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AFTER TALAK TIGA IN THE
TRADITION OF BINJAI VILLAGE
IN PASAMAN DISTRICT A
MAQÂS}ID AL- SHARÎ'AH
REVIEW

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AL- SHARÎAH REVIEW**

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Abstract

Allah SWT hates divorce the most even though He still allows us to do it. If the repudiation (talaq) has been conducted three times, the husband and wife should not reconcile unless the ex-wife marries another man (muḥ allil) and has been divorced by her second husband after having an intercourse as a husband and wife. In contrast, there is an obligation for married couples who have been separated because of the third talaq to remarry in Nagari Binjai. This obligation is based on the belief that this is a religious obligation that must be followed by the tradition. The separation because of the third talaq is believed to bring disaster to the village and the subjects will suffer in present life and will not smell the heaven aroma in the hereafter. Even though kawin maupah tradition is maslahah and permissible by some Islamic scholars, it still requires the husband and wife to conduct intercourse prior to the divorce. The maslahah of the kawin maupah is contrary to the Prophet's guidance, since there is no sexual intercourse in this payment-ordered marriage. Therefore,

the practice of kawin maupah by the Nagari Binjai community does not fulfill the qaşd al-Syâri' and maqâşid al-aşliyah which should be actualized in the maqâşid al-syarî'ah's theory.

Keywords: *kawin maupah, third talaq, nikah taḥlîl, maqâşid al-syarî'ah.*

A. Introduction

A divorce is an act that is principally allowed by Allah, but at the same time is despised by Him. However, problems in marriage are sometimes difficult to solve, and the only solution is through a divorce. In the Islamic rules, a husband is only permitted to pronounce the repudiation for the wife three times, known as the talaq, and the wife is also given the right to ask for a divorce to her husband which called khulu'. Both rights, the talaq and the khulu', have different consequences. The right of the talaq given to the husband allows him to reconcile with his wife until he pronounces the third talaq. Whereas if he comes to the third talaq, the husband could not reconcile with his ex-wife unless the ex-wife has been married to another man called as *muḥallil* (Lestari, 2016, p. 41) and has been divorced by that second husband, and by then the previous ex-husband could conduct a new marriage to her. Another requirement is that the divorce with the second husband should be carried out naturally without being engineered by any party, and the previously married couple should perform cohabitation as a husband and a wife. This requirement is known as *nikah taḥlîl* in the marriage in Islam (Gupta, 2018, p. 131-134). On the contrary, khulu' does not provide an opportunity to reconcile except through a new marriage.

Contrary to the provisions of Islamic rules above, the community in the District of Tigo Nagari, Pasaman Regency, has a slightly different tradition and practice of the Islamic teachings. The people consider the third talaq taboo and violate the religious rules. In their custom and religious view, the third talaq should be avoided because it will bring disaster to other members of the

communities. In addition, a wife who is exposed to the third talaq becomes as despicable as dog feces and will experience disastrous events in her life (Saputra, 2018, 150; Saputra, 2016, 8). Therefore, a husband who has already pronounced repudiation of the third talaq to his wife is obliged to remarry his ex-wife. The method of conducting a re-marriage of the second marriage process is by paying a man to legally marry his ex-wife with certain terms of condition, which is called the *kawin maupah*. The paid marriage does not last long and the paid husband is not allowed to have sex with the wife. According to terms of the condition of the agreement, the purpose of the marriage is only for the justification to the ex-husband to be able to remarry his ex-wife (Saputra, 2018, 153-156).

Based on the background as stated above, it seems that the *nikah tahlil* provisions of the Islamic rules in marriage are understood differently by the community. *Tahlil* in marriage is supposed to be used as a way to reunite separated couple, but the community tradition has made it an obligation. This tradition is a product of a religious understanding which develops within the community and is additionally caused by the community's persistence in adhering to the local customs. On the one hand, the practice of *kawin maupah* is beneficial for both the families and children; on the other hand, the practice of Islamic marriage rules in the Nagari Binjai community related to the marriage of *tahlil*, seems to be different from the provisions in the *fiqh munakahat* which have been discussed by Islamic scholars from various mazhab. Although there are some Islamic scholars' opinions who allow the *tahlil* marriage with paid husband, this opinion is not absolutely valid. There are other requirements that should be performed by the married couple, which is the obligation to have sexual intercourse as a husband and wife, which they did not perform. Both the realization of the benefits and the provisions that obligate the husband and wife to perform sexual intercourse are contradictions that need to be resolved through the study of *maqâsid al-syarî'ah*. In this case, the study of *maqâsid al-syarî'ah* is

necessary since this concerns nurturing the descendants (*hifz al-nasl*) in any aspects that could benefit them and the preservation of the religious text as the *waḍa' syari'ah* (the purpose of the shari'a).

Therefore, this study will comprehensively discuss the background and the reasons for the *kawin maupah* practice and the benefits it produced, then it will be analyzed through the study of *maqâsid al-syari'ah*, especially in *qaṣd al-Syâri'* (God's purpose in establishing the law), *qaṣd al-mukallaf* (the human's purpose in conducting the law), and *maqâsid al-aṣliyah* (the main purpose of establishing the law) in terms of nurturing the descendant (*hifz al-nasl*).

B. Discussion

1. *Nikah Tahlîl* in Fiqh Studies

Nikah Tahlîl is a marriage that allows the third talaq subjects to reconcile with their ex-couple through a new marriage (Saputra, 2018, 21). In the provisions of Islamic law, if a husband has imposed repudiation to his wife for three times, then it is *haram* for him to reconcile or remarry the wife. The husband can remarry the wife only if she has been married to another man and perform intercourse with the new spouse (Khare, 2016, p. 12-14). According to Ibn Qudâmah (Ma'mun, 2014, p. 49), this provision has become the consensus of the majority of Islamic scholars, and if this provision is not performed according to the procedure, then the conduct is wrong and heresy. The second marriage should be conducted fairly and naturally without any intention to divorce or any intention to allow the justification for the woman's previous husband. Thus, this marriage is in fact intended to form a happy marriage as regulated by the Islamic teachings.

Allah the Almighty has mentioned the rule of *nikah tahlil* in Surah al-Baqarah [2]: 230. Briefly, the verse states that when a husband pronounces repudiation for the third time to his wife, then his wife become unlawful for him until the wife has been

married to another man. This verse was revealed in relation to Aishah bint Abd al-Rahman ibn Athik who complained to the Prophet that she has been imposed with repudiation by her second husband Abd al-Rahmân ibn Zubair al-Quradzî. Aishah bint Abd al-Rahman wished to return to the first husband, Rifâ'ah ibn Wahhâb ibn Athîk, who had imposed her with the *talaq ba'in*, a non-reconciliate repudiation unless the wife has been married to another man and have sexual intercourse. In her contest, Aishah stated that Abd al-Rahmân ibn Zubair had imposed her with repudiation before he had sexual intercourse with her. The Prophet said that the re-marriage was not permitted before the second husband had copulated with her (Saputra, 2018, 30; Saputra, 2016, 27-28). The prohibition was reaffirmed by the Allah's Messenger in the hadis narrated by ibn Mâjah, where the Prophet cursed the person who became *the muḥallil* and the *muḥalla lahu* (Ibn Majah). The Prophet's displeasure was related to the practice of *nikah taḥlîl* in which the second marriage is engineered with the purpose of making the remarriage of the first husband to his ex-wife legal.

Sayyid Sâbiq stated that such taḥlîl marriage is invalid and illegal because the curse will not be imposed except for actions which are not permitted by the rules of conduct. Consequently, the first husband is forbidden to remarry his ex-wife, even if in the *ijab qabul* there are no statements of *nikah taḥlîl*, as there is an existing intention to do so and the intention becomes the measurement for its illegality. Furthermore, Sâbiq stated that the intention for a marriage should be of an eternal relation, with the aim to continue the lineage, to nurture the children and so on, as the main objectives of marriage (Saputra, 2018, 37).

According to Abu Mâlik Kamâl bin Sayyid Sâlim, the *muḥ allil* marriage is a marriage committed by a man with a woman who has been imposed with repudiation for three times by her previous husband and has passed her end period of *iddah*, and then her new husband imposed her with repudiation to legalize the woman to remarry the previous husband (Saputra, 2018, 24).

The scholars of Imamiyah and Malikiyah mazhab require that the men who become *muḥallil* to be in the baligh status, whereas the Syafi'iyah and Hanafiyah scholars only require that he is able to conduct sexual intercourse even if he is not yet baligh. The scholars of Imamiyah and Hanafiyah mazhab state that if the *muḥallil* is given a condition in which the covenant states that the marriage is to justify the bride to marry her previous husband, then the term of conditions is invalid but the marriage covenant is valid. However, Hanafiyah stated that if the woman is reluctant to be repudiated by the *muḥallil*, then she may tell the *muḥallil* that the divorce right is in her hands (Saputra, 2018, 26). This opinion was already denied by Ibrâhîm al-Nakha'î. He argued that such marriages were not permitted except if there is a sincere intention to get married. Therefore, if one of the three parties, be it the first husband, the candidate of the second husband, or the woman, has the intention or purpose to create a marriage that legalizes the wife to remarry her first husband, then the marriage is illegal (Saputra, 2018, 27). In his discussion, Syaidun (2016, p. 6) stated that marriages with divorce intentions were equal to the *nikah mut'ah*, which is forbidden by Islamic rules, because the marriage is not intended to last forever.

Wahbah al-Zuhaylî stated that there are three legal requirements for women who were imposed with the third repudiation to become legal to her first husband, namely¹¹

- a. The woman is married to another husband, based on the statement of Allah in the Al-Qur'an Surah al-Baqarah [2]: 230.
- b. The second marriage is *ṣaḥîh* (legal), and if this marriage is *fasid* (illegal), then the sexual intercourse does not make the woman halal for her first husband.
- c. The intercourse must be done through the vagina. If it is done through the anus, it will not make her halal for the first husband. The reason is that the Prophet has obliged that during the intercourse each party should experience the pleasure of the activity. If the opposite

happens, then the woman is still unlawful to remarry her first husband. This does not happen except by having a sexual intercourse on the genitals, because the law of halal depends on the pleasure felt by both parties (Saputra, 2018; Saputra, 2016).

The scholars of Hanbali and Maliki School added the fourth condition, which is the sexual intercourse is done in the halal status. If the woman copulates during her menstruation period, or during the *nifas* (childbirth recovery) time or one of the couples or both are in the condition of ihram, or one of them in performing an obligatory fasting, then that intercourse does not make the woman halal to be remarried to her first husband. Since this intercourse is stated as illicit by the right of Allah, then this intercourse does not have the right to cause the wife to be legally remarried to her first husband (Saputra, 2018).

As previously mentioned, the Prophet prohibited the *nikah taḥlîl* which is not intended to foster an everlasting marriage. According to Ibn Taymiyah (d. 728 H) and al-Syâṭibî (d. 790 H), as quoted by Busyro (2017), *maqâṣid al-aṣliyah* of the marriage is to continue the lineage and to achieve this ultimate goal, one must sustain his marriage (*al-dawâm wal al-baqâ` fî al-nikâh*). If this main objective does not exist in a person's marriage purpose, then he does not actualize the purpose of marriage as Allah's will (*the qaṣd al-Syâri`*). Therefore, the *nikah taḥlîl*, in which the main objective is only to provide a way for a man to remarry his ex-wife, is an act that cannot actualize the ultimate goal of marriage. Judging from the three possibilities of the occurrence of *mafsadah*, Ali Mutakin (2017, p. 564-565) stated that the act of this *nikah taḥlîl* has clearly and definitely created *mafsadah*, and therefore should not be conducted.

Furthermore, Ibn Taymiyah and al-Syâṭibî said that the legal status of *nikah taḥlîl* is similar to the *nikah mut'ah*, because both acts eliminate the main purpose that should be actualized in a marriage, and it also eliminates other goals. The main purpose of lineage continuity will be difficult to achieve except by regarding

the other goals that entail, which is to sustain the marriage (Busyro, 2017). Therefore, Islam in its principle does not allow the *nikah taḥlîl* that is engineered in such a way as to provide an opportunity for a man to remarry his ex-wife. However, it does not mean that Islam closes the opportunity for a re-marriage forever. A fair marriage conducted by an ex-wife that is followed by an unplanned divorce is the second chance for a man to remarry his ex-wife. This, in turn, provides a very valuable lesson for a man to not hastily pronounce a statement of divorce to his wife.

Based on the explanation above, the scholars from the Maliki and Hanbali mazhab do not justify the *nikah taḥlîl* with the intention to legalize a man remarry his ex-wife. This opinion is represented by Ibn Qudâmah (Hakim 2016: 90-91), Ibn Taymiyah and al-Syâṭibî. In discussing the issue of the hillah, al-Syâṭibî argued that it is unacceptable if it contradicts the objectives of the sharia, and one example is the *nikah taḥlîl* with the intention of justifying the first husband to remarry his ex-wife by manipulating as if a marriage had taken place (Sabri, 2014, p.11). Muhammad Ali (2016, p. 31) affirmed that the *nikah taḥlîl* is an example of such marriage that is forbidden by Allah, as well as the *nikah mut'ah* and the marriage with talaq intention.

Contrary to the previous opinions, in the Hanafi and Syâfi'î mazhab, as written by Naemah Abd. Rahman (2016, p. 10), the valid measurement of the marriage covenant in the *nikah taḥlîl* is related to the *lafaz* used in the covenant. If it is mentioned in the covenant, with precise words, that the marriage is to justify a man to remarry him to his ex-wife, then the covenant is invalid. Conversely, if it is not mentioned in the covenant, the marriage covenant is valid. Al-Sarakhsi in the *al-Mabsûṭ* also said that Abu Hanifah still considered the marriage covenant as legal eventhough *taḥlîl* was mentioned in the covenant, because the marriage mentioned in the Surah al-Baqarah [2]: 230 is a general term, without differentiating a requirement to declare *taḥlîl* or not in the covenant.

Furthermore, Naemah (2016, p. 11) stated that Imam Syâfi'î viewed that the most important thing is the form of a covenant. If the covenant has perfectly fulfilled the terms and conditions, then the covenant is valid. Nevertheless, the marriage covenant of the *nikah taḥlîl* which hides the intention to justify the first husband to remarry his ex-wife is makrooh and is not recommended. Even though it is sinful to do so, it does not make the covenant illegal. Such is their understanding regarding the Prophet's hadith for the perpetrators of the *nikah taḥlîl* (the *muḥallil*) and the first husband who imposed the third talaq (the *muḥallal lahu*).

Thus, it is agreed that the scholars from all mazhab, in general, do not advocate the conduct of the *nikah taḥlîl* with payments. The different opinions between them lie in the legal provisions of this kind of marriage. Malikiyah and Hanabilah scholars agreed that the legal status is forbidden and they do not provide an opportunity to conduct this marriage in any form. On the other hand, the scholars of Hanafiyah and Syafi'iyah still provide an opportunity for allowing it, with a condition that it is not stated in the covenant that the marriage is intended to justify the first husband for remarrying his ex-wife (al-Asy'ari 2016, p. 114-115). This is proven by the makrooh status they charge, though the perpetrators remain charged as sinful.

2. Preservation of Darûriyât al-Khams in the Study of Maqâsid al-Sharî'ah

Al-Syâtibî created a systematic discussion in the *maqâsid al-syarî'ah* and this indicates his advancements from previous scholars (Yusuf, 2015, p. 3-5). According to him, the essential objectives of the Islamic rules determination is to actualize the benefit for human's life in the world and the hereafter (Safei, 2017, p. 106).

In the discussion, al-Syâtibî divided this *al-maqâsid* into two important parts, namely the purpose of the *qaşd al-Syâri'* and *qaşd al-mukallaf* (al-Syâtibî: 5). *Qaşd al-Syâri'* is the objective of Allah and His Messenger in making rules in relation to His commands

and restrictions. Al-Syātibî divided the *qaṣd al-shāri'* into four purposes of creating the sharia, namely; first, *qaṣd al-Syāri' fî wadh'i al-syarî'ah* (the intention of Allah in establishing sharia) which in principle is to actualize benefits and to avoid detriment (*jalb al-maṣâlih wa dar'u al-mafâsid*); second, the *qaṣd al-Syāri' fî waḍ'î al-syarî'ah li al-ifhâm* (the purpose of Allah in establishing the law is to be understood) -the important theme discussed here is the Arabic language, which is intended to make sharia easily understood by all people-; third, *qaṣd al-Syāri' fî waḍ'î al-syarî'ah li al-taklîf bi muqtaḍâhâ* (the purpose of Allah in determining the law is to be conducted according to what He wants). In this section, the main topic is to discuss the *taklîf* beyond human capacity and the *taklîf* which contains *masyaqqah* (difficulties) in it; and the fourth is the *qaṣd al-Syāri' fî dukhûl al-mukallaf tahta ahkâm al-syarî'ah* (the purpose of Allah so that human are always under the guidance and rules of sharia). In short, the objective is to prevent the human from the influence of his personal desire in conducting the religious rule of conduct (Toriquddin, 2014, p. 35-36; Hakim, 2016, p. 3-5; and Syahabudin, 2014, p. 91-98).

The *qaṣdu al-mukallaf* is an objective that is directed towards the interests of humanity as the object of the law. According to 'Umar Sulaimân al-Asyqar, this is related to one's intention when performing various forms of worships. In his dissertation he discussed at length about this intention and divided the discussion into two parts: the first part discusses the importance of intentions in an action, which in essence he wanted to emphasize that the will regarding the intention is the correctness of the conduct. In the second part, al-Asyqar discussed the final goal (*al-ghâyah*) which is desired by those who intend to do an act and the objectives behind it. The central topic discussed in this section is about sincerity, and this should be the main motive for every *mukallaf* in conducting any activity (al-Asyqar, 1981, 9). In terms of discussing the topic of sincerity, the scope of the discussion is very broad, which includes the main goal and objectives to be achieved by the *mukallaf*, things that should be

comprehended by the *mukallaf* when he deviates from sincerity, the incorrect forms of purpose, and the effect of intention and purpose of an action (al-Asyqar, 1981, 345).

The main objective of learning *maqâşid* of *mukallaf* is so that any form of activity carried out by the *mukallaf* becomes beneficial for him especially when it is related with the activities of worshipping Allah. In this case, the benefits are directly related to the legitimacy and illegitimacy of the act he conducts legally, and in the end, each activity will prevent him from indulging his desires and delivering him to get the contentment of Allah (Aziz, 2016, p. 19). Therefore, the practice of *maqâşid al-mukallaf* will lead one to perfectly find the purpose of Allah in establishing a law (*qaşd al-Syâri'*).

Allah SWT commands the sharia to actualize benefits and avoid the *mafsadah* (*jalb al-maşâlih wa dar`u al-mafâsid*) (Mayangsari, 2014, p. 53). Al-Syaţibî wants to confirm that the rules of conduct which are commanded by Allah are only to actualize the benefits for humans. Regarding the benefit actualization, from the perspective of urgency and supremacy, al-Syâţibî and other scholars divide the benefits into three levels, namely *al-đarûriyât* (primary), *al-ĥâjiyyât* (secondary) and *al-taĥşîniyyât* (tertiary) (Al-Syâţibî, 8).

In this case, the scholars have concluded the forms of preservation to actualize that benefits, namely the benefit of *al-dîn* (religion), *al-nafs* (soul), *al-nasb* (descendant), *al-'aql* (logical mind), and *al-mâl* (property). Preserving these five things above is also divided according to the level of needs and priority scale which includes preservation in the form of *al-đarûriyat* as the top priority, preservation in the form of *al-ĥâjiyyât* as the second priority, and preserve in the form of *al-taĥşîniyyât* as the third priority (Busyro, 2016, 90).

Before explaining the three levels of benefit as above, it will be necessary to present the analysis concerning the general opinion of the scholars to limit the benefits preservation into five

main points. This analysis is important considering that there are no theoretical foundations that underlie the opinions of the scholar, either by al-Syâtibî himself or by the scholars before and after him. In addition, they also did not explain why this restriction occurred. Therefore, this restriction is a result of the scholar's *ijtihad* which is guided by the theoretical foundations that generally lean towards that direction. As a result, it is possible that the preservation of benefits does not only focus on the five things but more. For example, by al-Qarâfî (w.684 H) added *al-irḍ* (the preservation of honor) as part of *al-ḍarûriyât* which must be preserved as well as 'Izz al-Dîn ibn 'Abd al-Salâm (Elviandri, 2018, p. 125). In regard to this opinion, according to the author's analysis, there are at least three reasons that generally cause the scholars to limit the *al-ḍarûriyât* into five things only.

First, the issue discussed in the *al-ḍarûriyât* is the issue of Islamic rules on a practical and general level of everyday life and it has a significant effect even in the hereafter, and it is not just a general Islamic issue. This is proven by the discussions in various books of *fiqh* which generally discuss matters related to the preservation of religion, soul, logical mind, descendants, and property. For example, there are certain rules in the domain of worship and matters related to this. In addition, things that interfere with the existence of the religion are regulated properly, both in the form of orders to defend and to protect it, as well as in the form of restrictions from interfering its existence. This is also applied to the preservation of the soul, the logical mind, the descendants, and the property. These five main points are regulated explicitly and decisively in Islamic rules of conduct, and there are also explicit policies for those who ignore them. The additions made by some scholars, such as *al-irḍ*, do not have an impact as much as the impact for neglecting the provisions contained in *al-ḍarûriyât al-khams*. Even if the effect exists, it might only have an impact in the worldly life, while the *maqâṣid al-syarî'ah* does not only want to actualize the benefit in the worldly life, but it further actualizes its benefit in the life in the hereafter.

Second, the provisions for preserving the *al-ḍarūriyât al-khams* are accompanied by sanctions in the worldly life in the form of significant physical punishment when the rule is violated, and the perpetrators are categorized as committing major sins. That is why al-Ghazâlî (d. 505 H), in the *Ihyâ Ulûm al-Dîn*, includes the violation of *al-ḍarūriyât al-khams* as a major sin. In the subject of preserving religion, it is forbidden to do *riddah* (apostasy); in preserving the soul it is forbidden to commit murder; in preserving the logical mind it is forbidden to drink alcoholic beverages; in preserving the descendants it is forbidden to conduct adultery; and in preserving the property it is forbidden to steal. If the prohibitions are violated, then the sanctions are not only in the form of physical punishment in the world, but also very severe punishment in the afterlife. As for the *al-'ird* which is taken from the provisions of the *qazaf* (accusing people of conducting adultery), although there are criminal sanctions in the form of physical punishment, it can basically be reverted to the main subject in the nature of the *qazaf*, which is to preserve the descendant.

Third, the discovery of *al-ḍarūriyât al-khams* is based on the scholars' research through collecting the entire theoretical fundamentals, both in the instructing arguments and the prohibiting arguments. Based on the scholars' research by using the theory of *al-istiqrâ'*, the focus of *al-Syâri'* in establishing the law seems only for 5 (five) things, both in the field of *ibadah* (worships), *muamalah*, *munakahah*, *jinayah*, and *siyasah*. That is, generally all the provisions of the law of *al-Syâri'* lead to one of the *al-ḍarūriyât al-khams* (religion, soul, descendant, logical mind, and property). As for the *al-'ird*, it is a special provision, and not many provisions of the *al-Syâri'* could be attributed to it.

Based on these explanations, the limitation of *al-ḍarūriyât* to only five subjects, even though it is produced through the *ijtihad* (interpretation) of some scholars, all of the scholars accept the results and logically agreed upon (the *ijma'*), including the scholars who provide the addition other than mentioned. Thus,

it could be stated that the agreement of the scholar on the *al-ḍarûriyât al-khams* is something that is *qath'i* (definite), while the additions other than not agreed upon only occupy the quality of *zanni* (indefinite). However, there is still a possibility to add the categories of *al-ḍarûriyât* into six, seven, and so on, if there is a strong theoretical fundamental and it can also be proven as valid in terms of *al-istiqrâ'*. However, in the subsequent discussion¹¹, the author will only focus on the *al-ḍarûriyât* which has been agreed upon by the majority of the scholars⁵ to the present date, which includes the preservation of the religion, the soul, the logical mind, the descendant, and the property.

As mentioned previously, the benefit of preservation in terms of its interests have three levels of benefit, namely the benefit preservation on the interests of *al-ḍarûriyah*, *al-ḥâjiyyah*, and *al-taḥsîniyyah*. The levels will be explained as follow (Yakin, 2016, p. 320-323; Bahruddin, 2017, p. 8-9).

a. *Al-Ḍarûriyah* (The Primary Needs)

The expression *al-ḍarûriyah* is used in various terminologies, among which is in terminology in the science of mantiq and ushul fiqh. In the mantiq science, this term is mentioned when discussing the procedure for obtaining knowledge which is divided into two, namely the *ḍarûriyah* knowledge and the *iktisâbî* or *nazarî* knowledge. The *ḍarûriyah* knowledge is the knowledge that is produced without going through a deep thinking process and without efforts, while the *iktisâbî* or *nazarî* knowledge is the knowledge obtained through deep thinking process and serious effort (al-Kafawî, 616; 'Umar, 2008, 2233). In the Islamic jurisprudence, the term *ḍarûriyah* means something that is much needed ('Umar, 2008, 1358), and according to Muhammad Rawwâs Qal'ahji, it is a need that is very important to avoid the danger (the *ḍarar*) that will affect one of the *al-ḍarûriyât al-khams*. If this *ḍarûriyah* does not exist, then the *ḍarûrah* occurs,¹² which is a condition that is urgently needed and unavoidable (*al-hâjah al-syadîdah wa al-masyaqqah al-syaddah*). To avoid misinterpretation in this work, the *al-ḍ*

arûriyah terminology and the similar words are in the context of the scholars of fiqh.

According to the scholars of ushul fiqh, *al-ḍarûriyah* is everything that should exist to maintain the integrity of a man, both for his religion and his life. If the *al-ḍarûriyah* does not exist ²⁰ and is not well preserved, then it will damage the life of the human in the world and in the hereafter (Al-Syâṭibî, 8). In other words, the *al-ḍarûriyah* is an essential goal in human life in order to preserve their integrity. In this form of the *al-ḍarûriyah*, the purpose of Islamic law is to obligethe preservation of five needsthat are very essential for human beings, known as *al-ḍarûriyât al-khams*, which include the preservation of the religion, the soul, the logical mind, the descendant, and the property (Hasaballâh, 296-297). According to Amir Syarifuddin, the five *al-ḍarûriyât* are the things that absolutely should exist in humans. Therefore, Allah instructs us to make these efforts for our life existence and fullness. On the contrary, Allah forbids human to conduct actions that could eliminate or reduce one of the five *al-ḍarûriyât* benefits (Busyro, 2016, 121). The definition of preserve here at least has two meanings, namely:

First, the aspect that reinforces the elements and emphasizes the foundation, called as the *murû'ah min jâhib al-wujûd* (Al-Syâṭibî, 8-9). In terms of preserving the religion, it can be exemplified by the obligation to believe, to recite the two testimonials of creed, to conduct praying, fasting, hajj, and so on, whereas the preserving the soul is like the obligation to earn food, drinks, cloths, shelter and so on. Other preservation subjects include the rules in marriage and the muamalah (acts other than worships) in general. *Second*, the aspects that anticipate the five basic needs to be undisturbed and preserved properly, which is called the *murû'ah min jâhib al-'adam* (Al-Syâṭibî, 8-9). One of the examples is the regulations that prohibit something, such as the prohibition of killing, prohibition of drinking alcoholic beverage, prohibition of stealing, prohibition of adultery, prohibition of robbing, prohibition of conducting rebellion against the legitimate

governments, etc, are subject to sanctions for their violations, both in the world and in the hereafter. On the first aspect, preservation is committed through conducting all commands that are related to the five basic needs of human life, whereas, in the second aspect, it is emphasized to avoid or to abandon any actions that could disturb and harm those five needs (Busyro, 2016, 121).

b. Al-ḥâjiyah (secondary needs)

The *al-ḥâjiyah* is a need that also should be possessed by humans, and its existence will make the life easier and free from hardships (Busyro, 2016, 121). Therefore, people who do not acquire or prioritize the needs of *al-ḥâjiyah* will not damage and destroy their lives, but they will face hardships, both in conducting life activities and in the activities of worships. That is why in the subject of the religion, for example, it is permissible to take the remission given by Allah, such as the qasr in prayer for travelers, breaking the fast for travelers and sick people, conducting prayer in sitting conditions if one is unable to stand, gazing at the prospective wife/ husband, and so on. This is the general definition of *al-ḥâjiyah* and a few examples as presented in the *ushul fiqh*'s books.

Regarding this definition, Amir Syarifuddin (2007, 213-214) stated that the above definition is just one of the many meanings of *al-ḥâjiyah*. In fact, the *al-ḥâjiyah* is something that could convey someone to preserve the needs of *al-ḍarûriyah*. In this case, Syarifuddin grouped the objectives of the *al-ḥâjiyah* in terms of its legal determination into three groups, namely; *first*, things that are commanded by the *Syâri'* ain order to perform the sharia obligation well. This is called the compulsory *muqaddimah*, such as building a school in its relation to learning to improve the quality of the mind. Establishing a school is necessary, but if the school is not established it does not mean that the knowledge will not be obtained, because learning could be conducted outside the school. *Second*, things that are prohibited by the sharia to avoid indirect violations over one of the elements of the *al-ḍ*

arûriyât. Adultery is an example of the prohibition of the level of *al-ḍ arûriyât*.

However, all acts that lead to adultery are also forbidden to eliminate all the possibilities for conducting adultery. Doing *khalwat* (being alone with someone) is not adultery and will not harm the descendant, nor should end with adultery. Even so, the *khalwat* is banned in order to close the door that leads to the violation of the prohibition of the *al-ḍ arûriyât*. Third, all forms of convenience which include the *rukhsah* (convenience) regulation provide amenities in human life. Without the *rukhsah*, it will not eliminate one of the *dharuri* elements, but the human will be in a difficult state. *Rukhsah* are applied in the worship regulation such as the prayer for those who is travelling, in the *muamalah* such as the possibility of the *salam* transaction (indent sales), and also in the *jinayah* like giving the amnesty to cancel the *qisas* execution for the murderer, either by replacing it with the *diyat* (fine) or without *diyat* at all (Syarifuddin, 2007, 213-214).

Thus, the *al-ḥâjiyah* is things that should be conducted first by a person to implement the commands of Allah and to refrain from His prohibitions over the *al-ḍ arûriyyât al-khams*. If this is not performed, then the commands and prohibitions of Allah will not be properly performed. Therefore, in relation to this perceptive, the *al-ḥâjiyah* will produce the required status when the act is commanded by law and the forbidden status when the act is prohibited by law.

c. Al-Taḥsîniyah (tertiary needs)

The *al-taḥsîniyah* is the human needs to complete something he has done and to make it more beautiful and enjoyable. If this is not obtained by the humans it will not actually disturb his life order, nor will it make the life difficult. However, fulfilling these needs will create perfection, add an aesthetic value, and serve as a sign of outstanding morality (Busyro, 2016, 125). Thus, the needs at this level will not inhibit the preservation of the five basic needs, because these needs are categorized only

as the complementary needs. For example, using fragrance when attending congregational prayers, bathing before *Jumat* prayers, studying in a good room and using modern media, marrying someone from a noble family, not eating meals with unpleasant odors, prohibiting marriage with close relatives, and so on. When it is related to the law established, the needs at this level only occupy the *mustahab* (recommended) status in the act which is commanded, and the *makrooh* (disrecommendation) in the act which is prohibited.

According to M. Khorul Hadi (2016, p. 226-227), as he quoted from Yudian Wahyudi, the three levels of the *maqâşid al-syarî'ah* is a doctrine that guarantees the realization of benefit for humans in general, and for Muslims in particular, and at the same time it plays a part as the analysis tool in reading and solving problems that occur around us. Simultaneously, Ibn 'Asyûr stated that *maqâşid al-syarî'ah* is not just a principle in discovering the legal status, but has evolved into a tool to approach the *ijtihad*. According to him, linguistic arguments (texts) are not enough to discover the Islamic law, but they must be studied with a causative and teleological approach. He further stated that an Islamic law practitioner should not only focus on the five basic needs as presented by al-Syaṭibî but must be developed into the preservation of the universal values, such as tolerance, justice, equality, democracy, and human rights (Maulidi, 2015, p. 262). According to Chamim Tohari (2017, p. 21), the expansion of the meaning of *maqâşid al-syarî'ah* as proposed by Ibn 'Asyûr has weaknesses, such as it does not explain the priority scale when there is a conflict between each need, and the development concept he argued is not accompanied by a clear application so it seems to be abstract. In general, what is being conveyed by Ibn Ashûr only repeats and complements the concept of *maqâşid al-syarî'ah* which has been discussed by the previous scholars.

3. Preservation of the al-Ḍarûriyât al-Khams in the Subject of al-Nasb (Descendant)

As previously explained, the scholars have different opinions in placing the sequences in preserving the *al-darûriyât al-khams*. However, they generally put the preservation of religion (*al-dîn*) as the top priority. Indeed, there are not many theoretical fundamentals which state the religion as the first priority, especially if it is related to the person who will conduct the religion. On the one hand, the human life (*al-nafs*) must be prioritized, because religion will not be established if there is no human being to conduct it. On the other hand, human will continue to live even if there is no religion. However, there is at least one verse in the Quran that commands people to preserve the religion (*Jihad*) even though they have to sacrifice their lives and wealth (e.g QS al-Tawbah [9]: 41). Presumably, this argument is the main basis for the scholars to place the preservation of religion above the preservation of the soul and others. According to Jasser Auda, he agrees more with the opinion of Shaykh Muhammad al-Gazali who stated that the proposed order was flexible and parallel to their needs (Arfan 2013, p. 187).

Thus, as seen from the order of what must be preserved in protecting the interests of *al-ḍarûriyah*, *al-ḥâjiyah*, and *al-taḥsîniyah*, the author prefers the order as proposed by scholars in general, namely the preservation of the religion (*hifẓ al-din*), the preservation of the soul (*hifẓ al-nafs*), the preservation of the mind (*hifẓ al-'aql*), preservation of the descendant (*hifẓ al-nasl*), and preservation of the property (*hifẓ al-mal*). Considering this discussion is more focused on the preservation of the descendant (*hifẓ al-nasl*), the author will further limit this discussion only to this aspect.

In addition to other goals, to produce descendants is one of the objectives of a marriage. Therefore, the relationship between a man and a woman is arranged in the form of marriage. It is meant so that they will have descendants who will continue

their lineage. With the marriage institutions, Allah will accredit this lineage, so do the community. However, when the marriage institution is neglected, then Allah will not accredit the lineage, nor do the community. As a result, vertically (to Allah) and horizontally (to the society) there will be no honor that adheres to their descendants. When the lineage is purely accredited, there will be laws and regulations that come with it, such as legacy, kinship, and so on. Therefore, the descendant preservation becomes one of the main things that must be preserved by humans.

In terms of the needs, the descendant preservation can be divided into three points:

- a. Preserving the descendant in the level of *al-ḍarūriyah*, such as through being married and prohibiting adultery. Marriage is a legitimate way to obtain the off spring, otherwise, children from adultery are not accredited as legitimate descendants. Therefore, ignoring the rules on obtaining the offspring will damage the existence of lineage, both in the world and in the hereafter. The importance of this purely accredited lineage not only provides benefit in the world but also in the hereafter. In addition, Abad Badruzaman (2014: 75) also added into this the prohibition against denying the descendants without the right reasons, the prohibition of homosexual, and the prohibition of accusing someone of committing adultery. He further said that preserving the descendant can be concluded with the term “*nikah*” with all branches of discussion.
- b. Preserving the descendant in the level of *al-ḥâjiyah*, such as the necessity of witnesses in marriage, pronouncing the dowry in the marriage covenant and authorizing the divorce rights to the husband. If this is not carried out, it will be difficult for the marriage to be accredited as having an impact on the descendant; it will be difficult for the husband to pay the dowry, and it will be difficult to end the marriage when the marriage is no longer

able to be sustained. In Indonesia, the law for marriage registration can be categorized into this need. Ibn Taymiyah further forbids the marriage to an adulteress before she repented, and to impose the talaq except in both religious and life emergency situation. Such is also true to the prohibition of neglecting children's education (al-Badawî, 2000, 474-478), and the prohibition to conduct the *nikah tahlîl* and *nikah mut'ah*. These prohibitions aim to prevent someone from experiencing difficulties that he may overcome in relation to the descendant preservation, and also prevent someone from conducting actions that interfere with the *daruriyah* aspects of his marriage. If these provisions of *al-ḥâjjiyah* are not implemented, then the commands and prohibitions of Allah will not be implemented properly. Therefore, based on this definition, the *al-ḥâjjiyah* will produce an obligatory status (*fardhu*) when an act is ordered, and a forbidden status (*haram*) when the act is prohibited.

- c. Preservation of the descendant in the level of *al-taḥsîniyah*, such as the *khitbah* (proposing), allowing the men to look at the women before the proposing, and convening a *walimah* (wedding reception) in marriage. In the form of prohibitions, one of the examples is the prohibition on the marriage to the closest relatives. This preservation is to complete the marriage ceremony and to create a better marriage. If this is not performed it will not have a negative effect on the existence of marriage and the descendant.

In the present context, Badruzaman ((2014, p. 76) added that the discussion of *hifz al-nasl* was not only to clarify the position of the child *nasab* (lineage) through a legitimate marriage but also to protect the descendants from poverty, oppression, exploitation and so on. In the modern context, the expansion of the meaning of the *hifz al-nasl* also includes protection of orphans, abandoned

child, and children with special needs. This argument is supported by Muhammad Yafiz (2015, p. 107), as quoted from Umer Chapra, that the meaning of *al-hifz* (preserving) is not merely interpreted as conservation (*status quo*), but is intended for continuous development in addition to empowerment of the preserved.

According to al-Syaṭibî and Ibn Taymiyah, every command and prohibition of Allah contains the *maqâṣid al-aṣliyah* (main goal) and *maqâṣid al-tâbi'ah* (additional goal). Both of the *maqâṣid* forms support each other, in which the *maqâṣid al-aṣliyah* will generate and determine *maqâṣid al-tâbi'ah*, and the *maqâṣid al-tâbi'ah* will reinforce and ensure the realization of *maqâṣid al-aṣliyah* (Busyro, 2017, 219). Such is also in marriage, as these two goals mutually reinforce the strength of the marriage institution, in which the main goal is to obtain the descendant, while the additional goal is to acquire happiness and mutual pleasure as husband and wife. If what is meant in the marriage is only for the additional goal, so the main goal that has been set by Allah will not be achieved. The problem of the *nikah taḥlîl* marriage lies here; it is presumed that it is only meant to achieve the additional goals. According to Mahsun (2017, p. 12), the *nikah taḥlîl* is a temporary marriage which is not intended to last forever. It contains a conspiracy to outsmart the prohibition of Allah and His Messenger, and such an act is illegal because it only prioritizes the desires of lust such as the *nikah mis-yâr* (tourist marriage) cases.

1 4. **Kawin Maupah in the Nagari Binjai of Pasaman Regency**

Nagari Binjai²³ is located in one Nagari [read: village] out of three Nagari in Tigo Nagari District, Pasaman Regency, West Sumatra. Nagari Binjai consists of 5 (five) Jorong [read: hamlet] namely the Jorong Binjai, Tarantang Tunggang, Padang Kubu, Padang Sawah, and Padang Kubu. The total area of Nagari Binjai is ± 43,028 Ha. This Nagari is surrounded by other villages, and it is adjacent to Nagari Ladang Panjang in the north, with Nagari Selaras Air of the Agam Regency in the south, with Nagari Kinali of Pasaman Barat Regency in the west, and with Nagari Alahan Mati

and Nagari Koto Kaciak of Pasaman Regency in the east (Saputra, 2018, 116).

In the perceptions of the Binjai community, a person who imposed the third talaq to his wife is considered as a person who is mentally disturbed. If the subject is a woman, then it is deemed as a disgrace and she should be married soon to another man even if it has to be through *kawin maupah*. Therefore, marriages of *kawin maupah* in this community exist to prevent something catastrophic that could harm the community in the Nagari (Saputra, 2018, 151). In Nagari Binjai, there are several men who are willing to become the groom for the *kawin maupah* or marrying a woman -who has been imposed with the third talaq by her husband- with payment, and it seems that it has become their profession and they depend their monthly wage from this proposition. There are four people known as the professional perpetrator of *kawin maupah* in Nagari Binjai. They provide services not only in Nagari Binjai but also in neighboring villages (Saputra, 2016, 73). Presently, there are four couples recorded as being obligated to commit the process of *kawin maupah*.

Kawin maupah is conducted like regular marriages by fulfilling the terms and conditions of marriage in Islamic rules, such as the presence of the guardian from the women's side of the family, the witnesses of marriage and the dowry. The only difference lies in the existence of payment services for the groom since he is willing to marry the woman who has already been imposed with the third talaq. As for the dowry, it depends on the first husband (*muḥalla lahu*), because he will prepare all the funds needed for the marriage. The marriage takes place in the women's house, in the form of *nikah sirri* (unregistered marriage).

According to Madi (Saputra, 2018, 156), one of the *muḥ allil* (the hired groom), the period of marriage is very short as it lasts for one to five days. Furthermore, according to Aton (Saputra, 2018, 154; Saputra, 2016, 73-74), sometimes the divorce takes place immediately after the marriage covenant. It is because the hired groom is not allowed to have sexual intercourse with the

bride. Such is the term of the agreement made between the hired groom (*muḥallil*) and the woman's first husband (*muḥalla lahu*). The service payment for the hired groom is promised to be paid by the first husband or the ex-wife, depending on who wants the marriage the most. On the amount of payment for the service, the four hired grooms of *kawin maupah* (*muḥallil*) said on average they received Rp. 500,000 (five hundred thousand rupiahs) for their services. Likewise, as stated by the local leaders of adat, the minimum tariff is an approximate of Rp. 500,000.

This kind of marriage in Nagari Binjai has lasted since a long time ago, and none of the informants knew the original history. The community presumed that there are several reasons for the *kawin maupah*, including:

First, the customary regulation that obligates it to comply with religion. In this case, the community of Nagari Binjai belongs to the custom of Minangkabau land that has the "*Adat Basandi Syara', Syara' Basandi Kitabullah, Syara' Mangkat Adat Mamakai*" philosophy (Siswayanti, 2014, p. 480) (custom is based on sharia, the sharia is based on the Quran-, the religion dictates the law and the custom implements it), and the community is persistent in following the philosophy. In Islamic teachings, a divorce is an act that is disliked the least by Allah, especially if up to the third repudiation (Saputra, 2018, 151).

The religious foundations perceived by the community has resulted in a conclusion that the third talaq is not permissible, and therefore must be abolished by means of *kawin maupah*. In addition, there is also a rumor about the history in the era of the Prophet Muhammad which indicated that the woman who imposed with the third talaq is equal to the dog feces. There is no trusted source and the validity of this history is unclear, but this perception has deeply rooted in the Binjai community for a long time. According to Wasar (Saputra, 2018, 151), a local scholarly figure, the history that put women imposed with the third talaq as equal to dog feces is based on stories from the previous scholars. The story told that there was a mother who had a difficulty in

finding a cure for her child, then she vowed that she would eat dog feces if her child recovered. After his son had recovered, she was confused on how to perform her vow. So she came to the Prophet, then the Prophet told her to collect water from the roof of the house of a woman who was imposed with the third talaq because the water was deemed as equal to the dog feces.

In addition, the community also believes that women who are imposed with the third talaq and do not remarry their ex-husband will not smell the heaven. According to Laili (Saputra, 2018, 158-159), the motivation for the woman to remarry her ex-husband is to ensure that the woman can go to heaven. This shows that factors that reinforce the occurrence of this *kawin maupah* are religious motives which develop in the society.

Second, the social relations factors. As the consequence of being imposed with the third talaq due to the above reasons, the woman will be ostracized in the community and are in a humiliating position. Making a connection with her is equal to dealing with a despicable person, as despicable as dog feces and the inhabitant of Hell. Sulaini (Saputra, 2016) said that people cannot eat and drink the meals presented in the woman's house because the food provided is equal to dog feces. This condition indirectly shows that the woman's house is prohibited to be visited by the community because it is considered as a bad omen. This condition needs a solution since a good social relationship certainly has a great influence on the life of the society. The solution is by performing *kawin maupah*. Moreover, the community is also worried about the effect of imposing the third talaq that will not only endanger the couple but also their neighbors. The community believes that the tragedy will also affect 40 houses around the woman's house.

Third, there is a myth that women who are imposed with the third talaq and do not remarry their ex-husbands will face a tragedy in their life. According to Saputra (2016, 68-70), the general public widely believe that the tragedy will definitely happen, that if the woman goes to the river then she will be eaten by the crocodiles, and if she walks into the forest then she

will be eaten by the tigers. These myths eventually generate a strong desire for women who are imposed with the third talaq to remarry with their ex-husbands through *kawin maupah*. The marriage covenant of *kawin maupah* is also attended by the local *imam* and scholars who give their congratulations and prayer to the couple and their families. This shows that local scholars do not disapprove of *kawin maupah*.

² *Fourth*, for the reason of preserving the children in terms of child support and education, and that they will be neglected if their parents are divorced (Saputra, 2016, 69). In the matrilineal tradition of Minangkabau society, the position of a husband who lives in his wife's house is as a house guest (Ariani, 2015, p. 45). In the event of a divorce, the husband will return to his parents' home or marry another woman. The parenting loads become the obligation of the wife and her big family. This, in turn, will be burdensome for the ex-wife family. Thus, to avoid this condition, efforts are made to reunite the husband and wife by committing *kawin maupah*. This reason seems to play only as a complementary factor in *kawin maupah*. The fear of parenting load in the childcare in any forms is not necessary in Minangkabau custom since the woman is the one who rules over and possesses the property of *Rumah Gadang* (the legacy house). According to Dedi Arsa (2017, p. 54-46), although the husband becomes the part of the wives and children's life, the mother (wife) is the anchor in the family. Arsa further stated that a wife can take care of herself and his children with her inheritance, despite the fact that she divorces her husband. In general, this is a description of the life and position of Minangkabau women in the matrilineal custom.

5. Kawin Maupah From the Maqâsid al-Syarî'ah's View

The issue regarding *nikah tahlîl* with payment as in *kawin maupah* is not specifically discussed in fiqh, eventhough it is an inseparable part of the marriage due to the consequence for imposing the third repudiation to a woman. The *tahlîl* marriage which takes place naturally and unplanned made it possible for

an ex-husband to remarry his ex-wife after the expiration of her 'iddah time. The 'iddah (waiting period) is obligated to a woman who is imposed repudiation by her husband as the consequence of their marriage relationship. Based on this point of view, *kawin maupah* does not obligate 'iddah since there is no sexual intercourse between the groom and the bride in the marriage. Thus, one of the requirements of the *nikah tahlil* in the Islamic provisions is not carried out properly.

From the sociological view, the customary reason that obliges *kawin maupah* is that it brings benefit to the couple. It could be seen from the perspective of avoiding Allah's displeasure for those who imposed talaq, and it seems that this practice adheres to the correct Islamic teachings. This is the reason that is believed by the society in practicing the religion provisions, and that it should be actualized by the local customs in relation to the philosophy of "Adat Basandi Syara' Syara' Basandi Kitabullah Syara' Mangato Adat Mamakai (ABSSBK)". However, using the argument of Allah's displeasure for those who imposed talaq for the basis of allowing *kawin maupah* is certainly not sufficient to legalize the law status of this kind of marriage, because this argument contradicts other theoretical fundamentals that regulate the *nikah tahlil*.

In general, Zelfeni Wimra (2016, p. 198-199) responded that the ABSSBK philosophy in Minangkabau is not being implemented as it is written. Many local customs that are being practiced are not in sync with that traditional philosophy, and the sharia does not seem to have any bargaining power and is not integrated into the community anymore. On the contrary, the logical mind and the revelation and the tradition of the Prophet should be implemented in synergy and integratedly with the local custom so that it can be used as the fundamental for the Minangkabau custom.

As for other reasons developed in the community's belief that likened the women who are imposed with the third talaq to dog feces, it is presumably based on the history about the Prophet that has no clear reference in the hadis books. Even the

belief about the ex-wife that will not smell heaven if she does not remarry her ex-husband also has no reference in the hadis. The same is also true with the myth about the occurrence of tragedy for those women, that they will be eaten by crocodiles or attacked by tigers. This is also an unreasonable argument that cannot be justified. Based on the facts around this kind of marriage, there are two subjects that can be analyzed in this study of *maqâşid al-syarî'ah*.

First, when viewed from the generated maslahah, the sociological benefit felt by the community are only based on wishful thinking. The problem is that the maslahat is contrary to the provisions of the *tahîl* marriage as regulated by Allah and His Messenger. According to the hadis of the Prophet, the *nikah tahîl* should ensure that there is an event of sexual relation between the groom and the bride after the covenant, just like the usual marriage. The divorce that occurs afterward adheres to the 'iddah obligation of the women, which results in the husband being allowed to remarry his ex-wife. This is the rule spoken by The Prophet to teach the husbands to be cautious in pronouncing the talaq so that they consider it first before imposing talaq to their wives. Therefore, the maslahat seen by the Nagari Binjai community is contrary to the maslahat desired by the *al-Syâri'* (*qaşd al-Syâri'*). In the provisions of Islamic law, such maslahat is called as the *maslahat mulghah*, and the scholars agreed that this is a kind of improper maslahah. Therefore, *kawin maupah* tradition conducted by the Nagari Binjai community is not in accordance to *qaşd al-Syâri'* (the purpose of Allah in making the law).

Jasser Auda, as quoted by Khusniati Rofiah (2014, p. 86), argued that each legal provision that replaces justice with injustice, grace with hatred, and goodness with evil, means that the rule is not based on sharia, even if the rule is claimed to be true according to certain interpretations. Therefore, the correct legal opinion is an opinion which is produced on the basis of the authentic law and by paying attention to the *maqâşid al-syarî'ah*. On the other hand, Auda also asserted that the *urf* (the society

tradition) should be respected in order to achieve *maqâşid al-syarî'ah*, even if the '*urf*' is different from the meaning shown by the *naş* (theoretical fundamental). This is because the purpose of establishing Islamic law must refer to the benefit of the community that practices the law (Fasa, 2016, p. 326-328).

From these two statements, there seems to be a contradiction in Auda's reasoning. On the one hand, the determination of the law should refer to the authentic theoretical fundamental and *maqâşid al-syarî'ah*; on the other hand, he affirms to accept '*urf*' as a legal consideration even when the '*urf*' is different from the meaning understood from the *naş*. According to the authors, the '*urf*' meant by Auda is not intended to justify the thing that has been forbidden by Allah, such as *kawin maupah*, but rather towards the general theory of developing the Islamic law by making the '*urf*' as one of the legal arguments.

Second, in terms of *qaşd al-mukallaf* which focuses on the study of the intentions, the consequences of intentions, sincerity, and so forth with the aim of legalizing an act of law, the intention in *kawin maupah* is not to practice the provisions of Allah and His Prophet, but to induce the desires of the people with no legal basis. In reality, the practice of *kawin maupah* is indeed seen as beneficial for the community, but the consequences of the improper intentions and procedures do not comply to the guidance of Allah and the Prophet, making the practice contrary to *qaşd al-mukallaf* which is determined in the *maqâşid al-syarî'ah*. According to al-Ghazali (d. 505 H), the real benefit is when it is desired by Allah, not by the human (al-Ghazâlî, 1368, 286-287). Muhammad Sa'îd Ramađân al-Bûţî reinforced this by stating that the real benefit is to make the after life as the main goal, and for that, it should not contradict even in the slightest with the Quran and Sunnah (Fauzi, 2016, p. 309-310).

Third, as seen from the *maqâşid al-aşliyah* (main goal) and *maqâşid al-tâbi'ah* (additional purpose), a marriage is intended to produce descendants, and that is *maqâşid al-aşliyah* of a marriage. This will not be achieved except by sustaining the

marriage. The *maqâşid al-tâbi'ah* of marriage consist of many things, among which to acquire pleasure, halal status, peace, and so on. This is only to motivate someone to get married and to reinforce the position of *maqâşid al-aşliyah*. If the purpose of a marriage is only for the *maqâşid al-tâbi'ah*, then there will be no benefit that protects the interests of Allah. Not achieving the benefits as desired by Allah, has made the act not accredited as valid. Thus, the practice of *kawin maupah* in the tradition of Nagari Binjai community does not apply the *maqâşid al-syarî'ah* provisions as agreed upon by the scholars, and therefore should not be continued to be conducted as the solution for women who are imposed with the third talaq.

C. Conclusion

Based on the discussion above, it can be concluded that at least there are four factors that cause the occurrence of *kawin maupah* in Nagari Binjai, Pasaman Regency is: *first*, the existence of customary provisions which are believed to be in accordance with religion, in which the women who are imposed with the third talaq are in a despicable position equal to dog feces and will not smell Heaven; *second*, it is done to preserve harmonious social relations; *third*, there is a myth that is believed since a long time ago that a woman who is imposed with the third talaq and does not immediately remarry her ex-husband will face tragedies in her life; and *fourth*, concerns on the preservation and the sustainability of the children's education.

Based on the study of *maqâşid al-syarî'ah*, the practice of *kawin maupah* does not preserve the maslahah of the interest of Allah (*qaşd al-Syâri'*) in practicing their kind of *taḥlîl* marriage. This discrepancy also lies in *qaşd al-mukallaf*, in which the intention is not to obtain the pleasure of Allah, but rather to induce desires without a clear legal basis. On the other hand, when viewed from the concept of *maqâşid al-aşliyah* (main goal) and *maqâşid al-tâbi'ah* (additional goal), this marriage is not intended to actualize the *maqâşid al-aşliyah*, but only to actualize the *maqâşid*

al-tâbi'ah. In the study of *maqâsid al-syarî'ah*, *maqâsid al-tâbi'ah* is only used to motivate someone to conduct an order or to stop him from doing what is prohibited, and it is not the actual goal that Allah desires. Thus, the practice of *kawin maupah* is not in accordance with the theory of *maqâsid al-syarî'ah* agreed upon by the scholars.

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