

THE ISTIHSAN METHOD AND ITS ARGUMENT IN THE PRACTICE OF ISLAMIC ECONOMICS

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Abstract

The main sources of Islamic law are the Qur'an and the Hadith of the Prophet. The model for seeking Islamic law must first go through the legal verses found in the Qur'an, after which explanations are sought in the Hadith or the Sunnah of the Prophet. However, in this era of modern economics, there are many new systems or concepts of economic transactions that need to be examined to determine whether these systems or transactions can be conducted according to Islamic law. Seeing this reality, the usuli furu'iyah scholars, who usually come from the Hanafi or Maliki schools, seek new methods that can ensure the law functions well and serves the welfare of humanity. The approach taken was to apply the method of qiyas khafi based on maslahat. This method was then named the istihsan method. This research uses a normative approach with empirical descriptive analysis. The results of this research conclude that the istihsan method is one of the best ways for a mujtahid to discover and establish a legal ruling. Moreover, its application can be carried out in economic transactions that did not exist or had never been conducted before, even though the istihsan method still has its pros and cons. With the application of the istihsan method in legal discovery in the field of modern economy today, new laws are produced that are more suitable and provide benefits for the needs of society, and in turn, can avoid stagnation.

Keyword: Istihsan Method, Argument, Practice Of Islamic Economics,

INTRODUCTION

It is clear in the science of ushul fiqh that the main sources of Islamic law are the Qur'an and the Sunnah of the Prophet. This hierarchy emphasizes that every model of seeking Islamic law must first go through the legal verses found in the Qur'an, and then seek their explanations in the Sunnah of the Prophet. If in these two texts the issue being discussed is not found explicitly, then generally the ushul scholars apply the method of qiyas, which is drawing conclusions about a new case from an established legal case based on the similarity of the illah. Thus, the existing law is applied to the newly discovered legal case.

Up to this point, the legal resolution to the new case is generally considered to have found its answer. However, practical problems arise, namely that the legal answer provided with the qiyas jaly model above cannot be applied well, or its implementation causes social issues in the field. The problem may manifest as difficulties caused to the parties involved in the legal matter, or the new law may experience stagnation, thus not bringing any benefit to the legal practitioners. This generally occurs in the field of muamalat.

Seeing this reality, the usuli furu'iyah scholars, who usually come from the Hanafi or Maliki schools, sought a new method that could make the law function well and fulfill the welfare of humanity. The approach taken is to apply the method of qiyas khafi based on maslahat. With the application of this method, new laws are produced that better meet the needs of society and, in turn, can avoid stagnation in the field of law. This method was then named the istihsan method. As mentioned above, this method can generally be applied to issues of muamalat, one of which is in the field of economics. With the revival of the Islamic banking system, Islamic insurance, and other Islamic economic activities, this method has received considerable attention as a legal foundation for Islamic economic practices to move and develop in accordance with the demands of modernity.

RESEARCH METHOD

by using a normative approach. The normative approach is an attitude that adheres to applicable norms and rules. Norms in this case are related to evaluative standards. This means that normative attitudes make an assessment of behavior and results and are used as a standard of evaluation. Normative propositions evaluate several objects and actions carried out by humans. or scientific research that uses conceptual or library materials (Indah Rahmawati, 2020). Therefore, normative ethics in the object of sociological study emphasizes human actions that must coexist with applicable norms and rules. Normative attitudes are able to create harmonious interactions between communities. Various possibilities for social deviations can be reduced. A person's obedience and compliance with the rules also creates a well-ordered and orderly community life.

DISCUSSION

A. Definition of Istihsan

Istihsan etymologically (linguistically) means considering something good (Abdul Wahab Khalaf, 2014). Meanwhile, another opinion defines istihsan as:

1. Considering something better
2. Do something better.
3. Following something better
4. Searching for a better one to follow, because it is instructed (Amir Syarifuddi, 2011)

According to the terminology of ushul scholars, there are several definitions of istihsan, among others:

According to Syatibi (among the Maliki scholars), istihsan is defined as:

Istihsan in the Maliki school is using partial benefits as a substitute for general evidence (Wahbah Al-Zuhaili, 2006).

Based on that definition, the Maliki scholars view istihsan as a partial benefit, which is considered better to adopt and practice compared to the benefit present in the

previous law. Because the initial law does not or has not yet been able to actualize the maqashid al-Syari'ah, which is beneficial to the community in their lives.

According to Sarkhasi (among the Hanafite scholars), istihsan is defined as:

Acting with ijtihad with all our thoughts in determining something that by Shari'ah is entrusted to our opinion (Al-Sarakhsi, 2005).

On another occasion, al-Sarkhasi also mentioned the following: "Istihsan is abandoning qiyas and using something stronger than it, because there is a proof that requires it and it is more suitable for realizing the welfare of humanity." (Al-Sarakhsi, 2005).

As for the definition formulated by Sarkhasi, it can be concluded that istihsan is essentially two types of qiyas: first, the apparent qiyas, which has a weak influence and is referred to as the actual qiyas; second, the hidden qiyas, which has a strong influence, and this is what is referred to as istihsan, meaning qiyas that is transformed into istihsan. Sarkhasi defines istihsan by focusing more on its purpose, which is the welfare and ease for humans in facing various life problems.

Not much different from Sarkhasi, Al Thufi (from the Hanbali school) defines istihsan as:

"The shift of a mujtahid in determining the ruling on a particular issue from what is comparable to it is due to the existence of a more specific sharia evidence" (Abdul Wahhab Khallaf, 1972).

Meanwhile, Ibn Qadimah interprets:

"The shift of a mujtahid in determining the ruling on a particular issue from what is comparable to it is due to the existence of specific evidence in the Qur'an or sunnah" and "Something that is considered good by the mujtahid according to his reasoning" (Abdul Wahhab Khallaf, 1972).

The first and second definitions of istihsan, as mentioned above among Hanbali scholars, can be concluded that a mujtahid does not establish a ruling as it was established in a similar case because he follows another proof from the Qur'an and Sunnah that is considered more specific and more suitable for practice. As for the third definition, it considers istihsan to be the establishment of a ruling based solely on rational judgment. From this definition, there may arise objections from other scholars, because what the mujtahid considers better according to his reasoning may not necessarily be better in reality. As stated in QS. al-Baqarah: 216. It means: "What is deemed good by human reason may not necessarily be good in essence."

Abdul Wahab Khalab defines:

"Istihsan is the shift of a mujtahid from the demand of qias jaly (clear) to qias khafi (ambiguous), or from a general evidence to a specific ruling due to evidence that causes the mujtahid to redirect his reasoning and prioritize the shift in ruling" (Abdul Wahhab Khallaf, 1972).

The definition above implies that a mujtahid should establish laws based on existing general evidence. However, in certain circumstances, if the mujtahid sees a

specific benefit, he does not rely on the general evidence but instead uses that specific benefit or interest.

Looking at several definitions, it can be concluded that the usul scholars from the Maliki, Hanafi, and Hanbali schools, despite differing definitions of istihsan, agree on the fundamental understanding of istihsan, which is:

1. Moving from one legal provision regarding several legal events to another legal provision, moving from the general legal provision of the nash to the legal provision of qiyas, and from the general principle of syara' to the specific principle, excluding/abandoning a legal provision, exempting part of the law from the general legal provision that encompasses it, or specifying part of the legal unit from the general law. Shifting from one legal provision regarding certain legal events to another legal provision, transitioning from the general legal provision of nash to the legal provision of qiyas and from the general principle of shara' to the specific, setting aside/leaving a legal provision, excluding part of the law from the general legal provision that encompasses it, or specifying part of the legal unit from the general law.
2. That the transfer and so on must be based on a legal argument from either the text or its implied meaning, or public interest, or customary practices. Imam al-Ghazali (from the Shafi'i school) (Nasrun Haroen, 2001), explicitly rejected the term istihsan but substantively accepted the concept.

B. Legal Basis of Istihsan

Al Quran Surah Al-Zumar (39): 18:

The meaning is: "those who listen to the words and then follow the best among them." They are the ones who have been guided by Allah SWT and they are the ones who possess understanding.

Whereas the Sunnah they use as evidence is the Hadith that says: "From Ibn Mas'ud, the Messenger of Allah (peace be upon him) said: What is considered good by the Muslims is also good in the sight of Allah." (Narrated by Ahmad).

C. The Validity of Istihsan.

The scholars disagree on the validity of istihsan as one of the methods of deriving Islamic law. There are two groups that provide opinions about istihsan, namely the first group accepts it as a legal argument and the other group of scholars rejects it as a method of legal reasoning.

The opinion of scholars who accept istihsan as a source of law, namely the majority of ushul fiqh scholars from the Maliki, Hanafi, and most Hanbali schools, state that istihsan is one of the sharia proofs that establishes a ruling contrary to what is mandated by qiyas or generally by nash. Especially the Hanafis highly prioritize istihsan, which is considered stronger and has evidence, and abandon qiyas. This is evident in the statement of Abu Hanifah: "We use istihsan for this matter and abandon qiyas." Abu

Hanifah's statement is reinforced by Abu Al-Khattab with his saying: "I reject istihsan without evidence, and accept it when there is clear evidence and abandon qiyas" (Syamsuddin Muhammad ibn Muflah Al-Muqdisi al-Hanbali, 1999).

Abu Hanifah often established rulings using istihsan, but he never explained the meaning and formulation of the istihsan he applied. Therefore, he is said to establish laws solely according to his own will without using a method. As long as it is considered good, it can serve as the basis for legal rulings, because that is the meaning indicated by the term istihsan. After those criticisms arose, the companions and students of Abu Hanifah endeavored to explain the meaning and formulation of istihsan that their imam frequently practiced. Among them was Imam As-Syarkhasi, who authored a famous book that became a reference for followers of the Hanafi school, titled "Ushul al-Syarkhasi." They attempted to explain that istihsan does not deviate from the principles of Sharia. They stated that the essence of istihsan is two types of qiyas. First, qiyas jaly but weak in influence, this is what is called qiyas. Second, qiyas khafi but strong in influence, this is what is called istihsan, therefore in these two matters what is considered is the influence, not the clarity or lack of clarity of qiyas (Al-Sarakhsi, 1978). The stronger influence is what causes the Hanafis, Malikis, and some Hanbalis to prioritize istihsan over qiyas. Or in other words, the preference for istihsan over qiyas is solely based on the influence of its ruling, not on the hidden or apparent form of qiyas.

For the Hanafis and Malikis, in essence, istihsan is not an independent source of law, because in fact, the first form of istihsan is based on hidden analogy that prevails over clear analogy, due to several factors that favor it, which brings peace to the heart of the Mujtahid. Whereas the second form of istihsan is that its proof is maslahat, which is an exception to the general rule, and this is also referred to as the aspect of istihsan.

Second, the group that rejects istihsan as a legal proof and states that istihsan is establishing a law based solely on personal desire. The group that rejects istihsan as a legal proof includes Imam Shafi'i and his followers, the Zahiri school, and the Qathibah Shiite scholars (Wahbah Al-Zuhaili, 2006). Imam Shafi'i was a scholar who harshly criticized istihsan. His criticism is clearly seen in his statement: "Whoever uses istihsan has made his own law of sharia..." (Ibid.). Therefore, for Shafi'i, using istihsan in deriving legal rulings is haram if it contradicts the reports found in the Qur'an and hadith. In the book *Risalah Ushuliyah* by Imam Syafi'i, it is stated: "The analogy of someone who practices istihsan is like someone who prays facing a direction that, according to istihsan, is the direction of the Kaaba, without any evidence created by the lawgiver to determine the direction of the Kaaba." After Imam Syafi'i criticized the Hanafi and his followers, theologians followed suit, stating that istihsan is a flawed argument and cannot be used as a method for deriving legal rulings (Muhammad al-Hudhuri, 2004).

The basis for their criticism and rejection of the istihsan argument is:

1. It is not permissible to create a law except with a text or with something analogized to a text, because doing so means making a religious law based on personal desires. It is not permissible to create a law except with a text or with something analogized

to a text, because doing so means making a religious law based on the desires of the self. Allah SWT said: "And judge between them by what Allah has revealed, and do not follow their desires..." (Qur'an, Al-Maidah: 49).

2. Indeed, Prophet Muhammad (peace be upon him) never issued a fatwa using istihsan, but he waited until revelation came down, even though if he had used istihsan, it would have been correct, because he spoke not out of desire.

D. Various Types of Istihsan and Examples of Implementation in the Economy Islam

The Hanafite scholars categorize Istihsan into six types, namely:

1. Istihsan bi al-nash (istihsan based on verse or hadith). It means there is a verse or hadith about the law of a case that differs from the provisions of the general rule. In this case, the mujtahid in determining the law does not use qiyas or the usual method because there is a text that determines it. For example:
 - In the matter of salam (forward sale) transactions. At the time of the sale transaction, the goods being sold are not yet available. Based on the general provisions of the conditions of sale and the basis of analogy, such a transaction is usually not permissible and invalid, because one of the conditions of sale, which is the availability of the goods being sold at the time of the transaction, is not met. However, this method is not used because there is already a text that regulates it, namely the hadith of the Prophet which prohibits buying and selling something that is not present at the location except in the case of salam (advance payment) transactions. In this form, general provisions and qiyas are not used, and what is used thereafter is the nash that regulates that exception. (Viethzal Rivai, 2011).
 - Evidence from the Qur'an
(QS: al-Baqarah: 282): "O you who have believed, when you contract a debt for a specified term, record it. And let a scribe write between you in justice."
"O you who have believed, fulfill [all] contracts..." (Quran 5:1)
 - Evidence of the Hadith
"Whoever gives a greeting, let him do it with a clear measure and a clear weight, for a known duration." (HR. Bukhari Muslim).
Three things in which there is blessing: deferred sales, muqaradhah (mudharabah), and mixing wheat with flour for household needs, not for sale." (HR. Ibn Majah)
2. Istihsan bi al-ijma' (istihsan based on ijma'). What is meant by this type of istihsan is abandoning the necessity of using qiyas on a matter because there is ijma'. This occurs due to the fatwa of a mujtahid on an event that contradicts the established principles or general rules, or the mujtahids remain silent and do not

oppose what is done by people (society), which actually contradicts the established fundamental principles. For example:

In the case of public baths. According to the general rules, the public bathing service must be clear, namely how long a person bathes and how much water they use. However, if this is implemented, it will cause difficulties for the general public. Therefore, the scholars unanimously agree that it is permissible to use public bathing facilities, even without specifying the amount of water and the duration of use.

- The Maliki school, as mentioned by Iskandar Usman, 20, in this regard, provides an example of the obligation for someone who cuts a riding donkey to pay the full price of the donkey. The law is considered an exception to the general rule because the general rule establishes the obligation to pay for the loss equal to the reduced value of the damaged object caused by one's actions. If someone strikes an animal until it becomes lame, the general rule only establishes the obligation to pay a reduced price due to that strike. The aspect of *istihsan*, which is based on consensus, from the provision that requires a person who cuts off the tail of a riding donkey to pay the full price of the donkey, is that the riding donkey is used for transportation, not for other purposes. Therefore, with the cutting off of the donkey's tail, all its benefits from this specific use will be lost, because when related to its utility, the donkey is as good as non-existent. And compensation for the loss is the only option, because the cutting of the donkey's tail has caused the owner to be wronged and the poverty that could befall the donkey's owner (Iskandar Usman, 1994).
3. *Istihsan bi al-qiyas al-khafi* (*istihsan based on hidden analogy*). In this case, a mujtahid does not use *qiyas jali* in establishing his ruling, but rather uses *qiyas khafi*, because according to his calculation, that method is the strongest (most accurate). For example: Kutbuddin Aibak illustrates the issue of *waqf* of agricultural land, in this case, *waqf* of agricultural land that contains a road and a source of drinking water. Whether simply endowing the land already includes the road and drinking water source or not. If a mujtahid uses the usual *qiyas* approach, then by *waqfing* the land, it does not automatically include the road and drinking water source, as is the case in a sale transaction. The similarity between *waqf* and sale in this case is that both involve relinquishing ownership of the land; this approach is called *qiyas jali* (Kutbuddin Aibak, 2008). However, in this case, a mujtahid moves away from *qiyas jali* by taking another approach, namely equating it with a rental transaction, resulting in another legal conclusion, namely including roads and water sources in the land that is donated, even though this is not mentioned in the *waqf* agreement. This approach also uses *qiyas*, but in terms of the strength of its *illat*, it is considered weak, so it is

called qiyas khafi (vague qiyas). However, a mujtahid is more inclined to take this path because of its influence in realizing greater convenience, so this approach is called istihsan qiyas.

4. Istihsan bi al-mashlahah (istihsan based on the benefit). For example:

Implementation of revenue sharing in the profit sharing system in Islamic banks. According to the general practice, profit and loss sharing is used, but based on the benefit, Revenue sharing is applied. The benefit of Revenue Sharing is to maintain and prioritize the wealth of the community that is placed in Islamic banks. Also to create a sense of comfort and a sense of anxiety for depositors, so that they are not suspicious of Islamic banks that incur operational costs. (DSN-MUI Fatwa Number 15/DSN-MUI/IX/2000 Concerning the Principles of Distribution of Business Results).

Implementation of collateral in financing in Islamic banks. According to the general provisions, mudharabah, musyarakah and murabahah financing do not require collateral, but in order to protect/maintain the assets of the community that are managed, so that customers are serious, collateral needs to be requested (DSN-MUI Fatwa Number 25/DSN-MUI/III/2002 Concerning Rahn).

General provisions stipulate that workers in a factory are not responsible for damage to the products produced by the factory, except for their negligence and intention, because they are only workers who receive wages. However, for the sake of maintaining other people's property from the irresponsible attitudes of workers and the difficulty of trusting some factory workers in matters of product safety, Hanafi scholars use istihsan by stating that workers must be responsible for damage to every product of the factory, whether intentional or not. Maliki scholars exemplify this with the permission of doctors to see women's private parts when seeking treatment. According to general rules (qiyas), a person is prohibited from seeing another person's private parts. However, in certain circumstances a person must take off his clothes to diagnose his illness, so for the benefit of that person, according to the rules of istihsan a doctor may see the private parts of the woman who seeks treatment from him. (Nasrun Haroen, 1997).

5. Istihsan bil al-urf (istihsan based on generally applicable customs). What is meant by this type of istihsan is the deviation or deviation of the determination of a law that is different (opposite) to the provisions of qiyas, because of the existence of 'urf that is commonly practiced and is already known in the life of society. Example:

Buying and selling mu'athah in a supermarket, according to general provisions (qiyas) every buying and selling must use ijab and qabul, but because the 'urf that applies today in supermarkets usually happens buying and selling without ijab qabul, then buying and selling mu'athah is justified because of the reason of istihsan 'urf.

Another example is the same as the example of istihsan based on ijma' number two above, namely in the matter of public baths where the amount of water and the length of time the bath is used by someone is not specified, because local

customs can be used as a measure in determining the length and amount of water used.

6. Istihsan bi al-dharurah (istihsan based on emergency circumstances). This means that there are emergency situations that cause a mujtahid not to apply general rules or qiyas. A mujtahid abandons the obligation to apply qiyas to a problem because he is faced with an emergency situation, and the mujtahid adheres to the provisions that require fulfilling needs or preventing harm. In other words, because there is a problem that is urgent and becomes the need of many people, then the determination that should be based on qiyas is forced to be abandoned. For example: Saving in a conventional bank that basically uses an interest system, saving in a conventional bank with an interest system according to most scholars is prohibited because it contains elements of usury, but if in a region or city there is no Islamic bank with a profit-sharing system then it is permitted because it is categorized as an emergency. Using conventional reinsurance by Islamic insurance institutions before there was Islamic reinsurance.

According to the Maliki school of thought, which was proposed by Shathibi, istihsan is divided into three parts, namely:²⁶

- a. Leaving the arguments that are commonly used to do good deeds with 'urf (istihsan with 'urf). For example, statements that apply in oaths. If someone in his oath says that he will not eat meat, but later he eats fish, then he is said not to have broken his oath, even though fish is included in meat in the Quran. The reason is because the 'urf (custom) that applies in everyday speech, fish is not included in meat.
- b. Leaving the arguments that are commonly used, and subsequently doing good deeds in other ways because they are driven by considerations of benefit (istihsan with maslahah).

Leaving the arguments that are commonly done to avoid difficulties and provide convenience to the ummah. Looking at the explanation of istihsan and the example regarding sharia business law above, it is clear that istihsan is not a stand-alone source of law, it must be based on sharia evidence, namely evidence from the Quran and Hadith, ijma', qiyas and all its purposes are for benefit, so that the purpose of the Shariah objectives is achieved.

CONCLUSION

After observing and analyzing several opinions on the understanding of istihsan, it can be concluded that the essence of istihsan is that a mujtahid, in performing ijihad to find and establish a law, does not merely use one proof, whether that proof is in the form of qiyas, in the form of a general rule, or in the form of a general principle. Instead, he uses another proof in the form of a different qiyas that is deemed stronger, or a discovered nash, or applicable 'urf, an emergency situation, or an exceptional law.

Because in that way, the mujtahid considers it the best method that brings more benefits and reduces difficulties for the community.

Scholars who accept istihsan argue that istihsan is one way to seek the best solution for the interests of society. Meanwhile, those who reject istihsan argue that istihsan paves the way for deriving laws based solely on reason and personal desires. Meanwhile, if we study and examine the understanding provided by the scholars of the Hanafi and Maliki schools, the use of istihsan is actually based on shariah evidence as well. From there, it can be concluded that the differences between the schools of thought regarding the validity of istihsan are merely differences in terminology in interpreting istihsan, while their intentions and goals are the same, which is to promote the welfare of religion in accordance with the objectives of the Sharia.

Based on the exposition of the concept, it is clear that Sharia wants every individual to pay attention to their welfare. As-Syatibi used this term to describe the objectives of Sharia. In other words, humans are always required to seek welfare. Economic activities of production, consumption, and exchange that include benefits as defined by Sharia must be followed as a religious obligation to attain goodness in this world and the hereafter. Thus, all economic activities that contain benefits for humanity are referred to as needs. Meanwhile, the fulfillment of needs in this sense is the goal of economic activities that align with the objectives of religious obligations. Therefore, the tendency to use istihsan, as one of the methods for formulating Islamic economic law, needs to be implemented.

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