emphasis on a condition that everything that has been set up can not change, this rule then

- generate the branch rules "al aslumakana la makana" which can be interpreted that indeed everything already exists can not change forever, in etymology the belief is a science that there is no doubt in it, furthermore its truth is undeniable obviously [40-41].
- iii. Third Rule, "Every adversity will give conveniences". This rule is clear evidence that Islam is not intended to complicate the human but on the contrary Islam as rahmatan lil Alamin aims to bring human to the goodness, existing laws should not distress and encumber humans but always adapted to human capabilities, as it is mentioned in Q.S. Al Baqarah verse 286 , the jurists then make this rule to solve a variety of problems and determine the legal, that in formulating the law should not be too incriminating, but tend to the goodness, therefore it is appropriate if Asqalani said that Islam is an easy religion compared with the previous heavenly religions (Al Asqalani).
 - iv. Fourth Rule, "harm and danger must be eliminated". Understanding of this rule is initiated by the strong meaning that someone should not harm others, as stipulated in Q.S. Al Araf verse 56 and Q.S. Al Qasas verse 77, The two verses contain the word "tufsidu wala fil ardh", which has meaning do not make mischief on earth. The explanation can be understood that every human being is prohibited to make mischief on the earth in any form, as well as in interpreting the meaning contained in the Quran and Sunnah, the damage here is not only superficial damage or visible damage physically, but more than that such damage also includes moral, mindset, behavior and mental damage. On this basis, so this fourth main principle arose.
 - v. Fifth Rule "Tradition must be affirmed". The tradition here means a habit or urf that can be accepted by the healthy nature and done repeatedly, in this case when a habit is not contrary to the texts (nash) contained in the Qur'an and Sunnah then the habit can be done and should be no longer disputed, in this case the parameters of the tradition is the nothingness of conflict with the Quran and Sunnah, if a tradition conflicts to the Quran and Sunnah then automatically the tradition can not be applied and used as guidance in interpreting the law. The application of tradition till becomes a living law in a society focuses on two main points: the first, does not conflict to

the Quran and Sunnah and the second, to bring benefit to mankind, in consequence, if an act is not forbidden in the Qur'an and Sunnah, but did not bring benefit at all should not be done, because it can only lead to wastefulness and futility course, other case is about doubtful (subhat)actions which its halal and haram are not obvious, that if someone faces this situation he should avoid, as the Prophet Muhammad said "those who are stuck in a doubtful (subhat)case, then surely he was trapped in the case of the unlawful(haram)".

4 RESULT

In the beginning, the Islamic legal thought grew flexibly and dynamically follow the demands of the times, but besides that, it also retained the unchanged basic principles namely as a revelation from Allah SWT revealed to Prophet Muhammad. This dynamic and sturdy nature later became characteristic of Islamic law throughout the ages, where the dynamism makes Islamic law becomes flexible, and always adaptable to the developments and changing of times, meanwhile the rigidity of Islamic law makes it insoluble totally to the demands of the times, so still can maintain its purity without losing its identity. But in practice, the pace of the time development runs too fast, so it is not able to be accompanied by the pace of ijihad development which can be considered too slow. To actualize the flexibility, we can utilize qawaid fiqhiyyah or fiqh principles which can function as a parameter of the formatting the fiqh in contemporary Islamic law, it is done in order that the fiqh has the legal force and not conflict with nash or goodness, so it can be applied in everyday life. In detail, qowaid fiqhiyyah is a collection of some guidelines which contains values that should become the basic foundation of the establishment of Islamic law; therefore qowaid fiqhiyyah can be grouped into five basic principles/main Islamic laws, known by the term qowaid asasiyyah al khams. The five basic principles regulate the subject matters that should be followed in the effort to isthinbath (make output) a law in fiqh. In practical terms, it can be said that the Islamic law in fact is fiqh, namely the fuqaha's efforts in applying Islamic Sharia in accordance with the needs of recent society. Islamic law has a special characteristics in the adjustment to the times. The specificity of the characteristics of Islamic law is takamul (perfect), wasathiyah (harmony), and harakah (dynamic). Because the bigotry to the

foregone mahzab caused the taqlid, and the taqlid was one of the obstacle factors in the process of Islamic law reform in accordance with recent situation. Because the demands of the times and the awareness of Islamic scholars, then appears Islamic law reformation movement with various thoughts. Islamic legal reform requires the role of *ijtihad* and public awareness in receiving updates Islamic law.

Qowaid fiqhiyyah are universal principles which contain same subjects, which can be grouped in the same outline that later generates various branches of fiqh. Qawaid fiqhiyyah has been agreed by famous ulama as a base as important as the principal propositions and supporting ones existing in Islamic law, this is because qawaid fiqhiyyah can ease a mujtahid to understand Islamic law. So someone does not deserve to be considered as mujtahid, if not master qowaid fiqhiyyah. In short, the understanding of the rules of fiqh is necessary to perform *ijtihad*. The role of *ijtihad* is very big in the reform of Islamic law. The reform can not be carried out without a qualified mujtahid. Talking about reform in Islamic law and *ijtihad* in Islamic law, like two sides of a coin that can not be separated from one another, it is mutually complementary. If the process of *ijtihad* can be implemented in the process of reform of Islam correctly, so the laws of the *ijtihad* process will answer all the problems due to the demands of the times.

Thus the discussion about qowaid fiqhiyyah, and examples of its application, the five basic rules are desperately needed in the process of applying the contemporary Islamic law, regarding to the universality and generality of the Quran and Sunnah, so it needs a method as an analytical knife to find the essentials based on the two main Islamic law sources, beside that with qowaid fiqhiyyah then Islamic law can be adapted indirectly to the changes and developing of the times through an instrument called fiqh, but the flexibility of Islamic law can only apply to the mundane problems, whereas the problems about tauhid (monotheism) involves aqidah and worship can not be interpreted further because it can lead to heresy (*bid'ah*) and slander (*fitnah*) in understanding the true teachings of Islam.

5 CONCLUSIONS

The attempts to find out the true meaning of the Quran and Sunnah can be bridged by qowaid fiqhiyyah. This is because the values in the rules of fiqh are an outline that must be followed when formulating fiqh. If *ushul fiqh* is a method for

formulating fiqh, then qowaid fiqhiyyah is the approach way used in these methods, so fiqh produced can certainly not contrary to the arguments set out in the Quran and Sunnah as well as to answer all the problems that arise in every aspect of people's life. Qowaid fiqhiyyah should be a guideline in making a fiqh of Islamic law, this is because qowaid fiqhiyyah not only strive to ensure that fiqh is not contrary to the texts (*nash*), as contained in the Quran and Sunnah, but more than that qowaid fiqhiyyah also makes every fiqh have each *illat* which distinguishes between a fiqh with each other, in which the *illat* appear as a result of their legal rationing which generates other law in Islamic law. It is very important to remember every law there must be basic, because without *illat* that the law is not perfect, even with this *illat* laws contained in the texts, become flexible and dynamic, so it can answer and resolve all problems in every age. The application of contemporary Islamic law is very dependent on the application of qawaid fiqhiyyah in *ushul fiqh*, as raw predefined rules then this should be a major concern when discussing the contemporary Islamic law, it also aims to break the stigma that Quran and Sunnah have been irrelevant to recent time, because indeed Al-Quran and Sunnah were relegated by God to answer all problems in all ages, and as a revelation to the Prophet Muhammad the last prophet would never have outdated, it's just that the human mind is sometimes unable to understand perfectly the meaning of the Divine contained in the Quran and the Sunnah so often creates a negative stigma to it. Therefore qawaid fiqhiyyah is an adapter between the perfection of the Divine with the mortal human thought in understanding the intent of the creator of the universe Allah SWT.

REFERENCES

- Abd. Rahman, Asjmuni, *Kaidah-kaidah Fiqh*, Bulan Bintang Jakarta, pp: 17-18.
- Al Asqalani, IbnuHajar, *Fath al BarySyarhShahih al Bukhari*, Dar al Fikr, Beirut, pp: 164-165.
- Ali Ahmad al -Nadawi, *al-Qawaid al Fiqhiyyah*, Dar al Qalam, Damascus, pp: 43-44.
- Ash-Shiddiqy, Hasbi, *Filsafat Hukum Islam*, Pustaka Rizki Putra, pp: 105-108.
- Fanani, Muhyar, (2009), *Ilmu Ushul Fiqh Di Mata Filsafat Ilmu*, First Published, Walisongo Press, Semarang, pp: xiii-xiv.
- Hidayatullah, Syarif, (2012), *QawaidFiqhiyyah dan Penerapannya Dalam Transaksi Keuangan Syariah*

- Kontemporer (muámalat, maliyyahislahmiyah, muásirah), Gramata Publishing, Jakarta, pp:3-4.
- Hidayatullah, Syarif, (2012), QawaidFihiyyah dan Penerapannya Dalam Transaksi Keuangan Syariah Kontemporer (muámalat, maliyyahislahmiyah, muásirah), Gramata Publishing, Jakarta, pp:37-38.
- Hidayatullah, Syarif, (2012), QawaidFihiyyah dan Penerapannya Dalam Transaksi Keuangan Syariah Kontemporer (muámalat, maliyyahislahmiyah, muásirah), Gramata Publishing, Jakarta, pp:40-41.
- Ibnu Nujaim, al Asyabahwa al Nazhair, Dar al Fikr, Damascus, pp:115-116.
- Khalaf, Abdul Wahab, (1994) Poitik Hukum Islam, Tiara Wacana, Yogyakarta, pp: viii-ix.
- Laldin, Mohamad Akram, (2006), Introduction Shari'ah and Islamic Jurisprudence, Second Edition, CERT Publications, pp: 2-3.
- Muthahhari, Murtadha, (1995), Hak-Hak Wanita Dalam Islam, Third Edition, Lentera Basritama, Jakarta, pp: 49-50.
- Ridwan, (2007), Fiqh Pilitik, Gagasan, Harapan dan Kenyataan, First Published, FHUII Press, pp: xiv-xv.
- Ridwan, (2007), Fiqh Pilitik, Gagasan, Harapan dan Kenyataan, First Published, FHUII Press, pp: 76-78.
- Shahrastani, Abd. Al-Karim, al-Milalwa al-Nihal, Dar al-Fikr, Beirut, pp: 146-147.
- Shomad, Abd, (2010), Hukum Islam: Penormaan Prinsip Syariah Dalam Hukum Indonesia, First Published, Kencana Prenada Media Group, Jakarta, pp:1-2.
- Supriyatni, Renny, (2011), Pengantar Hukum Islam Dasar-Dasar Dan Aktualisasinya Dalam Hukum Positif, Widya Padjadjaran, Bandung, pp:12-14.
- Thalib, Prawitra, (2013), Syariah: Konsep dan Hermeneutika, First Published, Lutfansyah Mediatama, Surabaya, pp: 22-23.
- Thalib, Prawitra, (2016), Appliation of Qowaid Fiqhiyyah in Contemporary Islamic Law", *Jurnal Yuridika* Volume 31 No 1 Januari 2016, DOI: 10.20473/ydk.v31i1.1958,pp: 108-120
- Warson, Ahmad, (1997), Kamus Al-Munawwir Arab-Indonesia, Pustaka Progressif.
- Weiss, Bernard, (1992), The Search for God's Law: Islamic Jurisprudence in The Writings of Saif ad-Din al-Amidi, University of Utah Press, USA, pp: 34-43.
- Zuhaili, Wahbah, (1993), al-Fiqh al-Islami wa AdilatuhuBook 1, Dar al-Fikr, Beirut, pp15-16.