



## Islamic private law In the socio-cultural frame

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### ABSTRACT

Social culture is everything that is created by man with his mind and conscience for social life. While private law (civil) is a law that regulates family relationships, including marriage, guardianship, transfer of property, endowments, grants, Sadaqah, and others. Islamic law cannot be separated from various social realities, because Islamic law lives and develops along with the development and social changes of society. Thus, Islamic law that cannot be separated from the sociological aspects in its formation and development. These sociological aspects have been accommodated in jurisprudence (reasoning results), Ulema fatwas, Court jurisprudence, and legislation. this appears with the issuance of several laws and government regulations based on Islamic law, the government is accommodating to legal ideas derived from the Islamic religion whose application is adapted to the socio-cultural conditions of Indonesian society, as the adage of Islamic law: changes in a law are adapted to changes in time, place, circumstances and traditions prevailing in society.

**Keywords:** Social culture; private law; Islam

### 1. INTRODUCTION

Humans are Zoon politicon, social creatures who tend to live in groups, or at least choose to live together with others rather than living alone.<sup>1</sup> According to Soerjono Soekanto, humans are creatures of gregariousness, that is, creatures that instinctively

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<sup>1</sup> Hasan Shadily, *Sosiologi Untuk Masyarakat Indonesia* (Cet. XII; Jakarta Bina Aksara, 1989), h. 56.

tend to live together with other people.<sup>2</sup> When born into the world, man realizes his existence until adulthood and begins to use his mind. Nevertheless, there are those who understand the meaning of its existence and those who do not.<sup>3</sup> As a creature of the all-knowing creator, man was created to worship Him. Therefore, the duty of man is to make worship a fundamental necessity because the main purpose of his existence in the world is to worship.

In this context, one can feel the greatness of Allah which encourages the need to follow all the commands of Allah by doing proper deeds, seeing oneself as a servant of Allah, and placing Allah as the only God who is served sincerely in carrying out obedience and worship.

Therefore, the meaning of worship for each individual is not limited to the pronunciation of *ubudiyah* symbols alone, but is a substantial thing in human existence in the world. It is necessary to realize that doing worship based on God's command is not solely because of the ego of the creator, but for the benefit of mankind. This awareness can be achieved through understanding the meaning and purpose of the given *Shari'a*.

The purpose of the *Shari'a* of worship revealed by Allah through His Messenger can be summed up into four, namely: First, to know, oneness, and purify Allah with his various noble qualities. Second, be thankful for God's infinite blessings. Third, to encourage good behavior and noble character, so that people can improve their humanity and help others. Fourth, as a regulator of transactions and *muamalah* in order to prevent human arbitrariness and maintain the social order of society by imposing sanctions for violators of laws outlined by religion.<sup>4</sup>

If Allah requires humans to perform worship like angels, then he certainly gives the ability to humans as the ability of Angels to always glorify. Although man has a different arrangement of organs than angels, and is prone to boredom, difficulties, and inclinations, God by his mercy does not burden man beyond his ability. Allah establishes worship other than obligations (*Fard*) in accordance with the instincts and capabilities of the material form of each creature.

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<sup>2</sup> Soerjono Soekanto, *Sosiologi Suatu Pengantar* (Cet. VII; Jakarta: Rajawali Press, 1986) h. 102.

<sup>3</sup> Terkait dengan hal ini, hukum Islam mengenal istilah *ta'abbudi* dan *ta'aqquli*. *Ta'abbudi* merujuk pada ibadah yang tidak dapat diketahui alasannya secara rasional, sementara *ta'aqquli* merujuk pada ketentuan hukum yang dapat dipahami melalui akal dengan memahami alasannya yang terkandung di dalamnya.

<sup>4</sup> Ali Ahmad al-Jurjawi, *Hikmah dan Falsafah Dibalik Penetapan Syariat*, terjemahan dari *Hikmah al-Tasyri' wa falsafatuh*, (Bandung: Pustaka Hidayah, Cet. I, 1424 H/2003 M), h. 93.

Nature as a whole, including everything that happens in it, is subject and obedient to the command of his Lord, each in his own way in accordance with the potential given by God. Therefore, the discussion of worship covers all aspects of human life, whether in the form of deeds or words related to God as the creator, human relationships, and relationships with the surrounding natural environment. As a servant who is given physical, psychic, and intellect abilities, humans must fulfill these conditions.<sup>5</sup> In his worship, man is also influenced by the people around him, therefore, man needs social relationships in his life. This trait is common to humans, both advanced and primitive.<sup>6</sup>

Indeed, Islamic law does not distinguish between private law and public law, as understood in the understanding of Western jurisprudence because in private law there are aspects of Public Law, and vice versa. The scope of Islamic law in the sense of fiqh includes: munakahat, inheritance, muamalat in a special sense, jinayat or uqubat, al-ahkam as-sulthaniyah (caliphate), Shi'ar and mukhasamat.<sup>7</sup>

If Islamic law is systematized into the Indonesian legal system, the scope of law can be described as follows: a. Islamic civil law, including: 1. The law of marriage and divorce, 2. Wirasah, regulate all issues with heirs, heirs, inheritance and inheritance Division, 3. Muamalat, regulating the issue of material and property rights, human relations in matters of buying and selling, renting, borrowing, unions, contracts and so on. b. Islamic law includes: 1. Jinayah, which contains arrangements regarding acts that are threatened with punishment, both in the jarimah hudud and jarimah Ta'zir, 2. al akhsam as sulthaniyah discussed issues related to the head of State/head of government, the rights of the central government with the regions, about taxation, etc., 3. Syiar, regulate the affairs of war and peace, the relationship with followers of other religions and other countries, and 4. Mukhasamat regulates judicial matters, justice and procedural law.<sup>8</sup>

With regard to several causes, factors and backgrounds that influence the determination of Islamic law, then in this study discussed one of them is what are the socio-cultural factors in the determination of private law, including and how sociological dialectics that appear in the determination of private law in Islam.

## 2. METHODS

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<sup>5</sup> Lihat: Q.S. al-Isra (17): 36.

<sup>6</sup> Subhi R Mahmasani, *Falsafah al-Tasyri' fii al-Islam*, terj. Ahmad Sujono, *Filsafat Hukum dalam Islam* (Cet. II; bandung: PT. Al-Maarif, 1981). h. 20.

<sup>7</sup> M. Rosyidi, *Keutamaan Hukum Islam* (Bulan Bintang, Jakarta, 1971), h. 25.

<sup>8</sup> Muhammad Daud Ali, *Hukum Islam* (PT Raja Grafindo Persada, Jakarta, 1999), h. 5-6. Lihat juga Zainuddin Ali, *Hukum Perdata Islam di Indonesia* (Jakarta : Sinar Grafika, 2006), h. 25.

This type of research in the writing of this paper is descriptive-analytical and includes library research, namely studying books, scientific papers, magazines, newspapers, as well as legislation and government policies related to this research. This research generally relies on Written data sources.

### **3. RESULTS AND DISCUSSION**

#### **Socio-Cultural Definition and Private Law**

The term socio-cultural seen from the composition of the sentence is composed of two words, namely social and cultural. Referring to the Great Dictionary of Indonesian, social means with regard to society, also means like to pay attention to public interests.<sup>9</sup> While Culture by language means mind, intellect, customs. It also means something that has become a habit that is difficult to change. According to the term, culture is everything that is made by humans based on their minds and minds that contain love, taste and intention.<sup>10</sup>

So it can be concluded that sociocultural is a term used to refer to aspects of social and cultural life in a society. This includes values, norms, beliefs, customs, language, art, religion, and social institutions such as the family, school, and government.<sup>11</sup> Socio cultural influences the way people interact with each other, their behaviors, and thought patterns, as well as shaping the identity of communities and nations. Therefore, an understanding of social culture is very important in the establishment of law, especially Islamic law that will be established and applied in a homogeneous society.

#### **Socio-cultural definition according to experts**

##### **a. Andreas Eppink**

Andreas Eppink is a multidisciplinary expert best known for creating the Eppink model and developing the analysis of cultural psychology. Andreas Eppink was born in 1946. One of his important contributions was to give an understanding of socio-culture. According to Andreas Eppink, sociocultural refers to everything that happens or occurs in a given society and is characteristic of that society. In other words, he sees socioculture as a concept that encompasses all aspects of social and cultural life in a

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<sup>9</sup> Departemen Pendidikan dan Kebudayaan RI., *Kamus Besar Bahasa Indonesia* (Cet. IX; Jakarta: Balai Pustaka, 1997), h. 958.

<sup>10</sup> Departemen Pendidikan dan Kebudayaan RI., *Kamus Besar Bahasa Indonesia*, h. 149.

<sup>11</sup> Riduan Syahrani, *Seluk Beluk dan Asas-Asas Hukum Perdata* (PT Alumni, Bandung, 2006), h. 2.

society, including values, norms, traditions, language, social systems, institutions, and so on.<sup>12</sup>

In his analysis, Andreas Eppink sees that sociocultural includes not only aspects that appear physically or materially, but also aspects that are not visible such as thought patterns, attitudes and perceptions internalized by members of society. It understands that socioculture is inseparable from the individuals who live in said society, and also from the historical, geographical and political context in which said society is located. The Eppink Model developed by Andreas Eppink is used to analyze and understand the socio-cultural dynamics in a society. The Model covers a wide range of factors that influence socioculturalism, including the interaction between individuals, the role of social institutions, social change, and external factors such as globalization and technology. Thus, Andreas Eppink's contribution in developing the analysis of cultural psychology and providing an understanding of sociocultural helps us understand how social, cultural, and psychological factors are interrelated and interact in forming a particular society.

### **b. Edward Burnett Tylor**

Edward Burnett Tylor (1871), an anthropologist of the past, through his book *Primitive Culture and Anthropology* he explained that social culture is the whole element of society in the form of customs, arts, beliefs, morals, knowledge, thinking, abilities, and laws that a person acquires as part of a complex society.<sup>13</sup>

According to Tylor, socio-culture refers to the overall elements that exist in society and are part of the complex life of the community. These elements include customs, arts, beliefs, morals, knowledge, thinking, abilities, and laws. Tylor sees socioculture as the result of the accumulation of knowledge, values, and practices passed down from generation to generation in society. It understands that these elements form the identity and unique characteristics of a society and provide the foundation for social interaction, social organization and organization of people's lives.

Tylor's views focused primarily on primitive societies and identified patterns and similarities in their cultures in different parts of the world. He also proposed the theory of sociocultural evolution, which posits that human societies evolve from simpler levels of culture to more complex levels as technology, knowledge, and social organization develop. Tylor's book *Primitive Culture and Anthropology* made an important

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<sup>12</sup> Andreas Eppink. *Nilai-Nilai Terkandung Dalam Kebudayaan*, (Jakarta, Yayasan Obor Indonesia 1996), h. 49.

<sup>13</sup> Edward Burnett Tylor, *Cultural Digest and Cultural Customs*, (London: The Falmer Press, 1994), h. 190.

contribution to the study of Anthropology. It provides a conceptual framework for understanding and comparing human cultures from different regions and time periods. The concepts developed by Tylor, such as customs, beliefs and knowledge, are still an important part of modern anthropological studies.

Thus, Edward Burnett Tylor has made a significant contribution to understanding socio-culture as a whole element of society that includes aspects such as customs, arts, beliefs, morals, knowledge, thinking, abilities, and laws.

### **c. Paul Ernest**

Paul Ernest was an expert in the philosophy of mathematics, on the meaning of social culture. Ernest states that socio-culture involves individuals who form a community order and engage in activities together.<sup>14</sup>

According to Ernest's view, socio-culture not only includes aspects of the individual in isolation, but also involves the interaction and interrelationship between individuals in a society. He recognized that man is a social being who naturally engages in social interaction, is interdependent, and forms a complex network of relationships in society. Ernest emphasized the importance of activities together in social culture. The activity and collaboration carried out jointly by individuals in society is an integral part of the formation and maintenance of the socio-cultural order. Through joint activities, cultural norms, values and practices are maintained, renewed and preserved.

In this context, socio-culture involves social processes that include communication, collaboration, coordination, and interaction between individuals. These individuals participate in shared activities such as rituals, ceremonies, Economic Cooperation, sports, arts, and various other forms of social activities. Ernest's view underlines that socioculture is not a separate entity from the individuals in society. On the contrary, socio-culture is formed through the contributions of individuals who interact and influence each other in the context of society.

Thus, Paul Ernest's view of socioculture emphasizes the importance of the individuals who make up an order of society and engage in activities together. Through social interaction and collaboration, such individuals play an important role in shaping, maintaining, and developing socio-culture in society.

### **d. Lena Dominelli**

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<sup>14</sup> Paul Ernest, *The Philosophy of Mathematics Education*, (London: The Falmer Press, 1991), h. 90.

Lena Dominelli is a social worker and professor of sociopolitics, on the meaning of socio-culture. According to Dominelli, socio-culture is a part that is lacking in human ties and interactions, so it is necessary to recognize the ineffectiveness or weakness in it.<sup>15</sup>

Dominelli's views direct attention to neglected or underdeveloped aspects of the sociocultural context. He acknowledged that although socio-culture is a framework that involves human interaction and bonding, there are weaknesses or things that are less than optimal in this dynamic. Dominelli highlights the need for disclosure or recognition of such ineffectiveness or weakness. That is, in understanding and working with socio-culture, it is important for social workers or socio-political practitioners to recognize the existence of underdeveloped or vulnerable areas in socio-cultural ties and interactions.

Through such information, Dominelli's goal is to improve our understanding of the weak aspects of sociocultural and improve or strengthen them. This can involve paying attention to groups or individuals who may be marginalized, lack equal access, or face difficulties in fully participating in social interactions and cultural ties.

Social workers and socio-political practitioners play an important role in understanding and improving socio-culture. They can identify imbalances, inequalities, or discrimination in sociocultural ties, as well as work to reduce disparities and create more equitable opportunities for participation and influence in sociocultural contexts. In the context of Lena Dominelli's view, sociocultural is not a perfect entity or without weaknesses. However, with the right understanding and action, we can work to improve or strengthen underdeveloped aspects of human bonding and interaction, thereby creating a more inclusive and just society.

#### **e. Ki Hajar Dewantara**

The opinion of Ki Hajar Dewantara, who is also known as the father of Indonesian education, on socio-culture emphasizes the word "culture" which describes the results of human struggle both against nature and time. According to him, social culture reflects the success and well-being of a society that has been achieved through human struggle and effort.<sup>16</sup>

In the view of Ki Hajar Dewantara, socio-cultural forms can be diverse and varied. This shows that each society has a unique cultural richness, which includes traditions, customs, arts, languages and practices of daily life that characterize them. The importance of culture in the view of Ki Hajar Dewantara is to achieve happiness,

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<sup>15</sup> Lena Dominelli, *Feminist Social Work Theory and Practice*, (London, Palgrave, 2002), h. 30.

<sup>16</sup> Ki Hajar, Dewantara, *Kebudayaan*, (Yogyakarta: Penerbit Majelis Luhur Persatuan Tamansiswa, 1994), h. 28.

prosperity, and well-being of society. Culture is not only a marker of a people's identity, but also a foundation for their growth and development.

In this context, the struggle of Man Against Nature and time reflects the attempt to obtain progress and well-being. Socio-culture becomes a mirror of the course of history and development of a society, which includes challenges, innovations and achievements achieved through human effort. Ki Hajar Dewantara's opinion on socio-culture emphasizes the importance of appreciating, maintaining, and enriching a community's cultural heritage. In the pursuit of happiness, prosperity and well-being, culture becomes a strong foothold and an inherent identity of a society. Thus, Ki Hajar Dewantara's view underlines the importance of social culture as the result of human struggle and the foundation for achieving happiness, prosperity, and well-being of society.

#### **f. Parsudi Suparian**

Parsudi Suparlan is an anthropologist, argues that culture is the foundation for human behavior and life in general because culture is the result of human reason that is functioned to understand the surrounding environment and his life experience.<sup>17</sup>

In Suparian view, culture is a concept that involves human cognitive and intellectual aspects. Man uses his intellect to understand the world around him and deal with his life experiences. Through this process, humans create culture as a guide to interact with the environment and others. Culture forms the foundation for human behavior because it establishes thought patterns, values, norms, and symbolic systems that direct social action and interaction. Culture provides guidelines on what is considered right or wrong, natural or unnatural, as well as how human beings should behave and relate to others.

In this context, culture becomes the basis for the development and adjustment of the individual in society. Humans learn and adapt to the cultural norms and practices that exist around them. Culture also provides a framework of understanding of the ways of thinking, feeling, and behaving adopted by members of society. Suparian opinion highlights the role of culture as a mechanism for human adaptation to their social and physical environment. Culture enables people to understand the world around them, face life's challenges, and form meaningful social interactions.

In conclusion, Suparian considers culture as the result of human reason that is functioned to understand the surrounding environment and his life experience. Culture

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<sup>17</sup> Parsudi Suparlan, *Manusia, Kebudayaan dan Lingkungannya*, (Penerbit Raja Grafindo, 1992), h. 49.



becomes the foundation for human behavior and life in general, directing the thought patterns, values and actions that shape social interactions in society.

### **g. Koentjaraningrat**

Koentjaraningrat a scientist and author of the book *Introduction to anthropology* provides an understanding of culture. According to him, culture is a response, ideas, actions, and works made by humans in the context of community life. In addition, culture can also be learned and owned by humans.<sup>18</sup>

The Koentjaraningrat view emphasizes that culture is a product of human activity in society. Humans create ideas, respond to the environment, and perform actions based on their understanding and interpretation of the world around them. In this process, culture is formed as a result of human interaction with his physical and social environment. The importance in understanding Koentjaraningrat is that culture can be learned and owned. This refers to the fact that culture not only exists in an abstract form, but can also be observed, studied, and applied by humans. Culture becomes a heritage that can be passed on from generation to generation, where each individual has the opportunity to acquire knowledge, values, and cultural practices that exist in society.

In this context, culture encompasses diverse aspects such as language, value systems, customs, traditions, art, technology, and social institutions that shape human life. Culture plays an important role in shaping individual and group identity, providing direction and orientation in behavior, and influencing human thought patterns and perceptions of the world. Koentjaraningrat's view on culture emphasizes that culture is the result of human activities in community life. He underlined that culture can be learned and owned by humans, becoming an integral part of their lives and identity.

### **h. R. Soekmono**

Opinion Of R. Soekmono, an archaeologist and historian, about culture states that culture is a human effort or work that includes thoughts, objects, or behaviors that arise during his life.<sup>19</sup>

According to Soekmono, culture is a product of human effort and creativity. Man creates thoughts, ideas, concepts and ideas that are reflected in diverse forms, such as art, science, philosophy and other thoughts. This thinking reflects human knowledge, interpretation and understanding of the world around him. In addition to Thought,

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<sup>18</sup> Koentjaraningrat. *Manusia dan Kebudayaan Di Indonesia* (Jakarta: Djambatan, 2007), h. 102.

<sup>19</sup> R. Soekmono, *Pengantar Sejarah Kebudayaan Indonesia*, (Yogyakarta: Kanisius, 1994), h. 98.

Culture also includes objects created by man. These can be works of art, equipment, technology and other objects that are used or produced by humans in everyday life. These objects reflect the technological achievements, skills and aesthetics of man in creating those objects that are useful or have artistic value.

Furthermore, Soekmono mentioned that human behavior is also part of culture. This behavior includes norms, customs, ordinances, and practices carried out by society. Human behavior in interacting, communicating, working, and various other activities is a manifestation of the existing culture. Thus, in Soekmono's view, culture includes thoughts, objects, and human behavior that arise during his life. Culture is the result of human effort and creativity in creating something useful, has aesthetic value, and shapes people's way of life. Soekmono's opinion emphasizes the importance of human contribution in creating and enriching culture. Humans as active agents in the cultural process have a central role in creating, maintaining, and developing the cultural heritage that shapes their identity and life.

### **Private Law**

Private law, also known as civil law, is a set of family relationships including marriage and all its legal consequences, rights and obligations between husband and wife, parental rights to children, guardianship, transfer of property either when the owner is alive or after death, as well as the issue of endowments, grants, Sadaqah, and so forth.<sup>20</sup>

From this definition, it can be understood that civil law or private law is the set of rules that govern the relationship between individuals and other individuals.<sup>21</sup> This law emphasizes the protection of individual rights and confirms the attitude towards actions that can harm other individuals. The term "civil law" or "private law" refers to legal concepts that are closely related to the rights or interests of individuals. This concept guarantees the protection of a person's property so that everyone has authority over his rights in accordance with his wishes.<sup>22</sup>

From the above understanding, it can be understood that Islamic Civil Law is everything related to the law of marriage, inheritance, and regulation of material issues and rights to objects, rules for buying and selling, lending and borrowing, Association (profit-sharing cooperation), transfer of rights, and everything related to transactions.

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<sup>20</sup> Ahmad Rofiq, *Hukum Perdata Islam di Indonesia*, Edisi Revisi (Cet. I; Jakarta: RajaGrafindo Persada, 2013), h. 7.

<sup>21</sup> Zainuddin Ali, *Hukum Perdata Islam di Indonesia* (Jakarta: Sinar Grafika, 2006), h. 23.

<sup>22</sup> Abdul Karim Zidan, *Al-Waji fi Ushul al-Fiqh* (Beirut: Muassasah al-Risalah, 2002), h. 84.

While private law is a good law taupun material process is based on personal interests. Civil law falls into this category of private law.

### **Socio-Cultural Factors Of Law Enforcement In Islam**

In Islamic law, socio-cultural factors play an important role in the establishment of private law. Islamic law is enforced in order to build a civilized society and to achieve noble religious goals. Therefore, Islamic law must always pay attention to socio-cultural factors that affect society.

It is the law that God has made. (Islamic law) or made by man (the law) aims to regulate and organize and become a guide in the order of human life, both individually and in general. If the law made and established by God serves to confirm and filter social reality, which is well maintained and which is contrary to his will is removed, while the law made and established by man is much influenced by the social reality of the society in which the law will be applied. This makes Islamic law inseparable from various social realities of society, because Islamic law lives and develops along with the development and social changes of society. According to Soejono Soekanto, social change can be interpreted as a variation of accepted ways of life, either due to changes in geographical conditions, culture, population composition, ideology, diffusion, or new discoveries in society.<sup>23</sup>

Thus, Islamic law which cannot be separated from sociological aspects in its formation is in the process of development which is influenced by several factors, including: socio-cultural factors that live in society, regional factors where people live and develop, and fiqh or understanding factors that always develop following the development of community life. These three factors have been integrated in the social history of law so that Islamic law is very thick with sociological aspects that surround the determination of the law on the issues of community life, or in other words, social institutions have been started since the birth and development of Islamic law at the time of the Prophet Muhammad. To date, the process continues.

Below will be explained further aspects of sociological aspects that affect the formation of private law in Islamic law, including:

### **Results Of Reasoning (Jurisprudence)**

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<sup>23</sup> Soejono Soekanto, *Sosiologi Suatu Pengantar* (Jakarta: Rajawali Press, 2005), h. 305.

Etymologically, jurisprudence comes from the word "understand" which means understanding. However, in contrast to "science" which means knowledge or understanding acquired through the process of learning, jurisprudence places more emphasis on understanding acquired through the process of reasoning, although its use is not bound by revelation. According to the terminological sense, jurisprudence is the study of Islamic Sharia laws that are practical (amaliyah) and obtained from detailed arguments. In other words, jurisprudence is jurisprudence or a collection of Islamic Sharia laws regarding human actions taken from its arguments in detail.<sup>24</sup>

This understanding shows that jurisprudence is inseparable from the social context and is the result of human work that encourages the use of reason to understand Islamic law in the context of setting and structuring human actions. Therefore, jurisprudence is not born from a vacuum, but is formed through the dynamics of the struggle of people's lives. In this case, jurisprudence and the social reality of society mutually influence each other and are inseparable.

According to Rahmat Djatnika, modern jurisprudence has undergone significant development compared to jurisprudence in the days of the mujtahids of the 2nd century to the 4th century Hijriyah which is only compiled from detailed postulates. According to the Quran a Muslim is one who has absolutely surrendered to Allah and his commands and believes in pure Tawhid (the oneness of God) that isn't tainted with any shirk and this is why the Almighty has introduced prophet Abraham as a true worshipper of God.<sup>25</sup>

Thus, jurisprudence today has developed to regulate not only issues of worship, but also covers the sphere of social life of society. Jurisprudence comes in various thematic forms, such as Indonesian jurisprudence, environmental jurisprudence, and women's jurisprudence. This typology of jurisprudence arose as a result of the renewal of jurisprudence that took into account the social and cultural realities of society. In the reform of Islamic law, it is necessary to map which areas should undergo restructuring and which areas should be maintained. The scope of worship is decided based on a definite proposition, so the issue of worship is difficult to be renewed unless the technique and method of implementation can be renewed. On the other hand, the scope of muamalah has the opportunity to be renewed in accordance with the demands of the Times.

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<sup>24</sup> Ahmad Rofiq, *Hukum Islam di Indonesia* (Cet. I; Jakarta: RajaGrafindo Persada, 1995), h. 5; dan Abdul Wahhab Khallaf, *Ilmu Ushulul Fiqh*, terj. Noer Iskandar al-Barsany dan Moh. Tolchah Mansoer, *Kaidah-Kaidah Hukum Islam (Ilmu Ushulul Fiqh)* (Cet. VII; Jakarta: RajaGrafindo Persada, 2000), h. 2.

<sup>25</sup> Rahmat Djatnika, *Perkembangan Ilmu Fikih di Dunia Islam dalam "Hukum Islam di Indonesia, Perkembangan dan Pembentukan"* (Cet. II; Bandung: Remaja Rosdakarya, 1994), h. 28.

## Religious Decree Or Ruling By Scholars

The definition of Fatwa according to the Indonesian dictionary is: (1) the answer in the form of a decision or opinion given by the mufti/expert on an issue; and (2) the advice of the pious; good lessons; and advice. Fatwa Ulama.<sup>26</sup>

Yusuf Qardhawi defines that fatwa الفتوى (according to the language means the answer about an incident (event), which is a form of the word) al-fataa/youth) in his age, and as a metaphor (metaphor) or (isti'ara). Whereas the definition of fatwa according to syara 'is to explain syara law' in an issue as an answer to a question, whether the questioner is clear of his identity or not, both individually and collectively.<sup>27</sup>

According to Rohadi Abdul Fatah, a fatwa in Islam is an opinion or answer to a question asked by a fatwa requester.<sup>28</sup> Based on these definitions, it can be concluded that fatwas are the result of ijtihad from people who are qualified to solve various social problems faced by the community. Fatwas appeared during the Sahabah period along with the increase in Islamic territory and raised various new issues that required legal certainty from a mufti. Although fatwas are derived from the books of jurisprudence that have existed before, social and cultural changes and the development of science can affect the determination of fatwas. Therefore, socio-cultural differences and factors of scientific development can lead to differences of opinion among scholars regarding fatwas issued.<sup>29</sup>

In addition to the above two factors, other factors that can affect the determination of fatwas are the demands of the Times and the need that requires contemporary jurists to pay attention to the fact that the purpose is to facilitate and mitigate the law of furu' (branch) which is operational both in matters of worship and muamalah. Among the demands of the times, for example, allowed a woman to travel by plane without the escort of her muhrim with the permission of her husband or family. Social changes and the needs of the times can also influence the establishment of fatwas. Along with the Times, contemporary jurists need to pay attention to existing realities to facilitate the application of Branch law both in matters of worship and muamalah. One example is the permission for a woman to travel by plane without the escort of her muhrim with the permission of her husband or family.

## Jurisprudence

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<sup>26</sup> Tim Penyusun Kamus Pusat Pembinaan dan Pengembangan Bahasa, *Kamus Besar Bahasa Indonesia*, h. 240.

<sup>27</sup> Yusuf Qardhawi, *Fatwa Antara Ketelitian dan Kecerobohan* (Jakarta: Gema Insani Press, 1997), h. 5.

<sup>28</sup> Achmad Musyahid, *Melacak Aspek-Aspek Sosiologis dalam Penetapan Hukum Islam* (Cet. I; Makassar: Alauddin University Press, 2012), h. 138.

<sup>29</sup> Rohadi Abdul Fatah, *Analisis Fatwa Keagamaan dalam Fiqhi Islam* (Jakarta: Bumi Aksara, 1991), h. 119-121.

Jurisprudence comes from latin, which consists of two words IUs/iuris meaning law and prudentia meaning legal Science. So jurisprudence means expertise or ability in the field of law.<sup>30</sup> Meanwhile, according to the term, jurisprudence is a set of court decisions that are followed by judges in trying and deciding a case, both as a reference to the same legal case and as a comparison in different legal cases.<sup>31</sup>

Jurisprudence or court decision is a legal decision produced by the judges through the process of *ijtihad* then become the basis for the determination of the law for the judges afterwards in court.<sup>32</sup> Based on this definition, it can be understood that jurisprudence is the result of a court decision that has become a legal determination submitted by a judge to the litigant or as a reference for other judges in facing the same legal case at different places and times. With the existence of jurisprudence, of course, psychologically, the lower court judge will follow the higher judge in his position. The decision that has been decided by the Supreme Court for example will be a matter of consideration for the High Court and its subordinate to the same or almost the same permasalahan. It is practically very easy for judges who are at the judicial level, if there has been a decision from a higher judicial position. Likewise, if there is a decision of the High Court or Supreme Court, the decision of the lower court will be corrected or corrected by the High Court or Supreme Court if there is a legal remedy.

However, the jurisprudence that has been produced by the judges or scholars of the past can not be absolute for today's judges because the judge's decision is not binding due to the ever-changing public life, both due to Customs and socio-cultural factors, so that a judge must still do legal analysis or *berijtihad* in order to produce a comprehensive decision on each case, because the judge's decision has important significance, both for the judiciary, the parties to the case and for the judge.

## Legislation

Legislation is held to implement the Basic Law and the Constitution. The legal material must be based on three aspects, namely philosophical aspects, juridical aspects and sociological aspects. Legislation is said to have a philosophical foundation, if its formulation and norms can be justified through in-depth study (philosophically) accompanied by reasons that are in accordance with the ideals and views of human life in society that are in accordance with the ideals of truth, justice and morality.<sup>33</sup> Juridical

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<sup>30</sup> John M. Echols dan Hasan Sadilly, *Kamus Inggris Indonesia* (Cet. XXIII; Jakarta: Gramedia, 1996), h. 338.

<sup>31</sup> Hartono Hadisoeparto, *Pengantar Tata Hukum Indonesia* (Cet. I; Yogyakarta: Liberti, 1993), h. 14.

<sup>32</sup> Achmad Musyahid, *Melacak Aspek-Aspek Sosiologis dalam Penetapan Hukum Islam*, h. 153.

<sup>33</sup> Syarif Amiroeddin, *Perundang-undangan, Dasar, Jenis dan Teknik Membuatnya* (Cet. I; Jakarta: Bina Aksara, 1989), h. 44.

basis or also called legal basis or legal basis or legality is the basis or basis of the authority to make laws and regulations.<sup>34</sup>

The juridical basis can be distinguished in two aspects, namely the formal aspect, which is the legal provisions that authorize the body to form it, while the material aspect is the legal provisions on what problems or issues must be regulated. The sociological foundation is the foundation that uses the rules to established and meet the needs of society in various aspects that concern empirical facts about the development of the problem of the needs of society and the state.<sup>35</sup>

The classification of the three bases of legislation mentioned above, is only theoretical because in practice the three are always one and simultaneously affect the management of the government, for example, in state regulations, the three bases are seen in the body of the regulation, both considerations, dictums and in their explanations, even though a good legislation, if the regulation reflects the relationship of the three bases.

Of the three foundations, only the sociological foundation can undergo a shift from time to time. The shift was influenced by the changing views of wisdom in running the state government in accordance with the framework and criteria contained in a law in order to realize the happiness of the nation in accordance with the national goals set out in the law. As a law that is born from the guidance of the community, the influence of socio-cultural aspects in a law cannot be denied because the socio-cultural aspects are a mirror of the dynamics and social reality of the community that is formalized in the form of legislation, for example, the Indonesian law. No. 1 of 1974 on marriage. The socio-cultural aspects behind the birth of the law are:

- a. The occurrence of early marriage is caused by the assumption of society that in general women who are not married or unmarried are "underappreciated".
- b. The existence of the assumption in society that marriage can be carried out without the knowledge of employees of marriage abusers. This is because the position of parents who consider themselves to be a cleric or religious leader, so that without the presence of authorized officials, the marriage of their children is valid as long as it is in accordance with Islamic law.
- c. There is an assumption that marriage under the hand or commonly called religious marriage is allowed and they consider that marriage is legal.

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<sup>34</sup> Rosyidi Ranggawidjaya, *Pengantar Ilmu Perundang-Undangan Indonesia* (cet. I; Bandung: Mandar Maju, 1998), h. 44.

<sup>35</sup> M. Solly Lubis, *Asas-Asas Hukum Tata Negara* (Bandung: Alumni, 1982), h. 88.

- d. The ambiguity of the position of marriage registration, because there is no provision that one of the conditions of marriage is registration, either as a legal condition or as a complementary condition. In other words, women have no legal protection.

Among the products of Islamic legal thought that were included in the Indonesian legislation during the new order period were: 1) Law of the Republic of Indonesia Number 1 of 1974 on marriage; and 2) Law of the Republic of Indonesia number 7 of 1989 on religious courts. In addition, Government Regulation No. 28 of 1977 on the Representation of owned land and Presidential Instruction No. 1 of 1991 on the compilation of Islamic law were born.

Law No. 7 of 1989 was amended by Law No. 3 of 2006 which was followed by the birth of the Supreme Court Circular. No. 8 Of 2008. But a year after the birth of the circular, Law No. 48 of 2009 was born, which was followed by a circular of the Supreme Court of the Republic of Indonesia. No. 8 of 2010 which confirms the invalidity of the Supreme Court Circular No. 8 of 2008.

During the Reformation period, the products of Islamic legal thought that were promulgated were: 1) Law of the Republic of Indonesia number 17 of 1999 on the implementation of Hajj supported by the decree of the Minister of Religious Affairs No. 224 of 1999 on the implementation of Hajj and Umrah; and 2) Law of the Republic of Indonesia number 38 of 1999 on the management of Zakat supported by the decree of the Minister of Religious Affairs No. 581 of 1999 on the implementation of the law of the Republic of Indonesia number 38 of 1999 on the management of Zakat. In 2011 the law was renewed with the birth of the law of the Republic of Indonesia. No. 23 of 2011 which is supported by PP No. 14 of 2014 as a rule of its implementation.

The birth of several laws in Indonesia is historical evidence that Islamic legal products have never been challenged for their correctness. Therefore, the existence of socio-cultural factors in public life and legislation relating to the application of Islamic law in Indonesia has experienced a dynamic and continuous development, both through political infrastructure and superstructure channels in line with the reality, demands and support, as well as the will for efforts to transform Islamic law into a national legal system.

## **Acknowledgment**

Based on the discussion of this issue can be concluded that:

1. The stipulations of Islamic law cannot be separated from various sociological aspects.



2. Sociological dialectics is very evident in a variety of legal provisions in jurisprudence, determination law in fatwa ulama, the determination of law in jurisprudence and the determination of law in legislation, this appears with the publication of several laws and regulations based on Islamic law, the government accommodating to legal ideas derived from the religion of Islam whose application is adapted to the socio-cultural, conditions and traditions prevailing in society.

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