

The Use of Al-Maslahah Al-Mursalah in The Ijtihad of Imam Ash-Shafi'i

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Abstract: This study aims to answer such debate in that whether Imam ash-Shafi'i accepted or did not accept al-maslahah al-mursalah as dalil hukm (legal argument), or theoretically he did not accept it, but accept it practically. In relation to such issue, this study follows descriptive analysis method with the following steps; a) collecting data regarding the meaning of al-maslahah al-mursalah so that it can be used in analyzing the application of Imam ash-Shafi'i Fiqh law, b). collecting data regarding Imam ash-Shafi'i legal thought from ar-Risalah, al-Umm and Ikhtilaf al-Hadith to reconstruct his legal thought so that his frame of mind and its relation to al-maslahah al-mursalah can be seen clearly, c) describing the issue of Fiqh obtained from the books of Imam ash-Shafi'i and other books which may be determined by Imam ash-Shafi'i based on al-maslahah al-mursalah, d) analyzing the data on the legal thoughts and Fiqh issue of Imam ash-Shafi'i, and comparing this with the theory of al-maslahah al-mursalah so that it can be analyzed whether Imam ash-Shafi'i used al-maslahah al-mursalah or not, and e) drawing conclusions. The results of this study conclude that Imam ash-Shafi'i used al-maslahah al-mursalah as the basis or argument in establishing the Fiqh law. However, the al-maslahah al-mursalah is not a stand-alone argument because al-maslahah al-mursalah is included in the ijihad pattern of Imam ash-Shafi'i which is called Qiyas.

Keywords: al-maslahah al-mursalah, ijihad, Imam ash-Shafi'i, qiyas maslahah

Introduction

A rule states that there is no law without dalil (argument), so arguments are needed to establish the law. Dalil means something that is used as a guide based on comprehensive analysis to establish practical shara'. The arguments used as the

basis for determining the law of Fiqh include those that have been agreed upon by the majority of Muslims, namely the Qur'an, Hadith, Ijma' and Qiyas. Some of the arguments are still disputed, namely *al-istihsan*, *al-istishab*, *al-'urf*, *mazhab shahaby*, *syar'u man qablana*, and *al-maslahah al-mursalah* - a benefit that is not mentioned by shara' and there are no arguments that tell to follow it or not to follow it, but if it is followed, it will be beneficial.

According to experts, determining the law based on *al-maslahah al-mursalah* aims to realize the benefit of humans in the sense of achieving benefits and preventing humans from harm.¹ Specifically, regarding Imam ash-Shafi'i in the matter of *al-maslahah al-mursalah*, in general, it is known that Imam ash-Shafi'i does not view *al-maslahah al-mursalah* as the basis for determining the law of Fiqh.² This is what is considered so far about Imam ash-Shafi'i. However, recently there have been statements made to Imam ash-Shafi'i that, theoretically, indeed he did not accept *al-maslahah al-mursalah* as the basis for establishing law, but, practically, Imam ash-Shafi'i using *al-maslahah al-mursalah* in establishing the law.³

If you pay attention to the description above, it appears that there are two statements regarding the issue of Imam ash-Shafi'i's view of *al-maslahah al-mursalah*, namely:

- a. The first statement states that Imam ash-Shafi'i did not specify *al-maslahah al-mursalah* as the argument for establishing the law. If this statement is true, it can be assumed that, ideally, Imam ash-Shafi'i certainly did not apply this *al-maslahah al-mursalah* in an effort to establish the law.
- b. The second statement states that Imam ash-Shafi'i, theoretically, did not accept *al-maslahah al-mursalah*, but, practically, Imam ash-Shafi'i used *al-maslahah al-mursalah* in an effort to establish Fiqh law. If the second statement is true, it can be assumed that there may be indications in the legal provisions made by Imam ash-Shafi'i using *al-maslahah al-mursalah*, so Imam ash-Shafi'i can be considered inconsistent. This is because there is a difference between ideal/theoretical conditions and factual/practical conditions.

Some questions arise related to the information above: Which of the two statements can be considered most in accordance with the reality, namely the legal thought of Imam ash-Shafi'i with the operational practice of establishing Imam ash-Shafi'i law contained in his books. What is the actual reality, does Imam ash-Shafi'i accept or not accept *al-maslahah al-mursalah* as a legal argument? Or maybe

¹ Muhammad Muslehuddin, *Filsafat Hukum Islam Dan Pemikiran Orientalis*, Cet. I (Yogyakarta: Tiara Wacana, n.d.).

² Abd. al-Wahab Khallaf, *Mashadir At-Tasyri al-Islamy Fi Ma La Nashsha Fih*, Cet. III (Kuwait: Dar al-Qalam, n.d.).

³ Mustafa Sa'id Al-Khin, *Asar Al-Ikhtilaf Fi Qawa'id al-Ushuliyah* (Kairo: Muassasah ar-Risalah, 1973).

theoretically he doesn't accept it but practically he uses *al-mashlahah al-mursalah* as the argument for establishing the law? or maybe there has been a difference in perception of the meaning of *al-mashlahah al-mursalah* and the practice of Imam ash-Shafi'i in establishing the law, resulting in differences of opinion between researchers and legal observers ?

The research that has been carried out related to this writing is Noorwahidah's writing on the essence of al-mashlahah al-mursalah in the theory of istinbath of the law of Imam Shafi'i. He concluded that Imam Shafi'i did not make al-mashlahah al-mursalah as one of his methods of legal istinbat. Because Imam Shafi'i believed, all legal issues that do not have an explicit nash in the Quran or hadith can be resolved through ijthad. The ijthad is qiyas.⁴ Then Aris's writings which discuss Imam Shafi'i's thoughts on the position of mashlahah mursalah as a source of law. He concluded that although Imam Shafi'i was considered a mujtahid who opposed the use of mashlahah mursalah in the istinbath of law, he basically also used mashlahah as a source of law as long as it was not based on the impulse of lust and did not contradict the goals of the Shari'ah. There are several requirements that must be met in its use.⁵ Selanjutnya, tulisan Taufiqur Rohman yang memperbandingkan antara pemikiran Imam Malik dengan Imam Syafi'i tentang mashlahah mursalah sebagai sumber hukum. Dalam tulisannya ia berkesimpulan bahwa Imam Malik menggunakan mashlahah mursalah sebagai sumber hukum, yang berlainan dengan Imam Syafi'i yang tidak mempergunakannya sebagai sumber hukum.⁶

Benarkah bahwa Imam Syafi'i tidak menggunakan mashlahah al-murasalah sebagai metode istinbath hukum atau sebenarnya dia mempergunakannya, atau ada bentuk lain yang dapat disamakan dengan konsep mashlahah mursalah di dalam pemikiran Imam Syafi'i ? hal inilah yang menjadi fokus penelitian di dalam tulisan ini.

Results and Discussion

1. Defining al-Mashlahah al-Mursalah

⁴ Noorwahidah Noorwahidah, "ESENSI AL-MASHLAHAH AL-MURSALAH DALAM TEORI ISTINBAT HUKUM IMAM SYAFI'I," *Syariah: Jurnal Hukum Dan Pemikiran* 13, no. 1 (2013), <https://doi.org/10.18592/syariah.v13i1.88>.

⁵ Aris Aris, "PEMIKIRAN IMAM SYAFI'I TENTANG KEDUDUKAN MASLAHAH MURSALAH SEBAGAI SUMBER HUKUM | DIKTUM: Jurnal Syariah Dan Hukum" (Fakultas Syariah dan Hukum Islam Institut Agama Islam Negeri (IAIN) Parepare, December 5, 2017), <https://doi.org/10.35905/diktum.v11i1.97>.

⁶ Taufiqur Rohman, "KONTROVERSI PEMIKIRAN ANTARA IMAM MALIK DENGAN IMAM SYAFI'I TENTANG MASLAHAH MURSALAH SEBAGAI SUMBER HUKUM," *International Journal Ihya' Ulum al-Din* 19, no. 1 (September 7, 2017): 73, <https://doi.org/10.21580/ihya.18.1.1743>.

To find out the meaning of *al-mashlahah al-mursalah*, which is also referred to as *al-munasib al-mursal*, or *al-istidlal al-mursal*, or *al-istislah*, it is definitively important to obtain information from experts in Usul Fiqh, including al-Gazaly (d. 505 H), al-Amidy (d. 631 H), al-Baidhawiy (d. 658 H), as-Subky (d. 771 H), ash-Shathibiy (d. 790 H) and ash-Shaukany (d. 1255 H) from classical scholars. Meanwhile, information from modern scholars can be obtained from Muhammad Abu Zahrah, Abd. Al-Wahab Khalaf, and Umar Abdullah.

According to al-Gazaly, *al-mashlahah al-mursalah* is:

ما لم يشهد له من الشرع بالبطلان و بالإعتبار نصّ معيّن

Meaning: A *maslahah* for which there is no specific *shara'* text which states that it is not valid (void) and no one states that it is valid.⁷

In line with al-Gazaly, al-Amidy also seems to express an understanding that can be said to be the same as what was stated above. al-Amidy said that *al-mashlahah al-mursalah* is:

ما لم يشهد الشرع لها باعتبار ولا إلغاء

Meaning: A *maslahah* for which there is no *shara'* that admits its validity, nor does it declare that it is not valid.⁸

Al-Baidhawiy as suggested by al-Badakhshy, states that *al-mashlahah al-mursalah* is:

ما لم يشهد له أصل اعتبار أو إلغاء

Meaning: A *maslahah* for which there is no basis (law) that recognizes whether or not the *maslahah* is valid.⁹

As-Subky as reviewed by al-Mahally mentioned that:

قال ابن السبكي المناسب ... وإلا فهو المرسل وقال الشارح (وإلا) أي وإن لم يدل الدليل على إلغائه كما لم يدل على اعتباره (فهو المرسل) لإرساله أي إطلاقه عما يدل على اعتباره أو إلغائه ويعبر عنه بالمصالح المرسلة وبالإستصلاح

It means Al-Munasib (logical relationship between a certain trait and the established law). If there is no evidence that shows its invalidity as well as no

⁷ Abu Hamid Muhammad ibn Muhammad Al-Gazaly, *Al-Mustasfa Min 'Ilm al-Ushul* (Mesir: al-Jundiyah, 1981).

⁸ Saifuddin Abi al-Hasan 'Ali Al-Amidy, *Al-Ihkam Fi Ushul al-Abkam* (Beirut: Dar al-Fikr, 1981).

⁹ Nasiruddin Abdullah ibn Umar Al-Baidhawiy, *Minhaj Al-Wushul Ila 'Ilm al-Ushul* (Mesir: Muhammad Ali Shabih, n.d.).

evidence that shows its validity, then it is called al-Munasib with al-Munasib al-mursal. It is called mursal because regardless of the arguments that explain the validity or non-applicability of the syara'; *al-munasib al-mursal* is also called the terms *al-mashlahah al-mursalah* and *al-istislah*.¹⁰

The definition stated by as-Subky and then reviewed by al-Mahally above shows that there is a slight difference from the previous definition. This is because in this definition as-Subky uses the word *al-munasib al-mursal*. However, this definition is essentially no different from the previous one. It is said so, because al-Mahally explicitly states in his syarah that *al-munasib al-mursal* is *al-masalib al-mursalah* and is also called *al-istislah*.

Then, moving on to the next definition, ash-Shathiby al-Maliky explains that:

المصالح المرسله يرجع معناه الى اعتبار المناسب الذي لا يشهد له أصل معين على هذا شاهد شرعيّ على الخصوص ولا كونه قياساً بجيث إذا عرض على العقول تلقته بالقبول
 Meaning: Al-mashlahat al-mursalah means to take a suitable trait (as a legal bond) that has no particular basis, does not have a specific shari'a argument, it is not qiyas, but when confronted with reason, it will certainly be accepted.¹¹

Basically, this definition explains that there is an attribute, namely *al-munasib* that can be used as a legal bond, but that *al-munasib* does not have any information from the shara' which states to accept or reject it and if *al-munasib* is used, it is acceptable. This is what is meant by *al-mashlahah al-mursalah* or *istidlal al-mursal*. However, it should be noted that it is not the usual *qiyas ushuly*.

In the book *al-Muwafaqat*, ash-Syathiby also mentions *al-istidlal al-mursal*. The meaning of *al-istidlal al-mursal*, as described by Abdullah Daraz, is *al-mashlahah al-mursalah*, namely *maslahah* which has no legal basis from shara', either texts or ijma' which accepts or rejects it.¹² Ash-Shaukany stated that *al-mashlahah al-mursalah* is a *maslahah* that is not known whether it is accepted or not by the shara'. It is the *maslahah* that does not have a certain legal basis from shara' which admits or rejects it.¹³

¹⁰ Jalaluddin Al-Mahally, *Syarb Jam' al-Jawami'* (Mesir: Dar al-Ihya' al-Kutub, n.d.).

¹¹ Ibrahim ibn Musa ibn Muhammad al-Lakhami Ash-Shatiby, *Al-I'tisham*, Jld. II (Beirut: Dar as-Saqafah, n.d.).

¹² Ibrahim ibn Musa ibn Muhammad al-Lakhami Ash-Shatiby, *Al-Muwafaqat*, Jld. I (Mesir: at-Tijariyah al-Kubra, n.d.).

¹³ Muhammad ibn Ali Ash-Shaukany, *Irsyad Al-Fahul* (Beirut: Dar al-Fikr, n.d.).

Furthermore, scholars who live in modern times such as Abu Zahrah, Abd. Al-Wahab Khalaf¹⁴ and Umar Abdullah¹⁵ have discussed the notion of *al-maslahab al-mursalab* whose main point is a *maslahab* for which there is no particular argument from the shara' specifically that admits or rejects it.

If the definitions that have been described above are analyzed, it indicates that editorially there are differences among the definitions. However, essentially, there are similarities which in essence state that *al-maslahab al-mursalab* is *maslahab* which is not mentioned by shara'. This means that there are no specific shara' postulates that specifically indicate whether to use (*al-i'tibar*) or not to use (*al-ilgha'*) *maslahab* as the basis or purpose of determining the law. However, if *maslahab* is applied as the basis for determining the law, it will bring benefits and goodness to humans and at the same time can prevent them from harm and destruction.

An example of the operational application of *al-maslahab al-mursalab* as the basis for determining the law can be seen in the historical case regarding the collection and recording of the Qur'an that Umar al-Khattab offered to Abu Bakr. The background of the offer was put forward by Umar because many of the memorizers of the Qur'an passed away in the battle of Yamamah. Therefore, Umar was worried if the Qur'an was not recorded.

Responding to the solution proposed by Umar, Abu Bakr in his capacity as a State Official who was authorized to make decisions at that time replied, "How can I do something that Rasulullah has never done?". From Abu Bakr's answer, it can be understood that it seems that Abu Bakr was reluctant to accept Umar's solution because there is no Sunnah of the Prophet that specifically stipulates this matter. Then Umar replied, "*Huma, wa Allabi, kbair*".¹⁶ This (collecting and recording the Qur'an) brings goodness. Finally, Abu Bakr accepted Umar's suggestion and carried it out.

Observing the dialogue of the two companions above, the question that immediately arises is what is the law for collecting and recording the Qur'an? If so, what is the rationale? The answer is clear there is no shara' text that explains the law; and there is no specific argument that specifically stipulates or rejects it. Therefore, Abu Bakr could not decide to determine it. However, on the other hand, if the Qur'an is not recorded, then the Qur'an, as the main basic guideline for Muslims, will be destroyed so that Muslims no longer have guidance in religious life. This is a great danger (*mafsadab*) for Muslims. On the other hand, if the Qur'an is immediately recorded, the Qur'an will be preserved and at the same time, the religious affairs (*maslahab*) of Muslims will be preserved. This understanding is

¹⁴ Abd. al-Wahab Khalaf, *Ilmu Ushul Al-Fiqh*, Cet. VIII (Kuwait: Dar al-Kuwaitiyah, 1968).

¹⁵ Umar Abdullah, *Sullam Al-Wushul Li 'Ilm al-Ushul* (Mesir: Dar al-Ma'arif, 1956).

¹⁶ Ash-Shatiby, *Al-I'tisham*.

summed up in Umar's words: "For God's sake, there is good in that". The meaning of collecting and recording the Qur'an is *maslahah*. *Maslahah* like this is what ushul experts call *al-maslahah al-mursalah* because there is no *dalil* (argument).

After paying attention to the important things and characteristics that exist in the act of recording the Qur'an and also paying attention to and considering the act of shara' in determining the law is to realize the benefit of humans which is the general goal of shari'ah, a process or *istinbath* steps are arranged in a framework based on *istidlal al-mursal* or *al-maslahah al-mursalah* which is reconstructed in the following syllogistic pattern:

- In the act of recording the Qur'an there is a benefit for humans, namely maintaining religious affairs (*hifz al-din*)
- Every *maslahah* to maintain religion is required by shara', because maintaining religion is included in shara' goals in determining the law that must be realized
- the recording of the Qur'an is also required by shara' to be realized as a logical and rational consequence of the use of *maslahah* by the policy of shara' law.

Thus, based on the legal framework described above, it is determined that the law of recording the Qur'an is permissible by using the proposition of *al-maslahah al-mursalah*.

2. Statement of Ulama Who State That Imam Ash-Shafi'i Uses al-Maslahah al-Mursalah

From the literature studied, it has been found that some scholars of Usul Fiqh think that Imam ash-Shafi'i used *al-maslahah al-mursalah*. The scholars referred to are ash-Syaukany az-Zaidy (d. 1255 H), ash-Shathiby al-Maliky (d. 790 H), al-Asnawy (d. 772 H), Imam al-Haramain al-Juwainy (d. 478 H) and al-Zanjany (d. 656 H). The last three figures are from the Imam ash-Shafi'i school of thought.

Ash-Shaukany mentions Imam ash-Shafi'i thinks that laws can be determined based on *al-maslahah al-mursalah* on the condition that they are following the *maslahah* recognized by shara'.¹⁷ Then ash-Shathiby said that Imam ash-Shafi'i adhered to *istidlal mursal*.¹⁸ It means holding on to *ma'na* which is not based on valid *asli*, but the *ma'na* is close to the *ma'na* obtained from recognized sources.¹⁹ Similar statements are also found in the writings of al-Asnawy.²⁰

In this matter, both ash-Shaukany, ash-Shathiby, and al-Asnawy did not directly examine the legal thinking of Imam ash-Shafi'i. However, they only quoted

¹⁷ Ash-Shaukany, *Iryad Al-Fuhul*.

¹⁸ Ash-Shathiby, *Al-Muwafaqat*.

¹⁹ Ash-Shathiby, *Al-I'isham*.

²⁰ Abdurrahim ibn al-Hasan Al-Asnawy, *Nihayah As-Sul Fi Syarh Minhaj al-Ushul* (Mesir: Muhammad Ali Shabih, n.d.).

the statement of Imam al-Haramain al-Juwainy, a prominent figure who has the authority and competence to speak about Imam ash-Shafi'i legal thoughts because they only quoted the results of al-Juwainy's report. Therefore, to obtain more accurate data, it is necessary to directly examine al-Juwainy's writings.

Al-Juwainy, in his book *al-Burban*, discussed *al-maslahab al-mursalab* about forty-five pages in Kitab *al-Istidlal*. In that book, al-Juwainy explained the opinion and reasons of Imam ash-Shafi'i regarding *al-maslahab al-mursalab* which was called al-Juwainy with the terms *istidlal* and *istislah*.

At the beginning of his writing, al-Juwainy mentioned that scholars differed on the use of *istidlal (al-maslahab al-mursalab)* as the basis for determining the law.²¹ If al-Juwainy is asked a question regarding (a) does Imam ash-Shafi'i hold to *al-maslahab al-mursalab*?, and (b) what are the conditions?. Al-Juwainy gave an answer through his writings in order as follows:

- a. Imam ash-Shafi'i thinks that it is permissible to adhere to *istidlal (al-maslahab al-mursalab)* even though it is not based on the agreed-upon *asl*. He allows establishing the law by depending the law on *maslahabs* which are estimated to have similarities with those recognized by shara' and with *maslahabs* which are based on laws that have their origin in shara'. In another part, al-Juwainy mentions again that Imam ash-Shafi'i adheres to al-ma'na even though it is not based on an *asl* on the condition that al-ma'na is close to the existing *ma'na asl* on shara' Imam al-Haramain Al-Juwainy, *Al-Burban Fi Ushul al-Fiqh*, Jld. II (Qatar: Amir Daulah Qatar, n.d)..
- b. Then in the second problem regarding the conditions for taking *al-maslahab al-mursalab*, al-Juwainy mentioned that *maslahabs* (places to depend the law) are estimated to have similarities with *maslahabs* that are recognized by shara', and with *maslahabs* that are based on laws with *asl* in shara'. Or maybe *al-ma'na* which does not have *asl* is close to *ma'na* which has *asl* in shara'. In another part, al-Juwainy mentions again that Imam ash-Shafi'i mentioned, that if the legal bases (*usul*) that have '*illat* have been agreed upon by *qiyas* experts regarding their '*illat*, then I (Imam ash-Shafi'i) make the '*illat* as my guide, and I make the *istidlal* close to the al-ma'na, although it can't be exactly the same, so that it seems as if it becomes a *mu'tabar istidlal*. (Because) taking an *al-ma'na* because it is close to the *ma'na asl* (in a different surah) is more important than taking a form because it is close to its *asl* form based on the '*illat* that combines it because the field of difference of opinion on the *asl* issue lies in the meaning, not in the law. If reasoned *ijtihad* is close to shara' and does not contradict a

²¹ Imam al-Haramain Al-Juwainy, *Al-Burban Fi Ushul al-Fiqh*, Jld. II (Qatar: Amir Daulah Qatar, n.d.).

proposition, then that is an attempt to find an accepted argument (*istidlalan maqbulan*) Al-Juwainy..

Al-Juwainy's answer above shows that Imam ash-Shafi'i to establish the law adheres to *ma'na ijthadi* which does not have a specific and specific *asl*, but on the condition that the intended *ma'na* or *maslahah* has similarities with *maslahah* which is recognized by shara' or close (not the same) with *ma'na-ma'na* which has *asl* in shara'.

Taking *ma'na* can happen because it has the same nature or condition, and it is also possible because the *ma'na* is close. One thing that should be noted is that the *ma'na* has no *asl* in the sense that it does not have a specific *asl*, so *ma'na* is obtained by way of *ijtihad*. However, because it is close to the *ma'na* or *maslahah* which has an *asl* in the shara', in other words, it is by the shara' policy and does not conflict with the shara' argument, then this *istidlal* is acceptable.

Relying on the law of an event on *ma'na ijthadi* because it does not have a special and certain *asl*, but the meaning is by the laws that are *asl* in shara' and not contrary to the shara' argument, then whatever name is given to the argument in such a formulation does not matter. However, what is important is that the essence is substantially the same as what later people called *al-maslahah al-mursalah*. Thus, based on the analysis of the data-informed by al-Juwainy above, if it cannot be said for sure, at least it is strongly suspected that Imam ash-Shafi'i used *al-maslahah al-mursalah* practically, even implicitly accepting it theoretically. It is considered like that because even though Imam ash-Shafi'i does not mention the term *al-maslahah al-mursalah* explicitly in his *ar-Risalah*, but implicitly *al-maslahah al-mursalah* can be accepted because *al-maslahah al-mursalah* is included in the Imam ash-Shafi'i *qiyas* formulation.

Therefore, based on this kind of framework, it can be said that every *al-maslahah al-mursalah* is *qiyas* and not vice versa. If *qiyas* is a postulate in Imam ash-Shafi'i's theory of legal thought, then of course *al-maslahah al-mursalah* is also a postulate in Imam ash-Shafi'i's theory of legal thought which he uses to establish law and is at the same time an implicit acceptance of al-Shafi'i *al-maslahah al-mursalah* as a legal proposition because *al-maslahah al-mursalah* itself is included in the *qiyas* of Imam ash-Shafi'i.

3. Fiqh Issues Based on al-Maslahah al-Mursalah

In this section, the issue of Fiqh will be discussed to see the decisions and legal basis used by Imam ash-Shafi'i in determining the law against an event. Then the decision and legal basis mentioned by Imam ash-Shafi'i will be analyzed, so it can be seen that Imam ash-Shafi'i also uses *al-maslahah al-mursalah* in determining the law of Fiqh.

The issue of Fiqh in this case relates to inheritance known as al-musharaka, for example: A woman has died, and she leaves a husband, a mother, 2 (two) brothers and sisters (siblings). In this case, the husband gets 1/2, the mother gets 1/6, 2 (two) brothers and sisters get 1/3, and the heirs get a certain share which is called *ashhab al-furudh*. Meanwhile, siblings as '*ashabah*' get the rest of the inheritance. However, after *ashhab al-furudh* took their share, it turned out that there was no longer any share left for the siblings as '*ashabah*'. Here the question arises. Because siblings do not have a share in the inheritance, are siblings given shares with their mother's siblings in their third share?

In the historical context, it is found that Umar, in the first year of his reign, had decided that the siblings were not to be shared with the maternal siblings in their 1/3 share so the siblings did not get anything. Then in the second year of his reign, he decided that the siblings were to be shared with the half-siblings in their 1/3 share. Thus, siblings get a share of the inheritance.

Here it can be seen that there are 2 (two) decisions made by Umar in the same matter. Why did that happen? Facing this problem, at first, Umar decided not to give the inheritance to the siblings as in his first decision because the inheritance had been taken by Ashhab al-furudh. However, when Umar was about to decide the law on the matter, Umar's siblings interrupted him while proposing the following reasons: One-third of the siblings got 1/3 only because of their relationship with their mother since they are our mothers too. Then the sibling said, now suppose our father is *himar* or a stone thrown into the sea, are we not one mother. Umar was able to accept and understand the good thing (*istabsana*) in that opinion, then he decided to share the 1/3 part with them.²²

From the narration above, it is clear that Umar could understand the reasons put forward by the siblings. Therefore, he decided to give them a share of their mother's property by sharing it with his mother's brother. If they are not given, surely justice will not be realized, and this will cause difficulties. Meanwhile, the law is made to seek and enforce justice. Therefore, Umar's second decision was taken based on benefit; in the form of upholding justice and rejecting adversity. Al-Maridiny stated that Umar's first decision was based on *qiyas*, and his second decision was based on *istihsan*.²³

Actually, in this matter, among the Companions and the scholars of fiqh thereafter, there are differences of opinion which are divided into two parts, namely:

- a. Do not share with siblings of one mother in the 1/3 part, as was the opinion of Umar in the first place. Those who agree with this opinion are Abu Bakr,

²² Al-Maridiny, *Syarb Matn Ar-Rabbiah* (Surabaya: as-Saqafiyah, n.d.).

²³ Al-Maridiny.

Ali, and Ibn Abbas. This opinion was later taken by Abu Hanifah and Ahmad Ibn Hambal.

- b. In contrast to the first opinion, the second opinion divides siblings with their mother's siblings in their 1/3 share, like the second opinion of Umar. Those who agree with this opinion are Zaid Bin Sabit and Ibn Mas'ud. This opinion was later adopted by Imam Malik and Imam ash-Shafi'i.²⁴

Imam ash-Shafi'i agrees with Umar's second opinion, namely giving the inheritance to siblings by sharing with their mother's siblings in their 1/3 share. Imam ash-Shafi'i said, "We think that the husband gets 1/2, the mother gets 1/6, 2 (two) brothers and sisters get 1/3 share with siblings because of the father's kinship, if the law is invalid, the siblings are the same with brothers and sisters".²⁵

If Imam ash-Shafi'i is asked why are they shared in the 1/3 part which is the right of one's mother? Then Imam ash-Shafi'i replied, "We share them with their mother's brothers only because the mother joined them and the father's law is invalid. When the father's law is invalid, it will be as if he did not exist. If the father has a position that can make siblings get a share, we will use it. Either the father's position makes their share a little or a lot, this opinion is based on Umar's statement and based on qiyas as we have explained".²⁶

If you pay attention to the people who become heirs in this *al-musharakah* issue, they can be divided into 2 (two) types. The first one is *ashbab al-furudh* like husband, mother, and mother. The second one is the *'ashabah* which are like siblings'.

Normatively, the original law for one's mother has been determined by QS. An-Nisa'/4: 12. According to this verse, the mother's brother gets a share of 1/6 when he is alone. If there is more than one sibling, then they will get 1/3 by sharing among themselves. While the original law for siblings is determined based on the QS. An-Nisa'/4: 176, the share of siblings is determined to be if she is a woman, then 2 (two) female siblings will get 2/3. As for biological brothers, they get the *'ashabah* share. Then the technical instructions for the implementation of the distribution of inheritance, it is based on the hadith of the Prophet:

(الحديث) **أَلْحَقُوا الْفَرَائِضَ بِأَهْلِهَا فَمَا بَقِيَ فَلْأُولَىٰ رَجُلٍ ذَكَرَ (الْحَدِيثُ)**

According to this hadith, when the heirs of the *ashbab al-furudh* group gather with the *'ashabah* group, the *ashbab al-furudh* group takes their share first, then the rest is

²⁴ Muhammad Ali Ash-Shabuni, *Al-Mawaris Fi al-Syari'at al-Islamiyah* (Surabaya: Diponegoro, 1988).

²⁵ Muhammad bin Idris as-Syafi'i, Terj. Ismail Yakub, *Al-Umm*, vol. 3 (kuala Lumpur: Victorie Agency, 2000).

²⁶ Muhammad bin Idris as-Syafi'i, Terj. Ismail Yakub.

taken by the *'ashabah* group. This is a popular general rule in Islamic heritage regarding *'ashaba'*.²⁷

Therefore, based on the provisions of the verses above, it is known that both mother and sibling have their provisions that differ from one another. Imam ash-Shafi'i stated that the share of heirs determined by the Book of Allah and the Sunnah of the Prophet must be preserved. We can't reduce or add to it.²⁸

The first opinion which states that siblings are not shared with their mother's siblings is determined based on qiyas to the popular rule relating to the administration of the distribution of *'ashabah*, namely when *ashhab al-furudh* gathers with the *'ashabah* group, the inheritance must first be given to *ashhab al-furudh*, then the rest is given to the *'ashabah* group. In addition, another reason put forward by the first opinion is that if you share a sibling with a sibling, no text explains it.²⁹

Based on *qiyas* on this popular general rule, siblings do not get anything because the inheritance has been completely taken by *ashhab al-furudh*, which in this case includes husband 1/2, mother 1/6, and half-brothers 1/3 without sharing. With this kind of stipulation, it can be seen that each of them gets a share of the original legal provisions mentioned in the Qur'an.

As already mentioned earlier, Imam ash-Shafi'i confirms the sibling to the mother's brother; does not rely on the popular general rule. The problem now is what is the basis used by Imam ash-Shafi'i to denounce the sibling to his mother and abandon the popular general rule? whereas abandoning the general rule results in changing the status of siblings from *'ashabah* to *ashhab al-furudh*. Doesn't that mean that you have reduced the portion of your brothers and sisters? Meanwhile, Imam ash-Shafi'i himself has stated that the share of heirs determined by the Qur'an and the Sunnah of the Prophet should not be reduced.

If we analyze why the mother and sibling inherit the inheritance, it is a kinship relationship. Siblings who get an inheritance are due to a kinship with the mother of the deceased. Siblings inherit due to kinship with the father and mother of the deceased. From the point of view of this kinship relationship, the position of siblings is stronger than the position of the mother's siblings.

Siblings, in this case of *al-musharakah*, have the position of *'ashabah*. Therefore, it should be based on these general rules. However, according to Imam ash-Shafi'i, conforming to this rule will result in siblings not getting a share because the inheritance has been taken by *ashhab al-furudh*. It is unfair if the sibling who is stronger than the deceased does not get a share while the sibling who is weaker than the deceased gets a share of the inheritance. Therefore, Imam ash-Shafi'i said,

²⁷ Al-Maridiny, *Syarb Matn Ar-Rabbiyah*.

²⁸ Muhammad bin Idris as-Syafi'i, Terj. Ismail Yakub, *Al-Umm*.

²⁹ Hasan Ahmad Khatib, *Al-Fiqh al-Muqaran* (Kairo: Jami'ah al-Qahirah, 1957).

"If the father has a position that can allow the siblings to get a share, we will use it, whether the position of the father allows them to get a little or a lot of shares".

If the original law of siblings as *'ashabah* due to their kinship with the father was still being considered and maintained, this would undoubtedly lead to difficulties and injustice. While justice and eliminating difficulties are *maslahah* which is the will and purpose of *shara'* in applying the law. Therefore, Imam ash-Shafi'i canceled the father's law, which means also canceling the law of a sibling as *'ashabah*, then *qiyas* the sibling to his mother's brother. Thus, the siblings have become brothers of the same mother, and are entitled to a share. That is the meaning of the words of Imam ash-Shafi'i, when the father's law has been canceled, it will be as if he did not exist, and the siblings become the mother's brothers. In other words, siblings have changed status from *'ashabah* to *ashbab al-furudh*, so they get a share of 1/3 by sharing.

Imam ash-Shafi'i said that sharing siblings with one's mother is because it is the mother who unites them. It means the same mother gets the inheritance because of their relationship with the deceased of one mother. The siblings also had a one-mother relationship with the deceased. If a sibling gets an inheritance because the mother is with the deceased, then the siblings must also get an inheritance because the sibling has the same mother as the deceased. This is what Imam ash-Shafi'i meant by *qiyas* which was explained earlier.

From the above analysis, it can be seen that the basis used by Imam ash-Shafi'i, leaving the *qiyas* that should be based on these general rules, and switching to *qiyas* against one's brothers and sisters, is to uphold justice and reject difficulties that are *maslahah* by the objectives and basis of the policy of *shara'* in deciding the law. Based on the description of the discussion and analysis of the data above, a reconstruction of Imam ash-Shafi'i's way of thinking in the *istinbath* process regarding the issue of *al-musharakah* can be seen as follows:

According to Imam ash-Shafi'i, if a relationship with the deceased is seen through the father's path, the sibling becomes *'ashabah*. As *'ashabah*, he does not get a share of the inheritance. For the siblings to get the inheritance, the father's relationship was aborted. Then his part must be shared with siblings of the same mother. In regards to this sharing, there is no specific *shara'* about this problem. Therefore, Imam ash-Shafi'i uses *qiyas* for brothers and sisters of the same mother. The goal is to realize *maslahah*, which is to uphold justice and avoid difficulties.

Maslahah upholding justice and avoiding difficulties is the basic objective of *shara'* policy in establishing laws that are known and obtained not from one particular text, but *istiqra'* to the arguments of *shara'* which are numerous in various legal issues. Such *maslahah* is called *al-maslahah al-mursalah*. In this case, the *qiyas* of

Imam ash-Shafi'i is *qiyas maslahab*. *Qiyas maslahab* is *qiyas* that relies on *al-maslahab al-mursalab*.

Thus, even though Imam ash-Shafi'i, in establishing the law of sharing, only mentions *qiyas*, Imam ash-Shafi'i's *qiyas* is *qiyas maslahab*. *Qiyas maslahab* is based on *al-maslahab al-mursalab*. If Imam ash-Shafi'i uses *qiyas* which is based on *al-maslahab al-mursalab*, then it can be said that Imam ash-Shafi'i uses *al-maslahab al-mursalab*, even though he does not mention it explicitly. This must be understood because as described earlier, that *al-maslahab al-mursalab* is included in the *istinbath qiyas* pattern of Imam ash-Shafi'i. Thus, even though Imam ash-Shafi'i used *qiyas* for siblings of the same mother considering the relationship with their mother, what is the main basis of Imam ash-Shafi'i's logic is *al-maslahab al-mursalab*. In other words, what is written is *qiyas*, but what is implied is *al-maslahab al-mursalab* whose influence is greater in determining the law of sharing.

It is said that *al-maslahab al-mursalab* has a greater influence in determining the law of sharing because if there is no *maslahab* of course Imam ash-Shafi'i will not abort the father's law and carried out *Qiyas* to siblings of the same mother. Not carrying out the *Qiyas* means unfair and difficult. Unfair and difficult means opposing the purpose and basis of the shari'a policy in establishing the law. Therefore, Imam ash-Shafi'i left *qiyas* to the general rules and switched to *qiyas* siblings of the same brother because maintaining the original law was no longer effective for realizing *maslahab* which was the goal of shara' in establishing law. Since it is no longer effective for realizing *maslahab*, it needs to be transferred. If so, there is nothing to encourage Imam ash-Shafi'i to make the transition of *qiyas* except *maslahab*. Therefore, it is clear that *maslahab* has a greater influence in determining the law of sharing.

Conclusion

After paying attention to the definition of *al-maslahab al-mursalab* and *qiyas* Imam ash-Shafi'i, and after analyzing the patterns and characteristics of each comparatively, it was found that there was a coherent relationship between the two. Furthermore, data were also obtained in the form of statements by scholars as an indication that Imam ash-Shafi'i used *al-maslahab al-mursalab*. Then, the statements of the ulama were confirmed with the reality which in this case is the legal thought of Imam ash-Shafi'i, *istidlal* Imam ash-Shafi'i in determining *qiyas* and Fiqh issues that have been decided by Imam ash-Shafi'i. It has been found that there is a correspondence between the statement and the reality. Therefore, the author concludes that it is true that Imam ash-Shafi'i uses *al-maslahab al-mursalab* as the basis or argument in establishing the law of Fiqh. However, *al-maslahab al-mursalab*

is not a stand-alone proposition because *al-maslahah al-mursalah* is included in the pattern of ijtihad Imam ash-Shafi'i that is called *qiyas*.

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