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THE IJTIHAD CONSTRUCTION OF ISLAMIC LAW BASED ON THE MAQÂSHID AL-SYARÎ'AH APPROACH IN THE INDONESIAN CONTEXT

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Abstract

This research is developed from the author's findings of ambiguity in recent philosophical aspects of the application of Islamic law in Indonesia. Accordingly, it is crucial to immediately reform the ijtihad of Islamic law in Indonesia, because the practice is no longer in line with maqâshid al-syarî'ah and the principles of Islamic law. This can be seen from the emergence of civil disobedience toward Islamic law fatwas issued by fatwa institutions in IndonesiaThe purpose of this study is to find answers to the problems specified in the formulation of the problem. This research is a descriptive-normative research or library research that uses content analysis of the data obtained. In addition to using a conceptual approach, this study also uses a maqashidi approach (Maqâshid-Based Ijtihad) to answer the problem studied. The results of this study are: First, *there is philosophical confusion regarding the application of Islamic law in Indonesia which includes ontological, epistemological, and axiological confusion.* Second, *maqâshid al-syarî'ah known as al-ushûl al-khamsah includes the maintenance of religion (hifz al-dn), life (hifz al-nafs), lineage (hifz al-nasab), mind (hifz al-aql), and property (hifz al-mâl), as the dharûriyyah, hâjiyyah and tahsîniyyah level. Meanwhile maqâshid al-'ammah includes the following universal maqâshid principles; nature (al-fiṭroh), tolerance (al-samâhah), benefit (al-maslahah), equality (al-musâwah), and freedom (hurriyâh).* Third, *reformulation of Islamic law in Indonesia with the maqâshid al-syarî'ah approach can be achieved through two constructs, namely the integration of legal texts with al-ushûl al-khamsah and integration of legal texts with maqâshid al-syarî'ah al-'ammah.*

Keywords: *maqâshid al-syari'ah, reformulation, Islamic law, maslahah, justice.*

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A. Introduction

Globally, the purpose of Islamic law is to realize the benefit of mankind, both the benefit in this mortal world, and in the hereafter.[4] To achieve this benefit, a more detailed and technical law was enacted, both in the form of commandments and prohibitions, through two main sources of Sharia, namely the Qur'an and Hadith. From these two sources, various forms of Islamic law emerged, such as *fiqh, fatwa, qanun, and qadha'*. All of them must be intended to realize the benefit of mankind. This means that it can be ascertained that the rule of Islamic law is always oriented towards beneficial interests.

However, in reality, especially in Indonesia, the implementation of Islamic law is not always in line with the wider benefits and objectives of the Sharia. The example is the distortion of meanings related to terms in Islamic law that are intended for the political interests of certain groups, Sharia banking practices that are not in accordance with Islamic law and Sharia goals,[5] as well as various provisions in Islamic law that have been codified. The application of Islamic law that is not in line with the *maqâshid al-syarî'ah* making Islamic law appear not as a law that protects and defends the weak, in fact it benefits the majority and oppresses the minority.

Other examples are the legal issue of prohibiting a Muslims from inheriting the assets of her/his non-Muslim parents, the *misyar* marriage law which is not prohibited in Indonesian marriage law even though its harms aspect is greater than the benefits. A side from that, the law of dividing inheritance two compared to one between the male and female sections which is no longer relevant to the times, as well as other legal issues that are no longer able to benefit those of the Islamic faith.[6] Some of these examples will be discussed in this study.

As stated above, it shows few examples of the application of Islamic law in Indonesia which is not in line with the objectives to be achieved in the application of Islamic Sharia. Based on the reality of the application of Islamic law, the author feels that applying the law based on prophetic values (humanization, liberation and transcendence) is urgent both globally and nationally. Judging with the value of humanization means

[4] Mohammad Hashim Kamali, 'Goals and Purposes Maqasid Al-Shariah Methodological Perspectives' in Muna Tatari Idris Nessery, Rumee Ahmed (eds.), *The Objectives of Islamic Law the Promises and Challenges of the Maqasid Al-Sharia* (London: Lexington Books 2018) 7–11.

[5] Violations of sharia banking practices that are not in line with sharia law have been raised by many academics. *See* Mohammad Hosen, 'Prinsip keadilan dalam putusan pengadilan agama mataram nomor 0508/pdt.g/2016/pa.mtr. Tentang penyelesaian sengketa akad murabahah Menurut hukum ekonomi syariah' Theses Research at the University of Muhammadiyah Surabaya (2018).

[6] Look at the results of research conducted by Fika Andriyani, 'Implementasi Hukum Waris Islam Pada Tokoh Muhammadiyah' (2013) 1 Journal Ulumuddin.

punishing by humanizing humans, eliminating feelings of hatred, and fostering a spirit of togetherness to help each other and create a better life. Judging with liberalization means applying the law to relieve people of the shackles of poverty, backwardness, deprivation, and damage while judging with transcendence means applying the law to realize the purposes of the law (maqâshid al-syari'ah) namely faith and obedience to God in the form of realizing justice, equality, tolerance, and so on.

Based on this, the writer opines that it is very urgent to immediately reformulate the ijtihad of Islamic law in Indonesia today, because the practice of Islamic law is no longer in line with *maqâshid al-syarî'ah* and the principles of Islamic law. To address this disparity, the author offers the theory of *maqâshid al-syarî'ah* both in classical thought (*maqâshid Khashshah)* and in contemporary thought *(maqâshid al-'ammah)* universally developed by Muhammad Thahir Ibn Asyhûr as an approach in reformulating the ijtihad of Islamic law. The question is whether *the maqâshid al-syarî'ah* approach should be used. Because ijtihad based on conventional *ushul fiqh* only will not be able to solve contemporary problems faced by society, a more universal approach is needed that can free humanity from legal stagnation. Without making *maqâshid al-syarî'ah* a consideration for the determination and application of law, it will only make Islamic law appear in a rigid form and do not have dialogue with empirical reality, which is increasingly dynamic, complex, and plural. If this condition is left unchecked, in the end, Islamic law will not only be uprooted from the core purpose of religion but will also be further away from its elastic character and in accordance with all places and times. The reconstruction of Islamic law with the *maqâshid al-syarî'ah* approach is expected to produce Islamic law product that is more humanistic, and in line with *maqâshid al-syarî'ah,* both specific and universal according to the Indonesian context.

B. Problems Formulation

To focus this research, the writer limits the problem to the following problem formulations. What is the product of Islamic law in Indonesia today when viewed from an ontological, epistemological, and axiological perspective? What is the concept (position) of *maqâshid al-syarî'ah,* both typical and universal in Islamic law discourse? And, what is the construction of ijtihad in Islamic law with the *maqâshid al-syarî'ah* approach?

C. Methodology

This research is descriptive-normative, or library research that uses content analysis as a method of analyzing the data obtained. In addition to using a conceptual approach, this study also uses a *maqâshidi* approach (*Maqâshid Based Ijtihad*) to answer the problems studied. The author's data is obtained from studying and analyzing several sources related to the theory of *Maqâşid al-Syarî`ah* Muhammad Thahir ibn Asyhur. In analyzing data, the authors use the normative approach and *Maqâşid al-Sharî`ah al-ammah* as a basis for thinking.

D. Results and Discussion

1. The Application of Islamic Law in Indonesia: A Philosophical Problem

Until this moment at least, the author observes that in certain part of the application of Islamic law in Indonesia, there are quite serious problems, especially when observed from a philosophical perspective. The confusion over this philosophical aspect has resulted in the application of Islamic law to be far from the principles and objectives as a law that was revealed to realize precious goals. To prove this, the author elaborates on the argument related to the ambiguity of the application of Islamic law in the Indonesian context from the ontological, epistemological, and axiological aspect.

a. The Confusion of the Ontological Aspect

The study of philosophy, ontology, or metaphysics is part of the discussion of philosophy that discusses the nature of the existence of something, questions what reality is, or what existence is.[7] Therefore, ontology can be understood as a branch of philosophy studying realities, both from the aspect of being and its essence. Ontology discusses the reality of both function and form, both qualitatively and quantitatively. The object of the study of philosophical ontology from the material side includes the study of the nature of the universe (cosmology), God (theology) and human (anthropology), as well as reality, both physical (such as phenomena, fact, things that are visible to the naked eye) and a metaphysical one (such as magical thing or the invisible). In addition to questioning the existence of everything, ontology also discusses the nature of everything that exists. Therefore, ontology can also be called the "science of being" because ontology talks about everything that exists. Ontological studies can be divided into general and special

[7] Sutarjo Wiramihardja, *Pengantar Filsafat* (PT Refika Aditarma 2006) 133-135.

metaphysics. General metaphysics questions something that exists, while special metaphysical questions the nature of something that exists. This branch of ontological philosophy gave birth to various philosophical schools such as monism, dualism, naturalism, materialism, idealism, logical empiricism, and pluralism.

In this section, the author analyses ambiguity in the application of Islamic law in Indonesia in the realm of general ontology/metaphysics related to the investigation of the concept of existence itself. At the conceptual level, Islamic law in Indonesia is not well understood by certain Muslim circles, especially Muslims who are affiliated with political groups. For example, many Muslims misunderstand the concept and position of fatwa in the hierarchy of Islamic law. Many people in Indonesia are trapped in artificially created fatwas, especially fatwas from institution such as the Indonesian Ulema Council (MUI), and even a group that calls itself the National Movement to Guard Ulema's Fatwa (GNPF U). According to the author, this is a dangerous paradigmatic fallacy and will always cause turmoil in society. Because, as agreed by the scholars of *ushul fiqh*, both past and present, a fatwa is a responsive opinion of Islamic law from religious expert which is an understanding of the Sharia arguments, the conclusion is that a fatwa is an understanding, an opinion, not Sharia itself. Fatwa, like *fiqh*, is subjective and relative, because it reflects the personal thought of a scholar. Therefore, fatwa is not legally binding, it may be followed and abandoned. In this regard, there is a *fiqh* rule which reads;

الإِجْتِهاَدُ لاَيَنْقُضُ اِلإِجْتِهاَدِ

"Ijtihad is not cancelled because of other ijtihad."[8]

This rule asserts that a law resulting from ijtihad (human thought) occupies the same position; one cannot be said to be superior to the other. If there is a mujtahid who decides a law, there are other mujtahids who also arrive at a different legal conclusion on the similar case, the position of these laws is equal, not overpowering each other. In this case, people may choose which opinion is more suitable and easier for him to follow. Likewise, the change in the fatwa resulting from ijtihad in the past, when it was no longer relevant to the times and began to be abandoned by society, and a new fatwa emerges and was more relevant to the condition of the

[8] Zayn al-'Abidin Ibn Ibrahim ibn Nujaim, *Al-Ashbah wa al-Nadha'ir 'ala Mazhab Abi Hanifah al-Nu'man* (Dar al-Kutub al-Alamiyah) 105.

times. It does not mean that the results of the ijtihad previously were deleted by the results of today's ijtihad because each law resulting from ijtihad has its own place and time. Ijtihad in one situation that cannot defeat ijtihad in another. Therefore, imposing a fatwa in this country under political pressure like what was done by Islamic group such as the GNPF according to the author is an inappropriate act that needs to be stopped.

The ontological confusion in the application of Islamic law in Indonesia can also be found in the confusion in understanding the concept of ijtihad itself. Many Islamic groups do not properly understand what ijtihad is and limitations thereon, so they cannot distinguish between *qath'î* (certain) and *zhannî* (speculative) of Islamic law. In relation to this field of ijtihad, Sheikh Yusuf al-*Qardhawi* stated that about ten percent (10%) of the sacred text was in the form of postulates of constant *qath'î* law. This segment must be accepted as it is without having to adapt to the changes around it. What is included in this segment is basic issues concerning the foundations of religious teaching. While the rest – 90% of the teaching is in the form of global rules that are *zhannî*. This second segment is operational laws that are directly in touch with social and societal phenomena. This segment receives access to change if it refers to the moral messages contained in the sacred teaching globally and implicitly.[9] In this regard, Islamic jurists often postulate that the text of teaching in Islam is like an iceberg whose peak floats on the surface of the sea. Ten percent of it can be seen clearly above the water surface, while the remaining 90 percent is submerged under water which to dive in and find out requires equipment that is not light, namely in the form of ijtihad reasoning device.

The ten percent segment is a standard rule whose appointment by the teaching textually is carried out explicitly and constantly (*qath'î*) without giving other interpretation opportunities. This type and variety of teachings can be classified in more detail as follows: (1) The basics of *Aqidah* such as faith in Allah, angel, scripture, messengers and the Day of Judgment. (2) Pillars of Islam: Reading the Shahadah, establishing prayer, paying zakat, fasting in Ramadan Month, and performing Hajj. (3) Forbidden acts such as witchcraft, murder, adultery, theft, and backbiting. (4) Praiseworthy actions such as being honest, trustworthy, patient, keeping promises, and other types of good acts *(Al-Akhlaq Al-Karimah).* (5) Other

[9] Yusuf al-Qardhawi, *Al-Khasha'ish al-Ammah li al-Islam* (Dar al-Ma'rifah) 220-221.

types of teachings in Islam whose arrangements have been standardized by *qath'î* text, such as marriage contract procedures, divorce, reconciliation, and others.[10]

Meanwhile, the remaining 90 percent is a type of teaching that can adapt and be touched by change according to the context of space and time. The reality of the presentation above shows the great mind opportunity to participate in formulating the form of religious teachings at the practical level. This fact also reflects external and universal values of religious teaching because with its adaptive character, Islam does not only highly appreciate the use of the mind, but at the same time it will always appear compatible with the social dynamic that continue to roll from time to time. As a reflection of social phenomena that are dynamic in nature, there will always be humanitarian issues and new legal events that will arise from time to time. This can be anticipated where the multi-dimensional values of religious teaching can be clearly understood and implemented consistently and proportionally.

As for *ushul fiqh*, the *zhannî* region, whose presentation reaches 90%, is included in three forms of textual characteristic, namely: (1) Syar'i law based on the argument of *qath'î al-tsubût zhannî al-dalâlah*; (2) Syar'i law based on the argument of *zhannî al-tsubt qathî al-dalâlah* t; and (3) Syar'i law based on the argument of *zhannî al-tsubt zhannî al-dalâlah*.[11]

b. Confusion in Epistemological Aspects

Epistemology is a branch of philosophy that questions the certainty or truth of metaphysical knowledge, or the method that has become a source of human knowledge about reality. Epistemology discusses how humans acquire knowledge, for example through logical thinking, meaning that the nature of proper thinking, or how to organize thought that can describe the truth of knowledge. Epistemology based on logic produces deductive and inductive thinking structure. The structure of deductive thinking is a logical way of thinking, acceptable to common sense, and the truth resulted is a coherent truth (axiomatic). Meanwhile the structure of inductive thinking is a factual way of thinking, it is based on facts or existing data. The truth obtained from the inductive way of thinking is the correspondence or empirical truth. In the context of Islamic law, epistemology specifically talks about the theory

[10] Abu Yazid, *Nalar dan Wahyu: Interrelasi Dalam Proses Pembentukan Syariah* (Erlangga, 2007) 57-58.

[11] Abdullah Kahraman, *Fikih Usulu* (Ragbet Yayinlari, 2014) 56-57.

of science which includes discussion about source of knowledge, method and application.[12] Thus, the epistemology of Islamic law basically includes discussion of the sources of law-making, the methods used to enact the law, and application thereof with the aim of transforming the text's provision into a system of norms that can be enforced today.[13]

Returning to the discussion regarding ambiguity in the application of Islamic law in Indonesia in the epistemological realm, the author offers the following examples;

First, is the field of Sharia economic law/Sharia banking. In fact, the author has often heard from public testimony that the practice of Sharia banking is not different from conventional banking which is often accused of being a usurious institution by proponent of the Sharia economic system. One of the pieces of evidence that the author can put forward here is in the practice of *mudharabah* or *musyarakah* contract between Islamic bank as owner of capital and customer as worker. When referring to the *mudharabah* or *musyarakah* provision in *fiqh muamalah*, if the cooperation suffers a loss in its business, the profit-sharing should not be billed by the owner of the capital to the worker, even the loss should be shared between the two. However, the fact happened is that customer as a worker must return the capital fund and business profit that have been determined by the bank as the owner of capital.[14] The *mudharabah* practice by Sharia banks which is so inhumane and exploitative (containing element of extortion) has no response from the DSN MUI either in the form of a fatwa or a revision of the existing fatwa related to the irregularity, which according to the author states that the regulatory institution of the Sharia economy is more in favour of the interest of the owner of capital/Sharia banks than the interest of the customer.[15]

Second, regarding the labelling of halal product, according to the author, the halal labelling issued for consumptive products is contrary to the principle of convenience (*al-taysîr*) in Islamic law. This is based on the following fiqh rules;

[12] According to Nadirsyah Hosen, there are at least 10 books of commentary that interpret the word "awliya" not as "leader", but as an ally or close friend. *See* Nadirsyah Hosen 'Awliya' in https://luk.staff.ugm.ac.id/kmi/isnet/Nadirsyah/awliya/isi.html, accessed on January 9, 2022.

[13] Mohammad Dahlan, *Abdullah Ahmad An-Naim: Epistemologi Hukum Islam* (Pustaka Pelajar, 2009) 15.

[14] Mohammad Dahlan (n 15) 16.

[15] One example can be read in Mohammad Hosen (n 5).

الأَصْلُ فِيْ الْأَشْيَاءِ الْإِبَاحَةُ حَتَّى يَدُلَّ الدَّلِيْلُ عَلَى التَّحْرِيْمِ

"The origin of the law is that everything is permissible, so that there is evidence that shows the law is forbidden."

From these rules it can be understood that to determine the legal permissibility of something, there is no need for *syar'i* support, because the original law is permissible. In addition, the existence of information from the text regarding the forms of object or goods that are lawful is not intended as a limitation or prohibition on creating new forms of *muamalah* that are not mentioned in the *syar'i* text. Therefore, to determine the permissibility of new form of *muamalah*, it is not necessary to carry out legal *qiyas* with the form of *muamalah* that has been exemplified in the text. In this case, the provision that need to be considered in determining the permissibility of the *asya'* (something) is to see whether it is contrary to Sharia text or not. Therefore, what must be done is to find out whether there is text that forbids, not text that allows.

In addition, in the perspective of *mafhûm mukhalafah* theory,[16] *halal* labelling will have the implication that when a product is not labelled *halal*, it means that the product is forbidden to be consumed, because the *halal* has been labelled. Therefore, something that is already *halal* in origin – such as drinking water, food, refrigerator, clothing, and so on – or products that do not have any provisions in Islamic law that forbid, it should not need to be labelled *halal*, instead, something that is *haram* should be labelled *haram*, so that people understand which products are forbidden by religion and which are not. According to the author, this confusion in the determination of *halal* law is a form of epistemological confusion in the application of Islamic law in Indonesia.

c. Confusion in Axiological Aspects

Axiology is a branch of philosophy about ethics (the part of philosophy talking about value and judgment related to good and bad) and aesthetics (the part of philosophy talking about values and judgment that look at human work from the

[16] The author sees the partiality of DSN MUI to the owners of capital/banks, one of which is the bank's ability to ask for guarantees from customers in murabahah contracts, such as submitting property certificates to banks. Meanwhile, when the bank is the manager of the capital, the bank is not obliged to provide guarantees to customers. *See* DSN-MUI Fatwa No.4/DSN-MUI/IV/2000 on *Murabahah* Contracts in the Application of Property Rights. In addition, the obligation of transparency regarding the benefits of mudharabah or musyarakah is not specified in the fatwas issued by the DSN-MUI.

beautiful and ugly points of view). Axiology or philosophy of value and judgment formally only emerged in the mid-19th century. Although people have discussed axiological issues since ancient Greece, but the discussion is too specific in relation to certain problem, there has been no discussion of axiology in principle. Axiology is related to *axia* which means value or worth.[17] So, axiology can be interpreted as philosophical discourse on value and judgment. The axiology of legal science, according to the author, emphasizes the study of the function of law as a tool to uphold justice, equality and benefit for human life. It also discusses law as a tool to enforce norms in society. The axiology in Islamic law talks about the things that become the goals of the application of Islamic law such as *ahwal al-khamsah*, justice, benefit, equality, and tolerance as will be discussed in the next section.

Islamic Sharia reveals its essence in realizing its universal goals such as realizing benefit and eliminating damage in the form of upholding justice, equality, as well as to realize its goals in more specific forms such as maintenance of religion, the soul, lineage, mind, and property. To realize these goals, the scholars set out several principles of implementing Sharia (Islamic law) where Islamic law must be implemented based on these principles which include eliminating difficulties and not being burdensome (*'adamul haraj*), reducing burdens *(taqlîl al-takâlîf),* the establishment of Islamic law in stages (*tadrijiyah*), and making it easier for its adherents *(al-taysir).*[18] On this basis, the author believes that the application of Islamic Sharia/Islamic law is an effort to realize benefit, justice, convenience and welfare for human. This is the author's hypothesis in this study.

However, in reality, the author finds various facts that show just the opposite. In certain fields, the application of Islamic law in Indonesia is no longer able to realize the objectives of Sharia, even contrary to the principles of Sharia as other authors have stated. For example, in the following areas of law:

First, in the field of Islamic inheritance law, is the disparity in the inheritance between men and women, which is 2:1. The author sees that the provision on the distribution of inheritance 2:1 is no longer applicable in our society today. So far, the reason for applying this provision is not only based on the argument of the Qur'an,

[17] Mafhum mukhalafah is a pronunciation guide that shows that the law that is born from the pronunciation applies to issues that are not stated, whose laws are contrary to the laws mentioned. For example, praying five times a time is obligatory, so not doing it is haram.

[18] Armada Riyanto and others, *Pengantar Filsafat* (UMM Press, 2004) 145-146.

surah an-Nisa' verse 176 and Article 176 of the Compilation of Islamic Law, but it is also based on the argument that men should get twice the share of women because men are bones, the back of the family who has the obligation to support the family. According to the author, arguments like this can no longer be used because today as times have developed, and more women are the backbone of the family who even hold the same social role as men. So that the 2:1 division of inheritance no longer reflects justice, therefore it is increasingly being avoided even by groups of people who understand Islamic Sharia though.[19]

Second, in the field of Islamic marriage law. In this case the author takes the example of the case of *misyâr* marriage (marriage with the intention of temporary / the intention of divorce). In the Compilation of Islamic Law, a marriage is considered valid if it has fulfilled the pillars and the conditions. However, the Compilation of Islamic Law and several fatwa institutions in Indonesia have never included tradition as a legal consideration to prevent people from a marriage arrangement which harms another, especially the woman. The author says so because legalizing marriage under such conventional conditions is not enough to protect women's interest at least for the present. This can be seen from the practice of *misy'ar* marriage (married with temporary intention) carried out between Arab tourists and women in Indonesia in the peak area, where many indigenous women become victim of pregnancy rather than husbands of irresponsible.[20] In this case, the author sees that the Islamic marriage law as applied in Indonesia is still too ancient and cannot protect its citizens from the damage caused by *misy'ar* marriage which have been declared halal by the Saudi Arabian clerics.[21] In fact, once again, the main purpose of the revelation of Islamic Sharia is to eliminate harm/damage, but what has happened in Indonesia was the opposite.

The two examples above are evidence of the ambiguity in the application of Islamic law in Indonesia in the axiological aspect. At this point, the writer can say that there are still many products of Islamic law in Indonesia that society cannot

[19] Al-Salâm, Izz al-Dîn ibn Abd, *Qawâ'id al-Ahkâm Fî Masâlih al-Anâm* (Dâr al-Qalam, 1400 H) 6-14. Al-Ghazâlî and Muhammad bin Muhammad Abu Hamid, *Al-Mustasfa min 'ilmi al-ushûl* (Dâr al-Kitâb al-Ilmiyyah,) 286-287. Yusuf Al-Qardhawi, *Taisîr al-Fiqh al-Muslim al-Mu"âshirah fî Dhau" al-Qur"ân wa al-Sunnah* (Maktabah Wahbah, 1420 H).

[20] Regarding this problem, please see the results of Fika Andriyani (n 6) 196-201.

[21] Chamim Tohari, 'Fatwa Ulama tentang Hukum Nikah Misyar Perspektif Maqasid Shari'ah' (2013) 12 Journal of al-Tahrir Volume 207.

accept because there is confusion in the epistemological, axiological, and ontological domains. If this confusion is ignored, it will certainly keep people away from applying the law because it is felt that Islamic law can no longer provide benefits and justice for human life. Therefore, the ambiguity of the axiological aspect is no less important to be corrected, because this aspect according to the author is the most important of an application of law. If the law cannot realize the objectives of the law, the law becomes meaningless and must be abandoned.

2. *Maqâshid al-Syarî'ah*: Its Position as the Universal Purpose of Islamic Law

a. Definition

Terminologically, the meaning of *maqâshid al-syarî'ah* is defined by various redactions with definition that tends to follow the meanings of language by mentioning equivalent meanings. For example, al-Banani defines *maqâshid al-syarî'ah* as a legal wisdom, *al-Asnawi* interprets it as legal goals, while *al-Samarqandhi* defines it as legal meanings. As for al-Ghazali, al-Amidi, and Ibn Hajib *define maqâshid al-syarî'ah* to achieve benefits and mitigate.[22]

Imam al-Syathibi, a prominent scholar who is called as the founder of the science of *maqâshid al-syarî'ah*, defines *maqâshid al-syarî'ah* as the benefit of life in this world and in the hereafter. More specifically, he said with the following redaction: "The burdens of the Sharia return to safeguarding its goals which include the goal of *dharuriyah* (primary interest), *hajiyah* goal (secondary interest), and *tahsiniyah* goal (tertiary interest). Those goals are intended by the formulators of Sharia law on one main goal of Sharia,that is the benefit of life in this world and in the hereafter."[23]

Ibn Asyhûr defines *maqâshid al-syarî'ah* as "[t]he meanings and wisdoms that the syar'i observes and maintains in every form of determination of His law. This does not only apply to certain types of law, so that it is included in the scope of all the nature, general purpose, and meaning of Sharia contained in the law and also includes legal meanings that are not considered as a whole but are guarded in many

[22] Ahmad al-Raisuni, *Al-Fikr al-Maqashidi Qawa'iduhu wa Fawa'iduhu* (Mathba'ah al-Najah, 1999) 3-10. Ahmad Imam Mawardi, *Maqasid Syariah Dalam Pembaharuan Fiqh Pernikahan di Indonesia* (Pustaka Raja, 2018) 16.

[23] Umar bin Shalih bin Umar, *Maqâshid al-syarî'ah 'inda al-Imam al-Izzuddin Ibn Abd al-Salam* (Dar al-Nafa'is, 2003) 88.

forms of law."[24] The existence of various kinds of definitions of *maqâshid al-syarî'ah* essentially indicates that there is a close relationship between *maqâshid al-syarî'ah* with wisdom, legal motives or *'illat al-hukm*, goal, and benefit. In addition, the existence of these various definitions shows that the concept of *maqâshid al-syarî'ah* has developed from time to time, both in terms of coverage and emphasis.

From the various definitions above, it can be understood that essentially *maqâshid al-syarî'ah* is a target of text and particular laws to be realized in human life, both in the form of order, prohibition, and permissible, for individual, family, congregation, and community.[25] In addition, *maqâshid al-syarî'ah* is also called the wisdoms that are the purpose of enacting the law, [26] whether required or not. Because in every law prescribed by Allah for His servants there must be wisdom that accompanies it.[27]

b. Classification

According to al-Ghazâlî, the purposes of syaria include the maintenance of religion *(hifz al-dîn),* life *(hifz al-nafs),* lineage *(hifz al-nasab),* mind *(hifz al-aql),* and property *(hifz al-mâl),* at the *dharûriyyah, hâjiyyah* and *tahsîniyyah* level. These five existences are referred to as al-ushûl al-khamsah. Therefore, all actions aimed at maintaining al-ushûl al-khamsah are called *maslahah,* and all actions that cause the destruction and even loss of the existence of al-ushûl al-khamsah are referred to as *mafsadah*. Therefore, preventing the occurrence of *mafsadah* means doing *maslahah,* because these actions can produce *maslahah*.[28]

At the time of Muhammad Thahir Ibn 'Ashur, the thoughts of maqâshid al-syarî'ah underwent a very important renewal because at that time there was a shift in the position of al-uṣhūl al-khamsah which originally occupied its position as maqâshid 'ammah to maqâshid Khashshah. Meanwhile maqâshid 'ammah in Ibn

[24] Abu Ishaq al-Syathibi, *Al-Muwafaqat fi Ushul al-Ahkam. Volume 2* (Dar al-Fikr, 1995) 221.

[25] Muhammad Thâhir Ibn Âsyûr, *Maqâshid al-Syarî'ah al-Islâmiyyah* (al-Shirkah al Tuniziyyah li al-tawzi') 251.

[26] Yusuf al-Qardhawi, *Dirasah fi Fiqih Maqâshid Syari'ah: Baina al-Maqâshid al-Kulliyyah wa an-Nushush al-Juz'iyyah* (Dar as-Syuruq, 2006) 17.

[27] The objectives of the shari'ah are not 'illat as stated by the ushul fiqh scholars in the qiyas chapter and are defined as "clear, fixed, and in accordance with the law. "The 'illat is in accordance with the law, but it is not the purpose of the law." As their opinion about 'illat rukhshah (reason for relief) when traveling. Either in the form of jama '-qasar in prayer or breaking the fasting during Ramadan. 'Illat in the rukhshah is the journey, not the difficulty felt by a traveler on his journey. Because, the latter is the wisdom behind rukhshah, not 'illat.

[28] Yusuf al-Qardhawi (n 26) 18.

'Ashur's thought includes the following universal maqâshid principles; fitrah *(al-fiṭroh),* tolerance *(al-samâhah),* benefit *(al-maslahah),* equality *(al-musâwah),* and freedom *(hurriyah).*[29]

c. Strength and Position of Maqâshid al-syarî'ah as Legal Basis

Maqâshid al-Shari'ah, apart from serving as the goals of the Islamic doctrines, it is also a general principle of Sharia itself. It is not simply extracted from the elements of Sharia law or from some arguments, but more than that it is the embodiment of the deepest meaning, the essence of all laws, the arguments and content of the Qur'an and Sunnah. This has been conclusively agreed upon by the Ulema for centuries.

In this regard, Imam al-Syathibi said that all obligations ordered by the Sharia return to the maintenance of *maqâshid al-shari'ah*. According to him, *maqâshid al-syarî'ah* has the character of *qathî*, meaning a certainty for the establishment of religious and worldly affairs. The *qath'î* of *maqâshid al-syarî'ah* here has two meanings, namely:

First**,** *qathî* as a legal proposition. The *qathî* here refers to the authority of the *maqâshid al-syarî'ah* itself. For example, when *maqâshid al-syarî'ah* provides guidelines on how Muslims should carry out economic activity by emphasizing that economic transactions and pursuing profit by prohibiting the practice of usury in various forms, it can be ascertained that the prohibition is lowered for the sake of maintaining and safeguarding public property. So that there is no injustice in socio-economic activity, especially for the lower-class people who are economically weak and always disadvantaged. In its position as a *qathî* legal argument, the existence of *maqâshid al-syarî'ah* in every provision of Sharia law is undeniable. If *maqâshid al-syarî'ah* is in the form of an obligatory act, it is certain that there will be benefits in it. On the other hand, if *maqâshid al-syarî'ah* is a prohibition, it can be ascertained that there is harm and damage contained in it which must be avoided through the prohibition.[30]

Second is *qath'î* as a legal argument. In this context, the meaning of *qath'î* here actually emphasizes more on the ability to account for *maqâshid al-syarî'ah* theory

[29] Al-Ghazâlî and Muhammad bin Muhammad Abu Hamid (n 19) 286-287.

[30] Chamim Tohari, 'Pembaharuan Konsep maqâshid al-syarî'ah Dalam Pemikiran Muhammad Thahir Ibn Asyur' (2017) 13 Journal of Maslahah 1.

than *qath'î* in the context of its certainty as a legal proposition as attributed to legal verses and *hadiths mutawatir.* Because in theory it can be proven if *maqâshid al-syarî'ah* does not exist, the benefits of the world such as maintenance of life, security, and health needed by humans will not be realized properly. From here *maqâshid al-syarî'ah* has an important position in the process of establishing the law.[31]

Regarding the position of *maqâshid al-syarî'ah* in Islamic law, as the ultimate goal of Sharia, it should occupy a central position as a benchmark and indicator of whether or not a legal provision is correct. In other words, a result of correct legal ijtihad must be through a good understanding of *maqâshid al-shari'ah*. This is the message that was called for by *ushul fiqh* Ulema in the past such as Imam al-Juwayni, al-Ghazali, Ibn Qayyim al-Jawzi, al-Syathibi, and others. Even according to al-Syathibi, the differing opinions among the ulama is mostly due to their poor understanding of *maqâshid al-syarî'ah* or even their lack of understanding of *maqâshid al-syari'ah.*[32] This strong statement shows that *maqâshid al-syarî'ah* should be placed in a strategic and main position in the process of establishing Islamic law, but the reality that happened in the past was not so.

Finally, awareness of the importance of reviving the concept of *maqâshid al-syarî'ah* began to rise when there were many legal problems and the outdated science of *ushul fiqh* in dialectic with an increasingly complex era. Al-Syathibi is the one who initially gave serious attention to *maqâshid al-syarî'ah* by including it in the study of *ushul fiqh* as his main consideration, as described in his book *al-Muwâfaqât*. At the time of al-Syathibi, *maqâshid al-syarî'ah* became part of the science of *ushul fiqh*. It is in this context that there is a meeting between the theory of Islamic law and the philosophy of Islamic law.

At the time of Muhammad Thahir Ibn Asyhûr, the position of *maqâshid al-syarî'ah* experienced a development from what was originally part of the science of *ushul fiqh*. At this time it turned into an independent scientific discipline. Consequently, *maqâshid al-syarî'ah* is no longer just a collection of concept or theory that only complement the science of *ushul fiqh* but has evolved into an approach so that it eventually occupies a central position in the development of

[31] Al-Syathibi and Abu Ishaq, *Al-Muwafaqat fi Ushul al-Ahkam* (Dar al-Fikr, 1995) 5.
[32] Al-Syathibi and Abu Ishaq (n 31) 7.

contemporary Islamic legal ijtihad theory. According to Jasser Auda, Islamic law is assumed to be a system. The position of *maqâshid al-syarî'ah* as the main substance, both in the form of the approach and the ijthad method, it must always exist in every process of determining the law.[33]

3. Reformulation of Islamic Law Based on *Maqâshid al-Syarî'ah* in Indonesia Context

a. The Construction of Ijtihad from a *Maqâshid al-Syarî'ah* Approach

In the previous section, the author explained that the application of Islamic law in Indonesia has faced philosophical confusion in the ontological, epistemological, and axiological realm. Regarding ontological ambiguity, the author proposes that it can be resolved by using an *istiqra'* approach, namely inductive research by searching for specific and comprehensive meaning and purpose related to the true nature of Islamic legal doctrines, essentially generalizing the general meaning of the detailed meaning. According to Muhammad Thahir Ibn Asyhûr, *istiqra'* is the first and foremost way to reveal the essence of reality which in the context of ijtihad is *'illat* law.[34] With the *istiqra'* method, the meaning of Islamic law will not be distorted by context or other interests outside the enforcement of Islamic law. Therefore, the author considers that the istiqra' method will be able to solve the problem of ontological confusion in the practice of Islamic law in Indonesia.

As for overcoming the problem of ambiguity in the epistemological and axiological realms, building the ijtihad model with the *maqâshid al-syarî'ah* approach can be said to be the best solution. In contrast to *ushul fiqh* which is an epistemology that combines elements of revelation and logic in the field of extracting Islamic law, *maqâshid al-syarî'ah* has its own epistemological basis. Historically, the use of the *maqâshid al-syarî'ah* method has been practiced by the mujtahids from among the companions, especially the caliphs who succeeded the Prophet, namely Khulafa al-Rasyidin.[35] Even in Jasser Audah's note, the use of *maqâshid al-syarî'ah* as a legal consideration has existed since the time of the Prophet Muhammad such as the story that occurred on a trip to Bani Quraizah, where at that time the group were divided into two groups when they understood the

[33] Jasser Auda, *Maqashid al-syariah as Philosophy of Islamic Law: A System Approach* (IIIT, 2008) 54-55.

[34] Muhammad Thahir Ibn Asyur, *Maqashid al-Syariah al-Islamiyah* (Syirkah al-Tunisiyah li al-Tawzi') 189.

[35] Jasser Audah, *Al-Ijtihad al-Maqashidi* (Syabkah al-Arabiyyah, 2011) 4-5.

Prophet's order not to carry out ‘Asr prayer unless you have reached the village of Banu Quraizah. One group understands that the prohibition must be obeyed, while the other group understands the prohibition as an order to speed up the journey, so the last group continues to perform ‘Asr prayer on the way. The incident was reported to the Prophet, and he confirmed both.[36]

During the time of Khulafa al-Rasyidin, some legal practices with the nuances of *maqâshid al-syarî'ah* can also be found in their ijtihad. For example, Umar bin Khathab's ijtihad did not punish/cut off the hands of people who stole in times of famine. Umar's decision, at first glance, appears to contradict the provision of the Qur'an, surah al-Maidah verse 38 concerning the command to cut off the hands of those who steal and have reached the *nisab*, but also contradicts the law imposed by the Prophet and Caliph of Abu Bakr. Umar's ijtihad is, of course, based on consideration of *maqâshid al-syarî'ah*, because the context of the act of stealing was carried out in condition of famine and hunger, as well as based on compulsion.[37] Apart from Umar, Caliph of Usman bin Affan had also conducted legal ijtihad on the basis of *maqâshid al-syarî'ah*, namely in the case of a stray camel. Usman ordered to catch the lost camel and take care of it, if the owner comes to take it, he must be able to explain the identity of the lost camel, if the identity stated is correct, he may take it. However, if no one can state the identity of the lost camel correctly, the camel can be sold and the money kept until the owner arrives, or the money is used for the common good if no one claims to be the owner. This is different from the legal provisions at the time of the Prophet Muhammad where a loose camel cannot be caught by others until the owner finds the camel. As for Usman's reason, because the conditions have changed, where human morals are decreasing, there are fewer people who maintain the quality of honesty and trustworthiness, this is different from the condition of society at the time the Prophet was still alive.[38]

In addition to the groups described above, the scholars of the four schools of thought also carried out ijtihad with the nuance of *maqâshid al-syarî'ah*. For example, Imam Abu Hanifah uses the *istihsan* theory which has the similar principle

[36] Jasser Audah, *Membumikan Hukum Islam Melalui Maqashid Syariah: Pendekatan Sistem* (Mizan, 2015) 41.

[37] Holilur Rahman, *Maqasid al-Syariah: Dinamika, Epistemologi, dan Aspek Pemikiran Ushuli Empat Mazhab* (Setara Press, 2019) 45-46.

[38] Holilur Rahman (n 37) 49-50.

and objective of establishing law with *maqâshid al-syarî'ah*. In the practice of *istihsan,* the law of *kulli* sometimes becomes a mediator to realize a Sharia goal. For example, regarding the permissibility of the *salam* contract – which is a contract in which the goods that are the object of the contract do not yet exist, but their properties are stated in the contract with the delivery of time with the price submitted at the beginning of the contract[39]– which is in line with the principle of convenience *(al-taysîr)* and justice *(al-'adl)* in Islamic law. In the Maliki's thought, ijtihad based on *maqâshid al-syarî'ah* is also carried out to produce a theory of ijtihad known as *maslahah al-mursalah* and *sadd al-dzarî'ah*. Even in the Shafi'i's thought, ijtihad based on *maqâshid al-syarî'ah* is realized through its famous theory of ijtihad, namely *qiyâs*. From this it can be understood that each thought uses *maqâshid al-syarî'ah* in their ijtihad, although in a different form or method, either by mentioning the term *maqâshid al-syarî'ah* directly such as al-Ghazali and al-Syathibi or indirectly like al-Juwaini and al-Qarafi.[40]

As for the ijtihad process, the use of the *maqashid* sharia approach consist of three stages, namely:

First, *tashawwur*, which is an introduction to the problem and its context.

Second, *takyîf*, namely compiling arguments that are considered appropriate to novel problems that arise.

Third, *tathbîq*, namely determining the law by considering the benefits, legal consequences, as well as the main objectives of the law that will be decided on the problem at hand.

The author proposes the theory of *maqâshid al-syarî'ah*, both in the sense of *al-ushûl al-khamsah* and *maqâshid al-syarî'ah al-'ammah* (universal Sharia goals) as an approach in ijtihad of Islamic law in Indonesia, so that Islamic law results are more able to realize the values of humanization, liberation and transcendence.

b. Integrating Legal Texts With al-Ushl al-Khamsah

In al-Ghazali's view, the main purpose of Islamic Shari'ah is to realize benefit or benefit and avoid damage or harm. In terms of *fiqh* rules it is called:

جَلْبُ الْمَصَالِحِ وَدَرْءُ الْمَفَاسِدِ

"Attracting benefit and resisting damage".

[39] Wahbah Zuhaili, *Fiqh al-Islam wa Adilatuhu. Volume 4* (Dar al-Fikr, 1989) 598.
[40] Holilur Rahman (n 37) 169.

In Arabic, the word صلحة is *masdar* from the word صلح which means "(make) goodness." Like the word نفعة which is *masdar* from the word فع which means "(to give) benefit". According to Izz al-Dîn Abd al-Salâm, linguistically the word *"maslahah"* has the same meaning as the word "benefit," while the word *"mafsadah"* has the same meaning with the word *"mudharah" "damage."* For him, all fiqh problems only come down to the one rule above.[41] However, what is meant by *maslahah* in this context, according to al-Ghazlî, is not *maslahah* in the linguistic sense commonly used in society, namely benefit or something useful, but *maslahah* in the sense of syara', that is an effort oriented towards maintaining the purposes of Sharia, which includes the maintenance of religion *(hifz al-dîn),* life *(hifz al-nafs),* kinship *(hifz al-nasab),* mind *(hifz al-aql),* and property *(hifz al-mâl),* at the *dharûriyyah, hâjiyyah* as well as *tahsiniyyah* level. The five existences are referred to *al-ushûl al-khamsah*. Therefore, all actions aimed at maintaining *al-ushûl al-khamsah* are called *maslahah*, and all actions that cause the destruction and even loss of the existence of *al-ushûl al-khamsah* are referred to *mafsadah*.[42] Thus the meaning of *mafsadah* is something that can damage or eliminate one of the *al-ushûl al-khamsah*.

Al-Ghazali emphasizes that whoever thinks *maslahah* is a stand-alone legal basis, he is wrong. According to him, this is because *maslahah* is attributed to the maintenance of the essence of the objectives of the Sharia, while the objectives of the Sharia can be known through the Qur'an, Sunnah, and ijma.' This means that all *maslahah* that does not refer to the maintenance of the objectives of the Sharia as understood by the Qur'an, Sunnah, and ijma', it is an unacceptable *maslahah*, falsehood and rejected. He also emphasized that whoever uses *istislah* without any basis from the text, he has made Sharia, just as those who use *istihsan* as a method of establishing law are also those who make Sharia. Thus, according to al-Ghazali that every *maslahah* must be returned to the maintenance of the objectives of the Sharia which are known to exist as goal based on the Qur'an, Sunnah and ijma'.[43]

[41] Izz al-Dîn ibn Abd al-Salâm, *Qawâ'id al-Ahkâm Fî Masâlih al-Anâm* (Dâr al-Qalam, 1400 H) 6-14.

[42] Al-Ghazâlî and Muhammad bin Muhammad Abu Hamid (n 19) 286-287.

[43] Yusuf al-Qardhawi, *Taysir al-Fiqh li al-Muslim al-Mu'ashirah* (Maktabah Wahbah, 1420 H) 88.

Al-Ghazali's view that prioritizes Sharia texts to find out *maslahah* rather than using mind is also opposed by Najmuddin al-Thufi, a Hanbali fiqh expert who holds the view that *maslahah* and *mafsadah* can be apprehended directly using human mind. Therefore, *maslahah* is the strongest syara' argument. With such an understanding, al-Thufi argues that if there is a conflict between the Sharia text and *maslahah*, *takhshish* must be carried out on the text, delaying their validity, and not cancelling them. According to al-Thufi, *maslahah* is a syar'i argument in which the validity does not depend on the confirmation of text, but only depends on human reason. Therefore, he believes that *maslahah* is an independent argument in establishing the law, so that in his view, *maslahah* does not require supporting argument. For al-Thufi, mind is free to determine *maslahah* or *mudharah* based on custom, experiment, and in any way without the need for evidence from text. However, al-Thufi himself limits that the *maslahah* here is that related to problem in the field of *muamalah*, while in the field of worship there is no role of mind to determine the benefit.[44]

The author agrees more with al-Thufi's view. The good and bad deeds can be known by the human mind, because basically humans are equipped with reason to distinguish between which things are *maslahah* and *mafsadah*. If for these two things, humans must depend on the authority of revelation, what is the use of human mind. Based on the ability of mind to know and determine good and bad, the role of revelation for mind is actually just as a reinforcement or guide, or revelation in this case is as a source of knowledge about things that cannot be reached by mind.[45] Therefore, according to the author, legal text, whether codified as part of the Indonesian state law, must be integrated into the benefits in the context of *al-ahwal al-khamsah*, both the benefits that are explicitly explained in the Sharia texts and the benefit that are known by human mind.

For example, in the matter of determining the Regional Minimum Wage, it must reflect the benefit or Maqâshid al-Syarî'ah. The implementation of maqâshidal-

[44] Mustafa Zaid. *Al-Maslahah fi al-Tasyri' al-Islami wa Najm al-Din al-Thufi* (Dar al-Fikr, 1964) 124.

[45] This view is in line with the view of the Muktazilah group which assumes that reason is able to know good and bad without having to be guided by sharia. For example, injustice, lies, betrayal, oppression and deprivation of the rights of others are bad deeds. While justice, honesty, compassion, and honour are good deeds. This shows that reason is able to know good and bad without being supported by sharia. The clear evidence of this view is that nations that do not live by Islamic sharia also recognize and love justice, and fight against the injustice of power. Al-Syahrastani, *Al-Milal wa al-Nihal* (Dar al-Fikr) 153-156.

syarî'ah in determining the minimum wage for workers can be realized in the form of implementing Sharia order and abandoning Sharia prohibitions in *muamalah*/employment *(hifdz al-din),* the amount of wage can meet the needs of workers' living which includes the cost of food, clothing, and housing (*hifdz al-nafs*), the existence of employment insurance that can guarantee the survival, health, and education of the children of workers *(hifdz al-nasab),* the amount of wages can meet the health maintenance of workers *(hifdz al-aql),* and no workers' rights are removed *(hifdz al-mâl).*

Another example is in marriage law or family law, marriage law, which should not only contain Sharia law, but also *tawsiqy* law.[46] For example, both in the 1974 Marriage Law and in the Compilation of Islamic Law, it is stated that a marriage is valid if the requirement and pillar have been fulfilled. The provision of such laws for the present time according to the author is not sufficient to protect the rights of women. This can be seen in the practice of *misyar* marriage between indigenous girls and Arab tourists that occur in tourist areas, where the girls suffer more loss due to the marriage. It is time for marriage law in Indonesia to be perfected with *tawsiqy* requirements that focus more on the aspect of protecting women's rights.

At this point, the author wants to emphasize that the integration of legal texts with *al-ushûl al-khamsah* produces Islamic legal product that reflect the human element. That is why the companions and previous mujtahid scholars in establishing Islamic law, always depended on the suitability of the legal text with the Maqâshid al-Syarî'ah, regardless of the method of ijtihad used.[47] Accordingly, the resulting law is grounded law that is in line with the benefit of society, and law that protects all parties. Because God created the law in the world for the benefit of human.

c. Integrating Legal Text with Maqâshid al-Syarî'ah al-'Ammah

In the context of renewal or reformulation of Islamic law in Indonesia, the integration of legal text with *Maqâshid al-Syarî'ah al-ammah* is very important and urgent to do. This is because the existing Islamic legal products are still oriented towards the *ushuliyah* approach only, which is insufficient in answering the problems of contemporary society. The emergence of problems in Islamic law such

[46] The law of tawsiqy or the requirements of tawsiqy is a law that is formulated to perfect the syar'i law as a result of changes in the social conditions of society. See the explanation in Satria Effendi, *Problematika Hukum Keluarga Islam Kontemporer* (Kencana, 2004) 35-36.

[47] Fahretin Atar, *Fikih Usulu* (Marmara University Press, 2013) 347.

as civil law, criminal law, state constitutional law, constitutional law, as a result of the development of modern legal thought such as human right, gender, modern relation between Muslim and non-Muslim, and other legal issues which is not entirely classical Islamic law is able to provide adequate solution. In addition, the approach of Islamic law which is only oriented to *ushûl al-khamsah* only protects narrow individual interest, so a legal product that has a wider scope of protection is needed in order to reach a greater benefit.

Maqâshid al-Syarî'ah al-ammah (universal) was first coined by a Tunisian cleric, namely Muhammad Thahir Ibn Asyhûr (d. 1325 H/1907 AD). In his study of *Maqâshid al-Syarî'ah*, he puts down several new concept in more universal as part of *Maqâshid al-Syarî'ah*, namely *fitrah* (holiness), *al-samâhah* (tolerance), *al-musâwah* (equality), *al- hurruyah* (freedom), and *al-haq* (truth and justice). This development is not only in terms of the additional quantity of the previous *Maqâshid al-Syarî'ah* concept, but also in term of the quality of the effect of determining the elements of *Maqâshid al-Syar'ah* itself. The previous division of *Maqâshid al-Syarî'ah* into *al-ushûl al-kamsah* only functions as protection in the individual realm, while the elements of *Maqâshid al-Syar'ah* mentioned by Ibn Asyhûr emphasize the progressive functions of Islamic Sharia, which are more universal. The construction of Islamic law that is integrated with *Maqâshid al-Syarî'ah al-ammah* is a law that reflects the values mentioned above.

Fitrah. **(**Nature). According to Ibn 'Âsyûr, fitrah means character which is an order that Allah created for all His creatures.[48] Furthermore, Ibn 'Âsyûr explained that there are two kinds of nature, namely *the nature of jasadiyah* and *the nature of zihniyah*. The nature of *jasadiyah* is the tendency of the human organs to work as they function. While the nature of *zihniyah* is the nature of humanity in addition to its tendency to submit to and obey God that is their tendency to like goodness, such as justice, honesty, shame, regret, and so on.[49] The construct of Islamic law which is integrated with the objectives of *shari'ah al-ammah* is Islamic law which does not conflict with human nature. Human equipped with instincts and mind is to maintain the nature existed in themselves, but sometimes environmental or other factors make human lose their nature. Therefore, the general purpose of the revelation of Islamic

[48] Muhammad Thâhir Ibn ‘Âshûr, *Maqâshid al-Sharî’ah al-Islâmiyyah* 57.

[49] Muhammad Thâhir Ibn ‘Âshûr (n 48) 58. Muhammad Nabil Ghanayim, *Qawa’id al-Maqâshidiyah ‘inda al-Thahir ibn Asyur* (Al-Furqan Islamic Heritage Foundation, 2013) 100.

Sharia is to maintain and restore human nature when humans lose their nature. Various forms of punishment and threats in Islamic law are intended to purify human nature so as not to deviate. This also proves that any rule of law which contradicts human nature, essentially also contradicts Islamic Sharia.[50]

*Al-hurriyah (*freedom*).* Human rights in Islam are built upon the principle of freedom. In connection with the main tasks of humanity to maintain the earth and build civilization, humans are equipped with the freedom to do anything on earth in order to carry out this noble task. Therefore, human freedom is guaranteed in Islam, even in the matter of faith or disbelief, Islam gives freedom to human to make choice.[51] The principle of freedom in Islam can cover all aspects of life, such as freedom of religion, political freedom, freedom of thought, and freedom of association. According to Ibn 'Âsyûr, *hurriyah* became part of *maqâshid al-syarî'ah* because the message of Islam was revealed to abolish servitude and uphold freedom. One example that reflects this is several forms of punishment for freeing slaves in *fiqh jinayah*, as well as in the statement that there is no compulsion to practice religion in the Qur'an. Essentially all humans and creatures in the universe are born together with their rights to freedom throughout their lives.[52] Therefore, Islamic law which is integrated with the *hurriyah* concept should be a law that can protect basic human rights such as freedom of thought and opinion. In Indonesia, there are legal regulations which, according to the author, contradict this *hurriyah* concept, for example the law on blasphemy. In its application, the law often robs human basic rights as creatures who in Islam are given freedom of thought and opinion. This issue should be the attention of legal scientists in Indonesia by reviewing the application of the law.

Al-samâhah (*tolerance*). *Al-samâhah* according to Ibn 'Âsyûr means *al-adl* or *al-tawasuth* (in legal language it means the position between narrowness and ease, moderate, or balance). Ibn 'Âsyûr stated that tolerance is the beginning of the characteristic of the Sharia and its greatest *maqâshid*.[53] *Al-samâhah* which is interpreted terminologically by Ibn 'Âsyûr as "commendable ease of something that others find difficult" is characterized as something that eliminates danger and

[50] Muhammad Thâhir Ibn ‘Âshûr (n 48) 60.
[51] Q.S. AL-Kahfi [18]: 29.
[52] Muhammad Thâhir Ibn ‘Âshûr (n 48) 131-132.
[53] Muhammad Thâhir Ibn ‘Âshûr (n 48) 60.

damage. It is said to be a "commendable convenience" because it does not contain an element of harm. According to him, Allah gave the character of Muslims as *"ummatan wasathan"* because Muslims have an obligation to always enforce Islamic Shari, while in the Sharia contains the doctrine of *al-samahah*.[54] *Al-samâhah*, this trait is one way to manifest mercy and compassion in the universe. From this, al-samâhah and ease are part of maqâshid religion.[55] The Islamic law that is integrated with the concept of *al-samâhah* is Islamic law that can show its elastic, flexible nature, and can adapt to the conditions of the community faced. In the context of Indonesia, reformulation of Islamic law based on this *samahah* needs to be realized, especially for uncodified Islamic law such as fatwas. So far, the fatwas issued by fatwa institution in Indonesia seem to always side with the interest of the majority and exclude minority group. Just look at the fatwas about heretical sect, the fatwas about wishing a Merry Christmas, the fatwas about choosing non-Muslim leader, and so on which, according to the author, are far from being *al-samahah* as part of Maqâshid al-Syarî'ah al-ammah.

Al-musâwah (equality). Etymologically, *al-musâwah* has the meaning of equality and balance. Ibn 'Âsyûr emphasized that one of the goals of Islamic *shari'ah* is the realization of equality *(al-musâwah*) in life and eliminating what is called *al-tafâwut* (imbalance).[56] The similarity of the origin of creation and aqidah is the basis of Ibn 'Âsyûr's argument in establishing *al-musâwah* as part of *maqâshid al-syarî'ah*. According to Ibn Asyhûr, humans in this universe have the same right to life regardless of skin colour, blood type, or nationality. Therefore, Islamic Sharia was revealed to maintain these equality rights. *Al-musâwah* or equality according to Ibn 'Âsyûr has a position as the foundation *(al-ashl)* in Islamic law, so that in its implementation there is no need for a special argument to support its legality. Ibn 'Âsyûr gave an example that often the Qur'an in some of its invocations is sometimes only mentioned using the form of the word *muzakkar* (which in Arabic is intended for men), but also applies to women. This, according to him, proves that Islamic Sharia sources recognize the existence of equality or the principle of *al-musâwah*, which in this example is intended as equality in the context of gender.[57] In

[54] Muhammad Thâhir Ibn ‘Âshûr (n 48) 61.
[55] Muhammad Thâhir Ibn ‘Âshûr (n 48) 61.
[56] Muhammad Thâhir Ibn ‘Âshûr (n 48) 95.
[57] Muhammad Thâhir Ibn ‘Âshûr (n 48) 96.

connection with this principle, the reformulation of Islamic law which is integrated with the objectives of Islamic law *al-'ammah* must be able to uphold *al-musâwah* or equality. It is time for Islamic fiqh which is currently being implemented in Indonesia to be directed towards the realization of equality. Nowadays, the laws that are not in line with the principle of *al-musâwah* have not been reformed. For example, the law of inheritance between the male and female portion which is proportional to 2:1, as well as the law on the ratio of the number of witnesses between men and women. The ijtihad paradigm, which is based on the principle of *al-musâwah*, in addition to paying attention to the text, also considers the context or contemporary reality that occurs in legal subject, they are humans and their environment. So that the resulting law is a law that provides a solution, not a law that is cut off from the goals of the law.

Such is the construction of Islamic law reformulation with the *Maqâshid al-Syarî'ah al-ammah* approach which, if realized, will produce true Islamic law product (legal product that reflects truth and justice). It should be noted that the idea of legal justice has long been put forward by Aristotle and Thomas Aquinas by stating that the law is created based on just moral values or rules, where the morality already exists and has lived and is ingrained in society. Therefore, the task of legislator is only to formulate what already exists.[58] However, in the context of Islamic law, to realize true justice, a comprehensive approach is needed that can direct the result of legal ijtihad to the goals of universal and complete Islamic law, namely the *Maqâshid al-Syarî'ah al-ammah*.

E. Conclusion

From the results of the discussion above, there are several important conclusions that can be drawn. First**,** there is philosophical confusion regarding the application of Islamic law in Indonesia at this time, in the ontological, epistemological, and axiological confusion. If this confusion is ignored, it will certainly keep people away from applying the law because it is felt that Islamic law can no longer provide benefit and justice for human life. Therefore, this philosophical confusion becomes urgent to be considered by Islamic law experts in Indonesia. Second, *maqâshid al-syarî'ah* is the goal that is the target of texts and particular laws to be realized in human life, whether in the form of order,

[58] Radbruch and Dabin, *The Legal Philosophy* (Harvard University Press, 1950) 432.

prohibition, and permissible, for individuals, families, congregations, and communities. In addition, *maqâshid al-syarî'ah* is also called the wisdoms that are the goal of establishing Islamic law. Because in every law prescribed by Allah swt for His servants there must be wisdom that accompanies it. *Maqâshid al-syarî'ah* includes the maintenance of religion *(hifz al-dîn),* life *(hifz al-nafs),* kinship *(hifz al-nasab),* mind *(hifz al-aql),* and property (hifz al-mâl), at the *dharûriyyah, hâjiyyah* and *tahsîniyyah* levels. The thought of maqâshid al-syarî'ah underwent a very important renewal during the time of Ibn Asyhur, because at this time there was a shift in the position of *al-uṣhūl al-khamsah* which originally occupied its position as *maqâshid 'ammah* to become *maqâshid Khashshah*. Meanwhile *maqâshid 'ammah* in Ibn 'Ashur's thought includes the following universal maqâshid principles; nature *(al-fiṭroh),* tolerance *(al-samâhah),* benefit *(al-maslahah),* equality *(al-musâwah),* and freedom *(hurriyâh).* Third**,** the reformulation of Islamic law in Indonesia is very urgent through the *maqâshid al-syarî'ah* approach which can be taken with two constructs, namely the integration of legal text with *al-ushûl al-khamsah* and integration of legal text with *maqâshid al-syarî'ah al-' ammah* as explained before.

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