

**Theories of *iftā'* in Islamic law with special reference to the  
Shāfi'ī school of law and their application in contemporary  
Singapore**

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## ABSTRACT

This research aims to identify the legal theories developed and employed by the jurists of the Shāfi‘ī school of law for the purpose of issuing *fatāwā*. It intends to shed light on how these jurists understand the term *iftā’*, and what are the elements in their view that constitute the legal framework that they utilize for *iftā’*. This research also attempts to determine the differences between *iftā’* and the general process of formulating legal rulings by way of *ijtihād*, and the factors of consideration that may result in the existence of such a differentiation. This research argues that the existing legal discourse within the Shāfi‘ī *madhhab* has not rendered due attention to the significance of *iftā’*, and thus there exist a dearth of literature within the *madhhab* on the legal theories of *iftā’*.

This research also analyzes examples of *fatāwā* issued by the Singapore Fatwa Committee with the aim to comprehend how the legal theories of *iftā’*, lacking they may be within the legal deliberations of the Shāfi‘ī *madhhab*, have an influence on the *iftā’* institution of the state and the *fatāwā* it issued.

## ACKNOWLEDGMENT

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## TRANSLITERATION OF THE ARABIC ALPHABET

a	:	ا	t	:	ط
b	:	ب	z	:	ظ
t	:	ت	‘	:	ع
th	:	ث	gh	:	غ
j	:	ج	f	:	ف
ḥ	:	ح	q	:	ق
kh	:	خ	k	:	ك
d	:	د	l	:	ل
dh	:	ذ	m	:	م
r	:	ر	n	:	ن
z	:	ز	h	:	ه
s	:	س	w	:	و
sh	:	ش	y	:	ي
ṣ	:	ص	ah	:	ة
ḍ	:	ض	al	:	ال

## VOWELS

### Short vowels

fatha	a :	َ
dhamma	u :	ُ
kasra	i :	ِ

### Long vowels

ā	:	آ
ū	:	و
ī	:	ي

### Doubled

uwwa final: ū)	:	وْ
iyya (final: ī)	:	يْ
anna	:	نْ

## DIPHTHONGS

aw	:	وَ
ay	:	يْ
ae	:	عْ

# CHAPTER ONE

## INTRODUCTION

### 1.1 Introduction

The dynamism of Islamic law as a set of legal injunctions designed to not only sustain, but more significantly, to nourish the magnificence of man's life in its totality, has notably been addressed for centuries. Although a Muslim subscribes to an article of faith that dictates a conviction in the divine state of this law, hence its finality and intransience, the suppleness in its application and its level of practicality to achieve its goals of realizing general interests of its subjects, transcends beyond doubt of any enlightened researcher.

This is evident in the evolution of its legal theories throughout its extended history, originating from the days of Prophet Muḥammad in Makkah and Madīnah, to its contemporary scholars and jurists of the present day. Albeit the argument that Islamic law has long surpassed its glorious zenith in term of the ingenuity of its scholars' intellectual contribution, they have never failed to develop means to ensure its applicability across different social and temporal spheres.

This dynamic mutability of Islamic law has been significantly achieved, among others, through legal interpretations of *muftūn*, or jurisconsults, who "... were central to that

part of legal theory that dealt with modalities of transmitting the outcome of *ijtihād* from the domain of the legal profession down to the public.”<sup>1</sup>

*Iftā’* has been an important instrument throughout the Islamic legal tradition in providing Muslim societies with answers and solutions to their religious queries. It acts as the medium used by jurists to interpret the legal injunctions as revealed by the texts into a practical language that can be readily comprehended and complied with by the masses.

The legal theories on *iftā’* has gone through various stages of development, where scholars of different schools of law exercised their ingenuity to formulate principles and methodologies that, according to their judgment, would best suit the needs of their respective societies and communities, while at the same time, preserve the sanctity of the *sharī‘ah*, or the divinely revealed law of Muslims.

The Muslims in Singapore are one of such communities. The issue of strictly adhering to the classical *fiqh* (Islamic positive law) by holding firmly to the products of *ijtihād* of early Muslim jurists while religiously making references to their classical writings, and whether such a practice could sufficiently address the challenges of the community, has always been a point of debate among Singaporean Muslims.

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<sup>1</sup> Hallaq, Wael, “*Iftā’* and *Ijtihād* in Sunni Legal Theory : A Developmental Account”, in *Islamic Legal Interpretation : Muftis and Their Fatwas*, Masud, Muhammad Khalid, Messick, Brinkley & Powers, David S. (eds), Harvard University Press, Massachusetts, 1996, p. 33.

The *iftā'* institution in Singapore underwent a major transformation after the country's independence in 1965 which resulted, among others, in a constitutional act, named the Administration of Muslim Law Act (AMLA), billed and approved by the Parliament in 1966. The old practices of *fatāwā* being issued unofficially by individual scholars was then transformed into a formalized and institutionalized structure, when in 1968, an official Fatwa Committee chaired by a *muftī* was appointed by the President of Singapore, as stipulated in AMLA. The Fatwa Committee has since been dynamic and forward-looking in issuing *fatāwā* for the Singapore Muslims. This is evident in their responses to questions and issues like human organ transplant, recycled water, cloning and genetic engineering, property ownership, marriage and divorce regulations, and development of *waqf* properties, to name a few.

## 1.2 Research Problem

Among the terms of reference of the Fatwa Committee as spelled out in AMLA is that the Committee shall "... follow the tenets of the Shafi'ī school of law".<sup>2</sup> However, if the Committee "... considers that the following of the tenets of the Shafi'ī school of law will be opposed to the public interest, the Majlis<sup>3</sup> may follow the tenets of any of the other accepted schools of Muslim law as may be considered appropriate".<sup>4</sup>

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<sup>2</sup> Subsection 33(1) of AMLA.

<sup>3</sup> The Majlis refers to Majlis Ugama Islam Singapura, or the Islamic Religious Council of Singapore.

<sup>4</sup> Subsection 33(2) of AMLA.

It seems that the Muslim community of Singapore, as adherers of the Shāfi‘ī school of law, have decided to constitutionalise the school’s tenets in order to systematically administer their religious life, especially in seeking legal interpretations of the divine injunctions of the *sharī‘ah* as revealed. However, this leaves a fundamental issue worth investigating, and that is what are the legal theories developed by jurists of the Shāfi‘ī *madhhab* in the realm of *iftā’* that the Singapore Fatwa Community needs to subscribe to, and how is the application of these legal theories and principles, which were classically formulated and evolved through history, onto the contemporary context of modern Singapore and its Muslim population?

### **1.3 Specific Research Objectives**

This research aims to fulfill the following objectives:

- 1 To identify the propositions suggested, and principles utilized, by the jurists of the Shāfi‘ī school of law in formulating their legal theories on *iftā’*.
- 2 To understand the relevant theoretical evolutions that materialized within the *madhhab*, and factors that influenced or motivated such changes.

- 3 To determine the differences between *iftā'* and the general process of formulating legal rulings by way of *ijtihād*, and the factors of consideration that may result in the existence of such a differentiation.
- 4 To study examples of *fatāwā* issued by the *iftā'* institution in modern Singapore and the juristic evidences that form their basis of argument, as well as the contextual and environmental factors that influence the *fatāwā* issued.
- 5 To analyze the application of those legal theories of *iftā'* in the issuance of *fatāwā* by the Singapore Fatwa Committee.

#### 1.4 Rationale of Study

- 1 It is of utmost importance that *fatāwā* and religious guidance issued for Muslim communities are formulated with a conscious determination to fulfill the goals of *sharī'ah* (*maqāṣid al-sharī'ah*), which comprise of the protection of five necessities (*al-darūriyyāt al-khams*) of human life : religion, life, mind, property and progeny.<sup>5</sup>

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<sup>5</sup> 'Aṭiyyah, Jamāl al-Dīn, *Naḥw Tafīl Maqāṣid al-Sharī'ah*, Dār al-Fikr, Damascus, 2003, pp. 91-106.

In their effort to realize these goals, Muslim scholars have been known to be jealously preserving the sanctity of *sharī'ah* by religiously upholding the divinity of its texts. This is especially true when the principles of law and methodology of *ijtihād* that were formulated by al-Shāfi'ī are scrutinized, for they reflect his fundamental call for the superiority of the divine texts.<sup>6</sup> Al-Shāfi'ī's propositions have paved ways towards a systematic approach in deducting religious rulings from the textual sources, which has its marked influence on the legal thoughts of his successors, from within his *madhhab* in particular, and on scholars of other affiliations in general.

The scholars who succeeded al-Shāfi'ī continued the initiative of further developing his principles and methodologies in legal deduction, either by elaborating on them with further details, or expanding them with innovative additions, each exercising his intellectual liberty of agreeing or rejecting the views of others. Naturally, as a consequence of such a rich tradition in the realms of constructing Islamic legal theories, evolution of ideas unavoidably materialized. The first significance of this study would then be in the researcher's intention to identify the developmental accounts of these legal theories, and the contextual factors that both motivated and shaped their changes.

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<sup>6</sup> Abū Sulaimān, 'Abd al-Wahhāb Ibrāhīm, *Manhajīyyat al-Imām Muḥammad ibn Idrīs al-Shāfi'ī fī al-Fiqh wa Uṣūlih*, Dār Ibn Ḥazm, Beirut, 1999, pp. 85-170.

- 2 It is also hoped that this study would be able to contribute towards the legal discourse on the compatibility between the classical theories of Islamic law and the possibility of its pragmatic application in the contemporary world, seeking at the same time to strike an informed balance between the calls of two distinct groups; one of whom propagate the notion of compulsory permanence in employing literal understanding of classical texts, and the other who insist that issues faced by modern and post-modern societies are too complex for the *sharī'ah* to warrant a positive position in playing its role as the applicable set of law.
- 3 As there is an immense dearth of literature as well as academic research on the *fatwā* institution in Singapore, most likely due to the lack of interest among researchers in the Islamic legal experience towards such a small island state, this study will contribute significantly as a pioneering academic exercise in this particular area. The study will also provide an important share in the interest and trends shown in recent years towards the study of *fiqh* (Islamic positive law) for Muslim minorities.

## 1.5 Research Questions

In order to achieve the research objectives as stated earlier, this research will attempt to answer some questions as follows :



- 1      What constitutes *iftā'* in the perception of the jurists of the Shāfi'ī school of law?
- 2      What are the legal foundations that the jurists of the Shāfi'ī school of law base on in constructing their propositions on *iftā'*?
- 3      What are the forms of developments and changes that occurred in the formative stages of these legal theories of *iftā'*?
- 4      What are the factors of consideration that may cause *iftā'* to be different from the process of formulating general legal rulings by way of *ijtihād* as reflected in books on *uṣūl al-fiqh* of the Shāfi'ī school of law?
- 5      How are these legal theories of *iftā'* applied in the *iftā'* institution in contemporary Singapore?

These act as the guiding questions for the study that the researcher hopes would facilitate towards accomplishing its purpose and aims as mentioned above.

## 1.6 Scope and Limitation of Research

- 1 This study will focus on theories that discuss the legal issues in relations to *iftā'*.
- 2 The jurists of whose views will be investigated are of the Shāfi'ī *madhhab*, selection of whom will be according to prominence and influence in the Islamic legal fraternity, starting from al-Shāfi'ī himself as the founder of the school.
- 3 Examples of contemporary *fatāwā* to be analyzed are those issued only by the Singapore Fatwa Committee, whose members are officially appointed by the President of the Republic of Singapore, as stipulated by the Administration of Muslim Law Act (AMLA). Unofficial views on Islamic legal matters issued by individual scholars of the country will not be scrutinized in the study due to the following reasons :
  - a) Lack of documentation of both their rulings and the arguments that constitute the basis of those rulings.
  - b) Absence of constitutional legal standing allocated by AMLA to individual opinions, hence restrict their influence and effect on the government and the public.

## **1.7 Research Method**

The research approach for this study will be based on analytical methods, by investigating historical accounts of the developmental stages of the legal theories, primarily through library resources, especially in the initial stages of theoretical conceptualization and context setting. The library-based qualitative method will be the primary method used, in sourcing for information and data relevant to the research, from books, articles, journals, newspapers, magazines, websites etc.

In addition, an investigation of official documents of the Fatwa Committee, especially minutes of the Committee's meetings which are kept in the Office of Mufti, Islamic Religious Council of Singapore (MUIS), will be conducted to further understand the arguments and basis behind those *fatāwā* issued.

## **1.8 Literature Review**

As the institution of *fatwā* plays an important role in the *sharī'ah* legislation of any country, subjects related to *fatwā* have been commonly discussed, including its strong reference to the context in which the *fatwā* is issued. The writings by jurists of the Shāfi'ī school of law are of no difference, in such that a researcher may easily find numerous discussions on *fatāwā* and *muftūn* within the writings on Islamic law in the *madhhab*. The writings on *iftā'* by jurists of this *madhhab* can be classified into two main categories, the first of which are dedicated books written specifically on the issues

of *fatāwā* and *muftūn*. The second category comprises of writings on the topic that are incorporated as a section within larger books on Islamic law and its principles.

The first category, where dedicated books are written to specifically discuss on issues of *iftā'*, can be further divided into two groups. First are books on the etiquettes of *muftūn* in issuing *fatāwā* and the etiquettes of *mustaftīn* who request for the *fatāwā*. One of such writings is *Adab al-Muftī wa al-Mustaftī* by Ibn al-Ṣalāḥ,<sup>7</sup> who discusses at length the required qualities of a *muftī*, both in term of his knowledge skills in Islamic law, as well as his moral standing and personal characteristics. Subsequently Ibn al-Ṣalāḥ discusses the etiquettes that a *muftī* is expected to observe in the process of issuing a *fatwā*. This ranges from the need for him to consciously be humble when offering himself to assume the responsibility of *iftā'*, to the correct way of putting his answer, or *fatwā*, into writing. Although Ibn al-Ṣalāḥ's *Adab al-Muftī wa al-Mustaftī* was generally perceived by proponents of the Shāfi'ī school of law as the authority on issues of *muftūn* and *fatāwā*, as reflected by al-Nawawī's adoption of it in almost its entirety for the introduction of his *al-Majmū' Sharḥ al-Muhadhdhab*,<sup>8</sup> Ibn al-Ṣalāḥ does not elaborate on, or develop, the legal theories of *iftā'* sufficiently to be considered as a consolidated legal framework for the purposes of *iftā'*.

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<sup>7</sup> Ibn al-Ṣalāḥ, 'Uthmān ibn 'Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-'Ulūm wa al-Ḥikam, Medina, 1986.

<sup>8</sup> Al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū' Sharḥ al-Muhadhdhab*, Dār al-Fikr, Beirut, 2000, pp. 68-91.

The second category of dedicated writings on *iftā'* are the compilations of *fatāwā* written by jurists of the Shāfi'ī school of law in the form of answers to questions asked by the *mustaftūn*. Two of such books are *al-Ḥāwī lī al-Fatāwī* by al-Suyūṭī,<sup>9</sup> and *al-Fatāwā al-Kubrā al-Fiqhiyyah* by al-Haytamī.<sup>10</sup> These books are basically compilations of legal opinions and rulings on issues asked by members of the authors' community, but do not delve specifically into the discussion of the legal theories that can act as a systematic and congruent framework for the purposes of *iftā'* itself.

As for writings on *fatāwā* and *muftūn* that are incorporated as part of larger books in Islamic law by jurists of the Shāfi'ī *madhhab*, it is discovered that although such a discussion exists in almost all of the *uṣūl al-fiqh* books, they are usually placed towards the final sections of these books. This can be observed in al-Juwaynī's *Burhan*,<sup>11</sup> al-Ghazzālī's *Mustaṣfā*,<sup>12</sup> al-Rāzī's *Maḥṣūl*,<sup>13</sup> and al-Shīrāzī's *Luma'*,<sup>14</sup> to name a few. Again, similar to the categories mentioned earlier, these writings do not offer detailed deliberations on the legal theories of *iftā'*, for they generally address the issue of *ijtihād* and the etiquettes of a *muftī*.

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<sup>9</sup> Al-Suyūṭī, Jalāl al-Dīn 'Abd al-Rahmān ibn Abī Bakr ibn Muḥammad, *al-Ḥāwī lī al-Fatāwī*, al-Maktabah al-'Aṣriyyah, Beirut, 1990.

<sup>10</sup> Al-Haytamī, Shihāb al-Dīn Aḥmad ibn Muḥammad ibn Ḥajar, *Al-Fatāwā al-Kubrā al-Fiqhiyyah 'alā Madhhab al-Imām al-Shāfi'ī*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1997.

<sup>11</sup> Al-Juwaynī, Imām al-Ḥaramayn 'Abd al-Malik ibn 'Abd Allāh, *al-Burhān fī Uṣūl al-Fiqh*, Maṭābi' al-Dawḥah al-Ḥadīthah, Doha, n.d.

<sup>12</sup> Al-Ghazzālī, Abū Ḥāmid Muḥammad ibn Muḥammad, *al-Mustaṣfā min 'Ilm al-Uṣūl*, Mu'assasah al-Risālah, Beirut, 1997.

<sup>13</sup> Al-Rāzī, Fakhr al-Dīn Muḥammad ibn 'Umar, *al-Maḥṣūl fī 'Ilm Uṣūl al-Fiqh*, ed. Tāhā Jābir al-'Ulwānī, Mu'assasah al-Risālah, Beirut, 1997.

<sup>14</sup> Al-Shīrāzī, Ibn Ishāq Ibrāhīm ibn 'Alī al-Shīrāzī, *Kitāb al-Luma' fī Uṣūl al-Fiqh*, Dār al-Nadwah al-Islāmiyyah, Beirut, 1988.

With regards to the *iftā'* institution in Singapore, a comprehensive and in-depth study of the *fatāwā* issued by the Singapore Fatwa Committee and the legal framework that these *fatāwā* are based on has never been produced. The only literature available are papers written and presented by officers of the Office of the Muftī,<sup>15</sup> Islamic Religious Council of Singapore (MUIS), that provide general overview and understanding of the Fatwa Committee, and its establishment and functions. One of these writings is an article titled “Perkembangan dan peranan institusi fatwa di Singapura”<sup>16</sup> (The development and function of the institution of *fatwā* in Singapore) where the history of the application of Islamic law in Singapore is highlighted, until the codification of the Administration of Muslim Law Act I 1966. This Act governs, among others, the appointment of the Mufti of Singapore, the establishment of the Fatwa Committee and the appointment of its members. The article further addresses the functions of a *muftī* and the ethics with which a *muftī* should adhere to in the process of *iftā'*. It concludes by mentioning some of the methodologies applied by the Committee such as issuing the *fatāwā* based on the Shāfi‘ī school of law.

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<sup>15</sup> The Office of the Mufti was formed by the Islamic Religious Council of Singapore to provide secretariat support to both the Fatwā Committee and its chairman, the Muftī of Singapore.

<sup>16</sup> Semait, Syed Isa Mohamed, “Perkembangan dan peranan institusi Fatwa di Singapura” (The development and function of the *fatwā* institution in Singapore), Abdul Monir Yaacob & Wan Roslili Abd. Majid (eds.), *Mufti dan fatwa di Negara-negara ASEAN (Muftī and fatwā in ASEAN countries)*, Institut Kemajuan Islam Malaysia, Kuala Lumpur, 1998.

Another paper focusing on the *iftā'* institution in Singapore is titled “Pengurusan fatwa di Singapura”<sup>17</sup> (The administration of fatwā in Singapore) by Mohd Murat Md Aris, Director of Islamic Affairs, Islamic Religious Council of Singapore (MUIS). This paper focuses more on the function of a *muftī* as defined by the classical scholars and as governed by the Administration of Muslim Law Act (AMLA) mentioned earlier.

In relation to the management of *fatwā*, this paper includes the basis on which the members of the Fatwa Committee are appointed. It also mentions the establishment of the Office of Mufti as the supporting office of the Fatwa Committee, responsible to carry out research and produce research papers based on the problems and questions put forth to the Fatwa Committee. At the end of the paper emphasis is given to the challenges faced by the institution of *fatwā* in Singapore, especially pertaining to the position of Muslims in the country as a religious minority group striving in a secular multi-racial society. Therefore, regular discussions among the religious elites in the country, through discussion sessions and consultative forums, are very important to ensure that the *fatāwā* issued are on par with the needs of the society.

Another publication that is considerably instrumental to this research, apart from the papers mentioned above, is the collection of selected *fatāwā* issued by the Fatwa Committee. A total of three volumes have been published, one each in 1987, 1991 and

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<sup>17</sup> Md Aris, Mohd Murat, “Pengurusan Fatwa di Singapura” (*Fatwā* management in Singapore), Abdul Samat Musa, Adel Abdul Aziz, Haliza Harun & Nik Salida Suhaila Nik Saleh (eds.), *Prinsip dan pengurusan fatwa di Negara-negara ASEAN (The principles and management of fatwā in ASEAN countries)*, Kolej Universiti Islam Malaysia, Negeri Sembilan, 2006.

1998 respectively, and made available to the public, especially Muslim organizations and mosques to provide them with an encompassing knowledge of the rulings issued. These compilations of selected *fatāwā* are published in such a format that each *fatwā* is immediately preceded with a question. The *fatāwā* issued by the Fatwa Committee, as reflected in the three compilations, address a wide spectrum of issues, ranging from personal enquiries concerning the private lives of individuals in the Singapore society, to public issues that carry capacious implications to the general masses. The *fatāwā* compiled and published in the said three publications, however, are not classified into their respective categories according to the issues addressed.



## CHAPTER TWO

### LEGAL THEORIES ON *IFTĀ'* AMONG SHĀFI'Ī SCHOLARS

In conducting an analytical investigation into the *fatāwā* issued in Singapore since its independence in 1965, it is inevitable to understand the legal theories that constitute the theoretical framework from which the *fatāwā* are formulated. Such an understanding will shed light on the foundations on which the *fatāwā* are constructed on, the objectives they are set to realize, the methodology applied in the *iftā'* processes, and the tools utilized in addressing possible conflicts.

This Chapter is an attempt by this researcher to investigate the legal theories developed and held by jurists of the Shāfi'ī *madhhab* (school of law) on *iftā'*. The deliberate focus rendered to the Shāfi'ī *madhhab* in particular for investigation is due to the fact that the Muslims of Singapore have been adherents of the Shāfi'ī *madhhab* for generations. Based on this, the Administration of Muslim Law Act (AMLA) of the country's constitution<sup>18</sup> explicitly delineates a constitutional requirement that *fatāwā* issued by the country's Fatwa Committee are to be formulated according to the Shāfi'ī *madhhab*.

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<sup>18</sup> Further introduction and investigation of this Act and how it is related to the fatwa institution in Singapore will be attempted in Chapter Five.

## 2.1 Definition of *Iftā'* and its Parameters

The term *fatwā* lexically means an answer given to a question, while the act of giving out the answer is termed as *iftā'*. A *muftī* is a person who gives out the answer, while the one who asks is known as *mustaftī*.<sup>19</sup>

The technical usage of the term *fatwā* and its other derivatives in the realm of Islamic law, however, is associated with questions that only touch upon issues of the *sharī'ah*, or religious matters.<sup>20</sup> The technical meaning of the term *muftī* is, therefore, more specific than its lexical definition, for it commonly refers to a person who takes upon himself the task of providing his people with religious guidance, by answering their queries that are related to their religion; and to qualify him to perform as such, he is expected to be knowledgeable in sciences that are in relevance with the task, such as knowledge of the universals and the specifics (*al-'ām wa al-khāṣ*) of the Qur'ān, background motives of the revelation of its verses (*asbāb al-nuzūl*), *et. cetera*.<sup>21</sup>

These religious issues that a *muftī* is expected to provide answers on, are generally understood to be issues of *fiqh*, which is either ritualistic or juristic in nature. As for

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<sup>19</sup> Ibn Manẓūr, Muḥammad ibn Mukram, *Lisān al-'Arab*, Dār Lisān al-'Arab, Beirut, n.d., vol. 15, p. 147. See also Ibn al-Qaṭṭā', 'Alī ibn Ja'far al-Sa'dī, *Kitāb al-Af'āl*, Dā'irah al-Ma'ārif al-'Uthmāniyyah, Heidarabad, 1360(H), vol. 2, p. 466; and al-Shīrāzī, Muḥammad ibn Ya'qūb al-Fīrūzabādī, *al-Qāmūs al-Muḥīṭ*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1999, vol. 4, p. 423.

<sup>20</sup> Lewis, Pellat and Schacht (eds.), *The Encyclopaedia of Islam New Edition.*, E. J. Brill, Leiden, 1965, vol. 2, pg. 866. See also Zaydān, 'Abd al-Karīm, *Uṣūl al-Da'wah*, Maktabah al-Manār al-Islāmiyyah, n.d., 1976, p. 130.

<sup>21</sup> Al-Bahutī, Manṣūr ibn Yūnus ibn Idrīs, *Sharḥ Muntaha al-Irādāt*, 'Ālam al-Kitāb, Beirut, 1993, vol. 3, p. 456.

other areas, Masud indicates that some early theorists would limit the response range of *muftūn*, citing, as an example, al-Nawawī, who identifies *kalām* as a problematic field. Masud continues to state that, according to al-Nawawī, some *muftūn* responded to theological questions by saying, “This is not included in our knowledge”, “We did not sit (to give *fatāwā*) for this”, or “A question other than this I will take.”<sup>22</sup> However, a further investigation of al-Nawawī’s book, *al-Majmū‘*, highlights that the opposite is, in fact, true. Rather than the *muftūn* responding to theological questions in such a fashion of negativity, as alleged by Masud, al-Nawawī actually reports rejection by jurists of such a practice.<sup>23</sup>

Al-Nawawī does not seem to perceive *kalām* as a problematic field for a *muftī* to issue his *fatāwā* on, albeit it being a non-legalistic or juristic area. His preference is more of a *muftī* not to provide laymen with answers to their theological questions in a detailed manner, due to the general position of scholars that members of the public should not delve into discussions of such a nature which they are incapable to comprehend, hence the possibility of creating polemics within the community. Al-Nawawī’s reservation is also when a *muftī* who specializes only in the field of *fiqh* issues *fatāwā* on theological matters, which, according to al-Ṣaimarī, whose opinion is quoted by al-Nawawī, is

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<sup>22</sup> Masud, Muhammad Khalid, “Muftis, Fatwas, and Islamic Legal Interpretation”, Masud, Muhammad Khalid, Messick, Brinkley & Powers, David S. (eds.), *Islamic Legal Interpretation : Muftis and Their Fatwas*, (eds) Harvard University Press, Massachusetts, 1999, p. 20.

<sup>23</sup> Al-Nawawī, Abū Zakariyyā Muḥyi al-Dīn ibn Sharaf, *al-Majmū‘ Sharḥ al-Muhadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 86.

impermissible.<sup>24</sup> This generally receptive position by al-Nawawī towards *muftūn* addressing theological matters in their fatwas is reflected in Ibn al-Ṣalāḥ's book, *Adab al-Muftī wa al-Mustaftī*, where he reports that a reserved attitude by early jurists to issue *fatāwā* on theological matters was few and rare.<sup>25</sup>

Masud, in mentioning al-Nawawī as an example of theorists who impose limitation to the response range of *muftūn*, further narrates that two earlier *adab al-muftī* writers were cited by Al-Nawawī as maintaining that the *muftī* should refer questions relating to Qur'anic exegesis (*tafsīr*) to specialists in exegesis, unless they pertained directly to legal rules (*aḥkām*).<sup>26</sup> Masud fails, however, to point out that al-Nawawī, after reporting the views of the two writers, al-Ṣaimarī and al-Khaṭīb, makes a remark that he prefers the *muftī* to proceed in issuing *fatāwā* on matters relating to exegesis if he is competent in the field, not only verbally, but also in writing. Al-Nawawī closes the passage by indicating that there is no difference between issues of *tafsīr* and *aḥkām*.<sup>27</sup>

It can therefore be stated that the reservation by some jurists, if there is any, for a *muftī* to give *fatāwā* on issues other than those pertained to *fiqh* or *aḥkām*, is not due to those non-*fiqh* areas as problematic, but rather is motivated by the worry of an adverse

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<sup>24</sup> Ibid., p. 86.

<sup>25</sup> Ibn al-Ṣalāḥ, 'Uthmān ibn 'Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-'Ulūm wa al-Ḥikam, Medina, 1986, p. 157.

<sup>26</sup> Masud, Muhammad Khalid, "Muftis, Fatwas, and Islamic Legal Interpretation", Masud, Muhammad Khalid, Messick, Brinkley & Powers, David S. (eds.), *Islamic Legal Interpretation : Muftis and Their Fatwas*, (eds) Harvard University Press, Massachusetts, 1999, p. 20.

<sup>27</sup> Al-Nawawī, Abū Zakariyyā Muḥyi al-Dīn ibn Sharaf, *al-Majmū' Sharḥ al-Muhadhdhab*, Dār al-Fikr, Beirut, 2000, p. 86.

outcome that may be caused by either a lack of competency on the part of the questioner (*mustaftī*) to comprehend a detailed answer, as in the case of *fatāwā* on theological matters, or a lack of competency on the part of the *muftī* in areas that he is not specialized in, as in the case of *fatāwā* on issues of exegesis. In short, realizing *maṣlahah ‘āmmah*, or general good, is the factor of consideration in deciding which particular area a *muftī* is allowed to give *fatāwā* in, and which he is not. This is in line, among others, with the scholars’ proposition that a *muftī* should impose a stricter rule in answering a question by a *mustaftī* whom he sees as having a negligent or laidback attitude, and a lenient rule when he sees that the situation of the *mustaftī* warrants for one.<sup>28</sup>

Upon investigating the specific usage of the term *iftā’* among jurists of the Shafi‘ī *madhhab*, it appears that there are different views on its practical definition. This disparity in defining the term *iftā’*, is caused primarily by the varied positions among the jurists in the manner that they comprehend the term *ijtihād*, and the association between the two terms. In addition to this, further deliberations on what constitutes the prerequisites that qualify a person to issue *fatāwā* in later parts of this chapter will also show that due to practical considerations, later jurists after the first four centuries of the *Hijri* calendar introduced a range of concessions in delineating the parameters of *ijtihād*, thus providing additional flexibility in the definition of *iftā’*. It is therefore

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<sup>28</sup> Ibid., pp. 81-82.

essential, before this research delves further into the subject of *iftā'*, that the definition of the term *ijtihād* is accordingly addressed.

*Ijtihād* is a noun to the verb *ijtahada*, which lexically means to exert one's utmost effort to achieve an objective.<sup>29</sup> Its technical meaning as commonly employed in the realm of Islamic law is one that indicates total expenditure of effort made by a jurist in order to infer, with a degree of probability, the rules of *sharī'ah* from their detailed evidence in the sources.<sup>30</sup>

A further investigation into the definition of *ijtihād* employed by jurists of the Shāfi'ī *madhhab* highlights the fact that these jurists are not unanimous in their understanding of the term. Al-Shīrāzī defines *ijtihād* as exhausting one's effort to identify legal rulings of the *Sharī'ah*.<sup>31</sup> This definition of *ijtihād* is also shared by al-Baiḍāwī. However, in their commentaries to Al-Bayḍāwī's *Minhāj al-Wuṣūl fī 'Ilm al-Uṣūl*, both al-Asnawī and al-Badkhashī add to this definition that the rulings intended are those of which no decisive proof (*dalīl qat'ī*) on them are available in the texts.<sup>32</sup> Al-Ghazzālī also suggests a definition similar to this, that is *ijtihād* is to exhaust one's effort to

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<sup>29</sup> Al-Fīrūz Ābādī, Majd al-Dīn Muhammad ibn Ya'qūb, *al-Qāmūs al-Muhīt*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1995, vol. 1, p. 396.

<sup>30</sup> Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence*, The Islamic Texts Society, Cambridge, 2003, p. 469.

<sup>31</sup> Al-Shīrāzī, Abū Ishāq Ibrāhīm ibn 'Alī al-Shīrāzī, *Kitāb al-Luma' fī Uṣūl al-Fiqh*, Dār al-Nadwah al-Islāmiyyah, Beirut, 1988, p. 73.

<sup>32</sup> Al-Badkhashī, Muḥammad ibn al-Ḥassan, *Manāhij al-'Uqūl*, Maktabah wa Maṭba'ah Muḥammad 'Alī Ṣubayḥ wa Awlāduh, Cairo, n.d., vol. 3, pp. 191-192.

derive *sharī'ah* rulings in cases where there has not been any prior mention of their decisive evidences in the texts.<sup>33</sup>

Al-Shāfi'ī in his *al-Risālah* states that *ijtihād* and *qiyās*<sup>34</sup> are two nouns that share a mutual meaning.<sup>35</sup> This implies that, according to al-Shāfi'ī, a *mujtahid* is a person who exercises *ijtihād* in a way that he puts his best effort to apply a ruling on a particular case that has no explicit mention in the Qur'ān and the *sunnah*, by way of identifying a common cause, or *'illah*, between this new case and another that has prior mention in the texts, extending the same ruling of the original case to the new case based on the commonality of the effective cause.

Upon comparing al-Shāfi'ī's definition to the one suggested by al-Ghazzālī, al-Asnawī and al-Badkhashī, it is noted that albeit both definitions sharing a common thrust, that the cases that fall under the ambit of *ijtihād* are only those which do not have prior explicit mention of their decisive proofs in the texts, the two definitions differ in the procedures to be employed in order to deduce a ruling for the unprecedented cases. While al-Shāfi'ī specifically sets *qiyās* as the procedure to be followed, as implied by his insistence that *qiyās* and *ijtihād* share a common meaning, the other jurists

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<sup>33</sup> Al-Ghazzālī, Abū Hāmid Muḥammad ibn Muḥammad, *al-Mustaṣfā min 'Ilm al-Uṣūl*, Mu'assasah al-Risālah, Beirut, 1997, vol. 2, p. 400.

<sup>34</sup> *Qiyās* is the extension of *Sharī'ah* value from an original case, or *aṣl*, to a new case, because the latter has the same effective cause as the former. The original case is regulated by a given text, and *qiyās* seems to extend the same textual ruling to the new case. See Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence*, The Islamic Texts Society, Cambridge, 2003, p. 264.

<sup>35</sup> Al-Shāfi'ī, Muhammad ibn Idrīs, *al-Risālah*, Muṣṭafā al-Bābī al-Ḥalabī, Cairo, 1983, p. 477.

mentioned appear to have left it unfixed to any specific procedure. Nonetheless, the fact that many of these scholars propose that *ijtihād* is a tool to be employed only for cases unprecedented in the texts, sheds light to the reason behind the immense reluctance among the scholars, especially those who lived in the first two hundred years of the establishment of the *madhhab*, to allow anyone who has yet to attain the stature of a fully qualified *mujtahid*, to issue *fatāwā*, as will be further elaborated in subsequent parts of this research.

Another possible way of identifying *ijtihād* is by casting view on its presupposed opposite, which is *taqlīd*. There seems to exist a large degree of agreement among these scholars on what constitutes *taqlīd*. Al-Shāfi‘ī, al-Māwardī, al-Shīrāzī,<sup>36</sup> al-Ghazzālī,<sup>37</sup> are unanimous in defining *taqlīd* as accepting an opinion without evidence (*qabūl qawl bi lā ḥujjah*). If *ijtihād* can be accepted as the opposite of *taqlīd*, and this common notion of what *taqlīd* entails can be utilized as an indicator, it can thus be proposed that the common denominator that scholars refer to, to offer the meaning of *ijtihād*, is the process of identifying proofs and constructing credible arguments as the foundation for inferring legal rulings of the *sharī‘ah*. This will then provide consistency in the correlation between the two opposing terms, for when a qualified jurist embarks on a process to identify proofs and arguments of a ruling, he is said to be

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<sup>36</sup> Al-Shīrāzī, Abū Ishāq Ibrāhīm ibn ‘Alī al-Shīrāzī, *Kitāb al-Luma‘ fī Uṣūl al-Fiqh*, Dār al-Nadwah al-Islāmiyyah, Beirut, 1988, p. 70.

<sup>37</sup> Al-Ghazzālī, Abu Hamid Muhammad ibn Muhammad, *al-Mustasfa min ‘Ilm al-Usul*, Mu’assasah al-Risalah, Beirut, 1997, vol. 2, pp. 462-463.



exercising *ijtihād*, while a person who readily accepts a ruling without recognizing its evidences and arguments is said to be employing *taqlīd*.

Subsequent to these deliberations on the meaning of *ijtihād*, it is now apposite to present a discussion on the technical usage of the term *iftā'* and *fatwā* among the scholars of the *madhab* of al-Shāfi'ī. Al-Shāfi'ī himself, as the founder of the *madhhab*, suggests that *iftā'* is *ijtihād*, and that the two words are parallel in their meaning. He evidently maintains that the person must possess a set of skills and branches of knowledge in order for him to issue Islamic legal opinions, which comprises knowledge of the *Qur'ān*, the *sunnah* (normative practice or custom of the prophet), legal opinions of scholars, *qiyās* (analogical reasoning) and the Arabic language. Al-Shāfi'ī further elaborates the steps and processes that the person has to employ in each of the five disciplines stated, which, in short, resembles the very skills, knowledge and methods required of a *mujtahid*<sup>38</sup> (one who is qualified to exercise *ijtihād*).

It is al-Shāfi'ī's position that *ijtihād* is the order of the day in deriving legal judgments and rulings. A judge, according to al-Shāfi'ī, is obliged to avoid *taqlīd* (imitating legal opinions of others), even if those others are known to be superior in their knowledge skills.<sup>39</sup> Although it is a judge whom al-Shāfi'ī is making reference to, this obligation to

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<sup>38</sup> Al-Shāfi'ī, Muḥammad ibn Idrīs, *Kitāb al-Umm*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1993, vol. 6, p. 287.

<sup>39</sup> Ibid., p. 287.

exert *ijtihād* is understandably applicable to a *muftī* too, as both a judge and a *muftī* share a common basic function of processing evidences, either physical, textual or circumstantial as they may be, to derive from them a legal ruling which is as near to the truth as humanly possible. Moreover, if a judge has to have a set of knowledge skills that equates that of a *mujtahid*, as insisted by al-Shāfi‘ī, and that he has to go through a process of deliberations that constitutes the stages of *ijtihād*, his consultant,<sup>40</sup> who is called a *muftī* and whose qualification would logically have to be comparable, if not superior, is expected to be a *mujtahid* himself too. This is further supported by al-Shāfi‘ī’s own assertion that both a *muftī* and a judge must have substantial knowledge of the Qur’ān and the *Sunnah*, in order for the *muftī* to issue a *fatwā*, and for the judge to cast his judgment, and that *ijtihād* is to be applied in a situation where they are unable to find explicit indication in the Qur’ān and the *Sunnah* on the impending issue or case.<sup>41</sup> It is thus noted that al-Shāfi‘ī does not restrict a judge and a *muftī* to adhere to any particular *madhhab* or *imām* (leader of a school of law) in issuing *fatāwā*, due to his insistence that they must be *mujtahidūn* and that they must apply independent reasoning, or *ijtihād*.

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<sup>40</sup> On the injunction that a judge should make it a practice to seek the views of a knowledgeable and qualified consultant, see al-Shāfi‘ī, Muḥammad ibn Idrīs, *Kitāb al-Umm*, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1993, vol. 7, p. 158.

<sup>41</sup> Al-Shāfi‘ī, Muḥammad ibn Idrīs, *Kitāb al-Umm*, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1993, vol. 7, p. 154.

This may provide an explanation as to the strict prerequisites required of a *muftī*, as will be discussed in further detail in subsequent parts of this Chapter. There are several implications to this definition by al-Shāfi‘ī :

First, the various definitions suggested by jurists in identifying *ijtihād* itself has contributed towards the confusion in aligning *iftā’* to *ijtihād*. This will be further elaborated in later parts of this Chapter. Which particular definition of *ijtihād* is *iftā’* aligned to has an effect on the feasibility of providing answers to unprecedented religious issues faced by a muslim community, more than ever in an age where independent *mujtahidūn* are said not to be found abundantly, if not completely.

Secondly, insisting a parallel meaning between *iftā’* and *ijtihād* has led some jurists into adopting a rigid approach in formulating answers to religious enquiries. As *iftā’* is equated to *ijtihād*, and there no longer exists a *mujtahid*, as asserted by a considerable number of scholars, who is qualified to embark on *ijtihād* in its full capacity, this group of jurists maintain that later day *muftūn*, being semi-qualified, are only expected to issue *fatāwā* in the form of reporting the legal views of demised *mujtahidūn*.

Thirdly, this position by some jurists is probably the factor that has caused a sense of anxiety among pockets of Muslims, who perceive it as a failure on the part of the Islamic legal fraternity to provide a workable framework that would enable the issues and challenges faced by the Muslim communities to be addressed progressively,

according to their contemporary needs that are affected by the environmental contexts they live in.

Further investigation on al-Shāfi‘ī’s writings, however, reveals that he does not actually equate *iftā’* with *ijtihād* to mean that they share a parallel and identical definition. This is based on al-Shāfi‘ī’s proposition that *ijtihād* in its actuality is *qiyās*. In his *Kitāb al-Umm*, al-Shāfi‘ī writes :

“ ... it is improper for a *muftī* to issue *fatwā* to anyone, unless if he accumulates (knowledge) to become well-versed with the *al-Kitāb* (al-Qur’ān), its abrogating and abrogated verses, its specifics and universals, its convention; well-versed with the *sunnah* of the Prophet, and the opinions of scholars, old and new; well-versed with the language of the Arabs; astute and able to distinguish between the equivocals, and to understand *qiyās*. If he is deficient in any one of these qualities, he is not allowed to speak about *qiyās*. Similarly, if he is knowledgeable in the primary sources, but does not have a grasp of *qiyās*, which is secondary (to the primary sources), it is not permissible to tell him to exert *qiyās*, when he does not understand *qiyās*. If he understands *qiyās*, whilst he lacks knowledge of the primary sources, or any of them, it is not permissible to tell him to apply *qiyās* based on something that he does not know.”<sup>42</sup>

Here, in his listing of the qualities and knowledge areas that a *muftī* should possess that qualify him to issue a *fatwā*, there is a clear indication that al-Shāfi‘ī does not equate *iftā’* to *qiyās* as being synonymous in their meaning. This is implied by al-Shāfi‘ī’s own statement that having possession of the knowledge in *qiyās* is one of the

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<sup>42</sup> Al-Shāfi‘ī, Muḥammad ibn Idrīs, *Kitāb al-Ūmm*, Maktabah al-Kulliyyāt al-Azhariyyah, Cairo, 1961, vol. 7, p. 302.

prerequisites of a *muftī* to be allowed to issue *fatāwā*. Expressing an item as one part of a set of requirements to another, can not be construed to suggest that they are identical and synonymous. There is, therefore, a need to align this proposition by al-Shāfi‘ī to his other statement presented earlier in this research that *iftā’* is *ijtihād*, which is understood to mean *qiyās*. This researcher is of the view that, when insinuating that *iftā’* is *ijtihād*, al-Shāfi‘ī intends to highlight that *ijtihād*, and *qiyās* in this respect to be exact, is the single most important element in the procedural stages of formulating a *fatwā*. This is comparable to the saying of the Prophet, for example, “*al-ḥajj ‘arafah*”, which means that the pilgrimage ritual of *ḥajj* is to be physically present at the ‘*Arafah* area. This physical presence at the ‘*Arafah* area during pilgrimage is termed as *wuqūf*. However, scholars are unanimous in indicating that this prophetic narrative does not imply that the two terms *al-ḥajj* and ‘*Arafah* as parallel in their meaning. Instead this narrative in particular highlights the notion that the ritual of *wuqūf* at ‘*Arafah* is the single most important act of worship in the whole execution of *ḥajj*.

Al-Ghazzālī shows a similar inclination of equating *iftā’* to *ijtihād*. In his *al-Wasīṭ*, al-Ghazzālī mentions that among the prerequisites of a judge is that he must be a *muftī*. Al-Ghazzālī explicitly indicates that what he meant by a *muftī* is a *mujtahid* whose *fatāwā* are reliably accepted. He further elaborates that a *mujtahid* is he who is

thoroughly capable of independently arriving at the legal rulings of the *sharī‘ah* without the need to imitate the views of others.<sup>43</sup>

There is a need, as has been mentioned in the earlier part of this research on the definitions of *ijtihād* and of *taqlīd* employed by the jurists, to clearly distinguish the definition of these two terms used by each jurist from the one used by another, for different jurists may be referring to different understanding when they mention the permissibility, or impermissibility, of a *muqallid* to issue *fatāwā*. Al-Ghazzālī, for one, explicitly highlights that what he means by *taqlīd* is the acceptance of a legal statement or opinion without evidence (*qabūl qawl bi lā ḥujjah*).<sup>44</sup> This is also the definition used by his predecessors, like al-Māwardī and al-Juwaynī. It is therefore understandable when they insist that a *muqallid* of such a status should not be allowed to issue *fatāwā*, when he is not sufficiently equipped with the necessary knowledge to comprehend the proofs and arguments that form the foundation for the *fatāwā*, as it may result in serious misrepresentation of the *sharī‘ah*. This position by al-Ghazzālī and earlier jurists of the *madhhab*, I believe, warrants no disagreement among all scholars. However, when another jurist refers to the kind of *taqlīd* exercised by a *muftī muqallid* as answering questions by adhering to legal opinions of his *madhhab*, following the methodologies and principles of his *imām*, and, fully comprehending the evidences that constitute the rulings of the *madhhab*, albeit not deducing the ruling himself directly from the texts

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<sup>43</sup> Al-Ghazzālī, Abū Ḥāmid Muḥammad ibn Muḥammad, *al-Wasīṭ fī al-Madhhab*, Dār al-Kutub al-‘Arabiyyah, Beirut, 2001, vol. 4, pp. 295-296.

<sup>44</sup> Al-Ghazzali, Abu Hamid Muhammad ibn Muhammad, *al-Mustasfa min ‘Ilm al-Usul*, Mu’assasah al-Risalah, Beirut, 1997, vol. 2, pp. 462-463.

due to his deficiency in the prerequisites mentioned earlier, or possibly because he sees no necessity in doing so due to the availability of the ruling deduced by an earlier *ijtihād*, Ibn al-Ṣalāḥ and his contemporaries, as well as their successors, have shown signs of being more accommodative. What, then, would have possibly been al-Māwardī, al-Juwaynī and al-Ghazzālī's position on such a situation? The question on what actually constitutes *iftā'* will then be in place, for there will definitely be judicial implications if the interchangeability between the term *iftā'* and the term *ijtihād* is accepted, or rejected.

A further analysis on his writings reveals that al-Ghazzālī himself, albeit having insisted that only an independent *mujtahid* is qualified to issue *fatāwā* as a matter of principle,<sup>45</sup> offers a concession, in a situation where no independent *mujtahid* (*mujtahid mustaqill*) is available, by allowing a person who has reached the level of *ijtihād* in an established *madhhab* (*mujtahid fī al-madhhab*) to issue *fatāwā* by subscribing to the views (*taqlīd*) of his *imām*.<sup>46</sup> If his insistence that a *muqallid* should not issue any *fatwā* can be attributed to his understanding and suggestion that the term *taqlīd* carries the meaning of acceptance of a legal statement or opinion without evidence (*qabūl qawl bi lā ḥujjah*)<sup>47</sup>, as mentioned earlier, al-Ghazzālī must have utilized a different definition of *taqlīd* in this concession given to a *mujtahid fī al-madhhab* to issue *fatwā* by way of

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<sup>45</sup> Al-Ghazzālī, Abū Ḥāmid Muḥammad ibn Muḥammad, *al-Wasīṭ fī al-Madhhab*, Dār al-Kutub al-‘Arabiyyah, Beirut, 2001, vol. 4, pp. 295-296.

<sup>46</sup> Ibid., vol. 4, p. 296.

<sup>47</sup> Al-Ghazzālī, Abū Ḥāmid Muḥammad ibn Muḥammad, *al-Mustasfa min ‘Ilm al-Usul*, Mu’assasah al-Risalah, Beirut, 1997, vol. 2, pp. 462-463.

*taqlīd*. This provides us with a clear example of the critical need to identify the exact definitions used by each jurist in his deliberations of *ijtihād* and *taqlīd*, and their association with *iftā'*.

Al-Rāfi'ī offers a suggestion that the difference in views on the permissibility of a non *mujtahid*, when he is broadly knowledgeable in the *madhhab* of a *mujtahid*, to issue *fatāwā*, is induced by the differing positions among jurists on whether imitating the views (*taqlīd*) of a deceased *mujtahid* is acceptable. If such is considered allowable, the act of a non *mujtahid* exercising *iftā'* by way of reporting *fatāwā* earlier issued by a *mujtahid* is therefore accepted. In this instance, the *mustaftī*, in agreeing to the *muftī's* *fatwā*, is regarded not as a *muqallid* to the *muftī*, but to the *mujtahid* whom the *muftī* is adhering to.<sup>48</sup>

There is a considerably extensive discussion among jurists of the Shāfi'ī *madhhab* on the acceptability of imitating, by way of *taqlīd*, the views or *fatāwā* of a deceased *mujtahid*. Earlier jurists demonstrate a tendency to reject such a practice. Al-Juwaynī argues that, as an example, it has become a unanimous position that imitating the *madhhab* of Abū Bakr, who was a close companion of the Prophet, is no longer

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<sup>48</sup> Al-Rāfi'ī, 'Abd al-Karīm ibn Muḥammad ibn 'Abd al-Karīm, *al-'Azīz Sharḥ al-Wajīz*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1997, vol.12, p. 421.



permissible, despite the prophet's recognition of Abū Bakr's pre-eminence over the rest of the *ummah*.<sup>49</sup>

A closer scrutiny into al-Juwaynī's position displays a possible explanation to his rejection of such a practice. He expresses his predilection that when a *mujtahid*, whose *ijtihād* or *fatwā* has been adhered to by a *muqallid*, dies, it becomes the onus of the *muqallid* to reassign that adherence to another living *mujtahid*.<sup>50</sup> We know that the availability of *mujtahiūn* until the end of the fifth century was never an issue, hence al-Juwaynī's rejection of a *muqallid* imitating a deceased *mujtahid* is due to the abundance of living *mujtahidūn* during his time. It can therefore be concluded that the divergence from the views of al-Juwaynī, and his likes of early Shafī'ī jurists, by their successors within the *madhhab*, is motivated by the necessity caused by the dearth of *mujtahidūn*, a situation that later emerges at around the start of the sixth century. Ibn al-Ṣalāḥ and Al-Nawawī, for example, report on both views, but maintain their preferences on the permissibility of imitating the *ijtihād* of a deceased *mujtahid*. Al-Nawawī justifies his position by placing emphasis on the pressing needs of his time,<sup>51</sup> while Ibn al-Ṣalāḥ articulates that to disallow such a practice during his time would only afflict adversities.<sup>52</sup>

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<sup>49</sup> Al-Juwaynī, Imām al-Ḥaramain 'Abd al-Malik ibn 'Abd Allāh, *al-Burhān fī Uṣūl al-Fiqh*, Maṭābi' al-Dawḥah al-Ḥadīthah, Doha, vol. 2, p. 1350.

<sup>50</sup> Ibid., p. 1352.

<sup>51</sup> Al-Nawawī, Abū Zakariyyā Muḥyi al-Dīn ibn Sharaf, *al-Majmū' Sharḥ al-Muhadhdhab*, Dār al-Fikr, Beirut, 2000, p. 87.

<sup>52</sup> Ibn al-Ṣalāḥ, 'Uthmān ibn 'Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-'Ulūm wa al-Ḥikam, Medina, 1986, pp. 160-161.

Again, the difference in position in this can be ascribed to the different definitions of *ijtihād* and *taqlīd*. The opinion of the majority of later jurists of the *madhhab*, that it is allowed to subscribe to the *ijtihād* of a dead *mujtahid* by way of *taqlīd*, should not lead to complacency in term of accepting it indiscriminately. There are basically two primary levels in the process of formulating a legal opinion that is to be offered as a *fatwā* by a *mujtahid*<sup>53</sup> : firstly, the level of deriving an objective ruling purely from the texts, and secondly, the level of applying this ruling onto the context of which the *mustaftī* is in. This second dimension is of similar importance to the first, for it determines, based on the considerations of the intention (*maqṣad*) of the ruling, the general good (*maṣlaḥah āmmah*) it is designed to realize, and the anticipated outcome (*al-dharīʿah*) from its application, as to whether the initial text-based ruling stands, or an exception is to be given preference. The permissibility of emulating a dead *mujtahid*'s *ijtihād* should be confined to its first dimension, but not extended to the second, for the contexts that he was in during his lifetime when he issued his *fatwā* would most probably be unique to him. Another *mufīṭī*, living in either a different physical or a different temporal space, may emulate fully the *ijtihād* of the formerly mentioned *mujtahid* only if, upon a careful and thorough investigation of all environmental factors available, he finds the contexts that he is in and those of the former are to be in parallel. Otherwise, the act of imposing the *ijtihād* of the dead *mujtahid* indiscriminately, which includes both the first and the second dimensions of his *ijtihād* as stated above, without taking into consideration the environmental factors

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<sup>53</sup> Al-Ashqar, 'Umar Sulaimān 'Abdullāh, *al-Wāḍiḥ fī Uṣūl al-Fiqh*, Dār al-Salām, Egypt, 2001, p. 278.

that may demand a need of departing from the strict ruling initially derived from the sources (*‘azīmah*) to applying legal concession (*rukḥṣah*) in cases where the concessions are necessarily needed, will only cause digression from the intended purposes of the *sharī‘ah* (*maqāṣid al-sharī‘ah*), hence bringing about convolution to the enquirer, or *mustaftī*. This is as expressed by al-Zarkashī that the *ijtihād* of a *muftī* changes by time, and that it is improper for a lay person to emulate and adhere to a *fatwā* previously issued to another lay person.<sup>54</sup>

An investigation into propositions made by al-Māwardī reveals that as early as the middle of the fifth century, there has already existed a tendency, at least by al-Māwardī, to widen the acceptability of *iftā’* from only the limited sphere of *ijtihād*. In discussing the impermissibility of applying *taqlīd* in passing judgment, al-Māwardī gives an indication that there is a middle category between *ijtihād* and *taqlīd*, when he mentions that if a judge puts a preference to an opinion over another by virtue of its evidences, he is in actuality exerting *istidlāl*, and he is, by that, a *mustadill*.<sup>55</sup> It may be argued that his expression does not necessarily imply a creation of a third category between *ijtihād* and *taqlīd*, for exerting *istidlāl* carries an understanding that he is in fact referring to *ijtihād*. This is further supported by al-Māwardī’s own definition of *ijtihād*, which is “seeking truth by the evidences that lead to it”.<sup>56</sup> However, there are other jurists, like

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<sup>54</sup> Al-Zarkashī, Badr al-Dīn Muḥammad ibn Bahādir ibn ‘Abd Allah, *al-Baḥr al-Muḥīt fī Uṣūl al-Fiqh*, Wizārat al-Awqāf wa al-Shu‘ūn al-Islāmiyyah, Kuwait, 1992, vol. 6, p. 308.

<sup>55</sup> Al-Māwardī, ‘Alī ibn Muḥammad ibn Ḥabīb, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi‘ī*, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1999, vol. 16, p. 53.

<sup>56</sup> Ibid., p. 117.

al-Shāfi‘ī and al-Juwaynī, who define *ijtihād* as an effort of deriving rulings directly from the primary legal sources, which are the *Qur’ān* and *sunnah*. This is the view of not only early jurists from the first two centuries of the *madhhab*, as reflected by a late eighth century jurist, al-Zarkashī, when he defines *ijtihād* as “exerting the best of effort to arrive at an applied or practical religious ruling by way of *istinbāṭ*”.<sup>57</sup> This is further reiterated by al-Zarkashī himself when he defines a *mujtahid* as a person who “has reached puberty (*bāligh*), is sane (*‘āqil*) and has the capacity to derive rulings from their sources”.<sup>58</sup> If this understanding of what constitutes *ijtihād* by the likes of Al-Shāfi‘ī, al-Juwaynī, and al-Zarkashī is to be taken as the benchmark, it is therefore inappropriate to suggest that al-Māwardī’s *istidlāl* is to be categorized together as *ijtihād*.

Nonetheless, whether this *iftā’* process by way of *istidlāl* as suggested by al-Māwardī, is to be termed as *ijtihād*, or otherwise, is, in its actuality, immaterial, for the issue of relevance here is that there is already a position by al-Māwardī who points out that it is acceptable for a person to issue an Islamic legal ruling, be it in the form of a *fatwā* by a *mufī* or in the form of a judgment by a judge, not by extracting a rule directly from the sources of Quran and sunnah to originate a legal position, but by comparing and analyzing between two or more views already available by other *mujtahidūn*, and subsequently putting a preference to one over the other based on the strength of its evidences. This is in contrast to al-Shāfi‘ī’s and al-Juwaynī’s stringent understanding

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<sup>57</sup> Al-Zarkashī, Badr al-Dīn Muḥammad ibn Bahādir ibn ‘Abd Allah, *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh*, Wizārat al-Awqāf wa al-Shu‘ūn al-Islāmiyyah, Kuwait, 1992, vol. 6, p. 197.

<sup>58</sup> Ibid., vol. 6, p. 199.

of *ijtihād*, and thus provides an important extension to the parameters of *iftā'*. As for its identicalness to *taqlīd*, the definition of which is to accept a legal opinion without comprehending its proofs, *istidlāl* is obviously far from *taqlīd*.

This is al-Māwardī's approach in addressing the need for a non-independent *mujtahid* to issue *fatāwā*, albeit his shortcoming in deriving rulings directly from the textual sources. If al-Ghazzālī terms it as *taqlīd*, not under its initial definition of accepting a legal statement or opinion without its evidence (*qabūl qawl bi lā ḥujjah*), but rather imitating the views of a *mujtahid imām* with full comprehension of the legal evidences, al-Māwardī terms it as *istidlāl*. Both al-Ghazzālī and al-Māwardī, therefore, in addressing a common problem, put forth identical approaches, but assign to them different terms.

Upon scrutinizing these different positions of the jurists of the *madhhab*, it appears that an important issue that has been commonly addressed by these jurists is the correlation between *iftā'* and *ijtihād*. This researcher is therefore suggesting that, in a certain way, *ijtihād* is general, while *iftā'* is specific, but in a different way, the opposite is true.

In term of process, *iftā'* is general in comparison to *ijtihād*, as *ijtihād* is one of the processes of *iftā'* in its various stages. This is if *ijtihād* is defined as investigating the sources of evidence, and subsequently deducing rulings from those evidences (*istinbāt al-aḥkām*), or exercising *qiyās* in situations where there is no direct mention of the

issues at hand in the sources of evidence. As such, *ijtihād* is thus more specific than *iftā'*, for *iftā'* requires other procedures before and after this stage of *istinbāṭ al-aḥkām*, one of which is understanding the question posed by a *mustaftī*, comprising both its intent and its parts. The other is assessing the viability of applying the deduced theoretical ruling to the context of the *mustaftī*, taking into consideration the *mustaftī's* interests and needs.

However, in term of the subjects of the rulings, *iftā'* is more specific. Rulings that are formulated from the process of deduction from the sources of evidence, or by way of *qiyās*, are not targeted at any individual, or at any particular party. Therefore, if this is what is meant by *ijtihād*, it is then general in nature. *Iftā'*, on the other hand, is a specific ruling given as an answer to a specific question posed by a particular *mustaftī*, taking into account the specific context he is in.

This, in a way, explains the rationale behind the issue of whether a *muftī* is required to satisfy the conditions of a *mujtahid*, before he is allowed to issue *fatāwā*. If *iftā'* is basically concentrated at the process of *istinbāṭ al-aḥkām*, there is no doubt that satisfying fully the preconditions of a qualified *mujtahid* is critical. If, however, *iftā'* is concentrated more at the stage of applying the ruling to the context of a *mustaftī*, or *tanzīl al-ḥukm*, especially in cases where rulings on certain issues are already available from opinions of earlier *mujtahidūn*, the requirement that a *muftī* must be a qualified *mujtahid* thus becomes less pertinent.

As a conclusion to this discussion on the definition of *iftā'* among scholars of the Shāfi'ī *madhhab*, it can be mentioned that the earlier scholars tend to define the role of a *muftī* as someone who puts his utmost effort to deduce rulings from their primary sources, and subsequently offers these rulings as *fatāwā*, or answers to questions. Later scholars, on the other hand, place greater emphasis to the second role of the *muftī*, that is answering questions. There are two possible reasons to this. First, there was an abundance of absolute *mujtahidūn*, or *al-mujtahidūn al-muṭlaqūn* in the first two or three centuries of the establishment of the *madhhab*, while scholars of the later centuries held a common assumption that these absolute *mujtahidūn* were no longer in existence from then onwards. Secondly, the number of readily available legal opinions, that were deduced from the sources as products of *ijtihād*, in those early years, were small, as those were the developmental years of positive Islamic law, or *fiqh*, of the *madhhab*. Whereas, after three hundred years or so, after the establishment of the *madhhab*, these legal opinions became abundantly available in the form of scholarly writings by the scholars. In addition to that, gaining access to these resources also became easier in the later periods.

## 2.2 Qualifications of a *Muftī*

An analysis of the vast literature available within the Shāfi'ī *madhhab* on the technical definitions of *iftā'* and *fatwā*, and the elements that form its parameters, reveals a theoretical shift among later jurists of the *madhhab* from their predecessors on what

actually constitutes *iftā'*. There are differing views proposed by the jurists in identifying the required and accepted processes that a *muftī* is expected to employ in formulating his *fatwās*. Earlier jurists demonstrate a tendency to equate *iftā'* to *ijtihād*, hence the strict requirement that only a qualified *mujtahid* of the highest caliber is allowed to issue *fatwās*. Later jurists, on the other hand, display a more receptive attitude towards the notion of having non-*mujtahidūn* as *muftūn*, whose *fatāwa* can be a mere reporting of rulings by earlier *mujtahidūn*. This can be traced back to the jurists' position in term of competencies that provides a person the full qualification to exert *ijtihād* and, subsequently, to issue *fatāwā*; and the possibility of finding one such qualified person at any one time.

In presenting an analysis of the jurists' proposition on the qualifications of a *muftī*, this part of the Chapter is designed in a way that the jurists' legal views are arranged and presented chronologically, based on the year of their demise. This is to render an understanding of how the propositions evolved over time, and how a common position generally adopted by jurists of the *madhhab* as its standard legal viewpoint, eventually came into existence.

It is thus only appropriate to start this analysis with the propositioned offered by the founder of the *madhhab* himself, al-Shāfi'ī. As mentioned in an earlier part of this Chapter, al-Shāfi'ī maintains that for a person to be qualified to exercise *ijtihād* and subsequently to issue *fatāwā*, he must be conversant in the sciences of the Qur'ān, the



*sunnah*, the legal opinions of other jurists, the *qiyās*, and the Arabic language. The position held by al-Shāfi‘ī, as mentioned earlier, that only a *mujtahid* is qualified to issue *fatwās*, continued to prevail among scholars and jurists of his *madhhab* for the next two centuries. This is reflected, among others, in the writings of al-Māwardī. Like al-Shāfi‘ī, al-Māwardī mentions a list of knowledge skills that a person must possess to qualify him to issue *fatāwā*, which he places under the section of the administration of the judiciary in his *al-Aḥkām al-Sulṭāniyyah*.

Al-Māwardī mentions that a person who is qualified to issue *fatāwā*, or a judge who is qualified to deliver verdicts, must have knowledge of the *sharī‘ah*, which encompasses the understanding of its principles and the skill to execute legal decisions based on these principles. These principles of *sharī‘ah* are indeed the list of knowledge skills identical to those mentioned earlier by al-Shāfi‘ī, the first of which is knowledge of the Qur’ān, followed by knowledge of the *sunnah*, the consensus of scholars, and analogy.<sup>59</sup>

Al-Māwardī, however, offers further elaboration on the various related sciences of the skills listed, among which are of the abrogating and abrogated verses of the Qur’ān (*al-nāsikh wa al-mansūkh*), the clear and ambiguous (*al-muḥkam wa al-mutashābih*), the general and particular (*al-‘ām wa al-khāṣ*), and the undetermined and precise (*al-mujmal wa al-mufassar*).<sup>60</sup> This explains why, unlike al-Shāfi‘ī, al-Māwardī does not

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<sup>59</sup> Al-Māwardī, ‘Alī ibn Muḥammad ibn Ḥabīb, *al-Aḥkām al-Sulṭāniyyah wa al-Wilāyāt al-Dīniyyah*, Maktabah Muṣṭafā al-Bābī al-Ḥalabī, Cairo, 1973, p. 66.

<sup>60</sup> Ibid.

explicitly mention mastery of the Arabic language as the fifth knowledge skill required of a *muftī*, due to the fact that for the *muftī* to be able to grasp these Qur’ānic related sciences would already command of him a high competency in the language. Nonetheless, in his other book, *al-Ḥāwī al-Kabīr*, which is a commentary on al-Muzanī’s *Mukhtaṣar*, al-Māwardī concurs with every each and one of al-Shāfi‘ī’s five prerequisites, including the Arabic language skill, by providing them with further elaboration.<sup>61</sup>

In the area of *sunnah*, its knowledge must also encompass the understanding of its chain of transmission that affects either its acceptance or rejection, and also the knowledge of whether a particular *sunnah* is specific or general in nature and implication. As for the knowledge of the consensus of scholars, al-Māwardī complements al-Shāfi‘ī’s views with a proposition that it should also comprise of knowledge of the scholars’ differences in their legal opinion, so as for him to not only adhere to their consensus, but to exercise his own *ijtihad* in areas where he understands there are differences of opinion.<sup>62</sup>

In addition to these four areas of knowledge, al-Māwardī insists on an additional requirement, that such a person would have to possess a certain degree of intellectual

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<sup>61</sup> Al-Māwardī, ‘Alī ibn Muḥammad ibn Ḥabīb, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi‘ī*, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1999, vol. 16, p. 51.

<sup>62</sup> Ibid.

capacity, that not only enables him to be aware of his basic religious obligations, but also qualifies him to elucidate the ambiguous as well as to specify the indefinite.<sup>63</sup>

Al-Māwardī emphasizes that this set of knowledge and intellectual competence are what is required of a *mujtahid*, and only a *mujtahid* is allowed to issue *fatāwā*, or deliver a verdict. A person who has deficiency in all or any one of these required areas of knowledge is considered as unqualified to exercise *ijtihād*, thus for him to give *fatāwā* or deliver a verdict is taken as religiously impermissible. A person with such an incompetence, al-Māwardī insists, if officially appointed, would have his rulings annulled and rejected, even if they are coincidentally in concordance with the truth.<sup>64</sup>

Al-Māwardī proceeds to stress further that it is not only required of a *muftī* to possess the set of knowledge listed, but he is obliged, in practice, to employ *ijtihād*, and not restricting himself to the opinions of the *madhhab* that he associates himself with. According to al-Māwardī, a Shāfi‘ī judge is not obliged, in his rulings, to adhere to the views of al-Shāfi‘ī, unless if his *ijtihād* leads him to be convinced of al-Shāfi‘ī’s views. In a situation where his *ijtihād* causes him to find Abu Ḥanīfah’s opinion more persuasive, he has to employ and adopt it.<sup>65</sup>

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<sup>63</sup> Ibid., p. 65.

<sup>64</sup> Ibid., p. 66

<sup>65</sup> Ibid., p. 67.

By this al-Māwardī's elaboration, it is therefore noted that the position of making it obligatory to exercise *ijtihād* in issuing legal rulings continued throughout the next two centuries after al-Shāfi'ī, where adhering to a particular *madhhab* (*taqlīd*) was generally rejected by the scholars of the time, as highlighted by al-Māwardī himself :

“... and the stand of the majority of jurists is that his (a non-*mujtahid*'s) appointment is void and his rulings are rejected, and because the imitation (*taqlīd*) of the legal judgments of others is a necessity which is only befitting for those who are obliged to follow the truth, but not for those responsible for deciding what is binding in the law”.<sup>66</sup>

This close resemblance in views between al-Shāfi'ī and al-Māwardī indicates the huge influence that al-Shāfi'ī had on his followers in this issue of a *muftī*'s qualification, where after a period of more than two centuries after him, al-Shāfi'ī's proposition that only a *mujtahid* can issue a *fatwā* is still primarily echoed by al-Māwardī. This most probably is due to the abundance in the number of *mujtahidūn* during his time, where there was no real necessity to give allowance for non *mujtahidūn* to undertake the great responsibility of issuing *fatāwā*.

Nevertheless, there is a short report by al-Māwardī that marks the existence of a shift in the thinking of a small number of jurists, with regards to the requirement for a *muftī*, of both being a *mujtahid* in his qualification, and in exercising *ijtihād* in his practice of giving *fatāwā*. Al-Māwardī reports that there have been differing views among some

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<sup>66</sup> Ibid., p. 66.

jurists who disallowed a person who subscribes to a *madhhab* from ruling with opinions of other *madhāhib*. According to this group, a Shāfi‘ī jurist is not allowed to deliver a verdict with Abū Ḥanīfah’s opinion, while a Ḥanafī jurist is similarly not allowed to deliver a verdict with the views of Shāfi‘ī’s *madhhab*, even if his *ijtihād* leads him to it, as it invites censures and disapproval in his judgments and rulings.<sup>67</sup>

Al-Shīrāzī echoes al-Māwardī’s view with a firmer position on the obligation to exercise *ijtihād* on a *muftī*’s part.<sup>68</sup> He classifies individuals into two categories : the learned scholars and the laymen. In his discussion on *taqlīd*, which he defines as imitating an opinion without its evidence, al-Shīrāzī insists that only the latter are allowed to exercise it, while the former are obliged to employ *ijtihād*, particularly in making judgment and issuing *fatāwā* for others.<sup>69</sup> This injunction to employ *ijtihād* continues to stand, according to al-Shīrāzī, even in a situation where, due to shortage of time, a learned scholar fears that being occupied with *ijtihād* may cause him to miss a religious ritual.<sup>70</sup>

Al-Shīrāzī similarly shows an indifference to both al-Shāfi‘ī’s and al-Māwardī’s views in his listing of the knowledge prerequisites of a mufti, starting with a mastery in both the Qur’ān and *ḥadīth* (narrative relating deeds and utterances of the prophet), which

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<sup>67</sup> Ibid., p. 67.

<sup>68</sup> Al-Shīrāzī, Abū Ishāq Ibrāhīm ibn ‘Alī al-Shīrāzī, *Kitāb al-Luma’ fī Uṣūl al-Fiqh*, Dār al-Nadwah al-Islāmiyyah, Beirut, 1988, p. 119.

<sup>69</sup> Ibid., p. 119.

<sup>70</sup> Ibid., p. 120.

encompasses the various tools and sciences needed to comprehend their literal and intended meanings. These include, among others, a competency in the Arabic language, which is the language of the texts, and knowledge of the abrogating and the abrogated. Next is the requirement that a *muftī* should be well-versed in the issues that earlier scholars have arrived at a consensus on, as well as areas where there are divergence in views. Alongside this, a *muftī* is also required to be capable in utilizing analogy.<sup>71</sup>

This position by al-Shīrāzī is then reverberated by al-Juwaynī who, in turn, apart from providing greater detailing of the items mentioned by al-Shāfi‘ī, al-Māwardī and al-Shīrāzī, added new requirements that a *muftī* has to be knowledgeable in principles of jurisprudence, in history and in *fiqh*. Al-Juwaynī dedicates a chapter in his book *al-Burhān fī Uṣūl al-Fiqh* for the discussion on *fatwā*, of which he starts by elaborating on the prerequisites and characteristics of a *muftī*. Al-Juwaynī reports that already by his time, these prerequisites and characteristics have amounted up to a total of forty, and he insists that it is essential for a *muftī*, as a prerequisite, to completely satisfy the entire list.<sup>72</sup> With reference to the set of knowledge skills that would qualify an individual for *iftā’*, al-Juwaynī firstly enumerates the language competency that enables a *muftī* to comprehend the two primary sources of the *sharī‘ah*, namely the Qur’ān and *sunnaḥ*.<sup>73</sup>

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<sup>71</sup> Ibid., p. 120.

<sup>72</sup> Al-Juwaynī, Imām al-Ḥaramain ‘Abd al-Malik ibn ‘Abd Allāh, *al-Burhān fī Uṣūl al-Fiqh*, Maṭābi‘ al-Dawḥah al-Ḥadīthah, Doha, vol. 2, p. 1330.

<sup>73</sup> Ibid., pp. 1330-1331.

Secondly, al-Juwaynī posits the requirement of a *muftī* to be knowledgeable in the Qur'an, at a competency level that enables him to understand its text, not only from its language aspect, but more importantly through the transmitted narrations that carry the intended meanings of its verses. In addition to this, al-Juwaynī asserts that the knowledge of the abrogating and abrogated verses are as essential.<sup>74</sup>

The third is the knowledge of *'ilm al-uṣūl* (principles of Islamic jurisprudence), which al-Juwaynī describes as fundamental. According to al-Juwaynī, this knowledge saves a *muftī* from making the error of bringing forward an item that is supposed to be adjourned, or otherwise. In addition, mastery in this field helps in clearly identifying the different degrees of proofs and evidences.<sup>75</sup> This is followed by the knowledge in history, which is instrumental in providing a *muftī* with the required understanding of the abrogating and abrogated texts.<sup>76</sup> Next is the knowledge in *ḥadīth*, which includes the comprehension of the differences between its various categories.<sup>77</sup> This is further complemented with knowledge of the substantive law (*fiqh*), which is constructed in the form of available rulings derived from earlier *ijtihāds*.<sup>78</sup>

On top of all these knowledge areas, al-Juwaynī states that a *muftī* is required to have the benefit of a high degree of astuteness (*fiqh al-naḥs*). Al-Juwaynī further summarizes

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<sup>74</sup> Ibid., p. 1331.

<sup>75</sup> Ibid., p. 1332.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

that a *muftī* is he who, by having possession of all these qualities and competencies, is able to arrive at the rulings of the *sharī‘ah* with ease, independently capable of identifying the rulings of the *sharī‘ah*, both textually and deductively (*naṣṣan wa istinbāṭan*).<sup>79</sup>

By enumerating these prerequisites, al-Juwaynī obviously does not only conform to the propositions made by his predecessors that a *muftī* must be a *mujtahid*, but he incorporates into the list supplementary components that seems to have played its part in contributing towards further restricting the qualification of a *muftī*.

It should be highlighted that until the time of al-Juwaynī, about three centuries after al-Shāfi‘ī, the discussions on the qualifications of a *muftī* revolved around whether the individual attains the rank of *mujtahid*, with all its prerequisites to be able to employ *ijtihād*, or not, thus allowed and expected to only exercise *taqlīd*. *Ijtihād* is the effort to find answers on rulings by analyzing the texts, while *taqlīd* is a mere imitation of views of others without the need to understand the evidences. However, after a considerable period of time, it was taken as a matter of fact that nobody had the competency to embark on a ‘complete *ijtihād*’ as an absolute *mujtahid* anymore. Nevertheless, due to various factors, like the need still to find answers and solutions to new issues of Islamic law, and the importance of having *muftūn* who should not only be able to transmit

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<sup>79</sup> Ibid.



opinions of scholars, but rather capable to conduct a certain acceptable degree of investigation of the texts, new classifications of *ijtihād* and *mujtahidūn* were developed.

Al-Ghazzālī, in his discussion on the prerequisites of a *mujtahid*, asserts that for a person to become qualified to issue *fatāwā*, he has to have mastery of both the knowledge sources of the *sharī'ah* and their medium, that, together, constitute the methodology that would enable him to construct the rulings. Al-Ghazzālī enumerates the four sources as the Qur'ān, *sunnah*, legal consensus of scholars and the human intellect (*'aql*), the last of which he describes as the basis for the legal principles of *al-nafy al-aṣlī* (original nihility of obligation) and *al-barā'ah al-aṣliyyah* (original freedom from liability).<sup>80</sup>

This is followed by a list of four knowledge skills that act as medium for the *mujtahid* to derive rulings from the sources, the first of which is the knowledge and competency to corroborate evidences, and this includes knowledge of their classifications, forms and preconditions. Only by this, al-Ghazzālī maintains, that these proofs and evidences become feasible for legal deduction.<sup>81</sup> The second medium is the knowledge of the language of the Qur'ān and *sunnah*, followed by knowledge of the abrogating and abrogated texts of the Qur'ān and *sunnah*, and finally, knowledge of the chains of

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<sup>80</sup> Al-Ghazzālī, Abū Ḥāmid Muḥammad ibn Muḥammad, *al-Mustaṣfā min 'Ilm al-Uṣūl*, Mu'assasah al-Risālah, Beirut, 1997, vol. 2, pp. 383-385.

<sup>81</sup> Ibid., p. 385.

transmitters of the *sunnah*, with which the *muftī* is able to distinguish acceptable reports from the rejected ones.<sup>82</sup>

It can be seen from these listings that al-Ghazzālī continues the ideas of his predecessors in delineating the prerequisites of a *muftī*. As a matter of fact, al-Ghazzālī expands further the existing knowledge requirements, especially the propositions made by his teacher al-Juwainī, by adding a number of unprecedented elements, such as the human intellect as a source of Islamic legal knowledge, and the science of proofs and evidences. The only departure taken by al-Ghazzālī from al-Juwainī's propositions is the requirement that a mufti must be knowledgeable in the substantive law (*fiqh*), for, according to al-Ghazzālī, *fiqh* is a product of *ijtihād*, and as such is inappropriate to be taken as a precondition to *ijtihād*.<sup>83</sup>

However, in scrutinizing further the details of each of the items listed above, we can identify a few aspects of concession given by al-Ghazzālī to the required realization of these competencies in a person before he is eligible to issue *fatāwā*. One of these concessions is, in relation to the required knowledge of the Qur'ān and *sunnah*, that it suffices that the person possesses knowledge of only the verses and texts that touch

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<sup>82</sup> Ibid., pp. 386-387.

<sup>83</sup> Ibid., p. 388.

upon legal issues. Al-Ghazzālī estimates that the total number of Qur’ānic verses on legal issues as around five hundred verses.<sup>84</sup>

The next concession is that it is not required of the person to memorize all these Qur’ānic verses and *ahādīth* by heart, as for him to be able to locate the texts concerned, as and when needed, is taken as adequate. Al-Ghazzālī states that having in possession authentic compilations of *ahādīth* would also serve the purpose of providing the person with the necessary sources.<sup>85</sup> Similarly, it is not required of him to memorize all the abrogation that have occurrence in the Qur’ān and *sunnah*, nor all the legal cases that scholars have arrived at a consensus on. It is sufficient for him to be able to identify that every Qur’ānic verse or *ḥadīth* that he utilizes in any of his *fatāwā* is not of those that have been abrogated, and that his *fatāwā* are not in contradiction with any existing consensus.<sup>86</sup>

The most significant concession proposed by al-Ghazzālī, is the notion of partiality of *ijtihād* (*tajazzu’ al-ijtihād*). According to al-Ghazzālī, the complete existence of all the eight knowledge areas mentioned earlier combined is a prerequisite only of a *muftī muṭlaq* (absolute *muftī*), or a *mujtahid muṭlaq* (absolute *mujtahid*) who issues *fatāwā* in all areas of *sharī‘ah*. As for a *muftī* of a specific area of knowledge, possession of such a comprehensive set of disciplines is not required of him. It is an accepted possibility

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<sup>84</sup> Ibid., pp. 383-384.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid., p. 386.

that a person attains a position of issuing *fatāwā* and applying *ijtihād* in certain areas and not in others. Al-Ghazzālī offers the example of he who is knowledgeable in analogy and its methods, but does not enjoy the same level of competency in the field of *ḥadīth*, is permitted to give *fatāwā* in analogical issues that he knows have no association with *ḥadīth*. Another example is he who is well informed in the principles and rulings of inheritance law, is also allowed to give *fatāwā* in the area, albeit his knowledge deficiency in the *aḥādīth* that are related to the impermissibility of intoxicants, or the issue of marriage in the absence of the bride's guardian (*walī*).<sup>87</sup>

This suggestion by al-Ghazzālī for partial *ijtihād* had never been suggested by any jurist of the Shāfi'ī *madhhab* before him. It was initiated by his observation that there no longer exist in his time any independent *mujtahid* (*mujtahid mustaqill*) who satisfies all of the listed prerequisites.<sup>88</sup> Thus, an interesting but important change that al-Ghazzālī, at the start of the sixth century of the *Hijrah* (the prophet's migration from Mecca to Medina, signifying the beginning of the Islamic calendar) calendar, introduced into the legal theory is his proposition of partial *ijtihād*, which consequently paved the way for his successors to widen the classification of qualified *muftūn*, from only absolute *mujtahidūn*, to accepting a few categories of *muftūn* with various degrees of qualification. This is over and above the other several concessions suggested by al-Ghazzālī, which were highlighted in earlier parts of this Chapter. As such, Hallaq's conclusion that "... one can safely state that he (al-Ghazzālī) follows in the footsteps of

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<sup>87</sup> Ibid., p. 389.

<sup>88</sup> Ibid., p. 297.

his predecessors in affirming that to be a *muftī* is to be nothing short of a *mujtahid*<sup>89</sup>, is not precise, for al-Ghazzālī's suggestion for these concessions, particularly on the partiality of *ijtihād*, seems as though was not taken into consideration.

Upon analyzing this discussion by al-Ghazzālī, and subsequently by his successors, we can identify a significant redirection of focus, in comparison to those before him, from addressing aspects of the prerequisites and qualifications of a *muftī*, to classifying *muftūn* into several categories and sub-categories. If the jurists before al-Ghazzālī had divided followers of the *sharī'ah* only into *mujtahidūn* and *muqallidūn*, al-Ghazzālī introduced sub-categories under *mujtahidūn*, namely absolute *mujtahid* and partial *mujtahid*.

In his commentary to al-Ghazzālī's *al-Wajīz*, al-Rāfi'ī indicates similar prerequisites of *ijtihād* to what had been fundamentally defined by his predecessors mentioned earlier, namely al-Shāfi'ī, al-Māwardī, al-Shīrāzī, al-Juwaynī and al-Ghazzālī. Qualification for *ijtihād*, according to al-Rāfi'ī, must comprise of knowledge of the Qur'ān, *ḥadīth*, consensus of the scholars, analogy and the Arabic language. Al-Rāfi'ī further emulates al-Ghazzālī's position in his provision for concessions in each of these knowledge skills.<sup>90</sup>

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<sup>89</sup> Hallaq, Wael, "Iftā' and Ijtihād in Sunni Legal Theory : A Developmental Account", Masud, Muhammad Khalid, Messick, Brinkley & Powers, David S. (eds.), *Islamic Legal Interpretation : Muftis and Their Fatwas*, , Harvard University Press, Massachusetts, 1996, p. 35.

<sup>90</sup> Al-Rāfi'ī, 'Abd al-Karīm ibn Muḥammad ibn 'Abd al-Karīm, *al-'Azīz Sharḥ al-Wajīz*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1997, vol.12, pp. 415-416.

As for the complete amalgamation of these skills in an individual, al-Rāfi‘ī continues to display a resemblance with al-Ghazzālī’s proposition that such is required only of a *mujtahid muṭlaq* who issues *fatāwā* in all branches of Islamic law, consequently accepting al-Ghazzālī’s notion of partial *ijtihād*.<sup>91</sup> However, unlike al-Ghazzālī, who provides the reason for his proposition as being the inexistence of such an individual in his generation, al-Rāfi‘ī is silent about this. A possible explanation to this is that the absence of absolute independent *mujtahidūn* during his time has already been widely acknowledged throughout the Islamic legal and intellectual fraternity as a reality that no longer warrants any need for reiteration.

Nonetheless, al-Rāfi‘ī develops further on al-Ghazzālī’s idea of partial *ijtihād* by suggesting that the followers of al-Shāfi‘ī, Abū Ḥanīfah and Mālik, or, in short, followers of any *madhhab*, are classified into three categories, the first of which are the laymen (*al-‘awwām*), who are expected to follow or imitate (*taqlīd*) legal opinions issued by qualified scholars. The second category are those who attain the rank of being qualified *mujtahidūn*, but affiliate themselves to al-Shāfi‘ī and his likes by emulating his methodology in *ijtihād*, and in utilizing and categorizing the legal proofs and evidences. The third category of followers are those who are in between the two earlier categories, who do not attain the rank of *ijtihād* in the main body of *sharī‘ah* (*aṣl al-shar‘*), but are well informed of the legal principles of his *imām*, thus capable of

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<sup>91</sup> Ibid., p. 417.

applying analogy on new issues accordingly based on available issues of which rulings have been earlier deliberated by the *imām*.<sup>92</sup>

Ibn al-Ṣalāḥ, a younger contemporary of al-Rāfi‘ī, subsequently forged ahead with a more comprehensive classifications of *muftūn*. He dedicates a whole book, *Adab al-Muftī wa al-Mustaftī*, to discuss on the qualifications and ethics of both who issues *fatāwā* (*muftī*) and who requests for one (*mustaftī*).

On top of the generally personal characteristics that a *muftī* must satisfy in order for him to be qualified to give *fatāwā*, from his affiliation to Islām as his creed, and his possession of a just and trustworthy character, to the high degree of intellect and sagacity that he is endowed with, Ibn al-Ṣalāḥ categorizes *muftūn* into two main classifications, the first of whom is an independent *muftī* (*muftī mustaqill*). Ibn al-Ṣalāḥ terms a *muftī mustaqill* as also a *mujtahid mustaqill*, whom he defines as a person who attains a level of independency in deriving legal rulings of the *sharī‘ah* from its evidences without imitation (*taqlīd*) nor adherence to any *madhhab*.<sup>93</sup>

The set of knowledge and skills that a mufti of this category must possess, Ibn al-Ṣalāḥ maintains, starts with the knowledge of the Qur’ān, and this consists of its related sciences (*‘ulūm al-Qur’ān*). Second is the knowledge of the *sunnah*, which also

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<sup>92</sup> Ibid., p. 422.

<sup>93</sup> Ibn al-Salah, ‘Uthman ibn ‘Abd al-Rahman al-Shahrazūrī, *Adab al-Mufti wa al-Mustafti*, Maktabah al-‘Ulum wa al-Hikam, Medina, 1986, p. 87.

encompasses its related sciences (*‘ulūm al-ḥadīth*), which is then followed by knowledge of the consensus of jurists, besides knowledge of their points of disagreement. Next is the knowledge of analogy (*qiyās*), and knowledge of the principles of jurisprudence (*uṣūl al-fiqh*) which equips him with the tools needed to comprehend the preconditions of proofs, the various aspects of their legal indication, and the methodology of deriving rulings from them. This is subsequently supplemented with knowledge of the abrogating and abrogated texts, knowledge of the Arabic language, and finally, knowledge of *fiqh*<sup>94</sup>

According to Ibn al-Ṣalāḥ, this category of independent muftis are the group mentioned and meant by al-Juwainī as the only ones qualified to give *fatāwā*, due to their ability to arrive at the rulings of the *sharī‘ah* with ease. Albeit his agreement to this point by al-Juwainī as worth considering for a *muftī*, Ibn al-Ṣalāḥ insists that it should not be taken as a restrictive definition of a qualified *muftī*.<sup>95</sup> It is under this category that Ibn al-Ṣalāḥ mentions the issue of partial *ijtihād*, which was introduced earlier by al-Ghazzālī, and which he supports.<sup>96</sup>

The second category is the non independent *muftī*. Ibn al-Ṣalāḥ narrates that there has been an absence of independent absolute *muftūn* (*muftī mustaqill muṭlaq*) for a long

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<sup>94</sup> Ibid., pp. 86-87.

<sup>95</sup> Ibid., p. 88.

<sup>96</sup> Ibid., pp. 89-91.



period of time, and that the responsibility of issuing *fatāwā* has been taken up by jurists who affiliate themselves (*muftī muntasib*) to the founding *imāms* of the established *madhahib*.<sup>97</sup> This group of affiliated jurists are the subject of discussion under this category, whom Ibn al-Ṣalah further divides into four sub-categories. The first one of whom is a *muftī* who enjoys possession of all the characteristics and knowledge skills required of an independent (*mustaqill*) *muftī*, hence does not imitate (*taqlīd*) his *imām*, neither in his legal rulings nor in his evidences. He is, however, affiliated to his *imām* in the sense that he goes along with his methodology in *ijtihād* and advocates it.<sup>98</sup>

The second sub-category is a *mujtahid* who adheres to the *madhhab* of his *imām* (*mujtahid muqayyad*) and is capable of substantiating it with legal proofs, except that he does not advance further beyond the principles and fundamentals of his *imām*. Ibn al-Ṣalāḥ describes that although a mufti of this sub-category is a *mujtahid* who satisfies similar prerequisites of being competent in Islamic law and its principles, knowledgeable in the detailed evidences of legal judgments, as well as proficient in the art of analogy and in ascribing unprecedented cases to the principles of his *madhhab*, he is, however, inferior to the independent *mujtahidūn* mentioned earlier in some of their knowledge and skills, among which is his deficiency in the field of *‘ulūm al-ḥadīth*, or in the Arabic language. With such, he employs the writings of his *imām* as principles from which he derives rulings, in the same fashion that a *mujtahid mustaqill* derives

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<sup>97</sup> Ibid., p. 91.

<sup>98</sup> Ibid.

rulings from the divine texts. In another scenario, this *mujtahid muqayyad* may come across a ruling, and agreeably accepts the proofs provided by his *imām*, without thoroughly investigating whether they can be challenged by other proofs, or whether they fulfill the required conditions.

The third sub-category is he who does not attain the same echelon of the earlier mentioned categories of *mujtahidūn*, but is endowed with *fiqh al-naḥs* (a high degree of natural intelligence that facilitates him to exercise some form of *ijtihād*), preserves the *madhhab* of his *imām*, and has knowledge of its legal proofs. His inferiority to the earlier categories is due to his shortcomings in deriving rulings directly from the texts, or due to his lack of knowledge competency in the principles and fundamentals of jurisprudence or in other sciences that serve as tools for *ijtihād*.

Finally, the fourth sub-category is he who assumes the task of preserving his *madhhab* and narrating from it, while at the same time has full grasp of the legal issues of his *madhhab*, both the apparent and the ambiguous. However, he is not sufficiently capable in neither espousing its proofs nor employing its methods of analogy. Ibn al-Ṣalāḥ highlights that it is permissible for a *mufīṭ* of such a category to issue *fatāwā* only in the form of narrating and transmitting what has earlier been discussed and decreed by the *imām* or other *mujtahidūn* of his *madhhab*.

Al-Nawawī allocates a chapter on the ethics of *fatwā*, *muftī* and *mustaftī* in his opening to his book of Islamic law, *al-Majmū‘ Sharḥ al-Muhadhdhab*, explaining that he relies primarily on al-Ṣaymarī, al-Khaṭīb al-Baghdādī and Ibn al-Ṣalāḥ for his writing.

Analyzing the said chapter reveals that, in outlining the prerequisites of a qualified *muftī*, al-Nawawī merely transmits Ibn al-Ṣalāḥ’s proposition in its entirety, from the general characteristics required of a *muftī*, to the classification of *muftūn* into five categories, and the set of knowledge skills required of each category respectively.<sup>99</sup> Al-Nawawī, therefore, seems to provide Ibn al-Ṣalāḥ’s categorization of *muftūn* with a stamp of finality, when he reiterates it in his *al-Majmū‘*.

In his response to the issue of whether a *muqallid* is allowed to give *fatāwā* based on the legal opinions of the *mujtahidūn* that he imitates, al-Nawawī reports differing positions, first, of al-Ḥalīmī, al-Juwaynī, al-Rawḡanī and others on its impermissibility; second, of al-Qaffāl al-Māwarzī that it is allowed; and, third, of Ibn al-Ṣalāḥ who suggests that those who disallow such a practice are actually referring to a situation where the *muqallid* gives a *fatwā* in a fashion that implies as though the answer is by his own judgment.<sup>100</sup>

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<sup>99</sup> Al-Nawawī, Abū Zakariyyā Muḥyi al-Dīn ibn Sharaf, *al-Majmū‘ Sharḥ al-Muhadhdhab*, Dār al-Fikr, Beirut, 2000, pp. 68-74.

<sup>100</sup> Ibid., p. 75.

Al-Isnawī mentions in his *Nihāyat al-Sūl* that it is permissible for both a *mujtahid* and a *muqallid* who subscribes to and narrates the legal opinions of a living *mujtahid*, to issue *fatāwā*. However, al-Isnawī also reports that there are differing views among jurists on whether a *muqallid* of a deceased *mujtahid* is allowed to issue *fatāwā*, although al-Isnawī himself asserts that he holds the view that such is permissible, and that there was a consensus among jurists of his time on it.<sup>101</sup> This statement by al-Isnawī implies that a *muqallid* can issue *fatāwā*. In fact, it seems that there is no dispute if a *muqallid* of a living *mujtahid* is to issue *fatāwā*. Al-Haytamī, on the other hand, stresses that by doing as such, he is not to be considered a *muftī*, but merely a transmitter, or *nāqil*.<sup>102</sup>

It has to be highlighted that, although later jurists of the *madhhab* follow suit this position by Ibn al-Ṣalāḥ and al-Nawawī in allowing a sub-*mujtahid muftī* to issue *fatāwā* in the form of narrating the *ijtihād* of other fully-qualified *mujtahidūn* of his *madhhab*, this does not imply that it can be done ignorantly of the evidences and merits of the opinions narrated, as well as the methodologies applied by the *mujtahid* in deriving those rulings in the first place.

It is therefore a point of observation that until the time of al-Ghazzālī, the developmental account of this legal theory indicates a trend towards increasingly restricting the spheres of *ijtihād*, a term of which was used interchangeably to also mean

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<sup>101</sup> Al-Isnawī, Jamāl al-Dīn ‘Abd al-Raḥīm, *Nihāyat al-Sūl*, Maktabah wa Maṭba‘ah Muḥammad ‘Alī Ṣubayḥ wa Awlāduh, Cairo, n.d., vol. 3, p. 210.

<sup>102</sup> Al-Haytamī, Aḥmad ibn Muḥammad ibn Muḥammad ibn ‘Alī ibn Ḥajar, *al-Fatāwā al-Kubrā al-Fiqhiyyah ‘alā Madhhab al-Imām al-Shāfi‘ī*, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1997, vol.4, p. 294.

*iftā'*. This is especially reflected by the restrictive propositions offered by al-Juwaynī, which paradoxically lead him to refute the qualification of a number of widely accepted figures in the Islamic legal fraternity, namely al-Hasan al-Baṣrī, Mālik and Abū Ḥanīfah, by indicating factors that, according to al-Juwaynī, injure their characteristics as *mujtahidūn*.<sup>103</sup>

It can, however, be assumed that al-Juwaynī and his likes, by constricting the prerequisites further, and by insisting that a *muftī* has to have the complete qualification of an absolute *mujtahid*, were possibly aiming to preserve the sanctity of the *sharī'ah*, ensuring that only individuals with such a high qualification are allowed to issue *fatāwā*. This is so much true to the extent that even in a situation where the existence of a person, or a group, with such qualities is no longer attainable, subsequent initiatives taken by the jurists out of necessity are by creating different classifications of *muftūn* who possess different degree of qualifications, and not by compromising the fundamental prerequisites of the individuals who are initially accepted as the only and truly qualified *muftūn* due to their full competency to exert *ijtihād*.

As a conclusion to this part of this research, on the qualifications of a *muftī*, it should be mentioned that, first, the primary purpose of all the propositions suggested by the jurists in developing this legal theory is to safeguard the *sharī'ah* from unscrupulous interpretations by unqualified *muftūn*. Classifying the *muftūn* into *mujtahidūn* and non-

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<sup>103</sup> Al-Juwaynī, Imām al-Ḥaramayn 'Abd al-Malik ibn 'Abd Allāh, *al-Burhān fī Uṣūl al-Fiqh*, Maṭābi' al-Dawḥah al-Ḥadīthah, Doha, vol. 2, pp. 1335-1337.

*mujtahidūn*, and further into various sub-categories, is of secondary importance in identifying the status of their qualification to issue *fatāwā*. As a matter of fact, it only complicates the whole deliberation of the issue at hand. It leaves the discussion on the fundamental requirements of a *muftī* to continue to exist in the writings of the Shāfi‘ī *madhhab* as academic theories, but to a large degree impractical in term of their application and realization within the contexts of real communities that undergo the natural phenomena of evolution over time. In addition to that, this researcher is of the view that such an academic position effectively became one of the factors that has led to the notion of the closure of the doors of *ijtihād*, which consequently reinforced a psychological hesitancy in the general psyche of many muslims, scholars and lay men alike, to accept new *ijtihād* initiatives. This in turn would impede further progress of the Islamic law from taking its imperative course to develop in accordance to the ever changing needs and challenges of human societies. We should not lose sight that the main thrust is to define the prerequisites, of which in turn must be sufficiently dynamic to be able to evolve and develop accordingly to the needs and necessities of each community, influenced by factors of time, space, and cultural and generational differences.

Secondly, the concessions made to the prerequisites of a *muftī* as initiated by al-Ghazzālī, and subsequently the various classifications of *muftūn*, are intended as responses to address the perceived decline in both the quantity and quality of absolute

*mujtahidūn* about three centuries after al-Shāfi‘ī. As such, present calls by scholars of today to enhance further the establishment of collective and group *ijtihāds*, by having different individuals with different expertise to complement each other, would be instrumental in overcoming the inadequacy of not having in existence an individual who satisfies the prerequisites of an absolute *mujtahid*.

Thirdly, it is of utmost importance, in our effort to shed light on the legal theories introduced and developed by scholars, that we analyze also the thoughts and intellectual works of those scholars not dogmatically as doctrines, but rather critically through the lenses of intellectual history, or history of ideas. This research, for one, highlighted the fact that in studying a scholar’s opinion, it is crucial to study also as to why and how such a ruling was arrived at.

Fourthly, the task of achieving general good (*maṣlaḥah*) by addressing limitations that, in certain situations, may constrict the applicability of *sharī‘ah*, occurs not only in the areas of *fiqh*, where subjects of the law are at times given concessions (*rukḥṣah*) in discharging their religious obligations, but also in the dimensions of *uṣul fiqh*, where concessions that affect the principles of law are sometimes initiated too.

### **2.3 Steps of Identifying a *Muftī***

The scholars of the Shāfi‘ī *madhhab* are unanimous in pointing out that it is a religious obligation on a *muqallid*, an individual who finds himself inadequately equipped with

the necessary knowledge and skills to identify rulings of the *shari'ah* that he direly needs, to seek a qualified *muftī* to provide him with guidance, and with answers to his queries.<sup>104</sup>

Al-Zarkashī reports that a person that can be approached to provide *fatāwā* must only be one whose knowledge and trustworthiness are known, by way of identifying him as a person who possesses the qualities of such and supported by the community's acceptance that he is to be referred to for *fatāwā*. Al-Zarkashī also reports that there has been a unanimous position among the scholars that seeking *fatāwā* from those known to be of the opposite, is prohibited. As for an individual whose qualities are unknown of, al-Zarkashī indicates his preference that such is to be similarly prohibited too, until the *mustaftī* puts effort to verify the *muftī's* qualification.<sup>105</sup>

However, there are disagreements among these scholars on the method of identifying a *muftī* who is qualified to issue *fatāwā*, from another who is not. Al-Khatīb al-Baghdādī is of the view that it suffices for the *mustaftī* to get a testimony from one trustworthy individual in order to identify a qualified *muftī*.<sup>106</sup> This is also the position of Al-Shīrāzī.<sup>107</sup>

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<sup>104</sup> Al-Zarkashī, Badr al-Dīn Muḥammad ibn Bahādir, *al-Baḥr al-Muḥīt fī Uṣūl al-Fiqh*, Wizārat al-Awqāf wa al-Shu'ūn al-Islāmiyyah, Kuwait, 1992, vol. 6, p. 280.

<sup>105</sup> Ibid., vol. 6, p. 309.

<sup>106</sup> Al-Khatīb al-Baghdādī, Abū Bakr Ahmad ibn 'Alī, *al-Faqīh wa al-Mutafaqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 376.

<sup>107</sup> Al-Shīrāzī, Abū Ishāq Ibrāhīm ibn 'Alī al-Shīrāzī, *Kitāb al-Luma' fī Uṣūl al-Fiqh*, Dār al-Nadwah al-Islāmiyyah, Beirut, 1988, p. 119.



Al-Juwaynī refutes suggestions that a commoner should test the person whom he presumes to be a *mujtahid*, by addressing him with questions on issues that any qualified *mujtahid* is expected to have knowledge of. This, according to al-Juwaynī, carries no significance, as it was never practiced by the early Arabs in consulting the Prophet’s companions for rulings and guidance. The notion of accepting a person as a *mujtahid* by relying on popular reports within a community is also refuted by al-Juwaynī, who insists that such reports are a mere transmission of information on a person’s qualities that are intangible and can not be physically ascertained, thus lacking in merit. Al-Juwaynī consequently indicates his preference that it is sufficient for a layperson to accept a jurist as a qualified *mujtahid*, and for him to subscribe to his *fatāwā*, by depending on the jurist’s own admission that he is of such a caliber, with the condition that he is known to him to be trustworthy.<sup>108</sup>

This position by al-Juwaynī is problematic in a way that a trustworthy non-*mujtahid*, albeit being honest and truthful, may not be able to adequately appreciate his own limited capacity in relation to the requirements of a *mujtahid*, consequently admitting of being one, while in actuality he is not. Al-Juwaynī’s suggestion that popular reports by members of the community on the qualification of a *mujtahid* are of less value, due to them being intangible in nature, is also questionable. The trustworthiness of a person, if accepted as sufficient in agreeing to his self-admission that he is a *mujtahid*, is as intangible as his intellectual capacity is. It must be assumed that there must be a way to

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<sup>108</sup> Al-Juwaynī, Imām al-Haramayn ‘Abd al-Malik ibn ‘Abd Allāh, *al-Burhān fī Uṣūl al-Fiqh*, Maṭābi‘ al-Dawḥah al-Ḥadīthah, Doha, vol. 2, p. 1342.

measure the trustworthiness of a person, hence al-Juwaynī's acceptance, at least by relying on circumstantial factors. This should then be similarly applied to ascertain a person's qualification to exert *ijtihād*, and throwing a set of questions can be a useful tool to be utilized. As to al-Juwaynī's assertion that it was not a practice among the Arabs to verify the qualification of the Prophet's companions before approaching them for rulings, it can be argued that such an approach should be taken as specific to the situation of the time. The level of veneration and confidence that was conferred to the prophet's companions, which accordingly reflects the unparalleled acceptability of the guidance and rulings that they issued, explains the absence of any need for the Arabs to test their capacity. This has no resemblance to the issue at hand, of the dire necessity for a non-*mujtahid* to ascertain the credibility of the person he is relying on for his religious observance, especially in times where fully qualified *mujtahidūn* can rarely be found, if not completely absent.

Al-Ghazzālī holds the view that the *mustaftī* has to convince himself on the qualification of the *mufī* by way of popular reports (*tawātur*) by the people, if that can be done. Otherwise, it suffices for the *mustaftī* to establish his own best estimation (*ghālib al-zann*) based on the testimony of one or two trustworthy persons.<sup>109</sup> Al-Rāzī, albeit sharing with al-Ghazzālī his view that the *mustaftī* must establish his best

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<sup>109</sup> Al-Ghazzālī, Abū Ḥāmid Muḥammad ibn Muḥammad, *al-Mustaṣfā min 'Ilm al-Uṣūl*, Mu'assasah al-Risālah, Beirut, 1997, vol. 2, p. 468.

estimation of the *muftī*'s qualification, insists that it can only be achieved when the *muftī*'s practice of issuing *fatāwā* is widely recognized and accepted by his people.<sup>110</sup>

Al-Rāfi'ī, on the other hand, differentiates between the qualification of a *muftī* in term of his knowledge from that of his trustworthiness. According to al-Rāfi'ī, it is the onus of the *mustaftī* to ascertain the qualification of an unknown *muftī* by asking around about his knowledge stature. Once the qualification of the *muftī* in term of his knowledge has been verified, the *mustaftī* is no longer obliged to scrutinize his level of trustworthiness, as it is already assumed that he is trustworthy. This differentiation is based on a common notion that lay people are not generally known to be scholars, but scholars, in turn, are generally known to be trustworthy.<sup>111</sup> Ibn al-Salāḥ agrees that the testimony by a single trustworthy person on the qualification of a *muftī* is acceptable, but with the condition that the testifier possesses a certain degree of knowledge necessary to enable him to distinguish a qualified person from an other who is not.<sup>112</sup>

Al-Nawawī narrates that some of his contemporaries refused to accept the notion of seeking *fatāwā* from a person whose practice of issuing *fatāwā* has gained repute in his society, until the *muftī* himself professes that he is qualified for such, based on the argument that the person's renown reputation among laypeople does not carry any weight due to the possibility of erroneous perception. Al-Nawawī, however, argues that

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<sup>110</sup> Al-Rāzī, Fakhr al-Dīn Muḥammad ibn 'Umar, *al-Maḥṣūl fī 'Ilm Uṣūl al-Fiqh*, Mu'assasah al-Risālah, Beirut, 1997, vol. 6, p. 81.

<sup>111</sup> Al-Rāfi'ī, 'Abd al-Karīm ibn Muḥammad ibn 'Abd al-Karīm, *al-'Azīz Sharḥ al-Wajīz*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1997, vol.12, pp. 423-423.

<sup>112</sup> Ibn al-Ṣalāḥ, 'Uthmān ibn 'Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-'Ulūm wa al-Ḥikam, Medina, 1986, p. 159.

the *muftī*'s prominence within his society is sufficient as a basis to assume his qualification, and that getting his profession is not necessary, for his willingness to practice *iftā*' itself denotes his proclamation of his own qualification.<sup>113</sup>

This analysis, on the different opinions among the scholars on the preferred ways of how a *mustaftī* would identify whether a person is qualified to issue *fatāwā*, does not reveal any pattern of correlation between the degree of strictness or flexibility in the positions held by these scholars, and the different periods of time that the scholars lived in, unlike the earlier discussion on *ijtihād* and the prerequisites of a *muftī*. In that earlier discussion, it was highlighted that scholars of a later period tend to offer a more relaxed position in allowing a non-*mujtahid* to issue *fatāwā*, as compared to their predecessors, due to the general perception that as time evolved, a process of decline in the number of available *mujtahidūn* subsequently took place. This, in the researcher's view, provides an evidence that the needs and necessity to provide for the general good of the people (*al-maṣlaḥah al-‘āmmah*) are largely influenced by limitation of resources and opportunities, which in turn implicates the legal opinions of scholars. In this current discussion, the method that is to be employed by a *mustaftī* to ascertain the qualification of a *muftī* when he finds one, is not in any way affected by the limitation caused by the scarcity of *mujtahidūn* in a community, hence the absence of a pattern of moving towards a more relaxed position among scholars of later periods.

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<sup>113</sup> Al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū' Sharḥ al-Muhadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 87.

Another observation from this discussion is that the scholars do not seem to be stringent in their suggestions on the approaches to identify the qualification of a *muftī*, which is in contrast with their strict insistence on the list of prerequisites that a person must acquire in order to qualify him to exercise *ijtihād*, and consequently to issue *fatāwā*. This is probably due to the urgent need of the *mustaftī* to seek answers to his religious questions at that particular point of time, where none among the people but only one is found to be reliable, hence the ways proposed by the scholars should provide the *mustaftī* with the most practical option.

An other possible reason to this is that the issue at hand here is of ways to be employed by a *muqallid mustaftī* to identify whether a person is qualified as a *muftī*. As earlier presented, a *muqallid* is one who does not have sufficient skill to differentiate which between two evidences is stronger than the other, hence exercises *taqlīd*, which is defined as ‘accepting an opinion without understanding its evidence’ (*qabūl qawl bi lā hujjah*). It is therefore expected that the *muqallid* similarly would not be capable to ascertain whether the person in question has the necessary prerequisites that qualify him to issue *fatāwā*, or to practice *ijtihād*. Consequently, a way out, as proposed by the scholars, is by way of either getting self verification, or confession, by the *muftī* himself that he is qualified; or testimony from at least one trustworthy person on the *muftī*’s qualification; or by following a popular recognition by the people on the *muftī*.

However, in a hypothetical situation where a *mustaftī* has the capability to do more than just to rely on the *muftī*'s own confession or on a testimony by a trustworthy individual, a question arises as to whether this *mustaftī* is required to investigate further so as to satisfy himself on the *muftī*'s qualification? The available literature reveals that the scholars have not given specific deliberations to this question. Nonetheless, an analysis on the scholars' deliberations on the necessary steps to be employed when a *mustaftī* manages to find more than one *muftī*, may shed some light on this issue.

There are differing opinions among the scholars of the Shāfi'ī *madhhab* on this. The first of these is that held by Ibn Surayj,<sup>114</sup> al-Qaffāl,<sup>115</sup> and al-Khaṭīb al-Baghdādī,<sup>116</sup> that the *mustaftī* is obliged to put his best effort to investigate and identify who among these *muftūn* is the most knowledgeable. The *mustaftī* is then allowed to only follow the *fatwā* issued by this most knowledgeable *muftī*. Al-Māwardī,<sup>117</sup> al-Shīrāzī,<sup>118</sup> al-Rāfi'ī,<sup>119</sup> Ibn al-Ṣalāh,<sup>120</sup> al-Nawawī,<sup>121</sup> al-Āmidī,<sup>122</sup> al-Zarkashī,<sup>123</sup> and al-Haytamī,<sup>124</sup> on

<sup>114</sup> Al-Māwardī, 'Alī ibn Muḥammad ibn Ḥabīb, *al-Hāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1999, vol. 1, p. 32. See also al-Rāfi'ī, 'Abd al-Karīm ibn Muḥammad ibn 'Abd al-Karīm, *al-'Azīz Sharḥ al-Wajīz*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1997, vol.12, p. 424.

<sup>115</sup> Al-Shīrāzī, Abū Ishāq Ibrāhīm ibn 'Alī al-Shīrāzī, *Kitāb al-Luma' fī Uṣūl al-Fiqh*, Dār al-Nadwah al-Islāmiyyah, Beirut, 1988, p. 119. See also al-Rāfi'ī, 'Abd al-Karīm ibn Muḥammad ibn 'Abd al-Karīm, *al-'Azīz Sharḥ al-Wajīz*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1997, vol.12, p. 424.

<sup>116</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Ahmad ibn 'Alī, *al-Faqīh wa al-Mutafaqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 376.

<sup>117</sup> Al-Māwardī, 'Alī ibn Muḥammad ibn Ḥabīb, *al-Hāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1999, vol. 1, p. 32.

<sup>118</sup> Al-Shīrāzī, Abū Ishāq Ibrāhīm ibn 'Alī al-Shīrāzī, *Kitāb al-Luma' fī Uṣūl al-Fiqh*, Dār al-Nadwah al-Islāmiyyah, Beirut, 1988, p. 119. See also al-Shīrāzī, *al-Tabṣīrah fī Uṣūl al-Fiqh*, Dār al-Kutub al-'Ilmiyyah, Beirut, 2003, p. 244.

<sup>119</sup> Al-Rāfi'ī, 'Abd al-Karīm ibn Muḥammad ibn 'Abd al-Karīm, *al-'Azīz Sharḥ al-Wajīz*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1997, vol.12, p. 424.

<sup>120</sup> Ibn al-Ṣalāh, 'Uthmān ibn 'Abd al-Rahmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-'Ulūm wa al-Ḥikam, Medina, 1986, p. 158.

the other hand, are of the view that it is not necessary, and that the *mustaftī* is at liberty to choose any one of those *muftūn* that he wants. This second view is the opinion of the majority of the scholars, and is based on the argument that identifying the most knowledgeable among the *muftūn* can only be done by a similarly knowledgeable person. Al-Āmidī<sup>125</sup> further supports this position by asserting that it has never been a practice among the companions of the prophet to restrict seeking answers to religious queries only from those of a higher echelon among them.

Al-Juwaynī offers two different positions in this regard, according to two different stages. Firstly, at the stage of approaching a *muftī*; and secondly, at the stage of receiving response to a *mustaftī*'s question in the form of a *fatwā*. In approaching a *muftī*, where there are more than one that a *mustaftī* can find, al-Juwaynī is of the same view with the majority of the scholars of the *madhhab*, that the *mustaftī* is at liberty to approach any one that he likes.<sup>126</sup> However, at the stage where he receives differing answers from more than one *muftī*, the *mustaftī* is to first identify and follow the most knowledgeable and trustworthy among the *muftūn*. If one is found to be more

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<sup>121</sup> Al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū' Sharḥ al-Muhadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 87.

<sup>122</sup> Al-Āmidī, Saif al-Dīn Abū al-Ḥasan 'Alī ibn Abī 'Alī, *al-Iḥkām fī Uṣūl al-Aḥkām*, Dār al-Kutub al-'Ilmiyyah, Beirut, n.d., vol. 2, p. 458.

<sup>123</sup> Al-Zarkashī, Badr al-Dīn Muḥammad ibn Bahādir ibn 'Abd Allāh, *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh*, Wizārat al-Awqāf wa al-Shu'ūn al-Islāmiyyah, Kuwait, 1992, vol. 6, p. 311.

<sup>124</sup> Al-Haytamī, Aḥmad ibn Muḥammad ibn Muḥammad ibn 'Alī ibn Ḥajar, *al-Fatāwā al-Kubrā al-Fiqhiyyah 'alā Madhhab al-Imām al-Shāfi'i*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1997, vol. 4, p. 301.

<sup>125</sup> Al-Āmidī, Sayf al-Dīn Abū al-Ḥasan 'Alī ibn Abī 'Alī, *al-Iḥkām fī Uṣūl al-Aḥkām*, Dār al-Kutub al-'Ilmiyyah, Beirut, n.d., vol. 2, p. 458.

<sup>126</sup> Al-Juwaynī, Imām al-Ḥaramayn 'Abd al-Malik ibn 'Abd Allāh, *al-Burhān fī Uṣūl al-Fiqh*, Dār al-Wafā', Mansoura, 1992, vol. 2, p. 878.

knowledgeable while the other more trustworthy, the *mustaftī* is to put preference to the more knowledgeable over the one who is more trustworthy. If, in a situation, the *mustaftī* is eventually still unable to make such a preferential choice, al-Juwaynī proposes that the *mustaftī* is then discharged from any obligation with regard to the issue concerned. This proposition, that there can be this possible situation where a *mustaftī* is discharged in such a manner from certain religious obligations, is unique to al-Juwaynī. He arrived at this conclusion after his rejection of all the other propositions, among which is the notion that a *mustaftī* should opt for a stricter *fatwā*, by refuting that it is a directive without any valid argument nor justification. Al-Juwaynī also dismisses another notion that the *mustaftī* must follow the most accurate answer, highlighting that to expect the *mustaftī* to make such a decision is as good as getting him to follow his whims and fancies. To further support his position, al-Juwaynī insists that there can be *taklīf*, or religious responsibility on a sane adult, only when he can be made to comprehend what he is obligated with. In this instant, however, the *mustaftī*'s inability to identify which of the two or more *fatāwā* is for him to adhere to, is a cause for him to be relieved from any obligation concerning the issue at hand.<sup>127</sup>

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<sup>127</sup> Al-Juwaynī, Imām al-Ḥaramayn ‘Abd al-Malik ibn ‘Abd Allāh, *al-Burhān fī Uṣūl al-Fiqh*, Dār al-Wafā’, Mansoura, 1992, vol. 2, pp. 881-882.



Al-Ghazzālī proposes a considerably detailed discussion on this issue, which can be classified into four parts as follows<sup>128</sup> :

Firstly, in the earlier discussion on ways to verify the qualification of a *muftī* when only one *muftī* can be found, al-Ghazzālī insists that the *mustaftī* has to depend on popular reports (*tawātur*) by the people, if that can be done. Otherwise, it suffices for the *mustaftī* to establish his own best estimation (*ghālib al-ẓann*) based on the testimony of one or two trustworthy persons.

Secondly, in a situation where there are more than one *muftī*, the *mustaftī* is given the choice of asking any one that he wishes, without any need for further investigation to identify the one who is most qualified. This is assumingly a situation where both or all the *muftūn* are in agreement on one common ruling, for if they are not, it will shift to the next part of al-Ghazzālī's discussion. Nonetheless, a question arises here as to why the *mustaftī* is said to be at liberty to choose any one of the *muftūn*, when it can be suggested that he follows both or all of them, for they are unanimous in their ruling?

Thirdly, in his subsequent discussion, al-Ghazzālī suggests that if the *muftūn* hold different views on a particular ruling, and both or all the *muftūn* are of the same stature, the *mustaftī* is to approach them again for their advice. If they agree that he can make his personal choice, he is then allowed to do so, while if there is one particular view that

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<sup>128</sup> Al-Ghazzālī, Abū Hāmid Muḥammad ibn Muḥammad, *al-Mustaṣfā min 'Ilm al-Uṣūl*, Mu'assasah al-Risālah, Beirut, 1997, vol. 2, pp. 468-469.

they agree he should follow, he is required to abide by it. If, however the *muftūn* persist on their differing positions, the *mustaftī* is, again, allowed to make his own choice as to whom to follow.

Fourthly, when these *muftūn* are not unanimous in their rulings, and they are not of the same stature, al-Ghazzālī expresses his preference that the *mustaftī* must follow the most qualified among them. This, according to al-Ghazzālī, is to be attempted by the *mustaftī* by employing his best personal estimation, or *ghālib al-zann*.

Al-Rāzī, on the other hand, insists that the *mustaftī* is required to first try his best to identify who among the *muftūn* is the most knowledgeable, although he does not suggest any specific method for the *mustaftī* to apply in doing so. If, consequently, he is able to identify the one who is most knowledgeable, he is then obligated to approach that particular *muftī* over the other for *fatāwā*. However, in a situation where subsequently the *mustaftī* continues to fail to distinguish the most knowledgeable among them, either because the testimonies or indicators that he gathered are not sufficiently convincing for him to reach to the required conclusion, or because all these *muftūn* are of the same echelon, he is then expected to proceed to the next stage of trying to identify who among them is the most trustworthy and pious, for him to follow.

If, eventually, the *mustaftī* is still unable to come up with any decision, only then is he given the liberty to opt for any one of the *muftūn* that he is comfortable with.<sup>129</sup>

To a certain extent, this view by al-Rāzī bears some similarities with the one offered by al-Ghazzālī, where both of them express their inclination that a *mustaftī* cannot but exert a reasonable amount of effort to determine the most knowledgeable among the *muftūn*, whose *fatāwā* consequently becomes the only ones he is to follow. The difference between the two is at the initial stage of identifying the stature of these *muftūn*. If al-Rāzī insists that the *mustaftī* must try to determine the highest qualified among the *muftūn* from the earliest stage, al-Ghazzālī suggests that such an effort is to be exerted only when there are disagreements among the *muftūn* in their views.

This researcher is of the view that this position by al-Ghazzālī and al-Rāzī is the most justified, but realistic, and the closest to fulfill the need of a *mustaftī* to be self assured of the qualification of a *muftī* he is depending on for his religious guidance. The principle is, as highlighted by Ibn al-Ṣalāh<sup>130</sup> and al-Nawawī,<sup>131</sup> for a *mustaftī* to employ a realistic way according to the best of his capability, to convince himself that the person he approaches for *fatāwā* is duly qualified for such. It is understandable that due to a lack of capability on the part of the *muqallid mustaftī*, he can not be expected to

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<sup>129</sup> Al-Rāzī, Fakhr al-Dīn Muḥammad ibn ‘Umar, *al-Maḥṣūl fī ‘Ilm Uṣūl al-Fiqh*, Mu’assasah al-Risālah, Beirut, 1997, vol. 6, pp. 81-83.

<sup>130</sup> Ibn al-Ṣalāh, ‘Uthmān ibn ‘Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-‘Ulūm wa al-Ḥikam, Medina, 1986, p. 158.

<sup>131</sup> Al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū‘ Sharḥ al-Muhadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 87.

thoroughly comprehend the legal and theological basis of a *fatwā* issued by a jurist. Similarly, it is unbecoming to oblige him to make an enlightened preference for a legal opinion over another according to the merit of its evident and arguments, what more for him to deduce a ruling directly from the texts, a process of which is termed as *ijtihād*. Notwithstanding, for him to exert effort to satisfy himself, to the closest of his estimation, on the stature and qualification of a *muftī*, is practically an achievable task. The method and steps to be employed should otherwise be left to his discretion based on his capabilities, as well as the combination of resources, opportunities and limitations that are present before him.

The proponents of the second view, who suggest that it is not obligatory on the *mustafī* to investigate who among the *muftūn* is most knowledgeable, put forth an argument that only a similarly knowledgeable person is capable to identify the knowledge stature of a *muftī*. This argument is valid, if the expectation is for the *mustafī* to fully discover the exact truth with regards to the *muftī*'s stature. However, this is not the case, and the *mustafī* is not expected to do as such, for understandably he is not capable for it. An analysis of the views of the scholars, both of the first and the second positions, illustrates that the scholars generally accept the notion of having the *mustafī* to establish a self estimation (*ghālib al-zann*) as a basis for him to work upon. This is supported by al-Rāzī's report that the scholars of the *madhhab* agree (*ittafaqū*) that a *mustafī* is not permitted to seek a *fatwā*, unless he is led by his best estimation (*illā idhā ghalaba 'alā zannih*) that the person he is seeking the *fatwā* from is qualified to

exercise *ijtihād*, and is trustworthy.<sup>132</sup> It is not an issue of convincing others, but rather an undertaking to satisfy his own need to be self-assured of the qualification of the *muftī* he is about to approach for his religious guidance. This, as mentioned by al-Rāzī, can be achieved through a number of ways, among which are by getting testimony of one or more trustworthy persons; or by prevalent recognition among members of a community; or by the referral made by a *muftī* for the *mustaftī* to approach another, whom the former acknowledged as being more knowledgeable.<sup>133</sup> This notion of having one's best estimation as the foundation for his religious adherence and observance, should also be put forth as a response to al-Juwaynī's proposition indicated earlier, that a *mustaftī*'s obligation in the issue that he sought a *muftī*'s view on, is discharged, if the *mustaftī* is unable to determine which fatwa is to be followed.

This area of discussion is far from being archaic, when deliberations on establishing authority and acceptance of a contemporary *fatwā* institution, as in the context of Singapore, come into the picture. The different positions that exist among the scholars of the Shāfi'ī *madhhab* indicates the intensity of the need, in the views of these scholars, for a non-*mujtahid* layperson to put his best effort to satisfy himself with the qualification and trustworthiness of the individual from whom he seeks guidance to his religious queries, within a degree that is practical and realistic. The system and procedures that have been put in place for the Singapore's Fatwa Committee and its

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<sup>132</sup> Al-Rāzī, Fakhr al-Dīn Muḥammad ibn 'Umar, *al-Maḥṣūl fī 'Ilm Uṣūl al-Fiqh*, Mu'assasah al-Risālah, Beirut, 1997, vol. 6, p. 81.

<sup>133</sup> Ibid., vol. 6, p. 83.

*muftī* to function, as delineated in the Administration Law Act (AMLA), were designed in such a way that this issue of the integrity and credibility of the country's *fatwā* institution and its members is addressed. This will be further discussed in later parts of this research.

## 2.4 A *Muftī*'s Position in the Judiciary

It is recommended that a judge, in passing a judgment, consults the legal opinion of a knowledgeable individual, or individuals. This was mentioned by, and as early as, al-Shāfi'ī<sup>134</sup>, al-Māwardī<sup>135</sup> and al-Shīrāzī, the latter of whom suggests that the learned consultants are to be present in the hearing sessions.<sup>136</sup> This process of consulting the views of a learned jurist, or jurists, before passing judgment, resembles the current practice in Singapore, where occasionally the President of the Shariah Court would proceed to the Fatwa Committee for *fatāwā* on certain judicial issues. An issue that arises within this discussion is whether it is acceptable for the judge to pass a judgment that differs from the *fatwā* of his consultants. Al-Māwardī indicates his preference that the judge's consultants are in no position to force him to accept their legal opinion when he disagrees, provided that the judge is himself a *mujtahid*.<sup>137</sup> A merit stands in

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<sup>134</sup> Al-Shāfi'ī, Muḥammad ibn Idrīs, *Kitāb al-Ūmm*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1993, vol. 7, p. 158.

<sup>135</sup> Al-Māwardī, 'Alī ibn Muḥammad ibn Ḥabīb, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1999, vol. 16, pp. 47-49.

<sup>136</sup> Al-Shīrāzī, Ibrāhīm ibn 'Alī ibn Yūsuf al-Fīrūz'abadī, *al-Muḥadhdhab fī Fiqh al-Imām al-Shāfi'ī*, Dār Iḥyā' al-Turāth al-'Arabī, Beirut, 1994, vol. 2, p. 379.

<sup>137</sup> Al-Māwardī, 'Alī ibn Muḥammad ibn Ḥabīb, *al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-Imām al-Shāfi'ī*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1999, vol. 16, p. 49.

allowing a judge to hold a certain degree of legal liberty to decide, even if his decision departs from the position of his consultant, or consultants, for it is the judge who presides over the court hearings, thus placing him in a better position to decide on the outcome of every case, due to the vital first hand information on the argumentations, proofs and evidences that he has the privilege of, as compared to the information held by the consultant, who in numerous occasions is the *muftī*. It may be useful, however, in order to avoid juristic conflicts between the judge and his *muftī* consultants, that any legal opinion issued by the consultants is illustrated in the form of general principles and broad rulings, *upon* which the judge will, in turn, assume the task of translating it into specific application to the case he is presiding.

## 2.5 Retraction of a *Fatwā*

Al-Shāfi‘ī mentions that when a jurist finds a *fatwā* he has earlier issued as erroneous, he is obligated to retract it. This is also the case if he realizes that the earlier *fatwā* was in contradiction with the *Qur’ān*, a *sunnah*, or an *ijmā’*. Al-Shīrāzī adds to this list the apparent analogy (*al-qiyyās al-jalī*)<sup>138</sup> However, al-Shāfi‘ī asserts that the *mujtahid* is to resort to retracting such a *fatwā* only if the mistake or the contradiction is definite, and that there does not exist a second opinion that supports the *fatwā* issued earlier, hence

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<sup>138</sup> Al-Shīrāzī, Ibrāhīm ibn ‘Alī ibn Yūsuf al-Fīrūzabādī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfi‘ī*, Dār Iḥyā’ al-Turāth al-‘Arabī, Beirut, 1994, vol. 2, p. 380.

providing it with a possibility that it might be correct.<sup>139</sup> A possible question that may arise from this position by al-Shāfi‘ī is whether, by this view, he is disallowing any *mufīī*, who has a change of mind on that particular issue, from issuing a new *fatwā* that contradicts an earlier one, if the latter does not contain a definite error? This is unlikely to be the case, for al-Shāfi‘ī himself is known to have departed from a number of his earlier rulings that constitute his old *madhhab* (*al-madhhab al-qadīm*) and proposed new rulings which form part of his new *madhhab* (*al-madhhab al-jadīd*). What al-Shāfi‘ī means by retracting the abovementioned type of *fatāwā*, that are definitely erroneous or contradict a directly conspicuous text of the Qur’ān, *sunnah* or *ijmā‘*, is to nullify them totally, and not leaving the smallest bit of space for any member of the community to adopt them. In contrast, a ruling issued earlier, but subsequently viewed by the issuer as weak in its evidences and argument, possibly due to newly discovered proofs, or due to emerging needs of people of different contexts and circumstances, is naturally to be reviewed and reinterpreted by its issuer.<sup>140</sup> An expansion to its initial deliberations in order to realize and satisfy the general *sharī‘ah* principle of general good (*maṣlaḥah ‘āmmah*) may thus be formulated, without the need to completely invalidate it.

Al-Shāfi‘ī’s insistence that the retraction of an earlier *fatwā* can only be done if it is erroneous in a definitive form, or when it contradicts a directly conspicuous text of the

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<sup>139</sup> Al-Shāfi‘ī, Muḥammad ibn Idrīs, *Kitāb al-Ūmm*, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1993, vol. 7, p. 156.

<sup>140</sup> Muṭrijī, Maḥmūd, *al-Majmū‘ Sharḥ al-Muhadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 22, p. 51.



Qur'ān, *sunnaḥ* or *ijmā'*, carries an elemental merit, in such that there is always the possibility of the circumstantial factors that have earlier influenced the ruling to be formulated in its initial form, to reoccur after a period of time. This signifies the elasticity of the *Sharī'ah* that ensures its continued relevance and applicability in changing societies, where the formulation of its rulings, other than by utilizing the process of deriving them from the primary textual sources, that are the Qur'ān and the *sunnaḥ*, also comprises of taking into significant consideration the fundamental objectives of the *sharī'ah*, of which the personal, domestic and environmental situations of its subjects are hugely influential.

Another point of considerable value from al-Shāfi'ī's proposition lies in the fact that by discovering new evidences, and subsequently revising an existing ruling to formulate a new and updated one that is, to the best of its issuer's intellectual capacity, nearest to the truth, a jurist can never claim ultimate correctness. There is always the possibility of other evidences yet to be discovered, as much as the possibility of the jurist changing his preference in the methodology applied to extract ruling from the sources, even the very ones he utilized in his earlier *fatwā*.

This position by al-Shāfi'ī and al-Shīrāzī denotes, in short, the distinction between the legal spheres where *ijtihād* is allowed and those where its exertion is not accepted, namely issues where the conspicuous rulings are explicitly designated, beyond doubt, by the Quranic texts, *sunnaḥ*, *ijmā'* and *al-qiyās al-jalī*.

## 2.6 Procedural Stages of *Iftā'*

Upon scrutinizing the literature available within the *Shāfi'ī madhhab* on the procedural stages that a *muftī* is expected to go through in the process of formulating a ruling, and subsequently issuing it as a *fatwā*, it is discovered that the scholars of the *madhhab* generally presented a list of etiquettes that range from the first instant when the *muftī* receives a question, to the method that he is expected to apply in conveying the answer to the *mustaftī*, that is the person, or party, who seeks his *fatwā*. These proposed etiquettes should understandably constitute a significant and important part of the whole body of legal theories on *iftā'*, for they define the framework adopted by the jurists and *muftūn* in coming up with legal opinions requested by members of their community. It is therefore to be expected that such a framework would effect a considerable degree of influence on their *fatāwā* in their final form.

In order to facilitate further discussion and analysis of these theories, they are hereby categorised into three sections in accordance to three different stages, the first of which is the stage whence a *muftī* first receives a question, followed by the second stage when the *muftī* goes through a set of processes and procedures to formulate a legal opinion on the case being queried. This is subsequently followed by the third stage when the legal opinion is finally conveyed to the *mustaftī*.

### 2.6.1 When a *muftī* receives a question.

An investigation into the writings of scholars of the Shāfi‘ī scholars reveals that there is no dispute among them on the personal obligation placed onto a *muftī* to take up the task of providing the *mustaftī* with a *fatwā*, if there is no qualified person other than him available in the community.<sup>141</sup> Although it has been a common notion among the scholars to highlight, in the initial parts of their writings on *iftā*’, the tremendous cautions of any person from imprudently delving into issuing *fatāwā* and answering religious questions, due to its inviolability as a religious obligation and as a consecrated practice, to the extent that to be hesitant to issue *fatāwā* seems almost to be a virtue in itself, the scholars are apparently unanimous in suggesting that if a *muftī* finds himself to be the only one availably qualified, he can not avoid from assuming the responsibility.

In an earlier part of this research, it was presented that the majority of the Shāfi‘ī scholars are of the view that, in a situation where there are more than one qualified *muftī* available, the *mustaftī* is at liberty to choose any one of those *muftūn* that he wants to direct his questions to. Al-Khaṭīb al-Baghdādī, on the other hand, is among those other few who insist that the *mustaftī* is obliged to make his best possible effort to identify the one most knowledgeable among those *muftūn*, and upon identifying one,

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<sup>141</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn ‘Alī, *al-Faqīh wa al-Mutafaqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 386. See also al-Shīrāzī, Abū Ishāq Ibrāhīm ibn ‘Alī al-Shīrāzī, *Kitāb al-Luma’ fī Uṣūl al-Fiqh*, Dār al-Nadwah al-Islāmiyyah, Beirut, 1988, p. 71; Ibn al-Ṣalāh, ‘Uthmān ibn ‘Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-‘Ulūm wa al-Ḥikam, Medina, 1986, p. 108; & Al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū‘ Sharḥ al-Muḥadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 75.

only this particular *muftī* is he allowed to seek *fatāwā* from. This inclination by al-Khaṭīb al-Baghdādī to impose such a restriction, is further ascertained by his proposition that when a group of *muftūn* are approached, they are required to advise and direct the *mustaftī* to approach the one whom they know as the most knowledgeable among them.<sup>142</sup> This consistency by al-Khaṭīb al-Baghdādī is an indicator of his persistence that preserving the sanctity of the religion by way of getting only the highest echelon of a scholar to provide religious guidance to the community, is a commitment required of both the *muftī* and the *mustaftī*.

This zeal as displayed by Al-Khaṭīb al-Baghdādī continues to show when he proposes that, if the *muftī* receives a question that he is not confident of its answer, it becomes an onus on him to refer the *mustaftī* to another *muftī* that he knows is more knowledgeable, if there is any. According to al-Khaṭīb al-Baghdādī, in a situation where there is none other than him, the *muftī* is not to proceed with answering the question at hand. Instead, he is to abstain himself from answering.<sup>143</sup> This position by al-Khaṭīb al-Baghdādī is also shared by al-Nawawī.<sup>144</sup> Al-Shāfi‘ī, too, was reported by al-Haytamī as insisting that a *muftī* in such a situation should refrain from issuing any *fatwā* on the issue at

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<sup>142</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn ‘Alī, *al-Faqīh wa al-Mutafaqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 379.

<sup>143</sup> Ibid., vol. 2, pp. 360-361.

<sup>144</sup> Al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū‘ Sharḥ al-Muhadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 84.

hand until he is able to enlighten himself on which of the differing opinions is superior in its evidences.<sup>145</sup>

However, a pertinent question that needs to be addressed out of this position by al-Khaṭīb al-Baghdādī, al-Nawawī and al-Shāfi‘ī, is: until when should the *muftī* abstain from responding to a question that he is not totally sure of the answer, while at the same time there is no other more knowledgeable jurist that he knows of for him to direct the *mustaftī* to? If we are to base our consideration mainly on the *maṣlaḥah* of the *mustaftī* and the community, such a question should not be left unanswered indefinitely, or else the need of the *mustaftī* would be seen to have been unduly ignored by the *muftī*.

To this al-Haytamī offers a different proposition. He starts by asserting that a *muftī* is obliged to exert his utmost effort to identify the strongest opinion based on its evidences and merit of its argument. It is an offence for a *muftī* to deliberately choose an inferior view for his *fatwā*, for such an act is considered as following his lustful desire (*ittibā‘ al-hawā*). However, in a situation where, even after exerting a considerable amount of effort, the *muftī* is still unable to identify the stronger of the two, or more, views, he then has the liberty to adopt whichever view that he personally prefers. As due effort has been spent prior to his making that personal preference between the various views,

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<sup>145</sup> Al-Haytamī, Shihāb al-Dīn Aḥmad ibn Muḥammad, *al-Fatāwā al-Kubrā al-Fiqhiyyah ‘alā Madhhab al-Imām al-Shāfi‘ī*, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1997, vol. 4, p. 304.

he is therefore not to be condemned of following his lustful desire in formulating and issuing his *fatwā*.<sup>146</sup>

Al-Ghazzālī discusses this issue at length in his *al-Mustaṣfā*,<sup>147</sup> where he reports differing views on it among jurists. Al-Ghazzālī classifies these jurists into two main categories, the first of whom are those who hold the view that there is only one truth, or one reality, in identifying any religious ruling; and that only one legal opinion among several is correct. A *mujtahid* is therefore expected to exercise *ijtihād* with the personal aim to reach a degree of certainty in the one correct position. As identifying the single truth is achievable and all *mujtahidūn* are obliged to reach as such, the jurists of this category assert that there can not exist a contradiction between two or more legal evidences that remains irreconcilable. Therefore, in a situation where a *mujtahid* finds himself unable to determine which of the different legal positions as the correct one, he is obliged to either refrain from issuing any answer, or to adopt a cautious approach by choosing the strictest position.

The second category of jurists, according to al-Ghazzālī, are those who hold the view that there can be multiple truths; and that the concluding results of the *ijtihād* employed by the *mujtahidūn* are all accepted as correct, although they may appear to be contradictory to one another. Al-Ghazzālī narrates that the jurists of this category are

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<sup>146</sup> Ibid., vol. 4, p. 305.

<sup>147</sup> Al-Ghazzālī, Abū Hāmid Muḥammad ibn Muḥammad, *al-Mustaṣfā min 'Ilm al-Uṣūl*, Mu'assasah al-Risālah, Beirut, 1997, vol. 2, pp. 445-447.

further divided into two groups, one of which assert that a *mujtahid* or *mufī* who is unable to determine which among two or more positions is the most convincing, to exercise refrain (*tawaqquf*). The other group are those who view that such a *mufī* is at liberty to make his personal predilection (*takhyīr*) of any of the differing positions.

In further presenting his discussion on this issue at hand, al-Ghazzālī highlights that accordingly there are four possible resolutions. The first resolution is to apply both the opposing positions, or both the opposing legal evidences; while the second resolution is to abandon all. Al-Ghazzālī argues that these first two resolutions are unreasonable due to the apparent contradiction in existence. The third resolution, according to al-Ghazzālī, is indefinite refrain. To this, al-Ghazzālī stresses that it is also unacceptable as it will only lead to disruption and impasse. The only feasible resolution left is therefore to allow the *mufī* to have liberty to choose any of the positions as his answer, or *fatwā*.

This researcher is of the view that this issue is of significant importance in the discussion of the duties and responsibilities of a *mufī*, as well as his code of conduct, which is termed as *adab al-mufī* by the jurists. A *mufī* carries the religious onus of providing guidance to his community when he is requested to do so. Every effort should be taken to ensure that this important role of providing religious guidance should not be put to halt indefinitely. A *mufī*'s inability at any one time to be convinced of the stronger position between two or more legal opinions must not be accepted as a reason

to leave the *mustaftī* in desperation for an answer. It is therefore proposed that a *muftī* in such a situation should be given the opportunity to evaluate whether it is in the best interest of the *mustaftī* to proceed with issuing a *fatwā* by choosing any one of the available positions; or to defer issuing it until a time when the *muftī* is satisfied with the most appropriate position to be employed. However, if the *muftī* decides not to defer, it may be useful for him to be upfront with his *mustaftī* by declaring that his answer is to be taken as an interim measure, with a disclaimer that once he is able to reach a convincing position on the issue at hand, he will inform the *mustaftī*.

In their writings on the role of a *muftī* and his etiquette at the first stage of receiving a question, the jurists of the Shāfi‘ī *madhhab* also indicate that if a *muftī* is confronted with several questions by more than one *mustaftī* at any one time, the *muftī* is expected to give priority to questions that came in to him earlier, according to the sequence of their arrival to him for his disposal. If, however, there is reasonable reason for the *muftī* to advance a question that comes in later, such as in a situation where a *fatwā* is requested by a traveller who is in dire need to have his question answered on an immediate basis, the *muftī* is therefore given the liberty to provide him with the answer first, before answering other questions that have reached him earlier. This decision to give priority to any of the questions, based on the sequence of their arrival, or on the degree of urgency, or on any other consideration, is to be made discreetly for the benefit and the needs of the *mustaftī*. Making such a decision is left to the discretion of the *muftī*, with a caution, however, that he should not cause any detriment to anyone, and



that his decision should not be taken with the illicit intention to effect preferential treatment unduly to anyone.<sup>148</sup>

As providing religious guidance and issuing *fatāwā* is considered a task of great consequence and not to be taken lightly, a *muftī* naturally is expected to expend all effort to the best of his ability to arrive at an answer that he is convinced to be as nearest to the truth as humanly possible. In order for the *muftī* to be able to achieve as such, it is thus of critical importance that before embarking on the process of formulating the required ruling, he is to be fully cognisant of the question that he is being presented with, which should be inclusive of its intention and all the necessary facts that are related to it. To facilitate this, the scholars of the *madhhab* insist that a *muftī* should read a written question comprehensively to its very last part, highlighting that greater attention is to be given to this last part of the question, as generally by it, the exact content and intention of the question becomes clearly identifiable.<sup>149</sup> Al-Khaṭīb al-Baghdādī even suggests that the *muftī* has to read the question repeatedly for him to have adequate grasp of its content, and for him to give it his due thoughts.<sup>150</sup> When a *Muftī* finds that there is a part of the question that is ambiguous, he should revert to the

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<sup>148</sup> Ibn al-Ṣalāḥ, ‘Uthmān ibn ‘Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-‘Ulūm wa al-Ḥikam, Medina, 1986, p. 153. See also al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū‘ Sharḥ al-Muḥadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 82.

<sup>149</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn ‘Alī, *al-Faqīh wa al-Mutafaqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 387. See also al-Rāfi‘ī, ‘Abd al-Karīm ibn Muḥammad ibn ‘Abd al-Karīm, *al-‘Azīz Sharḥ al-Wajīz*, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1997, vol. 12, p. 426; Ibn al-Ṣalāḥ, ‘Uthmān ibn ‘Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-‘Ulūm wa al-Ḥikam, Medina, 1986, p. 137; & al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū‘ Sharḥ al-Muḥadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 79.

<sup>150</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn ‘Alī, *al-Faqīh wa al-Mutafaqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 390.

*mustaftī* for further clarification.<sup>151</sup> It is also advocated that the *mufī* consult other scholars for their views on the issue at hand.<sup>152</sup>

#### 2.6.2 When formulating a legal position

This is the stage when a *mufī* is expected to formulate or identify a ruling that will subsequently be provided to his *mustaftī* as a *fatwā*, either by way of deducing this ruling from the primary texts (*istinbāt*), or applying analogy (*qiyās*), or reporting the prevalent position of the *mufī*'s *madhhab* (*ittibā'*), or putting preference to one legal opinion of a jurist over another (*tarjīh*).

Al-Juwaynī<sup>153</sup> relates al-Shāfi'ī's proposition on the processes that a *mujtahid* is expected to consume in his effort to formulate a religious ruling for a new legally unprecedented case, the first of which is by investigating the Qur'ānic texts, followed by, in the instance of its unavailability in the Qur'ān, the *mutawātir* narrations, and then, again by virtue of their non-existence, the *āḥād* narrations. In dealing with any of the

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<sup>151</sup> Ibid., vol. 2, p. 388. See also Ibn al-Ṣalāh, 'Uthmān ibn 'Abd al-Raḥmān al-Shahrazūrī, *Adab al-Mufī wa al-Mustaftī*, Maktabah al-'Ulūm wa al-Ḥikam, Medina, 1986, p. 137; & al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū' Sharḥ al-Muḥadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 79.

<sup>152</sup> Al-Shāfi'ī, Muḥammad ibn Idrīs, *Kitāb al-Umm*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1993, vol. 7, pp. 155-158. See also al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn 'Alī, *al-Faqīh wa al-Mutafaqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 390; Ibn al-Ṣalāh, 'Uthmān ibn 'Abd al-Raḥmān al-Shahrazūrī, *Adab al-Mufī wa al-Mustaftī*, Maktabah al-'Ulūm wa al-Ḥikam, Medina, 1986, p. 138; & al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū' Sharḥ al-Muḥadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 79.

<sup>153</sup> Al-Juwaynī, Imām al-Ḥaramayn 'Abd al-Malik ibn 'Abd Allāh, *al-Burhān fī Uṣūl al-Fiqh*, Maṭābi' al-Dawḥah al-Ḥadīthah, Doha, vol. 2, pp. 1337-1339. This proposition by al-Shāfi'ī was also reported by al-Shawkānī, Muḥammad ibn 'Alī, in his *Irshād al-Fuḥūl ilā Taḥqīq al-Haqq min 'Ilm al-Uṣūl*, ed. Muḥammad Ḥasan Muḥammad Ḥasan Ismā'īl, Dār al-Kutub al-'Ilmiyyah, Beirut, 1999, vol. 2, pp. 310-311.

said texts, if they are to be found, its explicit and definite injunction is to be identified and adopted. In a situation where a definite injunction can not be established, the apparent connotation of the texts (*ẓāhir al-naṣṣ*) is to be resorted to. This is done, however, by, first, searching for a *mukhaṣṣiṣ* that provides a clearer understanding to the intended implication of the generalities of the texts.

When after all effort to investigate the texts has been exhausted without a satisfying conclusion, rather than instantaneously resorting to apply analogy (*qiyās*), a jurist is expected to give due consideration to the universals of the *sharī‘ah* and the general good it is set to realize. Only in a situation where a common good is nowhere to be identified for the case at hand, *ijmā‘* is then assumed. *Qiyās*, or analogy, is consequently applied when there is no unanimous position taken by jurists by way of *ijmā‘*. In his commentary to this proposition by al-Shāfi‘ī, al-Juwainī highlights his view that it is allowable for the *mujtahid* to resort to *ijmā‘* first before embarking on investigating all the other legal steps as outlined by al-Shāfi‘ī.

There is, however, a slight disparity in al-Ghazzālī’s narration of al-Shāfi‘ī’s proposition, as compared to al-Juwaynī’s narration of the same. In al-Ghazzālī’s version, it is stated that after failing to derive a ruling from the primary textual sources, and subsequently from *ijmā‘*, a *mujtahid* should proceed to employ *qiyās*. The consideration of the universals of the *sharī‘ah* and its general good (*kulliyyāt al-shar‘ wa maṣāliḥuhā al-‘āmmah*) is not mentioned as a step on its own before *ijmā‘* or *qiyās*.

Nonetheless, in the application of *qiyās*, al-Shāfi‘ī is reported by al-Ghazzālī as asserting that the universal legal maxims (*al-kulliyyāt al-‘āmmah*) should be prominently observed in order to identify the ‘illah, or the underlying legal cause of a ruling, before any consideration can be given to the other specific evidences.<sup>154</sup>

Scholars of the Shāfi‘ī *madhhab* also highlight their assertion that it is illicit for a *muftī* to adopt an attitude of laxity (*tasāhul*) in formulating and issuing *fatāwā*, and that those who are known for it are not to be further approached for *fatāwā*. Among the forms of this attitude is by being hasty and imprudent in issuing *fatāwā*, without first lending the issue at hand a proper investigation, nor exerting adequate effort to go through the necessary process in formulating an acceptable ruling. Another form of this attitude of laxity, or *tasāhul*, is by letting oneself to be taken in by corrupted motives to incessantly quest for legal artifices (*al-ḥiyal*) that contradict the *sharī‘ah*. This is done with the intention to either offer an accommodating and permissive ruling to those a *muftī* hopes to gain personal benefit from, or issue an astringent and uncompromising *fatwā* to those he wishes to cause harm to.<sup>155</sup> To the same effect, Al-Zarkashī also expresses preference that when a *muftī* is convinced by his *ijtihād* of a particular ruling for a *mustaftī*, he is not allowed to deliberately reject the *mustaftī* and refer him to another

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<sup>154</sup> Al-Shawkānī, Muḥammad ibn ‘Alī, *Irshād al-Fuḥūl ilā Taḥqīq al-Ḥaqq min ‘Ilm al-Uṣūl*, ed. Muḥammad Ḥasan Ismā‘īl, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1999, vol. 2, pp. 310-311.

<sup>155</sup> Al-Rāfi‘ī, ‘Abd al-Karīm ibn Muḥammad ibn ‘Abd al-Karīm, *al-‘Azīz Sharḥ al-Wajīz*, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1997, vol. 12, p. 419. See also Ibn al-Ṣalāḥ, ‘Uthmān ibn ‘Abd al-Raḥmān al-Shahrāzūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-‘Ulūm wa al-Ḥikam, Medina, 1986, p. 111 & al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū‘ Sharḥ al-Muḥadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 76.

*mufī* whom the former knows as holding a view different from his own, with the similar illicit intention as mentioned above, of curtailing the *mustafī* with impediments, or facilitating relief in his personal benefit.<sup>156</sup>

Notwithstanding, this austere position by the scholars should not be construed to mean that the interests of the *mustafī* are not taken as factors of consideration in the processes of *iftā*. To the contrary, it is praiseworthy if a *mufī* conducts an investigation into exploring legal artifices (*al-ḥiyal*) that are in concordance with the *sharīʿah*, with the chaste intention of finding solutions to the predicaments faced by the *mustafī*. In support of this notion, Ibn al-Ṣalāḥ and al-Nawawī narrated the words of Sufyān al-Thawrī that true acquaintance is, in reality, the ability by a trustworthy and qualified scholar to provide ease and relief, whilst merely providing strict and rigid rulings is an act any person can perform.<sup>157</sup>

If the *mufī* is being asked about an issue that he had earlier given his *fatwā* on, he is allowed to repeat the same answer instantaneously, if he can still remember the arguments and evidences that constituted the basis for his earlier *fatwā*. However, if he is unable to recall those earlier evidences and arguments, he is not permitted to proceed with issuing the same *fatwā* without first repeating the process of exercising *ijtihād*,

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<sup>156</sup> Al-Zarkashī, Badr al-Dīn Muḥammad ibn Bahādir ibn ‘Abd Allah, *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh*, Wizārat al-Awqāf wa al-Shu’ūn al-Islāmiyyah, Kuwait, 1992, vol. 6, p. 317.

<sup>157</sup> Ibn al-Ṣalāḥ, ‘Uthmān ibn ‘Abd al-Raḥmān al-Shahrazūrī, *Adab al-Mufī wa al-Mustafī*, Maktabah al-‘Ulūm wa al-Ḥikam, Medina, 1986, p. 111. See also Al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū’ Sharḥ al-Muḥadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 76.

and, consequently, only upon it is he expected to issue a new *fatwā*.<sup>158</sup> This is unless if his self estimation implies that his earlier *fatwā* was founded on a considerably strong argument.<sup>159</sup> Al-Juwaynī, on the other hand, is of the view that the *muftī* is not obliged to repeat the process of exercising *ijtihād* if the first *fatwā* was formulated based on an authentic text, for it is not conceivable that a text can possibly change. This concession of a *muftī* being spared from repeating the process of *ijtihād*, is similarly given in cases where, by compelling him to do so, it would only cause predicaments and grave difficulties, such as the need to travel to great distances, and the like; or in cases where the issues in question are repetitive and habitual in nature.<sup>160</sup>

If this second *fatwā* is not in accordance with his earlier *fatwā*, he is expected to inform his earlier *mustaftī* of the change in his opinion. This is due to the fact that the execution by the earlier *mustaftī* of the particular religious practice in question was built upon the earlier *fatwā*, hence when the *muftī* abandons it at a later stage, there no longer exists any valid foundation for the *mustaftī* to continue to build his practice on.<sup>161</sup>

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<sup>158</sup> Al-Rāzī, Fakhr al-Dīn Muḥammad ibn ‘Umar, *al-Maḥṣūl fī ‘Ilm Uṣūl al-Fiqh*, Mu’assasah al-Risālah, Beirut, 1997, vol. 6, pp. 69-70. See also al-Āmidī, Sayf al-Dīn Abū al-Ḥasan ‘Alī ibn Abī ‘Alī, *al-Iḥkām fī Uṣūl al-Aḥkām*, Dār al-Kutub al-‘Ilmiyyah, Beirut, n.d., vol. 2, pp. 454-455, & al-Zarkashī, Badr al-Dīn Muḥammad ibn Bahādir ibn ‘Abd Allāh, *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh*, Wizārat al-Awqāf wa al-Shu’ūn al-Islāmiyyah, Kuwait, 1992, vol. 6, p. 302.

<sup>159</sup> Al-Rāzī, Fakhr al-Dīn Muḥammad ibn ‘Umar, *al-Maḥṣūl fī ‘Ilm Uṣūl al-Fiqh*, Mu’assasah al-Risālah, Beirut, 1997, vol. 6, pp. 69-70.

<sup>160</sup> Al-Juwaynī, Imām al-Ḥaramayn ‘Abd al-Malik ibn ‘Abd Allāh, *al-Burhān fī Uṣūl al-Fiqh*, Dār al-Wafā’, Mansoura, 1992, vol. 2, p. 878.

<sup>161</sup> Al-Rāzī, Fakhr al-Dīn Muḥammad ibn ‘Umar, *al-Maḥṣūl fī ‘Ilm Uṣūl al-Fiqh*, Mu’assasah al-Risālah, Beirut, 1997, vol. 6, pp. 69-70. See also al-Zarkashī, Badr al-Dīn Muḥammad ibn Bahādir ibn ‘Abd Allāh, *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh*, Wizārat al-Awqāf wa al-Shu’ūn al-Islāmiyyah, Kuwait, 1992, vol. 6, p. 304.

A non *mujtahid muftī* is not allowed to issue *fatwās* by way of narrating the opinions of a deceased *mujtahid*, unless if the reporting *muftī* has the necessary knowledge to understand and appreciate the deceased's opinions and their evidences.<sup>162</sup> Al-Rāzī reports that scholars of his time were unanimous that this practice is allowed, due to the cessation of the existence of independent *mujtahidūn* then.

### 2.6.3 When issuing the answer

A *muftī* is expected to observe that he is in a good personal and emotional condition when issuing a *fatwā* to his *mustaftī*. The *muftī* is warned not to proceed with giving out answers if he is in a state of anger, hunger, thirst, depression, boredom, lethargy, illness, or any other condition that may have an effect on the *muftī*'s ability to be just and objective in making his judgement.<sup>163</sup>

In issuing a *fatwā* to a *mustaftī* who has difficulty in understanding the answer given, a *muftī* must have patience in assisting the former to comprehend the *fatwā*.<sup>164</sup> A *muftī* is also enjoined, in providing the requested answer, to try his best to help solve the

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<sup>162</sup> Al-Rāzī, Fakhr al-Dīn Muḥammad ibn 'Umar, *al-Maḥṣūl fī 'Ilm Uṣūl al-Fiqh*, Mu'assasah al-Risālah, Beirut, 1997, vol. 6, pp. 70-71.

<sup>163</sup> Al-Shāfi'ī, Muḥammad ibn Idrīs, *Kitāb al-Umm*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1993, vol. 7, p. 157. See also al-Rāfi'ī, 'Abd al-Karīm ibn Muḥammad ibn 'Abd al-Karīm, *al-'Azīz Sharḥ al-Wajīz*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1997, vol. 12, p. 425; Ibn al-Ṣalāḥ, 'Uthmān ibn 'Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-'Ulūm wa al-Ḥikam, Medina, 1986, p. 113; & al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū' Sharḥ al-Muḥadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 76.

<sup>164</sup> Ibn al-Ṣalāḥ, 'Uthmān ibn 'Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-'Ulūm wa al-Ḥikam, Medina, 1986, p. 135. See also al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū' Sharḥ al-Muḥadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 79.

problems faced by a *mustaftī*, and relieve him from any predicament that he is in.<sup>165</sup> To support this notion, al-Khaṭīb al-Baghdādī presented several narrations, among which is ‘Alī ibn Abī Ṭālib’s *fatwā* to a man who had earlier made an oath that his wife was to be divorced with the maximum three *ṭalāqs* if he did not have sexual intercourse with her in the day of the fasting month of *Ramaḍān*. In his *fatwā*, ‘Alī ibn Abī Ṭālib proposed that the husband travel with his wife in *Ramaḍān* and have intercourse with her during the journey. In another incident, al-Khaṭīb al-Baghdādī narrated that al-Shāfi‘ī was asked by a man about his earlier oath to divorce his wife if he ate a particular date or if he threw it away. To help the man to extricate himself from the predicaments of his oath, al-Shāfi‘ī suggested that he ate half of the date and threw the other half away.<sup>166</sup>

The interest of the *mustaftī*, therefore, seems to have always been a major factor of consideration by these scholars in their deliberations on the processes and etiquettes of *iftā’*. Another indication of this is that a *muftī* is allowed to issue an answer that is not exactly in accordance to his preferred view, if he sees a good reason in doing so in the interest of the *mustaftī*. Among others, if a *muftī* sees that there is a need to issue a stringent *fatwā* as a deterrent to a particular *mustaftī* from committing a crime, the *muftī* is allowed to proceed as such. To this effect, al-Khaṭīb al-Baghdādī, al-Rāfi‘ī and al-

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<sup>165</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn ‘Alī, *al-Faqīh wa al-Mutafaqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 411. See also al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū‘ Sharḥ al-Muḥadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 81.

<sup>166</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn ‘Alī, *al-Faqīh wa al-Mutafaqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, pp. 411-414.



Nawawī narrated that Ibn ‘Abbās, a companion of the Prophet, was once approached by someone who posed him a question on the status of repentance offered by a murderer, to which Ibn ‘Abbās replied that his repentance would not be accepted. However, to another who asked him a similar question, Ibn ‘Abbās offered a contradictory answer, indicating that a murderer’s repentance would be accepted. Subsequently, Ibn ‘Abbās explained that he had seen in the eyes of the first enquirer a desire to commit murder, thus Ibn ‘Abbās’s uncompromising reply, which was intended to provide deterrence. As in the case of the second enquirer, Ibn ‘Abbās clarified that the man had come to him with a sincere intention to repent from a murder he had earlier committed.<sup>167</sup>

In addition to this narration on Ibn ‘Abbās’s *fatwā* in the issue of a murderer’s repentance, al-Khaṭīb al-Baghdādī presented several other narrations that bring to the same effect, one of which is the Prophet’s response to a question directed to him by a young man on whether he was allowed to kiss his wife while fasting. The Prophet gave the young man a negative answer. However, to an old man who asked him the same question, the Prophet gave him permission to do so. To this, the Prophet explained that the old man, due to his age, has the ability to better control his lustful desires, and to

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<sup>167</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn ‘Alī, *al-Faqīh wa al-Mutaḥḥiqh*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 407. See also al-Rāfi‘ī, ‘Abd al-Karīm ibn Muḥammad ibn ‘Abd al-Karīm, *al-‘Azīz Sharḥ al-Wajīz*, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1997, vol. 12, p. 423; & al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū‘ Sharḥ al-Muhadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, pp. 81-82.

contain himself from acting further than a mere kiss, which would in turn taint his fast.<sup>168</sup>

In this respect, Al-Khaṭīb al-Baghdādī, who is one of those scholars who view that it is a personal obligation of a *muftī* to assume the responsibility of issuing *fatāwā* if there is no other qualified person in the community except him, goes even further to suggest that in certain situations, a *muftī* holds the right to refrain from answering any particular question that he sees wisdom in not answering. As an example, al-Khaṭīb al-Baghdādī reported that Mālik ibn Anas once avoided answering a question posed to him by a man, who, in turn, questioned him on his motive for not providing the requested answer. To the enquirer Mālik said, “If the issue that you asked me was something that you need in your religious life, I would have answered you.” Another example mentioned by al-Khaṭīb al-Baghdādī is his narration of an incident where Sa‘īd ibn Jubayr was asked by someone about the payment of *zakāt*. Sa‘īd replied by saying that the enquirer should perform his *zakāt* obligation by giving it to the rulers of the time. When Sa‘īd left the place, the enquirer followed him, and subsequently questioned him about his answer, for the rulers, according to the enquirer, were known to have mismanaged the *zakāts* that had been paid to them. Sa‘īd clarified that the correct answer should have been that the enquirer was to channel his *zakāt* according to God’s injunction. However, Sa‘īd

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<sup>168</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn ‘Alī, *al-Faqīh wa al-Mutafaqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 408.

revealed, he could not have answered it that way because the question was posed to him in the audience of the leaders of his community.<sup>169</sup>

These positions, as exhibited by the scholars mentioned, generally imply that the interests of the *mustaftī* are of grave importance in a *muftī*'s assessment for *fatwā* formulation. As highlighted in the previous paragraphs, a *muftī* may decide to deliberately issue rigid rulings to certain *mustaftīs* to act as deterrent, or to issue contradictory answers to different *mustaftīs*, or to avoid answering a question altogether in certain situations. This, nonetheless, can not be construed to mean that the *muftī* is given an infinite freedom to fabricate rulings according to his whims and fancies, either to suit the personal interests of his *mustaftī*, or those of his own. There has to be a structured guideline for a *muftī* to conform to, in order for his *fatāwā* to be in compliance with the objectives and fundamentals of the *sharī'ah*.

This is reflected, among others, by the cautionary remarks made by Ibn al-Ṣalāḥ and al-Nawawī, that a *muftī* has to be constantly aware not to discriminatorily sway towards satisfying the personal interests of his *mustaftī*, or conversely those of the *mustaftī*'s adversary, in any of his *fatāwā*. One of the examples of such an attitude is by highlighting only the rights that are to be enjoyed by a *mustaftī*, while his obligations and responsibilities are deliberately concealed or ignored in a *muftī*'s *fatwā*. In a situation where a *muftī* is conscious of his *mustaftī*'s intent to be issued with a *fatwā* that

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<sup>169</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn 'Alī, *al-Faqīh wa al-Mutafaqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, pp. 415-420.

is to the latter's personal favour, the *muftī* has to abstain from giving him the *fatwā* he desires.<sup>170</sup>

A differentiation, therefore, has to be made to distinguish a *maṣlahah mu'tabarah*, which is an interest that is acknowledged by the *sharī'ah*, in the advantage of an individual or a group of people, based on their genuine needs and necessities; from a *maṣlahah mulghāh*, which is an interest that is based solely on illicit human desires, thus rejected by the *sharī'ah* from being taken as a point of consideration in formulating Islamic rulings. This will be further deliberated in the next Chapter of this research.

In relation to this, integrity of the *muftī* is another issue that is of similar importance. Al-Khaṭīb al-Baghdādī insists that a *muftī* is not allowed to receive any form of reward from the party whom he provides *fatwā* to, as in the case of a judge who is also not allowed to accept any payment from any of the disputing parties involved in a legal case that he presides.<sup>171</sup> Ibn al-Ṣalāḥ highlights the fact that corruption is a crime abhorrent in the eyes of the *sharī'ah*, and that if this kind of reward made by the *mustaftī* for the benefit of the *muftī* resembles bribery, the *muftī* is thus forbidden from accepting it.<sup>172</sup>

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<sup>170</sup> Ibn al-Ṣalāḥ, 'Uthmān ibn 'Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-'Ulūm wa al-Ḥikam, Medina, 1986, p. 146. See also al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū' Sharḥ al-Muḥadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 81

<sup>171</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn 'Alī, *al-Faqīh wa al-Mutafaqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 347.

<sup>172</sup> Ibn al-Ṣalāḥ, 'Uthmān ibn 'Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-'Ulūm wa al-Ḥikam, Medina, 1986, p. 115.

To further safeguard the integrity of the *muftī* and the institution of *iftā'*, it is therefore important to curtail any possibility of a *muftī* being exposed to manipulation by parties with dissipated interests. It is crucial that a *muftī* is not left in dire condition without sufficient support from the state, or alternatively, his own community. It therefore becomes the responsibility of an *imām*, or ruler, to allocate from the *bait al-māl* some form of remuneration for a *muftī* whom he officially appoints to assume the post. This remuneration is intended to relieve the *muftī* from the need to take up other jobs to provide for himself or his family. In a situation where there is no *bait al-māl* in existence, or where the *muftī* is not given any allocation from the *bait al-māl*, the *muftī* is permitted to accept a kind of remuneration from members of his community if they agree to collaborate in providing for him, with the agreement that he dedicates his time to assume the task of answering their religious questions.<sup>173</sup>

Ibn al-Ṣalāḥ<sup>174</sup> and al-Nawawī<sup>175</sup> offer further detail to this position by al-Khaṭīb al-Baghdādī, by asserting that the *muftī* is only allowed to accept the financial allocation from *bait al-māl* if he has no other source of income that suffices for his needs. This researcher is of the view that such a uncompromising stand by Ibn al-Ṣalāḥ and al-Nawawī is a reflection of the degree of seriousness that they lend to the issue of a *muftī*'s integrity. This is generally consistent with the common cautiousness displayed

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<sup>173</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn 'Alī, *al-Faqīh wa al-Mutafaqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 347.

<sup>174</sup> Ibn al-Ṣalāḥ, 'Uthmān ibn 'Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-'Ulūm wa al-Ḥikam, Medina, 1986, p. 114.

<sup>175</sup> Al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū' Sharḥ al-Muhadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 76.

by scholars of the *madhhab* when it comes to the issue of the sanctity of *iftā'* and the revered position of a *muftī*, both of which are of critical importance to be guarded and maintained.

In the area of writing the text of the *fatwā* to be issued to the *mustaftī*, if a question consists of more than one possible aspect that need to be addressed, a *muftī* has to categorize the different issues and answer them all, and not to be selective in his *fatwā* by only providing answer to a particular part of the question, while ignoring the other parts. As an example, al-Khaṭīb al-Baghdādī narrates an incident where the Prophet was asked on the status of a dead rat found in fatty oil. To it the Prophet responded by saying that, if the fatty oil is in a solid state, the required action to be taken is to discard only the dead rat together with the immediate solid oil around it, whereas if the fatty oil is in liquid form, the oil is then to be disposed off totally.<sup>176</sup> Ibn al-Ṣalāḥ, on the contrary, emphasizes that to furnish the *mustaftī* with a comprehensive answer, that encompasses the different aspects of the question with all its possible scenarios, would only cause the whole answer to be too complicated for the *mustaftī* to comprehend, nor for him to benefit from.<sup>177</sup> Al-Shīrāzī and al-Nawawī suggest that if the *mustaftī* is available, and there is opportunity for the *muftī* to revert to him for further clarification on which particular issue or part of the question is of specific concern to him, the *muftī* is therefore at liberty to either answer only that specific aspect of the question, or to be

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<sup>176</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn 'Alī, *al-Faqīh wa al-Mutafaqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 399.

<sup>177</sup> Ibn al-Ṣalāḥ, 'Uthmān ibn 'Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-'Ulūm wa al-Ḥikam, Medina, 1986, p. 135.

exhaustive in his *fatwā*, by categorizing all possible aspects of the question, and subsequently answering these various aspects thoroughly. However, if the *muftī* is unable to get clarification from the *mustaftī*, due to his absence, the former is then expected to answer all parts of the question in a comprehensive manner.<sup>178</sup>

Although if the answer is to be thorough, encompassing the various possible aspects that the question may imply, as insisted by al-Khaṭīb al-Baghdādī, or as preferred by al-Nawawī, it should be briefly phrased in a fashion that can be easily comprehended by the *mustaftī*.<sup>179</sup> Al-Khaṭīb al-Baghdādī enjoins that a *muftī* avoid using complicated words and convoluted phrases, so as not to cause confusion or misunderstanding to the *mustaftī*.<sup>180</sup>

The style of handwriting and other aspects of how the text should be written are also given attention by the scholars. A *muftī* is expected to have his *fatwā* written in a legible manner, and the handwriting should be average in size. A *muftī* is also

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<sup>178</sup> Al-Shīrāzī, Abū Ishāq Ibrāhīm ibn ‘Alī, *Kitāb al-Luma’ fī Uṣūl al-Fiqh*, Dār al-Nadwah al-Islāmiyyah, Beirut, 1988, p. 71. See also al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū’ Sharḥ al-Muḥadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 78.

<sup>179</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn ‘Alī, *al-Faqīh wa al-Mutaḥḥiqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 399. See also Ibn al-Ṣalāḥ, ‘Uthmān ibn ‘Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-‘Ulūm wa al-Ḥikam, Medina, 1986, p. 141, & al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū’ Sharḥ al-Muḥadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 80.

<sup>180</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn ‘Alī, *al-Faqīh wa al-Mutaḥḥiqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 400.

encouraged to use one single pen and the same ink throughout the whole of the *fatwā* text, so as to minimize the possibility of the text being tempered with.<sup>181</sup>

It is suggested by al-Khaṭīb al-Baghdādī that there is nothing wrong for a *muftī* to mention in his *fatwā* the evidences that he employs for his *fatwā*.<sup>182</sup> In this respect, al-Nawawī<sup>183</sup> and al-Zarkashī<sup>184</sup> agree with al-Khaṭīb al-Baghdādī, but with an additional condition that the evidence, or argument, is unambiguous and brief. Al-Ṣaymari, as narrated by al-Nawawī, supplements this with another condition, that is a mufti may mention the evidence in his *fatwā* only when it is issued to a *faqīh*, or a person with knowledge is Islamic law, and not when the *fatwā* is given to a lay person.<sup>185</sup> At the same time, Al-Nawawī also narrated that al-Māwardī, on the other hand, disagrees that the evidence can be mentioned in the *muftī's fatwā*, in order to distinguish *iftā'* from teaching.<sup>186</sup> In contrast to al-Māwardī's general refusal in this regard, however, al-Nawawī expresses his preference that there should be a detailed differentiation between issuing a fatwa to a knowledgeable person, and another to an ignorant one; and between an evidence that is brief and explicit, and another that is lengthy or ambiguous. Al-

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<sup>181</sup> Ibn al-Ṣalāh, 'Uthmān ibn 'Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-'Ulūm wa al-Ḥikam, Medina, 1986, p. 139. See also al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū' Sharḥ al-Muhadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 79.

<sup>182</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn 'Alī, *al-Faqīh wa al-Mutafaqiqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 405.

<sup>183</sup> Al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū' Sharḥ al-Muhadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 84.

<sup>184</sup> Al-Zarkashī, Badr al-Dīn Muḥammad ibn Bahādir ibn 'Abd Allah, *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh*, Wizārat al-Awqāf wa al-Shu'ūn al-Islāmiyyah, Kuwait, 1992, vol. 6, p. 311.

<sup>185</sup> Al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū' Sharḥ al-Muhadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 84.

<sup>186</sup> *Ibid.*, p. 85.



Nawawī also differentiates between mentioning an evidence, which he agrees should be allowed with these conditions that he mentions, and explaining in detail the method of *ijtihād* applied, which he is not in agreement with.<sup>187</sup> In this aspect, these scholars clarify that it has never been a practice for a *muftī* to provide explanation in the *fatwā* that he issues, on the method of *ijtihād* he utilizes, or the procedures of analogy and *istidlāl* that he employs, to formulate the answer. This is unless if it is for the consumption of a judge, so as to assist him to understand the argument that forms the basis for the *muftī*'s legal opinion, or if there has been an earlier *fatwā* issued by somebody else that the *muftī* does not agree with, so as to provide explanation on his differing view.<sup>188</sup>

In issuing *fatāwā* on criminal cases that may lead to corporal punishment being exercised by a judge, such as in cases of murder, apostasy, and the like, a *muftī* is cautioned not to be impulsive in passing his own judgment. Instead, it is expected that the *muftī* provides a cautionary advice on the procedures that are to be taken by a judge before the latter returns his verdict, especially on the process of getting clarification and verification from the accused on his prior intention, and the subsequent process of getting him to repent. The *muftī* should provide the judge with a methodical *fatwā* that

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<sup>187</sup> Ibid.

<sup>188</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn 'Alī, *al-Faqīh wa al-Mutaḥḥiqh*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 406. See also al-Rāfi'ī, 'Abd al-Karīm ibn Muḥammad ibn 'Abd al-Karīm, *al-'Azīz Sharḥ al-Wajīz*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1997, vol. 12, p. 426; Ibn al-Ṣalāḥ, 'Uthmān ibn 'Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muḥḥī wa al-Mustaḥḥī*, Maktabah al-'Ulūm wa al-Ḥikam, Medina, 1986, p. 152; & al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū' Sharḥ al-Muḥadḥḥab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 85.

encompasses the various circumstances possible of a case, and their legal implications. As an example, in a case of apostasy, which is considered a crime in Islamic law, a *muftī* is warned not to rush into sentencing that the accused is to be punished, by death, or otherwise. Instead, the *muftī* should highlight in his *fatwā* that if the accused is to be eventually convicted, either by establishing evidences against him, or by his own statement, he is still to be given an opportunity by the authority to repent. If the convict repents, the *muftī* should advise, his repentance is to be accepted; but if, otherwise, he refuses to do as such, he is to be sentenced to such and such a punishment. The *muftī* must thus furnish in his *fatwā* a comprehensive list of possible punishments for the judge to consider, and from which the judge should not transgress.<sup>189</sup>

Finally, in preparing a written answer, after all considerations have been duly taken, as elaborated in the previous paragraphs, it is recommended that a *muftī* should reassess his draft answer before issuing it to the *mustaftī*, in order to ascertain that there is no essential part missing that may lead to misunderstanding.<sup>190</sup>

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<sup>189</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn ‘Alī, *al-Faqīh wa al-Mutafaqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 403. See also Ibn al-Ṣalāḥ, ‘Uthmān ibn ‘Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-‘Ulūm wa al-Ḥikam, Medina, 1986, p. 142; & al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū‘ Sharḥ al-Muhadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, pp. 80-81.

<sup>190</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn ‘Alī, *al-Faqīh wa al-Mutafaqqih*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, p. 401. See also Ibn al-Ṣalāḥ, ‘Uthmān ibn ‘Abd al-Raḥmān al-Shahrazūrī, *Adab al-Muftī wa al-Mustaftī*, Maktabah al-‘Ulūm wa al-Ḥikam, Medina, 1986, p. 139; & al-Nawawī, Abū Zakariyyā Muḥyī al-Dīn ibn Sharaf, *al-Majmū‘ Sharḥ al-Muhadhdhab*, Dār al-Fikr, Beirut, 2000, vol. 1, p. 79.

An analysis of this part of the research, on the procedural stages and the processes of *iftā'*, highlights the fact that the literature available within the Shāfi'ī *madhhab* on *iftā'* generally deals with the etiquettes of a *muftī* in answering questions. By perusing the propositions made by the scholars of the *madhhab* in all the three stages of an *iftā'* process, as presented in the preceding paragraphs, one can easily discover that not much discussion was allocated to the legal principles and the methodical framework needed in formulating legal rulings, be it by way of deducing the rulings directly from the primary texts (*istinbāt*), or by way of applying analogy (*qiyās*) for unprecedented cases of which there is no direct mention in the primary texts, or by way of putting preference to one legal opinion of a jurist over another (*tarjīh*).

It is also observed that the available literature of the Shāfi'ī *madhhab* on *iftā'* basically touches on several main themes as follows :

One : the obligatory status of a *muftī* to issue *fatāwā*.

Two : the safeguards to preserve the sanctity of the *iftā'* institution, as well as the integrity of a *muftī*.

Three : the precautions on the need for a *muftī* to be prudent, alert, just, and objective, in understanding a question and in providing an answer.

Four : the proper format to be used in drafting an answer, both in terms of the language and the style of handwriting used, so as to ensure that it can be understood by the *mustaftī* with ease and clarity.

Five : the content structure of the answer, that it has to be all-inclusive, but at the same time not too complicated, to a point where the *mustaftī* faces difficulty to comprehend, hence the general reservation by the scholars for a *muftī* to include his legal arguments and evidences within his answer to the *mustaftī*.

Six : the injunction to place the interest of the *mustaftī* as a major consideration in *iftā'*, and this encompasses multiple measures that range from a *muftī* giving priority to answer questions that need urgent responses, or avoiding to answer certain questions altogether if it is for a greater good; to the *muftī* answering in a fashion that can be easily identified by his *mustaftī*, or assisting him to comprehend the answer he is provided with if he has difficulty to comprehend it duly. In addition, these measures also range from offering the *mustaftī* solutions to the problems he is facing and relieving him from any predicament he is in, or exploring legal artifices (*ḥiyal*) that are recognised by the *sharī'ah*; to issuing differing answers to different *mustaftūn*, or providing an alternative ruling that contradicts the *muftī's* own initial view, in the best interest of the *mustaftī*.

This suggests that the scholars, in their writings on the processes of *iftā'*, departed from al-Shāfi'ī's definition of the term *iftā'*. In the initial parts of this chapter on the various definitions of *iftā'* utilized by the scholars of the *madhhab*, it was displayed that al-Shāfi'ī equates *iftā'* with *ijtihād*, and, in a separate location, he equates *ijtihād* with *qiyās*. Instead, in this area of discussion, these scholars seem to refer the term *iftā'* to its lexical meaning, that is answering a question. This observation by this researcher is derived at due to a number of factors :

One : the term *ijtihād* was mentioned as an exercise that a *muftī* has to apply in formulating a legal ruling in the processes of *iftā'*, not as a second term to *iftā'* itself, that shares with it an identical definition.

Two : the absence of significant mention of *qiyās* as a major legal tool to be utilized in these processes of *iftā'*.

Three : the main bulk of the discussion deals with the way a *muftī* should conduct himself in dealing with questions and in his interaction with his *mustaftī*, not in a *mujtahid's* interaction with the primary sources or texts, nor with any other legal tool or principles of law, all of which form the subject matter of *ijtihād* and *qiyās*.

Four : a substantial portion of the discussion is found to have been allocated to address the issue of a *mustaftī's* interest, which indicates a resemblance with the utilization of

*istiṣlāḥ* as the legal tool in formulating a *fatwā*. In certain parts of the discussion, a tendency to employ *istiḥsān* is also evident, when the scholars express their preference that a *muftī* issues a *fatwā* that is not in concordance with his own initial view, if it is in the best interest of the *mustaftī*. This is albeit the fact that al-Shāfi‘ī, as the founder of the *madhhab*, is known to be extremely wary in utilizing *istiṣlāḥ* and *istiḥsān* in the process of *ijtihād*.

It can be said that generally the scholars in their writings on *iftā’* and *muftūn* tend to ignore the process of applying the deduced ruling to the *mustaftī*, by taking into consideration the *mustaftūn* conditions, needs, restrictions or predicaments. The principle of *istiṣlāḥ* or *maṣāliḥ mursalah* should be of significance here. In the second stage of processing a ruling, the scholars generally show a very high degree of dependency on the processes of *ijtihād*, in its form of deducing rulings directly from the textual sources, or by way of analogy.

This is further supported by their assertion on the list of prerequisites that a *muftī* must possess to qualify him as a *mujtahid*, which reflects the skills required to deduce rulings from the texts. As when in later periods of the *madhhab*, when *mujtahidūn* were no longer assumed to be in existence, the scholars moved towards a position where *muftūn* are only expected to issue *fatāwā* based on *taqlīd*, by reporting the views of their *imāms* or established positions of their *madhāhib*, but with the condition that they fully comprehend their arguments and evidences, and the principles that these legal positions

are based on. In a situation where there are more than one opinion available, the *muftī* is then expected to exercise *tarjīh* and consequently issue a *fatwā* according to the strongest evidence.

It is this researcher's view that this second stage is, in its actuality, what most part of the whole content of *Uṣūl al-fiqh* itself is all about. Still, it does not extensively address the need of finding answers that solve the problems of the questioners in particular.

As in the third stage, it is also discovered that most of the discussion was on the technical forms of how to write the answer, what language to be used. Only minor parts are available in mentioning about adjusting a *muftī*'s position to suit the conditions of a *mustaftī*. This constitutes an inconsistency, when in listing down the prerequisites, majority of the scholars insist that a *mujtahid*, or a *muftī*, must have the ability to understand the environment and the community. In addition to this, in the first stage, many of these scholars state that in receiving a question, the *muftī* must get further clarification not only on the intended question, but also the condition of the *mustaftī*. Another irony is many of these scholars highlighted the point that a *muftī* can issue a *fatwā* to a particular not according to his preferred view, if there is *maṣlaḥah* in doing so.

This researcher is of the view that, in order to render justice to this discussion on the significance of general interests, or *al-maṣāliḥ al-mursalah*, in a *muftī*'s consideration

when formulating *fatwās*, a dedicated chapter on it should be developed. An analysis on the theory of *al-maṣāliḥ al-mursalah* within the framework of *iftā'* among the scholars of the Shāfi'ī *madhhab* will therefore be conducted in the next Chapter.

## 2.7 Conclusion

1 There has been a wide variation of notions among the jurists of the Shāfi'ī school of law on the legal theories of *iftā'* and *fatwā*. These differences exist in their definition of the term *iftā'* and *fatwā* itself, the prerequisites for a person to be allowed to issue *fatāwā*, and the foundations of *iftā'* in every of its processes and procedural stages. This Chapter has shown that these differences occurred due to the intellectual evolution that took place in the long history of the *madhhab*, largely influenced by the decreasing number of qualified *mujtahidūn* over time, until it reached a point where *mujtahidūn* were widely perceived to be no longer in existence. Adjustments to existing legal opinions inevitably had to be made from time to time to ensure continuation in accommodating the religious needs of Muslim communities for guidance in their religious life and practices, while at the same time preserving the sanctity of the religion and its laws.



- 2 The practice of *iftā'* can, should and has always been an effective channel in contributing towards the ever-important development and expansion of the Islamic positive law, or *fiqh*. It has to be pointed out, however, that *iftā'* is not just *fiqh*, and that *fiqh* alone cannot be taken as the sole point of reference in formulating *fatāwā*. This is due to the fact that *iftā'* is a process of identifying a legal ruling that best suits the specific needs and situation of a certain *mustaftī*. This process is generally termed as *tanzīl al-ḥukm*. *Fiqh*, on the other hand, is generally a set of legal opinions by jurists that were developed and deduced from the texts, directly or indirectly, without rendering any consideration to any specific context or person.
- 3 Major parts of the writings on *iftā'* and *fatwā* within the *madhhab* were allocated to the discussion on the etiquettes of a *muftī* and *mustaftī*. While these deliberations are useful, a much more critical aspect of legal discourse with regards to *iftā'* and *fatwā* was largely not given due attention by jurists of the Shāfi'ī *madhhab*. This refers to the dearth of deliberation on the legal framework for *iftā'*. As for the vast writings widely available in the field of *usul al-fiqh*, they are basically intended to provide guidelines in the process of deducing legal rulings from the primary texts. Therefore the framework and guidelines that exist in the

books of usūl al-fiqh are general in nature and is insufficient for iftā' purposes.

## CHAPTER THREE

### *MAŞLAHAḤ AS A LEGAL TOOL IN IFTĀ'*

Throughout the history of Islamic legal thought, *maşlahah* has been consistently described as one of the central attributes of the *sharī'ah*, as popularly claimed that “good” is “lawful” and that, in turn, “lawful” must be good.<sup>191</sup> It is the intent of the *sharī'ah* to promote the welfare of men both individually and socially and not the glorification of the Lawgiver, for He is above all wants and weaknesses. Islam dictates that the welfare of men as individuals which its law seeks to promote is not in respect merely of life on this earth, but also in the future life of the hereafter, hence the realization of man’s salvation in life after death becomes another factor underlying the Islamic conception of law.<sup>192</sup>

However, Muslim jurists were not homogeneous in accepting the concept of *maşlahah* as a principle of jurisprudence. Even among those who accepted it as one, no uniform position was arrived at in term of its definition, criteria and specification.

In the context of contemporary Muslim communities, the emergence of Muslim minorities in numerous numbers of sovereign countries, with new and unprecedented contexts and environments, has created a necessity for a review of the application of

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<sup>191</sup> Al-Raysūnī, Aḥmad, *al-Ijtihād: al-Naṣṣ, al-Wāqī', al-Maşlahah*, Dār al-Fikr, Damascus, 2002, p. 30.

<sup>192</sup> Mawil Izzi Dien, *Islamic Law From Historical Foundations to Contemporary Practice*, Edinburgh University Press, Edinburgh, 2004, p.56.

this important principle in the processes and approaches of *iftā'*. This is in view of the prevailing needs to realize *maṣlaḥah*, or general good, of which is the purpose of the *sharī'ah* itself, especially for the Muslim minorities, individually and collectively.

It was mentioned in Chapter One that this research intends to investigate the legal theories of *iftā'* with special reference made to the *Shāfi'ī* school of law. As such, it is only appropriate that the following discussion in this chapter on the technical consideration and usage of *maṣlaḥah* as a legal tool within the processes of *iftā'* is restricted to the opinions offered by those jurists of the said school of law. In doing so, this chapter will analyze, first, the definitions of the term '*maṣlaḥah*' employed by these jurists, followed by an effort to examine their propositions of its legal status and significance in the general framework of Islamic law. This will incorporate an examination of its different categories and the preconditions of its utilization. Subsequently, a discussion on the application of *maṣlaḥah* as a legal tool specifically in developing *fatāwā* according to the *Shāfi'ī* school of law will be attempted, before this chapter is concluded.

### 3.1 Definition of *maṣlaḥah*

The root word of *maṣlaḥah* is *ṣa-la-ḥa* or *ṣa-lu-ḥa*, one literal definition of which is “to be good, to repair or improve”.<sup>193</sup> It can also mean a thing or person which/who becomes “good, incorrupt, right, just, righteous, virtuous or honest”.<sup>194</sup>

Izzi Dien is of the view that the Arabic word *maṣlaḥah*, which derives from the root word of ṣ-l-ḥ, indicates construction, restoration of good and the removal of harm or corruption.<sup>195</sup> Kamali mentions that literally, *maṣlaḥah* means ‘benefit’ or ‘interest’.<sup>196</sup>

Nyazee proposes that the literal meaning of *maṣlaḥah* is defined as *jalb al-manfa‘ah wa daf‘ al-maḍarrah*, or the seeking of benefit and the repelling of harm. However, he further insists that *manfa‘ah* (benefit or utility) is not the technical meaning of *maṣlaḥah*, for what the jurists actually mean by *maṣlaḥah* is the seeking of benefit and the repelling of harm as directed by the Lawgiver.<sup>197</sup>

Al-Ghazzālī defines *maṣlaḥah* as an act to attain a benefit or prevent a harm. He, however, highlights that the *maṣlaḥah* intended in his deliberation is not what realizes human desires, but rather that harmonizes with the objectives, or *maqāṣid*, of the

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<sup>193</sup> Wehr, Hans, *A Dictionary of Modern Written Arabic*, Librairie Du Liban, Beirut, 1980, pp. 521-522.

<sup>194</sup> Lane, Edward William, *Arabic-English Lexicon*, Islamic Book Centre, Lahore, 1982, vol. 4, pp. 1714-1715. Originally published in 1877 by Williams and Norgate, London.

<sup>195</sup> Mawil Izzi Dien, *Islamic Law From Historical Foundations to Contemporary Practice*, Edinburgh, 2004, p. 69.

<sup>196</sup> Kamali, *Principles of Islamic Jurisprudence*, Cambridge, 2003, p. 351

<sup>197</sup> Nyazee, Imran Ahsan Khan, *Islamic Jurisprudence*, The International Institute of Islamic Thought, Islamabad, 2000, pp. 195-196.

*sharī'ah*. According to al-Ghazzālī, these objectives constitute the preservation of five essentials of human existence: religion, life, intellect, progeny and property. Consequently, every act that ensures the preservation of these five essentials is a *maṣlaḥah*, and similarly, any act that causes their eradication is a *mafsadah*, or a harm, thus avoiding it is a *maṣlaḥah*.<sup>198</sup>

Al-Badawī suggests that al-Ghazzālī, with this definition, applied the terms *maṣlaḥah* and *maqāṣid* interchangeably to indicate a common object.<sup>199</sup> This is in concordance with Izzi Dien's position that does not distinguish between a cause and its effect in defining *maṣlaḥah*, as long as it contributes to the betterment of life and faith in Islam.<sup>200</sup> However, upon closer scrutiny, al-Ghazzālī appears to utilize *maṣlaḥah* to connote any measure taken as a means to realize the preservation of *maqāṣid*, which are the objectives, of *sharī'ah*. In other words, *maṣlaḥah* is the cause and *maqāṣid* are the effects. Al-Alwani, however, suggests otherwise, when his definition of *maṣlaḥah* implies that the principal objective of the *sharī'ah* and all its commandments is to realize *maṣlaḥah*, hence placing it above *maqāṣid* as the ultimate goal of the *sharī'ah*.<sup>201</sup>

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<sup>198</sup> Al-Ghazzālī, Abū Hāmid Muḥammad ibn Muḥammad, *al-Mustaṣfā min 'Ilm al-Uṣūl*, Mu'assasah al-Risālah, Beirut, 1997, vol.1, pp. 416-417.

<sup>199</sup> Al-Badawī, Yūsuf Aḥmad Muḥammad, *Maqāṣid al-Sharī'ah 'inda Ibn Taymiyyah*, Dār al-Nafā'is, Amman, 2000, p. 60.

<sup>200</sup> Mawil Izzi Dien, *Islamic Law From Historical Foundations to Contemporary Practice*, p. 69.

<sup>201</sup> Al-Alwani, Taha Jabir, *Source Methodology in Islamic Jurisprudence*, 3<sup>rd</sup> ed., The International Institute of Islamic Thought, Virginia & London, 2003, p. 75.

Al-Ghazzālī's definition of *maṣlaḥah* highlights three significant points, the first of which is that the pursuit of human goals and the principle of utility based on human reason is not what is meant by *maṣlaḥah*. Secondly, *maṣlaḥah* is the securing of goals or values that the Lawgiver has determined for the *sharī'ah*. Finally, the goals determined for the *sharī'ah* by the Lawgiver may or may not coincide with values determined by human reason.<sup>202</sup>

It is a point of significance to differentiate *maṣlaḥah*, as a means, from *maqāṣid*, as objectives, for it is based on this conception that *maṣlaḥah* has also been designed by many jurists as a legal tool to derive rulings, as will be discussed in later parts of this research, albeit the fact that jurists applied different terms to indicate it as such.

The term '*maṣlaḥah*' has therefore been generally utilized in the realm of Islamic law to indicate two different facets, of which one is more general than the other. First, as a general term, *maṣlaḥah* is considered as the prime factor that underlies the spirit and intention of the *sharī'ah* as a divine body of law. It is a universally accepted notion among jurists across all legal schools that the *sharī'ah* was revealed with the intention of preserving general good and interest of human life. Based on this first understanding of the meaning of *maṣlaḥah*, the term is commonly used interchangeably by some jurists with the term *maqāṣid*, or *maqāṣid al-sharī'ah*.

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<sup>202</sup> Nyazee, Imran Ahsan Khan, *Islamic Jurisprudence*, The International Institute of Islamic Thought, Islamabad, 2000, pp. 196-197.

Secondly, in most cases of Islamic law, *maṣlaḥah* is referred to technically as a tool used in the process of establishing rulings on cases that were not mentioned in the two primary sources, namely the Qur'an and *sunnah*. It is considered as one of the subsidiary or secondary sources of law, termed by the jurists of Mālikī school of law as *maṣāliḥ mursalah*, and by the jurists of the Ḥanbalī school of law as *istiṣlāḥ*.

However, this utilization of *maṣāliḥ mursalah* and *istiṣlāḥ* as a legal tool to derive rulings and as a secondary source of Islamic law does not enjoy the similar level of unanimous agreement by jurists, as compared to their position towards it as the underlying purpose of *shari'ah*. The jurists of the Shāfi'ī school of law are widely assumed to have generally rejected it. Doi, for example, mentions that the Shāfi'ī school of law is the only school that does not recognise it as a source of Islamic law, citing al-Shāfi'ī's caution that it can open the door to the unrestricted use of fallible human opinions, since the public interest differs from place to place and time to time.<sup>203</sup>

A closer scrutiny into the discussion on *maṣlaḥah* among the jurists of the Shāfi'ī school of law, nonetheless, discloses that in their application of *qiyās* and other legal tools of the Islamic law, these jurists do adopt an approach that renders significance to the application of *maṣlaḥah*. The consideration given to *maṣlaḥah* by jurists of the Shāfi'ī school of law even bears similarities to *maṣāliḥ mursalah* widely utilised by the

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<sup>203</sup> Doi, Abdur Rahman I., *Shari'ah, the Islamic Law*, Ta Ha Publishers, London, 1984, p. 82.



Mālikī school of law, *istiḥsān* as utilised by the Ḥanafī school of law, and *istiṣlāḥ* of the Ḥanbalī school of law, all of which are commonly said to be strictly rejected by the scholars of the Shāfi‘ī school of law.

To further shed light on this, the following section of this research shall delve into the various legal tools or principles used by the Shāfi‘ī school of law that have correlation with *maṣlaḥah*.

### **3.2 Categories of *maṣlaḥah***

Many of the jurists classify *maṣlaḥah* into three general categories, the first of which is *maṣlaḥah mu‘tabarah*, or an interest that is recognised by a primary textual evidence. The second category is *maṣlaḥah mulghāh*, or an interest that is rejected due to its contradiction with an existing textual evidence. The third category is *maṣlaḥah mursalah*, or an interest that is not mentioned nor discussed by any of the textual sources.<sup>204</sup> This includes any public interest that falls within the objectives of Islamic law without being found in a known designated legal source reference, be it in the text or otherwise.

When it is qualified as *maṣlaḥah mursalah*, however, it refers to unrestricted public interest in the sense of its not having been regulated by the Lawgiver insofar as no

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<sup>204</sup> Abū Zahrah, Muḥammad, *Uṣūl al-Fiqh*, Dār al-Fikr al-‘Arabī, Cairo, n.d., pp. 279-280.

textual authority can be found on its validity and or otherwise.<sup>205</sup> More technically, *maṣlaḥah mursalah* is defined as a consideration that is proper and harmonious (*waṣf munāsib mulā'im*) with the objectives of the Lawgiver; it secures a benefit or prevents a harm; and the *sharī'ah* provides no indication as to its validity or otherwise.<sup>206</sup>

Therefore, the issue yet to be addressed is which category of *maṣlaḥah* is the point of contention among jurists, especially those of the Shāfi'ī school of law? Is it *al-maṣlaḥah al-mursalah*? Or is it the whole concept of *maṣlaḥah* as a principle that is objected by the likes of al-Shāfi'ī? The discussion on *maṣlaḥah* can thus be done at two different levels. The first is the process level of formulating a legal ruling, or *ḥukm*, where *maṣlaḥah* therefore forms a part of the secondary tools utilized in the field of *uṣūl al-fiqh* to derive rulings. The second is the foundational level, where *maṣlaḥah* is taken as the basis of the whole body of *sharī'ah*. In other words, it has to do with discussions in *maqāṣid al-sharī'ah*.

Al-Juwaynī discusses the issue of *al-maṣlaḥah al-mursalah* at length in a dedicated chapter of his book, *al-Burhān fī Uṣūl al-Fiqh*. However, his propositions will not be analyzed here, as he assigned a different term to indicate *al-maṣlaḥah al-mursalah*, which is *istidlāl*. Besides the assigning of a different term, this researcher is also of the view that it is only proper not to discuss al-Juwaynī's *istidlāl* in this section due to the

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<sup>205</sup> Khallāf, 'Abd al-Wahhāb, *Ilm Uṣūl al-Fiqh*, 12<sup>th</sup> ed., Dār al-Qalam, Kuwait, 1978, p. 84. See also Badrān, Abū al-'Aynayn, *Uṣūl al-Fiqh al-Islāmī*, Mu'assasah Shabāb al-Jāmi'ah, Alexandria, 1984, p. 209.

<sup>206</sup> Ibid., p. 210.

fact that al-Juwaynī is the only jurist of the Shāfi‘ī *madhhab* to use the term *istidlāl* in such a fashion. We shall therefore revert to al-Juwaynī’s *istidlāl* in a later part of this research, when the relation between *al-maṣlaḥah* and other legal tools is analyzed.

Al-Zarkashī, in his discussion on *maṣaliḥ mursalah*, reports that there are generally four different views on *maṣālīḥ*.<sup>207</sup> However, a fundamental point to note is that this discussion is primarily addressing the process of formulating rulings at the stage of *istinbāt*, or deducing rulings from the primary sources, hence the various conditions as asserted by the jurists. However, there is a need to investigate whether it is the same issue when it comes to *iftā’*. The propositions made by scholars in their writings on *adab al-muftī* provide an indication that there can be different consideration. Due to this, there is no need to delve further into this particular area of discussion, except in discussing the utilization of *istiṣlāḥ* in *iftā’*. For example, al-Ghazzālī insists that there must be three conditions fulfilled before a *maṣlaḥah* can be accepted, the first of which is that the case should lie in the area of *ḍarūrāt* (necessities), that is, it should be one of the five top purposes of the Islamic law. The second condition is that it should be definitive (*qat’ī*), that is, we should be certain about the resulting consequences. The third condition is that it should be general (*kullī*), that is, it should affect the entire Muslim ummah and be a public interest.<sup>208</sup>

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<sup>207</sup> Al-Zarkashī, Badr al-Dīn Muḥammad ibn Bahādir, *al-Baḥr al-Muḥīt fī Uṣūl al-Fiqh*, Wizārat al-Awqāf wa al-shu’ūn al-Islāmiyyah, Kuwait, 1992, vol. 6, pp. 76-79.

<sup>208</sup> Nyazee, Imran Ahsan Khan, *Islamic Jurisprudence*, International Institute of Islamic Thought, Islamabad, 2000, p. 246.

To a certain degree, the scholars' discussion in *adab al-muftī* in narrations like the case of repentance of a murderer, and the case of someone kissing his wife when he is fasting, indicates that this condition of *kullīyah* in *iftā'* can be transgressed in situations where such an application is called for. Ibn Daqīq al-ʿId is reported to have said that he does not reject the consideration of *maṣāliḥ*, for what he rejects is actually its liberal utilization (*istirsāl*).<sup>209</sup> Al-Zarkashi expresses his agreement to accept *maṣāliḥ* if it does not contradict *qiyās*.<sup>210</sup>

Al-Juwaynī<sup>211</sup> relates al-Shāfiʿī's proposition on the processes that a jurist is expected to consume in his effort to formulate a religious ruling for a new legally unprecedented case, the first of which is by investigating the Qurʾānic texts, followed by, in the instance of its unavailability in the Qurʾān, the *mutawātir* narrations, and then, again by virtue of their non-existence, the *āḥād* narrations. In dealing with any of the said texts, if they are to be found, its definite injunction is to be identified and adopted. In a situation where a definite injunction can not be established, the apparent connotation of the texts is to be resorted to. This is done, however, by, first, searching for a *mukhaṣṣis* that provides a clearer understanding to the intended implication of the generalities of the texts.

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<sup>209</sup> Al-Zarkashī, Badr al-Dīn Muḥammad ibn Bahādir, *al-Baḥr al-Muḥīt fī Uṣūl al-Fiqh*, Wizārat al-Awqāf wa al-Shuʿūn al-Islāmiyyah, Kuwait, 1992, p. 80.

<sup>210</sup> Ibid., p. 81.

<sup>211</sup> Al-Juwaynī, Imām al-Ḥaramayn ʿAbd al-Malik ibn ʿAbd Allāh, *al-Burhān fī Uṣūl al-Fiqh*, Maṭābiʿ al-Dawḥah al-Ḥadīthah, Doha, vol. 2, pp. 1337-1339. This proposition by al-Shafiʿī was also reported by al-Shawkānā, Muḥammad ibn ʿAlī, in his *Irshād al-Fuḥūl ilā Taḥqīq al-Ḥaqq min ʿIlm al-Uṣūl*, ed. Muḥammad Ḥasan Muḥammad Ḥasan Ismāʿīl, Dār al-Kutub al-ʿIlmiyyah, Beirut, 1999, vol. 2, pp. 310-311.

When after all effort to investigate the texts has been exhausted without a satisfying conclusion, rather than instantaneously resorting to apply analogy (*qiyās*), a jurist is expected to give due consideration to the universals of the *sharīʿah* and the general good it is set to realize. Only in a situation where a common good is nowhere to be identified for the case at hand, *ijmāʿ* is then assumed. *Qiyās*, or analogy, is consequently applied when there is no unanimous position taken by jurists by way of *ijmāʿ*.

### 3.3 *Maṣlaḥah* and other legal tools in the Shāfiʿī school of law

#### 3.3.1 *Qiyās*

Al-Juwaynī mentions in the section on *qiyās* in his *al-Burhān fī Uṣūl al-Fiqh* that the fundamentals of *sharīʿah*, or *usūl al-sharīʿah*, are five. The first is *amr ḍarūrī lā budda minh*, or an essential need without which a man's life shall cease to continue. The second is *ḥājah ʿāmmah lā yantahī ilā ḥadd al-ḍarūrah*, or a general necessity without which a man shall face grave difficulty, albeit not causing his life to cease. The third is not *ḍarūrah* and not *ḥājah*, but an act of *makrumah*, or virtue. The fourth is an act that in itself is not a *makrumah*, but its realization leads to another act that is considered as a virtue. The fifth is an act that has no bearing of any meaning of *ḍarūrah*, *ḥājah*, or *makrumah*, and this, according to al-Juwaynī, is rare, and it generally encompasses the physical acts of rituals. Al-Juwaynī discusses these five fundamentals of the *sharīʿah* at length and the different aspects of their correlation with the application of *qiyās* in cases

where the establishment of *'illah* is unattainable due to the absence of relevant primary evidences.<sup>212</sup>

It is therefore observed that al-Juwaynī explicitly and repetitively uses terms like *maṣlaḥah*, its plural form *maṣāliḥ*, and also *istiṣlāḥ*, to indicate an act of which the purpose is to realise *maṣlaḥah*. With this, al-Juwaynī establishes his proposition that *maṣlaḥah* is indeed a valid consideration in deriving rulings, by way of *qiyās*. This is based on the fact that the necessities and needs to realise *maṣlaḥah* determines the legal ruling in cases where no primary textual evidence of direct relevance exists in order to identify the *'illah*. The only situation where *maṣlaḥah* is not accepted as a valid point of consideration is in rituals, where the rational of many injunctions can not be comprehended by human mind.

Al-Bayḍāwī, al-Isnawī and al-Badkhashī incorporate the consideration of *maṣlaḥah* under the discussion of *qiyās*, which is unanimously accepted by scholars of the Shāfi'ī *madhhab* as a legal tool utilized to formulate rulings for cases where there is no preliminary mention of their rulings in the existing primary texts. The application of *qiyās* is done by extending a *sharī'ah* value from an original case, or *aṣl*, to a new case, because the latter has the same effective cause, or *'illah*, as the former.<sup>213</sup>

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<sup>212</sup> Al-Juwaynī, 'Abd al-Malik ibn 'Abdillāh ibn Yūsuf, *al-Burhān fī Uṣūl al-Fiqh*, ed. 'Abd al-'Azīm Maḥmūd al-Dīb, Dār al-Wafā', Mansoura, 1992, vol. 2, pp. 602-620.

<sup>213</sup> Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence*, The Islamic Texts Society, Cambridge, 2003, p. 264.

Al-Bayḍāwī lists down nine different methods of identifying ‘*illah*,<sup>214</sup> or the common effective cause that eventually determines the ruling for an unprecedented issue. One of these methods is relevant to our discussion herein, and it is what al-Bayḍāwī terms as *munāsabah*, which literally means correspondence or correlation. Al-Isnawī<sup>215</sup> and al-Badkhashī,<sup>216</sup> in their commentaries on al-Bayḍāwī’s *Minhāj al-Wuṣūl fī ‘Ilm al-Uṣūl*, indicate that this process of *munāsabah* takes place when an act by an individual corresponds with the general injunction of the *sharī‘ah* to realize things that are beneficial, and avoid those which effect harm.

This method of identifying the ‘*illah* by *munāsabah* is positioned fourth, after the first identification process by way of explicit and definitive indication of the ‘*illah* in the texts (*al-naṣṣ al-qāṭi‘*), followed second by way of implied insinuation of the texts (*al-īmā‘*), and subsequently the third method, which is by way of the consensus of the scholars (*ijmā‘*). The ‘*illah* identified by this method of *munāsabah* is not derived from the insinuation of any individual text, explicitly or otherwise, but through identifying a general purpose of the *sharī‘ah*, which is arrived at from the collective implication of all relevant sources of evidence. This general purpose of the *sharī‘ah*, of realizing good and avoiding harm, thus becomes the ‘*illah*, or the common effective cause, that correlates an unprecedented act or event, to either one that has earlier been given

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<sup>214</sup> Al-Isnawī, Jamāl al-Dīn ‘Abd al-Rahīm, *Nihāyat al-Sūl Sharḥ Minhāj al-Wuṣūl fī ‘Ilm al-Uṣūl*, Maktabah Muḥammad ‘Alī Ṣubaiḥ, Cairo, vol. 3, pp. 39-73.

<sup>215</sup> Ibid., vol. 3, pg. 52.

<sup>216</sup> Al-Badkhashī, Muḥammad ibn al-Ḥasan, *Manahij al-Uqūl Sharḥ Minhāj al-Wuṣūl fī ‘Ilm al-Uṣūl*, Maktabah Muḥammad ‘Alī Ṣubaiḥ, Cairo, n.d., vol. 3, p. 52.

acquiescence by the *sharī'ah* due to a benefit it causes to happen, or an other that was deemed illicit due to the harm that it brings about.

To render acceptance to an '*illah*' that is identified by way of *munāsabah*, al-Baiḍāwī insists that it must be recognised by the Lawgiver.<sup>217</sup> An '*illah*' identified through *munāsabah* that is not recognised by the Lawgiver is termed by al-Baiḍāwī as *munāsib mursal*, which he proposes that its acceptability, in the absence of any cogent evidence suggesting otherwise, is not definite. In his further illustration to this position by al-Baiḍāwī, al-Isnawī categorises such an '*illah*' into three types, the first of which is rejected by the Lawgiver, thus its unsuitability for consideration in Islamic law is not to be doubted. The second is that recognised by the Lawgiver, the consideration of which is therefore undisputable. The third category is termed as *munāsib mursal*, which according to al-Isnawī is a value that the Lawgiver is silent about, for there is no implied indication that it is recognised nor rejected.<sup>218</sup>

In his discussion on *qiyās* al-Zarkashī lists *munāsabah* as the fifth path in identifying '*illah*'. Al-Zarkashī highlights that *munāsabah* is also termed as *ikhālah*, *maṣlaḥah*, *istidlāl* and *ri'āyah al-maqāsid*. He defines *munāsabah* as identifying an '*illah*' by way of recognizing a benefit attained or a harm prevented from a particular act.<sup>219</sup> Al-

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<sup>217</sup> Al-Isnawī, Jamāl al-Dīn 'Abd al-Rahīm, *Nihāyat al-Sūl Sharḥ Minhāj al-Wuṣūl fī 'Ilm al-Uṣūl*, Maktabah Muḥammad 'Alī Ṣubaiḥ, Cairo, vol. 3, p. 54.

<sup>218</sup> Ibid., vol. 3, pp. 56-58.

<sup>219</sup> Al-Zarkashī, Badr al-Dīn Muḥammad ibn Bahādir ibn 'Abdillāh, *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh*, Wizārah al-Awqāf wa al-Shu'ūn al-Islamiyyah, Kuwait, 1992, vol.5, p. 206.



Zarkashī categorizes the general good that is recognized in the process of *munāsabah* into *ḍarūrah* (an essential need without which a man’s life shall not continue), *hājah* (a necessity without which a man shall face grave difficulty, albeit not causing his life to cease) and *taḥsīn* (a nicety). Al-Zarkashī reports that jurists of the Shāfi‘ī school of law have generally accepted that under the ambit of the essentials, or *ḍarūrah*, there are five aspects of a human’s life that are enjoined by the Lawgiver to be preserved: his life, his property, his progeny, his faith, and his intellect. The preservation of these five constitutes the *maqāṣid*, or the general purposes of the *sharī‘ah*. Al-Zarkashī further reports that there are some jurists who added the preservation of honour, or *a‘rāḍ*, as the sixth aspect in addition to those five. Al-Zarkashī stresses that observing the sequence of the three categories of the general good, which are the *darurah*, *hajah* and *tahsin*, is of huge importance, for in the event of contradicting benefits, predilection is to be given to the essentials over the niceties.<sup>220</sup>

Al-Zarkashī also makes another categorization of *maṣlaḥah*, not unlike the one proposed by both al-Isnawī and al-Badkhashī in their elucidation of al-Bayḍāwī’s views mentioned earlier, where benefits, or *maṣlaḥah*, are classified into three types: the first of which are those benefits that the *sharī‘ah* is known to render recognition and acceptance. The second type are those rejected by the *sharī‘ah*, while the third are benefits that are not mentioned in any of the textual evidences, thus the *sharī‘ah* is not known as to whether recognises or rejects them. Al-Zarkashī further highlights that the

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<sup>220</sup> Ibid., vol. 5, pp. 208-213.

benefits which fall under this third category are the ones termed by jurists of the Mālikī school of law as *maṣāliḥ mursalah*, a legal tool that is widely known to be significantly advocated and utilised by the Mālikī school of law. Al-Zarkashī however insists that the application of *masālih mursalah* should not be considered as unique to the Mālikī *madhhab*, for jurists of other schools of law tend to term it as *munāsabah*, which in its actuality is identical to *maṣāliḥ mursalah*.<sup>221</sup>

### 3.3.2 *Istiḥsān*

One of the most controversial secondary legal tools in the Shāfi‘ī school of law in term of its validity is *istiḥsān*. Jurists of the *madhhab*, led by its founder himself, are widely known to have extreme reservation in accepting *istiḥsān* as a tool to deduce rulings.<sup>222</sup> However, al-Shāfi‘ī’s rejection of *istiḥsān* should not be taken for granted without qualification of its specifics. The legal tools of *istiḥsān* and *maṣlaḥah* share certain common traits between the two, in the sense that general good, or *al-maṣāliḥ*, occupies a central role in both tools. An investigation into al-Shāfi‘ī’s legal thoughts reveals that his rejection of *istiḥsān* is not in itself absolute. Rather, al-Shāfi‘ī’s rejection materializes when *istiḥsān* is not applied in conjunction with the application of *qiyās*. This is reflected by al-Shāfi‘ī’s own statement that *istiḥsān* without *qiyās* is not allowed (*al-istiḥsān bi ghair qiyās lā yajūz*).<sup>223</sup> This implies that al-Shāfi‘ī is of the view that, in

<sup>221</sup> Ibid., vol. 5, pp. 214-216.

<sup>222</sup> See, among others, ‘Abd al-Wahhāb Ibrāhīm Sulaimān, *Manhajīyyat al-Imām Muḥammad ibn Idrīs al-Shāfi‘ī fī al-Fiqh wa Uṣūlih*, Dār Ibn Ḥazm, Beirut, 1999, pp.116-118. See also Muḥammad Abū Zahrah, *Uṣūl al-Fiqh*, Dār al-Fikr al-‘Arabī, Cairo, n.d., pp. 270-271.

<sup>223</sup> Al-Shāfi‘ī, Muḥammad ibn Idrīs, *Kitāb al-Umm*, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1993, p. 156.

the process of formulating legal rulings to novel issues, prominence is to be given to *qiyās*, before *maṣlahah* is consequently utilized when *qiyās* is not applicable.

### 3.3.3 *Istidlāl*

Al-Juwaynī extensively discusses the notion of applying general good as a legal tool to formulate rulings, in a chapter of his *al-Burhān*. He terms it as *istidlāl*, and an investigation of his writing on *istidlāl* suggests that there is a close association between *istidlāl* and the notion of adopting *istiṣlāḥ* and *maṣāliḥ mursalah* for cases that have no primary evidence, or *aṣl*, to be based on, and no ‘illah by way of *qiyās* can be developed to suit. Al-Juwaynī defines *istidlāl* as an implied meaning of a ruling that is consistent with logical reasoning, in the absence of a primary evidence, but which a general inference of an ‘illah corresponds with.<sup>224</sup>

This definition of *istidlāl* by al-Juwaynī insinuates that he positions *istidlāl* in parallel with *qiyās* in term of employing a ruling to a legal matter by way of identifying an applicable meaning appropriate for the ruling, or *ma‘nā munāsib li al-ḥukm*. The difference, however, lies with the existence, or non existence, of a specific primary evidence for the ruling to be based on. If there is one, the application is categorized as *qiyās*, and the applicable meaning is termed as ‘illah. However, the application is

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<sup>224</sup> Al-Juwaynī, ‘Abd al-Malik ibn ‘Abdillāh ibn Yūsuf, *al-Burhān fī Uṣūl al-Fiqh*, ed. ‘Abd al-‘Azīm Maḥmūd al-Dīb, Dār al-Wafā’, Mansoura, 1992, vol. 2, p. 721.

termed *istidlāl* if there exists no primary evidence of specific relevance to the issue. In such a situation, the effective meaning applicable in identifying a ruling is then derived from the need to realize general good and interest for humans.

By this definition of *istidlāl* by al-Juwaynī, it is also observed that it bears a certain degree of similarity with the definition of *al-maṣlaḥah al-mursalah* which was earlier discussed under the classification of *maṣlaḥah*. In that earlier discussion, it was mentioned that there are generally three categories of *maṣlaḥah*, the first of which is accepted as valid in the *sharī‘ah* due to the concordance between the *maṣlaḥah* and a textual evidence. This is termed as *maṣlaḥah mu‘tabarah*. The second category is known as *maṣlaḥah mulghāh*, one that is rejected by the *sharī‘ah* because of a contradiction between the *maṣlaḥah* and a textual evidence. The third category is *maṣlaḥah mursalah*, which is the subject of comparison here with *istidlāl*.

Al-Juwaynī narrates that al-Shāfi‘ī and most of the Hanafites accept *istidlāl*, but not as excessive as Mālik, who al-Juwaynī reports as accepting even interests that are remote from the inferences of the primary evidences.<sup>225</sup> In contrast to Mālik’s liberal practice in applying the principles of general good in formulating his legal opinions, al-Shāfi‘ī, as reported by al-Juwaynī, only allows the application of *istidlāl* if a meaning that is to be taken as the foundation for a particular ruling, has resemblance with, and is not

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<sup>225</sup> Ibid., vol. 2, p. 721.

remote from, the established meanings of the primary textual evidences.<sup>226</sup> Al-Shāfi‘ī further stresses his point that if the formulation of legal rulings is to be restricted in its foundation to only those availably mentioned in the primary texts, the spheres of *ijtihād* could not have expanded, for the existing primary texts and their implied meanings merely “occupy a small portion of a vast ocean”. This is evident, al-Shāfi‘ī further reiterates, when the practice of the Prophet’s companions in formulating their legal opinions, is examined. There is no report to suggest that the companions developed a set of legal principles beforehand, based on the primary textual evidences and the implied meanings of these evidences, for them to subsequently build their legal opinions by restrictively applying these principles to novel and unprecedented issues.<sup>227</sup>

This examination of al-Shāfi‘ī’s proposition, as narrated by al-Juwaynī, highlights a few points of observation, one of which is that al-Juwaynī was not the pioneer among the jurists of the Shāfi‘ī *madhhab* to render validity to the utilization of general good, or *al-maslahah*, in formulating legal rulings. It was al-Shāfi‘ī himself, as the founder of the *madhhab*, who expressed his acceptance of *al-maslahah* in issues where related primary texts are not in existence, while applying *qiyās* is not attainable due to the incompatibility of the ‘*illah*’.

The next point of observation is that al-Juwaynī’s reports of al-Shāfi‘ī’s propositions on *istidlāl* indicates that the latter was receptive towards the idea of rendering a learned

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<sup>226</sup> Ibid., vol. 2, p. 722.

<sup>227</sup> Ibid., vol. 2, pp. 723-724.

jurist the flexibility to formulate rulings, in certain situations, without the need to rigidly confine his legal thought processes to the standard sets of tools and principles of law. If such is true, why then did al-Shāfi‘ī take upon himself the task of systematically developing a framework of legal principles, an endeavour by which he was later widely referred to as the founder of *uṣūl al-fiqh*? This researcher therefore suggests an assumption that the legal principles and framework, as encompassed in the body of *uṣūl-al-fiqh*, are meant to provide safeguards from abuses in exercising legal thought processes in the *sharī‘ah*, and not to broadly impose rigid restrictions that impede the practices and development of *ijtihād*.

### **3.4 Utilisation of *maṣlaḥah* in *iftā’***

To comprehend the allocation for public interest mentioned in the Singapore’s Administration of Muslim Law Act (AMLA) as *al-maṣāliḥ al-mursalah* is improper, since *al-maṣāliḥ al-mursalah*, or *istiṣlāḥ*, is a process of establishing a ruling for a case that has no mention in textual sources. *Istiṣlāḥ* is utilized for new cases that bear no parallels in the texts nor precedent legal opinions of the jurists (*aqwāl al-fuqahā’*), whereas the consideration for public interest allocated by AMLA implies abandoning an established opinion within the Shāfi‘ī school of law in preference to another opinion from another *madhhab*. As such, it is therefore more appropriate to apply *istiḥsān* as it indicates, by the approach mentioned in AMLA, an act of giving priority to a particular

*ijtihād*, in this case of a non-Shāfi‘ī origin, above another, of which in this instance is an established opinion in the Shāfi‘ī *madhhab*.

In his *Kitāb al-Faqīh wa al-Mutafaqqih*, Al-Khaṭīb al-Baghdādī gives an indication that there are three possible situations where the consideration of *maṣlahah* may affect a *muftī*’s edict. The first situation is when a *muftī* sees that, in providing an answer to a *mustaftī*’s question, there is a need to impede the *mustaftī* from committing an unlawful act. In such a situation, the *muftī* is allowed to resort to allegorical interpretation, or *ta’wīl*, and issue a *fatwā* based on a ruling that the *muftī* himself is originally not keen of. To support this proposition, Al-Khaṭīb al-Baghdādī narrates an incident where the Prophet was approached by a young man who asked him whether it was permissible for him to kiss his wife while fasting. The Prophet replied by saying, “No”. The Prophet was then approached by an old man who asked a similar question. To this second person, however, the answer given by the Prophet was a positive one. Subsequently, the Prophet explained that he allowed the latter to kiss his wife while fasting because the old man was capable of self restraint.

Al-Khaṭīb al-Baghdādī also mentions another narration of an incident where Ibn ‘Abbās, a companion of the Prophet who was widely known for his astuteness in matters of the religion, was once asked by a man on the status of the repentance of a murderer. To him Ibn ‘Abbās responded by saying that the murderer’s repentance would not be accepted. However, to another person who came to him asking the same

question, Ibn ‘Abbās replied with a contradicting answer by insisting that the murderer’s repentance would be accepted. Ibn ‘Abbās later clarified that he saw in the eyes of the first enquirer a determination to kill someone, and hence issued a stringent answer with the intention to act as a deterrent. Whereas, Ibn ‘Abbās found the second person as one who was remorseful for a murder he had earlier committed, and hence the response was such that not to cause him despair.<sup>228</sup>

The second situation of where the consideration of *maṣlahah* may be allowed to affect a *muftī*’s edict is when he sees a way to extricate his *mustaftī* from a particular predicament. The *muftī* is thus allowed to resort to applying *ḥīlah*<sup>229</sup> and incorporate it in his edict, and consequently point it out to the *mustaftī*. In support of this proposition, al-Khaṭīb al-Baghdādī relates the story of Ayyūb who was once very angry with his wife during his illness and swore that if he recovered, he would punish her with one hundred lashes. To this, Ayyūb was ordained by God to fulfill his oath by lashing her only once but with a wisp of one hundred blades of grass.<sup>230</sup>

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<sup>228</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn ‘Alī ibn Thābit, *Kitāb al-Faqīh wa al-Mutaḥḥiqh*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, pp. 407-409.

<sup>229</sup> Al-Shāṭibī defines *ḥīlah* as the use of certain means in order to escape an obligation or to make some forbidden thing permissible. It is termed by Muhammad Khalid Masud as ‘legal evasion’ and by Ahmad Mohamed Ibrahim as ‘legal fiction’. Qoutoub Moustapha Sano terms it as ‘artifice’, while C. G. Weeramantry terms it as ‘stratagem’.

*Ḥīlah* is a highly controversial legal tool rejected by a considerable number of jurists. For further understanding of its legal validity among the jurists, see al-Shāṭibī, Abū Ishāq, *al-Muwāfaqāt*, Muṣṭafā Muḥammad, Cairo, n.d., pp. 378-391 & Masud, Muhammad Khalid, *Islamic Legal Philosophy*, Islamic Research Institute, Pakistan, 1977, pp. 284-285. See also Ibrahim, Ahmad Mohamed, *Sources and Development of Muslim Law*, Malayan Law Journal Limited, Singapore, 1965, p. 34; Quṭb Muṣṭafā Sānū, *Mu‘jam Muṣṭalahāt Uṣūl al-Fiqh*, Dār al-Fikr, Damascus, 2002, p. 190 & Weeramantry, C. G., *Islamic Jurisprudence: An International Perspective*, The Other Press, Kuala Lumpur, 2001, p. 41.

<sup>230</sup> This story of Ayyūb is mentioned in the Qur’an in verse 44 of Sūrah Ṣād (38).



Al-Khaṭīb al-Baghdādī also quotes a number of narrations, one of which is about a man who approached ‘Alī ibn Abī Ṭālib, a learned companion of the Prophet who was also his son-in-law, for a *fatwā*. The man was in a predicament as he had earlier made an oath that his wife was to be divorced with three *ṭalāqs* if he did not have sexual intercourse with her in the daylight of *Ramaḍān*. In his reply, ‘Alī ibn Abī Ṭālib suggested that the man took his wife for a trip in the month of Ramaḍān and had sexual intercourse with her on the trip during daytime. Another narration cited by al-Khaṭīb al-Baghdādī was of a man who came to al-Shāfi‘ī for a ruling on an oath he had made to have his wife divorced, either if he ate a date that he had with him or threw it away. Al-Shāfi‘ī ruled that the man should eat half of the date and throw away the other half.<sup>231</sup>

The third situation of a *muftī* taking *maṣlaḥah* as a point of consideration in issuing a *fatwā* is when he is of a view that there is a justified need to refrain from issuing a *fatwā*, or to withhold some information from being disseminated. On this, al-Khaṭīb al-Baghdādī cites a narration where a jurist by the name of Sa‘īd ibn Jubayr was once asked about the payment of *zakāh*, to which he responded by saying that its payment should be made to the rulers. However, Sa‘īd ibn Jubayr was later questioned by the *mustafī* after they left the place on why the latter was advised to pay *zakāh* to the rulers knowingly the rampant mismanagement of *zakāh* funds perpetrated by the rulers. To this, Sa‘īd clarified that the questioner should execute the obligatory *zakāh* payment to the relevant parties as God dictated, not to the rulers. Sa‘īd however explained that as

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<sup>231</sup> Al-Khaṭīb al-Baghdādī, Abū Bakr Aḥmad ibn ‘Alī ibn Thābit, *Kitāb al-Faqīh wa al-Mutaḥḥiqh*, Dār Ibn al-Jawzī, Saudi Arabia, Beirut & Cairo, 1426h., vol. 2, pp. 411-414.

the question was initially raised before a large audience of people, he was not in an advantageous position to offer a forthright answer.

Another narration reported by al-Khaṭīb al-Baghdādī is al-Shāfi‘ī’s position that skilled craftsmen should be made liable for the damages of merchandises that are in their care only if the damages were caused by them, and not merely due to the merchandises being in their care. However, al-Shāfi‘ī was reluctant to have this position of his to be made known publicly, as he was concerned that it might lead to complacency on the part of the craftsmen. Al-Khaṭīb al-Baghdādī also narrates the saying of Ibn Shabrumah that there are issues and questions which are not apposite to be asked by a questioner, nor are they apposite for a *muftī* to answer.<sup>232</sup>

Similarly reflected by the various books on *iftā’* by other jurists of the Shāfi‘ī *madhhab*, al-Khaṭīb al-Baghdādī did not elaborate on the legal framework or the guiding principles of utilizing *maṣlahah* for *iftā’* purposes.

It was mentioned in the earlier discussion on *istidlāl* that al-Shāfi‘ī restricts the utilization of *istidlāl* for cases where no primary evidences can be found to build a ruling upon, and where not even *qiyās* can be applied due to the remoteness of the ‘illah. *Istidlāl*, however, in such a restrictive manner of its application, may not be sufficient for the purposes of *iftā’*. This is based on the discussion forwarded in the

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<sup>232</sup> Ibid., vol. 2, pp. 415-420.

previous chapter of this research, that in certain situations, the consideration of *al-maṣāliḥ* and the interest of a *mustaftī* is to be given significance, to the extent that an existing standard ruling may be abandoned in order to provide preference to an initially weaker legal position, when the need to fulfil greater good in the interest of the *mustaftī* demands for such.

One particular fact that should not be ignored is that al-Shāfi‘ī’s insistence for such a strict application of *istidlāl* is in the realm of general *ijtihād*, where the intended outcome is to formulate a legal ruling by way of deducing it from the primary texts, without the need to render consideration to specific individuals in specific contexts. This is also the very objective of *uṣūl al-fiqh*, and its correlation with the positive law of *fiqh* does not suggest otherwise. This is as highlighted by a number of jurists of the Shāfi‘ī *madhhab*, among whom is al-Ghazzālī, that the subject matter of *uṣūl al-fiqh* is actually the texts, and that *uṣūl al-fiqh* does not deal with specific cases of any particular individual.<sup>233</sup>

Is it that *uṣūl al-fiqh* was designed by al-Shafi‘ī, and adopted by his followers, to be a set of principles and tools for the sole purpose of formulating rulings by relying on texts only, be it by *istinbāt* or *qiyās*? If that is the case, it is therefore understandable if there is no, or minimal, discussion within *uṣūl al-fiqh* on taking the *mustaftī*’s *maṣlaḥah*, based on his context and condition, as a primary factor for consideration in formulating

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<sup>233</sup> Abū Sulaimān, ‘Abd al-Wahhāb Ibrāhīm, *Manhajīyyat al-Imām Muḥammad ibn Idrīs al-Shāfi‘ī fī al-Fiqh wa Uṣūlih*, Dār Ibn Ḥazm, Beirut, 1999, pp. 119-120.

legal ruling. However, if this is true, it will mean that chapters on *iftā'*, even if mentioned or written as one of the chapters of *uṣūl al-fiqh*, are not exactly a subject matter of *uṣūl al-fiqh*.

Nonetheless, this researcher is of the view that *iftā'* can, and should be, included as one of the major parts of *uṣūl al-fiqh* in the Shāfi'ī school of law, for it deals with the process of formulating rulings, although not in the form of deducing it from the texts. Deducing rulings directly from the texts by *istinbāt*, or indirectly by *qiyās*, which in its actuality still relies on the texts, is primary, but formulating rulings by taking the context of the *mustaftī* as a factor of consideration and practically applying it to realize his *maṣāliḥ*, is as important.

In order to achieve this, few steps should be taken, the first of which is that the notion of *ijtihād* should be expanded to also encompass formulating rulings beyond sole reliance on texts. Secondly, it is imperative to acknowledge the significance of applying the most fitting ruling to a subject, through the process of *iftā'*, in the Islamic legal discipline. Finally, the framework on how to apply *istiṣlāḥ* and *istiḥsān* in the process of *iftā'* should be developed and included within the main body of *uṣūl al-fiqh*.

The process of *iftā'* starts at the stage of receiving enquiry and understanding the issue that is being asked. Once a question has been comprehended and the issue of relevance has been identified, a *muftī* then proceeds to conduct an investigation of existing

evidences to base his legal opinion on. In this instance, for a *mujtahid muftī*, he goes directly to the primary sources of the Qur'an and the *ḥadīth* in order for him to deduce a legal ruling by way of *istinbāṭ*. In cases where direct primary evidences do not exist, or could not be located, for the *mujtahid muftī* to deduce a ruling on the issue at hand, he is then expected to proceed to apply analogy, or *qiyās*. For a *muqallid muftī*, on the other hand, he is to start, not by directly analyzing the primary evidences of the texts, but rather by conducting a scanning exercise of preceding rulings available on a similar issue, which had been deduced and offered by earlier *mujtahids*. After obtaining these existing rulings, the *muqallid muftī* should put effort to comprehend the arguments and legal evidences utilized by those earlier jurists to build their opinions on. Only after these arguments and evidences have been clearly identified is the *muftī* permitted to issue his *fatwā*, according to the legal opinion available. This should be classified as *ittibā'*, not *taqlīd*. The *muqallid muftī* is not allowed to merely narrate a legal opinion of a jurist without first understanding its arguments and evidences. As such, it can be implied that even for a *muqallid muftī* in this particular instance, the primary textual sources again are still the basis for his eventual *fatwā*, although the process that he has to go through initially started with investigating earlier juristic opinions of other *mujtahidūn*.

Subsequently, after establishing the legal ruling, by way of *istinbāṭ*, *qiyās* or *ittibā'*, a *muftī* should not hastily issue it as his *fatwā* to the question posed by the *mustaftī*. The *muftī* is required to proceed to the next stage of applying the ruling to the *mustaftī*,

taking into account the context he is in, with all the relevant circumstances related to it. This is the process of *tanzīl al-ḥukm*. It is at this stage that the consideration of *maṣāliḥ mursalah*, *istiḥsān*, ‘*urf*, *dharā’i*’ and the like become factors of utmost importance, and the application of legal maxims of *ḍarūrah*, *mashaqqah*, *rukḥṣah*, *etcetera* come into play. One possible outcome that may result at this stage is that the original ruling that was deduced from the texts, or formulated through the process of *qiyās*, or identified by way of *ittibā’*, can be applied straightforwardly to the context of the *mustaftī*. However, there is also a possibility that such may not materialize, and that the ruling identified can not be applied as originally expected due to probable complications on part of the *mustaftī*. The *muftī* has then to return to the sources of evidence again to explore an alternative ruling that shall suit the needs of the *mustaftī* and in his best interest. On top of this, another possible outcome, is that the *muftī* may not even find any suitable alternative ruling from the sources of evidence, and he thus has to resort to apply his own reasoning according to the best of his ability to provide a *fatwā* to his *mustaftī*. This is where the general objectives of the *sharī’ah* (*maqāṣid al-sharī’ah*) are of crucial importance as a legal principle for the *muftī* to base his *fatwā* on. An issue worth mentioning, nonetheless, is that a *mujtahid muftī* would most probably face no difficulty to exercise such a legal process due to his intellectual capacity that he is endowed with, but a *muqallid muftī* may not be able to similarly assume such a task. What, then, is the way out?

To suggest that the application of legal maxims of *istiṣlāḥ*, *istiḥsān* and the like should be included within the framework of *ijtihād* and *iftā'*, is, in a way, immaterial and academic. This was how the opposing views on the permissibility and legality of applying *istiṣlāḥ* and *istiḥsān* in the process of *ijtihād* and *iftā'* came into existence. If the notion of *ijtihād* and *iftā'* is restricted to deducing rulings from the primary textual sources, and to *qiyās* in cases where there is no direct mention in the texts on certain issues, *istiṣlāḥ* and *istiḥsān* should therefore not be accepted as a legal tool, as asserted by a number of scholars of the Shāfi'ī *madhhab*. However, if the subsequent process of *tanzīl al-ḥukm*, after a particular ruling has earlier been identified from its sources of evidence, is to be considered as part of *ijtihād* and *iftā'*, *istiṣlāḥ* and *istiḥsān* should then taken as a significant factor of consideration, as preferred by other jurists of the Shāfi'ī *madhhab*, among whom are al-Juwaynī, al-Ghazzālī and Ibn 'Abd al-Salām.

One particular observation that is worth mentioning is that the scholars of the Shāfi'ī *madhhab* seem to place prime emphasis on *istinbāt*, or deducing ruling from the textual sources, as the major practice of *ijtihād*. This is to be subsequently followed by the phase of applying *qiyās* in issues or cases where no directly relevant text is to be found. Notwithstanding, *qiyās* is again a procedure where available texts are taken as the legal foundation for the new ruling, as both the text and the new case at hand share a similar *raison d'être*, or '*illah*'. Their *modus operandi* in Islamic jurisprudence therefore revolves mainly around the texts. This may probably provide an explanation as to why the process of *tanzīl al-ḥukm* has not been given significance in their writings and

discussions on *iftā'*. *Tanzīl al-ḥukm* is a procedure where the needs of a *mustaftī*, as well as the problems and predicaments that he is faced with, are to be given prominent consideration over the general or original ruling deduced from the texts, either directly by way of *istinbāt*, or indirectly by way of *qiyās*. In other words, it is an issue of text factor against human factor; whether prominence is to be rendered, in the process of issuing a *fatwā* that is requested by a *mustaftī*, to the interests and the needs of the *mustaftī* over the general ruling formulated from the texts, or the converse is true.

This conventional approach among the scholars of the Shāfi'ī *madhhab* is in contrast to that adopted by their compatriots from the Mālikī *madhhab*, who give greater emphasis to the human factor above the texts. This is manifested, among others, by their methodology of accepting the practices of the people of Medina, or *a'māl ahl al-madīnah*, as one of the legal principles adopted in the *madhhab*. This is later supported by writings offered by the Mālikī scholars, among whom is al-Shāṭibī in his *al-Muwāfaqāt*, where the issue of *tanzīl al-ḥukm* is highlighted prominently.

Nonetheless, it is far from the truth to insinuate that the interests of the *mustaftī* are totally discounted by the Shāfi'ī scholars. Discussion presented in earlier parts of this Chapter suggested that there have been considerable significance allocated for the application of *maṣlahah* within the legal doctrines of the Shāfi'ī *madhhab*. Al-Shāfi'ī's own famous phrase “*man istaḥsana fa qad shara'a*” (whoever utilizes the tool of *istiḥsān*, he is considered to have introduced innovation to the *sharī'ah*), is not to be



taken for granted as representing a standard principle of the *madhhab*, but with qualification of its specifics. This is based on the acceptability of observing the *mustafī*'s interests as an important factor of consideration in the process of *ijtihād* and *iftā*' among the Shāfi'ī scholars, although it is not accorded with a similar degree of mention, as compared to its significance among scholars of other *madhāhib*, in particular scholars of the Mālikī *madhhab*.

If this is seen as an inconsistency or a deficiency within the Shāfi'ī *madhhab*, it should be clarified that al-Shāfi'ī's methodology of giving prominence to the texts was primarily motivated by his undertaking to address a legal defect that he observed as prevalent among the jurists of his time. Al-Shāfi'ī noticed that the religious texts, and particularly the *ḥadīth*, were in his view not accorded due prominence as the primary sources in formulating Islamic law. In contrast, the consideration that was generally given to the needs and interest of the people, was already by his time tremendously emphasized, hence al-Shāfi'ī's insistence on the prominence of texts. Al-Shāfi'ī was providing a balance to the utilization of *al-maṣāliḥ al-mursalah*, by introducing the *ḥadīth* as the guideline. As suggested by many researchers, there are several parts in al-Shāfi'ī's writings that indicate the importance of observing *al-maṣāliḥ al-mursalah*, and that al-Shāfi'ī himself adopts *istiḥsān*, albeit not using the term explicitly. This proves that al-Shāfi'ī does not totally reject the utilization of *al-maṣāliḥ al-mursalah* as a legal tool. Instead, al-Shāfi'ī was putting forth his proposition that the texts, particularly the *ḥadīth*, should be given prominence, in order to provide judicial guideline and

framework to the practice of *al-maṣāliḥ al-mursalāh*, failing which would only have caused the Muslims to be allowed to unduly indulge in the spheres of personal interests and desires.

In his relatively lengthy discussion on *tarjīḥ*, or the act of giving preference to one evidence over the other, or to one ruling over another, al-Ghazzālī seems to have restricted his proposition to the textual aspects of the law. Only three areas were addressed by al-Ghazzālī in this regard, namely exercising *tarjīḥ* when there are contradictions in the main bodies of the textual evidences, or *al-matn*; in the chains of narration of the texts, or *al-sanad*; and in the *raisons d'être* of the evidences, or *al-'illah*.<sup>234</sup> The issue of giving preference to one ruling over another based on specific needs of the *muftā* was completely unaddressed. Al-Haytamī, however, proposes an opposite position to the one presented by al-Ghazzālī. According to al-Haytamī, a *muftā* can issue a *fatwā* that is not in line with the views of the *madhhab* that he adheres to, if he sees there is *maṣlaḥah* in it.<sup>235</sup>

There is, therefore, a pressing need to further construct the existing literature on *iftā'*, and in doing so, the widely familiar literature on *uṣūl fiqh* of the Shāfi'ī school of law only should not be taken as sufficient for *iftā'* purposes. One important aspect in the

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<sup>234</sup> Al-Ghazzālī, Abū Ḥāmid Muḥammad ibn Muḥammad, *al-Mustaṣfā min 'Ilm al-Uṣūl*, ed. Muḥammad Sulaimān al-Ashqar, Mu'assasah al-Risālah, Beirut, 1997, vol. 2, pp. 471-491.

<sup>235</sup> Al-Haytamī, Shihāb al-Dīn Aḥmad ibn Muḥammad, *al-Fatāwā al-Kubrā al-Fiqhiyyah 'alā madhhab al-Imām al-Shāfi'ī*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1997, vol. 4, pp.320-321.

further development of such a literature is the set of guidelines (*ḍawābīṭ*) for employing *maṣlaḥah*. In this respect al-Būṭī's writing may prove to be very useful.

The first guideline proposed by al-Būṭī is that the *maṣlaḥah* should comply with the objectives of the *sharī'ah*, or *maqāṣid al-shar'*. As suggested by al-Ghazzālī, al-Būṭī asserts that the five basic necessities (preservation of life, creed, mind, progeny and property) are, in their essence, means to realize an ultimate goal of the *sharī'ah*, which is for man to manifest worship to Allah in his actions, choices and behaviour, by obliging to Allah's divine rules and instructions.<sup>236</sup>

The second guideline is that the *maṣlaḥah* should not contradict the Qur'ān. In this aspect, al-Būṭī categorizes Qur'anic injunctions into two, one of which is of those explicit in their implied meanings that do not carry any possibility of other denotations; and another is of those subject to specifics and exceptions. It is only in this second category that a *mujtahid* exerts his effort to exercise *ijtihād* in relation to the Qur'an. Quoting al-Shawkānī and al-Māwardī as references, al-Būṭī confines the work of a *mujtahid* in this area into the processes of authenticating the text (*ithbāt al-naṣṣ*), extracting its *raison d'être* (*istikhrāj 'illatih*), substantiating its inferences (*ḍabṭ madlūlātih*), exercising preference among its possible connotations (*al-tarjīh bayn ihtimālātih*), and uncovering of its universals and specifics (*al-kashf 'an 'umūmih wa*

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<sup>236</sup> Al-Būṭī, Muḥammad Sa'īd Ramaḍān, *Ḍawābīṭ al-Maṣlaḥah fī al-Sharī'ah al-Islāmiyyah*, al-Dār al-Muttaḥidah, Damascus, 1990, pp. 110-117.

*khuṣūṣiḥ*). Al-Būṭī asserts that as long as there is a certain degree of injunction in the Qur’ān on a particular issue, the consideration of *maṣlaḥah* must not digress from it.<sup>237</sup>

The third guideline is that the *maṣlaḥah* should not contradict the *sunnah*.<sup>238</sup> Al-Būṭī distinguishes the words and actions of the Prophet in his capacity as a prophet, from those that he said and did in his capacity as a community leader. Only his words and actions that constitute religious injunctions are to be regarded as *sunnah* that the consideration of *maṣlaḥah* should effect any influence. Examples offered to illustrate this are the rituals, such as *ṣalāh* and *zakāh*. On the other hand, the Prophet’s administering of social issues of the time was more of a leadership call that was based on his personal judgment, thus was contingent upon changes of time and circumstances. The lack of permanency in such a matter naturally deprives it from being conferred the esteem status as *sunnah* that commands subservience and compliance, and therefore is not constituted under these guidelines.<sup>239</sup>

The fourth guideline is that the *maṣlaḥah* must not contradict *qiyās*,<sup>240</sup> while finally, the fifth guideline is that the consideration of a particular *maṣlaḥah* must not result in neglecting or ignoring another *maṣlaḥah* greater than the former.<sup>241</sup>

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<sup>237</sup> Ibid., pp. 120-123.

<sup>238</sup> Ibid., p. 144.

<sup>239</sup> Ibid., pp. 148-153.

<sup>240</sup> Ibid., pp. 190-191.

<sup>241</sup> Ibid., pp. 217-218.

### 3.5 Conclusion

1. The consideration of *maṣlaḥah* in Islamic law is existent and accepted as one of the tools for *ijtihād* in the Shāfi‘ī school of law, the discussion of which is positioned under the legal tools of *qiyās*, *istidlāl*, *istiḥsān* etc. However, jurists of this *madhhab* differ in the degree of their acceptance of *maṣlaḥah*, and how it is to be practically employed.
2. The framework of its utilization is considerably strict and restrictive, for its utilization is generally allowed only when *qiyās* is not applicable. Nonetheless, the common discourse is within the ambit of *uṣūl fiqh*, hence focus of discussion is biased towards considering *maṣlaḥah* in the legal stage of formulating general rulings, either by way of textual deduction (*istinbāt*) or by *qiyās*. In contrast, the formulation and application of rulings for the purpose of *iftā’* are apparently specific in nature, where the specific needs and contexts of the *mustafī* have critical influence on the *fatāwā* that are to be issued.

## CHAPTER FOUR

### SINGAPORE AND ITS *IFTĀ'* INSTITUTION

The conditions that a society live in not only shape their perspective towards life and the world, but also has a bearing on the rules that govern their lives, either in the private life of the individual members of the society or in their social interactions. This is similarly true in the spheres of Islamic law, for generally it was designed in a fashion that aims at realizing common good to both the individuals as well as the community at large. This is as what has been articulated by al-Ghazzālī that it is the intention of the *sharī'ah* to preserve the five basic necessities of man (*al-ḍarūrāt al-khams*), namely his life, his intellect, his faith, his genealogy and his property. Apart from these five basic necessities that constitute the primary needs of man, without which it is impossible for him to practically continue with his life, there are also other needs that are acknowledged by the *sharī'ah*. Al-Ghazzālī named these as *al-hājāt*. Albeit being accorded a lesser degree of criticality as per compared to the *al-ḍarūrāt al-khams*, they nonetheless effect consequences in rulings of the *sharī'ah*, for their absence results in man facing great difficulties in life.<sup>242</sup>

The significance of common good and its realization as the objective of *sharī'ah* was further reiterated by Ibn al-Qayyim al-Jawziyyah, who insisted that the *sharī'ah* and its

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<sup>242</sup> Al-Ghazzālī, Abū Ḥāmid Muḥammad bin Muḥammad, *al-Mustaṣfā min 'Ilm al-Uṣūl*, Dār Iḥyā' al-Turāth al-'Arabī, Beirut, n.d., vol. 1, pp. 216-223.

rulings are based on the foundation of *maṣāliḥ al-‘ibād*, or attaining common good for the humans. Ibn al-Qayyim insisted that the whole body of *sharī‘ah* is built upon justice, compassion, common good and wisdom, and that if there is any case where damage, harm and injustice is done instead of good and justice, it therefore has nothing to do with *sharī‘ah*.<sup>243</sup>

In order to establish the context setting for this research, this chapter is intended to cast light on present day Singapore as an independent state, and the conditions in which its Muslim community are living. This will consist of accounts of the country’s modern history; its political, social and economic background; the socio-economic realities of the Singapore Muslims; and the Islamic Religious Council of Singapore and its Fatwa Committee. It is hoped that this will shed light on the socio-economic, political and legal factors that come into play as a backdrop to better understand the rationale and motivation behind the *fatāwā* issued in the country.

These political, social, economic and legal conditions of a community may cause it to develop a certain way of thinking or to behave in a particular manner. If such a behaviour becomes habitual and rampant within a community, it can be categorized as *‘ādah*, which was defined by al-Aṣfahānī as a noun that indicates a repetition in action and reaction, to the extent that its actualization becomes easy as if it is a second

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<sup>243</sup> Al-Jawziyyah, Ibn al-Qayyim Muḥammad ibn Abī Bakr ibn Sa‘ad, *A‘lām al-Muwaqqi‘īn*, Dār al-Kutub al-Ḥadīthah, Cairo, n.d., vol. 3, p. 5.

nature.<sup>244</sup> Ibn ‘Ābidīn suggests that *‘ādah* is derived from the word *mu‘āwadah* (repetition), for by way of continuous repetition of a particular action or reaction time and again, it becomes a familiar behaviour that is inherent in the hearts and minds of the people, and which is received with acceptance without any need for relevance nor evidence, as it eventually becomes a cultural reality.<sup>245</sup> Such a common habitual behaviour of a community, or *‘ādah*, will have an effect on the rulings for the community and its members, if it satisfies a set of criteria, the first of which is that this *‘ādah* should not be in disagreement with the *sharī‘ah*. Secondly, it should be commonly practised by all or most of the members of the community. Thirdly, that the *‘ādah* that is intended to be taken into consideration is one that is already in existence within the community, not one that is intended to be put into existence. Finally, parties who enter into any contractual agreement do not express disagreement with the *‘ādah*.<sup>246</sup>

Providing an account of Singapore and its Muslims is therefore of crucial importance to the study of its *fatāwā*, for most of these *fatāwā* were issued to address their religious questions and concerns according to their environment, and subsequently also according to any existing common *‘ādah* widely practiced by the community. This is in line with the notion of the necessity to align *fatāwā* according to the changes that occur in a

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<sup>244</sup> Al-Aṣḥāhānī, Abū al-Qāsim al-Ḥusayn ibn Muḥammad, *al-Mufradāt fī Gharīb al-Qur’ān*, Maktabah Muṣṭafā al-Bābī al-Ḥalabī, Cairo, n.d., p. 352.

<sup>245</sup> Ibn ‘Ābidīn, Muḥammad Amīn, *Majmū‘ah Rasā’il Ibn ‘Ābidīn*, Dār Iḥyā’ al-Turāth al-‘Arabī, Beirut, n.d., vol. 2, p. 112.

<sup>246</sup> Al-Ashqar, ‘Umar Sulaimān ‘Abdullāh, *Naẓarāt fī Uṣūl al-Fiqh*, Dār al-Nafā’is, Amman, 1999, pp. 180-182.



particular community, as asserted by Ibn al-Qayyim that it is incumbent on a *muftī* to observe the need to be conscious of the *‘ādah* of the individual or community that seek his *fatāwā*. It is similarly vital for the *muftī* to be aware of any changes that are taking place in society and their cultures, and that, according to Ibn al-Qayyim, it is unbecoming of a *muftī* to issue *fatāwā* by merely narrating the content of books in his possession which is in contradiction with the realities of their environment and cultures, and which does not take into account the differences in time, space and conditions.<sup>247</sup>

#### 4.1 Singapore and its Modern History

Singapore consists of the island of Singapore and some 60 small islands within its territorial waters. It is situated approximately 137 kilometres north of the Equator. The main island is about 42 kilometres in length and 23 kilometres in breadth and 582.8 square kilometres in area.<sup>248</sup>

The geographical position of Singapore defines the history and contemporary position of its Muslim community. Singapore is the northernmost island in the Riau archipelago, which links the east coast of Sumatra with Peninsula Malaysia. This territory is the traditional home of the Malay people. Malay history is intimately linked with Islam, and the first Malay-Muslim trading city, Melaka (Malacca), flourished in

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<sup>247</sup> Al-Jawziyyah, Ibn al-Qayyim Muḥammad ibn Abī Bakr ibn Sa‘ad, *A‘lām al-Muwaqqi‘īn*, Dār al-Kutub al-Ḥadīthah, Cairo, n.d., vol. 3, pp. 99-100.

<sup>248</sup> *Singapore: Facts and Pictures 1994*, Ministry of Information and the Arts, Singapore, 1994, p. 1.

the fifteenth century. The sacking of Melaka by the Portuguese in 1511 marked the beginning of an era of intrusions by various colonial powers interested in the strategic sea lanes through the Straits of Melaka.<sup>249</sup>

Before the 15<sup>th</sup> century, the island was under the rule of the Majapahit Kingdom of Java,<sup>250</sup> and subsequently was put under the patronage of the Thai Kingdom. In the period between 1400s and 1511, the island was part of the Malacca empire, and later in the 18<sup>th</sup> century Singapore was ruled by the Johor-Riau empire.<sup>251</sup>

Modern Singapore started when Sir Stamford Raffles, representing the English East India Company, negotiated with Temenggung Abdul Rahman, the ruler of Singapore, and Sultan Husain of Johor, to occupy the island.<sup>252</sup> The British, who were extending their hegemony in India and whose trade with China in the second half of the eighteenth century was expanding, saw the need of a half-way house to refit, victualise and protect its merchant fleet. As a result, they established Singapore as their trading post in 1819,

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<sup>249</sup> Siddique, Sharon, "Singapore", John L. Esposito (ed.), *The Oxford Encyclopedia of the Modern Islamic World*, Oxford University Press, New York, 1995, vol. 4, p. 76.

<sup>250</sup> Muhammad Zaki Badawi, *Latarbelakang Kebudayaan Penduduk-penduduk Di Tanah Melayu (Cultural background of the people of Malay peninsula)*, Dewan Bahasa dan Pustaka, Kuala Lumpur, 1962, p. 46.

<sup>251</sup> Ismail Kassim, *Problems of Elite Cohesion : A Perspective From A Minority Community*, Singapore University Press, Singapore, 1974, p. 12.

<sup>252</sup> Abdullah Alwi Hassan, "Islam di Singapura : Satu Pengenalan" (Islam in Singapore: an introduction), Lutpi Ibrahim (ed.), *Islamika*, Sarjana Enterprise, Kuala Lumpur, 1981, p. 154.

besides Penang in 1786 and Malacca in 1795. These three states later became the Straits Settlements in 1826, under the control of British India.<sup>253</sup>

After attaining self-governance in 1959, a merger with Malaya was agreed in 1961 as part of a larger federation to include the British territories in Borneo. This led to the formation of Malaysia, of which Singapore was one of its states, in September 1963. However, the merger was short-lived, and Singapore was separated from the rest of Malaysia on August 9, 1965, and became a sovereign, democratic and independent nation.<sup>254</sup>

## **4.2 Singapore and its Economic Development**

With the advent of the steamship and the opening of the Suez Canal in 1869, Singapore became a major port of call for ships plying between Europe and East Asia. Singapore experienced unprecedented prosperity as trade expanded eightfold between 1873 and 1913, attracting migrants from areas around the region.<sup>255</sup>

The economic transformation of Singapore began in 1961, two years after it gained internal self-government. With the establishment of the Economic Development Board to implement the industrialisation programme, the country went through several stages

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<sup>253</sup> *Singapore: Facts and Pictures 1994*, Ministry of Information and the Arts, Singapore, 1994, p. 9.

<sup>254</sup> *Ibid.*, p. 11.

<sup>255</sup> *Ibid.*, p. 10.

of development leading to a strong manufacturing base and a well-developed business sector.<sup>256</sup>

With better-trained workforce and increased industrial capabilities, companies in the 1970s began to bring in more sophisticated processes to manufacture more capital-intensive products. By the early 1980s, a vibrant base of manufacturing capabilities had been established, and by the middle of 1990s, the economic development strategy has been broadened, the emphasis is on the manufacturing and the service sectors as the twin engines of growth. In addition, local enterprises are encouraged to diversify their operations, upgrade their skills and develop into strong export-oriented companies.<sup>257</sup>

By the end of the twentieth century, Singapore was already the second busiest port in the world, and probably the world's most computerized nation, has had a foreign exchange market with the world's fourth largest turnover, after London, New York and Tokyo, boast of having the best airport in the world, which had received 9.42 million passenger arrivals in 1993 (6.4 million of whom were tourists), had gross official international reserves towards the end of 1994 of about US\$57 billion (twenty one per cent higher than a year earlier and equal to about 5.7 months of imports, and providing the highest per capita figure in the world), a life expectancy at birth of seventy five

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<sup>256</sup> Ibid., p. 41.

<sup>257</sup> Ibid., p. 41.

years and an adult literacy rate of about eighty eight per cent and has achieved the world's highest proportion of share owners in the population.<sup>258</sup>

Such a tremendous economic progress of the state is in line with its government's vision to work towards developing Singapore into a developed country status. Singapore has visualized attaining developed country status by 2020 under a Dutch model or by 2030 if the United States is the model. The then First Deputy Prime Minister Goh Chok Tong was the first in 1984 to set the target for Singapore to attain the Swiss per capita GNP by 1999.<sup>259</sup> By the end of the century, the nation is convinced, to a large degree, that it has reached a developed country's income level, albeit not a fully developed country as yet.<sup>260</sup>

### **4.3 Islam and Muslims in Singapore**

Records of Islam and Muslims in Singapore during the early days are threadbare. However, Islam itself was already entrenched in Southeast Asia, spread in the early thirteenth century by merchants and Sufi missionaries who came from Hadramaut in Yemen and from the southern parts of India.<sup>261</sup>

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<sup>258</sup> Peebles, Gavin & Wilson, Peter, *The Singapore Economy*, Edward Elgar, Cheltenham, 1996, p. 3.

<sup>259</sup> Ministry of Trade and Industry, *The Strategic Economic Plan: Towards a Developed Nation*, SNP Publishers, Singapore, 1991, p. 40.

<sup>260</sup> Low, Linda, *Singapore: Towards a Developed Status*, Oxford University Press, Singapore, 1999, p. 4.

<sup>261</sup> Zuraidah Ibrahim, *Muslims in Singapore: A Shared Vision*, Times Editions, Singapore, 1994, p. 19.

The Singapore Department of Statistics reported that as at June 2006, the resident population of Singapore, comprising citizens and permanent residents, was estimated at 3,583,100. 75 per cent of these resident population were the Chinese who form the majority. The Malays numbered 490,600 or 13.7 per cent, Indians 313,400 or 8.7 per cent and persons of other ethnic groups 92,100 or 2.6 per cent.<sup>262</sup>

There has long been a prevalent perception that being a Malay in Singapore is so much synonymous to being a Muslim, that what is commonly referred to as Singapore's Muslim community is actually rather exclusively the Malay-Muslim community, and that Indian Muslims are generally excluded or are thought of as a minority.<sup>263</sup> This is due to the fact that almost all Malays in Singapore are Muslims, and they make up the largest group within the Muslim community in Singapore, where non-Malay Muslims constitute only about thirteen per cent of the community. Even writings about Singapore Muslims have always been focusing mainly on the Malays and not on other ethnic Muslims like Arabs and Indians.<sup>264</sup> In a study conducted on the religious communities in Singapore, based on a census of its population that was carried out in 1990, it was reported that 85.2 per cent of the country's Muslim population were

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<sup>262</sup> \_\_\_\_\_, Singapore Department of Statistics,  
<http://www.singstat.gov.sg/pubn/reference/yos/yos2008.pdf>, (accessed 18 August, 2008)

<sup>263</sup> Cheng, Beng Huat & Kwok, Kian-Woon, "Social Pluralism in Singapore", Hefner, Robert W. (ed.), *The Politics of Multiculturalism : Pluralism and Citizenship in Malaysia, Singapore and Indonesia*, University of Hawaii Press, Honolulu, 2001, p. 100.

<sup>264</sup> Hussin Mutalib, "Muslim Studies in Singapore", Bajunid, Omar Farouk (ed.), *Muslim Social Science in Asean*, Yayasan Penataran Ilmu, Kuala Lumpur, 1994, p. 1.

Malays,<sup>265</sup> while Indians constituted only 12.2 per cent of the Muslim community.<sup>266</sup>

Within the Malay community, they were religiously, as they were culturally, homogeneous with 99.6 per cent professing the Islamic faith.<sup>267</sup>

#### **4.4 The Economic Standing of Singapore Muslims**

The state's preoccupation to aggressively grow a booming economy and its success in achieving such, however, will have a bearing on the underclass of its society, as shown by experiences and lessons drawn from other developed industrial countries.<sup>268</sup> In many of the cases, the underclass ends up non-employed or employed at low rates or employed insecurely. On top of these, many would probably have bad relationships and would be single parents, perpetuating the underclass syndrome with its symptoms of a vicious circle where genes, parenting, nutrition and even chance lead to low ability, low education, low skill, and low motivation, reinforcing each other.<sup>269</sup>

The government has attached a great deal of importance to improving the standard of living of the Malay-Muslim minority. Traditionally this community has tended to lag behind the Chinese majority in terms of educational achievement, occupational

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<sup>265</sup> Kuo, Eddie C. Y. & Tong, Chee Kiong, *Religion in Singapore*, Singapore National Printers, Singapore, 1990, p. 9.

<sup>266</sup> Ibid., p. 7.

<sup>267</sup> Ibid., p. 7.

<sup>268</sup> Low, Linda & Ngiam, Tee Liang, "An Underclass Among the Overclass", Low, Linda (ed.), *Singapore: Towards a Developed Status*, Low, Linda (ed.), Oxford University Press, Singapore, 1999, p. 244.

<sup>269</sup> Ibid., p. 230.

advancement, and income levels. Government policy has been to emphasize and support self-help groups within the community, such as MENDAKI (Council on Education for Muslim Children) and the AMP (Association of Muslim Professionals).<sup>270</sup>

Historically, this situation of their economic stature can be traced back to the earlier days of British colonialism, which started in 1819, about one and a half century before the country's independence. In his explorative journey to the Malay archipelago in the middle of the nineteenth century, Alfred Russell Wallace gave a picture of the population by narrating that the native Malays were usually fishermen, boatmen and policemen. Besides the native Malays, there were also immigrants from other parts of the archipelago, mainly from Java, who were sailors and domestic servants. This is in contrast to the economic superiority of the Chinese, who already formed the great mass of the population, and who included some of the wealthiest merchants, the agriculturists of the interior, and most of the mechanics and labourers.<sup>271</sup>

Land ownership policies adopted by the colonial British government with regards to the Malays were among the factors that contributed towards them lagging behind the other communities economically. In the early twentieth century, many Malays were enticed to take up the lucrative rubber cultivation, thus abandoning the historical role assigned to them by the British to cultivate rice. Due to the fear that such a trend would effect

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<sup>270</sup> Siddique, Sharon, "Singapore", John L. Esposito (ed.), *The Oxford Encyclopedia of the Modern Islamic World*, ed. John L. Esposito, Oxford University Press, New York, 1995, vol. 4, p. 76.

<sup>271</sup> Wallace, Alfred Russell, *The Malay Archipelago*, Oxford University Press, Kuala Lumpur, 1986, p. 32.



food production for the needs of the new and fast expanding cities under the impetus of colonial capitalism, a 'no rubber' clause was imposed as a condition in the alienation of agricultural land to the Malays, diverting them away from commercial and cash crop cultivation other than rice.<sup>272</sup> Over and above this policy, the British enacted the Malay Reservation Policy, which curtailed the ability of the Malays to mortgage or sell lands to non-Malays. This policy in particular eventually resulted in the value of Malay reserve land to fall, in some areas by as much as fifty per cent, as compared to land outside the reservation.<sup>273</sup>

Although there were Arab and Indian Muslims who, as petty merchants and shopkeepers<sup>274</sup>, were considerably well-off in comparison to the native and immigrant Malays, the Arabs and Indians constituted a very small component of the Muslim community, and their private wealth was not reflective of that of the community in general.

In present day Singapore, one distinctive feature about the country is the racial heterogeneity of its population, the product of past immigration patterns. Three ethnic groups - Chinese, Malay, and Indians - constitute about 97 per cent of the population. Despite a long history of interaction, each race has retained its cultural distinctiveness.

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<sup>272</sup> Shaharuddin Maaruf, *Malay Ideas on Development: From Feudal Lord to Capitalist*, Times Books International, Singapore, 1988, p. 51.

<sup>273</sup> Ibid., p. 54.

<sup>274</sup> Wallace, Alfred Russell, *The Malay Archipelago*, Oxford University Press, Kuala Lumpur, 1986, p. 32.

This is reflected in the distinct employment patterns which have emerged among them. In a study published in 1976, a decade after Singapore's independence, it was reported that the Chinese, with about 76 per cent of the population are, by virtue of their numerical size, dominant in most industrial groupings, particularly in the service, commercial and manufacturing sectors. The Malays, who comprise some 15 per cent of the population, are concentrated in the public sector and to a lesser degree as unskilled workers in transport, storage and communication activities. This feature of the Malay occupational structure is in part due to past colonial policies which encouraged Malay participation in the government sector. The Indians, who constitute about 6 per cent of the population, are found mainly in the service and commercial sectors.<sup>275</sup>

Although the Chinese are found in a wide variety of professions and occupations, a greater proportion of them, compared to the Malays, are white-collar workers. Of the Malays who work in the service, transport and communications establishments, a greater number of them are employed in lower-paid jobs such as drivers and messengers. In the public sector they feature relatively more frequently as policemen, guards and watchmen. As for the Indians, they are found in a wide spectrum of jobs as lawyers, doctors, shop-keepers and labourers. In 1970 about 9 per cent of the Indians were professional or administrative and managerial workers compared to about 6 per cent for Malays and 10 per cent for Chinese.<sup>276</sup>

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<sup>275</sup> Pang, Eng Fong, "Growth, Equity and Race", Riaz, Hassan (ed.), *Singapore: Society in Transition*, Oxford University Press, Kuala Lumpur, 1976, p. 327.

<sup>276</sup> Ibid., p. 328.

This socio-economic condition of the Malays, who are normally considered as representing the Muslim community, as mentioned earlier, continued without any significant changes until the last decade of the twentieth century. Using the level of education as one of the important indicators of the socio economic status of a person, the 1990 census of Singapore's population shows that among the non-student population, Muslims constituted only 7.2 per cent of those with upper secondary and polytechnic qualification, and a mere 2.6 per cent of those with university (and above) qualification.<sup>277</sup> As among the student population, Muslim students constituted 8.5 per cent of those attending upper secondary and polytechnic institutions, and 4.3 per cent of those attending universities.<sup>278</sup> These numbers are considerably small in comparison to the size of the Muslim community, who in 1990 made up 15.4 per cent of the whole population of the country.

The education level of members of a community is also associated with other indicators of their socio-economic status, including occupation, income and in the Singapore context especially, the type of dwelling one lives in. Data from the same 1990 census also highlights the fact that only 9.0 per cent of those working in the professional and technical categories and 3.4 per cent of those working in the administrative and managerial categories were Muslims. In contrast, Muslims constituted as many as 20.6

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<sup>277</sup> Kuo, Eddie C. Y. & Tong, Chee Kiong, *Religion in Singapore*, Singapore National Printers, Singapore, 1990, p. 20.

<sup>278</sup> *Ibid.*, p. 21.

per cent of those working in the production lines and in other related jobs of lower status.<sup>279</sup> In terms of housing type, a mere 3.7 per cent of those living in landed properties and 2.2 per cent of those living in condominiums and private apartments were Muslims, while the rest were living in public housing flats.<sup>280</sup>

#### **4.5 The Administration of Muslim Law Act (AMLA) and the Islamic Religious Council of Singapore**

The Islamic Religious Council of Singapore<sup>281</sup>, under the Ministry of Community Development, Youths and Sports (MCYS), conducts the affairs of the Muslim population.<sup>282</sup> The Council was established as a body corporate in 1968 when the Administration of Muslim Law Act (AMLA) came into effect. Under AMLA, the Council is to advise the President of the Republic of Singapore on all matters relating to Islam in Singapore. The Council's role is to see that the many and varied interests of Singapore's Muslim community are looked after. The principal functions of the Council include:

1. Administration of *zakāh* and *fītrah*
2. Management and development of *waqf*

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<sup>279</sup> Ibid., p. 22.

<sup>280</sup> Ibid., p. 23.

<sup>281</sup> Locally known as MUIS, or Majlis Ugama Islam Singapura, in the language of the Malays, who form the majority of the Muslims in Singapore.

<sup>282</sup> \_\_\_\_\_, *Singapore: Facts and Pictures 1994*, Ministry of Information and the Arts, Singapore, 1994, p. 120.

3. Administration of pilgrimage and *da'wah* activities
4. Management of Mosque Building Fund and construction of new mosques
5. Administration of the affairs of all mosques
6. Coordination of Islamic educational programmes
7. Issuance of *fatāwā*
8. Provision of study grants to Muslim students
9. Provision of financial relief to poor and needy Muslims
10. Assistance to new converts<sup>283</sup>

Apart from the Islamic Religious Council of Singapore, the Administration of Muslim Law Act (AMLA) through Sections 34-56 also establishes the Shari'ah Court which has jurisdiction throughout Singapore to hear and determine actions and proceedings which relate to marriages and divorces of Muslims.<sup>284</sup> Sections 89-109 of the Act provides for the establishment of a Registry of Muslim Marriages and the appointment of its Registrar.

The existence of this particular Act, with its provisions for a law relating to Muslim religious and legal affairs in Singapore, and the manner of how this law is to be administered, provides the Muslims of the country with a conducive condition for them to fulfill their religious duties pertinently, albeit Singapore being a secular state. The

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<sup>283</sup> Zuraidah Ibrahim, *Muslims in Singapore: A Shared Vision*, Times Editions, Singapore, 1994, p. 121. See also M. B. Hooker, *Islamic Law in Southeast Asia*, Oxford University Press, Singapore, 1984, pp. 110-118.

<sup>284</sup> Hooker, M.B., *Islamic Law in South-East Asia*, Oxford University Press, Singapore, 1984, p. 111.

combination of these elements that shape the milieu of the country defines the identity and characteristics of the Singapore Muslims living in it, and consequently delineates the way they conduct their religious life. The Administration of Muslim Law Act (AMLA) thrusts the community to be systematically organized in administering and discharging their religious obligations, that encompasses these various issues as mentioned above. At the same time, however, being a secular state, the government does not provide heavy funding in support of such religious initiatives and programmes, as it can not project a bias inclination towards any particular faith group, however accommodating it may be towards all religions and religious communities. This could have put the Muslims in a predicament, for administering an act of law as extensive as the AMLA and the institutions established under its provision naturally stipulates a huge amount of financial resources, especially when the Muslims themselves as a community are trailing behind the others in terms of their economic well being.

The accomplishment achieved by the community in administering their religious life effectively over the past four decades since Singapore gained its independence in 1965, however, demonstrates a strong conviction of the Singapore Muslims to nurture an identity of financial independence and self confidence in managing their religious well being. An indication of this achievement is the Islamic Religious Council of Singapore itself who experienced significant expansion since its inception in 1968 to its present state, both in term of its staff strength and its functions. With only a president serving in a part-time capacity and a staff of seven, the Council has developed into a multi-

department organization with a strength of more than 140 officers at present. The Council has moved from being the official administrator of mosques in the country that played a reactionary role of merely repairing physical damages of the mosques and attending to public feedbacks and complaints, to a progressive agency who has successfully coordinated the financial resource of the Muslim community, planned and executed the building of modern mosques, designed their comprehensive religious and social programmes, managed a broad network of professionals and volunteers to run all the mosques, and nurtured these mosques to become national institutions that contribute towards social cohesion of the whole nation. This, for one, is an achievement that is felt by the Muslim community of Singapore as their collective success that they are proud of.

The Council has also expanded its function from overseeing the administration of various *waqf* properties by their respective trustees, to an active *waqf* developer who has undertaken numerous projects to enhance the asset value of these properties, the profit from which is considerably beneficial in the social development of the Muslim community. The success achieved by the community and the Council in this area of *waqf* development was further amplified by the International Sheikh Mohammed bin Rashid Al-Maktoum Award conferred in 2006 by the Ruler of Dubai, for Innovative Solutions in Islamic Finance.

Other achievements by the Islamic Religious of Singapore, that encompass areas of religious education for the Muslims, administration of *hajj* and *zakāt*, interfaith interactions, *halāl* food certification, social development of the less fortunate Muslims, are all but manifestations of the determination of the Singapore Muslims to continuously enhance their religious life, albeit being a minority within a secular state.<sup>285</sup>

#### **4.6 The *Fatwā* Institution in Singapore**

The parts of this Administration of Muslim Law Act (AMLA) which are of direct relevance to this research are those spelled out in Sections 30, 31, 32 and 33. Section 30 provides for the appointment of a Mufti by the President of Singapore, where the Mufti shall be ex-officio a member of the Islamic Religious Council of Singapore. Section 31 of the Act establishes the Fatwa Committee of the Islamic Religious Council, which consists of five members: the Mufti as the chairman; two other fit and proper members of the Islamic Religious Council; and not more than two other fit and proper Muslims who are not the members of the Council.<sup>286</sup> These members of the Fatwa Committee shall be appointed by the President of Singapore on the advice of the Council for such a period as he thinks fit, and the notification of every such

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<sup>285</sup> Green, Anthony, *Honouring the Past, Shaping the Future: The Muis Story*, Majlis Ugama Islam Singapura, Singapore, 2009.

<sup>286</sup> Subsection 31(1) of AMLA.



appointment shall be published in the *Gazette*.<sup>287</sup> The chairman and two other members of the Fatwa Committee, one of whom shall not be a member of the Islamic Religious Council, shall form a quorum.<sup>288</sup> This Fatwa Committee may regulate its own procedure, subject to the provisions of this Administration of Muslim Law Act (AMLA).<sup>289</sup>

As this Section 31 spells out the requirement that two of the four appointed members of the Fatwa Committee, other than the Mufti as the chairman, should not be from the members of the Islamic Religious Council, and that one of the two members who shall form a quorum for any of its meetings should also not be from the members of the Council, it is apparent that this Act is designed in a such a way that a certain degree of transparency and balance is to be consciously observed in all of the Fatwa Committee's deliberations. This is useful in ensuring that every single *fatwā* and opinion issued by the committee is perceived by the Muslims of the country to be independent from any possible biases of the Islamic Religious Council, or of the government, hence safeguarding the authenticity and integrity of those *fatāwā* issued, for such an arrangement implies that the government has no interference or influence in the decisions of the committee.

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<sup>287</sup> Subsections 31(2) and 31(3) of AMLA.

<sup>288</sup> Subsection 31(6) of AMLA.

<sup>289</sup> Subsection 31(7) of AMLA.

Section 32 of the Act spells out the procedures for issuing *fatāwā* by the Committee, where it shall consider every request that it receives for a *fatwā* or ruling on any point of the Muslim law, and shall prepare a draft ruling thereon, unless in its opinion the question referred is frivolous or for other good reason ought not to be answered.<sup>290</sup> The Mufti shall then officially issue the ruling on behalf and in the name of the Islamic Religious Council of Singapore, if such draft ruling is unanimously approved by the Legal Committee or those members thereof present and entitled to vote.<sup>291</sup> In a case where the Fatwa Committee is not unanimous, the question shall then be referred to the Islamic Religious Council, which shall in like manner issue its ruling in accordance with the opinion of the majority of its members.<sup>292</sup>

This section of the Act warrants a note that the Mufti of Singapore is not designated to individually issue any *fatwā* on his own accord based on his personal opinion. The role of a Mufti in Singapore, as provided by the Act, is to chair the Fatwa Committee and to finally issue a *fatwā* only according to the unanimous decision reached by the Fatwa Committee. Even in the event where the committee is unable to arrive at a unanimous decision in answering the question at hand, the Mufti is still not at liberty to provide his own opinion as a fatwa. Instead, such a question is to be tabled to the Islamic Religious Council, whose members shall in turn make a decision based on their majority votes. However, such a decision, if issued as an answer to the party who requested for a legal

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<sup>290</sup> Subsections 32(1), 32(2) and 32(3) of AMLA.

<sup>291</sup> Subsection 32(4) of AMLA.

<sup>292</sup> Subsection 32(5) of AMLA.

ruling, is to be considered as the position of the Islamic Religious Council, and not accorded the status of a *fatwā*, as it is not the decision of the Fatwa Committee.

This arrangement, as provided in the Administration of Muslim Law Act, would inevitably cause impediment to both the inquirer and the *fatwā* issuing authority; at the deliberation stage as part of the *iftā*' process, as well as at the stage of delivering the answer to the inquirer. During the stage of deliberation within the Fatwa Committee, such a provision may probably trigger some amount of anxiety among the committee members, as any inability to reach a unanimous decision would lead to the non-issuance of *fatwā* on a particular question, which in turn may create the perception among the community that the committee members and the Mufti as its chairman are not fully qualified in terms of their knowledge to accordingly address issues of concern of the community at large.

Apart from the question of perception, such a situation of non-issuance of any requested fatwa by the Fatwa Committee would most definitely leave its members feeling dissatisfied, as the fundamental intention of them providing their services to the committee would have naturally been to provide assistance and guidance to the Muslim community in dealing with their religious questions. This motivation to help guide the community, according to their needs and interest, is reflected in the provisions of the Administration of Muslim Law Act itself, where under Subsection 33-(2), it is mentioned that in a situation where the interest of the public requires the committee to

issue a *fatwā* according to the tenets of a school of law other than those of the Shāfi‘ī school of law, they are to place preference to the public interest, even though the Shāfi‘ī school of law is outlined by the Act as the principal school of law to be ordinarily followed in issuing *fatāwā*.

Section 32 of this Administration of Muslim Law Act (AMLA) also mentions that if in any court, which includes the Shari’ah Court constituted under this Act, any question of the Muslim law falls for decision, and such court requests the opinion of the Islamic Religious Council on the question, the question shall be referred to the Fatwa Committee which shall, for and on behalf and in the name of the Council, give its opinion thereon in accordance with the opinion of the majority of its members.<sup>293</sup>

Section 33 of the Administration of Muslim Law Act (AMLA) outlines the authorities to be followed by both the Islamic Religious Council and the Fatwa Committee, where in issuing any ruling both shall ordinarily follow the tenets of the Shāfi‘ī school of law.<sup>294</sup> In a situation where it is considered that the following of the tenets of the Shāfi‘ī school of law will be opposed to the public interest, the tenets of any of the other accepted schools of Muslim law may be followed, as may be considered appropriate. However, in any such ruling the provisions and principles to be followed shall be set out in full detail and with all necessary explanations.<sup>295</sup> In any case where the ruling is requested

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<sup>293</sup> Subsections 32(7) and 32(8) of AMLA.

<sup>294</sup> Subsection 33(1) of AMLA.

<sup>295</sup> Subsection 33(2) of AMLA.

in relation to the tenets of a particular school of Muslim law, the Islamic Religious Council or its Fatwa Committee shall give its ruling or opinion in accordance with the tenets of that particular school of Muslim law.<sup>296</sup>

#### **4.7 Conclusion**

As a conclusion to this chapter, let it be emphasized again that it is of utmost importance to encapsulate the social, political and economic elements that embody the environment that the Singapore Muslims live in and the challenges that they face, so as to comprehend the factors that the Mufti of the state and its Fatwa Committee have but to take into consideration in their *fatwā* deliberations.

Firstly, from the historical perspective, Islam has reached Singapore in particular and the Malay archipelago in general many centuries ago, and has captured the conviction of the Singapore Malays, who were the native inhabitants of the island, by ways of peaceful propagation and not by military means. They have been followers of the Shāfi‘ī school of law since the earliest days of Islam in the archipelago. Upon the arrival of the colonial rulers who brought together with them unprecedented economic progress to the island, Singapore subsequently opened up its shores to immigrants and traders from all corners of the globe, resulting in its native Malay Muslims to find

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<sup>296</sup> Subsection 33(3) of AMLA.

themselves eventually transformed into a minority group within the new social fabric of the country's population.

Secondly, in terms of the political environment that the Singapore Muslims are living in, Singapore is currently a democratic state, where general elections are held once in every four years to elect the people's representatives as members of Parliament. Singapore is also a secular state, where religion is not accorded any effective role and position in the political administration of the state, to the extent that the line of separation between religion and the politics is clearly defined through the Religious Harmony Act. However, this secular attitude of the state and the government is accommodative in nature, where the faith communities are allowed to profess their religions accordingly, and that these religions are left to progress as may be seen appropriate by their respective adherents, but without any discriminative preference given to any particular religion above the others.

Thirdly, in terms of the socio-economic standing of the Muslims in Singapore, it has been numerously mentioned in various studies, that the Singapore Muslims are still trailing behind the other communities with regards to their educational achievement, employment status, wealth accumulation, property ownership, and business proprietary, albeit some degree of progress shown in the last couple of decades. Although there has been an increase in recent years in terms of Muslim presence in professions, such as lawyers airline pilots and medical doctors, many Muslims face the possibility of being

unemployable, due to the highly competitive life culture in Singapore and its emphasis on meritocracy for vertical mobility.<sup>297</sup> The high percentage of Muslims among those involved in a number of social predicaments, such as drug abuse and divorce cases among married couples, is also indicative of the challenges that the Muslims are still facing as a community.

Fourthly, as a minority which numbers no more than seventeen per cent of the whole population, Muslims in Singapore are considerably independent and well organized in performing their religious obligations and in administering their religious affairs. The establishment of the Islamic Religious Council of Singapore, together with the formation of its Fatwa Committee and the official state appointment of a Mufti, under the provisions of the Administration of Muslim Law Act, has played a significant role in the religious life of the community, albeit the extremely minimal funding provided by the government for the administration of the act and the management of the Islamic Religious Council.

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<sup>297</sup> Hussin Mutalib, *Islam in Southeast Asia*, Institute of Southeast Asia, Singapore, 2008, pp. 51-52.

## CHAPTER FIVE

### ***FATĀWĀ* ISSUED BY THE SINGAPORE *FATWĀ* COMMITTEE**

This chapter looks at the *fatāwā* issued by the Fatwa Committee of the Islamic Religious Council of Singapore, and the application of the legal theories of *iftā'*, as discussed in the preceding chapters of this research, in these *fatāwā* issued.

An investigation on the *fatwā* files kept in the Office of the Mufti, Islamic Religious Council of Singapore were conducted. These files contain records of the *fatwā* meetings conducted since the first *Fatwā* Committee was put into inception in 1968 to the present. The areas on which the *fatwās* were issued vary from basic religious rites for individual persons, such as the daily prayers, pre-prayer ablution or *wuḍū'* and the verbal proclamation of faith, to major decisions that have a broad implication on the wider muslim community, like *fatāwā* on organ donation, *ḥalāl* food requirement, administration of *zakāh*, and the like.

As the *fatāwā* issued in this period of about four decades number in more than one thousand six hundred *fatāwā* altogether by estimation, this researcher is of the view that it is only appropriate to choose several *fatāwā* for investigation to satisfy the need of this research. As such, a criteria used by this researcher in choosing the *fatāwā* is by the breadth of their implication on the lives of the muslim community in Singapore.



Another particular focus is also given to *fatāwā* that went through changes in the decisions of the *Fatwā* Committee. This is due to the need to analyze and understand the factors that effect the changes, and the legal considerations given by the committee that have caused its members to make changes or adjustments to a number of their *fatāwā*.

### **5.1 Inheritance management and estate distribution**

As mentioned in earlier parts of this research, the preservation of man's property has been unanimously accepted by jurists as one of the essential objectives of the *sharī'ah*. Substantial sections of Islamic law have been allocated for the deliberation on rules and regulations of property ownership and transactions, which encompass properties that are not only owned or transferred during the lifetime of a person, but also those that are to be duly distributed to his heirs and beneficiaries upon his death.

In conducting an analytical investigation into the *fatāwā* issued by the Singapore Fatwa Committee, this researcher places preference to highlight foremost the examples of *fatāwā* that deal with estate management and distribution. This is due to the fact that the majority of questions posed to the Committee are on issues of such a nature. By browsing through the minutes of the Committee's meetings held in the Office of the Mufti, this researcher discovered that an average of about sixty percent of the issues deliberated by the Committee since its inception in 1968 have been on the distribution

of estates to their rightful heirs according to the Islamic law of *farā'id* or *mawārith*, the validity of *waṣiyyah* (bequest or will), the legal status of properties jointly owned by two or more persons when one of the parties passes away, and the application of tools like *hibah* (gift), *waqf* (endowment) and *nadhr* (vow) in facilitating and managing transfer of properties.

In the following section of this research, the researcher will present, first, the analysis on *fatāwā* issued with regards to the law of *farā'id* and the validity of *waṣiyyah*. This will be subsequently followed by an analysis on *fatāwā* issued on another category of instrument, termed as *nuzriah*, which is devised to facilitate the management and transfer of wealth.

#### 5.1.1 *Farā'id* and *Waṣiyyah*

The Islamic Law of Inheritance, also known as Islamic Law of Succession, is called *farā'id*. It deals with the distribution of the estate of a deceased Muslim according to certain formulae specified by the Qur'an and the Sunnah, after payment of legacies and debts are settled.

In the 3 volume compilation of selected *fatāwā* published by the Islamic Religious Council of Singapore (Muis), a total of twenty five *fatāwā* on inheritance and estate

distribution are highlighted.<sup>298</sup> Of these twenty five *fatāwā*, only two were on the issue of specific shares to be distributed to the respective heirs of a deceased person as allocated according to the law of *farā'id*. This is consistent with the investigation conducted by this researcher on the files of minutes of the Fatwa Committee meetings, where it was discovered that almost none of the questions posed to the Fatwa Committee on estate distribution and management were on issues of *farā'id*. On the contrary, most of the issues deliberated were in relation to the validity of *waṣāyā*, *nadhr*, *hibah* and *waqf*.

This researcher is of the view that this is due to two possible reasons, the first of which is that the jurisdiction provided by the Administration of Muslim Law Act (AMLA) in issues of *farā'id* was allocated to the state's Syariah Court. Sections 112 and 115 of AMLA dictates that the Syariah Court has jurisdiction over the method of distribution of a deceased person's estate among his next of kin in accordance with Islamic law.<sup>299</sup> Section 115 in particular of the said AMLA provides for the Court to issue an inheritance certificate to any person to be a beneficiary of a deceased person, upon an application made by that beneficiary. Questions on such a nature would have therefore been directed to the Syariah Court rather than to the Fatwa Committee due to the legal provision of the said AMLA.

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<sup>298</sup> Majlis Ugama Islam Singapura, *Kumpulan Fatwa (Compilation of Fatāwā)*, Majlis Ugama Islam Singapura, Singapore, vol. 3, pp. 24-38.

<sup>299</sup> Sections 112 and 115, the Administration of Muslim Law Act (AMLA), Singapore.

The second reason is the degree of certainty and clarity of the rules on *farā'id*, as availably reflected in the legal writings of the jurists, based on the injunction specifically delineated in the *Qur'ān* with considerable details.<sup>300</sup> When posed with questions of such a nature, the expected answers to which are straightforward and do not deal beyond the calculation of shares due to each beneficiary, the Syariah Court would be in due position to efficiently provide the requested calculation by issuing a Certificate of Inheritance. This is in contrast to questions on issues of *waṣiyyah*, *hibah*, *nadhr* and *waqf*, all of which are instruments devised with less rigidity in their specifics as compared to the rules of *farā'id*. These instruments allow greater flexibility for muslims to effect transfer of properties to persons or parties they wish to, albeit with certain regulations and prerequisites stipulated to act as legal guidelines. As a result, legal ambiguities exist in large number of wills made by members of the muslim community with regards to their validity according to the Islamic law, thus warrant the need to resort to the *iftā'* institution for deliberation and decision on the validity of those wills.

When occasionally there are questions on issues of *farā'id* brought up to the Fatwa Committee's attention, they are specifically on areas that still carry ambiguities and thus need deliberation and decision by the Committee. For example, one of the two *fatāwā* on *farā'id* mentioned in the compilation published is about the share of inheritance to be assigned to a deceased's mother when the deceased also left behind surviving siblings.

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<sup>300</sup> Surat al-Nisā', 4:7-13.

As the deceased's siblings are not allocated with any shares from the estate due to the existence of the deceased's father<sup>301</sup>, a question arose as to whether the deceased's mother should be allocated 1/3 or 1/6 of the estate. It is also mentioned in the question that there are two different views on this, and thus a *fatwā* is sought.

Upon deliberation, the Fatwa Committee agreed that the surviving mother should get 1/6 of the estate due to the existence of the deceased's siblings, regardless whether they too inherit or not.<sup>302</sup> The *fatwā* mentions that this is based on the Qur'anic verse “ ... for parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers (or sisters) the mother has a sixth. “. <sup>303</sup>

Another question on the rules of *farā'id* mentioned in the compilation is about the inheritance of a deceased person who was an adherent of the Shī'ah sect during his lifetime. He was survived by his wife, who was also the sole heir to his estate. The Fatwa Committee was asked on the method of distribution according to the Shī'ah school of law.

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<sup>301</sup> In the *farā'id* rules, the existence of the deceased's surviving father at the point of his death causes the shares for the deceased's siblings to be omitted. This is termed as *ḥajb*, and an heir who is not allocated any share due to the existence of another heir, is called *maḥjūb*.

<sup>302</sup> \_\_\_\_\_, *Kumpulan Fatwa 3*, Majlis Ugama Islam Singapura, 1998, pp. 33-34.

<sup>303</sup> *Sūrat al-Nisā'*, 4:11.

To this, the Fatwa Committee highlighted that the Administration of Muslim Law Act (AMLA) dictates that all *fatāwā* to be issued have to be based on legal views of the Shāfi‘ī school of law. Based on this provision in the constitution, the Committee decided that according to the Shāfi‘ī *madhhab*, the deceased’s wife was to be given 1/4 of the estate, and that the *Bayt al-Māl* was to receive the remaining 3/4 portion. The *fatwā* however proceeded further to explain that although such was the legal opinion within the Shāfi‘ī *madhhab*, in was not in conflict with the views of the Shī‘ah school of law. On this, the Committee quoted the view of Sheikh Muhammad ibn Hasan<sup>304</sup> who wrote that in the case of a deceased man who is survived only by his wife, she would inherit 1/4 of his estate and the remaining portion is to be given to the *Imām*, or *Bayt al-Māl*.<sup>305</sup>

As mentioned earlier, the majority of the *fatāwā* deliberated and issued by the Fatwa Committee in the area of inheritance and estate management are those relating to legal instruments other than *farā’id*. Many of the questions posed for the Committee’s deliberation are on the validity of *waṣāyā*, or wills. Upon investigating the *fatāwā* issued on the validity of *waṣāyā*, it is discovered that there are two prerequisites utilized by the Committee as general guidelines in determining the validity of any *waṣiyyah*. The first of these prerequisites is that any *mūṣā lahu*, or beneficiary mentioned in a will and intended to be bequeathed with a portion of the estate, must not be a *wārith* to the

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<sup>304</sup> The title of the book by this Sheikh Muhammad ibn Hasan of the Shī‘ah school of law, referred to by the Fatwā Committee, was not mentioned in the text of the *fatwā*.

<sup>305</sup> \_\_\_\_\_, *Kumpulan Fatwa 3*, Majlis Ugama Islam Singapura, 1998, pp. 30-31.

deceased, that is one who is already an heir to the deceased, and whose share of the inheritance has already been allocated by the rules of *farā'id*. The second prerequisite is that the total portion of the estate to be bequeathed to all the beneficiaries by way of *waṣiyyah* should not exceed one third (1/3) of the whole estate.

These two prerequisites to the validity of a *waṣiyyah* are widely mentioned in the writings on Islamic law by Jurists of the Shāfi'ī *madhhab*. In his *al-'Azīz Sharḥ al-Wajīz*, Al-Rāfi'ī mentioned and supported al-Ghazzālī's proposition on the first prerequisite that a *wārith* should not be bequeathed by way of *waṣiyyah*, and that if such a will is created it is considered as null and void. However, it can be allowed and the bequest considered valid if all the other *warathah* agree to allow such a bequest to stand and put into effect.<sup>306</sup> Similarly with the second prerequisite, al-Ghazzālī and al-Rāfi'ī explicitly mentioned that any bequest by way of *waṣiyyah* designed to exceed 1/3 of the whole estate is invalid, unless agreed to by all the *warathah*.<sup>307</sup>

Some examples of *fatāwā* issued by the Singapore Fatwa Committee on *waṣiyyah* with regards to these two prerequisites are as follows:

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<sup>306</sup> Al-Rāfi'ī, 'Abd al-Karīm ibn Muḥammad ibn 'Abd al-Karīm, *al-'Azīz Sharḥ al-Wajīz*, Dār al-Kutub al-'Ilmiyyah, Beirut, 1997, vol. 7, pp. 21-25. See also al-Bujayramī, Sulaymān, *Tuḥfah al-Ḥabīb 'alā Sharḥ al-Khaṭīb*, Dār al-Fikr, Beirut, 1998, vol. 3, pp. 428-430.

<sup>307</sup> Ibid., vol. 7, pp. 33-40. See also al-Bujayramī, Sulaymān, *Tuḥfah al-Ḥabīb 'alā Sharḥ al-Khaṭīb*, Dār al-Fikr, Beirut, 1998, vol. 3, pp. 423-427.

### Example 1

Question: A person made a will to bequeath 1/3 of his estate for the purpose of *waqf*. Is his *wasīyyah* valid?

Answer: The Fatwa Committee is of the view that the person, in making his will, has resolved to make a continuous act of charity. His *wasīyyah* was intended to purchase a house or a shop that would generate constant revenue. His *wasīyyah* therefore can not be changed, and must be complied with. As such, a house or a shop is to be purchased from his estate, and it shall subsequently become a permanent *waqf* as intended by the person.<sup>308</sup>

### Example 2

Question: A foreign citizen had made a will before he embraced Islam, that his properties in his country of origin were to be bequeathed to his children if he passes away. After becoming a Muslim and having a Muslim wife, the man passed away without retracting his earlier will, and his children did not embrace Islam. Is his will valid?

Answer: The Fatwa Committee agreed that the *wasīyyah* is valid and applicable, with the condition that the portion to be bequeathed does not exceed 1/3 of the whole estate.<sup>309</sup>

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<sup>308</sup> \_\_\_\_\_, *Kumpulan Fatwa 3*, Majlis Ugama Islam Singapura, Singapore, p. 24.

<sup>309</sup> *Ibid.*, p. 25.



### Example 3

Question: Is a Muslim allowed to devise a *waṣiyyah* where the beneficiary is a non-Muslims?

Answer: The Fatwa Committee decided that it is permissible for a Muslim to make a *waṣiyyah* for a non-Muslim beneficiary as long as the amount to be bequeathed does not exceed 1/3 of his whole estate.<sup>310</sup>

### Example 4

Question: A person made a *waṣiyyah*, wherein he intended to bequeath 1/5 of his estate to his adopted child. Is his *waṣiyyah* valid or otherwise?

Answer: The Fatwa Committee decided that the *waṣiyyah* is valid in view of the fact that the intended portion to be bequeathed does not exceed 1/3 of his inheritance, and also because it is not intended to be bequeathed to any of his *warathah* (legal heirs).<sup>311</sup>

### Example 5

Question: Is a *waṣiyyah* that dictates the following terms, valid?: First, that the deceased's widow was to be appointed as the trustee to administer his estate. Secondly, that 1/3 of the deceased's business shares was to be bequeathed to his widow. Thirdly, that the deceased's widow was to be given absolute authority to make her decision as to whether she would choose to continue with the business dealings of her late husband, as though she now owns the business.

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<sup>310</sup> Ibid.

<sup>311</sup> Ibid., p. 26.

Answer: This *waṣiyyah* is not valid, except the part where it is mentioned that the deceased's widow was to be appointed as the trustee to administer the estate. This is because the deceased appears to be trying to have power over his properties after his death, whereas he did not have the right to do as such. By his will, the deceased was also bequeathing a larger portion of his estate and a greater authorization to his widow, while the Prophet has asserted in a *ḥadīth* that a *waṣiyyah* to be bequeathed to a *wārith* is invalid.<sup>312</sup>

These examples and many other *fatāwā* issued by the Fatwā Committee in relation to the issue of *waṣiyyah* reflect the stand taken by the Committee to stay true to the legal opinion held by jurists of the Shāfi'ī *madhhab*, as provided by the Administration of Muslim Law Act (AMLA). The questions posed in these five examples are straightforward, and as such the two general principles mentioned in earlier paragraphs, that a bequest can not be made for the benefit of a *wārith* and that the amount should not exceed 1/3 of the whole estate, have been effectively utilized by the Committee in its decisions. Since there is no indication in these examples to suggest that special consideration is to be given in order to realize *maṣlaḥah* or to prevent *mafsadah*, the ruling held by the Shāfi'ī jurists as the most credible in the *madhhab* (*al-qawl al-mu'tamad fī al-madhhab*) was thus adopted as the basis for the *fatāwā* issued.

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<sup>312</sup> Ibid., pp. 27-28.

Having said this, it is however a fact of human life that every family is unique in term of the nature of inter-personal relationships among family members. Challenges faced by families vary from one to another, and conflicts of interests within the family units more than often instigate legal disputes and disagreements. This is especially true when it comes to issues of wealth management within families, as well as issues of property ownership and transactions.

The rules of *farā'id* as clearly outlined in the Qur'an, and the guidelines provided in the area of *waṣiyyah*, are designed to ensure equity and fairness in the distribution of estates, so as to avoid discords that are detrimental to family life and relationships. Jurists of all *madhāhib* unanimously agree with the legality of *farā'id* and *waṣiyyah* in Islamic law as instruments for estate management and distribution. Nonetheless, there can also be situations specific to certain families where the rules of *farā'id* and the general legal framework for applying *waṣiyyah* may not cause the realization of *maṣlahah* to take effect.

As an example, there may be a family of a husband and wife with a child. Supposedly the couple are already in their old age, both stricken with various illnesses, and no longer fit to work. The only property that they together own could be their house and some savings that they live on. Supposedly also, their only child, on the other hand, is an irresponsible person who was never willing to work in a proper decent job, and who repeatedly gets himself involved in countless criminal acts. In such a scenario, the old

couple would naturally have grave concerns and worries as to what would happen to their partner in the event one of them dies. If the management of their property is left unplanned, and the law of *farā'id* is to take its due course upon the death of one of the couple, their son would be given a majority share of the inheritance. The *farā'id* rules dictate that he would get 3/4 of the inheritance if his mother was to pass away, or 7/8 of the inheritance if his father was to pass away. Consequently, the welfare and livelihood of his surviving parent would be in jeopardy, for there is a great probability that the son would neglect his responsibility towards his parent.

The application of *waṣiyyah* in this particular case is also not legally feasible in Islamic law. As indicated earlier, one of the general rules in *waṣiyyah* is that it cannot be for the benefit of a *wārith* who already has a share in the inheritance allocated by the law of *farā'id*. In this particular case, if either the old man or his wife resorts to devise a *waṣiyyah* to bequeath his/her property to his/her surviving spouse upon death, the *waṣiyyah* would eventually be invalid, and the intent, futile.

This is one example from many more others, where special needs in specific contexts warrant a review of the standard legal tools normally applied, and where alternative solutions are explored, with the objective of realizing *maṣlahah*, as enjoined by the *sharī'ah*.

### 5.1.2 Nuzriah

The Islamic principles of justice, compassion and equitability are inherent in *farā'id*. There is always a need to educate Muslims to observe these principles. Nevertheless, and in addition to education, Islam also allows the introduction of other alternative methods in the distribution of property or wealth to safeguard these principles which could be compromised by the changing socio-economic landscape in order to preserve *maslahah*. Concepts like *nuzriah* provide a viable option to protect the interests, or *maṣālih*, of one's loved ones who are in dire circumstances. In fact, Islam is flexible even to the point of not adhering to the literal distribution of the shares as dictated by *farā'id* as long as the consent of all legal heirs, or *warathah*, is obtained, as previously mentioned.

Singaporean Muslims have enjoyed a good level of social and economic development over the last few decades, making them better off materially. However, in some cases, the increase in economic standing has not necessarily brought about a corresponding improvement in their social capital that is, in the bonds that exist among family members brought about by feelings of mutual trust and obligation. This becomes clearly evident when it comes to the division of the estate of a Muslim following his death. There were many instances where the legal heirs of the deceased (parents and siblings) insist on the immediate distribution of the estate according to *farā'id* without taking into account the conditions of the deceased's immediate family (wife and children).

*Nuzriah*, as it is widely referred to by the Singapore Fatwa Committee and the Muslim community of the country, is a legal instrument approved by the Fatwa Committee to provide an alternative means to the distribution of estate in accordance with the Shāfi‘ī school of law. The term *nuzriah* originates from the Arabic word *nadhr*<sup>313</sup> (vow), a term rooted in the Qur’an and has legal basis in Islam.<sup>314</sup> *Nadhr* is a widely recognized principle in Islamic jurisprudence and a subject matter within Islamic legal corpus. However, *nuzriah*, is not as widely used nor discussed. The origins of the concept can be traced to the works of later Shāfi‘ī jurists such as al-Nawawī and al-Haytamī, although it appears that the term itself was not used except by the Muftī of *Ḥaḍramawt*, Sayyid ‘Abd al-Raḥmān Bā‘alawī, in his compilation entitled *Bughyat al-Mustarshidīn*, and Muḥammad ibn Aḥmad al-Shāṭirī in his *al-Yāqūt al-Nafīs*. *Nuzriah* has also been a practice of some segments of the Shāfi‘ī school of law, notably in *Ḥaḍramawt*, Yemen. The use of *nuzriah* as a legal instrument in other Muslim jurisdictions is currently not known.

*Nuzriah* is a form of *nadhr* that serves the need of some Muslims to transfer wealth before death due to some dire circumstances. The Fatwa Committee has made a ruling to accept *nuzriah* on the authority of the position of a Shāfi‘ī jurist, Ibn Ḥajr al-Haytamī. According to al-Haytamī, the implementation of *nuzriah* can be deferred to a

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<sup>313</sup> As the Arabic root word is *nadhr*, its derivative should then be *nudhriyyah*. However, as the term widely and officially used by the Fatwa Committee and the Singapore Muslim community is *nuzriah*, this researcher opts to retain the mention of *nuzriah* rather than *nudhriyyah*.

<sup>314</sup> See Sūrat al-Baqarah, 2:270; Sūrat al-Ḥajj, 22:29; and Sūrat al-Insān, 76:7.

date specified by the *nādhir* (vower), which can be anytime between the date the *nuzriah* is made, to a maximum of three days before death due to sickness or an hour before sudden death.<sup>315</sup>

In the compilation of selected *fatāwā* published by the Islamic Religious Council of Singapore, three *fatāwā* on *nuzriah* were showcased. The first was about a person who made a will instructing that his estate was to be distributed according to the Shāfi‘ī school of law. He also made a *nuzriah* indicating that the portion of his estate that he had earlier inherited from his late father was to be given by way of *nadhr* to all his nephews and nieces on equal shares. The Fatwa Committee was asked whether the will and the *nuzriah* were valid. To this the Committee decided that both the will and the *nuzriah* were valid according to the Shafi‘ī school of law.<sup>316</sup>

The second case was about a person who bought a 4-room Housing Development Board (HDB)<sup>317</sup> flat using his parents’ names. The reason why the house was purchased under his parents’ names is that he had already owned another HDB flat, and it has always been a HDB policy that a person is restricted from owning two flats at the same time. Apparently the flat was intended only as a place for his parents to stay, but not as his gift to them. He was worried that in the event of his parents’ death, his siblings would

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<sup>315</sup> Al-Haytamī, Shihāb al-Dīn Aḥmad ibn Muḥammad ibn Ḥajar, *Tuḥfah al-Muḥtāj bi Sharḥ al-Minhāj*, Dār Sādir, Cairo, n.d., vol. 10, p. 77.

<sup>316</sup> \_\_\_\_\_, *Kumpulan Fatwa 3*, Majlis Ugama Islam Singapura, Singapore, 1998, p. 28.

<sup>317</sup> The Housing Development Board (HDB) is a statutory board formed by the Singapore Government with the task of providing quality but affordable public housing for the general public. About 80% of Singaporeans reside in HDB flats.

demand their share of inheritance from the said flat. His question posed to the Fatwa Committee was thus on how to devise a will, or *waṣiyyah*, that would effect in him being the legal owner of the flat in accordance with Islamic law. In its *fatwā* issued on this, the Committee expressed its view that the person can realize his intention by way of making a letter of *nuzriah*.<sup>318</sup>

The third *fatwā* was about a widow who inherited property from the estate of her late husband. She had the intention of giving away the inheritance to her two daughters, and proceeded to make a *waṣiyyah* to that effect. The Fatwa Committee was then asked on how to make the *waṣiyyah* valid. The Committee issued a brief *fatwā* suggesting that the *waṣiyyah* can be valid if the method of *nuzriah* is employed. By utilizing *nuzriah*, the property is considered to have been given to her two daughters during her lifetime.<sup>319</sup>

These three *fatāwā* on *nuzriah* are considerably brief. There is no indication of how a *nuzriah* is defined, what does it entail, and the procedures to be put in place for it to operate and be legally valid. There is also no illustration of how the text of the *nuzriah* referred to in these three *fatāwā* was, or should be, articulated. A further investigation into the files of minutes of the Fatwa Committee meetings, however, revealed that generally a *nuzriah* is a vow made by a person to transfer the ownership of his property/properties to an intended party, and that the transfer of ownership is to take

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<sup>318</sup> \_\_\_\_\_, *Kumpulan Fatwa 3*, Majlis Ugama Islam Singapura, Singapore, 1998, p. 28.

<sup>319</sup> \_\_\_\_\_, *Kumpulan Fatwa 3*, Majlis Ugama Islam Singapura, Singapore, 1998, p. 29.



place three days before the giver's death if it is due to illness, or one hour before his death if it is sudden.

This researcher is of the view that although the Fatwa Committee has approved of *nuzriah*, there are several difficulties that may arise from its use. The peculiar condition of its implementation before death raises the question of the exact timing of the transfer of ownership of the avowed property. Furthermore, the stipulation of the peculiar condition of implementation such as “3 days before death due to sickness or an hour before sudden death” raises the spectre of a fiction or textual anachronism being created in order to make the *nuzriah* a “before death” transaction. Moreover, the stated condition can be seen as absurd since no one could predict with any degree of certainty when the hour of death would take place.

It is therefore not a position of consensus among jurists that *nuzriah* is a valid and recognized legal instrument in Islam. In fact, *nuzriah* is seen in this context as a tool to circumvent *farā'id* which has been laid down in the main sources of Islamic law; the Qur'an and the *sunnah*. As such, *nuzriah* which is made to operate just before death, is seen to be in conflict with the principles and spirit of *farā'id*.

Apparently, *nuzriah* is a contentious and controversial tool to be applied for transfer of property. However, the issue of adopting a weaker legal opinion for the purpose of *iftā'* in certain cases with the objective of realizing *maṣlahah* and avoiding *mafsadah* has

been thoroughly addressed in earlier chapters of this research. This researcher has pointed out that the general reservation among jurists of the Shāfi‘ī *madhhab* towards the application of *istiḥsān*, *istiṣlāḥ* and *maṣāliḥ mursalah* was more in the realm of *uṣūl al-fiqh*, the purpose of which is to assist in the process of deducing rulings and legal opinions from the primary texts. The reservation comes about also when the consideration of *maṣlaḥah* is excessively and liberally utilized even in general situations. In the realm of *iftā’*, however, the propositions offered by the jurists of the Shāfi‘ī *madhhab*, as reflected in their writings, highlighted the fact that the consideration of *maṣlaḥah* is to be given prominence in the process of *tanzīl al-ḥukm* for specific cases with special needs and contexts.

The application of *nuzriah*, albeit with all the legal controversies and complications surrounding it, is a tool accepted by some jurists, among whom is Ibn Ḥajr al-Haytamī. It is thus an acceptable practice for the Fatwa Committee, and for any *mufī*, to issue certain *fatāwā* allowing its application for certain individuals or groups within the Muslim community, when strict observance of the rules of *farā’id* and the prerequisites of *waṣiyyah* is likely to cause greater harm.

## **5.2 Joint Tenancy in Flat Ownership**

### **5.2.1 Background of problem**

Singapore is a country which aims to be the hub for open trading, international investments and global finances. It is no surprise that many new schemes and plans are introduced to remain on par with the daily evolving trends and needs.

Similarly, new policies involving financial management and transactions are applied in helping to safeguard the interests of the public and to ensure better implementation of other transactions. Saving funds for working adults are governed in such a design that allows them to make purchases on indispensable necessities like housing, transport and medical facilities, while at the same time still ensure enough left to be enjoyed after retirement when they need it more.

In line with the applications outlined above is the procedure of purchasing a house from the Housing and Development Board (HDB) of Singapore. An applicant can purchase a flat as a sole owner of the flat. If there are 2 or more owners, they can own the HDB flat either as joint tenants or tenants-in-common. A maximum of four owners are allowed for each flat.

The second mode of purchase is the topic of discussion at present. A joint-tenancy is a form of ownership where all co-owners have equal interest in the flat, regardless of the individual owner's contribution to buy the flat. In joint-tenancy, there is a right of

survivorship. This means that upon the death of a joint-tenant, his interest in the flat will automatically be passed to the remaining co-owner(s), regardless of whether the deceased joint-tenant has left behind a Will.<sup>320</sup>

In understanding this contract from the civil law, this contract represents a shared ownership of the property between two or more co-owners. The contract does not denote the shares owned by the co-owners, and it does not take into account the contributions made by each of the co-owners. All co-owners have equal interest in the flat. Any transaction thereof with regards to this property requires the consent and initials of each of the co-owners.

The point of concern with this type of contract from the *sharī'ah* perspective is the right of survivorship upon the demise of one of the co-owners. Under joint-tenancy, if one of the flat owners passes away, the deceased joint-tenant's share or interest in the flat will be passed on to the surviving joint-tenant(s). For example: a husband and wife (both above 21 years old) are holding the flat under joint-tenancy. If the husband passes away, the surviving wife can take over the flat as the sole lessee if she is a Singapore Citizen or a Singapore Permanent Resident. If the lease had already been issued for the flat, a legal document known as the Notice of Death instrument will have to be prepared.

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<sup>320</sup> Housing Development Board. Singapore. Extracted on 12 May 2007.  
<http://www.hdb.gov.sg/4825703800256607.nsf/0/6233D1D7C31EDF9448257070001E17F6?Open>

The above means that, according to HDB rules, once a co-owner dies, full ownership of the property will be granted to the surviving co-owner automatically. No further legal proceeding which involves any court of law is needed. Even if the deceased has left behind a Will wherein the flat is included, the inclusion of the flat as part of the Will is considered void. It is different than tenancy-in-common, whereby each co-owner holds a separate and definite share in the flat. However, all the co-owners are entitled to the enjoyment of the whole flat regardless of their share in the property. There is no right of survivorship in tenancy-in-common. The deceased's interest in the flat does not pass on automatically to the remaining co-owner(s). Upon the death of a tenant-in-common, the deceased's interest in the flat will be distributed according to his Will (if any), or according to the provisions of the Intestate Succession Act.<sup>321</sup> In the case of Muslims, it is provisioned under AMLA Clause 106.<sup>322</sup>

Viewing the Joint Tenancy contract in terms of the ownership rights, we can deduce that the property belongs to the co-owners, and each has equal rights in it. This means that if we were to indicate this right in percentage, owner A and owner B both have 50% ownership of the property. Only after the death of either one of them – according to HDB rules – will the surviving owner obtain 100% ownership of the property. This signifies that prior to the demise, half of the property still belongs to the deceased.

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<sup>321</sup> \_\_\_\_, "Related information – tenancy-in-common", Housing Development Board of Singapore, <http://www.hdb.gov.sg/fi10/fi10206p.nsf/WPDis/Changing%20Of%20Owners%20And%20OccupiersRelated%20Information%20-%20Tenancy-in-Common?OpenDocument>. Accessed 2 January 2008.

<sup>322</sup> Republic of Singapore, *Administration of Muslim Law Act*, clause 106. –(1) In the case of any Muslim person domiciled in Singapore dying intestate, the estate and effects shall be distributed according to the Muslim law as modified, where applicable, by Malay custom.

The big question now is, should this half be included in the inheritance left by the deceased upon his death, which should be spent accordingly for the burial needs and ceremony, paying his debts, carrying out his bequests, and afterwards distributed to his legal heirs? Or does his agreement to undertake the purchasing of the house via Joint Tenancy indicate his intention to leave the house for the co-owner (in many cases the spouse or children) and not as part of the distributable inheritance?

#### 5.2.2 Fatwā issued on the problem

With regards to the matter of the joint Tenancy contract administered by the HDB, two questions so far have been submitted to the Fatwa Committee and addressed.

1. First *fatwā* issued in 1997

“Question 1. Does a flat – which was purchased by a man with his now divorced wife by Joint Tenancy contract - become full property of the ex-wife upon the demise of the man (her ex-husband)?

Answer: After conducting a research on the position of the Joint Tenancy contract, the Fatwa Committee opines that the ex-wife of the deceased does not have full ownership of the flat. The Fatwa Committee is of the view that she is only entitled to her share of half of the value of the flat.

This share is acquired by being the co-owner of the flat in accordance with the joint tenancy contract.

The remaining half of the flat value is allocated to the legal heirs of the deceased. The ex-wife has no right to this remaining share because they have been divorced prior to the deceased's death. Therefore she is not entitled to any portion of it as she no longer had any blood or family tie with the deceased at the time of his demise.”<sup>323</sup>

2. Second *fatwā* issued in 1997

“Question 2: A married couple purchased a HDB flat with both their names as joint tenants. According to HD law, upon demise of either one of the co-owners, full ownership of the flat is given to the succeeding co-owner. What is the Islamic ruling in this matter?

Answer: The Fatwa Committee has decided that a house left by a deceased, which was purchased by means of a Joint Tenancy contract, does not become fully owned by the surviving co-owner. The share belonging to the deceased must be appraised according to the value, then distributed to the legal heirs according to *farā'id* rules.”<sup>324</sup>

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<sup>323</sup> \_\_\_\_\_, *Kumpulan Fatwa 3*, Majlis Ugama Islam Singapura, Singapore, 1998, p. 38.

<sup>324</sup> *Ibid.*, p. 38.

### 5.2.3 Evaluation of *fatwā*

The Qur'an provides a general guideline on the general concept of contracts in Islam, highlighted in the verse (O you who believe! Fulfill your undertakings).<sup>325</sup> Any agreement or contract undertaken by a Muslim must be fulfilled and carried out, with the condition that these contracts are certain and ratified, and do not contradict with established principles in Islamic contracts.

To determine the certainty of this contract, consent and clarity of the contract have to be analyzed. The fact that both owners agree to this contract, wherein the automatic transfer after death is clearly highlighted and is legally bound, shows their knowledge of and consent to the transfer. Otherwise, the co-owners will not have opted for such a purchase scheme, as there are other means of purchasing available to them.

However, the issue of clarity of the contract cannot be established. According to the rules of wealth transfer in Islam, all means of transfer of monetary and property rights<sup>326</sup> have to be made distinctly and unambiguously, to avoid disputes due to lack of clarity. The ambiguity in this contract lies in the determining type of contract under Islamic commercial law the joint-tenancy contract falls into. This is important, because

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<sup>325</sup> Sūrat al-Mā'idah, 5:1.

<sup>326</sup> Transfer of wealth can be made during the lifetime of a person, or after his death. While alive, transfers can be made via *hibah* (gift), *ṣadaqah* (charity), *zakāt* and *waqf* (endowment/charitable bequest). Transfers after death include *waṣiyyah* (will) and *irṭh* (inheritance according to *farā'id*). Transactions such as *hibah*, *waqf* and *waṣiyyah* has to be elucidated clearly, either verbally or in writing. For more detailed reading, see Zuhaili, Wahbah, *Financial Transactions in Islamic Jurisprudence*, trans. El-Gamal, Mahmoud, Dār al-Fikr, Damascus, 2003.



only by ascertaining the type of contract it is categorized can we determine what the contract entails.

i. Joint tenancy and sharikat al-milk (joint ownership)

Some may venture to relate this contract to joint ownership, or association in property.

In Islamic commercial law, joint ownership (*sharikat al-milk*) is of two types:

1. involuntary partnership whence no action of approval from either partner is needed. This is illustrated in the form of legal heirs who share in the inheritance of a property.
2. voluntary partnership, in the form of joint purchase, or joint receivership of gift or bequest.

The latter is undoubtedly similar to the Joint Tenancy. In purview of the authority of transaction sanctioned to each of the sharing owners from the *Sharī'ah* stand, however, both types bears the same ruling. That is, none of the parties has the right to deal in the other's share.<sup>327</sup> Hence, if we were to view Joint-Tenancy in the same light as *sharikat al-milk*, a co-owner has no right or interest in the other co-owner's share of the property.

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<sup>327</sup> Sarakhsī, Muḥammad ibn Aḥmad ibn Abī Sahl, *Kitāb al-Mabsūt*, Dār al-Kutub al-'Ilmiyyah, \_\_\_\_, 2001, vol. 11, p. 162.

## ii. Joint Tenancy and hibah (gift)

The closest form of valid transaction we can relate the Joint Tenancy to is the *hibah* (gift). In this case, the condition of *ṣīghah* (expression) is not fulfilled. Referring to earlier Islamic legal literature, this condition is required according to all the schools of *fiqh*; for the *hibah* to be stated in verbal form by the *wāhib* (giver). However, consent of receipt from the recipient of the gift is not required. The only point of dispute among the scholars is the means of this expression, whether to be made in the direct or indirect form. This *ṣīghah* or verbal announcement of *hibah* can be dismissed if there is physical transfer of the gift, *ta'āṭī*. *Ta'āṭī* is valid as long as there is delivery of possession to the intended recipient, with the knowledge and permission of the giver, and there has been established understanding between the two parties that the giver intends it as a *hibah*.<sup>328</sup> *Hibah* also obliges the transfer of ownership from the giver to the recipient from the moment the expression of *hibah* is made.<sup>329</sup>

The above-mentioned criteria are not found in Joint Tenancy in its full clarity. Had the deceased owner made a written or verbal testimony of giving full ownership of the house to the joint-tenant(s) during his life, the matter can be acted upon as such. Those who have this intention should opt for transfer of flat ownership instead. This, which is done during the life of the deceased will prevent any ambiguity. Transfer of flat ownership means change of flat ownership between family members without monetary consideration by way of gift on grounds of love and affection. Generally, the procedure

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<sup>328</sup> Zuḥaylī, Wahbah, *al-Fiqh al-Islāmī wa Adillatuh*, Dār al-Fikr, Damascus, 1989, vol. 5, p. 21.

<sup>329</sup> *Ibid.*, vol. 5, p. 21.

consists of determining the proposed owner's eligibility to take over the flat, and their eligibility to obtain and financing of the monthly installment.<sup>330</sup> The eligibility criteria include having family relation with the original owner, and is 21 years and above. Assessment of income is not required if the proposed owner is an original occupier.<sup>331</sup> Eligibility of concessionary loan from HDB may also be granted, for those whose gross monthly household income is less than \$8,000.<sup>332</sup> Since the intended beneficiaries of this transfer scheme are family members, leniency is practiced in transfers for family members.

The Joint Tenancy contract, therefore, does not fully serve the purpose of giving the interest of the property to the co-owner, since transfer of ownership better accommodates this purpose. Hence it is inaccurate to conclude that the deceased has intended the house to be given to the co-owner. The HDB rule of automatic survivorship, although binding by law, does not mitigate the *Shari'ah* rulings which should be carried out by a practising Muslim. Hence the result remains that Joint Tenancy is not a form of *hibah* and the deceased's share of property still remains as his

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<sup>330</sup> \_\_\_\_\_, "Policies – Transfer of Flat Ownership", Housing Development Board of Singapore, <<http://www.hdb.gov.sg/fi10/fi10206p.nsf/WPDis/Changing%20Of%20Owners%20And%20OccupiersPolicies%20-%20Transfer%20of%20Flat%20Ownership?OpenDocument>> (accessed 2 January 2008).

<sup>331</sup> \_\_\_\_\_, "Related Information – Eligibility Criteria", Housing Development Board, Singapore, <<http://www.hdb.gov.sg/fi10/fi10206p.nsf/WPDis/Changing%20Of%20Owners%20And%20OccupiersRelated%20Information%20-%20Eligibility%20Criteria?OpenDocument>> (accessed 2 January 2008).

<sup>332</sup> \_\_\_\_\_, "Related Information – Eligibility for HDB Loan", Housing Development Board, Singapore, <<http://www.hdb.gov.sg/fi10/fi10206p.nsf/WPDis/Changing%20Of%20Owners%20And%20OccupiersRelated%20Information%20-%20Eligibility%20for%20HDB%20Loan?OpenDocument>> (accessed 2 January 2008).

possession upon his death, and therefore has to be treated as inheritance to be disbursed accordingly.

### iii. Joint Tenancy and *Maṣlahah*

A book, titled “Joint Tenancy in Muslim Law”<sup>333</sup> has been published by a Singaporean who has had experience in wealth and estate management. In the book, he contested the *fatāwā* issued pertaining the matter, and argues that Joint Tenancy is allowed in Islam and the property belongs fully to the surviving co-owner after the demise of the other. This argument is on the basis of *maṣlahah*, and the author brought a sample case of a house purchased on Joint Tenancy by a married couple. Detail of the case is as follows:

A married couple (Kassim and Zaiton) purchased a HDB flat and named both of them as co-owners through Joint-Tenancy. Kassim, as the only breadwinner of the family, solely paid for the monthly installments of the flat. In addition to that, he took a Home Protection Scheme (HPS), a housing insurance plan which will settle any remaining portion of the home loan should anything happen to Kassim. The husband then passed away, surviving his parents, wife, a son, a daughter and a foster-son. In accordance to the rules of HDB, after Kassim’s death the house was transferred to Zaiton, and the home loan was cleared by the HPS. A Certificate of Inheritance<sup>334</sup> was released by the

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<sup>333</sup> Sadali Rasban, *Joint Tenancy in Muslim Law*, HTH Advisory Services, Singapore, 2006.

<sup>334</sup> In Singapore, a Certificate of Inheritance is issued by the Shariah Court by request, to determine the shares of the legal heirs according to the *farā’iḍ* rules. This procedure is provisioned by the AMLA as

Shariah Court, allocating the portions of the heirs according to the *farā'id* rules. The deceased's total inheritance was to be divided into 72 shares.

Several months later, the parents of the deceased came and made claims on the deceased's estate, including the house which was then already legally owned by Zaiton. After consulting two religious bodies, she was advised to sell the house and share it with the parents and two children according to *farā'id*. As a result, she received 12.5% from the sale of the house, the deceased's parents received 16.7% each, and the rest went to the daughter (18%) and son (36.1%).<sup>335</sup>

The focal point which the author aimed to highlight in his book is the difficulties faced by the wife, after having to sell off the house. This is seen as more unreasonable since the house was supposed to belong to her fully. The ownership transfer has already been made by the HDB in concordance with the Joint Tenancy contract undertaken by the deceased. The author based his argument on preserving the *maṣlahah* of the widow and her children who were left with no shelter, and the fact that this alleged act of injustice is in contrast with the objectives of the *Sharī'ah*. He also ventured to relate the Joint Tenancy contract to the concept of *ruqbā*.

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follows: 109.(1) If in the course of any proceedings related to the administration or distribution of the estate of a deceased person whose estate is to be distributed according to the Muslim law any court or authority shall be under the duty of determining the persons entitled to share in such estate or the shares to which such persons are respectively entitled, the Shariah Court may, on a request by such court or authority or on the application of any person claiming to be a beneficiary and on payment of the prescribed fee, certify upon any set of facts its opinion as to the persons who are, assuming such facts, whether as found or hypothetical, entitled to share in such estate and as to the shares to which they are respectively entitled. *Administration of Muslim Law Act*.

<sup>335</sup> Sadali Rasban, *Joint Tenancy in Muslim Law*, HTH Advisory Services, Singapore, 2006, pp. 1-5.

What the researcher would first like to address in answer to the claims made by the author in his book is the division of the sale of the house. Rightfully, if we maintain that half of the property belongs to the deceased's estate, only 50% of the flat's value needs to be distributed among the legal heirs, the other half remains the right of the wife. This means that, on top of the 12.5% allocated to her from the *farā'id*, she also gets to keep 50% of the sale of the house. Since she was entrusted as the trustee for the shares of her two children, the accumulated percentage from the total sale of the house belonging to her and her two children is 83.3%.<sup>336</sup> Thus the deceased's parents are only entitled to 8.35% each from the total sale of the flat. Although this may seem to be a large amount to a housewife who is not working, it does not necessarily require her to sell the house. In fact, she can withdraw the same amount of money from her late husband's other inheritance which are in the form of cash, to be given to the parents. The author's claim that the ruling issued by the Fatwa Committee was the main reason that caused Zaiton and her children to lose their shelter, is seen to be without strong basis, and exaggerating.

It is undeniable that HDB flats owned by Joint Tenancy have caused many family disputes. However, the alleged injustice falls upon not only the co-owner of the flat, but also on the rightful legal heirs who are denied their share from the deceased's portion of the flat. The latter is highlighted in some cases brought to light by reports made in the

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<sup>336</sup> 83.3% is accumulated from the 50% owned by Zaiton as a joint tenant, plus 12.5% of the remaining half as Ziton's portion of the inheritance (6.25%), plus 18% of the remaining half as the daughter's portion of the inheritance (9%), plus 36.1% of the remaining half as the son's portion of the inheritance (18.05%).

local newspaper. It was reported that there are more cases of Muslims who ignore following *farā'id* rules to distribute inheritance. Lawyers working in many such cases revealed that many choose to apply civil law in cases wherein civil law may overrule *farā'id*. These instances include rules related to HDB, Central Provision Funds (CPF) and shared accounts. An example is the HDB rule concerning ownership transfer after the death of a co-owner in joint-tenancy. According to *farā'id*, the deceased share has to be distributed. However, if such a case is brought to court, no law can force the co-owner to give up his full right of the house.<sup>337</sup>

A case brought to illustrate this is a flat purchased by a Mahadi Said. The flat was paid for by cash, and named after him and one of his sons Abdul Rahman. Mahadi passed away in 1980. on 17<sup>th</sup> August 1996, the son, Abdul Rahman decided to sell the flat and distribute his father's share to his 6 sisters according to *farā'id*. 2 days later, he changed his mind and stopped the bank from issuing the cheques to his sisters, except to one of them, Anisah. The other 5 sisters brought the matter to court. However, the subordinate court ruled that under the HDB law, Abdul Rahman is automatically the full owner of the house after his father's death. Therefore, if he doesn't wish any portion of it to be distributed, the court is in no position to take any action against him or force him to abide by *farā'id* rules.<sup>338</sup>

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<sup>337</sup> Mazlena A. Mazlan, "Kes abai hukum faraid bertambah" (Cases of disregarding *farā'id* rules in the rise), p. 3, *Berita Harian*, 5 August 2000.

<sup>338</sup> Mazlena A. Mazlan, "Mahkamah sivil tak boleh paksa hukum faraid dipatuhi" (Civil courts not in position to compel *farā'id* to be complied with), p. 3, *Berita Harian*, 5 August 2000.

Another case was of a married couple Munirah and Mohamad Yusof. The couple, who had 6 children, divorced in 1989. Following the divorce, she received \$600 alimony per month for the expenses of two of their children who were still schooling. The husband then remarried to a Syarifa, but died in 1997. With no alimony support to finance the children who were then still attending Secondary and Tertiary education, Munirah worked as a cleaner with only an income of \$600 per month, which was not enough. Having the interests of her children at heart, she made a claim addressed to Syarifa on her children's share from the deceased's inheritance.

Munirah's lawyer estimated the deceased's inheritance to amount to more than half a million Singapore dollars. It includes the 4-room flat co-owned with Syarifa. A *fatwā* was issued in 1999 stating that the above mentioned estates, including 50% of the co-owned flat was to be distributed accordingly between Syarifa, her three children and the deceased's other 6 children. However, Syarifa refused to abide by the *fatwā*.<sup>339</sup>

In the above cases, both parties – the co-owner in the first illustration and the legal heirs in the last two cases – seem to be denied of their rights and their interests (*maṣlaḥah*) revoked. Hence, the claim of the author that giving joint-tenancy full ownership reserves *maṣlaḥah* and fulfills the objectives of the shariah is incorrect. In these cases, the interests vary from case to case, and we cannot determine which party is more deserving and more in need of the share. Therefore generalizing the ruling as proposed

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<sup>339</sup> Mazlena A. Mazlan, "Enggan agih harta walau fatwa dikeluarkan" (Refused to distribute inheritance although *fatwā* had been issued), p. 3, *Berita Harian*, 5 August 2000.



by the author is detrimental to the sanctity of the *Sharī'ah*. The key to this issue goes back to the nature of the contract undertaken.

iv. Joint Tenancy and *ruqbā* (conditional gift)

The argument that the joint tenancy contract is similar to the concept of *ruqbā* in Islamic commercial law is also subject to scrutiny. In this matter, it is pertinent to refer to the original sources of earlier Shāfi'ī literature wherein this concept was first expounded. *Ruqbā* is described as the giver (*wāhib*) saying the following: “This property is yours by *ruqbā*; such that if you die before me the property is returned to me, and if I die before you the property belongs to you”.<sup>340</sup> The word *ruqbā* originates from the verb form ra-qa-ba which bears the meaning of observing and monitoring. Hence this concept requires both parties to observe which of them dies first, as the ownership of the property depends on it.

With regards to the views of the jurists on *ruqbā*, the later view from the Shāfi'ī school of law is to accept it as a valid *hibah* – provided that there has been delivery of possession (*qabḍ*) – but the condition (observance of death) is considered as void. In other words, if the *wāhib* pronounces it as such, the property has become a gift to the recipient and is fully owned by him/her. The specified condition does not carry any

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<sup>340</sup> Al-Nawawī, Abū Zakariyyā Yaḥyā ibn Sharaf, *Rawḍat al-Tālibīn*, ed. ‘Ādil Aḥmad ‘Abd al-Mawjūd, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1992, vol. 4, p. 433.

influence on the transaction.<sup>341</sup> The jurists of the Ḥanbalī *madhhab*, and Abū Yūsuf from the Ḥanafī *madhhab* are also of this opinion.<sup>342</sup> This view is also transmitted from Ibn ‘Umar, Ibn ‘Abbās, ‘Alī, Shurayḥ, Mujāhid, Ṭāwūs and Sufyān al-Thawrī.<sup>343</sup> Abū Ḥanīfah and Muḥammad from the Ḥanafī *madhhab* however, differ slightly from their counterparts in this issue, and view the transaction and the gift as invalid totally.<sup>344</sup> According to them, this form of *hibah*, best described as contingent gift, is invalid because it is conditional on a contingency or possibility which may or may not occur. It implies that no present interest exists and that whether such right or interest will ever exist depends upon a future uncertain event. Hence, this transaction is seen as in conflict with the principles in property, therefore the whole transaction is void.<sup>345</sup> Nonetheless, they consider *ruqbā* as a valid ‘*āriah*, another transaction which means: “granting the right of usufruct/benefit from an item with no monetary charges”.<sup>346</sup> With regards to the ownership of the item, it still belongs to the first owner (giver) but the

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<sup>341</sup> Ibid., vol. 4, p. 434.

<sup>342</sup> Zuḥaylī, Wabāh, *al-Fiqh al-Islāmī wa Adillatuh*, vol. 5, pp. 9-10; Sarakhsī, *al-Mabsūt*, vol. 12, pp. 104-105.

<sup>343</sup> Mālik ibn Anas, *al-Muwatta’*, ed. al-Nadawī, Taqiyyuddīn, Dār al-Qalam, Damascus, 1992, vol. 3, p. 233.

<sup>344</sup> Sarakhsī, *al-Mabsūt*, vol. 6, p.184. The reason for the differing of opinions is the many *aḥādīth* narrated with regards to *ruqbā*. Some of the narrations allow, while some disallow. This calls for an effort to reach to a middle ground between these two views. What can be concluded is that in most of the narrations *ruqbā* is linked to a similar transaction, ‘*umrā*. This transaction can be best described as a temporary gift, whereby upon the death of the recipient, it should be returned to the giver. The scholars are of the opinion that in this transaction, the *hibah* is valid but the condition is void. Likewise with *ruqbā*. However, those from the second camp argue the dissimilarity between the two, in that *ruqbā* ownership is not transferred during the transaction but is dependant on a future uncertain stipulation. In contrary to ‘*umrā* wherein the transfer was made complete.

<sup>345</sup> Al-Kāsānī, Abū Bakr ibn Mas’ūd, *Badāi’ al-Ṣanāi’ fī Tartīb al-Sharāi’*, 3<sup>rd</sup> ed., Dār Iḥyā’ al-Turāth al-‘Arabī, Beirut, 2000, vol. 5, p. 165.

<sup>346</sup> Sarakhsī, *al-Mabsūt*, vol. 11, p. 142.

second party can benefit from it. The owner, however, can withdraw the grant and take the property at any time he wishes.

In essence, we can verify the difference between the concept of *ruqbā* and joint tenancy. Nothing stated in the contract indicates the flat as a gift from either party. Only aspects of “equal interest in the flat” and “right of survivorship” are given emphasis. Hence, the contest of comparing the two is inaccurate (*qiyās ma‘a al-fāriq*).

v. Joint tenancy ruling in Bombay, India

The final argument put forth by the author was the Bombay Court ruling that the Joint Tenancy is not in conflict with the *Sharī‘ah*. Going back to the source of reference, the literature written by an Asaf Fyzee reads:

English law, as we have seen, has had a considerable influence in modifying certain applications – if not principles – of Muhammadan law in India ... The question arises whether, by gift or otherwise, a tenancy-in-common and a joint-tenancy can be created. It has been held in Bombay that where a gift is made to two persons jointly, without specifying their individual shares, the donors took as tenants-in common, for the court leans heavily against joint-tenancy. But in another case, not involving a gift, the same High Court has laid down that there is nothing in Muhammadan law against the creation of a joint-tenancy, with benefit of survivorship. It would, therefore, seem that both a tenancy-in-common and a joint-tenancy can be created by appropriate means.<sup>347</sup>

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<sup>347</sup> Fyzee, Asaf A. A., *Outlines of Muhammadan Law*, Oxford University Press, Oxford, 4<sup>th</sup> ed., 1974, pp. 227-228.

If we study the above text closely, it does not include a detailed account of the grounds on which tenancy-in-common and joint-tenancy are held as permissible. Secondly, it can be noticed that the High Court has held two different positions in the same matter, one in favour of joint-tenancy and another against. This bears in mind the establishment of different rulings according to the different situations it is subject to. Since two cases pertaining the same matter in the same Court can differ in the verdict, more so the difference in treatment towards the issue in a different country and environment which is governed by a different set of rules and serves interests unlike those in Bombay. It is also mentioned that the Islamic law in India is heavily influenced by English Law. The same cannot be said of Singapore. Hence, comparing the Bombay ruling to the practice in Singapore opposes the underlying principle of change of ruling due to the change of place.

Above all, let us not forget the Qur'ānic verses which have systematically and clearly outlined the *farā'id* rules, with the main objective of avoiding exactly these kinds of disputes. (*Your parents or your children: You know not which of them is nearer to you in usefulness. It is an injunction from God. Lo! God is Knower, Wise*)<sup>348</sup> The Lawmaker, all Knowing of His servants, knows of the clouding evil that money can cause, hence the need to set such rules. Basing the distribution of inheritance to mere reason will unequivocally create conflict among the legal heirs, and indefinitely cause family rifts.

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<sup>348</sup> Sūrat al-Nisā', 4:11

#### 5.2.4 Conclusion

The researcher is in favour of the *fatwā* issued by the Fatwa Committee, as it is incontestable – as has been expounded extensively – that half of the house belongs to the deceased at the time of his death, and the Joint-Tenancy contract is void. This reinstates what was written in the previous chapter that any rule of law – either customary or legal – which contradicts a *Sharī‘ah* rule, comes secondary and the *Sharī‘ah* ruling must be given precedence. Especially in this case, wherein it is associated with the privileges of other human beings and may lead to denying others their due right.

However, the researcher does not deny that the Fatwa Committee, as the governing body entrusted with providing guidelines to Muslims of the country, should have provided a more concise and comprehensive explanation on the position of joint-tenancy in the *Sharī‘ah*. This is to provide a better understanding of the issue to the community. The *fatwā* issued concerning the matter is too short, hence do not fully address the concerns that many have in their minds. In today’s context when there is an increasingly thin line between the permissible and the prohibited, Muslims in Singapore are more aware of each of their daily transactions in ensuring it is in line with the *Sharī‘ah*.<sup>349</sup> At the same time, Muslims in Singapore, due to the increasing education

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<sup>349</sup> In Singapore, it can be said that Muslims are more conscious with adhering to religious demands in recent times as compared to the past. A good example is in ensuring the consumption of *ḥalāl* food. As Muslims become more concerned that the food products – prepared food in restaurants as well as ingredients in supermarkets – they buy are *ḥalāl*, the *ḥalāl* market has increased as more restaurants and consumer brands have applied for the *ḥalāl* certificate from Muis. More *ḥalāl* beef counters are also

they have attained, are more aware of managing their wealth and assets, during life and after death. With such contracts offered to the public, as well as other public schemes, the Fatwa Committee should be alert to address these issues in their entirety.

### **5.3 Human Organ Transplant**

The question of the permissibility of organ transplant from a muslim has a been a topic of debate by muslim scholars since its first introduction. Developments in the surgical procedures and the rising number of diseases and patients who are in need of transplant add up to the necessity of this question being addressed adequately. Likewise in Singapore similar concern has been raised, and *fatāwa* have been issued in light of the different circumstances encircling this matter.

#### **5.3.1 Background of the problem**

The National Kidney Foundation (NKF) is the pioneering organ donation advocacy in Singapore which undertook extensive educational campaigns to generate public awareness and support for kidney pledging since 1969. Since 1969, as many as 200 people were dying each year because of kidney failure. Not only was dialysis an expensive method of treatment, kidneys available for transplants were also scarce.

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opened in general supermarkets. The demand for *ḥalāl* (Islamic) banking is also on the rise as the first Islamic bank, the Islamic Bank of Asia was officially launched in Singapore in 2007. See Norhaiza Hashim, “Bank Islam pertama di sini dilancar” (First Islamic bank was launched here), p. 1, *Berita Harian*, 8 May 2007.

Before 1973, there was no law institutionalizing a person's wish to be a kidney donor. After much effort, the Medical (Therapy, Education and Research) Act of 1972 was passed, legislating the process of organ donation through the opting-in<sup>350</sup> system. This Act also preserves an organ pledger's wishes to remain sacrosanct. Prior to this, his family could render a donor's pledge invalid after his death.

From 1973 to 1986, intensive public education campaigns reaching religious groups, community and grassroots organizations, and educational institutions were conducted. In 1987, the Parliament of Singapore passed the bill for the Human Organ Transplant Act (HOTA). This Act presumes that Non-Muslim Singaporeans and Permanent Residents between 21 and 60 (age-wise), who die in accident, have pledged to donate their kidneys upon death, unless they opt-out in their lifetime. Since then, the average number of pledges (through HOTA) increased consequently from 200 to 4000 annually.<sup>351</sup>

As mentioned earlier, and as explained to the masses in those education campaigns, dialysis is not a cure for kidney patients. Besides being a tedious and painful process, dialysis (particularly non-subsidized dialysis) is expensive and quickly drains the

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<sup>350</sup> There are two systems implemented by countries internationally to regulate a person's wish to donate an organ; opting-in and opting-out. In Singapore, the opting-in system requires the donor to pledge his donation via donation card, signed by him and witnessed by one or two witnesses. As long as he has not filled any pledge card during his life, he is not considered as a donor. The opting-out system, also known as presumed consent, assumes that those who do not submit an objection, via opt-out card, are automatic organ donors. It means that as long as he has not filled any opt-out card, he is considered as a donor.

<sup>351</sup> NKF, "Organ Donation Initiatives", NKF Singapore, <http://www.nkfs.org/organ.php> (accessed 11 November, 2007).

financial resources of the kidney patient and his family. This adds to the emotional stress and family problems of kidney patients. They will have to bear this burden indefinitely. A kidney transplant is therefore the best option.<sup>352</sup>

The first cadaver renal (kidney) transplant was performed in 1972 and the first live transplant in 1976. To date over 850 cadaver and over 600 live transplants have been performed in Singapore. The ten year graft survival rates for the transplants have been excellent with 75% for cadaver transplants and 85% for live transplants. The average waiting time for a transplant is 7 years.<sup>353</sup>

Table 3.1  
Renal (kidney) Transplants in Singapore<sup>354</sup>

Year	Number of Transplants	
	Cadaveric	Live
2002	30	44
2003	18	26
2004	32	52
2005	43	53

<sup>352</sup> MKAC, "Proposal for inclusion of Muslims in the Human Organ Transplant Act", 2.

<sup>353</sup> National Organ Transplant Unit (NOTU), "Renal Transplant", Ministry of Health Singapore, <http://www.moh.gov.sg/mohcorp/programmes.aspx?id=2042> (accessed 11 November, 2007).

<sup>354</sup> Ibid.



The first heart transplant in Singapore was carried out in July 1990 and 31 transplants have since been successfully performed by the National Heart Centre. Since the advent of medications to control rejection, survival of transplant patients has improved significantly. About 80 percent of heart transplant patients survive 1 year or more. The quality of life improves dramatically after a heart transplant and patients are able to lead more active lifestyle, including returning to work.<sup>355</sup> The increase in the number of organ transplant programmes in Singapore led to the establishment of the Ministry of Health National Organ Transplant Unit (NOTU), to tailor organ procurement activities to meet the needs of the various transplant teams.

Table 3.2

Heart and Lung Transplants in Singapore<sup>356</sup>

Year	Number of Transplants	
	Heart	Lung
2002	2	1
2003	0	0
2004	4	2
2005	3	1
2006	6	1

<sup>355</sup> NOTU, “Heart Transplant”, Ministry of Health Singapore, <http://www.moh.gov.sg/mohcorp/programme.aspx?id=12486> (accessed 11 November,2007).

<sup>356</sup> Ibid.

In 2003, the Ministry of Health announced plans to extend the HOTA to include livers, corneas, and organs taken from non-accidental deaths, and regulate living donor transplants. Another public education campaign was launched to educate Singaporeans on the misconceptions of organ donation in support of the proposed extension. The revised law took effect on July 1, 2004.<sup>357</sup> It did not bear a great significance on Muslims, since the procedure for Muslims organ donation was still through pledging.

Following this amendment, more transplants have been carried out in Singapore hospitals. As at the end of 2006, 1778 patients have undergone cadaver and live kidney transplants,<sup>358</sup> 7 lung transplants, and 204 liver transplants.<sup>359</sup>

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<sup>357</sup> NKF, “Organ Donation Initiatives”, NKF Singapore, <http://www.nkfs.org/organ.php> (accessed 15 November, 2007).

<sup>358</sup> Puad Ibrahim, “Lebih ramai pesakit dapat manfaat” (More patients gained benefit), *Berita Harian*, Singapore, 1 March, 2007.

<sup>359</sup> NOTU, “Statistics”, Ministry of Health Singapore, <http://www.moh.gov.sg/mohcorp/programmes.spx?id=12494> (accessed 15 November, 2007).

Table 3.3

Liver Transplants in Singapore<sup>360</sup>

Year	Number of Liver Transplants	
	Cadaveric	Live
2002	5	18
2003	2	17
2004	8	13
2005	2	32
2006	7	25

In short, as of present, there are two acts constituting matters related to the donation and transplant of organs. These acts are:

1. Medical (Therapy, Education and Research) Act 1972 (MTERA). This Act is in the form of opt-in system, through the process of pledging to donate any organ following death.
2. Human Organ Transplant Act 1987 (HOTA). This Act is in the form of an opt-out system, wherein those who are unwilling to donate their organs after death,

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<sup>360</sup> NOTU, “Liver Transplant”, Ministry of Health Singapore, <http://www.moh.gov.sg/mohcorp/programmes.aspx?id=12494> (accessed 15 November, 2007).

are required to declare his disapproval. Otherwise, he will be deemed as having given his consent (presumed consent). This Act, encompass these situations:

- i) organ transplant can only be conducted in the event of sudden death caused by an accident.
- ii) Organ transplant limited only to kidney.
- iii) Enforced on all Singaporeans and Permanent Residents aged between 21 and 60 years, with the exclusion of Muslims.

The amendment of HOTA in 2004 constitutes the following expansions:

- i) to broaden the scope of HOTA to include death which are not caused by accidents (natural death, death by sickness).
- ii) To broaden the scope of HOTA to include the heart, liver and cornea.
- iii) To legislate existing regulations for organ transplants from living donors.

### 5.3.2 Muslims' involvement in the issue

Many of Singaporean Muslims also suffer from kidney failure, forming 18% of all kidney patients by the early 1990s. As a result, many Muslim kidney patients died from waiting for kidney donors.

In 1990, the Muslim Kidney Action Committee (MKAC) was formed under the auspices of MUIS. The committee, together with NKF, has been actively involved in

promoting awareness amongst Muslims on issues relating to kidney disease, dialysis and transplant. The MKAC also encouraged Muslims - through platforms like seminars, forums and talks, radio programmes and exhibition - to pledge their kidneys so that, in the event of their death, they can be used to save lives of kidney failure patients.<sup>361</sup>

The first kidneys from a Muslim cadaver was removed and transplanted into kidney patients at end of 1991. During that period of time, the standing ruling regarding Muslims donating kidneys was based on the 1986 fatwa issued by the Fatwa Committee which requires the endorsement of two male heirs (*waris*)<sup>362</sup> of the donor as witnesses to the pledge made by the donor. This means that a potential kidney pledger must first get the endorsement of his or her 2 *waris* on the pledge card. However, the process to get the endorsement of the heirs proved to be a great difficulty, especially if they are unwilling to give their consent. As of 2000, records show that more than 12,000 pledge cards were rejected because there was no endorsement by *waris*.<sup>363</sup> This resulted in some Muslims failing to pledge their kidney(s) even when they wish to.

In the light of this, in 1999, MKAC submitted a proposal of amendment to MUIS, to include Muslims in HOTA, so that Muslims, like any other Singaporeans between the

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<sup>361</sup> MKAC, "Proposal for inclusion of Muslims in the Human Organ Transplant Act" (unpublished), 1. This working paper was submitted to MUIS in November, 2000.

<sup>362</sup> A Malay word widely used in the issue of organ transplant among Singaporean Muslims, and is also officially used in pledge cards.

<sup>363</sup> MKAC, "Proposal for inclusion of Muslims in the Human Organ Transplant Act", p. 7.

age of 21-60 are deemed to be pledgers (presumed consent). However, a special provision would be included in the case of Muslims for the consent of the *waris* to be sought and obtained prior to the removal of the kidney. If the consent of the *waris* is not obtained, the kidneys would not be removed. Muslims who do not wish to be kidney pledgers may opt out by writing to the Ministry of Health, just like other Singaporeans. This proposal was in view of the increasing number of Muslim kidney patients whereby majority of them are from low-income families. On top of that, most of them did not pledge their kidneys not because they are not willing to, but because of refusal from legal heirs.<sup>364</sup>

This proposal was not approved by the Fatwa Committee. However, they issued an amendment to the 1986 *fatwā*, and removed the condition of consent from 2 *waris*, instead the pledge can be done with any 2 male witnesses. In 2007, another proposal was submitted to the Fatwa Committee to review this *fatwā*.

The cause of all these concerns was the rising number of kidney patients in Singapore, including Muslims. Until the month of July 2007, there were 3565<sup>365</sup> kidney patients who were suffering from End Stage Renal Disease (ESRD), 20% of them Malay/Muslims. More cases are expected to be diagnosed in the future as the two leading causes of kidney failure in Singapore, which are diabetes and hypertension, are

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<sup>364</sup> Suhaimi, "Fatwa dan fungsinya sebagai komunikasi hukum masyarakat Islam Singapura", p. 27.

<sup>365</sup> Hisham Hambari, "Panggilan ke unit derma organ meningkat" (Number of calls to the Organ Transplant Unit in the rise), *Berita Harian*, 14 July, 2007, p. 7.

on the rise. This trend - the increase of diabetic and hypertension patients - is prevalent among Muslims. Increase in kidney disease will result in a corresponding increase in dialysis and the waiting period for kidney transplants. By the end of 2006, 557 patients were in the waiting list for a cadaver renal transplant, 20% of them Malay/Muslims.<sup>366</sup>

### 5.3.3 The development of MUIS *fatwā* in the issue

Since the concept of organ transplant was founded, it has been widely discussed, particularly kidney donation. Many believed that organ donation went against the teachings of Islam. This resulted in many questions submitted to the Fatwa Committee on the matter. It is interesting to note that the *fatāwā* issued have been going through an evolving process in dealing with this question. This will be clearly elucidated in the coming pages.

#### 1) *Fatwā* issued in 1973

In 1973, a question was submitted to the Fatwa Committee of Singapore, regarding the will of a Muslim who wanted his kidney to be bequeathed to the hospital and donated to kidney patients.

After analyzing and studying the above-mentioned question, the Fatwa Committee declared that “the deceased Muslim’s organ donation pledge was not valid and considered void. This is on the basis that he (the deceased) doesn’t have full right on

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<sup>366</sup> Hisham Hambari, “Panggilan ke unit derma organ meningkat”, *Berita Harian*, 14 July, 2007, p. 7.

his physical body including his kidney. Therefore he has no right to transfer ownership to others. On top of that, the extent of danger of this disease (kidney failure), and whether there are means of treatment is not known. The success of kidney transplants is also not at a convincing level.”<sup>367</sup>

## 2) *Fatwā* issued in 1986

In 1986, the Singapore Government introduced HOTA. This Act was to be imposed on all Singaporeans, including Muslims. Its main purpose was to help kidney patients who have no other options of treatment except transplant.

In relation to that, the Ministry of Health posed a question to the Fatwa Committee regarding the permissibility of kidney transplant for a Muslim.

Members of the Fatwa Committee discussed this matter thoroughly among themselves, as well as referring to acknowledged *fatāwā* issued by other Muslim countries and international Islamic scholars, such as the Majma‘ al-Buḥūth al-Islāmiyyah of Al-Azhar in Cairo, and Majma‘ al-Fiqh al-Islāmī of the Organization of Islamic Countries (OIC) in Jeddah.

They thus concluded that such a transplant is prohibited if it is done in cases of non-emergency, even if the donor is still alive. This prohibition is made on the grounds that

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<sup>367</sup> Minutes of the Fatwa Committee meeting, 31 July 1973.



it will endanger the life of the donor. If the transplant is done after the donor's death, it is also prohibited, based mainly on the injunction to respect the body of the dead. Numerous Qur'ānic verses and Prophetic traditions are quoted in line with the prohibition of harming a dead body.

However, in cases of emergency (*darūrah*) to save human lives, they allowed if it fulfills certain conditions, for both live and cadaveric donors. The conditions are as follows:

“If the donor is still alive, the donation is subject to the following conditions:

- The donor must be a *mukallaf* (accountable)
- The donor must be willing and free from any form of coercion
- Success of the transplant surgery has to be ascertained
- The surgery must not harm the donor in any way

If the kidney is taken from a dead person, the additional conditions are:

- Consent from the heirs of the deceased
- Consent from the deceased prior to his death declaring his willingness to donate his kidney

The pledge from the deceased to donate his kidney(s) must be accompanied with the consent of his heirs during his life. The pledge will only be considered valid with consent from both the donor and his heir, as long as the donor has not withdrawn his

pledge. To avoid the decomposing of the kidney after the death of the donor, the consent of the heirs need not be asked for the second time.”<sup>368</sup>

Organ transplant in cases of emergency was thus allowed by the Fatwa Committee based on *ḍarūrah*, and fulfilling the needs of the patients who are in much need of transplants. This is in view of the religion’s general command to preserve the interest of human beings. A number of legal maxims related to *ḍarūrah* are expounded to support this view.

In addition to issuing this *fatwā*, the Fatwa Committee also gave two suggestions to the Singapore Government with relation to organ transplants. They are: (1) to request the Government that Muslims are exempted from HOTA, and (2) to provide the alternative that Muslims can declare to donate their organs by way of opting-in and not opting-out.

These suggestions were made solely to sustain the religious principle of maintaining the rights of the heirs of the deceased more than the deceased himself. The above-mentioned suggestions have been approved by the government and Muslims have thus been exempted from HOTA.

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<sup>368</sup> \_\_\_\_\_, *Kumpulan Fatwa I*, Majlis Ugama Islam Singapura, Singapore, 1987, p. 32.

### 3) Fatwā issued in 2004

In 1999, a delegate from NKF – which comprised of the Chief Executive of NKF and other members of the Muslim Kidney Action Committee (MKAC) – on 9<sup>th</sup> April 1999 asked the opinion of MUIS on an intended proposal to include Muslims under HOTA. Following this enquiry, the Fatwa Committee reviewed the 1986 *fatwā*, based on the principles of the *Sharī‘ah* and the guidelines provided therein. Predominant conditions of the kidney failure rate among Singaporeans were also put into consideration. Not only members of the Fatwa Committee were involved in the discussion, but local religious teachers (*asātidhah*) were also involved to share their views on the issue through a briefing and discussion session with members of the Fatwa Committee, which was focused on the topic of the issue of legal heirs’ consent and their sacrosanct right over the body of the deceased.<sup>369</sup>

Finally, an agreement was reached and amendments were made to the previous *fatwā*.

The changes endorsed are:

- “If the deceased had, during his life, pledged his kidney, the heirs are obliged to carry out his bequest and have no right to nullify this pledge after the deceased’s death. If the deceased has made no such bequest during his life, then the heirs have the right to donate the kidney if they wish.

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<sup>369</sup> The session was organized by the Office of the Mufti on the 9<sup>th</sup> March 2004.

- The consent of two male heirs when the donor made his pledge – as was required based on the 1986 *fatwā* – is no longer required. Instead, it is sufficient for the donor to produce any two male Muslims to endorse his pledge, even though they are not his heirs.”<sup>370</sup>

In the same Fatwa Committee meeting, the Committee was of the opinion that the organs of heart and liver can be compared to kidney in their role to save the life of the patient. Therefore, the Committee decided that the transplant of heart and liver are seen as a necessity to preserve human’s life (*darūrah*), hence are permitted on the same grounds as kidney transplants. As for cornea transplants, although seen as a means to only improve eyesight or regain lost of eyesight, the Fatwa Committee nonetheless decided to also allow on the basis of eradicating a difficulty (*dar’ mafsadah*).

#### 4) *Fatwā* issued in 2007

In July 2007, the Fatwa Committee declared the issuance of a new *fatwā* which allows Muslims to be included in the HOTA.<sup>371</sup> This decision was made after studying the report presented by the Office of Mufti regarding the issue of organ donation in Singapore, based on the latest report from MKAC which include: (1) the problems and difficulties faced by Muslim kidney patients, (2) the effectiveness of the campaigns held to increase the Muslim community’s awareness to help and pledge their organs, (3) the

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<sup>370</sup> Minutes of meeting for Fatwa Committee, approved on 13<sup>th</sup> July 2004 (MJF 30 2001-2004).

<sup>371</sup> \_\_\_\_\_, “Muslim boleh sertai HOTA” (Muslims can be included under HOTA), *Berita Harian*, Singapore, 27 July, 2007, p. 1.

present number of pledgers, and (4) whether the problems of kidney patients can be overcome with the available number of pledgers in the future, and the report from the Ministry of Health on the process, number and status of Muslim kidney patients compared to other ethnic groups in Singapore.

This decision was reached after considering many factors. Among them are:

- i) Many resolutions have been issued by the majority of Muslim jurists on the permissibility of organ transplant and donation from a dead person.
- ii) The objective of the *Sharī'ah* which asserts the importance to preserve the life of man, as stated in the Qur'ānic verse: "... and if any one saved a life, it would be as if he saved the life of the whole people".<sup>372</sup>
- iii) The unsuccessfulness of the prevailing *fatwā* and the opt-in system (MTERA) in solving the problems of kidney patients. Although a *fatwā* was already issued in 2004 to make the process of pledging easier, the number of pledgers are still insufficient and unable to help the waiting patients. At the same time, the difficulties faced by the patients are increasing and are also afflicting the families. Therefore, the hardship (*mafsadah*) that they are experiencing should be overcome with a viable solution, based on the legal maxims "When an issue becomes constricted, it may be expanded" and "A difficulty should be alleviated".

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<sup>372</sup> Sūrat al-Mā'idah, 5:32.

- iv) The concept of presumed consent in HOTA can be described as an advanced consent sought from the donors. They still have the choice of not donating by opting out of the system during life.”<sup>373</sup>

This latest *fatwā*, however, does not mean Muslims are now automatically included in HOTA. Changes have to be made to HOTA first before the inclusion can take place. Meanwhile, the Ministry of Health will study the *fatwā* in detail with MUIS and also consult the Muslim public on it.

#### 5.3.4 Response of the Muslim community towards these *fatāwā*

In the midst of all these developments, the response of the Muslim community has been varying, since the first issue of organ transplant was raised. Following the 1973 *fatwā* prohibiting organ donation, a book by a prominent Singaporean academic Prof. Syed Hussein Alattas was produced. This book, among others, questioned the position taken by the Fatwa Committee, on the basis that it did not consider the needs of the people. It further contested that looking for a cure (*tadāwī*) is recommended in Islam, and organ transplant is one of the means of medication.<sup>374</sup>

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<sup>373</sup> \_\_\_\_\_, “Fatwa beri jalan rawatan lebih sempurna” (*Fatwā* paves way for improved treatment), *Berita Harian*, Singapore, 27 July, 2007, p. 6.

<sup>374</sup> Al-Attas, Syed Hussein, *Biarkan buta*, Pustaka Nasional, Singapore, 1974.

Following the 1987 *fatwā* which permitted organ transplants if it fulfills the conditions defined by the Fatwa Committee, many have voiced their concerns, some in relief as they are able to help those in need, and some in doubt as they still have unresolved questions regarding the issue. Many steps have been taken to disseminate a correct understanding of the permissibility of organ donation, and its evidences. Amongst these steps is a seminar held which was aimed to explain the reasons organ donation and transplant are allowed in Islam.<sup>375</sup> The participants of this seminar were grassroots and Islamic organization leaders.

When MKAC launched the extensive campaign to gain support for the inclusion of Muslims under HOTA in 2000, many concerns were raised regarding the permissibility of donation on the basis of automatic or presumed consent. Questions were also raised with regards to the organs being donated to non-Muslims in fearing that the donor may bear the sins committed by the recipient after receiving the transplant. The Mufti stated that this reservation should be given only to non-Muslims who are at war with Muslims. In democratic Singapore, where non-Muslims live in peace with Muslims, such concerns are not founded. In fact, in matters relating to general interest and rendering assistance to others, the religion maintains equality between Muslims and non-Muslims, as Islam is a blessing for all of mankind (*rahmatan li al-‘ālamīn*). An illustration is given; on giving money to a beggar who then used it to buy liquor. In no way is the donor accountable for the beggar’s action, likewise in this case. Although some

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<sup>375</sup> \_\_\_\_\_, *Pemindahan ginjal: sebab-sebab Islam membenarkan (Kidney transplant: Reasons why Islam allows)*, Jamiyah, Singapore, 1994.

scholars still view organ transplant as prohibited, the Mufti stated that the number is small, and they base their arguments solely on the basis of precaution (*iḥtiyāṭ*). In practising our five *kulliyyāt* (general necessities), preserving self and health is very important. He further asserted that helping others to preserve their life and regain their health is undoubtedly a commendable thing to do in the religion.<sup>376</sup>

Prior to the issuance of the latest 2007 fatwā, many reports in the newspaper highlighted the plight of Muslim patients, who have to wait for transplant longer than non-Muslims who are included in HOTA. In the process of waiting, their organ continues to deteriorate and they have to consume large doses of medication daily.<sup>377</sup> Following this report, surveys have been made on the community's acceptance of the inclusion of Muslims in HOTA,<sup>378</sup> and the issue was discussed frequently in local forums. MKAC has also received an increasing number of enquiries on the procedures of pledging.<sup>379</sup> An informal campaign has been launched in mosques by addressing this issue in Friday

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<sup>376</sup> Noor A. Rahman, "Ikrar ginjal automatik tak bercanggah dengan fatwa" (Automatic kidney pledge is not in conflict with *fatwā*) & "Izin waris masih tetap diperlukan" (Permission by *waris* is still needed), *Berita Harian*, Singapore, 7 August, 2000, p. 1 & p. 4.

<sup>377</sup> \_\_\_\_, "Menanti dengan hati terbuka" (Waiting with an open heart), *Berita Harian*, Singapore, 7 June, 2007, p. 1.

<sup>378</sup> Of the 50 people asked in this informal survey conducted by the local newspaper, 32% do not agree of the inclusion, 6.4% are not sure, and the rest agreeable. Hisham Hambari & Halifi Hussin, "Ramai sokong derma ginjal" (Many support kidney donation), *Berita Harian*, Singapore, 14 July, 2007, p. 1. Among the reasons given by those who are unsure or opposed to the notion are lack of publicity and public education on the issue, vagueness in the processes of the transplant after the event of death, and uncertainty in its permissibility from the Islamic perspective. See Halifi Hussin, "Masih ramai yang keliru" (Many are still confused), *Berita Harian*, Singapore, 14 July, 2007, p. 6.

<sup>379</sup> Hisham Hambari, "Panggilan ke unit derma organ meningkat", *Berita Harian*, 14 July, 2007, p. 7.



sermons and disseminating booklets on organ donation from the Islamic perspective and its application in Singapore.<sup>380</sup>

Following the issuance of this *fatwā* and the inclusion of Muslims in HOTA, discussion sessions with *asātidhah*, or religious teachers, and press conferences have been made. The responses were largely positive, where many welcomed this *fatwā*, including ministers and health officials. In general, the Muslim community is supportive of organ donation, but are still varied in their response to this *fatwā*. They put forth many concerns, which are more directed towards the procedures involved rather than the religious ruling on it.<sup>381</sup>

#### 5.3.5 Evaluation of *fatwā*

The assessment of these *fatāwā*, no doubt, calls for a detailed study and thorough understanding and analysis of the prevailing conditions and developments of organ donation, and the responses given by both the government, religious authority (Fatwa Committee) and the general public.

The permissibility of organ donation has been established by majority of contemporary Islamic scholars, and numerous resolutions by International Islamic conferences have

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<sup>380</sup> Office of Mufti, *Organ transplant in Islam*, Majlis Ugama Islam Singapura, Singapore, 2007.

<sup>381</sup> —, “Prihatin perihal prosedur, bukan hukum” (Concerns about procedures, not ruling), *Berita Harian*, Singapore, 27 July, 2007, p. 7.

been made on this issue.<sup>382</sup> Hence, the second *fatwā* which permits organ donation and transplant, abrogating the first *fatwā*, is called for. The evidences brought forth in the second *fatwā* are also well-argued, based on revealed texts from the Qur’ān and *ḥadīth*, as well as established legal maxims. The problem that Muslims in Singapore are subject to, however, is different from those in other countries, due to the complications arising from the legislations of HOTA.

This Act was put in effect not for commercial or economical interest on the part of the Government, but to accommodate the needs of the people, due to the alarming rising number of patients, the fatality of renal failure and the large percentage of patients who have died due to this disease. Although medical researches have been conducted to define the causes of renal failure, its ascent is caused by the increase of other diseases. Due to the worrying general health conditions of Singaporeans, induced by soaring stress level owing to living and economic demands, the rise of renal failure is hard to contain and takes a long time to overcome by means of public health awareness programs.

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<sup>382</sup> Amongst these is the resolution made by the Majma‘ Fiqh Islāmī in its fourth conference dated 6-11 February 1988, with the condition of legal heirs’ consent. See \_\_\_\_, *Qarārāt Majma‘ al-Fiqh al-Islāmī*, 4<sup>th</sup> conference, Organisation of Islamic Countries (OIC), Jeddah, 1408/1988, vol. 1, p. 510. See also Albar, Mohammad Ali, “Islamic ethics of organ transplantation and brain death”, Ismail Ibrahim(ed.) *Islam dan pemindahan organ*, Institut Kefahaman Islam Malaysia, Kuala Lumpur, 1999, pp. 106-107, for an extensive list of *fatāwā* issued by jurists and resolutions made by religious bodies on this issue, dating from 1952 to 1990.

This being said, the ruling on organ transplant and its application in Singapore should be viewed in a different light than those issued in other countries. The above conditions and statistics are subjected specifically in Singapore, hence the religious stance on the issue must bear these characteristics in mind. The researcher applauds the Fatwa Committee on their approach to this matter, and their consideration of the surrounding factors and grave necessity that leads to the development of the *fatāwā*. The changes do not signify the lack of adherence to established rulings, rather they show the dynamicity of the *Sharī'ah* in such a way that it continues to succeed to solve the challenges Muslims face. However, let us analyze each of the main components of this issue to assess the contributing factors in these *fatāwā*:-

i. Consent to donate organs

Concern has to be directed to the amendment in 2004, which only endorsed the change of procedure of pledging from requiring the consent of two heirs to only two male Muslim witnesses. However, the *fatwā* did not approve the proposal made in 2000 to include Muslims in HOTA. This could be owing to the fact that the practice of seeking consent of *waris* prior to the transplant was not able to be determined. Although the Fatwa Committee exercised flexibility in the pledging process, it did not compromise the ground rule of consent, either from the donor himself or from *waris*.

However, doubts on the issue of presumed consent have been overcome in the new *fatwā* issued in 2007. The Deputy Mufti has shared that in 2004, the members of the

Fatwa Committee had doubts on the concept of presumed consent, and have insisted that explicit intention has to be made by the donor. However, based on the insufficient number of pledgers, the current pledging system is unable to support the rising number of patients. Although live transplant is a good alternative to overcome the problem of consent, since the donor is still alive to proclaim his consent beyond reasonable doubt, the number of live donors is considerably low as not many are brave to come forward as live transplant donors. These facts have led the Committee to re-evaluate the *fatwā* and reconsider the concept of presumed consent.

As those who do not wish to donate their organs may do so by opting-out of HOTA, the issue of force and lack of consent are unfounded in the opt-out system. Extensive steps are also currently carried out by MUIS to disseminate this news, so that all Muslims are aware of the current situation and the choice that they have. Some may view this step as a form of ‘penalty’ for the failure of Muslims to pledge organs since the past 20 years. However, the aspect of necessity should also be born in mind, as will be discussed next.

#### ii. Necessity (*darūrah*) of organ transplant and donation

The re-evaluation of the *fatwā* conducted in 2007 was based on the rising number of kidney patients, and is seen as necessary. On one hand, organ transplant is a definite necessity for those who suffer from kidney disease. The difficulties faced by those who have to undergo dialysis, both economically and emotionally, are enormous. Hence, a

transplant is the best option, although patients still have to rely on medication and cannot fully resume normal activities after transplant. Due to legal definitions entrenched in the provisions of HOTA, those who did not pledge their organs during health, will not be given priority to have an organ transplant if they contract kidney disease. In other words, they will be placed in the end of the waiting list, and literally have a slim chance of the possibility of a transplant. Hence, pledging can be categorized as a potential necessity even for the healthy.

On the other hand, the percentage of kidney patients to the overall Singapore population is not significant. Renal failure (nephritis and nephrosis) is listed as the 10<sup>th</sup> principal cause of death (1.6%) in Singapore as opposed to cancer (26.4%) and ischaemic heart disease (18.1%).<sup>383</sup> However, it can be argued that kidney disease does not bring certain death since it is a long term disease. Unless transplant is done, the suffering of the patient will continue until transplant, or death. Other diseases, like cancer, require other forms of treatment and the contribution of others does not play a role in the necessary surgery. In Islam seeking remedy and treatment for a sickness or disease is not compulsory. However, helping others within one's capacity is required as provisioned in many Qur'ānic verses definitively.

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<sup>383</sup> \_\_\_\_, "Statistics- principal causes of death", Ministry of Health Singapore, <http://www.moh.gov.sg/mohcorp/statistics.aspx?id=5526> (accessed 11 November, 2007).

An important aspect regarding cases which rely on necessity or *ḍarūrah* is that the “necessity is evaluated based on the extent of the necessity”.<sup>384</sup> This means that when a situation is allowed, or a prohibition is removed due to a necessary need, this provision is given based on the level of necessity, such that if the necessity ceases to exist, the provision should also be removed. In this case, organ donation should only be allowed on necessary organs only, and not on others. In the event that kidney disease patients have reduced considerably, or other means of treatment are found, this provision should be removed.

### iii. Management and treatment of organs

The possibility of these organs being used for trading is not realized, since the Government has legislated strict rules against this act, due to ethical issues. Provisioned in the statutory act of HOTA, Part IV, it reads:

14. – (1) Subject to this section, a contract or arrangement under which a person agrees, for valuable consideration, whether given or to be given to himself or to another person, to the sale or supply of any organ or blood from his body or from the body of another person, whether before or after his death or the death of the other person, as the case may be, shall be void.

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<sup>384</sup> Al-Suyūṭī, Jalāl al-Dīn ‘Abd al-Raḥmān ibn Abī Bakr ibn Muḥammad, *al-Ashbāh wa al-Naẓā’ir*, Dār al-Salām, Cairo, 2006, vol. 1, p. 214.

(2) A person who enters into a contract or arrangement of the kind referred to in subsection (1) and to which that subsection applies shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding 12 months or to both.<sup>385</sup>

iv. Procuring organs from brain-dead patients

The question of brain-stem death is also among the prominent concerns in the discussions of this issue. Many of the families of the deceased found it difficult to accept the request made by hospitals for the deceased's organs to be procured at this stage. Such a case was recounted by the Health Minister Khaw Boon Wan, of a brain-dead man. The family members of the man were involved in a disagreement on when the organs could be transplanted. The family members requested 24 hours to perform Taoist rituals on the man. This delay meant that the liver could not be used in a planned transplant. Seeing that the condition of the other organs is deteriorating, the hospital refused concession for further delay requested by the family.<sup>386</sup>

From the Islamic legal perspective, brain-death has been maintained as one of the ways to ascertain death. The Fatwa Committee of Singapore has issued a *fatwā* permitting

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<sup>385</sup> Republic of Singapore, *Human Organ Transplant Act* (Singapore, 1987), Part IV, clause 14. This Act constitutes Chapter 131A of the Singapore constitution, and first put into effect in 1987, with amendment in 2004.

<sup>386</sup> Lin, Keith, "More than one life saved every week after changes to law", *The Straits Time*, Singapore, 1 March, 2007, H7.

the disabling of a life supporting system when 3 qualified medical doctors have ascertained the patient to be brain-dead and has no chance of recovery.<sup>387</sup> This is congruent to the resolutions made during the “Seminar on Human Life: its Inception and End as viewed by Islam” held in Kuwait in 1985, and by the *Majma‘ al-Fiqh al-Islāmī* of OIC on its 3<sup>rd</sup> session held in Amman, October 1986. However, the issue of retrieving vital organs from brainstem dead patients remained unresolved in these International conferences. On top of that, the Council of Islamic Fiqh Academy of *Rābi‘at al-‘Ālam al-Islāmī* in its 10<sup>th</sup> session resolved that a person who is diagnosed as brain-dead can only be pronounced dead when respiration and heart beat cease after switching off the life-support apparatus. Hence, we may deduce that this resolution implies that retrieving vital organs from brainstem dead patients is not permissible within the dictates of the Shari’ah.<sup>388</sup>

In the case of conflict between different resolutions such as this – which are themselves *ijtihād* and are not definitive in nature – preference has to be made based on the comparison (*muwāzanah*) between the different benefits (*masāliḥ*) to be realized and the different harms (*mafasid*) to be avoided. Although the need of the organ patients are incumbent, thorough consideration and a detailed study has to be made before we alleviate this harm by incurring another harm of hastening the death of another patient.

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<sup>387</sup> Unpublished *fatwā* issued on 20/9/94.

<sup>388</sup> Abul Fadl, Mohsin Ebrahim, *Organ Transplantation: contemporary Islamic legal and ethical perspectives*, A.S. Noordeen, Kuala Lumpur, 1998, pp. 100-105.



In our attempt to apply *muwāzanah* between two lives, an issue discussed in earlier Islamic legal literature has addressed the issue of retrieving organs from criminals who have been convicted and are on death row. These criminals, whose status can be categorized as confirmed death, can be likened to those who are brain dead. However, most earlier jurists view that consent from these criminals is still required, as their physical body and organs are not to be disposed unduly.<sup>389</sup> This implies that consent must be sought, before death from the person himself, or after death from his heirs, through direct consent or presumed consent.

v. Availability of organs for transplant

Finally, the researcher would like to mention the main factor that has contributed to the issuance of the fourth *fatwā*, which is the decreasing number of Muslim pledgers. According to the table appended below, the decrease rate is indeed startling, especially when compared to the large number of patients in need of transplant.

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<sup>389</sup> ‘Ārif, ‘Alī ‘Ārif, “Madā i‘tidād bi riḍā al-maḥkūm ‘alaihi bi al-i‘dām fī naql al-a‘ḍā’ minhu”, *al-Dirāsāt al-Islāmiyyah*, Islamic Research Centre of the International Islamic University Islamabad, Pakistan, 2003, Volume 38, No.2.

Table 3.4

Number of Muslim Pledgers in Singapore<sup>390</sup>

Year	Number of Pledgers	Year	Number of Pledgers
1999	1130	2004	924
2000	1752	2005	496
2001	496	2006	87
2003	367	2007 until 30 June	75

The cause of this decline cannot be clearly founded, but it could be due to lack of publicity and campaigns on organ donation pledging, as well as prevalent misunderstandings on organ donation and the treatment of organ donors.

### 5.3.6 Conclusion

To conclude, the researcher views that this recent *fatwā* is called for to solve the difficulties. However, the Fatwa Committee has to put in more effort in defining the definitive aspects in this issue, and be aware of any changes made to HOTA, in ensuring that these future changes are not in conflict with the principles of the *Sharī'ah*. For example, in the event that the Government decides to amend the laws and allows

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<sup>390</sup> Hisham Hambari, "Panggilan ke unit derma organ meningkat", *Berita Harian*, 7

the sale of these procured organs, Muslims must be exempted again from HOTA as sale of organs is clearly prohibited in the *Sharī'ah* under any circumstance. The same applies if HOTA is extended to include organs which are prohibited to be donated, like organs of the reproductive system. Another issue is in the event of extending HOTA to other bodily parts which do not fall under the category of confirmed necessity, or *ḍarūrah*; in such an instance Muslims should be exempted as there are other means to alleviate this difficulty. Also, if there are reasons to suspect that a person's withdrawal from HOTA can be overruled by certain authorities, this issue also needs further evaluation.

## CHAPTER SIX

### CONCLUSION

In finalizing this research that the researcher has embarked on, the following conclusions are hereby proposed:

#### THE LEGAL THEORIES OF IFTĀ' AMONG SCHOLARS OF THE SHĀFI'Ī MADHHAB

1. There are generally two definitions of *iftā'* utilized by the jurists of the Shafi'ī school of law, the first of which is synonymous to *ijtihād*. It is based on this first definition that the set of preconditions suggested by jurists of the *madhhab* to qualify a person to issue *fatāwā* are the very same preconditions of a *mujtahid*. Only after about three centuries after al-Shāfi'ī, did al-Ghazzālī begin to introduce the notion of partial *ijtihād* (*tajazzu' al-ijtihād*) and other concessions to the preconditions mentioned, due to the increasing dearth of fully qualified and independent *mujtahidūn*.
2. This has led the subsequent jurists of the al-Shāfi'ī school of law to adopt a second definition of *iftā'*, which is closer to its literal meaning, and that is answering religious questions. If by the earlier definition, only fully qualified

*mujtahidūn* were permitted to issue *fatāwā* by way of employing the standard processes of *ijtihād*, this second definition however allows a knowledgeable person to answer questions pertaining Islamic law even if he has yet to reach the echelon of a fully qualified *mujtahid*. By this second definition of *iftā'* also, a *muftī* may issue a *fatwā* by way of *taqlīd*, or reporting a *mujtahid's* legal opinion that the *muftī* subscribes to.

3. Discussions offered by jurists of the Shāfi'ī school of law on *iftā'*, *muftūn* and *fatāwā* generally address the etiquettes of a *muftī* in issuing *fatwās*. No significant attention was given to provide or to allocate a dedicated legal framework for *iftā'*. This is due to the fact that the standard definition of *iftā'* widely accepted within the Shāfi'ī school of law is one that is parallel to *ijtihād*, and that the whole body of *uṣūl al-fiqh* is already intended to operate as the guiding principles for *ijtihād* in Islamic jurisprudence.
4. The absence of a dedicated framework for *iftā'* in the Shāfi'ī *madhhab*, however, may cause a considerable degree of setback to *muftūn* of the *madhhab* in discharging their duties of answering questions. This is because the discussions and writings of *uṣūl al-fiqh* are intended for the purpose of *ijtihād*, either in the form of deducing rulings from the primary texts, or in other secondary forms when there is no textual evidence in existence for novel cases of law. In other words, *uṣūl al-fiqh* and *ijtihād* are both general in nature,

whereas in many instances *iftā'* addresses specific questions and needs of individuals or groups in their specific time, space and environment. In addressing questions that are specific in nature, the realization and preservation of human interest, or *maṣlaḥah*, is to be given significant consideration similar to, if not greater than, the importance of observing the implied general injunction of the primary texts.

5. The consideration of *maṣlaḥah* in formulating Islamic legal rulings does exist in various sections of *uṣūl al-fiqh* books of the Shāfi'ī *madhhab*, especially in the extensive discussions on *qiyās*. However, there has been an apparent lack of consolidated and methodical deliberations on the application of *maṣlaḥah* in the realm of *iftā'* in particular, where the specific conditions that a *mustaftī* is in may cause the *muftī* to give prominence to an initially weaker legal opinion. This is highly probable, as well as legally acceptable, when the *muftī* finds that choosing a stronger and standard ruling as his *fatwā* will only expose the *mustaftī* to harm or grave difficulties. It is thus understandable if the jurists of the Shāfi'ī school of law commonly show a considerable degree of reservation in accepting *maṣlaḥah* liberally in the processes of general *ijtihād*, the evidence of which is their widely perceived rejection of *istiḥsān*, *istiṣlāḥ* and *maṣāliḥ mursalah*, but their willingness to utilise *maṣlaḥah* in addressing specific cases for *iftā'* purposes has to be highlighted and further developed into a systematic legal theory on its own.

## THE SINGAPORE FATWA COMMITTEE AND THE FATĀWĀ IT ISSUED

1. The Fatwa Committee of Singapore has played an important role in providing religious guidelines for the Singapore muslim community and in answering their religious questions since the Committee's inception in 1968. The Committee members have stayed true to their constitutional obligations as allocated under the state's Administration of Muslim Law Act (AMLA), where *fatāwā* issued by the Committee are generally according to the standard legal rulings opined by established jurists of the Shāfi'ī school of law.
2. In cases where certain standard legal opinions of the *madhhab* are perceived to have the potentials of implicating harm or difficulties to the *mustaftī* if these opinions were to be issued as *fatāwā*, the Fatwa Committee has never failed to take *maṣlahah* as the principal factor of consideration. This research has shown that such an approach does not only comply with the requirement of the state law, through AMLA, it is also in accordance with the legal theories of *iftā'* in the Shāfi'ī school of law. The multiple changes that the Fatwā Committee introduced to their *fatwā* on human organ transplant within a time span of 35 years is a clear manifestation of such. Although there still exist voices of suspicion and skepticism within the Muslim community, while some are still held back by confusion due to the number of changes that were made to the

*fatāwā* over time, the Fatwa Committee held true to their duty to put preference to the larger good of the general public.

3. A similar approach is apparently reflected in the *fatāwā* issued in areas of wealth management and inheritance. While truthfully adhering to the standard legal opinion of the Shāfi‘ī *madhhab* in issuing *fatāwā* on cases that are straightforward and general in nature, like in the issue of *farā'id*, the Fatwā Committee has also shown that it did not have any hesitation to employ alternative views, like the *fatāwā* on *nuzriah*, controversial they may seem to be, in order to provide solutions to difficulties faced by Muslims of the country. This can also be seen in the *fatāwā* on joint tenancy of home ownership, where the *maṣlahah* for the muslim public plays a central role in effecting the *fatwā* issued, and the adjustments made to its clauses over time.

## RECOMMENDATIONS

1. There must be continuous efforts to address the common assumption that the consideration of *maṣlahah* is of no significance in the legal thoughts within the Shāfi‘ī school of law. It should be highlighted that al-Shāfi‘ī’s inclination to reject *istiḥsān*, and also the reported reservation of scholars of the *madhhab* against the utilization of *istiṣlāḥ*, *maṣāliḥ mursalah*, and the like, is not without



qualification. A fact that needs to be further reiterated is that these rejections are actually directed against unscrupulous utilization of the legal tools mentioned.

2. In societies where there exists a general expectation that *fatāwā* for them are to be based on a particular *madhhab*, the *muftūn* and *iftā'* institutions of these societies have to go beyond the standard *fiqh* opinions within the *madhhab*, or *al-qawl al-mu'tamad fī al-madhhab*, for *iftā'* is a task of identifying the most suitable ruling for specific person/s according to their specific needs and situations. Awareness has to be created that in *iftā'*, realizing a *maṣlahah* recognized by the *sharī'ah* for the *mustaftī* is to be given superiority over the strongest *fiqh* opinion of any *madhhab*, when there are contradiction between the two.
3. More research has to be done to identify the need for, and further develop, a comprehensive legal framework for *iftā'*, similar to the framework vastly available in *uṣūl al-fiqh* which has long been effectively applied for the purpose of *fiqh* and the process of deducing rulings from the primary texts. Continuous research in this area is critical, for the process of *tanzīl al-hukm* is significantly inevitable in the realm of *iftā'*, but lacking in the intellectual body of *uṣūl al-fiqh*.

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