



Islamic Law Codification: The Friction on Authority of Islamic Law Establishment

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Abstract

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This paper is intended as a historical research study on renewal business through technical codification of Islamic law (Taqnin) as well as theoretical implications of the legislation (Tashri') of Islamic law through the political authorities called parliament. The authors conclude that taqnin and tashri' as an instrument of reform in Islamic Law is not something new from if analyzed from a historical perspective. This has been initiated in the past at least by Daulah Abbasiya in the Second Century Hijriyah or Eighth AD, but failed because of a conflict between the political authority (umara) and religion (ulama) in fighting authority of the establishment of Islamic law. This issue over and over again when codification movement and legislation of Islamic law in the modern era has theoretically implicated and it is a rare phenomenon that should be more deeply considering the renewal of Islamic law which is ongoing it contains at least one millennium old historical value.

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INTRODUCTION

LAW Reform is one of the main agenda on legal developing especially in Indonesia. Ideas of manifestation of that reform have prompted the need for renewal of thought development that questioning how Islamic Law response to the challenges of changing times, especially the Islamic world itself. But this effort is not been easy as said, considering how difficult of the challenge at the practical and conceptual level.

In the modern era a number of efforts to reform Islamic Law has been done to remodel and reconstruct the classical jurisprudence that has been established both at the level of substantive material—such as legal methodology (*usul al-fiqh*) as well as the formal procedural aspects. Fazlur Rahman is perhaps one of the forefront of the effort to reform the methodology of Islamic Law with the theory of motion of the multiple (*double movement*). The theory proposed jurisprudence and its hermeneutic, according to Rahman Islamic Law will only be renewed if the Islamic Jurist back in the aspect of normative and historical.²In any process of *itihad*, *Mujtahid* should make every effort to understand the arguments of Al-Quran and Hadith relevant problems faced, in understanding the normative aspects of the Quran and the Hadith, he should be back on the circumstances that accompany on the way down and release of Al-Quran and the Hadith. And at the same time the circumstances were then compared to contemporary circumstances confronting the *Mujtahid*. Thus the results of *ijtihad*/renewal of the law will be in accordance with the situation and needs of today's society, but at the same time doing justice to the law in the past.

Besides the methodological problems, these reform efforts also touched on the problem of “formal-procedural” through the idea of codification and the promulgation of Islamic law (*sharia*) into positive law. Starting with the release of Book of the Civil Code of the Ottoman Empire (*Majallat al-Ahkam al-Adliyyah*) in 1869, the process of codification and promulgation has become a phenomenon in the effort to reform the law in the Islamic world.³ Indonesia is not exempt from the phenomenon, after the issuance of Islamic Law Compilation through Presidential Instruction No. 1991, the codification effort and the promulgation of Islamic law is continually happen until today.⁴

During this attention, the codification and formalization of sharia law to become more positive on the political aspects of the legal suppression

² Akh Minhaji, 2013, *Sejarah Sosial Dalam Studi Islam*, 2013, Yogyakarta: Suka Press, pp.16-18.

³ See, N.J Coulson, 1964, *A History of Islamic Law*, Edinburg, pp.124-150.

⁴ Other important codifications is High Court Decree (Perma) No. 2 of 2008 concerning to Compilation of Sharia Economic Law and other laws and regulations such as Law No. 1 of 1974, Law No. 21 of 2008 concerning to Islamic Banking, Law No. 23 of 2011 *jo*. Law No. 38 of 1999 concerning to Zakat Management, and Law No. 41 of 2004 concerning *Waqf*.

especially in the context of political legislation. Whereas in the conceptual thing, there was a problem that no less complicated whereby when an effort to reform Islamic law is pursued through a process of codification (*taqnin*) and the enactment of sharia as the law through the process of legislation and regulation is actually a shift of authority from the law-making from *fiqh-ulama* (religious authority) the *qanun*-State authority (political authority). From this point of debate at the level of political issues and legislation is just a derivative of problem between the relationship between the authority of the *ulama* (*fuqoha*) and state authorities in establishing Islamic law.

This paper is intended to review the implications of the relationship between the *ulama* and the state after the codification and promulgation technique chosen as a way to renew Islamic law. In the discussion later many more Authors used some approaches in the analysis of social history.⁵ From these efforts will we be able to reassemble the record the history of the establishment of Islamic law in the context of global and local to then be withdrawn benefits not only for academic interest but also practically can help legal experts in the business in the future formulation and reform in Islamic law.

LAW AND SHARIA: PHILOSOPHICAL CONTEXT

BEFORE discussing further the issue of Islamic law reform efforts through the legislative process, there are some questions which quite a “tickle” very basic yet to be answered. The first question is what is meant by Islamic law? Can “Islamic law” is amended; and/or whether “Islamic law” that has been changed can still be described as “Islamic law”? This problem can only be addressed if we rethink what we mean by the Islamic Law.

In the approach philosophical, the term of Islamic Law is referred to the terms of *Islamic Recht* (Dutch), *Islamische Recht* (German), *Ley Islamica* (Spain), *Droit Musulman* (French), *Islamic Law* (English), *Islam Hukuku* (Turkish), and many other names in various different languages.⁶ But, this terms became a bit difficult when try to be referred into Arabic terminology. Most people use the term *Shari'ah* while the rest use the term *Fiqh* to indicate this kind of law. Some experts such as Abdul Wahhab Khallaf, Muhammad Yusuf Musa, Muhammad Mustafa Salabi, or Muhammad Sallam Madzkur were not always the same in defining *Sharia* and *Fiqh* in which sometimes one another in turn can be broadly defined and narrow. For the layman it

⁵ With high respect, this paper inspired by Minhaji's Perspective from his book concerning to the method of social historical studies and the thought that emphasized how important historical analysis to understand many problems in Islamic Law.

⁶ Those terms more proper than previous terms used, that conceptually wrong such as *Muhammadan Law* or *Mohammedaansche recht*

certainly confused and give considerable implications in the discussion of the practice of Islamic law as a whole.

Comparative legal studies experts indicated the problem above as a “terminological trap” that one of the causes occurs due to limited vocabulary as the equivalent of a foreign term to use translators into their native language. The only way to avoid such trap is to try to understand the definition of the absorption elements in accordance with the original language.

Minhaji as quoted of Al-Jurjani’s opinion in his *al-Ta’rifat* provide a definition language (*lughatan*) shari’a as *al-thariqah al-mustaqimah* (the straight path), whereas *al-fiqh* is *fahm* (understanding) or *al-‘ilm* (knowledge). In terms of definitions of the terminology (*ishtilahan*), Muhammad Mustafa Salabi defined sharia as the “rules of God’s servants in order to become good people who do good deeds associated with the act, *aqidah* and morals”. As for the definition of *Fiqh* is recognized as “sciences that related to the rules God set forth by the proposition in detail.”

Definition above distinguished *Shari’ah* and *Fiqh* from the existence perspective, that Sharia is eternal dimension which means it will never change throughout the ages, while *fiqh* as a science or legal methods currently on the dimensions of temporality. Meanwhile, in terms of shape Ashidiqie put sharia law in *abstracto* while jurisprudence as the law in *concreto*. Thus the limitations of Indonesian terms of Islamic law at one time can mean *sharia*, but in another context could also mean *fiqh*. To avoid any misunderstanding on defining both terminologies, the author emphasized that the scope of the definition of law reform in this paper is the terminology of Islamic law in the context of *Fiqh*.

ISLAMIC LAW: PRE-CODIFICATION

IN THE ANALYSIS of historical, prophetic treatise that brought the Prophet Muhammad in the early phase of the development of *da’wah* is not intended to establish a separate legal system; it is rather the teaching load of the system of ethics and values guiding people about what to do and what should be avoided in order to account for anything he did on the day of reckoning later.⁷ It can be analyzed from the versions (*al-ayah*) in Quran which contain the obligation (*al-ayah al hukumah*) is more less that other problems. In establishing the law, basically Muhammad is quite accommodating in the element of customary law (*urf*) of the pre-Islamic Arab nation which is not contrary to the *sharia*. At this time the need for the establishment of a separate legal system is not seen as an urgent necessity considering any legal issues facing the *ummah* when it can be directly asked of the Prophet Muhammad.

⁷ Joseph Schacht, “Problem of Modern Islamic Legislation”, *Studi Islamica*, No.12, 1960, p.106.

Islamic law as a legal system of its own (*sui generis*) begins compiled at the beginning of century of 7thM and reach maturity in the 9th century AD, this period is often referred to as the establishment of Islamic law (*formative period*).⁸ In this period of Islamic law it is not seen as a product of positive law enacted by the legislature as the mainland European legal systems, but not also a model of a legal system that is formed and attached to the doctrine of *precedent* (case law) as *the common law* system. Based on the constituent authority of Islamic law is more appropriate to be viewed as legal scholars (*jurist law*) for the material and legal resources to the material created and compiled by the *fuqoha* or *mufti* during the *formative period*. One thing is for sure that they are not member to any professional group or formal state functions as a legislative institution we know today.

Nowadays, Islamic Law manifested as a *fiqh* that produced from a thinking and *ijtihad* of *ulama* based on the sources of revelation and *ra'yu* (reason), and *Fiqh* itself consists of written sources in the form of books of *fiqh* (*rechtboek*), the methodology of law (*ushul fiqh*) and determination of the authorities and law enforcement authorities. In its legal methodology, Islamic Law guided by revelation contained in the Quran and hadith as a source of primary law, while approaches *ra'yulike qiyas* (deductive analogy) and *ijma'* (consensus of the *ulama* of every *mazhab*) is a complement with still refer to a main legal sources (al-Quran and hadith).

The earlier *Ulama* on formulating the written sources have made some effort to prepare the various issues and the legal stipulation in the book serves as a practical reference book of law for the *qadi*. Hanafi *Madzhab* of law is perhaps the most likely group to compile the book of the law. In this effort Imam Abu Hanifa formed a consulting council in the city of Kufa. Led by Imam Hanifa himself, this involves a team of 40 experts who mastered *fiqh*, *tafsir*, hadith, grammar, and other branches of science. In this institution, individual opinions discussed and combined with deliberation. It also implemented a set of rules that ensure law and jurisprudence to be coherent, and clear up eventually formed a fairly comprehensive book of the law at that time, but unfortunately the manuscript never reached us. In the meantime we also know the Maliki *Madzhab* of law book "al-Muwatta" or law book from Minhaj Al-Thalibin from Syafi'i *Madzhab* of composition Imam Nawawi.⁹

This method does not give way to political authorities (*umara'*) to control the formulation process of law-making despite various efforts repeatedly made to influence it. This is why it is not uncommon tension between *ulama* and *umara'* at that time. In general, leading *ulama* keep a distance and set strict limits in conjunction with the authorities. This effort is

⁸ Aharon Layish, "The Transformation of The Sharia", *Die welt des Islam, New Series*, Vol.44, 2004, p. 86.

⁹ Ahmad Ibrahim, 1993, *Perkembangan Kodifikasi Hukum Islam di Malaysia*, Bandung, Mizan, p. 91.

intended solely to prevent derogated an independence of *ulama* against the political authorities in establishing the law.

In the limited areas of political authority through *siyasa shar'iyya* function is only authorized to assign administrative decisions or *qanuns* in matters of taxation, land and *jinayah* problems in setting *ta'zir*. In addition *tauliyah* on the basis of political authority also has jurisdiction in matters of appointment, competence cases and practical problems in the administration of justice. Nevertheless overall the concept is still built on a foundation of theocracy are subject to and limited by *syari'ah*.¹⁰

The interesting thing to note is some attempt was made political authorities to extend their authority in law enforcement. Ibn al-Muqaffaa State secretary minister at the caliph al-Mansur (140H/757M) had suggested the need for codification of law through an administrative decision of the caliphate that will apply throughout the territory *daulah* Abbasiyah in those days to create uniformity of law and its enforcement in the court. This idea has a futuristic passion to overcome the gap between *madzhab* of law given at the time of Islamic law is still in its formative phase (formative period).¹¹ Although the concept was intended only to authorize technical procedural for the authorities in the enforcement of law and obviously did not go to the substance of the formulation law, but this idea also was widely rejected by *ulama* with various considerations. If it is accepted, the Islamic law will develop entirely different with what known today. Presumably, as stressed by Schacht that the thinkers of classical Islamic law were maintained strict limits and refused to close on power. It is most feared by *ulama* at that time surely is a concern authorities and their independence in formulating the law.

Another quite successful effort is perhaps a decision on the case expired. Previously, according to *fiqh* the authority to hear *qadi* only restricted by region and types of cases. Restrictions for its expiring (*daluarsa*) case after Sulaiman I introduced in 1550 instructed the *qadi* not to hear cases that the time has over from 15 (fifteen) years since the events that are legally take place, that's when the uniformity of the time limit expired widely accepted. Interesting turns the command does not work and binding for the *qadi*.¹² The decree will take effectively binding in court after the request ordered Shaykh al-Islam Abul-Suud to provide a *fatwa* which essentially stated that on the basis *Tauliyah*, as the caliph who had raised the *qadi*, and then it becomes a necessity for the *qadi* in order to implement Islamic law to obey the order/decision of the caliph.¹³

¹⁰ Joseph Schacht, 1964, *An Introduction to Islamic Law*, Oxford, p. 54.

¹¹ Coulson, 1964, *A History of Islamic Law*, Edinburg, p. 52.

¹² Joseph Shacht, *Op.Cit.*, p.102.

¹³ Daniele S.Lev, 1986, *Peradilan Agama Islam di Indonesia* (tran.Zaini Ahmad Noeh), Jakarta, Intermasa, p.1.

Even though not all positive legal products produced through the legislative process, the classical period up to the end of the Middle Ages, the *fiqh* established by the *ulama* manage almost all aspects of life of *ummah*. As a practical sciences is almost no area that is not entered by *fiqh*. As a science, *fiqh* is synonymous with *fuqoha* and *fuqoha* synonymous with *alim-ulama*. Considering how *ulama* has an important role in the establishment and administration of the Islamic legal system, should we be surprised if it has been argued that the establishment of the authority of Islamic law is an area of the *ulama* or a *religious authority*.

CODIFICATION OF ISLAMIC LAW

CODIFICATION of Islamic law is a phenomenon arising from the impact on many changes in socio-cultural fields, both of which occurred in the internal and global Islamic *Ummah*. In addition contiguity of Islamic civilization in the Middle East with the progress and the idea of western thought in the mid-19th century agenda helped stimulate reform in Islamic law.¹⁴The idea of the West most influential here include for example the concept of *the nation state*, *the rule of law* and *legal positivism*. Third idea of thinking has shaken the joints basis of the medieval Islamic legal heritage.

The concept of *the nation state* led to the idea that the legal distinction on the basis of religion is no longer tenable and the only distinction is the basic law of citizenship. Therefore, the law must be made in the national scope which applies to all citizens without regard to ethnicity, religion, race and so on. This makes the theory *credo, receptio in complexu*, as well as other theories which basing the enacting law to someone in accordance to his or her religion was lost basic ground mind.

The concept of *rule of law* makes the separation of powers, including the legislature as an institution adopted a law maker is seen as a necessity. Model Caliphate and *Daulah* assessed govern their absolute (despotic) when it began to lose legitimacy and support. While in the school of philosophy of law, the validity, legality and legal binding power is no longer determined by the religious authorities (theo-centric), but the law will only be valid and binding all have enacted into state law (statutory law) as the doctrine of legal positivism.

To realize the agenda of legal reform, the Islamic thinker faces two options, *first* whether it should remain on track classic *fiqh* with all its rigors, or *second*, Muslims have to turn westward to adopt the model of the formation of the law that is more advanced, but contrary to the concept of *fiqh* during which they practice, that in the development of most of the Islamic countries prefer the latter as an instrument to renew Islamic law.

¹⁴ About the effect of this friction, see Lothrop Stoddard on *The New World of Islam*.

In the law-making process and then adopted the institutional authority of the legislative power to run the codification and promulgation techniques (*taqnin*). Parliament then formed to merge *shari'a* law into the country through the formalization of sharia law into the positive (*tashri*). Book of the law then enacted it to the public, accompanied by the authority to impose sanctions for any infraction. No doubt the urge to use the technique of *tashri*, these include the magnitude of the desire to make a change in law to address community needs while remaining within the framework of Sharia as well as modernization measures as the influence of western civilization.

Law codification in Islamic world was firstly initiated by the government *daulah* era Ottoman Turkey in the mid-19th century AD. Law reform at the time started with some codifications of certain areas of *fiqh* from the West to be applied in the implementation of sharia through enactment these rules into laws and regulations. Gradually the practice of the law codification entered and changed some certain provisions that were previously complied with provision of *fiqh*. One of the most important efforts in the codification of Islamic law is the imposition *Majallat al-Adliyah* (1869-1876) accepted Islam as the Book of Civil Law.¹⁵ In addition to adopted western model of codification, the formulation of legal *Macelle* used the approaches from *Madzhab* of Hanafi *e.g* eclectic techniques (*takhayyur*) with its consideration of a more accommodating on providing a legal need to the people and State.

Since the beginning of the 20th century codification efforts have been expanded not only in certain issue, but also into the midwife-area of family law and legacy and also problems in the area of *waqf*. The enactment of Family Law of Ottoman Turkey in 1917 has pushed a similar codification in many countries in the Middle East and northern Africa. The main idea of law reform was driven by the influence of shift in the pattern of familial Arab nation into a *nuclear family* and the strengthening of women's rights in the area of family law. In the context of Indonesia's efforts to formalize sharia perhaps only started in half of the mid-20th century through the renewal of marriage laws, regulations of *waqf* practices, regulation of *zakat* management, and the establishment of Islamic banking regulation. The most important legal codification efforts including through the establishment of the Presidential Instruction No.1 of 1991 on the Compilation of Islamic Law and High Court Degree (Perma, *Peraturan Mahkamah Agung*) No.2 of 2008 on Law Compilation of Islamic Economics.

In general practice the *tashri* using juridical foothold in the government's authority to establish laws through *siyayas har'iyaa*. While the technique *istibant* or formulation of the law much used many accommodative approaches on facing the changes such as the approach eclectic (*takhayyur* and *talfiq*), approach *maslaha* (public interest) as well as the efforts

¹⁵ In Turkey language is called *Macelle*

of reinterpretation of the Al-Quran and As-Sunna as introduced Fazlur Rahman (called also neo-*ijtihad*).

Analyzing this phenomenon, it can be divided into two views whether codification of Islamic law can be seen as a form of renewal and positive developments on sharia development practices or not. This opinion is based on the view that the forms of these changes are manifestation of sharia vitality and its ability to renew its legal construction in internalization the spirit of progress.

Most others are quite skeptical and see that actual practice is actually out of the codification of sharia principles and lead to a process of secularization of the Islamic world. In this view *tashri* practices are not only seen as a problem in determining the formal procedural law of Islam but have further implications to the authority of the clergy in the determination of the law, including the legal methods used. Mechanical eclectic (*takhayyur* and *tafiiq*) as well as the dominant approach in the determination *maslaha* law is one of the main reasons for the refusal.

Rate as the practice of secularization can be seen for example in the implementation of *the Tunisian Code of Personal Status* of 1958 which regulates the legal issues of marriage and legacy in Tunisia.¹⁶ In Article 18 of the law stipulates the prohibition of polygamy in absolute terms by the sanctions in prison and fines for violators. This rule has come under high contradictory in the world of Islam at that time even until now because it is contrary to *sharia*. But in terms of the Tunisian government's own use of Islamic law proposition foothold in setting the rules by basing that polygamy require the husband's obligation to be fair, while perfect justice that cannot be realized by humans. Because the legislator believes that, in principle, basically Quran forbids polygamy.¹⁷

Meanwhile techniques such eclectic and *tafiiq takhayyur* criticized by classical scholars because it seemed opportunistic in law establishment. *Takhayyur* practice can be seen in the rules of *The Muslim Personal Law Application Act 1937* which regulates civil matters for Muslim in India. In this Act declared marital problems and divorce for the Muslim community in India is set according to the *Madzhab* Hanafi of *Fiqh* because most of Muslim in India adopted *Madzhab* of Hanafi. Considering that *Madzhab* stated that divorce which initiated by women are very difficult even almost impossible, then these laws prohibited any kind of divorce initiated by women. As excesses, if a woman wanted to divorce the only way is to opt out of the religion of Islam and thus the marriage broke up because *fasakh*. Since then the social impact of this law resulted in many India Muslim women who opt out of the religion of Islam only for the benefit of the reasons of

¹⁶ Tahir Mahmoud, 1972, *Family Law Reform in the Muslim World*, The Indian Law Institute, New Delhi, pp.35-38

¹⁷ Actually there is Hadith stated that the fair is not include in the rights of law, but Tunisia Government was not accepted this hadith, and this problem also can be compared with law No. 1 of 1974 concerning to the marriage.

divorce. Seeing these bad symptoms, Ashraf Ali Tsanawi in 1939 then initiated the birth of *The Dissolution of Marriage Act* governing divorce with techniques *takhayyur* then move from the *madzhab* of Hanafi into Maliki.¹⁸

In general *takhayyur* technique is rejected by *ulamamadzhab* except *madzhab* of Hanafi. It is based on that opinion contained that in one *madzhab* has its own distinct ground that attempts to “pick” one opinion with other opinions from different *madzhab* is in the other said damaging the overall foundation of the legal construction of the *madzhab*.

The same thing happened in *maslaha* approach (public interest) which by some *fuqoha* called the foundation “*maqasidshari'a*” that had not previously been widely accepted as the basis for determination of the law then turned and expanded its use by legislators and shifting approaches to *qiyas* (analogy deductive) previously more widely accepted. In practice *maslaha* approach has now become a pure concept basing on expediency in setting positive law. On this side of the will of the people seemed to have been the source of its own law. In the Indonesian context separate regulation regarding pregnant mate in Chapter VIII Section 53 and 54 Compilation of Islamic Law is perhaps an illustration of the practical use of this *maslaha* approach. In a more extreme view, Hallaq see more *maslaha* use as a tool of secularization of Islamic law rather than as a means of reform in Islamic law.¹⁹

The Response of *Ulama* on Codification and Promulgation of Islamic Law

A different attitude that cannot be met among the *ulama* is a problem of reception of codification practices against sharia Muslim country. On the one hand, the *ulama* conservative, as long as they have the freedom to express their views there is a tendency to reject and fight for the implementation *tashri* which is seen as a form of secularization of Islamic law. While on the other hand the *ulama* compromise supports the *tashri* techniques' in an effort to reform Islamic law with varying degrees of acceptance and even up to offer specific proposals for the legislative process.

There are several reasons why *ulama* have a tendency to make cooperation between the State and the *Ulama*. Among the problems of relationship between the regime authority and *ulama* both in terms of its formation and the degrading position role of social, economic and political. In view of the *ulama* moderate, the option to be outside and against the authority of the ruler is vanity remember it actually makes them face *vis a vis* on the

¹⁸ See HM. Atho Mudzhar, “Pengaruh Faktor Sosial Budaya Terhadap Pemikiran Hukum-Hukum Islam”, *Mimbar Hukum*, No.4 of 1991, Jakarta, Al-Hikmah and Badilag, p.25; see also Ira M.Lapidus, 1989, *A History of Islamic Societies*, UK, Cambridge University Press, pp. 698-699.

¹⁹ Hallaq, *The Transformation of Islamic Law* (7); also on *Legal Theories*, 214.

control and supervision of the state, another option to separate religion and state explicitly as in Turkey could not be a better alternative. Additionally reform law reforms are not inherently as well as a form of anti-religious ideology. Even the *ulama* it could get much greater benefit when collaborating with the State as it would make them better understand the demands of the state on one hand at a time coloring in accordance with the legislation process and scientific belief that they control. For the case in Saudi Arabia, for example, the collaboration of *ulama* and *umara* would have a theoretical foundation by basing on the opinion of Ibn Taymiyyah (1328) which teaches that the imposition of Islamic law it relies upon the authority *umara'*, while the legitimacy and recognition of the existing law on the cleric.

CONCLUSION

POST LAW codified and legalized in the Muslim world since that time there is a change of roles between the *ulama* and the State in applying the law. Technically, procedural change is the transition of *religious authority* into a *political authority*. The change makes the relationship *ulama* and the State is no longer the same as the previous period and the balance between them is decisive for the achievement of *maqasid syariah*. In this connection, the provisions of the enactment of sharia determined and depend on the legislative process by the political authorities, while a legitimate basis for compliance with these provisions is determined how much the authority of *ulama* and sharia law be accommodated in the country. It is no coincidence if in various problems above was we found a connecting line between the past and the present. The more deeply and objectively we review the originality of the historical aspects of Islamic law, the more benefits we can also pull in resolving the problems that we are facing today.

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