Ijtihād Maqāṣidi

The Interconnected Maṣlaḥah-Based
Reconstruction of Islamic Laws

A. Halil Thahir

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Tradition | Jilbab | Muslimah Clothing | Al-

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Shari'ah | Islamic Law | Religion

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1

INTRODUCTION

It is commonly understood that Islam came into existence with various dimensions,[1] including its legislation which aims to bring as many possible benefits for mankind, both in this world and hereafter.[2] Al-Ghazālī (d. 505 AH) said that Islam is concerned with five kinds of virtues[3] which, in *uṣūl al-fiqh*'s (Islamic jurisprudence) terminology, are called *al-kulliyāt al-khams* (the five universal). They include protection of religion (*al-dīn*), life (*al-nafs*), reason (*al-'aql*), descent (*al-nasl*), and property (*al-māl*).[4] Given the importance to protect the five *maṣlaḥah*

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[1]In general, Mahmud Shaltut classifies the teachings of Islam into two dimensions: *aqīdah* and *sharī'ah*. He calls the *aqīdah* dimension of the Qur'an with the term *al-imān* (beliefs) and the *sharī'ah* one with *al-'amal al-salih* (good deeds). According to Shaltut's classification, Islamic jurisprudence falls under the category of *sharī'ah*. See Mahmud Shaltut, *al-Islam 'Aqidah wa Shari'ah*, (n.p: Dar al-Qalam, 1966), pp. 11-13.

[2] It means to say that the axiology of Islamic jurisprudence is by definition theo-anthropocentric because it is oriented to the fulfillment of divine (heavenly) and human (worldly) well-beings altogether.

[3]Al-Ghazālī further said that these five well-beings do not exclusively belong to Islam, but also to all religions *(millah)* that aspires to the well-being of human-kind. Therefore, al-Ghazālī said that there is no single religion that does not forbid disbelief, killing, fornication, and consumption of anything that can impair the dysfunction of the reason. See Abu Hamid al-Ghazali, *al-Mustafā min 'Ilm al-Uṣūl*, Vol. 1, (Bairūt: Dār al-Fikr, t.th.), p. 286.

[4]Al-Zuhaili Wahbah pointed out that the Mālikiyyah and Shāfi'īyyah scholars listed the five main principles *(al-uṣūl al-khamsah)* in the following order: religion, life, reason, lineage, and property. Meanwhile, Ḥanafiyyah scholars listed: religion, life, lineage, intellect, and property. Similarly, al-Būṭī said that the

(the objectives of Islamic law), al-Shāṭibī (d. 505 AH) insisted that mujtahids must know well and integrate *maqāṣid al-sharī'ah* (the objectives of Islamic law) into their intellectual endeavors (*ijtihād*).

Before al-Shāṭibī (d. 790 AH), the study on *maqāṣid al-sharī'ah* serves only as one instrument in figuring out the *'illat* (the basic cause) of law when a legal analogy (*qiyās*) should be conducted to decide a legal status unknown to the *naṣṣ* (al-Qur'an and Hadith). The use of *maṣlaḥah* in search for the basic cause of the law (*masālik al-'illah*) is limited only to the cause that is acquired by reasoning (*'illat ijtihādī* or *mustanbaṭah*), not that is is explicitly mentioned by the texts, such as al-Qur'an, Hadith, and ijmā'. In other words, the study on *maṣlaḥah* before al-Shāṭibī (d. 790 AH) is confined to the realm of *qiyās*.

Al-Shāṭibī (d. 790 AH), on the other hand, suggested that the whole process of ijtihād, whether or not directly linked with the text, should consider maṣlaḥah as the "spirit" of the objectives of Islamic law. He further explained that an ijtihād aligned to the objectives of Islamic law (*al-ijtihād al-maqāṣidī*) should fulfill four aspects.[5] Firstly, it should be based on the text and the law that is contained therein, as well as the objectives of Islamic law (*al-nuṣūs wa al-aḥkām bi maqāṣidihā*); secondly, it should compromise the universal and general messages with the partial evidence (*al-jam' bayn al-kulliyāt al-'āmah wa al-khāṣah*); thirdly, it should be based on the principle of inviting the good and refusing the bad (*jalb al-maṣlaḥah wa dar'u al-mafāsid*); fourthly, it should predict the things that might happen in the long term (*i'tibār al-ma'ālāt*): whether the legal decision to be made will lead to the realization of goodness (*maṣlaḥah*), or supposedly will cause badness (*mafsadah*). With regard to the last aspect, al-Shāṭibī (d. 790 AH) said that

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ijmā' of 'ulama set up *al-uṣūl al-khamsah* according to the al-Ghazālī's order, i.e. religion, soul, intellect, lineage, and property. See Muhammad Sa'id Ramaḍān al-Būṭī, *Ḍawābiṭ al-Maṣlaḥah fī al-Sharī'ah al-Islāmiyyah*, (Bairūt: Muassasah al-Risālah, 1982), p. 250.

[5]Ahmad al-Raysuni, *Nazariyyat al-Maqasid 'Inda al-Imam al-Shatibi*, (Bairut: al-Ma'had al-'Alami li al-Fikr al-Islami, 1995), pp. 362-384.

the Prophet Muhammad had been reluctant to kill the hypocrites in fear that he would be considered in the future as a killer of His companions.[6]

In fact, al-Shatibi's breakthrough concept of maqāṣid al-sharīah still has limitations in the study of Islamic jurisprudence. Like al-Ghazālī (d. 505 AH), the pioneer of maqāṣid, al-Shāṭibī put forward partial accounts of Islamic jurisprudence by limiting himself to the aspects of the five universals (religion, life, intellect, lineage, and property), without making any linkage of each aspect. In addition to relying heavily on the five universals (*al-kulliyāt al-khams*), Shāṭibī's ijtihād maqāṣidī talked maṣlaḥah only in terms of its significance levels, i.e. *maṣlaḥah ḍarūriyyāt* (primary needs), *maṣlaḥah ḥājiyyāt* (secondary needs), and *maṣlaḥah taḥsīniyāt* (tertiary needs).

Consequently, such a partial approach leads also to partial understanding of Islamic jurisprudence. For instance, the obligation of five times daily prayers is seen as linked only to the benefit of religion, nothing to do with that of life, reason, descent, and property. Similarly, the obligation to cover the aurat (certain parts of the body), is considered merely as a preventive teaching to avoid fornication which, in the study of maqāṣid al-sharī'ah, falls under the category of the protection of the descent (*al-nasl*). Thus, it is not too surprising that the groups with the banners of "Sharī'ah" enforcement, either from religious institutions such as the Majelis Ulama Indonesia (MUI), and local regulation (Perda), have invited controversy among the public. The most current and most controversial example in the media was the Regional Regulation (Perda) of the Lhoksumawe City of Aceh which bans straddling for women while riding a motorbike.[7] This regulation concerns only with the benefit of descent (*al-nasl*), i.e. a good behavior by which sexual desire from man can be avoided. Meanwhile, the aspect of the protection

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[6]Ahmad al-Raysuni, *Ibid.*
[7]http://www.republika.co.id/berita/nasional/politik/13/01/08/mgaz85-larangan-duduk-mengangkang-bukan-syariat-islam, accessed February 22, 2013.

of life (*al-nafs*) lists at the top of the hierarchy of the five universals than just that of modesty. There is also a number of other Islamic legal decisions in the books of Islamic jurisprudence, both on worship (*'ibādah*) and socio-economics (*mu'āmalah*), which turned to be void of interconnected maṣlaḥah.

One example is in fiqh on women, such as on dressing and polygamy. The absence of the interconnected maṣlaḥah-based paradigm in the two cases has resulted in the subordination of women and, therefore, legal rules which neglects women's natural rights. It is obligatory for women to cover their entire body except palms and face. Indeed, there are some scholars who argued that a woman is allowed only to reveal one of her eyes in the presence of men other than her mahram. They argued that because women are the reasons behind the rampant adultery, they must be secluded and isolated from association with men in order that the latter is not swayed and fascinated by their beauty and, therefore, is not committed to adultery. Such maṣlaḥah, in the study of maqāṣid al-sharī'ah, belongs to the realm of protecting offspring (*ḥifẓ al-nasl*), and in the hierarchy of the five universals (*al-kulliyāt al-khams*) it sits in fourth position after religion, life, and reason, and one level above property.

In term of its strength, Abū Zahra considers the benefit of women Islamic dressing as *ḥājiyyat* (secondary), not *ḍarūriyyat* (primary), needs. In fact, as Nasaruddin Umar said, women Islamic dressing is taḥsīniyyat (tertiary), which can be subdued to *ḍarūriyyat* and *ḥājiyyat*. Thus, it is not an exaggeration when Muḥammad Shaḥrūr, a Syrian scholar, said:

> *"Indeed, ḥijāb is a private matter that a woman can determine for herself, without any pressure, intimidation, or terror. Al-Tanzīl al-Ḥakīm should not be reduced to referring to a woman who wears ḥijāb, and by which we call a woman who wears ḥijāb after she is not as going "back to religion", as if she was an*

> *apostate. Such reduction is an insult both to Islam and woman*
> *because it confines this great religion to only a piece of cloth."* [8]

The above-mentioned quote implies that, in Shaḥrūr's opinion, women are free to choose the types, models and designs of their dressing, as long as they can protect themselves from harassment. Dressing has nothing to do with religion. In fact, if someone was naked in front of her or his non-family (non-*muḥrim*), the punishment would be only social. It seemed that Shaḥrūr wanted to suggest, "it is too trivial to attribute dressing with religion; there are other things which are more important than dressing!" [9]

Therefore, Shaḥrūr holds that Muslim female dressing should not only be seen merely from the perspective of covering their bodies, as the Islamic clerics desired to. Rather, it should take into account another criterion, i.e. to what extent dressing will make a woman free from harassment.

Dressing will meet its best function when its designs, models, and desired colors follow tradition ('*urfiyyah*), contain aesthetic values or beauty (*jamāliyyah*). In Shaḥrūr's opinion, "appropriate" and "inappropriate" (*yalīq wa lā yalīq*) [10] are the standards to decide whether or not

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[8]Ibid., *Dirasat*, p. 327. There are other Muslim scholars who share the same opinion as Shaḥrūr's. Musda Mulia, for instance, pointed out that "we should appreciate and respect whatever women decided to choose in order that social harmony to be established. Sociologically, *jilbab* does not signify anything, nor it means a symbol of piety. A woman who wears a *jilbab* is not necessarily a pious one and otherwise. *Jilbab* is not identical with one's piety." See Siti Musda Mulia, "Memahami Jilbab dalam Islam" in *Psychology of Fashion Fenomena Perempuan (Melepas) Jilbab*, (Yogyakarta: LKiS, 2010), xiii.

[9]Shaḥrūr explained that the oversimplification of *hijab* into religious matters are due to some reasons, i.e. powerlessness *(al-'ajz)*, and more importantly patriarchal societies *(dhukuriyat al-mujtama')*, and discrimination of others on behalf of religion. Amid patriarchal societies, the *ulama*s (Muslim jurists) were also influenced by the patriarchal traps when formulating their legal products; in this case, a woman was treated as goods to be taken care of and controlled according to the preference of ulamas most of whom are male. Ironically, all these were done on behalf of glorifying women. See Shaḥrūr, *Dirāsāt*, p. 325.

[10]Ibid., p. 170.

dressing accords aesthetic values or beauty (*jamāliyyah*). A woman decides to restrict her freedom in dressing not because of religious demands, but of "appropriate"- or "inappropriate"-ness. Shaḥrūr also asserted that dressing has different aesthetic standards depending on where, when, and by whom it is worn. The aesthetic values of dressing are always changing and are subject to others' criticism. He gives the following example on how dressing has different standards of appropriateness and beauty:

> *In some societies it was found inappropriate for someone of the age of sixty years old, for instance, to wear red short pants and a purple t-shirt. However, such outfitcolorsmay be considered trendy and acceptable in other societies.[11]*

The aspect of tradition (*'urfiyyah*), Shaḥrūr said, is wider than aesthetics, because the former can restrict one's freedom of choice on something which has nothing to do with "appropriate" or "inappropriate", and beauty. Shaḥrūr illustrates that a widow who is on her waiting period and is religiously not allowed to talk about marriage, is "supposed" to dress according to the standards that her society is imposing on her. This provision, Shaḥrūr said further, has nothing to do with aesthetics.[12]

A study on Islamic jurisprudence based on interconnected maṣlaḥah (*ittiṣāliyyāt al-maṣāliḥ*) is necessary as it considers multi perspectives in its discussion. It is only by doing so that the word that the Prophet Muhammad was sent to bring flexible and tolerant teachings as well as grace to all human beings will become realized into this world.

This book attempts to answer two main issues: firstly, how does the interconnected maṣlaḥah-based ijtihād maqāṣidī work? Secondly, what are the implications of the interconnected maṣlaḥah-based ijtihād maqāṣidī on women's dressing?

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[11]Ibid.
[12]Ibid.

Discussions on *maṣlaḥah* (public interests), or precisely *maqāṣid al-sharī'ah* (the objectives of Islamic law), have been so far dominated by studies on the fathers of the concept of maṣlaḥah, such as al-Ghazālī (d. 505 H.), al-Shāṭibī (d.790 H.), and al-Tūfī (d. 716 H.). Among many works are Asafri Jaya Bakri, *Konsep Maqasid al-Syari'ah Menurut al-Syatibi dan Relevansinya Dengan Ijtihad Hukum Dewasa Ini*, (Graduate Program IAIN Syarif Hidayatullah Jakarta, 1994); Imam mawardi, *Fiqh Minoritas Fiqh al-Aqalliyat dan Evolusi Maqasid al-Syari'ah dari Konsep ke Pendekatan*, (Yogyakarta: LKiS, 2010); Ahmad al-Raysuni, *Naẓariyyat al-Maqāṣid 'Inda al-Imām al-Shāṭibī*, (Bairut: al-Ma'had al-'Alami li al-Fikr al-Islami, 1995).

However, these works fail to provide innovative, new discussions on the issue, such as how the concepts of maṣlaḥah proposed by those leading figures are developed into a concept of interconnected maṣlaḥah-based ijtihād maqāṣidī whose presence is supposedly able to bring certainty on contemporary legal problems in accordance with the rapidly changing times and sophisticated modern science.

This book is built upon the following theoretical framework. Noel J. Coulson said that Islamic law is divided into two sections: divine law and jurisprudence (laws of the *faqīh*).[13] While the former is related to the laws that are revealed by God and, therefore, are absolute, the latter are the legal products of human understanding and, therefore, are historical and profane.[14] Due to their historical and changeable natures, it is, therefore, imperative for Muslim jurists to take goodness or benefits into account when formulating their legal products. Nevertheless, it is im-

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[13]Noel J. Coulson, *Conflicts and Tension in Islamic Jurisprudence* (Chichago: The University of Chichago Press, 1969), p. 3

[14]Muhammad Arkoun said that Islamic teachings brought to us consist of two traditions: the first is "T" which refers to transcendental, enduring, unchangable traditions; the second is "t" which means the historical-cultural products of mankind, both passed by one generation to another generation or originated from the interpretations on the sacred textes. See Muhammad Arkoun, *al-Fikr al-Islami: Qira`ah 'Ilmiyyah*, transl. Hashim Salih (Bairut: Markaz Inha` al-Qawmi, 1987), pp. 19-20.

portant to note that the legal benefits that Muslim jurists have in mind should be measurable and within the parameters of the benefits that have been formulated by the Muslim scholars in the theory of maqāṣid al-sharī'ah.

Maqāṣid al-sharī'ah, which many researchers ascribed its peak to the creative hands of al-Shāṭibī (d. 790 AH), consciously or not, is nuanced by religious imagination (*al-mikhyāl al-dīnī*) and the religious, social, economic, and even political memories (*dzākirah*)[15] which are certainly different from current conditions and situations. It is inadequate to see the benefits in a professional world and fashion only from the eyes of the five universals (*al-kulliyāt al-khams*) which relies more heavily on levels of significance, i.e. *ḍarūriyyāt* (urgent, primary needs), *ḥājiyyāt* (secondary needs), and *taḥsīniyyāt* (tertiary needs); rather, it necessitates also the use of maṣlaḥah-based ijtihād maqāṣidī.

Al-Shāfi'ī (d. 204 AH) is one scholar who spoke the loudest in rejecting the use of reason in its various forms, either through istiḥsān or maṣlaḥah mursalah in excavating Islamic laws. Later scholars, such as al-Juwaynī (d. 478 AH) and al-Ghazālī (d. 505 AH), followed this thesis but then developed it into a concept of maṣlaḥah. Al-Juwaini (d. 478 AH) is considered as the forefather of maqāsīd. He brought forth the concept of ta'līl (causastion) in three categories: ḍarūriyyat, ḥājāt and maḥāsin. It is Juwayni's concept (d. 478 AH) that then inspires al-Ghazālī to formulate a new package of maṣlaḥah, namely maqāṣid al-sharī'ah in the framework of al-uṣūl al-khamsah (the five principles), which includes the protection of religion, life, intellect, descent and property, even though in practice it "mirrors" Shāfi'ī's ijtihad, i.e. *qiyās* (analogical reasoning).

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[15]One's way of thinking cannot be separated from the shadows of the memories (zakirah) and imagination (khayal) hammered by religious, social, cultural, and other modes. See Muhammad Arkoun, *al-Fikr al-Islami: Naqd wa Ijtihad*, transl. Hashim Salih (Bairut: Dar al-Saqi, 1998), p. 240.

Unlike al-Ghazālī (d. 505 AH) who belongs to Shafi'ī school, al-Shāṭibi (d. 790 AH) developed further Juwaynī's and al-Ghazālī's concepts of maṣlaḥah and established it as a method of Mālikī's istinbāṭ, i.e. *maṣlaḥah mursalah* (the unattested interest), which maintains a high level of dependence on texts.[16] Similar to al-Ghazālī (d. 505 AH), al-Shāṭibi (d. 790 AH) stated that the human goals or purposes (*maqāṣid al-mukallaf*) should not run against the five foundational goals of the laws (*maqāṣid al-sharī'ah*), and that both are largely compatible, and if there is disagreement between the two, maqāṣid al-mukallaf should be given a priority.[17]

The concept of maṣlaḥah was also developed by al-Ṭūfī (d. 716), a Hanbalī scholar who overtly refuses the interference of reason in istinbāṭ. For al-Ṭūfī, maṣlaḥah is the most leading and strongest legal evidence, particularly in relation between each human (*mu'āmalah*). Any legal evidence or postulate that contradicts to the spirits of

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[16]For al-Shatibi, al-maqāṣid al-'āmah should be a consideration in comprehending particular evidence (dalīl juz'ī). Ibid., p. 370.

[17]Around six centuries after al-Shatibi, Muhammad al-Tahir bin 'Ashur (d. 1393) came up as an emerging figure of maṣlaḥah with his famous work, *Maqāṣid al-Sharī'ah al-Islāmiyyah*; almost in the same time, there was also another scholar, 'Alāl al-Fāsī (d. 1394 H.) with his work, *Maqāṣid al-Sharī'ah wa Makānatuhā*. Both Arab-Maghribī scholars share common ideas in many aspects. For example, both share a common word that maqāṣid al-sharī'ah is built upon human nature. Quoting Qur'anic verse, Rum: 30 and al-A'raf: 119, Tahir bin Ashur and 'Alāl al-Fāsī agreed that protection human nature is part of maqāṣid al-sharī'ah which, therefore, should not contradict human intellect in a normal condition. Nevertheless, they disagreed on some points. Tahir bin Ashur put forward the autonomization of maqāṣid al-sharī'ah as a separate discipline from uṣūl fiqh by formulating its concepts, maxims as well as its focuses. On the contrary, 'Alāl al-Fāsī is concerned more on the detailed description of shari'ah, including its philosophy and hidden values, rather than on discourse of it's autonomy and independence from uṣūl fiqh. Later on, there came up a number of Muslim scholars on maṣlaḥah, such as Muḥammad Sa'īd Ramaḍān al-Būṭī, *Dawābiṭ al-Maṣlaḥaḥ fī al-Sharī'ah al-Islāmiyyah*; Musṭafā Zaid, *al-Maṣlaḥaḥ fī al-Tashrī' al-Islāmī*, Mustafa Shalabī, *Ta'līl al-Aḥkām*; Husain Hamid Hassan, *Naẓariyāt al-Maṣlaḥaḥ fī al-Fiqh al-Islāmi*. See Yūsuf Ḥāmid al-'Ālim, *al-Maqāṣid al-'Āmah li al-Sharī'ah al-Islāmiyyah*, (Kairo: Dār al-Hadīth, t.th.), p. 6.

maṣlaḥah should be rejected, because laws are not for the benefits of God, but solely to help humans reach maṣlaḥah, which is to gain goodness and in the same time to avoid dangers both in this life and the hereafter.

Since this work is a library research on interconnected maṣlaḥah-based ijtihād maqāṣidī, the data was collected from many literature sources, including primary and secondary ones. The primary sources include: (1) *al-Muwāfaqāt fī Uṣūl al-Sharī'ah* by Abū Isḥaq al-Shāṭibi (d. 790 AH); (2) *al-Mustaṣfā fī 'Ilm al-Uṣūl* by al-Ghazālī (d. 505 AH); (3) *al-Ta'yīn fī al-Sharh al-Arba'īn* by al-Ṭūfī (d. 716 AH). Meanwhile, the secondary sources are articles and books related to the discussion of uṣūl al-fiqh, especially on maqāṣid al-sharī'ah. The data collected was anaylised by using deductive, inductive, comparative-critical methods. The author used a deductive method when explaining the basic principles of maqāṣid al-sharī'ah and its relation to ijtihad. An inductive method is used when the author found that a number of scholarly opinions about maṣlaḥah are scattered in several sources after which conclusions were then made. A comparative-critical method is used when comparing the thoughts of the leading proponents of maqāṣid al-sharī'ah and determining the originality of their ideas.

This book is organized into the following discussions: The first chapter contains an introduction that includes the background of the problem, such as a description of the problems related to maqāṣid al-sharī'ah approach in the studies of Islamic jurisprudence, which is so far still centered on a maṣlaḥah perspective. Therefore, it requires a holistic approach in order to produce an Islamic law which is rich with maṣlaḥah.

The second chapter presents a discussion on the theoretical foundation of the studies of maqāṣid al-sharī'ah by reviewing the ideas of three leading figures, i.e. al-Ghazālī, al-Shāṭibi, and al-Ṭūfī. This section is then followed by a discussion on the concept of interconnected

maṣlaḥah-based ijtihād maqāṣidī to complement the previous concept of ijtihad maqāṣidī initiated by those leading figures, particularly al-Shāṭibi.

Chapter three examines Islamic law from various perspectives to find the common thread between the shariah, Islamic law, and Islamic jurisprudence. Discussion on the characteristics and principles of Islamic law was included also in this chapter. In other words, this chapter aims to provide a general overview of how Islamic law should be positioned, especially in the efforts of formulating legal rules that seek to bring the benefits for people. Such positioning will bring the Islamic law from its ideal concepts into practical usage for people.

Chapter four examines the application of interconnected maṣlaḥah-based ijtihād maqāṣidī in which Muslim clothing is taken as an example. The object of study is discussed within the framework of the previous chapters, leading to a new concept of *maqāṣid al-sharī'ah*-based Muslim clothing or what the author calls it as "*libās maqāṣidī*".

Chapter five is a summary of what the author discussed in the previous chapters. This section is divided into two topics: conclusions and suggestions. Conclusion higlights the main points with reference to the research focus. Suggestions are meant to provide recommendations for other researchers on maqāṣid al-sharī'ah, especially on the basis of interconnected maṣlaḥah.

2

MAQĀṢID AL-SHARĪ'AH
AND THE EXCAVATION OF ISLAMIC LAWS

2.1 Understanding Maqāsid al-Sharī'ah and its Development

Etymologically, *maqāṣid al-sharī'ah* contains two words: *maqāṣid* and *al-sharī'ah*. The term *maqāṣid* is the plural form of *maqṣad* that is derived from the verb قصد-يقصد (*qaṣada- yaqṣudu*) and contains different meanings, i.e. leading to one direction, goal, middle-way, fair, consistent, do not exceed the limits, a straight path, a midway between exaggeration and insufficiency.[18] Al-Māwardī said that all these meanings are found in the Qur'ān. The word, *sharī'ah*, etymologically refers to the path leading to spring. Terminologically, *sharī'ah* is defined as:

الأوامروالنواهيالإلهيةالمتعلقةبالسلوكالعمليمنحياةالإنسان

> God's commands and prohibitions relating to the behaviors of humans in life

Thus, *sharī'ah* concerns only with practical matters rather than beliefs. When the word *maqāṣid* is attributed to *sharī'ah*, it immediately brings into our mind the legal purposes of *sharā'* (fiqh), both inform of

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[18] Muhammad Amin Suhayli, *Qawā'idah Dar'u al-Mafāsid awlā Min Jalb al-Maṣāliḥ Dirāsah Taḥlīliyyah*, (Egypt: Dar al-Salam, 2010), p. 64.

maqāṣid al-sharī'ah (*al-ijtihad al-maqāṣidī*) as a legal theory and its application in some cases. 'Abd al-Majīd al-Najjār said that studies of *maqāṣid al-sharī'ah* should cover all of God's commands and prohibitions, related to human behaviors, beliefs, and other aspects of human life. It is no doubt that each God's command must have a purpose (*maqṣūd*) that calls for realization both in this world and in the Hereafter. A command to be faithful to Allah, for instance, aims to realize a peaceful soul in the world as a requirement to get pleasures in the Hereafter.[19] In relation with this purpose, God says in Surat al-Ra'd: 28: *'alā bi dhikrillāh taṭ mainnal-qulūb* ('Your heart will be at peace if you remember Allah').

Before al-Ṭāhir ibn 'Āshūr, maqāṣid al-sharī'ah has been not yet defined by its main prominents, including al-Shaṭibī, who conceptualized for the first time maqāṣid in his work, *al-Muwafaqāt*. There are two possible reasons, Musfir bin 'Ali al-Qahṭani puts in, why al-Shaṭibī neglected the definition of maqāṣid in this case: first, his *al-Muwafaqāt* was dedicated for scholars who have true knowledge and interests on the science of Islamic jurisprudence. Therefore, he felt it unnecessary to provide a definition of something that scholars are already familiar with; secondly, the focus of al-Shaṭibī's *al-Muwafaqāt* is to build a theory of maqāṣid still unknown by the previous scholars. Although al-Shaṭibī did not spesifically define the term, his elaborate explanation will bring its readers closer to the definition of maqāṣid al-sharī'ah.[20]

The concept of maqāṣid al-sharī'ah has undergone rapid development after al-Shaṭibī, making scholars aware of significance to define the term in such a way according to the ruling standards of a definition, which are *jami'* and *mani'* (comprehensive). In al-Raisūnī's opinion, as

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[19] Abd al-Majīd al-Najjār, *Maqāṣid al-Sharī'ah bi Ab'ād Jaīdah*, (Tunis: Dar al-Gharb al-Islami, 2012), p. 15.

[20] See also Musfir bin 'Ali al-Qahṭani, *al-Wa'y al-Maqasidi Qira'ah Mu'asirah bi li al-'Amal Maqasid al-Shari'ah fi Manahi al-Hayat*, (the Beirut: al-Shabakah al-'Arabiyyah li al-Abhath wa al-Nasr, 2013), p. 21.

quoted by Imam Mawardi, sharī'ah is the "laws of behaviours set up by Islam, whether in relation to the conception of Islamic theology and legislation".[21] Definitions by scholars at the time referred to its equivalent meanings of the term, such legal wisdom, legal purposes, legal meanings. Respectively al-Bannānī, al-Asnawī and al-Samarqandī put forward those definitions. al-Ghazālī, al-Āmidī, and Ibn al-Ḥājib defines maqāṣid al-sharī'ah as "gaining benefits and rejecting disutility (*mafsadat*)".

Therefore, maqāṣid al-sharī'ah has a strong connection with wisdom, causes (*'illat*), goals or intentions, and well-beings.[22] A more comprehensive definition of maqāṣid al-sharī'ah is given by Ibn 'Āshūr and 'Alāl al-Fāsi. Ibn 'Āshūr defines maqāṣid al-sharī'ah al-'āmah as referring to:

> المعانيوالحكمالملحوظةللشارعفيجميعأحوالالتشريعأومعظمهابحيث لاتختصملاحظتهابالكونفينوعخاصمنأحكامالشريعةفيدخلفيهذاأوصا فالشريعةوغايتهاالعامةوالمعانيالتيلايخلوالتشريعمنملاحظتهاويدخلف يهذاأيضامعانمنالحكمليستملحوظةفيسائرأنواعالأحكاموالكنهاملحوظ ةفيأنواعكثيرةمنها

> Meanings and wisdom that Shari' maintains in its legal determination. This does not only apply to certain types of laws but also to all properties, general purposes, and meanings contained in the Sharī'ah laws as well as all legal meanings unnoticed but maintained in many legal forms.[23]

Ibn 'Āshūr's definition of maqāṣid al-sharī'ah is still centered at the realm of al-maqāṣid al-'āmah (public good) rather than specific benefits

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[21] See Ahmad Imam Mawardi, *Fiqh MinoritasFiqh al-Aqalliyat dan EvolusiMaqāṣid al-sharī'ah: dari Konsep ke Pendekatan,* (Yogyakarta: LKiS, 2000), pp. 178-179.

[22] Ibid., p. 180.

[23] See 'Alal al-Fasi, *Maqasid al-Shari'ah wa Makarimuha,* (Kairo: Dar al-Salam, 2011), p. 24. See also Muhammad al-Ṭāhir bin 'Āshūr, *Maqāṣid al-Sharī'ah al-Islāmiyyah*, (Tunisia: Dār Sukhūn li al-Nashr wa al-Tawzī', 2007), p. 49. See also Musfir al-Qahṭani, *al-Wa'y al-Maqasidi*, p. 13.

(al-maqāṣid al-khāssah) that religion also maintains to secure worldy and heavenly happiness. 'Alal al-Fāsi, on the other hand, refers maqāṣid al-sharī'ah to:

الغايةمنهاوالأسرارالتيوضعهاالشارععندكلحكمممنأحكامها

"The goals and hidden meanings behind Shāri's laws.[24]

This definitions of maqāṣid al-sharī'ah mentioned above can also includes two kinds of the benefits, i.e. general and specific benefits. 'Alal al-Fasi's definitions of the term is repetition with different wordings. al-Raysuni provided similar definition:

الغاياتالتيوضعتالشريعةلأجلتحقيقهاالمصلحةالعباد

The objectives of Sharī'ah by which the goodness for all the mankind can be realized.[25]

It is true that al-Raysūnī did not explicitly mention the term *al-maqāṣid al-khāsh* (specific objectives). However, at the end of his definition he mentioned *maṣlaḥah al-'ibād* (human welfare), indicating that al-Fasi also requires specific objectives in regard with Islamic or legal arguments.

The general objectives of sharī'ah is linked to the purposes of human creation, i.e. to become caliphs (leaders, managers) on earth by worshipping Allah. In practice, it is impossible that leadership will be realized without the individual and social orders. Thus, it is right to say that the general and ultimate objective of sharī'ah is to realize the purposes of human presence on earth, i.e. becoming the caliphs to bring the benefits into individual and social life in order to achieve true happiness in this world and in the Hereafter.[26] Ibn 'Āshūr explains the general objectives of Sharī'ah as follows:

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[24] See Aḥmad al-Raysūnī, *Naẓariyat al-Maqāṣid 'Inda al-Imām al-Shāṭibī,* (Herndon, Virginia: The International Istitute of Islamic Thought, 1995), p. 18., and Mufsir al-Qahtani, *al-Wa'y al-Maqasidi*, p. 22.
[25] Ibid.
[26] Ibid., p. 17.

"إذا نحن استقرينا موارد الشريعة الإسلامية الدالة على مقاصدها من التشريع فيها وحفظ نظام الأمة واستدامة صلاحها بصلاح حالهم هي من عليهم وهو نوعا لإنسان ويشمل صلاح حهصلاح عقلهو صلاح عمله و صلاح ما بينيديهم ومنهم جود و داتا العالم الذي يعيش فيه"

If we examine the sources of Sharīah with reference to its objectives, it is clear to us that the goal is to maintain human orderliness and endure human welfare, including their intellects and behaviors, as well as the universe wherein they live.[27]

2.2 General Objectives (al-Maqāṣid al-'Āmah) in the Qur'an

Although maqāṣid al-sharī'ah has been widely discussed by many scholars, there is still little attention given on how the Qur'an talks about the general objectives (*al-maqāṣid al-āmah*). As al-Raysūnī pointed out, quoting Abd al-Karīm Ḥamīdī, the general objectives of the Qur'an are:[28]

أما المقاصد العامة فهي تلك الأغراض العليا الحاصلة من مجموعة أحكام القرآن

al-maqāṣid al-āmah are noble goals derived from a set of the Qur'anic laws.[29]

There are two ways to figure out the general objectives of the Qur'an. They are:

1. They are known to or confirmed by *naṣṣ* (*mansusah*); that is, the Qur'an explicitly mentions the given goals. al-Raysūnī said that there are four objectives explicitly mentioned in the Qur'an: the first is accepting the One-ness of Allah and worshipping Him

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[27] Ibid.

[28] Al-Raisuni, *Maqasid al-al-'Ilmiyyah Ghayat wa li al-'Amaliyyah Maqasid al-Shari'ah* (Beirut: al-Shabakah al-'Arabiyyah li al-Abhath wa al-Nahr, 2013), p. 25.

[29] Ibid., p. 24.

(*tawḥīd allā wa 'ibādatih*).[30] Among the verses that speak of this goal are Surah Hud: 1-3:

الٓرۚ كِتَٰبٌ أُحۡكِمَتۡ ءَايَٰتُهُۥ ثُمَّ فُصِّلَتۡ مِن لَّدُنۡ حَكِيمٍ خَبِيرٍ ١ أَلَّا تَعۡبُدُوٓاْ إِلَّا ٱللَّهَۚ إِنَّنِي لَكُم مِّنۡهُ نَذِيرٌ وَبَشِيرٌ ٢ وَأَنِ ٱسۡتَغۡفِرُواْ رَبَّكُمۡ ثُمَّ تُوبُوٓاْ إِلَيۡهِ يُمَتِّعۡكُم مَّتَٰعًا حَسَنًا إِلَىٰٓ أَجَلٍ مُّسَمًّى وَيُؤۡتِ كُلَّ ذِي فَضۡلٍ فَضۡلَهُۥۖ وَإِن تَوَلَّوۡاْ فَإِنِّيٓ أَخَافُ عَلَيۡكُمۡ عَذَابَ يَوۡمٍ كَبِيرٍ ٣

(This is) a Book, with verses basic or fundamental (of established meaning), further explained in detail,- from One Who is Wise and Well-acquainted (with all things): (It teaches) that ye should worship none but Allah. (Say): "Verily I am (sent) unto you from Him to warn and to bring glad tidings: (3) "(And to preach thus), ´Seek ye the forgiveness of your Lord, and turn to Him in repentance; that He may grant you enjoyment, good (and true), for a term appointed, and bestow His abounding grace on all who abound in merit! But if ye turn away, then I fear for you the penalty of a great day.

and Surah al-Zumar: 1-2:

تَنزِيلُ ٱلۡكِتَٰبِ مِنَ ٱللَّهِ ٱلۡعَزِيزِ ٱلۡحَكِيمِ ١ إِنَّآ أَنزَلۡنَآ إِلَيۡكَ ٱلۡكِتَٰبَ بِٱلۡحَقِّ فَٱعۡبُدِ ٱللَّهَ مُخۡلِصًا لَّهُ ٱلدِّينَ ٢

The revelation of the Book is from Allah, the Mighty, the Wise. Surely We have revealed to you the Book with the truth, therefore serve Allah, being sincere to Him in obedience.

The second objective is guidance for the mankind in religious and worldly affairs (*maqṣad al-hidāyah al-dīniyyah wa al-dunyāwiyyah*).[31] The Qur'an addresses this goal in eleven verses:

a. Surah al-Baqarah, 185:

شَهۡرُ رَمَضَانَ ٱلَّذِيٓ أُنزِلَ فِيهِ ٱلۡقُرۡءَانُ هُدًى لِّلنَّاسِ وَبَيِّنَٰتٍ مِّنَ ٱلۡهُدَىٰ وَٱلۡفُرۡقَانِۚ ١٨٥

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[30] Ibid., p. 26.
[31] Ibid., pp. 26-27.

The month of Ramazan is that in which the Quran was revealed, a guidance to men and clear proofs of the guidance and the distinction;

b. Surah Ali Imrān, 1-4:

الٓمٓ ١ ٱللَّهُ لَآ إِلَٰهَ إِلَّا هُوَ ٱلْحَيُّ ٱلْقَيُّومُ ٢ نَزَّلَ عَلَيْكَ ٱلْكِتَٰبَ بِٱلْحَقِّ مُصَدِّقًا لِّمَا بَيْنَ يَدَيْهِ وَأَنزَلَ ٱلتَّوْرَىٰةَ وَٱلْإِنجِيلَ ٣ مِن قَبْلُ هُدًى لِّلنَّاسِ وَأَنزَلَ ٱلْفُرْقَانَّ إِنَّ ٱلَّذِينَ كَفَرُواْ بِـَٔايَٰتِ ٱللَّهِ لَهُمْ عَذَابٌ شَدِيدٌ وَٱللَّهُ عَزِيزٌ ذُو ٱنتِقَامٍ ٤

Alif Lam Mim. Allah, (there is) no god but He, the Ever-living, the Self-subsisting by Whom all things subsist. He has revealed to you the Book with truth, verifying that which is before it, and He revealed the Tavrat and the Injeel aforetime, a guidance for the people, and He sent the Furqan. Surely they who disbelieve in the communications of Allah they shall have a severe chastisement; and Allah is Mighty, the Lord of retribution.

c. Surah al-Isrā`, 9:

إِنَّ هَٰذَا ٱلْقُرْءَانَ يَهْدِي لِلَّتِي هِيَ أَقْوَمُ وَيُبَشِّرُ ٱلْمُؤْمِنِينَ ٱلَّذِينَ يَعْمَلُونَ ٱلصَّٰلِحَٰتِ أَنَّ لَهُمْ أَجْرًا كَبِيرًا ٩

Surely this Quran guides to that which is most upright and gives good news to the believers who do good that they shall have a great reward.

d. Surah al-Jin, 1-2:

قُلْ أُوحِيَ إِلَيَّ أَنَّهُ ٱسْتَمَعَ نَفَرٌ مِّنَ ٱلْجِنِّ فَقَالُوٓاْ إِنَّا سَمِعْنَا قُرْءَانًا عَجَبًا ١ يَهْدِيٓ إِلَى ٱلرُّشْدِ فَـَٔامَنَّا بِهِۦ وَلَن نُّشْرِكَ بِرَبِّنَآ أَحَدًا ٢

Say: It has been revealed to me that a party of the jinn listened, and they said: Surely we have heard a wonderful Quran, Guiding to the right way, so we believe in it, and we will not set up any one with our Lord.

e. Surah al-Ahqāf, 30:

قَالُواْ يَٰقَوْمَنَآ إِنَّا سَمِعْنَا كِتَٰبًا أُنزِلَ مِنۢ بَعْدِ مُوسَىٰ مُصَدِّقًا لِّمَا بَيْنَ يَدَيْهِ يَهْدِيٓ إِلَى ٱلْحَقِّ وَإِلَىٰ طَرِيقٍ مُّسْتَقِيمٍ ٣٠

They said: O our people! we have listened to a Book revealed after Musa verifying that which is before it, guiding to the truth and to a right path:

f. Surah al-Naḥl, 64:

وَمَآ أَنزَلْنَا عَلَيْكَ ٱلْكِتَٰبَ إِلَّا لِتُبَيِّنَ لَهُمُ ٱلَّذِيٱخْتَلَفُوا۟ فِيهِ وَهُدًى وَرَحْمَةٗ لِّقَوْمٖ يُؤْمِنُونَ ٦٤

And We have not revealed to you the Book except that you may make clear to them that about which they differ, and (as) a guidance and a mercy for a people who believe.

g. Surah al-Naḥl, 89:

وَيَوْمَ نَبْعَثُ فِي كُلِّ أُمَّةٖ شَهِيدًا عَلَيْهِم مِّنْ أَنفُسِهِمْۖ وَجِئْنَا بِكَ شَهِيدًا عَلَىٰ هَٰٓؤُلَآءِۚ وَنَزَّلْنَا عَلَيْكَ ٱلْكِتَٰبَ تِبْيَٰنٗا لِّكُلِّ شَيْءٖ وَهُدٗى وَرَحْمَةٗ وَبُشْرَىٰ لِلْمُسْلِمِينَ ٨٩

And on the day when We will raise up in every people a witness against them from among themselves, and bring you as a witness against these-- and We have revealed the Book to you explaining clearly everything, and a guidance and mercy and good news for those who submit.

h. Surah al-Baqarah, 1-2:

الٓمٓ ١ ذَٰلِكَ ٱلْكِتَٰبُ لَا رَيْبَۛ فِيهِۛ هُدٗى لِّلْمُتَّقِينَ ٢

Alif Lam Mim. This Book, there is no doubt in it, is a guide to those who guard (against evil).

i. Surah al-Baqarah, 38:

قُلْنَا ٱهْبِطُوا۟ مِنْهَا جَمِيعٗاۖ فَإِمَّا يَأْتِيَنَّكُم مِّنِّي هُدٗى فَمَن تَبِعَ هُدَايَ فَلَا خَوْفٌ عَلَيْهِمْ وَلَا هُمْ يَحْزَنُونَ ٣٨

We said: Go forth from this (state) all; so surely there will come to you a guidance from Me, then whoever follows My guidance, no fear shall come upon them, nor shall they grieve.

j. Surah Ṭāhā, 123:

قَالَ ٱهْبِطَا مِنْهَا جَمِيعًۢا بَعْضُكُمْ لِبَعْضٍ عَدُوٌّ فَإِمَّا يَأْتِيَنَّكُم مِّنِّي هُدًى فَمَنِ ٱتَّبَعَ هُدَايَ فَلَا يَضِلُّ وَلَا يَشْقَىٰ ١٢٣

He said: Get forth you two therefrom, all (of you), one of you (is) enemy to another. So there will surely come to you guidance from Me, then whoever follows My guidance, he shall not go astray nor be unhappy;

k. Surah al-Māidah, 16:

يَهْدِي بِهِ ٱللَّهُ مَنِ ٱتَّبَعَ رِضْوَٰنَهُۥ سُبُلَ ٱلسَّلَٰمِ وَيُخْرِجُهُم مِّنَ ٱلظُّلُمَٰتِ إِلَى ٱلنُّورِ بِإِذْنِهِۦ وَيَهْدِيهِمْ إِلَىٰ صِرَٰطٍ مُّسْتَقِيمٍ ١٦

With it Allah guides him who will follow His pleasure into the ways of safety and brings them out of utter darkness into light by His will and guides them to the right path.

The third mansusah objective of the Qur'an is self-cleansing and wisdom-teaching (*maqṣad al-tazkiyah wa ta'līm al-ḥikmah*).[32] This objective is clearly mentioned in the following three verses:

a. Surah al-Baqarah, 151:

كَمَآ أَرْسَلْنَا فِيكُمْ رَسُولًا مِّنكُمْ يَتْلُواْ عَلَيْكُمْ ءَايَٰتِنَا وَيُزَكِّيكُمْ وَيُعَلِّمُكُمُ ٱلْكِتَٰبَ وَٱلْحِكْمَةَ وَيُعَلِّمُكُم مَّا لَمْ تَكُونُواْ تَعْلَمُونَ ١٥١

Even as We have sent among you a Messenger from among you who recites to you Our communications and purifies you and teaches you the Book and the wisdom and teaches you that which you did not know.

b. Surah Ali 'Imrān, 164:

لَقَدْ مَنَّ ٱللَّهُ عَلَى ٱلْمُؤْمِنِينَ إِذْ بَعَثَ فِيهِمْ رَسُولًا مِّنْ أَنفُسِهِمْ يَتْلُواْ عَلَيْهِمْ ءَايَٰتِهِۦ وَيُزَكِّيهِمْ وَيُعَلِّمُهُمُ ٱلْكِتَٰبَ وَٱلْحِكْمَةَ وَإِن كَانُواْ مِن قَبْلُ لَفِي ضَلَٰلٍ مُّبِينٍ ١٦٤

Certainly Allah conferred a benefit upon the believers when He raised among them a Messenger from among themselves, reciting to them His communications and

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[32] Ibid.

purifying them, and teaching them the Book and the wisdom, although before that they were surely in manifest error.

c. Surah al-Baqarah, 231:

وَإِذَا طَلَّقْتُمُ ٱلنِّسَآءَ فَبَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ سَرِّحُوهُنَّ بِمَعْرُوفٍۚ وَلَا تُمْسِكُوهُنَّ ضِرَارًا لِّتَعْتَدُواْۚ وَمَن يَفْعَلْ ذَٰلِكَ فَقَدْ ظَلَمَ نَفْسَهُۥۚ وَلَا تَتَّخِذُوٓاْ ءَايَٰتِ ٱللَّهِ هُزُوًاۚ وَٱذْكُرُواْ نِعْمَتَ ٱللَّهِ عَلَيْكُمْ وَمَآ أَنزَلَ عَلَيْكُم مِّنَ ٱلْكِتَٰبِ وَٱلْحِكْمَةِ يَعِظُكُم بِهِۦۚ وَٱتَّقُواْ ٱللَّهَ وَٱعْلَمُوٓاْ أَنَّ ٱللَّهَ بِكُلِّ شَيْءٍ عَلِيمٌ ٢٣١

And when you divorce women and they reach their prescribed time, then either retain them in good fellowship or set them free with liberality, and do not retain them for injury, so that you exceed the limits, and whoever does this, he indeed is unjust to his own soul; and do not take Allah's communications for a mockery, and remember the favor of Allah upon you, and that which He has revealed to you of the Book and the Wisdom, admonishing you thereby; and be careful (of your duty to) Allah, and know that Allah is the Knower of all things.

The fourth mansusah objective of the Qur'an is grace and happiness (*maqṣad al-rahmah wa al-sa'ādah*), which is noticeable from the following Qur'anic verses:

a. Surah al-Anbiyā', 107:

وَمَآ أَرْسَلْنَٰكَ إِلَّا رَحْمَةً لِّلْعَٰلَمِينَ ١٠٧

And We have not sent you but as a mercy to the worlds.

b. Surah al-Isrā', 82:

وَنُنَزِّلُ مِنَ ٱلْقُرْءَانِ مَا هُوَ شِفَآءٌ وَرَحْمَةٌ لِّلْمُؤْمِنِينَ وَلَا يَزِيدُ ٱلظَّٰلِمِينَ إِلَّا خَسَارًا ٨٢

And We reveal of the Quran that which is a healing and a mercy to the believers, and it adds only to the perdition of the unjust.

c. Surah Taha, 1-3:

طه ١ مَا أَنزَلْنَا عَلَيْكَ ٱلْقُرْءَانَ لِتَشْقَىٰ ٢ إِلَّا تَذْكِرَةً لِّمَن يَخْشَىٰ ٣

Ta Ha. We have not revealed the Quran to you that you may be unsuccessful. Nay, it is a reminder to him who fears:

d. Surah al-Anfāl, 24:

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوا۟ ٱسْتَجِيبُوا۟ لِلَّهِ وَلِلرَّسُولِ إِذَا دَعَاكُمْ لِمَا يُحْيِيكُمْ ۖ وَٱعْلَمُوٓا۟ أَنَّ ٱللَّهَ يَحُولُ بَيْنَ ٱلْمَرْءِ وَقَلْبِهِ وَأَنَّهُ إِلَيْهِ تُحْشَرُونَ ٢٤

O you who believe! answer (the call of) Allah and His Messenger when he calls you to that which gives you life; and know that Allah intervenes between man and his heart, and that to Him you shall be gathered.

e. Surah al-Baqarah, 179:

وَلَكُمْ فِي ٱلْقِصَاصِ حَيَوٰةٌ يَٰٓأُو۟لِي ٱلْأَلْبَٰبِ لَعَلَّكُمْ تَتَّقُونَ ١٧٩

And there is life for you in (the law of) retaliation, O men of understanding, that you may guard yourselves.

The fifth purpose is to uphold truth and justice (*maqsad al-ḥaq wa al-'adālah*), which is clearly mentioned in the following verses:

a. Surah al-ḥadīd, 25:

لَقَدْ أَرْسَلْنَا رُسُلَنَا بِٱلْبَيِّنَٰتِ وَأَنزَلْنَا مَعَهُمُ ٱلْكِتَٰبَ وَٱلْمِيزَانَ لِيَقُومَ ٱلنَّاسُ بِٱلْقِسْطِ ۖ وَأَنزَلْنَا ٱلْحَدِيدَ فِيهِ بَأْسٌ شَدِيدٌ وَمَنَٰفِعُ لِلنَّاسِ وَلِيَعْلَمَ ٱللَّهُ مَن يَنصُرُهُ وَرُسُلَهُ بِٱلْغَيْبِ ۚ إِنَّ ٱللَّهَ قَوِيٌّ عَزِيزٌ ٢٥

Certainly We sent Our messengers with clear arguments, and sent down with them the Book and the balance that men may conduct themselves with equity; and We have made the iron, wherein is great violence and advantages to men, and that Allah may know who helps Him and His messengers in the secret; surely Allah is Strong, Mighty.

b. Surah Al-An'ām, 115:

وَتَمَّتْ كَلِمَتُ رَبِّكَ صِدْقًا وَعَدْلًا ۚ لَّا مُبَدِّلَ لِكَلِمَٰتِهِ ۚ وَهُوَ ٱلسَّمِيعُٱلْعَلِيمُ ١١٥

And the word of your Lord has been accomplished truly and justly; there is none who can change His words, and He is the Hearing, the Knowing.

c. Surah al-Nisā', 85:

مَّن يَشْفَعْ شَفَٰعَةً حَسَنَةً يَكُن لَّهُۥ نَصِيبٌ مِّنْهَاۖ وَمَن يَشْفَعْ شَفَٰعَةً سَيِّئَةً يَكُن لَّهُۥ كِفْلٌ مِّنْهَاۗ وَكَانَ ٱللَّهُ عَلَىٰ كُلِّ شَىْءٍ مُّقِيتًا ٨٥

Whoever joins himself (to another) in a good cause shall have a share of it, and whoever joins himself (to another) in an evil cause shall have the responsibility of it, and Allah controls all things.

d. Surah al-Māidah, 48:

وَأَنزَلْنَا إِلَيْكَ ٱلْكِتَٰبَ بِٱلْحَقِّ مُصَدِّقًا لِّمَا بَيْنَ يَدَيْهِ مِنَ ٱلْكِتَٰبِ وَمُهَيْمِنًا عَلَيْهِۖ فَٱحْكُم بَيْنَهُم بِمَآ أَنزَلَ ٱللَّهُۖ وَلَا تَتَّبِعْ أَهْوَآءَهُمْ عَمَّا جَآءَكَ مِنَ ٱلْحَقِّۚ لِكُلٍّ جَعَلْنَا مِنكُمْ شِرْعَةً وَمِنْهَاجًاۚ وَلَوْ شَآءَ ٱللَّهُ لَجَعَلَكُمْ أُمَّةً وَٰحِدَةً وَلَٰكِن لِّيَبْلُوَكُمْ فِى مَآ ءَاتَىٰكُمْۖ فَٱسْتَبِقُوا ٱلْخَيْرَٰتِۚ إِلَى ٱللَّهِ مَرْجِعُكُمْ جَمِيعًا فَيُنَبِّئُكُم بِمَا كُنتُمْ فِيهِ تَخْتَلِفُونَ ٤٨

And We have revealed to you the Book with the truth, verifying what is before it of the Book and a guardian over it, therefore judge between them by what Allah has revealed, and do not follow their low desires (to turn away) from the truth that has come to you; for every one of you did We appoint a law and a way, and if Allah had pleased He would have made you (all) a single people, but that He might try you in what He gave you, therefore strive with one another to hasten to virtuous deeds; to Allah is your return, of all (of you), so He will let you know that in which you differed;

e. Surah al-Shūrā, 17:

ٱللَّهُ ٱلَّذِى أَنزَلَ ٱلْكِتَٰبَ بِٱلْحَقِّ وَٱلْمِيزَانَۗ وَمَا يُدْرِيكَ لَعَلَّ ٱلسَّاعَةَ قَرِيبٌ ١٧

Allah it is Who revealed the Book with truth, and the balance, and what shall make you know that haply the hour be nigh?

f. Surah al-Raḥmān, 1-9:

ٱلرَّحْمَٰنُ ١ عَلَّمَ ٱلْقُرْءَانَ ٢ خَلَقَ ٱلْإِنسَٰنَ ٣ عَلَّمَهُ ٱلْبَيَانَ ٤
ٱلشَّمْسُ وَٱلْقَمَرُ بِحُسْبَانٍ ٥ وَٱلنَّجْمُ وَٱلشَّجَرُ يَسْجُدَانِ ٦ وَٱلسَّمَآءَ
رَفَعَهَا وَوَضَعَ ٱلْمِيزَانَ ٧ أَلَّا تَطْغَوْا۟ فِي ٱلْمِيزَانِ ٨ وَأَقِيمُوا۟ ٱلْوَزْنَ
بِٱلْقِسْطِ وَلَا تُخْسِرُوا۟ ٱلْمِيزَانَ ٩

The Beneficent Allah, taught the Quran.He created
man,Taught him the mode of expression.The sun and the
moon follow a reckoning. And the herbs and the trees do
prostrate (to Him). And the heaven, He raised it high,
and He made the balance. That you may not be inordi-
nate in respect of the measure. And keep up the balance
with equity and do not make the measure deficient.

2. They are known through ijtihad (*istinbāṭ*); that is, the general ob-
jectives of the Qur'an are obtained through inductive studies of
the goals of the Qur'an (*maqāṣid al-Qur'ān)* and its universal
designations (*dalālah kulliyyah*).[33] This field had been an object
of study focus among Muslim scholars who pursued and ex-
plored the intricacies of the al-Qur'an, and whose life are always
under the guidance of the Qur'an. Several names worth to be
mentioned as the scholars of maqaṣid are al-Tirmidhi (w.320
AH/932 AD), al-Qaffal al-Kabir (d. 365 AH/976 AD), al-'Amiri
al-Failasuf (w.381 AH/991 AD), al-Juwaini (d. 478 AH/1185
AD), al-Ghazali (d. 505 AH/1111 AD), al- Ṭūfī (d. 716 AH/1318
AD), al-Shatibi (d. 790 AH/1388 AD), ibn 'Āshūr (d. 1393 AH /
1972 AD) and 'Alal al-Fasi (d. 1394 H./1974 H.).

It was from their studies that the concept of *al-maqāṣid al-'āmah*
(the general objectives) of the Qur'an emerged and became the founda-
tion of maqāsid al-sharī'ah. The following is a brief account of maqāṣid
al-Qur'ān as outlined by those leading figures:

1). al-Ghazālī on Maqāṣid al-Qur'ān

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[33] Ibid., p. 23

al-Ghazālī devided the objectives of the Qur'an (*maqāṣid al-Qur'ān*) into two categories: primary (*muhimmah*) and complementary (*mughniyah, mutimmah*). There are three primary objectives in the Qur'an: the first is to introduce God, as the one and the only to be worshipped (*ta'rīf al-mad'u ilayh*), which is Allah; the second is to introduce the straight path (*ta'rīf al-ṣirāṭ al-mustaqīm*), which is *sharī'ah*; and the third is introduce human conditions when seeing Allah (*ta'rīf al-wuṣūl ilayh*), which is the Day of Resurrection.[34]

al-Ghazālī said further that there are three maqsad al-Qur'ān which are complementary (*mutimmah*): the first is to introduce the conditions of those who accept da'wah (an invitation to goodness), and Allah's secrets for them in order that we are glad (*li al-targhīb*) and longing (*li al-tashwīq*) to Him. At the same time, it also explains the conditions of people who reject and oppose da'wah and how Allah warns and punishes them in order that we take a lesson (*li al-i'tibār*) and fear of (*li al-tarhīb*) Him.[35]

The second complementary maqsad al-Qur'an (*mutimmah*) is to tell the conditions of those who oppose the teachings of Allah and to uncover their disgrace and stupidity through proper arguments, so we leave (*al-tanfīr*) falsehood and hold firlmy the truth (*al-tathbīt fī al-ḥaq*). The third complementary *maqsad al-Qur'ān* is to introduce ways to obtain life provision (*kayfiyah akhdz al-zad*) and preparation (*al-isti'dād*) towards an eternal life.[36]

2). Ibn 'Abd al-Salam on Maqāṣid al-Qur'ān

Ibn 'Abd al-Salam's conception of maqāṣid al-Qur'ān is built upon one rule:

جلب المصالح و أسبابها و درء المفاسد و أسبابها

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[34] Ibid., p. 30.
[35] Ibid, p.31.
[36] Ibid.

Realizing the benefits along with their various causes, while rejecting all forms of damages (*mafsadah*) along with their causes.[37]

The Qur'anic verse which represents best the above rule is Surah al-Nahl, 90:

﴿إِنَّ ٱللَّهَ يَأْمُرُ بِٱلْعَدْلِ وَٱلْإِحْسَٰنِ وَإِيتَآئِ ذِي ٱلْقُرْبَىٰ وَيَنْهَىٰ عَنِ ٱلْفَحْشَآءِ وَٱلْمُنكَرِ وَٱلْبَغْيِ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُونَ ٩٠﴾

Surely Allah enjoins the doing of justice and the doing of good (to others) and the giving to the kindred, and He forbids indecency and evil and rebellion; He admonishes you that you may be mindful.

In Ibn 'Abd al-Salam's opinion, goodness (*al-iḥsān*) is bringing benefits or resisting damages (*jalb al-maṣālih aw daf'u al-mafāsid*). The "al" (*alīf lām*) in each word in the verse, i.e. *al-'adl* (doing justice), *al-iḥsān* (doing good), *al-fakhsya'* (doing shamefull deeds) and *al-munkar* (doing a sin), is general and covers all types (*istighrāq*), from small to large. Thus, *al-iḥsān* is inclusive of any efforts to realize the benefits or to refuse damages.[38]

3. al-Biqa'i on Maqāṣid al-Qur'ān

al-Biqa'i pointed out that all the content of the Qur'an leads to three general objectives (*al-maqāṣid al-'āmah*), which are an explanation of the faith (*al-'aqīdah*), laws (*aḥkām*), and stories (*qiṣaṣ*). The three general objectives are shown in Surah al-Ikhlāṣ, 22.[39]

4. Ibn 'Āshūr on Maqāṣid al-Qur'ān

For Ibn 'Āshūr, the general objective of al-Qur'ān is:

إناللهتعالىأنزلالقرأنكتابالصلاحأمرالناسكافة, رحمةلهملتبليغهممراداللهمنهم

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[37] Ibid., p. 32
[38] Ibid.
[39] Ibid., p.33

> Allah brings down the Book of Qur'an as a benefit and a grace for all people, conveying what God wants from them.[40]

In practice, the general objectives in the Qur'an include eight matters: to straighten a belief (*iṣlāḥ al-'i'tiqād*), to purify manners (*tahdhīb al-akhlāq*), to impose laws (*al-tashrī'*), to control people (*siyāsa al-'ummah*), to deliver stories and news about the previous communities (*al-qiṣaṣ wa akhbār al-umam al-salifah*), to teach something according to the conditions of the talked (*al-ta'līm bimā yunāsib halah al-mukhāṭabīn*), to give advice and warnings (*al-mawa'īd wa al-indzār*), and to demonstrate miracles with the Qur'an (*al-i'jāz bi al-Qur'ān*).[41]

2.3 Muslim Scholars ('Ulamā') on Maṣlaḥah

This section does not mean to provide the shifting development of maqāṣid al-sharī'ah from a concept into an approach, as pointed out by Mawardī in his book, *Fiqh of Minorities*.[42] Rather, it highlights the distinctive thoughts of three leading figures on maṣlaḥah, which is the heart of the studies on *maqāṣid al-sharī'ah*. The author chose the three central figures due to some considerations: firstly, al-Ghazālī (d. 505 AH), al-Shāṭibī (d. 790 AH) and al-Ṭūfī (d. 716 AH) are coming from different schools of Islamic jurisprudence; al-Ghazālī (d. 505 AH) belongs to Shafi'ī school whose ijtihad emphasizes much on the concept of qiyās; al-Shatibi (d. 790 AH) belongs to the Mālikī who puts forward maṣlaḥah

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[40] Ibid, p. 35.

[41] Ibid., pp. 36-37.

[42] The conceptualization of maqāṣid al-sharī'ah started from al-Tirmidhi (d. 320 AH / 932 AD, followed then respectively by the following scholars: al-Qaffal al-Kabir (d. 360 AH / 972 AD), al-'Amiriy al-Failasuf (d. 381 AH / 991 AD), al-Juwayni (d. 478 AH / 1185 AD), al-Ghazali (d. 505 AH / 1111M .), al-Shathibi (d. 790 AH / 1388 AD), Ibn 'Ashur (d. 1393 AH / 1972 AD), and 'Alal al-Fasi (d. 1394 AH / 1974 AD) . See Jassir 'Auda, *al-Ijtihād al-Maqāṣidī Min al-Taṣawwur al-Uṣūliy Ilā al-Tanzīl al-'Ilmiy*, (Beirut: al Shabakah al-'Arabiyah li al-Abhath wa al-Nasr, 2013), pp. 17-18.

mursalah as a main proposition after the Qur'ān and the Hadith; al-Ṭūfī (d. 716 AH) is a Ḥanbalī which relies heavily on the literal understanding of the Qur'an and the Hadith as well as giving priority to prophetic reports of the companions (*āthār al-Ṣaḥābat)* than analogy (*qiyās*) and other legal propositions in his intellectual excavation of Islamic laws. While the distinctive features of Ḥanbalī' school are visible in his *maṣlaḥah* on Islamic rituals and fixed ordinance (*muqaddarāt)*, al-Ṭūfī does not go beyond *maṣlaḥah* in his legal propositions in relation with *mu'āmalah*.

Secondly, the elaboration of the thoughts of these three figures—and surely other proponents of *maqāṣid al-sharī'ah*—on *maṣlaḥah* can be utilized as a tool of analysis when examining Shahrur's account of Muslim clothing and its relevance to *maqāṣid al-sharī'ah*.

Historically, since al-Shāfi'ī (d. 204H.) wrote his work *al-Risālah*, there has been an aggreement that set up Islamic jurisprudence (*uṣūl al-fiqh)* as a methodology in legislation of Islamic laws. Scholars of uṣūl fiqh were debating whether or not *maṣlaḥah* is a method of judicial verdicts (*istinbāṭ al-ḥukm*). The controversy was stirred by the fact that they disagree on to what extent reason (ra'y) can play a role in understanding the the messages of texts.

Al-Shāfi'ī (d. 204 AH) is one scholar who spoke the loudest in rejecting the use of reason in its various forms, either through istiḥsān or maṣlaḥah mursalah in excavating Islamic laws. Later scholars, such as al-Juwaynī (d. 478 AH) and al-Ghazālī (d. 505 AH), followed this thesis but then developed it into a concept of maṣlaḥah. Al-Juwaynī (d. 478 AH) is considered as the forefather of *maqāsīd*. He brought forth the concept of ta'līl in three categories: *ḍarūriyyat*, *ḥājāt* and *maḥāsin*. It is Juwaini's concept (d. 478 AH) that then inspires al-Ghazālī to formulate a new package of *maṣlaḥah*, namely *maqāṣid al-sharī'ah* in the framework of *al-uṣūl al-khamsah* (the five principles), which includes the

protection of religion, life, intellect, descent and property, event though
in practice it "mirros" al-Shāfi'ī's ijtihad, i.e. analogy (*qiyās*).

Unlike al-Ghazālī (d. 505 AH) who belongs to Shafi'ī's school, al-
Shatibi (d. 790 AH) developed further Juwaini's and al-Ghazali's con-
cepts of maṣlaḥah and established it as a method of Mālikī istinbāṭ, i.e.
maṣlaḥah mursalah, which maintains a high level of dependence on
texts.[43] Similar to al-Ghazali (d. 505 AH), al-Shatibi (d. 790 AH) stated
that maqāṣid al-mukallaf should not run against maqāṣid al-sharī'ah, and
that both are compatible, and if there is disagreement between the two,
maqāṣid al-mukallaf should be given a priority.[44]

The concept of maṣlaḥah was also developed by al-Ṭūfī (d. 716), a
Hanbalī scholar who overtly refuses the interference of reason in
istinbāṭ. For al-Ṭūfī, maṣlaḥah is the most leading and strongest legal
evidence, particularly in mu'āmalah. Any legal evidence or postulate
that contradicts to the spirits of maṣlaḥah should be rejected, because

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[43] For al-Shatibi, al-maqāṣid al-'āmah should be a consideration in comprehend-
ing particular evidence (*dalīl juz'ī*). Ibid., p. 370.

[44] Around six centuries after al-Shatibi, Muhammad al-Tahir bin 'Ashur (d.
1393) came up as an emerging figure of maṣlaḥah with his famous work,
Maqāṣid al-Sharī'ah al-Islāmiyyah; almost in the same time, there was also
another scholar, 'Alāl al-Fāsī (d. 1394 H.) with his work, *Maqāṣid al-Sharī'ah
wa Makānatuhā*. Both Arab-Maghribī scholars share common ideas in many
aspects. For example, both share a common word that maqāṣid al-sharī'ah is
built upon human nature. Quoting Qur'anic verse, Rum: 30 and al-A'raf: 119,
Tahir bin Ashur and 'Alāl al-Fāsī agreed that protection human nature is part of
maqāṣid al-sharī'ah which, therefore, should not contradict human intellect in a
normal condition. Nevertheless, they disagreed on some points. Tahir bin Ashur
put forward the autonomization of maqāṣid al-sharī'ah as a separate discipline
from uṣūl fiqh by formulating its concepts, maxims as well as its focuses. On the
contrary, 'Alāl al-Fāsī is concerned more on the detailed description of shari'ah,
including its philosophy and hidden values, rather than on discourse of it's
autonomy and independence from uṣūl fiqh. Later on, there came up a number
of Muslim scholars on maṣlaḥah, such as Muḥammad Sa'īd Ramaḍān al-Būṭī,
Dawābiṭ al-Maṣlaḥaḥ fī al-Sharī'ah al-Islāmiyyah; Musṭafā Zaid, *al-Maṣlaḥah
fī al-Tashrī' al-Islāmī*, Mustafa Shalabī, *Ta'līl al-Aḥkām*; Husain Hamid Hassan,
Naẓariyāt al-Maṣlaḥaḥ fī al-Fiqh al-Islāmi. See Yūsuf Ḥāmid al-'Ālim, *al-
Maqāṣid al-'Āmah li al-Sharī'ah al-Islāmiyyah*, (Kairo: Dār al-Hadīth, t.th.),
p. 6.

laws are not for the benefits of God, but solely to help humans reach maṣlaḥah, which is to gain goodness and in the same time to avoid dangers both in this life and the hereafter.

The following section attempts to elaborate and compare the thoughts of there leading figures on maṣlaḥah: al-Ghazali (d. 505 AH), al-Shāṭibi (d. 790 AH) and al-Ṭūfī (d. 716 H.). It is hoped that this will find a common thread between, as well as distinctive features of, each figures, and it eventually maybe developed as a tool of analysis in contemporary Islamic legal studies, on Muslim clothing and polygamy in particular.

2.4 Al-Ghazālī (d. 505 AH) on Maṣlaḥah

Al-Ghazālī or Abu Hamid Muhammad ibn Muhammad al-Ghazali al-Ṭufi al-Shafi'ī' was born in 450 AH/1058 AD in a small town in Khurasan (Iran) three years after the Seljuq came to rule in Baghdad.[45] al-Ghazali's parents were yarn spinners and well-known as pious persons with a simple life.

When he was a child, on his father's will, al-Ghazālī was a student of Ahmad bin Muhammad al-Razikani. Then, he went to Nisabur and studied at Madrasah Niẓāmiyah led by al-Haramayn al-Juwayni al-Shafi'ī (478 AH). It is in this madrasa that al-Ghazālī learned different scientific disciplines, such Sufism, jurisprudence, monotheism, philosophy and logics.[46]

Al-Ghazālī demonstrated his intelligence and deep knowledge in scientific discussions attended by religious scholars and Niẓām al-Mulk (d. 485 AH), the founder of the madrasa Niẓāmiyyah who was also the Prime Minister of the Sultan Seljuq, Mālik Shah. Al-Ghazālī's stunning performance attracted the attentions of all scholars and Niẓām al-Mulk

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[45] Sha'bān Muhammad Isma'il, *Uṣūl al-Fiqh Tārīkhuh wa Rijāluh*, (Makkah: Dār al-Salām, 1998), p. 203.
[46] Ibid.

as well, giving him a teaching position at the Madrasah Niẓāmiyah in 484 H and became the head of the university five years.[47] Al-Ghazālī died on 4 *Jumadil akhir* 505 AH or 1111 AD in Tus where he was born and finally buried.[48]

Etymologically, *maṣlaḥah* is equal to *manfa'ah* (benefit, utility) in terms of measure (*wazn*) and meaning. In uṣūl al-fiqh's terminology, *maṣlaḥah* means everything that can realize the goodness and avoid all sorts of *maḍarrah* (danger) or *mafsadah* (damage) in human life.[49] Thus, the presence or absence of *maṣlaḥah* is determined by two things. It means *maṣlaḥah* when it brings goodness and, on the contrary, it means *mafsadah* or *mafsadah* (damage) or *maḍarrah* (danger) when it attracts dangers, inequality, injustice and so forth.

For al-Ghazālī, in general there are always legal rationality (*ta'līl al-aḥkām*) behind God's laws (*sharī'ah*) in the Qur'an and Hadith.[50] That is, any provision from these two legal sources of law always has purposes (*maqāṣid*). Maqāṣid can reveal God's main ideas which are hidden behind the written words and, therefore, it can be also a basis to understand what God really wants by His rules for His creatures. Furthermore, it can also identify problems uncovered textually.

However, as al-Ghazālī pointed out, it is God-oriented rather than human-percieved *maṣlaḥah* that can be taken as a legal consideration.

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[47] Al-Ghazali wrote no less than two hundred titles in a various number of scientific disciplines and fifty of them were published. In theology and philosophy, for example, he wrote a total of 19 titles, in sufism and morality 19 titles, in exegesis 2 titles, and in fiqh and usul fiqh 8 titles. Ibid., p. 204. The period between the death of Imam Ahmad bin Hanbal in 241 AH/848 AD and the birth of al-Ghazali was nuanced heated intellectual debates and fanaticism of jurist schools, which resulted in unhealthy intellectual atmosphere as each school was claimed by its supporters to be the most suitable with the teachings of Islam while others were declared deviant and heretical.

[48] Ibid.

[49] Abu Hamid al-Ghazali, al-Mustaṣfā min 'Ilm al-Uṣūl, Vol. 1, (Bairūt: Dār al-Fikr, t.th.), p. 286.

[50] Ibid.

The benefits are not meant for God's sake, but for all the mankind in this world and the Hereafter.[51]

As for whether or not maṣlaḥah is recognized by Sharī'ah, al-Ghazālī divided it into three categories:[52] The first is *maṣlaḥah mu'tabarah* (the accredited welfare), i.e. one which is in line with the will of God. In this regard, al-Ghazālī gave an example of the unlawfulness of drinking everything that is intoxicating because of its qiyās with alcoholic drinks (*al-khamr*); the second is *maṣlaḥah bāṭilah or mulghah* (the corrupt welfare), i.e. one which is contrary to the will of Allah. In this case, al-Ghazālī relates this kind of maṣlaḥah to his refusal to the opinions of some scholars who require a king to fast two consecutive months as a ransom (*kifārāt*) of his conjugal relationship during the days in the month of Ramadan, on the grounds that if the king was required to pay *kifārāt* with freeing a slave, as stipulated in nass—it would not give a shock therapy to him. For al-Ghazālī, applying this logic would mean ruining the whole foundation of Islamic laws and people would change them as they wish.[53]

The third maṣlaḥah is one which the *naṣṣ* (the Qur'an and the Hadith) does not clarify whether it falls under *maṣlaḥah mu'tabarah* (justified by the Shāri') or *maṣlaḥah mulghah* (rejected by the Shāri'). This type of maṣlaḥah is called maṣlaḥah mursalah (undecided by the texts). This maṣlaḥah is applicable, al-Ghazālī said, as long as it belongs to the urgent needs (*ḍarūrah*) and the public interests, such as permission to attack unbelievers who make Muslims as human shields, even though the attack would kill some of those Muslim shields.[54]

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[51] Ibid.

[52] Ibid. See also al-Bashir Shammam, *Maqāṣid al-Sharī'ah al-Islāmiyyah wa 'Alaqatuhā bi al-Mabāhits al-Lughawiyyah Ru`yah fī al-Muwāzanah Bayn Muqtaḍayāt al-Lisān wa Maqāṣid al-Shār'i* (Tunis: al-Shirkah al-Tunisiyyah li al-Nasr wa Tanmiyah Fonun al-Rasm, 2013), p. 100.

[53] Ibid., p. 101.

[54] Ibid.

Al-Ghazālī asserted that God's purposes for all the mankind consist of five basic principles: i.e. religion (*dīn*), life (*nafs*), reason ('*aql*), descent (*nasab*), and property (*māl*). For al-Ghazālī, everything that reflects the protection of those principles is called maṣlaḥah, and otherwise is mafsadah.[55]

In al-Ghazālī's opinion, the five principals (*al-uṣūl al-khamsah*) do not exclusively belong to Islam, but also to all religions (*milal*) which requires the realization of public good on earth. Therefore, al-Ghazālī said further, there is no single religion that accepts apostasy, murder, adultery, theft, and consumption of something that could impair the functions of the reason.

Nevertheless, it should be noted here that al-Ghazālī's concept of the five benefits was developed from *maṣlaḥah* which has been previously conceptualized by leading scholars such as al-Juwaynī (d. 478 AH/1185 AD) and al-'Āmirī (d. 381 AH/991 AD), and then continued by the proponents of *maqāṣid al-sharī'ah* afterwards, such as al-Shāṭibi and al-Fasi. Before al-Ghazālī, the protection of religion (*ḥifẓ al-dīn*) is concerned with the criteria of apostate that al-'Amirī called it prohibition of loosing identity (*muzjirah khal'i al-bayḍah*). The scholars of *maqāṣid* after al-Ghazālī, such as al-Shāṭibi, Allāl al-Fāsī, and al-Ṭāhir ibn 'Āshūr, associated the protection of religion (*hifz al-dīn*) with all the aspects of Islamic teachings, ranging from beliefs (*aqīdah*), rituals, *muā'malah* and others. As times passed by, the understanding of *hifz al-dīn* is then not only about religious matters, but it is extended also to religious freedom. Thus, to protect one's freedom of choice to a certain belief part of *sharī'ah* (*maqāṣid al-sharī'ah*). This idea, as quoted by Jassir 'Auda, was proposed for the fist time by Saif 'Abd al-Fattāh.[56]

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[55] al-Ghazali, *al-Mustasfa*, p. 287.

[56] Jassir 'Audah, *al-Ijtihad al-Maqasidiy Min al-Taṣawwur al-Uṣūliy Ilā al-Tanzīl al-'Amaliy* (Bairut: al-Shabakah al-'Arabiyyah Li al-Abhath wa al-Nahr, 2013), p. 30.

Before al-Ghazālī, protection of life (*hifz al-nafs*) was related with more specific issues, i.e. prohibition to kill (*muzjirah qatl al-nafs*), protection of honor (*hifz al-'ird*), and prohibition to injure honor (*muzjirah thalb al-'ird*). In a further development, al-Juwaynī, al-Ghazālī, and al-Shāṭibī consistently simplified the term into two well-known terms, i.e. *hifz al-nafs* (protection of life), and *hifz al-nasl* (protection of descent). Thus, the term *muzjirah qatl al-nafs* (prohibition to kill) is included in the studies of *hifz al-nafs*, while *hifz al-'ird* and *muzjirah thalb al-'ird* were integrated into into the studies of *hifz al-nasl* (protection of descent).[57]

Although the term has been not changed, the protection of reason (*hifz al-'aql*) has been understood in conjuction with scientific, social, and cultural developments. When it was first formulated, the protection of reason was only centered on the prohibition to consume alcoholic drinks (*al-khamr*) due to their demaging affects on the mind. It was al-Qaradawi who then extended the term *hifz al-'aql* into an obligation to keep seeking knowledge until the end of life (*min al-mahdi ila al-lahd*), an obligation to observe and think about the universe (*malakūt al-samawāt wa al-ard*) for both individual and public interests.[58] Saif 'Abd al-Fattāh, a later proponent of *maqāṣid*, then developed the concept of al-nasl hifz into freedom of thought.[59]

Protection of property (*hifz al-māl*) has been also shifting from one to another period. Al-'Āmirī, before al-Ghazālī, called it *muzjirah akhdz al-māl* (a ban to take property), in which the punishment of theft (*al-sāriqah*) and robbery (*al-ḥirābah*) were also discussed. Al-Juwaynī then changed the term into *'ismah al-māl* (protection of property), which was then finalized by al-Ghazālī to the concept of *hifz al-māl* that he divided it into three levels: *al-ḍarūrāt* (primary), *al-ḥājāt* (secondary) and *al-*

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[57] Ibid., pp. 25-26.
[58] Ibid., p. 28.
[59] Ibid., p. 29.

taḥsīnāt (tertiary).[60] This categorization was based on the level of demand and the scale of priorities. *Maqāṣid al-ḍarūriyyāt* (primary objectives) refers to fundamental needs the absence of which will destroy the lives as whole.[61]

Maqāṣid al-ḥājiyyāt (secondary objectives) is defined as something that can facilitate people in fulfilling their primary needs.[62] Because of its significance in sustaining and completing the primary objectives, the presence of these secondary objectives is required (lit. *ḥājiyyāt*) rather than necessary (lit. *ḍarūriyyāt*). That is, the absence of *ḥājiyyāt* would not necessarily destroy human life, event though lackness or difficulties may exist.[63]

While *maqāṣid al-taḥsīniyyāt* (tertiary objectives) is defined as something whose presence is not necessary or required, but beautifies (lit. *taḥsīniyyāt*) the realization of the primary (*ḍarūriyyāt*) and secondary (*ḥājiyyāt*).[64] On the contrary, their absences will not demage or make life difficult, rather it only impairs a sense of beauty and ethics.

In regard with the legality of *maṣlaḥah* by the Shārī', al-Ghazālī classifies it into three: the first is *maṣlaḥah mu'aththirah* (authoritative), which is the benefits explicitly mentioned by the texts; the second is *maṣlaḥah mulghāh* (useless) and *gharībah* (unknown), which are the benefits neglected by the texts; and the third is *maṣlaḥah mursalah* (unregulated), which is the benefits not mentioned directly by the texts but in conformity with *maṣlaḥah* described by the texts.[65] It is important to note here that, as al-Ghazālī put in, *maṣlaḥah ḥājiyyah* (secondary benefits) and *maṣlaḥah taḥsīniyyah* (tertiary benefits) can not be used as a legal basis unless supported by *aṣl* (i.e. something whose legality is explained by the texts). Thus, the operative work of al-Ghazālī's

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[60] Ibid., p. 289.
[61] Ibid., p. 290.
[62] Ibid., p. 291.
[63] Ibid.
[64] Ibid., p. 292
[65] Ibid., pp. 310-311.

maṣlaḥah is indeed that of analogy (*qiyās*), because if there is no support from *sharā'* (the lawgiver), then it is *istiḥsān* (considered to be better).[66]

In al-Ghazālī's opinion, *maṣlaḥah ḍarūriyyah* (primary, urgent benefits) can serve as a legal basis only if it meets the following requirements: firstly, it does not conflict with *naṣṣ qaṭ'ī* (a decisive text). For al-Ghazālī, *naṣ qaṭ'ī* is stronger than *maṣlaḥah mursalah*. When there is contradiction (*ta'āruḍ*) between *maṣlaḥah* and *naṣṣ ẓannī* (an equivocal text), then the priority is given to *maṣlaḥah* without neglecting the texts. In other words, what applies here is that *maṣlaḥah* specifies (*takhṣiṣ*) the general meanings of texts; secondly, *maṣlaḥah* is universal (*kulliyāt*), not particular (*juziyyāt*); thirdly, there is a strong belief that *maṣlaḥah* is a real, not a mere eutopian, presumptious or suspicious one.[67]

2.5 Al-Shāṭibi (d. 790 AH) on Maṣlaḥah

Abū Isḥaq ibn Mūsa al-Gharnaṭī is known also as al-Shāṭibi. The name al-Shāṭibi is derived from the name of his mother land, Shatibah (Xativa or Jativa). He was born in Granada. Hamka Haq said that al-Shāṭibi's exact birth date is still unknown up to now. In general, most people refer to his death, i.e. 790 AH/1388 AD.[68] However, it is strongly supposed al-Shāṭibi was born and spent his life in Granada during the reign of Yūsuf Abū al-Hajjāj (1333-1354 AD) and Sultan Muhammad IV (1354-1391).[69]

The name Shāṭibi is attributed to his father's birthplace at Sativa (Shāṭibah), an area in east Andalusia. In 1247 M, al-Shāṭibi's family fled to Granada when Sativa was finally captured by the king of Spain Uraqun after a nine-year war since 1239M.[70]

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[66] Ibid., pp. 293-294.
[67] Ibid., pp. 295-309.
[68] Sha'bān, Uṣūl al-Fiqh, p. 417.
[69] Hamka Haq, al-Shatibi: *Aspek Teologis Konsep Maṣlaḥah dalam Kitab al-Muwafaqat*, , (Jakarta: Publisher Publishing, 2007), p. 17.
[70] Ibid.

Al-Shāṭibi learnt from a number of teachers among of whom are Ibn al-Fakhrār al Ibiri, Abū 'Abd al-Balinsī, Abū al-Qāsim al-Sabti, Abū Abd Allah al-Sharī' fi al-Tilimsānī, Imam al-Maqrī, Al-Khaṭib Ibn al-Marzūq, Abu 'Ali al-Manṣūr al-Mashzālī, Abu al-'Abbās al-Qabāb, and Abu 'Abdillāh al-Ḥfār.[71]

Among many works of al-Shāṭibi are: *Kitāb al-Muwāfaqāt*; (2). *Kitāb al-I'tiṣām*; (3). Kitāb al-Majālis; (4). *Sharḥ al-Khulāṣah*; (5). *Unwān al-Ittifāq fi 'Ilm al-Ishtiqāq*; (6). *Uṣūl 'an-Naḥw*; (7). *Al-Ifadāt wa al-Inshadāt*; (8). *Fatāwā al-Shātibī*.[72]

Al-Shāṭibi said that the purpose of Shā'ri' (Allah) are four. They are:

a. *Qaṣd al-Shāri' fi Waḍ'i al-Sharī'ah* (the Lawgiver Has Purposes in His Legislation)

Al-Shāṭibi pointed out that Allah revealed the Sharī'a (laws) is not but for bringing the benefits and avoiding difficulties (*jalb al maṣāliḥ wa dar'u wa al-Mafāsid*). To put it simpler, God imposed the rules for the benefits of people in the world and the Hereafter as well.[73] The realization of those benefits requires the fulfillment of five basic elements, i.e. religion, life, descent, reason and property.[74]

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[71] Al-Shatibi criticized excessive fanaticism (ta'aṣṣub) of the Granadian scholars and the Andalusian society over the Mālikī school. Others than Mālikī followers were misguided. It is known that the people of Andalus are strict followers of Mālikī's school since their king, Hisham al-Awwal bin Abdurrahman al-Dākhil, who reigned from 173-180H, announced it as the official school of the state. According to one story, Hisham al-Awwal preferred to choose Mālikī school after he questioned two scholars, one is Hanafī and the other one is Mālikī. Hisham al-Awwal asked: "where does Abu Hanīfah come from?" the Hanafi scholar replied: "Kufa". Then, he returned to the Mālikī scholar: "where does Imam Mālik come from?" the Mālikī scholar said: "Medina". Hisham then said: "it is enough for us a cleric who came from a place wherein the Prophet migrated into. Al-Shatibi wrote Kitab *al-Muwāfaqāt* in order to bridge the current tensions between the Mālikī and the Hanafī; See Ibid.

[72] Sha'ban, *Uṣul al-Fiqh*, Ibid.

[73] Ibid.

[74] Ibid. There is disagreement among scholars on the ordering of the five benefits. Given that al-Ghazali was the initiator of those five benefits, I inclined to al-

Waḥbah al-Zuhaylī pointed out that Mālikī and Shafi'ī's scholars listed the five main principles (*al-uṣūl al-khamsah*) in the following order: religion, life, intellect, descent, and property. On the hand, Ḥanafī put them in the order: religion, life, descent, intellect, and property.[75] Similarly, al-Būṭī said that 'ulamā agreed to follow the initiator's (i.e. al-Ghazālī) order of *al-uṣūl al-khamsah*, namely religion, life, intellect, descent, and property.[76]

In an effort to realize and maintain the five basic elements, al-Shāṭibi devided the benefits into three categories:[77]

1. *Al-maqāṣid al-ḍarūriyyāt* (primary, basic objectives);
2. *Al-maqāṣid al-ḥājiyyāt* (secondary objectives);
3. *Al-maqāṣid al-taḥsīniyyāt* (tertiary objectives).

Al-maqāṣid al-ḍarūriyyāt is:

الأمورالتيلابدمنهافيقياممصالحالدينوالدنيا, بحيثإذاافقدتلمتجرمصالحالدنياعلىاستقامة, بلعلىفسادوتهارجوفوتحياتوفيالأخرةفوتالنجاةوالنعيموالرجوعبالخسرانالمبين.

> Something whose presence is necessary in order to real-ize the goodness of religion and the world, and whose absence would make it unstable, and even damaged and destroyed, and in Hereafter it would lead to the loss of

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Ghazali's ordering of maṣlaḥah, i.e.: religion, life, reason, descent, and property. Ibn al-Subki (d. 771 AH) added the honor (al-'ird}) as the sixth benefit that is also maintained and protected by religion. al-Qarafi, al-Shawkani, and Ibn 'Ashūr refused it because they see that the protection of honor is already includ-ed in the scope of protection of descent. See Ahmad al-Raisūni, Naẓariyat al-Maqāṣid, pp. 62-64.

[75] See Wahbah al-Zuhaili, Uṣūl al-Fiqh al-Islāmī, Vol. 2, (Bairūt: Dār al-Fikr, 1986), pp. 752-753.

[76] See Muhammad Sa'id Ramaḍān al-Būṭī, *Ḍawābiṭ al-Maṣlaḥah fi al-Sharī'ah al-Islāmiyyah*, (Bairūt: Muassasah al-Risā lah, 1982), p. 250.See also Musfir bin 'Ali, *al-Wa'y al-Maqāṣidī*, p. 43.; Abd. Al-Majid al-Najjar, *Maqasid al-Shari'ah bi Ab'ad Jadidah* (Tunisia: Dar al-Gharb al-Islami, 2012), p. 47.

[77] Al-Shatibi, *al-Muwāfaqāt*, Vol. 2, 6

safety (from the wrath of God), pleasure, and harmful returning (to Allah).[78]

Protection of *maqāṣid al-ḍarūriyyāt* ranks the highest and most important than the two other maqāṣids. Therefore, sacrificing *ḍarūriyyāt* needs for *ḥājiyyāt* and *taḥsīniyyāt* is not justified.[79]

Al-maqāṣid al-ḥājiyyāt is:

إنهامفتقرةإليهامنحيثالتوسعةورفعالضيقالمؤديإلىالحرجوالمشقةاللاح
قةبفوتالمطلوبفإذالمترعدخلعلىالمكلفين   -   علىالجملة   -
الحرجوالمشقة,
ولكنهلايبلغمبلغالفسادالعاديالمتوقعفيالمصالحالعامة.

Something that is needed to bring forth easiness and eliminate limitedness that can cause difficulties and make what is sought is neglected. If maqāṣid is not maintained, the mukallaf people in general will be in trouble, but not to the extent of normal damages that the public good in general attempts to avoid.[80]

In short, the *ḥājiyyah* benefits refer solely to difficulties in this life. It is the spirit upon which Islam is actually built. Therefore, this spirit is reflected in all aspects of life, both in rituals and *mu'amalah* (interaction with others), such as relief (*rukhṣah*) of shortening (*qaṣar*) prayers for those who are sick or on travels and the rightfulness of anything good (*ṭayyibāt*).

Al-maqāṣid al-taḥsīniyyāt is:

فمعناهاالأخذبمايليقمنمحاسنالعاداتوتجنبالأحوالالمدنساتالتيتتأنفهاالعق
ولالراجحاتويجمعذلكقسممكارمالأخلاق

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[78] Al-Shatibi, *al-Muwāfaqāt*, Vol. 2, Ibid. Abu Zahra pointed out that rejecting everything that can result in the loss of one of the five basic elements can be regarded as ḍarūrī (primary/urgent). See Abū Zahra, *Usul al-Fiqh*, p. 371.

[79] Sapiuddin Shidiq, *Usul Fiqh*, (Jakarta: Kencana, 2011), p. 226. See also, Abu Zahra, *Usul al-Fiqh*, p. 372.

[80] Ahmad al-Raysūni, *Naẓariyat al-Maqāṣid 'inda al-Imām al-Shāṭibī*, (Herndon: al-Ma'had li al-'Ali al-Fikr al-Islāmī, 1995), p. 146.

> Maintaining good and proper traditions, as well as re-
> fraining from anything that can tarnish the mind. This
> understanding is summarized in noble characters.[81]

It includes also the benefits that can enhance ones' dignity in society and in the presence of Allah. Unlike *ḍarūriyyāt*, the absence of *taḥsīniyyāt* does not cause destruction and annihilation of human life. Unlike *ḥājiyyāt*, its absence will not also bring difficulties to human life but concerns only with noble morals and good customs.[82]

Al-Qarāfī said that *maṣlaḥah* under the category of *taḥsīnniyyah* is known also with complementary maṣlaḥah (*ma huwa maḥal al-tatimmāt*), because it serves only to complement the benefits. al-Shāṭibi gave some examples of this *maṣlaḥah*: cleaning excrements, ritual washing (*wūḍū'*), dry ablution (*tayammum*), bathing, covering the private parts of the body (*'aurāt*), using make-up, extra religious services (*nawāfil*), eating and drinking manners, avoiding disgusting foods and beverages, being too lavish and too saving.[83]

In *mu'āmalah*, al-Shāṭibi provides the examples of *maṣlaḥah taḥsīniyyāt* as follows: a ban to sale religiously unclean goods, prohibition for slaves to be witnesses and leaders, prohibition for women to become leaders and marry by themselves. In criminal laws, the examples include enactment of retaliation (*qiṣāṣ*) for free men for killing a slave, prohibition to kill women, children, clergy during a war.[84]

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[81] Ibid. See also Musfir bin 'Ali, *al-Wa'y al-Maqasidi*, p. 51.
[82] Al-Raysuni, *Nazariyah*, p. 227.
[83] Al-Shatibi, *al-Muwafaqat*, Vol. 2, pp. 22-23.
[84] Ibid.

The following figure sums up the the basic principles of al-uṣūl al-khamsah and their classification:

Figure 2.1.Al-Shaṭibī's Maṣlaḥah
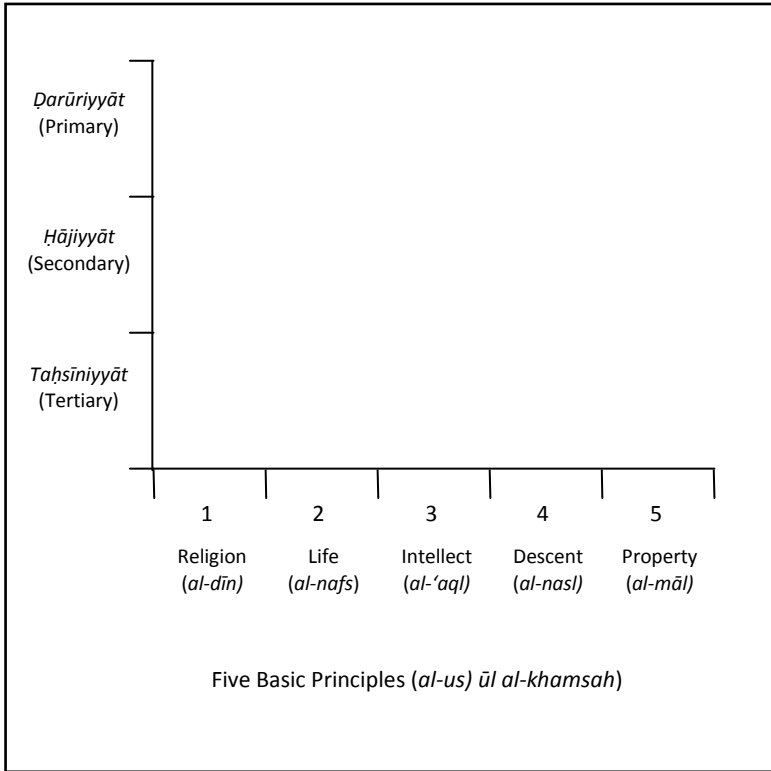
The application of the three categories of maṣlaḥah is shown in the table on next page.[85]

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[85] Ibid., pp. 227-230. See also Fathurrahman Djamil, *Metode Ijtihad Majlis Tarjih Muhammadiyah,* (Jakarta: Logos, 1995), pp. 41-44. These examples are elaborated from the ones given by Abu Zahroh in *Usul al-Fiqh*, pp. 370-373.

Tabel 2.1 Application of the Three Categories of Maqāṣid al-Sharī'ah[86]

No.	Five Basic Principles	*Ḍarūriyyāt*	*Ḥājiyyāt*	*Taḥsīniyyāt*
1	Religion	Protection and ob-servance of primary reli-gious obliga-tion such as a daily five-time prayer	Protection and observance of religious obliga-tion to remove difficulties such as combining (*jamā'*) and shortening (*qaṣar*) prayers for the travel-lers	- Religious obe-dience and re-spects for human dignity as well as observance of religious obliga-tion such as covering the aurāt, cleaning cloths and bod-ies. - Removal of religious chants whose sources are still un-known, and interfaith read-ings for the beginners.
2	Life	Fulfillment of basic needs of life such as foods and other physical needs.	- Allowance of hunting and enjoying good foods and bevarages	- Establishment of table man-ners; - Protection of one'self from other's unjusti-fied accusation and abuse
3	Intellect	Prohibition of alcoholic drinks	- Call for learn-ing - Prohibition of drinking alcohol lesser or more	-Restraint from thinking and listening to the unuseful

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[86] Some cases in this table were modified from Fathurrahman Djamil, *Metode Ijtihad.,* pp. 41-44.

4	Descent	Provision of marriage and prohibition of unlawful sex (*zinā*)	Obligation for a husband to mention maḥar during the marriage contract, ṭalaq rights for the husband dan khulū' rights for the wife, and obligation to cover the aurāt in the presence of non-muḥrims	- Obligation of marriage proposal (*khiṭbah*) and banquet (*walīmah*) in marriage - Prohibition to go outside by showing off *zīnah* (garnish).
5	Property	Provision of property entitlements and prohibition of unjustified control of other's property	Provision of forward sales (*salam*)	Prohibition of doing transaction which contains *gharar* (speculation)

The above classification of *maṣlaḥah* will help the scholars of Islamic law to analyze legal cases which contain a contradiction between maṣlaḥahs. When the contradiction is between two *ḍarūriyyāt maṣlaḥahs*, the priority should be given to the highest among the five basic principles (*al-uṣūl al-khamsah*), which are orderedly religion, life, intellect, descent and property.

This solution for the contradicting maṣlaḥah applies also to *ḥājiyyāt* and *taḥsīniyyāt*. For example, jihād in the way of Allah is a *ḍarūriyyāt* in the maintenance of the existence of religion and it brings human casualties. In this case, protection of religion through *jihād* must take precedence over maintaince of life even though the two are equally ranked as *ḍarūriyyāt*.[87]

If the contradiction between between *ḍarūriyyāt* and *ḥājiyyāt* and *taḥsīniyyāt*, or between *ḥājiyāt* and *taḥsīniyyaāt*, both *maṣlaḥah ḥājiyyāt*

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[87] Fathurrahman Djamil, *Metode Ijtihad*, p. 46.

and *taḥsīniyyāt* must be ignored in order to realize *maṣlaḥah ḍarūriyyāt*, and *maṣlaḥah taḥsīniyyāt* should be left for the sake of *maṣlaḥah ḥājiyyāt*. For instance, someone should meet his or her basic needs of food in order to survive. The foods should be justified ones (*ḥalāl*). Then, he or she somehow cannot find ḥalāl food, and he would die if he did not eat so in this condition it is justified to eat unjustified foods (*ḥarām*) in order to survive. Eating, in this case, means to protect the soul which is *ḍarūriyyāt*, while eating *ḥalāl* foods is *ḍarūriyyāt*.

Thus, protection of life (*ḍarūriyyāt*) should take precedence over *ḥājiyyāt*.[88] One example of contradiction between *ḍarūriyyāt* and *ḥājiyyāt* is the necessity to keep praying in congregation (*maṣlaḥah ḥājiyyāt*) albeit there is no a jurist (*faqīh*), an abstinent (*warā'*), or Qur'anic reciter (*qāri'*) (*maṣlaḥah ḥājiyyāt*).

Al-Shāṭibi asserted that maintainance of the five basic principles can be done in two ways: (1). In terms of its presence (*min nāḥiyat al-wujūd*), i.e. maintaining the things that can endure its existence; (2). In terms of absence (*min nāhiyyat al-'adam*), i.e. preventing the things that can cause its loss. In practice, these two ways of maintaining the five basic principles are exemplified as follows:[89]

1. Maintaining religion (*al-dīn*) in term of its presence (*al-wujūd*) through prayers and charity, and in term of its absence (*al-'adam*) through *jihād* and punishment for the apostates;

2. Maintaining life (*al-nafs*) in term of its presence (*al-wujūd*) such as eating and drinking, and in term of its absence (*al-'adam*) through retaliation (*qiṣāṣ*) and compensation (*diyāt*);

3. Maintaining intellect (*al-'aql*) in term of its presence (*al-wujūd*) through eating and studying, and in term of its absence (*al-'adam*) through punishment (*ḥādd*) for alcoholics;

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[88] Ibid., p. 45.
[89] See al-Raysūni, *Naẓariyat al-Maqāṣid*, pp. 146-147.

4. Maintaining descent (*al-nasl*) in term of its presence (*al-wujūd*) through marriage, and in term of its absence (*al-'adam*) through punishment (*ḥādd*) for those who did or accused someone of adultery;

5. Maintaining property (*al-māl*) in term of its presence (*al-wujūd*) through trading and working, and in term of its absence (*al-'adam*) through usury and cutting off the hands of thieves.

b. *Qaṣdu al-Shāri' fi Waḍ'i al-Shārī'ah li al-Ifhām* (the Lawgiver Revealed the Law to be Understood)

In Shāṭibi's opinion, because the Qur'an was revealed in Arabic, its proper understanding will require knowledge on the correct rules of the language.[90] In addition, al-Shāṭibi also stressed that Sharī'ah aims to realize the benefits for the Community (*Ummah*) of Muhammad who is known as "*ummiyyah*" (i.e. unable to read and write). Therefore, Sharī'ah is also "ummiyyah".[91]

c. *Qaṣdu al-Shāri' fi Waḍ'i al-Shārī'ah li al-Taklīf bi Muqtaḍāhā* (The Lawgiver Revealed the Law to be Obidied According to the His Demands)

In this case, al-Shāṭibi divided legal charge or obligation (*taklīf*) into two categories:[92] the first is *taklīf* that is beyond human capability (*al-taklīf bimā lāyuṭāq*). There will be further discussion on this since it is known that *taklīf* should be within the limist of human ability. Still related to this, al-Shāṭibi said: "A *taklīf* which is beyond the limits of human ability, then it is not valid regardless the sense approves it".

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[90] Ibid., p. 149
[91] Ibid.
[92] Ibid., pp. 150-151.

The second is *taklīf* which contains difficulties (*al-taklīf bimā fī hi mashaqqah*).[93] Al-Shāṭibi discussed the issue in further lenght. Al-Shāṭibi pointed out that the Lawgiver (*Shāri'*) does not mean by *taklīf* to cause difficulties (*mashaqqah*) for the *mukallafs* (the subject of laws), otherwise He provides an added value to them. For example, the obligation of jihad is not intended to lead them to distruction, but for the benefits of them (*waṣīlah amar ma'rūf nahy al-munkar*).[94] Similarly, the provision of cutting off hands in theft was not intended to cause damages over the body but for the sake of maintaining others' property.

When it seems there is *mashaqqah* in *taklīf*, it is *kulfah*, namely something that is indispensable from human activities as it is the case that hard-working day and night to make a living for people is not considered *mashaqqah*, rather a necessity and prevalence. It applies also to the issue of religious observance.[95] Al-Shāṭibi called it *mashaqqah mu'tādah* (normal or usual difficulties) because it can be done and, therefore, in *tashrī'* it is not seen as *mashaqqah*. What he means by *mashaqqah* is what he calls it *mashaqqah ghair mu'tādah* or *ghair 'ādiyyah*, i.e. one that is unusual and impossible to do, or whose realization would cause harm and trouble. One example is obligatory fasting for the sick and the elders, which is *mashaqqah ghair mu'tādah* condemned by Islam. Islam provides a *rukhhṣah* (relief) to overcome such *mashaqqah*.[96]

d. *Qaṣdu al-Shāri' fī Dukhūl al-Mukallaf Taḥta Aḥkām al-Sharī'ah* (the Lawgiver aims to bring humans into the Guidance of the Law)

Al-Shāṭibi insisted that *maṣlahah* that the Lawgiver wants to establish is one that sustains the establishment of life on earth for the sake of

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[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] Ibid., pp. 152-153.

the Afterlife.[97] Therefore, *maṣlahah* which is inclined only to mundane life rather than eternal life is not the purpose of the Lawgiver. This is why realization of *maṣlahah* should be void of lust and only by doing so that human beings will become freely conscious servants (*ikhtiyāran*) rather than compulsory ones (*ittiṭāran*).

In Shātibi's opinion, there are three conditions to fulfill in order to figure out the sharī'ah.[98]

1. Knowledge of the Arabic language. This requirement is imperative because the Qur'ān, which is is the primary source of Islamic law is written in Arabic.[99] The question is then whether other-than-Arabic translation is enough to understand the Qur'an? Shāṭibi's answer on this issue is shown in his description of the inferred meanings of the word (*dalālah lafẓī*).

For al-Shāṭibi, the inferred meaning of the words can be seen from two aspects: firstly, words that provide definite meanings (*muṭlāq*), which is called *dalālah aṣliyyah* (original meanings); secondly, words that demonstrate additional rather than definite meanings, which is referred to as *dalālah tābi'ah* (secondary meanings).

Al-Shāṭibi said that *dalālah aṣliyyah* is found in all languages and it, therefore, can been translated, such as an utterance that someone is standing. However, an emphasis in utterance or statement about someone, al-Shāṭibi said, belongs to *dalālah tābi'ah* and it is, therefore, hard to be translated because it links to the oral tradition of the Arabs who always consider the informant (*mukhbir*), the informed (*mukhbar 'anh*), and the information (*nafs al-ikhbār*), the situation and the wording (*al-hāl wa al-nasaq*), the grammatical aspects (*naw' al-uslūb*), the short (*ījazz*), and the length of the words (*iṭnāb*) and so forth.[100]

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[97] Al-Shatibi, *al-Muwāfaqāt*, Vol. 2, pp. 128-150.
[98] Fathurrahman Djamil, Metode Ijtihad, p. 46.
[99] Ibid., p. 66.
[100] Ibid.

2. Knowledge of the Sunnah.[101]
3. Knowledge of the reasons of the Qur'anic revelation.[102]

Al-Shāṭibi offered three ways to understand *maqāṣid al-sharī'ah*.[103] The first is by examining the pronunciation of the commands (*al-amr*) and prohibitions (*al-nahy*). The commands in the the Qur'an and the Hadith are meant to be realized and, on the contrary, the prohibitions are supposed to be restrained and kept away. The necessity to keep away from the prohibited is the purpose desired by Allah.[104]

It is important to note that the commands and prohibitions in the Qur'an and the Hadith have two dimensions: primary and secondary ones. For example, a strong command for praying is a primary objective, while avoiding indecency (*al- fakhshā'*) is a secondary one.[105]

The second is by analyzing the basic cause (*illāh*) behind the commands or the prohibitions. When the cause is clearly known (*ma'lūmah*) from a commands or a prohibition, it then should be guidance and be followed, because the legal objectives in the corresponding command or prohibition can be realized by submitting to the literal *'illāh* in the *naṣ*. The examples are a procreative objective in marriage and a mutual gain in trading.

On the other hand, the unknown cause ('*illāh ghayr al-ma'lūmah*), al-Shātibi said, must leave it to the Lawgiver with *tawaqquf* (i.e. no analysis should be conducted). This is because to extend the scope (*al-ta'addī*) of something unclear means to lay down laws without any legal proposition, and it goes against the law. The scope of any injunction or prohibition can be extended only when the objective of the law has been

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[101] Ibid., p. 68
[102] Ibid.
[103] Ibid., pp. 295-307. See also, Asafri Jaya Bakri, "Konsep Maqāṣid al-Sharī'a Menurut al-Syatibi and Relevansinya dengan Hukum Islam", (Disertasi- Program Pascasarjana UIN Jakarta, 1994), pp. 128-145.
[104] Ibid.
[105] Ibid, p. 132

clearly known. The third is by analyzing legal issues not explicitely mentioned by the Lawgiver (*sukūt al-shāri'*).[106]

2.6 Al-Ṭūfī (d. 716 AH) on Maṣlaḥah

Najm al-Din Abu al-Rabi' Sulayman ibn Abd al-Qawi bin Abd al-Karim bin Sa'id Al-Ṭūfī al-Sarsari al-Baghdadi al-Hanbali is later known as Al-Ṭūfī.[107] The name al-Ṭūfī is attributed (*nisbat*) to Ṭawfa, a village located in Sarsar Iraq where he was born. Besides he is known as al-Ṭūfī, he is also widely identified with the name Ibn Abi 'Abbas. Al-Ṭūfī was born in 673 AH (1274 AD) and died in 716 AH (1316 AD) in Palestine.[108]

Al-Ṭūfī wrote no less than 42 books on various topics, especially on the Qur'an, jurisprudence, logic, Arabic, and literature.[109] Out of all his works, one was echoing the loudest and shaking the world of Islamic thoughts, especially in of Islamic jurisprudence, namely *Kitāb al-Ta'yīn fī Sharh al-Arba'īn*, which is an explanation on *Al-Ḥadīth al-Arba'īn al-Nawawiyyah*.

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[106] Ibid.

[107] Ibn al-'Imād, *Shadzarat al-Zahab fī Akhbāi Man Zahab*, Vol. 5, (Bairūt: al-Maktabah al-Tijāri, t.th.), p. 39.

[108] Qamaruddin Khan, *Pemikiran Politik Ibn Taymiyyah*, trans. Anas Mahyud-din, (Bandung: Pustaka, 1983), pp. 37-38.

[109] Muṣṭafā Zaid, *al-Maṣlaḥah fī al-tashrī' al-Islāmī wa Najm al-Dīn al-Ṭūfī*, (Bairūt: Dār al-Fikr al-'Arabī, 1964), pp. 91-94. During the periode of al-Ṭūfī, a number of Islamic jurisprudence has been used to justify the policies and inter-ests of the authorities under the Mamluks of Egypt (649-924 H/1250-1517 AD). For instance, all the farmlands was shared exclusively between the political and the military authorities. The whole agricultural land in Egypt, for example, is divided as follows: 4 parts goes to the ruler as an individual, i.e. the sultan; 9 parts to the royal officials, including the security guards, the palace servants and soldiers assigned to provide immediate services to the king; 11 parts to the Mamluk emirs and other Mamluk soldiers. See SirJhon Clubb, *Solder of For-tune, The Story of the Mamluks,* (New York, 1973), p. 207, as cited by Abdallah M. Al-Husayn al-'Amīrī, Dekonstruksi Sumber Hukum Islam, terj. Abdul Basir, (Jakarta: Style Media First, 2004), p. 37.

In his book, precisely on the explanation of al-Hadith No. 32, i.e. *lā darāra walā dirāra* (no harm is allowed to onself or to others), al-Ṭūfī expressed his ideas on *maṣlaḥah* as an independent preposition (*dalil mustaqil*) in excavating Islamic laws,[110] on which this dissertation will explain in the following.

In fact, there is no other scholar who considers *maṣlaḥah* as an independent legal proposition (*mustaqil*) before al-Ṭūfī, nor among the leaders of the major schools, such as Abū Ḥanīfah al-Nu'man bin Thabit (d. 150 AH/767 AD), Mālik ibn Anas (d. 179 AH/795 AD), Muhammad ibn Idrīs al-Shāfi'ī (d. 204 H/819 AD), and Ahmad ibn Ḥanbal (d. 241 H / 855 AD), and their followers as well. To some extent, Abū Ḥanīfah accepts *maṣlaḥah* as the basis for determining laws through a method of *istiḥsān*, i.e. legal judgments based on common sense of practicality or appropriateness rather than directly on the texts or strict analogy (*qiyās*). Later, his opponents alleged that *istiḥsān* has violated the provisions in texts and analogy. The proponents of *istiḥsān* insisted that the allegation is untrue.[111] *Istiḥsān*, according to its proponents, is obviously in line with the provisions of the texts (*naṣ*) and *qiyās*, except that in certain cases the analogy is subtle and not immediately known.

On the other hand, Mālik (d. 179 AH) accepts al-maṣāliḥ al-mursalah[112] as a method in legal excavation (*istinbāṭ al-ḥukm*). One can use this method to "creatively" determine the laws, on which it is un-

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[110] See Najm al-Din al-Ṭūfī, *Kitāb al-Ta'yīin fii Sharh al-Arba'īn*, (Bairuut: Muassasah al-Rayyan, 1994), pp. 234-280.

[111] Referring to uṣūl al-fiqh among Hanāfī, Wahbah al-Zuhaili defines istiḥsān: "to turn from the provisions of qiyās jalī to the demands of qiyās khāfī because of stronger propositions, or turning away from the universal or deductive provisions (kulliyāt) to the demands of partial issues (juz'ī). See Wahbah al-Zuhailī, *Uṣūl al-Fiqh al-Islāmī,* Vol. 2, (Bairūt: Dār al-Fikr, 1998).

[112] The scholars uṣūl fiqh classified maṣlaḥah into three types: the first is maṣlaḥah mu'tabarah, i.e, one which is justified and considered by naṣ; the second is maṣlaḥah mulghāh, i.e. one which is clearly rejected and not considered by naṣ; and the third is maṣlaḥah mursalah or muṭlaqah, i.e. one that is unclear whether justified or refused by naṣ. It is the third type of maṣlaḥah which the Mālikī put forward in excavation of Islamic laws. See Ibid.

clear whether the text justifies it or not (*mursalah, muṭlaqah*) as long as they meet the criteria of *ḍarūriyyah* (urgent), *kulliyyah* (universal) and most likely will bring *maṣlaḥah* within the scope of the five basic principles (*al-uṣūl al-khamsah*), i.e. religion, life, intellect, descent and property.

Al-Shāfi'ī (d. 204 AH), on the other hand, explicitly rejected the use of reason (ra'y) in Islamic legislation, and, therefore, in the protection of maṣlaḥah for human beings as well. He asserted that the only acceptable source of law is the Qur'ān and the Sunnah of the Prophet. For al-Shāfi'ī (d. 204 AH) Sunnah is the second source of law after the Qur'an. Even, al-Shāfi'ī does not only consider the Sunnah as a binding source of law, but also **as** divine and, therefore, equal as the Qur'an.[113] He asserts that the Sunnah is equal to the Qur'ān and both cannot abandon (*naskh*) each other; in fact, the Sunnah is meant to interpret, judge and cancel the Qur'ān.[114]

al-Shafi'ī (d. 204 AH) pointed out further that all the legal benefits for the mankind are found in the Qur'ān and the Sunnah, and there is no need to use common sense except in urgent situations. For al-Shafi'ī, reasons serves only to derive laws by using a strict analogy (*qiyās*) based on the two sources of laws: the Qur'ān and the Sunnah.[115]

Ahmad ibn Ḥanbal (d. 241 AH) emphasizes the authority of Hadith (*ḥujjiyah al-ḥadīth*) which is considered weak, and the opinions of the companions of the Prophet (*āthār al-ṣaḥābah*) and the followers who came after them, with regard to the laws and the interpretation of *naṣṣ*.[116]

The opinions of the four jurist schools above on *maṣlaḥah* were also replicated by the scholars afterwards, such as al-Juwaynī (d. 478 AH),

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[113]Muhammad Abu Zahra, *al-Shāfi'i*, (Cairo, Dār al-Fikr, 1948), pp. 183-184, as cited by Abdullah M. Al-Husayn al-Amiri, *Dekonstruksi*, p. 5.
[114] Ibid.
[115] Ibid., p. 6
[116] Ibid., p.8.

al-Ghazālī (d. 505 AH), Ibn Taymiyyah (d. 728 H.), Ibn Qayyim al-Jauziyah (d. 751 AH), although they established some additional criteria and conditions. Ṭūfī's opinion on *maṣlaḥah*, as described above, is mostly derived from his explanation (*sharḥ*) on the hadith no. 32 in his *al-Hadith al-Arba'in al-Nawawiyyah*. The Hadith in question reads:

لاضررولاضرار

No harm should be allowed to oneself and to others.[117]

Regardless of whether the chain of transmitters is strong or its attribution to the Prophet is authentic, al-Ṭūfī found that the hadith represents the Qur'anic objectives to protect the good and well-being for the mankind. For him, the Ḥadīth is only a fragment of the following complete sentence:[118]

لالحوقأوإلحاقضرربأحدولافعلضرارمعأحد

No harm is allowed to someone and no adverse retaliatory actions are allowed on someone.

Al-Ṭūfī said further that the al-Ḥadīth contains a fundamental legal principle:

لالحوقضررشرعاإلابموجبخاصمخصص

No unlawful and harmful acts are justified (to others) unless there are reasons that specify (*takhṣīṣ*)[119]

To elaborate his views on the necessity to realize the benefits for the mankind as well as his rejection on any harmful actions both to one's self and to others, al-Ṭūfī quoted some Qur'anic verses, such as Surah al-Baqarah, 185:

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[117] Al-Ṭūfī, *Kitāb al-Ta'yīn*, p. 234. The Hadith is foud in *al-Muwaṭṭā'* No. 1234, *Sunan Ibn Majah* No. 2331 and 2332. See Mālik ibn Anas, *al-Muwaṭṭā'* Vol. 5, (Beirut: Dar al-Kitab al-'Arabi, t.th.), p. 37. Ibn Majah, *Sunan Ibn Majah*, Vol. 7, (Beirut: Dar al-Pole al-'Ilmiyyah, t.th.), p. 143.
[118] Al-Ṭūfī, *Kitāb al-Ta'yīn*, p.236
[119] Ibid.

شَهْرُ رَمَضَانَ ٱلَّذِيَ أُنزِلَ فِيهِ ٱلْقُرْءَانُ هُدًى لِّلنَّاسِ وَبَيِّنَٰتٍ مِّنَ ٱلْهُدَىٰ وَٱلْفُرْقَانِۚ فَمَن شَهِدَ مِنكُمُ ٱلشَّهْرَ فَلْيَصُمْهُۖ وَمَن كَانَ مَرِيضًا أَوْ عَلَىٰ سَفَرٖ فَعِدَّةٞ مِّنْ أَيَّامٍ أُخَرَۗ يُرِيدُ ٱللَّهُ بِكُمُ ٱلْيُسْرَ وَلَا يُرِيدُ بِكُمُ ٱلْعُسْرَ وَلِتُكْمِلُوا۟ ٱلْعِدَّةَ وَلِتُكَبِّرُوا۟ ٱللَّهَ عَلَىٰ مَا هَدَىٰكُمْ وَلَعَلَّكُمْ تَشْكُرُونَ ١٨٥

The month of Ramazan is that in which the Quran was revealed, a guidance to men and clear proofs of the guidance and the distinction; therefore whoever of you is present in the month, he shall fast therein, and who-ever is sick or upon a journey, then (he shall fast) a (like) number of other days; Allah desires ease for you, and He does not desire for you difficulty, and (He de-sires) that you should complete the number and that you should exalt the greatness of Allah for His having guided you and that you may give thanks.[120]

Al-Ṭūfī also cited Surah al-Nisa', 28:

يُرِيدُ ٱللَّهُ أَن يُخَفِّفَ عَنكُمْۚ وَخُلِقَ ٱلْإِنسَٰنُ ضَعِيفًا ٢٨

God wants to give relief to you and the man was made to be weak.[121]

and also Surah al-Hajj, 78:

وَجَٰهِدُوا۟ فِي ٱللَّهِ حَقَّ جِهَادِهِۦۚ هُوَ ٱجْتَبَىٰكُمْ وَمَا جَعَلَ عَلَيْكُمْ فِي ٱلدِّينِ مِنْ حَرَجٖۚ مِّلَّةَ أَبِيكُمْ إِبْرَٰهِيمَۚ هُوَ سَمَّىٰكُمُ ٱلْمُسْلِمِينَ مِن قَبْلُ وَفِي هَٰذَا لِيَكُونَ ٱلرَّسُولُ شَهِيدًا عَلَيْكُمْ وَتَكُونُوا۟ شُهَدَآءَ عَلَى ٱلنَّاسِۚ فَأَقِيمُوا۟ ٱلصَّلَوٰةَ وَءَاتُوا۟ ٱلزَّكَوٰةَ وَٱعْتَصِمُوا۟ بِٱللَّهِ هُوَ مَوْلَىٰكُمْۖ فَنِعْمَ ٱلْمَوْلَىٰ وَنِعْمَ ٱلنَّصِيرُ ٧٨

And strive hard in (the way of) Allah, (such) a striving a is due to Him; He has chosen you and has not laid upon you an hardship in religion; the faith of your father Ibra-him; He named you Muslims before and in this, that the Messenger may be a bearer of witness to you, and you may be bearers of witness to the people; therefore keep up prayer and pay the poor-rate and hold fast by Allah;

He is your Guardian; how excellent the Guardian and how excellent the Helper![122]

Based on the Ḥadīth, al-Ṭūfī insisted that *mafsadah* should be removed unless there is takhṣīs by evidence (*dalīl*). Thus, the contents of the Ḥadīth should take precedence over all legal evidences in order to avoid dangers and reach maṣlaḥah ah at the same time. This is because, as al-Ṭūfī said, if there is ḍarar in some evidences and we eliminate it by appling the Hadith—the methods of *takhṣīṣ* and and *bayān*—, then we actually have applied two evidences simultaneously; but if we do not eliminate it, it means that we do not apply any of the arguments, i.e. the Ḥadīth. Whereas, compromising several propositions is more than neglecting one of them.[123]

For al-Ṭūfī, there are nineteen propositions of the Sharī'a. They are (1). *Al-Kitāb*; (2). Al-Sunnah; (3). *Ijmā 'al-Ummah*; (4). *Ijmā' ahl al-Madīnah*; (5). *Al-Qiyās*; (6). *Qawl al-Ṣaḥābī*; (7). *Al-Maṣāliḥ al-Mursalah*; (8). *Al-Istiṣḥāb*; (9). *Al-Barā'ah al-Aṣliyyah*; (10). *Al-'Awāid*; (11). *Istiqrā'*; (12). *Sadd al-Dzarī'ah*; (13). *Istidlāl*; (14). *Al-Istiḥsān*; (15). *Al-Akhdz bi al-Akhaf*; (16). *Al-'Ismah*; (17). *Ijmā 'Ahl al-Kufa*; (18). *Ijmā' Asyrah*; (19). *Ijmā 'al-Khulafā' al-Arba'ah*.[124]

Of the nineteen propositions, Al-Ṭūfī said the strongest proposition is *naṣṣ* (texts) and *ijmā'* (consensus). The two sources of law are sometimes in harmony and sometimes in contradictory with *maṣlaḥah*. When they align with *maṣlaḥah*, there is no problem then because the three propositions, i.e. *naṣ*, *ijmā'* and *maṣlaḥah*, agree on laws. When there is disagreement between the two and *maṣlaḥah*, the latter should be given a priority through specification (*takhṣīṣ*) and explanation (*bayān*) of the passages of *naṣṣ* and *ijmā'* without annulling one of the two proposi-

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[122] Ibid., p. 523.
[123] Al-Ṭūfī, *Kitāb al-Ta'yīn*, p. 237.
[124] Ibid, p. 238.

tions, as it is the case when the Sunnah is given precedence over the Qur'ān through *bayān*.[125]

To emphasize his opinion, al-Ṭūfī provides a long explanation of the meaning and the scope of *maṣlaḥah* and the Shāri's attention on it. Al-Ṭūfī pointed out that *maṣlaḥah* is derived from *maf'alah* from the word *ṣalāḥ*, which means "something which is in a perfect state according to its role". For example, a pen is made in such a way for writing. A sword is hampered in such a way for cutting.[126]

According to traditions ('*urf*), *maṣlaḥah* is a means to achieve the goodness. Meanwhile, according to the law, *maṣlaḥah* is something that can help to realize the objectives of the Lawgiver, either in the forms of worship or customs. Then, *maṣlaḥah* is ivided into two parts: i.e. conducts according to the will of the Lawgiver (*Shāri'*), such as worship and anything else that is meant to bring the benefits for all mankind in this life, such as customs.[127]

Al-Ṭūfī argued that *maṣlaḥah* is applicable only in human interaction (*mu'amalat)*, not in matters related to worship and fixed ordinance (*muqaddarāt)* because worship belongs to the absolute rights of the Lawgiver. It is impossible for someone to know what is in worship, both in terms of quality and quantity, time or place, unless with the guidance from the Shāri'. The servant is but to do what has been ordered by the God, because a servant is considered obedient if he or she follows the master's commands.

It is also the case with worship. Therefore, when philosophers begin to deify reason and refuse Sharī'a, they are worth to receive the warth of

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[125] For al-Ṭūfī, *maṣlaḥah* is a means by which the benefits are realized. For example, trade is a means to achieve a profit. According to sharī'a, *maṣlaḥah* is something that leads to the objectives of the Shāri', both in the form of worship or customs. *Maṣlaḥah* is divided into two, i.e. conducts according to the will of the Shāri', such as worship and anything else that is meant to bring the benefits for all mankind in this life, such as customs. See Ibid.

[126] Ibid., p. 274.

[127] Ibid., p. 279.

Allah. They are away from the truth. In fact, they are misleading. Unlike the mukallaf, they have mixed *siyāsah* (politics) with sharī'ah which is meant deliberately for the benefits of the mankind.[128]

In relation with the Shāri's attention on *maṣlaḥah*, al-Ṭufī pointed out two important things: Firstly, al-Ṭūfī refused two opinions that both accepts and rejects at the same time on whether God's acts are based on reason (*mu'āllalah*)? For al-Ṭūfī, God's acts are based on some wisdom the benefits of which go back to the mankind (*mukallaf*), not to Allah because He is perfect and does not need anything else.[129] Secondly, al-Ṭufī also disagree with two conflicting opinions on the question of whether protection of *maṣlaḥah* is a must for Allah (*wājibah 'alayh*)— similar to that of mu'tazilah—, or it is just His grace for his creatures (*tafaḍḍdul min Allāh*). Al-Ṭūfī said that protection of *maṣlaḥah* is no doubt coming from Allah (*wājibah minhu*) as a grace, but it is not obligatory for Him (*lā wājibah 'alayh*).[130]

Ṭūfī's concept of *maṣlaḥah* is built upon four principles:[131]

a. Reason alone without revelation can determine the good and the evil. However, this autonomous function of reasons is limited in the aspects of *mu'amalah* and customs;

b. Still related to the first opinion above, he found that *maṣlaḥah* is an independent proposition of the Lawgiver whose justification does not depend on the confirmation of the *naṣṣ*, but on reason alone. For al-Ṭūfī, to determine whether or not something is *maṣlaḥah* is based on customs and experimentation, without necessary reference to the *naṣṣ*;

c. As mentioned before, *maṣlaḥah* serves as *shar'ī*'s proposition only in *muā'malah* (social relationships) and customs. In the as-

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[128] Ibid., p. 279
[129] Ibid.
[130] Ibid., pp. 241-242.
[131] See Ibrahim Hosen, "Beberapa Catatan Tentang Reaktualisasi Hukum Islam", in *Kontekstualisasi Ajaran Islam*, (Jakarta: Paramadina, 1995), pp. 254-257.

pects of worship and *muqaddarāt* (something whose quantity is determined already by the *naṣṣ*), *maṣlaḥah* cannot be used as a legal proposition. In either case, the decisions should belong to the naṣṣ and the *ijmā'*. Al-Ṭūfī made this differentiation because for him worship is Allah's absolute right and, therefore, is unknown to human beings in terms of its amount, manner, time and place unless there is justified explanation from Him. While mu'amalah aims to provide the benefits for the mankind, worship belongs to the best knowledge of Allah and, therefore, it is imperative for human beings to follow. In mu'amalah, human beings have a freedon to choose what they consider best as benefits and *maṣlaḥah*. Therefore, in such case they should prefer maṣlaḥah when the benefits are contradictory with the *naṣṣ*;

d. For al-Ṭūfī, *maṣlaḥah* is no doubt the strongest *sharī'*s proposition. He argued that *maṣlaḥah* serves as an argument (*ḥujjah*) only when there are no *naṣṣ* and *ijmā'*, but it should take precedence, through *takhṣīṣ* and *bayān*, when there is a conflict between the two. The preference and the priority of *maṣlaḥah* over the *naṣṣ* apply in all its characteristics, both in the *qaṭ'ī* and *ẓannī* chain of transmission (*sanad*) and the content (*matn*).

Based on the four principles above, al-Ṭūfī established three arguments in giving *maṣlaḥah* a priority over the *naṣṣ* and *ijmā'*:[132] First, the scholars disagree on the position of *ijmā'* as a legal proposition, and they agree, even those who are opposing the *ijmā'*, on that of *maṣlaḥah*. This means that giving a priority to the agreed (*maṣlaḥah*) over the disputed (*ijmā'*) is more reliable.[133]

Secondly, the *naṣṣ* contains a number of contradictions, which has caused disagreement among scholars, while there is no disagreement on maintaining *maṣlaḥah*. Thirdly, there are *naṣṣ* in the Sunnah that is

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[132] Ibid.
[133] Ibid.

rejected by *maṣlaḥah*, such as Umar's prohibition to convey the Hadith on the "guarantee" of Heaven for those who uttered *tawḥīd* (onesess of God). Umar meant this ban for the sake of Muslims, i.e. his concerns that the Hadith would encourage laziness among them.[134]

In al-Ṭūfī's opinion, justification of *istidlāl* (logical inference) in the aspect of worship is found in the *naṣṣ*, i.e. the Qur'an and the Sunnah. The two sources of law explain laws either separately or simultaneously. Table 2.2. below provides the steps of *istidlāl* for a better understanding:

Table 2.2Istidlāl in the Aspects of Worship and Muqaddarāt in Ṭūfī's Opinion

Scope	Legal Sources	Steps

'Ibādah and *Muqaddarāt*	The Qur'an alone (*in-farada bihī al-Kitāb*)	a. When there is only one verse, a legal basis can be inferred directly;
		 b. When there are several verses, then there are some possibilities:
		   - One single meaning: the step is the same as point (a)
		   - Different meanings: the steps should be: compromise, naskh, and selection of Sunnah more closer to the spirits of the Qur'an.

	The Sunnah alone (*in-farada bihī al-Sunnah*)	a. When there is only a single *hadith ṣaḥīḥ* (sound hadiths), a legal basis can be inferred directly. However, if there is not, the step should be: selection of *al-Kitāb* or *ijtihād* more closer to good behaviors and manners; b. When there are several hadiths, then there are some possibilities: - If all the hadiths are *ṣaḥīḥ* (sound) and contain a single

| | | meaning, they should be treated as if there is a single hadith; if they contain different meanings, the steps should be compromise and selection of the closest to the Qur'an and ijmā';
 - If there is only a single *hadith ṣaḥīḥ*, the step is the same as item (a);
 - If all the hadiths have different levels of *ṣaḥīḥ*, a priority should be given to the most *ṣaḥīḥ* one.
 - |
| | The Qur'an and the Sunnah (*ijtama'a fi al-ḥukm Kitāb wa Sunnah*) | a. If they share a common meaning, a legal basis can be inferred from one with the support from the other;
 b. If they have different meanings, the step should be compromise, *nasakh* and selection of the Qur'an, not the Sunnah. |

On the other hand, in the aspect of *mu'āmalah*, as al-Ṭūfī said, *istidlāl* (*logical inference*) should be built upon *maṣlaḥah*. In their views of a legal matter, *maṣlaḥah* and other legal propositions such as *naṣṣ*, *ijmā'* and *qiyās* may end up in two possibilities: same or different. To implement these two possibilities, al-Ṭūfī recommended the following steps of *istidlāl*:[135]

If *maṣlaḥah* and other legal propositions share a common legal provision, then there is no problem, such as the aggreement among the *naṣṣ*, *ijmā'* and *maṣlaḥah* in determining the five primary laws (*ḍarūrī*), i.e.: *qiṣāṣ* for killers, killing the apostates, cutting off the hands of thieves, ḥad for the plaintiff of adultery (*qādzif*), and *ḥad* for alcoholics.[136]

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[135] Ibid., p. 277.
[136] Ibid.

On the contrary, if *maṣlaḥah* and other legal propositions disagree, then a compromise should be done between them (*al-jam'u bayna-humā*), such as by applying some propositions to some particular laws, not to others, as long as they do not contradict *maṣlaḥah* or play around with the propositions. If a compromise is impossible, then *maṣlaḥah* should take precedence over any other propositions, in accordance with the Prophet's words in the Hadith: *lā ḍarara wa lā ḍirāra*. For al-Ṭūfī, this Hadith aims in particular to eliminate *mafsadah* (damages) and maintain *maṣlaḥah* which is the main objective of the *sharā'*. In this case, the other legal propositions serve only as a means (*wasāil*). In short, the objective should take precedence over the means.[137]

Al-Ṭūfī added that *maṣlaḥah* and *mafsadah* could be contradicting to each other for which there should be steps to avoid it. It is possible that a legal case sometimes only contains *maṣlaḥah*, or *mafsadah* alone, or contains *maṣlaḥah* and *mafsadah* at the same time. If it only has one maṣlaḥah, there is no problem, i.e. the maṣlaḥah can serve as a legal basis. However, if several *maṣlaḥahs* are found, then an effort should be made to accommodate all of them. When compromise is not possible, the priority should be given to the most urgent *maṣlaḥah* or drawing is made when they are equally important.[138]

When a legal case contains only one *mafsadah*, the given *mafsadah* should be avoided; if many, the whole *mafsadahs* should be kept away as much as possible. If this step is hard to take, an effort should be directed at the most possible one. If *mafsadahs* have different levels of urgency, it is the heavier one that should be avoided (*irtikāb akhaf al-ḍararayn*). However, if the levels of *mafsadahs* are equal, selection or drawing should be made in order to avoid *tuhmah* (prejudice).[139]

If a legal case contains *maṣlaḥah* and *mafsadah*, the step should be bringing the former and abandoning the latter. If not possible, the con-

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[137] Ibid., p. 278.
[138] Ibid.
[139] Ibid., p. 279.

sideration should be based on the level of its importance between bringing the *maṣlaḥah* and rejecting the *mafsadah*. If they are equally important, then a random selection or, if necessary, drawing can be made in order to avoid *tuhmah*.[140]

If a legal case contains contradiction between two *maṣlaḥah* and two *mafsadah*s, or between *maṣlaḥah* and *mafsadah*, the legal decision should be made on the basis of dominance (*arjaḥ*) both in *maṣlaḥah* and *mafsadah*. If they are equally leveled, a random selection or drawing can be made.[141]

Table 2.3 Mapping and Comparing Maṣlaḥah Between al-Ghazālī, al- Shāṭibi and al-Ṭūfī

Name	Back-ground of Thinking	Qualifica-tion of *Maṣlaḥah*	Ways of Understand-ing *Maṣlaḥah*	Functions of *Maṣlaḥah*
Al-Ghazālī (450 H/1058-505 H/111 M)	Shāfi'ī school; *qiyās* is a legal proposi-tion after the Qur'an, the Sunnah, and Ijmā'; for al-Shāfi'ī, ijtihad means *qiyās*.	Strength: *ḍarūrāt*, *ḥājāt*, *taḥsīnāt* (related to man-tainance of religion, life, intel-lect, de-scent, and property) Scope: Universal (*kullī*) and particular (*juz'ī*)	*Ta'lil al-aḥkām*: a method of figuring out the '*illat* (a basic cause of the law) as a re-quirement of qiyās	Provides a legal con-sideration if it meets the qualifica-tion: *ḍarūrāt kulliyāt* there is a strong be-lief that it will most likely bring Maṣlaḥah *Maṣlaḥah ḥājāt* and *taḥsīnāt* cannot provide

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[140] Ibid.
[141] Ibid., p. 279.

		Legality: *Muath-thirah* (has an impact, and is considered as a legal basis), *Mulghah* (not considered as a legal basis)		a legal consideration unless there are *naṣṣ* that support it, which means *qiyās*
Al- Shāṭibi (730H/1328M-790H/1388M)	Mālikī School; Maṣlaḥah mursalah is a legal source after the Qur'an, the Sunnah, and Ijmā'	Strenght: *ḍarūrāt*, *ḥājāt*, *taḥsīnāt* (related to man-tainance of religion, life, intel-lect, de-scent, and property) Scope: *Dunyawi-yah* (word-ly) and *ukhrawiy-yah* (other wordly), each is related to the aspects of *kullī* (universal) and *partic-ular* (juz'ī) Legality: *Mu'tabara,*	Texts-centered *Ijtihādī*: Knowledge of Arabic language and all intricate elements; knowledge of Sunnah; knowledge of *asbāb al-nuzūl*	*Maṣlaḥah mur*salah based ijti-had; *maqāṣid al-sharī'ah* takes prec-edence over *maqāṣid al-mukallaf*; *Al-Maqāṣid al-'Āmah* serves as a legal basis which relies on particu-lar legal proposi-tions (dalīl juz'ī)

		mulghah, and *mur-salah*		
Al-Ṭūfī (675H/1277-716 H /1318 M)	Hanbalī School	Strength: No classifi-cation of ḍarūrāt, ḥājāt, taḥsīnāt; for him maṣlaḥah is absolute and unlim-ited; its strength relies on the catego-ries of *rajah/qāwī* and *ar-jaḥ/aqwā* Scope: *maṣlaḥah dunyawiy-yah* and *maṣlaḥah ukhrawiy-yah* Legality: Any *maṣlaḥah* is valid, regardless of whether or not it confoms the *naṣṣ*	Reason alone can figure out maṣlaḥah	Serves as an inde-pendent legal basis (*mustaqāl*) in *mu'āmalah* only.

2.7 The Interconnected *Maṣlaḥahs* as an Approach

It has been mentioned earlier that the objectives of Islamic law is to realize the benefits while at the same time removing the damage (maf-sadah) for the mankind both in this life and Hereafter. The benefits that it seeks to realize are summed up in the five basic principles (*al-uṣūl al-khamsah*: religion, life, intellect, descent, and property). The five basic principles are hierarchical, i.e. the benefit related to maintainance of religion should take precedence over the other four ones, and that of life over that of intellect, descent, and property, and so forth.

The five *maṣlaḥahs* are interrelated to and mutually supportive of each other. For instance, event though the ultimate purpose of the oblig-atory daily five times prayers is to maintain the benefit of religion (*hifẓ al-dīn*), it linked also to the protection of life, intellect, descent, and property.[142] Anyone who wants to do prayers is required to be free from hadath and filth, and is recommended to preceed it with the use of tooth stick (*siwāk*) and to take a bath before doing a Friday prayer. All these rules in prayer is aimed at maintaining the goodness of life.

Anyone who is going to carry out prayers should be also in a con-scious state of mind. God strongly forbids a drunk to "approach" pray-ers. Thus, prayer concerns also with the benefit of intellect. Prayers which are conducted in a proper and sincere manner will keep someone away from indecency (*fakhshā'*), such as fornication and also evil things religiously and socially. The benefit that prayers bring forth is also cate-gorized as *hifẓ al-nasl* (maintenance of descent). Prayers also teach discipline if carried out timely and consistently. Even, Allah also com-mands that someone should attend a Friday prayer in order not to waste time; He also said that after the Firday prayer someone should immedi-

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[142] Further discussion on maṣlaḥah in prayers is available in Afzalur Rahman, *Tuhan Perlu Disembah*, trans. Hasmiyah Rouf, (Jakarta: Porch Sciences of the Universe, 2002), pp. 44-276.

ately spread on earth to make a living in the name of Allah (*faḍl Allāh*). Thus, Allah's command to make prayers as a means for help (*isti'ānah*) in life, including in working, is accompanied with its imperative realization. From this explanation, it is true to say that prayers are also related to the protection of property (*hifẓ al-māl*).

Looking at the relationship between each basic principle, as in the case of prayers above, the interconnected *maṣlaḥah* (*ittiṣāliyat al-maṣālih*) in the framework of the five basic principles (*al-uṣūl al-khamsah*: religion, life, intellect, descent, and property) can be summarized in the following figure:

Figure 2.2. The Interconnected Maṣlaḥah (ittiṣāliyat al-maṣālih)
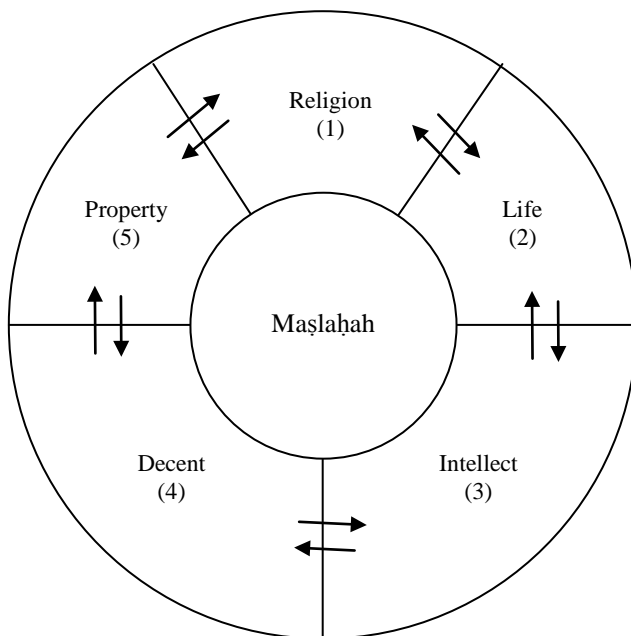
The chart above shows that each basic principle of *maṣlaḥah* has its own distinctive cell of scope. However, it does not mean to say that each cell has no relationship at all with the others; in fact, they are linked and

complementary to each other. The benefit of religion, as the highest one to be given a priority, is hard to come true without life, intellect, descent and property.[143] In other words, the maintainance of the religious benefits require the other four ones and otherwise.

2.8 The Interconnected Maṣlaḥah in Contemporary Islamic Studies: A Comparison

In a broader scope of Islamic studies, Amin Abdullah has in fact initiated the concept of interconnectivity. In Amin's opinion, the paradigm of interconnectivity assumes that to understand the changing complexities of human life, each scientific building of religious and social studies, the humanities, and the natural sciences can not stand alone from each other. In breif, there is a need for mutual cooperation and interdepence between disciplines in order to help people understand the complexities of their problems in life.[144] Amin Abdullah said:

> *Ḥaḍārāt al-naṣ (texts-oriented religious culture) cannot stand away from ḥaḍārāt al-'ilm (science and technology) and cannot be separated from ḥaḍārāt al-falsafah (culture, philosophy, ethics) and vice versa.[145]*

Separation of *ḥaḍārāt al-'ilm* (scientific culture) from *ḥaḍārāt al-falsafah* (ethical, emancipatory culture) will only result in a deprived human and ecological life. A mere marriage between *ḥaḍārāt al-naṣ* (texts-oriented religious culture) and *ḥaḍārāt al-'ilm* (science and technology) without *ḥaḍārāt al-'ilm* can give birth to radicalism and fundamintalism. Thus, Amin Abdullah pointed out, the presence of *ḥaḍārāt*

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[143] Prayers, for example, will not be carried out completely without the existence of healthy sould and mind as well as property in covering the aurat as one of its requirements.

[144] Amin Abdullah, *Islamic Studies Di Perguruan Tinggi Pendekatan Integratif-Interkonektif,* (Yogyakarta: Pustaka Pelajar, 2006), vii-viii.

[145] Ibid., p. 402.

al-falsafah is a must. Similarly, *ḥaḍārāt al-falsafah* will loose its fitality if it restrains itself from religious issues widely established in the culture of texts.[146] The interconnectivity between the cultural, philosophical, and scientific-technological entities in the Islamic academic world, such as State College for Islamic Studies (STAIN), State Institute for Islamic Studies (IAIN), and State Islamic University (UIN), Amin Abdullah added, is seen in the following chart:
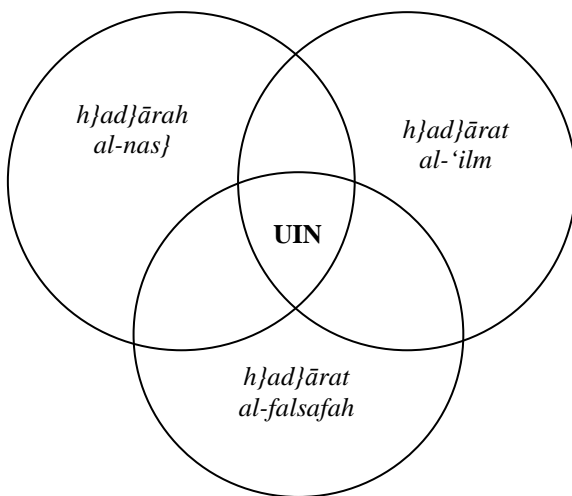
Figure 2.3 Scheme of Interconnected Entities[147]

Amin Abdullah also emphasizes that scholars of Islamic sciences should begin to reconstruct and reinterpret the terms *ittiḥād* (union) and *ḥulūl* (incarnation) which are widely used in classical Sufism and often criticized by the jurists (*fuqahā'*) and the teologians (*mutakallimūn*). In order to understand the practical-functional meanings of *wiḥdat al-wujūd* (unity of existence) and *ḥulūl*, the terms should not be interpreted

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[146] Ibid., p. 403.
[147] Ibid., p. 405.

as a union of divine and human elements, rather that of basic human needs, such as clothing, foods, shelters, religious affiliation or religiousity, self-actualization, and so on, regardless of race, coloured skin, ethnicity and religion. Amin Abdullah calls this understanding as *ittiḥād al-'ārif wa al-ma'rūf* (unification between who know and what is known).[148]

The interconnected "trinity" of the *ḥaḍārah* as proposed by Amin Abdullah above is situated at the level of critical analysis, which is the third tier of Islamic studies. Amin pointed out that there are three areas of Islamic studies: the first is practical faiths and understanding of the revelation as interpreted by scholars, interpreters (*mufassir*), social figures along with their respective preferences. In general, this scientific layer is "allergic" to any scientific-theoretical clarification and purification. At this level, Amin Abdullah said further, it is difficult to make a differentiation between religion and traditions, between religion and culture, and between beliefs and habits of mind.[149]

The second tier is scienctific theories as conceived and established in such a way by the scholars in their respective fields, such as the *'ulūm al-tafsīr (*science of the Qur'an*)*, *'ulūm al-ḥadīth* (science of the Hadiths), Islamic thoughts (theology, philosophy, and mysticism), fiqh (laws and social institutions), and history of Islamic civilization, Islamic thoughts, and Islamic proselytization.[150] Theories of Islamic science in the second tier is in fact the fruits of abstraction from the revealed texts and from religious practices along the Muslim periods, from the Prophet, companions (*Ṣahabat)*, followers (*tābi'īn)* eras through the historical developments of Muslim societies. Aware or not, all political, social, cultural conditions of those eras contributed to the the theoretical constructions.

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[148] Ibid., pp. 381-382.
[149] Ibid., pp. 72-73.
[150] Ibid.

The third tier is critical examinations (*qirā'ah naqdiyyah muntijah*) or the so-called "meta discourse", of the historical developments of the ups and downs of the theories established by the scholars in the second tier.[151] In this layer, theories, which are considered by some scholars as solid and mature (*naḍij*) and, therefore, "immune" to criticism (*ghayr qābil li al-niqāsh*), began to be in dialogue with other sciences, either with similar disciplines, such as *'ulūmu al-Qur'ān* with *'ulūm al-Ḥadīth* and the history of Islamic civilization and so forth, or with different ones such as with natural science, humanities, and social sciences. The third tier of Islamic science, as Amin Abdullah put it, actually belongs to the philosophy of Islamic sciences.[152]

Therefore, since the concept of interconnectivity is a critical examination of Islamic sciences in the second tier which belongs to philosophy of Islamic sciences, it can be inquired from the aspects of its consistency, coherence and correspondence.[153] From the aspect of consistency, Islamic teachings, such as respect for human dignity, must have an integrated connection with each other teachings, relationship between texts, between *ijmā'* (concensus) and *ittifāq al-'ulamā'* (agreements of Muslim scholars) in *bahtsul masā'il* and *munas tarjīḥ* (forums

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[151] Ibid.

[152] Ibid., p. 74.

[153] In the philosophy of science, there are three theories of truth: the first is the correspondence theory. According to this theory, the truth or the true situation is when the contents of a statement or an opinion has a correspondence with its objects. Thus, the truth is what is consistent with the fact, with reality, with the actual situation; the second is coherence or consistency theory. This theory states that the truth is built on the relationship between decisions (judgments) and something else, i.e. the fact or reality, rather on the relationship between the decisions or the judgements themselves. In other words, the truth is established on the relationship between the old and new decisions the justification of which we already knew. Thus, according to this theory, decisions or judgements are interconnected and are mutually explaining to each other. Hence, there came a formula: truth is a systemic coherence; truth is consistency. The third is theory of pragmatism. According to this theory, whether or not a speech, proposition, or theory is true will depend solely on its usefulness. Something is true if it brings benefits and otherwise. See Amsal Bakhtiar, Filsafat Ilmu, (Jakarta: King Grafindo Persada, 2011), pp. 112-121.

on religious problems), the opinions of Muslim leaders, heads of organizations, and religious officials.[154]

From the aspect of coherence, an Islamic teaching should be correlated to others and should not stand independently. The concept of divinity is inseparable from that of social responsibility; tenderness and compassion for others is indispensible from insistence in dealing with misconducts; *ukhuwwah* (brotherhood) is inseparable from *Islāmiyyah*, *bashariyyah* (humanity), and *waṭaniyyah* (nationality); *al-'adālah* (fairness) is closely related to *insāniyyah* (humanity); *al-'amānah* (honesty) is linked to the teachings of inclusiveness and *al-samāḥah* (tolerance), and so on.[155] Form the aspect of correspondence, there is no gap between theories and practices, between pure and applied concepts.[156]

Being the starting point of the philosophy of Islamic sciences, the above-mentioned three criteria will help us analyze deeply and critically (*qirā'ah naqdiyyah*) the Islamic teachings and doctrines as written, said, and propagated by Muslims within a certain periode of time, whether or not they meet the aspects of consistency, coherence and correspondence. It is only by doing so that we can produce something new being able to meet the needs and welfare of the planet.

Based on the explanation above, it is important to note that there are differences between the interconnected cultural entities (*al-ḥadārah*) as proposed by Amin Abdullah above and the interconnected *maṣlaḥah* in this book. The difference can be found at least in the following: the first is that the two concepts above have different scopes. The scope of the interconnected *maṣlaḥah* is clearly in the area of *al-uṣūl al-khamsah* (religion, life, intellect, descent, and property), which is a central issue in the studies of *maqāṣid al-sharī'ah*, by still considering the three-scale priorities: *ḍarū riyyāt*, *ḥājiyyāt*, and *taḥsīniyyāt*. In addition, it also considers the scale priorities of the five basic principles in formulating

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[154] Amin Abdullah, *Islamic Studies*, p. 79.
[155] Ibid., p. 80.
[156] Ibid.

maqāṣid al-sharī'ah-based Islamic laws with the principle of the protection of *al-uṣūl al-khamsah* simultaneously. Because the scope of the interconnected *maṣlaḥah* is the heart of *maqāṣid al-sharī'ah*, i.e. the benefits within the the framework of *al-uṣūl al-khamsah*, the laws that are derived from it can be attributed to *maqāṣid al-sharī'ah*, such as *al-libās al-maqaṣidī* (utility in dressing), *al-iqtiṣād al-maqāṣidi* (utility in finance), *al-ṣawm al-maqāṣidī* (utility in fasting), and so forth.

Whereas, Abdullah's concept of the interconnected *haḍārah* is directed toward the efforts to articulate the three entities of haḍārah the basis of text, science, and philosophy through a critical reading of the second tier of Islamic sciences; it aims expectedly to generate an a grounded understanding of religion, in accordance with the needs and contemporary places and times (*ṣaliḥ li kul al-zamān wa al-makān*). In other words, the scope of the interconnected maṣlaḥah is more specific than Amin's concept.

The second difference is that the concept of interconnected *maṣlaḥah* was born out of my concerns on the studies of *maqāṣid al-sharī'ah* which are still focused solely on maṣlaḥah within the framework of *al-uṣūl al-khamsah* and the scale priorities of *ḍarūriyyat*, *ḥājiyyāt*, and *taḥsīniyyat*, without any attempt to analyze the relational aspects between *maṣlaḥahs*; therefore, there is no wonder that laws which derived from such an approach focused only its attention on one maṣlaḥah not the others.

Using the paradigm of the interconnected *maṣlaḥah*, the obligation of daily five times prayers, for instance, should not be considered as God's command related only to the benefits of religion, but associated also with the other four benefits, i.e. life, intellect, descent, and property at the same time. It is also the case with Islamic doctrines on dressing, business, politics, and so forth. Strictly speaking, each benefit does not stand alone; rather it has a closed link with the other benefits in which all of them are completing each other.

Thus, the interconnected *maṣlaḥah* is a continuation and a further development of *maṣlaḥah* that has been conceptualized by previous scholars from the partial, particular propositions (*juz'iyyāt*) and seemingly inductive methods (*istiqrā'ī*) in formulation of Islamic laws. I come up with my own legal maxim:

ماكان أكثر اتصالا بالمصالح كان أكثر فضلا

The more connected a *maṣlaḥah* is, the more it brings virtues.

which can fill the gap among the following maxims of maqā ṣidiy-yah:[157]

1. الضرر يزال (a harm must be removed);

2. المشقة تجلب التيسير (difficulties can bring convenience);

3. الضرورة تبيح المحظورات (emergencies can allow the forbidden);

4. درء المفاسد مقدم على جلب المصالح (refusing *mafsadah* should take precedence over bringing *maṣlaḥah*);

5. إذا تعارض مفسدتان روعي أعظمهما ضررا بارتكاب أخفهما (when there are two opposing *mafsadahs*, a greater *mafsadah* is maintained by doing a lesser one);

6. الحاجة تنزل منزلة الضرورة (*ḥājah* can replace *ḍarūrāt*).

Whereas, Abdullah's interconnected haḍārah was a response to his academic concerns on a tension which seemed to heighten between religious "normativity" and "historicity" in the Islamic higher instutitions in the period 1990-1997 and then slightly calmed down in the period 1998-2005 as Master programs has been established in both public and private Islamic universities.[158] Amin Abdullah wrote:

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[157] See Jalāl al-Dīn al-Syūṭī, *al-Ashbāh wa al-Naẓāir fī al-Furū'*, (Semarang: Maktabat Family Enterprises, t.th), pp. 55-62.
[158] See Amin Abdullah, *Islamic Studies*, vi-vii.

> *To reduce the tension which quite often turned to unproductive, the author offers a scientific paradigm of "interconnectivity" in contemporary Islamic studies in universities. Unlike the paradigm of "integration" of science which is hoped to eliminate the tensions in question by fusing and squashing one into another, either by merging the aspect of religious "normativity-sacredness" as a whole into the realm of religious "historicity-profanity", or otherwise immersing and negating the whole aspect of Islamic historicity into religious normativity-sacredness without reserve, the author recommends the paradigm of "interconnectivity" which more modest (i.e.capable of self-measuring), humble and human.[159]*

The quote above implies that the concept of interconnectivity brought forward by Amin Abdullah was born out of the "womb" of academic anxiety in regard with the tensions between "normativity-sacredness" and "historicity-profanity" in Islamic studies on the one hand, and the difficulty in implementing the paradigm of "integration" of science on the other hand. For him, the paradigm of interconnectivity is easier to be applied in the academic world because it is more modest (capable of self-measuring), humble, and humane.

Concerns about difficult, not to say impossible, realization of the paradigm of "integration" of science is quite reasonable considering a huge gap in the framework or horizon of scientific integration. The paradigm of integration of science requires a deep understanding of the two fundamental sources of Islam, i.e. the Qur'an and the Hadith, which are interpreted hermeneutically to be a point of departure for religious worldviews (*Weltanschauung*), and skilfull analysis on social issues in the modern and post-modern era modern through the mastering of natu-

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[159] Ibid.

ral sciences, social sciences, and humanities.[160] Amin Abdullah illustrates the relationship of science in the following "spider web" figure:

Figure 2.4 The Horizon of Theo, Anthropocentric Integration of the Scientific Disciplines in Islamic State Universities[161]

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[160] Ibid., p. 106.
[161] Ibid., p. 107

2.9 The Operative Works of the Interconnected *Maṣlaḥah*-Based *Ijtihād Maqāṣidī*

Before going further into the discussion of *ijtihād maqāṣidī*, we need to understand properly the meanings of the term *ijtihād* and all its intricacy.

The term *ijtihād maqāṣidī* (intellectual excavation of Islamic laws with *maqāṣid al-sharī 'ah* as an approach) is a term that for the first time was mentioned by al-Shāṭibī in his work, *al-Muwāfaqāt fi Uṣūl al-Sharī'ah*. In this book, al-Shāṭibi set up the rules of *maqāsidiyyah* (objectives) as a basis in excavating Islamic laws. 'Abdurrahman Ibrahim al-Kilani, as quoted by Imam Mawardi, mapped Shāṭibi's rules of maqasidiyyah into three categories:[162]

The first is the rules related to *maṣlaḥah* (benefits) and *mafsadah* (damage), which as follows:

وضع الشرائع إنما هو لمصالح العباد في العاجل والآجل معا

> Determination of the *sharī'ah* laws are for the benefits of the servants, both in this world and and Hereafter.[163]

المفهوم من وضع الشارع أن الطاعة أو المعصية تعظم بحسب عظم المصلحة أو المفسدة الناشأة عنها

> It can be inferred from God's determination of the sharī'ah that obedience and disobedience are measured according to the levels of the benefits and mafsadat that they produce[164]

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[162] Imam Mawardi, *Fiqh Minorities* (Yogyakarta: LKiS 2010), pp. 213-214. Some rules of maqasidiyyah mentioned by Imam Mawardi has been in fact summarized by Ahmad al-Raysuni into two categories: the first is the thirty three rules related to the objectives Shāri' (Allah); the second is the fifty five rules related to the objectives of mukallaf. See Ahmad al-Raysuni, *Naẓariyat al-Maqāṣid 'Inda al-Imam al-Shatibī*, (Herndon: al-Ma'had al-'Alami li al-Fikr al-Islami, 1995), pp. 344-349.
[163] Ibid.
[164] Ibid.

الأوامروالنواهيمنجهةاللفظعلتساوفيدلالةالإقتضاءوإنماالإختلافبينمـ
اهوأمروجوبأوندبوماهونهيتحريمأوكراهةلاتعلممنالنصوصوماحـ
صلالفرقإلاباتباعالمعانيوالنظرفيالمصالحوفيأيمرتبةتقع

Commands and prohibitions contained by the text is equally strong in terms of propositions. The question whether they are justified or recommended, haram or makruh cannot be answered from the text, but from the meaning and analysis of in and to what extent the maṣlaḥah takes place[165]

المصلحةإذاكانتهيإنالغالبةعندمناظر هافيمعالمقسدةحكمالإعتيادفهيالـ
مقصودةشر عاولتحصيلهاوقععلالطلبالعباد

If the benefit is more dominant than the demage according to customs, then this is what exactly the benefit is desired by the Lawgiver and needed to to fulfill[166]

الأحكامالمشروعةللمصالحلايشترطوجودالمصلحةفيكلفردمنأفراده
ابحالها

The laws are aimed at the realization of the benefit does not require any benefit in each aspect of the whole aspects at the same time[167]

From the legal maxims above it can be inferred that the values, meanings, and presence of benefits are more authoritative than the texts in determinating Islamic laws. This condition contradicts the position of the texts in classical *istinbāt al-ḥukm*.

The second category is the rules of *maqāṣid* to eliminate difficulties (*raf'u al-ḥaraj*). They are:[168]

إنالشار علميقصدإنالتكليفبالشقو العناتفيه

Shāri' (Allah) does not want to bring difficulties and misery by His-*taklīf* (legal obligation)[169]

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[165] Ibid.
[166] Ibid.
[167]Ibid.
[168] Ibid.
[169] Ibid., pp. 215-216

لانز عفيأنالشار عقاصدإلىالتكليفبمايلز مفيهكلفةو مشقةولكنهلايقصدنف
سالمشقةبليقصدمافيذلكمنالمصالحالعائدةعلىالمكلفين

There is no question that Allah has established His-*taklīf* in which there are burden and hardship; however, the truth is that He does not desire the difficulties, rather the benefits that go back to the *mukallaf* (legally competent)[170]

إذاظهر فيبعضالر أيالقصدإلىالتكليفبمالايدخلتحتقدر ةالعبدفذلكر اجعفيالـ
تحقيقإلىالسو ابقهأولو احقهأوقر ائنه

If there is an objective that does not make sense to the servant, its legality is then equal or similar to what has preceeded it[171]

الشر يعةجار يةفيالتكليفبمقتضاهاعلىالطر يقالوسطالأعدلالأخذمنلاالـ
طر فينبقسطميلفيهالداخلتحتكسببالعبدو لامنغير مشقةانحلال

The *Sharī'a* needs to be explained in a moderate, fair and balanced manner, all of which can be done by the servant who do not have any difficulty and weakness.[172]

الأصلإذاأدالقو لإنبحملهعلىعمومهالحر جأوإلىمالايمكنعقلاشر عافهوأ
و غير جار و لاعلىاستقامةاطر ادفلايستمر الاطلاق

Basically, if a judgment will lead to difficulties or is impossible according to the sense and *sharī'*, then it can not be done consistently (*istiqāmah*) and, therefore, should not be passed on[173]

منمقصودالشار عفيالأعمالدو امالمكلفعليها

Part of the *Sharā*'s objectives in every deed is that a mukallaf is consistent in his or her acts[174]

The third rule of *maqāṣidiyah*, in Shāṭibi's opinion, is concerned with the outputs of the acts by the *mukallaf* (legally competent). This category consists of the following two rules:[175]

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[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] Ibid.
[174] Ibid.

النظر فيما ألا تأالأعمال المعتبر مقصودشر عاكانتاالأفعالموافقةأومخالفة

Examining the outputs of the legal acts is commanded by the *sharā'*, whether or not the action conforms or contradict the purpose of *sharā'*[176]

للمجتهدأنينظر فيالأسبابو مسبباته

A *mujtahid* (learned scholars) shall examine the causes and consequences of the law[177]

In order to apply the rules of *maqāṣidiyyah* above in an *ijtihād*, a *mujtahid* (a learned scholar) should take the following steps:

The first is relying on the Qur'anic texts and the Sunnah as well as the laws and their objectives contained therein (*al-nuṣūs wa al-ahkām bi maqāṣidihā*). This step confirms that *ijtihād maqāsidī* still hold the Qur'an and the Sunnah as legal sources and propositions. The whole process and the legal products should not deviate from the spirits of the two legal sources.[178] When the *naṣṣ* of the Qur'an and the Hadith are definite (*qaṭ'iy al-dalālah*), *ijtihād maqīsidī* should not go away from legal provisions of the *naṣṣ*. Thus, the alleged contradiction between the *naṣṣ qaṭ'ī* and *maṣlaḥah*, which assumes that the later will take precedence over the formar, is untrue at all. The true case is that when there is contradiction between the *naṣṣ qaṭ'ī* and *maṣlaḥah maẓnūnah* or *wahmiyyah* (presumptive benefits), the former should abandon the latter.

When ijtihad is about presumptively inferred meanings of the texts (*dalālah ẓannī*), it should not go beyond the meanings of the *naṣṣ ẓannī*, by seeking the closest meaning to Allah's will for the purpose of which *maqāṣid al-sharī'ah* can be used as an approach. A *mujtahid* should not limit himself to the literal meanings of the texts, rather he should strive to uncover *maqāṣid al-sharī'ah* behind the texts, so that the the benefits-

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[175] Ibid., p. 217.

[176] Ibid.

[177] Ibid.

[178] See also, Nur al-Din al-Khadimiy, *al-Ijtihad al-Maqasidiy*, (the Beirut: Dar Ibn Hazm, 2010), p. 144.

oriented laws can be established. One example is the case whether or not it is allowed to pay charity (*zakāt*) with something different from the type of property, such as *zakāt* for rice plants is paid by money or others. According Mālikī school, such *zakāt* is permissible and valid because it can realize the purpose of zakat itself, which is to fulfill the needs of the needy people.[179]

The second is combining universal and general passages with particular propositions (*al-jam'u bayn al-kulliyāt al-'āmah wa al-adillah al-khāṣah*). The universal and general passages (*al-kulliyāt al-'āmah*) can be *naṣṣ* (the al-Qur'an and the Sunnah), and also universal passages obtained synthetically from an inductive research (*al-kulliyāat al-istiqrāiyyah*) on several *naṣṣ* (the Qur'an and the Sunnah) and partial laws (*juz'ī*). The universal *naṣṣ* includes:

a. A command to do justice (*al-adalah*) in Surah al-Nisā', 58:

﴿إِنَّ ٱللَّهَ يَأْمُرُكُمْ أَن تُؤَدُّواْ ٱلْأَمَٰنَٰتِ إِلَىٰٓ أَهْلِهَا وَإِذَا حَكَمْتُم بَيْنَ ٱلنَّاسِ أَن تَحْكُمُواْ بِٱلْعَدْلِ إِنَّ ٱللَّهَ نِعِمَّا يَعِظُكُم بِهِۦٓ إِنَّ ٱللَّهَ كَانَ سَمِيعًا بَصِيرًا ٥٨

Surely Allah commands you to make over trusts to their owners and that when you judge between people you judge with justice; surely Allah admonishes you with what is excellent; surely Allah is Seeing, Hearing.

b. Prohibition to do something that may harm one'self or others in the Hadith:

لاضررولاضرار

No harm is allowed to one'self nor to others

c. The quality of actions depends on intentions as in the Hadith:

إنماالأعمالبالنيات

Any form of actions depends on its intentions

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[179] Rasyuni, *Naẓariyat al-Maqasid*, pp. 363-368.

While the universal principles that are obtained synthetically through an inductive research (*al-kulliyāat al-istiqrāiyyah*) on the naṣṣ and the laws are:

    a. The necessity to maintain and realize the five common benefits (*al-kulliyat al-khams*), i.e. religion (*al-dīn*), life (*al-nafs*), intellect (*al-'aql*), descent (*al-nasl*), and property (*al-māl*) by paying attention to the hierarchial priority and aspects of their significance: *ḍarūriyyāt* (primary), *ḥājiyyāt* (secondary), and *tahsīniyyāt* (tertiary);

    b. The legal maxims, such as:

الضرريزال

Demages must be removed

المشقةتجلبالتيسير

Difficulties bring convenience

العادةمحكمة

Tradition can be used as a legal basis

This second step of *ijtihād maqāṣidī* asserted that when a mujtahid found a postulate in the Qur'an or in the Sunnah on a particular legal case, he should not determine its legal status based solely on the meaning of the text, but should also see whether or not its realization is in line with *al-kulliyāt al-'āmah* (the five general benefits) and the general maxims of Islamic jurisprudence. If the are two complementary and uncontradictionary meanings, the legal status should be set according to what the law designated, and this is what the so-called *ijtihād maqāṣidī*. However, if the partial meaning of the text (*juz'ī*) contradicts the al-*kulliyāt al-'āmah*, a compromise should be made as far as possible between the two by the methods of *bayān* and *takhṣīṣ* where the particular meaning explains and specifies (*takhṣīṣ*) the general one. When a compromise is not possible, the priority should be given then to the messages contained in the *al-kulliyāt al-'āmah* or general maxims of fiqh be-

cause it has been obtained through an inductive research (*istiqra'ī*) whose level of validity is *qaṭ'ī* (obvious, convincing), as opposed to *juz'ī* argument (partial, case by case law) which is *ẓannī* (ambiguous, uncertain).

One examples is the case of limiting rights of managing property (*taqyīd taṣarruf al-māl*) designated by a *juz'ī* argument based on the public good, such as that it is intended to hurt others, or it can bring a greater difficulty than a benefit referred to by a *juz'ī* argument.

The third step is bringing the benefits and refusing damages in an asbsolute and necessary manner (*jalb al-maṣālīh wa da r'u al-mafāsid muṭlaqan*). The step applies when a legal case is not designated by naṣṣ both in the Qur'an and the Sunnah, in which there is a possible *maṣlaḥah* or *mafsadah*. When it is certain that it brings *mafsadah*, it should be considered unjustified; on the contrary, if it brings *maṣlaḥah*, it should be treated as legally binding as long as it falls under the *al-kulliyāt al-'āmah* (the five general principles: religion, life, intellect, descent, and property), and mostl likely will bring the universal benefits in the future.

In regard with this type of *ijtihād*, some scholars have established terms. Some called it *al-maṣlaḥah al-mursalah*,[180] *al-qiyās al-kullī*, *al-qiyās al-mursal*, and *al-qiyās al-wāsi'*.

The fourt is taking into account the legal consequences that may accour in the future (*i'tibār al-ma'ālāt*). This step in fact falls under the category of examining laws and its purposes (*al-ahkām bi maqāṣidihā*), it nevertheless puts an emphasis on the legal consequences possibly taking place in the future. When a *mujtahid* found that a legal rule can bring mafsadah in the long term, it should be replaced by the one which is "free" from possible problems in the long term. This kind of legal

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[180] The term is used by Mālikī school, although in practice the are other jurist schools which use similar terms, such as *qiyās kullī*, *qiyās mursal*, and *qiyas wāsi'*.

settlement is similar to a jargon by the Indonesia's loan offices, "Solving Problems without Problems".

One case to which the step can be applied is built is the Prophet's reluctant attitude toward fighting the hypocrites, despite that he knows very well their hypocrisy that made them worth to be fought.

<div dir="rtl">أخافأنيتحدثالناسأنمحمدايقتلأصحابه</div>

> I'm afraid that people would say, that Muhammad is fighting his Companions.

In some fiqh literatures, this method of ijtihad is similar to *sad al-dzarī'ah* (closing a door for possible damages). The difference is that while the former does not only take into account matters that may bring damages in the future, but also those that can bring benefit, the latter focuses only on damages (*mafsadāt*).

The fifth step is that all the legal considerations, ranging from the first to the fourth steps of *ijtihād maqāṣidi* should consider a linkage between *maslahahs*, or what the author refers to as the interconnected *maṣlaḥahs* (*ittiṣāliyāt al-maṣāliḥ*). When a *mujtahid* seeks to establish a legal status in economy, for example, in addition to giving an attention to the related textes in the Qur'an and the Sunnah, he should also consider other *maṣlaḥahs*, such as the benefits of religion, life, intellect, and descent, simultaneously. The reason is that in reality there is no specific law which contains only one benefit, rather a number of benefits. This is where the hidden meaning of an Islamic doctrine that goodness will be rewarded with ten of it, even with seven hundreds of it, such as the rewards for *ṣadaqah* and *infāq* (charity). The reward is doubled because it can bring more *maṣlaḥahs*. The legal maxim that can be used with regard to this step of *ijihād* is:

<div dir="rtl">ماكانأكثراتصالابالمصالحكانأكثرفضلا</div>

> The more something is interconnected with various benefits, the more valuable it is.

Another example of the interconnected *maṣlaḥah*-based *ijtihād maqāṣidi* is the case of Muslim clothing. On this issue, both the Qur'an and the Sunnah mentioned only the necessity for a woman to cover the 'aurat.[181] The two legal sources do not mention directly other aspects as requirements for a clothing to be considered *sharī'* (Islamic) or not, such as its cleaness, aesthetic values, or its conformity to customs and so forth. Whereas, these values are universal messages of Islam as referred to by the following universal texts (*al-nuṣūṣ al-kulliyah wa al-'āmah*), and legal maxims (*kulliyāt*):

a.   Surah al-Mudatstsir, 1-4:

يَٰٓأَيُّهَا ٱلۡمُدَّثِّرُ ١ قُمۡ فَأَنذِرۡ ٢ وَرَبَّكَ فَكَبِّرۡ ٣ وَثِيَابَكَ فَطَهِّرۡ ٤

O you who are clothed! Arise and warn, And your Lord do magnify, And your garments do purify,

b.   Surah al-A'raf, 31:

۞يَٰبَنِيٓ ءَادَمَ خُذُواْ زِينَتَكُمۡ عِندَ كُلِّ مَسۡجِدٍ وَكُلُواْ وَٱشۡرَبُواْ وَلَا تُسۡرِفُوٓاْۚ إِنَّهُ لَا يُحِبُّ ٱلۡمُسۡرِفِينَ ٣١

O children of Adam! attend to your embellishments at every time of prayer, and eat and drink and be not extravagant; surely He does not love the extravagant.

c.   The Hadith of the Prophet:

إن الله جميل يحب الجمال

God is beautiful and loves beauty

d.   Universal legal maxim:

العادة محكمة

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[181] The Qur'an talked about Women clothing in Surah al-Nur, 31 and al-Ahzab, 59.

Customs can be considered as a legal basis

These universal *naṣṣ* and legal maxims and other legal arguments can help a *mujthad* determines the legal status of clothing and polygamy on the basis of the interconnected *maṣlaḥah*.

2.10 Elements of Ijtihād Maqāṣidi

There are three interrelated elements in *ijtihād maqāṣidi*, i.e.: the text (*al-naṣṣ*), reality (*al-waqī'*), and the subject of law (*al-mukallaf*).[182] The texts in the context of *ijtihād maqāṣidi* refer to legal propositions whose legal causes (*'illat*) and purposes (*maqṣad*) will be applied to a certain legal case. The reality (*al-waqī*) is the operational object of *ijtihād maqāṣidi* to which a legal provision and its objective in the *naṣṣ* will be attached to it. The legal subject (*al-mukallaf*) is someone who is ready in mind, soul, and physic to accept the reality according to a legal claim and its objectives contained in the *naṣṣ*.[183] These three elements of *ijtihād maqāṣidi* have fundamental rules to be considered in the process of *ijtihād*.

1. The Basic Provisions of the Texts (*Naṣṣ*).

Since *ijtihād maqāṣidi* is associated with the legal provisions contained in the *naṣṣ* (the Qur'an and the Sunnah), which are in Arabic, it is imperative for a mujtahid to have proper knowledge of the intricacy of *naṣṣ* (texts) and its *maqāṣid* (purposes). For example, it is a necessity to apply the general meaning of a *naṣṣ* unless there is a speciality (*takhṣīṣ*). Similarly, the *khāṣ* (specific), *muṭlaq* (general), and *zāhir* (literal) legal arguments should not be taken away to other provisions unless there is

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[182] Nur al-Din al-Khadimiy, *al-Ijtihad al-Maqasidiy*, p. 174.
[183] Ibid.

an evident that said so.[184] In short, *ijtihād maqāṣidi* should not be taken out of the linguist rules, such as *al-amr* and *al-nahy*, *al-muṭlaq* and *al-muqayyad*, *al-haqīqah*, *al-majāz* and others.

2. The Basic Provisions of the Reality (*al-Waqī'*)

A study on reality (*al-waqī'*) is the most difficult process in *ijtihād maqāṣidi*, because improper vizualisation of it would make the corresponding laws "wrongly addressed". The work of *ijtihād maqāṣidi* does not only rely on the analysis of the text and its objectives, but it also demands accuracy in situating laws in realities each of which has a different characteristics. For instance, it is clear that buying and selling is justified (*ḥalāl*) while usury is forbidden (*ḥarām*). The problem then is that the terms *al-bay'* (buying and selling) and *al-ribā* (usury) in the Qur'an are written in the form of unit nouns (*ism al-jins*) which refer to general meaning, regardless of their shifting characteristics in social realities due to the development of science and technology. Thus, it could be the case that a legal rule which is in reality referred to as *al-bay'* and is declared justified by the *naṣṣ*, would change into other legal status, such as disacouraged (*makrūh)* or forbidden (*ḥarām)* because it has peculiarities that require a change of legal status.

In the context of situating reality as an integral part of *ijtihād maqāṣidi*, the presence of a collective intellectual endeavour (*al-ijtihad al-jamā'ī*) is necessary. By this collective *ijtihād*, an expert on social reality can provide a proper and objective description of the reality based on which legal provisions in the naṣṣ and their *maqāṣids* are then inferred. The scholars of *uṣūl al-fiqh* call the adjustment of law with reality as *taḥqīh al-manāt*. Nur al-Din al-Khadimiy, quoting al-Shāṭibī, defines the term as:

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[184] See Abu al-Walid al-Baji, *al-Isyarat fi Usul al-Fiqh al-Malikiy*, Tahqih Nur al-Din al-Khadimiy, (Tunisia: Dar al-Pole al-Wataniyyah, 1998), pp. 92-93.

<div dir="rtl">

أن يثبت الحكم الشرعي بمدركه الشرعي لكن يبقى النظر في
تعيين محله

</div>

Establishing the laws of shar', but the analysis is to de-
termine the accuracy of the object of the law[185]

Thus, taḥqīh al-manāt requires precision in understanding the objects
of the law with all its characteristics. A collective object of the law must
be distinguished from an individual one. The object of law in a country
may be different from that in other countries. Even, the same object of
law could possibly have a different legal status because of the shifting
circumstances. The process of taḥqīh al-manāt will make Islamic law
flexible and dynamic in accordance with the demands of socio-cultural
dynamics (*ṣāliḥ li kulli zamān wa makān wa 'awā'id*).

3. The Basic Provisions of the Subject of Law (*al-Mukallaf*)

It is no doubt that Islamic law is meant to be understood and imple-
mented by the *mukallaf* (a subject of law, or someone upon which a law
is imposed). The reality (*al-waqi'*) exists because there is relevance to
the subject of law. The most important point of the discussion is on the
reasoning by the subject of law ('*aqlaniyah al-mukallaf*). Each *mukallaf*
has a different reasoning about the *naṣṣ* (texts), its legal provisions and
their maqāṣid as well as its reality.

Historically, the reasoning of mukallaf (*tarikhiyyah 'aql al-mukallaf*)
reached a peak in the glorious era of Mu'tazila which linked the concept
of *al-taḥsīn and al-taqbīh* (the good and the bad) to *taklīf* (a burden to
perform a command or to leave a ban). For Mu'tazila, a command must
have rationality in which the concept of *al-taḥsīn and al-taqbīh* can be
used as a measure. Abū Ḥāshim al-Jubba'ī al-Mu'tazilī himself, alleged-
ly to emphasize the rationality of taklīf, preceded his definition of *taklīf*
with the words "*irādah*" (God's will), as follows:

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[185] Al-Khadimiy, *al-Ijthad*, p. 183.

<p dir="rtl">إرادةتفعلماعلىالمكلففيهكلفةومشقة</p>

> The willingness to perform an obligation for mukallaf in which there is a burden and difficuly as well.[186]

Thus, *ijtihād maqāṣidi* must also take into account the reasoning characteristics of the *mukallaf*, as a subject of law who will come into direct contact with and perform the laws. A *mujtahid* should also develop his reasoning capacity in examining the texts, the reality, and the *mukallaf*. The following figure presents the dialectical relations between text, reality, and *mukallaf* in regard with *ijtihād maqāṣidi*.

Figure 2.5. Dialectical Relations Between Texts, Reality, and Mukallaf in Ijtihād Maqāṣidi

al-Mukallaf
(the subject of law)

al-Waqi'
(reality)

al-Naṣṣ
(texts)

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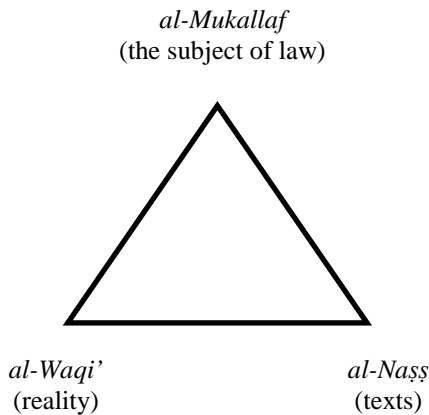
[186] Yahya Muhammad, *al-Aql wa al-Bayān wa al-Ishkāliyāt al-Dīniyyah* (the Beirut: al-Intishar Muassasah al-'Arabiy, 2010), p. 22. See also, 'Abd al-Jabbar al-Hamadaniy, *al-Majmū 'al-Muḥīṭ bi al-Taklīf fi al-'Aqāid*, tahqiq 'Umar al-Sayyid 'Azmi, Vol. 1. (Egypt: al-Mu'assasah al-Misriyyah li al-Ta'lif wa al-Iba 'wa al-Nasr, t.t), p. 11

3

ISLAMIC LAW AND THE METHODS
OF ITS EXCAVATION -
SHARĪ 'AH, ISLAMIC JURISPRUDENCE
AND ISLAMIC LAW: A RED LINE

3.1 Sharī'ah

Etymologically, *sharī'ah* means *al-'utbah* (twist of valley), *al-'atabah* (a doorway and a stair), *mawrīd al-sharīah* (a path where a drinke is looking for water), and *al-ṭarīq al-mustaqīmah* (a straight path).[187] The use of the term *sharīah* referring to the meaning *mawrid al-sharī'ah* can be found in the words of the Arabs: *shara'at al-ibil,* which means the camel goes out into the water source to drink.[188] The meaning of *al-sharī'ah* as *ṭarīqah al-mustaqimah* is found in the Qur'an, Surah al-Jathiyah, 18:

ثُمَّ جَعَلْنَاكَ عَلَىٰ شَرِيعَةٍ مِّنَ ٱلْأَمْرِ فَٱتَّبِعْهَا وَلَا تَتَّبِعْ أَهْوَآءَ ٱلَّذِينَ لَا يَعْلَمُونَ ١٨

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[187] Sha'ban Muhammad Isma'il, *al-Tashrī' al-Islāmi: Masdaruh wa Aṭwāruh*, (Mesir: Mktabah al-Nahḍah al-Mṣriyyah, 1985), p. 7; and Kamil Musa, *al-Madkhal Ilā al-Tashrī' al-Islāmī*, (Bairut: Muassasah al-Risālah, 1989), p. 17, as quoted by Dedi Supriyadi, *Sejarah Hukum Islam*, (Bandung: CV Pustaka Setia, 2007), p. 17.
[188] Ibid.

> Then We have made you follow a course in the affair, therefore follow it, and do not follow the low desires of those who do not know.

Terminologically, *sharī'ah* can both take a broad meaning, including the Islamic teachings in the form of faith, morals, or practical laws, and a specific one in which it refers to practical rules of Islam (*'amaliyyah*) alone, as defined by Shafiq Gharbal as follows:

<div dir="rtl">

مجموعة الأحكام الشرعية العملية المستنبطة من الكتاب والسنة والرأي والإجماع

</div>

> A number of *shar'ī* laws which are practical derived from al-Kitab, al-Sunnah, reason and consensus.[189]

The meaning of *sharī'ah* which is confined to the practical-legal aspects (*'amaliyyah*) above is a reduction of the term referring to religion that includes theology, practical laws and morality. It is clear from the Qur'an Surah al-Shura, 13:

<div dir="rtl">

﴿شَرَعَ لَكُم مِّنَ ٱلدِّينِ مَا وَصَّىٰ بِهِۦ نُوحٗا وَٱلَّذِيٓ أَوۡحَيۡنَآ إِلَيۡكَ وَمَا وَصَّيۡنَا بِهِۦٓ إِبۡرَٰهِيمَ وَمُوسَىٰ وَعِيسَىٰٓ أَنۡ أَقِيمُواْ ٱلدِّينَ وَلَا تَتَفَرَّقُواْ فِيهِۚ كَبُرَ عَلَى ٱلۡمُشۡرِكِينَ مَا تَدۡعُوهُمۡ إِلَيۡهِۚ ٱللَّهُ يَجۡتَبِيٓ إِلَيۡهِ مَن يَشَآءُ وَيَهۡدِيٓ إِلَيۡهِ مَن يُنِيبُ ١٣

</div>

> He has made plain to you of the religion what He enjoined upon Nuh and that which We have revealed to you and that which We enjoined upon Ibrahim and Musa and Isa that keep to obedience and be not divided therein; hard to the unbelievers is that which you call them to; Allah chooses for Himself whom He pleases, and guides to Himself him who turns (to Him), frequently.

The above verse shows us that religion (*al-dīn*) is basically universal and applicable to all generation, from that of Noah, Abraham, Moses, Jesus, to that of Muhammad who was the seal of the Prophets and Apostles. Nevertheless, each generation of the prophets has its own peculiari-

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[189] Shafiq Gharbal, *al-Mawsū'ah al-'Arabiyyah al-Muyassarah*, (Kairo: Dār al-Qalam, 1965), p. 1083.

ties and characteristics in its teachings, especially in the aspect of practical laws, but not in faith and moral issues. To distinguish religion's universal teachings from its locally-temporal practical laws, it is necessary to maka a differentiation between religion and *sharī'ah*. Religion refers to religious teachings as a whole, including faith, practical laws, and morality, while *sharī'ah* is confined to the practical laws only.

3.2 Islamic Jurisprudence (*Fiqh*)

Islamic jurisprudence *(al-fiqh)* etymologically means "to know and understand something very well."[190] This meaning of *fiqh* is found in several terms, such as *fiqh al-sira* (to understand the history of the Prophet Muhammad), *fiqh al-da'wah* (to understand the intricacies of proselytizing activities), *fiqh al-nisā'* (to understand the intricacies of women) and social-*fiqh*.

During the earlier period of Islam, the word fiqh means an understanding of the teachings of Islam as whole, which is synonymous with the word sharī'ah and religion (*al-dīn*) including the dimension of faith, practical and moral laws. It was Abū Ḥanīfah who initiated the devision of *fiqh* into two categories: *al-fiqh al-akbar* and *al-fiqh al-aṣghar.* Al-fiqh al-akbar is understood as *usūl al-dīn* (the basics of religion) which covers theology or monotheism. *Al-fiqh al-aṣghar*, on the other hand, is associated with fiqh along with the methodological tools of its formation.[191]

After Abū Ḥanīfah, starting from al-Shāfi'ī, Muslim scholars narrowed the definition of fiqh into practical laws as it is in the case of *sharī'a.* The following definition of fiqh is the most popular among them:

العلم بالأحكام الشرعية العملية المكتسب من أدلتها التفصيلية

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[190] Luwis Ma'lūf, *al-Munjid fi al-Lughah wa al-A'lām,* (Bairut: Dār al-Mashriq, 1986), p. 591.
[191] Supriyadi, *Sejarah Hukum*, p. 22.

The science of *sharā'* related to practical laws (*'ama-liyyah*) which are obtained from the detailed arguments.[192]

Looking at the definition of *fiqh* above, it is reasonable to say here that fiqh is a science of Islamic laws *(*Islamic Jurisprudence*)*, as it is apparent in the definition of *al-'ilm bi al-aḥkām* (knowledge on laws)*, and also legal materials as well as procedures at courts (procedural laws, *fiqh al-murāfa'āt)*. However, it is important to note that by the definition above, fiqh is not always synonymous with the laws or the rules (legislation). Fiqh is closer to ethical concepts of religion *(*religious ethics*).*[193]

3.3 Islamic Law

Etymologically, a law (*al-ḥukm*) means decision, obstruction and separation. In its further development, the term law is identical with wisdom. Both the words function to prevent someone from doing bad deeds with providing legal certainty on issues and putting a marker between the good and the wrong. However, the two have a different emphasis in its application. While the former emphasizes the formal legal aspects, the latter focuses more on substantial-cultural aspects[194].

Terminologicalally, some scholars defined the law as:

<div dir="rtl">

خطاب الله المتعلق بأفعال المكلفين اقتضاء أو تخييرا أو وضعا

</div>

God's commands pertaining to the actions of mukallaf (someone who is mindful and mature), either in the form of demands for performing something (obligatory and recommended [Sunnah]) or abandoning (*ḥarām and makrūh*), or a choice between performing or abandoning

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[192] See Wahbah al-Zuhaili, al-Fiqh al-Islāmi wa Adillatuhā, Vol. 1 (Bairut: Dar al-fikr, 1989), p. 15.

[193] Supriyadi, *Sejarah*, p. 25.

[194] Supriyadi, *Sejarah*., p. 25.

(*mubāḥ*), or make something as a cause, a term, and a barrier (*mani'*)

The definition of law above suggested that Islamic law is actually the texts (*naṣṣ*) of the Qur 'an and the Sunnah which are the representation of God's will as a hakim (law-maker). Meanwhile, a mujtahid only plays as *al-kāshif* (discoverer) by the will of God, especially when the fixed texts *(thawābit)* should face social realities which are always changing (*mutaghayyirāt*) according to circumstances. Therefore, even though many Islamic laws do not always reflect exactly the wording of these two sources of laws—because reasoning is also involved in the process of legal exvacation through linguistic or non-linguistic rules, such as *qiyās*, *istiḥsān*, *'urf*, *maṣlaḥah*—they are still considered divine laws and require observance from all Muslims.

From the description of the *sharī'ah*, Islamic jurisprudence, and Islamic law above, it can be inferred that sharī'ah is the substantial concept of all the teachings of Islam, including beliefs, morals, and laws, while Islamic jurisprudence (*fiqh*) is a functional concept that works to understand practical teachings of Islam. On the hand, Islamic law is both functional-theological in the sense that it is derived from intellectual endeavours of mujtahid who later codified it into jurisprudence (*majmu 'āt al-aḥkām*) and received a theological justification, i.e. the laws that they produced through their intellectual inquiries are coming from Allah. The scope of Islamic law is the same as fiqh, namely practical matters ('*amaliyyah*) only.

3.4 The Characteristics of Islamic Law

Islamic law has three characteristics upon which the scholars built their legal excavation in order to produce rules that are applicable and are in accordance with the realities of human life. They are:

1. Removing barriers and difficulties ('*adam al-ḥaraj).

This characteristic comes from some Qur'anic verses and the hadith,
such as:

a. Surah Al-Baqarah, 286:

لَا يُكَلِّفُ ٱللَّهُ نَفْسًا إِلَّا وُسْعَهَاۚ لَهَا مَا كَسَبَتْ وَعَلَيْهَا مَا ٱكْتَسَبَتْۗ رَبَّنَا لَا تُؤَاخِذْنَآ إِن نَّسِينَآ أَوْ أَخْطَأْنَاۚ رَ ۚ بَّنَا وَلَا تَحْمِلْ عَلَيْنَآ إِصْرًا كَمَا حَمَلْتَهُۥ عَلَى ٱلَّذِينَ مِن قَبْلِنَاۚ رَبَّنَا وَلَا تُحَمِّلْنَا مَا لَا طَاقَةَ لَنَا بِهِۦۖ وَٱعْفُ عَنَّا وَٱغْفِرْ لَنَا وَٱرْحَمْنَآۚ أَنتَ مَوْلَىٰنَا فَٱنصُرْنَا عَلَى ٱلْقَوْمِٱلْكَٰفِرِينَ ٢٨٦

> Allah does not impose upon any soul a duty but to the
> extent of its ability; for it is (the benefit of) what it has
> earned and upon it (the evil of) what it has wrought: Our
> Lord! do not punish us if we forget or make a mistake;
> Our Lord! do not lay on us a burden as Thou didst lay on
> those before us, Our Lord do not impose upon us that
> which we have not the strength to bear; and pardon us
> and grant us protection and have mercy on us, Thou art
> our Patron, so help us against the unbelieving people.

b. Al-Baqarah, 185:

يُرِيدُ ٱللَّهُ بِكُمُ ٱلْيُسْرَ وَلَا يُرِيدُ بِكُمُ ٱلْعُسْرَ

> Allah desires ease for you, and He does not desire for
> you difficulty

c. Surah Al-Hajj, 78:

وَجَٰهِدُوا۟ فِي ٱللَّهِ حَقَّ جِهَادِهِۦۚ هُوَ ٱجْتَبَىٰكُمْ وَمَا جَعَلَ عَلَيْكُمْ فِي ٱلدِّينِ مِنْ حَرَجٍ ٧٨

> And ye strive in the way of Allah and Jihad in truth. He
> has chosen you, and has imposed no difficulties on you
> in religion.

d. Surah al-Nisa`, 28:

يُرِيدُ ٱللَّهُ أَن يُخَفِّفَ عَنكُمْۚ وَخُلِقَ ٱلْإِنسَٰنُ ضَعِيفًا ٢٨

God wants to give relief to you, and the man was made to be weak

e. Hadith of the Prophet:

ما خير بين أمرين إلا ا ختار أيسرهما ما لم يكن إثما

The Prophet was not given a choice between two things, but he chose the most convenient as long as it is not a sin

The application of its characteristics is found, for example, in the permissibility of qaṣar (summarizing four cycled prayers into two) during a travel. Another example is the permissibility to break fasting for the sick and the traveler, to eat unclean foods in emergency condition, and the permissibility of tayammum for the sick or when no water is found for ritual ablution (*wuḍū'*).

1. Minimazing the Burden (*taqlīl al-takālīf*)

This characteristics means that all Islamic laws are not out of the limits and are applicable without bringing difficulties beyond human ability. It is true that every law brings both difficulties to each *mukallaf*, but they are still within human limits. Those difficulties may come from Islam itself or human unusual observance such as fasting *wiṣāl* (a continuous fasting without eating before andafter daybreak), praying on one leg, and so on.

This characteristics also regulates that a twofold legal burden in two similar cases cannot be considered as something that should be performed at once, such as obligatory bath for ritual impure removes *wudhū'* obligation as long as nothing is done to annul it. Similarly, the punishment for *zinā mukhshan* (illicit sex by a married man) is enough by stoning without having to combine with one-hundred scourging. These are the examples of Islamic laws wherein the characteristic of minimizing the burden is involved.

2. Gradual determination of the law (*al-tadarruj fi al-tashrī'*)

Social, cultural, economic and political conditions sometimes become the barriers in the application of laws. Nevertheless, Islamic law is binding because it is theological, which is believed to come from God which requires efforts for its implementation. This characteristic came up to bridge this gap. One legal maxim of fiqh reflects the spirit of this characteristic:

ما لا يدرك كله لا يترك كله

> Something that cannot be realized fully should not be abandoned fully

A well-known example of this characteristic is the Qur'anic prohibition of khamr (liquor). The Qur'an presents the law in stages; it first informs that khamr has the benefits for the human body but God said that the sin in it is greater than the benefits. The Qur'an then continues with the ban on prayers in a drunken state, and the last stage is expressly ban on drinking liquor. These stages chronologically are recorded in the following Qur'anic verses:

a. Al-Baqarah, 219:

﴿يَسْـَٔلُونَكَ عَنِ ٱلْخَمْرِ وَٱلْمَيْسِرِ قُلْ فِيهِمَآ إِثْمٌ كَبِيرٌ وَمَنَٰفِعُ لِلنَّاسِ وَإِثْمُهُمَآ أَكْبَرُ مِن نَّفْعِهِمَا وَيَسْـَٔلُونَكَ مَاذَا يُنفِقُونَ قُلِ ٱلْعَفْوَ كَذَٰلِكَ يُبَيِّنُ ٱللَّهُ لَكُمُ ٱلْـَٔايَٰتِ لَعَلَّكُمْ تَتَفَكَّرُونَ ٢١٩

> They ask you about intoxicants and games of chance. Say: In both of them there is a great sin and means of profit for men, and their sin is greater than their profit. And they ask you as to what they should spend. Say: What you can spare. Thus does Allah make clear to you the communications, that you may ponder.

b. Al-Nisa', 43:

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ لَا تَقْرَبُواْ ٱلصَّلَوٰةَ وَأَنتُمْ سُكَٰرَىٰ حَتَّىٰ تَعْلَمُواْ مَا تَقُولُونَ وَلَا جُنُبًا إِلَّا عَابِرِي سَبِيلٍ حَتَّىٰ تَغْتَسِلُواْ وَإِن كُنتُم مَّرْضَىٰٓ أَوْ عَلَىٰ سَفَرٍ أَوْ جَآءَ أَحَدٌ مِّنكُم مِّنَ ٱلْغَآئِطِ أَوْ لَٰمَسْتُمُ ٱلنِّسَآءَ فَلَمْ

تَجِدُوا۟ مَآءً فَتَيَمَّمُوا۟ صَعِيدًا طَيِّبًا فَٱمْسَحُوا۟ بِوُجُوهِكُمْ وَأَيْدِيكُمْ إِنَّ ٱللَّهَ كَانَ عَفُوًّا غَفُورًا ٤٣

O you who believe! do not go near prayer when you are Intoxicated until you know (well) what you say, nor when you are under an obligation to perform a bath-- unless (you are) travelling on the road-- until you have washed yourselves; and if you are sick, or on a journey, or one of you come from the privy or you have touched the women, and you cannot find water, betake your-selves to pure earth, then wipe your faces and your hands; surely Allah is Pardoning, Forgiving.

c. Al-Maidah verse 90-91:

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓا۟ إِنَّمَا ٱلْخَمْرُ وَٱلْمَيْسِرُ وَٱلْأَنصَابُ وَٱلْأَزْلَٰمُ رِجْسٌ مِّنْ عَمَلِ ٱلشَّيْطَٰنِ فَٱجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ ٩٠ إِنَّمَا يُرِيدُ ٱلشَّيْطَٰنُ أَن يُوقِعَ بَيْنَكُمُ ٱلْعَدَٰوَةَ وَٱلْبَغْضَآءَ فِي ٱلْخَمْرِ وَٱلْمَيْسِرِ وَيَصُدَّكُمْ عَن ذِكْرِ ٱللَّهِ وَعَنِ ٱلصَّلَوٰةِ فَهَلْ أَنتُم مُّنتَهُونَ ٩١

O you who believe! Intoxicants and games of chance and (sacrificing to) stones set up and (dividing by) arrows are only an uncleanness, the Shaitan's work; shun it therefore that you may be successful.

The Shaitan only desires to cause enmity and hatred to spring in your midst by means of intoxicants and games of chance, and to keep you off from the remembrance of Allah and from prayer. Will you then desist?

3.5 The Principles of Islamic Law

Is the principle here is the principle that is used as the principal per-son in thinking, acting, and so forth.[195] According Soenarjo, as quoted by Supriyadi, that there are nine principles of Islamic law, which is detailed as follows:

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[195]Supriyadi, *Sejarah Hukum*, p. 157.

1. Monotheism (*Tawḥīd*)

This principle asserts that the whole building of Islamic law is lied down on the Oneness of Allah. With the principle of *tawḥīd*, the implementation of a law will mean also as a worship and its qualities indeed depends to what extent God is present in both pure worship (*mahḍah*) or in impure one (*ghayr mahḍah*). It is this implementation of laws that the prophet referred to as *iḥsān* (good deeds)*:*

<div dir="rtl">

أن تعبد ربك كأنك تراه وإن لم تكن تراه فإنه يراك

</div>

> Be ye worship your God as if you see Him. If not, verily He sees you.

The principle of monotheism also suggested that that Islamic law should always be aligned with the Qur'an and the Sunnah, either through a direct understanding of the the texts or the spirits contained therein through a linguistic or non-linguistic approach such as *maqāṣid al-sharī'ah* and others.

Normatively speaking, this principle is found in Surah al-'Imran, 64:

<div dir="rtl">

قُلْ يَـٰٓأَهْلَ ٱلْكِتَـٰبِ تَعَالَوْاْ إِلَىٰ كَلِمَةٍ سَوَآءٍ بَيْنَنَا وَبَيْنَكُمْ أَلَّا نَعْبُدَ إِلَّا ٱللَّهَ وَلَا نُشْرِكَ بِهِ شَيْـًٔا وَلَا يَتَّخِذَ بَعْضُنَا بَعْضًا أَرْبَابًا مِّن دُونِ ٱللَّهِ فَإِن تَوَلَّوْاْ فَقُولُواْ ٱشْهَدُواْ بِأَنَّا مُسْلِمُونَ ٦٤

</div>

> Say: O followers of the Book! come to an equitable proposition between us and you that we shall not serve any but Allah and (that) we shall not associate aught with Him, and (that) some of us shall not take others for lords besides Allah; but if they turn back, then say: Bear witness that we are Muslims.

2. Justice (*al-'adl*)

Quraish Shihab, as quoted by Supriyadi, pointed out that justice as demanded by the Qur'an has a very diverse meaning, both in the process of establishing the law, enforcement of the humanitarian values, and so

on. Justice can be attributed to four meanings: first, justice is same-ness; second, justice is a balance; third, justice is respect and fulfillment for the individual rights or putting something in its proper place; fourt, justice is attributed to God.[196]

In the context of Islamic law, the principle of justice demands for legislation, and the application of Islamic law should also consider the objective conditions of the society where the law will be applied in a particular time. It could be that a particular law is applicable in some places but is not in some other places because of the social, cultural, economic and political factors. In this case, the the implementation of laws which does not reflect justice should be "deferred" until the time is conducive while at the same time looking for other alternative ones which are more adaptable.

3. Equality (*al-Musāwah*)

The principle of equality implies that any individual and group have the same and equal rights in the ayes of Islamic law. Therefore, legisla-tion should consider also the fulfillment of human rights in order that Islamic law can truly become a blessing for the mankind. This principle applies, for example, in examining the position between men and wom-en in their self-actualization both as the servants of God to improve their piety and as "the chaliphs" on Earth to maintain an ecosystem which is balanced and able to lead them to the happiness in the Hereafter.

Thus, the relationship between one and another individual, or one group and another group or individual, a men and women is not that between "subjects" vs. "object", rather between "subjects" vs. "sub-jects". In such a relationship, it is not justified for one individual or a group to control and repress others on behalf of religion.

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[196] Ibid., pp. 159-160.

It is undeniable that some of Islamic doctrines are still far from the principle of equality, such as the provision on woman's domestic roles. The rule stipulated that when a woman is leaving home she should be accompanied with a mahrām and should be covering parts of her body except eyes. On the contrary, a man is free to do activities outside, and is required to cover only his body between his navel and knees. In addition, a man is also given the right to do polygamy, even without permission from the first wife. Looking at these unfair Islamic laws, Muslim scholars are dealing with challenges to produce Islamic laws which are egalitarian without losing the spirits of maṣlahah as reflected in the Qur'an and the Sunnah.

Normatively, the principle of *al-musāwah* has its normative foundation in the Qur'an, Surah al-Hujurat, 13:

يَٰٓأَيُّهَا ٱلنَّاسُ إِنَّا خَلَقْنَٰكُم مِّن ذَكَرٍ وَأُنثَىٰ وَجَعَلْنَٰكُمْ شُعُوبًا وَقَبَآئِلَ لِتَعَارَفُوٓا۟ إِنَّ أَكْرَمَكُمْ عِندَ ٱللَّهِ أَتْقَىٰكُمْ إِنَّ ٱللَّهَ عَلِيمٌ خَبِيرٌ ١٣

> O you men! surely We have created you of a male and a female, and made you tribes and families that you may know each other; surely the most honorable of you with Allah is the one among you most careful (of his duty); surely Allah is Knowing, Aware.

4. Independence/freedom (*al-Ḥurriyyah*)

This principle asserts that each individual has the basic rights of religious freedom, the improvement of health and peaceful life, knowledge, descent, and properly entitled property. Therefore, any law that does not reflect the principle of *al-ḥurriyah* should be reoriented, reconstructed, and deconstructed, if necessary.

The principle is rooted in the the Qur'an, Surah al-Baqarah, 256, Surah al-Maidah, 48, Surah Yunus, 99, and Surah al-Kafirun, 6, which read:

    a. Al-Baqarah, 256:

لَآ إِكْرَاهَ فِي ٱلدِّينِۖ قَد تَّبَيَّنَ ٱلرُّشْدُ مِنَ ٱلْغَيِّۚ فَمَن يَكْفُرْ بِٱلطَّٰغُوتِ وَيُؤْمِنۢ بِٱللَّهِ فَقَدِ ٱسْتَمْسَكَ بِٱلْعُرْوَةِٱلْوُثْقَىٰ لَا ٱنفِصَامَ لَهَاۗ وَٱللَّهُ سَمِيعٌ عَلِيمٌ ٢٥٦

There is no compulsion in religion; truly the right way has become clearly distinct from error; therefore, who-ever disbelieves in the Shaitan and believes in Allah he indeed has laid hold on the firmest handle, which shall not break off, and Allah is Hearing, Knowing.

b. Surah al-Maidah, 48:

وَأَنزَلْنَآ إِلَيْكَ ٱلْكِتَٰبَ بِٱلْحَقِّ مُصَدِّقًا لِّمَا بَيْنَ يَدَيْهِ مِنَ ٱلْكِتَٰبِ وَمُهَيْمِنًا عَلَيْهِۖ فَٱحْكُم بَيْنَهُم بِمَآ أَنزَلَ ٱللَّهُۖ وَلَا تَتَّبِعْ أَهْوَآءَهُمْ عَمَّا جَآءَكَ مِنَ ٱلْحَقِّۚ لِكُلٍّ جَعَلْنَا مِنكُمْ شِرْعَةً وَمِنْهَاجًاۚ وَلَوْ شَآءَ ٱللَّهُ لَجَعَلَكُمْ أُمَّةً وَٰحِدَةً وَلَٰكِن لِّيَبْلُوَكُمْ فِي مَآ ءَاتَىٰكُمْۖ فَٱسْتَبِقُواْٱلْخَيْرَٰتِۚ إِلَى ٱللَّهِ مَرْجِعُكُمْ جَمِيعًا فَيُنَبِّئُكُم بِمَا كُنتُمْ فِيهِ تَخْتَلِفُونَ ٤٨

And We have revealed to you the Book with the truth, verifying what is before it of the Book and a guardian over it, therefore judge between them by what Allah has revealed, and do not follow their low desires (to turn away) from the truth that has come to you; for every one of you did We appoint a law and a way, and if Allah had pleased He would have made you (all) a single people, but that He might try you in what He gave you, therefore strive with one another to hasten to virtuous deeds; to Allah is your return, of all (of you), so He will let you know that in which you differed;

c. Al-Kafirun, 6:

لَكُمْ دِينُكُمْ وَلِيَ دِينِ ٦

You shall have your religion and I shall have my religion.

5. Commanding the Good and Prohibiting the Forbidden (*al-'Amr bi al-Ma'rūf wa al-Naḥy' 'an al-Munkar*)

The principle of *al-'amr bi al-ma'rūf* requires that Islamic laws should function also as a social engineering for a better human life and dignity through methods and approaches that make sense and accord to tradition and culture. On the other hand, by the principle of *al-naḥy' 'an al-munkar* Islamic law is intended to be a social control for human life in order to avoid all forms of damages and difficulties.

6. Helping One Another (*al-Ta'āwun*) and Dialogue (*al-Shūrā*)

This principle is based on the notion that no one is perfect but the Prophet Muhammad. Accordingly, it asserted that human beings should help one another in social, political, and legal and other aspects of life. Ijtihad should be done in a collective manner (*jamā'ī*) which involve all the experts in various fields of the legal matter in question. The law of economics, for example, should not be ever separated from religious, environmental, socio-cultural, educational aspects and others. The presence of those experts is needed to produce legal products aligned with and interconnected to human life. This is in this are that the principle *ta'āwun* and *shūrā* found its significance.

The principle of *ta'āwun* finds its basis in the Qur'an Surah al-Maidah, 2, Surah al-Mujadalah, 9, Surah Ali 'Imran, 159, and Surah al-Shura, 38:

a. Surah al-Maidah, 2:

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ لَا تُحِلُّواْ شَعَٰٓئِرَ ٱللَّهِ وَلَا ٱلشَّهۡرَ ٱلۡحَرَامَ وَلَا ٱلۡهَدۡيَ وَلَا ٱلۡقَلَٰٓئِدَ وَلَآ ءَآمِّينَ ٱلۡبَيۡتَ ٱلۡحَرَامَ يَبۡتَغُونَ فَضۡلٗا مِّن رَّبِّهِمۡ وَرِضۡوَٰنٗا وَإِذَا حَلَلۡتُمۡ فَٱصۡطَادُواْ وَلَا يَجۡرِمَنَّكُمۡ شَنَـَٔانُ قَوۡمٍ أَن صَدُّوكُمۡ عَنِ ٱلۡمَسۡجِدِ ٱلۡحَرَامِ أَن تَعۡتَدُواْ وَتَعَاوَنُواْ عَلَى ٱلۡبِرِّ وَٱلتَّقۡوَىٰ وَلَا تَعَاوَنُواْ عَلَى ٱلۡإِثۡمِ وَٱلۡعُدۡوَٰنِ وَٱتَّقُواْ ٱللَّهَ إِنَّ ٱللَّهَ شَدِيدُ ٱلۡعِقَابِ ٢

O you who believe! do not violate the signs appointed by Allah nor the sacred month, nor (interfere with) the of-

ferings, nor the sacrificial animals with garlands, nor those going to the sacred house seeking the grace and pleasure of their Lord; and when you are free from the obligations of the pilgrimage, then hunt, and let not hatred of a people-- because they hindered you from the Sacred Masjid-- incite you to exceed the limits, and help one another in goodness and piety, and do not help one another in sin and aggression; and be careful of (your duty to) Allah; surely Allah is severe in requiting (evil).

b. Surah al-Mujadalah, 9:

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓاْ إِذَا تَنَٰجَيْتُمْ فَلَا تَتَنَٰجَوْاْ بِٱلْإِثْمِ وَٱلْعُدْوَٰنِ وَمَعْصِيَتِ ٱلرَّسُولِ وَتَنَٰجَوْاْ بِٱلْبِرِّ وَٱلتَّقْوَىٰ وَٱتَّقُواْ ٱللَّهَٱلَّذِيٓ إِلَيْهِ تُحْشَرُونَ ٩

O you who believe! when you confer together in private, do not give to each other counsel of sin and revolt and disobedience to the Messenger, and give to each other counsel of goodness and guarding (against evil); and be careful of (your duty to) Allah, to Whom you shall be gathered together.

c. Surah Al-Imran, 159:

فَبِمَا رَحْمَةٍ مِّنَ ٱللَّهِ لِنتَ لَهُمْ وَلَوْ كُنتَ فَظًّا غَلِيظَ ٱلْقَلْبِ لَٱنفَضُّواْ مِنْ حَوْلِكَ فَٱعْفُ عَنْهُمْ وَٱسْتَغْفِرْ لَهُمْ وَشَاوِرْهُمْ فِي ٱلْأَمْرِ فَإِذَا عَزَمْتَ فَتَوَكَّلْ عَلَى ٱللَّهِ إِنَّ ٱللَّهَ يُحِبُّ ٱلْمُتَوَكِّلِينَ ١٥٩

Thus it is due to mercy from Allah that you deal with them gently, and had you been rough, hard hearted, they would certainly have dispersed from around you; pardon them therefore and ask pardon for them, and take counsel with them in the affair; so when you have decided, then place your trust in Allah; surely Allah loves those who trust.

d. Al-Shura, 38:

وَٱلَّذِينَٱسْتَجَابُواْ لِرَبِّهِمْ وَأَقَامُواْ ٱلصَّلَوٰةَ وَأَمْرُهُمْ شُورَىٰ بَيْنَهُمْ وَمِمَّا رَزَقْنَٰهُمْ يُنفِقُونَ ٣٨

> And those who respond to their Lord and keep up pray-
> er, and their rule is to take counsel among themselves,
> and who spend out of what We have given them.

7. Tolerance (*al-Tasāmuh*)

This principle asserts that the different thoughts of laws due to dif-
ferent theories, methods and approaches used in ijtihad should be
wholeheartedly accepted as a fact in a pluralistic reality. Nevertheless,
this disagreement can be tolerated as long as it related to *ẓanniyāt* (no
legal clarity) and does not interfere with the public good.

Muhammad Sa'id al-Ashmawi, basing himself on the historical re-
vealation of the Qur'an and the messages, set up the general purposes of
Islamic laws that should be a framework in formulating laws. They
are:[197]

Firstly, *sharī'ah* was revealed in relation with the establishment of a
religious community, and its implementation depends on the existence
of this given community; secondly, *sharī'ah* is revealed because of its
basic causes, and the latter does not have any conformity
with it;[198] thirdly, *sharī'ah* aims to realize the general benefits for socie-
ties. One way to reach this purpose is that some parts of *sharī'ah* re-
moves (*nāsikh*) earlier parts of it. Therefore, the truth and the benefit of
sharī'ah depend on circumstances and conditions which are changing
according to technological and scientific developments;[199] fourthly,
there are some parts of *sharī'ah* which apply specifically to the Prophet
Muhammad and to particular occassions;[200] fifthly, *sharī'ah* has an
uninterrupted relationship with the past. Similarly, the roots of *sharī'ah*
are closely related to the communities where it was im-

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[197] Muhammad Said al-Asymawi, *Nalar Kritis Syari'ah*, transl. Luthfi Thomafi,
(Yogyakarta: LKiS, 2012), pp. 46-47.
[198] Ibid.
[199] Ibid.
[200] Ibid.

posed. Nevetherless, there are some social institutions that are taken as a legal basis;[201] sixthly, the religion is already perfect and its value lies in its continuous attempts to adapt to the changing conditions of communities and drag people to a more dignified life.[202]

Ashmawi's explanation on the purpose and principles of *sharī'ah* above shows us that *sharī'ah* does not come in a vacuum context, rather in a historical "wrap" along with its various dynamics for which *sharī'ah* offered solutions for social problems under the framework of maṣlaḥah. Without this method of reading, Islam as "Blessing for the World" with the jargons "Back to the Qur'an and the Sunnah", "Islam Yes, Politics No" and others would be a figment only.

3.6 *Ijtihād* and *Mujtahid*

Linguistically, the term *ijtihād* is derived from the word "*juhd/jahd*" which means an ability (*al-ṭāqah*) when the letter *jīm* reads *ḍammah* (i.e. *juhd*), and a difficulty (*al-mashaqqah*) when the letter reads *fatḥah* (*jahd*).[203] Thus, *ijtihād* literally means putting all the effforts, both in the form of *juhd* (ability) and *jahd* (difficulties), because someone who devotes all the ability will be also definitely faced with troubles. It is not considered an *ijtihād* until someone "imposes" himself to do what he pleases and is ready to bear difficulties. An example of ijtihad in the sense of the meanings above is a saying by ʻAlī bin Abī Ṭālib:

<div dir="rtl">

فعليكم بالجد والإجتهاد, والتأهب والاستعداد, والتزود في منزل الزاد

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[201] Ibid.

[202] Ibid.

[203] Mustafa Ja'far Ceh Fard, *al-Ijtihād ʻInda al-Madzāhib al-Islāmiyyah Dirāsah Tahlīliyyah Ḥawla Madāris al-Ijtihād Wa Manāhijih Wa Adwārih* (Bairut: Markaz al-Hadarah li Tanmiyah al-Fikr al-Islamiy, 2011), p. 15.

> Devote yourself and get ready and prepare, be well-equipped![204]

The meaning of *ijtihād* above is also found find in the hadith of the Prophet Muhammad from 'Aisha:

<div dir="rtl">
كان رسول الله صلى الله عليه وسلم يجتهد في العشر الأواخر ما لا يجتهد في غيرها
</div>

> The Prophet used to strive his efforts during the last ten (of Ramadan), more than he ever did in any other times.

There are several definitions by ulamas on the term *ijtihād*. For al-Shafi'ī, it means *qiyās* (analogy) and even the two words are synonymous. He said:

<div dir="rtl">
فما القياس؟ أهو الإجتهاد أم هما مفترقان؟ قلت هما اسمان لمعنى واحد
</div>

> So what is qiyas? Is it the ijtihad, or both are different?. I replied, "They are two words with the same meaning meanings.[205]

If we look it carefully, Shāfi'ī's definition of ijtihad above is a *tamthīl* (metaphore) of how *ijtihād* itself works, because the method of *ijtihād qiyāsī* (i.e. *ijtihād* by analogy) is one among many methods of excavating Islamic laws that he mentioned in his *al-Risāla*, such as textual analysis of the aspects of the taklīf (*al-'amr and al-nahy*), the inference of meaning (*al-manṭūq and al-mafhūm*) and so forth. 'Abd al-Wahhab Khallaf defines *ijtihād* as follows:

<div dir="rtl">
عبارة عن بذل الجهدللتوصل إلى الحكم في واقعة لا نص فيها بالتفكير واستخدام الوسائل المختلفة من قياس أو استحسان أو مصالح مرسلة أو ترجيحات عقلية ظنية للاستنباط بها, فيما لا نص فيه.
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[204] Ibid.
[205] Muhammad bin Idris al-Shāfi'ī, *al-Risālah,* (Bairut: Dar al-Kutub al-'Ilmiyyah, tt.), p. 477.

a metaphore of devoting all the ability to figure out the laws in reality on which there is no *naṣṣ* by thinking and using various methods such as:

qiyās or *istiḥsān* or *maṣlaḥah mursalah* or

tarjīḥ (preference of one opinion) which is rational and *ẓannī* (allegedly true) in order to decide a legal status of an event on which the *naṣṣ* is silent.[206]

The definition above, as what al-Shafi'ī did, limits the scope of *ijtihād* only to the issues unexplained by the Qur'an and the Sunnah and, therefore, its application is done by *qiyās*, *istiḥsān*, *maṣlaḥah mursalah*, or by *tarjīḥ* (preference of one opinion from another). In fact, as mentioned earlier, the method of ijtihad sometime includes *ghayr al-naṣṣ* (non-textual), and sometimes includes textual analysis of the Qur'an and the Sunnah by a linguistic approach, such as *al-amr* (imperative), *al-nahy* (prohibition), *al-'ām* (general), *al-khāṣṣ (specific))*, *al-muṭlaq (unconditional)*, *al-muqayyad (conditional)*, *al-haqīqah (real)*, *al-majāz (figurative)*, *al-manṭūq (pronounced)*, *al-mafhūm (implied)*, and so forth. A more comprehensive definition of ijtihad is given by al-Jurjani:

استفراغ الفقيه الوسع ليحصل له ظن بحكم شرعي

A hard effort of a jurist (*faqīh*) to obtain the strongest suspescion of the *sharī'ah*.[207]

Al-Shāṭibi provides a definition of *ijtihād* with an emphasis on formulation of the law, in the form of confidence (*al-'ilm*) or a strong suspicion *(al-ẓann)* as well as the effort to figure out the objectives of the sharī'ah (*maqṣad al-sharī'ah*). He wrote:

استفراغ الوسع وإبلاغ الجهد في تحصيل العلم أو الظن بالحكم
طلبا لمقصد الشارع المتحد

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[206] Abd al-Wahhab Khallaf, *Maṣādir al-Tashrī' al-Islāmi Fi Mā La Naṣṣa Fīh*, (Damaskus: Dar al-Qalam, tt), p. 17.
[207] Al-Sharif 'Ali bin Muhammad al-Jurjani, *al-Ta'rīfāt*, (Bairut: Dar al-Kutub al-'Ilmiyyah, 1983), p. 10.

> Devoting all the efforts and mobilizing all the ability to acquire knowledge or suspicion of the law, in the hope of figuring out the purpose of the only Shā'ri'.[208]

Farid al-Ansari said that there are three possible understanding of the fragment: "*ṭalaban li maqṣad al-shāri' al-muttahid*" in the sentence above: the first is that although *mujtahids* often disagree on a particular law, they share a common intention, i.e. to uncover the purpose of the Shāri'. The second is that the purpose of Shāri' in a legal proposition, although it contains possible different legal directions, is one. It is the task of a *mujtahid* to reveal the given single purpose "hiding" behind a legal proposition. Therefore, although *mujtahids* disagree in certain law, they actually go to a common intention, i.e. the single purpose of the Shāri'.[209] The third is that the single purpose of the Shāri' means nothing but a proper application of the laws. Morever, al-Shāṭibi said that there are three stages in the process of *ijtihād*:[210]

1. ***Al-Fahm***, which is a true understanding of legal reasoning and aspects of laws, as well as the *maqāṣid al-sharī'ah*;

2. ***Al-Istinbāt***, which is the excavation of Islamic law. This stage will run well if a mujtahid has a proper understanding on the relationship between causes and effects (*al-sabab wa al-musabbab*) and the ability to infer from several indicators (*al-amarāt*), and knowledge of *maqāṣid al -sharī'ah*;

3. ***Al-Tanzīl***, which means that the law derived directly from the scripture or through *istinbāt* should be applied according to the legal reasoning (*al-manāṭ*): will it be applied to something general or specific? This stage is very important as to make the laws more grounded and applicable.
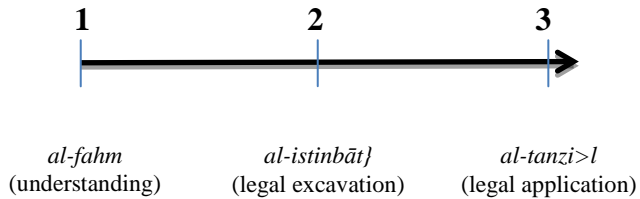
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[208] Farid al-Ansari, *al-Muṣṭalaḥ al-Uṣūliy 'Inda al-Shāṭibiy,* (Mesir: Dar al-Salam, 2010), p. 298.

[209] Ibid., p. 305

[210] Ibid., pp. 307-312.

Figure 3.1Shātibī's Stages of Ijtihad

1	2	3
al-fahm	*al-istinbāt}*	*al-tanzi>l*
(understanding)	(legal excavation)	(legal application)

3.7 Requirements of *Mujtahid*

The Muslim scholars found it important to provide certain require-
ments in ijtihad, because it is a scientific work that is related to revela-
tion. There are two dimensions in ijtihad: rationality and sacredness. The
rational aspects of ijtihad is inevitable since a mujtahid should be clever
in articulating the God's "limited" message (*al-mutanahiyyah*) in dia-
logue with the realities of human life which are changing according to
the "unlimited" development of science and technology (*ghayr al-
mutanahiyah*). Therefore, a *mujtahid* must have necessary knowledge of
the al-Qur'an and the Sunnah which represent the will of Shāri', and of
people's needs that require legal truism and certainty.

On the other hand, the sacred dimensions of ijtihad refer to the fact
that the results of an *ijtihad*, true (*sawāb*) or false (*khaṭa'*) regardless of
the controversy surrounding them, are still considered as sacreds law
and must be obeyed. They are also possibly be used as the basis for
emasculating human rights for which morality, as a requirement in
addition to scientific one, for a *mujtahid* plays a significant role.

1. Scientific Requirements

The scientific requirements can be categorized into two parts: the
first is the requirements related to science of religion (*'ulūm al-dīn*) such

as the Qur'an, the Sunnah, *ijmā'*, *asbāb al-nuzūl* (occations of revelation) and *nasīkh wa mansūkh* (the abrogating and abrogated); the second is those related to tools (al-wasā'il) to understand the true message of the Qur'an and the Sunnah, i.e the rules of language such as command and prohibition, the general and the specific, and so forth.

a. Requirements related to the science of religion ('*ulūm al-dīn*)

1. Knowledge of the Qur'an.

There is disagreement among the scholars that the Qur'an is the source of Islamic law besides the Sunnah. The formalization of the Qur'an as the most important requirement in ijtihad was first launched by Shāfi'ī in *al-Risālah*.Talking about the requirements for a mujtahid, he wrote:

العلم بأحكام كتاب الله: فرضه وأدبه وناسخه ومنسوخه وعامه وخاصه وإرشاده

> Knowing the laws of the Book of Allah: farḍu, nasīkh and mansūkh, the general and the specific, and all their designation.[211]

Other scholars, such as al-Basri al-Mu'tazili, al-Juwaynī, al-Ghazālī, Fakhr al-Din al-Razi, al-Amidi, Ibn Hazm, and others followed it later.[212] However, those later disagree on whether a *mujtahid* must memorize the entire Qur'an or simply know the verses related to the issues in question. Following al-Shāfi'ī, al-Juwaynī and al-Ghazālī require a thorough and in-depth knowledge of the Qur'an in *ijtihad*.[213] Whereas, al-Basri al-Mu'tazilī does not require that a *mujtahid* should memorize the entire Qur'an. Abu al-Walid al-Baji among the Mālikī argued that a

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[211] Al-Shafi'ī, *al-Risalah*., p. 510.

[212] See Fathi al-'Aṭawi, *al-Ijtihād fi al-Fikr al-Islāmiy,* (Bairut:Dar al-Fikr, 2014), p, 170. See also Sami Brahim, *Naqd al-'Aql al-Uṣūliy Dirāsah Taḥlīliyyah Naqdiyyah Li Uṣūl al-Fiqh 'Inda al-Mu'tazilah* (Tunisia: al-Magharibiyyah Li al-Tiba'ah wa Ishhar al-Kutub, 2014), p. 135.

[213] Fathi al-'Atawi, *al-Ijtihād*, p. 171.

mujtahid should be a true expert ('*alīm*) of the laws of the Qur'an, or otherwise he at least can read the whole Qur'an. Al-Bāji wrote:

صفة المجتهد أن يكون عالما بأحكام الكتاب وإن لم يكن من شرطه
أن يكون تاليا لجميعه

> The criteria is that a mujtahid should know the laws of the Book. If he can not meet this requirement, at least he read the whole Book.[214]

2. Knowledge of the Sunnah.

As it is in the case of the Qur'an, the Sunnah is a source of Islamic law. Therefore, it makes sense that scholars require a *mujtahid* to have understanding of the Sunnah along with its intricacies. Even al-Juwaynī expressed that in essence there is no separation between the Qur'an and the Sunnah.[215]

3. Knowledge of *ijmā'*

Ijmā' or consensus is a basic legal proposition after the Qur'an and the Sunnah. Islamic law that has been a consensus of scholars and based on the naṣṣ is "permanent" and can not be annulled by other ijtihad afterwards. Therefore, knowledge of Islamic law which has become the consensus of scholars is very urgent. Relating to this, al-Shāfi'ī said:

ولا يكون لأحدأن يقيس حتى يكون عالمابما مضى قبله من السنن
وأقاويل السلف وإجماع الناس واختلافهم

> One should not do qiyās unless he knows the Sunnah, opinions of the previous scholars, ijmā' of ulamā' and their disagreements.[216]

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[214] Abu al-Walid al-Baji, *Iḥkām al-Fuṣūl fī Aḥkām al-Uṣūl*, Vol. 2. (Bairut: Dar al-Gharb al-Islamiy, 1995), p. 728

[215] Imam al-Haramayn Abu al-Ma'aliy al-Juwayniy, *al-Burhān fī Uṣūl al-Fiqh*, Vol. 1. (Kairo: Dar al-Wafa', 1992), p. 128.

[216] Al-Shāfi'ī, *al-Risālah*, p. 510.

b. Knowledge of Arabic language and its intricacies

Scholars agreed that Islamic law is derived from the Qur'an and the Sunnah. It is God's prerogative that these two sources are in Arabic. Therefore, it is reasonable that a mujtahid is required to have the ability to understand the Arabic language and all its intricacies. With Being skillful in Arabic language a mujtahid can dive into a sea of rational meaning ('*aql al-ma'ānī*) of the Qur'an and the Sunnah. al-Shāfi'ī attested this this requirement by saying:

لا يعلم من إيضاح جمل علم الكتاب أحد جهل سعة لسان العرب
وكثرة وجوهه وجماع معانيه وتفرقها

> Someone who is blind of Arabic can not find an explanation of the sentences, aspects, meanings and the differences in the Book.[217]

Al-Juwaynī requires knowledge of *naḥwu* (syntax) and *i'rāb* (inflection) in *ijtihad*, because both play a major role in revealing the messages and the intents of the Shāri' in the Quran and in the Sunnah. Al-Ghazālī shares a common opinion. For him, a *mujtahid* must be equipped, even though is not skillful as imam Khalil al-Nahwiy, with knowledge of *naḥwu* in order to figure out the message and the purposes of God in the Qur'an.[218]

2. Intelligence and Morality Requirements

It is not enough for *mujtahids* to just have a deep knowledge, especially on the Quran and the Sunnah as well as the the intricacies of the Arabic. A *mujtahid* should also have good morality and high intelligence. This requirement is devided into two: general and specific. The general requirements are Muslim, matured and intelligent. These three conditions apply not only to the *mujtahid*, but also to *muftis* (ju-

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[217] Ibid.
[218] Al-Ghazali, *al-Mustaṣfā*, Vol.2. p. 202

rists), judges, witnesses, transactions, and other Islamic laws. The absence of one of these three conditions would make someone lose the eligibility (*al-ahliyyah*) in legal actions, particularly for a *mujtahid* whose opinions become references for the public in understanding and implementing Islamic teachings.[219]

In addition to Islam, mature, and intelligent, a *mujtahid* should be also fair and *warā'* (strictly refraining from what is unlawful and unnecessary). This requirement does not mean to put limitations on people— such as those who belong to the freedom of thought, who want to understand by their independently the messages of the Qur'an and the Sunnah. It is morality that would distinguish a thinker of Islam *(al-mufakkir fi al-Islām)* from a *mujtahid*.

Legal Reasoning of the Imām Madhhab

1. Hanafī's School

Broadly speaking, the Hanafī's jurist school built their legal reasoning on the following: the Qur'an, the Sunnah, *qawl al-Ṣaḥaby* (opinions of the Companions), *qiyās* (analogy), *istiḥsān* (preference), *ijmā'* (consensus), and *'urf* (tradition). As for these legal arguments, Abū Ḥanīfah said:

> أخذ بكتاب الله, فإن لم أجد فبسنة رسول الله (ص), فإن لم أجد في كتاب الله ولا سنة رسول الله أخذت بقول أصحابه, أخذ بقول من شئت منهم وأدع قول من شئت منهم, فأما إذا انتهى الأمر إلى إبراهيم النخعي والشعبي وابن سيرين والحسن وسعيد بن المسيب, فقوم اجتهدوا فأجتهد كما اجتهدوا

> I took (the law) with the Book of Allah, if I do not find it with the Sunnah of Rasulullah p.b.u.h. If I do not find it in the Book of Allah, nor in the Sunnah of the Prophet, then I take the opinion of his companions; I would take from

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[219] See al-Juwainiy, *al-Burhan*, Vol. 2.,p.869.

them an opinion that I want to, and I leave an opinion that I want. If the matter ended up with Ibrahim al-Nakh'iy, al-Sha'biy, Ibn Sirin, al-Hasan, and Sa'id al-Musayyab, then people do ijtihad, then I do ijtihad as they do.[220]

In regard with the Qur'an, the Hanafī believes that it is a name for a meaning only *(ism li al-ma'nā)*. Therefore, Abū Ḥanīfah argued that the required reading of the Qur'an in a prayer can be in non-Arabic language. As for the Sunna, the Hanafī preferred only *the sunna muta-wātirah* (the continuous) *or mashhūrah* (the well-known) as the basis of their legal reasoning. *Ḥadith aḥad* (a single-transmitted), even if it is valid, can serve as a legal reasoning if narrated by a companion who is also known as a jurist, such as Abu Bakr, Umar, Uthman, and Ali. If not, a hadith aḥad, such as that from Abu Hurairah, must comply with *qiyās*.[221]

The Ḥanafīte also argued that *qawl al-ṣahāby* can be used as a legal proposition if it has become a consensus among them, as long as no evidence is found in the Qur'an and the Sunnah.[222] Whereas, *qiyās* ranks the fourth in Hanafi's *ijtihād*. This method is chosen if the Qur'an and the Sunnah are silent, and there is *qawl al-ṣahāby* that reaches the level of consensus. The Ḥanafīte is also known as a jurist schools which is fond of using *istiḥsān* (preference) in *ijtihād*.

2. Mālikī's School

Although Imam Mālik bin Anas did not write anything on *uṣūl al-fiqh* (jurisprudence), his followers of the next era, al-Qadi 'Iyad, Ibn Rushd, Ibn Hamdun, and al-Qarafi established a methodology of ijtihad

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[220] See Muhammad al-Khudari Bek, *Tārīkh al-Tashrī' al-Islāmiy*, (Bairut: Dar al-Kutub al-'Ilmiyyah, 2008), p. 144.
[221] Muhammad Salam Madkur, *Manāhij al-Ijtihād fi al-Islām* (Kuwait: Jami'ah al-Kuwayt, 1973), p. 599.
[222] Ibid.

which is as systematic as Shafi'ī's. Broadly speaking, Mālikī's legal reasoning can be devided in two parts: the first is legal propositions which is also used by other jurist schools and the second is those exclusively belong to the Mālikī

a. Legal Propositions used also by other jurist schools

1) The Qur'an

Imām Mālik choose as a legal basis the Qur'anic verses that are *sharīh* (firm) and do not need a *ta'wīl* (allegorical interpretation). The Mālikī avoid *ta'wīl al-naṣṣ* unless there is no shar'ī reasoning that requires otherwise. As the Shafi'ī's school, the Mālikī also made *mafhūm muwāfaqah* (harmonious meaning) and *mafhūm mukhalafah* (divergent meaning) as a legal guidance.[223]

2) The Sunnah.

Unlike the Hanafī, the Mālikī accepts a *ḥadīth aḥad* (single transmitted hadiths) as a legal proposition as long as it does not contradict '*amal ahl al-Madīnah* (the practices of the people of Madinah). The Mālikī gives a priority to *ḥadīth aḥad* over *qiyās* as long as it is in accordance with *'amal ahl al-Madīnah*.

3) *al-Ijmā'* (Consensus)

The Mālikī recognizes only the consensus of *ahl al-Madīnah* and overrides *ḥadīth aḥad* when it turns out to be contradicting with *'amal ahl al-Madīnah*.[224]

4) *Qawl al-Ṣaḥabī* (Opinions of the Companions)

For the Mālikī, *qawl al-Ṣaḥabī* plays a strategic role in the excavation of Islamic law. One example is when Imam Mālik rejected *hajj*

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[223] Mustafa Ja'far, *al-Ijtihād 'Inda al-Madzāhib al-Islāmiyyah*, p. 112.
[224] Ibid., p. 112.

tamattu' (performing *'umrah* during the *hajj* season) based on a hadith by Sa'ad bin Abi Waqas from 'Umar that prohibits it.[225]

The reason behind Mālik's *istidlāl with qawl al-Ṣaḥabī* is that the Companions sometimes hear directly from the Prophet, or from other companions, or from their extraordinary understanding of the Qur'anic verses.[226]

5) *Qiyās* (analogy)

One example of Mālikī's ijtihad with *qiyās* is the obligation to make up (*qaḍā'*) and pay *kafārat* (penance) for people who did not perform *qaḍā'* until the coming of the consecutive Ramaḍān, based on analogy with those who deliberately break fasting in Ramaḍān; in both cases, they have disrespected the month of Ramaḍān.[227]

6) *al-Istiṣḥāb(Presumption of Continuity)*

Al-Istiṣḥāb is defined as:

<div dir="rtl">

الظن ببقاء الحكم في الحال أو الاستقبال بناء على ثبوته في الماضي وعدم قيام الدليل على تغييره

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> An allegation which becomes a permanent law in the present or in the future based on the exisiting laws in the past and there is no a legal proposition that changes it.[228]

7) *al-Istiqrā'* (a inductive research)

8) *al-Istidlāl* (reasoning)

For the Mālikī, *al-istidlāl* refers to:

<div dir="rtl">

محاولة معرفة الدليل المفضي إلى الحكم الشرعي من جهة القواعد لا من جهة الأدلة المنصوصة

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[225] Salim Madkur, *Manāhij al-Ijtihād*, p. 636.

[226] Ibid.

[227] Ibid.

[228] Ibid., pp. 638-639.

Efforts to determine legal propositions that can lead to the the shar'ī laws from the perspectives of legal maxims rather than the conotations of the texts.[229]

Al-Shawkani provides a definition of *al-istidlāl* as follows:

الدليل الذي ليس نصا ولا إجماعا ولا قياسا

It is a legal proposition which is not the *naṣṣ, ijmā', nor qiyās.*[230]

9) *al-Istiḥsān (juristic preference)*

10) *Shar'u Man Qablanā (the laws preceeding Islam)*

b. Distinctive Features of the Mālikī's Legal Reasoning

The distinctive features of the Mālikī's legal reasoning include *ahl al-Madīna* (the practices of the people of Madinah), *al-maṣlaḥah al-mursalah* (the unattested interests), *sadd al-dzarī'ah* (blocking the means), and *al-'urf* (tradition). As it has been explained before, for the Mālikīs the use of *ahl al-madīna* take precedence over a *ḥadīth aḥad*. In other words, *ḥadīth aḥad* is annulled when it contradicts the practice of the people of Madinah on the grounds that they knew better the behaviors of the Prophet.

In a further development, the scholars of Mālikī's school developed the legal arguments of *al-maṣlaḥah al-mursalah* in a more mature but "new" concept of *maqṣid al-sharī'ah,* especially after the publication of the *al-Muwāfaqāt fi Uṣul al-Sharī'ah* by Abu Ishaq al-Shāṭibi. *Maqāṣid al-sharī'ah*, which was originally a concept, has been developed further by scholars in the post-Shāṭibi, such ibn 'Āshūr, 'Alal al Fasi, Nur al-Din Mukhtar, into an approach and a method of ijtihad, known later as *al-Ijtihād al-Maqāṣidī.* Whereas, *sadd al-dzarī'ah* and *al-'urf*, despite of specific requirements for their implementation, in fact can be integrated into the studies of *maṣlaḥah* or *maqāṣid al-sharī'ah.*

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[229] Muṣṭafa Ja'far, *al-Ijtihād*, p. 115.
[230] Ibid., p. 116.

3. The Shafi'ī School

Shafi'ī's legal reasoning includes the Qur'an, the Sunnah, *al-ijmā'*, *qawl al-Ṣaḥābī, al-Qiyās, al-Istiṣhāb,* and *al-'Urf.*[231] Like other jurist schools, the Qur'an and the Sunnah are the primary sources in the ijtihad of the Shafi'ī. For al-Shafi'ī, hadith *aḥad* is a valid legal proposition and should be used before qiyās. Al-Shafi'ī refused the Iraqī scholars' claim that the imposition of hadith *aḥad* should be narrated by famous men, and also Mālik's opinion that it should be part of *'amal al-Madīnah.* As it is in the case of *Ḥadīth Aḥad*, al-Shafi'ī used *ijmā'* (consensus) as a legal proposition without any requirement that it should be following the people of Medina.[232] Al-Shafi'ī also established *qawl al-Ṣaḥābī* as a proposition legal proposition before moving forward to qiyās.

Al-Shāfi'ī was the first scholar who introduced and used a method *qiyās*. In his opinion, *qiyās* is used when there is a legal case on which the *naṣṣ* is silent.[233] By his method of *qiyās,* al-Shafi'ī made a new breakthrough in *ijtiḥād*, i.e. a moderation (*wasaṭiyyah*) between the Mālikī's seemingly very rigid *ijtihād* and the Hanāfī's loose one. In some particular cases, al-Shafi'ī also used *al-istiṣhāb* and *al-'urf* in his ijtihad.

4. The Ḥanbali's School

Ibn al-Qayyim asserted that there fivie elements upon which Ahmad bin Hanbal built his *ijtiḥād*: the first is the literal meanings of the Qur'an and the Sunnah. When a legal status of a problem is found in the al-Qur'an and the Sunnah, then the guidance is what is written in these two sources, regardless of any others' opinion, including those of the great Companions. For example, Imam Ahmad disagreed with his friend Ali,

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[231] Ibid., p. 138.
[232] Ibid., p. 139
[233] Al-Shaf'ī, *al-Risālah*, p. 477.

'Ustman, Talhah, Ubai bin Ka'b who said that *junūb* (impure bath) is not obligatory for a married couple who have not yet reach orgasm in their intercourse. His refusal was based on a hadith narrated 'Ā'ishah saying that the Prophet and she has been in such situation, the Prophet remained taking a bath.[234]

The second legal proposition is religious verdict (*fatwā*) of the Companions when there is no naṣṣ. For the Hanbalīs' school, the *fatwās* of the Companions, on which there is no disagreement among them, serve as a legal proposition of law after the Qur'an and the Sunnah. However, they do not terminologize it as a consensus.[235] When there is disagreement among the Companions on their *fatwās*, Imam Ahmad bin Hanbal chose the closest opinion to the Qur'an and the Sunnah.

Ahmad ibn Hanbal also used *Ḥadīth Mursal* (one which does not mention the Companions in the sanads) as the fourth legal reasoning. *Qiyās* is applied only no legal proposition is found in one of these four legal sources. Thus, for the Hanbalī, *qiyās* ranks at the fifth in the ordering of his legal reasoning.[236]

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[234] Mustafa Ja'far, *al-Ijtihād 'Inda al-Madzāhib al-Islāmiyyah*, p. 152.
[235]Ibid., p. 153.
[236] Muhammad Salam Madkur, *Manāhij al-Ijtihād*, p. 168.

4

MAQĀṢID AL-SHARĪ'AH-BASED FIQH: THE APPLICATION OF THE INTERCON-NECTED MAṢLAḤAHS TO MUSLIM WOMEN'S CLOTHING

From Dogmatic to Artistic *Ḥijāb*: The Search for Meanings of *Hijāb*, *Jilbāb* and *Khimār*

The Qur'an and the Hadith, as the sources of Islamic law, do not explain in detail, how should the form of clothing for both men and women. But it is undeniable that in the Qur'an there are several terms which are allegedly persumed by scholars (*ẓannī al-dalālah*)[237] as representing "Muslimah Clothing", which are: *ḥijāb*[238], *jilbab*[239] and *khimār*[240]. Therefore, the scholars give further details about the right fashion according to Islam, related to Islamic ways of clothing, such as the term of aurat (part of the body which may not be visible to others), some condi-

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[237]Eventhough alQuran is believed as *qat'iy al-wurud* (reliable as authentically revealed from God) and came to us based on consensus but there are two possibilities to gain meanings; first *Qat'iy al-Wurud* which is when the text is percise and clear where there is no need for further interpretation (Ta'wil) Second, *Zanniy al-Dalalah*, is when the text is *interpretable,* and open to be understood from different perspectives, and each is valid to be claimed as the true understanding without replacing the other trues, as long as the interpretation uses the right method of interpretation.

[238] The word *ḥijāb* is mentioned eight times in the Qur'an; they are surah al-A'raf, 46; al-Ahzab; 53, Shad, 32;, Fushshilat, 5, al-Shura, 51, al-Isra', 45; Maryam, 17, dan al-Muthaffifin, 15. From the eight uses of the word Hijab, there is only one use of Hijab in al-Ahzab that connects to the meaning of Muslimah clothing.

[239] Q.S. al-Ahzab, 59

[240] Q.S. al-Nur, 31

tions, and the functions of clothing, from symbol of piety, modesty and even resistance to the hegemony of Western culture.

In detail, the authors described the discussion as follows:

4.1 The Meaning of *Ḥijāb*, *Jilbāb*, and *Khimār*

a. *Ḥijāb*

Linguistically, *ḥijāb* is a synonym to *Sitr* (cap). *Ḥijāb* also means[241]:

<div dir="rtl">اسم مااحتجب به وكل ماحال بين شيئين حجاب</div>

> something that is used as a barrier, and everything that prevents two things to access visually called hijāb[242]

According to Abu al-Baqa` al-Kafawi (d. 1094 AH), *ḥijāb* is "everything that can cover and block to achieve something that is sought, such as caps, weakness (*al-'ajz*), and sin"[243]

Ḥijāb with the above meaning contained in the Qur'an at:

1. Surah Shad (38), 32:

<div dir="rtl">فَقَالَ إِنِّي أَحْبَبْتُ حُبَّ ٱلْخَيْرِ عَن ذِكْرِ رَبِّي حَتَّىٰ تَوَارَتْ بِٱلْحِجَابِ ٣٢</div>

> Then he said: Surely I preferred the good things to the remembrance of my Lord-- until the sun set and time for Asr prayer was over, (he said): drive them until they were hidden from his sight behind the veil[244].

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[241]See, Ibn Manzhur, *Lisan al'Arab*, Vol. 1, (Bairūt: Dār al-Fikr, 1990), p. 298.

[242] Fuad al-Barazi, *Hijab al-Muslimah* (Riyad : Maktab Usul al-Salaf, 1995), p. 27

[243] See Abu al-Baqa` al-Kafawi, *al-Kulliyyat: Mu'jam fi al-Musḥalahht wa al-Furuq al-Lughawiyyah,* (Bairut : Muassasat al-Risalah, 1993), 360. Weakness *al-'ajz becomes the burden (ḥijab)* of somebody to gain what he wants , while a Sin can be a burden from some one to his/her God. See also Muhammad Abd. Al-'Aziz 'Amr, *al-Libas waal-Zinah fi al-Shari'ah al-Islamiyyah*, (Bairut.: Muassasat al-Risālah, t.th), p. 117

[244]*Al-Qur'an dan Terjemahnya.*

2. Surah Maryam (19), 17:

فَٱتَّخَذَتْ مِن دُونِهِمْ حِجَابًا فَأَرْسَلْنَآ إِلَيْهَا رُوحَنَا فَتَمَثَّلَ لَهَا بَشَرًا سَوِيًّا
١٧

> So she took a veil (to screen herself) from them; then We
> sent to her Our spirit, and there appeared to her a well-
> made man.[245]

3. Surah al-Ahzab (33), 53:

يَـٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوا۟ لَا تَدْخُلُوا۟ بُيُوتَ ٱلنَّبِىِّ إِلَّآ أَن يُؤْذَنَ لَكُمْ إِلَىٰ طَعَامٍ
غَيْرَ نَـٰظِرِينَ إِنَىٰهُ وَلَـٰكِنْ إِذَا دُعِيتُمْ فَٱدْخُلُوا۟ فَإِذَا طَعِمْتُمْ فَٱنتَشِرُوا۟ وَلَا
مُسْتَـٔۡنِسِينَ لِحَدِيثٍ إِنَّ ذَٰلِكُمْ كَانَ يُؤْذِى ٱلنَّبِىَّ فَيَسْتَحْىِۦ مِنكُمْ وَٱللَّهُ لَا
يَسْتَحْىِۦ مِنَ ٱلْحَقِّ وَإِذَا سَأَلْتُمُوهُنَّ مَتَـٰعًا فَسْـَٔلُوهُنَّ مِن وَرَآءِ حِجَابٍ
ذَٰلِكُمْ أَطْهَرُ لِقُلُوبِكُمْ وَقُلُوبِهِنَّ وَمَا كَانَ لَكُمْ أَن تُؤْذُوا۟ رَسُولَ ٱللَّهِ وَلَآ
أَن تَنكِحُوٓا۟ أَزْوَٰجَهُۥ مِنۢ بَعْدِهِۦٓ أَبَدًا إِنَّ ذَٰلِكُمْ كَانَ عِندَ ٱللَّهِ عَظِيمًا ٥٣

> Believers, enter not the houses of the Prophet without
> his permission, nor wait for a meal to be prepared; in-
> stead enter when you are invited to eat, and when you
> have had the meal, disperse. Do not linger in idle talk.
> That is hurtful to the Prophet but he does not express it
> out of shyness; but Allah is not ashamed of speaking out
> the Truth. And if you were to ask the wives of the Proph-
> et for something, ask from behind a curtain. That is more
> apt for the cleanness of your hearts and theirs. It is not
> lawful for you to cause hurt to Allah's Messenger, nor to
> ever marry his wives after him. Surely that would be an
> enormous sin in Allah's sight.[246]

From the descriptiopn of languange used by the word hijāb as men-
tioned above, shows that there is no text in the Qur'an that shows the
meaning of the way of clothing as commonly understood by Muslims
today. In the abovementioned text (*naṣṣ*) would be more appropriate if
the word *ḥijāb* is understood as curtain.

While the term hijāb is defined as[247]:

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[245]Ibid.

[246]Ibid.

[247] Al-Barāzī, *Ḥijāb*, p. 28.

لباس شرعي سابغ تستربه المرأة ليمنع الرجال الأجانب من رؤية
شيئً من بدنها

The Sharī (Islamic) perfect outfit, made to cover the body of women; to block the view of men who are not mahram for her

From the definition of *ḥijāb* as mentioned above, it is understood that the term is not limited to a particular type of clothing. As long as the women's clothes can serve to cover the naked-ness and block the view of men who are not mahram for female aurat, it's proper to be called as Hijāb.

The Qur'anic verse that persumably has something to do with women's clothes is Surah al-Ahzab (33), 53. The verse is revealed in Medina. During that time, many people from the Islamic community came to the Prophet's home to ask for help and asking for something. His wives lived in the rooms surrounding by the assembly hall, which became the first mosque built by the prophet for Muslims.[248]

The historical background of the revelation of the verse (33:53) according to Anas bin Mālik (d. 93 AH) as follows:

> That verse is related to the marriage process of the Prophet to Zaynab bint Jahsh. at that time, the Prophet prepare food for the guests invited. But after they eat, most of guests -in this story said three guests – were still sitting and chatting. The Prophet entered the room of 'Aisha, then came out, with the expectations of the guests who are still living, had gone, but they have not, then he came back into the rooms of his other wives, alternating in and out to the chambers of all His wives. Finally they came out after the Prophet was waiting for a long time. "Anas bin Mālik, who told this story said "So I submit it to the Prophet, then he entered. I would also

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[248]See Fadwa El Juindi, *Jilbab*, p. 245.

enter but has fitted the veil between me and him, and then this verse revealed.[249]

In another narration that comes from al-Nasa'i, it is mentioned, that the wife of the Prophet, A'ishah, Said that 'Once when she was eating with the Prophet, 'Umar was passing over, then the Prophet invited Umar and he did eat, then -said 'Aisyah- his finger touched my finger, then 'Umar said, 'hus' or 'awwah', then came down the verse above.[250]

Another version also mentioned that the companion of the Prophet, Anas bin Mālik (d. 93 AH) stated that 'Umar ibn al-Khattab (d. 24 AH) proposed to the Prophet that, "O Messenger, good and bad people go into your house, shouldn't you ordered ummahāt al-mu`minīn (wives of the Prophet.) to put the veil?" Then this verse came down to put Hijāb.[251]

The scholars differed in terms of the necessity of *ḥijāb*, is it specifically only for the wives of the Prophet, or also the duty of every muslimah? Relating to this issue, Quraish Shihab explained various scholarly opinions. Some scholars argue that the requirement to wear the *ḥijāb*, such as the content of the verse of *ḥijāb* above applies in general to all Muslimah. This opinion is followed by a scholar who sets the whole body of a woman is *aurat* (nakedness), not least the face and palms. The above opinion, based on the following reasons:

First, at Prophet time, not only the wives of the Prophet who wear hijāb, but also all other Muslimah.[252] Second, the prohibition to enter the Prophet's house without permission does not mean a ban on the specialty of the Prophet house, but also applies to all the houses. Third, the editorial paragraph:

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[249]See M. Quraish Shihab, *Jilbab Pakaian Wanita Muslimah Pandangan Ulama Masa Lalu & Cendekiawan Kontemporer*. Print IV (Ciputat: Lentera Hati, 2009), p. 73
[250] Quraish Shihab, *Jilbab.,* p. 74
[251]Ibid.
[252]Ibid, p. 76.

<div dir="rtl">

ذلكم أطهر لقلوبكم وقلوبهن

</div>

In this way, is purer for your hearts and their hearts

The demand to purify the heart as contained in the paragraph above is not restricted to the wives of the Prophet, but also applies to every Muslim[253]. As already alluded by the author, there are scholars who understand that the word *ḥijāb* has nothing to do with clothes. The word *ḥijāb* as the way of dressing for women and the clothes are new interpretation which never existed at the Prophet time. The call for piety of the command and also prohibition to enter a house without permission of its owner cannot be imposed by the verse of *ḥijāb*, because there are other verses that explicitly mention it, i.e surah al-Nur [24]: 27, the editorial of the verse is as follows:

> *O believers! enter not houses other than your own, until you take permission and salute the residents there of.This is better for you, haply you may be heedful[254].0*

Thus, the content of the *ḥijāb* verse, does not necessarily apply in general to any Muslim or Muslimah.[255]

One thing that needs to be stressed here, that various disagreements of the scholars regarding their understanding the *ḥijāb* verse is something that can't be denied, because each scholar has a perspective in the understanding of religious texts, including the text of *hijāb*, also the elements of "interest" outside the text, such as religious imagination (*al-mikhyal al-dīnī*), and memory (*al-dzakīrah*) of the interpreters who con-

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[253] Ibid. 'Atiyah Saqar mentioned other reasons other than what is mentioned by Quraih Shihab, that at the beginning of Surah al Ahzab the Prophet was told to increase piety and not to listen to the Kaafir and the Hyprocrites. All Muslims are called upon this verse since the Khitāb (the one who is spoken to) who is partial cannot be burden to be applied generally based on the Khitab, analog , and other. See 'Atiyah Saqar, *al-Ḥijāb Bayn al-Tasḥi' wa al-Ijtimā'*, (Cairo: al-Dār al-Mīsriyyah li al-Kitab, 1991), p. 176

[254]*Al-Qur'an dan Terjemahnya.*

[255]Quraish, *Jilbab.*, pp. 83-84

sciously or not, that can color the result of an interpretation.[256] Thus, the different opinions about *ḥijāb* are more influenced by the logic of the interpreters rather than merely the firmness of the wording of the text itself.

b. *Jilbāb*

Linguistically, *jilbāb* means: *al-qamīs* (the robe, shirt), the plural form is *jalābīb*. Some interpret *jilbāb* as the:

ثوب أوسع من الخماردون الرداء تغطي به المراة رأسها وصدرها

Looser clothes, other than Khimārs (veil), not the scarf, which is used as head gear and cover of the chest of a woman[257]

Jilbāb is also interpreted as *al-izar* (a type of cloak), al-khimārs (veil), al-rida' (shawl), al-miqna'ah (veil), used by women to cover the head, back and chest[258].

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[256]According to Muhammad Arkoun, the logic ('aql) is one capacity amongst other capacities of mind. Arkoun prefers the usage of the word "mind" (*Fikr*) dari pada kata akal ('aql), because the word "Fikr/Mind has broader understanding. The Word *Fikr* has three unsures; the first is the '*aql itself which until now hgas more concerns from scholars* since 'Aql has mnore works on Scientific and cultural products. Second: Imagination (*khayaal, L'imagination*). The Third is Memory (*dhakirah, La me'moire*). The two qualities cannot be separated from 'Aqal (Logic/Ratio) when it works. Because Aql needs memory as it needs imagination.

It cannot be separated from the last it needs imagination to keep the brain fresh the three capacities are compliment to each others as the effort to see wide spaces of human soul (*al-rūḥ al-bashariyah*), which is to search how each works and the mechanism of the soul at certain moment. For Example when the creator does his work, be it a philoshoper, or an artist See Muhammad Arkoun, *Al-Fikr al-Islamī Naqd wa Ijtihad*, Tarj. Hashim Salih (Bairut : Dar al-Saqi, 1998), p. 240.

[257257]Ibn Mandhur, *Lisan al-'Arab*, Vol 1, 272. See also Muhammad al-Thaba'ṭabai, *al-Mizan fi Tafsir al-Qur`an*, vol 16 (Bairut : Matba'at Isma'ilyyan, t.th), p. 339.

[258]ibid

Ibn al-Sikkit (d. 244 AH) said that *jilbāb* is "something that can cover up women, or cover up clothing from the top". Abu Hasan al-Biqa'i (d. 777 AH), quoting the opinion of al-Khalil (d. 767 AH), says: "every outfit outside and inside, which is used as the cap is *jilbāb*"[259]

By the term, the definition of *jilbāb* is:

الملاءة التي تلتحف بها المرأة فوق ثيابها تسترجميع بدنها وملابسها

> A long dress, which is used by women's coats, put on the shirt, and it can cover the entire body, and clothes.[260]

From the above definition, it is understood that *jilbāb* is a garment with the following criteria; first, the clothes worn over clothing which is commonly used; second, the clothes can cover the entire body of women.

In al-Qur'an, the command about wearing *jilbāb* contained in Surah al-Ahzab, 59. Quraish Shihab emphasized that before the revelation of the verse, how to dress between free women and slaves, were good or irreverent, almost can be said same. Therefore, nosy men often interfere[261]. There fore to distinguish between the two social classes the verse

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[259] See Muhammad Shams al-Haq Abadi, *'Awn al-Ma'bud: Sharh Sunan Abi Dawud*, Vol. 11, (Bairut : Dar al-Kutub al-'Ilmiyyah, 1990), p. 106.

[260] Ibid., p. 33

[261] Quraish, *Jilbab*, p. 86. The almost similar expalanation about the history behind the revelation can be taken from al-Barazi, *Ḥijab al-Muslimah*, 126. Also Abdul Halim Abu Shuqqah. He explains that clothes can be varied from place to place according to natural seasons and social class. There are clothes that are used only by elites, common peaple, and slaves. The Jahiliyyah society was like that. The elite men wore scraft and gamis, and also some jewelswhile ordinary people wore only *Izar*. This happened also to women, Free Women and elite wore Niqob together with Jilbab, while poor women and slaves wore minimum clothes and open their faces. Even open their heads, as it is the symbol of poverty. On the other hand Niqob is the symbol of wealth See Abdul Halim Abu Shuqqah, *Kebebasan Wanita*, Translation . As'ad Yasin, (Jakarta: Gema Insani Press, 1997), p. 299

revealed. According to Quraish the verse is speaking about the function of cloths as the social class indicators based on their profesion.[262]

Some scholars understand that the word which is contained in Surah al-Ahzab, 59:

<div dir="rtl">يدنين عليهن من جلابيبهن</div>

Let them stretch out their *jilbāb*

The verse hints that the entire female body, including the face and hands, is *aurat* (nakedness), and therefore should be covered except one; eyes. The opinion was expressed by al-Alusi (d. 1270 AH), Ibn Jarir (d. 311 AH), Ibn al-Mundhir (d. 277 AH). Based on the history of Muhammad bin Sirin (d. 110 AH)[263]. Umm Salamah narrated that when the above verse revealed, the women of the Anshar (Community of madinah who help the Muslim exiles "Muhajirin" from Macca) when they are out of the house, they look like bunch of crows perched on their head, and they wore black[264].

c. *Khimār*

Linguistically, *khimār* is a synonym of the word *nashīf* (headgear, hoods). *Khimār* word formed from the word *khammara* which means covering. Everything that can be used as a lid called *khimār*. *Khimār*

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[262]Ibid, p. 52

[263]Ibid, p. 106

[264] Al-Baraz, *Hijab*, p. 108. This Hadith is the the preposition of Muhammad Salih bin Uthaymin when he said that all parts of women body is Aurat and shall be covered, including their facebut theie eyes. He even said that if they can see without their eyes, they must cover their eyes too . so the permission to open their eyes is as a matter of emergent (*dharurah*). See "Risalah Jilbab" dalam *Jilbab dan Cadar,* Translaltion Abu Said Al Anshori (Jakarta: Pedoman Ilmu Jaya, 1994), p. 84.

[265]can also mean *'imamah* (turban, headgear males), as contained in the text of hadith Umm Salamah:

<div dir="rtl">

انه كان يمسح الخف والخمار

</div>

> The Prophet wiped Khuff (shoes) and Khimārs (*'imamah,* a turban) [266]

In short, definition of *khimār* is[267]:

<div dir="rtl">

ما تغطي به المراة رأسها ووجهها تستربه عن أعين الرجال

</div>

> "Something that is used by women as headgear and and to cover their face from the male gaz."

Based on the explanation of the definition of *ḥijāb*, *jilbāb* and *khimār* as mentioned above, the authors noticed that from the three terms, basically, there is a point in common. That is, each means closure (*sitr*), although there were words which have more general meaning than other. *ḥijāb* and *jilbāb* mean clothing that covers the entire female body. The only difference between the two terms lies in its use, *ḥijāb* can be used for garments that cover the entire body of a woman, both underwear and outer clothing; *jilbāb* is outerwear that especially covers the whole body; and *khimār* is clothes that can cover the head, face and neck.

Some people claimed that the three types of clothes mentioned above are Islamic dresses. In my opinion, this claim is persumably because the three terms are contained in the Qur'an; moreover, each of them is complementary to each other in covering the *'aurat* of Muslim women as guided by Islam. Therefore, any women's clothes that can cover the nakedness of women, as well as not to provoke the sexual desire of males can be called *ḥijāb* or *jilbāb*.

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[265] Ahmad al-Zawi, *Tartīb al-Qāmūs al-Muḥīṭ*, Vol. 2, (Bairūt: Dār al-Kutub al-'Ilmyyah, 1996), p. 106. Murtaḍā al-Zubaydi, *Tāj al-'Arūs*, vol 6 (Bairūt: Dār al-Fikr, 194), p. 366.

[266]Ibid, p. 36

[267] Al-Barāzī, *Ḥijab*, p. 37. Compare with Ibrahim al-Abyari, *al-Mawsū'ah al-Qur`āniyah*, Vol. 12, (T.t : Muassasat Sajl al-'Arab, 1984), p. 178

4.2 The History of Muslim Women's Clothing

It was long before the presence of Islam that *jilbāb* became a culture, which is rooted in some Arabian nations. Fadwa El-Guindi wrote that based on the data of Assyrian laws, dated back in the year 1450-1250 BC, there was evidence on the relationship between *jilbāb* and social stratification. The Assyrian laws mentioned that there was a qualification of women who were obliged and who were prohibitted to wear *jilbāb*. The women who were required to wear *jilbāb* were the women of nobility (the elites), or female slaves when accompanying the noble women. This law clearly prohibited slave girls to wear *jilbāb*, including unmarried prostitutes.[268]

Slaves who were proved to be wearing *jilbāb* would be punished by severe sanctions, i.e. being whipped/slashed 50 (fifty times), their ears being cut, and their heads being doused with a pitch (*qatran*). This rule also applied to men who have slave women wearing *jilbāb* and did not report it.[269]Assyrians also mentioned in their laws that a man who wants to make a slave woman as his wife has to invite five or six of his friends and put a *jilbāb* on his slave in front of his friends by saying: "This is my wife".[270]

The women in the Ancient Greek in Athens were also obliged to wear *jilbāb* and to be staying inside the house; even, married couples should not see each other except during the wedding night (*laylat al-zawāj*). [271]They are forbidden to leave the house unless there was something very important, like visiting a close family member, the sick and

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[268]El-Guindi, *jilbab,* p. 44. Compare with al-Barazi, *Hijab*, p. 41. Thus, *jilbab* gives the impression of respect for the users.

[269]'Athiyyah Saqar, *al-Hijab Bayn al-Tashri' wa al-Ijtima'* (Kairo : al-Dar al-Misriyyah li al-Kitab, 1991), p. 27.

[270]Ibid.

[271]Ibid., p. 30.. See Mubashshir al-Tirazi al-Husayni, *al-Mar`ah wa Ḥuququha fi al-Islam*, (Bairut: Dar al-Kutub al-'Ilmiyyah, 1997), p. 8, and Fida 'Abd al-Razzaq al-Qasir, *al-Mar`ah al-Muslimah Bayn al-Shari'ah al-Islamiyyah wa al-Adalil al-Gharbiyyah*, (Bairut: Muassasat al-Rayyan, 1999), p. 14.

so on. When they had to leave the house, they must wear a thick *jilbāb* that covers their face except their eyes.[272]

The Ancient Greek society treated women as merchandise, not only for their parents as the "owners", but also for her husband. They believed that when an accident happened or their wish did not come true, all was because of the wrath of their gods. Therefore, once they could escape from disasters, they presented women as sacrifice, and made mediation (*waṣilah*) with them[273]

Unlike the classical Greek, the ancient Egyptian society did not require women to wear *jilbāb* when doing social activities such as in the fields and markets, if the circumstances are secured and safe. However, when situations were unsafe, they were wearing *jilbāb* in order to keep themselve safe from any disruptions. On the other hand, the ancient Egyptian society gave very heavy sanctions for adultery, i.e. cutting child's reproductive organs or genitals for men, and cutting noses for women.[274]

Abrahamic religions before Islam, such as Judaism and Christianity, are also very concerned about the use of the *ḥijāb*. In the Bible, the Book of Genesis, verse 65: 24 says:[275]

> *"He said to the servant: "Who is the man who walks in the park towards us? The servant replied: "He is my master," then Maria took the hood and hung up on her."*

Meanwhile, *jilbāb* is not known among the Arab women in *Jahiliyyah* (pre-Islamic) era. In daily life, they were wearing a shirt (*al-burd*)

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[272]

[273] Ibid.

[274]Ibid.compare with al-Barzi, *Hijab*, p. 52.; Wel Durant, *Qissat al-Hadarah,* trans. Zaki Najib Mahmud, Vol .1, (Bairut : Dar al-Jil, t.th.), p. 103.

[275]Quoted from Abdur Rasul al-Ghifari, *Wanita Islam*, (T.t : Pustaka Hidayat, t.t), 30. In the Book published by Indonesian Bible Society, the text above reads: "He said to the servant: "Who is that man walking in the field toward us? " The servant replied: "He is my master. "So takes her veil, and she veiling ". See *Alkitab*, (Jakarta: Lembaga Alkitab Indonesia, 2009), p. 28.

whose side is left open (without sewing), and a thin clothes that does not not cover the body. This tradition was prevalent also among the Arab women in the time of Prophet Muhammad. As narrated by Imam Muslim in his *Ṣaḥīḥ*, there was once a woman[276] doing *ṭawāf* (circleing the Ka'bah) while being naked and said:

<div dir="rtl">

اليوم يبدو بعضه او كله # فما بدا منه فلا أحله

</div>

> Today some or all are visible # Things which are seen are the things I don't consider lawful

Then the verse 31 of Surah al-A'raf was revealed: [277]

<div dir="rtl">

وَٱلَّذِينَ كَذَّبُواْ بِـَٔايَٰتِنَا وَٱسۡتَكۡبَرُواْ عَنۡهَآ أُوْلَٰٓئِكَ أَصۡحَٰبُ ٱلنَّارِّ هُمۡ فِيهَا خَٰلِدُونَ ٣٦

</div>

> 'O children of Adam! Take your best adornment whenever you go to mosque and eat and drink and do not cross the limit. Undoubtedly, the persons crossing the limit would not be liked by Him.[278]

Imam Zarkasyi (d. 794 AH) commented on pre-Islamic women[279]:

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[276]According to al-Suhayli, the woman is Daba'ah bint 'Amir bin Sas'ah. See 'Atiyah, *al-Hijab*, p. 36.

[277]See Abu al-Hasan al-Wahidi, *Asbaal-Nuzul,* (Bairūt: Dār al-Fikr, 1988), p. 151. Based on the word of God Surah al-Ahzab, 33: ولا تبرجن تبرج الجاهلية الأولى "do not be ornate and behave like the people of the first jahiliyyah The scholars' classify times of Jahiliyyah into two parts, namely *al-Jahiliyyah al-ula* and *al-Jahiliyyah al-tsaniyah*. The time limits al-jahiliyyah al-ula, as follows: 1) Phase between Adam and Nuh, a history of al-Hakim bin Uyaynah; 2) Phase between Nuh and Idris, a history of Ibn Abbas; 3) Phase between Nuh and Ibrahim, a history of al-Kalbi; 4) Phase Musa and Isa; 5), Phase between Daud and Sulaiman, narrated by Abu al-'Aliyah; 6), the phase between Isa and Muhammad, a history of al-Sha'bi. From the history it can be concluded that al-Jahiliyyah al-Ula is the period before the appointment of the Prophet Muhammad. While al-Jahiliyyah al-Tsaniyah are evils that occur after the period afterward, along with the coming of Prophet Muhammad. See al-Thabarisi, *Majma' al-Bayan fi Tafsir al-Qur'an,* Vol. 7, p. 558. See Isma'il Haqqi al-Barusi, *Tafsir Ruh al-Bayan,* Vol. 7, (Bairūt : Dar al-Fikr, t.th.), p. 170.

[278]*Al-Qur`an and Terjemahnya*, p. 225.

[279] Nong Darol Mahmada, *Kritik Atas Jilbab*, http://islamlib.com/id/artikel/kritik-atas-jilbab. downloaded at august 20th 2011.

> *They were wearing clothes that expose their necks of her chest,*
> *so the veins of their necks and limbs as well as the surrounding*
> *areas become visible. They also poked their jilbāb towards their*
> *backs, so that their faces remain open. That is why they are then*
> *immediately ordered to lend their jilbābs in order to close the*
> *front side of their chests.*[280]

Hindun bint 'Utbah (d. 14 AH) once was wearing clothes that show her chest when she was calling the infidels of Mecca to fight against the Muslims during the war of *Uhud*. This is usually done by the pre-Islamic women in lighting up the fight spirits.[281]

Under these circumstances, Islam came and provided guidance on how humans should dress and which part of the body that is considered *aurat* (nakedness) and, therefore, must be covered and kept away from the views of those who do not have rights to look at. The provisions on dressing associated with *jilbāb* are well described in Surah al-Ahzab, 59.While the ban to show *zīnah* (jewelry), which later referred by scholars as female *aurat* is mentioned in Surah al-Nur, 31.

From the above description, we can see that *jilbāb* which was originally a Mesopotamian-Persian traditions and the segregation of men and women which was Hellenistic-Byzantine tradition, were actually break into the boundaries of geo-culture, not excluding the northern and eastern part of the Arabian Peninsula, such as Damascus and Baghdad,

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[280]Ibid.

[281] Ibid. In addition to the conditional factors such as those described above, these two verses also fell more political, discriminatory and elitist. Surat Al-Ahzab, in which there are verses of hijab, fell after the battle of the Trench (5 AH). While the letter of An-Nur down after al-Ahzab and its condition when it was vulnerable. Is political because the verses above down to answer the attacks launched hypocrites, in this case Abdullah ibn Ubay and their allies, against Muslims. The attack "put on" the Muslim women, by slandering the prophet's wives, especially Aisha. Siti Aisyah events on this, called al-ifk events. At the time, these events are horrendous so to end it, must be confirmed by the revelation of the five verses that QS. An-Nur (23), 11-16. See Ibid.

which were regarded as the capital of Islamic politics during the Mu'awiya and Abbasid Dynasty.

The Institutionalization of *jilbāb* and the segregation of women had crystallized when the Islamic world has the link to Hellenism and Persian civilization in those two important cities. By this period, *jilbāb* that was the choice of clothes, got legal certainty (being institutionalized), as mandatory attire for Muslim women.[282]

4.3 Women's *Aurat*

The word *aurat* is derived from the Arabic word that literally means a gap (*al-'ayb*), deficiency (*al-naqs*), something shameful, or something deemed bad (*al-shay' al-mustaqbah*) of the members of the human body and something that brings shame when viewed.[283] Ibn al-Manzur (d. 711 AH) said that *aurat* is:[284]

العورة كل ما يستحيا منه إذا ظهر وهي من الرجل ما بين السرة والركبة ومن المرأة الحرة جميع جسدها إلا الوجه واليدين إلى الكوعين

> Nakedness is anything that is considered a shame if visible. Nakedness of man is the section between the navel and the knees, while the nakedness of the free woman is her entire body apart from the face and two hands until two wrists.

The word "*aurat*" is mentioned in the Qur'an four times, two are in the form of a single (*mufrad*) and the other two are in the plural form (*jamā'*).[285] The meaning of the word '*aurat*, in the Qur'an is as follows:

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[282] Nasaruddin Umar, *Fikih wanita Untuk Semua*, (Jakarta: Serambi Ilmu semesta, 2010), p. 26.

[283] Majd al-Din al-Fayruz Abadi, *al-Qamūs al-Muḥi*, (t.t: Mustafa al-Ḥalibi, 1925),

[284] See Ibn al-Manzur, *Lisan al-'Arab*, Vol. 4, p. 612.

[285] Husein Muhammad, *Fiqh Perempuan Refleksi Kiai atas Wacana Agama dan Gender*, Print 5 (Yogyakarta: LKiS, 2009), p. 67. 'Athiyah Saqar wrote that everything considered embarrassing, such as *qubūl* (penis) and rectum (parts

1) *Aurat* is a gap open to the enemy, or loop hole that gives others (enemies) the opportunity to attack[286]. This meaning is contained in Surah al-Ahzab [33], 13:

وَإِذْ قَالَت طَّآئِفَةٌ مِّنْهُمْ يَٰٓأَهْلَ يَثْرِبَ لَا مُقَامَ لَكُمْ فَٱرْجِعُواْ وَيَسْتَٔذِنُ
فَرِيقٌ مِّنْهُمُ ٱلنَّبِيَّ يَقُولُونَ إِنَّ بُيُوتَنَا عَوْرَةٌ وَمَا هِيَ بِعَوْرَةٍ إِن
يُرِيدُونَ إِلَّا فِرَارًا ١٣

And when a party of them said: O people of Yasrib! there is no place to stand for you (here), therefore go back; and a party of them asked permission of the prophet, saying. Surely our houses are exposed; and they were not exposed; they only desired to fly away.[287]

2) *Aurat* is defined as part of the human body that is embarassing to be viewed. This meaning is contained in Surah al-Nur [24]: 31, and also 58.

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ لِيَسْتَٔذِنكُمُ ٱلَّذِينَ مَلَكَتْ أَيْمَٰنُكُمْ وَٱلَّذِينَ لَمْ يَبْلُغُواْ
ٱلْحُلُمَ مِنكُمْ ثَلَٰثَ مَرَّٰتٍ مِّن قَبْلِ صَلَوٰةِ ٱلْفَجْرِ وَحِينَ تَضَعُونَ ثِيَابَكُم
مِّنَ ٱلظَّهِيرَةِ وَمِنۢ بَعْدِ صَلَوٰةِ ٱلْعِشَآءِ ثَلَٰثُ عَوْرَٰتٍ لَّكُمْ لَيْسَ عَلَيْكُمْ

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around the anus) is categorized *aurat*. See, 'Atiyah Saqar, *al-Hijab bayn al-Tashri' wa al-Ijtima'*, 57. The word *aurat* derives from the word 'ar, which means 'trouble', 'shame', 'reproach'. The ugliness is not because of something in itself, rather in other factors which cause badness. None part of the body is bad, because everything is good and useful, including *aurat*. Nevertheless, the people see the "visibility" as bad or improper. Surely, there are a lot of bad things according to one's judgement. Islam gives a clue about what it considered *aurat*. As a cover, of course, clothing can conceal any part of the body that the user does not want to show the public. Nevertheless, in Islam, aurat is understood "part of the body that must be covered, although you are alone, and should not be viewed except by certain people." See Muhammad Qurash Shihab, *Wawasan al-Qur`an: Tafsir Maudhu'i* (Bandung : Mizan, 1998), p. 161. Compare with Wahbah al-Zuhayli, *al-Fiqh al-Islami wa Adillatuh,* Vol. 1, (Bairut : Dar al-Fikr, 1997), p. 735.

[286] See al-Qurthubi, *al-Jami' li Ahkam al-Qur`an*, Vol. 15, (Bairut: Dar al-Kutub al-'Ilmiyyah, 1993), 97-98, and Husein, *Fiqh Perempuan*, p. 68.

[287]*Al-Qur`an and Terjemahannya*, p. 661.

وَلَا عَلَيْهِمْ جُنَاحٌ بَعْدَهُنَّ طَوَّفُونَ عَلَيْكُم بَعْضُكُمْ عَلَىٰ بَعْضٍ كَذَٰلِكَ
يُبَيِّنُ ٱللَّهُ لَكُمُ ٱلْآيَٰتِ وَٱللَّهُ عَلِيمٌ حَكِيمٌ ٥٨

'O believers; let those servants your hands own and those of you who have not reached puberty, ask leave of you three times-before the morning prayer, and when you put off your clothes at the noon and after the night prayer. These are three times of privacy for you. After these, three times there is no sin on you or on them. They come and go about one to the other. Thus, Allah narrates His signs for you. And Allah is Knowing, Wise.[288]

A discussion of *aurat* in the books of fiqh (Islamic jurisprudence) is related to the parts of the human body that must be covered with certain conditions because leaving them open in public is bad, embarrassing and stimulating sexual arousal.[289] Thus, the meaning of "*aurat*" in fiqh is the same as that in Surah al-Nur [24], 31 and 58.

Scholars set different limits of *aurat* for men and women, whether when performing *shalat* (ritual prayer) or when *non-mahram* (marriageable) people are present. Ibn Rushd (d. 595 AH) and al-Shawkani (d. 1250 AH) said that a there are three opinions about the limits of *aurat* for men: First, *'aurat* for men is between the center and his knees. This opinion is hold by al-Shāfi'ī (d. 204 AH), Mālik (w.179 H.) and Abū Ḥanīfa (d. 150 AH);

Second, *'aurat* for men is the genitals (*qubūl*), the anus [rectum] (*dubūr*), and the thighs; Third, as noted by al-Zahiri (d. 270 AH), Ibn Jarīr (d. 311 AH), one transmission from Mālik (d. 179 AH), and Ibn Ḥanbal (d. 241 AH), 'aurat for men includes the penis and the rectum only, the rest is not.[290]

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[288]Ibid., p. 554.
[289] See Syarif al-Din al-Nawawi, *al-Majmu' Sharh al-Muhadzdzab*, Vol. 3, (Jeddah: Maktabah al-Irshad, t.th.), p. 168.
[290]See Ibn Rush, *Bidayah al-Mujtahid*, Vol. 1, (Mesir: Mustafa Babi al-Halibi li al-Nashr, 1960), p. 83, and al-Shawkani, *Nayl al-Awṭar*, Vol. 2, (Bairut: Dar al-Jil, 1973), 49. see, Husein, *Fiqh Perempuan*, p. 69.

Similarly, Muslim scholars also disagree about the limits of *aurat* for women. This disagreement is clearer in their discussions on the different limits of '*aurat* for free (*ḥurrah*) and slave (*amāt*) women, although there are no authoritative texts which explicitly mention the case.

The majority of the Shafi'īte, Mālikīs, and Ḥanafīs argued that the nakedness of the free woman (*ḥurrah*) are all parts of the body except the face and the palms (the upper, outer, bottom, and inside).[291] The legal basis for the scholars in determining the *aurat* for women is Surah al-Nur [24], 31. The verse explicitly explained that believing women should not show beauty and ornaments (*zīnah*), except what (ordinarily) appear thereof.[292] However, some scholars disagree on the necessity for women to cover the face.[293] The debate arises due to their different interpretations on the word الاما ظهرمنها ('except what ordinarily appear thereof') as mentioned in Surah al-Nur, 31 above.

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[291] See Muhammad 'Ali Al-Ṣabuni, *Rawa'i' al-Bayan Tafsir Ayat al-Ahkam*, (T.t.: Dar Ihya' al-Turāth al-'Arabi, t.th.), p. 383. al-Sharbini, *Mughni al-Muhtaj*, Vol. 1, (Bairut: Dar Ihya' al-Tutrath al-'Arabi, t.th.), p. 185, Ali bin Abi Bakr al-Marghinani, *al-Hidayah Sharh al-Bidayah*, Vol. 1, (Bairut: al-Maktabah al-Islamiyyah, t.th.), pp. 43-44, and al-Siwasi, *Sharh Fath al-Qadir*, Vol. 1, (Bairut: Dar al-Fikr, t.th.), p. 259.

[292] Based on the paragraph above, those who may show *zinah* (beauty and decoration) in the presence of each other are: 1). husband; 2). father; 3). the father of the husband; 4). child; 5). children of the husband; 6). brother ; 7). son of the brother; 8). children of sisters; 9). Muslim women (*Muslimah*); 10). the slaves that they posses; 11). Male servants who have no desire (for women); 12). Children who do not understand about the *aurat* of women.

[293] Ibn Al-Mukhtar al-Shinqiti, based on some transmission from the Prophet's Companions, said that in general there are three opinions about *zinah zahirah*: First, something that women make as ornaments and seeing them does not mean viewing the part of their body; clothing (*thiyā*) is considered *zinah* in this category. Second, female ornaments where seeing them means seeing parts of women's body, such as eye shadow (*kuhl*) and ring (*khatam*); Third, some parts of women's body, i.e. face and two hands. See Ibn al-Mukhtar al-Shinqiti, *Adwa` al-Bayan fi Idah al-Qur`an bi al-Qur`an*, Vol. 5, (Bairut : Dar al-Fikr, t.th.), p. 515. See Abū al-Ḥasan al-Mawardi, *al-Nukat wa al-'Uyun,* Vol. 4, (Bairut : Dar al-Kutub al-'Ilmiyyah, t.th.), pp. 91-92.

The Ḥanafītes and Mālikīs argued that face and two hands of women are not the *aurat* (nakedness), and therefore can be shown.[294] They refer to the opinion of some of the Prophet's companions: Ibn Abbas (d. 68 AH) and the transmission of Tabi'in Sa'id bin Jubair (d. 95 AH), 'Atak (d. 114 AH), 'Ikrimah (d. 105 AH), al-Dahhak (d. 105 AH), that the *zinah zahirah* (apparent adornment) include the face (*al-wajh*) and the two hands (*al-kaffān*).[295]

Based on this allegorical interpretation (*ta'wīl*), as Ibn Jarir (d. 311 AH) said, the above verse implies "they do not reveal their ornaments except their urgent limbs that should be open, i.e. the face and two hands".[296] A Hadith narrated by Bukhari supports this interpretation:

> إن امرأة جاءت إلى رسول الله صلى الله عليه وسلم فقالت يارسول الله جئت لأهب لك نفسي فنظر إليها رسول الله صلى الله عليه وسلم فصعد النظر إليها وصوبه ثم طأطأ رسول الله صلى الله عليه وسلم رأسه فلما رأت المراة أنه لم يقض فيها شيئاجلست

> It is true that a woman came to the Prophet, and said: "O Allah's Prophet, I have come to give myself to you, then the Prophet looked at her, raising the view and directing (the position of) view, then the Prophet bowed his head. When the women knew that the Prophet did not want her, then she sat down[297]

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[294]Muhammad 'Ali al-Sabuni, *Rawa'i al-Bayan Tafsir Ayat al-Qur`an,* Vol. 2, (Jakarta: Berkah Utama, t.t),dan al-Barazi, *Hijab,* 143. and al-Sayyid al-Sabiq, *Fiqh al-Sunah,* Vol. 1, (Bairut: Dar al-Fikr, 1983), p. 108.

[295] See Ibn Jarir, *Tafsiral-Tabari*, Vol. 9, 303-305. see Yusuf al-Qardawi, *al-Niqab li al-Mar`ah* (Kairo: Maktabah Wahbah, 1996), pp. 30-31; Jalal al-Din al-Suyuti, *al-Durr al-Manthur*, Vol. 5, (Bairut: Dar al-Kutub al-'Ilmiyyah, t.th.), p. 31; Ibn 'Atiyyah al-Andalusi, *al-Muharrar al Wajiz,* Vol. 4, (Bairut: Dar al-Kutub al-Ilmiyyah, t.th.), p. 31; Ibn Rusyd, *Bidayat al-Mujtahid,* Vol. 2, (Bairut: Dar al-Kutub al-Ilmiyyah, t.th.), 185; al-Khattab al-Jalil al-Ru'ayni, *Mawahib al-Jalil,* Vol. 2, (Bairut: Dar al-Kutub al-Ilmiyyah, t.th.), p. 181.

[296]Ibn Jarir, *Tafsir*, Ibid.

[297]See Muhammad bin Isma'il al-Bukhari, *Sahih al-Bukhāri,* Vol. 9, (Bairut: Dar al-Fikr, 1991), p. 94.

They also argued that the Prophet would not have raised and directed his gaze at the woman should she has not made her face visible.[298]

It should also be emphasized that although for the Ḥanafite and Mālikis the face and hands are not '*aurat,* lustful look at them are considered unlawful.[299] This is the reason that in order to avoid a look that turns into lust, Allah gives a command of holding eyes (*ghadd al-bashar*) for both men and women, prior to His call to avoiding fornication (*hifz al-farj*) and concealing our hidden beauty (*zīnah bīṭinah*).

Abū Yūsuf (d. 182 AH), a member of the Ḥanafi's school, tolerates almost half of the legs and arms of a free woman because these are not *aurat* for them.[300] On the contrary, the Ḥanbali argued that a free woman should cover all parts of their body, including the face and hands. However, for the sake of *shalat* (ritual prayer), women are permitted to show off their face and palms.[301]

The followers of the Ḥanbali's school and the majority of the Shāfi'īte, asserted that women's face and two palms are '*aurat* and, therefore, should be covered.[302] This opinion is based on a narration from Ibn Mas'ud (d. 32 AH), Ibn al-Jawzi (d. 597 AH), which said that the word إلاماظهرمنها (that which normally appears) refers to scarves (*al-rida'*), clothing (al-thiyāb), and limbs that are visible under the clothes (*atrāf al-a'da'*). Thus, the face and two palms must be covered.

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[298] Al-Qardawi, *al-Niqab,* p. 38.

[299] see Muhammad Sa'id Ramadan al-Buti, *Fiqh al-Sirah,* (Bairut: Dar al-Fikr, t.th.), p. 231.

[300] Husein, *Fiqh Perempuan*, p. 70.

[301] Ibid. see, al-Kaludzani, *al-Hidayah*, Vol. I, Cetakan 1, (T.t.: Matabi' al-Qasim, t.th.), p. 28.

[302] Al-Zuhayli, *al-Fiqh al-Islami,* Vol 1, p. 755. See Abd al-Rahman al-Jaziri, *al-Fiqh 'Ala al-Madhahib al-Arba'ah,* Vol. 1, (Istanbul : Waqf al-Iklas, 1990), p. 191. The obligation to cover the face and two hands applies in all situations, i.e. whether or not the condition is free from slander (*fitnah*). See Abu Zakariya al-Nawawi, *Rawḍat al-Talibin,* Vol. 1, (Bairut : Dar al-Kutub al-'Ilmiyyah, 1992), p. 389; Muhammad Nawawi al-Bantani, *Nihayat al-Zayn* (T.t.: Sarahya' al-Kutub al-'Arabiyyah, t.th.), p. 47. See Ibn Jarir, *Tafsir,* 304. see Ibn 'Atiyah al-Andalus, *al-Muḥarrar l-Wajiz*, Vol. 4, (Bairut : Dar al-Kutub al-Ilmiyyah, t.th.), p. 31.

In addition, the Ḥanbalī based their opinions on Surah al-Ahzab, 59. The order to let down upon themselves their garments (*idna' al-jalābib*) means the obligation to cover all parts of the women's body, including the palms of the hands. This is in line with the transmission of 'Ubaydah al-Salamani saying that the wives of the believers (at the time of the Prophet) let down upon themselves their *jilbāb* so that all parts of their body are covered except their eyes.[303]

From above description, we can understand that the disagreement among the Muslim scholars on the *'aurat* of women lies only on the face and two hands.[304] As for the other parts of woman's body, they agreed that they are *aurat* that should not be visible except in the presence of certain people mentioned in Surah al-Nur, 31.

The above provision on the *'aurat* for free woman applies in the presence of non-*mahram* (marriagable) men.[305] The 'aurat in the presence of the same sex (both female), or in the presence of a *mahram* man, is the same as the aurat for a man, namely between the center and the knees.[306]

The dispute also occurs on the boundaries of the *'aurat* of slave women (*`amat*). Al-Nawawi (d. 676 AH) mentioned three interpretations on the *'aurat* for slave women[307]: First, parts of the body between the center and the knees. The majority of Shāfi'ī belongs to this opinion;

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[303]Ibn Taymiyyah, *Majmu' al-Fatawa,* Vol. 15, (Bairut : Muassasat al-Risalah, 1987), p. 371

[304]It is important to note that if showing off the face and palms can really cause sexual arousal for those who look at it, all Muslim scholars agreed on its prohibition. Similarly, the scholars agreed that show off face and the palm is permitted for women if it is for the sake of science, medical treatment, witness or other emergencies. See Fida Abd al-Razzaq al-Qasir, *al-Mar`ah al-Muslimah bayn al-Shari'ah al-Islamiyyah wa al-Adalil al-Gharbiyyah*, (Bairut: Muassasat al-Rayyan, 1999), p. 128.

[305] Those who are permitted to reveal *'aurat* in front of him is detailed in Surah al-Nur [24], 31, whom Shahrur Muhammad calls *maḥārimal-zīnah* (those who may expose beauty and ornaments). See Muhammad Shahrur, *Naḥwa Uṣūl Jadīdah*, p. 365.

[306] 'Aṭiyah Ṣaqar, *al-Ḥijāb Bayn al-Tashrī' wa al-Ijtimā'*, pp. 57-62.

[307] Husein, *Fiqh Perempuan*, p. 72.

Second, it is the same as the *aurat* for free woman (*ḥurrah*), except the head; Third, other parts of the body that are needed to be visible for work, i.e. those except the head, neck, arms and hands.

4.4 Scholars on the Requirements of Islamic Clothing

Islam does not specify the form and model of clothing, but specifies the criteria for all forms and models of clothing prevailing among societies whose culture and civilization are different from one another. This is because the Islamic law recognizes the existence of the 'urf (customs) as long as it does not contradict Islamic law.

The criteria for Muslim women's clothing are:

1) It should cover all the parts of her body classified as '*aurat*.[308]

2) It should be thick and opaque, [309] based on the Hadith:[310]

> إن أسماء بنت أبي بكر دخلت على رسول الله صلى الله عليه وسلم
> وعليها ثياب رقاق فأعرض عنها رسول الله صلى الله عليه وسلم
> وقال يا أسماء إن المرأة إذا بلغت المحيض لم تصلح أن يرى منها
> إلا هذا وأشار إلى وجهه وكفيه

> That Asma 'bint Abi Bakr entered the house of the Apostle to wear thin, the Prophet said:" O Asma', in fact, women who had menstruation (baligh) are not allowed

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[308] 'Aṭiyyah, *al-Ḥijāb,* p. 94, Fidā Abd. al-Razzāq, *al-Mar'ah al-Muslimah*, p. 129. As explained earlier, the '*aurat* for free women is distinguished from slave women. The '*aurat* of slave women is the same as that of men, which is part of the body between the center and the knees. The aurat of free woman, according to the majority Shafi'ī, Mālikī, and Hanafī are all parts of the body other than the face and the palms of hands.

[309] 'Atiyyah, *al-Ḥijāb,* Ibid. See al-Nawāwi, *Rawḍat al Ṭālibīn,* Ibid., Fidā Abd al-Razzāq, *al-Mar'ah al-Muslimah*, p. 129.

[310] See Shams al-Haq Abadi, *Sharḥ Sunan Abī Dāwūd,* Vol. 11, p. 109. The hadith, as admitted by Abu Daud, is classified as *mursal* because Khalid bin Duraik who is mentioning the Prophet's wife in the hadith, 'A'ishah, does not know 'Aisha personally, not even he lives in the same period as her. Many scholars considered that the *mursal* hadith can not be used as a legal proof. See Quraish, *Jilbab*, pp. 129-130, dan Subhi Ṣālih, '*Ulūm al-Hadīth wa Musṭalaḥuhū*, (Bairūt: Dār al-Malāyin, 1977), p. 166.

to be seen of her except this and this, with hints face and palms hand".

also based on the Hadith narrated by Muslim:

صنفان من أهل النار لم أرهما قوم معهم سياط كاذناب البقر يضربون بها الناس ونساء كاسيات عاريات مميلات مائلات رؤوسهن كأسنمة البخت المائلة لايدخلن الجنة ولايجدن ريحها وإن ريحها ليوجد من مسيرة كذا وكذا

There are two groups of experts hell who punished before Allah have never seen before, (1) people who carry a whip-like tail cattle used to hit people (he was a despotic ruler), (2) women who dressed but naked, which is always immoral and attract others to commit adultery, her hair of a camel's hump, they will not go to heaven, it will not even smell them, although the smell of paradise was wafted as far as a very long journey.[311]

It can be understood from the Hadith that the main purpose of clothing is to cover the *'aura*t in order to avoid temptation (*fitnah*). Thin and transparent clothes will provoke curiosity and slander both for the gazer and the wearer.

3) It should be loose and untight[312]

Among the objectives of *hijāb* is to avoid temptation (*fitnah*) from men. This is unlikely to happen when the clothing is not tight or showing off the curves of the body. Thus, the hijāb should be loose and not tight. Prophet said:

كسانى رسول الله صلى الله عليه وسلم قبطية كثيفة مما أهداها له دحية الكلبى فكسوتها امرأتى فقال ما لك لم تلبس القبطية قلت كسوتها امراتي فقال لى مرها فلتجعل تحتها غلالة فإني أخاف أن تصف حجم عظامها

The Messenger dressing qubtiyah (clothes made of hemp-made thin Egypt) thick to me that the clothes al-

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[311]Muslim, *Sahih Muslim*, Vol 14, (Bairūt : Dar al-Fikr, 1981), p. 110
[312]'Atiyyah, *al-Hijab*, p. 96.

Kalbi awarded to him. And then I put the clothes on my wife. Prophet asked me: "Why are you not wearing Qubtiyyah?" I replied: I put the shirt on my wife. Then the Prophet said: "Command her to wear clothes inside, behind Qubtiyyah, because I'm afraid the clothes can still describe the shape of the bones."[313]

4) The model of the clothes should not invite the passionate views of men.[314] Clothes that invite lust is contradictory to the purpose of the call to cover the *'aurat*. In addition, women should not also wear perfume that can "tease" men.[315] The criteria for women's clothing is intended to avoid slander[316] that eventually brings someone closer to fornication or adultery, an act that is strictly forbidden in Islam.

4.5 Considering Shahrur's Thoughts on the Function of Muslim Women's Clothing: A Contemporary Reading Towards Religious Texts

Relating to the function of women's clothes, Muhammad Shahrur[317], a Syrian Islamic thinker, provides an explanation of the content of Sura al-Ahzab, 59 which reads:

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[313] Ahmad bin Hanbal, *al-Musnad*, No. 20787, Vol. 44, (Bairut: Dar al-Fikr, t.th.), p. 257.

[314] Al-Barazi, *Hijab,* p. 289.

[315] In addition to the four requirements above, Fida Abd al-Razzaq provides other requirements for clothing, including Islamic one: first, it does not resemble men's clothing; Second, it is not similar to infidels' clothing; Third, it does not use perfume; fourth, it is not intended for popularity (*thawb al-shuhrah*). See Fidā Abd al-Razzāq, *al-Mar'ah al-Muslimah*, p. 130.

[316] Fuad al-Barazi said tha a "slander (*fitnah*)" in relation to the expose of the *aurat* means desire to do something justified only for married couples. See Fuād al-Barāzī, *Ḥijāb al-Mar`ah*, p. 259.

[317] Muhammad Shahrur was born in Damascus, Syria on April 11, 1938, from a father Deyb Shahrur and a mother Siddiqah bin Salih Filyun. Shahrur has five children: Tariq al-Laith, Basul, Masun and Rima out of his marriage with Azizah. Academically, he earned his doctorate in the field of soil and foundation mechanics at the University of Ireland. He is a lecturer at the Faculty of Civil Engineering in Mechanics of Land and Geology. Remarkably, he was prolific in writing Islamic studies and has produced a monumental work. His works include: *al-Kitāb wa al-Qur'ān : Qirā'ah Mu'āṣirah,* (Damaskus: al-Ahālī, 1990),

> *O Prophet! Tell to your wives, and daughters and Muslim wom-*
> *en, that they should keep putting a part of their wrapping covers*
> *over their faces. This is nearer than this that if they are recog-*
> *nized, they should not be annoyed. And Allah is Forgiving, Mer-*
> *ciful.[318]*

Shahrur asserted that the above verse talks about improving the model of clothes and was revealed in a prophetic context, and it is not a sharī'ah. The messages contained in the verse provide a lesson (*ta'līm*) on "how to dress" in order to avoid interference. According to Shahrur's opinion, the opening of the verse which reads يا أيها النبي "O Prophet", shows that it is intended to be a lesson rather than sharī'ah (*tashrī'*).[319]

Shahrur also stated that the above verse was set in Madina with the understanding of locality and temporality (*maḥalliah*), in relation with the absence of interference from bad people (*fãsiq*) against those believing women (*mukmināt*), when they go out to meet their needs.[320] Shahrur continued that currently these factors are gone because the mechanism for the implementation of this verse is not permanent. This verse teaches how *mukmināt* should wear clothing or the so-called *jilbāb* to perform their social activities.[321]

The verse also set up two reasons for the application of the doctrineof wearing the veil: knowledge (*al-ma'rifah*) and disruption (*al-adzā*). Shahrur pointed out that *mukmināt* are required to cover certain parts of their bodies that, if revealed, would cause harrasmant (*al-adzā*).

Naḥwa Uṣūl Jadīdah li al-Fiqh al-Islāmī, (Damaskus: al-Ahālī, 2000), *al-Islām wa al-Imān: Manẓūmat al-Qiyam,* (Damaskus: al-Ahālī, 1994), *Dirāsāt Islāmiy-yah Mu'āṣirah fi al-Dawlah wa al-Mujtama',* (Damaskus: al-Ahālī, 1996).
[318]*Al-Qur`an and Terjemahnya,* p. 678.
[319] Shahrur, *Naḥwa Uṣūl*, p. 372.
[320] Ibid.
[321] It should be reiterated here, that Shahrur defines jilbab as "outerwear that serves to protect a person (al-libās al-khāriji li al-himāyah). Whatever the shape and model of clothes are, as long as they can provide protection from various disorders, they can be considered jilbab. See, Shahrur, *Naḥwa*, p. 324.

However, it should be treated as a teaching, rather than a legal provision. There are two kinds of disruption: natural (*al-tabi'ī*) and social nature (*al-ijtimā'i*), and natural disturbances related to the geographical environment, such as air temperature and weather.[322] Shahrur also confirmed that a woman should dress according to the weather conditions and air temperature when and where she is, so as not to cause a natural disturbance on her. The verse, for Shahrur, is just a reminder of disruption and knowledge.

In the word: أن يعرفن فلا يؤذين ("so that they are known, therefore they are not disturbed"), the particle *fa'* indicates the existence of a cause (*fa' al-sababiyyah*) and sustainability (*ta'qīb*) between knowledge and disorders. This is what so-called social disorder (*al-adza al-ijtimā'i*). A woman should wear the outer garment (*libās khārijī*) and be active in her community in accordance with the social customs in the society, so that she does not become the target for taunts and annoyance. If she does not do that, then she will experience social disruption. Social disruption is the only form of punishment she received in the sense that God does not set a specific reward or punishment for her. This was the situation when this verse was revealed in Madina, i.e. the vandals are breaking the social order of *mukmināt* who go out at night to meet their needs.[323] In other parts, Shahrur wrote:

> *Indeed, hijāb for women is a private matter that can be determined by herself and for herself, without pressure, intimidation, and terror. There should be no any reduction in al-Tanzīl al-*

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[322] To fulfill the function of clothing as proposed by Shahrur, it is right to follow the advice of Henk Schuulte Nordholt: we must really carefully select a variety of clothing. which clothes are to wear for particular seasons which are changeing throughout the year, for the celebrations, inside or outside the house, workplaces, raining. What is the appropriate attire in the evening?" Henk Schultte Nordholt, "Pendahuluan" in Henk Schulte Nordholt (ed.), *Outward Appearances Trend, Identitas, Kepentingan*, trans. M. Imam Aziz, (Yogyakarta: LKiS, 2005), p. 1.

[323] Muhammad Shahrur, *Naḥwa*, p. 372.

Ḥakīm related to women in the use of the Hijāb, and we call the women who previously did not wear the hijāb then wear it as a "back to religion", as if she had come out of religion. Such reduction is an insult to Islam on the one side, and also an insult to the honor of the woman on the other side, because we limit this great religion into a problem of piece of cloth.[324]

The above quote indicates that Shahrur wants freedom (*al-ḥurriyyah*) entirely for women to choose the type, model and design of the clothes, as long as it enables to protect them from interference. The problem of clothing has nothing to do with religion. In fact, if someone naked in front of her non-*maḥram* people, she deserves only a social punishment, not the other. It seemed that Shahrur wanted to say, "It is too trivial to attribute clothing to religion, there are other things that are more important than clothing.[325]

The functions of clothing can be realized when the designs, models, and even a choice of color follows the tradition (*'urfiyyah*), and have aesthetic values (*jamaliyyah*). Shahrur said that to decide whether a cloth meets the *jamaliyyah* aspect or not, is to determine whether it is "appropriate" and "inappropriate" (*yalīq wa lā yaliq*).[326] Someone who

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[324] Ibid., *Dirasat*, p. 327. There are other Muslim scholars who share the same opinion as Sharur's. Musda Mulia, for instance, pointed out that "we should appreciate and respect whatever women decided to choose in order that social harmony to be established. Sociologically, *jilbab* does not signify anything, nor it means a symbol of piety. A woman who wears a *jilbab* is not necessarily a pious one and otherwise. *Jilbab* is not identical with one's piety." See Siti Musda Mulia, "Memahami Jilbab dalam Islam" in Psychology of Fashion Fenomena Perempuan (Melepas) Jilbab, (Yogyakarta: LKiS, 2010), xiii.

[325] Shahrur explained that the oversimplification of hijab into religious matters are due to some reasons, i.e. powerlessness (al-'ajz), and more importantly patriarchal societies (dzukuriyat al-mujtama'), and discrimination of others on behalf of religion. Amid patriarchal societies, the ulamas were also influenced by the patriarchal traps when formulating their jurist products, which is in this case a woman was treated as a goods to be taken care of and controlled according to the preference of ulamas most of whom are male. Ironically, all these were done on behalf of glorifying women. See Shahrur, Dirāsāt, p. 325.

[326] Ibid., p. 170.

would restrict her freedom in choosing clothes is not because of the demands of the Shari'a in covering the 'aurat, rather because of "appropriateness" or "inappropriateness". Shahrur also emphasized that the clothing aesthetic standards are varying with different circumstances; where, when, and by whom the clothes are worn. The aesthetic value of clothes is always changing and open to criticism. Different standard of decency and beauty in dressing is shown in the example given by Shahrur:

> *"Sometime societies found it inappropriate for someone who was sixty years old, for instance, wears a red short pant and a purple t-shirt. However, such colored outfit might be considered trendy and acceptable in other societies"[327]*

The aspects of tradition (*'urfiyyah*), Shahrur said, are wider than the aesthetics, because tradition can restrict a person's freedom to make choices that have nothing to do with the "appropriate" or "inappropriate" as well as with beauty. Shahrur illustrates that, a widow, who is on her waiting period and is religiously not allowed to marry or talk about marriage, is "supposed" to dress according to the standards that her society is imposing on her. This provision, Shahrur said further, has nothing to do with aesthetics.[328]

The aspects of conformity with the tradition (*'urfiyyah*) and aesthetics (*jamaliyyah*) that Shahrur mentioned above shows that the concept of clothes always move between two limits: the minimum limit (*al-hadd al-adnā*)[329] and the maximum limit (*al-hadd al-a'lā*), in addition to the aspects of beauty (*jamaliyyah*) and tradition (*'urfiyyah*). These two aspects need to be considered because it is very closely related to efforts to avoid interference (*adzā*), as implied in Surah al-Ahzab, 59. Sharur's opinion on the the function of is shown in the following figure:
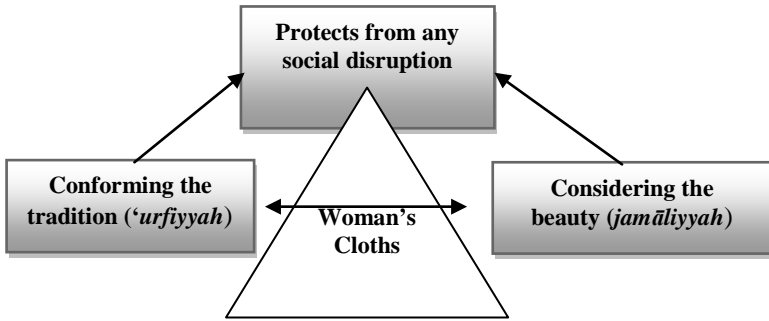
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[327] Ibid.
[328] Ibid.
[329] Ibid.

Figure 4.2 Shahrur on the Functions of Women's Clothing

The chart above shows that the function of women's clothing is to protect the wearer from natural and social disruptions. That function can be realized if the clothes meet the aspects of beauty and tradition.

4.6 The Relevance of Shahrur's View About the Function of Muslim Women's Clothing with the Maqāṣid al-Sharī'ah: Protection of Life Based on the Tradition and Aesthetics

As mentioned in the previous section, the function of clothing for women in Shahrur's opinion is to protect them from interference (*adzā*). The disorder can be natural (*tabi'iyyah*), such as as the heat of the sun, cold, etc., and social (*ijtimā'iyyah*). For the realization of these functions, women's clothing should consider the aesthetic aspects (*jamaliyyah*) and tradition ('*urfiyyah*) of where and when the clothes are worn.

To determine whether someone is dressing decently so he or she will not be heckled and booed will depend on the tradition and the prevailing culture in the community. Each region has its own culture and values

which affect how people consider a dressing polite or not. Besides meeting the aspect of conformity with the prevailing tradition, women's clothing should also take into account the aesthetic aspects (*jamaliyyah*). The aspects of tradition and aesthetics support the realization of women's clothing functions, i.e. avoiding interference.

Sharur's function of clothing is not the same as *maqasid al-sharī'ah* of clothing proposed by other scholars. Other scholars asserted that the purpose of clothing is the dresser can avoid fornication, i.e. illegal sexual intercourse outside marriage. Thus, the purpose of clothing in terms of the *maqasid al-sharī'ah* is included in the category of *hifz al-nasl* (protection of decendants)[330] which some scholars call *hifz al-'ird* (protection of honor). The protection of honor in clothing, those scholars said, is to refrain from falling into fornication, and to bring clarity of one's lineage of conjugal relationship that is acceptable to Islam.

Thus, Muhammad Shahrur and other scholars disagreed on the function of clothing. Shahrur emphasizes on the protection of the soul (*hifz al-nafs*) in order to avoid social and natural demages, while the later emphasizes the protection of the descent (*hifz al-nasl*).

The function of clothing conveyed by Muhammad Shahrur is actually similar to the opinion of Quraish Shihab. In Quraish's opinion, clothing has the functions of cover of the *'aurat*, decoration, protection from the heat and cold as well as the fortress of things that can disrupt order, and finally as a marker in nature and profession.[331] The difference between Muhammad Shahrur and Quraish Shihab in determining the function of clothing lies on their sources of reference. Muhammad Shahrur built his opinion on Surah al-Ahzab, 59, while Quraish Shihab described

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[330] According to those scholars, the protection of offspring is realized by two main ways: instruction of marriage and prohibition of adultery. Covering the *'aurat* supports the the prohibition of adultery, and is ranked as tertiary (luxuries).

[331] Quraish Shihab's opinion on the function of clothing has been described by the author in chapter two of this dissertation.

every function of clothing based on other verses which talk about the clothes, both for men and women.[332]

It is important to note here that the function of clothing for women in regard with *maqasid al-sharī'ah* is listed in the secondary rank (*ḥājiyyāt*).[333] It comes after the primary benefits (*daruriyyat*) and before tertiary one (*tahsiniyyat*), both seen as the protection of descent (*hifz al-nasl*), as the scholars argued, and as a protection of life (*hifz al-nafs*), as Muhammad Shahrur, Quraish Shihab, and Nasaruddin Umar said.

As previously described, that maṣlahahs in the five basic principles (*al-uṣūl al-khamsah*) is hierarchical, the first (i.e. religion) is more urgent than the next. Or, in other words, the sequence of the last principle (maintenance of property) is the lowest maslahah before maintenance of offspring, and so on. The five basic elements are divided into three sequential ranks: *ḍarūriyyat* (primary, urgent), *ḥājiyyāt* (secondary), and *tahsiniyyat* (tertiary).

This ranking is important, particularly when we are faced with a situation where there is a contradiction (*ta'arud*) between multiple maslahahs. For example, when there is a contradiction between maintainance of life and that of descent, the former should be given priority. Likewise, the protection of children should be "put aside" when it competes with the interests of religion and intellect. Thus, the protection of children can only take precedence when there is a negotitation with the protection of property. The provision applies when the ranking of each maslahah is the same: *daruriyyat*, *hajiyyat*, or *tahsiniyyat*.

If we follow the opinion of scholars that the function of clothing to protect the offspring (*hifz al-nasl*) is the secondary benefit (*hajiyyat*), then the maṣlaḥah of clothing should not take precedence over that of

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[332] The verses are: QS. Al-A'raf (7), 26, QS. Al-Nahl (16), 18, QS. Al-Azab (33), 59.

[333] The opinion is based on the opinion of Yusuf Hamid and Abu Zahra. Meanwhile, Nasaruddin Umar categorized dressing a tertiary maslahah (*tahsiniyyat*). See Yusuf Hamid, *al-Maqāṣid al-'Āmah li al-Sharī'ah al-Islāmiyyah*, p. 459, and Abu Zahrah, *Uṣūl al-Fiqh*, p. 371.

religion (such as *jihād fi sabīlillah*), life (such as making a living for survival) and that of intellect (such as seeking knowledge); particularly, the examples given by the authors are identified as the primary (*daruriyyat*).

Meanwhile, if the function of clothing follows Shahrur's opinion, which is attributed to the protection of life in order to avoid natural and social interference with attention to the beauty (*jamaliyyah*) and the radition ('*urfiyyah*), then clothing can be categorized as the secondary maslahah (*ḥajiyyat*) and even the tertiary one in regard with the intellect, lineage, and property.[334]

So, it is important to emphasize here that the standpoint of the scholars and Muhammad Shahrur in viewing the functions of clothing are still on the realm of *al-uṣūl al-khamsah* (the five objectives of Islamic law or *maqāṣid al-sharī'ah*: the protection of religion, life, intellect, descent and property). The concept of *maqāṣid al-sharī'ah* was initiated by al-Ghazali and developed later by al-Shāṭibi.

The suitability of the function of the clothing as explained by Muhammad Shahrur above becomes clearer when his explanation of *maslahah* is seen from Ṭūfī's concept (d. 716 AH) in which he classified it into two domains: wordly (*dunyawiyyah*) and other wordly (*ukhrāwiyyah*). The wordly *maṣlaḥah* is related to the problem of human transaction (*mu'āmalah*), while the other wordly *maṣlaḥah* mostly deals with worship and Devine decrees (*muqaddarāt*). As mentioned earlier, al-Ṭūfī argued that human transaction (*mua'malah*) provides more space for creativity, especially in its formats, as long as it brings the benefit and simultaneously removes the harm.

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[334]Fathurrahman Djamil gave some examples of tertiary maṣlaḥah as follows: maintenance of reason, i.e refrain from fantasizing or listening to something that is not useful; maintenance of the descent, i.e. mandatory khitbah and walīmah in marriage. See Fathurrahman Djamil, *Metode Ijtihad Majlis Tarjih*, pp. 43-44. The maintenance of the property, i.e. the provision to avoid gharar transactions (speculation).

Shahrur asserted that clothing has nothing to do with the issue of *ḥalāl* (lawful) and *ḥarām* (unlawful). The command to wear *jilbāb* in Surah al-Ahzab (33), 59 means to be *ta'limāt* (teaching): how it can protect the wearer from a variety of disruptions, especially social ones. It seems that Shahrur views clothing as a pure wordly issue (*mu'amalah*) and, therefore, just as Ṭūfī's concept of *maṣlahah*, he gives a wide space to reason, including in determining the the model of clothing in whatever forms as long as it does not cause trouble (*mafsadah*), or danger (*ḍarar*) for the human life on this planet.

In my opinion, the way Muhammad Shahrur explained the function of clothing is not much different from the steps of finding *maṣlaḥah* which is the core of *maqāṣid al-sharī'ah* as initiated by al-Ghazali (d. 505 AH), al-Shāṭibi (w . 790 AH) and al-Ṭūfī (d. 716 AH). As explained before, the way to figure out *maṣlahah*, in Ghazali's opinion, is by *ta'līl al-aḥkām* (i.e. looking the basic cause for the determination of the law). *ta'līl al-aḥkām* is mujtahid's effort in revealing the *'illat* (the basic cause) behind the laws for *qiyās* (analogy) as a method of legal formulation as prevailing in the Shafi'ī school.[335]

Shāṭibi pointed out that the *maṣlahah* is also known through the mastery of the Arabic language, the Sunnah, and the historical contexts of of the revelation. Meanwhile, al-Ṭūfī suggested that in mu'āmalah, maṣlaḥah can discovered through reason alone, without having to refer the what is written in the texts.

Sharu's function of clothing is based on Surah al-Ahzab, 59:

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[335] According to these madhhabs, there are two ways to find *'illat* (cause): the first, it is known from the textual wording (*'illah mansūsah*, i.e. *'illat* which is stressed by the text); and the second, it is known through ijtihad because it is not explained by the texts. The second model of *'illat* is known also as *'illah mustanbaṭah* (i.e. *'illat* obtained through ijtihad) which includes three phases: identification of the basic cause (*takhrij al-manāt*), selection of the basic cause (*tanqiḥ al-manāt*), and determantion of the basic cause, which is no doubt embedded and influential in laws (*taḥqīq al-manāt*).

يَٰٓأَيُّهَا ٱلنَّبِيُّ قُل لِّأَزۡوَٰجِكَ وَبَنَاتِكَ وَنِسَآءِ ٱلۡمُؤۡمِنِينَ يُدۡنِينَ عَلَيۡهِنَّ مِن
جَلَٰبِيبِهِنَّ ذَٰلِكَ أَدۡنَىٰٓ أَن يُعۡرَفۡنَ فَلَا يُؤۡذَيۡنَّ وَكَانَ ٱللَّهُ غَفُورٗا رَّحِيمٗا
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'O Prophet! Tell to your wives, and daughters and Muslim women, that they should keep putting a part of theirwrapping covers over their faces. This is nearer than this that if they are recognized, they should not beannoyed. And Allah is Forgiving, Merciful.[336]

Shahrur provides reviews of the functions of clothing according to Islam by interpreting the sentence: ذلك أدنى أن يعرفن فلا يؤذين "such so that they are easier to be known, so they are not disturbed"). Shahrur analyzed the verse by looking at the linguistic aspects after which he then generated conclusions about the function of clothing as explained earlier. Thus, Shahrur's steps in uncovering the *maqāṣid al-sharī'ah*, particularly on clothing, is not too much different from the that of *maqāṣid al-sharī'ah* as brought forth by the three leading figures: al-Ghazali, al Shāṭibi and al-Ṭūfī.

4.7 *Maqāṣid al-Sharī'ah* in Muslim Women's Clothing

As explained in the discussion of *maqāṣid al-sharī'ah*, the Islamic teachings, including Muslim women's clothing, aim to bring the benefits while at the same time avoiding dangers for human life, both in this world and in the hereafter. The benefits of *maqāṣid al-sharī'ah* cover the five main principles (*al-uṣūl al-khamsah*), i.e.: the protection of religion, life, intellect, descent, and property. Each principle is rated into *ḍaruriyyat* (primary), *ḥajiyyāt* (secondary), and *taḥsiniyyat* (tertiary, beauty).[337]

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[336]*Al-Qur`an dan Terjemahnya*, p. 678.
[337]The division of *maṣlaḥah* into three categories: *daruriyyat*, *hajiyyat* and *tahsiniyyat* in the five basic principle, is initiated by al-Ghazali and al-Shatibi. As for al-Ṭūfī, *maṣlaḥah* is absolute, without any limits and its strength ranges from *rajīḥ* (preponderant)/*qawī* (strong) and *arjah* (superior)/*aqwā* (stronger), and includes wordly (*dunyawiyyah*) and other wordly (*ukhrawiyyah*).

Based on my research on some literatures, I found no discussion on *maqāṣid al-sharī'ah* about Muslim women's clothing that follows al-Ghazali and al-Shāṭibi's systematization, especially in classifying *maṣlaḥah* based on three domains: *ḍaruriyyat*, *ḥajiyyāt*, and *taḥsiniyyat*. Nevetherless, explanations of *maqāṣid al-sharī'ah* in Muslim women's clothing can be observed from the application of the five basic principle of (*al-uṣūl al-khamsah*): religion, life, intellect, descent, and property. The following is the *maqasid al-shari'ah* for Muslim women's clothing as presented by some scholars:

1. To purify the hearts of the dresser and the people around her from. By Islamic dressing, some doors have been closed for the *satan* (evil) to whisper bad things which lead to sins. Some people fall into fornication from their curiosity to see pornographic contents after which they are involved in a manner that is immoral, such as rape and illicit sexual inter-course. Sinful deeds would not occur when the heart is full of piety to Allah as reflected in Islamic dressing.[338] Related to this purpose, God asserts in Surah al-Ahzab, 53.;

2. To shield oneself from the interference of unscrupulous people.[339] Allah assertes this goal in Surah al-Ahzab, 59.[340]

3. To be a symbol of Islam and implant a sense of shame to do despicable things. It is natural that anyone will be embarrassed when the private parts of her or his body is exposed.

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[338] See Aḥmad Musṭafā al-Marāghī, *Tafsīr al-Marāghī*, Vol. 8, (Bairūt: Dār al-Fikr, t.th.), p. 31; Wahbah al-Zahayli, *al-Tafsīr al-Munīr*, Vol. 2, 1 (Bairūt: Dār al-Fikr, t.t), p. 87; Ibn Taymiyyah, *al-Tafsīr al-Kabīr*, Vol. 5, (Dār al-Kutub al-'Ilmiyyah, t.th.), p. 360. See Muhammad Fuad al-Barāzī, *Ḥijāb al-Muslimah*, pp. 121-123.

[339]Fuad al-Barazi, *Ḥijāb al-Muslimah*, p. 126.

[340]Translation of the verse is: "O Prophet! say to your wives and your daughters and the women of the believers that they let down upon them their over-garments; this will be more proper, that they may be known, and thus they will not be given trouble; and Allah is the Forgiving, the Merciful. See *Al-Qur`an Terjemahnya*, p. 678.

It is illustrated in the story of Adam and Hawa, who are tempted to eat the forbidden fruit in Heaven which madem them to "cast away" from Heaven in nakedness. They immediately covered their bodies with the leaves of Paradise. Allah says in Surah al-A'raf, 22:

فَدَلَّىٰهُمَا بِغُرُورٍ فَلَمَّا ذَاقَا ٱلشَّجَرَةَ بَدَتْ لَهُمَا سَوْءَٰتُهُمَا وَطَفِقَا يَخْصِفَانِ عَلَيْهِمَا مِن وَرَقِ ٱلْجَنَّةِ وَنَادَىٰهُمَا رَبُّهُمَا أَلَمْ أَنْهَكُمَا عَن تِلْكُمَا ٱلشَّجَرَةِ وَأَقُل لَّكُمَا إِنَّ ٱلشَّيْطَٰنَ لَكُمَا عَدُوٌّ مُّبِينٌ ٢٢

Then he caused them to fall by deceit; so when they tasted of the tree, their evil inclinations became manifest to them, and they both began to cover themselves with the leaves of the garden; and their Lord called out to them: Did I not forbid you both from that tree and say to you that the Shaitan is your open enemy?[341]

Thus, humans by nature feel embarrassed when their private parts are exposed. They will lose their feeling of shame if they do not get used to cover theim. Considering the importance of feel of shame, the Prophet categorized it as a part of faith (*al-ḥayā' min al-īmān*).[342] It should be also emphasized that in essence covering nakedness with clothing is to maintain the dignity because event though there are many people who are dressing properly, they are still loosing their dignity.

From the above description, it is understood that the maqāṣid al-sharī'ah for Muslim clothing within the framework of maṣlaḥah in the al-uṣūl al-khamsah are inclusive of the protection of descent (*hifz al-nasl*). Yusuf Hamid said that the protection of descent in Islam is realized in two ways:[343] the first is by mandatory marriage. He emphasized that the primary purpose of marriage is as a safeguard against having legitimate offspring, while the other goals, such as to avoid the tempta-

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[341]*Al-Qur`an and terjemahnya*, p. 233.
[342]Badr al-Dīn Al-'Aynī, *'Umdat al-Qāri' : Sharḥ Ṣaḥīḥ al-Bukhāri*, Vol. 1, (Bairūt: Dār al-Fikr, t.th.).
[343]Yusuf Ḥāmid al-'Ālim, *al-Maqāṣid al-'Āmah*, pp. 399-408.

tions of the satan and to achieve serenity and inner peace are complementary (*ṭabi'ī*).[344]

The second way is rejecting something that can bring various harm (*daf'i al-mafāsid*), i.e. prohibition of fornication. Thus, protection of offspring that is *daruriyyat* is by prohibiting adultery, in addition to mandatory marriage. While prohibitions on *khalwah* (i.e. two non-*mahrams* staying alone in a quiet place), looking at non-*muhram* women, dressing in an indecent way, and showing off beauty for non-*mahram* men is complementary goals (*tabī' wa mukammil*).[345]

Thus, it can be asserted here that the *maṣlaḥah* of Muslim women's clothing, when viewed from the standpoint of its strength, ranks at *hajiyat* (tertiary, complementary) in the protection of descent.[346] Whereas, prohibition of adultery and marriage is *daruriyyat* (primary). Because it is *ḥajiyat*, Muslim women's clothing requires prudence (*iḥtiyaṭ*) in order to keep away from fornication. On the other hand, the effort to protect offspring which are *tahsiniyyat* (tertiary) includes prohibition for women to go out by showing off her jewelry.[347]

Simply put, protection of the descent in the frame of the three maṣlaḥahs (*ḍarūriyyat*, *ḥajiyyāt*, and *tahsiniyyat*) is summarized in the following figure:

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[344]The purposes of marriage, which are natural (*tabi'i*), in Hamid Yusuf's opinion, are: 1. As the bastion of the temptations of satan (*taḥassun min al-shaitān*); 2. Willingness to spousal relationships (*kasr al-tawqan*); 3. Holding the eyes (*ghadd al-basar*); 4. Keeping the intimate parts (*hifz al-farj*). See Ibid.

[345] See Ibid., pp. 445-463.

[346] See Muhammad Abu Zahrah, *Uṣūl al-Fiqh*, (T.t.: Dar al-Fikr al-'Arabi, t.th.), p. 371.

[347] Ibid., p. 372.

Figure 4.2Maṣlaḥah in the Protection of Descent (Hifz al-Nasl)
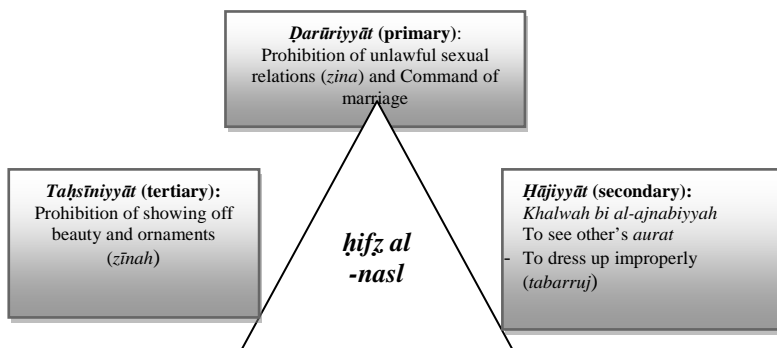
In contrast to the description of *maqasid al-shari'ah* of Muslim women's clothing above, Quraish Shihab argued that clothing, regardless of the sex, has the following functions:[348]

1. Covering the '*aurat*, i.e, things that are prone to "accidents" and therefore should not be exposed;

2. To be 'a jewellery' for the wearer. These two functions of clothing are based on Surah Al-A'raf (7), 26:

يَٰبَنِىٓ ءَادَمَ قَدْ أَنزَلْنَا عَلَيْكُمْ لِبَاسًا يُوَٰرِى سَوْءَٰتِكُمْ وَرِيشًۭا وَلِبَاسُ ٱلتَّقْوَىٰ ذَٰلِكَ خَيْرٌۚ ذَٰلِكَ مِنْ ءَايَٰتِ ٱللَّهِ لَعَلَّهُمْ يَذَّكَّرُونَ ٢٦

'O children of Adam! Undoubtedly, We have sent down towards you a dress that may cover your shamefulparts and one that be an adornment to you; and the dress of righteousness, that is the best. This is one of Allah's signs, that I they may be admonished.[349]

1) To be a protection from the heat and cold as well as the fortress of things that can disrupt public order. This function is implied in the Surah Al-Nahl (16), 81 which reads:

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[348] Quraish Shihab, *Jilbab*, pp. 50-52.
[349]*Al-Qur`an dan Terjemahnya*, 224.

وَٱللَّهُ جَعَلَ لَكُم مِّمَّا خَلَقَ ظِلَـٰلًا وَجَعَلَ لَكُم مِّنَ ٱلْجِبَالِ أَكْنَـٰنًا وَجَعَلَ لَكُمْ سَرَٰبِيلَ تَقِيكُمُ ٱلْحَرَّ وَسَرَٰبِيلَ تَقِيكُم بَأْسَكُمْ كَذَٰلِكَ يُتِمُّ نِعْمَتَهُۥ عَلَيْكُمْ لَعَلَّكُمْ تُسْلِمُونَ ٨١

> And Allah gave you shades out of things He made, and made for you shelters in the mountains, and made for you some garments to protect you from heat and some garments to protect you in fighting. Thus does He complete His favour on you, that you may submit to His Command.[350]

2) As a marker in nature or profession.[351] This function is understood from Surah Al-Ahzab (33), 59.

Quraish said further that Islam wants all these functions, or at least the most important one which is covering the 'aurat, to be realized in clothing. Unfortunately in practice, Quraish said further, the emphasis on this function has made some Muslims put aside the functions of beauty and identity.[352]

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[350]Ibid., p. 404.

[351] Hussein Muhammad said that the difference of 'aurat boundaries between free women and slave women in the view of scholars of fiqh is referring to women's status and social functioning at the time; whether she's a free woman who is, in the social construction of the Islamic community at the time, recommended not to work outside the house, leave the house, and expose themselves to many people, or whether she is a slave that is constructed to serve and work and do everything for the benefits of his master. With the above reasons, said Hussein, the former should be bodily more covered than the later. See Husein Muhammad, *Fiqh Perempuan*, p. 82.

[352]Ibid., p. 53. In line with the Quraysh, Fadwa El Guindi, mentions the types of headcovers as an indicator of a person's social conditions in the community and social status. He said that Yemeni women wear what is known as *lithmah*, which is "a thin, light, colored fabric worn on the head to conceal the hair and forehead, while the lower part can be pulled up and down to show off the face or the eyes only." An unmarried girl wears this type of clothing all the time and a married woman in the daily routines at home or during informal morning visits. In addition, there is also a type of clothing called *sitara*. Women of lower economic status wear this type of clothing. The higher status women wear a cloth called *syarsyaf*, i.e. "long skirt folds worn over clothing and a coat that covers the head, shoulders to waist, both are made of silk. See Fadwa El Guindi, *Jilbab*, 167, 172-173.

Looking at Shihab's functions of clothing above, it is clear then that the most important *maqasid al-sharīah* in clothing, both for men and women equally, is the protection of life (*hifz al-nafs*) rather than the descent (*hifz al-nasl*); even so, none of it is rated as *ḍarūriyyat*, but only *ḥajiyyāt* or *taḥsīniyyāt*.[353] The following table summarized the functions of cloting, as proposed by Quraish Shihab in relation with the *maqāṣid al-sharī'ah*:

Table 4.1 The Functions of Clothing in Relation to Maqāṣid al-Sharī'ah In Quraish Shihab's Opinion

No.	Function of Clothes	Aspects of *Maṣlaḥah*	Rank of *Maṣlaḥah*
1	Covering the 'aurat	*Hifz al-dīn* (protection of religion) in prayers	
		Hifz al-nafs (protection of life) outside prayers	
2	As a decoration or ornament		
3	As a safeguard from the heat and cold as well as things that can impair order	*Hifz al-nafs*	*Ḥājiyyāt/ Taḥsīniyyāt*
4	As a marker in nature or profession		

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[353] The hierarchial significance of the *maṣlaḥah ḥajiyāt* on clothing is based on Abu Zahra's opinion. See Abu Zahra, *Uṣūl al-Fiqh*, p. 371. As for the rank of *maṣlaḥah taḥsīniyyāt* in *Hijab*, Nasaruddin Umar said: "The veil and the like remains an Islamic teachings that needs to be considered serously, at least the veil provides lessons on ethics and aesthetics (*taḥsīniyyāt*)." See Nasaruddin Umar, *Fikih Wanita untuk Semua*, (Jakarta: Serambi, 2010), p. 28. Nur al-Din al-Khadimiya, former Tunisian Minister of Religious Affairs, shares the same opinion. See Nur al-Di al-Khadimiy, *al-Ijtihad al-Maqasidiy* (Tunisia: Dar Ibn Hazm, 2010), p. 44.

Form the Shihab's description of the function of clothing above we can also see that *maṣlaḥah* to be realized is the protection of religion (*hifẓ al-dīn*) and life (*hifz al-nafs*), all of which are ranked secondary (*ḥājiyyāt*) or tertiary (*taḥsīniyyāt*). Quraish Shihab does not mention that the obligation to cover the '*aurat* is part of the efforts to protect the existence of offspring (*hifz al-nasl*), as said by Yusuf Hamid and Abu Zahra. For Quraish, uncovering the '*aurat* can lead to "unwanted incident".

Thus, it is safe to say here that scholars do not discuss the issue of Islamic clothing by looking its relation with the overall *al-uṣūl al-khamsah* (the five basic principles) simultaneously. Their discussions are dominantly nuanced with an outlook of the efforts to prevent fornication and to meet the requirements of prayer conditions. The benefits of intellect and property are absent in the discussion of clothing.

Nasaruddin Umar said that the most prominent discourse in Indonesia on the use of *jilbāb* is related to the issues of health, trends, fashion, privacy due to the accumulation of the quality of religious education and propaganda in society. In fact, one study revealed that the prostitutes in Nanggroe Aceh Darussalam (NAD) are hiding their identity by wearing *jilbāb*.[354]

Based on the above description, I can point out here that the benefits contained in Muslim women's clothing have interconnection among all the maṣlaḥahs. As explained earlier, the function of women's clothing is to cover the '*aurat* which is complimentary (*mukammil*) to the prohibition of adultery as a form of the protection of offspring (*hifz al-nasl*). However, in addition to the function of covering the '*aurat* for the benefit of the descent, the clothing also serves as a covering of '*aurat* in prayers (*hifz al-din*), protection from natural and social distruption (*hifz al-nafs*), and a marker of identity and profession.[355]

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[354]Juneman, *Psycholohy of Fashion*, p. 5.
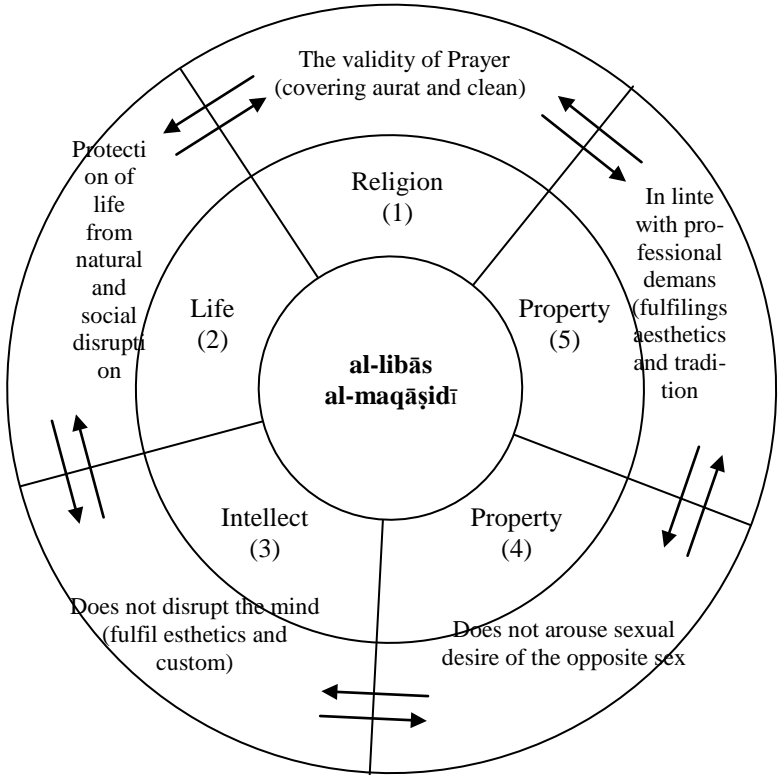[355]See Quraish Shihab, *Jilbab*, pp. 50-52

Thus, the concept of clothing in Islam is in line with the *maqāṣid al-sharī'ah*. I conceptualize it as *al-libās al-maqāṣidi* or 'beneficial clothing' in which Muslim women's clothing should fulfill its main functions: to cover nakedness, to avoid fornication, and to fulfill other functions related to religion, life, intellect, and property. The concept of *al-libās al-maqāṣidi* requires the fulfillment of appropriateness as a Muslim, a comfort in workplace, aesthetic values, and most importantly the capacity to cover the *'aurat*. If in any circumstances the cloth is no longer able to meet these entire functions, then at least it should bring benefits of covering the aurat, avoiding fornication, and fulfilling the requirement of prayers, then the benefits related to life, intellect, and property. In this case, I propose a new legal maxim of fiqh with regard to *al-libās al-maqāṣidi*:

$$\text{ما كان أكثر اتصالا بالمصالح كان أكثر فضلا}$$

> Anything that is interconnected with more maslahahs is having the most virtues.

The extent to which the maṣlaḥah is interconnected in the legal maxim above will depend on the following points: the first is the fulfillment maṣlaḥah, which the main goal of the establishment of a law. In the case of clothing, its main purpose is to protect the welfare of offspring by covering the aurat; the second is maṣlaḥah in connection with the five basic principles (religion, life, intellect, descent and property) by taking into account the scale of *ḍaruriyyat* (primary), *ḥajiyyāt* (secondary), and *taḥsīniyyāt* (tertiary). To sum up, *al-libās al-maqāṣidi* or 'the beneficial clothing' is shown in the following figure:

The validity of Prayer
(covering aurat and clean)

Religion
(1)

In linte
with pro-
fessional
demans
(fulfilings
aesthetics
and tradi-
tion

Protecti
on of
life
from
natural
and
social
disrupti
on

Life
(2)

Property
(5)

al-libās
al-maqāṣidī

Intellect
(3)

Property
(4)

Does not disrupt the mind
(fulfil esthetics and
custom)

Does not arouse sexual
desire of the opposite sex

5

CONCLUSION

Based on the research problem and how it is answered by an analysis of the data, we can conclude that the interconnected *maṣlaḥah*-based ijtihād maqāṣiḍi, which is the main argument of this dissertation, works in the following stages: (1) it should be built upon the Qur'anic texts and the Sunnah with all legal provisions contained therein as their objectives (*al-nuṣūṣ wa al-ahkām bi maqāṣidihā*); (2) it should integrate the general and universal messages with the specific and particularistic ones (*al-jam'u bayn al-kulliyāt al-'āmah wa al-adillah al-khāṣṣah*); (3) it should bring benefits and refuse absolute damages (*jalb al-maṣālih wa dar'u al-mafāsid muṭlaqan*); it should consider the legal consequences that possibly occur in the future (*i'tibār al-ma'ālāt*); (4) all the benefits of the legal considerations, ranging from the first to the fourth stages should take into account the interconnection between each maṣlahah or what that I refers to the interconnected maṣlaḥah (*ittisāliyāt al-maṣāliḥ*)

The implications of the interconnected maṣlaḥah-based *ijtihād maqāṣiḍi* on the case of Muslim women's clothing is that it brings forth the concept of 'beneficial clothing' (*al-libās al-maqāṣidi)*, i.e. clothing that can fulfill its primary function, which is to cover the aurat but also can sustain the benefits of religion, life, intellect, and property simultaneously.

Despite its all limitations, the findings of this research recommend that maṣlaḥah should be integrated in any legal formulation of Islamic laws because by only doing so that the legal products will aspire to the benefits which was the core of the Islamic teachings. There is a great expectation that in the future a new concept of *ijtihād maqāṣiḍi* will emerge for the sake of more adaptable and applicable Islamic laws.

6

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He has also produced a number of scholarly works both in books and journals. Among his books are: (1) *Menggugat Otentisitas Jilbab dan Hijab: Konsep Pakaian Ala Syahrur*, STAIN Kediri Press; (2) *Muhammad Abduh Pemikiran dan Pengaruhnya Terhadap Pembaharuan Islam*, STAIN Kediri Press; (3) *Naḥwa Afṣah al-Kalām Durūs al-Lughah al-'Arabiyyah*, STAN Kediri Press; (4) *Qirā'atunā al-Mu'āṣirah Durūs al-Lughah al-'Arabiyyah*. His works in journals, among others, include: (1) "Membongkar Ortodoksi Dalam Islam: Telaah Pemikiran Muhammad Arkoun", in *Jurnal Al-'Adalah STAIN Jember*; (2) "Menggugat Konsep Ikhtiyat dalam I'adah Shalat dhuhr t Ba'd al-Jum'ah", *Jurnal Empirisma* STAIN Kediri; (3) "Rekonstruksi Dalil-Dalil Hukum Para Imam Madzhab: Menimbang Maslahah Sebagai Dalil Hukum Terdepan", *Jurnal Empirisma* STAIN Kediri; (4) "Dari Nalar Literalis-Normatif Menuju Nalar Kontekstualis-Historis Dalam Studi Islam", *Islamica: Jurnal Studi Keislaman* (Terakreditasi) PPs IAIN Sunan Ampel Surabaya.

Married to Nana Najibah, the lovely family constituted of four sons and daughters is living in the village Randusongo RT. 02 RW. 03, Gerih District of Ngawi.

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Ijtihād Maqāṣidi

The Interconnected Maṣlaḥah-Based Reconstruction of Islamic Laws

A. Halil Thahir

received his Bachelor Degree from the Faculty of Sharia, IAI Nurul Jadid in 1994, and his Master degree in Shari'ah from IAIN Sunan Ampel Surabaya in 2003. He completed his Doctoral Degree in Dirasah Islamiyyah (Islamic Studies) in 2012 from the Postgraduate of IAIN Sunan Ampel Surabaya. Currently, he serves as a full-time faculty at the Department of Ushuluddin (Theology), State Institute for Islamic Studies (IAIN) Kediri, specializing on Fiqh and Ushul Fiqh, where he is also appointed as the head of Dept. of Ulum al-Qur`an wa al-Tafsir of the Graduate Program. With the support of the Indonesian Ministry of Religious Affairs, he participated in an Academic at University of Marmara Turkey in 2013 and received a Postdoctoral Fellowship Program for Islamic Higher Education (POSFI) at the University of Souse, Tunisia.

In this book Islamic law is presented from various perspectives to find the common thread between the Sharia, Islamic law and Islamic jurisprudence. The discussion is focused on the characteristics and principles of Islamic law as a means of providing a general overview of how Islamic law should be positioned, especially in the efforts of formulating legal rules that seek to bring benefit for people. Islamic law is brought from its ideal concepts into practical usage.

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