



**The Construction of Religious Freedom in Indonesian Legislation:
A Perspective of *Maqāṣid Ḥifẓ Al-Dīn***

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Abstract: The Indonesian state has legal provisions of religious freedom contained in the constitution and its derivatives legislation. This article aims to discuss religious freedom in Indonesian legislation from the perspective of *maqāṣid ḥifẓ al-dīn*. This study is the result of qualitative research using a content analysis approach. From the results of the discussion, it is known that the freedom of religion in Indonesian legislation includes freedoms to choose belief (Belief in One Supreme God), to worship, and to express religion. These provisions are in line with *hurriyyah al-'itiqād* Ibn 'Āsyūr and *al-ḥurriyyah fī al-dīn* al-Zuhailī regarding freedom of worship but are not in accordance with al-Zuhaili's opinion about freedom of belief, an area of personal choice when one may choose to be religious or not. The contradiction occurs because all Indonesian citizens must believe in One and Only God as the first precept of Pancasila and make six religions as religions recognized by the State as contained in Presidential Decree No. 1/1965 (PNPS Act). Therefore, it is necessary to reconstruct the law and values of religious freedom contained in the PNPS Act, especially in its implementation.

Keywords: Religious freedom; *maqāṣid al-syarī'a*; *ḥifẓ al-dīn*; Indonesian legislation.

Abstrak: Negara Indonesia memiliki ketentuan hukum tentang kebebasan beragama yang tertuang dalam konstitusi dan perundang-undangan di bawahnya. Artikel ini bertujuan mendeskripsikan kebebasan beragama dalam perundang-undangan di Indonesia menurut perspektif *maqāṣid ḥifẓ al-dīn*. Kajian ini merupakan hasil penelitian kualitatif dengan pendekatan konten analisis. Dari hasil pembahasan diketahui bahwa kebebasan beragama dalam perundang-undangan di Indonesia meliputi: kebebasan memilih keyakinan (ber-Ketuhanan Yang Maha Esa), beribadah dan mengekspresikan agama. Ketentuan tersebut selaras dengan ketentuan *hurriyyah al-'i'tiqād* Ibnu 'Āsyūr dan *al-hurriyyah fī al-dīn al-Zuhailī* tentang kebebasan beribadah, namun tidak sesuai dengan pendapat *al-Zuhailī* tentang kebebasan berakidah yang merupakan wilayah hati, dimana seseorang boleh memilih untuk beragama atau tidak beragama sekalipun. Hal ini karena semua warga Negara Indonesia harus ber-Ketuhanan Yang Maha Esa sebagaimana Sila pertama Pancasila dan menjadikan enam agama sebagai agama yang diakui Negara sebagaimana terdapat dalam Penetapan Presiden Nomor 1 Tahun 1965 (Undang-Undang PNPS). Oleh karenanya dibutuhkan rekonstruksi hukum dan nilai-nilai kebebasan beragama yang terdapat dalam UU PNPS, terutama dalam implementasinya.

Kata Kunci: Kebebasan beragama; *maqāṣid al-syarī'ah*; *ḥifẓ al-Dīn*; Undang-Undang di Indonesia.

Introduction

Ḥifẓ al-dīn in the context of religious freedom, like that proposed by Ibn 'Āsyūr and Wahbah Al-Zuhaylī is the most important part of human life. Contemporary Islamic legal scholars always pertain to the concept of *Ḥifẓ al-dīn* when they discuss the principle of human rights. The scholars of *Ushul al-Fiqh* (Islamic Legal Theory) such as Al-Syātibi, 'Izz al-Dīn 'Abd Al-Salām, Al-Būṭī, Aḥmad Al-Raysūnī, classify *ḥifẓ al-dīn* to the level of *maqāṣid daruriyyah* (primary needs). Although Indonesia is not a religiously based state, the maintenance of religious freedom is so important that it is guaranteed by the State as stated in the first principle of Pancasila "Belief in One Supreme God."

As a constitutional state, the right to have religious freedom for citizens is regulated in the Indonesian Constitution, namely the 1945 Constitution of the Republic of Indonesia (1945 Constitution) and the laws under it, namely Act Number 1/1965 concerning Prevention and/or Blasphemy of Religion (PNPS Ordinance), Act Number 39/1999 concerning Human Rights (HAM Act) and Act Number 12/2005 concerning Ratification of the International Covenant on Civil and Political Rights (ICCPR Treaty).

So far this day, a great number of studies on religious freedom in Indonesia have been carried out. According to the research conducted by the National Legal

Development Agency (BPHN), the State has given the right to freedom of religion to all citizens, but at the same time it also has an obligation to maintain public order as mandated by law. That is why the deviant sects of every religion as well as blasphemous words are part of the state's responsibility to maintain public order.

Jufri, Mudzakkir, Ropi, Susetyo & Sigit and Utoyo argue that normatively freedom of religion is guaranteed by the constitution, but at the same time the State imposes limitations on religious freedom with the regulations under it, as in case of the PNPS Ordinance and other regulations, which allegedly can be used as a tool to justify violence in the name of religion. Likewise, Grim argues that regulations about religions in Indonesia (de jure regulations) affect socio-religious hegemony (de facto regulations), and legal/policy limitations also have an impact on variations in the level of religious persecution.

The purpose of this paper is providing a new perspective, namely, how the laws and regulations on religious freedom in Indonesia are viewed from the perspective of *maqāṣid ḥifẓ al-dīn* or the goal of maintaining religious freedom as a part of *maqāṣid al-syarī'ah* or the objectives of shari'ah namely to create benefit and justice for all citizens. This is because according to Kayadibi, the state is a part of the *daruriyyāh* problem whose functions is to realize the public benefit. In addition, according to Nur, *maqāṣid al-syarī'ah* is an ethical-spiritual foundation for the dynamics of the Islamic legal process in dealing with contemporary problems.

This paper is based on the argument that the Constitution and laws in Indonesia have given freedom of religion to its citizens including the freedom to choose religion, worship and express their religion, but the provisions in Indonesian laws and regulations do not actually regulate freedom that is internal, namely the freedom of a person to embrace any religion or not even though according to Wahbah al-Zuhali's opinion. This is because freedom of religion in Indonesian laws and regulations is limited by the provisions contained in the Pancasila and the Constitution where all Indonesian citizens must have a religion with belief in the One Supreme God. This discussion is important because religious freedom in Indonesian legislation is seen from the perspective of *maqāṣid ḥifẓ al-dīn* which gives the right to freedom of religion for all human beings, both in the internal and external areas.

This study is the result of qualitative research using content analysis approach, which focuses the discussion on legal products both related to the purpose of values and the legal content of religious freedom in Indonesian legislation. The sources of data used in this discussion are legislation containing the legal rules for religious freedom in Indonesia such as the 1945 Constitution and the ordinances under it, namely the PNPS Act, the Human Rights Act, the ICCPR Treaty and the concept of *maqāṣid ḥifẓ al-dīn* according to the Ulama of

Legal Theory. The analysis method uses content analysis of religious freedom laws in Indonesian law.

Maqāṣid Ḥifz al-Dīn

Maqāṣid ḥifz al-dīn is one part of maqāṣid al-syarī'ah in addition to ḥifz al-'aql, ḥifz al-nafs, ḥifz al-nasl and ḥifz al-māl. According to Tariq Ramadhan, maqāṣid al-syarī'ah is called the highest objective of Islam. Meanwhile, according to Jasser Audah, maqāṣid is the plural of maqṣad which means purpose, objective, principle, intent and goal.

Shari'a is the provisions prescribed by Allah in both the Qur'an and the hadith. The content of Sharī'a is entirely wisdom and justice, and hence, maqāṣid al-syarī'ah is defined as the purpose behind the rule in the form of benefit, justice, grace and wisdom. If there is a rule that replaces justice with injustice, mercy with curse, public benefit with mafsadat, or wisdom with nonsense, then that rule does not belong to the sharī'a, even though it is claimed by some interpreters. This is in the opinion of Ibn Qoyyim as quoted by Jasser Auda.

Ḥifz al-dīn comes from the words ḥifz and al-dīn. Ḥifz comes from the Arabic word hafaza which means to maintain something. While ad-dīn lexically has many meanings, including الملك meaning power, القهر coercion, العز glory, الطاعة obedience, الخضوع obedience. Ḥifz al-dīn is one of maqāṣid al-syarī'ah (the highest objective of Islam) at the daruriyyāh level.

The meaning of ḥifz al-dīn, according to Al-Syātibi, is manifested in Islam, Iman and ihsan, which comes from the book of the Qur'an and its explanation in al-sunnah. When a person could achieve these all three in his religiosity, it will of course lead to the benefit of religion and the world. Furthermore, Al-Syātibi explains that ḥifz al-dīn consists of two forms, namely ḥifz al-dīn min jānib al-wujūd (from the side of its existence) which is affirmative creative in nature and ḥifz al-dīn min jānib al-'adam (from the side of its absence) which is negative protective.

The articulation of ḥifz al-dīn min jānib al-wujūd is that Allah commands humans to believe in Him, perform prayers, zakat, fasting Ramadhan and pilgrimage to Mecca. Whoever carry out these obligations, he or she will bring benefit and avoid harm. The articulation of ḥifz al-dīn min jānib al-'adam is, for instance, Allah forbids someone to steal. When someone does not commit stealing it will bring benefits and avoid harm to thers. In brief, ḥifz al-dīn min jānib al-wujūd is to uphold the foundations of Islam and faith (iman), while ḥifz al-dīn min jānib al-'adam is to eliminate everything that can undermine the foundations of that religion.

Similar opinion is also explained by Sa'id Ramaḍān al-Būṭī. According to him, ḥifz al-dīn includes Iman and Islam and, hence, ḥifz al-dīn is nothing other than maintaining iman and Islam. Religion, therefore, places great emphasis on the dimensions of faith and worship. Furthermore, al-Būṭī explained that the

benefit of religion is the basis of other benefits and the benefit of religion (al-dīn) must take precedence over other benefits. Thus, to put the benefits in order are the benefits of religion (al-dīn), soul (al-nafs), reason (al-'aql), offspring (al-nasl), and property (al-māl).

According to Ibn 'Ashur, ḥifẓ al-dīn means maintaining freedom in religion (ḥurriyyāt al-'itiqādāt) or hurriyyāt al-'aqīdah (freedom of belief). Jasser Auda explained that Ibn 'Āsyūr understood the meaning of ḥifẓ al-dīn as freedom in choosing religion or the absence of coercion in choosing religion as the verse of the Qur'an "la ikrāha fi al-dīn" (no compulsion in matters of religion). However, Ibn 'Āshūr believes that a person's freedom to have religion or not, is limited by the obligation to obey his religion when he has made his voluntarily choice. Obedience to religion should be carried out by guarding from things that can damage his faith or damage his deeds related to religion and the maintenance of religion (ḥifẓ al-dīn) in relation to the public life. This could be done by rejecting anything that could weaken the foundation of aqīdah. Similarly, according to Wahbah Zuhayli, the concept of "lā ikrāha fī al-dīn" is interpreted that there is no compulsion for someone to convert to Islam, and this belongs to the context of al-ḥurriyyah fī al-dīn (freedom of worship) in area of personal choice.

According to Zuhaylī, Islam is, in fact, the first religion to call for freedom of belief and to provide care and protection as well as to make the basis for belief. But when someone accepts Islam as a religion, he or she is obliged to hold it firmly and is forbidden to play with religion and vilify Muslims. For non-Muslims who live in an Islamic country or a country controlled by Muslims or in any other countries, they have the freedom to hold their religion and beliefs, as well as the freedom to convert to Islam voluntarily.

According to Jasser Audah, ḥifẓ al-dīn which is understood by al-Syātibi and other scholars whose thoughts are similar, is built on the view that fighting infidels and killing apostates are part of Shari'a obligation. The concept of ḥifẓ al-dīn which is built on this paradigm by some maqāṣid thinkers is no more considered as relevant interpretation to nowadays situations and conditions.

In the context of religious freedom, Ibn 'Āsyūr interprets ḥifẓ al-dīn as hurriyyah al-'itiqād (freedom of religion). He bases his ideas on the verse "la ikrāha fi al-dīn" which constitutes the goal of shari'a. However, when someone has chosen a religion (Islam), he or she must obey and loyal to the religion of Islam.

In line with Ibn 'Āsyūr, Wahbah Zuhayli also uses the term al-ḥurriyyah fī al-dīn as the interpretation of the verse "la ikrāha fī al-dīn". According to Zuhaili, freedom of religion is divided into the scope of freedom of belief, freedom to worship and to perform religious rituals. Freedom of belief is the freedom of a person to decide for himself in embracing belief or religion or not even believing in religion. This is inalienable right that no one can interfere with. The freedom of worship is the individual's freedom to worship. A person is free to express his

religion in the form of religious rituals, as well as he is free not to carry out his religious rituals while staying inside his residence. However, when he leaves his residence, he must follow the rules and limits set by the State for the purpose of public benefit.

When someone abjures Islam, according to al-Zuhaylī, that person must be invited to repent. However, in the context of the state when a person apostates, it means that he is contributing to the destruction of Islamic rules, abuses its norms, clashes with the concept of truth, emphasizes the destruction of the earth, worsens the understanding of freedom, and even violates religious freedom as stipulated in " la ikrāha fi al-dīn". (There is no compulsion to (enter) Islam). However, he can be punished according to state law when he openly challenges and fights state rules.

From several definitions as mentioned above, the meaning of *ḥifẓ al-dīn* in the opinion of the scholars, could be divided into two categories, namely *ḥifẓ al-dīn* in its muslim context as well as *ḥifẓ al-dīn* in its as social being context. First, in the muslim context, *ḥifẓ al-dīn* is carried out by strengthening the religious qualities of Muslims as stated by Al-Shātibī and al-Būṭī, namely being a good believer (mu'min), muslim and pious person (muhsin) by behaving in accordance with religious orders (min jānib al-wujūd), or abandon the religiously prohibited deed (min jānib al-'adam). Second, the meaning of *ḥifẓ al-dīn* which is articulated in as a social being context of the state. Everyone is free to choose their religion or not even though, but if he has made up his mind to choose a certain religion (say Islam), he must strengthen the quality of obedience to his religion without playing with it (Islam). This second pattern is in accordance with the opinion of Ibn 'Āsyūr and Wahbah Zuhaylī. These two patterns are not contradictory, but there are only differences in freedom of belief.

***Ḥifẓ al-dīn* in Indonesian Legislation**

To find out how Indonesia regulates and limits the freedom of religion and diversity of its citizens, one has to know the constitution and laws related to religion. This is as Ropi has explained, that one way to know the nature of the state is to know its constitution, because the constitution describes how the state has the power to regulate its people so that the state's political policies towards its people are known. The constitution is also a limitation on how the state limits the government's power in exercising its authority over its people, including in religious matters.

The rules related to maintain religious freedom (*ḥifẓ al-dīn*) and its limitations in the Indonesian legislation are systematically contained in the Pancasila as the state foundation, the 1945 Constitution of the Republic of Indonesia (1945 Constitution) Articles 28E, 28I, 28J and 29, The PNPS Act concerning the Prevention of Abuse and/or Blasphemy of Religion, the Human

Rights Act, Articles 4, 22 and 55, as well as the ICCPR Treaty, Article 2, 18 Paragraphs (1-4), Article 20 Paragraph (2), Article 26 and 27.

The first precept of Pancasila reads "Belief in One Supreme God". This is an evidence that Indonesia makes religion as the main value in the lives of its citizens, even in the diversity of the Indonesian culture. In addition, the evidence that religious values are the basis in determining state policies is also found in the preamble of the 1945 Constitution. While expressing gratitude for Indonesia's independence, the founding fathers said that it was achieved "by the grace of Allah the Almighty". Ethically speaking, this is the acknowledgment that a unified, sovereign, just and prosperous national life contains moral obligations that must be accounted for either before the fellow humans or God Almighty. .

Furthermore, in the 1945 Constitution, the right to freedom of religion for all Indonesian people is explained in several articles, namely Article 28 E paragraphs (1 and 2), 28 I paragraph (1) and 29 paragraphs (2), as follows:

Article 28E:

(1) "Everyone is free to embrace a religion and worship according to his religion, choose education and teaching, choose a job, choose a nationality, choose a place to live in the territory of the country and leave it, and has the right to return."

(2) "Everyone has the right to freedom to believe in beliefs, to express thoughts and attitudes, according to his conscience."

Article 28I paragraph (1) as follows:

"The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on the basis of retroactive law are human rights that cannot be reduced under any circumstances."

Article 29 paragraph (2) reads: "The state guarantees the independence of each resident to embrace his own religion and to worship according to his religion and belief."

Ḥifẓ al-Dīn in the Act Number 1/PNPS/ 1965 (PNPS Act)

The PNPS Act was born during the Old Order era, that was the era of President Soekarno's leadership. The PNPS Act originally comes from a Presidential Decree issued by President Soekarno. During the Soeharto's era, that Presidential Decree was transformed into an Act based on Ordinance Number 5 of 1969 concerning the Statement of various Presidential Decrees and Presidential Regulations as Ordinance. Thus, according to Adnan Buyung Nasution, the PNPS Act is considered to have been in accordance with the spirit of the formation of legislation based on the 1945 Constitution. During the Soekarno era the PNPS Act was not implemented. It was just implemented during the Soeharto era,

especially articles 165 and 165a for the purpose of maintaining public order in the context of the Suharto government. .

The purpose of the PNPS Act, as red in its legal considerations, is securing the state and society, the ideals of a national revolution and the development of the National entirety towards a just and prosperous society.

The contents of *hiḏf al-dīn* in the articles of Law Number 1/PNPS/1965 are as follows:

Article 1: "Everyone is prohibited from intentionally telling in public, recommending or seeking public support, to carry out an interpretation of a religion adhered to in Indonesia or to carry out religious activities that resemble religious activities of that religion, the interpretation and activities of which deviate from the basic teachings of that religion."

The understanding of this article as contained in the explanation of the PNPS Act is that everyone is prohibited from telling, recommending or seeking public support for carrying out acts that resemble religious activities, interpreting and carrying out activities which deviate from the six religions adopted in Indonesia, namely Islam, Christianity, Catholicism, Hinduism, Buddhism and Confucianism (Confucius). As for the meaning of "religious activities" it means all kinds of activities of a religious nature, for example naming a sect as Religion, using terms in carrying out or practicing the teachings of one's beliefs or performing worship and so on. The main points of religious teachings can be known by the Ministry of Religion (now the Ministry of Religion) which for that has the tools/methods to investigate them.

Why are there only six religions recognized? The next explanation tells us that it is because of the fact that these 6 kinds of religion which are embraced by nearly the whole population of Indonesia. Therefore, they get guarantees as explained in Article 29 paragraph 2 of the 1945 Constitution "The State guarantees the independence of each resident to embrace their own religion and to worship according to their religion and belief" not to mention that they also receive assistance and protection in embracing religion and worshiping according to their religion and beliefs.

It was further explained that "this does not mean that other religions, for example: Judaism, Zaratustrian, Shinto, Taoism are prohibited in Indonesia. They also get full guarantees as stipulated in article 29 paragraph (2) and they are left to exist, as long as they do not violate the provisions contained in this regulation or other laws and regulations."

However, the Presidential Decree article 1 provides an explanation of the different positions of local religion. The Government tries to channel it towards a healthy view and towards the Almighty God. This is in accordance with the provisions of MPRS Number II/MPRS/1960, appendix A. Field I, number 6.

According to social contract theory, as Rousseau argues, when a citizen has made a contract with the State with full awareness, he actually comes out of a free natural state and surrenders his rights to the power of the State and the sovereignty of the people. The state is mandated by the people to maintain security as well as to protect the people so that the State is legitimate to carry out its functions according to the will of the people, including creating laws carried out by the legislature and executive. State power in this context is a manifestation of God's power and this condition is an ideal condition

In the perspective of the social contract, when the State has determined that Pancasila whose first precept reads "Belief in One Supreme God", it must be regarded as collective agreement or social contract for all citizens. Then the provisions of the PNPS Law can be justified thereof. This means that the State has agreed that the entire Indonesian nation must believe in the one and only God. However, according to Hurd, the determination of six religions recognized by the State whom he called "governed religion" is a part of the political influence of the State. This is intended to maintain the security of the State and society as well as public order as described in the explanation of the PNPS Act.

One thing to note, the phrase "about activities that resemble religious activities adopted in Indonesia" found in article 1, Number 1 PNPS/1965 Act, when seen from the perspective of ḥifẓ al-dīn Al-Shāṭibi is an effort by the State in maintaining religion *min jānib al-'adam*, namely trying to prevent occurrences that will probably arise with actions resembling religious activities adopted in Indonesia. In Zuhailī's perspective, when activities resembling religious activities adopted in Indonesia are carried out alone at home and are not disseminated to the public so as to disrupt public order, it is legal to do so, but when it is done in the public space and causes harm, the state can enforce the law to maintain public good.

Therefore, Article 1 of Law No. 1 of 1965 is not in accordance with the concept of freedom of religion as Wahbah Juhaily's opinion, which means "*lā ikrahā fī al-dīn*" with the freedom to have a religion or not even a religion. This is because in Indonesia everyone must have a religion that believes in the only One God, even as stipulated in Article 156a of Law No. 1 of 1965 paragraph (2) will be sentenced to a maximum of five years for those who commit acts with the intention that people do not adhere to any religion. also, who is based on the One Godhead."

Furthermore, Article 2, the Act Number 1/PNPS/1965 contains provisions regarding the stages of action that should be taken by the government against persons or institutions that commit violations as contained in Article 1 of the Act Number 1/1965 as follows:

- (1) "Whoever violates the provisions in Article 1 is given a stern order and warning to stop his actions in a joint decision of the Minister of Religion, the Minister/ General Prosecutor and the Minister of Home Affairs."

(2) “If the violation referred to in paragraph (1) is committed by an organization or a sect of belief, then the President of the Republic of Indonesia may dissolve the Organization and declare the Organization or sect as a prohibited organization/cult, one after the other, after the President has received consideration from the Minister of Religion, the Minister/General Prosecutor and the Minister of Home Affairs.”

Article 2 of the Act Number 1 of 1965 explains systematically the way to handle the people or institutions that violate the provisions of article 1 of the Act Number 1 of 1965 carried out by the Government. The first step is that the government should give necessary advice and warnings to stop their actions. If the first warning is not heeded, the next step should be done with a stern warning. If the strong warning is still not heeded and the violation has a serious effect on the religious community life and the violation is carried out by an institution, then the next step is that the institution can be dissolved by the President. The President declares it as a prohibited organization or sect. This is as stipulated in the Article 169 of the Book of Indonesian Criminal Code (KUHP).

Furthermore, Article 3 of the Act Number 1/1965 explains the stages of action of the government against adherents, members or administrators or sects of beliefs who continue to violate even though their organization has been dissolved, namely imprisonment for a maximum of five years, as following:

Article 3: "If after taking action by the Minister of Religion together with the Minister/Prosecutor General and the Minister of Home Affairs or by the President of the Republic of Indonesia, according to the provisions in Article 2 against people, organizations or sects of belief, they still continue to violate the provisions in Article 1, then person, adherent, member and/or member of the Organizational Management from that sect shall be punished with imprisonment for a maximum of five years.”

Thus it can be said that articles 2 and 3 of the PNPS Act contain actions that the government can systematically take when there are people or sects of belief who commit violations as described in Article 1 of the PNPS Act, with the following steps: 1) giving warnings and advising people, the sect of a creed and the organization that committed the offense. 2) disbanding any sect or organization that continues to commit violations as stated in Article 1 of the PNPS Act; 3) if the violation is still committed by people from a belief or organization, even though the organization or sect has been dissolved, then they will be punished with imprisonment for a maximum of five years.

Furthermore, Article 4 of Act Number 1 of 1965 contains provisions that were later added to become one of the articles in the Book of Indonesian Criminal Code (hereinafter referred to as the Criminal Code), namely Article 156a. Article 4 of Act Number 1 of 1965 is read as follows:

Article 4: "In the Criminal Code, a new article is issued which reads as follows:

Article 156a: "It shall be punished by a maximum imprisonment of five years whosoever intentionally and publicly expresses feelings or commits an act:

- a. which are essentially enmity, abuse or blasphemy against a religion professed in Indonesia
- b. with the intention that people do not adhere to any religion, which is based on the belief in the One Godhead

Article 4 of the Act Number 1/1965 which is the same with Article 156a of the Criminal Code contains provisions concerning criminal acts punishable by imprisonment for a maximum of five years, is divided into two categories. The first is the category of criminal acts against abusing or desecrating religion either done verbally, through writing or through action, and secondly, it is a criminal act for a person who commits an act or an invitation not to adhere to any religion based on the belief in the One Supreme God.

In the elucidation of article 156a letter (a) it is stated that the provisions for acts that are categorized as hostile, abusing or blaspheming religion by word of mouth, writing or actions must be based on the intention to be hostile or insulting. Thus, scientific and objective speech or writing about a religion accompanied by efforts to avoid words which are insulting, or hostile is not a crime.

As for the explanation of article 156a letter (b) describing a criminal act with a maximum penalty of five years in prison for those who invite others not to have any religion, this criminal act is punishable because it is considered as disturbing the peace of other religious people, in addition to betraying the first precepts of Pancasila.

According to Juhaya S. Praja, Article 156a has a close relationship with Article 156. By quoting the opinion of the judges of the Purwakarta District Court Sunarto and A. Sumantri, Juhaya said that article 156 is characterized with generality about feelings of hostility, hatred and humiliation. While article 156a is specific about acts of blasphemy, therefore the elements contained in article 156a must meet three (3) elements namely; a) intentionally; b) in public (inhet openbaare); and c) blasphemy against religion.

When viewed from a maqāṣid perspective, the provisions of article 156a constitute the attempt of the government to punish acts that are categorized as madarat, namely acts that are hostile, abuse or desecrate a religion adhered to in Indonesia. In addition, madarat acts that are subject to punishment are actions that aim to prevent people from adopting any religion, which is based on the belief in God Almighty. The efforts of this State fall into the category of *ḥifẓ al-dīn min jānib al 'adam*.

***Hifz al-Dīn* in Act Number 39/1999 on Human Rights**

Act Number 39/1999 was enacted during the Government of President Bacharuddin Jusuf Habibie (Habibie) and was ratified by Habibie on September 23, 1999. This Act is basically inspired by the 1945 Constitution, especially those relating to the issue of equal rights for all citizens in law and government, including the right to freedom of religion and to worship according to their religion and belief.

In order to carry out the mandate of the 1945 Constitution, the People's Consultative Assembly of the Republic of Indonesia (MPR RI) made the decree of the MPR RI Number XVII/MPR/1998 concerning Human Rights. In addition, the MPR RI has assigned State High Institutions and all Government Apparatuses to respect, to uphold and to disseminate an understanding of human rights to the entire community and to immediately ratify various United Nations instruments on Human Rights, as long as they do not conflict with Pancasila and the 1945 Constitution of the Republic of Indonesia.

The rationale for the formation of this act, as found in its explanation, is as follows:

- 1) God Almighty is the creator of the universe and everything in it;
- 2) Basically, humans are endowed with a soul, form, structure, ability, will and various facilities by their Creator, to ensure the continuation of their life;
- 3) To protect, maintain, and improve human dignity, it is necessary to recognize and protect human rights, because without this, humans will lose their nature and dignity, so that they can encourage humans to become wolves for other humans (*homo homini lupus*);
- 4) Because humans are social creatures, one human right is limited by another human right, so that freedom or human rights are not without limits;
- 5) Human rights should not be taken away by anyone and under any circumstances;
- 6) Every human right contains an obligation to respect the human rights of others, so that in human rights there are basic obligations;
- 7) Human rights must be truly respected, protected, and enforced, and for that the government, state apparatus, and other public officials have the obligation and responsibility to ensure the implementation of respect, protection and enforcement of human rights.

For these reasons, the MPR RI made MPR Decree Number XVII/MPR/1998 concerning Human Rights which contains the need to establish an act on Human Rights. This it is the MPR RI who initiated the enactment of Act Number 39/1999 with the philosophical consideration concerning the importance of human rights besides sociological and political reasons.

The provisions on religious freedom contained in the Act Number 39/1999 read as follows:

Article 4 of the Act Number 39/1999 explains that:

“The right to life, the right not to be tortured, the right to freedom of person, thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person and equal before the law, and the right not to be prosecuted on the basis of retroactive law are human rights that cannot be reduced under any circumstances and by anyone.”

It is explained in the above article that the right to religion cannot be reduced "under any circumstances" including in a state of war and in an state of emergency, neither it is reduced "by anyone," either the State, the Government or members of the community. Even in the case of serious violations of human rights, including the violation of the right to freedom of religion, it is classified as crimes against humanity whose punishment can be prosecuted on the basis of retroactive law.

The right to freedom of religion is also contained in the Fifth Chapter on the Right to Personal Freedom in Article 22, which reads:

- 1) “Everyone is free to embrace his own religion and to worship according to his religion and belief.
- 2) The state guarantees the freedom of everyone to embrace his religion and belief.”

Article 22 of the Act Number 39/1999 talks about personal freedom of religion which includes the right to freedom of religion and belief according to one's own beliefs. In addition, it is also explained that the freedom of a person to worship according to his religion and belief is guaranteed by the State.

Freedom to worship according to one's own religion is also given to children as contained in Article 55 of the Act Number 39/1999, as follows: "Every child has the right to worship according to his religion, to think, to express according to his intellectual level and age under the guidance of parents and or guardians.”

Hifz al-Dīn in the Act Number 12/2005 concerning Ratification of the International Covenant on Civil and Political Rights (ICCPR Treaty)

The ICCPR (International Covenant on Civil and Political Rights) is an international covenant on civil and political rights which was ratified by the United Nations on December 16, 1966 and started into force on March 23, 1976. The ICCPR was ratified in Indonesia in the Act Number 12/2005 which was ratified in October 28, 2005 by President Susilo Bambang Yudoyono.

The content of religious freedom found in the ICCPR Treaty is almost the same as that found in the Act Number 39/1999. Both talk about religious freedom includes freedom to choose beliefs, adhere to religion and manifest it in worship,

practice, teaching, freedom to choose religion for children according to their beliefs, the right not to be discriminated against in religious matters and religious rights for minorities.

Freedom of religion in Article 18 of the ICCPR Treaty is red as follows:

Paragraph (1): Everyone has the right to freedom of thought, conscience and religion. This includes freedom to profess or choose a religion or belief of his choice, and freedom, either individually or in community with others, either in public or private, to manifest his religion or belief in worship, organization, observation and teaching."

Paragraph (2): "No one can be forced to interfere with his freedom to adhere to or choose his religion or belief according to his choice."

Paragraph (4): "The States Parties to the present Covenant undertake to respect the liberty of parents and, where recognized, legal guardians, to ensure that the religion and morals of their children conform to their own beliefs."

Article 24 paragraph (1) explains that every child has the right to be protected and not discriminated against, including based on religion, as follows:

"Every child has the right to have the right to the necessary protective measures because of his status as a minor towards his family, society and the state, without discrimination based on race, colour, sex, language, religion, national or social origin, wealth or birth."

In article 26 it is explained that all people have the same position before the law and are entitled to legal protection and without discrimination on any basis including on the basis of religion, as follows:

"All persons are equal before the law and are entitled to equal protection of the law without any discrimination. In this regard the law shall prohibit any discrimination, and ensure equal and effective protection for all against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, wealth, birth or other status."

Finally in article 27, it is explained about the equal rights for minority groups to practice their religion and their existence cannot be denied, as follows:

"In countries where ethnic, religious or linguistic minorities exist, the right of the people belonging to such minorities shall not be denied in society, together with other members of their groups, to enjoy their own culture, to implement and practice their religion themselves, or to use their own language."

From the description above, it can be said that conceptually, the laws and regulations in Indonesia have given equal rights to every Indonesian citizen to choose his belief and worship according to his religion and belief. However, the freedom to choose a belief is limited by the obligation of every citizen to believe in the only one God which is limited to six religions recognized by the government. This is not the same as Wahbah al-Zuhayli's opinion on religious

freedom (*ḥifẓ al-dīn*) in terms of freedom of belief (*aqīdah*) as a region of the heart, where a person may be religious or even non-religious.

Table I
***Ḥifẓ al-Dīn* Provisions in Indonesian law**

| Constitution/ Law | Provision of <i>Ḥifẓ al-Dīn</i> |
|----------------------|---|
| 1945 Constitution | Article 28E paragraph (1): everyone is free to embrace religion and worship according to his religion; Article 28E paragraph (2) has the right of citizens to freedom to believe in beliefs according to their conscience; Article 28I paragraph (1): religious rights cannot be reduced under any circumstances. Article 29 paragraph (1): The state guarantees the freedom of every resident to embrace his own religion and to worship according to his religion and belief. |
| PNPS Act | Giving freedom to embrace religion and worship to citizens as stated in Article 29 of the 1945 Constitution of the six (6) religions recognized by the government and the other religions that exist in Indonesia, however, for adherents of a belief system, they are guided to choose a religion recognized by the government |
| HAM Act | Article 4: The right to religion... is a human right that cannot be reduced under any circumstances and by anyone; Article 22 paragraph (1) Everyone is free to embrace their own religion and to worship according to their religion and beliefs; Article 22 paragraph (2) The state guarantees the freedom of everyone to embrace his religion and belief. |
| ICCPR Treaty | Article 18 paragraph (1): "Everyone has the right to freedom of thought, conscience and religion"; Article 18 paragraph 2: "No one can be forced to interfere with his freedom to adhere to or choose his religion or belief according to his choice." Article 24 paragraph (1): Religion and morals of children are according to their beliefs; Article 26: There is no discrimination in religion; Article 27: religious minorities must not be denied to practice and practice their own religion. |

Reconstruction of Religious Freedom (Ḥifz al-Dīn) in Indonesian Law: The Value of Maqāsid al-Syarīah

Common benefit and justice are the goals of the maqāsid. Ibn Ashur¹ as quoted by Al-Raysūnī, divides the purpose of māqāsid into two parts. First is maqāsid al-shari'a al-'āmmah, namely the meanings or pearls of wisdom set by Shari' (Allah) in all provisions of Islamic law. The common benefit is to yield benefit, reject evilness, uphold justice for all humans and maintain the continuity of regulations. Second is Maqāsid al-shari'a al-khassah, namely realizing useful human goals and maintaining the common benefit in their specific actions. Both common and specific maqāsid aim to perpetuate the benefit by maintaining it with the potential of reason, action and other natural potentials in which they live.²

While Al-Fasi³ interprets maqāsid al-shari'a as the goal of shari'a and the secret placed by Allah in each of His laws, Al-Raysūnī⁴ interprets maqāsid al-shari'a with the objectives set by shari'a for the benefit of the servant (humans). Al-Qaradhawī⁵ argues that maqāsid al-shari'a is the goal achieved through applying religious texts and particular laws in human life either in forms of orders, prohibitions or permission for individuals, families, congregations and people. Al-Zuhaily, quoting al-Khadimi's opinion, said, "Maqāsid as the five principles of Islam, namely, guarding religion, soul, mind, lineage and property". Meanwhile, al-Zuhaylī⁶ himself in his book mentions that maqāsid al-shari'a is a number of meanings or targets the shari'a has to be achieved. From some of those opinions, a conclusion can be drawn that maqāshid al-shari'a or the purpose of the existence of shari'a determined by God is possible in the form of the benefit of mankind, justice, wisdom or the preservation of the five basic rights of humans be it religion, soul, mind, lineage or property.

The purpose of *maqāsid al-shari'a* has been practised and exemplified by the Prophet when he became the leader of religion and state in Medina and it was also stated in the Medina Charter. Muhammad Hamidullah who quotes Ibn Hisham's text "Al-Sirah al-Nabawiyah" in full has divided the Medina Charter into 47 articles.⁷ Of the 47 articles, Zainal Abidin Ahmad classifies it into 10 chapters, namely the establishment of a Nation-State, human rights, religious

¹ Muḥammad Ṭāhir Ibnu 'Āsyūr, *Maqāshid Al-Syarīah Al-Islamiyyah*, Dar al-Nafais, 2001.

² Ahmad Al-Raysūnī, *Naẓariyyāt Al-Maqāšid 'Inda Al-Imām Al-Shāḥībī*, Herndon, Virginia: Al-Ma'had al-'Alamī li al-Fikr al-Islāmī, 1995.

³ 'Alal Al-Fāsī, *Maqāšid Al-Sharī'ah Al-Islāmiyyah Wa Makārimuhā*, 5th ed., Rabat: Dār al-Gharb al-Islāmī, 1993, p. 6.

⁴ Al-Raysūnī, *Naẓariyyāt Al-Maqāšid 'Inda Al-Imām Al-Shāḥībī*, p. 7.

⁵ Yusuf Qardawi, *Fiqh Maqasid Syari'ah*, Jakarta: Pustaka al-Kautsar, 2006, p. 13.

⁶ Wahbah Al-Zuhaylī, *Uṣul Al-Fiqh Al-Islami*, Damaskus: Dar al-Fikr, 1998, p. 1045.

⁷ Ahmad Sukardja, *Piagam Madinah Dan UUD 1945: Kajian Perbandingan Tentang Dasar Hidup Bersama Dalam Masyarakat Yang Majemuk*, Jakarta: UI Press, 1995, p. 45.

unity, unity of all citizens, minority groups, the duties of citizens, protecting the state, state leadership, politics of peace, and lastly a concluding remark.⁸

Some of the principles upheld by the Prophet in regulating religion in Medina emphasize the principles of equality of all citizens with the concept of Ummah,⁹ referring to all residents in Medina including both Muslims and Jews as contained in Articles 16, 24 and 35 and 46 of the Medina Charter. After being amended during the prophet's life, the concept of Ummah develops by not only including Muslim and Jewish groups but also Zoroasters in the Tratie agreement. Furthermore, during Umar's time, the concept of ummah develops again by including the Zimmis, namely all religions other than Islam that existed at that time and were not hostile to Islam in the "Zimmi Pacts."¹⁰ They all have the same rights and status as citizens, both majority and minority groups.

In addition to the equal rights and position of all citizens of all religions and ethnicities in Medina, they also have freedom of religion. The Medina Charter contains personal rights and freedoms to determine one's religion as stipulated in article 25 (2) of the Medina Charter: "Jews are free to embrace their religion just as Muslims are free to embrace their religion." This article applies to the Jews of Bani al-Najjar, Bani al-Harith, Bani as-Saidah, Bani Aus, and Jewish beliefs. In fact, this article is spiritually similar to the spirit of the Qur'an, Surah al-Kafirun 1-6.¹¹

The freedom of religion in Indonesian legislation includes freedom to choose religion, to worship and to express religion as regulated in the 1945 Constitution, the Human Rights Law and the ICCPR Law. However, the PNPS Law posits a paradox where it gives freedom to choose beliefs and worship according to their beliefs but it is limited to six religions recognized by the government, namely Islam, Christianity, Catholicism, Buddhism, Hinduism and Confucianism and other religions such as Judaism, Zoroastrianism, Shintoism, and Taoism are fully guaranteed as provided by Article 29 paragraph 2 as long as it does not violate religious blasphemy or violate the provisions of the six recognized religions.

However, Article 1 of the PNPS Law provides an explanation of the different positions of mystical bodies/schools since the government tries to channel them towards a healthy view and towards the One Supreme God. This is in accordance with the provisions of the M.P.R.S. No. II/MPRS/1960, appendix A., Field I, point 6. Therefore, when Article 1 of the PNPS Law seems to negate

⁸ Zainal Abidin Ahmad, *Piagam Nabi Muhammad SAW.*, Jakarta: Bulan Bintang, 1973, p. 21-30.

⁹ Zainal Abidin Ahmad, p. 21.

¹⁰ Zainal Abidin Ahmad, p. 106.

¹¹ M. Tohor Zahiri, *Negara Hukum: Suatu Studi Tentang Prinsip-Prinsipnya Dilihat Dari Segi Hukum Islam Dan Implementasinya Pada Periode Madinah Dan Masa Kini*, Jakarta: Bulan Bintang, 1992, p. 122.

the belief system and directs its followers to choose one religion from the religions recognized by the government, it can be understood as injustice from a law used as a reference in religious life. In its development, although those related to the administration of Beliefs are regulated in the Population Administration Law, Article 61 paragraph (2) and Article 64 (2) and Law Number 24 of 2013 Article 64 (5), which stipulates that for residents whose religion is not yet recognized based on the provisions of laws and regulations or for believers, their religion column is not filled in but is still served and recorded in the population database. However, if they do not state their beliefs, they will be considered godless or atheists and open the opportunity to be punished using the PNPS Law.¹²

Following Elizabeth S. Hurd¹³ who divides religion into three categories of religious forms in the context of their relationship with the state, namely expert religion, lived religion and governed religion, those six religions the government has recognized are included in the Governed Religion category which is constructed by those with political and religious power to determine a belief as a religion or not a religion. Meanwhile, Judaism, Zoroastrianism, Shintoism, Taoism and other living religions are considered as Lived Religion, for it is practised by both individuals and society every day in various authorities, rituals, texts and things that make them feel alive in the world. While local mystical belief is not considered a religion, its adherents are required to choose a religion from the six religions recognized by the government.

Therefore, according to Burhani,¹⁴ it is actually the government that determines whether or not a religion is recognized in Indonesia. Even with the concept of freedom of religion that exists in Indonesia, Marsudi Utoyo argues that the State actually gives limited freedom because even though the state makes the basis for religious freedom as stipulated in the 1945 Constitution Article 28E, in reality, the state limits religious freedom with policies and its derivative rules and especially at the level of its implementation.¹⁵

In the perspective of *maqāṣid al-shari'ah*, it is important to consider the extent to which the law on religious freedom in Indonesia, especially that contained in the PNPS Law provides benefits for all citizens, justice and the fulfilment of religious rights. It means that when the PNPS Law gives unequal rights to all citizens, particularly to adherents of a local belief, it seems that the PNPS Law needs to be reconstructed, especially at the level of its implementation related to the local belief and lived religion while considering the values that live in the Indonesian nation.

¹² "Pelanggaran Terhadap Minoritas Agama Di Indonesia," n.d.

¹³ Hurd, *Beyond Religious Freedom: The New Global Politics of Religion*, p. 8–9.

¹⁴ Ahmad Najib Burhani, "When Muslims Are Not Muslims: The Ahmadiyya Community and the Discourse on Heresy in Indonesia", University of California, 2013.

¹⁵ Utoyo, "Kebebasan Beragama Yang Terbatas," 2013, p. 583-92.

Reconstruction is carried out through several steps. The first is to conduct a study of the divine dimension in existing religions (lived religions) such as Ahmadiyya and other beliefs in an objective and wise manner. The second is to expand the political meaning of the religions that exist in Indonesia beyond those six religions in order to give equal rights to all existing religions and beliefs which recognize the existence of God. The third is to make the values of justice, the benefit of people and the fulfilment of human rights as goals in religious life as similar goals of *maqāṣid al-sharī'a*, in addition to the values contained in Pancasila.

Conclusion

The freedom of religion contained in the legislation in Indonesia includes the freedom to choose one's belief (Belief in One Supreme God), perform worship and express religion in daily life. This freedom is in accordance with the opinion of Ibn 'Āsyūr regarding *hurriyyah al-i'tiqadat*. Besides that, it is also in accordance with al-Zuhail's opinion about *al-hurriyyah fī al-dīn* in terms of freedom of worship. However, it is not in accordance with al-Zuhaylī's opinion about freedom of belief, because for Al-Zuhaylī freedom of belief is understood as freedom to choose religion or even leave it.

According to the *maqāṣid al-sharī'a* which aims to create the benefit of the people, justice, wisdom and the fulfilment of basic human rights, freedom of religion in Indonesia seems less appropriate in terms of the restrictions contained in the PNPS Law, where the State classifies religions into recognized religions, existed religions and beliefs that are considered non-religious. This classification creates an unfair distribution of religious rights for citizens in its implementation by giving more rights to the six recognized religions recognized. Thus, it is important to reconstruct the law and values of religious freedom contained in the PNPS Law with the values of *maqāṣid al-sharī'a*, in addition to the values of Pancasila.

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