Procedural Obstacles in Investigation and Prosecution of Cases on Deviant Teachings in Cyberspace: Maqasid Al-Syariah Approach

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Abstract: Cases in the Syariah Courts must be dealt with justifiably in accordance with Syariah. Thus, in offenses relating to the dissemination of deviant teachings in cyberspace, it is vital that proper investigation and prosecution be carried out successfully. In addition, the whole litigation process must be in line with Maqasid Al-Syariah. However, there is a lack of study in the literature on the application of Maqasid al-Syariah as a guide to confronting procedural obstacles in the investigation and prosecution of such cases. By using a qualitative method of document analysis and doctrinal study, the intrinsic objective of this study is to analyze the potential of Maqasid Al-Syariah in addressing the procedural obstacles in the prosecution of cases of deviant teachings in cyberspace. The study’s specific objectives are to (1) identify the procedural obstacles in the investigation and prosecution of cases on deviant teachings in cyberspace; and (2) analyze how the procedural obstacles in the investigation and prosecution of cases on deviant teachings in cyberspace can be addressed by using the guidance of Maqasid Al-Syariah. This study finds that Maqasid Al-Syariah is a valuable spiritual guide to investigators and prosecutors to carry out their duties diligently according to procedural and substantive laws. In addition, it guides them in finding possible solutions to the obstacles that they might encounter in carrying out their respective roles.

Keywords: deviant, criminal procedure, Maqasid Al-Syariah

1. Introduction

Deviant teachings are not based on Al-Quran and the Hadith and are not in harmony with the practice of Ahl Sunnah Wal-Jamaah (The Department of Islamic Development of Malaysia, 2000) (hereinafter referred to as “deviant teaching”). In Malaysia, the Syariah Criminal Offences Enactments of the various states state that disseminating deviant teachings is a Syariah offense. For example, the Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559) stipulates such offenses in a variety of names – ‘wrongful worship’; ‘false doctrine’; propagation of religious doctrines, etc.; ‘false claim’; ‘insulting, or bringing into contempt, etc. the religion of Islam’, ‘providing opinion contrary to fatwa’; and ‘religious publication contrary to Islamic law’.
2. Underlying Problems and Objectives of Study

Deviant teachings in cyberspace are unfiltered information. Unfiltered information is easily spread through cyberspace and can be criminal in nature (Babu, & Parishat, 2004; Philippsohn, 2001). According to the statistics from the Malaysian Police, cybercrime activities are on the increase (Sinar Harian, 28 June 2021). In Malaysia, the commission of such an act is punishable under the Communications and Multimedia Act 1988 (Act 588). Deviant teachings create conflict, distrust, and public disorder. This situation is aggravated when violence and killings are involved (Nordin, 2019). Deviant teachings were easily detectable in the past due to a small number of cases. A great number of Muslims share online religious materials on the internet (Azimaton et. al, 2015). The issue of concern is when such postings are deviant teachings and not easily detectable

Maqasid Al-Syariah is relevant in regulating human activities in the form of rules, obligations, and principles. In addition, Maqasid Al-Syariah also provides guidance to the exercise of *ijtihad* (personal reasoning) in solving a myriad of human issues concerning the community such as public health, finance, administration, and the management of a state. In Malaysia, suspects of deviant teachings are prosecuted in the Syariah Courts. The Syariah Courts deal with issues of deviant teachings cases by referring to the Syariah criminal offenses enactments/acts, Syariah criminal procedure, and Syariah (Islamic Law). The pre-trial preparation of deviant teaching cases will involve various stages beginning from investigation to the prosecution of the accused in a trial preceded by a Syariah court judge. Since the dissemination of deviant teachings is committed in cyberspace, there might arise various procedural issues in the processes of investigation and prosecution of suspects.

Notably, the Syariah criminal procedure enactments are based on the Criminal Procedure Code (Act 593). Act 593 is based on the Indian Penal Code of 1861 and not on Syariah. As such, it is fathomable that any procedural obstacles faced in deciding cases such as on deviant teachings in cyberspace are not centered on Maqasid Al-Syariah. Furthermore, there is a lack of literature on how the investigation and prosecution of cases relating to the dissemination of deviant teachings in cyberspace are done in harmony with Maqasid Al-Syariah.

Based on the foregoing situation, the main objective of this study is to analyze the potential of Maqasid Al-Syariah in addressing the procedural obstacles in the prosecution of cases on deviant teachings in cyberspace. The study’s specific objectives are to (1) identify the procedural obstacles in the prosecution of cases on deviant teachings in cyberspace; and (2) analyze how the procedural obstacles in the prosecution of cases on deviant teachings in cyberspace can be addressed by using the guidance of Maqasid Al-Syariah. This study is significant in promoting the use of Maqasid al-Syariah as a proactive step in managing the procedural obstacles in the prosecution of cases on deviant teachings in cyberspace. The impact of this paper is that it provides a preliminary step towards improving the current procedure of managing deviant teaching cases by using Maqasid al-Syariah as a reliable guide.

3. Literature Review

Deviant teachings disseminated especially by cult chiefs (leaders) have been the concern of Islamic authorities in Malaysia (Fadzil, 2011). Historically, deviant teaching activities began in the late nineteenth century. The first deviant teaching known as Taslim was founded in Kampung Seronok, Penang (Akmar, 2011). Deviant teachings then sprouted with Qadi Ani in the early 1930s (Jabatan Mufti Wilayah Persekutuan, 2008). Jusidini and Kusrin (2018) state...
that the main groups that circulated deviant teaching in cyberspace include Millah Abraham @ Ibrahim, Ilmu Syahadah, Zikir Nafas Ismail bin Kassim (PERAHMAT), and Raja Bomoh Sedunia.

Laws were used to curb the dissemination of deviant teachings. Relevant laws include the Federal Constitution itself (Art. 11(5) and 10(2), Defamation Act 1984 (Act 15), Printing and Presses and Publication Act 1984 (Act 301), Societies Act 1966 (Act 335), Police Act 1967 (Act 344), and Penal Code (N.M.B. Chap. 45). In addition, the dissemination of deviant teachings is coded as Syariah Offence. For example, deviant teachings are stated as coded Syariah offense in the Syariah Criminal Offences Enactment 1997 (Johor) and Syariah Criminal Offences Enactment 1992 (Perak). Notwithstanding this, Ismail (2016) states that there is currently no main cyber law in Malaysia to address Syariah offences committed in cyberspace. In addition, the current laws are not centered on Maqasid Al-Syariah principles. Forensic digital is a new area in Malaysia (Nong, 2016). Studies show that organisations must show readiness to face forensic activities and the ability to comply with applicable laws (Mohamed Elyas, Maynard, Atif Ahmad, & Lonie, 2014). Since the current laws are drafted in a way to address the commission of offences committed physically, there might arise procedural obstacles in prosecuting suspects when the offences are committed via cyberspace.

Furthermore, little knowledge is known as to how the procedural obstacles in the prosecution of cases on deviant teachings in cyberspace can be addressed by using the guidance of Maqasid Al-Syariah. Deviant teachings disorientate the beliefs of Muslims, their family lives, and of the public at large. These teachings violate the crucial purposes of Islamic law (Maqasid al-Syariah) namely, to preserve the purity of religion and life. As such, procedural obstacles must be tackled to curtail deviant teachings. Notably, in-depth studies relating to Maqasid al-Syariah are not recent. Islamic scholars have written numerous articles on the need to integrate Maqasid al-Syariah in solving contemporary issues (Mohd Yusob et al., 2015). For example, studies on such integration can be seen in analyzing and assessing bioethical issues (Ibrahim et al., 2019), social media use (Muhs Rosydi Mohammad et al., 2017), waqaf management (Nor Muhamad et al. 2015) and Islamic finance (Dusuki, & Bouheraoua, 2015).

Dusuki and Bouheraoua (2015) defined maqasid by stressing the objective of the Syariah to promote the welfare of the public, which lies in safeguarding their religion (dīn), their lives (nafs), their intellect (ʿaql), their posterity (nasl), and their property (māl). Thus, any act which ensures the safeguarding of these five objectives serves the public interest and is desirable. On the contrary, any act which disregards public interest must be removed.

Maqasid al-Syariah is linked to divine intent and moral rights such as justice, dignity, freedom, and cooperation (Niazi, 2016). This indicates that Maqasid al-Syariah can be used as an effective tool to solve various contemporary challenges, such as ineffective laws to curb the dissemination of deviant teachings in cyberspace. In this connection, it is crucial to know how Maqasid Al-Syariah might be used as a guide in addressing procedural obstacles in the prosecution of cases on deviant teachings in cyberspace. Based on the observation of various Syariah Criminal Procedure Enactments, the progression of a case in the litigation track relating to the dissemination of deviant teaching involves the carrying out of the respective duties of several parties, namely the Religious Enforcement Officer, Syarie Prosecuting Officer, Syarie Counsel, and Court Officers (namely the registrar and the judge).
4. Research Methodology

This qualitative study relies on document analysis of library-based materials. This involves the analysis of evaluating texts systematically from printed and electronic sources where the data will be analyzed and interpreted. A doctrinal study mostly used in legal and Syariah studies is also employed whereby crucial data from primary sources were extracted from the Holy Qur’an, relevant Acts, and Enactments. Secondary data were obtained from journal articles, proceeding papers, newspaper reports, and other relevant electronic materials.

5. Results

The results of this study show that some main obstacles faced in the investigation and prosecution stages of cases relating to the dissemination of deviant teachings in cyberspace are related to the identification of the suspect(s), documentary evidence, and lack of experience in digital forensics. Notwithstanding this, Maqasid Al-Syariah is a valuable spiritual guide for investigators and prosecutors to carry out their duties in the accomplishment of benefit (maslahah) and the avoidance of mafsadah (harm) in their line of duties. In addition, Maqasid Al-Syariah guides them in finding possible solutions to the obstacles that they might encounter in carrying out their respective roles in cases relating to deviant teachings that are disseminated in cyberspace. In facing obstacles relating to digital forensics, investigators and prosecutors should obtain assistance from digital forensic experts so that prosecution of the accused can be made accordingly.

6. Analysis and Discussion

The discussion in this section focuses on the following aspects: firstly, the procedural obstacles in the prosecution of cases on deviant teachings in cyberspace; and secondly, how the procedural obstacles in the prosecution of cases on deviant teachings in cyberspace can be addressed by using the guidance of Maqasid Al-Syariah.

First part: Procedural Obstacles in The Prosecution of Cases on Deviant Teachings in Cyberspace

The prosecution of a suspect depends heavily on how the processes involved are carried out, namely from the receipt of information and complaint from any person, processing of complaints, investigation, searches, and the prosecution of the suspect(s).

False doctrines can be disseminated on social media such as Youtube or Facebook. Any person may lodge a report on false doctrine to the relevant authorities to have such content removed. An analysis of the provisions of Syariah Criminal Procedure Enactments in several states would point out that the first procedural step that can be taken by an informant to initiate a criminal action in the Syariah Court against a person who is suspected of disseminating deviant teachings in cyberspace is by providing information to the nearest Religious Enforcement Officer (REO) of the Enforcement Department, Islamic Religion Department of the State [see, for instance, section 9 of the Syariah Criminal Procedure (State of Selangor) Enactment 2003]. Similar wordings of section 9 of the aforesaid Syariah Enactment are also seen in other enactments [see section 9 of the Syariah Criminal Procedure (Pahang) Enactment 2002; section 211 of the Syariah Criminal Procedure (Melaka) Enactment 2002; section 9 of the Syariah Criminal Procedure (State of Negeri Sembilan) Enactment 2002; section 9 of the Syariah Criminal Procedure (Kelantan Enactment 2002; and section 9 of the Syariah Criminal Procedure (Sabah) Enactment 2004]. A person may provide information to the Religious
Enforcement Officer (REO) in several ways. The ways are oral, written, and telephone calls. The obstacle faced by the REO is receiving information in written form (such as letters, and electronic mail) and telephone calls are that such information must be verified as to its accuracy.

An analysis of the State Syariah Criminal Procedure shows that legal actions would be taken against informants who provide false information. For example, section 211 of the Syariah Criminal Procedure (State of Selangor) Enactment 2003; Syariah Criminal Procedure (Pulau Pinang) Enactment 2004; Syariah Criminal Procedure (State of Pahang) Enactment 2002; Syariah Criminal Procedure (State of Kelantan) Enactment 2002, and Syariah Criminal Procedure (State of Sabah) Enactment 2002). Having said that, such a threat of legal action might hinder members of the public to assist the authorities in preventing the dissemination of false doctrine via a social media application.

Section 63 of the Syariah Criminal Procedure (State of Selangor) Enactment 2003 authorizes an REO to conduct a search for documents or things in any place. It must be borne in mind that the investigation process may include digital forensic evidence that can be deemed complicated for an inexperienced REO. An REO might not be familiar with the forensic process of identifying evidence, evaluating evidence, and finally making a report.

The Syariah Criminal Procedure lays down stringent rules pertaining to the framing of the charge against the accused. Several obstacles must be anticipated by the prosecution in framing the charge sheet. The analysis of sections 96 and 98 of the Syariah Criminal Procedure (State of Selangor) Enactment 2003 shows that the burden of proof is on the prosecution. Apart from that, the common procedure will require mentioning the way a crime is committed (see for instance sections 79, 80, and 81 of the Syariah Criminal Procedure (State of Selangor) Enactment 2003). The obstacle possibly faced is related to the difficulty in determining the time, place, and persons involved in disseminating deviant teachings if the offense is committed online. Other challenges during the trial include technical issues, the acceptance of testimonies from expert witnesses, and the acceptance of digital forensic evidence. According to Ambhire and Meshram (2012), digital forensics involves using scientific methods to identify, collect, preserve, validate, analyze, interpret, and present digital evidence from digital sources. However, the processes involved challenges during practical implementation. According to Fahdi, Clark, and Furnell (2013), challenges in digital forensics are related to technical, legal, and resource issues.

The prosecution may also face a situation where the Syarie counsel might argue that the Syariah Court which is trying the accused is not empowered to do so due to jurisdictional issue. The argument is that the offence is committed wholly or partly not within the local jurisdiction of the Syariah judge (see section 7 of the Syariah Criminal Procedure (State of Selangor) Enactment 2003. Other similar provisions are also found in the Syariah Criminal Procedure in other stat

Second part: Addressing the procedural obstacles in the prosecution of cases on deviant teachings in cyberspace by using the guidance of Maqasid Al-Syariah.
Syariah encompasses rules on the relationship between man and his Creator and the relationship amongst men. Submission to Allah (SWT) is succinctly mentioned in the following Quranic verse: “and begin regular prayer: for prayer precludes from disgraceful and unjust acts, and remembrance of Allah is the best without the doubt. And Allah understands the (Deeds) that you do.” (Al- Qur’an, Al-Ankabut: 45). In addition, Syariah accentuates the importance of
morality and good virtues in all actions. Based on this explanation, investigators and prosecutors need to refer to the five essentials of Maqasid Al-Syariah in performing their respective tasks when addressing the procedural obstacles in the prosecution of cases on deviant teachings in cyberspace. Further explanation is stated below.

**Protection of Religion (al-Din)**

Maqasid al-Shariah guides human efforts to curb crimes by describing the need to enjoin good actions and refrain from bad actions (‘amr bil-ma’ruf wan-nahi ‘an il-munkar). This is an integral part of the feature of a true believer who demonstrates great concern for the well-being of the community. Thus, by way of application, every party involved (namely the informant, Religious Enforcement Officer, and Syarie Prosecutor) must cooperate with each other to curb crimes. They must understand the need to protect the religion of Islam from any possible destruction such as the sinful act of disseminating inaccurate and misleading information about Islam. They must strive to accomplish benefit (maslahah) to the community and avoid harm (mafsadah) in their line of duties.

**Protection of Life (al-Nafs)**

The second essential of the Maqasid Al-Syariah is to protect one’s life. A Religious Enforcement Officer (REO) is duty-bound to examine witnesses at the investigation stage. For example, this procedural rule is stated under section 59 of the Syariah Criminal Procedure (State of Selangor) Enactment 2003. Apart from that, the REO shall ensure that a witness provides oral and written statements truthfully to avoid causing harm to the well-being of another person. Such harm might be in the form of an unfounded allegation. The Holy Qur’an mentioned: “And pay out in the cause of Allah and never leave yourselves into devastation (by an act of spending your wealth in the cause of Allah) and do good. Truly, Allah loves (those who enjoins good).” (Al-Baqarah: 195).

Apart from that, a Religious Enforcement Officer (REO) who is not familiar with the forensic process of identification of possible evidence and the procurement of that evidence at the location of the place where the offence is committed, shall seek the assistance of the forensic team to identify all electronic devices used in the commission of the offense apart from collecting documentary evidence. While carrying out his duty, the REO is not equipped with any weapon to defend himself. As such, in making arrests and searches, he must seek the assistance and company of the police, as the main law enforcement agency of the country (see section 3(3) of the Police Act 1976 (Act 344).

In the investigation stage, the REO must ensure that the postings in cyberspace are deviant teachings. This can be done by verifying with the state religious authorities and the Department of Islamic Development of Malaysia. The assistance of the police can also be sought if the postings pose a threat to national security and public order in violation of the Security Offences (Special Measures) Act 2012 (SOSMA), Prevention of Terrorism Act 2015 (POTA), and the Penal Code. It is also crucial for the REO and the prosecution to be familiar with the laws on the admissibility of electronic records under the definition of the word “computer” in various Syariah Evidence Enactments. They must endeavor to acquire knowledge in computer forensics since digital devices involved are such as USBs, hard disks, and tablets.

The duty of the prosecution begins upon receiving the investigation sheet from the Enforcement Department. At this juncture, it is crucial for the prosecution to examine thoroughly three important aspects, namely technical issues during the investigation stage, testimonies, and evidence. The Syarie Prosecutor must ensure that the investigation file contains important items such as the identity card of the suspect, an information sheet to the REO, an investigation order
from the Chief Syarie Prosecutor, relevant reports pertaining to arrest and investigations, and the list of confiscated items. It is pertinent for the Syarie Counsel to ensure that witnesses are competent and possess credibility according to Hukum Syarak. This is to ensure that the life of the suspect is not put in jeopardy.

Furthermore, to protect the life of the accused, the prosecution should ensure that the charge sheet should meet all requirements under procedural law. For example, the prosecution should ensure that the charge sheet mentions the law and provision on disseminating false doctrine/deviant teachings; and that every legal condition required under the law is met (see, for example, such importance is stated in the wordings of section 78 of the Syariah Criminal Procedure (State of Selangor) Enactment 2003).

In the trial stage, the Syariah Court judge shall dispose of cases justifiably. As such, the prosecution shall analyze the relevant issues and assesses the evidence, the Syariah laws, and relevant legal authorities. Section 192 of the Syariah Criminal Procedure (State of Selangor) Enactment 2003, for instance, prescribes the procedure when a person is dangerously ill and is unable to provide material evidence in court. In such a situation, the judge may order that the ill person’s disposition is taken at a specified time and place that are convenient and not detrimental to the dangerously ill person.

Protection of Dignity or Descent

Islam accentuates the need to protect the dignity of a person. By way of application, an informant who is aware that a person is suspected of or intended of committing the offense of disseminating deviant teachings shall only provide information to the REO if he believes that the said offense has been committed based on evidence and not according to his whims and fancies. Furthermore, the REO must take precautionary steps to avoid relying on false information provided to him. Such precautionary steps include taking down the telephone number of the informant and obtaining other crucial information that can identify the suspect or other information that may support the complaint. In addition, the REO shall remind the informant to sign any statement made by him and remind him of the repercussion of being fined or imprisoned for his refusal. This duty is clearly stipulated under the various Syariah criminal enactments (see for examples, section 216 Syariah Criminal Procedure (State of Selangor) Enactment 2003, section 216 Syariah Criminal Procedure (State of Negeri Sembilan) Enactment 2003, section 216 Syariah Criminal Procedure (State of Melaka) Enactment 2002, and Syariah Criminal Procedure (Pulau Pinang) Enactment 2004.

In addition, the REO and the Syarie Prosecutor must equip themselves with the knowledge of substantive criminal laws to enable them to identify the elements that sufficiently form the charge of disseminating deviant teachings in cyberspace. Without such knowledge, his investigation might affect the prosecution’s case due to a lack of evidence. It must be borne in mind that an REO and the Syarie Prosecutor might not be familiar with the forensic process of identifying possible evidence, and evaluation of evidence. As such, they must obtain assistance from officers who are knowledgeable in digital forensics from relevant departments (such as the Digital Forensic Department of the Malaysia Multimedia and Communication Commission).

Both the REO and the Syarie Prosecutor must bear in mind the importance of preserving the dignity of the suspect who is considered innocent until proven guilty by the Syariah Court. It must be noted that sections 99 and 224 of the Syariah Criminal Procedure (State of Selangor) Enactment 2003 allows an accused who has been arrested and charged without adequate ground
to be awarded compensation, and such compensation shall be incurred by the person who causes the arrest. As such, the Judge may consider imposing this section to compensate the person who has been accused wrongly for his loss of time and expenses. Islam prohibits the act of creating hatred towards another. Any allegation remains as such until proven otherwise. Thus, the dignity of the suspect during the investigation must be preserved. This is stated in the following verse: “And if (at any time) an incitement to discord is made to you by the Evil One, seek refuge in Allah. He is the one who hears and knows all things.” (Al-Qur’an. Al-Fussilat 41: 34-36). In such a situation, the REO and the Syarie Prosecutor should bear in mind that forensic testimonies of expert witnesses can also be misleading apart from the tendering of contaminated samples.

**Protection of Intellect or Mind (al-’Aql)**

In Islam, the tawhid value emphasizes that every word spoken by a person must take into consideration of one’s relationship with Allah SWT (habl min Allah) and with other persons (habl min al-nas) (Abdul Halim Ismail, 1987; Hamed, 1999; Omar, 2014). In Islam, any deed is related to God and is an act of worship (Ahmad, 2008). By understanding such relationships, the level of respect is preserved and avoids the destruction of society (Ilhamie Abdul Ghani Azmi 2001). The above explanation supported by Quranic verses can be applied in the practice of handling the litigation process of a case.

In protecting human intellect, any act or omission that affects a person’s intellect is forbidden. In this regard, the prosecution, witness(es), and accused must provide accurate information and not mislead the court. This is consistent with what was stated by Amanullah (2015) that providing inaccurate statements violates the greater objective of guarding intellect. In general, the Syarie Prosecutor as the prosecution shall not practice a careless attitude in particularizing the charge regarding the place, time, and person suspected of committing the offense. Thus, in framing the charge sheet, and in pretrial preparation, the Syarie Prosecutor must ensure all technical issues, the acceptability of testimonies from expert witnesses, and the acceptance of digital forensic evidence are taken care of to avoid complications during the trial. For instance, Section 96 (e) Syariah Criminal Procedure (State of Selangor) Enactment 2003 allows the accused or his Syariah Counsel to cross-examine all the prosecution’s witnesses. Nevertheless, this does not mean that the accused or his Syariah Counsel has the liberty to administer offensive cross-examination questions to the prosecution witnesses.

**Protection of Property (al-Mal)**

Syariah prohibits the taking away of another person’s property. The Holy Qur’an prohibits the eating up of another person’s property in an unjust manner and giving bribes (Al-Baqarah:188). As such, any act of disseminating information, photo, and video posted on social media which are proven in court as not an offense within the definition of Syariah Criminal Offences or violation of Syariah should not be removed wantonly.

Nevertheless, it must be borne in mind that seizing a person’s property (such as laptops or handphones) which is used to disseminate false doctrine is an exception to protecting such person’s property. This is because the devices are used to cause public disorder and a threat to the Muslim faith. Under Syariah Criminal Offences (Federal Territories) Act 1997 and the Syariah Criminal Procedure (State of Selangor) Enactment 2003, the Syariah Court is empowered to order any document used in the commission of disseminating false doctrine to be forfeited and destroyed. This is the prerogative of the Syariah Court irrespective of whether the accused is convicted of such an offense.
7. Conclusion

The obstacles faced in curbing the dissemination of deviant teachings in cyberspace are many. To name a few, the prosecution of the accused is not able to be carried out efficiently due to inexperienced prosecution officers, jurisdictional issues, and the inability to locate the physical location of an offense. Based on the Quranic verses and the illustrated examples, it can be surmised that total reliance on human intellect, procedural laws, and judicial decisions is not sufficient. Acquiring appropriate values in handling issues in managing deviant teachings cases avoids harm to oneself and the member of the public. In addition, adopting appropriate ways or values that are based on Maqasid Al-Syariah also enhances the present procedural way of managing such cases according to the Syariah Criminal Procedure. Based on the analysis of the above cases, it can be safely said the manner of conducting prosecution should not only be in line with the Syariah Criminal Procedure but also with Maqasid Al-Syariah.

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