

Legal Discovery in Islamic Perspective

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How to cite : Shabika Azzaria Putri, et. al. "Legal Discovery in Islamic Perspective". *Unifikasi : Jurnal Ilmu Hukum*. 8(1). 2021.43-52. DOI : 10.25134/unifikasi.v8i1.3848

Submitted : 26-12-2020

Revised : 14-01-2021

Accepted : 22-02-2021

Abstract : In general, legal discovery refers to conducting legal searches when the statutory regulations are not regulated and are unclear. Legal discovery is not only based on the concept of positive law, but it also refers to Islamic concepts. This aims to find the law on an issue where the regulation is not yet regulated. Thus, inexistence and unclear issues in law become present and apparent. Legal discovery in Islamic concept is known as Ijtihad, an act and an effort to find, understand, and formulate Islamic Shari'ah ruling. Legal discovery in Islam is conducted using several methods including istinbat, interpretation, literal/linguistic, causation (ta'lili), and synchronization methodologies. Other methods of legal discovery are qiyas, istihsan, masalah mursalah, istishhab, urf, mazhab shahabi which cannot be separated from the main sources of Islamic law, the Qur'an and hadith. Meanwhile, ra'yu and ijtihad are ways of thinking in understanding the Qur'an and hadith. These are to determine a problem where its nash has not been determined. The researchers employed library research in this study. The study examined the documents using secondary data and analyzed it using a qualitative method where the data are described in words, not numbers. In addition, the data collection is based on literature studies taken from books, journals, and internet sources related to legal discovery in the Islamic concept.

Keywords : Ijtihad; Islam; Legal discovery

Penemuan Hukum dalam Perspektif Islam

Abstrak : Penemuan hukum secara umum diartikan dalam hal untuk melakukan pencarian hukum apabila didalam peraturan perundang-undangan tidak diatur dan tidak jelas akan pengaturannya. Penemuan hukum bukan saja pada konsep hukum positif saja, namun ada juga penemuan hukum dalam konsep Islam. Hal ini bertujuan untuk menemukan hukum terhadap suatu permasalahan yang belum ada aturannya, sehingga suatu persoalan yang tidak ada atau tidak jelas hukumnya menjadi ada dan jelas. Penemuan hukum dalam konsep Islam yang dikenal dengan nama Ijtihad, dimana penemuan hukum dalam Islam merupakan suatu tindakan dan upaya untuk menemukan, memahami dan merumuskan hukum syara'. Penemuan hukum dalam islam dilakukan dengan beberapa metode, diantaranya istinbat yakni metode interpretasi, literal/linguistik, kausasi (ta'lili) dan sinkronisasi. Metode dalam melakukan penemuan hukum Islam yang lain adalah qiyas, istihsan, masalah mursalah, istishhab, urf, mazhab shahabi yang tidak terlepas dari sumber hukum Islam yang utama yakni, Al-Qur'an dan hadis. Sementara ra'yu dan ijtihad merupakan cara berpikir dalam melakukan pemahaman pada Al-Qur'an dan hadis, dalam menetapkan suatu permasalahan yang tidak atau belum ditentukan nashnya. Penelitian ini peneliti menggunakan metode penelitian kepustakaan, penelitian yang mengkaji studi dokumen dengan menggunakan data-data sekunder dan juga menggunakan analisis kualitatif dimana data-data pada penelitian ini dijelaskan dengan kata bukan angka. Pengumpulan data secara studi literature yang diambil dari buku, jurnal dan sumber internet terkait dengan penemuan hukum dalam konsep Islam.

Kata Kunci : Penemuan Hukum, Islam, Ijtihad.

INTRODUCTION

Rules that are used as references for behaving well in people's lives are known as laws. This law rule is to provide protection to many people's interests. Efforts should be made to provide protection for the interests in people's lives. Thus, the law can be implemented properly. In addition, the law can be implemented properly and poorly. This means that there is a violation of the law. Law violations committed by people must be enforced by law. This law enforcement is expected to

become a reality for human life.¹ In the reality, everyone yearns the law can be implemented in an event in society. This means the events are not allowed to deviate and must be determined by the existing legal rules. Thus, legal certainty can be manifested. According to Gustav Radbruch's opinion, there are three elements of law enforcement, legal certainty (*rechtsicherheit*), benefit (*zweckmassigkeit*), and justice (*gerechtigkeit*). These three basic legal values must always be considered so that its function and purpose can be manifested.²

The three elements of the basic legal value by Gustav Radbruch are legal certainty, with legal certainty, the community will be more orderly due to the existence of an applicable rule (law). Thus, if someone violates the law, they will be given sanctions. In addition, the community expects the law could be enacted in concrete events and bring benefits to law enforcement. Thus, the community can get justice.³ Related to the law, humans generally only pay attention to the law rules of statutory rules/regulations for practitioners. The people are aware that these laws and regulations are close to perfect. The laws do not completely regulate all peoples' problems and daily activities. Sometimes, laws and regulations are unclear and incomplete. It does not regulate all problems in people's lives. Moreover, in Muslims holly book, the Qur'an, which serves as a reference for Muslims in determining the law in occurring events, the Qur'an also sometimes requires interpretation of problems or issues that are considered unclear and possible (open) for interpretation.⁴

In Risalatul Qodla, there is a story about the Caliph Umar Bin Khattab who gave orders to Abdullah bin Qais, who at that time worked as a judge. Thus, if there was a problem in the Holy Qur'an and Hadiths, he will make a decision by considering the elements and value that grows in the community and make an analogy to problems that have previously been decided.⁵ In reality, after the death of Prophet Muhammad SAW, there have been various events, the legal problems have arisen, grow, and develop in such a complex manner. This is seen as if Allah SWT has conveyed the Islamic law to the Prophet Muhammad SAW.⁶ Furthermore, there must be an acknowledgment of the limitations of the legal texts contained in the Qur'an and hadiths. In fact, legal problems continue to develop without any limitations.⁷

As a result, a legal discovery must be made by people who work as judges and other legal officers. This is to provide shortcuts in dealing with legal problems. For instance, the legal rules which are unclear and/or the legal rules which have no law provisions. This is to overcome legal problems that happen in society.⁸ Then, to make legal discoveries by judges and legal officials, it is

¹ Muliadi Nur, *Rechtsvinding: Penemuan Hukum (Suatu Perbandingan Metode Penemuan Hukum Konvensional Dan Hukum Islam)*, Jurnal Ilmiah Al-Syir'ah, Vol.2, No.1, 2004.

² *Ibid.*; dikutip dari Achmad Ali., *Menguak Tabir Hukum (Suatu Kajian Filosofis dan Historis)*, eds. I, Jakarta: Chandra Pratama, 1996, p. 95.

³ Nurmin K. Martam, *Tinjauan Yuridis Tentang Rechtsvinding (Penemuan Hukum) Dalam Hukum Perdata Indonesia*, Jurnal Cahaya Keadilan, Vol.5, No.2, 2017.

⁴ Muliadi Nur, *Rechtsvinding : Penemuan Hukum (Suatu Perbandingan Metode Penemuan Hukum Konvensional Dan Hukum Islam)*, Jurnal Ilmiah Al-Syir'ah, Vol.2, No.1, 2004.

⁵ Tri Saupa Angka Wijaya, *Rechtsvinding Ditinjau Dari Hukum Acara Perdata*, Jurnal Ilmu Hukum Legal Opinion, Edition 4, Vol. 2, 2014; quoted from Parwoto Wingjusumarto, *Peran Hakim Agung Dalam Penemuan Hukum Dan Penciptaan Hukum Pada Era Reformasi Dan Transformasi*, Majalah Hukum Varia Peradilan Edition No. 251 in month of October 2006, Ikahi, Jakarta, 2006, pg. 68.

⁶ Riyanta, *Sumber Dan Metode Penemuan Hukum Islam*, <<https://www.academia.edu/>> accessed on November 1, 2020, at 01:00 p.m.; quoted from Rachmat Djatnika, "Jalan Mencari Hukum Islam Upaya Ke Arah Pemahaman Metodologi Ijtihad" dalam Amrullah Ahmad dkk., peny., *Dimensi Hukum Islam dalam Sistem Hukum Nasional*, cet. ke-, Jakarta: Gema Insani Press, 1996, pg. 99. Abdul Wahab Khalaf gave an explanation of the verses of the Qur'an which amounted to 6,234 verses, the legal verses are 228 verses; Family law is 70 paragraphs, treaty and material law is 70 paragraphs, 30 paragraphs of criminal law, 13 paragraphs of procedural law, 10 paragraphs of constitutional law, 25 paragraphs of international law, and 10 paragraphs of economic law.' Abd Al-Wahhab Khallaf, 'Ilm Usul al-Fiqh (Cairo: Matba'ah al-Istiqamah, 1956), pg.34-35.

⁷ Riyanta, *Sumber Dan Metode Penemuan Hukum Islam*, <<https://www.academia.edu/>> diakses tanggal 1 November 2020, pukul 13:20 wib ;dikutip dari Iskandar Usman, *Istihsan dan Pembaruan Hukum Islam*, edition 1, Jakarta: RajaGrafindo Persada, 1994, pg.1.

⁸ Riyanta, *Sumber Dan Metode Penemuan Hukum Islam*, <<https://www.academia.edu/>> accessed on November 1, 2020, at 01:30 p.m. ; quoted from the Islamic law literature, *the law invention is known as istinbath, while its intellectual activity is*

possible to use Islamic law as a source of law other than positive law. Usually, legal discoveries that use Islamic law are the countries where the majority of the population is Muslim. According to Amir Syarifuddin's opinion as quoted by Kutbuddin Aibak, the meaning of Islamic law is the revelation rules of Allah SWT and the Sunnah of the Prophet Muhammad which contained commandments and religious prohibitions for adult Muslims and *mukalaf* who have a healthy sense.⁹

In general, legal discovery refers to a law that is carried out without any problems/violations. This includes the laws implemented by each resident and law enforcers in a country at any time without realizing. For example, law enforcement, in a case where a policeman is working by standing at a crossroad to manage the traffic. Law enforcement can be implemented when the problem is handled by a judge. This situation is called a law enforcement.¹⁰

Some experts prefer to use the term "law formation" rather than "legal discovery". This is because the term legal discovery gives a vibe as if the rule of law already exists.¹¹ However, this term is more suitable in the Islamic context. This is because the law was not created but was carried out by discovery. *Mujtahid* is discovering and not creating the law. This not includes a belief that the rule of law was created by the creator, namely, Allah SWT as *syar'i*.¹² Referring to the aforementioned background, the writers are interested in in-depth discussion related to legal discovery in Islam. Accordingly, the formulation of the problem is about the concept, the method, and the source of legal discovery in Islam. Thus, the writers write down the results of the study in the form of a journal/article entitled legal discovery in Islamic perspective.

RESEARCH METHODS

The object of this research is related to the legal discovery in Islam. Thus, the writers employed normative legal research or library research. This type of research examines document studies involving secondary data. In addition, this research also used qualitative analysis where the data explained in terms of words, not numbers.¹³ The data collection used was literature studies taken from books, journals, and internet sources related to legal discovery in Islamic concepts.

In legislation, the regulation of legal discovery (*Rechtsvinding*) is sometimes incomplete and unclear. Thus, legal discovery is needed to provide an explanation. The definition of legal discovery simply refers to finding the law due to incomplete or unclear law. Generally, legal discovery is a process of concretization or individualization in legal regulations (*das Sollen*) which are general in nature and remembers certain real events (*das Sein*) (see also Van Eikema Hommes, no date: 25, 32). A judge is always encountered real events, problems, and cases that are obliged to be resolved. For this reason, it is necessary to seek the law.

The main point of legal discovery is finding the law for events that actually happening.¹⁴ According to the teachings of functional law by Ter Heide, the most important thing is finding the

known as ijtihad, which is to devote all of the ability to obtain legal provisions from the Qur'an and as-Sunnah that are unclear in meaning, and on issues that have no nash using predetermined means as a way of thinking. , read Asjmun Abdurrachman, "Sorotan terhadap Berbagai Masalah Sekitar Ijtihad" Inauguration speech professor, faculty of Shariah delivered in the open senate meeting of IAIN Sunan Kalijaga Yogyakarta, May 25, 1996, pg. 34

⁹ <<http://repo.iain-tulungagung.ac.id/>> accessed on November 1, 2020, at 02:10 p.m.; dikutip dari Kutbuddin Aibak, *Otoritas dalam Hukum Islam (Telaah Pemikiran Khaled M. Abou El Fadl)*, Dissertation, (Yogyakarta: UIN Sunan Kalijaga, 2014), h. 94. Kutbuddin Aibak, *Membaca Kembali Eksistensi Hukum Islam dalam keragaman Hidup dan Kehidupan*, dalam *Ahkam: Jurnal Hukum Islam*, Vol. 5, No.2, 2017, pg.322.

¹⁰ Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar Edisi Revisi*, eds. ke-1, Yogyakarta: Cahaya Atma Pustaka, 2014, pg.1.

¹¹ Riyanta, *Sumber Dan Metode Penemuan Hukum Islam*, <<https://www.academia.edu/>> accessed on November 1, 2020, at 02:15 p.m.: quoted from Sudikno Mertokusumo, *Mengenal Hukum Sebuah Pengantar*, eds 2, Yogyakarta: Liberty, 2005, h. 162.

¹² Riyanta, *Sumber Dan Metode Penemuan Hukum Islam*, <<https://www.academia.edu/>> accessed on November 1, 2020, at 02:15 p.m.: quoted from Abd al-Wahhab Khallaf, *Ilmu Usul al-Fiqh*, eds 5, Jakarta: Rineka Cipta, 2005, pg. 167.

¹³ <dtesis.com/pengertian-penelitian-hukum-normatif-adalah>, accessed on November 25, 2020, at 02:33 p.m.

¹⁴ Sudikno Mertokusumo, *Penemuan Hukum Sebagai Pengantar*, Yogyakarta: Cahaya Atma Pustaka, 2014, pg.49.

best solution in certain circumstances that meets the expectation of living together with the community and withstand "social games" controlled by "the rules of the game" (Wiarda, 1988: 40).¹⁵ Legal discovery is the result of human creation which means the prior legal application is preceded by a subjective selection of relevant events and rules. Its application refers to the repeated formulation of an abstract rule (unclear) in real events.¹⁶ According to Loude's opinion, legal discovery is not merely a logical process that involves fact subsection that exists in the law, but also covers an assessment of the future reality to discovering its law.¹⁷ Similarly, J.A. Pontier mentioned legal discovery as a response to the problem situation that describes in legal terms. Pontier also added that legal discovery provides answers to questions related to the law as a result of real occurrences.¹⁸

RESULTS AND DISCUSSION

1. Legal discovery in Islam

Legal discovery in Islamic law or other terms, *Ijtihad*, is basically an attempt to understand, find, and formulate the law in *syara'*. The clear rules have a *nash* that refers to mujtahid's effort in legal discovery, that is understanding and formulating the *nash* of the law so that they can be operationally implemented in easy way. For the laws that are not clearly mentioned in *nash*, the effort of legal discovery in Islam (*ijtihad*) refers to finding what is behind the *nash* then formulate it in the form of law. If no guideline of law applies in the *nash* but the legal discoverer's (mujtahid) awareness of Allah's law are detected, legal discovery in Islam, *ijtihad*, refers to dig the law that belongs to Allah SWT then formulate it in operational law.¹⁹

Ijtihad comes from the word "*al-jahd*" or "*al-juhd*" which means "*al-masyoqot*" (difficulty or affliction) then "*athoqot*" (capability or ability) based on Allah SWT saying in QS. At Taubah verse 79 which means: "*and (criticize) the one who find nothing (to spend) except their effort.*"²⁰ The definition of *ijtihad* can be seen from two aspects, the language and the terms. The differences lie in terms of context. Etymologically, the meaning of *ijtihad* (language) refers to the mobilization of all power to do things that are considered difficulties. Meanwhile, in terminology, *ijtihad* refers to conducting research and thoughts to get something close to the *syara* and Prophet sunnah. This is to get the *nash* which is *ma'qu*. Thus, the wisdom of sharia known as *maslahat* conveyed its meaning and general purposed.²⁰

Ibrahim Husein identified the meaning of *ijtihad* and *istinbath*. *Istinbath* comes from the word *Nabath* which means water that originally emanated from its source which was excavated. Therefore, terminologically, *istinbath* is the *muradif* of *ijtihad* which is removing something from its hiding place.²¹ Meanwhile, according to the ushul fiqh cleric's opinions, *ijtihad* is devoting all ushul fiqh cleric's abilities to gain an understanding at the level of *dhanni* in sharia law.²²

In general, *ijtihad* defines as the ability to express the interesting and good ideas for the common good (people). Moreover, *ijtihad* also refers to get an understanding of law in shara (Islamic law) which done by fikih expert known as a *mujtahid* by mobilizing all his abilities.²³ Meanwhile, the basics concept of *ijtihad*, mentioned in Qs. Ar-Rum verse 21 means, "*Indeed in that are signs for a people who give thought.*"

¹⁵ *Ibid.*,

¹⁶ *Ibid.*, h. 51.

¹⁷ Ishaq, *Penemuan Hukum dan Notaris*, Jurnal Recital Review, Vol. 1, No. 1, 2019; quoted from John. Z. Loudoe, *Menemukan Hukum Melalui Tafsir Dan Fakta*, Jakarta: Bina Aksara, 1985, pg. V.

¹⁸ J.A.Pontier, *Penemuan Hukum*, terj. Oleh B. Arief Shidarta, Bandung: Jendela Mas Pustaka, 2008, pg.1.

¹⁹ Muliadi Nur, *Rechtvinding: Penemuan Hukum (Suatu Perbandingan Metode Penemuan Hukum Konvensional dan Hukum Islam)*, Jurnal Ilmiah Syir'ah, Vol. 2, No. 1, 2004.

²⁰ Abd wafi Has, *Ijtihad Sebagai Alat Pemecahan Masalah Umat Islam*, Jurnal Epistemi, Vol. 8, No.1, 2013.

²¹ Ibrahim Husein, *Ijtihad Dalam Sorotan*, Bandung: Mizan, 1991, pg. 25.

²² Al-Jurjani Syarief Ali Muhammad, *Al-Tari'fat*, Jeddah: al-Haramain, t.t., pg. 10.

²³ Abd wafi Has, *Ijtihad Sebagai Alat Pemecahan Masalah Umat Islam*, Jurnal Epistemi, Vol. 8, No.1, 2013.

Thus, *ijtihad* also has its own functions. First, *al-ruju* ' means returning. Returning the teachings of Islam to the Qur'an and Sunnah from all less relevant interpretations. Second, *al-ihya* means life. Reviving part of values and Islam to encourage the respond the challenge. Third, *al-inabah* means improvement. fulfilling Islamic teachings that have been conducted an *ijtihad* by the previous cleric. There is a possibility of an error referring to the context of the previous era and the situation encountered.²⁴

2. Methods of Legal Discovery in Islam

The method of legal discovery in Islamic law is in fact almost similar to the method of positive law discovery. It involves the methods applied to a country according to Islamic law. This has been explained by Islamic Jurisprudents (Fuqaha). The methods they have encountered are very basic, for example, understanding law in legal texts using a hermeneutic method which is terminologically called Ushul Fiqh.²⁵ It has been stated in Islamic law that Muslim jurisprudence has developed an accurate model of legal discovery. According to Syamsul Anwar (Riyanta's quote), the method of finding Islamic law is called *Istinbat*. This is a legal discovery covering literal/linguistic interpretation, causation (*ta'lili*), and synchronization methodologies.²⁶

a. Interpretation/Linguistics Method

This method has functions to interpret verses and texts in the Qur'an and hadith. The linguistic method is used on problems where the legal text already exists, but it is still unclear due to *mutasyabih* content in-laws verses. This interpretation/linguistic method uses a study pattern that produces four legal statements taxonomies from legal texts. This covers the level of clarity, indication patterns of the intended law, the broad and narrow coverage of legal statements, and the forms of taklif formula, the statements.²⁷

b. Causation Method (Ta'lili)

This method is an important method in legal discovery. This is because there is an attempt to build laws on problems that have no legal text. In the causation method, there is an attempt to investigate the foundations that become the basis for the upholding of Islamic law. In this case, the causation method is divided into two types. Those that underlie the existence of the '*illat* law and law in *maqasid al-syari'ah*. In addition, there are two types of causation methods. The *qiyasi* method, conducted when no direct nash applies in dealing with the problem and the teleological method, a second attempt if no parallel cases are found the '*illat*'.²⁸

c. Synchronization Method

This synchronization method refers to a method that harmonizes various legal arguments that may in the end be something that is opposite to one another. Then, the development theory of *nasakh* and *tarjih* was conducted. *Nasakh* is the replacement of a shari'ah provision by another provision on the condition that the latter will arrive at the end and the two provisions are stipulated separately.²⁹

This is followed by a confession. The *ta'arud* occurs quite often outwardly. This is a resistance between the contents of one proposition with another where there is a degree of similarity. The conflict may arise between each verse of the Qur'an, each mutawwatir hadiths, and others. On the

²⁴ *Ibid.*,

²⁵ Bakhtiar, *Perbedaan dan Persamaan Metode Penemuan Hukum Islam dan Metode Penemuan Hukum Positif*, Pagarayuang Law Journal, Vol. 1, No.2, 2018.

²⁶ Bakhtiar, *Perbedaan dan Persamaan Metode Penemuan Hukum Islam dan Metode Penemuan Hukum Positif*, Pagarayuang Law Journal, Vol. 1, No.2, 2018; quoted from Riyanta, 2008, *Metode Penemuan Hukum (Studi Komparatif antara Hukum Islam dan Hukum Positif)*, Jurnal Penelitian Agama, Vol. XVII, No. 2, pg. 411.

²⁷ Munawir Hari, *Metodologi Penemuan Hukum Islam*, Ulumuna Jurnal Studi Keislaman, Vol. 16 No. 1, 2012.

²⁸ *Ibid.*, ; dikutip dari Riyanta, 2008, *Metode Penemuan Hukum (Studi Komparatif antara Hukum Islam dan Hukum Positif)*, Jurnal Penelitian Agama, Vol. XVII, No. 2, pg. 411.

²⁹ Bakhtiar, *Perbedaan dan Persamaan Metode Penemuan Hukum Islam dan Metode Penemuan Hukum Positif*, Pagarayuang Law Journal, Vol. 1, No.2, 2018; quoted from Munawir Hari, *Op.Cit.*, pg. 14.

other hand, no resistance will apply, the *ta'arud*, if the content of one argument with another possesses a different degree, for example, the content in the Qur'an verse and hadith.³⁰

In conclusion, three methods of legal discovery in Islam, interpretation/linguistics method, causation method, and synchronization method. These methods are commonly used by experts in conducting legal construction discovery on existing problems. These methods provide a guideline in Islamic law that can only be found and derived from the Qur'an verses and texts in the Al-Sunnah.³¹ However, apart from the aforementioned methods, there are other methods formulated by experts. The experts have unleashed all their rational abilities and formulated the used methods by other experts in making legal discoveries. This covers the methodology derived from the result of *mujtahid*. Each method used was different and was not used by other *mujtahids*. The difference applies due to different guidelines and considerations used by *mujtahid* in doing *ijtihad*.³² There are several *ijtihad* methods in establishing the law. However, not all of these methods are agreed in terms of its use.³³ Accordingly, the method of legal discovery in Islam covers

a. Qiyas

Linguistically, *Qiyas* refers to something that is equated with the same type or something that is measured by another. According to Imam Syafi'i's opinion, *Qiyas* is an effort of making legal provisions according to the arguments on things available in the holy book of the Qur'an and hadith.³⁴ In terminology, *Qiyas* has become a debate among scholars. Some define it as a method of extracting the law by being obedient to its *nash*. Meanwhile, some argue *qiyas* can stand alone as a source of law outside the *nash*.³⁵

b. Istihsan

Linguistically, *istihsan* means good or looking for good things. Meanwhile, in the *ushul fiqh* cleric's opinion, *istihsan* is to leave the law that has been stipulated in other laws, where the events are determined based on the argument of *syara'*. In other words, *istihsan* is an act of implementing another law by leaving the other law due to an obligation. This is regulated in a *syara'* argument.³⁶

c. Maslahah Mursalah

Linguistically, the word *maslahah* comes from Arabic which means bringing good things and rejecting damage.³⁷ According to Abdul Wahab Khallaf's opinion, *maslahah mursalah* is a *syar'i* that do not implement legal *syari'at*. This is to create a *maslahah*. There is no evidence indicates the recognition or annulment.³⁸ Meanwhile, Abu Zahra defined *maslahah mursalah* as all things that have benefits and are in line with the goals of *syar'i*, the Islamic law. He also added that there are no specific arguments showing the acknowledgment/non-acknowledgment.³⁹ Thus, *maslahah mursalah* refers to determining the law related to something that has not been mentioned in the Qur'an and Hadith. This is as the consideration for the interests of human life which focusing on the benefit to avoid damage.

³⁰ *Ibid.*,

³¹ *Ibid.*,

³² Muliadi Nur, *Rechtvinding: Penemuan Hukum (Suatu Perbandingan Metode Penemuan Hukum Konvensional dan Hukum Islam)*, Jurnal Ilmiah Syir'ah, Vol. 2, No. 1, 2004.

³³ *Ibid.*,

³⁴ *Ibid.*, dikutip dari; Ahmad Narawi Abdussalam Al Indunisi, *Ensiklopedi Imam Syafi'i*, Jakarta Selatan: PT. Mizan Publik, 2008, pg. 342.

³⁵ Sakirman, *Metodologi Qiyas Dalam Istibath Hukum Islam*, Jurnal Pemikiran Hukum dan Hukum Islam, Vol. 9, No. 1, 2018.

³⁶ Ahmad Sarwat, *Tentang Istihsan dan Pengertiannya*, <<https://www.rumahfiqih.com/tentang-istihsan-dan-pengertiannya>> accessed on November 23, 2020, at 01:09 p.m.

³⁷ Kholil, *Kembali kepada Al-Qur'an dan As-Sunnah*, Semarang: Bulan Bintang, 1955, pg. 43.

³⁸ Abdullah Wahab Khallaf, *Ilmu Ushul Fiqh*, terj. Noer Iskandar al-Bansany, *Kaidah-kaidah Hukum Islam*, Jakarta: PT. Raja Grafindo Persada, Cet.ke-8, 2002, pg. 123.

³⁹ Muhammad Abu Zahrah, *Ushul Al-Fiqh*, terj. Saefullah Ma'shum, et al., *Ushul Fiqih*, Jakarta: Pustaka Firdaus, Cet. 9, 2005, pg. 424.

d. Istishhab

Linguistically, *Istishhab* means requesting for friendship or making comparisons and bringing them closer. For the terminology, according to the *ushul fiqh* cleric, *istishhab* in *Al-Asnawy* is a legal stipulation against a problem in the future based on the basis of the previous related law. This is because there is no need to make a change in the law.⁴⁰

e. Urf

Etymologically, *urf* means good. Meanwhile, according to *ushul fiqh* cleric, it refers to a common thing in words and actions done by most people (the majority). In the term *Risalah Al-'Urf*, Ibn Abidin stated that tradition was taken from the word *mua'awadah* means to repeat. As this is often done repeatedly once at a time, he becomes famous. Actually, there is nothing in the relationship and no *karinah* in it. Tradition and *'Urf* has the same meaning even though they are different in terms of *mafhum*.⁴¹

f. Mazhab Shahabi

Mazhab Shahabi is Rasullullah's SAW companion who express opinions on issues whose legal rules are not explicitly explained in the Qur'an and the Prophet's sunnah. Simply, *mazhab Shahabi* refers to an individual opinion or *fatwa* expressed by Prophet's companion. According to *ushul fiqh* cleric, it is someone who meets the Prophet, has faith to believe in him then follows and for a long time living together. In addition, it becomes a reference for future generations and has a close bond with the Prophet.⁴²

3. Sources of Legal Discovery in Islam

Sources of legal discovery is the source used by judges and legal officers in conducting legal searches.⁴³ Then, they will discuss the sources of Islamic law as a place that needs to excavated, extracted, or found legal norms. The source of Islamic law refers to set of rules based on the revelation of Allah SWT and the Prophet's Sunnah on *mukallaf* who carry out recognized, believed, applicable, and binding behavior for all Muslims (Islam). Meanwhile, the word "set of rules" means that Islamic law contains an arranged and detailed rule that has binding legal force. The word "based on the revelation of Allah SWT and the Prophet's sunnah" means that a set of rules is found and based on the revelation of Allah SWT and the Prophet's sunnah. "*mukallaf* behavior", on the other hand, means Islamic law deals with human behavior that imposed by law. These rules apply to those who believe in the truth of Allah's revelations and the Prophet's sunnah, Muslims.⁴⁴

Furthermore, according to some Islamic jurists, there are three conclusions regarding the sources of Islamic law, the holy book Qur'an, hadith, and *ra'yu*.⁴⁵ These three sources are based on the provisions in Qs. An-Nisa (4): 59, a command to people to obey and have faith in Allah SWT, obey the Messenger and *ulum amri*, and if different opinions apply, it will be returned to Allah and the Messenger. The command to obey Allah SWT and the Messenger is based on the holy book Qur'an and hadith as a source of law. The command to obey *ulil amri* refers to *ijma'* as the source of law. Finally, if a different opinion still applies, return to Allah SWT and the Messenger which refers to *al-qiyas* as the source of law.

⁴⁰ Aflah Shorih, *Istishhab*, <<http://tantawi-ushulfiqh.blogspot.com/istishhab>>, accessed on November 23, 2020, at 02:30 p.m.

⁴¹ Abd. Rahman Dahlan, *Ushul Fiqh*, Jakarta: Amzah, 2011, pg. 67.

⁴² Epal Yuardi, *Makalah Mazhab Shahaby dan Dzari'ah Pengertian dan Kehujjahannya*, <<https://epalyuardi.blogspot.com/makalah-madzhah-shahaby-dan-dzariah>> accessed on November 23, 2020, at 03:15 p.m.

⁴³ Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, fourth edition, Yogyakarta: Liberty, 2006, pg. 48.

⁴⁴ Amir Syarifuddin, *Garis-garis Besar Fiqh*, cet. ke-1, Jakarta: Prenada Media, 2003, pg. 8-9.

⁴⁵ Ahmad Azhar Basyir, *Hukum Adat bagi Umat Islam*, first edition, Yogyakarta: Nurcahya, 1983, pg.7

Referring to the aforementioned description, the writers concluded two types of sources of Islamic law, namely the Qur'an and hadith.⁴⁶ Meanwhile, *ra'yu* and *ijtihad* are ways of thinking in understanding the Qur'an and hadiths and to determine a problem that has not been determined its *nash*. Likewise, the *kulliyah* principle is taken from various verses as the basis for determining the law in the future.

In positive law, the main sources of legal discovery consist of statutory regulations, customary law, jurisprudence, international treaties, and doctrine, as stated by Sudikno Mertokusumo.⁴⁷ These things show the levels in the sources of the law. Thus, if there is a problem with two sources, it is likely that a higher level will be used. This indicates that the higher source of law will defeat the lower source of law. In addition, positive law, there are formal and material sources of law in positive law. Formal sources of law are recognized in their form. Due to its form, the formal sources of law are known, obeyed, and applied generally. Meanwhile, the material source of law is the place where the legal material is taken.⁴⁸

CONCLUSION

Simply, legal discovery refers to finding incomplete and unclear law. Then legal discovery in Islamic law or known as *Ijtihad* is basically an attempt to understand, find, and formulate law in *syara'*. The law rule with clear *nash* refers to the efforts made by the *mujtahid*, the law discoverer, in understanding the *nash* of the law and formulate them in the form of operational legal formulations that are easily implemented. The method of legal discovery in Islamic law, the *istinbat*, is a legal discovery with interpretation, literal/ linguistic, causation (*ta'lili*), and synchronization methodologies. In addition, there are other methodology in legal discovery such as *qiyas*, *istihsan*, *maslahah mursalah*, *istishhab*, *urf*, *mazhab shahabi*. Furthermore, there are two sources of Islamic law, the Al-Qur'an and hadith. Meanwhile, *ra'yu* and *ijtihad* refers to ways of thinking in understanding the Qur'an and hadith. These two sources are also used to determine a problem that has no or not yet been determined its *nash*

SUGGESTION

In conducting legal discovery in Islam, declaring an action that has no rules or changes an existing rule for the better, one must really consider the methodology in the legal discovery that has been developed by previous Muslim jurists and implement it carefully and thoroughly. Do not let the legal products issued become unclear and contradict the sources of Islamic law. In addition, in conducting legal discovery in Islam, the researcher should refer to Al-Quran and the Prophet's sunnah and pay attention to and develop the understanding/the *mazhab* of previous Islamic jurists. They can synchronize the teachings of Islamic fiqh with the situation and the condition of current problems. Thus, all penalties given to Muslims do not deviate from the Islamic faith in answering an existing legal problem. In addition, the law enforcers especially the judges should be able to create public trust in court bodies and contribute harmonious efforts for people who want to seek justice, the people who gain truth and a sense of justice in society. The community has a desire to get justice from law enforcement. Therefore, law enforcers should carry out their duties and obligations with responsibility. If they commit an offense, they will get sanctions in the world (prison) and the hereafter (hellfire).

⁴⁶ Muhammad Syaltut berpendapat bahwa *ra'yu sama dengan ijtihad*. read Muhammad Syaltut, *Islam, Aqidah wa Syari'ah*, Cairo: Dar al-Qalam, 1966, pg.56.

⁴⁷ Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, cet.ke-4, Yogyakarta: Libert, 2006, pg. 48.

⁴⁸ Uci Putri Setia Ningsih, *Bentuk-Bentuk Sumber Hukum Berdasarkan Sumber Formil*, <<https://osf.io/>> accessed on November 24, 2020, at 04:15 p.m.

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