



The Technique of Determining Ijtihad and Its Application In Life: *Analysis of Istihsān, Maṣlaḥah Mursalah; 'urf; Syar'u Man Qablanā*

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Abstracts

Islam as a comprehensive religion has regulated the Shari'a for the conduct of all human actions which the Shari'a is universal and its use is not limited by the times. There are four main sources in the determination of law in Islam, namely Alquran, Sunnah, Ijma and Qiyas. Apart from the source of the law, there are several methods used by ululUshulFiqh to determine the law on a new problem. The issue in this research is whether the methods of ijthad such as Istihsan, MaslahahMursalah, Urf, and Syar'u man qablana can be accepted and allowed by the UlemaUshulFiqh in determining a law? What is the success in Islamic law? And how is it applied in human life and activity? The method used in this paper is the library study method. The results of the research obtained that Istihsan, MaslahahMursalah, 'Urf, and Syar'u man qablana are part of Islamic Shari'a. Despite the differences of opinion among the scholars regarding the ability to use the ijthad methods. There are those who directly allow, some also give certain conditions in the process of determining the law. Described the arguments that strengthen the opinions of the scholars in issuing their fatwa. There are also examples of the implementation and application of the ijthad method both at the time of the Prophet's best friend and in the present in accordance with the true Islamic Shari'a.

Keywords: *ijthad; Istihsān, Maṣlaḥah Mursalah; 'urf; Syar'u Man Qabalanā*

Introduction

Era, according to KBBI this word means a long or short period of time that marks something. Underlining that Era is time, we know that it is something that will continue to move forward, without any pause to look back. In other words, era is something that continues to grow, continues to provide new surprises with all the innovations that humans created in their time. Era development is something that cannot be avoided in our lives.

This underlies the many changes that occur in the environment around us, starting from people's mindset to someone's decision to do something. For example, years ago if we need ojek, we should go to ojek base, now with distinguished technology, we don't need to get tired to go to the ojekbase, because ojek will come to our location. Era development can be marked by the good developments, but each coin has two different sides. Era development can also cause new problems that we did not find before. An example that is currently happening is the crisis of respect for students to their teachers. This may be due to a lack of student understanding the honour of the teacher, as well as the lack of ethics learning in school.

Islam as a perfect and comprehensive religion has regulated the Shari'a to conduct all of human activity, in which the Shari'a is universal and can be used at any time (unlimited by era). During the time of the Prophet, if there were people who lacked understanding of a matter, they could ask directly to the Prophet, then what about us who lived thousands of years after the death of the Prophet? In this case we can look to the Qur'an, Al-Sunnah, and various scholars ijthad. In ijthad, the scholars use several methods such as; *istihsān*, *maṣlaḥah mursalah*, *syar'u man qabalanā and'urf*. In this article we will discuss or explain in more detail about several methods of ijthad and their application in life.

Istihsān

1. Definition of *Istihsān*

Istihsan etymologically is a masdar form of استحسن which means to take good things. Or hink something is good. Abu Hanifah still uses the meaning of lawi as the basis of istihsan usage, namely (استحسنastahsin) means "I consider good". (Abu al-Ainaini Badran, n.d.). As for istihsan understanding according to the terms, there are several definitions formulated by some ushul experts: (1) Ibn Subki proposed two definitions. Switching from using a qiyas to another qiyas that is stronger than him (*qiyās first*) (Syarifuddin 1999). And switching from using a proposition to customary habits because of a benefit. Ibn Subki explained that the first definition did not occur because the strongest of the two qiyas must take precedence. While the second definition is the party who rejects it. The reason is, if it can be ascertained that the customs are good because they apply as in the time of the Prophet or afterwards, and without any rejection from the prophet or from others, of course there are supporting propositions, both in the form of nash and *ijma'*. In this form, adat must be practiced in a certain manner. But if the truth is not proven, then the method is definitely rejected. (Abu al-Ainaini Badran, n.d.), (2) Abdul Wahab Khalaf, *Istihsān* is the movement of a mujtahid from the provisions of *qiyās jāli* (which is clear) to the provisions of *qiyās Khāfi* (which are vague), or the provisions which I (general) apply to provisions which are *istiṣnā'ī* (exceptions), because according to the mujtahid's view is the argument (reason) the

stronger who wants the transfer. (3) Abū al-Ḥasān al-Karkhī, *Istiḥsān* is the legal stipulation of a mujtahid for a problem that deviates from the provisions of the law applied to similar problems, because there are stronger reasons for the deviation, (4) Ibn Qudāmah, *Istiḥsān* is a justice to the law and its views because of the existence of certain propositions from the Koran and the Sunnah, (5) Ibn al-‘Arabī, *Istiḥsān* is choosing to leave the argument, taking the ruksah with the opposite law, because the argument is contrary to the other propositions in certain cases. And (6) Ibn Anbarī, *Istiḥsān* is choosing to use maslahatjuziyyah which is the opposite of qiyaskully. (Zahrah 1997).

Istiḥsān is a great source of law in legal terminology and istinbath by Mālikī and Ḥanafī. But basically Ḥanafī still continued to use the *qiyās* argument as long as it was deemed appropriate. (Zahrah 1997). Thus, *Istiḥsān* is basically when a mujtahid is more inclined and chooses certain laws and leaves the law because of one thing which in his view strengthens the second law of the first law. This means that specific issues that should be included are clear provisions, but because they are not possible and not properly implemented, special provisions must be applied as exceptions to general provisions or clear provisions.

2. Basic Law of *Istiḥsān*

The scholars who use *istiḥsān* take the arguments from the Quran and the Ḥadīth which mention the *istihsan* words in the denotative sense (such as *istiḥsān* pronunciation) like the Word of Allah in the Qur’an. “Those who listen to the words then follow what is best among them. They are those who have been given Allah’s instructions, and they are those who have reason.” (QS. Az-Zumar: 18). This verse according to them confirms that the praise of Allah for His servants who choose and follow the best words, and praise is certainly not intended except for something that is said by Allah: “And follow (the leader) the best that has been revealed to you from your Lord ...” (QS. Az-Zumar: 55). According to them, in this verse Allah commands us to follow the best, and the order shows that he is obligatory. And here there is nothing else to turn this command from compulsory law. So this shows that *istiḥsān* is hujjah. Prophet’s Hadith: “What is seen by the Muslims as something good, then on the side of Allah is good and what is seen as something bad, then by Allah’s side is also bad”. (HR Ahmad). This hadith shows that what is considered good by the Muslims with their common sense, then he too is with Allah. This shows the glory of the *istiḥsān*.

Scholar views of *istiḥsān*, Abū Zahrah argued that Abū Ḥanīfah used a lot of *istiḥsān*. Likewise in a statement written in several books of the Prophet which states that Ḥanafī acknowledged the existence of *istiḥsān*. In fact, in a number of books of jurisprudence, there are many problems that concern the *istiḥsān*. Al-Syātibī said that the *istiḥsān* was actually considered a strong proposition in law as the opinion of Mālikī and Ḥanafī. Similarly, according to Abū Zahrah, that Mālikī often works by using *istiḥsān*. In a number of the verses the Prophet mentioned that the Ḥanbalī acknowledged the existence of *istiḥsān*, as said by

al-'Amūdī and Ibn Hazib. However, al-Jalal al Mahallī in *Syarḥ al-Jam' 'al-Jawāmī'* claimed that the *istiḥsān* was recognized by Abū Ḥanīfah but other scholars denied it including the Ḥanbalī. The Syāfi'ī massively did not recognize the existence of *istiḥsān*, and they really stayed away from using it in legal terms and did not use it as a proposition. Even Imām Syāfi'ī said "Whoever uses *istiḥsān* means he has made sharia. He also said "All matters have been arranged by Allah. At least there are people who like it so that they are allowed to use qiyas, but they are not allowed to use *istiḥsān*."

3. Classification of *Istiḥsān*

The Ḥanafī cleric divided the *istiḥsān* into six types. As explained by al-Syāṭibī, namely

- a. *Istiḥsān bi a-Nash* (*istiḥsān* based on Quran or ḥadīth).

That is a deviation of a legal provision based on the provisions of *qiyās* to the legal provisions that are contrary to those stipulated based on the text of the Quran and ḥadīth. Example: in a will testament. According to the general provisions of the will it should not be, because of the nature of transfer of ownership rights to the person who has the right when the person who has the right is no longer capable, namely after he dies. However, this general rule is excluded through the word of Allah in Surah al-Nisa verse 11 which means: "After issuing a will which he made or a debt". The *istiḥsān* example with the ḥadīth of the Prophet is in the case of people who eat and drink because they forget when they are fasting. According to the general rule (*qiyās*), this person's fast is canceled because he has put something in his throat and does not hold his fast until the time of breaking the fast. However, this law is excluded by the hadith of the Prophet who said: "Whoever eats or drinks because he forgets he does not cancel his fast, because it is a blessing sent down by God to him" (HR. Tirmidzi).

- b. *Istiḥsān bi al-Ijma'* (*istiḥsān* which is based on *ijma'*)

That is leaving the necessity to use qiyas on an issue because there is an *ijma*. This happened because there was a fatwa from the mujtahid for an event that was contrary to the general principle or established principle, or the mujtahids were silent and did not reject what was done by humans, which was actually contrary to the basic principles that had been set. Example in the case of a public bath. According to the general rule, public bathing services must be clear, which must be how long someone has to take a shower and how many liters of water are used. However, if this is done it will be difficult for many people. Therefore, the scholars agreed to state that they may use public bath services even without determining the amount of water and the length of time spent.

- c. *Istiḥsān bi al-Qiyās al-Khāfi*

That is turning a problem away from the clear legal provisions of *qiyās* to the vague *qiyās* provisions, but its existence is stronger and more appropriate to practice. Example in

endowments of agricultural land. According to *qiyās al-jāli*, this waqf is the same as buying and selling because the land owner has aborted his property by transferring the land. Therefore, the rights of other people to pass through the land or drain water to agricultural land through the land are not included in the *waqf* contract, unless stated in the contract. And according to the *qiyās al-khāfi*, *waqf* is the same as the leasing contract, because the purpose of the *waqf* is to use the represented agricultural land. With this nature, all rights passed through the agricultural land or the right to drain water on the agricultural land are included in the waqf contract, even if it is not explained in the contract.

d. *Istihsān bi al-Maṣlahah* (*istihsān* based on benefit).

For example, the doctor's ability to see a woman's genitals in the treatment process. According to the general rule, someone is prohibited from seeing other people's genitals. But, in certain circumstances someone must undress to be diagnosed with the disease. So, for the benefit of that person, then according to the *istihsān* rules a doctor is allowed to see the aurat of a woman who is treated to him.

e. *Istihsān bi al-'Urf* (*istihsān* based on generally accepted customs).

That is legal deviation that is contrary to the provisions of *qiyās*, because of the *'urf* that has been practiced and is already known in the life of the community. Examples of this include hiring women to breastfeed their babies by guaranteeing their food, drinking and clothing needs.

f. *Istihsān bi al-Dharūrah* (*istihsān* based on *dharūrah*).

That is, a mujtahid abandons the necessity for the implementation of *qiyās* for a problem because it is faced with a state of *dharūrah*, and mujtahid adheres to a provision that requires to fulfill the requirements or reject the occurrence of harm. For example, in the case of an unclean cone well. According to the general rule the well is difficult to clean by removing all water from the well, because the well whose source from the spring is difficult to dry. However, the Ḥanafī scholars say that in such a situation to remove the impure it is enough to put a few gallons of water into the well, because the state of emergency requires that people do not have difficulty getting water for worship

4. Application of *Istihsān* in the Field of *Mu'āmalat Māliyyah*

The first type of *istihsān* example: According to the Ḥanafī, if a person forgives a piece of agricultural land, then the one who is condemned is irrigation rights, the right to make waterways on the land and so on. This was determined based on *istihsān*. According to *qiyās*, these rights cannot be obtained, because they emphasize the *waqaf* by buying and selling. On an important sale and purchase is the transfer of ownership rights from the seller to the buyer. If the *waqf* is abrogated by buying and selling, it means that the important thing is ownership rights. Whereas according to *istihsān* the right is obtained by

clarifying the *waqf* to rent. In leasing which is important is the transfer of rights to benefit from the owner of the goods to the tenant. So is the case with *waqf*. What is important in *waqf* is that the goods that are recited can be utilized. A field of rice fields can only be used if you get good irrigation. If the *waqf* is abrogated to the sale and purchase (*qiyās jālī*), then the purpose of the *waqf* will not be achieved, because the sale and purchase is prioritized in the transfer of ownership rights. Because of that, it is necessary to find another asset, namely rent. These two events have the 'illat' equation, namely prioritizing the benefits of goods or property, but the *qiyās* are *qiyās khāfī*. Because there is an interest, namely the attainment of the purpose of *waqf*, then the transfer from *qiyās jālī* to *qiyās khāfī* is done, which is called *istihsān*.

Another example is the rest of the bird's drink, such as the rest of the crow eagle and so on are sacred and halal taken. This was determined by *istihsān*. According to the *qiyās*, the rest of the drink of wild animals, such as dogs and wild birds, is forbidden to drink because the rest of the drink that has been mixed with the saliva of the beast is dissolved in the flesh. The beast immediately drank with his mouth, so that his saliva entered his drinking water. According to the *qiyās khāfī* that the beast is different from its mouth with the mouth of a animal. The mouth of a wild animal consists of meat that is forbidden to eat, while the mouth of a wild bird is a beak consisting of bone or horny substances and bone or horn substance is not unclean. Because of that the rest of the drinking bird does not meet with the meat that is forbidden to eat, because among its beak, so does its saliva. In this case certain conditions that exist in the birds of prey that distinguishes it from wild animals. Based on this situation, the transfer from *qiyās jālī* to *qiyās khāfī* is determined, which is called *istihsān*

The second type of *istihsān* example: Shara 'forbids someone to trade or enter into an agreement on something that has no form, when buying and selling is done. This applies to all types of buying and selling and agreements called *kullīlaw*. But syara 'gives *rukshah* (relief) to the purchase of goods with cash but the goods will be sent later, in accordance with the time promised, or by purchasing an order (greetings). Such relief is needed to facilitate trade traffic and agreements. Giving *rukshah* to *salam* is an exception from *kullīlaw* by using the law of *juz'ī*, because the circumstances require and are customary in the community. The one who adheres to the *istihsān* argument is the Ḥanafī, according to them *istihsān* is actually a kind of *qiyās*, namely winning the *qiyās khāfī* for *qiyās jālī* or changing the established law on an event or event determined based on general provisions for special provisions because there is an interest that allows it. According to them if it is permissible to stipulate a law based on *qiyās jālī* or *maṣlahah mursalah*, it is certain to do *istihsān* because the two things are essentially the same, only the names are different.

Besides the Ḥanafī, the other groups that used *istiḥsān* were a portion of the Mālikī and a portion of the Ḥanbalī. Those who opposed *istiḥsān* and did not make it as the basis of proof were the Syāfi'ī. According to them, *istiḥsān* is establishing the syara law 'based on lust desires. Imam Syafi'i said: "Whoever enters into *istiḥsān* means that he has established his own sharia law based on his desires of lust, while those who have the right to set the sharia law are only Allah." In the book *Risalah Ushahyah* written by him, stated: "The parable of the people who perform *istiḥsān* is like a person who prays facing a direction according to *istiḥsān* that the direction is the direction of the Ka'bah, without any arguments created by the syara'a to determine the direction ka'bah. "If we pay attention to the reasons expressed by the two opinions and the understanding of *istiḥsān* according to each of them, it will be clear that the *istiḥsān* in the opinion of the Ḥanafī is different from *istiḥsān* in the opinion of Syāfi'ī. According to Ḥanafī, it was a kind of *qiyās*, carried out because there was an interest, not based on lust, while according to Syāfi'ī, *istiḥsān* it arose because of a lack of taste, then moved to a better taste. If the *istiḥsān* was properly discussed, then the agreed understanding would be determined, surely the difference of opinion could be reduced. Therefore Al-Syāṭibī in his book *al-Muwāfaqāt* states: "people who establish laws based on *istiḥsān* should not be based solely on their desires and desires, but must be based on known things that the law is in accordance with the goal of Allah 'and accordingly with the general rules of syara. (Luthfi 2015).

Maṣlaḥah Mursalah

1. Definition of Maṣlaḥah Mursalah

Etymologically, said *al-maṣlaḥāt*, plural *al-maṣlaḥah* means something good, useful, and it is the opposite of evil or damage. (Abdurrahman 1983). *Maṣlaḥāt* is sometimes referred to as the term "*as-taṣlaḥah*", which means looking for the good. (Kholaf 1972). Whereas the problem according to the syara is basically among ulama ushul has the same view, although different in providing definitions. Jalāl al-dīn'Abd al-Raḥmān, for example, provides a definition of problem to maintain the sharia law on various good things that have been outlined and set boundaries, not based on human desires and passions." (Abdurrahman 1983). Ibn Taymiyyah, said that the problem is the mujtahid's view of actions that contain clear goodness and not actions opposite to Syariah. (Abdurrahman 1983). While Al-Ghāzalī, defining *maṣlaḥah* basically is trying to achieve and realize the benefits or reject the evil (Abdurrahman 1983).

As stated by Abdul Wahab Kallaf, it means something that is considered *maṣlaḥah*, but there is no legal firmness to realize it, and there are no specific arguments that support or reject it. (Efendi 2015). Of the four definitions above, both those proposed by Jalāl al-dīn'Abd al-Raḥmān, al-Ghāzalī, Abdul Kallaf, and Ibn Taimiyah, in principle contain the same

essence. That is, the problem that is intended is the benefit of being the goal of Sharia, not the benefit of being based solely on human desires and passions. Because it is fully realized that the purpose of legal reconciliation is none other than to realize the benefit of humans, in all aspects of life in the world, in order to avoid various forms that can lead to destruction.

2. The terms of *Maṣlaḥah Mursalah*

Groups that recognize the existence of *maṣlaḥah mursalah* in the formation of law (Islam) have required a number of certain conditions that must be fulfilled, so that *maṣlaḥah* does not mix with lust, purpose, and desires that destroy humans and religion. So that someone does not make his desire as inspiration and make his lust as his Sharia. These conditions are as follows: (1) *Maṣlaḥah Mursalah* should not conflict with *Maqāṣid Sharī'ah*. If there were no specific arguments that acknowledged it, then the *maṣlaḥah* was not in line with what Islam had intended, it could not even be called *maṣlaḥah*, (2) The benefit must be convincing, and there is no doubt, in the sense that there must be rational and in-depth discussion and research so that we are sure to give benefits or reject harm, and (3) *Maṣlaḥah* must be general and comprehensive, not specific to certain people and not specific to a small number of people. Al-Ghāzālī gave an example of this comprehensive *maṣlaḥah* with an example: infidels have fortified themselves with a number of people from the Muslims. If the Muslims are forbidden to kill them to preserve the lives of Muslims who fortify them, then the unbelievers will win, and they will annihilate the Muslims entirely. And if the Muslims fight Muslims who fortify infidels, then this danger is rejected from all Muslims who fortify those who disbelieve. For the sake of maintaining the benefit of all Muslims by fighting or annihilating their enemies.

3. Legal Basis for *Maṣlaḥah Mursalah*

There are some legal bases or arguments regarding the enactment of the *Maṣlaḥah Mursalah* theory including: (a) Al Quran: Among the verses that are made the basis of the enactment of *maṣlaḥah mursalah* is the word of Allah SWT. “*And we have not sent you, but to be a mercy to all nature*” (Al-Anbiya 21:107) and “*O mankind, there has to come to you instruction from your Lord and healing for what is in the breast and guidance and mercy for the believers.*” (Yunus 10:57), (b) Ḥadīth, The ḥadīth presented as the basic foundation for the blessings of the *maṣlaḥah mursalah* is the saying of the Prophet: “*You may not do madharāt and also promote each other.*” (HR. Ibn Majah and Daruquthni and others. This quality hadith hasan), (c) Ijma’, Companions such as Abū Bakar al-Ṣidīq, ‘Umar bin Khaṭṭāb and the madzhab of priests have given various laws based on the principle of *maṣlaḥah*.

Besides the aforementioned basics, the sincerity of the *mursalah* is also supported by the *‘aqliyah* arguments (rational reasons) as stated by Abdul Wahab Khalaf in his book

“*uṣūl al-fiqh*” that human benefit is always endless, therefore, if there is no legal sharia which is based on human concerns regarding the new *maṣlaḥah* that continues to develop and the formation of law based solely on the principle of *maṣlaḥah* who receives only Sharia recognition, then the formation of the law will cease and the benefits needed by humans in every period and place will be ignored. (Kholaf 1972)

4. Hujjah of *Maṣlaḥah Mursalah*

The scholars who made *mursalah* as one of the Sharia arguments, stated that the argument of the law of *maṣlaḥah mursalah* is: (a) The problems faced by humans always grow and develop as well as the interests and needs of their lives, (b) Actually the friends, the *tabi'īn*, *tabi'ā'tabi'īn* and the scholars who came afterwards had carried it out, so that they could immediately establish the law according to the benefit of the Muslims at that time. Kinds of *maṣlaḥah mursalah* based on the quality and importance of the benefit, they divided it into three types (Syafei 2010), namely: (1) *Maṣlaḥah Dharūriyah* (primary) is a case that is the place where human life is founded, which if abandoned, damages human life, rampant damage, arises slander, and great destruction. These cases can be returned to five cases, which are the main cases that must be maintained, namely: religion, soul, mind, lineage, and wealth. (2) *Maṣlaḥah Ḥajjiyah* (secondary), is that all forms of actions and behaviors that are not related to other bases (which exist in *maṣlaḥah dharuriyah*) that are needed by the community still materialize, but can avoid difficulties and eliminate narrowness. This *Hajjiyah* is not damaged and threatened, but can cause short sightedness and narrowness, and this *hajjiyah* applies in the field of worship, adat, muamalat, and jinayat fields, and (3) *Maṣlaḥah Taḥsīniyah* (tertiary) is to use all that is appropriate and appropriate which is justified by good customs and is covered by the *maḥāsīn al-akhlaq* section. *Taḥsīniyah* is also included in the field of worship, adat, muamalah, and the field of Uqubat. Prayers, for example, the obligation to purify unclean, cover the genitals, wear good clothes when establishing prayer, draw closer to Allah through the practices of the sunnah, such as sunnah prayer, sunnah fasting, charity and others.

Based on the existence of *Maṣlaḥah*, it is divided into: (1) *Maṣlaḥah Al-Mu'tabarah* is the benefit supported by Syara. That is to say there are specific propositions that make the basis of the form and type of benefit, (2) *Maṣlaḥah Al-Mulghah* is the benefit of being rejected by Syara', because it is against the provisions of Sharia, and (3) *Maṣlaḥah al-Mursalah* is the benefit of the existence of which is not supported syara', and not also canceled or rejected syara' through detailed arguments.

On *ushulfiqh* scholars agreed to say that *maṣlaḥah mu'tabarah* can be used as evidence in establishing Islamic law. Benefits like this are included in the *qiyas* method (Haroen 1997). *Maṣlaḥah al-mulghah* cannot be used as evidence in establishing Islamic law, because it cannot be found in Sharia practice (Haroen 1997). As for the success of the

process, in principle, the ulama accepted it as one of the methods in establishing Sharia, even though in terms of the placement of funds, the terms and conditions differed. The Ḥanafī said that to make *maṣlaḥah mursalah* a proposition, it was required that the law be held to the law (Amir 1316). That is, there are verses, hadiths or ijma' which indicate that the nature which is considered as benefit is illat in the stipulation of a law.

Examples of *maṣlaḥah mursalah*: the act of burning ash against those who deny paying zakat, it is for the benefit of, Require the existence of a marriage certificate for the legitimate lawsuit in the matter of marriage, Write the letters of the quran to Latin letters, Dispose of items that are on the ship without permission that have the goods, because there are large waves that make the boat shaky. For the sake of the benefit of passengers and reject the danger, Procurement of prisons, Currency printing and Making ownership letters

Syar'ū Man Qabalanā

1. Definition of *Syar'ū Man Qabalanā*

Syar'ū Man Qabalanā is a Sharia which is handed down to the people before the Prophet Muhammad, and to the people of Prophet Muhammad it is suggested to practice it as long as there is no arguments that forbid it (Efendi 2015). It can also be interpreted that *Syar'ū Man Qabalanā* is the previous Sharia (an obligation for people in the past) brought by their prophets, it can still apply to the people later, as long as there is no argument that prohibits or rejects the act (Munadi 2017). *Syar'ū Man Qabalanā* is the Sharia brought by the previous Apostles before the Prophet Muhammad was sent, which was a guide for their people for example the Shari'a of Prophet Isa, Daud (Kusmawati 2014). What is meant by *Syar'ū Man Qabalanā* is the Sharia or the teachings of the Prophets before Islam related to the law, such as the Shari'at of Prophet Ibrahim, Moses, and Isa, This problem is a separate subject in the discussion of the ushulfiqh *Syar'ū* etymologically means flowing. Sharia is a form isimterminologically means a place visited by people who want to drink that is crossed by humans to eliminate their thirst (Saebani 2008). Sharia is also interpreted as a straight path or thariqatun mustaqimatun as stated in the Qur'an. Beni quoted the words of Al-Maududi that the Sharia is the decree of Allah and His Messenger which contains the provisions of the basic, global, eternal, and universal laws that apply to all of His servants relating to the problems of *'aqidah*, worship, and mu'āmalah. (Saebani 2008)

The scholars explained that the Sharia before us or *Syar'ū Man Qabalanā* were laws which had been given to the ummah before Islam brought by the previous Prophets and became a legal basis to be followed by the ummah before the existence of the Shari'ah of the Prophet Muhammad. In principle, the Sharia intended from Allah for the previous people had the same principle as the Shari'a brought by the Prophet Muhammad. Among

the same principles are those related to the divine conception, about the hereafter, about promises, and the threat of God. Whereas the details are the same and there are also different according to the conditions and developments of each era (Kotto 2009). If basically the Shari'ah of samawi religion is one, then overall it must be accepted, except if there are arguments which explain that it is a temporal shari'a that applies to certain people, or has been abrogated in Islamic Shari'a. If there is no argument about it, then the law, the original law still applies.

2. The legal basis of *Syar'u Man Qabalanā*

“He has ordained for you, and what is revealed to you, [O Muhammad], and what we are enjoined upon Abraham and Moses - to establish the religion and not be divided there. Difficult for those who associate others with God is that to which you invite them. God chooses for Himself whom He will and guides to Himself whoever turns back [to Him] (Al-Syūrā 42:13); “We have believed in God, and Ishmael, Isaac, Jacob, and the Descendants, and to the prophets from their Lord. We make no distinction between them, and we are Muslims [submitting] to Him. “ (al-Imrān 3:84); Then We revealed to you, [O Muhammad], to follow the religion of Abraham, inclining toward truth; and he was not of those who associate with Allah (al-Nahl 16:123) and “O you who have believed, decreed that you were decreasing before you that you may become righteous (al-Baqarah 2:183).

3. Things that need to be considered in the use of *Syar'u Man Qabalanā*

The laws of the previous Sharia were not known without the source of Islamic law. Therefore, the sharia reconciliation is not considered legitimate if it is not based on the source. Because what can be used as evidence in the legal reconciliation for Muslims is a source of Islamic law. This is an agreement of fiqh experts. Something that has been approved based on the arguments of Islamic law can not be taken. Likewise if there is a proposition that shows that something legal provisions apply specifically to certain people. This provision cannot be broadly applicable to Islamic law, such as the prohibition of certain parts of dagig cattle and goats for the children of Israel. This is also based on the agreement of Islamic scholars. A law that is recognized in Islam as it is recognized in previous samawi religions, its legal status is based on Islamic texts, not with the previous people's

4. Various types of *Syar'u Man Qabalanā* (Munadi 2017)

The previous Sharia contained in the Quran or explanation of the Prophet which was given to the people before the Prophet Muhammad and also explained in the Quran and the ḥadīth of the Prophet that this has been recited and is no longer valid for the people of the Prophet Muhammad. Allah says in Surah Al-An'am verse 146, “And for those who are prohibited every animal of uncloven hoof, and of the cattle, we prohibited to them their fat, except what adheres to their backs or the entrails or what is joined with bone. [By]

that we repaid them for their injustice. And indeed, we are truthful (al-An'am 6:146). The verse above explains the prohibition of food that Allah set for the Jews first, but this does not apply to the people of Prophet Muhammad. The laws described in the Quran and the ḥadīth of the Prophet which are given to the previous people and also stated to apply to the people of the Prophet Muhammad and apply further. Like the obligation to fast, explained in Surat al-Baqarah verse 183 that it is obligatory to fast for the previous people and is obliged also to the people of the Prophet Muhammad to obtain devotion. The legal laws described in the Quran and the ḥadīth of the Prophet, are explained to apply to the ummah before the Prophet Muhammad, but clearly not stated for us, nor is there an explanation that the law was abrogated right.

5. Distribution of *Syar'u Man Qabalanā* (Munadi 2017)

Syar'u Man Qabalanā is divided into two parts, (1) Every Sharia law from the previous Ummah is not mentioned in the Quran and ḥadīth. Ulama agree that this first type is clearly not included in Islamic law, and (2) Every Sharia law from the previous Ummah is mentioned in the Qur'an and Ḥadīth. This second division is classified into three, namely, (a). *Nasakh* according to Islamic law, excluding Islamic Sharia according to the scholars. The example of the Sharia of the prophet Musa the clothes that were exposed to unclean were not holy, except for what was cut by the unclean, (b) It is considered Islamic Sharia according to the Qur'an and Ḥadīth. This includes Islamic law according to the agreement of scholars. For example, the Sharia is fasting, and (3) There is no affirmation of the Islamic law whether it is signed or considered as Islamic law. For example *qishas* provisions. But this provision is not expressly applied to Muslims, so it may be applied if there is no prohibition and has a mass value.

6. The opinions of the scholars regarding *Syar'u Man Qabalanā*

Al-Ghazālī, in the book *al-mushtashfā* confirms that the Prophet Muhammad not following the previous Prophet's Sharia. There are four underlying reasons; (a) When the Apostle sent Mu'adz bin Jabal to Yemen, then he asked Mu'adz; with what do you punish the problem? Then Mu'adz answered with the Qur'an, ḥadīth and Ijtihad, without mentioning the Torah, the Gospel and *Syar'u Man Qabalanā*, then the Prophet justified it, (b) If the Messenger of Allah required to use *Syar'u Man Qabalanā* then surely he will always use it in dealing with problems without waiting for the revelation, (c) If indeed *Syar'u Man Qabalanā* is still used then it must be obligatory to learn, explore and transform, including for the generation of companions and afterwards, and (d) It has become an *ijma'* among Muslims that the Sharia of the Prophet Muhammad is a sharia that overhauled the previous teachings, and as a whole is derived from sharia Prophet Muhammad.

Ushul fiqh scholars agreed that the previous Sharia of the Prophets which were not listed in the Qur'an and Ḥadīth, were no longer valid for Muslims, because the coming of Sharia had ended the implementation of the previous Sharia. Like wise *uṣūlfiqh* scholars agree, that before the Islamic Sharia specified in the Qur'an is valid for Muslims when where there is a firmness that it applies to the people sharia of the Prophet Muhammad, but enactment was not because of his position as sharia before Islam but because it was determined by the Qur'an. For example, the fasting of Ramadan which is obligatory on Muslims is a Shari'ah before Islam, as in verse 183 of Surat al- Baqarah: "O you who believe, it is obligatory for you to fast as required of those before you so that you will be devoted". *Uṣūlfiqh* scholars differed on the previous Sharia laws listed in the Quran, but there was no assertion that those laws still apply to Muslims and there is no explanation for canceling them. For example, the legal issue of *qiṣāṣ* (worthy law) in the Sharia of the Prophet Moses which is told in the Qur'an verse 45 Surat al- Maidah: "And We have appointed them in it (the Torah) that the soul (is rewarded) with the soul, eyes with eyes, nose with nose, ears with ears, teeth with teeth, and injuries (even) there are qisas ... ".Of the many forms of *qiṣāṣ* in the verse, the validity of the validity for Muslims is only qisas because of murder, as in verse 178 of Surat al-Baqarah. Other forms of qisas mentioned in the verse were disputed among fiqh scholars.

According to the Ḥanafī, Mālikī, the majority of the Shāfi'ī, and one of the narrations of Aḥmad bin Hambal, such laws apply to Muslims, among the reasons they are: Basically the Sharia is one because it comes from Allah too. Therefore, what is said to the previous Prophets and mentioned in the Quran applies to the people of Muhammad. This is indicated by the word of God: "He has told you about what was revealed to Noah and what We revealed to you and what We have testified to Abraham, Moses and Jesus, namely: Establish religion and do not you are divided because of it "(al-Shura: 13).

According to the Mu'tazilah scholars, Shi'ites, some of the Shāfi'ī and one of the opinions of Imam Aḥmad bin Hambal, the Sharia before Islam referred to in the Quran, did not become a Sharia for the people of the Prophet Muhammad. unless there is firmness to it, among them their reasons, are: The Word of God: "For each of the people among you, We give the rules and the clear path" (Surat al-Maidah: 48). The verse shows that each of the people has its own Sharia. That means the previous Sharia did not apply to the people of the Prophet Muhammad.

When Mu'az bin Jabal was sent to be a judge in Yemen, the Prophet asked him: "How do you settle a case?, Mu'az answered, with Kitaballah, if it is not in the Kitaballah, with the Sunnah of the Prophet, and if it is not in both sources, then I will ijtihad ". Then the Prophet praised the attitude of Muaz (HR Bukhari and Muslim). In the dialogue, there is no indication of the Prophet to refer to the Sharia of the previous Prophets. If the Sharia

of the previous Prophets could be used as a reference by Mu'az, of course the Prophet gave instructions for that.

Abdul WahhabKhallaf in his book Proposal of Jurisprudence explains, that the strongest of the two opinions is the first opinion, the reason, is that the Islamic Sharia only invalidates laws that happen to be different from the Islamic Sharia. Therefore, all the Sharia laws of the previous Prophets referred to in the Qur'an without any assertion that the laws were abrogated (abolished), then those laws apply to the people of the Prophet Muhammad. In addition, he called the laws in the Qur'an which are instructions for Muslims, showing the validity of the people of Muhammad.

'urf

1. Definition of 'urf

Uşūlfiqh scholars argue that the *urf* is something that has been accustomed to by humans in their association and has established its affairs. The essence of tradition and *'urf* is something that equally known by the community and has been applied continuously so that it is accepted by the community (Munadi 2017). Tradition and *'urf* are used to explain the habits that are in the community. The word *urf* is something that is considered good and accepted by common sense while *adat* is an act that is done repeatedly without any rational relationship (Dahlan 2011). In this context, *adat* and *'urf* are something that has been used to apply, accepted and considered good by the community. (Al-Syathibi, n.d.) Terminologically *'urf* comes from *'arafa, ya'rifu, 'urfan* which is often interpreted with "*al-ma'ruf*", which is something that has been known.

There are some Arabic experts equates between tradition and *'urf*, if both of these words are combined into a sentence, For example : "the law is based on tradition and *urf* "does not mean they have different meaning, although the use conjunctions" and "that is usually used as a word is the difference between the two words. (Syarifuddin 1999). While in terms of the *'urf* can be interpreted as something that has become a human habit in his association and has established its affairs (Zahrah 1999). Something that has become a human habit in association them, or lafaz who have used the meaning special ones outside the standard meaning, and not imagine another meaning when you hear it. (Wahbah al-Zuhaylī, n.d.) Tradition or *urf* that do not conflict with Islamic law can be confirmed but still applies to the community concerned. For example in the world of trade there is indent buying and selling, proposing women by giving something as a binder and so on.

2. The Legal Basis Of 'urf

Be a forgiving one, enjoin what is good, and turn away from the ignorant (al-A'raf 7:199). Through the verse above, Allah commands the Muslims to do something good

and beneficial. *Ma'rūf* itself is that which is considered by the Muslims as good, is done repeatedly, does not conflict with the true nature of human beings guided by general principles of Islamic teachings. Basically, the Sharia from the early days accommodated and acknowledged *'urf* or tradition that did not conflict with the Quran and ḥadīth. The arrival of Islam is not completely eradicating the traditions that have become one with the community. But selectively there are those that are recognized and preserved and some are abolished. For example, recognized customs, trade cooperation by sharing profits (*al-muḍārabah*). This practice has developed in the Arabs before Islam. Based on this fact, the scholars conclude that a good customs can legitimately be the foundation of policy, when meet several requirements. (Wahbah al-Zuhaylī, n.d.).

3. Provision of *'urf*

The *Uṣūlfiqh* scholars divided the *'urf* into three types: In terms of the object: *al-'urfal-Lafzhī* (habits involving utterance), It is the custom of the community to use certain pronunciation / expressions in expressing something, so that the meaning of the phrase is understood and crossed the minds of the people. For example the expression "meat" which means beef; even though the words "meat" include all the meat that exists. If someone comes to a meat seller, while the meat seller has a variety of meat, then the buyer says "I buy 1 kg of meat" the trader immediately takes beef, because the habits of the local people have specialized the use of the word meat on beef, and *al-'urfal-'amalī* (habits in the form of deeds), it is the custom of the community that is related to ordinary actions or civilization. Ordinary deeds" are the habits of the community in their life problems that are not related to the interests of others, such as work holiday habits on certain days of the week, the habit of eating special foods or drinking certain drinks and the habits of people in wearing certain clothes on special occasions.

In terms of its validity from the Sharia view:(1) *al-'urf al-Ṣaḥīḥ* (a habit that is considered valid), it is the custom that prevails in the midst of society that does not conflict with the texts (Quran or hadith) does not eliminate their welfare, nor does it bring harm to them. For example, during the engagement period the male gives a gift to the woman and this gift is not considered a dowry, (2) *Al-'urf al-fāsid* (a habit that is considered broken), it is a habit that contradicts the arguments of the Sharia and the basic rules that exist in Sharia. For example, habits that apply among traders in justifying usury, such as borrowing money between fellow traders. The borrowed money is ten million rupiahs within one month, must be paid as much as eleven million rupiah when due, with the calculation of the interest of 10%. Viewed from the point of view of the advantages gained by the borrower, the addition of a debt of 10% is not unreasonable, because the profits achieved from the ten million rupiah may exceed the interest of 10%. But this practice is not a habit that is helpful in the shara 'view, because the exchange of similar goods, according to Sharia cannot overdo each other.

4. Position of *'urf* as Source of Law

In social life in human societies that do not have laws, then *'urf* is the (habit) that becomes the Law that regulates them. So since ancient times' *urf* has a function as law in human life. Until now, *'urf* is considered as one of the pillars of the law, where many elements are taken from the applicable laws, then issued in the form of articles in the law. Sharia Islam came and acknowledged many of the acts of piercing and rights that were both known by the Sharia of Islam and previous Arab societies, besides many improving and eliminating other habits. In addition, the Islamic Sharia also carries new laws that regulate all aspects of human relations with each other in their social life, on the basis of necessity and guidance to the best possible solution, because the Sharia of the Lord is by law Its civil rules (in terms of its world) are intended to regulate human interests and rights. Therefore habits that have no recognizable origin can realize the goals and in accordance with the general basics.

5. The opinion of the scholars about the *'urf*

Mālikī scholars make the *'urf* or tradition of the people of Madinah as the basis for establishing the law and prioritizing it from *ḥadīth*. The ulama mazhab makes a provision that every one that comes from Sharia absolutely, without any limitations in syara or language, is returned to *'urf*. (Syarifuddin 1999) Ibn Qayyim stated that "Changes in fatwas can occur due to changes in time, place and circumstances. But the formation of law in the context of changes and differences in the *'urf* of the community is not just or forced, but must go through a thorough study and consideration, and the most important thing is to ensure that the law has access to it, because it is needed and *'illatsyar'i* to him. (Qayyim 1991).

6. Case study

This is the same as the prohibition of khamr by the prophet, when the prophet did not directly forbid khamr but with the first few khomer allowed but the prophet gave the understanding that in khamr it contained many *mudharats*, after that the second verse descended the prophet forbid shohabat to pray in a state drunk, the third verse descends as a prophet to drink khamr and explains that khamr is a thing the unclean and ordered to stay away from khamr and be strengthened again after that with the punishment of the person who drank khamr with 40 lashes. This incident signaled the Prophet's caution about how to change the customs that existed in the *Jahiliyah* era first and still carried out by some *ṣaḥabah*, how to forbid something needs to be carried out with caution and teaches us that prohibiting something does not have to be instantaneous but gradually. In fact, what is very surprising is a belief in marriage in Javanese customs such as not being able to marry someone whose house (Elor Kulon) north west if that happens then according to

their beliefs there will be a lot of calamities. This can be classified as a facade *urf* because in Islam that is not allowed to be married is just a mahrom woman without any provisions. And it is contrary to our reason, because they are not obvious reasons only following a brand on what was passed on by their ancestors.

Conclusions

Many steps can be taken regarding the taking of a law on a new problem which if not stated in the text Quran, Ḥadīth, Ijma', and Qiyās. The steps include the *Istiḥsān*, *Maṣlaḥah Mursalah*, *'Urf*, and *Syar'u Man Qabalanā*. These methods can be used to simplify determining the law in a case that has just been encountered. In its use, there are pros and cons among the scholars. There are those that allow it while it gives problems to the ummah, there are also those who forbid, or allow by certain conditions. This is because it is feared, the legal decisions taken do not bring *maṣlaḥah* to many people and are only based on personal desires and passions. These methods are not to be practiced freely by individuals. Legal provisions resulting from these methods have been reviewed and negotiated through a lengthy process by scholars. The scholars also agreed that if there were still provisions from Ijma' and qiyas that could still be used as guidelines, then the legal provisions should be based on these provisions.

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