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REINTERPRETATION OF *MAQASHID AL-SHARIA* IN INDONESIAN LEGAL PRODUCTSElva Imeldatur Rohmah*¹, Zainatul Ilmiah²^{1,2}. UIN Sunan Ampel Surabaya,
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History

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Abstract: *Maqashid al-Sharia* in classical Islamic law is understood hierarchically based on an emergency, which includes *Hifdz ad-Din*, *Hifdz an-Nafs*, *Hifdz al-Mal*, *Hifdz al-Aql*, *Hifdz al-Nasl*, and *Hifdz al-'Ird*. In dealing with contemporary issues that are currently emerging, these concepts often experience limited interpretations and contradictions to confuse the existing hierarchical system. In addition, regulations made by the government should pay attention to the aims and objectives of the rules themselves, namely to avoid damage and create benefit. It is in line with the *Maqashid al-Sharia* concept. It uses normative research methods with conceptual, statutory, and historical approaches in this study. It has been found that the *Maqashid al-Sharia* concept can be interpreted more broadly. The idea of *Maqashid al-Sharia* has more than six elements. It can be added with *Hifdz al-Bi'ah* (protecting the environment) and *Hifdz al-Siyasah* (maintaining government) to maximize the goal of avoiding damage and creating societal benefits. So that in the future, *Maqashid al-Sharia*, as a value that can be a source of reference in the manufacture of legal products in Indonesia, can keep up with the times and be able to answer contemporary issues that arise.

Keywords: *Maqashid al-Sharia*, legal products, Indonesia

Abstrak: *Maqashid al-Sharia* dalam hukum Islam klasik dipahami secara hierarkis berdasarkan keadaan darurat: *Hifdz ad-Din*, *Hifdz an-Nafs*, *Hifdz al-Mal*, *Hifdz al-Aql*, *Hifdz al-Nasl*, dan *Hifdz al-'Ird*. Dalam menghadapi problem kontemporer, konsep-konsep tersebut mengalami penafsiran terbatas dan kontradiktif sehingga membingungkan sistem hierarki. Selain itu, peraturan yang dibuat oleh pemerintah hendaknya memperhatikan maksud dan tujuan dari peraturan itu sendiri, yaitu untuk menghindari kerugian dan menciptakan kemaslahatan. Hal ini sejalan dengan konsep *Maqashid al-Sharia*. Metode penelitian yang digunakan adalah normatif dengan pendekatan konseptual, perundang-undangan, dan historis. Hasil penelitian ini menyebutkan bahwa konsep *Maqashid al-Syariah* dapat diartikan lebih luas. *Maqashid al-Syariah* memiliki lebih dari enam unsur, karena dapat ditambah dengan *Hifdz al-Bi'ah* (menjaga lingkungan) dan *Hifdz al-Siyasah* (menjaga pemerintahan) untuk memaksimalkan tujuan menghindari kerusakan dan menciptakan manfaat bagi masyarakat. Sehingga ke depannya *Maqashid al-Syariah* mampu menjadi nilai yang dapat menjadi acuan dalam pembuatan produk hukum di Indonesia dan dapat mengikuti perkembangan zaman serta mampu menjawab permasalahan kontemporer yang muncul.

Kata Kunci: *Maqashid al-Syariah*, produk hukum, Indonesia



A. Introduction

Maqashid al-Sharia is defined as the principles following Islamic law.¹ The point of *Maqashid al-Sharia* is *maslahah* because the determination of all kinds of Sharia or law in Islam is obliged to lead to benefit. *Maqashid al-Sharia* emerged as an alternative to avoid the rules of *ushul fihiyah*, which needed to be clarified for the public to understand. The concept of *Maqashid al-Sharia* is fundamental and has not gone unnoticed by Islamic scholars and legal experts. Most legal experts place their discussion in *Ushul Fiqh* when they discuss *qiyas*, such as Imam al-Haramain al-Juwaini (d. 478 H) in his book *al-Burhan*, Al-Gazali (d. 505 H) also reveals *Maqashid al-Sharia* in his book *al-Mustashfa*, as well as al-Razi (d. 606 H) in his book *al-Mahsul fi ilmi Usul Fiqh*.²

In subsequent developments, the study of *Maqashid Sharia* is a study major in Islamic legal philosophy, so it can be said that the term *maqashid al-shariah* is synonymous with Islamic Law Philosophy because it involves critical questions about the purpose of establishing law. *Maqashid al-Sharia* has been considered a deep foundation to set the rule. Companions of the Prophet also carry out efforts like that. Such actions can be seen clearly in several legal provisions by Umar Ibn al Khattab.³ This study of *Maqashid al-Sharia* then got a place in *ushul fiqh*, which was developed by *ushuli* in the application of *qiyas*, when talking about *Masalik al-illah*. Ibn Qudamah explained it when discussing the basis of *illat*, which must contain *maslahat*, namely getting good and avoiding harm.⁴

The concept of *Maqashid al-Sharia* occupies a significant position in formulating Islamic law. In the study of *ushul fiqh*, *Maqashid al-Sharia* occupies its urgency. Even al-Syatibi considers *Maqashid al-Sharia* to suggest *al-din wa al-syariat wa kulliyat wa al-millah*. Furthermore, al-Syatibi argues that knowledge of *Maqashid al-Sharia* is the main requirement for *mujtahids*.⁵ A *mujtahid* is obliged to understand the values that must be embodied in a rule.

Indonesia is a constitutional state, as explained in the 1945 Constitution Article 1, paragraph 3. The logical consequence is that all state life is always based on law. Likewise, the implementation of the state administration must be carried out based on the prevailing rules and regulations. In the rule of law, the government will exercise power based on the rule of law or what is known as the rule of law that aims to carry out a legal order. The practice of law must include three kinds of essential

¹ Ali 'Abdelmon'im, *Al-Maqasid Untuk Pemula* (Yogyakarta: SUKA-Pres UIN Sunan Kalijaga, 2013), 56.

² Mohamed Naser, "Laws Exegesis versus Jurisprudence (Comparative Studies in Understanding Religious Text and the Istimbath Process of Law on Mahar)," no. May 2017 (2020): 372.

³ Zul Anwar Ajim Harahap, "Konsep Maqasid Al-Syariah Sebagai Dasar Penetapan Dan Penerapannya Dalam Hukum Islam Menurut 'Izzuddin Bin 'Abd Al-Salam," *Tazkir: Jurnal Penelitian Ilmu-Ilmu Sosial Dan Keislaman* 9, no. 2 (n.d.): 65.

⁴ Ibn Raudah Qudamah, *Al-Nazhir Wa Junnat Al-Manazhir* (Beirut: Dar al-Kutub al-Alamiyah, 1994), 412.

⁵ Ali 'Abdelmon'im, *Al-Maqasid Untuk Pemula*, 60.

ideas of law, namely the basis of justice, benefit, and certainty. The government makes laws to create public welfare. The government, especially the legislative body, is the institution that has the authority to make legal products in Indonesia.⁶ The resulting legal products should contain good values, create prosperity and justice, and minimize the occurrence of damage in society. This is in line with the aim of the *Maqashid al-Sharia*, which is to both seek to create benefit and avoid adversity. This study aims to describe the concept of *Maqashid al-Sharia* in classical Islamic times, the problems of *Maqashid al-Sharia* in dealing with contemporary issues, and the reinterpretation of *Maqashid al-Sharia* in Indonesian legal products.⁷

This research was conducted using normative research methods and a conceptual and statutory, and historical regulation. The conceptual approach to this research is carried out by examining the concept of *Maqashid al-Sharia* in depth. The historical method is carried out to study the development of the *Maqashid al-Sharia* concept developed from classical to contemporary Islam. After that, the regulatory approach is used in analysing the reinterpretation of the idea of *maqashid al sharia*. This paper explicitly discusses the fundamental theoretical issues of the *Maqashid al-Sharia* image in its application to legal products in Indonesia. This paper is divided into several sections. An introductory paragraph that explains the background and urgency of the issues discussed. The theoretical study section will explain in detail the concept of *Maqashid al-Sharia*. The discussion section in the first section will explain the problems related to *Maqashid al-Sharia* in responding to current issues in Indonesia. Before presenting the conclusions of the third part, this paper describes the importance of reinterpreting the concept of *Maqashid al-Sharia* in its manifestation of legal products in Indonesia.

So far there have been several studies that discuss *maqasid al-sharia*, such as research entitled A Bibliometric Mapping on *Maqasid Shariah* in Islamic Perspective, The effect of shariah board characteristics, risk-taking, and *maqasid shariah* on an Islamic bank's performance, The Application of *Maqasid Shariah* on Banking Industry, *Maqasid Shariah* Index: A Literature Review, A review of indicators for the preservation of wealth (*Hifz al-mal*) based on *Maqasid al-shariah*, Human Capital, Quality of Sharia Supervisory Board and *Maqasid Shariah* Based Performance : Cross Country Evidence, and The Effect of Applying Sustainability (*Maqasid Shariah*) and Competition on Islamic Bank Financing. As far as the author has searched, there has been no research that specifically discusses the Reinterpretation of *Maqashid al-Sharia* in Indonesian Legal Products. So, with this research, it is hoped that it will be able to fill the gaps that exist in research related to *Maqashid al-Sharia*.

⁶ Ilham Fajar Septian, "Mengefektifkan Sistem Pemerintahan Dan Menyederhanakan Sistem Partai Politik: Belajar Kepada Pemilu Jerman," *Majalah Hukum Nasional* 49, no. 2 (2019): 58, <https://doi.org/10.33331/mhn.v49i2.28>.

⁷ Rahman Syamsudin, "Review of Court Decision after the Constitutional Court of Indonesia Decision in Legal Certainty and Justice Perspectives," *Journal of Law, Policy and Globalization* 69 (2018): 98.

B. The Concepts of *Maqashid al-Sharia*

Maqashid al-Sharia consists of two words, namely *Maqashid* and *al-Sharia*. *Maqashid* is the plural form of *maqhsad*, masdar mimi from the word *qashada-yaqshudu-qashdan-maqhsadan*. This word means *istiqomah al-thariq* (persistence in one way) and *al-i'timad* (something on which to rely).⁸ In addition, this word also implies *al-'adl* (justice) and *al-tawasuth 'adam al-ifrath wa al-tafrith* (taking the middle way, neither too loose nor too narrow). Based on some of the meanings above, it can be concluded that the word *al-qashd* is used to search for a straight path and the obligation to stick to that path. In addition, actions or phrases should be carried out based on justice, not too exaggerated and not too little, but it is hoped that they will take a middle ground.⁹

Sharia means *maurid al-ma'alladzi tasyra'u fihi al-dawab* (where the water flows, where the animals drink from there). In addition, the word Sharia is also used to mean *al-din* and *al-millah* (religion), *al-thariq* (path), *al-Minhaj* (method), and *al-sunnah* (habit). Thus, *Maqashid al-Sharia* means human efforts to find the perfect solution and the right direction based on the primary sources of Islamic teachings, namely the Al-Quran and the Hadith of the Prophet.¹⁰ *Maqashid al-Sharia* can also be understood as several meanings or goals to be achieved by *syara'* in all or most of its legal cases, and is the goal of Sharia, or the secret behind the ruling by sharia.¹¹

Ibn 'Asyur in the *Maqashid al-Sharia Al-Islamiyah*, states that the *Maqashid Shariah* is the meaning and wisdom shown by Allah in all or most of His *shariah*, also included in this area. The characteristics of the *Shariah* or its general purpose. According to Ibn Asyur, the essence of *maqashid syariah* is to achieve the maximum benefit for the people because the purpose of establishing law in Islam is to create an advantage to maintain *syara's* goals.¹² Almost in line with Ibn Asyur, Wahbah Zuhaili stated that the Shari'a is basically to realize a general purpose, benefit 'ummah, in the real world, namely to make individuals and congregations happy, to maintain rules, and to revitalize the world with all the means that will convey it to perfection, goodness, culture, and a commendable civilization.¹³

Maqashid al-Sharia also means knowing wisdom (the value and target of the *syarak* written in the Koran and Hadith), which Allah establishes for humans. There is only one purpose of the law: *maslahah*, or goodness and human welfare in this

⁸ Dwi Priyatno Priyarno, Ade Nur Rohim, and Lili Puspita Sari, "Analisis Kinerja Bank Syariah Di Indonesia Berbasis Maqashid Sharia Index," *Jurnal Ilmiah Ekonomi Islam* 8, no. 03 (2022): 3.

⁹ Busyro, *Maqashid Al-Syariah Pengetahuan Mendasar Memahami Masalah* (Jakarta Timur: Kencana, 2019), 165–66.

¹⁰ Busyro, 168.

¹¹ Harun Al-Rasyid, *Fikih Korupsi Analisis Politik Uang Di Indonesia Dalam Perspektif Maqashid Al-Syariah* (Jakarta: Kencana, 2017), 43–44.

¹² Nispan Rahmi, "Maqasid Al Syari'ah: Melacak Gagasan Awal," *Syariah Jurnal Hukum Dan Pemikiran* 17, no. 2 (2018): 162, <https://doi.org/10.18592/sy.v17i2.1970>.

¹³ Wahbah Zuhaili, *Konsep Darurat Dalam Hukum Islam* (Jakarta: Gaya Media Pratama, 1997), 47.

world and hereafter. As for the way to achieve this benefit, humans must meet the needs of *dharuriyat* (primary) and complete the requirements of *hajiyyat* (secondary) and *tahsiniat* (tertiary).¹⁴ Abu Zahrah's opinion states that the aim of bringing down *Maqashid al-Sharia* is as education for each individual (*tahdzibul fardh* / educating individual); upholding justice (*iqamah al-'adl* / establishing justice), and generate benefit (*jalb al-maslahah* / public interest).¹⁵

Ulama, who finalized the concept of *Maqashid al-Sharia*, is al-Syatibi. He needed to define the *Maqashid al-Sharia* in his book, *al-Muwafaqat* clearly. But he focuses more on the content of the *Maqashid al-Sharia* itself. Likewise, several other classical scholars only discussed the contents of the *Maqashid al-Sharia* without defining it first. Several contemporary scholars have only carried out the definition of *Maqashid al-Sharia*.¹⁶ They say that the content of the *Maqashid al-Sharia* is to realize the benefit of humankind in the world and the hereafter.¹⁷ Al-Syatibi explains about *al-Dharuriyat al-Kulliyat al-Khams* (the five necessities of *dharuriyat*), namely *hifdz al-din* (maintaining religion), *hifdz al-nafs* (nurturing the soul), *hifdz al-aql* (keeping minds), *hifdz al-nasb* (carrying offspring), and *hifdz al-mal* (maintaining the property).¹⁸

Based on the above definition, *Maqashid al-Sharia* is understood as a secret, and the ultimate goal that *shari'* wants to achieve in every law it stipulates.¹⁹ For mujtahids, knowledge of the *Maqashid al-Sharia* is beneficial for them in using the law correctly and as essential knowledge for understanding the texts of the verses of the Al-Qur'an and the Hadith of the Prophet. As for other people, it is hoped that they will understand the secrets of the legal establishment itself to motivate them to implement the law.²⁰ The ultimate goal of *Maqashid al-Sharia* is to establish rules capable of realizing the benefit of humankind in the world and the hereafter, either by realizing benefits or by rejecting all forms of mafsadat.²¹

The term *Maqashid al-Sharia* was never found by the Prophet and his companions. Still, from the historical study of Islamic law, it is known that the Prophet Muhammad had implemented *Maqashid al-Sharia* in his legal decisions, as well as

¹⁴ Harun Al-Rasyid, *Fikih Korupsi Analisis Politik Uang Di Indonesia Dalam Perspektif Maqashid Al-Syariah*, 102.

¹⁵ Muhammad Abu Zahrah, *Ushul Al-Fiqh* (Kairo: Dar al-Fikr al-Arabi, 1997), 86.

¹⁶ Azila Ahmad Sarkawi et al., "The Philosophy of Maqasid Al-Shari'ah and Its Application in the Built Environment," *Journal of Built Environment, Technology and Engineering* 2, no. March (2017): 217.

¹⁷ Busyro, *Maqashid Al-Syariah Pengetahuan Mendasar Memahami Masalah*, 65.

¹⁸ Harun Al-Rasyid, *Fikih Korupsi Analisis Politik Uang Di Indonesia Dalam Perspektif Maqashid Al-Syariah*, 98.

¹⁹ Sudirman Suparmin, "Reconstruction of Maqâshid Al-Syarî'Ah As an Approach To Constitutional Law" 12, no. 2 (2017): 45.

²⁰ Nur Kholish et al., "The Significance of Maqasid Syariah Principles in Improving Islamic," *International Journal of Innovation, Creativity and Change* 13, no. 3 (2020): 1244, https://www.ijcc.net/images/Vol_14/Iss_3/13367_Kholish_2020_E1_R.pdf.

²¹ Busyro, *Maqashid Al-Syariah Pengetahuan Mendasar Memahami Masalah*, 132.

during the times of his companions.²² Several mujtahids have carried out discussions about *Maqashid al-Sharia* before al-Syatibi in their books, including Ibn Hazm (d. 456 H / 1064 AD), al-Juwaini Imam al-Haramain (d. 478 H / 1078 AD), al-Ghazali (d. 505 H / 1105 AD), Fakhr al-Din al-Razi (d. 606 H / 1206 AD), al-Amidi (d. 631 H / 1231 AD), 'Izz al-Din Ibn Abd al-Salam (d. 660 H / 1262 AD), al-Qarafi (d. 684 H / 1285 AD), Najm al-Din al-Thufi (d. 716 H / 1328 AD), al-Zarkasyi (d. 794 H / 1394 M), Ibn Taimiyah (d. 728 H / 1328 AD), Ibn al-Qayyim al-Jauziyah (w. 751 H / 1350 AD), and al-Syatibi (d. 790 H / 1388 AD). The discussions carried out by these figures and the figures afterwards were not as perfect as those carried out by al-Syatibi.²³

One of the discussions in the book by al-Razi (d. 606 H) mentions the order of *ad-dharuriyat al-khams* (five main points) as a manifestation of the *Maqashid al-Sharia* theory, namely the maintenance of soul, property, lineage, religion, and mind.²⁴ At the same time, al-Amidi (d. 631 H) in his book gives priority to more priority when there is a conflict in *ad-dharuriyat al-khams*. The sequence in question begins with the maintenance of religion (*hifdz al-din*), soul (*hifdz al-nafs*), mind (*hifdz al-'aql*), descent (*hifdz al-nasb*), and property (*hifdz al-mal*).²⁵ Unlike the previous scholars, 'Izz al-Din Ibn Abd al-Salam (d. 660 H) implies that there is one addition to the previous *ad-dharuriyat al-khams*, namely by including al-'Irdh (honor) as part of the necessity/*dharuri* (principal). Including *al-'Irdh* as the necessity of *al-Dharuriyah*, which was further emphasized by al-Qarafi, one of the students of 'Izz al-Din Ibn Abd al-Salam. Al-Qarafi (d. 684 H) gives a different order from the previous: maintaining soul, religion, descent, mind, property, and honour. He prioritizes the soul of faith based on the idea that religion will not be upright and cannot be protected if the soul is not preserved first. Therefore, protecting the soul takes precedence over protecting religion. The existence of al-Qarafi with the Maliki school of thought greatly influenced the scholars of the Maliki school of thought in studying the theory of *Maqashid al-Sharia*. This is evidenced by the emergence of al-Syatibi (d. 790 H), who also has the Maliki school of thought and is referred to as the main character of the *Maqashid al-Sharia*. Thus, it was in the hands of al-Qarafi that there was a shift in the thinking of *Maqashid al-Sharia* from the scholars of the Syafi'i Madzhab to the scholars of the Maliki Madhab.²⁶

The discussion of the *Maqashid al-Sharia* conducted by al-Syatibi (d. 790 H) is considered the most perfect because it continues what has been discussed by previous scholars. He collected scattered issues and discussed them in pieces by

²² Busyro, 82–83.

²³ Busyro, 59–60.

²⁴ Fadli Setiawan, "Konsep Pariwisata Halal Di Indonesia Dalam Perspektif Maqashid Syariah," *Perbanas Journal of Islamic & Business* 2, no. 2 (2022): 83–85.

²⁵ Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach* (USA: The International Institute of Islamic Thought, 2007), 47.

²⁶ Busyro, *Maqashid Al-Syariah Pengetahuan Mendasar Memahami Masalah*, 96–97.

earlier scholars in a separate discussion in his book *al-Muwafaqat*. It is through *al-Muwafaqat* that the concept of *Maqashid al-Sharia* is discussed systematically. He developed and expanded the studies of previous scholars on *Maqashid al-Sharia* and arranged them in an orderly and systematic way, like a scientific discipline that stands alone so that it is easy to understand.²⁷

C. Problem of *Maqashid al-Sharia* in Responding on Contemporary Issues

A study of the *Maqashid al-Sharia*, in the end, concludes that the aim of *al-Shari* in establishing the law is to create benefit and prevent someone from harm or damage so that *al-Shari* stipulates specific rules by which the five necessities are to be maintained and protected (*al-dharuriyat al-khams*) for humans. Busyro explain *al-dharuriyat al-khams* is as follows:²⁸

1. Maintain or protect religion (*hifdz al-din*)

Maintaining religion is the first goal of Islamic law. It is because religion is a guideline for human life. In Islam, in addition to the components of the creed, which is the attitude of a Muslim's life, *Sharia* is the attitude of life of a Muslim both with God and in dealing with other humans and objects in society. For this reason, Islamic law is obliged to protect one's religion and guarantee the freedom of everyone to worship according to their beliefs.²⁹

In addition, Islam also protects rights and freedoms. The first freedom in Islam is freedom of belief and worship. Every religious believer has the right to their religion and school of thought. He should not be forced to leave him for another religion or school, nor should he be pressured to convert to Islam. Islamic *Sharia* rejects all forms of coercion because someone embraces Islam because they receive guidance from Allah. Allah will open and illuminate the eyes of his heart, and then that person will convert to Islam with evidence and evidence. Whoever's heart is blinded, whose hearing and sight are closed by Allah, then there is no point in them converting to Islam while being forced.³⁰

2. Maintain or protect the soul (*hifdz al-nafs*)

Preserving or protecting the soul is the second goal of Islamic law.³¹ For this purpose, Islam prohibits the disappearance of a soul (murder), and for the perpetrator

²⁷ Harun Al-Rasyid, *Fikih Korupsi Analisis Politik Uang Di Indonesia Dalam Perspektif Maqashid Al-Syariah*, 24–25.

²⁸ Busyro, *Maqashid Al-Syariah Pengetahuan Mendasar Memahami Masalah*, 65.

²⁹ Busyro, 66.

³⁰ Busyro, 66.

³¹ Mutholib Mutholib, Liky Faizal, and H. Muhammad Zaki, "Analisis Hukum Islam Terhadap Pelaksanaan Mediasi Perkara Perceraian Di Pengadilan Agama Gedong Tataan Dan Pengadilan Agama Pringsewu Lampung," *AL-MANHAJ: Jurnal Hukum Dan Pranata Sosial Islam* 4, no. 1 (2022): 91, <https://doi.org/10.37680/almanhaj.v4i1.1544>.

of a murder, the punishment is qishas (equal retribution). The first right most concerned about Islam is the right to life. So, it is not surprising that the human soul in the law of Allah is very glorified, must be cared for, guarded, and defended, and does not confront the sources of damage or destruction.³²

3. Maintain and protect the mind (*hifdz al-'aql*)

Humans are one of Allah's most perfect creatures because they are equipped with a mind.³³ Intellect is a source of wisdom (knowledge), the rays of guidance, and a medium for human happiness in the world and the hereafter. With mind, a letter from Allah was conveyed, with which humans have the right to be leaders on earth, and with it, humans become perfect and noble. For this reason, the mind is one of the most important things that need to be preserved in Islam.³⁴

4. Maintain and protect the offspring (*hifdz al-nasb*)

The protection of Islam for offspring requires marriage and prohibiting adultery, determining who can be married and who cannot be married, regarding the method of marriage and its conditions, so that the marriage is considered valid.³⁵ A mixture of two people of different types is considered. Legitimate and become the legal descendants of his father. Islam not only prohibits adultery but also prohibits things that lead to adultery. Islam also provides a way for men who want to marry more than one woman to keep themselves from falling into the affair. Islamic family and inheritance laws are laws specially created by Allah to maintain blood purity and the benefit of the offspring.³⁶

5. Maintain and protect property (*hifdz al-mal*)

Treasure is needed in this life. As a necessity, wealth, according to the Islamic perspective, must be sought and obtained. Because wealth is necessary, humans are also motivated to seek wealth to maintain its existence.³⁷ However, this motivation is limited by three conditions: the assets collected lawfully and used for lawful or good things. From these assets, the rights of Allah and other human rights (zakat) must be issued. Protection for suitable property can be seen in the following two ways. Namely, it has the right to be protected from its enemies, whether from theft, plunder, fraud,

³² Busyro, *Maqashid Al-Syariah Pengetahuan Mendasar Memahami Masalah*, 66.

³³ Muhamad Furqon and Siti Qomariyah, "Tinjauan Maqasid Syariah Terhadap Pertukaran Kewajiban Nafkah Antara Suami Dan Istri," *Al-Hukkam: Journal of Islamic Family Law* 2, no. 1 (2022): 3.

³⁴ Busyro, *Maqashid Al-Syariah Pengetahuan Mendasar Memahami Masalah*, 67.

³⁵ Ahmad Fauzan, "Childfree Perspektif Hukum Islam," *As-Salam* 15, no. 2 (2016): 5, <https://ejournal.staidarussalamlampung.ac.id/index.php/assalam/article/view/338>.

³⁶ Busyro, *Maqashid Al-Syariah Pengetahuan Mendasar Memahami Masalah*, 68.

³⁷ Suparyanto dan Rosad, "Eksistensi Baznas Kecamatan Pasca Tidak Diberlakukannya Dalam UU No 23/ 2011 Tentang Pengelolaan Zakat Di Indonesia (Analisis Kebutuhan Membangun Gerakan Zakat Di Kota Medan Perspektif Maqashid Al-Syariah)," *Mediation: Journal of Law* 5, no. 3 (2020): 58.

or the like. Second, these assets are used for immutable things without any redundant elements. Therefore, property should not be put away for wickedness or useless things.³⁸

In its development, the application of *al-dharuriyat al-khams* cannot only be interpreted as limited to the explanations above. Over time, the problems that arise are increasingly complex and varied. Issues that then arise want to be answered with a *Maqashid al-Sharia* approach. The problem that has emerged recently is the hierarchy of the *Maqashid al-Sharia*. There is a contradiction or debate about which one should take precedence between *hifdz al-din* and *hifdz al-nafs*. An example of a case is when the Covid-19 pandemic became increasingly widespread and disturbed the community. Then a fatwa appeared, replacing Friday prayers with midday prayers at home. It is done to anticipate the spread of the Covid-19 virus if Friday prayers are still being carried out. It then led to a long debate among scholars because when viewed with the *Maqashid al-Sharia* approach, there is a conflict between *hifdz al-din*, namely carrying out Friday prayers in congregation in mosques (while still applying health protocols) or *hifdz al-nafs*, which is sufficient replace Friday prayers with midday prayers at home.

The next debate is about the contradiction between *hifdz al-din*, *hifdz al-'aql*, and *hifdz al-mal*. In developed countries, the development of arts and culture is a top priority for the government; this has become a unique tourist attraction. In developing countries, the priorities are shopping places or infrastructure, while the development of arts and culture receives less attention. Art in developed countries is applied by many museums, paintings, or sculptures that have high artistic value and the like.³⁹ It is a matter of debate because religion prohibits making paintings or sculptures that resemble creatures. However, if this is forbidden, it is against *hifdz al-mal* and *hifdz al-'aql*.

Based on the example above, what was explained by the scholars about *Maqashid al-Sharia* when applied in everyday life turned out to be a lot of problems and debates. In addition, a new question arises, why the *Maqashid al-Sharia* described by the scholars only includes *al-dharuriyat al-khams* (five main points), even though there are other scholars such as Izz al-Din Ibn Abd al-Salam and al-Qarafi who are adding with *hifdz al-irdh* (maintaining honour). In addition, a few more things need to be added to the concept of *Maqashid al-Sharia*, namely *hifdz al-biah* (preserving the environment) and *hifdz al-siyasah* (maintaining national politics), as we know that environmental conditions very much support human existence. Human life will also be threatened if nature or the environment becomes damaged. Based on this, it can be concluded that it is crucial to maintain the climate (*hifdz al-biah*). In addition, today's legal products are made by the legislative or governmental institutions, which we

³⁸ Busyro, *Maqashid Al-Syariah Pengetahuan Mendasar Memahami Masalah*, 68.

³⁹ Jasser Auda, *Maqasid Al-Shariah: A Beginner's Guide* (London: The International Institute of Islamic Thought, 2008), 8.

usually call *ulil amri*. A good government will produce good legal products so that the benefit in society will be easier to realize. It is the goal of enacting a law to create miracles and avoid adversity. *Maqashid al-Sharia* is a value that humankind should understand and implement correctly to create a life full of blessings and away from *mafsadat* (damage).

The next problem is contextualizing the *Maqashid al-Sharia* according to the current time and era. If the understanding of *hifdz al-mal* is limited to applying the punishment of cutting hands for thieves, this will cause many problems. In this modern era, human rights are so aggressively fought for that cutting off the hand of a thief would contradict the concept of *hifdz al-irdh*. Contextually, *hifdz al-mal* is not just a hand cutting off a thief. *Hifdz al-mal* can be understood by realizing the welfare of the community. The government is obliged to improve the welfare of its people, and if it fails, then the government is considered to have been unable to implement *hifdz al-mal*.

Contextually, *hifdz al-nafs* cannot be understood only as a prohibition against killing and threatening *qishas* for murderers. In its development, *hifdz al-nafs* can be applied by always wearing a mask and using health protocols during the Covid-19 pandemic. It is a form of our obedience to the government and at the same time realizing *hifdz al-nafs*, if there are people who do not want to wear masks and apply health protocols properly, then it can be said that they are guilty of opposing the government and violating *hifdz al-nafs*.

In Islam, the mind is a source of wisdom (knowledge), therefore, maintaining minds (*hifdz al-aql*) is one of the five main things (*al-dharuriyat al-khams*) that must be guarded. Contextually, *hifdz al-aql* can be understood as the government's obligation to protect its people's intellectual property rights or provide adequate facilities for the development of science, such as providing support in the form of sufficient research funds for researchers. If the government fails to make this happen, then the government cannot implement *hifdz al-aql*.

The implementation of *hifdz al-nasb* cannot be understood only as an order to marry and the prohibition of adultery. Contextually, *hifdz al-nasb* is obligated to maintain the offspring's quality. Based on this, the government must find solutions to various problems that arise in a society related to preserving the quality of offspring, as an example of stunting that often occurs in Indonesian children. So, the government is obliged to address the stunting problem so that the Indonesian people have good-quality offspring.

D. Reinterpretation of *Maqashid al-Sharia* in Indonesian Legal Products

Since Indonesia's independence in 1945, Indonesia has declared itself a constitutional state through its constitution. This rule of law concept is not just black-

and-white jargon. However, it has many consequences. According to Jimly Asshiddiqie, in reformulating the main ideas of the rule of law in its current application in Indonesia, it is necessary to reformulate the thirteen main principles of the rule of law (*rechtsstaat*) that are applicable today. These thirteen main principles are the main pillars that support the establishment of a modern state so that it can be called a rule of law (the rule of law, or *rechtsstaat*) in its true meaning. These principles include the supremacy of law; equality in law (equality before the law); the principle of legality (due process of the law); limitation of power; independent mixed organs; free and impartial trial; state administrative court; the constitutional court; protection of human rights; democratic (*democratische rechtsstaat*); function to realize welfare goals (*welfare rechtsstaat*); transparency and social control; and believe in the One and Only God.⁴⁰

One of the main principles that become the pillars of upholding the rule of law in Indonesia is realizing the welfare goals (*welfare rechtstaat*). As the ideals of the Indonesian State formulated in the fourth paragraph of the preamble to the 1945 Constitution of the Republic of Indonesia, the Indonesian State aims to protect the entire Indonesian nation and all Indonesian blood, promote public welfare, educate the nation's life, and participate in implementing world order based on independence, eternal peace, and social justice. Conceptually, in the definition of a welfare state, it is stated that the government has a planned business system for the welfare of its people through community services in various fields.

The realization of the concept of the welfare state requires an essential role from the government as the holder of power and the people. What distinguishes the idea of a welfare state from a night owl state is the need for an active role of government in every running of the state. In this case, the government actively provides services, makes rules, monitors citizens' lives, and provides legal protection to citizens. The role of the government in realizing a welfare state can be concluded that it carries out two functions, namely the social services state or an agency of services (the state functions as a service tool) and social *rechtsstaat* (running a social law state). Lemaire calls it the terminology "*bestuurzorg*" (state administering the general welfare) or "*verzorgingstaat*" (welfare state).⁴¹

In carrying out the social function of *rechtstaat*, the government, in making legal products, both *beschiking* and *regeling*, must accommodate the community's interests to make society prosperous. Legal products produced by the government come from people's habits, laws that have lived in society, or hopes that they want to be realized. In his book *Law and Society*, Steven Vago also argues that law as an instrument of social change must go through two interconnected processes: internalizing and

⁴⁰ Jimly Asshiddiqie, *Konsep Negara Hukum: Ceramah Umum Dalam Rangka Pelantikan Dewan Pimpinan Pusat Alumni Universitas Jayabaya* (Jakarta, 2010), 23.

⁴¹ Absori Elviandri, KhuzdaifahDiyati, "Quo Vadis Negara Kesejahteraan: Meneguhkan Ideologi Welfare State Negara Hukum Kesejahteraan Indonesia," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 31, no. 2 (2019): 60.

institutionalizing behaviour patterns in society.⁴² So that the values that exist in society become material requirements that animate a legal product made by the government.

In line with the opinion expressed by Vago, in Islamic law, there is the term *Maqashid al-Sharia* which is interpreted as a concept to find out the wisdom or value of the rule of law established by lawmakers (*syari'*) to humans. There is only one purpose of the law: to create the benefit or welfare of humans in this world and the hereafter.⁴³ Way to achieve this benefit, humans must meet the needs of *dharuriyat* (primary) and complete the requirements of *hajiyyat* (secondary) and *tahsiniat* (tertiary). During its development, *Maqashid al-Sharia* was used to establish a law to answer various problems that arise in society. The position of *Maqashid al-Sharia* in the Indonesian legal system is a value that lives in the community, which is then implemented into a legal product. Based on this, when making legal products, the government can explore and harmonize them with the principles of *Maqashid al-Sharia*.

Based on the previous discussion, some of the dharruriyat needs that must be realized include *hifdz al-din*, *hifdz al-nafs*, *hifdz al-aql*, *hifdz al-nasb*, *hifdz al-mal*, *hifdz al-irdl*, *hifdz al-biah*, and *hifdz al-siyasah*. However, in practice, whether the concept of *Maqashid Shariah* can be in line with positive law in Indonesia. We can find this out by examining several legal products in Indonesia. In the context of maintaining or protecting religion (*Hifdz Al-Din*), it can be seen in article 29 of the 1945 Constitution of the Republic of Indonesia, which provides the basis for the recommendation to maintain tolerance in freedom of religion and belief. [Indonesia, the 1945 Constitution of the Republic of Indonesia, Preamble] This constitutional foundation then became the basis for the government to issue Law Number 16 of 2017 concerning the Stipulation of Government Regulations instead of Law Number 2 of 2017 concerning Amendments to Law Number 17 of 2013 regarding Community Organizations. The purpose of the promulgation of this regulation is to curb intolerant and radical community organizations that are contrary to the principles of *hifdz al-din*. Although by some circles of society, this law is deemed not accommodating the principle of checks and balances in the procedure for revoking the validity of a community organization by eliminating sanctions and the role of judicial power.⁴⁴

The following principle is the obligation to care for the soul (*hifdz al-nafs*). The implementation of *hifdz al nafs* can be reflected in several legal products issued by the government during the Covid-19 pandemic situation in the last two years. In early

⁴² Steven vago, *Law and Society* (New Jersey: Person Prentice Hall, 2009), 341.

⁴³ Vera Rimbawani Sushanti and Ernawati Huroiroh, "Telaah Perspektif Filsafat Hukum Dalam Mewujudkan Kepastian, Keadilan, Dan Kemanfaatan Hukum Di Indonesia," *Jurnal Legisla* 14, no. 2 (2022): 191.

⁴⁴ M. Beni Kurniawan, "Konstitusionalitas Perppu Nomor 2 Tahun 2017 Tentang Ormas Ditinjau Dari UUD 1945," *Jurnal Konstitusi* 15, no. 3 (2018): 456, <https://doi.org/10.31078/jk1531>.

2020, the government issued Government Regulation 21 of 2020 concerning Large-Scale Social Restrictions (PSBB). The background of this regulation is that the government feels it is essential to minimize the spread of the Covid-19 Virus, which can cause death. The enactment of this provision limits many daily activities, such as involvement in mosques that can trigger crowds. On a legal basis, worshipping in a mosque is a recommendation and even an obligation to implement Friday prayers. In an emergency like this, the principle of maintaining the safety of the soul (*hifdz al nafs*) is more appropriate than *hifdz al-din*.

The embodiment of the value of *Maqashid Sharia* in the *hifdz al-'aql* element can be found in the Freedom of Learning Policy for the level of education in Higher Education. This Freedom of Learning Policy is accommodated in the legal product of the Regulation of the Minister of Education and Culture Number 3 of 2020 concerning National Higher Education Standards. This policy provides an opportunity for students to have the right to study for three semesters outside the study program. The learning method in Merdeka Belajar – Merdeka Campus takes a variety of learning outside of lectures, such as student exchanges, internships, humanitarian projects, entrepreneurial activities, and independent studies/projects.⁴⁵ This legal product is in line with the principle of *hifdz al-aql*, which is the obligation to maintain and improve reason to respond to the times.

To build and protect offspring (*hifdz al-nasb*), this manifestation is not only an obligation for the individual. This principle can also be found in government policies to address stunting to fulfil commitments and protect offspring. Because constitutionally, especially in the 1945 Constitution of the Republic of Indonesia Article 28 H paragraph (1) states that the fulfilment of the right to live in physical and spiritual prosperity, to live and have a good and healthy living environment, and the right to health services is an obligation that the government must consider. In carrying out the mandate of the 1945 NRI Constitution, through Law Number 36 of 2009 concerning Health, especially in articles 141 to 143, has made efforts to tackle malnutrition by improving and improving public nutrition. More technically, the government's efforts in realizing the *hifdz al-nasb* principle are recognized by issuing Presidential Regulation 42 of 2013 concerning the National Movement to Accelerate Nutrition Improvement. However, more than overcoming stunting is needed to accommodate this regulation. The data from the survey data on the nutritional status of Indonesian infants in 2019 states that the prevalence of stunting is 27.67%.⁴⁶ This means that every one in four children under five in Indonesia has been malnourished for a long time, so it takes more massive efforts and implementation of targeted policies.

⁴⁵ Ditjen Pendidikan Tinggi Kemendikbud, *Pedoman Merdeka Belajar – Kampus Merdeka* (Jakarta: Direktorat Jenderal pendidikan Tinggi kementerian Pendidikan dan Kebudayaan, 2020), 4–5.

⁴⁶ Kontan.co.id, “Percepat Penanganan Stunting, Pemerintah Rancang Perpres Baru,” <https://nasional.kontan.co.id/news/percepat-penanganan-stunting-pemerintah-rancang-perpres-baru>, n.d.

In answering the legal status of crypto or cryptocurrency that transfers physical currency in digital form in the community, the Commodity Futures Trading Supervisory Agency issued Bappebti Regulation Number 5 of 2019 concerning Technical Provisions for the Implementation of the Physical Crypto Asset Market in the Futures Exchange. In these provisions, it is clear that the nature of crypto is not a currency. Crypto position itself is a commodity or asset to be traded. It is also an effort to resolve the legal status of cryptocurrency trading, which given the principle of *Maqashid al-Sharia*, namely *hifdz al-mal*, that currency trading is prohibited.

As a democratic country, the state must accommodate freedom of opinion and association. It has been adjusted in Article 28 I paragraph (4) of the 1945 NRI Constitution. However, Islam recommends that freedom to determine an opinion must also be accompanied by respecting the different interests of others. This freedom can be two blades for those who use it. In the space of thought in cyberspace, netizens' voices can become criticism and input for the authorities and even indirectly influence court decisions.

But on the other hand, this freedom can injure the honour of others by making hate speeches, disrespecting the diversity of SARA, and taking actions that do not reflect immorality in cyberspace, so the government needs to brake in overcoming this problem. So that the issuance of Law Number 11 of 2008 concerning Information and Electronic Transactions (ITE). Along with the development, this provision was later amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008. The efforts made by the government are in line with the principles of *hifdz al-Irdh* in the *Maqashid al-Sharia*, which requires maintaining human honour.

The legal instruments above still need to be fully able to guide the public on how to interact and use cyberspace properly. If today there is no technical protocol as a guide on what to do and what not to do in cyberspace, at least a particular law relating to information and electronic transactions provides legal certainty to the public. It means that articles with multiple interpretations and reports of rubber prone to abuse should no longer be found. So the government still needs to continue to study and make breakthroughs to make legal instruments that can accommodate the needs of society in this era of technological advancement.⁴⁷

The concept of *Maqashid al-Sharia* described by scholars in the classical era only includes *al-dharuriyat al-khams* (five main points). However, in its development, contemporary scholars expanded the elements of *Maqashid al-Sharia* by adding *hifdz as siyasah*. As a consequence of becoming a democratic country, one of them is a mechanism for holding general elections. Since the first elections in 1955, the electoral instruments have changed the dynamics of existing government politics. In organizing the polls for the last five years, there were legislative and legal products made by the

⁴⁷ Yani Fathur Rahman dan Zainatul Ilmiah, *Mengulas Digitalisasi Dalam Ragam Pandang* (Bogor: Penerbit Guepedia, 2020), 125.

DPR and the government. In holding the election for president and representatives of the people, there is Law Number 7 of 2017 concerning General Elections. And for the holding of elections for Governors, Regents and Mayors simultaneously, there is Law Number 6 of 2020 concerning the Stipulation of Government Regulations instead of Law Number 2 of 2020 concerning the Third Amendment to Law Number 1 of 2015 concerning the Stipulation of Government Regulations instead of Law Number 1 2014 concerning the Election of Governors, Regents, and Mayors. Apart from the above regulations, there are also other technical regulations made by the KPU and Bawaslu in tackling fraudulent acts and violations in the general election process. This provision is in line with the principle of *hifdz as siyasah* in *Maqashid al-Sharia*. In implementing democracy, the government must also maintain the stability of the state's life. The performance of *hifdz as siyasah* coincides with the General Principles of Good Governance (AAUPB) and the principles of good governance as meta norms in making election law products by the government. Ridwan stated that this principle was explored and discovered from the moral element, based on ethics as a fundamental law closely related to decency and prevailing norms.⁴⁸

The expansion of the *maqashid al-shariah* element was also triggered by several scholars related to environmental protection (*hifdz al-bi'ah*).⁴⁹ This element is essential because ecological sustainability needs to be maintained for future generations. We can find this *hifdz al-bi'ah* element in the firmness of the Constitutional Court Decision Number 85 / PUU-XI / 2013 concerning Judicial Review of Law Number 7 of 2004 concerning Water Resources. In its consideration, the Constitutional Court stated that water is one of the most essential and fundamental elements in human life and life or controls many people's lives. So, the state must govern water, and stringent restrictions are made to preserve and sustain water availability for the nation's life. This decision reflects that *hifdz al-biah* has become a value contained in government policies related to environmental conservation.

E. Conclusion

In light of the comprehensive discussion on *Maqashid al-Sharia* and its role in the Indonesian legal system, several key considerations and recommendations emerge. Firstly, the concept of *Maqashid al-Sharia*, encapsulating the ultimate goals of Islamic law, reflects a profound ethical framework that encompasses the protection of religion, life, intellect, lineage, property, honor, and governance. As societal challenges evolve in complexity, utilizing the *Maqashid al-Sharia* approach becomes increasingly pertinent for addressing contemporary issues. However, a pressing concern arises regarding the hierarchy of *Maqashid al-Sharia* in situations of contradiction or debate. To navigate this, legal authorities are encouraged to adopt a nuanced, case-by-case

⁴⁸ HR Ridwan, *Hukum Administrasi Negara* (Jakarta: PT Raja Grafindo Persada, 2016), 268.

⁴⁹ Nor'ain Othman and Rozian Mohd Taha, "Maqasid Al Shariah In The Governance And Management Strategy Of Islamic Tourism Businesses," *Iais.Org.My* 4, no. 1 (2015): 3.

application, ensuring a balanced and context-specific approach to prioritize the relevant goals based on the circumstances at hand. This dynamic adaptation can foster flexibility and relevance in the face of diverse challenges.

For the government, an emphasis on integration and harmonization is crucial. *Maqashid al-Sharia* should not exist in isolation but be seamlessly woven into the fabric of legal frameworks. Therefore, investing in education and training programs for legal practitioners, judges, and policymakers is imperative. This will not only deepen their understanding of *Maqashid al-Sharia* but also equip them with the tools to apply these principles judiciously. Moreover, the government should engage in regular consultations with religious scholars to ensure alignment with Islamic principles and enlist their guidance in resolving intricate legal issues. Public awareness campaigns can further contribute to a broader understanding of how *Maqashid al-Sharia* contributes to justice, social harmony, and ethical conduct. Future researchers play a pivotal role in enhancing the application of *Maqashid al-Sharia* in the legal system. Conducting empirical studies to assess the impact of its integration, undertaking comparative analyses with other legal systems, and exploring possibilities for legal pluralism are avenues for research that can offer valuable insights. Additionally, researchers should focus on the dynamic adaptation of *Maqashid al-Sharia* to contemporary challenges, keeping pace with the changing landscape of society. In conclusion, fostering a harmonious integration of *Maqashid al-Sharia* into the legal system requires collaborative efforts. Legal authorities should adopt a nuanced approach, the government should prioritize education and consultation, and future researchers should delve into dynamic adaptations and empirical studies. This holistic approach ensures that the principles of *Maqashid al-Sharia* not only endure but thrive in addressing the multifaceted challenges of a modern, diverse society like Indonesia.

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