

THE SHIFTING PARADIGM OF THE CLASSICAL THEORY OF *MAQĀSID AL-SHARĪ'AH* TO THE MODERN THEORY

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ABSTRACT

*This paper highlights the methodological critique of the contemporary Muslim scholars concerning with the development of epistemological paradigm of Islamic law, particularly the concept of classical maqāsid al-sharī'ah/maṣlaḥah (purposes or intents of Islamic law), which is regarded to be inadequate to cover the sophisticated issues. They view that the methodological establishment of Islamic law is frequently trapped within the textual, exclusive, and normative understanding for long period of the time. As a result, flexibility and elasticity of Islamic law are not able to engage in the dialogue to modern values, particularly related to issues of ḥudūd, human rights, public law, gender, and Muslim as a member of global citizenship. They argue that the understanding of the classical maṣlaḥah theory should be dialogued and related to social sciences, social changes, universal values and those of modernity. Therefore, this paper focuses on the concept of maqāsid al-sharī'ah within the perspective of the contemporary Muslim scholars namely Abdullah Saeed and Jasser Auda to view: (1) whether they tend to ground on the classical theory of maqāsid al-sharī'ah or they explore entirely their own original one; (2) the extent of urgency of maqāsid al-sharī'ah theory in legal reasoning process (ijtihād); and (3) the significant contribution of the contemporary Muslim scholars' thoughts on the discourse of Islamic law. Abdullah Saeed's reflection of the thinking about maqāsid al-sharī'ah is framed in three basic points: progressive-ijtihadi, contextuality in an effort to align Islam with contemporary development, and the ethico-legal to obtain the universal and moral values. In this case, Yasser Auda adds to interpret maqāsid al-sharī'ah with *asrār al-sharī'ah* in the frame of morality, universality, social justice, human dignity, human rights by questioning some fundamental things such as "whatness", "howness", and "whyness". Auda also tends to utilize the anthropological approach (maqāsid al-sharī'ah-based anthropology) and systems theory (maqāsid al-sharī'ah-based systems theory) in determining the meaning of maqāsid al-sharī'ah as the approach in the study of Islamic law by establishing a set of categories, namely*

cognitive, wholeness, openness, hierarchy, multi-dimensionality, and the purposefulness. This kind of the research is going to be viewed through the *contextual and phenomenological approach*.

Key words: *maṣlahah*, *'illah*, *asrār*, universal values, and social changes.

Introduction

Critique of the contemporary Muslim scholars about the development of the epistemological paradigm of science of jurisprudence is that it is frequently framed within the exclusive and normative aspect for many centuries.⁶⁰⁹ Consequently, the flexibility and elasticity of Islamic law are considered to be incapable to hold a dialogue with the sophisticated changes.⁶¹⁰ Some Muslim thinkers in the 20th and 21st century such as Fazlur Rahman, Mohammed Arkoun, Hassan Hanafi, Mohammad Shahrur, Abdullahi Ahmed al-Na'im, Riffat Hasan, Jasser Auda, Abdullah Saeed, and some other figures dramatically highlight the scientific paradigm of Islamic studies particularly paradigm of fiqh. For them, jurisprudence and its implication, including its legal philosophy of social institution, are considered too stiff making it less responsive to the challenges and demands of the modern times, especially in relation to issues of ḥudūd, human rights, public law, gender and others. It means that the understanding of the classical fiqh should be interconnected with social sciences, social changes, and values of modernity.⁶¹¹

Back to the paradigm of jurisprudence that has paradigmatic and epistemological stagnancy. This phenomenon can be seen from the use of patterned

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⁶⁰⁹ M. Amin Abdullah, *Islamic Studies di Perguruan Tinggi* (Yogyakarta: Pustaka Pelajar, 2010), vi-vii.

⁶¹⁰ Jaseer Auda is trying to parse the coagulation by asking the simple and fundamental things such as “whatness” (what), “howness” (how), and “whyness” (why). As a simple example, why a Muslim should run the pillars of Islam?, What advantages performing such pillars of Islam?, And how to interpret and apply the pillars of Islam?. These are the basic questions in *maqāṣid al-sharī'ah* as the first step in the effort to internalizing and externalizing the universal moral values. Auda defines *maqāṣid al-sharī'ah* as “*maqāṣid of the Islamic law are the objectives, purposes, intents, ends, principles behind the Islamic rulings*”. In principle, Auda tries to develop a new meaning to some predecessors' concepts namely Imam al-Juwayny, al-Ghazali, al-'Izz ibnu Abd Salam, Ibnu al-Qayyim, and al-Shatibi. However, he elaborates those of predecessors with several new approaches such as social, historical criticism, anthropology in the frame of social sciences. See M. Amin Abdullah, *Islamic Studies di Perguruan Tinggi*, 103. See also Jasser Auda, *Maqāṣid al-Sharī'ah as philosophy of Islamic Law, A Systems Approach* (London: Washington: IIIT, 2008), xxiii

⁶¹¹ The term of modern, modernism, modernity are derived from the tradition of Western's progress. In this context, modernity is understood as mind, school, movement, and attempt to change ideology, custom, old institution with a framework and a new mindset based on science and values of modernity, including the discourse of Islamic law in the perspective of modern Muslim scholars. Achievement of Western modernity is really materialized and marked by the Renaissance movement and Enlightenment (the age of reason) that makes rationality as the key to everything and departs off its religion and transcendental theology. See Harun Nasution, *Pembaharuan dalam Islam: Sejarah Pemikiran dan Gerakan* (Jakarta: Bulan Bintang, 1992), 11.

literal, textual, and historical-normative approach. It has also a less dialogical inter-connective with various social sciences and humanities, and tends to be more *tārīkh* than *tārīkhiyyah*.⁶¹² The example of a literature which considered as the most popular is like *Falsafah al-Tashrī' al-Islāmy* written by Subhi Mahmasani. This work displays more classical stories. *Hikmah al-Tashrī' wa Falsafatuhu* by al-Juwayni only emphasizes the wisdom of the 'ubūdiyyah aspect normatively. *Al-Muwāfaqāt fī Uṣūl al-Sharī'ah* written by al-Shatibi also more emphasizes on normative-historical aspect. Actually, the books were paradigmatic bid and considered as spectacular works. However, in the present context, where the social and historical life of human, as expressed by Abdullah Saeed, are experiencing extraordinary changes in managing and improving the quality of life. The changes here are development of science, socio-politics and socio-economics, demographic, legal, urban planning, environment and so on.⁶¹³ These factors also affect globally the cultural and religious interdependency in society. In order that Muslim communities do not just survive in the increasing competition, they are supposed to be able to take an important role. It also means that the reorientation and reconstruction of thought on Islamic jurisprudence (*fiqh*) is a necessity.⁶¹⁴

In line with Saeed, Omid Safi notes some important issues that must be answered by Muslim in contemporary era are gender inequality, discrimination against both of religiosity and ethnic minorities, human rights,⁶¹⁵ freedom to speak, belief, and practicing their own religion, unequal distribution of wealth and authoritarian governance, globalization and social changes. As an important part of global citizenship, Muslim communities are not only limited to local residents (local citizenship) where there is a struggle, an uneasy dynamic and dialectic of life.⁶¹⁶

In relation with the above description, this paper will highlight the concept of *maqāṣid al-sharī'ah* on the perspective of the contemporary Muslim scholars; (1) whether there is a trend they are still grounded in classical theory of *maqāṣid al-sharī'ah/maṣlahah* or even they have their own entirely original theory; (2) how extent

⁶¹² M. Amin Abdullah, *Islamic Studies di Perguruan Tinggi*, 188. Arkoun is one of the prominent modern Muslim scholars who quotes the tendency of eliminating the *tārīkhiyyāt* dimension of *fiqh* (jurisprudence) and *kalām* (theology).

⁶¹³ "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". See Abdullah Saeed, *Interpreting the Qur'an: Towards a Contemporary Approach* (London: Routledge, 2006), 2.

⁶¹⁴ M. Amin Abdullah, *Islamic Studies di Perguruan Tinggi*, 98-99.

⁶¹⁵ Anis Malik Thoah, *Tren Pluralisme Agama, Tinjauan Kritis*, (Jakarta: Perspektif, 2005), 180.

⁶¹⁶ Abdullah Saeed, *Interpreting the Qur'an*, 2.

the urgency of the maqāṣid al-sharī'ah theory in performing ijtihād (legal reasoning); (3) the significant effect between the thinking of contemporary Muslim scholars and the Islamic legal discourse. Of the above questions, it will also be seen the typology of contemporary Muslim scholars among textualist, moderate, semi-textualist, and contextualist or borrowing the theoretical framework of Wael B. Hallaq in jurisprudence paradigm, among literalist, utilitarianist, and liberal phenomenologist.⁶¹⁷

Meaning of Maqāṣid al-Sharī'ah

Etymologically, maqāṣid al-sharī'ah⁶¹⁸ consists of two words: maqāṣid and sharī'ah. Maqāṣid is a plural form of maqṣud (intend) to any destination, midway, fair, and not exceed, the straight path.⁶¹⁹ The second element is sharī'ah means the road to the springs, custom or sunnah, path to the ultimate source of justice.⁶²⁰ In the context of fiqh, sharī'ah means law that God prescribed for His slaves, either the provisions of al-Qur'ān or al-Sunnah.⁶²¹ Al-Raysuni says that sharī'ah means practical Islamic law in a conception of faith, legislation, moral, or mu'amalah.⁶²² Terminologically, maqāṣid al-sharī'ah has variety of equivalent words. Scholars of uṣūl al-fiqh, al-Shatibi, used to utilize the terms maqāṣid al-sharī'ah (purposes of Islamic law)⁶²³, al-maqāṣid al-shar'iyyah fī al-sharī'ah (purposes of the law contained in the Islamic law),⁶²⁴ and

⁶¹⁷ Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to the Sunni Uṣūl al-Fiqh* (Cambridge: Cambridge University Press, 1997), 162-163.

⁶¹⁸ According to Ahmad Raysuni, the term *maqāṣid al-sharī'ah* was firstly utilized by al-Turmudhi on the 3rd century AH. through his famous works; *al-Ṣalāh wa Maqāṣiduhu*, *al-Ḥaj wa Asrāruh*, *al-'Illah*, *'Ilāl al-Sharī'ah*, *'Ilāl al-'Ubūdiyyah*, and *al-Furūq*. The last book mentioned was then adopted by Imam al-Qarafi to be the title of his book. After al-Hakim, there were Abu Mansur al-Maturidy (d. 333 AH.) with his book *Ma'khad al-Shara'* and Abu Bakar al-Qaffal al-Shashi (d. 365 AH.) with his book *Uṣūl al-Fiqh* and *Maḥāsin al-Sharī'ah*. After al-Qaffal, there were Abu Bakar al-Abhari (d. 375 AH.) and al-Baqillany (d. 403 AH.) with each of their books *Mas'alah al-Jawāb wa al-Dalā'il wa al-'Illah* and *al-Taqrīb wa al-Irshād fī Tartīb Ṭuruq al-Ijtihād*. After al-Baqillany, there were al-Juwayni, al-Ghazali, al-Razy, al-Amidy, Ibn Hajib, al-Baidāwi, al-Asnawi, Ibn Subuki, Ibn Abd al-Salam, al-Qarafi, al-Thufi, Ibn Taymiyyah dan Ibn Qayyim. After them, there was newly al-Shatibi, the one who is regarded as the first figure to put the basic of the science of *maqāṣid*. He is the first one to construct the *maqāṣid al-sharī'ah* concept systematically. See Ahmad Raysuni, *Nadhāriyyāt al-Maqāṣid 'Inda al-Imām al-Shatibi* (Beirut: al-Muassasah al-Jamī'iyyah Li al-Dirāsāt wa al-Nashr wa al-Tauzi', 1992), 32.

⁶¹⁹ Fayruz Abadi, *al-Qāmūs al-Muḥīṭ* (Beirut: Muassasah al-Risālah, 1987), 396.

⁶²⁰ Louis Ma'luf, *al-Munjīd fī al-Lughah wa al-'Alām* (Beirut: Dār al-Mashriq, 1986), 632.

⁶²¹ *Al-Qur'ān* chapter 42: 13, 45: 18. See also the explanations given by Fazlur Rahman, *Islam* (Chicago: University of Chicago, 1979), 108.

⁶²² Abdul Wahab Khalaf, (1968). *'Ilm Uṣūl al-Fiqh* (Cairo: Dār al-Quwaitiyyah, 1968), 32.

⁶²³ Al-Shatibi, *Al-Muwāfaqāt fī Uṣūl al-Aḥkām*, Volume I, ed., Muhammad al-Khadar Husein al-Tulisi (ttp.: Dār al-Fikr, tth.), 4-5.

⁶²⁴ *Ibid.*, 7. Among the other scholars of *uṣūl al-fiqh*, *maqāṣid al-sharī'ah* is well understood by asrār al-sharī'ah that contained the secret behind the law laid down by personality in the form of benefit to mankind both in this world and in the hereafter. For example, the law requires various kinds of worship in order to establish the religion of Allah (*ḥifẓ al-Ḍn*), is prescribing the adultery law to maintain the honor and descent (*ḥifẓ al-nasl*), prohibition of thief to maintain one's possession (*ḥifẓ al-māl*),

maqāṣid min al-shar'iy al-ḥukm (purposes from of the law of Islam).⁶²⁵ Al-Shatibi confirms that maqāṣid al-sharī'ah is the Islamic law that aims to realize the benefit of people in the world and in the hereafter.⁶²⁶ On the other hands, Al-Bannani, al-Ghazali, al-Amidi and Ibn Hajib interpret the word maqāṣid al-sharī'ah by reaching benefit (maṣlaḥah) and refusing danger (mafsadah).⁶²⁷ Al-Fasi adds that maqāṣid al-sharī'ah is the ultimate goal and the secret behind each of the provision in Islamic law to be achieved.⁶²⁸

To provide a clear boundary, in the book of al-Muwāfaqāt volume II, al-Shatibi divides al-maqāṣid into two main parts namely the aim of law maker (qaṣd al-shāri') and the intent of the object of law (mukallaf). The aim of law maker is further subdivided into four sections: (1) qaṣdu al-shāri' fī waḍ'iy al-sharī'ah (the aim of law maker in provisioning the Islamic law); (2) qaṣdu al-shāri' fī waḍ'iy al-sharī'ah li al-ilhām (the aim of law maker in provisioning the Islamic law to be well-understood); (3) qaṣdu al-shāri' fī waḍ'iy al-sharī'ah li al-taklīf bi muqtaḍahā (the aim of law maker in determining the Islamic law to be carried out in accordance with the law itself); (4) qaṣdu al-shāri' fī dukhūl al-mukallaf taḥta aḥkām al-sharī'ah (the aim of law maker in provisioning the Islamic law that must always be obeyed and not based on the lust). Meanwhile, from the perspective of maqāṣid al-mukallaf, it also contains four aspects,⁶²⁹ namely: (1) true understanding about levels, characteristics, and relative or absolute maṣlaḥah; (2) linguistic dimension of the problem of taklīf which is frequently ignored by many jurists; (3) an explanation of the dalālah al-aṣliyyah (original understanding of exegesis) and umūmiyyah (general understanding of exegesis); (4) analysis of taklīf in conjunction with the ability and other difficulties. Restrictions given by al-Shatibi above are derived from the three fundamental kinds of maqāṣid to be achieved by Islamic law, namely: (1) ḍarūriyyāt (basic or primary needs); (2) ḥājīyyāt (secondary needs); and (3) taḥsīniyyāt (tertiary needs)⁶³⁰.

In contemporary Muslim scholars' point of view, the definition of maqāṣid al-sharī'ah is undergoing process to metamorphosis by involving the social sciences,

prescribing *qiṣās* punishment to maintain one's soul (*ḥifẓ al-nafs*). Therefore, *maqāṣid al-sharī'ah* can be interpreted as the objectives to be achieved from a legal determination.

⁶²⁵ Asfari Jaya Bahri, *Konsep Maqasid Syari'ah Menurut al-Syatibi* (Jakarta: Raja Grafindo Persada, 1996), 1-2.

⁶²⁶ The key word of understanding *maqāṣid al-sharī'ah* are *maṣlaḥah* or benefit and prosperity of human life. See Muhammad Khalid Mas'ud, *Filsafat Hukum Islam dan Perubahan Sosial*, trans. Yudian W. Asmin (Surabaya: Al-Ikhlās, 1995), 225. See also Al-Shatibi, *al-Muwāfaqāt fī Uṣūl al-Aḥkām*, 2.

⁶²⁷ Umar bin Shalih bin 'Umar, *Maqāṣid al-Sharī'ah 'inda al-Imām al-Shatibi 'Araḍan wa Dirāsatan wa Tahīlān* (Damshīq: Dār al-Fikr, 2000), 45.

⁶²⁸ Ilal al-Fasi, *Maqāṣid al-Sharī'ah al-Islāmiyyah* (Rabat: Maktabah al-Waḥdah al-Arabiyah, tt.), 50.

⁶²⁹ Yusuf Qarḍawi, *Al-Qur'an dan Sunnah Referensi Tinggi Ummat Islam*, trans. (Jakarta: Robbani Press, 1997), 251.

⁶³⁰ Al-Shatibi, *Al-Muwāfaqāt fī Uṣūl al-Aḥkām*, 220.

philosophy, law, and more patterned theo-centrism rather than anthropocentrism. Wahbah al-Zuhayli defines maqāṣid al-sharī'ah with the implicit values and objectives of law. The values and goals are viewed as objective and confidential aspect of Islamic law established by God.⁶³¹ Ibn Ashur interprets the essence of values contained in the provisions of Islamic rules. In addition, Abdullah Saeed with his contextual and ethico-legal theory, Fazlur Rahman with his double movement, Hassan Hanafi and Arkoun with his tārikhiyyāt theory view that the essential meaning of maqāṣid al-sharī'ah is to search the universal values.⁶³² Yasser Auda adds to interpret maqāṣid al-sharī'ah with asrār al-sharī'ah /wisdoms behind rulings or secrets behind the law in the frame of the moral principles, universality, social justice, human dignity, human rights, and others in order to provide answers to various problems faced by not only the Muslim community, but also non-Muslim.⁶³³

Maqāṣid al-Sharī'ah on the Modern Maqāṣidiyyūn Perspective

1. Abdullah Saeed

Abdullah Saeed⁶³⁴ calls on Muslims to be wise and always develop an interactive dialogue in responding modernity, humanity, creating a peaceful atmosphere, relationship between Muslims and non-Muslims. In religious constellation, such an interactive dialogue is often expressed as theo-anthropocentrism, which is an attempt to integrate religious dogma and development of science, contemporary issues, and global realities. Thus, it will be able to reveal the universal

⁶³¹ Wahbah Zuhayli, *Uṣūl al-Fiqh al-Islāmy*, Vol. 2 (Damaskus: Dār al-Fikr, 1986), 225.

⁶³² *Double movement* is a movement to idealize a return to the past, where and when the verse was revealed, to understand the context of historicity, then a back to the present with a “moral idea” as the substance of the verse to be reconstructed in accordance with the values of historicity and the present values. See Abdullah Saeed, “Fazlur Rahman: A Framework for Interpreting The *Ethico-Legal* Content of Qur'an” within *Suha Taji-Farouki, Modern Muslim Intellectuals and the Qur'an* (London: The Institute of Ismail Studies, 2004), 42-44.

⁶³³ Jasser Auda, *Maqāṣid al-Sharī'ah as Philosophy of Islamic Law A Systems Approach*, 1-2.

⁶³⁴ Abdullah Saeed was born in the Maldives, on September 25, 1964. Currently, he is a professor of Arabic and Islamic studies at the University of Melbourne, Australia. He is also the Director of the National Centre of Excellence for Islamic Studies. He earned a Ph.D. in Islamic studies from the University of Melbourne, Australia. Abdullah Saeed has an educational background in Arabic language and literature and Middle Eastern studies. The combination of educational institutions he learned, namely education in Saudi Arabia and academic careers in Melbourne Australia making him being competent to judge the West and East objectively. Saeed is very concerned about the development of the contemporary Islamic world. In himself, there is a spirit of how the teachings of Islam could be *shāliḥ li-kulli zamān wa makān* in understanding Muslim minority living in Western countries. As a prolific scholar, Abdullah Saeed has written a book with the theme of Islamic studies. Among his books that author often makes as reference are *The Qur'an: An Introduction* (2008), *Interpreting the Qur'an: Towards a Contemporary Approach* (2006), *Islamic Thought: An Introduction* (2006)⁶³⁴, *Approaches to the Qur'an in contemporary Indonesia* (2005). <http://www.findanexpert.unimelb.edu.au/display/person13483>

values to participate and give positive color of spiritual dimension based on tolerance and pluralism, and to make humanistic matters as central studies.⁶³⁵

Saeed's reflection of the thinking of maqāṣid al-sharī'ah is framed in three fundamental points: (1) progressive-ijtihadi, (2) contextual in an effort to align Islam with modern-contemporary developments, (3) ethico-legal to reveal the universal and moral values.

The first, progressive Islam⁶³⁶ is an attempt to turn back to the progressive dimension of Islam where in many centuries suppressed by the textual and literal domination to which al-Jabiri calls it as the epistemological domination or the bayāni domination in Islamic thought.⁶³⁷ The methodology used by progressive Muslim is what he calls as progressive-ijtihadi. In his book, *Islamic Thought*, Saeed notes that the most important characteristics possessed by those who claim themselves as progressive Muslims are namely: (1) they adopt the view that some of the traditional Islamic laws require a substantial change and reform in order to adapt to the needs of the Muslims community today; (2) they tend to support the need for fresh ijtihād and new methodology to running ijtihād to address contemporary problems; (3) some of them also combine the traditional Islamic scholarship with the modern Western thought and education; (4) they are firmly convinced that social changes, either in the area of intellectual, moral, legal, economy or technology, should be reflected in Islamic law; (5) they do not commit themselves to dogmatism or certain school of thought and

⁶³⁵ Amin Abdullah, for example, states that the future of Muslim is required to be not only an intense thinker with theological discourse, but at the same time, he has to be able to create the more creative dialogue with scientific areas such as psychology, sociology, anthropology, social work, environment, health, technology, economics, politics, international relations, law and justice, and so on through an integrative-inter connective approach. It is a new perspective in contemporary Islamic theology that is no longer in the debate of spiritual an sich, and is not only preoccupied with the discourses of knowledge that either comes from religion or not, but embracing throughoutly the contemporary human life issues. See Amin Abdullah, *Islamic Studies di Perguruan Tinggi*, 101-110.

⁶³⁶ On another occasion, on the seminar "Progressive Islam and the State in Contemporary Muslim Societies" at Marina Mandarin Singapore, Abdullah Saeed gave a somewhat different criteria than those of above. The ten criteria are more technically distinguishing the progressive Muslim's movements from that of others. According to him, Muslims progressive are: (a) showing a sense of comfort when they reinterpret or re-impose law and Islamic principles; (b) believing that gender equality has been established in Islam; (c) the view that all religions are inherently equal and should be constitutionally protected, (d) the view that all human beings are equal, (e) the view that beauty is an inherent part of the Islamic tradition either found in art, architecture, poetry or music, (f) supporting the freedom of speech, belief and association, (g) showing compassion to all human beings, (h) considering that the rights of "others" need to be respected, (i) choosing moderation and non-violence in resolving community's problems, (j) showing the joyful and enthusiastic when discussing issues related to the role of religion in the public level. See Omid Safi, *Progressive Muslims*, 9-15; see also Omid Safi, "What is Progressive Islam", within *The International Institute for the Study of Islam in the Modern World (ISIM) News Letter*, No.13, December 2003, 10.

⁶³⁷ Abdullah, M. Amin, *Islamic Studies di Perguruan Tinggi*, 184-226.

particular theology as approach in the study; (6) they focus on social justice, gender equity, human rights and harmonious relation between Muslims and non-Muslims.⁶³⁸

The second is contextual. Saeed adds that there are three stages of period in interpreting al-Qurʾān: (1) textual period, focusing on textual-linguistic understanding; (2) semi-textual⁶³⁹ which is still focusing on textual-linguistic understanding, rejecting the socio-historical aspect. However, in this stage, there has been an orientation for ethico-legal search. This method is typically used by neo-revivalist like Muslim brotherhood of Egypt, Jamāʾah Islāmiyyah in India; and (3) contextual: how the socio-historical approach is able to explore the universal values of al-Qurʾān which have been elaborated in the context of social sciences, politic, economy, culture, and history at the time. From there, it is then sorted which one is al-thawābit (things that are believed not to change or “fixed”) wa al-mutaghayyirāt (things that are believed or perceived to change).⁶⁴⁰ There is also a call as “al-thawābit” and “al-Mutaḥawwil”⁶⁴¹ or commonly called the difference between qaṭʿiy (qaṭʿiyyāt) and ḥannī (ḥanniyyāt)⁶⁴². Integrative relationship and interconnectivity which are projected by Saeed are textual-absolute, semi-contextual, contextual, or among text (firstness), author (secondness), and the reader (thirdness) as elaborative relationship.

The third, ethico-legal⁶⁴³ is an approach to uncover the content of the universal values of a particular verse in order to interact with a variety of contemporary issues objectively and reach a complexity of meaning.⁶⁴⁴ Another term of ethico-legal, based on Rahman’s concept, is “al-asbāb al-nuzū al-jaḍīd” (the recent reasons of the

⁶³⁸ Tariq Ramaḍān, *Western Muslims and the Future of Islam* (New York: Oxford University Press, 2004), 150-151

⁶³⁹ Ibid. See also Sayyid Abu al-Aʿla al-Mawḍūdī, *Towards Understanding the Qurʾān*, trans. Zafar Ishaq Ansari (Leicester: Islamic foundation, 1995), 54.

⁶⁴⁰ Ibid., 3.

⁶⁴¹ Ibid. In the treasure of thought of *fiqh* and *uṣūl fiqh*, it is also known as a very popular term like *qaṭʿiy* and *ḥannīy*. In term of categorization, both of treasure of philosophy and *uṣūl fiqh* are likely similar, but the scope, coverage, mean, and method of thinking are completely different.

⁶⁴² On the philosophical approach, it is also known what is called “*form*” and “*matter*”.

⁶⁴³ The term of “ethico-legal” or “double movement” is also used by some Muslim scholars such as Ghulam Ahmad Parves, Fazlur Rahman, Muhammad Arkoun, Farid Esack, and Khaled Abou El Fadl. These names are the representation of the rationalist-modernist thinkers. In their view, the content of ethic-law (ethico-moral) in *al-Qurʾān* should be directed to the contextual understanding in order to be more applicable and responsive to contemporary human problems.

⁶⁴⁴ Abdullah Saeed, *Interpreting the Qurʾān*, 3-5. See also another writing of Abdullah Saeed “A ‘contextualist’ reading of the Qurʾān is becoming increasingly popular, particularly among those Muslims referred to as ‘progressive-ijtihadis’. One of the primary concerns of this reading is that in order to understand and interpret the ethico-legal content of the Qurʾān and relate that content to the changing needs and circumstances of Muslims today, it is important to approach the text at different levels, giving a high degree of emphasis to the socio-historical context of the text. In the classical *tafsīr* this emphasis on socio-historical context was not considered important, particularly in the interpretation of the ethico-legal texts, despite the frequent use of *asbāb al-nuzūl* literature. In this paper, I will explore how progressive-ijtihadis are adopting a contextualist reading of ethico-legal texts of the Qurʾān.” <http://cambridgefluids.com>

revelation). In “Interpreting the Qur’ān ...”, Saeed focuses his studies on how to interpret the content of al-Qur’ān (tafsīr and fiqh) that have relevance to the philosophical-historical-universal value to the complexity of the needs of contemporary Muslims. He tried to do constructive reinterpretation of al-Qur’ān to uncover ethico-legal content so that it is able to be in line with the needs of modern communities without getting out from the context of the basic beliefs and practices. The approach he used is the historical-critical (historical critique) or how to understand al-Qur’ān within the historical and contemporary context.⁶⁴⁵ Ghulam Ahmad Parvez confirms that al-Qur’ān has unchangeable and meaningful cores, so that each generation can unearth new meaning as a doctrine that has been accentuated by the demands of modernity. In accordance with “ethico-legal”, he proposes two levels of meaning: (1) revealing the outer form of the specific meaning (juziyyāt) of the verse, and (2) revealing the inside meaning of the verse coupled with the social context, history, economics, politics and certain condition that later in line with the contemporary cases.⁶⁴⁶ Both Rahman and Saeed have the same view that the contextual meaning of the text is the embodiment of the prophetic spirit or the phrase “how the prophet might act were he living today”.⁶⁴⁷

2. Jasser Auda

Rigidity in providing definition and interpretation as well as operating of *maqāṣid al-sharī’ah* are likely answered by Jasser Auda’s concept⁶⁴⁸ in his book *Maqāṣid al-Sharī’ah as Philosophy of Islamic Law*. He questions some fundamental things such as “whatness” (what), “howness” (how), and “whyness” (why).⁶⁴⁹ In anthropological perspective, Jasser Auda also tries to open up a new perspective on how the actual role of the jurists and the *faqih* in determining the pattern, different

⁶⁴⁵ Ibid., 128-129.

⁶⁴⁶ “*Islam has an unchanging core, but in application is adaptable and fluid. This implies that the texts of revelation do not have a single, fixed meaning. Rather, each new generation can expect to find in the Qur’an a new treasures as their own capacity to understand its teaching grows. Second is the idea that the ethico-legal instructions of the Qur’an can be approached at two levels: a surface one related to putting into practice a specific ethico-legal instruction, and a deeper one related to underlying reasons for such an instruction ... for an ethico-legal instruction are associated with specific social, historical, economic, political or other circumstances, and if these circumstances ...*”. See Abdullah Saeed, *Interpreting the Qur’an*, 21.

⁶⁴⁷ Ibid., 21.

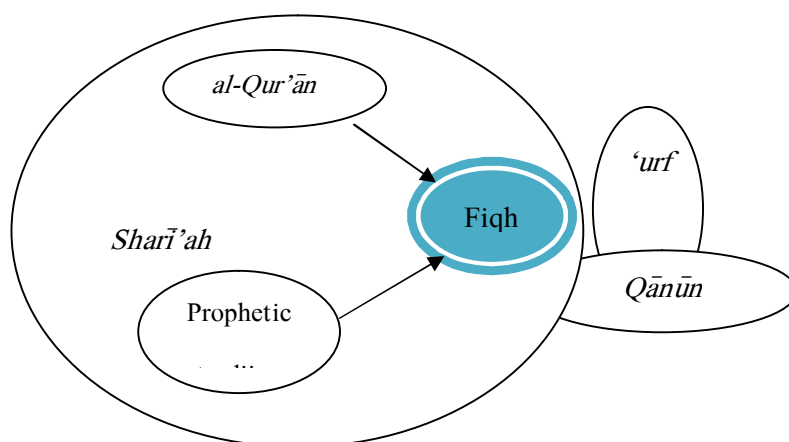
⁶⁴⁸ Jasser Auda is one of progressive Muslim intellectuals who concerns and always listens to various problems on the development of Islamic law, especially relating to *maqāṣid al-sharī’ah*. Through *Al-Maqāṣid Research Center* in London, he does a lot of socializing the concept with the aim of re-actualization of Islamic law. Together with Tariq Ramaḍān, he also founds CHILE (Research Center for Islamic Legislation and Ethics) as an Islamic research center that focuses on extracting universal values and ethical values of Islamic law against the basic principles of *al-Qur’ān* and *al-Sunnah* as a theoretical framework and a concrete contribution. See <http://www.cilecenter.org>. Lihat juga <http://iqra.ca/2012/qatar-foundation-launches-new-research-centre-for-islamic-legislation-and-ethics/>

⁶⁴⁹ Ibid.

interpretation, and religious understanding as a result of the development of human civilization.⁶⁵⁰ At least, Auda prefers to utilize the anthropological frame (*maqāṣid al-sharīʿah*-based anthropology) and the system theory (*maqāṣid al-sharīʿah*-based systems theory) in interpreting *maqāṣid al-sharīʿah* to capture the shift of understanding and the role played by the jurists in every age. In the era of traditional jurisprudence, it is described that the role of *faqīh* (religious scholars) is considered to be equal to *sharīʿah*, and it also seems to be equal to *al-Qurʿān* and *al-Sunnah* (prophetic tradition). Even, the so-called prophetic tradition has not been able to be clearly mapped and classified. (See illustration in Figure 1).

FIGURE 1

Understanding of Religiosity of Islam (Illustration of Relationship between *Sharīʿah*, Prophetic Tradition, *Fiqh*, *Qānūn*, ‘*urf* and *Faqīh* on the First Stage (Traditional Era)⁶⁵¹



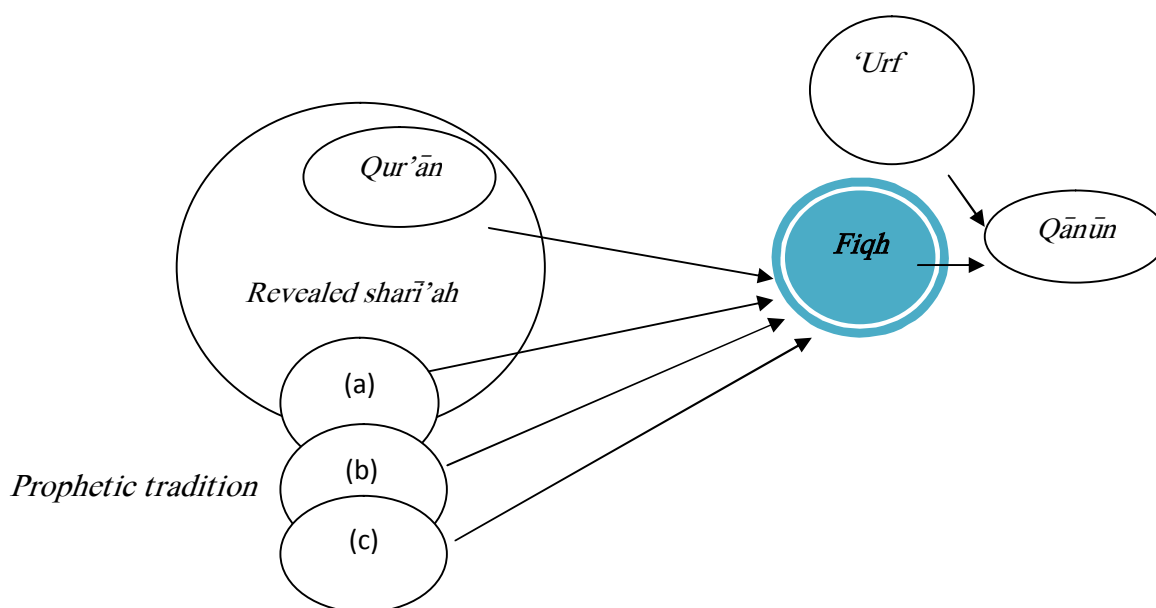
The development of jurisprudence in the modern era has clearly been begun to distinguish among what is called revealed *sharīʿah*, *al-Qurʿān*, prophetic tradition, and the role of *faqīh*. In the prophetic tradition area has also been sorted out which ḥadīth whose matan (essential content of ḥadīth) is acceptable and which one is not acceptable in accordance with the development of human knowledge and literacy. The respective position of Jurisprudence, as a form of Islamic religious understanding and practice of *faqīh*, has already been clear. It is clearly out of the area of the so-called revealed *sharīʿah*. (See figure 2).

⁶⁵⁰ Jasser Auda, *Maqāṣid al-Sharīʿah as Philosophy of Islamic Law A Systems Approach*, 57.

⁶⁵¹ Ibid., 58. See also <http://aminabd.wordpress.com/2011/01/14/urgensi-pendekatan-antropologi-untuk-studi-agama-dan-studi-islam/>

FIGURE 2

Understanding of Religiosity of Islam (Illustration of Relationship between *Sharī’ah*, Prophetic Tradition, *Fiqh*, *Qānūn*, ‘*Urf* and *Fāqih* on the First Stage (Modern Era)⁶⁵²

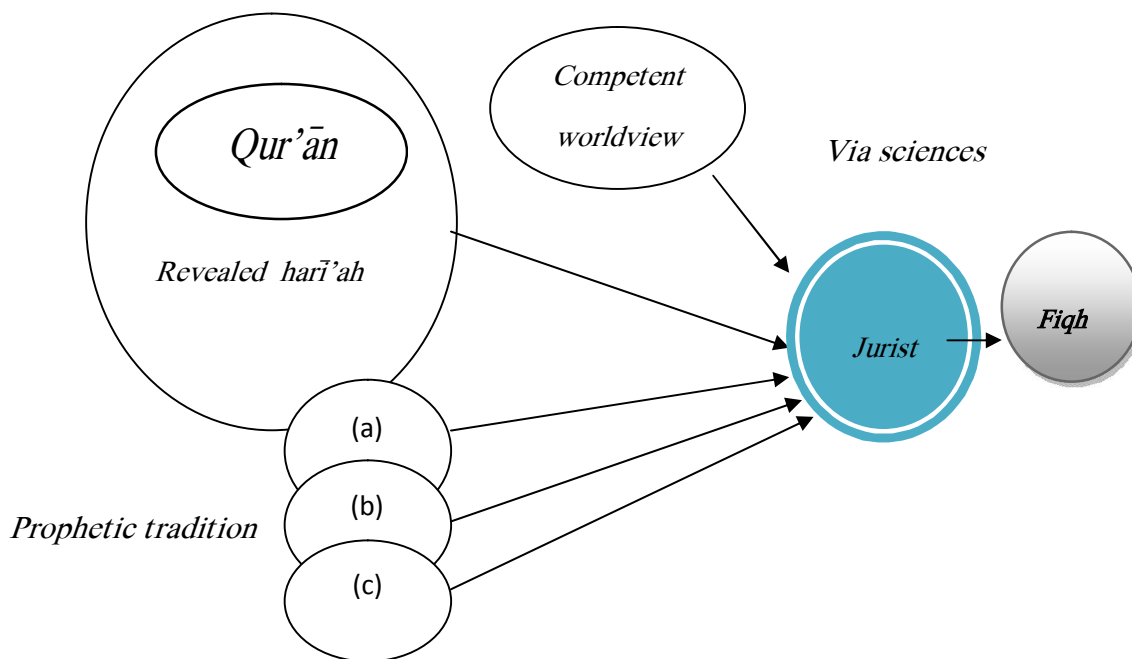


In addition, jurisprudence in postmodern era underlines what had been existing in the previous era. It also shows the role of *fāqih* and makes it being much clearer in understanding religion. The new thing here is that the understanding of the jurist, which is inspired by *al-Qurān* and *al-Sunnah*, is also heavily influenced by the views of his own life, the environment around him, even the level of scientific knowledge of mankind at that time. It is these factors that help shaping his outlook on life (competent worldview). While, the jurist’s competent worldview is influenced by the degree of his mastery of science, good knowledge of natural sciences, social sciences, contemporary culture and humanity that surround him. It means that the interpretation of scriptural text, *al-Sunnah*, and *al-ḥadīth* is very localized or defined by the level of mastery of the science of the jurist itself or based on the subjective geographical issues. (See figure 3).

⁶⁵² Ibid., 196.

FIGURE 3

Understanding of Religiosity of Islam (Illustration of Relationship between *Sharī’ah*, Prophetic Tradition, *Fiqh*, *Qānūn*, ‘Urf and *Fāqih* on the First Stage (Postmodern Era)⁶⁵³



From the development of Islamic law, as seen from their respective positions (*sharī’ah*, *fiqh*, and *fāqih*) above, it is clear that the approach of anthropology of religion (*sharī’ah*-based anthropology of religion) can help and even cooperate with the study of Islamic law to explain and break up the difficult issues to solve or explain by simply using theological and social foundation.

In addition to anthropological approach, Auda also offers a “system”⁶⁵⁴ as a kind of approach in the study of Islamic law by establishing a set of categories, namely cognitive, wholeness, openness, hierarchy, multi-dimensionality, and purposefulness⁶⁵⁵.

Cognitive nature. It necessitates a personal ability, knowledge, and outlook (worldview) of the jurist that will determine the direction and construction of the

⁶⁵³ Ibid., 204.

⁶⁵⁴ Bertalanffy, one of the system theory figures and often quoted by Auda, gives a limitation about the system theory: (1) *holism/holistic*; (2) *goal seeking*; (3) interrelation and interdependency of its object and attribute; (4) *input-output*; (5) transformation; (6) regulation; (7) hierarchy; (8) differentiation; (9) *equifinality* dan *multifinality*; (10) *entropy*. See Jasser Auda, *Maqāsid al-Sharī’ah*, 34-35.

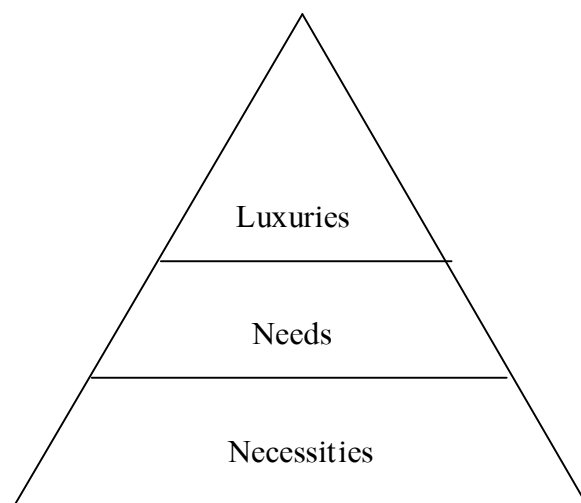
⁶⁵⁵ Ibid., xxiii.

Islamic legal system. With cognitive abilities, a jurist is able to unload the validity of the text. Therefore, it is necessary to distinguish among *sharī'ah*, *fiqh* and *fatwā*. According to Auda, *fiqh* is the human's interpretation of the jurist against the text. As a product, *fiqh* is apparently more as a mental cognition leads to either falseness or rightness. As a formulation of understanding, *fiqh* is determined by one's knowledge and skill in linking the concept of the scripture with the holistic meaning through the human's rationality.

The critique of modern thinkers about *fiqh* and *ijma'* is that both have the same position as *al-Qur'ān* and *al-Sunnah*. According to Auda, *ijma'* is nothing but a *multiple participant decision making* and nothing more than a consultative mechanism used by certain group of people.⁶⁵⁶ Of the role of jurist, as a mental cognition which is heavily crucial to the formulation of *fiqh*, is illustrated by the following figure:

FIGURE 4

Sharī'ah (*al-Qur'ān* dan *al-Ḥadīth*)



Fiqh; law of Islam *Fāqih* (the understanding to *al-Qur'ān* and *al-Ḥadīth*, *competent worldview*, *social sciences*, anthropology of religion, social, cultural, political, and economic context)

Fāqih, in addition, is inspired by *al-Qur'ān* and *al-Sunnah*. He is also heavily influenced by the view of his own life, the environment around him, even the level of scientific knowledge of the human at that time and is fitted with social sciences as well as the contemporary humanity.

⁶⁵⁶ *Ibid.*, 46 and 193.

Wholeness (shumūliyyah). It is a device that is so important for fāqih to have that he is able to think holistically in determining the direction of the product of fiqh. Thinking holistically means to carry and expand the scope of maqāṣid al-sharī'ah from the individual dimension towards the universal dimension so as to have a place in the heart of the public. The principle of holistic thinking will also be able to ward off the law of causality that the impossibility of creation without a cause shall be shifted no creation without purpose. Shifting classical cosmological argument that god is the first mover into constructive argumentation of the universe. The intended attitude of wholeness here are fairness, honesty, wisdom, freedom, openness, objectivity which is not bound by a specific school of thought (the dimension of human interpretation).

Openness. A new system can be said to be alive and effective when it is elaborated in openness. One of the fiqh dimensions that should be dismantled by the attitude of openness is 'urf which connotes and shades of Arab thought that has not necessarily been correspond with other regions. For example, the implementation of the marriage contract and Friday sermon required in Arabic. If this kind of 'urf is still retained and will not be open to the other areas', the main message of the marriage contract and Friday sermon will be blurred simply because of the Arabic sanctity and selfishness. Through openness, it is expected to capture the essence of the message of God as the universal values that actually aspired by the concept of maqāṣid al-sharī'ah.⁶⁵⁷

With the attitude of openness, a fāqih is supposed to be open that some concepts of fiqh (Islamic law) as the method of qiyās used is a form of the development of Aristotle's syllogistic deduction. Such a reasoning model (in modern term known as the deontic logic) generates the rule of fiqhiyyah mā lā yatimmu al-wājib illā bihī fahuwa wājib. Auda views that Aristotle's syllogistic deduction thrived in the classical fiqh tradition has been trapped on binary classification which is less accommodative to contemporary development.⁶⁵⁸ Therefore, the Islamic legal system

⁶⁵⁷ Although the term 'urf always connotes to the region and the Arab tradition as a community that tends to be a reference in determining a product of Islamic law, Amin al-Khuli confirms the importance of reconsidering the term 'urf for a more comprehensive interpretation and elastic so that Islamic law would be able to survive. Amin al-Khuli, *Manāhij Tajdīd fī al-Naḥwi wa al-Balāghah wa al-Tafsīr wa al-Adāb* (Mesir: al-Hay-ah al-Miṣriyyah al-‘Āmmah li al-Kitāb, 1995). See also Jasser Auda, *Maqāṣid al-Syarī'ah as Philosophy of Islamic Law, 209-211*.

⁶⁵⁸ As a simple example, why a Muslim should run the pillars of Islam?, What advantages do such pillars of Islam have?, And how he is to interpret and apply the pillars of Islam?. These are the basic questions in *maqāṣid al-sharī'ah* as the first step in the effort to internalizing and externalizing universal moral values. Jasser defines *maqāṣid al-sharī'ah* as *maqāṣid* of the Islamic law are the objectives, purposes, intents, ends, principles behind the Islamic rulings. In principle, Jasser is on newer meaning than that of the predecessors like al-Juwayny, al-Ghazali, al-'Izz ibn Abd Salam, Ibn al-Qayyim, and al-Shatibi. He is not necessarily out of the concept and not to judge the classical *mujtahid*.

should open a form that is built up through the philosophical tradition of thinking or at least have a linear logic with the logic of philosophy.⁶⁵⁹

Apart from the originality of the method of *qiyās* as a legacy of Greek philosophy, some groups such as *shi'ah zaydiyyah*, literalist, and *mu'tazilah* did not want to use analogical reasoning (*qiyās*) as one of the basic of Islamic law.⁶⁶⁰ Some Sunni scholars such as al-Ghazali himself also still questions the possibility of 'illah as the foundation of legal for several reasons: (1) there are some cases that do not have 'illah; (2) there is, sometimes, a case of having 'illah but people misunderstand it; (3) one case can have more than one cause but we are wrong in determining the appropriate 'illah; (4) the case has a cause but we are not precisely appropriate to determine the 'illah; (5) we are able to give a precise definition to the case but less precise in looking for analogy, (6) and *ijtihad* might be fault with the speculation.⁶⁶¹

Interrelated. This character implies that a system must have a hierarchy form that describes a structural-relationship of the existing sub. Islamic law, as a *fāqih's* product, is not certainly independent from the social structure with the different cultures and even ideologies. With interrelated, the theory of *maqāṣid al-sharī'ah* is expected to carry and combine the various schools of *fiqh* toward a point so it does not get stuck on the textual meaning and hegemony. Thus, anything that appears is able to solve.

Multi dimensionality. These characters want to confirm that the binary opposition in the establishment of Islamic law, even, more leads to reduction of methodological and narrow meaning. For example, the dichotomy between *qaṭ'iyyu al-dalālah* and *ẓanniyyu al-dalālah*, between *al-nāsikh* and *al-mansūkh*, *al-thawābit* and *al-mutaghayyirāt* should be seen from the perspective of *maqāṣid al-sharī'ah* and tends to the meaning that the establishment of Islamic law is more gradual and neither a meaning of binary opposition nor partial-ended.⁶⁶² Multi dimensionality means positioning the binary opposition in the framework of a coherent structure. As a system, it must contain the complex part, multidimensional, and have a diverse spectrums. Such various dimensions must be understood as a gradual process.⁶⁶³

Purposefulness. Every legal provision made by *ḥākim* (Allah and His prophet) must contain universal goals as a kind of benefit for mankind. While, the benefit

⁶⁵⁹ Jasser Auda, *Maqāṣid al-Syarī'ah as Philosophy of Islamic Law*, 209-211.

⁶⁶⁰ Ṣalahuddin Soltan, "*Ḥujjiyyah al-Adillah al-Mukhtalāf 'Alayhā fi al-Sharī'ah al-Islāmiyyah*" (Ph. D. Cairo University, 1992), 3.

⁶⁶¹ Al-Ghazali, *Al-Mustaṣfā fi 'ilm al-Uṣūl*, (ed.) Mohammed Abdul Salam Shafi, (Beirut: Dār al-Kutub al-'Ilmiyyah, t.t.), 304.

⁶⁶² Abdullah Rabi, *Al-Qaṭ'iyyāt wa al-Ẓanniyyāt fi Uṣūl al-Fiqh al-Islāmī* (Cairo: Dār al-Nahar, t.t.), 24-27.

⁶⁶³ Jasser Auda, *Maqāṣid al-Syarī'ah as Philosophy of Islamic Law*, 50-51.

achieved by man is not monolithic. A system will be able to go to one goal in different ways. Therefore, the contextual interpretation using maqāṣid is required. Fazlur Rahman and Abdullah Saeed have the same view point that the contextual interpretation of the holy text is the embodiment of the spirit of prophecy (prophetic spirit) or “how the prophet might act were he living today.”⁶⁶⁴

Urgency of Maqāṣid al-Sharī’ah in Ijtihād

The scholars of maqāṣid agree that in every provision of the Islamic law must contain asrār al-sharī’ah (secrets of sharī’ah), ḥikmah al-sharī’ah (wisdom of sharī’ah) or maqāṣid al-sharī’ah (purposes of sharī’ah) which lead to the same point, maṣlaḥah.⁶⁶⁵ The spirit of maṣlaḥah has actually grown and evolved since the time of prophet Muhammad,⁶⁶⁶ although the spirit was not certainly a patent term in a specific discipline. The scholars of maqāṣidiyyūn assert that maqāṣid al-sharī’ah have to be excavated through four sources, namely al-Qur’ān, al-Sunnah, istiqrā’ (research or inductive study), and al-ma’qūl (logic).⁶⁶⁷ They also agree that al-Qur’ān and al-Ḥadīth in many cases do not explicitly mention the purpose of the law. Under these conditions, the ‘illah and maqāṣid must be discovered through observation and in-depth research through a variety of approaches. It is also recognized by Fazlur Rahman, “The Qur’an always explicates the objectives or principles that are the essence of its law.”⁶⁶⁸

⁶⁶⁴ Abdullah Saeed, *Interpreting the Qur’an*, 1-7. See also Abdullah Saeed, *Islamic Thought*, 31-32.

⁶⁶⁵ The word *maṣlaḥah* (plural: *maṣāliḥ*) is synonymous of the word *manfā’ah* and the opposite of the word *mafsadah*. The word *manfā’ah* itself is frequently translated by *ladhdhādhdh* (comfortable) and an attempt to obtain or to defense it. See Husain Hamid Hassan, *Nazāriyyah al-Maṣlaḥah fī al-Fiqh al-Islāmī* (Cairo: al-Mutanabbi, 1981), 4. While al-Khawarizmi as to which is quoted by Wahbah al-Zuhayli said that *maṣlaḥah* is keeping the goal of Islamic law by refusing *fāsād* (destruction) of creation. See Wahbah al-Zuhayli, *Uṣūl al-Fiqh al-Islāmī*, Vol. II, 37. In the study of the *sharī’ah*, the word *maṣlaḥah* is used as a term to express a special sense, although it can not be separated from its original meaning. Al-Ghazali said that *maṣlaḥah* is seeking benefit and refusing harm. He explained that *maṣlaḥah* is the maintenance to purposes of Islamic law namely religion, life, intellect, and property. See Al-Ghazali, *al-Mustashfā min ‘Ilmi al-Uṣūl*, Vol. I (Beirut: Muassasah al-Risālah, 1997), 417.

⁶⁶⁶ For example, in a *ḥadīth*, the Prophet prohibited Muslims in Medina storing the meat but just food for three days. A few years later, there were some companions who violated the provisions of the Prophet by keeping the meat for more than three days. The event was presented to the Prophet. But, he justified and explained: “formerly I forbid you to save it (the meat) for the need of *al-daffah* (migrants from Bedouin villages who came to Medina to get the meat). Now, save the meat because there are no guests need it”. See HR. Muslim, *Ṣaḥīḥ Muslim*, Vol. VII, ed. ‘Isham Al-Shabathi, (Mesir: Dār al-Ḥadīth, 2001), 143-144. On another occasion, the Prophet prohibited the visit to grave because it was feared would be an excessive veneration of the spirit of the dead, so it could cause idolatrous act. But then, the Prophet condoned or allowed Muslims to have religious visit to the cemetery. *Ibid.*, 146.

⁶⁶⁷ ‘Umar bin Ṣāliḥ bin ‘Umar, *Maqāṣid al-Sharī’ah ‘inda al-Imām al-Izz al-Dīn ‘Abd al-Salām*, 73-78.

⁶⁶⁸ Fazlur Rahman, *Islam and modernity: Transformation of an Intellectual Tradition* (Chicago & London: Chicago University Press: 1984), 154.

Determination of *maqāṣid al-sharī'ah* above is uncertainly absolute. Ibn 'Ashur precisely puts the method of *istiqra'* as the most appropriate method of *ijtihād* to track the object and purpose of Islamic law. Ibn 'Ashur divides these methods into three kinds: (1) conducting a study of Islamic law which contains an explicit '*illah*'; (2) study of the legal arguments that have diverse '*illah*' and classify the most desired '*illah* of *shara'*'; and (3) research on the arguments of al-Qur'ān and the most acceptable *al-ḥadīth* which clearly states '*illah*' and purpose.⁶⁶⁹ The urgency of *istiqra'* in *maqāṣid al-sharī'ah* which is quoted by many subsequent Muslim scholars such as Allal al-Fasi, al-Raysuni, and several other contemporary thinkers.

In the following development, the theory of *maqāṣid al-sharī'ah* of al-Shatibi and Ibn 'Ashur has become the foundation of the transition from classical *uṣūl fiqh* focused on textual understanding to *uṣūl fiqh* which emphasizes contextual aspect of *maqāṣid al-sharī'ah* in conducting *ijtihād*. Hassan Hanafi calls this transition as the process of reconstruction of *uṣūl fiqh*, from '*ilm al-fiqh istidlālī istimbātī mantiqī* (Islamic jurisprudence that is more about the search to arguments in appointing law by a logical way) to '*ilm falsifi insānī sulukī 'ām* (philosophy of humanity that is based on common method). This process, said Hanafi, was based on three main scientific bases: *al-tārikhiyyah* (historical values), *al-naẓāriyyah* (conceptual consciousness), and *al-'amaliyyah* (operational awareness).⁶⁷⁰

The building of *uṣūl fiqh* with *maqāṣid al-sharī'ah* as an approach has clearly provided an overview and universal values contained in *sharī'ah*, legal resources and how to understand and operate them. The approach of *maqāṣid* as classical *uṣūl fiqh* evolution continues to evolve and become legal reasoning methodology and continues to undergo the refinement process as developed by contemporary *maqāṣidiyyūn* such as al-Raysuni, Abdullah Saeed, Jasser Auda, Jamal al-Diñ 'Athiyah, Taha Jabir al-Alwani, and Yusuf al-Qaradawi.

In the RAND Corporation Reports on Islamism's notes, the main agenda of the contemporary *maqāṣidiyyūn* is the consensus on the need to make a reform and reinterpretation of classical epistemology of Muslim thinkers to uncover the spirit of

⁶⁶⁹ According to Ibn 'Ashur, *maqāṣid al-sharī'ah* can be seen from the three things: (1) from the commands and prohibitions that are clearly explained; (2) through '*illah*' contained in the prohibition; (3) from the origin of the destination (*al-maqāṣid al-aṣliyyah*) and objectives that follow (*al-maqāṣid al-tābi'ah*). So, the purpose of Islamic law which is explicitly mentioned in the text, some of them are implied, and the others can be known through research and observation. See Ibn 'Ashur, *Maqāṣid al-Sharī'ah al-Islāmiyyah*, 190-196.

⁶⁷⁰ Hassan Hanafi, *Al-Turāth wa al-Tajdīd: Mawqifunā min al-Turāth al-Qadīm* (Beirut: t.p., 1981). The other works of him which have a focus on "reconstruction" are *Min al-Naqd ilā al-Ibdā'* (reconstruction of philosophy), *Min al-Fanā ilā al-Baqā'* (reconstruction of Sufism), *Min al-Nash ilā al-Wāqi'* (reconstruction of jurisprudence), *Min al-Naqd ilā al-'Aql* (reconstruction of the traditional sciences of *Islām* Arab), *Al-'Aql wa al-Ṭabī'ah*" (reconstruction of rational sciences) and some other works which have a focus on deconstructions.

Islamic law. Thus, the sources of Islamic law, according to this group, are al-Qurʿān, al-Ḥadīth, Muslim scholars and philosophers, modern law and moral values as well as consensus. Again according to RAND's, the modernists with their theology of modernity or theology of evolution (to borrow Darwin's theory), said that the existence of the values of the historicity of Islam (turāth) has not been adequate to deal with the contemporary problems of Islam (Islam as practiced during the time of Prophet is no longer valid).⁶⁷¹ In short, it can be underlined that the basic principles of modernity in the realm of Islamic law is reformation, reinterpretation, evolution, reconstruction, contextualization of Islamic law, tradition, rational mindset in the frame of maqāṣid al-sharī'ah or maṣlaḥah.

***Maqāṣid al-Sharī'ah* and Islamic Legal Discourse**

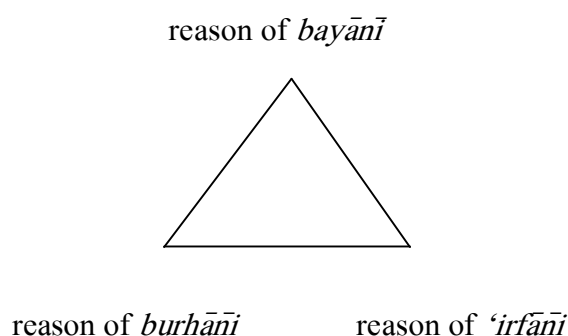
Elasticity of Islamic law in the realm of human nature and its bend character to issues of modernity is the concrete form of the truth of Islam as an ethical-moral and ethical-universal. Initial spirit of which is that Islam is *ṣaliḥ likulli zamān wa makān*. This fundamental character is demanding the construction of epistemology, ontology and axiology especially Islamic law that would make it capable of having an intense dialogue and interaction with the recent changes. Therefore, it is necessary to have an appropriate approach to decipher the text of *sharī'ah* to produce a functional system of rules. One of the methods to describe the flexibility within the realm of Islamic law is *maqāṣid al-sharī'ah* or well-known as *maṣlaḥah*.

Broadly speaking, the concept offered by some contemporary Muslim thinkers like Jasser Auda with his *maqāṣid al-sharī'ah*, Abdullah saeed with his contextual theory and *ethico-legal*, Fazlur Rahman with his double movement, Arkoun with his *tārikhiyyat* (historicity)⁶⁷² and that of some other figures' can be easily understood and rationalized through a circular relationship, integrative inter-connective approach. The similar criticism has also been proposed by Abid al-Jabri to describe the relationship among the three epistemologies in the Islamic world, ie, among reason of *bayānī*, *'irfānī*, and *burhānī* as follow:⁶⁷³

⁶⁷¹ Jasser Auda, *Maqāṣid al-Sharī'ah as Philosophy of Islamic Law...*, 147.

⁶⁷² Abdullah Saeed, "Fazlur Rahman: A Framework for Interpreting the Ethico-Legal Content of Qur'an", 42-44.

⁶⁷³ Muhammad Abid al-Jabri, *Bunyah al-'Aql al-Araby: Dirāsah Tahliliyyah Naqdiyyah li Nazm al-Ma'rifah fi al-Ṭaqāfāt al-'Arabiyyah* (Beirut: Al-Markāz al-Thaqafy al-'Araby, 1993), 555.



This shows the importance of laying the foundation of universal values of Islam that is expected to respond the needs of modern society. The need for change and reform of Islamic law to support the need for: (1) new methodologies excavation; (2) a harmonious between traditional Islamic thought and modern Western education; (3) reflecting the Islamic law in the areas of intellectual, moral, legal, economic, and technology; (4) not being involved in dogmatism or school of law or certain theology; (5) emphasizing thought on the area of universal justice, inclusive theology, gender equality, human rights; (6) creating harmonious relationship between Muslims and non-Muslims; (7) and “contextualist” as well as “ethico –legal”. These all are directed to be able to reveal the universal values of al-Qurʿān proportionally.⁶⁷⁴ Thus, maqāṣid al-sharīʿah as a philosophical foundation in law is expected to accommodate a variety of contemporary issues.

At least, there are some major spirit underlying the need for the maqāṣid al-sharīʿah or maṣlaḥah theory, namely: (1) how to present Islam to be more humanistic⁶⁷⁵ by understanding the universality of Islamic law; (2) the embodiment of the spirit of Islam as raḥmatan li al-ʿālamīn by showing Islam as tolerant, sympathetic, and empathetic to religious beliefs of others’; (3) to show the performance of Islam as the dynamic, creative, innovative religion, to reject the dogmatic shackles, the quo status and the comfortable zone, (4) to prove that Islam is the spirit to develop a work ethic, political, economics, social sciences and ethos of progression, (5) showing that Islam is not merely revival oriented, outward oriented (extrinsic-exoteric), but more on intrinsic and esoteric aspect.⁶⁷⁶

The universal values of Islamic law show the flexibility and elasticity of the nature of Islamic law to be able to resolve the problems with cultural backgrounds,

⁶⁷⁴ Ibid., 4-6. See also Abdullah Saeed, *Understanding the Three Abrahamic Faiths: Judaism, Christianity and Islam “Towards a More Inclusive View of the Religious ‘Other’”* within <http://www.dunedininterfaith.net.nz/lecture07.php>

⁶⁷⁵ M. Amin Abdullah, *Islamic Studies di Perguruan Tinggi*, 191.

⁶⁷⁶ Tim Penyusun Studi Islam IAIN Sunan Ampel Surabaya, *Pengantar Studi Islam* (Surabaya: Sunan Ampel Press, 2010), 244-245.

geographical, social, and level of advancement of science. Departing from the various achievements of modernity, the author considers that the transformation of Islamic law (fiqh) that is held is still dogmatic, normative, and has not been able to interact with social changes and social sciences. In short, the study of Islamic law is still in the stage of ‘ulūm al-dīn, it has not reached the stage of al-fikr al-Islāmy, even dirāsah al-Islāmiyyah. Therefore, accessing and transforming the development of a new paradigm of Islamic law to be integrated with the social sciences, the values of modernity, and universality is a necessity.

Typology of Maqāṣidiyyūn

Scholars of maqāṣidiyyūn have variety of tendencies to response, explain, and apply the theory of maqāṣid al-sharī’ah or maṣlaḥah. There are at least three major typologies about the epistemological construction of maqāṣid al-sharī’ah where they are substantially different each other. With a theoretical framework of Wael B. Hallaq, the development of uṣūl fiqh method has a historical distortion due to laxity of the judges and mysticism excessive dominance. Thus, the author of this paper classifies the methodology of uṣūl al-fiqh paradigm into the literalist, utilitarianist, and liberalist-phenomenologist.⁶⁷⁷

First, literalist group, which generally comes from among ṣāḥibī’s scholars. It is named by paradigm of literal epistemology because they use predominantly literal-textual. This group views that maqāṣid al-sharī’ah is an abstract concept that can not be known except with the direction of God. This instruction does not require any research (istiqrā’) which often against to the will of the language. Departing from this view, ṣāḥibī school rejects the method of qiyās. “Al-Risālah”, the work of al-Shafi’i which has a deductive theological pattern, was regarded as a pioneer in the realm of uṣūl fiqh. The work was then followed by a school of Mutakallimūn (Shafi’iyyah, Malikiyyah, Ḥanabilah and Mu’tazilah). After “al-Risālah”, there were some works that tended to the theme of secret, wisdom and purpose of the Islamic law that is part of maqāṣid al-sharī’ah, like al-Shashi (d. 365 AH.), al-Amiri (d. 381 AH.), al-Juwayni, and al-Ghazali (d. 505 AH.). Al-Shatibi adds that maqāṣid sharī’ah refers to the fundamental purpose of God as legislator that is maṣlaḥah al-‘āmmahah.⁶⁷⁸

⁶⁷⁷ Wael B. Hallaq is an extremely prominent professor of Islamic law in the West today. See Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to the Sunni Uṣūl al-Fiqh* (Cambridge: Cambridge University Press, 1997), 162-163.

⁶⁷⁸ Ahmad Raysuni, “*al-Baḥth fī Maqāṣid al-Sharī’ah Nash’atuhū wa Taṭawwuruhū wa Mustaqbaluhū*”, a paper presented on the seminar about *maqāṣid al-sharī’ah* which was held by *Muassasah al-Furqān li al-Turāth* in London, from March 1-5, 2005. See also in the chapter of the discussion about an introduction within the book of Ibn ‘Ashur which written by its editor, Muhammad al-Thahir al-Misawi, “al-shaykh Muhammad al-Thahir Ibn ‘Ashur wa al-Mashrū’ allazī lam Yaktamil”,

The second is utilitarianist⁶⁷⁹ or semi textual based on Auda's and Saeed's concept.⁶⁸⁰ Revitalization made by Ibn 'Ashur kept rolling by the reformers of *uṣūl al-fiqh* in the modern world, such as Muhammad Abduh, Rashid Rida, Abdul Wahab Khallaf, Allal al-Fasi, and Hasan Turabi. Because it does not offer a new theory unless revitalizing the principle of *maṣlaḥah* of al-Shatibi, Hallaq categorizes the reformers of jurisprudence in this group as the adherents of utilitarianism school.⁶⁸¹ In fact, the group has already started to move from their predecessors by trying to dialogue between *maṣlaḥah* with modernity, but the dominance of *dilālah al-lafẓiyyah* is still dominant.

The third is substansialist or liberal-phenomenologist. This group holds the three basic principles, namely: (1) that *maqāṣid al-sharī'ah* can be revealed through 'illah, wisdom, and universal purpose; (2) that *maqāṣid al-sharī'ah* must be associated with *ẓahīr al-lafẓ* but it is not absolute. It means that the text must not absolutely contain guidance on a provision of the law. In the event of a conflict between *ẓahīr al-lafẓ* with common sense or logic, then the precedence is the sense of reasoning, (3) *maqāṣid al-sharī'ah* must be understood in the present context within the social sciences and modern sciences perspective. The thinkers included in this third group, according to Weil B. Hallaq, are Muhammad Iqbal, Mahmud Muhammad Taha, Abdullah Ahmed al-Naim, Mohammed Said Ashmawi, Fazlur Rahman, Muhammad Shahrur, Yusuf al-Qaradawi, Taha Jabir al-Alwani, al-Raysuni, Abdullah saeed, Jasser Auda, Jamal al-Dīn 'Atiyyah.⁶⁸² They argued that the paradigm of *maqāṣid al-sharī'ah* can not be resolved simply by relying on the principle of the classical principles of *maṣlaḥah*. They assumed that the classical principle of *maṣlaḥah* is no longer sufficient

within Muhammad Thahir Ibn 'Ashur, *Maqāṣid al-Sharī'ah al-Islāmiyyah* (Urdu: *Dār al-Nafā'is li al-Nashr wa al-Tawzī'*, 2001), 139.

⁶⁷⁹ Utilitarianism is the theory of the greatest happiness. Utilitarianism, as a theory, was first systematically described by Jeremy Bentham and his student, John Stuart Mill. Utilitarianism is an ethical understanding that good is a useful, beneficial, and profitable. Instead, evil or bad is not helpful, not useful, and hurt. Because of that, good and bad behavior and actions defined in terms of useful, beneficial, and profitable or not. From this principle, the theory of goal or purpose of the action is then constructed. <http://id.wikipedia.org/wiki/Utilitarianisme>. In the realm of *maqāṣid al-sharī'ah*, the utilitarianism may be juxtaposed with the moderates who understand that *maqāṣid al-sharī'ah* needs to combine the two approaches, namely *ẓahīr al-lafẓ* and consideration of meaning or 'illah in a form that does not damage the *ẓahīr al-lafẓ* and does not damage the content of meaning/'illah. In this way, *sharī'ah* will continue to run in harmony with social changes and modernity.

⁶⁸⁰ Semi-textual is still textual-linguistic. It rejects the socio-historical but has had orientation for ethical-legal search. This method is typically used by the movements such as neo-revivalist like Muslim brotherhood of Egypt, *Jamā'ah Islamiyah* in India and so on. See Abdullah Saeed, *Interpreting the Qur'an*, 3-5. See also Sayyid Abu al-A'la al-Maududi, *Towards Understanding the Qur'an*, trans. Zafar Ishaq Ansari (Leicester: Islamic foundation, 1995), 54.

⁶⁸¹ Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to the Sunni Uṣul al-Fiqh*, 162-163.

⁶⁸² Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to the Sunni Uṣul al-Fiqh*, 162-163.

to make Islamic law being relevant in the modern world. Therefore, the operational pattern of maqāṣid al-sharī'ah must be viewed in the perspective of modernity. Weil B. Hallaq names this group with the liberalism school or muta'ammiqīn fī al-qiyās because they tend to stand on the contextual paradigm and are completely independent from the classical paradigm.⁶⁸³

Conclusion

Some important issues that require solution appropriately and wisely in contemporary era are gender inequality, discrimination against minorities either religious or ethnic minorities, human rights, lack of freedom to speak, to believe, and to practice their own religion, authoritarian government, globalization and social changes. Muslims, as an important part of world citizenship, are no longer limited to local residents or local citizenship. On the other hand, the flexibility and elasticity of Islamic law are considered to be incapable to dialogue with the modernity since they are often trapped on exclusivity and normativity. Therefore, it takes a creative and innovative thinking to restore the spirit of Islamic law ṣāliḥ likulli zamān wa makān and raḥmatan li al-'ālamīn. This spirit is captured by some Muslim Scholars in the past and present time by offering the theory of maqāṣid al-sharī'ah/maṣlaḥah.

Etymologically, maqāṣid al-sharī'ah consists of two words: maqāṣid and sharī'ah. Maqāṣid is the goal and sharī'ah means the laws that God prescribed for His slaves either the provisions of al-Qur'ān or al-Sunnah. Meanwhile, terminologically, maqāṣid al-sharī'ah has a variety of equivalent terms like maqāṣid al-sharī'ah, al-maqāṣid al-shar'iyyah fī al-sharī'ah, and maqāṣid min shar'iy al-ḥukm. So, maqāṣid al-sharī'ah is purposes of Islamic law to realize the benefit of people in the world and in the hereafter, the final goal to be achieved by the sharī'ah, and the secrets behind the sharī'ah. In this case, al-Shatibi constrains al-maqāṣid to be achieved by the Islamic law are namely: (1) ḍarūriyyāt, (2) ḥājīyyāt, and (3) taḥsīniyyāt.

In the realm of ijtihād, maqāṣid al-sharī'ah is derived from the fundamental spirit of maṣlaḥah al-'āmmah, 'illah, and wisdom that can be extracted through four sources, namely al-Qur'ān, al-Sunnah, istiqrā' or scientific inquiry, and rationality. This is the importance of laying the foundation of universal values of Islamic law to respond the needs of modern society supported by new methodologies excavation, a harmonious relationship between traditional Islamic thought and modern Western education, reflecting the Islamic law in the area of intellectual, moral, legal, social, economics, politics, and technology.

⁶⁸³ Ibid. See also Amin Abdullah, "Paradigma Alternatif Pengembangan Ushul Fiqh dan Dampaknya pada Fiqh Kontemporer", within *Mazhab Jogja: Menggagas Paradigma Ushul Fiqh Kontemporer* (Yogyakarta: Ar-Ruz, 2002), 118-123.

Furthermore, of the various ways in which some Muslims scholars utilize to respond, explain, and apply the theory of maqāṣid al-sharī'ah. There are at least three major classifications where they are substantially different each others. They are literalist, utilitarianist and liberalist-phenomenologist. The first is called liberalist because they tend to be textual and they also consider that maqāṣid al-sharī'ah is an abstract concept. The second is classified as utilitarianism or semi-textual since they started to move out of their predecessors by trying to have an intent dialogue with modernity. And, the third classification is liberalist-phenomenologist. In this group, they tend to be contextual and completely independent from the classical paradigm.

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