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MAPPING *SHARI'AH* NORMATIVE REASONING CONCEPTS

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ABSTRACT

Within the context of a larger project, in this paper, we discuss one-to-one mapping of the *Shari'ah* normative concepts of *wajib, haram, Sunnah,* etc., with conventional normative concepts of obligation, prohibition, and permission. The goal of the mapping to gaining a better understanding of the *Shari'ah* normative concepts and what deontic effects they generate when applied, and what consequences can be attained through the actions as compared to the Western normative concepts. Existing literature lacks such understanding of the correspondence between the two normative systems. The mapping shows conceptual overlapping between the concepts, yet the two types of systems should be separated from each other in terms of the philosophy, context, and the consequences of the Islamic normative systems as the expression of the divine will.

Keywords: Shariah sources, normative concepts, norms classes, Islamic normative reasoning

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1 INTRODUCTION

In the past few decades several scientific studies have been conducted on *Shari'ah* normative system and expressing the opinion about the possibilities of *Shari'ah* norms in a contemporary Islamic state. Such as Al-Qaradawi (2003), Ramadan (2009) broadly investigated the *Shari'ah* normative systems touching upon the basis of normative concepts, their properties and concepts prescribing *Shari'ah* punishments. Whereas Mukhametzaripov and Kozlov (2017) studied the *Shari'ah* functioning in the system of law from the point of view of potential negative consequence from use of *Shari'ah* norms. They relate the concept of 'law' and *Shari'ah* recognizing the significance of *Shari'ah* norms as the social regulator. Alwazna (2016), on the other hand, investigates the Islamic law and its sources to translate into comparative law written in English. He focuses on five different concepts of Islamic legal reasoning—obligatory, permitted, abominable and other concepts deduced from the *Shari'ah* and other sources which jurists confront for legal rulings (Hallaq 2009). An-Na'im (2011) studies the nature of *Shari'ah* as religious normative system, and civic law of the state—and at the same time the normative similarities between *Shari'ah* and the civic law regulating the actions and behaviour of subjects, and indicate the relationship and possible interactions, and for various reasons—cross-fertilization between the two normative systems.

Rather similar studies (Badr 1978, Soper 1995, Liebesny 1985, An-Nacim 2010, Asariwarni & Jandra 2018) compared the religious Islamic law with civil, common, and customary laws focusing on the concept of the legal systems, legal sources from historical, moral, philosophical, political, and social perspectives. However, limited understanding exists on the common concepts in the Islamic and Western normative systems controlling and guiding the socio-political and economic behavior. In the context of a larger study, in this paper, we investigate which common concepts in the Islamic normative systems are comparable to the Western legal normative systems and study their characteristics according to the deontic consequences and effects they produced when applied.

The remainder of the paper is structured as follow: next in Section 2 we precisely revisit normative concepts from conventional systems following which basic Islamic normative concepts are mapped with conventional normative concepts in Section 3. The paper is concluded with some remarks and pointers for future work in Section 4.

2 NORMS CLASSIFICATION: AN INFORMAL INTRODUCTION

The scope of norms is to define concepts to regulate their subjects, and to define what is legal and what is not. They are created to serve for different purposes and can be found in both normative provisions and recitals (Amantea *et al.* 2019). Essentially, all legal norms should contain information under which the norms become applicable and the (normative) effects that they produce when applied under different situations. These codes of actions can come in various forms, capturing different intuitions, prescribing or informing people how to act in a proper way; or the penalties or sanction for a person (or an organisation) who violates a norm (Peczenik 2009).

Over the years, various research efforts have been delved towards the classification of legal

norms and different classification schemes have been proposed. For instance, von Wright (1963) classified legal norms into three different types, namely: (i) determinative (or constitutive) norms, which define the concepts or activities that need to be defined or explicitly specified by legal norms, (ii) prescriptive norms, which prescribe the actions and the deontic effects produced by means of: (a) obligations, a legally binding set of actions that must be followed by the subject, (b) prohibitions, a legally binding situation that the subject must avoid, and (c) permissions, situations when neither obligations to the contraries nor prohibition hold, after performing the actions, and (iii) directive or technical norms, which prescribe what needs to be done in order to attained a certain end.

Following a functional approach, Waltl *et al*. (2019) have classified legal norms that appear in German laws into nine different categories, namely: duty, indemnity, permission, prohibition, objection, continuation, consequence, definition, and reference; whereas de Maat (2012) has divided legal norms into seven different types, namely: obligations, rights, application provisions, penalisation, calculations, delegations, and publication provisions, and have provided definitions to each of these. Besides, from a structural perspective, Amantea *et al.* (2019) has classified legal norms into 5 different types, namely: objective, constitute, deontic, scope, and meta-norms (procedural and contextual), and have studied their inter-relationships in the EU directives.

In addition to the above, Hilty *et al*. (2005) provide a characterisation of obligation based on its temporal structure and distributed life cycle, which provides a useful mapping from the requirements to enforcements with respect to their temporal boundaries and invariance properties. Whereas Hashmi *et al.* (2013, 2016) have classified the legal norms according to their temporal validity (Palmirani *et al.* 2011) and post-violation effects, and further divided the three basic normative classes (i.e., obligations, permissions, and prohibitions, as mentioned before) into 11 different subcategories, such as persistent vs non-persistent, achievement vs maintenance, preemptive vs non-preemptive, perdurant vs non-perdurant, etc., as illustrated in Figure 1. Hence, as can be seen in the figure, legal norms can be classified differently according to the legal force and binding effect (Kovacs *et al.* 2016), and from different aspects. Nevertheless, in its essence and at the highest level of abstraction, it is widely accepted that norms in legal documents can be largely divided into two categories, namely: constitutive norms and regulative norms, where constitutive norm, also known as count-as norms or count-as rules, are norms that regulate the creation of (institutional) facts and define concepts that are specific to a legislation; whereas regulative norms are norms that prescribe the actions and the deontic effects, such as obligations, prohibitions, and rights and permissions, produced after applied them. To be able to properly verify whether a particular action of the subject complied with the regulations it is constrained with—one has to determine whether the conceptual model of the actions align with the formal specification of norms by means of different deontic effects. In this context, the regulative (norms) can be deemed as a qualifier for an action of the subject or state of affairs as stipulated by the regulation (Peczenik 2009).

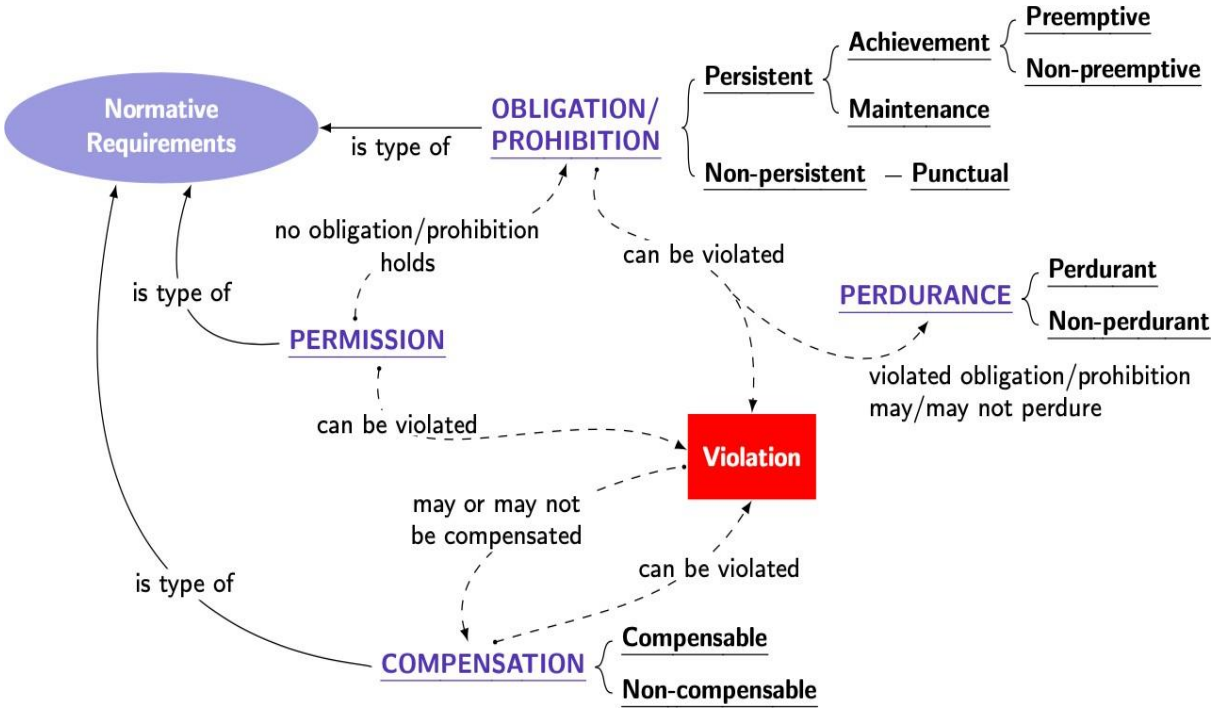

Figure 1: Classes and Relationships of different normative types (adopted from Hashmi *et al*., 2016)

In this regard, in the following sections, we are going to use the classification proposed in Hashmi *et al*. (2016) as a template for mapping the Islamic normative concepts with the conventional normative concepts, i.e., the deontic effects they produce when applied.

3 ISLAMIC NORMATIVE REASONING CONCEPT

The two primary sources of divine law in Islamic legal system are Holy *Qur'an* and *Sunnah* (literally, traditions)[1]. Both of these sources provide the guiding principles that explicitly establish Islamic legal rulings (Arabic: sg. *hukam*, pl. *ahkam*) to be applied to all believers (Alwazna 2016; Hallaq 2009). Certain legal rulings pertaining religious admonitions, salvific histories, instructions and eschatological cases communicated through these sources are definitive and require no personal reasoning or interpretations (e.g., the words of God (hereafter, Allah)) (Alwazna 2016). However, there is still a large corpus of legal rulings, from both *Qur'an* and *Sunnah*, that need to be interpreted before rulings can be applied. Such interpretations, in essence, are generally based on human apprehension of the divine law, called *Fiqah*, and is generally carried out by learned scholars (sg. *Alam*, pl. *Ulama*) having the knowledge and understanding of commandments, traditions, and practices transmitted through *Qur'an* and *Sunnah*.

Figure 2 illustrates the legal reasoning and law that has been emerged from *Fiqah*, namely: *ijma*, *ijtihad*, *taqlid*, and *qiyas*. *Ijma* (scholarly consensus) is a legal method of interpretation and reasoning by which scholars reason on an issue and derive conclusions in accordance with the

[1] *Sunnah* narrated at the authority of the companions of prophet Muhammad(pbuh) about his saying, actions or approvals collected over centuries through a complex but a rigorous and authentic process.

revelations of the *Qur'an* and narrations of the *Sunnah* (Esack 2009; Hallaq 2009). The basic requirements for *ijma* are the stringent narrations, i.e., the commandments of Allah cannot be altered and must be followed exactly. According to Rippin (2005), *ijma* is the most regarded element in the Islamic legal system as all Muslims agree that Qur'an's verses are explicit not allegorical such that only Allah knows the actual meanings and are not uttered by any others. Since *Qur'an* comprises around five hundred legal rulings applicable to Muslims (Alwazna 2016), only a small portion of *Shari'ah* rules is actually based on *ijma*.

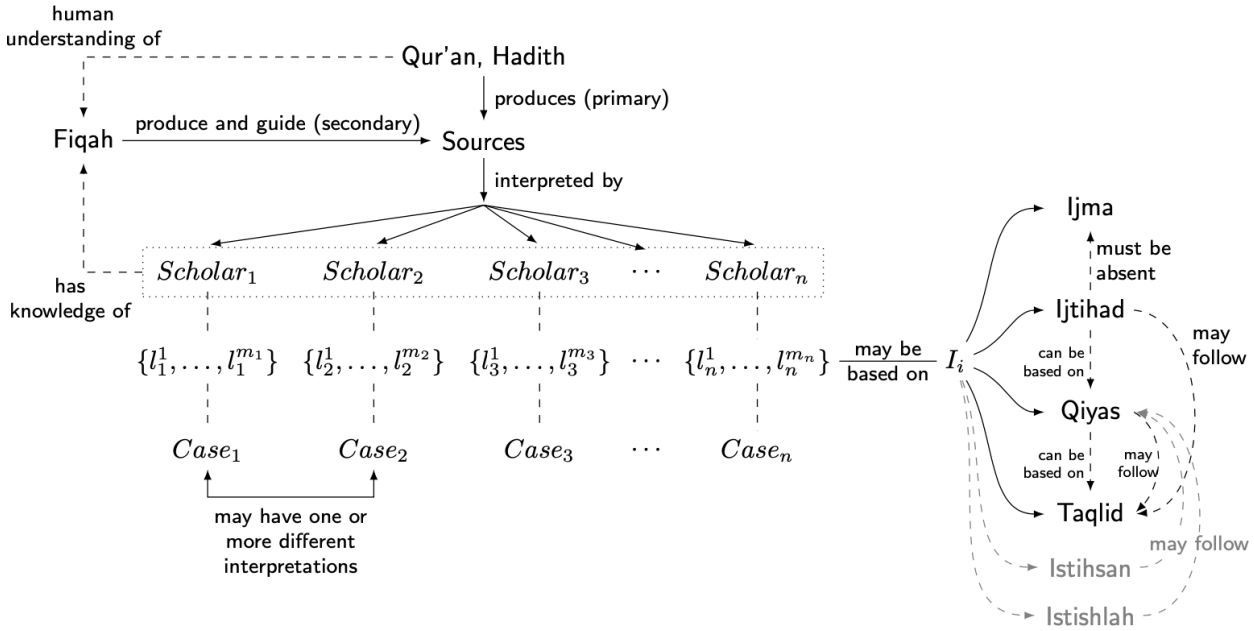

Figure 2: Sources of Shari'ah and Reasoning Methods

Ijtihad (personal reasoning),[2] on the other hand, is a reasoning method in which master-jurist (or *mujtahid*[3]) exert his maximum efforts in seeking knowledge and deriving the principles and legal rules by interpreting the holy scripture (Codd 1999). Islamic scholars (Albarghouthi 2011; Hallaq 1986, 1984; Hashish 2010; Kamali 2003) view *ijtihad* as the most important instrument and source of legal rulings after the holy scripture. It is used to explain the position of *Shari'ah* on ruling certain cases when *Qur'an* and *Sunnah* are silent, unclear, orindecisive.

Despite being the most pristine method, *ijtihad* was considered obsolete as during the 10th century as there was prevailing understanding amongst the jurists that most questions regarding *Shari'ah* had been answered and it was no longer needed for scholars to practice *ijtihad* (Codd 1999; Hallaq 1984; Kesgin 2011; Smock 2004), which lead to closing the door of *ijtihad*.[4] Con-

[2] Linguistically originated from an Arabic word "*al-juhud*", *ijtihad* means exertion, effort, trouble or pain. From an Islamic jurisprudence perspective, it refers to the attempt of a scholar to extracting legal rules based on evidence found in sources of *Shari'ah*. From a technical and legal jurisprudence perspective, various definitions of the term have been proposed. For example, Amidi (1984) viewed *ijtihad* as the "total expenditure of effort in the search of opinion about any legal rule in a manner that there is no further possibility to expanding the effort."

[3] A *mujtahid* is a qualified person of high ranks capable of managing the entire range of *ijtihad*, i.e., reasoning about the law through applying complex methods and principles of interpretation. See Hallaq (2009). Given the significance of *ijtihad*, there are differing opinions on the qualification of a *mujtahid*, see Codd (1999) and Weiss (2010) for details.

[4] Several reasons for closing the doors of *ijtihad* have been given including autocratic behaviour of Muslim caliphs, rationalist movements, preservation of the values and traditions, confinement of the practice to the explanation, application, at the most, interpretation of the doctrine, to name but a few, see Javed & Javed (2011); Schacht (1964) for details. Also, there is ongoing debate on whether the doors of *ijtihad* are permanently closed or there is possibility of reinstating the practice of *ijtihad*. This topic is out of the scope of this paper; however, interested readers are pointed to Smock (2004) for details.

sequently, this created a vacuum and fear of deterioration and religious distortion of the Islamic doctrine. Besides, this also created problems for laymen and non-specialist people to get detailed knowledge and understanding of complex issues and seek guidance on Islamic legal system to make informed decisions in accordance with the *Shari'ah* laws (Kesgin, 2011). This necessitated the scholars to practice *taqlid* (a.k.a. *ittaba*, to imitate or to copy), i.e., another reasoning method in which scholars follow the actions or views of (often) other scholars without questioning the veracity or demanding the proof of action or situation thereof. Al-Zuhayli (1986) defined *taqlid* as "indiscriminately accepting the opinion concerning the legal rule(s) without the knowledge of its bases". Historically, the permissibility of *taqlid* comes directly from *Qur'an* and narrated as:

> . . . to whom We revealed [Our message]. So, ask the people of the message if you do not know.
>
> — Surah An-Nahl [16:43] and Surah Al-Anbya [21:7]

And can be practised in two ways: (i) an ordinary person acts upon the opinions of a qualified person, and (ii) an expert scholar (from a specific area of law) seeks guidance from a high ranked scholar (Ghazala 2013). However, regardless of which form, the core of *taqlid* is that one should give up his personal judgments and follows the understanding and interpretations of earlier scholars without any prejudice to seek guidance in the absence of clear rulings (Abdul Karim 2015). Despite the ruling process is opposite to that of *ijtihad*,[5] both notions have a strong relationship as muqallids, i.e., person who practice *taqlid*, may follow the rulings based on *ijtihad*. However, several Islamic scholars, such as Ibn Qayyim al-Jawziyya (died 751 H), Yusuf Ibn Abdallah Ibn Mohammed Ibn Abd al-Barr (died 1071 H), Ibn Hazm (died 885 H), have questioned the legitimacy of *taqlid* and expressed their concerns over blindly practising *taqlid* (Mustafa 2013; Rahim 2004) because there was a wider feeling that it had severe consequences for the Islamic jurisprudence system as it was just limited to explaining the works of other scholars, without consulting the holy scriptures, thus distancing the scholars from *Shari'ah* and the *Qur'an* (Abdul Karim 2015; Halstead 2004).

Last but not least, *qiyas* (deduction by analogy)[6] is the fourth and widely used method for extracting legal rulings on the issues that are not covered by *Qur'an* and *Sunnah*, nor experts' opinions. In this method, scholars consider the operative and effective characteristics (*illa*) of the precedent cases (*asl*) to deduce rulings about new cases (*far*). Here, *illa* is the set of characteristics, which often refers to the contextual conditions or situations related to the new case, indicating the similarities and differences between the new and precedent cases that are required to perform *qiyas* (Albadri 2016; Hallaq 2009). Despite differing opinions amongst Muslim jurists (such as Ibn Hazm[7] or Al-Ghazali[8]) on the need and credibility of *qiyas*, there is a common agreement

[5] In *ijtihad*, a consensus is developed amongst jurists for some specific cases; whereas in *taqlid*, the opinions and understanding from various scholars is gathered (called *Talfiq*) into one definitive case dissimilar to all. See Ghazala (2013).

[6] According to Hallaq (2009: 176) "syllogistic, relational, a fortiori, econtrio and reduction, ad absurdum arguments" are some other methods subsumed under *qiyas*.

[7] Ibn Hazm, Ebuˆ Muhammed Ali b. Ahmed b. Said (died 456 AH) is one of the main critics of practicing *Qiyas*. In this famous book Kitabu'l-Fasl fil-Milel ve'l-Ahva ve'n-Nihal, (Mısır: Matbaˆatu'l-Edebiyye) he surveyed different systems of philosophical thoughts with regards to religions and beliefs and criticised Muslim theologians and jurists. In his arguments about *qiyas*, he raised questions about the consecrated scripts only to address purely by human means. But he did not fully deny the significance of human reasoning since it is backed by *Qur'an* itself.

[8] Abu Hamid Muhammad Ibn Muhammad al-Ghazali (died 448 or 450 AH) in his book *Al-Mustafa Min Ilm Al-Usul* (Vol. II: 56)

that for *qiyas* to be valid, it must be grounded on the pronouncements of *Shari'ah* such the illa is based on *Shari'ah* text. Hallaq (Hallaq 2009) discusses four mandatory elements of *qiyas* namely: (i) a new case requiring rulings must exist, (ii) the precedent case which is mentioned in the *Qur'an* and *Sunnah* or it is accepted by scholars through *ijma* and *ijtihad* providing the legal evidence (*dalil*) in support of the new case, (iii) scholar must consider the characteristics (*illa*) of new as well as precedent cases, and (iv) legal ruling still valid for original case and applicable to a new case too. The departure from any of these components may invalidate *qiyas*.

Apart from the basic methods mentioned above, there are also other less commonly used approaches that Islamic scholars used to derive the Islamic legal ruling. For instance, *Istihsan* (juristic preference) is as an inferencing approach in which jurists prefer one matter or idea over another. It is a special practice that is exercised by the jurists and generally associated with *qiyas* within the Islamic juristic framework. Contrary to *qiyas*, in the *Istihsan* reasoning process, a less apparent judgment might be preferred over a strongly apparent judgment because of some other evidence (Alwazna 2016). *Istishlah* (public interest), on the other hand, is an inferencing method that is not directly based on *Qur'anic* verses. Instead, it presents rational arguments for a case that is not related to religious observances and uses five universals of law, i.e., mind, protection of life, religion, property and family, as the centre point of its reasoning process (Hallaq 2009). While independent, both these approaches can be derived from above-described reasoning methods, we do not discuss them any further, but point interested readers to (Ahmad *et al.* 2011; Hallaq 2009; Kamali 2003) for details.

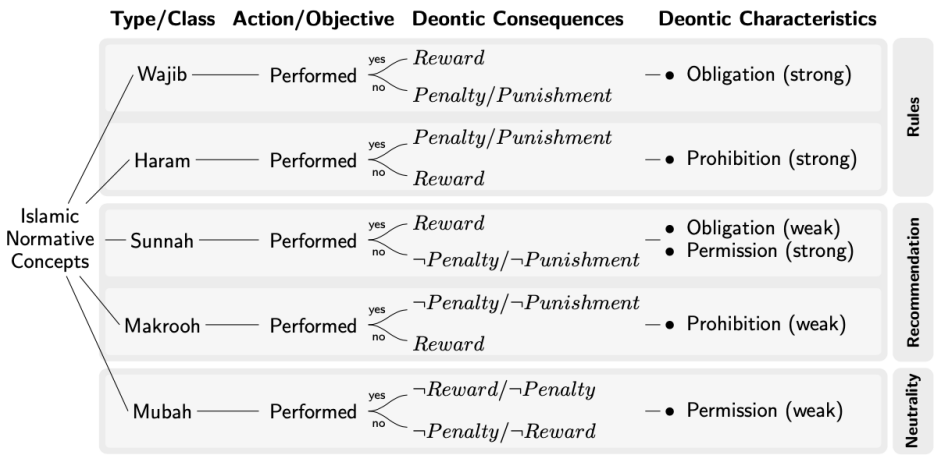

Figure 3: Basic Islamic normative concepts, deontic characteristics and consequences

Over the passage of time, a large corpus of legal rulings has been compiled based on the approaches described above. Figure 3 illustrates these normative concepts establishing the legal position of *Shari'ah* on various religious and societal issues, which can be classified as: (i) rules, that define whether a certain action is obligatory or prohibited based upon some context, (ii) recommendations, that define the permissibility of the action, and (iii) neutrality, that defines the situations of when not to carry out any retribution in case of violations or reward for carrying out the actions.[9]

disapproved *qiyas* on the bases that it is rationally impossible and legally prohibited.

[9] In the Islamic perspective, the notion of reward (or allowance) is an instrument of encouragement while punishment (penalty) is as a means of discipline. The reward is considered as receiving blessing and love of Allah for good deeds as well as receiving anger

Wajib[10] prescribes the minimum conditions that are obligatory to every Muslim, regardless of their societal and/or moral status of piety or saintliness. Failure to comply with these acts will lead to apostasy (Reinhart 1983). From the *Shari'ah* context, some wajib acts, such as the performance of prayers, the hajj (pilgrimage),and the payment of *zakat* (donation), are obligation on individuals. They are known as *wajib al-ayn* and cannot be excused in any situation or will be penalised in ignored.

Another type of *wajib* is known as *waajib al-Kafiyah*, which are obligatory to the entire community, such as burying the dead. The performance of *waajib al-Kafiyah* by one person removes the obligation from rest of the community. However, the entire community will be considered sinning if no one has performed the required action(s). Hence, in a classical sense, the avoidance of *wajib* will be punished while the performance of which isrewarded (Reinhart 1983).

Haram[11] refers to the set of taboo like acts that must be avoided under Islamic law, such as eating pork, drinking alcohol, uprooting trees, gambling, cheating, etc., and will be attributed as sin and punished accordingly. The prohibiting of such acts is directly come from the holy scripture and *Sunnah* of the highest statues and they mustbe avoided without any exception of nobility of cause or a good intention (Al-Qaradawi 1999). performing or legitimising the *haram* may constitute to apostasy.

Sunnah (a.k.a. traditions)[12] are acts that are based on the behaviour of prophet Muhammad(pbuh) and carry some virtue connotations from the Islamic moral system and are highly regarded. According to Esposito (2001), *Sunnah* acts can be classified as: (i) *sunnah al-qawliyah*, sayings or statements of the prophet Muhammad(pbuh), (ii) *sunnah al-filiyah*, actions of the prophet Muhammad(pbuh)'s actions, and (iii) *sunnah al-taqririyah*, the knowledge about something about prophet Muhammad(pbuh) remained silent or had no objection if practised by the companions. Reward will be given to those that carried out such acts, but no punishment will be meted to those that avoid it. Examples of *Sunnah* acts are performance of non-obligatory prayers, or removal of hurdles from the path which may hurt people on the way.

Makrooh are acts that are reprehensible or disliked by Islam but not haram. There is no punishment for doing these acts, but the avoidance of such acts will be rewarded. Essentially, *Makrooh* acts are not definitive of one's status in the Muslim community (Reinhart 1983). Based on the degree of severity, there are two main classes of *Makrooh*, namely: *Makrooh tahrimi* and *Makrooh tanzihi.*

Makrooh tahrimi[13] is strongly discouraged in Islam as its status is somewhat close to the unlawful haram. If one continuously doing a *makrooh tahrimi* act, he or she will be considered as

for bad deeds. They can only be come from the authority of the Gold and are subject to freedom. See Nazri *et al.* (2011).

[10] Some juristic have written *wajib* as "*fard*" and "*makoob*" which has same meanings in the sense of obligation—the omission of which leads of punishment (al-Lam' fi Usool al-Fiqh by Imam Ali al-Shiraazi (died 476) (Imam Abi Ishaq Ibrahim bin Ali al Shayrazi (1999)).

[11] The term "*Haram*" means "taboo, inviolable, sacred, wrongdoing, offence". See Baalbaki (1995: 460). It originates from the Arabic word "*harem*" which refers to women's quarters where men, except their husbands and relatives, are not allowed.

[12] "*Mustahabb*", "*Mandub*" and "Recommended" have also been synonymously used as *Sunnah*.

[13] "*Makrooh tahrimi"* can also be understood as being in diametrical opposition to "*wajib"*.

sinful and will be punished accordingly but without losing his/her status in the Muslim community. In contrast, *Makrooh tanzihi* acts do not account for any punishment and avoidance of such acts may earn the reward. Examples of *Makrooh* are the use of gold or silver utensils for men and women, fasting on the day of *Eid-al-Fitr*, delaying *Asr* prayer until the sun changes its color, wasting water whilst performing ablution or being miserly with it.

Mubaah are acts that are permitted and lawful. These acts often functionally mean indifferent, which is interpreted as act not involving Allah's judgment. Hence, there is no reward nor punishment for performing or neglecting such acts. From reasoning point of view, the legality of such acts has always been questioned as it is unclear whether they fall into the category of authorised acts, or whether they have any moral status (or legitimacy), or carry any moral consequences. This is ultimately a valid question because generally *Mubaah* acts are generally considered as permissible acts.

While these concepts prescribe obligatory actions, a set of certain pre-conditions, known as *rukan* (*tanet*), is necessary for determining the validity of actions to be punished or rewarded (Ahmad *et al.* 2011).

4 CONCLUSION

Shari'ah and other sources of Islamic divine law in the Islamic legal system provide various normative concepts as the code of life. Mostly these concepts are pivotal in Islamic normative reasoning and jurisprudence system, and indispensable in marking *fatwas* (or rulings) on various issues pertaining code of life for Muslims on what actions deem lawful—what is unlawful—and what is recommended. In particular, we have mapped Islamic normative concepts with the conventional civil normative concepts of obligation, prohibition, etc. The mapping shows that there is significant conceptual overlapping between the concepts in terms of deontic effects or consequences they produce; however, the two types of systems should be distinguished from the semantic understanding, philosophy, and the context in which they are applied, and the consequence of Islamic concept of law as the expression of the divine will. As future work, we plan to accumulate further understanding of complex normative and reasoning concepts such as *Istislah*, *Istihsan*, *rasm* (ritual practices), *an'an* (traditions), and create a comprehensive taxonomy of contemporary *Shari'ah* normatve concepts.

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