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Maqāṣid Sharī'ah

The Main Reference and Ethical-Spiritual Foundation for the Dynamization Process of Islamic Law

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Abstract

Two major roles of *maqāṣid sharī'ah* are very significant to be explored, namely: the directive system role and the defensive system one. The first role puts *maqāṣid sharī'ah* as the main reference for any reformation or changing processes and dynamization of Islamic law whereas the latter places it as the supreme morality that provides the foundation and ethical-spiritual power to Moslem society whenever they dialect towards the law. With these two roles, *maqāṣid sharī'ah* can serve as a tremendous impetus for the creation of future changes towards a more constructive and humanistic society. This study was of library research type and discussed *maqāṣid sharī'ah* from the time of the Prophet Muhammad (peace be upon him, *pbuh*) to this very day. It was aimed to elaborate further the position of *maqāṣid sharī'ah* as the main reference and the ethical-spiritual foundation of the process of dynamization of Islamic law in facing contemporary issues. It elaborated the concept of *maqāṣid sharī'ah* and observed the presence of flexibility, adaptability, and dynamic characteristic of Islamic law. At the same time, it was also purposed to open the minds of those who state and claim that Islamic law is immutable, doctrinal, eternal, and final so much so that it is regarded inadaptable to various forms of social changes and modernization which bring with them abundant contemporary issues.

Keywords : contemporary issue; dynamization; ethical-spiritual foundation; *maqāṣid sharī'ah*; reference

Introduction

Allah ordains Islamic law to maintain the benefit to humankind as well as to prevent any *mafsadāt* (harms) from them both in this world and in the hereafter.[1] The urgency of attaining benefit for mankind is found in all forms of laws, - the divine laws based on revelation as the Islamic law and other non-divine (man-created) laws which are not based on revelation,- although each law's emphasis is different.[2] With regard to Islamic law, the difference is in the privilege of the law itself. Meanwhile, there are so many contemporary public issues which need to be viewed wisely and thoroughly employing *maqāṣid sharī'ah*[3] (purposefulness of Islamic law) such as democracy, general election, parliamentary system, corruption

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[2] Asafri Jaya Bakrie, *Konsep Maqashid Syari'ah menurut al- Syatibi*, 1st ed., (Jakarta: P.T. Raja Grafindo Persada, 1996), p. 64; cf: Sya'bani, 'Maqashid al-Syari'ah sebagai Metode Ijtihad', p. 130.

[3] See further: Jasser Auda, *Maqashid Shariah as Philosophy of Islamic Law: A Systems Approach.* (London: IIIT, 2008a), p. 2.

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phenomenon, life and health insurances, stem cell therapy, and so forth.

In Indonesia, democracy which is manifested in the form of five yearly general elections to elect the head of central, provincial, and regency governments as well as their corresponding members of parliaments has been accepted as a mean to choose the national, provincial, and local heads of governments and members of parliaments. In regard to its application, the majority of Indonesian Muslim scholars have been accepting the concept of democracy positively and considering it to be compatible with the Islamic teaching.[4] Regarding the corruption phenomenon in Indonesia, the International Transparency stated that in 2018 Indonesia's Corruption Perception Index (CPI) rose to 38 and it ranked 89th out of all countries in the world. Zero point denotes the most corrupt country; the upper a country's rank, the less corruption is found and practiced in that country.[5]

Likewise, life and health insurances have been part of public needs and interest, so practicing them in a way which is in accordance with the Islamic law must be studied and eventually ruled with a government's regulation.[6] And so is the practice of human organ transplantation including the pretty recent breakthrough in medical treatment which is the stem cell therapy.[7] These are very few examples of contemporary crucial issues in our life in which an up-to-date perspective of Islamic law must be present.

The essential question about *maqāṣid* is a perennial issue as it is characterized by abundant questions such as: Is the Islamic law eternal or profane? Is it adaptable to a variety of occurring changes and modernization? Can it answer various new problems that arise? Is it capable to accommodate the changes and the process of modernization? There are a series of other questions closely related to the issue of *maqāṣid sharī'ah*, thus, discussing and elaborating this matter is still very relevant today.

Addressing the characteristic of Islamic law, there are two groups with different opinions. The first group comprising of some *fuqahā* (Islamic jurists) and a number of Islamologists concluded that the Islamic law is eternal. C. S. Hurgonje[8] and Joseph Schacht[9] belong to this group. They stated that, in accordance with its concept, development and methodology's characteristics, Islamic law was eternal, so, it was not adaptable to any form of social changes and process of modernization.[10] This view is not without any argument; what they said was based on these premises. First, Islamic law is eternal because the concept of law is authoritative, divine and absolute, so that it does not allow any change in it. Therefore, as a logical consequence of this concept, Islamic law is sacred, final, eternal, and it closes any door to changes. Second, Islamic law is eternal due to the nature of its origin and development where, in the formative period, it was untouched by any institution of law and social changes. Third,

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[4] See: K. M. Hakiki, 2016. 'Islam dan Demokrasi: Pandangan Intelektual Muslim dan Penerapannya di Indonesia', *Wawasan: Jurnal Ilmiah Agama dan Sosial Budaya,* 1, 1(2016): 1-17. DOI: 10.15575/jw.v39i1.583.

[5] A. Saputra, 'Indonesia Ranking 89 Indeks Persepsi Korupsi Dunia', *detikNews,* Jan 29, 2019. Available on: www.news.detik.com/foto-news/d-4405951/indonesia-ranking-89-indeks-persepsi-korupsi-dunia. Accessed on Jan 10, 2019.

[6] Uswatun Hasanah, 'Asuransi Dalam Perspektif Hukum Islam', *Asy-Syir'ah:Jurnal Ilmu Syari'ah dan Hukum,* 47, 1(2013): 239-268. Available on: 2019. www.asy-syirah.uin-suka.com/index.php/AS/article/download/63/63 Accessed on Jan 14, 2019.

[7] Boenjamin Setiawan, 'Aplikasi Terapeutik Sel Stem Embrionik pada Berbagai Penyakit Degeneratif,' *Cermin Dunia Kedokteran,* 153, (2014). Available online on: https://studylibid.com/doc/511580/aplikasi-terapeutik-stem-sel-embrionik-pada-berbagai-penyakit. Accessed on Jan 13, 2019.

[8] For more information about Hurgronje and his perception, see further in Christina Carvalho, *Christiaan Snouck Hurgronje: biography and perception,* MA thesis, (Amsterdaam: Universiteit van Amsterdaam, 2010), https://arno.uva.nl/cgi/arno/show.cgi?fid=168795. Accessed on Feb 1, 2019.

[9] Joseph Schacht, *An Introduction to Islamic Law,* (Oxford: Oxford University Press, 1996), p. 1.

[10] Muhammad Khalid Masood, *Shaṭibi's Philosophy of Islamic Law,* (New Delhi: Kitab Bhavan, 1998).

Islamic law is eternal because it does not develop any methodology for its changes.

The second group says that Islamic law can adapt to social changes and modernization. This group includes the majority of *fuqahā* (jurists) like Subhi Mahmasani[11] and a small number of Islamic law observers such as Linant Bellefond[12] and Coulson.[13] They argued that the principles of Islamic law that rest on the considerations of *maṣlaḥah* (the benefits to human kind), on *maqāṣid sharī'ah,* on the flexibility of law in practice, and on the emphasis of *ijtihād* (intellectual exercise),[14] show clearly that Islamic law is adaptable to social changes and modernization. What they said was also based on rational arguments. According to this group, Islamic law is purposed to achieve the benefit for mankind, therefore, it is supposed to be able to appreciate finely every social change and modernization for these two matters are considered taking parts in efforts to achieve *maqāṣid sharī'ah.* Hence, given the said purpose, Islamic law must be flexible.

Acknowledging it or not, actually the interaction between social changes and the Islamic law's theory has been taking place since the time of the Prophet Muhammad (pbuh). This interaction culminated during the time of enculturation between the Islamic culture and the Western one as a logical result of expansion efforts undertaken during the reign time of the Caliphs of the Prophet, Bani Umayyad, and Bani Abbasid. Hence, a renewal of Islamic law had occurred in the form of both its codification and modification. The renewal or modernization that took place in the body of Islamic law was based on the concepts of *maṣlaḥah* and *maqāṣid al-aḥkām* (purposefulness of regulations).[15]

A mature concept of *maqāṣid sharī'ah* was written by Imam al-Shaṭibi in his book *al-Muwāfaqāt fī Usūl al-Sharī'ah,*[16] 'Alal al-Fasi in *Maqāṣid Sharī'ah al-Islāmiyyah wa Makārimuhā,*[17] and Ibnu 'Ashur in *Maqāṣid Sharī'ah al-Islāmiyyah.*[18] These figures, among others, may be regarded as the initiators of *maqāṣid sharī'ah.* The contemporary Moslem scholars with their works about *maqāṣid sharī'ah* are, to name but few, Abdul Wahhab Khallaf, al-Raiṣuni, Sayyid Quṭb, Yusuf al-Qaraḍawi, and Jasser Auda.

This research was aimed to elaborate further the position of *maqāṣid sharī'ah* as the main reference and the ethical-spiritual foundation of the process of dynamization of Islamic law in facing contemporary issues. In so-doing, it elaborated the concept of *maqāṣid sharī'ah* and to observe the presence of flexibility, versatility, and dynamic

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[11] Subhi Mahmashani, *Falsafah al-Tashrī' fi al-Islām,* translated by Ahmad Soejono (Bandung: al-Ma'rifah, 1981).

[12] Y. Linant de Bellefonds, 'La Suppression des Juridictions du Statut Personnel en Egypte' [The Suppression of Personal Status Jurisdictions in Egypt], *Revue International du Droit Compare*, 8 no. 1 (1956), 412-425, https://www.persee.fr/doc/ridc_0035-3337_1956_num_8_3_10932. Accessed on Jan 13, 2019.

[13] N. J. Coulson, *A History of Islamic Law*, (New Jersey-USA: Aldine Transaction, 2011), p. 81.

[14] According to Arief, *ijtihād* is the exertion of mental energy in search for an Islamic legal opinion. In other words, *ijtihād* is the maximum effort expended by a Moslem jurist to apply *uṣūl al-fiqh* (principles of Islamic jurisprudence) in a purpose for discovering God's law. See further in Abdul Salam Arief, 'Ijtihad dan Dinamika Hukum Islam', *IN RIGHT: Jurnal Agama dan Hak Asasi Manusia,* 7(1): 1-15. (Yogyakarta: UIN Sunan Kalijaga, 2017). Available on: http://ejournal.uin-suka.ac.id/syariah/inright/article/view/1455. Accessed on Jan 19, 2019.

[15] More details can be traced further in any history book of Islamic civilization and books reviewing the periodicity of the formation of *fiqh* (Islamic jurisprudence). See, for example, Wael B. Hallaq, *The Origins and Evolution of Islamic Law (Themes in Islamic Law),* 1st ed. (Cambridge: Cambridge University Press, 2005); Labeeb Ahmed Bsoul, *Formation of the Islamic Jurisprudence: From the Time of the Prophet Muhammad to the 4th Century*, 1st ed. (London: Palgrave Macmillan. 2016); A. Halil Thahir, *Ijtihād Maqāṣidi: The Interconnected Maṣlaḥah-Based Reconstruction of Islamic Laws*, (Geneva: Globethics .net, 2019).

[16] Abu Ishaq al-Shatibi, and Daraz, Abdullah [ed.]. *Al-Muwāfaqāt fī Usūl al-Sharī'ah.* 4th ed. Beirut: Dār al-Ma'rifah, 1999.

[17] 'Alal al-Fasi, *Maqāṣid al-Sharī'ah al-Islāmiyyah wa Makārimuhā* (Rabath-Morocco: Maktabah al-Wahdah al-Arabiyyah, 1993).

[18] Muhammad al-Tahir Ibn 'Ashur, Maqāsid al-Sharī'ah al-Islāmiyyah. In *Treaties on Maqāsid al-Sharī'ah*, MT el-Mesawi (ed.), (London: The International Institute of Islamic Thought (IIIT), 2006).

characteristic of Islamic law. It was library research[19] type so the sources of this research were purely literature. The data collection in this research used the documentary technique.[20] According to Bailey, a documentary technique refers to the analysis of documents that contain information about the phenomenon we wish to study.[21] This method is, as Payne and Payne explained, used in investigating and categorizing physical sources, most commonly written documents, whether in the private or public domain.[22] Hadari Nawawi stated that a documentary technique is a way of collecting data through written heritages - especially in the form of archives and books,- about opinions, theories, arguments / postulates and others which have relations with the problems being researched.[23] In our research, we conducted in-depth study on some works (i.e. books) of previous Moslem scholars that discussed *maqāṣid sharī'ah,* including but not limited to al-Shatibi's *Al-Muwāfaqāt fi Uṣūl al-Sharī'ah,* al-Fasi's *Maqāṣid Sharī'ah al-Islāmiyyah wa Makārimuhā,* and Ibnu 'Ashur's *Maqāṣid Sharī'ah al-Islāmiyyah.* We also studied the works of contemporary scholars as previously mentioned: *Maṣādir al-Tashrī' al-Islāmi fī mā lā Naṣṣa fīh* by Abdul Wahhab Khallaf, *Naẓariyyāt al-Maqāṣid 'ind al-Imām al-Shaṭibi* by Ahmad al-Raishuni, *Al-'Adallah al-Ijtimā'iyyah fi al-Islām* by Sayyid Quṭb, *Al-Ijtihād fī al-Sharī'ah al-Islāmiyyah ma'a Naẓrāti Taḥlīliyyāt fī al-Ijtihād al-Mu'āṣir* by Yusuf al-Qaraḍawi, and *Maqashid Shariah as*

Philosophy of Islamic Law: A Systems Approach by Jasser Auda. Other scholarly works in the forms of books, articles, and journals were used to gain a better understanding on the theme of *maqāṣid sharī'ah.*

In analyzing the data obtained in this research, we used these procedures: 1) capturing the basic ideas of the primary sources, 2) highlighting those ideas through the perspective of research methods, 3) presenting various views and theories of secondary sources to sharpen and refine the analysis, and 4) performing a further analysis to develop a new one that has any relevance with the ideas. By conducting this last step, we expected to produce any findings and presumably an objective conclusion of the research.

Discussion
A. Understanding the Roles of Humankind

According to Islamic teachings, humans are a part of this universe, even they are trusted by Allah to become His vicegerents on the earth as His saying in QS al-Baqarah [2]: 30.[24] Hence, their existence is needed for the preservation of the earth until a specified time desired by Him. With such amazing advancement of science and technology, humans are capable to either perpetuate or destroy the earth in any aspect which, should they do they latter, is contradictary to what Allah wants as He desires the earth to remain eternal until the time comes for it to end.[25] Allah Himself has declared that Prophet Muhammad and the religion he brought with him was sent down by Him to humans with one great purpose which is as a blessing carrier for all creatures as His words in the Holy Qur'an Surah (QS) al-Anbiyā' [21]: 107 that reads: "*We sent thee not, but as a mercy for all creatures.*"[26]

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[19] According to Zed,'Library research is a research used library sources to get the data by utilizing the library sources (books, journals, newspapers, bulletins, micro films, magazines, etc.) to collect and analyse the data.' See further in: Mestika Zed, *Metode Penelitian Kepustakaan* (Jakarta : Yayasan Obor Indonesia, 2008).

[20] See: John W. Creswell, *Research Design,* 4th ed. (Thousand Oaks, CA: SAGE, 2014); Hadari Nawawi, *Metode Penelitian Bidang Sosial* (Yogyakarta: Gadjah Mada University Press, 1991), p. 133.

[21] K. D. Bailey, *Methods of Social Research.* 4th ed. (New York: The Free Press, 2007).

[22] G. Payne and J. Payne, *Key Concepts in Social Research.* (London: SAGE, 2004).

[23] See: Nawawi, *Metode Penelitian Bidang Sosial.*

[24] Abdullah Yusuf Ali, *The Meaning of the Holy Qur'an* (Maryland, USA : Amana Corporation, 1992), p. 24.

[25] Junaidi Lbs, 'Elastisitas Hukum Islam dalam Merespons Perubahan Sosial', *Madania,* 18, 1(2014): 67-78, p. 71. https://ejournal.iainbengkulu.ac.id/index.php/madania/article/view/4/4

[26] Ali, '*The Meaning of the Holy Qur'an'*, p. 818.

According to Hasan al-Turabi, the preservation of the earth is related to human existence, therefore, preserving the earth is done by preserving the human species.[27] The conservation of human *species* is pursued by establishing them to live in pairs between men and women to eventually have descendants *(tawallud)* and to breed *(tanāsul),* therefore human souls must be led by appropriate and effective rules since damaged human souls will cause damages on earth.[28]

Islam teaches universal basic norms that everyone is a part of and has a responsibility to the others, a part of the nature's creatures, and a part of the universal humanity. Therefore, a human being cannot escape from others, he/she needs to live in groups to defend themselves, to proliferate, and to exercise more comprehensive functions in order to fulfill the task of being Allah's vicegerent.[29] The smallest society is the family, then it adds up with other families to form a community, many communities eventually form a large group of people which is known as a nation or a state. Each person has different status based on their own function in life. This is what causes them to complement each other, the weak are protected, the rich can benefit from the poor. Humans are weak creatures as revealed by Allah in QS al-Nisā ' [4]: 28,[30] they are unable to fulfill their own needs, they must complement each other in addition to their dependence on other creatures in this world.[31]

Islam also teaches that humans are brothers since they come from one person namely Adam as in QS al-Nisā' [4]: 1,[32] then from Adam Allah created Eve as his wife, and from these two people all human beings originate. During his last pilgrimage the Prophet gave his sermon, among others he said on the day of 'Arafah: "*O people, know that your God is one, your ancestors are one. Do know there is no privilege for Arabs over 'Ajam (non-Arab) people, nor do 'Ajam over Arabs, there is no excess of red people over dark-skinned people, likewise dark-skinned people over red-skinned people except due to their fear of Allah.*"[33]

Such statement of the Prophet becomes an important principle in positioning mankind to be equal and of the same level. Ethnic, linguistic, and skin color differences due to differences in geographical factors are only signs to make it easier to recognize and to easily provide help as said by Allah in QS Al-Hujurāt [49]: 13: *"Indeed, the most noble person in Allah's side is the most pious. Men and women differ in unity. The achievements of each individual are judged by their piety and their ability to implement great benefits for others."* [34]

B. A Glance about Islamic Law

Throughout any history of mankind, a societal change with time is a natural phenomenon. No society is in a fixed condition at different times; all always move, flow, and head for an increasingly perfect civilization.[35] In realizing such a noble mission of creating a perfect civilization and fulfilling Allah's mandate to mankind to become His vicegerents and perpetuate the earth, proper regulations of man's life is needed. Allah has revealed such regulation through the teacings conveyed by all His Messengers. For Muslims, the rules are contained in their Islamic law which are different to other laws as previously mentioned.

The differences and specialties of Islamic law to other laws are: 1) the effect of Islamic law's benefit is not limited to the present time in this world but also it influences one's life in the hereafter. This is

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[27] Hasan al-Turabi, *Tajdīd al-Fikr al-Islāmi,* (Cairo: Dār al-Kutub, 1975), p. 75.

[28] Junaidi Lbs, '*Elastisitas Hukum Islam'*, p. 71.

[29] Ibid.

[30] Ali, '*The Meaning of the Holy Qur'an'*, p. 193.

[31] Abu Ja'far al-Thabari, *Jāmi' al-Bayān fī Ta'wīl al-Qur'ān*, Vol. 4, (Beirut: Dar al-Kutub, 2000), p. 32.

[32] Ali, '*The Meaning of the Holy Qur'an'*, p. 183.

[33] Imam Ahmad Ibn Hanbal, *Musnad Imām Aḥmad bin Hanbāl*. (Cairo, Muassasah Qurtubah. 1978).

[34] Ali, '*The Meaning of the Holy Qur'an'*, pp. 1342-1343.

[35] Junaidi Lbs, '*Elastisitas Hukum Islam'*, p. 67.

because Islamic law itself is created for the happiness in both lives, the present life and that of afterlife, 2) the benefit contained in Islamic law is not only related to material dimension (*maddiy*) but also to immaterial (*rūhiy*) one to humans, and 3) in Islamic law, the religious benefits is the basis for others. This implies that should a religious benefit conflict to a non-other one, the religious benefit must not be sacrificed.[36]

Islamic law is a law that is closely related to this change. In addition to bringing the role to change a society from its bad condition to a good one, this law is also a product of the change itself that is the result of contextual *ijtihād* by its scholars and practitioners from the time of the Prophet to the present day.[37] In the Prophet's days, religious matters were solved through revelation whereas worldly issues were solved through consultation with his Companions. In the Companions' era, *naṣṣ* (texts) from the Qur'an and Hadith became the reference, but the policies and decisions were obtained from consultations among them.

So is with what is happening at present, Islamic law is already much more developed than its initial inspiration but it is still preserved based on the texts of the Qur'an and Sunnah as the main sources of Islamic law. Thus, Islamic law is not an instant law given by God according to His desires, but it is the law that will develop step by step following and guiding the development of Muslim society in their time through *ijtihād* (religious reasoning) which is conducted by understanding the scriptures, analogizing new cases to existing ones which already have had their legal rules, and issuing new laws which are in line with the objectives of *sharī'ah*.[38]

According to Anwar, the process of legal reasoning in stipulating a legal rule for an issue involves three poles which have dialectical relations one to another: the text, the reality, and the objectives of law. The text with its symbolic characteristics and its relying upon generalization and abstraction in expressing an object enable the *mujtahid* (one that conducts *ijtihād*) to add a new meaning to it and this meaning is produced to an adequate understanding of the issue and the spatio-temporal space in which it happens on one hand and through considering the objectives of law as a meaning space on the other hand. The reality of the issue shades light in our understanding of the text, while the text in the same time gives us a clear orientation in coping with the reality.[39]

Attaching oneself to Islamic law can give glory to humans because Islamic law has the power that can shape humans into perfect beings or to humanize mankind. Islamic law, in its realization, is included in 2 (two) categories, first is *sharī'ah* which is permanent, clear, firm, and the truth is *qaṭ'iy* (certain), and applies universally, and second is *fiqh* which can accept changes, contains interpretation and the truth is a strong allegation of *mujtahid,* therefore, it is *zanniy* (interpretable) and applies to most. In Islamic law, this fiqh category is very elastic and responsive to the dynamics of society and changing times, so, with such nature, Islamic law can provide grounded and applicable solutions.[40]

The Holy Qur'an is the main source of Islamic law, however, as Wahyuni stated, not all of its text redactions have provided an understanding or rules which are *qaṭ'iy al-dilālah* (in a strict, certain, and detailed manner) which make it a ready-made package of rules that no longer requires detailed explanation. Factually, the reality shows that there are quite a lot of verses in the Qur'an with text redactions that are *mujmal* (global/undetailed), *khafī* (unclear), or *mushkīl* (abstruse) and even, in many cases,

[36] Bakrie, *Konsep Maqashid Syari'ah*, p. 64; cf: Sya'bani, *'Maqashid al-Syari'ah sebagai Metode Ijtihad'*, p. 130.

[37] Muhammad Salīm al-Awwa, *al-Fiqh al-Islāmī fi Ṭarīq al-Tajdīd*, (Beirut: al-Maktab al-Islāmī, 1419/1998), p. 4.

[38] Muhammad Salam Madkur, *Al-Ijtihād fī al-Tashrī` al-Islāmī*, (Cairo: Dār al-Nahḍah al-`Arabiyyah, 1983), pp. 58-62.

[39] Syamsul Anwar, 'Dalālah al-Khafī wa Āliyāt al-Ijtihād: Dirāsah Uṣuliyyah bi Iḥālah Khāṣṣah ilā Qaḍiyah al-Qatl al-Raḥim', *Al-Jami'ah : Journal of Islamic Studies*, 41, 2(2003): 153-170, p. 154. https://aljamiah.or.id/index.php/AJIS/article/view/1093/338

[40] Junaidi Lbs, 'Elastisitas Hukum Islam', p. 77.

the Qur'an only exposes universal norms and values. To practice such verses would certainly require further explanation and details. This fact is not seen as a shortage of the Qur'an, but rather it is an advantage that makes it to be always *up to date* and relevant to every place and era in line with its position as the source of the last celestial *sharī'ah*.[41]

Hence, Islamic law as practiced until nowadays is a dynamic law stipulated by Muslims on the basis of their understanding of revelation.[42] Such understanding and interpretation of revelation and adjustment to the time context is called *fiqh*, and this *fiqh* is what is known as *al-ḥukm al-Islām* (Islamic law). The term *al-ḥukm al-Islām* (Islamic law) appeared to distinguish it from other laws. In the classic books of *uṣūl fiqh*, such term was not popular and it was only found once in *al-Nubżat al-Kāfiyah* by Ibn Hazm al-Zāhirī on Volume I page 59. In *al-Furūq*, a book by As`ad ibn Muhammad ibn al-Husayn, it was mentioned three times whereas in *al-Manthūr fī al-Qawā'id* of Muhammad ibn Bahādur al-Zarkashi it was mentioned once.[43]

The term of Islamic law is often understood as a translation of the terms *fiqh* and *al-sharī'ah al-Islāmiyyah*. Factually, each of these terms has its own framework. Therefore, in various posts and forum, the contemporary Islamic scholars often pay efforts to describe each term so that they can be distinguished and placed proportionately.[44]

Broadly speaking, the method of conducting *istinbāṭ* (searching for legal cause) in *uṣūl fiqh* (fundamentals of Islamic law) is divided into three parts, namely: *ṭarīqah al-ijtihād al-bayāni* (a semantic/linguistic *ijtihād* method), *ṭarīqah al-ijtihād al-tawfīqi* (reasoning towards conflicting religious propositions), and *ṭarīqah al-ijtihād al-ta'līli* (reasoning employs legal causes/purposes), one of which is the method of *maqasid al-sharī'ah*.[45] The *maqāṣid al-sharī'ah* method was developed to achieve the ultimate goal of establishing and implementing Islamic law, namely the benefit to humanity.

Ṭarīqah al-ijtihād al-bayāni is a method of ijtihad or legal discovery by explaining *naṣṣ* (texts) that already exist through linguistic / semantic reasoning or approaches to these texts, which are carried out by : 1) looking at the obviousness of a statement contained in the texts of the Qur'an and the Hadith, 2) showing the meaning contained in the texts of of the Qur'an and the Hadith, 3) observing its broadness and narrowness of a statements contained in the texts of of the Qur'an and the Hadith, and 4) looking at the forms of *taklīf* (law imposing) contained in the texts of of the Qur'an and the Hadith.[46]

Tarīqah al-ijtihād al-tawfīqi is the method of stipulating a law by synchronizing the conflicting texts of the Qur'an and the Hadith. This method of ijtihad can be done in three ways, namely: *al-jam'u* (compromising), *al-naskhu* (aborting), and *at-tarjīh* (reinforcing).[47] Meanwhile, *tarīqah al-ijtihād al-ta'līli* is the method of legal discovery by finding the legal causes or purposes contained in the texts of the Qur'an and the Hadith. This *ta'līli* pattern is divided into two, namely *ta'līlu al-aḥkām bi al-'illah* (discovering a law based on its causes) and *ta'līlu al-aḥkām bi maqāṣidi al-sharī'ah* (discovering a law based on its purposes).[48]

According to Hazri, *maqāṣid* should enlighten the path of *uṣūl al-fiqh* for the *uṣūl* has become burdened with technicalities.

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[41] Afidah Wahyuni, 'Teori Tafsir dalam Perspektif Kebahasaan: Terminologi Tafsir, Ta'wil Dan Ta'lil', *Mizan: Jurnal Ilmu Syari'ah*, 4, 2(2016): 225-252, p. 226. https://www.jurnalfai-uikabogor.org/index.php/mizan/article/view/172/87

[42] Abd al-Rahman ibn Khaldun, 'Muqaddimah', In *Muqaddimah*, Masturi Irham (trans.), (Jakarta: Pustaka al-Kautsar, 2001).

[43] Junaidi Lbs, 'Elastisitas Hukum Islam', p. 68.

[44] Suansar Khatib, 'Eksistensi Nasakh dalam Implementasi Elastisitas Hukum Islam', *Madania*, 18, 1(2014): 79-86, pp. 79-80, https://ejournal.iain bengkulu.ac.id/index.php/madania/article/view/3; cf. Jaih Mubarok, Dinamika Pemikiran Hukum Islam di Indonesia', *Jurnal Unisia*, 48/XXVI/II(2003): 103-121, p. 103. https://journal.uii.ac.id/Unisia/article/download/5290/4708 Accessed 20 March 2020.

[45] Anwar, *'Dalālah al-Khafī wa Āliyāt al-Ijtihād'*, p. 157.

[46] Ibid, pp. 157-158.

[47] Ibid, p. 158.

[48] Ibid, p. 158.

Through the retrieval of the underlying objectives of the *sharī'ah*, it is hoped that such difficulties can be overcome. Yet, a historical look at the development of Islamic law reveals the centrality of *ijtihād*.[49]

C. Understanding *Maqāṣid Sharī'ah*

The term *maqṣid* (plural: *maqāṣid*) refers to *a purpose, a principle, an objective, an intent, an end, a goal, telos* (Greek), *finalité* (French), or *Zweck* (German).[50] It is derived from the verb *qaṣada-yaqṣudu* and contains different meanings, i.e. leading to one direction, goal, middle-way, fair, consistent, do not exceed the limits, a straight path, a midway between exageration and insufficiency.[51]

Meanwhile, as explained by Thahir, etymologically, *sharī'ah* means *al-'utbah* (twist of valley), *al-'atabah* (a doorway and a stair), *mawrīd al-sharīah* (a path where a drinker is looking for water), and *al-ṭarīq al-mustaqīmah* (a straight path).[52] The use of the term *sharīah* referring to the meaning *mawrid al-sharī'ah* can be found in the words of the Arabs: *shara'at al-ibil,* which means the camel goes out into the water source to drink[53] whereas its meaning as *ṭarīqah al-mustaqīmah* is found in QS al-Jāthiyah [45]: 18 that reads: *"Then We put thee on the (right) way of religion; so follow thou that (way), and follow not the desires of those who know not."*[54]

For Moslems, *sharī'ah* means religion, *al-ṭarīqah al-mustaqīmah* (the straight path), and *al-nuṣuṣ al-muqaddas* (the sacred texts) from the Qur'an and Sunnah.[55] Schacht says that *sharī'ah* is "the sacred law of Islam." He goes further, by stating that *"It is an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all aspects; it consists of ordinances regarding worship and ritual, as well as political and (in the narrow sense) legal rules."*[56] So, *maqāṣid sharī'ah* may shortly be defined as the objectives / purposes behind Islamic law enactment.[57]

The knowledge of *maqāṣid al-sharī'ah* is very important. Understanding *maqāṣid al-sharī'ah* can be used as a tool in understanding the redaction of the Holy Qur'an and the Sunnah/Hadith. It may also help to settle the conflicting arguments (*ta'ārud al-dilālah*) that may be found in those two textual Islamic sources of law, and can also be used as a method for establishing a law in cases where legal provisions are not provided either in the Qur'an or the Sunnah.[58]

In *uṣūl al-fiqh*, the objectives or purposes of Islamic law are often referred as *maqāṣid sharī'ah* which is actualized through reflecting fundamental values in Islamic laws namely: preserving one's religion, life, intellectual, lineage, property, honor, and environment. *Maqāṣid sharī'ah* is also mentioned in various terms, namely *maqāṣid al-sharī'*, *maqāṣid al-sharī'ah*, and *al-maqāṣid al-shar'iyyah*.[59] Essentially, these different forms of expression imply the same meaning which is the purposefulness or

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[49] Tengku Ahmad Hazri, 'Balancing Text and Context through Maqasid-based Ijtihad', *Islam and Civilisational Renewal,* 6, 3(2015): 422-426, p. 442. https://icrjournal.org/index.php/icr/article/view/507/468

[50] Auda, '*Maqashid Shariah as Philosophy of Islamic Law',* p. 2.

[51] Muhammad Amin Suhayli, *Qawā'idah Dar'u al-Mafāsid awlā Min Jalb al-Maṣāliḥ Dirāsah Taḥlīliyyah*, (Cairo: Dar al-Salam, 2010), p. 64, as quoted by Thahir, *Ijtihād Maqāṣidi*, p. 19.

[52] Sha'ban Muhammad Isma'il, *al-Tashrī' al-Islāmī: Maṣdaruh wa Aṭwāruh*, (Cairo: Maktabah al-Nahḍah al-Miṣriyyah, 1985), p. 7; Kamil Musa, *al-Madkhal Ilā al-Tashrī' al-Islāmī*, (Beirut: Muassasah al-Risālah, 1989), p. 17; cf.: Thahir, *Ijtihād Maqāṣidi*, p. 95.

[53] Ibid.

[54] Ali, 'The Meaning of the Holy Qur'an', p. 1297.

[55] Ibid. For Sunnah, see Muhammad Abdul Rauf, 'Al-Hadith: Its Authority and Authencity', *IIU Law Journal,* 1, 1(1989): 1-50.

[56] Schacht, '*An Introduction to Islamic Law'*, p. 1.; cf.: Kamaruzzaman Bustamam-Ahmad, (2007). The Application of Islamic Law in Indonesia: The Case Study of Aceh, Journal of Indonesian Islam, 1(1): 135-179, p. 142. DOI: 10.15642/JIIS.2007.1.1.135-180

[57] Auda, '*Maqashid Shariah as Philosophy of Islamic Law'*, p. 2.

[58] Sya'bani, *'Maqashid Al-Syari'ah sebagai Metode Ijtihad',* p. 138.

[59] Ahmad al-Raiṣuni, *Naẓariyyah al-Maqāṣid 'indal Imām al-Shaṭibi,* (Riyadh: Dār al-Ilmiyyah li al-Kitāb al-Islāmi. 1992), p. 17.

objective of the enactment of Islamic law. In general, the scholars of Islamic law interpret *maqāṣid sharī'ah* as the essence of Islamic law's enactment.[60] Najm al-Din al-Tufi (d. 716 H/ 1216) defines *maṣlaḥah* as what fulfills the purpose of Allah, the Law Maker (*al-Shāri'*). Meanwhile, al-Qarafi (d. 1285 H/ 1868) connected *maṣlaḥah* and *maqāṣid* with the rules of *uṣūl fiqh* which state: *'A purpose of law (i.e. maqāṣid sharī'ah) is invalid unless it delivers to the fulfillment of benefit or avoids harm'.*[61] Al-Fasi, as quoted by al-Raiṣuni, said:

> 'What is meant by *maqāṣid al-sharī'ah* is the objectives of *sharī'ah* and the secrets that have been set by *al-Shāri'* (God) in any provision of His laws.'[62]

And, the general principle of *maqāṣid al-sharī'ah* is emphasizing the importance of *jalbu al-maṣāliḥ wa dar'u al-mafāsid* (attaining benefits and resisting harms). In this case al-Raisuni said:

> 'In general, *maqāṣid* is preserving the rules, attracting benefits, resisting harms, establishing an equality among human beings and establishing *sharī'ah* (Islamic law) as an authoritative and obeyed law. On the other hand, it can also make the (Moslem) people as a community which is strong in quality, respected (by other people) and soothing. So, actually, *maqāṣid al-sharī'ah* is the purpose of the enactment of Islamic law which has to be realized for the sake of people as a whole.'[63]

D. A Brief Genealogy of *Maqāṣid Sharī'ah*

The literature exploration shows that the essence of *maqāṣid sharī'ah* in the form of *maṣlaḥah* or any other formalized various terms having the sense of *maqāṣid* has been present since the days of the Prophet Muhammad (pbuh) and his Companions, especially 'Umar ibn Khattab and other guided caliphs (i.e. Abu Bakr, 'Uthman and 'Ali) as narrated in a number of events. This is so because basically *sharī'ah* which is revealed through the Prophet Muhammad (pbuh) brings benefits to mankind that must be probed not only through textual propositions. Those benefits actually has existed since the Qur'anic verses were revealed and has also been contained in the Sunnah (hadith/traditions) of the Prophet. This is because basically *maqāṣid sharī'ah* never leaves the texts but always accompanies it.[64]

One of the most popular examples was a *mutawātir* (wellknown, narrated by many) hadith about praying 'Asr in Bani Quraiẓah.[65] The Prophet sent a delegation of Companions to Bani Quraiẓah and ordered them to perform the 'Asr prayer there.[66] However, the usual time for conducting 'Asr prayer was almost gone and they had not yet managed to arrive at Bani Quraiẓah's place. At that time, the Companions were divided into supporters of two different opinions: the first adhered to performing the prayer in Bani Quraiẓah's place with any consequence whatsoever, while the second group insisted on performing the prayer while on the trip before the time for 'Asr prayer ran out.

The argument behind the first opinion was that the Prophet's command textually asked everyone to carry out the 'Asr prayer in Bani Quraiẓah's place, while the rationalization of the second opinion was based on 'the intention/purpose' contained in the Prophet's command which was to ask the Companions to rush to Bani Quraiẓah's place and not intended to postpone the 'Asr prayer

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[60] 'Alal al-Fasi, *Maqāṣid al-Sharī'ah al-Islāmiyyah wa Makārimuhā* (Rabath-Morocco: Maktabah al-Wahdah al-Arabiyyah, 1993).

[61] Syihab al-Din al-Qarafi, *al-Żākirah,* vol. 5, (Beirut: Dar al-'Arab, 1994), p. 478. See also: Jasser Auda, *Membumikan Hukum Islam melalui Maqasid Syariah,* 1st ed., translated by Rosidin and 'Ali 'Abd el-Mun'im, (Bandung: Mizan Media Utama, 2015), p. 33.

[62] al-Raiṣuni, *Naẓariyyah al-Maqāṣid,* p.18.

[63] *Ibid,* pp.18-19.

[64] Nur Hasan, 'Maqashid Syari'ah di Masa Awal Islam', *Alif.id*, May 3, 2019. Available online: https://alif.id/read/nur-hasan/maqashid-syariah-di-masa-awal-islam-b217904p/ accessed May 5, 2019.

[65] The incidence took place around the 7th of Hegira. The location was about a couple of miles from Medina City. See further: Jasser Auda, *Maqāṣid al-Sharī'ah: Dalīl li al-Mubtadi'īn,* (London: al-Ma'had al-Alami li al-Fikr al-Islami (IIIT), 2008b).

[66] Muhammad al-Bukhari, *al-Ṣaḥīh,* edited by Musthofa al-Bugha, 3rd ed., (Beirut: Dar Ibn Katsir, 1986), p. 321.

until the end of its normal time. According to narrators of the hadith, when the Companions reported the incidence to the Prophet, the Prophet (pbuh) confirmed the truth of the two opinions. The Prophet's *taqrīr* (acknowledgment), as later practiced by Islamic jurists and scholars, shows the permissibility and truth of having different points of view.[67]

The only scholar who disagreed with the Companions who performed the said prayer on their trip was Ibn Hazm al-Ẓahiri (a prominent jurist of the Ẓahiri school of thought). He opinioned that those Companions should have performed the 'Asr prayer after arriving at Bani Quraiẓah as told so by the Prophet eventhough such was done after midnight.[68] The above example illustrates an early history of the concept of *maqāṣid sharī'ah* in the application of Islamic law and the arising implications from giving fundamental position on *maqāṣid* which had existed even at the time of the Prophet and his Companions.

The Quran as the transcendental source of Islamic teachings provides an important foundation namely *the principle of governing the interest of people* in every enactment of its legal regulation.[69] Among the evidences of mainstreaming *maqāṣid* or *maṣlaḥah* in every law enactment and in verses' textuality is that the texts only explain basic principles in the enactment of practical laws, whether civic, crime, economic, politics, and any other regulation. In some verses, there explained the law of an issue together with its wisdom either openly or not, for example: the verses about gambling and wine[70], those regarding alms or charity,[71] and those discussing women's menstruation.[72] This shows the importance of seeking benefits (for mankind) in the objectives of law which becomes a fundamental principle of Islamic law. Many texts of the Quran only state the general principles of law such as *al-aṣlu fī al-ashyā'al-ibāḥah* (the original status of anything is permissible),[73] the verses on the fundament of law implementation explaining *rafʿul ḥaraj wa taysīr* (lifting difficulties and promoting ease),[74] and the verses about liability to perform obligations and conveying rights to their owners.[75]

During the period of the Prophet's Companions, the need for *maqāṣid* was felt even more. This was due to the fact that there present a lot of problems that needed definitive legal answers remembering that after the expansion of Islam to various places, many Companions scattered in different areas. They found differences in customs and cultures from one place to another. Consequently, they, as *warathah al-anbiyā'* (the heirs of the Prophets) had a very urgent role in continuing the Prophet's duty to propagate Islam. They had been trained well since they accompanied the Prophet during his lifetime. So it's not surprising that they could have a powerful potency in capturing and applying *maqāṣid* in every process of performing *ijtihād*.

Implementation of *maqāṣid shari'ah* during their time could be found in many occasions: electing Abu Bakar as the first caliph, forbidding Abu Bakar from conducting business due to his public position by allocating for him some wages in return, not executing a sanction of cutting off the thieves' hands during the time of long

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[67] Yunal Isra, 'Maqashid Syari'ah dalam Ijtihad Para sahabat Nabi,' *Bincang Syariah*, July 30, 2018. Available on: https://bincangsyariah.com/kalam/maqashid-syariah-dalam-ijtihad-para-sahabat-nabi/ accessed on Feb 28, 2019.

[68] 'Ali Ibnu Hazm, *Al-Muḥallā*, Vol.3, 1ˢᵗ ed., edited by Lajnah Ihya al-Turats al-'Arabi (Beirut: Dar al-Afaq, [n.d.]), p. 29.

[69] Wael. B. Hallaq, *The Origins and Evolution of Islamic Law (Themes in Islamic Law)*, 1ˢᵗ ed. Cambridge: Cambridge University Press, 2005. p. 84.

[70] The Holy Qur'an, Surah al-Maidah [5] : 91, Ali, '*The Meaning of the Holy Qur'an'*, p. 277.

[71] Surah al-Tawbah [9] : 103, Ali, *The Meaning of the Holy Qur'an*, p. 468

[72] Surah al-Baqarah [2] : 222, *ibid*, pp. 89-90.

[73] Surah al-Baqarah [2] : 29, *ibid*, p. 23

[74] Surah al-Baqarah [2] : 173, Surah al-Baqarah [2] : 185, Surah al-Nisā' [4] : 28, Surah al- Māidah [5]: 6, Surah al-Ḥajj [22] : 78, *ibid*, pp. 68-69, 74, 193, 247-248, and 842 respectively.

[75] Surah al-Nisā' [4] : 58, Surah al-Isrā' [17] : 34, Surah al-Ḥajj [22] : 29, *ibid*, pp. 203, 683, and 829 respectively.

drought,[76] and so forth. In formulating the rules of life of Muslims at that time, they looked for support in the verses of the Quran and the hadiths of the Prophet. If they did not find any from both that correspond to the problems that exist, then they conducted *ijtihād* by looking for the lessons contained in the verses of the Qur'an and the hadiths of the Prophet.

One of events that arose after the Prophet Muhammad passed away was about Ḥuẓaifa's marriage to a Jewish woman. 'Umar bin Khattab, who heard that Ḥuẓaifa had married this Jewish woman asked him to divorce her. Since Ḥuẓaifa knew that marrying a woman of scripture was permissible, he asked 'Umar: "*Is the woman ḥaram (unlawful) for me* ?" Then 'Umar answered him that it was not *ḥaram* to marry to a woman of scripture, but rather, he was worried that other Companions would follow him because generally Jewish women had a more beautiful appearance. If this happened, it could cause slander for Muslim women and nurture free sex practices in society since there would be a large number of unmarried Muslim women.[77]

Just like the Companions, *tābi'īn* (the generation right after the Companions) always related practicing Islamic law to *maqāṣid*. This is because because they studied and took methods directly from the Companions. Whenever they found no text regarding a specific issue, they took *maṣlaḥah* (benefits) and *qiyās* (analogue). As Ibrahim an-Nakha'i ever said, "*Surely the laws of Allah have a purpose namely ḥikmah (wisdom) and maṣlaḥah (benefit) that returns to us*".[78] The pattern of *maqāṣid* during the *tābi'īn* period was reflected by the strong two schools of thought, namely the school of Hejaz and one of Iraq. They both practiced the fundaments of *maṣlaḥah* in producing legal decisions. In addition, different

circumstances between the period of the Companions and *tābi'īn* encourage the latter to perform *istinbāṭ* (searching for legal cause) with any device of *maṣlaḥah*.

A clear example is the problem of *tas'īr* (setting up a price as a general benchmark) when prices of needs rise. *Tābi'īn* such as Sa'id bin al-Musayyab, Rabi'ah bin Abdul Rahman, and others issued a *fatwā* (a religious advice) that *tas'īr* is permissible. The Prophet (pbuh) himself was reluctant to set up a fixed price even at a time when prices rose since *tas'īr* contained elements of unwillingness from the capital/merchandise owners. However, *tabi'īn* explained that the contextual situations that occurred at the time of the Prophet (pbuh) and what happened in their time were different. They explained that the rising prices of daily necessities during the time of the Prophet (pbuh) was triggered by changes in natural conditions in the form of long droughts, so there was no urgent need at that time. Whereas, in the context of the *tabi'īn* period, the price increase was triggered by the spread of stockpiling, traders' greed, and weak religious tendency. So, such condition required the regulation of general pricing to maintain balance and avoid hoarding practices. These two examples are mostly explained in the books of hadith such as *Sunan Ibn Majah* and Imam Malik's *Al-Muwaṭṭa'* as well as being an important discussion in the books of both classical and contemporary *fiqh*.[79]

Taking such method in decision-making on a new issue, after the death of the Prophet (pbuh), by adhering to the texts of the Qur'an and hadith as well as holding the essence of *maqāṣid shari'ah* like this continues from the time of the Companions, *tābi'īn*, *tābi'ut tābi'īn* (the generation right after *tābi'īn*), the imam of *maẓāhib* (schools of thought), and so forth up to our present time.

Observing the period of *al-a'immah al-mujtahidīn* (the *imāms* of *ijtihād*), the essence of *maqāṣid* can be found in the methodology of their *istinbāṭ*. In Maliki's school, *fiqh maṣāliḥ* (jurisprudence based on attaining

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[76] See: Moh. Khasan, 'Kedudukan Maqashid al-Syari'ah dalam Pembaharuan Hukum Islam', *Dimas* 8, 2 (2008): 296-314, p. 309; Nuruddin Amier, *Ijtihād Umar bin Khattab*.(Jakarta: Rajawali Pers, 1987).

[77] Hasan, 'Maqashid Syari'ah', 2019.

[78] See: Syihāb al-dīn Ahmad ibn 'Alī ibn Hajar al-Asqalānī, *Tahẓīb al-Tahẓīb* (Beirut: Dar al-Fikr, 1995).

[79] Hasan, 'Maqashid Syari'ah', 2019.

benefit) was very famous because the results of jurisprudence based on the principle of attaining benefits predominated. Imam Abu Hanifah took *maqāṣid* through *qiyās, istiḥsān* and *'urf*. Similarly, Imam Shafi'i did so through *qiyās* whereas Imam Ahmad ibn Hanbal and Imam Malik did so through *qiyās, maṣāliḥ mursalah, shadd al-żarī'ah,* and *fatḥ al-żarī'ah*. So, to summarize, it can be said that all scholars of major schools agreed to use *maqāṣid syarī'ah* as a legal foundation except the *Ẓahiriyyah* group that just stuck to texts only. They did so since they rejected the presence of *ta'līl* and *qiyās*. However, even so, they still used *maqāṣid* limited to those which were mentioned by texts alone.[80]

The research carried out by Ahmad al-Raiṣuni found that the first person used the term *maqāṣid al-shar'īy* was Abu al-Ma'ali Abd al-Malik Ibn Abdullah Imam al-Haramain al-Juwayni, (d. 478 H / 1085) in his book *al-Burhān fi Uṣūl al-Fiqh*.[81] The book is also known as *al-Kulliyyah al-Khams* and *al-Uṣūl al-Sharī'ah*.[82] Based on the works of previous scholars, Imam al-Shaṭibi explained and concluded that all scholars agree that Allah establishes various law provisions with a purpose to maintain the five basic elements of human *(al-ḍarūriyyat al-khams)* namely: preserving one's religion, life, intellect, descendants, and property. These five elements are also known as the principal objectives of law *(al-maqāṣid al-shar'iyyah)*[83] whereas Imam al-Ghazali named them *al-uṣūl al-khamsah*.[84] Al-Ghazali went on to explain that anything which is aimed to maintain those basic five is

al-maṣlaḥah, whereas on the contrary, anything which contradicts to it is regarded as an opponent of *al-maṣlaḥah,* namely *al-mafsadah* (harms). Rejecting *mafsadah* itself is also an *al-maṣlaḥah*.[85]

Meanwhile, Taj al-Din 'Abd al-Wahhab Ibn al-Subki, who was usually called as Imam al-Subki (d. 771 H/ 1370) added one other objective of law namely preserving one's honor *(hifẓ al-'irḍ),* so it is called *al-kulliyyah al-sitt*[86]. Before him, al-Qarafi (d. 694 H/ 1295) was the first scholar to use the term and he grouped it into the fifth objective (i.e. preserving one's property).[87]Likewise, a contemporery scholar, Sa'id Ramaḍan al-Buti, also stated that the purpose of *sharī'ah* is to preserve one's religion, life, intellect, descendants, and property.[88]

The scholars also agreed that the scale of priority in implementing laws that are prescribed in Islam is consistent with the order of preserving those five types of basic elements. In other words, preserving one's religion takes precedence over preserving one's life, preserving one's life takes precedence over preserving one's intellect, and so on. In summary it can be said that there are some scholars who itemize the objectives of laws into those five basic elements, some others detail them into six types, and some others do not develop them in detail at all.

Maqāṣid shari'ah proposed by al-Shatibi[89] is actually a follow-up of the concept of *maṣlaḥah* that had emerged in major works of *uṣūl fiqh* before him. In other words, the embryos or genes of *maqāṣid*

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[80] See further: Iffatin Nur, *Maqashid al-Syari'ah: Telaah Asal Usul dan Perkembangan Konsep Maqashid al-Syari'ah al-Syathibi*, Doctorate diss. (unpublished). (Jakarta: UIN Syarif Hidayatullah, 2008).

[81] 'Abd al-Malik ibn Yusuf Abū al-Ma'ālī al-Juwaynī, *Al-Burhān fī Uṣūl al-Fiqh* (Cairo: Dār al-Anṣār, 1400 H/1980).

[82] See: al-Raiṣuni, *Naẓāriyyah al-Maqāṣid*, p. 38.

[83] *Ibid*, p. 39.

[84] Abu Hamid al-Ghazali, Al-Mustaṣfā min 'Ilm al-Uṣūl. In *Al-Mustaṣfā min 'Ilm al-Uṣūl: On Legal Theory of Moslem Jurisprudence,* AZM Hammad (trans.), (Carolina: Create Space Independent Publishing Platform, 2018), pp. 286-287.

[85] *Ibid*, p. 287

[86] Taj al-Din 'Abd al-Wahhab Ibn al-Subki, *Hashīah al-'Allamah al-Bannāni 'alā Matn Jam'i al-Jawāmi,* chapter II, (Cairo: Dar Ihya' al-Kutub al-'Arabiyyah, [n.d.]), p. 280.

[87] Shihab al-Din Ahmad ibn Idris al-Qarafi, *Sharḥ Tanqih al-Fusūl,*(Cairo: Maktabah al-Kulliyah al-Azhar and Dar al-Fikr, 1973), p. 391. More details, see: al-Raisuni, *Naẓāriyyah al-Maqāṣid,* pp. 50-51. Compare also: al-Juwayni, *al-Burhān fi Uṣūl al-Fiqh,* p. 1551.

[88] Said Ramaḍan al-Buti, *Ḍawābit al-Maṣlaḥah fi al-Sharī'ah al-Islāmiyyah* (Beirut: Muassasah al-Risālah, 1990), p. 27.

[89] See further: al-Shatibi and Daraz [ed.]. *Al-Muwāfaqāt*, 1999.

shari'ah had existed since the time of the Prophet (pbuh) and the Companions. Ibn 'Ashur added that the validity of the concept of *maqāṣid* as a tool for legal formulation lies on the extent of the certainty and closeness of the science of *maqāṣid* to the predicate of *qaṭ'ī* (certain).[90] On this basis, the concept of *maqāṣid sharī'ah* he offered stood upright and on this basis as well he dared to make a valuable breakthrough and contribution to the next generation in studying and formulating the format of *maqāṣid sharī'ah*.

The validity of this statement had been supported by a historical, systematical, and periodical reviews starting from the time of the Prophet, the Companions, the *tābi'īn*, the *mujtahidīn* up to those who were closest to the time of al-Shatibi and goes further until the present day with the emergence of contemporary scholars like Abd al-Wahhab Khallaf, Ahmad al-Raiṣuni, Yusuf al-Qaraḍawi, and Jasser Auda, to name but few. The result of literature exploration shows that *maṣlaḥah* has been the essence of *maqāṣid* shari'ah.

E. *Maqāṣid Sharī'ah* as The Main Reference and Ethical-Spiritual Foundation for the Dynamization Process of Islamic Law

Nowadays, the contemporary *ijtihād* (religious reasoning) becomes a primary requirement even al-Qaradawi stated that its status is *farḍu kifāyah* (a collective obligation)[91] especially in the today's era with its dynamic problems and rapid technological advancement. The old and classic methods and approaches in providing legal solution will experience difficulties in solving contemporary cases. Hence, it is understood that we are in the need of having right devices to conduct *ijtihād* and updating methods used to be able to compensate for the progressive development of society and the dynamics of the demands of the era. In this regard, the method of *maqāṣid al-*

shari'ah is considered capable of dialogueing and offsetting the progress of contemporary era.[92]

Every law of God contains its objectives, both special objectives ('*illāt* and *ḥikmah*) and general ones (*maqāṣid 'āmmah*), which are to realize benefits to mankind. Any law which generally realizes benefits to mankind means realizing *maqāṣid sharī'ah*. Thus, it appears in the concept of *maqāṣid sharī'ah* the flexibility, versatility, and dynamics of the Islamic law. At the same time, it also opens the minds of those who state that the Islamic law is immutable, doctrinal, eternal, and final which is impossible to be adapted to various forms of social change and modernization.

From the series of trip of *maqāṣid* from time to time, it can be concluded that *maqāṣid* has a very urgent position in the process of *ijtihād* and this is supported by a variety of texts, theorems, logic and realities that are present which are aimed for human benefit not just in this world but until the hereafter. In fact, acknowledging that the dimension of *maqāṣid* in the study of Islamic law is so important, a number of scholars of Islamic law actually put it as one of the main requirements for someone that performs *ijtihād*. Again, al-Raiṣuni emphasized it by saying:

> 'For the first time and within certain limits which can be observed, we find that the first requirement to attain the degree of performing *ijtihād* is to understand *maqāṣid al-sharī'ah* properly. And we also find that the second one, which is also the last which also should not be out of the understanding of *maqāṣid*, is the possibility of performing *istinbāṭ* of Islamic law based on the understanding of *maqāṣid al-sharī'ah*.' [93]

It aims to avoid a condition that a person performing an interpretation or reasoning (on Islamic law) gets trapped in the

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90 Ibn 'Ashur, *Maqāṣid al-Sharī'ah al-Islāmiyyah*..

91 Yusuf al-Qardhawi, *Ijtihād al-Mu'āṣir Bayna al-Indibāṭ wa al-Infirāṭ*, (Cairo: Dār al-Tauzi wa al-Nashr al-Islāmiyah, 1994), p. 34.

92 S. Safriadi, 'Maqāṣid al-Sharī'ah sebagai Metode Ijtihad Kontemporer', *Al-Qadha*, 4, 2(2018):1-16., p. 1-2. https://journal.iainlangsa.ac.id/index.php/qadha/article/view/309

93 al-Raisuni, *Naẓāriyyah al-Maqāṣid*, p. 353

laws which are particular *(juz'iyyāt)* only and ignores *maqāṣid al-sharī'ah*. In this regard, al-Qaraḍawi[94] reminded us by saying:

'Understanding the purposefulness of Islamic law *(maqāṣid al-sharī'ah)* is an important thing so that one does not get caught up in a mistake of only paying attention to laws that are partial *(juz'iy)* without giving due regards to the purposes of laws that are universal *(kulliy)*. Otherwise, the law will only lead (us) to a mixing up and confusion.'

As a method, *maqāṣid al-sharī'ah* provides a perspective of reasoning in solving the problems of Islamic law, particularly those regarding to *mu'āmalah* (worldly transaction among people) in the religious life of a plural society. To arrive to the efforts of solving such laws, the thing that must be carried out by a *mujtahid* is focusing his/her attention to the purpose of law *(maqāṣid)* contained in the Quran and the Sunnah. So, the focus is not on its letters, but on the objectives of law itself that should be the main axis. In this case, the important thing is how to find and formulate the ideals of the ethics and moral of law contained on the verses and not its specific legislation or literal formulation.[95] In other words, it is *maqāṣid al-sharī'ah* or the ideals of ethics of laws that must be explored and given attention when establishing or taking any conclusion on law whether they are contained within the verses or in the context of the verses. However, the context in question is not the personal context which is particular *(juz'iy)* but rather it is the universal impersonal context *(kulliy)*.

In this context, performing *istinbāṭ* is not just by observing the *asbāb al-nuzul* (historicity of a text) in its classical sense, but more importantly on its *maqāṣid al-sharī'ah*.[96] The emphasis on the use of

maqāṣid is actualized by the expression "*al-'ibrah bi al-maqāṣid lā bi al-alfāẓ"* (the thing that must be held in establishing a law is its *maqāṣid* and not the literal wording of a text).[97] Thus, the thing that should be considered from a statement (in the verses of the Quran and the hadith) is the generality of the objective of *sharī'ah* and such consideration should be independent from any specific *naṣṣ* (texts).

In accomodating contemporary issues, the perspective of understanding of *maqāṣid* as one method to establish Islamic law is to know, to search, and to gain the basic principles of Islam. Therefore, when a law has come to its *maqāṣid*, the texts must be separated from its initial Arabian context (i.e. decontextualizing the text) and then a re-contextualization is performed, which is anchoring the basic principles of Islam into the non-Arabic hemisphere. Thus, the contextualization, discontextualization, and re-contextualization are the interpretation's mechanism of actions that apply all of the time.[98]

In answering this context, it is possible to perform new interpretations onto the approaches in studying religious texts, especially those texts that are products of Islamic scholars. Among the new interpretations is to give understanding that emphasizes on the purposes of law enactment itself or *maqāṣid al-sharī'ah*. Therefore, it is time to develop an understanding that emphasizes on substances, not on the legal-formalistic of *naṣṣ* (texts) of a law. As said by Abdul Moqsith: "*Searching for maqāṣid al-sharī'ah by various means without being too much enthralled in the beauty of a text. This is so since being enthralled is an ideological act that will only dull one's creativity in searching for the objective meaning and the importance of understanding of the background of the verse's revelation.*"[99] Any achievement of substantive meaning will necessarily establish the analysis of not only the structure of sentences, but - what is rather foundational- also of the social and cultural

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[94] Yusuf al-Qaraḍawi, *al-Ijtihād fī al-Sharī'ah al-Islāmiyyah ma'a Nazhrāti Taḥliliyat fī al-Ijtihād al-Mu'āṣir,* (Kuwait: Dar al-Qalam, 1985), p.44.

[95] Abdul Moqsith Ghazali, 'Merancang Kaidah Uṣūl Fiqih Alternatif.' In *Negara dan Civil Society: Gerakan dan Pemikiran Islam Kontemporer*, K. Hidayat & A. Gaus (eds.), (Jakarta: Paramadina, 2005), pp. 352-370, p.359.

[96] *Ibid*.

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[97] *Ibid*.

[98] *Ibid*, p. 359.

[99] *Ibid*, p. 361.

classes and structures that surround the history of the birth of text(s).

Indeed, Islamic law has no other objective than to realize benefits *(jalb al-maṣāliḥ)* and reject all forms of harms *(dar'u al-mafāsid).* This paradigm is formulated by al-Thufi in *Risālah fi Ri'āyah al-Maṣlaḥah* through his quote "*iẓā ta'araḍa al-naṣṣ wa al-maṣlaḥatu arjahā al-maṣlaḥah*" (whenever a text physically contradicts with *maṣlaḥah,* then attaining *maṣlaḥah* takes precedence).[100] This principle, paradigmatically, wants to state that whatsoever *texts,* either in the Quran, the Hadith and other *texts,* can be cancelled by *maṣlaḥah.* This means that the reasoning for *maṣlaḥah* can become a stronger argument than that of the text *(naṣṣ).*

In this regard, it must first be split between individual (subjective) *maṣlaḥah* and collective (universal) one. An individual (subjective) *maṣlaḥah* is one concerning to the interests of individuals and is separated from the interests of others. Because of having such subjective nature, the one who is entitled to determine it is the individuals concerned.[101] Meanwhile, for *maṣlaḥah* that has social-objective nature of interest to many people, the authority that provides an assessment is a lot of people through a *shūrā* (a consultation assembly) mechanism to reach a consensus *(ijmā').* Something that has become the consensus from the process of defining *maṣlaḥah* through a consultation assembly serves as a binding supreme law.

Maṣlaḥah (benefit) which is the realization of *maqāṣid* is the most basic foundation of any legislation of the Islamic *sharī'ah.* Verily, this is not because the teachings of Islam is necessary to be opportunistically matched with the development of *maṣlaḥah,* but the pursuit of *maṣlaḥah* objectively requires so. Thus, *maṣlaḥah* is a fundamental, unchanged, and universal religious teaching, whereas the execution of attaining the ideal of *maṣlaḥah* is a religious case which is categorized as *fuṣūl* (branches). Such case of religion can

change following the changes in the flow of history and civilization.

So, *maṣlaḥah / maqāṣid sharī'ah* serve itself as the main reference and the ethical-spiritual foundation for the process of the dynamization of the Islamic law in accomodating contemporary issues. The further form of the institutionalized and developed concept of *maqāṣid sharī'ah* is the emergence of a further question whether *maqāṣid* can become an independent legitimacy from the arguments of law.

There are three groups addressing this issue: the first group clings to the opinion that *maqāṣid* as an independent argument so that it is able to create its own laws and is able to become a device in performing *tarjiḥ* (affirmation). The second group has an opinion that *maqāṣid* is not seen as an independent argument and therefore it is powerless before the texts of Islamic laws and *ijmā'.* Meanwhile, the third group is the moderates who always balance *maqāṣid* with the texts of laws that exist. This last opinion is seen closer to the truth because it is in accordance with the rules of laws and human intellect, and it goes along with the benefit for mankind.

Some arguments confirming this is that *maqāṣid shari'ah* by its nature is one that is based on Islamic law which means that it follows the arguments and guidance of law, therefore, it cannot be separated from the rules and theorems of law. As it is well known that the balance used in determining whether something gives *maṣlaḥah* or brings *mafsadah* is the law. *Maqāṣid sharī'ah* is the quintessence of several texts, laws, *qarīnah* (legal clues) and *'illāt.* The existence of a strong bond between *maqāṣid* and the arguments of law is as the relationship between *kulliyyāt* and *juz'iyyāt.*

Meanwhile, the argument which states that *maqāṣid* is independent is one that prioritizes the function of *'aql* (reason/intelligence) in finding the benefit in every issue. The rapid advancement of development and problems that always race one after another causes a limited number of texts becoming unable to provide legal solutions. Therefore it is necessary to implement *maqāṣid sharī'ah* freely in order

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[100] See: 'Risalah al-Thufi fi Ri'āyāt al-Maṣlaḥāt' in Abdul Wahab Khallaf, *Masādir al-Tashrī' al-Islāmi,* 1982.

[101] *Ibid,* p. 362.

to open up a gap to move and to give legal decisions in accordance with the demands of time.

Maqāṣid sharī'ah or *maṣlaḥah shar'iyyah* can become a legal source if it meets the criteria [2] these seven basics, namely: *ḥifẓ al-din*, *ḥifẓ al-nafs*, *ḥifẓ al-'aql*, *ḥifẓ al-nasl*, *ḥifẓ al-māl*, *ḥifẓ al-'irḍ* and *ḥifẓ al-bī'ah* (i.e. preserving one's religion, life, intellectual, lineage, property, honor, and environment respectively) which are commonly known as *kulliyyāt sab'ah*. Then, these five (original) or seven (with the last two addition) maintenance of human needs are included in three consecutive phasing, i.e. *ḍarūriyyāt* (necessities), *ḥājiyyāt* (needs), and *taḥsiniyyāt* (luxuries). The restriction of *maqāṣid* to only those five basics is based on *istiqrā'* (inductive conclusion). Although there are some scholars who include *ḥifẓ al-'irḍ* (preserving one's dignity) separately, in fact, the case just mentioned can be categorized in one of the first five of *maqāṣid* above.

The scholars have provided an explanation of *maqāṣid* as well as its methods of application in performing *istinbāṭ*. For example, Imam Shaṭibi in his explanation about *maqāṣid* suggested that among the requirements to be able to reach the level to perform *ijtihād* is when a person is capable of understanding *maqāṣid* perfectly. Only by then, he/she is able to perform an *istinbāṭ* on a law from *maqāṣid* point of view.

Providing a contemporary legal decision can be made by using *maqāṣid* which is supported by arguments. As an example is the issue about *istinsākh* (cloning). The scholars state that cloning is illegal because it is not in accordance with *maqāṣid ḥifẓ al-nasl* (the purpose of preserving one's descendants) and other *maqāṣid*. Having a tendency to use *maqāṣid* like this does not necessarily mean to not enclose the argument of texts in making legal decisions, but it can be even automatically understood that the decision made is in accordance with the arguments that show *maqāṣid* as already explained.

Another example is related to *zakāh mustaghallāt* which is *zakāh* (alms) on properties that can bring profit to their owners by way of leasing or selling its products. For example: villas, factories, hotels, cars, aircraft, ships and other means of transportation. According to some scholars, such properties are not subjected to paying alms because they are not included in the category of wealth that has to be paid its alms. On the other hand, some other scholars oblige *zakāh* upon such properties due to a thought that they are included in the category of wealth that has to be paid its alms and that the *'illāt* of obliging *zakāh* has been fulfilled, namely the number of wealth has increased steadily. The process of obliging *zakāh* on such property is in accordance with the wisdom of endorsing *zakāh* which is to purify wealth and to help people in need. Another wisdom is that if *zakāh* is made compulsory to owners of plants and fruits that yield only meager profits, why is it not obligated to the owners of villas, factories and so forth that give a lot of revenue?

The issue of transplantation of human limbs is included as one that requires *ijtihād* to create its legal solutions. Several questions arise, for example: is it allowed to transplant human or animal limbs to save another human's life? Is it still permitted if the animal used is a dog or the limb is a dog's liver? Can someone give up his/her body, all or in parts, after his/her death for anatomic study so that it can be useful to others? And there are many other questions that require *maqāṣid* in the contemporary *ijtihād*.

The importance of promoting contemporary *ijtihād*, through both *ijtihād intiqāi* and *ijtihād inshā'i*, is in order to solve and answer any actual problems faced by Muslims nowadays when there is no legal provision about them. What is meant by *ijtihād intiqai* is an *ijtihād* to choose one of the opinions reported by the former scholars by way of performing *tarjīḥ* between one opinion to another. What is expected by doing so is to balance the opinions of scholars and to refer back to the arguments they used, then taking the srongest argument in accordance with the standards of *tarjīḥ*.

Meanwhile, *ijtihād inshā'i* is performing *istinbāṭ* of a new law in legal issues that have not been mentioned by former scholars. For example, the obligatory

of paying *zakāh* on factories, villas for rent, hotels, and others as becoming the opinion of Sheikh Abu Zahrah, Sheikh Abdul Wahhab Khallaf, Sheikh Abdur Rahman Hasan. This opinion is then chosen since it is considered stronger in its arguments *(rājiḥ)* by Dr. Yusuf al-Qaraḍawi in his book *Fiqhu al-Zakāh.*

Then, the next form of *ijtihād* is a combination of *ijtihād intiqa'i* and *ijtihād inshā'i.* It means choosing opinions of former scholars then adding it with elements of new *ijtihād.* As an example is an *ijtihād* from the Institution of Religious Advice, Kuwait, on the theme of abortion. The advice *(fatwā)* was taken from the opinion of the former scholars and was added with the results of a new *ijtihād* according to the progress of science and technology in modern medicine so that with modern devices the state of the embryos can be detected earlier whether they are exposed to disability or illness that affects their bodies or minds later on.

The *fatwā* reads, "A doctor is not allowed to abort the womb of a pregnant woman that has reached one hundred twenty days of pregnancy except to save the mother's life from a real danger resulted by her womb. It is allowable to do so with permission from the husband and his wife if the womb has not been perfectly forty days in age. If the pregnancy is more than forty days but less than one hundred twenty days then it should not be aborted unless the existence of embryo would endanger the mother's health due to the embryo's disease that may lead to the mother's death or lasting severe pain after giving birth. And it is also allowed to do an abortion if the embryo to be born is believed to be exposed to severe disability or acute disease on either his/her body or mind and cannot be expected to be recovered". The process of abortion outside *ḍarūrāt* (emergency) circumstances is required to be carried out in government hospitals. Meanwhile, the abortion process taken after forty days age of pregnancy should not be done except by decisions of three specialist doctors, at least one of whom specializes in diseases of women and birth and two other specialist doctors and they include a just Muslim doctor.

Conclusion

From the above discussion, some concluding remarks obtained are:

1. *Maqāṣid sharī'ah* is expressed in various terms namely *maqāṣid al-shāri',* *maqāṣid al-sharī'ah,* and *al-maqāṣid al-shar'iyyah.* These different forms of expression in essence imply the same meaning which is the purposefulness or objective of the enactment of Islamic law. Generally, the scholars of Islamic law interpret *maqāṣid sharī'ah* as the essence of Islamic law enactment. And, the general principle of *maqāṣid sharī'ah* is emphasizing the importance of attaining benefits and resisting harms.

2. *Maqāṣid sharī'ah* is independent as it is one that prioritizes functioning *'aql* (reason/intelligence) in finding benefits in every issue. The rapid advancement of the development and problems that always race one after another cause a limited number of texts becoming unable to find legal solutions. Therefore it is necessary to implement *maqāṣid shari'ah* freely in order to open up a gap to search for and provide legal decisions in accordance with the demands of time.

3. There are two major roles of *maqāṣid sharī'ah* that are very significant to be explored, namely: the directive system role and the defensive system one. The first role puts *maqāṣid sharī'ah* as the main reference for any reformation or changing processes and dynamization of Islamic law, while the latter places *maqāṣid sharī'ah* as the supreme morality that provides the foundation and ethical-spiritual power to the society whenever they dialect towards any reformation processes and dynamization of Islamic law. By having these two roles, *maqāṣid sharī'ah* can no longer be considered as an obstacle for any reformation as it is regarded so by the philosophy of materialism which states that *religion (i.e. Islamic law) is opium* to society. On the contrary, a religion can serve as a tremendous impetus for the creation of future changes towards a more constructive and humanistic society.

17

Acknowledgment

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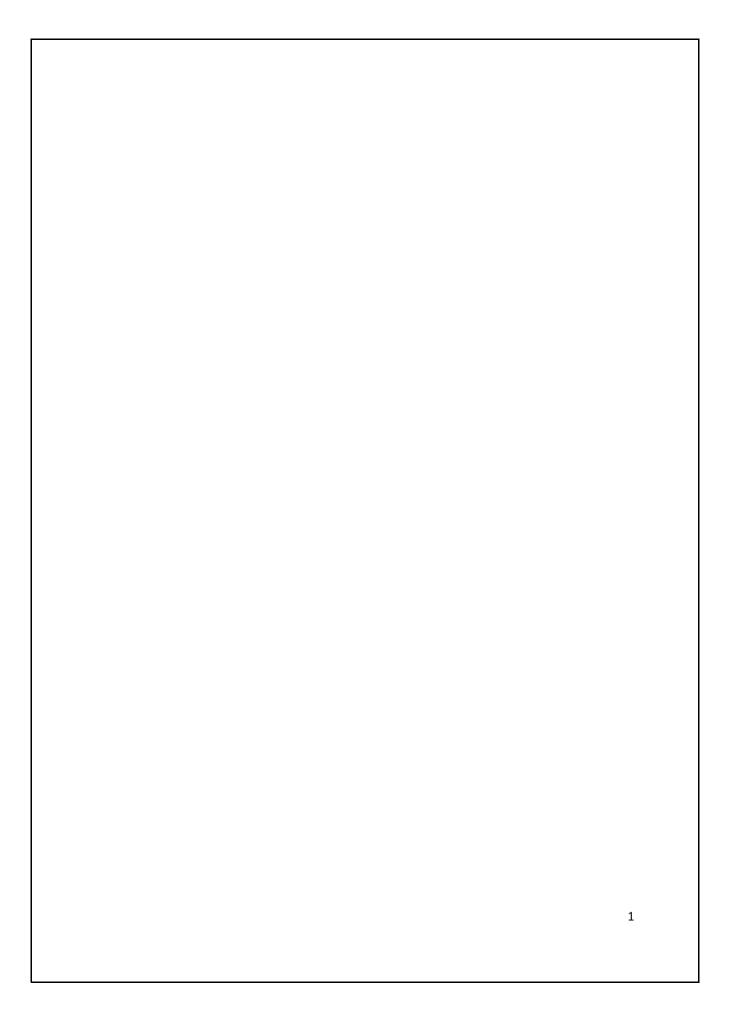Isra, Yunal. (2018). 'Maqashid Syari'ah dalam Ijtihad Para sahabat Nabi,' *Bicang Syariah*, July 30, Available on: https://bincangsyariah.com/kalam/maqashid-syariah-dalam-ijtihad-para-sahabat-nabi/ accessed on Feb 28, 2019.

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