



# MAQĀSĪD AL-SHARĪ'AH AND METHODOLOGICAL CRISIS OF CONTEMPORARY ISLAMIC LAW

**Dr. Sanuri, S.Ag., M.Fil.I.**

**MAQAŞID AL-SHARĀH  
AND METHODOLOGICAL CRISIS  
OF CONTEMPORARY ISLAMIC LAW**

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## FOREWORD

This book begins with a discussion of the epistemology of contemporary Islamic law. It is because the main problem of the Islamic law today is how to make it capable of responding to the problems of modernity in all aspects of life. Therefore, in parsing the epistemology of Islamic law, it is necessary to study the sources of the law. This is important because it is to distinguish between which of both, *al-Qur'an* and *Sunnah*, function as a source of law and which function as Islamic law itself. At least, this stems from the confusion of understanding that occurs among Muslim scholars that *al-Qur'an* and *Sunnah* are Islamic law. This kind of understanding actually places both of them at the operational relativity level of Islamic law which demands changes as needed. In fact, as revelations, both have absolute truths that cannot be changed editorially. To make Islamic law capable of dialogue with changes, on the methodological aspect, it requires a rule called *fiqhiyyah* rule and *uṣūl al-fiqh*. The scholars agree that an understanding of Islamic law must start from both in order to answer various problems that arise through the mechanism of *ijtihad*.

Furthermore, chapter two explains the indicators and standardization of the effectiveness of achieving Islamic law as a system of rules that takes place in social life. The indicators and standards for effectiveness are formulated in an index called the Human Development Index (HDI). Human development index, or in Indonesian terms it is commonly referred to as *Indeks Pembangunan Manusia* (IPM), is a program launched by the United Nations (UN) with the aim of measuring the extent to which human development is achieved through three basic components of

quality of life, namely: (1) longevity; (2) education and; (3) standard of living. By presenting these indicators and standardization, it will be seen whether the Islamic law that has been in force in a society and nation is able to change their lifestyle and mindset for the better or vice versa.

At this time, the challenges of Muslims are increasingly complex. Something that was impossible before is now possible. Conditions in which, at this time, Muslims are in the vortex of globalization, whether they want to or not, they have to be involved in it. This chapter three presents several global issues which have attracted the attention of the Islamic law scholars. Among the global issues that have become a problem for Muslims in the Millennium century is how to deal with waves of protests, especially from feminist groups against the domination of classical *fiqh* which is considered to be gender biased and does not fulfill aspects of justice which should be the spirit of Islamic law itself. In addition, modernists also question whether classical *fiqh* still sees human rights in a biased or binary position. In the context of Muslims as part of the world community, an attitude that must continue to be developed in order to be able to live side by side is mutual respect for the human rights of others. This will be achieved if the applicable legal system is open, adaptive and responsive to changes.

Chapter four of this book has entered the core discussion of the methodology of Islamic law. One of the theories offered in this chapter is the study of *maqāṣid al-sharī'ah*. However, in this chapter, the discussion is still around the definition and legal basis of *maqāṣid al-sharī'ah*, both those originating from *al-Qur'an* or *hadith*. To complement the study of *maqāṣid al-sharī'ah*, this chapter first presents the history or genealogy of *maqāṣid al-sharī'ah* starting from the embryo and figures who were directly

involved with the study of *maqāṣid al-sharī'ah* starting from the era of the Prophet Muhammad, the era of the Companions, classical scholars to contemporary Islamic law scholars. This genealogy needs to be presented to see the dynamics of Islamic law as a whole, especially in methodological and theoretical aspects.

To find out what and how *maqāṣid al-sharī'ah* is, chapter five of this book presents a more detailed and rigorous discussion about the level of validity and legal strength of *maqāṣid al-sharī'ah* as a theory used to extract Islamic law from its sources. This validity is very important because this point is the barometer for determining the level of effectiveness of Islamic law in a society. To further strengthen the theoretical position of *maqāṣid al-sharī'ah*, this chapter also presents the orientation of *maqāṣid al-sharī'ah*, the reach of *maqāṣid al-sharī'ah*, the originality of *maqāṣid al-sharī'ah*, and the strength of *maslahah* in *maqāṣid al-sharī'ah*.

Apart from being explained in chapter five, *maqāṣid al-sharī'ah* as a theory of Islamic law is also reinforced by the discussion in chapter six. This chapter focuses more on the differences between several terms that are often misinterpreted by readers, or at least, are related to one another, namely between *maqāṣid*, *maṣlahah*, *uṣūl al-fiqh*, and *wasā'il*. If *maqāṣid* is a goal that is to be achieved in every provision of Islamic law, both in the form of orders and prohibitions, then *maṣlahah* is the essence of the goal itself which must contain something that has beneficial values for humans and the universe. Meanwhile, *wasā'il* is a means to achieve a goal that contains goodness. If *maqāṣid* is absolute, then both, *maṣlahah* and *wasā'il*, are relative. The relativity of the two means is that they will always change according to

the development of science and the ability of Islamic law scholars to carry out constructive innovations. Progressiveness of *maslahah* and *wasāil* can also be reached through the study of *uṣūl al-fiqh* as a discipline of Islamic law that has existed long before

As in legal studies, it is certain that it departs from a universal guideline that is adhered to in the form of legal principles, so the science or theory of *maqāṣid al-sharī'ah* is also strengthened by basic principles as a way to make it easier to operationalize the theory. This also happens to *fiqh* law which always departs from principles. With these rules, the law is able to reach a wider scope while still holding the universal values of it. As with *maqāṣid*, every *maqāṣid al-sharī'ah* expert must have principles to operationalize their respective theories. Therefore, this seventh chapter presents a comprehensive discussion of the principles of *maqāṣid al-sharī'ah*, about how to reveal *maqāṣid al-sharī'ah*, about how *maqāṣid al-sharī'ah* is used as a guide and theory in carrying out *ijtihād*. However, in addition to reviewing the relevance between *maqāṣid* and *ijtihād*, this chapter is also equipped with a review of the controversy surrounding the issue of the closing of the gate of *ijtihād* which once revolved around the 10<sup>th</sup> century AD, especially in the *Sunni* Muslim tradition.

Finally, the discussion in this book is closed with chapter eight. In this chapter, the author also presents informations about the development of *maqāṣid al-sharī'ah* studies both at the national and international level. This chapter is projected to further strengthen the position of *maqāṣid al-sharī'ah* as a theory that needs to be considered in order to make law capable of side by side with modernity. The progressive and dynamic character offered by the *maqāṣid al-sharī'ah* theory increasingly finds its style when

*maqāṣid* experts are able to formulate their theory and are able to implement the theory in a *fatwa* institutions which are a reference for Muslim communities in dealing with various problems in their lives. Among the *fatwa* institutions that make *maqāṣid al-sharī'ah* an approach and a theory are: (1) The International Institute of Islamic Thought (IIIT) was founded in 1981 in London; (2) The Center for Islamic Legislation and Ethics, a research institute founded by a Muslim intellectual figure, Tariq Ramadan in Doha, Qatar; and (3) several Fatwa institutions spread across Southeast Asia and the Middle East.

In the end of the general description of the discussion of this book, the author hopes that what is presented in this book will be able to contribute to the wider community on the one hand and will further strengthen *maqāṣid al-sharī'ah* studies, which are increasingly booming, on the other hand. As an academic work, this book is not without faults and flaws. Therefore, with humility, the author will be very grateful to the readers and researchers who are willing to submit criticisms and suggestions for the goodness and perfection of this book.

Writer

Dr. Sanuri, S.Ag., M.Fil.I.

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## CHAPTER I

### EPISTEMOLOGY OF CONTEMPORARY ISLAMIC LAW

#### A. Legal Sources vs. Methodology of Islamic Law

Among Muslim scholars, there are often differences between the term of Islamic legal sources (*maṣādir al-aḥkām*) and Islamic legal methods (*al-adillah al-shar'iyyah*). However, there are some scholars who also consider both are the same. In fact, even further, many also began to question whether the position of both of them is still effective or not in solving the problems of contemporary Muslims, so that there may be several points that need to be refined. Others consider, in fact, the need to create a completely new theory through the theories outside of Islamic law. When viewed from the terms, the two are indeed different. One refers more to the estuary of all the rules that exist in Islam. The relationship between estuary and downstream shows an up-down relationship and not in otherwise. All rules must be in line with the rules and conditions of the source.

Furthermore, methodology is more technical, namely the way in which Islamic law is excluded from the original sources. Because technically, it is clear that methodology of Islamic law is a creativity of the human cognition aspect about how to find a method that can be used by all people to explain the provisions of law for a problem that can be pursued in a particular way.

The term “source of Islamic law” is a quite popular term for Indonesian Muslims. The word is the translation of the Arabic term *maṣādir al-aḥkām*. This term is actually less popular in the literature of the classical Islamic law as well as the classical *uṣūl al-fiqh*. To explain the meaning of the “source of Islamic law”, the classical period uses the term *al-adillah al-shar'iyyah*. Whereas, what is meant by the term *maṣādir al-aḥkām*, which is used by contemporary scholars, also refers to the term *al-adillah al-shar'iyyah*. *Maṣādir al-*

*aḥkām* is more focused on the object that becomes the reference or source of the law itself. Whereas, *al-adillah al-shar'iyyah* has a broader meaning, the arguments of *sharī'ah* law from which a law of a certain case is determined.<sup>1</sup>

In addition, the word “source of Islamic law” consists of two words, namely “source” and “Islamic law”. In the scientific tradition of Islamic law in Indonesia, there are some scholars of Islamic law who understand that it is as a specific Indonesian-style term used to describe the law of *fiqh* or *al-fiqh al-Islāmī* or under certain conditions, it is derived from the word *al-sharī'ah al-Islāmī*. Often the word of Islamic law is identical to what is understood by Muslim scholars both individually and collectively such as the *fatwa* of the Indonesian Ulema Council (MUI). In the study of Western scholars, they usually more often use the term Islamic law. In *al-Qur'an* and *al-Sunnah*, we do not find the term *al-hukm al-Islāmī*, but what we can find is Islamic *sharī'ah*. The word, then, metamorphosed into the term *fiqh* to describe and explain about a provision of Islamic law in a particular case that has occurred, is happening, and will occur with still referring to the opinions of the Muslim scholars of the school of thought.

The equalizing of “Islamic *sharī'ah*” with “Islamic law” or its derivation such as “Islamic *fiqh*/jurisprudence” is inappropriate since there has been a distortion of meaning. The superficiality of this meaning is very clear because, in fact, Islamic *sharī'ah* is a term to describe the teachings of Islam as a whole, starting from the aspects of ritual worship, social worship, spiritual or sufism, and science with everything that surrounds it. Whereas, Islamic jurisprudence or Islamic law is only limited to the area of the understanding of jurists about the legal aspects or to other specific dimensions. Usually, the mention of Islamic law is always associated with the formal legality of a country, both of those

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<sup>1</sup> Wahbah al-Zuhayli, *Uṣūl al-Fiqh al-Islāmī* (Damaskus: Dār al-Fikr, 1986), 401.

that are still scattered in the classical books and those which have become positive law of a country.

In historical context, Islamic law is the one that ever existed at the time of the Prophet Muhammad, the *Rāshidūn* Caliphate, and the end of the *Umayyad* Caliphate. Almost all historians of Islamic law agree that this period is the ideal period to be called a state based on *sharī'ah* or significant for the sources and development of *sharī'ah* or borrow the term of Fazlurrahman “the nature of the state and its relationship to *sharī'ah*”.<sup>2</sup> This point of view is also corroborated by Joseph Schacht’s testimony. He said “fundamentally Islamic law is sourced from *al-Qur'an* and *al-Sunnah* as understood through the practice of the first generation *fuqaha*, namely the verses of *al-Qur'an* and *al-Sunnah* which had been practiced by the Prophet Muhammad and his companions and several subsequent generations until the end of the rule of the *Umayyad* Caliphates.”<sup>3</sup>

In connection with the above discussion, Hasbi Ashshiddiqy defines Islamic law as a collection of efforts of jurists to apply *sharī'ah* law for the needs of the people in a certain period of time. In the treasury of Islamic jurisprudence in Indonesia, the term “Islamic law” is understood as a combination of two words namely “law” and “Islam”. A law is a set of rules about an act or behavior recognized by a state or society that is applicable and binding for all members. Then, the word law rests on the word Islam means that Islamic law is a rule formulated based on the revelations of Allah and *al-Sunnah* about behavior of *mukallaf* (people who can be burdened with obligations) that are recognized and believed to be binding for all Muslims.

Whereas, the word “source” in *fiqh* law is a translation of the word *maṣḍar* which has plural form of *maṣādir*, which means “a container within which legal norms can be found or

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<sup>2</sup> Fazlur Rahman, *Islam* (Chicago: University of Chicago Press, 1979), 79.

<sup>3</sup> Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1979), 18.

drew”. In this sense, the word “source” is only used for *al-Qur’an* and *al-Sunnah*, because both of them are containers where the *sharī’ah* law can be drawn. *Sharī’ah* law is a set of rules based on Allah’s provisions regarding human’s behavior that is recognized and believed to be valid and binding for all Muslims. While the word “*dalil*” means something that can be used as a basis for the provisions.

When it is connected with the word “law” or *al-adillah al-shar’iyyah* (arguments/proposition of Islamic law) means something that guides us in discovering the God’s law. The word proposition can be used for *al-Qur’an* and *al-Sunnah* because they lead to the discovery of God’s law. Among the *fuqaha*, the word *dalil* is interpreted with “something to which there is a designation of teaching, both that can convey to something that is convincing and to the strong suspicion that is not convincing”. According to the Muslim scholars of *uṣūl al-fiqh*, the word *dalil* is interpreted as “something that conveys to the demands of the authentic logical thoughts”.

So, the term “source of Islamic law” is anything that rises up rules that have binding power, namely the rules if violated will lead to strict and real sanctions. In other words, “the source of Islamic law” is anything that is used as a guide or a source of Islamic *sharī’ah*, namely *al-Qur’an* and *al-Sunnah* (Muhammad SAW). Most of the opinions of the Islamic jurisprudence scholars agree that, in principle, the main sources of Islamic law are *al-Qur’an* and *al-Sunnah*. As for several principles regarding the source of Islamic law according to al-Syatibi are: (1) the understanding of the propositions of *sharī’ah* does not conflict with the demands of reason; (2) the purpose of the formation of the propositions is to put human actions into account; (3) every proposition is universal or global; (4) the propositions of *sharī’ah* are divided into *qaṭ’i*/certain and *ẓanni*/uncertain; (5) the arguments of *sharī’ah* consist of the argument of *naqli* (revelation) and the argument of *aqli* (reason).

As the highest source of Islamic law, *al-Qur’an* contains, at least, three fundamental things, namely: (1) laws

governing human relation with Allah SWT regarding what must be believed and must be avoided in connection with his belief (*i'tiqādiyah*). It is, then, formulated in monotheism and *ushuluddin* or theology; (2) laws governing human association (*muamalah*) which are then developed in science of moral; (3) laws relating to human behavior in relation with Allah SWT and with fellow human beings, and are included in the form of what must be done or shunned (*amaliyah* law) developed in *sharī'ah* law.

In addition, the word *sunnah*, etymologically, means “usual way of doing anything”, whether it is good or bad. According to Muslim scholars, *sunnah* means “usual way to conduct religious practices”. According to Muslim Scholar of *uṣūl*, *sunnah* is “what was narrated from the Prophet Muhammad SAW in the form of the words, deeds, determinations, recognitions and the natures of the Prophet”. Meanwhile, according to Muslim scholars of *fiqh*, *sunnah* is “something that if done will get merit and if left will not get sin”. The Muslim scholars of *fiqh* place the *sunnah* as one of the five *sharī'ah* legal structures, namely *farḍ* (mandatory/obligatory), *sunnah* (recommended), *mubāḥ* (neutral/permitted), *makrūh* (disliked or offensive act), and *harām* (forbidden). In this context, *sunnah* is more meaningful as a legal status than as a “source of law”. The word “*sunnah*” is identical to “*hadith*”, where both are the same actions associated to Prophet Muhammad SAW. According to the Muslim scholars of *hadith*, the word *sunnah* is more directed to the words, deeds, and provisions of the Prophet who has become a tradition that has been living in the experience of religion.<sup>4</sup>

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<sup>4</sup> Types of *sunnah*, namely: (1) *sunna qauliyyah*, namely the words of the Prophet who heard his best companions and delivered it to others. But this Prophet's remarks were not revelations of *al-Qur'an*; (2) *sunnah fi'liyah*, which is an act carried out by Prophet Muhammad that was seen or known by his companions, then conveyed to others by his words; (3) *Sunnah taqrīriyyah*, namely the deeds of his companions or his words carried out in the presence of the Prophet or the knowledge of the Prophet, but not responded to or prevented by the Prophet.

Moving on from an understanding of the sources of Islamic law, the next is methodology or theory of Islamic law. At first glance, the two appear to be the same, but, in fact, they have very basic differences about which ones as sources, which ones as legal products, and which ones as methods to be used to produce law. Contemporary jurists highlight a lot about the theory of Islamic law which has, so far, been unable to juxtapose and unable to answer various contemporary issues of Muslim communities. When Muslims are faced with complexity in all lines of life in the field of social, economy, and politics, as well as science, inevitably *ijtihad* (legal reasoning) and methodological innovations in Islamic law are very much needed.

The foundation of the epistemology of Islamic law which is carried by the Muslim scholars of *uṣūl*, both classical and contemporary, is to realize a key word that is “*maslahah* for humans” (*al-maṣāliḥ li al-ʿibād*). It is in this spirit of *maslahah* that the Muslim scholars of *uṣūl* began to use and develop a methodological instrument formulated in *maqāṣid al-sharīʿah* (purposes of Islamic law), *ḥikmah al-sharīʿah* (wisdom of Islamic law), *asrār al-sharīʿah* (secrets of Islamic law), *maḥāsīn al-sharīʿah* (beauty of Islamic law).<sup>5</sup> This is a new paradigm in the context of revitalization and contextualization of contemporary Islamic law (*min al-nāṣṣ ilā al-wāqīʿ*?, borrowing the term of Hasan Hanafī). By developing a new paradigm is expected to be able to interact intensely with the values of modernity. This new paradigm permanently places *al-Qurʿan* and *al-Sunnah* as the highest sources of Islamic law and places the others as the methods or theories of Islamic law as in the following table:<sup>6</sup>

### Sources and Methodology of Islamic Law In the Jurists' Views of School of Law

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<sup>5</sup> Sayyid Ibn Husayn al-ʿAffani, *Zahr al-Basāʾīn min Mawāqif al-ʿUlamāʾ wa al-Rabbāniyyīn*, vol. 5 (Kairo: Dār al-ʿAffānī, n.d.), 105.

<sup>6</sup> Jasser Auda, *Maqāṣid al-Sharīʿah as Philosophy of Islamic Law, A Systems Approach* (London: Washington: IIIT, 2008), 133-134.

<p style="text-align: center;"><b>The Hanafi School of Law</b></p>	<p style="text-align: center;"><b>The Shi'ah School of Law</b></p>
<p style="text-align: center;">Al-Qur'an Al-Sunnah The Opinion of Ṣaḥābah Qiyās Istiḥsān Ijma' 'Urf Istiḥāb</p>	<p style="text-align: center;">Al-Qur'an Al-Sunnah Ijma' Ṣaḥābah Ahl al-Bayt The Opinion of Ṣaḥābah <i>Ahl al-Bayt</i> Istiḥāb</p>
<p style="text-align: center;"><b>The Maliki School of Law</b></p>	<p style="text-align: center;"><b>The Hanbali School of Law</b></p>
<p style="text-align: center;">Al-Qur'an Al-Sunnah The Opinion of Ṣaḥābah The Tradition of Madinah Qiyās Maṣlaḥah Sad al-Dharī'ah 'Urf Istiḥāb</p>	<p style="text-align: center;">Al-Qur'an Al-Sunnah The Opinion of Ṣaḥābah Ijma' Qiyās Maṣlaḥah Istiḥsān Sadd al-Dharī'ah Istiḥāb</p>
<p style="text-align: center;"><b>The Shafi'i School of Law</b></p>	<p style="text-align: center;"><b>The 'Ibadi School of Law</b></p>
<p style="text-align: center;">Al-Qur'an Al-Sunnah Ijma' Ṣaḥābah The Opinion of Ṣaḥābah Qiyās Istiḥāb</p>	<p style="text-align: center;">Al-Qur'an Al-Sunnah Ijma' Qiyās Istiḥāb Istiḥsān Maṣlaḥah</p>
<p style="text-align: center;"><b>The Mu'tazilah School of Law</b></p>	<p style="text-align: center;"><b>The Ṣahiriyyah School of Law</b></p>
<p style="text-align: center;">Al-Qur'an Al-Sunnah Ijma' Qiyās</p>	<p style="text-align: center;">Al-Qur'an Al-Sunnah Istiḥsān</p>

Maṣlaḥah Istiḥsān	
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From the table above, it can be read that some schools of law, such as Maliki, Hanbali, Mu'tazilah, and 'Ibadi have made the theory of *maṣlaḥah* as an important part in Islamic legal system. However, the leaps of the methodological innovation carried out by the Muslim scholars of *uṣūl*, especially from the 5-8<sup>th</sup> century of *Hijriyyah*, did not mean to be devoid of the spotlight. The critic often arises from contemporary Muslim scholars around the development of the epistemological paradigm of *fiqh* scholarship and the methodological instruments in the present context that it is often trapped in exclusivity and normativity for quite a long period of time. Waardenburg said: "the actual functioning of Islamic jurisprudence in Muslim countries is more restricted than for instance hundreds of years ago".<sup>7</sup>

Furthermore, Abdul Aziz Sachedine also questioned the epistemological building of Islamic law that is male-oriented "there are epistemological problems connected with the way normative sources are retrieved and interpreted by Muslim jurists that have hampered the necessary progress toward one particular area of inter-human relations, namely, the personal status of Muslim women ". As a result, the flexibility of Islamic law, that was originally able to dialogue with the development of the era, still leaves deficiencies on a macro scale.<sup>8</sup>

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<sup>7</sup> Jean Jacques Waardenburg, *Islam: Historical, Social, and Political Perspectives* (Berlin: Walter de Gruyter, 2002), 194-195., within *Perspectives on Islamic Law, Justice, and Society*, ed., Ravindra S. Khare (USA: Rowman & Littlefield, 1999), 146.

<sup>8</sup> Jasser Auda, *Maqāṣid al-Sharī'ah as Philosophy of Islamic Law, A Systems Approach*, xxiii.

## **B. Paradigm of *al-Qawā'id al-Fiqhiyyah* (Islamic Legal Maxim)**

In Islamic law, the term *qā'idah* or *qawā'id*, which is widely known, serves to summarize various problems of Islamic law. With these rules, we will be facilitated to solve various religious problems by using simple and general principles. In the study of Islamic jurisprudence, the Muslim scholars have set various rules as a benchmark for resolving these *fiqh* cases. The word *al-qā'idah al-fiqhiyyah* consists of two words namely *qā'idah* and *fiqhiyyah*. *Qā'idah* is a singular form, while *qawā'id* is a plural form whose meaning is “basic”, “principle”, and “rule”. Whereas, the word *fiqhiyyah* is derived from the word *fiqh* means “understanding”. So that, the term *fiqhiyyah* means a collection of *sharī'ah* laws which are related to the act of *mukallaf* and are excluded from detailed propositions.

According to Musthafa Ahmad al-Zarqa, *al-qawā'id al-fiqhiyyah* is the basics or rules related to the *sharī'ah* law that the most comprehensive parts of which are in the form of concise legal texts and containing stipulations of law in general on events and can be included in those problems. Meanwhile, according to Hasbi Ash-Shiddieqy, *al-qawā'id al-fiqhiyyah* is: “a universal and comprehensive rule of the intentions contained in *sharī'ah* law (*maqāṣid al-sharī'ah*) for a *mukallaf* (every person who can be burdened to carry out orders in Islamic law).

Tajuddin al Subki gives a definition of *al-qawā'id al-fiqhiyyah* as a general and comprehensive legal matter that can be applied to all parts of which to know and understand the law of each part.<sup>9</sup> While, Ali Ahmad al Nadwi defines *al-qawā'id al-fiqhiyyah* is the principles and the basis of the *sharī'ah* law in general. From these general rules, one can know the laws of something under its scope.<sup>10</sup> From the elaboration of the definition of these scholars, it can be stated

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<sup>9</sup> Ali Ahmad Al-Nadwi, *al-Qawā'id al Fiqhiyyah* (Beirut: Dār al Qalam, 1991), 41.

<sup>10</sup> Ibid., 45.

that the *al-qawā'id al-fiqhiyyah* begins with the identification of several legal facts that have similar motives inductively. After that, generalizations are made in the form of general *al-qawā'id al-fiqhiyyah* that can be applied to similar problems partially within its scope.

There are, at least, five basic principles in *al-qawā'id al-fiqhiyyah* that have been generalized by Muslim scholars of *fiqh* from various existing branch problems with inductive reasoning. These five rules govern almost all chapters of *fiqh* studies, both worship and *muamalah*. Then, these five rules give birth to other branches that are still in line with the main rules, namely: (1) *al-amr bimaqāṣidihā* / everything depends on the intention and purpose; (2) *al-yaqīnu lā yuzālu bi al-shakk* / belief cannot be lost because of doubt; (3) *al-mashaqqah tajlib al-taysīr* / the difficulty requires the easiness; (4) *al-ḍararu yuzālu* / potential danger must be eliminated; (5) *al-'ādah al-muḥākamah* / tradition or custom can become law.

The rule of *uṣūliyyah* or the rule of *al-qawā'id al-fiqhiyyah* discusses about the use and meaning of word and language. With these rules, the scholars of Islamic law can deduce the meaning of an Arabic word. For example, the rule of *al-amr li al-wujūb* (the meaning of the command word indicates mandatory) or the rule of *al-nahyu yaqtadī al-tahrīm* (the meaning of the word prohibition indicates the prohibition to conduct). These two rules are called *uṣūliyyah* rules which are found in the discussion of *uṣūl al-fiqh* (fundamentals of Islamic law). As an example of the word of God in *al-Qur'an*, chapter *al-Baqarah*: 43 “And establish prayer and give *zakah* and bow with those who bow [in worship and obedience]”. The experts of *uṣūl al-fiqh* will see that in this verse, there is *fi'l al-amr* (command verb). Based on the rules of *uṣūl al-fiqh* of “*al-amr li al-wujūb* (the word command is obligatory to carry out), then they will conclude that prayers and *zakah* are compulsory.

As for *al-qawā'id al-fiqhiyyah* (Islamic legal maxim) is a rule which is a conclusion of many problems of Islamic law

that have similarities, so that, the rules that represent the equation appear. As an illustration, the Islamic jurists are faced with hundreds of problems of Islamic law. After they examined those cases, they found a similarity in all of these problems. That similarity is later concluded to be the rule of Islamic law. For example, after examining many problems of Islamic law, the conclusion is that the “danger” must be eliminated, so they make the rule *al-dḍararu yuzālū* (all potential hazards must be eliminated). Or on another occasion, it is concluded that something that is believed to be ruling then it cannot be eliminated due to doubts that come after that, so they make the rule *al-yaqīnu lāyuzālū bi al-shakk* (belief cannot be removed with doubt ).

Based on this, the rules of *uṣūl al-fiqh* (Islamic legal maxim) are used earlier than the rules of *fiqh* (fundamentals of Islamic law). Because the rules of *uṣūl al-fiqh* are used to find out the meaning of a word which leads to a legal conclusion. Then from many of these laws, that have the same meaning or purpose, it is concluded to be the principles of *fiqh*. So, in term of the order of use, the origin of the rules of *uṣūl al-fiqh* is applied first, even though, in fact, the rules of *uṣūl al-fiqh* and the rules of *fiqh* are frequently used together.

Historically, in fact, the embryo of *al-qawā'id al-fiqhiyyah* has existed since the time of the Prophet Muhammad SAW. In this period, it was concluded that the seeds of *al-qawā'id al-fiqhiyyah* had existed since the time of Muhammad's treatise, even though, in this era, the Messenger of Allah and his companions had never named them as *al-qawā'id al-fiqhiyyah*. However, from the meaning of the words found by Muslim scholars that the Prophet had said the substance containing the rule of law even from the content of the *hadith* that he said.

The *mujtahid* from among the Muslim scholars then developed the verses of *al-Qur'an* which have general meaning. This, indirectly, many things said by the Messenger of Allah have the essence of *al-qawā'id al-fiqhiyyah*,

including: (1) *al-kharraj bi al-damān* / the rights that receive results because they have to bear losses; (2) *innamā al-a'māl bi al-niyyāt* / indeed, every action depends on the intention; (3) *lā ḍarara wa lā ḍirāra* / may not create danger and may not cause harm ; (4) *al'ujmāu jarḥuhā jabbārun* / damage imposed by animals is not subject to compensation; (5) *mā askara kathīruhu faqaliluhū ḥarāmun* / anything that is intoxicating in large quantities, so, even in the least amount is *haram*.

### **C. Urgency of *al-Qawā'id al-Fiqhiyyah* for *Ijtihad***

As for *al-qawā'id al-fiqhiyyah* or Islamic legal maxim has a very important position in developing the scope of Islamic law through the methods of legal *istinbath*. This also proves that truly, Islamic law is elastic and progressive law. *Al-qawā'id al-fiqhiyyah* is a discipline to formulate general arguments into support in describing a law that is not mentioned in *al-Qur'an*. This discipline is categorized as part of the proposition of the Islamic law and becomes an important component in the formulation of legal discovery. Moreover, a number of Muslim scholars assert that one measure of the degree of scholarship of an expert in Islamic law is the mastery of the science of *al-qawā'id al-fiqhiyyah*. Imam al-Qarrafī even puts this discipline as the basis of the second *sharī'ah* after the science of *uṣūl al-fiqh*. Therefore, it is very important for scholars of Islamic law to study this discipline because it has a progressive character to continue to make Islamic law able to develop effectively and can be accepted by common sense.

Broadly speaking, al-Qarrafī argues about the urgencies of *al-qawā'id al-fiqhiyyah* are, at least, three, namely: (1) *al-qawā'id al-fiqhiyyah* has a special position in the Islamic scientific realm because the expertise of a jurist is closely related to the mastery of *al-qawā'id al-fiqhiyyah*; (2) *al-qawā'id al-fiqhiyyah* can be the basis for giving fatwa; (3) *al-qawā'id al-fiqhiyyah* can make *fiqh* or Islamic jurisprudence

more organized, so that, it makes easier for someone to identify *fiqh* in very large numbers.<sup>11</sup>

Whereas, al-Zarkasyi argues that *al-qawā'id al-fiqhiyyah* will make it easier for scholars of Islamic law to remember and memorize a principle in solving numerous problems of Islamic law.<sup>12</sup> As for Mustafa al-Zarqa', he argues that the urgency of *al-qawā'id al-fiqhiyyah* clearly illustrates the general principles of *fiqh* in nature and opens up horizons and ways of thinking about *fiqh*. *Al-qawā'id al-fiqhiyyah* binds various practical branch laws and explains that each branch law has one *illat* (legal reason) even though the objects and themes are different.<sup>13</sup>

From some opinions of the scholars of Islamic law above, it can be concluded that the significance of *al-qawā'id al-fiqhiyyah* for the continuity of Islamic law are: (1) *al-qawā'id al-fiqhiyyah* is the realm of *ijtihad* in applying the legal *illah* which is dug out from the branch legal issues based on the results of the absolute *mujtahid's* legal reasoning; (2) *al-qawā'id al-fiqhiyyah* has an important role in facilitating the understanding of Islamic law, in which, various branches of law are mostly arranged into one rule; (3) the study of *al-qawā'id al-fiqhiyyah* can help to maintain and bind various and many conflicting problems into a way to present various laws; (4) *al-qawā'id al-fiqhiyyah* can develop a person's cognitive power, so that, they are able to determine unlimited *fiqh* laws in accordance with the norms of their own school of law; (5) binding the various laws in one bond shows that these laws have mutual and large benefits for the life of mankind.

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<sup>11</sup> Al-Qarafi, *al-Furuq*, Vol. 3, (Beirūt: Dār al-Ma'rifah, 1990), 3.

<sup>12</sup> Ali Ahmad al-Nadwi, *al-Qawā'id al-Fiqhiyyah* (Damaskus: Dār al-Qalam, 2000), 326.

<sup>13</sup> Musthafa Ahmad al-Zarqa', *al-Madkhāl al-Fiqh al-'Amm*, Vol. II (Damaskus: Maṭba'ah Jāmi'ah, 1983), 943.

## **D. Towards *Uṣūl al-Fiqh* (Fundamentals of Islamic Law)**

One of the branches of science in the treasury of Islamic legal methodology as an intellectual inheritance of the classical scholars of Islamic law is *uṣūl al-fiqh*. As a science that discusses the foundations underlying the birth of Islamic law (*fiqh*), the urgency of *uṣūl al-fiqh* is increasing, especially as a guide in answering various current legal issues. From the science of the Islamic jurisprudence (*uṣūl al-fiqh*), the scope of Islamic law is becoming increasingly broad. As the rules of *al-qawā'id al-fiqhiyyah*, *uṣūl al-fiqh* also proves that the true Islamic law is always alive in harmony in society wherever and whenever. This is what is meant by Islam, with all of its aspects, is always true and beneficial throughout the ages.

The word *uṣūl al-fiqh* is a combination of the two words, *uṣūl* and *fiqh*. The word *uṣūl*, which is the plural of the word *aṣlun*, etymologically means “something which functions as the basis for others”. This meaning, etymologically, is not far from the definitive purpose of the original word (*aṣlun*) because the science of *uṣūl al-fiqh* is a science upon which an Islamic jurisprudence is based on. While etymologically, the word *fiqh* means “deep understanding”. The meaning of *fiqh* in the legal term is actually not much different from the etymological meaning as mentioned above, namely: “the science of *sharī'ah* laws related to *amaliah* (actions practiced by mankind in their daily life) which is explored and formulated from specific arguments”. So that, from the meaning of *fiqh* in that term, it can be understood that the science of *fiqh* is a discussion of *sharī'ah* laws relating to actions and about specific arguments. Thus, *uṣūl al-fiqh*, in Islamic legal term, means: “the knowledge of the rules that lead to the effort to formulate the *syarī'ah* law from its specific proposition”, or

in a simple meaning is: “the rules that explain the ways of issuing the law from its legal arguments”.<sup>14</sup>

The Muslim scholars of *uṣūl al-fiqh* have various definitions about *uṣūl al-fiqh*. Some of them emphasize the function of *uṣūl al-fiqh*, while others emphasize the nature of *uṣūl al-fiqh*. But, in principle, they agree that *uṣūl al-fiqh* is a science whose object of study is the proposition of *sharī‘ah* laws globally with all of their problems. According to Abdul Wahab Khallaf, the definition of *uṣūl al-fiqh* is “*al- ‘ilm bi al-qawāid wa al-buḥūth allatī yatawaṣṣalu bihā ilā istifādah al-aḥkām al-shar‘iyyah al-‘amaliyyah min adillatihā al-tafṣīliyyah au hiya majmū‘ah al-qawā‘id wa al-buḥūth allatī yatawaṣṣalu bihā ilā istifādah al-aḥkām al-shar‘iyyah al-‘amaliyyah min adillatihā al-tafṣīliyyah*” (knowing the rules and discussions that are able to become a bridge to take advantage of *sharī‘ah* laws practically from their detailed prepositions, or a collection of rules and discussions that can be a bridge to take advantage of the *sharī‘ah* laws practically from their detailed arguments).

So, according to Abdul Wahab Khallaf, the aims of studying *uṣūl al-fiqh* are: (1) to apply the rules, theories, discussion of the arguments/prepositions in detail in producing Islamic *sharī‘ah* law which is taken from those prepositions; (2) to look for habits of understanding of the Islamic religion; (3) to study Islamic laws related to human life; (4) Muslims must strive to deepen knowledge in religious laws in the field of creed, morals, and *muamalah*.<sup>15</sup>

The scopes of the discussion on *uṣūl al-fiqh* are as follows: (1) the sources of Islamic law or the arguments used in exploring *sharī‘ah* law, both agreed and disputed; (2) looking for a way out of the postulates which are outwardly considered to be contradictory; (3) discussion of *ijtihad*, conditions, and the characteristics of a person who does it

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<sup>14</sup> Amir Syarifudin, *Ushul Fiqih* (Jakarta: Logos Wacana Ilmu, 1997), 35.

<sup>15</sup> Syahrul Anwar, *Ilmu Fiqh & Ushul Fiqh* (Bogor: Ghalia Indonesia, 2010), 77.

(*mujtahid*), both concerning general conditions and specific conditions about knowledge that must be possessed by a *mujtahid*; (4) discussion of *sharī'ah* law which includes the conditions and types of which; (5) discussion of the rules used in terminating the law from the postulates, both through the language rules and through understanding the objectives to be achieved by a text (verses of *al-Qur'an* or *hadith*).<sup>16</sup>

The science of *uṣūl al-fiqh*, like the formulations of other sciences of *sharī'ah* law such as the science of interpretation, the science of *hadith*, the science of Arabic language, initially did not take the form of systematic and ready to use at the beginning of its development. At least, this knowledge began to take shape systematically at the end of the second century of *Hijriyyah*, namely when Imam al-Shafi'i (d. 204 AH) began to formulate it in a work entitled *al-Risālah*. To see the history of the development of the science of *uṣūl al-fiqh*, at least, it can be mapped into several phases. First: the seed of *uṣūl al-fiqh* science; second: the initial systematization of the science of *uṣūl al-fiqh*; third: the systematization of the two sciences of *uṣūl al-fiqh*; fourth: the golden period of the science of *uṣūl al-fiqh*; fifth: the development in the form of explanations and summaries of the works of *uṣūl al-fiqh*; and sixth: the development in the form of *taisīr / taṣhīl*.

During the time of the Messenger of Allah (Muhammad SAW), all problems related to Islamic law were all able to be answered by the Prophet and none of those who rejected the decree. Along with that, the seeds of the science of *uṣūl al-fiqh* had begun to grow even though they had not found their ideal form as a science that we know today. The seed of the science of *uṣūl al-fiqh* continued to develop during the companions period. When the Prophet died, the ones who played a major role in shaping Islamic law were the companions of the Prophet. At this time, the companions, including the time of *tabi'in*, did a lot of *ijtihad*

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<sup>16</sup> Nasrun Haroen, *Ushul Fiqh* (Jakarta: PT Logos Wacan Ilmu, 1997).

(independence interpretation) when a problem was not found in *al-Qur'an* and *al-Hadith*. In conducting *ijtihad*, the companions had used the rules of *uṣūl al-fiqh*, even though, it had not been formulated in a scientific discipline. Their decisions and agreements as a result of deliberations were known as *ijma'* of the companions. The methods they used at conducting *ijtihad* were *qiyas* (analogy) and *maslahah*.<sup>17</sup>

During the *Tabi'in* period, the history of the development of *uṣūl al-fiqh* was marked by the polarized of *manhāj al-istinbāṭ al-ḥukm* (methodology of conducting *ijtihad* in Islamic law) by the Muslim scholars at that time. They were classified as two major schools of law, namely the *ahl al-āthār* school of law which was centered in Hijaz and the *ahl al-ra'y* school of law which was centered in Iraq. Finally, this knowledge began to be systematized in its initial form by Imam Muhammad bin Idris al-Shafi'i (d. 204 AH) through his work *al-Risālah*. Imam Khathib al-Razi (d. 606 AH) said, "all people agree that a person who first formulated the science of *uṣūl al-fiqh* is Imam al-Shafi'i. He is a person who wrote the chapters and distinguished some of their objects from the others".<sup>18</sup> And based on the confession of

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<sup>17</sup> There is also an opinion says that in the time of *Tabi'in* (the period after the companion), where Islam was increasingly widespread throughout the world, the *istinbath* (independence interpretation) method became a demand and became clearer. The *Tabi'in* carried out *ijtihad* in various Islamic regions, such as in Madinah, Iraq, and in Basrah. The starting point of the Muslim scholars in setting the law can be different from one another. Some use *maṣlaḥah* and some other use *qiyās* (analogy). From this different point of view, it then gives rise to three large streams, each of which has a different character. The three groups are Iraq school of law, Kufah school of law, and Madinah school of law. Iraq school of law is more rational. Whereas, Kufah school of law also prioritizes reason, and Madinah school of law is known as *Hadith* school of law.

<sup>18</sup> Muhammad Ibn Umar al-Razi, *Manāqib al-Shafi'i* (Kairo: Maktabah al-Kulliyāt al-Azhariyyah, 1406 AH), 153.

Imam al-Isnawi (d. 772 AH), he said: “our Imam, al-Shafi’i, is the first person to write this knowledge based on *ijma*”.<sup>19</sup>

The post-al-Shafi’i period, the science of *uṣūl al-fiqh* continued to experience rapid development. Works with nuance of *uṣūl al-fiqh* began to appear. In this phase, the systematization of the objects of the science of *uṣūl al-fiqh* increasingly found its essence. During this time, works, such as: *Ṭā’ah al-Rasūl* by Imam Ahmad Ibn Hanbal (d. 241 AH), *Al-Ijma’*, *Ibṭāl al-Taqlīd*, *Khābar al-Wāḥid*, *al-Khuṣūs wa al-’Umūm* are all the works of Dawud Ibn Ali al-Zahiri (d. 270 AH), *Khābar al-Wāḥid*, and *Ithbāt al-Qiyās* by Isa Ibn Aban al-Hanafī (d. 221 AH), *Risālāt fī al-Uṣūl* by Ubaidillah al-Karkhi al-Hanafī (d. 340 AH), and *al-Fuṣūl* by Abu Bakar al-Jassas al-Hanafī (d. 370 AH).<sup>20</sup> These works show the productivity of the post-al-Shafi’i scholars in exploring and creating a methodology for Islamic law.

Studies about the science of *uṣūl al-fiqh* continued to crawl until the 5<sup>th</sup> and the 6<sup>th</sup> centuries of *Hijriyyah*. At this time, it had reached the golden phase of the science of *uṣūl al-fiqh* which was marked by the emergence of works that began to encompass all the objects of *uṣūl al-fiqh* science as it is known today. Even, the works of *uṣūl al-fiqh* in this phase became the foundation of the whole studies of Islamic jurisprudence which continued to be developed in subsequent phases with their respective patterns. This phase was marked by the emergence of works, such as: *Al-’Umad* by Qadhi Abdul Jabbar al-Mu’tazili (415 AH), *Al-Mu’tamad* by Abu al-Husain al-Bashri al-Mu’tazili (436 AH), *Al-Luma’*, *Sharḥ al-Luma’*, and *al-Tabṣīrah* are all by Abu Ishaq Shirazi al-Shafi’i (476 AH), *Al-Faqīh wa al-Mutafaqqih* by al-Khathib al-Baghdadi al-Shafi’i (463 AH), *Al-Burhan* by Imam al-

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<sup>19</sup> The statement of Imam al-Isnawi is: كَانَ إِمَامَنَا الشَّافِعِيُّ رَضِيَ اللَّهُ عَنْهُ هُوَ الَّذِي أَوَّلَ مَنْ صَنَّفَ فِيهِ بِالْإِجْمَاعِ “المبتكر لهذا العلم بلا نزاع وأول من صنف فيه بالإجماع” Abdurrahman Ibn al-Hasan al-Isnawi, *al-Tamhīd fī Takhrīj al-Furū’ alā al-Uṣūl* (Beirut: Mu’assasah al-Risālah, 1400 AH), 45.

<sup>20</sup> ‘Iyadh Ibn Nami al-Sulami, *Uṣūl al-Fiqh alladhī Lā Yasā’ al-Faqīh Jahlahu*, (Riyad: Dār al-Tadmūriyyah, 2005), 8.

Haramain al-Juwayni al-Shafi'i (478 AH), *Al-Mustashfā*, *Al-Mankhūl*, *Shifā' al Ghalil* are all by Abu Hamid al-Ghazali al-Shafi'i (505 AH), *Al-'Uddah* by Qadhi Abu Ya'la al-Hanbali (458 AH), *Al-Wādih* by Ibnu 'Aqil al-Hanbali (512 AH), *Al-Tamhīd* by Abu al-Khatthab al-Kalwadzani al-Hanbali (510 AH), *Al-Uṣūl* by al-Sarakhsi al-Hanafī (483 AH), *Kanz al-Wuṣūl ilā Ma'rifah al-Uṣūl* by al-Bazdawi al-Hanafī (482 AH), *Ihkām al-Fuṣūl* and *Al-Ishārah* are all the works of Abu al-Walid al-Baji al-Maliki.<sup>21</sup>

As part of the methodology of Islamic law, science of *uṣūl al-fiqh* is proposed from the elements in it, namely: (1) the *'aqīdah/tauḥīd/kalām*; this knowledge becomes the reference of the science of *uṣūl al-fiqh* in relation to how to build *naqli* (revelation) and *aqli* (reason) arguments on the sources of Islamic law; (2) the science of Arabic language; this is due to the sources of Islamic law are in Arabic, so, these sources must be understood as the Arabs understand the language. From this scientific reference, the objects of the study of *uṣūl al-fiqh* are born around *dalālah al-fāz* (implied meaning of each word), *'umūm wa khuṣūs* (universality and specificity), *mutlaq muqayyad* (absolute meaning or restricted meaning), *amrun wa nahyun* (words that indicate the command and prohibition); (3) Islamic jurisprudence or the science of *fiqh*; basically, the science of *uṣūl al-fiqh* is created in order to produce various *sharī'ah* laws which are then compiled in the science of *fiqh*.

According to Hasan Hanafi, a Muslim contemporary figure and thinker who cares and is concerned with the issue of Islamic legal methodology, said that the science of *uṣūl al-fiqh* is something that is very valuable for the development of Islamic law towards perfection. *Uṣūl al-fiqh*, as a theory and epistemology of Islamic law, in fact, is very urgent to be revitalized. The need is because history has proven that *uṣūl al-fiqh*, although, at first, it was an extraordinary work created by *uṣūliyyūn* (the Muslim scholars of *uṣūl al-fiqh*),

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<sup>21</sup> Ibid.

but, in the next process, it experienced sacralization and standardization. This is because the science of *uṣūl al-fiqh* has lost its historical and human's cognitive dimensions. Whereas, in the beginning, the Islamic methodologies, such as *ijma'* and *qiyas* underwent a process of historical evolution. In this context, the revitalization effort of the science of *uṣūl al-fiqh* is very significant to do. Hasan Hanafi also asserted that by using a historical approach, understanding by involving the humanitarian and historical dimensions, the science of *uṣūl al-fiqh* that had been produced by the classical Muslim scholars would be able to become a very effective Islamic legal methodology in today's life.

### **E. Contextualization of Methodology of Islamic Law**

In the course of history, Muslim scholars were always looking for new formulas in developing Islamic legal methodologies to be able to contribute in answering various problems arise. In addition, the development of the methodology was a necessity of the people at the time. In a modern time, encouragement will need an evaluation of the epistemological and methodological construction of *fiqh* to strengthen. It aims to make Muslims able to become an important element and can take a significant role in the midst of increasingly sharp competition. Then the reorientation and reconstruction of thoughts about Islamic law (*fiqh*) is a necessity as An-Naim said: "once it is appreciated that *sharī'ah* was constructed by its founding jurists, it should be possible to think about reconstructing certain aspects of *sharī'ah*".<sup>22</sup>

The need for reorientation and reconstruction of Islamic law is as An-Na'im's comments around the three fundamental issues that are considered not to reflect the values of justice, equality, and freedom, namely slavery,

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<sup>22</sup> Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse: Syracuse University Press, 1990), xiv;

gender discrimination and non-Muslims as the second class in the Muslim community. The classification between *ḥarbi* unbeliever and *dhimmi* unbeliever in various classical *fiqh* literatures or even today is a form of discrimination on the basis of religion. A *dhimmi* unbeliever is often equated with a woman. For example, the testimony (witness) in the case of *ḥudūd* and *qisās*, one Muslim male is the same as two *dhimmi* unbelievers or two women. In the field of politics, not all but only in certain region, a *dhimmi* unbeliever either becomes a second class or even loses his political rights altogether even though he is a resident.

Departing from the facts above, An-Na'im makes it clear that there are actually similarities between Islamic law (*sharī'ah*) in the historical context<sup>23</sup> and the conception of Human Rights in a modern terminology. However, from the formative period of Islamic law in the 7<sup>th</sup> – 9<sup>th</sup> AD until the end of the second and even third millennium, slavery has not disappeared institutionally, discrimination against non-Muslims, and the assumption that women are the second hand and do not have legal skills as men are still a tradition.<sup>24</sup> As a result, the rights and the acquisition of the value of *maslahah* which they had originally obtained were reduced by the interpretation of *sharī'ah* law (*naṣṣ*) which tends to be men-oriented.

Some points that are considered as gender discriminatory and not in line with the principle of justice

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<sup>23</sup> Fazlur Rahman, *Islam* (Chicago: University of Chicago Press, 1979), 79. This opinion is also corroborated by Joseph Schacht's testimony. He said "fundamentally Islamic law is sourced from *al-Qur'an* and *al-Sunnah* as understood through the practice of the first generation of *fuqahā'*, namely the text of *al-Qur'an* and *al-Sunnah* which was practiced by the Prophet Muhammad and his companions and several subsequent generations until the end of the rule of the *Umayyad* Caliph. See Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1979), 18.

<sup>24</sup> H.A.R. Gibb and J.H. Kramers, *Shorther Encyclopedia of Islam* (Leiden: E. J. Brill, 1953), 67 and see also Noel Coulson, *History of Islamic Law* (Edinburg: Edinburg University Press, 1964), 18-19.

are: (1) a Muslim man may marry Jewish and Christian women, whereas, Muslim women are not permitted to marry a Christian and Jewish man; (2) a husband has the right to divorce his wife whenever he wants, but wife does not have the right to divorce as the man has; (3) in the case of the distribution of inheritance, a man gets twice of the share of a woman, even though, the care of parents is a girl, and even a son has no responsibility to his parents.<sup>25</sup>

Therefore, there must be a meeting point between Islamic law and basic human values in the modern order of life on a national, regional, and international scale through a wise attitude and adequate worldview from contemporary Islamic law scholars.<sup>26</sup> There is a short phrase of An-Na'im that is quite interesting as a form of dissatisfaction with the dynamics of Islamic law in the global arena: "when we consider writings by the contemporary Muslim scholars, we find that most of the published expositions of human rights in Islam are not helpful because they overlook the problems of slavery and discrimination against women and non-Muslims".<sup>27</sup> Actually this expression is a form of An-Na'im's dissatisfaction with the phenomena included in response to Khadduri's statement which said: Human rights in Islam, as prescribed by the divine law or *shari'ah* are the privileges only of persons of full legal capacity. A person with a full capacity is a living human being of mature age, free, and of Muslim faith. It follows, accordingly, that non-Muslim and slaves who lived in the Islamic state were only partially protected by law or had no legal capacity at all.<sup>28</sup>

The meeting point between human rights and Islam is a quite interesting theme today both in the Islamic world itself and at the international level. In line with An-Na'im's point

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<sup>25</sup> H.A.R Gibb and J.H. Kramers, *Shorther Encyclopedia of Islam*, 67.

<sup>26</sup> Abdullahi Ahmed An Na'im, *Toward an Islamic Reformation; Civil Liberties, Human Rights, and International Law*, 170-173.

<sup>27</sup> *Ibid.*, 171.

<sup>28</sup> Majid Khadduri, "Human Rights in Islam," within *Annals of the American Academy of Political and Social Science*, 79.

of view, Auda also believes that the reform agenda of the Islamic legal methodology must reflect a linear spirit with the universal declaration of human rights as a component in the objectives of Islamic law itself. Thus, according to Auda, sources of contemporary Islamic law are: (1) *al-Qur'an*; (2) *al-Sunnah*; (3) *maslahah* which is derived from the texts; (4) *ijtihad* of the Imams of the schools of law; (5) human's ratio; (6) universal values contained in the declaration of human rights both on a national and international scale.<sup>29</sup> Here, the signal of a shift in the instrument of Islamic law is getting stronger by placing the theory of *maslahah* in the third rank and universal values & human rights in the sixth rank.

Jasser Auda, in his book *Maqāṣid al-Sharī'ah as Philosophy of Islamic Law*, said that the main agenda of contemporary *maqāṣidiyyūn* (a term to refer to those of the Muslim scholars who are expert in the theory of *maqāṣid al-sharī'ah*) is to make consensus about the need to reform and reinterpret the building of the epistemology of the classical Muslim thinkers to uncover the spirit of Islamic law. Thus, the source structures of Islamic law according to this group are *al-Qur'an*, *al-hadith*, Muslim scholars and philosophers, modern law and moral values and consensus. Still according to some critics about the epistemological construction of Islamic law, that Islam as practiced in the era of the Prophet was inadequate to deal with various problems of contemporary Muslims (Islam as practiced during the time of the Prophet is no longer valid). In brief, it can be underlined that the basic principles of modernity in the realm of Islamic law are reform, reinterpretation, evolution, reconstruction, contextualization of Islamic law, tradition, rational thought patterns in the frame of *maqāṣid al-sharī'ah* or *maṣlahah*.

The search for universal values had existed in the Universal Islamic Declaration on Human Rights. The declaration was declared in 1981 by a number of Muslim

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<sup>29</sup> Jasser Auda, *Maqāṣid al-Sharī'ah as Philosophy of Islamic Law, A Systems Approach*, 159. Jasser Auda, *Maqāṣid al-Sharī'ah as Philosophy of Islamic Law*, 147.

figures and scholars from around the world at UNESCO (United Nations Educational, Scientific and Cultural Organization). Some of the intended universal values are the right to life, freedom, equality, justice, transparent justice, fair of trial, protection against crime and torture, asylum, freedom of religion and speech, freedom of association, education, and freedom of mobility.

From the criteria above, countries that are predominantly Muslim are still deemed unable to catch up with European countries. The Universal Islamic Declaration on Human Rights (UIDHR) was declared in 1981 in Paris with 23 articles. Then in 1990, the Cairo Declaration on Human Rights in Islam was also declared. Both of these declarations are actually a response to the declaration of Human Rights by the United Nations in 1948, the Council of Europe in 1950, and the European Conference on Security and Corporation in 1975. The main purpose of the UIDHR is to show the world and to acknowledge that human rights in Islam have existed since 14 centuries ago. The main figures and, at the same time, as UIDHR drafter are Abul A'la Mawdudi and Sutan Hussein Tabandeh.<sup>30</sup>

## **F. Significance of *Ijtihad* in Islamic Law**

Muslim scholars (*ulama*) have differences in defining the word *ijtihad* and its emphasis. Some definitions of *ijtihad* given by the Muslim scholars are as follows: (1) al-Shafi'i says that *ijtihad* consists of an analogy (*qiyās*); (2) Ibn Hazm defines *ijtihad* is to investigate the provisions of God through *al-Qur'an* and al-Sunnah; (3) Abu Ishaq al-Shirazi argues that *ijtihad* is more general than analogy because *ijtihad* means trying hard to achieve certain legal provisions; (4) according to al-Imam al-Ghazali, *ijtihad* means maximum effort by a *mujtahid* in studying the provisions of religion; (5)

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<sup>30</sup> Jean Jacques Waardenburg, *Islam: Historical, Social, and Political Perspectives* (Berlin: Walter de Gruyter, 2002), 171-176 see also Robert Spencer, *The Politically Incorrect Guide to Islam* (USA: Regnery Publishing, 2005), 196-197.

while Mustafa al-Shalabi gives a broader definition of *ijtihad*, namely efforts to extract religious laws, symbols, expressions, and very deep text meanings. Of the several definitions that seem different from each other, but, in fact, there are similarities in principle that *ijtihad* is a hard effort of someone who has the ability in the field of law and methodology to remove the law from its main sources, namely *al-Qur'an* and *Hadith*.

Historians of Islamic law note that the peak of the progress of the Sunni school of law in all major issues concerning positive legal issues, Islamic legal methodology, and justice system had occurred at the beginning of the tenth century AD. The achievement in the field of Islamic law and its methodological means prove that at this time, there has been a phase of intellectual maturity of the Muslim scholars. However, amidst the hustle and bustle of the discourse of Islamic law for the increasingly widespread Muslim community, it was suddenly shocked by the controversy about the issue of the closing of the gate of *ijtihad* (*insidād bāb al-ijtihād*).<sup>31</sup> Although this does not occur as a whole in the tradition of the Islamic jurisprudence school of law, but the issue has enough impact on the creativity of the scholars of Islamic law to be able to contribute to progress.

Apart from the issue that was deliberately exhaled by those who did not want progress in Islamic law with all of its aspects, internally Muslims, the issue is part of the belief that only certain people who already have the *mujtahid* qualifications can do *ijtihad*. The requirements to become a *mujtahid* are quite heavy and almost not owned by the Muslim scholars after the previous *mujtahid*. This is what makes them feel they do not have ability to do *ijtihad*. In fact, they feel enough with what has been produced by their

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<sup>31</sup> Salih Kesgin, "A Critical Analysis of the Schacht's Argument and Contemporary Debate on Legal Reasoning Throughout the History of Islamic Jurisprudence", within *The Journal of International Social Research*, vol. 4, No. 19 (2011), 163.

predecessors even though various new problems arise and are not able to be covered by classical *fiqh*.

In the midst of the uncertainty and pessimism of some Muslim scholars (*ulama*) to do *ijtihad*, some scholars began to be suspicious of the issue. They agreed that the principle of *ijtihad* had been instilled by the Prophet Muhammad SAW to the Companions in solving cases that were not covered in *al-Qur'an* and *hadith*. Among the history of consensus about the freedom of Muslims to always think progressively is a *hadith* about the event between the Prophet and Mu'adh Ibn Jabal when he was appointed as a judge (*qādī*) in Yemen. This condition continued until the period of the *Rāshidūn* Caliphate and the *Umayyah* Caliphate known as *al-ijtihād bi al-ra'y* until the 8<sup>th</sup> century AD.<sup>32</sup> In Post-8<sup>th</sup> century AD, *ijtihad* was gradually separated from *ra'y*.

Among the Muslim scholars who strongly opposed that the door of *ijtihad* was never closed were Jamal al-Din al-Afghani, Muhammad 'Abduh, Muhammad Iqbal, and other reformist Muslim scholars. They believe that Islam is *ṣalīḥ li-kulli zamān wa makān* (Islam is always relevant along with the times and places). Therefore, it is very unlikely that Islam as a religion of God is only limited to certain times and places. What is exemplified by the Prophet Muhammad in the case of Mu'adh Ibn Jabal is the most powerful legal basis for reviving and awakening Muslims to always be productive and progressive.

In line with various changes in the social, economic, political, scientific and technological areas, often cause serious problems related to Islamic law. Therefore, according to Schacht, the Islamic jurisprudence of modernist Islamic legislation must be logical and permanent and require a firmer and more consistent theoretical basis. Or borrow the phrase of Esposito that if Muslim reformers want to produce comprehensive and consistent Islamic law, they must formulate a systematic methodology that has strong Islamic

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<sup>32</sup> Akgündüz Ahmet, *Introduction to Islamic Law: Islamic Law in Theory and Practice* (Rotterdam: IUR Press, 2010), 152.

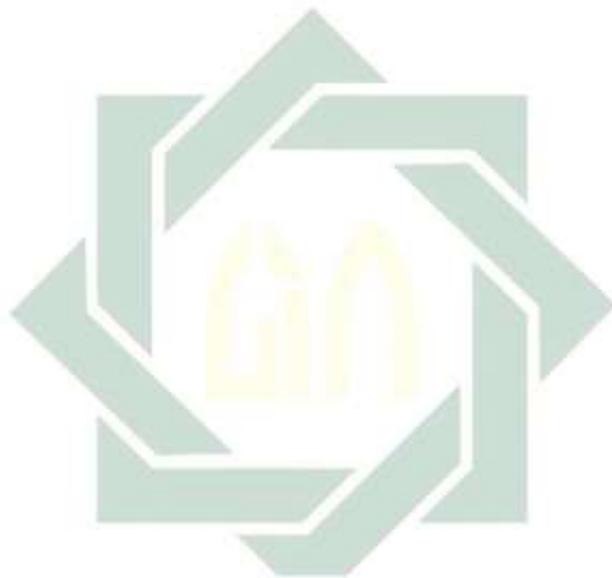
roots. To find the basis of the theory, one important concept that needs to be studied, according to Imam al-Haramain al-Juwayni (d. 478 AH / 1085 AD) is the concept of *maqāṣid al-sharī'ah*. The essence of the theory of *maqāṣid al-sharī'ah* or the purposes of Islamic law is to realize benefit (*maslahah*) for human life and save people from damage and danger. This is the paradigm of the methodology of Islamic law that offers many alternative solutions while still adhering to the universal principles of *al-Qur'an* and *hadith*.

In connection with the significance of the theory of *maqāṣid al-sharī'ah* as a new paradigm in carrying out *ijtihad*, seven centuries ago, Imam al-Shatibi gave accentuation that the knowledge of *maqāṣid al-sharī'ah* was a prerequisite for a *mujtahid* of this time. Rejection of *maqāṣid al-sharī'ah* can be fatal to the outcome of *ijtihad* and fatwa. Those who consider the theory of *maqāṣid al-sharī'ah* as *bid'ah* are those who understand the verses of *al-Qur'an* textually and give less space to the aspects of meaning and the objects in question.<sup>33</sup> According to al-Shatibi, the significance of *maqāṣid al-sharī'ah* as an epistemic framework for thinking in *ijtihad* are: (1) to understand an expression of the texts both from *al-Qur'an* and *Hadith* then issue the meaning of the text through the linguistic maxim approach which is usually operationalized in the discipline of *uṣūl al-fiqh*; (2) to find common ground in the case of contradictory propositions (*ta'āruḍ*) according to the *fuqahā'*; (3) to emphasize the importance of analogy, *'illah*, and wisdom contained in the text of *al-Qur'an* and *Hadith*; (4) to provide guidance in implementing an act that does not have provisions in the text through consideration of *maslahah*; (5) in certain cases where a *mujtahid* is unable to track the purpose of the *sharī'ah* maker, applying textually provisions is better as a form of servitude (*al-ta'abbudī*); (6) there must be awareness to conduct in-depth research on

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<sup>33</sup> Ahsan Lihasanah, *al-Fiqh al-Maqāṣid 'inda al-Imām al-Shāṭibī wa Atharuh 'alā Mabaḥith Uṣūl al-Tashrī' al-Islāmī*, 26-27.

cases that are not mentioned directly in the text of *al-Qur'an* and *Hadith* by operating the method of *istiqrā'*.<sup>34</sup>



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<sup>34</sup> Ibid.

## CHAPTER II

### HUMAN DEVELOPMENT INDEX AS BENCHMARK ON THE EFFECTIVENESS OF ISLAMIC LAW

#### A. About Human Development Index

The Human Development Index (HDI) or *Indeks Pembangunan Manusia* (IPM) is a comparative measurement of life expectancy, literacy, education and living standards for all countries throughout the world. HDI is used to classify whether a country is a developed country, a developing country or an underdeveloped country. It is also used to measure the effect of economic policies on quality of life. This index was developed in 1990 by Indian Nobel laureate, Amartya Sen and Pakistani economist, Mahbubul Haq, and was assisted by Gustav Ranis from Yale University and Lord Meghnad Desai from the London School of Economics. Since then, this index has been used by the United Nations Development Program in its annual HDI report. Amartya Sen described this index as a “vulgar measure” because of its limitations. This index focuses more on things that are more sensitive and useful than just the per capita income that has been used so far. This index is also useful as a bridge for serious researchers to find out in more detail in making human development reports.

In UNDP (United Nations Development Program), human development is a process to enlarge choices for humans. The definition and concept of human development, basically, cover a very broad dimension of development of the country. In the concept of human development, it should be analyzed and understood from its human standpoint, not just from its economic growth. According to UNDP (Human Development Report, 1995: 103), a number of important premises in human development are: (1) development must prioritize the population as the center of attention; (2) development is intended to increase choices for the population, not only to increase their income. Therefore the

concept of human development must be centered on the population as a whole, and not just on the economic aspects; (3) human development pays attention not only to efforts to improve human capabilities, but also to efforts to utilize these human capabilities optimally; (4) human development is supported by four main pillars, namely: productivity, equality, affinity, and empowerment; (5) human development becomes the basis in determining development goals and in analyzing options for achieving them.

According to the United Nations Development Program (UNDP), human development is a very important activity because it is a measure of the progress of a nation. In addition, it also shows that a certain country has a level of prosperity at a certain level. Therefore, UNDP interprets “human development” as a process in order to provide diverse alternatives to the people of a nation in order to have participatory competencies (enlarging the choices of people) in a development through empowerment efforts that give priority to increasing basic human capabilities.<sup>35</sup> So, human development can also be seen as the development of human resources through improving the level of health, knowledge, and skills, as well as utilization of their skills.

There are, at least, four principles that are always inherent in human development, namely productivity, equity, sustainability, and empowerment. These four principles then become a benchmark for the progress of a country. In line with the above definition, Ayunanda Melliana understands the term “development” is an activity in order to improve the level of life and social welfare in various aspects of life. Such activities are carried out in a planned and sustainable way by optimizing the basic capabilities of the available human

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<sup>35</sup> This definition is extracted from the provisions of the Human Development Index (HDI) that was initiated by the United Nations (UN) through a unit called the United Nations Development Program (UNDP)

resources, science and technology, and relying on the social development of the people of a country.<sup>36</sup>

Based on this concept, the population is placed as the final destination, while the development effort is seen as a means to achieve that goal. Noteworthy from the four aspects are: (1) productivity, namely the population must increase productivity and full participation in the process of income and income creation. So, economic development is part of the human development model; (2) equal distribution, i.e. residents have the same opportunity to get access to economic and social resources; (3) sustainability, i.e. access to economic and social resources must be ensured not only for current generations, but also for future generations, including all physical, human and environmental resources; (4) empowerment, i.e. residents must participate fully in decision making processes that will determine (the form/direction) of their lives.

Human development index (HDI), or in Indonesian term commonly referred to as *Indeks Pembangunan Manusia* (IPM), is a program launched by the United Nations (UN) with a view to measuring the extent of human development achievements through three basic components of quality of life, namely: (1) longevity; (2) level of knowledge and education; and (3) a decent life or standard of living. The higher these three components in a country, the better human development is as a vital aspect. For developed countries, the achievement of the three aspects is quite high, farther above developing countries, especially countries that are still lagging behind.

Each of the three dimensions has an indicator to measure whether the three dimensions are high, medium, or low. For example, the health dimension can be seen from the indicator of life expectancy at birth. The education dimension

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<sup>36</sup> Melliana, "Statistika Faktor yang Mempengaruhi Indeks Pembangunan Manusia di Kabupaten/Kota Provinsi Jawa Timur dengan Menggunakan Regresi Panel", within *Jurnal Sains and Semi Pomits* Vol. 2 No. 2 (2013).

is used to look at the literacy rate and average length of schooling. And the purchasing power of a community against a number of basic needs to measure the dimensions of a decent standard of living. The interconnection and synergy points of the three dimensions are a measure of whether a region or country is classified as a developed, developing, or underdeveloped country. It is also intended to find out what policies are supposed to be taken by the government to be reflected in the decision making of a country in the future, especially economic policy. Thus, the quality of life of a society of a nation can compete competitively from year to year.<sup>37</sup>

According to Muchlas Samani, the Human Development Index (HDI), or in Indonesian term called the *Indeks Pembangunan Manusia* (IPM), is a standard set by the United Nations to view and measure the welfare level of a country's society on the basic aspects of life, such as: expectancy, education level, and standard of living for all countries in the world. By knowing the high or low of the Human Development Index of a country, it becomes a correction for that country to further enhance development that in need to be increased. This program also provides information to the world that a country has been able to achieve high or low of the Human Development Index levels. In the economic aspect, the high level of the Human Development Index of a country will provide legal certainty for business actors to invest. On social aspects and environmental cleanliness, it will provide a sense of security for foreign tourists to come to the country concerned.<sup>38</sup>

Departing from the three main aspects above then developed into points or sub-points as the translation of the three. This index is seen by using more than 200 criteria

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<sup>37</sup> Hem Lata Joshi, *Human Development Index, Rajasthan: Spatio-temporal and Gender Appraisal at Panchayat Samiti/Block Level (1991-2001)* (New Delhi: Concept Publishing Company, 2008), 1.

<sup>38</sup> Muchlas Samani and Hariyanto, *Konsep dan Model Pendidikan Karakter* (Bandung: PT Remaja Rosdakarya, 2011), 239.

including low level of political participation, literacy, direct role in education, hopes for survival, access to clean water, labor, living standards, and gender justice.<sup>39</sup> Amartya Sen sees that this index is a vulgar measurement with absolute boundary characteristics. He adds that this index is more focused on things that are sensitive and more constructive than just per capita income which has been used as a reference for every country. In addition, this index also functions as a mediator for researchers to find out more particular things in making human development reports of an area or country.

### **B. Human Development Index in Historical Paths**

Discussion around socio-economic development has long been going on, including indicators as benchmark of these achievements. Per capita income of a nation, as an indicator of development, has been sued by economic and non-economic circles. They consider that the indicators are no longer accurate in looking at the level of socio-economic development of a particular society in a particular country. Therefore, they are trying to make new indicators more credible and able to describe conditions more accurately about the level of social and economic progress. The intended indicator is the focus on human development. According to Morris, if the socio-economic development achievement indicator can be seen from the Physical Quality of Life Index (PQLI), it is different from the United Nations Development Program (UNDP) which sees that building a Human Development Index (HDI) will be more affective.

The Human Development Index is the result of an annual report made by the United Nations Development Program (UNDP) since 1999 for countries around the world. The originators of this brilliant idea were three persons, namely: (1) Nobel laureate from India, Amartya Sen; (2) a

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<sup>39</sup> Data was taken from the 2000 and 2012 Human Development Index reports released by The United Nations Development Program (New York: Gilmore Printing Service Inc., 2013), 143-147.

Pakistani economist, Mahbub ul Haq.<sup>40</sup> He is also a thinker from Yale University; (3) Gustav Ranis, an economist from London School of Economics Lord Meghnad Desai. In launching its development model, the United Nations Development Program (UNDP) places people at the center of all development processes and activities. Since 1990, UNDP has issued annual reports on the progress of human development for countries in the world. One of the measurement tools to see aspects that are relevant to human development is through the Human Development Index (HDI), which is also known in Indonesian term as the *Indeks Pembangunan Manusia*.

The Human Development Index is a classification index about the achievement of a country that includes three basic competencies, namely: (1) education as measured by literacy or literacy rates in adults (with a weight of two-third) and a combination of primary, secondary, top, gross education enrollment ratio (weight one-third); (2) healthy life and longevity as measured by life expectancy at birth, and; (3) an adequate standard of living is measured by the natural logarithm of gross domestic product per capita in purchasing power partition.

Based on the three indicators, three country groups are established as the following: (1) the countries with low level of human development. This level happens if the Human Development Index ranges from 0 to 50. Countries that fall

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<sup>40</sup> Mahbubul Haq is an economist from Pakistan. In addition, he is also a professor of microeconomics at the University of Karachi. He served as the 13<sup>th</sup> Minister of Finance of Pakistan who served for 5 years, starting from April 10, 1985 to January 28, 1988. Some of the scientific papers he wrote increasingly led to the stronger legitimacy of his expertise in the economic field. As his work entitled "Reflections on Human Development" (1996) further strengthened the opening of new avenues for human development policy proposals and became an inspiration for the formation of the Economic and Social Council of the United Nations. He served as chief economist of the Planning Commission during the 1960s, and was the director of the World Bank's Department of Policy Planning in the 1970s. He is known as a spokesperson that is capable of articulating and persuading for developing countries.

into this category are classified as countries that have low concern or ability for human development; (2) countries with moderate level of human development if the Human Development Index ranges from 51 to 79. Countries included in this category have shown that there are serious efforts to improve their human resource development services; and (3) countries with a high level of human development if the Human Development Index ranges from 80 to 100. Countries included in this category are very concerned about the development of human resources.

Every period, there is a big theme that is carried by the United Nations Development Program (UNDP) as a work program platform and as a determinant of the policy direction of a nation's government. The theme of each year is extracted and is a picture of various global issues that are being faced by the world countries, as in the Human Development Report (HDR) table, as below:

<b>NO</b>	<b>YEAR OF HDR</b>	<b>THEMES OF THE HDR IN EACH YEAR</b>
1	HRD 1990	Concept and Measurement of Human Development
2	HDR 1991	Financing Human Development
3	HDR 1992	Global Dimensions of Human Development
4	HDR 1993	People's Participation
5	HDR 1994	New Dimensions of Human Security
6	HDR 1995	Gender and Human Development
7	HDR 1996	Economic Growth and Human Development
8	HDR 1997	Human Development to Eradicate Poverty
9	HDR 1998	Consumption for Human Development
10	HDR 1999	Globalization with a Human Face
11	HDR 2000	Human Rights and Human Development
12	HDR 2001	Making New Technologies Work for Human Development
13	HDR 2002	Deepening Democracy in a Fragmented World

14	HDR 2003	Millennium Development Goals: A Compact Among Nations to End Human Poverty
15	HDR 2004	Cultural Liberty in Today's Diverse World
16	HDR 2005	International cooperation at a crossroads: Aid, trade and security in an unequal world
17	HDR 2006	Beyond scarcity: Power, poverty and the global water crisis
18	HDR 2007-2008	Fighting climate change: Human solidarity in a divided world
19	HDR 2009	Overcoming barriers: Human mobility and development
20	HDR 2010	The Real Wealth of Nations: Pathways to Human Development
21	HDR 2011	Sustainability and Equity: A Better Future for All
22	HDR 2013	The Rise of the South: Human Progress in a Diverse World
23	HDR 2014 <sup>41</sup>	Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience.
24	HDR 2015	Work for Human Development
25	HDR 2016	Human Development the Way ahead.
26	HDR 2018	Human Development Indices and Indicators.
27	HDR 2019	Beyond income, beyond averages, beyond today: Inequalities in human development in the 21st century

Each of the major themes above also shows the direction of activities and the direction of achievement that must be carried out by each country. The trends regarding these themes are based on the main problems faced by the majority of the world community. This report

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<sup>41</sup> This work program platform is quoted from Human Development Reports 1990-2014. The report on human development was absent in 2012. In this case, the writer did not find a reason why that year was absent.

comprehensively explains the performance of countries in maintaining the welfare of their citizens. By using the Human Development Index (HDI), which is a combination of indicators, such as health, wealth, and education, the level of the each country's human development can be easily classified. From the results of the report that has been made by UNDP, it can be seen the ranking of countries that occupy the position of developed, developing, and underdeveloped countries. This ranking also shows that the policy direction of a nation has reached the point of hope or not.

In 2015, one of the countries in the highest level in Southeast Asian country was Japan. Japan has the highest life expectancy after Hong Kong and Australia. In this period, Indonesia must be satisfied with a score of 70.1. Nevertheless, the trend of Indonesian people's life expectancy continues to creep up from year to year. This shows that there is an increase in policies and standards of healthy living from the government to take care and seriously in ensuring the sustainability of its people.

### **C. Standard of Human Development Index**

To find out the level of the Human Development Index of a country, the United Nations Development Program has determined a formula that is generally used by the world countries by changing an initial variable. Example is  $x$  of a free index between 0 and 1 (which allows different indexes to be added as a whole). The formula was subsequently converted in the context of calculating the Human Development Index level in several provinces/cities throughout Indonesia. The team of Human Development Index report in 2006-2007 determined that the status of human development according to the United Nations Development Program could be classified into 3 (three) major groups, namely:

- a. Low level : HDI < 50
- b. Intermediate level : 50 < HDI < 80

c. High level : HDI 80

In the context of comparability between regions in Indonesia, comparison between districts/cities, the second criterion, namely the intermediate level is divided into 2 (two) groups, thus, the status description will change to be as follows:

- a. Low level : HDI <50
- b. Lower-middle level : 50 <HDI <66
- c. Middle-high level : 66 <HDI <80
- d. Top level : HDI 80

The formulas used to calculate the Human Development Index is:  $HDI = 1/3 [X (1) + X (2) + X (3)]$ , where:

- X (1) : Life expectancy index
- X (2) : Education index =  $2/3$  (literacy index) +  $1/3$  (average length of school index)
- X (3) : Index of living standards/index of expenditure per capita.

Each Human Development Index component is a comparison between the difference of an indicator score and its minimum score with the difference between the maximum score and the minimum score concerned. Thus, the formula can be presented as follows:

Index  $X (i) = X (i) - X (i) \text{ min} / [X (i) \text{ max} - X (i) \text{ min}]$ , where:

- X (1) : Indicator to i (i = 1, 2, 3)
- X (2) : Maximum grade of school X (i)
- X (3) : Minimum grade of school X (i)

The maximum score and minimum score of indicator X (i) has been determined by the United Nations Development Program as the following table:

The Maximum and Minimum Score of the Components  
Of the Human Development Index (HDI)

COMPONENTS OF IPM (=X(I))	MAXIMUM SCORE	MINIMUM SCORE	EXPLANATION
Life Expectancy	85	25	Based on the global standard of UNDP
Literacy Rate	100	0	Based on the global standard of UNDP
Average Length of School	15	0	Based on the global standard of UNDP
Adjusted per capita consumption 1996	732.720 <sup>a)</sup>	300.000 ... (1996) 360.000 <sup>b)</sup> ... (1999)	UNDP uses adjusted real GDP per capita

Source: Nanggroe Aceh Darussalam Central Statistics Agency's Expose on HDI, 2009

Note:

- a. Estimated maximum at the end of PJP II in 2018
- b. Adjusting the old poverty line with the new poverty line

#### **D. Human Development Index in Indonesia**

Human development is one of the concerns and becomes a United Nations' (UN) pilot project together with other programs such as peace, health, cooperation among the nations of the world etc. The higher the level of human development of a country, the more it shows that the country has an increasingly established level of prosperity. In addition, the high and low levels of human development of a country will also be able to provide certainty to the world to invest in the country. One effective way to find out the

conditions of human development is to use the Human Development Index (HDI). This index is an accumulation of indicators, such as health, wealth, and education.

Of the countries in the world to be the objects of UNDP (United Nations Development Program) research, Indonesia is still recorded as a country to have low human development index. In 1999, Indonesia ranked the 102<sup>nd</sup> with an index of 0.677. In addition, in 2005, Indonesia decreased in the 110<sup>th</sup> position out of 177 countries of the world, with an index of 0.697. If compared to ASEAN countries, such as Malaysia (sequence 61 with index of 0.796), Thailand (sequence 73 with index of 0.778), Philippines (sequence 84 with index of 0.758) and Vietnam (sequence 108 with index of 0.704), it appears that Indonesia is still relatively low. However, in 2006, Indonesia's number of Human Development Index progressed to reach 0.711 and was ranked the 108<sup>th</sup>, beating Vietnam which had a value of 0.709.

In 2007 Indonesia's number of Human Development Index continued to climb up to 0.728, which placed Indonesia at the 100<sup>th</sup>. However, this position had declined in 2012 and 2013, which was at the 108<sup>th</sup> position. Although Indonesia's rank of Human Development Index was still at the middle level of the countries of the world score of 0.684, it was still below the world average of 0.702. For more details on how to know the Human Development Index scores, especially countries in the Southeast Asia, so, it can be seen in the UNDP's Human Development Report in 2007.

Based on the UNDP's Human Development Report in 2007, Japan still dominated the top life expectancy of 82.7. It means that the average Japanese community can reach the age of 82.7 / year or close to 83 years. Likewise, for the literacy rate, Japan reached of 99.0. This means that education programs in Japan had been successful because only 1 percent of the Japanese population is illiterate, while the remaining of 99 percent is literate. This shows that, the level of illiteracy in Japan is very low.

Conversely, for Indonesia, the life expectancy is only 70.5. This means that the average Indonesian people can only survive at the age of 70.5 years. If it is compared to Japan, it can reach almost 83 years old. Furthermore, the Indonesian literacy rate only reached 92.0. It means that the illiteracy rate in Indonesia was 8.0 percent of the population of Indonesia. Only 92.0 percent of Indonesia's population is not illiterate. The highest ranking of the score of the Human Development Report in the Asian Region is still achieved by Japan, which ranks the 10<sup>th</sup> in the world, while Indonesia ranks the 111<sup>th</sup> in the world.

Based on this score, the Human Development Report for Indonesia is considered sufficient, and the human development in Japan is very high. This shows that in Japan, development has been oriented to basic human needs. The human resources are the main priority in efforts to improve quality. In contrast, in Indonesia, human resources in the development process must still be increased. So it is not surprising that the quality of human resources in Indonesia is still low.

The maximum points that can be achieved by several regions such as DKI Jakarta, Yogyakarta, Riau, North Sulawesi, East Kalimantan and Riau Islands are in the range of 76.00 - 78.59 in 2013. Based on the formula for calculating the national standard ranking, the figure is still classified as medium. However, there is a tendency to increase the level of the Human Development Index in Indonesia from year to year. This reflects that the economic, education and health policies taken by the government are getting better, although it still leaves a lot of home works when compared to other countries.

### **E. Indicators of Human Development Index in Indonesia**

In general, the components of Human Development Index are the age of life (longevity), knowledge, and a decent standard of living. Life span is measured by life expectancy or  $e_0$  which is calculated by using the indirect method (Brass

method, Trussel variant) based on the average variable of children born alive and the average number of children still alive. The knowledge component is measured by literacy rates and average length of school calculated based on the *Susenas Cor* data. For the record, UNDP in its annual HDR publication since 1995 uses primary, secondary, and high school participation indicators as a substitute for average length of school because of the difficulty in obtaining data on average length of school globally. The literacy rate indicator is obtained from the reading and writing ability variable, while the average length of school indicator is calculated using two variables simultaneously; namely the level/class that is being/has been undertaken and the highest level of education completed. To find out in detail the main components used to determine the level of HDI are as follows:

### **1. Expectation of Life at Birth (ELB)**

Expectation of Life at Birth is the average amount of life expectancy that will be lived by a newborn baby in a certain year. ELB is one of the indicators in the health sector to predict one's life opportunity. Through this statistic indicator, it can be seen the development of the level of health in a particular region as well as a comparison with the level of health in other regions.

Life Expectancy Rate is a statistical prediction of how long a person will enjoy life in the world. The survey concluded that there were differences in life expectancy for men and women in Indonesia. The life expectancy of women is relatively higher compared to that of men. The life expectancy of women is 54 years in 1980, then 64.7 years in 1990, and 70 years in 2000. In fact, the increasing life expectancy of the Indonesian population has logical implications for the increasing number of elderly people. Based on the data, Indonesian women entering menopause are now increasing every year. The increasing number is due to the increasing population of the elderly and the high

life expectancy accompanied by an improved degree of public health.<sup>42</sup>

On the other hand, increasing life expectancy is one indicator/assessment of a country's health status and is used as a reference in planning health programs. Life Expectancy Rate, according to the National Development Planning Agency (BAPPENAS), as the author quotes from its official website, states that "Indonesia's population is expected to reach 273.65 million by 2025. In the same year, life expectancy is estimated at 73.7 years".<sup>43</sup>

In line with the results of the BAPPENAS's survey, the CIA World Fact book noted that in 2011, the overall life expectancy of Indonesians was 70.76 years. If divided by sex, the life expectancy of Indonesian men is 68.26 years and 73.38 years for women. Indonesia is ranked number 108 based on the UN's list of the 191 countries published on Wikipedia and Monaco is number 1 with an overall life expectancy of 89.73 years. Then, it is followed by Macau with the number of 84.41 years.<sup>44</sup>

At the ASEAN level, the life expectancy of the population in Indonesia ranks the 6<sup>th</sup> position. In period 2010-2015, the first position was occupied by Singapore, which recorded an index of 82.2 from the previous position of the 2005-2010 period at 81.2. The life expectancy of Indonesian residents was recorded at 70.1 in 2010-2015, or up from 69.1 (2005-2010).<sup>45</sup> A public

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<sup>42</sup> Mitchell H Gail and Jacques Benichou, *Encyclopedia of Epidemiologic Methods* (New York: John Willey & Sons Ltd, 2000), 476.

<sup>43</sup> Kementrian PPN/Bappenas, *Evaluasi Kinerja Pembangunan Daerah (EKPD) di 33 Provinsi Tahun 2014*.

<sup>44</sup> Life expectancy by country according to the CIA World Factbook (2011 survey)

<sup>45</sup> The data was obtained from the Central Statistics Agency (BPS) and the United Nations' report entitled "World Population Prospect: The 2010 Revision Population Database". In a row, the second to eighth position of life expectancy in the Asean period 2010-2015 compared to 2005-2010, in addition to Singapore and Indonesia as follows: Vietnam ranks second with an index of 75.9 from the position of 75.1 (2005- 2010). Third is Malaysia 74.9 from 74.0. Fourth is Thailand 74.3 from 73.3 previously.

policy observer from the University of Indonesia, Patrick Wauran, said that high and low of the population expectations indicate the level of welfare of a country. This includes the country's level of security and growth. For conflict countries, the life expectancy of the population is quite low. This means that the conflict countries are not always based on poor countries, because the data also notes that the life expectancy of the population in the United States is only 78.9 from 78.1. This figure is still below Singapore.

For the indicator of life expectancy, the percentage of the national achievements in 2013 was 70.07 percent, only filled by 15 provinces with achievements above national achievements, while 18 provinces were below the national achievements in 2013. In 2013, the best life expectancy achievements were occupied by DKI Jakarta Province with 74.20 percent achievement, and subsequently achieved by DI Yogyakarta, North Sulawesi, Central Java and East Kalimantan Provinces.

The achievement of DKI Jakarta Province, in 2013, was lower compared to 2012 which was 76.80 percent. Decreased achievement in life expectancy in the province of DKI Jakarta, despite a decline in performance, the target of the Provincial Government of DKI Jakarta has exceeded the 2013 RKP target. This is due to factors: (1) improvement in the quality of handling emergency conditions both in daily conditions and in disaster situations; (2) declining mortality in disaster emergencies; (3) increasing access and quality of services to health facilities and infrastructure; (4) increasing community participation in health promotion.

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The fifth is Cambodia 71.6 from 69.5 previously. Seventh, Philippines 68.6 out of 67.8, and eighth is Myanmar 65.1 from 64.2. Meanwhile, the highest position in the world is occupied by Japan 83.5 from 82.7. And Hong Kong 83.3 from 82.4 took second place. While the country that has the lowest life expectancy in the world according to the data, is occupied by Nigeria 52.3 from 50.2.

In addition, the lowest achievement was achieved by West Nusa Tenggara Province by 63.02 percent. This was then followed by the Provinces of South Kalimantan, Banten, North Maluku and Maluku. Problems that arose as a result of lack of achievement of life expectancy indicators, such as: (1) low levels of community welfare; (2) limited infrastructure services, health infrastructure that has not yet reached remote areas; (3) lack of awareness/interest of the community in checking their health condition, so, they have not been able to choose how good nutrition is for their health. Achievements of West Nusa Tenggara Province which amounted to 62.71 percent, experienced an increase in 2013, only when compared to 2012, it still did not meet the targets set by the Regional Government of West Nusa Tenggara Province in 2013 which amounted to 68.2 percent.

According to BAPPENAS's research, several factors hampered the low achievement in life expectancy in 2013, in several provinces, partly due to:

- a. The level of community welfare is still below average. This can be seen from the high percentage of the poor population which indirectly implies the purchasing power of nutritious food intake. So, it is not uncommon cases of maternal and infant deaths and especially in disadvantaged, remote and rural areas.
- b. Limited health infrastructure, facilities and infrastructure in rural and remote areas. This makes it very difficult for them to get access to proper health care.
- c. The low quality of nutrition for children under five, especially in remote areas, and rural areas, due to the inability of parents in economic terms to be able to meet the nutrition of their toddlers.
- d. The low level of public awareness about the importance of health is indicated by the fact that there are still very few people covered in the BPJS's health program.

Of the many problems with life expectancy in 2013, a number of recommendations to overcome this problem include:

- a. Improving community welfare through various poverty alleviation programs, expanding access to health services and equitable distribution of health service infrastructure development,
- b. Increasing the number of the basic health infrastructure, namely facilities and infrastructure of hospitals, *posyandu*, and health centers, and increase the number of health workers, especially in remote and rural areas, as well as providing incentives for health workers who voluntarily are willing to open health practices in the regions.
- c. There is socialization from both the central government and regional governments regarding the need for protection for toddlers, especially in terms of the availability of adequate nutrition, to support the health of toddlers in the future
- d. Disseminating of the BPJS's health program, especially in terms of government protection to the underprivileged people who have not been covered by the BPJS's health program.<sup>46</sup>

## **2. Infant Mortality Rate (IMR)**

Infant Mortality Rate is one important indicator in determining the level of public health because it can describe the general health of the population. This figure is very sensitive to changes in the level of welfare and health, which can be defined as death that occurs between the times after the baby is born until the baby has not exactly one month old.

Based on the research conducted by Varney, there were approximately 8 million perinatal deaths (stillbirths) in the world occurred each year. Of this, about 85% of newborn deaths occurred due to infection, asphyxia at

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<sup>46</sup>Ibid.

birth, and injury at birth. Furthermore, World Health Organization (WHO) reported that of 8.1 million infant deaths in the world, 48% were neonatal deaths. Of all neonatal deaths, around 60% were infant deaths of less than 7 days (*perinatal*) and infant deaths of more than 7 days due to disruption during the perinatal period. The results of the 2003 Indonesian Demographic Health Survey (SDKI), obtained 35/1000 live births for infant mortality and 20/1000 live births for neonatal mortality. Indonesia has not succeeded in achieving the target of decreasing perinatal mortality (early neonatal). Indonesia, through the newborn health program, is included in the maternal health program. In the national strategy plan for making pregnancy safer, the target of health impacts for newborns is to reduce neonatal mortality to 15 per 1000 live births.<sup>47</sup>

On the other hand, one of the Millennium Development Goals' (MDGs) priorities is the application of the agreement of the 189 representatives of the member states of the United Nations which had originally been operational since September 2000. The target of the Millennium Declaration was the achievement of people's welfare and human development in 2015. A declaration signed by the 147 heads of state from 189 countries at the 2000 Summit in New York was a major challenge in development worldwide including the Indonesian government.

There are, at least, eight points of agreement that are the responsibility of the government in order to create superior human development. Among the eight commitments are: (1) reducing more than half of those who suffer from hunger; (2) guarantying all children to complete basic education; (3) alleviating gender disparity at all levels of education; (4) reducing infant mortality by 2/3; (5) combating HIV/AIDS, Malaria, and several other dangerous diseases; (6) increasing environmental

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<sup>47</sup> <http://kesmas-ode.blogspot.co.id/2012/10/makalah-angka-kematian-bayi-dan-balita.html>

resilience; (7) developing world cooperation for progress; (8) and reduce by half the number of people who did not have access to clean water in 2015.<sup>48</sup>

Achievement of the low infant mortality rate in 2013 was achieved by the Province of Central Kalimantan with an achievement of 4.56 people/1,000 live births, or about 50% decrease compared to 2012 of 8 people/1,000 live births. The success of the Central Kalimantan Provincial Government could not be separated from the role of the Provincial and Regional Governments to implement the Central Kalimantan *Baringas* program.<sup>49</sup> The program prioritized public health priorities in various layers, especially increasing the number of medical personnel, repairing and renewing health facilities, facilities and infrastructure in a number of hospitals, *puskesmas*. After Central Kalimantan Province, the lowest infant mortality rate was achieved by the Riau Islands Province, Bengkulu, South Sulawesi and DKI Jakarta.<sup>50</sup>

While, for the highest infant mortality rate was obtained by the Province of South Sumatra, with the achievement of 100 people/1,000 live birth. This achievement has decreased if compared to the achievements in 2012 which amounted to 108 people/1,000 live births. The next provinces with the highest infant mortality rates were Southeast Sulawesi, Central Sulawesi, West Nusa Tenggara and Papua.

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<sup>48</sup> Margaret Joan Anstee, "Millennium Development Goals" within Rorden Wilkinson, David Hulme, *The Millennium Development Goals and Beyond: Global Development after 2015* (Canada: Routledge, 2012), 19-21. See also Francis Nwonwu, *The Millennium Development Goals Achievement and Prospect of Meeting the Target in Africa* (South Africa: Africa Institute of South Africa, 2008), 1-2. See also Malcolm Langford, *The Millennium Development Goals and Human Right: Past, Present and Future* (New York: Cambridge University Press: 2013), ix-x.

<sup>49</sup> Jum'atil Fajar, Tommy Saputra, Andang Jarwadi, abahTYA, Tri Setyautami, *INFORMASI KAPUAS (Jilid 5): 1 Juli 2011 - 1 Oktober 2011* (Kapuas: 2014), 144-145.

<sup>50</sup> Kementerian PPN/Bappenas, *Evaluasi Kinerja Pembangunan Daerah (EKPD) di 33 Provinsi Tahun 2014*.

Although in 2013 the South Sumatra Province experienced a decrease in the achievement of infant mortality rates, the awareness of the community to utilize services at the *posyandu*, *puskesmas*, and *poskesdes* levels in terms of carrying out complete immunizations on their babies was quite good. The high infant mortality rate in South Sumatra Province was due to the lack of facilities and infrastructure, especially from disadvantaged areas and water territorial as well as borders that were still not reached by access to health services and the limitations of medical personnel.<sup>51</sup>

Several factors have caused the low achievement of infant mortality in 2013 in several provinces, including:

- a. Improved services to reduce infant mortality rates are not yet directly proportional to health access in remote areas, disadvantaged areas, territorial waters, and borders;
- b. Other causes of infant death begin from the gestational age of 28 weeks until the 7<sup>th</sup> day after delivery. This is due to *tetanusneonatorum*, low body weight, and other causes such as slow fetal growth, malnutrition in the fetus, and lack of oxygen in the uterus and failure to breathe after birth;
- c. The lack of public awareness in proactively examining her pregnancy can also cause high infant mortality, not only in disadvantaged areas, but also in urban areas.<sup>52</sup>

Of the many problems concerning with the achievement of infant mortality rate in 2013, a number of recommendations to overcome this problem includes:

- a. Equitable health services and their facilities, both from the presence of officers, the ability and skills of medical officers as health service providers and health financing by the public;

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<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

- b. Public awareness needs to be increased in checking for pregnancy and proactive officers in carrying out monitoring and providing optimal health services from pregnant women to post-delivery. These all are very much in need of attention;
- c. Increasing the quality and quantity of health workers equally in various regions, this is to cover the need for monitoring for mother, babies, and toddlers who need optimal nutrition and care.<sup>53</sup>

### **3. Literacy Rate (LR)**

Literacy Rate is the percentage of population aged 15 years and over who can read and write. This is for all population aged 15 years and over in an area. The Literacy Rate is used as an educational indicator to find out the number of people who are literate in an area. The higher the literacy rate means the better the quality of the population in the region.

Literacy Rate, also known as literacy, is the ability to read and write. The opposite of the word “literacy” is “illiteracy”, where the inability to read and write is still a problem, especially in South Asian countries, the Middle East, and Africa (40 % to 50 %). East Asia and South America have an illiteracy rate of around 10 % to 15 %. Typically, literacy levels are calculated from the percentage of the adult population who are able to read and write. Literacy can also be interpreted as the ability to use language in understanding a reading, listening to words, expressing them in written form, and speaking.

In modern developments, this word has been interpreted as the ability to read and write at a good level and to communicate with others, or to the degree that a person can convey his ideas in a literate society, so that, he can become part of that society. The United Nations Organization for Education, Science and Culture (UNESCO) has the following definition: “Literacy is the

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<sup>53</sup> Ibid.

ability to identify, understand, translate, create, communicate and process the contents of a series of texts contained in printed and written materials related to various situations”.<sup>54</sup>

From an economic perspective, the high or low level of literacy ability of a country indirectly will be a special attraction for shareholders and foreign investors to invest capital and investment in the country. One of the countries of Southeast Asia that has a high literacy rate is Japan. In 1900, literacy in this *Sakura* country had reached 78 percent and continued to increase sharply to 98 percent in 1920. In 2003, Japan was able to increase the literacy rate to 99%.<sup>55</sup> This level has not even been surpassed by Indonesia in the current Millennium century.<sup>56</sup> The average length of school indicator measures the number of years spent by Indonesians aged 15 years and over in pursuing all types of formal education that have been undertaken. The higher the average levels of schooling, the better the quality of education of the population in a province.

Between 2012 and 2013, the average length of school performance was still obtained by DKI Jakarta Province, the achievements in 2013 increased if compared to 2012 which was 11 years. The increase in average length of schooling in 2013 was inseparable from the role of the regional government of DKI Jakarta Province which had organized several programs such as dedicated programs. This program provided Educational Operational Assistance (BOP) for students ranging from elementary to high school/vocational school level, free of school fees, the

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<sup>54</sup> H. S. Bhola, *A Source Book for Literacy Work: Perspective from the Grassroots* (London: Jessica Kingsley Publisher/UNESCO Publishing, 1994), 28-30.

<sup>55</sup> Nanette Gottlieb, *Language and Society in Japan* (New York: Cambridge University Press, 2005), 91-92.

<sup>56</sup> Insup Taylor and M. Martin Taylor, *Writing and Literacy in Chinese, Korean and Japanese: Revised edition* (Philadelphia: John Benjamin Publishing Company, 2014), 256.

availability of smart cards, increased access, quality, educational facilities and infrastructure as well as the relevance education of DKI Jakarta. These programs were also supported by an increase in the education budget according to the 1945 Constitution, which was a minimum of 20 % of the APBN of 336.85 trillion Rupiahs and the provision of the education budget of 27.6 % of the APBD.<sup>57</sup>

The reasons for the Provinces that still have a high average length of school performance low are due to: (1) a factor in the low economic condition of the community which has an effect on the limitations of accessing education; (2) the large number of people outside school age (15 years and over) who undertake education outside of school, such as course packages A, B, and C; (3) there are still many children who do not want to continue their education because they prefer to work to help their family's economy; and (4) the existence of socio-cultural factors, such as getting married at an early age (middle and upper education age).<sup>58</sup>

Of the many problems with the average length of school performance in 2013, a number of recommendations to overcome this problem include:

- a. Scholarship policies especially for people with low economic levels. In addition, it needs to be continuously evaluated, so that, the implementation mechanism is right on target;
- b. The policy of equal distribution of acceleration and quality of education in all regions, especially in remote, disadvantaged, border areas, and those with low economic potential needs to be carried out;
- c. Collecting data on people who are still in school age limit who have dropped out of school, have never attended school and are also very far from access to

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<sup>57</sup> Kementerian PPN/Bappenas, *Evaluasi Kinerja Pembangunan Daerah (EKPD) di 33 Provinsi Tahun 2014*.

<sup>58</sup> Ibid.

- education so that it can stimulate local people to enter school;
- d. Optimizing assets owned by the local community or security forces, community leaders, religious leaders and government officials to become the driving force of the education movement for the community in order to reduce the number of literacy figures.<sup>59</sup>

#### 4. Poverty Rate (PR)

Poverty is the most crucial problem for the people of an area or nation. To overcome poverty, various attempts have been made to reduce the number, so that, it did not increase. According to the REPUBLIKA online news, it is predicted that the number of poor people in 2015 would reach 30.25 million people or around 12.25 percent of Indonesia's population.<sup>60</sup> There are several factors that appear to be more dominant for an increase in poverty, including rising fuel prices, inflation, and a weakening dollar.

Based on BPS's data, the number of the poor people in 2014, the percentage of the poor people in Indonesia reached 11.25 percent or 28.28 million people. Then, the number will quantitatively increase even though the percentage has a decreasing trend. Head of BPS, Suryamin added that based on survey until March 2014, the poor population in Indonesia decreased compared to the results of the survey at last September. In March 2014, the number of poor people was 28.28 million people, compared to September 2013, there was a decline from 28.60 million people, and the percentage also decreased from 11.46 to 11.25 percent.

In line with REPUBLIKA and BPS's data, *World Fact Book* and World Bank predict that at the world level, the number of the poor people in Indonesia is among the

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<sup>59</sup> Ibid.

<sup>60</sup> <http://www.republika.co.id/berita/koran/pareto/15/01/02/nhjny6-tantangan-kemiskinan-pada-2015>

fastest compared to other countries. Noted in the range of 2005 – 2009, Indonesia was able to reduce the average rate of decline in the number of poor people per year by 0.8%, far higher than the achievements of other countries such as Cambodia, Thailand, China, and Brazil which were only in the range of 0.1 % per year. Even, India recorded a minus result or an increase in the poor population.

Poverty is a problem that occurs in every developing country, particularly Indonesia. Poverty causes a decrease in the quality of human resources, so that, productivity and income are low. In addition, the problem of poverty is a problem related to social factors, such as increasing crime in big cities, the emergence of slums, decreasing the level of health and others. Therefore, efforts to reduce poverty must be carried out comprehensively, cover various aspects of community life, and be implemented in an integrated manner.<sup>61</sup> In 2012, DKI Jakarta Province got the best number in the achievement of poor population, which amounted to 3.72 percent in 2013. This achievement has increased if compared to 2012 which only amounted to 3.72 percent. The following provinces with the best achievements were Bali, with a score of 3.95 percent, South Kalimantan, Belitung and Banten.

The contributing factors to low achievement of the percentage of the poor people in 2013 in several Provinces were due to:

- a. The increase in the price of basic necessities, as a result of the increase in fuel oil (BBM) so as to encourage people to reduce their purchasing power;
- b. Low level of education, impacting on the lack of a person having certain skills needed in his life. Limitations of education and skills possessed by

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<sup>61</sup> Kementerian PPN/Bappenas, *Evaluasi Kinerja Pembangunan Daerah (EKPD) di 33 Provinsi Tahun 2014*.

someone cause a person's limited ability to enter the workforce;

- c. Limited employment opportunities, so that, the consequences of poverty for the community, especially those who do not have skills. In addition, capital limitations can also be experienced by someone to be able to complete the tools and materials in order to apply their skills with the aim of earning income.<sup>62</sup>

Of the many problems concerning with the achievement of the percentage of the poor people in 2013, a number of recommendations to overcome these problems include:

- a. Sharpening social protection programs. This sharpening is mainly related to the accuracy of the recipient of the assistance;<sup>63</sup>
- b. Sharpening programs to reduce the burden on poor households through free education and free health care;
- c. Increasing the quantity and quality of higher education scholarships for children from poor families.<sup>64</sup>

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<sup>62</sup> Ibid.

<sup>63</sup> The determination of the cash direct beneficiaries so far has often been biased because of inaccuracies in the data used as a basis for determining or biasing family / neighbors conducted by *RT / RW* and village / *kelurahan* officials in determining recipients. Therefore, it is necessary to develop a mechanism for receiving complaints and guaranteeing accountability from providing social protection assistance, for example, by involving mass media, NGOs and a system of quick responses to complaints

<sup>64</sup> This program is currently needed, so that, the cycle of poverty in the poor households can be broken, one way outs is the investment in human resources in these poor households. This can be done by giving scholarships from elementary school to high education to one child from all poor households. If every poor household has a child with a college education, then the poor household has human capital that has a great chance of escaping poverty and potentially helping other family members to get out of poverty as well.

## CHAPTER III

### GLOBAL ISSUES OF POST-MODERN MUSLIM

#### A. Is Islam a progressive religion?

In one of his works, Sukarno, the first President of Indonesia, once wrote “True Islam does not contain anti-nationalist principles; True Islam is not anti-socialistic in nature, as long as the Islamists are hostile to broad-based nationalists and correct Marxism, as long as the Islamists do not stand on *Ṣīrāṭal Mustaḳīm*; as long as it is not he can lift Islam from evil and mischief”. (Soekarno: 1964). Soekarno’s writing is not intended to show his alignments in certain groups such as nationalists or Marxism, but rather as a criticism of the one’s religious belief understanding that tends to be exclusive will never be able to achieve progress. In fact, a superficial understanding of Islam will bring Muslims backwardness, poverty, and easily oppressed by other nations.<sup>65</sup>

Asghar Ali Engineer (1939-2013 AD), a liberation theologian, also saw that the arrival of Islam in the Arabian Peninsula, if it is judged from the socio-historical approach, it will have a spirit of progressiveness. As a paradigm, Islamic progressiveness remained part of the variant of Islamic interpretations. This is because, actually, the challenges of Muslims will always be there and never be finished, then as a consequence, the interpretation of Islam for the solution to publicity also never knows the end. It does not have to be a completely new interpretation, but it is more important to the extent that the relevance of the interpretation of ideas meets the demands of reality. In this case, what is offered by Progressive Islam reawakens the same breath of struggle.

Hassan Hanafi, through an article entitled *Yasār al-Islām* (Islam Left) in a book *Min al-Aqīdah ilā al-Thaurah* (From the Creed to the Revolution), strongly criticized the

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<sup>65</sup> Syamsul Bakri, *Gerakan Komunisme Islam Surakarta 1914-1942* (Yogyakarta: LKiS, n.d.)

practice of worship of certain theologies. Such practices should be shifted towards how to contribute to the struggle to defend the people. The Hanafi's article seeks to position itself in a line against injustice. Theology has finished praising God, what is expected now is a revolution, namely how to implement the praises of God in the social, economic and political spheres. A new construction of understanding, in which characteristics, such as the Rich, the Wise, the Helpful, the Perfect and etc. should be implemented in the daily life because the progression of life is essentially what God wants. Put simply, if God is just, it means we must do justice. If God is helpful, we must be willing to help. And if God is rich, we must also try to improve our lives to be better and prosperous.

In the Islamic thought in Indonesia, the spectrum of Islamic thought discourse was born to meet the demands that emerged in its time. If we go back in the 70s, discussions of Islamic thought have attracted attention through the Islamic thought reform movement pioneered by Nurcholish Madjid. This renewal emerged as a response of Islam to the idea of modernization, precisely the idea of the progress of the New Order government. One of the orientations of Muslim modernists is to present Islam and to provide content and role in a changing society. In his lecture, Nurcholish invited Muslims to look at the impasse of thinking and creativity being held back by various forms of ignorance. Therefore, Nurcholish suggested the need for freedom of thought, ideas of progress, open attitudes, and liberal reform groups, which in turn could foster psychological striking force to foster fresh thoughts.

In his work entitled, "Interpreting the Qur'an: Toward a Contemporary Approach", Abdullah Saeed, a Muslim intellectual who lives in Australia, wrote that in the last 150 years, the history of mankind has experienced extraordinary changes in the organization and improvement of the quality

of life.<sup>66</sup> Severe changes in the development of science, social-political and social-economic order, demographics, law, urban planning, environment and so on. These terrible changes, according to Saeed, are related to globalization, population migration, scientific and technological advances, space exploration, archeological discoveries, evolution and genetics, general education and literacy levels. He said:

However, my position is that the epoch making changes in the world over the past 150 years have affected Muslims as well as non-Muslims and altered significantly how we see the world. These changes are enormous: globalization, migration, scientific and technological revolutions, space exploration, archaeological discoveries, evolution and genetics, public education and literacy, to name a few. We must add to this an increased understanding of the dignity of the human person, greater inter-faith interaction, the emergence of nation-states (and the concept of equal citizenship) and gender equality”.

These factors also affect the existence of a global cultural dependency, including the area of religious diversity of the community. This paper is intended that Muslims do not just survive in the midst of increasingly fierce competition, but they must be able to take an important role in every change that occurs. So, to get there, we need a new paradigm of thinking. That is a progressive paradigm in understanding the teachings of Islam, one of which is by re-orientation and reconstruction of thoughts about the system and institutional education of Islam.<sup>67</sup>

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<sup>66</sup> Abdullah Saeed is a Muslim intellectual who has been living in Australia and masters the intellectual property of the classical-central-modern- and post-modern Islam and has a base of Islamic education in the Middle East (Saudi Arabia and Egypt).

<sup>67</sup> M. Amin Abdullah, *Islamic Studies di Perguruan Tinggi* (Yogyakarta: Pustaka Pelajar, 2010), 98-99.

Above all, there is an increase in understanding and awareness of the importance of human dignity, greater inter-faith interaction, the emergence of the concept of a nation-state that has an impact on equality and equal treatment for all citizens (equal citizenship), increasingly positioning Muslims in adversity if they do not take steps on progress. The spread of gender issues that are sown from several classical *fiqh* concepts is also in the spotlight. In addition, these tremendous social changes have an extraordinary impact and change the pattern of religious thought and outlook (religious worldview) both within the Muslim community and other religious communities. Saeed said:

The issue of how Muslims see the religious ‘other’ is of fundamental importance to establishing peace among the people of the world. Muslims comprise roughly 20% of the world’s population. Islam has the second highest number of followers after Christianity. In this talk, I will be arguing that a religious tradition with an inclusive view of the religious ‘other’ can play an important role in establishing peace in the world, peace between communities and peace between individuals. More inclusivism equals a better chance for peace in the domain of religion.<sup>68</sup>

Indeed, Saeed’s writing aims to remind again of the great potential of Muslims to be able to change the world for the better, be open minded, cooperative, and responsive to various internal problems of Muslims in determining attitudes towards modernity, humanity, creating an atmosphere of peace, relations between Muslims and non-Muslims, and including how to represent the face of Islam in the

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<sup>68</sup> Abdullah Saeed, *Understanding the Three Abrahamic Faiths: Judaism, Christianity and Islam “Towards a More Inclusive View of the Religious ‘Other’”* conveyed in St David Lecture Theatre, University of Otago, Dunedin, N.Z., Wednesday 5th September 2007.

millennium.<sup>69</sup> These issues are the starting point for the emergence of various understandings and movements. Among Saeed's serious concerns is between moderate Muslims and puritan groups in Islam. Both claim to be the most correct and authentic representation of Islam. Both of them believe that they represent God's message which is rooted in *al-Qur'an* and *Hadith*. The contradiction of the various understandings and movements that mutually claim the truth, in fact, will become a great potential when viewed in the perspective that Islam is a system, where differences in interpretation and implementation are a necessity. Thus, the new system will be able to operate effectively.

Amin Abdullah notes that the principle of understanding the existence of others, other groups, and adherents of other religions, borrowing the Max Weber's term "*verstehen*" or "understanding others" can be done by fostering an attitude of empathy, sympathy, social skills and holding fast to the principles of universal reciprocity. These attitudes are something that is highly recommended in Islam, even required for every individual. This is the character that will lead to the embodiment of an *irfani* epistemological tradition on a mindset that is more unity in difference, tolerant and pluralist.<sup>70</sup>

To achieve this goal, Muslim thinkers in the early of the 20<sup>th</sup> and 21<sup>st</sup> century worked hard how to combine between the classical Islam (*salaf*) and the modern Islam (contemporary), between Western life patterns and established values internally in the Muslim world, between the epistemology of *bayani* and the epistemology of *burhani* or between textualist and contextualist, between *ulūm al-dīn* and *dirāsāt al-Islāmiyyah*.<sup>71</sup> It is this mindset with the spirit

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<sup>69</sup> M. Amin Abdullah, *Islamic Studies di Perguruan Tinggi*, 209-210. See also Hasan Askari & Jon Avery, *Toward A Spiritual Humanism; A Muslim-Humanist Dialogue* (Leeds: Seven Mirrors Publishing House Limited, 1991), 69-90.

<sup>70</sup> M. Amin Abdullah, *Islamic Studies di Perguruan Tinggi*, 209-210.

<sup>71</sup> Ibid.

of wanting to marry between two points of view and two very intersecting traditions that Abdullah Saeed calls the progressive-ijtihadi mindset.

In the view of Omid Safi, progressive Islam is a manifestation of the teachings of Islam both in the understanding and practice of social life that runs consistently. Comprehensive understanding of Islam will lead Muslims to place and respond to several important issues, such as gender injustice, discrimination against minority groups, both religious or ethnic minorities, violations of human rights (HAM), lack of freedom of speech, belief and practice of one's own religion, distribution of wealth which is uneven, and authoritarian government. A comprehensive paradigm of thinking is needed at this time, not just to be able to survive in the midst of the vortex of globalization, but also how to make Islam as the driving spirit of all activities towards progress. That is what we call as progressive Islam.

Addressing issues of gender injustice, discrimination against minority groups, both religious and ethnic minorities, human rights violations (HAM), Anis Malik Toha understands that progressive Islam does not have to be offered by the West. He, even, apologetically says that the West is now entering a dubbed phase. Muhammad Imarah calls it as "*marḥalāt al-ijtiyāh*" (phase of destruction), that is a development whose principle is written out and clearly illustrated in Western efforts that are all-out to exploit the wealth of other countries (read Islamic countries). They also continuously peddle their modern ideologies that are considered universal, such as democracy, pluralism, human rights and the free market and export them for the consumption of other countries to obtain their own interests.<sup>72</sup>

According to Abdullah Saeed, progressive-ijtihadi is not a movement, but a continuation of modernist, neo-modernist and then progressive trends. Progressive-ijtihadi accommodates all groups who have alignments with the

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<sup>72</sup> Anis Malik Toha, *Tren Pluralisme Agama, Tinjauan Kritis*, (Jakarta: Perspektif, 2005), 180.

universal values of Islam, so that, they are expected to be able to answer the needs of modern society. The main reasons that Saeed hacked the progressive-ijtihadi concept are that: (1) Islam is currently in the midst of globalization cycles in praxis, globalization and social change in the practice of daily life and not globalization in theory; (2) Muslims today have become an important part of global citizenship, not just limited to local citizens (local citizenship) where there are a struggle, dynamics, and dialectics of life that are not easy.<sup>73</sup>

From the description above, there are some important points that progressive Islam wants to realize, namely:

1. How to present Islam more humanist by living up to the universality of Islamic values;<sup>74</sup>
2. Embodiment of the spirit of Islam as *rahmatan li 'ālamīn* (Islam is as the blessing for the universe) and *al-Islām ṣāliḥ li kulli zamān wa makān* (Islam is always appropriate for every time and place) by displaying an Islamic face that are tolerant, sympathetic, and empathic towards diversity and other people's beliefs;
3. Showing the performance of Islam as a dynamic, creative, innovative religion by rejecting the shackles of imitation, the status quo, and the comfort zone;
4. Proving Islam as a spirit to develop a work ethic, politics, economic interest, science, and a progressive ethos;
5. Displaying Islamic revivalism which is not merely oriented toward outward (extrinsic-exoteric), but more on aspects of inward oriented (intrinsic-esoteric).<sup>75</sup>

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<sup>73</sup> Abdullah Saeed, *Interpreting the Qur'an*, 2.

<sup>74</sup> The term "humanistic" is currently quite popular as a counter theory of "positivistic" tendencies in the philosophy of science. This paradigm shift in the philosophy of science is falling everywhere and encouraged the book entitled "Humanizing the Classroom" by John P. Miller. And without exception, the discourse also entered the realm of Islamic sciences. See M. Amin Abdullah, *Islamic Studies di Perguruan Tinggi*, 191.

<sup>75</sup> Tim Penyusun Studi Islam IAIN Sunan Ampel Surabaya, *Pengantar Studi Islam* (Surabaya: Sunan Ampel Press, 2010), 244-245.

## **B. Feminist Resistance to Classical Islamic Jurisprudence**

Feminism is a series of social movements, political movements, and ideological movements that have the same goal, namely to define, build, and achieve gender equality in political, economic, family, personal, and social spaces. In addition, this movement aims to fight for women to be treated fairly in society and get out of gender stereotypes and try to build educational and professional opportunities equal to those of men. The feminist movement began in the late of the 18<sup>th</sup> century in the West and developed rapidly throughout the 20<sup>th</sup> century with the agenda of equalization of political rights for women.

Today, the feminist movement has spread everywhere both in Islamic countries (countries with Muslim majority) and non-Islamic countries (countries with Muslim minority). A number of European secular Muslim activists reject the product of interpretation of the texts (revelations) either classical or modern, because they consider those products of interpretation are still thick of social injustice, historical injustice, more favoring to men, and injustice in social, economic and political roles. Amina Wadud and Fatima Mernissi see that in some religious concepts of Islam, they still often place women in the inferior position of men. In the realm of Islamic Jurisprudence, they strongly disagree with the one-half inheritance part because it does not reflect justice at all and does not understand the socio-historical context at the time of the revelation. In addition, Islamic Jurisprudence is not also fair to the problems of polygamy, witnessing, and others.

The persistence of several interpretations of gender bias above, according to Mernissi, is evidence of the failure of integration between the seventh century of Arabs and the modern-century women.<sup>76</sup> In the socio-historical level, the one-half provision of inheritance system in Islam should also

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<sup>76</sup> Fatima Mernissi, 'A Feminist Interpretation of Women's Rights in Islam', within Charles Kurzman (ed.) *Liberal Islam* (New York: Oxford University Press, 1998), 126.

change. This is a small part of women's imperiority that lasts quite a long time as a result of the historical-critical process which has no place in the approach used by the classical and even the modern commentators.

The discourse of gender inequality continues to be colored by protests, not only by feminist activists from non-Muslims, but also Muslim feminists, especially those who live and acculturate to Western life. They strongly criticized some points, particularly what have happened in France, as below: (1) both Muslim men and women are human beings who want to worship God. They expressly condemned the misogyny movement (anti-women's movement), homophobia and anti-Semitism in France; (2) they demand equality of rights between men and women. Democracy can be built on its main basis, namely equality of rights between men and women; (3) there is recognition that the homosexual phenomenon is a social reality that cannot be avoided. Therefore, tolerance is needed as long as it concerns their own personal affairs and does not damage the applicable law; (4) they condemned anti-Semitic expressions made in the name of Islam such as the dispute between Palestine and Israel.<sup>77</sup>

Gender is a product of a social interpretation that is strongly influenced by religious, cultural, policy and political understanding. For example, male gender is often associated as the main breadwinner, while women are more viewed in their reproductive and domestic roles. Gender discourse in the contemporary feminism agenda itself focuses a lot on equal rights, women's participation in work, education, sexual freedom and reproductive rights.

From the 17<sup>th</sup> to the 21<sup>st</sup> century, feminists' struggles have had their ups and downs and experienced a far more complex area of demands and agendas of struggle and even demanded a special study of this discourse. Gender is a relatively new term. According to Shorwalter, gender discourse began to be widely discussed in early 1977s, when

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<sup>77</sup> Abdullah Saeed, *Islamic Thought*, 147

a group of feminists in London no longer used old issues, such as patriarchal or sexist, but replaced them with gender discourse.<sup>78</sup> At that time, the dimension of gender theology was still not much discussed, even though people's perceptions of gender originated in many religious traditions, including conceptions and paradigms in reinterpreting religious doctrines.

An Expert of international Islamic law, Abdullah Ahmad An-Na'im in his work "Toward an Islamic Reformation; Civil Liberties, Human Rights, and International Law", also highlights several religious understandings that further corner the position of women. In his work, An-Na'im underscored several concepts of Islamic Jurisprudence which he considered did not yet reflect the value of justice and the equality of roles between men and women. Among them are the inability of a Muslim woman to marry a non-Muslim man, polygamy, the right to divorce, and inheritance. Some of the *fiqh* products above, according to him, are more visible to one party and disadvantage to the other parties, in this case is women. Therefore, he assumed that there must be something wrong in understanding the sacred texts.<sup>79</sup>

Abdullah Ahmed An-Na'im also highlights the issue of discrimination in the name of gender and religion, both of which were not universal Islamic norms, but temporary norms based on their historical context at the time. With the reconstruction of understanding of gender-biased verses, he suggested using a historical criticism approach. The spirit of Islam is constructive, so, discrimination on the basis of gender and religion is morally rejected and politically irresponsible at this time.<sup>80</sup>

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<sup>78</sup> Elaine Showalter (Ed.), *Speaking of Gender* (New York & London: Routledge, 1989), 3.

<sup>79</sup> Abdullah Ahmad An-Na'im, *Toward an Islamic Reformation; Civil Liberties, Human Rights, and International Law* (New York: Syracuse University Press, 1990), 175-176.

<sup>80</sup> Abdullah Ahmed An-Na'im, *Dekonstruksi Syari'ah*, trans. Ahmad Suaedy and Amiruddin Ar-Rany (Yogyakarta: LKIS, 2001), 336-339.

Through a socio-historical approach, Abdullah Saeed sees that there should be a change of view in producing legal products and *fatwas* especially relating to issues of gender injustice. This kind of understanding will actually place and prove that the true function of the fundamental of *al-Qur'an* is as *rahmah li al-'alamīn* (as blessing for all of the universe). An understanding orientation that is more flexible and always relevant to the development of science including social, cultural, political and even interfaith realms. As an illustration of how important the reinterpretation of ethics-law (*ethico-legal* or universal values) of *al-Qur'an* is *fiqh* that always develops along with the changing times. For example, the emancipation of women<sup>81</sup> is considered a taboo concept in the view of the classical jurisprudence, but now, it is a trend and even a demand, where women's rights must be equal to men proportionally.

Women's emancipation is one of the central themes that have received serious attention from several Muslim scholars in the context of "progressive Muslims" including Abdullah Saeed. The representation of the emancipation of women promoted by Saeed is Fatima Wadud, a professor in the field of Islamic studies, especially with regard to theme like gender. Sharp criticism made by Fatimah wadud is that the product of the interpretation of *al-Qur'an* in the classical era did not have partiality towards women. Therefore reinterpretation needs to be done.<sup>82</sup>

Some Indonesian Muslim communities consider *fiqh*, as a result of the Muslim scholars' *ijtihad*, is an Islamic law that is absolutely correct, even some of them equate *fiqh* with the main sources of Islamic law namely *al-Qur'an* and *al-Sunnah*. Whereas, socio-historically, the Islamic jurisprudence (*fiqh*) that developed in Indonesia and in Muslim countries is departing from the cognitive aspect of Islamic jurists with Arab social and cultural background. So that, the atmosphere of *fiqh* like this is considered to place

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<sup>81</sup> Abdullad Saeed, *Islamic Thought*, 152.

<sup>82</sup> Ibid.

men more privileged than women or commonly referred to as patrilineal culture. This is clear when talking about guardianship, divorce, inheritance, witnesses, and there are still many areas where a woman is placed in a sub-ordinate position for a man. As the development of women's education progressed, they, especially those who were part of the feminist movement, began to question whether it is a doctrine that had to be accepted as it was or only subjectively interpreted by men. This is the core problem that led to various claims by feminists.

Within the Indonesian context, the discourse on women's liberation has brought a breath of fresh air to the changing fate of women in Indonesia. The paradigm of thinking of the liberal feminism has inspired many women's movements in Indonesia to achieve equality of rights between men and women. However, in a class perspective (borrowing the term of Karl Marx's class struggle), the mindset of the current feminism born in the West, at least, will bring up three weaknesses: (1) this concept will create a split in the concentration of "class struggle" from oppressed class women to break free from capitalism; (2) this concept will form an unproductive gender dichotomy perspective, which is a perspective that views humans as men are enemies; and (3) the gender dichotomy with the necessity of the same role in all matters is a thought that ignores human nature as God's creation that is destined to be male or female.

It seems that feminist movements in the world today are more of a Western-style liberal feminism. Liberal feminism is a modern form of feminism. Liberal feminism is characterized by an individualistic struggle regarding equality. According to feminist philosophy, to create equality between men and women, there is no need to make major improvements in society, but only need to change legal policies that give women opportunities to become equal in position with men in both public and private spaces. For a liberal feminist, evidence of progress in the struggle of women can be seen from the number of women occupying

strategic-public positions previously occupied by men. In the United States and in many Western countries, this current of feminism, with a touch of capitalist style of production, has finally become a mainstream in the women's liberation movement.

As an anti-thesis of the increasingly widespread feminism movement in Indonesia, Muslimah Hizb ut-Tahrir Indonesia (MHTI), a subordinate women's organization of Hizb ut-Tahrir Indonesia (HTI), exists to reject the struggle of feminists to free women from patriarchal domination and to place them on equal position as men. According to them, the nature of women who are biologically different from men also has natural implications for the different roles of each; women at home taking care of children, men make a living. For them, Islam clearly regulates these differences. However, in practice, this organization is frequently trapped in the vortex of the feminist movement. In an analysis published by The Conversation by Dyah Ayu Kartika, it was clear that anti-feminist groups could waltz into parliament as a result of feminist efforts to fight for an increase in the composition of women in parliament. Interestingly, anti-feminism women who entered parliament due to feminism voiced women's rights but totally rejected the idea of feminism and gender equality brought by feminists.

### **C. Issues of Human Rights in the Frame of *Maqāṣid al-Sharī'ah***

The contemporary *maqāṣidiyyūn* (the Muslim scholars who have a big concern to the discussion of *maqāṣid al-sharī'ah*) are always trying to develop *maqāṣid* by using contemporary perspectives. One of the drivers of the emergence of the spirit of reform (*tajdīd*) is a strong suspicion that the development of Islamic law studies is currently not able to harmonize with the progress of modern human thought patterns. In addition, *fiqh* and its implications in social institutions are considered to be too rigid, so that, they are less responsive to the challenges and demands of the

changing times, especially those related to issues of human rights, public law, gender and others.<sup>83</sup> Therefore, a dialogue is needed between the understanding of classical *fiqh* and the new sciences to be able to answer various global issues.

On the other hand, the lagging development of human resources in the Islamic world from Western countries, as seen from the ranking of the Human Development Index, is one proof that there are serious problems with the Islamic legal system, theology and philosophy of law. Responding to this problem, Mahmoud Mohammed Taha (d. 1985 AD) wants to contribute through the *sharī'ah* evolutionary approach (*taṭwīr al-tashrī'*). In this approach, he is more emphasizing in the Mecca period because it is more *uṣūl* (basic) and includes universal and fundamental values as the basic spirit in world association.

The *Makkiyyah* verses (verses revealed in Mecca period) usually use general terms such as “O man”, “O son of Adam”, as can be seen in *al-Qur'an* chapter al-Ḥujurāt: 1 (O mankind, indeed, We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted). And also in chapter *al-Isrā'*: 70 (And, We have certainly honored the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference).

Whereas, the *Madaniyyah* verses (verses revealed in Madinah period) use specific expressions, such as “O believers” or about the different statuses of men and women as in *al-Qur'an* chapter *al-Nisā'*: 34 (Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth. So righteous women are devoutly obedient, guarding in [the husband's] absence what Allah would have them guard. But

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<sup>83</sup> Jasser Auda, “Europe a Land of Islam”, within <http://islamstory.com/en/node/38951>.

those [wives] from whom you fear arrogance - [first] advise them; [then if they persist], forsake them in bed; and [finally], strike them. But if they obey you [once more], seek no means against them. Indeed, Allah is ever exalted). Etc. The *Makiyyah* verses emphasize more on the values of justice, equality, human dignity without differentiating gender, creed, religion, race, etc. however, the *Madaniyyah* verses are more specific.

According to An-Na'im, the encounter between Islamic law (*shari'ah*) in the context of history and the conception of human rights in a modern terminology can be met through the basic human values in the modern order of life on a national, regional, or international scale through the wise attitude and adequate worldview of the contemporary jurists.<sup>84</sup> Jasser Auda interpreted the "wise attitude" and "worldview" intended by An-Na'im with the importance of the reform agenda (*tajdid/renewal*) of the linear Islamic legal methodology with the universal declaration on human rights/UDHR.<sup>85</sup>

The contribution of universal values contained in the A Universal Islamic Declaration on Human Rights (UIDHR) was declared in 1981 by a number of Muslim figures and scholars from around the world at UNESCO (United Nations Educational, Scientific and Cultural Organization). The main figures of UIDHR are Abul A'la Mawdudi and Sutan Hussein Tabandeh. Thus, according to Auda, the sources and methodologies of the contemporary Islamic law are: (1) *al-Qur'an* as source; (2) *al-Sunnah* as source; and the next are as methodologies; (3) problems derived from the text; (4) *ijtihad* of the *Imams* of the School of law; (5) human ratio;

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<sup>84</sup> Abdullah Ahmed An Na'im, *Toward an Islamic Reformation; Civil Liberties, Human Rights, and International Law* (Syracuse, New York: Syracuse University Press, 1990), 170-173.

<sup>85</sup> Jean Jacques Waardenburg, *Islam: Historical, Social, and Political Perspectives* (Berlin: Walter de Gruyter, 2002), 171-176 see also Robert Spencer, *The Politically Incorrect Guide to Islam* (USA: Regnery Publishing, 2005), 196-197.

(6) universal values contained in the declaration of human rights both on a national and international scale.<sup>86</sup>

Agreeing with An-Na'im's viewpoint, Samine Yasmeen said that the contextualization of *maqāṣid al-sharī'ah* through the spirit of achieving *maslahah* for mankind by making human rights as benchmark at the moment is the right way for Muslims.<sup>87</sup> Muhammad Umer Chapra, in his book entitled *The Islamic Vision of Development in the Light of Maqāṣid al-Sharī'ah*, emphasized the importance of the *maqāṣid al-sharī'ah* approach in realizing world peace.<sup>88</sup>

Through the *maqāṣid* approach, some *maqāṣidiyyūn* figures are also enthusiastic to contribute to the progress of Muslims, on one side, and to further strengthen the position of human development and human rights developed by the United Nations, on another side. Starting from Ibn 'Ashūr which offers *hiḏḏ al-usrah* (looking after the family), *al-ḥurriyyah al-i'tiqādiyyah* (religious freedom), orderliness, civility, human rights, freedom, and equality as the highest goal of Islamic law.<sup>89</sup> Furthermore, in the contemporary era, Yusuf al-Qardawi added several important points such as social welfare, freedom, and human dignity. Whereas, Hashim Kamali contributed to the addition of the values of freedom and independence, safeguarding human rights, economic development and research, development of science and technology.<sup>90</sup>

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<sup>86</sup> Ibid.

<sup>87</sup> Samine Yasmeen, *Muslim in Australia: The Dynamics of Inclusion and Exclusion* (Melbourne: Melbourne University Press, 2010), 111-112.

<sup>88</sup> Muhammad Umer Chapra, *The Islamic Vision of Development in the Light of Maqāṣid al-Sharī'ah* (Herndon, London: The International Institute of Islamic Thought, 2008), 6-7.

<sup>89</sup> The idea of Ibn 'Ashur, according to Halim Rane, had an important contribution to the basics of *maqāṣid al-sharī'ah* in responding to human rights issues in the twentieth century. See Halim Rane, *Islam and Contemporary Civilization: Evolving Ideas, Transforming Relations* (Melbourne: Melbourne University Press, 2010), 94-95.

<sup>90</sup> Ibid.

The values of universality unearthed through the *maqāṣid* approach, according to Auda, is a concrete form as well as a manifestation of the seriousness of Muslims in realizing justice, equality, peace, tolerance, human resource development, gender problems faced by human beings both in the micro scale and macro.<sup>91</sup>

### **D. Interfaith Dialogue: From Indonesian Muslims for the World**

Interfaith dialogue, at this time, is very much needed along with the heating up of relation between religious communities and relation between several regions in several parts of the world which are allegedly led to differences in beliefs. Indonesia is one of the countries known globally as a pilot project of the religious harmony agenda. Even, with the interfaith dialogue that occurred in Indonesia is the media to convey to the international world of how the Indonesian people manage harmony to become a productive and positive force.

Interfaith dialogue is not a new matter in human civilization. This happens because plurality in all aspects of life is part of natural law as a gift of God. Therefore, what is needed is a change in perspective and human methods in addressing plurality in line with the times. In the history of Islam, all the Prophets and Apostles of Allah were sent in the context of pluralistic history and social conditions, so that, interfaith relation and dialogue are not new phenomena because they have been going on for thousands of years. Internally, the importance of interfaith dialogue can be understood because it not only has theological and legal common ground as part of the core of divine teachings, but also it comes from the same tradition and ancestor.

Historically, the Apostles, in carrying God's messages, always invite other religious communities to have dialogue. The New Testament, for example, tells a great deal about

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<sup>91</sup> Jasser Auda, *Maqāṣid al-Sharī'ah a Beginner's Guide* (London: International Institute of Islamic Thought, 2008), 26-27.

how Jesus often has dialogue with the Baptist's disciples, chief priests, and Jews from the Sadducees and Pharisees. So, it is with Muhammad SAW, who is theologically and historically inseparable from the missions of the previous treatise. *Al-Qur'an*, even, places Jews and Christians as the people of the Scripture who must be respected. Prophet Muhammad SAW also invites them to have dialogue with good and true argumentation. However, throughout the course of history, good relations often become a source of conflict, misunderstanding, distrust, hatred and endless theological disputes.

Systematic theology is an offer of an operationalized approach in the area of religion, especially those relating to doctrines, beliefs, and interfaith dialogue. Systematic theology seeks to portray wholly all aspects related to religion and beliefs, such as history, philosophy, science, and ethics as a holistic system. Systematic theology is quite popular especially in the tradition of Christian theology.<sup>92</sup> Christian systematic theology questions fundamental matters, such as "what exactly does the Bible teach us today to deal with new problems?" Through systematic theology, Christians try to do two main things, namely: (1) grouping data and sources of all Bible teachings that are relevant to the topic of conversation, such as ritual, justice, truth, brotherhood, compassion, unity, understanding differences, and morality; (2) the next step is to group, classify, reinterpret, and integrate various aspects and teachings into a standard order in the present context.

According to Jasser Auda, systematic theology in the Christian tradition in such a sense bears a resemblance to the *maqāṣid* approach in the study of Islamic law. Both of these approaches offer a concept of "reinterpretation" and "contextualization" of religious doctrine as a basis for

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<sup>92</sup> Wayne Grudem, *Systematic Theology: An Introduction to Biblical Doctrine* (Grand Rapids: Zondervan Publishing House, 2000), 22.

religious law dynamism in the face of social change.<sup>93</sup> If in *maqāṣid*, there are classifications of *al-ḍarūriyyāt al-khams* (the five priorities) such as protecting religion (*hifẓ al-dīn*), protecting souls (*hifẓ al-nafs*), protecting reason (*hifẓ al-ʿaql*), protecting offspring (*hifẓ al-nasl*), protecting property (*hifẓ al-māl*),<sup>94</sup> then the systematic theologians also have the same concept, such as the importance of protecting human life, human health, protecting the soul with how to “forbid consuming alcohol”, the importance of maintaining and nurturing a family, and so on.<sup>95</sup> To further strengthen Jasser Auda’s thesis on the two approaches above, in a slightly different perspective, John Hick asserted: “That although the language, concepts, liturgical actions, and cultural ethos differ widely from one another, yet from a religious point of view basically the same thing is going on in all of them, namely, human beings come together within the framework of an ancient and highly developed tradition to open their hearts and minds to God”.<sup>96</sup>

Hick’s journey as a Christian began in an Anglican Church in England. The Hick’s Worldview in his youth was a humanist. When he was 18 years old, he experienced an evangelical conversion at University College, Hull. He fully accepted the doctrines of the Church. His theological shift first began to appear in 1961 when he taught at Princeton Theological Seminary. At that time, Hick began to question the historicity of the birth of the virgin need to be maintained to support the incarnation. While teaching in the theology department at Birmingham University, he began to develop pluralism. In this city, he met immigrants with Muslim

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<sup>93</sup> Jasser Auda, *Maqāṣid al-Sharīʿah a Beginner’s Guide* (London: International Institute of Islamic Thought, 2008), 46-47.

<sup>94</sup> Ibrahim al-Gharnati al-Shatibi, *al-Muwāfaqāt fī Uṣūl al-Sharīʿah*, vol. 3, ed. ‘Abdullah Darāz (Beirut: Dār al-Maʿrifah, n.d.), 47.

<sup>95</sup> Wayne Grudem, *Systematic Theology: An Introduction to Biblical Doctrine* (Grand Rapids: Zondervan Publishing House, 2000), 124, 208.

<sup>96</sup> John Hick, *God Has Many Names* (Grand Rapids: Zondervan, 1995), 38. Dan John Hick, “A Pluralist View”, within *Four Views on Salvation in a Pluralistic World* (Grand Rapids: Zondervan, 1995), 29-42.

backgrounds, Sikhs, Hindus, Buddhist groups, and also the Jewish community who had been in the city for a long time. He became a co-founder of AFFOR (All Faiths for One Race). As one of the leaders, he often visited the Synagogue, Mosque, Hindu Temple and Sikhism.<sup>97</sup>

Through a holistic point of view (*shumūliyyah*) in *maqāṣid*, theologians or *mutakallimūn* will put certain religious doctrines and beliefs as the principle of ethics and universal morality in order to achieve common goals. The values of ethics and universal morality explored through the teachings of religions must contain a spectrum of similarities, although they are different in their respective religious practices. Auda believes that through a goal-based theology approach will be able to play an important role in realizing inter-faith dialogue.<sup>98</sup> With the creation of inter-faith dialogue, religious diversity can play an important role in creating peace in the world, peace among the communities and peace among the individuals. It can also reduce, not to say, eliminate, exclusive attitudes in the religious domain. Regarding this, Abdullah Saeed said:

The issue of how Muslims see the religious ‘other’ is of fundamental importance to establishing peace among the people of the world. Muslims comprise roughly 20% of the world’s population. Islam has the second highest number of followers after Christianity. In this talk, I will be arguing that a religious tradition with an inclusive view of the religious ‘other’ can play an important role in establishing peace in the world, peace between communities and peace between individuals. More inclusivism equals a better chance for peace in the domain of religion.<sup>99</sup>

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<sup>97</sup> John Hick, *God Has Many Names*, 38.

<sup>98</sup> Jasser Auda, *Maqāṣid al-Sharī‘ah a Beginner’s Guide*, 48.

<sup>99</sup> Abdullah Saeed, *Understanding the Three Abrahamic Faiths: Judaism, Christianity and Islam “Towards a More Inclusive View of the Religious Other”*.

It seems that in the context of universality, long before, Ibn ‘Ashur also agreed that there had been a meeting point between religions that could be understood through the *maqāṣid* approach mainly through the concept of *al-fiṭrah* (purity) and the *samāḥah* (tolerance).<sup>100</sup> Through *fiṭrah*, the purpose of human being as creature must have been longing for a safe, peaceful life, wanting to live in harmony, wanting to save the world and the hereafter. Whereas, through the application of the concept of *samāḥah* when associating with other than Islam. He would like to reiterate once again that it would show the height of Islam itself. He said: “*lahum mā lanā wa ‘alaihim mā ‘alainā*” (we have to protect them and vice versa).<sup>101</sup> Ibn ‘Ashur was the first to shift the concept of *ḥifẓ al-dīn* (protecting religion) in the level of modernity to *al-ḥurriyyah al-i’tiqādiyyah* (religious freedom) or the contemporary scholars often quote the fragment of *al-Qur’an* chapter *al-Baqarah* verse 256: (there is no compulsion in religious matter).

### **E. Contextualization of Islamic Jurisprudence (*Fiqh*) into Positive Law**

The development of Islamic law in the Archipelago is in line with the existence and development of Islam itself as a religion that is followed by the majority of Indonesian people. As a consequence of the beliefs they believe in, *al-Qur’an* recommends that each adherent to have obedience to Allah and His Messenger comprehensively, starting from the aspects of worship, social, legal, economic and others. The application of Islamic law as a positive law for Indonesian Muslims has a philosophical, juridical, and sociological basis

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<sup>100</sup> Muhammad al-Tahir Ibn ‘Ashur, *Maqāṣid al-Sharī‘ah al-Islāmiyyah*, ed. Muhammad al-Tahir al-Mīawi (Tunisia: Dār al-Nafāis li al-Nashr wa al-Tawzī‘, 2001), 269-271.

<sup>101</sup> Fathi Hasan Mulkawi, *Al-shaykh al-Ṭāhir Ibn ‘Ashūr wa Qaḍāyā al-Iṣlāḥ fī al-Fikr al-Islāmī al-Mu’āṣir* (Herndon: al-Ma’had al-‘Ālimī li al-Fikr al-Islāmī, 2011), 598-601.

that are adequate for the Indonesian people. Thus, the state is obliged to accommodate Islamic law as positive law for Indonesian Muslims.

The position of Islamic law in Indonesia is always interesting to talk about, especially the legal system of Islam attached to the legal system of the country where it exists. How can a Muslim be able to apply the teachings of Islam properly and optimally if it is not supported by a legal system that protects and guarantees the implementation of religious orders, both in ritual worship and social worship? However, this does not mean that when the state does not guarantee the continued implementation of religious teachings, then a Muslim cannot practice the teachings of Islam.

Bahtiar Effendy writes that one of the most prominent features of Islam is its “omnipresence”. This view recognizes that where Islam exists, it will always provide “true moral guidance for human action”. Muhammad Hisham also holds that the character of Islam is not limited to the domains of belief, ritual, and morals, but also includes social, political, and legal institutions. Therefore, the existing legal system in Islam must also be integrated into the prevailing legal system in a country. Moreover, Indonesian Muslims are in the majority.

H. A. R. Gibb asserted that Islamic law has an important role in building public order in Muslims and has a great influence on the life of the nation and state.<sup>102</sup> It is because Islamic law, as an integral part of the Islamic teachings, cannot be separated from the basic framework or basis of the Islamic religion itself. In Muslim community, the norms or rules contained in the Islamic religion are implemented in the form of basic rules called Islamic *sharī‘ah*. Allah SWT obliges Muslims to implement Islamic law in their private, social and state life. *Sharī‘ah* law must

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<sup>102</sup> Ichtijanto, “Pengembangan Teori Berlakunya Hukum Islam di Indonesia” within *Hukum Islam di Indonesia Perkembangan dan Pembentukannya*. See also Eddi Rudiana Arief dkk. (ed.), *Pengantar Juhaya S. Praja* (Bandung; Remaja Rosdakarya, 1994), 114.

be implemented both as a religion and as a social institution. Islamic law, as one of the social institutions, experiences actualization even further internalization into various social institutions available in the community.

*Shari'ah* law is Allah's legal system that regulates human relations with God, human relations with fellow human beings, and human relation with the universe. Whereas, *fiqh*, as a product of human intellectual capacity, seeks to interpret the principles of *shari'ah* law systematically which include worship, *munakahat* (the family law), *mu'amalah* (social, and business law), and *jinayah* (criminal law). A. Djazuli says that *fiqh* includes worship, *al-aḥwāl al Shakhṣiyah* (marriage, inheritance, will and endowments), *mu'amalah*, *jināyah*, *aqḍiyah* (justice), *siyāsah* (politics and legislation). There are, at least, 4 (four) types of Islamic legal thought products known in the course of the history of Islamic Law, namely: *fiqh* books, *fatwa* of Ulama, religious court decisions and legislation in several Muslim countries.

The contextualization of Islamic law (read Islamic jurisprudence) into positive law in force in Indonesia illustrates how Islamic law is a system of rules that is not monolithic, but it is able to collaborate with various ingredients without losing identity and substance as rules originating from the God of the Universe. This also proves that Islamic law has a universal character, so that, it is able to dialogue with any rules and anywhere. From the description, the contextualization of Islamic law in Indonesia is a necessity politically, economically, and culturally, as well as socio-historically.

From the political aspect, in fact, Islamic law has existed and has been formally recognized as one of the prevailing legal systems of the government and has binding legal force. That is because historically, the development of Islamic law from the time of the prophet Muhammad SAW, the *Rāshidūn* Caliphate, the *Umayyad* Caliphate, and the *Abbasiah* Caliphate became one of the main pillars to

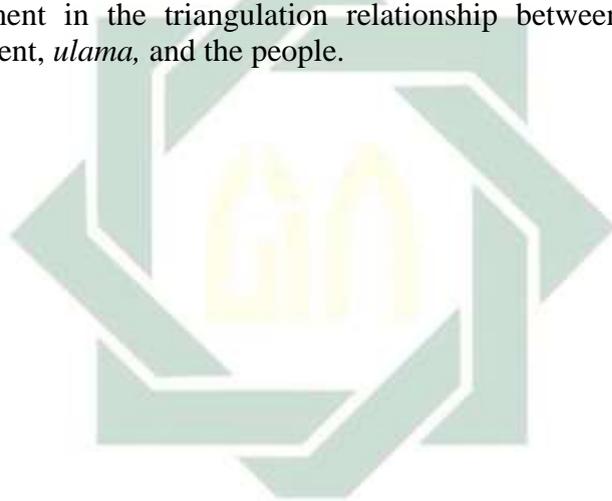
regulate the life of the nation and state. In other words, speaking about Islamic law also means talking about the politics of law that were developing at that time. How not, Islamic law will not be able to enforce if it is not supported by a strong and sovereign government system.

From the economic aspect, Islam is a religion that has a deep concern about the economic condition of its adherents. In the early days of Islam, economic activities received quite serious attention because it was an important pillar of the progress and strength of a country. On the other hand, to maintain the economic assets and wealth of a Muslim nation and society, it is necessary to have a legal certainty, so that, security guarantees are created to continue to develop an economy to be oriented towards achieving a decent life for its inhabitants. Starting from here, it is necessary to have a strong legal system to protect various economic-based activities.

From the cultural aspect, Islamic law is a religion that upholds the values of justice, truth, equality. He views that every human being has a natural freedom and cannot be seized by anyone else. Through these universal values, Islamic law seeks to engage in dialogue and cultural compromise while prioritizing the basic values that are the message of Allah SWT. The character of Islamic law to metamorphose itself, through the concept of *'urf* (tradition), is a proof that it is flexible. Even, it can appear and exist in the midst of diverse cultures and social conditions.

Socio-historically, the positivation of Islamic law in Indonesia, both criminal and civil, has actually been going on for quite a long time, even before the Dutch colonialism and several other European countries. Among the criminal laws that have been applied to Muslim communities were the rules about theft, murder, etc. they were applied in the Islamic kingdom of Demak. While, some examples of civil law in force at that time were about the law of marriage, inheritance, *zakat* and endowments, as well as the implementation of the pilgrimage for those who were able to do.

The spirit of internalization of the two legal systems further confirms that long before the European colonialist movement to various Asian regions, Indonesian people were familiar with Islamic criminal and civil law as an alternative they used to resolve existing cases. In addition, this condition shows that the understanding of Indonesian people about Islamic law is not limited to theological normative but is at the formal-normative legal level. One important element of the implementation of Islamic law in Indonesia is the creation of a beautiful collaboration between *ulama* (Muslim scholars) and *umara* (the government officers) that occurs significantly and simultaneously in comparing a celestial rule into a joint commitment in the triangulation relationship between the government, *ulama*, and the people.



## CHAPTER IV

### GENEALOGY OF *MAQĀSĪD AL-SHARĪ'AH*

#### A. Understanding of *Maqāṣid al-Sharī'ah*

The rapid development of science and technology has brought the world to a point where the pattern of human life, with all of its aspects, must also shift. An order of life that initially proceeded naturally, with a strong bulkhead of the norm, now, it has been transformed into an order that increasingly open to each other. Certainly, this situation affected the building of the epistemology of change in Islamic law. Will Islamic law remain on the old paradigm by sticking to the opinions of the classical Muslim scholars without improvising and reinterpreting or even be completely free from the rules that had been coined by these classical Muslim scholars? This is what often creates a dilemma among Muslims about whether we stick to the old paradigm or shift to a view that relies on competence worldview to be able to contribute to the present problems of Muslims.

In the context of *maqāṣid al-sharī'ah*, Ahmad al-Raysuni said that the word *maqāṣid al-sharī'ah* was first used by al-Tirmidhi in the 3<sup>rd</sup> century of *Hijriyyah*. through his books, *al-Ṣalāḥ wa Maqāṣiduhā*, *al-Hajj wa Asrāruh*, *al-'Illah*, *Ilāl al-Sharī'ah*, *Ilāl al-'Ubūdiyyah* and also his book *al-Furuq* which was then copied by Imam al-Qarafi became the title of his book. Then, after al-Hakim, appeared Abu Mansur al-Maturidi (d. 333 AH/939 AD) with his work *Ma'khad al-Shara'* followed by Abu Bakar al-Qaffal al-Shashi (d. 365 AH/971 AD) with his book *Uṣūl al-Fiqh* and *Maḥāsīn al-Sharī'ah*. After al-Qaffal, the next was Abu Bakar al-Abhari (d. 375 AH/981 AD) and al-Baqillani (d. 403 AH) each with his work, *Mas'alat al-Jawāb wa al-Dalā'il wa al-'Illah* dan *al-Taqrīb wa al-Irshād fī Tartīb Ṭuruq al-Ijtihād*. After the death of al-Baqillani, the study of *maqāṣid al-sharī'ah* continued to shift to the hands of some famous

scholars, such as al-Juwayni, al-Ghazali, al-Razi, al-Amidi, Ibn Hajib, al-Baydawi, al-Asnawi, Ibn Subuki, Ibn ‘Abd al-Salam, al-Qarafī, al-Tufī, Ibn Taymiyyah, Ibn Qayyim, and al-Shatibi. This last name is considered as the first person who laid the foundation of the science of *maqāṣid*. He was the first person to compile the concept of *maqāṣid al-sharī‘ah* systematically.<sup>103</sup>

Etymologically, *maqāṣid al-sharī‘ah* is composed of two words, *maqāṣid* and *sharī‘ah*. *Maqāṣid* is the plural form of the word *qaṣd*, (*qaṣada-yaqṣudu-qaṣdan-fahuwa qāṣidun*) which means to “intend”, “to a destination”, “middle”, “fair and do not exceed the limits”, “go straight”.<sup>104</sup> This interpretation is in line with the verse fragment in *al-Qur‘an*, chapter *Luqmān*, verse 19: (*and simplify your walk*). In addition to the above meaning, the word *qaṣd* also means “fair” (*‘adl*), or middle attitude (*i ‘tidāl*), which is the opposite of transgressiveness (*ifrāt*), such as the middle attitude between wasteful (*isrāf*) and miser (*taqtīr*).<sup>105</sup>

Taha ‘Abd Rahman says that the word *maqṣid* has three meanings, namely: (1) *ḥuṣūl al-fawāid* “obtaining benefit”; (2) *ḥuṣūl al-tawajjuh wa al-khurūj min al-nisyān* “getting away from forgetfulness”; and (3) *ḥuṣūl al-gharaḍI al-ṣaḥīḥ wa qiyām al-bā‘ithi* “towards the right goal by carrying out what is required”.<sup>106</sup> Whereas, Ibn Manẓur (d. 711 AH / 1317 AD) defines *qaṣd* with *istiqāmah al-ṭarīq wa al-imaitimād*

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<sup>103</sup> Ahmad al-Raysuni, *Naḍāriyyāt al-Maqāṣid ‘inda al-Imām al-Shāḥibī* (Beirut: al-Muassasah al-Jamī‘iyyah li al-Dirāsah wa al-Naṣr wa al-Tawzī‘, 1992), 32.

<sup>104</sup> Fayruz Abadi, *al-Qāmūs al-Muḥīṭ* (Beirut: Muassasah al-Risālah, 1987), 396.

<sup>105</sup> Ahmad al-Raysuni, *Naḍāriyyāt al-Maqāṣid ‘inda al-Imām al-Shāḥibī*, 32.

<sup>106</sup> Ahsan Lihasanah, *Al-Fiqh al-Maqāṣid ‘inda al-Imām al-Shāḥibī wa Atharuh ‘alā Mabāḥith Uṣūl al-Tashrī‘ al-Islāmī* (Kairo: Dār al-Salām li al-Ṭabā‘ah wa al-Naṣr wa al-Tawzī‘ wa al-Tarjamah, 2008), 11-12.

“consistent and holding fast to the road”.<sup>107</sup> From the various linguistic definitions above, what is desired by the *maqāsid* with the word *al-maqāsid* is “*al-hadfu*” (direction), *al-ghāyah* (final destination), *al-istiqāmah* (fixed/consistent), *al-’adl* (fair), *al-i’tidāl* (middle attitude/moderat), *mā warāa al-fi’l* (something that is directed behind the action), and *al-ghāyah min al-aḥkām al-Islāmiyyah* (the purposes of Islamic law).<sup>108</sup>

While the second element is the word *sharī’ah*. This word comes from *shara’a – yashra’u – shar’an fahuwa shāri’un* which means “path to a spring”, “custom” or “Prophet’s living tradition”. “Road”, etymologically means *al-ṭarīqah*, which is the path taken to a water source to drink. According to the term of ‘Izz al-Din Ibn ‘Abd al-Salam (d. 660 AH / 1209 AD), the word *al-sharī’ah* is interpreted as *al-sharī’atu: hiya al-manhajū al-mustaqīmu alladhī irtadāhu Allāh li ’ibādihī wa maurid al-aḥkām al-munazzamatu lahu*<sup>109</sup> (the straight path and the rule of law which Allah accepts for His servant). More concisely, ‘Ali al-Tahanawi defines *al-sharī’atu hiya al-i’timāru bi iltizāmi al-’ubūdiyyati*<sup>110</sup> (effect of command in the form of *ubūdiyyah*/worship burdening). *Sharī’ah* is also defined as “going towards the main source of justice”.

To further complement the definition of *sharī’ah* above, Kamal Habib defines *sharī’ah* with “the straight path that must be taken, so that, humans can be saved in the world and the hereafter”, as in chapter *al-Jā thiyah*, verse 18: (then, we make you be on a *sharī’ah* from that affair, then follow the

<sup>107</sup> Ibn Manzur, *Lisān al-’Arab*, vol. 3 (Beirut: Dār Ṣādir, t.th.), 353. See also Al-Fayruz Abadi, *Al-Qāmūs al-Muḥīṭ*, vol. 1 (Damaskus: Dār al-Fikr, 1983), 372.

<sup>108</sup> Muhammad al-Tahir Ibn’ Ashur, *Maqāsid al-Sharī’ah al-Islāmiyyah*, ed. Muhammad al-Tahir al-Misawi (Kuala Lumpur: al-Fajr, 2001), 183.

<sup>109</sup> Bin Zaghbihah ‘Izz al-Din, *Al-Maqāsid al-’Ammah li al-Sharī’at al-Islāmiyyah* (Kairo: Dār al-Safwah, 1996), 39.

<sup>110</sup> Muhammad ‘Ali al-Tahanawi, *Mawsū’ah Kashshāf Istilāḥāt al-Funūn wa al-’Ulūm*, vol. 1, ed., ‘Ali Dahruj (Beirut: Maktabah Libnān, 1996), 1019.

sharī‘ah and do not follow the lust of those who do not know) and chapter *al-Māidah*, verse 48: (for each of us we give rules and a clear path). Al-Raysuni said that *sharī‘ah* means “provisions of the practical Islamic law in the form of the conception of creed, legislation, morals, and *muamalah*”. In the context of *fiqh*, *sharī‘ah* means “the laws prescribed by Allah SWT for His servants in the form of provisions derived from *al-Qur’an* or *Sunnah*”.<sup>111</sup>

Thus, *maqāṣid al-sharī‘ah* has a variety of word equivalents. The Muslim scholars of *uṣūl al-fiqh*, al-Shatibi, often uses several terms, such as the word *maqāṣid al-sharī‘ah*<sup>112</sup> (purposes of Islamic law), *al-maqāṣid al-shar‘iyyah fī al-sharī‘ah*<sup>113</sup> (the purposes of law contained in *sharī‘ah* law), and *maqāṣid min shar‘ al-ḥukm* (the purposes of presenting Islamic law). Muhammad Tahir Ibn ‘Ashur means that *maqāṣid al-sharī‘ah* is *al-ma‘āni wa al-ḥikami almalḥūzati li al-shāri‘i fī jamī‘i aḥwāl al-tashrī‘au mu‘aẓẓamihā biḥaiṭhu lā takhtaṣṣu mulāḥaẓātuhābi al-kauni fī naw‘in khāṣṣin min aḥkām al-sharī‘ah* (the intent and wisdom of the *sharī‘ah* maker in all of the provisions of his *sharī‘ah* to show the excellence and magnimity of the *sharī‘ah* laws that are not shown in certain legal cases).<sup>114</sup>

Among the other Muslim scholars of *uṣūl al-fiqh*, *maqāṣid al-sharī‘ah* is also understood as *asrār al-sharī‘ah* i.e. the secrets that lie behind the law established by *sharī‘ah* in the form of benefits for humans in the world and in the hereafter. For example, the *sharī‘ah* requires various types of worship with the aim to uphold the religion of Allah (*ḥifẓ al-dīn*), the punishment prescribed for perpetrators of adultery is

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<sup>111</sup> *Al-Qur’an* chapter *al-Shūra*: 13, and chapter *al-Jāthiyah*: 18. See also the explanation given by Fazlur Rahman. *Islam* (Chicago: University of Chicago, 1979), 108.

<sup>112</sup> Al-Shatibi, *al-Muwāfaqāt fī Uṣūl al-Aḥkām*, vol. 1, ed. Muhammad al-Khadar Husein al-Tulisi (Beirut: Dār al-Fikr, n.d.), 4-5.

<sup>113</sup> *Ibid.*, 7.

<sup>114</sup> ‘Allal al-Fasi, *Maqāṣid al-Sharī‘ah al-Islāmiyyah wa Makārimuhā* (Beirut: Maktabah al-Waḥdah al-‘Arabiyyah, 1963), 51.

to maintain honor and descent (*ḥifẓ al-nasl*), the law concerning with the prohibition of theft is to preserve one's property (*ḥifẓ al-māl*), the punishment of *qiṣās* is for protecting one's soul (*ḥifẓ al-nafs*). Therefore, *maqāṣid al-sharī'ah* can be interpreted as the objectives to be achieved from a legal determination.<sup>115</sup>

'Allal al-Fasi (d. 1394 AH/1974 AD) defines *maqāṣid al-sharī'ah* with *al-ghāyāt minhā wa al-asrār allatī waḍa'ahā al-shāri'* 'inda kulli ḥukmin min aḥkāmiha (the goals and secrets desired by the maker of the *sharī'ah* in all provisions of Islamic law).<sup>116</sup> According to Ahmad al-Raysuni, *maqāṣid al-sharī'ah* is the goal which is always attached to the *sharī'ah* law for the benefit of humans).<sup>117</sup> Yusuf Hamid al-'Alim defines that *maqāṣid al-sharī'ah* is the goal to be achieved by the provisions of Islamic law and the secrets desired by the maker of the *sharī'ah*, the Most Wise, for every legal provision.<sup>118</sup> Meanwhile, according to Jasser Auda, *maqāṣid al-sharī'ah* is the purpose and secret behind the provisions of Islamic law.<sup>119</sup>

From some definitions above, Nur al-Din Mukhtar al-Khadimi underlines some basic components that must be present in *maqāṣid al-sharī'ah*, namely: (1) it must contain a purpose and secret to be achieved; (2) *sharī'ah* laws; (3) all desired goals and secrets must lead to the value of obedience and worship to Allah; and (4) the purposes and secrets are in

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<sup>115</sup> Raid Nasri Jamil Abu Mu'nas, *Manhaj al-Ta'lil bi al-Ḥikmah wa Atharuh fi Tashri' al-Islām: Dirāsah Uṣūliyyah Taḥlīliyyah* (Herndon: al-Ma'had al-'Ālimī li al-Fikr al-Islāmī / IIIT: 2007), 262.

<sup>116</sup> Ibid.

<sup>117</sup> Ahmad al-Raysuni, *Nazriyyat al-Maqāṣid 'inda al-Shāṭibī* (Beirut: Maṭba'ah al-Najāḥ al-Jadīdah, 1991), 7.

<sup>118</sup> Nur al-Din Mukhtar al-Khadimi, *Abḥāth fī Maqāṣid al-Sharī'ah* (Beirut: Muassasat al-Ma'ārif li al-Ṭabā'ah wa al-Nashr, 2008), 14.

<sup>119</sup> Jasser Auda, *Maqāṣid al-Sharī'ah as philosophy of Islamic Law, A Systems Approach* (London: International Institute of Islamic Thought, 2008), 2.

the form of *maslahah*/benefit for humans in the world and the hereafter.<sup>120</sup>

In the view of some contemporary Muslim scholars, the definition of *maqāṣid al-sharī'ah* experienced a shift in meaning and orientation by involving social sciences, legal philosophy, and to be more Theo-anthropocentric than the Theo-centric pattern. Wahbah al-Zuhayli defines *maqāṣid al-sharī'ah* as the explicit values and goals of the Islamic law. These values and goals are seen as *sharī'ah*'s goals and secrets set by Allah.<sup>121</sup> Another offer regarding the meaning of *maqāṣid al-sharī'ah* is by the search for universal values that comes from Abdullah Saeed with his contextual and ethico-legal theories. In addition, Jasser Auda added that *maqāṣid al-sharī'ah* is wisdoms behind rulings or secrets behind legal provisions in the frame of the principles of morality, universality, social justice, humanity (human dignity), human rights in order to provide answers to various problems faced by both Muslim and non-Muslim communities.<sup>122</sup>

### **B. Embryo of *Maqāṣid al-Sharī'ah***

The development of Islamic law is inseparable from the great role of the classical Muslim scholars, especially those who lived during the second and third centuries of *Hijriyah*. They are the people whose lives have been devoted only for the progress of Islam in order to be accepted by society at large. With their intelligence and deep knowledge of the teachings of Islam, they began to develop a methodology that was originally to be used to carry out the rule of law. A theory, that had never existed before, but came into existence in the post-Prophet's death. Among them was the theory of *maslahah*. This theory then continued to develop in the hands

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<sup>120</sup> Nur al-Din Mukhtar al-Khadimi, *Abḥāth fī Maqāṣid al-Sharī'ah*, 14.

<sup>121</sup> Wahbah al-Zuhayli, *Uṣūl al-Fiḥ al-Islāmī*, Vol. 2 (Damaskus: Dār al-Fikr, 1986), 225.

<sup>122</sup> Jasser Auda, *Maqāṣid al-Sharī'ah as Philosophy of Islamic Law A Systems Approach*, 1-2, 23-25.

of medieval Muslim scholars to become a separate discipline called *maqāṣid al-sharī'ah* or the purposes of Islamic law.

In fact, between *maslahah* and *maqāṣid al-sharī'ah*, there is no difference. Both are linear relationship because the goal of Islamic law is to realize the greatest benefit for human life and the universe. Talking about the history of *maqāṣid al-sharī'ah* as a scientific discipline, it will be confronted with a big question: who was the first placeholder of *maqāṣid al-sharī'ah*? It is said that Imam al-Shatibi, from among the Maliki school of law, was the first placeholder, or even long before Imam al-Shatibi, some Muslim scholars had already talked about the term of *Maqasid Sharia*. Formally, it is viewed that the term of *maqāṣid al-sharī'ah* was indeed unknown in the early days of Islam. However, in those early days, the term *maslahah* was known, namely since the time of the Prophet and the period after the Messenger of Allah which was used in determining a law.

One source said that the word *maqāṣid al-sharī'ah* was first used by Abu Abdillah Ibn Ali al-Turmudhi (al-Hakim), a Muslim jurist who lived at the end of the 3<sup>rd</sup> century and the early of the 4<sup>th</sup> century of *Hijriyyah*. He was the first to use the term *maqāṣid al-sharī'ah* through one of his works, *al-Ṣalāḥ wa Maqāṣiduhā* (prayers and their purposes). After al-Hakim, appeared Abu Mansur al-Maturidi (d. 333 AH) with his work entitled *Ma'khad al-Sharā'i* and then followed by Abu Bakr al-Qaffal al-Shashi (d. 365 AH) with his work *Maḥāsini al-Sharī'ah*. After them, there was Abu Bakr al-Abhari (d. 375 AH), al-Raisuni in his book *Min A'lami Maqāṣid Sharī'ah* added Abu Hasan al-Amiri (d. 381 AH) with his work *Al-I'lām Bi Manāqib al-Islam*, and Shaykh Saduq (d. 381 AH) with his work *I'lāl al-Sharā'i*.

Another source said that explicitly, the basic values or embryo of the theory of *maqāṣid al-sharī'ah* already existed during the Prophet's companions. Imam Ahmad (d. 241 AH/847 AD) narrated that "when the companions faced a new problem and they did not find its legal basis in *al-Qur'an* and *hadith*, they would use *ra'y* (ratio) through *qiyās*

(analogy) method”.<sup>123</sup> Imam Ahmad concludes that the method of *ra’y* and *qiyās* contain the element of *maqāṣid al-sharī‘ah*. However, the resulting *ijtihād* must be in accordance with what is desired by the maker of the *sharī‘ah* (Allah SWT and His Messenger).<sup>124</sup> Some cases that indicate the values of *maqāṣid al-sharī‘ah*, as written by Jasser Auda, are as follows:

First, *ḥadīth ṣaḥīḥ* about the Prophet’s command to a number of his companions to go to *Banū Qurayzah* and to perform *Aṣr* prayer there. Because the journey was quite far and the prayer time was almost up, then some of the group of companions remained at the Prophet’s command to perform *Aṣr* prayer as soon as they arrived at *Banū Qurayzah*.<sup>125</sup> But, some others performed *Aṣr* prayer on the trip for fear of going to *Maghrib*.<sup>126</sup> The first group carried out according to

<sup>123</sup> Nur al-Din Mukhtari al-Khadimi, *Abḥāth fī Maqāṣid al-Sharī‘ah: Dirāṣah Maqāṣidiyyah Liba’d Qaḍāyā al-Ijtihādi wa al-Tajdīd wa al-Mu’aṣirah wa al-Fikr wa al-Ḥaḍārah wa al-Thaqāfah wa al-Mantiq wa al-Uṣūl wa al-Furū’*, (Beirut: Muassasat al-Ma’arif li al-Ṭabā’ati wa al-Nashr: 2008), 21

<sup>124</sup> *Fatāwā Ibn Taymiyyah*, vol. 19, 286.

<sup>125</sup> Bani Quraizah was a Jewish tribe who lived in Madinah at the beginning of the first years after the migration of the Prophet Muhammad. This tribe was at the end of the prophetic period of the Prophet Muhammad had carried out hostility and led to war. The war between Prophet Muhammad and the Jews of Medina, namely Bani Quraizah was the last war that occurred in the 5<sup>th</sup> year *Hijriyyah* and was named the Bani Quraizah War. Prophet Muhammad, after finishing the Ahzab war, moved toward the settlement of the Banu Quraizah with his army. After being surrounded for 15 days, they asked for peace and then they accepted the trial of Sa’ad bin Mu’adz. The war with the Bani Quraizah was because they worked together with the polytheists in the War of Ahza.

<sup>126</sup> Muhammad Ibn Isma‘il al-Ja’fari al-Bukhari, *Ṣaḥīḥ al-Bukhārī*, vol. 1, ed. Muṣṭafā al-Bughā (Beirut: Dār Ibn Kathīr wa al-Yamāmah, 1407 H.), 321. The text of the *ḥadīth* above is as follows: عن ابن عمرو رضي الله عنهما أنه قال: قال النبي صلى الله عليه وسلم لنا لما رجع من الأحزاب: لا يصلين أحد العصر إلا في بني قريظة، فأدرك بعضهم العصر في الطريق، فقال بعضهم: لا نصلي حتى نأتها، وقال بعضهم: بل نصلي! لم يردنا ذلك (أي أنه أراد الإسراع). فنكر للنبي صلى الله عليه وسلم فلم يأخروا: لأنصلي إلا حيث أمرنا رسول الله صلى الله عليه وسلم وإن فاتنا الوقت. (رواه البخاري)

the Prophet's instruction as it was.<sup>127</sup> Among the Muslim jurists who disagreed with a group of the Prophet's companions who performed the *Aṣr* Prayer on a trip for fear that the *Maghrib* time would come was Ibn Hazm (d. 456 AH/1064 AD), a Muslim jurist from the *Zāhiriyyah* school of law who was quite famous for his literal interpretation model. According to him, because it was the Prophet's command, the companions should continue to pray after arriving in Banū Qurayzah, even though they had to do *qada'* (repeat) at night.<sup>128</sup> In addition, the second group was a form of rationalization of the Prophet's instruction. What was conducted by the second group indicates the existence of *maqāṣid al-sharī'ah* that is not the order of performing prayer, but the order to arrive at Banū Qurayzah as the essence command.

Second, it is about the unwillingness of the Caliph Umar Ibn Khattab to distribute part of Egypt and Iraq regions that had been conquered by the Muslims. Aside from being a Caliph, Umar's position among the companions was sufficiently taken into account, so that, the opinions and decisions he made were often used as reference for Muslims at that time, including at this time, especially when discussing of *maqāṣid al-sharī'ah* sticking out. The request of the companions to divide the conquered territories was to depart from the verses of *al-Qur'an* which allowed taking part of the spoils of war.<sup>129</sup>

In a book called *Fiqh al-Maqāṣid: Ināṭah al-Aḥkām al-Shar'iyyah Bimaqāṣidihā*, Jasser Auda makes the rules of *maqāṣid al-sharī'ah* (legal purposes of Islamic law) as

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Ibn Hujjaj Abu al-Husayni al-Naysaburi Muslim, *Ṣaḥīḥ Muslim*, vol. 3, ed. Muḥammad Fuat 'Abd al-Bāqī (Beirut: Dār al-Iḥyā' al-Turāth, n.d.), 1391.

<sup>127</sup> 'Ali Ibn Hazm, *al-Muḥallā*, vol. 3, ed. Lajnah Iḥyā' al-Turāth al-'Arabī (Beirut: Dār al-Āfāq, n.d.), 291.

<sup>128</sup> Ibid.

<sup>129</sup> Jasser Auda, *Maqāṣid al-Sharī'ah Dalīl li al-Mubtadi'* (Herndon, London: al-Ma'had al-'Ālimī li al-Fikr al-Islāmī, 2011). See also Yahya Ibn Adam, *al-Kharraj* (Pakistan: al-Maktabah al-'Ilmiyyah, 1974), 110.

follow: “*manhaju Umar wa al-ṣaḥābah al-mujtahidīn raḍiya Allāh ‘anhum istadalla ilā al-naẓri limaqaṣīd al-aḥkām al-shar’iyyah wa ahdāfiḥā ‘inda taghayyuri al-zamān wa al-aḥwāl walam yajmad ‘alā ẓawāhir al-nuṣūṣ aw ḥattā ‘allalaha al-mundabīḥah*” (the Umar’s legal reasoning and that of the *mujtahids* from among the companions are the basis of the theory of *maqāṣid al-sharī‘ah*, particularly, in responding to changing times and places, not trapped in the textual interpretation of the text until the finding of the reason of law/*illah* correctly).<sup>130</sup>

The opinion of Jasser Auda departs from the principle of Caliph Umar Ibn Khattab which expressly rejected the argumentation of the Companions to divide the conquered territories based on *al-Qur’an* which permits taking part of the spoils of war. The rejection of Caliph Umar on the basis of the verses of *al-Qur’an* whose meanings are more general than those of the companions, as contained in chapter *al-Ḥashr: 7* (And what Allah restored to His Messenger from the people of the towns - it is for Allah and for the Messenger and for [his] near relatives and orphans and the [stranded] traveler - so that it will not be a perpetual distribution among the rich from among you. And whatever the Messenger has given you - take; and what he has forbidden you - refrain from. And fear Allah; indeed, Allah is severe in penalty). The verses used by Caliph Umar is as an argument which implies that God has a goals (*maqāṣid*) in order that there is no domination and monopoly of wealth by certain people.<sup>131</sup> This Umar’s legal reasoning illustrates that the higher purpose of law must take precedence over literal understanding.

Third, the cancellation of cutting off the hands of theft perpetrators in the midst of famine that struck the Madinah’s resident. The Caliph Umar realized that the law of cutting off hands was the command of *al-Qur’an*, however,

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<sup>130</sup> *Fiqh al-Maqāṣid: Ināḥ al-Aḥkām al-Shar’iyyah Bimaqāṣidiḥā*, 214.

<sup>131</sup> Jasser Auda, *Maqāṣid al-Sharī‘ah Dalīl li al-Mubtadi’*, 32.

on the other hand, the people really needed logistics to be able to survive. Therefore, giving punishment to a thief in a very tight condition, namely to survive, is violating the value of justice (*ḥikmah*), even though justice is the highest goal of Islamic law.<sup>132</sup>

The policy of the cancellation of cutting off the hands of theft perpetrators, which was carried out by Caliph Umar Ibn Khattab at that time, was that the community was hit by famine (crop failure). In fact, *al-Qur'an* as it is known in verse 38, chapter *al-Ma'idah* confirms that, "Men who steal and women who steal, cut off both of their hands (as) retaliation for what they have done, and as part of the punishment of Allah. And Allah is All-Mighty and Wise". This verse is the legal basis for cutting off hands for the thieves. However, many people questioned why Umar Ibn Khattab stopped or postponed the cutting off of hands for thieves during the lean season and whether the decision contradicted the above verse or not.

Textually, the decision of Caliph Umar Ibn Khattab contradicts the verse. However, contextually, the decision of Caliph Umar is in accordance with the universal principles of *al-Qur'an*, namely the principle of preserving and saving human's life which is more important than merely fulfilling legal demands. In fact, Caliph Umar was not against the law of cutting off the hands as stipulated in *al-Qur'an*, but rather considering objectively the social conditions of the communities that were not conducive to carry out the law of cutting off the hands. Umar's argument is based on the fact that it may be that the person who stole was pressured by the extremely difficult circumstances of life that he was forced to steal to preserve his life and family, otherwise, their lives would be lost.<sup>133</sup>

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<sup>132</sup> Muhammad Baltaji, *Manhaj Umar Ibn al-Khaṭṭāb fī al-Tashrī'* (Kairo: Dār al-Salām, 2002), 190.

<sup>133</sup> Umar Shihab, *Kapita Selektā Mozaik Islam: Ijtihad, Tafsiṣ, dan Isu-Isu Kontemporer*, (Mizan Pustaka, 2014), 56-57.

From the three cases above, it seems clear that the companions did not always carry out the law textually or what the Muslim scholars of *uṣūl al-fiqh* said as *dilālah al-lafẓ* (understanding the verse textually), but in some cases of the *ijtihād* by the companions were more oriented to the purposes of the law itself contextually (*dilālah al-maqāṣid*).

### **C. The Classical Figures of *Maqāṣid al-Sharī'ah* (The 9<sup>th</sup> – 10<sup>th</sup> Century AD)**

The study of *maqāṣid al-sharī'ah* continues to develop from one period to the next. During the period of companions, the term *maqāṣid al-sharī'ah* had not been found as a single discipline or refers to how to do *ijtihād*. However, in the period after the companions, the term of *maqāṣid al-sharī'ah* had begun to appear even though it was limited to the title of the book. Scholars of Islamic law agree that after the period of companions, the study of *maqāṣid al-sharī'ah* continued to experience evolution in the period of the *Imams* of the school of law. Although the term *maqāṣid al-sharī'ah* was less popular at this time, but the terms *qiyās*, *istihsān*, and *maṣlaḥah* were often used by the *Imams* of the school of law as a method of *ijtihād*. Only at the time of Imam al-Juwayni (d. 478 AH / 1085 AD), the theory of *maqāṣid al-sharī'ah* began to find a clear form by dividing *ḍarūriyyāt*. the next is the development of the theory of *maqāṣid al-sharī'ah* from the 3<sup>rd</sup> to 5<sup>th</sup> century of *Hijriyah*.

#### **1. Al-Tirmidhi al-Hakim (d. 296 AH/908 AD)**

During Al-Tirmidhi al-Hakim, the term *maqāṣid* had been found. At least, from the two books he wrote, the first book was titled *al-Ṣalāh wa Maqāṣiduhā* (prayer and its purposes) and second *al-Ḥajj wa Asrāruh* (pilgrimage and its secrets). This book discusses in detail about the wisdom and spiritual secrets behind the movements in prayer. The substance of *maqāṣid* contained in this book places more emphasis on aspects of spiritual pureness and spiritual awareness through reading *takbīr*, *tahmīd*, and

facing towards *qiblah*.<sup>134</sup> One part in his book, *al-Ṣalāh wa Maqāṣiduhā*, is as follows:

By remembering to Allah frequently, the heart will be calm and peaceful. Conversely, the more indulging in lust, the heart will be harder and drier of the spiritual values. The heart is like a tree that is crushed by the soothing morning dew. If the heart is too eager to remember Allah, then it is like a tree that sucks dew water. Thus, the roots will get stronger into the earth and its branches will expand. However, if the tree is not watered, it will dry out and the branches will become fragile as the dry season comes. If so, as soon as you pull the branch, it will break. So, tree like that is better to be cut down and become fuel. Likewise, with a fragile and dry heart from remembering to Allah, the heart suffers because of the heat of impulse and pleasure. If this is the case, then the human body will become fragile and lazy to carry out Allah's commands and refuse to obey Him. If you force it, it will be destroyed and it will only become fuel for hellfire.<sup>135</sup>

From the two books entitled *al-Ṣalāh wa Maqāṣiduhā* (prayer and its purposes) and the second *al-Ḥajj wa Asrāruh* (pilgrimage and its secrets) show that Al-Tirmidhi al-Hakim began to question that ritual worship, such as prayer and pilgrimage, have not only a spiritual dimension but, more than that, both have also a social dimension. In this dimension, it seems that the orientation to create *maslahah* for human's life also occupies an important level. That is, every command that Allah gives to His servants, must have purpose or purposes. And the

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<sup>134</sup> Ahmad al-Raysuni, *Naẓriyyat al-Maqāṣid 'inda al-Imām al-Shāṭibī* (Herndon, London: al-Ma'had al-'Ālimī li al-Fikr al-Islāmī, 1992).

<sup>135</sup> Ahmad al-Raysuni, *Imām al-Shāṭibī's Theory of the Higher Objectives and Intents of Islamic Law*, 5.

purposes are certainly in the form of *maslahah* or good values for humanity.

## 2. Abu Zayd al-Balkhi (d. 322 AH/933 AD).

At the time of Abu Zayd al-Balkhi, the terms *maslahah* and *maqāṣid* had already been known especially in *muamalah* field. The first book he wrote *al-Ibānat ‘an ‘Ilali al-Diyānah* (the purposes behind the religious practices) was more focused on the objectives of Islamic law. The second book, *Maṣāliḥ al-Adān wa al-Anfus* (benefits for physical and mental health), examines how the practice of Islamic teachings has a significant contribution to physical and mental health. So, at that time, *maslahah* was not only in the area of religious rituals, but also had already entered the *muamalah* region.<sup>136</sup>

Two books written by Abu Zayd al-Balkhi, namely *al-Ibānat ‘an ‘Ilali al-Diyānah* (the purposes behind the religious practices) and *Maṣāliḥ al-Adān wa al-Anfus* (benefits for physical and mental health) further reinforce that there has been a significant development in the study of *maqāṣid al-sharī‘ah*. These books also indicate that there has been a paradigmatic shift in the discourse of *maqāṣid al-sharī‘ah* from theocentric to anthropocentric character. That worship, besides containing the human self-servitude dimension to his God, it also has a more crucial dimension in the level of human life.

## 3. Al-Qaffal al-Kabir (d. 365 AH/975 AD)

At the time of al-Qaffal al-Kabir, the development of *maqāṣid al-sharī‘ah* was not too different from his predecessors. Al-Kabir still raised issues about *maqāṣid al-sharī‘ah* and the wisdom behind the command of *ṭahārah* (purification), *wuḍu*, and prayers. Only one book that can be found from the works of al-Kabir i.e. *Maḥāsin*

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<sup>136</sup> Jasser Auda, *Maqāṣid al-Sharī‘ah Dalīl li al-Mubtadi’*, 39-40.

*al-Sharāī*’ (the beauty of *sharī‘at*).<sup>137</sup> The message to be conveyed by al-Qaffal through this book is that truly, Islamic law is not rigid, but more flexible. It does not only talk about strict penalties for violators, but also talks about reliefs (*rukḥṣah*) especially for those who are unable to carry out the burden. He tried to display the character of Islamic law as *rahmatan li al-‘ālamīnn* (mercies for all over the universe) by continuing to stand on the values of universality that exist in *al-Qur‘an* and *al-Sunnah*.

#### 4. Ibn Babawayh al-Qummi (d. 381 AH/991 AD)

The fourth is Ibn Babawayh al-Qummi. He was a quite influential Muslim scholar in *Shī‘ah* school of law. In his work *‘Ilal al-Sharāī*’ (arguments of the *sharī‘ah* law), al-Qummi began to use reasoning devices to rationalize commands in *sharī‘ah* law, such as belief in Allah, prophet, angel, heaven-hell, etc. In addition, he also remained oriented to aspects of moral values, or in the term of Abdullah Saeed, “ethico-legal”, in matters of prayer, fasting, pilgrimage, *zakat*, filial piety to parents and other commands. In this book, he harmonizes between revelation and reason.<sup>138</sup>

The relevance of reason and revelation will eventually be discussed in detail by Imam al-Ghazali in the 12<sup>th</sup> century AD. He tries to give an adequate description of the relationship between the two. He said *‘al-‘aqlu lan yahtadī illā bi al-shar‘i, wa al-shar‘u lam yutabayyan bi al-‘aqli, al-‘aqlu ka al-asās wa al-shar‘u ka al-binā‘*’ (the relationship between reason and revelation is that reason will not be able to explain everything without

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<sup>137</sup> Ibid., 40. See also Muhammad Hashim Kamali, “al-Maqāṣid al-Sharī‘ah: the Objectives of Islamic Law”, 1.

<sup>138</sup> Omar Hasan Kasule, “Derivation of Legal Rulings on In-Vitro Fertilization from the Purpose of the Law (Istinbāṭ aḥkām al-Talqīḥ al-Istina‘e al-Khārij min Maqāṣid al-Sharī‘ah)”, within *The International Medical Journal*, vol. 4, No. 2 (Desember 2005), 80. See also Ahmad al-Raysuni, *Imām al-Shāṭibī’s Theory of the Higher Objectives and Intents of Islamic Law*, 8

the guide of revelation, and revelation will not be possible to be explained except by using the intermediaries of reason. Reason is like a foundation while revelation is like the building).

Based on Cak Nur's view, revelation has a spiritual dimension. The spiritual nature of this revelation made it contains the mystery side. This divine mystery does not mean implausible. Mystery is something whose answer is unknown. Mystery is a puzzle, where the answer is the next puzzle. How does reason stand before this mystery? In the face of this divine mystery, reason can only surrender itself. Reason must recognize its limitations. Reason must accept the fact that it is not able to answer everything. Indeed, no one can answer everything. Science, which is worshiped in modern times, has also limitations. Science cannot also answer everything. Only God himself is perfect and knows all the answers.

However, the surrender of reason is not passive surrender. It is actively responsible for its faith rationally, logically, and systematically. The limits of reason are not to provide empirical evidence of the existence of its faith. If reason is demanded to provide empirical evidence, it directly denigrates religious beliefs themselves as "goods". To be religious with reason means to make reason as a tool. A tool to provide rational arguments for its faith. This is the task of reason to anticipate shallowness.<sup>139</sup>

Ibn Babawayh al-Qummi, in his *Ilal al-Sharā'ih* (arguments of the *sharī'ah* law), actually wants to convey a message that every command of Allah to His servants must have a purpose or purposes. Exploration of the goals of God's command certainly requires an adequate reasoning capacity, because that is a very potential mean to uncover the cognitive aspects of humans.

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<sup>139</sup> (Ensiklopedi Nurcholish Madjid, 2012)

## 5. Al-'Amiri al-Faylasuf (d. 381 AH/991 AD)

The fifth is al-'Amiri al-Faylasuf. In his monumental work *al-I'lām Bimanāqib al-Islām* (awareness of the nature of Islam), al-Faylasuf places more emphasis on the value of *maslahah* through the theory of *ḥudūd* or legal sanction for criminal. In the study of *maqāṣid al-sharī'ah*, the concept of *ḥudūd* is the realization of *ḥifẓ al-nafs* (safeguarding the soul). Every action that has the potential to hurt or even eliminate the lives of others, there must be commensurate punishment. When all the perpetrators of crime have realized that the punishment of the crime that they committed is the same as their actions, then the perpetrators of the crime will feel afraid of committing crime. When all the perpetrators of crime are afraid of committing crime means that the human's soul will be protected from danger.

## D. The Figures of *Maqasid al-Shari'ah* in a Medieval Century (The 11<sup>th</sup> – 14<sup>th</sup> Century AD)

### 1. Abu al-Ma'ali al-Juwayni (d. 478 AH/1085 AD)

The first is Abu al-Ma'ali al-Juwayni or better known as Imam Haramain. He is an adherent and a great scholar of the 5<sup>th</sup> century of *Hijriyyah* of the Shafi'i school of law. In addition, Imam al-Juwayni is also known as the founder of the rational theology in Islam, which is the identity of the Muktazilah group. However, after the emergence of Imam al-Juwayni, he brought a new thought that still held fast to the Ash'ariyah school of theology that he professed, namely by giving a more portion of reason in determining a law or problem. Although the thoughts of Imam al-Juwayni provide a large portion of the role of reason, but Imam al-Juwayni never put reason in line with the revelations (*al-Qur'an* and *al-Sunnah*). In the view of Imam al-Juwayni, reason is given more portions solely to understand the passage of *al-Qur'an* and *al-Sunnah* and is not aligned with it, let alone placed higher.

Although, theologically, al-Juwayni tends to be more rational and closer to the Mu'tazila's understanding, but, in fact, his mindset is not far from *ahl al-sunnah wa al-jamā'ah*, where he always places *al-Qur'an* and *Hadith* as the main reference sources. However, the style of thought brought by Imam al-Juwayni is creative-innovative thinking, which brings the Islamic thought of *ahl al-sunnah wa al-jamā'ah* to a more moderate. The thoughts of Imam al-Juwayni are not only limited to *kalam* and theology, but also in *fiqh* and *uṣūl al-fiqh*. In fact, Imam al-Juwayni is one of the founders of the study of *maqāṣid al-sharī'ah*, which later became a new scientific discipline.

The idea of al-Juwayni about *maqāṣid al-sharī'ah* is believed to be the first step in a major project towards the reconstruction of Islamic law through the theory of *maqāṣid*. From his monumental book *al-Burhān fī Uṣūl al-Fiqh* (arguments in *uṣūl al-fiqh*), the leading figures of *maqāṣid al-sharī'ah* consider al-Juwayni as the first person to introduce the term *marātib al-maqāṣid* (the level of *maqāṣid*). He divides *maqāṣid* into three levels; *darūriyyāt* (primary needs), *ḥājīyyāt* (secondary needs), and *taḥsiniyyāt* (tertiary needs). In this book, he also offers a completely new principle that the goal of Islamic law is to realize the five *īṣmah* (protection); *īṣmat al-dīn* (safeguarding religion), *īṣmat al-nafs* (safeguarding the soul), *īṣmat al-'aql* (safeguarding reason), *īṣmat al-nasab* (safeguarding nasab) , and *īṣmat al-māl* (safeguarding property).<sup>140</sup>

The second book is *Ghiyāth al-Umam* (toward the salvation of humanity). He hypothesized that “if the *Imams* of the school of thought and the jurists are gone, the only way to save Islam is a bottom-up reconstruction using the basic principles in which all legal provisions lead to the *maqāṣid*. The principles of *maqāṣid* are

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<sup>140</sup> Ahmad al-Raysuni, *Imām al-Shāṭibī's Theory of the Higher Objectives and Intents of Islamic Law*, 12.

expected to be able to reconcile various tendencies, differences and opinions of various commentators.<sup>141</sup>

Al-Juwayni once said “anyone who fails to understand the objectives of the *sharī‘ah* because they are trapped in the meanings of “command” and “prohibition” textually, then, he has failed in understanding the fundamental principles of the Islamic law itself”. This expression is in response to al-Ka’bi (a well-known Muslim scholar of the *Mu‘tazilah* School of law) who explicitly rejects the category of *mubāḥ* in the terminology of Islamic law. So, al-Juwayni precisely directs and uses the terminology for permissibility or even compulsory to study of *maqāṣid al-sharī‘ah* as an important part in the *ijtihad* process.<sup>142</sup>

## 2. Abu Hamid al-Ghazali (d. 505 AH/1111 AD)

The second figure during this period was Abu Hamid al-Ghazali. Like his teacher, al-Juwayni, al-Ghazali, in the book *al-Mustasfā fī ‘Ilm al-Uṣūl*, further strengthens the theory of *maqāṣid al-sharī‘ah*. If al-Juwayni uses the term *‘iṣmah* (protection) then, al-Ghazali uses the term *ḥifẓ* (safeguarding/preservation); *ḥifẓ al-dīn* (safeguarding religion), *ḥifẓ al-naḥs* (safeguarding the soul), *ḥifẓ al-‘aql* (safeguarding reason), *ḥifẓ al-nasl* (safeguarding descent), and *ḥifẓ al-māl* (safeguarding property). However, as the follower of the Shafi’i school of law, al-Ghazali is reluctant to use the terms *maqāṣid* or *maṣāliḥ* because both of these terms are more like “*maslahah*/illusive purpose” (*al-maqāṣid al-mawḥūmah*). As a second equivalent, he offers the concept of *qiyās* theory which relies on *‘illah*.<sup>143</sup>

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<sup>141</sup> Ibid.

<sup>142</sup> Ahmad al-Raysuni, *Imām al-Shāḥibī’s Theory of the Higher Objectives and Intents of Islamic Law*, 13.

<sup>143</sup> Jasser Auda, *Maqāṣid al-Sharī‘ah as philosophy of Islamic Law, A Systems Approach*, 18.

### 3. Al-'Izz Ibn 'Abd al-Salam (d. 660 AH/1209 AD)

The third figure is al-'Izz Ibn 'Abd al-Salam. Through the book *Maqāṣid al-Ṣalāh* (the purposes of prayer) and *Maqāṣid al-Ṣawm* (the purposes of fasting), he examines in detail how important the search for wisdom behind the command of Allah SWT. The significant contribution of al-Salam in the theory of *maqāṣid al-sharī'ah* is clearly visible in his book *Qawā'id al-Aḥkām fī Maṣāliḥ al-Anām* (the rules of law for the achievement of human's benefit). In this last book, he said "every act or activity that does not have a clear purpose and value of *maslahah*, so, he must be avoided and, vice versa, every act that has a goal and *maslahah*, even though no legal basis is found explicitly in *al-Qur'an*, *sunnah*, and *ijma'* (the companions' consensus) , then it must be maintained".<sup>144</sup>

### 4. Shihab al Din al-Qarafi (d. 684 AH/1285 AD)

The fourth figure is Shihab al-Din al-Qarafi. Al-Qarafi's contribution to the more robust building of the theory of *maqāṣid* is quite large. In his book *al-Furūq* (differentiator), he clearly distinguishes between the role of the prophet Muhammad as conveyer of the revelation (divine message), judge (judge), and as a leader. Al-Qarafi said:

There is a difference between the Prophet's actions in his capacity as a messenger, a judge, and a leader figure ... the implication in Islamic law is what he says or what he does in the capacity as a messenger of revelation is as a permanent and general law ... but a policy that is with regard to the military, public

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<sup>144</sup> Jasser Auda, *Maqāṣid al-Sharī'ah as philosophy of Islamic Law, A Systems Approach*, 19. See also Omar Hasan Kasule, "Derivation of Legal Rulings on In-Vitro Fertilization from the Purpose of the Law (*Istinbāṭ aḥkām al-Talqīḥ al-Istina'e al-Khārij min Maqāṣid al-Sharī'ah*)", 80.

issues, ... appointing a judge (*qāḍī*) and the governor, distributing the spoils of war, and signing an agreement ... are more specific and purely as leaders.<sup>145</sup>

Al-Qarafi interprets *al-maqāṣid* with the aim or purpose of the Prophet's own actions. To reinforce his theory of *maslahah*, he also wrote the book *Fatḥ al-Dharāī' Litaḥqīq al-Maṣāliḥ* (opening up something harmful to achieve the essence of *maslahah*).<sup>146</sup> *Fatḥ al-dharī'ah* is the opposite of the word *sadd al-dharī'ah* (سد الذريعة). It is a phrase form (*iẓāfah*) consisting of two words, *sadd* and *al-dharī'ah*. Etymologically, the word *al-sadd* is an abstract noun (*maṣdar*) from the word *sadda-yasuddu-saddan*. The word *al-sadd* means to close something that is defective or damaged and heap a pit. While, *al-dharī'ah* is a single noun means road, means (*wasīlah*) and the cause of something happening. The plural of *al-dharī'ah* is *al-dharāī'*. For this reason, in some books of *uṣūl al-fiqh*, such as *Tanqīḥ al-Fuṣūl fī 'Ulūm al-Uṣūl* written by al-Qarafi, a term which used is *sadd al-dharāī'*.<sup>147</sup>

##### 5. Shams al-Din Ibn al-Qayyim (d. 751 AH/ 1347 AD)

Furthermore, the fifth figure is Shams al-Din Ibn al-Qayyim. This figure is quite well known among the Islamic legal philosophers. The contribution of Ibn al-Qayyim to the theory of *maqāṣid* is through his detailed criticism in his book *al-Ḥiyāl al-Fiqhiyyah* (the *fiqh* rigidity). He said: "rigidity in *fiqh* is prohibited by some reasons; first, it is not in line with the spirit of wisdom of the *sharī'ah* (*ḥikmat al-tashrī'*), and second, it is because

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<sup>145</sup> Shihab al-Din al-Qarafi, *al-Furuq*, ed. Khafil Mansour (Beirut: Dār al-Kutub al-'Ilmiyyah, 1998), vol. 1, 357.

<sup>146</sup> Muhammad Ibn Mukarram Ibn Mansur al-Afriqī al-Miṣrī, *Lisān al-'Arab*, (Beirut: Dār Ṣadir, tt), vol. 3, 207.

<sup>147</sup> Ibid.

of the refusal of Muslim scholars of *fiqh* against the theory of *maqāṣid*” In relation to wisdom, he expressly said:

*Sharī‘ah* law is based on wisdom and the spirit to achieve public welfare to live in this world and the hereafter. *Sharī‘ah* law definitely contains the values of justice, wisdom and goodness. Therefore, any rule of law that replaces justice with injustice, compassion with hostility, public problems with damage, wisdom with nonsense, then, the rule of law cannot be categorized as a *sharī‘ah* rule, even though, it is justified based on correct interpretation.<sup>148</sup>

## **E. *Maqāṣid al-Sharī‘ah* in a Modern Century: From Granada to Tunisia**

### **1. Al-Shatibi (d. 790 AH/1388 AD)**

First is Abu Ishaq Ibrahim Ibn Musa Ibn Muhammad al-Lakhmi al-Shatibi. (d. 790 AH / 1388 AD). He lived and developed his thoughts on Islamic law in a very famous city in Spain / Andalusia, namely Granada. In the 14<sup>th</sup> century AD, Granada was the capital of the kingdom of Banu Nasri led by a Sultan Muhammad V al-Ghani Billah (1354-1359 AD and 1362-1391 AD), a city that would later be known throughout the world, especially when the *maqāṣidiyyūn* raised up the theme around *maqāṣid al-sharī‘ah* which had been sinking for 5-6 centuries. By gratification, the kingdom of Banu Nasri, under the leadership of Sultan Muhammad V al-Ghani Billah, had reached the peak of glory in all aspects of life. Granada (Arabic; *Ghīrnatah*) in the 14<sup>th</sup> century AD underwent various political, socio-religious, economic and legal changes and developments that would later affect the

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<sup>148</sup> Ahmad al-Raysuni, *Imām al-Shāṭibī’s Theory of the Higher Objectives and Intents of Islamic Law*.

mindset and legal thinking products of Muslim scholars including al-Shatibi (d. 790 AH / 1388 AD).<sup>149</sup>

From the socio-political aspect, the social changes that occurred in the 14<sup>th</sup> century AD were inseparable from the receding disruption of security stability in the 13<sup>th</sup> century AD when there was a massive Mongol invasion to the Muslim east and the rapid development of Christianity in the west. According to Muhammad Khalid Mas'ud, the success of Sultan Muhammad V in creating political stability can be understood from two factors. First, his success in maintaining the stability of foreign policy by establishing cooperation in the form of peace agreement with a number of Christian kingdoms in the north and fellow Muslim rulers in northern Africa. Second, maintaining domestic political stability through centralized control of internal military power in the kingdom's empire.

This conducive-political stability provides a fairly fresh climate for the development of science, especially in the field of Islamic studies. This is evidenced by the emergence of monumental works from Muslim scholars and intellectuals, as in northern Africa, Ibn Khaldun (d. 808 AH / 1382 AD) wrote a historical philosophy, in Syria, Ibn Taymiyyah (d. 728 AH / 1328 AD) studying political science and legal theory, in Persia, al-'Iji (d. 754 AH / 1355 AD) developed Sunni theology, and in Spain, al-Shatibi produced monumental work in the field of Islamic legal philosophy.<sup>150</sup>

As the capital city, Granada is the center of attention and attraction for scholars from various countries, especially northern Africa. Ibn Khaldun, Ibn al-Khatib and al-Shatibi are among the Muslim scholars who have brilliant reputations in the area of Islamic philosophy and law. In addition to experiencing rapid progress in various

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<sup>149</sup> Josef W. Meri and Jere L. Lacharach, *Medieval Islamic Civilization* (New York: Roudledge, 2006), 302.

<sup>150</sup> *Ibid.*

aspects of life, Granada in the 14<sup>th</sup> century AD underwent various changes and developments in politics, social, religiosity, economics and law that would later affect the mindset and product of thought of Islamic jurists including al-Shatibi.

Al-Shatibi is a very productive philosopher. At the same time, he is an expert in Islamic law of the Maliki school of thought from Spain.<sup>151</sup> His full name is Abu Ishaq Ibrahim Ibn Musa Ibn Muhammad al-Lakhmi al-Shatibi. The place and date of birth are not known exactly, but the name al-Shatibi is often associated with the name of a place in eastern Spain, namely Sativa or Shatibah (Arabic). Because of this, al-Shatibi is assumed to have been born or at least, never lived there. Al-Shatibi grew up in Granada and his history of intellectuality was formed in the city which was the capital of the Banu Nasri kingdom. In his youth was coincided with the reign of Sultan Muhammad V al-Ghani Billah which was a golden period for Granada as well as the period of the destruction of Islam in Spain.

The city is the center of attention of a lot of scholars from all parts of northern Africa. At that time, many scientists visited Granada or were at the palace of Banu Nasri. Among them are Ibn Khaldun and Ibn al-Khatib. This opportunity was not wasted by al-Shatibi to learn from the famous Muslim scholars at the time.<sup>152</sup> The spirit of *ijtihad* and rejecting *taqlid* voiced by the leading Muslim scholars above is enough to give color to al-Shatibi's thought patterns in many of his works including his magnum opus *al-Muwāfaqāt*.<sup>153</sup> According to Za'far Iqbal, al-Shatibi was one of the thirteen great Sunni

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<sup>151</sup> Ahmad al-Raysuni, *Naḏāriyat al-Maqāṣid 'inda al-Imām al-Shāṭibī*, 98.

<sup>152</sup> Ahmad al-Raysuni, *Imām al-Shāṭibī's Theory of the Higher Objectives and Intents of Islamic Law* (Herndon: IIIT, 2006), 75-76.

<sup>153</sup> Al-Shatibi, *al-Muwāfaqāt fī Usūl al-Fiqh*, vol 1, ed. 'Abd Allāh Darāz (Beirut: Dār al-Ma'rifah, 1996), 29-33.

scholars in the eighth to fifteenth-century AD who became many references in contemporary Islamic legal matters.<sup>154</sup>

Zafar Iqbal and Mervyn Lewis noted that among the names of the Muslim scholars who were followed by many Muslims in Islamic law discourse from the past until now are: (1) Abu Hanifah al-Nu'man Ibn Thabit, 700-767 AD, a founder of the Hanafi School of law in Kufah; (2) Malik Ibn Anas, 716 AD, a founder of the Maliki School of law in Medina. This Maliki School of law would later become the state official school of law, especially during the time of Sultan Muhammad V al-Ghani Billah and would become a school of law which was adopted by Imam al-Shatibi; (3) Ya'qub Ibn Ibrahim Abu Yusuf, 731 AD, a student of Abu Hanifah and became *qāḍī* (judge) during the reign of Harun al-Rashid, 786-809 AD; (4) Abu Zakariyya Yahya Ibn Adam al-Quraysh, 752-818 AD; (5) Muhammad Ibn Idris al-Shafi'i, 767-821 AD, a founder of the Shafi'i School of law; (6) Ahmad Ibn Hanbal, 780-855 AD, a student of al-Shafi'i and a founder of the Hanbali School of law; (7) Abu Ja'far Ahmad Ibn Nasr al-Dawudi, d. 1012 AD, a follower of the Maliki school of law; (8) 'Ali Ibn Muhammad al-Mawardi, 974-1058 AD; (9) Abu Hamid Muhammad Ibn Muhammad al-Ghazali, 1058-1111 AD, the author of the book *Ihyā' 'Ulūm al-Dīn*; (10) Fakh al-Din al-Razi, 1149-1209 AD, a theologian who is famous for his work *Mafātih al-Ghayb*; (11) Yahya Ibn Sharaf al-Nawawi, d. 1233 AD, a *hadith* expert and an Islamic jurist of the Shafi'i School of law; (12) Taqi' al-Din Ahmad Ibn 'Abd Halim Ibn Taymiyyah, 1263-1328 AD, a person who is quite famous for his book *al-Fatawā* in 35 volumes; (12) Abu Ishaq Ibrahim Ibn Musa al-Shatibi, d. 1388 AD, a philosopher of Islamic law; (13) 'Abd al-Rahman Ibn Khaldun, d. 1382 AD, a compiler of the book *al-Muqaddimah*.<sup>155</sup>

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<sup>154</sup> Zafar Iqbal and Mervyn Lewis, *An Islamic Perspective on Governance* (Massachusetts: Edward Elgar Publishing, 2009), 26-27.

<sup>155</sup> *Ibid.*

The educational background of al-Shatibi has been colored by some prominent scholars in Granada and diplomats who visited Granada. Among these scholars, who need to be mentioned, were Abu ‘Abd Allah al-Maqqari who came to Granada in 757 AH / 1356 AD as an emissary of Sultan Banu Marin and as a diplomat. He was the author of an Arabic grammar book. He was known as *muḥaqqiq* or expert in the field of application of the general principles of the Maliki school of law for special cases. His intellectual interaction with al-Maqqari began with the discourse of Racism in *uṣūl al-fiqh* of the Maliki school of law. Al-Maqqari was also an influential person in the field of Sufism. The two teachers of al-Shatibi who introduced philosophy, theology, and other sciences known as traditional sciences (*al-‘ulūm al-taqlidiyyah*) were Abu ‘Ali Mansur al-Zawawi and al-Sharif al-Tilimsani (d. 771 AH / 1369 AD). Abu ‘Ali Mansur al-Zawawi came to Granada in 753 AH / 1352 AD. However, due to frequent debates with the legal experts in Granada, finally, in 765 AH / 1363 AD, he was deported from Andalusia.

During the time of Sultan Muhammad V al-Ghani Billah, the *fuqaha*’ had a strong position in political constellation. This is the characteristic in the history of Islam in Spain. This condition was one of the reasons why the Maliki school of law became a state official school of law at that time.<sup>156</sup> On the other hand, during the time of al-Shatibi, there were two opposing Muslim scholar groups, namely the traditionalist group and the *ahl bid’ah* group. This second group, in al-Shatibi’s note, often performs practices of worship that appear to be forced because there are no clear provisions in *al-Qur’an* and *al-Sunnah*.

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<sup>156</sup> Jorgen S. Nelsen, “Shari’a between Renewal and Tradition”, within *Shari’a as Discourses: Legal Tradition and the Encounter with Europe*, eds. Jorgen S. Nelsen and Lisbet Christoffersen (Farnham, England: Ashgate Publishing Ltd.,1988), 5.

It was at this time that al-Shatibi appeared as a single person against prominent Muslim scholars who often gave *fatwa* without a clear basis of knowledge and comprehensive argumentation. As a result, Islamic law, at that time, had lost the inner spirit as a rule of God that certainly must have a noble purpose.<sup>157</sup> Therefore, when al-Shatibi compiled the book *al-Muwāfaqāt*, a work which is quite well-known in the study of Islamic law today, he was accused by traditionalist groups as *ahl bid'ah*. Even, he was then expelled from Granada. However, he was convinced that teachings based on false arguments would eventually disappear.<sup>158</sup>

The greatest motivation of al-Shatibi studying *uṣūl al-fiqh* started from his deep anxiety over the phenomenon of the weakness of the building of *fiqh* methodology in responding to the challenges of the social change. The radical mindset and controversial *fatwa* of al-Shatibi made him positioned as an opposition to power by the jurists who were predominantly pro-power. A number of issues that had become controversial include Sufism and Islamic jurisprudence (*fiqh*). Al-Shatibi opposed the practice of extreme Sufism until it was mixed with *fiqh*, for example, the obligation to performing certain rituals of Sufism in prayer, while the rituals were strongly and legally obligated. Other examples were the obligation of *zuhud* in general or to all Muslims and the belief in the superiority of a *shaykh* (the leading figure) over all other sect leaders. Al-Shatibi also opposed the practice of mentioning the name of a particular *sultan* in prayers. Al-Shatibi considered such practices were to be more political than religious.

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<sup>157</sup> Masudul Alam Choudhury, *Islamic Economics and Finance: An Epistemological Inquiry* (Bingley, UK: Emerald Group Publishing Limited, 2011), 74.

<sup>158</sup> Felicitas Meta Maria Opwis, *Maṣlaḥah and the Purpose of the Law: Islamic Discourse on Legal Change From the 4<sup>th</sup>/10<sup>th</sup> to 8<sup>th</sup>/14<sup>th</sup> Century* (Leiden: Brill, 2010), 247. See also Masudul Alam Choudhury, *Islamic Economics and Finance: An Epistemological Inquiry*, 74-75.

In addition to the above phenomenon, Al-Shatibi also highlighted *ta'asṣub* (excessive attitudes in worship) which was practiced by some *Ulama* of Granada and the Andalusian community towards the Maliki school of law. They see that anyone who is not from Ma'liki school of law is a heretic. As in historical records, that the Andalusians held firmly the Maliki school of thought since the first sultan, Hisham al-Awwal Ibn 'Abd al-Rahman al-Dakhil who ruled from 173-180 AH, making this school as a state official school of law. Khalid Mas'ud wrote:

Shatibi was much worried not only by the fact that tasawwuf comprised a number of rituals which he considered bid'ah but also by the fact that tasawwuf was having an adverse effect upon fiqh and *uṣūl*. He did not oppose the Sūfīs if they followed their peculiar practices individually or as a requirement of tasawwuf. He opposed them when certain Sūfīs and fuqahā' suggested under the influence of tasawwuf, that these practices were obligatory in a religio-legal sense.<sup>159</sup>

At least, the depth of al-Shatibi's knowledge in the fields of Islamic law, interpretation, and philosophy can be seen through his works. All of the works of al-Shatibi refer to two main fields of science which are popularly called *'ulūm al-wasīlah* (Arabic language sciences) and *'ulūm al-maqāsid* (sciences of the purposes of the Islamic law). Among the works are:

- a. *Al-Muwāfaqāt*: this book consists of 4 volumes. The original title of this book is *al-Ta'rīf bi Asrār al-Taklīf* then changed to *al-Muwāfaqāt*.

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<sup>159</sup> Muhammad Khalid Mas'ud, *Islamic Legal Philosophy: A Study of Abū Ishāq al-Shāṭibī's Life and Thought* (Delhi: International Islamic Publishers, 1989), 74-75.

- b. *Al-I'tisām*: this book consists of two chapters and was written after the book *al-Muwāfaqāt*. This book thoroughly examines the practice of *bid'ah*. Al-Shatibi died before completing this book.
- c. *Al-Majālis*: this book is the explanation of the book *al-Buyū'* contained in *Ṣaḥīḥ al-Bukhārī*.
- d. *Sharḥ al-Khulāṣah*: this book contains the grammar or *naḥwu* as an explanation of *Alfiyyah* Ibn Malik.
- e. *'Unwān al-Ittiḥād fī 'Ilm al-Ishtiqāq*: this book explains the science of *ṣarf* and *fiqh al-lughah*.
- f. *Uṣūl al-Naḥw*: this book discusses the rules of language (*qawā'id al-lughah*).
- g. *Al-Ifādāt wa al-Inshādāt*: this book is specifically designed as a description of Imam al-Shatibi's life journey as well as mentioning his teachers and students.<sup>160</sup>

## 2. Ibn 'Ashur (1879-1973 AD)

The second figure is Ibn 'Ashur.<sup>161</sup> His full name is Muhammad Tahir Ibn Muhammad Ibn Muhammad Tahir Ibn Muhammad Shadhili Ibn' Abd al-Qadir Ibn Muhammad Ibn 'Ashur. The family of Ibn 'Ashur is known as a devout and worshippers family. Ibn 'Ashur's Grandfather, namely Muhammad Tahir Ibn Muhammad Ibn Muhammad Shadhili was an Arabic expert, jurist, and in 1851 AD had served as chairman of *qāḍī* and even was trusted as a *mufti* in Tunisia.<sup>162</sup> If it is prosecuted, the

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<sup>160</sup> Muhammad Makhluf, *Shajarah 'an-Nūr al-Zakiyyah* (Beirut: Dār al-Kutub al-'Arabī, 1349 H), 23. See also Ahmad Raysuni, *Imām al-Shāḥibīs Theory of the Higher Objectives and Intents of Islamic Law* (Herndon: IIIT, 2006), 78-80.

<sup>161</sup> Muhammad al-Tahir Ibn 'Ashur, *Maqāṣid al-Sharī'ah al-Islāmiyyah*, ed. Muhammad al-Tahir al-Misawi (Tunisia: Dār al-Nafāis li al-Nashr wa al-Tawzī', 2001), 15.

<sup>162</sup> The Encyclopedia of Islam, "Ibn Asyur", *The Encyclopedia Of Islam. New Edition* (Leiden: 1971), vol. 3, 720.

great-grandfather of Ibn ‘Ashur is from an Andalusian family.<sup>163</sup>

In general, the portrait of Ibn ‘Ashur’s life is divided into two periods. First is the era of French colonial rule over *Maghrib ‘Arabī* countries, such as Morocco (1912-1956 AD), Al-Jazair (1830-1962 AD), Egypt (1798-1801 AD), and Tunisia (1881-1956 AD).<sup>164</sup> While the second period is the period of independence achieved by the people of Tunisia in 1956 to 1973 AD, the year he died. Among the Arab countries, Tunisia is a country with a high level of tribal nationalism. This is proven by 100 percent of the population speaking Arabic.<sup>165</sup> This factor is the basic capital for this country to get out of French colonialism soon.<sup>166</sup>

The first period of his life was marked by various major events in the Islamic world such as the weak authority of the Caliphate of Turkey Uthmani over the countries of its power. This condition is exploited by European imperialist countries to expand their power over Islamic countries in Middle East, including Tunisia. Trying to escape from the French occupation, various resistance movements grew. There are, at least, three important factors in encouraging the emergence of various independence movements, namely: (1) the spirit of reform voiced by Muhammad ‘Abduh (1849-1905 AD) to fight French colonialism; (2) Tunisian reformer, Khayruddin al-

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<sup>163</sup> Muhammad al-Tahir Ibn ‘Ashur, *Maqāṣid al-Sharī‘ah al-Islāmiyyah*, ed. 15.

<sup>164</sup> Kenneth J. Perkins, *A History of Modern Tunisia* (Cambridge: Cambridge University Press, 2004), 229. See also Elizabeth Suzanne Kassab, *Contemporary Arab Thought: Cultural Critique in Comparative Perspective* (New York: Columbia University Press, 2010).

<sup>165</sup> L. Carl Brown, *Diplomacy in the Middle East: The International Relations of Regional and Outside* (New York: I.B.Tauris, 2004), 294.

<sup>166</sup> *Ibid.*

Tunisi through education; and (3) physical confrontation between freedom fighters and invaders.<sup>167</sup>

The second period of Ibn ‘Ashur’s life was post-independence. After being colonized by France for 75 years, in 1958 AD, Tunisia gained its independence. At that time, the leadership was held by Habib Borgouiba as president. Under his leadership, Tunisia was a newly independent country that was most ready to modernize. This is because the figure of Borgouiba has good capability to do lobbying politics in addition to his individual character of western-oriented. It is closer to France and European countries than to Arab countries.<sup>168</sup> This was proven when the annexation of territory in the Suez Canal by France and Israel, Borgouiba said “if I had to choose between the Arab League and NATO, then surely, I would choose NATO”.<sup>169</sup>

In order to realize his desire to make Tunisia a modern country and under the pretext of catching up with the country from developed countries, Borgouiba actively carried out secularization campaigns everywhere and claimed that it was the only way to bring the country towards progress. Islam was set aside from the political arena, even from public spaces. Islam seemed to be nothing more than religious rituals. On the other hand, Western tradition was the only model taken for granted that was worth following.

Apart from the Tunisian socio-political conditions which were in the grip of French colonialism and in the midst of the struggle of the Tunisian people to gain independence, on the other hand, Ibn ‘Ashur lived in the traditions of the Sunni Muslim family and the followers of

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<sup>167</sup> Jamil M. Abun-Nasr, *A History of the Maghrib in the Islamic Period* (New York: Cambridge University Press, 1993), 355.

<sup>168</sup> Clement Henry Moore, *Tunisia since Independence: The Dynamics of the One-Party Government* (London: University of California Press, 1965), 8.

<sup>169</sup> L. Carl Brown, *Diplomacy in the Middle East: The International Relations of Regional and Outside*, 294.

the Hanafī school of thought. It appears in young Ibn ‘Ashur a reformist spirit that he inherited from his grandfather, Muhammad al-Tahir Ibn ‘Ashur (1815-1868 AD). In 1892 AD, Ibn ‘Ashur began studying at the *al-Zaytūnah* educational institution (formal education with al-Azhār standard in Cairo). During this time, he interacted with a lot of major scholars at that time. Because of the level of genius, almost all of his teachers said that Ibn ‘Ashur had inherited the spirit of reformist *ulama* (reform-minded *ulama*) in 1860-1870 AD like Khayr al-Din.<sup>170</sup> From here, the beginning of his career as a lecturer at his almamater (*al-Zaytūnah*). After graduating in 1899 AD, In 1927 AD he was trusted to occupy an honorable position, namely as the Chief Justice of the Maliki school of thought (1927 AD). And Ibn ‘Ashur reached the peak of his career, when, in 1932, he was appointed as the Tunisian Great Mufti (*Shaykh al-Islām*).<sup>171</sup>

Ibn ‘Ashur’s scientific reputation can be seen from his works that show the depth of his knowledge, especially about Islamic law. Among the works that have been written by him are:

- a. *Tafsīr al-Tahrīr wa al-Tanwīr* (interpretation of *al-Qur’an* written in 15 volumes).
- b. *Kashf al-Muwatta’* (the explanation of the book *al-Muwatta’* of Imam Malik Ibn Anas).
- c. *Naẓār al-Fasīḥ* (the explanation of the book *al-Jami’ al-Ṣaḥīḥ* of Muhammad Ibn Isma’il al-Bukhari).
- d. *Alaysa al-Ṣubḥ bi Qarīb* (critical study of the history of Islamic education which he completed with the reform project in the field of education).

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<sup>170</sup> Muhammad al-Tahir Ibn ‘Ashur, *Maqāsid al-Sharī’ah al-Islāmiyyah*, 39-41.

<sup>171</sup> Iyad Khalid, *Muhammad Tahir Ibn ‘Ashur* (Damaskus: Dār al-Qalam, 1995), 51.

- e. *Uṣūl al-Niẓām al-Ijtimā'ī fī al-Islām* (study of the principles of peace as a system of Islamic socio-political values).
- f. *Hāshiyat al-Tawhīd wa al-Taṣḥīḥ* . (criticism and explanation of the book of *Sharḥ al-Tanqīḥ al-Fuṣūl*, a book of *uṣūl al-fiqh* of the Muslim scholars of the Maliki school of law, Shihab al-Din al-Qarafi).
- g. *Maqāṣid al-Sharī'ah al-Islāmiyyah*.

This last book discusses the highest purposes of Islamic law. This book was first printed in Tunisia in 1946 AD. The book, which was later ranked in the discourse of Islamic law, was written seriously by Ibn 'Ashur and was based on the spirit of revitalizing Islamic law (*fiqh*). Issues surrounding the latter book came to surface when Shaykh Muhammad Abduh, an Islamic reformer in Egypt and the Arab world, visited Tunisia for the second time in 1903 AD. His meeting with Abduh was enough to enlighten Ibn 'Ashur about the importance of the Islamic reform movement in all joints especially aspect of methodology of Islamic law.<sup>172</sup> In the preamble of *Maqāṣid al-Sharī'ah al-Islāmiyyah*, Ibn 'Ashur said:

“In this book I intend to develop some quite important discourse about *maqāṣid al-sharī'ah al-Islāmiyyah* and to provide illustrations and arguments about the importance of *maqāṣid al-sharī'ah* (especially) for those who want to understand Islam, as a guide or reference when there

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<sup>172</sup> Muhammad Abduh once recommended to his students, including Rashid Rida and Ibn 'Ashur, to read and study the work of al-Shatibi's *al-Muwāfaqāt*. This book was first printed in Tunisia in 1883 AD (a year before Abduh's visit to this country or 63 years before the book *Maqāṣid al-Sharī'ah al-Islāmiyyah* was printed in Tunisia). See Riḍwān al-Sayyid, “Contemporary Muslim Thought and Human Right”, within *Islam Cristiana 21* (1995), 27-41. See also Ibn 'Ashur, *Treatise on Maqāṣid al-Sharī'ah* (Herndon: International Institute for Islamic Thought, 2006), xiv-xv.

are differences of opinion and changes of time, as a means to minimize dissent among the *fuqaha* ' (who have different places and times), as a means for the followers of the school of law when confronting such conditions or only refer to one opinion. Thus, the sectarian fanaticism can be avoided and more in favor of the truth".<sup>173</sup>

Through this last book, Ibn 'Ashur wants to emphasize that *maqāṣid al-sharī'ah* has been separated from the science of Islamic Jurisprudence (*fiqh*) and has become an independent scientific discipline. Almost all contemporary Muslim scholars of *maqāṣid al-sharī'ah* agree that the book *Maqāṣid al-Sharī'ah al-Islāmiyyah* is a pioneer in the study of *maqāṣid al-sharī'ah* after Imam al-Shatibi, five to six centuries ago.

The Muslim scholars of *maqāṣid al-sharī'ah* who lived during Ibn 'Ashur are 'Allal al-Fasi (d. 1394 AH / 1074 AD) from Morocco. These two scholars became the central figures in the study of *maqāṣid al-sharī'ah* after Imam al-Shatibi. The book entitled *Maqāṣid al-Sharī'ah al-Islāmiyyah* is one proof of the genius of Ibn 'Ashur in making new formulations which he set in such a way as to make Islamic law appear cooler and able to dialogue with the progress of time. In addition, the book of *Maqāṣid al-Sharī'ah al-Islāmiyyah wa Makārimuha*, written by 'Allal al-Fasi, also received a response that was no less lively than the work of Ibn 'Ashur. The competence of Ibn 'Ashur in *maqāṣid al-sharī'ah* is also recognized by Ahmad al-Raysuni who said:

“if al-Shatibi is a very calculated figure for the many famous Muslim scholars, and a person who understands of the most people who understand the science of *maqāṣid al-sharī'ah*, even, he is the 'first

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<sup>173</sup> Muhammad al-Tahir Ibn 'Ashur, *Maqāṣid al-Sharī'ah al-Islāmiyyah*, vol. 2, 165

teacher' in the science of *maqāṣid al-sharī'ah* discourse ... on the other hand, Ibn 'Ashur is the 'second teacher' in the science of *maqāṣid al-sharī'ah* discourse ... the idea of Ibn 'Ashur is not just tailing his predecessors ... but, he is able to make completely new formulations and examples".<sup>174</sup>

## **F. The Figures of *Maqasid al-Shari'ah* in a Contemporary Era**

The development of the science of *maqāṣid al-sharī'ah* is getting faster and faster. At present, almost every study on the methodology of Islamic law has included the study of *maqāṣid al-sharī'ah* as a core part. This science is able to take attention of many scholars of Islamic law throughout the Islamic world. In the view of contemporary Muslim scholars, the definitions, scopes, and rules that underlie *maqāṣid al-sharī'ah* always experience a shift. Muhammad Hashim Kamali asserted that the shift was due to three fundamental things: (1) *maqāṣid al-sharī'ah*, as knowledge in the realm of human's cognition, has a relative level of truth; (2) the basic character of *maqāṣid al-sharī'ah* is as a set of open-ended values; (3) the emergence of new problems which impact on the demand to carry out methodological reconstruction of Islamic law. This section will briefly describe the ideas of some of the contemporary *maqāṣid al-sharī'ah* figures about the conception of *maqāṣid al-sharī'ah*.<sup>175</sup>

### **1. Yusuf al-Qardawi (Born in 1926)**

One of the contemporary *maqāṣid al-sharī'ah* figures, whose writings and *fatwas* are highly waited by the Muslim community in all over the world, is Yusuf al-

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<sup>174</sup> Ahmad al-Raysuni, *Naẓāriyat al-Maqāṣid 'inda al-Imām al-Shāḥibī* (Riyād: al-Dār al-'Ālimiyyah li al-Kitāb al-Islāmī, 1995), 335-341.

<sup>175</sup> Muhammad Hashim Kamali, "Maqāṣid al-Sharī'ah Made Simple", within *Islamic Studies*, 38 (1999), 193-209.

Qardawi.<sup>176</sup> Yusuf al-Qardawi was born in Shafth Turab, Cairo, Egypt, September 9, 1926. He is a Muslim scholar from Egypt. He is known as a *mujtahid* in the current modern era. Aside from being a *mujtahid*, he is trusted as the head of a *fatwa* institution. Many *fatwas* that have been issued are used as reference material for the legal issues. However, many also criticized the *fatwas* as more directed to liberal thinking. He obtained his doctorate in 1972 with a dissertation “*Zakat* and its Impact on Poverty Reduction”, which was later printed into the book “*Fiqh al-Zakat*”. The book discusses about *zakat* in the perspective of modernity.<sup>177</sup>

It seems that al-Qardawi’s thoughts are more likely to be inductive. This can be seen from the way he understands the *juziyyāt* (parsial) texts to reveal the meaning of *kulliyyāt* (universal). Thus, the product of Islamic law cannot be separated from the intrinsic objectives. This view is a criticism of textual groups that tend to be apologetic in interpreting texts, so that, the resulting legal products are increasingly far from the basic values and are less applicable to various problems of contemporary Muslims.<sup>178</sup>

In connection with the concept of *maqāṣid al-sharī‘ah* as that of the other contemporary *maqāṣidiyyūn*, al-Qardawi sees that *maqāṣid al-sharī‘ah* is a human’s concept that cannot be separated from natural mind. Therefore, it will always develop along with changes in time and place. He defines *maqāṣid al-sharī‘ah* as more oriented towards *fiqh*, that is, “the ultimate goals desired by the *sharī‘ah*, of all ‘orders’, ‘prohibitions’, and ‘permissibilities’, and which is to be realized by the provisions of the *juziyyah* law in the lives of *mukallaf* in

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<sup>176</sup> [http://en.wikipedia.org/wiki/Yusuf\\_al-Qardawi](http://en.wikipedia.org/wiki/Yusuf_al-Qardawi).

<sup>177</sup> Ibid.

<sup>178</sup> Yusuf al-Qardawi, *al-Siyāsiyyah al-Shar‘iyyah fī Daw’ al-Nuṣūṣ al-Sharī‘ah wa Maqāṣidiha* (Kairo: Maktabah Wahbah, 2005), 25-26.

the realm of individuals, families, groups, and the people as a whole”.<sup>179</sup>

The different of al-Qardawi’s concept of *maqāṣid al-sharī‘ah* with the others’ is to add “maintaining honor” as part of *al-ḍarūriyyāt al-khams*.<sup>180</sup> Then he divides *maqāṣid al-sharī‘ah* into two main parts, namely: first, on the meaning and general objectives, such as the principle of convenience, justice, self-servitude to Allah, helping one another to achieve piety, propaganda, realizing human nature, and brotherhood.<sup>181</sup> Whereas, on the second level are *ḍarūriyyāt*, *ḥājīyyāt*, dan *taḥṣīniyyāt* as particular purposes to realize benefits of *mukallaḥ* for individuals, families, groups, and the whole community.<sup>182</sup> This study is almost the same as the philosophical study of Umar Baha’ al-Din al-Amiri with the concept of *al-Fiqh al-Ḥaḍārī*. Through this concept, he wants to bring together the universal values of civilization and the universal values of Islam, so that, contemporary issues can be covered.<sup>183</sup>

The spirit that Yusuf al-Qardawi wants to achieve through his concept of *maqāṣid al-sharī‘ah* is that *Islām ṣāliḥ likulli zamān wa makān*. To achieve this basic goal, al-Qardawi always rests on six main points, namely: (1) the belief that every *sharī‘ah* provision must contain wisdom in the form of *maslahah*; (2) integrating Islamic *sharī‘ah* provisions with social sciences; (3) attitude and

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<sup>179</sup> Yusuf al-Qardawi, *Dirāsah fī Fiqh Maqāṣid al-Sharī‘ah bayn al-Maqāṣid al-Kullīyyah wa al-Nuṣūṣīyyah al-Juzīyyah* (Beirut: Dār al-Shurūq, 2006), 11-13.

<sup>180</sup> Yusuf al-Qardawi, *Dawr al-Qiyām wa al-Akhlāq fī al-Iqtisād al-Islām* (Kairo: Maktabah Waḥbah, 2001), 115-116.

<sup>181</sup> Yusuf al-Qardawi, *Khiṭabunā al-Islām fī ‘Aṣr al-Awlāmah* (Kairo: Dār al-Shurūq, 2004), 32-33.

<sup>182</sup> Yusuf al-Qardawi, *al-Siyāsiyyah al-Shar‘īyyah fī Ḍaw’ al-Nuṣūṣ al-Sharī‘ah wa Maqāṣidihā*, 25-26.

<sup>183</sup> ‘Umar Baha’ al-Din al-Amiri, *al-Islām wa Azmah al-Ḥaḍārāh al-Insāniyyah al-Mu‘āṣirah fī Ḍaw’ al-Fiqh al-Ḥaḍārī* (Jeddah: Dār al-Alāmiyyah al-Kitāb al-Islāmī, 1993), 76.

worldview that show harmony between the regions of the world and the hereafter; (4) there is a direct and indirect relationship between the provisions of the text and the reality of life at all times; (5) the principle of convenience; (6) the principle of inclusiveness (openness), dialogue, and tolerance.<sup>184</sup>

## 2. Taha Jabir al-'Alwani (Born in 1935)

The second contemporary figure of *maqāṣid al-sharī'ah* is Taha Jabir al-'Alwani.<sup>185</sup> He was born in 1935 in Iraq. His competence in the field of Islamic legal theory is the use of the *maqāṣid al-sharī'ah* approach particularly with regard to Muslims in the modern world. He is the Chair of the North American Jurisprudence Council, and has served as President of the International Institute of Islamic Thought which based in Herndon, London. He taught Islamic legal theory for more than ten years at some Islamic universities before migrating to the United States. Professor al-'Alwani received his MA and Ph.D. in the theory of Islamic law and jurisprudence from Al-Azhar in Cairo.

He defines *maqāṣid al-sharī'ah* its purpose and *'illah* of the provisions of the *sharī'ah* law itself. Al-'Alwani divides *maqāṣid al-sharī'ah* into three main parts, namely: first, *al-maqāṣid al-'ulyā al-ḥakimah* as the highest level of *maqāṣid*. *Maqāṣid* at this level includes *tawḥīd* (the oneness of God), *tazkiyyah* (self-cleansing), and *'umrān* (civilization/peace).<sup>186</sup> These three values are universal principles which form the basis of all of the *sharī'ah* provisions. *Al-maqāṣid al-'ulyā al-ḥakimah* is inductively explored from the universal values contained in *al-Qur'an*

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<sup>184</sup> Yusuf al-Qardawi, *Dirāsah fī Fiqh Maqāṣid al-Sharī'ah bayn al-Maqāṣid al-Kulliyah wa al-Nuṣūṣiyyah al-Juziyyah*, 53.

<sup>185</sup> [http://en.wikipedia.org/wiki/Taha\\_Jabir\\_Alalwani](http://en.wikipedia.org/wiki/Taha_Jabir_Alalwani).

<sup>186</sup> Taha Jabir al-'Alwani, *Qaḍāyā Islāmiyyah Mu'aṣirah Maqāṣid al-Sharī'ah* (Beirut: Dār al-Hādī, 2001), 135-183.

and *Sunnah* as the highest authority of Islamic law.<sup>187</sup> Second, *al-maqāṣid al-kullīyyāt* occupies the second level which contains the values of justice, freedom, and egalitarian. Third, *al-maqāṣid al-ḍarūriyyāt* as the goal of *sharī‘ah* at the next level, namely *ḍarūriyyāt*, *ḥājīyyāt*, and *taḥsīniyyāt* as the lowest *maqāṣid*.<sup>188</sup> The linkages of these three things are integral as goals that must be achieved in an effort to obtain the nature of benefit.<sup>189</sup>

### 3. Jamal al-Din ‘Attia

The third contemporary figure of *maqāṣid al-sharī‘ah* is Jamal al-Din ‘Attia, an expert in the field of study of *maqāṣid al-sharī‘ah*. He defines *maqāṣid al-sharī‘ah* as the highest objective of Islamic law in a set of values of justice, humanity, universality, and *maslahah* which are basically desired by *sharī‘ah* law in the forms of “orders”, “prohibitions”, and “permits”, and which are intended to be realized by the provisions of the *juziyyah* (specific) law in the lives of *mukallaf*, whether in the realm of individuals, families, and groups, as well as the community as a whole.<sup>190</sup> In his book entitled *Towards Realization of the Higher Intent of Islamic Law*, ‘Attia interprets *maqāṣid* with the most fundamental goal of *ijtihād* is how to be able to respond to various contemporary problems faced by Muslims.

Furthermore, practically, in order that *maqāṣid* can be compared in the area of Islamic law, ‘Attia explains several steps to uncover the aims and objectives of Islamic law: (1) integration between contemporary values and *maqāṣid* through the role of reason and experience; (2) giving answers to questions theoretically and complexly

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<sup>187</sup> Ibid., 174.

<sup>188</sup> Ibid., 83.

<sup>189</sup> Ibid., 97.

<sup>190</sup> Jamal al-Din ‘Attia, *Towards Realisation of the Higher Intent of Islamic Law* (London: International Institute of Islamic Thought, 2007), 153.

through the role of *maqāṣid* in *ijtihād* and legal theorization; and (3) the need for the role of the *maqāṣid* mindset in intellectual area of the scholars of Islamic law.

The different side of ‘Attia is that he does not stop at the conception of *ḍarūriyyāt* (*ḍarūriyyāt*, *ḥājīyyāt*, and *taḥsīniyyāt*) as what the *maqāṣidiyyūn* (Muslim scholars who have a big concern to *maqāṣid al-sharī‘ah* discourse) have formulated. But he adds with two new conceptions namely *zīnah* and *fuḍūl*. *Zīnah* is a complement to *taḥsīniyyāt* in the form of accessories needs like someone who has excessive clothing, enough housing, and others. Whereas, *fuḍūl* is the negative side of *taḥsīniyyāt* like consuming unlawfull food or doing something dangerous, or he calls it by the term *mā warāa al-taḥsīnī* (something opposite from *taḥsīniyyah*).<sup>191</sup>

‘Attia adds that the priority of *al-ḍarūriyyāt al-khams* (safeguarding religion, soul, intelligence, descent, and wealth) is not ambiguous and rigid, but it is more flexible. He gives an example of “safeguarding soul” is by giving food and drink. But, there are millions of people who suffer from malnutrition. Under such condition “giving nutritious food” rises above “safeguarding religion” and so on.<sup>192</sup> This ‘Attia’s critic is the same as what Jasser Auda put forward as explained in next pages.

#### 4. Al-Raysuni

Another *maqāṣidiyyūn* figure is al-Raysuni. As al-Shatibi holds that *ijtihād* is not just a textual understanding of *al-Qur’an* and *al-Sunnah*, but, it must also pay attention to the contextual dimensions. Al-Raysuni interprets *maqāṣid al-sharī‘ah* is “the purposes desired by the *sharī‘ah* law in the form of *maslahah* for *mukallaḥ*.”<sup>193</sup> In his book entitled *Imām al-Shāṭibī’s Theory of the Higher*

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<sup>191</sup> Ibid., 43.

<sup>192</sup> Ibid.

<sup>193</sup> Ahmad al-Raysuni, *Imām al-Shāṭibī’s Theory of the Higher Objectives and Intent of Islamic Law*, xxiii.

*Objectives and Intent of Islamic Law*, in addition to describing the ideas of al-Shatibi, he also quotes the opinion of Ibn ‘Ashur and ‘Allal al-Fasi. He puts more emphasis on how to understand the proposition of the texts by using the approach of *maqāṣid al-sharī‘ah*.

According to him, there are four basic principles that underlie how to operationalize *ijtihād* by using *maqāṣid al-sharī‘ah*, namely: (1) every provision of *sharī‘ah* law must have *‘illah*, purposes and benefits; (2) the determination of *maqāṣid al-sharī‘ah* in a legal provision must be argued; (3) the urgency of arranging hierarchically the benefit and the interpretation; (4) the need to distinguish between goals/*maqāṣid* and means/*wasāil* towards the goals; (5) When trying to pass *tarjih* among several different opinions, the higher issue must take precedence over the lower issue, while the smaller *mafsadah* takes precedence over the larger *mafsadah*. In the *maqāṣid* approach, the power of the proposition tends to be defeated by the strength of its *maslahah* side. This is the difference between the *maqāṣid* approach and the classic *uṣūl al-fiqh* approach in *tarjih* process.<sup>194</sup>

This view is actually more focused on the urgency of the search for wisdom, *‘illah*, and meaning, as well as benefit as legal goal. It seems that this view is parallel with the rules established by al-Shatibi who wants to show the face of Islamic law that is dynamic and has accentuations on various problems of the contemporary Muslim communities. He adds that the most important aspects in carrying out Islamic law are *maslahah* and wisdom.

## 5. Mohammad Hashim Kamali

The next contemporary *maqāṣid* figure is Mohammad Hashim Kamali. Hashim Kamali’s idea is, in

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<sup>194</sup> Jamal al-Din ‘Attia, *Towards Realisation of the Higher Intent of Islamic Law*, 39.

fact, not far from that of the other contemporary *maqāṣidiyyūn*. However, there are some conceptions that look different. According to Kamali, *maqāṣid al-sharī‘ah* has three levels. The highest levels of *maqāṣid* are *rahmah* (Allah’s affection) and *hudā* (Allah’s instructions/guidance). The next levels are justice, avoiding difficulties and dangers, prioritizing benefits, and education for individuals (*tahdhīb al-fard*). Next, followed by *maqāṣid* at the lowest level, namely *ḍarūriyyāt*, *ḥājīyyāt*, and *taḥsīniyyāt*.

“Justice” and “*maslahah*”, besides both are being the *sharī‘ah* objectives, they are also the manifestations of the *rahmah* of Allah itself. Kamali incorporates “education for individuals” as “justice” and “*maslahah*”. Thus, if individuals have become good, then they will become agents for realizing *maslahah* in a social context. Kamali agrees with Ibn ‘Ashur that *maqāṣid al-sharī‘ah* can be extracted through the induction method. The induction conception according to Kamali are: (1) through textual meaning of *al-Qur’an* and *al-Sunnah*; (2) through rational considerations; (3) through *fatwas* of the related scholars of schools of thought; (4) through reasons of provision contained in the text; (5) through assessments of the strength or the weakness of promises or replies (*al-wa’d wa al-wa’id*) contained in the text.<sup>195</sup>

Being in line with Ibn ‘Ashur’s view, Hashim Kamali’s thought of the importance of education for each individual also agrees with that of Wahbah al-Zuhayli. He assumes that through moral education and instilling moral values in each individual occupie a very vital position. With moral education achieved by each individual, in addition to delivering the individual to be a pious figure,

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<sup>195</sup> Ibid.

he also means to have made these individuals as a means to realize *maslahah* for others.<sup>196</sup>

## 6. Jasser Auda (Lahir 1966)

Jasser Auda was born in Cairo in 1966. He has a slightly different educational background from other *maqāṣidiyyūn*, where he was able to get an education in the Middle East and Europe. In 1988, he received education of *al-Qur'an* and Islamic sciences at the Al-Azhar Mosque, Cairo. He obtained his BA degree from the concentration of Islamic Studies at Islamic American University, USA in 2001 and his BSc degree was obtained from Engineering Cairo University, Egypt Course Av. Furthermore, his Master's degree in *maqāṣid al-sharī'ah* and *fiqh* was obtained from the Islamic University of America, Michigan, in 2004. In 2006, he earned his Ph.D in Systems Analysis studies from the University of Waterloo, Canada. Whereas, a Ph.D for the second time from the University of Wales, England in 2008 in the concentration of Islamic Legal Philosophy.<sup>197</sup>

At present, Jasser Auda is a Professor in Philosophy of Islamic Law at the Faculty of Islamic Studies of Qatar, Qatar Foundation. In addition, there are several important positions occupied by Jasser Auda especially with regard to the movement for the contextualization efforts of Islamic law mainly in European countries. Among the important positions held by Jasser Auda are: (1) as a founding member of the “International Association of Muslim Ulema” based in Dublin; (2) a member of the “Academic Council of the International Institute of Islamic Thought” in London, England; (3) a member of the “International Institute for Advanced Systems Research”, Canada; (4) a member of the “Center for

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<sup>196</sup> Wahbah al-Zuhayli, *Nazāriyyāt al-Ḍarūrāh al-Sharī'iyah* (Beirut: Muassasāt al-Risālah, 1985), 50. Muhammad Hashim Kamali, “Maqāṣid al-Sharī'ah Made Simple”, 193-209.

<sup>197</sup> <http://islamstory.com/en/node/38951>

Supervision of Civilization Study Center”, United Kingdom; (5) a member of the “Executive Board of the Association of Social Muslim Scientists”, United Kingdom; (6) a member of the “Islamophobic and Racism Resistance Forum”, United Kingdom, and; (7) and consultants for Islamonline.net.

In terms of writing, Jasser Auda is a productive scholar. Some of Auda’s writings in book are: *Fiqh al-Maqāṣid*; *Inātah al-Aḥkām al-Shar’iyyah Bimaqāṣidihā*, 2008; (2) *Maqāṣid al-Sharī’ah as Philosophy of Islamic Law A Systems Approach*, 2008; (3) *Maqāṣid al-Sharī’ah a Beginner’s Guide*, 2008; (4) *Contextualising Islam in Britain: Exploratory Perspectives*, 2009; (5) *Khulāṣah Bidāyah al-Mujtahid li al-Qāḍī Abī al-Walīd Ibn Rushd al-Qāḍī*, 2009; (6) *Maqāṣid al-Sharī’ah Dalīlun li al-Mubtadi’*, 2011. He also has dozens of writings in journals, printed media, books, DVDs, public lectures, and online journals which are scattered around the world.<sup>198</sup>

Some important points about Jasser Auda’s thoughts and criticisms about *maqāṣid al-sharī’ah* are departing from some fundamental questions namely “whyness” (why), from *qiyās* based on *‘illah* to *qiyās* based on *maqāṣid*, *maṣlahah* rests on *maqāṣid*, Jasser Auda’s critique of the classic paradigm of *maqāṣid al-sharī’ah*. If viewed from a philosophical perspective, the question “why” has the same degree as “what is the goal”. Thus, *maqāṣid al-sharī’ah* is a branch of Islamic epistemology which was originally able to answer the challenges of the question “why”. *Maqāṣid al-sharī’ah* explains “wisdom behind the provisions of Islamic law” (*al-ḥikmah min warāi al-ḥukm*), such as “social solidarity” is the wisdom of the concept of *sadaqah*, the concept of associating with neighbors, and the concept of greeting each other. Furthermore “increasing self-awareness of the existence of

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<sup>198</sup> Muhammad Umer Chapra, *The Islamic Vision of Development in the Light of Maqasid Al-Shariah* (Herndon: International Institute of Islamic Thought, 2008), ii.

God” is the wisdom of establishing prayer, fasting, performing pilgrimage, reciting *al-Qur’an* and so on.

By referring to the classification of *maqāṣid al-sharī‘ah* offered by some modern and contemporary *maqāṣidiyyun* figures, like Muhammad ‘Abduh, Ibn ‘Ashur, ‘Allal al-Fasi, Jamaluddin ‘Attiya, Yusuf al-Qardawi and others, Jasser Auda first grouped *maqāṣid al-sharī‘ah* based on their target objects into three, namely:

- a. *Al-maqāṣid al-‘āmmah* (general purposes): this *maqāṣid* is excavated through the complexity of Islamic law building (*kulliyāt al-sharī‘ah al-Islāmiyyah*) by adding new values in the realm of *ḍarūriyyah* and *ḥājīyyah*, such as universality (*al-kullīyyāt*), public justice (*al-‘adālah al-ijtimā‘īyyah*), the principle of ease (*al-taysīr*), landing to earth (*al-‘ālimiyyah*).<sup>199</sup>
- b. *Al-maqāṣid al-khāṣṣah* (particular purposes): this *maqāṣid* is explored through certain discussions in Islamic law, such as welfare for children in family law, making preventive efforts in the area criminal law, and prevent the monopoly of certain people or groups in the law of sale and purchase transactions.<sup>200</sup>
- c. *Al-maqāṣid al-juziyyah* (partial objectives): this third *maqāṣid* has more to do with the intentions or wisdoms behind the stipulation of Islamic law, such as finding truth as wisdom from the command to bring witnesses to a trial, giving *rukḥṣah* (lightening) is the wisdom of the ability to break fasting for sick people, to feed the poor as a lesson from the prohibition of storing sacrificial meat.

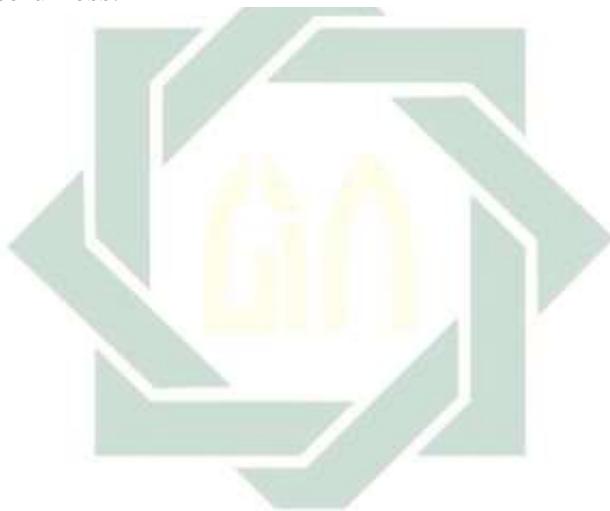
Jasser Auda’s concept of *maqāṣid al-sharī‘ah* is formulated by developing Bertalanffy’s system theory, a systems theory expert. He said that an effective and

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<sup>199</sup> Jasser Auda, *Maqāṣid al-Sharī‘ah a Beginner’s*, 6-7; Jasser Auda, *Maqāṣid al-Sharī‘ah as Philosophy of Islamic Law A Systems Approach*, 5.

<sup>200</sup> Jasser Auda, *Maqāṣid al-Sharī‘ah a Beginner’s*, 6-7.

efficient system is one that contains features: (1) holism; (2) goal-seeking; (3) interrelationship and interdependence; (4) input and output; (5) transformation; (6) regulation; (7) hierarchy; (8) differentiation; (9) equifinality and multifinality; and (10) entropy. According to Auda, the building of *uṣūl al-fiqh* is like a system and can be analyzed through integration between system theory and Islamic theology as an inseparable unit. Features that are broken down through integration are human's knowledge, wholeness or universality, openness, interrelated hierarchy, multi-dimensionality, and purposefulness.



## CHAPTER V

### THE THEORY OF *MAQAŞID AL-SHARĪ'AH*

#### A. Validity of *Maqaşid-al-Sharī'ah*

The Muslim scholars of *maqaşid* agree that the aims and objectives of the *sharī'ah* have a hierarchy that shows different degrees of emphasis from one another. This is because there is a *sharī'ah* goal which is famously mentioned in the texts (*al-Qur'an* and *al-Sunnah*). So that, the legal provision is certain (*qaṭ'ī al-dalālah*) as in chapter *al-Nahl*: 89 (And [mention] the Day when We will resurrect among every nation a witness over them from themselves. And We will bring you, [O Muhammad], as a witness over your nation. And We have sent down to you the Book as clarification for all things and as guidance and mercy and good tidings for the Muslims).<sup>201</sup> This verse explains that the purpose of the sending down of *al-Qur'an* is to explain everything and instructions as well as grace and good news for those who surrender.

In addition, there are also some objectives which are not mentioned in the text explicitly or famously (*mutawātir*/the most famous). As in chapter *Hūd*: 101 (And We did not wrong them, but they wronged themselves. And they were not availed at all by their gods which they invoked other than Allah when there came the command of your Lord. And they did not increase them in other than ruin). The verse explains that the purpose of this verse is for people to repent to Allah before Allah tortures them).<sup>202</sup> Chapter *al-Mā'idah*: 6 (O you who have believed, when you rise to [perform] prayer, wash your faces and your forearms to the elbows and wipe over your heads and wash your feet to the ankles. And if you are in a state of *janabah*, then purify yourselves. But if you are ill or on a journey or one of you comes from the place of relieving himself or you have contacted women and do not

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<sup>201</sup> *Al-Qur'an*, chapter *al-Nahl*: 89.

<sup>202</sup> *Al-Qur'an*, chapter *Hūd*: 101.

find water, then seek clean earth and wipe over your faces and hands with it. Allah does not intend to make difficulty for you, but He intends to purify you and complete His favor upon you that you may be grateful).<sup>203</sup> This verse explains that the wisdom of purification is for bodily health).

Ibn ‘Ashur explained that the wisdom or purpose of the command of ablution is to purify oneself, including physical purity by cleansing the limbs, and the sanctity of the soul. Regarding the sanctity of the soul, Ibn ‘Ashur asserted that only Allah knows that for certain, but according to him, we must believe that all the commands of Allah associated with a worship must contain hidden wisdoms which are not able to be fully understood by reason, because only God knows all of them, like the wisdom of four *raka’at* in *zuhur* prayer. Furthermore, he gave a warning if we mention the wisdom of a worship then our explanation is not possible to contain all the wisdom, that is because it is only a part of our limited understanding.

In response to this second viewpoint, the Muslim scholars of *maqāṣid* (*maqāṣidiyyūn*) can still accept as certain *maqāṣid al-sharī’ah* (*qaṭ’ī*). In addition, there are also *sharī’ah* objectives that are not explicitly stated in the text. The *maqāṣidiyyūn* differed opinions about whether or not valid as *maqāṣid al-sharī’ah*. In term of legal force, the *maqāṣidiyyūn* divided the *maqāṣid al-sharī’ah* into three parts, namely: (1) *al-maqāṣid al-qaṭ’iyyah* or certain purposes; (2) *al-maqāṣid al-ẓanniyyah* or speculated purposes; and (3) *al-maqāṣid al-wahmiyyah* or false purposes.<sup>204</sup>

First, *al-maqāṣid al-qaṭ’iyyah* (certain purposes) is a type of *maqāṣid* which is certainly and famously has been mentioned in *al-Qur’an* and/or *Hadith*, so that, it becomes a sure knowledge (*fī al-dhihn al-yaqīn*) that the intention contained in the text in large numbers is what is desired by the *sharī’ah* makers (Allah and His Messenger), as in chapter

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<sup>203</sup> *Al-Qur’an*, chapter *al-Māidah*: 6.

<sup>204</sup> Ibn ‘Ashur, *Maqāṣid al-Sharī’ah al-Islāmiyyah*, 314-315.

*al-Baqarah*, verse 185: (The month of Ramadhan [is that] in which was revealed the Qur'an, a guidance for the people and clear proofs of guidance and criterion. So whoever sights [the new moon of] the month, let him fast it; and whoever is ill or on a journey - then an equal number of other days. Allah intends for you ease and does not intend for you hardship and [wants] for you to complete the period and to glorify Allah for that [to] which He has guided you; and perhaps you will be grateful).<sup>205</sup> Allah requires ease for you and does not require trouble for you. And in chapter *al-Ḥajj*, verse 78 which explains that Allah has never made it narrow for you in matters of religion and a number of other verses that are meaningful. This shows that the *maqāṣid* of the two verses is to eliminate difficulties (*raf' u al-ḥaraj*) even without going through in-depth research.

In other cases, the method of determining *maqāṣid* can also be found in the verse itself as in chapter *al-Baqarah*, verse 179: (And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous).<sup>206</sup> This verse shows that in *qiṣāṣ*, there is a guarantee of survival for human's life. It can be convinced that the intention behind the *qiṣāṣ* law is "maintaining survival" (*hifz al-ḥayāh*). Thus, the *sharī'ah*'s purpose contained explicitly in the text no longer requires classification whether it is *ʿām* (general) or *khāṣ* (particular).<sup>207</sup> Another example of the *sharī'ah*'s purpose which has been clearly stated in the text is as in chapter *al-'Ankabūt*: 45: (Recite, [O Muhammad], what has been revealed to you of the Book and establish prayer. Indeed, prayer prohibits immorality and wrongdoing, and the remembrance of Allah is greater. And Allah knows that

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<sup>205</sup> *Al-Qur'an*, chapter *al-Baqarah*: 185.

<sup>206</sup> *Al-Qur'an*, chapter *al-Baqarah*: 179.

<sup>207</sup> 'Abd al-Majid al-Najjar, *Maqāṣid al-Sharī'ah Bi'ab'ād al-Jadīdah*, 38.

which you do).<sup>208</sup> This verse explains that, in fact, prayer can prevent from cruel and unjust deeds.

Second, *al-maqāṣid al-ḡanniyyah* (speculated purposes), that is the purpose of the *sharī‘ah* law which is contained in texts both in *al-Qur’an* and *Hadith*, but it does not reach *mutawatir* (the most famous) and can be explored through the search for ‘illah (legal reasons) or *istiqrā‘* (research). Examples of *maqāṣid* for this category are when Allah prohibits monopoly and hoarding property, as in chapter *al-Taubah*: 34-35 (O you who have believed, indeed many of the scholars and the monks devour the wealth of people unjustly and avert [them] from the way of Allah . And those who hoard gold and silver and spend it not in the way of Allah - give them tidings of a painful punishment. The Day when it will be heated in the fire of Hell and seared therewith will be their foreheads, their flanks, and their backs, [it will be said], “This is what you hoarded for yourselves, so taste what you used to hoard”).<sup>209</sup> This verse explains about prohibition of hoarding gold and silver and not spending it in the way of Allah. And a *hadith* “From Ma‘mar, he said, the Messenger of Allah said: whoever hoards goods, he is guilty (sinful) “(narrated by Muslim).<sup>210</sup> And in chapter *al-Ḥashr*: 7 (it is intended that property does not only revolve among the rich among you only).<sup>211</sup>

Some examples of the verses above, Allah reconciles buying and selling, facilitating the sale and purchase agreement, an order to spend some of the assets. Thus, it can be concluded that “to eliminate centrality in the circulation of

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<sup>208</sup> *Al-Qur’an*, chapter *al-Ankabūt*: 45.

<sup>209</sup> *Al-Qur’an*, chapter *al-Taubah*: 34-35.

<sup>210</sup> عن مَعْمَرٍ، قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: «مَنْ أَحْتَكَرَ فَهُوَ خَاطِيٌّ» (رواه (مسئلم)

<sup>211</sup> Meaning: “And what Allah restored to His Messenger from the people of the towns - it is for Allah and for the Messenger and for [his] near relatives and orphans and the [stranded] traveler - so that it will not be a perpetual distribution among the rich from among you. And whatever the Messenger has given you - take; and what he has forbidden you - refrain from. And fear Allah; indeed, Allah is severe in penalty”.

wealth in certain groups” is the purpose (*maqāṣid*) of the legal provisions relating to assets and wealths. Since the mention of the intent in some of the above commands is not clear, the *maqāṣid* contained is *ẓann* (alleged/predictable). However, the *maqāṣidiyyūn* agree that the status of *ẓann* which is carried out based on sufficient knowledge is considered as an acceptable form of understanding of Islamic law through the *ijtihād* process.<sup>212</sup>

Another example of *al-maqāṣid al-ẓanniyyah* (speculated purposes) is when Allah allows *ta'aruf* or introduction between the two parties, especially men and women, then in marriage, it requires the agreement of the two brides, including the requirement for a guardian's consent and announcing the marriage. From this example, the purpose of the *sharī'ah* law found through the search for *'illah* is to “establish and strengthen family relations”.

Third, *al-maqāṣid al-wahmiyyah* (false purposes) is the search for the purpose of *sharī'ah* through reason or often called illusive *maqāṣid*. Besides there are no clear provisions in the text and even against the will of the text, *maqāṣid* with this category is also explored through the principle of excessive *al-taysīr* (convenience), so that, the danger is greater than the benefits (*anna al-ḍarara fihā yaghlibu 'alā al-manfa'ah*). For example, taking benefits or *maslahah* from alcohol (*khamer*) and allowing drinking *khamer* to warm the body. Determination of this kind of *maslahah*, in addition to contrary to common sense, it is also in contrary to the meaning of the text, so that, the Muslim scholars of *maqāṣid* agreed that they could not accept it as a basis in Islamic law or by calling it *wa hiya fī al-shar'i ghairu mu'tabarah* (*maslahāh* like that can not be accepted by *sharī'ah* law).<sup>213</sup>

In his dissertation, which he later made it as a book, Mazid raised the theme of how the law of men or women

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<sup>212</sup> Ibid., 38-39.

<sup>213</sup> Muhammad Mukhtar Ibn Ahmad Mazid, *Aḥkām al-Jarāḥah al-Tibbiyyah wa al-Āthār al-Mutarattibah 'Alayhā* (Jeddah: Maktabah al-Ṣaḥābah, 1994), 190.

who perform beauty and handsomeness operation with the aim of realizing *al-maqāṣid al-taḥsīniyyāt* (tertiary purposes). In a chapter on *fī jarāḥat al-tajmīl al-taḥsīniyyah* (beauty / handsomeness surgery to realize the tertiary purposes). He concluded that a beauty and handsomeness operation that change the creation of Allah; from a flat nose to sharp, from black to white, from a man to a woman or vice versa, are unlawful. Because, even though he wants to carry out *maqāṣid al-taḥsīniyyah*, but it is in contrary to *ḥifẓ al-naḥs* (*maqāṣid al-ḍarūriyyāt*) i.e. Allah has been honored humans as the most excellent and perfect creation. Mazid adds that carrying out *maqāṣid al-taḥsīniyyah* by performing beauty or handsomeness operation to change the creation of Allah is a form of *maqāṣid al-wahmiyyah* or *maqāṣid ghayr mu'tabarah* or often called *maqāṣid mulghāh* (misguided goals).

### **B. Orientation of *Maqāṣid al-Sharī'ah***

In *sharī'ah* law, there are many provisions which directly relate to all aspects of human life hierarchically. Similarly, in determining the orientation of the *maslahah* in Islamic law, there is also a hierarchy that shows a priority scale or Imam al-Juwayni (d. 478 AH / 1085 AD) called it as *marātib al-maqāṣid* (hierarchy of objectives). Nur al-Din Mukhtar al-Khadimis divided *maqāṣid al-sharī'ah* of this category into two, namely *al-maqāṣid al-kulliyyah* (universal purposes) and *al-maqāṣid al-juziyyah* (partial purposes).<sup>214</sup> In addition, 'Abd Majid al-Najjar divided *maqāṣid al-sharī'ah* into three, namely: *al-maqāṣid al-kulliyyah*; (2) *al-maqāṣid al-naw'iyyah*; (3) *al-maqāṣid al-juziyyah*.<sup>215</sup>

First, *al-maqāṣid al-kulliyyah* (universal purposes) is *maqāṣid* which contains *maslahah* in a macro scale, so that, realizing this requires hard and continuous effort from the lowest to the highest scope. An example is *maqāṣid* of realizing the governance system on earth based on the

<sup>214</sup> Nur al-Din Mukhtar al-Khadimi, *Abḥāth fī Maqāṣid al-Sharī'ah*, 42.

<sup>215</sup> 'Abd al-Majid al-Najjar, *Maqāṣid al-Sharī'ah Bi'ab'ād al-Jadīdah*, 40-41.

principle of ease (*al-taysīr*) and eliminating difficulties (*raf'ū al-ḥaraj*), automatically, the purpose of protecting the institutions of the people can be reached. By realizing the objectives of the *sharī'ah* in a macro scale (*kulliyah*), according to 'Allal al-Fasi, automatically, it has been maintaining and realizing the objectives of the *sharī'ah* on a micro scale (*juziyyah*).<sup>216</sup>

According to 'Allal al-Fasi that by establishing a strong governance system, maintaining all existing regulations, enforcing the law fairly and continuously (*istiqāmah*), maximizing the role of reason proportionally, maintaining actions that can detrimental to others, then these mean that the principles of *al-maqāṣid al-kulliyah* have been applied in the form of the principle of easing (*al-taysīr*) and eliminating difficulties (*raf'ū al-ḥaraj*), the aim of maintaining the institutions of the *ummah*, equality among human beings and so on.<sup>217</sup>

Second, *al-maqāṣid al-naw'iyyah* is a number of provisions of *sharī'ah* law intended to achieve one goal, such as a number of provisions of *sharī'ah* law relating to family law are aimed to further strengthen and maintain family ties (*tamtīnu uṣrah al-qarābah wa al-ḥuffāz 'alaihā*). Another example is a set of Islamic laws related to *al-mu'āmalat al-māliyyah* is intended to realize *ḥifz al-māl* (safeguarding property). *Al-maqāṣid al-naw'iyyah* is also referred to as *al-maqāṣid al-khāṣṣah* (special purposes).<sup>218</sup>

Third, *al-maqāṣid al-juziyyah* is the goal to be achieved through a specific legal provision. For example, the purpose of ablution is to purify. This goal is directly stated in one place (verse) by carrying out a specific command, as in chapter *al-Māidah*, verse 6: (O you who have believed, when you rise to [perform] prayer, wash your faces and your

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<sup>216</sup> 'Allal al-Fasi, *Maqāṣid al-Sharī'ah al-Islāmiyyah wa Makārimuhā* (Beirut: Maktabah al-Waḥdah al-'Arabiyyah, 1963), 45-46.

<sup>217</sup> Ibid.

<sup>218</sup> 'Abd al-Majid al-Najjar, *Maqāṣid al-Sharī'ah Bi'ab'ād al-Jadīdah*, 41-42.

forearms to the elbows and wipe over your heads and wash your feet to the ankles. And if you are in a state of janabah, then purify yourselves. But if you are ill or on a journey or one of you comes from the place of relieving himself or you have contacted women and do not find water, then seek clean earth and wipe over your faces and hands with it. Allah does not intend to make difficulty for you, but He intends to purify you and complete His favor upon you that you may be grateful).<sup>219</sup> This verse explains that Allah does not want to trouble human, but He wants to purify human).

Another example is the prohibition of Allah in “gambling” and “drinking khamer”. The purpose of this prohibition is specifically stated, namely to avoid slander and hostility due to gambling and drinking khamer, as mentioned in chapter *al-Mā'idah*, verse 91: (Satan only wants to cause between you animosity and hatred through intoxicants and gambling and to avert you from the remembrance of Allah and from prayer. So will you not desist?).<sup>220</sup> This verse explains that *shaitan* intended to cause hostility and hatred between those for drinking khamer and gambling. And the third example is the prohibition of applying for a woman who has been proposed by someone else. This prohibition is intended in order that there is no enmity with other believers or with others.<sup>221</sup>

### **C. Scopes of *Maqāṣid al-Sharī'ah***

In line with the changing times, where Muslims are faced with complexity in many ways, then inevitably of Islamic law must also shift methodologically. Therefore, contemporary Muslim scholars of *maqāṣid* try to provide a formula for the classification of *maqāṣid* theory by giving new spaces to dimensions that have wider scope. The

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<sup>219</sup> *Al-Qur'an*, chapter *al-Mā'idah*: 6.

<sup>220</sup> *Al-Qur'an*, chapter *al-Mā'idah*: 91.

<sup>221</sup> 'Abd al-Majid al-Najjar, *Maqāṣid al-Sharī'ah Bi'ab'ād al-Jadīdah*, 41-42.

contemporary classifications formulated by the Muslim scholars of Islamic law are:

First, *al-maqāṣid al-ʿāmmah* (general purposes). This *maqāṣid* is explored through the complexity of Islamic law building by adding new values to the realm of *ḍarūriyyah* and *ḥājīyyah*, such as “justice” and “freedom”.<sup>222</sup> Ibn ‘Ashur (d. 1393 AH / 1973 AD) interpreted *al-maqāṣid al-ʿāmmah* by keeping God’s commandments, seeking *maslahah* or benefits, and resisting danger (*jalb al-maṣāliḥ wa dar’ al-mafāṣid*), building equality between human beings, respecting applicable laws, and encouraging the creation of progress for human development.<sup>223</sup>

Meanwhile, ‘Allal al-Fasai argues that the highest goal of Islamic law is to preserve the ecosystems that exist in the universe, so that, the sustainability of life in it is maintained. This cannot be achieved except through; (1) human wisdom as a caliph on earth; (2) encouraging people to do right based on morality and integrity; (3) always take a step forward; (4) protecting natural resources; (5) and planning for the good of all.<sup>224</sup>

Second, *al-maqāṣid al-khāṣṣah* (particular purposes). This *maqāṣid* is explored through certain discussions in Islamic law, such as welfare for children in family law, taking preventive measures in the area of criminal law, and preventing monopoly of certain people or groups in transaction law. According to Ibn ‘Ashur, examples of the specific areas to be achieved by *al-maqāṣid al-khāṣṣah* are: (1) the intention of *shāri’* or *sharī’ah* makers in determining legal provisions relating to families; (2) the purpose of *sharī’ah* makers in determining legal provisions relating to assets; (3) the purpose of *sharī’ah* makers in law of

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<sup>222</sup> Jasser Auda, *Maqāṣid al-Sharī’ah as Philosophy of Islamic Law A Systems Approach*, 5.

<sup>223</sup> Ahmad al-Raysuni, *Imām al-Shāṭibī’s Theory of the Higher Objectives and Intents of Islamic Law* (London: The International Institute of Islamic Thought, 2005), xxiii.

<sup>224</sup> *Ibid.*

transaction is being relevant to workers and employment opportunities; (4) the purpose of *sharī'ah* makers in matters of justice and testimony; (5) the purpose of *sharī'ah* makers related to the command of *ṣadaqah*; and (6) the purpose of *sharī'ah* makers in establishing legal provisions related to punishment for the perpetrators of criminal acts.<sup>225</sup>

Third, *al-maqāṣid al-juziyyah* (partial purposes) is *maqāṣid* relating to the intention or wisdom behind the stipulation of law or 'Allal al-Fasi interprets it with *wa asrār allatī waḍa'ahā al-shāri' 'inda kulli ḥukmin min aḥkāmihā* (secrets that exist in every legal provision), such as discovering the truth is as wisdom of the command to bring witnesses in court, giving *rukḥṣah* (relief) is the wisdom of the permissibility to break fasting for the sick people, feeding the poor is as wisdom of the prohibition of storing sacrificial meat.<sup>226</sup>

## D. Originality of *Maqāṣid al-Sharī'ah*

Departing from the *maslahah* spirit for life and human development for the better condition, there are, at least, two kinds of *maslahah*; the *al-maṣlaḥah al-uṣūliyyah* (main, fundamental, and basic benefit) and *al-maṣlaḥah al-wasāiliyyah* (facility, tool, means benefit). The operation of *al-maṣlaḥah al-wasāiliyyah* is projected to achieve *al-maṣlaḥah al-uṣūliyyah*. Departing from these two important components, the *maqāṣidiyyūn* divided *maslahah* into two, namely: (1) *maqāṣid al-uṣūl* (basic and fundamental goals) and; (2) *maqāṣid al-wasāil* (mean, facility, tool goals).

First, *maqāṣid al-uṣūl* is the basic goal to be achieved by the provisions of Islamic law itself, namely *al-ḍarūriyyāt al-khams* (the five primary needs) which includes *ḥifẓ al-dīn* (safeguarding religion), *ḥifẓ al-naḥs* (safeguarding the soul),

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<sup>225</sup> Ahsan Lihasanah, *al-Fiqh al-Maqāṣidī 'Inda al-Imām al-Shāḥibī wa Atharuh 'alā Mabāḥith Usūlī al-Tashrī' al-Islāmī* (Kairo: Dār al-Islām li al-Ṭabā'ah wa al-Nashr wa al-Tawzī', 2008), 25;

<sup>226</sup> Jasser Auda, *Maqāṣid al-Sharī'ah as Philosophy of Islamic Law A Systems Approach*, 5.

*ḥifẓ al-'aql* (safeguarding reason), *ḥifẓ al-nasl* (safeguarding offspring), and *ḥifẓ al-māl* (safeguarding property). In addition, there are also basic principles that automatically stick to Islamic law itself, such as justice (*al-'adālah*), freedom (*al-ḥurriyyah*), equality (*al-musāwāh*), wisdom (*al-ḥikmah*), and goodness for humans (*maṣāliḥ al-'ibād*).

The example of *maqāṣid al-uṣūl*: (1) in the field of worship is that the original purpose of the command of prayer is to surrender and humble oneself, submit, feel really despicable, small in the presence of Allah, insult God and negate the others by directing body and soul to Him alone. The original purpose of fasting is submission, worship, and carrying out God's commands. The original purpose of the command of *zakat* is to carry out God's commands, show gratitude, and form of praise to Him, purify the soul, and purify property. The purpose of the pilgrimage is to worship and carry out the command of Allah which is manifested in a series of *Hajj* (pilgrimage) rituals in the form of activities and utterances of remembrance and glorification of Allah.

The example of *maqāṣid al-uṣūl*: (2) in the field of *muamalah* is that the main purpose of every transaction in Islam is intended as an effort to preserve property, to encourage people to work and try to get good fortune in a lawful way, and to make it a means of worshiping Allah, so that he will be rewarded in the future; (3) the example of *maqāṣid al-uṣūl* in the field of *munakaḥāt* (family laws) is that the main purpose of marriage is to obtain offspring for human survival by regenerating and enlivening the world, maintaining one's life and dignity; (4) example of *maqāṣid al-uṣūl* in the field of *jinayah* (criminal laws) is that the order of punishment in a criminal case contains the main goal of realizing justice by giving compensation to a person who becomes a victim, being the trespass of the wrongdoer, and giving effect deterrent for perpetrators of criminal acts so as not to repeat their actions again.

Second, *maqāṣid al-wasāil* is a means to achieve the basic or fundamental objectives (*maqāṣid al-uṣūl*). Imam al-

Shatibi termed this second point with *maqāṣid al-tabī'ī*. That is to achieve the basic objectives (*maqāṣid al-uṣūl*), it must go through certain means. And the intended means is *maqāṣid al-wasāil*.<sup>227</sup>

The examples of *maqāṣid al tabī'iyah*: (1) in worship, for example, in the matter of prayer is like preventing cruel and evil deeds, resting from the boredom and busyness of world problems. The *maqāṣid al tabī'iyah* from fasting is to prevent the possibility of being deceived by the temptations of *satan*, and to help fortify oneself from committing dishonesty when in one's own state of mindfulness that God always sees him even though no one knows what he did. The *maqāṣid al tabī'iyah* from the command of *zakat* is the development of society in the field of trade, industry, so that, their economy becomes stronger, helping to meet the needs of the poor and other needy people.

(2) *maqāṣid al tabī'iyah* in the command of marriage is to take care of offspring, Allah SWT makes this purpose as a natural in humans; (3) *maqāṣid al tabī'iyah* in *muamalah* is the fulfillment of the needs of human life as social beings. they have instincts to need everything for the sake of survival, so that, they cannot be separated from interaction with others, humans need food, drink, clothing, and money, etc.; (4) *maqāṣid al tabī'iyah* in the *jināyah* issue is the aim to relieve the emotions of the victim and foster a willingness in the hearts of the victims' families, so that, they will avoid excessive revenge and vigilante justice.

### **E. Hierarchy of *Maṣlahah* in *Maqāṣid al-Sharī'ah***

*Maqāṣid* in this category is oriented to help humans in achieving all the problems faced both in the short term (world) and long term (hereafter). Based on the strength and scope, there are several levels, each of which has a different hierarchy. For example, the *maṣlahah* value of a ban on stealing is a form of realization of *hifẓ al-māl* (safeguarding

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<sup>227</sup> 'Abd al-Majid al-Najjar, *Maqāṣid al-Sharī'ah Bi'ab'ād al-Jadīdah*, 45-46.

wealth) and has a stronger position than the *maslahah* value of buying and selling transactions on a micro and macro scale. From the perspective of the strength, the *maqāṣidiyyūn* divide into three parts, namely; (1) *al-maqāṣid al-ḍarūriyyah* (primary purposes); (2) *al-maqāṣid al-ḥājīyyah* (secondary purposes); and (3) *al-maqāṣid al-tahsīniyyah* (tertiary purposes).<sup>228</sup>

‘Abd al-Qadir ‘Awdah, in his book, especially in chapter “*tartīb al-maqāṣid al-’ammah min al-tashrī’*”; explains at length and is very neat about *al-maqāṣid al-ḍarūriyyāt*, so that, it’s easy to understand. He divided it into three parts, *ḍarūriyyāt*, *ḥājīyyāt*, and *tahsīniyyāt*, where the three objectives must be realized from the first sequence, *ḍarūriyyāt*, then the second sequence *ḥājīyyāt*, and *tahsīniyyāt*.<sup>229</sup>

First, *al-maqāṣid al-ḍarūriyyah* is to indicate the level of needs that must exist or are also called as primary needs. If this level of need is not met, the safety of humanity will be threatened both in this world and the hereafter. According to al-Shatibi and Ibn ‘Ashur, *al-maqāṣid al-ḍarūriyyah* must be realized, because if not, the spirit of Islamic law which should provide guarantees for human safety in the world and the afterlife will fail. According to al-Shatibi, there are five things that fall into this category, or what is often referred to as *al-ḍarūriyyāt al-khams* which includes *ḥifẓ al-dīn* (safeguarding religion), *ḥifẓ al-nafs* (safeguarding soul), *ḥifẓ al’aql* (safeguarding reason), *ḥifẓ al-nasl* (guarding offspring), and *ḥifẓ al-māl* (guarding treasure/wealth).<sup>230</sup>

About the fifth hierarchical classification of *al-maqāṣid al-ḍarūriyyāt al-khams*, ‘Abd al-Qadir ‘Awdah offers an

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<sup>228</sup> Yusuf Ahmad Muhammad al-Badawi, *Maqāṣid al-Sharī’ah ‘inda Ibn Taymiyyah* (Yordan: Dār al-Nafāis li al-Nashrī’ wa al-Tawzī’, 1999), 85.

<sup>229</sup> ‘Abd al-Qadir ‘Awdah, *al-Tashrī’ al-Janāyī al-Islāmī Muqāranan bi al-Qānūnī al-Waḍ’ī* (Beirut: Dār al-Kātib al-’Arabī, n.d.), 203.

<sup>230</sup> ‘Abd al-Qadir ‘Awdah, *al-Tashrī’ al-Janāyī al-Islāmī Muqāranan bi al-Qānūnī al-Waḍ’ī*, 203.

interesting example of resolution of how and what actions should take precedence when disputes occur among the components contained in *al-ḍarūriyyāt al-khams*. An example of *ḍarūriyyāt* is *ijtihād*. By conducting *ijtihād*, someone has realized *ḥifẓ al-dīn* (safeguarding religion). In this case, safeguarding religion has higher level than safeguarding soul. Furthermore, drinking alcohol (*khāmer*) for the sake of saving lives is permissible for those who are forced to drink it or in an emergency because *ḥifẓ al-nafs* should take precedence over *ḥifẓ al-'aql*. And next, if someone is forced to make sacrifices in order to save the property of others who really need it for their survival, then it is permissible or even must be done because *ḥifẓ al-nafs* has a higher position than *ḥifẓ al-māl*, and so on.<sup>231</sup>

The Muslim scholars of *maqāṣidiyyūn* agreed that in every provision of Islamic law, it must aim to realize the five basic needs above. For example, regarding the *qiṣās* law in chapter *al-Baqarah*, verse 178-179: (O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother anything, then, there should be a suitable follow-up and payment to him with good conduct. This is alleviation from your Lord and a mercy. But whoever transgresses after that will have a painful punishment. And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous).<sup>232</sup> In these two verses, particularly in verse 179 explains that the wisdom of applying the law of *qiṣās* is safeguarding the life of the people. This verse stipulates the *qiṣās* law which aims that the threats to human life can be eliminated.<sup>233</sup>

To complete the hierarchy made by al-Shatibi, Adnan M. Umamah added with some real examples, such as to

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<sup>231</sup> Ibid.

<sup>232</sup> *Al-Qur'an*, chapter *al-Baqarah*: 178-179.

<sup>233</sup> 'Abd al-Majid al-Najjar, *Maqāṣid al-Sharī'ah Bi'ab 'ād al-Jadīdah*, 47-46.

realize *ḥifẓ al-nasl* is with *ijtihād*, to realize *ḥifẓ al-nafs* is with a valid marriage, to realize *ḥifẓ al'aql* is through the prohibition of drinking *khāmer* and all intoxicants, to realize *ḥifẓ al-ird* is through the punishment of adultery and *qadhaf* (accusing others of adultery), and to realize *ḥifẓ al-māl* is forbidden to steal and the *ḥadd* law (cutting off hands) for the perpetrators, liars, and traitors.<sup>234</sup>

Second, *al-maqāṣid al-ḥājīyyah* is a secondary need. Al-Shatibi said that if these needs are not met, human safety is not to be threatened but he will experience difficulties. The basic spirit of Islamic *sharī'ah* is to eliminate all these difficulties.<sup>235</sup> Adnan M. Umamah added that *ḥājīyyah* is to give humanity breadth out of difficulties (*inaahā taftaqiru ilaihā min ḥaithu al-tausi 'ati liraf'i al-daiqi al-muaddī fī al-ghālībi ilā al-khurūj wa al-mashaqqah*).<sup>236</sup>

For example, the existence of *rukḥṣah* (lightening) law, as Abdul Wahhab Khallaf explained, is an example of Islamic *sharī'ah*'s attention to people who are in difficult conditions. Other examples are permitting not to do fasting for travelers, the punishment of *diyāh* (fines) for someone who unintentionally or accidentally kills, the suspension or even the release of cutting off the hands for the perpetrators of theft because they are urged to save their lives or their families from starvation and so on.

Third, *al-maqāṣid al-taḥsīniyyah* is a tertiary need. According to Imam al-Ghazali, *taḥsīniyyah* is a need that does not threaten the existence of one of the five main points (*al-darūriyyāt al-khams*) and also does not cause difficulties at the *ḥājīyyah* level if it is not fulfilled, but it is only a complement, beautifying, facilitating related to local customs

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<sup>234</sup> Adnan M. Umamah, *al-Tajdīd fī al-Fikr al-Islāmī* (Beirut: Dār Ibn al-Jawzī', 1994), 190.

<sup>235</sup> Al-Shatibi, *al-Muwāfaqāt*, vol. 2, 226.

<sup>236</sup> Adnan M. Umamah, *al-Tajdīd fī al-Fikr al-Islāmī* (Beirut: Dār Ibn al-Jawzī', 1994), 335.



## BAB VI

### MAQAŠID, MAŠLAHAH, UŞUL AL-FIQH, AND WASAİL

#### A. Differentiation between *maqāšid* and *mašlahah*

The terms *maqāšid* (plural: *maqāšid*) as discussed in the previous chapters are “goals”, “middle”, “just”, “not over the edge”, “straight road”, “telos” (Greek), “finalite” (French), and “zweck” (German). So, *maqāšid al-sharī‘ah* is “purpose”, “intention”, or “wisdom behind the provisions of *sharī‘ah* law”. At the same time, *mašālīh* is the “goodness” or “benefits” that the *sharī‘ah* wants to achieve or bring good and to reject danger” *jalb al-mašālīh wa dar’ al-mafāsid*.<sup>239</sup> Related to understanding *mašlahah* with *jalb al-mašālīh wa dar’ al-mafāsid*, we can find in almost all books that discuss about *uṣūl al-fiqh*, like Al-Shaykh Muhammad al-Tahir Ibn ‘Ashur, *Qaḍāyā al-Iṣlāh fī al-Fikr al-Islāmī al-Mu‘āṣir*, in the work of Muhammad al-Bashir al-Hajj, *Maḥmūm Khilāf al-Aṣl*.<sup>240</sup>

According to al-Hallaq, between *maqāšid al-sharī‘ah* and *mašlahah*, both are mutually reinforcing one another. For example, preserving the soul and mind is an example of *al-ḍarūriyyāt al-khams* that can be achieved through providing food, clothing, shelter, and proper education. On the other hand, some potential dangers that could threaten the basic objectives above can be avoided by criminal penalties, punishments for alcohol drinkers, or eradicating materials that could endanger human reason and life.

A number of Muslim scholars of *uṣūl* have various conceptions and terms related to the theory *maqāšid* that they offer. For example, ‘Abu al-Ma’ali al-Juwayni (d. 478 AH / 1085 AD), an expert on *maqāšid* who had a major

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<sup>239</sup> Imran Ahsan Khan Nyazee, *Islamic Jurisprudence (Uṣūl al-Fiqh)* (Islamabad: Islamic Research Institute Press, 2000), 161.

<sup>240</sup> Muhammad al-Bashir al-Hajj, *Maḥmūm Khilāf al-Aṣl* (London: al-Ma’had al-‘Alimī li al-Fikr al-Islāmī, 2008), 292.

contribution in the discourse of this theory, used the term *al-maṣālīḥ al-ʿāmmah* (public benefits). Abu Hamid al-Ghazali (d. 505 AH / 1111 AD) elaborated his *maqāṣid* theory with *al-maṣlaḥah al-mursalāh*. He said:

Basically, *maṣlaḥah* is to bring benefits and to avoid danger, but, this is not what I want, because bringing benefits and rejecting danger are more representing human goals, namely human welfare through the achievement of these goals. What I really mean by *maṣlaḥah* is to maintain the objectives of the *sharīʿah* itself.<sup>241</sup>

Theory of Imam al-Ghazali (d. 505 AH / 1111 AD), which was then followed by Fakhr al-Din al-Razī (d. 606 AH / 1209 AD) and al-Amidi (d. 731 AH / 1334 AD) Najm al-Din al-Tufi (d. 716 AH / 1316 AD), defines *maṣlaḥah* with “a virtue that must be achieved according to the will of *shāriʿ*’ (*sharīʿah* makers). In addition, al-Qarafi (d. 684 AH / 1285 AD) sees the relationship between *maṣlaḥah* dan *maqāṣid* as a linear relationship that *maqāṣid* cannot be said to be valid if it does not provide benefits and avoid dangers (*maḥsadah*).<sup>242</sup>

Subhi R. Mahmassani gives a special note relating to the formulation of *al-maṣālīḥ al-mursalāh* based-legal methodology, that it must be oriented towards achieving public interest that in line with the aims and objectives of the *sharīʿah*. According to the Maliki school of law, *al-maṣlaḥah al-mursalāh* can be used as the basis of Islamic legal methodology with three conditions, namely: (1) *maṣlaḥah* is only related to *muʿamalah* through the mechanism of *ijtihād* (independence interpretation); (2) *maṣlaḥah* must be in line with *sharīʿah*’s spirit; and (3) the conception of *maṣlaḥah*

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<sup>241</sup> Ahmad al-Rayshuni, *Naḍāriyyah al-Maqāṣid ‘inda al-Imām al-Shāṭibī* (Riyad: Dār al-ʿĀlamiyyah Kitāb al-Islāmī, 1992), 41-45.

<sup>242</sup> Jasser Auda, *Maqāṣid al-Sharīʿah as Philosophy of Islamic Law A Systems Approach*, 2.

must rest on *al-ḍarūriyyāt al-khams* (safeguarding religion, soul, reason, descent, and property).<sup>243</sup>

Furthermore, it is interesting to read the formulation of *maslahah* of Najm al-Din al-Tufi (d. 716 AH / 1316 AD). Philosophically, al-Tufi relies more on his *maslahah* theory on four principles, namely:

1. *istiqlāl ‘uqūl biidrāki al-maṣāliḥ wa al-mafāsīd* (independence of reason in understanding *maslahah* and *mafsadah*);
2. *almaṣlahatu dalīlun sharīyyun mustaqillun ‘an al-nāṣṣ* (*maslahah* is the *sharī‘ah*'s proposition that is outside the text);<sup>244</sup>
3. *majāl al-‘amal bi al-maṣlahah huwa al-mu‘āmalāt wa al-‘ādāt dūna al-‘ibādāt* (application of *maslahah* is in the realm of *muamalah* and habits, not in worship);<sup>245</sup>
4. *al-maṣlahah aqwā min adillah al-shar‘i* (*maslahah* is the most powerful *sharī‘a*'s proposition).<sup>246</sup>

Apparently, the view of al-Tufi has a unique style and is different from the others by holding the principle of *taqdīm al-maṣlahah ‘alā al-naṣṣ* (if there is a conflict between teks and *maslahah*, then *maslahah* must take precedence).<sup>247</sup> According to al-Tufi, sources of legal reasoning are: *al-Qur‘an*, *sunnah*, *ijma‘ al-ummah*, *ijma‘ ahl al-madīnah*, *ijma‘ ahl al-kūfah*, *ijma‘ al-ītrah*, *ijma‘ al-khulafā‘ al-rāshidīn*, *qiyās*, the companions' opinion, *maṣlahah al-mursalah*, *istiṣhāb*, *al-barā‘ah al-aṣliyyah*, *al-‘Awāid*, *istiqra‘*, *sadd al-dharī‘ah*, *al-istidlāl*, *istiḥsān*, *al-akhdh bi al-*

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<sup>243</sup> Subhi R. Mahmassani, *The Philosophy of Jurisprudence in Islam* (Kuala Lumpur: Open Press, 2000), 87-89.

<sup>244</sup> Najm al-Din al-Tufi, *Sharḥ al-Arba‘īn al-Nawāwī Mulḥiq al-Maṣlahah fī Tashrī‘ al-Islāmī* (Kairo: Dār al-Fikr al-‘Arabī, 1954), 18.

<sup>245</sup> Najm al-Din al-Tufi, “Risālah al-Ṭūfī”, dalam ‘Abd al-Wahhāb al-Khalāf, *Maṣādir al-Tashrī‘ fī mā lā Naṣṣ fīḥ* (Kuwait: Dār al-Qalam, 1972), 143.

<sup>246</sup> Ibid.

<sup>247</sup> Ibid.

*akhaff* (taking the lightest opinion) , and *al- iṣmah* (safeguard). Among these nineteen propositions, the most powerful ones to be used as legal propositions are *al-Qur 'an*, *al-Sunnah* and *Ijma'*. However, if there are conflicts (*ta 'arud*) in the legal process among the many propositions, then the *maslahah* is priority. In the view of al-Tufi, benefit is the most powerful *shari'ah* proposition. In fact, according to him, *maslahah* is the substance of the law itself, while the texts and *ijma'* and other *shari'ah* propositions are only a means or media (*wasail*) to achieve this *maslahah*.<sup>248</sup>

Some Muslim scholars consider that the theory of *maslahah* of al-Tufi cannot be entered into the realm of *maslahah* since the only one who has full authority to determine is God (*ḥaqq al-musharri* ). Reason, in this case, only continues the continuity of worship itself because reason cannot penetrate God's secret in worship, whether in terms of number, method, time, and place, except for official explanations that come from the *shari'ah* makers, (*al-Qur 'an* and *al-Sunnah*). While in the field of *muamalah* and customs, reason can move freely at the *maslahah* level.

Other than the limits given by al-Tufi, Auda parses the *maslahah* (interest) through several aspects. In term of material, he divides *maslahah* into two: (1) *maṣlahah al- 'ammah*, the universal benefit which concerns the interests of the people; (2) *maṣlahah al-khāṣṣah*, partial benefit concerning personal interests. At the same time, in term of the existence of the *maslahah* itself, there are three forms, namely: (1) *maṣlahah al-mu 'tabarah*, benefit that is supported by the text; (2) *maṣlahah al-mulghah*, the benefit is rejected because it is contrary to *shari'ah* law; (3) *maṣlahah al-mursalah*, benefit which is not supported by the proposition of the text, but it has strong support from the implicit meaning of a number of texts.<sup>249</sup>

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<sup>248</sup> Ibid.

<sup>249</sup> Jasser Auda, *Maqāṣid al-Shari'ah as Philosophy of Islamic Law A Systems Approach*, 120-121.

## B. Differentiation Between *Maqāṣid al-Sharī'ah* and *Uṣūl al-Fiqh*

*Uṣūl al-fiqh* (fundamentals of Islamic law) is composed of two words, namely *uṣūl* and *al-fiqh*. According to Wahbah al-Zuhayli and Shaykh Taqīyyuddin al-Nabhani, terminologically, the word *uṣūl* (plural of *al-aṣl*) means “base”, “source”, “principal”, “foundation”, and “root”. The word *aṣl*, which means base, foundation or root, is as mentioned in chapter *Ibrāhīm*, verse 24: (Have you not considered how Allah presents an example, [making] a good word like a good tree, whose root is firmly fixed and its branches [high] in the sky?).<sup>250</sup> The word *aṣl* in term is “cases that are the basis for others”, both in sensory things such as building wall on foundation, or in reason, such as building *ma'lūl* on *'illah* and *madlūl* on *dalīl*.<sup>251</sup> According to the *fuqahā*, the word *al-aṣl* also means *al-dalīl* as in *al-Qur'an* أقيموا الصلاة. That is, the original argument about the obligation to establish prayer leads to the main source of *al-Qur'an*.<sup>252</sup>

In addition, terminologically, the word *al-fiqh* means understanding (*al-fahmu*).<sup>253</sup> The word *al-fiqh* can be found, for example in *al-Qur'an*, chapter *Tāhā*, verses 27-28: (And untie the knot from my tongue. That they may understand my speech). Then in *al-Qur'an*, chapter *al-Nisā'*, verse 78: (Wherever you may be, death will overtake you, even if you should be within towers of lofty construction. But, if good comes to them, they say, “This is from Allah “; and if evil befalls them, they say, “This is from you.” Say, “All [things] are from Allah.” So what is [the matter] with those people that they can hardly understand any statement?).<sup>254</sup> And in

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<sup>250</sup> Wahbah al-Zuhayli defined the word *'aṣl* dengan ما يبنى عليه غيره سواء أكان هذا البناء حسياً أو معنوياً. See Wahbah al-Zuhayli, *Uṣūl al-Fiqh al-Islāmī*, Vol. 1 (Suriyah: Dār al-Fikr, 1986), 16.

<sup>251</sup> Ibid., 16.

<sup>252</sup> Ibid.

<sup>253</sup> Jamal al-Banna in his book “*Qaḍīyyat al-Fiqh al-Jadīd*”. See also 'Abd Allah Ibn 'Abd Rahman al-Bassamī, *Tawḍīḥ al-Aḥkām min Bulūgh al-Marām*, Vol. 1, 29.

<sup>254</sup> Al-Qur'an, chapter *al-Nisā'*: 78.

chapter *al-Tawbah*, verse 122: (And it is not for the believers to go forth [to battle] all at once. For there should separate from every division of them a group [remaining] to obtain understanding in the religion and warn their people when they return to them that they might be cautious).<sup>255</sup>

Terminologically, there are many definitions of *al-fiqh* given by jurists. According to Abu Hamid al-Ghazali (d. 505 AH / 1111 AD), *al-fiqh* means issuing *sharī'ah* laws from their source (*al-Qur'an*, *al-sunnah*, and *ijma'*) through arguments or certain rules.<sup>256</sup> According to some *fuqahā'*, including Imam al-Shafi'i (d. 204 AH / 821 AD), *al-fiqh* is *al'ilm bi al-aḥkām al-shar'iyyah al-'amaliyyah al-mustanbiḥah min adillatihā al-tafṣiliyyah* (knowledge about the applicable *sharī'ah* laws that can be extracted from detailed arguments).<sup>257</sup>

Slightly different from al-Shafi'i, al-Amidi defines *al-fiqh* as “a number of *sharī'ah* law products produced through research and the search for detailed propositions”. Al-Kasani defines *al-fiqh* with “knowledge about *halal* (lawful) and *haram* (unlawful), about *sharī'ah* and its legal implications, and so on”. While, Muhammad Ibn Shalih al-'Uthaymin gives a slightly different definition of *fiqh*, namely: *ma'rifah al-aḥkām al-shar'iyyah al-'amaliyyah biadillatihā al-tafṣiliyyah* (knowing the applicable *sharī'ah* laws through detailed arguments).<sup>258</sup>

Thus, *uṣūl al-fiqh*, according to al-Baydawi, is *ma'rifah dalā'il al-fiqh ijmalan wakaiḥiyah al-istifadah minhā wa ḥāl al-mustafīd* “recognizing the arguments of *fiqh* law globally and recognizing the procedure of extracting the *fiqh* law and recognizing who explores the *fiqh* law (*mujtadid* or

<sup>255</sup> Al-Qur'an, chapter *al-Tawbah*: 122.

<sup>256</sup> Ali Ahmad al-Dayri, *Tuq al-Khitāb* (Beirut: al-Muassasah al-'Arabiyyah li al-Dirāsāt wa al-Nash, 2007), 146.

<sup>257</sup> Wahbah al-Zuhayli, *Uṣūl al-Fiqh al-Islāmī*, Vol. 1 (Suriyah: Dār al-Fikr, 1986), 19.

<sup>258</sup> 'Abd al-Wahhab 'Abd al-Salam Tawilah, *Athar al-Lughah fī Ikhtilāf al-Mujtahidīn* (Dār al-Salām li al-Ṭabā'ah wa al-Nashr wa al-Tawzī' wa al-Tarjamah, 1414 H), 78.

*muqallid*)”.<sup>259</sup> According to al-Zuhayli’s definition, *uṣūl al-fiqh* is the rules of the *sharī‘ah* law and the basis of fatwa on the branch issues and served as a guide in *ijtihād* and the formation of laws.<sup>260</sup> Meanwhile, the Muslim scholars of Shafi‘iyyah, Malikiyyah, Hanafiyyah agreed that *uṣūl al-fiqh* is *al-qawā‘id allatī yūṣilu al-baḥthu fihā ilā istinbāṭ al-aḥkām min adillatihā al-taḥṣīliyyah* (knowledge of the rules, the arguments in general, and how the arguments and rules are operationalized in the jurisdiction of the *sharī‘ah* ).<sup>261</sup>

From some definitions above, it can be underlined that *uṣūl al-fiqh*, in general, is one of the methods or means for extracting the law from the main sources as desired by the *sharī‘* (Allah and His Messenger),<sup>262</sup> whether relating to matters of faith, worship, *muamalah*, *‘uqūbah* (punishment), and morals. Thus, *uṣūl al-fiqh* is not a final destination, but it is nothing more than a means, tool, or method in the legal status. In relation to the development and contextualization of Islamic law, *uṣūl al-fiqh* has a significant role. Through the rules that were extracted from the main sources of Islamic law (*al-Qur‘an* and *hadith*), various new problems, which have not been mentioned in the text, are still able to be covered, so that, Islamic law will continue to live, elastic, dynamic throughout the ages and places. In this case, Taha Jabir al-‘Alwani said:

“*uṣūl al-fiqh* is rightly considered to be the most important method of research ever devised by Muslim’s thought. Indeed, as the solid foundation upon which all Islamic disciplines are based, *uṣūl al-fiqh* not only benefited Islamic civilization but contributed to the

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<sup>259</sup> Wahbah al-Zuhayli, *Uṣūl al-Fiqh al-Islāmī*, Vol. 1, 23-24.

<sup>260</sup> *Ibid.*, 6.

<sup>261</sup> Al-Zuhayli, *Uṣūl al-Fiqh al-Islāmī*, Vol. 1, 23.

<sup>262</sup> Mustafa Hilmi, *Manāḥij al-Baḥth fī ‘Ulūm al-Insāniyyah*, 24.

intellectual enrichment of world civilization as a whole”<sup>263</sup>

According to al-Bassami, there are two fundamental benefits of studying *uṣūl al-fiqh*, namely; (1) giving guidance to a *mujtahid* to do *ijtihād* by removing the *sharī‘ah*’s intent from its arguments; (2) doing the legal reasoning from its *uṣūl* (rules).<sup>264</sup> More systematically, al-Zuhayli explains the five benefits of studying *uṣūl al-fiqh*, namely; (1) historically, to find out the legal rules used by the classical jurists and *mujtahids* in performing *ijtihād*; (2) scientifically, giving courage to do legal reasoning as had been done by the prior classical *fuqahā‘* and *mujtahid*; (3) practically, giving guidance to the jurists and *mujtahids* in performing *ijtihād*; (4) comparatively, raising awareness about the different methods and approaches of the previous *mujtahids*, whether using the *naqliyyah* (textual), *‘aqliyyah* (contextual), or *uṣūliyyah* approaches; (5) in confidence, knowing the right way in taking legal and consistent consequences to practice it in order to achieve happiness in the world and the hereafter.<sup>265</sup>

This opinion bears little resemblance to what was written by Khudhari Beik. According to him, there are five benefits of studying *uṣūl al-fiqh*, namely; (1) stating the qualifications that must be fulfilled by a *mujtahid* in order to be able to properly explore the *sharī‘ah* law; (2) as a reference in determining and establishing *sharī‘ah* law through methods developed by *mujtahids*, so as to be able to solve various new problems that arise; (3) preserving religion from distortion and misuse of sources and legal propositions.

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<sup>263</sup> About the position and the significant of *uṣūl al-fiqh* can also be seen in Mu‘il Yusuf ‘Izz al-Din, *Islamic Law: From Historical Foundations to Contemporary Practice* (Edinburg: Edinburg University Press, 2004), 98-99.

<sup>264</sup> ‘Abd Allah Ibn ‘Abd Rahman al-Bassami, *Tawḍīḥ al-Aḥkām min Bulūgh al-Marām*, Vol. 1, 29.

<sup>265</sup> Al-Zuhayli, *Uṣūl al-Fiqh al-Islāmī*, Vol. 1, 29-31.

*Uṣūl al-fiqh* is a measure of the validity of the truth of *ijtihād*; (4) knowing the strengths and weaknesses of the *mujtahids*, seen from the argument they used; and (5) knowing the strengths and weaknesses of an opinion in line with the argument used in *ijtihād*, so that, the scholars who are interested in Islamic law can do *tarjīḥ* (choosing the strongest) one of the arguments or opinions by expressing their opinion.

Thus, the fundamental difference between *maqāṣid al-sharī'ah* and *uṣūl al-fiqh* is that if *maqāṣid al-sharī'ah* is the goals and secrets desired by the *sharī'ah* makers (Allah SWT and His Messenger) on all the provisions of Islamic law that lead to the value of obedience to Allah to get benefit for humans in the world and the hereafter. Whereas, *uṣūl al-fiqh* is one method or means of extracting the law from the main sources as desired by the *sharī'ah* makers (Allah and His Messenger). If *maqāṣid al-sharī'ah* is the highest and permanent goals of law, then *uṣūl al-fiqh* is no more as a means, tool, or method of legal reasoning.

### **C. Differentiation between *Maqāṣid al-Sharī'ah* and *Wasā'il***

The discussion about *maqāṣid* and *wasā'il* is a very interesting topic. The two terms are also debatable since there is no agreement on both among the Muslim scholars, especially, if the two terms must be understood in the context of modernity and contextualization of Islamic law. Not to mention the confusion between the two terms, as if clashed between the rules of *li al-wasā'il ḥukm al-maqāṣid* (means is a tool to reach the purposes) with the *fiqhiyyah* rules: *mā lā yatimm al-wājib illā bihī fahuwa wājib* (an obligation that cannot be carried out except by a means, then that means becomes mandatory).<sup>266</sup>

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<sup>266</sup> Taha Jabir al-'Alwani, *Iṣlāḥ al-Fikr al-Islāmī: Madkhal ilā Niẓām al-Khiṭāb fī al-Fikr al-Islāmī al-Mu'aṣir* (Herndon: al-Ma'had al-'Alimī li al-Fikr al-Islāmī, 2009), 74.

Ibn ‘Ashur expressly distinguishes between *maqāṣid* dan *wasāil*.<sup>267</sup> *Maqāṣid*, according to him, is a goal to be achieved by the *mukallaf* that can be in the form of *maṣlahah* or *mafsadah*.<sup>268</sup> In addition, *wasāil* is a legal provision that becomes a way to arrive at the desired goals (*maqāṣid*). The better the means towards the intended purpose, of course, the better the means are, and the worse the means to reach the intended purpose, the worse the means are.<sup>269</sup>

In line with Ibn ‘Ashur, Nur al-Din Mukhtar al-Khadimi gives a detailed description that there are two main characteristics of *wasāil*, namely:

1. *Thābitun lāyataghayyaru bitaghayyuri al-zamān wa al-makān wa al-ḥāl* (permanent and does not change with the changing time, place, and condition), like, Friday prayer in mosque and pilgrimage in Mecca. Both are examples of permanent *wasāil*. That is, the two worships can not be done simply by listening to the radio or conducting pilgrimage through television.
2. *Mutaghayyirun wa mutaḥarrikum biḥasbi al-aḥwāl wa al-ḥurūf al-mukhtalifah wa al-mutaghayyirah* (elastic and dynamic according to the changing circumstances and conditions), such as social worship.<sup>270</sup> Hasan Hanafi, an admirer of al-Shatibi’s thought, wrote in his book *Min al-Naṣṣ ilā al-Wāqī’* (from the texts into the context) as follow:

والشريعة مقاصد ووسائل. المقاصد لذاتها، والوسائل تحقيق لها، فلا مقاصد بلا وسائل ولا وسائل بلا مقاصد. الشريعة

<sup>267</sup> Wajih Kamal al-Din, *Dirāsah Ḥawl Qā’idah Mā Lā Yatimm al-Wājib illā bihī Fahuwa Wājib* (Kutub ‘Arabiyyah, n.d.), 190.

<sup>268</sup> ‘Ali Ibn Muhammad Ibn Salim al-Thaqali, *Al-Iḥkām fī Uṣūl al-Aḥkām li al-‘Amidī*, vol. 1, 115.

<sup>269</sup> Fathi Hasan al-Mulkawi, *al-Shayikh Muḥammad Ṭāhir Ibn ‘Ashūr Qaḍāyā al-Iṣlāḥ wa al-Tajdīd fī al-Fikr al-Islāmī al-Mu’āṣir* (Herndon: al-Ma’had al-‘Ālimī li al-Fikr al-Islāmī, 2011), 119-120.

<sup>270</sup> Nur al-Din Mukhtar al-Khadimi, *Abḥās fī Maqāṣid al-Sharī‘ah* (Beirut: Muassasat al-Ma’ārif li al-Tābā‘ah wa al-Nashr, 2008), 44.

قصد و هدف للتحقيق وليست قيذا على السلوك وتحديداله. هي مجموعة من المبادئ العامة التي لاختلف باختلاف الأديان والمذاهب والطوائف والملل. هي بمثابة الجمع بين الإعلان العالمي لحقوق الإنسان، والإعلان العالمي لحقوق الشعوب، الإعلان العالمي لحقوق الإنسان، والإعلان العالمي لواجبات الإنسان ومسئوليته

“*Sharī‘ah* is purpose and means (*wasāil*). The goal is for itself, while the means are to achieve that goal. Then, there is no goal without means and no means without goal. Definitely, *sharī‘ah* has a goal and means that can be achieved through research (and tracking) instead of forcing and shackling humans to carry it out. *Sharī‘ah* contains universal values that are certain in accordance with various religions, sects, groups, and beliefs. In the social context, it will always accommodate human rights and rights of nations, and includes the basic human rights and individual human obligations and responsibilities”<sup>271</sup>

According to Mustafa Makhdam, in his dissertation entitled *Qawā‘id al-Wasāil fī al-Sharī‘at al-Islā miyyah*, stated that it was the first to allude to the rule of *wasāil* to achieve *maqāṣid* was Imam al-Shafi‘i. He, then, divided *maqāṣid* and *wasāil* into three parts: (1) *maqāṣid mahḥzah*, that is *maqāṣid* which is not mixed with *wasāil*, purely as *maqāṣid* from any points of view, for example prayer, fasting, *jihad*, pilgrimage, prohibition of adultery, prohibition of stealing, and all charities. All of them are done specifically for themselves; (2) *wasāil mahḥzah*, that is *wasāil* which is not interfered with *maqāṣid*, purely as *wasāil* from any perspectives, such as walking to the mosque, waiting on a lonely road to rob, *tayammum* for prayer, and all activities that are purely carried out for other activities; and (3)

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<sup>271</sup> Hasan Hanafi, *Min al-Naṣṣ ilā al-Wāqi’*, vol. 2 (Kutub Arabiyyah, n.d.), 486.

*maqāṣid* and *wasāil ghayr mahẓah*, that is, actions which, on one hand become *maqāṣid*, and on the other hand as *wasāil*, such as ablution for prayer, reading *al-Qur'an* for the smooth fortune, reading *shalawat* for the Prophet to commemorate his birth, corruption to buy drugs, and so on.

With more straightforward language, al-Qarafi (d. 684 AH / 1285 AD) explains that the motives of law (*mawrid al-aḥkām*) revolve around *maqāṣid* and *wasāil*, where *wasāil*, whether forbidden or lawful is still based on *maqāṣid*. He said:

وموارد الأحكام على قسمين: مقاصد وهي المتضمنة للمصالح والمفسدة في أنفسها ووسائل وهي الطرق المفضية إليها، وحكمها حكم ما أفضت إليه من تحريم وتحليل، غير أنها أخفض رتبة من المقاصد في حكمها والوسيلة إلى أفضل المقاصد أفضل الوسائل، وإلى ما يتوسط متوسطة، ومما يدل على حسن الوسائل الحسنة

“The purposes of the Islamic law are divided into two: (1) *maqāṣid* which contains *maṣlahah* and *mafsadah* to itself; and (2) *wasāil* which contains various ways to reach *maqāṣid* in the form of lawful (*halal*) and unlawful (*haram*), even to the lowest level of *maqāṣid*. The means to achieve the highest goal is the best means. Means to achieve a medium goal is a medium means. Likewise, a means to achieve a good goal is a good means”<sup>272</sup>

Still in discussion about the difference between *maqāṣid* (goals) and *wasāil* (means or tools), Yusuf al-Qardawi and Faysal Mawlawi elaborate on the importance of distinguishing between *maqāṣid* and *wasāil* in producing fatwas in the Fatwa Institution they lead, the European Council for Fatwa and Research (ECFR). When this fatwa

<sup>272</sup> Khali Mansur Ahmad Ibn Idris al-Qarafi, *Al-Furuq aw Anwār al-Buruq fī 'Anwā' al-Furuq* (Dār al-Kutub al-'Ilmiyyah, 1998), 22.

institution is demanded to provide fatwa around the initial and final determination of the month of Ramadan for Muslim minorities in several European countries, Yusuf al-Qardawi said that to see the moon whether with *ru'yah al-hilāl* (seeing the moon directly) or *ḥisāb* (predicting the moon by certain mathematic formula), both are *wasāil* not *maqāṣid*. Al-Qardawi also applies the concept of *maqāṣid* versus *wasāil* in his fatwa on headscarf for Muslim women, that the headscarf is *wasāil* (*means*) to achieve *maqāṣid*, namely politeness, ethics, and permanent and lasting grace.<sup>273</sup>

Categorization based on *maqāṣid* and *wasāil* (means and goals-based categorization) in Islamic law will provide ample opportunities for the emergence of various radicalism viewpoints. For example, in a large reform project, Taha Jabir al-'Alwani highlights the issue of gender inequality as inseparable from the pre-Islamic culture. Islam comes by involving women in witnessing cases. According to al-Alwani, the *maqāṣid* of this case is to end, or at least, to change the stereotypical perception against women and to give the same role proportionally. Nonetheless, assuming that the status of women's testimony is worth half than that of men (two women are equal to one man) is a form of gender injustice as understood by the contemporary Muslim scholars. Therefore, the *maqāṣid* and *wasāil* approach in this case is needed.<sup>274</sup>

Still about *maqāṣid* and *wasāil*, Jasser Auda commented that various historical events and the role of Islamic law that prevailed at that time have to be understood in the cultural, geographical, and historical contexts of the Islamic message itself. The key, according to Auda, is an

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<sup>273</sup> Yusuf al-Qardawi, "Maqāṣid al-Sharī'ah al-Islāmiyyah: Dirāsāt fī al-Qaḍāyā al-Manhaj wa al-Qaḍāyā al-Taṭbīq", within Mohammed Salem El-Awa, ed. (Kairo: al-Furqan Islamic Heritage Foundatin, al-Maqāṣid Research Center, 2006), 117-121.

<sup>274</sup> Taha Jabir al-'Alwani, *Issues in Contemporary Islamic Thought* (London, Washington: International Institute of Islamic Thought, 2005), 164-166.

adequate understanding of the aspects of *maqāṣid* (goals) and *wasāil* (means), *al-thubūt* (fixed values) and *al-mutaghayyirāt* (changeable values). *Wasāil* can expire, as Jasser Auda added, but *maqāṣid* will always exist all the times.<sup>275</sup> To find out more about *wasāil*, here are the thirteen rules (*qawā'id*) about *wasāil*<sup>276</sup> as can be read in a book titled *al-Qawā'id al-Fiqhiyyah wa taḥbīqātuhā al-Fiqhiyyah wa al-Qānūniyyah* written by Doctor Ahmad Yasin and also in the book titled *al-Qawā'id al-Fiqhiyyah* written by Muhammad Shidqi Ibn Ahmad al-Burnu Abu al-Harith al-Ghazzi as follows:

1. *Al-wasāill ahā aḥkām al-maqāṣid* (the law of destination also applies to the ingredients). If something must be done, then the means to achieve something is mandatory, for example: walking for prayer in congregation in mosque, or working to get good fortune, or visiting relatives, or preaching and the like. Conversely, if something is forbidden to do, then the means to achieve something is also forbidden.
2. *Qad takūn waṣīlah al-muḥarram ghair muḥarramah idhā afdat ilā maṣlahah rājiḥah* (there are some conditions, where the unlawful means to be lawful if it leads to the clear benefit). Example: in a very forced condition, where someone has to eat pork and dog, then, with the reason to preserve the soul as the main goal of Islamic law, as in the division of *al-ḍarūriyyāt al-khams*, then this is permissible. Allah SWT said in chapter *al-Baqarah*: 173 (He has only forbidden to you dead animals, blood, the flesh of swine, and that which has been dedicated to other

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<sup>275</sup> Jasser Auda, *Maqāṣid al-Sharī'ah a Beginner's Guide* (London: International Institute of Islamic Thought, 2008), 35.

<sup>276</sup> Ahmad Yasin, *al-Qawā'id al-Fiqhiyyah wa taḥbīqātuhā al-Fiqhiyyah wa al-Qānūniyyah*, (al-Mahli Academic for Publishing and Distributing co.) read also Muhammad Shidqi Ibn Ahmad al-Burnu, *Mausū'ah: al-Qawā'id al-Fiqhiyyah*, vol. 12 (Beirut: Muassasah al-Risalah Nashīdūn, 2003).

than Allah. But whoever is forced [by necessity], neither desiring [it] nor transgressing [its limit], there is no sin upon him. Indeed, Allah is Forgiving and Merciful).<sup>277</sup>

3. *Kullamā saqāta i'tibār al-maqṣid saqāta i'tibār al-waṣīlah* (if the attainment of *maqṣid* is prohibited, the attainment of *waṣīlah* also fails). This third rule is almost the same as the first rule, where if something is done by *mukallaḥ* by means, however, the means is not in accordance with the real objectives, so, the means is not required.
4. *Kullu taṣarruf jarra fasādan daf'a ṣalaḥan fahuwa manhiyyun 'anhu* (any actions that have bad consequences or eliminate the benefits, the action is prohibited). Example: business whis is conducted in unlawful ways in Islamic law or inappropriate according to good traditions that developed in society, so, the business becomes unlawful.
5. *Anna ujūra al-wasāil wa āthāmahā takhtalifun bi ikhtilāf maqāṣidihā* (the reward for the means/*wasāil* varies according to a small or a big purpose of the Islamic law itself). As Allah SWT said in chapter *al-Zalzalah*: 7-8: (So whoever does an atom's weight of good will see it. And whoever does an atom's weight of evil will see it).<sup>278</sup>
6. *Kullamā quwiyat al-waṣīlah ilā al-adaī kāna athmuhā a ḥam* (if the *wasāil*/means is allegedly conveyed to the goals/purposes, the influence of the means is larger). Determining a just leader in a country is mandatory. However, the means to be fair, there must be some criteria that must be owned by the prospective leader, so that, determining the criteria of the leader is very necessary, as Allah said in chapter *al-Shūra*: 38 (And those who have responded to their lord and established prayer and whose affair is [determined by] consultation

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<sup>277</sup> *Al-Qur'an*, chapter *al-Baqarah*: 173.

<sup>278</sup> *Al-Qur'an*, chapter *al-Zalzalah*: 7-8.

among themselves, and from what We have provided them, they spend).<sup>279</sup>

7. *Anna ‘adam al-iqtidāa al-waṣīla hilā al-maqṣid yabṭul i ‘tibāruhā* (*wasāil*/means which does not convey to the purpose is not dictated). This type of means can be a temporal means for a certain time and place. Therefore, one can perform contextualization of the means as long as it does not contradict the arguments of *al-Qur’an* and *al-Sunnah*. As Allah SWT said in chapter *al-Anfāl*: 60 (And prepare against them whatever you are able of power and of steeds of war by which you may terrify the enemy of Allah and your enemy and others besides them whom you do not know [but] whom Allah knows. And whatever you spend in the cause of Allah will be fully repaid to you, and you will not be wronged).<sup>280</sup>
8. *Al-wasāil akhfaḍu ratbatin min al-maqāṣid* (*wasāil*/means is lower than *maqāṣid*). One of the meanings of prayer is to remember and pray to Allah. So, just remembering and asking to Allah without conducting prayer is not justified. That is because the purpose of the command of prayer is greater than just *wasāil*. It means that prayer must be done.
9. *Idhā ta ‘addadat al-wasāil ilā al-maqṣid. al-wāḥid fata ‘tabiru al-sharī‘atu fī al-taklīf bitaḥṣīlihā aqwā tilka al-wasāil taḥṣīlan li al-maqāṣid al-mutawassil ilaihi biḥaithu yahṣul kāMilan, rāsikhan, ‘ājilan, maisūran* (if there are several *wasāil*/means that lead to the one *maqāṣid*, so, the *sharī‘ah* law is more in favor of the strongest one, where *maqāṣid* is realized perfectly, directly, and easily). As in a *hadith* “do not fast until you see the new moon and do not break your fast until you see it too”. In another expression, “If it is cloudy, then complete the *Sha‘ban* month to thirty” (narrated by *Muttafaq ‘alaih*).

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<sup>279</sup> *Al-Qur’an*, chapter *al-Shūra*: 38.

<sup>280</sup> *Al-Qur’an*, chapter *al-Anfāl*: 60.

10. *Idhā tasāwat al-wasāil fī al-ifḍāi ilā al-maqāsid bi i'tibār aḥwālīh kullihā sawwat al-sharī'ah fī i'tibārihā wa takhayyaru al-mukallaḥu fī taḥṣīl ba'dihā dūna al-ukhrā, idhā al-wasāil laisat maqṣūdātān lidhātihā* (if some *wasā'il*/means are equal in producing *maqāsid*, so, the *sharī'ah* sees the means as equal, in this condition, the *mukallaḥ* may choose some of it, because *wasā'il* is not intended for itself). For example, the issue of headscarves where Muslim women can choose the styles and shapes as long as it can cover genitals and politeness. As Allah says in chapter *al-Aḥzāb*: 59 (O Prophet, tell your wives and your daughters and the women of the believers to bring down over themselves [part] of their outer garments. That is more suitable that they will be known and not be abused. And ever is Allah Forgiving and Merciful).<sup>281</sup>
11. *Inna al-shaia idhā kāna wājiban walahū wasāilun muta'addidatun lā yajibu aḥaduhā 'ainan* (if something is obligatory, and it has several *wasā'il*, the mandatory of *wasā'il* is only one of them)
12. *Qad takun al-waṣīlah mutaḍammīnah maḥṣadah tukrahu au tuḥramu liājīn lahā, wa mā ju'ilat waṣīlatan ilaihi laisa biḥarāmin walā makruhin* (sometimes *wasā'il*/means contains danger/*maḥṣadah*, so that, it is forbidden or unlawful, but if *wasā'il* does not contain danger/*maḥṣadah*, it is not forbidden). An example of this rule is the use of a *siwak* as a means to clean teeth and mouth. Yusuf Qardhawi argues that the meaning of the word “*siwak*” in the text is to clean the mouth until God accepts it, so that, it can use *Arak* wood or toothpaste or items that can clean the mouth.
13. *Yughtafaru fī al-wasāil mā lā yughtafaru fī al-maqāsid* (in *wasā'il*, there is forgiven thing that is not forgiven in *maqāsid*)

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<sup>281</sup> *Al-Qur'an*, chapter *al-Aḥzāb*: 59.

## CHAPTER VII

### RULES (*AL-QAWA'ID*) OF *MAQAŠID AL-SHARĪ'AH*

#### A. Methods to Reveal the *Maqāšid al-Sharī'ah*

Basically, if we look far back, the method of inductive legal excavation had already existed in the Greek scientific tradition. This method was then developed by Islamic scholars from Aristotle's philosophy by promoting rational-philosophical thinking. Aristotle's framework of thinking is well known in the Islamic world with the term *burhānī* reasoning. It is a thinking model that seeks to analyze science to the deepest principles and foundations. Syllogism is a form of application of *bayānī* reasoning, in which, several premises are constructed. These premises are then called major premise, minor premise, and conclusion. This means that conclusions cannot be made if they only consist of one premise. In addition, the two premises must contain the same term. The premises in the syllogism above, according to Aristotle, actually obtained by inductive (*istiqrā'ī*) from the existing empirical reality, through the process of abstraction. Basically, partial and empirical objects and events, each has a universal content which can be combined with one another.<sup>282</sup>

According to Ibn Taymiyyah (d. 728 AH), as written by al-Badawi in his doctoral dissertation, there are six ways to express the *maqāšid al-sharī'ah*, namely: first, *istiqrā'* (inductive reasoning).<sup>283</sup> Second, understanding Arabic rules (*ḍabṭ al-lisān al-'arabiyyah*).<sup>284</sup> Third, referring to the opinions of the companions (*aqwāl al-ṣaḥābah*). Fourth, understanding the context of the conversation (*siyāq al-kalām*). Fifth, distinguishing between the main objectives (*al-*

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<sup>282</sup> Rens Bod, *A New History of the Humanities* (United Kingdom: Oxford University Press, 2013), 128-129.

<sup>283</sup> Gerhard Endress, "Mathematics and Philosophy in Medieval Islam" within *The Enterprise of Science in Islam: New Perspectives*, eds. J. P. Hogendijk and Abdelhamid. I. Sabra (USA: The Massachusetts Institute of Technology, 2003), 142-143.

<sup>284</sup> Ibn Taymiyyah, *Majmu' al-Fatawā*, vol. 7, 298.

*maqāṣid al-aṣliyyah*) and the consequence goals (*al-maqāṣid al-tabīʿiyyah*). And sixth, implementing the provisions of the text based on the level of ability, particularly when they are not clearly stated.<sup>285</sup> In this dissertation, al-Badawi explains at length about the concept of *maqāṣid al-sharīʿah* and the method for expressing *maqāṣid al-sharīʿah*. The dissertation, which was later printed as a book, had received appreciation from examiners as *muntāz* (cum laude).

According to Ibn Taymiyyah, the rules of Arabic language are not the aim but are nothing more than a means to understand *al-Qurʿan* in a comprehensive and accurate manner. It is because *al-Qurʿan* is written in Arabic. Although *al-Qurʿan* also contains many terms and rules which are not derived from Arabic. In another part he also emphasized *inna al-asl fī maʿrifah maqāṣid al-sharīʿah huwa mā yadullu ʿalaih min murādih bitaṣarrufātihī wa ʿādātihī wa al-lughah al-ʿarabiyyah wasīlatun lidhālik*.<sup>286</sup> This statement shows that the understanding of Arabic language with all of its rules is quite important to determine the purposes of the *sharīʿah* law.

Responding to the last point, carrying out the provisions of the text according to the level of ability when the objectives are not clearly stated, al-Shatibi asserted that if a *mujtahid* is able to find the *sharīʿah* goals that there are no clear provisions in the text, if the findings are good and in harmony with the spirit of the texts, so, it can be accepted. However, if the findings are contrary to the basic values of *sharīʿah*, the findings can not be accepted.<sup>287</sup>

According to al-Shatibi, there are four schools of law that respond to efforts to uncover *maqāṣid al-sharīʿah*, namely the *Zahiriyyah* schools of law, *Bāṭiniyyah*, *al-Mutaʿammiqūn fī al-qiyās* (sticking firmly to *qiyās* method),

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<sup>285</sup> Yusuf Ahmad Muhammad al-Badawi, *Maqāṣid al-Sharīʿah ʿinda Ibn Taymiyyah* (Ardān: Dār al-Nafāis li al-Naṣhr wa al-Tawzīʿ, 1999), 201-240.

<sup>286</sup> Ibid.

<sup>287</sup> Al-Shatibi, *al-Muwāfaqāt*, vol. 2, 685.

and the majority of *fuqahā'*. Firstly, the *Zāhiriyyah* (textualist) school of law argues that *maqāṣid al-sharī'ah* is only able to be known textually from the text instructions. Secondly, the *Bāṭiniyyah* (essentialist) school of law says that *maqāṣid al-sharī'ah* cannot be achieved by simply understanding the text literally but must through an understanding of what is behind the text. Thirdly, *al-muta'ammiqūn fī al-qiyās* understands that *maqāṣid al-sharī'ah* can only be revealed through *qiyās*, and fourthly, *al-rāsikhūn* says that *maqāṣid al-sharī'ah* must be understood in the perspective of the text and context. The text intended here is looking at the literal meaning of the text, while the context is the meaning of the substance or *'illah* contained in a text. The meaning of the substance must not damage the literal meaning of a text, and vice versa.<sup>288</sup>

Furthermore, Imam al-Shatibi notes that *maqāṣid al-sharī'ah* can be revealed in four ways. First is by understanding the meaning of command (*al-amr*) and prohibition (*al-nahy*). Second, revealing the *'illah* of a command and prohibition. Third, revealing the main objectives of the *sharī'ah* (*al-aṣliyyah*) and its effects (*tabi'iyah*). And fourth, searching for *maslahah* values implied in the text. This theory will later be developed by Ibn 'Ashur especially in the area of *maslahah* and continue to be developed by contemporary *maqāṣidiyyūn* including Jasser Auda. Here are the rules and ways of expressing the meaning of *sharī'ah* (*al-ṭuruq likashf maqāṣid al-shāri'*):

## 1. Understanding Command and Prohibition

The first way is to understand the meaning of command (*al-amr*) and prohibition (*al-nahy*) which are at the beginning of the verse and are clearly mentioned (*mujarrad al-amri wa al-nahyi al-ibtidāi al-taṣriḥi*). This method more emphasizes to the linguistic approach. Al-Shatibi explains that the meaning of a command is to show

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<sup>288</sup> Ibid., 274 – 275.

an obligation to be carried out, while the meaning of a prohibition indicates an obligation to leave it. Then the act of “carrying out the command” and “knowing the prohibition” is a form of *maqāsid al-shāri’* (the will of the *sharī’ah* makers).<sup>289</sup>

- a. The purpose of “command at the beginning of the verse” is what is meant by the *sharī’ah* maker, as stated in *al-Qur’an*, chapter *al-Jum’ah*: 9 (O you who have believed, when [the adhan] is called for the prayer on the day of Jumu’ah [Friday], then proceed to the remembrance of Allah and leave trade. That is better for you, if you only knew). This verse explains that the command to remember Allah immediately is the purpose of the *sharī’ah* makers, at the same time, the command to leave the sale and purchase is the second purpose, the intention follows, the light (*khāfi*) intention, and the intention which has no strong legal provisions (*ghayr al-wāḍiḥ fī al-dalālah*).<sup>290</sup>
- b. Raid Nasri Jamil Abu Mu’nas commented on the first step of determining the purpose of the *sharī’ah* maker of Imam al-Shatibi. He argued that the “command” or “prohibition” which is not clearly the aim of the *sharī’ah* law but it is nothing more than the intention of the *sharī’ah* maker to be carried out or abandoned. Abu Mu’nas added that the real purpose of the *sharī’ah* law is precisely in the search for *illah*, namely *maslahah* or *mafsadah* for humans by carrying out the command or abandoning the prohibition. This is the essence of the purpose of *sharī’ah* law which is not only oriented to the *sharī’ah* maker but also to humans.<sup>291</sup>
- c. The clear “command” and “prohibition”, like in chapter *al-Jum’ah* above, also demand the existence of the

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<sup>289</sup> Ibid., 667.

<sup>290</sup> Ibid., 668.

<sup>291</sup> Raid Nasri Jamil Abu Mu’nas, *Manhaj al-Ta’līl bi al-Ḥikmah wa Atharuh fī al-Tashrī’ al-Islāmī* (London: The International Institute of Islamic Thought, 2007), 358-359.

opposite meaning of “leaving” or “doing” as in the rules of *al-amr bi al-shai’ nahyun ‘an diddihī*.<sup>292</sup> Performing “command” and “prohibition” is the purpose of the *sharī’ah* law, while, carrying out the opposite is the second purpose. According to Wahbah al-Zuhayli, this rule was agreed upon by the majority of Ulama of *uṣūl* except Mu’tazilah. For example: the prohibition of “standing” means the command of “sitting” etc.

## 2. Revealing the *‘illah* of the Command and Prohibition

The second way, al-Shatibi continued, is to reveal the *‘illah* of a “command” or “prohibition” (*i’tibār ‘illal al-amr wa al-nahyi*), just as the command to “marry” is because there are some benefits for the offspring, the command of “buying and selling” is to obtain benefits for the both parties, and the law *qisās* is to avoid crime etc.<sup>293</sup> Another way of searching *‘illah* is the rule *al-maqāṣid al-sharī’ah tadūru ma’a ‘illah al-ḥukm wujūdan wa ‘adaman*.<sup>294</sup> (the purposes of the *sharī’ah* law depend on whether or not there is *‘illah*). This rule is almost existing in every discussion about *uṣūl al-fiqh* (the fundamentals of Islamic law). However, if the *‘illah* of law cannot be found, new *‘illah* that reflects *maslahah* must be sought.<sup>295</sup>

## 3. Revealing the Main *Maqāṣid* and the Following *Maqāṣid*

Next, the third way is (*al-maqāṣid al-aṣliyyah wa al-maqāṣid al-tabi’iyyah*) to reveal the main *sharī’ah* objectives (*al-aṣliyyah*) and their effects (*tabi’iyyah*), as in the rules of *fainna li al-shāri’ fī shar’i al-aḥkām al-*

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<sup>292</sup> Al-Shatibi, *al-Muwāfaqāt*, vol. 2, 668.

<sup>293</sup> Ibid.

<sup>294</sup> Muhammad al-Amin Ibn Muhammad al-Mukhtar, *Mudhakkarah fī Uṣūl al-Fiqh* (Madinah Munawwarah: Maktabah al-’Ulūm wa al-Ḥikam, n.d.), 33-34.

<sup>295</sup> Al-Shatibi, *al-Muwāfaqāt*, vol. 2, 669.

*‘ādiyyah wa al-‘ibādiyyah maqāṣidun aṣliyyun tabi‘uhu* (in fact, when the *sharī‘ah* makers establish laws in the form of habits or worship, they, certainly, contain main objectives and following objectives). The main <sup>296</sup> objectives function as a legal provision, while the following objectives serve more as an amplifier, complement, and consummation of the main objectives.

For example, when al-Shatibi understands the meaning of the verse *إن الصلاة تنهى عن الفحشاء والمنكر*. Al-Shatibi, like Ibn Taymiyyah, makes “remembering to Allah” is as *maqāṣid al-aṣliyyah* (the main *maqāṣid*) of prayer. At the same time, “preventing from abominable and unjust acts” is the *maqāṣid al-tabi‘ah* (the following *maqāṣid*). Another example of the main objectives is to establish offspring, and then followed by the following objectives in the form of “seeking calm”, “seeking pleasure in a lawful way”, “keeping from falling”. If the main objectives have a reference in the text, the following objectives are based more on tracking wisdom behind the main goal.<sup>297</sup>

#### 4. Tracking *Maslahah* (Benefit)

The fourth method is (*sukūt al-shāri‘*) searching *maslahah*. This is due to the absence of clear instructions in the form of “commands” or “prohibitions”, “mandatory” or “prohibited”, “may be done” or “not” written in texts and occur post-prophetically (on the companion’s period). In this condition, al-Shatibi took the path of searching for the *maṣlahah al-mursalah* as frequently done by the classical *fuqahā’* by making the primary needs of (*ḍarūriyyāt*) as barometer of the power of the *maslahah*. He, then, compiled the rules of “*faḥṭāju ahl al-sharī‘ah ilā al-nazri fihā wa ijrāihā ‘alā mā taqarrara fī kulliyātihā wa tunā aktharu aḥkāmi hādihā al-nau‘i ‘alā al-maṣlahah al-mursalah*” (hence, in such

<sup>296</sup> Ibid., 670.

<sup>297</sup> Ibid., 671.

circumstances, Islamic jurists must conduct research on the matter and operate according to the provisions in priority needs, then new legal provisions are built based on the issue of *maṣlahah al-mursalah*)<sup>298</sup> Examples of this fourth method are gathering *mushaf*, codification of *hadith*, and several other new cases.<sup>299</sup>

Ibn ‘Ashur explained, and at the same time, developed the theory of al-Shatibi by offering three completely new formats for determining *maqāṣid al-sharī‘ah*. The first is the search for ‘illah through the induction mindset (*istiqra’*). Second, through the arguments or the postulates of *al-Qur’an* which explicitly mentions the purpose of the *sharī‘ah* (*adillah al-qur’ān al-wāḍiḥah al-ṣarīḥah fī dalālatihā*). And third, through the most famous *hadith* (*ḥadīth mutawātirah*).<sup>300</sup>

## 5. Inductive-Empirical Mindset (*Istiqra’*)

The word *istiqra’*, etymologically, means “participation”, “continuous” (*al-tatābu’*). In a more popular term, *istiqra’* is also called induction (the opposite of deduction), which is a method of thinking that goes from something specific to the general, sometimes, it also going from the less general to the more general.<sup>301</sup> In the context of Islamic jurisprudence, *istiqra’* (induction) is *al-ḥukm ‘alā kulliy bimā taḥaqqqa fī juziyyatih* (a method of general inference that is produced by special facts).<sup>302</sup> This method is often used by the jurists especially in establishing a law. Imam al-Shafi’i is one of the *fuqaha’*

<sup>298</sup> Ibid., 671.

<sup>299</sup> Ibid., 672.

<sup>300</sup> Mohammad Tahir Ibn ‘Ashur, *Maqāṣid al-Sharī‘ah al-Islāmiyyah*, vol. 2 (Yordan: Dār al-Nafāis, 2001), 189-196.

<sup>301</sup> Muhammad Hasan Jabal, *Difā’u ‘an al-Qurān al-Karīm: Uṣūlat al-A’rāb wa Dalālatuh ‘alā al-Ma’ānī fī al-Qur’ān al-Karīm wa al-Lughah al-‘Arabīyyah* (Beirut: al-Ṭabā‘ah al-Ḥadīthah, 2000), 114.

<sup>302</sup> Ahmad Ibn ‘Abd al-Halim, *Majmu’ al-Fatāwā li Shaykh al-Islām Taqiy al-Dīn Ibn Taymiyyah al-Ḥarrānī*, vol. 9 (Dār al-Wafā’ li al-Ṭabā‘ah wa al-Nashr wa al-Tawzī’, 2005), 106.

who often operationalized *istiqra*’ method, especially in determining the duration of menstruation for women.<sup>303</sup> Rationalists translate *istiqra*’ with *al-ḥukm ‘alā al-juziyyāt li ithbāt al-ḥukm al-kulliy* (drawing general conclusion based on the characteristics of the units).<sup>304</sup>

For example, the application of the *istiqra*’ method in *uṣūl al-fiqh* is the principle that *al-asl fī al-amr li al-wujūb* (in principle, the command sentence indicates mandatory law). This conclusion is drawn based on the units of statement (premises) in the form of: (1) the arguments or postulates of the texts which denounce those who disobey the command of Allah; (2) the propositions of the texts which show a threat to people who do not carry out the command of Allah; (3) the Prophet’s statement in the form of command or act of setting an example, which his companions later understood as something that had to be implemented and their assumption was justified by the Prophet himself; (4) linguistic aspects indicate that *fī ‘il al-amr* (command sentence) shows mandatory unless there are indications that show other meanings.

Basically, *istiqra*’ is a method of inductive-empirical mindset in determining Islamic law. This is, of course, closely related to the sources of law in Islam namely *al-Qur’an* and *Hadith*. As it is known that there are quite a lot *al-Qur’an*’s verses and *hadith* which only describe the basic-universal norms and values, so that, to understand such texts is in need of a certain method of thinking. The aim is that a content of the text can be understood and can

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<sup>303</sup> Imam al-Shafi’i determined the law for the shortest *ḥaid* period is a day and night, the usual period is six or seven days or seven nights, and the longest *ḥaid* period is fifteen days or fifteen nights. The establishment of this law was carried out by Imam al-Shafi’i based on research on several women in Egypt which he later established as a legal provision of *fiqh* for all women in the world.

<sup>304</sup> Muhammad ‘Alī al-Tahanawi, *Mawṣi‘at Kashshāf Iṣṭilāḥāt al-Funūn wa al-‘Ulūm*, vol. 1 (Beirut: Maktabah Lebanon Nashirūn, 1996), 172.

be obtained a legal ruling from it. In addition, the *istiqra'* method is also part of the work system of epistemology, namely by making *al-Qur'an's* verses and the Prophet's traditions as the main authoritative references as the basis for building knowledge. There are, at least, two ways to get knowledge from the text; to hold the literal meaning of the text and to hold the true purpose of the text.

Examples in *fiqh* law "five times prayer is mandatory". This conclusion is not only based on one fragment of the verse, but must do research (*istiqra'*) to find other verses that will support the results of the conclusions later. The obligatory prayers are produced by *istiqra'* research that; (1) many verses contain '*amr* to perform prayers; (2) special rewards for those who perform prayers; (3) threats for those who leave prayers; (4) orders to perform prayers in any condition, whether in a healthy or sick condition, in a safe situation or in war, sitting or standing and so on; (5) the most famous history of the Prophet to date which shows that Muslims maintain the implementation of prayers. Statements 1 - 5 have been tested for truth. It turns out that most of the premises show about the obligatory of prayers. Because it concerns religious issues, the conclusions obtained from *istiqra'* can be the provision and stipulation of the new Islamic law.

As said by al-Shatibi and Ibn 'Ashur, that *istiqra'* is one of the proper methods to identify the *maqāṣid al-sharī'ah*. This method is stated in *uṣūl al-fiqh* which is also needed by *mujtahids* in order to explain and answer legal problems easily. As in the words of al-Shatibi, "*uṣūl al-fiqh innamā ma'nāhā istiqrāu kulliyāt al-adillah ḥattā takūna 'inda al-mujtahid naṣb 'ain wa 'inda al-ṭālib suhlah al-multamis*".<sup>305</sup> This is because even though the texts (*al-Qur'an* and *Hadith*) have an absolute level of truth, however, the understanding of the texts is more relative. It is from this awareness that the *mujtahids* strive

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<sup>305</sup> Al-Shatibi, *al-Muwāfaqāt*, vol. 2, 323.

for how Islamic law is still able to oversee various achievements in many aspects of life. In the *istiqra'* method, the subject of the study is the text and context (*al-naṣṣ* and *al-wa qi* '). The text is looking at the explicit meaning, while the context is looking for the substance meaning or *'illah* contained in the text. The substance meaning must not damage the explicit meaning of the text, and vice versa.

There are two types of *istiqra'*, namely *istiqra' tām* (perfect induction) and *istiqra' nāqis* (imperfect induction).<sup>306</sup> If the conclusion is based on the similarity of the characteristics of all the units, it is called *istiqra' tām* and has an absolute legal force.<sup>307</sup> However, if the conclusion is based on the similarity of some of the unit's characteristics, it is called *istiqra' nāqis* and has a perceptual or uncertain legal force. In the scientific tradition of *uṣūl al-fiqh*, the induction method is used, among others are in establishing a general method for discussing legal issues or establishing *fiqh al-'amalī* (practical *fiqh*), whether the issue are *farḍ* (mandatory/obligatory), *sunnah* (recommended), *mubāḥ* (neutral/permitted), *makrūh* (disliked or offensive act), *harām* (forbidden), valid, and invalid.

In the area of the study of Islamic law, *istiqra' nāqis* places *al-Qur'an*, *hadith*, and opinions of Muslim scholars, who have authority, as the main objects. The existence of *istiqra' nāqis*, in the realm of social sciences, is due to the characteristics of human behavior and social institutions are not constant, so is the legal authority of the verses of *al-Qur'an* and the Prophet's traditions that support are rarely agreed about their certainty meaning.

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<sup>306</sup> Yusuf Ahmad Muhammad al-Badawi, *Maqāṣid al-Sharī'ah 'inda Ibn Taymiyyah* (Ardān: Dār al-Nafāis li al-Nashr wa al-Tawzī', 1999), 203.

<sup>307</sup> Hussam Muhy al-Din al-Alusi, *Madkhal ilā al-Falsafah* (Beirut: al-Muassasah al-'Arabiyyah li al-Dirāsāt wa al-Nashr al-Markāz al-Raisī, 2005), 86.

Therefore, it can only be done with *istiqra' nāqis* which results uncertainty conclusion but most likely true.

The Muslim scholars of *uṣūl* have different opinions about the legal force of these two types of *istiqra'*. However, al-Ghazali,<sup>308</sup> Ibn Najjar, and most of the Muslim scholars of *uṣūl* agree that *istiqra' tām* has an absolut/certain law force, while *istiqra' nāqis* has an uncertain law force. Different from the above opinion, al-Shatibi and Ibn Taymiyyah argue that both (*tām* and *nāqis*) have certain law force as long as not in contradiction with the substance of Islamic teachings.

#### a. Studying the Law That Has a Clear *illah*

First is *istiqrāu al-aḥkām al-ma'rufah 'illatuhā bimaslak al-'illah* (reviewing and examining all the laws that their *'illah* have been known). By researching *'illah*, the *maqāṣid* will be known easily. For example, the prohibitions of applying for women that have been proposed by others, as well as the prohibition of bidding on something that other people have offered as a major premise. The *'illah* of the prohibition is “greed” by blocking other people’s interests as a minor premise. From there, it can be taken one goal / *maqāṣad* namely lasting brotherhood between brothers and sisters. Based on *maqāṣad*, it is not unlawful to propose the proposal of another person after the first applicant revokes his desire as a conclusion.<sup>309</sup>

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<sup>308</sup> ‘Amir al-Jazzar, *Majmū'ah al-Fatāwā li Shaykh al-Islām Taqīyy al-Dīn Ibn Taymiyyah al-Ḥarrānī*, vol. 9 (Dār al-Wafā' li al-Ṭabā'ah wa al-Nashr wa al-Tawzī', 2005), 106-107.

<sup>309</sup> Ahsan Lihasanah, *Al-Fiḥ al-Maqāṣid 'inda al-Imām al-Shāṭibī wa Atharuh 'alā Mabāḥith Uṣūl al-Tashrī' al-Islāmī*, 104-105.

**b. Examining Legal Postulates That Have the Same *‘illah***

The second is *istiqrāu adillah al-aḥkām ishtarakat fī ‘illatin wāḥidin* (examining legal postulates/arguments that have the same *‘illah* until it is believed that the *‘illah* is the intended purpose). Example, a number of commands to free slaves show that one of the purposes of the *sharī‘ah* law is freedom (*al-ḥurriyyah*).

**6. Research on the Postulates of *al-Qur’an***

The sixth way is *adillah al-qur’ān al-wāḍiḥah al-ṣarīḥah fī dalālatihā* (the purposes of the *sharī‘ah* law can be tracked through research on the arguments/postulates of *al-Qur’an* which clearly and explicitly contains the content of law, so that, it is unlikely to interpret the explicit meaning). As in *al-Qur’an* chapter *al-Baqarah*: 205 (And when he goes away, he strives throughout the land to cause corruption therein and destroy crops and animals. And Allah does not like corruption). And in chapter *al-Baqarah*: 185 (The month of Ramadhan [is that] in which was revealed the Qur’an, a guidance for the people and clear proofs of guidance and criterion. So whoever sights [the new moon of] the month, let him fast it; and whoever is ill or on a journey - then an equal number of other days. Allah intends for you ease and does not intend for you hardship and [wants] for you to complete the period and to glorify Allah for that [to] which He has guided you; and perhaps you will be grateful).

In addition to those verses, the purposes of the *sharī‘ah* law can also be tracked through research on the arguments/postulates of *al-Qur’an* as mentioned in chapter *al-Ḥajj*: 78 (And strive for Allah with the striving due to Him. He has chosen you and has not placed upon you in the religion any difficulty. [It is] the religion of your father, Abraham. Allah named you “Muslims” before [in

former scriptures] and in this [revelation] that the Messenger may be a witness over you and you may be witnesses over the people. So establish prayer and give zakah and hold fast to Allah. He is your protector; and excellent is the protector, and excellent is the helper). According to Ibn ‘Ashur, the purposes of the verses above can easily be found from the explicit meaning of the text. Thus, the “text” is as a major premise and “the explicit meaning of the text” is as a minor premise, and the meaning of “damage”, “convenience”, and “difficulty” function as conclusions or *sharī‘ah* purpose.

#### **7. *Sunnah Mutawatirah* (The Most Famous Prophet’s Living Tradition)**

The seventh way is through *al-sunnah al-mutawatirah* to reveal the objectives of the *sharī‘ah* law. It can be done through observation the arguments/postulates from the *sunnah al-mutawatirah*, either meaningfully or practically (*al-tawātur al-ma’ nawī* and *al-tawātur al-‘amalī*). *Al-tawātur al-ma’ nawī* is the testimony of many companions that the Prophet had done something. Consequently, the status of what the Prophet did at that time is *maqāsid al-darūriyyāt* (priority purposes). An example of *mutawatir al-ma’ nawī* is *ṣadaqah jāriyyah* and prioritizing prayer from *khutbah* in *‘īd al-ḥajj* and *‘īd al-adḥā* prayers.

Whereas, the example of *mutawatir ‘amalī* is the authentic *hadith* narrated by al-Bukhari and Muslim about a companion named Abu Barzah who canceled his prayer because he was looking for his loose horse. After he got his horse back, he immediately repeated his prayer. When it was confirmed to the Prophet, the Prophet said that canceling prayer for the safety of the horse (vehicle) was better than losing his horse and having to go home on foot.

The purpose of this *sharī‘ah* law in this case is the principle of “convenience” (*al-taysīr*).<sup>310</sup>

## **B. The relevance of *Maqāṣid al-Sharī‘ah* and *Ijtihad***

On the beginning of the tenth century AD, the Sunni school of law had reached a level of maturity where all major problems regarding positive legal problems could be resolved. The established justice system today is a proof of the intellectual maturity of the Muslim scholars who were also supported by an adequate legal methodology. However, the great achievements of the classical Muslim scholars were suddenly shocked by the controversy about the issue of the closing of the gate of *ijtihad* / *insidād bāb il-ijtihād* (the door of *ijtihad* closed) which had an impact on the freezing development of Islamic law since the beginning of the tenth century AD.

Shaykh Abu Zahrah expressly rejected the issue by saying that in the tradition of the Shī‘ah Imāmiyyah (specifically), there was never a statement “the door to *ijtihad* is closed”. It always opens, and even, the leading figures Shī‘ah Imāmiyyah never forbade it. The issue of the closure of the gate of *ijtihad* / *insidād bāb al-ijtihād* can be found, for example, in some literatures written by ‘Ubaydillah Ibn Husayn al-Karhi (d. 340 AH / 951 AD), a scholar from the Hanafi school of thought, Bakr Ibn al-A’la (d. 344 AH / 955 AD), a scholar from the Maliki school of thought, and not found in the period before both.

To understand the contradictions surrounding the issue of “closing the gate of *ijtihad*”, it is necessary to firstly understand the meaning of *ijtihad*, because scholars, who use

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<sup>310</sup> The text of the *hadith* is: عن الأزرق بن قيس قال: كنا على شاطئ نهر بالأهواز. فقام يصلي وخلي فرسه، فانطلقت الفرس، فترك صلاته وتبعها حتى ادركها فأخذها، ثم جاء فقضى صلاته وفيها رجل له رأي فأقبل يقول: انظروا إلى هذا الشيخ ترك صلاته من أجل فرس، فأقبل فقال: ما عفتني أحد منذ فارقت رسول الله صلى الله عليه وسلم، وقال: إن منزلي متراخ فلو صليت و تركت الفرس لم اتي أهلي الى الليل، وذكر أنه صحب رسول الله صلى الله عليه وسلم فرأى من تيسيره. This *hadith* is quoted in *Shahīḥ al-Bukhārī* in chapter ‘amal fī al-ṣalāh, *hadith* no. 1211, vol. 2, 367.

the term *ijtihad*, have different perceptions about the concept of *ijtihad*. The meaning of *ijtihad* has changed from time to time and has been felt in various contexts by various scholars throughout the history of Islamic law. Some definitions of *ijtihad* given chronologically by the Muslim scholars are as follows: (1) al-Shafi'i (d. 204 AH / 819 AD): "*ijtihad* consists of an analogy (*qiyās*)". (2) Ibn Hazm (d. 456 AH / 1064 AD): "*ijtihad* means to investigate the provisions of God through *al-Qur'an* and *Sunnah*". (3) Abu Ishak Shirazi (d. 476 AH / 1083 AD): "*ijtihad* is more general than analogy because *ijtihad* means trying hard to achieve certain legal provisions". (4) al-Ghazali (d. 505 AH / 1111 AD): "*ijtihad* means maximum effort by a *mujtahid* in studying the provisions of religion". (5) Mustafa al-Shalabi: "*ijtihad* means the attempt to extract religious laws, symbols, expressions, and the meanings of very deep texts".<sup>311</sup>

The reality, essence, and scope of *ijtihad* itself are still a source of debate from the second century of *Hijriyyah* to this day. Some Muslim historians and Western scholars assert that the right to use the ability to do *ijtihad* individually has been frozen in the Sunni tradition around the beginning of the 10<sup>th</sup> century AD. A very popular term is the closing of the gate of *ijtihad* / *insidād bāb al-ijtihād* (the door of *ijtihad* is closed). According to Wael Hallaq, historical witness is not true. Some other Western scholars such as W. Montgomery Watt and Bernard Weiss prefer the middle position. In addition, there are several statements that the idea of closing the door of *ijtihad* does not project the reality. Because the practice of *ijtihad* is not only the absolute right of the four schools of law, but also the right for every Muslim who already has adequate capabilities.

The jurists agree that the principle of *ijtihad* leads from a *hadith* about the event between the Prophet and Mu'adh Ibn Jabal when he was appointed as a judge (*qādī*) in Yemen. This condition continued until the period of the *Rāshidūn*

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<sup>311</sup> Muhammed Mustafa Shalabi, *Ta'āl al-Aḥkām*, (Mesir: 1974), 11.

Caliphate and the *Umayyad* Caliphate which were known as *al-ijtihād bi al-raʿy* (legal reasoning with reason)<sup>312</sup> until the 8<sup>th</sup> century AD. At the Post-8<sup>th</sup> century AD, *ijtihād* gradually separated from *raʿy*. Muhammad Ibn Idris al-Shafiʿi (d. 204 AH / 819 AD), the founder of the *fiqh* Shafiʿi school of law, was the first to oppose *raʿy* and prefer *ijtihād* method through *qiyās* or deductive analogy. The great idea of al-Shafiʿi is clearly explained in the well-known book *al-Risālah fī Uṣūl al-Fiqh*. The idea was then continued to be developed by subsequent scholars by introducing the concepts of *istiḥsān* and *istiḥāb*. In the twentieth century, the discussions on the issue of the closing of the gate of *ijtihād* / *insidād bāb il-ijtihād* (the door of *ijtihād* closed) began to warm up again among Western scholars and Muslim scholars. There are, at least, three big waves that respond to the above issues.

First, scholars who believe that the gates of *ijtihād* closed are Orientalists. Joseph Schacht claimed that at the beginning of the 10<sup>th</sup> century, Islamic law had matured, so that, the scholars concluded that all problems could be found a solution from the opinion of the school of law's figures. Coulson also chooses the same view as Schacht. He said: "the issue of the closure of the gate of *ijtihād* is perhaps more a result of the internal pressure of the Muslim communities than on external factors. The essence of *ijtihād* was reached when Islamic jurists in the early tenth century officially acknowledged that the power of their creativity had been fully poured".<sup>313</sup> It seems that Fazlur Rahman agrees with the Orientalists. He said: "... at the end of the third/ninth and beginning of the fourth/tenth centuries, both the dogma and the law had taken a definite shape, the *ijma* ' arrived at by that

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<sup>312</sup> Akgündüz Ahmet, *Introduction to Islamic Law: Islamic Law in Theory and Practice* (Rotterdam: IUR Press, 2010), 152. Read also Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1979), 37.

<sup>313</sup> N.J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 81.

time was declared final and the door of ‘ijtihād’ was closed”.<sup>314</sup>

Second are some experts who believed that the door to *ijtihād* has never been closed. The scholars who were in this line were W. Hallaq, Jamal al-Din al-Afghani (d. 1897 AD), Muhammad ‘Abduh (d. 1905 AD), Muhammad Iqbal (d. 1938 AD), and scholars of the Salafi movement. W. Hallaq expressly rejected the issue both theoretically and practically. Hallaq said: “... there was no consensus on the closure of the gate of *ijtihād* as reported by Schacht, and that the *ijtihād* was to be a continual effort in theory and no such invalidation of *ijtihād* happen historically”.<sup>315</sup>

Third, there are also some scholars who take middle position. The middle rows are Bernard Weiss, Edward Sell, Muhammad Ali, Muhammed Shafi’i and Ziya Gokalp. They prefer the middle way which is “true that the door of *ijtihād* has been closed but has been reopened along with the needs and various new problems that are urgent to do *ijtihād*”.<sup>316</sup>

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<sup>314</sup> Fazlurrahman, “Post-Formative Developments in Islam” within *Islamic Studies* (Karachi: Gateway Publications 1966), 87.

<sup>315</sup> Wael B. Hallaq, “Was the Gate of *Ijtihād* Closed?”, 3-41.

<sup>316</sup> Shaista P. Ali Karamali, “The *Ijtihad* Controversy” within *Arab Law Quarterly*, Vol. 9, No. 3 (1994), 251-254.

## CHAPTER VIII

### ACTIVIST INSTITUTIONS OF *MAQĀSID AL-SHARĪAH*

#### A. International Institute of Islamic Thought (IIIT)

The International Institute of Islamic Thought (IIIT) was founded in 1981 in London by an Arab Muslim intellectual (Mecca) ‘Abdul Hamid Abu Sulayman.<sup>317</sup> He was born in Mecca in 1936. He held his BA and MA in Political Science at al-Azhar University. After graduating, he continued studying in Pennsylvania and earned his Ph.D in International Relation. Some of the important roles he once occupied were as Secretary-General of the World Assembly of Muslim Youth, founder and president of the Association of Muslim Social Scientists, founder of the International Institute of Islamic Thought (IIIT) and chancellor of the International Islamic University of Malaysia (IIUM) during 1988-1998. The idea of establishing IIIT originated from the dichotomy between Islam and Western progress. Islamization of knowledge tries to build a synthesis between Islamic thought and the theories, methodologies and research developed by the Western world.

This organization, founded by Abdul Hamid Abu Sulayman, then functions as a center for the study of contemporary Muslim scholars in the field of Islamic Law, especially those relating to the theme of *maqāsid al-sharī‘ah*.<sup>318</sup> The main agenda of this institution are: (1) as a medium for reforming the mindset of Muslim scholars, so that they are able to reconstruct and determine priorities in the development of Islamic law in the contemporary era; and

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<sup>317</sup> Halim Rane, *Islam and Contemporary Civilisation: Evolving Ideas, Transforming Relations* (Melbourne: Melbourne University Press, 2010), 65-66.

<sup>318</sup> Katherine Bullock, *Rethinking Muslim Women and the Veil: Challenging Historical & Modern Stereotypes* (Herndon, London: International Institute of Islamic Thought, 2002), viii; Tahir Ibn ‘Ashur, *Treatise on Maqāsid al-Sharī‘ah* (Herndon, London: IIIT, 2006), ix.

(2) to redesign an Islamic cultural scheme by displaying contemporary Islamic humanism and social knowledge in Islamic perspective.<sup>319</sup> According to Abu Sulayman's confession, what he did was actually inspired by the reinterpretation and reconstruction movement of Fazlur Rahman, and young Muslim intellectuals who idolized Rahman's thought as a form of dynamism of Islamic thought.

To achieve the above objectives, several important points made by this institution are: (1) to encourage Muslim scholars to make a mental transition from the orientation of particular Islamic law (*juziyyah*) to universal (*kulliyyah*); (2) to direct the attention of the law which is merely an inward oriented structure toward outward oriented structure by making the values of truth, justice, and intrinsic meaning; (3) to move from just a debate about the means (*wasā'il*) and methodology towards how to make Islamic law elastic based on intent and purpose (*maqāṣidiyyah*). All of the above points will only be effective through the transformation of thinking in the academic area.<sup>320</sup>

On the other hand, the role of a *mujtahid* to revitalize Islamic law in order to provide answers to new problems will increasingly prove that truly, Islamic law is always alive (*ṣāliḥ li kulli zamān wa makān*). Therefore, by offering the concept of *ijtihād* based on *maqāṣid* (objectives-based *ijtihād*), it is hoped that the Muslim scholars of Islamic law will be more creative and innovative in conducting *ijtihād*. They are also hoped not to be trapped in exclusivity, group fanaticism, and classical theories that are considered less adequate in the present context.<sup>321</sup>

Concerning with those purposes, The International Institute of Islamic Thought (IIIT) offers a new breakthrough

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<sup>319</sup> Ahmad al-Raysuni, *Imam al-Shāṭibī's Theory of the Higher Objectives and Intents of Islamic Law* (Herndon, London: International Institute of Islamic Thought, 2005), xii.

<sup>320</sup> Ibid.

<sup>321</sup> Khalid B. Sayeed, *Western Dominance and Political Islam: Challenge and Response* (New York: State University of New York Press, 1995), 160-161.

by translating, and at the same time, publishing various thoughts on the study of *maqāṣid al-sharī'ah* which have been in a vacuum for five to six centuries. In order to be able to read the thoughts of the Muslim scholars from all over the world and become a reference for Muslims throughout the world, IIIT has published more than three hundred book titles with the big theme “reconstruction and methodological re-actualization of Islamic law” in various world languages. In addition, there are several programs offered by IIIT in addition to publications and translations, namely research programs, seminars, conferences and other media they can use to promote the study of *maqāṣid al-sharī'ah*.<sup>322</sup>

Some central figures in the study of *maqāṣid al-sharī'ah* are those who have a spirit of reform (*tajdīd*) and contemporarization of classical *maqāṣid* (*al-maqāṣid al-taqlidiyyah*) with diverse backgrounds. Among these figures are Ahmad al-Raysuni with his book “Towards Realization of the Higher Intentions of Islamic Law”, Jamal al-Din ‘Attia with his book “*Islamic Law: Maqāṣid al-Sharī'h a Functional Approach*”, Yusuf al-Qardawi with his book “*Dirāṣah fī Fiqh Maqāṣid al-Sharī'ah*”, Jasser Auda in his book “*Fiqh al-Maqāṣid*” and several other figures.

In The International Institute of Islamic Thought, Jasser Auda’s position is one of the important pillars in efforts to develop the theory of *maqāṣid al-sharī'ah*. With a slightly different educational background from the other *maqāṣidiyyūn* (Muslim scholar who have a big concern to the study of *maqāṣid al-sharī'ah*), including his big name in the area of Islamic legal philosophy, which is incorporated in IIIT. Jasser Auda’s thought makes this institution increasingly known and sought after by readers, especially from academics. Another thing that makes Auda look different in the *Maqāṣid al-sharī'ah* discourse is that he offers a completely new approach namely “system theory” as philosophy and the basis of Islamic law. The new theory

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<sup>322</sup> Jasser Auda, *Maqāṣid al-Sharī'ah as philosophy of Islamic Law, A Systems Approach* (London: Washington: IIIT, 2008), xix-xx.

Auda made is a good combination between the Islamic legal theory and the European social theory.<sup>323</sup>

### **B. The Center for Islamic Legislation and Ethics (CILE)**

The *Center for Islamic Legislation and Ethics* is a research institute founded by a Muslim intellectual figure, Tariq Ramadan who later became chairman, in Doha, Qatar. Tariq Ramadan, born in 1962 in Geneva, is a professor in contemporary Islamic Studies at Oxford University. In addition, he actively gave lectures in the Theology Faculty at Oxford University. He was also a visiting lecturer (visiting professor) at the Faculty of Islamic Studies in Qatar, professional researcher at Doshisha University in Kyoto, Japan, and the director of CILE. He held his MA in French philosophy and literature and his Ph.D in Arabic and Islamic Studies from the University of Geneva. In addition, he also received special training at Cairo University. Through his writings and lectures, he has contributed positively in the discourse around Muslim issues in the West and for the revival of the Islamic world.

In addition his educational background, he also actively lectures on theology, ethics, social justice, ecology, and dialogue between religious communities and between cultures. As an academic and thinker, he wrote many books, including: *The Arab Awakening: Islam and the New Middle East* (2012), *The Quest for Meaning, Developing a Philosophy of Pluralism* (2010), *What I Believe* (2009), *Radical Reform, Islamic Ethics and Liberation* (2008) and many other articles, freelance writings, and papers.<sup>324</sup>

Regarding the existence of CILE, Jasser Auda said “CILE is based in Doha, but we have an international mission. The issue of Islamic ethics will benefit Qatari society, but it’s much wider than Qatar and the Arab world. I would actually say that it’s even wider than the Muslim

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<sup>323</sup> Ibid.

<sup>324</sup> Tariq Ramadan, *Islam and the Arab Awakening* (Oxford, New York: Oxford University Press, 2012), xii.

world, because Islamic ethics for me is human ethics”.<sup>325</sup> The existence of CILE also received full support from contemporary Islamic Studies at Oxford University and the Faculty of Islamic Studies in Qatar. CILE’s main agenda is to focus on six areas, namely health, gender issues, ecology, economics, art, and food.

Of the six objects above, the link between morality and economics is a priority for CILE. What’s interesting about the figure of Tariq Ramadan is that he departed from a family that was thick with the fundamentalist Islamic tradition *Ikhwān al-Muslimīn* which was founded by his own father, Hasan al-Banna. However, it is the fundamentalist tradition that led Ramadan to become a reformist figure who is accustomed to liberal thinking styles.

This is also recognized by his little friend, Caroline Fourest. He said “Tariq Ramadan of today may, of course, be different man from Tariq Ramadan of five, ten, or fifteen years old ... Tariq Ramadan has had to act as the link between so many different worlds ...”.<sup>326</sup> Jasser Auda’s position in CILE is as vice chairman. So, structurally, he has a position one level below Tariq Ramadan and is involved in determining the policies that CILE will take, especially in carrying out its main mission as the center of study of Islamic law. Auda added “the idea behind the centre is renewal. Islamic law and Islamic ethics require renewal from both sides: from the side of Islamic law and the ethical dimension”

In fact, the International Institute for Islamic Thought (IIIT) and The Center for Islamic Legislation and Ethics (CILE) have a common ground on the spirit of “Islamic law reform”. On the other hand, CILE also highlights the tendency to understand Islamic teachings textually and linguistically. The understanding of Islamic teaching like this, according to CILE, will not be relevant to have dialogue with modernity or even seems to be increasingly distant. It is

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<sup>325</sup> <http://www.qf.org.qa/content/qf-telegraph/issue-70/creating-cile>

<sup>326</sup> Caroline Fourest, *Brother Tariq: The Doublespeak of Tariq Ramadan*, xii, 3.

because with such an exclusive understanding, it will reduce the universality and basic values of Islam itself.<sup>327</sup>

Tariq Ramadan and Jasser Auda, both said that *ijtihad* in the contemporary era is not just to rely on the text (*dalālat al-naṣṣ*), but the scope of *ijtihad* would be rightly on target by combining text and social reality or based on text and context (*al-naṣṣ wa al-wāqī*). To complement the effective *ijtihad* model, another CILE's offer is to combine text and social changes, social sciences, and natural sciences.<sup>328</sup> Regarding *maqāṣid* discourse, Tariq Ramadan said:

If Islam is a universal message, appropriate to all places over all times then this should be shown, proved and expressed through a permanent reflection going and coming from the sources to reality and from reality to the sources. This process should be witnessed in every time, everywhere, so that, the application of the Islamic law remains faithful to the *maqāṣid al-sharī'ah*.<sup>329</sup>

### **C. *Maqāṣid al-Sharī'ah* as the Basic Concept of Islamic Human Rights**

Muhammad Hasyim Kamali, An-Na'im, Jasser Auda, Abdullah Saeed are among the many *maqāṣid al-sharī'ah* and international Islamic law experts who emphasize the need for evaluation of the epistemological and methodological construction of *fiqh*. One of the purposes of this project is in order that Muslims are still able to be an important element of the so fast world change. It can be a motivation for Muslims to think progressively, so they can

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<sup>327</sup> Hamza Eskandarani, "Ethical and Legal Implication in Assisted Reproductive Technology" within *Muslim Medical Ethics: From Theory to Practice*, eds. Jonathan E. Brockopp, Thomas Eich (Kolumbia, South Carolina: University of Suth Carolina Press, 2008), 151.

<sup>328</sup> Ibid.

<sup>329</sup> Faisal Kutti, "Sharī'ah Courts in Canada" within *Debating Sharia: Islam, Gender Politis, and Family Law Arbitration*, eds. Anna Korteweg and Jennifer A. Selby (Toronto: University of Toronto Press, 2012), 137.

take a significant role in the midst of increasingly sharp competition.

One of the most important things in the big project is the reorientation and reconstruction of thoughts about Islamic law (*fiqh*) which still has not moved from the comfort zone of the classical paradigm. In criticizing this matter, an international expert in Islamic law, An-Naim said: “Once it is appreciated that *sharī‘ah* was constructed by its founding jurists, it should be possible to think about reconstructing certain aspects of *sharī‘ah*”.<sup>330</sup>

As an international law expert, An-Na’im is able to read that there is, in fact, a point of synergy between Islamic law (*sharī‘ah*) in the historical context and the conception of Human Rights in a modern terminology. Islamic law, in the context of history (historical *sharī‘ah*), is rules that has been existing during the time of the Prophet Muhammad, the *Rāshidūn* Caliphate and at the end of the *Umayyad* Caliphate. Almost all historians of Islamic law agree that these periods are the ideal period to be called as a state based on *sharī‘ah* (*sharī‘ah*-based state) or significant for the sources and development of *sharī‘ah* or borrowing the term of Fazlurrahman “the nature of the state and its relationship to *sharī‘ah*”.<sup>331</sup>

However, An-Na’im also criticizes that from the formative period of Islamic law in the 7<sup>th</sup> to 9<sup>th</sup> AD until the end of the second and even third millennium, slavery has not disappeared institutionally, discrimination against non-Muslims and in otherwise, and the assumption that women are the second hand and do not have legal skills as men. Even, these are still a tradition among the Muslim communities.<sup>332</sup> As a result, the rights and the acquisition of

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<sup>330</sup> Abdullahi Ahmed An-Na’im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse: Syracuse University Press, 1990), xiv.

<sup>331</sup> Fazlur Rahman, *Islam* (Chicago: University of Chicago Press, 1979), 79.

<sup>332</sup> Noel Coulson, *History of Islamic Law* (Edinburg: Edinburg University Press, 1964), 18-19.

the value of the *maslahah* that they have originally obtained are reduced by the interpretation of *sharī'ah* law (*naṣṣ*) which tends to be men-oriented. That is, to make Islamic law able to synergize and contribute to the principles of International Law and Human Rights, all understandings of classical *fiqh* must be dialogue with the current situations.

Shifting the paradigm of the classical jurisprudence does not mean totally rejecting the results of *ijtihad* of the most extraordinary classical scholars, but rather thinking about how Muslims inherit the spirit of progression and productivity of the very high classical Ulema. By understanding and taking the universal values inherited from the classical Ulama means living their thoughts in the present context. Therefore, there must be a meeting point between Islamic law and basic human values in the modern order of life on a national, regional, and international scale through a wise attitude and adequate worldview from contemporary Muslim scholars of Islamic law.<sup>333</sup>

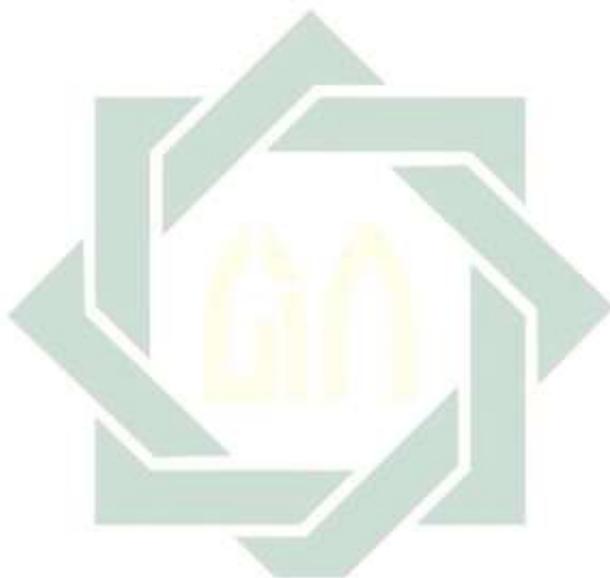
Auda believes that the reform agenda of the Islamic legal methodology must reflect a linear spirit with the declaration of universal human values (universal declaration on human rights) as a component in the objectives of Islamic law itself. By placing the theory of *maqāṣid al-sharī'ah* in the process of *ijtihad* of Islamic law, it means that it has advanced towards achieving greater *maslahah* for human life without having to be limited by dichotomous barriers between classical and modern.

The most important thing is that the main agenda of the contemporary *maqāṣidiyyūn* is to make a consensus about the need to reform and reinterpret the epistemological construction of the classical Muslim thinkers to uncover the spirit of Islamic law. Thus, the structure of the sources of Islamic law in addition to placing *al-Qur'an*, *al-hadith* as the highest sources of Islamic law, also adds to the several theories of Islamic law that are sowing from developments

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<sup>333</sup> Abdullahi Ahmed An Na'im, *Toward an Islamic Reformation; Civil Liberties, Human Rights, and International Law*, 170-173.

and changes that occur at this time. In brief, it can be underlined that the basic principles of modernity in the realm of Islamic law are reform, reinterpretation, evolution, reconstruction, contextualization of Islamic law, tradition, rational thought patterns in the frame of *maqāṣid al-sharī'ah* or *maṣlaḥah*.



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