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Item Type	Thesis
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الجامعة الإسلامية العالمية ماليزيا
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA
يونيرسيتي إسلام انتارابغسا ملايسيا

THE WRITINGS OF INDONESIAN "LIBERALS" ON *MAṢLAḤAH* RELATED TO FEMALE PERSONAL AFFAIRS: AN *UṢŪLĪ* CRITIQUE

BY

MARDIYAH KHAIRANI

A dissertation submitted in partial fulfilment of the requirement for the degree of Master of Islamic Revealed Knowledge and Heritage (Fiqh and Usūl al-Fiqh)

Kulliyyah of Islamic Revealed Knowledge and Human Sciences
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NOVEMBER 2008

ABSTRACT

This research presents a critical analysis of the concept and applications of *maṣlaḥah* as proposed by Indonesian liberal intellectuals. It also highlights the general differences in definition and applications of *maṣlaḥah* between Muslim scholars and liberal intellectuals. The study also explores discourse on reconstruction of women *fiqh* in the domain of Islamic family law in the form of Counter Legal Draft-*Kompilasi Hukum Islam* (CLD-KHI) which as propagated by liberal intellectuals in Indonesia. This research uses both critical and analytical methodologies. The result of this study indicates that there are obvious differences on the definition and applications of *maṣlaḥah*, as well as the concept of *maqāṣid* of Sharī'ah as stated by Muslim scholars and Indonesian liberal intellectuals. The aforementioned differences emanates from the methodological differences whereby Muslim scholars base their opinion on text proofs, but the Indonesian liberal intellectuals attempt to justify their stands on Western driven assumptions irrespective of their consonance with the the Qur'ān and the *ḥadīth*.

ملخص البحث

هذا البحث دراسة تحليلية لمفهوم وتطبيقات المصلحة عند المفكرين الليبراليين في إندونيسيا، يتعرض هذا البحث للفروق والاختلافات الواسعة في تعريفات وتطبيقات المصلحة بين العلماء المسلمين والمفكرين الليبراليين في إندونيسيا في الوقت الحاضر، كما يستعرض هذا البحث النقاش الدائر حول إعادة صياغة فقه النساء في نطاق قانون الأحوال الشخصية المقترح في شكل مسودة قانونية معاكسه لقانون الأحوال الشخصية الإسلامي (Counter Legal Draft- *Kompilasi Hukum Islam*). وقد استخدمت هذه الدراسة المنهج التحليل النقدي، وأظهرت نتيجة هذه الدراسة عدداً من الفروق المميزة في تعريف وتطبيقات المصلحة ومقاصد الشريعة الإسلامية بين العلماء المسلمين والمفكرين الليبراليين. وتنبني تلك الفروق على الاختلافات المنهجية بين العلماء المسلمين والمفكرين الليبراليين في إندونيسيا. حيث يعتمد العلماء المسلمون في آرائهم على أدلة القرآن والسنة النبوية بينما نجد المفكرين الليبراليين يبحثون عما يبرر أرائهم المتأثرة بالثقافة الغربية بغض النظر عن مدى موافقها للقرآن والسنة النبوية.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Islamic Revealed Knowledge and Heritage (Fiqh and Uṣūl -Fiqh).

……
Naamane Djeghim
Supervisor

……
Anis Malik Thoha
Supervisor

I certify that I have read this study and that in my opinion; it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Islamic Revealed Knowledge and Heritage (Fiqh and Uṣūl -Fiqh).

……
Syed Sikandar Syah
Examiner

This dissertation was submitted to the Department of Fiqh and Uṣūl -Fiqh and is accepted as a partial fulfilment of the requirements for the degree of Master of Islamic Revealed Knowledge and Heritage (Fiqh and Uṣūl -Fiqh).

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Head,
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This dissertation was submitted to the Kulliyyah of Islamic Revealed Knowledge and Human Sciences and is accepted as a partial fulfilment of the requirements for the degree of Master of Islamic Revealed Knowledge and Heritage (Fiqh and Uṣūl -Fiqh).

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Hazizan Md. Noon
Dean,
Kulliyyah of Islamic Revealed
Knowledge and Human Sciences

DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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THE WRITINGS OF INDONESIAN "LIBERALS" ON *MAṢLAḤAH* RELATED TO FEMALE PERSONAL AFFAIRS: AN *UṢŪLĪ* CRITIQUE

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ACKNOWLEDGEMENTS

In the name of Allah, the Merciful, the Compassionate. All praise is due to Allah s.w.t. for His countless blessings. Peace and blessings be upon the Most Honorable Messenger of Allah, his pure family and righteous companions.

I would like to record my utmost gratitude to my parents, M. Amin Djamaluddin, and Mulyanah. My beloved husband Dwida Setiawan Wahyudi, and also my beloved son, Mumtaz Tsaqiful Azam. Their sacrifice is a tremendous support for me.

My special gratitude goes to my respected supervisor, Dr. Naamane Djeghim for his encouragement and constant guidance.

My deep appreciation also goes to my examiner, Dr. Syed Sikandar Syah for his invaluable suggestions to further improve this research.

All my lecturers and administrative staff from IRKHS truly deserve my appreciation for enhancing my knowledge and experience.

My thanks also goes to all my friends in IIUM. . I owe Jamalia a special thanks for helping me a lot in the completion of this research.

May Allah grant all of them the best rewards here and hereafter!

TABLE OF CONTENTS

Abstract ii
Abstract in Arabic iii
Approval Page iv
Declaration Page v
Copyright Page vi
Acknowledgements vii
Table of Contents viii
Transliteration Table x

CHAPTER ONE: INTRODUCTION 1
1.1. Introduction 1
1.2. Research Problem 3
1.3. Research Question 3
1.4. Research Objectives 4
1.5. Limitation of Study 4
1.6. Research Methodology 4
1.7. Literature Review 5

CHAPTER TWO: THE CONCEPT OF *MAṢLAḤAH* 12
2.1. Literal and juridicial definition 12
2.2. Legislative foundation 14
2.3. The classification 15
2.4. Juristic concepts 19
2.4.1. Abū al-Ḥusayn al-Baṣrī 19
2.4.2. Abū Ḥāmid al-Ghazālī 20
2.4.3. Fakhr al-Dīn al-Rāzī 23
2.4.4. Saif al-Dīn al-Āmidī 24
2.4.5. Najm al-Dīn al-Ṭūfī 25
2.4.6. Ibn Taymiyyah 28
2.4.7. Abū Ishāq al-Shāṭibī 29
2.4.8. Muhammad al-Ṭāhir ibn ʿĀshūr 33
2.5. Polemics about *al-maṣlaḥah al-mursalah* 35
2.6. *Maṣlaḥah* from Indonesian liberal intellectuals' point of view 40
2.6.1. The meaning of liberal Islam 40
2.6.2. History of liberal Islam in Indonesia 42
2.6.3. "Liberal Islam" groups 45
2.6.4. Intellectual background 48
2.6.5. Socialization of liberal Islam 49
2.6.6. Reaction to liberal Islam 52
2.7. The liberal intellectuals' view on *maṣlaḥah* 55

CHAPTER THREE: LIBERAL ISLAM' APPLICATION OF *MAṢLAḤAH* IN ISLAMIC FAMILY LAW 62
3.1. Issues in marriage 63

3.1.1. *Wālī* (marriage guardianship)....63
3.1.1.1. Why *wālī* ……....66
3.1.2. Issue of inter-religious marriage....67
3.1.2.1. The liberal view....71
3.1.3. *Mahr* (dowry)....77
3.1.4. Polygamy....81
3.1.4.1. Polygamy in Indonesian Family Law....81
3.1.4.2. Liberal Intellectual's view....83
3.1.4.3. The *Shari'* rule....84
3.1.4.4. The law....85
3.1.4.5. Polemics around polygamy....86
3.2. Issues on *ṭalāq* (divorce) and *'iddah* (waiting period)....92
3.2.1. *Ṭalāq*....92
3.2.1.1. The law of *ṭalāq* in Islam....94
3.2.1.2. Why *ṭalāq* is in the husband's hand?....96
3.2.1.3. The misuse of *ṭalāq* (divorce)....98
3.2.2. *'Iddah* (waiting period)....99
3.2.2.1. The Liberal intellectuals objection....101
3.2.2.2. Wisdom....102
3.3. Inheritance....103
3.3.1. Liberal intellectuals objection to inheritance law....103

CONCLUSION....109

BIBLIOGRAPHY....111

TRANSLITERATION

Table of the system of transliteration of Arabic words and names
used by the International Islamic University Malaysia

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

CHAPTER ONE

INTRODUCTION

INTRODUCTION

Maṣlaḥah is on center stage today in the Muslim academic world because some Muslim intellectuals are attempting to reconstruct Islamic law based on the principle of *maṣlaḥah.*

The root word of *maṣlaḥah* is *ṣ-l-ḥ* (*ṣalaḥa* or *ṣaluḥa*). *Maṣlaḥah* literally means utility or what is good or beneficial. Technically it refers to the purposes of legal rulings and the intended utility of the law in general. One of its synonyms is *manfaʿah*. Its antonyms are *maḍarrah* and *mafsadah*. The plural form of *maṣlaḥah* is *maṣāliḥ.* In its general meaning, it is every single action that proves to be beneficial and brings goodness to mankind, and prevents wrongful conduct and harmful incidents. Therefore, any meaning that brings about goodness can be called *maṣlaḥah.*[1]

According to al-Ghazālī, the essential application of *maṣlaḥah* is divided into two aspects: positive and negative. The first deals with seeking or acquiring a certain benefit, goodness, utility or beneficence, while the second is concerned with the removal of evil, harm or injuries from the life of the individual and ultimately of the community. However, in legal discussion, the concept of *maṣlaḥah* embraces the

[1] Muḥammad Saʿīd Ramaḍān al-Būṭī, *Ḍawābiṭ al-maṣlaḥah fī al-Sharīʿah al-islāmiyyah,* (Beirut: Muʿassasah al-Risālah, 1982), 24.

preservation of five principal human interests, namely religion, life, reason, lineage and property.[2]

Al Ṭūfī says that *maṣlaḥah* is "the cause leading to *ṣalaḥ* and *nafʿ*.[3]

In this era, there are a lot of issues imported from Western culture into Indonesia, especially those related to women. Currently many Western ideas under the pretext of *maṣlaḥah* inroads into Islamic literature at the behest of some liberal intellectuals, who have been influenced by Westernization/Orientalism/Occidentalism.They try to insert into Islamic ideas those thinking in the name of reconstructing Islamic law. In general, these intellectuals claim that Islamic law *(fiqh Islāmī*) is dominated by classical ideas which are irrelevant to current world affairs.

They by invoking the *uṣūlī* principle: *"al-Aḥkām tataghayyar bitaghayyurr al-zamān wa al-makān"* (laws may change according to the change of place and time) and also the principle theory of *maṣlaḥah,* attempt to interpret the Qur'ān and the *Sunnah* based on what they call "contextual concepts." They also endeavour to propose a new form of *fiqh* which they claim to be more humane and just in the sense that it is unbiased in terms of gender; placing women and men on the same footing.

In this thesis, therefore the researcher attempts to clarify the concept of *maṣlaḥah* and its application in accordance with the *maqāṣid* of the Sharīʿah. The researcher will also investigate the concept of *maṣlaḥah* as being propagated and taught by some contemporary liberal intellectuals in Indonesia who attempt to

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[2] Abū Ḥāmid Muḥammad al-Ghazālī, *al-Mustaṣfā,* ed. Muḥammad ʿAbd al-Salām ʿAbd al-Shāfī (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1993), 174.

[3] Al-Ṭūfī, *al-Risālah fī riʿāyat al-Maṣlaḥah,* ed. Aḥmad ʿAbd al-Raḥīm al-Sāyīḥ (Cairo: al-Dār al-Miṣriyyah al-Lubnāniyyah*,* 1993*),* 25.

promote a new form of *fiqh* which they consider to be more humane, just and suitable for the modern age.

RESEARCH PROBLEM

The application of the concept of *maṣlaḥah* to issues regarding women, as propagated by some Indonesian contemporary liberal intellectuals, invites a great deal of controversy among the academic community in particular and the public in general. Therefore, there is a need to clarify the difference between the understanding of the concept of *maṣlaḥah* and its application between those intellectuals and Muslim in the domain of Islamic family law.

RESEARCH QUESTIONS

1. Who can be designated as "liberal" intellectuals in Indonesia?
2. What is the origin of the understanding of the concept of *maṣlaḥah* as being propagated by those contemporary intellectuals in Indonesia?
3. What are the applications of the concept of *maṣlaḥah as* proposed by these intellectuals?
4. Is the concept of *maṣlaḥah* propagated by these intellectuals in accordance with Islamic law? Does it fit into the category of *maṣlaḥah muʿtabarah* or *maṣlaḥah mulghāh?*
5. Is the liberal interpretation and implementation of the concept of *maṣlaḥah* in the domain of family law in accordance with Islamic law?

RESEARCH OBJECTIVES

1. To intelligibly identify the concept of *maṣlaḥah* as conceived by liberal intellectuals in Indonesia and whether this matches with the concept of *maṣlaḥah* as explained by mainstream Muslim scholars.
2. To bring forth clarification and criticism of the concept and application of *maṣlaḥah* as being propagated by liberal intellectuals in Indonesia.
3. To identify the sources from which liberal intellectuals derive their ideas.
4. To elaborate on the application of the concept of *maṣlaḥah* in the area of family law as being propagated by liberal intellectuals in Indonesia.

LIMITATION OF STUDY

The limitations of this study are set upon the analysis on matters proposed by significant Indonesian contemporary liberal intellectuals, which touch on issues related to women in family law. The aforementioned issues are marriage, divorce, *ʿiddah* and inheritance. This study is confined to Indonesia where these issues have been widely propagated and developed in Indonesian society especially in large cities such as Jakarta, Bandung, Yogyakarta and Surabaya.

RESEARCH METHODOLOGY

This study falls under qualitative research; therefore it is based on library research. Thus, it will involve basically the tools of library research to obtain the necessary information and required data. Then, these materials would be analytically studied and compared.

LITERATURE REVIEW

One of the contemporary Muslim intellectuals, whose views on matters of *maṣāliḥ al-mursalah* attracts attention, is Ḥusayn Ḥāmid Ḥassān. Two of his writings are entitled "*Fiqh al-maṣlaḥah wa taṭbīqātuhu al-muʿāṣirah,*"[4] and "*Naẓariyyat al-maṣlaḥah fī al-fiqh al-Islāmī.*"[5] In the former, the author discusses *fiqh al-maṣlaḥah*, its connection to general *maṣlaḥah* and Islamic law, its prerequisites, and finally a number of its general applications which have connections with *al-muʿāmalāt al-māliyyah* and contemporary economics. Meanwhile, his later book, *"Naẓariyyat al-maṣlaḥah fī al-fiqh al-Islāmī"* is an elaboration on the theory of *maṣlaḥah* from the views of well known Muslim scholars.

Another work entitled, "*Ḍawābiṭ al-maṣlaḥah fī al-Sharīʿah al-islāmiyyah,*" written by Muḥammad Saʿīd Ramaḍān al-Būṭī, sets out rules for the determination of *maṣlaḥah*. According to the author, the effective way to preserve the Sharīʿah in its ideal form is to determine *maṣlaḥah* by the needs recognized by the Sharīʿah, otherwise the Sharīʿah would be reduced to the position of man-made laws. The purpose of al-Būṭī's work is to set down the rules for using *maṣlaḥah* in legal reasoning, and in doing so he analyzes the views of the Muslim jurists. It may be noted that al-Būṭī takes the most restrictive view of *maṣlaḥah* by holding that *maṣlaḥah* can serve as a basis for new rulings provided that: firstly, it has the support of some legal proof. Next, it is not contradicted by any other legal proofs, such as analogy.[6]

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[4] Ḥusayn Ḥāmid Ḥassān, *Fiqh al-maṣlaḥah wa taṭbīqātuhu al-muʿāṣirah*, (Jeddah: al-Maʿhad al-Islāmī li al-Buḥūth wa al-Tadrīb al-Bank al-Islāmī li al-Tanmiyyah, 1993).

[5] Ḥusayn Ḥāmid Ḥassān, *Nazariyyat al-maṣlaḥah fī al-fiqh al-islāmī,* (Cairo: Maktabah al-Mutanabbī, 1981).

[6] Muḥammad Saʿīd Ramaḍān al-Būṭī, *Ḍawābiṭ al-maṣlaḥah fī al-Sharīʿah al-islāmiyyah,* (Beirut: Muʿassasah al-Risālah, 1982)

The book *"Utility in Classical Islamic Law"*[7] written by Ihsan Abdul Wajid Bagby discusses basic views on *maṣlaḥah mursalah*. He first sets out the views of Muslim scholars who denounce *maṣlaḥah mursalah*, such as those from the Muʿtazilah and Shāfiʿī schools of thought and then those Muslim scholars who welcome this concept, such as those from the Ḥanafī and Mālikī schools of thought and Imām al-Ghazālī. The book also discusses views of the three main supporters of *maṣlaḥah mursalah*, namely, al-Shāṭibī, Ibn Taimiyyah, and al-Ṭūfī. In its final chapter, the author discusses three legal principles based on *maṣlaḥah* which are *murāʿāt al-khilāf, sadd al-dharā'iʿ*, and changes in customs and circumstances.

Ḥarakāt taḥrīr al-mar'ah min al-musāwāh ila al-jindar: dirāsah naqdiyyah islāmiyyah,[8] written by Muthannā Amīn al-Kurdistānī, discusses feminism issues, its history and related matters. It is an excellent work which criticizes the method of thinking of feminists such as Fatima Mernisi.

The book by Ramaḍān al-Būṭī, entitled *"al-Mar'ah bayna tughyān al-niẓām al-gharbī wa laṭā'if al-tashrīʿ al-rabbānī,"*[9] provides answers to the claims that Islam confines and casts out women.

In part two of *"Islamic Legal Philosophy"* by Muhammad Khalid Masud, the author discusses the concept of *maṣlaḥah* in Islamic law. He touches on the concept of *maṣlaḥah* before al-Shāṭibī and in the modern times.[10]

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[7] Ihsan Abdul-Wajid Bagby, *"Utility in classical islamic law: The concept of maṣlaḥah in uṣul al-fiqh,"* (Ph.d. dissertation, The University of Michigan, 1986).
[8] Muthannā Amīn al-Kurdistānī, *Ḥarakāt taḥrīr al-mar'ah min al-musāwāh ilā al-jindar: dirāsah naqdiyyah islāmiyyah*, (Kuwait: Dār al-Qalam, 2004)
[9] Saʿid Muḥammad Ramaḍān al-Būṭī, *al-Mar'ah bayna tughyān al-niẓām al-gharbī wa laṭā'if al-tashrīʿ al-rabbānī* (Damascus: Dār al-Fikr, 1996).
[10] Muhammad Khalid Masud, *Islamic legal philosophy*, (Pakistan: Islamic Research Institute, 1977).

In addition, literatures containing "*Fatwas Munas VII Majelis Ulama Indonesia"*[11] representing the resolution 7th of *Musyawarah Nasional,* comprises of *fatwas* on the unlawfulness of inter-religious marriage, unlawfulness of inter-religious inheritance and *fatwas* on criteria of *maṣlaḥah*. *Fatwas* from Majelis Ulama Indonesia provide answers to matters which are being propagated in Indonesia by liberal intellectuals. Regarding the criteria of *maṣlaḥah,* Majelis Ulama Indonesia observes that presently there are numerous groups and individuals who utilize the concept of *maṣlaḥah* as a basis to justify a set of regulations without paying any regard to the existing formal guidance. Eventually, these actions precipitate deviations in applying Islamic regulations and create disturbance in the society. Therefore, Majelis Ulama Indonesia firmly emphasizes that *maṣlaḥah* which is lawful from the Sharīʿah point of view is the one which does not contradict the Qur´ān and the *Sunnah*. Moreover, the one entitled to determine whether something is considered as *maṣlaḥah* or not according to the Sharīʿah, is an institution which possesses the competence in the subjects of the Sharīʿah and this should be done through *ijtihād jamāʿī.*

Among the books from liberal`s perspective which attempt to promote the concept of "new *fiqh*" based on *maṣlaḥah* is *"Hal-hal Yang Tak terpikirkan Tentang Isu-Isu Keperempuanan dalam Islam"* (The unthinkable feminine issues in Islam).[12] In this book, the author, Syafiq Hasyim, attempts to bring forth a new concept on *fiqh* of women. After providing analysis on some classical *fiqh* matters, the author maintains that much of these views are irrelevant today. The author claims to use a method of *fiqh* development based on *maqāṣid* of the Sharīʿah and the principle of

[11] Majelis Ulama Indonesia, *Fatwa munas VII Majelis Ulama Indonesia*, (Jakarta: Author, 2005).
[12]Syafiq Hasyim, *Hal-hal yang tak terpikirkan tentang isu-isu keperempuanan dalam Islam*, (Bandung: Mizan Media Utama, 2001).

justice, equality, democracy and moral socialization. Further, he claims that the method used by him is *tazāmunī* (synchronic) and *itsqāthī* (diachronic). According to him, the concept of *tazāmunī* (synchronic) is to read a literature and utilize it to connect the reality from history to the reality of modern era. In the context of women, the method of *tazāmunī* means to withdraw the facts and meanings of *fiqh* from the past (classical literature) to be used as practical solutions of *fiqh* in the current era. The author provides the concept of *ijbār* as an example which was initiated by *fiqh* Shāfi'ī and has been adopted by some people in modern time, although the situations and conditions of the current age differ much from the previous ages. Every era has its own epistemology and every epistemology provides its own meanings. The method of *tazāmunī,* as stated by the author, often results in the problem of anachronism (incorrect time).

On the other hand, according to the author, the method of *itsqāthī* is to read a literature and dwell on its meaning in the contemporary era by severing the ties of meaning from the past. Therefore, due to the discontinuity of history, it is impossible to replicate the meaning from the past to be used in the present. However, it does not necessarily mean that the meaning from the past will never be used. Instead, the meaning from the past should be used as an unbinding reference which acts as a basis of knowledge that explains its content that was influenced by historical events.

In his concluding chapter, the author elaborates that out of these two approaches, the most beneficial method of comprehension is the latter; *itsqāthī.* To him, using this method of comprehension, especially in the context of *fiqh*, will lead to improvements in understanding the meaning of *fiqh* literatures according to the

current need instead of living with the past.[13]

The book *"Fiqh Perempuan, Refleksi Kiai Atas Wacana Agama dan Gender"* (*Fiqh* on women, a Muslim scholar reflection on religious and gender subjects)[14] was written by Husein Muhammad. He is a *Kyai* (Javanese Muslim scholar) in Indonesia who is well known of his thoughts which lean towards feminism. He observes that there are gaps and imbalances between religious ideals and social reality. He states that religious ideals provide rooms and opportunities to actualize women rights as they were to men, and it was the social reality which actually limited, and prevented these actualizations. The disparity as mentioned above needs to be eliminated through critical-intellectual efforts and reconstructions on religious literatures which act as principles. Accordingly, he states that we need to reinterpret and reconstruct *fiqh* methods into the current social context. He also states that *fiqh* is supposed to be an intellectual result from Muslim scholars who were just human beings, therefore its content and truth should be relative and contextual, and its substantial and rational meanings should be subject to development. Unfortunately, according to Husein Muhammad, *fiqh* has become a "religion' whose meaning has become sacred and eternal.

Generally, the above book highlights womens` rights in Islam (especially to classical *fiqh*). The author observes that the classical interpretations generally tend to be gender biased. For instance, to them al-Nisā´: 34 "*al-rijāl qawwamūna ʿalā al-nisā´'*' provides a meaning as if there is an absolute superiority of men above women. So is the case with classical *fiqh* which tends to portray women as sources of "*fitnah*." The author attempts to bring forth an improved interpretation on *fiqh al-nisā'*. At the

[13] Syafiq Hasyim, 265-266.
[14] Husein Muhammad, *Fiqh perempuan refleksi kiai atas wacana agama dan gender*, (Yogyakarta: LKIS, 2001), 5-10.

end of the book, the author criticizes *ʿuqūd al-lujain* which was written by Imām Nawāwī al-Bantanī (this written material was an essential reference on the matters of marriage in traditional religious educational institutions with Shāfiʿī school of thought in Indonesia).

The book "*Dari Syariat Menuju Maqashid Syariat: Fundamentalisme, Seksualitas, dan Kesehatan Produksi.*"[15] *(*From Sharīʿah toward *maqāṣid* of the Sharīʿah: Fundamentalism, sexuality, and reproductive health) tries to analyze the weakness of the Sharīʿah and *fiqh* in being considered as final, complete, and non-interpretable texts. The authors says that critical study of the construction of *fiqh* is not to be based only on restudying the primary texts as the foundations for the construction of *fiqh*, but also on empirical study of several regions that have implemented the Sharīʿah. Furthermore, the authors give alternatives to re-understand *fiqh* and fundamental Islamic texts. It has suggested in the book that "formal, rigid, and standard *fiqh*" should become a more humanist *fiqh*, by using *maṣlaḥah* theory for rational interpretation.

The books "*Fiqh lintas Agama" (*Inter-religious *fiqh*)[16] and "*Kawin Lintas Agama, Perspektif Kritik Nalar Islam" (*A critical perspective on inter-religious marriage in Islam)[17] bring forth discourses on opinions which allow marriages between Muslims and non-Muslims in general, based on (as what they called) the principle of *maṣlaḥah.*

In conclusion, as quoted by these liberal authors, it is necessary to refer to the Qur´ān and to re-interpret it comprehensively, and to use the theory of *maṣlaḥah* as

[15] Zuhairi Misrawi et al, *Dari syariat menuju maqashid syariat: Fundamentalisme, seksualitas, dan kesehatan reproduksi*, (Jakarta: Ford Foundation, 2003).
[16] Mun'im A. Sirry (ed.), *Fiqih lintas agama, (*Jakarta: Yayasan Waqaf Paramadina, 2004).
[17] Suhadi, *Kawin lintas agama perspektif kritik nalar Islam*, (Yogyakarta: LKIS, 2006).15-20.

the bases to adapt to this modern world, in such a way that there will be new interpretation from the Qur´ān in defining the concept of equality between men and women, as underlined by the concept of justice and democracy in the Qur´ān.

After studying the writings of liberal intellectuals in Indonesia, it is distinguishable that they attempt to bring forth opinions solely based on what they consider as *maṣlaḥah* principles. But which *maṣlaḥah* do they depend on? Is it based on the Qur'ān and the *Sunnah* or human desires?

It is due to the above questions, that the researcher attempts and aspires to scholarly study the concept of *maṣlaḥah* in the light of the Sharīʿah texts, and sequentially analyze how the liberal intellectuals attempt to apply the concept of *maṣlaḥah* to their disputed opinions they put forward, specifically the ones on gender equality.

CHAPTER TWO

THE CONCEPT OF *MAṢLAḤAH*

LITERAL DEFINITION

The word *maṣlaḥah,* literally originates from the root *ṣ-l-ḥ* (*ṣalaḥa or ṣaluḥa*). It means something which is "to be good, right, to repair or improve." For instance, in Arabic, when someone says: *Naẓara fī maṣāliḥ al-nāṣ,* meaning "he considered the things that were for the good of the people." Or: *fī al-amr maṣlaḥah,* meaning "in the affair is that which is good."[18] *Maṣlaḥah,* is an infinitive noun of the former. One of its synonyms is *manfaʿah*; and both may mean "utility." Both *ṣalaḥa* and *ṣaluḥa* can mean a thing or man which/who becomes "good, incorrupt, right, just, righteous, virtuous, or honest."[19] *Maṣlaḥah,* in the legal parlance, further means benefit or interest. Its antonyms are *maḍarrah* and *mafsadah*, meaning "harm" or "evil." The plural form of *maṣlaḥah* is *maṣāliḥ*. In most cases, however, the plural form takes precedence.

JURIDICIAL DEFINITION

Juridically, *maṣlaḥah* carries the meaning of "welfare," and the jurists applied the term to mean "general good" or "public interest"[20] or the acquisition of goodness, utility, benefit and the removal of harm or evil.[21] In the legal context *maṣlaḥah* has a more specialized meaning. Al-Ghazālī states that although *maṣlaḥah* means "the acquisition of utility (*manfaʿah*) and the avoidance of harm (*maḍarrah*)," Muslim

[18] Edward W. Lane, *Arabic-English Lexicon,* (Beirut: Librairie du Liban, 1968), 4:1715.
[19] Ibid.
[20] Madjid Khaduri, "Maṣlaḥa," *Encyclopedia of Islam,* vol. 1, no. 4 (1991):738.
[21] ʿAbd al-Karīm Zaidān, *al-Wajīz fī uṣūl al-fiqh,* (Beirut: Muʾassasah al-Risālah, 1986), 236.

jurists use the term mainly to refer, "to the preservation of the purpose *(maqṣūd*) of the Sharīʿah."[22] Al-Ṭūfī describes *maṣlaḥah* as, "the cause leading to the purpose of the Law-giver."[23] To Ibn 'Abd al-Salām, *maṣlaḥah* means *ladhdha* (pleasure) and *faraḥ* (happiness) and the means leading to them.[24] *Maṣlaḥah* according Ibn ʿĀshūr can be defined as, "attribute of the act (*fiʿl)* whereby righteousness and goodness (*ṣalāḥ*) takes place, that is to say utility and benefit (*nafʿ*), always or mostly for the public or individuals."[25]

A point to note in these definitions is that *maṣlaḥah* not only means the attraction of utility but also the avoidance of harm. The concept of avoiding disutility is an important element in the definition, because the Qur'ānic verses and the *ḥadīth* clearly state that Islam does not entail any harm or hardship. Owing to these clear texts, the consideration of bad consequences is a significant aspect of legal reasoning. Good consequences, in this regard, are always weighed against bad consequences. Achieving *maṣlaḥah,* therefore, can be attributed to legal rulings that lead to the avoidance of bad consequences.[26]

Although the word *maṣlaḥah* is not found in the Qur'ān, the derivatives of the root (*ṣ-l-ḥ)* are found in numerous passages of the Qur'ān. The verb *ṣalaḥa* is used in the Qur'ān primarily with the meaning to do good, righteous and virtuous deeds or to be or become good, righteous, or virtuous. In the Qur'ān we find the verse that means: "Gardens of Eden –they shall enter it along with their fathers, their wives and their

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[22] Abū Ḥāmid Muḥammad al-Ghazālī, *al-Mustaṣfā,* ed. Muḥammad ʿAbd al-Salām ʿAbd al-Shāfī (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1993), 174. See also Ḥusayn Ḥāmid Ḥassān, *Naẓariyyat al-maṣlaḥah fī al-fiqh al-Islāmī,* (Cairo: Maktabah al-Mutanabbī, 1981), 5-6.
[23] Najm al-Dīn al-Ṭūfī, *al-Risālah fī riʿayat al-maṣlaḥah,* ed. Aḥmad ʿAbd al-Raḥīm al-Sāyīḥ (Cairo: al-Dār al- Maṣriyyah al-Lubnāniyyah*,* 1993*),* 25. See also: Ḥuṣayn Ḥāmid, ibid., 9.
[24]Ibn ʿAbd al-Salam, *Qawāʿid al-aḥkām fī maṣāliḥ al-anām,* ed. ʿAbd al-Laṭīf Ḥassan ʿAbd al-Raḥman (Beirut: Dār al-Kutub al-ʿIlmiyyah,1999), 1:12.
[25]Muḥammad al-Ṭahir Ibn ʿAshur, *Ibn Ashur treatise on maqasid al-shariah,* translated from Arabic by Mohammed el-Ṭaḥir el-Mesawi (London: The International Institute of Islamic Thought, 2006), 92.
[26] Ibid., 27-28.

offspring who are righteous (*ṣalaḥa*)."[27] Another derivative is the adjective *ṣāliḥ* (pl. *ṣaliḥāt*), which is found in the frequently repeated phrase of the Qur'ān:

"Whoever believes in God, and the last day, and do good [*ʿamila ṣāliḥan*] they have their reward in the presence of their Lord"[28]

The Qur'ān uses *ẓalama* ('He did wrong')[29] and *fasada* ('He/it corrupted')[30] as opposite terms to *ṣaluḥa.*

In the Qur'ān and the *ḥadīth* the word *aṣlaḥa* is at times contrasted with the verb *afsada*, which basically means to cause immorality, wickedness, corruption, and disorder. In one example God says in the Qur'ān, "*lā tufsidū fī al-arḍi baʿda iṣlāḥihā.*" (Do not cause wickedness and disorder in the earth after righteousness and peace have been established in it.)[31]

LEGISLATIVE FOUNDATION OF MAṢLAḤAH

Jurists cite the Qur´ān, the *ḥadīth*, and *ijmāʿ* (consensus) as proofs of the theory of *maṣlaḥah*. Some of the verses that are often quoted in support of the theory of *maṣlaḥah* are: "We have sent you Muhammad only as a mercy to the worlds."[32] "God does not wish to place on you hardship. He wishes only to purify you and complete His blessing on you."[33] In regards to the purpose of specific rulings, the Qur´ān says for example, "fasting has been ordained for you just as it has for those before you that you might learn self-restraint."[34] The *ḥadīth* most relied upon to

[27]Qur'ān, *al-Raʿd*: 23.
[28]Qur'ān*, al-Baqarah*: 62.
[29]Qur'ān, *al-Mā'idah*: 39.
[30]Qur'ān*: al-Shuʿarā´*:125*; al-Naml*: 142; *al-Baqarah*: 220.
[31]Qur'ān, *al-Aʿrāf*: 56.
[32]Qur'ān, *al-Anbiyā´:*107.
[33]Qur'ān, *al- Mā'idah*: 6. Muḥammad Saʿīd Ramaḍān al-Būṭī, *Ḍawābiṭ al-maṣlaḥah fī al-sharīʿah al-Islāmiyyah,* (Beirut: Mu´assasah al-Risālah, 1982), 75-78.
[34]Qur'ān, *al-Baqarah*: 183.