



CHAPTER II

REVIEW OF RELATED LITERATURE

A. Previous Research

There are some previous researchs about the inheritance distribution. First, research on distribution of inheritance had been done by several researchers, such as Syafaat titled, *“Tinjauan Hukum Islam Terhadap Bagian Warisan Anak Ragil Pada Masyarakat Desa Cagkring Kecamatan Sabang Kabupaten Kebumen”* (The Review of Islamic law On The Eldest Son’s Share In The Society of Village of Cangkring, Sub-District of Sabang, Regency of Kebumen), year 2009. In the thesis, Syafaat says that the research result is the distribution of inheritance did

not use Islamic law, but the distribution of inheritance used the rule of *adat* law. The share of inheritance between man and woman was equal. However, the eldest son had bigger share than other, because he became the pillar of parent's family before and also managed the cost of their father's funeral.

The same research was also done by Abdulloh titled, "*Pembagian Harta Warisan Pada Masyarakat Adat Di Kabupaten Tegal*" (The Distribution of Inheritance On Adat Society In Regency of Tegal), year 2005. Abdulloh said that the the distribution of inheritance in Tegal was performed by an agreement of heirs. The agreement used the rule of Islamic law. The rasio share of inheritance was 2 : 1. The inheritance was distributed after finishing the cost of their father funeral.

In other hand, Triya Wulandari S. was also done the research titled, "*Pelaksanaan Pembagian Warisan Secara Damai Dalam Bentuk Takhoruj Di Pengadilan Agama Makassar*" (The Implementation of Inheritance In Takhoruj Form In Religion Court of Makassar), year 2014. The research was about the distribution of inheritance too, especially the distribution by an agreement. In her thesis, the distribution of inheritance was used by an agreement among heirs, namely by performing *takhoruj*. *Takhoruj* is done by some heirs to ungrudgingly do not obtain property or get the incomplete share. *Takhoruj* was done to give the benefit (*maslahah*) for heirs.

No	Name	Title	Similarities	Differences
1	Syafaat ⁴	<i>Tinjauan Hukum Islam Terhadap</i>	1. The distribution of inheritance	In Syafaat's research, the

⁴Syafaat, *Tinjauan Hukum Islam Terhadap Bagian Warisan Anak Ragil Pada Masyarakat Desa Cagkring Kecamatan Sabang Kabupaten Kebumen*, Thesis, (State Islamic University Sunan Kalijaga Yogyakarta: 2009).

		<p><i>Bagian Warisan Anak Ragil Pada Masyarakat Desa Cagkring Kecamatan Sabang Kabupaten Kebumen</i> (The Review of Islamic Law On The Eldest Son's Share In The Society of Village of Cangkring, Sub-District of Sabang, Regency of Kebumen)</p>	<p>did not use Islamic law. 2. Before the distribution, eldest son managed the cost of their father's funeral.</p>	<p>distribution of inheritance used the rule of <i>adat</i> law. Whereas in current research, the distribution of inheritance used an agreement among heirs. In Syafaat's research, eldest son had bigger share than other in inheritance distribution. Whereas current research, the ratio share of inheritance was not regulated.</p>
2	Abdulloh ⁵	<p><i>Pembagian Warisan Pada Masyarakat Adat Di Kabupaten Tegal</i> (The Distribution of Inheritance On Adat Society In Regency of Tegal)</p>	<p>1. Before the distribution, all heirs were collected to discuss the distribution (made an agreement among heirs). 2. The inheritance was distributed after finishing the cost of their father's funeral.</p>	<p>In Abdulloh's research, the distribution of inheritance used the rule of Islamic law. Whereas current research, the distribution of inheritance used an agreement among heirs. In Abdulloh's research, the ratio share of inheritance was 2 : 1. Whereas current research, the ratio share of inheritance was not regulated.</p>
3.	Triya	<i>Pelaksanaan</i>	1. Distribution of	In Triya's

⁵Abdullah, *Pembagian Harta Warisan Pada Masyarakat Adat Di Kabupaten Tegal*, Thesis, (Diponegoro University Semarang: 2005).

	Wulandari . S ⁶	<i>Pembagian Warisan Secara Damai Dalam Bentuk Takhoruj Di Pengadilan Agama Makassar</i> (The Implementation of Inheritance In Takhoruj Form In Religion Court of Makassar)	inheritance was performed by agreement of heirs. 2. The purpose of distribution of inheritance is give priority to benefit (masalahah) for heirs.	research, the distribution of inheritance used the rule of <i>takhorruj</i> form (some heirs ungrudgingly does not obtain property or get it but incompletely). Whereas curen research, the distribution of inheritance used converting inheritance right into saving and loan form.
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After analyzing the previous researches, the researcher concludes that there are many similarities and differences between the previous researches and the current research. The previous researches can used as support concepts to make good analyzing of this research. Thus, the current research can be better than previous researches.

B. Theoretical Framework

1. Islamic Law of Inheritance

The inheritance law is included to civil law. Today, Indonesia has various sources of inheritance law. The various sources of inheritance law can be seen on *Burgerlijk Wetboek* (BW) or European Law, *Adat* Law, and Islamic Law. European law is applied to Tionghoa and European peoples. *Adat* law is

⁶Triya Wulandari. S, *Pelaksanaan Pembagian Warisan Secara Damai Dalam Bentuk Takhoruj Di Pengadilan Agama Makassar*, Thesis, (Hasanuddin University Makassar: 2014).

applied to origin people of Indonesian. While Islamic law of inheritance is applied to Indonesian or Arabian *muslim*.⁷

a. The Definition

There are some names for Islamic law of inheritance. Those are *fiqh mawaris*, *ilmu faraidh*, and inheritance law. *Fiqh mawaris* is a knowledge which discuss about inheritance, how the distribution process, the person has the right to accept property, and how many the share of each heir.⁸

Muhammad al-Syarbiny gave the mean of *ilmu faraidh*:

الْفَقْهُ الْمُتَعَلِّقُ بِالْإِرْثِ وَمَعْرِفَةُ الْحِسَابِ الْمَوْصَلُ إِلَى مَعْرِفَةِ ذَلِكَ وَمَعْرِفَةُ قَدْرِ الْوَجِبِ مِنَ التَّرَكَةِ لِكُلِّ ذِي حَقٍّ

(*Ilmu faraidh* is) *Fiqh* that related to inheritance and calculation knowledge to know the share of property that should be transfered to each heir.⁹

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.¹⁰

⁷Suparman Usman and Yusuf Somawinata, *Fiqh Mawaris Hukum Kewarisan Islam*, (Jakarta: Gaya Media Pratama, 2008), p. 189.

⁸Muhibbin and Abdul Wahid, *Hukum Kewarisan Islam Sebagai Pembaruan Hukum Positif di Indonesia*, (Jakarta: Sinar Grafika, 2009), p. 7.

⁹Suparman Usman and Yusuf Somawinata, *Fiqh Mawaris Hukum Kewarisan Islam*, (Jakarta: Gaya Media Pratama, 2008), p. 14.

¹⁰Zainuddin Ali, *Pelaksanaan Hukum Waris di Indonesia*, (Jakarta: Sinar Grafika, 2008), p. 33.

b. Pillars and Requirements of Inheritance

There are three pillars in the rule of inheritance distribution. Each pillar has to fulfill requirements certain. In *fiqh*, pillar is *rukn*, and requirements are the condition that must be fulfilled by each pillar.¹¹ The pillars are as follows: 1) Deceased, 2) Property, 3) Heir.¹²

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.¹³

c. Principles of Islamic Law of Inheritance

1) Principle of *Ijbari*

The principle of *ijbari* means that the transfer of wealth to heir that automatically distributed after the deceased passed away.

2) Principle of Bilateral

The principle of bilateral means that the transfer of wealth to heir with two lineages. The lineages are matrilineal and patrilineal. Matrilineal is the lineage from the relationship of mother family, while patrilineal is the lineage from the relationship of father family. Basically, the principle of bilateral affirms that sex is not the blocker for distribution of inheritance.

¹¹Muhibbin and Abdul Wahid, *Hukum Kewarisan Islam Sebagai Pembaruan Hukum Positif di Indonesia*, (Jakarta: Sinar Grafika, 2009), p. 56-57.

¹²Amir Syarifuddin, *Hukum Kewarisan Islam*, (Jakarta: Kencana, 2008), p. 204.

¹³Suparman Usman and Yusuf Somawinata, *Fiqh Mawaris Hukum Kewarisan Islam*, (Jakarta: Gaya Media Pratama, 2008), p. 24.

3) Principle of Individual

The principle of individual means the share of inheritance can be distributed to heir individually (personally).

4) Principle of Balanced Justice (*Keadilan Berimbang*)

The principle of balanced justice means that the share of inheritance must be based on the balance of right and obligation (responsibility).

5) Principle of Death Consequence

The principle of death consequence means that the wealth can not be distributed to other (heir) if the deceased lives.¹⁴

2. Legal Basis of Islamic Law of Inheritance

a. Al-Quran

يُوصِيكُمُ اللَّهُ فِي أَوْلَادِكُمْ لِلذَّكَرِ مِثْلُ حَظِّ الْأُنثَيَيْنِ فَإِنْ كُنَّ نِسَاءً فَوْقَ اثْنَتَيْنِ فَلَهُنَّ ثُلُثَا مَا تَرَكَ وَإِنْ كَانَتْ وَاحِدَةً فَلَهَا النِّصْفُ وَلِأَبَوَيْهِ لِكُلِّ وَاحِدٍ مِّنْهُمَا السُّدُسُ مِمَّا تَرَكَ إِنْ كَانَ لَهُ وَلَدٌ فَإِنْ لَمْ يَكُنْ لَهُ وَلَدٌ وَوَرِثَهُ أَبَوَاهُ فَلِأُمِّهِ الثُّلُثُ فَإِنْ كَانَ لَهُ إِخْوَةٌ فَلِأُمِّهِ السُّدُسُ مِنْ بَعْدِ وَصِيَّةٍ يُوصِي بِهَا أَوْ دَيْنٍ آبَاؤُكُمْ وَأَبْنَاؤُكُمْ لَا تَدْرُونَ أَيُّهُمْ أَقْرَبُ لَكُمْ نَفَعًا فَرِيضَةٌ مِنَ اللَّهِ إِنَّ اللَّهَ كَانَ عَلِيمًا حَكِيمًا

“In regard to inheritance, Allah commands you concerning your children: that the share of a boy shall be twice that of a girl. In the case where there are more than two girls, their share will be two thirds of the estate; but if there is only one girl, her share will be one half of the estate. If the deceased left children behind, each of the parents shall get one sixth

¹⁴Muhibbin and Abdul Wahid, *Hukum Kewarisan Islam Sebagai Pembaruan Hukum Positif di Indonesia*, (Jakarta: Sinar Grafika, 2009), p. 23-30.

of the estate, but if the deceased left no children and the parents are the only heirs, the mother shall get one third of the estate, but if the deceased left brothers and sisters, then the mother will get one sixth of it. *The distribution in all cases shall be* after fulfilling the terms of the *last* will and the payment of debts. With regards to your parents and your children, you do not know who is more beneficial to you, therefore, Allah issued this ordinance. Surely Allah is the Knowledgeable, Wise.”¹⁵

The verse means some rules of Islamic law of inheritance, namely:

- 1) It regulates about the share comparison between male and female, namely 2 : 1.
- 2) It regulates about the share obtained by two or more daughters. They obtain two-third of property.
- 3) It regulates about the share obtained by woman, namely a half of property.
- 4) It regulates about the share obtained by mother or father. They obtain one-sixth of property if deceased has child.
- 5) It regulates if deceased has not child and brother, mother's share is one-third of property.
- 6) It regulates if deceased has not child, but he has brother, mother's share is one-sixth of property.
- 7) Should perform the distribution of inheritance according to number 1 till 6 after transferring a testament and deceased's debt.¹⁶

Beside, there are other verses which regulate about Islamic law of inheritance, namely:

¹⁵Malik, *The Qur'an in English Translation Complete*, (t.t.: MidEastWeb, 2007), p. 29.

¹⁶Zainuddin Ali, *Pelaksanaan Hukum Waris di Indonesia*, (Jakarta: Sinar Grafika, 2008), p. 35.

- 1) Surah An-Nisaa' verse 7: there is equal inheritance right for man and woman.
 - 2) Surah An-Nisaa' verse 8: there is the share for non heir who presence in the time of distribution.
 - 3) Surah An-Nisaa' verse 12: about the share of widower whose husband passed away.
 - 4) Surah An-Nisaa' verse 176: about the share of inheritance distribution in *kalalah* condition.
 - 5) Surah An-Nisaa' verse 33: about the share of inheritance distribution to substituted heir.
 - 6) Surah Al-Baqarah verse 180: about performing a testament before deceased passed away.
 - 7) Surah Al-Baqarah verse 240: about a testament for the wife leaved.¹⁷
- b. Hadith

As second source of law after Quran, hadith has three functions: the first, hadith is as interpreter or giver a concrete form of quran. The second, hadith is as explanation the rule of Quran. The third, hadith can create the law which is not mentioned in Quran.¹⁸

First, the function as the giver a concrete form, such as a hadith was noted by Bukhori and Muslim from Ibnu Abbas. The hadith said that it is better if human limits the testament from one-fourth to one-third, because the Prophet said that (might be) one-third is enough.

¹⁷Zainuddin, *Pelaksanaan Hukum*, p. 33-40.

¹⁸Abdul Ghafur Anshori, *Hukum Kewarisan Islam di Indonesia Eksistensi dan Adaptabilitas*, (Yogyakarta: Gadjah Mada University Press, 2012), p. 15.

Second, hadith is also able to as explanation the rule of Quran. Hadith explains the meaning of *al-Baqarah* verses 180 and 240, where actually the verses do not explain the provision of testament limitation. Therefore, the hadith can become explanation of the verses.

Third, hadith can create the law which is not mentioned in Quran, such as inheritance for no heir or *kalalah* that becomes the right of *baitul mal* (HR. Ahmad and Abu Daud). Besides, hadith gives a power, such as hadith about the share of daughter. The share is a half, if she is in her condition without brother (HR Five *muhaddisin* except Muslim from Ibnu Mas'ud).¹⁹

c. *Ijtihad*

In performing *ijtihad*, *Mujtahid* divides the problems to three kinds. First, a problem that is still open on interpretation because the related verse and hadith are *zanni*. Second, no rule in *nash* (Quran and hadith) for a problem, *mujtahid* has absolute freedom to *ijtihad* in this condition. Third, there is *nash qath'i* for a problem that had been done by Umar Bin Khattab with certain reason and analysis.

Ijtihad can be done with various ways, such as *qiyas* and *istihsan*. *Ijtihad* that can achieve the agreement among *mujtahids* is called *Ijmak*.²⁰ *Ijtihad* opinion from experts (thinkers) of Islamic law of inheritance can be used in this research as like as *maslahah* in Najamuddin at-Thufi view,

¹⁹Abdul Ghafur, *Hukum Kewarisan*, p. 16.

²⁰Abdul Ghafur, *Hukum Kewarisan*, p. 17.

because no rule in *nash* that regulates about converting inheritance right into saving and loan form.

d. Compilation of Islamic Law

Islamic law is a subsystem of law in Indonesia that becomes legal norm for creating national law, included in inheritance law. We can look to Presidential Directive Number 1 of 1991 about Compilation of Islamic Law and Decision of Religious Minister Number 154 of 1991. Actually, this effort becomes the good indication as like as the statements of Abdul Gani Abdullah. First, the effort shows that Islamic law is as living law in society. Second, the effort ends double perception in implementation of Islamic law. In inheritance term, the effort tries to show value of balance, justice, and equal right among heirs. Third, it gives clear direction in the implementation of Islamic law that can be used by government and society. It applies to those who need to solve the problem, especially in inheritance terms.²¹

Commonly, in the Compilation of Islamic Law, inheritance law consists of the discussion of inheritance, such as heir, deceased, property, etc. the Compilation of Islamic Law is general and acomodative, because it only regulates basic aspects that had been clearly written in Quran and Hadith, such as the heir and his/her share.

The Compilation of Islamic Law was not written some aspects too, so it has advantage and disadvantage. The advantage gives a freedom for

²¹ Abdul Ghafur, *Hukum Kewarisan*, p. 239.

judge of Religion Court in the implementation of law that has been not regulated in the Compilation of Islamic Law. Hence, the judge has more alternative of choices from *ulama's* opinions to solve cases. The disadvantage is the Compilation of Islamic Law that is still general and many aspects unregulated. Thus, the Compilation of Islamic Law is still less available in implementation unification of law.²²

3. Islamic Law of Inheritance in Hazairin

The Hazairin's thought about inheritance is based on parental or bilateral system. Bilateral system is a kinship system that is based on male and female lineages, where they are equal to get inheritance right. The system was implemented in Aceh, Riau, Jawa, Kalimantan, Sulawesi, Ternate, and Lombok societies. The bilateral system according to Hazairin is that each person can reckoned his kinship line through father or mother. Furthermore, the Hazairin's thought is the concept of inheritance system that applies the inheritance right to two lineages, both of father and mother. Bilateral society is dominant in Indonesia.²³

Hazairin affirmed that society kinship system in Quran is bilateral system. The system affects to the system of inheritance becomes bilateral system. His conclusion is based on Surah an-Nisa (4) verses 23 and 24. Hazairin argued that Quran does not accept the unilateral society such as patrilineal and matrilineal systems. Based on his research on *adat* law applied

²²Abdul Ghafur, *Hukum Kewarisan*, p. 257.

²³Abdul Ghoni Hamid, "Kewarisan Dalam Perspektif Hazairin," *Jurnal Studi Agama dan Masyarakat*, 1 (January, 2007), p. 43.

in some areas, he stated the patrilineal and matrilineal systems were not based on Quran but the differences of thought.

The Hazairin theory was relied on his research on Islamic law, especially on civil law. His brilliant understanding on surah an-Nisa verses 23 and 24 was done by social anthropology approach. Hazairin argued that the inheritance system is relied on family system, while family system is relied on marriage system. Inheritance, family, and marriage systems can determine the form of social system. Therefore, the social system may also affect marriage and inheritance systems.

The limitation of marriage prohibition in Islamic law is based on surah an-Nisa (4) verses 23 and 24. Hazairin observed the relation between those verses from social anthropology approach that the inheritance law is continuance from marriage law. Therefore, marriage law may not differ with inheritance law.²⁴

Hazairin's bilateral concept has been accommodated in article 174 verse (1) Compilation of Islamic Law. The article states that the position of male and female heirs is equal. The compilation of Islamic law makes the two different groups, namely man and woman groups.²⁵ Thus, every heir has the right to obtain his share, either is male or female.

4. Inheritance Right

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

²⁴ Abdul Ghoni, *Kewarisan Dalam Perspektif Hazairin*, p. 45.

²⁵ Abdul Ghoni, *Kewarisan Dalam Perspektif Hazairin*, p. 58.

لِّلرِّجَالِ 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 be a little or much, they shall be legally entitled to their shares.” (QS. An-Nisaa’ (4): 7).²⁶

The verse states the equality of right between male and female heirs and the difference of heirs’ share. The provision of the verse is main principle that both man and woman have the same inheritance right. This statement was affirmed by Islam that women can become legal subject in inheritance system.²⁷ 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.²⁸ The heir can have the right if he/she fulfills any requirements as follow:

- a. Individual (personal)
- b. Has blood or marriage relation
- c. Islam
- d. There is no bar of inheritance legally

²⁶Malik, *The Qur'an in English Translation Complete*, (t.t.: MidEastWeb, 2007), p. 29.

²⁷Muhibbin and Abdul Wahid, *Hukum Kewarisan Islam Sebagai Pembaruan Hukum Positif di Indonesia*, (Jakarta: Sinar Grafika, 2009), p. 12.

²⁸Mukti Arto, *Hukum Waris Bilateral Dalam Kompilasi Hukum Islam*, (Solo: Balqis Queen, 2009) p. 42.

- e. The requirements mentioned must be fulfilled when the deceased passed away.²⁹

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. Besides, the possession right is also to prohibit other persons to do anything to the property. While in inheritance system, the possession right is justification for the heir to do anything to his share, except if there is bar of inheritance.

There are two kinds of possession right in Islamic law, namely:

- a. Perfect possession (*milkuṭ tam*) is the authority right either to the thing and the benefit.
- b. Imperfect possession (*milkuṇ naqish*), is the authority right to the thing or benefit only.³⁰

Furthermore in Islamic law, there are four causes why a person can have possession right, namely:

- a. Caused by (may) have a thing (*Ihr zul mubaltat*)

The thing is not other person's thing and the possession is not prohibited by Islamic law. For example, the thing obtained from hunting, opening new land, water in the river, finding the treasure (*rikaz*) and spoil goods.

²⁹Mukti Arto, *Hukum Waris*, p. 69.

³⁰Abdul Ghafur Anshori, *Filsafat Hukum Sejarah, Aliran Dan Pemaknaan*, (Yogyakarta: Gadjah Mada University Press, 2006), p. 135.

b. Caused by agreement (*al-uqud*)

The agreement is legal relationship between two persons that a man gives a right to another to demand the property. While, the man obligates to fulfill the demand mentioned. There are two kinds of legal deed as follows:

- 1) Unilateral deed is legal deed that is performed by a man and causes rights and obligations to another. For example, to perform a testament or *hibah*.
- 2) Bilateral deed is legal deed that is performed by two parties and causes rights and obligations for them. For example, trading, renting, works or contract.

c. Caused by Inheritance (*al-Khalafiyah*)

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.

d. Caused by the benefit of property

A thing resulted from the certain property is the right of the property owner, for example animal child or cow milk.³¹

In this research, the possession right intended is *al-Khalafiyah syakhsyan syakhsy*, because the inheritance right is the right that should he/she gets after the deceased passed away. The inheritance right is obtained from replacing the deceased's position, included to have the property left.

5. *Maslahah*

Maslahah is Arabic word that was formed from “*salaha-yasluhu-suluhan-wa sulahan-wa salahiyyatan*”. *Maslahah* is *masdar* that means anything which produces good benefit and useful value, either in tangible or intangible. 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 related to human's interests that aim to prevent *madharat* in the life. *Al-maslahah* can be said as a pillar of sharia which directly relates to human's interests. *Al-maslahah* is the main purpose and the intent of the sharia formulation.³²

The definition of *maslahah* in al-Khawarizmi is:

وَالْمَرَادُ بِالصَّلَاحَةِ الْمُحَافَظَةُ عَلَى مَقْصُودِ الشَّرْعِ بِدَفْعِ الْمُفَاسِدِ عَنِ الْخَلْقِ

³¹Abdul Ghafur Anshori, *Filsafat Hukum Sejarah, Aliran Dan Pemaknaan*, (Yogyakarta: Gadjah Mada University Press, 2006), p. 135-137.

³²Arifah 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.

“And that was intended with *al-maslahah* is to maintain the purpose of Islamic law by refusing the disadvantage (*Mafasid*) of human.”³³

Scholars agreed that the purpose of Islamic law is to maintain religion, life, mind, lineage, and property and to prevent damages. *Al-maslahah* is the part of sharia doctrine in the legislation that according to God's command.³⁴ Scholars of *ushul fiqh* divide *maslahah* into two kinds; the first, *maslahah uhkrawi* consists of beliefs (*aqidah*) and worship, and the second *maslahah duniawi* that exist in *muamalah* issues.³⁵

Commonly, scholars agreed that *ri'ayah al-maslahah* is the concept which describes the maintainance of Islamic law's purpose. *Ri'ayah al-maslahah* was determined to obtain the advantage or refuse *mudharat* to the human (to maintain the religion, life, mind, offspring, and property). They admitted two kinds of *ri'ayah al-Maslahah* that can be accepted as legal sources; the first, *mashlahah mu'tabarah* that is recognized by *Quran* or *hadith* and the second, *mashlahah mursalah* is *mashlahah* which is not supported by the certain theorem but supported by uncertain one.³⁶

Furthermore, *maslahah* in Najamuddin at-Thufi view will be explored in detail as follows:

³³ Arifah Millati, *Konsep Ri'ayah*, p. 50.

³⁴ Arifah Millati, *Konsep Ri'ayah*, p. 53.

³⁵ Idaul Hasanah, *Konsep Maslahah Najamuddin Al-Thufi Dan Implementasinya*, (FAI University of Muhammadiyah Malang), p. 2.

³⁶ Arifah 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. 74-75.

a. *Maslahah* of Najamuddin at-Tufi

At-Tufi, a Hanbali scholar,³⁷ lived in decline of Islam period (decline of Islamic law). This period started from middle of fourth century of hijriah till end of thirteenth century of hijriah when many scholars were less brave to find new Islamic laws. They felt enough and just followed the opinion of previous scholars (as Abu Hanifah, Maliki, Syafi'i, and Hambali).³⁸

At-Tufi defined *maslahah* is:

عِبَارَةٌ عَنِ السَّبَبِ الْمُوْدِّي إِلَى مَقْصُودِ الشَّارِعِ عِبَادَةً أَوْ عَادَةً

“The expression from the reason that brings to the Sharia goal in the form of worship or *adat*.”³⁹

The definition of *Maslahah* in at-Tufi view equals to al-Ghazali is which looks that *maslahah* can bring to the Sharia goal. *Maslahah* becomes a criterion and a reference of Sharia goal that aims to maintain the religion, life, mind, lineage and property without releasing human's interests.⁴⁰ He argued that *al-maslahah* is the purpose of Islamic law, and the (specific) *nash* that contradicts to *al-maslahah* should be disregarded.⁴¹

³⁷Jasser Auda, *Maqasid Al-Shari'ah As Philosophy of Islamic Law: A Systems Approach*, (Selangor: Vinlin Press, 2010), p. 122.

³⁸Hamzah, “Kemaslahatan Menurut Najamuddin Al-Tufi,” *al-Daulah*, 1 (Juni, 2014), p. 93-94.

³⁹Hamzah, Kemaslahatan Menurut, p. 97.

⁴⁰Amir Syarifuddin, *Ushul Fiqh*, Jilid 2, (Jakarta: Kencana, 2009), p. 347.

⁴¹Jasser Auda, *Maqasid Al-Shari'ah As Philosophy of Islamic Law: A Systems Approach*, (Selangor: Vinlin Press, 2010), p. 122.

The statement based on at-Thufi's word:⁴²

وَإِنْ تَعَدَّرَ الْجَمْعَ بَيْنَهُمَا قَدِّمْتَ الْمَصْلَحَةَ عَلَى غَيْرِهَا ، لِقَوْلِهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ : لَا ضَرَرَ وَلَا ضِرَارَ ، وَهُوَ خَاصٌّ فِي نَفْيِ الضَّرَرِ الْمُسْتَلْزِمِ لِرِعَايَةِ الْمَصْلَحَةِ ، فَيَجِبُ تَقْدِيمُهُ ، وَلِأَنَّ الْمَصْلَحَةَ هِيَ الْمَقْصُودَةُ مِنْ سِيَاسَةِ الْمُكَلَّفِينَ بِإِثْبَاتِ الْأَحْكَامِ وَبَقَايِ الْأَدِلَّةِ كَالْوَسَائِلِ ، وَالْمَقَاصِدُ وَاجِبَةُ 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."

At-Tufi obtained the view of *maslahah* from the discussion (syarah) hadith number 32 of Hadith Arba'in Nawawi that said:

حَدَّثَنِي يَحْيَى عَنْ مَالِكٍ عَنْ عَمْرِو بْنِ يَحْيَى الْمَازِنِيِّ عَنْ أَبِيهِ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ لَا ضَرَرَ وَلَا ضِرَارَ

"(Malik Says) Yahya told to me, he narrated from Malik, from 'Amr bin Yahya al-Mazini from his father that the Prophet said: Do not endanger thyself and others (HR. Malik Number 1234)."⁴³

The hadith means not to cause the danger to self and others, and not to reply a disadvantage with other one. Beside the hadith (*la darâra wa lâ dirâra*), his view of *mashlahah* is also based on other verses, such as

⁴² At-Thufi, *Risalah fi Ri'ayah al-Maslahah*, (First Edition; Mesir: t.p., 1413), p. 45.

⁴³ Imron Rosyadi, "Pemikiran At-Tufi Tentang Kemaslahatan," *Suhuf*, 1, (Mei, 2013), p. 52.

about *qishâh*, the punishment for adulterers and the punishment of cutting off a hand. The verses imply that *maslahah* should be maintained with the law enforcement.

Because of *Sanad* of the hadith consists of Yahya bin ‘Imarah bin Abi Hasan, ‘Amr bin Yahya bin ‘Imarah bin Abi Hasan, Malik, dan Yahya, the Hadith which narrated by Malik in *al-Muwaththa’* is *marfu’ mursal*, because there is not a *sahabat* in this *sanad*. However, after researching the narrators’ connection, the *sanad* can be judged until the Prophet (*marfu’*). Yahya bin ‘Imarah bin Abi Hasan (Ibn Ishaq appraises him as *tsiqoh*), and ‘Amr bin Yahya bin ‘Imarah bin Abi Hasan (an-Nasa’i, Ibn Ma’in, al-‘Ajali dan Ibn Namir appraise him as *tsiqoh*), so the hadith is *shahih*. Thus, the hadith can be used as an argument (*hujjah*) to decide an issue.⁴⁴

At-Tufi formulated *maslahah* theory from the hadith because he wanted to affirm that the main purpose of Islamic law is to protect the human’s interests.⁴⁵ 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

⁴⁴Imron Rosyadi, *Pemikiran At-Tufi*, p. 53.

⁴⁵Abdallah M. al-Husayn al-’Amiri, *Dekonstruksi Sumber Hukum Islam Pemikiran Hukum Najm ad-Din Thufi*, (Jakarta: Gaya Media Pratama, 2004), p. 42.

maslahah becomes human's right that more prioritize than the God's right (*nash*).⁴⁶

There are four principles which were espoused by at-Tufi that made him different with the other scholars' view, namely:

- 1) Free mind determines *maslahah* and *mafsadat*. Because of the mind can determine *maslahah* and *mafsadat*, *maslahah* must get the support from the *nash* or *ijma'*. But, he limits the independence of mind in the cases of *muamalah* (social interaction) and *adat* only. He released the dependence on the *nash* about goodness and badness of *muamalah* and *adat* issues.
- 2) *Maslahah* is independent theorem in legal decision. Hence, the *maslahah* does not require supporting theorem, because *maslahah* is based on the mind opinion only.
- 3) *Maslahah* just applies to *muamalah* and custom issues. But, worship was regulated by Sharia such as *Rakaat*⁴⁷ of *Dluhur* praying is 4, fasting for 30 days, and *tawaf*⁴⁸ is seven times. Worship issues are not object of *maslahah*, because it is included to Allah's right.
- 4) *Maslahah* is the most powerfull of sharia theorem. Therefore, he also said that if the *nash* or *ijma* contradicts to *maslahah*, *maslahah* is more important than the *nash* by the way of *takhsis* and *bayan*.⁴⁹

⁴⁶Imron Rosyadi, "Pemikiran At-Tufi Tentang Kemaslahatan," *Suhuf*, 1, (Mei, 2013), p. 55.

⁴⁷*Rakaat* is esesntial unit of prayer ritual, consisting of bows and prostrations performed a prescribed number of times.

⁴⁸*Tawaf* is ceremony of circumambulation of the Ka'bah in mecca Seven times.

⁴⁹Hamzah, "Kemaslahatan Menurut Najamuddin Al-Tufi," *al-Daulah*, 1 (Juni, 2014), p. 98-99.

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 mind higher than Quran and Hadith. According to Tufi, the goal of sharia is *maslahah*, and *maslahah* can be achieved by the mind. The mind can be used to determine *maslahah* or *mafsadat*, because Quran and Hadith repeatedly push the human to use the mind well.

At-Tufi prioritizes *maslahah* than the *nash* because the *nash* contains many contradictions. Therefore, maintaining the *maslahah* is the reason agreed by sharia.

According to at-Tufi, basically Allah's and the Prophet's word were intended to human's interests (*maslahah*). Hence, the existence of *maslahah* as a legal basis can not be doubted, not only when no *nash* and *ijma* regulate the issues, but also when contradict among them, *maslahah* should be priority. At- Tufi counted out provisions in the field of worship. He wrote, "We regarded that *al-maslahah* is should be prioritized than other in the field of *muamalah*, not in worship."⁵⁰

6. *Ash Shulhu*

Literally, *Ash-shulhu* means to end disputes or quarrels. While in sharia, *shulhu* is a kind of agreement to end the resistance between two parties. The person who performs the agreement is called *mushalih*. The issue disputed is called *mushalih 'anhu*. The activity was done by a party to end the

⁵⁰Yusuf Al-Qardhawi, *Dirasah fi Fiqh Maqashid Asy-Syari'ah (Baina Al-Maqashid Al-Kulliyyah wa An-Nushush Al-Juz'iyyah)*, Translator. Arif Munandar Riswanto, (First Edition; Jakarta: Pustaka Al-Kautsar, 2007), p. 230.

dispute is called *mushalih 'alaihi*, or *badalush shulh*. *Ash-shulhu* aims to achieve an agreement in the disunity. Allah says in Surah Hujurat verse 9:

وَإِنْ طَائِفَتَانِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأَصْلَحُوا بَيْنَهُمَا فَإِنْ بَغَتْ إِحْدَاهُمَا عَلَى الْأُخْرَىٰ فَقَاتِلُوا
الَّتِي تَبْغِي حَتَّىٰ تَفِيءَ إِلَىٰ أَمْرِ اللَّهِ فَإِنْ فَاءَتْ فَأَصْلَحُوا بَيْنَهُمَا بِالْعَدْلِ وَأَقْسِطُوا إِنَّ اللَّهَ يُحِبُّ
الْمُقْسِطِينَ

“If two parties among the believers fall into mutual fighting, make peace between them. Then if one of them transgresses against the other, fight the one who has transgressed until he returns to the commands of Allah. Then, if he returns, make peace between them with justice and be fair; for Allah loves those who are fair and just.”⁵¹

The Prophet’s word also mentions that the agreement among Muslims is allowed. Accordance to the hadith narrated from ‘Amar bin ‘Auf, the Prophet said:⁵²

الصُّلْحُ جَائِزٌ بَيْنَ الْمُسْلِمِينَ إِلَّا صُلْحًا حَرَّمَ حَلَالًا أَوْ أَحَلَّ حَرَامًا

“The agreement between the Muslims was allowed, except the agreement which allows the forbidden or forbids the kosher.”

And at-Tirmidzi affirmed:⁵³

وَالْمُسْلِمُونَ عَلَىٰ شُرُوطِهِمْ

“And (*muamalah*) Muslims was based on their requirements.”⁵⁴

⁵¹Malik, *The Qur'an in English Translation Complete*, (t.t.: MidEastWeb, 2007), p. 232.

⁵²Ibnu Majah Abu Abdullah Muhammad bin Yazid al-Quzwaini, *Sunan Ibnu Majah*, (t.t.: Dar Ihya'), p. 788.

⁵³Muhammad bin Isa bin Surah bin Musa bin ad-Dahhak at-Tirmidzi, *Sunan at-Tirmidzi*, (Ed. 2; Egypt: t.p., 1395), p. 626.

Then, he said that the hadith is *hasan shahih*. Umar said: "Refuse hostility until they reconcile, because adjudicates the case in the court will develop the malice among them."⁵⁵

A requirement of *mushalih* is a person that the actions can be declared valid legally, is not like crazy, childish, etc. While, the requirements of *mushalih 'anhu* are as follows:

- a. *Mushalih 'anhu* is useful goods.
- b. *Mushalih 'anhu* is included to human's right that can be replaced ('iwadh).⁵⁶

7. *Maqasid al-Shariah*

Literally, *maqsid* (plural: *maqasid*) refers to a purpose, objective, principle, intent, or goal. *Maqasid al-shariah* is the pupose of Islamic law. For a number of Islamic legal theorists, *Maqasid al-shariah* is an alternative expression to people's interests. For example, Abd al-Malik al-Juwayni, one of the earliest contributors to *al-maqashid* theory used *al-maqashid* and public interests (*al-masalih al-'ammah*) interchangeably. Abu Hamid al-Ghazali elaborated on a classification of *maqashid*, he called it "unrestricted interests" (*al-masalih al-mursalah*). Fakhr al-Din al-Razi and al-Amidi followed al-Ghazali in his terminolgy. Najm al-din al-Tufi who gave *al-maslahah*

⁵⁴Sayyid Sabiq, *Fikih Sunnah*, Vol. 13, Translator. Kamaluddin A. Marzuki, (8th Edition; Bandung: Al-Ma'arif, 1987), p. 212.

⁵⁵Sayyid Sabiq, *Fikih Sunnah*, p. 212.

⁵⁶Sayyid Sabiq, *Fikih Sunnah*, p. 213-217.

precedence even over the direction implication of the *nash*, he defined *maslahah* as what fulfils the purpose of the Legislator.⁵⁷

Maqasid al-Shariah consists of two words namely *Maqasid* and *al-Shariah*. *Maqasid* means deliberateness or aim, and *al-Shariah* means the path to the source of water, can also be said as a way toward the main source of life. Meanwhile, al-Syatibi said:

هَذِهِ الشَّرِيعَةُ... وَضِعَتْ لِتَحْقِيقِ مَقَاصِدِ الشَّارِعِ فِي قِيَامِ مَصَالِحِهِمْ فِي الدُّنْيَا وَالْآخِرَةِ

“Actually *shariah* is intended to establish human’s welfare in the world and the hereafter.”⁵⁸

The definition said that the aim of sharia according to Imam al-Syatibi is human’s *maslahah*. He affirmed that no rule of Allah which does not have a purpose. The rule does not have a purpose as same as impose something that can not be implemented. He argued that *maslahah* is as something which relates to human’s welfare, the fulfillment of necessity for human’s life, and the acquisition from the emotional and intellectual qualities.

The necessity for human’s life is used to determine the goodness and badness (*maslahah* and *mafsadat*) of something and becomes the main goal of law enforcement. Human’s demands are stratified, according to al-Syatibi there are three categories, namely: *dharuriyat* (primary need), *hajiyyat* (secondary need), and *tahsiniyah* (tertiary need). Before al-Syatibi era, al-

⁵⁷Jasser Auda, *Maqasid Al-Shari’ah As Philosophy of Islamic Law: A Systems Approach*, (Selangor: Vinlin Press, 2010), p. 2.

⁵⁸Muslimin Kara, “Pemikiran Al-Syatibi tentang Maslahah dan Implementasinya Dalam Pengembangan Ekonomi Syariah,” *Assets*, 2 (2012), p. 177.

Juwaini also had the same view that affirmed three kinds of the purposes of *shariah* as follow:

- a. *Dharuriyat* is the crucial matter of religious continuity and human's life in the world and the hereafter. If the primary need is lost, we will provide misery on the world, the loss of favor, and the punishment in the hereafter. According to the scholars, there are five kinds of *dharuriyat*, namely: maintaining the religion, life, mind, lineage, and property.
- b. *Hajiyat* is to relieve human's difficulty. If the secondary need does not exist, human will feel the difficulty. For example, performs an agreement among two parties.
- c. *Makramat (Tahsiniyat)* is to make the human be in a noble behaviour and straight morality. If it does not perform, human's life would be contrary to the values of decency, morality, and healthy. For example, to close the genitals and well dressed when praying.⁵⁹

⁵⁹Ghilman Nursidin, *Konstruksi Pemikiran Maqashid Syariah Imam al-Haramain al-Juwaini (Kajian Sosio-Historis)*, Synopsis of Thesis (Semarang: State Islamic Institute Walisongo Semarang: 2012), p. 20.