

CONVERTING INHERITANCE RIGHT INTO SAVING AND LOAN FORM
IN *MASLAHAH* PERSPECTIVE

(Case Study In Geluran, Taman, Sidoarjo)

CHAPTER I
INTRODUCTION

A. Background of Research

The provision argues both man and woman have the right to get the share of property, written in Quran verse 7 surah an-Nisa':

لِلرِّجَالِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ وَلِلنِّسَاءِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ مِمَّا قَلَّ مِنْهُ أَوْ كَثُرَ نَصِيبًا مَّفْرُوضًا

“Men will have a share in what their parents and their near relatives leave; and women will have a share in what their parents and their near relatives leave: whether it be a little or much, they shall be legally entitled to their shares.”¹

But sometimes distribution of inheritance is not appropriate with Islamic law. In the case happened in Geluran Village, Taman Subdistrict, Sidoarjo Regency, the problem is the difference way in distributing the inheritance. The inheritance is not given to every heir (children). The case happened in Geluran Village, after the properties were collected, eldest son invited his brothers and sisters to talk the way of inheritance distribution. Finally, the result of meeting was agreed by all brothers and sisters. The properties were not distributed to all heirs. Some shares of the property were given as endowment, but another was saved by eldest son. Then if one of brother or sister wants to take the share of property (saved by eldest brother), he or she must loan the property. Someday, he or she must return the property to be saved again. Thus, the heir has not right to possess the property because when he or she loans the property, he or she must returns. In this fact, the distribution is not appropriate with Islamic law. Because of in the rule of inheritance distribution, the heir should obtain the share of property. This research formulates the problems, namely: 1) Why do people

¹Malik, *The Qur'an in English Translation Complete*, (t.t.: MidEastWeb, 2007), p. 29.

convert inheritance right into saving and loan form? And 2) How does *maslahah* view on converting inheritance right into saving and loan form?. The research aims to describe the people's reason convert inheritance right into saving and loan form and to explore *maslahah* views on converting inheritance right into saving and loan form.

CHAPTER II

REVIEW OF RELATED LITERATURE

A. Theoretical Framework

1. Islamic Law of Inheritance

Islamic law of inheritance regulates the transfer of wealth from deceased to heir. The regulation is based on sources of Islamic law namely Al-Quran, hadith, *ijtihad*, and Compilation of Islamic Law.² There are three pillars in the rule of inheritance distribution. Each pillar has to fulfill requirements certain. In *fiqh*, pillar is *rukun*, and requirements are the condition that must be fulfilled by each pillar.³ The pillars are; 1) Deceased, 2) Property, 3) Heir.⁴ While, the requirements are; 1) Deceased passed away factually or legally, such as judge decision of death of *mafqud* (lost), 2) The heir lives, although he is still embriyo, 3) No blocker of inheritance right.⁵

2. Inheritance Right

There is inheritance right for heir. For example, surah an-Nisa verse 7 says:

لِّلرِّجَالِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ وَلِلنِّسَاءِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالْأَقْرَبُونَ مِمَّا قَلَّ مِنْهُ أَوْ كَثُرَ نَصِيبًا مَّفْرُوضًا

²Zainuddin Ali, *Pelaksanaan Hukum Waris di Indonesia*, (Jakarta: Sinar Grafika, 2008), p. 33.

³Muhibbin and Abdul Wahid, *Hukum Kewarisan Islam Sebagai Pembaruan Hukum Positif di Indonesia*, (Jakarta: Sinar Grafika, 2009), p. 56-57.

⁴Amir Syarifuddin, *Hukum Kewarisan Islam*, (Jakarta: Kencana, 2008), p. 204.

⁵Suparman Usman and Yusuf Somawinata, *Fiqh Mawaris Hukum Kewarisan Islam*, (Jakarta: Gaya Media Pratama, 2008), p. 24.

“Men will have a share in what their parents and their near relatives leave; and women will have a share in what their parents and their near relatives leave: whether be a little or much, they shall be legally entitled to their shares.” (QS. An-Nisaa’ (4): 7)”⁶

The verse states the equality of right between male and female heirs and the difference of heirs’ share. Thus, Quran gives the inheritance right to every heir to obtain the share. Regarding to the principle of individual, every heir has the right to obtain his/her share. Therefore, he/she has the right to do anything to her/his share.⁷ The heir can have the right if he/she fulfills any requirements as follows; a) Individual {personal}, b) Has blood or marriage relation, c) Islam, d) There is no bar of inheritance legally, e) The requirements mentioned must be fulfilled when the deceased passed away.⁸ The inheritance right can be understood as possession right to the property. The possession right is the right to have something and to do anything to the property. Furthermore in Islamic law, a person have possession right because Inheritance (*al-Khalafiyah*) aspect. A person can obtain possession right by taking another one’s possession. There are two kinds of the cause as follows:

- 1) *Khalafiyah syakhsyan syakhsy (irts)*: the heir replaces the position of deceased, including his possession right of property.
- 2) *Khalafiyah syai’an syaiin (tadlmin or ta’wild)* or assure disadvantage: if a person harms another, he is obligated to assure his disadvantage. The compensation becomes receiver’s right.

3. *Maslahah*

The definition of *al-maslahah* is the effort to take the advantage and to prevent *mafsadat (jalb al-Masalih wa daf al-Mafasid)*. *Al-maslahah* is the main purpose and the intent of the sharia formulation.⁹ There is one scholar

⁶Malik, *The Qur’an in English Translation Complete*, (t.t.: MidEastWeb, 2007), p. 29.

⁷Mukti Arto, *Hukum Waris Bilateral Dalam Kompilasi Hukum Islam*, (Solo: Balqis Queen, 2009) p. 42.

⁸Mukti Arto, *Hukum Waris*, p. 69.

⁹Arifah Millati Agustina, *Konsep Ri’ayah Al-Maslahah Najumuddin A-Thufi Relevansi Dengan Konsep Reaktualisasi Hukum Islam*, Thesis, (The State Islamic University Maulana Malik Ibrahim Malang: 2005), p. 49.

that created *maslahah* concept. At-Tufi, a Hanbali scholar,¹⁰ lived in decline of Islam period (decline of Islamic law). The statement based on at-Thufi's word:¹¹

وَأِنْ تَعَدَّرَ الْجَمْعَ بَيْنَهُمَا قَدِّمْتُ الْمَصْلَحَةَ عَلَى غَيْرِهَا ، لِقَوْلِهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ : لَا ضَرَرَ وَلَا ضِرَارَ ، وَهُوَ خَاصٌّ فِي نَفْيِ الضَّرْرِ الْمُسْتَنْزِمِ لِرِعَايَةِ الْمَصْلَحَةِ ، فَيَجِبُ تَقْدِيمُهُ ، وَلِأَنَّ الْمَصْلَحَةَ هِيَ الْمَقْصُودَةُ مِنْ سِيَاسَةِ الْمُكَلَّفِينَ بِإِثْبَاتِ الْأَحْكَامِ وَبَاقِي الْأَدْلَةِ كَالْوَسَائِلِ ، وَالْمَقَاصِدُ وَاجِبَةٌ التَّقْدِيمِ عَلَى الْوَسَائِلِ .

“If may not unify them, so *maslahah* is prioritized than other. Because of the tradition “Do not endanger thyself and others”. The tradition is special to avoid a danger that is determined to maintain *maslahah*. So, obligate to prioritize it, and because the *maslahah* is the political purpose of human (mukallaf) by determining some laws and theorems as intermediary, and the purpose is prioritized than the intermediary.”

He argued that human has the right to obtain a benefit. According to at-Tufi, there are two kinds of right that related to *maslahah*, God's right and human's right. The God's right consists of the matters about worship and beliefs (*aqidah*). The God's right is enshrined in the *nash* that must be obeyed by human. But, the matter of human becomes human's right as well as *muamalah* issues. However, if the *nash* contradicts to human's *maslahah*, the human can refuse it. Thus, human's *maslahah* becomes human's right that more prioritize than the God's right (*nash*).¹² The principles which were espoused by Najamuddin at-Tufi made him different from other *ushul fiqh* scholars. The difference key is that he places the reason higher than Quran and Hadith. According to Tufi, the goal of sharia is *maslahah*, and *maslahah* can

¹⁰Jasser Auda, *Maqasid Al-Shari'ah As Philosophy of Islamic Law: A Systems Approach*, (Selangor: Vinlin Press, 2010), p. 122.

¹¹At-Thufi, *Risalah fi Ri'ayah al-Maslahah*, (First Edition; Mesir: t.p., 1413), p. 45.

¹²Imron Rosyadi, "Pemikiran At-Tufi Tentang Kemaslahatan," *Suhuf*, 1, (Mei, 2013), p. 55.

be achieved by the reason. Hence, the existence of *maslahah* as a legal basis cannot be doubted, not only when no *nash* and *ijma* regulate the issues, but also when contradict among them, *maslahah* should be priority.¹³

CHAPTER III RESEARCH METHOD

The research uses empirical research and qualitative approach that based on descriptive analysis. Locus of the study is in Geluran Village. The primary data is an interview to the heirs. The secondary data are written documents, books, previous researches, regulations that related to thesis title. Then, *maslahah* of Najamuddin at-Thufi's view is tool analysis of the research.

CHAPTER IV FINDINGS AND DISCUSSION

A. The Reasons of Converting Inheritance Right Into Saving and Loan Form

1. The Advantages

a. To help the heir who needs fund

Istiqomah said, "*Keuntungan e iso mbantu keluarga seng mbutuhno, lek kerugian opo yo fan, sakjane gak ono fan, kabeh podo pengen mbantu dulur e kog fan*".¹⁴ (The advantage was to help the other who need, but actually the disadvantage was not there, all heirs only wanted to help the other). Laili also said, "*Kerugiane gak ono fan, yo mek untung e, iso mbantu keluarga seng kurang mampu*".¹⁵ (The disadvantage was not there, only the advantage that can help the poor heirs). Furthermore, if one of the heirs needs much money, he would no borrow fund to the bank. Because of the bank sets interest system in any lends. This rule will worsen heirs' economic condition. In the inheritance distribution by saving and loan form, the heirs can help the other in need and does not set an interest system.

¹³Yusuf Al-Qardhawi, *Dirasah fi Fiqh Maqashid Asy-Syari'ah (Baina Al-Maqashid Al-Kulliyah wa An-Nushush Al-Juz'iyyah)*, Translator. Arif Munandar Riswanto, (First Edition; Jakarta: Pustaka Al-Kautsar, 2007), p. 230.

¹⁴Istiqoma, *interview* (Sidoarjo, January 16, 2015).

¹⁵Laili, *interview* (Sidoarjo, January 18, 2015).

b. To prevent the disunity among heirs

Istiqomah said, "*Selain iso mbantu yg lain, mungkin agar tidak terjadinya perpecahan dan keluarga iso lebih harmonis.*"¹⁶ (Beside to help the other, it may prevent the disunity and the family can be more harmonious). The statement explains that the inheritance distribution by saving and loan form gives the advantage to prevent the disunity and the family life will be more harmonious. Be better for each heir to allow their shares to be collected and their share became collective share. Thus, the inheritance distribution by saving and loan form will maintain the harmonious in the family life. So, there is no disunity or quarrel among the heirs.

c. To create more harmonious family relationship

The statement affirmed by Istiqomah as the heir, "*Selain iso mbantu, mungkin agar tidak terjadinya perpecahan dan iso lebih harmonis.*"¹⁷ (Beside to help the other, may be to prevent the disunity and the family can be more harmonious). The greatest caring will remove all derogatory or demeaning attitudes to another. Thus, each heir will feel the harmonious life in their family.

2. Disadvantages

a. The eldest son must patch the money when it is zero

Actually, there were no disadvantages that were felt by the heirs in the inheritance distribution by saving and loan form. Istiqomah said, "*Keuntungan e iso mbantu keluarga seng mbutuhno, lek kerugian opo yo fan, sakjane gak ono fan, kabeh podo pengen mbantu dulur e kog fan*"¹⁸. (The advantage was to help the other who need, but actually the disadvantage was not there, all heirs only wanted to help the other). Laili also said, "*Kerugiane gak ono fan, yo mek untung e, iso mbantu keluarga seng kurang mampu*"¹⁹. (The disadvantage was not there, only the advantage that can help the poor

¹⁶Istiqoma, *interview* (Sidoarjo, January 16, 2015).

¹⁷Istiqoma, *interview* (Sidoarjo, January 16, 2015).

¹⁸Istiqoma, *interview* (Sidoarjo, January 16, 2015).

¹⁹Laili, *interview* (Sidoarjo, January 18, 2015).

heirs). Based on their statements, no one mentioned the disadvantages in the inheritance distribution way. But, based on the implementation, the inheritance distribution by saving and loan form gave a disadvantage to the eldest son because he must patch the money when it is zero.

b. All heirs have no right to possess the money

in the implementation of the inheritance distribution by converting inheritance right into saving and loan form, the heirs did not obtain the right to possess the money. They must loan the money when they need. Then, if they have much money one day, they must return it. Thus, the disadvantage of the inheritance distribution is that the heirs cannot possess the money perfectly.

B. *Maslahah* Views On Converting Inheritance Right Into Saving and Loan Form

Although, Quran and hadith in detail regulates the law of inheritance, but *maslahah* is the main factor of the agreement in the family. Based on the concept that was given by Najamuddin Al-Thufi, the main purpose of Islamic law is to provide a protection for *maslahah*.²⁰ The statement affirms that the human have the right to obtain *maslahah* in their life. Based on Al-Thufi's concept, there are two kinds of right that related to *maslahah*, God's right and human's right. The God's right consists of the matters about worship and beliefs (*aqidah*). The God's right is enshrined in the *nash* that must be obeyed by human. But, the matter of human becomes human's right as well as *muamalah* issues. However, if the *nash* contradicts to human's *maslahah*, the human can refuse it. Thus, human's *maslahah* becomes human's right that should more prioritize than the God's right (*nash*).²¹

Based on Thufi's concept, *maslahah* are independent theorem in legal decision. Hence, the *maslahah* does not require supporting theorem, because *maslahah* is only based on the reason opinion only. *Maslahah* just applies to

²⁰Abdallah M. al-Husayn al-'Amiri, *Dekonstruksi Sumber Hukum Islam Pemikiran Hukum Najm ad-Din Thufi*, (Jakarta: Gaya Media Pratama, 2004), p. 42.

²¹Imron Rosyadi, "Pemikiran At-Tufi Tentang Kemaslahatan," *Suhuf*, 1, (Mei, 2013), p. 55.

muamalah and custom issues. Najamuddin Al-Thufi places the reason higher than Quran and Hadith. According to Tufi, the goal of sharia is *maslahah*, and *maslahah* can be achieved by the reason. The reason can be used to determine *maslahah* or *mafsadat*, because Quran and Hadith repeatedly push the human to use the reason well. Thus, prioritize and maintain the *maslahah* is the agreement that was desired by sharia. Then, the inheritance distribution by saving and loan form may be justified because the inheritance distribution prioritizes *maslahah*.

The statement is based on at-Thufi's word:

وان تعذر الجمع بينهما قدمت المصلحة على غيرها ...

“If may not be unified them, so *maslahah* is prioritized than other...”

Thus, the view of *maslahah* on the agreement of the inheritance distribution is as a way to realize the goal of sharia. The agreement is a main key to form a *maslahah* that accordance to the goal of sharia. Meanwhile, the inheritance term is one of scopes of *muamalah* activities. According to At-Thufi, *muamalah* is included to the human's right that can be founded the *maslahah*. Furthermore, human's *maslahah* should be more prioritized than the God's right as well as the agreement to convert the inheritance right into saving and loan form. The statement is the result of *maslahah* view to eliminate the disunity and aims to prioritize *maslahah* for the heirs. The inheritance distribution can help the poor heirs in need and can eliminate the difficulty. While, an agreement on distributing the inheritance can be supported by the consideration of heirs' economic condition. The agreement is expected to help the poor heirs. Another reason is the heirs' consideration that one of them was more responsible to the property management. Thus, the agreement to give him more share than the other's one is logical as long as the other approve the agreement.

CONCLUSIONS

1. The reason of converting inheritance right into saving and loan form consists of the advantages are; 1) to help the heir who needs fund, 2) to prevent the

disunity among heirs, 3) to create more harmonious family relationship. While, the disadvantages are; 1) the eldest son must patch the money when it is zero. 2) all heirs have no right to possess the money.

2. In the case, the agreement is the inheritance right substituted by the right to save and to loan the property (money). Based on the *maslahah* concept of Najamuddin at-Tufi, the main purpose of Islamic Law is to provide a protection for *maslahah*. He affirms that human has the human's right, especially in *muamalah* issues. Therefore, if the *nash* contradicts to human's *maslahah*, human can refuse the *nash* (only *muamalah* issues). Thus, human's right should more prioritize than the God's right (*nash*). The God's right is only in the worship and beliefs issues. The inheritance distribution issue is the scope of *muamalah* term. Najamuddin At-Thufi confirms that the *maslahah* only comes from the reason. He places the reason higher than Quran and hadith. So, if the reason looks something as a *maslahah*, then it must be maintained. Thus, the *maslahah* view of Najamuddin at-Tufi on the agreement of the inheritance distribution is as a way to realize the goal of sharia, as well as the agreement on converting the inheritance right into saving and loan form is the result of *maslahah* view to help poor heir, to eliminate the disunity, and to create the harmonious family.

SUGGESTIONS

The researcher would like to provide advices in the development of Islamic law, especially in Islamic law of inheritance. Hopefully, the advices will be constructive and acceptable for all parties, namely:

1. For the policy makers in the implementation of inheritance law, this study can be used as reference for judges of religion court in the same case.
2. The equality and solidarity of inheritance distribution knowledge is better publicized by Islamic law of inheritance experts in Friday sermons, lectures, or other events. Thus, the socialization of law in the media will create the society that can perform well the Islamic law.
3. This study can be used as a good reference for other researchers to create better research and more innovative ones.

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