

AL-MASHLAHAH AL-MURSALAH AND ISTISHLAH IN SHARIA ECONOMIC PRACTICE

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Abstract: *Maslahah al Mursalah and Istishlah are two important concepts in Islamic law that are often used in sharia economic practices. Maslahah al mursalah refers to the general benefit which is recognized by the scholars but there is no specific syar'i argument that shows this. Istishlah, on the other hand, refers to the fundamental public interest that cannot be accommodated by existing law or there is no syar'i argument that shows how to handle the situation. In Islamic economic practice, maslahah al mursalah and istishlah are used to determine the right legal solution in situations that are not regulated by Islamic law. For example, in the practice of Islamic finance, maslahah al mursalah can be used to determine investment policies that are profitable for society in general. Istishlah, on the other hand, can be used to determine policies that protect the public interest in situations that are not regulated by existing law. However, the use of maslahah al mursalah and istishlah in sharia economic practices must be carried out with caution and must not conflict with basic Islamic values. In addition, the use of these two concepts must be based on a correct and comprehensive understanding of Islamic law. Overall, maslahah al mursalah and istishlah are important concepts in Islamic law that can be used in sharia economic practices to determine appropriate policies in situations that are not regulated by existing law. However, the use of these two concepts must be done with caution and must not conflict with basic Islamic values.*

Keywords: *al-mashlahah al-mursalah, istishlah, sharia economics*

Introduction

Islamic scholars agree that the main sources of Islamic law are the Koran and hadith. Other sources (arguments) such as ijma', qiyas, istihsan, mashlahah mursalah are still disputed, both their existence and their intensity as legal arguments. However, what the author discusses is mashlahat/istishlah. Mashlahat is a legal proposition that can provide a faster and wider movement for mujtahids to think, because it does not require so much connection with texts as applies to qiyas. However, what is emphasized more is a belief that in it there is the benefit of the people.

Various product developments and sharia economic innovations require a strong legal basis so that they remain in line with sharia principles. For this reason, understanding the methods of determining the law on various financial transactions and innovations is a necessity. Maslahah mursalah is one of the many methods that can be used to determine the law.

Mashlahah mursalah consists of two words, namely mashlahat and mursalah. The definition of maslahah etymologically is an effort to take advantage and eliminate mafsada/ madharat. From this it can be understood that mashlahah has two terms, namely benefits and keep madharat away. Sometimes this mashlahah is viewed from the aspect of the consent alone and becoming qorinah eliminates mafsadat.

Imam Al-Ghazali as mentioned in Wahbah Az-Zuhaili's quote that Mashallah basically gains benefits and rejects harm. Furthermore, this meaning is emphasized to safeguard the five maqashid ash-shariah, namely religion, soul, mind, intellect, lineage and property. Furthermore, Al- Ghazali emphasized that every case that contains one of the elements of maqashid Ash-shari'ah is called mashlahah. Conversely, if there is not one element of maqashid Ash-shari'ah, then it is mafsadat. While preventing it is maslahah.

Thus, mashlahah mursalah is a method of ijihad in order to explore sharia law (Istinbath). But not based on certain texts, but based on the approach intended to derive syara' law (maqashid Asy-shari'ah). Imam Malik is a priest who firmly uses mashlah mursalah. It's just that, according to Imam Malik, mashlah mursalah must have several conditions, namely first, there is an agreement between mashlah which is seen as a source of argument that stands alone with the objectives of the Shari'a. With this condition, the mashlah mursalah must not conflict with other arguments and also not conflict with the qath'i argument. Both mashlah must be rational (rationable) which has properties that can be accepted by reason. Third, mashlah is used to eliminate difficulties (raf'ul haraj). Through the mashlah mursalah approach, various forms of sharia financial transactions and innovations not only have a legal basis as a basis for their application, but can also be studied in more depth regarding their benefits in a holistic, comprehensive and thorough manner.

Literature Review

Maslahah al Mursalah

Maslahah al Mursalah is a concept in Islamic law that refers to the public interest or benefit that is considered important and recognized by the scholars, but there is no syar'i argument that specifically indicates this. Therefore, maslahat al-mursalah can be used as a legal basis in Islamic legal decisions if there is no specific argument. Several literature reviews regarding maslahah al mursalah include:

1. "Maslahah al-Mursalah and the Limits of Reason" by Mohammad Hashim Kamali. This article discusses the extent to which maslahah al mursalah can be used as a legal basis in Islam and what are the limits on its use.
2. "The Concept of Maslahah al-Mursalah in Islamic Jurisprudence" by Abdul Basit bin Ahmad. This article discusses the definition, sources, and application of maslahah al mursalah in Islamic law

Istishlah

Istishlah is a concept in Islamic law that refers to the basic public interest that cannot be accommodated by existing law or that there is no syar'i argument that shows how to handle the situation. In this case, istishlah is used to find appropriate legal solutions for situations that are not covered by Islamic law. Several literature studies regarding istishlah include:

1. "Istishlah (Public Interest) and Islamic Legal Theory" by Mohammed Hashim Kamali. This article discusses the concept of istishlah and how it can be used as a legal basis in Islamic legal decisions.
2. "Istishlah and the Interpretation of Islamic Law" by Ahmed Fekry Ibrahim. This article discusses how istishlah can be used to interpret Islamic law in situations that are not governed by existing law.

Method

To do research about maslahah al mursalah and istishlah, research method that can be used is the study of literature. This method is carried out by collecting various literature, both books, journal articles, and papers related to the problem to be studied. In research about maslahah al mursalah and istishlah, this method can be used to collect literature discussing definitions, sources,

and applications masalah al mursalahAndistishin Islamic law.

Result and Discussion

In language, the word *al-maslahah* is a good *lafadz al-manfaa'at*, namely the sentence *mashdar* which has the same meaning as the sentence *ash-shalah*. The author of the *Al'Arab Oral Dictionary* explains two meanings, namely *al-maslahah* which means *al-shalah* and *mashlahah* which means the singular form of *al-mashalih*. Everything means that there are benefits both from the origin and through a process, such as producing pleasure and benefits, or prevention and protection, such as avoiding harm and disease, all of which can be said to be *mashlahah*.

Muhammad Said Ali conveyed a similar definition and meaning, *mashalah*, the beneficial actions directed by *Shari'* (Allah) to His servants in order to preserve and safeguard their religion, soul, intellect, offspring and property.

Maslahah which is the goal of *syara'* is not *masalah* which is solely based on desire and lust, because the aim of legal *syari'atan* is nothing but to realize human welfare in the form of aspects of world life so as to avoid various aspects of damage. Determination of Islamic law through the *maqashid Asyari'ah* approach is one form of approach in establishing *syara'* law apart from the linguistic approach often used by scholars.

Ahmad ar-Raisuni clarifies this benefit from the expression of expediency. According to him, the meaning of *masalah* is to bring benefits or avoid harm. Meanwhile, what is meant by benefit here is an expression of enjoyment or any path leading to enjoyment. As for what is meant by harm is an expression of pain or any path leading to pain.

Ibn`Abd as-Salam, said Ahmad ar-Raisuni, divides *masalah* into four, namely enjoyment, causes of pleasure, happiness and causes that make happiness. Abdul Wahab Khallaf, defines *al-maslahah al-mursalah* as a *masalah* that is not determined by *syar'i* as the basis for determining the law, nor is it fair, the *syari* states its existence or must leave it. Wahbah al-Zuhaili defines *masalahal-mursalah* as: Some characteristics are in line with the actions and goals of *syara'*, but there is no specific argument from *syara'* that justifies or invalidates it, and with the enactment of laws on it benefits will be achieved and human damage is avoided. *Al-Maslahat al-mursalah* is a method of establishing law for legal events that has not been explicitly regulated in the *Qur'an* and *hadith*, but this method explores benefits directly. *Al-maslahat al-mursalah* is used to answer legal cases or events that develop in accordance with developments in social change and the demands of human life, but there is no law that has been decided with certainty regarding this legal issue.

Blasphemy *Maslahah al Mursalah*

Fiqh scholars agree that *masalah mursalah* is not valid as a legal basis in the field of worship because the field of worship must be practiced as it is inherited by the Prophet Muhammad, therefore the field of worship does not develop. In the proof of *masalah mursalah*, there are differences of opinion among *ushul* scholars, among others.

The first among the *Syafi'iyah* scholars, the *Hanafiyah* scholars and some of the *mailikiyah* scholars, such as Ibnu Hajib and the *zahir* experts, are of the opinion that *mashlahah mursalah* cannot be used as evidence. The *ash-Shafii* scholars did not include *al-maslahat al-mursalah* as a legal proof. *Al-Shafii* emphasized the attachment of every law to the *Koran*, *sunnah*, *ijma'* and *qiyas*. The only *ijtihad* method used is *qiyas*. On the grounds that Islamic law is complete and the *Koran* is a *tibyan* (explanation) for everything, *al-Shafii* does not accept the possibility that there are problems that cannot be resolved with texts, either directly or through *ijtihad*, namely *qiyas*.

Meanwhile, the second group of *Maliki* scholars is of the opinion that *mashlaha mursalah* as the basis for determining the law is Imam Malik. For the reason that Allah sent his messengers to the surface of this earth to guide his people to goodness. For this argument he refers to one of the following verses of the *Koran* It means : *And We did not send you, but to (be) a mercy for universe* (Qs. *Al-Anbiya* : 107)

The reasons for the ushul fiqh scholars for the use of mashlahah mursalah as evidence are as follows:

1. Islamic Shari'a was revealed, as concluded by the scholars based on the instructions of the Koran and sunnah, which aim to realize the benefit and needs of mankind. The needs of mankind are always evolving and it is impossible for all of them to be detailed in the Al-Quran and Sunnah of the Prophet Muhammad SAW, therefore anything that is considered maslahah mursalah as long as it does not conflict with the Koran and Sunnah of the Prophet is valid as evidence.
2. Companions in ijtihad consider maslahah mursalah as a legal basis without anyone disputing it. For example, Umar bin Khattab once confiscated some of the assets of officials in his time which were obtained by abusing his position. Practices like this were never exemplified by the Prophet Muhammad SAW, but this was necessary for Umar bin Khattab to protect state assets from the undermining of officials. That foundation then serves as the basis for maslahah mursalah in determining Islamic law.

Terms *Maslahah al Mursalah*

Those who acknowledge the mashlahah mashlahah mursalah in the formation of (Islamic) law have required a number of certain conditions that must be met, so that maslahah does not mix with lust, goals and desires that damage humans and religion. Scholars who argue with maslahah mursalah have provided certain criteria in verifying what is considered maslahah and what is not. They do this with great care and caution, in order to avoid the speculative influence of humans who are only based on their desires and ego interests in reasoning and consideration, when verifying these benefits. Condition- These requirements include, in the view of Imam Malik which was reduced by al-Syatibi, consisting of:

1. The benefit must be reasonable (ma'qulat) and relevant to the legal case at hand;
2. This benefit must become a blue print in maintaining something that is a principle in life and eliminating difficulties (masyaqqat) and harm;
3. The benefit must be in line with the intention of the legislation and must not conflict with the qat'i syara' argument.

Imâm al-Ghazâlî has established the arguments underlying his statement, so that mashlahah mursalah or istishlah can be an argument in legal istinbât must meet the following conditions, namely;

1. The benefit is included in the level or category of basic needs (darurriyat). That is, to determine a maslahah level must be considered, whether to destroy or damage the five basic elements (al-usûl al-khamsah) or not;
2. The benefit must be certain and cannot be based solely on conjecture (zan). That is, it must be believed that something really contains benefits;
3. The benefit must be universal in nature, namely benefit that applies in general and for collective interests, so that it cannot be individual and partial;
4. The benefit must be in line with the intention of Islamic law legislation.

Abd al-Wahhâb Khallaf With a different editorial but almost the same essence and substance summarizes the conditions for maslahah to be used as evidence, namely;

1. The benefit must be essential and cannot be based on predictions (wahm). That is, in taking the benefit one must also consider the harm it will cause. If you ignore the harm that will be caused, it means that the benefit is built on the basis of wahm. For example,

- efforts to seize husband's haktalak, by delegating it to the judge in every condition;
2. Benefit must apply universally or for all layers and not for individuals or for certain groups (partial). That is, the benefit is for the benefit of the majority of people or to prevent the majority of people from difficulties and harm;
 3. Institutionalization of law on the basis of benefit (*maslahah mursalah*) must not conflict with the legal system and the basis for establishing *nas* (Qur'an and Sunnah) and *ijma'*.

Miscellaneous *Maslahah al Mursalah*

According to Khalid Mas'ud *Maslahah* can be divided into three types: first *Maslahah* which has textual evidence supporting its consideration. Both *Maslahahs* are denied by textual evidence. The three *maslahahs* that are neither supported nor disproved by textual evidence. The first category is *maslahah* which is righteous and can be the basis of *Qiyas*. It is the second category of forbidden types and the third category that require further consideration. Therefore, said Muhammad Khalid Mas'ud, the elements of *maslahah* contained in the third category are examined further in terms of their strength. He added that from this point of view there are three levels of *maslahah*, namely emergency, *hajjat* and *tahsianat* or *tazyinat*. In terms of *syara'*, the *maslahah mursalah* can be divided into the following 3 parts:

1. *Maslahah Al-Dharuriyah* (Needs) are the things on which human life is established. If this matter is abandoned, it will result in the destruction of the joints of human life. For example, the obligation to protect the soul, mind, wealth, religion, honor and lineage. If one of these elements is damaged then life is damaged, *fitnah* arises which ends in destruction.
2. *Maslahah Al-Hajjiyah* (Secondary) are all forms of actions and actions that are not bound by another basis (which is in *Maslahah Al-Dharuriyah*) needed by humans can still be realized. But the main purpose of *maslahah Al-Hajjiyah* is to provide ease of life or something that leads to broad freedom without being seized by fear of losing *maslahah hajjiyah* such as soul, mind, wealth, religion, honor and lineage. Maintaining personal independence is an example of everyone having the freedom to come and go, play and can sleep at any time as long as it does not conflict with the *Shari'a* and this is included in the category of *maslahah al-hajjiyah*.
3. *Maslahah Al-Tahsiniyah* (Completeness) is to use everything that is appropriate and appropriate that makes life beautiful and great and the main focus is *mahasinul khuluk* and visual beauty. This *maslahah* refers more to beauty, its nature is only for goodness and perfection. If it cannot be realized or achieved by humans, it will not complicate or damage their life order. An example of wearing nice clothes plus fragrance when going to perform this prayer is not a basic requirement but for completeness.

Maslahah in terms of the aspect of its existence, the *ushul* scholars divide it into 3 types namely:

1. *Maslahah al-Mu'tabarah* is the *maslahah* contained in the text that cannot be doubted by *syara'*. Muhammad al-said Ali Abdul Rabbuh is of the opinion, what is included in this *maslahah* are all the *maslahahs* described and mentioned by the texts, for example in matters of maintaining religion, mind, soul, lineage and property. Therefore, Allah has determined to try to protect religion, perform *qishas* for the murderer, punish drunkards for the sake of maintaining reason, punish adulterers and similarly punish the perpetrators of theft. All scholars agree that all *maslahah* which are categorized as *maslahah mu'tabarah* must be upheld in life. Because in terms of level, it is a basic interest that must be upheld.
2. *Maslahah Al-Mulghah* is *maslahah* that contradicts the provisions of the text or is only considered by common sense. This means that this *maslahah* model is rejected. Because there are arguments that show that it is contrary to clear arguments. An example of

equalizing the distribution of inheritance between women and their brothers. There are many benefits to the tanning, but it is contrary to the text. So that's why this model is called *masalah mashlahah al-mulghah*.

3. *Mashalah Al-Mursalah* namely *mashlahah* which is in a position between *mashlahah mu'tabarah* and *mashlahah mulgha*. In other words, there are no Qur'anic or as- Sunnah texts that clearly legitimize their existence and also do not cancel or ignore their existence. All *mashlahahs* that are referred to by human reason, but are not ordered or rejected by the text, are called *mshlahah mursalah*. Imam Malik was the first to introduce the term *mashlahah mursalah* and make it a source of Islamic law. Examples of *mashlahah mjrsalah* are the codification of the Koran, making currency, making prisons and so on.

Application Maslahah al Mursalahin Sharia Economic Practices

In line with the development of progress and civilization, the problems of human life will be increasingly complex and varied and require legal certainty. Several developments in the field of Islamic economics that had never existed before also required legal certainty as to whether these models and products could be applied, bearing in mind that there were no texts that could be referred to for this activity. These contemporary economic problems, for example, will not be able to be solved if you only rely on the old methods of approach used by previous scholars. Difficulties in obtaining texts on certain issues are very likely to occur so that they cannot be resolved by using *qiyas* because no equivalent is found in the texts, or *ijma ulama* because the era is too far away. Under these conditions, then the process of determining *masalah mursalah* law can be used as an alternative method of determining law. In order to avoid the derailment of the determination of the law from lust, then doing *ijtihad* using *masalah mursalah* should be done together. As for some examples of the use of *masalah mursalah* in Islamic economics as follows:

1. Establishment of Islamic financial institutions/banks.

Banks are something that society really needs. Banks with all their functions have become a part of modern society that cannot be separated anymore. Banks have become a means of helping fellow human beings, both saving money, borrowing money, paying utility bills, telephone bills, tuition fees, transfers, and even channeling aid funds to people affected by disasters. Conceptually, Islam does not order the establishment of banking institutions. However, not a single verse from the Qur'an or al-Hadith prohibits the establishment of banking institutions. The *mudharabah* contract (profit sharing) that is known so far, in the Islamic concept is a personal relationship (not an institution such as a bank) between two or more people in the form of a work contract, where the capital owner hands over the money to a trusted person to use as working capital and the results are divided according to the agreement. However, with the establishment of the bank, the benefits are getting bigger and can be felt by many people. In addition, these benefits also do not conflict with existing legal texts, both the Qur'anic and hadith texts.

2. Collateral on financing *mudharabah*.

Sharia Banking in Indonesia in serving the needs of the public who want banking services with sharia principles based on law in Law Number 21 of 2008 concerning Sharia Banking, so that sharia banks in providing financing facilities follow government regulations, namely in accordance with Article 23 of the Law Number 21 of 2008, that this provision requires additional collateral in every high-risk financing such as *mudharabah* financing.

Mudharabah financing is a high-risk financing, because the bank will always face problems from the *mudarib*. Under no matter how good the conditions or with the best possible analysis, the risk of non-performing financing cannot be avoided, so Islamic banks take the initiative to ask for additional collateral as collateral for the financing. This is done by ensuring that the capital given to financing customers (*mudarib*) are expected

to return to normal in accordance with the provisions at the time of the contract.

Although in principle collateral is not allowed in mudarabah financing considering that Islamic banking institutions are intermediary institutions for money circulation in society, so banks must maintain the trust of third party funds that are saved, it is only natural that banks ask for additional collateral based on the principles of ushul fiqh masalah mursalah. Masalah mursalah which refers to the needs, interests, goodness and benefit of the general public may be applied as long as it does not conflict with strict principles and propositions and really leads to the common good which does not cause difficulties and harms other people or parties in general. On the basis of this masalah mursalah, in providing financing, sharia banks must use methods that do not harm the bank and the interests of the customers who entrust funds to it.

Apart from that, the consideration for the permissibility of a sharia bank as a provider of funds to ask for additional collateral for the mudharabah financing provided is because the funds provided by a third party which are used as capital by the bank area trust, and the bank must maintain the trust the bank must be ready if at any time a third party taking the funds because the funds provided to the bank are a wish for many people (3rd parties) so automatically the additional collateral used as collateral also becomes a necessity for the contract. The objective of reducing moral hazard and ensuring that the mudarib actually implements all the terms agreed upon in the contract are also part of the reasons for allowing the provision of additional collateral by managers for high-risk financing provided by Islamic banks.

3. Cartel and Monopoly.

A cartel is an agreement among independent producers to coordinate decisions, so that each member of the cartel can gain monopoly profits. Agreements can be in the form of production restrictions/quotas, sales areas or price agreements. Under this definition, a single business entity holding a monopoly cannot be considered a cartel, although it may be guilty of abusing its monopoly. Cartels usually arise in oligopoly conditions, where there are a small number of sellers with homogeneous product types, and are carried out in order to gain market power so that they can regulate product prices by limiting the availability of goods in the market.

Under antitrust laws, cartels are banned in most countries. Even so, cartels still exist both at the national and international levels, formally and informally. In Article 11 of Law Number 5 of 1999 concerning Antitrust and Unfair Business Competition, it is stated that cartel agreements are categorized as prohibited agreements. In Article 11 it is stated: Business actors are prohibited from entering into agreements with their competing business actors, which intend to influence prices by regulating the production and or marketing of goods and or services, which may result in such occurrences.

Monopolistic practices and or unfair business competition. "In the Islamic economy, cartels are actions that will harm consumers, and have the potential to create unfair business competition. Even though fair business competition will provide positive benefits for the economy. Often in an industry there are only a few players who dominate the market, so they can push them to take collective action with the aim of increasing economic power and maximizing profits. For this reason, restrictions on production and price levels are carried out through several collective agreements. If referring to the monopoly theory, an industrial group that has oligopolistic power will get the maximum profit if they jointly carry out monopolistic practices. By banning cartels, producers will be encouraged to create fair business competition and create production efficiency and input allocation, as well as encourage more innovation, including production infrastructure. Meanwhile, from the consumer side, they will benefit in the form of relatively cheaper prices, because the output price is formed by the production process or

the efficient management of production organizations.

Conclusion

By paying attention to the process of its formation and development, it is clear that fiqh law is in fact nothing other than the formulation of the understanding of the results of the *ijtihad* of the scholars of shari'a texts in the form of laws or provisions that aim to benefit human life in this world and in the hereafter. *Mashalah mursalah* is something that can bring or bring benefits needed in human life in general, including something that can prevent or eliminate harm; while the shari'at text has nothing specific and firm to justify or cancel it.

Even though the scholars have different opinions regarding the meaning of *ishtislah* and the use of *mashalih mursalah* as the proposition of shari'at, in reality they are not different in making *mashlahat* a consideration in understanding shari'at texts and various events or cases that they encounter in their daily lives; it has even been used since the time of the Prophet's companions as a consideration for *ijtihad*, although with another term whose contents are the same as *mashalih mursalah*. *Mashalih mursalah* is included in the scope of *mashlahat* which is justified by shari'a to be used as a consideration for *ijtihad* to understand and reformulate fiqh laws that are harmonious and relevant to the needs of today's life, as long as *mashlahat* contains efforts to achieve *maqasid al-shari'at* (maintaining religion, soul, mind, lineage and property).

The use of *maslahah mursalah* as a source of determination for Islamic economic transactions and practices that did not exist before is a necessity. Various forms of sharia economic development, both institutionally and productly, show that the role of *maslahah mursalah* is very significant. This can be seen from the establishment of Islamic banking, the emergence of Islamic credit cards as a facility to facilitate various transactions, the existence of renewal in *mudharabah* transactions such as collateral obligations and revenue sharing as a method of profit sharing, and others. In the future, with the rapid development of the Islamic economy, the use of *maslahah mursalah* will become increasingly dominant.

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