



## **REFORMULATING THE CONCEPT OF *MAŞLAHAH*: FROM A TEXTUAL CONFINEMENT TOWARDS A LOGIC DETERMINATION**

*Iffatin Nur, Muhammad Ngizzul Muttaqin*

Postgraduate, Institut Agama Islam Negeri Tulungagung, Indonesia

E-mail: iffaeltinury@gmail.com, muttaqinizzul19@gmail.com

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DOI: 10.21154/justicia. v17i1.1807

Received: 5 Dec 2019

Revised: 8 March 2020

Approved: 8 May 2020

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**Abstract:** Up to this contemporary era, the concept of *maşlahah* developed by several leading Moslem scholars seems to be rather theocentric in a way that it is transfixed on the *maşlahah* considerations contained in the texts (*nass*). This means that the concept of *maşlahah* has so far been shadowed in the textual confinement so that the resulting *maşlahah* becomes an old-fashioned, stagnant, and less-able concept for responding to the times' challenges. This study aims to open up discourses and opportunities for the development and reformulation of *maşlahah* in the current contemporary era. This qualitative study is library research. The data used were obtained from book literatures, journals, and other writings related to *maşlahah* and were analyzed using a content analysis method. The discussion was done by describing the historical data of previous thoughts on *maşlahah* from the process of textual confinement to logic determination which was then formulated with the reality of today's modern era life. The results of this study indicate that: 1) from its historical aspect, the reformulation of *maşlahah* is one which has so far only been assessed in the perspective of *Shāri'* (the Law Maker), hence, it is necessary to reformulate it in the perspective of *mujtahid* by referring to *maşlahah* associated with the issues' reality context, 2) there is a need to incorporate the concept of ethics and humanity into the structure of *maşlahah*, and 3) there present a necessity to formulate a collective-based *ijtihād* in probing of *maşlahah* to create a scientific *maşlahah*-based *ijtihād* methodology.

**Abstrak:** Hingga pada era kontemporer sekarang ini, konsep *maşlahah* yang dikembangkan oleh beberapa tokoh ilmuwan Muslim tampak lebih bersifat teosentris yang terpaku pada pertimbangan *maşlahah* yang terdapat pada teks (*nass*). Artinya, konsep *maşlahah* selama ini masih terbayang-bayang dalam kungkungan teks sehingga *maşlahah* yang dihasilkan menjadi konsep yang jumud, stagnan, dan kurang bisa merespon tantangan zaman. Penelitian ini berusaha membuka wacana dan peluang terhadap perkembangan dan reformulasi *maşlahah* pada era kontemporer saat ini. Penelitian ini adalah sebuah studi pustaka (*library research*) yang dilakukan dengan metode kualitatif. Data yang dipakai berasal dari literatur buku, jurnal, dan tulisan-tulisan lain yang berkaitan dengan *maşlahah* dan dianalisa menggunakan metode *content analysis*. Pembahasan dilakukan dengan mendeskripsikan data sejarah pemikiran *maşlahah* dari proses kungkungan teks hingga determinasi akal yang kemudian diformulasikan dengan

realitas kehidupan era modern saat ini. Temuan penelitian ini menunjukkan bahwa: 1) reformulasi *maṣlaḥah* dari aspek sejarah adalah *maṣlaḥah* yang selama ini hanya dinilai dalam perspektif Syari', karena itu perlu mereformulasikan dalam perspektif mujtahid dengan mengacu kepada *maṣlaḥah* yang dikaitkan dengan konteks realitas permasalahan, 2) perlu untuk memasukkan konsep etika dan kemanusiaan dalam struktur *maṣlaḥah*, dan 3) perlu untuk mereformulasikan ijtihād berbasis kolektif dalam pengambilan *maṣlaḥah* guna menciptakan metodologi ijtihād berbasis *maṣlaḥah* yang ilmiah.

**Keywords:** Logic Determination; Collective-based Ijtihād; Textual Confinement; *maṣlaḥah*; Reformulation.

## INTRODUCTION

In accordance with our understanding so far, the *shari'ah* (law / way of life) that Allah had revealed to mankind aims to create *maṣālih/maṣlaḥāt* (benefits, plural of *maṣlah ah*) for their lives on this earth. Nevertheless, problems and issues faced by mankind always grow, develop, and never cease from emerging<sup>1</sup> whereas the vivid and detail *nass sharā'* (religious legal texts) are very limited. Therein, the *shari'ah* provides a guidance for them to search for legal ways which can help them find a way-out dealing with the problems they face.<sup>2</sup>

When discussing about *maṣlaḥah*, Moslems will be led to adapt to a very popular theme among Islamic law scholars, namely *maqāṣid shari'ah* (objectives of Islamic law enactment). Nuruddin ibn Mukhtar al-Khadimy defined *maqāṣid shari'ah* as the values that lie behind the provisions of *sharā'* (Islamic law) resulting from human conducts, be these objectives are found in *juz'iy* (specific) laws or *kulliy* (general) ones, and as *maṣlaḥah kulliyyah* (general benefit) or *simmat ijmā'iyyah* (the substance of benefits agreed by majority of Moslem scholars). According to him, these objectives are collected in a purpose of realizing an effort of servitude to *Allah*, the Almighty God, and as a manifestation of benefits for the survival of humanity both in this present world and the hereafter.<sup>3</sup> Unfortunately, the theme of *maṣlaḥah / maqāṣid shari'ah* was not studied pretty intensely by the early generations of Moslems. However, such condition, according to Ikromi, does not justify that the existence and legal validity of *maṣlaḥah* are invalid.<sup>4</sup> This is so since the emergence of this theme (i.e. *maṣlaḥah*) has the Holy Qur'an itself together with the Hadith of the Prophet as its foothold.

<sup>1</sup> Muksana Pasaribu, "maṣlaḥah dan Perkembangannya sebagai Dasar Penetapan Hukum Islam," *Jurnal Justicia* 1, no. 4 (2014). 350.

<sup>2</sup> Fatkan Karim Atmata, "Perkembangan Uṣūl Fiqh dari Masa ke Masa," *Jurnal Mizan: Jurnal Ilmu Syariah* 5, no. 1 (2017).

<sup>3</sup> Nuruddin ibn Mukhtar Al-Khadimy, *Al-Ijtihād al-Maqāṣidi* (Doha: Wazarah al-Awqaf wa al-Syu'un al-Islamiyah, 2005).

<sup>4</sup> Zul Ikromi, "Pendekatan Istishlahi dalam Ijtihad Abu Bakar al-Shidiq," *Jurnal Mazahib: Jurnal Pemikiran Hukum Islam* XVI, no. 1 (2017). 53.

Although *maṣlahah* has not become a separate major of study in the early generation of Moslems (i.e. during the Prophet Muhammad and his Companions' era), it does not mean that *maṣlahah* had not been their concern. This is so said since should we conduct any research on the inherited Islamic legal jurisprudence, then we will certainly find a lot of law provisions with *maṣlahah* contents within them. As Rahmi stated, the conducts of the Prophet's Companions were actually *maṣlahah*-oriented based on their profound understanding about the guidance and teachings of Islam coupled with their high awareness in paying efforts to create benefits to mankind.<sup>5</sup>

Moreover, conducting *ijtihād* (intellectual exercise to establish an Islamic law) always starts from an existing problem. A number of thought models about *maṣlahah* that exist show clearly that the Islamic jurists' thoughts were influenced by the conditions of the problems they faced at their corresponding time they lived. Different era brings with it different issues, especially with today's situation in which scientific and technological advancement moves very rapidly. It is, therefore, understandable that the classical model of Islamic law cannot be presented to deal with current problems satisfactorily.<sup>6</sup>

There are some thoughts indicating that the concept of *maṣlahah* has a very strong significance in the development of Islamic law studies. One which intrigues the authors' interest is an opinion which states that one of the reasons why Islamic law is acceptable in every time and space (*ṣālih fī kulli zamān wa makān*) is none other than the use of fundamental values regarding *maṣlahah* in extracting the law.<sup>7</sup> This opinion serves as the foothold to further develop the existing thoughts and to reformulate the concept about *maṣlahah*.

Discussing *maṣlahah*, especially about its development in Indonesia, is not something new. There were several Indonesian figures who offered their views regarding the understanding and application of the concept of *maṣlahah*, including Abdurrahman Wahid – a former chairman of Nahdlatul Ulama and Indonesian president. In his view, *maṣlahah* is the spirit of Islamic religion in solving the problems of humanity.<sup>8</sup> Then, there were Muhammad Sahal Mahfudz who said that *maṣlahah* approach in Islamic law had to include the usage of multidisciplinary and interdisciplinary perspectives<sup>9</sup> and Ali Yafie who stated that *maṣlahah* is the

<sup>5</sup> Nispan Rahmi, "Maqāṣid Syari'ah: Melacak Gagasan Awal," *Jurnal Syariah: Jurnal Ilmu Hukum Dan Pemikiran* 17, no. 2 (2017). 161.

<sup>6</sup> Muhyidin and Ilyas Supeno, "Pergeseran Orientasi Pemikiran Hukum Islam Kontemporer (Pembaharuan Pemahaman Hukum Islam dari Legal-Eksoterik Menuju Substantif-Esoterik)," *Diponegoro Private Law Review* 4, no. 1 (2019). 494.

<sup>7</sup> Zakaria Syafei, "Tracing Maqaṣid al-Shari'ah in the Fatwas of Indonesian Council of Ulama (MUI)," *Journal of Indonesian Islam* 11, no. 1 (2017).

<sup>8</sup> M. Nur Fauzi, "Konvergensi Pemikiran Etika Sosial Gus Dur dan Etika Utilitarianisme," *Ullumuna: Jurnal Studi Keislaman* 5, no. 2 (2019).

<sup>9</sup> Imam Bukhori, "Konsep Maṣlahah dalam Perspektif KH. MA. Sahal Mahfudh," *Falasifa* 8, no. 2 (2017).

soul of Islamic law and must be present in all Islamic legal products.<sup>10</sup> Meanwhile, among others, an attempt to reformulate the concept of *maslahah* had also been carried out by Afrizal Ahmad in which he offered a reformulation of *maslahah* relating to the preservation of one's life (*hifz al-nafs*) which included not only one's lives, but also his/her soul (*al-rūh*), body (*al-jasad*), mind (*al-fikr*), and heart (*al-qalb*).<sup>11</sup> Differing to these concepts, the authors try to offer a new reformulation of the concept of *maslahah* which is more relevant in solving today's problems.

This paper aims to provide a knowledge of the history of thought development over the emergence of the concept of *maslahah* as a method and an approach in the discourse of Islamic law studies as well as to find out the steps of reformulating the concept of *maslahah* in dealing with contemporary issues. Such is necessary since the employment of *maslahah* as a measure to solve the issues relating to Islamic law turns out to be conditional which means that employing *maslahah* in solving the same problem but at different position and condition leads to different results of its legal products. As Purnomo's essay, the construction of *maslahah* thought , better known as *istiqlāhi* pattern of thought, is more able to respond to the humans' problems from different 'time and space' points of view.<sup>12</sup>

From the literature study on the theory of *maslahah*, the authors came up with the root questions leading to the necessary efforts for reformulating the concept of *maslahah*. These are, but not limited to, *first*, how are the academic arguments from the history of thought on *maslahah* from time to time? *Second*, what is the appropriate measure for reformulating the concept of *maslahah* in this contemporary era? To answer these questions, an in-depth literature study about the concept of *maslahah* from time to time was conducted and the data obtained was dialogued to the today's regional reality. Then, the data was analyzed through the content analysis method<sup>13</sup> which was aimed to produce a step for reformulating the *maslahah* concept through a credible analysis process.

## THE URGENCY OF EMPLOYING MASLAHAH IN STUDYING ISLAMIC LAW

Prior to discussing *maslahah* and its use as a tool of stipulating a law, the meaning and essence of *maslahah* need to be understood. Etymologically, the word *maslahah* according to Abdurrahman, means something good and beneficial, hence, it is the opposite of evil or damage. He further stated explicitly that in its general

<sup>10</sup> Anwar Sadat, "Kedudukan Maṣlaḥah Perspektif Prof. KH. Ali Yafie," *Jurnal Al-'Adl* 6, no. 2 (2013).

<sup>11</sup> Afrizal Ahmad, "Reformulasi Konsep Maqāsid Syari'ah: Memahami Kembali Tujuan Syari'at Islam dengan Pendekatan Psikologi" *Hukum Islam* XIV, no. 1 (2014).

<sup>12</sup> M. Sidiq Purnomo, "Formulasi Maṣlaḥah al-Mursalah al-Syathibi dalam Upaya Ijtihad Kontemporer," *Jurnal Al-'Adalah* X, no. 2 (2011). 198.

<sup>13</sup> For better understanding about content analysis method, read: John W. Creswell, *Qualitative Inquiry and Research Design*, 3<sup>rd</sup> ed. (Los Angelos: SAGE, 2013); C. R. Kothari, *Research Methodology: Methods and Techniques*, 2<sup>nd</sup> ed. (New Delhi: New Age International Ltd. Publisher, 2004).

meaning *maṣlahah* is all that have benefits for humans either they are beneficial in obtaining goodness and pleasure or to remove any difficulty and distress.<sup>14</sup> Thus, the essence of *maṣlahah* is realizing goodness and happiness in human life and avoiding anything that can damage and ruin it. However, it must be understood that *maṣlahah* is related to the arrangement of the value of goodness which is descent, appropriate, and feasible to meet human needs.

Meanwhile, in terms of *sharā'*, the *uṣūliyyun* (scholars of *uṣūl al-fiqh*) shared the same view in defining *maṣlahah*, although they were different in providing its notion. In Abdurrahman's opinion,<sup>15</sup> for example, *maṣlahah* is defined as "*an attempt to preserve the aims and objectives of the Islamic law on the various virtues in which their limits have been determined and set, and they are not based on mere human desires and passions.*" According to al-Ghazali, *maṣlahah* is basically human efforts in trying to achieve and realize benefits or reject *maṣarāt* (harms).<sup>16</sup> Whereas Ibn Taimiyah stated that, as quoted by Abu Zahrah, what is meant by *maṣlahah* is the view of *mujtahid* (a person capable of conducting *ijtihād*) concerning any human deed which contains clear goodness and is not contrary to the Islamic law.<sup>17</sup> From these three definitions, it is clear that *maṣlahah* contains the same purposes and implications that is the benefits for mankind which become the purposes to be attained through Islamic law enactment and not those which are solely based on mere human desires and passions.

The historical reality notes that there is a continuous development in the theory of Islamic law, in this case *uṣūl al-fiqh* (fundamentals of Islamic jurisprudence), in accordance with the development of era. This is not surprising since Islamic law plays a double functions which are as a device to measure social reality with ideals of *sharī'ah* leading to the law containing those which are permissible (*ḥalāl*) and prohibited (*ḥarām*) and, at the same time, as a tool of social engineering. Hence, the development of legal theory undoubtedly occurs in line with the development of law in general according to the context of space and time. Therefore, the adaptability for *renewal* is one of characteristic of Islamic law. And, one important and fundamental concept which becomes a subject of Islamic law is that of *maṣlahah*<sup>18</sup> which serves as one of the devices in establishing Islamic law as well as being a *ḥujjah shar'iyyah* (legal argument). In Zaidan's opinion, Imam Malik and his followers and Imam Ahmad positioned *maṣlahah*

<sup>14</sup> Jalaluddin Abdurrahman, *Al-Maṣāliḥ al-Mursalah wa Makānatuhā fī al-Tashrī'* (Egypt: Matba'ah al Sa'adah, 2003). 12-13.

<sup>15</sup> Abdurrahman, 13.

<sup>16</sup> Al-Ghazali, *Al-Mustasfā* (Egypt: Maktabah al-Jumdiyah, 2010). 251.

<sup>17</sup> Abu Zahrah, *Uṣūl al-Fiqh* (Cairo: Dar al-Arabi, 2005). 495.

<sup>18</sup> Rifqi Kurnia Wazzan, "Epistemologi Mashlahah sebagai Pijakan Fiqh Indonesia," *Pengadilan Agama Kendal*, 22 Jan 2020. <http://pa-kendal.go.id/new/125-artikel/331-epistemologi-mashlahah-sebagai-pijakan-fiqh-indonesia-oleh-rifqi-kurnia-wazzan>, acsessed March, 20 2020

as legal propositions and *hujjah* (argument) in establishing Islamic law.<sup>19</sup> Even Abu Zahrah added to mention that Imam Malik and his followers are a group that proclaims and voices *maslahah* as a legal proposition and legal argument.<sup>20</sup>

Observing thoroughly the life of the Prophet, there can be found a variety of practices of attaining *maslahah*. To be more concrete and precise, the Holy Quran that generally becomes the guidance, the improvement agent, and the director in attaining happiness, also includes well in detail various '*illāt* (legal causes) and *maqāṣid* (objectives) in some discussions contained in its sacred texts. For example, concerning the enactment of regulations, the Quran only mentions three basic principles which are the consultation,<sup>21</sup> justice,<sup>22</sup> and equity<sup>23</sup> whereas the acts in detail are left to mankind so that they can take most benefit through their wisdom.

The substance of attaining *maslahah* can also be found in the Prophet's sayings. Among the texts of hadiths that show wisdom in prioritizing efforts to obtain *maslahah* is the Prophet's saying to his Companions, Mu'az ibn Janbal and Abu Musa al-Ash'ari, when they were assigned to Yemen, "Do make things easy and not hard and give glad tidings and do not make people run away (from guidance)."<sup>24</sup> Likewise, the Prophet's approval towards the saying of Mu'az ibn Janbal to hold on *ra'yu* (analysis) in the absence of an answer from the texts of both the Qur'an and the Sunnah or when the legal texts are *zanniy* (unclear/ambiguous) and contain multi-functional meanings that require decisive meaning which is closer to the objectives of law that may be reached with *al-ra'yu al-sahih* (good analysis), shows this kind of wisdom.

Furthermore, as described by Abu Zahrah, during the time of the Companions of the Prophet, principles of *maslahah* had been practiced by them and their benefits have been becoming a legacy until today. For example, they had compiled the *muṣḥaf* (sheets of manuscript) of Qur'an in a single book and this was done for fear that the Qur'an would disappear from civilization together with the death of many Companions who had memorized it. Such practice did not exist during the time of the Prophet nor was it prohibited. The gathering of the Qur'an's sheets of manuscript into a single unit was solely for the benefit of *ummah* (Moslem community).<sup>25</sup> Likewise, as explained by Addad,<sup>26</sup> the Caliph

<sup>19</sup> Abdul Karim Zaidan, *Al-Wājiz fi Uṣūl al-Fiqh*, (Baghdad: al-Dar Arabiyah Littiba'ah, 2000).

<sup>20</sup> Abu Zahrah, *Uṣūl al-Fiqh*, 280.

<sup>21</sup> The Holy Qur'an Surah (QS) Āli 'Imrān [3] : 159, see Abdullah Yusuf Ali, *The Meaning of the Holy Qur'an* (Maryland, USA : Amana Corporation, 1992). 169.

<sup>22</sup> QS al-Nisā' [4] : 58, *Ibid.* 203.

<sup>23</sup> QS al-Hujurāt [49] : 10, *Ibid.* 1341.

<sup>24</sup> A hadith (no. 3996) narrated by al-Bukhari. See: Muhammad ibn Ismail al-Bukhari, "Ṣaḥīḥ al-Bukhari", Translated and edited by Muhammad Muhsin Khan, *The English Translation of Ṣaḥīḥ al-Bukhari with the Arabic Text* (Virginia: Al-Sadaawi Publication, 1996).

<sup>25</sup> Abu Zahrah, *Uṣūl al-Fiqh*, 281.

<sup>26</sup> M. Zaini Abdad, "Ijtihad Umar ibn al-Khattab: Telaah Sosio Historis atas Pemikiran Hukum Islam." *Istinbath: Jurnal Hukum Islam* 13, no. 1 (2014), 45.

Umar did not implement the execution of penalty towards thieves by cutting off their hands<sup>27</sup> at the times of ‘ām majā’ah (famine) or ‘ām ramadah (prolonged drought periods) took place based on the thought that the crime was done due to emergency condition in order to maintain one’s life whereas imposing such a penalty would only worsen the situation faced by the *ummah* at that time.

The Companions of the Prophet had, actually, used *maṣlahah* in accordance with the objectives of Islamic law enactment, therefore, its usage must be practiced according to the objectives of Islamic law itself. Putting *maṣlahah* aside, according to Sidiq, means to set aside the objectives of *shari’ah* itself. Hence, holding on to *maṣlahah* becomes an obligation since *maṣlahah* is one of the main grips that stands as a separate theory which does not come out of the basics of other legal grips. On this basis, it may be said that *maṣlahah* is a part of the objectives of *shari’ah* even though it is not mentioned directly by the sacred texts of either the Qur'an or Hadith.<sup>28</sup>

In his essay, Sya’ban explained that benefits will continue to develop together with the development of social reality, likewise, they will continue to change with the changes of environmental conditions. Should the benefits not be prioritized in its entirety and not be responded with an appropriate provision, or only be focused on the existence of the propositions that recognize them, they will undoubtedly disappear from the reality of human life and will halt the development of laws that are responsive to the era’s changes and development. Sya’ban asserted further that an attitude of being negligent and pay improper attention to the development of *maṣlahah* is not in line with the purpose of Islamic law.<sup>29</sup> Such view becomes the key word in arguing on the position of *maṣlahah* as *ḥujjah shar’iyyah*. This is so because should the benefits that exist in each place be set aside whereas they actually remain in line with the will of *al-Shārī’*, then, according to Abu Zahrah, such a condition will only cause troubles to mankind. This is contrary to what God deserves as He loves to ease human in dealing with their problems and He does not wish to impose any unbearable difficulty onto them.<sup>30</sup>

<sup>27</sup> As ordered by Allah, in QS al-Maidah [5]: 38 He says: "As to the thief, male or female, cut off his or her hands, a punishment by way of example from Allah for their crime", see: Ali, *The Meaning of the Holy Qur'an*, 259, and practiced by the Prophet in some occasions. In one hadith narrated by al-Bukhari no. 4304 and Muslim no. 1688, the Prophet said: "...Surely the people before you had been destroyed. When one among their nobles stole, he was left (unpunished), but when one among their weak people stole, he was subjected to be punished by *hadd* (religious penalty on crimes). For the sake of Muhammad's soul which is in His hand! Should Fatimah the daughter of Muhammad steal, I would cut off her hand." See: al-Bukhari, "Şahih al-Bukhari" and Imam Muslim, *Şahih Muslim* (Riyadh, KSA: Maktabatur Rusyd, 2001).

<sup>28</sup> Syahrul Sidiq, "Maqāṣid Syari'ah dan Tantangan Modernitas: Sebuah Telaah Pemikiran Jasser Auda," *Jurnal In Right: Jurnal Agama dan Hak Azazi Manusia* 7, no. 1 (2017): 143.

<sup>29</sup> Zaky al-Din Sya’ban, *Uṣūl al-Fiqh al-Islāmi* (Egypt: Mathba’ah Dar al-Ta’lif, 2003). 176.

<sup>30</sup> Abu Zahrah, *Uṣūl al-Fiqh*. 282.

Furthermore, leaving *maslahah* when establishing a law, according to Cholili, will cause a difficulty and strictness in practicing Islamic law,<sup>31</sup> whereas Nur and Muttaqin added that using *maslahah* as a method and an approach in stipulating Islamic law has a mission towards realizing a multi-dimensional Islamic law in which *maslahah*, law, and the conditions of people's needs must be considered as a whole.<sup>32</sup> Such *ijtihād* in probing beneficial values when establishing Islamic law does not only favor *nass* (texts) *an sich*, but also considers the substance of the texts (i.e. the content of *maslahah*) and considers the conditions and problems that are needed by the community.

The urgency of the emergence of the concept of *maslahah* which is reduced to *maqāṣid shari'ah* originated from the anxiety of Islamic jurists about the sustainability of Islamic legal products. Such anxiety is certainly not without reason, the difference in time and change in place and space serve as the main trigger. So that, in its development, the concept of *maslahah* has been experiencing a renewal through a new breakthrough from the philosophical approach to the system one. With this understanding, *maslahah* has, undoubtedly, a very strong urgency in maintaining the spirit of Islamic law to be accepted and applicable at any place and time.<sup>33</sup>

## MAŞLAHAH AS A DOCTRINE AND A METHOD IN STUDYING ISLAMIC LAW

The theological aspects of Islamic law can be examined and studied thoroughly from the essence of the objectives of achieving Islamic law establishment. Although there are many theories explaining this such a statement, the most famous and most prominent is the theory of *maslahah*. As a doctrine, *maslahah* aims to achieve and create benefits for mankind in general whether they are Moslems or adherents of other religions. Therefore, Abdurrahman<sup>34</sup>, Rabuh<sup>35</sup>, and Abu Zahrah<sup>36</sup> proclaim that the three priority scales related to human needs in enduring their lives, - *darūriyyāt*, *hājiyyāt*, and *tahsiniyyāt*, - are mutually complementary and reinforcing.

Al-Biri defined *darūriyyāt* as the human primary needs that must exist whereas their absence has implications for the destruction of human life.<sup>37</sup> *Hājiyyāt*,

<sup>31</sup> Achmad Cholili, "Urgensi dan Relevansi al-Maslahah al-Mursalah sebagai Metode Ijtihad Kontemporer," *Jurnal At-Tahdzib* 1, no. 2 (2013). 213.

<sup>32</sup> Iffatin Nur and Muhammad Ngizzul Muttaqin, "Fiqh Jalan Tengah (Mempertemukan Maqāṣid Syari'ah, Hukum, dan Realitas Sosial)," *Zawiyah: Jurnal Pemikiran Islam* 5, no. 2 (2019). 215.

<sup>33</sup> Abdurrohman Kasdi, "Actualizations of Maqāṣid al-Shari'ah in Modern Life: Maqāṣid al-Shari'ah Theory as a Method of the Development of Islamic Laws and Shari'ah Economics," *Justicia Islamica: Jurnal Kajian Hukum Dan Sosial* 16, no. 2 (2019). 247-268.

<sup>34</sup> Abdurrahman, *Al-Maṣāliḥ al-Mursalah wa Makānatuhā fī al-Tashrī'*. 19.

<sup>35</sup> Muhammad al-Said Ali Abd Rabuh, *Buğuth fī al-'Adillah al-Mukhtalaf Fīhā 'Inda al-Uṣūliyyīn* (Egypt: Matba'ah al-Sa'adah, 2004). 81.

<sup>36</sup> Abu Zahrah, *Uṣūl al-Fiqh*. 278.

<sup>37</sup> Zakariya al-Biri, *Maṣādir al-Āḥkām al-Islāmiyyah* (Cairo: Dar al-Ittihad Littba'ah, 2009). 124.

according to him, means human secondary necessities; they support whatever is needed by humans to facilitate those included in *maṣlahah darūriyyāt* category<sup>38</sup> as well as to get rid of and avoid any difficulty in human efforts to realize those included in *darūriyyāt*. Since their function is to support and to complement the human primary needs (*darūriyyāt*) then the presence of secondary needs (*hājiyyāt*) is necessitated. This means that should secondary needs not exist, they will not lead to human destruction, however, their absence might complicate and even make imperfect the primary needs (*darūriyyāt*).

Meanwhile, *taḥsiniyyāt*, according to Abdurrahman, means tertiary needs. Their presence is not necessarily needed since they serve as a complement in beautifying the process of realizing primary needs (*darūriyyāt*) or secondary ones (*hājiyyāt*).<sup>39</sup> Conversely, the absence of tertiary needs (*taḥsiniyyāt*) will neither destroy nor cause difficulty to human life, but it may reduce the sense of beauty and aesthetics in human life. Whichever need is to be given higher scale of priority is a man's personal latitude and such a decision becomes a man's private option in the effort to present him/her as a respected figure as long as it does not conflict with the provisions of *nass*.<sup>40</sup> This is where mankind are granted with space to choose and to exercise their abilities in order to avoid *mafsadāt* (harms) in the form of the loss of aesthetic values and related specialties. Equipping with these three concepts of *maṣlahah* necessities as its doctrine, the existence of *maṣlahah* theory persists.

In formulating the method of establishing Islamic law by *mujtahids*, it is necessary to reckon and realize the fact that the texts of the Qur'an and Hadith are limited quantitatively whereas civilization and social reality have been developing and progressing from time to time. For this reason, various methods of stipulating Islamic law have been developed and offered by *mujtahids* to deal with the limited texts of the Qur'an and Hadith in contrast to unlimited issues and social problems. Unfortunately, these methods tend to be given a theological foundation by those who had developed them so that, in most times, they are considered sacred.<sup>41</sup>

With such condition, many Moslems are trapped and indoctrinated into idols. They once or even still think and consider that a legal stipulation by an *imām mažhab* (a leader of school of thought in Islamic jurisprudence) is "divine". Excessive fanatics on any opinion of a school of thought often times caused unnecessary tensions and quarrels both in thoughts or, worse, physically. As a

<sup>38</sup> *Ibid.* 125.

<sup>39</sup> Abdurrahman, *Al-Maṣāḥiḥ al-Mursalah wa Makānatuhā fī al-Tashrī'*, 21.

<sup>40</sup> Asyraf Wajdi Dasuki and Nurdianawati Irwani Abdullah, "Maqāṣid al-Shari'ah, Maṣlahah and Corporate Social Responsibility," *American Journal of Islamic Social Sciences* 24, no. 1 (2007). 31–33.

<sup>41</sup> Ahmad Faisal, "Islamic Shari'a in Indonesia: The Struggle between Sacrality and Profanity," *Jurnal Al-Ulum* 19, no. 1 (2019). 33–34.

result, borrowing Mansouri's words, long debates ensued since many Moslems want to talk to *God* in the language of *God*, whereas *God* speaks to humans using their language except in matters regarding divinity and monotheism.<sup>42</sup>

Due to such a condition, Islamic law then experienced a long sleep adding to the many casualties falling in the course of defending the opinions of certain *imām mažhab* and their schools. Right at this point, utilizing *maṣlaḥah* approach as a method of establishing Islamic law is intended as an analysis tool or as a lens to read issues and problems in the human life's reality is needed. As stated by Auda, a *maṣlaḥah*-based approach, which is also one of the approaches classified under modernism in contemporary Islamic law reformation, attempts to avoid the shortcomings of apologetics by reading the scripts in terms of the benefits they achieve, rather than specific pre-conceived policies.<sup>43</sup>

As a method of *ijtihād*, *maṣlaḥah* necessitates and positions its values in the diversity of schools of thought with all their differences in their unique *istinbāṭ* (extracting Islamic law) method and all its legal products. According to al-Raysuni and Barut, when there are legal differences about an issue, then the final decision is taken through a compromise or comparison that favor the opinion which is more impartial and incline more heavily towards realizing general benefit for the *ummah*. In this way, the use of *maṣlaḥah* in stipulating Islamic law places more emphasis on the universality of values contained and are implicit in the legal texts rather than the explicit meaning of the texts. Therefore, the method of *tarfīḥ* (prioritizing an argument) uses *maṣlaḥah* more dominantly both as an approach and as a method of *istinbāṭ*.<sup>44</sup>

In its application, the theory of *maṣlaḥah* is not simple and does not completely eliminate differences of opinions. The contradiction between *maṣlaḥah* and *mafsadāt* or a disagreement between a benefit on one hand and another benefit on the other hand open up a space for debating it. This is possible since there are several levels and classifications of benefits, including personal benefits and general ones. Whenever such contradiction takes place, the main principle to hold onto is to prioritize rejecting *mafsadāt* over attaining *maṣlaḥah* as stipulated in *qawā'id uṣūl al-fiqh* (the principles of *uṣūl al-fiqh*) that says "*dar'u al-mafāsid muqaddam 'alā jāl al-maṣāliḥ*" (rejecting harms takes precedence over attaining benefits). However, according to al-Qaradhawi, if the benefits to be obtained are for the greater importance while the harms are on a narrower scale or there is a

<sup>42</sup> Mabrouk Chibani Mansouri, "Holy Time and Popular Invented Rituals in Islam: Structures and Symbols," *Al-Jami'ah: Journal of Islamic Studies* 56, no. 1 (2018). 123–124.

<sup>43</sup> Jasser Auda, *Maqāṣid al-Shari'ah as Philosophy of Islamic Law: A Systems Approach*, (London: IIIT, 2007). 176.

<sup>44</sup> Ahmad al-Raysuni and Muhammad Jamal Barut, *Al-Ijtihād al-Naṣṣ al-Wāqi' al-Maṣlaḥah* (Beirut: Dar al-Fikr, 2000). 37.

disagreement between two different benefits, then attaining *maṣlahah* in such a condition is prioritized.<sup>45</sup>

The use of *maṣlahah* also brings significant legal implications to the style and format of contemporary Islamic law. The strength of *maṣlahah* in extracting contemporary Islamic law will open up very widely the possibility of the emergence of different Islamic legal provisions in different places and at different times since the consideration of *maṣlahah* is very much influenced by the differing conditions of place and time. In such a case, Islamic law that once flourished in the Middle Eastern countries may not necessarily be applicable elsewhere, say Indonesia, since one aspect that affects its stipulation is the condition of the place, the reality of related society, and the different time of civilizations. Having such a situation, Islamic law will be open and flexible which is opposite to the nature of '*aqīdah* (creed) or *tawḥīd* (monotheism) which are fixed and certain.

The emergence of the *maṣlahah* theory aims to fight against trans nationalizing Islamic law and it rather introduces the diversity of Islamic legal products based on *maṣlahah*. Hence, the emergence of *maṣlahah* has a very large role in creating an order of life that is godly and just and has a legal certainty and a universal understanding regarding *maṣlahah*. Having these characters to be presented forward, Islam will come with a cool, peaceful, and reassuring face.<sup>46</sup>

## **THE CONCEPT REFORMULATION OF MAṢLAHĀH: FROM A TEXTUAL CONFINEMENT TOWARDS A LOGIC DETERMINATION**

The basic concept of *maṣlahah* initiated by the Prophet Muhammad and his Companions is an ideal to be realized. Then, the concept was built in stages over the centuries sourced on very in-depth statements in the form of *uṣūl al-fiqh* studies so that they came to be formulated in Islamic legal products.<sup>47</sup> With this basic concept, it becomes clear that *maṣlahah* is God's wish and purpose which includes standards, values, criteria, and guidelines derived from the texts of God to be applied in solving human problems and as guidelines for mankind in enduring their life.

The historical studies on the development of *maṣlahah* did not previously pay much attention and seemed to be ruled out. Likewise, the studies on Islamic law only focused on studying *uṣūl al-fiqh* and *qawā'id fiqhīyyah* which were oriented to the texts and not focused on their intents and purposes. Whereas, actually, these three matters, - *maṣlahah*, *uṣūl al-fiqh*, and *qawā'id fiqhīyyah*, - become elements in an

<sup>45</sup> Yusuf al-Qaradhawi, *Madkhal li a-Dirāsah al-Islāmiyyah* (Beirut: Mu'assasah al-Risalah, 2009). 60-65.

<sup>46</sup> Al-Raysuni and Barut, *Al-Ijtihād al-Naṣṣ*, 31-32.

<sup>47</sup> Siti Amaroh and Masturin, "The Determinants of Maqāṣid Sharī'ah-Based Performance of Islamic Banks in Indonesia," *IQTISHADIA: Jurnal Kajian Ekonomi Dan Bisnis Islam* 11, no. 2 (2018). 357.

inseparable system as follows: 1) *uṣūl al-fiqh* becomes a methodological foundation for giving birth to *fiqh* (Islamic jurisprudence), 2) *qawādīd fiqhīyyah* serves as the foundation of *uṣūl al-fiqh* and *fiqh*, and 3) *maṣlahah* has its own values and spirit contribution to *fiqh*, but it is understood in the domain of Islamic legal philosophy, therefore, it does not touch the study of *istinbāt al-ahkām* or *ijtihād* method.

There are at least two reasons why *maṣlahah* does not become an integral part of Islamic law compared to *uṣūl al-fiqh* and *qawādīd fiqhīyyah*. First, the theological debates among Moslem scholars become a major contributor to why the concept of *maṣlahah* is overridden by the dominance of the schools of thought that opposed the logic. The school's stand in opposing logic determination while putting forward the religious texts contribute significantly to such situation. Second is the inclusion of studies about *maṣlahah* into the studies of Islamic law's philosophy and not in the realm of *uṣūl al-fiqh*. This certainly puts *maṣlahah* into a place that so far has been a debate, although, according to Shaharuddin, the studies of *maṣlahah* still gain benefits from the situation since, so far, the studies of *uṣūl al-fiqh* cannot be separated from the creation of benefits for mankind as found in the methods of *istihsān* (juridical preference), *sadd al-żarī'ah* (blocking the means), and *maṣlahah mursalah* (unattested benefit) which, in all these three methods, the substance of *maṣlahah* are still utilized.<sup>48</sup>

In the context of discussing *maṣlahah/maqāṣid shari'ah*, the stages of development about *maṣlahah* were preceded by the use of *maṣlahah* as an ideal condition that represented Islamic law. Such was put forward by the Companions of the Prophet Muhammad like Abu Bakr who collected the *mushaf* of the Qur'an in a single book and Umar who did not cut off the hands of thieves as previously explained. *Maṣlahah* as an ideal, not a theory of *uṣūliyyah* (those related to the fundaments of Islamic law), became a theme that was not systematically discussed in its initial development, but, later on, it gets a more detailed, clear and applicable meaning after going through a series of stages of the development of *uṣūl al-fiqh*.<sup>49</sup>

Nevertheless, in the history of Islamic legal thought there found Moslem scholars with various works who discussed the secret elements, wisdom, and the purposes and objectives of Islamic law, which are, actually, the essence of *maṣlahah* involvement in Islamic law stipulation. They were Abu Bakar al-Qaffal al-Shasi (d. 365 AH/976 AD) with *Uṣūl al-fiqh* and *Mahāsin al-Shari'ah*, Abu al-Hasan Muhammad al-Amiri (d. 381 AH/992 AD) with *al-Taqrīr li Awjūh al-Taqdīr*, Imam Haramayn al-Juwaini (d. 478 AH/1085 AD) with *al-Burhān*, Imam al-Ghazali (d.

<sup>48</sup> Amir Shaharuddin, "Maṣlahah-Mafsadah Approach in Assessing the Shari'ah Compliance of Islamic Banking Products," *International Journal of Business and Science* 1, no. 1 (2010), 132.

<sup>49</sup> Ahmad al-Raysuni, *Al-Baḥth fī Maqāṣid al-Shari'ah Nash'atuhā wa Tatawwuruhā wa Mustaqbaluhā* (Ribath: Mathba'ah al-Najah al-Jadidah al-Dar al-Baidhah, 2007). 2.

505 AH/1111 AD) with *al-Manhūl*, *Shifā al-Ghalīl* and *al-Mustasfā*, Imam al-Shatibi (d. 790 AH/1388 AD) with *al Muwāfaqāt*, and Ibn ‘Ashur (d. 1393 AH/1973 AD) with *Maqāṣid Shari’ah*, to name but few. However, it is a sad fact that the development of the concept of *maṣlahah* looks very slow when compared to the rapid development of ‘*ulūm al-fiqh* (science of Islamic jurisprudence), *uṣūl al-fiqh*, and *qawā'id fiqhīyyah*.<sup>50</sup>

The stagnation of thoughts post-al-Ghazali is often considered as a result of his stand in rejecting philosophy. This condition also contributed to the stagnant position of Islamic law with its methodological ideas which otherwise should had been able to develop with the times. The vacuum of development post-al-Shatibi, however, had been a driving force for refreshing the concept of *maṣlahah* in order to create Islamic laws that are adaptable and capable to dialogue with social reality. In Wael B. Hallaq’s view, what had been done by al-Shatibi was an attempt to express Islamic law openly. To Hallaq, Islamic law had undergone historical distortion due to the lack of thought of the *mujtahids* and the excessive domination of Sufism that occurred in the old days.<sup>51</sup>

The high number of problems related to Islamic law and the stagnation of *uṣūl al-fiqh* in dialoguing with social reality had encouraged al-Shatibi to refresh the theoretical studies of *uṣūl al-fiqh*. He spent a lot of efforts to include *maṣlahah* as the main consideration in the study of *istinbāt al-ahkām* (extracting Islamic law) which became a realm in *uṣūl al-fiqh*. It was at this time that the first foundation of the study of *maṣlahah* was included in the discourse of *uṣūl al-fiqh*. Then, the position of *maṣlahah* eventually experienced a very significant development during the time of Ibn ‘Ashur. Differing to al-Shatibi that included *maṣlahah* as a part of the *uṣūl al-fiqh* theory, Ibn ‘Ashur saw the need for *maṣlahah* to become a separate scientific discipline and to break away from *uṣūl al-fiqh* studies so that *maṣlahah* will no longer become a conception confined by *uṣūl al-fiqh*, but rather it can evolve into becoming an approach in extracting Islamic law. Finally, according to Mawardi, *maṣlahah* becomes a separate theoretical breakthrough in the world of contemporary Islamic law.<sup>52</sup>

From the formulation of *maṣlahah* proposed by several figures previously discussed, it can be concluded that *maṣlahah* is a way of solving problems by considering the benefits contained in the religious texts. To the authors’ opinion, such concept of *maṣlahah* is considered obsolete because *maṣlahah* contained in the texts may not be accepted when it is applied to solve the today’s problems

<sup>50</sup> *Ibid.* 185-186.

<sup>51</sup> Wael B. Hallaq, *A History of Islamic Legal Theories, An Introduction to the Sunni Uṣūl al-Fiqh* (Cambridge: Cambridge University Press, 2007). 162-163.

<sup>52</sup> Ahmad Imam Mawardi, *Fiqh Minoritas (Fiqh Al-'Aqalliyat dan Evolusi Maqashid al-Syari'ah)*: Dari Konsep ke Pendekatan (Yogyakarta: LKiS, 2010). 188.

of society. The stagnation and collision of the concept of *maṣlaḥah* may be explored and observed whenever the old model of the concept is confronted to the occurring contemporary problems and issues.

So, in order to reformulate the concept of *maṣlaḥah* in addressing contemporary problems nowadays, a dismantling on the concept is needed that is not only fixated on the texts, but also that prioritizes logical considerations. It is in this regard that the authors try to offer three important things that need be done in reformulating the concept of *maṣlaḥah* in this contemporary era, so that any *ijtihād* using *maṣlaḥah* will be accepted and more relevant with the era's development.

*First*, utilizing and considering *maṣlaḥah* in solving contemporary problems is "conducted in the perspective of *mujtahids* by considering *naṣṣ* (texts)". This is because so far conducting *ijtihād* employing *maṣlaḥah* only focuses on the consideration of the texts, when there is a conflict between the texts and logic, then the texts are prioritized. This principle is certainly no longer relevant since those with more understanding of the today's need of *maṣlaḥah* are *mujtahids*, not the texts.<sup>53</sup>

*Second* is including human values and ethics as a part of *maṣlaḥah* *darūriyyāt*, *ḥājiyyāt*, and *taḥsiniyyāt*. The classification of *maṣlaḥah* into *darūriyyāt*, *ḥājiyyāt*, and *taḥsiniyyāt* in some ways contains its own dilemma. As an example, the penalty imposed on theft is on one hand aimed for maintaining *maṣlaḥah* regarding protecting one's wealth (*hifẓ al-māl*), however, on the other hand, it violates another *maṣlaḥah* which is preserving one's soul (*hifẓ al-nafs*) due to the punishment of cutting off hands. It is very clear that in this illustration there present a necessity of employing *maṣlaḥah* wisely. Regarding this matter, the classification concept of *maṣlaḥah* must certainly need to be overhauled by incorporating social ethics and human values. This is because social ethics and human values are the most important substances that must not be lost whenever conducting *ijtihād* using *maṣlaḥah*. The social ethics can be applied by protecting the dignity of others and fertilizing mutual tolerance whereas human values can be applied in upholding human equality, eliminating discrimination, and opposing any form of oppression.<sup>54</sup>

*Third* is applying a collective *ijtihād* in extracting and establishing Islamic law utilizing *maṣlaḥah*. What has been happening so far is that employing *maṣ*

<sup>53</sup> Such criticism had been expressed by Fazlur Rahman, "Towards Reformulating the Methodology of Islamic Law: Sheikh Yamani on Public Interest in Islamic Law," *New York University Journal of International Law and Public* 12 (1979), 219–224.

<sup>54</sup> See further: Iffatin Nur, "In the Name of Public Interest We Evict? (Re-actualizing the Standing Position of Proletarian Jurisprudence to the Marginalized)," *Saudi Journal of Humanities and Social Sciences* 5, no. 2 (2020). Preserving one's dignity and honour also becomes the most valuable aspect in reformulating the concept of *maṣlaḥah*. See: Saim Kayadibi, "The State as an Essential Value (*Darūriyyat*) of the Maqāṣid al-Shari'ah," *Ahkam: Jurnal Ilmu Syariah* 19, no. 1 (2019). 4–5.

*lahah* as considerations in extracting and establishing Islamic law is only carried out in one perspective which, in some respects, may not be accepted by other perspectives. Therefore, a collective *ijtihād* in determining *maṣlahah* is done by including *maṣlahah* considerations regarding a problem from many points of view including scientific, health, social, technological, humanitarian, ethical, political, and so forth.<sup>55</sup>

These three steps of reformulation are grounded on the fact that *maṣlahah* is not only related to human relations (*mukallaf*) with God alone, but also to the arrangement of human relations with each other as well as with the universe.<sup>56</sup> Thus, the reformulation concept can be applied in all aspects of life that are peaceful, safe, and bring peace and comfort to the universe. This is in accordance with the main mission of Islam which is a religion that brings mercy to all the universe (*raḥmatan li al-ālamīn*).<sup>57</sup>

These reformulation steps are intended to define that Islamic legal products obtained by employing *maṣlahah* as their considerations are ethical systems and values covering all aspects of life. Employing *maṣlahah* is purposed to serve as the ground oriented to become the main device in adjusting to the era's development so that the basic values and fundamental objectives of Islamic law reflecting the religion's holistic view in guiding and ruling human life both individually and as a group can be realized. Hence, all human activities conducted at all times and places cannot be separated from the ethical, humanitarian, and spiritual aspects.

Subsequently, the application and development of *maṣlahah* at the present era needs to be evidenced through regional studies which, in legal studies, become a particular consideration. Such regional studies are perceived to be experiencing a development and expansion of the realm of Islamic law so the concept of *maṣlahah* will find its appropriate momentum in this contemporary era. Having this situation, *maṣlahah* will become the religion's universal value and the *perennial wisdom* will become a global discourse in compiling and stipulating global ethics towards creating a peace and tranquil world.

The potential for the development and reformulation of the concept of *maṣlahah* can be conducted by creating a new format of Islamic law or jurisprudence (*fiqh*) needed by Moslems and the wider community. Such a creation begins with

<sup>55</sup> Such serves as a proof that Islam is a religion that brings blessing to all (*raḥmatan li al-ālamīn*) and contributes for providing goodness in all aspects of human life. Therefore, a collective *ijtihād* employing a variety of perspectives is needed to realize the religion's vision and mission. See further: Alias Azhar, "The Need for Collective Ijtihad between the Fuqaha and Experts in Health Science and Modern Medicine: A Review," *International Journal of Psychosocial Rehabilitation* 24, no. 2 (2020).

<sup>56</sup> Eko Saputra and Busyro, "Kawin Maupah: An Obligation to Get Married after Talak Tiga in the Tradition of Binjai Village in Pasaman District, a Maqasid al-Shari'ah Review," *QIJIS: Qudus International Journal of Islamic Studies* 6, no. 2 (2018). 191.

<sup>57</sup> Allah says in QS al-Anbiyā' [21]: 107: "Wa mā arsalnāka illā raḥmatan li al-ālamīn" (We sent thee not for but a mercy for all creatures), see: Ali, *The Meaning of the Holy Qur'an*, 818.

the development of human life and establishes laws which are suitable for specific place and condition. By so-doing, the consideration of *maṣlahah* in accordance with the reformulation steps that have been described and the study of the region eventually becomes a necessity which is needed by contemporary *ummah* and is aimed to realize the vision of having Islamic law (*fiqh*) which is in accordance with any place and time (*sālih fī kulli zamān wa makān*).

## **CONCLUSION**

From this study, it is found that there present a need for a new formulation of the concept of *maṣlahah* in order to dialogue Islamic law with today's social reality for realizing the benefit to the *ummah*. The initial step of reformulation is by overhauling the concept of *maṣlahah* from that as formulated in the history of *maṣlahah* thought into three things: 1) giving the *mujtahids* the opportunity to consider and utilize the *maṣlahah* needed by people without having to be confined in the texts, 2) including human values and social ethics as the essence of the concept of *maṣlahah*, and 3) conducting a collective *ijtihād* by considering *maṣlahah* from various viewpoints of life aspects.

In the contemporary era in which any law is demanded to be able to dialogue with local, temporal, and always-changing issues, then, the concept of *maṣlahah* has the opportunity to create new Islamic jurisprudence (*fiqh*) that is adaptable, applicable, more able to dialogue with social reality, and capable to respond to various contemporary problems of the *ummah*. Moreover, studies about *maṣlahah* are open widely for any researcher to provide further developments about the steps of reformulation of the *mmaṣlahah* concept which might be different to the three steps of reformulation offered in this study and to apply them in the context of real life through the formulation of *maṣlahah* approach in solving contemporary problems that exist in the current era which, in turn, will create new products of Islamic law needed by the today's *ummah*.

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