

THE REFORMULATION OF PANCASILA CONSTITUTIONAL STATE: *MAQÂSHID AL-SYARÎ'AH'S* PERSPECTIVE

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Abstract: This study focuses on how *maqâshid al-syarî'ah* (sharia objectives) correlates with the reformulation of Pancasila constitutional state concept. Specifically, it aims at proving and explaining the relevance of *maqâshid al-syarî'ah* with the reformulation of Pancasila constitutional state concept. This study uses a qualitative research method that is based on theoretical-philosophical approach. Data were collected using documentary study techniques and were analyzed using qualitative content analysis techniques. The findings of this study indicate that the concept of Pancasila constitutional state has certain characteristics of constitutional state. The values and doctrines embedded in Pancasila are the state fundamental principles of Indonesia as well as the basic ideology of the state. In Islamic law perspective, the concept of Pancasila constitutional state has its substantial basis in *maqâshid al-syarî'ah*. This study proves that the concept of Pancasila constitutional state is theoretically valid and substantively connected to *maqâshid al-syarî'ah*, which includes justice (*al-'adl*), affection (*al-rahmah*), public interest (*al-mashlahah*), wisdom (*al-hikmah*), and the five objectives (*al-maqâshid al-khamsah*).

Keywords: Pancasila; rule of law; Pancasila's rule of law; *maqâshid al-syarî'ah*; *al-mashlahah*.

Abstrak: Penelitian ini berfokus pada bagaimanakah relevansi *maqâshid al-syarî'ah* dengan reformulasi konsep Negara Hukum Pancasila. Penelitian ini bertujuan membuktikan dan menjelaskan relevansi *maqâshid al-syarî'ah* dengan reformulasi konsep Negara Hukum Pancasila. Dalam penelitian ini diterapkan metode riset kualitatif berbasis pendekatan teoritis-filosofis, yang dalam pengumpulan datanya menggunakan teknik studi dokumenter; dan data dianalisis dengan teknik analisis isi secara kualitatif (*qualitative content analysis*). Temuan penelitian ini menunjukkan bahwa konsep Negara Hukum Pancasila memiliki ciri dan karakteristik Negara Hukum *plus* nilai-nilai dan kaidah-kaidah yang terkandung dalam Pancasila sebagai dasar negara dan ideologi bangsa Indonesia; dan dari perspektif hukum Islam, konsep Negara Hukum Pancasila punya basis substantif *maqâshid al-syarî'ah*. Penelitian ini menyimpulkan bahwa konsep Negara Hukum Pancasila terbukti valid dan otentik menurut sudut pandang teori *maqâshid al-syarî'ah* dan substansi *maqâshid al-syarî'ah*, yang meliputi *al-'adl*, *al-rahmah*, *al-mashlahah*, *al-hikmah*, dan *al-maqâshid al-khamsah*.

Kata kunci: Pancasila; negara hukum; negara hukum Pancasila; *maqâshid al-syarî'ah*; *al-mashlahah*.

Introduction

According to Adnan Buyung Nasution, since 1945, Pancasila has been developing into a complex doctrine or worldview that is different from other worldviews.¹ Meanwhile, Ahmad Syafi'i Maarif stated that Pancasila is a contemplative reflection of Indonesia's socio-historical heritage formulated in five principles.² Pancasila is a noble

moral agreement for Indonesians. The birth of Pancasila and its development in the early period cannot be separated from the process of the birth of Indonesia as a new country. This implicitly means that the birth of an independent Indonesia is identical with the birth of Pancasila.³

The issue of Pancasila constitutional State has long been discussed and debated in various

¹ Adnan Buyung Nasution, *Aspirasi Pemerintahan Konstitusional di Indonesia: Studi Sosio-Legal atas Konstituante 1956-1959*, (Jakarta: Pustaka Utama Grafiti, 2009), p. 63.

² Ahmad Syafi'i Maarif, *Islam dan Masalah Kenegaraan:*

Studi tentang Percaturan dalam Konstituante, (Jakarta: LP3ES, 1996), p. 144.

³ Ahmad Syafi'i Maarif, *Islam dan Masalah Kenegaraan:...*, p.145

academic and scientific research forums. Arief Hidayat's⁴ study, for example, views that Pancasila constitutional State has several characteristics, namely (i) it is a family-principle based state, (ii) it is a state with certainty and justice, (iii) it is a religious nation-state, and (iv) it integrates law as the means of social change and the reflection of society's culture. Sarip's study⁵ concluded that the characteristics of Pancasila constitutional state lie within the constructed state's law that was based on the five principles of Pancasila. Meanwhile, Janpatar Simamora's⁶ study, taking account of the content of the fourth paragraph of the 1945 Constitution's Preamble, conveys that the meaning of law state as referred by Article (1) paragraph (3) of the 1945 Constitution is Pancasila constitutional State.

There has been a consensus which presumes the concept of Indonesian law state is different from both *rechtstaat* and *law state* in general. The concept of Indonesian law state has certain characteristics that are based on the spirit and soul of Indonesia as a nation (*volkgeist*), namely Pancasila. Despite the characteristics of Pancasila based Indonesian law state (Pancasila constitutional state) have been identified and formulated, the concept of Pancasila constitutional State has not been implemented and institutionalized properly.

In regard to the issue of *maqâshid al-syarî'ah* and its correlation with constitutional political issues, there are several important studies need to be reviewed. Yusof Ismail,⁷ for example, argued that *maqâshid al-syarî'ah* is a comprehensive concept covering all aspects of human life. He further explained that through *maqâshid al-syarî'ah*'s framework the governance of social enterprises can be flexibly managed and focused toward

better performance. Naupal⁸ concluded that the implementation of the six principles of *maqâshid al-syarî'ah* in Islamic education system summoned every agent of Islamic education to position itself within an interconnected system to achieve similar goals, despite the application of different methods. Ahmad Imam Mawardi⁹ emphasized that *maqâshid al-syarî'ah* is an essential component in developing reliable solutions to solve the problems of Islamic law for Muslim minorities in Western countries.

Abdul Aziz¹⁰ argues that the theory of *maqâshid al-syarî'ah* can be employed as the theoretical basis for state administration formulations based on either universal Islamic values, local traditional practices, or foreign cultural elements that will not contradict with universal Islamic values. According to M. Tahir Azhary¹¹, the concept of *mashlahah mursalah* (undesigned public interest), which is the conceptual basis of *maqâshid al-syarî'ah* theory, is very useful in applying the principles of Islamic nomocracy in Indonesian context. In this regard, the concept of Pancasila constitutional law certainly needs to be studied from an Islamic point of view, namely the *maqâshid al-syarî'ah* theoretical approach. This study is crucial due to the fact that some parties still contradict the concept of Indonesian law state with Sharia (Islam). This study intends to prove whether the current reformulation of Pancasila constitutional state is compatible or incompatible with the theory of *maqâshid al-syarî'ah*, which in turn can prove whether the concept of Pancasila constitutional state is 'shar'îy' or 'Islâmy' (in accordance with Islamic law).

Method

The object of this research is the Pancasila constitutional state in the perspective of *maqâshid*

⁴ Arief Hidayat, *Negara Hukum Berwatak Pancasila*, (Jakarta: MKRI, 2017), p. 3.

⁵ Sarip, "Kemajemukan Visi Negara Hukum Pancasila dalam Misi Hukum Negara Indonesia", *Jurnal Refleksi*, vol. 2, no. 2 (April 2018), p. 110-123.

⁶ Janpatar Simamora, "Tafsir Negara Hukum dalam Perspektif UUD 1945", *Jurnal Dinamika Hukum*, vol. 3, no. 2 (2014), pp. 547-559.

⁷ Yusof Ismail, et.al., "Good Governance of Social Entrepreneurship with Wasatiyyah from Maqasid al-Shari'ah", dalam *Journal of Education and Social Sciences*, vol. 6, (February 2017).

⁸ Naupal, "The Reconstruction of Islamic Education in Indonesia Through Maqasid Shari'ah of Jaseer Auda", *Journal Al-Ulum*, vol. 17, no. 2, (December 2017).

⁹ Ahmad Imam Mawardi, "The Urgency of Maqasid al-Shari'ah Reconsideration in Islamic Law Establishment for Muslim Minorities in Western Countries", *International Journal of Innovation, Creativity and Change*, vol. 12, no. 9 (2020).

¹⁰ Abdul Aziz, *Chiefdom Madinah: Salah Paham Negara Islam*, (Jakarta: Pustaka Alvabet dan LaKIP, 2011), p.370.

¹¹ Muhammad Tahir Azhary, *Negara Hukum: Suatu Studi tentang Prinsip-Prinsipnya Dilihat dari Segi Hukum Islam, Implementasinya pada Periode Negara Madinah dan Masa Kini*, (Jakarta: Penerbit Kencana, 2007), p.267.

al-syarî'ah. The issue of Pancasila constitutional state in the perspective of *maqâshid al-syarî'ah* determines the compatibility or incompatibility of Pancasila constitutional state with Islamic law. In turn, it affects the possibility of widely Muslim acceptance toward this concept. This research is qualitative in nature as it uses qualitative data that is obtained through library materials and online information sources. This research is also a normative-doctrinal legal research with a theoretical-philosophical approach because it focuses on concepts, supposition upon the rule of law related to law state, Pancasila constitutional state, and *maqâshid al-syarî'ah*. The research data were collected through documentary study techniques. Documentary study technique is applied to explore the main theories and concepts that form the research framework, as well as obtain information about the theoretical dynamics and the dynamics of law state implementation, Pancasila constitutional state, and *maqâshid al-syarî'ah*. The data were analyzed by applying 3 (three) stages of analysis, namely data reduction, data display, and data verification. In addition, qualitative content analysis techniques is also applied.

Result and Discussions

1. The discourse of *Maqâshid al-Syarî'ah* Theory

Terminologically, *maqâshid al-syarî'ah* is defined by many scholars in different expositions. Each definition emphasizes different points. However, most definition incorporates certain values and concepts namely wisdoms and meanings,¹² secrets,¹³ goals,¹⁴ explications,¹⁵ motives or abstract

reasons,¹⁶ and *mashlahah*¹⁷ (public interests) embedded in the rules and norms that have been set by Allah and His Messenger. *Maqâshid al-syarî'ah* is inherently instilled concepts in the Islamic legal system. Therefore, in Islamic legal system, *maqâshid al-syarî'ah* occupies a very important position in the discovery and formulation of legal norms.

The chronological-historical discussion of the *maqâshid al-syarî'ah* concept usually begins with the presence of al-Juwaynî (d. 478 H), an important figure popularly known as Imâm al-Haramain. After his appearance, the idea of *maqâshid al-syarî'ah* began to be conceptualized in an evolutionary-progressive manner through the thoughts of al-Juwainî (d. 478), al-Gazâlî (d. 505 H), al-Râzî (d. 606 H), al-Âmidî (d. 631 H), 'Izz al-Dîn ibn 'Abd al-Salâm (d. 660 H), al-Qarâfî (d. 684 H), al-Thûfî (d. 716 H), Ibn Taimiyah (d. 728 H), Ibn Qayyim al-Jauziyyah (d. 751 H), al-Zarkashî (d. 794 H), and al-Shathibî (d. 790 H).

The idea of *maqâshid al-syarî'ah* is one of the important remarks of al-Juwaynî's theoretical perspective upon Islamic law, particularly when he talks about *al-ta'îl* (the indication of determinant cause/'illat) on the basic teachings of *al-syarî'ah*. In this regard, according to al-Juwaynî,¹⁸ certain matters can be used as 'illat (determinant cause), including (i) something that is essential (*dharûrî*); (ii) something that has become general needs/necessities (*hâjah 'âmmah*); (iii) something related to ethics (*makramah*). Furthermore, al-Juwaynî emphasized that the highest and most important goal of *al-sharî'ah* is *jalb al-mashalih wa dar' al-mafâsid* (captivating advantage/benefit and preventing disadvantage/harm). According to him, this goal is *qath'î* (definite).¹⁹

¹² See Muḥammad Thâhir ibn 'Ashûr, *Maqâshid al-Sharî'ah al-Islâmiyyah*, (Qâhîrat: Dâr al-Salâm, 2006); Ḥammâdî al-'Ubaydî, *al-Shâthibî wa Maqâshid al-Sharî'at*, (Bayrût: Dâr Qutaybah, 1992); Wahbah al-Zuhaylî, *Ushûl al-Fiqh al-'Islâmî*, (Dimashq: Dâr al-Fîkr, 1989); Nur al-Dîn ibn Mukhtâr al-Khâdimî, *'Ilm Maqâshid al-Sharî'ah*, (Tûnis: Maktabah al-'Abîkan, 2013); and Muḥammad ibn Sa'd al-Yûbî, *Maqâshid al-Sharî'ah al-Islâmiyyah wa 'Alâqatuhâ bi al-'Adillat al-Syar'iyyah*, (Riyâdh: Dâr al-Hijrah, 1998).

¹³ See 'Allâl al-Fâsî, *Maqâshid al-Sharî'ah al-Islâmiyyah wa Makârimuhâ*, (Rabâth: Dâr al-Garb al-Islâmî, 1963).

¹⁴ See Ḥmad al-Raysûnî, *Nazhariyyat al-Maqâshid 'inda al-Imâm al-Syâthibî*, (Riyâdh: al-Dâr al-'Âlamiyyat li al-Kitâb al-Islâmî, 1995); Ismâ'îl al-Husaynî, *Nazhariyyat al-Maqâshid 'inda Muḥammad Thâhir ibn 'Ashûr*, (Harandûn: al-Ma'had al-'Âlamî li al-Fîkr al-Islâmî, 1995); dan 'Abd al-Ḥamid al-Najjâr, *Maqâshid al-Sharî'ah bi Ab'âd Jadîdah*, (Bayrût: Dâr al-Garb al-Islâmî, 2008).

¹⁵ See Fathî al-Duraynî, *Maqâshid al-Mukallafîn 'inda al-'Ushûliyyîn*, (Riyâdh: al-Dâr al-'Âlamiyyat li al-Kitâb al-Islâmî, 1995).

¹⁶ See 'Abd al-Rahmân Zayd Ibrâhîm al-Kaylânî, *Qawâ'id al-Maqâshid 'inda al-Imâm al-Syâthibî*, ('Ammân: al-Ma'had al-'Âlamî li al-Fîkr al-Islâmî, 2000).

¹⁷ See Yûsuf Ḥamid al-'Âlim, *al-Maqâshid al-'Âmmah li al-Sharî'ah al-Islâmiyyah*, (Riyâdh: al-Dâr al-'Âlamiyyat li al-Kitâb al-Islâmî, 1994); dan Mushthafa ibn Karâmatillah Makhdûm, *Qawâ'id al-Wasâ'il fi al-Sharî'ah al-Islâmiyyah*, (Riyâdh: Dâr Isbîliyyâ, 1998).

¹⁸ 'Abd al-Malik ibn 'Abdillah al-Juwaynî, *al-Burhân fî Ushûl al-Fiqh*. Taḥqîq 'Abd al-'Azḥîm al-Dîb, (al-Manshûrat: Dâr al-Wafâ', 1992); and Hishâm Sa'd al-Azhhar, *Maqâshid al-Sharî'ah 'ind al-Imâm al-Haramayn wa Âtharuhâ fi al-Tasharrufât al-Mâliyyah*, (Riyâdh: Maktabat al-Rushd, 2010).

¹⁹ Muḥammad Thâhir ibn 'Ashûr, *Maqâshid al-Sharî'ah al-Islâmiyyah*, p.202; dan Muḥammad ibn Sa'd al-Yûbî, *Maqâshid al-Sharî'at al-Islâmiyyah wa 'Alâqatuhâ bi al-'Adillat al-Syar'iyyah*, p.391.

Meanwhile, al-Ghazâlî (d. 505 H)²⁰ emphasized that the objectives of *al-syarî'ah* include 5 (five) basic protection, namely (i) protection toward religion (*hifzh al-dîn*), (ii) protection toward soul (*hifzh al-nafs*), (iii) protection toward mind (*hifzh al-'aql*), (iv) protection toward offspring (*hifzh al-nasl*), and (v) protection toward wealth (*hifzh al-mâl*). The five basic protections were later called as *al-dharûriyyât al-khams*. The above five objectives are in the position of *al-dharûrât* (essential needs); the highest position of *mashlahah* which is the core of *maqâshid al-syarî'ah*. What comes after the position of *al-dharûrât* is *al-hâjât* (necessity), which is something that is not *darûrah*. Then, it is followed by the position of *al-tahsînât wa al-tazyînât* (tertiary necessities) which is occupied by something that is neither *al-dharûrât* nor *al-hâjât*; something in the form of goodness, virtue, beauty and convenience in habitual practices and relationships/interpersonal relationships.

Al-Ghazâlî's idea of five basic protections then influenced one of his students, Fakhr al-Dîn Muḥammad al-Râzî (d. 606 H), to put forward the goals of *al-sharî'ah* at the highest level (*al-dharûrât*), which includes *al-dharûriyyât al-khams*, although al-Râzî mentioned a different hierarchical order in mentioning *al-dharûriyyât al-khams*. In addition, he also used the term '*al-nasb* (descendants) instead of *al-nasl*'.²¹ After al-Râzî, al-Âmidî (d. 631 H) proposed the novelty aspect of the increasingly formed *maqâshid al-syarî'ah* concept, namely combining the discussion of *maqâsid* levels (the trilogy of *al-dharûrât*, *al-hâjât*, and *al-tahsînât*) with the discussion of *al-tarjîhât*.²²

The theory of *maqâshid al-syarî'ah* was more mature when al-'Izz ibn 'Abd al-Salâm (d. 660 H)²³ came up with the idea of classifying *maslahah* with various points of view, including *maslahah dunyawiiyyah* and *maslahah ukhrawiiyyah*, *maslahah haqîqiyyah* and *majâziyyah*. Regarding al-'Izz ibn

'Abd al-Salâm's thought, in his research, 'Umar ibn Salih ibn 'Umar²⁴ concluded that through an analysis of the sub-concept of *jalb al-mashâlih wa dar' al-mafâsid*, he reconstructed a number of legal maxims which are very important, namely (i) *tahshîl mashlahah al-wâjib awlâ min daf' mafsadah al-makrûh* (actualizing the advantage/benefit of obligatory cases is more prioritized than preventing the disadvantage/harm of displeased cases); (ii) *tasharruf al-wulât wa nuwwabuhum bimâ huwa al-ashlah li al-mawliyyi 'alaih* (the policy of leaders and officials is something that brings the most benefit to the people); (iii) *lâ yuqaddam fî ayy wilâyat illâ aqwa al-nâs bi jalb mashâlihîhâ wa dar' mafâsidihâ* (the appointment of leaders should not be prioritized except for those who are most steadfast in realizing *mashlahah* and preventing *mafsadah*); (iv) *lâ yajûzu ta'thîl mashâlih saddaqaha al-gâlib khaufan min wuqu' mafâsid kadhhabahâ al-nâdir* (*mashlahat* that is justified by common practices should not be ignored because of certain concerns about the occurrence of *mafsadat* (harm) which is considered as rare occurrences); (v) *hifzh al-ba'dh awlâ min tadyî' al-kull* (maintaining some matters is more important and preferable than neglecting/ignoring the matter entirely); (vi) *hifzh al-mawjûd awlâ min tahshîl al-mafqûd* (protecting something that exists is more important than realizing something that doesn't exist); (vii) *tahammul akhaff al-mafsadatain daf'an li 'a'zhamihimâ* (carrying out a lighter burden of disadvantage/harm is necessary because it prevents the occurrence of a heavier harm); (viii) *daf' al-dharar awlâ min jalb al-naf'* (preventing harm is more important than captivating benefit); and (ix) *al-'ashl fî al-amwâl al-tahrim mâ lam yatahaqqaq al-sabab al-mubîh* (the most considerable reason in wealth matter is it's unlawful status prior to the existence of lawful proof/cause that allows it).

After the death of al-'Izz ibn 'Abd al-Salâm, then came al-Qarâfî (d. 684 H) who have contributed significant growth and development toward the formulation of *maqâshid al-syarî'ah* theory. According to al-Qarâfî,²⁵ the essence of

²⁰ Abû Hamid Muḥammad al-Ghazâlî, *al-Mustashfâ min 'Ilm al-Ushûl*, (Riyâdh: Mu'assasat al-Risâlah, 1997), p. 417.

²¹ Fakhr al-Dîn Muḥammad al-Râzî, *al-Mahshûl fî 'Ilm Ushûl al-Fiqh*, (Bayrût: Mu'assasat al-Risâlah, 1992).

²² Sayf al-Dîn 'Alî al-Âmidî, *al-Ihkâm fî Ushûl al-Ahkâm*, (Riyâdh: Dâr al-SHamî'î, 2003).

²³ 'Izz al-Dîn 'Abd al-Azîz ibn 'Abd al-Salâm, *Qawâ'id al-Ahkâm fî Mashâlih al-Anâm*, (Qâhirat: Maktabat al-Kulliyât al-Azhariyyat, 1994), p.12.

²⁴ 'Umar ibn Sâlih ibn 'Umar, *Maqâshid al-Sharî'ah 'ind al-Imâm al-'Izz ibn 'Abd al-Salâm*, ('Ammân: Dâr al-Nafâ'is, 2003), p.520.

²⁵ Shihâb al-Dîn 'Abû al-'Abbâs 'Ahmad al-Qarâfî, *Kitâb*

Islamic law can be divided into 2 (two) kinds of dimensions, namely (i) *maqâshid*, a dimension that intrinsically contains *mashlahah* and *mafsadah* content; and (ii) *wasâ'il*, a dimension that represents the path/media/conduit that leads to the realization of *maqâshid*. Regarding the innovative idea of al-Qarâfî, the study of Mâjid Muḥammad al-Tharâwanat concluded that al-Qarâfî often expresses *maqâshid al-syarî'ah* with the expression of *jalb al-mashâlih wa dar' al-mafâsid* and he introduces 3 (three) levels of *maqâshid* consisting of (i) *al-dharûrât*, (ii) *al-hâjât*, and (iii) *al-tatîmmât*. Moreover, he also names the five elements of *al-dharûrât* level as *al-kulliyât al-khams* (the five general goals of *al-sharî'ah*).

After al-Qarâfî, al-Thûfî (d. 716 H) appeared with his controversial concept of *mashlahah*. In al-Thûfî's²⁶ perspective, the core concept of *maqâshid al-syarî'ah* is *ri'âyat al-mashlahah* which includes *tahshîl al-mashlahah* (realization of advantages/benefits) and *nafy al-dharar* (preventing or nullifying harm and disadvantages). According to al-Thûfî,²⁷ the highest and strongest *syara'* postulates are *al-nashsh* and *al-ijmâ'*. He further explained that if there is a conflict between *al-nashsh* and *al-ijmâ'* on one hand and *ri'âyat al-mashlahah* on the other, then *ri'âyat al-mashlahah* should be prioritized through *al-takhshîsh* and *al-bayân* methods. This point of view, proposed by al-Thûfî, was considered controversial by the *usûlî* scholars, both in his time and after his death.

After the phenomenal al-Thûfî, came Ibn Taymiyah (d. 728 H). Regarding Ibn Taymiyah's thoughts, al-Badaw's²⁸ study concluded that Ibn Taymiyah did not agree with the limitation of *maqâshid* classification in the form of trilogy which incorporates *al-dharûriyyah wa al-hâjiyyah*

wa al-tahsîniyyah. According to Ibn Taymiyah, the classification of *maqâshid* may include other concepts other than the aforementioned trilogy.

Another notable scholar who came after Ibn Taymiyah is Ibn Qayyim al-Jauziyyah (d. 751 H)²⁹ who presented the discussion of *maqâshid al-syarî'ah* under the subject of "changes in law due to changes in situation, location, conditions, customs, and intentions" (*taghayyur al-fatwâ wa ikhtilâfihâ bi asab taghayyur al-azminah wa al-amkinah wa al-ahwâl wa al-'awâ'id wa al-niyyât*). Ibn Qayyim al-Jauziyyah theorizes that the construction of Sharia stands firmly on the foundation of *hikmah* and *mashlahah* for human life, both in this world and in the hereafter. According to Ibn Qayyim al-Jauziyyah, justice (*al-'adl*), compassion (*al-rahmah*), *al-mashlahah*, and *al-hikmah* are the basic goals of Sharia, as well as the main elements of *maqâshid al-syarî'ah*.

After Ibn Qayyim al-Jauziyyah, al-Zarkashi (d. 794 H)³⁰ appeared. He views that one of the techniques for determining 'illat (determinant cause) is *al-munâsabah* (which is sometimes referred by different terms, including *al-ikhâlâh*, *al-mashlahah*, *al-istidlâl*, and *ri'âyat al-maqâshid*). He further explains that the attempt to identify it is called *takhrîj al-manâth*. In his analysis of *al-munâsabah*, al-Zarkashî argues that through inductive analysis of the *Shara'* laws it can be concluded that the *Shara'* laws are linked and bound by *mashlahah*, which is the essence of *maqâshid al-syarî'ah*.

The theoretical-conceptual idea of *maqâshid al-syarî'ah* became phenomenal with the appearance of al-Shâthibî (d. 790 H) who discussed and analyzed the concept of *maqâshid al-syarî'ah* in depth. According to al-Shâthibî³¹, the various legal obligation of *Shara'* lead to the creature-oriented goals that will not exceed from 3 (three) types of goals, namely *darûriyyah*, *hajiyyah*, and *tahsîniyyah*. In this regard, al-Shâthibî identifies

al-Furûq au Anwâr al-Burûq fî Anwâ' al-Furûq, (Qâhirah: Dâr al-Salâm, 2001), p. 450.

²⁶ Najm al-Dîn Abû al-Rabî' Sulaymân al-Thûfî, *Kitâb al-Ta'yîn fî Sharḥ al-'Arba'in*, Tahqîq 'Aḥmad Ḥâj Muḥammad 'Uthmân, (Bayrût: Mu'assasat al-Rayyân, 1998), p. 237. See Also Najm al-Dîn Abû al-Rabî' Sulaymân al-Thûfî, *Sharḥ Muktaşhar al-Rawdhah*, Tahqîq 'Abdullah 'Abd al-Muḥsin al-Turkî, (Riyâdh: Wizârat al-Shu'ûn al-Islâmiyyah wa al-'Awqâf wa al-Da'wat wa al-Irshâd, 1998), p. 207.

²⁷ Najm al-Dîn Abû al-Rabî' Sulaymân al-Thûfî, *Kitâb al-Ta'yîn fî Sharḥ al-'Arba'in...*, p. 238.

²⁸ Yûsuf Aḥmad Muḥammad al-Badawî, *Maqâshid al-Sharî'ah 'ind 'Ibn Taymiyah*, ('Ammân: Dâr al-Nafâ'is, 1999), p. 263.

²⁹ Ibn Qayyim al-Jauziyyah, *I'lam al-Muwaqqi'in 'an Rabb al-'Âlamîn*, (Riyâdh: Dâr Ibn al-Jauzî, 2002), Juz ke-4, p. 337.

³⁰ Badar al-Dîn Muḥammad al-Zarkashî, *al-Baḥr al-Muḥith fî Ushûl al-Fiqh*, (Kuwayt: Wizârat al-Awqâf wa al-Shu'ûn al-Islâmiyyah, 1998), p. 206.

³¹ Abû Ishâq Ibrâhîm al-Shâthibî, *al-Muwâfaqât fî Ushûl al-Sharî'ah...*, p.17.

darûriyyah as something that cannot be omitted. It is essential for the establishment of all *mashlahah*, which includes (i) protection toward religion, (ii) protection toward soul, (iii) protection toward reason, (iv) protection toward offspring, and (v) protection toward assets. Meanwhile, *hajiyyah* is identified as something that is needed, which provides flexibility and eliminates difficulties. In this instance, if this *hajiyyah* is not fulfilled, there will be difficulties or burdensome matters. However, it will not reach the level of causing potential damage to all general benefits. *Tahsîniyyah*, on the other hand, is defined as the form of doing good things according to general habits and avoiding bad things according to common sense, all of which are represented by noble ethics.

Muhammad Abû Zahrah³² is of the view which perceives that the essence of *maqâshid al-syarî'ah* is *al-mashlahah al-haqîqiyah* (definite and real *mashlahah*) that is always embodied in *nass* (sacred text).

Meanwhile, Yûsuf al-Qaradawî³³ enriched the theoretical content/concept of *maqâshid al-syarî'ah* by offering an idea stating that the most important aspect of *maqâshid al-syarî'ah* is *maqâshid 'âmmah ra'îsiyyah*, which includes (i) providing convenience, (ii) justice, (iii) devotion to God, (iv) preaching, and (v) referring to human nature. Moreover, Yûsuf al-Qaradawî³⁴ proposed a convincing way to find out *al-maqâshid al-shar'iyyah*. First, examine each 'illat (both *manshûshat* and *gair mansûsat*) in the text of al-Qur'an and al-Hadith. Second, study and analyze particular laws to conclude the meaning of the integration results of the particular laws being studied. Jasser Auda³⁵ argues that the traditional classification of *maqâshid* in the form of *darûriyyah* category has drawn criticism from contemporary Islamic legal experts for some reasons, which include its individualistic scope, inability to reach

universal norms/values, limited people can be covered by these goals, and exclusively based on *fiqh* literature with limited concern upon the sacred texts of Islamic law. In this instance, contemporary Islamic jurists initiated a new classification of *maqâshid* to nullify the aforementioned limitations. The idea of the new classification of *maqâshid* is the manifestation of the experts' views to reform and modernize Islamic law. In this new concept, the *maqâshid* structure is described as a multidimensional structure, where the level of need, the scope of rules, the scope of people, and the degree of universality are valid dimensions that cover both the new paradigm and its classification.

This study adopts the theory of *maqâshid al-syarî'ah* that was proposed by al-Shâhibî. Moreover, the idea of Yûsuf al-Qaradawî and Jasser Auda are also employed to achieve a more comprehensive understanding.

2. The Theoretical Perspective of Constitutional State

Sarja³⁶ stated that there are 6 (six) forms of constitutional state in history, namely (i) Islamic nomocracy, (ii) European-continental legal state (*rechtsstaat*), (iii) Anglo-Saxon constitutional state, (iv) socialist legal state, (v) International Commission of Jurist's constitutional state, and (vi) Indonesian constitutional state, namely Pancasila constitutional state.

According to Immanuel Kant, "constitutional state" is enforced by 3 (three) fundamental principles, namely (i) separation of powers, (2) protection of human rights, and (iii) order and security. On the other hand, Friedrich J. Stahl views that the concept of "constitutional State" or "*rechtsstaat*" incorporates 4 (four) important elements, namely: (i) protection of human rights; (ii) power sharing; (iii) constitutional based government; and (iv) state administrative court.³⁷

Albert Venn Dicey views that the concept of constitutional state or the rule of law is based upon 3 (three) important elements, namely: (i)

³² Muhammad Abû Zahrah, *Ushûl al-Fiqh*, (Qâhirah: Dâr al-Fikr, 1990).

³³ See Jasser 'Audah, *Maqâshid al-Sharî'ah 'inda al-Qaradawî*, (Doha, Qatar: Multaqa al-Imâm al-Qaradawî, 2007).

³⁴ Yûsuf al-Qaradawî, *Dirasat fî Fiqh Maqâshid al-Sharî'ah bain al-Maqâshid al-Kulliyyah wa al-Nushûsh al-Juz'iyyah*, (Qâhirah: Dâr al-Shurûq, 2008).

³⁵ Jasser Auda, *Maqâshid al-Sharî'ah as Philosophy of Islamic Law: A Systems Approach*, (London & Washington: International Institute of Islamic Thought, 2007), pp. 246-247.

³⁶ Sarja, *Negara Hukum: Teori dan Praktek*, (Yogyakarta: Thafa Media, 2016), p. 37.

³⁷ See Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia*, (Jakarta: Sekretariat Jenderal dan Kepaniteraan MK-RI, 2006).

law supremacy, (ii) equality before the law, and (iii) fair and just law process.³⁸ In addition, according to Scheltema, constitutional state stands on a foundation of (i) protection of human rights, (ii) legal certainty, (iii) equality before the law, (iv) democracy, and (v) public service. Meanwhile, Paul Scholten argued that constitutional state is formed through 3 (three) foundations, namely (i) limitation of power, (ii) legal bases, and (iii) protection of human rights.

Meanwhile, Henry William Rawson Wade emphasized that the concept of constitutional state is built on the basis of 5 (five) principles, namely (i) law based government, (ii) independent and impartial judiciary, (iii) legal bases, (iv) government and citizen power balance, and (v) power limitation. Franz Magnis Suseno supports the opinion that constitutional state has some main elements including (i) law based government, (ii) independent judiciary, and (iii) protection of human rights. The International Commission of Jurist stated that there are 3 (three) important characteristics of constitutional state, namely (i) the state must obey the law, (ii) the government respects individual rights, and (iii) the existence of independent and impartial judiciary.³⁹

Meanwhile, John Locke stated that in constitutional state concept, power and governance should be carried out based on legitimate laws and regulations. For John Locke, the important elements of constitutional state are (i) people-legitimacy based government, (ii) setting up citizen's welfare as the main aim of government, and (iii) law based governance.⁴⁰

Baron de Montesquieu argues that in constitutional state, separation and power balance between legislative, executive, and judicial is very essential. Montesquieu further noted that if legislative and executive power are owned by the same party, there will never be freedom; it is a tyranny.⁴¹ Thus, for Montesquieu, constitutional

state exists with the main support of power separation.

According to Jimly Asshiddiqie,⁴² the determinant factor of power's administration is norm or law. Therefore, the term nomocracy is closely related to the idea of law sovereignty or law principles as the highest authority. The idea of constitutional state was built through developing legal apparatus as a functional and just system. It is developed by arranging the superstructure and infrastructure of political, economic, and social institutions in an orderly manner. It is also fostered by building a rational and impersonal legal culture and awareness in society, nation, and state. For this reason, the legal system needs to be built (law making) and enforced (law enforcing) as it should be, starting with the constitution as the law which holds the highest position. In order to ensure the upholding of the constitution as the supreme law, a Constitutional Court should be formed and functioned as the guardian and the ultimate interpreter of the constitution.

Yusril Ihza Mahendra⁴³ argued that the rule of law was built on the basis of 4 (four) principles, namely: (i) limitation and distribution of state and government power (spreading van de macht), (ii) protection of human rights, (iii) authoritative judiciary that is independent and free from government interference, (iv) government actions must always be in accordance with the law (legaliteit beginsel), both written and unwritten, known as the principles of good governance (algemene beginselen vanbehoorlijk bestuur). Meanwhile, Muhammad Tahir Azhary,⁴⁴ taking inspiration from the Islamic legal system, offered an idea that the characteristics of a good constitutional state encompassing 9 (nine) principles, namely: (i) the principle of power as a mandate, (ii) the principle of deliberation, (iii) the principle of justice, (iv) the principle of equality, (v) the principle of recognition and protection of

³⁸ Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia...*, (2006).

³⁹ Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia...*, (2006).

⁴⁰ Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia...*, (2006).

⁴¹ Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia...*, (2006).

⁴² Jimly Asshiddiqie, *Gagasan Negara Hukum Indonesia*, (unpublished paper).

⁴³ Yusril Ihza Mahendra, *Modernisme dan Fundamentalisme dalam Politik Islam: Perbandingan Partai Masyumi (Indonesia) dan Partai Jamā'at-i-Islāmī (Pakistan)*, transl. Mun'im A. Sirry, (Jakarta: Paramadina, 1999), p.2.

⁴⁴ Muhammad Tahir Azhary, *Negara Hukum:...*, p.64.

human rights, (vi) the principle of free judiciary, (vii) the principle of peace, (viii) the principle of welfare, and (ix) the principle of people's obedience. Meanwhile, Jimly Asshiddiqie offers 13 (thirteen) main principles of constitutional state, namely: (i) law supremacy, (ii) equality in law (equality before the law), (iii) the principle of legality (due process of law), (iv) restriction of power, (v) independent mixed organizations, (vi) independent and impartial judiciary, (vii) administrative court, (viii) constitutional court, (ix) protection of human rights, (x) democratic (demokratische rechtsstaat), (xi) functioning as a means of realizing the goals of the state (welfare rechtsstaat), (xii) transparency and social control, (xiii) believing in One God.

In 2019, the World Justice Project (WJP) released the 2019 WJP Rule of Law Index Report. In WJP's view, the concept of constitutional state is perceived as a legal system, institutions and society that always stands firmly based on the following 4 (four) universal principles. First, the principle of accountability, which means that government and non-government parties are responsible before the law. Second, fair and just law, where laws and regulations are clear, published, stable, applied indiscriminately, and protect fundamental rights, including individual security, engagements/agreements, property, and human rights. Third, open government, in which the processes of establishing, structuring and enforcing laws and regulations are easy to access, fair and efficient. Fourth, the process of handling disputes are impartial and easy to access, i.e. the judiciary is carried out in a timely manner by neutral, independent, ethical, and competent officials. The judiciaries are easily accessible, have adequate resources, and reflect the composition of the community they serve.⁴⁵

The four universal principles explicated by the WJP on constitutional state were then developed into 9 (nine) factors called as the WJP's constitutional state Index. The nine factors are (i) limitation of government power, (ii) absence of corruption, (iii) open government, (iv) fundamental rights, (v) order and security, (vi) enforcement of

regulations, (vii) civil justice, (viii) criminal justice, and (ix) informal law.⁴⁶

In 2018, the Indonesia Legal Roundtable (ILR) launched a research report entitled "2017 Indonesian constitutional state Index". ILR initiated the concept of constitutional state Index that is based on 5 (five) principles, namely (i) government obedience to the law, (ii) formal legality, (iii) independent judiciary, (iv) access to justice, and (v) human rights. Each of these principles is then elaborated in a number of various indicators. The principle of government obedience to the law, the principle of an independent judiciary, and the principle of human rights have a central position for the 3 (three) indicators of the constitutional state.⁴⁷

Referring to various ideas and thoughts on the constitutional state that have been discussed above, based on a synthetic-integrative framework, it can be identified that there are 5 (five) main elements of constitutional state, namely (i) limitation of state power, (ii) law supremacy, (iii) legal bases (iv) independent judiciary, and (v) protection of human rights.

3. The Concept of Pancasila Constitutional State based on *Maqâshid al-Syarî'ah*

Pancasila has the position as well as the function of *philosophische grondslag, weltanschauung, staatsfundamentalnorn, staatsidee* and *rechtidee* for Indonesia as a state.⁴⁸ Indonesia, in establishing its constitutional state is based on the legal ideals (*rechtsidee*) of Pancasila. According to Mochtar Kusumaatmadja, the purpose of Pancasila based law is to provide protection for humans positively and negatively. Negative protection means passive protection carried out through preventing arbitrary actions. While positive protection means actively creating fair social conditions so that every human can get equal opportunity⁴⁹. It is also meant to

⁴⁶ World Justice Project, *Rule of law...*, (2019).

⁴⁷ Indonesia Legal Roundtable, *Indeks Negara Hukum Indonesia Tahun 2017*, (Jakarta: Indonesia Legal Roundtable, 2018).

⁴⁸ A. Hamid S. Attamimi, *Peranan Keputusan Presiden Republik Indonesia dalam Penyelenggaraan Pemerintah Negara: Suatu Studi Analisis Mengenai Keputusan Presiden yang Berfungsi Pengaturan dalam Kurun Waktu Pelita I– Pelita IV*, (Jakarta: Universitas Indonesia, 1990).

⁴⁹ Arif Bernard Sidharta, *Refleksi tentang Struktur Ilmu*

⁴⁵ World Justice Project, *Rule of law Index 2019*, (USA: World Justice Project, 2019).

provide equal opportunity to develop the full potential of its citizen. The basis of constitutional state according to Pancasila, among others, is the recognition of God's law, natural law and ethical law. In addition, the position and relationship of the 3 (three) laws can be arranged in one holistic framework together with the state and positive law.⁵⁰

In Yudi Latif's⁵¹ view, despite the fact that our constitution has undergone several changes since the Proclamation, in the Preamble of 1945 constitution, it is emphasized that our independence should be based on Pancasila, which contains five interrelated precepts. Moreover, Yudi Latif views that the five precepts have a strong ontological, epistemological, and sociological basis, as well as relevant historic, rational, and actual dimensions.

According to Moh. Mahfud MD,⁵² in its position as the basis and undisputed state ideology, Pancasila must be used as a paradigm (frame of thought, source of values, and directional orientation) for legal development. Therefore, the concept of Pancasila constitutional state should assign Pancasila as a framework of thought, a source of values and orientation for state administration, apart from other necessities to fulfil the general requirements of a constitutional state.

According to Azhary⁵³, the concept of Indonesian constitutional state has met the requirements of the *rechtsstaat* or constitutional state, providing that the formula of "Law Based State" is more appropriate, in which the main elements are (i) the law is based on Pancasila, (ii) people's sovereignty, (iii) constitutional system, (iv) equality before law and government, (v) independent judicial power, (vi) the power of administering laws rests upon the President and the legislative body (DPR), and (vii) the adoption of MPR system. The concept of "Law Based State" is a type of welfare state that is in line with the ideals of Pancasila State that

aims to: (i) protect the entire land of Indonesia as a nation, (ii) promote general welfare, (iii) educate the nation's life, and (iv) participate in implementing world order based on freedom, eternal peace, and social justice. So, a Law Based State is a Welfare Law State that embodies the ideals of Pancasila. Thus, it can also be called as the Pancasila Constitutional State.

In order to realize the ideals of Pancasila Constitutional State, the above mentioned principles should be regulated in the 1945 Indonesian constitution. In this regard, the Constitution and constitutional state are two entities that cannot be separated. A constitution is the main guarantee to protect citizens from arbitrary treatment. In a constitutional state system, the Constitution is the most effective apparatus to protect citizens through the concept of constitutional state or *rechtstaat*.⁵⁴ The ideals of constitutional state have been formulated by the founding fathers of the nation in a constitution called 1945 Constitution, particularly the Article 1 Paragraph (3) of the 1945 Constitution (the amended version).

An important sentence in the Article 1 Paragraph (3) of the 1945 Constitution (the amended version) that should be taken into account is "The State of Indonesia is a law state." Meanwhile, the Elucidation of the 1945 Constitution (pre-amendment) states that the Indonesia is based on law (*rechtsstaat*), not based on mere power (*machtsstaat*). The use of the term *rechtsstaat* raises a question of what kind of *rechtsstaat* is adopted by Indonesia and whether the *rechtsstaat* is identical with the European-Continental version of the rule of law concept or not.⁵⁵ According to Muhammad Tahir Azhary,⁵⁶ although the term *rechstaat* is used in the explanation of the 1945 Constitution (pre-amendment), the concept of *rechstaat* adopted by Indonesia is not the concept of a Western (European-Continental) legal state and neither is the concept of *the rule of law* from the Anglo-Saxon countries. Rather, it is the concept of Pancasila constitutional state which has 5 (five) main characteristics: (i)

Hukum, (Bandung: Mandar Maju, 2000).

⁵⁰ Bambang Arumanadi, Sunarto, *Konsepsi Negara Hukum Menurut UUD 1945*, (Semarang: IKIP Semarang Press, 1990).

⁵¹ Yudi Latif, *Negara Paripurna: Historisitas, Rasionalitas dan Aktualitas Pancasila*, (Jakarta: Kompas-Gramedia, 2012), p. 609.

⁵² Moh. Mahfud M.D, *Membangun Politik Hukum, Menegakkan Konstitusi*, (Jakarta: Rajawali Pers, 2017).

⁵³ Azhary, *Negara Hukum Indonesia: Analisis Yuridis-Normatif tentang Unsur-Unsurnya*, (Jakarta: UI-Press, 1995), p.153

⁵⁴ Miriam Budiardjo, *Dasar-Dasar Ilmu Politik*, (Jakarta: Gramedia Pustaka Utama, 2003)

⁵⁵ Azhary, *Negara Hukum...* p. 152.

⁵⁶ Muhammad Tahir Azhary, *Negara Hukum:...*, p.98.

a close relationship between religion and state; (ii) relying on the almighty God; (iii) freedom of religion in a positive sense; (iv) atheism is not allowed and communism is prohibited; and (v) utilizing the principle of kinship and harmony. Muhammad Tahir Azhary confirmed that the main elements of Pancasila constitutional state include (i) Pancasila, (ii) MPR, (iii) constitutional system, (iv) equality, and (v) independent judiciary system. The five main characteristics, in Muhammad Tahir Azhary's view, are based on the basic principle of the first principle of Pancasila, which is believing in One God. With this first principle, Pancasila constitutional state does not only have a special characteristic, but also the most special feature of all constitutional state concepts, both the Western concept (*rechstaat* and *the rule of law*) and the concept called socialist legality.⁵⁷

According to Oemar Senoadji,⁵⁸ the Indonesian state of law matches Indonesian characteristics because Pancasila has been appointed as the main basis and the source of law. In this instance, Indonesian State of Law can also be called Pancasila Constitutional State. In the view of Muhammad Tahir Azhary,⁵⁹ there are two things that need to be considered in Pancasila constitutional State. *First*, religious freedom should refer to a positive meaning so that denying God the Almighty (atheism) or attitudes that are hostile to God the Almighty are not justified, unlike in communist countries that justify anti-religious propaganda. *Second*, there is a close relationship between state and religion, both in an absolute and relative manner. In this regard, Pancasila constitutional State does not recognize the doctrine of separation between religion and state. Thus, religious freedom is one of the most important factors for the concept of Pancasila constitutional State.

Oemar Senoadji⁶⁰ emphasized that the next feature of the Pancasila constitutional State is that there is no rigid and absolute separation between religion and state, but a harmonious relationship

between religion and the state that should be established. Meanwhile, according to Muhammad Tahir Azhary⁶¹, in Pancasila constitutional State, there should be no separation between religion and the state, either absolutely or relatively. This is because the separation would be contrary to Pancasila and the 1945 Constitution. Thus, in the concept of Pancasila constitutional State, the absence of a rigid and absolute separation between religious domain and state domain is a very important factor.

According to Padmo Wahjono,⁶² Pancasila constitutional state must be studied from the starting point of the kinship principle as stated in Article 33 of the 1945 Constitution. In the principle of kinship, the priority is on the people, but human dignity and respect are still taken into consideration. Thus, the principle of kinship is one of the most important factors in the concept of Pancasila constitutional State.

Muhammad Tahir Azhary⁶³ stated that in addition to the principle of kinship, it is necessary to add one more principle, namely the principle of harmony. The two principles (kinship and harmony principles) reflect that Indonesia as a nation and state is unified with the spirit of kinship and harmony in life. Thus, in the concept of Pancasila constitutional State, the principle of harmony occupies a very important factor.

Meanwhile, along with the discourse of constitutional state, the concept of Islamic nomocracy is also introduced. According to Muhammad Tahir Azhary,⁶⁴ "Islamic nomocracy" is a legal state that has general principles in the form of: (i) the principle of power as a mandate, (ii) the principle of deliberation, (iii) the principle of justice, (iv) the principle of equality, (v) the principle of recognition and protection of human rights, (vi) the principle of an independent judiciary system, (vii) the principle of peace, (viii) the principle of welfare, and (ix) the principle of obedience to the citizens. From the constitutional

⁵⁷ Muhammad Tahir Azhary, *Negara Hukum*:... p. 98.

⁵⁸ Oemar Senoadji, *Peradilan Bebas Negara Hukum*, (Jakarta: Erlangga, 1980), p. 24.

⁵⁹ Muhammad Tahir Azhary, *Negara Hukum*:... p. 98.

⁶⁰ Oemar Senoadji, *Peradilan Bebas Negara Hukum*, p. 24.

⁶¹ Muhammad Tahir Azhary, *Negara Hukum*:... p.94.

⁶² Padmo Wahjono, *Konsep Yuridis Negara Hukum Indonesia*, (unpublished paper).

⁶³ Muhammad Tahir Azhary, *Negara Hukum*:... p.102.

⁶⁴ Muhammad Tahir Azhary, *Negara Hukum*:... p. 85.

side, as stated by Moh. Mahfud M.D.⁶⁵, Indonesia is not a religious state (not based on a particular religion) but a religious nation state. In the religious nation state, Islamic law becomes the source or material for law making, so it does not need to be a separate formal law. As a source of law making, Islamic law can be mixed eclectically with other sources of law, such as Western law, customary law, or international law in its universal principles to constitute a formal source of law (statutory regulations) that are *Indonesianistic* (Indonesian based features). This *Indonesianistic* national law is the core of the legal system of the Pancasila constitutional State, a legal system that embodies the plurality of Indonesia as a nation.⁶⁶

Substantively, the Pancasila constitutional state is characterized by the practice of Pancasila's precepts, namely (i) believing in One God. (ii) just and civilized humanity, (iii) the unity of Indonesia, and (iv) Democracy guided by the inner wisdom in the unanimity arising out of deliberations among representatives, and (v) social justice for all Indonesian citizens. These five characteristics constitute a unified and integral unit that inspire the Pancasila constitutional State.

The concept of Pancasila constitutional State rests on 4 (four) factors, namely (i) freedom of religion, (ii) the absence of a rigid and absolute separation between the religious domain and the state domain, (iii) the principle of kinship, and (iv) the principle of harmony. Furthermore, based on conceptual-structural analysis, Pancasila constitutional state is based on 5 (five) main factors or principles, namely the principle of divinity (the Almighty God), the principle of humanity (just and civilized humanity), the principle of unity, (Indonesian unity), the principle of deliberation, (people led by wisdom in deliberation/representation), and the principle of justice, (social justice for all Indonesians).

Oemar Senoadji⁶⁷ argues that the Indonesian state of law incorporates the characteristics of

Indonesia (*Indonesianism*), where Pancasila is the main basis and source of law. Therefore, it can also be called as Pancasila constitutional State. Padmo Wahjono⁶⁸ examines and believes that Pancasila constitutional State emerges from the kinship principle starting point reflected in Article 33 of the 1945 Constitution.

In Muhammad Tahir Azhary's view⁶⁹, the concept of Pancasila constitutional state is different from both the concept of *rechtsstaat* (Europe-Continental) and the concept of *the rule of law* (Anglo-Saxon), which is characterized by: (i) there is a close relationship between religion and the state, (ii) relying on the principle of believing in One God, (iii) the existence of religious freedom in a positive sense, (iv) atheism is not allowed and communism is prohibited, and (v) the principle of kinship and harmony. In the concept of Pancasila constitutional State, Pancasila's position as the important source of law is ensured. Pancasila is valued as the ideal-constitutional basis of every legal product⁷⁰. The concept of Pancasila constitutional State represents a combination of 3 (three) elements, namely Pancasila, national law, and state goals. The basic values instilled in Pancasila are transformed into legal ideals and legal principles which then reconstruct the national law. Pancasila constitutional state requires a harmonious relationship between the government and the people (Indonesian citizen).⁷¹ Meanwhile, M. Ali Taher Parasong⁷² concluded that the concept of Pancasila constitutional State combines the elements possessed by both the concept of *rechtsstaat* and *the rule of law* that are enriched by elements that are unique to Indonesia, namely the precepts of Pancasila.

Such a way of interpretation can reconstruct and reformulate the soul of Pancasila constitutional State which includes the integration of the precept of the Almighty God, the precept of a just and civilized humanity, the precept of the unity of Indonesian, the precept of democracy led by

⁶⁵ Moh. Mahfud M.D., *Membangun Politik Hukum, Menegakkan Konstitusi*, (Jakarta: Rajawali Pers, 2017), p. 141.

⁶⁶ Muhammad Alim, *Asas-Asas Negara Hukum Modern dalam Islam: Kajian Komprehensif Islam dan Ketatanegaraan*, (Yogyakarta: LKIS, 2010).

⁶⁷ Oemar Senoadji, *Peradilan Bebas Negara Hukum*, p. 35.

⁶⁸ Sarja, *Negara Hukum: Teori..*, p. 37.

⁶⁹ Muhammad Tahir Azhary, *Negara Hukum:...*, p.97.

⁷⁰ M. Ali Taher Parasong, *Mencegah Runtuhnya Negara Hukum*, (Jakarta: Grafindo Books Media, 2014).

⁷¹ M. Ali Taher Parasong, *Mencegah Runtuhnya...*, p. 60

⁷² M. Ali Taher Parasong, *Mencegah Runtuhnya...*, p.64.

wisdom in deliberation/ representation, and the precept of social justice for all Indonesians. In addition, the Pancasila constitutional State has a body that is represented in an integrated manner by the principles/factors of (i) limitation of state power, (ii) government obedience to the law, (iii) transparent government, (iv) judicial power independence, (v) access to justice, and (vi) human rights. So, the so-called Pancasila constitutional State is a unity of soul and body.

Benjamin Fleming Intan⁷³ emphasized that through the unique secularization framework within Pancasila constitutional state concept, religion can possibly contribute or even encouraged to contribute to the betterment of the nation, state and society. The First Precept of Pancasila implies that the state is based on the One God, so that religion has a very important role in public life. Substantively, the precept of believing in One God is the spiritual foundation of Indonesia, while the precept of a Just and civilized humanity is its moral and ethical foundations. The principle of the unity of Indonesia, on the other hand, is the social foundation. The percept of democracy Led by Wisdom in deliberation/representation becomes the political reference. Finally, the principle of Social Justice for all Indonesians is regarded as the common goal of the state⁷⁴. Thus, the five precepts are the ethical, moral, and spiritual basis of Indonesia as a state and nation.

In a comprehensive-integral and conclusive manner, the principal elements of the concept of Pancasila constitutional State are (i) limitation of state power, (ii) the rule of law, (iii) the principle of legality (iv) an independent judiciary, and (v) protection of human rights, (vi) believing in the One and Only God, (vii) just and civilized humanity, (viii) the unity of Indonesia, (ix) Democracy Led by wisdom in deliberation/representation, and (x) social justice for all Indonesians.

Historically, we can find that the concept of State of Law has been implemented in Islam, as

concluded by Muhammad Alim.⁷⁵ He stated that the State of Medina is a state of law that implements a democratic *shura* institution, an independent, fair and impartial judiciary, upholds human rights, and has a constitution. Meanwhile, Ahmad Sukardja⁷⁶ emphasized that the Medina Charter, which became the constitution for the State of Medina, contained very advanced (modern) ideas. Inadvertently, the 1945 Constitution contained similar concepts with the contents of the Medina Charter. Thus, substantively, the 1945 Constitution could be considered as Islamic-like constitution.

It is unavoidable that the principle of limiting state power is essential for Pancasila constitutional state because apart from its function to limit the power of the rulers (state apparatus), it is also to realize another special function, which is to achieve maximum efficiency in accordance with the demands of modernity.⁷⁷ The principle of limiting state power is translated practically by: (i) regulating the relationship between government and citizens through laws and policies, (ii) the distribution of power that can guarantee the independence of judicial power, and (iii) the distribution of state power.⁷⁸ With the division of power, power is functionally divided among state apparatuses so that each state apparatus has limited duties and authorities regulated clearly by laws.⁷⁹ The limitation of state power becomes absolute in order to prevent the presence of absolutism, a practice of unlimited state power, which in turn may cause authoritarianism.

In the perspective of *maqâshid al-syar'ah*, the principle of limiting state power has a strong basis. In *shari'ah* view, the power of the state is limited, fundamentally, by the Qur'an and Sunnah. Socio-politically, the power of the state is limited by the rights and freedoms of individual citizen

⁷³ Benjamin Fleming Intan, "Public Religion" and the Pancasila-Based State of Indonesia: An Ethical and Sociological Analysis, (New York: Peter Lang Publishing, Inc., 2008), p. 18.

⁷⁴ Masdar Farid Mas'udi, *Syarah Konstitusi UUD 1945 dalam Perspektif Islam*, (Jakarta: Pustaka Alvabet, 2011).

⁷⁵ Benjamin Fleming Intan, "Public Religion" and the Pancasila-Based State..., p.18.

⁷⁶ Masdar Farid Mas'udi, *Syarah Konstitusi UUD 1945...*, p. 78.

⁷⁷ A. Mukhtie Fadjar, *Negara Hukum dan Perkembangan Teori Hukum, Sejarah dan Pergeseran Paradigma*, (Malang: Intrans Publishing, 2018).

⁷⁸ Alfauzi, Ro'is, Orien Effendi. (2020). "Pembatasan Kekuasaan Berdasarkan Paham Konstitusionalisme", *Jurnal Política*, vol. 7, no. 2 (2020).

⁷⁹ A. Mukhtie Fadjar, *Negara Hukum dan Perkembangan...*, (2018).

who must be protected by the state⁸⁰. According to al-Ghazâlî⁸¹, the power of the state is limited by law through the basis of justice principle. In other words, the limitation of state power is very important for the realization of justice. From the point of view of *maqâshid al-syarî'ah*, "limiting state power" is the manifestation of justice principle, which is the main spirit of *maqâshid al-syarî'ah* itself.

The principle element of law supremacy is fundamental to Pancasila constitutional state. Law supremacy means that the law has the highest power in the country. Both the ruler, the people and the state must all be subject to the law. In relation to Pancasila constitutional State, the principle of law supremacy positions Pancasila as the ideal basis because it contains ideals and values that direct the realization of the law supremacy. With the principle of law supremacy, the dynamics of power in the governance process can be limited and controlled so as not to bulldoze the people's basic rights. The law supremacy ensures the avoidance of power abuse carried out by power holders. Law supremacy is also a normative idea to ensure the realization of equality before the law. Law supremacy places the law in the highest authority as a law or regulation that binds every citizen in realizing justice and truth.

The principle of law supremacy implies that all problems are solved by law as the highest guideline. Jimly Asshiddiqie⁸² argues that in the perspective of law supremacy, the true leader of the state is not human but a constitution that reflects the highest law. Normative recognition of law supremacy is represented in the formulation of laws and/or constitutions.

In the perspective of *maqâshid al-syarî'ah*, the principle of law supremacy can be found based on the principle of *al-'adl* as one of the main elements of *maqâshid al-syarî'ah* itself. In the theory of *maqâshid al-syarî'ah*, there is *mashlahah 'âmmah* concept which contains the meaning of

public interest, society's interest, people's interest, nation's interest, and state interest. Hierarchically, the position of *mashlahah 'âmmah* is the highest hierarchy compared to other variants of *maslahat*. The principle of law supremacy exists to ensure the protection of community's interests and the state because the law exists for the welfare of society and the state.

The basic element of legality principle (due process of law) is an important foundation for Pancasila constitutional state. It is unavoidable that the principle of legality (due process of law), in all its forms, is an absolute prerequisite for the existence of Pancasila constitutional State. According to Jimly Asshiddiqie⁸³, this implies that all government actions must be based on valid and written laws and regulations. Such laws and regulations must exist and be applied prior to preceding administrative actions. Thus, every action or deed must be based on certain rules or procedures (*regels*).

In the perspective of *maqâshid al-syarî'ah*, the principle of legality (due process of law) is a manifestation of justice principle, in which justice is acceptable if the statutory regulation is enacted and the validity is announced prior to taking any action referring to the regulations concerned. Hence, laws and regulations come before the actions that have been regulated by the laws. This is the important meaning of justice. In addition, the principle of legality has a strong relevance to *al-maqâshid al-khamsah*, which means that the principle of legality presents as a form of protection for religion, soul, mind, lineage, and property.

The principle element of independent judicial power underlies the realization of: (i) the independence of judges in hearing and deciding cases; (ii) the independence of judges regarding the management of judges' resources; (iii) the independence of judges regarding institutional policies; and (iv) the independence of judges from the influence of the public and the mass media⁸⁴. Meanwhile, the principle of independent

⁸⁰ 'Abd al-Salâm Muḥammad 'Abd al-Karîm, *al-Tajdîd wa al-Mujaddidûn fî Ushûl al-Fiqh*, (Qâhîrat: al-Maktabat al-Islâmiyyat, 2007).

⁸¹ Abû Ḥamîd Muḥammad al-Ghazâlî, *Iḥyâ' 'Ulûm al-Dîn*, (Bairût: Dâr Iḥyâ' al-Kutub al-'Arabiyyat, 1995), Juz 1.

⁸² Jimly Asshiddiqie, *Gagasan...*, (unpublished paper).

⁸³ Jimly Asshiddiqie, *Gagasan...*, (unpublished paper).

⁸⁴ Indonesia Legal Roundtable, *Indeks Negara Hukum Indonesia Tahun 2017*, (Jakarta: Indonesia Legal Roundtable, 2018).

judicial power is central to the control mechanism indicators. The principle of independent judicial power allows the presence of a check and balance mechanism to work. This principle will control as well as ensure the extent to which the legislative and executive powers have complied with the principal elements of the state of law.

In the perspective of *maqâshid al-syarî'ah*, the principle of independent judicial power is called *sultah qadâ'iyyah*, which is the legal line established by the Quran and Hadith. As it has been stated that the state (leader of the state) is given 3 (three) kinds of authority, namely *sultah tanfidziyyah* (executive authority), *sultah tasyrî'iyyah* (legislative authority) and *sultah qadâ'iyyah* (judicial authority). The principle of independent judicial power is closely related to the concept of *sultah tasyrî'iyyah*. According to Islamic legal theory, especially the *maqâshid al-syarî'ah* theory, the principle of independent judicial power is the manifestation of *hâjiyyah*. An independent judicial power structure must be present in society, nation, and state; without this, injustice and authoritarianism will arise. An independent judicial power structure exists in the context of realizing the *hajiyyah maslahah*. This is the next *maqâshid al-syarî'ah* basis for Pancasila constitutional State index.

The principle element of human rights protection is an important foundation for the construction of Pancasila constitutional State. Most of state of law concepts and theories agree that human right is an integral part that will be protected and achieved by any state of law. It is undeniable that human rights principles are central to substantive indicators of the state of law concept.⁸⁵

Referring to the international human rights legal framework, the assurance of human rights mandated, at least, 3 (three) obligations to the state: the obligation to respect, the obligation to fulfill, and the obligation to protect. This mandate was also adopted, with a different editorial, in the provisions of Article 28I paragraph (4) of the 1945 Constitution. It states that the protection, promotion, enforcement, and fulfillment of human

rights are the responsibility of the state, especially the government. There are at least 48 clusters of rights insured in the 1945 Constitution.

Meanwhile, Islamic law has its own view on human rights. Mohammad Hashim Kamali⁸⁶ confirmed that the concept of human rights is not completely objective and value-free because it is often situated in the context of tradition, public opinion, and culture. Human Rights are actually a set of rights that are inherent in the human natural existence as the creatures of God the Almighty and are His gifts that must be respected, upheld and protected by the state, law, government, and everyone to honor and protect human dignity. The presence of human rights necessitates the existence of Human Rights Obligations, which is a set of obligations that is obligatory for the implementation and the supremacy of human rights.

In the view of Islam, maintaining and appreciating individual rights is as important as maintaining and appreciating the rights of society. The basic rights that humans have are gifts from God that need to be guarded, nurtured, and protected. In the view of Islam, human rights are bestowed by Allah, not by anyone else. Thus, no party or institution on earth has the authority to amend, change, reduce or eliminate the rights that have been bestowed by Allah. Abu A'la Maududi⁸⁷ made a statement that every person has primary human rights just because he is a human being. These rights must be respected and upheld by everyone, anywhere and anytime.

The relevance of *maqâshid al-syarî'ah* with human rights is reflected in the element of five basic protection principles. It includes (i) protection toward religion (*hifzh al-dîn*) in the form of respecting the right to religious freedom, (ii) element of protection toward the soul (*hifzh al-nafs*) in the form of respecting the right to life, (iii) element of protection toward reason (*hifzh al-'aql*) in the form of respecting the freedom of opinion and expression, (iv) elements of protection toward offspring (*hifzh al-nasl*) in the form of

⁸⁶ Mohammad Hashim Kamali, *The Dignity of Man: An Islamic Perspective*, (Kualalumpur: Ilmiah Publishers, 2002).

⁸⁷ Abu A'la Maududi, *Human Rights in Islam*, (Islamabad: Markazi Maktabah Islam, 1982).

⁸⁵ Indonesia Legal Rountable, *Indeks Negara Hukum...*, (2018).

respecting the rights of offspring, and (v) elements of protection toward property (*hifzh al-mâl*) in the form of respecting the property rights.

Baharuddin Lopa⁸⁸ emphasized that the concept of human rights (HAM) in Islam contains certainty, but still maintains flexibility. Meanwhile, Mohammad Hashim Kamali⁸⁹ concludes that the implementation of international human rights norms is of course adapted to the social, cultural, and historical specifics of the country concerned. Moreover, he emphasized that the Islamic view of human rights is not based on the premise of a conflict between individuals/citizens and the nation-state.

The principle of believing in One God is an important foundation for the construction of Pancasila constitutional State. Yudi Latif⁹⁰ emphasized that awareness of God's presence in the life of society, nation and state had been declared in the Preamble of the 1945 Constitution which stated "By the grace of Allah the Almighty". The strong religious stake in the formation of Indonesia as a nation indicates the fact that the nation's founders never imagine a public space that is empty from God. Divinity within the framework of Pancasila reflects the ethical commitment of Indonesians to organize a public-political life based on the values of morality and noble characters. Divinity within the framework of Pancasila resembles the conception of civil religion that involves universal moral values of religions. It signifies the pretension of making the divine moral values as the basis of managing public-political life in the context of a multicultural and multi-religious society; without making one religion (religious element) dictating the state.

God in the framework of Pancasila is an attempt to find common ground in the spirit of mutual-cooperation to provide a strong moral foundation for political life based on the morality taught by God. Within the framework of this search for common ground, Indonesia is not a secular

country that pretends to corner religion into the private sphere. It is mainly because the principle of believing in One God in Pancasila clearly requires the divine values to underlie public-political life. At the same time, the state is also required to protect and support the development of religious life as a vehicle for fertilizing ethical values in public life⁹¹.

The precept of believing in One God contains a number of noble values. *First*, Indonesians express their belief and devotion to God the Almighty. *Second*, Indonesians believe and fear God the Almighty according to their respective religions and beliefs and the basis of just and civilized humanity. *Third*, developing an attitude of mutual respect and cooperation between adherents of religions and adherents of different beliefs towards God the Almighty. *Fourth*, fostering harmony in the life of fellow religious people and other types of beliefs. *Fifth*, religion and other types of beliefs is related to the personal relationship of humans with the Almighty God which they believe in. *Sixth*, developing mutual respect for the freedom to worship according to their respective religions and beliefs. *Seventh*, not to impose a religion and other types of beliefs on others.⁹²

The precept of the Supreme God is the basis that guides the other precepts. The first principle is the guiding principle for the ideals of the Indonesian state. These spiritual and ethical principles provide guidance to the betterment of the people and the nation. By placing the precept of believing in One God as the first precept, the state gains a solid moral foundation. In the Islamic perspective, the concept of believing in One God is none other than what is known as monotheism. This interpretation is not intended to deny the right to live for other religions adopted in Indonesia because monotheism is the deepest and earliest (primordial) belief of all religions in the world.⁹³ Based on this first precept, it is clear that Indonesian cannot be separated from the soul, mind and values of God and monotheism religious based concept.

⁸⁸ Baharuddin Lopa, *al-Qur'an dan Hak-hak Asasi Manusia*, (Yogyakarta: Danabhakti Primayasa, 1996).

⁸⁹ Mohammad Hashim Kamali, *The Dignity of Man: An Islamic Perspective*, (Kuala Lumpur: Ilmiah Publishers, 2002).

⁹⁰ Yudi Latif, *Negara Paripurna: Historisitas, Rasionalitas ...*, p. 55.

⁹¹ Baharuddin Lopa, *al-Qur'an dan Hak-hak Asasi Manusia...*, (1996)

⁹² Mohammad Hashim Kamali, *The Dignity of Man: An Islamic Perspective*, (Kuala Lumpur: Ilmiah Publishers, 2002).

⁹³ Masdar Farid Mas'udi, *Syarah Konstitusi UUD 1945...*, p. 25.

This spiritual dimension of the first precept is associated with Article 29 of the 1945 Constitution which recognizes the existence and independence of religious believers to practice their religious worships freely. According to Hazairin⁹⁴, Article 29 Paragraph (1) of the 1945 Constitution contains a message which signifies that, in the Republic of Indonesia, laws, regulations, and policies should not be contradictory to the principle of one God's existence. The Preamble of the 1945 Constitution also contains the essence of strong divine values. Based on the explanation above, it can be said that Indonesia is a religious Pancasila state, not a secular state that separates or distances divine and religious values from the pulse of national and state life.

In the *maqâshid al-syarî'ah* perspective, the principle of believing in One God goes hand in hand with the concept of *darûriyyat*. Moreover, this principle is in accordance with the doctrine of monotheism as the main foundation of *Sharia*. In accordance with the meaning contained in the concept of *darûriyyah*, it can be said that without the principle of believing in One God, Indonesia will not stand and will fall apart if it loses and ignores this principle of believing in the One God. In the structure of *maqâshid al-syarî'ah* the element of protection toward religion (*hifzh al-dîn*) ensures that religion, which actually contains the principle of believing in One God, is protected and maintained for the sake of the existence of the state itself. Religion is also positioned as the spiritual and ethical basis for the implementation of Pancasila constitutional State. In this context, *sharia* also contains the teachings of tolerance, freedom, and opportunity for adherents of other religions to carry out the teachings of their respective religions⁹⁵. It should also be noted that on the basis of this first principle, the Republic of Indonesia positions itself as neither a secular state nor a religious state, but firmly states that Indonesians recognise the existence of God the Almighty.⁹⁶

The principle of just and civilized humanity is an important foundation for the construction of Pancasila constitutional state. The principle has two dimensions, namely the external dimension, in the form of world peace struggle, participation, and the inward dimension, in the form of glorifying human rights, both as individuals and as a group.⁹⁷ In the Preamble of the 1945 Constitution, this humanitarian commitment is contained in all paragraphs, especially the first and fourth paragraphs. The first paragraph emphasizes the commitment of Indonesians to universal humanity by emphasizing the absolute right to freedom for all nations and their citizens without exception. The second paragraph emphasizes the national struggle for independence, the right to self-determination and the idealization of humanity in the realm of independence. The third paragraph restores human dignity to the nature of equality in the blessing of God's creation, which requires an atmosphere of free national life; and with that, Indonesia declared its independence. The fourth paragraph articulates humanitarian issues to the goals of the state and anchors humanitarian issues toward the state.⁹⁸

In the perspective of *maqâshid al-syarî'ah*, the principle of Just and Civilized Humanity is generally in line with the theory of *maqâshid al-syarî'ah*. This principle emphasizes that the nature and dignity of human beings should be used as a moral reference in formulating and implementing policies for Indonesia as a nation and a state⁹⁹. *Sharia* affirms that the noble status of humans is above all other creatures (Q.S.[17]:70). Therefore, any offences against the spiritual and physical integrity of humans is a serious crime (Q.S. [5]:32). So, glorifying humans is essentially glorifying Allah, the Almighty God. Conversely, humiliating man and humanity is a contempt for the God. With this principle, humans are recognized and treated according to their dignity as the creatures of God the Almighty who are equal in degree, having the

⁹⁴ Hazairin, *Demokrasi Pancasila*, (Jakarta: Tintamas, 1973), p. 18.

⁹⁵ Azhary, *Negara Hukum Indonesia: Analisis Yuridis-Normatif tentang Unsur-Unsurnya*, p.153

⁹⁶ Krissantono, (ed.), *Pandangan Presiden Soeharto tentang*

Pancasila, (Jakarta: Yayasan Proklamasi CSIS, 1980).

⁹⁷ Yudi Latif, *Negara Paripurna: Historisitas, Rasionalitas...*, p. 181.

⁹⁸ Yudi Latif, *Negara Paripurna: Historisitas, Rasionalitas...*, p. 182.

⁹⁹ Masdar Farid Mas'udi, *Syarat Konstitusi UUD 1945...* p. 25.

same basic rights and obligations regardless their ethnicity, lineage, religion and belief, gender, skin color, social status, and so on. In this regard, the principle of justice (*al-'adl*), as the fundamental element of *maqâshid al-syarî'ah*, is strongly relevant with the principle of Just and Civilized Humanity. The presence of *al-syarî'ah* on earth carries the main mission of realizing complete and comprehensive justice to eliminate discrimination. In fact, it can be said that the essence of *al-syarî'ah*'s teachings is justice.

Based on the principles of just and civilized humanity, a culture of love for each other, tolerance (*tepo seliro*), and unarbitrary action towards others is also developed. In this regard, the principle of compassion (*al-rahmah*), as a fundamental element of *maqâshid al-syarî'ah*, is strongly relevant with the principles of just and civilized humanity. With this principle, tolerance should be upheld, while intolerance should be eliminated from all aspects of the pluralistic society's life of the nation.

The principle of the unity of Indonesia also implies that the nature and condition of Indonesia, as a state, must be in accordance with the concept of one, which means absolute. It cannot be divided and separated. Thus, Indonesia is like a person that has its own features, traits and characteristics that should be perceived as a wholistic unity.¹⁰⁰ The principle of the unity of Indonesia, thus, positions the state, the nation, and the territory of Indonesian's homeland as one unit. This principle also means that Indonesian is a unified state that overcomes all groups and individual understandings. It is not a state tahta is based on individualism and class status (*group state*). In the *maqâshid al-syarî'ah* perspective, the principle of the unity of Indonesia is contained in *maqâshid al-syarî'ah*, namely the principles of *al-ukhuwwah* (brotherhood), *al-jamâ'ah* (unity), and *al-ta'âwun* (cooperation), which are important principles of *al-sharî'ah* teachings displayed in the Quran; Q.S. [49]:10, Q.S. [3]:103, Q.S. [49]:13 and Q.S. [5]:2.

The principle of Democracy Led by Wisdom in Deliberation/Representation is an important

foundation for the construction of Pancasila constitutional State. On the basis of this principle, every citizen has the same position, rights and obligations. In exercising their rights, citizens must pay attention to and prioritize the interests of the state and the community. By having the same position, rights, and obligations so that no one will be forced by other parties. The decisions made in deliberation must be morally accountable to the Almighty God, upholding human dignity, valuing truth and justice, prioritizing unity and integrity for the common good. In the perspective of *maqâshid al-syarî'ah*, the principle of democracy and representation is intrinsically contained in the principle of *shûrâ*, which is an important element of *maqâshid al-'âmmah min al-sharî'ah*. Imperatively, the Qur'an emphasizes the importance of implementing *shûrâ* for the sake of social order, as indicated in Q.S. [3]:159 and Q.S. [42]:38. Empirically and historically, the principle of *shûrâ* has been practiced throughout the history of the Prophet SAW. and similarly throughout the history of the *râshidah caliphate*, starting from the election of Abû Bakr al-SHiddîq, 'Umar ibn al-Khaththâb, 'Uthmân ibn 'Affân to 'Alî ibn Abî âlib, as the caliph of the prophet respectively.

The principle of social justice for all Indonesian citizens is an important foundation for the construction of Pancasila constitutional state. With this principle, every Indonesian citizen is required to realize the same rights and obligations to create social justice. In the perspective of *maqâshid al-syarî'ah*, the principle of social justice for all Indonesians is in line with the principle of justice (*al-'adl/al-'adâlah*) which is a fundamental principle in the concept of *maqâshid al-syarî'ah*. In *al-sharî'at* perspective, justice means treating everyone equally without discrimination. Thus, the first element of justice is equality. One of the meanings of the principle of justice is not to treat oneself or someone based on lineage/blood lineage. Justice is related to the rights that are inherent naturally and socially to every individual and groups.

Conclusion

The conceptual formulations of Pancasila constitutional State should be revitalized with

¹⁰⁰ Kaelan, *Filsafat Pancasila: Pandangan Hidup Bangsa Indonesia*, (Yogyakarta: Paradigma, 2009), p. 180.

religious concepts and ideas. In this notion, *maqâshid al-syarî'ah* is strongly relevant to the reformulation of Pancasila constitutional State. These ten elements of the Pancasila constitutional State, in Islamic perspective, is relevantly correlates with *maqâshid al-syarî'ah* basis. Therefore, the reformulation of Pancasila constitutional State has been validated through *shar'î* principles. Thus, it can be said that Pancasila constitutional State is an Islamic legal state entity that ever existed in the contemporary Islamic world.

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