

*Review article*

## **The Confusion about *Maslahah* Implementation in *Ijtihad* Discourse**

**Saifudin Zuhri**

*Faculty of Tarbiyah and Education, Walisongo State Islamic University Semarang, Semarang 50185, Jawa Tengah, Indonesia*

### **ABSTRACT**

In the study of *ijtihad*, there is often confusion over the implementation of *maslahah* (human welfare) by Islamic law observers when they face new social problems. It is too easy to set a law based on *maslahah* regardless of what *maslahah* actually is. The present paper reviews the concept of *maslahah* and sheds light on differences and similarities of the way in which it is conceptualised in the related literature. The literature included the *Quran*, *Hadith*, *usul fiqh*, *al-Ihkam fi usul al-ahkam* as well as a number of important related sources. Qualitative methods were used to analyse the literature and synthesise the concepts based on the objectives of the present research and the authors' interpretations.

*Keywords:* Islamic law, *Maslahah*, method of law, purpose of law

### **INTRODUCTION**

*Maslahah* in simple terms is a decision-making model based on the current context (*maqasid syari'ah*) of the community. To implement *maslahah* as a method of law, it is essential to distinguish *maslahah* as the purpose of law instead of *maslahah* as the source of law. *Maslahah* or often called

*maslahah mursalah* as the source of Islamic law can be made clear when the scholars refer to a number of sources of Islamic law to determine whether they agree or disagree to it. Generally *maslahah* may originate from two distinct sources (Figure 1).

As the figure shows, the sources could be agreed or disagreed upon. The agreed sources, according to Rahman (1979) are the *Qur'an*, the prophetic tradition (*Hadith*), the consensus (*Ijma'*), and analogy (*qiyas*); commonly regarded as something 'good', given approval consent (*Istihsan*), takes the public interest into account (the public interest - *Maslahah Mursalah*), taking it as

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*E-mail address:*

saifudinzuhri71@gmail.com

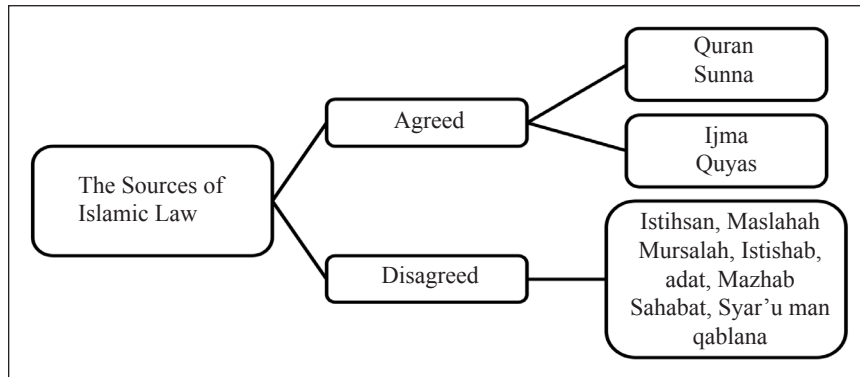


Figure 1. Details of sources of Islamic law

companion, go along (*Istishab*), Beneficence kindness, Custom (*urf*), the companions opinion (*Mazhab Sahabat*), and law before the prophet Muhammad (*Shar'u man qablana*) (Khallaf, 1972). More details on these will be presented later in this paper.

In the discourse of Islamic law, *maslahah* is divided into three, namely basic needs that must exist (*daruriyah*), basic needs that do not have to exist (*hajiyyah*) and needs for completeness of life (*tahsiniyah*). *Tahsiniyah* is further divided into two types of additional needs (*sunnah*) and complementary needs (*mubah*) which are both obligatory and both can help individuals in an Islamic community to preserve their religion, soul, property, mind and descendants.

When the scholars of *ushul fiqh* discuss the method of legal reasoning to establish the law of its propositions, they regard *maslahah* as synonymous with *munasabah* (objective and reasonable decision) when looking for source and reason (*illat*) of law. Al-Gazali (as cited in Zahrah, n.d.) explained that when *Sunnah* and *Ijma'* were not found in the *Qur'an*, they could

be determined by *ijtihad* in two ways: (1) observation and classification (*as-Sabr wa at-taqsim*) and (2) objective and reasonable decision (*munasabah*).

From the previous description, it can be understood that the position of *maslahah* can be divided into three: (1) as a source of Islamic law; (2) as the purpose of Islamic law; and (3) as a method of establishing Islamic law. In the discussion of Islamic law, there is often a lack of clarity of the *maslahah* which is used, whether *maslahah* is a source of law, a purpose of law, or a method of establishing law. Unclear usage of *maslahah* causes the confusion in the use of *maslahah* among observers of Islamic legal studies.

The purpose of this paper is to review the use of *maslahah* and to determine the procedure in which it is correctly processed and implemented.

## METHODS

The present paper is a review of related literature extracted from various sources. The sources for this paper were primarily

the *Quran*, *Hadith*, *usul fiqh*, *al- Ihkam fi usul ahkam* as well as *Kompilasi Hukum Islam di Indonesia* [The Compilation of Islamic Law in Indonesia] (2000), *Fatwa-fatwa Majelis Ulama Indonesia* [The fatwa of Indonesian Ulama Council: A Study on Indonesia Islamic Thought, 1975 - 1988] (Muhdzar, 1993), *Kontektualisasi Ajaran Islam* [Contextualization of Islamic teaching] (Nafis, 1996), *Pemahaman Islam: Antara rakyu dan wahyu* [Understanding of Islam: Between reason and revelation] (An-Najar, 1997), *Dekontruksi Shari'ah Wacana Kebebasan Sipil, Hak Asasi Manusia dan Hubungan Internasional dalam Islam* [Towards an Islamic Reformation of Civil Liberties, human rights, and International Law] (Ni'am, 2001), and *Reaktualisasi Ajaran Islam* [Reactualization of Islamic teaching] (Sjadzali, 1995).

The research model is a rationalistic qualitative research one based on the philosophy of rationalism. Muhajir (1996) stated that all science was derived from our intellectual understanding that was built on the ability to make logical arguments. Logical arguments are constructed in a descriptive-analytical way. Therefore, hypotheses are not required. Description is needed by the researcher to explain the truth or error of a concept or thought. The analysis used in this study is descriptive-comparative. The author first describes the three meanings of *maslahah* as they are. Next, he compares the differences that exists among the three types of *maslahah*, and finally he explains their use and application.

## RESULTS AND DISCUSSION

### **Maslahah as the Purpose of Islamic Law**

Zahrah (n.d.) stated that the ultimate purpose of Islamic law was that it benefited the members of the community. There is no law in either the *Qur'an* and *Sunnah* but there is some benefit in it. What is *Maslahah*? Al-Buti (1977) confirmed that *Maslahah* was the benefit determined by God for his servants covering the preservation of religion, soul, mind, descendants and property. This view is affirmed in the following verses:

*And we have not sent you, but to be a mercy to the worlds. (Q. S, al-Anbiya' 21: 107)*

*The Lord obliged the prayers of his servants be aimed to prevent evil and unjust acts. (Q.S. Al-Ankabut, 29:45)*

*It is required that the wealth should not be gathered only to the rich. (Q.S.al-Baqarah 2: 179)*

*And there is for you in Qishash (the assurance of continuity) of life, O you people of understanding, that you may become righteous. (Q.S.al-Baqarah 2: 179)*

It can be understood that *maslahah* may be either directly established by God as mentioned above or set by humans for the benefit of humankind which eventually becomes a custom. This is how a common *maslahah* is achieved (Hasan, 1971).

*Maslahah* as the purpose of Islamic law can be divided into three types: (i) *Maslahah Tahsiniyat* which is associated with fairness,

maintaining propriety in the ways of worship and business interactions (*muamalah*), and goodwill in social interactions, such as the implementation of marriage contract, (ii) *Maslahah Hajiyat* which is associated with the difficulties encountered; for example, a young girl before the legal age to get married requires a guardian's permission, and (iii) *Maslahah Daruriyat* which is the basis of the establishment of law; it is the basis of *Shari'at*, and *Shari'at* maintains it. According to At-Tufi (2002),

It emphasizes the preservation of religion by setting penalties for people who violate the teachings of their religion, the preservation of the mind or reasoning by giving punishment to the drunkard, the preservation of the soul by giving an appropriate penalty, preservation of the descendants by setting punishment for a person who is unfaithful to their partner, the preservation of dignity by giving punishment for the accused of adultery and the preservation of property by giving punishment for the thieves. (p. 139)

From the description of the three types of *maslahah*, it can be concluded that the establishment of objectives (*Maqashid*) *al-Shari'at* in the provisions of the law contains four aspects. First, the purpose of the good deeds is for the benefit of humans in the world and the hereafter. Second, the *shari'ah* text is something that must be understood

through the meaning of language so that the benefit contained can be achieved. Third, *shari'ah* is a legal provision imposed on a human so that he must do it. Fourth, the purpose of *Shari'at* is to provide the corridor of the law for humans. Obedience is needed as the effort to control human lust.

### ***Maslahah* as the Source of Islamic Law**

The source of Islamic law is the evidence of *Shari'at*. It is the main reference in establishing Islamic law. Islamic law is derived from the *dalil*. For example, the law on zakat was derived from the *dalil wa atuz-zakat* (*al-Baqarah*, 2:43).

Legal sources such as *Ijma'*, *Qiyas*, *istihsan* and *maslahah* should not be contradictory to the conditions contained in the *Qur'an* and *Hadith* both textually and implicitly. The determination of whether the *dalil* is contradictory or not to *nash* is another matter. If *maslahah* is contradictory to the *nash*, *maslahah* is the first to be considered for scrutiny. In this case, it is not that *maslahah* is contradictory to *nash* textually and implicitly. Therefore, the instructions (*dalil*) out of *nash* on one side can be called as the source of the law, and on the other side, can be called the method of *ijtihad*. The experts of Islamic local theory often mention *adillah ahkam* (law instruction) like *Ijma'*, *Qiyas* and so on, as *turuq istinbat al-Ahkam*, which is the method of law establishment. This is where the confusion of the implementation often occurs.

Scholars such as Zuhaili (1977) provide several conditions to the implementation of *maslahah* which is often called *maslahah mursalah*:

- (a) *Maslahah mursalah* must be in accordance with the purpose of Islamic law so that the existence of the instructions (*dalil*) or consensus (*ijmâ'*) which is *qat'î* is not eliminated. It must also be in accordance with the *maslahah* which has been shown by God and His Messenger.
- (b) It must be rational. That is, when it is faced with the intellectual reasoning or sense, it can be accepted because it brings benefits and prevents damages; for example, when we apply for credit agreement in banking, a survey on our residence, job and monthly income should be conducted as the effort to avoid fraud so that the agreement is fair to both parties and prevents loss.
- (c) It must be universal. It should include all Muslims. It should not be for the benefit of some people only because Islamic *Shari'at* is for the benefit of all people and does not discriminate against any race, tribe, nation or religion. It is not like giving special treatment for people from the tribe X because he is of the same tribe as the president, governor, or minister.

From the practice of *maslahah* implementation as a source of law, several examples can be offered:

- (a) The *Qur'ân* and *Sunna* do not set minimum wages, but it is an important need for government employees and other people such as factory workers, supermarket employees and other workers who work for more than eight hours. They deserve to receive a decent wage to meet their needs of food, beverages, clothing and residence. Based on the instructions (*dalil*) of *maslahah*, the government must determine the reasonable minimum wage for the workers for their benefit, so that they can have a good life.
- (b) Another example of *maslahah mursalah* is issuing identity cards, passports, and marriage certificates. Based on the *dalil* of *maslahah*, it is a must to know the identity of the owner of a document. It is also for the sake of avoiding problems. For example, when someone is lost on the street and he has no identity at all, it will be difficult for others to locate him.

In the case of legal decision-making, MUI (Indonesian Council of Ulama) issued many *fatwas* which by many people are considered to violate the conditions in the *Qur'an*. The statement of the MUI *Fatwa* of June 1, 1980, that a muslim woman is

not allowed to be married to a non-muslem, and a muslem man is not allowed to marry a non-muslem woman, is inconsistent with *al-Maidah*, 5: 5, in which it is stated that it can be allowed – that marriage be allowed to preserve dignity among those who were given the bible before you. Fatwa prohibits this kind of marriage because the loss (*mafsadah*) is greater than the benefit (*maslahah*). Although this *fatwa* is specifically indicated in Indonesia, it is contradictory to what is clearly stated in the *Qur'an*. It also contradicts the classic *fiqh* texts which agree to grant permission to a muslem man to marry a woman from *ahl al-kitab*. *Maslahah* as the Method of Establishing Islamic Law

*Maslahah* as a method of establishing Islamic law is based on the purpose of Islamic law. *Maslahah* affirms that Islamic law is mandated to realize and preserve the general welfare of mankind and for the greatest good. It is in contrast to the meaning of *maslahah* as a source of law and the purpose of law. *Maslahah as the method* of law enforcement brings goodness and benefits, such as trade that brings profit, according to At-Tufi (1998) who introduces four methods for *maslahah* as the cause of law:

- (1) *Takhsis munfasil*. For example, a woman who has divorced should wait for three months before she can re-marry (*al-Baqarah*, 282); however, this does not apply for those who currently had no sexual relationships (*al-Ahzab*, 49).

- (2) *Tabyin an-nash* (explanation of the text). For example, the provisions for women who *divorced their husbands* were determined by three 'quru' (*al-Baqarah*, 228). The word quru 'needs to be explained, which means "holy" or means "menstruation"
- (3) *Tahdidan-nash* (limitation of the text). To offer an example, some Islamic rules do not apply to non-believers.
- (4) *Istisna'i* (exception); for example, the blood of the animal is *haram* but the liver is *halal*.

To justify these four methods, three reasons could be presented from the *Qur'an* and *Hadith*, as follows:

- (1) Explicit justification: The law can be found on the text explicitly.
- (2) Implicit justification: God's law cannot be found in *nash* of the implicit meaning. This kind of law is called a law based on what is implied by the text *nash*.
- (3) Hidden justification: God's law can be found neither from the text (*nash*) nor from the implied meaning, but can be found in the essence of the whole *Shari'a* intention.

The law which is determined based on what is implied behind the text (*nash*) according to Al-Duwalibi (1959) is called *ijtihad*. According to Abu Zahrah (n.d.), *ijtihad* is meaningful *ijtihad* if it attempts to explain and establish *Shari'a* law for which



there is nothing in the text, but it is implied in *nash* thereby making it necessary to make decisions based on the rule of *maslahah*.

The law which is determined based on this *maslahah* method according to Muhammad Taqi al-Hakim (1977, as cited in Zuhaili, 1977) includes *ijtihad* because *ijtihad* method includes *ijma'*, *qiyas*, *istihsan*, *maslahah*, *urf*, *istishab* and so on.

*Maslahah* is used as a method of Islamic law because basically the law is to bring human benefit, and to avoid human misery.

Often the reviewers of Islamic law about *maslahah* or *istislah* are equated with the term *maslahah mursalah*, in contrast to the explanation of at-Tufi (1998) that the *maslahah* he meant was not like the concept of Imam Malik, even wider than that. The concept of *maslahah* at-Tufi (1998) does not only apply to legal problems that have no text, but also to legal problems that have *nash*. Therefore the method used is not *maslahah* like the concept of Imam Malik, but at-Tufi gives reason (*illat*) to texts and *ijma'* in the field of worship and the like and pays attention to *maslahah* in *mua'amalah* and the like. Thus it can be concluded that the assertiveness of *maslahah* as a special method of Islamic law includes:

- (1) Legal problems that have no text
- (2) Legal issues that have texts.
- (3) Legal problems that have texts, but are contrary to reason.

To explore the laws of the text so that it can be applicable is an inevitable demand. The legal content of a text and the real condition of the community, whether the meaning of a text is still quite relevant, or

whether it has experienced a difference, is *conditio sine coanon* as a material consideration in establishing the law. Even though the *qat nash* is 'i' of the instructions, but the legal content is related to the affairs of the society that is experiencing development, then there is no impossible temporal-casuistic law that is determined by the text to be ruled out, if the wisdom and *maslahah* want other. And if the wisdom and *maslahah* want to return to the legal provisions designated by the text, then that law must be determined.

Dahlan (1987) provided an example of corneal transplantation from people who had died to someone who needed treatment - of course there would be no textual answer in the text either in the *Qur'an* or *Hadith* because such things had never happened at the time of the Prophet, and it was not possible to find a connection with one of the texts in *nash*. Eye transplants are obviously of great benefit, that is blind people can take advantage of their vision, and there are also no other people's interests that are violated. There are issues with human cloning, plastic surgery, and marriage through technology tools such as telephone, internet, SMS. Most recently, as a result of the earthquake and tsunami on December 26, 2004 in Aceh and parts of Medan that took thousands of lives, and due to the difficulty of evacuation as there were scattered bodies of the deceased that caused unpleasant odors (and there was likelihood that there would be an outbreak of disease), there were suggestions from the community that the bodies be burned. How about the burning of bodies in Islam?

Four of these methods are used. Of course, by referring to the source of the law of *maslahah*, the problem can be solved in *shar'i* by looking for legal alternatives.

It could happen that a mujtahid in one problem within a different period of time is different, such as in the case of Imam Syafi'i, who has old opinions and new opinions.

MUI after reviewing and analyzing the problem of cloning, then establishes cloning of humans as haram, however, cloning of the legal plants and animals may be carried out for the benefit of humanity and/or to avoid harm.

The position of *maslahah* as mentioned above can be described in Figure 2.

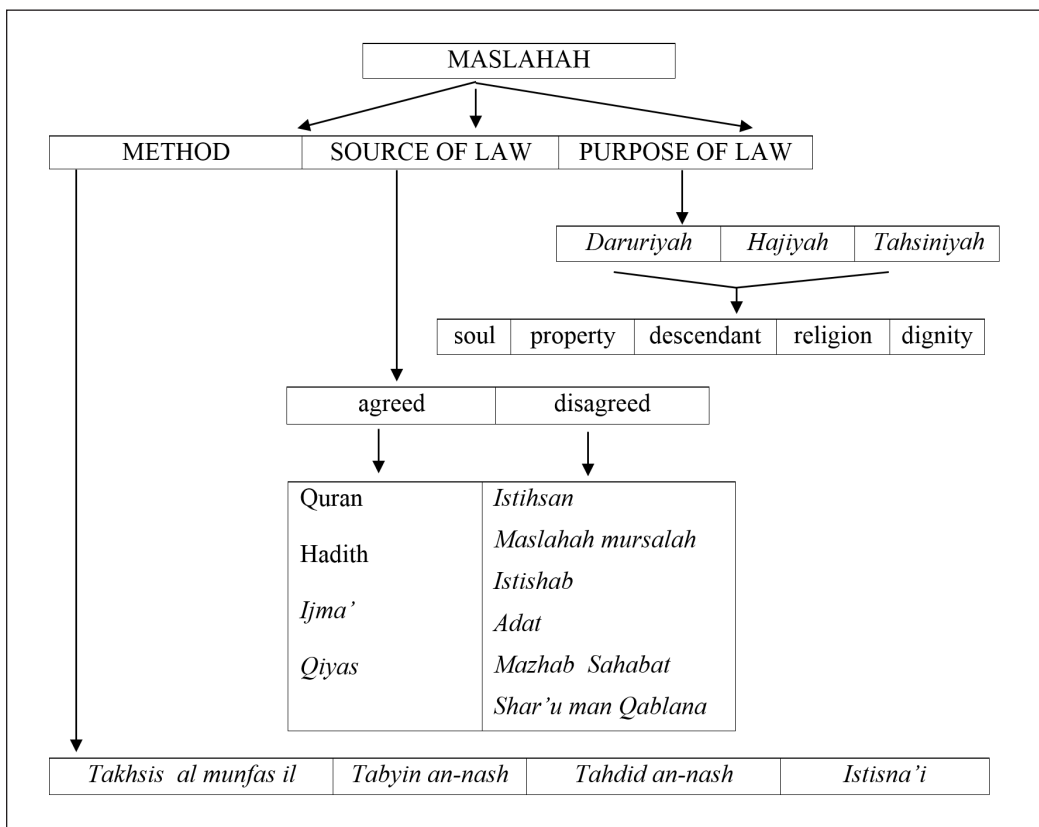


Figure 2. The position of *maslahah* as it is divided into three

### CONCLUSION

*Maslahah* as the objective of Islamic law is the welfare that will be achieved by *syaria'* on the laws established. The design and thought of this goal is to attract benefit and

avoid damage through 5 ways, namely: the preservation of religion, soul, mind, descendants and property.

*Maslahah* as a source of law means it is a legal provision based on *maslahah*. The idea is that when the *nash* of the *Qur'an* and



al-*Hadith* textually regulating it are absent, the establishment of the law is based on *maslahah*. The *maslahah* is divided into 3 types: *daruriyah*, *hajiyyah* and *tahsiniyyah*.

*Maslahah* as legal *istinbat* method (the use of individual reasoning) is known as *istislahi* method. The methods used are:

- (a) Using takhsis munfasil
- (b) Tabyin an-nash
- (c) Tahdid an-nash dan
- (d) Istisna'i

The contribution of the findings of the differences in *maslahah* as a source of law, as a goal of law and *maslahah*; and as a method of legal reason is to eliminate confusion in its use in the practice of law. At the same time as the *maslahah* procedure is a legal method, Islamic jurists can apply it according to the procedure. The result of the application of the *maslahah* method is that *maslahah* is used as a legal source for social, legal and religious problems in line with *maslahah* as a legal goal.

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