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## Contextualization of The Istiṣhāb Wa Sadd Al-Ẓarī'ah Towards Islamic Economic Practices in Indonesia

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### ABSTRACT

*Istiṣhāb wa sadd al-ẓarī'ah is part of the method of legal decision making in Islam among other methods, whose application always rests on the concept of maṣlahāt. This research describes how the application of istiṣhāb wa sadd al-ẓarī'ah to contemporary economic problems in Indonesia. Such application is the case of bai 'al-ajal, the application of maqāṣid al-syarī'ah to determine various provisions in the Islamic financial concept, the obligation to consume halal food and drinks, to social cases such as the law of prostitution localization in Indonesia. This research is a research library. Sources of data are literature or come from various literatures, including the book of al-Ihkām fī Uṣūl al-Ahkām, al-Ihkām li Ibn Ḥazm, al-Mujiz Fī Uṣūl al-Fiqh, Sadd al-Ẓarī'ah fī al-Syarī'ah al-Islāmīyah, al-Mustasfā Fī Ilm al-Uṣūl, Uṣūl al-Tasyrī 'al-Islāmī, al-Ihkām fī Uṣūl al-Ahkām, Muḥāḍarat fī*

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## A. Introduction

Islamic law is an integral and most important part of Islam. Therefore, Schacht puts forward his thesis that an observer of Islamic civilization is unable to understand the turmoil of the development of Islamic legal institutions in modern Muslim countries today without a deep understanding of the historical theory and praxis of Islamic law.<sup>1</sup> Schacht also said that it is not an exaggeration when Islamic law occupies a very central position in the religious sense of Muslims and it is a truism to say Islam as the religion of law.<sup>2</sup> Snouck Hurgronje also said, "Islam is a religion of law in full meaning of the world". According to H. A. R. Gibb Islamic law (*fiqh*) is "*the epitome of the true Islamic spirit, the most decisive expression of Islamic thought, the essential kernel of Islam.*"<sup>3</sup>

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<sup>1</sup>Joseph Schacht, 1982, *An Introduction to Islamic Law*, The Clarendon Press, Oxford, p. 1.

<sup>2</sup>Joseph Schacht, *Theology and Law in Islam*," dalam G.E. Von Grunebaum (ed.), *Theology and Law in Islam*, Otto Harrasowitz, Weisbaden, p. 23.

<sup>3</sup>G-H. Bosquet dan Joseph Schacht (eds.), 1957, *Selected Works of C. Snouck Hurgronje*, E. J. Brill, Leiden, p. 48.

Many Islamic researchers such as Ibnu Hazm, Al-Amidi, Al-As'adi, Al-Syairazi, Al-Syatibi, Abu Zahrah, Al-Zuhaily, have concluded that it is impossible to understand Islam well without comprehensive knowledge of *ushul fiqh* (Islamic law). Islam is then touted as a religion that has a flexible legal system. So that this flexibility necessitates criticism, review, and even a new, just formulation. Discusses on justice in Islamic legal philosophy where the theory of justice, or often referred to as *maṣlahāt* theory, has always been a topic that is constantly being studied by Islamic legal philosophers (*uṣūl al-fiqh*), especially when discussing the issue of *maqāṣid syarī'ah*. According to Huijbers, benefit and justice are at the core of Islamic law. This is manifested by the number of verses of the al-Qur'an which contain benefits and justice.<sup>4</sup> Among them, namely al-Qur'an surah al-Nisā '(4): 58; al-Nisa '(4): 135; al-Māidah (5): 8; al-An'ām (6): 90; and al-Syūrā (42): 15.

The aim of Islamic law is to maintain the benefit of humans and at the same time to avoid *maḥṣadāt* (damage), both in this world and in the hereafter.<sup>5</sup> Furthermore, that the purpose of the sharia when linked to *maṣlahāt* is threefold: first, *al-ḍarūrīyāt*, namely the aim of the shari'a returning to *hifdhu nafs*, '*aql*, *māl*, *din*, '*irḍi*, and *nasab*. Second, *al-hājīyāt*, namely the principle of convenience in life or not burdensome ('*adam al-haraj*). Third, *al-taḥsinīyāt*, namely the existence of moral or ethical principles.<sup>6</sup> This effort was made to attempt to dialogue normativity with dynamic social objectivity.<sup>7</sup>

The purpose of Islamic law plays an important role in the effort to form Islamic law in accordance with the universal values of Islam, one of which is *istiṣhāb wa sadd al-ẓarī'ah*. It should be explained that the interesting factors in economic studies can be seen from two aspects of *ushul fiqh*. *Istiṣhāb* is a method of *ijtihād* or extracting Islamic law that relies on the previous law as long as there are no arguments against it, the term *ijtihād* in historical reviews, usually refers to the case of Mu'az ibn Jabal who was sent by the Prophet to

<sup>4</sup>Theo Huijbers, 1995, *Filsafat Hukum dalam lintasan sejarah*, cet VIII, Kanisius, Yogyakarta, p. 196.

<sup>5</sup>Hendri Hermawan Adinugraha, Fakhroddin, and Mashudi, "The Reconstruction of *Maqāṣid Al-Syarī'ah* Approach in Islamic Economy: Insights from Jasser Auda Perspective", *Social Sciences and Education Research Review*, Vol. 7, No. 2, 2020, p. 212.

<sup>6</sup>Abu Ishaq al Syatibi, 1314, *Al Muwafaqat*, Jil. II, Dar al-Fikr, Bairut., p. 8-12.

<sup>7</sup>Hendri Hermawan Adinugraha dan Ahmad Hasan Asy'ari Ulama'i, "Understanding of Islamic Studies through Textual and Contextual Approaches", *Farabi*, Vol. 17, No. 1, 2020, p. 26.

carry out judicial duties in the city of Yemen.<sup>8</sup> Meanwhile *sadd al-ẓarī'ah* relies on the concept of *maṣlahah* and avoids *maḥṣadāh* in its various forms. This second method is more impressive in providing the legal status of prior and preventive legal features.

*Istiṣhāb wa sadd al-ẓarī'ah* are two methods of legal decision-making (*istinbat al-hukm*) in Islam whose application always rests on the concept of *maṣlahāt* with its various variations which researchers are currently examining by considering several aspects commonly used in legal studies, namely sociological, philosophical and normative juridical aspects.<sup>9</sup> This research describes how the application of *istiṣhāb wa sadd al-ẓarī'ah* to contemporary economic problems, such as the obligation to consume halal food and drinks, buying and selling vehicle number plates, and dissolving prostitution localization.

## B. Method

This research is a research library. Sources of data are literature or come from various literatures, including the book of *al-Iḥkām fī Uṣūl al-Aḥkām*, *al-Iḥkām li Ibn Ḥazm*, *al-Mujiz Fī Uṣūl al-Fiqh*, *Sadd al-Ẓarī'ah fī al-Syarī'ah al-Islāmīyah*, *al-Mustasfā Fī Ilm al-Uṣūl*, *Uṣūl al-Tasyrī 'al-Islāmī*, *al-Iḥkām fī Uṣūl al-Aḥkām*, *Muḥāḍarat fī Uṣūl al-Fiqh*, *Toward an Islamic Reformation: Civil Liberties, Human Rights International Law, journal on The Reconstruction of Maqāṣīd Al-Syarī'ah Approach in Islamic Economy, Dzari'ah Sadd Review on Islamic Economy, and The Urgency of Islamic Law Sources Knowledge Maṣādir Al-Aḥkām Al-Mukhtalaḥ Fīhā: Istiṣhāb, Sadd Al-Dzarī'a, and Qaul Al-Ṣaḥabī*, and other primary sources relevant to the contextualization of *istiṣhāb wa sadd al-ẓarī'ah* in Islamic economic practice in Indonesia. Data analysis techniques in this study used editing, organizing, and finding.

<sup>8</sup>Ahmad ibn Hanbal, 1993, *Musnad al-Imām Ahmad Ibn Hanbal*, Dar al-Kutub al-Islamiyah, Bairut, p. 252.

<sup>9</sup>Gibtiah dan Yusida Fitriati, "Perubahan Sosial dan Pembaruan Hukum Islam Perspektif Sadd al-ẓarī'ah", *Nurani*, Vol. 15, No. 2, 2015, p. 102.

## C. Result and Discussion

### 1. Introduction to *Istiṣhāb*

*Istiṣhāb* is linguistically derived from the word *ṣuḥbah* which means accompanying or accompanying (not being separated). *Istiṣhāb* means **طلب المصاحبة** (looking for friends)<sup>10</sup> or **اعتبار الصحابة** (consider friendship).<sup>11</sup> As for the meaning of **الصحبة** is to compare something and bring it closer.<sup>12</sup> *Istiṣhāb* is a six letter verb (fi'l ṣulāṣī mazīd bi ṣalāṣati aḥrūf) from the word *istiṣhaba*, *yastaṣhibu*, *istiṣhāban* with *wazān* or *istaṣ'ala*, *yastaṣ'ilu*, *istiṣ'ālan*. The form of *ṣulāṣī mujarad* is *ṣahaba*, *yaṣhabu*, *ṣuḥbatan wa ṣahābatan* which means to accompany, to be friends with, to make friends.<sup>13</sup>

Meanwhile, according to the term, some uṣūl scholars interpret it differently, but it has the same meaning in substance. According to al-Syaukani, *istiṣhāb* is establishing (law) something as long as there is no other argument that changes it.<sup>14</sup> Ibn Qayim al-Jauziyah defined *istiṣhāb* as always enforcing the law by establishing laws based on existing laws, or negating laws on the basis of the absence of previous laws.<sup>15</sup> According to Muhammad Ubaidillah al-As'adi, *istiṣhāb* is to impose law on something based on pre-existing arguments, and is deemed to remain valid until there is another argument that changes it.<sup>16</sup> While al-Ghazali defines it by adhering to the argument of reason or *syara'*, not because he does not know the evidence, but after careful discussion or research, it is known that there is no argument that changes it.<sup>17</sup>

<sup>10</sup>Abdul Hadi, 2014, *Ushul Fiqh: Konsep Baru tentang Kaidah Hikmah dalam Teori Fiqh*, Islamic Development Bank (IsDB) & IAIN Walisongo Semarang, Semarang, p. 120.

<sup>11</sup>Abd Wahhab Khallaf, 2004, *Ilm Uṣūl al-Fiqh*, al-Haramain, Jiddah, p. 91.

<sup>12</sup>Abd al-Aziz ibn Abdurahman al-Rab'iyyah, 1979, *Adillah al-Tasyrī al-Mukhtalaf fī al-Ihtijāj bihā*, Muassasah al-Risalat, Bairut, p. 275.

<sup>13</sup>Ahmad Warson Munawwir, 1984, *Kamus al-Munawwir*, Pondok Pesantren al-Munawwir Krapyak, Yogyakarta, p. 816-817.

<sup>14</sup>Muhammad ibn 'Ali ibn Muhammad al-Syaukani, 1992, *Irsyād al-Fukhūl ilā Taḥqīq 'Ilm al-Uṣūl*, juz 1, Dar al-Fikr, Beirut, p. 396.

<sup>15</sup>Muhammad ibn Abi Bakr ibn Ayyub al-Dimasqi, 1973, *I'lām al-Muwaqī'in*, juz 1, Dar al-Jil, Bairut, p. 339.

<sup>16</sup>Muhammad Ubaidillah al-As'adi, 1990, *al-Mujiz Fī Uṣūl al-Fiqh*, Dar as-Salam, Ttp, p. 251.

<sup>17</sup>Abu Hamid al-Ghazali, 1993, *al-Mustasfā Fī Ilm al-Uṣūl*, Dar al-Kutub al-Ilmiyah, Beirut, p. 159.

Concluding from this definition, *istiṣhāb* is the law enforcement of something based on pre-existing arguments, both reason and *syara'* as long as there are no other arguments that cancel it. In other words, *istiṣhāb* is actually a legal stipulation or legal enforcement of a case in the present or future based on what has been determined or applied previously as long as there is no argument against it.

## 2. Istiṣhāb Wisdom as Legal Proposition

According to Abu Zahrah,<sup>18</sup> the majority of scholars proposing *fiqh* (*uṣūlīyūn*) have agreed that the three forms of *istiṣhāb* above, namely *istiṣhāb al-ibāḥah al-'aṣliyah*, *istiṣhāb barā'ah al-'aṣliyah*, and *istiṣhāb al-hukm*, can be used as arguments law. As for *istiṣhāb al-waṣf*, the scholars have different opinions about the value of its honesty. Broadly speaking, the differences of opinion of the ulama proposing *fiqh* are related to the evidence of *istiṣhāb al-waṣf*. First, the opinion of Malikiyah, Shafi'iyyah scholars such as al-Muzani, al-Sairafi, Imam al-Haramain, al-Ghazali and Hanabilah which states that *istiṣhāb al-waṣf* can be used as evidence in full, either in creating new rights or in defending rights which have existed.<sup>19</sup> For example, if someone is missing and the exact location is not known (*mafqūd*), then that person is considered still alive and that person still has legal rights such as the right to inherit property if an heir dies. Thus, the Syafi'iyyah and Hanabilah scholars accepted *istiṣhāb* as absolute evidence.<sup>20</sup>

Second, the opinion of the Hanafiyah and Malikiyyah scholars who argue that *istiṣhāb al-waṣf* can be used as evidence only to defend existing legal rights (*al-daḥ'u*) not to create new rights (*al-iṣbāt*).<sup>21</sup> In connection with this opinion, the legal status of missing persons according to the Hanafiyah and Malikiyah scholars is still the husband of his wife and his property belongs to him. However, if any of his heirs pass away, then the level of distribution of the inheritance must be suspended (*mauquṭ*) until there is evidence that he is still alive. The position of the inheritance of the *mafqūd* people is as entrusted goods. The reason for the postponement of

<sup>18</sup>Saifuddin Abi Hasan 'Ali ibn Muhammad al-Amidi, 1983, *al-Iḥkām fī Uṣūl al-Aḥkām*, juz 4, Dar al-Kutub al-Ilmiyyah, Bairut, p. 173-174.

<sup>19</sup>*Ibid.*, p. 172.

<sup>20</sup>Muhammad ibn 'Ali ibn Muhammad al-Syaukani, *op.Cit.*, p. 379.

<sup>21</sup>Abd al-Wahhab Khallaf, *op.Cit.*, p. 93.

granting inheritance to mafqūd is because in inheritance law the condition for the heir is that he is really alive, both de facto and de jure.<sup>22</sup> The final decision regarding the legal status of a *mafqūd* person is decided by the judiciary, namely the decision of a judge that the *mafqūd* person is declared dead. The law of death can be divided into two, namely intrinsic death, namely real death that occurs naturally and legal death, namely the death penalty for a person because of a court decision. The basis for the determination which is used as a guide in determining the legal status of the death of a missing person (mafqūd) is based on three considerations, namely the consideration of age whether it is possible to be alive or possibly dead, second, to determine the death of a person based on the missing person's peers, the third is based on the background to the loss of the person, such as missing an airplane or other ship accident.<sup>23</sup> In this connection, it is clear that the *mafqūd* person cannot automatically create new rights, namely the right to become heirs. As for scholars who accept *istiṣhāb* absolutely, a mafqūd can become heirs.<sup>24</sup>

Meanwhile, according to Mustafa Sa'id al-Khani, in addition to the opinion of the two groups of scholars above, there is one more opinion, namely the opinion of some Hanafiyah scholars and some Shafi'iyah scholars and Abi Husain al-Basri and a group of Mutakalimin scholars who stated that *istiṣhāb* is not it can be turned into evidence in the stipulation of law either to establish laws based on existing laws or to establish laws that do not yet exist. The argument they put forward is that the legal status is halal or haram, which are syara laws 'which must be based on textual justification that comes from *al-Syarī*', both from al-Qur'an and al-Hadith.<sup>25</sup>

According to scholars who reject *istiṣhāb*, someone who uses *istiṣhāb* as evidence for a certain action means that he has done good deeds without using evidence.<sup>26</sup> In the view of 'Abd al-Wahhab Khallaf, the ulama's refusal of *istiṣhāb al-waṣf istiāb* because the *istiṣhāb* basing is only on speculative assumptions (*i'tibār*) (*ẓannī*), not facts. However, in practice

<sup>22</sup>Abd al-Wahhab Khallaf, *Maṣādir al- Tasyrī'*, terj. Bahrūn Abu Bakar, 1984, Risalah, Bandung, p. 217.

<sup>23</sup> Jaih Mubarak, 2002, *Metodologi Ijtihad Hukum Islam*, UII-Press, Yogyakarta, p. 139.

<sup>24</sup>Muhammad Kamaluddin Imam, 1996, *Uṣūl al-Fiqh al-Islāmī*, Muassasah al-Jamiyyah li dirasat wa al-Syu'un wa Tawji, Bairut, p. 240.

<sup>25</sup>Nasroen Haroen, 1997, *Ushul Fiqh I*, Logos, Jakarta, p. 134.

<sup>26</sup>Abd al-'Aziz ibn Abdurahman al-Rab'iyyah, *op.Cit.*, p. 283.

in the judiciary in Islamic history it has been proven that judges (qāḍī) have made *istiṣhāb* a method of establishing law. For example, the judges decide whether property rights are retained based on proof of ownership rights (deeds) that have been legalized in the past. Ulama uṣūlīyūn who accept *istiṣhāb* as a legal argument place *istiṣhāb* as the final argument if no other argument is found explaining the law.<sup>27</sup>

### 3. Introduction to *Sadd al-ẓarī'ah*

Etymologically, the word *sadd al-ẓarī'ah* which consists of *sadd* which means closing and *al-ẓarī'ah* means the path that leads to something. The plural is الزرائع.<sup>28</sup> Meanwhile, according to the term uṣūl al-fiqh, *sadd al-ẓarī'ah* is anything that can deliver and become a way to something that is prohibited by *syara'*.<sup>29</sup> *Sadd al-ẓarī'ah* can be understood as a way that can lead to something that is prohibited by the *syara'* which must be closed (*sadd*) or prevented or avoided. In its development, the term *al-ẓarī'ah* is sometimes interpreted in a more general sense or in a broader sense. So that *al-ẓarī'ah* can be defined as anything that can deliver and become a way to something that results in *mafsadāh* and *maslahah*.<sup>30</sup> Therefore if it contains the result of *mafsadāh* (damage) then there is a provision for *sadd al-ẓarī'ah* (the road is closed), whereas if it results in *maslahah* (goodness) then there is a provision for *fath al-ẓarī'ah* (the road is opened). However, in subsequent developments the term *fath al-ẓarī'ah* was less of a problem than *sadd al-ẓarī'ah*.

<sup>27</sup>Muhammad Kamaluddin Imam, *op.Cit.*, p. 236.

<sup>28</sup>Abdul Hadi, *Ushul Fiqh : Konsep Baru Tentang Kaidah Hikmah dalam Teori Fiqh*, p. 128. Ada pula yang mengartikan *al-ẓarī'ah* berarti *waṣīlah* (perantara). See also Muhammad Abu Zahrah, *Ilm Uṣūl Fiqh*, p. 288.

<sup>29</sup>Wahbah al Zuhaili, 1406 H/1986 M, *Uṣūl Fiqh al Islamī*, Juz II, Dar al Fikr, Bairut, p. 873; and al Syatibi, *Al Muwafaqat-IV*, p. 198. While *al-ẓarī'ah* according to the terms of Islamic jurists, is something that becomes an intermediary towards actions that are forbidden or permissible. Therefore, the meaning of *al-ẓarī'ah* has two meanings, namely that which is forbidden, is called *sadd al-ẓarī'ah* which means closing the roads and means so that it does not arrive at the intended result whether the result is praiseworthy or despicable, good or bad. , beneficial or not, while what is legalized, is called *fath al-ẓarī'ah*, which means opening the way and an intermediary to arrive at the intended result without limitation whether the result is praiseworthy or despicable, good or bad, beneficial or not. See Muhammad Hisyam al-Burhani, *Sadd al-Ẓarī'ah fī al-Syarī'ah al-Islāmīyah* (Beirut: al-Matba'ah al-Raihani, 1985), 57.

<sup>30</sup>Ibn Qayyim al-Jauziyah, *I'lam al Muwaqī'in 'An Rabbil'Alamin*, Jil. III, Dar al Jil, t.t, Bairut, p. 148.

For example, a judge is prohibited from personally receiving guests from the parties in a case before the case is decided, because it is feared that it will lead to injustice or take sides in determining the law regarding the legal case being handled. Basically it is permissible to receive guests privately, but in this case it is prohibited. The prohibition against judges from receiving guests is in accordance with the basic principles of *syara'*, namely the effort to attract *maslahah* and avoid *mafsadāh*.<sup>31</sup>

Another example of zakat. Before the time of *ḥaul* (the time limit for calculating zakat so that it is obligatory to pay zakat) comes, a person who has a number of assets that must be zakat is obliged to donate a portion of his assets to his son, so that the *niṣāb* of the property is reduced and he is spared the obligation of zakat. Basically giving wealth to children or other people is recommended by *syara'*, because this act is a contract of help. However, because the purpose of the grant is to avoid the obligation to pay zakat, this action is prohibited. This prohibition is based on the premise that a grant whose law is *sunna* invalidates zakat which is obligatory.<sup>32</sup>

The purpose of this *sadd al-ẓarī'ah* is to make it easier to achieve benefit and avoid *mafsadāt*. In sharia there are commandments and prohibitions. Execution of orders and avoidance of prohibitions are carried out directly and indirectly, so that something is done beforehand. Then a rule appears:<sup>33</sup> *مالا يتم الواجب الا به فهو واجب*. This rule does show the meaning that the perfection of an order is obligatory, then the actions that support it are obligatory. Likewise, in the prohibition, actions that are prohibited, something previously prohibited, such as a *taḥlīl nikāh* contract, performing a marriage contract to just interrupt a woman who has been bullied three times from her husband with the aim of allowing them to remarry. On the other hand, if the motives and intentions are good according to *syar'i* goals, such as doing a marriage contract with the intention of building a household, then opportunities must be opened to do so.

<sup>31</sup>Hendri Hermawan Adinugraha dan Mashudi, "Al-Maslahah Al-Mursalah dalam Penentuan Hukum Islam". *Jurnal Ilmiah Ekonomi Islam*, Vol. 4 No. 01, 2018, p. 66.

<sup>32</sup>Nasrun Haroen, *op.Cit.*, p. 161-162.

<sup>33</sup>Abdul Hadi, *op.Cit.*, p. 129.

#### 4. *Sadd al-ẓarī'ah* Wisdom as Legal Proposition

The scholars in expressing the *sadd al-ẓarī'ah* hujjahan as a tool or argument in establishing *syara'* law (*istinbat*) there are differences of opinion. Among them there are those who accept *sadd al-ẓarī'ah* as evidence such as Malik ibn Anas, Ahmad ibn Hanbal, Ibn Taimiyah, Ibn al-Qayyim al-Jauziyah, and Syi'ah, and there are also those who completely reject its validity as evidence; namely Ibn Hazm. In addition, there are also those who accept its validity, but reject it in other contexts; namely ash-Shafi'i and Abu Hanifah. Basically, scholars agree on the validity of the concept of *sadd al-ẓarī'ah*, even though there is a difference in how it is pronounced in a frame or name. Among those who mostly use the concept of *sadd al-ẓarī'ah* in their legal terms are Malik ibn Anas, Ahmad ibn Hanbal, and Abu Hanifah (however, their frequency is still below Malik and Ahmad). While the least (rarely) use it is ash-Shafi'i. And what is meant by a different frame or name is, for example *qiyās* and *istihsān*.<sup>34</sup>

The scholars state that *sadd al-ẓarī'ah* can be accepted as one of the tools or arguments for establishing the law<sup>35</sup> on the grounds that they put forward the word of Allah QS. al-'An'am 6: 108.

Another reason put forward by the ulama of the Malikiyah school and the ulama of the Hanabilah school was the hadith of the Prophet Muhammad.<sup>36</sup>

حدثنا محمد بن جعفر بن زيار قال أخبرنا وحدثننا عباد بن موسى قال حدثنا إبراهيم بن سعد عن أبيه عن حميد بن عبد الرحمن عن عبد الله بن عمرو قال: قال رسول الله ﷺ لي الله عليه وسلم ﷺ أن أكبر الكبائر أن يلعن الرجل والديه قيل يا رسول الله كيف يلعن الرجل والديه قال يلعن أبا الرجل فيلعن أباه ويلعنه ﷺ رواه أبو داود

Meaning: "Has told us Muhammad bin Ja'far bin Ziyad he said; has reported to us. (In another way it is mentioned) Has told us Abbad bin Musa both said; has told us Ibrahim bin Sa'd from his Father from Humaid bin 'Abdurrahman from Abdullah bin Amru he said, "The Messenger of Allah -peace and prayer of Allah be upon him-said:" Indeed, among the greatest sins is a man who cursed his parents. "He was asked, "O Messenger of Allah, how can a man curse his parents?" he replied: "He cursed someone else's father, until that person cursed his

<sup>34</sup>Wahbah al-Zuhaili, *op.Cit.*, p. 890.

<sup>35</sup>Abu Ishaq ash-Shatibi, *al-Muwāfaqāt fi Uṣūl al-Syarī'ah*, Juz IV, p. 358-361.

<sup>36</sup>Al-Hafidz Sulaiman, *Sunan Abi Daud-II*, Toha Putra, Semarang, t.th, p. 629.

father. He cursed someone else's mother, until that person cursed his mother".

The scholars of the Hanafiyah mazhab and the Syafi'iyah mazhab can accept *sadd al-'arī'ah* as evidence in certain matters and reject it in other cases. Like Imam al Syafi'i allowing people who are due to age not to fast, but he does not allow showing his non-fast in public.<sup>37</sup>

Meanwhile, Ibn Hazm who rejected the validity of *sadd al-ẓarī'ah* as evidence, in this case he has several arguments as follows:

- a) That the point of the hadith ان الحلال بين والحرام بين الخ ....., is not that something that is doubtful (*mushtabih*) is haram and must be shunned or abandoned under the pretext of *ihtiyāt* and so as not to fall into something that is forbidden. However, it is not obligatory to be shunned, but only as an advice (which is not obligatory) to stay away from it. And the act of turning away is considered a *wara'*.<sup>38</sup>
- b) As for the Hadith البر حسن الخلق وللاثم ماحاك الخ ....., he said that in the sanad of the hadith there is one of the great rawi, namely Mu'awiyah ibn Salih. So that the hadith is *munqaṭi'* hadith. Besides that, the hadith is against the QS. al-Nisa '4: 82 follows: ولو كان من عند غير الله لوجدوا فيه اختلافًا كثيرًا means that basically in religion there is only one, there is no conflict or difference. Whereas in the human soul there are several desires or inclinations.<sup>39</sup>
- c) Whereas the legal provisions based on *sadd al-ẓarī'ah* are legal provisions based solely on allegations. Meanwhile, the legal provision based on the allegation is forbidden (not allowed).<sup>40</sup>

Based on three arguments above, Ibn Hazm absolutely rejects the validity of *sadd al-ẓarī'ah* as evidence, but still accepts it as an act of *wara'* (من المكارم). In other words, he also has a tendency to carry it out, because he is a pious person. And his rejection of *hujjah sadd al-ẓarī'ah* was because he was a *Zāhirī*.<sup>41</sup>

<sup>37</sup>Al-Bannani, 1983, *Syarḥ al Maḥallī 'Alā Matn Jam'i al-Jawami'*, Jil. II, Dar al-Kutub al-Ilmiyah, Bairut, p. 264.

<sup>38</sup>Ibn Hazm, *al-Iḥkām fī Uṣūl al-Aḥkām*, Dar al-Kutub al-'Ilmiyah, t.t, II, Bairut, p. 183-184. What is meant by *wara'* is an act that causes the perpetrator to get praise and reward, and conversely for those who do not do this action will not get reproach and sin as long as he really does not fall into something that is forbidden even though without taking preventive action (الذريعة سد) the. See Ibn Hazm, *al-Iḥkām fī Uṣūl al-Aḥkām*, p. 183.

<sup>39</sup>*Ibid.*, p. 184.

<sup>40</sup>*Ibid.*, p. 191.

<sup>41</sup>Wahbah al-Zuhaili, *op.Cit.*, Juz II, p. 904.

## 5. Implementation of *Istiṣhāb wa Sadd al-ẓarī'ah* in Answering Islamic Economic Issues

The urgency of *fiqh* in modern financial studies can be found through the economic concepts in the Qur'an that are elaborated with the results of empirical studies to produce a perspective in the management and utilization of limited resources to fulfill unlimited human desires. Islamic economics aims to assist humans in fulfilling their life needs which are based on harmony and balance between the fulfillment of physical needs and the needs of spiritualism. The *maṣlahāt* approach in Islamic law is the right concept to adapt Islamic law to social changes that develop very rapidly along with the modernization of development. Benefit as a reference for determining *syara'* law can undoubtedly manifest as a symbol of Islam which is *rahmatan li al-'ālamīn*.<sup>42</sup>

The majority of *fiqh* scholars consider the *mu'amalah* aspect to be included in the realm of habit, not the domain of worship. Therefore, the determination of *'ilat* and the reasons for its permissibility is based on *maslahah* and the principles of justice and freedom in contract. These principles are elaborated from the evidence of revelation and empirical human experience throughout the ages. *Naṣṣ* is only a confirmation of the general principles that must be fulfilled by the customs and *mu'amalah*, such as the principles of justice, equality, pleasure, and freedom of contract. Because basically in *mu'amalah* the principle applies that the basis of *mu'amalah* is permissible until there are arguments that forbid it.

The development of Islamic law in the economic and financial aspects has a strong foundation from *fiqh* and the proposal of *fiqh* itself. Empirically, the operational practice of Islamic financial institutions in Indonesia has a place in positive law in Indonesia. The highest constitution in Indonesia accommodates the implementation of Islamic teachings, including aspects of *mu'amalah maliyah* in the economic life of the Indonesian Muslim community.<sup>43</sup>

Basically, every action contains two sides, firstly an intermediary that encourages doing something, and the second goal which is the

<sup>42</sup>Moh. Mahrus, *Aplikasi Al-Dzari'ah Dan Al-Hilah Perspektif Hukum Islam*, <https://www.semanticscholar.org>, p. 17.

<sup>43</sup>Rahman Ambo Masse, 2016, *Fiqh Ekonomi dan Keuangan Syariah*, Trust Media Publishing, Yogyakarta, p. 37-39.

conclusion of that action, good or bad. The act which intervenes and the way to something is called *Dzari'at*. The *al-ẓarī'ah* contains two meanings, namely what is prohibited, is called *sadd alal-ẓarī'ah*, and what is required to be carried out is called *fath al-ẓarī'ah*.<sup>44</sup> The application of *sadd al-ẓarī'ah* takes precedence over *fath al-ẓarī'ah*. This is in accordance with the concept of *qaidah dar'u al-mafâsid muqaddam 'alâ jalb al-masâlih* (refusing the damage takes precedence over attracting benefit). When *sadd al-ẓarī'ah* is enforced, then at that time there is also the spirit of *fath al-dzari'ah*.<sup>45</sup>

The study of *Sadd al-ẓarī'ah* is closely related to the discussion of the legal actions of *mukallaf* and *maslahah* which become *maqâsid al-syarī'ah*. The resolution of the *Maqâṣīd al-syarī'ah* concept for Islamic banking issued by the Shari'ah Advisory Council (SAC) provides a strengthening of the understanding that Islam through *Maqâṣīd al-syarī'ah* can be applied to produce for mankind. *Maqâṣīd al-syarī'ah* is an important aspect in the development of Islamic law. This is also an answer that Islamic law can adapt to social changes that occur in society.<sup>46</sup> However, *Maqâṣīd al-syarī'ah* (in traditional *Usul Fiqh*) is always considered a complementary science, not as an independent discipline in establishing a law. *Maqâṣīd al-syarī'ah* application to determine various provisions in the concept of Islamic finance.<sup>47</sup>

The rationale for the *sadd al-ẓarī'ah* law for scholars is that every action contains two sides, the first is to encourage action, and the second goal or goal which becomes the *natijah* (conclusion or effect) of that action, good or bad. If his *natijah* is good, then everything that leads to him is required to do it. On the other hand, if his conscience is bad, then anything that pushes him is also bad, because it is forbidden.<sup>48</sup> As an illustration, a judge is prohibited from accepting a gift from a party in a case before the

<sup>44</sup>Hifdhotul Munawaroh, "Sadd Al- Dzari'at dan Aplikasinya Pada Permasalahan Fiqih Kontemporer", *Jurnal Ijtihad*, Vol. 12, No. 1, 2018, p. 63.

<sup>45</sup>Moh. Mahrus, *Aplikasi Al-Dzari'ah Dan Al-Hilah Perspektif Hukum Islam*, <https://www.semanticscholar.org>, p. 17.

<sup>46</sup>Hendri Hermawan Adinugraha, Fakhroddin, dan Ahmad Anas, "Reaktualisasi Hukum Islam Di Indonesia (Analisis Terhadap Teori Hudud Muhammad Syahrur)", *Islamadina*, Vol. 19, No. 1, 2018, p. 3.

<sup>47</sup>Muhammad Deni Putra, "Maqasid Al Shari'ah Dalam Keuangan Islam (Tinjauan Teoritis Atas Pemikiran Dr Ahcene Lahsasna)", *Iltizam: Journal of Shariah Economic Research*, Vol. 1, No. 1, 2017, p. 61.

<sup>48</sup>Hifdhotul Munawaroh, *op.Cit.*, p. 68.

case is decided, because it is feared that it will lead to injustice in determining the law regarding the case being handled. Basically it is permissible to accept gifts (gifts), but in this case it is prohibited. The prohibition against judges from accepting this prize is in accordance with the basic principles of *syara'*, namely the effort to attract *maṣlahāt* and avoid *mafsadāt*.<sup>49</sup>

Among the examples used by the Malikiyyah scholars in the *sadd al-ẓarī'ah* application are the case of *bai 'al-ajal*, also in the sale and purchase of food that does not exist in its form. Meanwhile, an example was a case where he allowed the sale and purchase of pregnant animals, where according to him it did not break the sale and purchase contract and was carried out by *bi pleasure*. Meanwhile, Imam Syafī'i (w: 204 H) uses *sadd al-ẓarī'ah* in his book "Al-Umm" and refuses to use *sadd al-ẓarī'ah* in other discussions in the same book. An example of a case where he uses *sadd adz-dzariah* is when he forbids someone to prevent water from flowing into a plantation or rice field. According to him, this will be a means (*al-ẓarī'ah*) to prevent getting something that is permitted by Allah and also *dzariah* to prohibit something that is permitted by Allah. Even though water is a gift from Allah that can be accessed by anyone. Meanwhile, an example was a case where he allowed the sale and purchase of pregnant animals, where according to him it did not break the sale and purchase contract and was carried out by pleasure (*bi ridha*).<sup>50</sup> From these two conditions, it can be concluded that Imam Syafī'i used *sadd al-ẓarī'ah* very carefully, if the *mafsadāt* that will appear will actually occur or at least it is likely (*galabah dānn*) will occur.

If a case is sure that it will bring *mafsadāh*, then it is permissible to take the *al-ẓarī'ah*, this is in accordance with the case of buying and selling goods to be used for immorality. Ibn Hazm punished him with "haram" because it would bring a definite *mafsadāh*, namely the use of these items for immorality. For that, it can be concluded that Ibn Hazm himself did not deny *sadd al-ẓarī'ah* absolutely, but he was very careful in applying it.<sup>51</sup>

An example of *sadd al-ẓarī'ah* on other economic motives is the current problem that is still a dilemma regarding the localization of prostitution in Indonesia. One party wants to eradicate localization because

<sup>49</sup>Gibtiah dan Yusida Fitriati, *op.Cit.*, p. 103.

<sup>50</sup>Hifdhotul Munawaroh, *op.Cit.*, p. 22.

<sup>51</sup>*Ibid.*, p. 27.

it is a source of adultery, the value of its *maṣlahāt* is that if localization can be destroyed, surely this nation will be free from such immoral acts. On the other hand, there is a greater danger if localization is eradicated, namely that adultery (read: adultery as a profession or job) is increasingly rampant in various places, so that the assumption that the more severe negative effects of these actions are experienced by the community at large, not only among people. Certainly, for example the spread of the HIV virus, venereal disease and so on. Therefore, this party wants the localization of prostitution not to be destroyed, but also not approved. The solution is to take various approaches both spiritually and psychologically or otherwise to provide guidance and awareness to adulterers to stop and repent. This is part of the concept of *sadd al-ẓarī'ah* which is to prevent the spread of a larger *mafsadāh* if prostitution localization is destroyed. In this condition, the spirit of *fath al-ẓarī'ah* appears, which is an effort to provide knowledge about the prohibition and reprehension of adultery so as to prevent anyone who wants to approach him (*wa lā taqrabu al-zinā*).<sup>52</sup>

For example, in economic activity from the perspective of *sadd al-ẓarī'ah* in buying and selling, it can be described as follows: Every conscious action performed by someone must have certain clear objectives, regardless of whether the intended action is good or bad, brings benefits or causes harm. Some communities have succeeded in opening new jobs by becoming sellers of “vehicle number plates”. This situation has often occurred in one of the villages in Klaten Regency, namely in Kedungan Village. The sellers of “vehicle number plates” are more concerned with the profit as much as possible and ignore the moral side and the benefit of the people. The practice of buying and selling “motorized vehicle number plates” is viewed from the terms of the pillars and the terms of sale and purchase that do not meet the requirements, namely that the goods can be used for prohibited acts. And if viewed from *sadd al-ẓarī'ah*, the practice of buying and selling “license plates” is better not done because it brings a lot of *mafsadāt* than its benefit.<sup>53</sup>

As an analogy to *sadd al-ẓarī'ah*, for example, before the action that someone is aiming for, there is a continuation of the action that precedes it.

<sup>52</sup>Moh. Mahrus, *op.Cit.*, p. 17.

<sup>53</sup>Kirana Hari Nugraini, “Tinjauan Sadd Al-Ẓarī'ah Terhadap Praktik Jual Beli Plat Nomor Kendaraan Bermotor (Studi Kasus di Desa Kedungan, Kecamatan Pedan, Kabupaten Klaten)”, *Jurnal Al Hakim*, Vol. 1, No. 2, 2019, p. 1.

For example, if someone wants to get halal food and drinks, he goes through several phases of activities such as finding a seller, preparing a place and making tools. The main action in this case is to obtain halal food and drinks, while the other activities mentioned above are intermediary or preliminary. The preliminary action which is not legally stipulated is the obligation to obtain halal food and drink (because there is already evidence), but the act of an intermediary such as setting up a shop or shop and looking for a food and beverage seller has no direct legal argument. Can it be categorized as compulsory by law for the activities of making a stall or shop and looking for food and beverage sellers like consuming halal food & drinks.

Theoretically, every action contains two sides: the side that drives to act and the goal or goal that becomes the *natijah* (conclusion or effect) of that action. According to his *natijah*, there are two forms of action: the result is good, then everything that leads to it is good and therefore is required to do it. Both his *natijah* are bad, so anything that pushes him is also bad, and therefore forbidden. To determine the law of the path (means) which prohibits the goal, in *sadd al-ẓarī'ah*, there are three things that need to be considered: First the goal. If the goal is forbidden, then the way is forbidden and if the goal is obligatory, the way is obligatory. Second Intention (Motive). If the intention is to achieve halal, then the law of the ingredients is lawful, and if the intention to achieve is haram, then the ingredients are haram. The third result of an action.<sup>54</sup>

Therefore, Islamic legal sources that focus on *istiṣhāb*, *sadd al-ẓarī'ah*, and *qaul al-ṣahābi* are very important to be implemented in the aspect of Islamic economics. Because there are still many Indonesian people who do not understand or even do not know the sources of Islamic law at all.<sup>55</sup>

#### D. Conclusion

*Istiṣhāb* in essence is to strengthen or declare that a law that has been stipulated remains valid because nothing has changed or excluded it. So that

<sup>54</sup>Muaidi, "Saddu Al-Al-ẓarī'ah Dalam Hukum Islam", *Tafaquh: Jurnal Hukum Ekonomi Syariah Dan Ahwal Syahsiyah*, Vol. 1, No. 2, 2016, p. 34.

<sup>55</sup>Ahmad Maulidizen dan Khalel Mohammed Amar, "The Urgency of Islamic Law Sources Knowledge Maṣādir Al-Aḥkām Al-Mukhtalaf Fihā: Istiṣāb, Sadd Al-Dzarī'a, and Qaul Al-Ṣahābi", *Hukum Islam*, Vol. XVIII, No. 2, 2018, p. 49.

the law stipulated by the old law becomes permanent as long as there is no evidence to change it. Whereas *sadd al-ẓarī'ah* is a method as a preventive measure in dealing with the change in 'illat (cause), while still referring to the objectives of Islamic law (maqāṣid al-syarī'ah) and the values of *mafsadāt* and *maṣlahāt*, such as a husband and wife who have proof of a marriage certificate is not considered a married couple as long as there is other evidence such as a divorce certificate. It turns out that the *sadd al-ẓarī'ah* method is able to answer the challenges of social and economic change in Indonesian society. For example, the legal category is mandatory for activities to make halal stalls or shops and to find halal food and drink sellers as well as the obligation to consume halal food and drinks. So that Islamic law is always expected to be more productive and implementative and always innovative. Therefore, the *istiṣhāb wa sadd al-ẓarī'ah* method is a suitable attempt to contextualize Islamic law in Indonesia (especially with regard to Islamic economic practices) amidst efforts to oppose social change in the face of the challenges of the times.

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