

***MAQASIDU ASY SHARI'AH* IN THE CONCEPT OF THE LEGAL STATE OF PANCASILA**

Hari Widiyanto

Faculty of Sharia, Insitut Agama Islam An-Nawawi Purworejo Indonesia
Jl. Ir. H. Juanda No.1 Berjan, Gebang, Purworejo, Jawa Tengah, Indonesia 54191
E-mail: hari.widiyanto25@gmail.com

Muhajir

Faculty of Sharia, Insitut Agama Islam An-Nawawi Purworejo Indonesia
Jl. Ir. H. Juanda No.1 Berjan, Gebang, Purworejo, Jawa Tengah, Indonesia 54191
E-mail: muhajirmadruslam@gmail.com

Fitrohtul Khasanah

Faculty of Sharia, Institut Agama Islam An-Nawawi Purworejo
Jl. Ir. H. Juanda No.1 Berjan, Gebang, Purworejo, Jawa Tengah, Indonesia 54191
E- mail: elhasna016@gmail.com

Ida Faridah

Faculty of Tarbiyah and Dakwah, Insitut Agama Islam An-Nawawi Purworejo Indonesia
Jl. Ir. H. Juanda No.1 Berjan, Gebang, Purworejo, Jawa Tengah, Indonesia 54191
E-mail: faridahida242@gmail.com

Achmad Nursobah

Faculty of Sharia, Insitut Agama Islam An-Nawawi Purworejo Indonesia
Jl. Ir. H. Juanda No.1 Berjan, Gebang, Purworejo, Jawa Tengah, Indonesia 54191 E-
mail: cahayapagi87@gmail.com

ABSTRACT

The rule of law in its development has experienced several concepts of meaning including the concept of the rule of law state, the concept of the state of law *rechtsstaat*, and the concept of the state of law Pancasila. The differences in the concept of the rule of law that exist in several countries cannot be separated from the differences in the socio-cultural conditions that exist in several countries. For example, in Indonesia, Pancasila is a view and philosophy of life that is full of ethical and moral values for Indonesian people, as stated in the 1945 Constitution Preamble and implied in the Articles of the 1945 Constitution of the Indonesia Republic. However, to clarify the characteristics of the Pancasila legal state, it is necessary to have the values inherent in the Indonesian nation. Considering that the majority of the Indonesian population is Muslim, the values of *maqasidu shari'ah* are used as a tool to clarify the characteristics of the Pancasila legal state as well as to assess the extent of its implementation. This study examines the potency of Maqashid Sharia to be implemented in Pancasila as state law in the midst of religious diversity in Indonesia. This study applies the philosophical approach to discover the essence of Maqashid Sharia, so that relevance and significance can be obtained. This study indicated that although in Indonesia there are many religions, sharia values must be able to protect them, so that in the end, sharia values contained in *maqasidu asy shari'ah* can be accepted by the Indonesian people through the concept of a state of law Pancasila.

Keywords: Maqashid sharia, Legal state of Pancasila, Islamic value

Background

The discussion of the rule of law has been a long discussion in the history of human civilization, because thousands of years ago, the discussion had been available in human perception with respect to forming an ideal state, although the format was still highly simple.¹ The Greek philosophers, for example, since about the fifth century BC, have initiated the ideals of an ideal legal state, which at that time was better known as a *polis* state. Many countries have recently adopted the concept of the rule of law as an ideal state concept.²

It is just that the term of *polis* state as a form of legal state used in the days of the Greek philosophers has changed to a new term in accordance with the area where this development was born. In the area of Continental Europe, talks about the rule of law are often identified with the term *rechtsstaat*, whereas in Anglo-Saxon adherents, the term rule of law is used. The two terms, although they have a slightly different implementation system, are essentially the same, namely, trying to identify a country where the administration of government is based on the law.

In general, the concept of an Anglo-Saxon legal state known as the rule of law and the Continental European school of law with the concept of a legal state of *rechtsstaat* are widely used by different countries worldwide. Meanwhile, Indonesia has the concept of a state of law with a legal state of Pancasila.

The concept of Pancasila law state is based on the views and philosophy of the noble life of the Indonesian nation. The legal state of Pancasila is a crystallization of views and philosophy of life that is full of ethical and moral values of the Indonesian nation, as stated in the Preamble of the 1945 Constitution and implied in the Articles of the 1945 Constitution of Indonesia Republic, so that the concept of a legal state of Pancasila is different from the concept of *rechtsstaat* law or the rule of law that is based on individualistic liberalism. One of the other differences lies in the issue of the individual position toward society and the rights also obligations of the individual toward society. In addition, the legal state of Pancasila has several characteristics that make it different from the other rule of law concepts. To emphasize these characteristics, as well as to clarify the implementation of the concept of a legal state of Pancasila, the values of *maqasidu asy shari'ah* are needed.

The values of *maqasidu as shari'ah* are used in addition to clarifying the implementation of the concept of the legal state of Pancasila, as well as to identify the values contained in the concept of the legal state of Pancasila. There are several reasons why *maqasidu asy shari'ah* is used as a tool to clarify the implementation of the concept of a legal state of Pancasila. One of them is that *maqasidu asy shari'ah* that is sourced from Islamic Shari'ah is in line with the majority religion possessed by the Indonesian people. This study will prove that Islamic Shari'ah values can be accepted by Indonesian people in the midst of diversity of religion in Indonesia.

Literature Review

A. Legal State

The idea of the legal state had existed long before the 1968 revolution in England, but only re-emerged in the 17th century and became popular in the 19th century. The thought of the

¹Sayuti, Konsep Rechtsstaat dalam Negara hukum Indonesia--: Kajian Terhadap Pendapat Azhari Nalar fiqh--: jurnal kajian ekonomi islam dan kemasyarakatan, Volume 4, Nomor 2, Desember 2011).

²Novi Eka Saputri, The Existence of Pancasila Ideology in the Concept in Indonesia Legal State, International Journal of Multicultural and Multireligious Understanding (IJMMU), Vol. 7, No. 10, November 2020, <http://dx.doi.org/10.18415/ijmmu.v7i10.2085>

legal state itself is a reaction to past arbitrariness. Therefore, the purpose of the legal state is that the state makes the law supreme, every state or government administrator is obliged to obey the law (subject to the law). There is no power above the law, everything is under the law (under the rule of law). With this position, there should be no arbitrary power or abuse of power.³ The elements of legal state have a close relation with the history and development of society of a nation.⁴

In the Middle Ages, the idea of a rule of law emerged to stem the arbitrariness of the power that practiced an absolute system and ignored the rights of the people. The events of the French revolution are a real lesson that is very valuable to ponder. Absolutism in France was performed by King Louis XIV with his phenomenal king's words. The king's words gave rise to the motto "T etat e'sest moi" that means "the state is me."⁵ The absolute attitude of the king led to the rise of movements against the king. The people wanted freedom of work and tried to get out of the intervention of the ruler by performing the proposition "laissez faire, laissez aller" that means "by surrendering everything to individual activities and initiatives, and preventing the interference of political power, then the general welfare will be created by itself."⁶

In subsequent developments, the concept of the legal state has had several different meanings and implementations in several countries, including:

1. *Rechtsstaat*

Rechtsstaat is a concept in Continental European legal thought that was originally borrowed from German law, which can be translated as "legal state," "state of law," "state of justice," or "state of rights" where the exercise of government power is limited by law. C.W. Van der Port explains that on a democratic basis, "rechtsstaat" is said to be a "state of mutual trust" (*de staat van het wederzijdjs vertrowen*), that is, the belief of his supporters, that the power given will not be abused, he expects obedience from the people.⁷

Rechtsstaat itself was born in mainland Europe that basically relies on the Continental European system that is termed civil law. The idea of *rechtsstaat* became popular in the 17th century as a result of the socio-political situation of Europe that was dominated by royal absolutism. The European legal system was born from the struggle of the bourgeoisie to get a place in the law, because at that time, the law was only controlled by the kings, the nobles, and the church. The bourgeoisie hopes for a guarantee of independence and legal certainty, so that the principle of equality before the law is born.⁸

The notion of *rechtsstaat* has become popular since the 19th century, which was born from a struggle against absolutism so that it is revolutionary in nature, which is based on a continental law called civil law. The characteristic of the rule of law at that time was described as a night watch state (*nachtwakersstaat*).⁹

³-Sayid anshar, Konsep Negara Hukum dalam Perspektif Hukum Islam, SOUMATERA LAW REVIEW, -Volume 2, Nomor 2, 2019, DOI: <http://doi.org/10.22216/soumlaw.v2i2.4231>.

⁴-Ni'matul Huda, 2005, Negara Hukum, Demokrasi & Judicial Review, Yogyakarta: UII Pers, hal. 2.

⁵-Sugan da Wirananggapati dkk, 1992, Sejarah Nasional Indonesia dan Dunia, Jakarta: PT Galaxy Puspa Mega, hal. 2.

⁶-Satjipto Rahardjo, 2009, Negara Hukum yang Membahagiakan Rakyatnya, Yogyakarta: Genta Publishing, hal. 18.

⁷-Zaid Afif, "Konsep Negara Hukum Rule of Law dalam Sistem Ketatanegaraan Indonesia", Jurnal Pionir LPPM Universitas Asahan, Vol. 2, No. 5 (Juli-Desember 2018) hal. 58.

⁸-Jimly Asshiddiqie & A Safa'at, 2006, Teori Hans Kelsen Tentang Hukum, Jakarta:Konstitusi Press, hal. 25.

⁹-Muntoha, 2009, Negara Hukum Indonesia, Pasca Perubahan UUD 1945, Yogyakarta: Kaukaba, hal. 384.

Furthermore, Immanuel Kant put forward the notion of the legal state in a narrow sense, which places the function of *recht* and *staat*, only as a means of protecting individual rights and state power is interpreted as passive, which has the duty to maintain public order and security. In its development, the notion of the legal state was considered unsatisfactory, so the idea emerged to improve Kant's understanding, which is known as the formal legal state. The concept of *rechtsstaat* was explained by Frederick Julius Stahl in *philosophie des rechts* that states that in a legal state, there are several main elements formally as follows¹⁰:

- a. Recognition and protection of human rights
- b. To protect human rights, state administrators must be based on the Trias Politica theory
- c. The government performs its duties under the law (*wetmatigheid van bestuur*)
- d. If the government in performing its duties based on the law still violates human rights, then there is an administrative court that will resolve it.¹¹

The elements of a formal legal state proposed by Stahl aim to protect human rights by limiting and supervising the implementation of state power by law. The state must not deviate or expand the administration of state power.

2. Legal State of Pancasila

Indonesia is a legal state. This is implied in Article 1 paragraph (3) of the 1945 Constitution and implies that Indonesia is a legal state (*rechtsstaats/rule of law*), not a state on mere power (*machtstaats*). The Indonesian legal state is based on Pancasila and the 1945 Constitution and selects a prismatic or integrative concept from the two conceptions of *rechtsstaats* and the rule of law that combines the principle of "legal certainty" in *rechtsstaats*, with the principle of "justice" in the rule of law.¹² Thus, Indonesia does not select one or which one is better and superior, but elaborates the two principles into a unified and inseparable whole and includes the positive elements of the two principles in overseeing the administration of government and law enforcement for the sake of creating benefit and order in society in accordance with the objectives of the law as stated by Gustav Radbruch, that is, justice, certainty, and benefit.¹³

To be able to discover whether the concept of the legal state is actually adopted by the Indonesian country is to look at the preamble and the articles in the 1945 Constitution as a whole source of Indonesian legal politics. First, the preamble and articles of the 1945 Constitution contain the goals, principles, ideals, laws, and basic norms of the Indonesian country that must be the goals and foundations of Indonesian legal politics. Second, the preamble and articles in the 1945 Constitution contain distinctive values derived from the views and culture of the Indonesian nation inherited by the ancestors of the Indonesian nation.¹⁴ It can be understood because the elements of the legal state have a close relationship with history, the development of society, and the nation state.¹⁵

¹⁰-Moh. Mahfud MD, 1999, *Pergulatan Politik dan Hukum di Indonesia*, Yogyakarta: Gama Media, hal 129.

¹¹-Titik Triwulan Tutik, 2007,- *Eksistensi, Kedudukan, dan Wewenang Komis Yudisial sebagai Lembaga Negara dalam Sistem Ketatanegaraan Republik Indonesia Pasca Amandemen UUD 1945*, Jakarta: Prestasi Pustaka, hal 30.

¹²-Atang Hermawan Usman, kesadaran hukum masyarakat dan pemerintah sebagai faktor tegaknya negara hukum di Indonesia, *Jurnal Wawasan Hukum*, Vol. 30 No. 1 Februari 2014, [Doi: http://dx.doi.org/10.25072/jwy.v30i1.74](http://dx.doi.org/10.25072/jwy.v30i1.74).

¹³-Moh. Mahfud, 2006, *Membangun Politik Hukum Menegakkan Konstitusi*, Jakarta: LP3ES, hal. 23.

¹⁴-Wiratmadinata-, Construction of legal paradigm of **paneasilaPancasila**: a conceptual perspective, *Journal of Legal, Ethical and Regulatory Issues*, Volume 23, Special Issue, 2020.

¹⁵-Sarip, Abdul Wahid, Kemajemukan visi negara hukum pancasila dalam misi hukum negara Indonesia, *Refleksi Hukum*, Volume 2 Nomor 2 April 2018, <https://doi.org/10.24246/jrh.2018.v2.i2.p109-124>.

By looking at these two parameters, it is clear that the concept adopted by the Indonesian legal state since independence until now is not the concept of *rechtsstaat* and not the concept of *the rule of law*, but rather forms a concept of a new legal state that is rooted in the views and philosophy of the noble life of the Indonesian nation. Pancasila, as the state's base, must be realized, including the recognition and implementation of human rights guarantees, the limitation of power, the respect and enforcement of law that is lawfully enforced by the state, and others.¹⁶ Pancasila contains the principle of divinity, that is, Belief in One Supreme God; the principle of humanity,¹⁷ that is, just and civilized humanity¹⁸; the principle of nationality, that is, the Unity of Indonesia; the principle of democracy embodied in people's sovereignty in the form of consensus democracy, that is, democracy led by wisdom in deliberation/representation; and the principle of social justice for the public interest, that is, social justice for all Indonesian people. Thus, the existence of Pancasila can be used as a tester of positive law that exists in Indonesia, which means that all legal formation and its application and implementation cannot be separated from the values of Pancasila as *Staatsfundamentalnorm*.¹⁹

The characteristics of the Pancasila legal state are as follows²⁰:

- a. The legal state of Pancasila is a family state. In a family state, there is recognition of individual rights (including property rights) or human rights. In line with Zuly Qodir's statement,²¹ Pancasila recognizes protecting individual rights to the rights of the community in all aspects of life,²² but by prioritizing national interests (common interests) above the interests of the individual.
- b. The legal state of Pancasila is a legal state that is certain and fair, which is performed by combining various elements that are both contained in the concept of *rechtsstaat* and *the rule of law*, that is, combining the principle of legal certainty with the principle of justice, as well as other legal concepts and systems, such as the customary legal system and the religious legal system that live in this archipelago.
- c. The legal state of Pancasila is a religious nation state. The concept of a legal state of Pancasila is a concept of a state that has a divinity. Belief in God means that the life of the Indonesian nation and state is based on the belief in the One Godhead. The concept of a legal state of Pancasila based on the One Godhead is a concept of a legal state that is classified as a religious nation.²³
- d. The legal state of Pancasila combines law as a means of changing society and law as a reflection of society's culture. By combining these two concepts, the legal state of

¹⁶-Muhammad Hoiru Nail, Pancasila and Religious Values in Establishment of Legal Regulations, *Jurnal Magister Hukum Udayana* (Udayana Master Law Journal), ol. 9 No. 2 July 2020, DOI:10.24843/JMHU.2020.v09.i02.p.06.

¹⁷-Dini Amalia Fitri, Pancasila as a legal science paradigm, *International Journal of Law Recontruction, Reconstruction*, Volume 3, Issue II, September 2019, DOI: <http://dx.doi.org/10.26532/ijlr.v3i2.8055>.

¹⁸-Muhtadi, Redesign of Constitutional Ethics Forfor State Administrator Based on The Value of Pancasila, *Fiat Justisia: Jurnal Ilmu Hukum*, Volume 12 Number 2, April-June 2018, DOI: <https://doi.org/10.25041/fiatjustisia.v12no2.940>.

¹⁹Attamimi, A, Hamid S. 1990. *Peranan Keputusan Presiden Republik indonesia dalam Penyelenggaraan Pemerintah Negara: Suatu Studi Analisis Mengenai Keputusan Presiden yang Berfungsi Pengaturan dalam Kurun Waktu Pelita I - Pelita IV*. Disertasi Ilmu Hukum Fakultas Pascasarjana Universitas Indonesia, Jakarta.

²⁰-Moh. Mahfud, -Op. Cit. hal. 23-30.

²¹-Aqil Teguh Fathani dan Zuly Qodir, Agama Musuh Pancasila? Studi Sejarah dan Peran Agama dalam Lahirnya Pancasila →, *Jurnal "Al-Qalam"* Volume 26 Nomor 1 Juni 2020.

²²-Aqil Teguh Fathani dan Zuly Qodir, Agama Musuh Pancasila? Studi Sejarah dan Peran Agama dalam Lahirnya Pancasila →, *Jurnal "Al-Qalam"* Volume 26 Nomor 1 Juni 2020.

²³-Budiarti, analisis yuridis perkawinan beda agama dengan pendekatan maqashid al-yari'ah dalam konteks negara hukum pancasila *Justicia Islamica* Volume 15, Nomor 1 Juni Tahun 2018.

Pancasila tries to maintain and reflect the values that live in society (living law) as well as to positivize the living law to encourage and direct the society in accordance with the principles of Pancasila.

- e. In a legal state of Pancasila, the basis for making and forming national laws must be based on legal principles that are neutral and universal, in the sense that they must meet the main requirements, that is, Pancasila as adhesive and unifier; based on values that can be accepted by all interests and do not favor certain groups or classes, prioritizing the principles of mutual cooperation and tolerance.

This is important because the concept of implementing a legal state of Pancasila must always be focused on the realization of the goals of the Indonesian country. The goals of the Indonesian country are definitively stated in the fourth paragraph of the Preamble of the 1945 Constitution.

From that, it can be understood that Pancasila is the main guideline for state administration activities that are based on the one and only God, just and civilized humanity, Indonesian unity, democracy led by wisdom in representative deliberation, and social justice for all Indonesian people.²⁴

B. *Maqasidu shari'ah*

Islam is a religion that is Shaamil (complete and comprehensive). In Islam, there are rules, laws, and culture that become the main guidelines for the life of Muslims as a whole, ranging from individual matters to social affairs of society in general. As a rule of life has the main goal to be accepted by all mankind. The purpose of bringing down Islamic law is for the good of all mankind. Within the scope of this goal is called *ushul fiqh* with *maqashid assyariah* the meaning and purpose of the revelation of Islamic law.²⁵ All laws, in the form of both orders and prohibitions, which are recorded in the texts of the shari'ah, are not empty and meaningless.²⁶ God conveys certain commands and prohibitions for these purposes and objectives. *Al-Syatibi* called it the term *Maqashid al-Sharia*.²⁷

Maqashid al-sharia, or the objectives of Islamic law, is a prominent entity of Islamic law epistemology of practical reasoning. The aim is to avoid damage (*dar'u al-mafasid*) and gain an advantage (*jalb al-mashalih*). It is referred to as the public interest by Muslim scholars (*maslahah*). The core of Islamic teachings is the protection of the public good, which contains specific and universal aspects of religious values, which are usually classified into three types, namely, tertiary (*tahsiniyat*), secondary (*hajiyat*), and primary (*dharuriyyat*).²⁸

Etymologically, *maqashid al-syari'ah* consists of two words, namely, *maqashid* and *al-syari'ah*. *Maqashid* is the plural form of *maqashid* that means intention or purpose.²⁹ Meanwhile, shari'ah literally means the road to a water source. The road to this water source

²⁴-Arief Hidayat, Negara Hukum Berwatak Pancasila, Mahkamah Konstitusi Republik Indonesia, hal. 6.

²⁵-Novi Rizka Amalia, Penerapan konsep maqashid syariah untuk realisasi identitas politik islam di Indonesia, Dauliyah, Vol. 2, No. 1, Januari 2017 (DOI: <http://dx.doi.org/10.21111/dauliyah.v2i1.806>).

²⁶-Ali Sodikin, Antropologi Al-Qur'an Model Dialektika Wahyu dan Budaya, Yogyakarta, Ar-Ruzz Media, 2008, h. 12.

²⁷ Ali Muttaqin, Teori Maqashid al-Syari'ah dan Hubungannya dengan Metode Istinbath Hukum, Jurnal Kanun Ilmu Hukum, Vol. 19, No. 3 (Agustus, 2017), h. 547.

²⁸-Syahbudi Syahbudi Sabuda, Understanding *panasilaPancasila* in the maqashid-based framework and its relevance to *indonesianIndonesian* religious harmony: a dialogue approach, Istinbath Jurnal Hukum dan Ekonomi Islam, vol. 20, No. 1. 2021 p. 1-228.

²⁹-Ibnu Mansur al-Afriqi, Lisan al-'Arab, Bairut: Dar al-Sadr, t.th, Vol: VIII, h. 175.

can also be said to be the road to the main source of life.³⁰

Therefore, according to Imam Al-Syatibi, Allah sent down shari'ah (rules of law) for nothing but to benefit and avoid harm (*jalbul mashalih wa dar'ul mafasid*). In simpler language, the legal rules that Allah has set are only for the benefit of man himself. Al-Syatibi then divides this benefit into three important parts, namely, *dharuriyyat* (primary), *hajiyyat* (secondary), and *tahsiniyat* (tertiary).³¹

a. *Dharuriyyat*

Linguistically, it means an urgent or emergency need and must be held as a goal, the absence of which can threaten the safety of mankind, and can even result in total destruction of life. In this category, there are five things that need to be considered, namely, maintaining religion, preserving the soul, maintaining the mind, maintaining honor and lineage, and maintaining property.³²

The embodiment of the five main elements that a *mukallaf* will get benefit, when he can maintain the five main aspects. On the other hand, he will get *mafsadat*, when he cannot do it well³³

b. *Hajiyyat*

Linguistically, it means secondary needs. If this need is not materialized, it does not threaten safety, but will experience difficulties. To eliminate these difficulties, in Islam, there is a law of *rukhsa* (lightening) that is a law that is needed to lighten the burden, so that the law can be implemented without feeling pressured and restrained.

c. *Tahsiniyat*

Linguistically, it means things that are perfect. This level of need is in the form of complementary needs. If this need is not fulfilled, it will not threaten nor cause difficulties.

Meanwhile, Jasser Audah claims that the most fundamental notion of Maqasid is in the shape of universal values and humanity principles.³⁴

He divides the scope of maqasidu asy shari'ah into three levels as follows³⁵:

a. General *Maqāṣid* (*Al-maqāṣid al-‘āmmah*)

Maqāṣid that can be considered in Islamic law as a whole. Like the inevitability and necessity above, the ulama also added new al-maqāṣid such as “justice, universality, and convenience.”

b. Specific *Maqāṣid* (*Al-maqāṣid al-khāṣṣah*)

Maqāṣid that can be considered in one particular chapter of Islamic law, such as child welfare in the family law aspect, preventing crime in the criminal law aspect, and preventing monopoly

c. Partial *Maqāṣid* (*Al-maqāṣid al-juz'īyyah*)

³⁰-Fazzlurrahman, Islam, terj., Ahsin Muhammad, Bandung: Pustaka, 1984, h.140.

³¹-Haqiqi Rafsanjani, ETIKA PRODUKSI DALAM KERANGKA MAQASHID SYARIAH. Jurnal Perbankan Syariah Vol. 1 No. 2, November 2016 ISSN: 2527-6344 (DOI: <http://dx.doi.org/10.30651/jms.v1i2.763>).

³²Erie Hariyanto dan Ni'matunnuriyah-, Advokat syariah dalam mediasi perkara perceraian menurut maqashid al syariah,-Ulul Albab; Malang Vol. 18, Iss. 1, (2017): 117-137 (DOI: <http://10.18860/ua.v18i1.4277>).

³³-Al-Fasi, Maqashid al-Syari'ah al-Islamiyyah wa Makarimuha, t.t: Maktabat al-Wihdat al-Arabiyyat, tth, h. 51-52.

³⁴-Muhammad Iqbal Fasa, Reformasi Pemahaman Teori Maqasid Syariah (Analisis Pendekatan Sistem Jasser Audah) Hunafa: Jurnal Studia islamika, Vol 13 No 2 (2016): EKONOMI ISLAM, DOI: <https://doi.org/10.24239/jsi.v13i2.438.218-246>.

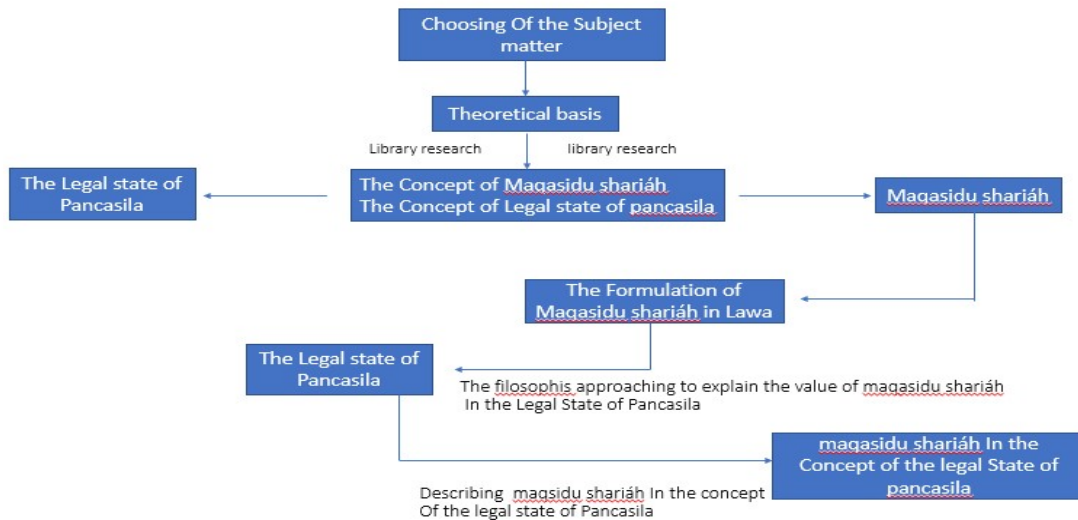
³⁵-Auda, Jasser, Membumikan Hukum Islam Melalui Maqashid Syariah, Bandung: PT Mizan Pustaka, 2015, hlm 320.

This *maqāṣid* is the “purpose” behind a certain text or law, such as the purpose of revealing the truth in determining the number of certain witnesses in certain legal cases. The purpose of eliminating the difficulty in allowing the sick person to not fast, and the purpose of ensuring food for the poor in prohibiting Muslims from storing meat on the days of *Eid al-Hajj*, etc.

C. Methodology

This study systematically examines *maqasidu as shari’ah* in the concept of a legal state of Pancasila using a philosophical approach. This study will provide a systematic and objective description of the facts, characteristics, and the state of Pancasila law and at the same time describe the concept of *maqasidu as shari’ah* contained in the state of Pancasila law and its implementation in the life of the nation. The data in this study were obtained through literature study. The first way is to browse journals and books about the concept of a legal state of Pancasila. After that, explore the concept of thinking As Ayatibi and Jaser Audah about *maqasidu as shari’ah* through reading books and journals. The involvement of the figures represented the concept of Maqashid Sharia that had undergone a development.

Furthermore, after the data are collected, they are analyzed descriptively to describe the concept of the rule of law and identify the characteristics of the legal state of Pancasila. After that, it is also able to describe the object of this research to explore the concept of *maqasidu as shari’ah* belonging to As Syatibi and Jaser Audah to be analyzed to then identify to what extent the values of *maqasidu shari’ah* are contained in the concept of the state law of Pancasila. In the next stage, a philosophical interpretation is performed to find the values of *maqasidu as shari’ah* contained in the concept of the Pancasila state law as well as assessing the extent to which the implementation of the legal state of Pancasila concept is performed.



Picture 1

D. Discussion

Indonesia is a state of law based on the 1945 Constitution. The concept of the state of law in Indonesia is based on Pancasila. This is that makes the concept of the state of law in Indonesia different from other concepts of the state of law. The concept of the legal state of Pancasila does not only uphold the state of law but also protects the human rights of all Indonesian citizens whose population is culturally and religiously diverse.

Pancasila as differentiator has characteristics and values that can be accepted by all Indonesian people, including Muslims who are the majority. Until now, Muslims still consider the concept of the legal state of Pancasila in its implementation not to conflict with Islam, even in line with Islamic values contained in *maqasidu shari'ah*.

To clarify the implementation of each of the characteristics of the legal state of Pancasila, *maqasidu as shari'ah* is considered as one of the options. *Maqasidu as shari'ah* is held with the intention of realizing the welfare of mankind as a whole.³⁶ Because actually *maqasidu as shari'ah* aims to create the public benefit and avoid damage.³⁷ Thus, the form of a legal state with certainty and justice in forming laws and policies must be able to lead to benefit and avoid damage. This is in line with the rule³⁸:

درء المفسد مقدم على جلب المصالح

It means that “Avoiding harm takes precedence over taking benefit.”

In addition, to realize a legal state that is certain and fair, one must be able to identify the essence or reasons for the formation of a rule and policy. Because every policy and rule must have its reasons. Thus, when the “causes” still exist, the existence of these rules and policies also exists, and vice versa. This is in accordance with the *maqasidu* rules in determining the legal *illah*, that is

الحكم يدور مع العلة وجودا و عدما

It means that “The law still exists as far as the *Illat* is.”

Another characteristic is that the legal state Pancasila is a state of divinity, which means placing religion in a very important position in the life of the nation and state. Thus, religious freedom must be maintained and cared for properly. This is in line with the main *maqasidu shari'ah*, that is, *hifdzu addin* (protecting religion). There are many ways to implement it, for example, developing an attitude of tolerance and giving the widest possible freedom to practice one's beliefs and religion. To maintain tolerance and freedom, the law on desecration and blasphemy must still be enforced. In addition, every time the government takes a policy, it must consider religious aspects so that it is not counterproductive.

In integrating law as a means of changing society and law as a reflection of community culture, which is a characteristic of the legal state of Pancasila, it must accommodate the law that lives in society as long as the law brings benefit and does not cause damage. Because the law is dynamic, so in the *maqasidu shari'ah* method:

العادة محكمة

This means that “the habits of society (the living law) can be made into law (legal positivity).”

³⁶-Zaenuddin mansur, implementasi teori maqashid syari'ah asy-syatibi dalam muamalah kontemporer, Jurisdictie: Jurnal Hukum dan Syariah Vol. 11 No.1 Tahun 2020.

³⁷-Ali Muttaqin, Teori Maqashid al-Syari'ah dan Hubungannya dengan Metode Istibath Hukum, Jurnal Kanun Ilmu Hukum, Vol. 19, No. 3 (Agustus, 2017), h. 547.

³⁸-Moh Toriquddin, Teori Maqasidu as syari'ah perspektif Al syatibi, de Jure, Jurnal Syariah dan Hukum, Volume 6 Nomor 1, Juni 2014, hlm. 33-47.

This would be the uniqueness of the Pancasila legal state that is always dynamic as long as the living law brings benefits and is able to avoid damage. Thus, unconsciously, the process has become a means of community change.

Implementation of *maqasidu as shari'ah* in the concept of a legal state of Pancasila

As understood, *maqasidu shari'ah* is held to produce policies that are able to produce benefit and avoid harm. For this reason, according to Syatibi, there are three main points of *maqasidu as shari'ah*, namely, *Maslahat dharuriyyat*, *Maslahat hajiyat*, and *Maslahat tahsiniyat*.³⁹

a. Maslahat Dharuriyyat

There are five main and basic things that fall into this type, whose interests must always be guarded or protected:

- 1) Protecting Religion (*al-Din*)—In understanding protecting religion in the concept of the legal state of Pancasila is how every government policy must not conflict with religious understanding. In addition, the state, in this case the government, must be able to maintain freedom of religion and tolerance by enforcing the blasphemy law as stated in Article 156 letter a of the Criminal Code.
- 2) Protecting Life (*al-Nafs*) —In Islam, human life is something very valuable and must be guarded and protected. A Muslim is forbidden to kill another person or himself. The translation of *Surah Al-Isra* 17:33, reads: “And do not kill the soul which Allah has forbidden, except by right.” To understand protecting lives in the concept of a legal state of Pancasila is how the state must be able to protect the lives of its citizens as stated in articles 338, 339, and 430 of the Criminal Code. In addition, do not make policies that are only economic-oriented, but these policies can threaten the lives of their citizens.
- 3) Protecting Mind (*al-Aql*)—We must guard and protect it. Islam advises us to seek knowledge to the ends of the world and forbids us from corrupting our common sense, such as drinking alcohol. To understand protecting reason in the concept of a state based on the legal state of Pancasila is how the state must be able to maintain the common sense of its citizens. Not only by banning every product that is capable of damaging the mind such as alcohol and acts of pornography and porno-action, but the state must also be able to educate the common sense of its citizens by ensuring proper education for its citizens. In accordance with the mandate of Law No. 20/2003 on the national education system.
- 4) Protecting Family/Line of Descent (*al-Ird*)—Maintain line of descent by marrying in religion and state. To understand the family in the concept of a legal state of Pancasila is how the state should be able to minimize the act of adultery by enforcing Article 284 of the Criminal Code. In addition, to prevent families from adultery, how the government facilitates marriage for its citizens. Not only that, in the modern concept of *maqasidu shari'ah*, protecting the family can be done by prospering each family so that family resilience becomes strong.
- 5) Protecting Wealth (*al-Mal*)—Wealth is a very important and valuable thing, but Islam forbids us to get our wealth illegally, by taking other people’s wealth by stealing or

³⁹Abu Ishaq al-Syatibi, *Al-Muwafaqat*: (Beirut: Darul Ma’rifah, 1997), jilid 1–2, h. 324.

corruption. As the sound of the letter al-Baqarah 2:188: “And do not consume one other’s wealth unjustly or send it (in bribery) to the rulers in order that (they might aid) you (to) consume a portion of the wealth of the people in sin.” To understand protecting wealth in the concept of a legal state of Pancasila is how the state must be present in the crime of theft by enforcing Article 362 of the Criminal Code in a firm and proportional manner. However, in the modern concept of *maqasidu as shari’ah*, protecting wealth can be performed by the state through prospering people by opening up as many job opportunities as possible for the citizens.⁴⁰

For a *mukallaf* will get benefit, when he can maintain the five main aspects. On the other hand, he will feel *mafsadat*, when he cannot do it well.⁴¹

b. *Maslahat Hajiyat*

Linguistically, it means secondary needs. If this need is not realized, it does not threaten safety, but will experience difficulties. To eliminate these difficulties, in Islam, there is a law of *rukhsa* (lightening) that is a law that is needed to lighten the burden, so that the law can be implemented without feeling pressured and restrained. In the benefits of *hajiyat*, how the state is able to make policies to make it easier for its citizens to achieve the benefits of *dharuriyyat*. For example, do not let the country’s economic interests open a large source to invest by bringing in foreign workers. However, this policy can threaten the benefit of *dharuriyyat* in the form of increasing unemployment for the citizens themselves. This means that the state is negligent in safeguarding its assets.

c. *Maslahat tahsiniyat*

Linguistically, it means things that are complement. This level of need is in the form of complementary needs. If this need is not fulfilled, it will not threaten nor cause difficulties. This benefit can be like an additional existence that is so urgent but important to achieve the benefits of *hajiyat* and *dharuriyyat*. For example, the policy for the arts is to hold art concerts by inviting Westerners to show pornography. This can damage the benefits of protecting mind and protecting honor.

E. Conclusion

The concept of the legal state of Pancasila has special characteristics that distinguish it from other concepts of a state of law. And in the implementation of these characters, it is in line with Islamic values contained in *maqasidu shari’ah*. The legal state of Pancasila does not only have elements of legal certainty but must also implement the value of justice, by putting things in their place. Thus, its implementation is not rigid, because as much as possible, it avoids damage rather than just taking benefits. This is in line with the principles of Islamic values in *maqasidu ash shari’ah*, that is

درء المفساد مقدم على جلب المصالح

It means that “Avoiding harm takes precedence over taking benefit.”

In addition, the concept of the legal state of Pancasila accommodates the living law in society, considering that Indonesia has many customs and each custom has its own laws.

⁴⁰-Retna Gumanti, *Maqasid Al-Syariah Menurut Jasser Auda (Pendekatan Sistem dalam Hukum Islam)*, Jurnal Al-Himayah V2. Issue 1 2018 ISSN 2614-8765, E ISSN 2614-8803.

⁴¹-Al-Fasi, *Maqashid al-Syari’ah al-Islamiyyah wa Makarimuha*, t.t: Maktabat al-Wihdat al-Arabiyyat, tth, h. 51–52.

Therefore, the implementation of the legal state of Pancasila accommodates customary law. This is in line with Islamic values contained in the maqasidu ash shari'ah concept, that is

العادة محكمة

It means that “the habits of society (the living law) can be made into law (legal positivity).”

The concept of the legal state of Pancasila is a concept of the legal state where Pancasila is a differentiator from other concepts of the legal state. The values of Pancasila that color the legal state in Indonesia are in line with maqasidu ash shari'ah that is filled with Islamic values, such as the maintenance of religion, soul, lineage, mind, and property, all of which have been regulated in the concept of the legal state of Pancasila. It can even be said that Pancasila is the embodiment of Islamic teachings. Islam is a religion of mercy for all nature and loves harmony, tolerance, justice, gender, and all aspects of world life.

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