

Internalization of Maqasid al-Syari'ah in Judge's Decision

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ABSTRACT

This study aims to determine values application of Maqasid al-Syari'ah (main purposes of law) in judge's decision. The decision which is used as the object of this study is the decision of PT Medan No. 144 / PID / 1983 / PT Mdn, by judge Bismar Siregar. The issue to be addressed is; firstly, how is the implementation of Maqasid al-Syari'ah in the ruling Justice, and secondly, what are the values of Maqasid al-Syari'ah covered in Decision of PT Medan No. 144 / PID / 1983 / PT Mdn? This study is a normative study with a case approach. The data used are both secondary data and secondary legal materials. This study finds out that in an effort to find the appropriate law to be applied in a legal case, Maqasid al-Syari'ah values can be used as an approach. Maqasid al-Syari'ah values in the Decision of PT Medan No. 144 / PID / 1983 / PT Mdn are two folds: *hifz al-'ird* (guarding the honour) and *hifz al-nasl* (guarding the descendant).

Keywords: *Maqasid al-syari'ah, judge's decision*

1. INTRODUCTION

There are at least three legal systems grown and developed in Indonesia, namely the system of civil law, customary law and Islamic law.[1] However, in the practical, each of these laws does not gain a balanced portion. Out of the three systems, the practices have insisted the influence in arranging national legal system. Conflict of the legal system began since the coming of the Dutch colonial in Indonesia and keep existing until now.[1] As a result, Indonesian people who are mostly Muslims cannot utterly use Islamic law in upholding justice. So far, Islamic law is only used to solve problems in family law cases. It is in religious courts and does not nudge the criminal sphere. The practice of Islamic law in general is stand still left its own internal problems. Not only in Indonesia, but also in countries that are mostly lived Muslim, such as Malaysia and Turkey. This is an affect of the country's hesitation in implementing Islamic law. These doubts eventually create different political experiments, it is how to find the right link between Islam and politics, how to positioning Islamic law in the context of a modern state, and how Islamic law needs to be comprehended and practiced.[1] In the development of law in Indonesia, especially concerning the development of the practice of Islamic law, Islamic law raises and downs following the political direction that existed at that period. What is the actual desire and purpose of the holders of power, both government and political authorities, so the practice of Islamic law is led at the policy.[2] In the justice context, although Islamic law can only be applied in family law cases, it does not exclude the possibility that the values covered in Islamic law can be sustained in court decisions issued by judge. In the study of Islamic law, the judge is equally with

Mujtahid because of his role in creating law. In effort to finding an appropriate law to the context of a judge or mujtahid cannot be a mouthpiece of the law but must be a mouthpiece of justice where the people takes at the front line. Maqasid al-Syari'ah can be used as philosophical thinking basis for judges in applying the law on a case. So, the verdict obtained will bring benefit to both parties and to the public as well as avoid bad things that might be existed.

Maqasid al-Syari'ah can be understood as the objectives desire of the Shariah and the secrets of the Rasahia established by Shari '(Allah) in every law. Thus it can be assumed that what is meant by maqashid al-shariah is the purpose of Allah as Syar'i (lawmaker) in determining the law against His creators.[3] The essence of maqasid al sharia is to realize goodness while avoiding need or benefit and refusing badness.[3], [4, p. 52]

In the study of judges' decisions in Indonesia it is interesting to study how Supreme Court judge Bismar Siregar applied the law to obtain the benefit of the people. Authors interested in the ruling PT Medan No . 144 / PID / 1983 / PTperzinaan between in-laws of King Sidabutar and Katarina br Siahaan in 1983 when Bismar Siregar was a judge of the Medan High Court. Although some observers of the law consider this ruling controversial, but according to the author this ruling applies the Maqasid al-Syari'ah in finding law oriented to benefit in order to preserve respect and protect descent of women. There are un restrictions on the problems in this study described in two problems. First, how the practice Maqasid al-Syari'ah in the ruling Justice and what the values of Islamic maqasid contained in Decision PT Medan No . 144 / PID / 1983 / PT Medan. Throughout the writer's search for papers similar to this study, there have been a number of studies on court decisions, but no one has specifically

examined the internalization of Maqasid al-Syari'ah in a judge's ruling. Among the papers examining court decisions include the first, a study entitled "Maqasid Sharia: Theoretical and Applicative Studies on Contemporary Issues". This study describes Maqasid Syariah; about the theory of Maqasid Sharia, its leaders, starting from Imam al-Juwaini to Ibn 'Ashur. Furthermore, this article tries to reveal the relationship between *ijtihad* and Maqasid Syariah, especially the relationship of *qiyas*, *istihsan* and *sadd al-dzariah* with Maqasid Syariah.[5]

Second, the study entitled "The Concept of Maqasid al-Syari'ah as the Basis of Determination and Practice in Islamic Law According to 'Izzuddin Bin' Abd Al-Salam (W.660 H)". This study focuses on exploring the opinion of 'Izzuddin ibn' Abd al-Salam about the concept and its practice in the Islamic law maqasid. The result is that the sharia maqasid is the basis for the enforcement of Islamic law and its practice, both in the fields of worship, muamalah and morality.[6] Based on this description, study on maqasid al sharia internalization is new study in the study of court decisions.

This study is a normative study focused on examining the practice of the rules or norms in positive law to concrete cases.[7, p. 295] Because the object of this study is a court decision, Decision PT Medan No . 144 / PID / 1983 / PT Mdn, hence it is used case approach. The main study in the approach is the ratio decidendi or reasoning , the court's consideration to reach at a decision.[8, p. 134] The data used is secondary data which are primary legal materials, Decision PT Medan No . 144 / PID / 1983 / PT Mdn, and secondary legal materials namely books, journals and papers related to this study.

2. A BRIEF ON THE MAQASID AL-SHARI'AH

Musthafa Abdul Raziq, contemporary jurist argued that the philosophy of Islamic law consists of legal sources, rules and objectives. So, refers to the purpose of the practice of Islamic law, there are scholars who lay the philosophy of Islamic law with maqasid al-tasyri 'or maqasid al-shari'ah, the real purpose or secret of the enactment or establishment of Islamic law from Allah Swt.[9, p. 153] The objectives of Islamic law are appropriate with human nature and the functions of the human nature of all the natural fitrah power. In brief, these functions reach the happiness of life and keep it, which is called as *al-tahshi'l wal ibqa'* by the philosophers of Islamic law. Therefore, the purpose of Islamic law is *al-tahshi'l wal ibqa'* or taking benefit as well as preventing damage which is usually called *jalb al-mashalih wa daf' al-mafa'sid*. [10, p. 100] The term maqasid is Arabic مقاصد (maqasid), which is a plural form of word مقصد (maqsad) it means intent, target, principle, intention, final objective. That term means *telos* (in Greek), *finalite* (French), or *Zweck* (German). Maqasid of Islamic law are the aim or intentions behind that law. For a number of theorists of Islamic law, maqasid is an alternative statement to مصالح (masalih) or 'benefits'. For

example, 'Abd al-Malik al-Juwaini (d. 478 H / 1185 AD), one of the earliest contributors to Maqasid theory used the terms *al-maqasid* and *al-masalih al-'ammah* (public benefit) alternately.[11], [12]

Al-Maqasid can also be considered as a number of (as considered) divine purposes and moral concepts which underlie the process of *al-Tasyri 'al-Islami* (the preparation of laws based on Islamic Sharia), such as the principles of justice, human dignity, freedom of will, holiness, ease, solidarity, etc. These aims and concepts which create a bridge between *al-Tasyri 'al-Islami* and current concepts of human rights, development and social justice.[12, p. 5]

Al-Maqasid has many changes in the classification, depends on the dimensions seen by a *fakih* or *ulama*, such as: [12, pp. 7–8]

- Dimensions of inevitability (the basis of classical classifications)
- The legal dimension seeks to reach al-Maqasid
- The human group including al-Maqasid, and
- The degree of universality of al-Maqasid.

The classical classification of al-Maqasid consists 3 (three) stages of necessity: *al-Daruriyyat* (inevitability), *al-Hajjiyyat* (needs), and *al-Tahsiniyyat* (luxury). Then the scholars divided the inevitability into 5 (five): *Hifz al-Din* (preservation of religion), *Hifz al-Nafs* (preservation of life), *Hifz al-Mal* (preservation of wealth), *Hifz al-Nasl* (preservation of descent). Some scholars add *Hifz al-Ird* (preservation of honour).[12, p. 8] *Daruriyat* considered as essential things for human life itself. There is general agreement that this *daruriyat* protection or is the goal behind every divine law. The maqasid at the stage of need or pilgrimage is considered less essential for human life. The least, Maqasid at the stage of completeness or *tahsiniyat* is what beautifies the maqasid which is at the previous stage, according to traditional expressions.[11, p. 34] The stages according to al-Syatibi. Each stages serves and protects a greater stage.[11, p. 35]

Daruriyat need is the stage of needs that must provided so that they are called primary needs. If this stage of need is not provided, the safety of humankind both in the world and in the hereafter will be endangered. *Hajjiyat* need is secondary need, if it not provided, I will not threat the safety, but humans will get difficulties. The need for *hajjiyat* serves to expand the goals of the maqasid and eliminate the strictness of the literal meaning whose practice brings obstacles and difficulties which ultimately damage the maqasid. The need for *tahsiniyat* is to pick what is appropriate with the best habits (culture) and avoid the traditions that are not preferred by wise people. *Tahsiniyat* need is the stage of needs in which if not fulfilled, it will not threat the existence of any o main elements above nor cause difficulties.[13]

The content of maqasid al-shari'ah can be known by referring to the expression al-Syatibi in his book *al-Muwafaqat fi Usul al-Syari'ah*. He said that the Shari'ah was actually established for no one unless for the benefit

of humankind in this world and in the hereafter. So, the shari'ah is basically made to create a joy for individuals and worshipers, maintain the rules and enliven the world with all kinds of means that will convey it to the stages of perfection, goodness, culture and noble civilization, because Islamic proselytizing is a blessing for all human.[14]

From the above explanation, it can be stated that what becomes the main topic in the al-Shari'ah maqashid is wisdom and illat stipulated by a law. In the study of usul fiqh, wisdom is different from illat. Illat is a certain characteristic that is obvious and can be seen objectively (zahir), and there is a benchmark (mundhabit), and appropriate with legal provisions (munasib) is the determinant of the existence of law. Whereas, wisdom is something that becomes the purpose or the aim of presented law in the form of benefit for human.[14]

3. RESULTS AND DISCUSSION

3.1. *The Practice of the Maqasid al-Syariah*

The question that is necessary to be answered in this section is how to apply Maqasid al-Syari'ah in a judge's decision which is basically as the formulation of problem in Islamic law. Before answering the question above, the paradigm that must be built is that deciding a decision is an attempt to reach finding. According to Soedikno Mertokusumo, in his book "penemuan hukum sebuah pengantar" (the discovery of an introductory law), provides definition that law finding is the process of establishing law by judges, or other legal apparatus assigned to applicate general legal rules on concrete case.[14, p. 37] Through this understanding, it can be known that case that is submitted to the court is a concrete case, precisely the case is still general. Therefore the judge must classify the submitted case so that decision can be decided. In an effort to discover the legal facts, the practice of Maqasid al-Syari'ah that can be used is raising questions relating to core cases being examined. This means how a judge can discover the actual facts of the case is using questions that are based on a philosophical analysis of the case.[3, p. 8]

Then in an effort to find the appropriate law to be applied in these legal case the Maqasid al-Syari'ah can be used as an approach. According to Satria Effendi M. Zein, the analysis of Maqasid al-Syari'ah is an approach in deciding law from its sources or understanding Islamic law. The approach offered in deciding law through the linguistic approach and the maqasid al-shari'ah approach. The linguistic approach is to find out general arguments, mujmal, mutlaq, muqayyad, zahir, and others. While, the emphasis of the Maqasid al-Syari'ah approach lies on the effort to expose and explain the law of a case that is faced through legal considerations which has no special appearance using methods; ijma, qiyas, ihtisab, istihsab, sad al-zari'ah, 'urf and so on.[13] In the legal discovery

method by sudikno, the method above is known as the method of interpretation and reasoning of law or argumentation. Furthermore, in applying the maqasid al-syariah for deciding a case, the judge's considerate the theory of the benefit of the law meaning that the judge as a translator or a contributor the meaning through legal discovery (rechtsvinding) and creates new law through his decisions (judge made law), the law must be able to realize the benefit for the community (especially those who litigate) in each decision.[3, p. 9]

3.2. *The Internalization of the Maqasid al-Syariah*

Bismar Siregar is an Indonesian former Supreme Court justices. He was Chief Justice in 1984-2000. During his life, he was known as a progressive Supreme Court judge.[15] Although he had passed away and leave his motherland in 2012, on April 19, 2012, but his name will never be forgotten by entire people in this nation, especially the law observer. Because, the decisions that he issued for more than 35 years as a judge at that time always create law breakthroughs and attract public attention. Many decisions that were made by the thought of Bismar Siregar provide legal breakthroughs and were not confined to the positivism law paradigm. So that, the decision he made was appreciated by people as a progressive decision, but the decision often was also considered controversial by some law observers and law enforcers, especially judges who did not agree to his perspectives. One of the decisions that was considered progressive as well as controversial was the decision of the Medan High Court No. 144/PID/1983/PTMdn, which was about adultery. From that case, in this paper, the authors were interested in analysing the decision, where as author assumed that the decision implemented the Maqasid al-Syari'ah values. To illuminate the cases handled by Bismar described in the table as follows.[16]

Case Position, This case is related to adultery between father in-law of Raja Sidabutar and Katarina br Siahaan. Before the adultery, the father in-law promised to marry Katarina. However, the promise was not done, so Katarina reported the case to the police. The prosecutor charged the father in-laws with criminal acts (Article 293 of the Criminal Code in conjunction with Article 5 paragraph 3 of the 1951 Emergency Law), fraud (Article 378 of the Criminal Code), and unpleasant acts (Article 335 of the Criminal Code).

Decision, Medan District Court judges panel in their decision Number 571 / KS / 1980 / PN Mdn in March 5, 1980, stated that the defendant was proven to have committed molestation with a woman who was not his wife. The defendant was sentenced in prison for three months with a trial period for six months. Then, he prosecutor appealed. The Medan High Court judges panel annulled the verdict of the first instance court, and the defendant was found guilty of fraud. In considering the decision, the panel of judges broadened the meaning of the

elements of Article 378 of the Criminal Code "... giving / delivering certain items". The judges assumed that the meaning of "goods" also means "services". In this case, the panel of judges saw that the relationship between the father in-laws and Katarina could be interpreted that the father in-laws got "services" from Katarina. The panel of judges also assumed that the meaning of "goods" also means Katarina's "honor" which she gave to her father in-laws because of the promise to be married. Related to this, the panel of judges borrowed the regional language terms of the defendant and witness (Katarina), Tapanuli, "bonda" which also meant goods including genitals. In the ruling, the panel of judges sentenced in-laws to three years in prison. (Source: hukumonline.com, decisions of conscience)

To elaborate the decision above, it would be fair to listen to the explanation from Shidarta in a seminar "Strengthening Understanding of Human Rights for Judges all over Indonesia" on 2-5 May 2011 held by the Judicial Commission. In his paper entitled "Law Discovery through Judge's Decision [17], it was stated that the panel of judges led by Bismar Siregar composed syllogisms one by one related to Article 378 of the Criminal Code, namely regarding fraud allegedly against the accused Father in-laws of Raja Sidabutar.

The panel of judges started the syllogism from the element that indicated the target of norm (normadressaat), the word "barang siapa" (whoever) and continued to the next elements from the Article 378 of the Criminal Code. When the assembly arrived at the "barang" (goods) element, the "ketersendatan" (delay) occurred. The word "goods" can be interpreted grammatically, but such meanings are very different from law facts. The judge was aware of this difference in meaning, so he could not simply ignore it. The judge must pause for a moment by making an intermediary syllogism whereas it is a syllogism specifically made for the purpose of explaining the meaning of the "goods". The intermediary syllogism expression also explains what is meant by Henket of the stand point between (tussenstandpunten).

The legal fact that is found here is the legal fact which does not merely come from grammatical interpretation. If only the grammatical interpretation is relied upon, at the end, the judgement could be benefit for the defendant. It is possibly that the judge at that time had practiced a regressive reasoning method. The judge already has a conclusion first, and the justification is determined later. This judgement is likely to be contradictive on the judge's well intentions to provide a portion for justice for the victim, in this case a young woman, who has lost her honour (virginity) because of being persuaded by the defendant. The judge also wanted his verdict to be useful, it is to set a precedent and warning to men who often take unilateral benefits from bad behavior as what the defendant did.

For that reason, the judge then tried to delve the meaning of "goods" from various sources, including from the local culture. Finally, a syllogism was successfully developed by a panel of judges can be described explicitly as follows:

Major premise	All organs attached on a human body are GOODS according to the provisions of Article 378 of the Criminal Code.
Minor premise	Virginity is an organ attached on a human body
Conclusion	Virginity is GOODS according to the provisions of Article 378 of the Criminal Code

By making this syllogism, ketersendatan (lagging) stated above had been successfully resolved. Thus, the judge could continue the next set of syllogisms, until at the end he came to the final conclusion about whether or not the fraud is qualified by Article 378 of the Criminal Code. If it was qualified, secondary norms of criminal threats could be imposed. The practice of this secondary norm is usually not mentioned a lot in the discourse on legal reasoning. The philosophical area is more with area of ethics and discretion of judges, rather than logic talks. If we pay attention closely, the major premise above is an exposition as well. The judge had made a new definition of the term "barang" (goods) in Article 378 of the Criminal Code.

In the case above, the formulation of the major premise is truly a work of the judge. The judge accidentally did not take it from the explanation of the law (so it is not an authentic interpretation), nor it was not picked the explanation from other laws (so it is not a systematic interpretation), and it was not taken from legal history or history of the law (so it is not a historical interpretation), and was not taken from the Criminal Code draft (so it is not a futuristic interpretation), and was not traced the legal system of other countries (so it is not a comparative interpretation). Because the judge stated that he was inspired by local culture, he probably intended to make a sociological interpretation. However, whatever the name of the interpretation, the legal discovery in this decision has had an extensive impact to the word "goods" in Article 378 of the Criminal Code.

Based on the explanation above, a comprehensive understanding of the case handled by Bismar Siregar's can be obtained. He was able to formulate a philosophical analysis to the handed case. He understood very well that the rules provided in criminal law would not be able to ensnare the defendant with a fair punishment for the deed he had committed.

Through the legal finding effort uses interpretation method which according to Sarif Sidharta is a sociological interpretation because it delves the meaning of "goods" from several sources including from the local culture. Eventually, the committers could be sentenced to 3 years. This is decided because of keeping the honor (*hifz al- 'ird*) and guarding the descent (*hifz al-nasl*) of women from the arbitrary men actions.

Implicitly, it can be known how judge Bismar through his legal finding internalized the maqasid syariha values in

deciding a case. The purpose of this law enforcement is to guard the honour of a woman which becomes sharia maqasid dimension of this ruling. So, what is created is the benefit for people and the firm of God's law on this earth.

4. CONCLUSION

Based on the explanation above, it can be concluded that; firstly, in finding a proper law to be applied in legal case, Maqasid al-Shari'ah can be used as an approach. The practice of Maqasid al-Syari'ah for deciding the case, then the judge's consideration is benefit theory of the law, in other word, the judge as the translator or the contributor of meaning through the finding of the law, (rechtsvinding) and creating a new law through the decisions (judge made law), the law must be able to realize the benefit for the community (especially those who litigate) in each decisions.

Secondly, to reach the goodness for people and the firm of the law appropriate with the Maqasid al-Syari'ah, Bismar Siregar made a syllogistic analysis through understanding local culture about the meaning of "goods". Eventually, the meaning of "goods" can be extended so that Article 378 of the Criminal Code can be applied to deceive the defendant. In this endeavor, Bismar was able to internalize the Maqasid al-Syari'ah in his decision oriented to the benefit for people to keep the honor (hifz al-'ird) and keep the descendant (hifz al-nasl) of women.

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