



# An Examination of the Moderate Ijtihad Method from the Perspective of Abdullah bin Bayyah and Its Application in the Formulation of Islamic Law

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## Abstract

Fiqh is a product of ijtihad, developed through a dialectical process between textual sources and real-world contexts. Fiqh possesses various characteristics, some of which are rigid and complex, while others are more flexible and adaptable. Rigid fiqh arises from an ijtihad that is fixated on textual understanding without exploring its objectives (maqashid), whereas excessively flexible fiqh is formulated from an ijtihad that prioritises maqashid while disregarding the texts (*al-nas*). Both patterns of ijtihad represent extremes that are not justified within the framework of Islam. Consequently, it is essential to examine and apply a flexible and dynamic fiqh derived from moderate ijtihad. This article aims to analyse and identify applicable concepts related to the theory of moderate ijtihad as articulated by Abdullah bin Bayyah, subsequently implementing these concepts in response to contemporary issues. This research constitutes a literature review that investigates the thoughts of contemporary scholars and analyses them employing a descriptive-analytical approach to derive meaningful insights. This study plays a crucial role in examining and applying the concept of moderate ijtihad to address contemporary matters in Islamic jurisprudence, which continue to evolve alongside the progress and transformation of human civilisation. Furthermore, moderate ijtihad has the potential to produce Islamic legal rulings that are not only flexible and adaptive but also firmly grounded in the higher objectives of sharia (maqashid sharia). The research findings indicate that Abdullah bin Bayyah's method of moderate ijtihad involves linking *al-nuṣūṣ* with maqashid sharia, observing and distinguishing between *al-thawābit* and *al-mutaghayyirāt*, considering the context of changing times in formulating Islamic law, acknowledging customs, 'urf, or local traditions, contemplating the consequences, and considering conditions, as well as personal and community psychology. The application of moderate ijtihad results in the formulation of legal rulings, such as the prohibition of gelatin derived from pigskin and bones—except in cases of necessity—and the obligation of marriage registration.

**Keywords:** *al-Mutaghayyirāt*; *al-Nuṣūṣ*; *al-Thawābit*; Maqashid; Moderate Ijtihad.

## Abstrak

Fikih merupakan produk ijtihad yang diproses melalui dialektika antara nas dan realitas. Fikih yang rigid dihasilkan dari ijtihad yang terpaku pada pemahaman tekstual, tidak menyelidik maqashidnya, sedangkan fikih yang fleksibel dirumuskan dari ijtihad yang menitikberatkan maqashid dan mengesampingkan nas. Kedua pola ijtihad ini bersifat ekstrem yang tidak dibenarkan dalam Islam. Karena itu, fikih yang fleksibel dan dinamis yang dihasilkan dari ijtihad moderat perlu ditelaah dan diaplikasikan. Studi ini berupaya menganalisis dan menemukan gagasan aplikatif dengan isu terkini tentang teori ijtihad moderat yang dibangun Abdullah bin Bayyah. Artikel ini merupakan penelitian kepustakaan dengan mengkaji pemikiran tokoh kontemporer yang berwawasan moderat, kemudian dianalisis dengan menerapkan pendekatan deskriptif analitis sehingga dapat dihasilkan suatu temuan. Penelitian ini sangat penting dilakukan untuk menganalisis dan mengaplikasikan gagasan ijtihad moderat dalam menjawab problem fikih kontemporer yang terus bergerak seiring kemajuan dan perkembangan peradaban manusia. Selain itu, ijtihad moderat dapat menghasilkan hukum islam yang fleksibel, adaptif dan berorientasi maqashid syariah. Hasil riset ini menemukan bahwa metode ijtihad moderat Abdullah bin Bayyah, yaitu mengaitkan *nuṣūṣ* dengan maqashid syariah, mencermati dan membedakan antara *al-thawābit* dan *al-mutaghayyirāt*, memperhatikan konteks perubahan zaman dalam merumuskan hukum Islam, memperhatikan adat istiadat, 'urf atau tradisi setempat, memikirkan konsekuensi-konsekuensinya, dan memperhatikan kondisi, psikologis personal dan masyarakat.

**Kata Kunci:** *al-Mutaghayyirāt*; *al-Nuṣūṣ*; *al-Thawābit*; Maqashid; Ijtihad Moderat.



## Introduction

Islamic law possesses the capacity to evolve and adapt to the changing needs of time and context, as well as the differences inherent in various temporal and spatial circumstances, provided it remains within the framework of maqashid sharia and sound legal principles.<sup>1</sup> A key characteristic of *fiqh* is its flexibility, elasticity, and dynamism,<sup>2</sup> which facilitates adaptation and implementation according to the contextual realities of time, place, and human welfare.<sup>3</sup> Muslims can apply Islamic law in both normal and emergency conditions, whether residing in countries with Muslim majorities or minorities. In the context of Indonesia, despite the presence of diverse tribes, ethnicities, customs, traditions, languages, cultures, and religions,<sup>4</sup> Muslims in various regions are able to realise and practise Islamic law in their daily lives, in their relationship with God, and in their interactions with fellow human beings. This adaptability is attributable to the flexible, elastic, and dynamic nature of Islamic law, which allows for a harmonious coexistence with local traditions and customs that do not conflict with the Qur'an or the Sunnah. Every action and utterance made by humans is connected to Islamic law, with some of these deriving from the Qur'an and the Sunnah, while others are rooted in alternative sources of evidence.<sup>5</sup>

Islamic law is derived from the process of ijtihad.<sup>6</sup> Various patterns of Islamic legal approaches influence the outcomes of *istinbath*. The textual-literal approach tends to produce rigid, strict, and difficult *fiqh*,<sup>7</sup> relying on a literal interpretation of *al-nuṣūṣ al-sharī'ah* without engaging in examination and reflection on its underlying wisdom, *'illat*, and maqashid,<sup>8</sup> thereby denying *ta'lil al-aḥkām*, which is based on reason, and favouring difficult laws over easier alternatives. In instances where there are two or more opinions, one difficult and the

<sup>1</sup> Wahbah al-Zuhayli, *Maṣṣū'ah al-fiqh al-Islāmī wa al-Qaḍāyā al-Mu'āṣirah*, Juz I (Damaskus: Dār al-Fikr, 2012), 38. See also, Jād al-Ḥaq 'Alī Jād al-Ḥaq, *Murūnah al-Fiqh al-Islāmī* (Kairo: Dār al-Fārūq, 2005), 69.

<sup>2</sup> 'Abdu al-Ḥalīm 'Uways, *al-Fiqh al-Islāmī bayna al-Taṭawwur wa al-Thabāt* (Madīnah Munawarah: al-Shirkah al-Su'ūdiyyah liabḥās wa al-Tawṣīq, t.t.), 92.

<sup>3</sup> 'Abdu al-Karīm Zīdan, *al-Madkhal li Dirāsah al-Sharī'ah al-Islāmīyah* (Iskandariah: Dār 'Umar ibn al-Khaṭṭāb, 2001), 67. See also, Ṣāliḥ ibn Ghānim al-Sadlān, *al-Qawā'id al-Fiqhiyah al-Kubrā wa lā Tafarra'a 'anhā* (Riyād: Dār Balnasyah, 1417 H), 388.

<sup>4</sup> Ahmad Syafii Maarif, *Fikih Kebinekaan* (Bandung: Mizan Pustaka, 2015), 20.

<sup>5</sup> Mannā' Khalīl Al-Qaṭṭān, *Wujūb Taḥkīm al-Sharī'ah al-Islāmīyah* (Saudi: Idārah al-thaqāfah wa al-Nashr al-Jāmī'ah, 1985), 68; See also Muḥammad al-Khaḍri Ḥusain, *Al-Sharī'ah al-Islāmīyah Ṣāliḥah li Kulli Zamān wa Makān* (Kairo: Dār Nahḍah Misra, 1999), 13; Abdul Wahhāb Khallāf, *Maṣādir al-Tashrī' al-Islāmī fīmā lā naṣṣa fih* (Kuwait: Dār al-Qalam, 1993), 155.

<sup>6</sup> Al-Juwaynī, *Matn al-Waraqāt* (Riyād: Dār al-Samay'i, 1996), 7; Abū Ishāq Ibrāhīm ibn 'Alī al-Fairūz Abādhi Al-Shayrāzī, *Al-Luma' fi 'Uṣūl al-Fiqh* (Beirut: Dār al-Hadīth al-Kitābiyah, 2013), 82; Muḥammad ibn Muḥammad Al-Maḥallī, *Sharf al-Waraqāt fi 'Uṣūl al-Fiqh* (Riyād: Maktabah Nazzār Muṣṭafā al-Bāz, 1996), 35; Muḥammad ibn 'Alwī Al-Mālikī, *Sharh Manzūmah al-Waraqāt fi 'Uṣūl al-Fiqh* (Beirut: Dār al-kutub al-'Ilmiyah, 2011), 11; Muḥammad Yāsīn al-Fadānī, *Bughyah al-Mushtāq fi Sharh al-Luma'* (Beirut: Dār ibn Kathīr, 2011), 47.

<sup>7</sup> Yūsuf Al-Qarḍāwī, *Dirāsah fi Fiqh Maqāṣid al-Sharī'ah Bayna al-Maqāṣid al-Kulliyah wa al-Nuṣūṣ al-Juz'iyah* (Kairo: Dār al-Shurūq, 2008), 54–55; Lestari Nurhajati and Adam James Fenton, "ISLAMIST NEWSPEAK: The Use of Arabic Terms as a Form of Cultural Hegemony in Political Communication by Muslim Fundamentalist Groups in Indonesia," *Journal of Indonesian Islam* 14, no. 2 (December 1, 2020): 292–308, <https://doi.org/10.15642/JIIS.2020.14.2.287-308>.

<sup>8</sup> Ibrāhīm ibn Mūsā ibn Muḥammad al-Lakhmī al-Shāṭibī, *Al-Muwāfaqāt fi Uṣūl al-Sharī'ah* (Kwait: Wazārah al-Shu'ūn al-Islāmīyah, n.d.), Juz 11, 297; 'Abdullah bin Bayyah, *Alāqah Maqāṣid al-Sharī'ah bi Uṣūl al-Fiqh* (London: Mu'assasah al-Furqān, 2006), 43; Adnān Muḥammad Amāmah, *al-Tajdīd fi al-Fikr al-Islāmī* (Riyād: Dār ibn al-Jawzī, 1424), 297; Hammādī Al-'Ubaydī, *Al-Shāṭibī wa Maqāṣid al-Sharī'ah* (Beirut: Dār Qutaybah, 1992), 125; 'Ābid ibn Muḥammad Al-Sufyānī, *Al-Thabāt wa al-Shumūl fi al-Sharī'ah al-Islāmīyah* (Mekkah: Maktabah al-Manārah, 1988), 158.

other easy,<sup>9</sup> the more challenging opinion is often the one issued as a fatwa. This textualist paradigm overlooks the development of the world, human civilisation, and the changes that are entirely distinct from the era of classical fiqh experts (*fuqahā'*). Particularly in the contemporary era, revolutions in science, technology, biology, electronics, atomic theory, space, communication, and information further underscore the inadequacy of a rigid approach.<sup>10</sup> By disregarding the advancement and progression of the times, such an approach fails to account for the evolving traditions and conditions that should be integral to the formulation of Islamic law, neglecting the concessions that facilitate human ease.

In contrast, the substantive-contextual approach tends to overlook specific *nuṣūṣ* (*al-nuṣūṣ al-juz'iyah*) under the justification of prioritising universal benefits and *maqashid kulliyah*. This approach does not adequately consider *zāhir nuṣūṣ*, but instead focuses predominantly on meanings, *maqashid* and *arsār al-sharī'ah*.<sup>11</sup> The liberal paradigm effectively annuls *al-nuṣūṣ al-qat'iyah*, *hudūd*, and *kaffarat* under the rationale of human benefit (*maṣlahah*) and *maqashid sharia*, prioritising benefit in a manner that contradicts the *naṣṣ*, which is *qat'ī al-dalālah* and *al-thubūt*, favouring reason over revelation,<sup>12</sup> and subordinating *nuṣūṣ* if they conflict with *maṣlahah* and *maqashid*.<sup>13</sup> Proponents of liberalism argue that attentiveness to *maqashid* can alleviate the stagnation of Islamic law, which lags significantly behind the evolution of human civilisation.<sup>14</sup>

Liberals contend that reason serves as a tool for interpreting and understanding for legal texts (*nuṣūṣ*). If reason identifies a *maṣlahah*, then it must promote goodness and benefits for humanity. Consequently, this *maṣlahah* should be implemented even if it contradicts particular *naṣṣ*, whether from the Qur'an or the Sunnah, as *maṣlahah* is deemed the essence of Islamic law.<sup>15</sup> However, the limitations of human reason must be acknowledged; human intellect is susceptible to deception by base desires, leading to misjudgements regarding what is good or harmful. Conversely, reason may misinterpret something as bad, despite its inherent benefits. Thus, reason requires the guidance of revelation to illuminate and clarify what is right and wrong, good and bad, *mafsadah* and *maṣlahah*.<sup>16</sup> Numerous instances illustrate the limitations of reason, including the allowance of actions forbidden by sharia, such as the pre-Islamic Arab practice of burying girls alive, denying them inheritance rights, and endorsing alcohol consumption and usury. In the modern era, we witness similar rationalisations of reprehensible actions, including the legalisation of sexual deviations (lesbian, gay, bisexual, and transgender/LGBT), pornography, narcotics, and other socially detrimental practices.

<sup>9</sup> Al-Qardāwī, *Dirāsah fī Fiqh Maqāṣid al-Sharī'ah bayna al-Maqāṣid al-Kulliyah wa al-Nuṣūṣ al-Juz'iyah*, 62.

<sup>10</sup> Ade Dedi Rohayana and Muhammad Jauhari Sofi, "Critique of Radical Religious Paradigm: An Epistemological Analysis from Principles of Islamic Thought," *Indonesian Journal of Islam and Muslim Societies* 11, no. 1 (June 21, 2021): 163–84, <https://doi.org/10.18326/ijims.v11i1.163-184>.

<sup>11</sup> al-Shāṭibī, *Al-Muwāfaqāt fī Uṣūl al-Sharī'ah*, Juz II, 297; al-'Ubaydī, *al-Shāṭibī wa Maqāṣid al-Sharī'ah*, 125; Al-Ḥassān Shahīd, *al-Khiṭāb al-Naqdī al-'Uṣūlī min Taṭbīqāt al-Shāṭibī 'ilā al-Tajdīd al-Mu'āṣir* (Herndon: Ma'had al-'Ālamī lilfīkr al-Islāmī, 2012), 206; Amāmah, *al-Tajdīd fī al-Fīkr al-Islāmī*, 297.

<sup>12</sup> Māhīr Ḥusayn Ḥaswah, *Fiqh al-Wāqī' wa Atharuh fī al-Ijtihād* (Yordan: al-Ma'had al-'Ālamī lilfīkr al-Islāmī, 2009), 194.

<sup>13</sup> al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharī'ah*, Juz II, 297-298; Al-'Ubaydī, *al-Shāṭibī wa Maqāṣid al-Sharī'ah*, 125; Amāmah, *Al-Tajdīd fī al-Fīkr al-Islāmī*, 297.

<sup>14</sup> Al-Qardāwī, *Dirāsah fī Fiqh*, 85-88; Abdullan bin Bayyah, *al-Irḥāb: al-Tashkīḥ wa al-Ḥulūl* (Riyāḍ: Maktabah al-'Ubaykān, 2007), 103.

<sup>15</sup> Al-Qardāwī, *Dirāsah fī Fiqh Maqāṣid al-Sharī'ah bayna al-Maqāṣid al-Kulliyah wa al-Nuṣūṣ al-Juz'iyah*, 100.

<sup>16</sup> Al-Qardāwī, 100.

Several studies have explored the concept of moderate ijtihad and its related themes from various perspectives and methodological approaches. Ahmad Hasan al-Banna et al. (2022) conducted research on Muhammad Imarah's Thoughts on Fiqh Moderation, concluding that Imarah emphasised the necessity of understanding and implementing moderate ijtihad in the formulation of Islamic law.<sup>17</sup> According to Imarah, the text (*nass*) and ijtihad function in tandem, with ijtihad serving to uncover the meanings embedded within texts to derive legal rulings. Similarly, Muhammad Al Fikri and Qathrun Nada (2024) examined The Concept of *Wasathiyah* Islam from the Perspective of KH Hasyim Muzadi: A Study of Surah al-Baqarah 143, elucidating that KH Hasyim Muzadi associates moderate Islam with the concept of *Islam rahmatan lil-'alamin*—a vision that promotes peace, serenity, and harmony among religious communities. For Muzadi, *wasathiyah* is synonymous with justice and balance.<sup>18</sup> Furthermore, Wildani Hefni (2022), in *Reinventing Human Dignity in the Islamic Legal Discourse: The Wasathiyah Approach from Khaled Abou El-Fadl to Interreligious Relations*, concludes that Khaled Abou El-Fadl conceptualises moderation in Islamic law through an interdisciplinary framework, advocating for an approach that integrates textual analysis, contextual understanding, and a deep engagement with the *maqashid*.<sup>19</sup> Rasito and Izza Mahendra (2022) also investigated Moderation of Fiqh Through Yusuf al-Qaradawi's Maqashid Sharia Approach: Exploring Its Relevance in Indonesia, demonstrating that the moderation of *fiqh* through the *maqashid sharia* approach can yield legal rulings that are pertinent to contemporary situations, conditions, and developments.<sup>20</sup> In addition to these works, Kholishudin et al. (2023), in *The Implementation of the Manhaj Maqāṣidī bin Bayah in Understanding Hadith (Fiqh Hadith)*, emphasise that the interpretation of hadith should not be partial; rather, it must be approached holistically, drawing from various texts on the same theme, understanding social realities, and engaging with the *maqashid sharia*.<sup>21</sup>

This research diverges from previous studies in terms of its distinct focus and scope. It provides a comprehensive examination of the moderate ijtihad method articulated by Abdullah bin Bayyah. While prior research has addressed his contributions, few studies have explored his ijtihad framework in detail, with the majority concentrating primarily on *maqashid sharia*. Moreover, existing literature has generally encompassed broader themes, such as Islamic moderation and global *fiqh* moderation, without specifically centring the moderate ijtihad method as the main focus of study.

The primary aim of this research is to scrutinise the ijtihad method initiated by Abdullah bin Bayyah. Based on the aforementioned background, two academic questions arise: how is

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<sup>17</sup> Ahmad Hasan Al-Banna, Umi Rosyidah, and Hammis Syafaq, "Muhammad Imarah's Thought on Fiqh Moderation," *Komparatif: Jurnal Perbandingan Hukum dan Pemikiran Islam* 3, no. 2 (January 30, 2024): 158–70, <https://doi.org/10.15642/komparatif.v3i2.2037>.

<sup>18</sup> Muhammad al Fikri and Qathrun Nada, "Konsep Islam Wasathiyah Perspektif KH. Hasyim Muzadi (Telaah Surah al-Baqarah Ayat 143)," *Al-Wasathiyah: Journal of Religious Moderation* 3, no. 1 (July 7, 2024): 93–109, <https://doi.org/10.30631/jrm.v3i1.65>.

<sup>19</sup> Wildani Hefni, Rizqa Ahmadi, and Imam Mustofa, "Reinventing the Human Dignity in Islamic Law Discourse: The Wasathiyah Approaches from Khaled Abou El-Fadl to the Interreligious Relation," *Al-Manahij: Jurnal Kajian Hukum Islam* 16, no. 2 (November 25, 2022): 239–54, <https://doi.org/10.24090/mnh.v16i2.6928>.

<sup>20</sup> Rasito Rasito and Izza Mahendra, "Moderasi Fikih Melalui Pendekatan Maqasid al-Shari'ah Yusuf al-Qaradawi: Mencari Relevansinya di Indonesia," *Al-Wasathiyah: Journal of Religious Moderation* 1, no. 1 (August 4, 2022): 36–65, <https://doi.org/10.30631/jrm.v1i1.3>.

<sup>21</sup> Kholishuddin Kholishuddin and Moh. Hudal Hafid Ilmi, "Implementation of Manhaj Maqāṣidī bin Bayah in Understanding Hadith (Fiqh Ḥadīṣ)," *Nabawi: Journal of Hadith Studies* 4, no. 1 (April 21, 2023): 45–81, <https://doi.org/10.55987/njhs.v4i1.63>.

the moderate ijtihad method initiated by Abdullah bin Bayyah, and how is this moderate ijtihad method implemented in the formulation of contemporary Islamic law? This study seeks to elucidate the moderate ijtihad method from Abdullah bin Bayyah's perspective and to analyse its application in producing contemporary Islamic law.

## Method

This library research utilises techniques for the collection, analysis, and processing of data derived from the works of Abdullah bin Bayyah, specifically in the form of books, articles, and papers. The study aims to identify the ideas, concepts, and methods of ijtihad posited by Abdullah bin Bayyah and subsequently apply these insights to address contemporary issues. Following the data collection phase, a comprehensive analysis is conducted, employing descriptive analytical methods. The data sources for this research are categorised into two types: primary data and secondary data. Primary data sources encompass the writings of Abdullah bin Bayyah, including *Ma'āyir al-Wasāṭiyah fī al-Fatwā*, *al-Wāqī' al-Mu'āṣir wa atharuhu fī al-Aḥkām al-Shar'iyah*, and *Mashāhid min al-Maqashid*. In contrast, secondary sources consist of works that discuss the ijtihad method authored by both classical and contemporary scholars.

## Moderate definition

Etymologically, moderation refers to a balance between static and dynamic elements, motion and stillness, rigour (*azimah*) and concession (*rukhsah*). 'Abdullah bin Bayyah defines moderation as the integration of universal (*kullī*) and partial (*juz'ī*) elements, achieving a balance between maqashid (objectives of Islamic law) and *furū'*, as well as the integration of *nuṣūṣ* and *maṣlahah mu'tabarah* in the determination of fatwas and opinions.<sup>22</sup> Moderate reasoning pays attention to constant provisions (*al-thawābit*) while not disregarding elements that may change (*al-mutawayyirāt*), considers the context of contemporary times, and takes into account needs (*hājat*), human interests, and emergency conditions.

## The moderate ijtihad method from the perspective of Abdullah bin Bayyah

According to Abdullah bin Bayyah, the moderate ijtihad method in formulating Islamic law involves:

### Connecting *nuṣūṣ* with maqashid sharia

Maqashid is derived from *nuṣūṣ*, and *nuṣūṣ* is encompassed within maqashid. The two concepts are interrelated and cannot be dissociated. *Nuṣūṣ* cannot be adequately comprehended without the elucidation of maqashid.<sup>23</sup> Therefore, the formulation of Islamic law is not solely derived from the *nuṣūṣ*, but must also be contextualised through an understanding of the maqashid. Failing to consider maqashid when interpreting the text may lead to misinterpretations of both the text and the process of *istinbath*.<sup>24</sup> In conducting ijtihad, it is imperative to grasp the maqashid in a comprehensive manner and to engage in ijtihad

<sup>22</sup> 'Abdullah bin Bayyah, "Ma'āyir al-Wasāṭiyah fī al-Fatwā," 100, accessed January 15, 2025, <https://binbayyah.net>.

<sup>23</sup> Muḥammad Sa'd ibn Aḥmad ibn Mas'ūd al-Yūbī, *Maqāṣid al-Sharī'ah al-Islāmiyah wa 'alāqatuhā bi al-Adillah al-Shar'iyah* (Riyāḍ: Dār al-Hijrah, 1998), 475–80; Muḥammad 'Abdu al-'Āṭi Muḥammad 'Alī, *al-Maqāṣid al-Shar'iyah wa Atharuhā fī al-Fiqh al-Islāmī* (Cairo: Dār al-Hadīth, 2007), 23–27.

<sup>24</sup> Abdul Maḥmūd Muhammad al-Sūsūh, "Usus al-'Alāqah Bayna al-Maqasid wa al-Nusus 'inda Usuliyyin wa al-Hadathiyyin," *Al-Mizān* 10, no. 2 (2023): 80.

grounded in this understanding.<sup>25</sup> Familiarity with maqashid facilitates a clearer comprehension of *nuṣūṣ*, allowing for a more logical evaluation of the balance between *maṣlaḥah* and *mafsadah*.<sup>26</sup> The essence of maqashid lies in the minimisation of harm and the promotion of *maṣlaḥah*. Every law prescribed by sharia must embody *maṣlaḥah*,<sup>27</sup> while prohibitions must inherently possess a *mafsadah* impact. *Maṣlaḥah* must not be overlooked, and *mafsadah* must be eradicated.<sup>28</sup>

The formulation of Islamic law must be predicated on the integration of textual sources (*nuṣūṣ*) and maqashid, rather than being confined to a literal interpretation. Each *nuṣūṣ* of sharia incorporates maqashid within it. Therefore, the maqashid of every text under examination must be investigated to ensure accurate understanding.<sup>29</sup> However, in instances where a problem cannot be identified within analogical texts (*qiyās*) and reasoning, the legal *istinbath* should be based on universal texts and maqashid, as these represent the essence of *nuṣūṣ*.<sup>30</sup>

A thorough understanding of maqashid sharia and the establishment of Islamic law based on maqashid considerations are pivotal in the reasoning of ijtihad.<sup>31</sup> Maqashid sharia extends beyond theoretical frameworks, being subject to research and application in the formulation of Islamic law,<sup>32</sup> and can serve as a foundational source.<sup>33</sup> Acquaintance with maqashid sharia aids in distinguishing valid from invalid *qiyās* and mastering the wisdom of sharia alongside its maqashid is instrumental in resolving Islamic legal dilemmas. Any Islamic law that contravenes maqashid is deemed invalid and erroneous.<sup>34</sup> This principle is referred

<sup>25</sup> al-Shāṭibī, *Al-Muwāfaqāt fī Uṣūl al-Sharī'ah*, Juz IV; 'Abdu al-Ḥamīd al-'Alamī, *Manhaj al-Darsi al-Dalālī 'inda al-Imām al-Shāṭibī* (Maroko: Wazārah al-Awqāh wa al-Shu'ūn al-Islāmiyah, 2001), 439; Aḥmad al-Raysūnī, *Nazariyah al-Maqāsid 'inda al-Imām al-Shāṭibī* (Herndon: al-Ma'had al-'Alamī lilfīkr al-Islāmī, 1995), 319; Shahīd, *Al-Khiṭāb al-Naqdī al-'Uṣūlī min Taṭbiqāt al-Shāṭibī 'ilā al-Tajdīd al-Mu'āṣir*, 207.

<sup>26</sup> Abdullah Manarat, "Al-Maqasid al-Shariah wa Dawruha fi Daf'i al-Ta'arud bayna al-Nusus al-Nabawiyah," *Jarash* 22, no. 1 (2021): 225.

<sup>27</sup> Abdulazīz ibn Abdussalām al-Salamī, *Qawā'id al-Aḥkam fī Maṣāliḥ al-Anām*. Juz, I (Kairo: Maktabah al-Kulliyāt al-Azhariyah, 1994), 11; Aḥmad Muḥammad Ridwān, *Maqāsid al-Sharī'ah inda al-Imām Tajuddīn al-Subkī* (Beirut: Dār al-Kutub al-Ilmiyah, 2023), 77.

<sup>28</sup> Muḥammad bin Umar, *Min al-Ijtihād fī al-Naṣ Ilā al-Ijtihād fī al-Wāqī'* (Beirut: Dār al-Kutub al-Ilmiyah, 2009), 95–96.

<sup>29</sup> Al-Raysūnī, *Nazariyah al-Maqāsid*, 363; Jamāluddīn Aṭīyah, *Naḥwa Taf'il Maqāsid al-Sharī'ah* (Damaskus: Dār al-Fikr, 2001), 182.

<sup>30</sup> Aḥmad al-Raysūnī, *Muhādarātu fī Maqāsid al-Sharī'ah* (Kairo: Dār al-Kalimah, 2010), 124.

<sup>31</sup> Abdullah bin Bayyah, *Mashāhid Min al-Maqāsid* (Riyād: Dār Wujūh, 2012), 151; al-'Alamī, *Manhaj al-Darsi al-Dalālī 'inda al-Imām al-Shāṭibī*, 439; Bayyah, *Alāqah Maqāsid al-Sharī'ah bi Uṣūl al-Fiqh*, 95; al-Raysūnī, *Nazariyah al-Maqāsid 'inda al-Imām al-Shāṭibī*, 353; Nūruddīn ibn Mukhtār al-Khādīmī, *Al-Ijtihād al-Maqāsidī*, Juz I (Qatar: Dār al-Kutub al-Qatariyah, 1998), 61; Yūsuf Aḥmad Muḥammad al-Badawī, *Maqāshid al-Syarī'ah 'inda Ibnī Taymiyyah* (Yordan: Dār al-Nafā'is, 1999), 112–13; Aḥmad al-Raysūnī, *Maqāsid al-Maqāsid* (Beirut: al-Shubkah al-'Arabiyyah, 2013), 42; 'Allāl al-Fāṣī, *Maqāshid al-Syarī'ah wa Makārimuhā* (Beirut: Dār al-Gharab al-Islāmī, 1993), 165–66; Ahmad al-Raysūnī, *Muhādarātu fī Maqāsid al-Sharī'ah* (Cairo: Dār al-Kalimah, 2010), 287; 'Abdu al-Wahhāb ibn 'Alī ibn 'Abdu al-Kāfi al-Subkī, *Jam'u al-Jawāmi' fī Uṣūl al-Fiqh* (Beirut: Dār al-Kutub al-Ilmiyah, 2003), 118; Ahmad al-Raysūnī, *Min Alām al-Fikr al-Maqāsidī* (Beirut: Dār al-Hādī, 2003), 62; Samīḥ 'Abdu al-Wahhāb al-Jundī, *Ahammiyah al-Maqāsid fī al-Sharī'ah al-Islāmiyyah* (Beirut: Mu'assasah al-Risālah, 2008), 69; Aḥmad 'Abdu al-Salām al-Raysūnī, *al-Tajdīd al-Uṣūlī Naḥwa Siyāghah Tajdīdiyyah li'Ilmi Uṣūl al-Fiqh* (Beirut: Dār al-Kalimah, 2015), 725.

<sup>32</sup> 'Alī ibn 'Abdu al-Kāfi ibn 'Alī al-Subkī, *al-Ibhāj fī Sharḥ al-Minhāj*, Juz I (Cairo: Maktabah al-Kulliyat al-Azhariyah, 1981), 8–9; Ismā'īl al-Ḥasanī, *Nazariyah al-Maqāsid 'inda al-Imām Muḥammad al-Tāhir Ibn 'Āshūr* (Herndon: al-Ma'had al-'Alamī lilfīkr al-Islāmī, 2005), 371; al-Jundī, *Ahammiyah al-Maqāsid fī al-Sharī'ah al-Islāmiyyah*, 71; Ahmad Raysūnī, *Abḥāth fī al-Midāni* (Kairo: Dār al-Kalimah, 2010), 74–75.

<sup>33</sup> Aḥmad Al-Raysūnī and Aḥmad 'Abdu al-Salām, *Al-Tajdīd al-'Uṣūlī Naḥwu Siyāghah Tajdīdiyyah li'Ilmi 'Uṣūl al-Fiqh* (Beirut: Dār al-Kalimah, 2015), 725; al-Jundī, *Ahammiyah al-Maqāsid fī al-Sharī'ah al-Islāmiyyah*, 106.

<sup>34</sup> al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharī'ah*, 252; Al-'Ubaydī, *al-Shāṭibī wa Maqāsid al-Sharī'ah*, 150.

to as *al-fiqh al-haḍārī*.<sup>35</sup> Consequently, *faqīh*, *mujtahid*, and *mustanbiṭ* must consistently consider maqashid whenever determining Islamic law.<sup>36</sup>

An opinion regarding Islamic law may be adhered to and implemented only if it is derived from the reasoning of a person (*mujtahid*) who possesses profound knowledge of maqashid sharia.<sup>37</sup> An individual who neglects to comprehend and consider maqashid in every command (*lafaz 'amr*) and prohibition (*lafaz nahi*) lacks the competence to interpret Islamic law,<sup>38</sup> as maqashid represents the essence, the wisdom of sharia,<sup>39</sup> and the guiding principles for *mujtahids*.<sup>40</sup> Recognising the maqashid sharia embedded within *nuṣūṣ* can significantly enhance comprehension and the appropriate application of Islamic law, tailored to benefits,<sup>41</sup> local conditions, and circumstances. Ignoring maqashid results in the stagnation of Islamic law and the suppression of beneficial Islamic principles.<sup>42</sup> Understanding and interpreting *nuṣūṣ* with considerations of maqashid is indicative of a moderate ijtihad approach, striking a balance between careless interpretations, overly broad readings, and rigid literalism. This methodology entails interpreting description (*lafaz*) within its intended meaning, framed<sup>43</sup> by the objectives of maqashid. Moderate reasoning necessitates that *nuṣūṣ* be comprehended and interpreted in light of its maqashid.<sup>44</sup> Thus, the formulation of Islamic law derived from the Qur'an and al-Sunnah should be congruent with and harmonious to the principles of maqashid sharia. Given the robust interconnection between maqashid and *nuṣūṣ*, both elements must be duly considered in the process of legal reasoning.

### Observing and distinguishing between *al-thawābit* and *al-mutaghayyirāt*

Islamic law, seen from its static and dynamic aspects, is of two types, namely 1. *al-aḥkām al-thawābit* (static laws) are Islamic laws resulting from *qat'ī juz'ī* (partial explicit) texts. This kind of law cannot change throughout time, in any place and condition, such as the obligation of prayer, fasting, zakat, hajj, being good to both parents, the prohibition of stealing, corruption, adultery, robbery, usury, fraud, treason, and so on, 2. *al-aḥkām al-mutaghayyirāt* is an Islamic law produced through ijtihad based on the evidence of *ẓannī*, *kullī* or secondary

<sup>35</sup> Al-fiqh al-haḍārī is fiqh which is based on universal maqāṣid and asrār (secrets) of sharī'ah Yūsuf al-Qarḍāwī, *Al-Sunnah Maṣḍaran lilma'rifah wa al-Haḍārāh* (Cairo: Dār al-Shurūq, 2002), 230; al-Raysūnī, *min A'lām al-Fikri*, 101.

<sup>36</sup> Al-Raysūnī, *Maqāṣid al-Maqāṣid*, 43; Al-Raysūnī and al-Salām, *Al-Tajdīd al-'Uṣūlī Nahwu Siyāghah Tajdīdīyah li'Ilmi 'Uṣūl al-Fiqh*, 725.

<sup>37</sup> al-Subkī, *al-Ibhāj fi Sharḥ al-Minhāj*, Juz III, 206.

<sup>38</sup> 'Abdu al-Mulk ibn 'Abdullah al-Juwaynī, *al-Burhān fi 'Uṣūl al-Fiqh*, Juz I (Cairo: Dār al-Aṣar, n.d.), 295; See also al-Raysūnī, *Naẓariyah al-Maqāṣid 'inda al-Imām al-Shāṭibī*, 48; al-Yūbī, *Maqāṣid al-Sharī'ah al-Islāmiyah wa 'Alāqatuhā bi al-Adillah al-Shar'iyah*, 50–51; 'Abdu al-'Azīz ibn 'Abdurrahmān ibn Rabī'ah, *'Ilmu Maqāṣid al-Shāri'* (Riyāḍ: Maktabah al-Mulk, 2002), 59; Yūsuf Aḥmad Muḥammad al-Badawī, *Maqāṣid al-Sharī'ah 'inda Ibnī Taymiyah* (Yordan: Dār al-Nafā'is, 1999), 107; 'Abdu al-Qādir Ḥarazullah, *Ḍawābiṭ I'tibār al-Maqāṣid fi Majāl al-Ijtihād wa Atharuhā al-Fiqhī* (Riyāḍ: Maktabah al-Rush, 2007), 173.

<sup>39</sup> Bayyah, *'Alāqah Maqāṣid al-Sharī'ah bi Uṣūl al-Fiqh*, 133; Aḥmad al-Raysūnī, "al-Maqāṣid al-Sharī'ah wa Dawruhā fi Istīnāṭ al-Aḥkām," *al-Muslim al-Mu'Āṣir* 32, no. 128 (April 2008): 8.

<sup>40</sup> Abū Ḥāmid Muḥammad Al-Ghazālī, *Haqīqah al-Qawlayni* (Riyāḍ: Majallah al-Jam'iyah al-Fiqhiyah al-Su'ūdīyah, n.d.), 312; See also 'Abdurrahmān ibn Abu Bakr al-Suyūṭī, *Al-Raddu 'alā Man Akhlada Ilā al-Ardī wa Jahila anna al-Ijtihād fi Kullī 'Aṣrin Farḍun* (Cairo: Maktabah al-Thaqāfah al-Dīniyah, n.d.), 91; Aḥmad al-Raysūnī, *al-Fikr al-Maqāṣidī Qawā'iduh wa Fawā'iduh* (Riyāḍ: al-Dār al-Bayḍā', 1999), 91; al-Jundī, *Aḥammīyah al-Maqāṣid fi al-Sharī'ah al-Islāmiyah*, 105.

<sup>41</sup> 'Abdu al-Majīd al-Najjār, *Maqāṣid al-Sharī'ah bi ab'āb Jadīdah* (Beirut: Dār al-Gharab al-Islāmī, 2008), 18.

<sup>42</sup> Muḥammad al-Tāhir ibn 'Āshūr, *Alaysa al-Ṣubḥ biqarīb* (Cairo: Dār al-Salām, 2006), 173; Al-Raysūnī, *min A'lām al-Fikr al-Maqāṣidī*, 83.

<sup>43</sup> Aḥmad al-Raysūnī, *al-Taysīr al-Fiqhī* (Beirut: Dār ibn Ḥazm, 2007), 115.

<sup>44</sup> Aḥmad al-Raysūnī, *al-Taysīr al-Fiqhī* (Beirut: Dār ibn Ḥazm, 2007), 115.

evidence (*qiyas*, *maṣlaḥah*, *istiḥsān*, *ʿurf*, *istiṣḥab* and so on).<sup>45</sup> This law can align with changes in the context of the times, community behavior, place, conditions, and customs. The purpose of changing the law is to uphold rights and justice, obtain *maṣlaḥah*, and reject *mafsadah*.<sup>46</sup> It is flexible, elastic, and dynamic and can change according to the times' development and human civilization's progress.<sup>47</sup> Islamic law is a living entity that moves dynamically, develops, and is flexible so that it can adapt to contemporary human life that is developing rapidly in line with social, economic, and political developments and the progress of human civilization. Therefore, optimizing the reasoning of *qiyās*, *maṣlaḥah*, and *ʿurf* is a must because *naṣ* is limited and ends, while human events and problems are endless. This is intended to spread *maṣlaḥah*, reject harm, bring ease, prevent hardship, and keep away damage.<sup>48</sup>

There are five criteria for the static and dynamic nature of Islamic law, namely: 1. Laws resulting from texts that are *qaṭʿī al-thubūt* and *qaṭʿī al-dalālah* are static. Conversely, laws obtained from texts *ẓannī al-thubūt* or *al-dalālah* are dynamic. 2. Dogmatic and irrational laws are static; conversely, laws that have *illat*, rational, and contain *maṣlaḥah* are dynamic. 3. *Maqāṣid al-sharīʿah* are static, while the instruments that lead to them are dynamic; 4. Laws related to faith, worship, and the basics of *muʾamalah* are static, but social, economic, political, cultural, and environmental laws are dynamic and 5. Laws that have a dynamic dimension must be linked to the static, both are like a correlation between the partial and the universal.<sup>49</sup>

Islamic law, when viewed through its static and dynamic dimensions, can be categorised into two types:<sup>50</sup> 1. *al-aḥkām al-thawābit* (static laws), which are Islamic laws derived from *qaṭʿī juzʿī* (partial explicit) texts. This category of law is immutable over time, irrespective of place and condition, encompassing obligations such as prayer, fasting, zakat, hajj, filial piety, and prohibitions against theft, corruption, adultery, robbery, usury, fraud, and treason, among others. 2. *al-aḥkām al-mutaghayyirāt* (dynamic laws) are Islamic laws generated through ijtihad based on evidence that is *ẓannī*, *kullī*, or secondary evidence, including *qiyas*, *maṣlaḥah*, *istiḥsān*, *ʿurf*, and *istiṣḥab*. This type of law can adapt to changes in the context of time, community behaviour, place, conditions, and customs. The purpose of altering the law is to uphold rights and justice, achieve *maṣlaḥah*, and mitigate *mafsadah*. It is characterised by flexibility, elasticity, and dynamism, allowing it to evolve in response to contemporary developments in human life, particularly those related to social, economic, and political changes, as well as the progress of human civilisation. Consequently, optimising the reasoning of *qiyās*, *maṣlaḥah*, and *ʿurf* is imperative, given that the text is limited and finite, while human events and issues are boundless. This approach aims to promote *maṣlaḥah*, avert harm, facilitate ease, prevent hardship, and eliminate damage.

There are five criteria for understanding the static and dynamic nature of Islamic law: 1. Laws derived from texts that are *qaṭʿī al-thubūt* and *qaṭʿī al-dalālah* are static, whereas laws obtained from texts that are *ẓannī al-thubūt* or *al-dalālah* are dynamic. 2. Dogmatic and irrational laws are static; in contrast, laws that possess an *illat*, are rational, and contain *maṣlaḥah* are

<sup>45</sup> Fahdu ibn Ṣalīh al-Ajlān, *Maʾrakah al-Naṣ* (Riyāḍ: Majallah al-Bayān, 2011), 133.

<sup>46</sup> Muṣṭafā Aḥmad al-Zarqā, *al-Madkhal al-Fiqhī al-ʿĀm* (Damaskus: Dār al-Qalam, 2004), 942.

<sup>47</sup> Bayyah, "Maʾāyir al-Wasaṭiyah fī al-Fatwā"; Muḥammad Muṣṭafā al-Zuhaylī, *al-Thawābit wa al-Mutaghayyirāt fī al-Sharīʿah al-Islāmiyah* (Mekkah: al-Mamlakah al-Arabiyyah, 2012), 7.

<sup>48</sup> Iḥsān Tawfiq, *al-Thawābit wa al-Mutaghayyirāt fī al-Sharīʿah al-Islāmiyah* (Damaskus: Wazārah al-ʿIlām, 1995), 315–19.

<sup>49</sup> Rabih ibn Aḥmad, *al-Sunnah al-Nabawiyyah bayna al-Fahmi all-Sadīd wa Muṭallabāt al-Jadīd* (Kairo: Dar al-Wafaʾ, 1991), 158.

<sup>50</sup> Bayyah, *al-Irhāb: al-Tashkīḥ wa al-Ḥulūl*, 103–4.



dynamic. 3. Maqashid Sharia are static, while the instruments that facilitate these aims are dynamic. 4. Laws pertaining to faith, worship, and the fundamentals of *muamalah* are static, while those related to social, economic, political, cultural, and environmental issues are dynamic. 5. Laws with a dynamic dimension must be interconnected with static laws; both dimensions are analogous to the correlation between the particular and the universal.

### Considering the context of changing times in the formulation of Islamic law

Bayyah cites al-Shatibi's thoughts as a foundational argument for his concept of moderation. He posits that a high-level mufti is one who approaches the formulation of Islamic law with a moderate mindset, avoiding entrapment within both literalist and liberal schools of thought. He endeavours to establish connections between *maqāshid* and *nuṣūṣ*, *kullī* (universal) and *juz'ī* (partial), *nuṣūṣ* and *wāqī'* (reality), text and context, as well as *al-thawābit* and *al-mutaḥawwirāt*.<sup>51</sup> Moderation (*al-wasaṭiyyah*) constitutes the ultimate objective of *Shari'*, while extremism and liberalism diverge from its intended goals. Extreme and literal interpretations may yield Islamic law that is harsh, rigid, and disconnected from human interests, thereby imposing challenges and limitations on its implementation. Conversely, liberal interpretations may lead to *tasāhul* (permissiveness) in the formulation of Islamic law, risking a capitulation to desires that are prohibited by *shara'*.<sup>52</sup> Moderate muftis strive to establish Islamic law that is accessible, not *tasāhul*, and does not impede human implementation.<sup>53</sup>

The concept of changing times refers to the evolution of human circumstances in response to temporal changes, rather than an annual or centennial transition; this is because the passage of time does not inherently prompt alterations in Islamic law.<sup>54</sup> The objective of adapting Islamic law in response to temporal changes is to realise benefits, mitigate harm, and alleviate constraints on humanity.<sup>55</sup> Change is an inherent principle (*sunnatullah*) within the universe. The condition of the world, as well as human customs, will continue to evolve in accordance with the passage of time.<sup>56</sup> Therefore, an understanding of the changing conditions of time and humanity is a prerequisite for the consideration of Islamic law. Ignorance of these changes is a folly.<sup>57</sup> Failure to account for the shifts in time and human conditions may result in the neglect of numerous human rights, causing harm that outweighs any benefits.

The companions of the Prophet Muhammad paid close attention to the conditions and changes of their times in their *ijtihad*. Umar ibn al-Khattab, in his *ijtihad* and interpretation of *nuṣūṣ*, demonstrated a keen awareness of *maqashid*, contemporary developments, geographical contexts, and evolving circumstances. Among the outcomes of his *ijtihad* were decisions such as not granting converts a share of *zakat*, the invalidation of triple divorce, the abolition of the punishment of exile, the suspension of the punishment of hand amputation during periods of famine, and an increase in the number of *takzir* laws. Similarly, Uthman, another companion, instructed the community to confiscate found camels, sell them, retain the

<sup>51</sup> Bayyah, *al-Irḥāb: al-Tashkīṣ wa al-Ḥulūl*, 103–4.

<sup>52</sup> Ibrāhīm ibn Mūsā ibn Muḥammad al-Lakhmī al-Shāṭibī, *al-Muwāfaqāt fi Uṣūl Ash-Sharī'ah*, Juz IV, 188–189; Al-Raysūnī and al-Salām, *al-Tajdīd al-'Uṣūlī Naḥwu Siyāghah Tajdīdiyyah li'Ilmi 'Uṣūl al-Fiqh*, 790–91; Muḥammad Jamāluddīn al-Qāsimī, *al-Fatwa fi al-Islām* (Beirut: Dar al-Kutub al-Ilmiyah, 1986), 56.

<sup>53</sup> Al-Raysūnī and al-Salām, *al-Tajdīd al-'Uṣūlī Naḥwu Siyāghah Tajdīdiyyah li'Ilmi 'Uṣūl al-Fiqh*, 791.

<sup>54</sup> Yūsuf al-Qardāwī, *Mujibāt Taghayyur al-Fatwā fi 'Aṣrinā* (Kairo: Maktab al-Amānah al-'Āmmah, n.d.), 49.

<sup>55</sup> Muḥammad 'Uthmān Shubayr, *al-Qawā'id al-Kulliyah wa al-Ḍawābiṭ al-Fiqhiyah fi al-Sharī'ah al-Islāmiyah* (Yordania: Dār al-Nafā'is, 2007), 265.

<sup>56</sup> Abdurrahmān ibn Khaldūn, *Muqaddimah Ibn Khadūn*, Juz I (Beirut: Dār al-Fikr, 2001), 38.

<sup>57</sup> Muḥammad Amīn Afandī ibn 'Ābidīn, *Majmū'ah Rasā'il Ibn 'Ābidīn* (Juz I, n.d.), 46.

proceeds, and return the money to the rightful owner, while still allocating inheritance to a wife who had been divorced while gravely ill.<sup>58</sup>

Changes in Islamic law are inevitable due to alterations in time, place, circumstances, *'urf*, or human customs. The primary consideration for modifying the law is the evolution of *maṣlaḥah* in light of changing times. The laws subject to change are those derived from ijtihad, rather than those founded on *qaṭ'i* evidence.<sup>59</sup> Subsequent generations of scholars may hold differing opinions from their predecessors, despite belonging to the same school of thought. Such differences arise from temporal changes rather than from discrepancies in the evidential basis.<sup>60</sup> Changes in time are typically influenced by two factors: the moral decay of society and its advancement towards order.<sup>61</sup> Both factors significantly impact the evolution of Islamic law. As Ibn 'Ābidīn articulated:

فَكَثِيرٌ مِنَ الْأَحْكَامِ تَخْتَلِفُ بِاخْتِلَافِ الزَّمَانِ لِتَغْيِيرِ عُرْفِ أَهْلِهِ، أَوْ لِحُدُوثِ ضَرُورَةٍ، أَوْ فَسَادِ أَهْلِ الزَّمَانِ، بِحَيْثُ لَوْ بَقِيَ الْحُكْمُ عَلَى مَا كَانَ عَلَيْهِ أَوَّلًا، لَزِمَ مِنْهُ الْمَشَقَّةُ وَالضَّرَرُ بِالنَّاسِ، وَلِخَالَفِ قَوَاعِدِ الشَّرِيعَةِ الْمُبْنِيَةِ عَلَى التَّخْفِيفِ وَالتَّيْسِيرِ وَدَفْعِ الضَّرَرِ وَالْفَسَادِ، لِبَقَاءِ الْعَالَمِ عَلَى أَتَمِّ نِظَامٍ وَأَحْسَنِ أَحْكَامٍ. وَلِهَذَا تَرَى مَشَايِخَ الْمَذْهَبِ (أَيِ الْحَنَفِيِّ) خَالَفُوا مَا نَصَّ عَلَيْهِ الْمُجْتَهِدُ فِي مَوَاضِعَ كَثِيرَةٍ بَنَاهَا عَلَى مَا كَانَ فِي زَمَنِهِ لِعِلْمِهِمْ بِأَنَّهُ لَوْ كَانَ فِي زَمَنِهِمْ لَقَالَ بِمَا قَالُوا بِهِ أَخْذًا مِنْ قَوَاعِدِ مَذْهَبِهِ

A number of Islamic laws have evolved in response to changing times, influenced by shifts in *'urf* (customs of society), emergencies, and moral decline within society. If these laws were to remain enforced as they were in the past, they would inevitably cause hardship and difficulties for individuals and contradict the principles of sharia, which are fundamentally based on alleviation, facilitation, and the rejection of harm and damage. This is because well-conceived rules and effective implementation of the law underpin the stability of the natural order. Consequently, Hanafi scholars have diverged from earlier *mujtahids* on several issues, taking into account considerations of *'urf*, contextual circumstances, and the conditions of their respective eras. These scholars recognised that had they lived in the present day, they would likely have arrived at similar conclusions, given their adherence to the principles of their school of thought.<sup>62</sup>

Conditions, situations, customs, human needs, order, administration, and regulations are subject to change and development over time. Several factors have contributed to these changes, including: a) moral decline among individuals and diminished religious adherence, b) alterations in *'urf* or human customs, which serve as legal foundations for scholars in their time, leading to modifications in Islamic law, c) the acquisition of new scientific knowledge or

<sup>58</sup> Ṣubḥī al-Maḥmaṣānī, *Turāth al-Khulafā' al-Rāshidīn fi al-Fiqh wa al-Qadhā* (Beirut: Dār al-Ilmu, 1984), 589.

<sup>59</sup> Bayyah, "Ma'āyir al-Waṣāṭiyah fī al-Fatwā."

<sup>60</sup> Maḥmūd ibn Aḥmad al-'Aynanī, *al-Bināyah fī Sharḥ al-Hidāyah* (Beirut: Dār al-Fikr, 1990), 45.

<sup>61</sup> Jamāl 'Aṭīyah and Wahbah Zuḥaylī, *Tajdīd al-Fiqh al-Islāmī* (Damaskus: Dār al-Fikr, 2000), 181.

<sup>62</sup> 'Ābidīn, *Majmū'ah Rasā'il*, Juz II, 125. See also, Ṣubḥī al-Ṣāliḥ, *Ma'ālim al-Sharī'ah al-Islāmiyah* (Beirut: Dār al-Ilmi lilmaalāyīn, 1975), 67; Muḥammad Muṣṭafā Shalbī, *Uṣūl al-Fiqh al-Islāmī* (Beirut: al-Dār al-Jāmi'iyyah, t.t.), 343; Ṣāliḥ ibn Ghānim Sadlān, *al-Qawā'id al-Fiqhiyah al-Kubrā wa lā Tafarra'a 'anhā* (Riyāḍ: Dār Balnasiyah, 1417 H.), 427; Muḥammad Abū Zahrah, *Abū Ḥanīfah Ḥayātuh wa 'Aṣruḥ-Ārā'uh wa Fighuh* (Beirut: Dār al-Fikr al-'Arabī), 401; Amāmah, *al-Tajdīd fī al-Fikr al-Islāmī*, 35-36.

information that necessitates revisions to the law based on previously established scientific understanding. For instance, there exists a divergence of opinion among the fiqh experts regarding the maximum duration of pregnancy; al-Zuhri posited that the maximum period of pregnancy is six or seven years, 'Ubadah ibn al-'Awam suggested five years, whereas al-Layth argued for three years. Meanwhile, the majority of scholars have determined that the maximum pregnancy duration is two years. Ibn Hazm contended that the maximum pregnancy period should not exceed nine months. These opinions were based on historical observations of pregnant women and anecdotal evidence from physicians, rather than on definitive proof. However, contemporary medical science, through research and experimentation, has established that the maximum pregnancy duration cannot exceed nine months. Thus, the perspective most aligned with current understanding is that of Ibn Hazm. d) The evolution of regulatory frameworks, orderly administration, facilities, and economic, social, and political systems necessitates changes to Islamic law, and e) the presence of emergencies and general needs can lead to modifications of certain historical Islamic laws.<sup>63</sup>

### Be attentive to local customs, 'urf, or traditions

'Urf, traditions or customs can be used as sources of Islamic law<sup>64</sup> so that they need to be considered and considered when determining them.<sup>65</sup> Therefore, ijtihad must know 'urf or customs (whether 'urf 'am or khās; violates naṣṣ or not) and human conditions<sup>66</sup> so that the resulting Islamic law can contain ease and relief and not make it difficult for humans to practice it.<sup>67</sup> In fact, determining Islamic law based on 'urf as it was originally, while 'urf as its mainstay has changed is against *ijmā'* and is stupidity,<sup>68</sup> it should have looked at 'urf first in determining Islamic law.<sup>69</sup> It can change due to changes in time, place, conditions, motives, and local customs. If it is not observed, the formulated Islamic law can be wrong, containing difficulties and narrowness.<sup>70</sup> Taking Islamic law in fiqh books raw, without looking at 'urf, clear indications and the condition of society can neglect their rights and oppress them.<sup>71</sup> Humans who have made a tradition and custom of an act make it a necessity, useful and beneficial for their lives. However, not all 'urf can be maintained and preserved because it sometimes has a negative impact, is harmful and dangerous for humans. 'Urf or customs can be perpetuated if

<sup>63</sup> Shubayr, *Al-Qawā'id al-Kulliyah wa al-Ḍawābiṭ al-Fiqhiyah fī al-Sharī'ah al-Islāmiyah*, 263–65; Al-Zarqā, *Al-Madkhal al-Fiqhī al-'Ām*, Juz II, 941–942.

<sup>64</sup> Muḥammad Abū Zahrah, *Uṣūl al-Fiqh* (Beirut: Dār al-Fikr al-'Arabī, n.d.), 273; Zahrah, *Abū Ḥanīfah Ḥayātuh wa 'Aṣruḥ-Ārā'uh wa Fiqhuh*, 396; Muḥammad Abū Zahrah, *Mālik Ḥayātuh wa 'Aṣruḥ-Ārā'uh wa Fiqhuh* (Kairo: Dār al-Fikr al-'Arabī, n.d.), 448.

<sup>65</sup> Muḥammad ibn Abū Sahl al-Sarkhasī, *Al-Mabsūd* (Beirut: Dār al-Ma'rifah, n.d.), 137; See also 'Ābidīn, *Majmū'ah Rasā'il Ibn 'Ābidīn*, Juz II, 115; Al-Zarqā, *al-Madkhal al-Fiqhī al-'Ām*, Juz II, 884; Zahrah, *Uṣūl al-Fiqh*, 273.

<sup>66</sup> 'Ābidīn, *Majmū'ah Rasā'il Ibn 'Ābidīn*, Juz II, 129; Zahrah, *Abū Ḥanīfah Ḥayātuh wa 'Aṣruḥ-Ārā'uh wa Fiqhuh*, 404.

<sup>67</sup> 'Ābidīn, *Majmū'ah Rasā'il*, Juz II, 125; Zahrah, *Uṣūl al-Fiqh*, 275; Sadlān, *al-Qawā'id al-Fiqhiyah al-Kubrā*, 427; Zahrah, *Abū Ḥanīfah Ḥayātuh*, 401.

<sup>68</sup> Aḥmad ibn Idrīs al-Mālikī al-Qarāfi, *Al-Iḥkām fī Tamyiz al-Fatāwā 'an al-Aḥkām wa Taṣarrufāt al-Qāḍi wa al-Imām*, Juz I (Beirut: Dār al-Bashā'ir al-Islāmiyah, 1995), 218–19; See also Muḥammad Muṣṭafā Shalbī, *al-Fiqh al-Islāmī bayna al-Mithāliyah wa al-Wāq'iyyah* (Beirut: al-Dār al-Jāmi'ah, 1982), 96; Muḥammad Bakr Ismā'il, *al-Qawā'id al-Fiqhiyah Bayna al-Aṣālāh wa al-Tawjīh* (Dār al-Manār, 1997), 158.

<sup>69</sup> 'Ābidīn, *Majmū'ah Rasā'il Ibn 'Ābidīn*, Juz II, 115.

<sup>70</sup> Muḥammad ibn Abū Bakr ibn Ayyūb ibn al-Qayyim al-Jawziyah, *I'lām al-Muwaqqi'in 'an Rabb al-'Ālamīn*, Jld IV (Riyāḍ: Dār ibn al-Jawzī, 1423 H), 337. See also, al-Qarḍāwī, *al-Islām wa al-'Ilmāniyah*, 145; Jasser Auda, *Maqāṣid al-Sharī'ah kafalsafah littashrī' al-Islāmī Ru'yah Manzūmiyah*, (Herndon: al-Ma'had al-'Ālamī lilfikir al-Islāmī, 2012), 20; al-Badawī, *Maqāṣid al-Sharī'ah*, 143; Umāmah, *al-Tajdīd fī al-Fikr*, 34; al-Raysūnī, *al-Taysīr al-Fiqhī*, 180.

<sup>71</sup> 'Ābidīn, *Majmū'ah Rasā'il Ibn 'Ābidīn*, 47.

they do not conflict with *nuṣūṣ* and the basic principles of *sharā'* which are *qaṭ'ī*,<sup>72</sup> do not eliminate *maṣlahat* and do not cause *mafsadah*.<sup>73</sup> Therefore, '*urf*, which contradicts and deviates from the Qur'an and the Sunnah, must be rejected because legalizing '*urf* like that is the same as ignoring *nuṣūṣ*, following lust, and invalidating the *sharī'ah*.<sup>74</sup>

The experts in *ushul fiqh* (*usuliyyūn*) states that among the requirements of *ijtihād* is knowing the community's customs.<sup>75</sup> Customs can change and differ due to differences in era, region, conditions and so on.<sup>76</sup> '*Urf* or customs that need to be considered in determining Islamic law are '*urf* or local customs. Islamic law can vary due to differences in '*urf* or customs in each region. Therefore, scholars of a school of thought often disagree with the imams of their schools because of differences in social conditions, customs, and culture.<sup>77</sup> A person who wants to formulate Islamic law must know the era, the condition of society, local '*urf* (*'ām* or *khāṣ*), whether it violates *naṣṣ* or not, and be competent in determining Islamic law; he does not just memorize several *fiqh* laws and evidence.<sup>78</sup> Al-Qarāfī wrote:

فَمَهْمَا بَجَدَدَ فِي الْعُرْفِ اعْتَبَرَهُ وَمَهْمَا سَقَطَ أَسْقَطَهُ وَلَا تَجْمُدُ عَلَى الْمَسْطُورِ فِي الْكُتُبِ طَوْلَ عُمْرِكَ  
بَلْ إِذَا جَاءَكَ رَجُلٌ مِنْ غَيْرِ أَهْلِ إِقْلِيمِكَ يَسْتَفْتِيكَ لَا تَجْرِهِ عَلَى عُرْفِ بَلَدِكَ وَاسْأَلْهُ عَنْ عُرْفِ بَلَدِهِ  
وَاجْرِهِ عَلَيْهِ وَأَفْتِهِ بِهِ دُونَ عُرْفِ بَلَدِكَ وَالْمُقَرَّرُ فِي كُتُبِكَ فَهَذَا هُوَ الْحَقُّ الْوَاضِحُ وَالْجُمُودُ عَلَى الْمَنْقُولَاتِ  
أَبْدًا ضَلَالٌ فِي الدِّينِ وَجَهْلٌ بِمَقَاصِدِ عُلَمَاءِ الْمُسْلِمِينَ وَالسَّلَفِ

Whatever happens to the '*urf* must be considered, whether modernity or decadence. We should not always be confined and shackled by explanations (*fiqh*, *tafsir*, *shurūf* *hadith*, etc) in books. If someone from another area comes to you to ask for a fatwa, do not determine the law based on the '*urf* of your area. However, ask about the '*urf* of his area and then determine the law based on the consideration of the '*urf* of the questioner's area. The explanations in your books are correct and clear. However, confining yourself to the explanations of the *turāsh* books is a deviation and ignorance of *maqashid*.<sup>79</sup>

Indonesia has hundreds of '*urf* customs spread across various regions and preserved from generation to generation. According to the author, knowing the local '*urf* is a must for someone (*mujtahid* or *mustanbiṭ*) who intends to decide on Islamic law in the area. This can support him in determining Islamic law that produces benefits, eliminates harm and is easy to do. '*Urf* or Indonesian customs can be maintained and preserved on the condition that they do not conflict with *nuṣūṣ al-sharī'ah* and contain benefits.

<sup>72</sup> Wahbah al-Zuhaylī, *Uṣūl al-Fiqh al-Islāmī*, Juz I (Damaskus: Dār al-Fikr, 2009), 120; See also Ya'qūb ibn 'Abdu al-Wahhāb al-Bāḥisīn, *Qā'idah al-'Ādah Muḥakkamah* (Riyāḍ: Maktabah al-Rush, 2012), 70; al-Zarqā, *al-Madkhal al-Fiqhī al-'Ām*, Juz II, 902.

<sup>73</sup> Muṣṭafā Sa'īd al-Khan, *al-Kāfi al-Wāfi fī 'Uṣūl al-Fiqh al-Islāmī* (Beirut: Mu'assasah al-Risālah, 2000), 215; 'Abdu al-Karīm Zīdan, *al-Madkhal li Dirāsah al-Sharī'ah al-Islāmiyah* (Iskandariah: Dār 'Umar ibn al-Khaṭṭāb, 2001), 206.

<sup>74</sup> Zahrah, *Ushūl al-Fiqh*, 273; Zahrah, *Abū Ḥanīfah Ḥayātuh wa 'Aṣruḥ-Ārā'Uh wa Fighuh*, 397.

<sup>75</sup> 'Ābidīn, *Majmū'ah Rasā'il Ibn 'Ābidīn*, Juz II, 125.

<sup>76</sup> Al-Shāṭibī, *Al-Muwāfaqāt fī Uṣūl al-Sharī'ah*, Juz II, 226.

<sup>77</sup> Muḥammad Maḥrūs, *Mabāhith fī al-Iqtisād al-Islāmī al-Mu'āṣir* (Kairo: al-Markaz al-Arabi, 2019), 294; Umar Sulaymān Ashqar, *al-Madkhal Ilā Dirāsah al-Madāris wa al-Mazhāhib al-Fiqhiyah* (Yordan: Dār al-Nafā'is, 1998), 50.

<sup>78</sup> 'Ābidīn, *Majmū'ah Rasā'il Ibn 'Ābidīn*, Juz II, 129.

<sup>79</sup> Al-Qarāfī, *al-Iḥkām fī Tamyiz al-Fatāwā 'an al-Aḥkām wa Taṣarrufāt al-Qāḍi wa al-Imām*, 218–19; al-Jawziyah, *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn*, Juz IV, 470.

## Consider the implications

The consequences of something, words or actions must be considered and thought about before determining the law. A *mujtahid* must seriously understand the consequences of the law, both current and future aspects of *maṣlaḥah* and *mafsadah*, because the aim of Islamic law is to benefit humans and avoid harm from them. The law of everything is related to the consequences it causes; haram or halal laws can be formulated based on the consequences.<sup>80</sup> If this is not thought about in-depth, it can result in *fiqh* that harms maqashid sharia, is difficult to implement, and even causes harm to humans.<sup>81</sup> Therefore, classical and contemporary maqashid sharia are very important to understand and apply in answering contemporary fiqh problems.

Paying attention to the legal consequences to be formulated is a must. The *mujtahid* must contemplate the consequences (*maṣlaḥah* and *mafsadat*) before determining the law of a problem. He is not enough to just study the *nusūs*.<sup>82</sup> The *mujtahid* must think about the appropriate law, *maṣlaḥah* and *mafsadah* for each the person who is burdened (*mukallaḥ*) according to his capacity, time, and condition because the tendencies of each person's soul are not the same.<sup>83</sup> In addition, realizing *maṣlaḥah* and rejecting *mafsadah* requires the *mujtahid* to observe reality.<sup>84</sup> The information can know the consequences of legal acts of *nusūs*, logic, senses, customary rules, indications, and conditions.<sup>85</sup> If he ignores it, it means he is not competent in *ijtiḥad*.<sup>86</sup> Naṣ, reality, changes and developments in social, economic, political, cultural, and all that encompasses the event must really be considered.<sup>87</sup> This can help him know the best consequences to produce Islamic law, which is *maṣlaḥah*.<sup>88</sup> This is a basic requirement for a *mujtahid*. In addition, he must master the maqashid sharia because *i'tibār al-mā'alāt* (paying attention to consequences) and maqashid are interrelated. An act or word cannot be formulated as a law, except after a process of deep thought regarding its consequences and maqashid.<sup>89</sup> Paying attention to reality and its legal consequences is an instrument to renew the intellect in understanding the *naṣ*. This pattern is part of the moderation of *ijtiḥad* between paying attention to the *dalālah naṣ* and its consequences in the reality of life.<sup>90</sup>

<sup>80</sup> Bayyah, "Ma'āyir al-Wasāṭiyah fī al-Fatwā"; al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharī'ah*, Juz III, 192; Umar Yadyah, *Manhaj al-Istiqrā' inda al-Uṣūliyyīn wa al-Fuqahā* (Beirut: Dār al-Kutub al-Ilmiyah, 2011), 177.

<sup>81</sup> Al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Sharī'ah*, Juz IV, 140-141; 'Abdu al-'Azīz ibn 'Abdurrahmān ibn Rabī'ah, *'Ilmu Maqāṣid al-Shārī'* (Riyād: Maktabah al-Mulk, 2002), 332; Aḥmad Al-Raysūnī, *Muhāḍarātu fī Maqāṣid al-Sharī'ah* (Kairo: Dār al-Kalimah, 2010), 222.

<sup>82</sup> Abdu al-'Azīz, *'Ilmu Maqāṣid al-Shārī'*, 332.

<sup>83</sup> Amāmah, *al-Tajdīd fī al-Fikr al-Islāmī*, 319.

<sup>84</sup> Al-Shahīd, *Al-Khiṭāb al-Naqdī al-'Uṣūlī min Taṭbīqāt al-Shāṭibī 'ilā al-Tajdīd al-Mu'āṣir*, 246.

<sup>85</sup> Abdulkarīm Akyawī, *Nadariyah al-I'tibār fī al-Ulūm al-Islāmiyah* (Herndon: al-Ma'had al-'Ālamī lilfikir al-Islāmī, 2008), 511.

<sup>86</sup> al-Raysūnī, *Nazariyah al-Maqāṣid 'inda al-Imām al-Shāṭibī*, 381; Akyawī, *Nadariyah al-I'tibār fī al-Ulūm al-Islāmiyah*, 471; Ismā'il Hasan Ḥafyān, *Mu'assasah al-Ijtiḥād wa Wadīfah al-Sulṭah al-Tashrī'iyah* (Herndon: al-Ma'had al-'Ālamī lilfikir al-Islāmī, 2015), 238.

<sup>87</sup> Akyawī, *Nadariyah al-I'tibār fī al-Ulūm al-Islāmiyah*, 472.

<sup>88</sup> al-Raysūnī, *Nazariyah al-Maqāṣid 'inda al-Imām al-Shāṭibī*, 348.

<sup>89</sup> Al-Shahīd, *al-Khiṭāb al-Naqdī al-'Uṣūlī min Taṭbīqāt al-Shāṭibī 'ilā al-Tajdīd al-Mu'āṣir*, 97.

<sup>90</sup> Rabī' al-Hamdāwī, "Athar al-Manhaj al-Uṣūlī fī Tarsikh al-Wasāṭiyah fī al-Fikr al-Islāmī," *al-Fikr al-Islāmī al-Mu'āṣir* Herndon: al-Ma'had al-'Ālamī lilfikir al-Islāmī (2020): 174.

## Attending to individual and societal psychological conditions

A significant aspect to consider in the *istinbath* of Islamic law is the necessity of contemplating the law that is appropriate for each *mukallaf* by observing their temporal, situational, and individual conditions, as each soul possesses a distinct inclination towards performing good deeds. Consequently, the *mujtahid* must take into account *nuṣūṣ*, as well as the social, economic, cultural, and psychological realities of the individual or society,<sup>91</sup> to produce Islamic law that is *maṣlaḥah* and suitable for them.<sup>92</sup> The study of reality is referred to as *taḥqīq al-manāṭ*. There are two types of *taḥqīq al-manāṭ*: special attention (*taḥqīq al-manāṭ al-khāṣ*) and general attention (*taḥqīq al-manāṭ al-‘ām*). *Taḥqīq al-manāṭ al-khāṣ* involves focusing on individual circumstances, taking into account their personal freedoms and considering the law that is appropriate for them. In this context, a *mujtahid* endeavours to formulate a suitable law for each person, in accordance with their time, conditions, and personalities. It is impermissible according to sharia and irrational to apply the same law in a particular case when the surrounding conditions differ, as local conditions significantly influence the determination of Islamic law.<sup>93</sup> This is termed *fiqh al-wāqī’ al-fardī* (fiqh of personal reality).<sup>94</sup> In contrast, *taḥqīq al-manāṭ al-‘ām* involves determining Islamic law based on general considerations of reality.<sup>95</sup> Failing to observe reality can lead to Islamic law that is inflexible, non-adaptive, and devoid of benefit. Therefore, it is insufficient for a *mustanbiṭ* or *mujtahid* to merely study the *nuṣūṣ*; they must also be adept when addressing specific problems or events. They must consider the surrounding conditions and realities; if they respond without such consideration, they risk making an error, as their legal formulation would not be grounded in a specific basis (*manāṭ mu’ayyan*).<sup>96</sup>

Attention to personal and societal psychological conditions is essential, as an individual can only accurately determine Islamic law by thoroughly contemplating it and understanding the nature of reality. By doing so, they can correctly ascertain Islamic law for an individual or society based on the Qur’an and the Sunnah.<sup>97</sup> The application of Islamic law may vary due to differences in region, time, and even individual circumstances. A legal issue may be deemed haram in one area due to its harmful effects, while in another, it may be considered halal because of its benefits.<sup>98</sup> Furthermore, a particular legal issue may be ruled haram for one

<sup>91</sup> Muhammad Dasūqī, *Nahwa Manhaj Jadīd Lidarāsah Ilmi Ushūl al-Fiqh*, Juz I (Herndon: al-Ma’had al-Alami lilfikir al-Islami, 1995), 491.

<sup>92</sup> Al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl Ash-Sharī’ah*, Juz IV, 70.

<sup>93</sup> Al-Duraynī, *Buḥūth Muqāranah*, Jld I, 129.

<sup>94</sup> Abdullah bin Bayyah, “al-Wāqī’ al-Mu’āṣir wa Atharuhu fī al-Aḥkām al-Shar’iyah,” in <https://binbayyah.net>; See also Abdu al-Raūf ibn Muḥammad Amīn, *al-Ijtihād Ta’aththuruha wa Ta’tthiruha fī Fiqhy al-Maqāsid wa al-Wāqī’* (Beirut: Dār al-Kutub al-Ilmiyah, 2013), 671.

<sup>95</sup> Bayyah, “Ma’āyir al-Waṣāṭiyah fī al-Fatwā,” Aḥmad al-Raysūnī dan Muḥammad Jamāl Bārūt, *al-Ijtihād al-Nāṣ, al-Wāqī’, al-Maṣlaḥah* (Damaskus: Dār al-Fikr, 2000), 65. See also, al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl*, Juz IV, 69-71; al-Raysūnī, *al-Tajdīd al-Uṣūlī Nahwu*, 735; Ḥaswah, *Fiqh al-Wāqī’*, 25; Muḥammad ibn ‘Alī ibn Ḥusayn al-Makkī al-Mālikī, *Ḍawābiṭ al-Fatwā* (Bākūs: Dār al-Furqān, 1998), 47; al-Zubaydī, *al-Ijtihād fī Manāṭ*, 256-257.

<sup>96</sup> Sa’īd Shabbār, *al-Ijtihād wa al-Tajdīd fī al-Fikr al-Islāmī al-Mu’āṣir* (Herndon: al-Ma’had al-Alami lilfikir al-Islāmī, 2007), 590.

<sup>97</sup> Al-Jawziyah, *I’lām al-Muwaqqi’in*, Jld II, 165; Amāmah, *al-Tajdīd*, 181; Yusri al-Sayyid Muḥammad, *Jāmi’ al-Fiqh*, Juz VII (T.np: Dār al-Wafā’, 2000), 121; Nājī Ibrāhīm al-Suwaid, *Fiqh al-Muwāzanah bayna al-Nazariyah wa al-Taṭbiq* (Beirut: Dār al-Kutub al-Ilmiyah, 2002), 169; Balqāsīm ibn Dhākir al-Zubaydī, *al-Ijtihād fī Manāṭ al-Ḥukmi al-Shar’ī* (Riyāḍ: Takween, 2014), 279-280.

<sup>98</sup> Zahrah, *Uṣūl al-Fiqh*, 283; Fakhrudīn al-Rāzī, *al-Tafsīr al-Kabīr*, Juz IV (Beirut: Dār al-Fikr, 1981), 145; Muḥammad ibn Muḥammad ibn Yūsuf al-Sanūsī al-Ḥusaynī, *Mukammil Ikmal Akmāl*, Juz I (Beirut: Dār al-Kutub al-Ilmiyah, t.t), 137.

individual due to its detrimental impact on them, while being ruled halal for another individual because it proves beneficial. Additionally, the study of reality serves to re-evaluate several Islamic laws that may no longer yield benefits, as they are unsuitable for application in the context of contemporary life.

Moderate scholars (*wasatīyūn*) in the establishment of Islamic law do not solely rely on *nuṣūṣ al-sharī'ah*; they also strive to relate it to societal realities. They consider both the text and the context simultaneously, ensuring that the Islamic law they produce is not insular but rather connected to social reality, in alignment with *maqashid*, *maṣlahah*, and the spirit of sharia. They maintain that every issue in Islamic law must have a corresponding answer or solution.<sup>99</sup> This is predicated on the foundations and sources of Islamic law, which take the form of *naql* (*nuṣūṣ*) and reason (*ijtihād*), functioning to understand, contextualise, and dynamise it, thereby making Islamic law applicable in every time and place.

### **Implementation of Abdullah bin Bayyah's moderate ijtiḥād method in contemporary issues**

Islamic legal issues consistently arise and evolve in every era, corresponding to changes in social, economic, political, and cultural contexts, as well as advancements in science. Consequently, *ijtiḥād* is essential in addressing new challenges and formulating their legal status. The reasoning behind *ijtiḥād* serves to bridge the essence and reality in the formulation of contemporary *fiqh*. Islamic legal products derived from classical *fuqahā* are not necessarily suitable or contain *maṣlahah* in addressing contemporary issues. Among the pressing problems in contemporary *fiqh* are:

#### **Implementation of the gelatin oil regulation**

Gelatin is a protein that can be derived from pig skin, cow skin, pig and cow bones, poultry skin, fish skin and bones,<sup>100</sup> and goat skin.<sup>101</sup> It has various applications that support human needs in food, pharmaceuticals, cosmetics, and health. The benefits of gelatin include antimicrobial, antioxidant, antiplatelet, antihypertensive, and immunomodulator activation properties.<sup>102</sup> However, 46% of the world's gelatin is sourced from pig skin. This presents a dilemma from a *fiqh* perspective: what is the legal status of gelatin derived from pig skin?

This is a contemporary issue that necessitates *ijtiḥād*, requiring a legal ruling to be formulated. We can employ the method of linking *nuṣūṣ* with *maqashid* and *i'tibār al-ma'ālāt*. First, we will examine the arguments that elucidate the legal status of consuming and utilising pork. Several verses address the legal status of pork: al-Baqarah verse 173, al-Maidah verse 3, al-An'am verse 145, and an-Nahl verse 115.

Allah SWT states in Surah al-Baqarah 1(173):

Indeed, He has only forbidden you carrion, blood, pork, and the meat of animals slaughtered by names other than Allah. However, whoever is compelled to

<sup>99</sup> Al-Qardāwī, *Dirāsah fī Fiqh Maqāṣid al-Sharī'ah Bayna al-Maqāṣid al-Kulliyah wa al-Nuṣūṣ al-Juz'iyah*, 150.

<sup>100</sup> Adilla Wahyu Nugraheni, Apri Dwi Anggo, and Eko Nurcahya Dewi, "Pengaruh Jenis Asam Terhadap Karakteristik Gelatin Kulit Ikan Ayam-Ayam (*Abalistes Stellaris*)," *Jurnal Ilmu dan Teknologi Perikanan* 3, no. 2 (December 10, 2021): 78–85, <https://doi.org/10.14710/jitpi.2021.13144>.

<sup>101</sup> Moh Khoeron, "UIN Jakarta Raih Hak Paten Gelatin," accessed February 23, 2023, <https://kemenag.go.id/nasional/uin-jakarta-raih-hak-paten-gelatin>.

<sup>102</sup> "Gelatin Dapat Dimanfaatkan untuk Berbagai Bidang Ilmu," accessed September 3, 2023, <https://fapet.ub.ac.id/gelatin-dapat-dimanfaatkan-untuk-berbagai-bidang-ilmu>.

consume it, not out of desire and not in excess, will incur no sin. Indeed, Allah is Forgiving, Most Merciful.

This verse affirms that the consumption and utilisation of all parts of the pig is haram.<sup>103</sup> The rationale behind the prohibition of pork lies in the presence of numerous tapeworms, which are highly detrimental to human health.<sup>104</sup> Tapeworms found in pigs can infiltrate the bloodstream and lead to a variety of diseases, including disorders of the brain, liver, spinal cord, lungs, respiratory issues, brain inflammation, digestive disorders, diarrhoea, and skin inflammation, among others.<sup>105</sup> The lifestyle of pigs is characterised by unsanitary and filthy habits, as they consume their own excrement and other unclean substances.<sup>106</sup> The maqashid is to abstain from impure food in order to safeguard the soul from contamination by unclean and degrading pathogens. Consequently, gelatin derived from pork skin and bones is haram unless in cases of emergency, as there are no alternative materials suitable for producing gelatin.

### Implementation of the challenges associated with the law of marriage registration

Marriage is a profound bond imbued with worshipful significance and entails adherence to Allah's command to establish a household characterised by *sakinah*, *mawaddah*, and *rahmah*. Several verses of the Qur'an and hadith elucidate the concept of marriage in detail. The ulama have delineated the conditions and pillars of marriage based on the study of these verses and various hadiths. The Shāfi'ī school of thought, predominantly followed and practised by the Indonesian populace, identifies five pillars of marriage: the groom, the bride, a guardian, two witnesses, and the marriage contract (*ijāb* and *qabūl*). However, the government has instituted additional regulations as outlined in Law Number 1 of 1974 concerning marriage, Article 1, Paragraph (2), which stipulates that every marriage must be recorded in accordance with applicable laws and regulations. This requirement is further reinforced in the Compilation of Islamic Law (KHI), Article 5, Paragraph (1), which mandates that to ensure orderly marriage within the Islamic community, every marriage must be documented. The implication of this rule is that marriage registration becomes essential to bestow legal validity upon the union of husband and wife. The inquiry arises: what is the legal standing of marriage registration?

This issue is *ijtihādiyyah* and contemporary in nature, wherein its legal formulation can employ the method of linking *nuṣūṣ* with maqashid while considering the evolving context of modernity. We may rely on *nuṣūṣ al-sharīah* in determining the laws governing marriage registration, including:

Surah al-Nisā 3(59):

"O you who believe, obey Allah and obey the Messenger of Allah and the ulil amri among you."

<sup>103</sup> Muḥammad ibn Aḥmad ibn Abi Bakr al-Qurṭubī, *al-Jāmi' li-ahkām al-Qur'ān*, Juz III (Beirut: Mu'assasah al-Risālah, 2006), 32.

<sup>104</sup> Muḥammad Rashīd Riḍā, *Tafsīr al-Qur'ān al-Hakīm*, Juz VI (Kairo: Dār al-Manār, 1947), 136.

<sup>105</sup> Alvi Jauharotus Syukriya, "Science and Technology Studies of the Causes of Prohibited Foods in Islamic Law," *Journal of Halal Product and Research (JHPR)* 2, no. 1 (2019): 44–50, <https://doi.org/10.20473/jhpr.vol.2-issue.1.44-50>.

<sup>106</sup> Muḥammad al-Ṭāhir ibn 'Āshūr, *Tafsīr al-Taḥrīr wa al-Tanwīr*, Juz II (Tunisia: al-Dār al-Tūnisīyah, 1984), 119; Aḥmad al-Raysūnī, *Naẓariyah al-Maqāṣid 'inda al-Imām al-Shāṭibī* (Herndon: al-Ma'had al-'Ālamī lilfīkr al-Islāmī, 1995), 151.



There are several scholarly interpretations of the term *ulī al-amri*. Abū Hurayrah interpreted *ulī al-amri* as *umarā'* (leader). In contrast, Mujāhid interpreted *ulī al-amri* as referring to scientists and fiqh experts (*fuqahā'*). Ibn Abi Najīh also interpreted *ulī al-amri* as *fuqahā'* and thinkers. Similarly, Jābir posited that the term signifies an expert in the Qur'an and a scientist.<sup>107</sup> 'Aṭā' interpreted *ulī al-amri* as *fuqahā'* and scholars. On the other hand, 'Ikrimah asserted that *ulī al-amri* specifically refers to Abu Bakr and 'Umar. Furthermore, al-Ṭabarī's analysis concluded that the prevailing interpretation among scholars is that *ulī al-amri* denotes *umarā'* (leaders) and *wulāt* (rulers), as this interpretation is supported by various hadiths that emphasise the importance of obeying leaders and rulers in matters of obedience and regulations that benefit Muslims.<sup>108</sup> The majority of scholars, including Abu Hurayrah and Ibn Abbās, agree that this verse instructs believers to obey Allah, the Messenger of Allah, and the government.<sup>109</sup>

Numerous hadiths exist that underscore the command to obey leaders and the government, including one narrated by al-Bukhārī from Abū Salamah, who reported hearing from Abū Hurayrah that the Messenger of Allah said:

مَنْ أَطَاعَنِي فَقَدْ أَطَاعَ اللَّهَ وَمَنْ أَطَاعَ أَمِيرِي فَقَدْ أَطَاعَنِي وَمَنْ عَصَانِي  
أَمِيرِي فَقَدْ عَصَانِي

"Whoever obeys me has obeyed Allah. Whoever disobeys me has disobeyed Allah. And whoever obeys my leader has obeyed me, and whoever disobeys my leader has disobeyed me."<sup>110</sup>

This hadith elucidates the obligation to obey leaders, rulers, and the government. Consequently, the laws and regulations<sup>111</sup> established by the government must be adhered to and respected under two conditions: 1) they must not contradict the commands of Allah and the Messenger of Allah, and 2) they must not contain sin. The laws and regulations enacted and ratified by the government are in accordance with the commands of Allah and the Messenger of Allah; thus, obeying and implementing them is tantamount to obeying Allah and the Messenger of Allah. In cases where the laws and regulations do not align with the commands of Allah and the Messenger of Allah and do not contain sin, the Messenger of Allah requires compliance with these regulations. Therefore, adhering to and implementing these regulations equates to obeying the Messenger of Allah. The government functions as the executor of the commands of Allah and the Messenger of Allah, regulating the lives of the

<sup>107</sup> Al-Qurṭubī, *al-Jāmi' li Ahkām al-Qur'ān*, Juz VI, 429; 'Abdurrahmān ibn Abu Bakr al-Suyūṭī, *al-Durru al-Manthūr fī al-Taḥsīn bi al-Ma'thūr*, Juz IV (Kairo: Markaz al-Hijr, 2003), 505–6.

<sup>108</sup> Muḥammad ibn Jarīr al-Ṭabarī, *Jāmi' al-Bayān 'an Ta'wīl Āyī al-Qur'ān*, Juz VII (Kairo: Dār al-Hijr, 2001), 176–82.

<sup>109</sup> Al-Qurṭubī, *al-Jāmi' li Ahkām al-Qur'ān*, Juz VI, 428–29.

<sup>110</sup> Aḥmad ibn 'Alī ibn Ḥajar al-'Asqalānī, *Fath al-Bārī* (Riyād: Maktabah al-Mulk, 2001), 119.

<sup>111</sup> The types and hierarchy of laws and regulations in Indonesia are governed by Law of the Republic of Indonesia Number 12 of 2011 on the Formation of Legislation, specifically Chapter III, Article 7 paragraph (1), which stipulates the following order: The 1945 Constitution of the Republic of Indonesia (UUD 1945), Ketetapan MPR, Law (Undang-Undang or UU) or Government Regulation in Lieu of Law (Peraturan Pemerintah Pengganti Undang-Undang or Perppu, Government Regulation (Peraturan Pemerintah or PP), Presidential Regulation (Peraturan Presiden or Perpres), Provincial Regulation (Peraturan Daerah Provinsi or Perda Provinsi), and Regency/City Regulation (Peraturan Daerah Kabupaten/Kota or Perda Kabupaten/Kota).

community to achieve a prosperous, peaceful, and fulfilling life in both this world and the hereafter.<sup>112</sup>

*Maṣlaḥah* refers to anything that is beneficial in realising and maintaining maqashid sharia, which include the preservation of religion, soul, reason, lineage, honour, and property. *Maṣlaḥah* can serve as the basis of Islamic law if it meets three criteria: 1) it must be a factual *maṣlaḥah* (*ḥaqīqiyah*), not an imaginative *maṣlaḥah* (*wahmiyah*), 2) it must be a public *maṣlaḥah* (*maṣlaḥah ‘āmmah*), not a personal-subjective *maṣlaḥah* (*maṣlaḥah khāṣṣah*), and 3) it must not conflict with the laws or principles established based on naṣṣ or *ijmā’*.<sup>113</sup> The *maṣlaḥah* arising from marriage registration includes the following: 1. Authentic evidence (*wathīqah rasmiyah*). Marriage registration serves as authentic written evidence that a valid marriage has occurred according to both Islamic law and positive law, providing legal force and protection for the husband and wife. Consequently, the recognition of a marriage bond between a husband and wife cannot be accepted if it cannot be substantiated by a marriage certificate.<sup>114</sup> 2. Safeguarding the rights of husband and wife. The wife's material rights encompass dowry, living expenses, and residence, while her non-material rights pertain to a good and fair social life. The wife's obligation is to devote herself physically and mentally to her husband in matters permitted by Islamic law. The husband's rights include obedience, trustworthiness, good social interaction, and religious education of the wife.<sup>115</sup> 3. Protecting the rights of children. Both parents are obligated to care for, maintain, and educate their children. Should either spouse fail to fulfil their obligations, either party may file a lawsuit in the Religious Court.<sup>116</sup> 4. Ensuring the establishment of order in marriage.<sup>117</sup> Marriage registration aids the government in maintaining orderly population administration for public services and family development. 5. Preventing invalid marriage ties, such as a man marrying a woman who is still a *mahram* or a woman who is undergoing the *‘iddah* period, among other scenarios. The author's analysis suggests that these benefits include those of *ḥaqīqiyah*, *‘āmmah kulliyah* and do not conflict with the principles of sharia. Through the analysis of *nuṣūṣ* and maqashid, marriage registration emerges as a regulation that must be obeyed and implemented by the Indonesian population. This regulation aligns with maqashid sharia, does not conflict with the principles of sharia, and contains no elements of immorality.

As introduced by Abdullah bin Bayyah, the *ijtihād* method integrates the foundational sources of Islamic law, texts (*nuṣūṣ*), objectives (*maqāṣid*), and the social, cultural, economic, and political realities of the time. In formulating Islamic law, it is essential to thoroughly consider the consequences of actions or items. The psychological conditions of individuals or communities also play a critical role in shaping *ijtihād*. The application of Islamic law may vary depending on geography, time, and individual circumstances. For instance, an action

<sup>112</sup> Ṣafī al-Raḥmān al-Mubārakfūrī, *Minnah al-Mun’im Bisharḥ Ṣaḥīḥ Muslim*, Juz III (Riyāḍ: Dār al-Salām, 1999), 252.

<sup>113</sup> Afifuddin Muhajir, *Membangun Nalar Islam Moderat : Kajian Metodologis* (Sukorejo: Tanwirul Afkar, 2018), 96–97; Wahhbah al-Zuhaylī, *al-Wajīz fi ‘Uṣūl al-Fiqh* (Beirut: Dār al-Fikr, 1999), 96; al-Fāṣī, *Maqāshid al-Syarī’ah wa Makārimuhā*, 146.

<sup>114</sup> Khallāf, *Maṣādir al-Tashrī’ al-Islāmī Fīmā lā Naṣṣa fih*, 85.

<sup>115</sup> Mahkamah Agung, “Kompilasi Hukum Islam” (2011), BAB XII Hak dan Kewajiban Suami Istri, Pasal 80, Pasal 83.

<sup>116</sup> Mahkamah Agung, “Kompilasi Hukum Islam” (2011), BAB XIII Hak dan Kewajiban Suami Istri Agung, Pasal 77 ayat (3).

<sup>117</sup> Mahkamah Agung, “Kompilasi Hukum Islam” (2011), BAB II Dasar Dasar Perkawinan Agung, Pasal 5 ayat (1).

may be deemed unlawful in one region due to its harmful effects, while in another, it could be considered permissible or even obligatory due to its benefits. Similarly, an act that is harmful to one person may be deemed haram for them, while it could be permissible or obligatory for another person if it is beneficial to them. The study of *nuṣūṣ*, *maqāṣid*, and contextual realities is crucial for reassessing Islamic laws that may no longer serve their intended purpose (*maṣlaḥah*) because they are no longer relevant to contemporary life. This approach ensures that the formulation of Islamic law genuinely promotes public benefit (*maṣlaḥah*) while preventing harm (*mafsadah*).

## Conclusion

Based on the preceding description and analysis, it can be concluded that Abdullah bin Bayyah is a prominent contemporary Muslim scholar with a moderate vision who conceptualises *ijtihād* as a method for addressing the evolving issues of Islamic law in response to the progress of human civilisation. Bayyah advocates for the moderate *istinbath* method in formulating Islamic law, which involves linking textual sources (*nuṣūṣ*) with *maqāshid sharia*, observing and distinguishing between *al-thawābit* and *al-mutaghayyirāt*, and paying attention to the context of changing times in formulating Islamic law. This includes considering customs, *‘urf* or local traditions, contemplating the consequences, and being attentive to the psychological conditions of individuals and the community. Employing this method is expected to create Islamic law that fosters *maṣlaḥah*, adapts to the conditions and customs of society, promotes convenience, and upholds humanitarian values. This *ijtihād* method proves highly relevant for addressing contemporary issues within Islamic law. Implementing this method enables *fiqh* to remain dynamic, rather than stagnant, and to continually adapt to the evolving challenges of Islamic law. This *ijtihād* method is particularly pertinent for responding to contemporary Islamic legal challenges, which are constantly changing and developing in tandem with the progress of human civilisation.

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