

## HATE SPEECH IN MAQASID SHARIA PERSPECTIVE

***Lutfiana Dwi Mayasari***

Institut Agama Islam Negeri Ponorogo

Email: [lutfiana.mcw@gmail.com](mailto:lutfiana.mcw@gmail.com).

***Akmal Adi Cahya***

Pengadilan Agama Lewoleba

Email: [aladic.27@gmail.com](mailto:aladic.27@gmail.com).

### **Abstract:**

According to the universal declaration of human rights, freedom of speech is fundamental rights. It is needed by human to express their feeling to each other especially towards stakeholders. The article 19 of the declaration also stated it clearly that it has guarantee for human to receive information. However, it has to be admitted that several speeches are leading human into calamity. There are cases of human violence based on national, racial, or religious hatred. It has been known there are cases in south East Asia such as the attack of Ahmadiyah and Shia community, the sealing of several religious houses, and the stateless Rohingya ethnic. Those cases are usually started by the practice of hate speech. International Convention on Civil and Political Rights (ICCPR) defines hate speech as any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence. Hate speech is one form of restricting freedom of speech in order to maintain social order. In Islamic literature, some scholars has categorized several kinds of speech that are prohibited according to Islamic tradition. Hujjatul Islam Al-ghazali categorized twenty kinds of speech which are prohibited by Islamic tradition. However, hate speech is not specifically included within. This research found that hate speech is consisted by several kinds of those prohibited speech. It contains the act of ridicule, insult, and curse. Moreover, it calls for the audience to hate and violence the target group. To enrich the understanding of the issue, this research use the *maqasid* sharia as fundamental value in Islamic law that offered by Jasser Auda. Through the method of multi-dimensions and blocking the mean which are combined by maqasid, this research emphasizes that hate speech is repugnant and it is better to be prohibited. However, the prohibition of the act should be followed by good evaluation system. Therefore, it is not abused by several groups for their private gain.

**Keywords:** Rights, Freedom, Discrimination, Islam

## A. Introduction

Discrimination towards specific group are can be seen even in contemporary world. The exile of Rohingya from Myanmar, the attack towards shia community in Indonesia, the annihilation of several religious ritual houses, are the valid examples of discrimination based on religion and racial in current world. According to the report of Wahid Institute, there are many cases of discrimination towards specific group especially in term freedom of religion. The organization found 121 cases at 2009, 184 cases at 2010, 267 cases at 2011, 278 cases at 2012, and 245 cases at 2013. Those cases are consisted of many types of act. In 2013, Physical attack is the most types of discrimination by reaching 27 cases found by the organization. By collecting 25 cases, sealing the religious houses especially church get the second places. While in the third place, there are 16 cases of religious activity prohibition.<sup>1</sup>

Some discriminations towards specific group started by specific speech which contain the suggestion to disrespect another group. Furthermore, the audience of the speech are asked to discriminate and to violate the target group. This type of discrimination are known as hate speech. The Wahid institute get special note for the act of hate speech. In its annual report, the organization count hate speech as one type of discrimination which increase between 2012 and 2013. Particularly, this type become the public concern because of the obor rakyat case. It can be understood because the case is happened during national election and the target group of the speech is the candidate of Indonesian president. It also becomes a proof that hate speech is still assumed to be effective to persuade people.<sup>2</sup>

There are some Islamic socialites are the doer of this type of discrimination. They suggest their adherent to hate and to violate other especially other religious adherent. Those Islamic socialite provokes their

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<sup>1</sup> The Wahid Institute, Laporan Tahunan: Kebebasan Beragama/Berkeyakinan dan Intoleransi 2013, (Jakarta: The Wahid Institute,2013) p. 24-25

<sup>2</sup> The Wahid Institute, Laporan Tahunan: Kebebasan Beragama/Berkeyakinan dan Intoleransi 2014, (Jakarta: The Wahid Institute,2014) p. 32

adherent to hate another group in the name of protecting the Islamic teaching. This socialite labeled the victim as a deviant group which allowed to be violated and moreover to be killed.<sup>3</sup> Moreover, in Islamic historical development, some socialites of certain *madhahib* suggest their follower to violate another *madhahib* follower.<sup>4</sup>

In contemporary phenomena it can be represented by the conflict between *shi'a* and *sunni*. The criminalization of Tajul Muluk, leader of *shi'a* community in Sampang is one of many cases which involve the Muslim inciter within. Amnesty international gives special concern on the involvement of MUI (*Majelis Ulama Indonesia*) at the criminalization. MUI is non-government organization which incorporate of Indonesian Muslim clerics. The organization has issued a fatwa that *Shi'a* are deviant. Moreover, the organization help the stakeholder to legitimate the discrimination towards *Shi'a* adherent.<sup>5</sup>

Another case come from the discrimination towards Ahmadiyah. The group become the target of several incitement, discrimination, and violence. It can be seen on the attack of LPI (*Laskar Pembela Islam*) towards AKKBB (*Aliansi Kebangsaan untuk Kebebasan Beragama dan Berkeyakinan*). The attack is caused by the hatred of LPI towards Ahmadiyah, and AKKBB is the supporter of Ahmadiyah. In the case, Habib Rizieq Shihab is charged as the one who incite his follower to hate and discriminate Ahmadiyah. It also has been known that Habib Rizieq Shihab is the leader of Islamic organization named FPI (Front Pembela Islam).<sup>6</sup>

In other hand, there are Islamic socialite that protect those deviant group. One Islamic socialite who is known to be the protector of those groups are the forth president of Indonesia K.H. Abdurrahman Wahid. He is known to be the

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<sup>3</sup> It can be seen clearly on the issue of ahmadiyah at 2008. Several muslim leader, representing their organization, suggest their follower to kill and hate the adherent of ahamdiyah. See the video on <https://www.youtube.com/watch?v=U7RLCXNdKF4> accessed on 18 July 2015

<sup>4</sup> Jasser Auda, *Maqasid al-Shari'ah as Philosophy of Islamic Law: A Systems Approach* (London: The International Institute of Islamic Thought, 2007)p. 59

<sup>5</sup> Amnesty International, *Prosecuting Beliefs: Indonesia's Blasphemy Laws*, (United Kingdom: Amnesty International, 2014)p. 1

<sup>6</sup> Al-Araf dkk, *Penebaran Kebencian: Studi Pengantar Penebaran Kebencian di Indonesia*, (Jakarta: Imparsial, 2015) p. 64-65

father of pluralism in Indonesia. It is him who acknowledge and accommodate Konghuchu as one religion in Indonesia. Despite of his noble position and power that he has as one Muslim leader in Indonesia, he never suggest his followers to attack another group which has different religion and belief. His famous quotes is “if you do good deed, people will never ask what is your religion”. Weather Abdurahman Wahid or Habib Rizieq are known as Islamic leader with numbers of follower across Indonesia. Therefore, their acts are the very example which will be followed by their followers.

In Islamic law, there have been known the concept of Maqasid Sharia. For several scholar, this concept becomes an important issue to upgrade Islamic law. Yusuf Qardhawi asserted that maqasid sharia is the core of fiqh tradition in Islam. He said that each *fiqh* tradition is the branch of maqasid sharia theory.<sup>7</sup> Another modern scholar, Jasser Auda describes maqasid sharia as the fundamental concept which becomes the measurement of Islamic law effectiveness.<sup>8</sup>

Considering the difference acts between Islamic leader over the issue of hate speech and the important place of Maqasid sharia in Islamic law, this research attempts to see how hate speech actually seen in Islamic tradition. The research attempt to use Jasser Auda concept of Maqasid sharia as tool to decide the value of hate speech. It explain what kind of fulfillment that fulfilled by the existence of hate speech especially in maqasid sharia perspective. The researcher hopes that this research can enrich the study of human rights especially its correlation with Islam. Hence, this research able to be a consideration for the reader in deciding their speech.

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<sup>7</sup> Yusuf Al-Qardhawi, *Dirasah fi Fiqh Maqasid Asy-Syari'ah: Baina Al-Maqashid Al-Kulliyah wa An-Nushus Al-Juz'iyah*, (Egypt: Dar Asy-Syuruq, 2006) p. 10 translated by H. Arif Munandar Riswanto.

<sup>8</sup> Jasser Auda, *Maqasid al-Shari'ah as Philosophy of Islamic Law: A Systems Approach*, (London: The International Institute of Islamic Thought, 2007)p.55

## B. Hate Speech Concept

Many scholars has discussed the definition of hate speech. John K. Roth defines hate speech as offensive speech directed against individuals because of their race, ethnicity, religion, sexual orientation, or other group affiliations.<sup>9</sup> Kent Greenwalt said that insult, epithets, and hate speech tend to shock those at whom they are directed and others who hear.<sup>10</sup> According to Kent, those words are strongly cause immediate violence either from the speaker or listener. Therefore, it is usual for scholar to discuss hate-crime and hate-speech in the same chapter.

Imparsial, a Non-Government Organization in Indonesia that concern on the issue of Human Rights emphasizes the relation and the difference between hate-crime and hate speech. According to Imparsial, Hate-crime is the criminal act based on bias-motivation. The motivations are the hatred towards race, sex, ethnic, religion, disability, ages, sexual orientation, political language, opinion, nationality, social status, or the color of the skin. Hate speech is not an act except the speech, while hate crime is the criminal act, mostly are in the form of physical violence.<sup>11</sup>

The discussion of hate speech is aroused because of its position towards the freedom of speech concept. The prohibition of specific speech likely restricted the freedom of speech which is fundamental principle of democracy and human rights protection. The Universal Declaration of Human rights guarantee the freedom of speech at article 19 "Everyone has the rights to freedom of opinion and expression". This article also guarantee every human beings to seek, receive, and impart information and ideas through any media.<sup>12</sup> Moreover, freedom of speech is needed in the shake of revealing the truth.<sup>13</sup>

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<sup>9</sup> John K. Roth, Ethics, (USA: Salem Press. INC, 2005) vol.2 p.624

<sup>10</sup> Kent Greenawalt, Fighting Words, (New Jersey: Princeton University Press, 1936)p.47

<sup>11</sup> Al-Araf dkk, Al-Araf dkk, Penebaran Kebencian: Studi Pengantar Penebaran Kebencian di Indonesia, (Jakarta: Imparsial, 2015) p.31

<sup>12</sup> Universal declaration of Human Rights, Article 19

<sup>13</sup> Kent Greenalts, Fighting Words, (New Jersey: Princeton University Press, 1936)p.1

However, the declaration also guarantee that every human beings are equal in dignity and rights. Each one of them should act towards one another in a spirit of brotherhood.<sup>14</sup> This article is the fundamental principle in applying all articles in the declaration. Hate speech, by its hatred towards race, sex, ethnic, religion, disability, ages, sexual orientation, political language, opinion, nationality, social status, or the color of the skin is believed to be the violation of this principle. Kent said, there are four main factors for restricting hate speech: (1) The danger of immediate violence; (2) psychological hurt for persons who are the object of abuse; (3) general offense that such language is used; and (4) destructive long-term effects from attitudes reinforced by abusive remarks.<sup>15</sup>

It is generally admitted that it is hard to classify speech that called hate-speech. Like how to identify “He is Black” which likely express the hate of the speaker against the black skin person and “He is Black” which is said in the sake of giving description of somebody who has black skin. There must be several categorizations or features that have to be considered before judging speech as hate speech. For instance, for the case “He is black” it can be altered by seeing the condition of society which usually call black skin person by replacing dark for black, dark is more polite rather black. Therefore, the sentence “He is black” strongly express the hatred and discrimination.

International Convention on Civil and Political Rights (ICCPR) define hate speech as any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence.<sup>16</sup> This definition classify hate speech as speech which likely able to stimulate attack and discrimination towards specific group. It is differentiate hate speech and insulting. While insulting is the speech which express the hatred, hate-speech is going more further by calling the audience to hate and violence the target group.

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<sup>14</sup> Universal declaration of human rights, Article 1

<sup>15</sup> Kent Greenwalts, *Fighting Words*, (New Jersey: Princeton University Press, 1936)p.50

<sup>16</sup> International Convention on Civil and Political Rights, article 20

Article 19, International Non-government Organization concern on freedom of speech provide interpretation toward the article. **Advocacy** is promoting hatred publicly towards the target group.<sup>17</sup> **Hatred** is a state of mind characterized as “intense and irrational emotions of opprobrium, enmity, and detestation towards the target group”. **Incitement** refers to statements about national, racial, or religious group hich create an imminent risk of discrimination, hostility or violence against persons belonging to those groups. **Discrimination** shall be understood as any distinction, exclusion, restriction or preference based on race, gender, ethnicity or belief, disability, age, sexual orientation, language political or other opinion, national or social origin, nationality, property, birth or other status color, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. **Violence** shall be understood as the intentional use of physical force or power against another person, or against a group or community that either result in or has a high likelihood of resulting injury, death, psychological harm, maldevelopment, or deprivation. **Hostility** implies a manifested action-it is not just a state of mind, but it implies a state of mind, hich is acted upon. I this case, hostility can be defined as the manifestation of hatred-that us the manifestation of “intense and irrational emotions opprobrium, enmity and detestation towards the target group. The concept has received scant attention in jurisprudence and therefore deserves greater consideration.<sup>18</sup>

Furthermore, the Office of the united nation high commissioner for human rights (OHCHR) suggested a system for assessing the violation over article 20 of ICCPR. In the recommendation named Rabat Plan of action there are six part threshold test as proposed for those expression which are criminally prohibited. First part is assessing the context of statements, analysis

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<sup>17</sup> Article 19, The Camden Principles on Freedom of Expression and Equality, (London: Article 19) p.10

<sup>18</sup> Article 19, Towards an Interpretation of article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred work in progress, (Vienna: Article 19, 2010)p.7

of the contest should place the speech act within the social and political context prevalent at the time the speech as made and disseminated. Second part is assessing the position of the speaker before the audience to whom the speech is directed. Third part is examining the intent, because negligence and recklessness are not sufficient for an article 20 of the ICCPR. This article need more than just negligence and recklessness to describe the meaning of advocacy and incitement. Fourth part is evaluating the content or form of the speech. The analysis over this part include the degree to which the speech as provocative and direct as well as a focus on the form, style, nature of the arguments deployed in the speech at issue or in the balance struck between arguments deployed. The fifth figure to examine on this issue is the extent of the speech. This include the elements such as the reach of the speech, its public nature, magnitude and the size of its audience. It is also determine whether the speech was disseminated through one single leaflet or through broadcasting in the media. The last figure to examine is the likelihood and imminence. It means the courts have to determine that there was reasonable probability that the speech would succeed in inciting actual action against the target group.<sup>19</sup>

It can be seen that hate-speech concept offered by the ICCPR focused on protecting the human and not the thought itself. Hate speech prohibited because of its strong possibility of influencing human to do violence over another human beings. The article is unlikely the blasphemy law that punish offender because of their insult over religion. Therefore, rather because of insulting words, hate speech focused on the possibility of violence that appear based on the speech.

John K. Roth documented that since the early 1980's, nearly every U.S. State has passed some type of hate-crime law, and many local governments and other agencies (especially schools and universities) have attempted to

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<sup>19</sup> Office of The United Nations High Commissioner for Human Rights (OHCHR), Rabat Plan of Action on The Prohibition of Advocacy of National, Racial, or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence, (Rabat: OHCHR, 2012)p.6

regulate hate speech in some manner.<sup>20</sup> Imparsial documented that United State of America, Uni eropa, France, Germany, Netherland, United Kingdom, India, japan, and Malaysia have anti-hate-speech regulation.<sup>21</sup> This is the proof that hate speech is already acknowledge by international community to be one type of human rights violation.

Indonesia ratified the ICCPR through the regulation number 12 year 2005. This is also the proof of Indonesia acknowledgment over the danger of hate speech. Before ratifying this convention, Indonesia has regulated hate speech on criminal regulation in article 156 and 157. Both of article included in chapter crimes against public order. Article 156 said “Everyone showing enmity, hatred, and humiliation against group/s of Indonesia, shall be imprisoned for four years and pay the fine Rp. 4500,-. Habib Rizieq Shihab, the leader of Front Pembela Islam was charged by this article. In 2008 Indonesia has regulation of Information and Electronic Transaction number 11 year 2008. Hate speech regulated on this regulation at article 28 (2), it asserted “Everyone, intentionally and without right spreading information in order to stimulate hatred and enmity over individual and/or specific group based on race, religion, tribe, and intergroup”. The article 45 (2) said, “Everyone who fulfilled the article 28 (2/1) shall be imprisoned for 6 years, and/or pay the fine Rp. 1.000.000.000,-“. However, the regulation of hate speech seems difficult to be implemented.

There are two problems that can be found from the implementation on both of articles. First, the ambiguity definition of the article, especially in Regulation Number 11 Year 2008. The article seen as threat over freedom of expression. There are strong possibility of abusing the article for private gain. For government, the article can be used for restricting the public critics. Second, there is a conflict between self-regulating body and law enforcement institution to classify the level of hate speech. There are cases should be

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<sup>20</sup> John K. Roth, *Ethics*, (USA: Salem Press. INC, 2005) vol.2 p.624

<sup>21</sup> Al-Araf dkk, *Al-Araf dkk, Penebaran Kebencian: Studi Pengantar Penebaran Kebencian di Indonesia*, (Jakarta: Imparsial, 2015) p.68

processed as criminal act of hate speech but rather processed in non-criminal department. For instance, the case of obor rakyat magazine which processed by pers regulation rather criminal regulation.<sup>22</sup>

Finally, there are many concepts that offered by scholars and regulations but this research used the ICCPR concept. Because this regulation is produced by the institution which declared the human rights declaration. The convention is believed as the continuity regulation after the declaration. Hence, this research see hate speech more than just insulting words, it is also speech which stimulate the audience to hate and discriminate the target group.

### C. Maqasid Sharia

There are several meaning of *Maqasid*, Jasser Auda has documented those meanings in his book. According to Auda, maqasid refers to a purpose, objective, principle, intent, goal, end, *telos* (Greek), *finalite* (French), or *Zweck* (German). *Maqasid* of the Islamic law are the intention or purpose behind the law.<sup>23</sup> He also describe that the question of why “for something” is equivalent to the question of “what is the *maqasid*”. Jasser provides the story of the children’s question as the way to describe what is *maqasid*:

I often start courses on *maqasid sharia* with the story of a little girl who asked her father: ‘Dad, why do you stop the car at the traffic light?’ Her father replied, with an educative tone: ‘Because the light is red, and red means stop.’ The girl asked: ‘But why?’ The Dad replied also with a tone of education: ‘So the policeman does not give us a ticket.’ The girl went on: ‘But why would the policeman give us a ticket?’ The Dad answered: ‘Well. Because crossing a red light is dangerous.’ The girl continued: ‘Why?’ Now the Dad thought of saying: ‘This is the way things are,’ but then decided to be a bit philosophical with his little beloved daughter.

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<sup>22</sup> Al-Araf dkk, Al-Araf dkk, Penebaran Kebencian: Studi Pengantar Penebaran Kebencian di Indonesia, (Jakarta: Imparsial, 2015) p.51-54

<sup>23</sup> Jasser Auda, *Maqasid al-Shari’ah as Philosophy of Islamic Law: A Systems Approach*, (London: The International Institute of Islamic Thought, 2007)p.2

Thus, he answered: 'Because we cannot hurt people. Would you like to be hurt yourself?' The girl said: 'No!' The dad said: 'And people also do not want to be hurt. The Prophet (peace be upon him) said: "Love for people what you love for yourself."' But instead of stopping there, the girl asked: 'Why do you love for people what you love for yourself?' After a bit of thinking, the father said: 'Because all people are equal, and if you would like to ask why, I would say that God is The Just, and out of His Justice, He made us all equal, with equal rights, and that is the way He made the world!'<sup>24</sup>

Based on the conversation, there are levels of answer according to Jasser auda. First, the sign/*'alamah* level which shown by the first question and answer of stoping at the traffic light because the light is red. The red light as the reason of stopping the car is just the sign and not the real purpose, therefore it called the sign level. Second, the rule or law level that can be seen at the answer of why when the light turns red, it means stop. It because so the policeman did not give the ticket, because did not stop when the lights turns red is breaking the law. The third is *maslahah* level which shown in the answer "crossing lights is dangerous because it could hurt people". The dangerous as reason is based on human life protection. The fourth level is the value level that show human should not be hurt because no human like to be hurt, and they are equal. Because of this equality, no one are allowed to violent, hurt and humiliated other. Equality is part of justice, and justice is the fifth level on this question level. The top level is the last answer for the girl, "..God is the just, and out of his justice, he made as equal, with equal rights, and that is the way he made the world". God as The Just is the highest level which called the faith/awareness level. Jasser said, *Maqasid sharia* basically can use this kind of methodological way of thinking.

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<sup>24</sup> Jasser Auda, *Maqasid Al-Sharia A Beginner's Guide*, (London: The International Institute of Islamic Thought, 2008)p.1

*Maqasid sharia* has an important position in the theory of Islamic law, especially considering the world global development. Islamic law need new concept that compatible for every conditions. It should not be a textual argumentation for every chapter of human life, particularly when the texts are compatible only for the time when it is asserted. *Maqasid sharia* which focused on the purpose of the ruling, make the theory flexible and compatible for each time and condition. It did not need any plain textual iteration to define the status of some actions in Islam. As long as the actions are leading to the fulfilment of Islamic *maqasid* and did not opposing the *maqasid*, the actions are acceptable.

The important position of *maqasid sharia* in Islamic law also has been emphasized by modern scholars. Jasser Auda, based on system approach classifies six features of Islamic law 1) Cognitive nature of the system; 2) Wholeness; 3) Openness; 4) Interrelated Hierarchy; 5) Multi-Dimensionality; 6) Purposefulness. For Jasser, the effectiveness of Islamic law is assessed based on fulfillment of its purposes (*maqasid*).<sup>25</sup> Another Islamic scholar, Yusuf Qardhawi emphasizes that developing *maqasid* is the key for islam to be an updated value in contemporary world.<sup>26</sup>

Generally, *maqasid sharia* categorized the purpose of Islamic law into levels. Traditional classification divide them into three levels of necessity, they are necessities (*darurat*), needs (*hajiyyat*), and luxuries (*tahsiniyat*). The necessities are classified into what preserves one's faith, soul, wealth, mind, and offspring. It is generally have been accepted that the necessities are considered essential matters for human life and the preservation of these necessities is the objective of revealed law. The three levels are interrelated, each level serves and protect the level below.

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<sup>25</sup> Jasser Auda, *Maqasid al-Shari'ah as Philosophy of Islamic Law: A Systems Approach*, (London: The International Institute of Islamic Thought, 2007)p.55

<sup>26</sup> Yusuf Al-Qardhawi, *Dirasah fi Fiqh Maqasid Asy-Syari'ah: Baina Al-Maqashid Al-Kulliyah wa An-Nushus Al-Juz'iyyah*, (Egyt: Dar Asy-Syuruq, 2006) p. 10 translated by H. Arif Munandar Riswanto.

However, the theory evolved over centuries. There are contemporary theorist criticized the traditional classification. They said that the traditional *maqashid* fall short to include specific purposes for single scripts/rulings or groups of script that cover certain topics or chapter of *fiqh*. It also concerned with individual rather families, society, and human in general. The traditional did not include the universal value such as justice and freedom. Those theorist also criticized the traditional concept ere deduced from studying *fiqh* literature, rather than the original sources. Therefore, modern scholarship introduced new conceptions and classification of *maqashid*. Moreover, several scholars even accommodate the declaration of human rights as one value in *maqasid sharia* concept.

The modern theorist offering new concept of *maqasid sharia*. First is specific *maqasid*, this level of maqasid are focused on the intention of specific scripts or ruling. This type of *maqasid* evolve very fast based on the condition. For instance, the tradition of preparing the army by picking a good horse should not be understood literally. The tradition has the purpose of strengthening the army and not just the horse. Because by the development of the weaponry, horse transformed into car, tank, helicopter and ect. The second is the general *maqasid* which concern on certain chapter of Islamic law. While specific *maqasid* concern on one scripts, the general *maqasid* concern on several scripts and concepts in one chapter. It talks about the purpose of family, financial transaction, and law enforcement in Islam. The third level is general *maqasid* which contain the purpose of the entire body of Islamic law. Justice and facilitation are examples for this level of *maqasid*.

However, differentiation between scholar in term of defining the maqasid or the purpose of islam is common even in the prophet era. It goes back when prophet sent a group of companion to Banu Qurayzah and instruct them to pray their afternoon (*asr*) prayer there. The allowed time to pray *asr* almost expired before the group reached Banu Qurayzah. Thus, the group divided into supporters of two different opinions, first group entailed praying at Banu Qurayzah and second group entailed praying on the way. Later, when the

companions narrated the story to the prophet, he approved both opinions. Another story come from the second caliph, the *ijtihad* of Umar Al-faruq over punishment for thief. He did not apply the hudud but give the thief another punishment considering the crisis condition in the country. There are many interpretations over both of events. Those stories can be an example on differentiation of understanding *maqasid* event in companion's level.

It is very acceptable if there are many interpretation of thing that should be the purpose of Islamic Law. By the changing condition and time, the interpretation absolutely will be changed (*Taghayirul ahkam bi taghaiyirul amkinah wa azaminah*). Finally, the summary of maqasid sharia definition can be reflected by the quote of Shams al-Din Ibn al-Qayyim:<sup>27</sup>

Shariah is based on wisdom and achieving people's welfare in this life and the afterlife. Shariah is all about justice, mercy, wisdom, and good. Thus, any ruling that replaces justice with injustice, mercy with its opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to the Shariah, even if it is claimed to be so according to some interpretation

After describing the concept if maqasid, Jasser Auda offered his concept which put purpose (maqasid) as the key for every Islamic law methodology. He claimed that by using maqasid as the basic or the fundamental value in every method of producing Islamic law. This idea especially can be seen in compromising two different and contradicting narration (prophet tradition).

To deal with the contradiction, Islamic jurist/scholar have been applying six strategies. First, conciliation method (*al-jam'*). This method is based on the searching of missing condition or context of the narrations. Second, abrogation method (*al-naskh*) which suggest that the later evidence should abrogate the former. Third, elimination method (*al-tarjih*) that suggest endorsing the narration which is most authentic and eliminating the other. Fourth, waiting

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<sup>27</sup> Jasser Auda, *Maqasid al-Shari'ah as Philosophy of Islamic Law: A Systems Approach*, (London: The International Institute of Islamic Thought, 2007)p.20

method (*al-tawaqquf*) that recommends the scholar is not to make any decision until one of the above three methods is evident. Fifth, cancellation method (*al-tasaqut*) which suggest the degradation of narrations based on the uncertainty in both. Sixth, choice method (*al-takhyir*) which give the scholar the right to choose whatever is rendered suitable for the situation at hand.

Jasser claimed that those method reduces the quality of Islamic value. For instance, the revelation of verse 9:5 of the Qur'an known as 'The Verse of The Sowrd'. It states: "But when the forbidden months are past, then slay the pagans wherever you find them and seize them". Jasser said, the historical context of the verse is the ninth year of hijrah, there is ar between Muslim and the pagans of Makah. However the context was taken out from the verse and claimed to have defined the ruling between Muslim and non-Muslim in every place, time and circumstance. Because of the taking out of the context, this verse seen as contradicting with other verses in Qur'an which calling for dialogue, freedom of belief, forgiveness, peace, and even patience. Conciliation between the contradicting verses are not chosen by the scholar. Moreover, the abrogation method was used to abrogate the former verses. Because the Sword verse revealed in the end of prophet's life, it can abrogated other contradicted verse which suggest dialogue, freedom of belief, forgiveness, peace, and even patience.

Therefore, Jasser suggest to combine the multi-dimensionality and *maqasid* approach to solve the previous problems. The one-dimensional of 'opposition' such as war and peace, men and women, silent and noise, and so on will find no way to reconcile the contradicting evidences. If the one-dimensional expanded into two-dimensions, the second of which is a *maqasid* to which both evidences contribute, then we will be able to resolve the opposition and understand/interpret the evidences in a unified context.

Jasser apply this method on the contradiction of evidences/narrations related to ways of performing 'acts of worship' (*ibadat*), all attributed to the prophet. Understanding the opposing narrations within a *maqasid* of magnanimity (*taisir*) entails that the prophet di carry out these rituals in various

ways, suggesting flexibility in such matters. This kinds of differentiations can be found during the way of standing and moving during prayers, making up for breaking one's fasting in Ramadan, details of pilgrimage and so on. Second example of the application of this method presented by Jasser in the context of opposing narrations that address matters related to customs (*al-urf*). However according to Jasser, these narrations could all be interpreted through the maqasid of universality of the law. For instance, the two narrations attributed to Aishah, one which forbid any woman from marriage without the consent of her guardian, while the other one allows previously married women to make their own independent choices on marriage. It is also narrated that Aishah herself did not apply the condition of consent in some cases. Understanding both narrations in the context of considering customs based on the law's 'universality' resolves the contradiction and provides flexibility in carrying out marriage ceremonies according to different customs in different places and times

#### D. Hate Speech in Islamic tradition

Speech is one of human daily activity especially for interacting with others. There are many wisdom words suggesting humans to speak and talk nicely to others. In Indonesia there is a quote "Your Mouth is Your Tiger" (*Mulutmu Harimaumu*). It means if humans did not watch what they are talking about, it will be a calamity for them. Islam acknowledges this and suggests that adherents to speech, speak, talk, and interact with other humans in good behavior. Islam sees good interaction as one character of a *mu'min* and *muslim*. It has narrated in the prophet tradition "anyone who has faith in God and believes on the day afterlife should speak good or just be silent" (*man kana yu'minu billahi wal yaumil akhir fal yakul khoiran aw liyasmu*).<sup>28</sup>

Speaking nicely is also one of many rights that neighbors get from one another. Nice speech is also counted as one charity in Islam. It can be seen on the

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<sup>28</sup> Muhammad bin Ismail Abu Abdullah Al-Bukhari Al-Ja'fiy, *Al-Jami'ul Musnad Al-Shohih Al-Mukhtashor min Amwari Rosulullah wa sunanuhu wa ayyamihi*: Shohih Bukhari, (Dar Thouqu An-Najat, 122 H) Vol.8 p.11

chapter of the obligation for act nicely towards neighbor in many books.<sup>29</sup> There are speech categorized as bad speech in Islamic tradition, Al-ghazali mentioned twenty kinds of bad speech (harm of Tongue/Afatul Lisan), they are:<sup>30</sup>

No	Kind of Speech	Definition/Explanation
1.	Unnecessary Talk ( <i>Al-Kalam fima la ya'nik</i> )	Such talks that if uttered do not cause any benefit and do not do harm in this world and in the next.
2.	Excessive Talk ( <i>Fudulul Kalam</i> )	To utter such words as are of no use and to hold such talks as are of no use. Necessary talks can be held in short, if one sentence is sufficient, second sentence is unnecessary.
3.	Useless Talk ( <i>Al Khoudu fil batil</i> )	Talking about untrue matters and to spend talks in action of sins. For instance to state the beauties of a woman, to tell about assembly of drinking wine, etc.
4.	Quarrels and unlawful disputes ( <i>Al-Mar'u wal jidalu</i> )	Staying away from unlawful/meaningless quarrel is one characteristic of faith in human. It said the faith of a man is known who has got in him six qualities: among those is giving up quarrel.
5.	Disputes about wealth and properties ( <i>al-khusumah</i> )	Rasul said: ho dispute about properties with another out of ignorance, remain always in the displeasure of god till he becomes silent
6.	Ornamentation in	To disclosure oratory and to give lectures with

<sup>29</sup> Ahmad bin Ali bin Hajar Abu Fadl Al-'Atsqolaniy As-Syafi'i, Fathul Bariy Syarhi Shohih Al-Bukhori, (Beirut: Dar Al-Mu'arofah, 179 H) Vol.10 p.445-447

<sup>30</sup> Abi Hamid Muhammad bin Muhammad Al-Ghazali, Ihya' Ulumuddin, (Beirut: Dar Ibn Hazim, 2005) Vol.3 p. 995-1058 translated by Faz-ul-Karim

	talks	ornamental words.
7.	Obscene and bad took	Rasul said: Four persons will give trouble to the inmates of hell. They will be running between hot water and gire and proclaim their sorrow, one of them will be such from hose mouth pus and blood ill come out. He will be asked: why is this condition of yours? He will say: I used to hold obscene and evil talks...
8.	Curse	The prophet said: A believer ( <i>mu'min</i> ) does not curse another.
9.	Songs and Poetries	The bad of this kind of speech depend on the content. If it is good, then the poetry and songs are good but if it is bad, then the poetry and songs are bad.
10.	Laugh and Jokes	It does not mean joke and laugh are prohibited, it ill be commendable if go without limit. Rasul said: I cut jokes, but I don't say but truth.
11.	Ridicule ( <i>As-Sakhriyatu al Istihza'</i> )	This kind of speech means to neglect or hold in contempt another and show his defects. God says: O believers, no people shall ridicule another people. Perchance the latter may be better than the former. No woman shall ridicule another woman, Perchance the latter may be better than the former
12.	Disclosure secret talks ( <i>ifsya'us sirri</i> )	It is unlawful as it gives pain to the mind of another. Rasul said: hne any man tells you something and ask you to keep it secret, it is a trust ( <i>amanah</i> ).
13.	False Pomise	It is another harm of tongue/bad speech as it

	( <i>wa'dul kadzab</i> )	wants to make promise in haste but it does not become possible to fulfil it always
14.	Falsehood ( <i>AL-Kadzab fil Qouliy al yamin</i> )	Another bad speech is false-speaking and false oath. These are great sins and heinous faults. Rasul said: Be careful of falsehood as it is the companion of the sinner and both will be in hell.
15.	Back-biting ( <i>Ghibah</i> )	It means to say anything to another about your brother in his absence that he does not like. Rasul said: The repentance of back-biting is not accepted till the back-bitted man pardons him.
16.	Cheating and Slander ( <i>Namimah</i> )	It means to take the faults of one to the ears of another. God say: O believer, if a transgressor comes to you with a news, test it correctness, lest you injure a people out of ignorance.
17.	Hypocrisy ( <i>Kalamun dzi lisanaini</i> )	It is to go to enemies and introduce to each of them as friend and to hold one opinion ith each of them. Prophet said: he ho has got to tongue in the world will have to tongues in the nest world.
18.	Praise ( <i>Al-madhu</i> )	There are four harm that can come from praising 1) Falsehod; 2)Show; 3)Uncertainty of the object quality; 4)the praised man could be great sinner
19.	Carelessness ( <i>Ghoflah fi daqaiqil Khot'i</i> )	It is the carelessness of the speech or inattention in words, especially when they are uttered in connection with religious affairs.
20.	Question of	It is told that rasul enraged because of

	ordinary men about God	unlimited questions questioned before him. He afraid the people will ask something that related to God and will distract their faith. Like “God created the creatures, but who created God?”
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It can be seen that Islamic scholar also has produced kind of speech that is prohibited by Islamic law. The prohibition of those speech related to the prophet tradition or God revelation. However, the Islamic scholar -especially Al-Ghozali in this case- frequently said that those kinds of speech are able to harm other. Therefore, hate speech by its destructive effect is the combination of several bad speech in above categorization. Because hate speech, especially according to ICCPR is insulting, ridiculing, and cursing the target group in order to stimulate the audience to harm the target group. The inciter or the speaker insult, ridicule, curse, and suggest the audience to do unlawful act such as discriminating, beating, and moreover to kill specific person or group.

The valid example of hate speech can be seen from the speech delivered by Sobri Lubist, member of Front Pembela Islam. This speech spreads through video uploaded in youtube.com, part of this speech say “*Kami ajak umat islam, kita perangi ahmadiyah, bunuh ahmadiyah dimanapun mereka berada*” (we call muslim, let fight ahmadiyah, kill ahmadiyah eherever we found them).<sup>31</sup>

### E. Hate speech and Blocking The Mean

Blocking the Mean is one of Islamic law methodology acknowledge by almost all Islamic school except zahiris and shia. This methods means to forbid or block a lawful action because it could be means that lead to unlawful action. The example of this method is digging a well on a public road that

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<sup>31</sup> The video can be accesed in <https://www.youtube.com/watch?v=U7RLCXNdKF4>

certainly harm people. Generally, digging well is allowed but it becomes prohibited because risking the public safety.

There are levels of harm that can be the basic argument to block some actions. The first level of harm is 'certain'. This level is shown in the example of digging well on public road which certainly will harm. Second level is 'Most Probable' which is shown in the phenomena of trading weapons during civil unrest. Maliki and Hanbali agree to block these means, while other disagreed. Third level is 'probable' which is shown in case of 'woman travels by herself', Maliki and Hanbali agreed to block in this case, while other disagreed. The fourth level is 'rare' which represented by the case of 'selling grape, it has risk the grapes will be transformed into wine. For this case, jurist agreed that blocking the means does not apply anymore because the benefit of the action is more than the harm.

There are two key words to understand the blocking means concept, first the blocked action fundamentally lawful and second, even the action is lawful but it will lead to the destruction. Speech is fundamentally the right of every human being on earth. The declaration clearly guarantee this right. However, it becomes prohibited when it certainly lead to war and assassination. Freedom of expression is guarantee by the human right, but it must be limited. Speech are fundamentally permissible, but due to the risk of growing hatred, war and the appearance of another unlawful actions, several kinds of speech especially which certainly will harm people are should be prohibited.

## **F. Human Rights as New Purpose of Islamic law**

The declaration is claimed to be the reflection of the concept of human rights history. It is produced by combining every states participant local wisdom. The declaration search for common or fundamental human rights that never change wherever and whenever the human. Therefore, it can be used for every races, religious adherent, citizens, and each human being can stand for their right in accordance with the declaration of human rights.

It has been accepted by many Islamic scholar that human rights (The declaration of Human Rights) play an important role in modern society. There are Islamic states –mostly classified based on the number of muslim citizen- has ratified the human rights declaration. Moreover, several countries has specific regulation in applying human rights, for instance Indonesia has the regulation number 39 year 1999 of human rights. Indonesia also ratified another convention like ICCPR, ECOSOC, CEDAW AND etc.

Emphasizing ibn Al-qayyim quote that sharia is always lead to the wisdom, justice and human welfare. It can be concluded that if there are some la claimed to be Islamic but it gives human calamity, it should be reinterpreted. Is also can be concluded, however the legislator, if the law or rule lead and proved to be able realizing the prosperity, it could be Islamic either. In the history, Islamic law are acknowledge many Arabic tradition such as pilgrimage, releasing the slave, wearing veil are adopted and moreover being improved by Islamic tradition.

It also can be found that many Muslim scholar use the Greek philosophy as their basic of knowledge epistemology. For instance, Al-ghazali, Ar-Rozi, Al-farabi and many others scholar build their knowledge from the Greek philosophy concept. Although, many of them also criticized the concept. However, this phenomena shows that even it come from non-Muslim scholar, as far as it can produce and lead to the prosperity, Muslim community are allowed to adopt it as Islamic treasure.

Human rights proved to be accepted and become the threshold for many states and countries all over the world. Islam has to take part in developing this concept. Especially to prove Islam as the universal value that will lead to prosperity for all human being and not just for Muslim.

## **G. Conclusion**

From the above explanations it could be found that Islamic tradition actually forbid several types of speech. Al-Ghazali offered 20 types of speech/talk that must be anticipated by Muslim community. It shows that Islam

also acknowledge the limitation of specific speech. According to those 20 types of speech/talk, hate speech are consisted from many type of those speeches. Hate speech contains ridicule, insult, and curse within. Moreover, hate speech also suggest the audience of speech to harm the target group.

Based on the definition of hate speech on ICCPR, it is not all speech which contains ridicule, insult and curse are hate speech. It must fulfilled several conditions which has offered, for instance the condition that recommended by the Rabat plan of Action. The definition itself restricting the “just speech” to an advocacy. While the speech can come out of ignorance (unintentionally), advocacy is definitely systematic and structured. These conditions have to be applied carefully, because the legalization of prohibiting hate speech is vulnerable for being the medium of some criminalization.

In term of Islamic law methodology, hate speech can be approached or evaluated through several ways. First, through the method of combining multi-dimensional and *maqasid* sharia within. By this method, it can be found two opposing evidences, one suggest the freedom of speech and the other one limiting the speech. Through *maqasid* of “Keeping human life/Preserving of Soul/*Hifdhun Nafs*”, it is understandable to limit some speeches as hate speech. Because hate speech, by considering the fulfilment of several conditions, could lead the audience to harm other group. Second, blocking of the mean methodology which improved by combining the principle of purposefulness (*maqasid*). This method see the hate speech as one stimulation for people to start hating each other and disturb the social order. Therefore, hate speech is repugnant and must be prohibited.

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