

CHAPTER II :

LITERATURE REVIEW

2.1 Introduction

There are large volume of literatures pertaining to unlawful substances such as wine, porcine, alcohol, blood, urine in seeking medical treatment in the name of *hifz al-nafs*. Most of the *fiqh* books have discussed on medication using filth and intoxication substances along with the principals of *darūrah*, yet, minimal engagement with *ḥājah fiqh* principals in situations where forbidden items were used. This is because, regardless of any internal factors among Muslim that may be permissible in consumption of unlawful substance as medicine, external factors such as the patient genetic makeup may be beyond control which obliged the patient to use such treatment as the only effective treatment.

Thus, the classifications of the theme within this research have been stratified into four which include *darūrah*, *ḥājah*, *istiḥālah* and preventative medicine from shariah perspective. Various literatures were looked upon to highlight the gap of this shariah research.

2.2 The Application of *Darūrah* in Islamic Ruling

The theory of *darūrah* can be presumed as a fundamental theory for this research, following the rise of obstetric VTE cases which had been declared as the main killer of pregnant mothers in Malaysia in recent years (DOSM, 2017). Obstetric VTE incidences and complications affects two lives; the mothers and the unborn babies. Thus, justifying the definition of *darūrah* and it acquires a definite and distinguish understanding of the disease itself to prevent obstetric VTE occurrences beforehand. However, does *darūrah* connotation applied to the patient whom is not yet having any obstetric VTE complication and act as prophylaxis treatment. Does this unlawful treatment have any role as preventive medicine where it helps to prevent from any life threatening and debilitating disease? How does the level of *darūrah* are defined between at-risk mothers, high-risk or moderate risk mother in developing VTE and its complications? Confusing issues arises with patients presented with VTE event which leads to near death experience and later usage of halal option of anticoagulant yet predisposes to further bleeding complication and death.

Based on *darūrah* terminology, the questions above may help to solve the puzzling issues in managing obstetric VTE patients. Hence, at-risk mothers are required to receive prophylaxis treatment particularly upon those who are at high risk in VTE event. In addition, Al-Quran stated in several chapters regarding *darūrah* term as following;

إِنَّمَا حَرَّمَ عَلَيْكُمُ الْمَيْتَةَ وَالدَّمَ وَلَحْمَ الْخِنْزِيرِ وَمَا أُهْلَ بِهِ ۖ لَعَنَ اللَّهُ فَمَنْ أَضْطَرَّ غَيْرَ بَاطِلٍ
وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ ۚ إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ ۝۱۷۳

“He has only forbidden you what dies of itself, and blood, and flesh of swine, and that over which any other (name) than (that of) Allah has been invoked; but whoever is driven to necessity, not desiring, nor exceeding the limit, no sin shall be upon him; surely Allah is Forgiving, Merciful.”

(Al-Quran. Al-Baqarah 2: 173)

حَرَّمَ عَلَيْكُمُ الْمَيْتَةَ وَالْدَّمَ وَلَحْمَ الْخِنْزِيرِ وَمَا أُهْلَ لِغَيْرِ اللَّهِ بِهِ وَالْمُنْخَنِقَةُ وَالْمَوْقُوذَةُ
وَالْمُتَرَدِّيَةُ وَالنَّطِيحَةُ وَمَا أَكَلَ السَّبُعُ إِلَّا مَا ذَكَّيْتُمْ وَمَا ذُبِحَ عَلَى النُّصُبِ وَأَنْ تَسْتَقْسِمُوا
بِالْأَزْلَمِ ذَلِكَمْ فِسْقٌ الْيَوْمَ يَبْسُ الَّذِينَ كَفَرُوا مِنْ دِينِكُمْ فَلَا تَخْشَوْهُمْ وَاخْشَوْنِي الْيَوْمَ
أَكْمَلْتُ لَكُمْ دِينَكُمْ وَأَتِمَمْتُ عَلَيْكُمْ نِعْمَتِي وَرَضِيتُ لَكُمُ الْإِسْلَامَ دِينًا فَمَنِ اضْطُرَّ
فِي مَخَصَصَةٍ غَيْرِ مُتَجَانِفٍ لِإِثْمٍ فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ ٣

Meaning: "Forbidden to you is that which dies of itself, and blood, and flesh of swine, and that on which any other name than that of Allah has been invoked, and the strangled (animal) and that beaten to death, and that killed by a fall and that killed by being smitten with the horn, and that which wild beasts have eaten, except what you slaughter, and what is sacrificed on stones set up (for idols) and that you divide by the arrows; that is a transgression. This day have those who disbelieve despaired of your religion, so fear them not, and fear Me. This day have I perfected for you your religion and completed My favor on you and chosen for you Islam as a religion; but whoever is compelled by hunger, not inclining willfully to sin, then surely Allah is Forgiving, Merciful."

(Al-Quran. Al-Ma'idah 5:3)

وَمَا لَكُمْ أَلَّا تَأْكُلُوا مِمَّا ذُكِرَ اسْمُ اللَّهِ عَلَيْهِ وَقَدْ فَصَّلَ لَكُمْ مَا حَرَّمَ عَلَيْكُمْ إِلَّا مَا اضْطُرُّرْتُمْ إِلَيْهِ وَإِنْ كَثِيرًا لَيُضِلُّونَ بِأَهْوَاءِهِمْ بِغَيْرِ عِلْمٍ إِنَّ رَبَّكَ هُوَ أَعْلَمُ بِالْمُعْتَدِينَ ١١٩

Meaning: "And what reason have you that you should not eat of that on which Allah's name has been mentioned, and He has already made plain to you what He has forbidden to you-- excepting what you are compelled to; and most surely many would lead (people) astray by their low desires out of ignorance; surely your Lord-- He best knows those who exceed the limits."

(Al-Quran. Al-An'am 6: 119)

قُلْ لَا أَجِدُ فِي مَا أُوحِيَ إِلَيَّ مُحَرَّمًا عَلَى طَاعِمٍ يَطْعَمُهُ إِلَّا أَنْ يَكُونَ مَيْتَةً أَوْ دَمًا مَسْفُوحًا أَوْ
لَحْمَ خِنْزِيرٍ فَإِنَّهُ رِجْسٌ أَوْ فِسْقًا أُهْلَ لِغَيْرِ اللَّهِ بِهِ فَمَنِ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَإِنَّ رَبَّكَ
غَفُورٌ رَحِيمٌ ١٤٥

Meaning: "Say: I do not find in that which has been revealed to me anything forbidden for an eater to eat of except that it be what has died of itself, or blood poured forth, or flesh of swine-- for that surely is unclean-- or that which is a transgression, other than (the name of) Allah having been invoked on it; but whoever is driven to necessity, not desiring nor exceeding the limit, then surely your Lord is Forgiving, Merciful."

(Al-Quran. Al-An'am 6: 145)

أَتَى أَمْرُ اللَّهِ فَلَا تَسْتَعْجِلُوهُ سُبْحَنَهُ وَتَعَالَى عَمَّا يُشْرِكُونَ ١

Meaning: “Allah’s commandment has come, therefore do not desire to hasten it; glory be to Him, and highly exalted be He above what they associate (with Him).”

(Al-Quran. Al-Nahl 16: 115)

Based on foregoing Quranic verses, the term *darūrah* translated into certain compelled times when Muslims have been excused to consume the prohibited materials to save their lives or to skip the mandatory obligation. Crucial situations in those verses clarified by the Lawgiver that there are difficulties and pressed situations in this life where Muslims are allowable to commit things that are against Islamic teaching, yet it is still considered as lifesaving in such circumstances.

Introspection among Hadith texts, the theory of *darūrah* also had been enunciated in an inevitable extreme situation such as drought, starving and treatment with unlawful source in compelled situations as following:

عن الفجيع العامري أنه أتى رسول الله صلى الله عليه وسلم فقال: ما يحل لنا من الميتة، قال: ما طعامكم، قلنا: نغتبق نصطبج. قال أبو نعيم فسر له لى عقبة قدح غدوة وقدح عشية. قال ذاك - وأبى الجوع. فأحل لهم الميتة على هذه الحال. قال أبو داود الغبوق من أخی النهار والصبح من أول النهار

Meaning: Al-Faji’ came to the Messenger of Allah (PBUH) and asked: Is not dead meat lawful for us? He said: What is your food? We said: Some food in the evening and some in the morning. AbuNu’aym said: Uqbah explained it to me saying: a cup (of milk) in the morning and a cup in the evening; this does not satisfy the hunger. So made the carrion lawful for them in this condition. Abu Dawud said: *Ghabuq* is a drink in the evening and *Sabuh* is a drink in the morning.

(Hadith. Abū Dāud. Sunan Abī Dāud. Kitāb al-Aṭ‘imah. Bāb fī al-Mudṭar ilā al-Maytah: #3817)

عَنْ أَنَسٍ - رَضِيَ اللَّهُ عَنْهُ - أَنَّ نَاسًا اجْتَوَوْا فِي الْمَدِينَةِ فَأَمَرَهُمُ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ أَنْ يَلْحَقُوا بِرَاعِيهِ - يَعْنِي الْإِيلَ - فَيَشْرَبُوا مِنْ أَلْبَانِهَا وَأَبْوَالِهَا فَلَحِقُوا بِرَاعِيهِ فَشَرَبُوا مِنْ أَلْبَانِهَا وَأَبْوَالِهَا حَتَّى صَلَحَتْ أَبْدَانُهُمْ فَقَتَلُوا الرَّاعِيَ وَسَافُوا الْإِيلَ فَبَلَغَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَبَعَثَ فِي ظُلُمِهِمْ فَبَجَىءَ بِهِمْ فَقَطَعَ أَيْدِيَهُمْ وَأَرْجُلَهُمْ

Meaning: “From Anas (May Allah be pleased with him), ‘the climate of Medina did not suit some people, so the Prophet ordered them to follow his shepherd, i.e. his camels, and drink their milk and urine (as a medicine). So, they followed the shepherd that is the camels and drank their milk and urine till their bodies became healthy. Then they killed the shepherd and drove away the camels. When the news reached the Prophet, he sent some people in their pursuit. When they were brought, he cut their hands and feet and their eyes were branded with heated pieces of iron.’”

(Hadith. Al-Bukhāriyy. Sunan al-Bukhāriyy. Kitāb al-Ṭib. Bāb al-Dawā’ bi Abwāl al-Ibil: #5686)

The interpretation from both primary sources in Islam, Quran and Hadith texts pertaining to *ḍarūrah* principle were discussed by the early jurists including al-Shāfi‘iyy, al-Jaṣṣaṣ, al-Juwayniyy, al-Sarakhshiyy, al-Ghazāliyy, Ibn al-‘Arabiyy, ‘Izz al-Dīn Ibn ‘Abd al-Salām, al-Qarāfiyy, al-Suyūṭiyy dan Ibn Nujaym al-Ḥanafiyy (Hapiz, 2016).

Al-Imām Al-Shāfi‘iyy (2001) wrote in his classical book of *fiqh*, al-‘Umm whom bound the theory of deducing the *ḥukm* of *ḍarūrah* only applicable when the *ḍarūrah* condition had occurred. In another hand, Al-Ghazāliyy (n.d.) used the theory of *ḍarūrah* to preserve *maṣāliḥ*. These descriptions from both prominent scholars in Shafi’ite sect depicted that the strength of *ḍarūrah* concept and its limitation in application depending on certain situations and within specific times only. Gradually, the later jurists’ and scholars clarified upon *ḍarūrah* definition and it had extended the connotation with additional elements to accommodate the Muslims requirements.

Ibnu Nujaym (1999) in his book *Al-Ashbāh wa al-Nazā’ir ‘alā mazhab Abī Ḥanīfah* (1999) elaborated seven causes of getting *rukḥṣah* in worships such as travel

(*safar*), illness (*marad*), force (*ikrah*), forget (*nisyān*), ignorance (*jahl*), hardship (*‘usr*) and widespread of difficulties (*umūm al-balwā*) and shortcoming (*naqs*). Another well-known example was by Al-Suyūṭīyy (1983), which include seeking medical treatment with unlawful sources (*al-tadāwī bi al-muḥarramāt*) either impurities substances (*najāsāt*) or alcohol (*khamr*) or illness (*marad*) that may cause to allow such concession (*rukḥṣah*). These extension of clarifications upon *darūrah* definition can be applied towards contemporary issues in this modern era.

Hapiz (2016) proposed in his doctorate dissertation with regards of *darūrah* used as yardstick of determining Islamic ruling in this matter. He has contributed a comprehensive guideline in defining *darūrah shar‘iyyah* context, dealing with unlawful sources which majority infused with products nowadays either food, medicines or daily used product and substances. Pharmaceutical products such as heparin and LMWH was mentioned at a glance, yet it was focused on each sector of food, pharmaceutical and cosmetic and the application *fiqh ruling*. In another hand, our study elaborates in depth the usage LMWH as prevention of obstetric VTE.

There is a gap between the research analysis and the clinical practice where the literature only mentions on specific *darūrah* conditions and the *fiqh* ruling yet the reality LMWH is used more often in preventive medicine. Mohd Hapiz proposed a hierarchy of using *muḥarramāt* in contemporary consumerism while this research aims to find out the solution for LMWH usage from *fiqh* perspective since most of the obstetricians whom are the experts has higher preference in using LMWH upon mothers who are at risk of VTE due to the scientific and safety profile (Mardiana et al., 2016). Unfortunately, it was less favored by most Muslims due to presence of halal alternative, Fondaparinux.

Hapiz in his research at that time found that LMWH is impermissible from *istihālah* concept as it was not fully tested nor certified of its purity from any scientific laboratory for its presence of residual porcine DNA. Nevertheless, this research had proposed that LMWH purity can be verified and considered as permissible if there is no residual porcine DNA proven by a certified laboratory.

In another hand, Farhani (2017) in her doctorate dissertation designed a guideline of using suture which made out of unlawful substance such as porcine. It was explicitly stated that, in addition to *ḍarūrah*, *ḥājah* can be recognized as determinators to impose Islamic law, *istihālah* and *istihlāk* also shall be deemed as legal indicators of purification. Mubarak (2003), Abū Ṭaha (2007) and Nadiah Rāzī (2014) explained the definitions, types, limitation of *ḍarūrah* are the reasons why there are *rukḥṣah* in Islam. They analyzed various contemporary issues according to four of *fiqh* by using the comparison methodology.

In that study, it was mentioned that medical treatment with prohibited sources in *ḍarūrah* situation are allowed in Islam, provided that the patients should receive recommendation from experience and expert Muslim medical doctors. However, there must be proven that there are no *halal* alternatives available to replace the unlawful source of medicine. Although the arguments were very informative, the authors did not include the principals of Islamic ruling in term of preventive medicine using unlawful source specifically porcine. This is considered as theoretical gap specifically in the level of *ḍarūrah* definition and perspective. This research proposed the definition of *ḍarūrah* itself equivalent to minimum *ḍarūrah*, maximum *ḍarūrah*, dread to be destroyed as prevention from the occurrence and destruction state itself. The definite and distinguish connotation of *ḍarūrah* will be further clarified and elaborated.

Hanani (2010) in her doctorate dissertation discussed about the usage of Methadone as treatment among drug addicted patients in Malaysia. Methadone are synthetically produced and has almost similar compound as compared heroin drug, however, is has better safety profile and lesser side effect and complications. It is use as mode of treatment among drug addicted patients with AIDS disease to help combating their addiction, in order to preserve and prevent further harm and complication, like a familiar saying, a lesser evil is better than the evil itself. She analyzed the status of Methadone according to the rule of *ḍarūrah* using *fiqh* comparison as the methodology. The study focused on using of unlawful source in the name of *ḍarūrah* to contribute to the harm reduction programmed in Malaysia. Our study focuses on porcine base as unlawful source which had underwent the process of complete transformation (*istiḥālah tāmmah*) to be used as preventive medicine. Most Arabic countries, unlike Malaysia were more inclined to accept products from unlawful sources which had undergone *istiḥālah* processes to be used in daily life without attributing to *ḍarūrah* or *ḥājah* justifications.

The main gap analyzed in this research is the misconception of *ḍarūrah* context particularly among medical doctors who deal directly with the mothers who are at risk of VTE. As it is generally accepted that, unlawful substance in medicine may be allowed to be use as treatment at the stage of *ḍarūrah* from *fiqh* perspective. However, there is no parameter or manual reference to determine the level of *ḍarūrah* especially related to obstetric VTE complications. Thus, among the medical doctors including non-Muslim unable to justify and informed that in cases of moderate risk or almost *ḍarūrah* are also known as tenacious need which is actually ranked as *ḍarūrah* (Irwan et al, 2019, Irwan et al., 2019).

The misconception between patient as receiving end and the medical practitioner in using porcine base treatment has cause a conflict between the two which further showed an alarming rise of maternal mortality due to the VTE incidences and complications after the verdict of decision by MCMKI in 2009.

Darūrah is a point of reference to allow flexibility between the prohibition among Islamic ruling so that the objective of shariah (Al-Ghazāliyy, n.d.) attained with guarded principles. This situation insists consistently among shariah scholars all over the places to widen their *ijtihad* especially when new arising matters gradually develop consistent with technology advancement and threaten human lives. The same foregoing fact mentioned is explained in other sectors for example in *muāmalāt* or Islamic finance. Abdul Aziz et al., (2018) elaborated that *tawarruq munazzam*, according to a fatwa, was prohibited by the OIC in 2009 but later had been applied in Malaysia based on the argument of *darūrah*.

Different *fatwā* applied in Malaysia indicates the flexibility of MCMKI in evaluating the issue and the decision made is pertinent in Malaysia depending on the current need, locality practice and culture. As far as pregnancy and puerperium mothers who are at risk of VTE concerned in this research, it is a worrying to see the rise of maternal death numbers in Malaysia with VTE as the principal cause. As a result, a new perspective is required to denote and define the meaning and scope of *darūrah*. The terminology of *darūrah* based on *fiqh* perspective requires appropriate clarification from Islamic authority for example MCMKI or JAKIM with regard the usage of LMWH during pregnancy and puerperium. It will help for public as reference in general, to clarify the dilemma amongst medical doctors and pharmacists in using it as prevention.

Mahaiyadin et al (2017) expressed their view that unlawful sources can be used during *darūrah* or *mashaqqah* situation, either food or non-food, based on the Islamic

legal maxims called *al-ḍarūrāt tubīḥ al-maḥẓūrāt* and *al-ḍarūrah tuqaddar biqadarihā*. Even though in extreme situation of *ḍarūrah* situation which probably would threaten upon *al-ḍarūriyyāt al-khamsah*, the consumption of prohibited sources should be taken within limitation as guided by Quranic text. In a similar manner, Fariza et al (2016) found in their research of *ḍarūrah tuqaddar biqadarihā* in flood victims, a systematic and effective way in delivering zakat in Malaysia upon flood victims by evaluating their *mashaqqāt* are highly recommended by *zakat* institutions depending on the locality, severity of the effected family during that time rather than generalizing the situation of *mashaqqāt* to each person or family at all times.

Siti Khatijah et al (2016) in their review, critically assessed a maternity pant product which was designed to be worn during childbirth by the female patients. As a result, the maternity pant can be asserted as an indicator for *ḍarūrah* but executed with shariah boundary. Thus, allowing *awrah* of female patients limited to the necessity for procedures to male doctors during labour. In fact, the product had indeed met with the shariah standard and compliant with *qā'idah fiqhiyyah*, which theoretically stated that “whatever can't be gained in its entirety should not be discarded entirely” or in Arabic *mā lā yudrak al-kull lā yutraku al-kull*. In another hand; this research relates directly with *ḥifẓ al-nafs* of two souls, then the priority endures in the highest *maqasid al-sharī'ah* but concerned with limitation due to the unlawful medicinal substance which is considered as a serious issue among Muslims.

Despite the concern in prescribing LMWH for high risk mothers adhere to the medical guidelines as recommended dose of LMWH either for treatment or preventive therapy. Hence, a research gap has emerged and to identify the level of extent for *ḍarūrah* either maximum *ḍarūrah* or minimum *ḍarūrah* (Irwan et al., 2019).

The concept of *ḍarūrah* and its limitation had been precisely put forward by jurists since the previous time under Islamic legal maxims (*qawā'id fiqhiyyah*). The *qawā'id* are very useful in medical specializations because it recognized the novel, foreign and complex issues which does not have any concrete legal text to clarify with. *Qawā'id fiqhiyyah* usually came in few words, expressed in epithetical statement of the goals and objectives of shariah. Ramlah (2021) described many medical cases for example reproductive technology (assisted reproduction, contraception, abortion, sex selection, and genetic testing), end of life issues (artificial life support, euthanasia), transplantation (stem cells and solid organs), cosmetic and reconstructive surgery, post-mortem issues (embalming, cryopreservation, and autopsy) can be applied with using five main principles of *qawā'id fiqhiyyah* which considered as pillar of Islamic legal maxims.

In conclusion, decision in 2009 by MCMKI (JAKIM, 2015) regarding the matter of LMWH had been issued as prohibited due to its porcine ground preparation with exemption for those who in *ḍarūrah*. The decision has been treated as unquestionable issue by Muslims at public as 'porcine issue' endures as taboo towards Muslims' culture owing to simply falling into severe filth (*al-najasah al-mughhallazah*) legal rule in Islam (Al-Shafi'iyy, 2001).

The researcher views that decision of MCMKI retains the position held by Shafi'ite school regarding the spectrum of halal and haram in dietary intake as public reference in Malaysia. Relevantly, that position would guide them to not exaggerate the bother of *ḥalāl* and *ḥaram* especially driven by their lust or desire for profit purposes. However, the void concerned, following the troubling figures of maternal mortality recently has created disharmony between related parties such as MCMKI, JAKIM and MOH related to usage of porcine base LMWH. Consequently, the definition of *ḍarūrah*

require further explanations; for example, when is it the situation considered as *ḍarūrah*? Before or after the VTE had been diagnosed? The answer for this will be the outcome of this research.

2.3 The Position of *Hājah* and its Application in Determining Islamic Ruling

Basically, the definitions of *ḍarūrah* was not debated as controversial as *hājah* owing to its clear interpretation. In contrast, the interpretation of *hājah* usually lead to a dubious state when it is not well defined and distinguished (Kāfiyy, 2004). Among of the books which shaped the foundation of *hājah* upon this research is *Al-Burhān fī Uṣūl Al-Fiqh* written by Al-Juwayniyy (1979). His writings were considered as a huge contribution to Muslims community, not only in defining *ḍarūrah* and level of texts justification (*tadlīl*), the definition of *hājah* and its applicability as a parameter in determining Islamic rulings were elaborated. *Hājah* concept, hence, discussed under an important *qā'idah fiqhiyyah* namely *al-hājah tunazzal manzilah al-ḍarūrah*, which was first introduced by Al-Juwayniyy in his writings. Subsequently, giving a new *ijtihād* perspective shariah scholars.

Al-hājah tunazzal manzilah ḍarūrah according to Al-Juwayniyy, (n.d.) in another book *Al-Ghiyāth Al-'Umam fī Iltiyāth Al-Zalam* means if a situation in which a need in people is withhold for a long term until burdens over people' life has occurred. In that situation, *hājah fiqh* ruling justify for certain necessity has been set out as the *ḍarūrah* ruling. In that book, Al-Juwayniyy emphasized on the medicines (*dawā'*) either for treatment or prevention had been categorized as *ḍarar* in another hand, the medicine although has been used for prevention purposes (*'aqāqīr*), it can also be consumed.

Aḥmad Kāfiyy (2004) discussed in his book, *al-Hājah al-Shar'īyyah, Hudūduhā waqawā'iduhā* which elaborates the controversial issue under the principle of *hājah*

shar‘iyyah. The book explained about *qawā‘id uṣūliyyah al-ḥājiyyah*, *qawā‘id maqāṣidiyyah ḥājiyyah* and *ḍawābiṭ ḥājiyyāt* which exemplified an influential range of *ḥājah* perspective in determining Islamic rulings. It is a very useful reference for researchers to discuss regarding contemporary issues related with unlawful sources of product usage either in peak of *ḍarūrah* time or when the situation near to *ḍarūrah*? The researcher utilizes definition of *ḍarūrah* to apply in this research to the extent of LMWH needed as early prevention as Aḥmad Kāfiyy in his writings did not mention specifically about LMWH in Malaysia setting.

Al-Zarkashiyy (1985) in his book *Al-Manthūr* did mention that individual whom falls in the category were requirements and needed upon *ḥājah khaṣṣah* can permit to consume unlawful sources either food or non-food with justifications. Eating food that belongs to non-Muslim and treatment with using unlawful sources substitute for example *najāsah*. While Al-Suyūṭiyy (1983) comprised the concept of *ḥājah khaṣṣah* and *ḥājah ‘ammah* in a *qā‘idah fihiyyah* called ‘*al-ḥājah tunazzal manzilah al-ḍarūrah khaṣṣatan kānat aw ‘ammatan*’ and being used by contemporary shariah scholars.

Wahbah al-Zuhayliyy (1985) in *Nazariyyah Al-Ḍarūriyyah Al-Shar‘iyyah Muqāranah Ma‘a al-Qānūn al-Wādī* was amongst of contemporary shariah scholars who compiled his opinion that expansion of determination in Islamic rulings can be verified with *ḥājah* principle, instead of *ḍarūrah*. The author distinguished the differences between *ḍarūrah* and *ḥājah* in the sub-topic of *qā‘idah fihiyyah* “*al-ḥājah al-‘āmmah aw al-khaṣṣah tunazzal manzilah al-ḍarūrah* in depth. Wahbah al-Zuhayliyy mentioned about moderate need (*al-ḥājah al-mutawassitah*), normal need (*al-ḥājah al-‘ādiyyah*) and tenacious need (*al-ḥājah al-shadīd*).

It also described details on *ḥājah* principle and its provisions by contemporary *Fiqh* scholars to support *ḥājah* principle and applications in certain extent to become a valid parameter as Islamic rulings determinator. However, their objectives of writing differ from this research as this research intended to recommend an *ijtihād* from *fiqh* perspective following the increasing cases of maternal mortality.

In *mu'āmalah* area, Al-Zarqā' (1989) described *mu'āmalah* issues under *ḥājah* with some criteria and contradict with *qiyās* is classified as *al-ḥājah tunazzal manzilah ḍarūrah* such as 'aqad *ijārah*, 'aqad *salam*, compensation, rental (*isti'jār*), manufacturing (*istiṣnā'*), entering toilet with payment. Oni Sahroni (2015), Al-Nashmiyy (2012) had evaluated certain cases in *mua'malat* with the justification of *al-ḥājah tunazzal manzilah al-ḍarūrah*. The similar opinion shared on *al-ḥājah tunazzal manzilah al-ḍarūrah* may be applied in today's transaction of interaction. Needless to say, many *mu'āmalāt* cases were debated with *qā'idah fiqhiyyah* owing to peoples' need.

Abū Al-Ward (2010) in his observation in depth towards the need or *ḥājah* among people who lived in deprived areas which less accessibility and quality of life in various sectors either in food, treatment, clothes and education, affecting them socio-economically causing unhappiness, hence leading towards committing crimes.

However, in medical and pharmaceutical fields most necessities seem to be interlinked immediately to *hiḍḍ al-naḥs*. Do both fields can be justified by *al-ḥājah tunazzal manzilah al-ḍarūrah*? Both fields are, indeed related closely to *ḍarūrah* concept. Yet, rigorous explorations from *fiqh* perspective are further deemed. Some Shariah scholars such as Al-Matrūdiyy (2008), Al-Shamrukh (2008), Al-Jahniyy (2008) presented the solutions using *qawā'id fiqhiyyah* such as *la ḍarar wa lā ḍirār*, *al-ḍarūrah tubih al-maḥzūrāh*, *al-ḍarūrah tuqaddar biqadarihā* when confronting with new legal

medical issues. Although the *qawā'id fiqhiyyah* does not stand as justifications for specific issue, the arguments towards certain issues which applicable in timely manner.

There are some medical cases involved with the principal of *ḥājah*. This is according to jurists under the concept of *al-ḥājah tunazzal manzilah al-darūrah*. Other medical treatment in situations which categorized under that *qā'idah fiqhiyyah* such as patients with protruded teeth and required braces as treatment to allow proper teeth alignment which helps in proper eating and digestion. Other conditions with *ḥājah* in surgery, where affected body part that following accidents treated, using medicines or drugs (*takhdīr*) in surgery and derived from porcine or surgical procedure involving dead bodies for educational purpose. Isa (2016) however positioned those conditions in *darūrah* which translated into pressing need. The researcher observed that the term of pressing need is viewed as tenacious need which initially under *hajah* but later transformed into *darūrah* depending to the situation.

A doctorate thesis regarding *ḥājah* and its effect to the Islamic law written by Al-Rashīd (2008) elaborated in depth the concept including definition, legal texts from Al-Quran, hadīth, *ijmā'* or '*aqliyyah*', the types of *ḥājah*, effects upon its implementation toward shariah, the measurement of *ḥājah levels*, *ḥājah's* relation toward *maqāṣid al-sharī'ah* with *qawā'id fiqhiyyah* and vice-versa. He also discussed on the contemporary issues which applicable and practiced by the *ḥājah principle*. His writings enlightened that *ḥājah* are eligible to emerge as an important topic in *fiqh* and *uṣūl fiqh* and deemed to be explored amongst Muslim scholar nowadays. Though it was thorough, topic of unlawful medicinal substances as preventive medicine from shariah perspective was not within the context covered, nor specifically preventive treatment using unlawful substance among mothers whom are at risk of VTE.

In non-Muslim countries, the theory of *ḥājah* is deemed as a pivotal principle for Muslims who live there. It is known there are limited accessibility and various constraints to obtain *ḥalāl* *ṭayyib* products either foods, clothes or medicines. Thus, this create everlasting dilemma amongst Muslims leading to long term difficulties, especially if there are no solution given in tandem with *fiqh* justification in order to eliminate their difficulties. Al-Sa'diyy (n.d.) discussed the difficulties occurred amongst Muslims whereby if they do not apply the theory of *al-ḥājah tunazzal manzilah al-ḍarūrah* in various aspects of life such as worships, *mu'āmalah*, food, art, clothes and decorations, consequence, they will be bogged down into a straight jacket doctrine and may test their faith.

While in Malaysia, there were several papers debated regarding *al-ḥājah tunazzal manzilah al-ḍarūrah*. Kamis & Kashim (2016) in their paper entitled *Analysis of the al-Ḥājah Tunazzal Manzilat al-Ḍarūrah Doctrine in Cosmetics Fatwa* which analyzed the *qā'idah* used in cosmetic *fatwās*. The proposal tabled could be a useful guideline upon stakeholders and education for Muslim community. They figured out that cosmetic issues were among the uncommon contemporary issues which *qā'idah al-ḥājah tunazzal manzilah al-ḍarūrah* were applied.

In another hand, Subri (2016) and Ramli et al (2016), Pauzi & Man (2017), and Rohani Desa (n.d.) discussed about justifications of vaccination towards healthy children and prior to pilgrimage as prevention which are categorized as allowed (*mubāḥ*) under *al-ḍarar yuzāl* and *al-ḥājah tunazzal manzilah al-ḍarūrah*.

In a nutshell, the concept of *al-ḥājah tunazzal manzilah al-ḍarūrah* require more elaborations as people from other than shariah's background such as medical doctors may be confused with that *qā'idah* between the need or necessity.

2.4 The Concept of *Istihālah* as Legal Indicator in Imposing *Fatwā*

Istihālah is not an extraterrestrial subject and has being debated over centuries among shariah scholars. *Istihālah* is considered to be one of indicators applied in this research although it is dissected as secondary principle. A paper written by Mahaiyadin & Osman, (2017) which aimed to examine the view of Islamic authorities in pronouncing *fatwā* legally regarding the status of *istihālah* among Islamic Fiqh Council (IFC) under the Muslim World League, *al-Lajnah al-Dā'imah li al-Buhūth al-ʿIlmiyyah wa al-ʾIftā'*, Saudi Arabia and local institutions such as MCMKI and State Fatwa Committee Meeting. This is because the stance imposed by those authorities immediately affected Muslims' minds in any decision made. Mahayaidin and Osman concluded that if only *istihālah* had been accepted by MCMKI in deriving any *fatwā*, all dilemmas surrounding pharmaceuticals, cosmetics and foods issues may immediately have solved. Their preference made to understand that *istihālah* can be defined as a valid indicator in medical treatment using unlawful sources in Malaysia in order to ease the concern among Muslims' nowadays. However, the author rationalized the decision of MCMKI to refute *istihālah* owing to the virtue of extra precaution (*ihtiyāt*) basis.

Hammad (2004) stated that he has advocated both terms namely *istihālah* and *istihlāk* either in the areas of food or non-food shall be accepted as verifying tools in imposing *fatwā* without negligence regarding their provisions as both were approved in sight of shariah. Mohd IzharAriff (2017), Mohd Izhar Ariff et al., (2018) supported Hammad' opinions with regard *istihālah* concept by stating international *fatwā* and national *fatwā* regarding *istihālah* in products which majority have been accepted. However, in order to achieve *istihālah* approval, it should be preceded by laboratory proofs as evidence of purification for a true *istihālah tāmamah*.

Based on those foregoing authors, Hanafite and Malikite sects stated that the detection of physically changes over *istiḥālah* and *istihlāk* products through human eyes are deemed adequate to determine either *istiḥālah saḥīḥah* (complete transformation) or *fasādah* (imperfect transformation) in their times. However, those papers were prone to allow flexibility within the permissibility spectrum of unlawful products derivatives. However, their researchs were majorly performed on food products which are different as compare to this research. Our scope was more on medical and pharmaceutical issues.

There are some papers published recently by Irwan et al., (2018), Nur Zaireena et al., (2018), Zizi Azlinda et al., (2019) which established a research on LMWH as preventive medicine upon pregnant and puerperium and its relation to the theory of *istiḥālah*. The objectives of their papers were to analyze *fiqh* of *istiḥālah* amongst the scholars. Their studies put forward some evidences regarding the bio-chemical changes and properties of LMWH following complete *istiḥālah* process and its safety profile upon pregnant women. The porcine base anticoagulant LMWH was proven recently to be completely pure and negative of any porcine base DNA (Sanofi-Aventis, 2017), with its superiority in clinical evidences of safety profile it opens a new perspective in clinical practice especially among the Muslim practitioners. However, despite the proven purity, the porcine base LMWH anticoagulant which underwent *istiḥālah* and *istihlāk* has insufficient evidence in *fiqh* concept among the of Shafite shariah scholars and researchers.

In relation to this, Saadan (2009) presented that *istiḥālah* theory is acceptable and reasonable nowadays in Malaysia but in merely certain issues such as porcine based medicine for insulin treatment. In another hand, the issues of derived gelatin in medicines had been imposed as permissible under *ḍarūrah* yardstick. It is useful to state that *ḍarūrah* is a situation when mankind forced to surrender his or her live or any al-

ḍarūriyyāt al-khamsah. The researcher concluded that Saadan's standpoint included *ḍarūrah* principle over *istiḥālah* principle which indirectly explained his opinion towards *istiḥālah*.

Azri et al., (2017) also came out with the *fatwās* issued by MCMKI regarding several products which is allowed for *ḍarūrah* situation such as bone China products, biothrax vaccine and rotate vaccine. This paper has properly tabled the differences between few names of of porcine base such as swine, pork, pig, porcine, sow, hog, boar, lard, bacon, ham and bristle. The author stressed that *istiḥālah* theory is not widely accepted in Malaysia. Stemming from *istiḥālah* theory has less enthusiasm in Malaysia, this is the reason why, the principle of *ḍarūrah* were used to undertake the controversy issues in Malaysia.

Othman Jaludin et al.,(2018) later came and supported the same situation that current practice in Malaysia refusing to apply *istiḥālah* theory in deriving the Islamic ruling while principle of *ḍarūrah* has taken place stably in order to support some novel issues especially in pharmaceutical issues with product infused with intoxicated ingredients.

Saadon (2014) attempted in analyzing the *ijtihād* in his paper entitled *Contemporary Ijtihad on Issues of Istiḥālah: A Comparative Study Between Fatwas by Middle East Jurists and Malaysian National Fatwa Council* as comparison on this issue. This paper included a comparison on the methodologies and other factors that were taken into *fatwā* organizations in middle east and Malaysia' consideration in determining the ruling with using the *istiḥālah* principle.

Throughout his study, Saadan also described that although *istiḥālah* theory were usable by jurists in their *ijtihād* and would benefit Muslim society especially in choosing their halal food, drinks, medicine etc. The paper concluded that the *fatwā* has been

justified on the basis of lenience or strict sense, the jurists in every locality had meticulously evaluated in all aspects according to the level of need of the state.

Based on those foregoing literatures regarding *istiḥālah*, the authors did come to an agreement that *istiḥālah* has been accepted as Islamic legal ruling indicator, next to *ḍarūrah* and *ḥājah*. It is to eliminate the Muslim' burdens and hardships in their daily chores and interactions particularly for Muslim consumers in Malaysia. In this research, *istiḥālah* considered as a supporting theory, while, *ḍarūrah* and *ḥājah* are the main theories in the usage of LMWH during pregnancy and puerperium, based on the argumentation in Malaysia.

Theory of *istiḥālah* is not unfamiliar around *fiqh* pragmatic, yet still limited in its implementation in Malaysia. Porcine based medicines definitely stumbled upon tremendous difficulties attributed to bioethics in the strong-rooted Malay-Muslim community in Malaysia. However, in term of *fiqh* discipline, it is, indeed, a substantial contribution which able to solve the issues in bioethics as numerous products made out of lawful, unlawful and conglomerate items in pharmaceutical issues.

2.5 LMWH as Preventive Medicine from Shariah Perspective

LMWH is an anticoagulant that has been proven to be able to inhibit blood clotting and prevent it especially during pregnancy and puerperium. LMWH is prescribed to those women who are having risk factors of developing VTE. MOH (2014) published first edition of the *Training Manual for the Prevention and Treatment of Venous Thromboembolism in Pregnancy and the Puerperium* was published in 2014. A more recent guideline has since been published by MOH (2018) which mentioned that “besides recommending a standardized approach for documented VTE risk

stratification, the prevention of VTE through lifestyle measures, mechanical and medical thromboprophylaxis will be discussed”.

According to MOH, the percentage of women requiring thromboprophylaxis as they were medically indicated is expected to increase further in near future. However, the data of research regarding LMWH from shariah is still insufficient and the decision issued on the matter of LMWH supposedly viewed with the intention to remove the difficulties among Muslim patients especially during pregnancy and puerperium by applying *darūrah* and *hājah* yardsticks in medical or medicines cases.

MCMKI officially issued a decision regarding the prohibition of LMWH (Enoxaparin Sodium) as following:

“The usage of Clexane and Fraxiparine are necessarily needed (*darūrah*) upon patients to prevent blood clot formulation which could occur immediately in chronic condition, the committee decided to impose that both types of the medicines are prohibited due to its unlawful sources in the sight of Islam as currently there is an alternative medicine called Arixtra which is lawful source extraction and its effectiveness as similar to Clexane and Fraxiparine” (JAKIM, 2015).

Based on that decision, it is understandable that apart from unlawful sources in LMWH as main cause of LMWH usage prohibition, another reason was due to the existence and availability of *halāl* alternative which potentially to pose same functions and effects as effective as LMWH such as Clexane and Fraxiparine. Arixtra is recognized as a synthetic anticoagulant grouped under Fondaparinux Sodium. It was noted by GlaxoSmithKline (GSK) as the Fondaparinux that it is excreted in breast milk in lactating rats’ experiments. However its presence in human milk were unknown, (GlaxoSmithKline (GSK), n.d.). It also reported that Fondaparinux can cross placenta barriers in vivo (De Carolis et al., 2015, Dempfle, 2004) although Lagrange et

al., (2002) showed the report that Fondaparinux sodium does not cross the placenta barrier in their study, they were using in-vitro human and perfused cotyledon model.

In fact, Fondaparinux is an anticoagulant of choice for the mothers who are hyperallergic towards heparin group of anticoagulant or had heparin-induced-thrombocytopenia (HIT) complications (De Carolis et al., 2015). However, those literatures still unable to certain Fondaparinux safety profile upon pregnancy and puerperium. Hence, medical experts preferred to use LMWH as first choice of anticoagulant upon those mothers as fondaparinux end point risk of bleeding like UFH. As a synthetic anticoagulant, fondaparinux are irreversible in the event of bleeding complication as protamine sulfate unable to reversible the effect as compare to LMWH. Nevertheless its safety profile are very much awaited (A. G. Turpie, 2004).

A paper proposed for the parties and authorities to take halal issue seriously in order to safeguard the welfare and interest of the public. Few medicines are discussed and analyzed by Asmak et al.,(2015), for instance, an impure base medicines; firstly, insulin to treat diabetes type 1 and 2 derived originally from dog pancreas but nowadays there are alternatives with bovine and porcine. Secondly, LMWH, an anticoagulant used to avoid blood clot which are derived from porcine. Third, trypsin which is made out of pork and are used widely in food, scientific processor and medical industry. The paper proposed that those medicines which extracted from intoxicated ground should be observed seriously from all sides such as consumers, authorities, halal certification and medical practitioners to ensure halal property of the medicines.

However, according to Mahaiyadin & Osman (2015) in *Fiqh Consumerism Framework*, a guideline has been formed for shariah scholars in deducing *fatwā* in localities. The center point that had been proposed in that paper is to assist the public to

provide an opinion with less burden in Muslim societies, while emphasizing more on *ih̥tiyḁ̄t* concept due to socio-culture introduced from all over the globe.

While Hammad, (2004) supported the treatment using *ḍarūrah* and *ḥājah* premises in medical cases because medication process is all encompass of prevention and treatment. Hence, medical cases can be treated with *ḥājah*, instead of merely *ḍarūrah* measurement. However, the measurement shall be applied in systematic, thoughtful and under supervision of Muslim medical doctors, with patients' consents.

There was a paper discussed about LMWH as unlawful medicine base which published by Muhammad Mustaqim et al., (2013). That study has stipulated that Arixtra (Fondaparinux Sodium) is preferred due to non-dubious ingredients and had been verified as halal. Because of that, LMWH is disallowed for prevention blood clot for VTE condition unless in *ḍarūrah* situation. The paper, however, discussed on LMWH issue upon all types of VTE disease. However, according to MOH, pregnancy is a crucial period which there is continuous demand for LMWH supply. The paper did not take into account the justification of *ḥājah* which is viewed different from medical perspective particularly after analyzing the increment of maternal mortality statistic in Malaysia recently due to VTE.

Medicine and food are different products, hence the opportunity for Muslim users in Malaysia to obtain those products associated with different ratio of availability and feasibility. In Malaysian context, variety of foods and various kind of permissible foods are easy to access, in fact, because of less cautions in choosing nutritious foods, Malaysia superseded obesity in South East Asia. Bouzenita (2011) disagreed to the opinion that porcine inserted to produce genetic modified food (GMF) due to the principle of *ḍarūrah*, *jallālah*, *istiḥālah* and *istiḥlāk* are not transferable to the GMF

products, as it was against the principle of *ḍarūrah*. it is a big argument for the consumerism under prohibition result in between a need and necessity.

However, medical case like VTE during pregnancy and puerperium are categorized as catastrophic and lethal cases yet preventable. the pregnancy itself already a risk itself to develop into VTE, other risk factors of VTE during pregnancy and puerperium particularly following caesarean mode of delivery and obesity has been identified as escalators for the VTE event. Hence, following the examination in these situations, thromboprophylaxis using LMWH among pregnant women is proposed as permissible under *fiqh* theories such as *ḍarūrah* and *ḥājah* (Zizi Azlinda, 2019). In her paper, LMWH has been preferred compared to Heparin even though it has been derived from porcine mucosa cell, but the risk and predisposing factors of the pregnant and puerperium women which escalates to higher probability to develop VTE complications is considered as a pressed need to use LMWH as thromboprophylaxis.

In international context, the Majma' Fiqh Islāmiyy on 13-17 Dec 2003 which convened in Mecca had inferred their *ijtihād* as following; first, the *Majma'* allows LMWH in prevention of VTE, provided there is no equivalent alternative available whether in term of functions and benefits offered compared to LMWH. Second, the use of LMWH must be in controlled measurement which is consumed within its limitation without extensively (IslamOnline, 2019). Those issued decisions have their own reasonable facts which supported by *qawā'id shar'iyyah* to remove difficulties, wipe out the harm with limitation, take the lighter harm instead of the heavier between both harms or in Arabic phrase as *al-ḍarūrah tubīḥ al-maḥzūrāt* and *irtikāb akhaff al-ḍararayn li dar'i 'alaihimā*.

As a conclusion, the researcher viewed that medical issues have different perspective compared to selection in food industry. Porcine based medicine such as

LMWH is preferable to be applied in the time of *darūrah* and *hājah* as that preventive medicine supported with theory of *istiḥālah*. Consequently, the eligibility of studies with regard LMWH during pregnancy and puerperium from shariah perspective shall be verified as rigorous research on the reality of obstetric VTE demand is necessarily needed particularly over *fiqh* view.

