

CHAPTER 1: INTRODUCTION

1.0 Introduction

As a general point of view, it is agreed that the message of Islam ultimately provides guidance and direction in the best interest of the humanity (*maṣāliḥ al-‘ibād*) as explained by numerous great Muslim scholars such as al-Ghazālī¹, Ibn ‘Abd al-Salam² and al-Shāṭibī³ in their works. The acceptance of the concept that *Shari’ah* is all about *maṣlaḥah* and *mafsadah* could also be found in *Zahiri’s* legal thought, the literalist school in Islamic law.⁴ *Maṣlaḥah* itself is an intrinsic concept in *Maqāṣid al-Shari’ah*, and many scholars of *Uṣūl al-Fiqh* and *Maqāṣid al-Shari’ah* used the terms ‘*maqāṣid*’ and ‘*maṣlaḥah*’ interchangeably in their writings.⁵

This general yet essential understanding is related to every aspects and areas of Islam, including familial relations and issues. Family in Islam is meant to be an abode of peace, love, tranquillity, just and merciful. These values and objectives of the family in Islam are derived inductively from the Quranic verses concerning familial relations and issues, in addition to prophetic traditions related to the familial rulings. One of the prominent contemporary scholars highlighting ‘familial higher purpose of *Shari’ah*’ as a noble purpose that stands on its own is Ibn ‘Āshūr in his magnum opus, *Maqāṣid al-Shari’ah al-Islāmiyyah*, saying:

¹ Al-Ghazālī, *al-Mustasfā min ‘Ilm al-Uṣūl*. p. 2/482.

² Ibn Abd al-Salam, *Qawā‘id al-Aḥkām fī Iṣlāḥ al-Anām*. p. 1/14.

³ Al-Shāṭibī, *al-Muwāfaqāt*. p. 1/337.

⁴ Al-Kilānī, *Qawā‘id al-Maqāṣid ‘ind al-Imām al-Shāṭibī*. p. 129-132.

⁵ Baza, *Maṣāliḥ al-Insān*. p. 35-36.

“The consolidation and proper functioning of the family constitute the foundation of human civilization and the integrating factor of society’s law. Therefore, it has been one of the objectives of all laws in the world to take special care of the family by laying down specific rules for its formation and proper functioning.”⁶

As a brief statement, it is worth noting that in the *Maqāṣid* discourse, basically there are three categories of *Maqāṣid*, general *Maqāṣid*, specific *Maqāṣid* and partial *Maqāṣid*. In this part, basic definitions of the terms are provided as follows:

1. **General** *Maqāṣid* : These *purposes* are observed throughout the entire body of Islamic law, such as the necessities and needs, and newly proposed *maqāṣid*, such as ‘justice’ and ‘facilitation’.
2. **Specific** *Maqāṣid* : These *purposes* are observed throughout a particular ‘chapter’ of the Islamic law, such as the welfare of children in family law, preventing crimes in criminal law, and preventing monopoly in financial transactions law.
3. **Partial** *Maqāṣid* : These *purposes* are the ‘intentions’ behind specific scripts or rulings, such as the intent of discovering the truth in seeking a certain number of witnesses in certain court cases, the intent of alleviating difficulty in allowing an ill and fasting person to break her/his fasting, and the intent of feeding the poor in banning Muslims from storing meat during Eid days.⁷

⁶ Ibn ‘Āshūr, *Maqāṣid al-Sharī‘ah al-Islāmiyyah*. p. 430.

⁷ Auda, *Maqasid al-Shari‘ah as Philosophy of Islamic Law*. p. 19-20.

Maqāṣid approach has several fundamental features and roles such as interrelating universals and particulars and supervising the realizing of higher purposes of *Shari'ah*, as elaborated in the next chapter. Moreover, the immense significance of the *Maqāṣid* also pertains to its absolute status encompassing the different times and places. At the same time, the relative challenges, realities and issues are always in need of the new *fatwas* as well as the most accurate, practical and more prioritized decrees of our contemporary times.⁸ This is the very substance of al-Qarāfi's statement, saying "to always be stagnant to the scholars' texts is astray of the religion as well as an ignorance of the intents of Muslim scholars and the early generation of them."⁹

Accordingly, some Muslim scholars have strengthened and preferred several classical juridical opinions that once were considered 'weak', but after being scrutinized from the Islamic point of view by referring to the *Maqāṣid*, the opinions are recommended to be applied in the different contexts and challenges.¹⁰ This dialectic relationship between the *Maqāṣid* and the realities and challenges is indispensable for our times in order to critically examine new challenges and issues of the Islamic thought, in general, and to the *fiqh* or Islamic jurisprudence, in particular.

The issues and challenges relating to the *fiqh* of family may be exemplified by several familial matters that have been extensively discussed by researchers and scholars, for instance, the compatibility of CEDAW (Convention on Elimination of All Forms of Discrimination Against Women) with Islamic law,¹¹ marital rape,¹² conversion to

⁸ Baza, *Maṣāliḥ al-Insān*. p. 401.

⁹ Al-Qarāfi, *al-Furūq*. p. 1/387.

¹⁰ Bin Bayyah, *Maqāṣid al-Mu'āmalāt wa Marāṣid al-Wāqi'āt*. p. 119-210; Bin Bayyah, *Mashāhid min al-Maqāṣid*. p. 191.

¹¹ Ibrahim, *Family Law: Non-Muslims in Malaysia*. p. 10-22

Islam and its implications,¹³ and custody of children.¹⁴ Moreover, Bin Bayyah suggests several issues relating to family relations to be revisited, including the issues of maintenance, divorce, custody, and many others, in order to exercise the independent reasoning by verification of the basis of rulings.¹⁵

Thus, due to significant changes reflecting various aspects of life and society, this research aims to tackle and address familial issues as one of the crucial areas of life and society, as it is highly concerned in Islam. In light of *Maqāsid al-Sharī'ah*, this research is focused on the *fiqh* of family issues in the Malaysian context by examining the status of *nasab* (blood relation) of illegitimate children.

1.1 Problem Statement

There is an approach that underlies all interpretations of the Islamic Scriptures and the application of Islamic jurisprudence. Interestingly, the discourse on the approach of Islamic research and study has been ceaselessly explored, creatively expanded, and even respectively criticized since the early generation of Muslim scholars to the contemporary age. According to Alwani, one of the problems in Muslim legal thought is ignoring numerous universals and purposes of the Quran, and dedicating to particular divine texts based on the reductionist approach. Unlike the approach, the

¹² Ibid., p. 120-121.

¹³ Ibid., p. 183-223.

¹⁴ Ibid., p. 300-337.

¹⁵ Bin Bayyah, *Tanbīh al-Marāji' 'alā Ta'ṣīl Fiqh al-Wāqi'*, p. 107.

prophetic approach focuses on creating a purposive universal mind; thus the verse 3:164 in the Quran identifies the fundamental roles of the Prophet.¹⁶

Moreover, in describing the problem of some contemporary approaches to the divine texts, al-Qaraḍāwī classifies them into three schools of thought, the 'Neo-Literalist', 'Modern Denouncers of Scripture' and 'Centrism or Moderation'.¹⁷ In a more detail explanation of the features of the schools, while appraising the 'moderation' school, he presents the negatives of the former and latter. As asserted by him, among the fundamental features of the 'Centrism or Moderation' school are the constructive analysis of the purpose of the divine text before issuing Islamic ruling,¹⁸ and to differentiate between the permanent purposes of *Shari'ah* and the changeable means.¹⁹

Furthermore, by using different terms yet containing very similar substances, 'Imārah describes three general trends in the contemporary Islamic thought represented by 'imitators of the past Muslim intellectual heritages', 'imitators of the western' and 'revitalization and renewal'.²⁰ In an extensive study on the universal principles of *Shari'ah*, al-Raysūnī criticizes majority Muslim jurists' approach that is considered over-concentrated on the partial Islamic texts while giving a very small portion of their focus on the universal principles and higher objectives of *Shari'ah*.²¹

¹⁶ 'Alwānī, *Maqāṣid al-Sharī'ah*. p. 41.

¹⁷ Al-Qaraḍāwī, *Dirāsāt fī Fiqh al-Maqāṣid*. p. 39-41.

¹⁸ Ibid., p. 155.

¹⁹ Ibid., p. 174.

²⁰ 'Imārah, *Azmat al-Fikr al-Islāmī al-Mu'āṣir*. p. 58-84.

²¹ Al-Raysūnī, *al-Kulliyāt al-Asāsiyyah li al-Sharī'at al-Islāmiyyah*. p. 182.

Based on the aforementioned highlights by the scholars, in sum, the crucial problem viewed by this research is manifested by the limited presence of *Maqāṣid al-Sharī'ah* approach in dealing with the Islamic jurisprudence's issues specifically concerning *nasab* of illegitimate child. Therefore, "Islamic thought must undertake a methodological study to articulate the *Shari'ah* aims, purposes and directives so that these may serve as introductions to Islamic studies in various fields of life,"²² as clearly stressed by AbuSulayman.

Since the mentioned problem relating to the theoretical, the second problem is relating to the practical as both is interrelated. Regarding practical, several scholars opine that the approach's problem is also related to the strict interpretation and adherence to the *madhhab* (Islamic jurisprudence's school),²³ and overlooking the importance of considering the realities before issuing an opinion.²⁴

The same is for the case of *fiqh* of family in Malaysia, specifically on the determination of the *nasab* status of illegitimate children. There are two positions by Syariah High Court concerning the issue of an illegitimate child. The first, which is also the predominant position, disallows illegitimate children from being attributed to their biological father. This position is in resemblance to all *fatwa* committees from the different states in Malaysia except Perlis.²⁵ Meanwhile, the second position permits the illegitimate child to be attributed to his/her biology father with certain conditions.²⁶

²² Abu Sulayman, *Crisis In The Muslim Mind*, p. 100.

²³ Ibid., p. 4-5.

²⁴ Bin Bayyah, *Tanbīh al-Marāji' 'alā Ta'ṣīl Fiqh al-Wāqi'*, p. 9.

²⁵ Hasan, "An Analysis On The Illegitimate Child Cases In The Syariah Court."

²⁶ Ibid.

The polemic debate on the *nasab* of an illegitimate child in Malaysia illustrates the difference of opinions among scholars and their approach to interpreting Islamic scriptures and applying Islamic jurisprudence. The number of cases has also been increasing as The National Registration Department (NRD) statistics show that a total of 159,725 children were born out of wedlock to Muslim mothers since 2013. Of this number, 53,492 were born in 2013, 54,614 in 2014 and 51,169 in 2015.²⁷ Given these problems and issues, this study attempts to explore and analyse a *Maqāṣid* approach to the contemporary *fiqh* of family in the Malaysian context. The actualization of *Maqāṣid* approach in the *fiqh* of family will be clearly illustrated and analysed in the case of the status of *nasab* (blood relation) of an illegitimate child.

1.2 Research Questions

- 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 *dawabit* 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?

²⁷ Ahmad, "159,725 Anak Tak Sah Taraf Didaftar Sejak 2013."

1.3 Research Objectives

- 1) Developing *Maqāṣid al-Sharī'ah* approach for contemporary *fiqh* of family.
- 2) Contextualising the *Maqāṣid al-Sharī'ah* approach on the *fiqh* of family in the case of *nasab* of an illegitimate child.
- 3) Formulating parameters of realizing the *Maqāṣid al-Sharī'ah* in the familial issues.
- 4) 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.

1.4 Significance of the Study

The study explores discourse on the *Maqāṣid al-Sharī'ah* pertaining to familial issues. It also utilizes the thematic method of interpreting the Quran. The interpretation is critical because all verses from the beginning to the end of the *sūrah* (chapter) are like a word in terms of interconnecting verses²⁸, and even the whole Quran, since the meaning of a verse cannot be understood unless it is clarified by other verses of a different place or *sūrah*.²⁹

Meanwhile, the thematic interpretation of the Quran is also a crucial aspect in exploring the Quranic concepts and the purpose of the *Shari'ah*. For instance, the

²⁸ Al-Shāṭibī, al-*Muwāfaqāt*. p. 3/351.

²⁹ Ibid., p. 3/355-356.

concepts of *taqwa*, family and *nasab* in light of the Quran is derived from the thematic interpretation since the 'interpretation of the Quran by the Quran' is considered the most accurate, followed by the interpretation of the Sunnah.³⁰ This interpretation urges us to employ inductive reasoning that is indispensable in extracting the purposes of *Shari'ah*.³¹

The reasoning is the process of using enumeration that is undertaken through the sources of *Shari'ah*.³² This kind of reasoning is considered fundamental, especially in the study of *Maqāṣid al-Sharī'ah*. Therefore, al-Shāṭibi and Ibn 'Āshūr, as two examples of classical and modern scholars of this discipline, extensively use it in their exploration of the purposes of *Shari'ah*. For instance, al-Shāṭibi asserts that if from the induction of all the evidence on an issue that a combined meaning emerges providing certain knowledge, it becomes the desired evidence, and it is similar to what is called *mutawatir* in meaning.³³

Accordingly, al-Shāṭibi relies upon induction in general, and in determining the purposes of *Shari'ah* in particular.³⁴ The same goes with Ibn 'Āshūr, who stresses that an inductive examination of numerous indicants in the Qur'an and the authentic Prophetic traditions allows for the compelling conclusion that the rules of the *Shari'ah* are based on inner reasons and causes that devolve upon the universal goodness and benefit of both society and individuals.³⁵

³⁰ Al-Ṭayyar, *Sharḥ Muqaddimah fī Uṣūl al-Tafsīr*. p. 271-285.

³¹ Ibn 'Āshūr, *Maqāṣid al-Sharī'ah al-Islāmiyyah*. p. 190.

³² Al-Shāṭibi, *al-Muwāfaqāt*. p. 1/48.

³³ Ibid., p. 1/50.

³⁴ Al-Rayṣūnī, *Naẓariyat al-Maqāṣid 'ind al-Imām al-Shāṭibī*. p. 312.

³⁵ Ibn 'Āshūr, *Maqāṣid al-Sharī'ah al-Islāmiyyah*. p. 180.

Furthermore, this study provides principles and references to utilize *Maqāṣid al-Sharī'ah* in dealing with the current issues and challenges in the *fiqh* of family. Among the imperative principles are the purposefulness of *Shari'ah*³⁶ and *maṣlaḥah* as a principle of legal reasoning.³⁷ Based on the findings, the study formulates guidelines or parameters of realizing *Maqāṣid al-Sharī'ah* based on the *Maqāṣid* approach. These guidelines may be helpful as a reference in dealing with family-related issues and challenges, specifically in the case of *nasab* status of illegitimate children.

1.5 Research Scope

This study mainly concentrates on the dimension of *fiqh* rather than the law-related aspects and discourses. The focal point of this study is the application of *Maqāṣid al-Sharī'ah* in contemporary *fiqh* of family in the Malaysian context. The discourse on *Maqāṣid al-Sharī'ah* involves the examination of methodological issues of Islamic jurisprudence in order to articulate the *Shari'ah* aims, purposes and directives.

As a case study, this research 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. The findings of this research offer the features and roles of *Maqāṣid* approach, preference of different positions on the issue of *nasab* of illegitimate child,

³⁶ Al-Shāṭibī, *al-Muwāfaqāt*. p. 2/334.

³⁷ Masud, *Shatibi's Philosophy of Islamic Law*. p. 127.

and guidelines for realizing the principles of *Maqāṣid al-Sharī'ah* in the Malaysian context.

1.6 Definition of Terms

Maqāṣid Approach

As an extensive discussion on the definition of *Maqāṣid* is presented later in the chapter two, therefore only a brief introduction to the essential term is mentioned herein. Accordingly, al-Raysūni's definition is ample to be quoted. As stated by him, *Maqāṣid al-Sharī'ah* can be simply understood as “the purposes which the law was established to fulfill for the benefit of mankind.”³⁸

This can be concluded that *Sharī'ah* is all about drawing benefits to and preventing harms from humanity. All the commanding and prohibitions, as well as the simply permitted acts, have their pearls of wisdom, divine secrets and interests to be achieved. Indeed, this intrinsic characteristic of *Sharī'ah* gives impact to the study of Islamic issues and implies dealing with all issues in the light of Islam.

Meanwhile, the word approach has several meanings; one of them is “a way of considering or doing something”³⁹ and this meaning is intended by this research. Thus, when combining the word ‘*Maqāṣid*’ with the word ‘approach’, it can be concluded that *Maqāṣid* approach is the adoption of purposes and intents of *Sharī'ah*

³⁸ Al-Raysūni, *op cit.*, p. 19.

³⁹ “Approach - Definition.”

as a framework in interpreting the Islamic scriptures, as well as exploring and examining issues and challenges in the Islamic Law.

Fiqh of Family

Fiqh of family is constituted of two words, the second is in English and basically, its meaning is clear, while the first is in Arabic and needs further explanation. Notwithstanding the precise meaning of the word ‘family’, it should be stressed that only the relevant meanings to this research’s purpose are accepted, hence excluding some other meanings. For instance, in a dictionary, there are seven different meanings of family. Despite the diversity of meanings, the meaning of family here only confines to a social unit consisting of parents and the children they rear namely the children of the same parents; one’s husband (or wife) and children; a group of people related by ancestry or marriage; relatives.⁴⁰

Meanwhile, in defining *fiqh*, according to al-Aṣṣafahānī, *fiqh* signifies to arrive at an unseen knowledge by using seen knowledge; hence, it is more specific than knowledge. *Fiqh* also, he continued, denotes comprehension of divine judgements.⁴¹ On a broader explanation of the definition, al-Jurjani says, *fiqh* denotes to comprehend the purpose of the speaker’s speech. Technically it is the comprehension of the practical judgements derived from their comprehensive sources. It is said that *fiqh* is to apprehend the hidden meaning, where the judgement depends on. It is a discipline originated by reason and requires insight and intellectual contemplation. Therefore, it is prohibited to call the Almighty Allah as *faqīh* (one who practices *fiqh*) because

⁴⁰ Agnes, *Webster’s New World College Dictionary*. p. 512.

⁴¹ Al-Aṣṣafahānī, *Mufradāt Alfāz al-Qur’ān*. p. 487.

nothing is hidden from Him.⁴² Therefore, based on the foregoing definitions, *fiqh* of family may be defined as a deep comprehension of the practical commands pertaining to family that is derived from their comprehensive sources.

Illegitimate Child

One of the definitions of the illegitimate child refers to “the condition before the law, or the social status, of a child whose parents were not married to each other at the time of his or her birth.”⁴³ Apparently, this definition is based on a legal perspective, along with certain countries contexts, hence lacking the Malaysian context and the Islamic jurisprudence’s perspective.

In the Encyclopedia of Islamic Jurisprudence (*Al-Mawsū‘at al-Fiqhiyyah al-Kuwaytiyyah*), illegitimate child is a child born to a mother as a result of adultery.⁴⁴ It is also defined as a child that is given birth by its mother through adultery, not marriage.⁴⁵

In this regard raised the jurisprudential issue on the minimum months for a child to be delivered by a pregnant woman. Jurists concur that the earliest month for a child to be born is sixth. This is concluded based on the interpretation on two interrelating verses, 46:15 and 2:233. The verse 46:15 mentions thirty months for the period of carrying the child to his weaning, while the 2:233 is on the suckling children for two whole years for mothers who wish to complete it. When combining these verses, it eventually

⁴² Al-Jurjāni, *Kitāb al-Ta‘rīfāt*. p. 168.

⁴³ “Illegitimate Children.”

⁴⁴ *Al-Mawsū‘at al-Fiqhiyyah al-Kuwaytiyyah*. p. 3/70.

⁴⁵ *Ibid.*, p. 45/204.

results that the earliest month is sixth.⁴⁶ Obviously, this shapes the definition of illegitimate child in the Malaysian Islamic Family law as shown shortly.

In Act 303 of Islamic Family Law (Federal Territory) Act 1984, illegitimate, in relation to a child, means born out of wedlock but not as a result of *syubhah* intercourse.⁴⁷

Muzakarah of the National Fatwa Council defines an illegitimate child as one who is born out of marriage either because of adultery or rape. Moreover, he/she is not born from a 'doubted sexual intercourse' or slavery or the child who is born less than six months and two seconds after the sexual intercourse according to the Islamic calendar.⁴⁸

Despite the different meanings of the term, this study's concern is merely on the *nasab* status of children born out of wedlock. This means that the research's intended meaning lies in the child born out of marriage, as specified in Act 303, as well as in the Muzakarah of the Fatwa National Council.

1.7 Literature Review

The studies and researches on the *Maqāṣid al-Sharī'ah* have reached an advanced stage of development, as claimed by al-Raysūni. Besides the reason of the existence of

⁴⁶ Al-Qurtubi, *al-Jāmi' li Ahkām al-Qur'ān*. p. 16/126.

⁴⁷ Act 303 Islamic Family Law (Federal Territory) (1984).

⁴⁸ "Kompilasi Pandangan Hukum Muzakarah Jawatan Kuasa Fatwa Majlis Kebangsaan Bagi Hal Ehwal Ugama Islam Malaysia."

the ‘specific principles’ of *Maqāṣid* in the current *Maqāṣid* study, he also stresses that there are hundreds of studies written in the field of *Maqāṣid* by numerous scholars and researchers whether in Arabic or English.⁴⁹

Seemingly, the claim made by al-Raysūni has also been highlighted by Bin Bayyah, in his opinion regarding the ‘mature’ of *Maqāṣid*’s definitions in contemporary studies.⁵⁰ Evidently, in his 10 volumes book, Imam has listed numerous works from more than a thousand years ago to current time related to *Maqāṣid* studies.⁵¹

Despite the innumerable studies on *Maqāṣid* from many scholars, as claimed by Kamāl al-Din Imam, there is still a vast and active intellectual movement in this field, especially since the classical studies of *Maqāṣid* were part of the *Uṣūl al-Fiqh* and not on its own. This study does not deny the intrinsic relation between *Maqāṣid al-Sharī’ah* and *Uṣūl al-Fiqh*,⁵² instead aims to contribute to the existing studies on *Maqāṣid al-Sharī’ah* by examining certain issues in order to realize the *maqāṣid* in our challenging times.

In this respect, there should be no claim to limit the great purposes (*al-Maqāṣid al-Kubrā*) to specific findings only.⁵³ The reason is that the Quran, as the primary source of Islam, is always open to be creatively and critically read and reread in exploring new wisdom behind the divine verses. Accordingly, there is a need to examine many issues in current time by utilizing the *maqāṣid* approach in every aspect of our life,

⁴⁹ Al-Raysūni, *al-Qawā’id al-Asās li ‘Ilm Maqāṣid al-Sharī’ah*. p. 6-7.

⁵⁰ Bin Bayyah, *‘Alāqat Maqāṣid al-Sharī’ah bi Uṣūl al-Fiqh*. p. 14-15.

⁵¹ Imam, *al-Dalīl al-Irshādī*.

⁵² Bin Bayyah, *op. cit.* p. 134.

⁵³ *Ibid.*, p. 31.

including familial relation and issue. Among the issues of the familial relation is the status of *nasab* of the illegitimate child.

According to this study, there are pieces of literature that are concerned with this topic. They are categorized and discussed into three main themes, namely *Maqāṣid al-Sharī'ah*, *fiqh*, and legal perspectives,

1.7.1 *Maqāṣid al-Sharī'ah* Perspective

There are numerous studies written in the field of *Maqāṣid al-Sharī'ah*. One of the studies is primarily based on the *Maqāṣid* approach is *al-Ussrat fī Maqāṣid al-Sharī'ah: Qirā'at fī Qaḍāyā al-Zawāj wa al-Ṭalāq fī Amrikā* (The Family and *Maqāṣid al-Sharī'ah*: Marriage and Divorce in American Muslim Family).

In this book, Zainab Alwani examines the theory of '*maqāṣid* of family' as well as the issues of family in America, specifically those pertaining to marriage and divorce. The author dedicates almost half of her study demonstrating the concept of *maqāṣid al-sharī'ah*, and the development of specific *maqāṣid* of family among the scholars throughout history from the classical time to the contemporary day.⁵⁴ She provides vital information about the realities of the Muslim families in America and demonstrates the approach of realization of *Maqāṣid* in America.⁵⁵ The last subtopic

⁵⁴ 'Alwānī, *al-Ussrat fī Maqāṣid al-Sharī'ah: Qirā'at fī Qaḍāyā al-Zawāj wa al-Ṭalāq fī Amrikā*. p. 33-145.

⁵⁵ *Ibid.*, p. 147-302.

in the dissertation is the parameters for exploration and realization of the family-related *Maqāṣid*.⁵⁶

Notwithstanding the well-written work on the topic, certain considerations should be taken. First, this dissertation's focal point is examining the issue of marriage and divorce in America. In contrast, the central point of this research is the actualization of the *Maqāṣid* approach in the Malaysian context. On the other hand, Alwani has limited her study to the issue of marriage and divorce, whereas this study attempted to examine the status of *nasab* of an illegitimate child.

Meanwhile, Maher Haswa in *Maqāṣid al-Uṣrah wa Usus Binā'ihā fī al-Ru'yat al-Islāmiyyah* (The Higher Objectives of Family and Foundations of Its Building from The Islamic Perspective) explains the notion of family related *maqāṣid* and its foundations from the Islamic perspective.⁵⁷ As lucidly noted from the title, this study is substantially divided into two parts, firstly, the higher objectives of *Shari'ah* for the family's rulings, and secondly, foundations of building a family from the Islamic perspective. This study recommends that the family in Islam should reflect the holistic perspective of Islamic revealed teachings. It also emphasizes the urgency of reform in the familial issues by mobilizing and developing efforts in order to achieve its objectives.

Despite the visualized concept, the practical dimension is still lacking in this study, especially of the contemporary challenges and issues in the *fiqh* of family. Moreover, the author himself leaves this study with two important questions to be answered; one

⁵⁶ Ibid., p. 303-354.

⁵⁷ Ukasha and Zaytun, *al-Uṣrat al-Muslimah Fi Ḍill al-Taghayyurāt al-Mu'Āṣirah*. p. 181-216.

of them concerns the consequence behind the disregard— totally or partially of *Maqāṣid* of the family to the family-related rulings. The other is, “what is the Islamic jurisprudence’s process and choices in the legal legislating to realize the *Maqāṣid* of the family?”⁵⁸ Significantly, both questions form the basis of this study’s examination.

In addition to both studies that were explicitly explaining the higher objectives of *Shari’ah* of family, Jamīla Tilwout comes out with quite different attention. In her research titled *Maqāṣid al-Ussrah fī al-Qur’ān: Min al-Insān ilā al-‘Umrān* (Higher Purposes of Family in al-Quran: From Human To Civilization),⁵⁹ she explains the relationship between the preservation of family and civilization in light of the specific purposes of family in the Quran.

Tilwout insists that the preservation of family is an essential objective since it primarily preserves people and secondarily preserves human social organization. This study is not only an explanation to the Quranic concepts that constituted of the purposes; instead, she contends the essence of considering *zeitgeist* in understanding family from the higher purposes of the Quran due to many new challenges faced by family institutions nowadays. Nevertheless, the very gap in her article to this study is the absence of a specific study to answer familial issues and challenges except for specific critiques to the modern’s concepts of family that contradicted to the specific purposes of family in the Quran.

⁵⁸ *ibid*, p. 216.

⁵⁹ Tilwout, “*Maqāṣid al-Ussrah fī al-Qur’ān: Min al-Insān Ilā al-‘Umrān*.”

Besides the abovementioned studies, a study on ‘Gender Issues in Islam: Recovering the Measure and Restoring the Balance’ by Mohammed El-Tahir El-Mesawi attempts to resolve the issues of woman and gender. Since the study is only “a preliminary attempt at opening a new direction and offering a different perspective” in the debate of gender issues in Islam, obviously the central point of this study endeavours to provide a different Islamic conceptual in dealing with the gender issues.⁶⁰ Despite his analysis of the *Maqāṣid*-based approach to woman and gender issue’, it is found that the study does not provide ample attention to demonstrate a *Maqāṣid*-based approach to woman and gender issue. Moreover, the study also silent on the application of *Maqāṣid* approach in the context of *fiqh* of family.

As a result, obviously the research gap between this thesis and the abovementioned studies relating to *Maqāṣid al-Sharī‘ah* perspective revolves around two main issues. Firstly the difference of context emphasized as shown in the al-Alwani's study that applies to the American context, which is totally different with this research. Secondly, the silence on the application as demonstrated in the studies by al-Haswa, Tilwout and el-Mesawi as the theoretical dimension emphasized rather than practical, whereas the second half of this research is on the application of the theory.

1.7.2 *Fiqh* Perspective

Abdou Samad and al-Quibaty re-examined the topic of *nasab* (lineage) of a child that was born out of wedlock in light of higher objectives of *Shari‘ah*. This study is

⁶⁰ El-Mesawi, “Gender Issues in Islam: Recovering the Measure and Restoring the Balance.”

primarily and intensively dedicated to examining the issue of *nasab* as well as the methods of proving the status of *nasab* from the Islamic jurisprudence perspective.⁶¹

Notwithstanding, the objectives of *Shari'ah* in the research have only been given a small space of explanation and almost limited to the protection of progeny. This is so, despite its extensive purposeful concepts that can be extracted from the Islamic scriptures like care of family, care of children, preservation of civilization by preserving people who will build and develop civilization, to name a few.

Among other significant studies from *Fiqh* perspective is *Athar al-Başmat al-Wirāthiyyah fī Qadāyā al-Aḥwāl al-Shakhṣiyyah* (The Implication of DNA to the Issues of Islamic Family Law), a thorough study on the topic by Manāl al-'Ashi.⁶² As obviously understood by its title, this study answers explicitly questions of DNA, its legitimacy to be considered as shreds of evidence in legal issues, to what extent it could be considered in the Islamic law and others that are substantially related to the previous questions. Thus, it provides relationship with a study case in this research about the lineage of a child who was born out of marriage, primarily explicated in chapter three of the dissertation.

Nevertheless, two fundamental elements in the dissertation are not related to this study. First, this study is basically divided into two crucial categories. Firstly, *Maqāṣid* approach that is not considered among the main research questions of the dissertation. Secondly, even though the issue of *nasab* has been examined respectively

⁶¹ Samad and al-Quibaty, "Lineage of Illegal Child: Fiqh Study in Light of Purpose of Conservation of The Offspring."

⁶² Al-'Ashi, "*Athar al-Başmat al-Wirāthiyyah fī Qadāyā al-Aḥwāl al-Shakhṣiyyah*."

by Manāl al-'Ashi and both previously mentioned authors (Abdou Samad and al-Quibaty), rather the question still exists, at least that in light of the Malaysian context, as proved later.

Furthermore, since this study concerns the Malaysian context, the issue of circumstance, surrounding and condition certainly should be covered too. *Athar al-'Urf wa al-Taḥawwulāt al-Ijtimā'iyah fī al-Usrat al-Muslimah* (The Implications of Custom and Social Changes To Islamic Family) by Rahmani contributes to this topic in light of the principle of *'urf* (custom). This article is limited to explain the implications of custom and social changes to the Islamic family. The study emphasizes that custom is a part of the Islamic principles and should be considered before issuing and practising a ruling. Furthermore, Rahmani stresses that the negative impacts of the social changes should be tackled, and there should be a strategy in changing the adverse conditions to be positive.⁶³

Despite the relevance of the study, there is no specific discourse and emphasis on the *Maqāṣid*-based approach in dealing with the custom and social changes. In contrast, higher purposes of *Shari'ah* is very fundamental in examining customs such as the differentiation of permanent objectives and changeable ways of realizing them and comparing the benefits and harms in a certain context in order to achieve love, mercy and other specific objectives of the family.

Finally, it can be concluded that the main gap between the studies relating to the *fiqh* perspective and this research is the lack of referring to *Maqāṣid al-Sharī'ah* as an

⁶³ Ukasha and Zaytun, *al-Usrat al-Muslimah Fi Zill al-Taghayyurāt al-Mu'Āsirah*. p. 356-358.

approach while examining the case of *nasab* of illegitimate child, not only looking into certain aspect of *Maqasid* as have been done by Abdou Samad and al-Quibaty. Furthermore, there is another significant gap relating to the Malaysian context because unlike this research, *fiqh* discourse in the studies is not examined in light of it.

1.7.3 Legal Perspective

Several studies are deemed to be pertinent to this research. An article named Terengganu Shariah High Court Decision On Illegitimate Child: Legal Crisis? analyzes some of the Terengganu Shariah High Court decisions concerning illegitimate child. The decisions are studied from the point of whether it is contrary to the fatwa of State Fatwa Committee or not.⁶⁴

There are four cases presented and each of them has its own situation. The situations are the legitimation of child born less than six months of the date of marriage, the legitimation of child born more than six months of the date of marriage, the legitimation of child born after the divorce of its parents, and the legitimation of child born out of *watie syubhah*. In sum, it could be simplified that there are only two situations which are children that are born less than and more than six months. Consequently, the order of the court that held the legitimation of the child born less than six months made the article to finally suggest for revisiting the result as such order needs a clearer provision from the law.

⁶⁴ Irwan Mohd Subri et al, "Terengganu Shariah High Court Decision On Illegitimate Child: Legal Crisis?"

However, as obvious from the title and its main content, the scope of the *fiqh* addressed on the topic is too limited, as it is simply presented without critically examining the opinion of both the opponents and proponents of the legitimation. The article may achieve its objective, but it also demonstrates the gap between it and this research.

Another study titled Registration Problems of Illegitimate Children Among Muslims In Malaysia,⁶⁵ aims at explaining the issues of illegitimate child pertaining to the fatwa on *nasab* in Malaysia, child registration procedures at the National Registration Department, and arising legal issues. The findings of the study concluded that there are two fatwas regarding the *nasab* of a child's birth and the registration of the illegitimate child. Consequently, there appears to be ambiguity in the state of Perlis with regard to the unlawful registration of children as to which authority should be referred by Perlis's NRD; whether the National Fatwa Council or the state fatwa, even though the informant claimed that, as a federal agency, Perlis's NRD must comply with the national fatwa. The article ends up by strongly suggesting the community to seek the authorized agencies if they face any arising issues or problems relating to an illegitimate child so that the best possible solutions can be provided.

Nevertheless, the gap between the article and this study lies in the main focus of it, which is a legal perspective, whereas Islamic jurisprudence's perspective is emphasized here. Moreover, unlike the article, the Malaysia Islamic Family Law is only referred to as better. The other existing gap is that the article does not focus on the *fiqh* perspective; thus, there is no need to utilise *Maqāṣid* approach in the study.

⁶⁵ Bakar, "Registration Problems of Illegitimate Children Among Muslims In Malaysia."

As a result, the emphasis is different from this study which mainly utilises the approach.

In addition, another study was done on Illegitimate Child from The Perspective of *Shari'ah* and Islamic Law in Malaysia.⁶⁶ The author, Paizah Hj Ismail, analyses the different opinions among scholars and the stand of fatwa in the issue of an illegitimate child. She also examines the Islamic Family Law in Malaysia and its implications for illegitimate child's position in the family, particularly in determining the name and inheritance problem.

As her study was dedicated to the issue of the illegitimate child from the *Shari'ah* perspective and Islamic Law in Malaysia, she concluded that a child is considered legitimate, by the current Muslim community in Malaysia, if born as a result of a valid marriage in the eyes of religion and the Islamic Family Law of the States. The study does not emphasize and discuss the *Maqāṣid*-based approach and *fiqh* discourse alike, in dealing with the issue. *Maqāṣid* principles and rational arguments are useful to offer an alternative opinion in light of the Malaysian context, at least for some instances, if not all.

Therefore, there are also significant gaps between legal perspective studies and this research. As can be clearly seen, the main gap is the absence of *Maqāṣid* approach in the studies. Another gap is the reduction of *fiqh* discourse even in the study claiming to be emphasizing on both the law and *fiqh* as conducted by Paizah, as reviewed earlier.

⁶⁶ Ismail, "Anak Tak Sah Taraf Dari Perspektif Syariah Dan Perundangan Islam Di Malaysia."

1.8 Research Methodology

Since this research is theoretical and conceptual, the researcher considers that the qualitative research approach is an appropriate methodology. This research employs a qualitative methodology, involving library research by primarily utilising research materials related to this study, including books, journals, *fatwas*, seminar/conference papers, cases law and other documents. Moreover, in order to obtain further information about the subject, a semi-structured interview had been conducted with Yang Arif Mr Zulfikri bin Yaso', High Syariah Court Judge of Selangor. Considering the nature of this research, a qualitative methodology used in this study would be able to meet the research aims, questions and objectives given the nature of the research.

Regarding the interpretation of Islamic scriptures, the study majorly employs *Maqāṣid* oriented approach. The features and roles of this approach are extensively examined in chapter two. Moreover, inductive reasoning, which is intrinsic in the *maqāṣid* approach, is utilized in exploring specific purposes of familial relations. The method is also primarily related to the thematic reading of the Quran. Thus, thematic reading of the Quran is also employed for *Shari'ah* investigation purposes and identification of certain Quranic concepts related to this study.

Meanwhile, for the translation of the verses of the Quran cited herein, both English translations of the Quran by Yusuf Ali and Marmaduke Picktall are widely referred. Concerning the translations of the hadiths cited in this study, English translations of

Ṣaḥih *al-Bukhari*,⁶⁷ Ṣaḥih Muslim,⁶⁸ and Abu Dawud⁶⁹ used. Moreover, since this research is related to the Islamic Law, the using of certain terminologies originated from Arabic language is indispensable. Therefore, for the meanings of the terminologies, English translations of several Islamic Law books are always benefitted from, specifically the translations of the Shafi'i's *al-Risalah*,⁷⁰ first half of Shatibi's *al-Muwafaqat*,⁷¹ and Ibn 'Āshūr's *Maqāṣid al-Sharī'ah*.⁷²

1.9 Organisation of Chapters

This research is divided into four chapters. Chapter 1 sets forth the research questions, objectives, significance, scope of the thesis and the research methodology. This chapter also discusses literature reviews relating to the study, specifically on *Maqāṣid*, *fiqh* of family, and legal perspectives.

The next chapter explores the conceptual framework of the *Maqāṣid* approach, as well as its features and essential roles in Islamic Law. The chapter demonstrates the reason for examining *Maqāṣid* approach separately from *Uṣūl al-Fiqh*, despite the significant relationship of both disciplines.

Chapter three attempts to contextualise *Maqāṣid al-Sharī'ah* approach in the contemporary *fiqh* of family in the case of *nasab* of illegitimate child. In this chapter,

⁶⁷ Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, 2007.

⁶⁸ Hajjaj, *Ṣaḥīḥ Muslim*, 2007.

⁶⁹ Dawud, *Sunan Abū Dāwud*, 2008.

⁷⁰ Al-Shāfi'i, *al-Risālah*, n.d.

⁷¹ Al-Shāṭibī, *al-Muwāfaqāt (The Reconciliation of The Fundamentals of Islamic Law)*.

⁷² Ibn 'Āshūr, *Maqāṣid al-Sharī'ah al-Islāmiyyah (Treatise on Maqasid Al-Shari'ah)*.

the study discusses contemporary *fiqh* of family issues by referring Islamic Family law, court cases and *fatwas* from States and Federal Territories regarding *nasab* of illegitimate child. This chapter then examines and analyses the position of *nasab* of illegitimate child from the perspective of Islamic jurisprudence in light of *Maqāṣid* approach.

Finally, the last chapter concludes and offers several recommendations of the study. This chapter summarizes the overall findings and discussion of the research. The study also offers several recommendations in the form of parameters or *Dawabit* on *Maqāṣid al-sSharī'ah* approach in the familial relations in the context of Malaysia. The chapter ends the discussion with an explanation on the limitation of the study and suggestion for further research. Notwithstanding the limitation, the study has yielded sufficient findings to meet the overall research objectives as well as being able to answer the entire research questions.

1.10 Conclusion

This research aims to explore and develop a *Maqāṣid* approach to contemporary *fiqh* of family in the Malaysian context. The study discusses *Maqāṣid al-Sharī'ah* as an approach by exploring the existing thoughts as well as critically and creatively expanding the approach and highlighting its roles. The research contextualises the *Maqāṣid*-based approach on the contemporary *fiqh* of family by referring to the issue of *nasab* of an illegitimate child. This research argues that the analysis, findings and recommendations from an in-depth study into this area will contribute something

significant towards resolving contemporary *fiqh* of family issues as in the case of *nasab* of an illegitimate child and enriching the discourse on *Maqāṣid al-Sharī'ah* in the Malaysian context.

