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INTERPRETING IMMUTABLE LEGAL TEXTS:  
THE POSNERIAN PRAGMATISM OF ISLAMIC LAW

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## TABLE OF CONTENTS

LIST OF FIGURES .....	V
ACKNOWLEDGEMENTS.....	VI
ABSTRACT .....	VII
1. INTRODUCTION.....	1
A. Key Questions and Purpose of the Dissertation.....	1
B. A Short Course in Islamic Law .....	13
C. Structure of the Dissertation .....	29
2. A GENERAL SURVEY ON THEORIES OF LEGAL INTERPRETATION .....	32
A. Introduction.....	32
B. Semantic-Based Theories of Interpretation .....	33
1. United States Variants.....	33
2. Islamic Variants.....	37
C. Intent-Based Theories of Interpretation.....	41
1. United States Variants.....	41
2. Islamic Variants.....	46
D. Context-Based Theories of Interpretation .....	48
1. United States Variants.....	48
2. Islamic Variants.....	57
E. Consequence-Based Theories of Interpretation.....	60
1. United States Variants.....	60
2. Islamic Variants.....	76

F.	Conclusion.....	89
3.	ISLAMIC LAW AND THE CLAIM OF PERFECTION.....	94
A.	Defining a Perfect Law: Understanding the Claim.....	94
B.	Using Well-Being Criteria in Testing the Claim of Perfection.....	104
C.	The Rationality Parameters.....	107
4.	A CHALLENGE TO ISLAMIC LAW'S IMMUTABILITY.....	121
A.	Introduction.....	121
B.	Prohibiting Permissible Acts: Unilateral Divorce and Slavery.....	123
1.	Limitation of the Husbands' Unilateral Right to Divorce Their Wives..	123
2.	Prohibition of the Slavery Institution.....	127
C.	Waiving Obligated Acts: The Elimination of Theft's Penal Sanctions.....	135
D.	Permitting Prohibited Acts: The Puzzle of Islamic Financing Structure.....	140
1.	The Murabahah Financing Scheme (Fixed Interest Debt Financing).....	142
2.	The Bay' al-'Inah Controversy.....	145
3.	The Ijarah Financing Scheme (Floating Interest Debt Financing).....	148
5.	THE CONSEQUENTIALIST NATURE OF ISLAM.....	153
A.	Islam, Economic Incentives and CBA.....	153
B.	The Most Important Story in the Qur'an: Khidr versus Moses.....	173
C.	The Consideration of Well-being in Islam and the Problem of Satisficing.....	190
6.	THE ECONOMIC STRUCTURE OF ISLAMIC LAW AND LEGAL INSTITUTIONS.....	196
A.	Introduction.....	196
B.	Slavery and The General Theory of Second Best.....	198

C.	Economic Incentives and Unfairness in The Design of Penal Sanctions For Theft.....	221
D.	The Cost of Enforcement and The Puzzle of Riba.....	230
7.	CONCLUSION .....	247
	BIBLIOGRAPHY .....	255

## LIST OF FIGURES

3.1	<i>Murabahah</i> Financing Structure .....	143
3.2	<i>Bay' al-'inah</i> Financing Structure.....	146
3.3	<i>Sukuk Al-Ijarah</i> Financing Structure.....	150

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## ABSTRACT

The law is ubiquitous and yet it does not always suit the people's needs and interests. There are at least two strategies for dealing with that problem. We can either amend the relevant legal texts through various means, ranging from exercising formal amendment procedures to a violent rebellion or civil war, or we can impose a different meaning on those texts through various techniques of interpretation, heeding appropriate limits in stretching the applicable meaning. This dissertation focuses on the second strategy and seeks to illuminate the role of consequence-based theories of interpretation, when formally amending the law is costly or impossible, as is the case when legal texts are formally immutable.

The Islamic legal system provides an excellent case study. Being governed or at least inspired by divine texts that have survived with no change for almost 1,500 years, it is a unique legal system that claims to be perfect, since it is assumed to be ordained by God, the omniscient entity, and not mere fallible human beings. If this claim is true, and perfection is translated into flawlessness, the Islamic legal system would never experience the problems usually faced by human-made legal systems, such as the hardships in discovering the original intent of the lawmakers or the possibility of having a law that expires because of circumstantial changes. Thus, when the texts are clear, the law must be implemented as it is, equating perfection with absolutism.

But in practice, it is not difficult to find cases where, using consequence-based theories of interpretation, Islamic jurists and regulators interpret and apply legal provisions of the system's foundational documents, the Qur'an and Hadiths, inconsistently with the plain meaning of the texts or their historical contexts. Are these interpretations justified? Or does the problem lie within the inherent structure of Islamic law? To answer that question, we must first resolve whether the consequence-based interpretation is compatible with the Islamic legal system, given its claim of perfection, and if the answer is yes, whether the compatibility defeats such claim.

In this dissertation, I will show from philosophical and economic perspectives that the need to interpret Islamic legal texts does not necessarily jeopardize the system's claim of perfection. Quite the contrary, having the possibility of reading the texts in numerous ways is fundamental in maintaining that claim. I will also demonstrate that consequence-based theories of interpretation are compatible with the Islamic legal system due to its consequentialist nature, opening the possibility of having a religious justification for Pragmatism and Law & Economics.

## CHAPTER 1

### INTRODUCTION

"...Today I have perfected your religion for you, completed My blessing upon you, and chosen as your religion Islam..." (Qur'an surah Al-Ma'ida [5]:3)<sup>1</sup>

#### A. KEY QUESTIONS AND PURPOSE OF THE DISSERTATION

Being part of a legal system that claims to be derived directly from God, the all-powerful omniscient entity and the supreme lawmaker,<sup>2</sup> the provisions of Islamic law (the exact definition of which will be revealed in due course) may look puzzling to attentive readers if not full of paradoxes. To begin with, even though Islam promotes the values of egalitarianism,<sup>3</sup> freedom and justice,<sup>4</sup> and states many times that it comes as a blessing for the people, to serve their needs, to alleviate them from hardships,<sup>5</sup> it mysteriously decides not to strictly prohibit slavery,<sup>6</sup> nor does it provide a single afterlife threat to any person who owns slaves.<sup>7</sup> Indeed, in what can be considered

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<sup>1</sup> See M.A.S Abdel Haleem, *The Qur'an* (New York: Oxford University Press, 2005), 23. I will be using this version of translation for the remainder of this dissertation. This is for ease of reference only as in depth discussion on the meaning of Qur'anic verses will refer to various books of *tafsir* (interpretation and commentaries of the Qur'an) written by respected classical and contemporary Islamic scholars, among others (starting from the earliest one in history): Abu Ja'far Muhammad bin Jarir Ath-Thabari ("**Ath-Thabari**"), Abu 'Abdullah Al-Qurthubi ("**Al-Qurthubi**"), Ismail Ibn Kathir ("**Ibn Kathir**"), Jalaluddin Al-Mahalli ("**Al-Mahalli**"), Jalaluddin Al-Suyuthi ("**Al-Suyuthi**"), Muhammad bin Ali bin Muhammad bin Abdullah Asy-Syaukani ("**Asy-Syaukani**"), Wahbah Az-Zuhaili ("**Az-Zuhaili**"), and Quraish Shihab.

<sup>2</sup> See further discussion in Mahdi Zahraa, "Characteristic Features of Islamic Law: Perceptions and Misconceptions," *Arab Law Quarterly* 15 (2000): 169.

<sup>3</sup> See an interesting empirical research on the relationship between Islam and the implementation of egalitarian values in Nancy J. Davis and Robert V. Robinson, "The Egalitarian Face of Islamic Orthodoxy: Support for Islamic Law and Economic Justice in Seven Muslim-Majority Nations," *American Sociological Review* 71 (2006): 167-190.

<sup>4</sup> See further discussion in Ahmad Zaki Yamani, "Social Justice in Islam," *Islamic Studies* 41 (2002): 19-24.

<sup>5</sup> See further discussion in Andrew F. March, "Taking People as They Are: Islam as a "Realistic Utopia" in the Political Theory of Sayyid Qutb," *The American Political Science Review* 104 (2010): 189-191.

<sup>6</sup> It is fascinating that Islamic legal scholars, especially the classical ones, were generally silent on whether slavery is prohibited under Islamic law. While they often discussed the ways in which slaves can be manumitted, most of them refused to discuss the validity of slave trading. See Ehud R. Toledano, *As If Silent and Absent – Bonds of Enslavement in the Islamic Middle East* (New Haven: Yale University Press, 2007), 15.

<sup>7</sup> Instead, it provides various positive economic incentives to Muslims to release their slaves. These incentives include declaring the act as a free ticket to heaven or as a compensation for committing private or criminal offenses under Islamic law. See Jacob Neusner and Tamara Sonn, *Comparing Religions Through Law – Judaism and Islam*

as the ultimate irony, the extinction of slavery in the Islamic world (which took more than a millennium) probably owed more to complex external factors instead of its own internal legal rules.<sup>8</sup>

Since this religion regulates what people should refrain from in terms of eating and drinking, such as pork and liquor (even imposing quite a harsh punishment against those who dare to drink them),<sup>9</sup> insisting that Islam should have taken a stronger stance against a demeaning institution like slavery seems to be a reasonable request. After all, wine and swine are most likely trivial matters compared to the life and fate of slaves who are genuinely human being. But if that assumption is true, why were the Islamic rules of slavery designed in such a way?

As a religion that allows a murderer to avoid death penalty by compensating his victim's family with a certain amount of money or tangible assets (or even none if the family members forgive him),<sup>10</sup> and, to give a more extreme example, in one famous story that will later become the central theme of this dissertation, permits a person to kill an innocent child without any penal or moral consequences,<sup>11</sup> Islam imposes a seemingly strict punishment that cannot be waived nor forgiven in the form of hand amputation for theft cases.<sup>12</sup> Justifying leniency for a more hideous

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(London: Routledge, 1999), 158-161, and J. H. Johnston, "The Mohammedan Slave Trade," *The Journal of Negro History* 13 (1928): 478.

<sup>8</sup> See for example in R. David Goodman, "Demystifying "Islamic Slavery": Using Legal Practices to Reconstruct the End of Slavery in Fes, Morocco," *History in Africa* 39 (2012): 143-174. See further discussion in Chapter 6.

<sup>9</sup> There is still an ongoing debate within the community of Islamic legal scholars on whether the prohibition should be applied as an absolute restriction or only if the drinking activity causes insobriety. See Ibn Rushd, *The Distinguished Jurist's Primer: Volume II*, trans. Imran Ahsan Khan Nyazee (Reading: Garnet Publishing, 2000), 534-536. Note also that while there is a criminal sanction for drinking liquor, there is no penal sanction for eating pork.

<sup>10</sup> See Rudolph Peters, *Crime and Punishment in Islamic Law – Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge: Cambridge University Press, 2005), 38-39. Some scholars argue that the blood-money concept is only applicable in cases of unintentional murders, but the majority still accept that it can also be applied for intentional murders since the final decision resides with the victim's family members. In fact, they can also forgive the murderer without any compensation.

<sup>11</sup> See further discussion in Chapter 5 on the story of Moses and Khidr.

<sup>12</sup> See Peters, *supra* note 10 at 56. It is worth to note that the hand amputation sanction is only applied when certain specific requirements are satisfied, including the requirement that the stolen goods were coming from a place which was locked or under guard. Thus, in case a thief took the goods located in places where people could

crime is already challenging,<sup>13</sup> but I suppose this is nothing compared to the herculean task of finding a proper justification for letting a person free from any ramifications after killing a child.<sup>14</sup>

What could be the reasoning for this choice of policy? Is it possible that theft is a far more dangerous threat to our society compared to homicide, so dangerous that once committed, there is no turning back for the perpetrators? Or would it be better to conclude that there was never any link between the severity of the act (from a moral perspective) and the policy formulated in response to such act in the Islamic legal system? Perhaps our last case could show this idea in a better way.

Though Islam declares that the sin of engaging in transactions involving *riba* (the term has not been defined consistently, but in practice, most Islamic jurists agree that it covers any type of interest attached to a debt, regardless of the debt's purpose or the interest's amount)<sup>15</sup> is at least equal to the sin of having an incestuous relationship with our own mother,<sup>16</sup> the sin of murdering

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easily take them, he will not be subjected to such punishment. We will further analyze these provisions in Chapter 6.

<sup>13</sup> Murder is part of the 7 major sins in Islam while theft is not. See Hadith no. 6857 of Al-Bukhari's compendium of Hadiths in Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 8, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 447 which states: "Narrated Abu Hurairah: The Prophet said, "Avoid seven great destructive sins." They (the people) asked, "O Allah's Messenger! What are they?" He said, (they are:) (1) To join partners in worship with Allah; (2) To practice sorcery; (3) To kill the life which Allah has forbidden, except for a just cause (according to Islamic law); (4) To eat up Riba (usury); (5) To eat up the property of an orphan; (6) To show one's back to the enemy and fleeing from the battlefield at the time of fighting; (7) And to accuse chaste women who never even think of anything touching their chastity and are good believers."" For further information on Al-Bukhari, please see note 90 below. On the meaning of Hadith, see note 34.

<sup>14</sup> As will be further discussed in Chapter 4, this story supports the idea that Islam does not promote deontological ethics. In the view of a deontologist, if a right exists, morality prohibits its violation, since the right acts as a shield against the intrusive designs of the utility-maximizing consequentialist. For example, killing an innocent child is morally impermissible not because it fails to produce the greatest good, but because doing so would violate the child's rights. See further discussion in Tim Stelzig, "Deontology, Governmental Action, and the Distributive Exemption: How the Trolley Problem Shapes the Relationship between Rights and Policy," *University of Pennsylvania Law Review* 146 (1998): 901-902.

<sup>15</sup> See Edana Richardson, "The Shari'a Prohibition of Interest," *Trinity College Law Review* 11 (2008): 78. See further discussion in Abdullah Saeed, *Islamic Banking and Interest: A Study of the Prohibition of Riba and Its Contemporary Interpretation* (Leiden: E.J. Brill, 1996).

<sup>16</sup> This is coming from a famous Hadith of the Prophet. See further discussion in Wahbah Al-Zuhayli, *Financial Transactions in Islamic Jurisprudence*, vol. 1 (Mahmoud A. El-Gamal trans, Dar al Fikr 2003), 311.

a person,<sup>17</sup> or 36 times the sin of conducting *zina* (unlawful sexual intercourse),<sup>18</sup> it imposes severe punishments for those who commit *zina* (including death penalty by stoning for married defendants);<sup>19</sup> and yet at the same time, it does not provide any penal sanctions against the practitioners of *riba*.<sup>20</sup> The two previous examples might have subtler comparative elements, but it is as bright as the sun in a clear summer day that Islam compares the sins of *riba* versus *zina* and then, for some reasons that we must further analyze, opts for a completely opposite policy for each act in which the less morally wrong act actually gets a harsher punishment.

One might say that the cases above are merely anomalies which would normally occur whenever we have an overarching legal system that regulates almost every aspect of daily life.<sup>21</sup> But as I will discuss in more depth in Chapter 3, not only are anomalies supposed to be impossible to exist within the Islamic legal system (at least from a theoretical perspective), it would be more accurate to designate these cases as parts of a larger pattern that becomes the cornerstone of Islamic law, a pragmatic approach in dealing with social issues through law. In fact, I would later argue that the central idea of pragmatism, specifically, the idea of pragmatism as envisioned by judge Richard Posner,<sup>22</sup> has a high degree of compatibility with the design of Islamic law.

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<sup>17</sup> This is also based on a very famous Hadith, see *Id* at 310 and note 13 above.

<sup>18</sup> See Daniel Klein, "The Islamic and Jewish Law: A Bridge to Commercial Growth and Peace in the Middle East," *Denver Journal of International Law and Policy* 23 no.3 (1994-1995): 537. Under Islamic law, sexual intercourse is only permitted within a marriage or between a slave woman and her master. See Peters, *supra* note 10 at 59.

<sup>19</sup> See further discussion in Rushd, *supra* note 9 at 521-529. There is still an ongoing debate on whether married people who commit adultery must be punished by way of stoning. Some scholars argue that such punishment is only recognized in Hadith and not in Koran and therefore the provisions of the Koran which only give general sanctions in the form of lashes should be prioritized against the death penalty.

<sup>20</sup> To the best of my knowledge, discussion on *riba* only focuses on its prohibition but not on the penal sanction for those who practice it. I suspect that this is partly due to the fact that the Koran and Hadith also do not provide any sanctions. Though the super majority of Islamic legal scholars declare that *riba* is prohibited, some of them agree to accept the existence of banking interest due to economic necessity. This is puzzling considering the harsh words used by God in Koran against *riba*. See further debates in Al-Zuhayli, *supra* note 16 at 339-352.

<sup>21</sup> In practice, Islam categorizes all human acts into various different categories in an attempt to basically regulate everything under the sun. See further discussions in A. Kevin Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought* (New York: State University of New York Press, 1995), 3.

<sup>22</sup> See discussion in Chapter 2.

In a world where religions are often associated with moral absolutes or deontological model of morality, where right is right and wrong is wrong,<sup>23</sup> claiming that Islam embraces a consequentialist point of view through Posnerian pragmatism sounds to be a stretch (and probably preposterous). Nothing could be further than the truth. As I will further argue in this dissertation, the pragmatism of Islam is closely related to, if not the logical consequence of, the religion's grandiose claim of being a perfect one (including its laws).<sup>24</sup> And within such claim lies the quintessential problem that sets the motion of this dissertation, namely, does a perfect law need change? The short answer is yes. But explaining the reasoning behind such an answer will take a couple of hundred pages and a long journey across history.

As eloquently elaborated by Roscoe Pound below, the conflict between stability and change in law is a timeless issue:

*"Law must be stable and yet it cannot stand still. Hence all thinking about the law has struggled to reconcile the conflicting demands of the need of stability and of the need of change. The social interest in the general security has led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be assured. But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interest as well as to new modes of endangering security. Thus, the legal order must be flexible as well as stable."*<sup>25</sup>

This issue begins with the fact that law is ubiquitously intrusive in our life, it claims authority over its subjects, conferring rights and obligations, instructing us what is permitted and what is prohibited to do.<sup>26</sup> Some would argue that market and other necessary institutions that we

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<sup>23</sup> See further discussions in John Finnis, *Moral Absolutes: Tradition, Revision, and Truth* (Washington, DC: The Catholic University of America Press, 1991), 1-6.

<sup>24</sup> See further discussions in note 47.

<sup>25</sup> See Roscoe Pound, *Interpretations of Legal History* (New York: The Macmillan Company, 1923), 1. See also fascinating discussion about the tension between backward looking (stability and traditions) versus forward looking (social goals) aspirations in law in Martha C. Nussbaum, "Janus-Faced Law: A Philosophical Debate," in *The Timing of Lawmaking*, ed. Frank Fagan and Saul Levmore (Cheltenham: Edward Elgar Publishing Limited, 2017), 249-279.

<sup>26</sup> See Robert Hale, "Some Basic Constitutional Rights of Economic Significance," *Columbia Law Review* 51 (1951): 271. See further discussion in Cass R. Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1994), 4-5. See also Joseph Raz, "The Claims of Law," in *The Authority of Law: Essays on Law and Morality*, ed. Joseph Raz (London: Oxford University Press, 2009), 28-33.

often take for granted may only be possible due to the existence and coercive power of law.<sup>27</sup> In short, law may significantly affect people's understanding, needs, and actions.<sup>28</sup> Simultaneously, different people have different needs and the law might not be able to satisfy everyone.<sup>29</sup> If it could, we all would be living in nirvana and law schools could be closed down. Thus, people will have vested interest in how the law is shaped, read and enforced, establishing a complex relationship between law and men where each tries to influence the other.<sup>30</sup>

There are basically two major strategies to deal with the discrepancy between the content of the law and the interests of the people. We can try to amend the law through whatever means ranging from exercising formal amendment procedures to a swift rebellion or civil war,<sup>31</sup> or we can impose a different meaning to the relevant legal texts through various techniques of interpretation. This dissertation focuses on the latter approach and seeks to understand the role of consequence-based theories of interpretation (the types of which will be described in Chapter 2), particularly, in interpreting immutable legal texts that possess supreme authority within a legal system ("**Immutable Legal Texts**").

In this case, immutability refers to the ability of the legal texts' language (and not necessarily their meaning) to remain stable for a considerable amount of time under the assumption that it is exceptionally difficult or impossible to amend the language of those texts, meaning that the costs of amendment are significantly higher than the costs of imposing a different

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<sup>27</sup> See Sunstein, *supra* note 26 at 5.

<sup>28</sup> See further discussion in Steven Shavell, *Foundations of Economic Analysis of Law* (Cambridge: Harvard University Press, 2004), 571-592 and also Richard Posner, "Philistinism in Law," *Northern Kentucky Law Review* 16 (1988-1989): 417-418.

<sup>29</sup> See Lawrence M. Friedman, *Impact: How Law Affects Behavior* (Cambridge: Harvard University Press, 2016), 54-55.

<sup>30</sup> See further discussion in *Id.* at 73-95.

<sup>31</sup> Amendment to laws and regulations is the standard solution whenever lawmakers face unfamiliar problems and the previous rules do not provide a complete solution. Of course, for each new policy, there is no guarantee that it will be free from social losses especially if the policy is suboptimal. See further discussion in Frank Fagan, "Legal Cycles and Stabilization Rules," in *The Timing of Lawmaking*, ed. Frank Fagan and Saul Levmore (Cheltenham: Edward Elgar Publishing Limited, 2017), 12-13.

meaning to those texts, which further incentivizes the relevant legal actors to creatively adopt or establish a new meaning (heeding the limits in stretching the applicable meanings) rather than to spend effort amending the texts' body (whatever the procedure is).<sup>32</sup>

Meanwhile, having supreme power in a legal system means that the relevant Immutable Legal Texts are deemed as the highest sources of law in that system's hierarchy such that any other legal sources in that system must conform to their provisions. An easy example of Immutable Legal Texts would be the texts of the Qur'an<sup>33</sup> and, to certain extent, Hadiths<sup>34</sup>, the supreme legal sources in the Islamic legal system whose texts have remained the same for almost 1,500 years. The texts of the United States Constitution (or simply the "US Constitution") may also fall under the same category, albeit in a weaker sense compared to the immutability of the Qur'an and Hadiths texts.<sup>35</sup>

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<sup>32</sup> In other words, the term "immutability" primarily refers to the linguistic aspect and not necessarily the substantive aspect. Indeed, while the body of the text might remain the same, the meaning could change throughout the time and whether such change in meaning is justified is subject to a debate that has not yet been settled until today. See further discussion in Liaquat Ali Khan, "The Immutability of Divine Texts," *Brigham Young University Law Review* 2008 (2008): 810-811.

<sup>33</sup> The Qur'an (which can be translated into the "Book") is the Holy Book of Islam that has the following characteristics: (i) it is the word of God revealed to the Prophet Muhammad, (ii) both its words and meaning were revealed, (iii) it was revealed in Arabic, and (iv) it has enjoyed successive and constant transmission and therefore its authenticity has been established beyond doubt. The Qur'an is the primary and ultimate source of Islamic law. See Ahmad Hasan, "The Qur'an: The Primary Source of *Fiqh*," *Islamic Studies* 38, no. 4 (Winter 1999): 477.

<sup>34</sup> The Hadiths are basically the collection of stories of what Prophet Muhammad said and did, and of which he approved or disapproved. Given the position of the Prophet in Islam, most Islamic jurists consider the Hadiths as the second-in-rank legal source below the Qur'an. See Aisha Y. Musa, *Hadith as Scripture: Discussions on the Authority of Prophetic Traditions in Islam* (New York: Palgrave Macmillan, 2008), 1. For discussion on scholars who entirely reject or limit the Hadiths that can be used as a valid source of law, see Mustafa As-Siba'ee, *The Sunnah and Its Role in Islamic Legislation*, trans. Faisal Muhammad Shafiq (Riyadh: International Islamic Publishing House, 2008), 177-250. For further discussion concerning the controversies surrounding the use of Hadiths in Islamic law and clarifications on the role of Hadiths as part of the Islamic Immutable Legal Texts, see Section B below.

<sup>35</sup> Discussions on the immutability of the US Constitution and its difficult amendment process have been made many times. For views from early 20<sup>th</sup> century, see Joseph Ragland Long, "Tinkering with the Constitution," *Yale Law Journal* 24 (1914-1915): 573-589 and W.F. Dodd, "Amending the Federal Constitution," *Yale Law Journal* 30 (1920-1921): 350-354. For a contemporary view, see Eric Posner, "The U.S. Constitution is Impossible to Amend," *Slate*, May 5, 2014, accessed 12 May 2018, [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2014/05/amending\\_the\\_constitution\\_is\\_mu\\_ch\\_too\\_hard\\_blame\\_the\\_founders.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/05/amending_the_constitution_is_mu_ch_too_hard_blame_the_founders.html). See also the data and analysis in Richard Albert, "The Structure of Constitutional Amendment Rules," *Wake Forest Law Review* 49 (2014): 972-973, in which the US Constitution is ranked as the most-difficult-to-amend constitution among the constitutions of more than 30 democratic countries. David Strauss argues that amendment procedures might be irrelevant for the US Constitution because in practice, the constitutional meaning includes not just the texts of the document, but also the settled understanding that have

I choose Immutable Legal Texts as the subject of my research because, given their supposed long history, finding cases of conflicts between legal texts and human interests should be relatively easy. It is bound to happen. And due to their supreme position within a legal system or jurisdiction, referring to other sources beyond the legal texts, including abstract moral values are unavoidable unless the texts contain everything necessary to decide the relevant case, which adds more complexities and provides an opportunity to give my own meaningful contribution to current legal scholarship.

In view of the above, when facing Immutable Legal Texts, one might immediately infer that legal interpretation, particularly the consequence-based type, is the only feasible alternative to resolve the conflict between legal stability and satisfaction of social interest.<sup>36</sup> This is of course a premature conclusion as there are some important questions that must be addressed beforehand. First of all, is it necessary to read the texts in a different way through legal interpretation? Maybe some supreme laws are free from the defects argued by Pound, rendering the idea of conflict as illusory?<sup>37</sup> Or if those laws have defects, maybe preserving the fidelity of the texts (if such thing exists), no matter what the consequences in individual cases, is more important to the whole

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developed alongside the texts. This supports the notion that, under the assumption that the costs of amendment are extremely high, people have more incentives to change the textual meaning through different procedures. See further discussion in David A. Strauss, "The Irrelevance of Constitutional Amendments," *Harvard Law Review* 114 (2000-2001): 1457-1505.

<sup>36</sup> Jerre S. Williams argues that under the constitutional practice in the United States, it is already accepted that amendment to the US Constitution does not always have to be done through the difficult formal amendment process, but also through altered interpretation and application by the Supreme Court. In other words, legal interpretation has effectively become a method of amendment even though the texts of the US Constitution are not changed. See Jerre S. Williams, "Stability and Change in Constitutional Law," *Vanderbilt Law Review* 17 (1963-1964): 221.

<sup>37</sup> The claim made by Islamic legal scholars on the perfection of Islamic law could be a good example. The typical claim would say that the law of Islam is eternally applicable because it is not based on the customs and traditions of any particular people, and it is not for any particular period, but it is based on the same principles of nature on which man has been created. See Eran Lerman, "Mawdudi's Concept of Islam," *Middle Eastern Studies* 17 (1981): 494.

system?<sup>38</sup> In other words, under this view, the consequences of our interpretive choice do not and should not matter in interpretive process.

Suppose we decide that legal interpretation is necessary, to what extent can we interpret the texts? Can we have a decent agreement on what the term means? Traditionally, legal interpretation means an act of identifying the semantic or linguistic meaning of a legal text in context, which will then be followed up by the act of construction, namely, applying such meaning to certain factual circumstances.<sup>39</sup> Do consequence-based theories of legal interpretation fit such account?

Scott Soames provides two important tasks of legal interpretation, epistemological and constitutive.<sup>40</sup> The epistemological task is to ascertain the content of laws resulting from previous actions of other legally authoritative sources while the constitutive task is to render an authoritative judgment that itself plays a role in determining what the content of the law is.<sup>41</sup> Sometimes this judgment changes the content of the laws, or legal provisions, that were the focus of the epistemological task.<sup>42</sup> Considering these interpretive tasks and their effects in understanding the content of law, consideration about consequences might play a significant role.

The concept of “meaning” itself might not be limited only to the semantic meaning. As argued by Richard H. Fallon Jr., the meaning of a legal text can refer to its literal or semantic meaning, its contextual meaning as framed by the shared presuppositions of speakers and listeners, its real conceptual meaning, its intended meaning, its reasonable meaning, or its

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<sup>38</sup> See further discussion in Ilan Wurman, *A Debt Against the Living: An Introduction to Originalism* (Cambridge: Cambridge University Press, 2017), 76-83.

<sup>39</sup> See Randy E. Barnett, “Interpretation and Construction,” *Harvard Journal of Law and Public Policy* 34 (2011): 66 and Lawrence B. Solum, “The Interpretation-Construction Distinction,” *Constitutional Commentary* 27 (2010): 95-96.

<sup>40</sup> See Scott Soames, “Toward a Theory of Legal Interpretation,” *New York University Journal of Law & Liberty* 6 (2011): 231.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

previously interpreted meaning.<sup>43</sup> In such situation, what meaning should be prioritized? Should we rely only on and nothing but the texts? Should we find and rely on the intention behind the texts, even if they are not clearly reflected within the texts? Can we ignore the voices of the past and look only on what matters today, assuming it is possible to identify these voices?

Furthermore, what are the values that we should consider in interpreting those texts, if any? Should legal interpretation be free from any normative commitments? Is there only a single justifiable theory of legal interpretation? Or is Cass Sunstein's claim correct, that in the end, there is nothing that interpretation "just is", namely, that among the reasonable alternatives, no approach to legal interpretation is mandatory and therefore, any approach must be defended on normative grounds, which further means that all interpretive theories are essentially consequence-based, and they only differ in the goals to be pursued?<sup>44</sup>

I share the same view with Professor Sunstein. At the end of the day, given the deep relationship between law and human interests, and the fact that even the concept of law itself is far from being settled,<sup>45</sup> including the standards of determining the applicability of legal meanings,<sup>46</sup> believing that all legal interpretive methods could be freed from normative justification is a naïve attempt. As an example, if one believes that the consequences resulting from

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<sup>43</sup> See Richard H. Fallon Jr., "The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation," *The University of Chicago Law Review* 82 (2015): 1239.

<sup>44</sup> By providing normative grounds to support a certain type of interpretive theory, we are essentially saying that the reason why we are using such theory is to comply with certain goals or principles that we believe must be adhered. In other words, such theory becomes a consequence-based one, regardless of the difference in techniques and goals. See Cass R. Sunstein, "There is Nothing that Interpretation Just Is," *Constitutional Commentary* 30 (2015): 193. The same idea has been conveyed long time ago by Henry Campbell Black when he said: "*The rules of construction are not rules of positive law, unless expressly provided by statute. They rest on the authority of the courts, which have gradually evolved them, and they are not imperatively binding in the same sense as are the enactments of the legislature.*" See Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws*, 2<sup>nd</sup> edition (St. Paul: West Publishing Co, 1911), 9. For an argument against this notion, see Richard Ekins, "Interpretive Choice in Statutory Interpretation," *The American Journal of Jurisprudence* 59 (2014): 1-24. I have to admit that Ekin's counter-arguments are not thoroughly convincing as we will further see below.

<sup>45</sup> See further discussion in Brian Z. Tamanaha, *A Realistic Theory of Law* (New York: Cambridge University Press, 2017), 38-43.

<sup>46</sup> See further discussion in Fallon Jr., *supra* note 43 at 1307-1308.

our choice of interpretation is less important than preserving the original meaning of the legal texts, there is presumably a normative value that justifies such ranking whether the interpreter realizes it or not. Saying that original meaning must be prioritized because it is more important is a useless tautology. The same applies if one tries to defend any other position. Finding this “normative value” is what excites me the most in writing this dissertation and I could not find a subject that is more interesting than Islamic law.

During years of my research on Islamic law, I have always been fascinated with the claim of countless Islamic legal scholars that Islamic law is perfect, the best among any existing human made laws, since it is made and inspired by the unlimited wisdom of God.<sup>47</sup> Wearing the hat of someone that never received a legal education, when I hear that a law is perfect, I would quickly assume that such law would fit and could be implemented in any condition, and would never expire or need amendment.

Consequently, having a perfect law should mean that we can disregard its consequences and any discussion about culture, geography, or other social aspects that may affect the law. Why bother anyway? If the claim is true, whatever we do, such law would always suit the people’s interest, or at the very least, it will always yield better results for the people compared to any other laws regardless of the relevant conditions. In other words, societal conditions do not and should not construct or affect the so called “perfect” law.

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<sup>47</sup> A lot of Islamic jurists have declared the perfection of Islamic law. This is not surprising as the Qur’anic verse quoted in the beginning of this dissertation clearly supports that notion. To name one example, Muhammad Ibn Idris al-Shafi’i, the founder of Shafi’i School which is one of the 4 major schools of Islamic law, argues that legal rules deriving from the Qur’an and Hadiths fit into intelligible and orderly categories, categories which, in turn, reflect and therefore embody the divine design and perfection of the law. He further argues that the solution to any given legal problem—or more particularly, any legal rule—can be shown to derive directly from a revealed textual source, namely the Qur’an, the Hadiths or both. See Joseph Lowry, *Early Islamic Legal Theory: The Risala of Muhammad ibn Idris al-Shafi’i* (Leiden: Koninklijke Brill NV, 2007), 23. This claim of perfection will be an essential theme of this dissertation and I will further test such claim in the following chapters of this dissertation.

Yet, and I personally find this to be totally unsurprising, two of the oldest consequence-based theories of legal interpretation that we can find in legal literature came from the Islamic world, *Istihsan*<sup>48</sup> and *Istislah*<sup>49</sup> (we will be having a thorough discussion on these two theories in the next chapter). And both of them existed long before Richard Posner promoted his own version of pragmatism and Law & Economics in the Western hemisphere.<sup>50</sup> Surely these theories did not emerge from an empty space. The main question is how could this happen? Are these theories invalid, a product of misunderstanding upon the perfectness of Islamic law or could they signal a great discovery on the true nature of Islamic law?

To provide better examples on how those interpretive theories work in the real world, we will discuss in Chapter 4 some important cases in Islamic law that show a huge discrepancy between what was originally mandated and what is actually implemented in various parts of the world. The discussion in that chapter will be descriptive, as I have no intention to examine whether the decision to implement the law differently is or is not properly justified. I simply want to prove that the conflict between law and social needs exists even in a “perfect” legal system.

This dissertation is, therefore, a serious attempt to understand the real-world consequences of Islamic law’s claim of perfection. Given the scale and effect of such claim, it would be a pity if we only limit our discussion and analysis in the realm of faith where one is expected to simply believe without questioning anything. I will argue that the existence of consequence-based theories of legal interpretation in Islamic legal scholarship cannot be separated from the pragmatist nature of Islamic law and that such pragmatism is the inevitable outcome of its own grandiose claims in dealing with its Immutable Legal Texts.

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<sup>48</sup> See further discussion in Chapter 2.

<sup>49</sup> See further discussion in Chapter 2.

<sup>50</sup> See Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton University Press, 2008), 96-101.

Another important reason for choosing the Islamic legal system as a case study (and writing my dissertation in an American university) is because I see a lot of resemblances between the two systems. At first blush, one might dismiss any possible similarity between the United States legal system and the Islamic legal system since the first is assumed to be governed by the laws of men while the latter is governed by the divine laws of God. Quite to the contrary, both systems surprisingly share similar problems and a variety of applicable interpretive theories in reconciling their Immutable Legal Texts with societal needs. After all, other than the US Constitution, there are not many written supreme laws that have survived for a considerable amount of time in this planet. The Qur'an and Hadiths (both may be jointly referred to as the "Basic Codes") belong to that small set. I am certain that there are a lot of valuable lessons for legal scholarship in the United States that can be gained from the rich history of Islamic law, and vice versa.

In the next section of this introductory chapter, I will discuss several basic concepts of Islamic law and Islamic legal system, setting the boundaries that form the main focus of this dissertation such as the differences between *Shari'a* and *Fiqh* and why I focus my research on the *Shari'a* part.

#### **B. A SHORT COURSE IN ISLAMIC LAW**

All the talk about paradoxes within Islamic law should probably begin with the existence of the institution itself; like Schrödinger's cat, it exists and at the same time could also be a mere illusion. The reason is simple, namely, there is not yet a single version of Islamic law that clearly and unequivocally establishes the rules to be followed by the entire Muslim population in the world.<sup>51</sup> There is a great divergence of views among scholars, not just between opposing schools,

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<sup>51</sup> See Knutt S. Vikor, *Between the God and the Sultan: A History of Islamic Law* (New York: Oxford University Press, 2005), 1.

but also within the same school concerning of exactly what rules belong to Islamic law and how they bind the population of the faithful.<sup>52</sup>

Furthermore, the Islamic legal system consists of legal institutions, determinations, and practices that span a period of more than 1,400 years, arising from a wide variety of cultural and geographic contexts that are as diverse as Arabia, Egypt, Persia, Bukhara, Turkey, Iberia, Nigeria, Mauritania, Mali, Indonesia, India and China (and this list is far from complete).<sup>53</sup> Across those jurisdictions and countries, some claim to be full fledged Islamic or religious nations, some others implement Islamic law provisions to a certain degree without making an exact statement on their countries' status.<sup>54</sup> In such a case, what can be considered as Islamic law and Islamic legal system?

I will first start by defining the Islamic legal system from a purely theoretical point of view as a legal system that places the Basic Codes as its ultimate sources of law and therefore, all legal provisions under such system must be derived from and/or do not contradict these sources.<sup>55</sup> I use this definition because the supremacy of God's laws over human made laws is a concept that is

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<sup>52</sup> *Id.* The schools of thought in Islamic law are incredibly diverse throughout the history. There were regional ones and personal ones which will later transform into doctrinal schools with lots of followers. The currently 4 major schools are the Hanafi School, Maliki School, Shafi'i School and Hanbali School. See further discussion in Wael B. Hallaq, "From Regional to Personal Schools of Law? A Reevaluation," *Islamic Law and Society* 8 (2001): 1-26.

<sup>53</sup> See Khaled M. Abou El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (New York: Rowman & Littlefield, 2014), xxxii.

<sup>54</sup> Quoting Naseef Naeem, "By definition, countries with an Islamic character are those in which the reality of constitutional law in some way or another either reflects Islam as a holistic concept or the principles of the Islamic faith in general or, alternatively, in the interpretation of one of the Islamic schools of law. Consequently, those countries with a Muslim majority whose constitution recognizes in one way or another the principles of laicism, secularism, the religious neutrality of the state or the separation of the state and religion will not be considered in this paper. Nevertheless, there is no overlooking that even in these countries, Islam has some status in the system or, to be more precise, the legal system of the state. However, its influence extends not so much to constitutional law as to other areas, such as family law." See Naseef Naeem, "The Influence of Religious Clauses on Constitutional Law in Countries with an Islamic Character," in *Islam and the Rule of Law – Between Sharia and Secularization*, ed. Birgit Krawietz and Helmut Reifeld (Berlin: Konrad-Adenauer-Stiftung, 2008), 72.

<sup>55</sup> This is called the submission principle where no rule of local custom, legislation, regulation, case holding, treaty, or any other norm of positive law is Islamic unless it is compatible with the Qur'an and Hadiths which are considered as the supreme laws of every generation of Muslims and of every sect of the Muslim community. This principle also acknowledges the historical controversy over the collection of Hadiths (as will be discussed later below). See Liaquat Ali Khan and Hisham M. Ramadan, *Contemporary Ijtihad: Limits and Controversies* (Edinburgh: Edinburgh University Press, 2012), 5-6.

agreed among Islamic jurists without major controversies as the defining feature of the Islamic legal system.<sup>56</sup> Of course, given its theoretical nature, the definition does not prevent us from seeing discrepancies in the real world. I acknowledge the possibility that some of the Basic Codes' provisions are being ignored, waived, or modified in certain jurisdictions, including those that claim to fully or partially implement Islamic law, due to whatever reasons.<sup>57</sup>

The above fact does not defeat the purpose of having the initial definition since I am not working on constructing the correct form of the Islamic legal system within a jurisdiction, nor am I working on defining the normative characteristics of an Islamic nation, namely, the characteristics that a country must have before it can claim as an Islamic nation or a nation that implement Islamic law faithfully. The dissertation's focus is purely descriptive. It is to find out whether there exists any "proper" guideline in interpreting Islamic Immutable Legal Text and whether consequence-based theories are compatible with such system. In such case, my definition of Islamic legal system serves as a baseline in testing whether the practical discrepancy that we find in real life could be justified under the Basic Codes' provisions given the nature of the system and available theories of legal interpretation.

My next goal is to define Islamic law which is often separated into two distinctive categories, *Shari'a* and *Fiqh*. Some scholars define *Shari'a* as the divine part of Islamic law (namely, the legal provisions of the Basic Codes), an abstract ideal that is supposed to be free from any

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<sup>56</sup> It is, after all, the defining feature of a legal system that claims to be derived directly from an all-knowing God that knows best about the need of humanity. See further discussion in Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University Press, 2013), 49-51.

<sup>57</sup> Examples: the Qur'an and Hadiths are not considered as those jurisdictions' supreme legal sources, or their legal actors interpret that such provisions can be waived, ignored, or modified based on certain interpretive theories. Indeed, as we will discuss further below, scholars might differ in discerning the factors that constitute a contradiction between God's laws and human laws, and therefore, what some scholars see as contradiction might be considered consistent by other ones. See further discussion in Khan and Ramadan, *supra* note 55 at 7-10.

imperfection,<sup>58</sup> while some others think that the term covers the entire body of laws and regulations that govern the lives of the Muslim communities, including the Basic Codes, *Fiqh* (in its traditional definition) and Islamic positive laws.<sup>59</sup> I subscribe to the minimalist view of *Shari'a* and therefore, in this dissertation, *Shari'a* refers solely to the legal provisions set out in the Basic Codes (subject to certain clarifications as set out below).

On *Fiqh*, while it is traditionally reserved for Islamic legal scholarly treatises, given the need to make a comparison between God made laws and human made laws, I prefer to take a maximalist view where *Fiqh* is defined as any human effort at understanding or implementing the ideal contained in *Shari'a*, and they can be in many forms, ranging from legal treatises and juristic opinions (*fatwas*) to court rulings and state regulations.<sup>60</sup> As such, I am not limiting my sources of *Fiqh* to the extent that they are socially accepted as positive laws at one point in time as I believe that they all can contribute as case studies in analyzing the practice of interpreting Islamic Immutable Legal Texts.<sup>61</sup>

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<sup>58</sup> See among others, Frank Griffel, "Introduction," in *Shari'a: Islamic Law in the Contemporary Context*, ed. Abbas Amanat and Frank Griffel (Stanford: Stanford University Press, 2007), 3, Khan and Ramadan, *supra* note 55 at 3, and Fadl *supra* note 53 at xl-xli.

<sup>59</sup> See Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 2-7.

<sup>60</sup> See further discussion in Norman Calder, "Nawawi and the Typologies of *Fiqh* Writing," in *Shari'a: Islamic Jurisprudence in the Classical Era*, ed. Colin Imber (Cambridge: Cambridge University Press, 2010), 75-76, Murteza Bedir, "Fikih to Law: Secularization Through Curriculum," *Islamic Law & Society* 11 (2004): 385-401, and Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Islamabad: The International Institute of Islamic Thought, 2000), 18-24. In classical term, *Fiqh* is usually only limited to Islamic legal scholar treatises and juristic opinions. But as I will further explain in note 14 below, it would be better to cover other form of positive laws as part of *Fiqh*. Indeed, in practice, Islamic law is transforming from jurist law, that is, a law created by independent legal experts, to statutory law, a law promulgated by a national-territorial legislature. See Aharon Layish, "The Transformation of the Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World," *Die Welts des Islams* 44 (2004): 85-113.

<sup>61</sup> Since *Fiqh* is basically a human product, my approach in selecting the relevant sources for analyzing them fits the legal positivism tradition. In such case, I submit to these two fundamental theses: (i) Social Thesis, namely, what count as law in any particular society is fundamentally a matter of social fact and (ii) Separability Thesis, namely, what the law is and what the law ought to be are separate questions. See Brian Leiter, "Legal Realism and Legal Positivism Reconsidered," *Ethics* 111 (2001): 286. This is why my sources of *Fiqh* cover a wide range, among others, classical legal treatises, courts decision, state regulations, and executive actions of Islamic Caliphs; all of them are currently or at one point in history considered as the actual law within the society. See Coulson, *supra* note 59 at 218-225. See also the development of Islamic positive laws throughout the history in Robert W. Hefner, "Introduction: Shari'a Politics – Law and Society in the Modern Muslim World," in *Shari'a Politics: Islamic Law and Society in the Modern World*, ed. Robert W. Hefner (Indianapolis: Indiana University Press, 2011), 1-54. At the same time, acknowledging these sources as *Fiqh*, as Islamic positive laws, does not necessarily mean that we cannot

Theoretically speaking, it must be noted that not all human efforts constitute *Fiqh*, and there is a separate discussion on the criteria that must be satisfied before one can claim that he has done proper efforts in understanding the content of *Shari'a* known as the theory of *Ijtihad*.<sup>62</sup> This discussion made sense in the past because in the early days of Islamic legal scholarship (namely, around the first 300 years since the birth of Islam), there were not yet clear divisions of roles within the state apparatus, and there were plenty of schools of thought competing for domination across various jurisdictions; consequently, traditional scholars began their discussion by elaborating a theory of who would be qualified to perform *Ijtihad*, instead of focusing on defining the officials or governmental structures that have the authority to read and implement the law.<sup>63</sup> In any case, this was mainly an institutional issue, that is, who or what institution would be qualified to perform the *Ijtihad*; and institutional issues are not the focus of this dissertation.

It is clear now that the entire body of Islamic law covers both *Shari'a* and *Fiqh*, but a critical distinction must still be made between these two categories, as *Shari'a* is divine, sacred, an embodiment of perfection; and *Fiqh*, on the other hand, is human-made and subject to mistakes and uncertainties.<sup>64</sup> One of the dissertation's goals is to demonstrate that Islamic law is inherently consequentialist and pragmatic, and that it is compatible with consequence-based theories of

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question their appropriateness with the *Shari'a*. Furthermore, posing that question does not necessarily mean that *Shari'a* must be considered as a system of natural law outside the positive legal system. We can also consider *Shari'a* as part of the Islamic positive law if its source of authority is derived from social acceptance. Therefore, regardless of the status of *Shari'a* (as natural law or positive law), we can always make a theoretical assessment to determine whether the terms of *Fiqh* are in line with the *Shari'a*, which is essentially an issue of legal interpretation.

<sup>62</sup> *Ijtihad* is generally defined as the capacity for making deductions in matter of law in cases to which no express text or rule already determined by consensus is applicable. It is one of the earliest legal theories that dealt with institutional problem in a legal system. See further discussion in Shaista P. Ali-Karamali and Fiona Dunne, "The Ijtihad Controversy," *Arab Law Quarterly* 9 (1994): 238-257 and Mohamed Abdel-Khalek Omar, "Reasoning in Islamic Law: Part Two," *Arab Law Quarterly* 12 (1997): 354-366.

<sup>63</sup> For discussion concerning standards for scholarship in Islamic law, see, for example, Hisham M. Ramadan, "Toward Honest and Principled Islamic Law Scholarship," *Michigan State Law Review* 2006 (2006): 1573-1607. Around 400 years after the birth of Islam, in one of the first treatises on Islamic administrative and constitutional law, the *Ijtihad* capabilities were cited as part of the requirements for certain government officials and positions. See further discussion in Abu'l Hasan Al-Mawardi, *Al-Ahkam As-Sultaniyyah – The Laws of Islamic Governance*, trans. Asdullah Yate (London: Ta-Ha Publishers Ltd., 1996).

<sup>64</sup> See further discussion on the differences between *Shari'a* and *Fiqh* in Fadl *supra* note 53 at xli-xxlvii.

interpretation. In such a context, I am not interested to find traces of pragmatism in *Fiqh*; a lot of work has already been done in that subject. One example would be the work of Ahmed Fekry Ibrahim that discusses the history of pragmatic way of thinking in Islamic legal scholarship and modern laws through the existence of *takhayyur* and *talfiq* methods in Islamic legal theory, where a legal actor freely chooses and even combines opinions and interpretations from among different schools of Islamic legal thought to create new results in legal matters.<sup>65</sup>

Another clear example of this consequentialist way of thinking in *Fiqh* can be found in a famous case of Islamic law on war, particularly, the permissibility of attacking non-Muslim enemies that hold Muslim hostages, even if the hostages are children and they are being used as human shield (significantly increasing the probability of imposing dangers, including risk of death, to the hostages), as long as the Muslim soldiers intentionally try to avoid hitting the hostages and if such attack is necessary to avoid more harm from losing the war.<sup>66</sup> From a deontological perspective, imposing such an incredibly high risk without giving any autonomy to the hostages in deciding their own fates is absolutely unacceptable, as lives are not tradable.<sup>67</sup>

Furthermore, the diversity of opinions within *Fiqh* is enormous and essential as captured in the following Arabic maxim: “*the person who do not understand divergences in doctrine, has not*

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<sup>65</sup> See Ahmed Fekry Ibrahim, *Pragmatism in Islamic Law: A Social and Intellectual History* (New York: Syracuse University Press, 2015). These methods themselves are controversial and not all scholars approve them. See further discussion in J.N.D. Anderson, “Modern Trends in Islam: Legal Reform and Modernization in the Middle East,” *International and Comparative Law Quarterly* 20 (1971): 13-14, Aharon Layish, “Islamic Law in the Modern World: Nationalization, Islamization, Reinstatement,” *Islamic Law and Society* 21 (2014): 280, and most comprehensively in Birgit Krawietz, “Cut and Paste in Legal Rules: Designing Islamic Norms with Talfiq,” *Die Welt des Islams* 42 (2002): 3-40.

<sup>66</sup> For classical point of view in this issue, see Abu Ja’far Muhammad bin Jarir Ath-Thabari, *Al-Tabari’s Book of Jihad: A Translation from the Original Arabic*, trans. Yasir S. Ibrahim (New York: The Edwin Mellen Press, 2007), 61-66. For a view from a contemporary scholar, see Wahbah Az-Zuhaili, *Fiqh Islam Wa Adillatuhu*, vol. 8, ed. Dadi M. Hasan Basri, trans. Abdul Hayyie al-Kaitani et al. (Depok: Gema Insani Press, 2011), 36.

<sup>67</sup> See further discussion on the debate between consequentialist and deontological moral way of thinking in imposing risk in John Oberdiek, *Imposing Risk: A Normative Framework* (Oxford: Oxford University Press, 2017), 131-142. Also note that under the current international law discussion, targeting civilians in a war can be considered as a war crime. See Judith Butler, “Human Shields,” *London Review of International Law* 3 (2015): 228.

caught the true scent of *Fiqh*.”<sup>68</sup> As such, finding legal approaches that support any ideas existing under the sun, including Pragmatism and Law & Economics, in *Fiqh* is not entirely impossible, but may be bound to happen given the numbers of ideas available. And even if we find that the practitioners of *Fiqh* (scholars, legislators, executive agents, judges) are acting pragmatically in rendering their opinions and issuing regulations particularly on matters that are not specifically regulated in the *Shari’a*,<sup>69</sup> the million-dollar question is, so what? In the end, their opinions are just another fallible human creation and no one can claim absolute authority over the others with respect to his personal opinion.<sup>70</sup>

Thus, the more fundamental issue that must be resolved is what the *Shari’a* says about this diversity of opinions and interpretive theories, especially considering its claim of perfection (recalling that any reference to perfection of Islamic law in this dissertation refers to the *Shari’a* part). As will be further elaborated in the next chapter, will the case be similar with the United States legal system where different theories of legal interpretation can exist together and compete for supremacy, as none of them has absolute normative justification, or is there only a single acceptable theory of legal interpretation that must be followed under the *Shari’a*?

Before we answer the above question and move forward with the discussion of legal interpretive theories, there are three important clarifications regarding my focus on *Shari’a*. The

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<sup>68</sup> This is also known as *ikhtilaf*, disagreement and diversity of opinions among the jurists. Such is the importance of acknowledging diversity of opinions in *Fiqh* and that it cannot be eliminated. See further discussion in A. Qodry Azizi, “Ikhtilaf in Islamic Law with Special Reference to the Shafi’i School,” *Islamic Studies* 34 (1995): 368-369. See also the discussions in Liaquat Ali Khan, “Free Markets of Islamic Jurisprudence,” *Michigan State Law Review* 2006 (2006): 1488-1493.

<sup>69</sup> See further discussion in Noel J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Kuala Lumpur: The Other Press, 2006), 4-5.

<sup>70</sup> When the Prophet passed away, the Basic Codes did not mandate any religious leader that will hold ultimate authority over the entire Muslim community. Thus, leadership and authority in Islamic community depend mostly on social facts, namely, acceptance by the society of such leadership in a specific jurisdiction ala Legal Positivism tradition. See further discussion in Khaled M. Abou El Fadl, *And God Knows the Soldier: The Authoritative and Authoritarian in Islamic Discourses* (New York: University Press of America, Inc, 2001), 23-34. In fact, there are jurisprudential scholarships that try to analyze whether the law itself can claim absolute authority over its subjects and other moral considerations within a jurisdiction. See, for example, Abner S. Green, *Against Obligation: The Multiple Sources of Authority in a Liberal Democracy* (Cambridge: Harvard University Press, 2012).

first clarification is on the status of the Hadiths as part of the Basic Codes. Speaking purely from ranking, as per my own definition, the Qur'an should be considered as the only truly Immutable Legal Text in the Islamic legal system (Hadiths, ultimately, are secondary to Qur'an). However, Hadiths can be considered as the primary sources in filling the gaps of Qur'anic rules, further explaining or clarifying provisions that are briefly or not clearly discussed in the Qur'an;<sup>71</sup> and in fact, there are cases in which the texts of the Qur'an, despite its primary status, seem to be compromised by the texts of the Hadiths (though they are still being debated vigorously among Islamic jurists).<sup>72</sup>

One famous example in which the texts of the Hadith seem to compromise the texts of the Qur'an is the debate on the punishment for *zina* done by people who have married. Under the Qur'an, any person who commits *zina* shall be punished by lashes regardless of his/her marriage status. Meanwhile, under the Hadiths, adulterers who have married shall be subject to stoning punishment (*rajm*). Most classical Islamic jurists argue that the punishment prescribed by the Hadiths should be followed as a special case for those who have married while a minority group of scholars, especially the modern ones, argue that the punishment in Hadiths is not in line with the Qur'an prescribed sanction and therefore should not be adopted.<sup>73</sup>

The above issue arises because it is not clear whether the tradition for stoning was adopted prior to or after the revelation of the Qur'anic verses related to *zina's* punishment, where such ambiguity is recorded in Hadith no. 2415 in Al-Bukhari's compendium of Hadiths: "Narrated Ash-

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<sup>71</sup> See further discussion in Adis Duderija, "Introduction: The Concept of Sunna and Its Status in Islamic Law," in *The Sunna and its Status in Islamic Law*, ed. Adis Duderija (London: Palgrave Macmillan, 2015), 6.

<sup>72</sup> The debates occur because some scholars think that the compromise was not due to Hadiths provisions having higher status than the Qur'anic provisions but because the Qur'anic "universal" provisions were being rendered particular by the Hadiths. See Jalal al-Din Al-Mahalli and Imam Al-Juwayni, *Sharh Al-Waraqat: Al-Mahalli's Notes on Imam Al-Juwayni's Islamic Jurisprudence Pamphlet*, trans. Musa Furber (Abu Dhabi: Islamosaic, 2014), 29.

<sup>73</sup> See further discussions in, among others, Rushd, *supra* note 9 at 523 and Ahmad Hanafi, *Pengantar dan Sejarah Hukum Islam [An Introduction and History of Islamic Law]* (Jakarta: PT Bulan Bintang, 1995), 113-114.

*Shaibani: I asked 'Abdullah bin Abi Aufa about the Rajm (stoning to death for committing illegal sexual intercourse). He replied, "The Prophet carried out the penalty of Rajm." I asked, "Was that before or after the revelation of Surah An-Nur?" He replied, "I do not know.""*<sup>74</sup>

In addition, notwithstanding the fact that God is deemed as the sole lawgiver in the Islamic legal system,<sup>75</sup> God has tasked the Prophet to explain the law by word and deed.<sup>76</sup> Accordingly, the Prophet's acts and words were binding not because he was deemed as a separate lawgiver, but because what he said about the law had originally been conveyed to him by God or had God's approval.<sup>77</sup> In other words, the Prophet acted as the living embodiment of God's will through Hadiths and in such circumstances, one can argue that Hadiths are inseparable parts of the Basic Codes (with some reservations as there are, after all, several good reasons for the secondary rank of Hadiths).<sup>78</sup>

Since Hadiths were primarily transferred by oral means and the collective work to collect them in writing was only started systematically around 200 years after their initial transmission, not all Hadiths enjoy the same degree of transmission (*sanad*) like the Qur'an and therefore, the authenticity of some Hadiths is questionable or relatively less reliable compared to the Qur'an.<sup>79</sup> Due to the unequal rank of transmission's validity and the fact that there are many conflicting stories among hundreds of thousands of available Hadiths (some of which are simply fabricated), a Hadith cannot be used as a legal basis unless, at the minimum, its chain of transmission has been reviewed and declared valid.<sup>80</sup>

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<sup>74</sup> See Al-Bukhari, *supra* note 13 at 438.

<sup>75</sup> See Ahmad Hasan, "The Sources of Islamic Law," *Islamic Studies* 7 (1968): 165.

<sup>76</sup> See M. Mustafa Al-Azami, *On Schacht's Origin of Muhammadan Jurisprudence* (Oxford: Oxford Centre for Islamic Studies, 1996), 8. This is also recorded in numerous verses of the Qur'an.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 69-71.

<sup>79</sup> See further discussion in Fazlur Rahman, *Islam* (Chicago: The University of Chicago Press, 2002), 58-67.

<sup>80</sup> In practice, different schools of Islamic law employ various methods in recognizing the authority and validity of a Hadith. See further elaboration on this issue in Jonathan A.C. Brown, "Did the Prophet Say It or Not?"

Once the *sanad*'s validity is confirmed, the next thing to be analyzed is the textual content of the Hadiths (*matan*), which is not as straightforward as one may initially think. There are cases where it is unclear whether the Prophet directly acted on behalf of God or based on his own rational thinking and therefore, it is disputed whether those acts are infallible and impose an immutable binding obligation upon the Muslim community.<sup>81</sup> Since the Prophet talked about and acted upon a lot of matters, it is generally agreed that the compliance to his authority are specifically related to religious and legal matters because the Prophet is assumed to be fully guided by God only when dealing with those matters.<sup>82</sup> In "non-legal" matters, the Prophet has once stated that the people know better than him as recorded in Hadith no. 6126 of Sahih Muslim:

*"It was narrated from Mūsā bin Talhah that his father said: "The Messenger of Allah and I passed by some people who were at the top of their date palms. He said: 'What are these people doing?' They said: 'They are pollinating them, putting the male with the female so that it will be pollinated.' The Messenger of Allah said: 'I do not think that it is of any use.' They were told about that, so they stopped doing it. The Messenger of Allah was told about that and he said: 'If it benefits them, let them do it. I only expressed what I thought. Do not blame me for what I say based on my own thoughts, but if I narrate something to you from Allah, then follow it, for I will never tell lies about Allah, may He Glorified and Exalted is He.'"*<sup>83</sup>

In practice, differentiating these legal and non-legal acts require in-depth analysis on a case by case basis and Islamic jurists have developed certain tools to distinguish the relevant acts. As an example, Malik bin Anas, the founder of Maliki School, used the praxis of Medina's people to distinguish various roles of the Prophet and understand whether a Hadith has a universal legal implication or limited application.<sup>84</sup> Even in terms of legal acts, there are conflicting legal decisions

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The Literal, Historical, and Effective Truth of Hadiths in Early Sunnism," *Journal of the American Oriental Society* 129, no. 2 (2009): 265-285. For a complete guide on the types and degrees of Hadiths, see Ibn al-Salah Al-Shahrazuri, *An Introduction to the Science of Hadith*, trans. Eerik Dickinson. (Reading: Garnet Publishing, 2011).

<sup>81</sup> See Ahmad Hasan, "The Concept of Infallibility in Islam," *Islamic Studies* 11, no. 1 (March 1972): 1-2.

<sup>82</sup> See Scott C. Lucas, "The Legal Principles of Muhammad B. Ismail Al-Bukhari and Their Relationship to Classical Salafi Islam," *Islamic Law and Society* 13, no. 3 (2006): 295.

<sup>83</sup> See Abul Hussain Muslim bin Al-Hajjaj, *English Translation of Sahih Muslim*, vol. 6, ed. Huda Khattab, trans. Nasiruddin al-Khattab (Riyadh: Maktaba Dar-us-Salam, 2007), 209. For further information on Muslim's compendium of Hadiths (or Sahih Muslim), please see note 90.

<sup>84</sup> See Umar F. Abd-Allah Wymann-Landgraf, *Malik and Medina: Islamic Legal Reasoning in the Formative Period* (Leiden: Koninklijke Brill NV, 2013), 266-267. For a sample of scholarship that focuses on analyzing the act or words of the Prophet that should not be considered as legally binding, see Tarmizi M. Jakfar, *Otoritas Sunnah Non-*

by the Prophet recorded in numerous Hadiths in which the backgrounds are not clearly expressed, forcing Islamic jurists to reconcile the stories to the extent possible (such as, claiming that each decision is only applicable in special circumstances, or that one decision has universal application while the other is for special case that is permitted under the universal rule) or deem one story to be invalid by authority of the other story.<sup>85</sup> We will see later in Chapter 2 the effect of such conflicting stories on their usefulness as interpretive tool.

And to add fuel to the fire, instead of referring to the actual action or omission of the Prophet, some Hadiths describe what the Companions<sup>86</sup> of the Prophet said or do.<sup>87</sup> Despite being highly respected as the first generation of Muslims, the Companions' authority is far below the authority of the Prophet in deciding legal cases and therefore, they should not be mixed up.<sup>88</sup> These issues make the analysis of Hadiths becomes more complex and scholars are encouraged to be cautious in using Hadiths as legal sources.<sup>89</sup> To minimize some of the potential issues (at least

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*Tasyri'iyah Menurut Yusuf Al-Qaradhawi* [The Authority of Non-Tasyri'iyah Sunnah According to Yusuf Al-Qaradhawi] (Yogyakarta: Ar-Ruzz Media, 2011).

<sup>85</sup> See further discussion in Jonathan A.C. Brown, *Hadith: Muhammad's Legacy in the Medieval and Modern World* (Oxford: One World Publication, 2009), 160-165. Interestingly, the Prophet claimed that he might have misjudgment in deciding legal cases. In such cases, the decision was still legally valid, but the party who tricked the Prophet will be liable in the afterlife. See Hadith no. 7181 in the Al-Bukhari's compendium of Hadiths: "*Narrated Umm Salama, the wife of the Prophet: Allah's Messenger heard some people quarrelling at the door of his dwelling, so he went out to them and said, "I am only a human being, and litigants with cases of dispute come to me, and someone of you may happen to be more eloquent (in presenting his case) than the other, whereby I may consider that he is truthful and pass a judgement in his favour. If ever I pass a judgement in favour of somebody whereby he takes a Muslim's right unjustly, then whatever he takes is nothing but a piece of (Hell) Fire, and it is up to him to take or leave."*" See Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 9, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 184-185.

<sup>86</sup> Companions of the Prophet, or Companions for short, signify the collectivity of men and women who met the Prophet Muhammad during his mission (ca. 610–32), embraced Islam, and remained Muslim until they died. While there is widespread agreement among nearly all Muslims over the political activities of the Companions, Sunnis and Shi'is remain deeply split over the religious authority of these individuals. See further discussion in Gerhard Bowering, ed., *The Princeton Encyclopedia of Islamic Political Thought* (Princeton: Princeton University Press, 2013), 109-110.

<sup>87</sup> See Ahmad Hasan, "The Sunnah – Its Early Concept and Development," *Islamic Studies* 7, no. 1 (March 1968): 49.

<sup>88</sup> See Rahman, *supra* note 79 at 58.

<sup>89</sup> A practice that has been done since the times of the Companions. This is especially true for individual and isolated Hadiths. See Hasan, *supra* note 87 at 52-53. For further resources on this matter, see also Eerick Dickinson, *The Development of Early Sunnite Hadith Criticism: The Taqdimah of Ibn Abi Hatim al-Razi* (Leiden: Koninklijke Brill NV, 2001).

related to the chains of transmission), I will, most of the time, be referring to the two most authoritative sources of Hadiths in the Islamic world, the Bukhari and Muslim compendiums of Hadiths.<sup>90</sup> When I refer to Hadiths outside these two compendiums, I will, to the best of my knowledge, be avoiding any reference to Hadiths whose status is deemed weak by traditional standards in the science of Hadith.<sup>91</sup>

Second clarification, not all provisions of the Basic Codes are deemed as legal provisions *per se* since they also contain numerous ethical and moral codes, and some other stuffs, including words of poetry and brief glimpses into the past and future.<sup>92</sup> How to differentiate one from the other, and is such differentiation necessary in our quest to find the “proper” interpretive theory of Islamic Immutable Legal Texts? To ferret out these legal provisions from the Basic Codes, we must first understand the 5 classifications of human acts in Islamic law, namely: (i) *wajib*, acts that are obligatory,<sup>93</sup> (ii) *mandub*, acts that are recommended,<sup>94</sup> (iii) *haram*, acts that are prohibited,<sup>95</sup> (iv) *makruh*, acts that are disapproved,<sup>96</sup> and (v) *mubah*, acts that are permitted.<sup>97</sup> In practice, there is

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<sup>90</sup> The Bukhari’s compendium of Hadiths was designed by Abu Abdullah Muhammad bin Ismail bin Ibrahim bin al-Mughira bin Bardizbeh al-Ju’fi al-Bukhari (or Al-Bukhari for a shorter version), the most prominent collector of Hadiths in the Sunni Islamic world, while the Muslim compendium of Hadiths was made by Muslim bin al-Hajjaj, the best student of Al-Bukhari. The Bukhari’s compendium of Hadiths, together with Muslim’s, are considered as the most authoritative sources of Islamic law second to Qur’an only. I will not discuss here why their compendiums obtained such prestigious position in the Sunni Islamic world. However, readers interested with this theme may further refer to Jonathan A.C. Brown, *The Canonization of al-Bukhari and Muslim: The Formation and Function of the Sunni Hadith Canon* (Leiden: Koninklijke Brill NV, 2007). Please also note that as stated above, picking the compendiums of Bukhari and Muslim only minimizes the transmission issues. There is still the *matan* issue within these two compilation of Hadiths. See further discussion in Faiqotul Mala, *Otoritas Hadis-Hadis ‘Bermasalah’ dalam Shahih Al-Bukhari* [The Authority of ‘Problematic’ Hadiths in Shahih Al-Bukhari] (Jakarta: PT Elex Media Komputindo, 2015).

<sup>91</sup> Known as *dha’if* hadiths which include a lot of subcategories, including forged hadiths and hadiths whose chains of transmission is cut loose from the Prophet. See further explanation in Al-Shahrazuri *supra* note 80 at 24.

<sup>92</sup> See further discussion in Jean Abd-El-Jalil and Leon King, “Islam, the Koran and History,” *CrossCurrents* 3 (1952): 38-40.

<sup>93</sup> See Nyazee, *supra* note 60 at 58.

<sup>94</sup> *Id* at 65.

<sup>95</sup> *Id* at 68.

<sup>96</sup> *Id* at 71.

<sup>97</sup> *Id* at 72.

fluidity among these acts, namely, a *wajib* act may turn into a *haram* act, a *haram* act may turn into a *mubah* act or even a *wajib* act, and so forth, depending on the relevant circumstances, and the structure and objectives of the rules.<sup>98</sup>

One could argue that this fluidity is, by itself, perfect evidence of the pragmatism of Islamic law. However, the conditions upon which such fluidity is permitted are still being fiercely disputed among Islamic legal scholars (as they are part of the overall interpretive process) and some scholars do believe that the classification of certain acts are absolute and that the law governing them is unchangeable no matter what the circumstances.<sup>99</sup> We will see more of this debate in the next chapter.

Islamic legal discourse tends to focus on *wajib*, *haram* and *mubah* acts since the other two categories are merely recommendation.<sup>100</sup> If a person performs *mandub* acts, he will be rewarded by God and if he does not, there shall be no recourse.<sup>101</sup> *Makruh* acts are the reverse of *mandub* acts, namely, a person will be rewarded by God if he does not do those acts and there shall be no penalty if he continues to do so.<sup>102</sup> Those who are tempted to reckon from this discussion that sanctions or coercion is the essential element of Islamic law would be disappointed.<sup>103</sup>

Performing *haram* acts or failing to perform *wajib* acts do not necessarily entail penal sanctions. An easy example of prohibited acts without sanction that I briefly discuss at the opening of this chapter would be *riba*; though the act is clearly prohibited and the sin of committing such act is deemed equal to 36 times of the sin of doing *zina* (at least according to one Hadith), there are

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<sup>98</sup> See *Id* at 74-78.

<sup>99</sup> See Tamara Albertini, "The Seductiveness of Certainty: The Destruction of Islam's Intellectual Legacy by the Fundamentalists," *Philosophy East and West* 53 (2003): 464-465.

<sup>100</sup> See Nyazee, *supra* note 60 at 78.

<sup>101</sup> See Wael B. Hallaq, *A History of Islamic Legal Theories – An Introduction to Sunni Usul Al-Fiqh* (Cambridge: Cambridge University Press, 1997), 41.

<sup>102</sup> *Id.*

<sup>103</sup> For further discussion concerning the necessity of having sanction or coercion as an inseparable characteristic of law, see Frederick Schauer, *The Force of Law* (Cambridge: Harvard University Press, 2015).

no specific penal sanctions for eating profits from *riba* transactions under the Basic Codes.<sup>104</sup> Another good example would be the fact that there are no specific penal sanctions for consuming swine/pork meat even though its prohibition is deemed absolute.<sup>105</sup> Meanwhile, a Muslim's rejection or failure to perform the Islamic prayer (*shalat*) could be a great example to show the possibility of having no sanctions for failing to perform an obligated act. It is debatable though when the refusal to perform the prayer is considered as an act of apostasy, especially when the refusal to pray has been made explicitly and intentionally by the relevant person.<sup>106</sup> In such case, the controversial penalty on apostasy might be applicable.<sup>107</sup>

True, despite the non-existence of penal sanctions, there might be some afterlife consequences for the failure of complying with the above rules. Case in point, according to Hadith no. 7047 in Al-Bukhari's compendium of Hadiths, *riba* eaters will be punished in the afterlife to stay (presumably forever, unless he is a Muslim) in a river of blood in hell, constantly being stoned all the time if they try to get out from such river.<sup>108</sup> But as I will further argue in Chapters 5 and 6, afterlife threats are completely different from sanctions in ordinary legal sense and should be excluded from the discussion.

And while there are no sanctions associated with rules relating to *mubah* acts as these are essentially power or right-conferring rules, there are certain verses in the Basic Codes which prohibit Muslims from prohibiting anything that has been permitted by God and vice versa, to

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<sup>104</sup> See Klein, *supra* note 18 at 537.

<sup>105</sup> See further discussion in Richard A. Lobban, Jr., "Pigs and Their Prohibition," *International Journal of Middle East Studies* 26 (1994): 57-75.

<sup>106</sup> See further discussion in Ibn Rushd, *The Distinguished Jurist's Primer: Volume I*, trans. Imran Ahsan Khan Nyazee (Reading: Garnet Publishing, 2000), 98-99

<sup>107</sup> *Id.*

<sup>108</sup> See Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 9, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 119-120.

which some jurists argue that such designation is absolute without any exemptions.<sup>109</sup> We will discuss this issue further in Chapters 3 and 4 as they are closely related to the use of consequence-based interpretive theories in Islamic law.

Since the Basic Codes are not specifically designed as legal codes (at least not in the form usually understood by modern legal scholars or even the classical ones), Islamic jurists have developed comprehensive linguistics and context-based rules in distinguishing the legal provisions of the Basic Codes.<sup>110</sup> Discussing these technical rules would not contribute significantly to our overall discussion on theories of legal interpretation, and therefore, I only discuss them in brief in Chapter 2. I can assure the readers, however, that the case studies elaborated in Chapters 4 and 6 of this dissertation fit the characteristics of legal provisions in the Basic Codes using the rules stipulated by the majority of Islamic jurists.<sup>111</sup> Whenever necessary, I will indicate when I discuss certain verses from the Basic Codes that normally do not meet the characteristics of a legal provision, especially if I find that the subject of those verses matter for legal interpretation. The reasoning for using those non-legal provisions will be set out in Chapter 3.

Finally, for my third clarification, there are sources of Islamic law other than the Basic Codes. In Islamic legal theories (also known as *Ushul Fiqh*), these sources include among others

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<sup>109</sup> See Yusuf al-Qaradawi, *The Lawful and the Prohibited in Islam*, 2<sup>nd</sup> ed., trans. K. al-Hilbawi, M. Siddiqi, and S. Shukri (Cairo: Al Falah Foundation, 2001), 11-16. On the concept of power-conferring rules, see further discussion in Neil MacCormick, *H.L.A. Hart*, 2<sup>nd</sup> Edition (Stanford: Stanford University Press, 2008), 100-112.

<sup>110</sup> A good summary of these semantic and contextual rules can be found in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3<sup>rd</sup> Edition (Cambridge: The Islamic Text Society, 2003), 117-201. These rules include among others, rules for determining whether a Qur'anic verse contains an order to do something or not to do something, rules for determining whether a legal provision in the Basic Codes must be applied universally or only in certain cases that meet certain conditions, and rules for determining whether an obligation or restriction must be enforced immediately and continuously or could be done later depending on the situation.

<sup>111</sup> The rules that govern the origin of words, their usages and classifications are primarily determined on linguistic grounds which are not strictly part of the religion or having a power like the *Shari'a*. These are human made and therefore they are not absolute. See *Id.* at 117. In legal positivism tradition, they are basically rules of recognition, namely, rules that identify primary rules of obligation in a legal system. See Grant Lamond, "The Rule of Recognition and the Foundations of a Legal System," in *Reading HLA Hart's The Concept of Law*, ed. Luis Duarte D'Almeida, James Edwards, and Andrea Dolcetti (Oxford: Hart Publishing Ltd., 2011), 97-122.

(by order of priority): Consensus (*Ijma'*),<sup>112</sup> Analogy (*Qiyas*),<sup>113</sup> Juristic Preference (*Istihsan*),<sup>114</sup> Well-Being Consideration (*Istislah*),<sup>115</sup> and Customary Practices (*'Urf*).<sup>116</sup> The use of *Ijma'*, *Qiyas* and *'Urf* is relatively acceptable among all of the major schools of Islamic law while *Istihsan* and *Istislah* were more controversial and their use was generally limited to certain classical schools only (though they gained more grounds among modern scholars of Islamic law).<sup>117</sup> Unlike the Basic Codes, their existence and how they are being used as valid sources of law are still subject to disputes.<sup>118</sup> Moreover, their role is often limited to providing solutions to legal issues that have not been specifically settled by the Basic Codes.

I mention these sources because I will be referring to them in this dissertation from time to time and readers should understand the position of these sources compared to the Basic Codes

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<sup>112</sup> The concept of *Ijma'* has not been defined consistently. Some scholars argue that the term should refer to the consensus made by Islamic jurists only, some limits the class of scholars whose consensus can be taken into account, some others think that opinion of the general public could matter. It is also still debated whether the term should refer to unanimous consensus or just majority consensus, or whether the consensus actually exists in reality and not just in theory. Indeed, *Ijma'* might be considered as the Islamic version of theory of democracy in terms of determining when consensus occurs and how it should bind the citizens. For further discussion on the complexity and use of *Ijma'*, see Ahmad Hasan, "Ijma' in the Early Schools," *Islamic Studies* 6, no. 2 (June 1967): 121-139 and Abdullah bin Hamid Ali, "Scholarly Consensus: Ijma' – Between Use and Misuse," *Journal of Islamic Law and Culture* 12 (2010): 92-113.

<sup>113</sup> *Qiyas* is a systematic form of reasoning in law, and should not be translated into a simple practice of analogy. It started as a method to show a resemblance between two parallel cases or institutions, an Aristotelian syllogism and later transformed into a complex theory which covers among others: finding the correct *ratio legis* (*'illat*), qualifications for performing *Qiyas*, and typologies of analogies that are permitted and prohibited. For further discussion on the use of *Qiyas*, see Ahmad Hasan, "The Principle of Qiyas in Islamic Law – An Historical Perspective," *Islamic Studies* 15 (1976): 201-210.

<sup>114</sup> See further discussion in Chapter 2.

<sup>115</sup> *Istislah* is basically the Islamic law version of Law & Economics. See a general survey on the use of *Istislah* theory in Felicitas Opwis, "Maslaha in Contemporary Islamic Legal Theory," *Islamic Law & Society* 12 (2005): 182-223. We will have further discussion about this theory in Chapter 2.

<sup>116</sup> *'Urf* refers to social customary practices/traditions. In Islamic legal discourse, it is possible to use these traditions as valid sources of law in dealing with things that are not discussed in the Basic Codes. See further discussion in Noel J. Coulson, "Muslim Custom and Case-Law," *Die Welt des Islams* 6 (1959): 15-17. For a comprehensive discussion on *'Urf*, see Ayman Shabana, *Custom in Islamic Law and Legal Theory – The Development of the Concepts of 'Urf and 'Adah in the Islamic Legal Tradition* (New York: Palgrave Macmillan, 2010).

<sup>117</sup> See Opwis, *supra* note 115 at 220-223. See also Sherman A. Jackson, "Literalism, Empiricism, and Induction: Apprehending and Concretizing Islamic Law's Maqasid Al-Shari'ah in the Modern World," *Michigan State Law Review* 2006 (2006): 1469-1486.

<sup>118</sup> See H. Chad Hillier, "Muhammad Iqbal on al-Fiqh: Towards a Natural Law Jurisprudence," *Journal of Islamic Law and Culture* 12 (2010): 260-261.

within the hierarchy of valid legal sources in Islamic law as these sources belong to the realm of *Fiqh*. Some of them, particularly, *Istihsan* and *Istislah*, are also considered as methods of legal interpretation in the literatures of *Ushul Fiqh*. When acting as legal sources, they are treated as secondary sources, dealing only with issues that are not specifically regulated in the Basic Codes or *Ijma'* and *Qiyas*;<sup>119</sup> and when acting as methods of legal interpretation, they deal with how a legal provision in the Basic Codes should be read and implemented depending on the relevant circumstances.<sup>120</sup>

It is worth to note that by their nature, *Istihsan* and *Istislah* are clearly pragmatic method of interpretation and sources of Islamic law. And even trace of pragmatism can be found in *Ijma'*, *Qiyas*, and *'Urf*. But as I discussed above, I would like to analyze this pragmatist element at the most fundamental level of Islamic law and therefore, I am focusing on the *Shari'a* part as I believe that the design of *Shari'a* is a major factor in shaping the content of the secondary sources.

### C. STRUCTURE OF THE DISSERTATION

This dissertation is organized in 7 chapters. To set the stage for the discussion that follows, this introductory chapter explores the main issue of this dissertation, namely, the role of consequence-based theories of interpretation in interpreting Immutable Legal Texts, and also some key concepts of Islamic law, particularly, the definition, scope, and sources of Islamic law and Islamic legal system that set the basis of my entire analysis.

A general survey of the current state of competing theories of legal interpretation in the United States and the Islamic legal system with special emphasis on the consequence-based ones is provided in Chapter 2. This chapter serves as an introduction to the applicable major legal

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<sup>119</sup> See Mahdi Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research," *Arab Law Quarterly* 18 (2003): 238-241.

<sup>120</sup> See for example the discussion in Ahmad Hasan, "Early Modes of Ijtihad: Ra'y, Qiyas, and Istihsan," *Islamic Studies* 6, no. 1 (March 1967): 71-75.

interpretive theories through comparative lens, allowing readers to have a better understanding on the similarities and differences between the two legal systems in terms of interpreting Immutable Legal Texts.

I then discuss the basic claims and parameters that will be used to define and test the perfection of Islamic law in Chapter 3. Here I will show the multiple sides of such concept and the consequences of using a particular definition toward our choice of legal interpretive theories, especially when we associate perfection with immutability of not only legal texts, but also their meaning. I will also discuss whether well-being consideration could be considered as a valid parameter in assessing the concept of perfection.

Chapter 4 examines various cases in Islamic law that seem to challenge the notion of an immutable law, especially against the claims and parameters set out in Chapter 3. The cases will be categorized into three main themes: (i) acts that were originally permitted but later prohibited or limited, (ii) acts that were originally compelled but later waived or ignored, and (iii) acts that were originally prohibited but later permitted or seemed to be “permitted”. The primary goal of this chapter is to demonstrate the clashes between Islamic legal scholars and rulers on specific legal provisions from the Basic Codes that should be deemed settled under the idea that perfection of Islamic law is equal to absolutism and immutability of legal meaning. The cases also serve as an example where consequence-based theories of interpretation were used to justify the decision.

After discussing the above cases, I focus my attention in Chapter 5 on scrutinizing various key stories from the Qur’an and Hadiths that may shed some light on the principles that should be adhered in interpreting and implementing Islamic laws. Through these stories, I intend to demonstrate that at the most fundamental level, Islam is a pragmatic and consequentialist religion, and therefore does not necessarily restrict the use of consequence-based theories of legal

interpretation. Furthermore, I will also show that these characteristics are not automatically in contradiction with the claims and parameters set out in Chapter 3.

Having the required analytical tools, in Chapter 6, I return to the legal cases previously discussed in Chapter 4 and test whether the trace of pragmatism discussed in that chapter are reflected in the basic design of the relevant Islamic legal institutions. This chapter discusses: (i) the permissibility of Islamic legal institution of slavery and its correlation with the general theory of second best in economics, (ii) the penal sanction for theft which will be compared with the structure of sanctions for murder and *hirabah* (banditry)<sup>121</sup> under Islamic law, and their correlation with human incentives and notion of fairness, and (iii) the prohibited institution of *riba* whose lack of penal sanctions will be compared with the structure of sanctions for *zina* and consumption of liquors and swine. Other than demonstrating the pragmatist nature of Islamic law, Chapter 6 is also intended to resolve the issue on whether having a rule that will always maximize the overall well-being of the society at all time is possible; and in case the answer is no, its consequences to the notion of Islamic law's perfection.

Finally, Chapter 7 sets the conclusion of this dissertation, namely, that it is possible for consequence-based theories of interpretation to fit the Islamic legal system due to its consequentialist nature and adherence to scarcity. I will also discuss the extent to which my claim can be falsified, opening the way for future researches to improve the theory and to answer the remaining unsettled questions.

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<sup>121</sup> Known as banditry or disturbance of the peace. Usually, this crime involves the minimum element of showing drawn weapons in order to frighten people travelling on a public road and to prevent them from continuing on their journey. It can be followed up with hold-up, killing, and property taking. See further discussion in Peters, *supra* note 10 at 57-58.

## CHAPTER 2

### A GENERAL SURVEY ON THEORIES OF LEGAL INTERPRETATION

#### A. INTRODUCTION

In this chapter, we will be having a general survey on interpretive theories applicable in both the United States and the Islamic legal system. For readers unfamiliar with Islamic legal interpretation, having this survey would allow them to: (i) easily find the corresponding theories in the United States literatures, and (ii) have a better understanding on the similarities and differences between those theories. With this newfound understanding, I further hope that my readers could see that both legal systems have much the same problems in reconciling their archaic Immutable Legal Texts with current societal problems, and therefore can learn from each other to find a better solution to such pressing problem.

Indeed, the United States is not unique in terms of legal interpretive theories. Identical debates can be found within the rich history of Islamic law and Islamic legal theory. In fact, it might not be an exaggeration to claim that the existing debates on how to interpret Immutable Legal Texts in the United States are simply a repetition of the issues previously faced by Islamic jurists. After all, under both legal systems, the authoritative meaning of their Immutable Legal Texts is in the hand of independent human legal scholars and jurists which are diverse and prone to bias and mistakes; and the interaction between those supreme texts and human agency puts very similar pressures for jurists in each system in interpreting the laws.<sup>1</sup>

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<sup>1</sup> See Asifa Quraishi, "Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence," *Cardozo Law Review* 28 (2006-2007): 68. It is well known in Islamic legal theory that an opinion of an Islamic legal scholar, as authoritative as it may be, is not characterized by absolute certainty. It is simply an opinion that may be wrong or right and is not a self-evident truth. See Bernard G. Weiss, "Interpretation in Islamic Law: The Theory of Ijtihad," *The American Journal of Comparative Law* 26, no. 2 (Spring 1978): 203. Furthermore, in terms of consistency or predictability in the United States Federal Court system, no guarantee can be given due its "diversity". See Cornelius M. Kerwin and Scott R. Furlong, *Rulemaking: How Government Agencies Write Law and Make Policy*, 4<sup>th</sup> Edition (Washington DC: CQ Press, 2010), 71.

Another major reason to have the discussion in this chapter is to provide a glimpse of the current state of applicable interpretive theories in both systems, whose variants can be classified into 4 major groups: (i) semantic-based, (ii) intent-based, (iii) contextual-based, and (iv) consequence-based, and show that despite all the claims made by these schools of interpretation of being the most legitimate ones, none of them ends up as the absolute winner since each school has its own fundamental weaknesses that prevent its path of dominance.

There are two goals that I would like to achieve from the exercise in this chapter. First, it serves as an elaboration of the idea briefly discussed in Chapter 1, namely, that in general there is nothing that interpretation “just is”. Second, the exercise is crucial to support my argument that consequence-based theories of interpretation are not second-rate theories lacking legitimacy and sophistication compared to the other variants (especially within the context of Islamic legal system).

By showing that consequence-based interpretive theories are capable to hold their own against other competing theories (which do not always have the final say in determining the exact meaning of the relevant Immutable Legal Texts), I will have the right ammunition to build my theory on the role of consequence-based interpretive theories in dealing with Immutable Legal Texts and, specifically for Islamic legal system, on the correlation between their existence and the basic design of *Shari’a*.

## **B. SEMANTIC-BASED THEORIES OF INTERPRETATION**

### **1. UNITED STATES VARIANTS**

Let us first start with the semantic-based theories which will be represented by the Plain Meaning theory: if a reading of a legal text provides a clear answer to a case, further inquiries

should end and the text must be enforced as it is.<sup>2</sup> When this theory is being used, it is equivalent to saying that the text is so clear that no method of interpretation is necessary.<sup>3</sup> The problem is, what does “clear” mean? Is there any intelligible way to explain such term? Is it limited only to the semantic or literal meaning of the text where it can be assumed that it is context-independent?<sup>4</sup>

H.L.A Hart has famously argued about the open texture nature of language which may affect how we read and interpret the law given the uncertainties built within the relevant legal texts.<sup>5</sup> In an adversarial system like in the United States, the primary testers of whether a legal text is clear and reliable are the people themselves. Judges are basically awaiting people to knock the court’s door. The standard economic model of litigation states that rational people will only go to the court if:  $P_P J - C_P + S_P > P_D J + C_D - S_D$  (which can be rearranged into:  $P_P J - P_D J > (C_D + C_P) - (S_P + S_D)$ ).<sup>6</sup> The parties’ analysis on the probability of their victory will depend on how they perceive: (i) the overall strength of their case from legal perspective, (ii) the accuracy of information supporting their case, (iii) their ability in presenting their case to the court, and (iv) the capabilities of their counterparts in defending their position and rebutting the initial claims.

Some cases will never reach the court (or if they do, they will be most likely settled before the court declares its final verdict) because the legal issues might be quite clear without having the court’s intervention and the parties understand that their total costs do not justify the litigation

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<sup>2</sup> See Abner J. Mikva and Eric Lane, *An Introduction to Statutory Interpretation and Legislative Process* (New York: Aspen Publishers, 1997), 10.

<sup>3</sup> See Wilson Huhn, *The Five Types of Legal Argument* (Durham: Carolina Academic Press, 2008), 20.

<sup>4</sup> See Richard H. Fallon Jr., “The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation,” *The University of Chicago Law Review* 82 (2015): 1246. See also Ellen Schaubert and Ellen Spolsky, *The Bounds of Interpretation – Linguistic Theory and Literary Text* (Stanford: Stanford University Press, 1986), 17-18.

<sup>5</sup> See further discussion in H.L.A Hart, *The Concept of Law*, 3<sup>rd</sup> edition (Oxford: Oxford University Press, 2012), 128-136.

<sup>6</sup> This is a slightly modified model from Richard A. Posner, *Economic Analysis of Law*, 8<sup>th</sup> edition (New York: Aspen Publisher, 2011), 765.  $J$  is the amount to be received by the plaintiff if he wins the case;  $P_P$  is the plaintiff’s probability to win the case as calculated by the plaintiff;  $C_P$  is the plaintiff’s cost for court litigation;  $S_P$  is the plaintiff’s cost for out-of-court settlement;  $P_D$  is the plaintiff’s probability to win the case as calculated by the defendant;  $C_D$  is the defendant’s cost for court litigation; and  $S_D$  is the defendant’s cost for out-of-court settlement.

process. But in some other cases, there will be genuine differences among the parties in understanding the relevant legal issues. The stronger their own conviction, the higher their incentives to convince the court that their position is the right one, and the parties (in theory) will keep fighting until the highest level of the court to the extent that they have sufficient budget. In short, dispute occurs in the court when both parties are optimistic that they can win the case.<sup>7</sup>

Those are the cases that bring headaches to judges. The fact that there are at least two parties having different understanding of a legal text and both think that they have a good chance of winning indicates that there is a problem in understanding the text.<sup>8</sup> Maybe plain meaning is just an illusion? By expanding Ludwig Wittgenstein's theory, Saul Kripke argues that plain meaning does not exist, each word needs context to be understood and will be subject to the understanding of the relevant interpretive community.<sup>9</sup> Andrei Marmor argues that the full content of communication in a natural language is enriched by various factors and often goes beyond the meaning of the words and sentences uttered by the speaker.<sup>10</sup> This is especially true for legal conversation which is strategic in nature and therefore employs various pragmatic approaches in conveying its messages to its intended audiences.<sup>11</sup>

Equally ambiguous in understanding and using the Plain Meaning theory is the concept of ambiguity itself. What is the meaning of ambiguity and is it valid to claim that interpretation is only necessary when the text is ambiguous? The problem lies with how we define the term.

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<sup>7</sup> *Id.*

<sup>8</sup> This problem is also known as "pernicious ambiguity" where the various actors involved in a dispute all believe a text to be clear but assign different meanings to it. See Lawrence M. Solan, "Pernicious Ambiguity in Contracts and Statutes," *Chicago-Kent Law Review* 79 (2004): 859.

<sup>9</sup> See Saul Kripke, *Wittgenstein on Rules and Private Language* (Cambridge: Harvard University Press, 1982), 96-97. We will soon see that the meaning of "interpretive community" is also unclear and yields multiple interpretations.

<sup>10</sup> See further discussion in Andrei Marmor, "Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech," in *Philosophical Foundations of Language in the Law*, ed. Andrei Marmor and Scott Soames (Oxford: Oxford University Press, 2013), 83-104.

<sup>11</sup> *Id.* at 83. According to Marmor, the essential feature of a strategic speech is that the speaker strives to implicate more than he would be willing to make explicit. In other words, context matters in such case.

Linguists and philosophers distinguish ambiguity and vagueness in discussing indeterminacy in meaning, where ambiguity refers to a situation in which an expression can be understood in more than one distinct sense, and vagueness refers to problem of borderline cases.<sup>12</sup> Meanwhile, legal actors tend to use the term “ambiguity” to refer to all kinds of indeterminacy, regardless of their source.<sup>13</sup> In that sense, ambiguity occurs whenever there is a lack of clarity or when there is uncertainty about the application of a term.<sup>14</sup> It is also unclear whether ambiguity should be deemed to occur based on a private conclusion that, regardless of what others might think, the reader is unsure how best to read the text (internal perspective), or based on disagreement among ordinary speakers of a language upon the meaning of a text (external perspective).<sup>15</sup>

This differentiation of internal and external perspectives matters when we are dealing with the controversial qualifier of the Plain Meaning approach, that is, the text must be enforced as it is to the extent it does not produce any absurd results.<sup>16</sup> Like “ambiguity”, different people may have different understanding on the meaning of “absurdity”. As an example, Justice Antonin Scalia and

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<sup>12</sup> See Solan, *supra* note 8 at 860. Jeremy Waldron provides a formal definition for ambiguity, that is, an expression X is ambiguous if there are two predicates P and Q which look exactly like X, but which apply to different, though possibly overlapping, set of objects, with the meaning of each predicate amounting to a different way of identifying objects as within or outside its extension. See Jeremy Waldron, “Vagueness in Law and Language: Some Philosophical Issues,” *California Law Review* 82 (1994): 512. Meanwhile, Timothy Endicott provides a more elaborated definition of vagueness in law, that is, a legal instrument is vague if its language is imprecise, so that there are cases in which its application is unclear. Therefore, a vague legal standard clearly applies in some cases, and clearly does not apply in others, and there are borderline cases in which the linguistic formulation of the standard leaves its application unclear. See Timothy Endicott, “The Value of Vagueness,” in *Philosophical Foundations of Language in the Law*, ed. Andrei Marmor and Scott Soames (Oxford: Oxford University Press, 2013), 16.

<sup>13</sup> See Solan, *supra* note 8 at 860. Through an empirical test, there is indeed evidence that judges were not being precise when defining ambiguity, namely, whether it means that there is more than one plausible way to read a statute or whether the statute simply seems ambiguous to the reader. The test also shows that there is a risk that definition of ambiguity can be easily biased by strong policy preferences. See further discussion in Ward Farnsworth, Dustin F. Guzior, and Anup Malani, “Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation,” *Journal of Legal Analysis* 2 (2010): 290-291.

<sup>14</sup> See further discussion in Sanford Schane, “Ambiguity and Misunderstanding in the Law,” *Thomas Jefferson Law Review* 25 (2002-2003): 167.

<sup>15</sup> See Solan, *supra* note 8 at 859 and Farnsworth, Guzior and Malani, *supra* note 13 at 258.

<sup>16</sup> See Veronica M. Dougherty, “Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation,” *The American University Law Review* 44 (1994-1995): 127-128.

Bryan A. Garner define the doctrine by saying that a legal provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve.<sup>17</sup> On the other hand, Judge Abner Mikva defines the doctrine as a case where applying the literal language of the law in certain situations would lead to absurd results, ones that constructively could not have been within the purpose of the enacting legislature.<sup>18</sup>

Without a swift agreement on the meaning and standards of ambiguity and absurdity, I doubt that the Plain Meaning theory could help us in a satisfactory way in determining when legal interpretation is necessary or what a disputed legal term means. The problems that plague this approach allow us to conclude that context matters in reading and understanding legal texts. The main question is, how can we determine the correct context? As we will see in the next section, there are not lack of answers from legal scholars.

## 2. ISLAMIC VARIANTS

In Islamic legal system, Literalism is the main representative of semantic-based theories. Having a long history in Islamic law, an extreme version of it is often represented by the now extinct Dzahiri School (though there are some modern counterparts that resemble this ancient school).<sup>19</sup> Literalism often refers to the idea that literal meaning is privileged and must be

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<sup>17</sup> See Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), 234. Of course, the follow-up question will be: what is the standard to determine a reasonable person?

<sup>18</sup> See Mikva and Lane, *supra* note 2 at 10. In practice, this purpose might be, in a way, consequence-based.

<sup>19</sup> Ibn Hazm, the founder of this school, took legal texts so seriously that for him, practical reasoning and analogy seems to be useless if not misleading. He argues that analogy is the source the led Adam to follow the devil's trick which caused him to be thrown away from the heaven. He also argues that reasoning (in this case, *ratio legis*) cannot conclusively explain how the legal provisions in the Qur'an were being structured and whether it can be used to waive or ignore those provisions in certain circumstances. Therefore, it is the legal texts of the Basic Codes that must be followed strictly as they are. See further discussion in A.S. Tritton, "Ibn Hazm: The Man and the Thinker," *Islamic Studies* 3, no. 4 (1964): 475-476. This extreme form of literalism is being revived through the Wahabi and Salafi movement in the modern era. See further discussion in Fadl, *supra* note 3 at 256-257. To be fair to Ibn Hazm, his theory of legal interpretation is more complex than a simple strong commitment to texts. He also developed theories related to *Ijma'* and determination of valid source of Hadiths since he believed that the law must be certain as ordered by God and therefore any uncertain sources must be excluded. Accordingly, under his

prioritized over any other meaning in understanding God's intention.<sup>20</sup> Literal or plain meaning itself refers to the idea that barring cases of pure homonymity, words have singular primary meanings, and regardless of how these primary meanings were acquired, a word and its associated meaning form a very strong individual relationship.<sup>21</sup> Moreover, when these words are put together into sentences, and then expressed as utterances, these composite entities also have a primary meaning formed from the individual meaning of each word combined with fixed rules of grammar which dictate how these elements interrelate to produce meaning.<sup>22</sup>

But most Islamic legal scholars fully understand that from the very beginning, meaning of legal texts are not limited to a single definition. Far before Richard Fallon, Jr. came with the discussion on the various meanings of legal meaning, many centuries ago, the literatures of *Ushul Fiqh* discussed at least 4 types of legal meaning that can be taken out from the Basic Codes. These meanings are: (i) the explicit meaning (*'ibarat al-nass*), the literal meaning of the texts derived from the obvious words and syntax of the sentences,<sup>23</sup> (ii) the alluded meaning (*isharat al-nass*), the meaning accompanying the primary meanings that become the main object of the text which can be obtained through further investigations of the signs that might be detectable within such text,

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theory, the sources of Islamic law became very limited. See Adam Sabra, "Ibn Hazm's Literalism: A Critique of Islamic Legal Theory," in *Ibn Hazm of Cordoba: The Life and Works of a Controversial Thinker*, ed. Camilla Adang, Maribel Fierro, and Sabine Schmidtke (Leiden: Koninklijke Brill NV, 2013), 97-160.

<sup>20</sup> See Robert Gleave, *Islam and Literalism: Literal Meaning and Interpretation in Islamic Legal Theory* (Edinburgh: Edinburgh University Press, 2013).

<sup>21</sup> *Id.* at 26. Muhammad Shahrur argues that there are no synonyms in the Qur'an and therefore, each word used in the Qur'an has a specific use and meaning. While this is a very interesting theory and Shahrur has built a comprehensive work on this idea, most Islamic jurists believe that synonyms exist in the Qur'an and affect the process of interpretation. See Muhammad Shahrur, *The Qur'an, Morality, and Critical Reason – The Essential Muhammad Shahrur*, trans. Andreas Christmann (Leiden: Koninklijke Brill NV, 2009), 7-11.

<sup>22</sup> See Gleave, *supra* note 20 at 26.

<sup>23</sup> See further discussion on the examples and application of this type of meaning in Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3<sup>rd</sup> Edition (Cambridge: The Islamic Text Society, 2003), 168-169 and Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Islamabad: The International Institute of Islamic Thought, 2000), 283-284.

<sup>24</sup> (iii) the inferred meaning (*dalalat al-nass*), the meaning that is derived from the spirit and rationale of a legal text even where this is not indicated in its words and sentences.<sup>25</sup> and (iv) the required meaning (*iqtidha al-nass*), the meaning on which the text itself is silent and yet which must be read into it if it is to fulfill its proper objective.<sup>26</sup> As a general rule, the use of inferred and required meanings are usually less ranked compared to the other types of meaning.<sup>27</sup>

Acknowledging the existence of these multiple meanings, Islamic jurists further developed some important linguistic rules to decipher and interpret the legal provisions within the Basic Codes. These rules include the distinction of words that signify command (leading to *wajib* acts),<sup>28</sup> prohibition (leading to *haram* acts),<sup>29</sup> and permissibility (leading to *mubah* acts).<sup>30</sup> They also have linguistic rules that indicate the universality or particularity,<sup>31</sup> the clarity or obscurity,<sup>32</sup> the literal or figurative meaning,<sup>33</sup> and conditions of a legal provision (including the basis and requirements for performing, restricting, waiving, timing the performance of, and determining the subject of the

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<sup>24</sup> See further discussion on the examples and application of this type of meaning in Kamali *supra* note 23 at 169-171 and Nyazee, *supra* note 23 at 284-285.

<sup>25</sup> See further discussion on the examples and application of this type of meaning in Kamali *supra* note 23 at 171-172 and Nyazee, *supra* note 23 at 285-287.

<sup>26</sup> See further discussion on the examples and application of this type of meaning in Kamali *supra* note 23 at 172-175 and Nyazee, *supra* note 23 at 287-288.

<sup>27</sup> See Nyazee, *supra* note 23 at 288-289.

<sup>28</sup> See in among others: See Jalaluddin Al-Mahalli and Imam Al-Juwayni, *Sharh Al-Waraqat: Al-Mahalli's Notes on Imam Al-Juwayni's Islamic Jurisprudence Pamphlet*, trans. Musa Furber (Abu Dhabi: Islamosaic, 2014), 17, Kamali *supra* note 23 at 188-193, Nyazee, *supra* note 23 at 294-295, Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Georgia: Lockwood Press, 2013), 60-62, and Wahyudi Sarju Abdurrahim, *Ijtihad Semantik dalam Ushul Fiqh* [Semantic Ijtihad in Ushul Fiqh] (Yogyakarta: Citra Pustaka, 2015), 91-98.

<sup>29</sup> See in among others: Al-Mahalli and Al-Juwayni, *supra* note 28 at 22, Kamali *supra* note 23 at 194-196, Nyazee, *supra* note 23 at 295, Zysow, *supra* note 28 at 60-62, and Abdurrahim *supra* note 28 at 91-98.

<sup>30</sup> See in among others: Ibrahim ibn Musa Abu Ishaq al-Shatibi, *The Reconciliation of the Fundamentals of Islamic Law Volume 1*, trans. Imran Ahsan Khan Nyazee (Reading: Garnet Publishing, 2011), 98-99, Kamali *supra* note 23 at 194-196, Nyazee, *supra* note 23 at 188-193, Zysow, *supra* note 28 at 60-62, and Abdurrahim *supra* note 28 at 91-98.

<sup>31</sup> See in among others: Al-Mahalli and Al-Juwayni, *supra* note 28 at 23-29, Kamali *supra* note 23 at 140-154, Zysow, *supra* note 28 at 76-93, and Nyazee, *supra* note 23 at 298.

<sup>32</sup> See in among others: Al-Mahalli and Al-Juwayni, *supra* note 28 at 30-31, Kamali *supra* note 23 at 122-140, and Nyazee, *supra* note 23 at 299-300,

<sup>33</sup> See in among others: Al-Mahalli and Al-Juwayni, *supra* note 28 at 13-16, Kamali *supra* note 23 at 158-162, Nyazee, *supra* note 23 at 300-301, and Abdurrahim *supra* note 28 at 203-258.

act prescribed in the relevant legal provision).<sup>34</sup> Armed with these linguistic rules, defenders of Literalism believe that they would be able to fully understand the intention of God and apply Islamic legal rules faithfully.

However, the problem plaguing its counterparts in the United States legal system also applies against the Islamic version of Literalism, namely, insufficient consensus in applying the linguistic rules and therefore, what is clear to certain scholars might be unclear to others; what is limited in application for some scholars turns out to have a wide scope of applicability according to their rivals.<sup>35</sup>

Take for example the concept of order (*amr*). In Islamic legal theory, *amr* does not always mean as a strict command from God to be followed by the people. In fact, it has multiple meanings where some are associated with the classification of Islamic legal acts as discussed in the previous chapter, including: obliging an act (*wajib*), recommending an act (*mandub*), permitting an act (*mubah*), or simply indicating a pray or mocking the enemies of God.<sup>36</sup> Some Islamic legal scholars claim that these meanings can be inferred from the texts themselves, but some others claim that without understanding the context of the entire texts or the historical usage of the word, it is impossible to know the specific purpose of the order set out within the texts.<sup>37</sup> As argued by Abu Hamid Al-Ghazali, the Arab people sometimes use the “order” form as recommendation and in other time as obligation and they do not inform the readers that it was coined for one rather than the other.<sup>38</sup>

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<sup>34</sup> See in among others: Kamali *supra* note 23 at 155-158 and Nyazee, *supra* note 23 at 74-78.

<sup>35</sup> See the debates among the Islamic jurists regarding these linguistic rules in Gleave, *supra* note 20 at 94-125 and also Zysow, *supra* note 28 at 93-110.

<sup>36</sup> See further discussion in Abdurrahim *supra* note 28 at 93-95.

<sup>37</sup> *Id.* at 94.

<sup>38</sup> Zysow, *supra* note 28 at 65.

And even when one could conclude that the order clearly indicates a command, Literalism is not always able to explain how the command should be implemented, who should perform the command and what would be the timing for performing such command, including whether the act must be conducted immediately or whether one could delay such performance.<sup>39</sup> In the end, the linguistic rules of the Literalism school do not eliminate the debates, they actually perpetuate them. And this brings us to the next variant, the intent-based theories of interpretation.

### C. INTENT-BASED THEORIES OF INTERPRETATION

#### 1. UNITED STATES VARIANTS

In their quest to understand the context of a relevant legal text, some interpretive theories focus on the intent of the lawmakers. Purposivism usually acts as the leading theory for this variant, being a technique of legal interpretation that seeks to recover the intention of the relevant author of the legal texts, the will of the legislator (the “subjective” intent) and the purposive activity of the law itself, a continuous striving to solve the basic problems of social living (the “objective” intent).<sup>40</sup>

Another good candidates are Imaginative Reconstruction, a method of interpretation where a judge tries his best to think his way into the minds of the enacting legislators and imagine how they would have wanted the law to be applied to the relevant case<sup>41</sup>, and the early version of Originalism where it started as a legal interpretation theory that focuses on seeking the original

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<sup>39</sup> See further discussion in Saim Kayadibi, *Principles of Islamic Law: The Methods of Interpretation of the Texts* (Selangor: Islamic Book Trust, 2017), 210-215 and also M. Kholid Afandi and Nailul Huda, *Ala Tashil Ath-Thuruqat* (Kediri: Lirboyo Pres, 2014), 108-109.

<sup>40</sup> See Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed. William N. Eskridge, Jr. and Philip P. Frickey (New York: Foundation Press, 1994), 148. Aharon Barak tries to combine these two approaches when he defines Purposivism as a method of legal interpretation that combines elements of the subjective (the intention of the author of the text) and objective (the intent of the reasonable author and the legal system’s fundamental values). See further discussion in Aharon Barak, *Purposive Interpretation in Law* (New Jersey: Princeton University Press, 2005), 87-88.

<sup>41</sup> See Richard A. Posner, “Statutory Interpretation – in the Classroom and in the Courtroom,” *The University of Chicago Law Review* 50 (1983): 817. For a newer version of this theory see further discussion in Einer Elhauge, *Statutory Default Rules: How to Interpret Unclear Legislation* (Cambridge: Harvard University Press, 2008), 41-78.

intent of the framers of the US Constitution.<sup>42</sup> In some cases, intent is translated into “the spirit of the law,” causing the expressed texts of the law to be read with the lawmakers’ purpose in mind so that the texts literal meaning can be excluded if it can satisfy the higher purpose.<sup>43</sup> Formally speaking, under this theory, the fact that the legislator enacted  $x$  as a means to the end  $y$  is a ground for holding that it is mandatory to apply  $x$  in such a way as to realize  $y$ .<sup>44</sup>

Why focusing on legislators’ intent? Paul Grice proposes that a speaker’s meaning can be understood in terms of intentions and the recognition of intentions, and that the meaning of communications can ultimately be understood in terms of speaker meaning.<sup>45</sup> While Grice understands that linguistic convention matters for much communication or that sentence meaning may differ from an utterer’s meaning, he still claims that the intentions of the utterer should be the key to communication.<sup>46</sup> Indeed, a speaker’s intent is often crucially relevant to what ordinary people understand a speaker to have communicated in ordinary conversation.<sup>47</sup> Consequently, under the assumption that legislators are the only authorized parties to make and enact the law, the object of legal interpretation should be to ascertain the meaning of legal texts as understood

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<sup>42</sup> Nowadays, the theory has evolved to focus on the linguistic meaning of the US Constitution’s provisions as understood by the general public at the time they were promulgated, and therefore it is more similar to Textualism rather than the intent-based theory of legal interpretation. See Lawrence B. Solum, “What is Originalism? The Evolution of Contemporary Originalist Theory,” in *The Challenge of Originalism: Theories of Constitutional Interpretation*, ed. Grant Huscroft and Bradley W. Miller (Cambridge: Cambridge University Press, 2011), 12.

<sup>43</sup> *Holy Trinity Church v. United States* can be a good example. See further discussion in Carol Chomsky, “The Story of *Holy Trinity Church v. United States*: Spirit and History in Statutory Interpretation,” in *Statutory Interpretation Stories*, ed. William N. Eskridge, Jr., Phillip P. Frickey and Elizabeth Garret (New York: Foundation Press, 2011), 5-6.

<sup>44</sup> See Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, trans. Ruth Adler and Neil MacCormick (Oxford: Oxford University Press, 2011), 237.

<sup>45</sup> See Kent Greenawalt, *Legal Interpretation: Perspectives from Other Disciplines and Private Texts* (Oxford: Oxford University Press, 2010), 20.

<sup>46</sup> *Id.*

<sup>47</sup> See Richard H. Fallon Jr., “The Many and Varied Roles of History in Constitutional Adjudication,” *Notre Dame Law Review* 90 (2014-2015): 1763.

and intended by the law-making body, either expressly or by implication.<sup>48</sup> Of course, the next question would be, where can we find such intention? Do we limit the materials only to the texts of the law, or should we rely on other sources?

The main problem with intent-based theories of interpretation is not its philosophical background (which is relatively uncontroversial in legal discourse), rather, it is in finding the source of such “intent” or “purpose”. In statutory interpretation, legislative history documents are the primary aids in understanding the relevant context of the law.<sup>49</sup> For regulatory interpretation, the sources are even richer. One could start with the statement of basis and purpose which must accompany each regulation.<sup>50</sup> Practically speaking, this statement is not in a concise form that simply refers the regulation to the statute that authorizes it, rather it contains detail explanation on the reasoning used by the agency to promulgate the regulation.<sup>51</sup> Other relevant sources include the guidelines, manuals and bulletins that may be issued by the relevant agencies.<sup>52</sup> From this behemoth size of sources, how to determine the criteria of legitimate ones?

Assuming that it is possible to determine the legitimate materials, the next critical issue would be whether it is plausible to argue that there exists a single unified intent of the legislators to be found in the materials scattered around the relevant legislative piece, intent that can be used to further determine the meaning of the legal texts. The strongest critics against the intent-based theories argue that laws and regulations are often made collectively by a committee; public choice

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<sup>48</sup> See Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws*, 2<sup>nd</sup> edition (St. Paul: West Publishing Co, 1911), 11.

<sup>49</sup> See further discussion on the use of legislative history in Hart, Jr. and Sacks, *supra* note 40 at 1212-1255. For a comprehensive discussion on the materials that can be considered as legislative history documents or legislative evidence, see Victoria Nourse, *Misreading Law, Misreading Democracy*, (Cambridge: Harvard University Press, 2016), 153-160.

<sup>50</sup> See Kevin M. Stack, “Interpreting Regulations,” *Michigan Law Review* 111 (2012-2013): 377-378.

<sup>51</sup> *Id.* at 378.

<sup>52</sup> See Donna M. Nagy, “Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problem and a Proposed Framework,” *Cornell Law Review* 83 (1997-1998): 999.

theory famously demonstrates that legislative body/congress/agency's committee is a "they", not an "it", and therefore they do not have "intents" or "designs" that are hidden yet discoverable.<sup>53</sup> Hence, per these critics, seeking such collective intent is implausible if not impossible.<sup>54</sup>

How can we know whether these lawmakers (Constitution's framers/congress members/agency executives) have the same purpose and goal in drafting the law?<sup>55</sup> Can we assume that the legislature is composed of reasonable people seeking to achieve reasonable goals in a reasonable manner (as famously claimed by Hart and Sacks)?<sup>56</sup> I do not think that this is a reasonable assumption simply because that is not how the world works. Legislators comprise of people and as discussed in Chapter 1, each person has his own unique interests and goals. Now, if their views differ, whose views should be given more weight, the majority or the minority? What if the majority consists of numerous factions, each having its own agenda? Furthermore, if there is any ambiguity in the available materials of legislative history, how can we resolve it? How can we explain an ambiguous/vague law by referring to equally ambiguous/vague explanatory documents?

In answering the above questions, the critics of intent-based theories of interpretation usually argue that a law is the product of bargaining and compromise among many lawmakers with competing interests.<sup>57</sup> As such, not only that Hart and Sacks' assumption is innately baseless, using legislative history documents (or other similar documents) to understand the meaning of a

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<sup>53</sup> See Frank H. Easterbrook, "Statutes Domain," *University of Chicago Law Review* 50 (1983): 547-548.

<sup>54</sup> *Id.* For a discussion that defends the use of legislative intent as a valid mechanism of legal interpretation despite this "collective" problem, see Richard Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012), 218-243.

<sup>55</sup> This is also known as the problem of ascribing unitary intent to multimember bodies that enact legislation or draft or ratify constitutional provisions. See further discussion in John F. Manning, "Textualism and Legislative Intent," *Virginia Law Review* 91 (2005): 430-431.

<sup>56</sup> See Hart, Jr. and Sacks, *supra* note 40 at 1378.

<sup>57</sup> See John F. Manning, "The Eleventh Amendment and the Reading of Precise Constitutional Texts," *Yale Law Journal* 113 (2003-2004): 1665.

law might betray the compromise made among lawmakers due to the heterogeneity of the available documents.<sup>58</sup> The documents might be inconclusive, contradictory, and merely planted for political purposes, casting significant doubts on their reliability as interpretive sources.<sup>59</sup> In that context, using legislative history is like “looking over a crowd and picking out your friends,”<sup>60</sup> leading to a situation where legal interpreters are masking their own policy preferences with some questionable “intent.”<sup>61</sup>

As an example, the “Federalist Paper” is often considered by some lawyers and judges as an authoritative document to understand the meaning of the US Constitution since the document was made by some of the United States’ most cherished founding fathers. But in reality, it is just one of many political documents in the past that were used to support or challenge the ratification of the US Constitution. Accordingly, the document is essentially a partisan product that only supports certain portions of the overall thoughts and opinions of the United States’ founding fathers.<sup>62</sup> If that is the case, using the Federalist Paper in constitutional interpretation under the assumption that it is somehow reflects the thoughts of the US Constitution framers seems to betray

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<sup>58</sup> See further discussion in Adrian Vermeule, “Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church,” *Stanford Law Review* 50 (1997-1998): 1872-1877.

<sup>59</sup> See more of these objections to the use of legislative history documents in Office of Legal Policy, *Using and Misusing Legislative History: A Re-evaluation of the Status of Legislative History in Statutory Interpretation* (Washington DC: United States Department of Justice, 1989), 47-57. See also Frank H. Easterbrook, “What Does Legislative History Tell Us?,” *Chicago-Kent Law Review* 66 (1990): 441-450. For a comprehensive study that discusses the proper use of legislative history, see Abbe R. Gluck and Lisa Schultz Bressman, “Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I,” *Stanford Law Review* 65 (2013): 901-1026.

<sup>60</sup> See further discussion in Phillip P. Frickey and William N. Eskridge, Jr., “The Story of *Steelworkers v. Weber*: Statutory Text, Spirit, and Practical Reasoning,” in *Statutory Interpretation Stories*, ed. William N. Eskridge, Jr., Phillip P. Frickey and Elizabeth Garret (New York: Foundation Press, 2011), 120.

<sup>61</sup> See Frank H. Easterbrook, “The Role of Original Intent in Statutory Construction,” *Harvard Journal of Law & Public Policy* 11 (1988): 62-66.

<sup>62</sup> See further discussion in Ray Raphael, *Constitutional Myths: What We Get Wrong and How to Get It Right* (New York: New Press, 2013), 104-105. For a comprehensive history on the making of the US Constitution and the debates surrounding the process, see Michael J. Klarman, *The Framers’ Coup: The Making of the United States Constitution* (New York: Oxford University Press, 2016).

the compromise made by the framers themselves when they agree with the final version of the US Constitution.

It is worth to note that practitioners of Textualism (which we will discuss in just a moment) like Justice Antonin Scalia, supports the use of Federalist Paper though for a different purpose. Rather than seeking the original intent, according to him, the main purpose of reading that document is to understand the original meaning of the relevant texts of the US Constitution.<sup>63</sup> Admirable as it may be, such variant also succumbs to some fundamental problems which would eventually position Textualism in the same level with intent-based interpretive theories.

## 2. ISLAMIC VARIANTS

Since the Basic Codes are assumed to be made by a single drafter, namely, God (when Hadiths are considered as part of the Basic Codes, the Prophet is assumed to be acting solely on behalf of God), unlike in the United States legal system, the public choice critics against collective law making is not relevant, and discovering the lawmaker's original intent is no longer an implausible task.<sup>64</sup> Not surprisingly, there is a strong consensus among Islamic jurists that seeking the intention of God as the supreme lawmaker is the ultimate goal of legal interpretation in Islamic law,<sup>65</sup> though the fact that they are so divided in determining the correct methods to discover God's divine intent allows Islamic legal discourse to have such a rich history of academic debates on legal interpretation.<sup>66</sup>

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<sup>63</sup> See further discussion in Antonin Scalia, "Original Meaning," in *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived*, ed. Christopher J. Scalia and Edward Whelan (New York: Penguin Random House, 2017), 183-187.

<sup>64</sup> See further discussion on the Public Choice critics in Jerry L. Mashaw, *Greed, Chaos & Governance: Using Public Choice to Improve Public Law* (New Haven: Yale University Press, 1997), 50-80.

<sup>65</sup> See further discussion in Bernard G. Weiss, *The Spirit of Islamic Law* (London: The University of Georgia Press, 2006), 55-57. Similar position is also taken by Mohammad Hashim Kamali, a prominent Islamic scholar who resides in Malaysia, where he explains that the object of interpretation of Islamic law is to ascertain the intention of God. See Kamali, *supra* note 23 at 117-118.

<sup>66</sup> As an example, some Islamic jurists submit to extreme voluntarism and carry the notion of submission to God's will in a way that makes Islamic law utterly contingent upon a sovereign and unbound divine will. Consequently, they refuse to acknowledge any rational element in the law that the human mind is capable of comprehending on its own without the help of revelation. See Weiss, *supra* note 65 at 35.

Similar to the legislative history approach, some Islamic jurists try to understand God's intention by referring to certain historical Hadiths or words of Companions that provided the background stories to some of the legal provisions within the Basic Codes, such as, the historical contexts when the relevant provision was first introduced, the initial target of those provisions, and so forth.<sup>67</sup> Though these background stories could assist Islamic jurists in understanding God's intention, in practice, not all legal verses in the Qur'an or the Hadiths have complete background stories, and even if they do, some of them might be conflicting and some others do not have valid chains of transmission, causing their legitimacy to be seriously questioned.<sup>68</sup> Quoting John Burton on these possible inconsistencies:

*"Companion reports often clash. That happens because the Companions had not all been equal in their knowledge of the prophet's teachings. Some had been more frequently in his company than others, so that the oldest of his associates might well be unaware of something he had done and said, if they chanced to be absent on an occasion when others were present and able to report. The report from one or more Companions to which no other Companion has been reported as dissenting has a strong claim on our consideration. But a report from a single Companion from the Prophet has an even stronger claim to be considered, no matter how many other Companions may be reported as having done or said differently."*<sup>69</sup>

There is also a huge debate among Islamic scholars on whether it is always proper to interpret the Basic Codes provisions using these background stories.<sup>70</sup> This is usually related to one famous maxim in the science of *tafsir* (Qur'anic commentaries), namely, "the guideline to understand a verse is its general language and not the specificity of its cause."<sup>71</sup> Under this

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<sup>67</sup> These sources are called *Asbabun Nuzul* for Qur'anic verses and *Asbabul Wurud* for Hadiths stories. See John Wansbrough, *Qur'anic Studies: Sources and Methods of Scriptural Interpretation* (New York: Prometheus Books, 2004), 38 and Neal Robinson, *Discovering the Qur'an: A Contemporary Approach to a Veiled Text* (London: SCM Press, 2003), 61.

<sup>68</sup> See further discussion in John Burton, *An Introduction to the Hadith* (Edinburgh: Edinburgh University Press, 2001), 31-35.

<sup>69</sup> See *Id.* at 158-159.

<sup>70</sup> See further discussion in Kenneth Cragg, "The Historical Geography of the Qur'an: A Study in *asbab al-nuzul*," *Journal of Qur'anic Studies* 1 (1999): 82-83.

<sup>71</sup> See further discussion regarding this maxim in M. Quraish Shihab, *Kaidah Tafsir: Syarat, Ketentuan, dan Aturan yang Patut Anda Ketahui Dalam Memahami Ayat-Ayat al-Qur'an* [Tafsir Guidelines: Requirements, Conditions, and Rules that You Should Know in Understanding the Verses of the al-Qur'an] (Tangerang: Lentera Hati, 2013), 238-243.

principle, the background of a legal verse does not necessarily affect the generality of the relevant rule even if the verse is only applied to a specific case or person in such background story as further elaborated by Kenneth Cragg below:

*“Traditional tafsir has always held the asbab in the nuzul to be ‘occasions’ and not ‘causes’, or at least not ‘causes’ in the sense that the text is ‘necessitated’ by any time or place, seeing that it is inviolate already in heaven. How the problem is to be resolved of an eternally ‘uncreated’ Qur’an nevertheless being staked in a temporal sequence that necessarily unfolds in response to empirical situations as these emerge in prophetic experience and its local immediacies, belongs with any and every theology of Scriptured ‘revelation’.”<sup>72</sup>*

However, this maxim is still disputed among Islamic jurists until today since some of them also believe that the specificity of the cause matters in interpretation.<sup>73</sup> Put differently, there is not yet a strong consensus on how to read, use and interpret those background stories, rendering them less effective as the main source in finding God’s intention (which is quite similar to the issues related to the use of legislative history documents in the United States). One might wonder, if finding the intent of a single entity could be this difficult, do we have any hope to find the combined intent of multiple persons and institutions? This could be a decisive blow on the entire intent-based theories of interpretation, particularly, the subjective part.

#### **D. CONTEXT-BASED THEORIES OF INTERPRETATION**

##### **1. UNITED STATES VARIANTS**

The criticisms against intent-based theories bring us to the contextual-based theories with their champion, Textualism, a theory of legal interpretation that focuses almost exclusively on the text of the law and other intrinsic sources of meaning, including looking for the public meaning of the words used in the law as of the time the law was drafted.<sup>74</sup> Justice Antonin Scalia, the “godfather” of Textualism, explains that his interpretive method is the fair reading method, that

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<sup>72</sup> See Cragg, *supra* note 70 at 82.

<sup>73</sup> See Shihab, *supra* note 71 at 240-241.

<sup>74</sup> Linda D. Jellum, “But That is Absurd! Why Specific Absurdity Undermines Textualism,” *Brooklyn Law Review* 76 (2010-2011): 919.

is, determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.<sup>75</sup> Scalia further explains that to understand the context of a legal text, we must embrace not just textual purposes, but also the word's historical associations acquired from recurrent patterns of past usage and the word's immediate syntactic setting, namely, the words that surround it in a specific utterance.<sup>76</sup> Thus, for Textualism (and the newer version of Originalism), dictionaries and historical documents that can shed some light on past generations' understanding of a legal text will be very useful.<sup>77</sup>

There is also Intratextualism, a branch of Textualism that argues that a law should be read in unison as if there exists implicit links between its clauses, refusing the tendency to read those clauses in splendid isolation, and replacing dictionaries with the terms specifically used in the relevant law as the main tool in revealing community's understanding of certain legal terms.<sup>78</sup> This approach is similar to the Whole-Text Canon that asks legal interpreters to consider a law's entire text in view of its structure and of the physical and logical relation of its many parts.<sup>79</sup>

Textualism's respect toward texts and their original meaning is praiseworthy. What could be a better evidence for acknowledging the law's legitimacy other than faithfully following the texts and their surrounding contexts without falling into the trap of literalism?<sup>80</sup> From political

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<sup>75</sup> See Scalia and Garner, *supra* note 17 at 33.

<sup>76</sup> *Id.*

<sup>77</sup> For some judges, dictionary definitions are considered as an objective and relatively authoritative resources for discerning ordinary meaning of legal texts. See James J. Brudney and Lawrence Baum, "Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras," *William and Mary Law Review* 55 (2013-2014): 486-487. For use of historical dictionaries and other documents to understand original meaning of legal texts, see Gregory E. Maggs, "A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution," *The George Washington Law Review* 82 (2013-2014): 359-362.

<sup>78</sup> See further discussion in Akhil Reed Amar, "Intratextualism," *Harvard Law Review* 112 (1998-1999): 788-795. Prof. Amar elaborates more of this idea in Akhil Reed Amar, "Architecture," *Indiana Law Review* 77 (2002): 671-700.

<sup>79</sup> See Scalia and Garner, *supra* note 17 at 167.

<sup>80</sup> According to Laurence H. Tribe, fidelity to texts is essential to avoid the temptation of resorting to free form methods of interpreting the law which might cause people to question the authority of the law, especially the US Constitution. See further in Laurence H. Tribe, "Taking Texts and Structure Seriously: Reflections on Free-Form

theory perspective, if legal texts can be easily dismissed or manipulated, how can law claim authority and create stability among different political branches?<sup>81</sup> In a sense, Textualism is similar to the intent-based theory of interpretation in promoting the idea that judges (or any other legal interpreters) should be faithful agents of lawmakers and not independent principals (the difference is in determining the sources for finding such intent).<sup>82</sup> As quoted from Henry Campbell Black:

*“The wisdom, policy, or expediency of legislation is a matter with which the courts have nothing whatever to do. Whether or not a given law is the best that could have been enacted on the subject; whether or not it is calculated to accomplish its avowed object, whether or not it accords with what is understood to be the general policy of legislation in the particular jurisdiction—these are questions which do not fall within the province of the courts. And hence a court exceeds its proper office and authority if it attempts, under the guise of construction, to mould the expression of the legislative will into the shape which the court thinks it ought to bear.”<sup>83</sup>*

Some legal scholars also argue that limiting judges’ power in interpreting laws (by focusing on text and only the text) will induce the legislators to be more disciplined in drafting them, and thus reducing the number of ambiguous laws (though empirically speaking, the existence of such effect is still doubtful).<sup>84</sup> Moreover, legal actors are so obsessed with history and tradition that it would be natural for them to rely on historical sources to justify their case.<sup>85</sup> Yet,

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Method in Constitutional Interpretation,” *Harvard Law Review* 108 no. 6 (1995): 1300-1303. Of course, fidelity could mean a lot of things. Ronald M. Dworkin argues that in constitutional interpretation, there are at least two meanings of fidelity, namely, fidelity to the text and fidelity to the past constitutional practice, including past judicial decisions interpreting and applying the constitution. I do not think that proponents of Textualism have properly settled this distinction, including the implication of such distinction. See Ronald M. Dworkin, “The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve,” *Fordham Law Review* 65 (1997): 1249.

<sup>81</sup> See further discussion in Frank H. Easterbrook, “Textualism and the Dead Hand,” *The George Washington Law Review* 66 (1997-1998): 1119-1122.

<sup>82</sup> See further discussion in Frank H. Easterbrook, “Text, History, and Structure in Statutory Interpretation,” *Harvard Journal of Law & Public Policy* 17 (1994): 63.

<sup>83</sup> See Black, *supra* note 48 at 11.

<sup>84</sup> See for example, W. David Slawson, “Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law,” *Stanford Law Review* 44 (1992): 407-410. See also Adrian Vermeule, “Interpretive Choice,” *New York University Law Review* 75 (2000): 94-95.

<sup>85</sup> As argued by Richard Posner, law is the most historically oriented, backward looking, and past-dependent of the professions, venerating tradition, precedent, pedigree, custom, and ancient practice. It is also suspicious of innovation and discontinuities. See Richard A. Posner, “Past-Dependency, Pragmatism, and Critique of History in

Textualism is not completely free from defects, especially when it deals with Immutable Legal Texts.

First, most of the time, the US Constitution proceeds by briefly indicating certain fundamental principles whose specific implications will be implemented later on.<sup>86</sup> John Hart Ely argues that while some US Constitutional provisions are relatively specific, some are extremely open-textured and it is impossible to read or understand these provisions without referring to other sources beyond the text of the US Constitution.<sup>87</sup> In other words, textual meaning has its own limits because it does not always contain the information necessary to decide the case at hand,<sup>88</sup> and even the framers were not so foolish as to think that all interesting issues are encoded and settled in the original text of the US Constitution.<sup>89</sup>

Second, if Textualists cannot fully trust legislative history documents which contain the discussion of “only” several hundred people, and they claim that lawmakers do not have any unified intent, how could they claim that lawyers and judges are capable to decipher the understanding of a word by an interpretive community whose members and sources are substantially larger and more diverse?<sup>90</sup> Are dictionaries reliable to solve the issue?<sup>91</sup> On what authority, since dictionaries are not always made by elected officials and have no legal authority?

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Adjudication and Legal Scholarship” *The University of Chicago Law Review* 67 (2000): 573. See also Cass R. Sunstein, “The Idea of a Usable Past,” *Columbia Law Review* 95 (1995): 601-608.

<sup>86</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), 1.

<sup>87</sup> See further discussion in *Id.* at 13-14.

<sup>88</sup> See Barnett, *supra* note 39 at 68. See also Alexy, *supra* note 44 at 1.

<sup>89</sup> See further discussion in Frank H. Easterbrook, “Pragmatism’s Role in Interpretation,” *Harvard Journal of Law & Public Policy* 31 (2008): 902-904.

<sup>90</sup> See thoughtful critics against Textualism on this problem in Nourse, *supra* note 49 at 42-43.

<sup>91</sup> As Cass Sunstein argues, the problem with dictionary is that words might have a meaning quite different from what might be found in Webster’s or the Oxford English Dictionary, and courts do not and should not “make a fortress out of the dictionary.” See further discussion in Cass R. Sunstein, “Principles, Not Fictions,” *University of Chicago Law Review* 57 (1990): 1247. Without systematic guidance on how dictionaries should be used, the use of dictionaries has resulted in inconsistent analysis and conclusions, which have added little certainty to the law. See further in Samuel A. Thumma and Jeffrey L. Kirchmeier, “The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries,” *Buffalo Law Review* 47 (1999): 301-302.

Why their voices should matter then in legal discourse? Is a dictionary more valuable or better than another dictionary? Should we rely instead on newspapers, magazines, internet, books, or other types of historical sources? Moreover, do any of these sources accurately represent the intent of the community, if such thing does exist? Who should decide and on what criteria?<sup>92</sup> Would we be able to properly define interpretive community and know precisely their actual understanding of various legal terms?<sup>93</sup>

Third, the US Constitution has existed for more than 200 years. History is not an easy subject, and historical evidence is often unclear or conflicting, leading to many possible interpretations and resulting in a theory with such loose analytical boundaries that it can be used to support a variety of outcomes on thorny constitutional issues.<sup>94</sup> Above all, do we believe that lawyers and judges are qualified to act like professional historians in interpreting and understanding historical facts, assuming that consistent facts are available?<sup>95</sup> Will this really lead to faithful enactment of the relevant legal texts or will this open too much discretion by legal interpreters to fulfill their own desires and objectives, something that is disdained by Textualists?<sup>96</sup>

Fourth, if collective intent does not exist, could a law have intrinsic purpose that can be known solely from reading the law as it is? Can we really say that a law is intended to achieve *x* if we can't really know the intention of its creator? Suppose a law clearly states that it is intended to

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<sup>92</sup> Example: is it better to rely on Black's Law Dictionary or any other dictionary? What if dictionaries provide competing meanings? See fascinating discussion on the use of dictionaries and other sources by the United States Supreme Court in analyzing the meaning of "carrying" in *Muscarello v. United States* in Lawrence M. Solan, "The New Textualist's New Text," *Loyola of Los Angeles Law Review* 38 (2004-2005): 2050-2053. We can conclude from Solan's discussion that the use of dictionary is prone to cherry picking.

<sup>93</sup> See Cass R. Sunstein, "Six Theses on Interpretation," *Constitutional Commentary* 6 (1989): 96.

<sup>94</sup> See J. Harvie Wilkinson III, *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance* (Oxford: Oxford University Press, 2012), 46-47. See also Fallon Jr., *supra* note 47 at 1833.

<sup>95</sup> See Wilkinson III, *supra* note 94 at 50-51. As argued by Frank Easterbrook, judges are normal people, overburdened generalist, not philosophers or social scientists. See Easterbrook, *supra* note 82 at 69.

<sup>96</sup> See further discussion in Antonin Scalia, "Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws," in *A Matter of Interpretation*, ed. Amy Gutmann (Princeton: Princeton University Press, 1997), 17-18.

achieve  $x$ , what would happen if an honest reading of that law indicates that some of its provisions are not in line at all with  $x$ ? Can and should we read the law in a way that reduces conflict among its provisions?<sup>97</sup>

But wait, if each law is a product of compromise among many people, how can we assume that a law should be read in a coherence and systematic way?<sup>98</sup> The incoherence might be intentional in order to reach a compromise, causing the law to develop “multiple personalities.”<sup>99</sup> And in such case, what personality should be ranked higher? The *Yates v. United States* case<sup>100</sup> is a good example of this problem in which there is a clear conflict between the specific purpose of a criminal statute (derived from the statute as a whole) and the general applicability of the texts of the disputed provision.<sup>101</sup>

Fifth, suppose that we can know with certainty the relevant interpretive community and the public original meaning of a legal text, why should we fix the meaning of such text at the time

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<sup>97</sup> Such as using the Harmonious-Reading Canon. See Scalia and Garner, *supra* note 17 at 180-181.

<sup>98</sup> In Easterbrook’s view, it is not only impossible to reason from one statute to another, but also impossible to reason from one or more sections of a statute to a problem not resolved. See Easterbrook, *supra* note 53 at 547. See also Adrian Vermeule and Ernest A. Young, “Hercules, Herbert, and Amar: The Trouble with Intratextualism,” *Harvard Law Review* 113 (2000): 730-777.

<sup>99</sup> See Joseph A. Grundfest and A.C. Pritchard, “Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation,” *Stanford Law Review* 54 (2001-2002): 640-641.

<sup>100</sup> *United States v. Yates* 733 F.3d 1059 (11<sup>th</sup> Cir. 2013), *cert. granted in part*, 134 S.Ct.1935 (2014).

<sup>101</sup> This case discusses the interpretation and application of 18 U. S. C. §1519, which provides: “Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both,” namely, whether such section (which was enacted as part of the Sarbanes-Oxley Act of 2002, 116 Stat. 745, legislation designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation) is applicable to John Yates, a commercial fisherman who caught undersized red grouper in federal waters in the Gulf of Mexico and then ordered a crew member to toss the suspect catch into the sea to prevent federal authorities from confirming that he had harvested undersized fish. The Court’s majority argue that the statute is not applicable, stating that the term “tangible object” does not cover fish given the main purpose of the statute is to deal with financial frauds. Meanwhile, the dissenters argue that the texts of the statute are clear enough to decide that fish is definitely a tangible object and therefore the statute must be applied. Both groups cite legislative history documents to support their idea. Who offers the correct interpretation? See further discussion in John G. Malcolm, “Hook, Line & Sinker: Supreme Court Holds (Barely!) that Sarbanes-Oxley’s Anti-Shredding Statute Doesn’t Apply to Fish,” *Cato Supreme Court Review* (2014-2015): 241-249.

the law was promulgated?<sup>102</sup> If we find their understanding to be outdated and does not make any sense for the current interpretive community, or such understanding fails to consider the changes in the relevant circumstances, should we enforce the law in accordance with such outdated understanding? Over time, the gaps and ambiguities of a law proliferate as society changes and generates new variation on the problem initially targeted by the law. Can we expect lawmakers to fully consider all future possibilities and create an all-encompassing law? Probably not. In such case, why don't just we treat the old law as if it has expired?<sup>103</sup>

Textualists usually argue that regardless of the inability of lawmakers to make an all-encompassing law, it is still imperative to maintain the original meaning of the legal texts as understood when the law was promulgated in the first place since respecting the previous agreed political arrangement is important to maintain the political justification for enacting future laws, a debt against the living.<sup>104</sup> In a situation where law can be easily amended, this "Dead Hand" argument sounds reasonable.<sup>105</sup> But it becomes a crucial problem for the US Constitution because it is almost impossible, if not at all, to amend the US Constitution, rendering its texts to be immutable.<sup>106</sup>

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<sup>102</sup> This is also known as the "Fixation Thesis." See Lawrence B. Solum, "Originalism and Constitutional Construction," *Fordham Law Review* 82 (2013-2014): 459.

<sup>103</sup> See further discussion in William N. Eskridge Jr., "Dynamic Statutory Interpretation," *University of Pennsylvania Law Review* 135 (1987): 1479-1481. See also Brian Bix, "Legal Interpretation and The Philosophy of Language," in *The Oxford Handbook of Language and Law*, ed. Peter M. Tiersma and Lawrence M. Solan (Oxford: Oxford University Press, 2012), 153. Scalia and Garner on the other hand argues that a statute is not repealed by non-use or desuetude, namely, a statute has no expiry date and shall always be applicable until it is repealed by another statute. In their view, allowing judges to declare a statute to be inoperative simply due to desuetude would cast a considerable doubt on the validity of laws and the separation of powers under the US Constitution. See Scalia and Garner, *supra* note 17 at 337. Interestingly, Bryan Garner thinks that the same concept should not be applied to ancient judicial opinion, namely, precedents should become obsolete if the conditions or facts that existed when they were rendered are different or no longer exist, or if the underlying rationale is no longer sound. See Bryan A. Garner et al., *The Law of Judicial Precedent* (St. Paul: Thomson/West, 2016), 178-179.

<sup>104</sup> See Easterbrook, *supra* note 81 at 1120.

<sup>105</sup> See further discussion in Adam Samaha, "Dead Hand Arguments and Constitutional Interpretation," *Columbia Law Review* 108 (2008): 607-610 and Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, & Judicial Review* (Kansas: University Press of Kansas, 1999), 196-208.

<sup>106</sup> See discussion in Chapter 1.

In such case, Joseph Raz argues that law is a product of creation and re-creation, of continuous development rather than product of a single act of legislation; thus typically, the law survives its creators.<sup>107</sup> While the authority of the original legislator is important in providing the grounds for believing that those subject to the law would be doing the best they can do if they conform to it, the law is continuously re-created through the authority of its interpreters and with time, such authority provides the ground for holding it to be binding on its subjects.<sup>108</sup>

Meanwhile, David Strauss offers empirical claim that in practice, the US Supreme Court does not always follow the original understandings of constitutional provisions, namely, the understandings, held at the time that a provision was adopted, about how it would be applied.<sup>109</sup> Indeed, there are well-known examples in which following the original understandings of various vague provisions would require us to abandon settled constitutional principles in the United States.<sup>110</sup>

Last but not least, the questionable justification for having canons of construction as valid references in Textualism. Scalia and Garner may have compiled a comprehensive list of canons of construction that they think fit the criteria for supporting the Textualism project. But their list does not and most probably, cannot eliminate the concern made by Karl N. Llewellyn long ago that for each canon of construction, there exists another equal and opposite canon, rendering them ineffective and creating opportunity for unsupervised discretion of legal interpreters.<sup>111</sup>

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<sup>107</sup> See further discussion in Joseph Raz, "On the Nature of Law," in *Between Authority and Interpretation: On the Theory of Law and Practical Reason*, ed. Joseph Raz (London: Oxford University Press, 2011), 123.

<sup>108</sup> *Id.*

<sup>109</sup> See David A. Strauss, "Foreword: Does the Constitution Mean What It Says?," *Harvard Law Review* 129 (2015): 14.

<sup>110</sup> *Id.*

<sup>111</sup> See the compilation of these conflicting canons in Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little Brown and Company, 1960), 521-535. For a view arguing that this is not the case and that these seemingly conflicting canons can live side by side, see Geoffrey P. Miller, "Pragmatics and the Maxims of Interpretation," *Wisconsin Law Review* 1990 (1990): 1179-1227.

Moreover, some of these canons required judges to have substantive commitments in performing legal interpretation. One good example is the Constitutional-Doubt canon that poses a serious challenge to Textualism's commitment of preserving the fidelity to text. The Constitutional-Doubt canon provides that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Supreme Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of the Congress."<sup>112</sup> An earlier version of the canon, the "classical avoidance," states that "*as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the Act.*"<sup>113</sup>

Under this canon, the Supreme Court is expected to respect the decision of the legislators and not to easily disregard their choice of policy by declaring their enacted statutes as unconstitutional.<sup>114</sup> In other words, the canon is made so that the frictions created by the institution of judicial review is minimized.<sup>115</sup> Scalia and Garner ironically categorize the "Presumption of Validity" canon (which reflects the "classical avoidance") as a fundamental canon in interpreting the provisions of a statute.<sup>116</sup> But favoring the interpretation that saves the constitutionality of a statute does not automatically mean that the Supreme Court maintains the original meaning of the US Constitution's texts.<sup>117</sup> As such, not only that the canon is a double-edged sword which can be

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<sup>112</sup> *Edward J. DeBartolo Corp. v. Fla Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). See further discussion in Gillian E. Metzger and Trevor W. Morrison, "The Presumption of Constitutionality and the Individual Mandate," *Fordham Law Review* 81 (2012-2013): 1717. See also a slightly different wording in Scalia and Garner, *supra* note 29 at 247.

<sup>113</sup> *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring). See further discussion in Adrian Vermeule, "Saving Constructions," *The Georgetown Law Journal* 85 (1996-1997): 1949.

<sup>114</sup> See Chief Justice John Marshall's explanation in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) and further discussion in David M. Burke, "The 'Presumption of Constitutionality' Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty," *Harvard Journal of Law & Public Policy* 18 (1994-1995): 79-81.

<sup>115</sup> See Posner, *supra* note 41 at 815.

<sup>116</sup> See Scalia and Garner, *supra* note 17 at 66.

<sup>117</sup> The decision might not necessarily reflect the true meaning of the US Constitution and create incentives to legislators to breach the US Constitution by giving them misguided legitimacy. See Burke, *supra* note 114 at 82-83.

used for either judicial activism or judicial restraint, depending on how judges use it,<sup>118</sup> it is also highly questionable whether such canon supports the main program of Textualism and why the proponent of Textualism promotes the use of such canon, or, as a matter of principle, any canons of construction.<sup>119</sup>

## 2. ISLAMIC VARIANTS

In Islamic legal system, the path to understand the context of Basic Codes' legal provisions normally begins with analyzing the acts and speech of the first and second generations of Muslims under the assumption that they lived together for so many years with the Prophet, the ultimate interpreter of God's will; ergo, they had a better understanding than later generations on what God really wants, striking a strong resemblance with the new Originalism and Textualism,<sup>120</sup> though there is a subtle difference with their counterpart in the US legal system.

Under the banner of Textualism, the views of US founding fathers are sought on the basis that they provide a glimpse of what ordinary citizens would originally think when they read the legal texts. But in Islamic legal systems, the first generations of Muslims, particularly the Companions, are considered as the golden generation, the best among the entire generations of Muslims.<sup>121</sup> As such, classical Islamic jurists tend to give more weight to the opinions of these first

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<sup>118</sup> See Frank H. Easterbrook, "Do Liberals and Conservatives Differ in Judicial Activism?," *University of Colorado Law Review* 73 (2002): 1405-1406.

<sup>119</sup> Further analysis shows that this canon does not necessarily support and defend legislative supremacy. See further discussion in William K. Kelley, "Avoiding Constitutional Questions as a Three-Branch Problem," *Cornell Law Review* 86 (2001): 846-860.

<sup>120</sup> A good example is the reference by Maliki School to the practices of people in Medina as a valid source of legal interpretation. See further discussion in Yasin Dutton, *The Origins of Islamic Law: The Qur'an, the Muwatta' and Madinan 'Amal*, 2<sup>nd</sup> Edition (New York: RoutledgeCurzon, 2002), 32-52. Meanwhile, Ahmad bin Hanbal, founder of the Hanbali School argues that the basis of jurisprudence is following what is reported from the Prophet and his Companions, relying on how they implement and interpret the rules in the Qur'an. See Abdul Hakim I. Al-Matroudi, *The Hanbali School of Law and Ibn Taymiyyah: Conflict of Conciliation* (New York: Routledge, 2006), 32.

<sup>121</sup> See Ira M. Lapidus, "The Golden Age: The Political Concepts of Islam," *The Annals of American Academy of Political and Social Science* 524 (1992): 14.

generations in interpreting Islamic Immutable Legal Texts.<sup>122</sup> We will talk more about the consequences of such treatment in the next section.

Some others adhere to a technique that is similar to Intratextualism, which is usually used by Islamic scholars specializing in the commentaries and interpretation of the Qur'an (*tafsir*), where a Qur'anic text is interpreted by referring to other parts of the Qur'an or the explanation by the Prophet in Hadiths.<sup>123</sup> Since Islamic Law is assumed to be solely made by God, the possibility of finding a truly coherent law where each context can be fully understood without any trace of contradictions should not be entirely impossible in Islamic legal system. Indeed, the Qur'an itself has a specific verse stating that there is no contradiction within its own provisions to further support the above notion (which will be elaborated in Chapter 3).<sup>124</sup>

Unfortunately, like in the United States, none of these approaches yields a truly decisive result. To begin with, there are too many historical data on the "original understanding" of Basic Codes' legal texts by the first generation of Muslims<sup>125</sup> (not to mention the bulk of opinions among the jurists themselves commenting on such "original understanding")<sup>126</sup> that are widely available

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<sup>122</sup> See for example, Muhammad Ibn Idris Al-Shafi'i, *The Epistle on Legal Theory*, trans. Joseph Lowry (New York: New York University Press, 2013), 431-433.

<sup>123</sup> See further discussion in Abdullah Saeed, *Interpreting the Qur'an: Towards a Contemporary Approach* (New York: Routledge, 2006), 42-46. There is also another approach that treats the Qur'an's structure and composition of each surah as an integral part in the interpretive process. This approach is called the *nazm* approach. See further discussion in Mustansir Mir, *Coherence in the Qur'an: A Study of Islahi's Concept of Nazm in Tadabbur-i Qur'an* (Kuala Lumpur: Islamic Book Trust, 2011), 30-63.

<sup>124</sup> Qur'an surah An-Nisa'a [4]:82 states: "Will they not think about this Qur'an? If it had been from anyone other than God, they would have found much inconsistency in it." See M.A.S Abdel Haleem, *The Qur'an* (New York: Oxford University Press, 2005), 58. According to Seyyed Hossein Nasr, this verse represents one of several challenges posed by the Qur'an against its detractors to convince them of its divine origin. See Seyyed Hossein Nasr, ed., *The Study Qur'an: A New Translation and Commentary* (New York: HarperCollins Publishers, 2015), 228. Similar opinions can also be found in several commentators of the Qur'an such as Al-Qurthubi and Az-Zuhaili. See further discussion in Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 5, ed. Ahmad Zubairin and Mukhlis B. Mukti, trans. Ahmad Rijali Kadir (Jakarta: Pustaka Azzam, 2008), 682-687, and Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 3, ed. Zainul Arifin, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2016), 173-178. Further discussions concerning this verse will be discussed in Chapter 3.

<sup>125</sup> See the discussion in Chapter 1 regarding the numerous sources of Islamic law.

<sup>126</sup> See further discussion in Ahmed Affi and Hassan Affi, *Contemporary Interpretation of Islamic Law* (Leicestershire: Troubador Publishing Ltd., 2014), xxv-xxix.

for review. Facing the enormous amount of legal sources, Islamic legal scholars later develop a complex set of tools to settle the contradictions among those sources, known as the method of *tarjih*, which is basically a method to analyze and determine the preponderance of various competing legal sources in Islamic law.<sup>127</sup>

Compared to the United States, it could be argued that the existence of *tarjih* method is one step ahead in terms of having a systematic method to determine the context of a legal provision from countless competing legal sources. But, as interesting as it may be, I will not discuss in depth the *tarjih* method in this dissertation. This is because the methods of *tarjih* are not strictly derived from the Basic Codes, rather, they are the results of Islamic jurists' creativity and therefore belong to the realm of *Fiqh* which is not the focus of my research. In any case, the existence of *tarjih* method does not completely eliminate the problem of contradictions or cherry picking among these sources.

Regarding the use of Intratextualism in Islam, in reality, there are genuine difficulties in reconciling the entire Qur'anic verses (not even including the conflicting narratives in Hadiths), and to solve such issues, numerous Islamic jurists rely on the theory of abrogation (*naskh*), by which they claim that the legal power of certain verses in the Qur'an (even though they remain as parts of the Qur'an) is deemed to be overridden by other verses in the Qur'an.<sup>128</sup>

The existence of *naskh* is controversial within Islamic legal discourse and its scope, impact and evidence are still highly disputed among Islamic scholars. The verse that creates this problem is Qur'an surah Al-Baqara [2]: 106 which states: "*Any revelation We cause to be superseded or forgotten,*

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<sup>127</sup> See Hallaq, *supra* note 101 at 154-155. A good resource on the method of *tarjih* can be found in Muhammad Wafaa', *Metode Tarjih atas Kontradiksi Dalil-Dalil Syara'* [Tarjih Method on Contradictions of Islamic Legal Arguments], trans. Muslich (Bangil: Al-Izzah, 2001). While the existence of *tarjih* method is commendable, it does not eliminate differences in the overall Islamic legal interpretive process.

<sup>128</sup> Readers who are interested with this theme may refer to Louay Fatoohi, *Abrogation in the Qur'an and Islamic Law: A Critical Study of the Concept of "Naskh" and Its Impact* (New York: Routledge, 2013).

*We replace with something better or similar. Do you [Prophet] not know that God has power over everything?"* According to one interpretation, this verse only informs the Muslims that there were God's laws that have been superseded and replaced in the past but it does not automatically mean that there are any verses in the Qur'an that have been abrogated and therefore have no more legal power or consequences.<sup>129</sup>

I do not submit to this theory as there are other ways to read the texts of the Basic Codes without having to resort to the concept of abrogation. And as I will discuss further in the next chapters of this dissertation, there are numerous legal cases under Islamic law that cannot be compromised or settled by virtue of abrogation. One must question if there are too many abrogated verses in the Basic Codes, how can Islamic law claim to be a perfect guidance while it still maintain "useless" verses within its highest source of law?

Nevertheless, even if we accept such theory to be true, the cases that I will be using in this dissertation will not be much affected by such theory of abrogation. More importantly, the abrogation theory imposes a serious challenge to the Islamic version of Intratextualism because it shows that there are situations in which the scholars admit their inability to reconcile the legal provisions within the Qur'an and choose to resolve the case by assuming that one provision has been revoked by another provision even though it might not be the case.<sup>130</sup>

## **E. CONSEQUENCE-BASED THEORIES OF INTERPRETATION**

### **1. UNITED STATES VARIANTS**

The last variant of legal interpretation theories that will be discussed in this brief survey and which will be the main theme of this dissertation is the consequence-based ones, where I will

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<sup>129</sup> See further discussion regarding the interpretation of such verse in John Burton, "The Exegesis of Q. 2: 106 and the Islamic Theories of "naskh: mā nansakh min āya aw nansahā na'ti bi khairin minhā aw mithlihā"," *Bulletin of the School of Oriental and African Studies* 48, no. 3 (1985): 452-469.

<sup>130</sup> See further discussion on this issue in Ahmad Hasan, "The Theory of Naskh," *Islamic Studies* 4, no. 2 (1965): 192-196.

focus on Pragmatism, a theory made famous by Richard Posner that concentrates on the potential impacts or consequences of our choice of interpretation on practical legal problems.

According to Posner, there are three main elements of Pragmatism, namely: (i) a distrust of metaphysical entities ("reality," "truth," "nature," etc.) viewed as warrants for certitude whether in epistemology, ethics, or politics, (ii) an insistence that propositions be tested by their consequences, by the difference they make-and if they make none, set aside, and (iii) an insistence on judging our projects, whether scientific, ethical, political, or legal, by their conformity to social or other human needs rather than to "objective," "impersonal" criteria.<sup>131</sup>

Even though a Pragmatist may want to come up with the decision that will be best with regard to the present and future needs, he is not uninterested in past decisions, statutes and so forth as there are wisdoms to be considered within those documents.<sup>132</sup> To quote Posner himself based on one of his recent remarks:

*"I'm a pragmatist. I see judges as trying to improve things within certain bounds. There are practical restrictions on the exercise of one's moral views. There are specific laws that are deeply entrenched. Where the judges are free, their aim, my aim, is to try to improve things. My approach with judging cases is not to worry initially about doctrine [and] precedent . . . [,] but instead, try to figure out, what is a sensible solution to this problem, and then having found what I think is a sensible solution, without worrying about doctrinal details, I ask "is this blocked by some kind of authoritative precedent of the Supreme Court"? If it is not blocked, I say fine, let's go with the common sense . . . solution."*<sup>133</sup>

Indeed, a Pragmatist does not only regard the consequences of his interpretive choice toward the parties directly involved in a case before him, but also the systemic and institutional

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<sup>131</sup> See Richard Posner, "What Has Pragmatism to Offer Law?," *Southern California Law Review* 63 (1989-1990): 1660-1661.

<sup>132</sup> See Richard A. Posner, *The Problematics of Moral and Legal Theory* (Cambridge: Harvard University Press, 2002), 242. See further discussion in pages 227-309.

<sup>133</sup> See Eric J. Segall, "The Constitution Means What the Supreme Court Says It Means," *Harvard Law Review Forum* 129 (2016): 178.

consequences of such choice of interpretation.<sup>134</sup> Being a proponent of the dynamic statutory interpretation, Prof. William Eskridge also admitted that he too is a pragmatist and said:

*“Pragmatism emphasizes the concrete over the abstract and is problem-solving in its orientation, For the pragmatist, a statute is a political response to a problem or cluster of problems, and the statutory drafters expect their product to be applied in a manner that advances the overall political enterprise as well as its specific goals. Indeed, they realize that, in an important sense, statutory meaning is not fixed until it is applied to concrete problems.”*<sup>135</sup>

The usual critics against Pragmatism argue that the theory gives too much discretion to legal interpreters to follow their own policy preferences without paying attention to institutional limitations.<sup>136</sup> In his interview with C-Span, Chief Justice John G. Roberts emphasized that the Supreme Court is not a political branch, and consequently, when the Supreme Court decides a case, it is based on the law and not policy preference.<sup>137</sup> The idea is simple, tenured judges which are not democratically elected cannot be trusted with too much powers.<sup>138</sup> They are not omniscient and they surely make mistakes, especially when they are facing complex problems with limited information, so it would make sense if we limit their ability to interpret the law to avoid significant mess (assuming that Pragmatism does lead to abuse of power).<sup>139</sup>

Nonetheless, the same critics can be made against the use of historical archives, textual analysis, dictionaries, canons of construction and legislative history as previously discussed. A

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<sup>134</sup> See Richard A. Posner, *How Judges Think* (Cambridge: Harvard University Press, 2008), 238-239. See the full discussion in pages 230-265.

<sup>135</sup> See William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (Cambridge: Harvard University Press, 1994), 50. While not everyone might agree with the value proposed by Prof. Eskridge, one can see clearly that he has no issue in promoting his personal value as the basis for interpreting the laws.

<sup>136</sup> See Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Cambridge: Harvard University Press, 2006), 53-55. In relation to policy preference, Lawrence Solum adds that there exists a moral obligation to follow what the law says even when the result the law requires is not the same as the result that would otherwise be required by the application of the moral theory that we believe is true or correct. See further discussion in Lawrence B. Solum, "The Unity of Interpretation," *Boston University Law Review* 90 (2010): 556.

<sup>137</sup> See Brian Lamb, Susan Swain, and Mark Farkas, ed., *The Supreme Court: A C-Span Book Featuring the Justices in Their Own Words* (Philadelphia: Public Affairs, 2010), 6.

<sup>138</sup> See Frank H. Easterbrook, "What's So Special About Judges?," *University of Colorado Law Review* 61 (1990): 776-777.

<sup>139</sup> See Vermeule, *supra* note 136 at 289-290.

smart judge can use those various methods to support his own policy preferences while still looking as if he is restraining himself.<sup>140</sup> As Cass Sunstein once stated, the meaning of any text, including the Constitution, is inevitably and always a function of interpretive principles, and these are inevitably and always a product of substantive commitments.<sup>141</sup> And the idea that judges care about the impact of their decisions cannot be easily dismissed from both theoretical<sup>142</sup> and empirical perspectives.<sup>143</sup> The great justice Oliver Wendell Holmes Jr. once said:

*“The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”*<sup>144</sup>

Empirically speaking, claiming that judges care about their decisions is not the same with saying that judges are merely political actors in disguise; there is a complex relationship between the judges’ ideology and policy preferences with the need to respect the applicable laws, which can be translated to mean that judges are indeed acting pragmatically.<sup>145</sup>

Hence, in terms of satisfying personal policy preference, one could argue that the primary difference of Pragmatism with the previously discussed theories is essentially the fact that Pragmatism openly allows the use of the interpreters’ substantive commitment<sup>146</sup> in interpreting

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<sup>140</sup> See Richard A. Posner, “Against Constitutional Theory,” *New York University Law Review* 73 (1998): 3-4. For further elaboration in judicial strategic decision making, see Duncan Kennedy, *A Critique of Adjudication* (Cambridge: Harvard University Press, 1997), 180-212. With respect to history, it could be argued that judges can construct law’s own history in the process of deciding present cases through a complex genealogical operation that accords them enormous discretion yet allows them to claim that they are being bound by the past. See Austin Sarat and Thomas R. Kearns, “Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction,” in *History, Memory, and the Law*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: The University of Michigan Press, 2002), 5.

<sup>141</sup> See Cass R. Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1994), 8.

<sup>142</sup> See Frank H. Easterbrook, “The Inevitability of Law and Economics,” *Legal Education Review* 1 (1989): 4.

<sup>143</sup> See as an example, the discussion in Ward Farnsworth, “The Role of Law in Close Cases: Some Evidence from The Federal Courts of Appeals,” *Boston University Law Review* 86 (2006): 1083-1095.

<sup>144</sup> See Oliver Wendell Holmes Jr., *The Common Law* (Cambridge: The Belknap Press of Harvard University Press, 2009), 3.

<sup>145</sup> See further discussion in Lee Epstein, William M. Landes, and Richard Posner, *The Behavior of Federal Judges: A Theoretical & Empirical Study of Rational Choice* (Cambridge: Harvard University Press, 2013), 385-404.

<sup>146</sup> See further discussion concerning the use of the interpreter’s own value judgment in William N. Eskridge Jr., “Gadamer/Statutory Interpretation,” *Columbia Law Review* 90 (1990): 620-651.

legal texts whereas the other methods prevent (or at least appear to prevent) the use of such substantive commitment, claiming that the interpreters are and should be working as agents for certain principals (whoever the principals are).<sup>147</sup> Interestingly, an empirical research demonstrates that the tendency of policy preferences of a legal interpreter might influence his reading of a text without his awareness of it, making the problem to be cognitive instead of ignorance of theories of interpretation.<sup>148</sup>

Perhaps, the strongest criticism against Pragmatism is not about the discretionary power granted by this method to legal interpreters (after all, every system of interpretation must be based on at least, a modicum of discretion);<sup>149</sup> rather, it is concerning the value to be maximized in interpreting legal texts, the goal to be pursued by Pragmatism.<sup>150</sup> In Ehud Barak's own words:

*"Pragmatic interpretation rightly considers the different building block of the interpretive process – text, authorial intent, the intent of the system, discretion – but it does not set a goal to which the interpreter must aspire in assembling these building blocks. All that is left is the interpreter's subjective will as to what seems good. This is not enough for the interpretive process which is more than just interpretive subjectivity."*<sup>151</sup>

Without any specific goal in Pragmatism, even Ronald Dworkin's interpretive theory of "Law as Integrity" and Scott Shapiro's interpretive theory of "Law as an Act of Planning" would surely fall under the brand of Pragmatism since both theories require legal interpreters to satisfy certain goals in interpreting the law taking into consideration the "system" (whatever the system

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<sup>147</sup> See further discussion in Richard H. Fallon Jr., "Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation – And the Irreducible Roles of Values and Judgment Within Both," *Cornell Law Review* 99 (2014): 687-688.

<sup>148</sup> See further discussion in Ward Farnsworth, Dustin F. Guzior, and Anup Malani, "Policy Preferences and Legal Interpretation," *Journal of Law and Courts* 1 (2013): 115-138. Daniel Farber on the other hand demonstrates that theories of legal interpretation might not necessarily matter in deciding legal cases. See further in Daniel Farber, "Do Theories of Statutory Interpretation Matter? A Case Study," *Northwestern Law Review* 94 (2000): 1429-1434.

<sup>149</sup> See Barak, *supra* note 40 at 289.

<sup>150</sup> Namely, because the critics think that there are no clear standards in Pragmatism concerning what is best to achieve, and therefore, it becomes an "empty" theory. See further discussion in Ronald M. Dworkin, "In Praise of Theory," *Arizona State Law Journal* 29 (1997): 365-367.

<sup>151</sup> See Barak, *supra* note 40 at 289-290.

is) as a whole. And maybe that is a correct assessment since there are multiple values available to be pursued by legal interpreters through Pragmatism.<sup>152</sup>

To give a better understanding on why Dworkin's and Shapiro's theories could be considered as part of Pragmatism, a brief discussion on their theories is necessary. Under Dworkin's theory, judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrines of their community.<sup>153</sup> In this case, constructive interpretation is a matter of imposing purpose on an object or practice in order to make it the best possible example of the form or genre to which it is taken to belong.<sup>154</sup>

Meanwhile, Shapiro's theory of interpretation focuses on the economy of trust, arguing that trust matters in the interpretation of law because trust matters in the interpretation of plan and planning is the ultimate function of law.<sup>155</sup> The more a trustworthy a person is judged to be, the more interpretive discretion he or she is accorded.<sup>156</sup> Shapiro further provides two meta-interpretive principles. First, there is no such thing as the correct interpretation of a legal text.<sup>157</sup> Legal interpretation is always actor relative: a text is interpreted correctly only in relation to an

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<sup>152</sup> Indeed, consequence-based theories can have many forms as long as they urge legal interpreters to pursue certain goals in interpreting the laws. One that has been mentioned above is the "Dynamic Statutory Interpretation" theory by Prof. Eskridge (see note 135). The "Living Constitution" theory in constitutional interpretation could also easily fall under the banner of consequence-based theory. See further discussion about this theory in David A. Strauss, "Do We Have a Living Constitution?," *Drake Law Review* 59 (2010-2011): 973-984. I focus on Pragmatism in discussing consequence-based theories since it sets a neutral tone for prioritizing consequences in legal interpretation while the goals to be achieved can be discussed separately.

<sup>153</sup> See further discussion in Ronald M. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1994), 225-275.

<sup>154</sup> *Id.* When discussing the above theory, Scott Shapiro further explains that an interpretation makes an object the best that it can be when it both "fits" and "justifies" the object better than any rival interpretation. An interpretation "fits" the object if it approves of the object's existence or its properties. A purpose is "justified" if it is a purpose worth pursuing, meaning that it is grounded on the principle of morality when we are discussing the law or social practice. See Scott J. Shapiro, *Legality* (Cambridge: The Belknap Press of Harvard University Press, 2011), 295.

<sup>155</sup> See Shapiro, *supra* note 154 at 357-359.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

actor and his particular place within the system's economy of trust.<sup>158</sup> Second, proper interpretive methodology is determined not only by the level of trust accorded actors, but by their roles as well.<sup>159</sup> An interpretive methodology is proper for an interpreter in a given legal system just in case it best furthers the objectives actors are entrusted with advancing, on the supposition that the actors have the competence and character imputed to them by the designers of their system.<sup>160</sup>

The fact that multiple theories can somehow be considered to represent the idea of Pragmatism should be a good reason to set a clearer goal for it. After all, we do not want this theory to become an empty one that acts like a trash can for everything else. Now when we talk about goals, discussion on Pragmatism, at least Posner's version of Pragmatism, cannot be separated from his Law & Economics movement, which include both (i) positive Law & Economics that focuses on the use of microeconomic theory and assumption of rationality in providing descriptive analysis on various legal issues<sup>161</sup> and (ii) normative Law & Economics that focuses on how to maximize the welfare of society through legal instruments in the most efficient manner.<sup>162</sup>

It is undeniable that the application of Law & Economics is especially controversial in constitutional interpretation because of its endorsement of typically a single social goal, namely, resource allocation efficiency.<sup>163</sup> Concurrently, given the US Constitution's status as the supreme law of the land, constitutional debates often involve picking the primary social goals, which may include protection of property, egalitarianism, social justice, fairness and many more.<sup>164</sup> Why should we prioritize resource allocation efficiency? Consider also the difficulties in defining

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> See Richard A. Posner, "Economics, Politics, and the Reading of Statutes and the Constitution," *The University of Chicago Law Review* 49 (1982): 263-291.

<sup>162</sup> See further discussion in Posner, *supra* note 6 at 3-20.

<sup>163</sup> See Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (Chicago: The University of Chicago Press, 1994), 4.

<sup>164</sup> *Id.*

“welfare/well-being” which provokes some commentators to argue that the concept is useless for policy analysis.<sup>165</sup> Moreover, the assumption of rationality seems to be very weak as people often behave inconsistently in pursuing their self-interest and maximizing their welfare.<sup>166</sup> How can we build a theory of legal interpretation based on such a flawed assumption?

Those are fair criticisms and deserve some quick clarifications as they will affect the discussion in later chapters, especially when I argue that the Law & Economics approach is compatible with Islamic law (a more detailed discussion on this subject will be made in Chapter 5). Let us start with the concept of well-being. One thing is certain, well-being is not solely equal to wealth.<sup>167</sup> Matthew D. Adler provides a summary of three distinct philosophical accounts on well-being. The first is the preference-based account where well-being is defined as the satisfaction of preference which at minimum would cover preference over choice (possible actions) and outcomes.<sup>168</sup> The second is the hedonistic or the mental state account in which the occurrence or the non-occurrence of a certain kind or kinds of mental state become the basic source of well-being.<sup>169</sup> The last one is the objective-good account in which the proponents furnish some list of “goods” that are seen as intrinsic constituents of well-being, among others, life, knowledge, play, health, and aesthetic experience.<sup>170</sup>

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<sup>165</sup> As an example, should we define well-being as the satisfaction of preferences? Can we properly define preferences? Or suppose that the satisfaction of preferences is not always in line with well-being, can we set out an agreed list of objective state of affairs that promote well-being? See further discussion in Daniel M. Hausman, *Preference, Value, Choice, and Welfare* (Cambridge: Cambridge University Press, 2012), 78-87.

<sup>166</sup> See Thomas S. Ulen, “Rational Choice and the Economic Analysis of Law,” *Law and Social Inquiry* 19 (1994): 487-488. For a comprehensive discussion on this subject, see Richard Thaler, *Misbehaving: The Making of Behavioral Economics* (New York: W.W. Norton & Company, inc., 2015).

<sup>167</sup> A good, if not devastating critic from Ronald Dworkin on this subject can be read in Ronald M. Dworkin, “Is Wealth a Value?,” *The Journal of Legal Studies* 9 (1980): 191-226.

<sup>168</sup> See further discussion in Matthew D. Adler, *Well-Being and Fair Distribution* (New York: Oxford University Press, 2012), 159-162.

<sup>169</sup> See further discussion in *Id* at 162-165. This mental state concept is usually translated into “happiness” or “subjective well-being” where individuals are surveyed and asked to measure and quantify their “happiness” or “life satisfaction” on a numerical scale.

<sup>170</sup> See further discussion in *Id* at 165-170.

Multiple scholars provide different definitions of well-being, but in general, their definition will either fall under one of the above accounts or combine more than one account. In their seminal book, *Fairness versus Welfare*, Louis Kaplow and Steven Shavell seem to combine the entire 3 accounts when they explain that their all-encompassing definition of well-being: (i) incorporates in a positive way everything that an individual might value, namely, goods and services that the individual can consume, social and environmental amenities, personally held notions of fulfillment, sympathetic feelings for others, and so forth, and (ii) reflects in a negative way harms to his or her person and property, costs and inconveniences, and anything else that the individual might find distasteful.<sup>171</sup> Under their definition, well-being is not restricted to hedonistic and materialistic enjoyment or to any other named class of pleasures and pains.<sup>172</sup> Therefore, it could also include the taste for a notion of fairness, just as it could also cover the taste for art, nature, or fine wine.<sup>173</sup>

Meanwhile Cass Sunstein provides a combination of the mental state and objective-good accounts in defining well-being through his 5 dimensions of nonsectarian welfare statement, namely, subjective well-being, longevity, health, educational attainment, and wealth.<sup>174</sup> Prof. Adler himself offers a complex definition of well-being that combines preference-based and objective-good accounts where well-being is defined as the satisfaction of preferences of a fully informed and fully rational person that can perform interpersonal comparison of his and other people probable life histories so that his well-being ranking of his life histories is conceptually

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<sup>171</sup> See Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Cambridge: Harvard University Press, 2002), 18.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 21.

<sup>174</sup> See Cass R. Sunstein, "Nonsectarian Welfare Statement," *Regulation and Governance* 10 (2013): 127.

connected to his ideal preferences, namely, to what he would be motivated to choose if he had full information and rationality.<sup>175</sup>

As we may see from the above discussion, there is not yet a consensus on the definition of well-being, though this is not its exclusive characteristic as other morality principles face a similar problem. Michael Sandel, to name one, criticizes the welfare maximization principle for making justice and rights as mere calculation and not principle, and offers “justice as the common good” as a better principle, focusing on defining the meaning of a good life beyond utility and the rights of freedom.<sup>176</sup> But what is the common good anyway? What are its fundamental differences with the all-encompassing definition of well-being as discussed by Kaplow and Shavell above?<sup>177</sup>

I suppose one can be a defender of Law & Economics without having to claim that well-being must be the sole decisive value in legal analysis.<sup>178</sup> The reason is simple, the most important concept of economics is none other than the principle of scarcity.<sup>179</sup> If there is no scarcity, there is no need for allocation, law would be useless, and life will most likely be boring.<sup>180</sup> But scarcity exists, its power is absolute, and we need to cope with it in pursuing our end goals, including choosing and balancing the social goals to be pursued among many available goals. Given the existence of scarcity, pursuing any value in the society is not free; there will be costs and trade-off,

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<sup>175</sup> See further discussion in Adler, *supra* note 168 at 201-225. We will discuss Adler’s concept in more details in Chapter 5.

<sup>176</sup> See Michael Sandel, *Justice: What’s the Right Thing to Do* (New York: Farrar, Straus and Giroux, 2010), 260-261.

<sup>177</sup> See Kaplow and Shavell, *supra* note 171 at 18.

<sup>178</sup> This position is called *weak welfarism*, which basically argues that overall welfare has moral relevance but that other considerations, such as distributive or rights-based consideration may have moral relevance as well. In other words, overall welfare is morally relevant but not morally decisive. See Matthew D. Adler and Erick A. Posner, *New Foundations of Cost-Benefit Analysis* (Cambridge: Harvard University Press, 2006), 53. See also a good critic against using welfare as the exclusive guideline for legal analysis in Ward Farnsworth, “The Taste for Fairness,” *Columbia Law Review* 102 (2002): 1992-2026.

<sup>179</sup> See Milton Friedman, *Price Theory* (New Brunswick: Transaction Publishers, 2008), 1-2.

<sup>180</sup> See Easterbrook, *supra* note 142 at 3.

and well-being of the people may be affected.<sup>181</sup> In fact, even the implementation of an abstract value or right could very much contradict the implementation of another value or right other than well-being.<sup>182</sup> To what extent then will we sacrifice well-being against “common goods” or any other existing abstract values such as equality, liberty and security?<sup>183</sup>

For an example of empirical study on this matter, Eric Posner argues that given the vast list of rights (and the generality of those rights), plus the differences of conditions and needs among many countries (which lead to inconsistent implementations), the rights-based approach has failed to improve the well-being of the societies that need it the most.<sup>184</sup> This does not necessarily mean that human rights are not important in the calculation of well-being. It simply means that focusing too much on rights might cause us to miss the important aspect of well-being. Even if we do not believe that well-being must always be ranked first in moral consideration, no one can seriously deny the importance of well-being or even propose the idea that well-being component should and can be entirely excluded from moral calculation. Consequently, we will need to do an appropriate cost-benefit analysis (“CBA”) in determining the priority of our social goals and this is essentially a program of Law & Economics that is in line with Pragmatism.<sup>185</sup>

The term “CBA” may refer to conceptual CBA, namely, the idea that CBA can function as a disciplined framework for specifying baselines and alternatives, for ensuring that the costs and benefits of a rule are considered, and for encouraging reliance on evidence rather than solely on

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<sup>181</sup> Just like pursuing fairness can cost people’s well-being. See Kaplow and Shavell, *supra* note 171 at 471.

<sup>182</sup> See further discussion in Ronald M. Dworkin, “Do Values Conflict? A Hedgehog’s Approach,” *Arizona Law Review* 43 (2001): 251-259. Dworkin suggests that there is more than meet the eye, namely, these conflicting values might not be contradicting at all, depending on how we define and structure them.

<sup>183</sup> See the elaboration of these values in Deborah Stone, *Policy Paradox: The Art of Political Decision Making* (New York: W.W. Norton & Company, 2002), 39-130.

<sup>184</sup> See the more comprehensive discussion in Eric A. Posner, *The Twilight of Human Rights Law* (Oxford: Oxford University Press, 2014), 137-148.

<sup>185</sup> See further discussion in Richard Posner, “Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers,” *The Journal of Legal Studies* 29 (2000): 1153-1177.

intuitive judgment.<sup>186</sup> It can also refer to quantified CBA, namely, CBA that is supported by strong consensus theory, reliable research designs, and good, representative evidence (and when it is only supported by weak, contested theory, unreliable research designs, or poor, unrepresentative evidence, it is better labeled as guesstimated CBA).<sup>187</sup>

The application of CBA in legal interpretation is no less controversial than Law & Economics. To name a few issues: is it possible to perform a perfect CBA that can assess all costs and benefits of a choice of policy in a single metric? Can we assume that all values are commensurable? Can we even value life? If not, how can CBA settle the difference in valuation? To what extent should we perform CBA? Should it be exhaustive regardless of the costs of doing the study? And then who has the capacity to perform such a complex method?

Cass Sunstein argues that different kinds of valuation cannot without significant loss be reduced to a single “super concept”, like happiness, utility or pleasures.<sup>188</sup> Any such reduction produces significant loss because it yields an inadequate description of our actual valuations when things are going well which will further impair predictive accounts of human behavior and normative judgments about ethics, law, and politics.<sup>189</sup> He further demonstrates that due to ignorance or uncertainty, certain costs and benefits of a policy cannot be quantified, or if they can, they might not be monetized.<sup>190</sup>

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<sup>186</sup> See John C. Coates IV, “Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications,” *The Yale Law Journal* 124 (2015): 893.

<sup>187</sup> *Id* at 891-892.

<sup>188</sup> See Cass R. Sunstein, “Incommensurability and Valuation in Law,” *Michigan Law Review* 92 (1994): 784. For an opposing view, Frederick Schauer argues that the concept of incommensurable values might be just more than meets the eye. He demonstrates that evidence on which people based their arguments for incommensurability, including certain statements they make, certain choices they make, and the moral uneasiness they feel about these choices, is susceptible to another interpretation. On this interpretation, incommensurability claims and other principle claims emerge in an equilibrium in which rational actors try to show that they are unlikely to cheat in cooperative endeavors. See Frederick Schauer, “Instrumental Commensurability,” *University of Pennsylvania Law Review* 146 (1997-1998): 1213.

<sup>189</sup> See Sunstein, *supra* note 188 at 784-785.

<sup>190</sup> Ignorance refers to a situation where people cannot specify either outcomes or probabilities and uncertainty refers to a situation where people are able to identify a range of possible outcomes but are unable to

Related to these types of criticism, Adler and Posner argue that CBA is not a super procedure, it should be seen as a decision procedure implementing overall well-being, not the totality of moral considerations which may include egalitarian, deontological and/or non welfare-based considerations.<sup>191</sup> More importantly, CBA is a flexible and practicable set of techniques for attaching certain values (such as money or happiness) to welfare impacts and not a single rigid formula.<sup>192</sup> And even if CBA may fail to produce a complete ordering of outcomes, it does not necessarily mean that it cannot be used at all, especially in situations where it does give determinate guidance.<sup>193</sup>

The flexibility of CBA as can be seen in its various forms is a crucial element in our discussion later on. Adler and Posner's views represent the classic monetary based CBA.<sup>194</sup> There is also happiness-based CBA whose aim is to measure how people actually experience their lives: what makes them happy and unhappy, and what they enjoy and dislike.<sup>195</sup> Instead of introducing the distortions created from using money as a proxy for people's quality of life, this type of CBA analyzes that quality directly.<sup>196</sup> Sunstein's own solution when benefits cannot be quantified in policy analysis is to use the break-even analysis which poses the following question: how high would the benefits have to be, in order for the costs to be justified? In such case, the related agency

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specify the probability that any of them will occur. See Cass R. Sunstein, "The Limits of Quantification," *California Law Review* 102 (2014): 1380-1381. This is of course related to monetary based CBA.

<sup>191</sup> See Adler and Posner, *supra* note 178 at 157.

<sup>192</sup> *Id* at 183.

<sup>193</sup> *Id*. In more general terms, Neil Duxbury argues that while commodification may sometimes seem an inappropriate form of valuation, it is important that we consider in each instance whether the benefits engaging in this form of valuation might outweigh the apparent costs. Creeping commodification, quite simply, is not necessarily insidious commodification and therefore, the potential of market reasoning needs to be explored, not resisted. See Neil Duxbury, "Law, Markets and Valuation," *Brooklyn Law Review* 61 (1995): 700-701.

<sup>194</sup> For further discussion on monetary-based CBA as a welfare maximizing decision procedure, see Adler and Posner, *supra* note 178 at 62-100.

<sup>195</sup> See John Bronsteen, Christopher Buccafusco, and Jonathan S. Masur, "Well-Being Analysis vs. Cost-Benefit Analysis," *Duke Law Journal* 62 (2013): 1689.

<sup>196</sup> *Id*. For further discussion on happiness-based CBA, see John Bronsteen, Christopher Buccafusco, and Jonathan S. Masur, *Happiness & the Law* (Chicago: The University of Chicago Press, 2015), 27-58.

calculates the costs and offers a judgment about the conditions under which the benefits would justify them, along with an explanation of that judgment.<sup>197</sup>

With respect to the limits in doing CBA, Adrian Vermeule provides an interesting account about rationally arbitrary decision. His theory is primarily based on the existence of uncertainty and how it affects policy analysis and decision making. Vermeule offers three types of uncertainty, namely: (i) brute uncertainty, in which well-defined facts about the world relevant to the decision cannot be ascertained (at acceptable costs), (ii) strategic uncertainty, in which interdependent choices create multiple equilibria, and (iii) model uncertainty, in which the very analytic framework to be used to assess uncertain choices is itself unclear.<sup>198</sup>

He further argues that due to certain types of uncertainty, it is not always possible for a decision maker to give first-order reasons for his choice (reasons that justify the choice relative to other choice within his feasible set), and therefore he will only be able to provide second order reasons, namely, reasons to make some choice or other within the feasible set, even if no first order reason can be given.<sup>199</sup> In such case, the decision maker should be permitted to stop its effort to collect more information before making a substantive discussion, or else there will be infinite regress of uncertainty about how much information to collect before deciding how much information to collect.<sup>200</sup>

The alternative term for this idea is satisficing, namely, a non-maximizing response to uncertainty or bounded rationality in which a decision maker searches among options or choices until, but only until one is found that meets some preset aspiration level; until, but only until, the

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<sup>197</sup> See further discussion in Sunstein, *supra* note 190 at 1387-1395.

<sup>198</sup> See Adrian Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Cambridge: Harvard University Press, 2016), 133.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 150.

choice is “good enough”.<sup>201</sup> One may argue that the application of CBA in legal interpretation could result in a shallow or discreditable application of non-legal theories (since CBA is especially heavy with economics and may also require specialized skills in statistics, politics, and other relevant social sciences) by legal practitioners, at least according to the standards of the practitioners of the relevant disciplines.

In this case, Richard Fallon Jr. makes an empirical claim that this is fine in the United States to the extent that such application does not offend the minimal standards of acceptability for performance of legal practitioners own distinctive craft.<sup>202</sup> One of the reasons for such acceptability is because law is a practical discipline, with a need to reach closure swiftly.<sup>203</sup> Resolution of a case cannot always await all of the empirical investigation or development of close reasoning that a decision maker would ideally want.<sup>204</sup> Furthermore, implicit norms of the judicial craft call upon judges, where reasonably possible, to explain their decisions as reflecting principles or policies rooted in past, legally authoritative decisions that deserve to be applied in the present.<sup>205</sup> And for a variety of reasons, arguments that purport to justify a decision as uniquely correct may have to claim more than they can prove.<sup>206</sup>

Lastly, on irrationality, we first need to understand the meaning of rationality before we can deal with its infamous arch nemesis. John Harsanyi argues that in everyday life, when we speak about “rational behavior”, we usually refer to a behavior involving a choice of the best means available for achieving a given end.<sup>207</sup> Later on, the concept is extended in economics to

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<sup>201</sup> See further discussion in Vermeule, *supra* note 136 at 176-177.

<sup>202</sup> See further discussion in Richard H. Fallon Jr., “Non-Legal Theory in Judicial Decision Making,” *Harvard Journal of Law and Public Policy* 17 (1994): 93.

<sup>203</sup> *Id.* at 93.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 94.

<sup>206</sup> *Id.* at 94-95.

<sup>207</sup> See John C. Harsanyi, “Advances in Understanding Rational Behavior,” in *Rationality in Action: Contemporary Approaches*, ed. Paul K. Moser (Cambridge: Cambridge University Press, 1990), 272-273.

cover choice among alternative ends on the basis of a given set of preferences and a given set of opportunities.<sup>208</sup> In Gary Becker's view, rationality in economics can be simplified into two fundamental assumptions, namely, each person has an ordered set of preferences, and he chooses the most preferred position available to him.<sup>209</sup> Accordingly, such concept does not demand that each person must have complete information or engage in costless transaction;<sup>210</sup> rationality in human is not the same with omniscience since people do have limited capacity in gathering and processing information in order to make a decision.<sup>211</sup>

Becker further shows that in the presence of scarcity, even the most "irrational" person must yield since he could not maintain a choice that was no longer within his opportunity set, forcing him to act "rationally."<sup>212</sup> A recent empirical paper supports this idea, namely, in circumstances that require valuation of items whose worth is vague, scarcity leads people to rely on relatively consistent, internally generated standards.<sup>213</sup> I suppose we should differentiate the purely irrational actions (where people make decisions without any trace of goals or consideration of their own well-being) from predictable biases and inconsistencies that people may suffer in making their decisions.<sup>214</sup> The latter does not defeat the entire purpose of having the rationality assumption, rather, it assists us in improving our analysis.<sup>215</sup>

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<sup>208</sup> *Id.* at 275.

<sup>209</sup> See Gary S. Becker, *Economic Theory* (New York: Aldine Transaction, 2008), 26.

<sup>210</sup> See Gary S. Becker, "The Economic Approach to Human Behavior," in *The Essence of Becker*, ed. Ramon Febrero and Pedro S. Schwartz (Stanford: Hoover Institution Press, 1995), 6-7.

<sup>211</sup> See Posner *supra* note 6 at 4.

<sup>212</sup> See Gary S. Becker, "Irrational Behavior and Economic Theory," *The Journal of Political Economy* 70, no. 1 (1962): 12. This is why Becker argues that the concept of scarcity is sufficient in analyzing economic problems without having to resort to the rationality assumptions. See Becker *supra* note 209 at 11.

<sup>213</sup> See Anuj K. Shah, Eldar Shafir, and Sendhil Mullainathan, "Scarcity Frames Value," *Psychological Science* 26, no. 4 (2015): 409. Though it must also be noted that at the same time, scarcity can tax the mind and cause people to follow decisions that are bad to their well-being. See further discussion in Sendhil Mullainathan and Eldar Shafir, *Scarcity: The New Science of Having Less and How It Defines Our Lives* (New York: Picador, 2013), 39-66.

<sup>214</sup> A good summary of these biases can be seen in Cass R. Sunstein, *The World According to Star Wars* (New York: HarperCollins Publishers, 2016), 74.

<sup>215</sup> I have to admit that defining irrationality is a lot harder than defining rationality. Different people may have different understanding of its meaning and what is deemed irrational in one perspective may be deemed

## 2. ISLAMIC VARIANTS

Consequence-based theories of interpretation had a long history in the Islamic legal system and one famous example of them is *Istihsan* which is often used by the Hanafi and Maliki Schools.<sup>216</sup> Developed by the first generation of Islamic legal scholars, the concept of *Istihsan* has received numerous definitions. According to Al-Kharki, *Istihsan* means that one should take a decision in a certain case different from that on which similar cases have been decided on the basis of its precedents, for a reason which is stronger than the one found in similar cases and which requires departure from those cases.<sup>217</sup>

Abu'l Husayn al-Basri argues that *Istihsan* is a departure from the established way of reasoning out of various ways, not particularizing a general rule, owing to a reason stronger than the one found in the established rule, and it provides a fresh evidence vis-à-vis the previous one.<sup>218</sup> Meanwhile, Abu Bakar Al-Jassas said that *Istihsan* means to depart from obvious analogical reasoning and to adopt what is better than such reasoning.<sup>219</sup>

All of the above definitions are quite difficult to understand, though we may conclude in summary that when using *Istihsan* in interpreting a legal provision of the Basic Codes, the relevant jurists should seek to understand the potential consequences of such provision and their compatibility with the provision's intended purpose, and after further deliberations, choose the

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rational from another perspective. See further discussion in Tim Harford, *The Logic of Life: The Rational Economics of an Irrational World* (New York: Random House, 2008), 10-31.

<sup>216</sup> Hanafi School is one of the major 4 schools of Islamic law along with Maliki, Shafi'i and Hanbali. See further discussion in Ahmed El Shamsy, *The Canonization of Islamic Law: A Social and Intellectual History* (Cambridge: Cambridge University Press, 2013), 23-28. For a comprehensive discussion on the reasoning methods of Abu Hanifah, founder of the Hanafi school, please refer to Imran Ahsan Khan Nyazee, *Theories of Islamic Law* (Islamabad: Islamic Research Institute Press, 2005), 173-176. See also the discussion in Mohammad Fadel, "Istihsan is Nine-Tenths of the Law: The Puzzling Relationship of Usul to Furu in the Maliki Madhhab," in *Studies in Islamic Legal Theory*, ed. Bernard G. Weiss and Ruud Peters (Leiden: Koninklijke Brill NV, 2002), 161-162

<sup>217</sup> See Ahmad Hasan, "The Principle of Istihsan in Islamic Jurisprudence," *Islamic Studies* 16 (1977): 348.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

consequence that they think fit the purpose in a better way, even if it is not entirely in line with the plain or immediate meaning of such legal provision.<sup>220</sup> According to Ahmad Hasan, the common theme of *Istihsan* is therefore to set aside a law which causes hardship and instead adopt or formulate a law which provides ease and comfort.<sup>221</sup>

One famous example of the application of *Istihsan* according to Abu Yusuf, a prominent scholar from Hanafi School, is the decision made by Caliph Umar bin Khatab to keep the land of Southern Iraq under state control instead of dividing it among the conquering tribes even though under the text and precedent of the Basic Codes, the plots of land must be divided to the tribes as part of their war's booty.<sup>222</sup> In this case, Abu Yusuf argued that Umar bin Khatab considered the good and general benefit of the Islamic community as the basis of his decision to make such exception as he wanted to avoid a situation in which the majority of land plots fall under the control of minorities.<sup>223</sup> We will see more of Umar bin Khatab's wisdom in Chapter 4.

In other words, *Istihsan* is one of the earliest versions of Pragmatism, and like its counterpart, the theory does not fully elaborate the basic values that must be followed to reach the intended consequences as there is no clear definition on hardships, comfort, and general benefits. This is precisely why opponents of *Istihsan* often accused its user of adopting rulings that are not rooted in a firm textual basis or a formal way of reasoning like analogy (*qiyas*), reflecting a mere arbitrary personal opinion that opens the possibility of ordinary men to legislate on matters that are supposed to fall under the authority of God.<sup>224</sup>

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<sup>220</sup> See Salma Taman, "An Introduction to Islamic Law," *European Journal of Law Reform* 16 (2014): 237-238. See also note 51.

<sup>221</sup> See Hasan, *supra* note 217 at 349.

<sup>222</sup> See Felicitas Opwis, *Maslaha and the Purpose of Law: Islamic Discourse on Legal Change from the 4<sup>th</sup>/10<sup>th</sup> to 8<sup>th</sup>/14<sup>th</sup> Century* (Leiden: Koninklijke Brill NV, 2010), 10.

<sup>223</sup> *Id.* at 11.

<sup>224</sup> See Felicitas Opwis, "The Construction of *Madhhab* Authority: Ibn Taymiyya's Interpretation of Juristic Preference (*Istihsan*)," *Islamic Law and Society* 15 (2008): 224.

Such lack of clarity was later tackled by theoretical discussions on the application of welfare maximization principle in legal interpretation (and its compatibility with God's intention to promote the people's overall well-being) which were well documented since the 8<sup>th</sup> century mainly by scholars of Maliki School through the theory of *Istislah*.<sup>225</sup>

Mustafa Ahmad Az-Zarqa, a prominent Syrian contemporary Islamic scholar, states that there are 4 main characteristics of a good law under the *Istislah* theory, namely:

- (a) providing benefits (*Jalb al-Mashalih*): the law must provide benefits to the society;
- (b) rejecting evil (*Dar al-Mafsid*): the law must protect the people from harms (or in economic terms, costs);
- (c) taking necessary preventive action (*Sadd al-Dzari'*): the law must prevent the means to an end if such end will most likely materialize and harm the people (showing a good understanding of probability, though not yet in a sophisticated way); and
- (d) adapting to the changing era (*Taghayyur al-Zaman*): the law must be flexible enough so that it can suit the changing situation and condition.<sup>226</sup>

It is undisputed among Islamic jurists that one of the main purposes of *Shari'a* as set out by God is to maximize the well-being of the society, the greater good, as recorded in various verses of the Qur'an where God claims that the Qur'an was revealed as a mercy and blessing for human beings,<sup>227</sup> and that the *Shari'a* satisfies the standard definition of a good law as argued by Az-Zarqa

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<sup>225</sup> See a general survey on the use of *Istislah* theory in Felicitas Opwis, "Maslaha in Contemporary Islamic Legal Theory," *Islamic Law & Society* 12 (2005): 182-223.

<sup>226</sup> See Mustafa Ahmad Az-Zarqa, *Hukum Islam dan Perubahan Sosial: Studi Komparatif Delapan Mazhab Fiqh* [Islamic Law and Social Change: A Comparative Study of 8 Islamic Law Schools of Thought], trans. Ade Dedi R. (Jakarta: Riora Cipta, 2000), 44.

<sup>227</sup> There are at least 4 verses in the Qur'an that discuss the relationship between well-being and God's law. First is Qur'an surah Al-Baqara [2]: 185 which states: "It was in the month of Ramadan that the Qur'an was revealed as guidance for mankind, clear messages giving guidance and distinguishing between right and wrong. So any one of you who is present that month should fast, and anyone who is ill or on a journey should make up for the lost days by fasting on other days later. God wants ease for you, not hardship. He wants you to complete the prescribed period and to glorify Him for having guided you, so that you may be thankful." See Haleem, *supra* note 124 at 20. Second is Qur'an surah Al-Anbiya [21]: 107 which states: "It was only as a mercy that We sent you [Prophet] to all people." See *Id.* at 208. Third is Qur'an surah

above. But as you may have guessed, the central problem lies with the exact concept of well-being itself. Apparently, this is quite a universal problem in both legal systems.

In *Ushul Fiqh* literatures, the term “well-being” or “*maslahah*” is often distinguished into three forms:

- (a) *maslahah mu'tabarah*, well-being aspects that have been validly and clearly recognized in clear texts of the Basic Codes;
- (b) *maslahah mulghah*, well-being aspects that have not been clearly recognized in the texts of the Basic Codes and have the potential to contradict the clear provisions of the Basic Codes; and
- (c) *maslahah mursalah*, well-being aspects that have not been clearly recognized in the texts of the Basic Codes but have the potential of maximizing the welfare of the society without violating existing texts of the Basic Codes.<sup>228</sup>

In its less controversial usage, *Istislah* is used to establish religious justification for issuing new rules on issues that are not covered by or which are not clearly settled by the Basic Codes (this

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Yunus [10]: 57-58 which states: “*People, a teaching from your Lord has come to you, a healing for what is in [your] hearts, and guidance and mercy for the believers.*” See *Id.* at 132. And last is Qur’an surah Al-An’am [6]: 157 which states “...or ‘*If only the Scripture had been sent down to us, we would have been better guided than them.*’ Now clear evidence, guidance, and mercy have come to you from your Lord. Who could be more wrong than someone who rejects God’s revelations and turns away from them? We shall repay those who turn away with a painful punishment.” See *Id.* at 92-93. In discussing Qur’an surah Al-Anbiya [21]: 107, Quraish Shihab, one of the most prominent Qur’an commentators (*mufassir*) from Indonesia, claims that this verse confirms that the teachings from the Prophet (including the *Shari’a*) brings good benefits and compassions to all beings in Earth. See M. Quraish Shihab, *Tafsir Al-Mishbah – Pesan, Kesan dan Keserasian al-Qur’an* [Tafsir Al-Mishbah – Message, Image and the Harmony of the Qur’an], vol. 8 (Jakarta: Lentera Hati, 2009), 132-135. Similar opinions can also be found in among others: Abu Ja’far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 18, ed. Edi Fr, trans. Ahsan Askan (Jakarta: Pustaka Azzam, 2009), 333-334, Abu ‘Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 11, ed. Mukhlis B. Mukti, trans. Amir Hamzah (Jakarta: Pustaka Azzam, 2008), 930, Muhammad bin Ali bin Muhammad Asy-Syaukani, *Tafsir Fathul Qadir*, vol. 7, ed. Besus Hidayat and Fajar Inayati, trans. Amir Hamzah Fachruddin (Jakarta: Pustaka Azzam, 2011), 460, Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 1, ed. Achmad Yazid Ichsan and Muhammad Badri H., trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2013), 375-392, and Departemen Agama RI, *Al-Qur’an dan Tafsirnya* [Al-Qur’an and Its Interpretations], vol. 1 (Jakarta: Lembaga Percetakan Al-Qur’an, 2009), 269-275.

<sup>228</sup> See further discussion in Abdul Salam Arief, “Ushul Fiqh Dalam Kajian Bisnis Kontemporer,” [Islamic Legal Theory in Contemporary Business Issues] in *Mazhab Jogja: Menggagas Paradigma Ushul Fiqh Kontemporer* [Jogja School of Law: Establishing a Contemporary Paradigm of Islamic Legal Theory], ed. Ainurrofiq (Yogyakarta: Ar-Ruzz, 2002), 207. In general, *maslahah mulghah* is excluded from analysis under the *Istislah* theory.

refers to *maslahah mursalah*) where it must satisfy 4 additional requirements before it can be used as a source of law: (i) the benefit must be real and not fictitious, (ii) the benefit must not be contrary to the provisions of the Basic Codes or *Ijma* and *Qiyas*, (iii) the benefit must be public, not personal or individualistic, and (iv) the benefit must not lead to the loss or impairment of an interest that has a higher priority according to the priority order stated above (meaning that the approach can only be used after exhausting other acceptable legal sources with higher hierarchy).<sup>229</sup> Here we can see an early version of CBA performed by Islamic jurists albeit not in a sophisticated form.

Expanding on the above concept of *maslahah*, Abu Hamid Al-Ghazali, one of the most prominent legal scholars in the Shafi'i School, argues that the concept of well-being satisfaction can be translated into the preservation of at least one of these five dimensions: religion, life, mind/rationality, family/posterity, and wealth/property (also called as the purposes of the law (*maqasid al-shari'a*)), which resemble the nonsectarian welfare statement proposed by Cass Sunstein in the previous section.<sup>230</sup> We will discuss these dimensions and their implications toward legal interpretation in depth in the next chapters.

Now this dissertation is particularly interested with the second type of *maslahah*, that is, *maslahah mulghah* which is deeply related to a minority group of scholars who argued that clear texts of the Basic Codes can be entirely compromised if such deviation is required to maximize the welfare of the society.<sup>231</sup> In this group's view, based on God's revelation, the ultimate purpose of having the *Shari'a* is to serve human well-being, and therefore the welfare maximization principle

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<sup>229</sup> See Mahdi Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research," *Arab Law Quarterly* 18 (2003): 238-241.

<sup>230</sup> The *maqasid al-sharia* were made famous by Abu Hamid Al-Ghazali, a prominent classical Islamic scholar from the Shafi'i School. See Ebrahim Moosa, "Abu Hamid Al-Ghazali," in *Islamic Legal Thought: A Compendium of Muslim Jurists*, ed. Oussama Arabi, David S. Powers, and Susan A. Spectorosky (Leiden: Koninklijke Brill NV, 2013), 278-279.

<sup>231</sup> The main proponent of this idea was Najmuddin al-Tufi, a classical scholar from the Hanbali School. See Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari'a into Egyptian Constitutional Law* (Leiden: Koninklijke Brill NV, 2006), 38-40.

should always be prioritized in any case;<sup>232</sup> an idea that is actually quite well-known in the United States, as once said by Felix Frankfurter: “*We make of them clever pleaders but not lawyers if they fail to catch the glorious vision of the law, not as a harsh Procrustean bed into which all persons and all societies must inexorably be fitted, but as a vital agency for human betterment.*”<sup>233</sup>

Historically speaking, the above jurists were not that successful in promoting their theoretical position.<sup>234</sup> First, they failed to provide a systematic argument to support their idea, and instead only relied on a single Hadith which states that no harm should be made against human being.<sup>235</sup> Second, the biggest critics against their idea accuse that those who argue that human well-being must always be prioritized implicitly acknowledge the possibility of conflicts between the Basic Codes texts with the general welfare of the society as if God fails to understand human needs and that God's law is imperfect. This dealt a major blow to which the well-being defenders failed to make a comeback, at least not until the modern era where *Istislah* and *Istihsan* gained more traction and supporters from contemporary scholars.<sup>236</sup>

Qur'an surah Al-Hajj [22]: 78 essentially states that God placed no hardship in the religion of Islam (including its laws).<sup>237</sup> In light of the verse's bold statement, particularly the idea that God

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<sup>232</sup> See Opwis, *supra* note 222 at 241. It is unfortunate that Al-Tufi did not establish a systematic theory on implementing welfare maximization principle in a case by case basis.

<sup>233</sup> See Felix Frankfurter, “The Law and The Law Schools,” *The American Bar Association Journal* 1 (1915): 539.

<sup>234</sup> According to Mohammad Hashim Kamali, the elaboration of *Istislah* and the introduction of *maqasid al-sharia* came too late to significantly shape the Islamic law and Islamic legal theory. See further discussion in Adis Duderija, “Contemporary Muslim Reformist Thought and Maqasid Cum Maslaha Approaches to Islamic Law: An Introduction,” in *Maqasid Al-Shari'a and Contemporary Reformist Muslim Thought: An Examination*, ed. Adis Duderija (London: Palgrave Macmillan, 2014), 5.

<sup>235</sup> See an extensive discussion about this particular Hadith and its application in Islamic legal maxims in Azman Ismail and MD. Habibur Rahman, *Islamic Legal Maxims: Essentials and Applications* (Kuala Lumpur: IBFIM, 2013), 39-48.

<sup>236</sup> See further discussion in Mohammad Hashim Kamali, “Methodological Issues in Islamic Jurisprudence,” *Arab Law Quarterly* 11 (1996): 22 and also in David Johnston, “A Turn in the Epistemology and Hermeneutics of Twentieth Century Usul Al-Fiqh,” *Islamic Law and Society* 11 (2004): 254-278.

<sup>237</sup> The complete texts are as follows: “*Strive hard for God as is His due: He has chosen you and placed no hardship in your religion, the faith of your forefather Abraham. God has called you Muslims — both in the past and in this [message] — so that the Messenger can bear witness about you and so that you can bear witness about other people. So keep up the*

has no intention to impose hardships upon human beings, some Islamic jurists argue that God has a complete understanding of well-being issues and has taken care such problem in such a way that leaves no options for a change of law.<sup>238</sup>

These jurists seem to believe that due to the perfection of God's knowledge, the entire legal provisions of the Basic Codes have fully considered the well-being issues and no second guesses are needed.<sup>239</sup> According to Abu Bakr Al-Jassas, a prominent classical legal scholar from Hanafi School, God's legislation would always be made based on *hikmah* (reason and wisdom), but it does not mean that God discloses all of the reasoning to men and therefore men should not second guess the nature of *maslahah* contained in God's legislation in order to avoid unnecessary mistakes or abuse of power by fallible mortals.<sup>240</sup> It is interesting to note that Al-Jassas used the story of Moses and Khidr in Qur'an surah Al-Kahf to support the idea that men cannot understand God's underlying purposes in establishing a policy. I will be using the same story later in Chapter 5 to instead support the consequentialist view of Islamic law.

To sum up, based on these jurists opinions, if there is a conflict between the core texts of the Basic Codes and the social needs, either the conflict is illusory or it is the people that need to cope with the law, no matter what the circumstances are, as the Basic Codes' legal provisions

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*prayer, give the prescribed alms, and seek refuge in God: He is your protector — an excellent protector and an excellent helper.*" See Haleem *supra* note 124 at 214.

<sup>238</sup> See further discussion about the interpretation of this verse in Ath-Thabari, *supra* note 227 at 652-656 and also Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 12, ed. M. Iqbal Kadir, trans. Ahmad Khotib (Jakarta: Pustaka Azzam, 2008), 252-259. The issue of human infallibility also contributes to this idea as scholars argue that since humans cannot fully understand God's reasoning, they cannot think just on their own and must follow the guideline created by the all-knowing God and the Prophet. After all, God only wants the best for humans. See further discussion in Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge: Cambridge University Press 2009), 14-15. On the idea that God gives good laws to the people, Qur'an surah Al-Anfal [8]: 24 states: "*Believers, respond to God and His Messenger when he calls you to that which gives you life. Know that God comes between a man and his heart, and that you will be gathered to Him.*" See Haleem, *supra* note 124 at 111.

<sup>239</sup> See Opwis, *supra* note 222 at 19-20.

<sup>240</sup> *Id.* at 20.

would always, by the end of the day, maximize the welfare of the society causing adjustment to be necessary, if not entirely unlawful.<sup>241</sup>

If the above claim is correct, unlike in the United States, the Dead Hand problem poses no threat to Islamic law and legal interpretation is most probably unnecessary since the problem of human error does not exist in *Shari'a*. The framers of the US Constitution and lawmakers in the United States are fallible, they make mistakes and may compromise in drafting the law,<sup>242</sup> they may also fail to consider future change of circumstances. But God and the Prophet are deemed to be completely free from this problem. And yet, as will be further discussed in Chapter 4, notwithstanding the strong religious claim of absolutism and immutability in Islamic law, it is relatively easy to find practical applications of Islamic law in the real world that seem to deviate from “clear” texts of the Basic Codes, deviations that are incredibly difficult to be justified other than by relying on consequence-based theories of interpretation, particularly the theory of *Istislah*.

From practical perspective, these deviations are not unexpected. As a matter of fact, and as has been discussed in the introductory chapter, the Basic Codes are being used by many countries as primary legal sources or inspiration for certain laws, and each country has different characteristics, institutions and needs in adopting those provisions.<sup>243</sup> As such, there is no doubt

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<sup>241</sup> Muhammad Ibn Idris al-Shafi'i goes further to say that disagreement to clear textual evidence in the Qur'an and Hadith is unlawful. See Muhammad Ibn Idris al-Shafi'i, *Al-Risala – Treatise on the Foundations of Islamic Jurisprudence*, 2<sup>nd</sup> ed., trans. Majid Khadduri (Cambridge: The Islamic Texts Society, 2008), 333-334.

<sup>242</sup> Benjamin Franklin long time ago acknowledged that the US Constitution is not perfect, that he disagreed with some of its provisions and that he supported the ratification of the US Constitution simply because it is the best available document at that time compared to other alternatives. See Benjamin Franklin, “Benjamin Franklin’s Speech at the Conclusion of the Constitutional Convention,” in *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification - Part One*, ed. Bernard Bailyn (New York: The Library of America, 1993), 3-5.

<sup>243</sup> See further discussion in Abdelilah Belkeziz, *The State in Contemporary Islamic Thought – A Historical Survey of the Major Muslim Political Thinkers of the Modern Era*, trans. Abdullah Richard Lux (London: I.B. Tauris & Co. Ltd., 2009). The book provides a very good summary on the development of Islamic political thoughts and various concepts of Islamic state with different degrees of Islamic law enforcement and different states form, ranging from nation states to a super state under one government (*khilafah*). For a classical view on how Islamic law should be administered by the state, see Abu'l Hasan Al-Mawardi, *Al-Ahkam As-Sultaniyyah – The Laws of Islamic Governance*, trans. Asdullah Yate (London: Ta-Ha Publishers Ltd., 1996).

that these differences hinder the possibility of unifying the interpretation of Islamic founding legal texts which further leads to various inconsistent results.<sup>244</sup>

Alas, legal flip-flopping, the act of picking legal provisions from the Basic Codes that one approves and dismissing those that he does not like without any proper justification, is a messy way to defend the notion of Islamic law's perfection. The United States legal system might tolerate this flip-flopping as a result of being governed by laws made by imperfect and diverse men.<sup>245</sup> But such inconsistency does not make any sense in the Islamic legal system. If perfection is translated into randomness, the claim would be meaningless, and the entire foundation of the Islamic legal system will crumble to dust.

This brings us to another issue that should raise great concern in terms of building a high-quality scholarship, namely, the fact that Islamic jurists often ignore any empirical evidence in supporting their over-the-top claim (including the claim of perfection). Take for example the opinion of Wahbah Az-Zuhaili, a prominent contemporary Islamic scholar from Syria, on the hand amputation punishment for theft. He said that based on experience (without using any empirical data to support this idea), there are no other laws that can prevent criminal activities as good as God's laws since God's law will always produce the utmost benefits for the society both in general and particulars.<sup>246</sup> Regardless of the problems surrounding his claim (including lack of empirical evidence), he was a respectable Islamic scholar in the Islamic world and people in the Middle East

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<sup>244</sup> As has been argued many centuries ago by Ibn Khaldun, the most famous classical Islamic historian and sociologist, human beings require social organization and the main consequence of social organization is disagreement among the people. Ibn Khaldun uses this rational understanding as the basis of his theory on why Muslims need a united government that will then settle such dispute. He would be very surprised to find out that by the 21<sup>st</sup> century, the Muslims are living in many separate countries with distinctive characteristics and needs. See further discussion in Ibn Khaldun, *The Muqqadimah: An Introduction to History*, ed. N. J. Dawood, trans. Franz Rosenthal (Princeton: Princeton University Press, 2005), 155-157.

<sup>245</sup> See note 242.

<sup>246</sup> See Wahbah Az-Zuhaili, *Tafsir Al-Wasith*, vol. 1, ed. Budi Permadi, trans. Muhtadi et al. (Jakarta: Gema Insani Press, 2012), 403.

and many other Muslim countries take his words very seriously. And with great power comes great responsibility as all of these legal issues will affect the fate of countless real people.

Now let us compare Az-Zuhaili's opinion with the empirical research made by Tahir Wasti which indicates that the implementation of *Shari'a* provisions on homicide and murder in Pakistan failed to maximize the welfare of the society because these laws provide more incentives to people with higher power and gender status in the society to abuse their power due to their ability to buy their freedom from the penalty. As a result, instead of reducing or even eliminating the numbers of homicide cases, the implementation of the law was actually increasing the release rates of murder suspects which was followed by higher rates of homicide cases.<sup>247</sup>

True, Wasti's findings might be wrong or inaccurate and should be taken with a grain of salt. But if we take his findings seriously, one could find good reasons to propose some adjustments to the structure of penal sanctions in Islamic criminal law, or at the very least, review such structure to learn more about its potential adverse effects. But as discussed above, regardless of those important findings, there are a lot of Islamic jurists that will quickly dismiss Wasti's ideas based on faith only. This is such a pity because the claim of perfection is essentially an empirical one that can be falsified.

The divine status of *Shari'a* thus provides a unique opportunity to answer the main issues of this dissertation, namely, whether the Basic Codes provide any guideline on legitimate theories of legal interpretation, and whether reference to consequence-based interpretive theories are acceptable, especially when the texts' meaning and historical context are relatively undisputed. The stake itself is very high. Depending on how we build the arguments and the results of our

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<sup>247</sup> See the full discussion in Tahir Wasti, *The Application of Islamic Criminal Law in Pakistan* (Leiden: Koninklijke Brill NV, 2009). As an example, in a poor family, a guy might kill his sister because he thinks that she has tainted her family honor. Since he is the backbone of the family, his parents forgive him from any punishment so that he can continue to support the family. This creates a strong discrimination against women and a strong incentive for the male counterparts to kill their sisters.

analysis, we might be deemed to challenge the wisdom and authority of God and the Prophet; and in some places, that could be considered as a blasphemy, or even a capital offense.<sup>248</sup>

It is unfortunate that it is so easy to fall into the authoritarian trap by using religious justification to unilaterally end any disagreement.<sup>249</sup> This often leads to oversimplification, namely, that Islam is a total way of life which is applicable to all times and places, and a solution to any problem faced by the Muslim community, where there should be no separation between the religious and worldly life, and between state and religion. Of course, oversimplification is always problematic, especially when you want to enforce religious laws through the state.<sup>250</sup>

To name one example on how sensitive this issue could be is the argument once made by Muhammad Al-Ghazali, a prominent Islamic legal scholar from Egypt, that the *Shari'a* rules on female's testimony (where a female testimony is valued as only half of a male) should no longer be applicable because when compared to their counterparts in the Prophet's male dominated era, modern women have better experience in ordinary life. Despite his traditional roots, academic qualifications, and esteemed position, Muhammad Al-Ghazali was heavily criticized by conservative Islamic scholars due to this opinion where they claim that Al-Ghazali has exceeded the permitted limit for interpretation and that, according to some extreme views, he should be deemed of renouncing his faith.<sup>251</sup>

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<sup>248</sup> See Jack David Eller, *Cruel Creeds, Virtuous Violence: Religious Violence across Culture and History* (New York: Prometheus Books, 2010), 187-188.

<sup>249</sup> See also John Walbridge, *God and Logic in Islam – The Caliphate of Reason* (Cambridge: Cambridge University Press, 2011), 32.

<sup>250</sup> See Rifki Rosyad, *A Quest for True Islam – A Study of the Islamic Resurgence Movement among the Youth in Bandung, Indonesia* (Canberra: ANU E Press, 2006), 5. In practice, this also attracts a good deal of attention from political parties for ease of finding campaign materials. One good example would be Islamic political parties in Indonesia that support the idea of implementing Islamic law as the official law of the state as the basis for their campaign. See further discussion in Yon Machmudi, *Islamising Indonesia – The Rise of Jemaah Tarbiyah and The Prosperous Justice Party* (Canberra: ANU E Press, 2008), 193-195.

<sup>251</sup> See Jonathan A.C. Brown, *Misquoting Muhammad: The Challenge and Choices of Interpreting the Prophet's Legacy* (London: Oneworld Publications, 2014), 139. The rule on women's value of testimony is based on Qur'an surah Al-Baqara [2]:282 which says: "You who believe, when you contract a debt for a stated term, put it down in writing: have a scribe write it down justly between you. No scribe should refuse to write: let him write as God has taught him, let the

Indeed, the above case of Al-Ghazali is not an exception. There are numerous verses in the Qur'an that explicitly state that following God's law is an obligation to each Muslim,<sup>252</sup> to a level where such person accepts the rulings from God and the Prophet voluntarily, showing total obedience with heart full of acceptance and joy,<sup>253</sup> and that those who reject to follow God's

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*debtor dictate, and let him fear God, his Lord, and not diminish [the debt] at all. If the debtor is feeble-minded, weak, or unable to dictate, then let his guardian dictate justly. Call in two men as witnesses. If two men are not there, then call one man and two women out of those you approve as witnesses, so that if one of the two women should forget the other can remind her...*" See Haleem, *supra* note 124 at 32. Ibn Kathir, citing a Hadith from Sahih Muslim collection, argues that the ruling on testimony was made because the Prophet said that women are having less intellectual capacity compared to men. See Abu I-Fida' Isma'il ibn 'Umar ibn Kathir, *Tafsir Ibnu Katsir*, vol. 1, ed. M. Yusuf Harun et al., trans. M. Abdul Ghoffar (Bogor: Pustaka Imam Asy-Syafi'i, 2003), 564-565. In addition, Seyyed Hossein Nasr opines on women's value of testimony as follows: "If one reads this provision for women's testimony in light of the legally established principle upholding women's competence to own property and carry out economic transactions, it suggests that the stipulation regarding women's testimony in the present verse is particular to this circumstance and is meant to address certain social or communal difficulties a woman might face when witnessing in such a case. Unlike spot sales, which require no witnesses or written contracts, a forward contract involved items requiring a certain level of expertise to understand. Indeed, from among those whom you approve as witnesses suggests that it is a matter of competence in a specific area, and such transactions would not have been widely carried out by women of the time. Moreover, such arrangements could extend over years, and women would not necessarily be as available to act as male witnesses, from a strictly social point of view, over a long period of time. The trade of present goods refers to a transaction where delivery is made at the time of payment and is thus concluded instantaneously, obviating the need to write a formal contract." See Nasr, *supra* note 124 at 122-124. For other opinions on this verse, see further discussions in Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 4, ed. Besus Hidayat Amin and Akhmad Affandi, trans. Ahsan Askan (Jakarta: Pustaka Azzam, 2008), 769-832, Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 2, ed. Mukhlis B. Mukti, trans. Fathurrahman and Ahmad Hotib (Jakarta: Pustaka Azzam, 2013), 665-699, Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 2, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2015), 132-158, RI, *supra* note 227 at 431-438.

<sup>252</sup> On the obligation to settle things in accordance with God's law, Qur'an surah Al-Maida [5]: 44-47 state: "We revealed the Torah with guidance and light, and the prophets, who had submitted to God, judged according to it for the Jews. So did the rabbis and the scholars in accordance with that part of God's Scripture which they were entrusted to preserve, and to which they were witnesses. So [rabbis and scholars] do not fear people, fear Me; do not barter away My messages for a small price; those who do not judge according to what God has sent down are rejecting [God's teachings]. In the Torah, We prescribed for them a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, an equal wound for a wound: if anyone forgoes this out of charity, it will serve as atonement for his bad deeds. Those who do not judge according to what God has revealed are doing grave wrong. We sent Jesus, son of Mary, in their footsteps, to confirm the Torah that had been sent before him: We gave him the Gospel with guidance, light, and confirmation of the Torah already revealed – a guide and lesson for those who take heed of God. So let the followers of the Gospel judge according to what God has sent down in it. Those who do not judge according to what God has revealed are lawbreakers." See Haleem, *supra* note 124 at 72. According to Ath-Thabari's explanation, failure to follow what has been ordained by God is an atrocity and those who commit such act might be considered as non-believers and liars (especially if they know what the actual rule is). See full discussion on the interpretation of these verses in Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 9, ed. Besus Hidayat Amin and M. Sulton Akbar, trans. Akhmad Affandi and Benny Sarbeni (Jakarta: Pustaka Azzam, 2008), 1-65 and also in Az-Zuhaili, *supra* note 124 at 535-545.

<sup>253</sup> See Wael B. Hallaq, "Considerations on the Function and Character of Sunni Legal Theory," *Journal of the American Oriental Society* 104 (1984): 680. Qur'an surah Al-Ahzab [33]: 36 states: "When God and His Messenger have decided on a matter that concerns them, it is not fitting for any believing man or woman to claim freedom of choice in that matter: whoever disobeys God and His Messenger is far astray." See Haleem, *supra* note 124 at 269. Furthermore, Qur'an surah An-Nisa' [4]: 65-70 states: "By your Lord, they will not be true believers until they let you decide between them in all matters of dispute, and find no resistance in their souls to your decisions, accepting them totally – if We had ordered, 'Lay down your lives' or 'Leave your homes,' they would not have done so, except for a few – it would have been far better for them and stronger confirmation of their faith, if they had done as they were told, and We would have given them a rich reward of

prescribed law are deemed as blasphemous or hypocrites.<sup>254</sup> Though the legal consequences of rejecting God's law or the types of acts that can be considered as rejecting such laws are still subject to endless debates, some Islamic jurists do believe that changing God's law may be categorized as an act of rejection, owing, most of the time, to the claim that the *Shari'a* is perfect.<sup>255</sup> In such situation, defining perfection and its parameters in Islamic law is incredibly important and will affect how we assess the compatibility of consequence-based theories of interpretation with Islamic law and legal system. Imagine the atrocity if the entire activity of interpretation becomes unlawful due to our mistake in properly define the term.

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*Our own and guided them to a straight path. Whoever obeys God and the Messenger will be among those He has blessed: the messengers, the truthful, those who bear witness to the truth, and the righteous – what excellent companions these are! That is God's favour."* See *Id.* at 57. In essence, the above two verses are in line with the verse quoted in note 252, there is obligation to Muslims to follow what has been decided by God and the Prophet. See further discussion on Al-Ahzab [33]: 36 in Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 14, ed. M. Iqbal Kadir, trans. Faturrahman Abdul Hamid, Dudi Rosyadi, and Marwan Affandi (Jakarta: Pustaka Azzam, 2009), 466-469, and Nasr, *supra* note 124 at 1030-1031, whereas discussions on An-Nisa' [4]: 65-70 can be seen in Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 7, ed. Besus Hidayat Amin, trans. Akhmad Affandi (Jakarta: Pustaka Azzam, 2008), 289-315, Nasr, *supra* note 124 at 221-222, and Az-Zuhaili, *supra* note 124 at 149-159.

<sup>254</sup> On the wrongness of disobeying God's law, Qur'an surah Al-Baqara [2]: 229 states: "*Divorce can happen twice, and [each time] wives either be kept on in an acceptable manner or released in a good way. It is not lawful for you to take back anything that you have given [your wives], except where both fear that they cannot maintain [the marriage] within the bounds set by God: if you [arbiters] suspect that the couple may not be able to do this, then there will be no blame on either of them if the woman opts to give something for her release. These are the bounds set by God: do not overstep them. It is those who overstep God's bounds who are doing wrong.*" See Haleem, *supra* note 124 at 269. On the idea that deemed to lose your faith if you follow other laws than the laws of God, Qur'an surah Al-An'am [6]: 121 states: "*and do not eat anything over which God's name has not been pronounced, for that is breaking the law. The evil ones incite their followers to argue with you: if you listen to them, you too will become idolaters.*" Furthermore, Qur'an surah An-Nisa' [4]: 14 states: "*But those who disobey God and His Messenger and overstep His limits will be consigned by God to the Fire, and there they will stay – a humiliating torment awaits them.*" See further discussions on Al-Baqara [2]: 229 in Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 3, ed. Mukhlis B. Mukti, trans. Fathurrahman, Ahmad Hotib, and Dudi Rosyadi (Jakarta: Pustaka Azzam, 2012), 276-314, Nasr, *supra* note 124 at 100-101, Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 3, ed. Besus Hidayat Amin and Akhmad Affandi, trans. Ahsan Askan (Jakarta: Pustaka Azzam, 2008), 822-868, Az-Zuhaili, *supra* note 227 at 543-557, and RI, *supra* note 227 at 335-343. See further discussions on Al-An'am [6]: 121 in Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 10, ed. Edy Fr., trans. Ahsan Askan (Jakarta: Pustaka Azzam, 2009), 441-463, and Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 7, ed. M. Iqbal Kadir, trans. Sudi Rosadi, Fathurrahman, and Ahmad Hotib (Jakarta: Pustaka Azzam, 2014), 188-196. Finally, see further discussion of An-Nisa' [4]: 14 in Nasr, *supra* note 124 at 195, and Al-Qurthubi, *supra* note 251 at 625-627

<sup>255</sup> See note 254

## F. CONCLUSION

To sum up the discussion in this chapter, while there seems to be an endless supply of legal interpretive theories, in general, they can be categorized into 4 major types: (i) semantic-based (e.g. Plain Meaning/Literalism), (ii) intent-based (e.g. Purposivism, Legal Process), (iii) contextual-based (e.g. Textualism, New Originalism), and (iv) consequence-based (e.g. Pragmatism, Living Constitution, *Istislah*). I do not claim that any of these theories is far superior compared to the other ones, nor do I claim that one must rely exclusively on a single method to reach a viable solution to various legal problems. Unless there is a clear law stating the permissible theory of legal interpretation, we can safely conclude at this stage that no theory of legal interpretation has an absolute claim of being the only valid one in both legal systems.<sup>256</sup> Put differently, there are also no absolute normative or positive grounds to eliminate the consequence-based theories of interpretation in both legal systems.

In fact, it is plausible that these 4 types of theories could support each other. A legal interpreter who endorses a consequence-based theory might support the exclusive use of semantic-based, intent-based, and/or contextual-based theories to support his preferred goal, such as, ensuring that unqualified generalists do not mistakenly interpret complex regulations using their own misguided preferences, causing problems to the overall well-being of the citizens. Or in the context of Islamic legal system, ensuring that one does not blindly following his own self-interest and prejudice by claiming that he speaks for the public benefit but at the same time dares

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<sup>256</sup> See Cass R. Sunstein, "There is Nothing that Interpretation Just Is," *Constitutional Commentary* 30 (2015): 211-212. See further discussion in Kent Greenawalt, *Statutory and Common Law Interpretation* (Oxford: Oxford University Press, 2010), 127-129. Some scholars do argue that certain theories of interpretation have already become the law of the land, though of course, the claim is debatable. See, for example, William Baude, "Is Originalism Our Law?," *Columbia Law Review* 115 (2015): 2363-2391. Some other scholars argue for the necessity of having a law that designates legitimate interpretive rules. See, for example, Nicholas Quinn Rosenkranz, "Federal Rules of Statutory Interpretation," *Harvard Law Review* 115 (2002): 2085-2157. Abbe R. Gluck argues that other than the Chevron doctrine, the US Supreme Court has treated other interpretive principles as mere "rules of thumb." See Abbe R. Gluck, "What 30 Years of *Chevron* Teach Us About the Rest of Statutory Interpretation," *Fordham Law Review* 83 (2014): 609.

to breach what has been ordained by God. On the other hand, a strict supporter of intent-based theory could find a situation where “legislators’ intent” requires him to think pragmatically, and so forth.

My project is therefore similar to Richard Fallon Jr.’s constructivist coherence theory<sup>257</sup> and William Baude’s and Stephen E. Sachs’s law of interpretation<sup>258</sup> where I seek to find how different kinds of arguments and approaches fit together in interpreting Immutable Legal Texts, specifically the texts of the Qur’an and Hadiths in the Islamic legal system, and whether these primary sources provide hints on the “proper” methods to be followed and those that must be avoided, namely, the legitimate theories and the illegitimate ones.

One important caveat on what this dissertation is not about. While I often mention judges as legal interpreters in my discussion above (as legal interpretation is traditionally considered to be the exclusive domain of the court, at least in the United States), I am not claiming that judges are the sole savior of the legal system. This is especially true for Immutable Legal Texts which act as the supreme law of the land (such as the US Constitution).<sup>259</sup> The US Constitution governs the role and relationship among governmental branches (legislators, judges, president and agencies), and they are all expected to comply with its provisions.<sup>260</sup>

Some would argue that only the Supreme Court has the final say in interpreting the meaning of the US Constitution. But in practice, members of each political branch can read the US

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<sup>257</sup> See further discussion in Richard H. Fallon Jr., “A Constructivist Coherence Theory of Constitutional Interpretation,” *Harvard Law Review* 100 (1986-1987): 1238-1243.

<sup>258</sup> See further discussion in William Baude and Stephen E. Sachs, “The Law of Interpretations,” *Harvard Law Review* 130 (2017): 1084-1085.

<sup>259</sup> See *Marbury v. Madison*, 5 U.S. 137 (1803). Actually, there could also be multiple legal actors involved in statutory interpretation. Sometimes, the effort is cooperative, but at other times, a sort of tug-of-war develops, with the various branches vying for power. See further discussion in Lawrence M. Solan, *The Language of Statutes: Laws and Their Interpretation* (Chicago: The University of Chicago Press, 2010), 160-195.

<sup>260</sup> The US Constitution restricts the action of all different governmental actors differently. See Nicholas Quinn Rosenkranz, “The Subjects of the Constitution,” *Stanford Law Review* 62 (2009-2010): 1222. See also discussion on the role of US Constitution in managing political risks among different institutions in Adrian Vermeule, *The Constitution of Risk* (Cambridge: Cambridge University Press, 2014), 2-5.

Constitution's texts and interpret the meaning by themselves; their understanding might differ from the Supreme Court's understanding, and they might not always comply with the Supreme Court's interpretation.<sup>261</sup> As famously raised by Professor Walter F. Murphy, the absence of an ultimate constitutional interpreter is simply a fact of American political life.<sup>262</sup> In a way, the act of making new statutes by Congress can be considered as an act of interpreting the US Constitution, namely, the legislators think that what they draft reflects the correct understanding of the US Constitution's provisions.

The same can also be said when the president is about to sign a law and he is assessing whether the law is unconstitutional; in such case, he is interpreting the terms of the US Constitution.<sup>263</sup> As argued by Keith E. Whittington, additional meaning of the US Constitution's texts might not be discovered through mere legal tools, it must be constructed from the political melding of the documents with external interests and principles.<sup>264</sup> The question is, whose interpretation should be followed and implemented when there are clear frictions among these institutions? Because it seems that interactions among the branches inevitably involve the possibility of conflict and this conflict has no logical stopping point.<sup>265</sup>

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<sup>261</sup> A simple question, when legislators give their oath that they will follow the US Constitution, do they mean following the Constitution's texts or the interpretation of those texts by the Supreme Court? See further discussion on the limit of judicial supremacy in Mark Tushnet, "Marbury v. Madison and the Theory of Judicial Supremacy," in *Great Cases in Constitutional Law*, ed. Robert P. George (Princeton: Princeton University Press, 2000), 18-25. For a historical discussion of cases where there are conflicts of interpretation between the Supreme Court and other governmental branches, see Robert A. Burt, *The Constitution in Conflict* (Cambridge: Harvard University Press, 1992), 143-154. For an introduction on how other political branches interpret the Constitution, see David P. Currie, "Prolegomena for a Sampler: Extrajudicial Interpretation of the Constitution, 1789-1861," in *Congress and the Constitution*, ed. Neil Devins and Keith E. Whittington (Durham: Duke University Press, 2005), 18-38.

<sup>262</sup> See Lee Epstein, "Who Shall Interpret the Constitution?," *Texas Law Review* 84 (2005-2006): 1307.

<sup>263</sup> See an interesting discussion about this issue in William Baude, "Signing Unconstitutional Laws," *Indiana Law Review* 86 (2011): 303-333.

<sup>264</sup> See Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge: Harvard University Press, 1999), 1.

<sup>265</sup> See further discussion through the sample of Citizens United case in Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* (New Haven: Yale University Press, 2017), 18-21.

From institutional perspective, if we believe that judges are not qualified to perform any economic, historical or linguistic analysis because they are merely generalist,<sup>266</sup> can we assume that legislators suddenly have the right capabilities to perform the arduous task? How could we believe that those legislators will be able to consistently draft and pass high quality laws with clear words; laws that are consistent with all other past, current, and future regulations, including and most importantly, the US Constitution, in a political system where reaching consensus is difficult<sup>267</sup> and highly susceptible to cycling of preferences as once noted by the Arrow's theorem?<sup>268</sup>

Or maybe all questions relating to interpretation of constitutional provisions that affect complex public policies should be deferred to agencies since in terms of expertise and specialization, agencies officials are more equipped to do the task compared to judges, a fact that has been used as the basis for deference in many cases?<sup>269</sup> Choosing the right party to perform such interpretive task is an interesting and important issue, but whether this task should be dominated by judges, executive agencies, legislators, or anyone else, is an institutional problem that will not be tackled in this dissertation.

I am not saying that institutional analysis should be disregarded. As I have said before, given the status of Immutable Legal Texts in a legal system or jurisdiction, multiple legal actors might be involved in the process of reading and interpreting them. My goal is only to find whether consequence-based theories of interpretation could fit a legal system in interpreting Immutable

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<sup>266</sup> See Easterbrook, *supra* note 138 at 778-780.

<sup>267</sup> See further discussion in Kenneth A. Shepsle, "Dysfunctional Congress?," *Boston University Law Review* 89 (2009): 371-372 and also Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, "Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation," *Law and Contemporary Problems* 57 (1994): 10-14.

<sup>268</sup> See further discussion in John W. Patty and Elizabeth Maggie Penn, *Social Choice and Legitimacy: The Possibilities of Impossibility* (New York: Cambridge University Press, 2014), 15-25.

<sup>269</sup> See further discussion in Nicholas J. Leddy, "Determining Due Deference: Examining When Courts Should Defer to Agency Use of Presidential Signing Statements," *Administrative Law Review* 59 (2007): 877-881.

Legal Texts. If the answer is affirmative, we can then analyze the kind of institution that could best do such interpretive task and how other institutions should properly respond.<sup>270</sup>

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<sup>270</sup> For a comprehensive discussion on the relation between interpretation and institution, see Cass R. Sunstein and Adrian Vermeule, "Interpretation and Institutions," *Michigan Law Review* 101 (2002-2003): 885-951.

## CHAPTER 3

### ISLAMIC LAW AND THE CLAIM OF PERFECTION

#### A. *DEFINING A PERFECT LAW: UNDERSTANDING THE CLAIM*

The Qur'an has claimed numerous times that Islam is the one religion above all<sup>1</sup> and that its laws are perfect and the best compared to any other laws existing in this universe.<sup>2</sup> However, it is not entirely clear on what it means with being perfect and that is problematic. With all the hype from such grandeur claim, perfection must mean something; it cannot be random or else, there is nothing special with God's law. This is not to say that randomness is always bad. A randomized controlled trial for policy design and implementation (where laws are essentially randomized) might provide a better result in finding and evaluating the most appropriate policy compared to non-random evaluation of legal policies.<sup>3</sup> But this kind of randomization would only make sense if the policy makers do not have full knowledge of the issue at hand and the potential consequences of the policy (thus, the needs to have multiple experiments).<sup>4</sup> Surely this does not fit the characteristic of God.

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<sup>1</sup> Qur'an surah Al-Fath [48]: 28 states: "It was He who sent His Messenger, with guidance and the religion of Truth, for him to show that it is above all [false] religion. God suffices as a witness." See M.A.S Abdel Haleem, *The Qur'an* (New York: Oxford University Press, 2005), 334-337. In interpreting *Religion of Truth*, or "the True Religion" (*dīn al-haqq*), Seyyed Hossein Nasr argues that such statement is as a reference to Islam itself and thus see all verses within the Qur'an as a reference to the triumph of Islam over all other religions. See further discussions in Seyyed Hossein Nasr, ed., *The Study Qur'an: A New Translation and Commentary* (New York: HarperCollins Publishers, 2015), 1255-1256.

<sup>2</sup> Qur'an surah Az-Zumar [39]: 55-57 state: "Follow the best teaching sent down to you from your Lord, before the punishment suddenly takes you, unawares, and your soul says, "Woe is me for having neglected what is due to God and having been one of those who scoffed!" Or it says, "If God had guided me, I would have joined the righteous!" See Haleem, *supra* note 1 at 299. Furthermore, Qur'an surah Hud [11]: 1 states: "[This is] a Scripture whose verses are perfected, then set out clearly, from One who is all wise, all aware." See Haleem, *supra* note 1 at 136-137. And then Qur'an surah Al-Ma'ida [5]: 50 states: "Do they want judgement according to the time of pagan ignorance? Is there any better judge than God for those of firm faith?" See Haleem, *supra* note 1 at 73. See further discussions on Az-Zumar [39]: 55-57 in Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 15, ed. M Mukhlis B. Mukti, trans. Muhyiddin Mas Rida, Muhammad Rana Mengala, and Ahmad Athaillah Mansur (Jakarta: Pustaka Azzam, 2009), 632-648 and Nasr, *supra* note 1 at 1132-1133.

<sup>3</sup> See the interesting discussion on this subject in Michael Abramowicz, Ian Ayres, and Yair Listokin, "Randomizing Law," *University of Pennsylvania Law Review* 159 (2011): 931-935.

<sup>4</sup> *Id.* at 931.

God has claimed numerous times that the Qur'an and the entire creation of the universe was made on purpose, not a mere game,<sup>5</sup> and that it is perfect without flaw,<sup>6</sup> indicating that each part of the Qur'an is meaningful. The Qur'an also claims that God is omniscient,<sup>7</sup> omnipotent,<sup>8</sup> the best

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<sup>5</sup> Qur'an surah Al-Anbiya [21]: 16-18 state: "We did not create the heavens and the earth and everything between them playfully. If We had wished for a pastime, We could have found it within Us— if We had wished for any such thing. No! We hurl the truth against falsehood, and truth obliterates it – see how falsehood vanishes away! Woe to you [people] for the way you describe God!" See Haleem, *supra* note 1 at 204. The phrase "We could have found it within Us" is interpreted by Ath-Thabari as meaning that if God had willed to do so, He would not have created the world at all, referring back to the previous verse, which states that God did not create the world *in play*. See Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 18, ed. Besus Hidayat Amin, trans. Beni Sarbeni (Jakarta: Pustaka Azzam, 2008), 29-36. Please also refer to Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 9, ed. Malik Ibrahim and Sayuda Patria Halim, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2016), 45-53. Furthermore, Qur'an surah Al-Mu'minin [23]:115 states: "Did you think We had created you in vain, and that you would not be brought back to Us?". See Haleem, *supra* note 1 at 219. Seyyed Hossein Nasr states that "the Qur'an often asserts that God created the world *in truth*, not *in play* or *in vain*. The question about returning to God is posed in the context of the frequent assertion in the Qur'an that human beings will indeed return to God and that in fact all things return to God. See Nasr, *supra* note 1 at 863. Finally, Qur'an surah Ad-Dukhan [44]: 38-39 state: "We were not playing a pointless game when We created the heavens and earth and everything in between; We created them for a true purpose, but most people do not comprehend." See Haleem, *supra* note 1 at 322. See further discussion in Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 13, ed. Achmad Yazid Ichsan, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2016), 219-223.

<sup>6</sup> Qur'an surah Al-Mulk [67]: 1-4 state: "Exalted is He who holds all control in His hands; who has power over all things; who created death and life to test you [people] and reveal which of you does best—He is the Mighty, the Forgiving; who created the seven heavens, one above the other. You will not see any flaw in what the Lord of Mercy creates. Look again! Can you see any flaw? Look again! And again! Your sight will turn back to you, weak and defeated." See Haleem, *supra* note 1 at 382-383. Seyyed Hossein Nasr defines several terms within the verse as follows: *Sovereignty* translates *mulk*, a word closely related to *malakūt*, which is rendered *dominion*; they derive from the same root, *m-l-k*, which in verbal form means "to possess," "to control," "to rule," or "to reign." According to some, *malakūt* refers to God's Lordship over the unseen realm, while *mulk* refers to God's Lordship over the visible world. The Divine Name *Mālik* ("Master") also derives from this root, as does the word for "king" (*malik*) and the most widely used word for "angels" (*malā'ikah*; sing. *malak*). He also argues that this verse is related to another verse in the Qur'an which maintains that for one who contemplates the Qur'an, no discrepancy will be found in it. See Nasr, *supra* note 1 at 1394-1395. See also Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 19, ed. M Mukhlis B. Mukti, trans. Akhmad Khatib, Dudi Rosyadi, Faturrahman, and Fachrurazi (Jakarta: Pustaka Azzam, 2009), 5-17.

<sup>7</sup> Qur'an surah Al-Hujurat [49]: 16 states: "Say, 'Do you presume to teach God about your religion, when God knows everything in the heavens and earth, and He has full knowledge of all things?'" See Haleem, *supra* note 1 at 339.

<sup>8</sup> Qur'an surah An-Nisa' [4]: 170 states: "The Messenger has come to you [people] with the truth from your Lord, so believe— that is best for you— for even if you disbelieve, all that is in the heavens and the earth still belongs to God, and He is all knowing and all wise." See Haleem, *supra* note 1 at 66. See further discussion in Nasr, *supra* note 1 at 1263 and Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 3, ed. Zainul Arifin, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2016), 370-373. In addition, Qur'an surah An-Nisa' [4]: 131 states: "Everything in the heavens and the earth belongs to God." See Haleem, *supra* note 1 at 66. Az-Zuhaili points out that "Allah owns everything in this universe including His perfections on rule and will". Thus, the verse itself is a reminder of Allah as an omnipotent being. See Az-Zuhaili, *supra* note 8 at 370-373. Further discussions on the verse may also be found in Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 5, ed. M. Iqbal Kadir, trans. Fathurrahman Abdul Hamid, Dudi Rosyadi, and Marwan Affandi (Jakarta: Pustaka Azzam, 2009), 967-969. Lastly, Qur'an surah Ali-Imran [3]: 26 states: "Say, 'God, holder of all control, You give control to whoever You will and remove it from whoever You will; You elevate whoever You will and humble whoever You will. All that is good lies in Your hand: You have power over everything.'" See Haleem, *supra* note 1 at 36. All commentators understand the *good* that belongs to God means all possible good. See Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 5, ed. Besus Hidayat Amin, trans. Beni Sarbeni (Jakarta: Pustaka Azzam, 2008), 184-190.

judge in the universe,<sup>9</sup> and maker of the best law.<sup>10</sup> In line with these claims, classical Islamic legal discourse acknowledged that God's actions are purposeful and well-considered,<sup>11</sup> but they have different opinions on whether such purpose can be recognized by the human mind.<sup>12</sup>

One particular verse in the Qur'an becomes the source of such debate, namely, surah Ali-Imran [3]:7 which states that the Qur'an is divided into clear (*muhkamat*) and ambiguous (*mutasyabihat*) verses where only God knows the meaning of those ambiguous verses.<sup>13</sup> In such case, does it mean that humans are cursed to forever walk in darkness, to never be able to make

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<sup>9</sup> Qur'an surah Al-A'raf [7]: 87 states: "If some of you believe the message I bring and others do not, then be patient till God judges between us. He is the best of all judges." See Haleem, *supra* note 1 at 100. In relation to the verse, Seyyed Hossein Nasr commented that "In the case of the Midianites, as with the people of Noah, Hūd, Ṣāliḥ, and Lot, Divine punishment takes various forms of earthly destruction from which the prophets and their followers are spared. The ominous instruction to "wait" or "be patient" is also made by Noah and by Muhammad, who is told to respond to the Quraysh's continued denial in a similar manner. That God is the best of judges is also stated in many verses of the Qur'an, and He is similarly said to be the *best of deciders*." See Nasr, *supra* note 1 at 439.

<sup>10</sup> Qur'an surah Al-Imran [3]: 32 states: "You who believe, obey God and the Messenger, and those in authority among you. If you are in dispute over any matter, refer it to God and the Messenger, if you truly believe in God and the Last Day: that is better and fairer in the end." See Haleem, *supra* note 1 at 56. On the idea that God is the sole legislator and the best judge, Qur'an surah Yusuf [12]: 40 states: "All those you worship instead of Him are mere names you and your forefathers have invented, names for which God has sent down no sanction. Authority belongs to God alone, and He orders you to worship none but Him: this is the true faith, though most people do not realize it." See Haleem, *supra* note 1 at 107. Commentators' opinion on these verses are generally similar with the verses stating that God is the best judge. See note 9. See also Qur'an surah Al-An'am [6]: 114-117 which state: "[Say], 'Shall I seek any judge other than God, when it is He who has sent down for you [people] the Scripture, clearly explained?' Those to whom We gave the Scripture know that this [Qur'an] is revealed by your Lord [Prophet] with the truth, so do not be one of those who doubt. The word of your Lord is complete in its truth and justice. No one can change His words: He is the All Hearing, the All Knowing. If you obeyed most of those on earth, they would lead you away from the path of God. They follow nothing but speculation; they are merely guessing. Your Lord knows best who strays from His path and who is rightly guided." See Haleem, *supra* note 1 at 89. See further discussion in Nasr, *supra* note 1 at 383.

<sup>11</sup> See Aron Zysow, *The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory* (Georgia: Lockwood Press, 2013), 203.

<sup>12</sup> *Id.*

<sup>13</sup> The complete verse is as follows: "It is He who has sent this Scripture down to you [Prophet]. Some of its verses are definite in meaning—these are the cornerstone of the Scripture—and others are ambiguous. The perverse at heart eagerly pursue the ambiguities in their attempt to make trouble and to pin down a specific meaning of their own: only God knows the true meaning. Those firmly grounded in knowledge say, 'We believe in it: it is all from our Lord'—only those with real perception will take heed." See Haleem, *supra* note 1 at 34. The interpretation of this verse causes a huge debate among Islamic scholars as recorded in Ath-Thabari, *supra* note 8 at 28-79. Seyyed Hossein Nasr commented that this verse is perhaps the most direct discussion in the Qur'an of the science of Qur'anic interpretation. Each part of the Qur'an conventionally called a "verse" in English means originally "a sign" (*āyah*), as Arabic has a separate word for "verse" as it applies to poetry. A sign (*āyah*) can be either within us or outside of ourselves. Here Qur'anic signs (or passages) are described as either *determined*, *muhkam*, or *symbolic*, *mutashābih*. The verb *ḥakama* means lexically to "curb," "repel," "command," or "judge" and hence is rendered by "determine." See Nasr, *supra* note 1 at 7.

correct decisions in understanding God's intention? Not necessarily, since the understanding of that verse itself is also subject to multiple interpretations.

The first group of scholars argue that educated and righteous scholars can understand the meaning of Qur'anic verses, even the ambiguous ones.<sup>14</sup> The second ones argue that the term "mutasyabihat verses" refers to verses whose laws have been replaced with the *muhkamat* verses and that "muhkamat verses" refers to verses that are still valid.<sup>15</sup> The third ones argue that "muhkamat verses" means verses related to rules on permitted and prohibited actions (*halal* and *haram*) while "mutasyabihat verses" means verses whose meanings resembles the meanings of other verses despite having different pronunciation.<sup>16</sup>

The most convincing interpretation (which is also supported by Ath-Thabari) states that "muhkamat verses" means verses that are known and can be interpreted by the scholars and "mutasyabihat verses" means verses that are unknown to no one and their understanding is only known by God, usually in the form of Arabic alphabets that are used as opening to some of Qur'anic surahs.<sup>17</sup> No one knows the meaning of those random alphabets until today and they do not convey any guideline.

Ath-Thabari's support for the last interpretation is based on the idea that it does not make any sense if God has claimed in the Qur'an that the Qur'an shall provide a clear and useful guideline for the people until the end of time<sup>18</sup> and at the same time there are no discernible way

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<sup>14</sup> See Ath-Thabari, *supra* note 8 at 68-69.

<sup>15</sup> *Id.* at 36-37.

<sup>16</sup> *Id.* at 39-40.

<sup>17</sup> *Id.* at 42.

<sup>18</sup> Qur'an surah An-Nahl [16]: 64 states: "We have sent down the Scripture to you only to make clear to them what they differ about, and as guidance and mercy to those who believe." See Haleem, *supra* note 1 at 156. According to Wahbah Az-Zuhaili, the verse refers to Habits of people in denying the prophets, task of Muhammad in explaining the Qur'an, moreover appoint the Qur'an as a guide. See further discussion in Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 7, ed. Arya Noor Amarsyah, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2014), 414-417. See also further discussion on this verse in Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 16,

to understand such guideline.<sup>19</sup> If it cannot be understood, why bother giving the guideline in the first place and why bother claiming that it will open the correct path to the people?<sup>20</sup> That is basically saying that God acts randomly or contradictory which is not in line with the entire Qur'anic verses that have been previously discussed (and as will be further explained below, Qur'anic verses cannot contain inconsistencies or mistakes).

Of course, saying that we have the possibility to understand God's intention does not exactly mean that we could know such intention with absolute certainty. And, as I will further argue in the following chapters, this problem of certainty affects the entire discussion on the use of consequence-based theories of interpretation in Islamic legal system (and actually, also in the United States). Setting that aside, now that we have concluded that it should be possible to understand God's intention and purpose, the next impeding task is to choose the exact meaning of perfection in Islamic law. Though there are several ways to define that term, based on the claims set out in the Qur'an and the opinions of Islamic jurists as previously discussed, they can be

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ed. Edi Fr and Besus Hidayat Amin, trans. Misbah, Ahsan Askan, and Khairul Anam (Jakarta: Pustaka Azzam, 2009), 181-182.

<sup>19</sup> See At-Thabari, *supra* note 8 at 43.

<sup>20</sup> Qur'an surah Al-Ma'ida [5]:15-16 states: "*People of the Book, Our Messenger has come to make clear to you much of what you have kept hidden of the Scripture, and to overlook much [you have done]. A light has now come to you from God, and a Scripture making things clear, with which God guides to the ways of peace those who follow what pleases Him, bringing them from darkness out into light, by His will, and guiding them to a straight path.*" See Haleem, *supra* note 1 at 69. Discussions on the verse has been brought up by Seyyed Hossein Nasr, where the *straight path* is associated with the life lived in accord with Divine Guidance throughout the Qur'an. See Nasr, *supra* note 1 at 284. The Qur'an also decides what is right and wrong, as discussed in surah Ali Imran [3]: 3-4 which states: "*Step by step, He has sent the Scripture down to you [Prophet] with the Truth, confirming what went before: He sent down the Torah and the Gospel earlier as a guide for people and He has sent down the distinction [between right and wrong]. Those who deny God's revelations will suffer severe torment: God is almighty and capable of retribution.*" See Haleem, *supra* note 1 at 34. Further discussions on inauguration of Tauhid and the arrival of Al-Qur'an may be found in Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 2, ed. Achmad Yazid Ichsan, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2013), 175-181. Meanwhile, Qur'an surah Al-Furqan [25]: 1 states: "*Exalted is He who has sent the Differentiator down to His servant so that it may be a warning to all people.*" See further discussion on this verse in Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 13, ed. Mukhlis B. Mukti, trans. Muhyiddin Mas Rida and Muhammad Rana Mengala (Jakarta: Pustaka Azzam, 2008), 3-8 and Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 10, ed. Zainul Arifin, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2016), 33-38. In the common law tradition, Lon L. Fuller argues that a law that cannot be understood breaches its basic inner morality as clarity is one of the most essential ingredients of legality. See further discussion in Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), 63-65.

summed up by the two definitions of “perfect” in the American Heritage Dictionary, namely, “having no faults, flaws, or defects”<sup>21</sup> or “completely suited for a particular purpose or action.”<sup>22</sup>

As much as we have freedom in choosing our way of interpreting things, we cannot run away from the consequences of our choice. If we go with the first concept of perfection, the entire legal provisions contained in the Qur’an (and, after meeting certain criteria, Hadiths<sup>23</sup>) must be absolute.<sup>24</sup> Under this simplistic explanation, any further discussion and interpretation would be a waste of time as long as the people can read and understand God’s will in the Basic Codes where it is assumed that they have an unqualified duty to submit to God’s will.<sup>25</sup> Consequently, a single deviation from a “perfect” rule would be enough to refute its claim of perfection, and therefore, not only that deviation must be discouraged, it should also be unnecessary.

But if we go instead with the second concept of perfection, the view of Abu Ishaq Al-Shatibi’s, one of the most prominent classical Islamic jurists, would be relevant. Al-Shatibi claimed that Islamic law is perfect in terms of setting out universal principles, though it does not

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<sup>21</sup> See Stephen R. Kleinedler ed., *The American Heritage College Writer’s Dictionary* (New York: Houghton Mifflin Harcourt, 2013), 704.

<sup>22</sup> *Id.* Similar alternatives to the definitions in the American Heritage Dictionary can be found in the Oxford Dictionary, namely, “having everything needed, the best of its kind” versus “highly suitable, exactly right for something.” See Anthony Cowie ed., *Oxford Advanced Learner’s Dictionary* (Oxford: Oxford University Press, 1994), 918

<sup>23</sup> See the discussion in Chapter 1 regarding the clarifications on Hadiths role and rank as part of the Basic Codes.

<sup>24</sup> As an example, Quraish Shihab, one of the most prominent Qur’an commentators (*mufassir*) from Indonesia, claims that there is no flaw in any provisions of Islamic law such as provisions related to marriage, sale & purchase, and inheritance. See M. Quraish Shihab, *Tafsir Al-Mishbah – Pesan, Kesan dan Keserasian al-Qur’an* [Tafsir Al-Mishbah – Message, Image and the Harmony of the Qur’an], vol. 3 (Jakarta: Lentera Hati, 2009), 27.

<sup>25</sup> Qur’an surah Al-Dhariyat [51]: 56-58 state: “I created jinn and mankind only to worship Me: I want no provision from them, nor do I want them to feed Me – God is the Provider, the Lord of Power, the Ever Mighty.” See Haleem, *supra* note 1 at 344. Quoting Ibn Kathīr, Seyyed Hossein Nasr links this to his understanding of what is reported to have been written in a previous scripture: “It has been transmitted in one of the Divine books [that] God says, ‘Son of Adam, I created you to worship Me, so play not! I have taken on the burden of your provision, so tire yourself not! If you seek Me, you will find Me. If you find Me, you have found everything. If I pass you by, everything has passed you by. And I am more beloved to you than everything. See Nasr, *supra* note 1 at 1280-1281.

necessitate that it contains all particular matter or that all particular of the Qur'an is certain.<sup>26</sup> This is primarily based on the understanding of the finiteness of the Qur'anic texts and the infinite issues that the Muslim community may face from time to time.<sup>27</sup> Indeed, it is impossible for the Basic Codes with such limited text to cover all particular problems that could exist throughout the history. No sane Islamic jurists would claim that the Basic Codes specifically deal with how to regulate the traffic nor will they claim that the Basic Codes become less perfect because they do not discuss the intricacies of traffic regulations.

Under the second concept, a legal provision or policy in the Basic Codes is perceived as a derivative of certain core universal principle(s) having specific purposes/goals and that a deviation from such provision would be permitted to the extent it satisfies the core principle(s) set out in the Basic Codes. Similar to this idea, Liaquat Ali Khan introduces the concept of jurodynamics of Islamic law to combine the immutability of the Basic Codes with the fluid normative energy of the *Shari'a* that can change forms to satisfy spatiotemporal needs.<sup>28</sup> He further develop 4 key concepts to implement his theory that includes: abrogation (two incompatible rules cannot coexist at the same time though they can in two different time frames),<sup>29</sup> specification (a rule can be exempted once certain conditions are met),<sup>30</sup> gradualism (a rule does not have to be imposed at once, instead it can be implemented through pragmatic gradualism and not through revolutionary

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<sup>26</sup> See Felicitas Opwis, *Maslaha and the Purpose of Law: Islamic Discourse on Legal Change from the 4<sup>th</sup>/10<sup>th</sup> to 8<sup>th</sup>/14<sup>th</sup> Century* (Leiden: Koninklijke Brill NV, 2010), 251-253. Al-Shatibi is a famous classical legal scholar from Maliki School and was considered as one of the best theoreticians of *Istislah* theory.

<sup>27</sup> See Ayman Shabana, *Custom in Islamic Law and Legal Theory – The Development of the Concepts of 'Urf and 'Adah in the Islamic Legal Tradition* (New York: Palgrave Macmillan, 2010), 48.

<sup>28</sup> See Liaquat Ali Khan, "Jurodynamics of Islamic Law," *Rutgers Law Review* 61 no. 2 (2008-2009): 232-233.

<sup>29</sup> *Id* at 240.

<sup>30</sup> *Id* at 243.

instantaneousness),<sup>31</sup> and cyclical desuetude (a rule might be immutable but it does not necessarily mean that it must be applied in all spatiotemporal circumstances).<sup>32</sup>

The main problem with Al-Shatibi's concept of Qur'anic perfect universal principles or Liaquat Ali Khan's concept of jurodynamics is the fact that other than providing various general abstract principles, the Qur'an also contains specific legal provisions. Claiming that the Qur'an has several universal principles that can last forever in terms of truthfulness and usefulness is uncontroversial.<sup>33</sup> And the diversity of opinions within *Fiqh* might actually be due to the flexibility brought by this concept of universal principles.<sup>34</sup> But to claim that some of the specific legal provisions of the Qur'an can be deviated using those universal principles is a completely different matter.

True, there are cases in the Basic Codes where deviation to legal provisions are explicitly permitted, particularly in situation of emergencies or extreme dire needs (known as the concept of dispensation or *rukhsa*).<sup>35</sup> If we take into account the existence of *rukhsa* in Islamic law, one may argue that by definition, Islamic law is not "perfect" because it still requires adaptation and deviation from its original rules. However, since the rules of *rukhsa* are explicitly stated in the Basic Codes (and Muslim are heavily encouraged to use such dispensation whenever possible),<sup>36</sup> it can also be argued that it is actually a sign of perfection, that is, the *Shari'a* already considers all potential problems in the real world and deals with them accordingly.<sup>37</sup> More importantly, save

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<sup>31</sup> *Id* at 245.

<sup>32</sup> *Id* at 247.

<sup>33</sup> See further discussion in Abdulmajeed Hassan Bello, "Dynamic Approach to the Shari'ah: A Case Study of Ijtihad and its Application in Contemporary Society," *Arab Law Quarterly* 27 (2013): 261.

<sup>34</sup> *Id.* at 260.

<sup>35</sup> See further discussion in Azman Ismail and MD. Habibur Rahman, *Islamic Legal Maxims: Essentials and Applications* (Kuala Lumpur: IBFIM, 2013), 48-53.

<sup>36</sup> See Alawi Abbas al-Maliki and Hasan Sulaiman al-Nuri, *Ibanah Al-Ahkam Syarah Bulugh Al-Maram*, vol. 2, ed. Sabariah Bakri, trans. Nor Hasanuddin H.M. Fauzi (Selangor: Al-Hidayah Publication, 2010), 4-5.

<sup>37</sup> *Id.* at 5.

from those cases that are explicitly stated in the Basic Codes, using *rukhsa* to waive or change a legal provision in the Basic Codes is usually deemed illegitimate.<sup>38</sup> In addition, the application of *rukhsa* is always temporary, as it is essentially a dispensation and not a one way ticket for making permanent change to the relevant legal provision.<sup>39</sup>

Here is the part where the story gets truly interesting, namely, by raising the following question: What about those legal provisions in the Basic Codes where no specific leeway from *rukhsa* is available, the cases of which will be discussed in Chapter 4? Will deviation from those provisions be permitted without having any consequences to the claim of perfection? It is a well-known maxim in *Ushul Fiqh* that an act that has been permitted by God should not be prohibited by men and vice versa.<sup>40</sup> In supporting this idea, Yusuf al-Qaradawi, a prominent contemporary

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<sup>38</sup> See Ibrahim ibn Musa Abu Ishaq al-Shatibi, *The Reconciliation of the Fundamentals of Islamic Law Volume 1*, trans. Imran Ahsan Khan Nyazee (Reading: Garnet Publishing, 2011), 112.

<sup>39</sup> *Id.* at 112-113. See also Abdul Haq, Ahmad Mubarak, and Agus Ro'uf, *Formulasi Nalar Fiqh: Telaah Kaidah Fiqh Konseptual* [Formulation of Fiqh Thought: Analysis of Conceptual Fiqh Maxims], vol. 1 (Lirboyo: Santri Salaf Press, 2009), 226-227.

<sup>40</sup> See Yusuf Al-Qaradawi, *The Lawful and the Prohibited in Islam*, 2<sup>nd</sup> ed., trans. K. al-Hilbawi, M. Siddiqi, and S. Shukri (Cairo: Al Falah Foundation, 2001), 11-16. There are numerous verses in the Qur'an that support this notion. On the prohibition to prohibit permissible things and vice versa, Qur'an surah Yunus [10]: 59-60 state: "Say, 'Think about the provision God has sent down for you, some of which you have made unlawful and some lawful. Say, 'Has God given you permission [to do this], or are you inventing lies about God?'" See Haleem, *supra* note 1 at 131. Here Al-Qurthubi explains that the context of these two verses is related to the people of Mecca's arbitrary paganistic practices claimed to be derived from God even though they had no basis whatsoever. See Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 8, ed. M. Ikbal Kadir, trans. Budi Rosyadi, Fathurrahman, and Nashiulhaq (Jakarta: Pustaka Azzam, 2014), 861-865. Qur'an surah Al-A'raf [7]: 32 further states: "Say [Prophet], 'Who has forbidden the adornment and the nourishment God has provided for His servants?' Say, 'They are [allowed] for those who believe during the life of this world: they will be theirs alone on the Day of Resurrection.' This is how We make Our revelation clear for those who understand." See Haleem, *supra* note 1 at 96. And Qur'an surah Al-Maida [5]: 103-104 state: "God did not institute the dedication of such things as *bahira*, *sa'iba*, *wasila*, or *hama* to idols; but the disbelievers invent lies about God. Most of them do not use reason: when it is said to them, 'Come to what God has sent down, and to the Messenger,' they say, 'What we inherited from our forefathers is good enough for us,' even though their forefathers knew nothing and were not guided." See Haleem, *supra* note 1 at 78. Al-Qurthubi and Ath-Thabari, commented that "the four Arabic terms in this verse refer to particular kinds of camels that, for various reasons, the Arabian idolaters used to consider sacred and dedicate to the gods. Such camels could not be ridden or milked for human consumption but had to be allowed to wander and graze freely. The commentators differ on the precise nature of each of these kinds of camels, and the distinctions they mention for these different consecrated camels tend to overlap. Some report that *baḥīrah* referred to a female camel who had borne five offspring." See Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 6, ed. Ahmad Zubairin and Mukhlis B. Mukti, trans. Ahmad Rijali Kadir (Jakarta: Pustaka Azzam, 2013), 798-812, and Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 9, ed. Besus Hidayat Amin and M. Sulton Akbar, trans. Akhmad Affandi and Benny Sarbeni (Jakarta: Pustaka Azzam, 2008), 546-571. Seyyed Hossein Nasr points out that many past peoples rejected the messages of the prophets sent to them because they were reluctant to abandon their existing idolatrous and immoral practices. Such people often invoke their fathers and their fathers' corrupt religious guidance as a basis for their rejection of the prophets. Some even manifest outrage at the prophets' demand that they abandon the

Islamic legal scholar from Qatar, argues in his seminal work, *The Lawful and Prohibited in Islam*, that it is the sole right of God to determine the lawfulness and unlawfulness of an act.<sup>41</sup> Moreover, some other scholars also argue that the general restriction for changing God's prescribed law is due to the idea that whatever is prohibited by God must be bad and whatever is permitted must be good (as claimed in the Qur'an).<sup>42</sup>

As we have seen from the debates on *Istislah*, only a minority of Islamic jurists dare to claim that the second concept of perfection can be fully implemented.<sup>43</sup> Most scholars seem to adopt a mixed position, namely, they believe that both universal principles and specific legal provisions are perfect and flawless.<sup>44</sup> But this mixed position can only work if there is indeed no contradiction

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traditions of their fathers. See Nasr, *supra* note 1 at 329-330. Further discussions on Arabian idolaters and *jahiliyah* people may also be found at Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 4, ed. Fahmi Bahreisy, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2016), 99-104.

<sup>41</sup> See Al-Qaradawi, *supra* note 40 at 12. Qur'an surah Al-Maida [5]: 87-88 state: "You who believe, do not forbid the good things God has made lawful to you – do not exceed the limits: God does not love those who exceed the limits – but eat the lawful and good things that God provides for you. Be mindful of God, in whom you believe." See Haleem, *supra* note 1 at 78. Qur'an surah Al-Anfal [6]: 116-117 state: "Do not say falsely, 'This is lawful and that is forbidden,' inventing a lie about God: those who invent lies about God will not prosper – they may have a little enjoyment, but painful punishment awaits them." See Haleem, *supra* note 1 at 133. Seyyed Hossein Nasr points out that earlier in this *sūrah* and elsewhere, the Qur'an clearly delineates lawful and unlawful foods. These stipulations are presented in a way that suggests that the limits on what can be consumed are rather few, and that in fact Muslims have a wide range of lawful foods available to them that they can eat and enjoy freely. In such context, the Qur'an is critical of those who would forbid lawful things arbitrarily and without divine warrant. See Nasr, *supra* note 1 at 321.

<sup>42</sup> Qur'an surah Al-A'raf [7]: 157 states: "who follow the Messenger – the unlettered prophet they find described in the Torah that is with them, and in the Gospel – who commands them to do right and forbids them to do wrong, who makes good things lawful to them and bad things unlawful, and relieves them of their burdens, and the iron collars that were on them. So it is those who believe him, honor and help him, and who follow the light which has been sent down with him, who will succeed." See Haleem, *supra* note 1 at 105. Qur'an surah At-Tahrim [66]: 1-2: "Prophet, why do you prohibit what God has made lawful to you in your desire to please your wives? Yet God is forgiving and merciful: He has ordained a way for you [believers] to release you from [such] oaths —God is your helper: He is the All Knowing, the Wise." See Haleem, *supra* note 1 at 380. Al-Qurthubi indicates that this verse was reportedly revealed after the Prophet had sworn to his wife Ḥafṣah that he would no longer have intimate relations with his Coptic slave girl, Maria. The Prophet had been intimate with Maria in Ḥafṣah's apartment on Ḥafṣah's day (the Prophet's wives rotated, each having one day with him in turn). When Ḥafṣah became upset, the Prophet asked her to tell no one of it and then told Maria that she was forbidden to him, after which this verse and the following verses were revealed. See Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 18, ed. M Mukhlis B. Mukti, trans. Akhmad Khatib, Dudi Rosyadi, Faturrahman, and Fachrurazi (Jakarta: Pustaka Azzam, 2009), 702-812.

<sup>43</sup> See Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3<sup>rd</sup> Edition (Cambridge: The Islamic Text Society, 2003), 360.

<sup>44</sup> See Ahmad Al-Raysuni, *Imam Al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law*, trans. Nancy Roberts (London: The International Institute of Islamic Thought, 2005), 136-137.

between: (i) the universal principles and the specific legal provisions, and (ii) the specific legal provisions and conditions of the real world.

Regrettably, the claim of perfection is often left as an issue of faith. Instead of thinking seriously about the consequences of having a perfect law, some scholars declare that analyzing those consequences is a futile attempt since human being is assumed to be unable to fully understand the perfect knowledge of God.<sup>45</sup> Some others simply support the claim of perfection without providing any evidence or at least, an exact comparison with other laws.<sup>46</sup> In their view, since God has already claimed so in the Qur'an, it has to be automatically true without further analysis and evidence;<sup>47</sup> but nothing can be further from the truth, since the claim of perfection, of being the best law, is essentially a testable claim. As we will further see in Chapter 4, deviations to legal provisions in the Basic Codes are real and these deviations cannot be easily dismissed as illegitimate without a serious attempt of understanding the core problem, namely, whether there is any correlation between these deviations and the internal structure of the rules in the Basic Codes?

#### **B. USING WELL-BEING CRITERIA IN TESTING THE CLAIM OF PERFECTION**

In assessing the claim of perfection and choosing the definition that is most compatible with Islamic law, I propose to use the welfare maximization principle as the main criteria. Under such criteria, we will test whether *Shari'a* provisions always maximize the overall well-being of the society regardless of the situations. If the answer is yes, certainly the first concept of perfection should be declared as the winner. But if it can be shown that there exists a situation where a *Shari'a*

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<sup>45</sup> The issue here is more on the idea that the rules in the Basic Codes must be further translated and interpreted in order to be implemented successfully in the society, but no matter how hard we try, human efforts cannot perfectly translate God's wisdom in the Basic Codes. Consequently, no one can claim absolutism of Islamic law due to the perfection claim. See the discussion at the beginning of this Chapter.

<sup>46</sup> See for example, Wahbah Az-Zuhaili, *Tafsir Al-Wasith*, vol. 1, ed. Budi Permadi, trans. Muhtadi et al. (Jakarta: Gema Insani Press, 2012), 403.

<sup>47</sup> *Id.*

provision does not maximize the overall well-being, and there is no applicable specific rule of *rukhsa*, the second concept of perfection would be more plausible and accordingly, the probability of requiring consequence-based theories of interpretation in Islamic legal system would also increase considerably (since it will also mean that the use of such theory does not necessarily jeopardize the claim of perfection).

There are at least two reasons for using the well-being criteria. First, from a *de facto* point of view, the question of whether God's laws always satisfy human well-being has been debated numerous times by Islamic jurists, particularly on the use and misuse of *Istislah* theory.<sup>48</sup> As such, I am not inventing an entirely new issue that has no prior basis within the history of Islamic legal discourse, though it surely requires a new answer since previous debates have not conclusively settled such issue.<sup>49</sup>

Second, there are numerous Qur'anic verses that specifically discuss the relationship between well-being and *Shari'a*, and how its provisions are made to promote and maintain the well-being of the people.<sup>50</sup> Thus, using well-being as a criterion to test the claim of perfection is not entirely implausible based on the texts of the Basic Codes. However, there are two follow-up issues that must be resolved if we want to use such criteria, namely, the exact scope of well-being in Islamic law (so we know the elements that should be tested), and the extent to which it must be satisfied assuming that there are also other considerations to be satisfied.

In terms of scope, as extensively discussed in the previous chapter, the definition of well-being has not been fully settled either in the United States or Islamic legal discourse. Nevertheless, there are certain items that have been undisputedly considered as inherent parts of Islamic concept

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<sup>48</sup> See Al-Raysuni, *supra* note 44 at 169-175.

<sup>49</sup> *Id.*

<sup>50</sup> See our discussion in Chapter 2 regarding the theory of *Istislah*.

of well-being, the *maqasid al-shari'a*, and regardless of the fact that *maqasid al-shari'a* do not cover all elements of well-being,<sup>51</sup> they can still provide important starting points for our analysis.

In terms of well-being position in the hierarchy of considerations within Islamic law, it must first be shown that Islam is a consequentialist religion, which will open the possibility for us to create a rank of various outcomes and choose the best one among those outcomes.<sup>52</sup> Once Islam's consequentialist nature has been demonstrated convincingly, we then need to determine whether there are other values that have to be considered and prioritized over well-being in Islamic law.<sup>53</sup> If it turns out that those other values must be prioritized, the failure of satisfying well-being is not necessarily a sign of Islamic law's "flaw", and the welfare maximization principle would be irrelevant or less powerful as a criteria to test the claim of perfection.

As will be further elaborated in Chapters 5 and 6, while there are values other than well-being to be considered within the Basic Codes, I will argue that the position of well-being is no less important than those other values within the hierarchy of applicable values in Islamic law. In fact, it is more probable to infer that the overall design of legal provisions in the Basic Codes is more influenced by the element of scarcity (which is essentially an economic problem) rather than the satisfaction of abstract deontological values. Accordingly, there is quite a huge compatibility between Law & Economics and *Shari'a*, and the use of well-being as a proxy to test the perfection of Islamic law would be a useful one.

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<sup>51</sup> They are essentially similar to Cass Sunstein's non-sectarian welfare statement. See Ebrahim Moosa, "Abu Hamid Al-Ghazali," in *Islamic Legal Thought: A Compendium of Muslim Jurists*, ed. Oussama Arabi, David S. Powers, and Susan A. Spectorosky (Leiden: Koninklijke Brill NV, 2013), 278-279.

<sup>52</sup> This is the principal definition of consequentialist moral framework as provided by Professor Matthew D. Adler. See Matthew D. Adler, *Well-Being and Fair Distribution* (New York: Oxford University Press, 2012), 22.

<sup>53</sup> There is always a possibility that Islam follows the concept of *weak welfarism*. See the definition in Matthew D. Adler and Erick A. Posner, *New Foundations of Cost-Benefit Analysis* (Cambridge: Harvard University Press, 2006), 53.

### C. THE RATIONALITY PARAMETERS

To assist our analysis, I would like to introduce three fundamental parameters for the test to come, all of which are directly derived from the Qur'an. Assuming that God is omniscient, omnipotent and purposeful as the Qur'an proudly claims, as the "perfect" guidance, the Basic Codes must at least satisfy the parameters of "completeness", "consistency" and "correctness" in offering guidelines to humanity (these three parameters will be jointly referred as the "**Rationality Parameters**").

The parameter of "completeness" has two elements. The first one is derived from one of the most controversial assumptions in economics about preferences, namely, that a rational decision maker makes only meditated and informed choices, and therefore he has considered all potential alternatives of choices before making the final decision.<sup>54</sup> While this assumption might be too stretched for ordinary human being (as demonstrated by behavioral economics in Chapter 2), it is surely a modest one for an omniscient entity like God. Once applied to the Basic Codes, when analyzing whether solutions to specific cases as described in various stories within the Basic Codes always maximize the overall well-being, I assume that God had already considered all applicable conditions and all possible alternatives at the time the decisions were made, all potential future outcomes, and also the relevant ruling principle(s) before setting up those solutions in the Basic Codes.<sup>55</sup> Using this parameter, we can test whether there is any situation in which the

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<sup>54</sup> See Geoffrey A. Jehle and Philip J. Reny, *Advance Microeconomic Theory*, 3<sup>rd</sup> Edition (Essex: Pearson Education Limited, 2011), 5, Andreu Mas-Colell, Michael D. Whinston, and Jerry R. Green, *Microeconomic Theory* (Oxford: Oxford University Press, 1995), 6-7, and Hal R. Varian, *Intermediate Microeconomics: A Modern Approach*, 8<sup>th</sup> Edition (New York: W.W Norton & Company, 2010), 35. Basically, under the completeness assumption, the policy maker makes only meditated and informed choices. While under the transitivity assumption, the policy maker must be consistent and will not produce any form of cycles.

<sup>55</sup> The Qur'an clearly claims that God has complete information on everything as stated in Qur'an surah An-An'am [6]: 59, "He has the keys to the unseen: no one knows them but Him. He knows all that is in the land and sea. No leaf falls without His knowledge, nor is there a single grain in the darkness of the earth, or anything, fresh or withered, that is not written in a clear Record." See Haleem, *supra* note 1 at 84.

solutions will fail to maximize the overall well-being. If such situation exists, we can then analyze why God still chose to take the initial decision and its consequences to the concept of perfection.

The second element of the “completeness” parameter refers to the completeness of the Basic Codes in providing universal principle(s) that can be used to solve social problems.<sup>56</sup> After all, the Qur’an does claim that it has provided all kinds of illustration so that the people may learn.<sup>57</sup> This is the main reason for my argument that all stories in the Basic Codes matter in Islamic legal interpretation, even if those stories do not contain the usual elements of command, prohibition or permissibility as stipulated under the typical linguistic and context-based rules made by Islamic jurists. The whole set of the Basic Codes are intended to be useful guidelines for mankind,<sup>58</sup> and ignoring some of their parts just because we have difficulties in reconciling them would prevent us from reaping maximum benefits from the Basic Codes or even worse, put us in a situation where we implicitly claim that there is a useless guideline in the Basic Codes, contradicting the parameters of “consistency” and “correctness” as shall be discussed below.

To avoid confusion, the parameter of completeness does not mean that the Basic Codes provide complete information on all matters under the sun (it is not), nor does it mean that the Basic Codes have completely solved one major issue often found in ordinary constitutional drafting, the necessity to make a constitutional bargain due to incomplete information which can be in the form of uncertain payoffs and hidden information.<sup>59</sup> In this case, uncertain payoffs refer to changes to the payoffs of a party that drafted the constitution due to unpredictable future

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<sup>56</sup> As claimed by Al-Shatibi and Al-Shafi’i. See Opwis, *supra* note 26 at 251-253 and Joseph Lowry, *Early Islamic Legal Theory: The Risala of Muhammad ibn Idris al-Shafi’i* (Leiden: Koninklijke Brill NV, 2007), 23, respectively.

<sup>57</sup> Qur’an surah Az-Zumar [39]: 27-29 state: “*In this Qur’an, We have put forward all kinds of illustration for people, so that they may take heed – an Arabic Qur’an, free from any distortion – so that people may be mindful. God puts forward this illustration: can a man who has for his masters several partners at odds with each other be considered equal to a man devoted wholly to one master? All praise belongs to God, though most of them do not know.*” See Haleem, *supra* note 1 at 297. See further discussion in Al-Qurthubi, *supra* note 2 at 318-325.

<sup>58</sup> See note 18.

<sup>59</sup> See Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitution* (Cambridge: Cambridge University Press, 2009), 66-71.

outcomes<sup>60</sup> and hidden information refers to the asymmetrical distribution of information among the drafters where one party does not know the other party's true intention and purpose when presenting its draft in the first place.<sup>61</sup>

The standard solution to the problem of uncertain payoffs is to write a loosely defined constitution that allows flexible adjustment over time as new information is revealed.<sup>62</sup> But this is a risky solution because a constitution that is too loose might exacerbate the hidden information problem where a party may choose to hid his original plan with the goal of obtaining more constitutional surplus from the ambiguity created from the loose texts.<sup>63</sup> This leads to the other solution, creating a more complete agreement specifying contingencies with the risk of constraining adaptations to exogenous changes.<sup>64</sup> Other solutions include solving potential constitutional disputes through third party (such as courts),<sup>65</sup> or simply renegotiating the terms of the constitution.<sup>66</sup>

Since the Prophet, the sole arbiter and interpreter of God's intention, is no longer with us, having a decisive judgment on the meaning or having renegotiation of the Basic Codes terms is simply impossible. Nevertheless, since the Basic Codes are assumed to be made by God, one might be tempted to conclude that the incomplete information problem should have already been settled by the Basic Codes and that there is no "constitutional bargain" within the Basic Codes. As I will further elaborate below, though this notion might be true, there could also be other legitimate reasons, without having to jeopardize the entire concept of Islamic perfection, to argue that certain

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<sup>60</sup> *Id* at 68.

<sup>61</sup> *Id* at 69.

<sup>62</sup> *Id* at 71.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id* at 72.

<sup>66</sup> *Id* at 73.

degree of bargains exist in the Basic Codes and that the Basic Codes' design does not always solve the incomplete information problem, opening the path for using legal interpretive theories in Islamic law.

Next, I define "consistency" as the impossibility of having contradictions between various rules and stories in the Qur'an, at least in the most abstract level, because different problems might require different solutions.<sup>67</sup> What really matters is that those different solutions are and must be derived from the principle(s) set out in the Qur'an. In economic terms, it means that there are no cycling of preferences in the Basic Codes, if  $A > B$  and  $B > C$ , then  $A > C$ .<sup>68</sup> The Qur'an made an interesting analogy to explain this concept of transitivity, namely, there can only be one God in this universe to make sure that it is not collapsing due to multiple omniscient and omnipotent entities fighting each other for supremacy.<sup>69</sup>

The final and most important parameter, "correctness", refers to the claim that each and every statement of the Qur'an is correct and true. The Qur'an claims many times that no one speaks more truly than God and that the Qur'an contains the ultimate truth.<sup>70</sup> And since the Qur'an also

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<sup>67</sup> This should be a reasonable assumption since Qur'an surah An-Nisa'a [4]:82 states: "Will they not think about this Qur'an? If it had been from anyone other than God, they would have found much inconsistency in it." See Haleem, *supra* note 1 at 58. Wahbah Az-Zuhaili further explains that the "no inconsistency" claim covers both of Qur'anic texts and meaning, and that such verse strengthens the notion that the Qur'an is set of laws which do not contradict one to another. See Wahbah Az-Zuhaili, *Tafsir Al-Wasith*, vol. 1, ed. Budi Permadi, trans. Muhtadi et al. (Jakarta: Gema Insani Press, 2012), 312-313. See also the issue of *naskh* in Chapter 2 which is sometimes used by Islamic scholars as a way to solve potential inconsistencies in the Qur'an, though this is still subject to endless debates.

<sup>68</sup> See Jehle and Reny, *supra* note 54 at 5, Mas-Collel, Whinston, and Green, *supra* note 54 at 7, and Varian, *supra* note 54 at 36. Under the transitivity assumption, the policy maker must be consistent and will not produce any form of cycles.

<sup>69</sup> Qur'an surah Al-Anbiya' [21]:22-23 states: "If there had been in the heavens or earth any gods but Him, both heavens and earth would be in ruins: God, Lord of the Throne, is far above the things they say: He cannot be called to account for anything He does, whereas they will be called to account." Wahbah Az-Zuhaili explains that it is impossible to have two gods having equal power since both will act as they please and one cannot control the others, resulting in the destruction of the world. As such, it would make sense that there could only be one God and this God must also be consistent as per His own claim in the Qur'an. See Wahbah Az-Zuhaili, *Tafsir Al-Wasith*, vol. 2, ed. Budi Permadi, trans. Muhtadi et al. (Jakarta: Gema Insani Press, 2013), 575. Further discussions by Az-Zuhaili may also be found in Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 9, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2015), 53-62.

<sup>70</sup> Qur'an is the sole truth according to Qur'an surah An-Nisa' [4]: 122 states: "but We shall admit those who believe and do good deeds into Gardens graced with flowing streams, there to remain forever – true promise from God. Who

states how God absolutely hates hypocrites (those who say certain things and then do or actually believe the opposite),<sup>71</sup> promising that they will be sent to hell for eternal damnation and torture,<sup>72</sup> it would be utterly ridiculous if a single verse in the Qur'an turns out to be wrong; God, in any case, cannot be a hypocrite. This also means that the claim of perfection (whatever the meaning), completeness, and consistency must be entirely correct with all of their consequences.

By using the above three parameters, my analysis will proceed as follows: (i) first, I will try to determine whether consequences matter in the Basic Codes, (ii) if consequences matter, whether well-being matters in the Basic Codes, (iii) if well-being matters, whether the legal provisions of the Basic Codes always satisfy well-being, and (iv) if those legal provisions do not

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*speaks more truly than God?"* See Haleem, *supra* note 1 at 125. See further discussions regarding rewards on faith and good deeds in Az-Zuhaili, *supra* note 8 at 270-280.

<sup>71</sup> On the rule of not saying what you don't actually do, Qur'an surah Ash-Shaff [61]: 2-3 state: "*You who believe, why do you say things and then do not do them? It is most hateful to God that you say things and then do not do them.*" See Haleem, *supra* note 1 at 370. Al-Qurthubi explains that the verse is related to some Muslims who said, "if we knew the deeds most beloved to God, we would expend our wealth and souls to perform such deeds." So God directed them to the works most beloved to Him, saying, *Truly God loves those who fight in His way in ranks, as if they were a solid structure*, and yet they refuse to do so. See Al-Qurthubi, *supra* note 42 at 411-413. On the nature of hypocrites, Qur'an surah An-Nisa' [4]: 60 states: "*Do you [Prophet] not see those who claim to believe in what has been sent down to you, and in what was sent down before you, yet still want to turn to unjust tyrants for judgement, although they have been ordered to reject them? Satan wants to lead them far astray.*" See Haleem, *supra* note 1 at 56. Az-Zuhaili argues that the verse refers to the assumption and habits of disbelievers, where it is implicated that it is Satan, not God, who led these people astray. As such, this serves as a refutation of the predestinarian theological view (*jabr*) that holds that God chooses to guide or mislead certain people. See Az-Zuhaili, *supra* note 8 at 144-149.

<sup>72</sup> On the afterlife punishment for hypocrites, Qur'an surah Al-Tawba [9]: 95-96 state "*When you return to them, they will swear to you by God in order to make you leave them alone – so leave them alone: they are loathsome, and Hell will be their home as a reward for their actions – they will swear to you in order to make you accept them, but even if you do accept them, God will not accept people who rebel against Him.*" Ath-Thabari and Az-Zuhaili share similar opinion that the verses emphasize that there would be terrible sanctions upon the people that were not honest with their faith/beliefs. See Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 13, ed. Besus Hidayat Amin, trans. Beni Sarbeni (Jakarta: Pustaka Azzam, 2008), 32-36, and Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 6, ed. Talqis Nurdianto, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2015), 456-466. Qur'an surah Al-Tawba [9]: 68-69 states: "*God promises the Fire of Hell as a permanent home for the hypocrites, both men and women, and the disbelievers: this is enough for them. God rejects them and a lasting punishment awaits them.*" See Haleem, *supra* note 1 at 122. Al-Qurthubi points out that on the subject of Muslims imitating the practices of the religious communities of the past, some commentators mention a well-known *hadith* that states, "By Him in Whose Hand lies my soul, you will follow the worts of those who went before you, span by span, cubit by cubit, until, were one of them to enter the hole of a lizard, you would enter it also." *Their share* is interpreted to mean their share in religion. See *Tafsir Al-Qurthubi*, vol. 8, *supra* note 39 at 490-496. Adding up to the notion of Muslims imitating the practices of the religious communities of the past by the later commentator, Seyyed Hossein Nasr states that the greater strength or wealth of previous generations are often mentioned in the Qur'an to demonstrate that such worldly superiority was ultimately of no benefit to them, see Nasr, *supra* note 1 at 524-525.

always satisfy well-being, whether there is a possibility that deviation from the problematic provisions using consequence-based theories of legal interpretation can be justified based on the Basic Codes. Whatever the answer is, the final answer to the above issues must take into account all three parameters as will be further elaborated in Chapters 5 and 6.

A thoughtful reader might ask the following questions, if God is a perfect policy maker, completely rational, eternal, all powerful, and the only entity that has the entire knowledge in this universe to set out the best solutions for all social problems that might possibly exist in the entire history of mankind, why making us work so hard to decipher the rules from the Basic Codes? Why God does not talk straightforwardly, such as, making the Basic Codes in the format of a legal code generally known to lawyers and legal scholars, so that they do not need to have a dispute on the rules to determine what texts constitute legal provisions or how to interpret them in the best way?

More crucially, given God's absolute power, why does God not simply change the people's mind and behavior so that they will be obedient, nice and helpful to each other, especially since the angels were recorded in the Qur'an saying that humans will only cause damage and bloodshed in Earth?<sup>73</sup> These questions can go on and on, but they are highly correlated with the theme of perfection, and deserve some decent answers. To reduce the possibility of providing my own speculative answers and to ensure that the answers are textually authoritative, I will let the Basic Codes directly respond to those questions.

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<sup>73</sup> Qur'an surah Al-Baqara [2]: 30 states: "[Prophet], when your Lord told the angels, 'I am putting a successor on earth,' they said, 'How can You put someone there who will cause damage and bloodshed, when we celebrate Your praise and proclaim Your holiness?' but He said, 'I know things you do not.'" See Haleem, *supra* note 1 at 7. Here, Az-Zuhaili comments that the verse is simply a rendition that underlines the notion that mankind is appointed as the "Khalifah" or leader of the world. See Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 1, ed. Achmad Yazid Ichsan and Muhammad Badri H., trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2013), 90-98. In addition, the word "Khalifah" can also mean "successor" or "deputy," hence *khalīfat rasūl Allāh*, or "successor/steward of God's Messenger," shortened to *khalīfah* (anglicized as "caliph"). See further discussions in Departemen Agama RI, *Al-Qur'an dan Tafsirnya* [Al-Qur'an and Its Interpretations], vol. 1 (Jakarta: Lembaga Percetakan Al-Qur'an, 2009), 74-84.

First of all, the Qur'an already states that: (i) God will not use any mind tricks and super powers in delivering the correct guidelines for mankind even though God has all the power to do so,<sup>74</sup> (ii) the Prophet main duty is only to give warning to the people,<sup>75</sup> and (iii) he has no power to compel the people to believe him, including hypocrites which will go to the lowest depths of hell.<sup>76</sup>

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<sup>74</sup> Qur'an surah Al-Ma'ida [5]: 48 states: "We sent to you [Muhammad] the Scripture with the truth, confirming the Scriptures that came before it, and with final authority over them: so judge between them according to what God has sent down. Do not follow their whims, which deviate from the truth that has come to you. We have assigned a law and a path to each of you. If God had so willed, He would have made you one community, but He wanted to test you through that which He has given you, so race to do good: you will all return to God and He will make clear to you the matters you differed about." See Haleem, *supra* note 1 at 72. Seyyed Hossein Nasr points out several comments from Ibn Kathir that in *for each among you We have appointed a law and a way*, the word "Qur'an" was elided, but meant to be understood, so that the phrase would read, "for each among you We have appointed [the Qur'an] as a law and a way," indicating the universality of Qur'anic rulings. These more exclusivist readings, however, seem inconsistent with the verse's clear implication that it is the Divine Will that there be multiple religious communities, as expressed in the next line of this verse, *had God willed, He would have made you one community*. Grammatically, this is a counterfactual conditional statement indicating that human beings do not exist as *one* (religious) *community*, because God has not willed it as such. See Nasr, *supra* note 1 at 300-301.

<sup>75</sup> On the fact that the Prophet's task is only to give warning, Qur'an surah Al-Ghasiyah [88]: 21-24 state: "So [Prophet] warn them: your only task is to give warning, you are not there to control them. As for those who turn away and disbelieve, God will inflict the greatest torment upon them. It is to Us they will return, and then it is for Us to call them to account." Furthermore, Qur'an surah Al-Maida [5]: 92 states: "Obey God, obey the Messenger, and always be on your guard: if you pay no heed, bear in mind that the sole duty of Our Messenger is to deliver the message clearly." Seyyed Hossein Nasr argues that this is one of several verses where the Prophet is reminded that his only duty is to deliver *the clear proclamation*. In the same vein, the Prophet is repeatedly reminded that he has no control over others' reactions to the message that he delivers and thus is not responsible for those who remain unmoved by it See Nasr, *supra* note 1 at 322-323.

<sup>76</sup> This restriction is confirmed in among others: Qur'an surah Yunus [10]:99-100, "Had your Lord willed, all the people on earth would have believed. So can you [Prophet] compel people to believe? No soul can believe except by God's will, and He brings disgrace on those who do not use their reason." See Haleem, *supra* note 1 at 135. In fact, the idea that God is not interfering with people's mind and faith is repeated many times in the Qur'an. See further discussion in Mustafa Mahmoud, *The Qur'an: An Attempt at Modern Reading*, trans. M.M. Enani (Cairo: Dar Al-Ma'aref, 2000), 39-40. Quraish Shihab explains that "God's will" in this surah means the general law of causality as established by God, rejecting the fatalistic idea that everything is predetermined. This also explains why God says, "disgrace on those who do not use their reason", showing that without using reason, you will never believe in God. See M. Quraish Shihab, *Tafsir Al-Mishbah – Pesan, Kesan dan Keserasian al-Qur'an* [Tafsir Al-Mishbah – Message, Image and the Harmony of the Qur'an], vol. 5 (Jakarta: Lentera Hati, 2009), 514. On our inability to help those who have been led astray by God, Qur'an surah An-Nisa' [4]:142-145 state: "The hypocrites try to deceive God, but it is He who causes them to be deceived. When they stand up to pray, they do so sluggishly, showing off in front of people, and remember God only a little, wavering all the time between this and that, belonging neither to one side nor the other. If God leaves someone to stray, you [Prophet] will never find a way for him. You who believe, do not take the disbelievers as allies and protectors instead of the believers: do you want to offer God clear proof against you? The hypocrites will be in the lowest depths of Hell, and you will find no one to help them." Seyyed Hossein Nasr points out Al-Kabir's commentary on the verse where it supports the idea that hypocrisy is among the worst of human moral conditions, perhaps even worse than disbelief, since hypocrites are said to be *in the lowest depths of the Fire*. Some commentators argue that hypocrisy is indeed worse than disbelief, since it compounds a lack of belief with belittling Islam and deceiving the believers. See Nasr, *supra* note 1 at 257-259.

Historically speaking, the Prophet really started from zero and worked with the people on an as-is basis when he started his quest back in the 7<sup>th</sup> century.<sup>77</sup> Without any supernatural intervention, there is no guarantee that the people will always agree with the Prophet and follow his guidance. In fact, they could be and were actually hostile toward his ideas.<sup>78</sup> The Prophet basically faced a diverse set of people with unique personalities and priorities in their life. He also faced various constraints that can prevent his great policy ideas from being enforced in the real world. Under those circumstances, is it possible to build a policy that entirely fits God's ideals no matter what the stakes, or will the policies succumb to the realities of life and become pragmatic? We will see the answer later on.

In relation to this problem of missing divine intervention, some of the Prophet's enemies that were skeptical with his claims asked him to immediately proceed with the punishments promised by God upon them. This was due to the numerous claims in the Qur'an that God destroyed many communities in the past that refused to follow the teachings and warnings of their prophets, even though God had granted them sufficient time to repent.<sup>79</sup> Therefore, the skeptics

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<sup>77</sup> See Patricia Crone, *God's Rule: Government and Islam* (New York: Columbia University Press, 2004), 9-11.

<sup>78</sup> For a detailed account on the difficulties and attacks that the Prophet faced in Mecca for his first 10 years of prophethood, see Muhammad Mohar Ali, *Sirat Al-Nabi and the Orientalists: With Special Reference to the Writings of William Muir, D.S. Margoliuth and W. Montgomery Watt*, vol. 1B (Medina: King Fahd Complex for the Printing of the Holy Qur'an, 1997), 609-665. Suffice to say that his first 10 years is a failing program.

<sup>79</sup> On the idea that those who dare to defy God shall be destroyed, Qur'an surah Yasin [36]: 30-31 state: "*Alas for human beings! Whenever a messenger comes to them they ridicule him. Do they not see how many generations We have destroyed before them, none of whom will ever come back to them?*" See Haleem, *supra* note 1 at 282. Further discussions on extreme injustice disbelievers do to themselves and the punishment they will suffer can be found in Al-Qurthubi, *supra* note 2 at 56-62, and Nasr, *supra* note 1 at 1075. On the requirement of delivering messengers before final punishment, Qur'an surah Al-Isra [17]:15-16 state: "*Whoever accepts guidance does so for his own good; whoever strays does so at his own peril. No soul will bear another's burden, nor do We punish until We have sent a messenger. When We decide to destroy a town, We command those corrupted by wealth [to reform], but they [persist in their] disobedience; Our sentence is passed, and We destroy them utterly.*" See Haleem, *supra* note 1 at 176. As argued by Seyyed Hossein Nasr, this verse brings together three themes commonly invoked throughout the Qur'an, including the related ideas that the consequences of one's moral actions and one's state of guidance or misguidance ultimately devolve upon oneself and that no one assumes *the burden of another*. This means that no one is punished for the misdeeds of another, but all must bear the consequences of their own actions. Although some may lead others astray, the burden of the sins committed by those who were thus misguided is still borne by themselves, although some verses indicate that those who mislead bear an additional burden. In addition, God does not punish the people without proper warning, especially though a messenger as God would never destroy towns for their wrongdoing while

wanted to see evidence of God's true power by sending them natural disasters because they did not believe the Prophet and the Prophet seemed to have no power to do anything against them.<sup>80</sup>

The Qur'an replied to those people by claiming that punishments for disbelievers in the Prophet's era shall be postponed until the end of days.<sup>81</sup> This might be a very convenient way to avoid the skeptics' challenge as the answer cannot be falsified (no one knows when the end of days will arrive and obviously the day of judgment never came during the lifetime of the Prophet, his Companions and also his enemies), but in any case, it satisfies all of the Rationality Parameters, namely, the answer is consistent, complete, and cannot be proven wrong at least until we see the actual judgment day.

Second, many verses in the Qur'an claim that even though the Qur'an demands unquestioning obedience to God and the Prophet, it also simultaneously requires men to use their critical reasons in analyzing and understanding the reasoning and spirit behind the injunctions

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their people were heedless, namely, before a messenger had made them aware of their wrongdoing and its destructive consequences. See Nasr, *supra* note 1 at 699.

<sup>80</sup> Qur'an surah Yunus [10]: 47-52 state: "Every community is sent a messenger, and when their messenger comes, they will be judged justly; they will not be wronged. They ask, 'When will this promise be fulfilled, if what you say is true?' Say [Prophet], 'I cannot control any harm or benefit that comes to me, except as God wills. There is an appointed term for every community, and when it is reached they can neither delay nor hasten it, even for a moment.' Say, 'Think: if His punishment were to come to you, during the night or day, what part of it would the guilty wish to hasten? Will you believe in it, when it actually happens?' It will be said, 'Now [you believe], when [before] you sought to hasten it?' It will be said to the evildoers, 'Taste lasting punishment. Why should you be rewarded for anything but what you did?'" See Haleem, *supra* note 1 at 132. Al-Qurthubi views this verse as a command from God to Muhammad, where he is told to say to the idolaters of Mecca, upon their insistence that he should hasten God's Punishment, that he has *no power over what harm or benefit may come to him*, which is to say that neither he nor anyone else possesses the power to bring about God's Punishment or for that matter any benefit from Him. *For every community there is a term*—that is, a specific life span known only to God—at the end of which that community will perish; alternately, it can be punished even before its earthly life comes to an end; see Al-Qurthubi, *supra* note 39 at 848-853.

<sup>81</sup> Qur'an surah Asy-Syura [42]: 21 states: "How can they believe in others who ordain for them things which God has not sanctioned in the practice of their faith? If it were not for decree concerning the final Decision, judgement would already have been made between them. The evildoers will have a grievous punishment." See Haleem, *supra* note 1 at 312. In interpreting "decree concerning the final Decision", Seyyed Hossein Nasr directed us on his translation of the Qur'an, where the later wording is replaced by "Word of Division", where it refers to the Divine Judgment, which divides the believers and the disbelievers and makes truth distinct from falsehood. In this same vein, the Day of Judgment is referred to as *the Day of Division* in the Qur'an. In this context, *Word of Division* indicates that, had God not already decreed that the division between the believers and disbelievers would take place on the Day of the Resurrection, those who make the innovations alluded to in the first part of the verse would already have been judged. See Nasr, *supra* note 1 at 1179.

made by God.<sup>82</sup> In certain parts, the Qur'an directly mocks people who follow stupid laws without questioning their validity and authority just because their ancestors did the same.<sup>83</sup> The Qur'an even positions those who refused to reason at the same level with the hateful hypocrites.<sup>84</sup> To put it in a simpler way, we can have a law school analogy.

Why do law schools invest a huge amount of time teaching analytical skills and critical thinking to prospective lawyers through the Socratic Method, complex case studies,

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<sup>82</sup> See Ahmad Hasan, "Rationality of Islamic Legal Injunctions: The Problem of Valuation (*Ta'lil*)," *Islamic Studies* 13, no. 2 (June 1974): 96. I quote below some relevant Qur'anic verses. First, Qur'an surah Al-'Imran [3]:118: "You who believe, do not take for your intimates such outsiders as spare no effort to ruin you and want to see you suffer: their hatred is evident from their mouths, but what their hearts conceal is far worse. We have made Our revelations clear for you; will you not use your reason?" See Haleem, *supra* note 1 at 43. This is interpreted by some commentators to mean that in certain important matters pertaining to the affairs of Muslims, such as writing contracts or sending significant messages, one should not rely on non-Muslims; in this vein al-Qurthubi bemoans the fact that in his day Muslims were relying on Jews and Christians as scribes and secretaries, although this reflects the society of his day. Others seem to interpret this as a statement on human nature in general, mentioning a Hadith that states, "God has sent no prophet, nor appointed any vicegerent, save that he had two groups of intimates. One group enjoins and encourages what is right while the other enjoins and encourages what is evil. He is protected who is protected by God," which is interpreted to mean that God will protect whom He will from the evil promptings of those who are close to them. See Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 4, ed. Ahmad Zubairin, trans. Dudi Rosyadi, Nashirul Haq, and Fathurrahman (Jakarta: Pustaka Azzam, 2008), Men must think as stated in Qur'an surah An-Nahl [16]: 44 which states: "We sent them with clear signs and scriptures. We have sent down the message to you too [Prophet], so that you can explain to people what was sent for them, so that they may reflect." See further discussions in Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 10, ed. M. Iqbal Kadir, trans. Asmuni (Jakarta: Pustaka Azzam, 2008), 268-271 On the idea that one should not follow blindly things that they do not really know, Qur'an surah Al-Isra [17]:36 states: "Do not follow blindly what you do not know to be true: ears, eyes, and heart, you will be questioned about all these." Ath-Thabari argues that the wordings "Do not follow blindly what you do not know to be true" can mean that one should not speak of things about which one does not have proper knowledge or falsely claim to have knowledge about something that one does not in fact have. See Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 16, ed. Besus Hidayat Amin and M. Sulton Akbar, trans. Akhmad Affandi and Benny Sarbeni (Jakarta: Pustaka Azzam, 2008), 675-680.

<sup>83</sup> Qur'an surah Al-Baqara [2]:170 says: "But when it is said to them, 'Follow the message that God has sent down,' they answer, 'We follow the ways of our fathers.' What! Even though their fathers understood nothing and were not guided?" See Haleem, *supra* note 1 at 19. See further discussion in Az-Zuhaili, *supra* note 73 at 327-332. Similar question is repeated again in Qur'an surah Al-Ma'ida [5]:103-104: "God did not institute the dedication of such things as *bahira*, *sa'iba*, *wasila*, or *hama* to idols; but the disbelievers invent lies about God. Most of them do not use reason: when it is said to them, 'Come to what God has sent down, and to the Messenger,' they say, 'What we inherited from our forefathers is good enough for us,' even though their forefathers knew nothing and were not guided." See Haleem, *supra* note 1 at 78. Here, Ath-Thabari explains that this kind of attitude is highly questionable, why following the rules made by people that do not know anything just because those people are their ancestors? See Ath-Thabari, *supra* note 39 at 570-571.

<sup>84</sup> Qur'an surah Al-Anfal [8]:20-22 states: "Believers, obey God and His Messenger: do not turn away when you are listening to him; do not be like those who say, 'We heard,' though in fact they were not listening—the worst creatures in God's eyes are those who are [willfully] deaf and dumb, who do not reason." See Haleem, *supra* note 1 at 111. Ibnu Kathir, one of the most prominent classical Qur'anic commentators in par with Ath-Thabari, explains that the latter verse was related to hypocrite people, those who actually reject God's orders and prohibitions but appear to support God's rulings in public sphere. They are cursed because they refuse to use their reason in understanding God's perfect wisdom. See Abu l-Fida' Isma'il ibn 'Umar ibn Kaṭhīr, *Tafsir Ibnu Katsir*, vol. 4, ed. M. Yusuf Harun et al., trans. M. Abdul Ghoffar (Bogor: Pustaka Imam Asy-Syafi'i, 2003), 25-26.

interdisciplinary approach, and other creative methods as may be necessary? If being a good lawyer is only about reading and memorizing the law, would not it be easier to just teach them to memorize some doctrines and statutory provisions and pretend that they can solve great cases by solely using such knowledge? Why choose the more difficult path? The reason is quite obvious, because we believe that the former set of methods is better than the latter ones in producing good lawyers<sup>85</sup> as the law is not some closed mathematical formula that produce exact answers all the time.<sup>86</sup>

The Basic Codes are intended to be a guideline that will last until the end of time since there will be no new Prophet after Muhammad.<sup>87</sup> However, as discussed above, given the limited text of the Basic Codes, covering all particular problems that may exist throughout the history is impossible (unless we have a legal code with infinite pages) and therefore the Muslim community must be able to think and find their own solution for future legal issues using the principles set out in the Basic Codes. Without proper analytical and critical thinking skills, how can we expect the people to translate the principles in the Basic Codes into solid policy making? Most probably, they can't. Deciphering the texts and seeking out the correct principles for lawmaking in the Basic Codes could serve as a good training program in improving people's analytical skills, especially if the design is considered as an intentional disfluency, the metacognitive experience of difficulty associated with completing a mental task, in order to improve the learning results.<sup>88</sup>

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<sup>85</sup> See the discussion in among others (starting from the oldest paper until the latest one): John Dickinson, "Legal Education and the Law School," *University of Pennsylvania Law Review* 79 (1930-1931): 429-431, Richard Posner, "Philistinism in Law," *Northern Kentucky Law Review* 16 (1988-1989): 415-424, Richard J. Hardy, Chapman Rackaway, and Laurie E. Sonner, "In the Supreme Court Justices' Shoes: Critical Thinking through the Use of Hypothetical Case Law Analyses and Interactive Simulations", *Political Science and Politics* 38 (2005): 411-414, and Charles A. Cox, Sr. and Maury S. Landsman, "Learning the Law by Avoiding It in the Process: And Learning from the Students What They Don't Get in Law School," *Journal of Legal Education* 58 (2008): 341-350.

<sup>86</sup> See further discussion in Jerome Frank, "What Constitutes A Good Legal Education?," *American Bar Association Journal* 19 (1933): 724-726.

<sup>87</sup> See Hasan, *supra* note 82 at 95.

<sup>88</sup> See further discussion in Connor Diemand-Yauman, Daniel M. Oppenheimer, and Erikka B. Vaughan, "Fortune Favors the Bold (and the Italicized): Effects of Disfluency on Educational Outcomes," *Cognition* 118 (2011):

To clarify, I am not trying to argue that the design of the Basic Codes provides the most optimum way to promote critical thinking; that would require in-depth discussion on latest techniques of legal education and cognitive psychology and is beyond the scope of this dissertation. I only try to show that given the huge amount of advices (or even commands) for mankind to think critically in the Qur'an, there could be rational reasons for having the complex design of the Basic Codes, reasons that are not necessarily in contradiction with the claim of the Basic Codes to be a useful guideline for humanity.<sup>89</sup>

Finally, God has stated very clearly in the Qur'an that all human will be tested to know whether they are worthy enough to enter the heavens and that they will be tested with a lot of things.<sup>90</sup> One can always ask the fairness of having these tests in the first place, but the idea of test provides an excellent hint on why God claims that there will be no direct supernatural intervention

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111-115 and also Adam L. Alter, Daniel M. Oppenheimer, and Nicholas Epley, "Disfluency Prompts Analytical Thinking – But Not Always Greater Accuracy: Response to Thompson et al. (2013)," *Cognition* 128 (2013): 252-255. Of course, the effect of disfluency itself is still being debated. For contrary opinion, see Tim Kuhl and Alexander Eitel, "Effects of Disfluency on Cognitive and Metacognitive Processes and Outcomes," *Metacognition Learning* 11 (2016): 1-13.

<sup>89</sup> And yet, in many jurisdictions, there are multiple attacks and violence against the use of critical thinking in analyzing religious issues. See further discussions in Mohamed Saeed M. Eltayeb, "The Limitations on Critical Thinking on Religious Issues under Article 20 of ICCPR and its Relation to Freedom of Expression," *Religion and Human Rights* 5 (2010): 119-135.

<sup>90</sup> On the requirement for having trial to be tested, Qur'an surah Al-Baqara [2]:214 states: "Do you suppose that you will enter the Garden without first having suffered like those before you? They were afflicted by misfortune and hardship, and they were so shaken that even [their] messenger and the believers with him cried, 'When will God's help arrive?' Truly, God's help is near." See Haleem, *supra* note 1 at 24. Az-Zuhaili comments that the verse emphasizes the presence of prophets as necessities and their stories as supporting the sayings within the Qur'an. See further discussion in Az-Zuhaili, *supra* note 73 at 473-480. On the fact that people will be tested with their wealth, Qur'an surah Al-Anfal [8]:28 states: "Be aware that your possessions and your children are only a test, and that there is a tremendous reward with God." See Haleem, *supra* note 1 at 112. Seyyed Hossein Nasr states that this verse is similar in message to [64]:14: *Among your spouses and your children there is indeed an enemy unto you; so be wary of them.* See Haleem, *supra* note 1 at 377. This verse would also reflect the general theme of this part of the *sūrah* that good things can also be trials, such as victory on the battlefield and the spoils of war. See Nasr, *supra* note 1 at 490. On the fact that people will be tested with their lack of wealth, Qur'an surah Al-Baqara [2]:155 states: "We shall certainly test you with fear and hunger, and loss of property, lives, and crops. But [Prophet], give good news to those who are steadfast." Al-Qurthubi, points out a specific hadith where it states, "Patience comes at the first blow," meaning that the proof of a patient and steadfast heart is its state "in the heat of the affliction", not when it is over, in which case anyone can be patient. Although some have defined it as not complaining, al-Qurthubi notes that Job tells God, *Truly Satan has afflicted me with weariness and punishment*, and then God says, *Truly We found him to be steadfast.* Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 2, ed. M. Iqbal Kadir, trans. Fathurrahman Abdul Hamid, Dudi Rosyadi, and Marwan Affandi (Jakarta: Pustaka Azzam, 2009), 407-410.

in most worldly affairs and why God orders men to think critically, namely, to ensure that men can prove their worthiness in front of God.<sup>91</sup>

It is true that the Basic Codes claim that God knows the final position of each person in heaven and hell, and there is a bit of philosophical problem of determinism versus free will in such case.<sup>92</sup> But as explained in the Basic Codes, in practice, such philosophical problem does not really matter since God will judge based on the actual acts done by the relevant person and those acts will be the evidence to determine such person's final position in the afterlife.<sup>93</sup> Consistent with such account, the Qur'an further claims that each person is responsible for himself and will be held accountable for his own deeds.<sup>94</sup> Thus, the need of having no direct intervention toward the

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<sup>91</sup> See discussions in note 90.

<sup>92</sup> Hadith no. 6569 in Al-Bukhari's compendium of Hadiths state: *"Narrated Abu Hurairah: The Prophet said, 'None will enter Paradise but will be shown the place he would have occupied in the (Hell) Fire if he had rejected Faith, so that he may be more thankful; and none will enter the (Hell) Fire but will be shown the place he would have occupied in Paradise if he had Faith, so that may be a cause of sorrow for him.'*" See Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 8, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 304. Hadith no. 6596 in Al-Bukhari's compendium of Hadiths states: *"Narrated 'Imran bin Husain: A man said, 'O Allah's Messenger! Can the people of Paradise be known (differentiated) from the people of the (Hell) Fire?' The Prophet replied, 'Yes.' The man said, 'Why do people (try to) do (good) deeds?' The Prophet said, 'Everyone will do the deeds for which he has been created to do or he will do those deeds which will be made easy for him to do (i.e., everybody will find easy to do such deeds as will lead him to his destined place for which he has been created).'*" See *Id.* at 317.

<sup>93</sup> Hadith no. 6493 in Al-Bukhari's compendium of Hadiths states: *"Narrated Sa'd bin Sahl As-Sa'idi: The Prophet looked at a man fighting against Al Mushrikun [polytheists, pagans, idolaters, and disbelievers in the Oneness of Allah and in His Messenger Muhammad] and he was one of the most competent persons fighting on behalf of the Muslims. The Prophet said, 'Let him who wants to look at a man from the dwellers of the (Hell) Fire look at this (man).'*" Another man followed him and kept on following him till he (the fighter) was injured and, seeking to die quickly, he placed the tip of the blade of his sword between his breasts and leaned over it till it passed through his shoulders (i.e., committed suicide). The Prophet added, *"A person may do deeds that seem to the people as the deeds of the people of Paradise while in fact, he is from the dwellers of the (Hell) Fire; similarly a person may do deeds that seem to the people as the deeds of the people of the (Hell) Fire while in fact, he is from the dwellers of Paradise. Verily, the (results of) deeds done depend upon the last actions."* See *Id.* at 271.

<sup>94</sup> On the fact that each person is responsible for himself to change his destiny, Qur'an surah Ar-Ra'd [13]:11 states: *"Each person has guardian angels before him and behind, watching over him by God's command. God does not change the condition of a people [for the worse] unless they change what is in themselves, but if He wills harm on a people, no one can ward it off – apart from Him, they have no protector."* See Haleem, *supra* note 1 at 154. Al-Qurthubi commented that Some have also understood God does not change the condition of a people [for the worse] unless they change what is in themselves to mean that God will not alter the positive or negative circumstances of people until they themselves bring about changes in their actions and lives. *but if He wills harm on a people* refers to when He wishes to punish them. See Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 9, ed. M. Iqbal Kadir, trans. Muhyiddin Masridha (Jakarta: Pustaka Azzam, 2008), 680-689.

people's mind so that they may think and decide by themselves.<sup>95</sup> This could also explain why the intervention in the form of punishment and destruction against disbelievers in the Qur'an often occurred after they were being reminded and then failed to comply within the time period given by God.<sup>96</sup>

The above explanations might not conclusively rationalize the reasons for having the current design of the Basic Codes and resolve God's true intention behind all of the hardships in worldly affairs. Life could be meaningless and God maybe just an immortal and indestructible tyrant who is bored with having eternal life and has the power to do everything imaginable or unimaginable in this universe and probably, any existing dimensions that we could never think of.

Having said the above, for the purpose of this dissertation, we can actually dismiss all of the discussions related to God's rationale and make our analysis solely based on the rules of the game established in this chapter (namely, the Rationality Parameters) in order to answer the following question: given the multiple claims of perfection in the Basic Codes, can any of those claims be held accountable?

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<sup>95</sup> Qur'an surah An-Nahl [16]: 93 states: *"If God so willed, He would have made you all one people, but He leaves to stray whoever He will and guides whoever He will. You will be questioned about your deed."* See further explanation in M. Quraish Shihab, *Tafsir Al-Mishbah – Pesan, Kesan dan Keserasian al-Qur'an* [Tafsir Al-Mishbah – Message, Image and the Harmony of the Qur'an], vol. 6 (Jakarta: Lentera Hati, 2009), 710-711. Quraish Shihab, commented that it is God's will in creating mankind with different degree of believing. He can however make all mankind in believing Him, yet he doesn't. God wants mankind to belief by themselves and strive in goodness through creativity and its free will. As mankind is a caliphate of the world, then the burden shall lie in mankind for its betterment.

<sup>96</sup> See note 80.

## CHAPTER 4

### A CHALLENGE TO ISLAMIC LAW'S IMMUTABILITY

#### A. INTRODUCTION

In the previous chapter, we have discussed extensively the two possible definitions of “perfect”, their potential consequences, and how they will be tested using the Rationality Parameters. Logically speaking, if we say that X is perfect for all things and cases, any deviation to X would mean that X is no longer perfect for all things. Whether the deviation is minor or major does not matter for concluding that X is not perfect. Applying this logic to the first concept of perfection where being perfect is equal to being flawless, any compromise, as minor as it might be, to the legal texts of the Basic Codes that are not subject to specific conditions or dispensations for waiver means that those provisions cannot be applied universally, threatening the entire concept of a perfect and absolute legal system.

By contradiction, if we adopt the second concept of perfection and agree that a “clear” legal text in the Basic Codes can be compromised (as long as the compromise is made in line with the universal principle(s) set out in the Basic Codes), how can we defend the immutability of meaning of other legal texts within the Basic Codes? This does not necessarily mean that all other legal provisions in the Basic Codes must be changed or adjusted, it simply means that all of those provisions might be changed if there are good reasons to do so. Under the Rationality Parameters, particularly the “consistency” and “correctness”, only one of these concepts can be true.<sup>1</sup> Which one is more probable?

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<sup>1</sup> Al-Ghazali discusses this issue extensively to show that it is impossible for God’s law to have contradiction at the most abstract level and therefore, the necessity of using the *tarjih* method in settling contradictions. See Muhammad Wafaa’, *Metode Tarjih atas Kontradiksi Dalil-Dalil Syara’* [Tarjih Method on Contradictions of Islamic Legal Arguments], trans. Muslich (Bangil: Al-Izzah, 2001), 118-126.

Before we conduct the test to determine the answer to the above question, I will show various cases of “deviations” from the *Shari’a* that have occurred in the real world. The main purpose of this chapter is to demonstrate that: (i) there is a genuine concern of well-being issues in understanding and interpreting Islamic Immutable Legal Texts, (ii) such concern is in direct conflict with the language and historical contexts of those texts, and (iii) the inconsistencies generated by Islamic jurists in interpreting Islamic legal provisions are real.

Do note that I am not inclined to present any normative justification for supporting these “deviations” or to claim that the deviations have properly considered the aspect of well-being and are in line with the provisions of the Basic Codes as a whole. At this point, I have to remind the readers that the ultimate goal of this dissertation is to show that there are probabilities that consequence-based theories of interpretation, particularly, Pragmatism and Law & Economics, are compatible with Islamic law, and that there could be situations in which the legal provisions of the Basic Codes do not maximize the overall well-being of the people. I am not arguing that Islamic jurists must always use consequence-based theories of interpretation nor do I argue that specific legal provisions of the Basic Codes are currently failing to promote the overall well-being.

To separate the wheat from the chaff, that is, to ensure that the “deviations” discussed in this chapter are highly correlated with well-being consideration set out within the universal principles of the Basic Codes, I will be using cases in which the clarity of the relevant legal texts in the Basic Codes is relatively undisputed, and their plain meaning or historical contexts are so clear that even a common reader can effortlessly understand their meaning. I also ensure that the “deviations” to the legal provisions that I pick were not caused by any dispensation or condition that is specifically granted to those provisions under the Basic Codes.<sup>2</sup>

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<sup>2</sup> See the discussion on this concept back in Chapter 2.

There will be three types of cases, each having different implication, that will be discussed in this chapter. The first type of cases deal with acts that are originally permitted and now prohibited or limited. The second type of cases deal with acts that are originally compelled and then no longer performed or ignored. The last type of cases deal with acts that are prohibited and yet seem to be permitted through certain means.

**B. PROHIBITING PERMISSIBLE ACTS: UNILATERAL DIVORCE AND SLAVERY**

**1. LIMITATION OF THE HUSBANDS' UNILATERAL RIGHT TO DIVORCE THEIR WIVES**

Under the *Shari'a*, the husband has an absolute right to repudiate his marriage at any time (for maximum 3 times) and to resume the marriage again as he deems fit within a certain period of reconciliation (only for the first and second instances).<sup>3</sup> Once the marriage is repudiated for the third time, such marriage will be completely terminated and he can only remarry his former wife under the following conditions, namely, his former wife has married another man, and she has been divorced by her new husband.<sup>4</sup>

Iran takes a different approach in dealing with the above issue. The late Ayatollah Khomeini, the supreme spiritual leader of Iran, argued that the court is free to grant divorce to the wife without having to obtain her husband's consent on the grounds of "hardship" in the marriage.<sup>5</sup> Ayatollah Sane'i, another spiritual leader of Iran pushed the argument of Ayatollah Khomeini even further by saying that hardship can be interpreted to mean as follows: if a woman

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<sup>3</sup> Kecia Ali, "Marriage in Classical Islamic Jurisprudence: A Survey of Doctrines," in *The Islamic Marriage Contract; Case Studies in Islamic Family Law*, ed. Asifa Quraishi and Frank E. Vogel (Cambridge: Harvard University Press, 2008), 24.

<sup>4</sup> *Id.*

<sup>5</sup> Ziba Mir-Hosseini, "A Woman's Right to Terminate the Marriage Contract: The Case of Iran," in *The Islamic Marriage Contract; Case Studies in Islamic Family Law*, ed. Asifa Quraishi and Frank E. Vogel (Cambridge: Harvard University Press, 2008), 219-220.

asks for a divorce from her husband and her husband refuses to give his consent, such refusal is on its own the proof of the wife "hardship" in the marriage.<sup>6</sup>

This has been further adopted in Iran's Family Protection Law, which also states that all divorces must go through the court, effectively abolishes the unilateral right of men to repudiate their marriage.<sup>7</sup> The Iranians argue that since the changes are only related to procedural matters, the state law is not contravening the general principle of Islamic law regarding husbands' rights in divorce cases.<sup>8</sup> It is an interesting idea, but there is no specific textual basis to say that legal procedures that were set out by God can be easily changed (as we have seen with the late Al-Ghazali case discussed in Chapter 2 on the value of women's testimony). In addition, some scholars might argue that Iran, which is controlled by the Shi'i, is not a part of the majority Sunni Muslims and therefore is not representative as a sample.<sup>9</sup> However, Indonesia, the largest Sunni Muslim country in the world, actually follows the same approach with Iran.<sup>10</sup> Malaysia, which is officially a Sunni Islamic nation, also adopts a similar practice.<sup>11</sup>

In designing the Indonesian version of Islamic family law, Indonesian legal scholars were also debating the validity of limiting the right of husbands to divorce their wife.<sup>12</sup> Surprisingly, the Indonesian scholars who made the final decision actually referred to Shi'i interpretation.<sup>13</sup> They argue that the procedure set out in Qur'an surah Al-Nisa' [4]:35 for reconciliation between couples

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<sup>6</sup> *Id.* at 223.

<sup>7</sup> *Id.* at 220-221.

<sup>8</sup> *Id.* at 220.

<sup>9</sup> See further discussion on the general differences between Sunni and Shi'i in Maria Massi Dakake, *The Charismatic Community: Shi'ite Identity in Early Islam* (Albany: State University of New York Press, 2007).

<sup>10</sup> Euis Nurlaelawati, *Modernization, Tradition and Identity – The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam: Amsterdam University Press, 2010), 54-55. Not only that Indonesia requires the divorce by husband to be conducted through the Religious Court, Indonesia also provides the right to wives to ask for divorce by themselves through the Religious Court without having any aid from the husband.

<sup>11</sup> Mohammad Hashim Kamali, "Islamic Law in Malaysia: Issues and Developments," *Year Book of Islamic & Middle Eastern Law* 4 (1997-1998): 164-165.

<sup>12</sup> See Nurlaelawati, *supra* note 10 at 119-120

<sup>13</sup> *Id.*

should be interpreted as mandatory and not voluntarily.<sup>14</sup> Meanwhile, the Malaysian scholars argue based on Qur'an surah Al-Baqara [2]:231 which states that the husband should provide kindness and equitable treatment to her estranged wife as the basis for requiring the court to interfere in the process.<sup>15</sup>

Speaking bluntly, those opinions do not make any sense if we view the precedent from the Basic Codes where it is clear that a husband's right to divorce his wife is not subject to his wife's or the court's approval.<sup>16</sup> There are no specific textual basis for saying that the reconciliation

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<sup>14</sup> The text of the Qur'an verse is as follow, "If you [believers] fear that a couple may break up, appoint one arbiter from his family and one from hers. Then, if the couple want to put things right, God will bring about a reconciliation between them: He is all knowing, all aware." See M.A.S Abdel Haleem, *The Qur'an* (New York: Oxford University Press, 2005), 54. See further discussion in Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 6, ed. Besus Hidayat Amin, trans. Akhmad Affandi (Jakarta: Pustaka Azzam, 2008), 945-950 and also Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 3, ed. Zainul Arifin, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2016), 76-77.

<sup>15</sup> See Kamali, *supra* note 11 at 164. The text of the Qur'an verse is as follow: "When you divorce women and they have reached their set time, then either keep or release them in a fair manner. Do not hold on to them with intent to harm them and commit aggression: anyone who does this, wrongs himself. Do not make a mockery of God's revelations; remember the favor He blessed you with, and the Scripture and wisdom He sent to teach you. Be mindful of God and know that He has full knowledge of everything." See Haleem, *supra* note 14 at 26. Here, Az-Zuhaili argues that Islam is not a religion which directs its believers to act in bad faith toward others as demonstrated by how a divorce should be conducted, namely, a husband shall not prolong the process in divorcing his wife, as prolonging could lead in more harm than good. See Wahbah Az-Zuhaili, *Tafsir Al-Wasith*, vol. 1, ed. Budi Permadi, trans. Muhtadi et al. (Jakarta: Gema Insani Press, 2012), 113. See also further discussion in Departemen Agama RI, *Al-Qur'an dan Tafsirnya* [Al-Qur'an and Its Interpretations], vol. 1 (Jakarta: Lembaga Percetakan Al-Qur'an, 2009), 335-343 and Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 1, ed. Achmad Yazid Ichsan and Muhammad Badri H., trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2013), 557-564.

<sup>16</sup> The Qur'an sets out one specific surah to discuss the issue of divorce, namely surah Al-Talaq. And there is clearly no discussion on the limitation of the husband's right to divorce his wife based on a court's judgment. The following verse 1-6 of that surah are reproduced for ease of reference: "Prophet, when any of you intend to divorce women, do so at a time when their prescribed waiting period can properly start, and calculate the period carefully: be mindful of God, your Lord. Do not drive them out of their homes—nor should they themselves leave—unless they commit a flagrant indecency. These are the limits set by God— whoever oversteps God's limits wrongs his own soul—for you cannot know what new situation God may perhaps bring about. When they have completed their appointed term, either keep them honorably, or part with them honorably. Call two just witnesses from your people and establish witness for the sake of God. Anyone who believes in God and the Last Day should heed this: God will find a way out for those who are mindful of Him, and will provide for them from an unexpected source; God will be enough for those who put their trust in Him. God achieves His purpose; God has set a due measure for everything. If you are in doubt, the period of waiting will be three months for those women who have ceased menstruating and for those who have not [yet] menstruated; the waiting period of those who are pregnant will be until they deliver their burden: God makes things easy for those who are mindful of Him. This is God's command, which He has sent down to you. God will wipe out the sinful deeds and increase the rewards of anyone who is mindful of Him. House the wives you are divorcing according to your means, wherever you house yourselves, and do not harass them so as to make their lives difficult. If they are pregnant, maintain them until they are delivered of their burdens; if they suckle your infants, pay them for it. Consult together in a good way— if you make difficulties for one another, another woman may suckle the child for the father." See Haleem, *supra* note 14 at 378-379. For further discussion on the explanation of these verses that support my idea above, see Muhammad Abdel Haleem, *Understanding the Qur'an: Themes and Style* (New York: I.B. Tauris & Co Ltd, 2001), 55-57.

process is mandatory. As recorded by Ibn Rushd (or better known as Averroes in the Western world), a very prominent classical Islamic scholars from Maliki School, all major classical Sunni schools agree that arbitration is voluntary and a husband's right to divorce is possessed only by himself, unless he agrees to appoint the arbitrators.<sup>17</sup> Similar opinions are also recorded by Ath-Thabari.<sup>18</sup>

To support the idea that the recommendation to treat the wife kindly can be interpreted to justify the rule that a husband cannot divorce his wife before the court says so, Mohammad Hashim Kamali argues that such interpretation is chosen to fulfill the objective of the Qur'anic verse mentioned above.<sup>19</sup> In choosing that interpretation, Kamali probably refers to the required meaning of the Qur'an (*iqtidha al-nass*) as discussed in his treatise on Islamic legal theory.<sup>20</sup> But if we refer to Wahbah Az-Zuhaili's explanation, the original understanding of that verse refers to the prescribed manner for husbands in divorcing their wives, namely, they should not burden their wives and play with the system.<sup>21</sup> This applies to cases where a husband divorces his wife, making the wife believes that he really wants to end their marriage, and then takes her back near the end of the reconciliation period just to create uncertainties for her.<sup>22</sup>

Some other scholars reject this court sanctioned divorce based on one of the Basic Codes' principles which stipulates that whatever is permitted by God cannot be prohibited by men and

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<sup>17</sup> See further discussions in Ibn Rushd, *The Distinguished Jurist's Primer: Volume II*, trans. Imran Ahsan Khan Nyazee (Reading: Garnet Publishing, 2000), 119. They differ though on whether the husband must specifically delegate his power to divorce his wife to the arbitrators to enable the arbitrators to separate them (Hanafi and Shafi'i) or whether the arbitrators automatically have such power once appointed (Maliki). More crucially, in its original understanding, the arbitrators must actually be the family members of the husband and wife, and only if these family members are not available can they appoint the ruler or judges as arbitrators.

<sup>18</sup> See Ath-Thabari, *supra* note 14 at 945-950.

<sup>19</sup> See Kamali, *supra* note 11 at 164.

<sup>20</sup> See discussion in Chapter 2 regarding linguistic rules of interpretation in Islamic law.

<sup>21</sup> See Az-Zuhaili, *supra* note 15 at 113.

<sup>22</sup> *Id.*

vice versa.<sup>23</sup> Under this principle, it can be argued that prohibiting the husband's rights to divorce his wife through court's decision is a direct violation of the husbands' Qur'anic right and therefore should be rejected.<sup>24</sup> Considering these debates, we can safely conclude that the Iranian, Indonesian and Malaysian scholars are relying more on their substantive commitments (most probably using the welfare maximization principle under the *Istislah* theory) in making their interpretation since the textual and historical arguments to support their case are not convincing. Of course, whether this "deviation" actually maximizes the overall-wellbeing of the people, or at least, the wives and the family, is a separate issue.

## 2. PROHIBITION OF THE SLAVERY INSTITUTION

Probably there is no better case than the institution of slavery to display how a completely permissible act was transformed into a prohibited one in Islamic law. There is no doubt that the current majority of Islamic jurists condemn the existence of slavery, arguing that it is not in line with the well-being of the people (especially those that become slaves) and must therefore be prohibited.<sup>25</sup> But reaching this current state of consensus was quite complicated. The title of Ehud Toludano's book, *As If Silent and Absent – Bonds of Enslavement in the Islamic Middle East*, perfectly describes the treatment of slavery legal issues in Islamic legal scholarship: silent or indirect, most of the time; which is not shocking.<sup>26</sup>

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<sup>23</sup> See Yusuf al-Qaradawi, *The Lawful and the Prohibited in Islam*, 2<sup>nd</sup> ed., trans. K. al-Hilbawi, M. Siddiqi, and S. Shukri (Cairo: Al Falah Foundation, 2001), 14-15.

<sup>24</sup> Al-Qaradawi also favors the unilateral right of husbands to divorce their wives as a part of God's wisdom, though he argues that in practice, Islamic law has set out some limitations (but not courts) so that husbands should be more careful in using their rights. See Yusuf al-Qaradawi, *Fatwa-Fatwa Kontemporer* [Contemporary Fatwas], vol. 2, ed. Subhan and M. Solihat, trans. As'ad Yasin (Jakarta: Gema Insani Press, 1995), 502-513.

<sup>25</sup> See Farhad Malekian, *Principles of Islamic International Criminal Law* (Leiden: Koninklijke Brill NV, 2011), 229-230.

<sup>26</sup> The majority of Islamic jurists generally refuse to discuss the validity of slave trading. See Ehud R. Toledano, *As If Silent and Absent – Bonds of Enslavement in the Islamic Middle East* (New Haven: Yale University Press, 2007), 15. In depth discussion on this issue can be found in Ehud R. Toledano, *Slavery and Abolition in the Ottoman Middle East* (Seattle: University of Washington Press, 1998), 135-154. Though in certain rare moments, there are some scholars who actively discussed the laws and rules relating to the permissibility of slavery. See further discussion

Dealing with slavery issues in the modern world is difficult to begin with. It is a universal principle nowadays that slavery is morally abhorrent and violates basic human rights, and this principle is so irrefutable that a citation is not even needed to support it because slavery is the ultimate form of being ripped from one's context, and thus from all the social relationships that make one a human being.<sup>27</sup> And yet, it is also an undeniable fact that slavery has existed and persisted in the Islamic world for more than a millennium across numerous regions from Africa to the Ottoman Empire.<sup>28</sup> It was only in the 20<sup>th</sup> century that most nations that adopted Islamic law as part of their legal system started to ban the institution of slavery.<sup>29</sup>

True, the persistent existence of the institution does not automatically mean that slavery is deemed to be legally valid under the Basic Codes. It might be argued that the widespread of slavery in the past was caused by the people's ignorance of the rules established by God and the Prophet. Sadly, I have to disagree with this apologetic notion. This is not a mere problem of ignorance since the Basic Codes provide a lot of materials that support the permissibility of the institution, and some of them are highly disturbing if viewed under the current trends of human rights and well-being considerations.

The first sign of slavery's permissibility can be found in Qur'an surah Al-Mu'minin [23]:1-7 which state that not only it is permissible for men to have sexual intercourse with their female slaves, it is also not a shameful action.<sup>30</sup> Following the logic of a famous Islamic legal maxim which

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in Chris Gratien, "Race, Slavery, and Islamic Law in the Early Modern Atlantic: Ahmad Baba al-Tinbukti's Treatise on Enslavement," *The Journal of North African Studies* 18 (2013): 461-465.

<sup>27</sup> David Graeber, *Debt: The First 5,000 years* (New York: Melville House Printing, 2011), 168.

<sup>28</sup> See for example: William Gervase Clarence-Smith, *Islam and the Abolition of Slavery* (London: Hurst and Company, 2006), 2-19. This book provides a clear description on how the institution of slavery is performed in various parts of the Muslim world. Also see Fariba Zarinebaf, *Crime and Punishment in Istanbul 1700-1800* (Berkeley: University of California Press, 2010), 94-97, which discusses the pervasive ownership of slavery by the ruling class in the Ottoman Empire and the slave trading industry in that era.

<sup>29</sup> See Bernard Lewis, *Race and Slavery in the Middle East* (Oxford: Oxford University Press, 1990), 79.

<sup>30</sup> The text of the verse is as follows: "[How] prosperous are the believers! Those who pray humbly, who shun idle talk, who pay the prescribed alms, who guard their chastity except with their spouses or their slaves —with these they are not to blame, but anyone who seeks more than this is exceeding the limits." See Haleem, *supra* note 14 at 215. Ath-Thabari

deeply condemns hypocrisy, namely, any act that supports or directly leads to a prohibited act is also prohibited,<sup>31</sup> if slavery is fully prohibited like *riba* and alcoholic drinks, certainly sexual intercourse with slaves must also be prohibited, which is not the case.<sup>32</sup> The second sign comes from the Qur'anic verses<sup>33</sup> and numerous Hadiths that permits enslavement of war prisoners.<sup>34</sup> Under those materials, it is permissible to annul the marriage of the women captives, enslave them, and having sexual intercourse without having permission from them (on in other words, rape).<sup>35</sup>

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explains that according to this verse, not only that having sexual intercourse with women slaves is permitted, it is also not a shameful action and it is acknowledged by God. See Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 18, ed. Edi Fr, trans. Ahsan Askan (Jakarta: Pustaka Azzam, 2009), 674-676.

<sup>31</sup> See further discussion in Azman Ismail and MD. Habibur Rahman, *Islamic Legal Maxims: Essentials and Applications* (Kuala Lumpur: IBFIM, 2013), 195-196.

<sup>32</sup> See Al-Qaradawi, *supra* note 23 at 22. The maxim states: if something is prohibited, anything which leads to it is likewise prohibited. The same principle is also applied for alcoholic beverages and *riba*. See also Ahmad ibn Naqib al-Misri, *Reliance of the Traveler: A Classic Manual of Islamic Sacred Law*, trans. Nuh Ha Mim Keller (Maryland: Amana Publication, 2008), 662. Al-Misri is a classical Islamic scholar from the Shafi'i School.

<sup>33</sup> On the permissibility of taking captives, Qur'an surah Muhammad [47]: 4 states: "When you meet the disbelievers in battle, strike them in the neck, and once they are defeated, bind any captives firmly – later you can release them by grace or by ransom – until the toils of war have ended. That [is the way]. God could have defeated them Himself if He had willed, but His purpose is to test some of you by means of others. He will not let the deeds of those who are killed for His cause come to nothing." See Haleem, *supra* note 14 at 331. Al-Qurthubi, pointed out that according to this verse, prisoners of war can be set free as a gracious act, ransomed for money, or freed to the other side in an exchange of prisoners. It does not, however, command that prisoners be released. They may thus continue to be held captive as well or in certain cases even executed, as there are numerous alternatives practiced by the Prophet at various times during different battles according to different circumstances. Although there are debates as to whether there are other verses in the Qur'an that abrogate this verse, al-Qurthubi notes that abrogation should only arise in cases where two verses are considered irreconcilable in their legal intent. If it is still possible to implement both verses under different circumstances, as in this case, there is no abrogation. Whether to slay prisoners of war because they are implacable adversaries, continue to hold them captive, or set them free must thus be decided on a case-by-case basis. See Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 16, ed. M Mukhlis B. Mukti, trans. Akhmad Khatib (Jakarta: Pustaka Azzam, 2009), 582-594.

<sup>34</sup> For example, see Hadith no. 6262 of Al-Bukhari's compendium of Hadiths in Muhammad ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 8, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 158, which states "Narrated Abu Sa'id: The people of (Banu) Quraiza agreed upon to accept the verdict of Sa'd. The Prophet sent for him (Sa'd) and he came. The Prophet said (to those people), "Get up for your chief, or said, "the best among you!" Sa'd sat beside the Prophet and the Prophet said (to him), "These people have agreed to accept your verdict." Sa'd said, "So I give my judgement that their warriors should be killed and their women and children should be taken as captives." The Prophet said, "You have judged according to the King's (Allah's) Judgement.""

<sup>35</sup> See Hadith no. 6603 of Al-Bukhari's compendium of Hadiths in Al-Bukhari, *supra* note 34 at 319, which states: "Narrated Abu Sa'id Al-Khudri: that while he was sitting with the Prophet, a man from the Ansar came and said, "O Allah's Messenger! We get slave girls from the war captives and we love property; what do you think about coitus interruptus?" Allah's Messenger said, "Do you do that? It is better for you not to do it, for there is no living creature which Allah has ordained to come into existence but will be created." See also Hadith no. 3608 of Muslim compendium of Hadiths in Abul Hussain Muslim bin Al-Hajjaj, *English Translation of Sahih Muslim*, vol. 4, ed. Huda Khattab, trans. Nasiruddin al-Khattab (Riyadh: Maktaba Dar-us-Salam, 2007), 108, which states: "It was narrated from Abu Sa'eed al-Khudri that on the Day of Unain, the Messenger of Allah sent an army to Awtas, where they met the enemy, fought them and prevailed over them. They captured some female prisoners, and it was as if the Companions of the Messenger of Allah felt

And of course, there could be no better sign than the fact that the Prophet himself also owned slaves and married one of his slaves.<sup>36</sup>

Slaves are essentially considered as pure goods or assets in Islamic law and are freely tradable,<sup>37</sup> which is similar with how slaves were treated in the pre-civil war US legal system, mere properties.<sup>38</sup> Classical Islamic scholars, based on a famous Hadith in Al-Bukhari's compendium, prohibited people whose liabilities exceed their assets to free any of their slaves because such act might jeopardize the interest of their creditors, even if such manumission has been previously promised to the slaves, a very early form of fraudulent conveyance.<sup>39</sup>

In the case of a female slave who claimed to a man that she has been released by her master and then the man married her, Ahmad bin Hanbal opines that the man must not take her words and instead should ask first for further proof that the woman has indeed been released from slavery, or confirmation from the woman's master.<sup>40</sup> If a man permits another man to have sexual intercourse with his slave, the second man will be exempted from penalty for adultery since such

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*reluctant to have intercourse with them because of their idolater husbands. Then Allah, the Mighty and Sublime, revealed: "Also (forbidden are) women already married, except those (slaves) whom your right hands possess", meaning, they are permissible for you once their 'Iddah has ended."*

<sup>36</sup> See for example Hadith no. 6161 in Al-Bukhari, *supra* note 34 at 106. See also John Ralph Willis, "Preface", in *Slaves and Slavery in Muslim Africa*, ed. John Ralph Willis (London: Frank Cass and Company Limited, 1985), viii. This was also confirmed by Ahmad bin Hanbal where it is recorded that he once asked the permission of his wife to buy an inexpensive girl slave to emulate the practice of the Prophet. See Ibn al-Jawzi, *Virtues of the Imam Ahmad ibn Hanbal*, vol.2, ed. and trans. Michael Cooperson (New York: New York University Press, 2015), 61. The Prophet's companions and wives also have slaves as can be found in many stories in Bukhari's and Muslim's collections.

<sup>37</sup> See further discussion and examples in Madeline C. Zilfi, *Women and Slavery in the Late Ottoman Empire* (Cambridge: Cambridge University Press, 2012), 161-162.

<sup>38</sup> See further discussion in John T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Whyte as Makers of the Masks* (Berkeley: University of California Press, 1976), 40-41.

<sup>39</sup> See Rushd, *supra* note 17 at 443. This is also show how Islamic law is in favor of creditors compared to the rights of the slaves. In fact, the practice can be traced back to Prophetic traditions. See for instance Hadith no. 2415 in Al-Bukhari's compendium of Hadiths which states: "*Narrated Jabir: A man manumitted a slave and he had no other property than that, so the Prophet cancelled the manumission (and sold the slave for him). Nu'aim bin Al-Nahham bought the slave from him.*" See Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 3, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 344.

<sup>40</sup> See Ahmad ibn Muhammad ibn Hanbal, *Chapters on Marriage and Divorce: Responses of Ibn Hanbal and Ibn Rahwayh*, trans. Susan A. Spector (Austin: University of Texas Press, 1993), 102-103.

act is considered as a gift to the other man.<sup>41</sup> All of these examples are in favor of the characterization of slaves as assets and not humans.

More interestingly, there are no penal sanctions for trading and use of slaves, although to be fair, there is a single Hadith in Bukhari (out of 7,397 Hadiths)<sup>42</sup> with the following text: "*The Prophet said, "Allah says, 'I will be against three persons on the Day of Resurrection: one who makes a covenant in My Name, but he proves treacherous, one who sells a free person (as a slave) and eats the price, and one who employs a laborer and gets the full work done by him but does not pay him his wages.'"*"<sup>43</sup> However, this Hadith only provides afterlife threats and as we will further discuss in Chapter 5, there is a significant difference between an afterlife threat and an actual penal sanction.

Ibnu Hajar Al-Asqalani, a prominent classical legal scholar from the Shafi'i School who was acknowledged as the most comprehensive commentator of Al-Bukhari's compendium of Hadiths, argues that the restriction stipulated in the above Hadith is related to someone who frees a slave then hides such situation from everyone, or forces such freed slave to work for him, or even worse, sells that freed slave to a third party.<sup>44</sup> So, this is slightly different with common sense opinion that the Hadith was intended to prevent the sale of an entirely free men into slavery.

As pointed out by Al-Asqalani, there are no prescribed sanctions in the Qur'an for those who sell a free man and this position has become an *Ijma* among the scholars,<sup>45</sup> though he did note that there were various debates among Islamic jurists on the permissibility of selling free men into slavery, but then somehow, the debates vanished mysteriously without explicit reasons

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<sup>41</sup> See Rushd, *supra* note 17 at 522.

<sup>42</sup> See Jonathan A.C. Brown, *The Canonization of al-Bukhari and Muslim: The Formation and Function of the Sunni Hadith Canon* (Leiden: Koninklijke Brill NV, 2007), 69. Or 7563 hadiths in Al-Bukhari's compendium of Hadiths if we refer to Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 9, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997)

<sup>43</sup> Recorded in Hadith no. 2227 in Al-Bukhari, *supra* note 39 at 238.

<sup>44</sup> See Ibnu Hajar Al-Asqalani, *Fathul Baari*, vol. 12, ed. Ahmad Zamroni, trans. Amiruddin (Jakarta: Pustaka Azzam, 2007), 410.

<sup>45</sup> *Id.*

(supporting my initial argument that the disappearance of slavery in the Muslim world owed more to external factors rather than internal legal rules).<sup>46</sup> In any case, sale and purchase of natural born slaves are definitely permitted,<sup>47</sup> and as discussed above, enslavement and the sale of men, women and children during war were also permitted since they were considered as war's booty.<sup>48</sup>

Apologetic scholars usually argue that the laws related to slavery are just temporary like the rules prohibiting alcoholic drinking which were imposed in stages,<sup>49</sup> and that the purpose of having such law is to eventually prevent and prohibit the whole institution since the institution was already pervasive when Islam came.<sup>50</sup> To be textually true and to make it consistent with the case of alcohol prohibition in the Basic Codes, the restriction on slavery institution should have been stated explicitly in the Qur'an prior to the death of the Prophet (which ended all forms of communication between God and mankind) since the gradual prohibition on alcohol (from *makruh* to *haram* act) in the Qur'an was finished before the Prophet's death.<sup>51</sup>

But the actual nail in the coffin that should put this idea of temporality to rest is the fact that the validity of slavery was generally acknowledged by many Islamic jurists during the 1,400

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 414.

<sup>48</sup> Recorded in among others, Hadith no. 2229 in Al-Bukhari, *supra* note 39 at 238. The hadith also discusses the permissibility for the fighters to have sexual intercourse with the women captives. Ath-Thabari claims that it is already a consensus among Islamic scholars that women and children captives shall be automatically enslaved as a result of war. Even if they embrace Islam afterwards, such conversion will not release them from the status of slavery. See further discussion in Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Al-Tabari's Book of Jihad: A Translation from the Original Arabic*, trans. Yasir S. Ibrahim (New York: The Edwin Mellen Press, 2007), 287-293. I am somewhat not surprised to find out that Wahbah Az-Zuhaili, despite being a contemporary scholar, approves the enslavement of women and children as a result of war albeit with certain minor requirements. See Wahbah Az-Zuhaili, *Fiqh Islam Wa Adillatuhu*, vol. 8, ed. Dadi M. Hasan Basri, trans. Abdul Hayyie al-Kaitani et al. (Depok: Gema Insani Press, 2011), 84-88.

<sup>49</sup> See Al-Qaradawi, *supra* note 23 at 67-68.

<sup>50</sup> See Az-Zuhaili, *supra* note 48 at 85.

<sup>51</sup> Historically, the prohibition of drinking alcoholic beverages was conducted through multiple stages before it was prohibited completely by God. Indeed, under Islamic legal theory, in some cases, God did not impose the ultimate obligation all at once, instructing communities to bring fundamental changes through pragmatic gradualism and not through revolutionary instantaneousness. See Liaquat Ali Khan, "Jurodynamics of Islamic Law," *Rutgers Law Review* 61 no. 2 (2008-2009): 244-245.

years history of Islamic law, though in a rather indirect way. A good example is Ibn Rushd's *Bidayatul Mujtahid* (written approximately 600 years after the birth of Islam) where he defines *zina* as all sexual intercourse that occurs outside of a valid marriage or a lawful ownership.<sup>52</sup> The sale and purchase of slaves are also recorded in *Bidayatul Mujtahid* as an example for legal discussion on the validity of sales through usurious means.<sup>53</sup> And as stated above, *Bidayatul Mujtahid* is not an anomaly, similar opinions on the validity of slavery institution and slave trading can be found in numerous treatises and regulations of the old Islamic empires and kingdoms spread across the planet.<sup>54</sup> This is why I previously argue that the persistent existence of slavery was not a mere problem of ignorance or misunderstanding, the institution was deeply embedded in the Basic Codes, and its elimination actually required a huge leap of faith.

The conclusion is clear, with the overwhelming numbers of Qur'anic verses, stories from the Hadiths, and the opinions from classical Islamic jurists on slavery, to argue that slavery is prohibited in entirety or just temporarily permitted under Islamic law based on textual and historical materials (without resorting to consequence-based theories of interpretation and various universal principles in the Basic Codes) is a herculean task, if not almost impossible, since there

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<sup>52</sup> See Rushd, *supra* note 17 at 534-536. He further states that all Islamic jurists (at least in his own era) agree with such definition. But what is more fascinating is the fact that the discussion on the legal status of slavery is found on chapters related to criminal law since Ibn Rushd did not write a specific chapter on the validity of slavery itself. *Bidayatul Mujtahid* itself is one of the most respected treatises on Islamic law. It is still used until today in various faculties of Islamic law around the world and can be considered as an elite representation of Sunni's legal scholarship. See also Hanafi scholars' similar definition of *zina* in Norman Calder, "The Hanafi Law on Fornication," in *Shari'a: Islamic Jurisprudence in the Classical Era*, ed. Colin Imber (Cambridge: Cambridge University Press, 2010), 37.

<sup>53</sup> See Rushd, *supra* note 17 at 171. This is highly ironic considering the fact that the book discusses the prohibition on sale of pigs and the dispute on the validity of selling dogs and cats, and yet, it does not show any problem in selling slaves (which indicates that slave trading was business as usual). On a separate note, we can learn a lot on how Islamic jurists made their legal reasoning just from their debates on the sale of dogs and cats.

<sup>54</sup> See for instance in Ghislaine Lydon, "Slavery, Exchange and Islamic Law: A Glimpse from the Archives of Mali and Mauritania," *African Economic History* 33 (2005):121-127. The discussion ranges from the validity of slavery institution to techniques for selling slaves in the market. See also another classical treatise from Hanafi School that yields similar analysis in Burhan Al-Din al-Farghani al-Marghinani, *Al-Hidayah – The Guidance: A Translation of Al-Hidayah Fi Sharh Bidayat Al-Mubtadi, A Classical Manual of Hanafi Law*, vol. 2, trans. Imran Ahsan Khan Nyazee (Bristol: Amal Press, 2008), 211.

are a lot of verses and stories to be reconciled, including Qur'anic verses that prohibit people from prohibiting permissible things<sup>55</sup> and Hadith stories that permit the institution.<sup>56</sup>

Some scholars seem to believe that the rules on slavery is no longer relevant on the grounds that slavery does not exist anymore.<sup>57</sup> While the accuracy of such claim is subject to further debates,<sup>58</sup> there is a huge missing link in their argument. It is not conclusive yet that the legal institution of slavery did disappear naturally due to the betterment of human nature without any physical and political intervention, and it is even more obscure whether this was caused by Islamic law.

From historical perspective, the elimination of slavery in the modern world involved several brutal wars, foreign intervention, and regulatory prohibitions in various jurisdictions including nations that claimed to be religious or adopted the Basic Codes' provisions as part of their laws.<sup>59</sup> Therefore, the legal issue is actually very important, namely, were the earlier prohibitions made by those "Islamic" countries valid and made in accordance with the provisions of the Basic Codes? What if someone argues that the right to have and enjoy slaves is a fundamental right secured by the Basic Codes? Such argument is not entirely implausible given the applicable provisions of the Basic Codes. In the words of the late Professor Bernard Lewis,

*"The abolition of slavery itself would hardly have been possible. From a Muslim point of view to forbid what God permits is almost as great an offense to permit what God forbids – and slavery was authorized and regulated by the holy law."*<sup>60</sup>

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<sup>55</sup> See Al-Qaradawi, *supra* note 23 at 12.

<sup>56</sup> *Id.*

<sup>57</sup> See Lewis, *supra* note 29 at 79.

<sup>58</sup> This is highly correlated with how we define the practice of slavery itself. See the complete discussion in Suzanne Miers, "Contemporary Forms of Slavery," *Canadian Journal of African Studies* 34 (2000): 714-747.

<sup>59</sup> See for example in Mary Ann Fay, "Slavery in the Ottoman Empire and Its Demise, 1800-1909 by Y. Hakan Erdem," *International Journal of Middle East Studies* 30 (1998): 574-576, Ehud R. Toledano, "Late Ottoman Concepts of Slavery (1830s-1880s)," *Poetics Today* 14 (1993): 485-493, and Lewis, *supra* note 29 at 78-84.

<sup>60</sup> See Lewis, *supra* note 29 at 78.

In the end, there can only be two possibilities. First alternative, we conclude that slavery must be prohibited based on well-being consideration. In such case, the notion that Islamic law always maximize overall welfare is no longer true, and the second definition of perfection will become the only alternative, or else, the Rationality Parameters will be violated. Consequently, other provisions of the Basic Codes may also be subject to further review if necessary to assess their compatibility with the universal principle(s) of the Basic Codes.

Or, alternatively, we prove empirically that the rules on slavery permissibility always maximize the welfare of the society at all time, including in our current modern world, or at the very least, it is the best rule among all other possible rules. Consequently, slavery should not be prohibited *per se* and the market should be the one to decide whether the trading of slaves would continue based on supply and demand (since it is a permissible act and people are generally free to choose their own course of actions regarding such permissible act).<sup>61</sup> Are there any scholars out there who are brave and smart enough to take this daunting challenge? In Chapter 6, I will show that given the applicable rules of slavery in Islamic law, it is highly probable that the institution will continue to thrive instead of dying naturally.

### C. WAIVING OBLIGATED ACTS: THE ELIMINATION OF THEFT'S PENAL SANCTIONS

Under the Basic Codes, the punishment for theft is hand amputation which is reflected in Qur'an surah Al-Maida [5]:38-40 that state: *“Cut off the hands of thieves, whether they are man or woman, as punishment for what they have done – a deterrent from God: God is almighty and wise. But if anyone repents after his wrongdoing and makes amends, God will accept his repentance: God is most forgiving, most merciful. Do you [Prophet] not know that control of the heavens and earth belongs solely to God? He punishes whoever He will and forgives whoever He will: God has power over everything.”*<sup>62</sup>

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<sup>61</sup> This is the essence of a *mubah* act. See our discussion in Chapter 1.

<sup>62</sup> See Haleem, *supra* note 14 at 71.

Several Hadiths further explain that the punishment is not applied to any type of theft, but only to those cases in which the stolen object's value is equal to a quarter of Dinar or a shield.<sup>63</sup> It is quite a straightforward provision and non-controversial, at least until modern days when the majority of Islamic nations and countries who adopt the Basic Codes as part of their legal system have treated the provision as if it never existed.<sup>64</sup>

The decision to ignore the punishment is not without any precedent, though in a rather limited version. Caliph Umar bin Khatab's once released convicted thieves from hand amputation punishment during a famine period in Medina.<sup>65</sup> Strictly speaking, the Basic Codes never state that the penal sanction for thefts can be waived simply because of a famine.<sup>66</sup> In Islamic legal discourse, it is often argued that the punishment for theft is a part of God's personal right which cannot be waived by men (this concept of God's right is also applicable for the punishment of *zina*, *hirabah*

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<sup>63</sup> See Hadith no. 6789 in Al-Bukhari, *supra* note 34 at 410, which states: "Narrated 'Aishah: The Prophet said, "The hand should be cut off for stealing something that is worth a quarter of a Dinar or more."" See also Hadith no. 6792 in *Id.* at 411, which states. "Narrated 'Aishah: The hand of a thief was not cut off during the lifetime of the Prophet except for stealing something equal to a shield in value."

<sup>64</sup> See Malekian, *supra* note 25 at 405. Historically speaking, it was not until the Iranian revolution that there was a new revivalist movement for bringing back these old penal sanctions into the stage. Politics played a lot of role in this case and implementation varied among multiple jurisdictions, so that even when the sanctions were reintroduced, they were not practiced in courts. See further discussion in Sadakat Kadri, *Heaven on Earth: A Journey Through Shari'a Law From the Deserts of Ancient Arabia to the Streets of the Modern Muslim World* (New York: Farrar, Straus and Giroux, 2012), 211-236.

<sup>65</sup> See Werner Ende, "Justice as a Pervasive Principle in Islamic Law," in *Islam and the Rule of Law – Between Sharia and Secularization*, ed. Birgit Krawietz and Helmut Reifeld (Berlin: Konrad-Adenauer-Stiftung, 2008), 30. This is a very famous case as recorded in many literatures on Islamic law and *tafsir* of Qur'an. According to Ath-Thabari, the famine was so severe that it affected all of the people in Medina and spread so much death. People even started to slaughter their sheep but then disgusted with the appearance of the animals and would not eat even though they are starving. See Abu Ja'far Muhammad bin Jarir Ath-Thabari, *The History of Al-Thabari*, vol. 13, *The Conquest of Iraq, Southwestern Persia, and Egypt*, trans. Gautier H. A. Juynboll (Albany: State University of New York Press, 1989), 155.

<sup>66</sup> See similar opinions from different major Islamic law schools in Muhammad Ibn Idris Al-Shafi'i, *Al Umm*, vol. 12, ed. Badruzzaman, trans. Amir Hamzah (Jakarta: Pustaka Azzam, 2015), 155-166 (for Shafi'i school), Ibnu Qudamah, *Al Mughni*, vol. 13, ed. M. Sulton Akbar, trans. Muhyiddin Mas Rida, M. Zuhirsyan, and Ahmad Zuhri Rangkuti (Jakarta: Pustaka Azzam, 2013), 259-280 (for Hanbali school), See Marghinani, *supra* note 54 at 247-264 (for Hanafi school), Rushd *supra* note 17 at 536-542 (for Maliki school), and Wahbah Az-Zuhaili, *Fiqh Islam Wa Adillatuhu*, vol. 7, ed. Arif Muhajir, trans. Abdul Hayyie al-Kaitani et al. (Depok: Gema Insani Press, 2011), 371-377 (for a contemporary view).

and murder).<sup>67</sup> Abu'l A'la Mawdudi, a famous conservative Islamic scholar from Pakistan, claims that if a person rejects the implementation of God's law simply because he thinks such law is barbarous (which is one of many possible reasons for waiving such law), such person should explicitly declare that he actually rejects Islam, which has severe consequences.<sup>68</sup>

We can only wonder whether Islamic jurists, especially the most conservative ones, are brave enough to say that Caliph Umar bin Khatab, one of the most loyal companions of the Prophet, who was honorably titled al-Faruq by the Prophet himself, that is, the one who can distinguish the right things from the wrong things, has rejected Islam because of his decision above (which is only an example from many of his decisions that may not be in line with the clear texts of the Qur'an and Hadiths).<sup>69</sup>

Indeed, if we stick to the texts in the Basic Codes and the original understanding of those texts, it is incredibly difficult to establish a legal basis for supporting Umar's decision.<sup>70</sup> Some scholars argue that this is evidence of Umar's adherence to the principle of forgiveness and necessity in the Qur'an and therefore his decision is still textually justified.<sup>71</sup> As cited above, Qur'an surah Al-Ma'ida [5]:38-39 does say as follows: "... *But if anyone repents after his wrongdoing and*

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<sup>67</sup> Rudolph Peters, *Crime and Punishment in Islamic Law – Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge: Cambridge University Press, 2005), 55.

<sup>68</sup> Abu'l A'la Mawdudi, "The Islamic Law," in *Princeton Readings in Islamist Thought – Texts and Contexts from al-Banna to Bin Laden*, ed. Roxanne L. Euben and Muhammad Qasim Zaman (Princeton: Princeton University Press, 2009), 104. This is quite a mainstream thought in conservative Islamic jurists' circle.

<sup>69</sup> For a biography of Umar bin Khatab and further readings on cases that he decided during his tenure as the Caliph, see Ahmad Zidan, *The Rightly Guided Caliph*, trans. Dina Zidan (Cairo: Islamic Inc., 1998), 105-159. Discussing the entirety of Umar's decision will need a separate paper. Suffice to say though in this paper that most of his decisions actually represent the Law and Economics approach.

<sup>70</sup> Interestingly, Ibnu Qudamah, a prominent Hanbali scholar actually took Umar's opinion as a legal basis for waiving the punishment in his *magnum opus*, *Al Mughni*. See Qudamah, *supra* note 66 at 346-347.

<sup>71</sup> See as an example in Nazeem Goolam, "Ijtihad and Its Significance for Islamic Legal Interpretation," *Michigan State Law Review* 2006 (2006): 1447. Similar case also occurred as recorded in *Al-Muwatta*, the seminal work of Malik bin Anas. In this case, Umar bin Khatab waives the sanction for a slave that stole the assets of his master since Umar deems that the slave has the right to parts of his master assets. Hanafi scholars agree with Malik's opinion and argue that the slave's hand cannot be amputated since his master is liable for his well-being. See Muhammad bin Al-Hasan Ash-Shaybani, *The Muwatta of Imam Muhammad: The Muwatta of Imam Malik ibn Anas in the Narration of Imam Muhammad ibn al-Hasan ash-Shaybani*, trans. Mohammed Abdurrahman and Abdassamad Clarke (London: Turath Publishing, 2004), 297.

*makes amends, God will accept his repentance: God is most forgiving, most merciful.*"<sup>72</sup> Taken at face value, it seems reasonable to think that based on such verse, the sanctions can be waived on the basis of necessity and forgiveness, as if there exist a specific *rukhsa* for waiving such punishment.<sup>73</sup>

But not all scholars agree with this explanation. Ath-Thabari cites various Hadiths and opinions from classical commentators of the Qur'an which state that the repentance is only applicable after the punishment has been conducted.<sup>74</sup> Hadith no. 6800 from Al-Bukhari compendium of Hadith states: "*Narrated 'Aishah: The Prophet cut off the hand of a lady, and that lady used to come to me, and I used to convey her message to the Prophet, and she repented, and her repentance was sincere.*"<sup>75</sup> In other words, the repentance will only be accepted by God once the punishment is executed, and repentance does not exempt the punishment.<sup>76</sup>

Ibn Rushd cites opinions from Maliki and other schools where forgiveness can only be granted by the victim of the theft, not the ruler of the land, which is consistent with the rule on forgiveness in homicide cases.<sup>77</sup> And if the forgiveness is given after the case has been reported to

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<sup>72</sup> See Haleem, *supra* note 14 at 67.

<sup>73</sup> Quraish Shihab argues that if the thief repents and returns the goods then the hand amputation sanction should not be implemented. Quraish Shihab also argues that from Arabic language perspective, the term used for "thief" seems to cover multiple offenses, meaning that this punishment should only be applied to repeat offenders. See M. Quraish Shihab, *Tafsir Al-Mishbah – Pesan, Kesan dan Keserasian al-Qur'an* [Tafsir Al-Mishbah – Message, Image and the Harmony of the Qur'an], vol. 3 (Jakarta: Lentera Hati, 2009), 111-112. Apparently, similar approach was also being used in Cairo during the Mamluks regime, though not consistently. See Carl F. Petry, *The Criminal Underworld in a Medieval Islamic Society: Narratives from Cairo and Damascus Under the Mamluks* (Chicago: Middle East Documentation Center, 2012), 53-54. On a separate note, Ahmad bin Hanbal said that he supports Umar's decision and that he will also waive the punishment if the theft was done out of necessity and that people are suffering hardship and famine. See 'Ali Muhammad As-Sallabi, *'Umar Ibn Al-Khattab: His Life and Times*, vol. 1, trans. Nasiruddin al-Khattab (Riyadh: International Islamic Publishing House, 2009), 422. Note the additional condition: people are suffering hardship and famine. I would argue later on that this is the key to understand Umar's decision while compassion is just a less insignificant factor.

<sup>74</sup> See Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 8, ed. Besus Hidayat Amin and M. Sul-ton Akbar, trans. Akhmad Affandi and Benny Sarbeni (Jakarta: Pustaka Azzam, 2008), 869-871.

<sup>75</sup> See Al-Bukhari, *supra* note 34 at 413.

<sup>76</sup> *Id.*

<sup>77</sup> These opinions are based on several Hadiths from the Prophet. See Rushd, *supra* note 17 at 545-546.

the ruler, Maliki and Shafi'i Schools argue that the punishment must still be conducted while the Hanafi School argues that the punishment can be waived.<sup>78</sup>

What is then the proper reasons for Umar's decision since he did not cite any authority when he issued his policy? Is it simply because he is Umar bin Khatab, the second most important companion of the Prophet and a person guaranteed to enter heaven?<sup>79</sup> A legal theory that says that an act is legally acceptable just because a great man says so seems really weak, especially for Islamic legal theory that claims that the Prophet is the only man that has the authority to determine what is wrong and right other than God.<sup>80</sup>

Can we explain Umar's decision based on his understanding of God's implicit objectives? Might be, but in such case, aren't we acknowledging that the objective is more important than the text in this case? Whatever the reason is, it is highly unlikely that the decision was made purely based on compassion and human rights issue. If this is true, we should see many other theft cases in which the same principle is applied, namely any thief that steals because of necessity should be forgiven and exempted from the amputation punishment outside famine condition.<sup>81</sup> I have not found such precedent and it would be interesting to see an actual case recorded in the first generation of Muslims reflecting such measure.

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<sup>78</sup> *Id.* at 546.

<sup>79</sup> Hadith no. 7262 of Al-Bukhari compendium of Hadiths states: "Narrated Abu Musa: The Prophet entered a garden and told me to guard its gate. Then a man came and asked permission to enter. The Prophet said, "Permit him and give him the glad tidings that he will enter Paradise." Behold! It was Abu Bakr. Then 'Umar came, and the Prophet said, "Admit him and give him the glad tidings that he will enter Paradise." Then 'Uthman came and the Prophet said, "Admit him and give him the glad tidings that he will enter Paradise.'" See Al-Bukhari, *supra* note 42 at 227.

<sup>80</sup> See M. Mustafa Al-Azami, *On Schacht's Origin of Muhammadan Jurisprudence* (Oxford: Oxford Centre for Islamic Studies, 1996), 69-71.

<sup>81</sup> To clarify, this refers to cases where the thieves' well-being is not the liability of the victim, meaning that the thieves must steal the goods from independent parties. See Ash-Shaybani, *supra* note 71 at 297. For a summary of requirements for imposing the hand amputation sanction, please refer to Al-Misri *supra* note 32 at 613-615. In Hadith no. 4410 of Sahih Muslim, the Prophet clearly says that if his daughter, Fatimah, commits theft, he will personally cut her hand off. No forgiveness there. See Muslim, *supra* note 35 at 458-459.

If a temporary measure made by Umar bin Khatab was still hotly debated and questioned in Islamic legal scholarship, how one can argue that the punishment for theft can be waived in its entirety as currently practiced in the majority part of the modern world? I guess it cannot be done unless we are using consequence-based theories of interpretation and even then, there is no guarantee that such waiver can be justified.

#### D. PERMITTING PROHIBITED ACTS: THE PUZZLE OF ISLAMIC FINANCING STRUCTURE

For our last case study, we will be discussing the prohibition of *riba* and the Islamic financing structures that were supposed to act as its rivals or alternatives. As I briefly mentioned in Chapter 1, the exact definition of *riba* has not been fully settled, particularly in relation to certain form of barter transaction. However, the majority of Islamic jurists agree that any form of interest attached to a loan constitutes *riba*.<sup>82</sup> *Riba* is such a despicable act that in one Hadith, the Prophet cursed not only the lender, but also the borrower, the person who records the transaction and the

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<sup>82</sup> Qur'an surah Al-Baqara [2]:278-281 states: "You who believe, beware of God: give up any outstanding dues from usury, if you are true believers. If you do not, then be warned of war from God and His Messenger. You shall have your capital if you repent, and without suffering loss or causing others to suffer loss. If the debtor is in difficulty, then delay things until matters become easier for him; still, if you were to write it off as an act of charity, that would be better for you, if only you knew. Beware of a Day when you will be returned to God: every soul will be paid in full for what it has earned, and no one will be wronged." See Haleem, *supra* note 14 at 32. Al-Qurthubi commented that in the Islamic tradition, loans (as opposed to investments) were ideally charitable in nature, owing to the time factor in giving and taking money and since other transactions and financial instruments, such as credit sales and leases, were available for non-charitable investments and the raising of funds. Hence the invitation in this passage to turn previously *ribā*-laden loans into charity in the case of a debtor in dire financial circumstances: *and it is better for you to give [it] as charity*. A Hadith states, "Whosoever grants a delay to one in difficult circumstances shall be credited an act of charity for each day of it." This does not negate the claim of a lender to the original principal, since the verse encourages *a respite until there is ease* but does not require it. See Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 3, ed. Mukhlis B. Mukti, trans. Fathurrahman, Ahmad Hotib, and Dudi Rosyadi (Jakarta: Pustaka Azzam, 2012), 820-834. In addition, Qur'an surah Al-Rum [30]:39 states: "Whatever you lend out in usury to gain value through other people's wealth will not increase in God's eyes, but whatever you give in charity, in your desire for God's approval, will earn multiple rewards." See Haleem, *supra* note 14 at 259. Az-Zuhaili notes that the verse recommends Muslims to give *Infaq*, types of gifts which will actually guarantee their wealth. See Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 11, ed. Zainul Arifin, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2016), 113-118. See also further comments in Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 14, ed. M. Iqbal Kadir, trans. Faturrahman Abdul Hamid, Dudi Rosyadi, and Marwan Affandi (Jakarta: Pustaka Azzam, 2009), 85-93. And finally, see Hadith no. 4089 in Muslim's compendium of Hadiths states: "It was narrated from 'Ubaidullāh bin Abi Yazid that he heard Ibn 'Abbās say: "Usamah bin Zaid told me that the Prophet said: Riba is only in the case of delayed payment.'" See Abul Hussain Muslim bin Al-Hajjaj, *English Translation of Sahih Muslim*, vol. 4, ed. Huda Khattab, trans. Nasiruddin al-Khattab (Riyadh: Maktaba Dar-us-Salam, 2007), 318.

two witnesses to such transaction.<sup>83</sup> And while the Qur'an states that God has prohibited *riba* and permitted sale and purchase transaction, Islamic jurists are still disputing which sale and purchase transactions could be permitted and which ones should be prohibited since it resembles *riba* too much.<sup>84</sup>

All three financing structures that will be discussed below basically resemble *riba*-based financing from economics perspective (though they are different in terms of formalistic legal form), which begs a fundamental question: why bother prohibiting *riba* if the available alternatives are essentially the same? Would not that be equal to hypocrisy which is highly disdained in the Basic Codes?<sup>85</sup> The first and the last financing structures are *murabahah* (costs plus financing) and *ijarah* (lease-based financing), respectively. Both structures are generally accepted by Islamic jurists and represent the most widely used form of Islamic financing in practice.<sup>86</sup> The second one is the *bay' al-'inah*, a controversial financing scheme that is generally prohibited other than in Malaysia.

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<sup>83</sup> Hadith no. 4093 of Muslim's compendium of Hadiths states: "It was narrated that Jabir said: "The Messenger of Allah cursed the one who consumes Riba and the one who pays it, the one who writes it down and the two who witness it," and he said: "They are all the same."" See Muslim, *supra* note 82 at 319.

<sup>84</sup> Qur'an surah Al-Baqara [2]:275-276 states: "But those who take usury will rise up on the Day of Resurrection like someone tormented by Satan's touch. That is because they say, 'Trade and usury are the same,' but God has allowed trade and forbidden usury. Whoever, on receiving God's warning, stops taking usury may keep his past gains – God will be his judge – but whoever goes back to usury will be an inhabitant of the Fire, there to remain. God blights usury but blesses charitable deeds with multiple increase: He does not love the ungrateful sinner." See Haleem, *supra* note 14 at 31-32. Al-Qurthubi points out that the verse means that although the principal amount can still be legitimately expected from the relevant debtor, the added increase to the principal was cancelled. This applied only to outstanding *ribā*; past *ribā* was not opened to being reclaimed. See Al-Qurthubi, *supra* note 82 at 889-893. Further comments on usury and its negative impact towards individuals and the society is further discussed in Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 2, ed. Achmad Yazid Ichsan, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2013), 111-132 and Seyyed Hossein Nasr, ed., *The Study Qur'an: A New Translation and Commentary* (New York: HarperCollins Publishers, 2015), 119.

<sup>85</sup> See the discussion in Chapter 3.

<sup>86</sup> See further discussion in Harris Irfan, *Heaven Bankers: Inside the Hidden World of Islamic Finance* (New York: The Overlook Press, 2016), 135-136. In general, *murabahah* transactions account for about 80%-90% of Islamic bank business with *ijarah* coming in the second place. See Abdel-Rahman Yousri Ahmad, "Islamic Modes of Finance and the Role of Sukuk," in *Islamic Finance: Instruments and Markets*, ed. Conrad Garner (London: Bloomsbury Information Ltd, 2010), 7.

## 1. THE MURABAHAH FINANCING SCHEME (FIXED INTEREST DEBT FINANCING)

In classical terms, *murabahah* is a transaction where a seller declares to the buyer the price at which he had bought the goods and then inform the profits that he will expect from the buyer.<sup>87</sup> It is basically a sale and purchase transaction in which the seller informs his basic costs to the buyer before asking for the proposed profits. Several classical Islamic jurists discussed the factors that can be and cannot be calculated in determining the actual costs and permitted profits.<sup>88</sup> In contemporary discussion, however, *murabahah* is defined as a financing scheme where an Islamic bank purchases an asset from third parties for the benefit of a customer (i.e. the debtor) and then sells the asset to such customer with an agreed upon mark-ups on the costs.<sup>89</sup>

As long as the mark-up amount is fixed and therefore cannot be changed during the financing period without mutual consent of the parties, the bank can agree with its client on the amount of mark-up profit and administrative costs that it would like to charge without having to satisfy certain conditions such as in the past.<sup>90</sup> This means that the bank can charge anything that it wants so long as the debtor initially agrees, and theoretically speaking, there is no legal restriction if the banks decide to charge an exorbitant amount of mark-up profit to the debtor, though in practice, they just refer to the available market interest rate.<sup>91</sup>

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<sup>87</sup> See Rushd, *supra* note 17 at 256.

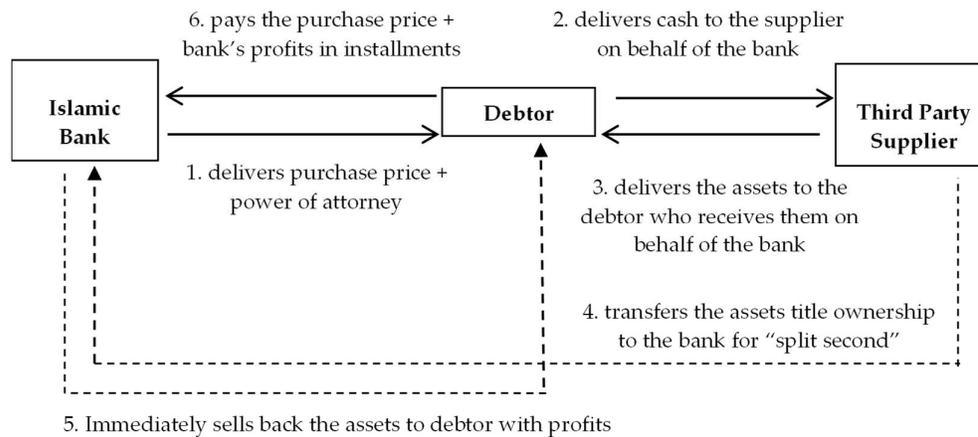
<sup>88</sup> *Id* at 257.

<sup>89</sup> See Muhammad Akram Khan, *Islamic Economics and Finance: A Glossary*, 2<sup>nd</sup> ed. (London: Routledge, 2003), 26. Notice that there is no limitation on the profits that the seller might acquire from *murabahah* transaction. This make *murabahah* structure as a very effective way to bypass the *riba* restriction and also to defeat the argument that *riba* should only be prohibited when the amount is excessive. In practice, due to competition, Islamic bank will take into account the interest rate set up by conventional banks for similar type of financing.

<sup>90</sup> See Muhammad Ayub, *Understanding Islamic Finance* (England: John Wiley & Sons, Ltd., 2007), 214.

<sup>91</sup> See Qudeer Latif and Susi Crawford, "Introduction to Islamic Financial Risk Management Products," in *Islamic Finance: Instruments and Markets*, ed. Conrad Garner (London: Bloomsbury Information Ltd, 2010), 12.

Figure 3.1: *Murabahah* Financing Structure



As we can see, the sale and purchase structure is only used for financing purpose and should not be considered as a real sale and purchase. The assets were never delivered to the bank, and the bank does not really own the assets, except maybe for a split second. The Islamic bank's sole purpose in granting the power of attorney to the debtor (which is to represent the bank in buying the assets from third parties and then to sell such assets to the debtor himself) is to ensure that such transaction will be formally deemed as a sale and purchase under Islamic law and therefore will not be considered as a transaction involving *riba*.<sup>92</sup>

Essentially, the structure of the assets transfer in *murabahah* will significantly depend on the tax treatment of Islamic financing transactions in the relevant countries. As an example, Malaysia has already considered such sale and purchase transaction as merely for financing purposes and exempts the sale and purchase tax based on its tax neutrality principle.<sup>93</sup> Singapore also adopts

<sup>92</sup> Such formalistic thinking is the main reason why some Islamic scholars actually view the entire transaction structure as simply a leeway from *riba* based financing. See Mehmet Asutay, "Islamic Microfinance: Fulfilling Social and Developmental Expectations," in *Islamic Finance: Instruments and Markets*, ed. Conrad Garner (London: Bloomsbury Information Ltd, 2010), 27.

<sup>93</sup> See further discussion in Dato Dr Nik Norzrul Thani Nik Hasan Thani and Madzlan Hussain, "Legal and Regulatory Issues Concerning Islamic Finance's Development in Malaysia," in *Current Issues in Islamic Banking and Finance: Resilience and Stability in the Present System*, ed. Angelo M. Venardos (Singapore: World Scientific Publishing Co. Pte. Ltd., 2010), 81-98.

similar policy with Malaysia in order to boost the growth of Islamic finance industry,<sup>94</sup> while Indonesia was a little bit late in adopting the same view for *murabahah* transaction.<sup>95</sup> Prior to the promulgation of such tax regulation, there were a lot of tax disputes between Indonesian Islamic banks and tax authorities since the tax authorities insist that the sale and purchase in *murabahah* transaction should be treated as a real transaction with certain VAT consequences.

From an economic point of view, *murabahah* is very similar to conventional secured debt financing with a fixed interest rate. The bank provides the necessary funds to the debtor (whose amount is equal to the value of the goods to be bought by the customer) and then it charges a fixed “interest” rate attached to such principal amount to be repaid in full by the customer in periodical installments. The banks can also use the relevant goods as a security for repayment. Some scholars argue that in *murabahah* structure, Islamic banks must bear the risk of the product to the extent the banks have not legally received the products, as if the banks acting as real trader instead of financier.<sup>96</sup> However in practice, banks will simply transfer such risks to their customers since both parties understand that this is a financing transaction instead of a pure sale and purchase transaction.<sup>97</sup>

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<sup>94</sup> See further discussion in Arfat Selvam, "Legal and Regulatory Changes to Promote the Development of Islamic Banking and Finance in Singapore," in *Current Issues in Islamic Banking and Finance: Resilience and Stability in the Present System*, ed. Angelo M. Venardos (Singapore: World Scientific Publishing Co. Pte. Ltd., 2010), 17-44.

<sup>95</sup> See further discussion in Hanim Hamzah, "Recent Legal and Regulatory Developments for Islamic Banking and Finance in Indonesia," in *Current Issues in Islamic Banking and Finance: Resilience and Stability in the Present System*, ed. Angelo M. Venardos (Singapore: World Scientific Publishing Co. Pte. Ltd., 2010), 99-114.

<sup>96</sup> Ayub, *supra* note 90 at 221. It is interesting to note that Muhammad Ayub argues that the most ideal option for *murabahah* financing structure would be where the banks act as a direct trader. He recognizes though that relying on this idea would impose significant managerial problems on the banks. This is a strong evidence that *murabahah* financing cannot be used as if it is a true sale and purchase transaction. It will not work simply because the business of a bank is not for trading goods. See also the discussion in Muhammad Yusuf Saleem, *Islamic Commercial Law* (Singapore: John Wiley & Sons, Ltd., 2013), 37.

<sup>97</sup> This is based on my experience in handling Islamic finance transactions in Indonesia. Even the Central Bank of Indonesia clearly stipulates in its regulations that in *murabahah* structure, the bank is acting as a financier and the regulation is silent with respect to risk allocation, allowing the banks and the customer to make their own arrangements. See also Selvam, *supra* note 94 at 31-33.

The only major “risk” that Islamic banks must bear in *murabahah* financing is that it cannot change its mark-up rate unilaterally at any time during the period of the financing.<sup>98</sup> But this is not a real “risk” as it can simply be avoided by charging a higher rate of mark-up which can be considered as a premium in giving greater certainties to the customers (since the amount is fixed). One may question, what is then the difference of this structure with the prohibited *riba*-based financing structure? Granted, *murabahah* structure is a little bit “better” than the Malaysian *bay’ al-’inah* (as discussed below) since the assets in *murabahah* are for real commercial purposes. And there is no doubt that the super majority of Islamic jurists support the use of *murabahah* financing structure.<sup>99</sup> But is not this just another example of formalistic way of thinking that puts form over substance? Are these scholars satisfied with such way of thinking? How to tell that this is not mere hypocrisy?

## 2. THE BAY’ AL-’INAH CONTROVERSY

For the second financing structure, we will return to Malaysia to discuss one of the most controversial structures in Islamic financing, the *bay’ al-’inah*. The contract of *bay’ al-’inah* normally involves a sale of an asset by a first party to the second party for immediate or spot payments followed by an immediate sale of the same asset by the second party to the first party for a higher amount on deferred payments.<sup>100</sup> The asset is by no means useful to both parties either for consumption purposes or derivation of usufruct right.<sup>101</sup>

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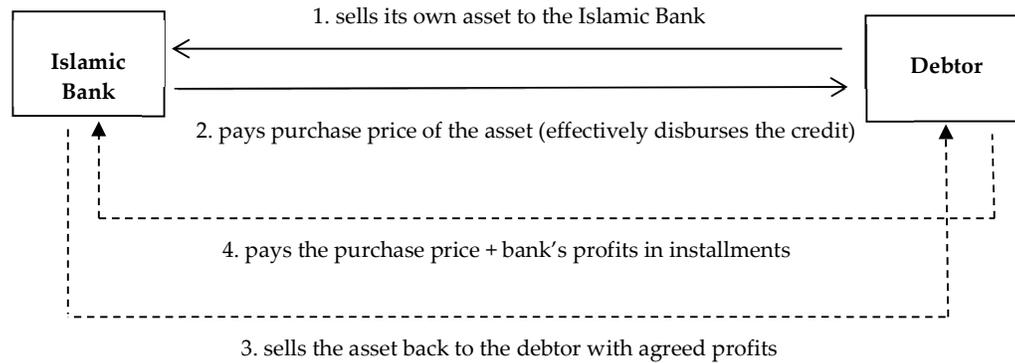
<sup>98</sup> Ayub, *supra* note 90 at 218.

<sup>99</sup> *Murabahah* financing structure is derived from sale and purchase transaction structure and God has indeed stated clearly in the Qur'an that sale and purchase is a lawful (*halal*) transaction. See Wahbah Al-Zuhayli, *Financial Transactions in Islamic Jurisprudence*, vol. 1 (Mahmoud A. El-Gamal trans, Dar al Fikr 2003), 349.

<sup>100</sup> See Saiful Azhar Rosly and Mahmood Sanusi, "Some Issues of Bay' Al-'Inah in Malaysian Islamic Financial Markets," *Arab Law Quarterly* 16 (2001): 263.

<sup>101</sup> *Id.*

Figure 3.2: *Bay' al-'inah* Financing Structure



One could argue that this financing structure is the ultimate form of legal evasion by Malaysian Islamic scholars in facing the prohibition of *riba*.<sup>102</sup> Why? Because the structure is effectively the same with conventional debt financing with fixed interest rate (it is also similar to *murabahah* transaction, but the assets used in this transaction are previously owned by the debtor himself). Yet, this structure is widely used in Malaysia and dominates its Islamic financial industry.<sup>103</sup> To support their opinion, Malaysian Islamic jurists rely on the opinion from the Shafi'i School where a contract is deemed valid by external evidence that it was properly concluded, while the unlawful intention of the parties to the contract is immaterial, as it will be up to God to judge.<sup>104</sup>

The Hanafi, Maliki and Hanbali scholars disagree with the above opinion, citing a Hadith from Aisha binti Abu Bakr (one of the Prophet's wives) which prohibit this kind of sale and

<sup>102</sup> For a more nuanced view on characterizing *riba* as interest, see Mahmoud A. El-Gamal, "An Attempt to Understand the Economic Wisdom in the Prohibition of Riba," in *Interest in Islamic Economics: Understanding Riba*, ed. Abdulkader Thomas ed., (London: Routledge, 2006), 111-123.

<sup>103</sup> See for example the discussion in Amir Shaharuddin, "The Bay' Al-'Inah Controversy in Malaysian Islamic Banking," *Arab Law Quarterly* 26 (2012): 499-511.

<sup>104</sup> Malaysia Securities Commission, *Resolutions of the Securities Commission Shariah Advisory Council*, 2<sup>nd</sup> Edition (Kuala Lumpur: Malaysia Securities Commission, 2007), 21-22. On 27 February 2014, the Sharia Advisory Council of the Securities Commission of Malaysia updated its resolution on *bay' al-'inah* (which was firstly issued on 29 January 1997), stating precisely that in order to ensure that the contract of *bay' al-'inah* is lawful, the sale and purchase contracts must be separated into two contracts and signed at separate times (one second of time difference is actually enough), and none of the contracts contain any promise to repurchase the assets.

purchase.<sup>105</sup> However, the Shafi'i school rejects the validity of that Hadith's transmission and instead rely on analogy (*Qiyas*) to confirm the validity of *bay' al-'inah*.<sup>106</sup> In terms of hierarchy of legal source, the Shafi'i School seems to have the upper hand since if we strictly refer to the Qur'anic verse on the prohibition of *riba*, the sale and purchase structure of *bay' al-'inah* should be permitted.<sup>107</sup>

Contrary to the defenders of this formalistic way of thinking, Ibn Ashur, a prominent contemporary Islamic law scholar from Tunisia who specialized in the *Istislah* theory, argues that based on the Basic Codes, Islamic law is about essences and real attributes, and not names and forms, and therefore, focusing too much on formalities would defeat the purpose of having God's law.<sup>108</sup> Other scholars also argue that *bay' al-'inah* should be prohibited based on *Sadd al-Dzari'* principle (which is a part of the *Istislah* theory<sup>109</sup>) that aims to prevent practices that can lead to forbidden acts such as, in this case, *riba*.<sup>110</sup>

At this point, we may ask the sincerity and consistency of the scholars involved in the formulation of this policy. In the Malaysian case of husbands' right to divorce, to support the idea that such right must be limited through the court, the scholars focus on the purpose of the law. But in the Malaysian case of *bay' al-'inah*, the scholars focus on the formal structure of the transaction and dismiss the possibility of such transaction resembling *riba*. Moreover, although

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<sup>105</sup> See Rushd, *supra* note 17 at 172-173.

<sup>106</sup> *Id.* at 173.

<sup>107</sup> See note 84.

<sup>108</sup> See further discussion in Muhammad al-Tahir ibn Ashur, *Treatise on Maqasid al-Shari'ah*, trans. Mohamed el-Tahir el-Mesawi (London: Biddles Ltd., 2006), 171-173. To support his idea, Ibn Ashur cites a famous Hadith where the Prophet warned severely and disapprovingly that some of his community would consume intoxicants and call them by another name.

<sup>109</sup> See Mustafa Ahmad Az-Zarqa, *Hukum Islam dan Perubahan Sosial: Studi Komparatif Delapan Mazhab Fiqh* [Islamic Law and Social Change: A Comparative Study of 8 Islamic Law Schools of Thought], trans. Ade Dedi R. (Jakarta: Riora Cipta, 2000), 44.

<sup>110</sup> See Securities Commission, *supra* note 104 at 21. Interestingly, in Indonesia where the majority of Islamic scholars are coming from the Shafi'i school, the *bay' al-'inah* is prohibited using the *Sadd al-Dzari'* principle.

Malaysia permits the use of the controversial *bay' al-'inah* financing structure, it adopts the Islamic criminal law in cases such as drinking and gambling without extensive modifications.<sup>111</sup> Meanwhile, Indonesian Islamic law eliminates husbands' right to unilaterally divorce his wife, but still maintains the Islamic inheritance system where a male will receive twice the portion of a female.<sup>112</sup> Why favor adopting one departure to clear texts using consequence-based theories of interpretation while maintaining the other ones under the idea that the *Shari'a* is immutable?

The most ironic part of the debate on *bay' al-'inah* is the fact that the best argument for prohibiting such transaction is coming from consequence-based theories of interpretation instead of the actual texts of the Basic Codes since if we refer to the Qur'anic verse as mentioned above, all sale and purchase transaction must be allowed. The prohibition of *riba* and its relationship with well-being consideration are indeed more complicated compared to the slavery or waiver of theft punishment, and we will further discuss such issue in Chapter 6. At the moment, suffice to say that the existence of *bay' al-'inah* and its permissibility raise a valid concern that the Basic Codes seem to permit things that is supposed to be prohibited. This concern is even stronger once we discuss the next and final financing scheme, *ijarah*.

### 3. THE IJARAH FINANCING SCHEME (FLOATING INTEREST DEBT FINANCING)

*Ijarah* is the formalistic legal solution to *bay' al-'inah*. In classical terms, *ijarah* is simply an ordinary lease transaction. The most important element of *ijarah* is that the lease object must contain a usufruct/utility rights that can be used by the lessor for a certain fee.<sup>113</sup> Since it is naturally

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<sup>111</sup> Kamali, *supra* note 11 at 172. The law is known as the Malaysia Syariah Criminal Offences (Federal Territories) Act, which was issued in 1997.

<sup>112</sup> There was a discussion to amend the Indonesian Islamic legal code on inheritance portions of men and women so that the portion will be equal. But in the end, the idea was rejected. See R. Michael Feener, *Muslim Legal Thought in Modern Indonesia* (Cambridge: Cambridge University Press, 2007), 141-146.

<sup>113</sup> See further discussion about this matter in Rushd, *supra* note 17 at 265-273. Some Islamic scholars argue that *ijarah* is actually a sale and purchase transaction, although the object of the sale and purchase is intangible rights. We will not use such definition in this paper since the differences between these two definitions are merely technical and will not alter our analysis.

not a financing transaction, like *murabahah*, the *ijarah* scheme has also been altered significantly to meet the demand of modern financing structure.

Modern *ijarah* structures have many variations and I will discuss two of them in this dissertation. In the first structure, the client/debtor “sells” the usufruct right of his own assets (in the form of either immovable or movable property) to the Islamic bank or *sukuk* holders (represented by a trustee) with lump sum payment and then the bank or *sukuk* holders will lease the usufruct right back to the client/debtor with certain lease fee called *ujrah*.<sup>114</sup> At the end of the lease period, the debtor will repurchase the usufruct right from the banks or *sukuk* holders.<sup>115</sup>

The second *ijarah* structure is usually used for home financing, when the bank will first purchase the property from third party contractor for the benefit of the customer and then lease the property to the customer, and at the end of the lease period, the customer will have the right to purchase such asset from the bank.<sup>116</sup> This second structure might have significant differences with the first structure in terms of risk assessment, property ownership and tax treatment, and will ultimately affect its use by Islamic banks.<sup>117</sup>

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<sup>114</sup> This is the most basic structure to be used in a *sukuk* financing. Usually it also involves a special purpose vehicle to act as the issuer for selling the usufruct right of the relevant assets. Note that usufruct right is a pure contractual right and the sale of it does not involve any actual property rights. See further in Muhammad al-Bashir Muhammad al-Amine, *Global Sukuk and Islamic Securitization Market – Financial Engineering and Product Innovation* (Leiden: Brill, 2012), 150-151.

<sup>115</sup> As you may see, the main difference with *bay' al-'inah* is that the value sold in an *ijarah* transaction is the usufruct rights of the underlying asset, while in *bay' al-'inah* structure, scholars suspect that there is no additional value created from that transaction and that the increased return is created based merely on the passage of time.

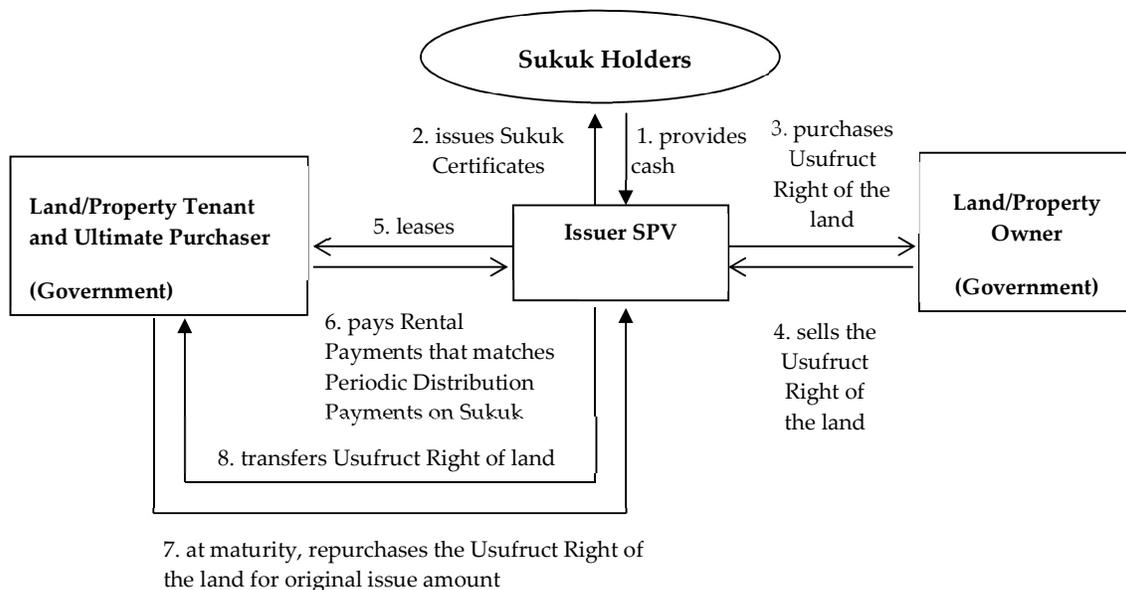
<sup>116</sup> See Amjid Ali, "Shariah Law – Bringing a New Ethical Dimension to Banking," in *Islamic Finance: Instruments and Markets*, ed. Conrad Garner (London: Bloomsbury Information Ltd, 2010), 4.

<sup>117</sup> I say “might” because such risk allocation is determined by the accounting treatment for these two types of *ijarah* financing. Once the *ijarah* assets are considered as a part of a bank’s assets, the bank will need to consider the assets depreciation and maintenance costs for its profit calculation, increasing the complexity of this *ijarah* structure. See Frank E. Vogel and Samuel L. Hayes, *Islamic Law and Finance: Religion, Risk and Return* (The Hague: Kluwer Law International, 1998), 214. However, the ultimate risk of the second type *ijarah* financing is its tax treatment. In certain countries, the sale and purchase of the assets at the end of the leasing period might be considered as a true sale and purchase assuming the tax codes of such jurisdiction have not adopted tax neutrality principle for *ijarah* scheme, and as a result, there is an additional tax burden to the banks and the homeowner.

The periodical lease fee can be arranged to cover the principal amount of the prior sale and purchase transaction plus the profits of the Islamic bank or investors, or to cover only the profits whereas the principal amount will be paid via buyback undertaking issued by the debtor/client to be conducted at the end period of *sukuk* or *ijarah* financing.<sup>118</sup> In addition, the periodical lease fee can be flexible or fixed, depending on the agreement between the parties, provided that the basic formula and the base rate for the recalculation of the lease fee must be stated up front in the contract.<sup>119</sup>

The scheme below will help the readers to understand how the first type of *ijarah* is used in sovereign *sukuk* offering structure.

Figure 3.3: *Sukuk Al-Ijarah* Financing Structure



From an economic point of view, the first type of *ijarah* is very similar to conventional secured debt financing with floating interest rate while the second type of *ijarah* represents

<sup>118</sup> See further discussion on this payment structure in Abdulkader Thomas, "Lease Finance and Ijarah," in *Structuring Islamic Finance Transactions*, ed. Abdulkader Thomas, Stella Cox, and Bryan Kraty (London: Euromoney Books, 2005), 78.

<sup>119</sup>*Id.* at 78-79. This payment structure gives Islamic bank higher flexibility in calculating its profits, making *ijarah* as an equal counterpart of ordinary secured debt financing with floating interest rate.

financial leasing transaction. The first type of *ijarah* is still the most favorite structure for *sukuk* transactions. First, it gives equity participation in the usufruct rights of the underlying assets and thus allow its owners to trade it in the market (Islamic laws prohibit trading of debt securities unless they are traded at their nominal value).<sup>120</sup> Second, its structure is also very simple (and thus less administrative costs in structuring the deal).

But more importantly, we should already notice the similarities between *bay' al-'inah* and *ijarah* structure by now. In both transaction, the debtor is using his own assets as a way to get financing. In *bay' al-'inah* transaction, he sells his asset to the creditor and then buy it back with a mark-up price which will be repaid in installments. In *ijarah* financing, he leases his asset (or basically selling the usufruct right of the asset) to the creditor and then the creditor lease it back to the original owner for a fee. What is the main difference between these two transactions other than mere play of words?

One might argue that since *ijarah* is a lease transaction, if the leased asset is destroyed, the transaction will be void and the creditor must take the risk that he will not get repayment in full because the debtor will no longer pay the lease fee, while in the case of *bay' al-'inah*, the risks have been unfairly transmitted back to the debtor, namely, once the asset is sold back to the debtor, it does not matter whether the asset is lost or not, the debtor must still pay the original price plus mark-ups.<sup>121</sup> This might be a valid point to differentiate *ijarah* from *bay' al-'inah*, but there are a lot of creative ways to solve this issue.

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<sup>120</sup> See Hans Visser, *Islamic Finance: Principles and Practice* (United Kingdom: Edward Elgar Publishing Limited, 2009), 65. Since debt securities can only be traded at nominal value under Islamic laws, we won't have enough investors to participate in the secondary market for such securities. This explains why *murabahah*, which dominates the Islamic financing transactions by banks, is not widely used in Islamic capital market transactions.

<sup>121</sup> See Mohammed Obaidullah, "Securitization in Islam," in *Handbook of Islamic Banking*, ed. M. Kabir Hassan and Mervyn K. Lewis (Cheltenham: Edward Elgar, 2007), 198.

As an example, in both structure, the creditor could simply require the debtor to purchase insurance to cover his assets and then transfer the proceeds of such insurance to the creditor in case the asset is destroyed.<sup>122</sup> There is no restriction for doing this kind of transaction in Islamic law and in fact there is already a version of Islamic insurance called *takaful*.<sup>123</sup> And regardless of who holds the title to the goods in the transaction, both parties are most likely have incentives to protect the asset as the creditor definitely wants to protect its security while the debtor wants to ensure that he can still utilize his operational assets. Therefore, in economics sense, there is not much difference between the two structures and allocation of risk can always be translated into additional premium to be paid by one party to the other or additional cost of procuring insurance.

This leads us back to the original question in this section, why bother prohibiting *riba* in the form of interests attached to debts when the alternative financing structures are basically the same except for mere formalities? Would not that be essentially permitting prohibited acts? I suppose this signifies the right time for us to move on to the next chapter and determine whether Islam is a consequentialist religion.

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<sup>122</sup> See Shamsad Aktar, "Islamic Banks: Resilience and Stability – Not Immune from Crisis," in *Current Issues in Islamic Banking and Finance: Resilience and Stability in the Present System*, ed. Angelo M. Venardos (Singapore: World Scientific Publishing Co. Pte. Ltd., 2010), 246.

<sup>123</sup> See further discussion in Suzanne White, "Islamic Insurance Markets and the Structure of Takaful," in *Islamic Finance: Instruments and Markets*, ed. Conrad Garner (London: Bloomsbury Information Ltd, 2010), 17-19.

## CHAPTER 5

### THE CONSEQUENTIALIST NATURE OF ISLAM

#### A. ISLAM, ECONOMIC INCENTIVES AND CBA

Before we can discuss the consequentialist nature of Islam, we will have to define the meaning of consequentialism and for such purpose, I will be referring to the definition made by Matthew D. Adler, namely, a choice-evaluation framework is consequentialist if it revolves around a ranking of outcomes.<sup>1</sup> And since moral decision procedures have the special feature of being person centered and being impartial between person's interest, a moral choice evaluation framework is consequentialist if it revolves around an impartial ranking of outcomes.<sup>2</sup>

The basic idea of such a moral framework is as follows: first, take some set of outcomes; second, generate a ranking of the outcomes, whereby each outcome is ranked as better than, worse than, equally good as, or incomparable with every other outcomes; third, rank the available choices in light of the outcome ranking; and finally, choose the action with the best outcome among those within the ranks.<sup>3</sup> The best outcome does not always have to be perfect, the decision maker can always choose an "undominated" action, namely, one whose outcome is not morally worse than any other.<sup>4</sup> And if the decision maker is choosing under a conditions of uncertainty, the choice-evaluation framework will see each choice as a probability distribution over outcomes and will

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<sup>1</sup> See Matthew D. Adler, *Well-Being and Fair Distribution* (New York: Oxford University Press, 2012), 22.

<sup>2</sup> This idea of impartiality is in line with the Qur'an's claim that God does not need anyone and the existence or non-existence of human does not affect God. See Qur'an surah Fatir [35]: 15-17 which state: "People, it is you who stand in need of God – God needs nothing and is worthy of all praise – if He wills, He can do away with you and bring in a new creation, that is not difficult for God." See M.A.S Abdel Haleem, *The Qur'an* (New York: Oxford University Press, 2005), 278. Seyyed Hossein Nasr states that from this perspective one must cut oneself off from all that is other than God, because poverty toward and need for God is intrinsic to human nature, whereas poverty toward or need for other things is accidental. Therefore, every need that one experiences is ultimately a need for God, since the phenomena for which one experiences need are veils that hide God and reveal God at the same time. That God is the Praised thus indicates that being praised is intrinsic to the Divine Nature and not dependent upon anything to praise Him. See Seyyed Hossein Nasr, ed., *The Study Qur'an: A New Translation and Commentary* (New York: HarperCollins Publishers, 2015), 277-280.

<sup>3</sup> See Adler, *supra* note 1 at 22-23

<sup>4</sup> *Id.* at 42.

instruct the decision maker how to integrate the outcome ranking with this probability information to rank choices.<sup>5</sup>

On the other hand, deontological moral framework focuses on the sense of duty or obligation that lies behind an action or behavior instead of its consequences.<sup>6</sup> In ethical theory, that sense of duty may be thought to be generated by any of a variety of causations.<sup>7</sup> Indeed, for deontological theory, morality is a matter of duty (the Greek word *deon* means “one must”).<sup>8</sup> Duties are usually understood in terms of particular actions we must do or refrain from.<sup>9</sup> It is the action itself that is right or wrong: it is not made right or wrong by its consequences, and therefore actions are generally understood in terms of intentions or the inherent nature of such action.<sup>10</sup>

To satisfy the Rationality Parameters, a system that supports deontological moral framework cannot at the same time supports consequentialist moral framework. Why? Because the deontological moral framework argues that an act must be performed or omitted regardless of its consequences while consequentialist moral framework argues the complete opposite, namely, an act must be performed or omitted due to the consequences of such act.<sup>11</sup> Simultaneously supporting completely opposite ideas is not a good sign of consistency especially when the main subject is not an issue of mere indifference in determining preferences, such as, choosing your preferred ice cream’s taste.

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<sup>5</sup> *Id.* at 23.

<sup>6</sup> See Douglas Vickers, *Economics and Ethics: An Introduction to Theory, Institutions, and Policy* (Westport: Praeger Publishers, 1997), 12. See also Richard F. Stalley and Roderick T. Long, “Socrates and Early Socratic Philosophers of Law,” in *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, vol. 6, 2<sup>nd</sup> edition, ed. Fred D. Miller Jr. and Carrie-Ann Biondi (New York: Springer Dordrecht, 2015), 45.

<sup>7</sup> See Vickers *supra* note 6 at 12.

<sup>8</sup> See Stephen Law, *Philosophy* (New York: DK Publishing, 2007), 104.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See further discussion in Samuel Freeman, “Utilitarianism, Deontology, and the Priority of Right,” *Philosophy and Public Affairs* 23 (1994): 313-314.

True, supporter of deontological moral framework could argue that following certain sense of duty may require us to satisfy certain ends or consequences or that such duty is grounded in “full consciousness” of the “respective worth” of our springs of actions.<sup>12</sup> Meanwhile, at the most fundamental level, one could also argue that a consequentialist is no different from a deontologist, namely, he believes that there is an absolute duty to always consider the consequences before choosing to act (or not to act), such as to attain happiness.<sup>13</sup> However, we do not have time for wordplay in this dissertation. And therefore, I will adhere to the typical value of action versus consequence element for differentiating both moral frameworks.

If Islam truly favors the deontological moral framework, which tends to be rigid or inflexible as it deals with absolutes,<sup>14</sup> one will have to show that all mandated, recommended, permitted and prohibited acts in Islamic law are not subject to any consideration of consequences (including well-being). In such case, a Muslim must do or refrain from an act simply because he has been ordered to do so by God as the ultimate arbiter of what is right and wrong, and no further question should be asked regarding such order other than the moral/legal classification of the acts.<sup>15</sup> There are certain occasions in the Basic Codes where it “seems” that this is actually the case, creating a theological problem that has plagued the Islamic philosophy discourse for centuries,

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<sup>12</sup> See Peter A. Carmichael, "The Logical Ground of Deontology," *The Journal of Philosophy* 46 (1949): 35. There is also moderate deontological theories that admit that constraints have thresholds, though I view this as just another form of consequentialism. See further discussion in Thomas S. Ulen, "Law and Economics, the Moral Limits of Market, and Threshold Deontology," in *Law & Economics: Philosophical Issues and Fundamental Questions*, ed. Aristides N. Hatzis and Nicholas Mercurio (London: Routledge, 2015), 203-225.

<sup>13</sup> See Bart Schultz, *The Happiness Philosophers: The Lives and Works of the Great Utilitarians* (Princeton: Princeton University Press, 2017), 34-35. Also known as moral impartialist, believing that one has the moral duty to do whatever would make things go best. See Derek Parfit, *On What Matters*, vol. 3 (Oxford: Oxford University Press, 2017), 344.

<sup>14</sup> See John Haldane, "Ethics, Religion, and Relativism," *The Review of Metaphysics* 60 (2006): 123-124.

<sup>15</sup> See our discussion in Chapter 3.

namely, whether men have capabilities to differentiate the right things from the wrong things without God's revelation.<sup>16</sup>

Fortunately, I do not have to do the same to prove otherwise. Under the Rationality Parameters and given our definition above on actions versus consequences, by contradiction, a single example of case in which the moral value of an act is determined by its consequences would mean that Islam does not strictly follow the deontological moral framework. And as will be further discussed below, there are a lot of cases in the Basic Codes that display such consequentialist way of thinking. Clearly, this is not an anomaly.

I admit though that the existence of those cases might not conclusively prove that Islam is an inherently consequentialist religion. There are, after all, two possible explanations. First, either it is certain that Islam absolutely favors a consequentialist moral framework above the deontological moral framework. Or alternatively, Islam contains inconsistencies, namely, at certain time it favors consequentialism and at another time, deontological approach, without any intelligible way to resolve the above inconsistencies (which means that the Rationality Parameters are being violated). To achieve a truly decisive conclusion, we will need to review the entire Qur'anic verses and that is simply beyond the scope of this dissertation.

As such, my claim in this dissertation is more modest, namely, given the Rationality Parameters: (i) the nature of Islam is more compatible with consequentialist moral framework rather than a deontological one, and (ii) the moral and legal duties existing under Islamic law are subject to satisfaction of certain consequences. It should be noted that similar to the issue of Pragmatism, saying that consequences matter without explaining what kind of consequences matter would be meaningless.<sup>17</sup> And given that the Basic Codes claim that God is purposeful, there

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<sup>16</sup> See a thorough and fascinating discussion on this subject in A. Kevin Reinhart, *Before Revelation: The Boundaries of Muslim Moral Thought* (New York: State University of New York Press, 1995).

<sup>17</sup> See our discussion in Chapter 2.

should be at least certain guidelines that allow us to understand the types of consequences that matter for our analysis.<sup>18</sup> We will discuss this issue further in section C of this chapter and later in Chapter 6.

Following up with the idea that Islam supports consequentialist moral framework which requires its proponents to rank outcomes and choose the best possible one, there are two proxies that I will be using to support such idea. First, the introduction of CBA (as a decision-making procedures) and economic incentives as part of the Basic Codes, and second, the existence of cases in the Basic Codes where actions that are normally deemed to be morally wrong due to its inherent nature are permitted given their consequences.

Qur'an surah Al-'Asr [103]: 1-3 explicitly establishes the concept of doing CBA in everyday life, namely, all men will be in loss except for those who believe in God and do good deeds.<sup>19</sup> Qur'an surah Ali Imran [3]: 104 further states: "*Be a community that calls for what is good, urges what is right, and forbids what is wrong: those who do this are the successful ones.*"<sup>20</sup> Indeed, the Qur'an goes to great length in explaining the differences of afterlife rewards and punishments for good and

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<sup>18</sup> See our discussion Chapter 3.

<sup>19</sup> The texts of the verse are as follows, "*By the declining day, man is [deep] in loss, except for those who believe, do good deeds, urge one another to the truth, and urge one another to steadfastness.*" See Haleem, *supra* note 2 at 435. Ath-Thabari explains that in this surah, God explicitly made a vow that men will be really in losses unless they follow God's orders, where Seyyed Hossein Nasr stated that this *sūrah* can be seen as pertaining to both the life of the individual and that of the human species; according to traditional Islamic belief, the fall of humanity continues as the historical cycle unfolds, and each generation is a degree below the generation before it. See further discussion in Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 26, ed. Mukhlis B. Mukti, Besus Hidayat Amin and Fajar Inayati, trans. Amir Hamzah (Jakarta: Pustaka Azzam, 2009), 920-925 and Nasr, *supra* note 2 at 1558. See also the discussion in Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 20, ed. M. Iqbal Kadir, trans. Fathurrahman Abdul Hamid, Dudi Rosyadi, and Marwan Affandi (Jakarta: Pustaka Azzam, 2009), 710-715. Furthermore, see Qur'an surah Al-Baqara [2]:256 which states: "*There is no compulsion in religion: true guidance has become distinct from error, so whoever rejects false gods and believes in God has grasped the firmest hand-hold, one that will never break. God is all hearing and all knowing.*" Az-Zuhaili commented that the verse emphasizes on restrictions on forcing Islam upon other people and that Allah is the drive to believe. See Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 2, ed. Achmad Yazid Ichsan, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2013) 45-52. See also Departemen Agama RI, *Al-Qur'an dan Tafsirnya* [Al-Qur'an and Its Interpretations], vol. 1 (Jakarta: Lembaga Percetakan Al-Qur'an, 2009), 420-430.

<sup>20</sup> See Haleem, *supra* note 2 at 34.

bad deeds, stating that each reward will be calculated precisely to ensure that people's rights are not impaired by God.<sup>21</sup>

This obsession with accurate calculation of rewards is barely surprising since the Qur'an has no problem in using the analogy of trade to describe God's reward and punishment system where God was deemed to buy the life and wealth of the believers with paradise in exchange for their service for Islam (in this case, waging a "holy war").<sup>22</sup> Even usury (*riba*) is not an inherently bad thing as long as the money is "loaned" to God in which God will repay such loan multiple times.<sup>23</sup> In other words, the relationship between a person and God in Islam can be described as a commercial relationship where all is counted and measured, and life is essentially a business where you can obtain gains or losses.<sup>24</sup> The most important thing to do is to always think about

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<sup>21</sup> See Jane Dammen McAuliffe, ed., *Encyclopaedia of the Qur'an*, vol. 4 (Leiden: Koninklijke Brill NV, 2004), 458. God gives such guarantee in Qur'an surah Al-Anbiya' [21]:47, "We will set up scales of justice for the Day of Resurrection so that no one can be wronged in the least, and if there should be even the weight of a mustard seed, We shall bring it out— We take excellent account." See Haleem, *supra* note 2 at 205. Ath-Thabari explains that God will perfectly calculate a person's good and bad deeds and will ensure that such person will receive his rewards according to the calculation. Notice that in this case, God is acting like a calculator who counts the number of deeds plus rewards, where if your positive deeds exceed your bad deeds, you go to heaven and if not, you go to hell, resembling CBA. No wonder that in Islam, the Muslims are always reminded to calculate their deeds every day to ensure that their CBA is correct. See Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 18, ed. Edi Fr, trans. Ahsan Askan (Jakarta: Pustaka Azzam, 2009), 105-109. Separately, Az-Zuhaili emphasizes that the verse is about supervision and management from God to mankind through justice, based on *hisab*. See Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 9, ed. Malik Ibrahim and Sayuda Patria Halim, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2016), 77-53.

<sup>22</sup> See McAuliffe, *supra* note 21 at 457. On the trade for heaven by God for Muslims, Qur'an surah Al-Tawba [9]:111 states: "God has purchased the persons and possessions of the believers in return for the Garden— they fight in God's way: they kill and are killed— this is a true promise given by Him in the Torah, the Gospel, and the Qur'an. Who could be more faithful to his promise than God? So be happy with the bargain you have made: that is the supreme triumph." See Haleem, *supra* note 2 at 126.

<sup>23</sup> Qur'an surah Al-Baqara [2]: 245 states: "Who will give God a good loan, which He will increase for him many times over? It is God who withholds and God who gives abundantly, and it is to Him that you will return." See Haleem, *supra* note 2 at 28. See further discussion in Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 1, ed. Achmad Yazid Ichsan and Muhammad Badri H., trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2013), 607-615. In addition, Qur'an surah At-Taghabun [64]: 17 states: "If you make a generous loan to God, He will multiply it for you and forgive you. God is ever thankful and forbearing." See Haleem, *supra* note 2 at 376-377. Seyyed Hossein Nasr comments that this verse follows upon the reference to *the Day of Mutual Dispossession*. In contrast to the disbelievers, *who have purchased error at the price of guidance, and punishment at the price of forgiveness*, the believers sell their souls seeking God's good pleasure and thus *lend unto God a goodly loan*. The way God multiplies charitable offerings is best reflected in Al-Baqara [2]:261: "The parable of those who spend their wealth in the way of God is that of a grain that grows seven ears, in every ear a hundred grains. And God multiplies for whomsoever He will" See Nasr, *supra* note 2 at 1382.

<sup>24</sup> See Maxime Rodinson, *Islam and Capitalism*, trans. Allen Lane (London: Saqi Books, 2007), 116-117.

the costs and benefits of your potential actions and be ready to take the correct decision, or else, face the dire consequences in the afterlife (where most will simply regret their actions).<sup>25</sup>

From all the possible systems, why did God choose this system? As discussed in Chapter 3 and as claimed by the Qur'an itself, the system is chosen because it is the only effective way to screen the faithful people that may go to heaven.<sup>26</sup> The idea of relying on a reward and punishment system and strategically giving incentives to believers to act in accordance with God's prescribed values provide insightful hints that the Basic Codes support the consequentialist moral

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<sup>25</sup> Qur'an surah Al-Qiyamah [75]: 36 states: "Does man think he will be left alone?" See Haleem, *supra* note 2 at 399-400. Qur'an surah Al-Mudassir [74]: 38-48 states: "Every soul is held in pledge for its deeds, but the Companions of the Right will stay in Gardens and ask about the guilty. 'What drove you to the Scorching Fire?' [they will ask] and they will answer, 'We did not pray; we did not feed the poor; we indulged with others [in mocking the believers]; we denied the Day of Judgement until the Certain End came upon us.' No intercessor's plea will benefit them now." See Haleem, *supra* note 2 at 397-398. Seyyed Hossein Nasr comments that this verse means that the good and evil deeds that a soul has committed bind it to a particular end, since God attends to every soul in accordance with what it has earned, where Al-Qurthubi states that this is most likely the first use of the term *companions of the right* in the chronological order of revelation. According to most commentators, it means those of faith and piety. See Nasr, *supra* note 2 at 1442-1443 and Al-Qurthubi, *supra* note 6 at 574-590. On repentance, Qur'an surah Al-Maida [5]:36-37 state: "If the disbelievers possessed all that is in the earth and twice as much again and offered it to ransom themselves from torment on the Day of Resurrection, it would not be accepted from them – they will have a painful torment. They will wish to come out of the Fire but they will be unable to do so: theirs will be a lasting torment." See Haleem, *supra* note 2 at 71. Seyyed Hossein Nasr points out that the verse is on the certainty of the reckoning after death which is a central theme of the Qur'an, and the Qur'an repeatedly asserts the futility of seeking to ransom oneself with worldly goods in order to escape punishment in the hereafter. See Nasr, *supra* note 2 at 295. See also Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 3, ed. Zainul Arifin, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2016), 501-508 and Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 9, ed. Besus Hidayat Amin and M. Sulton Akbar, trans. Akhmad Affandi and Benny Sarbeni (Jakarta: Pustaka Azzam, 2008), 279-298. Furthermore, Qur'an surah Al-Furqan [25]: 25-29 state: "On the Day when the sky and its clouds are split apart and the angels sent down in streams, on that Day, true authority belongs to the Lord of Mercy. It will be a grievous Day for the disbelievers. On that Day the evildoer will bite his own hand and say, 'If only I had taken the same path as the Messenger. Woe is me! If only I had not taken so and so as a friend – he led me away from the Revelation after it reached me. Satan has always betrayed mankind.'" See Haleem, *supra* note 2 at 228-229. Al-Qurthubi, comments that some take *true sovereignty* to mean that on that Day there will be no illusion of any sovereignty other than God's, even though true sovereignty was always God's, and all other claims to sovereignty over anything will disappear. See Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 13, ed. Mukhlis B. Mukti, trans. Muhyiddin Mas Rida and Muhammad Rana Mengala (Jakarta: Pustaka Azzam, 2008), 60-68. Further discussions on the frightful conditions during the end of days can be found in Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 10, ed. Zainul Arifin, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2016), 67-72.

<sup>26</sup> Qur'an surah Al-Baqara [2]:214 says, "Do you suppose that you will enter the Garden without first having suffered like those before you? They were afflicted by misfortune and hardship, and they were so shaken that even [their] messenger and the believers with him cried, 'When will God's help arrive?' Truly, God's help is near." See Haleem, *supra* note 2 at 24. Ibn Kathir explains that unless men are tested, how can they prove that they are worthy to enter into the heaven? The tests can be in many forms of hardships. But in any case, successful people will be rewarded. See further discussion in Abu l-Fida' Isma'il ibn 'Umar ibn Kathir, *Tafsir Ibnu Katsir*, vol. 1, ed. M. Yusuf Harun et al, trans. M. Abdul Ghoffar (Bogor: Pustaka Imam Asy-Syafi'i, 2003), 413-415.

framework, namely, performing good deeds and avoiding bad deeds are not mere duty, but acts whose consequences may eventually (if not guaranteed to) benefit the believers.<sup>27</sup>

Even the act of following God's rule for the sake of displaying love to God without regard to heaven and hell is not an entirely selfless act in Islam because God has stated that doing such unrequited act will enable the relevant person to receive the greatest gift of all from God,<sup>28</sup> and that for each hardship experienced by a Muslim, there is always a reward from God, and therefore, there is no such thing as a free lunch in Islam.<sup>29</sup> Truly, avoiding the use of economic incentives in Islam is like avoiding a barrage of bullets in modern warfare, an incredibly difficult feat to attempt.

There are a lot of examples of afterlife rewards given to faithful people in the Basic Codes. Slaves are encouraged to work to the best of their abilities for their masters so that they can get double rewards.<sup>30</sup> The deed with the highest reward is to believe in God and fight for his cause.<sup>31</sup> The best manumission of slave is the manumission of the most expensive slave and most beloved by his master.<sup>32</sup> If someone cannot afford to do the above difficult deeds, he will still be rewarded by refraining from harming others.<sup>33</sup> If someone is sick or experiencing pain, he will be also be

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<sup>27</sup> See note 26.

<sup>28</sup> As recorded in Hadith no. 181 in Muslim's compendium of Hadiths which states: "It was narrated from Suhaib that the Prophet said: "When the people of Paradise have entered Paradise, Allah, Blessed is He and Most High, will say: 'Do you want anything more?' They will say: 'Have You not brightened our faces, and admitted us to Paradise, and saved us from the Fire?' Then He will remove the Veil, and they will not be given anything that is more dear to them than gazing upon their Lord [the Mighty and Sublime]." See Abul Hussain Muslim bin Al-Hajjaj, *English Translation of Sahih Muslim*, vol. 1, ed. Huda Khattab, trans. Nasiruddin al-Khattab (Riyadh: Maktaba Dar-us-Salam, 2007), 288.

<sup>29</sup> See note 34 below.

<sup>30</sup> Many Hadiths relating to such reward are recorded in Al-Bukhari's compendium of Hadiths, and one of them is contained in Hadith no. 97 in Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 1, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 113.

<sup>31</sup> Active fighters and early believers will be privileged in receiving rewards based on the Qur'an. See McAuliffe, *supra* note 21 at 458.

<sup>32</sup> See Hadith no. 2518 in Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 3, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 402.

<sup>33</sup> *Id.* See also in Hadith no. 6491 in Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 8, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 269-270.

compensated with afterlife rewards.<sup>34</sup> And to ensure that no good deeds are left unrewarded, the Prophet guarantees that good deeds done by people before they embrace Islam will still be calculated as part of their good deeds account once they convert into Islam.<sup>35</sup> Meanwhile, different bad deeds will yield different afterlife punishments in hell (the Basic Codes do not lack any creativity in terms of describing the menu of tortures available for sinners, but I would be digressing if I discuss these punishments).<sup>36</sup>

What is even more fascinating is the fact that the rewards in Islam are not strictly limited to afterlife ones, they also cover worldly financial rewards, suggesting that the Basic Codes has a deep understanding of the basic nature of human.<sup>37</sup> The same is also applicable for punishment as demonstrated by various penal sanctions in Islamic law.<sup>38</sup> Even though the afterlife rewards and punishments tend to be over the top, no one can prove or disprove their existence. There is always a risk that those rewards and punishments do not exist and different people have different degree of faith. Some might truly believe that the afterlife rewards and punishments exist and act based on such belief. Others might discount the existence of these reward and punishment and will only

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<sup>34</sup> Hadith no. 5660 of Al-Bukhari's compendium of Hadith states: "Narrated 'Abdullāh bin Mas'ud: I visited Allah's Messenger while he was suffering from a high fever. I touched him with my hand and said, "O Allah's Messenger! You have a high fever.' Allah's Messenger said, "Yes, I have as much fever as two men of you have." I said, "Is it because you will get a double reward?" Allah's Messenger said, "Yes, no Muslim is afflicted with harm because of sickness or some other inconvenience, but that Allah will remove his sins for him as a tree sheds its leaves." This is a unique response to the usual claim that a perfectly kind God will not harm or let faithful people to experience hardships. Basically, as long as you stay true to your faith during hardship, you will be compensated. Sickness could be a trial with good rewards, not punishment. See Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 7, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 316.

<sup>35</sup> See Hadith no. 1436 in Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 2, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 299 which states: "Narrated Hakim bin Hizam: I said to Allah's Messenger, "Before embracing Islam, I used to do good deeds like giving in charity, manumission of slaves, and the keeping of good relations with kith and kin. Shall I be rewarded for those deeds?" The Prophet replied, "You became Muslim with all those good deeds (without losing their reward)."

<sup>36</sup> See further discussion and examples in Madeline C. Zilfi, *Women and Slavery in the Late Ottoman Empire* (Cambridge: Cambridge University Press, 2012), 88. Examples of different punishments for different bad deeds can be found in Hadith no. 7047 in Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 9, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 118-122.

<sup>37</sup> See our discussion regarding Khidr and Moses in the next section and also our discussion about war booty in the next couple of pages.

<sup>38</sup> See our discussion in Chapter 6.

act when there are physical incentives. Consequently, standing alone, afterlife rewards and punishments are most likely not enough and must be supported by physical rewards.<sup>39</sup>

In one story, God grants treasures to the children of a man who had been righteous in his life.<sup>40</sup> In another story, after successfully passing God's trial in the form of painful sickness and loss of his entire wealth and children, Job (also known as Ayub in Arabic), one of God's prophets, received rewards by getting twice the amount of wealth and children that he lost.<sup>41</sup> Islam is also famously known as a major religion (and maybe the only one) that publicly allocates certain part of the Muslim mandatory funds contribution (also known as *zakat*<sup>42</sup>) for new converted followers, including those who need to strengthen their commitment to Islamic faith and individuals whose evil can be forestalled or who can benefit and defend the Muslims.<sup>43</sup>

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<sup>39</sup> See further discussion in Dan Ariely, *Predictably Irrational* (London: HarperCollinsPublishers, 2009), 195-216. As discussed in Dan Ariely's work, religiosity helps in building a better character of human, but it is not enough, and people must be constantly reminded of their religiosity in order to make it work effectively.

<sup>40</sup> Recorded in Qur'an surah Al-Kahf [18]: 82. The complete texts can be found in note 73 below.

<sup>41</sup> It is as if children are normal goods in Islam since they are replaceable and are more demanded when wealth increases. The story can be found in Qur'an surah Al-Anbiya' [21]: 83-84, "Remember Job, when he cried to his Lord, 'Suffering has truly afflicted me, but you are the Most Merciful of the merciful.' We answered him, removed his suffering, and restored his family to him, along with more like them, as an act of grace from Us and a reminder for all who serve Us." See Haleem, *supra* note 2 at 207. The commentaries on this story including the debate on whether God revives Job's kids or completely replace them with new ones are discussed in Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 19, ed. Edy Fr. and M. Sulton Akbar, trans. Ahsan Askan, Yusuf Hamdani, and Abdush-Shamad (Jakarta: Pustaka Azzam, 2009), 186-234. But all of those scholars agree that the numbers of his kids are doubled as his reward. Also see Qur'an surah Shad [38]: 41-43 which states: "Bring to mind Our servant Job who cried to his Lord, 'Satan has afflicted me with weariness and suffering.' 'Stamp your foot! Here is cool water for you to wash in and drink,' and We restored his family to him, with many more like them: a sign of Our mercy and a lesson to all who understand." See Haleem, *supra* note 2 at 292.

<sup>42</sup> Zakat can also be considered as a form of early tax program for Muslims. See Yusuf al-Qaradawi, *Fiqh al Zakah Vol. 1: A Comparative Study of Zakah Regulations and Philosophy in the Light of Qur'an and Sunnah*, trans. Monzer Kahf (Jeddah: Scientific Publishing Centre, 2007), 11-13.

<sup>43</sup> See Yusuf al-Qaradawi, *Fiqh al Zakah Vol. 2: A Comparative Study of Zakah Regulations and Philosophy in the Light of Qur'an and Sunnah*, trans. Monzer Kahf (Jeddah: Scientific Publishing Centre, 2007), 33. It is interesting to note that in another famous decision, Umar bin Khatab stopped the distribution of *zakat* portion to this group because he deemed that they are no longer needed by Islam even though the Qur'an and the Prophet never state that such distribution can be stopped. This is another example of how Umar deviates from the original text of the Qur'an. See *Id.* at 36. Ath-Thabari adds that the distribution to these people should not depend on their wealth but on their usefulness to Islam. See Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 12, ed. Edy Fr. and M. Sulton Akbar, trans. Yusuf Hamdani et al. (Jakarta: Pustaka Azzam, 2008), 892-893.

But perhaps the best example of how these financial rewards work is through the Basic Codes provisions relating to the division of war spoils (which include slaves, plots of land, and property). A lot of Qur'anic verses promise that those who agree to fight the holy war against pagans and unbelievers will not only obtained the highest rewards in the heavens, but will also reap material assets from the gains of war.<sup>44</sup> Let that sink in for a moment. We can try to characterize the Islamic “holy war” in many ways, but it is difficult to avoid reading those provisions as a valid justification to argue that war is and should be a profitable business in Islam, especially since the rule is later formalized as a legal provision in the Qur'an which states that the soldiers who fought the war shall receive 4/5 of the entire war spoils while the rest shall go to the state and the Prophet.<sup>45</sup> Obviously, this provides a huge incentive for the Muslim soldiers to fight

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<sup>44</sup> Qur'an surah At-Tawba [9]: 28-31 state: “Believers, those who ascribe partners to God are truly unclean: do not let them come near the Sacred Mosque after this year. If you are afraid you may become poor, [bear in mind that] God will enrich you out of His bounty if He pleases: God is all knowing and wise. Fight those of the People of the Book who do not [truly] believe in God and the Last Day, who do not forbid what God and His Messenger have forbidden, who do not obey the rule of justice, until they pay the tax and agree to submit. The Jews said, ‘Ezra is the son of God,’ and the Christians said, ‘The Messiah is the son of God’: they said this with their own mouths, repeating what earlier disbelievers had said. May God confound them! How far astray they have been led! They take their rabbis and their monks as lords, as well as Christ, the son of Mary. But they were commanded to serve only one God: there is no god but Him; He is far above whatever they set up as His partners!”. See Haleem, *supra* note 2 at 119. Al-Qurthubi stated that some commentators believe that this verse was revealed in the ninth year of the *hijrah*, after the conquest of Mecca and the same year when it is reported that the Prophet sent ‘Ali ibn Abi Thalib to announce to the idolaters that they were no longer to return to perform the pilgrimage in Mecca. See further discussion in Abu ‘Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 8, ed. M. Iqbal Kadir, trans. Budi Rosyadi, Fathurrahman, and Nashiulhaq (Jakarta: Pustaka Azzam, 2014), 238-280. See also Nasr, *supra* note 2 at 511-515 and Abu Ja’far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 12, ed. Besus Hidayat Amin, trans. Beni Sarbeni (Jakarta: Pustaka Azzam, 2008), 676-717.

Qur'an surah Al-Anfal [8]: 69 states: “So enjoy in a good and lawful manner the things you have gained in war and be mindful of God: He is forgiving and merciful.” See Haleem, *supra* note 2 at 115. Qur'an surah Al-Anfal [8]: 70-71 state: “Prophet, tell those you have taken captive, ‘If God knows of any good in your hearts, He will give you something better than what has been taken from you, and He will forgive you: God is forgiving and merciful.’ But if they mean to betray you, they have betrayed God before, and He has given you mastery over them: He is all knowing, all wise.” See Haleem, *Id.* Here, Seyyed Hossein Nasr pointed out that as a spiritual allegory, this passage is interpreted to mean that for those on the spiritual path, their goal should not be to have followers or devotees over whom they could exert influence—rather they must totally dominate and slay the ego. See Nasr, *supra* note 2 at 499-500. Qur'an surah Al-Fath [48]:20-21 states: “He has promised you [people] many future gains: He has hastened this gain for you. He has held back the hands of hostile people from you as a sign for the faithful and He will guide you to a straight path. There are many other gains [to come], over which you have no power. God has full control over them: God has power over all things.” See Haleem, *supra* note 2 at 335-336. Al-Qurthubi gives out a different view on this verse where some read this verse to mean that God hastened the attainment of war spoils in general, namely, from a spiritual perspective, the verse refers to the inner riches received by those who follow the spiritual path. See Abu ‘Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 16, ed. M Mukhlis B. Mukti, trans. Akhmad Khatib (Jakarta: Pustaka Azzam, 2009), 719-723.

<sup>45</sup> Qur'an surah Al-Anfal [8]: 41 states: “Know that one-fifth of your battle gains belongs to God and the Messenger, to close relatives and orphans, to the needy and travelers, if you believe in God and the revelation We sent down to Our servant

the war since most of the spoils will go to them, which could be a very profitable business given the (compare such system with the current trend in modern military's financial incentives). In fact, it is probable that the active conquest of Islam in its earliest days is highly correlated with such provision.<sup>46</sup>

While there are also punishments for those who refuse to go to the war, the Qur'an surprisingly only focuses on afterlife sanctions, instead of using penal sanctions, claiming that those people will go to hell.<sup>47</sup> I will not elaborate the reasons behind God's decision to use different incentives in terms of reward and punishment (namely, physical and afterlife rewards for those who agree to fight, but lack of physical punishment for those who refuse to go), but suffice to say

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*on the day of the decision, the day when the two forces met in battle. God has power over all things.*" See Haleem, *supra* note 2 at 113. For further discussion see Ibn Rushd, *The Distinguished Jurist's Primer: Volume I*, trans. Imran Ahsan Khan Nyazee (Reading: Garnet Publishing, 2000), 466. Again, Umar bin Khatab made a revolutionary idea by stopping the division of land to the soldiers and holding the land on trust for the benefit of the society, arguing that it will jeopardize the interest of the society if the valuable land is distributed to the soldiers and used by their descendants only. Umar really thinks like an economist. See *Id.* at 480. Al-Qurthubi states that *take as spoils* renders the verbal form of *ghanimah*, which has the meaning of anything one acquires through exertion (though in Sunni legal tradition, it refers to those things that are taken legitimately in war). The term is usually distinguished from *fi'ah*, which refers to anything that is taken through peaceful means, such as a property tax (*kharāj*) or the indemnity or tax on non-Muslims (*jiyyah*). Others, however, consider the two terms to be synonymous. Some jurists believe that one abrogates the other, though most see this verse as a specification of the ruling given in another verse. See further discussions in Al-Qurthubi, *supra* note 44 at 1-43.

<sup>46</sup> See a good summary on the history of Islamic conquest in Robert G. Hoyland, *In God's Path: The Arab Conquests and the Creation of an Islamic Empire* (Oxford: Oxford University Press, 2015).

<sup>47</sup> On the obligation to go to war, Qur'an surah At-Tawba [9]: 38-39 state: "*Believers, why, when it is said to you, 'Go and fight in God's way,' do you feel weighed down to the ground? Do you prefer this world to the life to come? How small the enjoyment of this world is, compared with the life to come! If you do not go out and fight, God will punish you severely and put others in your place, but you cannot harm Him in any way: God has power over all things.*" See Haleem, *supra* note 2 at 119-120. Qur'an surah At-Tawba [9]: 81-85 state: "*Those who were left behind were happy to stay behind when God's Messenger set out; they hated the thought of striving in God's way with their possessions and their persons. They said to one another, 'Do not go [to war] in this heat.' Say, 'Hellfire is hotter.' If only they understood! Let them laugh a little; they will weep a lot in return for what they have done. So [Prophet], if God brings you back to a group of them, who ask you for permission to go out [to battle], say, 'You will never go out and fight an enemy with me: you chose to sit at home the first time, so remain with those who stay behind now.' Do not let their possessions and their children impress you: God means to punish them through these in this world, and that their souls should depart while they disbelieve.*" See Haleem, *ibid.* Al-Qurthubi states that those who stayed behind will be forced to *laugh little and weep much* as a result of their experience of the hereafter, unlike the believers who weep from belief in God (in hope and fear) in this life. See Al-Qurthubi, *supra* note 44 at 536-556. Further discussions on this verse can also be found in Nasr, *supra* note 2 at 528-529 and Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 5, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2015), 566-576.

that there is indeed a strong case that Islam acts pragmatically in one of the most controversial aspects of this religion, namely, the obligation to go to war.<sup>48</sup>

I am not trying to make a comprehensive discussion on Islamic law of war nor am I interested to prove that Islam is a religion of peace or vice versa in this dissertation. In line with the main objectives of the dissertation, I am more inclined to show that Islam is a pragmatist and consequentialist religion and the Basic Codes provisions on Islamic war provide many good examples of such way of thinking. Some scholars argue that all war in Islam is just and that Islam is the first religion to provide a comprehensive guideline for engaging a just war.<sup>49</sup>

Indeed, there are several verses in the Qur'an that support such idea, namely, that war should be an act of retaliation or defense,<sup>50</sup> that the retaliation should be proportionate,<sup>51</sup> and that

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<sup>48</sup> Qur'an surah Al-Baqara [2]: 216 states: "Fighting is ordained for you, though you dislike it. You may dislike something although it is good for you, or like something although it is bad for you: God knows and you do not." See Haleem, *supra* note 2 at 24. Some early commentators argued that *fighting is ordained for you* referred only to the Companions of the Prophet and that fighting alongside him was an individual responsibility for each of them, but later became a communal responsibility. See further discussion in Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 3, ed. Mukhlis B. Mukti, trans. Fathurrahman, Ahmad Hotib, and Dudi Rosyadi (Jakarta: Pustaka Azzam, 2012), 87-91.

<sup>49</sup> See for example in M. Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace* (New York: Cambridge University Press, 2014), 159-160.

<sup>50</sup> On the obligation to fight those who fight the Muslim, Qur'an surah Al-Baqara [2]: 190-192 states: "Fight in God's cause against those who fight you, but do not overstep the limits: God does not love those who overstep the limits. Kill them wherever you encounter them, and drive them out from where they drove you out, for persecution is more serious than killing. Do not fight them at the Sacred Mosque unless they fight you there. If they do fight you, kill them – this is what such disbelievers deserve – but if they stop, then God is most forgiving and merciful." See Haleem, *supra* note 2 at 21. Az-Zuhaili argues that this verse demonstrates the basic principles of war in God's way, while Al-Qurthubi cites that this passage is considered by some to be the first verse in the chronological order of revelation to permit fighting with the enemy of Islam, though others dispute this opinion and consider the first such passage to be Al-Hajj [22]:39: "Permission is granted to those who are fought, because they have been wronged." Among those passages that had previously forbidden fighting (i.e., while in Mecca and initially in Madina), some list Al-Fussilat [41]:34: "Repel [evil] with that which is better; then behold, the one between whom and thee there is enmity shall be as if he were a loyal protecting friend;" [5]:13: "Thou wilt not cease to discover their treachery, from all save a few of them. So pardon them, and forbear; Al-Muzzammil [73]:10: "Bear patiently that which they say and take leave of them in a beautiful manner;" and Al-Ghashiya [88]:22: "Thou are not a warder over them." Many commentators use this passage to discuss the usual rules of war, such as the prohibition against killing women, children, monks, hermits, the chronically ill, old men, and peasants. See Nasr, *supra* note 2 at 83-84 and further discussion in Az-Zuhaili, *supra* note 23 at 416-430, and Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 2, ed. M. Iqbal Kadir, trans. Fathurrahman Abdul Hamid, Dudi Rosyadi, and Marwan Affandi (Jakarta: Pustaka Azzam, 2009), 787-801.

<sup>51</sup> Qur'an surah An-Nahl [16]: 125-128 states: "[Prophet], call [people] to the way of your Lord with wisdom and good teaching. Argue with them in the most courteous way, for your Lord knows best who has strayed from His way and who is rightly guided. If you [believers] have to respond to an attack, make your response proportionate, but it is best to stand fast. So [Prophet] be steadfast: your steadfastness comes only from God. Do not grieve over them; do not be distressed by their scheming, for God is with those who are mindful of Him and who do good." See Haleem, *supra* note 2 at 173-174. Al-

there should be proper warning before declaring war, especially when there were previous truce agreements.<sup>52</sup> I would assume that these provisions are highly related and consistent with the Qur'an's numerous messages to the Muslims that they should act in accordance with fairness and justice,<sup>53</sup> that they should order what is right and forbid what is wrong,<sup>54</sup> and that they should

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Qurthubi notes that some commentators have suggested that this verse was abrogated by At-Tawba [9]:5, which commands Muslims, "*Slay the idolaters wheresoever you find them,*" although many major commentators disagree, considering the first verse to be general in its meaning, that is, applying to anyone at any time who has been wronged, and therefore not abrogated. See Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 10, ed. M. Iqbal Kadir, trans. Asmuni (Jakarta: Pustaka Azzam, 2008), 498-505.

<sup>52</sup> Qur'an surah At-Tawba [9]: 12-15 state: "*But if they break their oath after having made an agreement with you, if they revile your religion, then fight the leaders of disbelief—oaths mean nothing to them—so that they may stop. How could you not fight a people who have broken their oaths, who tried to drive the Messenger out, who attacked you first? Do you fear them? It is God you should fear if you are true believers. Fight them: God will punish them at your hands, He will disgrace them, He will help you to conquer them, He will heal the believers' feelings and remove the rage from their hearts.*" See Haleem, *supra* note 2 at 117. Qur'an surah Al-Anfal [8]: 58 states: "*And if you learn of treachery on the part of any people, throw their treaty back at them, for God does not love the treacherous.*" See Haleem, *supra* note 2 at 114. Al-Qurthubi, commented that the legality of executing people for insulting the Prophet is thus seen in terms of treaties and political loyalties and is based upon the implicit threat of actual violence that such insults might entail—as demonstrated by the case of Ka'b ibn al-Ashraf, who went far beyond insults to generate hostility against the Prophet—rather than on the offense of the insult itself. See further discussion in Al-Qurthubi, *supra* note 44 at 188-202. For further comments on faith of the disbelievers and recommendations to wage war on disbelievers, see Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 5, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2015), 396-404.

<sup>53</sup> On the obligation to act fairly and in justice, Qur'an surah An-Nisa' [4]:58 states: "*God commands you [people] to return things entrusted to you to their rightful owners, and, if you judge between people, to do so with justice: God's instructions to you are excellent, for He hears and sees everything.*" See Haleem, *supra* note 2 at 56. See further discussion in Az-Zuhaili, *supra* note 25 at 134-144 and Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 5, ed. M. Iqbal Kadir, trans. Fathurrahman Abdul Hamid, Dudi Rosyadi, and Marwan Affandi (Jakarta: Pustaka Azzam, 2009), 606-613. Qur'an surah An-Nisa' [4]:135-138 further state: "*You who believe, uphold justice and bear witness to God, even if it is against yourselves, your parents, or your close relatives. Whether the person is rich or poor, God can best take care of both. Refrain from following your own desire, so that you can act justly—if you distort or neglect justice, God is fully aware of what you do. You who believe, believe in God and His Messenger and in the Scripture He sent down to His Messenger, as well as what He sent down before. Anyone who does not believe in God, His angels, His Scriptures, His messengers, and the Last Day has gone far, far astray. As for those who believe, then reject the faith, then believe again, then reject the faith again and become increasingly defiant, God will not forgive them, nor will He guide them on any path. [Prophet], tell such hypocrites that an agonizing torment awaits them.*" See Haleem, *supra* note 2 at 63. Seyyed Hossein Nasr argues that the Qur'an requires the presence of witnesses for commercial transactions, the transfer of wealth to orphans upon maturity, and adjudication of serious criminal charges. To judge between people "with justice," as God commands, society must depend upon people honestly and fully witnessing to the truth, without regard for the ultimate consequences of their truthful testimony, which is not in their hands. According to this verse, testimony should not be swayed either by self-interest (*though it be against yourselves*) or ties of kinship (*or [against] your parents or kinsfolk*). One should note that one has a duty to testify not only against others, but even against oneself, and that truthful witnessing takes precedence even over the kindness and deference the Qur'an asserts one owes to parents and kinsfolk. See Nasr, *supra* note 2 at 253-255.

<sup>54</sup> Ali-Imran [3]: 110 states: "*[Believers], you are the best community singled out for people: you order what is right, forbid what is wrong, and believe in God. If the People of the Book had also believed, it would have been better for them. For although some of them do believe, most of them are lawbreakers.*" See Haleem, *supra* note 2 at 42. Seyyed Hossein Nasr, states that interpretation on reasons why Muslims are the best society, and the downfall of Jews, depend on allowing the categories of "Muslims" (i.e., followers of the religion brought by Muhammad) and "People of the Book" to overlap. If 'Abd Allāh ibn Salām was Muslim, then he was not in any sense one of the People of the Book

respect the trust of other people and therefore, act trustfully.<sup>55</sup> This is arguably a strong evidence that Islam puts considerations other than well-being in moral and legal decision making which is in line with another God's claim, namely, that He shall not act unjustly.<sup>56</sup>

I have to admit that defining fairness is not an easy task and discussion about fairness in the Basic Codes are sometimes ambiguous. Professor Vernon Smith, however, provide a good summary on some meanings that can be attributed to fairness which I believe reflects its core concepts, including: (i) equality of outcomes (in similar situations, apply similar rules), (ii) equality of opportunity to achieve outcomes, (iii) equilibrium market allocation (to each in proportion to his or her contribution to the net surplus of the group, (iv) property right norms, (v) reciprocity.<sup>57</sup>

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unless these are political designations like "Arab" or "Byzantine." By the same token, if one is *among* the People of the Book (i.e., one of them), then one is by definition not a Muslim. Although the terms "Muslims" and "People of the Book" can designate political entities, the Qur'an and *Ḥadīth* do not refer directly to a Muslim (i.e., a follower of Muhammad) as one of the People of the Book or vice versa. This fact does not prevent the scope of *muslim*—namely, one who submits to God—from embracing others beyond the followers of Muhammad. See Nasr, *supra* note 2 at 160. Further elaboration on the verse can be found in Az-Zuhaili, *supra* note 19 at 371-380.

<sup>55</sup> On the idea that a Muslim must respect other people's trust, Qur'an surah Al-Anfal [8]: 27 states: "*Believers, do not betray God and the Messenger, or knowingly betray [other people's] trust in you* See Haleem, *supra* note 2 at 112. Seyyed Hossein Nasr points out that the significance of being faithful to one's trust is also mentioned in numerous Qur'anic verses. Some commentators try to link this command to have trust with certain historical incidents related to later battles, but those would seem to be out of sequence in what is essentially a discussion of the Battle of Badr. See Nasr, *supra* note 2 at 490. Qur'an surah An-Nisa' [4]:105 states: "*We have sent down the Scripture to you [Prophet] with the truth so that you can judge between people in accordance with what God has shown you. Do not be an advocate for those who betray Trust.*" Az-Zuhaili notes that the verse is instructions on producing court rulings and following court instructions based on truthfulness and fairness. See Az-Zuhaili, *supra* note 25 at 252-264.

<sup>56</sup> Ali Imran [3]:108-109 state: "*These are God's revelations: We recite them to you [Prophet] with the Truth. God does not will injustice for His creatures. Everything in the heavens and earth belongs to God; it is to Him that all things return.*" See Haleem, *supra* note 2 at 42. According to Al-Qurthubi, God has no need to be unjust to anything or anyone, since He has power over all things and all things belong to Him. See Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 4, ed. Ahmad Zubairin, trans. Dudi Rosyadi, Nashirul Haq, and Fathurrahman (Jakarta: Pustaka Azzam, 2008), 419-420. However, Seyyed Hossein Nasr states that these verses raise the question of God's relationship to good or evil; namely, what does it mean to say that *God desires no wrong for the worlds*? One perspective, typified in Ash'arite theology, states that God does no wrong because wrong (*zulm*) is definable as trespassing upon what belongs to another, and since everything belongs to God, nothing He does could amount to a wrong. Another prominent perspective, typified by the Mu'tazilite school of theology, states that God is always just, and what is just or unjust are objective features of the world recognizable by human beings. Some philosophers and Sufis make a distinction between God's "prescriptive command" (*al-amr al-taklifi*) and the "engendering command" (*al-amr al-takwīnī*); the former refers to what God asks of human free will and the latter to God's Power to create. Being free, human beings can choose what God does not want, but cannot oppose what God wills to be. See Nasr, *supra* note 2 at 160-161.

<sup>57</sup> See further discussion in Vernon L. Smith, *Rationality in Economics* (Cambridge: Cambridge University Press, 2010), 161-163.

Yet, there are also numerous cases where those principles seem to be breached in a way that is seriously damaging the entire notion of fairness, justice, and other usual deontological values. Let us start with the permissibility of war. When the Prophet and his Companions were still a weak minority group in Mecca for approximately 10 years, there were no order for war.<sup>58</sup> Forget having a full-blown war, given their conditions, to be able to survive the harsh treatments of the pagans during those days was already a huge achievement. The war order came gradually once the Prophet's group started to move to Medina and built enough strength to engage in multiple wars with the pagans in Mecca. Arguing that they have been wronged and driven out of their original home at Mecca, the Prophet and his Companions first started the war by engaging multiple surprise raids against the pagans' caravans and trade groups.<sup>59</sup>

But the fairness of these initial series of attacks is highly questionable. Unless it can be proven beyond any reasonable doubt that those caravans belong to the people that directly caused the expulsion of the Muslims from Mecca, is it fair to "retaliate" against people having no connection with the expulsion? Is it morally acceptable to attack unrelated people because we have

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<sup>58</sup> The first order of war came through Qur'an surah Al-Hajj [22]: 39-40 which state: "Those who have been attacked are permitted to take up arms because they have been wronged— God has the power to help them – those who have been driven unjustly from their homes only for saying, 'Our Lord is God.' If God did not repel some people by means of others, many monasteries, churches, synagogues, and mosques, where God's name is much invoked, would have been destroyed. God is sure to help those who help His cause – God is strong and mighty." See Haleem, *supra* note 2 at 212. See the discussion regarding the historical background of the above verse in Ali Ibn Ahmad Al-Wahidi, *Kitab Asbab Al Nuzul: Occasions and Circumstances of Revelation* (Kuala Lumpur: Dar Al Wahi Publications, 2015), 318-319. Seyyed Hossein Nasr commented that this is the verse most frequently thought to be the first in permitting the believers to use force to defend themselves. *Permission is granted* refers to permission to fight. Previously, Muslims had been required to deal with the persecution and violence against them with patience and forbearance and in two notable cases through emigration from Mecca: the first was the emigration of some Companions to Abyssinia in 615, where they received the protection of the Negus; and the second was the major emigration of the Prophet and his Companions from Mecca to Medina in 622. See Nasr, *supra* note 2 at 839. Meanwhile, Al-Qurthubi states that according to some, this verse was revealed at the time of the emigration (*hijrah*) of the Prophet from Mecca to Medina, and it is said that upon hearing this verse Abū Bakr said, "I knew that fighting would come to pass". See Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 12, ed. M. Iqbal Kadir, trans. Fathurrahman Abdul Hamid, Dudi Rosyadi, and Marwan Affandi (Jakarta: Pustaka Azzam, 2009), 168-180.

<sup>59</sup> See details of these raids in among others: Abu l-Fida' Isma'il ibn 'Umar ibn Kathir, *The Life of the Prophet Muhammad: Volume II*, trans. Trevor Le Gassick (Reading: Garnet Publishing, 1998), 232-250, Muhammad ibn Ishaq, *The Life of Muhammad: A Translation of Ishaq's Sirat Rasul Allah*, trans. A. Guillaume (Pakistan: Oxford University Press, 1967), 281-291, and Ibnu Hajar Al-Asqalani, *Fathul Baari*, vol. 20, ed. Abu Rania, trans. Amiruddin (Jakarta: Pustaka Azzam, 2007), 2-10.

been wronged by other parties that may not be directly related to the victims of our attack? Or does Islam suddenly adopt communal liability for justifying such attack? Without proper justification, it would be more accurate to classify these attacks as highway robbery raid. Apparently, in Islam, even a robbery can be justified when it serves the greater good, especially since this is essentially a strategic and profitable move for the early Muslim community at that time.<sup>60</sup>

Eventually, the Basic Codes' order to perform the war became wider and the relatively small conflicts turned out to be full scale wars that culminated in the decisive victory of the Prophet where he was finally successful in returning to and claiming Mecca under the banner of Islam.<sup>61</sup> Following the development of the above verses and stories on war, it is not surprising to find out that most classical Islamic jurists support the idea that an Islamic nation should promote peace and enter into treaties with neighboring enemies only when it is in a weak state and then such nation is recommended to end the treaties and attack the enemies when it has enough military capabilities, picking the weakest one first before engaging with the stronger ones.<sup>62</sup> It is such a

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<sup>60</sup> Indeed, from military point of view, the raids were deemed strategic and demonstrated the genius intellect of the Prophet. See the analysis in Richard A. Gabriel, *Muhammad: Islam's First Great General* (Norman: University of Oklahoma Press, 2007), 73-85 and Russ Rodgers, *The Generalship of Muhammad: Battles and Campaign of the Prophet of Allah* (Gainesville: University Press of Florida, 2012), 51-64.

<sup>61</sup> Qur'an surah Al-Anfal [8]: 39-40 states: "[Believers], fight them until there is no more persecution, and all worship is devoted to God alone: if they desist, then God sees all that they do, but if they pay no heed, be sure that God is your protector, the best protector and the best helper." See Haleem, *supra* note 2 at 112. Seyyed Hossein Nasr pointed out that for this verse, see also the similar verse in Al-Baqara [2]:193: "And fight them until there is no strife, and religion is for God. But if they desist, then there is no enmity save against the wrongdoers." Al-Rāzī explains that strife (fitnah), which can also mean "trial" or "temptation," refers to the persecution the Muslims endured at the hands of the Mecca idolaters, both before and after the hijrah. Even after the hijrah, Muslims still residing in Mecca were treated badly and oppressed severely by the idolaters. This verse orders the believers to fight until this strife or trial (fitnah) is gone. In al-Rāzī's view, they must be fought until religion is wholly for God, but he understands it as pertaining only to the environment around Mecca and not extended to the whole world. According to al-Rāzī, the reason for fighting is the cessation of fitnah, which is only possible with the disappearance of the forces of disbelief. See Nasr, *supra* note 2 at 492-493.

<sup>62</sup> See Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Al-Tabari's Book of Jihad: A Translation from the Original Arabic*, trans. Yasir S. Ibrahim (New York: The Edwin Mellen Press, 2007), 79-88.

pragmatic way of thinking and at the same time, it is difficult to argue that such opinion was not supported and inspired by the stories in the Basic Codes as previously discussed.

It is also important to note that among the early adventures of Islam, there are cases where preemptive attacks without warning were launched against certain tribes of the pagans (in which the Muslims enjoyed a good deal of war spoils, including women slaves) based on the argument that the Prophet had already predicted that they will launch an attack.<sup>63</sup> It is incredibly hard to resist comparing such reasoning with George W. Bush's arguments when he started the Iraq war; I suppose he learned from the best.

There are also cases where assassinations were allowed against people who should fall under the category of civilians (including the permissibility of using "dirty" tricks to ensure that those assassinations were successful).<sup>64</sup> Apparently, scheming these maneuvers is not an

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<sup>63</sup> Hadith no. 2541 in Al-Bukhari's compendium of Hadiths states: "Narrated Ibn 'Aun: I wrote a letter to Nāfi', and Nafi' wrote in reply to my letter that the Prophet had (suddenly) attacked Bani Mustaliq (without warning while they were heedless) and their cattle were being watered at the places of water. Their fighting men were killed and their women and children were taken as captives; the Prophet got Juwairiya on that day. Nafi' said that Ibn 'Umar had told him the above narration and that Ibn 'Umar was in that army." See Al-Bukhari, *supra* note 30 at 413. See further explanation about the permissibility of this pre-emptive attack in Ibnu Hajar Al-Asqalani, *Fathul Baari*, vol. 14, ed. Abu Rania, trans. Amiruddin (Jakarta: Pustaka Azzam, 2007), 238.

<sup>64</sup> See Rodgers, *supra* note 60 at 73. This is officially recorded in Hadith no. 4037 in Al-Bukhari's compendium of Hadiths which states: "Narrated Jabir bin 'Abdullah: Allah's Messenger said, "Who will kill Ka'b bin Al-Ashraf who has hurt Allah and His Messenger?" Thereupon Muhammad bin Maslama got up saying, "O Allah's Messenger! Would you like that I kill him?" The Prophet said, "Yes." Muhammad bin Maslama said, "Then allow me to say a thing (i.e., to deceive Ka'b)." The Prophet said, "You may say it." Then Muhammad bin Maslama went to Ka'b and said, "That man (i.e., Muhammad) demands Sadaqa from us, and he has troubled us, and I have come to borrow something from you." On that, Ka'b said, "By Allah, you will get tired of him!" Muhammad bin Maslama said, "Now as we have followed him, we do not want to leave him unless and until we see how his end is going to be. Now, we want you to lend us a camel load or two of food." (Some difference between narrators about a camel load or two). Ka'b said "Yes (I will lend you), but you should mortgage something to me." Muhammad bin Maslama and his companion said, "What do you want?" Ka'b replied, "Mortgage your women to me." They said, "How can we mortgage our women to you and you are the most handsome of the Arabs?" Ka'b said, "Then mortgage your sons to me." They said, "How can we mortgage our sons to you? Later they would be abused by the people's saying that so-and-so has been mortgaged for a camel load of food. That would cause us great disgrace, but we will mortgage our arms to you." Muhammad bin Maslama and his companion promised Ka'b that they, or he (Muhammad bin Maslama) would return to him. He came to Ka'b at night along with Ka'b's foster brother (milk suckling brother), Abu Na'ila. Ka'b invited them to come into his fort, and then he went down to them. His wife asked him, "Where are you going at this time?" Ka'b replied, "None but Muhammad bin Maslama and my (foster - milk suckling) brother Abu Na'ila have come." His wife said, "I hear a voice as if blood is dropping from him." Ka'b said, "They are none but my brother Muhammad bin Maslama and my foster (milk suckling) brother Abu Na'ila. A generous man should respond to a call at night, even if invited to be killed." Muhammad bin Maslama went with two men. So Muhammad bin Maslama went in together with two men, and said to them, "When Ka'b comes, I will touch his hair and smell it, and when you see that I have got hold of his head, strike him." The sub narrator also mentioned that Muhammad bin Maslama said to his companions, "I will let you smell his head."

inherently bad deed as God states that the schemes of pagans and unbelievers to kill and defeat the Prophet and his Companies were useless since God is the best schemer in history,<sup>65</sup> and in the above cases, the schemes were intended to ensure that a satisfying victory can be achieved for Islam.<sup>66</sup> Again, consequences matter a lot.

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*Ka'b bin Al-Ashraf came down to them, wrapped in his clothes, and diffusing perfume. Muhammad bin Maslama said, "I have never smelt a better scent than this." Ka'b replied, "I have got the best Arab women who know how to use the high class of perfume." Muhammad bin Maslama requested Ka'b, "Will you allow me to smell your head?" Ka'b said, "Yes." Muhammad smelt it and made his companions smell it as well. Then he requested Ka'b again, "Will you let me (smell your head)?" Ka'b said, "Yes." When Muhammad got a strong hold of him, he said (to his companions), "Get at him!" So, they killed him and went to the Prophet, and informed him." See Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 5, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 221-223.*

Hadith no. 4040 states: "*Narrated Al-Bara': Allah's Messenger sent 'Abdullāh bin 'Atik and 'Abdullah bin 'Utba with a group of men to Abu Rafi' (to kill him). They proceeded till they approached his castle, whereupon 'Abdullāh bin 'Atik said to them, "Wait (here), and in the meantime I will go and see." 'Abdullāh said later on, "I played a trick in order to enter the castle. By chance, they lost a donkey of theirs and came out carrying a flaming light to search for it. I was afraid that they would recognize me, so I covered my head and legs and pretended to answer the call of nature. The gate-keeper called, 'Whoever wants to come in, should come in before I close the gate.' So, I went in and hid myself in a stall of a donkey near the gate of the castle. They took their supper with Abu Rafi' and had a chat till late at night. Then they went back to their homes. When the voices vanished and I no longer detected any movement, I came out. I had seen where the gate-keeper had kept the keys of the castle in a hole in the wall. I took it and unlocked the gate of the castle, saying to myself, 'If these people should notice me, I will run away easily.' Then I locked all the doors of their houses from outside while they were inside, and ascended to Abu Rafi' by a staircase. I saw the house in complete darkness with its light off, and I could not know where the man was. So I called, 'o Abu Rafi!' He replied, 'Who is it?' I proceeded towards the voice and hit him. He cried loudly but my blow was futile. Then I came to him, pretending to help him, saying with a different tone of my voice. 'What is wrong with you, o Abu Rafi?' He said, 'Are you not surprised? Woe on your mother! A man has come to me and hit me with a sword!' So again I aimed at him and hit him, but the blow proved futile again, and on that Abu Rafi' cried loudly and his wife got up. I came again and changed my voice as if I were a helper, and found Abu Rafi' lying straight on his back, so I drove the sword into his belly and bent on it till I heard the sound of a bone break. Then I came out, filled with astonishment and went to the staircase to descend, but I fell down from it and got my leg dislocated. I bandaged it and went to my companions limping. I said (to them), 'Go and tell Allah's Messenger of this good news, but I will not leave (this place) till I hear the news of his (i.e., Abu Rafi') death. When dawn broke, an announcer climbed over the wall and announced, 'I convey to you the news of the death of Abu Rafi'.' I got up and proceeded without feeling any pain till I caught up with my companions before they reached the Prophet to whom I conveyed the good news." See *Id.* at 225-227.*

<sup>65</sup> Qur'an surah At-Tariq [86]: 13-17 state: "*This is truly a decisive statement; it is not something to be taken lightly. They plot and scheme, but so do I: [Prophet], let the disbelievers be, let them be for a while.*" See Haleem, *supra* note 2 at 417. Further discussions on Qur'an surah At-Tariq [86]: 13-17 are elaborated by Seyyed Hossein Nasr where he stated, "the verse can be seen as alluding to punishment in both this world and the hereafter, but also to mercy insofar as God allows people time to repent." See Nasr, *supra* note 2 at 1501-1502. On the idea that Allah is the best schemer, Qur'an surah Ali Imran [3]: 54 states: "*The [disbelievers] schemed but God also schemed; God is the Best of Schemers.*" See Haleem, *supra* note 2 at 38 and further analysis in Az-Zuhaili, *supra* note 19, at 274-282. Qur'an surah Al-Anfal [8]: 30 states: "*Remember [Prophet] when the disbelievers plotted to take you captive, kill, or expel you. They schemed and so did God: He is the best of schemers.*" See Haleem, *supra* note 2 at 112. Seyyed Hossein Nasr points out that this verse refers to the persecution that the Prophet personally suffered in Mecca, when, after losing the protection of his uncle Abu Thalib, he was often exposed to mortal danger and to sanctions that eventually resulted in the migration to Medina, during which he was pursued by Meccans who wished to eliminate him. It simply means that God is a better "planner" than those who plot against Him. See Nasr, *supra* note 2 at 490-491.

<sup>66</sup> Ibnu Hajar Al-Asqalani also had the same view when he analyzes the two Hadiths discussed in note 64. See Al-Asqalani, *supra* note 59 at 226.

Related to the assassination, in terms of retaliation (*qisas*) for murder, the Basic Codes adopt a different system when the victim is a non-believer. In a normal case, a murderer shall be subject to retaliation or hefty financial compensation (more on this in Chapter 6). However, if the murderer is a Muslim and the victim is a non-believer, no retaliation shall be imposed toward the murderer.<sup>67</sup> The only punishment for such killer is that he will not be able to smell the fragrance of heaven on the judgment day, though it is not clear whether this would also mean that he shall not be able to enter the heaven.<sup>68</sup> In any case, this different treatment signals how Islam perceive the act of killing, namely, it is not an inherently bad act as long as there are good reasons to justify the killing.

The concept of hypocrites back in Chapter 3 is also relevant for our discussion in this section. Recall that hypocrites are those who say something and act differently, those who have two faces; these are the people who were promised to spend eternity in hell.<sup>69</sup> Lo and behold, such act is not inherently bad either, it depends on whether the act is necessary to ensure the protection of your life. This is known as *taqiyya*, namely, the act to appear as if you are not a Muslim in order to protect your life from the dangers of Islam's enemies.<sup>70</sup>

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<sup>67</sup> Hadith no. 6915 of Al-Bukhari compendium of Hadiths states: "Narrated Abu Juhaifa: I asked 'Ali "Do you have anything Divine literature besides what is in the Qur'an?" Or, as Uyaina once said, "Apart from what the people have?" 'Ali said, "By Him Who made the grain split (germinate) and created the soul, we have nothing except what is in the Qur'an and the ability (gift) of understanding Allah's Book which He may endow a man with, and we have what is written in this sheet of paper." I asked, "What is (written) on this paper?" He replied, "Al-'Aql (the legal rules and regulations of Diya and the (ransom for) releasing of the captives, and the judgement that no Muslim should be killed in Al-Qisas (equality in punishment) for killing a Kafir (disbeliever)."" See Al-Bukhari, *supra* note 36 at 40.

<sup>68</sup> Hadith no. 6914 of Al-Bukhari compendium of Hadiths states: "Narrated 'Abdullah bin 'Amr: The Prophet said, "Whoever killed a Mu'ahid (a person who is granted the pledge of protection by the Muslims) shall not smell the fragrance of Paradise though its fragrance can be smelt at a distance of forty years (of travelling)."" See *Id.*

<sup>69</sup> See our discussion in Chapter 3.

<sup>70</sup> On *taqiyya*, Qur'an surah Ali-Imran [3]: 28-29 state: "The believers should not make the disbelievers their allies rather than other believers, anyone who does such a thing will isolate himself completely from God, except when you need to protect yourselves from them. God warns you to beware of Him: the Final Return is to God. Say [Prophet], 'God knows everything that is in your hearts, whether you conceal or reveal it; He knows everything in the heavens and earth; God has power over all things.'" See Haleem *supra* note 2 at 34-49. Az-Zuhaili pointed out that the verse is on the false loyalty towards disbelievers and warnings on the end of days. See Az-Zuhaili, *supra* note 19, at 231-241. An-Nahl [6]: 106-107 state: "If people do not believe in God's revelation, God does not guide them, and a painful punishment awaits them. Falsehood is fabricated only by those who do not believe in God's revelation: they are the liars. With the exception of those who

In one Hadith within the Al-Bukhari compendium of Hadiths, the Prophet talked disdainfully about one person whom he about to meet and then when he actually met him, he talked very politely to him, prompting his wife, Aisha, to ask the Prophet, why did he act so nicely? The Prophet responded that it is important to guard our talking manner to other people as not to make them desert us.<sup>71</sup> Imagine the surprise when we read the next two pages of the compendium and found one Hadith that states that the worst people before God on the Day of Resurrection will be the double-faced people who appear to some people with one face and to other people with another face.<sup>72</sup> I suppose this is a very strong sign that being double face is only prohibited when the consequences are “bad”.<sup>73</sup> The only alternative explanation is that the Prophet is a hypocrite and surely such conclusion is not acceptable under the Rationality Parameters.

**B. THE MOST IMPORTANT STORY IN THE QUR’AN: KHIDR VERSUS MOSES**

Having all of the examples in the previous section, I am quite confident to claim that there is a huge probability that Islam is a true consequentialist and pragmatist religion. To argue otherwise would seriously challenge the ability of the Basic Codes to satisfy the Rationality Parameters. However, in case there are still some people who are not yet convinced with such

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*are forced to say they do not believe, although their hearts remain firm in faith, those who reject God after believing in Him and open their hearts to disbelief will have the wrath of God upon them and a grievous punishment awaiting them. This is because they love the life of this world more than the one to come, and God does not guide those who reject Him.”* Ath-Thabari states that this verse is believed by most commentators to have been revealed on the case of ‘Ammār ibn Yāsir, an early Meccan whose parents were tortured and killed because of Islam and who was himself coerced through torture and threat of death into outwardly renouncing his faith in Islam. See Abu Ja’far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 16, ed. Besus Hidayat Amin, trans. Akhmad Affandi (Jakarta: Pustaka Azzam, 2008), 340-348. Further comments on this subject can also be found in Nasr, *supra* note 2 at 687.

<sup>71</sup> Hadith no. 6054 of Al-Bukhari compendium of Hadiths states: “*Narrated ‘Aishah: A man asked permission to enter upon Allah’s Messenger. The Prophet said, “Admit him. What an evil brother of his people,” or said, “a son of his people!” But when the man entered, the Prophet spoke to him in a very polite manner. (And when that person left) I said, “O Allah’s Messenger! You had said what you had said, yet you spoke to him in a very polite manner?” The Prophet said, “O ‘Aishah! The worst people are those whom the people desert or leave in order to save themselves from their dirty language or from their transgression.”* See Al-Bukhari, *supra* note 33 at 54.

<sup>72</sup> Hadith no. 6058 of Al-Bukhari compendium of Hadiths states: “*Narrated Abu Hurairah: The Prophet said, “The worst people before Allah on the Day of Resurrection will be the double-faced people who appear to some people with one face and to other people with another face.”* See *Id.* at 56.

<sup>73</sup> See a comprehensive discussion regarding this subject in Ahmad ibn Naqib Al-Misri, *Reliance of the Traveler: A Classic Manual of Islamic Sacred Law*, trans. Nuh Ha Mim Keller (Maryland: Amana Publication, 2008), 745.

claim, I would like to discuss a story in the Basic Codes that I believe provide the best argument to support the Islamic consequentialism, namely, the story of Moses and Khidr as recorded in Qur'an surah Al-Kahf [18]: 60-82 and several Hadiths in Al-Bukhari and Muslim compendium of Hadiths.<sup>74</sup>

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<sup>74</sup> The complete texts are as follows: "Moses said to his servant, 'I will not rest until I reach the place where the two seas meet, even if it takes me years!' But when they reached the place where the two seas meet, they had forgotten all about their fish, which made its way into the sea and swam away. They journeyed on, and then Moses said to his servant, 'Give us our lunch! This journey of ours is very tiring,' and [the servant] said, 'Remember when we were resting by the rock? I forgot the fish— Satan made me forget to pay attention to it— and it [must have] made its way into the sea.' 'How strange!' Moses said, 'Then that was the place we were looking for.' So the two turned back, retraced their footsteps, and found one of Our servants— a man to whom We had granted Our mercy and whom We had given knowledge of Our own. Moses said to him, 'May I follow you so that you can teach me some of the right guidance you have been taught?' The man said, 'You will not be able to bear with me patiently. How could you be patient in matters beyond your knowledge?' Moses said, 'God willing, you will find me patient. I will not disobey you in any way.' The man said, 'If you follow me then, do not query anything I do before I mention it to you myself.' They travelled on. Later, when they got into a boat, and the man made a hole in it, Moses said, 'How could you make a hole in it? Do you want to drown its passengers? What a strange thing to do!' He replied, 'Did I not tell you that you would never be able to bear with me patiently?' Moses said, 'Forgive me for forgetting. Do not make it too hard for me to follow you.' And so they travelled on. Then, when they met a young boy and the man killed him, Moses said, 'How could you kill an innocent person? He has not killed anyone! What a terrible thing to do!' He replied, 'Did I not tell you that you would never be able to bear with me patiently?' Moses said, 'From now on, if I query anything you do, banish me from your company— you have put up with enough from me.' And so they travelled on. Then, when they came to a town and asked the inhabitants for food but were refused hospitality, they saw a wall there that was on the point of falling down and the man repaired it. Moses said, 'But if you had wished you could have taken payment for doing that.' He said, 'This is where you and I part company. I will tell you the meaning of the things you could not bear with patiently: the boat belonged to some needy people who made their living from the sea and I damaged it because I knew that coming after them was a king who was seizing every [serviceable] boat by force. The young boy had parents who were people of faith, and so, fearing he would trouble them through wickedness and disbelief, we wished that their Lord should give them another child— purer and more compassionate—in his place. The wall belonged to two young orphans in the town and there was buried treasure beneath it belonging to them. Their father had been a righteous man, so your Lord intended them to reach maturity and then dig up their treasure as a mercy from your Lord. I did not do [these things] of my own accord: these are the explanations for those things you could not bear with patience." See Haleem, *supra* note 2 at 187-188. Seyyed Hossein Nasr elaborated that these verses contain the account of Moses and the mysterious "servant" he meets at *the junction of the two seas* (v. 60). This is the only account of Moses in the Qur'an that does not have some references in the Biblical text. The mysterious servant is not named in the Qur'an but is identified by all commentators and by a hadith of the Prophet as Khidr (or al-Khadr, the "Green One"). Khidr is considered widely to be a prophet who lives well beyond the ordinary span of a human lifetime and is indeed associated with eternal life or with what lies beyond or between the realms of life and death. This association with perpetual life and the contrast between Moses as the bringer of Divine exoteric law and Khidr as the possessor of an esoteric *knowledge from God's Presence* (v. 65) are the bases of the story's metaphysical and mystical richness and have made it the subject of much interpretation and elaboration in Islamic literature. In Sufism, Khidr is considered the prophet of initiation into Divine mysteries as well as a special spiritual guide from whom many, including the famous Sufi metaphysician Ibn 'Arabī, claimed to have received initiation. The story of Moses and Khidr recounted in these verses has been read in many ways. It provides one of the most dramatic demonstrations of God's power over life, death, and resurrection, a theme also found in the earlier account of the youths of the cave. But this story is also understood to be a symbolic account of the difference between formal and exoteric knowledge based upon revealed scripture or reason, on the one hand, and esoteric knowledge that comes directly from God, on the other; it is also a symbolic account of spiritual mastery and discipleship and of the different levels of the human soul and its spiritual training. Finally, the story indicates that God's Will is mysteriously operating through all events and actions and attests to the existence of a hidden interpretation (*ta'wīl*) of what one witnesses and experiences in this world—an interpretation known only to a few, like Khidr, who have been given this knowledge directly by God Himself. This knowledge may transcend the

The summary of this story is as follows: Moses, in his capacity as a prophet and leader of the Jews, claimed that he is the most learned man among them.<sup>75</sup> Due to his arrogance, God instructed

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understanding of even a great prophet like Moses, who in this story represents the exoteric, or outward, dimension of religion. See Nasr, *supra* note 2 at 748-750. Further comments may also be found in Departemen Agama RI, *Al-Qur'an dan Tafsirnya*, vol. 5 [Al-Qur'an and Its Interpretations] (Jakarta: Lembaga Percetakan Al-Qur'an, 2009), 635-641.

<sup>75</sup> Hadith no. 3401 states: "Narrated Sa'id bin Jubair: I said to Ibn 'Abbas, "Nauf Al-Bikali claims that Musa, the companion of Al-Khidr was not Musa (the Prophet) of the Children of Israel, but some other Musa." Ibn 'Abbas said, "Allah's enemy (i.e., Nauf) has told a lie. Ubal bin Ka'b told us that the Prophet said, 'Once Musa stood up and addressed Bani Israel. He was asked who was the most learned man amongst the people. He said, I.' Allah admonished him as he did not attribute absolute knowledge to Him (Allah). So, Allah said to him, 'Yes, at the junction of the two seas there is a slave of Mine who is more learned than you.' Musa said, 'O my Lord! How can I meet him?' Allah said, Take a fish and put it in a basket and you will find him at the place where you will lose the fish.' Musa took a fish and put it in a basket and proceeded along with his boy-servant, Yusha' bin Nun, till they reached the rock where they laid their heads (i.e., lay down). Moses slept, and the fish, moving out of the basket, fell into the sea. 'It took its way into the sea (straight) as in a tunnel. Allah stopped the flow of water over the fish and it became like an arch (the Prophet pointed out this arch with his hands). They travelled the rest of the night, and the next day. Musa said to his boyservant, 'Bring us our early meal; indeed, we have suffered much fatigue in this journey of ours.' Musa did not feel tired till he crossed that place which Allah had ordered him to seek after. His boy-servant said to him, 'Do you know that when we betook ourselves to the rock, I indeed forgot the fish, and none but Satan made me forget to remember it. It took its course into the sea in a strange way?' So there was a tunnel for the fish and for them (Musa and his servant) there was astonishment. Musa said, 'That is what we have been seeking.' So, both of them went back retracing their footsteps till they reached the rock. There they saw a man lying covered with a garment. Musa greeted him and he replied saying, "Is there such a greeting in your land?' Musa said, 'I am Musa.' The man asked, 'Musa of Bani Israel?' Musa said, 'Yes, I have come to you so that you may teach me something of that knowledge which you have been taught (by Allah).' He said, 'O Musa! I have some of the knowledge of Allah, which Allah has taught me, and which you do not know, while you have some of the knowledge of Allah which Allah has taught you and which I do not know.' Musa asked, 'May I follow you?' He said, 'But you will not be able to remain patient with me, for how can you be patient about things which you know not?' (Musa said, 'You will find me, if Allah will, truly patient, and I will not disobey you in aught.') So, both of them set out walking along the seashore, a ship passed by them and they asked the crew of the boat to take them on board. The crew recognized Al-Khidr and so they took them on board without fare. When they were on board the ship, a sparrow came and stood on the edge of the boat and dipped its beak once or twice into the sea. Al-Khidr said to Musa, 'O Musa! My knowledge and your knowledge have not decreased Allah's Knowledge except as much as this sparrow has decreased the water of the sea with its beak.' Then suddenly Al-Khidr took an adze and plucked a plank, and Musa did not notice it till he had plucked a plank with the adze. Musa said to him, 'What have you done? They took us on board charging us nothing; yet you have intentionally made a hole in their ship so as to drown its passengers. Verily, you have done a dreadful thing.' Al-Khidr replied, 'Did I not tell you that you would not be able to have patience with me?' Musa replied, 'Do not blame me for what I have forgotten, and do not be hard upon me for my affair (with you).' So, the first excuse of Musa was that he had forgotten. When they had left the sea, they passed by a boy playing with other boys. Al-Khidr took hold of the boy's head and plucked it with his hand like this. (Sufyan, the sub narrator, pointed with his fingertips as if he was plucking some fruit.) Musa said to him, 'Have you killed an innocent person who has not killed any person? You have really done a horrible thing.' Al-Khidr said, 'Did I not tell you that you would not be able to have patience with me?' Musa said, 'If I ask you about anything after this, keep me not in your company. You have received an excuse from me.' Then both of them proceeded till they came to some people of a town, and they asked its inhabitants for food but they refused to entertain them as guests. Then they saw therein a wall which was just going to collapse (and Al-Khidr repaired it just by touching it with his hands). (Sufyan, the sub narrator, pointed with his hands, illustrating how Al-Khidr passed his hands over the wall upwards.) Musa said, 'These are the people whom we have called on, but they neither gave us food, nor entertained us as guests, yet you have repaired their wall. If you had wished, you could have taken wages for it.' Al-Khidr said, 'This is the parting between you and me, and I shall tell you the explanation of those things on which you could not remain patient'." The Prophet added, "We wished that Musa could have remained patient by virtue of which Allah might have told us more about their story." (Sufyan, the sub narrator, said that the Prophet said, "May Allah bestow His Mercy on Musa! If he had remained patient, we would have been told furthermore about their case."") See Muhammad ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 4, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 379-382.

him to learn from someone that has directly received God's wisdom and knowledge, known as Khidr.<sup>76</sup> After an arduous journey, Moses finally met him and asked Khidr's permission to accompany him. Before their journey began, Khidr warned Moses that he will not be patient enough to travel with Khidr, but Moses insisted that he will and off they go.<sup>77</sup> 3 cases occurred. First, Khidr broke someone's boat by making a hole in it even though the person had let Khidr and Moses to travel with his boat for free.<sup>78</sup> Moses immediately protested such act but was reminded of his promise of being patient.<sup>79</sup> Second, Khidr killed a young boy.<sup>80</sup> Being a prophet, obviously Moses protested again and he was reminded for a second time.<sup>81</sup> Finally, when they arrived in a village whose villagers did not welcome them nicely, they ended up staying in an abandoned broken house.<sup>82</sup> Khidr fixed that house's wall, and being rational, Moses reminded Khidr that he can ask for a compensation.<sup>83</sup> With that act, Khidr told Moses that they must now part ways and he then explained the reasoning of his acts.<sup>84</sup>

It turns out that the boat was owned by a poor man.<sup>85</sup> Khidr knew that a ruthless king who loves to confiscate good boats will soon pass that road and unless he broke the boat, the boat will be confiscated.<sup>86</sup> The young boy's parents were people of faith and Khidr was concerned that the boy will trouble the parent with wickedness and disbelief so that he killed the boy while at the

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<sup>76</sup> Khidr's name was not mentioned in the Qur'an. His name was mentioned instead in Hadith Number 74 in Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 1, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 99-100. See also Hadith no. 124 in the same book.

<sup>77</sup> See Haleem, *supra* note 22 at 187-188.

<sup>78</sup> *Id.* at 188.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

same time wishing that God will replace the boy with a better kid (purer and more compassionate).<sup>87</sup> Finally, the abandoned house belonged to a righteous man and there was a good amount of treasure below the house.<sup>88</sup> Khidr was ordered by God to fix the house as a compensation for the righteous man's kids since the man had passed away.<sup>89</sup>

The Moses-Khidr story holds a very important role and yet its economic understanding is underdeveloped as Qur'anic commentators usually focus their attention on either Moses's low patience,<sup>90</sup> the importance of pursuing knowledge no matter what the stakes (since Moses had a dangerous journey in finding Khidr),<sup>91</sup> or the idea that this story is about total obedience to the all-knowing God.<sup>92</sup> Some even argue that the whole story is just an allegory, a metaphor to represent the idea of a spiritual journey where we are expected to kill our bad desires (*nafs*).<sup>93</sup> A quite interesting interpretation given the fact that when this story is repeated in Hadiths with trustworthy chain of transmissions, the Prophet never treated it as an allegory, but rather a true story that actually happened in the past.<sup>94</sup>

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<sup>87</sup> *Id.* The Qur'an is consistent in treating kids as replaceable goods.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See for example the discussion of this story in the official commentary to the Qur'an made in RI, *supra* note 74 at 635-641 and Departemen Agama RI, *Al-Qur'an dan Tafsirnya*, vol. 6 [Al-Qur'an and Its Interpretations] (Jakarta: Lembaga Percetakan Al-Qur'an, 2009), 3-10. See also Jalaluddin Al-Mahalli and Jalaluddin As-Suyuthi, *Tafsir Jalalain*, vol. 3, ed. Ainul Haris Umar Thayyib, J. Hariyadi, and Waznin Mahfuzh, trans. Najib Junaidi (Surabaya: Pustaka eLBA, 2010), 384-385.

<sup>91</sup> See for example Al-Misri, *supra* note 73 at 867.

<sup>92</sup> See Ian Richard Netton, "Toward a Modern Tafsir of Surat al-Kahf: Structure and Semiotics," *Journal of Qur'anic Studies* 2 (2000): 77.

<sup>93</sup> See further discussion on this interpretation in Nasr, *supra* note 2 at 754-756.

<sup>94</sup> Hadith no. 4726 of Al-Bukhari's compendium of Hadiths states: "Narrated Ibn Juraij: Ya'la bin Muslim and 'Amr bin Dinar and some others narrated the narration of Sa'id bin Jubair. Narrated Sa'id: While we were at the house of Ibn 'Abbas, Ibn 'Abbas said, 'Ask me (any question).' I said, 'O Abu 'Abbas! May Allah let me be sacrificed for you! There is a man at Kufa, who is a story-teller called Nauf; who claims that he (Al-Khidr's companion) is not Musa (Moses) of Bani Israel.' As for 'Amr, he said to me, 'Ibn 'Abbas said, (Nauf) the enemy of Allah told a lie." But Ya'la said to me: Ibn 'Abbas said: Ubayy bin Ka'b said: Allah's Messenger said, "Once, (Musa) (Moses) preached the people till their eyes shed tears and their hearts became tender, whereupon he finished his Khutba (religious talk). Then a man came to Musa (Moses) and asked, Allah's Messenger, is there anyone on the earth who is more learned than you?' Musa (Moses) replied, 'No.' So, Allah admonished him, for he did not ascribe all knowledge to Allah. It was said (on behalf of Allah), 'Yes, (there is a slave of Ours who knows more than you).' Musa (Moses) said, 'O my Lord! Where is he?' Allah said, 'At the junction of the two seas.' Musa (Moses) said, 'O my Lord! Tell me of a sign whereby I will recognize the place'. "'Amr said to me: Allah said, "That place will be

From economic perspective, this Khidr versus Moses story is the strongest evidence of the Basic Codes consequentialist logic with many useful takeaways. To clarify, in analyzing this story and later on the institutional structure of various provisions of the Basic Codes, I am performing a rational reconstruction, that is, I am not reconstructing the specific historical circumstances in

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*where the fish will leave you." Ya'lā said to me, "Allah said (to Musa) (Moses), 'Take a dead fish (and your goal will be) the place where it will become alive." So Musa (Moses) took a fish and put it in a basket and said to his boyservant "I don't want to trouble you, except that you should inform me as soon as this fish leaves you." He said (to Musa) (Moses), "You have not demanded too much." And that is as mentioned by Allah: "And (remember) when Musa (Moses) said to his boy-servant." (V.18:60) Yusha' bin Nun. (Sa'id did not state that). The Prophet said, "While the boy-servant was in the shade of the rock at a wet place, the fish slipped out (alive) while Musa (Moses) was sleeping. His boy-servant said (to himself), 'I will not wake him,' but when he woke up, he forgot to tell him. The fish slipped out and entered the sea. Allah stopped the flow of the sea where the fish was, so that its trace looked as if it was made on a rock." 'Amr, forming a hole with his two thumbs and index fingers, said to me, "Like this, as if its trace was made on a rock." Musa (Moses) said, "We have suffered much fatigue on this, our journey." (This was not narrated by Sa'id). Then they returned back and found Al-Khidr. 'Uthman bin Abi Sulaiman said to me, (they found him) on a green carpet in the middle of the sea. Al-Khidr was covered with his garment with one end under his feet and the other end under his head. When Musa (Moses) greeted, he uncovered his face and said astonishingly, 'Is there such a greeting in my land? Who are you?' Musa (Moses) said, 'I am Musa (Moses).' Al-Khidr said, 'Are you the Musa (Moses) of Bani Israel?' Musa (Moses) said, 'Yes.' Al-Khidr said, 'What do you want?' Musa (Moses) said, 'I came to you so that you may teach me something of that knowledge which you have been taught.' Al-Khidr said, 'Is it not sufficient for you that the Taurat (Torah) is in your hands and the Divine Revelation comes to you, O Musa (Moses)? Verily, I have a knowledge that you ought not learn, and you have a knowledge which I ought not learn.' At that time a bird took with its beak (some water) from the sea; Al-Khidr then said, 'By Allah, my knowledge and your knowledge besides Allah's Knowledge is like what this bird has taken with its beak from the sea.' Until, when they went on board the ship, they found a small boat which used to carry the people from this sea-side to the other sea-side. The crew recognized Al-Khidr and said, 'The pious slave of Allah.' (We said to Sa'id: "Was that Khidr?" He said, "Yes.") The shipmen said, 'We will not get him on board with fare.' Al-Khidr scuttled the ship and then plugged the hole with a piece of wood. Musa (Moses) said, 'Have you scuttled it in order to drown its people? Verily, you have committed a thing Imr (a Munkar - evil, bad, dreadful thing).' (V.18:71) (Mujahid said, "Musa (Moses) said so protestingly.") Al-Khidr said, 'Did I not tell you, that you would not be able to have patience with me?' (V.18:72) The first inquiry of Musa (Moses) was done because of forgetfulness, the second caused him to be bound with a stipulation, and the third was done intentionally. Musa (Moses) said, 'Call me not to account for what I forgot, and be not hard upon me for my affair (with you).' (V.18:73) (Then) they found a boy and Al-Khidr killed him. Ya'lā said: Sa'id said, 'They found boys playing and Al-Khidr got hold of a handsome infidel boy, laid him down and then slew him with a knife. Musa (Moses) said, 'Have you killed an innocent person who had killed none?' (V.18:74). Then they proceeded and found a wall which was on the point of falling down, and Al-Khidr set it up straight. Sa'id moved his hand thus and said, 'Al-Khidr raised his hand and the wall became straight. Ya'lā said: 'I think Sa'id said, 'Al-Khidr touched the wall with his hand and it became straight!' Musa (Moses) said to Al-Khidr, 'If you had wished, you could have taken wages for it.' Sa'id said, 'Wages that we might have eaten.' And there was a king behind them.' (V.18:79) And there was in front (ahead) of them. Ibn 'Abbas recited: "As there was a king in front (ahead) of them. It is said on the authority of somebody other than Sa'id that the king was Hudād bin Budād. They say that the boy was called Haisfr." As there was a king in front (ahead) of them who seized every ship by force." (V.18:79) So, I wished that if that ship passed by him, he would leave it because of its defect, and when they have passed they would repair it and get benefit from it. Some people said that they closed that hole with a bottle, and some said with tar. 'His parents were believers, and he (the boy) was a disbeliever and we (Khidr) feared lest he would oppress them by rebellion and disbelief.' (V.18:80) (i.e., that their love for him would urge them to follow him in his religion). 'So we (Khidr) desired that their Lord (Allah) should change him for them for one better in righteousness and near to mercy.' (V.18:81). This was in reply to Musa's (Moses) saying: Have you killed an innocent person?" (V.18:74) 'Near to mercy' means they will be more merciful to him than they were to the former whom Khidr had killed. Someone other than Sa'id said that they were compensated with a girl. Dawud bin Abi 'Asim said on the authority of more than one that this next child was a girl." See Muhammad ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 6, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 202-205.*

which the story/institution occurred, rather, I am trying to describe the essential features of situation in which such an event could occur, the rationale of its happening that way and its potential consequences.<sup>95</sup>

There are two important lessons from the boat case. First, the Qur'an basically permits policy makers to impose costs on someone's well-being if it can reduce his overall costs in the future (in this case, it is better repairing a hole in the ship than making a completely new one). And second, in line with Matthew Adler's concept, in Islamic moral framework, the policy maker is permitted to choose an "undominated" action, namely, one whose outcome is not morally worse than any other, regardless of the fact that it might not be the perfect solution to be taken where no one's well-being is impaired.<sup>96</sup> In practice, this concept has also been incorporated into various Islamic legal maxims.<sup>97</sup>

Allowing Khidr to damage the boat does not necessarily mean that Islam does not respect private property. There are multiple verses in the Qur'an that command the Muslims to respect the property of other people and to only consume such property by mutual trade.<sup>98</sup> In a famous

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<sup>95</sup> I borrow the concept from Edna Ullmann-Margalit. See Edna Ullmann-Margalit, *The Emergence of Norms* (Oxford: Oxford University Press, 2015), 1.

<sup>96</sup> See Adler *supra* note 1 at 22-23.

<sup>97</sup> See a comprehensive discussion on this subject in Abdul Haq, Ahmad Mubarak, and Agus Ro'uf, *Formulasi Nalar Fiqh: Telaah Kaidah Fiqh Konseptual* [Formulation of Fiqh Thought: Analysis of Conceptual Fiqh Maxims], vol. 1 (Lirboyo: Santri Salaf Press, 2009), 209-266.

<sup>98</sup> On the restriction to bribe and use property wrongfully, Qur'an surah Al-Baqara [2]: 188 states: "Do not consume your property wrongfully, nor use it to bribe judges, intending sinfully and knowingly to consume parts of other people's property." See Haleem, *supra* note 2 at 21. See further discussions in Az-Zuhaili, *supra* note 23 at 406-411 and RI, *supra* note 19 at 280-282. On the restriction to use other people assets wrongfully, Qur'an surah Ali-Imran [3]: 161 states: "It is inconceivable that a prophet would ever dishonestly take something from the battle gains. Anyone who does so will carry it with him on the Day of Resurrection, when each soul will be fully repaid for what it has done: no one will be wronged." See Haleem, *supra* note 2 at 46. Al-Qurthubi finds that though many commentators treat this verse in the context of purloining the spoils of war, they also generalize it to refer to any kind of embezzlement or misuse of a trust. To consume or keep the spoils of war before they are fairly divided is considered by many to be a major sin, subject to varying levels of punishment, including physical punishment. See Al-Qurthubi, *supra* note 56 at 635-655. In the same vein, Seyyed Hossein Nasr comments that any kind of mishandling or corruption in the matter of public goods is severely condemned in Islam. In connection with this verse, some commentators mention a Hadith describing a man who was sent by the Prophet to collect the alms (*zakāh*); when he returned he said, "This is for you, and this was given as a gift to me." The Prophet severely reprimanded him for this, asking if he waited for

story, the Qur'an explains that as a prophet and king of Jews, it is impermissible for David to take the assets of his citizen just because he was enamored of it, effectively discussing the proper requirements for regulatory taking.<sup>99</sup>

Since the Qur'an is not allowed to be inconsistent, as per the Rationality Parameters, we will most likely have to view the above duty to respect other people property from a consequentialist perspective, namely, damaging and/or consuming other people's property without mutual trade might not be inherently bad if there exists another deciding factor to perform such "evil" acts. And I will explain below why I think that is the case.

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his gift at his mother's and father's house, meaning that the accepting of the "gift" was an unjust practice that could not have been applied to all people equally. See Nasr, *supra* note 2 at 175.

On the restriction to consume other people assets, Qur'an surah An-Nisa' [4]: 29-30 state: "You who believe, do not wrongfully consume each other's wealth but trade by mutual consent. Do not kill each other, for God is merciful to you. If any of you does these things, out of hostility and injustice, We shall make him suffer Fire: that is easy for God." See Haleem, *supra* note 2 at 53. Al-Qurthubi and Az-Zuhaili similarly commented that the verse indicates that suicide is forbidden and that whoever kills a fellow believer or, some say, transgresses any of the major rules established to this point in the verse shall have hell as his reward. See further discussion in Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 5, ed. M. Iqbal Kadir, trans. Fathurrahman Abdul Hamid, Dudi Rosyadi, and Marwan Affandi (Jakarta: Pustaka Azzam, 2009), 347-366 and Az-Zuhaili, *supra* note 25 at 55-63.

<sup>99</sup> On the story of David and his issues with his *nafs*, Qur'an surah Ash-Shad [38]:17-26 state: "Bear their words patiently [Prophet]. Remember Our servant David, a man of strength who always turned to Us: We made the mountains join him in glorifying Us at sunset and sunrise; and the birds, too, in flocks, all echoed his praise. We strengthened his kingdom; We gave him wisdom and a decisive way of speaking. Have you heard the story of the two litigants who climbed into his private quarters? When they reached David, he took fright, but they said, 'Do not be afraid. We are two litigants, one of whom has wronged the other: judge between us fairly – do not be unjust – and guide us to the right path. This is my brother. He had ninety-nine ewes and I just the one, and he said, "Let me take charge of her," and overpowered me with his words.' David said, 'He has done you wrong by demanding to add your ewe to his flock. Many partners treat each other unfairly. Those who sincerely believe and do good deeds do not do this, but these are very few.' [Then] David realized that We had been testing him, so he asked his Lord for forgiveness, fell down on his knees, and repented: We forgave him [his misdeed]. His reward will be nearness to Us, a good place to return to. 'David, We have given you mastery over the land. Judge fairly between people. Do not follow your desires, lest they divert you from God's path: those who wander from His path will have a painful torment because they ignore the Day of Reckoning.'" See Haleem, *supra* note 2 at 291. Seyyed Hossein Nasr commented that other commentators maintain that such details do not in and of themselves merit a connection with the story of Bathsheba, especially as such an interpretation must extrapolate beyond the plain sense of the text. Furthermore, there is little in the Qur'anic text to substantiate this connection and, as Ibn Kathir observes, the basis for relating these verses to the story of Bathsheba are not grounded in sound accounts. Al-Rāzī also maintains that even the sanitized version of the story, in which there is no adultery, runs counter to the qualities attributed to David here and in other *sūrah*s. It also appears to be as a result of the effort to connect this verse to the story of Bathsheba that the disputants are said to be angels in the form of human beings, since it would then constitute a message coming directly from God. See Nasr, *supra* note 2 at 1104-1108. Further comments on the verse can be found in Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 15, ed. M Mukhlis B. Mukti, trans. Muhyiddin Mas Rida, Muhammad Rana Mengala, and Ahmad Athaillah Mansur (Jakarta: Pustaka Azzam, 2009), 356-434.

If we pay more attention to the story, we will quickly notice that there was no explanation on whether Khidr helped the boat owner to fix his boat once he left, leaving the impression that the boat owner was left to deal with the problem by himself. Given the parameter of “completeness”, is this the most optimum way to solve the problem of the evil king? Can the story be interpreted to show a support to certain moral duty without regard to consequences?

From the story, we could think of many other viable solutions that can be taken by Khidr and Moses, each having very different conclusions and consequences. First, suppose that the duty to do the right and fair thing is the most important thing to do in Islam, Khidr and Moses could just stay and wait for the evil king to arrive. They can then try to argue against the king and defend the boat. Surely this might cost their lives, and the solution might not be Pareto efficient since two good men would have died for nothing as the boat will still be taken anyway. But the story will have a different nature since consequences do not really matter from deontological perspective. Here we will be having a grand story of two brave souls that were willing to sacrifice their own life for the sake of protecting the right of the poor even though they could always run from it.

Second alternative, they could tell the boat owner to leave for a while or to hide the boat until the king passed the place, or at the very least, once the king passed and the boat has been damaged, they return to fix the boat or compensate the boat owner with some money to cover the repair cost. Since it was told that the boat belonged to a poor man, how could it be ever justified that such poor man was required to deal with his damaged boat by himself (granted that it is still better than losing the entire boat) when there are two able men to help him?

The final alternative was the decision taken by Khidr in the story. And the most probable way for us to explain such decision in a consistent manner is because Khidr was subject to scarcity and his own budget constraints. Moses and Khidr were facing a powerful and ruthless king. They cannot be expected to physically fight that king to defend the poor guy’s rights unless God granted

them superpowers (God only gave them valuable information).<sup>100</sup> It is also possible that the situation at that time did not permit Khidr to choose other viable options (namely, scarcity). And consequently, rather than taking the most honorable alternative or the most welfare maximizing solution, Khidr chose a satisficing solution, a non-maximizing response to uncertainty or bounded rationality or any other form of scarcity in which a decision maker searches among options or choices until, but only until one is found that meets some preset aspiration level; until, but only until, the choice is “good enough”.<sup>101</sup> The case for permitting the use of satisficing will be stronger once we viewed the second case.

The second case is clearly more controversial since it involves the killing of a young boy. How on earth could we justify such case and why put such an extreme case in the Basic Codes? This is especially concerning because the Qur’an specifically prohibits parents from killing their children and anyone from taking other’s life without right.<sup>102</sup> Indeed, in one Qur’anic verse, taking

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<sup>100</sup> I am not considering the solution where God simply destroyed the evil king due to the Qur’an claim that God shall not be directly intervening with the worldly affairs. Khidr’s advantage is only information. He has no superpower and how the information is used will be subject to real world limitations. On why God does not act directly, Qur’an surah Muhammad [47]: 4 states: “When you meet the disbelievers in battle, strike them in the neck, and once they are defeated, bind any captives firmly – later you can release them by grace or by ransom – until the toils of war have ended. That [is the way]. God could have defeated them Himself if He had willed, but His purpose is to test some of you by means of others. He will not let the deeds of those who are killed for His cause come to nothing.” See Haleem, *supra* note 2 at 331.

<sup>101</sup> See the basic concept in Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Cambridge: Harvard University Press, 2006), 176-177.

<sup>102</sup> On the restriction to kill, unless based on the right reason, Qur’an surah Al-An’am [6]:151 states: “Say, ‘Come! I will tell you what your Lord has really forbidden you. Do not ascribe anything as a partner to Him; be good to your parents; do not kill your children in fear of poverty – ‘We will provide for you and for them’ – stay well away from committing obscenities, whether openly or in secret; do not take the life God has made sacred, except by right. This is what He commands you to do: perhaps you will use your reason.” See Haleem, *supra* note 2 at 92. On the restriction to kill your own child and murder in general, Qur’an surah Al-Isra [17]:31-33 state: “Do not kill your children for fear of poverty – We shall provide for them and for you – killing them is a great sin. And do not go anywhere near adultery: it is an outrage, and an evil path. Do not take life, which God has made sacred, except by right: if anyone is killed wrongfully, We have given authority to the defender of his rights, but he should not be excessive in taking life, for he is already aided [by God].” See Haleem, *supra* note 2 at 177. Al-Qurthubi and Ath-Thabari have similar opinion in commenting the verse, where they indicate that only a male heir (*walī*) can exercise this authority, but others disagree. Here *heir* translates *walī*, which can also mean “protector,” and thus some cite At-Tawba [9]:71, “But the believing men and believing women are protectors (*awliyā*’; sing. *walī*) of one another,” as evidence that female heirs and next of kin might also be granted such authority. It is also understood to mean that the murderer should not be tortured, maimed, or mutilated before execution. *Verily he shall be helped* most likely refers to the heir of the slain individual. See Nasr, *supra* note 2 at 704 and further discussions in Al-Qurthubi, *supra* note 51 at 623-633 and Ath-Thabari, *supra* note 70 at 651-669. On the losses of those who kill their own kids, Qur’an surah Al-An’am [6]:140 states: “Lost indeed are those who kill their own

someone's life without right is deemed equal to killing the entire mankind.<sup>103</sup> How to resolve these competing values without at least violating the parameter of "consistency" under the Rationality Parameters?

One probable answer is because the Qur'an is thinking through the lens of consequentialist moral framework and therefore killing someone is not prohibited *per se*. After all, the restrictions of killing other people in the Qur'an are often, if not always, paired with the explanation of "without right."<sup>104</sup> In other words, the act of killing could be permitted when there are good reasons for doing it. Most Islamic jurists believe that these reasons are usually limited to the

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*children out of folly, with no basis in knowledge, a forbidding what God has provided for them, fabricating lies against Him: they have gone far astray and have heeded no guidance."* See Haleem, *supra* note 2 at 92. Al-Qurthubi argues that this verse comes as a response to the Meccan idolaters' practice of "slaying their children," and to the false prohibitions they establish regarding livestock, indicating that those who engage in such practices are *lost*; that is, they lose their way in this world and face perdition in the hereafter. The pre-Islamic Arabs, particularly the Arabs of the northern tribes of Rabi'ah and Muḍar, would *slay their children*, specifically their daughters, out of fear either that the daughters would be captured and thus become a source of dishonor and humiliation for their families or that the burden of supporting them would impoverish their families. See Nasr, *supra* note 2 at 393 and further discussion in Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 7, ed. M. Ikbal Kadir, trans. Sudi Rosadi, Fathurrahman, and Ahmad Hotib (Jakarta: Pustaka Azzam, 2014), 248-250.

<sup>103</sup> On the restriction to kill, Qur'an surah Al-Maida [5]:32 states: "*On account of [his deed], We decreed to the Children of Israel that if anyone kills a person – unless in retribution for murder or spreading corruption in the land – it is as if he kills all mankind, while if any saves a life it is as if he saves the lives of all mankind. Our messengers came to them with clear signs, but many of them continued to commit excesses in the land.*" See Haleem, *supra* note 2 at 71. Comments on the account of Adam's two sons have been pointed out by Seyyed Hossein Nasr, where within the Bible it is focused on the gravity and horror of the act of murder. Cain's initial inability to hide Abel's corpse in the Qur'anic account and the statement that Abel's blood was "crying . . . out from the ground" in the Biblical account (Genesis 4:10) both suggest the particular difficulty of concealing a crime of murder, and thus the likelihood of punishment in this world as well as the next. In this verse concluding the account, the Qur'an further emphasizes the enormity of the sin of murder by stating that God *prescribed for the Children of Israel* that the killing of one soul was like the killing of *mankind altogether* and, analogously, that saving a life was like saving *mankind altogether*. See Nasr, *supra* note 2 at 291-292. Furthermore, Al-Qurthubi states that in explaining the symbolic equivalence the verse suggests between killing a single soul and killing all humanity, some commentators claim that the intended meaning is that killing a soul of particular spiritual importance—such as a prophet or a "just imam"—is like killing all humanity; others say that killing a single soul is like killing all humanity from the point of view of the murdered individual. Some, however, consider the gravity of murder from the perspective of its offense to the Creator, for whether one kills a single person or many, one has violated what God has made most sacred. See *Id.* at 292, and further discussion in Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 6, ed. Ahmad Zubairin and Mukhlis B. Mukti, trans. Ahmad Rijali Kadir (Jakarta: Pustaka Azzam, 2013), 347-353. In the same vein, Ath-Thabari and Az-Zuhaili also comment on the stories of Qabil and its criminal acts of conducting the first homicide on earth. See Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 8, ed. Besus Hidayat Amin and M. Sul-ton Akbar, trans. Akhmad Affandi and Benny Sarbeni (Jakarta: Pustaka Azzam, 2008), 760-782 and Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 3, ed. Zainul Arifin, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2016), 481-491.

<sup>104</sup> See Ibnu Qudamah, *Al Mughni*, vol. 12, ed. M. Sul-ton Akbar and Ahmad Nur Hidayat, trans. Abdul Syukur and Muhyidin (Jakarta: Pustaka Azzam, 2013), 1-3.

punishment upon apostates, married adulterers, and those who kill other people without right, or the act of killing non-Muslim enemies during war time.<sup>105</sup>

But what about Khidr's case? Is there any justification for killing an innocent kid? Under one interpretation, it could be argued that Islam favors absolute utilitarianism because it permits the sacrifice of a kid's well-being (namely, his life) for improving his parents' well-being, satisfying the greater good of two for the price of one.<sup>106</sup> But if this is the correct interpretation, the entire notion of fairness and justice in the Basic Codes would be useless since a pure utilitarian approach would exclude such idea as long as the greatest numbers of people are happy (at least according to utilitarianism staunchest critics).<sup>107</sup> Since justice and fairness are not entirely empty concepts in the Basic Codes, though not necessarily the most important considerations as discussed above, an argument that says that those considerations are meaningless would surely violate the parameters of "consistency" and "correctness."

An alternative explanation is that this case confirms the supremacy of pursuing Pareto efficiency<sup>108</sup> in Islamic policy making. In Islamic theology, a kid that dies before puberty will automatically go to heaven even if he is a kid of a pagan.<sup>109</sup> Therefore, in this case, the kid's and the parents' overall well-being were enhanced by Khidir's act and no one suffered losses (the kid went directly to heaven, the ultimate place for pleasure and happiness, and the parents were saved

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<sup>105</sup> Hadith no. 6878 in Al-Bukhari's compendium of Hadiths states: "Narrated 'Abdullah: Allah's Messenger said, "The blood of a Muslim who confesses that La ilaha illallah (none has the right to be worshipped but Allah) and that I am the Messenger of Allah, cannot be shed except in three cases (1) life for life, (2) a married person who commits illegal sexual intercourse and (3) the one who turns renegade from Islam and leaves the group of Muslims."" See Al-Bukhari, *supra* note 36 at 20. See also Qudamah, *supra* note 104 at 3.

<sup>106</sup> Following the tradition of Jeremy Bentham, in this case, utilitarianism refers to a maximizing and collective principle requiring governments to maximize the total net sum or balance of the happiness of all its subjects. See H.L.A Hart, "Utilitarianism and Natural Rights," *Tulane Law Review* 53 (1979): 663-664.

<sup>107</sup> See further discussion in *Id.* at 676-678.

<sup>108</sup> The application of Pareto efficiency in public policy requires that at the very least, one person profits and none is harmed as a result of a policy. See Filip Falda, *Pareto's Republic and The New Science of Peace* (Canada: Gilmore Press, 2011), 23.

<sup>109</sup> See Hadith no. 7047 in Al-Bukhari, *supra* note 36 at 121-122.

from hell and were assumed to receive better compensation for the loss of their kid).<sup>110</sup> However, there are some serious problems undermining such explanation.

Though the Basic Codes have repeated numerous times that the afterlife rewards and punishment are far more important than the entire world, in general, the Basic Codes let the people to freely choose their own way of life with all of its consequences.<sup>111</sup> And as I will further explain below, in terms of policy making, afterlife rewards and punishments do not really matter. In Khidr's case, the fact that such freedom of choice was robbed from both the kid and the parents (without further explanation on the reasoning behind the decision) would impose some considerable costs to them, costs that might outweigh their perceived benefits, at least in the worldly sense. Moreover, there was also no explanation on whether the parents were genuinely happy with the decision made by Khidr or whether they were eventually happy with the replacement kid, and therefore it was not entirely clear whether the decision truly reached Pareto efficiency.

More importantly, one could always ask why, among so many other solutions, Khidr had to kill the boy? Similar to the boat story, there are multiple solutions available under the "completeness" parameter. As an example, Khidr could have chosen instead to educate the kid to be a better person or at least told the parents to pay more attention to his kid. The majority of Qur'anic commentators explain that when Khidr voiced his concern on the kid's future behavior and his parents' well-being, he had sufficient information to infer the huge probability that the

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<sup>110</sup> Various stories in Ath-Thabari's *tafsir* state that the kid was indeed replaced with a better one. See Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 17, ed. Besus Hidayat Amin, trans. Ahsan Askan and Khairul Anam (Jakarta: Pustaka Azzam, 2009), 317-322. Muhammad Al-Ghazali claimed that what the kid will actually do in the future is to kill his parents. See Muhammad Al-Ghazali, *A Thematic Commentary on the Qur'an*, trans. Ashur A. Samis (London: International Institute of Islamic Thought, 2011), 318. If this interpretation is correct, there is a huge probability that Khidr's decision is Pareto efficient. However, it is not clear how Al-Ghazali reached such interpretation and thus I will not be using his interpretation of the story as the basis for discussion in this dissertation.

<sup>111</sup> See discussion in Chapter 3. See also the discussion in Taha Jabir Al-Alwani, *Apostasy in Islam: A Historical & Scriptural Analysis*, trans. Nancy Roberts (London: The International Institute of Islamic Thought, 2011), 2-3.

parents would not be able to educate their child due to their huge love upon him.<sup>112</sup> Furthermore, inferring from the available stories,<sup>113</sup> Khidr were constantly travelling, and it seems reasonable to assume that staying and educating one kid was simply too costly for him (in his role as a God's messenger, he had bigger opportunity costs since he was required to solve many outstanding problems). If the above explanations are correct, we have another solid example of satisficing instead of maximizing overall well-being in legal and policy decision making even though we have to admit, this is one tough act to be justified.

Another crucial aspect from the second story is that Khidr's decision was not clearly made with 100% certainty since the language used in the Qur'an indicates that Khidr was concerned (not certain) with the kid's future and his potential bad impacts toward his parents.<sup>114</sup> The compensation for the parents (in the form of a better kid which will love them more) was also still expected and not certain.<sup>115</sup> This element of uncertainty holds a significant weight in our case because some scholars argue that Khidr's story is concerning a person with complete information from God, namely, the kid was certain to become an evil person in the future, and therefore, the story is not relevant for policy making as its focus is to teach people to completely believe in God's wisdom without questioning anything.

Several other scholars disagree with such idea and interpret the act of Khidr as a preventive action given uncertainties of the future.<sup>116</sup> But it is also possible that the kid became worse due to

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<sup>112</sup> See M. Quraish Shihab, *Tafsir Al-Mishbah – Pesan, Kesan dan Keserasian al-Qur'an* [Tafsir Al-Mishbah – Message, Image and the Harmony of the Qur'an], vol. 7 (Jakarta: Lentera Hati, 2009), 354-355.

<sup>113</sup> See note 94.

<sup>114</sup> This is discussed in Ath-Thabari, *supra* note 110 at 317. Some scholars argue that the language refers to uncertainties, while some other scholars argue that the expression only refers to Khidr's disdain of the kid's future act and that he has complete information on the kid from God. Since there is no authoritative explanation on this issue, it seems plausible to argue that the element of uncertainties exists in this case.

<sup>115</sup> See Ath-Thabari, *supra* note 110 at 317-318.

<sup>116</sup> See Wahbah Az-Zuhaili, *Tafsir Al-Wasith*, vol. 2, ed. Budi Permadi, trans. Muhtadi et al, (Jakarta: Gema Insani Press, 2013), 462. Az-Zuhaili mentions that this is a form of application of *Sadd al-Dzari'* principle.

the inability of his parents to educate him (blinded by love), and in such case, why blame the kid instead of the parents? Why don't God punish the parents instead for their failure of acting as good parent? Given the genuine uncertainties on the meaning of Khidr's concern in the story, which explanation is more probable and consistent with other provisions in the Basic Codes?

Returning a bit to Chapter 3, we had a discussion on the Basic Codes' command to all Muslims to always put their critical thinking and the idea that God is ultimately purposeful.<sup>117</sup> Had Khidr's story is truly about complete obedience to God's will, it will be directly in contradiction with the command to think and the mocking made by the Qur'an against people who blindly follow old traditions and cultures without question.<sup>118</sup> Moreover, a proper story on total obedience to God is better represented by Qur'an surah Al-Saffat [37]: 102-111 which tells the story of Abraham and the heavenly order to sacrifice his son,<sup>119</sup> and the case was handled in a very different manner compared to Khidr's story.

In this story, Abraham was instructed by God via a dream to sacrifice his own son, a son that he got after years of waiting in vain.<sup>120</sup> He consulted with his son and they agreed that they must follow God's will without further question.<sup>121</sup> However, at the last moment before Abraham

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<sup>117</sup> See the discussion at the beginning of Chapter 3.

<sup>118</sup> See the discussion in Chapter 3.

<sup>119</sup> The complete texts are as follows: "Lord, grant me a righteous son,' so We gave him the good news that he would have a patient son. When the boy was old enough to work with his father, Abraham said, 'My son, I have seen myself sacrificing you in a dream. What do you think?' He said, 'Father, do as you are commanded and, God willing, you will find me steadfast.' When they had both submitted to God, and he had laid his son down on the side of his face, We called out to him, 'Abraham, you have fulfilled the dream.' This is how We reward those who do good—it was a test to prove [their true characters]— We ransomed his son with a momentous sacrifice, and We let him be praised by succeeding generations: 'Peace be upon Abraham!' This is how We reward those who do good: truly he was one of Our faithful servants." See Haleem, *supra* note 2 at 287. Comments on the verse may be found on Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 21, ed. Besus Hidayat Amin, trans. Mishab (Jakarta: Pustaka Azzam, 2009), 894-901.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

sliced his son's throat, God informed Abraham that this was just a test, that he had successfully passed such test and that his sacrifice had already been replaced by God with a sheep.<sup>122</sup>

If God allowed Abraham to kill his own son to prove his love to God, Islam might have taken a very different path due to its endorsement of human sacrifices ritual. Fortunately, that is not the case because in this story of total obedience, God personally prevented Abraham from making such a huge mistake.<sup>123</sup> The key take away should be obvious, Abraham's story is not a story to be replicated. There is no rational reason for the sacrifice other than a test on Abraham and his son. We also know that in Islamic theology, further communications between God and mankind have been cut till the end of days with the death of the Prophet.<sup>124</sup> So, if a Muslim currently thinks that he has received instruction from God to kill his own son, not only that God will not be coming to prevent him from performing that act, there won't be any normative justification to support his killing and most probably, he will be deemed liable for the act and will have to face the legal consequences.

In Khidr's case, the Qur'an explains why the act was done (consistent with the idea that God is purposeful) and as discussed above, there are possibilities that Khidr's decision to kill the boy might not be Pareto efficient (similar to the boat's case). In order to be consistent with the claim in the Basic Codes that God's decision is always good,<sup>125</sup> the only explanation which may justify the decision was either the decision was truly welfare maximizing (which is incredibly difficult to prove), or satisficing under the condition of scarcity (which could be caused by time constraints, the costs for gathering information, uncertainties of future results, Khidr's own opportunity costs, and so forth).

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> And believing otherwise would generally count as blasphemy. See David F. Forte, "Apostasy and Blasphemy in Pakistan," *Connecticut Journal of International Law* 10 (1994-1995): 49-50.

<sup>125</sup> See discussion in Chapter 3.

The fact that Khidr received direct information from God (and we do not have that kind of advantage)<sup>126</sup> does not necessarily mean that the story is useless for policy making as argued by the supporters of total obedience to God, and in fact, it does not really matter. With or without complete information, the key lesson here is the consequentialist nature of the decisions and the problem of scarcity. The boat case is a good example. Even if Khidr and Moses have the entire information in this universe, as long as they were not granted the powers of Superman or enough time to make preparations like Batman, two ordinary persons have a very slim chance to win a fight against a king and his army. Such is the limit of the power of information against actual brute forces.

While Khidr's second story looks pretty much cruel, it represents the reality of our life, namely, laws and public policies will always have an effect on the people's well-being, whether directly or indirectly, whether small or significant.<sup>127</sup> A simple example: what are the differences between deciding whether to impose a death penalty on certain criminals and deciding whether to subsidize the health care services for the general citizens? Both decisions might be significantly different from deontological morality point of view, but from economics perspective, their effects to human's life are similar, namely, someone will die because of death penalty or lack of health care. The main differences between those two rules are the speed and coverage of their effects on the people's life. In such case, we can either close our eyes and pretend that we can avoid moral

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<sup>126</sup> See Qur'an surah Luqman [31]: 34 states: "Knowledge of the Hour [of Resurrection] belongs to God; it is He who sends down the relieving rain and He who knows what is hidden in the womb. No soul knows what it will reap tomorrow, and no soul knows in what land it will die; it is God who is all knowing and all aware." See Haleem, *supra* note 2 at 263. See further discussion regarding the inability of ordinary humans to know precisely about the future in Jalaluddin Al-Mahalli and Jalaluddin As-Suyuthi, *Tafsir Jalalain*, vol. 3, ed. Ainul Haris Umar Thayyib, J. Hariyadi, and Waznin Mahfuzh, trans. Najib Junaidi (Surabaya: Pustaka eLBA, 2010), 45.

<sup>127</sup> See further discussion in Cass R. Sunstein, *Simpler: The Future of Government* (New York: Simon & Schuster, 2013), 30-33.

dilemmas in making public policy, or we can bravely face the issue and try to pick the best option pragmatically given the available situation and condition.<sup>128</sup>

As for the third story, I do not find any significant implication for policy making. But it is still interesting to see the way Moses was described as a *homo economicus* by suggesting Khidr to ask for a compensation for fixing the walls of a broken house.<sup>129</sup> In a way, the story is aligned with the Qur'anic message of doing CBA in everyday life and engaging in a profitable trade with God and others, and that there is no such thing as a free lunch in Islam.<sup>130</sup>

### C. THE CONSIDERATION OF WELL-BEING IN ISLAM AND THE PROBLEM OF SATISFICING

With the Khidr-Moses story, I believe it is safe to conclude that the nature of Islam as a religion is consequentialist and pragmatist. And more importantly, based on the discussion and materials that we had so far, it also seems probable that maximizing well-being is an important consideration to be pursued by Islamic law's version of consequentialism, and that the relevant dimensions of well-being in Islam are well covered under the concept of *maqasid al-shari'a* (religion, life, mind, family, and property).<sup>131</sup>

I will not be discussing which element must be prioritized among those 5 dimensions as I believe that the more important aspects to be resolved is whether there are any considerations other than well-being that must be prioritized in decision making. In a situation without scarcity, there will be no restrictions to pursue the entire elements of the *maqasid al-shari'a*, but we are not living in that kind of world and analyzing which element of well-being should be ranked higher in condition of scarcity is only relevant when the focus of this dissertation is to provide normative justifications to adopt or change certain legal provisions in Islamic law purely based on well-being

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<sup>128</sup> See a good case study on this issue in *Id.* at 156-161.

<sup>129</sup> See note 74.

<sup>130</sup> See the discussion in Section A of this Chapter 5.

<sup>131</sup> See discussion in Chapter 2.

consideration. If that is indeed the case, surely, an intra-comparison of each dimension's ranking would be required, but currently, that is not my concern.

For the purpose of this dissertation, all I have to do is to show that given scarcity, there exist a situation where not all dimensions of well-being can be satisfied and there are trade-offs between well-being consideration and other abstract values during the implementation of certain legal provisions in the Basic Codes. If I can also show that well-being consideration is more prioritized compared to those other abstract values, that would be an additional bonus to my claim.

Returning to the cases discussed in section A and B above, it is quite clear that even though well-being matters, not all dimensions of well-being can be satisfied in those cases, and even worse, some abstract deontological values were also sacrificed. In Khidr's boat case, the dimension of property is sacrificed to avoid bigger losses in terms of property and life. In Khidr's boy case, there is a trade-off between the dimension of life and religion, in which the element of religion seems to be prioritized. More importantly, notice that in both cases there is a serious challenge against the satisfaction of the dimensions of justice and fairness. No one can deny that breaking someone's property without any compensation despite no fault and consent from the owner is unfair.<sup>132</sup> And it is so obvious that killing a person, let alone a child, before he commits any crime (where no items of evidence for such crime exist at the moment of his murder) is unjust.

The ideas of imposing a moral duty to maintain a just war and to always speak the truth in the Basic Codes are not internally consistent if pre-emptive attacks, assassinations of civilians, and questionable lies and tricks are permitted to ensure that the protection of life, mind, religion,

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<sup>132</sup> Freedom of choice in dealing with governmental actions is an important element in the modern world. See further discussions in Tim Stelzig, "Deontology, Governmental Action, and the Distributive Exemption: How the Trolley Problem Shapes the Relationship between Rights and Policy," *University of Pennsylvania Law Review* 146 (1998): 954-955.

family and property can be maintained.<sup>133</sup> How to explain these blatant contradictions under the Rationality Parameters? I suppose there is only one answer, namely, when not all dimensions can be fully satisfied, a Muslim decision maker should prioritize the element of well-being and pick the best consequence that can be achieved given the available conditions, an act of balancing.

Thus, the remaining question would be: are there any intelligible standards within the Basic Codes that can be used to determine when scarcity shall rule the decision making procedure so that one must prioritize certain dimensions of well-being compared to other considerations or to make an intra-comparison among the available dimensions of well-being? As an example in Khidr's boy case, it would be egregious if the main reason why Khidr decided to kill the boy is simply because he was too lazy to spend his time teaching the boy to become a better person. Are any of my previous alternative explanations good enough to justify the killing? Does Islam favor a Pareto approach or a Kaldor-Hicks approach, involving the use of a one-sided meta-norm versus balancing meta-norms, respectively?<sup>134</sup>

I admit that under the current circumstances, I have not yet found an exact formula that can be used to justify the consideration of scarcity, to determine when satisficing is the most optimum solution, and to determine to what extent we must work to ensure the satisfaction of as many values as possible. This is something that I will be pursuing in my future projects. For now, as will be further elaborated in Chapter 6, I will focus my attempt to demonstrate that the Islamic legal institutions that I previously discuss in Chapter 4 are consistently implementing the ideas that well-being consideration matters and that there are trade-offs between well-being and other abstract deontological values in those institutions, conflicts which most probably can only be

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<sup>133</sup> See the discussion in Section A of this Chapter 5.

<sup>134</sup> See further discussion in Gerrit De Geest, "Any Normative Policy Analysis Not Based on Kaldor-Hicks Efficiency Violates Scholarly Transparency Norms," in *Law & Economics: Philosophical Issues and Fundamental Questions*, ed. Aristides N. Hatzis and Nicholas Mercuro (London: Routledge, 2015), 181-202.

explained through the lens of scarcity. By displaying those cases, I would be able to demonstrate that the second definition of perfection is more probable compared to the first one and accordingly, there is also a huge probability that consequence-based theories of interpretation could fit the Islamic legal system.

Last but not least, there is one important issue that must be clarified in defining well-being in Islamic law, namely, whether afterlife costs and benefits should be calculated or even prioritized in implementing and interpreting the Basic Codes legal provisions. Qur'an surah Al-An'am [6]: 32 says: "*The life of this world is nothing but a game and a distraction; the Home in the Hereafter is best for those who are aware of God. Why will you [people] not understand?*"<sup>135</sup> One might argue that even if we can demonstrate that Islamic law is inherently consequentialist, we cannot fathom the effect of changing the law upon Muslim individuals from the afterlife perspective. Not to mention that there are also claims that certain punishments in the *Shari'a* are absolute because they are God's sole right (and therefore, must be enforced at any cost) and that by accepting these penal punishments, one can be exempted from afterlife sanctions.<sup>136</sup> Hence, it is probable that since afterlife is the "real" life in Islam, all consideration of worldly well-being should be eventually ignored and the law should stay as it is.<sup>137</sup>

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<sup>135</sup> See Haleem, *supra* note 2 at 82.

<sup>136</sup> See Hadith no. 6801 in Al-Bukhari, *supra* note 33 at 413-414 which states: "*Narrated 'Ubada bin As-Samit: I gave the Baia (pledge) to the Prophet with a group of people, and he said, "I take your pledge that you will not ascribe partners to Allah, will not steal, will not commit infanticide, will not slander others by forging false statements and spreading it, and will not disobey me in ordering you Ma'ruf (Islamic Monotheism and all that Islam ordains). And whoever among you fulfils all these (obligations of the pledge), his reward is with Allah. And whoever commits any of the above crimes and received his legal punishment in this world, that will be his expiation and purification. But if Allah screens his sin, it will be up to Allah, Who will either punish or forgive him according to His Wish."* Abu 'Abdullah said, "*If a thief repents after his hand has been cut off, then his witness will be accepted. Similarly, if any person upon whom any legal punishment has been inflicted repents, his witness will be accepted.*"

<sup>137</sup> Qur'an surah Al-Ma'ida [5]: 35-37 states: "*You who believe, be mindful of God, seek ways to come closer to Him and strive for His cause, so that you may prosper. If the disbelievers possessed all that is in the earth and twice as much again and offered it to ransom themselves from torment on the Day of Resurrection, it would not be accepted from them – they will have a painful torment. They will wish to come out of the Fire but they will be unable to do so: theirs will be a lasting torment.*" See Haleem, *supra* note 2 at 71. Seyyed Hossein Nasr specifically comments that though for others, doing right action and fulfilling religious duties were the primary means of approach to God, Sufi commentators also stress cultivating spiritual virtues, such as patience, contentment, and sincerity as means of approach to God and that

Indeed, as we may see from the discussion at the beginning of this chapter, Islamic law establishes two methods for securing compliance from its subjects. The first is based on worldly temporality, which treats individuals' life as a finite temporal duration and institutes rewards and punishment on the assumptions that individuals want to maximize personal benefit and minimize personal losses in the earthly life.<sup>138</sup> The second one is based on the timelessness of the hereafter, which provides rewards and punishments in the afterlife, the existence of which is a cardinal belief of Islamic faith where they shall exist for eternity.<sup>139</sup>

But does such differentiation truly matter in terms of legal interpretation and policy making? Does the existence of afterlife sanctions somehow affect the implementation of the worldly laws stipulated in the Basic Codes? I believe that the answer is a resounding no. The first reason can be derived from simple common sense. If the afterlife rewards and sanctions matter and life is just a fleeting moment compared to the eternity of the hereafter, why bother having the worldly laws in the Basic Codes? Why don't we settle everything in the afterlife instead? There would be no need to send murderers to their death or to require them to compensate the families of their victims since all of them will go to hell anyway and burnt for eternity (or at least for a very, very long time).<sup>140</sup> And yet, the Basic Codes provides an array of legal provisions to deal with various human problems ranging from how to properly cleanse ourselves to how we should retaliate when someone hits us in the face.<sup>141</sup>

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the certainty of the reckoning after death is a central theme of the Qur'an, and the Qur'an repeatedly asserts the futility of seeking to ransom oneself with worldly goods in order to escape punishment in the hereafter. See Nasr, *supra* note 2 at 294-295.

<sup>138</sup> See Liaquat Ali Khan, "Fana and Baqa Infinities of Islam: Approaches to Islamic Law and Behavior," *University of St. Thomas Law Journal* 7 (2009-2010): 552.

<sup>139</sup> *Id.*

<sup>140</sup> See notes 102 and 103.

<sup>141</sup> Also known as the rule of *qisas*. See Qudamah, *supra* note 104 at 187-197.

Second, it is also absolutely clear within the Islamic legal literatures that no rewards or sanctions explicitly prescribed in the Basic Codes for certain acts are or could be waived simply because the Basic Codes describe the exact afterlife rewards or sanctions for those acts.<sup>142</sup> As such, it can be argued that for the purpose of legal interpretation, especially the consequence-based ones, afterlife rewards and sanctions are not part of the equation. Surely, they are essential in the overall costs and benefits calculation by each Muslim (and Muslims are encouraged to consider both elements of afterlife and the worldly life in making their decision), but they do not affect how the law should be applied. With that being cleared, we can move forward to the next chapter.

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<sup>142</sup> See Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 3<sup>rd</sup> Edition (Cambridge: The Islamic Text Society, 2003), 173.

## CHAPTER 6

### THE ECONOMIC STRUCTURE OF ISLAMIC LAW AND LEGAL INSTITUTIONS

#### A. INTRODUCTION

The stories and cases discussed in the previous chapter have established quite a compelling case for Islamic consequentialism in policy and decision making. Not only that consequences matter in Islam, well-being consideration is also ranked higher compared to other abstract values such as fairness and justice (in their simplest forms) in determining the desirable consequences in crucial cases (such as full-scale war, assassinations of civilians, and the killing of an underaged boy). However, I admit that demonstrating the consequentialist nature of Islam does not automatically mean that it is permissible or there is any inherent need to change the legal provisions or institutions of the Basic Codes through legal interpretation or otherwise.

First, the cases discussed in Chapter 5 may reflect various one time responses to very specific situations, and therefore they cannot be used to support a more general application of consequentialism in interpreting broader provisions of the Basic Codes. Second, it is possible that the main purpose of those cases is simply to display the Islamic moral framework in order to justify the past rulings of God and do not necessarily impose any binding legal obligation (the rulings made by Khidr, for example, do not fall under the category of legal provisions under the usual linguistic and contextual standards of *Ushul Fiqh*).<sup>1</sup> In other words, they provide valuable moral lessons but do not grant a license to amend the decisions previously decided by God. Of course, imposing a rule saying “thou shall kill all annoying brats” is an incredibly bad marketing technique for a religion (or for any regulations made by sane people); it is an overkill to say the least even if it is deemed only as a moral lesson. And finally, as will be further elaborated below, there might be no need to change the legal provisions of the Basic Codes because from a

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<sup>1</sup> See discussions in Chapters 1 and 2.

consequentialist perspective, those provisions are the best that could ever be, the best of all possible worlds.

The problem ultimately lies with the claim of perfection in Islamic law. As long as we do not settle the exact definition, there will always be a potential conflict between those who believe that God's law must be applied as it is at all time until the judgment day and those who believe that the law should be subject to change in certain circumstances. Due to Islamic consequentialism, where, as part of their decision making procedure, Muslims are encouraged to pool various outcomes, rank those outcomes, and pick the best one among them, the second definition of perfection<sup>2</sup> is not entirely improbable. But at the same time, the first definition of perfection<sup>3</sup> is also probable. What should we choose?

Based on our discussions so far, one key element to resolve the above issue is the ability of the Basic Codes' legal provisions to satisfy the dimensions of well-being and other abstract moral values. We note from our discussion in Chapter 5 that these dimensions serve as part of the overall consideration in Islamic legal and policy decision making. We also note that the rulings decided in those previous cases failed to fully satisfy the above dimensions as some compromises and sacrifices of values were made despite the possibility of having better solutions that could satisfy Pareto efficiency (at least in theory).

Relying solely on the above fact, I can easily argue that given the Rationality Parameters, the first definition of perfection in which the entire provisions of the Basic Codes were assumed to be immutable and absolute seems to be mistaken because there are provisions that clearly are not

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<sup>2</sup> Under the second definition, the perfection of *Shari'a* refers to the completeness of its universal principles where all legal rules in the *Shari'a* are derived from those principles and can be changed to the extent the change is made in line with the applicable universal principles. This concept can only work if and only if Islam supports the consequentialist moral framework, since under a deontological moral framework, any discussion on changing the law would not be necessary as one should only seek to perform the duty that has been imposed upon him, including the duty to follow whatever has been ordered by God. See Chapter 3

<sup>3</sup> Under the first definition, perfection is equal to flawlessness and absolutism. See Chapter 3.

flawless. And therefore, the second definition of perfection which allows modification to the legal provisions to the extent it is in line with certain universal principles in the Basic Codes is more probable and also consistent with the Rationality Parameters.

But, if I stop there, I feel that most Islamic jurists will not be convinced on the necessity to use consequence-based theories of interpretation in Islamic law. And there are at least 3 arguments to deny my claim as I have briefly discussed above. To strengthen my claim, I will be focusing my efforts in this Chapter 6 to demonstrate that there are situations and conditions when certain legal provisions or legal institutions of the Basic Codes that have large scale application (and thus greater impacts to the Muslim community) fail to satisfy the dimensions of well-being and other values that are set out in the Basic Codes. If it turns out that they do not always satisfy those dimensions, there would be a stronger case for the second definition of perfection and accordingly, there would also be a higher probability that consequence-based theories of legal interpretation could fit the Islamic legal system and that the provisions of the Basic Codes could be modified through legal interpretation.

In this case, I will be returning to the three legal institutions that have been previously discussed in Chapter 4, namely, slavery, theft, and *riba*.

**B. SLAVERY AND THE GENERAL THEORY OF SECOND BEST**

Since Islam did not immediately ban all form of slavery, criminalize the slave trading practice, or at the very least, morally condemn the practice, there are two possible interpretations. First, from deontological perspective, Islam simply does not view slavery as an abhorrent institution (if it is inherently bad, it should be prohibited/condemned). A Hadith from Al-Bukhari's compendium seems to suggest that slaves were made in that condition due to God's own volition, as if their status are predetermined from the beginning of the universe and that such

institution is already pre-ordained by God.<sup>4</sup> Second, from a consequentialist perspective, Islam refused to see the institution from a black and white lens and acted pragmatically in stipulating its rules after considered the available circumstances. The following discussion will show why the second interpretation is more plausible.

A religion that thinks that slavery is perfectly fine and does not care about the well-being of the slaves will not spend a lot of time regulating various incentives to free the slaves either through positive compensations or imposition of additional costs. For instance, freeing a slave will be rewarded with a free ticket to heaven<sup>5</sup> (representing the abstract afterlife compensation) and the right to inherit certain portion of the slave's assets (known as *al-Wala*) from the freed slaves (representing the worldly financial compensation).<sup>6</sup>

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<sup>4</sup> See Hadith no. 30 in Al-Bukhari's compendium of Hadiths which states: "Narrated Al-Ma'rur: At Ar- Rabadha I met Abu Dhar who was wearing a cloak, and his slave, too, was wearing a similar one. I asked about the reason for it. He replied, "I abused a man by calling his mother with bad names." The Prophet said to me, "O Abu Dhar! Did you abuse him by calling his mother with bad names? You still have some characteristics of ignorance. Your slaves are your brothers and Allah has put them under your command. So whoever has a brother under his command, should feed him of that which he eats and dress him of that which he wears. Do not ask them (slaves) to do things beyond capacity (power) and if you do so, the help them." See Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 1, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 70. It is interesting to note that in this Hadith, the Prophet characterizes slaves as brothers who have been put under free men's command by God, as if indicating the institution of slavery is arranged and permitted by God. Compared this to discussion about slavery in the classical Roman law discourse where slavery was deemed common and in opposition to natural reason at the same time, creating a paradox though at the same time establishing the moral ambiguities of slavery in the ancient world. See further discussion in Richard A. Epstein, *Skepticism and Freedom: A Modern Case for Classical Liberalism* (Chicago: The University of Chicago Press, 2003), 4-5.

<sup>5</sup> Recorded in Hadith no. 2517 in Al-Bukhari's compendium of Hadiths which states: "Narrated Abu Hurairah: The Prophet said, "Whoever frees a Muslim slave, Allah will save all the parts of his body from the (Hell) Fire as he has manumitted the body-parts of the slave." Said bin Marjana said that he narrated that Hadith to 'Ali bin Al-Husain and he manumitted his slave for whom 'Abdullah bin Ja'far had offered him ten thousand Dirham or one thousand Dinar." See Muhammad ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 3, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 402.

<sup>6</sup> See Hadith no. 1493 in Al-Bukhari's compendium of Hadiths which states: "Narrated Al-Aswad: 'Aishah intended to buy Barira (a slave-girl) in order to manumit her, and her masters intended to put the condition that her Al-Wala would be for them. 'Aishah mentioned that to the Prophet who said to her, "Buy her, as the Wala is for the manumitter." Once some meat was presented to the Prophet, and 'Aishah said to him, "This (meat) was given in charity to Barira." He said, "It is an object of charity for Barira but a gift for us.'" See Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 2, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 332-333.

Then there are certain acts whose punishment include freeing a slave. A person who intentionally has sexual intercourse during the fasting period in the holy month of Ramadhan is required to free at least one slave (though if he cannot do it, he must fast for 60 consecutive days or if he also cannot do it, he will be required to feed at least 60 poor people).<sup>7</sup> The same sanction is also applicable for any man who prohibits himself from his wife by saying that his wife is just like his mother (the technical Arabic term is *Zihar*, a cultural way of saying that you do not want to be with your wife anymore, but have no intention to divorce her), whereas if he does not perform the above sanctions, he is prohibited from having sexual intercourse with his wife.<sup>8</sup> And if a person unintentionally kills another person, he must also free a slave as part of his punishment.<sup>9</sup>

In terms of emigration of slaves from territories controlled by pagans to a Muslim territory, if such slave is coming from a pagan territory that has no treaties with the Muslim community, that slave will be deemed automatically free when he reaches the Muslim territory.<sup>10</sup> If he is

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<sup>7</sup> Recorded in Hadith no. 6087 in Al-Bukhari's compendium of Hadiths which states: "*Narrated Abu Hurairah: A man came to the Prophet and said, 'I have been ruined for I had sexual relation with my wife in Ramadan (while I was observing fasting)'. The Prophet (in expiation) said (to him), 'Manumit a slave.' The man said, 'I cannot afford that.' The Prophet said, '(Then) observe Saum (fast) for two successive months (continuously)'. The man said, 'I cannot do that.' The Prophet said, '(Then) feed sixty Masakin (poor persons)'. The man said, 'I have nothing (to feed them with)'. Then a big basket full of dates was brought to the Prophet. The Prophet said, 'Where is the questioner? Go and give this in charity.' The man said, '(Shall I give this in charity) to a poorer person than I? By Allah, there is no family in between these two mountains (of Al-Madina) who are poorer than we.' The Prophet then smiled till his premolar teeth became visible, and said, 'Then (feed) your (family with it).'*" See Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 8, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 71.

<sup>8</sup> See further discussion in Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 24, ed. Eddy Fr. and Besus Hidayat Amin, trans. Fathurrozi and Anshari Taslim (Jakarta: Pustaka Azzam, 2009), 772-782.

<sup>9</sup> See Ibn Rushd, *The Distinguished Jurist's Primer: Volume II*, trans. Imran Ahsan Khan Nyazee (Reading: Garnet Publishing, 2000), 495. Hadith no. 6905 in Al-Bukhari's compendium of Hadiths states: "*Narrated Hisham's father: Al-Mugira bin Shu'ba said: 'Umar consulted the companions about the case of a woman's abortion (caused by somebody else). Al-Mugira said, 'The Prophet gave the verdict that a male or female slave should be given (as a Diya).'*" See Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 9, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 36.

<sup>10</sup> Hadith no. 5286 in Al-Bukhari's compendium of Hadiths states: "*Narrated Ibn 'Abbas: Al-Mushrikun were of two kinds as regards their relationship to the Prophet and the believers. Some of them were those with whom the Prophet was at war and used to fight against, and they used to fight him; the others were those with whom the Prophet had a treaty, and neither did the Prophet fight them, nor did they fight him. If a lady from the first group of Al-Mushrikun emigrated towards the Muslims, her hand would not be asked in marriage unless she got the menses and then became clean. When she became clean, it would be lawful for her to get married, and if her husband emigrated too before she got married, then she would be returned to him. If slave or female slave emigrated from them to the Muslims, then they would be considered free persons (not slaves) and they would have the same rights as given to other emigrants. The narrator then mentioned about Al-Mushrikun involved with the Muslims in a treaty, the same as occurs in Mujahid's narration. If a male slave or a female slave emigrated*

coming from a pagan territory that has a treaty, he will not be returned but the Muslim community must pay his price to the pagans.<sup>11</sup>

And although slaves are still treated as valid transferable assets with limited rights inferior to free men, the Basic Codes prevent the sale of any female slave that gives birth to a child from her master and oblige the master to release her upon his death.<sup>12</sup> On various occasions, the Prophet also instructed his Companions to treat kindly their slaves as if those slaves are their brothers and to not let them work too hard beyond their capacity.<sup>13</sup> Similar message is stated in Qur'an surah An-Nahl [16]: 71 where God says: "*God has given some of you more provision than others. Those who have been given more are unwilling to pass their provision on to the slaves they possess so that they become their equals. How can they refuse to acknowledge God's blessings?*"<sup>14</sup> Though it is worth to mention that according to Ath-Thabari, this verse actually discusses God's criticism on people who do not want to associate themselves with their slaves but then they associate other mortal beings with the Almighty God, instead of how to properly treat slaves.<sup>15</sup>

Finally, despite conflicting opinions among Islamic major schools of law due to the language in the Basic Codes, slave owners are generally discouraged from killing or torturing their

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*from such Al-Mushrikun as had made a treaty with the Muslims, they would not be returned, but their prices would be paid (to Al-Mushrikun)." See Muhammad Ibn Ismaiel Al-Bukhari, The Translation of the Meanings of Sahih Al-Bukhari Arabic-English, vol. 7, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 137-138.*

<sup>11</sup> *Id.*

<sup>12</sup> See further discussion in Burhan Al-Din Al-Farghani Al-Marghinani, *Al-Hidayah – The Guidance: A Translation of Al-Hidayah Fi Sharh Bidayat Al-Mubtadi, A Classical Manual of Hanafi Law*, vol. 2, trans. Imran Ahsan Khan Nyazee (Bristol: Amal Press, 2008), 145-149. The tradition is based on the Prophet's Hadiths and the requirements are quite complicated when the female slave is owned by more than one person.

<sup>13</sup> See Al-Bukhari, *supra* note 4 at 70.

<sup>14</sup> See M.A.S Abdel Haleem, *The Qur'an: A New Translation* (New York: Oxford University Press, 2005), 170. The above verse indicates that people should pass some of their provisions to their needy slaves (although the original understanding of this verse, at least according to some classical scholars, does not reflect such understanding).

<sup>15</sup> See further discussion in Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 16, ed. Eddy Fr. and Besus Hidayat Amin, trans. Ahsan Askan et al. (Jakarta: Pustaka Azzam, 2009), 217-218.

slaves since the owners might be subject to retaliation (*Qisas*) or at least be required to pay hefty compensation for doing those acts or to free the tortured slaves.<sup>16</sup>

From economics perspective, as briefly mentioned above, it can be argued that the above provisions are designed to incentivize slave owners to free their slaves and opt for the service of free men. What mostly differentiate slaves from free workers assuming that both have the same labor skills? The costs of maintaining one. Compensation for a free worker's service is his salary (and any other form of benefits as may be agreed between the worker and the employer). For slaves, salary is rarely an option especially because the owners tend to have incurred significant costs for purchasing the slaves in the first place and the slaves are expected to cover those acquisition costs (Islamic law actually regulates how slaves can obtain freedom by entering into a contract with their owner as a way to repay their initial purchase price).<sup>17</sup>

Given the circumstances, a slave owner can either incentivize his slaves to work by treating them well or simply torturing them (this will include the costs of performing and supervising the torture). A slave owner can also gain profits from trading his slaves since slaves are recorded as assets (which is a profitable business especially for ransom slavery, where speculators buy prospective slaves who might have enough wealth and connections at home to buy themselves out of captivity, hoping for a significant rate of investment return)<sup>18</sup> or imposing taxes against his

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<sup>16</sup> Scholars from the Hanafi and Maliki Schools agree that a person who kills or injures his slave must be killed or injured in the same way. Others disagree with such notion. But in general, compensation is always applicable. See further debates in Rushd, *supra* note 9 at 482-483, 491-492, and 500-501. However, Hadith no. 4517 in Abu Dawud compendium of Hadiths prohibits retaliation against slave owners and the Hadith's transmission is considered quite good (*hasan*). The Hadith states: "It was narrated from Ibn Abi 'Arubah, from Qatadah, with the chain of Shu'bah, similarly, and he added: "Then Al-Hasan forgot this Hadith and he used to say: 'A free man should not be killed (in retaliation) for a slave.'" See Imam Hafiz Abu Dawud Sulaiman bin Ash'ath, *English Translation of Sunan Abu Dawud*, vol. 5, ed. Huda Khattab, trans. Nasiruddin al-Khattab (Riyadh: Maktaba Dar-us-Salam, 2008), 113.

<sup>17</sup> See Rushd, *supra* note 9 at 453-454.

<sup>18</sup> See Robert C. Davis, *Christian Slaves, Muslim Masters: White Slavery in the Mediterranean, The Barbary Coast, and Italy 1500-1800* (New York: Palgrave MacMillan, 2003), 70.

slaves income from other job.<sup>19</sup> Assuming that slaves and free workers end up giving similar productivity for the same job, as long as the market price of the free workers' salary (and benefits) is higher than the costs of maintaining the slaves minus his commodity market value and tax from his income, a rational slave owner would most likely prefer to use the service of the slaves.<sup>20</sup>

By imposing penal sanctions or hefty financial compensation for killing or torturing slaves, Islamic law substantially increases the costs of owning slaves while at the same time ensuring that the slaves will be treated better by their masters. After all, without torture, what are the alternative ways for slave owners to ensure that their slaves will maintain their productivity? As a result, the owners will have more incentives to treat the slaves well and this creates a better bargaining position for the slaves. Additional protection is also given to female slaves (in which they were usually used for satisfying their master's sexual needs) through the rule that female slaves cannot be sold and must be freed after their master's death once they give birth to a child of their master.<sup>21</sup> This rule increases the costs of owning female slaves even further because now the owners cannot extract profits from selling or pledging their slaves to third parties while the possibility of producing a child is quite high assuming there are no effective contraceptive tools in that era.<sup>22</sup>

The Islamic moral idea that slaves are brothers of their owners (albeit with a different position) and also the guardian of their masters' assets (creating an impression that slaves hold an important role) cannot be ignored in analyzing the institution.<sup>23</sup> Throughout the history of

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<sup>19</sup> See Hadith no. 2102 in Al-Bukhari's compendium of Hadiths which states "*Narrated Anas bin Malik: Abu Taiba cupped Allah's Messenger. So he ordered that he be paid one Sā' of dates and ordered his masters to reduce his tax (as he was a slave and had to pay a tax to them).*" See Al-Bukhari, *supra* note 5 at 184-185.

<sup>20</sup> See an interesting economic analysis on slaves' productivity and slave owners' incentives in Yoram Barzel, "An Economic Analysis of Slavery," *The Journal of Law and Economics* 20 (1977): 87-110.

<sup>21</sup> See further discussion in Rushd, *supra* note 9 at 475-476.

<sup>22</sup> See further discussion in Abu Shuja Al-Asfahani, *The Ultimate Conspectus*, trans. Musa Furber (Abu Dhabi: Islamosaic, 2012), 160.

<sup>23</sup> Recorded in Hadith no. 2554 in Al-Bukhari's compendium of Hadiths which states: "*Narrated Abdullah: Allah's Messenger said, 'Everyone of you is a guardian and is responsible for his charges. The ruler who has authority over people, is a guardian and is responsible for them, a man is a guardian of his family and is responsible for them; a woman is a guardian of her husband's house and children and is responsible for them; a slave ('Abd) is a guardian of his master's property*

Muslims' empire, some slaves were very successful in climbing the political ladder while retaining their status as slaves, and one of the Muslim's famous dynasty was effectively a dynasty established and ruled by those coming from slaves' class.<sup>24</sup> While there might be no exact causation between the above moral framework and the position acquired by slaves within the history of Islamic civilization, it cannot be denied that the framework provides better starting grounds for slaves to climb the ladder toward leadership and power.

If we compare the above facts and rules with the treatment of slaves in the United States prior to and after the universal manumission, one can quickly conclude that, theoretically, being slaves in the Islamic world is better compared than being slaves in the United States.<sup>25</sup> In the late Ottoman empire, slavery is even deemed as a legitimate industry supported by the unshakable conviction that Islamic law was predicated on deep human concern and could not possibly condone any practice which was not humane, caring, and cognizant of the suffering of the weak and poor members of society.<sup>26</sup> But this dissertation is not intended to provide an apologetic defense of the slavery institution in the Islamic legal system. We have seen the nice parts of the institution, now, we also need to see the "darker" parts to understand the fragile position of slaves under Islamic law.

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*and is responsible for it; so all of you are guardians and are responsible for your charges.*" See Al-Bukhari, *supra* note 5 at 419.

<sup>24</sup> See further discussion in Eric Chaney, "Islamic Law, Institutions and Economic Development in the Islamic Middle East," *Development and Change* 42 (2011): 1468-1469, and then in Ehud R. Toledano, "Late Ottoman Concepts of Slavery (1830s-1880s)," *Poetics Today* 14 (1993): 477-483, and also Humphrey J. Fisher, "Slavery and Seclusion in Northern Nigeria: A Further Note," *The Journal of African History* 32 (1991): 125.

<sup>25</sup> As may be argued by Islamic apologetics such as in the case of the treatment of slaves in the Ottoman empire, though of course, the truth about the real practice continues to be disputed. See Toledano, *supra* note 24 at 491-495. See also Bernard Lewis, *Race and Slavery in the Middle East* (Oxford: Oxford University Press, 1990), 78.

<sup>26</sup> See Toledano, *supra* note 24 at 495. According to Ehud Toledano, slavery was part and parcel of the Ottoman family, an institution scrupulously guarded against any outside interference. Since slavery was thus doubly shielded by social and religious practice, any attempt to impugn it as morally reprehensible was perceived as an indictment of the culture as a whole.

According to one Hadith, gifting a slave to our own extended family is a better noble act than freeing such slave.<sup>27</sup> Back in Chapter 4, we had a discussion that any promise to free a slave from a person whose liabilities exceed his assets cannot be enforced and the slave must still be sold to compensate his master's lack of assets. A slave woman has no right to refuse marriage proposal from a free man,<sup>28</sup> and in fact, has no right to refuse the request of his master to have sexual intercourse, effectively allowing rape against her (though technically speaking, this will not be considered as a rape under Islamic law).<sup>29</sup> Furthermore, even if she can marry with a free man, such marriage was typically condoned given her lower status in society having significantly less value compared to a free woman.<sup>30</sup>

In another Hadith, the Prophet states that taking money from prostitution of slave girls is prohibited.<sup>31</sup> But it is highly doubtful that this is an effective binding legal decision. Qur'an surah Al-Nur [24]: 33 specifically states that God prohibits men from forcing their female slaves into the business of prostitution, a common practice in Arabia since the pre-Islamic era,<sup>32</sup> but if the female

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<sup>27</sup> Hadith no. 2592 states: "Narrated Kuraib, the freed slave of Ibn 'Abbas that Maimuna binti Al-Harith (the wife of the Prophet) said that she manumitted a slave-girl but did not take the permission of the Prophet. On her turn when the (Prophet) came to her house she said, "Do you know O Allah's Messenger, that I have manumitted my slavegirl. He asked, "Have you (already) done it?" She replied, "Yes." The Prophet said, "You would have got more reward if you had given her (i.e., the slavegirl) to one of your maternal uncles.'" See Al-Bukhari, *supra* note 7 at 447.

<sup>28</sup> Hadith no. 6970 from Al-Bukhari's compendium of Hadiths states: "Narrated Abu Hurairah: Allah's Messenger said, "A lady-slave should not be given in marriage until she is consulted, and a virgin should not be given in marriage until her permission is taken." The people said, "How will she express her permission?" The Prophet said, "By keeping silent (when asked her consent). Some people said, "If a man, by playing a trick presents two false witnesses before judge to testify that he has married a with her consent and the judge confirms his marriage, and the husband is sure that he has never married her (before), then such a marriage will be considered as a legal one and he may live with her as a husband.'" See Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 9, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 75.

<sup>29</sup> See Murray Gordon, *Slavery in the Arab World* (New York: New Amsterdam Book, 1992), 79-83. This treatment is quite similar to the pre-civil war treatment in the United States. See John T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Whyte as Makers of the Masks* (Berkeley: University of California Press, 1976), 43-46.

<sup>30</sup> See further discussions in Mohammed Ennaji, *Slavery, The State and Islam* (Cambridge: Cambridge University Press, 2013), 30-31.

<sup>31</sup> Recorded in Hadith no. 2238 in Al-Bukhari, *supra* note 5 at 243.

<sup>32</sup> See M.S. Sujimon, "Istilhaq and Its Role in Islamic Law," *Arab Law Quarterly* 18 (2003): 117. And in fact, many new forms of prostitution cum slavery cum sex trafficking still occurs until today where some are somehow

slaves are still being forced to do it, the slaves will be forgiven by God.<sup>33</sup> This indicates that there are no effective sanctions or mechanics to prevent the slave owners from forcing their slave girls to enter into such business, which is in line with the idea that slaves are mere assets to be utilized by their owners as they deem fit.<sup>34</sup> After all, while the prostitution business is “prohibited”, gifting a slave to be sexually used by the owner’s friend is generally permissible, creating a puzzling paradox.<sup>35</sup>

And though Islamic law is very accommodative to runaway slaves from outside the Muslim territories, allowing them to be automatically freed or mandating the Islamic community to purchase their freedom, such rule is not applicable for runaway slaves in Islamic territory as they will become fugitives, can be captured for repossession, and their captor must be compensated by the relevant owner after meeting certain requirements just like in the Dredd-Scott case,<sup>36</sup> a practice that was still being implemented up until the Ottoman empire era.<sup>37</sup>

This segregation of treatment is not an anomaly, rather, it is done systematically, since the Basic Codes do provide different set of rules for free people and slaves.<sup>38</sup> One particular example is the discussion that we had above on applying the right of *Qisas* for slaves in case their master

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“legalized” through technicalities. See the fascinating stories in Shereen El Feki, *Sex and the Citadel: Intimate Life in a Changing Arab World* (New York: Anchor Books, 2013), 180-215.

<sup>33</sup> The texts of the verse are as follows, “... Do not force your slave-girls into prostitution, when they themselves wish to remain honorable, in your quest for the short-term gains of this world, although, if they are forced, God will be forgiving and merciful to them.” See Haleem, *supra* note 13 at 223. Further discussion on the interpretation of this verse which confirms my understanding above is recorded in Abu Ja’far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 19, ed. Edy Fr. and M. Sulton Akbar, trans. Ahsan Askan, Yusuf Hamdani, and Abdush-Shamad (Jakarta: Pustaka Azzam, 2009), 149-156.

<sup>34</sup> See Gordon, *supra* note 29 at 79-80.

<sup>35</sup> See Rushd, *supra* note 9 at 522.

<sup>36</sup> See further discussion in Al-Marghinani, *supra* note 12 at 369-372. See also the discussion about the Dredd Scott case in Paul Finkelman, *Supreme Injustice: Slavery in the Nation’s Highest Court* (Cambridge: Harvard University Press, 2018), 183-186.

<sup>37</sup> See further discussion in Yvonne J. Seng, “Fugitives and Factotums: Slaves in Early Sixteenth-Century Istanbul,” *Journal of the Economic and Social History of the Orient* 39 (1996): 152-163.

<sup>38</sup> Such as in the case of homicide and personal injury law. See Rudolph Peters, *Crime and Punishment in Islamic Law – Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge: Cambridge University Press, 2005), 40.

tortures them. In general, masters cannot be retaliated by their slaves for the torture.<sup>39</sup> In the case of *zina*, a master who falsely accuses his slave for committing *zina* shall not be punished with the usual punishment for such crime, namely, 80 times flogging, even though he may be punished by God in the judgment day (and as discussed in the previous chapter, afterlife sanctions are not considered as part of Islamic law).<sup>40</sup>

We also need to consider the rules regarding the permissibility of enslaving free men, women and children through wars and also the silent treatment of the Basic Codes on the permissibility of slave trading as discussed extensively in Chapter 4. Some of these rules are simply abominable even when we are using the lowest standard of morality, including: (i) automatic annulment of the female captives' existing valid marriage simply by being enslaved and the permissibility to rape them,<sup>41</sup> and (ii) the permissibility for separating infants and their mother from their captive father when they are about to be taken as slaves or sold to third party,<sup>42</sup> and after certain age, separating the children from the mother to be sold to different third parties.<sup>43</sup>

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<sup>39</sup> See Rushd, *supra* note 9 at 491.

<sup>40</sup> Hadith no. 6858 in Al-Bukhari's compendium of Hadith states: "Narrated Abu Hurairah heard Abul-Qasim (the Prophet) saying, "If somebody slanders his slave (by accusing them of committing illegal sexual intercourse) and the slave is free from what he says, he (the master) will be flogged on the Day of Resurrection, unless the slave is really as he has described him."" See Al-Bukhari, *supra* note 5 at 441.

<sup>41</sup> See Hadith no. 6603 in Al-Bukhari, *supra* note 7 at 319 which states: "Narrated Abu Sa'id Al-Khudri: that while he was sitting with the Prophet, a man from the Ansār came and said, "O Allah's Messenger! We get slave girls from the war captives and we love property; what do you think about coitus interruptus?" Allah's Messenger said, "Do you do that? It is better for you not to do it, for there is no living creature which Allah has ordained to come into existence but will be created."" See also Hadith no. 3608 of Muslim's compendium of Hadiths in Abul Hussain Muslim bin Al-Hajjaj, *English Translation of Sahih Muslim*, vol. 4, ed. Huda Khattab, trans. Nasiruddin al-Khattab (Riyadh: Maktaba Dar-us-Salam, 2007), 108. "It was narrated from Abu Sa'eed Al-khudri that on the Day of Uunain, the Messenger of Allah sent an army to Awtâs, where they met the enemy, fought them and prevailed over them. They captured some female prisoners, and it was as if the Companions of the Messenger of Allah felt reluctant to have intercourse with them because of their idolater husbands. Then Allah, the Mighty and Sublime, revealed: "Also (forbidden are) women already married, except those (slaves) whom your right hands possess", meaning, they are permissible for you once their 'Iddah has ended."

<sup>42</sup> See Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Al-Tabari's Book of Jihad: A Translation from the Original Arabic*, trans. Yasir S. Ibrahim (New York: The Edwin Mellen Press, 2007), 323-326.

<sup>43</sup> *Id.* Slave owners in the United States had this similar power when they decide to sell their slaves to other parties. See further discussion in Mark Thornton, Mark A. Yanochik, and Bradley T. Ewing, "Selling Slave Families Down the River: Property Rights and the Public Auction," *The Independent Review* 14 (2009): 71-79.

In short, from a deontological perspective, the Basic Codes provisions on slavery are simply messed up and incoherent, unless of course, we actually believe there are strong grounds to argue that having sexual intercourse with a female slave without her consent, enslaving free men through wars, separating children from their parents, and creating a segregated society complete with segregated laws are morally acceptable. Indeed, the standard picture of humane treatment of slavery in Islam is misleading if we view the entire institution and its related rules as a whole. True, there are rules that support the humane treatment, but we would be fooling ourselves if we think that those rulings are sufficient as they basically maintain the institution albeit with some improvements from the original model.

From a consequentialist perspective, however, there are certain factors that may help us to understand the existence of Islamic institution of slavery. I have to reiterate that the discussion below is not intended to blindly defend such institution, rather, I am trying to provide a rational reconstruction on how the institution was first introduced and maintained. We should first understand that Islam started from zero and within 23 years of his leadership, Prophet Muhammad spent at least 10 years of isolation in Mecca with a very small group of followers before he finally moved to Medina and start to gain more power.<sup>44</sup> At the same time, the institutions of slavery has been going on for thousands of years, and it was pervasive in the Middle East where Islam started its journey of glory.<sup>45</sup>

In line with the above situation, in Qur'an surah Al-Balad [90]: 8-13, God declares that one of the most difficult roads that is recommended for Muslims is to free slaves.<sup>46</sup> Why is it difficult?

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<sup>44</sup> See J.J. Saunders, *A History of Medieval Islam*, (London: Routledge, 2002) 24-26.

<sup>45</sup> Slaves are highly demanded in this region though not necessarily for productive economic activities, but for military purposes, domestic needs, and sexual needs. See further discussion in John Wright, *The Trans-Saharan Slave Trade* (New York: Routledge, 2007) 1-6.

<sup>46</sup> The texts are as follows: "*Did We not give him eyes, a tongue, lips, and point out to him the two clear ways [of good and evil]? Yet he has not attempted the steep path. What will explain to you what the steep path is? It is to free a slave.*" See Haleem, *supra* note 14 at 422.

One simple explanation is that because freeing a slave is costly and not every man is rich enough to do it.<sup>47</sup> While it is usual for a religion to require its followers to show their commitment to the religion by performing various ritualistic practice, it is a completely different matter when the religion starts requiring its followers to discharge their valuable assets without clear compensation. After all, one does not simply convert into a new religion without considering the transaction costs and benefits of doing so.<sup>48</sup> Hence, the existence of various rules on manumission where compensations are given through afterlife and worldly rewards seem to be a better approach.

Another possible pragmatic reason that is worth to be explored further is the undeniable fact that releasing the entire slaves and eliminating the slavery institution in 23 years was most likely impossible without any divine intervention. To free all the slaves at the same time would mean that Islam will require all of its followers to immediately free their slaves too (if not, the pagans will accuse the Muslims for committing hypocrisy and as has been repeated many times in this dissertation, hypocrites go directly to hell). This is an incredibly sensitive matter from economics and political perspective. If some of the Arabic tribes rebelled against Abu Bakar, the first Caliph, shortly after the death of the Prophet, creating the first civil war in Islamic history, due to their refusal to pay *zakat* (which is far, far cheaper compared to freeing a slave),<sup>49</sup> consider

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<sup>47</sup> Recorded in Hadith no. 2518 in Al-Bukhari, *supra* note 5 at 402-403. See also interesting data on the pricing of slaves in the 15<sup>th</sup> century era in Suraiya Faroqi, "From the Slave Market to Arafat: Biographies of Bursa Women in the Late Fifteenth Century," *Turkish Studies Association Bulletin* 24 (2000): 3-20.

<sup>48</sup> See an empirical research on the correlation between costs and benefits of entering a new religion and the rate of conversion in Jean Ensminger, "Transaction Costs and Islam: Explaining Conversion in Africa," *Journal of Institutional and Theoretical Economics* 153 (1997): 4-29.

<sup>49</sup> See Yusuf al-Qaradawi, *Fiqh al Zakah Vol. 2: A Comparative Study of Zakah Regulations and Philosophy in the Light of Qur'an and Sunnah*, trans. Monzer Kahf (Jeddah: Scientific Publishing Centre, 2007), 14-15. See further history on this civil war in Tamir Abu-Su'ood Muhammad and Noha Kamal Ed-Din Abu Al-Yazid, *Biographies of the Rightly-Guided Caliph*, ed. M. Ibrahim Kamara and Joanne McEwan (Cairo: Dar Al-Manarah, 1998), 59-65. At that time, even Umar bin Khatab was thinking to accept the demand from the tribes that they will no longer pay *zakat* to the Caliphate. But Abu Bakar made the correct decision by engaging in such war and maintain the institution of *zakat*. This is also recorded in Al-Bukhari, *supra* note 28 at 47-48 in Hadiths no. 6924-6925 which state: "Narrated Abu Hurairah When the Prophet died and Abu Bakr became his successor and some of the Arabs reverted to disbelief, 'Umar said, "O Abu Bakr! How can you fight these people although Allah's Messenger said, 'I have been ordered to

what would happen to the fundamental structure of the earlier Muslim community if slavery was immediately banned? Duly note that slaves were not even subject to *zakat*.<sup>50</sup>

Even the great British Empire failed to take a universal manumission scheme back in 1901 when they arrived in Northern Nigeria and issued the Proclamation of Slavery in which they prohibited slave-raiding and declared that all subsequently born of slave parents would be free, but did not prohibit slaveholding.<sup>51</sup> Despite its power at that time, faced with an ancient and flourishing systems of slavery which probably involved several million men and women, it was still beyond their administration power to have enforced any policy of immediate emancipation, especially when they need to consider the existence of the slave-owners class.<sup>52</sup>

There are at least two major effects of choosing an immediate policy of universal manumission. First, a substantial portion of the people's wealth will suddenly disappear overnight unless compensation is given, such as in the case of the southern part of the United States post-Civil War with devastating effect to not only the southern states (where the institution was thriving and profitable)<sup>53</sup> but also the whole United States.<sup>54</sup> Who will pay the compensation? Without full compensation, how to ensure that most people will comply with the policy without war or other

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*fight the people till they say: La ilaha illallah (none has the right to be worshipped but Allah), and whoever said La ilaha illallah, Allah will save his property and his life from me, unless (he does something for which he receives legal punishment) justly, and his account will be with Allah." Abu Bakr said, "By Allah! I will fight whoever differentiates between Salat (prayers) and Zakat; as Zakat is the right to be taken from property (according to Allah's Orders). By Allah! If they refused to pay me even a kid they used to pay to Allah's Messenger, I would fight with them for withholding it." 'Umar said, "By Allah! It was nothing, but I noticed that Allah opened Abu Bakr's chest towards the decision to fight, therefore, I realized that his decision was right."*

<sup>50</sup> "Narrated Abu Hurairah: Allah's Messenger said, "There is no Zakat either on a horse or a slave belonging to a Muslim."" See Hadith no. 1463 in Al-Bukhari, *supra* note 6 at 315.

<sup>51</sup> See Polly Hill, "From Slavery to Freedom: The Case of Farm-Slavery in Nigerian Hausaland," *Comparative Studies in Society and History* 18 (1976): 395.

<sup>52</sup> *Id.*

<sup>53</sup> See further discussion in James D. Foust and Dale E. Swan, "Productivity and Profitability of Antebellum Slave Labor: A Micro Approach," *Agricultural History* 44 (1970): 39-62.

<sup>54</sup> See the complete analysis in Claudia Dale Goldin and Frank D. Lewis, "The Economic Costs of the American Civil War: Estimates and Implications," *The Journal of Economic Theory* 35 (1975): 299-326.

forms of coercion?<sup>55</sup> Did the Muslims have enough military and financial power at that time to fight with all other tribes and cities that practice slavery? Most likely no. When the Prophet started his early preaching, historians argue that he quickly became an enemy of the ruling tribes because his teachings attacked their financial and trading position as the manager of pagans' pilgrimage in Mecca.<sup>56</sup> That was the effect of just teaching that pagan idols and gods are imaginary stuffs. Imagine the effect if the Prophet also attack another profitable industry such as slavery.

Second, suppose that the Muslim community successfully enforce the universal manumission policy, the territory might be quickly overwhelmed by new labor forces that most likely fall into the category of the poorest kind.<sup>57</sup> Who will take care of them? Their previous masters? What are their incentives to do that? Why should they pay for the well-being of their former slaves while they have just been robbed from their precious assets? Unless the state already secures enough funds to maintain the welfare of the newly free people or the market is flexible enough to absorb the new labors, we will just throwing people into oblivion (which might also include their descendants, creating intergenerational poverty).<sup>58</sup> Unfortunately, there are no data available on this matter in the Prophet's era, but considering the fact that the state was a still a foreign concept and the initial government has limited power and resources at that time, it is safe to assume that early Muslims did not have the resources to maintain a policy of universal manumission.

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<sup>55</sup> See interesting analysis on this issue in Claudia Dale Goldin, "The Economics of Emancipation," *The Journal of Economic History* 33 (1973): 66-85.

<sup>56</sup> See Muhammad Mohar Ali, *Sirat Al-Nabi and the Orientalists: With Special Reference to the Writings of William Muir, D.S. Margoliuth and W. Montgomery Watt*, vol. 1B (Medina: King Fahd Complex for the Printing of the Holy Qur'an, 1997), 611.

<sup>57</sup> In essence, slavery can be viewed as an extreme form of poverty. With all the power centralized at the owners, slaves would have nothing once they are emancipated. See Barzel, *supra* note 20 at 109.

<sup>58</sup> See for example the discussion in Robert William Fogel and Stanley L. Engerman, *Time on the Cross: The Economics of American Negro Slavery* (New York: W.W. Norton Company, 1974), 258-264.

A parallel comparison can be made with the history of slaves' manumission in the United States. Many historians argue that the fight for the institution of slavery was one of the main reasons for creating the civil war.<sup>59</sup> And the US civil war was very costly, not only at the time the war occurred, but also afterwards, passing many generations.<sup>60</sup> Some also argue that the only reason why the 13<sup>th</sup> Amendment can be passed, banning the slavery institution in the United States, was because the Southern states lost the war and they had no choice other than to approve the proposed amendment.<sup>61</sup> Consider also the discrimination experienced by African-Americans long after the slavery institution was banned and also the confusion and chaos caused by the complexity of imposing the emancipation policy across numerous territories in the United States as there was no immediate unified policy.<sup>62</sup> Universal manumission is important and maybe, after the dust settles, the benefits of pursuing it outweigh the entire ordeal, but surely it is not without any negative drawbacks to the overall well-being of the society for certain periods of time.

And this is also precisely why there could be problems with the approaches taken by the Basic Codes on slavery issue. The General Theory of Second Best nicely explains the problem. According to Thomas Ulen, under the General Theory of Second Best, correcting a subset of market imperfections does not necessarily improve social welfare.<sup>63</sup> Assuming that there are 100 identifiable market imperfections, fixing some of the most egregious of those imperfections would not necessarily cause the society to be better off since one correction may have unintended and

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<sup>59</sup> See among others in Edward E. Baptist, *The Half Has Never Been Told: Slavery and the Making of American Capitalism* (New York: Basic Books, 2014), 400-414.

<sup>60</sup> See further discussions in Stanley L. Engerman, "Economic Adjustments to Emancipation in the United States and British West Indies," *The Journal of Interdisciplinary History* 13 (1982): 191-220 and Goldin and Lewis, *supra* note 54 at 299-326.

<sup>61</sup> See the discussions in Leonard L. Richards, *Who Freed the Slaves? The Fight Over the Thirteenth Amendment* (Chicago: The University of Chicago Press, 2015). Given how costly it was to amend the US Constitution on slavery issue, it is quite reasonable to say that the US Constitution texts are indeed immutable.

<sup>62</sup> See further discussion in Laura F. Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (New York: Cambridge University Press, 2015), 82-92.

<sup>63</sup> See Thomas S. Ulen, "Courts, Legislatures, and the General Theory of Second Best in Law and Economics," *Chicago-Kent Law Review* 73 (1997-1998): 204.

unanticipated consequences that adversely impact market efficiency or transaction costs elsewhere.<sup>64</sup> In other words, unless all of the problems are fixed simultaneously, things might be improved or vice versa.<sup>65</sup>

There are two possible courses of actions given the existence of such theory. First, we may stay our hand and make no attempts to correct market imperfections, knowing that the cost society is bearing under these imperfections may be the best state of affairs for which we can hope.<sup>66</sup> Second, we can direct our efforts at the correction of only manageable imperfections, such as those that are glaring and are unlikely to have adverse consequences elsewhere.<sup>67</sup> But in order to be confident about these latter methods of dealing with piecemeal correction (and piecemeal it must be because no society can afford to correct all imperfections at once), we must be fairly confident that we have identified all the impacts in other markets of making a correction in one market.<sup>68</sup>

Once applied to the Islamic institution of slavery, we can easily see that Islam takes a piecemeal approach with slavery. Scarcity rules the game, and the costs for eliminating the industry in its entirety were not bearable in the early days of Islam. Yet, while the piecemeal solutions might help to ease the suffering of the slaves and probably improved their well-being compared to the old regime, it is doubtful that the rulings maximize the overall well-being of the society in the long run due to the fact that they did not deal with all of the problems simultaneously.

The ambiguity of slave trading permissibility might serve a greater purpose. Creating an easy to understand rule of thumb is important and might probably suit better a less developed

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<sup>64</sup> *Id.* at 220.

<sup>65</sup> *Id.* at 204.

<sup>66</sup> *Id.* at 215.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

society compared to a modern and sophisticated one. Indeed, there is always a trade-off for having such arrangement, but it can be argued that as long as the benefits exceed the costs, the policy should be acceptable. Of course, the next question will be, at what cost?

While imposing such rule of thumb might create easier implementation, at the same time, it also imposes considerable costs to the existing and future slaves. By all means, given the assumption of completeness in the Basic Codes, picking a rule that says all slavery must be freed no matter what the costs is not entirely impossible. In fact, given all the talks in the Basic Codes about fairness, justice and compassion, it doesn't make any sense that slavery can still be permitted. The explanation is simple, a combination of scarcity and a pragmatic way of balancing multiple interests and values.

From economics perspective, the Islamic rules on slavery might only be justified in a world where there are not enough resources to: (i) free the slaves without excessive costs from war and/or compensation to previous owners; and (ii) maintain the welfare of the freed slaves, ensuring that they can live independently after the end of the slavery without burdening the existing labor market and society as a whole. Under these assumptions, it can be argued that slaves would still be better off living under those rules compared to living in a world where universal manumission is applied immediately. And later on, it is expected that the number of slaves would naturally decrease due to the rules set out by the Basic Codes, reaching a situation in which the institution is completely vanished as usually argued by apologetic scholars.<sup>69</sup> But is this a correct assessment or simply a naïve hope?

There are at least three approaches to incentivize people to acquire fewer slaves: we can increase the costs of acquisition, provide additional benefits for freeing the slaves, and, alter the price of the substitutes. We previously discussed the ways in which Islamic law could increase the

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<sup>69</sup> See for example in Ahmad Zaki Yamani, "Social Justice in Islam," *Islamic Studies* 41 (2002): 24.

costs of acquisition and provide additional benefits to slave owners who choose to free their slaves, yet the Islamic slavery rules' biggest flaw is that it does not pay much attention to the problem of substitution effect especially considering the fact that slave labor and free labor are not necessarily exact substitutes.<sup>70</sup>

In essence, slavery gave the owner a set of long-term property rights in the slave; while wage labor was a type of contract, of variable duration, between the employer and the laborer for the labor itself.<sup>71</sup> Institutionally speaking, slavery and free labor have a very different design. Slaves might be worked in different ways (such as by violence), override cultural norms (allowing exploitation of females or domestic service), and reduce transaction costs (the cost of finding, hiring, and training laborers since slaves can produce new generation of slaves).<sup>72</sup> In certain sectors, high transaction costs or cultural stigmas (such as domestic service) may have prevented slavery and free labor from competing in such sectors.<sup>73</sup> By contrast, in other niches - especially urban-based crafts - slavery and free labor may have been near perfect substitutes, so that the price of slaves was particularly sensitive to the wage level.<sup>74</sup>

To give a clearer example, let us take the case of female slaves whose one of their main purposes is essentially to satisfy the sexual needs of their masters. Where on earth can we find a woman who would be willing to have sexual intercourse with a man at any time and place based on the absolute discretion of such man without any form of compensation for the woman? And by compensation, I do not mean only financial compensation, but also love, compassion and any

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<sup>70</sup> See Kyle Harper, "Slave Prices in Late Antiquity," *Historia: Zeitschrift für Alte Geschichte* 59 (2010): 213.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

other intangible form of compensation. The case is clear, once slavery is terminated, there is simply no cheap substitution to the slave girls and harems.

Thus, without any clear prohibition against various ways for accumulating future slaves through active enslavement and subject to availability of substitutes (which are not always ready), there are less incentives to eliminate the existence of the slavery institution and there would be no guarantee that the institution will ever vanish bearing no other external factors. In fact, it is probable that the acquisition rate of new slaves might be higher than the rate of freed slaves under Islamic rules, especially in the case of acquiring slaves through war, conquest, and trading.<sup>75</sup> This is not a mere problem of failure to adhere to the values of Islamic law, these old conquerors were simply acting rationally under the available circumstances and rules.

In line with the above, it took more than 1,300 years to eliminate slavery in Islamic countries. As expected, without a strict prohibition, there are a lot of incentives to acquire new slaves through various measures and the business was thriving.<sup>76</sup> Indeed, one research shows that between 1530-1780, the number of slaves acquired in Algiers reached around one and a quarter million men, and these numbers are merely limited to white Christian Europeans enslaved by Muslim empires; combined with the black slaves from other part of Africa, the numbers can be eerily humongous.<sup>77</sup> No wonder that the prohibition of slavery in some of the Islamic countries were not merely caused by the natural evolution of human kindness and good virtues in those territories, but also involved brute force by other countries, particularly, the western world.<sup>78</sup> As

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<sup>75</sup> See further discussion in J.H. Johnston, "The Mohammedan Slave Trade," *The Journal of Negro History* 13 (1928): 478-491.

<sup>76</sup> See for example in Ghislaine Lydon, "Islamic Legal Culture and Slave-Ownership Contests in Nineteenth-Century Sahara," *The International Journal of African Historical Studies* 40 (2007): 392-394.

<sup>77</sup> See Davis, *supra* note 18 at 23.

<sup>78</sup> See for example in Mary Ann Fay, "Slavery in the Ottoman Empire and Its Demise, 1800-1909 by Y. Hakan Erdem," *International Journal of Middle East Studies* 30 (1998): 574-576, Toledano, *supra* note 24 at 485-493, and Lewis *supra* note 25 at 78-84.

once modeled in another research, given all the circumstances and incentives surrounding the slavery industry, in reality, slavery usually ends with legal prohibition rather than voluntary abandonment.<sup>79</sup>

From the perspective of slaves, the institution of slavery clearly affects their well-being. They lose their freedoms and most of their basic human rights.<sup>80</sup> It is already incredibly difficult to establish a proper valuation for those who voluntarily sell themselves into slavery. Imagine the pain and cruelty for those who were being taken into slavery by force,<sup>81</sup> and the devastating economic effects of such practice toward the territories where the slaves are originating from since the targets were usually the most physically healthy and economically productive men.<sup>82</sup> No amount of money and kind gesture would ever be sufficient to compensate their losses.

Any legal system that claims that its laws will bring justice and improve well-being would be lying if at the same time those laws ignore the fate of these poor souls, or allow the possibility of adding more poor souls into the system. Under the Rationality Parameters, God cannot lie and the Basic Codes must always be truthful. Thus, I am afraid that the only reasonable explanation for maintaining the slavery institution in Islam is due to its consequentialist nature and most probably, scarcity.

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<sup>79</sup> See the complete analysis in Ron Rogowski, "Slavery: A Dual Equilibrium Model with Some Historical Examples," *Public Choice* 155 (2013): 189-209.

<sup>80</sup> In fact, they may also lose their body parts, such as in the case of eunuchs. In Islamic history, despite the prohibition of mutilating slaves body parts, the market for eunuchs was quite thriving because the solution is simple, conduct the mutilation outside the jurisdiction of Islamic countries and import the end-product to the country only after the castration has been performed. See further discussion in Jan Hogendorn, "The Hideous Trade: Economic Aspects of the "Manufacture" and Sale of Eunuchs," *Paideuma: Mitteilungen zur Kulturkunde* 45 (1999): 137-160. A paper record how a slave's family in the United States were put under extreme stress and pain because one of their family members were sold to another party, a practice that is also permitted under Islamic law. See Laura T. Murphy, "The New Slave Narrative and the Illegibility of Modern Slavery," *Slavery & Abolition* 36 (2015): 382-385.

<sup>81</sup> See further discussion in Daina Ramey Berry, "'In Pressing Need of Cash': Gender, Skill, and Family Persistence in the Domestic Slave Trade," *The Journal of African American History* 92 (2007): 22-25.

<sup>82</sup> See further discussion in Chapurukha M. Kusimba, "Archaeology of Slavery in East Africa," *The African Archaeological Review* 21 (2004): 65-66.

One explanation that I may offer on why the Basic Codes do not provide any sunset or sunrise clause for ending the slavery (despite its inherently “evil” nature) is because it is impossible to calculate the best time to end such institution, at least if we are using the tools applicable in the 7<sup>th</sup> century. Forget predicting the occurrence of an event within 100 years, even in this digital age of big data, predicting events beyond a week rarely yields highly accurate results despite all the available technology.<sup>83</sup> The best that we could do is to work in a collaborative team, shorten the periods for predicting, and continue to update the prediction as new information pours in.<sup>84</sup>

Consider the following simulation, to determine the exact time for ending the slavery under the assumption that the overall benefits of such policy could exceed the costs, the policy makers in that era must at the very least calculate: (i) the total number of slaves, (ii) the total number of slave owners, (iii) the amount of wealth and resources that must be spent to free the slaves (including the potential losses of assets value and the costs of taking care the emancipated slaves and enforcing the manumission policy), (iv) the competition and interchangeability between free labors and slaves (including the demand for slaves services that cannot be replaced with free labors such as sexual and leisure services and the demand for free labor services that might be affected by the additional manpower post emancipation), and (v) the probability of conflict in numerous form, including full-scale war, with slave owners, traders and other countries where slavery is permitted. Not to mention the increase complexity from the need to ensure that Islamic law on slavery does not fall into hypocrisy. If they decide to declare that slavery is prohibited, following the logic of Islamic law on prohibited items,<sup>85</sup> sexual relationships with

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<sup>83</sup> See Philip E. Tetlock and Dan Gardner, *Superforecasting: The Art and Science of Prediction* (New York: Crown Publishers, 2015), 12-13.

<sup>84</sup> Id at 191-192.

<sup>85</sup> See discussion in Chapter 3.

slaves must also be banned and all existing slaves must be freed post the declaration, or at least, no more slaves can be accumulated, effectively banning the hugely profitable slaves trading activities and the soldiers from converting war captives into slaves.

Perhaps God understood that pending the necessary tool, imposing an uncertain sunset/sunrise clause in the Basic Codes would lead to chaos during the implementation and therefore, rather than creating a loophole which may cause a civil war between those who defend and those who reject the slavery institution, it would be better if the institution is deemed valid but measures are made to reduce the pain of the victims from slavery. Alternatively, without any supernatural interference, if an exact deadline for slavery validity was actually imposed, there is also a probability that it might give additional incentives to throw more people to slavery simply because the masters and rich people want to maximize their assets ownership before the expiry date. People respond to incentives and when the implementation of a controversial legal rule is delayed, those who will be affected might take certain actions to minimize or even eliminate such rule before its official enactment.<sup>86</sup>

This explanation is essentially a good example of satisficing in dealing with a crucial institution affecting the lives of many. The world unfortunately is not a linear system where causes and effects can be determined easily as an action might trigger numerous out-of-control chain reactions and a cause does not necessarily produce a proportionate effect.<sup>87</sup> But the costs of taking such policy is not cheap. Some balancing of interests must be made, a great compromise which unfortunately had a role in preserving the problematic institution.

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<sup>86</sup> See further discussions in Frank Fagan and Saul Levmore, "Legislative Sunrises: Transitions, Veiled Commitments, and Carbon Taxes," in *The Timing of Lawmaking*, ed. Frank Fagan and Saul Levmore (Cheltenham: EdwardElgar Publishing Limited, 2017), 130-146.

<sup>87</sup> See Donella H. Meadows, *Thinking in Systems: A Primer* (Vermont: Chelsea Green Publishing, 2008), 91.

Judging from the current conditions and the significantly reduced number of slaves compared to the entire population of this planet, there could be good reasons to claim that slavery must be totally prohibited without having to resort to complex economic and mathematical proof. But to affirmatively answer this question would mean that we accept the notion that the Basic Codes' rules are subject to adjustment. Can mainstream Islamic jurists accept this idea without challenging the claim of Islamic law's perfection and immutability? The answer is yes, but only if we submit to the second definition of perfection.

In addition, when the Qur'an establishes the principle that men should not prohibit things that have been permitted by God and vice versa, it also says at the same time that men should deeply think about those rules and not blindly following the old rules just because previous people did the same. It is ironic that in most cases, such reminder to use our intellect is eliminated from the discussion, leading to a weird conclusion: people should not blindly follow their ancestors' laws and should properly analyze the backgrounds of those laws, yet they should not do the same when analyzing God's laws even though the claims made by God's laws are empirical and testable.

The result is also absurd. If we determine that God's right in classifying permitted and prohibited acts is absolute and that there is an undeniable duty to maintain and defend such right of God, then there is also no way for us to argue that slavery should be prohibited because God never explicitly prohibits slavery in the Basic Codes. Slavery thus becomes God's ultimate bait in thinking on how to interpret the legal provisions of the Basic Codes. At this point, some readers might still be unconvinced. Is it true that the nature of Islamic law is pragmatic and consequentialist? Wouldn't it mean that if we agree that a rule in the Basic Codes can be adjusted, other part of the rules can also be adjusted? Under the Rationality Parameters, the answer should be a resounding yes, though people may differ on the requirements and standards for making such adjustment.

C. *ECONOMIC INCENTIVES AND UNFAIRNESS IN THE DESIGN OF PENAL SANCTIONS FOR THEFT*

Back in Chapter 4, we had a discussion on the penal sanction for theft (that is, hand amputation) and how it was waived temporarily by Umar bin Khatab during a famine. In this section, we will seek to understand the nature of such punishment from economics and consequentialist moral framework, and there will be three claims that I would like to demonstrate. First, the hand amputation punishment could only be efficient and welfare maximizing under certain circumstances. Second, Umar's decision is a good solution when the full implementation of such punishment might not improve the overall well-being. And third, when compared with other form of criminal sanctions involving life and property, it could be argued that the punishment for theft in Islam contains inherent unfairness that was not immediately recognized if we view the rule in isolation.

Regarding the first claim, there is no doubt that amputating a person's hand would significantly affect his productivity and in the 7<sup>th</sup> century, where no bionic technology is available, the effect of the amputation would be permanent. If we compared this to the modern prison sanction, hand amputation is indeed a cruel punishment. But cruelty itself is a fluid concept. Compared to the typical 16-18<sup>th</sup> century penalty for larceny, namely, death penalty,<sup>88</sup> hand amputation might be a less cruel option for aspiring thieves. Since the standards for cruelty will most likely depend on the moral standards of the relevant community, I do not think that it could be used as a useful standard to assess the viability of hand amputation as a penal punishment.

From economics perspective, the hand amputation punishment is not necessarily an inefficient solution to prevent thefts regardless of the cruelty factor. In fact, it could be efficient as long as the following conditions are satisfied, namely, the costs from the convicted thieves' loss of

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<sup>88</sup> See William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Chicago: The University of Chicago Press, 1979), 238.

productivity plus the costs of legal enforcement are smaller than the benefits gained from the decreased rate of thefts, including the savings made by law abiding citizens due to increased security. However, in order for this punishment system to work efficiently (or become the best solution for reducing the crime rate), there are certain underlying conditions that must be satisfied. For example, the punishment would have to instill sufficient fear to any potential thieves so that we do not end up with excessive amount of disabled unproductive people. In short, the conviction rate must be high.

Furthermore, it must be shown that alternative sanctions are less effective or costlier in reducing the rate of theft. This is usually the claim of scholars that support the hand amputation punishment,<sup>89</sup> though I have not seen any empirical proof to support such claim. Last but not least, there should be no other conditions that impose higher costs to the potential thieves such that they are still willing to conduct the crime despite the heavy sanctions. This latter problem was clearly demonstrated in Umar bin Khatab's case of famine.

In a normal situation, a thief may have the option to engage in the crime and risks losing his hand or engage in a normal business activity in order to survive his daily life. A rational thief, therefore, would only perform the act if the benefits gained from the crime exceed his potential costs from the hand amputation punishment multiplied with the probability of getting caught and punished minus his opportunity costs from other ventures. But during a famine in which food and other potential ventures are scarce, the above equation does not work. There are more pressures for people to survive, there are less alternatives for other ventures, and the probability of facing death from starvation would also increase significantly.<sup>90</sup>

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<sup>89</sup> See Wahbah Az-Zuhaili, *Fiqh Islam Wa Adillatuhu*, vol. 7, ed. Arif Muhajir, trans. Abdul Hayyie al-Kaitani et al. (Depok: Gema Insani Press, 2011), 239-241.

<sup>90</sup> See further discussion in Liaquat Ali Khan, "Jurodynamics of Islamic Law," *Rutgers Law Review* 61 no. 2 (2008-2009): 249.

As discussed above, the hand amputation punishment would be efficient if the number of convicted thieves are not too many so that the society does not end up with a large group of permanently unproductive disabled people to be fed and taken care of. With famine increasing the probability of death to potential thieves, they will have more incentives to conduct the crime, having to choose between losing their life and losing a limb. Accordingly, this would increase the probability of conviction which further increases the probability of having additional number of unproductive people assuming they survive the famine.

Umar bin Khatab seemed to have a clear grasp of the above problem and decided to postpone the punishment until the famine passed. This “economic” explanation makes more sense compared to the usual deontological explanation that Umar simply followed the duty to act graciously and compassionately toward those in need. As explained in Chapter 4, there are no specific exemption for the punishment of theft due to mercy and compassion other than in the case of famine.<sup>91</sup> In fact, if we use the analogy from the punishment for *zina*, Muslims are actually encouraged to throw away their compassion and continue with the penal punishment to ensure that there would be lessons for other people.<sup>92</sup> In other words, analyzing Umar’s exemption using such moral duty would yield results that are inconsistent with the clear texts of the Basic Codes and also the available historical pictures.

The next important issue is the idea that there exists an inherent unfairness within the punishment for theft. Hadith no. 6787 of Al-Bukhari’s compendium of Hadiths state:

*“Narrated 'Aishah: Usama approached the Prophet on behalf of a woman (who had theft). The Prophet said, “The people before you (past nations) were destroyed because they used to inflict the legal punishments on the poor and forgive the rich. By Him in Whose Hand my soul is! If Fatima (daughter of the Prophet did that (i.e., stole), I would cut off her hand.””*<sup>93</sup>

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<sup>91</sup> See Ibnu Qudamah, *Al Mughni*, vol. 13, ed. M. Sulton Akbar, trans. Muhyiddin Mas Rida, M. Zuhirsyan, and Ahmad Zuhri Rangkuti (Jakarta: Pustaka Azzam, 2013), 346-347.

<sup>92</sup> Indeed, the Basic Codes actually recommend that the punishment for *zina* should be done in public so that people can know and understand the prohibition. See Az-Zuhaili, *supra* note 89 at 342.

<sup>93</sup> See Al-Bukhari, *supra* note 7 at 409.

This is a very strong statement from the Basic Codes that support a fair and just application of law regardless of the subjects' wealth. However, as will be further discussed below, we will have to carefully interpret such statement since there are some issues that must be resolved once we compared the punishment for theft with other types of punishment for crimes related to life and property, namely, murder and *hirabah* (or robbery/banditry).

Viewed from the lens of economics, at a glance, it seems that the penalties pertaining to those above crimes have been designed with careful attention to human incentives. The punishment for theft is hand amputation, the punishment for murder is either *qisas* (death by retaliation)<sup>94</sup> or *diyat* (hefty financial compensation)<sup>95</sup>, and the punishment for *hirabah* is a

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<sup>94</sup> On *Qisas*, Qur'an surah Al-Baqara [2]:178-179 state: "You who believe, fair retribution is prescribed for you in cases of murder: the free man for the free man, the slave for the slave, the female for the female. But if the culprit is pardoned by his aggrieved brother, this shall be adhered to fairly, and the culprit shall pay what is due in a good way. This is an alleviation from your Lord and an act of mercy. If anyone then exceeds these limits, grievous suffering awaits him. Fair retribution saves life for you, people of understanding, so that you may guard yourselves against what is wrong". See Haleem, *supra* note 14 at 19-20. Al-Qurthubi, points out that retribution renders *qisas*, which means retaliation for physical injury and death. It falls under the general legal category of *hudud*, or corporal punishments for crimes considered especially grievous. The broad legal, social, and cultural context of this verse is the system of tribal feuds and vendettas in the Arabia of the time, which, as the commentators describe, would often escalate to proportions way beyond the original crime. Thus, one tribe might retaliate for the killing of a man by killing not only his murderer, but many other members of his tribe, which served the purpose of not only exacting revenge for past crimes, but also sustaining the status and esteem of one's own tribe. Often a tribe bent on maintaining or exalting its position would target a person of higher social standing than the one who was originally killed: killing a free person for the death of a slave, a man for the death of a woman, a notable for the death of a person of low station. Like vendettas in other cultures throughout history, often the original crime was irrelevant to the ongoing status of the conflict, which was fuelled simply by the most recent act of retaliation. See Seyyed Hossein Nasr, ed., *The Study Qur'an: A New Translation and Commentary* (New York: HarperCollins Publishers, 2015), 77. See further discussion in Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 2, ed. M. Iqbal Kadir, trans. Fathurrahman Abdul Hamid, Dudi Rosyadi, and Marwan Affandi (Jakarta: Pustaka Azzam, 2009), 560-593. In the same vein, Az-Zuhaili and the Ministry of Religious Affairs of Indonesia similarly argue that the concept of *qisas* is to ensure security and order of the society. See Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 1, ed. Achmad Yazid Ichsan and Muhammad Badri H., trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2013), 354-366 and Departemen Agama RI, *Al-Qur'an dan Tafsirnya* [Al-Qur'an and Its Interpretations], vol. 1 (Jakarta: Lembaga Percetakan Al-Qur'an, 2009), 260-264.

<sup>95</sup> Qur'an surah An-Nisa' [4]: 92-93 states: "Never should a believer kill another believer, except by mistake. If anyone kills a believer by mistake he must free one Muslim slave and pay compensation to the victim's relatives, unless they charitably forgo it; if the victim belonged to a people at war with you but is a believer, then the compensation is only to free a believing slave; if he belonged to a people with whom you have a treaty, then compensation should be handed over to his relatives, and a believing slave set free. Anyone who lacks the means to do this must fast for two consecutive months by way of repentance to God: God is all knowing, all wise. If anyone kills a believer deliberately, the punishment for him is Hell, and there he will remain: God is angry with him, and rejects him, and has prepared a tremendous torment for him." See Haleem, *supra* note 14 at 59-60. Hadith no. 6880 states: "Narrated Abu Hurairah: In the year of the conquest of Mecca, the tribe of Khuza'a killed a man from the tribe of Bani Laith in revenge for a killed person belonging to them in the Pre-Islamic Period of Ignorance.

combination of multiple limb amputation and crucifixion to death or permanent banishment from the community.<sup>96</sup> In short, the punishment for theft is relatively lesser than the punishment for murder which is also relatively lesser than the punishment for *hirabah*. This design is in line with the general theory of criminal law in Law & Economics that sanctions for a combination of offenses

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*So Allah's Messenger got up saying, "Allah held back the (army having) elephants from Mecca, but He let His Messenger and the believers overpower the infidels (of Mecca). Beware! (Mecca is a sanctuary)! Verily! Fighting in Mecca was not permitted for anybody before me, nor will it be permitted for anybody after me. It was permitted for me only for a while (an hour or so) of that day. No doubt! It is at this moment a sanctuary; its thorny shrubs should not be uprooted; its trees should not be cut down; and its Luqata (fallen things) should not be picked up except by the one who would look for its owner. And if somebody is killed, his closest relative has the right to choose one of two things, i.e., either the blood-money or retaliation by having the killer killed." Then a man from Yemen, called Abu Shah, stood up and said, "Write (that) for me, O Allah's Messenger!" Allah's Messenger said (to his Companions), "Write that for Abu Shah." Then another man from Quraish got up, saying, "O Allah's Messenger! Except Al-Idhkhir (a special kind of grass) as we use it in our houses and for graves." Allah's Messenger said, "Except Al-Idhkhir.""* See Al-Bukhari, *supra* note 28 at 21. Al-Qurthubi argues that the view where anyone participating in the intentional killing of a believer will only be judged later in the Day of Judgment seems inconsistent with other verses requiring punishment for murderers. However, given other verses in the Basic Codes indicating that idolatry (*shirk*) is the only unforgivable sin and that God accepts the repentance of His servants, Al-Qurthubi admits the possibility of repentance and forgiveness even for an intentional killer. See Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 5, ed. M. Iqbal Kadir, trans. Fathurrahman Abdul Hamid, Dudi Rosyadi, and Marwan Affandi (Jakarta: Pustaka Azzam, 2009), 736-773. Further comments on punishments for deliberate and accidental murder can be found in Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 3, ed. Zainul Arifin, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2016), 197-213.

<sup>96</sup> On *Hiraba*, Qur'an surah Al-Maida [5]:33-35 states: "Those who wage war against God and His Messenger and strive to spread corruption in the land should be punished by death, crucifixion, the amputation of an alternate hand and foot, or banishment from the land: a disgrace for them in this world, and then a terrible punishment in the hereafter, unless they repent before you overpower them – in that case bear in mind that God is forgiving and merciful. You who believe, be mindful of God, seek ways to come closer to Him and strive for His cause, so that you may prosper." See Haleem, *supra* note 14 at 71. According to Al-Qurthubi, the crimes covered under this *hadd* punishment are referred to collectively as *hirabah* and consist of armed robbery, assault (including rape), and murder, particularly of innocent travellers along the road, although this is widely considered to include attacks in cities and settled areas as well. The use of weapons, threats of extreme violence, or other tactics to instil fear are the hallmark of these crimes and distinguish them from other forms of robbery or assault. See further discussion in Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 6, ed. Ahmad Zubairin and Mukhlis B. Mukti, trans. Ahmad Rijali Kadir (Jakarta: Pustaka Azzam, 2013), 353-378. In the same vein, Ath-Thabari commented that as in the case of all sins, even grave ones, the door of repentance is usually left open. Repentance for these crimes may spare the perpetrators punishment in the hereafter but is considered to spare the perpetrators earthly punishment only if they repent before they are "overpowered," that is, before they are caught and brought to the authorities. This parallels the idea that repentance spares a person punishment in the next life only if it is made before death, after which the divine sentence and punishment become certain. See Abu Ja'far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 8, ed. Besus Hidayat Amin and M. Sulton Akbar, trans. Akhmad Affandi and Benny Sarbeni (Jakarta: Pustaka Azzam, 2008), 783-858. Further comments on Qur'an surah Al-Maida [5]:33-35 may be found in Nasr, *supra* note 94 at 292-295 and Az-Zuhaili, *supra* note 95 at 491-501. See also Hadith no. 6802 in Al-Bukhari, *supra* note 7 at 415 which states: "Narrated Anas: Some people from the tribe of 'Uki came to the Prophet and embraced Islam. The climate of Al-Madina did not suit them, so the Prophet ordered them to go to the (herd of much) camels of charity and to drink their milk and urine (as a medicine). They did so, and after they had recovered from their ailment (became healthy) they turned renegades (reverted from Islam) and killed the shepherd of the camels and took the camels away. The Prophet sent (some people) in their pursuit and so they were (caught and) brought, and the Prophet ordered that their hands and legs should be cut off and their eyes should be branded with heated pieces of iron, and that their cut hands and legs should not be cauterized, till they died."

must be different or heavier than the sanction for a single offense.<sup>97</sup> Without such differentiation, criminals may have more incentives to perform the multiple offenses since the costs for doing the crimes (from actual punishment) would be the same while the benefits from the multiple offenses may yield higher returns.<sup>98</sup>

Of course, the devil is in the details. In practice, the legal structure of theft and *hirabah* in Islamic law resembles the rules on larceny and robbery in the classic common law system, respectively.<sup>99</sup> With respect to thefts, the hand amputation punishment is only available against the act of taking someone's else property by way of stealth where such property has not been entrusted to the theft.<sup>100</sup> The Muslim jurists are still debating whether to be qualified as a theft punishable with hand amputation, the act must be done against a property secured in a safe custody (meaning that if the property is not secured by the owner, the punishment shall not be applicable).<sup>101</sup>

This is an interesting approach as it provides incentives for property owners to be more careful in handling their assets. Regardless of the rule on safe custody, however, theft is generally restricted to larceny and larceny is just a single form of theft. Stuart P. Green describes the numerous ways in which theft can be performed, namely, (i) aggravated/armed robbery, (ii) simple robbery, (iii) extortion, (iv) blackmail, (v) theft by housebreaking, (vi) larceny, (vii) embezzlement, (viii) looting, (ix) false pretenses, (x) passing a bad check, (xi) failing to return lost

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<sup>97</sup> See further discussion in Isaac Erlich, "Economics of Criminal Law: Crime and Punishment," in *The Oxford Handbook of Law and Economics Volume III: Public Law & Legal Institutions*, ed. Francesco Parisi (Oxford: Oxford University Press, 2017), 316-317.

<sup>98</sup> *Id.*

<sup>99</sup> See Blackstone, *supra* note 88 at 229 and 241.

<sup>100</sup> See Ibn Rushd, *The Distinguished Jurist's Primer: Volume II*, trans. Imran Ahsan Khan Nyazee (Reading: Garnet Publishing, 2000), 536-537.

<sup>101</sup> See Ibnu Qudamah, *Al Mughni*, vol. 13, ed. M. Sulton Akbar, trans. Muhyiddin Mas Rida, M. Zuhirsyan, and Ahmad Zuhri Rangkuti (Jakarta: Pustaka Azzam, 2013), 292-293, Muhammad Ibn Idris Al-Shafi'i, *Al Umm*, vol. 12, ed. Badruzzaman, trans. Amir Hamzah (Jakarta: Pustaka Azzam, 2015), 282-286, and also Az-Zuhaili, *supra* note 89 at 386-387.

or misdelivered property, and (xii) receiving stolen property.<sup>102</sup> From all of those types, in general, the Basic Codes only deal with larceny, extortion, robbery and theft by house breaking. In addition, the rules on theft and *hirabah* do not cover cases of corruption and bribery in the government though this may be equally bad or even worse from economics perspective compared to a simple larceny in terms of loss of property and opportunity costs to the society.<sup>103</sup>

The Basic Codes are not completely silent on these other types of crime against property. As briefly discussed in Chapter 4, there is a general warning on the prohibition of taking other people assets without mutual consent.<sup>104</sup> There are also stories in the Hadith in which the Prophet cursed corruptors and bribers.<sup>105</sup> But there are no explicit sanctions available for those prohibited acts, only afterlife sanctions. This fact is puzzling, especially if we return to the main idea in the above Hadith no. 6787. Given its nature, theoretically speaking, larceny is not a crime that is often associated with the rich people simply because they would have better opportunity costs.

Indeed, the Prophet gave the sample of Fatima, his own daughter, to demonstrate his commitment on the equality before the law (and in reality, Fatima is very poor). But what kind of equality of law that we are talking? If the basic idea is that anyone must be convicted and punished for larceny regardless of his stature, then there is equality in such case. But I will not call this as a “true” equality because as discussed above, larceny is not a lucrative crime for rich people. True, the non-existence of penal punishment for other types of theft and crime against property and

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<sup>102</sup> See the full discussion in Stuart P. Green, *13 Ways to Steal a Bicycle: Theft Law in the Information Age* (Cambridge: Harvard University Press, 2012), 93-131.

<sup>103</sup> See further discussion in Mohamed A. 'Arafa, "Corruption and Bribery in Islamic Law: Are Islamic Ideals Being Met in Practice," *Annual Survey of International & Comparative Law* 18 (2012): 171-242.

<sup>104</sup> On the restriction to eat the assets of orphaned kids, Qur'an surah An-Nisa' [4]: 10 states: "Those who consume the property of orphans unjustly are actually swallowing fire into their own bellies: they will burn in the blazing Flame." See Haleem, *supra* note 14 at 51. Al-Qurthubi argues that given the context, this may be a warning to those making their bequests who have wrongly used the property of orphans or a warning to the disbelievers who refused to allow women and children to inherit. Based on this verse, usurping the wealth of orphans is considered one of the most grievous sins. See further discussions in Abu 'Abdullah Al-Qurthubi, *Tafsir Al-Qurthubi*, vol. 10, ed. M. Iqbal Kadir, trans. Asmuni (Jakarta: Pustaka Azzam, 2008), 134-138.

<sup>105</sup> See 'Arafa, *supra* note 103 at 203-204.

breach of trust in the Basic Codes do not prevent governments of Islamic nations or any other nations to adopt their own legal provisions against those crimes. But finding a nation or classical Islamic jurists that would implement the hand amputation punishment against those other crimes is like finding a rare pink flying unicorn.<sup>106</sup>

It is ironic that despite the claim that equality before the law is important in Islam, the Basic Codes adopt quite a heavy punishment for the simplest crime against property usually done by the poorest and leave the rest as an open policy. It is interesting to note that in classical and contemporary discussions of Islamic law, it is generally prohibited to impose an open policy sanction (also known as *Ta'zir*) in the form of confiscating the assets of the criminal perpetrator.<sup>107</sup> This seems counterintuitive when dealing with crimes like corruption, bribes or money laundering as money is the blood of these criminal activities and yet, we are not allowed to confiscate these "dirty money" (at least in theory).

Even worse, when compared to the Islamic law on murder, it becomes more apparent that the design of the Basic Codes legal provision is not a pro poor one. From economics perspective, the rules on *qisas* and *diyat* seem to be efficient. The rules allow retaliation, but at the same time they also permit financial compensation in exchange of the retaliation. This looks like a win-win solution and some have suggested that those rules should be adopted by modern nations.<sup>108</sup> However, there is also a darker side effect of the rules. From fairness and equality point of view, the *diyat* rule is essentially a pro rich rule since given the required amount of *diyat*, which is very

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<sup>106</sup> As can be seen in the entire discussion in 'Arafa, *supra* note 103 and also in Az-Zuhaili, *supra* note 89 at 378-404. This is due to the fact that there is no *hudud* sanctions for crimes against property other than for larceny and robbery.

<sup>107</sup> See Az-Zuhaili, *supra* note 89 at 528-529.

<sup>108</sup> See further discussion in Siti Zubaidah Ismail, "The Modern Interpretation of the Diyat Formula for the Quantum of Damages: The Case of Homicide and Personal Injuries," *Arab Law Quarterly* 26 (2012): 361-364.

expensive, only rich people can afford to pay them.<sup>109</sup> Thus, a poor person who murders another man will have to pay with his own life. There are also other conditions which can make the rule inefficient such as argued by Tahir Wasti regarding the application of *diyat* and *qisas* in Pakistan (which I briefly discuss in Chapter 2),<sup>110</sup> but this is not our main concern for now.

The Basic Codes rules regarding theft do not even permit a waiver for punishment against the perpetrator if he has returned the stolen property and it is also disputed whether the forgiveness from the property owner would exempt a thief from punishment.<sup>111</sup> While there might be some economic reasons for making such rule (which I will not be exploring here), regardless of those economic reasons, there is such a stark difference in terms of equality when we compared such rule with the rule on *qisas* and *diyat* in which the negotiation between the killer and the family of the deceased is very flexible and accommodating.<sup>112</sup>

I am not trying to argue that the Basic Codes' legal provision on theft or even *hiraba* should be applied for other types of crime against life and property or that the rule on *diyat* must be adjusted. The proper legal rules for those crimes (and any necessary adjustment) will have to be discussed at another time. The most important lesson from the structure of rules in the Basic Codes regarding theft is that such structure contains an inherent inequality once comparison between rules is made. Arguing that the application of hand amputation punishment should be limited to very specific cases in modern law given its severe and irreversibility nature might be a noble idea, but the fact that such punishment is reserved for typically the poorest ones is indeed questionable.

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<sup>109</sup> See Az-Zuhaili, *supra* note 89 at 635. In one decision by Umar bin Khatab, the minimum amount is 1,000 gold Dinar or 12,000 silver Dirham or 100 camels, or 200 cows or 2,000 goats.

<sup>110</sup> See the full discussion in Tahir Wasti, *The Application of Islamic Criminal Law in Pakistan* (Leiden: Koninklijke Brill NV, 2009). Similar view can also be found in Stephanie Palo, "A Charade of Change: Qisas and Diyat Ordinance Allows Honor Killings to Go Unpunished in Pakistan," *University of California, Davis Journal of International Law & Policy* 15 (2008): 93-109.

<sup>111</sup> See for example in Qudamah, *supra* note 101 at 325 and also Al-Shafi'i, *supra* note 101 at 167-169.

<sup>112</sup> See Russell Powell, "Forgiveness in Islamic Ethics and Jurisprudence," *Berkeley Journal of Middle Eastern and Islamic Law* 4 (2011): 27-28.

One possible explanation is that maybe this is due to the fact that larceny and robbery are easier to prove in the court compared to embezzlement, false promises, illegal takings, and corruptions. The latter crimes require more evidence and understanding on the promises given and the basis of ownership of the disputed property (which is quite a concern among Islamic legal scholars). Thus, given the costs of enforcement and potential mistake in determining the actual perpetrator and economic losses, imposing an irreversible punishment would be counter-productive as it increases the probability of incurring unnecessary and costly mistakes against the overall well-being of the society.

Assuming that the above notion is true, then once again, we see how Islamic law favors the economic and pragmatic approach at the cost of diminishing the value of equality and justice. Under the Rationality Parameters, such fact increases the probability that the second definition of perfection is a more logical choice and that it might be necessary for us to get back and review the original rule on theft once we have a better understanding on the actual situation and condition of the society.

#### **D. THE COST OF ENFORCEMENT AND THE PUZZLE OF RIBA**

For a religion that declares that the sin of engaging in transactions involving *riba* (usury, which also covers financial interest attached to a debt) is at least equal to the sin of having an incestuous relationship with your own mother<sup>113</sup> and equates the sin of eating the proceeds from *riba* with the sin of murdering a person and apostasy,<sup>114</sup> it is deeply puzzling that the Basic Codes do not provide any criminal sanction for people involved in such transactions. If the sin of *riba* is

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<sup>113</sup> This is coming from a famous Hadith of the Prophet. See further discussion in Wahbah Al-Zuhaili, *Financial Transactions in Islamic Jurisprudence*, vol. 1. trans. Mahmoud A. El-Gamal (Damascus: Dar al Fikr, 2003), 311.

<sup>114</sup> See Hadith no. 6857 in Al-Bukhari, *supra* note 7 at 447 which states: "Narrated Abu Hurairah: The Prophet said, "Avoid seven great destructive sins." They (the people) asked, "O Allah's Messenger! What are they?" He said, (they are:) (1) To join partners in worship with Allah; (2) To practise sorcery; (3) To kill the life which Allah has forbidden, except for a just cause (according to Islamic law); (4) To eat up Riba (usury); (5) To eat up the property of an orphan; (6) To show one's back to the enemy and fleeing from the battlefield at the time of fighting; (7) And to accuse chaste women who never even think of anything touching their chastity and are good believers.""

truly equal to killing a person unjustly,<sup>115</sup> wouldn't common sense dictate that God should also criminalize *riba* and enforce the same type of punishment, namely, death penalty in the Qur'an?

Even more puzzling is the fact that Islamic jurists are more permissive in letting Muslims use the service of conventional financial institutions that earn their income from *riba* related activities,<sup>116</sup> even though in one Quranic verse, God has declared war with practitioners of *riba* (of course such war never occurred).<sup>117</sup> Compare this with the case of apostasy or the act of renunciation of a religion.<sup>118</sup> As mentioned above, the sin of apostasy is considered as one of the biggest sins in the Qur'an (which is similar to *riba*), though the Qur'an does not provide any criminal penalty for this act.<sup>119</sup> The death penalty for apostasy was actually developed in Hadiths for cases related to political matters, especially related to religious wars.<sup>120</sup> But the majority of classical Islamic scholars apply such punishment for wider cases of apostasy, including those that are completely unrelated to political matters such as in the Prophet era, even calling this as a consensus or *Ijma'*.<sup>121</sup> This is confusing. These scholars agree to kill someone due to apostasy and yet they did not develop the same conclusion for *riba* cases even though both sins should be equal?

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<sup>115</sup> See Al-Zuhaili, *supra* note 113 at 341.

<sup>116</sup> In the past, many Islamic jurists are debating on the validity of using conventional financial institutions where some argue that the use of such financial institutions is out of necessity for the Muslim community. See further *Id* at 339-352 for an extensive debate on *riba*. Historically speaking, the first form of Islamic bank emerged in 1963 in Egypt, while the first official Islamic bank was established in 1971. That seems very late, considering the "evil" nature of *riba*. See Munawar Iqbal and Philip Molyneux, *Thirty Years of Islamic Banking: History, Performance, and Prospects* (New York: Palgrave Macmillan, 2005), 37.

<sup>117</sup> Qur'an surah An-Nisa' [2]: 279 states: "If you do not, then be warned of war from God and His Messenger. You shall have your capital if you repent, and without suffering loss or causing others to suffer loss." See Haleem, *supra* note 14 at 32.

<sup>118</sup> See Taha Jabir Al-Alwani, *Apostasy in Islam: A Historical & Scriptural Analysis*, trans. Nancy Roberts (London: The International Institute of Islamic Thought, 2011), 25-31.

<sup>119</sup> See David F. Forte, "Apostasy and Blasphemy in Pakistan," *Connecticut Journal of International Law* 10 (1994-1995): 44.

<sup>120</sup> *Id.*

<sup>121</sup> *Id* at 45. See also Al-Alwani *supra* note 118 at 7.

Furthermore, the decision to expand the punishment for political apostasy to all form of apostasy is questionable,<sup>122</sup> so why don't they do the same thing with *riba*?

It is also relatively easy to see Islamic jurists and ordinary Muslim citizens fuss about the moral degradation in a community when they see people who drink alcoholic beverages or commit *zina*. Demonstration against brothels or casinos is usual in Muslim communities. But demonstration against commercial conventional banks for committing a major sin? It's like looking for a needle in a haystack. It is so rare, it might only exist in myths along with unicorns and trolls. Take Saudi Arabia as an example. According to the 2016 World Islamic Banking Competitiveness Report from Ernst & Young, the total market share of Islamic compliant banks in Saudi Arabia is 51.2% of the total banking market located there.<sup>123</sup> Let that sink in for a moment and remember how Saudi usually deals with other lesser bad deeds.<sup>124</sup> Indeed, in Saudi Arabia, charging interest is illegal and the contract is not enforceable, but it is not a criminal activity and commercial conventional banks charges "administrative/services fees" on loans instead of interest rates, showing an incredible lack of effort in trying to cover up for their questionable actions.<sup>125</sup>

Last but not least, as discussed in Chapter 4, even the alternative financing schemes as proposed by Islamic jurists by relying on the provisions of the Basic Codes are actually very similar with *riba*-based financing from economics perspective (though they are different in terms of

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<sup>122</sup> See further discussion in *Id* at 44-48.

<sup>123</sup> The full report can be accessed here: <http://www.ey.com/Publication/vwLUAssets/ey-world-islamic-banking-competitiveness-report-2016/%24FILE/ey-world-islamic-banking-competitiveness-report-2016.pdf>. See page 12. This is actually a drop from the approximately 53% position back in 2014.

<sup>124</sup> Saudi Arabia is very intrusive in private matters, as they have what can be considered as moral polices (also known as *muhtasib*). See further discussion in Frank E. Vogel, "The Public and Private in Saudi Arabia: Restrictions on the Powers of Committees for Ordering the Good and Forbidding Evil," *Social Research* 70 (2003): 760-761.

<sup>125</sup> See further discussion in Abdulaziz M. Al-Dukheil, *The Banking System and Its Performance in Saudi Arabia* (London: Saqi Books, 1995), 27. To be honest, it is difficult to find literatures that openly discuss the banking industry in Saudi Arabia. As with slavery issues, most literatures are also silent with regard to banking interest. Ironically speaking, this is coming from a country that rejects the validity of *bay' al-'inah*. See also the discussion in Ayoub M. Al-Jarbou, "The Role of Traditionalists and Modernists on the Development of the Saudi Legal System," *Arab Law Quarterly* 21 (2007): 203-204.

formalistic legal form), which begs a fundamental question: why bother prohibiting *riba*? To be fair, there exists an Islamic financing scheme that is not similar to *riba*-based financing schemes, namely, *mudharabah*, the profit/loss sharing financing scheme.

In the beginning, this financing scheme is celebrated as the main representative of Islamic finance which is intended to replace the current commercial banking system that uses *riba*.<sup>126</sup> Some scholars argue that *mudharabah* is in line with the view of Islam on the relationship between men and the nature of the world in which men engage in productive enterprise, whereas claiming a predetermined positive return on money capital when the world is uncertain is against the nature of the world.<sup>127</sup> For these scholars, using *mudharabah* financing scheme would increase the welfare of the society because it will allocate the resources efficiently.<sup>128</sup>

Interestingly, despite the claim that *mudharabah* should be the primary Islamic financing scheme, its actual rate of use is not high at all.<sup>129</sup> In fact, modern Islamic banks tend to use fixed income financing schemes that do not differ much from ordinary secured debt financing scheme with interests such as *murabahah* and *ijarah*.<sup>130</sup> Of course the above fact raises various criticisms against the current nature of Islamic finance. Some of the critics argue that the use of fixed income

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<sup>126</sup> Muhammad Nejatullah Siddiqi, *Issues in Islamic Banking – Selected Papers* (Leicester: The Islamic Foundation, 1994), 97.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 69-71.

<sup>129</sup> See Abbas Mirakhor and Iqbal Zaidi, "Profit-and-Loss Sharing Contracts in Islamic Finance," in *Handbook of Islamic Banking*, ed. M. Kabir Hassan and Mervyn K. Lewis (Cheltenham: Edward Elgar Publishing Limited, 2007), 57. See also note 130.

<sup>130</sup> See further discussion in Harris Irfan, *Heaven Bankers: Inside the Hidden World of Islamic Finance* (New York: The Overlook Press, 2016), 135-136. In general, *murabahah* transactions account for about 80%-90% of Islamic bank business with *ijarah* coming in the second place. See Abdel-Rahman Yousri Ahmad, "Islamic Modes of Finance and the Role of Sukuk," in *Islamic Finance: Instruments and Markets*, ed. Conrad Garner (London: Bloomsbury Information Ltd, 2010), 7.

financing by Islamic banks is a form of legal hypocrisy, though with a hope that someday Islamic finance industry will change for the better.<sup>131</sup>

*Mudharabah* is basically a financing scheme where a capital owner (in the modern context, the Islamic banks) supplies all the capital to an entrepreneur who contributes his management and expertise for conducting certain business projects/activities that are *Shari'a* compliant.<sup>132</sup> The majority of Islamic scholars agree that under a *mudharabah* contract, profits from the business will be shared between the capital owner and the entrepreneur on an agreed basis (which cannot be changed during the term of the agreement unless mutually agreed between the parties) while any losses of the project (up to the initial investment of the capital owner) will be borne by the capital owner since there should be no guarantee against such losses.<sup>133</sup>

Furthermore, *mudharabah* financing must not contain any contractual provision that requires the entrepreneur to promise a fixed return, causing additional difficulties in making a projection on the return of the investment.<sup>134</sup> It is permissible though for the investors to put certain covenants in the financing contract which will allow them to recover their initial investment plus any outstanding profit in case the entrepreneurs fail to satisfy those covenants.<sup>135</sup> Islamic jurists

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<sup>131</sup> See as an example: Kelly Holden, "Islamic Finance: "Legal Hypocrisy" Moot Point, Problematic Future Bigger Concern," *Boston University International Law Journal* 25 (2007): 341.

<sup>132</sup> See Rushd, *supra* note 100 at 284. For a modern definition of *mudharabah*, see Elisabeth Jackson-Moore, *The International Handbook of Islamic Banking and Finance* (Kent: Global Professional Publishing, 2009), 34.

<sup>133</sup> See Al-Zuhaili, *supra* note 113 at 326 and Ioannis Akkizidis and Sunil Kumar Khandelwal, *Financial Risk Management for Islamic Banking and Finance* (Hampshire: Palgrave Macmillan, 2007), 49. No guarantee against such losses means that investors are generally not permitted to demand for the repayment of their principal contribution if the business fails. Some Islamic scholars even argue that *mudharabah* financing cannot be secured by the assets of the entrepreneurs due to such limitation.

<sup>134</sup> See Mahmoud A. El-Gamal, *Islamic Finance – Law, Economics, and Practice* (Cambridge: Cambridge University Press, 2006), 123. While Islamic banks might use fixed rate of profit sharing in the financing agreement, they cannot demand for fixed returns. This create a major problem in projecting the banks' profits since the periodical payment amount will vary depending on the profits generated by the entrepreneurs' business/project.

<sup>135</sup> See further discussion in Michael J.T. McMillen, "Islamic Project Finance," in *Handbook of Islamic Banking*, ed. M. Kabir Hassan and Mervyn K. Lewis (Cheltenham: Edward Elgar Publishing Limited, 2007), 221-224.

have not reached an agreement with regard to the extent of such covenants, but in most cases, parties are generally free to put the covenants as they wish.<sup>136</sup>

Based on the above discussion, suffice to say that *mudharabah* is essentially an equity-based financing scheme in which the investors will generally act as silent investors without managerial works. All conditions for the investment (namely, the covenants) should be stated up front and the actual work for the project will be conducted under the discretion of the entrepreneurs. Islamic jurists often claim that *mudharabah* financing scheme is an example of how fairness works in Islam because unlike the debt financing which puts the burden of risk solely on one party, that is, the debtor, *mudharabah* financing puts the burden of risk on both parties.<sup>137</sup>

From economics point of view, however, this idea of fairness does not make any sense. In economic terms, choosing debt versus equity financing is not about fairness, it is simply a matter of CBA, risk against returns. There is no such thing as a riskless investment in this world, be it debt or equity. In a *mudharabah* financing scheme, the entrepreneurs will be generally protected from liability to the investors if they conduct their job in good faith,<sup>138</sup> and the existence of security, if permitted, can only be used as a way to reduce the entrepreneurs incentive to act dishonestly.<sup>139</sup> In this scheme, the financiers/investors will simply have to put more weight on the details and

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<sup>136</sup> See Rushd, *supra* note 100 at 286-287. Indonesia could be a good example. Fatwa No. 7 of the National Shari'a Board of Indonesia allows Islamic banks to recover their losses in case the entrepreneur breach any covenants in the financing agreement. They even allow *mudharabah* financing to be secured with the assets of the entrepreneur as an incentive to ensure that the entrepreneur will do its business properly (of course the security can only be enforced in case there is a solid evidence that the entrepreneur breaches the covenants).

<sup>137</sup> See further discussion in Ahmed El-Ashker and Rodney Wilson, *Islamic Economics – A Short History* (Leiden: Koninklijke Brill NV, 2006), 55.

<sup>138</sup> Hans Visser, *Islamic Finance: Principles and Practice* (Cheltenham: Edward Elgar Publishing Limited, 2009), 87-88. A good analogy for this good faith principle is the business judgment rule in US corporation laws that enables directors to have huge discretion in managing the business of the corporation and allows them to be shielded from liability in case the business decisions ends up bad provided that there is no evidence of conflict of interest or self-dealing elements. For further discussion, see Stephen M. Bainbridge, *Corporation Law and Economics* (New York: Foundation Press, 2002), 242.

<sup>139</sup> Adiwarmar A. Karim, "Incentive-Compatible Constraints for Islamic Banking: Some Lessons from Bank Muamalat," in *Islamic Banking and Finance: New Perspectives on Profit-Sharing and Risk*, ed. Munawar Iqbal and David T. Llewellyn (Cheltenham: Edward Elgar Publishing Limited, 2002), 97.

financial soundness of the project rather than the personal financial capabilities of the entrepreneurs in returning their investment. Moreover, since the amount of profits in *mudharabah* financing cannot be fixed, the investors will have more difficulty in predicting their own future income.<sup>140</sup>

All of the above factors will increase the financing risks and monitoring costs<sup>141</sup> of the investors, which, in theory, will simply be translated into a demand for higher rate of profits compared to conventional debt financing. That is, in essence, the ultimate difference between *mudharabah* and ordinary debt financing scheme from economics perspective. The fundamental question is, is it actually possible to compare which transaction is more equitable? Would an equity-based financing that demands higher rate of return from the debtor be deemed fairer compared to a debt-based financing that demands lower rate of return? Suppose we view the issue from the debtor's perspective, would it be fairer for him if he is always required to choose a financing scheme whose costs are higher so that he could minimize his payment risks even if he prefers to pay smaller costs of financing but with increased risk? In practice, the debtor's choice of financing scheme will depend on a lot of factors and they need flexibility to cope with the relevant situation.<sup>142</sup>

Returning to the discussion in Chapter 4, there are no significant differences between *murabahah* and *ijarah* financing (as alternatives to *riba*-based financing) with ordinary debt

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<sup>140</sup> Hennie van Greuning and Zamir Iqbal, "Banking and the Risk Environment," in *Islamic Finance: The Regulatory Challenge*, ed. Simon Archer and Rifaat Ahmed Abdul Karim (Singapore: John Wiley and Sons (Asia) Pte. Ltd. 2007), 21.

<sup>141</sup> Kazem Sadr and Zamir Iqbal, "Choice Between Debt and Equity Contracts and Asymmetrical Information: Some Empirical Evidence," in *Islamic Banking and Finance: New Perspectives on Profit-Sharing and Risk*, ed. Munawar Iqbal and David T. Llewellyn (Cheltenham: Edward Elgar Publishing Limited, 2002), 139. Basically, this is a problem mainly created by information asymmetry. Sadr and Iqbal proposed solutions is to induce Islamic banks to increase their level of monitoring in order to reduce such asymmetry, arguing that the increased costs of monitoring should be considered as investment by the banks.

<sup>142</sup> See good discussion on this subject in Franco Modigliani and Merton H. Miller, "The Cost of Capital, Corporation Finance and the Theory of Investment," *The American Economic Review* 48 (1958): 292-293.

financing. *Murabahah* financing is basically a debt financing with fixed amount of interest and the *ijarah* financing is a debt financing with adjustable rate of interest (though the formula must be approved by both parties up front). Since there are no restrictions regarding the maximum amount of fees or mark-up profits as long as the parties mutually agree (which means that in general, the only limit to such fees/mark-up profits is the available market rate), the language of fairness might also not be relevant. There is also a more pressing question: if these two types of financings are permitted under the Basic Codes, how can Islamic law maintain its consistency in rejecting hypocrisy under the Rationality Parameters?

Let us first discuss how classical Islamic law treats the issue of indebtedness. Theologically speaking, even though the Prophet says that being indebted is a hateful condition, debt is still an absolute obligation. Based on some Hadiths, unless the creditors forgive his debt, a debtor who fails to pay his debt to other people will not go to the heaven, even if he died in a holy war campaign (which basically grants a free ticket to heaven).<sup>143</sup> Even the Prophet refuses to pray for those who died and still has unsettled debt.<sup>144</sup> These harsh rules demonstrate the high regards

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<sup>143</sup> See Rushd, *supra* note 100 at 342. Hadith no. 4880 in Muslim's compendium of Hadiths states: "It was narrated from Abu Qatadah that the Messenger of Allah stood up before them and said to them: "Jihad in the cause of Allah and faith in Allah are the best of deeds." A man stood up and said: "O Messenger of Allah, do you think that if I am killed in the cause of Allah, my sins will be expiated?" The Messenger of Allah said: "Yes, if you are killed in the cause of Allah and you are patient and seek reward, facing (the enemy) and not turning away." Then the Messenger of Allah said: "What did you say?" He said: "Do you think that if I am killed in the cause of Allah, my sins will be expiated?" The Messenger of Allah said: "Yes, if you are killed in the cause of Allah and you are patient and seek reward, facing (the enemy) and not turning away, except debt, for Jibril, told me that." See Abul Hussain Muslim bin Al-Hajjaj, *English Translation of Sahih Muslim*, vol. 5, ed. Huda Khattab, trans. Nasiruddin al-Khattab (Riyadh: Maktaba Dar-us-Salam, 2007), 219. Hadith no. 4883 in the same compendium states: "It was narrated from 'Abdullah bin 'Amr bin Al-As that the Messenger of Allah said: "The martyr will be forgiven for everything, except debt." See *Id.* at 220.

<sup>144</sup> And the Prophet refused to make a prayer for those who died with debt. Hadith no. 2289 in Al-Bukhari, *supra* note 5 at 270, states: "Narrated Salama bin Al-Akwa': Once, while we were sitting in the company of Prophet, a dead body was brought. The Prophet was requested to lead the funeral Salat (prayer) for the deceased. He said, "Is he in debt?" The people replied in the negative. He said, "Has he left any wealth?" They said, "No." So, he led his funeral prayer. Another dead person was brought and the people said, "O Allah's Messenger! Lead his funeral Salat (prayer). The Prophet it said, "Is he in debt?" They said, "Yes." He said, "Has he left any wealth?" They said, "Three Dinar." So, he led the funeral prayer. Then a third dead person was brought and the people said (to the Prophet), "Please lead his funeral Salat (prayer)." He said, "Has he left any wealth?" They said, "No." He asked, "Is he in debt?" They said, ("Yes! He has to pay) three Dinar." He [refused to offer funeral Salat (prayer) and] said, "Then offer Salat (prayer) for your (dead) companion." Abu Qatada said, "O Allah's Messenger! Lead his funeral prayer, and I will pay his debt." So, he led the Salat (prayer)."

given by Islamic law on the obligation to honor someone's debt. The Qur'an itself sets out a specific long verse to recommend Muslims to always record their debts in written accompanied with two witnesses to ensure that there will be no dispute in the future.<sup>145</sup>

In one scholar's opinion, a bankrupt debtor can be thrown into prison until all of his debt is repaid, and he might stay there until he dies if he does not pay such debt.<sup>146</sup> Another opinion says that a creditor can have the right to follow the debtor (a direct waiver of the debtor's privacy), to harass the debtor, and to use strong and rude language against such debtor if the debtor refuses to pay his debts.<sup>147</sup> Only when the debtor has finally exhausted his entire wealth that the majority of the scholars argue that he can be finally released from any sanction (even if he is unable to pay his debt).<sup>148</sup> In such case, the debtor is already in a very bad condition that any further sanctions would simply be too burdensome or strictly useless.

There is also an opinion from Umar bin Abdul Aziz, a famous caliph on par with Umar bin Khatab, who argued that in cases in which the debtor's assets are not enough to satisfy his debts, the debtor can be forced to work for the creditors until his debt is satisfied, effectively creating a forced labor system under Islam (the system is still applicable in modern Middle East).<sup>149</sup> In other words, once a debtor is indebted and he cannot pay such debt, he is practically screwed up and will be at the full mercy of his creditors. In any case, this might be slightly better compared

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<sup>145</sup> See Haleem, *supra* note 14 at 32.

<sup>146</sup> See Rushd, *supra* note 100 at 342. Though this is usually applicable to people who try to run from their debts even though they have enough assets to pay.

<sup>147</sup> See further discussion in Farhat J. Ziadeh, "Mulazamah or Harassment of Recalcitrant Debtors in Islamic Law," *Islamic Law and Society* 7 no. 3 (2000): 293. Indeed, even the Prophet says that a debtor has the right to be harsh on his debtors as indicated in a story where a creditor acts in a very rude manner against the Prophet. See Hadith no. 2306 in Al-Bukhari, *supra* note 5 at 283.

<sup>148</sup> See Ziadeh, *supra* note 147 at 292.

<sup>149</sup> This opinion is followed by Ahmad bin Hanbal. See *Id.* at 297. Also confirmed in Rushd, *supra* note 100 at 351. Therefore, although the practice of making a bankrupt debtor into a slave has already been banned during the early Caliphate (See Graeber, *supra* note 27 at 168-169), a partial form of slavery, namely, force labor, still existed in such period. See also discussion in Alain Testart, "The Extent and Significance of Debt Slavery," *Revue Francaise de Sociologie* 43 (2002): 173-204.

to the pre-Islamic era where one could be enslaved for failure of paying his debts to his creditors.

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The excessive protection to creditors might correlate with the importance of commercial activities in Islamic world (at least during the time when Islam was firstly promulgated) and the degree of trust required for people in conducting their business. First of all, the institution of debt might be as ancient as the institution of slavery.<sup>151</sup> Second, debt is inherently related to commercial activities which were flourishing in the early era of Islam until the 19th centuries.<sup>152</sup> As an example, Timur Kuran noted that in the 16th century, a Portuguese witness estimated that at least 200,000 people gathered in Mecca, accompanied by 300,000 animals, some for sacrifice, other for trade, whereas even if only a quarter of these pilgrims conducted commerce, it would have constituted a vast economic enterprise.<sup>153</sup> One particular Hadith also recorded that *riba* practice is very pervasive in Medina.<sup>154</sup>

Another plausible reason is that those harsh rules are designed in order to incentivize the debtors for avoiding debt. But if that is really the case, we are back at square one when we view the permissibility of *murabahah* and *ijarah* financing schemes since the failure to repay the inflated assets price in *murabahah* or the lease fee in *ijarah* will put the “buyer” or the “lessor”, respectively, in financial indebtedness, and thus the risks of being treated harshly. Does not this look like a trap? While *riba* is prohibited, alternative debt financing structure is permitted and creditors have a lot of rights against debtors, if not absolute. Not to mention that there are no criminal sanctions against those who eat *riba* in the first place. Where is the fairness and equality in such design?

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<sup>150</sup> See Ziadeh, *supra* note 147 at 297.

<sup>151</sup> See further discussion in Graeber, *supra* note 27.

<sup>152</sup> See more details in Timur Kuran, *The Long Divergence: How Islamic Law Held Back the Middle East* (Princeton: Princeton University Press, 2011), 45-59.

<sup>153</sup> *Id.* at 47.

<sup>154</sup> See Hadith no. 3814 in Muhammad Ibn Ismaiel Al-Bukhari, *The Translation of the Meanings of Sahih Al-Bukhari Arabic-English*, vol. 9, trans. Muhammad Muhsin Khan (Riyadh: Maktaba Dar-us-Salam, 1997), 96.

There are several potential explanations to support such design from economics perspective. First, it would be naïve to think that all debtors in this world would want to seek equity financing scheme. The reason is simple. In general, equity financing must provide higher yield and also potentially larger stake of control to the investor due to its high risks. Accordingly, equity financing scheme could be more “expensive” for debtors compared to debt financing. Some debtors might prefer to sacrifice his profits and stake of ownership for the sake of better protection, but not all debtors share the same view. If he prefers “cheaper” financing with increased risks on his side, why should he be forced to choose the more expensive one? Isn’t that clearly inefficient or maybe simply unfair? To eliminate debt financing would mean to eliminate a valid alternative form of financing that can be useful in practice. And as briefly discussed above, how could fairness and equality argument work in the above case? Is it fair to always require the debtor to incur a higher financing costs if there exists a cheaper one but with larger risk to such debtor? And since there are practically no limits anyway to the inflated price of *murabahah* or rent fees of *ijarah*, there is indeed a probability that an ordinary debt financing could be “cheaper” than the Islamic counterpart, rendering the whole argument of fairness to be baseless.

Second, eliminating debt financing scheme without eliminating the entire system of sale and purchase transaction is also impossible because it is relatively easy to structure many alternative forms of debt financing scheme through sale and purchase or lease transactions, and no sane religion would eliminate those transactions. *Murabahah* and *ijarah* schemes are just two of many forms of Islamic debt financing schemes that are currently available in the market. In fact, as discussed above, some banks in Saudi Arabia do not even bother to make up a structure, they just say that instead of charging interest, they charge service fees for giving loan.<sup>155</sup> Should this be prohibited? Most probably not. Suppose that I give someone a loan free of interest and then I say

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<sup>155</sup> See note 125.

that I will charge him a management consultancy fee by giving “management consultancy services” in doing his business and this fee reflects the applicable LIBOR. My transaction should be valid because what I am offering is a service also known as *jo’alah* in classical Islamic law literature.<sup>156</sup>

Given the diversity of opinions, the number of potential financing structures to avoid strict *riba* based financing structures, and the actual need of maintaining the existence of sale and purchase transactions, the costs of comprehensive supervision are most likely not justified and criminalization will most likely be counterproductive against the need to support trading activities. Who will have the final authority to decide the validity of each transaction in the market? When is the right time to decide that a transaction is mere formalities and when it is not for Islamic financing?<sup>157</sup>

As an example, even until today, the financing structures that are acceptable under Islamic law are still vigorously debated and as for modern international offering of Islamic securities products, most of the transaction documents are usually governed by English law.<sup>158</sup> Investment bankers would typically reject the use of Islamic law as a governing law of the documents, and instead provide a *fatwa*/Islamic legal opinion issued by their respective committee of Islamic jurists to validate the securities structure from Islamic law point of view. Why? Because they do not want to give any opportunity to investors to challenge the validity of the transaction documents under

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<sup>156</sup> See further discussion in Al-Zuhaili, *supra* note 113 at 437-439.

<sup>157</sup> Hadith no. 4094 of Muslim’s compendium of Hadiths states: “It was narrated that An-Nu’ mân bin Bair said: “The Messenger of Allah said - and An-Nu’ mân pointed with his fingers to his ears - “That which is lawful is clear and that which is unlawful is clear, and between them are matters which are unclear which many people do not understand. Whoever guards against the unclear matters, he will protect his religion and his honor, but whoever falls into that which is unclear, he will soon fall into that which is unlawful. Like a shepherd who grazes his flock around the sanctuary; he will soon graze in it. Verily, every king has his prohibited land and verily, the prohibited land of Allah is that which He has forbidden. In the body there is a piece of flesh which, if it is healthy, the entire body will be healthy but if it is corrupt, the entire body will be corrupt. Verily it is the heart.”” See Muslim, *supra* note 41 at 320.

<sup>158</sup> See Michael Ainley, Ali Mashayekhi, Robert Hicks, Arshadur Rahman and Ali Ravalia, “The Development of Islamic Finance in the UK,” in *Islamic Finance: A Guide for International Business and Investment*, ed. Roderick Millar and Habiba Anwar (London: GMB Publishing Ltd., 2008), 10.

Islamic law once they purchase the securities.<sup>159</sup> There are simply too many different opinions which create too much uncertainties.<sup>160</sup> By relying on the *fatwas*, the investment banks provide a disclaimer to the investors that if they disagree with the *fatwa*, they should simply refrain themselves from buying the securities in the first place.

Indeed, the costs of supervision and enforcement by the government would be quite enormous to handle those cases compared maybe to ordinary criminal cases such as theft and homicide which are quite straightforward (though as discussed in the previous section, even a crime as simple as theft has at least 13 variants). If a sanction is imposed in the early days of Islam, how can we expect a newly established religion without any administrative agency and legal authority to supervise all trading activities and enforce sanctions to whoever practices transactions that resemble *riba*?

An easier strategy is to exaggerate the afterlife punishment for *riba* which is in line with standard economic analysis for criminal law. If the probability of enforcement is low, increase the severity of the penalty.<sup>161</sup> And since the probability of afterlife sanctions is absolutely unknown (no one has returned from the dead), it would make sense to impose a sanction that is beyond the severity of any possible worldly sanctions, namely, an eternity in hell. Of course, as discussed in the previous chapter, using afterlife sanctions might not be a truly effective legal strategy. So the other alternative is to introduce the possibility of annulling the transaction and let market practice

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<sup>159</sup> See further discussion on this issue in Muhammad Al-Bashir Muhammad Al-Amine, "Unresolved Shari'a Issues in Sukuk Structuring," in *Issues in Sukuk and Proposals for Reform*, ed. Mohammad Hashim Kamali and A.K. Abdullah (Ratby Lane: Islamic Foundation, 2014), 46-51.

<sup>160</sup> See a sample of this kind of dispute and the role of choice of law in Islamic financing transactions in Richard T de Belder, "Shari'a Supervisory Boards and Shari'a Compliance," in *Islamic Finance: A Guide for International Business and Investment*, ed. Roderick Millar and Habiba Anwar (London: GMB Publishing Ltd., 2008), 191-192.

<sup>161</sup> See further discussion in Richard A. Posner, *Economic Analysis of Law*, 8<sup>th</sup> Edition (New York: Aspen Publishers, 2011), 278-280.

decides how best to deal with the validity of the applicable variants of “Islamic financing” transactions.

The idea of designing the legal provisions of *riba* in the Basic Codes in accordance with the cost of enforcement will be clearer if we compare such design with other samples of prohibited acts, namely, the consumption of swine and alcohol and the act of *zina*. Under the Basic Codes, consumption of swine is absolutely prohibited<sup>162</sup> while the consumption of alcoholic drinks are debatable. Some scholars argue that the prohibition is only implemented when the consumption causes intoxication.<sup>163</sup> Some other scholars limit the prohibition to only certain type of drinks, while others apply the prohibition to every substance that contain alcohol.<sup>164</sup> Despite the prohibition, there are no specific penal sanctions for the consumption of swine in the Basic Codes, but there are penal sanctions for the consumption of alcoholic drinks in the amount of 80 times of flogging.<sup>165</sup>

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<sup>162</sup> Qur'an surah Al-Maida [5]: 3 states: “You are forbidden to eat carrion; blood; pig’s meat; any animal over which any name other than God’s has been invoked; any animal strangled, or victim of a violent blow or a fall, or gored or savaged by a beast of prey, unless you still slaughter it [in the correct manner]; or anything sacrificed on idolatrous altars. You are also forbidden to allot shares [of meat] by drawing marked arrows – a heinous practice – today the disbelievers have lost all hope that you will give up your religion. Do not fear them: fear Me. Today I have perfected your religion for you, completed My blessing upon you, and chosen as your religion Islam: [total devotion to God]; but if any of you is forced by hunger to eat forbidden food, with no intention of doing wrong, then God is most forgiving and merciful.” See Haleem, *supra* note 14 at 68. See further discussion in M. Quraish Shihab, *Tafsir Al-Mishbah – Pesan, Kesan dan Keserasian al-Qur’an* [Tafsir Al-Mishbah – Message, Image and the Harmony of the Qur’an], vol. 3 (Jakarta: Lentera Hati, 2009), 27. Qur’an surah An-Nahl [16]: 115 states: “He has forbidden you only these things: carrion, blood, pig’s meat, and animals over which any name other than God’s has been invoked. But if anyone is forced by hunger, not desiring it nor exceeding their immediate need, God is forgiving and merciful.” See Haleem, *supra* note 14 at 173. Further discussions on this verse can be found in Nasr, *supra* note 94 at 688-689 and Ath-Thabari, *supra* note 15 at 367-369.

<sup>163</sup> Qur’an surah Al-Maida [5]: 90-91 state: “You who believe, intoxicants and gambling, idolatrous practices, and [divining with] arrows are repugnant acts – Satan’s doing – shun them so that you may prosper. With intoxicants and gambling, Satan seeks only to incite enmity and hatred among you, and to stop you remembering God and prayer. Will you not give them up?” See Haleem, *supra* note 14 at 76. Seyyed Hossein Nasr notes that this is the fourth and final passage in the chronological order of revelation relating to intoxicating drinks, signifying their ultimate and complete prohibition. The verse is understood as applying to all forms of gambling, just as the prohibition on wine in these verses is understood as a prohibition on all intoxicants. See Nasr, *supra* note 94 at 232-233. Further discussions on these prohibited items can also be found in Wahbah Az-Zuhaili, *Tafsir Al-Munir*, vol. 4, ed. Fahmi Bahreisy, trans. Abdul Hayyie al-Kattani, et. al. (Jakarta: Gema Insani Press, 2016), 55-67 and Abu Ja’far Muhammad bin Jarir Ath-Thabari, *Tafsir Ath-Thabari*, vol. 9, ed. Besus Hidayat Amin and M. Sulton Akbar, trans. Akhmad Affandi and Benny Sarbeni (Jakarta: Pustaka Azzam, 2008), 359-373.

<sup>164</sup> See Qudamah, *supra* note 101 at 409.

<sup>165</sup> *Id.*

The punishment structure of *zina* is also very interesting. Once proved, the sanction can be extremely severe. Any non-married couple who perform *zina* may be subject to 100 times of flogging and/or expulsion for 1 year.<sup>166</sup> Meanwhile, for those who have been married, they may be subject to death penalty by stoning.<sup>167</sup> Yet, in order to be proved of doing the act, there must exist at least 4 fair male witnesses (female witnesses are either treated as half of men's testimony, or entirely excluded in *zina* cases)<sup>168</sup> who witnessed the actual penetration of vagina by penis, which means that any other penetration of orifices is generally excluded.<sup>169</sup> In line with the classical Islamic legal maxim that punishment must be avoided in cases of doubts or ambiguities, the above rule established an exceedingly high standard of evidence to be satisfied if one wishes to prosecute a couple for *zina*.<sup>170</sup>

Adding even more incentives for people not to make any false report on *zina* cases, the Basic Codes stipulate that if someone accuses another person for *zina* and fails to bring the above required witnesses, he shall be deemed a criminal, his testimony shall no longer be valid, and he shall be subject to the punishment of 80 times flogging.<sup>171</sup>

One particular issue that is often neglected when discussing the punishment of *zina* is the treatment of privacy at home and its significance under the Basic Codes. In numerous Hadiths, the Prophet has reiterated that not only a Muslim must not trespass someone's else property, he must also not look into other people's property or house.<sup>172</sup> Failure to do so will grant the right to the

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<sup>166</sup> See Az-Zuhaili, *supra* note 89 at 315-316.

<sup>167</sup> See further discussion in *Id.* at 317-319

<sup>168</sup> See further discussion in *Id.* at 323-329

<sup>169</sup> See further debates on the definition of *zina* in Sara Omar, "From Semantics to Normative Law: Perceptions of Liwat (Sodomy) and Sihaq (Tribadism) in Islamic Jurisprudence (8<sup>th</sup> – 15<sup>th</sup> Century CE)," *Islamic Law and Society* 19 (2012): 227-229.

<sup>170</sup> See further discussion about the maxim in Intisar A. Rabb, "Islamic Legal Maxims as Substantive Canons of Construction: *Hudud*-Avoidance in Cases of Doubt," *Islamic Law and Society* 17 (2010): 63-125.

<sup>171</sup> See further discussion in Az-Zuhaili, *supra* note 89 at 345-350.

<sup>172</sup> On Privacy, Hadith no. 5626 of Muslim's compendium of Hadiths states: "Abu Sa'eed Al-Khudri said: "I was sitting in Al-Madinah, in a gathering of the Ansar, when Abu Musa came to us, in a panic, or trembling with fear. We said:

property owner to hit the violator in the eye (even if it may blind the violator) and there shall be no right of retaliation from the violator).<sup>173</sup>

With all of these rules, unless a couple perform *zina* in an open space in front of the public, the risk of getting caught is very slim. And in fact, most cases recorded in the Basic Codes regarding *zina* where punishments were actually executed involved the confession of the perpetrators. So this begs an important question, why bother having the *zina* punishment if the rule is designed to prevent punishment from happening save for “extreme” cases, as if the rules are intentionally designed to sabotage their own implementations? Separately, why bother declaring some acts to be legally and morally prohibited but leave out the sanctions?

Explaining such decision from deontological perspective might cause some headaches, but from economic perspective, I would argue that the issue is similar with *riba*, namely, it is related to the costs of enforcement. Proving that someone is drunk is relatively easier than proving that someone consumes the meat of swine. After all, how could you differentiate a person that has enjoyed the taste of swine with someone that has not, unless of course, we spend a lot of money to fund the legal enforcement officers to check all houses and restaurants to find the swine? Same with *zina* case, unless the government spends additional funds to check all houses and any other private residences (which by the way, is actually prohibited under the Basic Codes), looking out for *zina* perpetrators is very difficult. Would it ever be justified for us to spend so much costs for

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*‘What is the matter with you?’ He said: ‘Umar sent for me to come to him, and I came to his door and said Salam three times, but he did not answer me, so I went back.’ He said: ‘What kept you from coming to us?’ I said: ‘I did come, and I said Salâm three times at your door, but you did not answer me, so I went back, because the Messenger of Allah said: “If one of you asks permission to enter three times and permission is not given to him, let him go back.” ‘Umar said: ‘Bring proof (of the Prophet saying that), otherwise I will take you to task.’” See Muslim, *supra* note 143 at 512-513.*

<sup>173</sup> Hadith no. 6241 of Al-Bukhari’s compendium of Hadiths states: “Narrated Sahl bin Sa’di: A man peeped through a round hole into the dwelling place of the Prophet while the Prophet had a Midra (an iron comb) with which he was scratching his head. The Prophet said, “Had I known you were looking (through the hole), I would have pierced your eye with it (i.e., the comb).” Verily! The order of taking permission to enter has been enjoined because of that sight that one should not look unlawfully at the state of others).” See Al-Bukhari, *supra* note 7 at 146. In addition, Hadith no. 6242 states: “Narrated Anas bin Malik: A man peeped into a room of the Prophet. The Prophet stood up, holding an arrow head. It is as if I am just looking at him, trying to stab the man.” See *Id.* at 147.

checking those private properties while there are other looming criminal activities that also need proper attention from the ruling authorities?

It could be argued that the above designs reflect the pragmatic nature of Islam, namely, several acts can be determined as morally and legally abhorrent and yet, Islamic law employs different policies in dealing with these acts. This is another important aspect of Islamic law that has not been fully elaborated in theory since common sense may dictate that religious or moral values should be absolute, that is, a “bad” act must be prohibited at any cost (compare this with say, the absolute restriction of abortion and contraception in Catholic religion).<sup>174</sup>

Based on the above discussion, I suppose we can conclude that the current Islamic financing structures are not evidence of hypocrisy as it might be the satisficing solution to condition of scarcity in terms of enforcement and alternative financing schemes. The rules also allow us to have a better understanding of the rules on slavery. In dealing with *riba*, the Basic Codes clearly condemn the act, impose harsh afterlife punishment, and make the act illegal (though no penal sanctions were introduced). The Basic Codes did not do the same with slavery. One possible explanation is because in terms of *riba*, there are still many other alternatives form of financing that can be used without imposing a significant burden to the people. Such alternative does not necessarily exist for slavery. As previously discussed, a slave owner who can freely have sexual intercourse with his female slaves would not have any replacement to those benefits once the institution of slavery is deemed invalid. For each different act, the Basic Codes thus employ different method, giving a strong support to its consequentialist nature.

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<sup>174</sup> See the comprehensive discussion in John Finnis, *Moral Absolutes: Tradition, Revision, and Truth* (Washington, DC: The Catholic University of America Press, 1991).

## CHAPTER 7

### CONCLUSION

This dissertation began with the question of whether consequence-based theories of legal interpretation could fit in the process of interpreting a legal system's Immutable Legal Texts, especially when the system claims to be perfect. Here, "fit" simply means that the use of those interpretive theories is not entirely rejected by or not compatible at all with the legal system. Using the Islamic legal system as my case study, and based on the discussion presented in this dissertation, I believe that the answer to the above question should be yes. As demonstrated in the previous chapters, once we subject the legal provisions of the Basic Codes to close scrutiny, we can easily find actual and potential conflicts between those provisions and the satisfaction of various moral considerations, including well-being, fairness, justice, and equality. Furthermore, these conflicts are deeply embedded within the institutional design of various legal provisions of the Basic Codes that are assumed to be made by God (who should be purposeful, rational, and all-knowing), and therefore, it is quite difficult to argue that those conflicts were random, unintentional, or unexpected.

The existence of those conflicts challenges the idea that the perfection of God's law should be equal to flawlessness where each legal provision of the Basic Codes is immutable and absolute, and its implementation must always be done the same way at any time and condition regardless of the consequences (unless the Basic Codes have set out specific exemptions in implementing such provision).<sup>1</sup> Since the Rationality Parameters do not permit any untrue and contradicting statement within the Basic Codes, choosing a potentially incorrect definition of perfection would jeopardize the foundational claims of the Basic Codes.

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<sup>1</sup> See the discussion in Chapter 3.

In such a case, it is better that the perfection of *Shari'a* should be understood as the perfection of certain universal principles, in which the Basic Codes' legal provisions are essentially the derivatives of those principles, opening up the possibility of modifying them if the modification complies with the relevant universal principles.<sup>2</sup> To support this idea, at the very least, it is imperative to show that the Islamic moral framework is inherently consequentialist, namely, that it requires Muslim decision makers to create and rank a set of outcomes and choose the best one among those available outcomes, satisfying the universal principles in the process.<sup>3</sup> Why? Because such a moral framework would allow the flexibility of modifying certain rules if it is necessary to satisfy the desired consequences, whatever they are as may be deemed fit by the Basic Codes.

As discussed in Chapters 5 and 6, there are strong indications that Islam favors the consequentialist moral framework, and given the available examples in the Basic Codes, believing to the contrary would most probably cause us to breach the Rationality Parameters. Regarding the consequences to be satisfied, I further demonstrate in those chapters that the consideration of well-being (through the concept of *maqasid al-shari'a*) is valued highly within the stories and legal provisions of the Basic Codes and in fact, it is often ranked higher compared to the traditional deontological moral values such as fairness, justice, and equality.

Having all the key conditions fulfilled, we can safely conclude that the use of consequence-based theories of interpretation in the Islamic legal system is not entirely rejected within such system. Indeed, these interpretive theories may be useful in analyzing and modifying the current legal provisions of the Basic Codes to the extent the modification is permitted under the universal

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<sup>2</sup> See the discussion in Chapter 3.

<sup>3</sup> See Matthew D. Adler, *Well-Being and Fair Distribution* (New York: Oxford University Press, 2012), 22.

principles of the Basic Codes, and therefore, their use is not strictly limited to cases in which the Basic Codes were silent.

Obviously, there are some potential objections to the above conclusion. First, changing God's law to adapt to certain circumstances may be deemed to violate God's sole right to determine what is right and what is wrong.<sup>4</sup> How can we reconcile such a right with the probable necessity of modifying God's law under the Rationality Parameters? Second, despite the inherent issues, there is a possibility that the legal provisions of the Basic Codes could actually maximize the well-being of the society, depending on how we perceive the time and scope of those provisions. As an example, instead of using the span of 10-30 years, we should instead be using the span of 1,400 years as the basis for analyzing the impact of various legal provisions of the Basic Codes on the well-being of the society. Third, though not flawless, the Basic Codes might still produce the best laws compared to any other legal system, and therefore the most "perfect" system amid a set of imperfect ones. If any of these reasons is correct, there will be no need to rely on the consequence-based theories of legal interpretation in the Islamic legal system since there is no need to modify the Basic Codes' legal provisions in the first place.

Against the first objection, I have previously argued that even though the Basic Codes include numerous verses containing the prohibition of permitting prohibited acts and vice versa, at the same time, the Basic Codes also encourage Muslims to think and analyze the laws thoroughly so that they do not repeat the same mistake of their ancestors who blindly followed their old laws and false traditions.<sup>5</sup> In other words, it can be argued that what is truly prohibited

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<sup>4</sup> On the prohibition to permit prohibited things, Qur'an surah At-Tawba [9]: 37 states: "*Postponing sacred months is another act of disobedience by which those who disregard [God] are led astray: they will allow it one year and forbid it in another in order outwardly to conform with the number of God's sacred months, but in doing so they permit what God has forbidden. Their evil deeds are made alluring to them: God does not guide those who disregard [Him].*" See M.A.S Abdel Haleem, *The Qur'an* (New York: Oxford University Press, 2005), 119. See further discussion in Chapter 3.

<sup>5</sup> See the discussion in Chapter 3.

by the Basic Codes is the attitude of blindly accepting or modifying the law without providing any proper reasons, and not necessarily the act of modifying the law itself.

In addition, while the Basic Codes also ordered Muslims to follow what God and the Prophet decided in certain cases, there is no specific verse in the Qur'an which says that such decision must be followed at all time and in any situation. Indeed, it is still being debated among Islamic jurists whether the entire Basic Codes' legal provisions were intended to be applied universally or only in certain specific conditions. This is known in *Ushul Fiqh* discourse as the classic problem of generality of a rule versus the specificity of its background.<sup>6</sup> Thus, the first objection is not yet conclusive and in practice, there are several ways to reconcile the idea of God's rights with the need to change God's law, ways that do not violate the Rationality Parameters.

The second objection can be rephrased as follows: in the long run, the legal provisions of the Basic Codes maximize the overall well-being of the society, and shall be eventually fair and just in their aggregate application. Unfortunately, as John Maynard Keynes put it, in the long run, we will all be dead. To name one example, in the long run, there is a possibility that the Islamic rules on slavery might be more efficient and welfare maximizing compared to the universal manumission approach in the United States, which involved brutal wars and imposed significant economic losses on the Southern states. But at the same time, we also need to acknowledge that for more than a thousand years, such rules provided the necessary ammunition for Islamic nations to maintain the status quo of the slavery institution with all of its repercussions for the well-being of the slaves (including the unfairness and unjust treatment against these second-class members of society).<sup>7</sup> How should we deal with the actual inefficiencies and injustice that happened before the arrival of the happy ending (which by the way, is not guaranteed)?

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<sup>6</sup> See the discussion in Chapter 2.

<sup>7</sup> See the discussion in Chapters 4 and 6.

More importantly, this is essentially an empirical claim, and a tough one to prove. Supporters of this objection must first determine the exact timeframe for calculating the effect of a legal provision (which can be a very subjective determination and is prone to manipulation). Afterwards, they must also prove that: (i) there are continuous improvements to the overall well-being of the society and the satisfaction of other abstract moral values by the passage of time, and (ii) such improvement was directly or, at least, primarily caused by the existence of unchanging Islamic legal provisions in the Basic Codes and not other factors.

Finally, under the third objection, despite the fact that legal provisions of the Basic Codes may not necessarily satisfy the entirety of human needs, those provisions are still the best ones that people can obtain, compared with any other possible solutions and laws. Similar to the second objection, this is also an empirical claim, not a mere question of faith. If Islamic jurists truly believe that the legal provisions of the Basic Codes are the best and that no improvements can be made, despite the inherent problems that plague those provisions, since it is assumed that any modification will only make things worse, they should work harder to prove such claims.

One important goal of this dissertation is to directly challenge those legal scholars who keep claiming that the *Shari'a* is perfect, and yet refuse to provide any empirical evidence to support their idea. Though delivering empirical evidence might be a herculean task, it is not entirely impossible. To do so, one will only have to prove that: (i) the legal provisions of the Basic Codes will always yield better overall results compared with any other human laws at any time and situation, and (ii) any changes to the Basic Codes' legal provisions will always cause worse results. If they are successful in empirically proving these two claims, my theory will be completely falsified, and I have no issue with that. In fact, I wish those aspiring scholars good luck. Of course, I am not betting my money that this empirical revolution will come soon. If somehow this

dissertation could inspire more Islamic legal scholars to appreciate the importance of engaging in empirical scholarship,<sup>8</sup> I would consider that as quite a huge achievement.

I cannot stress enough that the Islamic law's claim of perfection does not provide it with any advantages over other legal systems. I understand that such claim is unavoidable since the system claims that it was made by God, but at the end of the day, the claim only creates additional liabilities and challenges for its supporters. Other legal systems can easily run away from the problems of inconsistencies and bad design of laws since they can always argue that those laws were made by imperfect beings under the condition of scarcity. Imperfections are already expected, if not guaranteed. Unfortunately, we cannot use the same argument for the Islamic legal system. Due to the Rationality Parameters, the Islamic legal system cannot bear the possibility of having a single incorrect or inconsistent claim in the Basic Codes. Not only would it tarnish the claim of perfection, but it would also render the Islamic legal system to be equal to other imperfect legal systems having lesser status.

During the course of this dissertation, I have not yet tried to establish a theory regarding the proper standards to adjust the provisions of the Basic Codes, nor the considerations that must be prioritized under scarcity or a budget constraint. As much as I would like to elaborate, an Islamic legal theory of optimization and satisficing will have to wait for another time. For now, it is sufficient to demonstrate that the legal provisions and institutions of the Basic Codes may not always satisfy the entire dimensions of well-being and other abstract moral values under certain circumstances. Given the consequentialist nature of Islam, there is a high probability that consequence-based theories of legal interpretation, which include Pragmatism and Law &

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<sup>8</sup> See the importance of empirical scholarship in the field of law in Thomas S. Ulen, "The Impending Train Wreck in Current Legal Education: How We Might Teach Law as the Scientific Study of Social Governance," *University of St. Thomas Law Journal* 6 (2009): 306-313.

Economics, will be necessary to cope with such issues, if they are not already incorporated in practice by Islamic jurists.<sup>9</sup>

To close this chapter, what are some valuable lessons that can be drawn for legal scholarship in the United States? First, Posnerian Pragmatism is not a completely original idea, but was developed on the shoulders of past giants. Yes, American scholars provide a more comprehensive account on how to use and implement the consequence-based theories of interpretation in dealing with Immutable Legal Texts. This is completely natural given the accumulation of technical skills in the past 50 years. But the basic idea itself has already been promoted by Islamic jurists long before the establishment of the United States. Rediscovering these old gems could bridge the gap between both systems and help modern scholars in evaluating the state of their own theories and how to improve them even further.

More importantly, I assume that Posnerian Pragmatism's distrust of metaphysical entities and realms is primarily related to the fear of thinking in absolutes in dealing with numerous legal and policy matters. I find this distrust to be irrelevant for Islamic law given the nature of the *Shari'a* as discussed in previous chapters. In fact, I think such distrust is also mistaken because it is always possible to have an absolute rule that says that every legal decision must be made in a flexible and pragmatic way (such as in the case of *Shari'a*'s principles). While I do not claim that my proof is conclusive, I am quite certain that there is a high degree of probability that Posnerian Pragmatism's core idea of considering the consequences of our legal judgment to human interests and needs in interpreting the law is compatible with Islamic law.

Second, if consequences matter in a legal system claimed to be perfect, it is safe to assume that they should matter even more in an "imperfect" system such as that of the United States. I

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<sup>9</sup> See further elaboration in Cass R. Sunstein, *Valuing Life: Humanizing the Regulatory State* (Chicago: The University of Chicago Press, 2014), 1-3. Like it or not, governments and rulers should focus on the human consequences of their choice of actions and improve their way in making decisions.

have demonstrated through this dissertation that there could be religious and moral justifications for using consequence-based theories of interpretation in solving and interpreting legal problems. They simply begin and end with scarcity.

Finally, given the high stakes of using consequence-based interpretive theories in the Islamic legal system (such as the possibility of being deemed blasphemous or violating God's rights), it requires immense discipline from legal interpreters in building their case and presenting their arguments when they choose to interpret the clear provisions of the Basic Codes. The same level of discipline should apply in the United States when dealing with the US Constitution. Gone are the days when legal interpreters took swift action with great repercussions. Instead of making grandiose claims, they should act carefully and limit the applicability of their interpretive choice in order to minimize any unintended effects. At the end of the day, consequence-based theories of interpretation are not and should never be an excuse to act without limit or accountability.

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