

# Adopted Children as *Mahram*: Responding to Ijtihad ‘Ā’isyah (614-679 Ad) in the Flow of Modernization

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## Abstract

The process of adopting children in Islam is able to adjust to the customs (‘urf) of the community as long as it does not conflict with the principles of *syara’*. Likewise family life in Indonesian society still implements the custom of breastfeeding children (*radhā*) to others. This article aimed to respond the social behavior between adopted children and their foster parents in following the modernization flow. One of the *Ijtihad* ‘Ā’isyah believes that a child who is close to reaching *baligh* can become a *mahram* with a mother who is breastfeeding him. This opinion must be understood by the principle of *ihtiyāt* (caution). Observing the authority of the Religious Court in determining the status of adopted sons who adhere to the principle that between adopted sons and adoptive parents is not a *muhrim* so they must maintain the genitals. Therefore *ijtihad* ‘Ā’isyah is an opportunity to be enforced in this modern era by emphasizing the age limit of adopted sons who are allowed to breastfeed, so that adopted sons have the status of *mahram*.

**Keyword:** Adopted Children, *Mahram*, ‘Ā’isyah, Modernization

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## INTRODUCTION

The scholars of fiqh agree that they prohibit the tradition of adoption which results in the law of transfer of lineage (descent), as is popularly practiced by the *jahiliyah* community and applies to western law. Islam only justifies adoption as a form of transferring the obligation to maintain, educate and provide for daily living. Islamic law also provides space for customary law as long as it does not contradict the principles of *syara’*, even placing it as one of its sources of law (*al-‘ādah al-muḥakkamah*). Indigenous people in Indonesia also recognize local adoption from across families to be cared for lovingly like their own children.<sup>1</sup>

Since the early post-prophetic era, the *ijtihad* of Prophet’s close friends in various historical records has shown a general tendency to make an agreement (*ijma’/consensus*) on legal material based on the Prophet’s verse or *hadīth* related to similar situations.<sup>2</sup> Then, as the expansion of Islam developed and the Prophet’s close friends’ new experiences increased throughout their interactions with people from various civilizations, the *Sahabah* began to face new questions about

<sup>1</sup> Ahmad Kamil, *Hukum Perlindungan Dan Pengangkatan Anak Di Indonesia* (Jakarta: Raja Grafindo Persada, 2008), 113.

<sup>2</sup> Fakhr al-Dīn Al-Rāzī, *Al-Maḥṣūl Fī ‘Ilmi Al-Uṣūl*, ed. Ṭahā Jabīr Al-‘Alwānī, 3rd ed., vol. 4 (Mesir: Mu’assasah al-Risālah, 1997), hlm. 21. Alaidin Koto, *Ilmu Fiqh Dan Ushul Fiqh*, 5th ed. (Jakarta: Rajawali Press, 2014), 75. Misalnya terkait ‘pengharaman minyak babi’, ‘seperenam bahagian nenek dalam warisan’, ‘batasan maksimal kandungan selama dua tahun’, dan isu-isu lain

legal issues that did not have direct answers from the Koran or *Hadīth*.<sup>3</sup> In certain issues, the solution they took was to apply the understanding of general benefit (*maṣlahah*), especially realized in the form of deliberation among the Companions through government institutions (*khalifah*). They consider the results of the deliberations to represent the people based on the orders of the head of state.<sup>4</sup>

In the study of *ushul fiqh*, the *ijtihad* of *Shahabah* is sometimes included in the discussion of *ijma'*, if what they produce does not get opposition from other Friends, it is also directly legitimized by the caliph.<sup>5</sup> On the other hand, it is included in the discussion of *qaul al-shahabi*, which has been claimed by some scholars that the words of the Friends that are not based solely on their thoughts are *hujjah* (legal basis) for the Muslims.<sup>6</sup>

On the other hand, among the Prophet's close friends, of course, not all agree on certain cases which they think are different in understanding the texts. The contribution of differences of opinion among Prophet's close friends, in turn, will also affect the formation of the characteristics of the school or fiqh 'tendency' in the form of methodology (*ijtihad*) in cases that are implicit in the Koran and *Hadīth*. The schools or 'tendencies' are among the rationalistic scholars (*Ahl al-Ra'yi*) and among the textualist scholars (*Ahl al-Hadīth*). According to Jasser Auda, the factors that trigger the formation of the two tendencies can occur in three ways, including situations of conflict/schools, personality of the *Imam*, and the migration process of the Prophet's close friends.<sup>7</sup>

From the Prophet's Companions who have contributed greatly to the treasury of Islamic law, including Ā'isyah *radhiAllahu 'anha* (614 - 679 AD); (hereinafter: 'Ā'isyah). His role as narrator of *Hadīth* and at the same time providing opinions among the Companions cannot be doubted. Her personality as a strong and independent woman, shows her character that supports the independence and rights of women in some of the direct history of the Companions in various *fatwa* and opinions.<sup>8</sup>

The interesting point for the writer to research on it based on the *ijtihad* Ā'isyah which states that a child who is almost adult/*baligh* with a woman who breastfeeds him is able to have *maḥram* relationship. This problem leaves problems in the future. The opinion of 'Ā'isyah was opposed by the Prophet's close friends and other scholars, but some of them supported this opinion. It is

<sup>3</sup>Jasser Auda, *Membumikan Hukum Islam Melalui Maqasid Syariah: Pendekatan Sistem*, 1st ed. (Bandung: Mizan Pustaka, 2015), 105.

<sup>4</sup>Hasbi Ashshidieqy, *Pengantar Hukum Islam 1* (Jakarta: Bulan Bintang, 1975), hlm. 201.

<sup>5</sup>Abd al-Wahhāb Khalāf, *Ilm Uṣūl Al-Fiqh*, 8th ed. (Mesir: Maktabah al-Da'wah al-Islāmiyyah Syabāb al-Azhar, t.th.), 50.

<sup>6</sup>Muḥammad Abū Zahrah, *Uṣūl Fiqh* (Kairo: Dār al-Fikr al-'Arabī, t.th.), 221.

<sup>7</sup>Auda, *Membumikan Hukum Islam Melalui Maqasid Syariah: Pendekatan Sistem*, 105-107.

<sup>8</sup>Jamal J. Elias, "The Ḥadīth Traditions 'Ā'isha as Prototypes of Self-Narrative," *Edebiyāt; Harwood Academic* 7 (1997): 216.

assumed that the opinion of 'Ā'isyah will potentially be distorted by certain parties, if they do not use the principle of *ihtiyat* (prudence) in understanding it. Based on this discussion the authors questioned; What are the methodological aspects used by 'Ā'isyah in the *fatwa*?, and; how to respond to this *fatwa* in facing the modernization of Islamic law today?

This article aimed to address the social behavior between adopted children and their foster parents in the flow of modernization and provide a descriptive-objective picture, not legitimizing or confronting various parties in one opinion. Whereas the problem of adopted children referred to in this research is children who in terms of maintenance for their daily lives, education costs and so on, shift their responsibility from their original parents to their adoptive parents based on a court decision.

## RESEARCH METHODOLOGY

The article described a normative review of the previous literature (state of the art). The data collection techniques through book surveys, including: the techniques used to examine written data and information in primary and secondary sources of books compiled by experts in the legal, social and political fields, especially issues related to this research. The analysis technique used qualitative content analysis techniques, it was: the process of arranging the order of the data, organizing it into a pattern, category and data description unit, that is, giving significant meaning to the analysis, explaining the description and looking for relation between the dimensions of description.<sup>9</sup> In connection with the thought of 'Ā'isyah regarding the thought of fiqh, which is extracted from the Koran and al-Sunnah, both of which are in Arabic, the approach used is the approach of linguistic principles (*al-qawā'id al-lughawiyyah*) and the approach to meaning (*al-qawā'id al-ma'nawiyyah/al-syar'iyyah*).<sup>10</sup> Furthermore, to draw conclusions, deductive methods were used. The deductive method was used when analyzing the principles of 'Ā'isyah thought that applied in general, then examining the problems that applied specifically.

## LIFE HISTORY OF 'Ā'ISYAH (614 – 679 M)

Her full name is 'Ā'isyah bintu' Abdullāh ibn Abū Quḥāfah. Islamic historians did not find the exact date of birth of 'Ā'isyah, but it was estimated that she was born in the year of 614 AD. Her father, 'Abdullāh, was better known as Abū Bakr al-Ṣiddīq (w. 13 H). Her mother, Zainab, or known as Umm Rūmān (w. 6 H).<sup>11</sup> In Arabic custom, determining (*kunyah*) and (*laqab*) in pairing a name is very important.<sup>12</sup> In several narrations, it was stated that *kunyah* is called Ummu

<sup>9</sup> Noeng Muhadjir, *Metodologi Penelitian Kualitatif*, (Yogyakarta: Penerbit Rake Sarasin, 1989), 68-69.

<sup>10</sup> Alī Hasaballah, *Uṣūl al-Tasyrī' al-Islāmī*, (Kairo: Dār al-Ma'ārif, 1985), 203.

<sup>11</sup> Sa'īd Fāyiz Al-Dakhīl, *Mausū'ah Fiqh 'Ā'Isyah Ummu Al-Mukminīn Hayātuhā Wa Fiqhuhā*, 1st ed. (Beirut: Dar al-Nafāis, 1989), 19-23.

<sup>12</sup> Ibn Ḥajar Al-'Asqalānī, *Manāqib Imam Al-Syafi'ī*, 1st ed. (Jakarta: Cendekia Sentra Muslim, 2001), 45.

‘Abdullah, because ‘Ā’isyah was not blessed with children, the Prophet SAW at her request assigned the *kunyah* to her sister’s daughter (‘Asmā’), it was ‘Abdullah ibn Zubair. The *laqab* is mentioned by the Prophet SAW with; ‘Ā’isyah, Bintu al-Shiddiq, Bintu Abi Bakr, Humaira, while the Companions call her ‘Umm al-Mukminin’. She passed away at the age of 66 years to coincide with Ramadan in 58 Hijriah/ 679 AD.<sup>13</sup>

‘Ā’isyah is the Prophet’s youngest wife. She is known as a role model and a noble personality, so that historians place her as the most central woman in Islam.<sup>14</sup> Her contribution to the spread of Islam was in line with the journey of her life with the Prophet SAW, so that she dominated some of the *Hadīth*’s narrations surrounding the Prophet’s life as well as being widely quoted by the companions to the *tabi’in*. The narrations of *Hadīth* by ‘Ā’isyah through the selection of al-Bukhari and Muslim counted 2,210 *Hadith* and most of them were narrated in the *ahad* (main) line relating to *Hadīth fi’iliyyah*. Along with that, ‘Ā’isyah understanding of the Koran text is believed to have reached the essence of the text implicitly, with considerations based on *asbabu al-nuzul*, *sunnah*, language understanding and personal *ijtihad*.<sup>15</sup>

The role of ‘Ā’isyah in the narration of *Hadīth* was widely used as a reference for the companions of the Prophet. As a narrator who was careful and *tsiqah* (reliable) in quality, ‘Ā’isyah is superior to Abu Hurairah (w. 59 H). However, in terms of quantity, Abu Hurairah narrated more about *Hadīth* than ‘Ā’isyah. Her belief was praised by many companions and *tabi’in*, such as; Abu Musa al- ‘Asy’ari (w. 54 H) said: “If the people have difficulty understanding a narration, then the reference is ‘Ā’isyah, so that more than 100 friends who narrated *Hadith* from her”. Likewise, Abu Syihab al-Zuhri (w. 124 H) said; “If all knowledge is gathered from the Prophet’s wives into one, then the knowledge of ‘Ā’isyah exceeds that all”.<sup>16</sup>

At that time, the involvement of ‘Ā’isyah in Arabic social society showed a strong female personality. She grew up in a traditional Arab situation. It was proven by the fact that since she was a child, she was raised by the Bani Makzum family, so that this family introduced her to the conditions of life in the Arab which was still pure, taught her fluency and instilled a high degree of intimacy. Likewise in the political field, her participation in the Jamal war (656 AD) showed a

<sup>13</sup>Abū ‘Abdillāh Muḥammad ibn Ismā’il Al-Bukhārī, *Ṣaḥīḥ Al-Bukhārī*, 1st ed., vol. 12 (Beirut: Dār Ibn Katsīr, 2002), 117; Abū al-Ḥusain Muslim ibn al-Hajjāj Al-Naisābūrī, *Ṣaḥīḥ Muslim*, 1st ed., vol. 7 (Beirut: Dār Kutub al-‘Ilmiyyah, 1991), hlm. 198; Abū Dāwud Sulaimān ibn al-Asy’ats Al-Sijistānī, *Sunan Abū Dāwud*, 1st ed. (Beirut: Dār Kutub al-‘Ilmiyyah, t.th.); Ibn Mājah, *Sunan Ibn Mājah*, vol. 7 (Beirut: Dār Kutub al-‘Ilmiyyah, t.th.), 377.

<sup>14</sup>Denise Spellberg, *Politics, Gender, and The Islamic Past: The Legacy of ‘Aisha Bint Abu Bakr* (New York: Columbia University Press, 1994), 2.

<sup>15</sup>Spellberg, 3.

<sup>16</sup>Abu Hajjaj Yusuf Al-Mazzy, *Tahdzib Al-Kamal Fi ‘Asma’ Al-Rijal* (Beirut: Dar al-Fikr, 1994), 376.

follow-up attitude to the investigation of the murder of Uthman ibn Affan to immediately execute the perpetrators. Such attitudes are used in part to legitimize women's participation in politics.<sup>17</sup>

Furthermore, in the field of fiqh, after the Prophet was passed away, the problem of fiqh among Prophet's close friends became increasingly complex and varied. The interpretation of the Koran text and the *sunnah* which initially became the foundation, then wanted the rationality of *ijtihad* in answering the problem. 'Ā'isyah played the role of using *ijtihad* independently to respond to events that occurred at that time, so that the *fiqh* discourse that was rolling at that time was dominated by domestic problems (*ahwal al-syakhshiyah*) and criminal (*jinayah*).<sup>18</sup>

### PROPHET'S COMPANIONS *IJTIHAD* METHODOLOGICAL FRAMEWORK

The meaning of *ijtihad* is indeed variously stated by some scholars, such as; Ibn Humām, Abū Zahrah, Muḥammad al-Syaukānī.<sup>19</sup> But, in principle, it was a serious effort by jurists to find 'amaliah law (*fiqh* law) from the source (*dalīl*). Likewise, the law is *zhannī* (not the only truth, it still contains other possibilities) established through *ijtihad*. Strictly speaking, Muḥammad Abū al-Nūr Zuhair stated that *ijtihad* was only related to *faqih* activities.<sup>20</sup> More specifically, *ijtihad* includes all teachings or other aspects of Islam that are not limited to the issue of fiqh alone. Likewise, according to Muḥammad Yūsuf Mūsā is a serious effort to interpret and understand the sources of Islamic teachings (the Koran and *ḥadīths*).<sup>21</sup>

Furthermore, Muḥammad Mūsā Tiwanā categorized *ijtihad* into three forms, including; first, *ijtihad* in the explanation and interpretation of the texts. Second, *ijtihad* through *qiyas* on events that have been confirmed by the texts or *ijma'*. Third, *ijtihad* through *ra'yu*.<sup>22</sup> In this case, it is more appropriate to use *ijtihad* in the understanding of the texts of the Koran and *ḥadīth* as well as covering other aspects of Islam (besides *fiqh*), both in the form of direct interpretation and explanation of the texts (*istinbātī*) and *ijtihad bi al-ra'yi*. In the development of Islamic history, *ijtihad* has been applied in the theological aspect.<sup>23</sup> For events for which has been defined by *nas*,

<sup>17</sup>Ahmad Izzuddin, "Peran Sayyidah 'Ā'isyah Dalm Pembentukan Hukum Islam Berwawasan Gender," *Egalita* 7, no. 1 (January 2012): 11.

<sup>18</sup>Izzuddin, 12.

<sup>19</sup>Muḥammad 'Amīm al-Iḥsān Al-Barkātī, *Al-Ta'rīfāt Al-Fiqhiyyah*, vol. 1 (Beirut: Dār al-Kutub al-'Ilmiyyah, 2003), 17; Alī ibn Muḥammad Al-Jurjānī, *Al-Ta'rīfāt*, vol. 1 (Beirut: Riyādh al-Ṣulh, 1969), hlm. 2; Ibn Humām, *Al-Taḥrīr* (Beirut: Muṣṭafā al-Bābī al-Ḥalabī wa Awlāduh, 1315), hlm. 523; Zahrah, *Uṣūl Fiqh*, 379; Muḥammad Al-Syaukānī, *Irsyād Al-Fuḥūl* (Beirut: Dār Iḥya al-Turāts al-'Arabi, t.th.), 250.

<sup>20</sup>Muḥammad Abū al-Nūr Zuhair, *Uṣūl Al-Fiqh*, vol. 4 (Mesir: Maṭba'ah Dār al-Taklīf, t.th.), 233.

<sup>21</sup>Nadiyah Syarīf Al-Umūri, *Al-Ijtihād Fī Al-Islām Uṣūluhu, Ahkāmuhu, Afāquhu* (Mu'assasah al-Risālah, 1981), hlm. 25; Muḥammad Yūsuf Mūsā, *Tārīkh Al-Fiqh Al-Islāmī* (Beirut: Dar al-Qalam, t.th.), 43.

<sup>22</sup>Muḥammad Mūsā Tiwanā, *Al-Ijtihād Wa Mādḥā Hajātunā Ilaihi Fī Hadzā Al-'Aṣr* (Dār al-Kutub al-Ḥadītsah, t.th.), 39.

<sup>23</sup>Tiwanā, *Al-Ijtihād Wa Mādḥā Hajātunā Ilaihi Fī Hadzā Al-'Aṣr*, 26.

the application of *ijtihād* rests on understanding *naş* and comprehensive research on it which is general or specific in nature and restricts its generality. Whereas for events for which there is no stipulation of *naş*, the objective of the *ijtihād* is to examine the law using the *aqli* argument, such as: *qiyās*, *istihsān*, *urf* and so on.<sup>24</sup>

After the Prophet passed away, *ijtihād* continued and they issued an opinion on a matter according to their knowledge and understanding, so that differences of opinion between them continued.<sup>25</sup> According to Abū Zahrah, the *ijtihād* of some friends was limited to explaining and interpreting the Koran and *sunnah*, while others used *qiyās*, such as Abdullāh ibn Mas'ūd and Alī ibn Abī Tālib; and some have come to the use of *maşlahah*, such as 'Umar ibn Khaţţab.<sup>26</sup> According to Alī al-Sayis, in performing *ijtihād* the companions also pay attention to the *dalālah* (guidance) of the texts and use *ra'yu*. They use all their abilities to search for the truth, and the results of their thoughts they connect with existing evidence and clues. They have done *ijtihād* with *qiyās*, *istihsān*, *al-barā'at al-aşliyyah*, *sadd al-dzarī'ah* and *maşlahah al-mursalah*.<sup>27</sup>

The occurrence of *khilafiyah* among Prophet's close friends illustrated that Islamic law in the early generations was not rigid and static, as in later times. Different opinions among Prophet's close friends and even contradictions regarding shared problems can be tolerated, as long as the arguments between them are quite valid. This further explained the differences in opinion of the friends.<sup>28</sup>

## MODERNIZATION OF ISLAMIC LAW

At the end of the XV century (fifteen), the modernization movement in Arnold Toynbee's research, has emerged in Europe in the form of a break from the rigor of Christianity by its adherents.<sup>29</sup> Samuel Huntington related it to the results of the development of science and technology that enabled humans to control nature. Modernity is characterized by a very fast change process involving industrialization, urbanization, from a primitive society to a developed society.<sup>30</sup> Fazlur Rahman related it in the scope of religion as an effort to harmonize religion, including in

<sup>24</sup> Abd al-Wahhāb Khallāf, *Maşādir Al-Tasyrī' Fī Mā Lā Naşsa Fīhi* (Kuwait: Dār al-Qalām, 1972), hlm. 7; Aḥmad Hanafi, *Pengantar Dan Sejarah Hukum Islam* (Jakarta: CV Bulan Bintang, 1970), 162.

<sup>25</sup> Ibn 'Abidīn, *Hasyiyah Radd Al-Mukhtār 'alā Al-Durar Al-Mukhtār: Syarh Tanwīr Al-Abşār*, vol. 1 (Beirut: Dar al-Qalam, t.th.), 68.

<sup>26</sup> Muḥammad Abū Zahrah, *Tārīkh Al-Madzāhib Al-Islāmiyyah*, vol. 2 (Beirut: Dār al-Fikr al-'Arabī, t.th.), 22.

<sup>27</sup> Muḥammad Alī Al-Sāyis, *Tārīkh Al-Fiqh Al-Islāmī* (Mesir: Maţba'ah 'Alī Şābih wa Awlāduh, t.th.), 36.

<sup>28</sup> Muḥammad Abū Fattah Al-Bayanuni, *Dirāsah Fī Ikhtilāf Al-Fiqhiyyah* (Mesir: Maktabah al-Hudā, 1975), 26.

<sup>29</sup> Nurcholish Madjid, *Islam Doktrin Dan Peradaban- Sebuah Telaah Kritis Tentang Masalah Keimanan, Kemanusiaan, Dan Kemodernan*, 2nd ed. (Jakarta: Yayasan Wakaf Paramadina, 1992), 451.

<sup>30</sup> Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, ed. M. Sadat Ismail, 11th ed. (Yogyakarta: Macat Library, 2017), 95, <https://doi.org/10.4324/9781912282180>.

the Islamic world.<sup>31</sup> By relying on rational power, modernity emerged as a reconstruction of classical fiqh to answer human problems by examining dogma outside the text of the text. So that modernization is understood by Western society as a movement and an effort to change classical understandings and traditions, so that they can be adapted to the current situation due to developments in knowledge and technology.<sup>32</sup>

The emergence of the modernity movement in Islam is an effort to bridge the gap between the ideals of Islamic teachings and the reality of its people. The problem is, whether Muslims are able to maintain the ideals of their teachings in the current of modernization or they will carry out a transformation.<sup>33</sup> Reformists consider the teachings of Islam to be very relevant to all circles, the public and individuals. They even state that the results of ijtihad traditionally have to be reformed based on texts to suit the contemporary context and contemporary needs.<sup>34</sup>

One such reformist figure as Abdullah Saeed, Omid Safi focused on studying contemporary Islamic issues. The spirit of Islamic teachings is actually compatible (*ṣālih li kulli zamān wa makān*) in social development. According to Saeed, the modernity movement in this century will continue to develop in the form of a trend (not a movement) of neo-modernist thinking and then progressive. Omid Safi said there were several important issues that were highlighted in the flow of modernization, including; gender issues, discrimination and human rights.<sup>35</sup>

In Saeed's perspective, the current trend is classified into six groups, including:<sup>36</sup>(1) *The Legalist-Tradionalist*. The emphasis is on the laws developed and interpreted by scholars of the premodern period; (2) *The Theological Puritans*. The focus of thought is on the ethical and doctrinal dimensions of Islam; (3) *The Political Islamist*. The tendency of thinking is on the political aspect of Islam with the ultimate goal of establishing an Islamic state; (4) *The Islamist Extremists*. It has a tendency to use violence against every individual and group that he considers to be an opponent, whether Muslim or non-Muslim; (5) *The Secular Muslims*. It assume that religion is a private matter; and (6) *The Progressive Ijtihādists*. It is contemporary Muslim thinkers who have sufficient mastery of classical Islamic treasures (classical period), and seek to reinterpret religious understanding (through *ijtihād*) by using methodological tools of modern sciences

<sup>31</sup>Madjid, *Islam Doktrin Dan Peradaban- Sebuah Telaah Kritis Tentang Masalah Keimanan, Kemanusiaan, Dan Kemodernan*, xxv.

<sup>32</sup>Harun Nasution, *Islam Rasional Gagasan Dan Pemikiran* (Bandung: Mizan Pustaka, 1995). 181.

<sup>33</sup>William Shepard, "Fundamentalism; Christian and Islamic," *Religion* 17 (1987): 355–378.

<sup>34</sup>A. Mukti Ali, *Beberapa Persoalan Agama Dewasa Ini* (Jakarta: Rajawali Press, 1988). 25.

<sup>35</sup>Jasser Auda, *Maqasid Al-Shari'ah as Philosophy of Islamic Law: A System Approach* (London: IIIT, 2008), 177–79; Syaikh Abdullāh ibn Syaikh al-Mahfūz bin Bayyah, *Shinā'at Al-Fatāwā Wa Fiqh Al-'Aqaliyyah* (Beirut: Dar al-Minhaj, 2007), 6–8.

<sup>36</sup>Abdullah Saeed, *Islamic Thought An Introduction* (New York: Routledge, 2006), 149.

(science, social sciences and humanities) in order to answer the needs of Muslim society contemporary.<sup>37</sup>

At first glance, it seems clear that the style of contemporary Islamic scholarship offered by Saeed is different from that of traditional Islamic scholarship. The use of traditional methods still exists, where the *naş* of the Koran is the central point of departure, but the method of interpretation has been integrated with the use of new epistemologies, which involve contemporary social sciences and humanities, also critical philosophy.<sup>38</sup> Saeed did not mention the use of these methods and approaches explicitly, but the inclusion and use of the term modern Western education is one indication of an entry point that can lead lovers of contemporary Islamic studies in this direction. Also issues and problems of contemporary humanities were evident when Saeed and Safi mentioned gender issues, discrimination and human rights as part of an inseparable framework of modernization. The issue of contemporary humanities will not be concluded properly if the epistemology of Islamic scholarship still uses the old '*ulūm al-dīn* methods and approaches.

In Indonesia, the modernization of Islamic law has been brought and applied in movements, such as; Muhammadiyah, Nahdhatul Ulama (NU), Persis.<sup>39</sup> The 1970s, Greg Barton described a new trend in Indonesian Islam that went beyond the traditionalist Islamic movement and the modernist Islamic movement, it was: the progressive movement.<sup>40</sup> Meanwhile, Ahmad Amir Aziz in his research argued that the typology of progressive movements can be divided into three: Rational Islam, Civilization Islam and Transformative Islam.<sup>41</sup>

According to Nurcholis Madjid, the effort to undertake the progressive modernization of *ijtihād* is very important to understand and perceive the classical period of Islam known as the salaf period, although the analysis of the salaf period is still controversial. With the argument that the *ijtihād* renewal process cannot be started from scratch. So, starting the development of thought from scratch will only end in intellectual poverty.<sup>42</sup>

## RESPONSE IJTIHAD 'Ā'ISYAH (614 - 679 AD)

It is undeniable that *ijtihād* 'Ā'isyah argues that a person who is still young or near *baligh* is able to become a *mahram* with a woman who breastfeeds him without being limited to 2 years of

<sup>37</sup>Saeed, 150–51. Tariq Ramadan, *Western Muslims and the Future of Islam* (New York: Oxford University Press, 2004), 24–28.

<sup>38</sup>Maizul Imran, "Redefenisi Konsep Perkawinan Islam DI Indonesia (Kompromi Pemikiran Islam Progresif Dengan Ijtihad Ibn Hazm)," *ALHURRIYAH: Jurnal Hukum Islam* 1, no. 2 (2016): 147, <https://doi.org/10.30983/alhurriyah.v1i2.486>.

<sup>39</sup>Greg Barton, "Neo-Modernism: A Vital Synthesis of Traditionalist and Modernist Islamic Thought in Indonesia," *Studia Islamika* 2, no. 3 (1995): 1.

<sup>40</sup>Greg Barton, *Gagasan Islam Liberal Di Indonesia* (Jakarta: Paramadina, 1999), hlm. 11.

<sup>41</sup>Ahmad Amir Aziz, *Neo-Modernisme Islam Di Indonesia* (Jakarta: Rineka Cipta, 1999), 19.

<sup>42</sup>Madjid, *Islam Doktrin Dan Peradaban- Sebuah Telaah Kritis Tentang Masalah Keimanan, Kemanusiaan, Dan Kemodernan*, 387.

age. This is based on surah al-Baqarah, verse 233: وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ أَرَادَ أَنْ يُنَمِّئَ (‘Divorced’ mothers will breastfeed their offspring for two whole years, for those who wish to complete the nursing of their child’)

and surah al-Ahqaf, verse 15: وَحَمْلُهُ وَفِصَالُهُ ثَلَاثُونَ شَهْرًا (Their ‘period of’ bearing and weaning is thirty months.)

The interpretation of ‘Ā’isyah to the above verse is understood as the period of primacy of breastfeeding the child, not within the limit of the time the feeding causes *mahram*.<sup>43</sup>

Then based on the Hadith narrated by ‘Ā’isyah, as follows:

عَنْ عَائِشَةَ أَنَّ سَالِمًا مَوْلَى أَبِي حُدَيْفَةَ كَانَ مَعَ أَبِي حُدَيْفَةَ وَ أَهْلِهِ فِي بَيْتِهِمْ. فَأَتَتْ (تَعْنِي ابْنَةَ سَهْلٍ) النَّبِيِّ ص، فَقَالَتْ: إِنَّ سَالِمًا قَدْ بَلَغَ مَا يَبْلُغُ الرِّجَالُ، وَ عَقَلَ مَا عَقَلُوا، وَ إِنَّهُ يَدْخُلُ عَلَيْنَا وَ إِنِّي أَطْنُ أَنْ فِي نَفْسِ أَبِي حُدَيْفَةَ مِنْ ذَلِكَ شَيْئًا. فَقَالَ لَهَا النَّبِيُّ ص: أَرْضِعِيهِ، تَحْرُمِي عَلَيْهِ وَ يَذْهَبِ الَّذِي فِي نَفْسِ أَبِي حُدَيْفَةَ. فَرَجَعْتُ، فَقَالَتْ: إِنِّي قَدْ أَرْضَعْتُهُ، فَذَهَبَ الَّذِي فِي نَفْسِ أَبِي حُدَيْفَةَ. مسلم<sup>44</sup>

Meaning: From ‘Ā’isyah RA, that Salim, the former slave of Abu Hudzaifah, lived with Abu Hudzaifah and his family in their house. Then the wife of Abu Hudzaifah (Suhail’s daughter), came to the Prophet SAW, and said, “Surely Salim has reached maturity, and his mind is like most of adults. And he is in our house. Meanwhile, I thought that in Abu Hudzaifah there was something (jealousy) about it, how is that?”. The Prophet SAW said to him, “Breastfeed him, then you become haram to him and something that is in Abu Hudzaifah will disappear”. Then Sahlah came home. Then he said, “Really I have fed him”. Then something was missing in Abu Hudzaifah. (Narrated by Muslim).

In line with the history above, there was also a history of Zainab bint Ummu Salamah<sup>45</sup> and also a history of ‘Ā’isyah.<sup>46</sup> The incident of Abu Hudzaifah, who was worried about Salim’s presence in his house, made his wife’s question (Sahlah) to the Prophet. So *Rasul* gave a solution to Sahlah to make Salim into a *mahram*, even though Salim’s condition at that time was almost aged. In the history it was stated that the conditions that occurred when Sahlah fed Salim, did not do direct breastfeeding, but Sahlah fed her through a accommodating container which coincidentally at that time Sahlah gave birth to a child.<sup>47</sup>

Those who rejected ‘Ā’isyah opinion included th’ Prophet’s own wives. They generally did not accept the proposition used by ‘Ā’isyah. In their view, the ability of the Prophet SAW only applies specifically to Sahlah, the wife of Abu Hudzaifah and his former foster child who was almost aged, it was Salim. It was based on the history of Zainab, مَا نَرَى هَذَا إِلَّا رُخْصَةً أَرْخَصَهَا رَسُولُ اللَّهِ ص

<sup>43</sup> Al-Dakhīl, *Mausū’ah Fiqh ‘Ā’Isyah Ummu Al-Mukminīn Hayātuhā Wa Fiqhuhā*, 552.

<sup>44</sup> Al-Naisābūrī, *Ṣaḥīḥ Muslim*, 7: 356 hadits no. 2637.

<sup>45</sup> Al-Naisābūrī, 7: 358 hadits no.2639.

<sup>46</sup> Al-Naisābūrī, 7: hlm. 355 hadits no. 2636.

<sup>47</sup> Al-Dakhīl, *Mausū’ah Fiqh ‘Ā’Isyah Ummu Al-Mukminīn Hayātuhā Wa Fiqhuhā*, hlm. 553. Berdasarkan Hadīth di atas, pendapat ‘Ā’isyah ini diikuti oleh ulama lain seperti; ‘Atha, Laits, Daud al-Zahiri dan Ibn Taimiyyah.

لِسَالِمٍ خَاصَّةً، فَمَا هُوَ بِدَاخِلٍ عَلَيْنَا أَحَدٌ مِنْ هَذِهِ الرِّضَاعَةِ، وَلَا رَائِيًّا<sup>48</sup> on't you know that it is only a relief that was D specially made by Rasulullah SAW for Salim? So no one (may) enter our (house) with such a breastfeeding and (also) (may) not see us".

From the opinion of the Prophet's wives above, then *Jumhur ulama* also rejected it and argued that what happened to Sahlah, the wife of Abu Hudzaifah and Salim was merely a specialization out of habit, and that was the prerogative of the Prophet Muhammad. The law did not apply in general. Because there are so many other propositions that expressly ensure that this harmony will not occur if the breastfed child has passed the two year age limit, and there could be a possibility that the *Hadīth* about the story 'Ā'isyah which allows adult men to breastfeed women to become *mahram* has been eliminated, with the arrival of *Hadith* narrated by some Prophet's close friends, such as Umm Salamah: *لَا يُحْرَمُ مِنَ الرِّضَاعِ إِلَّا مَا فَتَقَ الْأَمْعَاءُ فِي الثَّوْدِي وَكَانَ قَبْلَ الْفِطَامِ* (Rasulullah SAW said: he could not make mahram but breastfeed that would fill him with this milk, and this happened when the child was not breastfed). Riwayat Ibn Uyainah. History of Ibn Uyainah: *لَا رِضَاعَ إِلَّا مَا فَتَقَ الْأَمْعَاءُ فِي الثَّوْدِي وَكَانَ قَبْلَ الْفِطَامِ* ((Rasul SAW said: no breastfeeding except for two years.) History of Ibn Mas'ud: *لَا رِضَاعَ إِلَّا مَا أَنْشَرَ الْعِظْمَ وَآثَبَتِ اللَّحْمَ* (Rasulullah SAW said: there is no breastfeeding but to strengthen bones and grow flesh). Jabir's History: *لَا رِضَاعَ بَعْدَ فَصَالٍ وَلَا يَتِمُّ بَعْدَ اخْتِلَامٍ* (No breastfeeding after breastfeeding and no orphans after baligh).<sup>49</sup>

In responding to the challenges of modernization, codification of law is needed in order to achieve legal certainty. The legal context in Indonesia, adoption is the authority of the District Courts and Religious Courts. The authority of the District Courts to judge based on Staatblaad 1917 Number 129, Circular Letter of the Supreme Court Number 4 of 1989, Law Number 6 of 1974 concerning Basic Provisions for Social Welfare, Law Number 4 of 1979 concerning Child Welfare, Law Number 23 of 2003 concerning Child Protection, Decree of the Minister of Social Affairs of the Republic of Indonesia Number 58/HUK of 1985, Decree of the Minister of Social Affairs of the Republic of Indonesia Number 13 of 1993 and Decree of the Minister of Social Affairs of the Republic of Indonesia Number 2/HUK of 1993.<sup>50</sup>

Like wise, the authority of the Religious Courts is prohibited from accepting cases if there are no statutory provisions that explicitly regulate them. The authority of the Religious Courts to

<sup>48</sup>Al-Naisābūrī, *Ṣaḥīḥ Muslim*, 7: 360 hadist no.2641.

<sup>49</sup>Al-Dakhīl, *Mausū'ah Fiqh 'Ā'isyah Ummu Al-Mukminīn Hayātuhā Wa Fiqhuhā*, 556.

<sup>50</sup>M Fahmi Al Amruzi, "Anak Angkat Di Persimpangan Hukum," *Masalah-Masalah Hukum* 43, no. 1 (2014): hlm. 113–14, <https://doi.org/10.14710/mmh.43.1.2014.107-114>.

handle adoption of children took effect after the issuance of Law Number 3 of 2006 concerning amendments to Law Number 7 of 1989 concerning the Religious Courts. In the explanation of the provisions of Article 49 letter a point 20 which reads: “determination of the origin of the child and the determination of adoption based on Islamic law”. Like wise, Law Number 23 of 2002 concerning child protection, Compilation of Islamic Law (KHI) articles 171 (h) and 209 paragraph (2), Regulation of the Minister of Religion No. 2 of 1987 and Fatwa MUI No.U.335/MUI/IV/82.<sup>51</sup>

Because the Religious Courts are inseparable from Islamic norms, there are principles upheld by the Religious Courts regarding adoption, as follows: *first*, that adoption does not make it a biological child and has the same rights as a biological child. *Second*, that adoption aims for the benefit of child protection and child welfare. *Third*, that adoption is only in the form of transferring responsibility from biological parents to adoptive parents in terms of life maintenance, education, and so on. *Fourth*, that adoption is carried out on the basis of helping, especially neglected, poor and orphaned children. Islam recommends paying attention to abandoned, poor and orphaned children. *Fifth*, the prospective adoptive parents must share the same religion as the adopted child candidate. *Sixth*, adoption must not break the lineage with the biological parents or cut the blood relationship between the adopted child and the biological parents. *Seventh*, adopted children with adoptive parents do not inherit each other, they only have a legacy mandatory legal relationship from the inheritance of their adoptive parents, because the position of adopted children cannot be biological children, adopted children whose parents are not clear are considered like their own siblings. *Eighth*, that between adopted children and their adoptive parents are not muhrim so they still have to maintain their genitals.<sup>52</sup>

Based on the above principles, the Religious Courts as the only institution that has the right to determine the status of adopted children, actually also pay attention to legal protection for adoption. If we look at the eighth point above, ‘that between adopted children and their adoptive parents are not muhrim so they still have to keep their genitals’, based on the habits of family life in Indonesia, no one can guarantee that they have to keep their genitals in the home (private). There must be an extra careful attitude to carry out this command, especially Muslims guarding their genitals at home.

In order to carry out fresh *ijtihad* in the ideas of progressive Modern Islamic thought, at least *ijtihad ‘Ā’isyah* which allows a child who is almost over age to breastfeed his adoptive mother as

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<sup>51</sup>Amruzi, 111–12.

<sup>52</sup>Kharisma Galu Gerhastuti, Yunanto, and Herni Widanarti, “Kewenangan Pengadilan Negeri Dan Pengadilan Agama Dalam Pengangkatan Anak Yang Dilakukan Oleh Orang-Orang Yang Beragama Islam,” *Diponegoro Law Journal* 6, no. 2 (2017): 8–9.

a *mahram* can be an opportunity to be implemented so that the problem of maintaining the genitals between adopted children and adoptive parents is lost, because his status has become *mahram*. But the challenge in the future, technically the ability to breastfeed it is not meant by direct feeding. However, it must be understood that breastfeeding is carried out by the adoptive mother or another sister, and then the child drinks it until he is full.

Surely, every *ijtihad* offered is not entirely true. The weakness of this *ijtihad* 'Ā'isyah, did not explicitly set the age limit for adopted children who were allowed to be breastfed. The events of Salim in the narration of 'Ā'isyah were estimated to have reached 5 years. Establishing this age limit requires a separate *ijtihad* to anticipate the absence of immorality between adopted children and their adoptive parents if breastfeeding is also justified when the child has already been *baligh*. Legal consequences related to *maram* due to breastfeeding (*radhā'*) in modern times are very important in the environment of household, in the aspect of worship, such as; touch during ablution, the situation of the Hajj journey that requires a *mahram*, as well as other aspects of *mu'amalah*.

## CONCLUSION

From the above discussion, the authors concluded that the methodological aspects used by 'Ā'isyah in the fatwa were based on the Koran and *Hadith* which can be used as evidence. The interpretation of the verses of surah al-Baqarah, verse 233 and al-Ahqāf, verse 15 indicated the period of primacy of breastfeeding the child, not in the period of feeding that causes *mahram*, according to the interpretations of other Prophet's close friends. The *hadith* regarding the events of Salim can be applied generally (*'am*). That independent *ijtihad* 'Ā'isyah which suggested that a child who was nearly mature (*baligh*) can become *mahram* with a woman who is breastfeeding him and must be understood with the principle of *ihtiyāt* (prudence) which is technically understood by breastfeeding through a container by a foster mother or the other sisters of that adopted mother, then the child drank it until it was full. Although the opinion of 'Ā'isyah was conflicted among the *Sahaba* and *Jumhur ulama*, it has the opportunity to act as legal protection for the habits of family life in Indonesians who cannot guarantee that they have to keep their genitals at home. The weakness of this *ijtihad* 'Ā'isyah was that there was no explicit stipulation on the age limit for adopted children who were allowed to be breastfed, and in fact, it takes a way of *ijtihad* in setting this age limit. Currently the Religious Courts are one of the institutions that have the authority to confirm the age limit of adopted children who are allowed to be breastfed, because the life of Indonesian people still use the habit of breastfeeding their children to other people.

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