P-ISSN : 1411-2353

MEDIA SYARI'AH

Wahana Kajian Hukum Islam dan Pranata Sosial

Vol. 17, No. 2, Juli-Desember 2015

Baharuddin Bin Sayin & Muhammad Hamizan Bin Ab Hamid
Waqf Higher Education: Implementation Model In University College Bestari (UCB), Terengganu, Malaysia

Iskandar Budiman
Pembangunan Sumber Daya Manusia Sebagai Modal dalam Sistem Ekonomi Islam (Human Resources Development as Human Capital in Islamic Economic System)

Mochammad Arif Budiman, Ruzita Mohd. Amin, Selamah A. Yusoff & Adewale Abideen Adeyemi
Measuring *Maqasid Al-Shari'ah* ata Micro
Level with Special Reference to the Preservation of Wealth

Mohd Zakhiri Md Nor
Siyāsah Sharīʿah and the Discretionary Actions of the Ruler: Examining the Work of *al-Qarāfī* in *al-Tamyīz* and *al-Subkī* in *al-Fatāwā* in Classical Islam.

Nazaruddin Ali Basyah
Membudayakan Sikap Positif dan Pemikiran Kreatif Terhadap Kewirausahaan di Kalangan Masyarakat Muslim: Satu Alternatif Kepada Penanggulangan Kemiskinan

Nur Hajrina & Wahyu Jatmiko
Between *Sharia Maqasid* Index and Human Development Index: Which One is Happier?

FAKULTAS SYARIAH DAN HUKUM UNIVERSITAS ISLAM NEGERI AR-RANIRY

MEDIA SYARI'AH

MEDIA SYARI'AH

Wahana Kajian Hukum Islam Pranata Sosial
Vol. 17, No. 2, 2015

EDITOR-IN-CHIEF
Ihdi Karim Makinara

EDITORS
Agustin Hanafi
Ali Abubakar
Analiansyah
Bismi Khalidin
Jamhir
Mijaz Iskandar
Mursyid
Mutiara Fahmi

INTERNATIONAL EDITORIAL BOARD
A. Hamid Sarong (Universitas Islam Negery Ar-Raniry, BANDA ACEH)
Arskal Salim (Universitas Islam Negery Syarif Hidayatullah, JAKARTA)
Al Yasa' Abubakar (Universitas Islam Negery Ar-Raniry, BANDA ACEH)
Euis Nurlaelawati (Universitas Islam Negery, SUNAN KALIJAGA)
Kamaruzzaman Bustamam-Ahmad (Universitas Islam Negery Ar-Raniry, BANDA ACEH)
Muhammad Amin Summa (Universitas Islam Negery Syarif Hidayatullah, JAKARTA)
Ratno Lukito (Universitas Islam Negery SUNAN KALIJAGA)
Ridwan Nurdin (Universitas Islam Negery Ar-Raniry, BANDA ACEH))
Sonny Zulhuda (International Islamic University, MALAYSIA)

ASISSTEN TO THE EDITOR
Ainun Hayati
Musliadi
Syarbunis

ENGLISH LANGUAGE ADVISOR
M. Syuib

ARABIC LANGUAGE ADVISOR
Fakhrurrazi M. Yunus

COVER DESIGNER
Ikhlas Diko

MEDIA SYARI'AH, *is a six-monthly journal published by the Faculty of Sharia and Law of the State Islamic University of Ar-Raniry Banda Aceh. The journal is published since February 1999 (ISSN. 1411-2353) and (ESSN.2579-5090) Number. 0005.25795090 / Jl.3.1 / SK.ISSN / 2017.04. earned accreditation in 2003 (Accreditation No. 34 / Dikti / Kep / 2003). Media Syari'ah has been indexed Google Scholar and other indexation is processing some.*

MEDIA SYARI'AH, *envisioned as the Forum for Islamic Legal Studies and Social Institution, so that ideas, innovative research results, including the critical ideas, constructive and progressive about the development, pengembanan, and the Islamic law into local issues, national, regional and international levels can be broadcasted and published in this journal. This desire is marked by the publication of three languages, namely Indonesia, English, and Arabic to be thinkers, researchers, scholars and observers of Islamic law and social institutions of various countries can be publishing an article in Media Syari'ah*

MEDIA SYARI'AH, *editorial Board composed of national and international academia, part of which are academicians of the Faculty of Sharia and Law of the State Islamic University of Ar-Raniry Banda Aceh. This becomes a factor Media Syari'ah as prestigious journals in Indonesia in the study of Islamic law.*

Recommendations from the editor to scope issues specific research will be given for each publishing Publishing in January and July.

Editor Office :
MEDIA SYARI'AH
Wahana Kajian Hukum Islam dan Pranata Sosial
Fakultas Syariah dan Hukum Islam UIN Ar-Raniry Banda Aceh, Provinsi Aceh – Indonesia
Email: mediasyariah@ar-raniry.ac.id
ihdimakinara@ar-raniry.ac.id
Webs: jurnal.ar -raniry.ac.id/index.php/medsyar
Telp.+62 (651)7557442,Fax. +62 (651) 7557442
HP : 0823 0400 8070

Table of Contents

Articles

219 *Baharuddin Bin Sayin & Muhammad Hamizan Bin Ab Hamid*
Waqf Higher Education: Implementation Model In University College Bestari (UCB), Terengganu, Malaysia

239 *Iskandar Budiman*
Pembangunan Sumber Daya Manusia Sebagai Modal dalam Sistem Ekonomi Islam (Human Resources Development as Human Capital in Islamic Economic System)

271 *Mochammad Arif Budiman, Ruzita Mohd. Amin, Selamah A. Yusoff & Adewale Abideen Adeyemi*
Measuring *Maqasid Al-Shari'ah* ata Micro Level with Special Reference to the Preservation of Wealth

293 *Mohd Zakhiri Md Nor*
Siyāsah Sharīʿah and the Discretionary Actions of the Ruler: Examining the Work of *al-Qarāfī* in *al-Tamyīz* and *al-Subkī* in *al-Fatāwā* in Classical Islam.

311 *Nazaruddin Ali Basyah*
Membudayakan Sikap Positif dan Pemikiran Kreatif Terhadap Kewirausahaan di Kalangan Masyarakat Muslim: Satu Alternatif Kepada Penanggulangan Kemiskinan

333 *Nur Hajrina & Wahyu Jatmiko*
Between *Sharia Maqasid* Index and Human Development Index: Which One is Happier?

373 *Nurul Hilmiyah, Bayu Taufiq Possumah & Muhammad Hakimi Mohd. Shafiai*
Tawhidic Based Public Policy: A Theoretical Overview

Siyāsah Sharīʿah and the Discretionary Actions of the Ruler: Examining the Work of *al-Qarāfī* in *al-Tamyīz* and *al-Subkī* in *al-Fatāwā* in Classical Islam

Mohd Zakhiri Md Nor

Abstract: *Sharīʿah law is a revealed law and the ruler applies the Siyāsah Sharīʿah in administering the state according to Allah ordained. The question is whether this discretion of the ruler remains open in exercising the Siyāsah al-Sharīʿah. This paper focuses on the application of siyāsah syarīyyah and discretionary actions of ruler in classical Islam. It is also to examine the work of al-Qarāfī in Tamyīz and al-Subkī in Fatāwā al-Subkī in classical Islam. The paper first outlines the nature of siyāsah al-Sharīʿah from Sharīʿah perspective. The next part of the paper examines the roles of the ruler in exercising the siyāsah al-Sharīyyah. The context of the study is the work of al-Qarāfī and al-Subkī in Classical Islam. The paper concludes by outlining several recommendations for determining the parameters of the*

application of siyāsah al-Sharīʿah and discretionary actions of ruler in the contemporary Islamic state. The methodology adopted in the research is purely qualitative, engaging in doctrinal archival research of classical literatures and cases on the discretion actions of ruler in the application of siyāsah al-Syarīʿah. Since there is scarcity of resources on the subject matter, this study is deemed to be significant in filling in the gaps of the application of siyāsah al-Syarīyyah and discretionary actions under the Sharīʿah laws.

Keywords: Siyasah Shariyyah, Discretionary Action, Classical Islam

(a) Personal Background of al-Qarafi al- Maliki and al-Subki al-Shafi'i

Al-Qarafi full name is shihāb al-Dīn Abū al-'Abbās Aḥmad ibn Idrīs (al-Sanhaji al-Bihinsi al-Misri) al-Qarāfī (1228–1285). He is a Maliki jurist during Mamluk period.For the purpose of this paper, the author refer to one of the literature from al-Qarafi is *al-Ihkam fi Tamyiz al-Fatawa an Ahkam wa Tasarufat Imam wa al-Qadi*

Another scholar that the author refers is Abdul Wahab bin Taqiyuddin 'Ali bin Abdul Kafy as-Subky. Tajuddin as-Subki died on 7 Dzulhijjah tahun 771 H / 2 Juli 1370 M in Damaskus. One of his major work is on *fatawa al subki fi furu al Shafi*

(b) The rules of *Siyasah al Syariah* in Islam

Ideally, the first component of the State is the ruler himself. Even though the al-*Qurʾān* does not mention the concept of State, the jurists infer the concept of State by the existing concept of *imāmah* / *khalīfah* or *dar al-Islam*[1]. According to Khalīdī, the term *khalīfah* refers to the Islamic state itself.[2] According to al-Mawārdī, the *khalīfah* is to replace the duties of prophethood.[3] The *khalīfah* act as to *maẓhar al -siyāsī* and *maẓhar al -dīnī*, *inter alia* to administer the affair of *fiqḥ al- muʿāmalāt* matters[4] According

---

[1] Sulaiman al-Timawi., *Al-Sultat Al-Thalatha Fi Al-Dasatir Al -Arabiyyah Al- Muasirah Wa Fi- Fikri Al- Siyasi Al Islami* (al-Qahirah: Jami'at 'Ayn Shams, 1986).See also Dr. Wahbah az-Zuhaili, *Al-Fiqh al-Islami wa Adillatuhu*, IX/823).

[2] Mamood Abdul Majid al-Khalidi., *Qawaid Nizam Al-Hukm Fil Al-Islam* (Oman: Maktabah Muhtasib, 1983); ———, *Maalim Khilafah Fi Al-Fikri Al-Siyasi Al-Islami* (Bayrut: Dar al-Jil, 1984).Al Khālīdi, 226.

[3] 'Ali ibn Muhammad al Mawardi., *Al-Ahkam Al-Sultaniyya*.

[4] Ibid.Al-Māwardi. See also Sulaiman al-Timawi., *Al-Sultat Al-Thalatha Fi Al-Dasatir Al -Arabiyyah Al- Muasirah Wa Fi- Fikri Al- Siyasi Al Islami*; Wahbah Zuhaily., *Fiqh Al-Islam Wa Adilatuhu* (Dimashq: Dar al-Fikr, 1999).

to *al-Khalīdī*, the administration of the State falls into three categories, the first being al- *maẓhar al siyāsī* that is the institution that run political affairs or anything that refers to power (*al-sulṭān*) and administration system (*niẓām al ḥukm*).[5] The second category is *maẓhar al-dīnī* that is the institution that run the religious affairs outside the scope of *al- sulṭān* and *niẓām al-ḥukm*. This may include matters pertaining to *al-muʿāmalāt, al-akḥwāl al-shaḥṣīah* and *al- ʿibādāt*, and the third category is the combination of both.[6]

Therefore, public administration (*al-siyāsah al- ʿammah*) is not the task of the judges, especially weak judges who have not the power to enforce their rulings, for example, a weak judge who issues rulings against a powerful king.[7] The state can introduce necessary laws to ensure social justice and to put an end to economic exploitation and oppression and the Holy *al-qurʾān* gives the Islamic State the necessary legal authority to do so.[8] Islamic jurist lay down the way to the ruler to practice *al-siyāsah al-syarīʿah*[9]ʾ Ibn Taimiyyah, in his book "*al-Aḥkām al-Suṭtaniyyah*

---

[5] Mamood Abdul Majid al-Khalidi., *Qawaid Nizam Al-Hukm Fil Al-Islam*.

[6] *Ibid.*

[7] Shihāb al-Dīn Abū al-Abbās Ahmad b. Idris al-Qarafi., *Al-Ihkam Fi Tamyiz Al-Fatawa an Al-Ahkam Wa Tasarrufat Al-Qadi Wa Al-Imam*, ed. al-Fattah Abu Ghuddah, vol. 9 (Aleppo: Maktabat al-Matbuat al-Islamiyah, 1387/1967).

[8] Muhammad Ayūb., *Understanding Islamic Finance* (United States of America: John Wiley and Sons Inc, 2009).

[9] Shukeri Mohamad., "*Siyasah Syariyyah* Dan Kedudukannya Sebagai Method Penentuan *Hukum*," in *Seminar Hukum Islam Semasa Peringkat Kebangsaan* (Kuala Lumpur: Jabatabn *Fiqh* dan *Usul*, Akademi Pengajian Islam, Universiti Malaya, 1997). See also Ghalib Abd Al-Kafi Qarshi., *Awaliyyat Al-Farouq Al-Siyasiyyah Wa Al-Idarah Wa Al-Qada* (al-Mansurah: Dar al-Wafa, 2008).1) *Siyāsah Syarīʿah* should be based on *ʾuṣūls*/ methodologies that accepted by *Syaraʾ* like *al-Istislah, al- Istiḥsān, maqāṣid al -Syarīʿah, Sad al -zarāʾi, taḥqīq al- manāṭ al -khas, al -ʿuruf al -soleh maal al -afʿaal* and so on. 2) It cannot be based on the thinking that not based on *dalil-dalil syarīʿah* or based on whims and fancies or based on personal interest 3) it should be execersied to the curse of Allah. *Al-Siyāsah al- syarīʿah* cannot go agaist *dalil-dalil syaraʾ* 4) this is for public interest becaude the the act of

wal al-Wilāyah al-Dinniyah" defines politic as *"Iqāmatul al- din wa siyāsatul al- dunya bihi*" According to Islamic law, Islamic state is headed by a *muslim* ruler, implements *ḥudūd* and prohibits *ribā*. The law is from the *Qurʾān* and *Sunna* that is the actions of Prophet Muḥammad *s.a.w.* and His companions that relates to the conduct of the government (*al-siyʾar*), land tenure, taxation, covering of holy war, the status of non-Muslims.[10] The laws so introduced by the ruler must be within the limits of the *Sharīʿah*, and does not go beyond what is allowed in Islam[11] as it is imperative that the practice of the ruler must be within the limits of *ḥukm* Allah *s.w.t.*[12] Rasulullah *s.a.w.* is the greatest ruler and exercised *siyāsah al- sharīʿyyah* from his act and actions. Sometime the prophet acted as a ruler and the society has to get the permission from the *kḥālīfah* when it pertaining to public interest[13] Needless to say, the *khalīfah* or *imāmah* or state is bound to administer *Sharīʿah* and uphold *Sharīʿah* in carrying out their duties administering the State.[14] The prophet is the political leader and head of the state catered for the needs of the society Muslim and non-Muslim and protects their right under the constitution of Madina. The prophet was also a *mufti* and a judge to solve the disputes among the society and the best period of civilization is the period of Rasululallah *s.a.w.*[15] *Al- Mawārdī* said it is a compulsory (*wājib*) for the *khalīfah* to defend and implement all Islamic laws

---

Kḥalīfah is to follow public interest 5) cannot go against the spirit of *Sharīʿah* and the *Sharīʿah* principles

[10] Collin Imber, *Ebu's Su'ud: The Islamic Legal Tradition* (Edinburrgh: Edinburgh University Press, 1997).

[11] Muhammad Ayūb., *Understanding Islamic Finance*.

[12] Mamood Abdul Majid al-Khalidi., *Qawaid Nizam Al-Hukm Fil Al-Islam*.

[13] Shihāb al-Dīn Abū al-Abbās Ahmad Ibn Idris Al-Qarafi., *Al-Furuq*.This can be seen in *Ḥadīth* al-Salb whereby Rasullah act as a judge. Issues pertaining *Iḥyaʾ al-Mawātt* as a *kḥalīfah* and *Ḥadith* Hendun the wife of Abu Sufyan as a *mufṭī*

[14] Mohammad Hashim Kamali., *Shariah Law: An Introduction*.

[15] Khairu Qarnu Qarni

in Islamic state[16] and the status of Islamic state does not change even though it has been collonised.[17]

The main argument is whether the ruler in classical Islam has the discretionary power and if they have the discretionary power, the discretionary power is wide open

There is a limit for the ruler to exercise his power. The exercise of the siyasah shariyyah should be based on the following parameters:

The *ʿulamāʾ* provided certain conditions and parameters as to how to apply *siyāsah al-Sharʿiyyah* :-[18]

(1) *Siyāsah* must comply with the requirements of the *Sharīʿah.*

(2) *Siyāsah* must be in line with the spirit of the *Sharīʿah* and its principles.

(3) It should not contradict clearly with the *naṣṣ* (scripture).

---

[16] Wan Zahidi Wan Teh., "Ciri-Ciri Sebuah Negara Islam," in *Seminar Perlaksanaan Hukum Syarak di Malaysia* (Puteri Pan Pasific, Johor Bahru: Kerajaan Negeri Johor Darul Takzim and Institut Kefahaman Islam Malaysia(IKIM), 2000). Ciri-Ciri Sebuah Negara Islam, Seminar Pelaksanaan Hukum Syarak di Malaysia, 13-15 October 2000 organised by Kerajaan Negeri Johor Darul Takziuof Islamic and Institute of Islamic Understanding Malaysia. *Al -Mawardi* lays down the duties of *Kḥalīfah* among *inter alia* (1) protect the religion from any encroachment of understanding which deviates from aqidah and the true Isl teachings as had been agreed by ulama' upon ijtima' based upon the Quran and the sunnah, (2) to put in place a judicial system to settle disputes and uphold justice, (3) to manage the collection and distribution of zakat, e.g. appointment of 'amil and etc. and (4) to put in place an efficient administration system to manage matters pertaining to finance, government assets, workers and also the armed forces.

[17] Abdul Monir Yaacob, Malaysia Sebagai Sebuah Negara Islam (IKIM 2005)

[18] Shukeri Mohamad, *Siyāsah Syarīyyah Dan* Kedudukannya Sebagai Method Penentuan Ḥukum, Seminar Hukum Islam Semasa Peringkat Kebangsaan 17018 Jun 1997,organised by Jabatan *Fiqḥ* san *ʾUṣūl* Akademi Pengajian Islam Universiti Malaya p.1-16.

(4) It must rely on the correct methods or instruments of *ijtiḥād* (independence reasoning) like *maṣālih al-mursalah* (public interest) and *sad al-dharāʿi (*blocking the means) and not based on whims and fancies of the respective parties.

No doubt the roles of the Imam change over time but the roles of Imam in Islam is basically is to *iqamatu al-din wa siyasah al-dunya bihi*. The Imam is a symbol of religion and politics.

(c) The Discretionary action of *Imam* according to *Al-Qarafi*

The classical jurist is very clear distinction between *fatwa, hukm* and judicial pronouncement. Al-Qarafi studied the Hadiths from the Prophet and made a clear distinction on that judicial pronouncement as to whether that judicial pronouncement as the act of the prophet as *al-imam*, *mufti* and judge.

(d) The position of non *mujtahid mufti* according to al-Qarafi and al-Subki

Is the requirement of *mujtahid* is really necessary in order to be a judge/*mufti*.?

According to *Al-Qarafi* "there is no disagreement among the scholars that such is not the right of every one. Rather such is the right only of one who has obtains specific entitlement and the entitlement is the receipt. On the position of *non-mujtahid /muqallid* judge " give judgment based on the view most widely subscribed to *(al-mashhur)* in his guild, even if he does not know this to be view best substantiated by the evidence *(al-rajih),* following in this the view of his *Imam*, just as he follows the latter is his f*atwa*. This is of course violates the view that the judge should be a *mujtahid, rajih* and apply the view that most sound. *Al- qarafi* finally says that the legal content of judge's ruling must find precedence in the views of the recognized

Al-Qarafi futher stated judge's action shall arise in any of these three circumstances:-

(a) Where the implementation of the resulting legal rule requires investigation, precise clarification, and exertion of effort by a perspicacious scholar and just arbiter, in order to confirm the existence of the legal cause and the extent to which it calls to the corresponding legal rule into effect:

(b) Where leaving the privilege of implementing legal rules upon the occurrence of legal causes to the public is likely to lead to public strife, (1) The subject matter a court is permitted to criminal, civil matters the *muamalat*.matters of religious observance (*ibadat*) lie outside the judicial authority

(2) Within the area of *muamalat* only rule from *wajib,mubah,haram* may be imposed as binding decisions Judges may not imposed rules on *mandub* and *makruh* categories.

Judicial action is discretion when it involves:-

1. The resolution of a question that is not legal in strict sense and therefore not a constituent of *madhhab* (it is not a question of *mukhtalaf fihi*)

2. On *takzir* matters –*al-Qarafi* notes that here consensus support the levying of non-prescribed punishments for certain acts but the punishment is subject to disagreement

3. Discretionary actions may often be mixed with judicial decisions and the questions become one of discerning which aspect of a judge's action is unassaible and which one or not.

At the initial setting, Al- Qarāfī has outlined a number of rules for the legal process in Islam.

First, the legal process in Islam is basically to resolve disputes of civil and criminal matter. In other words, legal intervention is basically focused on *muʿāmalāt* disputes to protect the *huqūq al-'Ibād.*

Second, the judge may be called upon to adjudicate disputes when there is a justification to do so. If the society were to the public solve disputes on their own, this will create chaos in the society particularly matters pertaining to sharp disagreement between the schools of law and conflict of interest between rights of *'ibād* and right of *Allāh*.

Third, in solving disputes, the judge shall not levy binding decision. In the process of giving judgment the judge can refer to discretionary actions (*taṣarrūfāt)* and pronouncement of *obiter dictum (fatwā).*

The fourth rule propounded by *al-Qarāfī* is that the decision or ruling shall be based on obligatory, forbidden and neutral. It is binding and unsailabale. rancor, manslaughter and fighting and to the corruption of soul and property

(c) Where there exists strong disagreement (*khilaf)* (among the jurist consults) accompanied by a conflict between the right of Allah *s.w.t.* and the rights of man.

According to *Al-Qarafi*, the definition of the binding decision (*hukm*), the legal process in Islam is restricted in two ways:

Fifth, any discretionary action may carry binding force to solve dispute. There are not unassailable and can be challenged

and overturned. In such a case, dicta or *fatwā* can be challenged and can be overturned.

Sixth, a dicta or *fatwā* can be overturned if it fulfills certain specifications.

Seventh, in solving the dispute, if the matter is agreed upon in total (*mujmaʿ ʿalaihi)* the judge has no choice of ruling but to apply the rule adopted by the consensus after establishing such fact.

Eighth, in the case where there are disagreements (*mukhtalaf fih)* the judge would first have to choose a view from among those upheld in his school. Next, his process as *insha* turn the *fatwā* to the *hukm* and it becomes binding and unasailable.[19]

The ninth rule propounded by *Al Qarāfī* is that the judge shall apply the most *mashūr* view in his school in solving the dispute. But it is also flexible as the judge may still adopt the views of other school to solve the fact in issues based on the principle of *tarjīḥ*.

Tenth, on the issue of unprecedented case, the judge can exercise *taḥrīj*. The result of this becomes *ḥkm* and binding and unassailable so long it does not violate the precepts or rather *qawāʿid* in the prescribed *madhhab* recognized in the judge's school.

The eleventh and the final rule is that in the event of dispute as to who supposed to be a judge, the choice of the defendant is preferred. The *ḥukm* which is made by the presiding

[19] Shihāb al-Dīn Abū al-Abbās Ahmad b. Idris al-Qarafi., *Al-Ihkam Fi Tamyiz Al-Fatawa an Al-Ahkam Wa Tasarrufat Al-Qadi Wa Al-Imam.*

judge shall be binding upon him no matter the fact if the claimant or the defendant is from different *madhhab*.[20]

According to *Subkī*, there are two points when dealing with *madhhab*, the first point relates to views that should be embraced though they were unequivocally outside the *madhhab*, or weak and accentric views within it. *Subkī's* himself, or anybody else, in his professional capacity as a *mufṭī* or a *qāḍī*. Meanwhile, the second point relates to views which were well established within the *madhhab*, where *Subkī* simply changed the balance of preference.[21]

Calder also asserted that in exercising the *siyasah syariah* the functionaries in Islam should be based should base on the *al-Quran* and *al-Sunnah*.

The first case signifies that a judgment may be overturned for being contrary to the text of the sources of the al-*Qurʾān* and *al -Sunna*[22] is the *case concerning the waqf of Badr al-Din ʾIbn Asākir* The first case which signifies that a judgment may be overturned for being contrary to the text of the sources of the *al-Qurʾān* and *al- Sunna* concerns a *waqf* by one Badr al-Din ʾIbn Asākir. Another interesting argument in this case was that a judge may be one *mujtahid* or *muqallīd*. A *waqf* in favour of *Badr al-Din*, based on his own affirmation, was created in the property being in his possession, which would then pass to his children and his descendants. If one of the children or descendants dies leaving descendants, his share goes to his descendants in order to males twice the share of females. If one of his children, or his children's children, or their descendants, dies leaving no issue, his share goes

[20] Ibid.

[21] aqi Al-Din Ali Bin Abdul Al Kafi(1355-1284). *Fatawa Al-Subki* (Bayrut: Dar al-Makrifah, 1900). See also Calder, *Islamic Jurisprudence in the Classical Era*.

[22] Calder, *Islamic Jurisprudence in the Classical Era*.

to those in his own generation (*darājātihi*), giving preference to the nearest to him and then the next nearest, siblings by two parents sharing with siblings by the father only (*yashtariku fi-hi al-ikhwan min al-abawayn wa min al –ab).*Soon after the demise of *Badr al-Din*, dispute arose among the descendants following the passing away of some of the immediate children of *Badr al-Din*, with some leaving behind issues and some not. The dispute concerned the entitlement of the issues to the right under the *waqf*, and if entitled, what would be the proper distribution thereof. For this dispute, a *Hanbali* judge gave a judicial decision (*hakama*) favouring some of the descendants, but it was reported that the judgment did not clarify clearly the grounds of the judgment. In addition, the judgment was delivered in the absence of the losing descendants or their representatives. The judge further claimed that his decision lies within an area of permitted *ikhtīlāf*, with that area of his choice of rule is final and cannot be overturned merely because a different judge espouses a different one of permitted rulings. According to *Subkī* the decision of the *Hanbalī* judge can be overturned. The ultimate aim of *Subkī's* argument is to establish that the rule adopted by the *Hanbalī* judge is outside the standard, permitted *ikhtilāf*, and therefore warrants the overturning of the judgment for being contrary to the texts. As to the issue of how the phenomenon of established *ikhtīlāf* impinges on the inviolability of judicial decision, *Subkī* contended that when a *qāḍī* proceeds to judgment (*ḥukm*) and does not believe in his own judgment, then he fails to judge on a basis of revelation and he lacks knowledge, therefore it is not permitted for a *qāḍī* to give a judgment until he believes that it is a true judgment. It was further argued that when a judge finds there is a conflict and no way of establishing a preference and no date (which would establish the preferred later view), it is permissible if he has the capacity and establishes a preference with sound proof and his judgment will be put into effect (*nufidha ḥukmu hu*), even if it is a view rejected by most

jurists, as long as not outside the *madhhab*.*Subkī* further viewed that in respect to present times, is that anyone at all who takes the post of judge or *qāḍī*, if the *Sultan* specifies the appointment to judgeship by the established tradition of a *madhhab* if he is a *muqallīd*, or by his own opinion that he is a *mujtahīd*, or the *Sultan* says, "I appoint you to judgeship according to such and such *madhhab*", then he may not go beyond the bounds of the established tradition of that *madhhab*, whether he is a *muqallid* or *mujtahid fi al -madhhab*. He may not go beyond the bounds of the *madhhab*, whether he is *muqallid* or *mujtahid*, because the terms of appointment restrict him. Nor may give judgments based on accentric and far-fetched views within the *madhhab*, even if there are preferable to him, because they are equivalent of views outside the *madhhab*.[1]It is therefore established that a judicial decisions in an Islamic context, there was of an element of unpredictability. A judge would normally follow the dominant view within a *madhhab*, thus offering general predictability in the law. However, where there was an established *ikhtilāf*, then a fully competent judge could establish his own preference, within the area of acknowledged *ikhtilāf*, based on reason argument. A less competent judge was fully bound to the preferred view within the *madhhab*, meaning the one promoted and established by literary tradition. In either case, a judicial decision, once issued, was binding on the litigants and safe from annulment. However, if a judicial decision could be shown to be based on the view that was not an established component of *ikhtilaf*, it might be annulled, as in this case at hand.

Calder also stated the second case is considered as a landmark case for intervention powers of Muslim judges in disputes[23].

[23] Ibid.

In the case at hand, a dispute arose among the descendants of the deceased Bahādur concerning the co-ownership of shares in the estate village held by the deceased. One of the sons of the deceased disposed of his share in the property in the correct division i.e. 4 1/16 however it was argued to be inaccurate statement of the total shares in the property. It was stated to be "4 1/16 out of the communal shares (*shaman shaian*) that are the whole village", instead it should be "4 1/16 out of the 18 1/3 shares that were held in common by the descendants of the deceased". Accordingly, one of the descendants approached the *qāḍī* asking for a declaration to be invalid as it contained inaccurate division of the shares of the property. *Subkī*, acting as the *qāḍī* in this case, acknowledged some force to the argument, however in the end disagreed and felt that the words of the sale could be read in a manner that permitted the validity of sale. This was supported by the fact that there had been a formal division of the village, validated by a series of judgments was one relevant factor, and that a judge had previously given a juridical ruling on the validity of this sale, and the preservation of a juridical ruling from annulment was mandatory as far as possible - *siyanat hukm al-hakim an al-naqd wajiba ma amkana*.[1]It was therefore established in the case that where a juridical declaration is made by a judge, it is thereby preserved from annulment until it becomes manifest that the declaration is opposed to a revealed text, or consensus, or a clear analogy, and none such are found in the present instance.

Calder also cited the third case which explains that there is no need for a case to come before a judge for the validity of *ḥukm* to be questioned, and subject to scrutiny by *mufṭī*.[24]In this case one Jew Abd al-Qāhir bin Muhāsin bin Manja constituted a *waqf* in favour of his descendants, incorporating a condition that if any of

[24] Ibid.

them left the Jewish faith they would lose their right to participate in *waqf*. The declaration and the establishment of all the relevant particulars, took place before the Hanafi *qāḍī* Shams al-Din Muhammad b Muhammad b Abi I Izz who recorded his judgment approving the *waqf* in a judicial document (*nass isjal*). Later, the document (and the supervision of the *waqf*) fell to the *Hanafi qāḍī*'s son, Alal-Din, who took over from his father. The latter sought a *fatwā* regarding the validity of that clause which excluded a descendant who converted (for the purposes of this argument, to Islam) and received one response from a *Hanbalī* judge, and the one from *Subkī,* in the year 747/1346-7, both judges in this instance acting as *muftī*. Neither the *Hanbali* nor *Subkī* liked the cause in question, though the grounds and conditions of their dislike is not the same.In this case, no judicial process has been started. There is no evidence that any of the descendants of *ʿAbd al-Qāhir* had abandoned their Judaism. The *Hanafi qāḍī* had initiated the problem and had sought opinions from two of his colleagues. Subkī's remarks showed that there is no need for a case to come before a judge for the validity of *ḥukm* to be questioned, and subject to scrutiny by *muftī*. In addition, the task of the *qāḍī* involved an investigation of the details of a case, and the issue of *ḥukm* which was binding on the litigant.

(e) Conclusion

In classical Islam the Imam is very clear in applying and the limit of *siyasah Syariah.* In applying the *siyasah syariah*, there are clear distinct roles between the *imam, mufti* and *Qadi*. Their functionaries are not acceptable if violates the principles *of siyasah syariah*, al-Quran and the Sunnah.

Bibliography

Sulaiman al-Timawi., *Al-Sultat Al-Thalatha Fi Al-Dasatir Al -Arabiyyah Al- Muasirah Wa Fi- Fikri Al- Siyasi Al Islami*

(al-Qahirah: Jami'at 'Ayn Shams, 1986).See also Dr. Wahbah az-Zuhaili, *Al-Fiqh al-Islami wa Adillatuhu*, IX/823).

Mamood Abdul Majid al-Khalidi., *Qawaid Nizam Al-Hukm Fil Al-Islam* (Oman: Maktabah Muhtasib, 1983);

———, *Maalim Khilafah Fi Al-Fikri Al-Siyasi Al-Islami* (Bayrut: Dar al-Jil, 1984).Al Khālīdi, 226.

'Ali ibn Muhammad al Mawardi., *Al-Ahkam Al-Sultaniyya*.

Al-Māwardi. See also Sulaiman al-Timawi., *Al-Sultat Al-Thalatha Fi Al-Dasatir Al -Arabiyyah Al- Muasirah Wa Fi- Fikri Al-Siyasi Al Islami*; Wahbah Zuhaily., *Fiqh Al-Islam Wa Adilatuhu* (Dimashq: Dar al-Fikr, 1999).

Mamood Abdul Majid al-Khalidi., *Qawaid Nizam Al-Hukm Fil Al-Islam*.

Shihāb al-Dīn Abū al-Abbās Ahmad b. Idris al-Qarafi., *Al-Ihkam Fi Tamyiz Al-Fatawa an Al-Ahkam Wa Tasarrufat Al-Qadi Wa Al-Imam*, ed. al-Fattah Abu Ghuddah, vol. 9 (Aleppo: Maktabat al-Matbuat al-Islamiyah, 1387/1967).

Muhammad Ayūb., *Understanding Islamic Finance* (United States of America: John Wiley and Sons Inc, 2009).

Shukeri Mohamad., "*Siyasah Syariyyah* Dan Kedudukannya Sebagai Method Penentuan *Hukum*," in *Seminar Hukum Islam Semasa Peringkat Kebangsaan* (Kuala Lumpur: Jabatabn *Fiqh* dan *Usul*, Akademi Pengajian Islam, Universiti Malaya, 1997). See also Ghalib Abd Al-Kafi Qarshi., *Awaliyyat Al-Farouq Al-Siyasiyyah Wa Al-Idarah Wa Al-Qada* (al-Mansurah: Dar al-Wafa, 2008).

Collin Imber, *Ebu's Su'ud: The Islamic Legal Tradition* (Edinburrgh: Edinburgh University Press, 1997).

Muhammad Ayūb., *Understanding Islamic Finance*.

Mamood Abdul Majid al-Khalidi., *Qawaid Nizam Al-Hukm Fil Al-Islam*.

Shihāb al-Dīn Abū al-Abbās Ahmad Ibn Idris Al-Qarafi., *Al-Furuq*.This can be seen in *Ḥadīth* al-Salb whereby Rasullah act as a judge. Issues pertaining *Iḥya᾽ al-Mawātt* as a *kḥalīfah* and *Ḥadith* Hendun the wife of Abu Sufyan as a *mufṭī*

Mohammad Hashim Kamali., *Shariah Law: An Introduction*.
Khairu Qarnu Qarni

Wan Zahidi Wan Teh., "Ciri-Ciri Sebuah Negara Islam," in *Seminar Perlaksanaan Hukum Syarak di Malaysia* (Puteri Pan Pasific, Johor Bahru: Kerajaan Negeri Johor Darul Takzim and Institut Kefahaman Islam Malaysia(IKIM), 2000).

Abdul Monir Yaacob, Malaysia Sebagai Sebuah Negara Islam (IKIM 2005)

Shukeri Mohamad, *Siyāsah Syarīyyah Dan* Kedudukannya Sebagai Method Penentuan Ḥukum, Seminar Hukum Islam Semasa Peringkat Kebangsaan 17018 Jun 1997,organised by Jabatan *Fiqḥ* san *᾽Uṣūl* Akademi Pengajian Islam Universiti Malaya p.1-16.

aqi Al-Din Ali Bin Abdul Al Kafi(1355-1284). *Fatawa Al-Subki* (Bayrut: Dar al-Makrifah, 1900). See also Calder, *Islamic Jurisprudence in the Classical Era*.

Calder, *Islamic Jurisprudence in the Classical Era*.