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DIVISION OF COMMON PROPERTY: APPROACH FROM THE SHARIA MAQASHID SYSTEM THEORY BY JASSER AUDA

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ABSTRACT
This article aims to analyze the division of joint property using the theoretical approach of Maqasid al-Shariah system by Jasser Auda. Disparities in the division of joint property persist in judicial decisions in Indonesia. This is due to the absence of a definite legal framework for judges to use as a fundamental basis in their considerations. Additionally, there are factors influencing this phenomenon, including changes in social dynamics, gender equality, and other social issues. This article employs a qualitative research method based on a literature review with the theoretical approach of Maqasid al-Shariah system by Jasser Auda. The research demonstrates that the division of joint property should consider justice and welfare based on comprehensive scientific considerations encompassing economic, social, and customary aspects prevalent in specific societies or cultures.

KEY WORDS
Division, common property, Sharia Maqashid system theory, Jasser Auda.

Marriage, as a fundamental institution in human life, entails a number of obligations, rights, and responsibilities that must be regulated wisely. One aspect that often becomes a source of conflict is the division of joint property. In marriage, joint property refers to the accumulation of assets acquired during the marriage by both spouses. Although often perceived as merely a financial issue, the division of joint property is actually a more complex matter that affects the dynamics of marriage, family welfare, and social values. It is important to remember that the division of joint property is not just about finances but also about justice, empathy, and recognition of each spouse's role in building the family. In an era where gender roles are increasingly converging and marriage is no longer solely about economics.

The division of joint property in the context of divorce is an issue that has significant impacts on individuals and society. This relates to how assets acquired during marriage will be divided between husband and wife when the marriage ends. Over the years, various legal systems have developed different approaches to the division of joint property. Some follow strict equality principles, dividing joint property evenly between husband and wife. Others are more flexible, considering individual contributions to the marriage and other factors that may influence the division.

In recent years, there has been increasing debate about what constitutes a fair and equitable division of joint property. Factors such as gender equality, the dual role of spouses in marriage, and changes in family economic dynamics have influenced how society and legal experts view this issue. In this context, the perspective of Maqasid al-Shariah, a framework of understanding in Islamic law that evaluates the goals and values intended to be achieved by the law, becomes highly relevant. One of the leading thinkers in formulating the perspective of Maqasid al-Shariah is Jasser Auda. Maqasid al-Shariah, as taught by Auda, encompasses important objectives in Islam, including the preservation of religion, life, lineage, intellect, and property. By considering this framework, we can better evaluate and understand how the division of joint property should be conducted in the context of marriage.

This article aims to elucidate and analyze the concept of Maqasid al-Shariah and how this framework can be applied to the division of joint property in marriage. We will delve into how the division of joint property is not only related to meeting the financial needs of

divorcing couples but also to the preservation of moral, social, and cultural values highly esteemed in Islam. In order to better understand how the concept of joint property is applied in various societies, a systems theory approach is a highly useful framework. Systems theory enables us to analyze how elements within the social, cultural, and legal systems interact and influence each other.

METHODS OF RESEARCH

This research utilizes a qualitative research method grounded in a literature review approach with the Maqasid al-Shariah systems theory by Jasser Auda. The article will commence by conducting an in-depth literature review. This involves gathering literature and relevant sources on the concept of joint property, systems theory, and Maqasid al-Shariah. This literature review will aid in understanding the theoretical framework and conceptual framework employed in the research.

This approach will employ qualitative analysis to delve deeper into the concept of joint property within the framework of Maqasid al-Shariah systems theory. It will involve analysis of classical texts, scholars' perspectives, and relevant literature reflecting the views of Maqasid al-Shariah. Additionally, the author will attempt to compare the concept of joint property within the framework of Maqasid al-Shariah systems theory with other approaches, such as traditional family law or positive law. Comparative analysis will help identify similarities, differences, and practical implications of different approaches.

RESULTS AND DISCUSSION

Joint property refers to assets acquired during the course of marriage or within the societal structure. In Javanese culture, joint property is known as "gonogini," a term originating from Javanese customs. Although this concept's terminology originates from Java, similar concepts are known in other regions with different terms, such as "hareuta sihaerukat" in Aceh, "harta suarang" in Minangkabau (West Sumatra), "guba kaya" in Sundanese (West Java), "druwe gabra" in Balinese (Bali), and "barang perpatangan" in Kalimantan (Borneo). According to Professor Van Vollenhoven, Gonogini property divides Indonesia into nineteen customary laws, which are based on differences in the organization of society and community associations.

The nine customary laws, namely Aceh, Tanoh Gayo-Alas and Batak, Minangkabau, South Sumatra, Malay, Bangka and Belitung, Kalimantan (Dayak), Minahasa, Gorontalo, Toraja, South Sulawesi, Ternate Islands, Maluku-Ambon, Irian, Timor Islands, Bali and Lombok, Central and East Java, Swapraja Solo and Yogyakarta, and West Java. Among the many indigenous communities in Indonesia, there are three types of customary kinship systems, namely (Ansyary, 2016):

- Patrilineal kinship system, which is a kinship system where members trace their descent solely through the male line or paternal side continuously upward because of the belief that they originate from a father (origin). Indigenous communities adhering to the patrilineal kinship system include the Gayo community in the Gayo Highlands of Central Aceh, Tapanuli (Batak), Nias, Buru Island, Seram Island, Lampung Pepadun, Bali, and Lombok;
- Matrilineal kinship system is a kinship system where members trace their descent solely through the maternal line continuously upward because of the belief that they all originate from a mother (origin). Communities adhering to the Matrilineal kinship system, such as the Minangkabau community, Kerinci, Semendo, (South Sumatra), Lampung Paminggir;
- Bilateral/Parental kinship system is a kinship system where members trace their descent through both the father's and mother's lines, such as the Aceh and Javanese communities.

Generally, common property in customary law is almost the same throughout Indonesia. What can be considered the same is the limitation of wealth that becomes

common property, while other aspects, especially regarding the continuation of common property itself, differ in each region. Like in Java, the distribution of wealth into personal property and joint marital property after a divorce between husband and wife. Meanwhile, in Aceh, the distribution of wealth into personal property and hareuta seuhaerukat is very important both during divorce and during inheritance distribution if one of the spouses dies (Muhammad, 1965).

Although the distribution of common property in various regions can be said to be almost the same, there are also differences based on the local cultural context of the community. One example where customary law tends not to apply the concept of common property is in the Lombok region, West Nusa Tenggara. According to customary law in Lombok, women who divorce return to their parents' home with only their children and belongings, without receiving rights to common property (Djuniarti, 2017).

From the above exposition, it can be understood that Indonesian society in settling marital wealth still relies on customary law. If this is applied, it can lead to discrimination against women and men. Therefore, there needs to be regulation of marital wealth, especially common property.

The concept of common property originally stems from customary law that has evolved in Indonesia. This concept is subsequently supported by Islamic law and positive law, indicating a fusion of the wealth of the husband and wife in a marriage. In the Marriage Law No. 1 of 1974, Articles 35-37 explain that assets acquired during marriage are considered common property, excluding inheritance and gifted assets. Each inheritance and gifted asset remains under the control of each party unless otherwise stipulated.

The legal basis regarding common property can be traced through the following laws and regulations:

- Article 35 paragraph 1 of the Marriage Law defines common property as "property acquired during the marriage." This means that wealth acquired before the marriage is not considered common property;
- Civil Code Book of Law Article 119 states that "From the moment the marriage is conducted, according to the law, comprehensive common property arises between husband and wife, as long as no other provisions are made in the marriage agreement. This common property, while the marriage persists, cannot be abolished or altered by agreement between husband and wife.";
- Civil Code Book of Law Article 121 mentions that regarding liabilities, common property includes all debts made by each spouse, whether before, during, or after marriage. Thus, common property encompasses assets and liabilities arising from the joint management of spouses;
- Compilation of Islamic Law (Presidential Instruction No. 1 of 1991) Article 85 states that "The existence of common property in marriage does not preclude the possibility of each husband or wife owning separate property." This article has acknowledged the existence of marital property in marriage. In other words, the Compilation of Islamic Law supports the unity of property in marriage (common property), although once united, there is still the possibility of each spouse owning separate property;
- Compilation of Islamic Law Article 86 paragraphs 1 and 2 further states that "basically there is no mingling between the husband's property and the wife's property because of marriage" (paragraph 1). In paragraph 2, it is further emphasized that basically the wife's property remains her right and is fully controlled by her, and likewise, the husband's property remains his right and is fully controlled by him.

From the aforementioned legal bases, it can be understood that common property encompasses all forms of assets and liabilities during marriage, while in the management of common property, husbands and wives have equal rights. Husbands and wives may act regarding common property with each other's consent, unless otherwise stipulated in the marriage agreement as regulated in Article 49 paragraphs 1 and 2 of the Compilation of Islamic Law. If the use of common property is not agreed upon by both parties, such action may be deemed unlawful, as stipulated in Article 92 of the Compilation of Islamic Law, which

states that husbands or wives are not allowed to sell or transfer common property without the consent of the other party.

The Position and Concept of common property, along with all its provisions, are not regulated in Islamic law and are also not found in classical fiqh studies. The issue of common property is a legal issue that was not previously considered by earlier fiqh scholars. This gap arises because the issue of common property has only emerged and been widely discussed in modern times.

Contemporary fiqh studies discuss common property in marriage resulting from a partnership between husband and wife, leading to the mingling of assets that can no longer be distinguished. The legal basis for this is found in the Quran, Surah An-Nisa, verse 32, which states that for all men there is a share of what they have earned, and for all women there is a share of what they have earned. Islamic law also maintains that wealth acquired by the husband during marriage becomes the husband's right, while the wife is only entitled to the maintenance provided by the husband. However, the Quran and Hadith do not provide explicit provisions that all assets acquired by the husband during the marriage are entirely his right, and the wife's rights are limited to the maintenance provided by her husband.

Muhammad Syah, in his perspective on common property, argues that the joint livelihood of husband and wife should fall under the category of mu'amalah, but surprisingly, it is not specifically discussed. This may be because most authors of fiqh books are Arabs who generally do not recognize the joint livelihood of husband and wife. What is known is the term syirkah or partnership. Islamic law regulates the separate ownership of assets between husband and wife as long as it is not stipulated in the marriage contract. Islamic law allows flexibility for married couples to make marriage agreements that ultimately become legally binding. Islamic law grants each spouse, whether husband or wife, the right to individually own property that cannot be interfered with by the other party. A husband who receives gifts, inheritances, and the like has full control over the assets received without the intervention of the wife, and vice versa. Thus, the pre-marital assets owned by each spouse become the individual property of each married couple (Musthofa, 2018).

Epistemologically, the term "positive" is derived from the Latin word "ponere-posui-positus," which means to place. The word "placing" indicates that in positivism, something is already given. In the legal context, this given entity is positive legal sources, which are established by political authorities (Abdullah, 2016).

John Austin (1790-1861), a follower of legal positivism and a renowned English legal scholar known for his teachings in analytical jurisprudence, stated that the sole source of law is the highest authority in a state. Other sources are merely secondary. The source of law is its direct creator, namely the sovereign or the highest legislative body in a country, and all laws stem from this same source. Laws derived from it must be obeyed unconditionally, even if they are perceived as unjust.

Positivism recognizes only one type of law, which is positive law. According to positivism, law is only studied from its external aspects, what emerges for the reality of social life, without considering values and norms such as justice, truth, wisdom, and others that underlie these legal rules; thus, these values cannot be captured by the senses. Because it disregards what lies behind the law, namely values of truth, welfare, and justice that should exist within the law, positivism only adheres to the following principles: (1) Law is the commands of humans. (2) There is no need for a connection between law and morality, between existing law (das sein) and what should be law (das sollen). (3) Analysis of legal concepts that should be continued and must be distinguished from historical research on the causes or origins of laws, and also different from critical evaluation. (4) Decisions (laws) can be logically deduced from pre-existing regulations, without needing to refer to social purposes, wisdom, and morality. (5) Moral judgments cannot be established and maintained by rational reasoning, evidence, or testing (Abdullah, 2016).

The legal positivism movement has strengthened the theory of legalism, which states that there is no law outside the statute, and the statute is the sole source of law (Armia, 2002). According to legalism, the statute is considered complete and clear in regulating all legal matters. Therefore, judges must not do anything other than strictly applying the law as it

is. Thus, according to this theory, law and statutes are considered identical, and what is more important is to ensure legal certainty. Judges are merely seen as automatons, that is, their position is subordinate to the law or only as executors of the law, so judges are not authorized to alter the content of the law. Judges are only authorized to apply legal regulations to concrete events with the assistance of interpretive methods, especially grammatical interpretation, which interprets the meaning of legal provisions according to everyday language (Sutiyoso, 2012).

The division of common property in the Indonesian judicial system that applies legal positivism is generally normative in itself, meaning that it decides and establishes the division of common property as 50/50 for each party without considering who contributed more to the creation of that common property. The advantage of applying legal positivism is that judges in deciding cases of division of common property do not encounter differences in determining the distribution proportion of common property, so judges only focus on examining whether the property is indeed common property or not.

Contra Legem is a judicial decision that disregards existing legal regulations, allowing judges not to use them as the basis for consideration or even to act contrary to statutory provisions as long as these provisions no longer align with societal developments and the sense of justice of the community. Instead, judges make decisions based on their own convictions by carefully and thoroughly examining and analyzing the case according to the evolving law within society.

In the pursuit of justice, judges may act contra legem. This is permitted on the grounds that if a case lacks clear rules or regulations governing a legal issue, judges have the authority to act contra legem. In other words, judges are obligated to delve into, follow, and understand the legal values and sense of justice prevalent in society. This principle aligns with the provisions of Article 28 (1) of Law No. 4 of 2004, supplemented by Article 5 (1) of Law No. 48 of 2009 concerning the Judicial Authority, and the Explanation of Article 30 (1) of Law No. 5 of 2004 concerning the Supreme Court.

Based on the Explanation of Article 28 (1) of Law No. 48 of 2009 concerning the Judicial Authority and Article 5 (1) of Law No. 5 of 2004 concerning the Supreme Court, it is regulated that these provisions are intended to ensure that judicial decisions are in accordance with the law and the sense of justice prevailing in society. In addition, it is added in the general explanation of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) that "the basic law is the written law, while alongside it, in addition to written law, there is also unwritten law." This means that in addition to written law (national law), there is also unwritten law that is alive and evolving in Indonesian society, known as customary law. This customary law is in accordance with the provisions of Article 28 (1) of Law No. 48 of 2009 concerning the Judicial Authority, where judges excavate the law when encountering a problem of absence of rules governing a particular issue. Based on the above principle, Indonesian judges are not allowed to be legalistic, merely serving as a conduit or mouthpiece of the law, although they must always be legalistic. Judicial decisions must serve to promote improvement in society and build social harmony in interactions. Only in this way, according to them, will judicial decisions be correct and fair.

In line with this principle, if existing statutory provisions conflict with the public interest, appropriateness, civilization, and humanity, namely values that are alive in society, then according to Yahya Harahap, judges are free and authorized to take contra legem actions, meaning to issue decisions contrary to the relevant legal provisions (Harahap, 2005).

The implementation of contra legem by judges in deciding a case where there is no regulation or the regulation is unclear is an exercise of progressive law. In the teachings of progressive law, it is not permitted to be overly legalistic in addressing a legal issue. Progressive efforts are needed, which provide benefit and justice to those seeking justice. Judges, who in procedural law are referred to as the mouthpiece of the law, are expected to be progressive by not always assuming that legal certainty will bring justice. The primary goal of seeking a legal rule is justice and benefit; once these are realized, there will no longer be legal issues.

Etymologically, the term "progressive" originates from the word "progress" in English, which denotes advancement. When the terms "law" and "progressive" are amalgamated, it implies that the law should be capable of keeping abreast with societal developments to effectively serve the interests of the community based on the moral aspects of law enforcement resources. In the context of progressive law being associated with legal interpretation, this signifies that progressive interpretation understands the legal process as a liberation process from antiquated concepts unsuitable for addressing contemporary life's demands. The potency (interpretation) of progressive law lies in its ability to reject and dismantle the status quo (Ali, 2013).

The fundamental assumption articulated concerns the perspective on the relationship between law and humans. Herein, the principle is underscored that law is for humans, not vice versa. Law does not exist for its own sake but for something broader and more significant. Therefore, whenever there is an issue within or concerning the law, it is the law that should be reviewed and improved, not humans forced into a legal scheme (Ali, 2013).

Law is not an institution that is absolute and final but heavily relies on how humans perceive and utilize it. Humans are the determinants, not the law. Confronting humans with the law prompts us to make complex choices, but fundamentally, existing legal theories are rooted in both factors. The more a theory shifts towards the legal factor, the more it regards law as something absolute, autonomous, and final. The more it shifts towards humans, the more the theory aims to provide space for human factors (Ali, 2013).

Progressive law does not accept law as an absolute and final institution but is highly determined by its ability to serve humanity. In this thought context, law is always in the process of becoming. Law is an institution that continuously builds and transforms itself towards a higher level of perfection. This quality of perfection can be diversified into factors such as justice, welfare, concern for the people, and so forth. This is the essence of law that is always in the process of becoming "law as a process, law in the making." Law does not exist for itself, but rather it serves humanity (Ali, 2013).

Wawan Andriawan asserts that Pancasila is actually aligned with Sociological Jurisprudence, which is one of the progressive legal theories oriented towards substantive justice (Andriawan, 2022). Progressive law teaches that law is not a sovereign entity but a tool to articulate the foundation of humanity, which functions to bestow grace upon the world and humanity. Progressive law does not seek to turn law into an unscrupulous technology but rather an institution of moral humanity (Andriawan, 2022).

From the aforementioned points, it can be inferred that the underlying assumptions of progressive law are as follows (Andriawan, 2022):

- Existing law is for humans, not for itself;
- Law is always in the status of "law in the making" and is not final;
- Law is an institution of moral humanity and not a conscienceless technology.

Thinking progressively entails daring to depart from the mainstream absolutism of law and instead placing law within the broader context of humanity's issues. Working based on a deterministic legal mindset is indeed necessary. However, it is not an absolute necessity when faced with a problem that employs modern legal logic, as it would undermine humanity's position and truth. Working based on a progressive legal mindset will prioritize the primary factor in law, which is humanity, while in a positivist legal paradigm, the belief is in the law's truth over humanity. Humans can be marginalized as long as the law remains upheld. Conversely, the progressive legal paradigm believes that it is the law that can be marginalized to support the process of human existentialism, truth, and justice (Andriawan, 2022).

Law serves humanity, not itself; thus, the characteristics of progressive law are as follows (Ali, 2013). Firstly, progressive law leads society to a paradigm where the law is aimed at humanity. Law is not the center of legal action, but rather humans are at the center of legal rotation.

Secondly, progressive law does not apply the status quo in legal action. The consequence of applying the status quo in legal matters is that the law becomes the benchmark in all aspects, and humans are subjugated to the law. Such legal action is in line

with positivistic, normative, and legalistic methods where humans cannot change the situation without changing the existing law; in other words, law is merely about regulations. However, progressive law does not rely on legalistic-dogmatic and analytical positivistic principles but rather on sociological or humanitarian principles. The role of humans here is a consequence of the choice not to adhere absolutely to the formal text of a regulation. The important way to overcome stagnation in legal action is to free oneself from the dominance that blindly follows the law. This can be done when human elements or human actions are involved in legal action.

Thirdly, progressive law is biased towards justice that is pro-people. So far, the meaning of justice must be placed above regulations, so law enforcers must dare to break the rigidity of legal texts (legal mobilization) if the text undermines the people's sense of justice. This pro-people justice principle can be used as a measure to avoid the inherent progressiveness in progressive law from deteriorating, deviating, being misused, and other negative aspects, so that progressive law can lead society towards justice and welfare.

Fourthly, progressive law assumes that law is not final, in other words, law is always in the process of becoming "law as a process, law in the making." Law has a journey that continuously transforms from time to time in making decisions that can achieve legal ideals. Each decision is terminal towards the next, which is better. Thus, progressive law is sensitive and responsive to every change amidst a dynamic society so that it is ready to face these changes without forgetting its obligation to protect the people towards legal ideals.

Fifthly, progressive law seeks to build a legal state with a conscience and spiritual intelligence. Legal actions with conscience (conscience) are not only based on logic but accompanied by modalities of compassion such as empathy, honesty, commitment, and courage. Progressive law is carried out with spiritual intelligence that is not limited to a specific standard (rule-bound) and is only contextual, but is more out of the box from the existing situation in an effort to seek deeper truth or value.

The term "maqāṣid" is the plural form of the word "maqṣad," which means purpose, target, aspiration, and goal. Meanwhile, what is meant by maqāṣid in the Islamic perspective is the target, goal, aspiration, or objective of Islamic law. According to some fuqahā (jurists), the term maqāṣid is often understood as "maṣālih" (benefits) (Auda, 2008). For example, Abdul Malik al-Juwaini used the terms "maqāṣid" and "al-maṣalih al-‘ammah" (general welfare) (Auda, 2008), while Abu Hamid al-Ghazali referred to it as "al-maṣlaḥah al-mursalah." This terminology was then followed by Fakhruddin al-Razi and al-Amidi (Auda, 2011).

Regarding the understanding of maqāṣid al-sharī’ah, according to Ahmad al-Rasyuni, Abu Ishaq al-Syatibi did not provide clear boundaries and understanding. Classical uṣūlī scholars who discussed maqāṣid al-sharī’ah also did not provide a clear definition. Therefore, a clearer definition was formulated by contemporary scholars who have a significant interest in the concept of maqāṣid al-sharī’ah (al-Rasyuni, 1995). Ibn Ashyur, for example, referred to it as maqāṣid al-tashrī’ al-‘ammah. It is explicitly stated that Maqāṣid al-tashri’ al-‘āmmah are the meanings and objectives of laws considered by the legislator (shāri’) in all circumstances of legislation or most of them. This attention is not specific to certain natural conditions in particular laws of the sharī’ah (maqāṣid al-tashrī’ al-‘ammah are the meanings and wisdoms intended by the legislator in all conditions of legislation or most of them, in that its considerations are not restricted to existence in a specific nature of the laws of the sharī’ah) (Ashur, 1946).

Meanwhile, ‘Allal al-Fasi explained that maqāṣid al-sharī’ah refers to: "The objectives of the law, and the secrets laid down by the legislator in each of its laws" (Al-murād bimaqāṣid al-sharī’ah; al-ghāyah minhā; wa al-asrār allatī waḍa’ahā al-shāri’ ‘inda kulli ḥukm min aḥkāmihā) (al-Fasi, 1993).

Not significantly different from what al-Fasi proposed, Wahbah Zuhaili stated that: Maqāṣid al-sharī’ah are the meanings and objectives of legislation in all laws or most of them, or the objectives of the law, and the secrets laid down by the legislator in each of its laws (maqāṣid al-sharī’ah are the meanings and purposes of the shar’ in all its laws or most

of them, or they are the objectives of the law, and the secrets laid down by the legislator in each of its laws) (Zuhaili, 1986).

Indeed, many definitions have been proposed by Muslim scholars and intellectuals. However, the three definitions above suffice to represent the various definitions put forward by uṣūlī scholars. Furthermore, it can be concluded simply that maqāṣid al-sharī'ah are the meanings and objectives implicit in every law that has been legislated by Allah SWT, which are substantially oriented towards the welfare of all living beings.

Jasser Auda offers two concepts to make maqāṣid more dynamic and responsive to contemporary issues. Firstly, according to Auda, the concept of maqāṣid must evolve from mere "preservation and protection" to "development and enhancement of human rights" (Auda, 2008). Secondly, this concept should also extend to issues concerning human resource development.

Firstly, from the notion of "preservation" and "protection" towards "development" and "human rights". Maqāṣid al-sharī'ah needs to be developed to suit the situations and conditions faced. Therefore, by emphasizing the orientation towards the development and enhancement of human rights, maqāṣid becomes more relevant in addressing issues of both religious and humanitarian significance.

Abu Ishaq al-Syatibi explained that the imposition of Sharia is essentially a safeguarding or protection of its objectives (al-Syatibi, 1997). This paradigm of safeguarding or protection follows al-Ghazāli's terminology. He coined the term hifẓ al-nasl (preservation of lineage) as the primary objective of Islamic law. This concept is an expansion of the concept proposed by al-Juwaini through the term hifẓ al-furūj (preservation of chastity), which itself is a reinterpretation of al-'Amir's description of maqāṣid as "penalties for acts of indecency," a theory of criminal law. The concept, originating from al-'Amiri, is now better known as hifẓ al-nasl, which was also discussed by al-Shātibi in his book al-Muwāfaqāt (Auda, 2008).

Subsequently, based on the developments made by al-Juwaini and Ibn Ashur, Jasser Auda argues that hifẓ al-nasl, meaning "preservation of lineage," has evolved into "concern for the family," even suggesting the establishment of an "Islamic civil social system." Hifẓ al-'aqli (preservation of reason) is reinterpreted as "development of scientific thinking," "pursuit of knowledge," "resisting herd mentality," and even "avoiding brain drain." Hifẓ al-'irḍ (preservation of honor) is developed into "preservation of human dignity" and "protecting human rights." Meanwhile, hifẓ al-dīn (preservation of religion) is developed into "freedom of belief in contemporary expressions." Then hifẓ al-māl (preservation of wealth) is developed into "economic development" and "bridging the wealth gap" (Auda, 2008).

Secondly, human resource development (HRD) as a maqāṣid. Jasser Auda proposes HRD as a maqāṣid, based on a UN Development Report, which states that many Muslim-majority countries rank lower in the Human Development Index (HDI) compared to developed countries. However, some Muslim countries rank high in human development, such as Brunei, Qatar, and the United Arab Emirates (Auda, 2008).

He argues that HRD has become a central theme today to be implemented through Islamic law and falls within the main objectives of maqāṣid. This is because over 200 indicators used as standards in research mostly align with maqāṣid. For example, measuring political participation, literacy rates, education enrollment, life expectancy, access to clean water, employment, and living standards. With this idea, it is hoped that it will strengthen the position of Islamic law as more advanced and adaptable to human needs and developments (Auda, 2008).

Thus, in Jasser's hands, maqāṣid signifies progressiveness, futurism, and humanism. For him, maqāṣid is not merely a methodology for deriving legal rulings or a concept of preservation, but rather a development that leads to the enhancement of human rights and human resource development. Through this concept of maqāṣid, it is hoped that human development in Muslim countries can be improved and the common good based on the 200-plus indicators of the UN Development Program Report (UNDP) can be realized.

While Jasser's concept of maqāṣid is characterized as progressive-futuristic-humanistic, in its implementation, Jasser utilizes a systems approach. This approach signifies an integrative-multidimensional and interrelated perspective. In essence, the

subsystems synergize with each other, forming a cohesive whole. However, each subsystem functions in its respective role, albeit influencing one another. Furthermore, these subsystems do not negate or dismiss other aspects.

In the context of maqāṣid, Jasser Auda formulates a system expected to keep maqāṣid dynamic amidst the changing times and challenges it faces. According to him, there are six systems that need to be integrated, namely: cognitive nature system, wholeness, openness, interrelated hierarchy, multidimensionality, and purposiveness (Auda, 2008). His elaboration is as follows.

Cognitive Nature system is placed in an initial position or hierarchy for a reason. Historically, concerning Islamic jurisprudence or law, it has always been understood as absolute divine law, final, and obligatory to be followed. This system liberates the understanding from being confined to the terms of jurisprudence and divine law.

Theoretically, according to uṣūlī scholars, jurisprudence (fiqh) is the knowledge of Sharia laws derived from detailed evidence. The intention behind the term "knowledge" in this definition not only implies certainty but also includes speculative knowledge. This is because evidence about practical matters (‘amaliyah), especially branches (furū’iyyah), is predominantly presumptive. Based on this rationale, uṣūlī scholars argue that jurisprudence falls under the category of presumptive knowledge (Zuhaili, 1986).

However, al-Qadi al-Baidhawi disagrees with uṣūlī scholars. He asserts that jurisprudence is not presumptive but certain. According to him, if a mujtahid speculates a law – with strong speculation – then it is obligatory to issue a fatwa and implement it. Laws that are speculated to be true are not universal and are not recognized as true by other mujtahids. This inevitably leads to differences of opinion among scholars. Hence, jurisprudence is Sharia laws resulting from human ijtihād (independent reasoning) which still contain weaknesses. The implication is, it is difficult to claim one thing as the most correct among various laws, especially to label it as the will of God.

In this context, Jasser Auda intends to change the paradigm of jurisprudence understood as divine law, to the understanding of "human cognition." In other words, jurisprudence is the result of a mujtahid's reasoning efforts to extract laws from the sources of Islamic law (the Qur’an and Hadith). Therefore, according to him, consensus (ijma’) is not considered a source of Islamic law. Instead, it is a consultative mechanism or the use of systemic terminology, referred to as multi-participant decision-making. In this context, Ibn Taymiyyah mentioned various inaccurate claims about ijma’, especially those made by Ibn Hazm regarding several issues. For example, considering those who reject consensus as apostates, or stating that women cannot lead men in prayer and so on (Auda, 2008).

Wholeness theory examines all interconnected aspects, as each part contains characteristics that can be integrated into a unified concept (Auda, 2008). According to Retna Gumanti, Jasser Auda, through a systemic theory approach, asserts that every existing causality should not be viewed as partial components but must be seen as a whole picture, so that these parts have interconnected and dynamic functions (Gumanti, 2018).

According to Amin Abdullah, this system represents an effort to rectify the shortcomings found in classical uṣūl al-fiqh, which tends to employ a reductionist and atomistic approach. The atomistic approach can be seen in the way classical scholars treat texts to solve problems without considering other related and supportive texts. The solution offered is to apply the principle of holism by interpreting thematically, not limited to legal verses but also considering other verses in concluding or determining Islamic law (Abdullah, 2020).

The Islamic concept known as "Relevant in every place and time" (ṣōlih fī kulli makān wa zamān) cannot stand firm without an open-minded attitude among Muslim scholars (ulama) in conducting ijtihād. Ijtihād will always remain open and dynamic because, as is well known, revelation has ceased, religious texts are very limited, while life's problems are increasingly complex and require fresh ijtihād to solve them. Thus, the openness of a faqīh (jurist) regarding various contemporary issues - with a clear-minded approach and discarding the obscure - to affirm the dynamic character of Islamic law is greatly needed.

This system of openness offers two mechanisms or ways to ensure that Islamic law remains relevant and alive. Firstly, the change in law accompanied by a change in the worldview of a faqīh. The worldview of a faqīh is influenced and shaped by all aspects of life around them, ranging from religion, self-concept, geography, environment, politics, society, economy, to language. A faqīh's worldview influences their ijtihād results significantly, as it brings their worldview into the construction of Islamic law (Auda, 2008).

The worldview held by a faqīh or scholar must be based on science and attentive to reality. For example, in determining the maximum period of pregnancy, this reality can only be known through scientific methods, which are part of someone's worldview (Auda, 2008). Therefore, in conducting ijtihād, a faqīh needs to consult with various experts related to the issues to be addressed in their fatwa.

Secondly, philosophical openness. Historically, in the struggle of Islamic thought, philosophy has had a bad image among Muslims. Philosophy was declared forbidden by some scholars, such as Ibn Aqil, al-Nawawī, al-Suyuti, al-Qushayri, Ibn Ruslan, al-Shirbin, and Ibn Ṣalah. Ibn Salah's fatwa is widely cited in discussions of philosophy, leading to the punishment of a faqīh who was also a Muslim philosopher, and his books were burned for violating the fatwa, namely Ibn Rushd (Auda, 2008).

This system expects faqīhs to be open to benefiting from the contributions made by philosophers, especially medieval Muslim philosophers who have contributed to both philosophy and logic. For example, considering Ibn Sina's concept of time, al-Farabi's version of induction, Ibn Rushd's openness to all philosophical investigations, and Ibn Hazm and Ibn Timiyah's criticism of Aristotle's analogy. With this, it is hoped that Islamic law will be able to develop, renew, and remain alive throughout the ages (Auda, 2008).

Amin Abdullah explains that this system provides two improvements to the construction of maqāṣid al-sharī'ah (Abdullah, 2020). Firstly, there is an improvement in the scope of maqāṣid. The traditional construction of maqāṣid, which has been developed by classical scholars, is still particular or specific, resulting in a limitation of the scope of maqāṣid al-sharī'ah. Therefore, to integrate and interrelate them, Jasser Auda establishes a classification to expand this scope and divides it into three levels: 1. General Maqāṣid, which includes various higher and more general benefits across all parts of Islamic law, such as justice and facilitation; 2. Specific Maqāṣid, covering benefits in specific sections of Islamic law that are more specific, such as the welfare of children in the family; protection from harm in criminal law; and protection from monopolies in economic law; 3. Partial Maqāṣid, which relates more to the purposes behind a specific text in Islamic law, for example, the intention to alleviate, allowing sick individuals not to fast (Abdullah, 2020).

Secondly, there is an improvement in the scope of individuals covered by maqāṣid. Traditional maqāṣid are still individualistic; therefore, the introduction of this system provides a social and public dimension so that maqāṣid can reach multicultural societies, nations, and even humanity worldwide.

Conflict among evidences (ta'āruḍ) is often encountered by mujtahids. Due to this conflict, scholars have formulated several methods to resolve them. According to the Shafi'i, Maliki, Hanbali, and Dhahiri schools of thought, the order of preference is al-Jam'u wa al-tawfīq (compromise), al-tarjīḥ (preference), al-naskh (abrogation), and al-tasāquṭ al-dalīlayn (abandoning two conflicting evidences) (Zuhaili, 1986). Therefore, Jasser Auda proposes this system to expand the scope of a mujtahid and introduce a new dimension, namely maqāṣid, to eliminate conflicts. Thus, evidences found to be conflicting with each other will be understood not to be conflicting by placing each text in its respective situation and context.

The Sharia imposed on the Muslim community is inseparable from its goals, which are fundamentally oriented towards the welfare of humanity both in this world and the Hereafter (al-Syatibi, 1997). Jasser Auda proposes maqāṣid not only as a method and basis of Sharia or the wisdom behind its legislation but also as a fundamental perspective applied and considered in ijtihād. The application of maqāṣid is used as a foundation in determining whether evidences are to be specified (takhsīs) or interpreted (ta'wil), determining the validity of the contrary implication (mafhūm al-mukhālafah) of an evidence. Thus, in his ijtihād considerations, he always makes maqāṣid the perspective (Auda, 2008).

In conclusion, as a concept, maqāṣid evolves according to the contemporary context. In other words, the renewal of ijtihād applies not only to the realm of jurisprudence but also to methodology (uṣūl al-fiqh). Jasser, with his six integral-multidimensional and interrelated system approaches, contributes to making Islamic law progressive and responsive to current and future conditions.

These six approaches will be elaborated upon and their relevance to the Common Good discussed as follows:

The cognitive nature proposed by Jasser Auda constitutes the foundational basis for reconstructing fiqh based on the maqashid al-Shari'ah. The first step taken is to separate the understanding between revelation and fiqh. Consequently, fiqh is no longer perceived as absolute and infallible law but rather as human understandings (ijtihad) by scholars, which can be either correct or incorrect (Auda, 2008).

In the perspective of Islamic Law, the term "Common Property" is unfamiliar within the classical Islamic legal scholarship. Therefore, faced with the reality of issues concerning common property, Islamic legal intellectuals engage in ijtihad to analogize common property with partnership or shirkah abdan. Furthermore, Common Property is rigidly regulated in the Indonesian Compilation of Islamic Law (KHI) articles 85 to 97, essentially dividing common property equally or in a 50:50 ratio. However, the Marriage Law does not explicitly and clearly mention the division of common property.

The relevance of cognitive nature to this distribution lies in the fact that common property, as a result of ijtihad, is not absolute and as dictated in the KHI, i.e., 50:50. If referring to the Marriage Law, the common property is regulated according to its own laws. As this falls within the realm of fiqh, and since the Marriage Law does not explicitly regulate it, the distribution of the common property can be adjusted to the societal realities. Therefore, a judge, acting as a mujtahid, can determine the distribution based on the social conditions of their community.

Wholeness system theory views all aspects as interrelated components, given that each part possesses characteristics that can be integrated to form a unified whole concept (Auda, 2008). As stated by Jasser Auda, every cause-effect relationship should be seen as part of a larger picture. In a system, the relationship between components performs specific functions. Unlike static collections of parts, interconnections are built holistically and continually evolve (Auda, 2008).

Wholeness in observing an entity of Islamic law can be practiced through thematic interpretation, a method of interpretation that directs attention to a specific theme, then seeks to understand that theme by gathering all verses related to it, analyzing and understanding each verse, and then compiling general verses connected to specific ones, and so forth.

A similar notion is also explained by Amin Abdullah, who views this system as an effort to rectify the weaknesses found in classical usul al-fiqh, which tends to employ reductionist and atomistic approaches. The atomistic approach can be observed in how classical scholars treat texts to solve problems without considering other related and mutually supportive texts. The solution he offers is to apply the principle of holism by conducting thematic interpretation, not limited to legal verses but also considering other verses in concluding or deciding Islamic law.

Moreover, in the context of joint property, there are actually no specific verses or hadiths addressing it. Islamic intellectuals attempt to understand the Quranic verses and hadiths related to the property of spouses and partnership. Kholil Nawawi, in the article "Joint Property According to Islamic Law and Indonesian Legislation," explains the verses related to property and the rights and obligations of spouses in Islam, which basically do not provide explanations regarding joint property. Subsequently, the article also elucidates evidence related to partnership, which is then analogized with joint property. Thus, in this context, while joint property is not specifically and extensively mentioned, there is a core essence in these verses and hadiths that, if analogized, would lead to the issue of joint property.

A system needs to interact with its surrounding environment to sustain its existence. This can only be achieved through openness. The Islamic legal system, as an open system,

always endeavors to engage in ijtihad. Therefore, it is impossible to make it closed because textual sources are very limited, while the realities of life are unlimited (Auda, 2008).

In this feature, Jasser Auda proposes 2 (two) mechanisms to achieve openness. First, legal change through changes in worldview or cognitive disposition. Jasser explains that a person's worldview is shaped by various aspects of knowledge acquired, starting from religion, self-concept, geography, environment to politics, social, economic, and language (Auda, 2008). Furthermore, he argues that the worldview must be competent, meaning it should be based on scientific principles.

Openness through this mechanism is expected for a jurist, legislator, and even judges not to be trapped in literalism in determining laws that seem to overlook the purpose of establishing those laws.

Second, philosophical openness. Simply put, in this part, Jasser wants to utilize philosophy as a branch of knowledge used to explore the law to achieve a genuine purpose of the law.

In relation to joint property, understanding it requires other scientific tools, sociological or economic reviews need to be present and elaborated in more detail as a form of accommodating openness. Additionally, its connection with philosophical openness is by examining joint property from the perspective of distributive justice proposed by Aristotle, which will be explained in more detail in Chapter V.

According to Amin Abdullah, this system intends to rectify the weaknesses found in the construction of classical maqashid Shariah. First, by expanding the scope of maqashid Shariah. Because the traditional construction of maqashid made by classical scholars is still particular, the scope of maqashid Shariah is still limited. Thus, Jasser Auda classifies to broaden this scope and divides it into 3 (three) categories to integrate and relate them. As follows (Auda, 2008):

- General Maqashid covers various higher and general benefits to be found throughout the Islamic legal system, such as justice with ease;
- Specific Maqashid: these maqashid cover benefits in specific chapters of Islamic law that are more specific, such as the welfare of children in the family environment;
- Partial maqashid, these maqashid are more towards the purposes behind a specific text in Islamic law, for example, the purpose of easing, allowing a sick person not to fast.

Joint property in this system will be reviewed from a broader perspective, namely in the general maqashid, joint property aims to provide justice to a divorced couple regarding the property they have acquired during marriage. Not only about the portion received but how property support life after divorce. For example, if they have children, then whoever has custody should rightfully receive a larger portion. Thus, this justice is not only felt by the divorced couple but on a larger scale, namely the family.

In multidimensionality system, Jasser Auda offers a solution to the binary thinking that results in rigidity in ijtihad. According to him, traditional fiqh schools often employ binary and one-dimensional thinking. Many legal fatwas are issued based solely on single evidence, without considering other possible evidence related to the issue (Auda, 2008).

Therefore, concerning the conflicts between evidences frequently encountered in texts, Jasser Auda proposes multidimensionality based on maqashid. Thus, a seemingly conflicting evidence will no longer be seen as opposing but can support each other towards specific objectives within different contexts.

As there are no conflicting evidences regarding common property, as the method used is analogy, discussions in this system regarding common property will focus on binary thinking concerning justice in the division of common property. If the division of common property revolves solely around fair distribution, it will give rise to subjective notions of fairness and unfairness. Therefore, the paradigm to be changed is how to bring this justice to a distributive-proportional nature so that this justice goal can truly be achieved and various parties can accept it wisely.

According to Gharajedaghi as quoted by Jasser Auda, a system has the feature of purposefulness if it meets two criteria: 1. achieving the same results with different methods in

the same environment, and 2. achieving different results in different environments or the same environment (Auda, 2008). Thus, according to Jasser, the effectiveness of a system is measured based on the level of attainment of its maqashid (Auda, 2008). Therefore, he places maqashid in the Islamic legal system as a fundamental criterion in ijtihad (Auda, 2008).

In this feature, Jasser Auda proposes to use maqashid as a tool for analogy. Because, according to him, the rationale in qiyas often changes and is determined inaccurately. For example, such as the permissibility of a sick person to break the fast, with the rationale of "illness." According to Ibn Qudamah, illness is not 'exact' because the types of illnesses are diverse, such as mild ailments like toothaches, minor wounds, abscesses, and so on. So, "illness" cannot be used as a valid motif in that analogy, and what can be affirmed as a motif is the wisdom to protect someone from potential harm (Auda, 2008).

In the issue of common property, which originates from the result of ijtihad through qiyas, it would be more valid to follow the idea proposed by Jasser Auda, because partnership essentially requires an agreement. Amelia Rahmaniah explains that a marriage contract is not a partnership contract because the purpose of the marriage contract is clear, to form a marital bond, not any other bond. Furthermore, both normatively and practically in Islamic history, no issues regarding common property are found. Furthermore, according to her, the appropriate motive behind common property is to provide a balanced position between husband and wife (Rahmaniah, 2015).

In this feature, the author proposes a clearer and more rigid motif, namely justice. The regulation of common property is to provide protection for spouses in the use of common property. Meanwhile, the regulation of fair distribution of common property aims to provide according to the contributions of the spouses in building the household. Thus, with this common property, they obtain their rights to continue their lives.

CONCLUSION

This article has explored the concept of the division of common property from the perspective of the Sharia Maqashid system theory developed by Jasser Auda. In the course of this research, several important conclusions can be reached:

- Sharia Maqashid System Approach: the Sharia Maqashid System theory provides a rich and holistic framework for understanding the concept of the division of common property in Islam. It is not just about formal legal aspects but also about achieving broader moral, ethical, and humanitarian goals;
- Principle of Justice and Balance: in this approach, the principles of justice and balance are crucial. The division of common property must respect the rights of all parties involved and maintain balance within society;
- Flexibility and Context: the Sharia Maqashid System theory allows for flexibility in interpreting and applying the law. This enables accommodating social and cultural changes and considering the context of individuals and communities;
- Progress and Compliance: the division of common property should reflect Sharia goals, such as the advancement of well-being and the protection of individual rights. It should also ensure compliance with religious and ethical values;
- Family and Community Interests: the Sharia Maqashid System emphasizes the importance of family and community interests in the division of common property. It is not just about individual rights but also about building a healthy and just community;
- Holistic Approach: this approach reminds us that Islam is not just about ritual aspects but also about how we interact in everyday life. The division of common property is an important part of this dimension.

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