



May 16-17, 2013  
UNY Hotel  
Yogyakarta State University



Organized by :  
Institute of Research and Community Services  
Yogyakarta State University



**PROCEEDINGS**  
**INTERNATIONAL CONFERENCE ON EDUCATIONAL**  
**RESEARCH AND INNOVATION 2013 (ICERI 2013)**  
STRENGTHENING THE TIES BETWEEN EDUCATION AND RESEARCH

May 16 – 17 , 2013 | UNY Hotel | Yogyakarta State University

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Bambang Sugeng, Ph.D  
Sumarno, Ph.D  
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**Desain Cover :**

Pudji Triwibowo

**ISBN 978-602-7981-04-1**

Perpustakaan Nasional : Katalog dalam Terbitan (KDT)  
xi + 464 hlm; 21 x 29 cm

**Penerbit:**

**UNY Press**

Kompleks Fak. Teknik UNY, Kampus Karangmalang  
Yogyakarta 55281 Phone : (0274) 589346  
E-mail : [unypress.yogyakarta@gmail.com](mailto:unypress.yogyakarta@gmail.com)

# INTRODUCTION

Research is one of the three activities that should be conducted by the academic community of a university. Through research activities lecturers get empirical facts that are valuable for the improvement and development of theories and practices to bring about a qualified education.

In relation to the essence of a research to improve the quality of education, it is highly recommended that they do not conduct researches perfunctorily. Researches that are conducted should show special qualities recognized internationally. One effort to realize it is by conducting researches in the field of education and teaching and the field of community service integratedly.

Another important effort is by updating the knowledge and insights in the educational field either through reading related references or having discussions and meetings with other researchers and educational practitioners. In this context an international conference on educational researches and innovations constitutes a strategic forum to improve the researchers' insights and studies in contributing themselves to solve the educational problems through reseraches.

Hopefully, all materials in this conference are compiled into a proceeding that all related parties can read and are useful for us to improve the quality of education.

Yogyakarta, 10<sup>th</sup> of May 2013  
Rector of Yogyakarta State University

Prof. Dr. Rochmat Wahab, M.Pd., M.A.

# PREFACE

First of and above all, all praises and thanks be to Allah, the Lord of mankind and all that exists for His blessings and grace without which this international conference on educational researches and innovations would never be realized. This conference is a forum for the local, national and international educational researchers and practitioners to discuss strategic issues in the field of educational researches and innovations that are and will have been developing to realize effective schools.

This proceeding consists of three parts. The first is research policies, which include the management of educational researches, the development of teacher training in researches, and the participation of students and teachers in researches. The second part covers the model and implementation of educational researches, including collaborative researches between the educational world and industry, as well as society based researches. The third part includes researches on teaching and learning innovations in the areas of educational sciences, sport sciences, mathematics and science, engineering and vocational education, and informal education.

Hopefully, this proceeding can be beneficial for all of us to improve the quality of education.

Yogyakarta, 10<sup>th</sup> of May 2013

Head of Research and Community Service Institute of  
Yogyakarta State University

Prof. Dr. Anik Ghufron

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# **New Paradigm of Research on Islamic Law: Learning from *Pesantren* Tradition for Developing the Islamic Legal Studies in the Islamic Higher Education**

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## **Abstract**

The Indonesian Law number 12 of 2012 on Higher Education asserts that *Ma'had 'Aly* (the higher Islamic boarding school) is one of religious education institutions. This institution has not been well-known among educational researchers, not only because it is still new, but also it exists only in some *Pesantrens* (Islamic boarding school). The *Ma'had Aly* is usually operated traditionally, both in its institution and scientific structure. The institution is considered to have not adequate space to open dialogue related to the social change. However, there is an interesting phenomenon in the *Ma'had Aly* Salafiyah Syafi'iyah Situbondo, East Java that can become an exception of such assumption. Although, from its name the institution can be categorized as a traditional Islamic boarding school which is affiliated to as-Syafi'i's school, however, it develops a progressive model of research on Islamic law. Through observation, in-depth interview and documentation to the institution, this research shows that the institution which focusing on *fiqh* (Islamic legal studies) has placed its position as a trend setter of researches on Islamic law in term of *Pesantrens* world. Its main ideas even may serve a reference in developing Islamic legal studies in the higher Islamic education, particularly Islamic law faculties in Indonesia. The model of Islamic legal studies that is developed in educational institutions such as the higher Islamic boarding school or the higher Islamic education will influence the trends of epistemology and practical thoughts of its alumni. The alumni, who will be the *Kyai* (Islamic priests) or Islamic experts, give religious services and implementing Islamic law in daily life. They become references for muslim society in understanding Islamic law related to their daily life (*al-fiqh al-yaumiy*). They will also become the agents that influence the worldview of muslim society on Islamic law, and give enlightenments for them in implementing the Islamic law and make the Islamic law as the living law that will be an alternative of sub system contributing to develop the system of national law. In addition, inclusive paradigm in Islamic legal studies will produce inclusive generation.

On the contrary, radical and intolerant paradigm that is developed by an educational institution of Islamic law will create intolerant generation. In this light this study will show its urgents.

**Keywords:** Epistemology, Paradigm of research, Islamic Legal Studies, *Ma'had Aly*, Islamic Higher Education

## Introduction

Research is one of the important instruments for developing science which makes possible to interrelate scientific theory and empirical reality dialectically. As the result, it may generate an approval or refusal of old-established scientific theory, a development of a particular scientific theory or even an invention in a new scientific theory. By doing research, in the context of the development of Islamic legal studies, scientific theories and Islamic legal doctrines will be interrelated with recent realities (*al-waqā'i*) to correct established Islamic legal theories and legal doctrines for the benefits of humankind as a fundamental objective of Islamic law.<sup>1</sup>

As a scientific activity, research necessarily involves a selection of a certain epistemological choices. In the Islamic legal studies, this selection of an epistemological choice that is developed by an educational institution influences public perception in Islamic law as well as the development of national legal system in the future. Therefore, the study of how an educational institution develops its epistemology in Islamic Legal Studies is significant to develop a research model of Islamic law. It is to increase the choices/alternatives of Islamic legal studies system that are relevant to the public needs. Researching Islamic legal studies in *Pesantren* is always interesting considering *Pesantren* community is known for its uniqueness in assessing Islamic law. *Pesantren* is often regarded practicing literal understanding of Islamic legal and rarely using the tools of analysis that is provided by the *usul al-fiqh* or Islamic legal philosophy. *Pesantren* is also believed to be heavily dependent on *turats* and ignoring social reality. However, it does not mean *Pesantren* has only one and only approach model. Within the powerful conservative epistemology which is established in *Pesantren*, many efforts have been conducted to reinterpret the established models of Islamic legal studies, although it never be a mainstream. This paper is

<sup>1</sup>Al-Syaṭībī believes that none of God's law that has no purpose. God's purpose in establishing the law described as *maqasidas-Shari'ah* or *maqashidas-syar'iyyah fi as-shari'ah* or also *maqasid min shari'ah 'al-hukm* (Al-Syaṭībī, tt., Juzl: 21, 23; Juzl, p. 374). Al-Syaṭībī (tt., Juzl: 6) states: "The fact of sharia is derived to realize God's purpose in establishing the human benefit both in religion and worldly life" (*hāzihias-syari'ah.....wudi'at litahqiq maqasidas-shari'ah 'qiyāmimaṣālihihim fi ad-din wadunyama'an*). In addition, Al-Syaṭībī (tt., Juzl: 54) states "the (Islamic) laws is for the benefit of human" (*al-ahkam limasyrah maṣālihal-'ibad*).

trying to expose how *Ma'had Aly Salafiyah Syafi'iyah Situbondo*<sup>2</sup>, East Java, formulate new paradigm of research of Islamic law that seems to be very inspiring and can be seen as an alternative model in developing Islamic legal studies in the Islamic Higher Education.

### Research Method

This research is aimed to answer two questions. First, how the research on Islamic law have been developed in *Ma'had Aly*. Second, how it can be adopted in developing research on Islamic law in Islamic Higher Education especially in Syari'ah Faculty.

The *Ma'had Aly Salafiyah Syafi'iyah Situbondo* was selected as the locus of the research due to the fact that the *Ma'had* has an open and phenomenal study on Islamic legal studies, even posing itself as different from the mainstream. The collection of data in this research was conducted through four methods. First, the studies on the written documents. Second, observation on the ongoing academic activities in *Ma'had Aly*. Third, interviews with some outstanding figures of *Ma'had Aly*. Fourth, simple questionnaire for check and recheck purpose. The analysis was undertaken by descriptive technique in qualitative method.

### Doctrinal Islamic Legal Research: Finding Law for *in-Concreto's Lawsuit*<sup>3</sup>

In the *mainstream* of textual-oriented of Islamic legal studies in *Pesantren*, *Ma'had Aly Salafiyah Syafi'iyah Situbondo* can be seen as "deviant". Their interpretation of Islamic law—as the products of Islamic legal studies is appear—shows a different face from the *mainstream* of Islamic legal studies and seems to be more progressive. In sociological criteria—to distinguish from the theological criteria—they put themselves as "*kelompoksempalan*" [the splinter group]<sup>4</sup> that showed opposition to the mainstream's patterns in the Islamic legal studies in *Pesantren*.

In the making of legal conclusion, *Ma'had Aly Situbondo* applies its own standard procedures. The procedure makes their reasoning become systematic. The standard procedure is packed in a three steps, namely *fiqh al-waqi'*, *fiqhan-nuṣūṣ*, and *fiqh at-tanzil*.

For the example of how the procedure works can be seen in their discussion of the case of female circumcision.

In the first step or *fiqhal-waqi'* on women circumcision are about the process and implications, either positive or negative. It only can be explained by doctor. Having done the first step and obtain a complete opinion of the issue, the next step is *fiqhan-nuṣūṣ* to

<sup>2</sup>*Ma'had Aly* is officially named *Al-Ma'had Aly Lil Ulum al-Islamiyah Qismal-Fiqh*, founded by KH. As'ad Syamsul Arifin on February 21<sup>st</sup>, 1990 at Sukorejo Situbondo East Java as a pilot project of "regeneration of Islamic jurists".

<sup>3</sup>The data and analysis in this paper is developed from the research entitled "*the Dynamic of Islamic Legal Studies in Pesantren (Liberal Elementon Study of Fiqh in Ma'had Aly Salafiyah Syafi'iyah Sukorejo Situbondo)*", see Musahadi (2012: 286-307).

<sup>4</sup>The term of "*kelompoksempalan*", first allegedly used by Abdurrahman Wahid as a substitute for the word "splinter group" as a term that has no religious connotation although it is used for a small group that broke away (*menyempal*) from the party or social and political organization. For "the splinter group" in religious terminology usually use term "*sekte*" (sect). See Martin van Bruinessen (1992: 16-27).

understanding the religious texts (Qur'an and Sunnah) that are relevant for the issue. The final step is *fiqh at-tanzil* which is a way of interrelating religious texts with female circumcision to finding *masalah*.

The method of procedures of Islamic legal studies is similar with tradition of doctrinal legal research that is finding the law for *in-concreto's cases* described as clinical legal studies. This kind of doctrinal legal research is trying to make a description of the actual problem and discovering a solution after take critical "consultation" from a set of common norms of positive law.

The procedure of "search" and "research" in this study are: first, searching for the relevant facts of lawsuits as minor premise. Second, searching for the relevant abstract legal prescriptions in the positive law as major premise. And third, finding *in concreto's law* as a conclusion through syllogism procedures (Sunggono, 1997:94-95).

The first step, searching for the relevant facts in doctrinal legal research to finding law for *in-concreto's lawsuit* is parallel with *fiqh al-waqi'* in the Islamic legal studies in *Ma'had Aly*. The second step, searching for the relevant abstract legal prescriptions in the term of *Ma'had Aly* called as *fiqh al-nusus*. And the last step, finding *in-concreto's lawsuit*, *Ma'had Aly* called as *fiqh al-tanzil*.

Those procedures are clearly legible in their Islamic legal products published in *Tanwirul Afkar* bulletin. For example, it can be argued here on a legal opinion regarding the pig enzyme on article entitled "*Enzim Babi untuk Penyedap Makanan*" [Pig Enzyme for Food Seasoning]<sup>5</sup> in the book *Fiqh Realitas* (Abu Yasid, ed., 2005: 181-188). The article is a response to the controversial legal issues faced by Indonesian people under President Gus Dur in the late of 2000.

The controversy triggered by mass media report about PT. Ajinomoto Indonesia whose products contain pig enzyme. On December 19, 2000, Majelis Ulama Indonesia [Indonesian Ulama Council] stated Ajinomoto's product was unlawful (*haram*). On the contrary, *Ma'had Aly* had different analytical Islamic jurisprudence and concluded seasoning that contain pig enzymes was lawful (*halal*).

The first step is *fiqh al-waqi'* (searching for the relevant facts). *Ma'had Aly*, in this case, researched about the process of making Ajinomoto's *vetsinto* get complete and comprehensive study. *Ma'had Aly* had realized that this step could not be done by *fuqaha* (Islamic law authorities). The knowledge requires the involvement of experts in the fields of study such as bio-chemistry and bio technology experts (Yasid, 2005:182).

The process of *fiqh al-waqi'* got a conclusion that the spice was made from the raw molasses material and tapioca. The calcium of raw molasses is processed chemically through "decalcification" to producing TCM (Treated Cane Molasses). Meanwhile, tapioca is taken

<sup>5</sup>This article published in *Tanwirul Ahkam Bulletin*, Edition 123<sup>rd</sup>/4<sup>th</sup> of Friday/January, 26<sup>th</sup> 2001 which was originally titled "*Ajinomoto Tidak Sedap Lagi?*" [Ajinomoto is not tasty anymore?]



through the process of *saccharification* to producing glucose, which is then combined with TCM, and other compounds are saline substance, vitamins, ammonia (NH<sub>3</sub>), sulfuric acid and caustic soda. Then, all materials entered in the fermentation process which produces “broth”. After the process of isolation and purification process, the MSG (Monosodium Glutamate) is delivered.

The fermentation process needs bacteria (*brevibacteriu, lactofermentum*) called microbe that should be kept in active condition—so these microbes must be regenerated. Microbes grown on gelatin containing peptone derived from the breakdown of protein (such as from peanut, soybean, and so on). Ajinomoto uses soybean protein called *soypepton*. For the breakdown process uses *catalyst*<sup>6</sup> (a substance that serves to speed up chemical processes but did not participate in the final product). And the catalyst that used is *bactosoytne* containing *porcyne*. That is, the mixture of enzymes derived from pancreatic pig extracts, plant extracts and other enzymes. The advantages of *bactocoytine* are microbes will be more durable and economically cheaper. In one gram can produce 50 tons of MSG. It is clear that the debate lies on *bactocoytine* that used as catalysts containing pig enzyme (Yasid, 2005:182-183).

After *fiqh al-waqi'* is completely done, it needs to be answered, what the using of catalyst as described will lead to impurity of production (MSG or Ajinomoto's vetsin)? For that, the next step is *fiqh al-nusus* (searching for the relevant abstract legal prescriptions) to explore the normative provisions or fiqh texts relating to the issue. First, they refer to Surah al-Baqarah 173: “He (Allah) has only forbidden to you dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah”.

They concluded that the verse as normative base on the explicit prohibition of eating carrion, blood, pork and animals slaughtered without mentioning the name of Allah. In the eyes of ulama, the term of “*lahm*” (pork) is multi interpretation. The majority of them argue that “*lahm*” covers all parts of the pig's body (flesh, bone, fat, blood and so on). That word (“*lahm*”) is to show that the most widely consumed is pork. Unlike the majority of ulama, Imam Daud ad-Dhahiri stated that the unlawful thing is pork, while other parts, such as lard is not unlawful.

The second base of the unlawful of pig enzyme is Al-An'am 145: “Say, In what was revealed to me, I find nothing forbidden to a consumer who eats it, except carrion, or spilled blood, or the flesh of swine—because it is impure—or a sinful offering dedicated to other than God. But if someone is compelled by necessity, without being deliberate or malicious—your Lord is Forgiving and Merciful.”

In order to interpreting the verse, *Ma'had Aly* make referred to the opinion of Imam Fakhr al-Din al-Razi (1990, XIII: 180), that God forbid pork because of its excrement (*najis*). It

<sup>6</sup>See AbuYasid, ed., 2005:233.

shows that the excrement (*najis*) is *illat* for the unlawful for pig. That is why all excrements are prohibited to eat—because of gross and abhorrent. Surah Al-An'am 145 is also confirmed by Surah Al-A'raf 157: ...*who enjoins upon them what is right and forbids them what is wrong and makes lawful for them the good things and prohibits for them the evil and relieves them of their burden and the shackles which were upon them*".

Based on two verses above, *Ma'hadAly* concluded that all parts of the pig are *najis*, including *porcine* that serves as a catalyst in the process of change vetsin's Ajinomoto. The building of logics, so far, seems to support that vetsin's Ajinomoto is forbidden. But do not rush to conclusion first.

*Ma'hadAly* apparently creates another criticism by presenting other analysis. They state that something exposed excrement called as *mutanajis*, not *najis*. It still could be purified to be "lawful". Therefore, in the process of producing Ajinomoto's vetsinis indeed containing "contemporary" *mutanajis*, but it can be purified—although next problem arises: by what? To answer this problem, *Ma'hadAly* explores multi-statements from various ulama. According to Imam Syafi'i, there are four ways to purify *mutanajis*, namely water, dust, *dibagh* (the tanning process) and *takhallul* (vinegar-making process).<sup>7</sup>

Imam Ahmad ibn Hanbal agreed with Imam Shafi'i, except in *dibagh*. Imam Malik and Imam Abu Hanifah have different opinion. According to Imam Malik and Imam Abu Haneefah, *al-muṭahhirat* (tool and method to purify) are manifold. Not just limited to the four mentioned by Imam Shafi'i, but it also could be *al-Dalk* (polish), *al-fark* (scrape), sun-dried and so on.<sup>8</sup>

Related to this debate, *Ma'hadAly* is more agreed with Imam Abu Hanifa and Imam Malik opinions. They judge that these opinions are more relevant and productive in the recent time. There are so many things that cannot be washed with water, moreover with the dust. Goods such as silk, velvet coat or similar, would be damaged if washed with water—because of that, chemical process is more secure and needed.

Through the last logics, *Ma'hadAly* go on to *fiqh al-tanzil*. According to them, the chemical process in Ajinomoto's vetsinis the way to purify the microbes. Those active microbes are indeed *mutanajis* because it was developed by *bactosoytne* containing pig enzyme. But, in the certain moment, the *bactosoytne* will get loose from microbes because it was just a catalyst. Having released pig enzyme from microbe, the microbe is purified and *halal* for consumption (Yasid, ed., 2005:186-186).

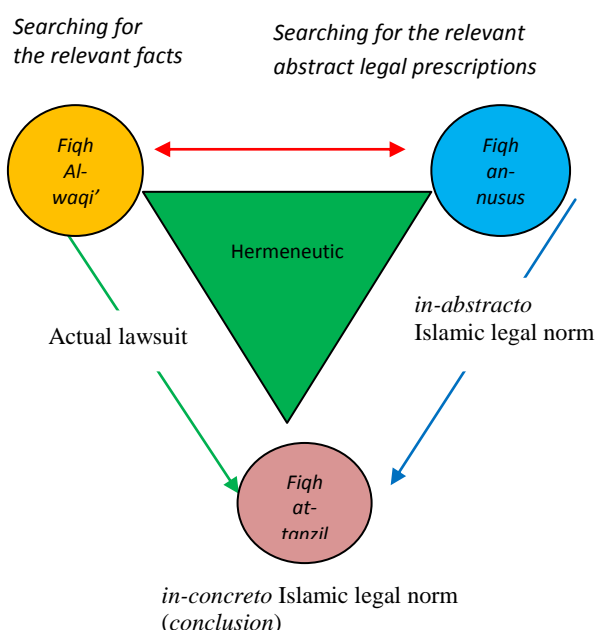
<sup>7</sup>*Takhallul* derived from the word "*khallun*" meaning vinegar. Thereby, the meaning of *takhallul* is a natural chemical process to produce vinegar from *legen* [unfermented toddy] or other. *Legen*, although the first condition is lawful, but if it is left for several days would be *khamr*—as unlawful thing—because of intoxication. But, in the next few days, through a chemical process as well, the *khamr* will turn into vinegar. The vinegar is not intoxicating so the lawful for consumption—if the process is natural and no catalyst.

<sup>8</sup>Islamic scholar's debate on this topic can be seen in al-Zuhaily, 1989, I:92-113.

The unique of Islamic legal studies in *Ma'had Aly* is the use of legal maxims (*al-qawa'id al-fiqhiyyah*) in making legal conclusion. In the case of pig enzyme, they raised questions to be answered by *qawa'id al-fiqhiyyah*. So, would we convince that pig enzyme can be lost through chemical process for 100 percent?

In solving the problem, they use *al-qaidah al-fiqhiyyah*: "when the doubt faced with the common sense, the common sense must be guided".<sup>9</sup> For example, if someone finds the slaughtered animal in the Muslim-majority region, and he doubts that the slaughter is a Muslim or not, referring to the *al-qaidah*: that person permitted to eat based on common sense or prevalence—the slaughter generally would be a Muslim. In accordance to that rule, *Ma'had Aly* reaffirm that the release of pig enzyme occurs in the chemical process. Moreover the process makes the pig enzyme would not be carried away in the final process (Abu Yazid, ed., 2005:187-188).

The method of Islamic legal research that was developed by *Ma'had Aly* can be drawn as below:



### Critical Reflection for Developing Islamic Legal Studies in Islamic Higher Education

There are some interesting notes in the illustration of the procedure for determining legal conclusion of pig enzyme above. First, *Ma'had Aly* realizes that Islamic jurist (*fuqaha*) have limited-skill related to the chemical case like a process of producing cooking spices. They open opportunity for involving other authorities who are experts in the field of the problem being addressed, especially in the *fiqh al-waqi'*.

<sup>9</sup>*Ma'had Aly* referred this principle and examples from al-Suyuti (1995:77), Ibn Hazm (tt., II: 137) and Ibn Umar (tt.: 17).

The *Ma'had Aly's* opinion is in line with the thought of Muhammad Iqbal on *ijtihad*. According to Iqbal, the complexity of modern life requires the implementation of *ijtihad jama'iy*, where *ulama* authority is not absolute because of their restrictiveness. He asserted that other experts are needed based on their competence although they have no competence in Islamic law (Iqbal, 1981: 174).

Thereby, in looking for problem solving of Islamic law, someone cannot simply look at normative rules, but he or she needs to consider of "non-juridical dimension" (non-*syar'i*) need since it presents more comprehensive legal conclusion, avoids miss-leading, and fair.

Second, *Ma'had Aly* create a progressive paradigm. In this case, *Ma'had Aly* leave *Pesantren* style and even common *Nahdlatul Ulama's* views in the Islamic legal research. As can be seen from the case of pig enzyme, in the phase of *fiqhan-nuṣūṣ*, *Ma'had Aly* Situbondo referred directly to the Qur'an. In the tradition of *Bahtsul Masail NU* (BMNU), reference (*ma'khaz*) is usually taken from only standard books of fiqh (*al-mu'tabarah*), and does not directly refers to the Quran and Al-Hadith. Unlike the prevailing tradition, *Ma'had Aly* referred directly to the Qur'an<sup>10</sup> and subsequently the books of *fiqh*. In this way, *Ma'had Aly* is actually more explorative to capture the values of a substantive value in the primary source of Islamic law, that is, al-Qur'an. They can freely operate the theories of Islamic jurisprudence that have learned: operating *qiyas*, searching for *ratio-legis* (*illathukm*) through *ta'lil* method without being restricted by established opinions of *ulama* in *fiqh al-mu'tabarah*.

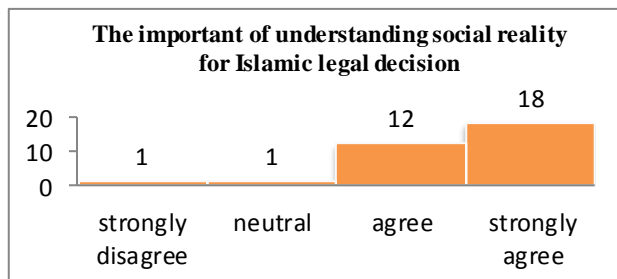
Third, *Ma'had Aly* can go further beyond Shafi'i school. In *fiqh al-nuṣūṣ*, *Ma'had Aly* explored various schools for the references of legal opinions related to pig enzyme. They narrated opinions of the four Imam's schools, from the opinion of Imam Shafi'i and Imam Ahmad, and then, opinion of Imam Abu Hanifa and Imam Malik.

However, surprisingly, when it comes to selecting of varied references of *fiqh* about the tools and methods for cleansing excrement goods (*mutanajis*) they selected the opinions of Imam Abu Hanifa and Imam Malik that are considered to be more productive and relevant to the context of modern life and more benefit.

The logical reasoning of *fiqh* of *Ma'had Aly* Situbondo, as already explained, is putting the understanding of the social reality in an important position in the constructing legal conclusions. It is relevant with the results of research to 32 *mahasantri* (students) of *Ma'had Aly* Situbondo. When asked to give a comment on the statement that "the truth (validity) formulation of Islamic law is not just determined by the ability of scholars to understand legal norms, but also determined by their ability to understand social reality",

<sup>10</sup>In NU's intellectual tradition, *istinbatal-hukm* that directly from primary sources (the Qur'an and Al-Hadith) is a "taboo". For NU, the activities entered the domain of *ijtihad mutlaq*, while they aware no qualification to be *mujtahid mutlaq*. In the long time, NU only takes *ijtihad* in *mazhab* [school of thought]. In addition to more practical, the model of *ijtihad* can be done by the large of Islamic scholars under NU (Mahfudh, 1994:27).

they replied as shown in the figure of “the important of understanding social reality for Islamic legal decision”.



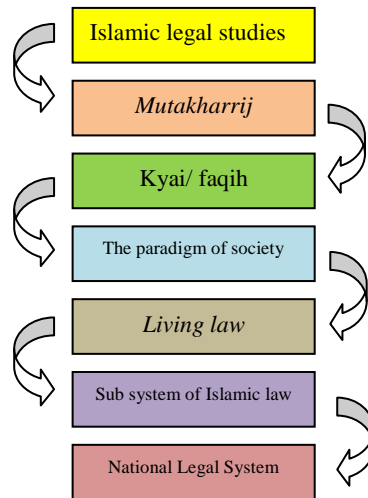
This survey showed 18 (56%) of respondents stated strongly agree, 12 (38%) respondents agreed, 1 (3%) of respondents stated neutral, and only 1 (3%) of respondents stated strongly disagree. The results of this survey showed that the source of knowledge in the Islamic legal studies is not only normative texts, but also social reality. In the Islamic history, the jurists have always noticed social aspect in developing *istinbāṭ al-hukmas* a way to implementing the essence of Islam, especially *maslahah*.

The choice of epistemology of Islamic legal studies developed by *Ma'had Aly* is based on awareness of how the method or epistemology has significant role to create public perception on Islamic legal studies, and even to develop national law system in the coming days. *Kyai Hasan Basri* stated that *fiqh* studies that have been developed by institution have a strategic significance in shaping public perception of Islamic law. It is why the process of selection of paradigm should be done carefully and seriously and meets the public needs.

The paradigm developed by *Ma'had Aly* will affect the *mutakharrij* (alumni) performance, both in practicing *fiqh* and epistemology. Those *mutakharrij* are candidates of cleric who will serve public in religious serving, including the implementation of *fiqh* in everyday life (*al-fiqh al-yaumiyyah*).

Hence, *mutakharrij* eventually are agents that affect public perception about Islamic law. It encourages them to choose method of critical Islamic legal studies in order to give legal solution for public. They are expected to become critical agents who capable to give “enlightenment” in *fiqh* practice, and make *fiqh* as living law to be an alternative sub-system for the national legal system.

### Interconnected between Fiqh research system and National Law System



The graph above shows that the Islamic legal studies that have been developed in *Ma'had Aly Situbondo* will affect the paradigm of alumni (*mutakharrij*), who are the *Kyai* in the future. In the context of paternalistic society, a *Kyai* would be a leader for religious practice whose *fatwas* (legal opinions) will create public paradigm on Islamic law. Then, the paradigm of society builds *fiqhas* living law which may serve as a potential material for the national legal system. As Indonesia is a country where Muslims are the vast majority, the national legal system at least will be influenced by the paradigm in the Islamic legal studies.

### **The Choice of Epistemology for Developing Islamic Legal Studies in Islamic Higher Education**

One of the basic points of the Islamic legal studies in *Ma'had Aly* is the concept of interrelating between religious text and social reality. According to *Kyai Afifuddin* (Assistant Director of *Ma'had Aly Situbondo*), in understanding and making of legal conclusions, the text cannot be separated from its context, the reality. It should be a dialogue between the text and reality (*jadaliyyahal-nasma'a al-waqi'*). That is why, in making of legal conclusion a comprehensive understanding of the historical context of the verse (*ma'rifat al-sabāb an-nuzul*), the historical context of the *hadith* (*ma'rifat al-sabābal-wurūd*) and the present context (*ma'rifat al-sabāb al-durūf*) is required. After that process, the conclusion was formulated to understand the social reality (*tanzil al-Ahkamma'a al-waqi'*). The best sample

for that was what was done by Umar ibn al-Khattab in the problem of zakat for *muallaf* (interview with KH. Afifuddin Muhajir, April 6<sup>th</sup> 2010).

The interpretation of reality (*al-waqi'*) actually requires special skill that might not be owned by *fuqaha'*. At the level of exploring the legal reasoning (*takhrij al-manat*), the Islamic jurists are indeed the most authoritative. But at the level of *tahqiq al-manat*, it requires other experts who have skill in understanding the social reality comprehensively. The law of cigarette, for example, based on *ijtihad jama'i*, that the smoking is *makruh* because of using the wealth for useless things (*sarf al-mal ila ma gaira al-nafi'*).

However, the problem is not simple. The interpretation of "smoking reality" requires experts outside *fuqaha'*. It is because smoking related to health care therefore it requires a medical experts to analyzing the impact of smoking on human health (*al-waqi'*). Likewise, because smoking related to the large corporations involving millions of people in the industry, so the analyzing *al-waqi'* requires economists and so on (interview with KH. Afifuddin Muhajir, April 6<sup>th</sup> 2010).

In the context of the development of Islamic legal studies in Islamic Higher Education, the principles above are essential. A multidisciplinary approach is certainly very possible in university considering its greater resources than *Pesantren*. Moreover, university has a constitutional mandate to develop sciences in all disciplines. It means that the research traditions of Islamic legal studies can be developed through a multidisciplinary approach.

Anas Saidi, a researcher at LIPI who gives teaching several times in social research at *Ma'had Aly Situbondo*, states that for the long time the paradigm of Islamic legal studies in *Pesantren* and university is the paradigm of "judge and legitimate reality". So often *Fiqh* does not give any solutions for the social problems. In the view of Anas Saidi (interview, April 5<sup>th</sup> 2010), the Islamic legal studies should not only lead to provide legal status of reality, but also to find a way out for the unfair reality. For the keenness, in the Islamic legal studies traditions, the use of social theories is inevitable.

The Islamic legal studies, in this regard, should contribute to the search for answers of the question: *how to change?* That is, how to change the reality from injustice to justice, from *mafsad* to *maslahat*. At this point, the development of critical law schools is significant to offer critical-epistemological orientation in understanding the reality comprehensively.

In social sciences, the difference of epistemological basis influences the paradigm of social reality. In this case, Emile Durkheim considered as the prominent thinker to develop positivistic epistemology, while humanistic epistemology was developed by Max Weber. In the positivistic paradigm, the base of research is quantitative approach that regards social science as the same as natural science, because of quantified, empirical, causality, predictable, and objective. Therefore, the method of quantitative research is adapted from

the method of natural science, especially in the use of mathematical or statistical analysis. Its orientation is just to know (how to know) about the reality of it.<sup>11</sup>

For humanistic epistemological paradigm thinkers (interpretive)—who take qualitative method as the main base of research—the nature of objective social reality is actually a reality that has been shaped by the subjective interests. The main task of scientist is to understand the subjectivity of behavior in constructing social reality. Since the behavior is not always regular, not repeatedly, it cannot be predicted and cannot be measured as well as not always has deterministic causality. The method of “*verstehen*” or “understanding” is the key in obtaining knowledge in the social sciences.

Paradigm of science	Positivism	Interpretive	Critical Social Science
<i>Figure</i>	Emile Durkheim	Max Weber	Karl Marx
<i>The view of reality</i>	Objective	Subjective	Subjective
<i>Research paradigm</i>	Quantitative	Qualitative	Participatory Action Research
<i>Orientation</i>	How to know	How to know	How to change
<i>Question sample</i>	How about the consumption for poor society?	How can the poverty be removed?	How to change the poverty to prosperity?

In other words, the natural science methods that have principles of generalization, law of causality, and predictable cannot be duplicated in the social sciences due to the nature of two object—natural and human—is different. Although differ in understanding of social reality, both have the same orientation: “how to know”. To understand poverty, for example, the positivism paradigm only wants to know about how the consumption of the poor and the interpretive paradigm likes to know more about why poverty is difficult to be removed.

Unlike two paradigms above, the critical social science paradigm that was driven by Karl Marx, states that the study of social reality is to be oriented on how to change the unequal

<sup>11</sup>The critics for positivism paradigm can be found in Ritzer and Goodman (2005:177-178).



and unfair into equal and fair condition. The concern of the study is changing poverty to prosperity.

In the development of Islamic legal studies in Islamic Higher Education, the above paradigm is relevant. The study is not only oriented to understand the reality of law in society, but also to change the reality: from unfair to fair, from *mafsadat* to *maslahah*. In this way, the Islamic legal studies can be seen as an instrument of advocacy for the oppressed society. In summary the science of Islamic law is not merely a theoretical discourse, but an instrument of empowerment.

## Conclusion

Based on the empirical evidences of this research, it can be concluded that the Islamic legal studies developed by *Ma'had Aly* shows a paradigm shift. In the case of pig enzyme of Ajinomoto, it can be affirmed that *Ma'had Aly* Situbondo applied clinical legal research through three stages, namely *fiqhal-waqi'*, *fiqhan-nusus*, and *fiqhal-tanzil*. The characteristics of the new paradigm are: First, in the Islamic legal decision *Ma'had Aly* recognize the limitation of *fuqaha*, therefore, it needs the involvement of other authorities who are experts in the field of the problem being addressed, especially at *fiqhal-waqi'*. Second, *Ma'had Aly* go beyond the mainstream paradigm of *Pesantren* in determining Islamic legal decision. *Ma'had Aly* refer directly to the Qur'an, and subsequently refer to the books of *fiqh*. It means that they regarded the books of *fiqh* as secondary resources. Third, they are not fanatic to Syafi'i school. Fourth, the understanding of the social reality is a significant instrument in undertaking procedure of legal decision.

By considering paradigm and method of legal conclusion of *Ma'had Aly* on the case of pig enzyme, for example, the study of Islamic legal studies can be developed collaboratively with the discipline of nutrition or chemistry. Islamic Higher Education can offer a new study program that combines technology and *syari'ah* as has been developed by some universities in Malaysia.

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