



**Lisan Al-Hal : Jurnal Pengembangan Pemikiran dan Kebudayaan**

**Volume 16, Issue 1, June 2022**

e-ISSN : 2502-3667, p-ISSN : 1693-3230

<https://journal.ibrahimy.ac.id/index.php/lisanalhal>

## REFLECTION ON THE RELATIONS OF ISLAMIC LAW AND POLITICS

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### **Abstract:**

Discussions about Islamic Law and Politics are always interesting things to discuss. It is interesting because it has become a debate of all time, especially from various circles of formalist madhhab Islamic groups dealing with substantialist schools. The group's debate can be narrowed down to the question of the position of Islamic Law on politics and vice versa. The question is not a simple problem, because the implications are very large for the construction of thought in theory and reality. The purpose of this study is to determine the relationship between power and legal justice, to examine the identity of law and justice, and the necessity of power in law enforcement. The results show that Islamic law is knowledge of human rights and obligations while politics is knowledge of managing public affairs based on power. When viewed from the Islamic law literature, politics is part of the discourse in Islamic law. The Islamic law that regulates politics also has a gap in the interest of incoming power, therefore the Islamic power is obliged to conduct deliberation so that the people's interest is maintained in ijthadi law and in the application of non-ijthadi law. Power must uphold justice in every action and its actions cannot be separated from the law. This means that the power to enforce justice is through a just law. Enforcement must be carried out by power so that if power betrays the people, impeachment may be carried out.

**Keywords:** Reflection, Relationship, Politics, Islamic Law

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Received : March 16, 2022; Revised : April 26, 2022; Accepted : April 28, 2022; Published : April 29, 2022

## INTRODUCTION

Look for the equivalent of the phrase *hukm Islami* in references to the Arabic Language cannot be found in equivalent in the Indonesian language in addition to meaning Islamic government. Even Though in Indonesia *hukm Islami* is absorbed into the word Islamic law which has another meaning from its original meaning. The Meaning of Islamic Law in question is only found in the word *al-fiqh* which means knowledge of the laws practical shari'a which is taken from the detailed arguments or can be is also defined as a compilation of practical shari'a laws which derived from the detailed arguments.<sup>1</sup> Islamic law or fiqh in Indonesian is usually translated as Islamic law. They are two different things. In the Indonesian context, Islamic law is often understood as a set of legal rules arising from Islam, namely the Qur'an, *sunnah*, *ijma'* and *qiyas*. If this is what is meant, of course, Islamic law is fiqh. Apart from fiqh, there is also *qadha'* which is also often referred to as Islamic law. Besides, there are also fatwas

<sup>1</sup> Abdul Wahhab Khallaf, *'Ilmu Ushul al-Fiqh* (Jakarta: Dar al-Kutub al-Islamiyah, 2010), 13.

as a product of fiqh.<sup>2</sup> As for politics, according to one of the definitions given by the KBBI is all affairs and actions (policies, tactics, etc.) regarding state government or against another country<sup>3</sup>.

If it is observed from the definition given earlier than from a linguistic point of view, Islamic law and politics can meet with. The argument is that Islamic law, which means government, is absorbed into Indonesian, even though what is meant is *al-fiqh* in the sense of law or regulation so this shows the relationship of meaning between government and law has adjacent side. If the law and politics can be met on the side of Language, the next discussion is whether Islamic law and Can politics be reconciled theoretically and also reality? Prof. Dr Syaikhul Kiram Azyumardi Azra once said in a forum seminar, that the slogan of *al-Syari'ah Hakimatun ala jami'i af'ali al-Ibad* (the Shari'a regulates all human actions) that's a slogan that not correct because what is meant by the Shari'a are verses about the law. If this opinion is used as a backup, then the implications are a matter of politics for which there is no specific text (*nash*) that punishes it, then the question is outside the sharia.

This is a small example of the discourse on Islamic law and politics. There is still a lot of debate about the legal relationship between Islamic law and politics which have implications for the constitutional system, from ideology, a form of state and government, a system of government, system politics, constitution, nationalism and geopolitics. Therefore, the discourse is not simple, sometimes derivative parts mixed to make it confusing, not only according to the point of view of non-Islamic scientists, even in the eyes of a scientist Islam itself.<sup>4</sup>

The discourse demands where is the role of Islam as the religion of *rahmatan li al-'alamin* and *wasathan*. What's the position of politics in Islam and what is the position of Islam towards politics. The application of Islamic law in the socio-political context of Indonesia is always attracting polemics and debates.<sup>5</sup> Not only on a technical level juridical, even at a very sensitive political level, related to the formal relationship between religion and the state. Added again with a discourse on the tug of war between the rulers and the controlled.<sup>6</sup> This tug of war can be realized in the form of a law that is carried out by the ruler, of course, it is very vulnerable to the interests of the ruler into the law that comes from it. Therefore, it is Important once conducted a study of the boundaries between the law as an extension of power and the voice of the people's (the citizen) conscience.

If it is clear where the legal position is between the ruler and the people, the discourse does not stop there. Thus, this paper will raise several questions, what power and legal justice are closely related? What is the law synonymous with justice or not

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<sup>2</sup> Ahmad Yani and Megawati Barthos, 'Transforming Islamic Law in Indonesia from a Legal Political Perspective', *Al-Ahkam* 30, no. 2 (2020): 162, <https://doi.org/10.21580/ahkam.2020.30.2.6333>.

<sup>3</sup> 'Arti Kata Politik - Kamus Besar Bahasa Indonesia (KBBI) Online', accessed 21 February 2021, <https://kbbi.web.id/politik>.

<sup>4</sup> Bahtiar Effendy, *Islam dan Negara: Transformasi Pemikiran dan Praktik Politik Islam di Indonesia* (Jakarta: Paramadina, 1998), 1.

<sup>5</sup> Pepen Irpan Fauzan and Ahmad Khoirul Fata, 'Positivisasi Syariah di Indonesia, Legalisasi atau Birokratisasi?', *Jurnal Konstitusi* 15, no. 3 (2018): 593, <https://doi.org/10.31078/jk1537>.

<sup>6</sup> Puji Kurniawan, 'Pengaruh Politik Terhadap Hukum', *Jurnal Al-Maqasid: Jurnal Ilmu Kesyarahan Dan Keperdataan* 4, no. 1 (2018): 33, <https://doi.org/10.24952/almaqasid.v4i1.1416>.

identical? Is it only with power, then a just law can be enforced or even without power, a just law is more secure?

## RESEARCH METHODS

This research method adopts standard research; By reading and editing, research materials carefully on the topics discussed to find the truth of consistency, this research is normative research. Research materials use reputable primers, while secondary materials are publications and collections. Collecting data by reviewing literature books using data sources from the literature, either in the form of books, journals, articles, journals, as well as data analysis methods using descriptive methods. Methods of analysis and methods of content analysis.

## RESULTS AND DISCUSSION

### Understanding Islamic Law and Politics

The term Islamic Law is an Indonesian term that only exists in Indonesia. It is a translation of *al-fiqh al-Islami* or in a certain context, it becomes the meaning of *al-shari'ah al-Islamiyah*<sup>7</sup>. *Al-Fiqh* according to language, is understanding, like people say "*Fulan faquha qauli*" which means "fulan understand my words". From this word also the word of God "*Walakin la tafqahuna tasbihahum*".<sup>8</sup> While the meaning of fiqh in shari'a terminology is understanding of *syar'i*'s mukallaf actions, not "*aqli*", in the form of obligations (*wajib*), prohibitions (*haram*), permits (*mubah*), recommendations to do (*sunnah*) and recommendations to leave (*makruh*)<sup>9</sup>. The sharia terminology was later refuted by Muhammad bin Ali al-Tayyib Abu al-Hasan al-Basri bin al-Mu'tazili. He defines fiqh as the whole of the understanding of sharia laws. He refutes the first definition because the definition means fiqh as an act only while the law is not an act. The reason is that law be valued additions (*idhafah*) to action while something cannot possibly be valued additions to itself<sup>10</sup>.

According to Mohammad Muslehuddin, Abu Hanifah's definition of fiqh, namely one's knowledge of the rights and obligations of human obligation, is the most comprehensive definition because it can be directed to knowledge about something that can be what a person does and what is forbidden to him. In this meaning, fiqh means knowledge about obligations and rights and according to Muslehuddin, this is the most appropriate interpretation of Abu Hanifa's definition of law.<sup>11</sup>

The most popular definition is the understanding of the laws of practical Shari'a law taken from the arguments in detail or compilation of practical Shari'a laws derived

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<sup>7</sup> Zainuddin Ali, *Hukum Islam: Pengantar Hukum Islam Di Indonesia* (Jakarta: Sinar Grafika, 2015), 2.

<sup>8</sup> وَإِنْ مِنْ شَيْءٍ إِلَّا يُسَبِّحُ بِحَمْدِهِ وَلَكِنْ لَا تَفْقَهُونَ تَسْبِيحَهُمْ

"There is not a single thing (of heaven, earth, etc.) that does not glorify His praises, but you simply cannot comprehend their glorification." (QS. al-Isra': 44)

<sup>9</sup> Abu Ali al-Hasan bin Syihab bin al-Hasan bin Ali bin Syihab al-Abkari Al-Hanbali, *Risalah Fi Ushul Al-Fiqh* (Makkah al-Mukarramah: al-Maktabah al-Makkiyah, 1992), 61.

<sup>10</sup> Muhammad bin Ali al-Thayyib Abu al-Hasan al-Bashri Al-Mu'tazili, *Al-Mu'tamad Fi Ushul al-Fiqh* (Beirut: Dar al-Kutub al-Ilmiyyah, 1403), 3.

<sup>11</sup> Mohammad Muslehuddin, *Hukum Darurat Dalam Islam*, trans. Ahmad Tafsir (Bandung: Pustaka, 1985), 12.

from the detailed arguments.<sup>12</sup> In short, Fiqh means knowledge of a person's rights and obligations.

Turn to the notion of politics. In the KBBI, politics means (knowledge) about the state administration or state (such as about the system of government, the basis of government), or is defined as all affairs and actions (policies, tactics, etc.).<sup>13</sup> Whereas in the English dictionary, politics is the activities of the government, members of law-making organizations, or people who try to influence the way a country is governed, or the job of holding a position of power in the government.<sup>14</sup> Meanwhile, politics itself, if it is associated with Islamic Law, is then related to the term *Siyasah*.

The term of *Siyasah* according to Arab Language is *masdar* from the word *ساسة* - *يسوس* - *سياسة*. An Example of using this word is *ساسة الدابة أو الفرس* (he keeps animals or horses). This is said when someone takes care of his livestock from feeding, giving drinking, taming, cleaning and others.<sup>15</sup> In pre-Islamic times, the word *siyasah* is used to mean the management of the internal affairs of a country. In modern Arabic, the use of meaning is still in use. The term *siyasah* is also found in the literature politics, such as in the book *al-Siyasah al-Madaniyyah* by al-Farabi, the *siyasah* refers to the branch of philosophy that studies the art of politics. In fiqh sunni, *siyasah* is found in the word *al-siyasah al-syar'iyah*, which means government based on sharia law. The Use of the word aims to harmonize Islamic law and politics which has been around since the middle ages.<sup>16</sup>

Yusuf al-Qaradawi views that this meaning is a borrowed meaning for use in a human context. Therefore, it is as if humans, having been able to overcome animal affairs, can step up to overcome human affairs, and lead to managing their affairs. Therefore, the explainer (*syarih*) of the dictionary says that it is part of a figure of speech when it says *سست الرعية سياسة* which means I rule and prevent them. While *السياسة*, means taking care of something to fix it.<sup>17</sup>

According to *mu'jam kamil* quoted by al-Qardhawi, *siyasah* is something related to government and management civil society. Meanwhile, according to the dictionary of the social sciences, *siyasah* shows a human behaviour related to involvement in fighting or deciding the fight for the kindness of the public which always includes the use of force or competition to get it. And in the legal dictionary, *siyasah* is defined as subjects or the art of managing public affairs.<sup>18</sup>

### The Existence of Politics in the Study of Islamic Law

If the word *siyasah*, is known to mean both linguistically and in terms, then the next turn is to examine the term in the books of the previous generations of Islam, as well as in Islamic fiqh and thought as well as from Islamic sources themselves. Is the

<sup>12</sup> Khallaf, *Ilmu Ushul al-Fiqh*, 13.

<sup>13</sup> 'Arti Kata Politik - Kamus Besar Bahasa Indonesia (KBBI) Online'.

<sup>14</sup> Cambridge Dictionary, 'Meaning of Politics in English', accessed 16 April 2022, <https://dictionary.cambridge.org/dictionary/english/politics>.

<sup>15</sup> Yusuf al-Qardhawi, *al-Din wa al-Siyasah* (Dublin: al-Majlis al-Urubiy li al-Ifta' wa al-Buhuts, 2007), 18.

<sup>16</sup> Yohana Oktaviani Lavan, 'Implementation Of Islamic Values In Indonesian Political Dynamics', *Intelegensia : Jurnal Pendidikan Islam* 9, no. 1 (2021): 57-58, <https://doi.org/10.34001/intelegensia.v9i1.2042>.

<sup>17</sup> Yusuf al-Qardhawi, *al-Din wa al-Siyasah*, 18.

<sup>18</sup> Yusuf al-Qardhawi, *al-Din wa al-Siyasah*, 18.

word *siyasah* in the Qur'an, the Sunnah of the Prophet, the books of fiqh of the schools that are followed or the books of fiqh that are not based on schools of thought?

The word *siyasah* is not found at all in the Qur'an, not in the *makkiyah*, *madaniyyah*, nor in the words formed from them, both in character and in reality. Anyone who reads *al-mu'jam al-mufahras li alfadz al-qur'an*, then he will get the same impression. Therefore ar-Raghib in his *mufradat* does not mention it. Likewise with the *mu'jam alfadz al-Qur'an* published by *majma' al-lughah al-arabiyyah*.<sup>19</sup> As for matters relating to *siyasah*, many verses discuss it, such as regarding *wilayah*, *imamah*, *khalifah*, and so on<sup>20</sup>. Sometimes some people take this as an excuse that the Qur'an or Islam does not pay attention to politics. There is no doubt that this pretext is a kind of distortion of facts, even though the word *siyasah* is not found in the Qur'an at all, but its meaning is contained and spread in the Qur'an.

A commensurate example of this is the word *al-aqidah* whose words are not found at all in the Qur'an. However, its content is found in all parts of the Qur'an, from faith in Allah, the Angels, the Books, His Messengers and the Hereafter even *al-aqidah* is the main discussion surrounding the verses of the Qur'an<sup>21</sup>. In the Sunnah of the prophet found words containing *siyasah*, namely in the hadith of al-Bukhari and Muslim narrated by Abu Hurairah:

حَدَّثَنَا مُحَمَّدُ بْنُ بَشَّارٍ، حَدَّثَنَا مُحَمَّدُ بْنُ جَعْفَرٍ، حَدَّثَنَا شُعْبَةُ، عَنْ فُرَاتِ الْقَزَّازِ، عَنْ أَبِي حَازِمٍ، قَالَ: قَاعَدْتُ أَبَا هُرَيْرَةَ خَمْسَ سِنِينَ فَسَمِعْتُهُ يُحَدِّثُ، عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، قَالَ: كَانَتْ بَنُو إِسْرَائِيلَ تَسُوسُهُمُ الْأَنْبِيَاءُ، كُلَّمَا هَلَكَ نَبِيٌّ خَلَفَهُ نَبِيٌّ، وَإِنَّهُ لَا نَبِيَّ بَعْدِي، وَسَتَكُونُ خُلَفَاءُ فَتَكْتُمُونَ، قَالُوا: فَمَا تَأْمُرُنَا؟ قَالَ: فُوا بِبَيْعَةِ الْأَوَّلِ، فَالْأَوَّلِ، وَأَعْطُوهُمْ حَقَّهُمْ، فَإِنَّ اللَّهَ سَائِلُهُمْ عَمَّا اسْتَرَعَاهُمْ.

"Muhammad bin Basyar has taught us hadith, Muhammad bin Ja'far has taught us hadith, Shu'bah has taught us hadith from Furat al-Qazaz, from Abu Hazim, he said: "I lived with Abu Hurairah for five years and I heard him teach a hadith from the Prophet which said:

"At first, the Children of Israel were managed and led by the Prophets. Every time a prophet dies, he will be replaced by another prophet. Verily there will be no prophet after me, but there will be many caliphs. The companions asked, what do you order us? The Messenger of Allah said: Fulfill the first allegiance, only the first, and give them their due. Verily Allah will hold them accountable for what they did." (Hadith of al-Bukhari no. 3455, Muslim no. 1842)<sup>22</sup>

<sup>19</sup> Yusuf al-Qardhawi, *al-Din wa al-Siyasah*, 19.

<sup>20</sup> Wahyu Abdul Jafar, 'Fiqh Siyasah Dalam Perspektif Al-Qur'an Dan al-Hadist', *Al-Imarah: Jurnal Pemerintahan Dan Politik Islam* 3, no. 1 (2018): 21, <https://doi.org/10.29300/imr.v3i1.2140>.

<sup>21</sup> Yusuf al-Qardhawi, *al-Din wa al-Siyasah*, 19.

<sup>22</sup> Muhammad bin Ismail Abu Abdullah al-Bukhari al-Ju'fi, *al-Jami' al-Musnad al-Shahih al-Mukhtashar min Umur Rasulillah wa Sunanih wa Ayyamih*, Juz 4 (t.t: Dar Tauq al-Najah, 1422), 169; Muslim bin al-Hajjaj Abu al-Hasan al-Qusyairi al-Naisaburi, *al-Musnad al-Shahih al-Mukhtasar Bi Naql al-Adl Ila Rasulillah*, Juz 3 (Beirut: Dar Ihya al-Turats al-Arabi, t. th), 1471.

Politics or *siyasah* as used in classical legal terminology has multiple senses. First, *siyasah* was understood by the Hanafi and other jurists as an aggravated law, usually used in the context of punishment that requires a stronger stance: However, as is well known, this usage was not the only one; in another usage, the word denotes rulings issued by the sovereign and his official representatives for the practice of governance or statecraft. Al-Maqrizi, a Mamluk historian and scholar, was probably the first person who defined *siyasah* in this second sense. There he defined *siyasah* as a type of statute or as a kind of ruling: “*siyasah* is a *qanun* promulgated to observe etiquette, interests, and regulation of properties (*al-qanun al-mawdu’ li-ri’ayah al-adab, wa al-masalih wa intizham al-amwal*)”<sup>23</sup>. It is not clear which of the two meanings came first. The scholars of various schools of thought (*madzhab*) have discussed *siyasah* in their books. The discussion is specifically explained when they talk about *ta’zir*, while *ta’zir* is a punishment that is not defined by the texts (*nash*)<sup>24</sup>.

In the discussion of *siyasah* the scholars are divided into two groups; some of them have broadened their scope, and others have narrowed their scope. Adherents of the Shafi'i school are among the groups that narrowest the scope of *siyasah* among other groups because they do not consider *maslahah mursalah* as a method of finding the law.<sup>25</sup> This is understandable because by using *maslahah mursalah*, creations in legal stipulation are more wide open. Imam al-Haramain, one of the leaders in the Shafi'i school in the book *al-Ghiyatsi*, expressed his objection to *ta’zir* by the authorities by exaggerating the limits of the law of *had*. Therefore, he criticizes the adherents of *maslahah mursalah*, and even mentions the opinion of Imam Malik regarding the permission of the ruler to destroy one-third of the population based on the benefit of two-thirds of the population.<sup>26</sup> This implies that *siyasah* or *ta’zir* does not provide benefits but adds to the problem. *Ta’zir* is what Imam al-Haramain calls *siyasah*.

Imam al-Haramain's rejection of *maslahah mursalah* contradicts the facts obtained by al-Imam Syihabuddin al-Qarafi al-Maliki. He mentioned that when he investigated various existing schools, including the Shafi'i school, he finds other schools of thought when using analogies, compromising or separating two issues without looking for supporting evidence that can be used as a consideration for the meanings they compromise or separate even they only suffice with absolute (*muthlaq*) relations.<sup>27</sup> For example, regarding the law of *had*, Imam Shafi'i analogizes the punishment for drunkards (drinking *khamr*) to the punishment of *qadzaf* (people who accuse adultery), namely 80 lashes, because people who are drunk will be delirious and in their delusions, it is strongly suspected that they will accuse other people of adultery. Even among the Shafi'i schools, scholars with the calibre of al-Ghazali discussed the problem of

<sup>23</sup> Mürteza Bedir, ‘The Hanafi View of Siyasa and Sharia between Idealism and Realism: Al-Hasiri’s Conception of Temporal and Religious Politics: (Siyasa Ad-Diniyya al-‘uzma and Siyasa al-Hissiyya al-‘uzma)’, *Journal of Islamic Review* 10, no. 2 (2020): 453, <https://doi.org/10.26650/iuitd.2020.693785>.

<sup>24</sup> Yusuf al-Qardhawi, *Al-Din Wa al-Siyasah*, 23.

<sup>25</sup> Misran Misran, ‘Al-Mashlahah Mursalah: Suatu Metodologi Alternatif Dalam Menyelesaikan Persoalan Hukum Kontemporer’, *Jurnal Justisia : Jurnal Ilmu Hukum, Perundang-Undangan Dan Pranata Sosial* 1, no. 1 (2020): 145, <https://doi.org/10.22373/justisia.v1i1.2641>.

<sup>26</sup> Abdul Malik bin Abdullah bin Yusuf bin Muhammad al-Juwaini Abu al-Ma’ali Ruknuddin al-Muqallab bi Imam al-Haramain, *al-Ghiyatsi Ghiyats al-Umam fi al-Tayyats al-Dzulam* (t.t: Maktabah Imam al-Haramain, t. th), 218.

<sup>27</sup> Abu al-Abbas Syihabuddin Ahmad bin Idris bin Abdurrahman al-Maliki al-Qarafi, *Syarh Tanqih Al-Fushul* (t.t: Syirkah al-Thiba’ah al-Fanniyah al-Muttahidah, 1973), 395.

*mashlahah mursalah* extensively in their ushul fiqh books.<sup>28</sup> This is what is called *masalahah mursalah* and it exists in all schools of thought.

The next opinion is the opinion promoted by the Hanafi school, which talks the most about *siyasah* compared to other schools. In *Radd al-Mukhtar*, Ibn Abidin explains by quoting al-Quhustani that *siyasah* is not specified in cases of adultery, even in various *jinayah* matters, while the considerations are left to the authorities as in the book *al-Kafi*. For example, killing the perpetrators of heresy (*bid'ah*) who are suspected of spreading heresy, although not to the level of infidels (*kafir*) as in the book *al-Tamhid*<sup>29</sup>. The substance taken from the opinion of this school is that *siyasah* only relates to punishment and provides a deterrent effect. Whereas nowadays *siyasah* is broader than that because it covers various issues, such as customs and contractual relations of administration, economy, peace, war, social relations, national legislation and others.

There is an opinion of Ibn Aqil when commenting on the opinion of Shafi'i quoted by Ibn Qayyim which states that *siyasah* is something that can make humans closer to goodness and further from damage even though it was not determined by the prophet and was not revealed revelation to him. Therefore, the words of Shafi'i who said "there is no *siyasah* but those that are in accordance with the Shari'a", if it is interpreted as "not contradicting the words of the Shari'a" then it is true and if it is interpreted "there is no *siyasah* but what is said by the Shari'a" it is a big mistake and violated the companions of the prophet.

It is wrong because during *Khulafa a-Rasyidin* period there were executions of the death penalty and other severe punishments that were not denied by anyone who understood the Sunnah, even though it was in the form of burning by Uthman against manuscripts other than *Rasm Uthmani* because of considerations for the benefit of the people, as well as the burning of Ali against the *zindiq* people in the trenches and also the exile of Umar bin al-Khattab against Nasr bin Hajjaj<sup>30</sup>. In conclusion, although the scholars from various schools of thought differ on *siyasah*, it cannot be denied that *siyasah* or politics have become the subject of a long and interesting discourse on the study of Islamic law.

### **Law as an Extension of Power and The Voice of Citizen's Conscience**

One of the properties of Islamic law is that its main source is in the will of God revealed to the Prophet Shallallahu 'alaihi wasallam. This law has the goal of forming a community of believers, even though they are made up of various tribes and are separated in distant places. Only religion, not nationalism or geography, is the most viable source of binders. Even the state is subject to the Qur'an, which provides little opportunity for legislators to add to the law, and in no way denounces or rejects it. This world is seen as the terrace of another world which is better for believers, and the Qur'an lays out norms towards each person and towards society to ensure safe transfer to that other world (heaven). This implies that it is impossible to separate political or

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<sup>28</sup> Misran, 'al-Mashlahah Mursalah', 146.

<sup>29</sup> Ibn Abidin Muhammad Amin bin Umar bin Abdul Aziz Abidin al-Dimasyqi al-Hanafi, *Radd al-Mukhtar 'ala al-Durr al-Mukhtar*, Juz 4 (Beirut: Dar al-Fikr, 1992), 15.

<sup>30</sup> Muhammad bin Abi Bakr bin Ayyub bin Sa'ad Syamsuddin Ibn Qayyim al-Jauziyyah, *al-Thuruq al-Hukmiyah* (t.t: Maktabah Dar al-Bayan, t. th), 12-13.

legal theory from the teachings of the prophet Shallallahu 'alaihi wasallam, which established norms regarding religious, domestic, social, and political matters.<sup>31</sup>

Sharia law itself is divided into two. *The first* is a law that is understood without a process of *ijtihad*.<sup>32</sup> This is because the proposition is *qath'i*, both in its transmission and in its meaning. This law belongs to the type that is fixed and does not change and cannot be replaced even though the situation and conditions change. While *the second* is the law obtained through *ijtihad*.<sup>33</sup> Sometimes because there are no texts (*nash*) or the texts are *dzanni*, either the transmission or the indication of their meaning. From this point of view, the law can change and adapt to the environment. This is what is called *fiqh*.

In establishing and implementing *fiqh* or sharia law, tactics are needed so that the law can be applied effectively and efficiently. Islam has established the necessity of the principle of *syura* (deliberation) for Muslims in social life. However, Islam does not determine the method and system of deliberation or *syura*. The implication is that the method and system are delegated to the development of time and conditions of a place, which in *fiqh* rules is known as *تغيير الأحكام بتغير الزمان والمكان* (*law changes according to changes in time and place*).<sup>34</sup>

A problem for which there is no text, then the whole is included in the area of *ijtihadi* (can be *ijtihad*) and *syuriy* (can be deliberated). Members of the deliberations are required to express their opinion on the matter. If the members of the deliberation have determined their opinion, then it must be carried out, provided that they must not deviate from the principles of Islamic teachings and the soul of *tasyri*<sup>35</sup>. If there is a problem which according to Islam is outside the area of deliberation and part of it is within the scope of the *syura*, it is required that it does not come out of the provisions of Islam. This shows that the *syura* is tied to Islam and must run within its territory by implementing its principles and serving its ideals in all circumstances and times.<sup>36</sup> It can also be formulated with and where there are benefits (*mashlahah*), then that is where

<sup>31</sup> Muslehuddin, *Hukum Darurat Dalam Islam*, 14–15.

<sup>32</sup> Jalaluddin Muhammad bin Ahmad bin Muhammad bin Ibrahim al-Mahalli, *Syarh al-Waraqat fi Ushul al-Fiqh* (Palestina: Jamiah al-Quds, 1999), 69.

<sup>33</sup> *Qath'i*'s argument is like the word of Allah:

وَأَقِيمُوا الصَّلَاةَ وَآتُوا الزَّكَاةَ وَارْكَعُوا مَعَ الرَّاكِعِينَ

"Establish Prayer and dispense zakah (the purifying alms) and bow in worship with those who bow". (QS. al-Baqarah: 43)

The verse above shows the command to pray is obligatory. While the explanation that the prayer time is five times a day is strengthened by the attitude of the Messenger of Allah and his companions who never left it.

*Dzanni*'s argument is like the word of Allah:

وَالْمُطَلَّقاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلَاثَةَ قُرُوءٍ

"Divorced women must wait (the period of *iddah*) for three monthly cycles..." (QS. al-Baqarah: 228).

The word *quru'* in Arabic is called the word *musytarak* (meaning more than one meaning). Can mean *thuhr* (holy), or mean *haid* (menstruation). So that the mujtahids have different opinions in determining the period of *iddah* for divorced women. Jalaluddin Muhammad bin Ahmad bin Muhammad bin Ibrahim Al-Mahalli, 69.; Muhamad Mas'ud, 'Dalil Qath'i Dan Zhanni', *Islamika : Jurnal Agama, Pendidikan Dan Sosial Budaya* 13, no. 1 (2019): 102–3, <http://ejournal.unis.ac.id/index.php/ISLAMIKA/article/view/156>.

<sup>34</sup> Khalil Mahmud Ni'rani, *Atsar adz-Dzarfi fi Taghayyur al-Ahkam al-Syar'iyah* (Kairo: Dar Ibn al-Jauzi, 2006), 112.

<sup>35</sup> Abdul Qadir Audah, *al-Islam wa Awdhauna al-Siyasiyyah* (Beirut: Muassasah al-Risalah li al-Thiba'ah wa al-Nasyr wa al-Tauzi', 1981), 196.

<sup>36</sup> Audah, *al-Islam wa Awdhauna al-Siyasiyyah*, 196–97.



Allah's Shari'a is found, then this can be justified if Shari'a does not talk about it, and leaves it to open space for *ijtihad* and thought on the matter. As for other than such problems, then what is correct is if it is said, where there is the Shari'a of Allah, then there is *mashlahah*.<sup>37</sup>

According to Abdul Qadir Audah in *al-Islam wa awdha'una al-siyasah*, the *syura* stands on fundamental principles, including:<sup>38</sup>

1. *Syura* is a right that is assigned to the government and the citizens. In this case, no one is superior to one another. Just as the government can express its opinion on every government issue, so can the citizens.
2. It is the duty of the government has to consult with the citizens. Al-Qur'an Surah Ali Imran verse 159 obliges the government to consult with the citizens in state affairs, be it difficult affairs or light affairs.<sup>39</sup> Meanwhile, the citizens can exercise their right at any time to express their opinion and demand the government to place their opinion in a place according to Allah's decree. More than that, the citizens also have the right to demand the government to be transparent so that the citizens can channel the best opinion from them.
3. Deliberations must be based on sincerity, not because of personal interests, pragmatic practical interests, group interests, both ethnic and regional. Deliberations may also not be held based on fraud, deceit, coercion and bribes.
4. Deliberations do not have to be in the form of unanimity of the participants of the deliberation in one opinion. However, only the votes were agreed upon by most members of the deliberation.
5. The obligation to implement decisions by minority groups whose opinions are not taken and lose to the views of the majority group. The Prophet gave an example of this when discussing with his friends while the majority of the companions wanted to go out to Uhud even though the Prophet thought it was better to wait for the enemy in Medina.

### **Power and Justice of the Law**

Human affairs will be more upright in the world if they are enforced fairly, even though they are accompanied by some sins, compared to being upright with injustice without sin. Therefore Ibn Taimiyah said:

إِنَّ اللَّهَ يُقِيمُ الدَّوْلَةَ الْعَادِلَةَ وَإِنْ كَانَتْ كَافِرَةً، وَلَا يُقِيمُ الدَّوْلَةَ الظَّالِمَةَ وَإِنْ كَانَتْ مُسْلِمَةً

"Verily, Allah will establish a just government even if he disbelieves and (otherwise) He will not establish an unjust government even though it is Islam".<sup>40</sup>

<sup>37</sup> Asrorun Ni'am Sholeh, *Metodologi Penetapan Fatwa Majelis Ulama Indonesia: Penggunaan Prinsip Pencegahan Dalam Fatwa* (Jakarta: Emir, 2015), xxx.

<sup>38</sup> Audah, *Al-Islam wa Awdhauna al-Siyasiyyah*, 199–203.

<sup>39</sup> ... وَشَاوِرُهُمْ فِي الْأَمْرِ ۖ فَإِذَا عَزَمْتَ فَتَوَكَّلْ عَلَى اللَّهِ ...

"... and consult with them in (conducting) matters. Once you make a decision, put your trust in Allah..." (QS. Ali-Imran: 159)

<sup>40</sup> Taqiyyuddin Abu al-Abbas Ahmad bin Abdul Halim bin Taimiyyah al-Harrani, *Majmu' al-Fatawa*, Juz 28 (al-Madinah al-Nabawiyah: Majma' al-Malik Fahd li Thiba'ah al-Mushaf al-Syarif, 1995), 146.

It is also said that the world will be eternally with justice and disbelief, but will not be eternal with injustice even though Islam is. Prophet Muhammad SAW said:

عَنْ أَبِي بَكْرَةَ قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: مَا مِنْ ذَنْبٍ أَجْدَرُ أَنْ يُعَجَّلَ اللَّهُ تَعَالَى لِصَاحِبِهِ الْعُقُوبَةَ فِي الدُّنْيَا مَعَ مَا يَدْخُرُ لَهُ فِي الْآخِرَةِ مِثْلُ الْبُعْيِ وَقَطِيعَةِ الرَّحِمِ.

*“From Abu Bakr R.A, he said: The Messenger of Allah SAW said: “There is no sin that is more appropriate for Allah SWT to hasten the punishment for the perpetrator in this world at the same time as the punishment provided in the hereafter other than tyranny and people who cut off family ties”. (Hadith of Abu Dawud no. 4902)<sup>41</sup>*

The wrongdoers are humiliated in this world even though in the hereafter they will be forgiven and given mercy because justice is the rule of everything. If the world's affairs are enforced justice, he will be upright, even though the perpetrators will not get a reward in the hereafter. Otherwise, when the affairs of this world are not enforced justice, it will not be upright, even though the perpetrator will get the reward of his faith in the hereafter<sup>42</sup>. Thus, justice is the main principle that cannot be omitted (*sine qua non*) and must become a power trait. Justice is the enemy of every form of persecution, injustice and rape of the rights of others as well as discriminatory behaviour.<sup>43</sup>

If justice is associated with Islamic nomocracy, then it must always be viewed from the point of view of the function of state power. This function includes three basic obligations for state administrators or a government as the holder of power, namely<sup>44</sup>: First, is the obligation to exercise state power fairly, honestly and wisely. All people without exception must get the favours of justice that arise from state power. For example, the implementation of state power in the fields of politics and government. All people must get their rights fairly without discrimination. Second, is the obligation to uphold judicial power in the fairest way possible. The law must be enforced according to its provisions. The law applies to anyone, regardless of their position. Third, is the obligation of state administrators to realize something that is the goal of a just, prosperous and prosperous society under the pleasure of Allah. It is concerned with justice and social welfare.

The principle of justice in Islamic nomocracy contains a noble concept. It is not the same as justice created by humans. Human justice with the doctrine of humanism has removed sacred values and has too venerated humans as individuals, so that humans become the benchmark. On the other hand, the concept of justice in an Islamic nomocracy places humans in their proper place as individuals and society. Man is not a benchmark, but he is a servant of Allah, whose value is determined by his relationship with Allah and with fellow human beings or according to the formulation of the al-

<sup>41</sup> Abu Dawud Sulaiman bin al-Asy'asy al-Sijistani, *Sunan Abi Dawud*, ed. M. Muhyiddin Abd. Hamid (Beruit: al-Maktabah al-'Ashriyyah, 1431), 276.

<sup>42</sup> Taqiyuddin Abu al-Abbas Ahmad bin Abdul Halim bin Taimiyyah al-Harrani, *Majmu' al-Fatawa*, Juz 28, 146.

<sup>43</sup> Sarja, *Negara Hukum: Teori Dan Praktek* (Yogyakarta: Thafa Media, 2016), 45.

<sup>44</sup> Sarja, *Negara Hukum*, 45-46.

Qur'an "*hablun min Allah wa hablun min al-nass*" (the bond between humans and Allah and between humans and humans).

In the Islamic doctrine, only Allah occupies the central point. Therefore, justice in Islamic humanism has been always theocentric, meaning that it rests and is centred on Allah, God the Great and Almighty. Thus the concept of justice in Islam has advantages that are not found in the human version of justice concepts. Finally, it should be noted that one of the doctrines in Islamic law, avoiding punishment for mistakes that are not yet believed, is one of the most important Islamic principles that must also be implemented by every wise judge in upholding justice.<sup>45</sup>

### **The Inevitability of Power in Enforcing the Law**

The power of the state is prohibited from acting that harms the people. The state must command the *ma'ruf*, prevent the *munkar* and carry out Allah's laws. If he cheats, harms the citizens, wastes the rights of the citizens, then he has the right to be impeached.<sup>46</sup> It is said that everyone who serves in the government and all positions under the government in the hierarchy below, it is not permissible for him to act except with what brings benefit (*mashlahah*) or rejects damage (*mafsadat*), as in the rules of fiqh:

تَصْرُفُ الْإِمَامِ عَلَى الرَّاعِيَةِ مَنُوطٌ بِالْمَصْلَحَةِ

*"The government's action on the people must be followed by the benefits"*<sup>47</sup>

The above rule is the decision of Imam Syafi'i who said:

منزلة الإمام من الرعية منزلة الولي من اليتيم

*"The position of the government towards the people is like the position of a guardian to an orphan"*.

The provisions of Imam Syafi'i above are induced from the word of Allah, namely:

وَلَا تَقْرُبُوا مَالَ الْيَتِيمِ إِلَّا بِالَّتِي هِيَ أَحْسَنُ حَتَّىٰ يَبْلُغَ أَشُدَّهُ....

*"And do not even go near the property of the orphan except that it is in the best manner till he attains his maturity..."*<sup>48</sup>

Meanwhile, Imam Suyuthi believes that the origin of this rule is what Sa'id bin Mansur narrated in his *Sunan*:

<sup>45</sup> Sarja, *Negara Hukum*, 46–47.

<sup>46</sup> Muhammad Hasbi Ash-Shiddieqy, *Falsafah Hukum Islam* (Semarang: Pustaka Rizki Putra, 2013), 96.

<sup>47</sup> Abdur Rahman bin Abu Bakar Jalaluddin al-Suyuti, *al-Asybah wa an-Nadzair* (Lirboyo: Maktabah Islam, 2016), 83.

<sup>48</sup> (QS. al-Isra': 34)

قال عمر رضي الله عنه: إني أنزلت نفسي من مال الله بمنزلة والي اليتيم إن احتجت أخذت منه فإذا أيسرت رددته فإن استغنيت استعفت.

*"Umar r.a said: "I positioned myself from Allah's property in the position of guardian of orphans. If I need it, I take the treasure. But when I am in a state of ease then I return the treasure. But if I'm insufficient condition, then I'll take care of it".*

Some examples are if the government (*Imam*) distributes zakah among the zakah recipients (*ashnaf*), it is unlawful to give more to one group than another even though the needs are the same. If the government wants to delete the list of some soldiers (zakah recipients) the law is allowed with a cause, if without a reason then it is not allowed. And there are many other examples. The Prophet SAW also threatened the government that acted arbitrarily and harmed its people with his words:

مَا مِنْ أَمِيرٍ يَلِي أَمْرَ الْمُسْلِمِينَ، ثُمَّ لَا يَجْهَدُ لَهُمْ وَيَنْصَحُ إِلَّا لَمْ يَدْخُلْ مَعَهُمُ الْجَنَّةَ

*"There is not a leader who takes care of the affairs of the Muslims, then he is not serious and does not act honestly with them, except that the leader will not enter Paradise with them". (Hadith of Muslim no. 142)<sup>49</sup>*

Among what perfects this privilege, is that Islam does not give the head of state or regional head a privilege for its people other than their obligation to obey it in *ma'ruf* fields. In other fields, the government is the same as the people, in fact, they are seen as servants of the people, guardians of the rights of the people and humans who are entrusted with maintaining the benefit of the people and as implementing God's laws and His Shari'ah<sup>50</sup>.

## CONCLUSION

Islamic law is knowledge of some human rights and obligations, while politics is knowledge of how to manage public affairs based on power or government. In the study of Islamic law, politics has existed since the middle ages and developed even though it has not yet become a form of politics that has been understood so far. This means that politics are included in the study and discourse of Islamic law. From several schools (*mazhab*), it was found that the Shafi'i school greatly narrowed the opportunities for politics, while the Hanafi school opened up many opportunities to develop political discourse in Islamic law. The law itself is a form of power politics. Therefore, in matters of an *ijtihadi* nature, the power can carry out *ijtihad*. However, if the ruler is the only one who does *ijtihad*, then there can be arbitrariness of power. Therefore, the power (government) is obliged to conduct consultations with the people (the citizen) and the people have the right to express their opinions to the authorities at any time even without being asked. About power, the perpetrators of power must uphold justice

<sup>49</sup> Abu al-Husain Muslim bin al-Hajjaj al-Qusyairi al-Naisaburi, *Shahih Muslim* (Beirut: Dar Thauq al-Najah, 1334), 88.

<sup>50</sup> Ash-Shiddieqy, *Falsafah Hukum Islam*, 97.

through the laws they enforce. Justice must be upheld when administering state administration, in enforcing justice and in realizing the goals of a just, prosperous and prosperous society. One of the tasks of power is to carry out the laws that have been set. If the ruler is unable to carry out his obligations and even betrays his people by committing fraud, fraud and other unethical actions, then power may be impeached.

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