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Najmuddin Ath Thufi *Mashlahah* as Legal Reasoning for Judges' Decisions and Its Contribution to the Reform of Indonesian Islamic Family Law

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Abstract: This article explores the concept of *Mashlahah* Najmuddin Ath Thufi as a legal reasoning for judges' decisions. The concept of Mashlahah Najmuddin Ath Thufi can be a solution for judges in deciding cases in court. The judges are required to build legal reasoning, who do not have strong legal reasoning can produce decisions that are considered *Onvoldoende Gemotiveerd*, namely decisions that are insufficient judgment. The question to be answered in this article is how is the construction of Mashlahah according to Najmuddin Ath Thufi in the legal reasoning of judges' decisions? What is the contribution of Najmuddin Ath Thufi's *Mashlahah* to the renewal of Islamic family law in Indonesia? The method of analysis uses qualitative, while the approach is normative. Data sources are obtained from books, law journals, court decisions and dictates. The results show that, Najmuddin ath Thufi's Mashlahah theory bases the constellation of Mashlahah on the superiority of human reason, based on the interpretation of the Prophet's hadith which reads la dharar wala dhirar. Mashlahah Najmuddin Ath Thufi as the basis of Legal Reasoning for judges' decisions focuses on rechtsvinding (law discovery) and creating new laws (rechtsschepping). Judges because of their position (ambtshalve), are not just the mouth or mouthpiece of the law (bouche de la loi), but become translators or givers of meaning (interpreters). Najmuddin ath Thufi's Mashlahah theory contributes to the reform of Islamic family law in Indonesia through court decisions.

Keyword: Protection, Rights of Women and Children, Interconnection System.

Abstrak: Artikel ini mengupas konsep Mashlahah Najmuddin Ath Thufi sebagai *legal reasoning* putusan Hakim. Konsep *maslahah* Najmuddin Ath Thufi dapat menjadi tawaran solusi bagi Hakim dalam memutuskan perkara di Pengadilan. Hakim dituntut untuk membangun *legal reasoning*, Hakim yang tidak memiliki *legal reasoning* yang kuat dapat menghasilkan putusan yang dianggap *Onvoldoende Gemotiveerd* yakni putusan yang *insufficient judgement*. Pertanyaan yang akan dijawab dalam artikel ini adalah bagaimana konstruksi Mashlahah menurut Najmuddin Ath Thufi di dalam *legal reasoning* putusan hakim? Apa konstribusi Mashlahah Najmuddin Ath Thufi terhadap pembaruan hukum keluarga Islam di Indonesia? Metode analisis menggunakan kualitatif, sedangkan pendekatan secara normatif. Sumber data diperoleh dari buku-buku, jurnal-jurnal hukum, putusan pengadilan dan diktat-diktat. Hasil penunjukkan bahwa, teori *Mashlahah* Najmuddin ath Thufi melandaskan konstelasi Mashlahah pada superioritas akal pikiran manusia, dilandaskan dari interpretasi hadis Nabi yang berbunyi *la dharar wala dhirar*. *Mashlahah* Najmuddin Ath Thufi sebagai dasar *Legal Reasoning* putusan hakim menitik beratkan pada *rechtsvinding* (penemuan hukum) dan menciptakan hukum baru (*rechtsschepping*). Hakim karena jabatannya (*ambtshalve*), bukan sekadar mulut atau corong undang-undang (*bouche de la loi*), tetapi menjadi penerjemah atau pemberi makna (penafsir). Teori *Mashlahah* Najmuddin ath Thufi memberikan konstribusi terhadap pembaruan hukum keluarga Islam di Indonesia melaui putusan Pengadilan.

Kata Kunci: Mashlahah, Najmuddin Ath Thufi, Legal Reasoning, Islamic Family Law.

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A. Introduction

Legal Reasoning is reasoning about the law, which is the search for "reason" about the law or the search for the basis of how a judge decides a case or legal case, a lawyer argues the law and how a legal expert reasons the law (Vera & Ainuddin, 2017). Another meaning of Legal Reasoning is to find the legal basis contained in a legal event, whether it is a legal act (agreement, trade transaction, etc.) or a case of violation of law (criminal, civil, or administrative) and incorporate it into existing legal regulations (Susetio, 2011). In carrying out their duties, a judge must have good reasoning in analyzing and giving sufficient consideration (Yoki Pradikta et al., 2024).

However, due to a lack of understanding of legal reasoning, it is not uncommon for judges' decisions to be considered Onvoldoende Gemotiveerd, namely decisions that are considered imperfect, in English referred to as insufficient judgment (Wijaya, 2020). Incomplete judicial decisions are decisions that do not carefully consider all the facts relevant to the case in question and do not contain strong legal grounds (Firdawaty et al., 2023).

Article 5 paragraph (1) of Law No. 48/2009 on Judicial Power says that "*Judges and constitutional judges are obliged to explore, follow, and understand the values of law and a sense of justice that live in society*" (Faridah Junida Maudian, A. Muslimin, 2023). Based on the explanation of the article, this provision is intended so that the decisions of judges and constitutional judges are in accordance with the law and sense of justice of the community. Legislation that always lags behind social changes in society requires the sensitivity of judges to prioritize the sense of justice that lives in society, but this will become a serious problem when the sense of justice that lives in the midst of society is contrary to existing laws and regulations (Habib Shulton A, Fatul Mu'in, 2020).

Of the many legal issues that are brought before the Court, there are several examples of cases where judges dare to decide cases contrary to existing laws and regulations. One example is about inheritance cases regarding non-Muslim heirs. The Prophetic Hadith clearly states the following:

حدثنا أبوعاصم عن ابن جريج عن ابن شهاب عن علی ابن حسين عن عمر بن عثمان عن اسامة بن زيد رضی الله عنهما أن النبي رسول الله صلى الله عليه وسلم قال لايرث المسلم الكافر ولاالكافر المسلم

The Compilation of Islamic Law in Article (172) regulates as follows: *The heir is considered to be Muslim if it is known from the Identity Card or recognition or practice or testimony, while for newborns or children who are not yet adults, religion according to their father or environment*. The Hadith and the Compilation of Islamic Law above stipulate that the requirements for heirs must be Muslim (Nawawi et al., 2021). However, there are several Supreme Court decisions that provide inheritance to non-Muslim heirs by way of compulsory testament, one of which is decision number 16 K/AG/2010 and was decided by the Supreme Court on April 30, 2010. The Supreme Court's consideration of giving mandatory will to non-Muslim heirs with legal considerations of a sense of justice and benefit (Maksum, 2020).

The principle of law in Indonesia as referred to in Article 5 paragraph (1) of Law Number 48 of 2009 has given judges the freedom to decide cases that contradict statutory regulations because the statutory regulations are contrary to the sense of justice that lives in the midst of society but still must be with responsible freedom, meaning that any decision made by the judge must be with strong legal reasoning

so that the decision becomes complete and perfect so that it can convince justice seekers (Pradikta et al., 2023).

The creation of law is a form of ijtihad of Judges who do not just find what is already contained in legal sources, but also make something from nothing (Mu'in et al., 2023). This is where the urgency of the function and position of the Judge responds and provides protection for legal cases that exist among the people on the obligations positioned by law (See: LNRI Tahalun 2004 No. 9 and TLNRI No. 4359). For this reason, a judge must have theoretical abilities in technical law, such as interpretation and legal construction, which in essence on the one hand is to provide space for judges to find the law of a case being examined, as well as motivated judges not to be rigid in the rules in the articles of legislation. In the scope of deciding a problem, there is also the term contra legem, which is a way of allowing a judge to deviate from a rule that is in fact contrary to the justice of the people. This action, according to the law, has legitimacy (Article 28 paragraph (1) of Law Number 4 Year 2004, concerning Judicial Power), which essentially gives a mandate to Judges to find the value of regulations found among the people so that the decisions created can realize a sense of justice.

Discussion related to legal reasoning in judges' decisions in this article, the author tries to analyze with the Mashlahah theory of Najmuddin ath Thufi, the offer of this Mashlahah theory is to build strong legal reasoning in judges' decisions. Najmuddin ath Thufi's Mashlahah theory is very different from the Mashlahah theory of other scholars. Besides its emergence against the current of his time. Mashlahah ath-Thufi is known to be more liberal than Mashlahah ash Syatibi (Hasanah, 2011).

According to Ath Thufi, "*by preserving Mashlahah, that is actually the starting point of the purpose of shari'ah, unlike worship because it is the prerogative of Allah*" (Khalaf, 1972). Ath Thufi further explains that sometimes the Mashlahah and the Shar'i arguments are compatible, and sometimes they are contradictory. If they are compatible, then it is permissible to apply the Mashlahah or other evidence. On the other hand, if they are contradictory, but it is possible to compromise, then the solution is to compromise as long as some of the arguments can be brought to bear on some other rulings and circumstances on the principle of not neglecting Mashlahah. Then, if this is not possible, then Mashlahah must take precedence over other arguments, given the Prophet's hadith *la dharar wala dhirar*. The Prophet's Hadith *la dharar wala dhirar* specifically states that the elimination of harm is the goal of the ruling, while the texts and consensus are more of a means to achieve the goal of the law, therefore, the goal (al-maqashid) must take precedence over the means (al-wasa'il) (Khalaf, 1972, p. 141).

If the Judge chooses justice or expediency by overriding the articles and even overriding the text (Al-Qur'an, Hadith) then the concept of Mashlahah Ath-Thufi if integrated with the principle of expediency or the principle of justice as referred to in the purpose of law is expected to give birth to a solid legal argument. So this means that even though the Judge's decision is against the articles or even against the text, if the Judge in his legal reasoning presents a solid legal argument, the Judge can still be said to decide according to the law.

There have been many researchers who have conducted research on Najmuddin Ath Thufi's Mashlahah theory including Muhammad Roy Purwanto, the subject of this research is epistemological criticism, and ideological criticism of the concept of

Mashlahah al-Thûfi, as well as the re-formation (reconstruction) of the concept of Mashlahah, so as to produce a concept of Mashlahah that is rational, universal and dynamic (Purwanto, 2014). M. Ilham, wrote about Najm Al-Din Al-Tufi's thoughts on mashlahat and the relevance of the Concept of Religious and State Relations. The main problem raised in this study is how Najmuddin Ath-Thufi's thoughts on Mashlahah and its relevance to the concept of religion and state relations (Ilham, 2016). Another research by Moch. Nurcholis, with his research on determination of Mashlahah on the liberation nash of Najmudin Al-Thufi's shari'ah reasoning, that to find the existence of Mashlahah does not have to wait for information and support from the nash. Reason can independently determine things that have Mashlahah in them and things that have mafsadah. However, in its application, maslahah must be considered whether it is related to worship and muqaddarât or related to mu'amalat and customs (Moch. Nurcholis, 2017).

The novelty and Gap analysis of this article is a decision that prioritizes legal expediency with a Mashlahah approach according to Najmuddin Ath-Thufi as legal reasoning. The problems to be answered in this article are how is the construction of Mashlahah according to Najmuddin Ath Thufi in the legal reasoning of judges' decisions? What is the contribution of Najmuddin Ath Thufi's Mashlahah in the legal reasoning of judges' decisions for the renewal of Islamic family law in Indonesia? The contribution of this article is to answer the need for renewal of Islamic family law in Indonesia through judges' decisions that prioritize legal expediency with the Mashlahah approach according to Nujmuddin Ath-Thufi.

B. Research Methods

This type of article is normative juridical, normative juridical research in this article puts the law as a building system of norms. The system of norms in question is about the principles, norms, rules of legislation, agreements and doctrines (teachings), this research specializes in one of the principles of the three legal principles born from the theory of legal objectives, namely the principle of expediency, there are differences of opinion among legal experts about the permissibility of principles being used as legal arguments, because principles are considered as something that is still abstract.

The method used is qualitative, aiming to analyze the principle of benefit as part of legal reasoning by integrating the theory of Mashlahah from Najmuddin Ath-Thufi and the principle of benefit into legal reasoning, thus it is hoped that the principle (benefit) which if still considered abstract, but can be "convincing" as a legal argument. While the approach used is a conceptual approach. The definition of a conceptual approach is research that departs from legislation and doctrines that develop in legal science (Marzuki, 2007).

In this study, the author departs from Article 5 paragraph (1) of Law Number 48 of 2009 which gives judges the freedom to decide cases that are contrary to laws and regulations because these laws and regulations are contrary to the sense of justice that lives in the midst of society. Secondary data sources in the author of this article are in the form of books related to the purpose of law according to legal science, books written by classical and contemporary fiqh writers who study and criticize Najmuddin Ath-Thufi's opinion on Mashlahah theory and also books that study and criticize the theory of legal objectives, journals, papers, articles, newspapers, the internet related to the object of this research.

C. Results

Najmuddin Ath Thufi Maslahah Framework

Abu al-Rabi' Sulaiman bin 'Abd al-Qawi bin 'Abd al-Karim ibn Sa'id, he is better known as Najmuddin ath-Thufi. The diminutive name with al-Thufi is actually named after the village of Thufa in the Sharshar region, known as sharshar al-Sufla, near Bagdad, where he was born (Zaid, 1954). Historically, at-Thufi was born into a critical and uncertain society after the fall of Baghdad to the Mongols. The fall of Baghdad due to the attack of the Mongol army is a very heartbreaking tragedy in the trajectory of Muslim history. Because directly or indirectly is the starting point of the decline and destruction of Muslims, both politically and social life and science. Qamaruddin Khan argued that at that time there was a burning of very valuable works so that many works could not be saved. Muslims greatly lost the documentation of science as the intellectual heritage of previous generations (Khan, 1983).

Ath-Thufi's education began in his hometown by studying with several teachers. He memorized the books al-Mukhtasar al-Kharqi (Summary of al-Kharqi's book) and Al-Luma' (Works of Ibn Jani, Ath-Thufi's teacher) in the field of Arabic. He also traveled back and forth to Sarsar to study fiqh with Shaykh Zainuddin Ali bin Muhammad as-Sarsari, a Hanbali jurist known as al-Bugi. In 691 AH he moved to Baghdad. There he memorized al-Muharrar fi al-Fiqih (the handbook of the Hanbali school) and discussed it with Shaykh Taqiyuddin Az-Zarzirati. In addition, he studied Arabic with Ali bin Abdillah bin Muhammad Al-Mausuli. He studied usul fiqh with Nashr Al-Faruqi, and hadith with Rashid bin Al-Qasim, Ismail bin At-Tabbal, and Abdur Rahman bin Sulaiman Al-Harani. Most of his teachers were of the Hanbali school of thought and so it is not surprising that he was also a follower of the Hanbali school.

In addition to these sciences, he also studied logic, faraid, and al-fadal (how to discuss), so that he was able to express his thoughts independently, without being bound to a madhhab. In this regard, when compiling Al-Akbar fi Qawa-id At-Tafsir, he said that the book was intended for those who want to develop their minds in search of the truth, not for those who are bound by the opinions of others or seek the truth through the opinions of others. Almost all histories that explore Al-Thufi's life history describe Al-Thufi as an intellectual genius who likes to read and write and is classified as productive in the world of scientific works. More than that he is a liberalist and generalist whose work is biased in various disciplines. The many places and regions that Ath-Thufi visited to absorb knowledge and expand his thinking helped condition an intellectual figure who was not only specific to one discipline. On the contrary, Ath-Thufi's works can cover various disciplines. His works include the Qur'an, Hadith, Fiqh, Usil Fiqh, Language, Literature and he was also a famous poet in his time.

Najamuddin al-Thufi is a scholar of ushul fiqh of the Hambali school of thought. He is known for his maslahah theory. His thinking about maslahah is known by some researchers of Islamic law as biased and liberal thinking. Because according to him, if there is a conflict between the qath'i nash and the keMashlahahan in tsubutut dilalah, then maslahah must take precedence and suspend the nash because the shari'a was revealed to realize human keMashlahahan (Zaid, 1954).

Ath-Thufi stood out in the field of ushul fiqh when he discussed the concept of necessity in his book Syarah al-Arbain an-Nawawiyah (Ath-Thufi, 1998). It is this controversy in the field of keMashlahahan that makes him still remembered today. According to Ath-Thufi, the teachings revealed by Allah SWT through His revelation and the sunnah of the Prophet SAW are essentially for the benefit of mankind. Therefore, in all matters of human life, the principle that is taken into consideration is kemashlahatan. If a job contains kemashlahlah for humans, then the work must be carried out. In discussing this concept of keMashlahahan, Ath-Thufi is very different from other scholars (Ath-Thufi, 1998). Ath-Thufi, in compiling his Mashlahah theory, classifies Islamic law into two groups, first, the laws of worship and muqaddarat whose meaning cannot be reached by the intellect in detail. The guidelines in this first group of laws are nash and ijma'. The second group is the laws of muamalat, adat, siyasah dunyawiyyah, and others whose meanings and intentions can be reached by the human mind. The basis and guidance is maslahah an-naas (human benefit) (Irfan et al., 2021). Thus, at-Thufi gives precedence to maslahah over nashah and ijma' in matters of custom, muammalat, and others if nashah and ijma' contradict maslahah. However, not in matters of worship, because that is the right of Shara' and it is not known how to determine the Mashlahah except from the text and consensus (Ath-Thufi, 1998).

Ath-Thufi tends to base the constellation of Mashlahah on the superiority of human reason. For Ath-Thufi, the vision of reason is more objective in positioning the criteria of Mashlahah than the antagonism of nash (teaching texts) between one another. There are at least four ideal foundations used by Ath-Thufi in analyzing and laying the foundations of Mashlahah theory in Islamic fiqh, which is different from the majority of scholars. The four foundations are:

1. *Istiqlal al-'uqul bi idrak al-mashalih wa al-mafasid*. Freedom of human reason to determine the prosperity (maslahah) and misery (Mudharat) in the field of worldly mu'amalat. The implication is that the determination of the prosperity and misery in the field of muamalat is sufficiently done by human reasoning without the support of revelation or hadith. According to Ath-Thufi, human reason alone is competent enough to determine what is maslahah and what is mafsadat (mudharat). This seems to create quite a controversy compared to the opinion of shariah experts in general who only recognize the existence of Mashlahah that comes from the principle of nash.
2. *Al-maslahah dalil syar'i, mustaqill 'an al-nushush.* the prosperity (maslahah) is an argument outside the sacred text (verse or hadith). Mashlahah is an independent shar'i argument in the sense that the validity of Mashlahah has no dependence on the nash. On the contrary, the existence of Mashlahah can be shown by empirically proving it through customary law.
3. *Majal al-'amal bi al-Mashlahah huwa al-mu'amalah wa al- 'adat duna al-'ibadah wa al-muqaddarat.* According to Ath-Thufi, matters of worship are purely the right of the almighty alone, so there is no opportunity for humans to uncover its Mashlahah content. On the other hand, what concerns mu'amalah and 'adah, Allah SWT consumes fully for the benefit of His servants. Therefore, the human intellect can implement it even though the content of Mashlahah contained in it is at odds with the nash.

4. *Al-Mashlahah aqwa adillah al-syar'i.* It is the strongest proof of shara'. Ath- Thufi does not stipulate that the convenience is a stand-alone argument and is the strongest argument of shara', not just a proof, when there is no nashash and ijma', but must take precedence over nashash and ijma' when there is a contradiction between the two. Thus, if there is a contradiction between the text of revelation or hadith and the interests related to worldly muamalat issues, the interests must take precedence through takhsis or bayan (specialization or explanation). Ath-Thufi does this because in his view, Mashlahah comes from the Prophet's words: la dharara wa la dhirara does not harm and is not harmed".

The basis of Najmuddin ath Thufi's Mashlahah theory is:	
Freedom of human reason to determine what is good and what is bad	استقلال العقول بإدراك المصاحل والمفاسد
This benefit is an argument that does not depend on the text	المصلحة دليل شرعي مستقل عن النصوص
The object of using Mashlahah theory is the laws of social transactions [mu'amalah] and the laws of custom ['adat]	مجال العمل بالمصلحة هو المعامالت والعادات
This benefit is the strongest evidence of Shara'	المصلحة أقوى أدلة الشرع

These four foundations must be understood by judges in order to develop legal reasoning that prioritizes the principle of benefit. Based on the above, ath-Thufi is of the view that the unknowable Mashlahahs are the Mashlahahs contained in matters of worship. According to ath-Thufi, "by preserving Mashlahah, that is actually the starting point of the purpose of shari'a, unlike worship because it is the prerogative of Allah" (Khalāf, 1998). Therefore, the Mashlahah that relates to the social life of the believers and their rights, this can be known by them through their minds. In other words, if we do not see any Shari'ah evidence that does not mention Mashlahah, we hold that the Shari'ah has allowed us to seek Mashlahah on our own (Hasanah, 2011).

The Urgency of Legal Reasoning in Judges' Decisions

The simple definition of Legal Reasoning is reasoning about the law, namely the search for "reason" about the law or the basic search for how a judge decides a legal case, a lawyer argues the law and how a legal expert reasons the law (Vera & Ainuddin, 2017). Legal reasoning is inseparable from efforts to build legal arguments, a law enforcer requires legal reasoning. Legal reasoning is thinking, using, developing or controlling a problem in the field of law by using legal reasoning. Legal reasoning is reasoning about the law, namely the search for "reason" about the law or the search for the basis of how a judge decides a case or legal case, a lawyer argues the law and how a legal expert reasons the law (Asnawi., 2023).

Legal Reasoning in a judge's decision has a central role, this is in accordance with Article 50 of Law No. 48 of 2009 concerning Judicial Power which states that "*Court decisions must not only contain the reasons and basis for the decision, but also contain certain articles of the relevant laws and regulations or unwritten sources of law that are used as the basis for judging*". A decision that does not have strong legal reasoning is an imperfect and flawed decision (Mahmudah et al., 2022). Judges in

carrying out their duties must have good reasoning in analyzing and providing strong considerations.

For judges, legal reasoning is useful in taking into consideration to decide a case so that the decision that is born is a decision that can be accounted for. As for legal practitioners, legal reasoning is useful for finding the basis for an event or legal action with the aim of avoiding violations of the law in the future and to become material for argumentation in the event of a dispute regarding the event or legal action (Mu'in, Fathul, Firdaweri, 2022).

The basic form of Legal Reasoning is reasoning in its implementation there are several things that are the subject of debate among jurists, especially in countries that adhere to case law (*common law*). Should judges be free to analyze, interpret and decide a case? Some argue that judges should be limited to not going beyond the legal reasoning examples obtained from previous courts (Anwar Nawawi, 2022). This is considered by legal scholars in the United States as limiting the freedom of judges to use their ability to look at the case they are adjudicating. As a result of this rigid doctrine, judges seem to lose their freedom to look for differences in a case with cases that have been decided previously. In the development of legal theory, scholars expect that judges should not only attempt to see cases through the "eyes" of their predecessors, but should also be able to see the case they are adjudicating through their own eyes.

In common law countries such as the United States and the United Kingdom there is also a debate about the application of legal reasoning based on the doctrine of "*stare decisis*" which requires Judges to keep referring to precedents from previous cases. In England, Prof. Montrose for example has explicitly stated that in terms of analytical reasoning by example, the view of most judges in England, especially in recent decades, is that modern English judicial practice limits the freedom of English judges to override reasoning put forward by previous courts.

Mr. Cross objected that the result of the rigid application of the doctrine of precedent was that Judges often had to see the law through the eyes of their predecessors. He went on to say that he did not agree that it was the duty of American judges to see the law as a fixed whole, and that in his view seeing the law through their own eyes rather than through the eyes of their predecessors would not lead to a pattern of predominantly rejecting the reasoning of previous judges or making distinctions where there was no reason to distinguish events. Legal reasoning that has been developed through cases decided by previous judges is followed by judges who hear cases that occur afterwards by searching and building legal reasoning on a case-by-case basis. So even though a similar case has occurred many times, in compiling arguments in his opinion, the Judge must base legal reasoning specifically for each particular case.

A judge is sometimes faced with a legal vacuum when having to handle a case. A legal vacuum in the absence of legislation as a legal consideration is natural. Justice is not always identical to the law, because justice is broader than the law. In the face of a legal vacuum, Judges must adhere to the principle of ius curia novit, where Judges are considered to know the law. Judges may not refuse to examine, hear and decide a case on the pretext that there is no law or the law is incomplete. Article 10 paragraph (1) of Law Number 48 of 2009 Concerning Judicial Power confirms that "*Courts are prohibited from refusing to examine, hear and decide a case submitted on*

the pretext that the law does not exist or is unclear, but are obliged to examine and hear it".

The provisions of this article imply to the Judge that if a statutory regulation is unclear or has not regulated it, the Judge must act on his own initiative to resolve the case. The judge has the role of determining what constitutes the law, even if the legislation cannot help him. If the Judge does not find written law, or there is written law but it is not in accordance with the "sense of justice that develops in the midst of society" then the Judge is obliged to explore unwritten law to decide based on the law as a wise and responsible person. Thus, the Judge can give a decision that is in accordance with the law and the sense of justice of the community.

To provide a decision that is in accordance with the law and a sense of justice, the Judge must also decide cases based on his conscience. The voice of conscience in question is a voice of conscience for the benefit of the public at large, not for the self-interest of the Judge or to protect the interests of certain people who have access to power. In order to uphold truth, justice and legal certainty, the Judge must not become a prisoner of the law (to borrow Prof. Satjipto Rahardjo's term) by acting as a mere trumpeter of the law (Rahardjo, 2009). For this reason, he must have the courage to make visionary legal discoveries (*rechtvinding*) by looking at future developments in society, but still guided by truth and justice as well as favoring and being sensitive to the fate of the nation and the state of his country (Aulia, 2018).

In order to find the law, Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power stipulates that "Judges and constitutional judges are obliged to explore, follow, and understand the values of law and sense of justice that live in society". The explanation of the article states, that "This provision is intended so that the decisions of judges and constitutional judges are in accordance with the law and sense of justice of the community". Thus, this provision means that Judges are formulators and diggers of living values in society, they should be able to recognize, feel, and be able to explore the feelings of law and a sense of justice that live in society. To be able to find the law, Judges in examining and deciding a case use the method of legal discovery (Habib Shulton Asnawi dan M. Anwar Nawawi, 2022).

D. Discussion

Application of Mashlahah Najmuddin Ath Thufi as the Basis of Legal Reasoning for Judge Decisions

Ath-Thufi's thinking about the theory of Mashlahah is not a building that has lost its basic footing, but it is entirely based on the understanding and interpretation of the Prophet's hadith that says: *la dharar wala dhirar*. So the mainstream of al-Thufi's Mashlahah paradigm is to eliminate all forms of harm. The spirit of al-syari'ah from the hadith *la dharar wala dhirar* becomes the spirit that drives the construction of his Mashlahah supremacy theory. With the spirit of al-syari'ah of the hadith, al-Thufi's thought reaches its radical and liberal culmination, because with the power of his theory that transcends the text and consensus'. At the level of implementation, the concept of Mashlahah ath-Thufi can be a solution to the resolution of legal cases and at the same time can realize the *maqashid al-syari'ah* desired by the shari'ah itself.

The purpose of this shari'a can be realized, further al-Thufi methodologi asserts that when there is a *ta'arudh* between Mashlahah versus nash and or *ijma'*, then he uses the *takhshish* approach, and *bayan*, not me-*nasakh*, or freeze the nash, it seems that al-Thufi thinks temporarily delaying the enactment of nash and ijma' until the readiness of the community to accept it. This method of al-Thufi's legal istinbat process is corroborated by Muhammad Musthafa Tsalabi with his statement that it is permissible to leave the nash absolutely as long as the aim is to realize human benefits. In addition, it should also be understood that takhshish is not to abolish the nash, but as a temporary suspension of the provisions of the nash. (Tsalabi, 1981)

Mashlahah Najmuddin Ath Thufi as the basis of Legal Reasoning for judges' decisions focuses on rechtsvinding (*legal discovery*) as one of the essential substance of the Judge's duties. Judges because of their position (*ambtshalve*), are not just the mouth or mouthpiece of the law (*bouche de la loi*), but become translators or interpreters through legal discovery, or legal construction in the form of interpretation, even creating new laws (*rechtsschepping*) through their decisions (Sunggono, 2022).

The substance of legal discovery for the Judge itself is a serious effort to find the law *in concreto*, and therefore a Judge must first have a comprehensive collection of legal knowledge *in abstracto*. In the process, legal norms *in abstracto* are absolutely necessary to function as major premises, while the relevant facts in the case (*legal facts*) serve as minor premises. Through the process of syllogism, a conclusion will be obtained, namely the law *in concreto* in question.

The urgency of developments regarding legal discovery in judicial practice, not only revolves around the process of processing premises into conclusions through the flow of syllogism, but sometimes becomes a problem, namely how far the weight of a premise can be held to build a conclusion in relation to; legal certainty (*rechtsscherheit*), legal expediency (*zweckmassigkeit*), and legal justice (gerechtigkeit). Judges are also required to create law (*rechtsschepping*), namely through the creative power of the Judge with the intermediary of the decision he handed down to form law (*judge made law).*

So in addition to the legislator as an abstract objective law maker, the Judge is a concrete objective law maker. Laws or other regulations will not be able to regulate the acceleration, development, and changes in people's lives in detail, so in this aspect a legal formation is needed which some people say that "Judges fill the vacuum in the formal legal system of the applicable legal system". This means that judges can, and even must, fill the void that exists in the legal system (*rechtsvacuum*).

Law formation is a manifestation of the Judge's creation that not only finds what already exists in legal sources, but also creates something from nothing. Herein lies the importance of the function and role of a Judge to answer and protect legal issues that occur in society on the authority placed by law (See: Article 28 of Law Number 14 of 1985 which has been amended by the second amendment, Law Number 3 of 2009 concerning the Supreme Court).

Judges must master technical legal theories, such as legal interpretation and construction, which in principle on the one hand is to provide space for Judges to find the law of a case being examined. On the other hand, it motivates Judges not to be fixated on the provisions of the articles of a rule of law. In fact, in the context of deciding a case by a judge, the principle of *contra legem* is also known, which is a

mechanism that allows judges to deviate from a statutory provision that is clearly contrary to the sense of public justice. Such actions are juridically legitimized (Article 28 paragraph (1) of Law Number 4 Year 2004, concerning Judicial Power), which in principle mandates judges to explore legal values that exist in society so that decisions made can fulfill the existing sense of community justice.

This method of Al-Thufi's legal istinbat process is corroborated by Muhammad Musthafa Tsalabi with his statement that it is permissible to leave the nash absolutely as long as the aim is to realize human benefits. In addition, it should also be understood that takhshish is not to abolish the nash, but as a temporary suspension of the provisions of the nash (Tsalabi, 1981).

Legal Reasoning aplications of Judges' decisions that prioritize the principle of benefits with the approach of Najmuddin Ath-Thufi's Mashlahah theory, that the Judge's decision must contain Legal Reasoning which is structured based on a strong and sturdy Legal Reasoning structure, on the other hand "*expediency*" as one of the objectives of the law, can be used as one of the elements of the strong and sturdy Legal Reasoning structure. But there will be a problem if the legal reasoning only contains the reason for expediency. The author argues that expediency is more appropriately placed as a prioritized goal of a decision. Whereas in the context of case settlement in religious courts attached to Islamic law, it must also contain Islamic legal instruments. Therefore, to achieve this goal, the Mashlahah theory of Najmuddin Ath-Thufi is needed as Legal Reasoning.

Above it has been explained that Legal Reasoning which is only based on the principle of expediency can cause the decision not to fulfill clear and sufficient considerations called *onvoldoende gemotiveerd*. Therefore, in deciding cases in the Religious Courts, it is not enough with only consideration of expediency but must also be complemented by kemashlah. Therefore, to be able to answer the times by considering expediency (one of the objectives of the law) in deciding cases, it is very important to be accompanied by the concept of Mashlahah as formulated by Najmuddin Ath-Thufi.

The obligation of the judge in his decision is to contain legal reasoning which is compiled from a strong and sturdy argument structure (*legal argument)* (Habib Shulton Asnawi, 2022). Whereas in the context of case settlement in the Religious Courts attached to Islamic law that has been codified into legislation, legal arguments must be built from the concepts and theories of Islamic law. Therefore, Najmuddin Ath Thufi's Mashlahah theory is a very appropriate choice as a legal argument to build a solid legal reasoning for the judge's decision.

Najmuddin Ath Thufi's Mashlahah Contribution as a Family Law Update

The results of the author's research found that many problems of Islamic family law in Indonesia can be resolved through judicial decisions by making the Mashlahah theory of Najmuddin ath Thufi as an argument (*legal argument*) which is part of the construction of legal reasoning for judges' decisions in court. In the context of family law / Islamic marriage law, law enforcement oriented towards justice and expediency is needed. Although sometimes justice and expediency are not only dealing with the articles but also dealing with the nash (Qur'an and hadith), this is where strong legal reasoning is needed.

Najmuddin Ath Thufi's Mashlahah contribution as an update to Indonesian Islamic family law can be seen in the *isbat* marriage case. In the examination of the

case of *itsbat marriage* in a particular case (casuistic). Husband and wife (Petitioner I and Petitioner II) had entered into marriage 10 years ago and had several children, the status of the applicants when married was a bachelor and a girl, applying for Istbat marriage (*marriage validation*). In the examination of the case it was proven that the marriage did not fulfill the pillars of marriage, namely there was no guardian, the consent was carried out between the prospective groom and the prospective bride. The Petitioners' reason was that the marriage was conducted in the city of Medan while the parents of Petitioner II were in Surabaya, so the marriage was conducted without a marriage guardian. Referring to Law Number 1 of 1974 concerning Marriage which has been amended by Law number 16 of 2019, it is explained that marriage is valid ..... *if it is carried out according to the laws of each religion*.... It is further regulated in article 19 of the Compilation of Islamic Law: *Wali* marriage *in marriage is a pillar that must be fulfilled for the prospective bride who acts to marry her*.

In the above itsbat marriage case, if referring to the legislation and mainstream fiqh, the judge will reject the *itsbat marriage* application because it does not fulfill the marriage requirements. In this case, the author will provide a different decision, according to the author, the application for itsbat marriage can be granted with the arguments that the author will present below. The author argues that what is granted in the case a quo is an administrative process for recording purposes, that there was a marriage 10 (ten) years ago in Medan. As for the invalidity of the marriage because the marriage was without a guardian, the author will order the Plaintiffs to have ijab kabul again (*tajdidunnikah)* with a legal and qualified marriage guardian. When connected with the concept of maslahah Ath-Thufi, the author argues that the granted *itsbat marriage* is part of *mu'amalah,* for the benefit of administrative registration. Meanwhile, if it is connected to the principle of expediency, then granting the application for istbat marriage a quo will be more beneficial for the Plaintiffs on the other hand, no one is harmed.

Legal Reasoning built from the construction of the principle of benefits with the *Mashlahah* theory approach offered by Najmuddin Ath Thufi with its various conditions according to the author is a solution in answering legal issues that are always "ahead" of regulations and legal texts. Mashlahah Najmuddin Ath Thufi is a very appropriate choice to answer legal problems that continue to roll and develop. The characteristics of Mashlahah superiority in Najmuddin ath Thufi's Mashlahah theory will contribute a lot to the renewal of Islamic family law in Indonesia through court decisions.

E. Conclusion

Ath-Thufi thinking about the theory of Mashlahah is not a building that has lost its basic footing, but it is entirely based on the understanding and interpretation of the Prophet's hadith that says: la dharar wala dhirar. Najmuddin Ath Thufi Mashlahah as the basis of Legal Reasoning for judges' decisions focuses on rechtsvinding (*legal discovery*) as one of the essential substance of the Judge's duties. Judges because of their position (*ambtshalve*), are not just the mouth or mouthpiece of the law (*bouche de la loi*), but become translators or givers of meaning (*interpreters*) through legal discovery, or legal construction in the form of interpretation, even creating new laws (*rechtsschepping*). The urgency of the development of legal discovery in judicial practice, not only revolves around the

process of processing premises into conclusions through the flow of syllogism. Najmuddin Ath Thufi Mashlahah contribution as an update to Indonesian Islamic family law can be seen in the *isbat* marriage case. In the examination of the case of *itsbat marriage* in a particular case (casuistic), that which is granted in the case a quo is an administrative process for recording purposes, that there was a marriage 10 (ten) years ago in Medan. As for the invalidity of the marriage because the marriage was without a guardian, the author will order the Plaintiffs to have ijab kabul again (*tajdidunnikah*) with a legal and qualified marriage guardian. Mashlahah in Najmuddin ath Thufi Mashlahah theory will contribute a lot to the renewal of Islamic family law in Indonesia through court decisions.

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