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Refusal on Qiyas and Implications for Development Contemporary Islamic Law (Study on the Ibn Hazm Critics to Qiyas)

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ABSTRACT: *Qiyas* as a method of discovery and excavation of Islamic law has been formulated with very well by Imam Shafi'i still be an intellectual debate among scholars. Ibn Hazm was one of the scholars who refuse the use of *Qiyas* to find and dig in the legal texts. The refusal of Ibn Hazm on *Qiyas* due to the results obtained with the formulation of the laws *Qiyas* method still can't give legal certainty. This refusal is influenced by al-Shafi'i's refusal on Istihsan. The refusal of Ibn Hazm on *Qiyas* is part paved the way for the development of Islamic law in the contemporary world today. There are at least two models of the development of Islamic law to do, namely the development of Islamic law that is still based on and grounded in the discovery and excavation methods of the old law that has been generated by previous scholars of Islamic law and the development of an entirely separated from the product of thought scholars' earlier. Two models are equally important in producing the formulation of Islamic law that is able to adapt to changing social, cultural, political, and economic as well as advances in science and technology today.

KEYWORDS: Ibn Hazm, refusal, qiyas.

1 INTRODUCTION

Imam al-Shafi'i as a figure who was considered to have success fully bridged the two streams of law experts and scholars of hadith and *ra'yi* proposed four sources of Islamic legal reasoning, namely the Qur'an, Sunnah, ijma', and the latter is Qiyas(Nouruzzaman, 1996 :36). In view of al-Shafi'i, Qiyas is the only method that can be trusted to perform *ijtihad*. It is, as his phrase that *Qiyas* is *Ijtihad*. (Al-Shafi'i, tt: 477).

Qiyas method which has been attempted by al-Shafi'i to be formulated, in the next development, it was still being debated among scholars intellectual. The debate was based on the accepting and refusing on *Qiyas*. Zahiris David groups and his followers werw very extreme groups in refusing Qiyas (Abdul-Wahhab, tt: 28-30). One of the followers of al-Zhahiri Davidis very well known on the stage of history of Islamic legal thought was Ibn Hazm al-Andalusi in Andalus, and the school ever grown there. In fact, according to Scaht, the school of al-Zhahir is substantially can be known through the writings of Ibn Hazm (Schat, 1964: 64). The refusal of Ibn Hazm on *Qiyas* argued at length in his work entitled"*al-Ihkam fi Usul al-Ahkam*".

Research on the Ibn Hazm refusal on Qiyas is very important to do. There are several reasons why a study of Ibn Hazm's refusal is important. First, in recent years, especially since the era of *ijtihad* spirit re-voiced, there is a tendency among Islamic thinkers to actualize back legal methods developed by classical scholars as *Qiyas, Istihsan*, and *istidlal*. The tendency in this direction starts from the premise that the law *istimbath* methods ever developed in the classical times still has relevance for dealing with and resolving any new legal issues that always arise in the midst of contemporary society. That's because the legal issue is a necessity and always appear in the historical development of human civilization, even though the legal issues that arise before and now is very much different, but methodological is the same so the old method still fit for use. The methods mentioned above after in-depth analysis and then linked to contemporary legal issues, it still retained its relevance. In a dissertation conclusion stated that *Qiyas* method is most clearly and accurately method in response to contemporary legal issues (Sulaiman, 1997: 235). But no matter how clear and accurate the method of *Qiyas,* it still has a weakness. The

weaknesses that have been shown and demonstrated by Ibn Hazm need to be revisited. Because there is possiblity over Ibn Hazm's refusal on Qiyas for some explanations to develop a method of *Qiyas* itself, as one of *istimbath* method that has been born by the scholars' earlier (the method of excavation and discovery of law) that existed in the treasury of Islamic intellectual thought while some of scolars want to abolish it.

Second, this study wants to prove scientifically the truth of an assumption that it is too tied to the textual approach may result less in accommodating towards social change. Ibn Hazm as noted above was a figure that was more tied to the textual approach and refused on *Qiyas*. Thirdly, Ibn Hazm, as pointed out by Abu Zahra, refused on *Qiyas* after he had read the works of al-Shafi'i, entitled "*Ibthal al-Istihsan*" and eventually Ibn Hazm agrees with David al-Zhahiri to say that the arguments of al Syafi'i's refusal on *Istihsan* deemed worthy as the arguments to refuse on *Qiyas*. (Abu Zahra, tt: 357). This explanation at least has given the assumptions of the author that the refusal of Ibn Hazm on *Qiyas* sourced or at least inspired by the thought of al-Shafi'i when he refused on istihsan so the refusal of Ibn Hazm on *Qiyas* was the same or at least close to the refusal of al-Shafi'i on *istihsan*. It is based on the thesis advanced by Ahmad Hasan and Subhi Mahmasani confirming that the thought of a fiqh scholar is not only determined by the socio-historical conditions surrounding him but also determined by the ideas of scholars who preceded him (Mahmasani, 1980:221, Hasan, 1994).

Based on the above considerations, there are some important questions to be discussed in terms of refusal of Ibn Hazm on *Qiyas*. Some of these questions are: what factors encouraged Ibn Hazm refused on Qiyas? Is Ibn Hazm's refusal on *Qiyas* the same with the refusal of al-Shafi'i on istihsan? How is meaningful of Ibn Hazm'refusal on *Qiyas* for the development of contemporary Islamic law?

2 RESEARCH METHODS

The main purpose of this paper is to provide scientific information and the whole of the reasons and causes of refusal of Ibn Hazm on *Qiyas*, see the possibility of continuity between the Ibn Hazm and al-Shafi'i and the meaning of Ibn Hazm's refusal on *Qiyas* for islamic law reform today. Thus the method that will be used in the search data is literature research methode (library research), that is by reading the works of Ibn Hazm literature itself as the primary data and the works that examine issues pertaining *Qiyas* and Ibn Hazm as secondary data. The data have been obtained through subsequent readings will analyze through content analysis. This analysis is intended to analyze the meanings contained within the overall ideas of Ibn Hazm which is closely related to his refusal on *Qiyas.*

3 RESEARCH FINDINGS

3.1 REFUSAL FACTORS OF IBN HAZM ON QIYAS

After Ibn Hazm believes that a law can only be obtained in the four sources namely the Qur'an, al-hadith, *ijma'* and through *al-dalil* that all of that in the view of Ibn Hazm are based on the texts themselves, then Ibn Hazm believes that the other sources, out of the four, are contrary to the texts and the historical fact and finally Ibn Hazm concluded that any use of ra'yu including *Qiyas* was incompatible with the demands of syari'ah, and hence also Ibn Hazm refused on Qiyas. This is an important factor that drives Ibn Hazm refused on *Qiyas*. It is therefore not surprising that Ibn Hazm in refusing on *Qiyas* underlying his thought by stating the number of the verses of the Qur'an, the hadiths, Companions fatwas, tabi'in fatwas and the *ijma'*.The following explanations will show the underlying thought of Ibn Hazm refused on *Qiyas*.

a. Al-Quran

In the view of Ibn Hazm, he saw quite alot of the verses of the Qur'an that expressly did not justify the use of *Qiyas*, these verses can be found in various places in of the Qur'an, among others, in Surah al-Nisa'59. According to Ibn Hazm, it clearly shows that when there is a conflict(disagreement in religious matters, especially legal issues), it is an obligation only to return to the main source of the teachings of Islam, namely of the Qur'an and *sunnah* or hadith. Because he thinks that the provision of God that must be followed so that for those who return to the referral source other than the two it means violate or conflict with God's commands. That is according to Ibn Hazm Qiyas is not one of the efforts to transform and restore of the Qur'an or al-*Sunnah* as it has been commanded by AllahSWT. This view of course will bring sin to do it.

Ibn Hazm view above indicates that Ibn Hazm still questioned , "who is actor"in applaying Qiyas, which of course is human.The question is whether the legal conclusions were deduced by humans (*mujtahid*) it can be regarded as the law of God as well, is not that formulate it is human. The formulation of the law who was born through the process of *Qiyas* is not God's law, but is a human law.

In addition because *Qiyas* is considered contrary to the command of God, Qiyas also is something in addition to the provisions of the religion (*bid'ah*/innovation). In the view of Ibn Hazm, the provisions of religion is complete and none which is not explained by of the Qur'an and *Sunnah Rasullullah*. Therefore, according to Ibn Hazm, Qiyas is not needed anymore(Ibn Hazm, al-IhkamI, I, tt: 11). In that statement, Ibn Hazm wanted to show antagonism views among Qiyas expert toward their principal assuming that not all of the events described by the Qur'an and the *Sunnah* of the Prophet. In addition, according to Ibn Hazm, in religion there was never known branch of legal , but that was only legal fundamental of which was contained in the texts and at the same time the human differences would occur at the fundamental of it, such as prayer, pilgrimage, the contract of sale and others (Ibn Hazm, al-Ihkam VIII, tt:516). Then, according to Ibn Hazm, the religious law should be based on certainty, and not allowed to conjecture. If one allowe or forbid something that is contrary to law that is establishesing in the Qur'an and Sunnah, it means doing lies and falsehood, and this means over cross the commond of the God and his messanger. These things violate the provisions outlined by Allah SWT.

When considered basic arguments put forward by Ibn Hazm as well as his understanding of the priority number of the verses, it is no exaggeration to say that Ibn Hazm in refusing on *Qiyas* because of his understanding in very strict and rigid to some verses of the Qu"ran. It shows also that for Ibn Hazm al-Qur'an itself does not justify the use of *Qiyas* in the over all of the religious law.

In addition , according to Ibn Hazm, Qiyas identifies something that isnot known for certain provisions of the law as well precede Allah and His messenger in establishing the law. This fact, according to Ibn Hazm, can be found in several verses of the Qur'an (IbnHazm, al-Ihkam VIII, tt: 522), i.e.*al-Hujurat* 1 and *al-Isra*'36. This view is in line with the very sensitive group to the form of rationalism in religion. For those that religious truth must emerge from the al-Quran and al-*Sunnah* and various forms of rationalism is heresy (Majid, 1984: 16).

b. Al-Hadith

In addition to the Qur'an, in refusing on *Qiyas*, Ibn Hazm also used the hadith. Ibn Hazm also criticized the Hadith of Mu'az Ibn Jabal that allows the use of *ra'yu*. From the its *isnaad* according to Ibn Hazm, the hadith was narrated by al-Haris Ibn Umar and he was *majhul*(the identity is unknown). In terms of honor also is contrary to the Qur'an (Ibn Hazm, al-Nabzat, 1985: 59). The Ibn Hazm's opinion is in line with the opinion of Abu Dawud, one of hadith experts, who said that Muaz ibn Jabal hadith isnot conection to Rasulullah (Abu Daud, tt:18-19), and the research conclusion of Syuhudi Ismail, one of hadith experts in Indonesia(Ismail, 1992: 110-120).

c. Companions Fatwas

In addition to the Qur'an and the hadith, in refusing on *Qiyas*, Ibn Hazm also used a number of Companions Fatwas that in his observation, the companions also did not justify *Qiyas*. According to Ibn Hazm, The refusal of Companions on Qiyas is based on texts. As the words of Abu Hurairah when he told to Ibn Abbas, when hadith comes to you , you shouldnot make it the parables. This fact, according to Ibn Hazm, Abu Hurairah clearly do not justify the use of *Qiyas*.

Then the words of Samurah Ibn Jandab quoted by Ibn Hazm who said that Qiyas was embroider the Sunnah (Ibn Hazm, al-Ihkam VIII, tt: 537). Umar bin Khattab ever does not allow the use of *Qiyas* in dealing with forgiveness with Sadaqah (Ibn Hazm, al-Ihkam, tt: 540). The same event also occurs in Ibn Mas'ud who thinks that something that is no explanation in the texts is something that is contrary to God. This is according to Ibn Hazm means cancellation of *Qiyas*. In overall view, Ibn Hazml was almost agreed to cancel *Qiyas* and something that did not exist in the Qur'an nor in the Sunnah of the prophet (Ibn Hazm, al-Ihkam VIII, tt: 541).

c. Tabi'in Fatwas

Not satisfied and fairly with the Qur'an, Hadith, Companions Fatwa, Ibn Hazm in refuseing on *Qiyas* also cites a number of tabi'in opinions.The Tabi'in Opinions shown by Ibn Hazm that it can be seen in the following explanation:

1. Muhammad ibn Sirin said, *Qiyas* is misfortunend and bad luck. And the first person who practiced *Qiyas* is the devil.
2. The words of al-Sya'bi to David al-Audi. Keep 3 things, that if you declared on something of a problem, then you answer it, then do not you follow your passions. And if you are asked about something problem, then you do not use *Qiyas* to something with something else. Because some times you forbid the lawful or justify the unlawful. And if you are asked about something, and you do not know, then say, I do notknow, and I was your friend (Ibn Hazm, al-Ihkam VIII, tt: 542-543).

Tabi'in Fatwa above according to Ibn Hazm enough to be evidence of not using of *Qiyas* in religion. It is recognized that among the companions there were who forbidden *Qiyas*, ie if Qiyas is clearly contrary to the definitive texts and based on the propositions that there is no relation between the major premise and the minor one that will axis draft of the law that are likely to produce imperfect Qiyas(Majid, 1984: 106).

d. *Ijma'*

It seems that the basics are presented as mentioned above, Ibn Hazm was also not satisfied so that he still needed to add them to the basis of *ijma'*. According to him, *Ijma*' really has explained the necessity to leave *Qiyas*, ie, ijma'of the muslim people as a whole making compulsory only to take the legal provisions of the Qur'an and *Sunnah* that are valid from rasullulah SAW and with something that has been agreed upon by the community (people *ijma'*) as a whole about the compulsory or illicit something of shari'ah. Also Ijma 'community that does not justify talking about shariah without foundation of texts or *ijma'*. All the people have agreed on the truth of the word of God as in Surah al-Annisa': 59. This fact, according to Ibn Hazm, is people Ijma to leave Qiyas. Ibn Hazm further says, in fact there is no proof (reason) for someone to use *Qiyas* except the flaws and mistakes done by someone other than the Prophet (Ibn Hazm, al-Ihkam VIII: 548).

What was done by Ibn Hazm in his refusing on *Qiyas* as shown above can at least show that Ibn Hazm attempted to prove that his refusal on or objections against *Qiyas* actually based on solid evidence and reliable and not based on weak evidence. Ibn Hazm holds that the source of Islamic teachings and traditions of the Salaf itself there are several instructions directly on the prohibition of the use of *Qiyas* and all *ra'yu*. It also is intended to head off *Qiyas* opinion of most experts generally agree that they all use *ra'yu* and *Qiyas,* it is also under the terms of religion, they even assume existing practice of the Prophet and the companions to apply *Qiyas*. The fact like this that encouraged Ibn Hazm in refusing on *Qiyas* need to put forward a number of verses, hadiths, Companions fatwas and all of which in the view of Ibn Hazm enough to show that *Qiyas* was something that was never justified by religion. It is more obvious that the previous description is visible in the efforts of Ibn Hazm in refusing on *Qiyas* more emphasis to the theological view point, and this will be more apparent again when he criticized about law illat.

3.2 IBN HAZM CRITICISM AGAINST *QIYAS* PRACTICE

in an effort to refuse on *Qiyas,* Ibn Hazm argued not only a with normative-*dogamtis* as shown in the previous explanation,but also he expressed some *Qiyas* practices that often developed among Qiyas experts and Ibn Hazm criticized the mistakes and weaknesses. There are several legal cases that became the target of criticism of Ibn Hazm.

a. Persecution Cases of Parents

Opinions are often found among Qiyas experts about this is that the persecution to the parents that are prohibited under the *Qiyas*, which departed from the word of Allah in Surah al-Isra': 23, where this verse explains even just to say do not say *hus*(uf) to parents, but here also include the prohibition to other than just saying *hus*(uf) which can take the form of beatings and even murder. Qiyas in this form often called *Qiyas awlawi*.

In the view of Ibn Hazm's opinion, it is very wrong. Because according to Ibn Hazm ban that could only be captured from the words ban *hus*(uf) limited only to ban the word *hus*(uf) without having meant otherwise like hitting or killing. However, according to Ibn Hazm, ban to hit and kill can be captured from a whole series of these verses. In this verse Allah firmly and clearly explained to do good, say the gentle, love, be kind, to both parents and at the same time there is a ban on snapping to both.Therefore, according to Ibn Hazm, based on this explanation there is obligation to treat parents well. According to Ibn Hazm, banning to hit and kill is not based on the words *uf*(*hus*) earlier, but it is based on the direct instructions that can be understood from the verse as well as the existence of some direct explanation of some traditions. If banning to hit or kill just enough with the ban say *uf(hus)*alone, Allah does not need to explain the need to do good, to love both parents and snapped to ban both. But in reality, Allah in the verse is still explaining the necessity to do good, to love them (Ibn Hazm, al-Ihkam,VIII, tt: 387-388).

When viewed in this case, Ibn Hazm's opinion seems to be more readily accepted. Because he uses a very concise path. Ibn Hazm here actually wants to show that the Qiyas experts too quickly to conclusions based on *Qiyas* , whereas the problem bright and clearly conveyed in texts. Ibn Hazm wants to show that the Qiyas expert inconsistent in their own statements. Are not they, Ibn Hazm said, have agreed that *Qiyas* wasnot allowed as long as there are explained. Even before he noted examples above, Ibn Hazm first cited the opinion of Abu Hanifah and al-Shafi'i. In the opinion of Abu Hanifah, he said that *khabar mursal* and weak hadith from Rasullullah are better than *Qiyas*, and not justified *Qiyas* while nash still explained. *Qiyas* are not allowed in *kafarat* problem, the issue of *hudud* and measures set out in the texts. While al-Shafi'i said that in his opinion,it is not allowed Qiyas while the texts are still be, and when there is none, it is obligatory using it in any law(Ibn Hazm, al-Ihkam, VIII,tt: 385).

b. Child Murder by Economic Reason

In the Qur'an, Allah describes the prohibition of killing children with poor excuses. Through the way of *Qiyas*, murder by other reasons, such as abortion, is also prohibited. According to Ibn Hazm murder because of economic reasons also is

forbidden. The prohibition, according to Ibn Hazm, not by way of *Qiyas*. The prohibition is based directly on the texts. Some texts that explain it can be seen in the Qur'an Surah al-Isra': 31, 33 and Surah al-An'am 140 (IbnHazm, al-Ihkam,VIII, tt:387-393).

Of several examples of cases above that Ibn Hazm wants to show that the Qiyas experts more prefer to Qiyas than *nash,* but clearly the problem has been stated and explicitly in the texts.The Factors neglegting *nash* too soon while it is still possible to draw conclusions of law based on texts directly encourages Ibn Hazm refuse on *Qiyas*. This fact as admitted by Ibn Hazm that *Qiyas* experts, according to Ibn Hazm, some times often ignore the Qur'an and outward prefer to *khabar ahad*. Then they, too, Ibn Hazm said, often more concerned with *Qiyas* even considered more powerful than the Qur'an (Ibn Hazm, al-Ihkam,VIII, tt: 554).

3.3 METHODOLOGICAL CRITIQUE

Ibn Hazm also criticized Qiyas methodological when he questioned whether *Qiyas* was entirely true, or only partly true. If it is said that the whole *Qiyas* is true, this is an impossibile because in fact the result of the *Qiyas* often conflicting, some time it justifies and some time forbid one. And is it possible that two contra dictory things can be gathered simultaneously. If it is said that there are also some Qiyas right and partly wrong there, the question that arises then how to identify the right *Qiyas* from the wrong one (Ibn Hazm, al-MuhallaI, tt: 79). summarily the critique of Ibn Hazm is how to distinguish between true Qiyas and wrong one or in other words what methods can be used to sort between right and wrong *Qiyas*. Ibn Hazm, wanted a single truth in the over all practice of *Qiyas.* This , of course, contrary to al-Syafi'i's oponion. According to al-Syafi'i that the right of Qiyas is possibility one. So the right of Qiyas is the external one (Al-Syafi'i, tt: 483)

Then also The prophet methodologically never taught what, how and when Qiyas can be used. If qiyas is more needed, the prophet certainly would not forget to explain its operational. Therefore Qiyas is illegal (Ibn Hazm, al-Ihkam,VII, tt: 445).

In addition, Ibn Hazm still questioned whether Qiyas is applied in the things that have been mentioned in texts or things that arenot described in the texts. If it is said to things that have been mentioned in the texts, it means it has been violated to *ijma'* and there is no such person said that. Because, according to Ibn Hazm for applicability of *Qiyas* it must be based on texts or *ijma'* and no *furu'*are back to *ashal*. If it is said that *Qiyas* is applied on those things are not explained by the texts, then this is contrary to the texts. Because, according to Ibn Hazm none of the religion and their laws unless there are texts that explain them (Ibn Hazm, al-Ihkam,VII, tt: 445).The view of Ibn Hazm was close to the views of al-Shafi'i. According to al-Shafi'i *Qiyas* should not be applied while *al-khabar* explains(Al-Shafi'i, tt: 477, 599).

Ibn Hazm gives a method for assessing errors of Qiyas, ie if there is aproblem (I) resembles the other problem(II), then the second issue of compulsory judged as problem I.Then, Ibn Hazm said, look for problems III that resembles to problems II. And the third issues hould be judged the same as the problems I (Ibn Hazm, al-Ihkam VIII, tt: 551). The final conclusion that the problem III doesnot resembles to the problem I.

3.4 REFUSAL ON LAW ILLAT(RATIO LEGIS)

Ibn Hazm does not accept *illat* because it appeared in his mind, whether *illat* including action of God and his law or not from his action and his law or not from his action and not from one besides Him. In the view of Ibn Hazm there are only three alternatives just this possibility. If *illat* considered apart from the other than Allah and His law, then the consequence is that means there is a creator besides Allah, legislator besides Him so that others can require God to do an act and the law established. Comments like this clearly, according to Ibn Hazm is *shirk* and *kufr*. Ibn Hazm recognizes that Qiyas experts wouldnot argue like this. If *illat* was considered not of his actions nor of his deeds in addition, it means that in this universe there is something that no creator, or there are people who give law to God and it is they who justify and proscribe and decided to Allah SWT.Comments like even this *kufr* pure. But if *illat is* an act of God and His law, then the question that arises is whether or not God do something for certain *illat* or not because of certain *illat*. If not because of certain *illat*, then it means the Qiyas experts*,* according to Ibn Hazm have left their basic principles and admitted that Allah didnot act because certain illat. Therefore, according to Ibn Hazm ,Allah S WT acted that he wanted and not because of *illat* at all (Ibn Hazm, al-Ihkam VIII, tt: 601-602).

The explanation shows that Ibn Hazm took *illat* as legal issues in the theological frame work. In addition to the refusal of Ibn Hazm on law *illat* because all the companions of the prophet from firts generation until last generation, the *tabi'in* and their followers never said that Allah Almighty has set a law for certain *illat* (Ibn Hazm, al-Ihkam, VIII, tt: 92).

3.5 LINKAGES BETWEEN IBNHAZM'S ARGUMENT AND AL-SHAFI'I

According to al-Shafi'i, someone saying *istihsan* is not from the command of God and not the command of His messenger and what he say can't be accepted as something that comes from God and His messenger. However, according to al-Shafi'i, some one who gives a legal decision or gives fatwa with common *khabar* or by *Qiyas* means he implements what has been ordered. If a judge or a mufti in solving aproblem does not refer to texts or *khabar* or use *Qiyas* but using *Istihsan*, he must admit the possibility of a different opinion of him. Even any judge or mufti would argue with what he thinks is right which in turn in the emerging diversity issues in Fatwas and law in accordance with the wishes of each. If this is allowed, it means that the law bases on desire of judge or mufti (Al-Shafi'i, al-Umm VII, tt: 315-316).

In his refusing on *Istihsan*, al-Shafi'i pointed out an example. If there are two people litigants come to the judge about the defects in the goods, the judge should have to know in advance or call expert witnesses, then he can only decide whether the goods is the defective one or not. If in reality the goods is defective, the judge must determine what the price of the goods in market. Therefore the judge in deciding the case must base on the explanation of the expert witnesses who know the true market price. However, if the expert witness said "if the defective goods is determined by Qiyas with other merchandise, it takes the value of the price in certain price, the result of *qiyas* show the price so , but I use *istihsan so* that the merchandise was priced in other price". According to al-Shafi'i, the results of *istihsan from* the expert witness cannot be used by the judge to decide the case and the judge must decide in accordance with the prevailing market price at that time which is a general provision (Al-Shafi'i, al-Umm VII, tt: 315-316).

Of some of the arguments put forward by al-Shafi'i above, it can be said that al-Shafi refused on *Istihsan* because He thinks that it is:

1. Assigning the law that is not based on what God and His Messenger have commanded.
2. The Prophet himself never explained the law based on what he thinks is right, but he always awaits the revelation in every issue he faced.
3. Prophet did not approve of the companions to establish legal/make decisions based on what they deemed good
4. *Istihsan* not have clear boundaries and accurate measure that it would result in adifference with no limit to the back to him.
5. Establishing the law based on *istihsan* is set the law bases on desire and wild *ra'yu.*

The purpose of al-Shafi refused on *Istihsan* is in its attempt to create legal uniformity and minimum suppress dissent (Coulson, 1987: 68), despite the efforts failed because his efforts have given rise to two mahzab more recently come later, i.e. Ahmad ibn Hanbal and of al-Zhahiri Dawud. Two figures of this school, according to Wael B.Hallaq, after al-Shafi'i go a step further in an effort to refuse on the legal reasoning although the two figures are not exactly the same. Ahmad Ibn Hanbal not use *Qiyas* except in urgent situations, and David al-Zhahiri is categorically refuse Qiyas (Hallaq, 1997: 32).

From the above description shows that the arguments of al-Shafi'i refusing on *Istihsan* are similar to that used by Ibn Hazm refusing on *Qiyas*. They are both looking at the legal determination based on the *istihsan* according to al-Shafi'i and the establishment of law based on *Qiyas* according to Ibn Hazm is contrary to the texts. Al-Shafi'i considers that I*stihsan* a legal determination based on desire. For in *Istihsan* no clear benchmarks and measure. Ibn Hazm actually see that in the *Qiyas* even then still be possible to establish the law of the mind and the passions encouragement especially when searching and analyzing *illat*.

3.6 SIGNIFICANCE OF IBN HAZM'S REFUSAL ON QIYAS FOR DEVELOPMENT OF CONTEMPORARY ISLAMIC LAW.

The renewal of Islamic law began in earnest along with the emergence of the reform movement in Islam in the ninth century was essentially a movement to revive the spirit of *ijtihad*. Islamic reformers almost agreed to *ijtihad* and *taqlid* should be encouraged back should be deductible. In fact, as stated by Iqbal that *ijtihad* is the dynamic principle of the structure of Islam (Iqbal, 1981: 148). Islamic law that the principal source is al-Quran and al-Hadith through out the course of its history has been able to demonstrate the flexibility and elasticity of the face of any changes that occur in the community. *Ijtihad* is justified even highly recommended by the Prophet has given encouragement to the *mujtahid* since companions time until the next era to bring the results of a series of *ijtihad.*

The movement to revive the spirit of *ijtihad* and eradicate culture *taqlid* has also been carried out by Ibn Hazm in his time when Andalus was hit by a very strong culture of imitation to the Maliki school. *Ijtihad* is echoed by Ibn Hazm is looking for an issue in the legal texts of the Qur'an or hadit and *ijtihad* is not the use of *Qiyas, Istihsan* and *ra'yu* in finding the law (Ibn Hazm, al-Ihkam, VII, tt: 440).

Ijtihad must revive in response to find and establish laws that can addres the new issues and developments brought about as a result of changes in culture, politics, and economics as well as the progress of science and technology (Amin, 2013: 14). In response to new problems and developments occur, there are three approaches that are often carried out by experts of Islamic law today, the approach pattern of the traditional groups that still refer to classical and medieval texts followed in accordance with their mazhab, and if the books of *mahzab* of *fiqh* followed it they do not find the answer, then they turn to the books of other *mahzab* that are applied in a way of *talfiq*. Such as approach , according to Ibrahim Hosen, make Jurisprudence (fiqh) be dynamic and be able to answer the challenges of the times and thus *fiqh* will thrive, grow and always live(Hosen, 1988: 24-25). But in the analys of Islamic experts of Western that states that the principle of *talfiq* doesnot show actual reform even more it indicates to the tendency of *taqlid* (Coulson, Conflicts and Tensions, 1966: 101).

The second pattern of approaches is to look for a solution that is faced directly with looking for the answer in the al-Quran and al-Hadith by still using methods have been developed by scholars of the past. *Istihsan, Qiyas* and some other *istimbath legal* methods are used to address the new law. The third pattern of the approaches is to look for solutions faced with finding the answer in the al-Quran and al-Hadith by using an entirely new method. This third pattern as that of Muhammad Shahrur and Fazlurrahman use. Of the three approaches above, the pattern of the first and second approaches are still dominant in the Islamic society.

Although *Qiyas* can be used to address the new law, but behind it, legal experts that often use it, according to Yusuf Qaradawi, often slipping into the use of *Qiyas* that damaged. One example of the use of such defective *Qiyas* is about MUI Fatwa dealing with livestock and eating meal of frog. In the MUI fatwa stated that the frog is haram but breeding it is allowed. Rational arguments of the fatwas are that because of the use of animal skins that are cooked is permissible in Islam, then the problem of breeding to ads equivalent(using *Qiyas*) to the tannery. The theorem states because of all the animals, except the pigs and dogs, otherwise clean(no unclean), the frog also includes a clean animal. Therefore, if eating a frog is declared unlawful, raising frogs is not forbidden, since frog isnot considered unclean animals. *Qiyas* (Analogy) between breeding frogs and tanneries are only accepted up to the stage on safeguarding alone and cannot be applied to useful of the frog. (Mudzhar, 1993: 116-117).

The above case shows that Islamic jurists are still confused to determine the legal *illat*(ratio legis) while it is a very important component in the application of *Qiyas*. Reality like this is very feared by Ibn Hazm in his refusal on the *Qiyas*. One legal cases solved by the same method but produces the opposite conclusion. Therefore behind the refusal of Ibn Hazm on *Qiyas* , there is meaningful for the contemporary development of Islamic law, namely;

1. Development of old legal theory that still needs further refinement. In this case, *Qiyas* need to be developed. *Illat* improvements itself becomes very urgent. If the previous analysis of the legal, the analysis of *illat* is not include analysis of modern science, now the current participation of modern science becomes absolute. One example which should be mentioned here is the issue of the prohibition of alcohol. In the past, Islamic jurists stated that alcohol *is* illicit because it is intoxicating. Today this is no longer enough to say intoxicating is reason for the prohibiton of alcohol alone. But it should include also the reason the number of levels of alcohol contained in it that makes those who drink get drunk. So research on the chemical elements in the strong drink becomes important.
2. Development of new methodology formulation . The critique of Ibn Hazm againts *Qiyas* shows that the science of *usul fiqh*, or better known as the Islamic Legal Theories are open and anti-establishment. The development of a new formulation of methodology in order to overcome the current crisis faced by the science of *usul fiqh* itself is more significant. The formulation of the source of law, for example, is not related to the existence of the nation state that is becoming a reality of the modern world today. Therefore, the formulation of Islamic law sources can be developed in accordance with the reality today. The source of Islamic law now is the Qur'an, al-*Sunnah*, and state legislation. Important implication of this formulation is when the source of Islamic law is the Qur'an, *Sunnah*, and State Legislation, the all products produced by state law are the part of Islamic law that must be obeyed by all Muslims. Therefore, there is no reason for Muslims not to obey the rules issued by the state on the grounds it is state law and not religious law (fiqh). Conflict between religious law and state law, as such, can be availed.

4 CONCLUSION

Based on previous explanations, the following conclusions can be drawn some;

1. The main factor why Ibn Hazm refuseed on *Qiyas* is due to the results obtained with the legal provisions of the *Qiyas* still doubt the truth and has a great opportunity for the creation of legal uncertainty.
2. There is a similarity between the refusal of al-Shafi'i on istihsan and the refusal of Ibn Hazm on *Qiyas*. Therefore, the hypothesis that the refusal of Ibn Hazm on *Qiyas* inspired by al-Shafi'i's refusal on *Istihsan* is justified.

3. The refusal of Ibn Hazm on *Qiyas* gives meaningful to the development of Islamic law in the contemporary world. The development will lead to the reconstruction of the classical Islamic legal theory and the reformulation of contemporary Islamic legal theory.

RECOMMENDATIONS

The results of this study recommends the following;

1. *Usul fiqh* as a portion of Islamic knowledge must be developed in order to respond to the demands of social change taking place in contemporary Islamic societies. Development of usul fiqh through a process of assessment and in-depth study. In this context, the works of past scholars deserve to be re-examined in order to find the pearl of thought which is very valuable as a material for the development of *usul fiqh* in today's contemporary world. The refusal of Ibn Hazm on Qiyas gives the spirit of the contemporary scholars of *usul fiqh* today to venture out of the trap methods of discovery and excavation of the old laws that are already established and working hard to find a method of discovery and excavation of new laws that are better able to address contemporary legal issues at this time. Therefore, research on *usul fiqh* should continue to be developed.
2. The refusal of Ibn Hazm on *Qiyas* should be able to inspire the contemporary scholars of *usul fiqh* to be critical to the establishment of a science building. The critical of the establishment is the basis for progress.

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