

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.0 Introduction

This chapter presents significant findings obtained from the study. Besides delineating the objectives of the study that are realized, and the questions that are carefully answered, this chapter also consists of the answers for two of the research questions which are the recommendations and *dawābiṭ* of the realizing of *Maqāṣid* which are concluded from the research findings. Consequently, it is proved shortly here that the problem and research questions are answered in this study. Moreover, this chapter demonstrates the contribution of the research and its limitation, as well as the suggestion for further research.

4.1 Summary of the Main Findings

It is worth noting that there are four objectives of this research. Firstly, developing *Maqāṣid al-Sharī'ah* approach for contemporary *fiqh* of family and its significant role for its related issues. Secondly, Contextualising the *Maqāṣid al-Sharī'ah* approach on the *fiqh* of family in the case of *nasab* of an illegitimate child. Thirdly, formulating parameters of realizing the *Maqāṣid al-Sharī'ah* in the familial issues. Fourthly, providing relevant recommendations in light of the research findings to contribute to

the contemporary *fiqh* of family in the case of *nasab* of an illegitimate child in the Malaysian context.

The objectives aim to answer four research questions as follows:

- 1) What is the *Maqāṣid al-Sharī'ah* approach on the contemporary *fiqh* of family?
- 2) How to contextualise the *Maqāṣid al-Sharī'ah* approach on the contemporary *fiqh* of family, in the case *nasab* of the illegitimate child?
- 3) What are the *ḍawābiṭ* or parameters of realizing the *Maqāṣid al-Sharī'ah* on the contemporary *fiqh* of family?
- 4) What are possible recommendations to resolve issues on the *fiqh* of family, in the case of *nasab* of an illegitimate child in the Malaysian context?

Concerning the first objective, which is also the answer for the first question, the study attempts to develop the *Maqāṣid* approach in the context of *fiqh* of family. The research discusses and examines the *fiqh* of family from the *Maqāṣid* approach, as a standalone discipline, in light of the integration of knowledge in Islam. In this respect, this research does not deny its relation with other Islamic knowledge, especially *Uṣūl al-Fiqh*.

Five roles and features are emphasized in the *Maqāṣid* approach. Firstly, the feature of the primacy of the Quran that opens the door to the urgency of Quranic concepts for the study of *Maqāṣid*. Second, the interrelationship of universals and particulars, which is a manifestation of the wholeness of this method, is essential in reconciling universals and particulars and in finding answers to emerging issues. Thirdly,

supervising the realization of *Maqāṣid* in rulings and issues in people's lives, as can be seen by the principles of *istiḥsān* and blocking and opening the means. Fourthly, evaluating hadith transmission and text. Fifthly, revisiting *ijtihād* in the Islamic scholarship legacy, which is essential as there are many opinions in the Islamic scholarship heritage that were based on different reality and context.

The study further explicitly examines family relations. The specific purposes set forth by demonstrating the Quranic concept of *taqwā* as generally, it is fundamental for the Islamic study, and particularly the presence of *taqwā* is evident in many verses on family relations. The purposes are divided into four parts, namely the preservation of progeny, actualization of interest and avoiding injury, care of family, and preservation of spiritual and emotional within the family.

Regarding the second objective, in contextualizing the *Maqāṣid* approach in the context of fiqh of family, it is vital to understand and appreciate the dynamic and its existing practices in Malaysia. Understanding text and context is essential to actualize the *Maqāṣid* approach in the contemporary *fiqh* of family, specifically on the *nasab* of illegitimate children. In this regard, Chapter three analyses the position of *nasab* of an illegitimate child under the Islamic Family Law.

In general, on the state's enactment gives preference to *madhhab Shafi'i* and majority view or *jumhur* as clearly described in section 54 of the Enactment No. 1 of 2003, Administration Of The Religion of Islam (State of Selangor) Enactment 2003. Moreover, it is seen in the *fatwa* of the States and Federal regarding the matter, except for Perlis. The *fatwa* of Perlis is the result of section 54 of the Enactment No. 4 of

2006, Administration of the Religion of Islam, Enactment 2006. It is mentioned in articles 1 and 2 of the section:

(1) In issuing any *fatwa* under section 48, or certifying an opinion under section 53, the *fatwa* Committee shall follow the al-Quran and or Sunnah of the Prophet.

(2) In issuing a *fatwa* under this Part, the Majlis and *Fatwa* Committee shall have due regard to the Adat Istiadat Melayu or Malay Customary Law applicable in the State of Perlis.³⁷⁹

The study continues by examining the *Maqāṣid* approach to the issue of *nasab*. It is clear that *nasab* has been given a particular focus in contemporary *fiqh*. Moreover, there are two features of contemporary *fiqh* of family, the openness of references, and the increasing of writing on the field separately, and both also applied to the *nasab* issue, especially of the illegitimate child. Consequently, in the contemporary *fiqh* of the family, *nasab* has been discussed continuously, as has long been documented in the classical books of Islamic jurisprudence.

After that, the polemical discourse over the issue was examined. Two groups differ on the status of the lineage of illegitimate children, firstly the predominant, or the opponents of legitimation, and secondly the minority, or the proponents. Concerning the primary proof, which is the hadith of matrimonial bed, both the opponents and proponents concur that in case of the presence of the bed, it is the evidence of legitimation. Nevertheless, the proponents differ in case of the absence, as they

³⁷⁹ Section 54 of the Enactment no. 4, Administration of the Religion of Islam (State of Perlis) Enactment (2006).

contend that in such case, the child can be ascribed to his/her biological father if he claims the child and its mother does not deny of it.

Besides their difference of opinion on the interpretation of the primary proof, both positions also support their positions by providing several rational arguments, including *maṣlaḥah*-based arguments.

In order to apply the *Maqāṣid* approach in the polemical discourse, this research contributed by employing it in interpreting of the hadith and the rational arguments as well. Regarding the hadith, the context of a dispute is highlighted to identify the judgeship capacity of the Prophet, as his intent, when given the right of the ascribing to the master of the slave-girl. Moreover, the rational arguments from both sides are also analysed by recalling some principles of *Maqāṣid* approach.

As a result, the stance of the proponents that requires legitimation is favourable and endorsed by this research as it is observed that the primary proof is historical and not applicable in the case of lack of a matrimonial bed, a position supported by several other proofs, more closely related to the Quranic concepts of *nasab*, mainly through the principles derived from the law and the Quranic definition of *taqwā* as well. Additionally, many *maṣlaḥahs* can be achieved through the legitimation, supported by several principles of *Shari'ah*, and is probable to be applied in the Malaysian context.

4.2 Recommendations

Regarding the fourth objective, which is related to possible recommendations to resolve issues on the *fiqh* of family, in the case of *nasab* of an illegitimate child in the Malaysian context, the recommendations are given in light of the research's findings.

Firstly, considering the *Maqāṣid* approach in tackling the case mainly the specific purposes of the family-related matters. In this respect, the parameters of realizing the purposes of *Shari'ah* in the familial issues, including the case of *nasab* are explained in 4.2.1. Undoubtedly, judges and muftis in the states and the federal in Malaysia have been applying *Maqāṣid al-Sharī'ah* in their verdicts and judgments. Nevertheless, this study concerns the comprehensive use of its method in interpreting and applying the Islamic Scriptures as tried to be illustrated in this study.

In order to significantly appreciate the approach in the Malaysian context, it is essential to stress on shaping the *Maqāṣid al-Sharī'ah* based mind. It can be realized through the consideration of *Maqāṣid al-Sharī'ah* as a fundamental subject for the students of fiqh, fatwa and law students, as well as improving the understanding towards the approach to judges (Kadi) and law practitioners relating to Islamic matters.

Secondly, in light of the first recommendation, it is suggested that the official fatwa councils in states and the federal revisit the fatwa concerning *nasab* of an illegitimate child issued by them previously. The suggestion is provided after taking into consideration of the facts that the fatwa is disputable, the main proof is arguable, and the position of the proponents of legitimation is not necessarily based on weak arguments, as outlined in chapter three. In this regard, the hint by the mufti of Pulau Pinang to review the fatwa of his state is an example to realize this second recommendation. According to him, this fatwa should be revised and changed if the

need arises; after all, Islamic teachings are based on justice, wisdom, honour, and goodwill.³⁸⁰

Thirdly, the allowing of the illegitimate child to be ascribed to his or her biological father should be considered as an alternative by the judge. Besides the juristic discourse argued in chapter three, this recommendation is per the case of *Zafrin Zulhilmi bin Pauzi v Noor Aini binti Nasron* [2013] 2 ShLR 42 and *Faizal bin Rabion v Nurul Fazila bt Naw*i [2014] 1 ShLR 137 that were held by the courts. In justifying their judgments, both judges used the opinion of Dr. Abdul Karim Zaidan, allowing the legitimation only for the worldly purpose, such as school registration, without affecting the religious matters like inheritance. Hence, referring to the cases, this study recommends judges to take into account the proponents opinion before issuing their judgment.

Fourthly, in the case of biological fathers of children born out of a wedlock, this can be referred to the result of the case of *Zafrin Zulhilmi bin Pauzi v Noor Aini binti Nasron* [2013] 2 ShLR 42 and *Faizal bin Rabion v Nurul Fazila bt Naw*i [2014] 1 ShLR 137, It is highly recommended that they pursue a solution to the care of their children, especially in the field of inheritance. Since the inheritance is not included in the worldly matters as held by the courts, then this study suggests they provide their biological children bequest (*wasiyya*) and gift (*hibah*). Both are permissible to be given to a person that is not legally entitled to the property of the inheritor. In this respect, in the *madhhab* of al-Shāfi'i, a bequest is permissible to be given to non-

³⁸⁰ Nambiar, "Fatwa On Bin Abdullah Should Be Revised Says Penang Mufti."

Muslim, just like giving charity.³⁸¹ This recommendation is given to realize the purpose of care of the family, as stated in 2.4.3.

Finally, it is always important to stress on educating Muslim to avoid adultery and means towards it because it is highly forbidden in the religion and leads to negative consequences, including the production of an illegitimate child. The aforementioned recommendations should not be considered as a way out to normalise the phenomenon, but instead, an answer for the rights of the innocent children in the first place.

4.2.1 *Dawābiṭ* Of Realizing *Maqāṣid al-Sharī‘ah* In Familial Issues

Regarding the third question, which is concerned with *dawābiṭ* or parameters of realizing the *Maqāṣid al-Sharī‘ah* in the familial issues and challenges, the question is answered herein. Those guidelines are derived from the approach set out earlier in the second chapter, defining its scope for family issues and challenges.

There are six main *dawābiṭ* of realizing, that is related to familial issues, extracted from the *Maqāṣid* approach. They are interrelated and not separated from each other. These *dawābiṭ* or parameters are identifying the underlying purpose of an Islamic sacred text, identifying the field of which a ruling is ascribed to, general consideration purposes when interpreting the Islamic sacred text, differentiating between the purpose and means, consideration of outcomes, and understanding reality.

³⁸¹ Al-Shirbīnī, *Mughnī al-Muḥtāj*. p. 4/71.

4.2.1 (a) Identifying Underlying Purpose of an Islamic Sacred Text

The first parameter is identifying the underlying purposes of Islamic scriptures. This is the very core of the guidelines and the approach in general. Among the methods of identifying purposes of the Lawgiver are the pure commands and prohibitions expressly stated and imposed primarily of the underlying causes of commands and prohibitions. The Lawgiver has primary as well as secondary roles in the elaboration of the legal rules of human practice and religion, and the silence on the law of the cause or the lawfulness of the act, where there is a need to do so.³⁸²

In doing so, in order to avoid the unintended purpose of the text, probable purposes must be thoroughly scrutinized before discerning the actual purpose. In this respect, al-Ghazālī condemns some Muslims who mistakenly think that the Lawgiver intends to totally get rid of human desires, while the actual purpose is to bring people to the moderation, not to eliminate it.³⁸³

Accordingly, the wisdom behind God's commands or prohibitions, in this case - Quranic verses and Hadiths concerning familial matters, may be explored and utilized for a better understanding and implementing of the text. Nevertheless, as every single ruling is under its specific field, then this first parameter needs to be comprehended in light of its specific purpose.

4.2.1 (b) Identifying the Field of Which a Ruling is Ascribed To

As a consequence, the second parameter defines the area to which the decision is

³⁸² Al-Shāṭibī, *al-Muwāfaqāt*. p. 2/658-671.

³⁸³ Al-Ghazālī, *Ihya' Ulūm al-Dīn*. p. 3/611-612.

applied and begins to explore the purposes of the decision.³⁸⁴ In this respect, the purposes of familial rulings, for instance, what is outlined in chapter two, are essential to be conceived and considered for a better understanding and implementation.

For instance, since one of the specific purposes of familial rulings is the preservation of lineage; thus jurists consider the legitimation of children who born after two, four, or even seven years of pregnancy claim. This is so, even though nine months is the common term of a pregnancy. On the contrary, a pregnancy that is claimed to take several years is usually caused by adultery. However, such cases are legitimated by many jurists, among other reasons is for the sake of preservation of lineage.³⁸⁵

4.2.1 (c) Consideration General Purposes When Interpreting the Islamic Sacred Text

Moreover, the third parameter is the consideration of general purposes when interpreting the Islamic sacred text. As already known, general purposes are considered by the Lawgiver in all or most of the areas and circumstance of legislation.³⁸⁶ This parameter is explained in chapter two while addressing one of the functions and features of the *Maqāṣid* approach, the interrelation between universals and particulars.

An example is grasping benefit and avoiding harm that is intended by the Lawgiver, as repeatedly mentioned, must be taken into account in actualizing *Maqāṣid* both in the interpretation and implementation. Consequently, honour or equitability, or *ma'rūf*

³⁸⁴ Al-Raysūni, *Maqāṣid al-Maqāṣid*. p. 90-91.

³⁸⁵ Al-Qarāfi, *al-Furūq*. p. 3/338-339.

³⁸⁶ Ibn 'Āshūr, *Maqāṣid al-Sharī'ah al-Islāmiyyah*. p. 251.

in the Quranic term, is deemed fundamental in marriage.³⁸⁷

4.2.1 (d) Differentiating Between the Purpose and Means

However, besides exploring the purposes of the Lawgiver, there is an important parameter that must be considered, differentiating between the purpose and means. Regarding this fourth parameter, a principle stresses that the reward of the means to various acts of obedience varies in accordance with the variation of the excellences of the purposes and their *maṣlaḥah*. Thus, a means to the best of purposes is better than all other means.³⁸⁸

Moreover, the significance of a means also different due to the level of the purpose it serves, whether it necessity, need, or luxury. It is accordingly because there are different levels of purposes, as mentioned earlier. Therefore, to better actualize the purposes of the Lawgiver, it is fundamental to identify the level of issue or matter before interpreting and implementing it.

For instance, if an issue is concerned with the lineage, then it is fundamental because the preservation of lineage is the way to sustain the progeny. In addition, it is essential to point out, in the light of the fourth rule, that the decisions of the means are usually changeable, whereas the decisions of the purposes are permanent.³⁸⁹

Examples of variable means in family matters are the approaches used to examine the child's lineage in certain situations. In spite of the methods discussed by jurists,

³⁸⁷ Al-Shāshi, *Maḥāsīn al-Sharī'ah*. p. 286.

³⁸⁸ Ibn Abd al-Salam, *Qawā'id al-Aḥkām fī Iṣlāḥ al-Anām*. p. 1/165.

³⁸⁹ Al-Qaraḍāwī, *Dirāsāt fī Fiqh al-Maqāṣid*. p. 174.

including testimony, claim, recognition, *qiyafah* (determining lineage based on traits and likeness), the injunction of the judge, and even the method of the lot. However, there is a strong method invented by humans in the 20th century, namely deoxyribonucleic acid (DNA). Accordingly, this method is helpful to identify the lineage of illegitimate and abandoned children as well.³⁹⁰

4.2.1 (e) Consideration of Outcomes

Furthermore, the fifth parameter is the consideration of outcomes. This consideration not only dealing with the current reality, but this guideline also deals with impacts and futures that may be the results of a decision made, or policy applied, or *fatwa* gazetted. The rational and *maṣlahah*-based arguments are essential to be examined before preferring a decision.

Consequently, there are specific means that are permitted in principle but then prohibited considering the outcomes they may lead to. This can be exemplified by the ruling of marrying women from people of scripture that is permitted in principle. Nevertheless, in certain specific situations, Umar al-Khattab was forbidden because of the potential damage in the future and because of the good command of the Muslim community at that time.³⁹¹

To better understand the significance of this guideline, the statement of al-Shāṭibi is recalled:

³⁹⁰ Al-Hilālī, *al-Baṣmat al-Wirāthiyyah*. p. 396-411.

³⁹¹ Baltājī, *Manhaj 'Umar al-Khaṭṭāb fī al-Tashrī'*. p. 259-263.

“Heeding the outcomes of actions is consistent with the higher objectives of the Law, whether the actions concerned are in accordance with the Law or in violation thereof. Therefore, the person engaging in *ijtihād* is not to judge a human action, be it one of commission or omission, until after he has given a careful thought to the consequences to which the said action will lead.”³⁹²

4.2.1 (f) Consideration of Reality and Social Change

The fifth parameter also urges the need for understanding the current realities and circumstances as well as the expected futures. Therefore, the sixth parameter to actualize *Maqāṣid* in every aspect of life, including familial matters is the consideration of reality.

Ibn al-Qayyim obviously expresses the significance of this parameter as he stresses that a mufti or judge is not able to issue a fatwa or verdict without understanding two things. Firstly, understanding and having a good grasp of reality. He should have a good understanding of what is happening, based on circumstantial evidence and other signs, so that he has a full understanding of it. Second, to understand what is required in the light of these circumstances, that is, to understand the judgment of Allah which He has provided in His Book or through His Messenger concerning this truth. He should apply the one to the other.³⁹³

³⁹² Ibid., p. 4/517-518.

³⁹³ Ibn al-Qayyim, *A'lām al-Muwaqqi'īn*. p. 1/189-190.

In this regard, Ibn 'Abidin articulates the fundamental of understanding reality and social change before issuing fatwa, judgment and applying the policy. According to him:

"Know that jurisprudential questions are either fixed by a clear text and that is the first chapter [of this work] or by *ijtihād* or reasoned opinion (*ray*'). For many of these questions, the *mujtahid* builds on the practice of his day in such a manner that if he lived with today's practices, he would have reached a different decision to that he did earlier. For this reason [the jurists] have stated that one of the conditions for full juristic reasoning (*ijtihād*) is to know the practice of the people, as many of the rulings differ according to change over time, either through change in people's practices or through necessity or the corruption of people of the day. Thus if judgement stayed as it had been earlier, it would cause distress and harm to people and would thereby contravene the principles of the *shari'a* which are founded on lightening and easing [life], and avoiding harm and corruption so that the world remains in most perfect order and finest balance."³⁹⁴

Apparently, the crucial of this parameter not only lies in its relation with the previous parameter, but it also related to the other parameters. In this regard, understanding the context and reality helps adapt the *fiqh* to social reality, creating appropriate means to realize the purposes, grasping the laws and customs of a country as part of the understanding, and so forth.

³⁹⁴ 'Abidīn, *Majmū'at Rasā'il Ibn 'Ābidin*. p. 2/125.

As a result, all these guidelines are essential to be always referred to in order to actualize Shari'ah purposes, especially in family issues and challenges, and generally in every aspect of our life.

4.3 Contribution of The Research

This study is broadly divided into two main components, theoretical, and practical. In respect of theoretical, this research contributes to visualizing the *Maqāṣid al-Sharī'ah* approach and its significance in examining family related issues, including nasab of illegitimate children. The specific purposes of Shari'ah relating to familial matters also studied from the perspective of the crucial concept of the Quran, namely *taqwā*. The utilizing of a thematic method of leading the Quran leads to the emphasis on the concept when examining the familial purposes, which is essential to highlight how the Quran speaks about family-related matters.

Moreover, regarding the second component, this study contributes to contextualising the *Maqāṣid* approach in the case of nasab of illegitimate children. Unlike several studies that are only limited to *maqāṣid* dimension by emphasizing on the purpose of preservation of lineage as mentioned in the literature reviews, this study deems *Maqāṣid* as an approach. Therefore, the reading of the Islamic scriptures concerning the issue and analysing the scholars' juristic opinions as well is mainly done by utilizing the approach. For that reason, the roles and principles of *Maqāṣid* approach are present and recalled in the reading, analysing, and preferencing as well.

4.4 Limitation and Future Research

Since the scope of this research is limited to the application of *Maqāṣid al-Sharī'ah* in contemporary *fiqh* of family in the Malaysian context, it explores and analyses the related familial issues in light of *Maqāṣid al-Sharī'ah* with specific reference on the status of *nasab* of illegitimate children. Therefore, two main components of this research are the theoretical and practical discourse. The former is represented by visualization of the *Maqāṣid* approach, its features and roles, with a special emphasis on the family-related matters. In contrast, the latter examined the case of the status of illegitimate children.

In this respect, several other issues are not discussed in this research as they are not related to the scope. One of them that this study suggested is the very core of the legitimization or delegitimizing in light of predominant position within the Islamic juristic discourse, the definition of illegitimate children, especially the term six months and two seconds, as legally written and applied in the Malaysian context of Islamic Family Law.

Accordingly, a significant question raises here is the difference between a mother giving birth out of matrimonial bed after nine months of pregnancy. However, her marriage only occurred after three months of it. Meanwhile, another child also born out of premarital sex. However, his mother got married before her nine months of pregnancy reached three months. In light of the current practice, unlike the latter, the former is considered illegitimate.

The question is important because the underlying wisdom of the acceptance of such length of pregnancy lies in the probability of its existence among the community, as stated by al-Qaffal al-Shashi.³⁹⁵ Therefore, if scientists refute the possibility of such instances, as they correctly find that the birth given after nine months of pregnancy, which is more than six months of marriage, then what is the role of Islamic Family Law on the actual length of pregnancy that proves that the child born from matrimonial bed? This suggested study is undeniably related to science as well as Islamic jurisprudence.

4.5 Conclusion

To recall, the focal point of this study was limited to the realisation of *Maqāṣid al-Sharī'ah* in contemporary *fiqh* of family in the Malaysian context. The discourse on *Maqāṣid al-Sharī'ah* involved its theoretical dimension, emphasising on the specific purpose of familial rulings. As a case study, this research explored and analysed the related familial issues in light of *Maqāṣid al-Sharī'ah* with specific reference on the status of *nasab* of an illegitimate child.

The visualised findings and the guidelines alike demonstrate that all the research questions are answered, hence realizing the aims of this study. In the end, it can be concluded that the *Maqāṣid* approach is genuinely essential in the Islamic jurisprudence, including the tackling of challenging issues of contemporary times, especially those related to familial relations.

³⁹⁵ Al-Shāshi, *Maḥāsīn al-Sharī'ah*. p. 306-307.

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