



The Implementation Of The 'Urf And Its Implications On The Determination Of Contemporary Sharia Economic Law

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Abstract: *The study aims to apply 'urf as the tool to view the problems of contemporary shari'ah economic law and its implications on the legal determination of shari'ah economic law cases. This research used qualitative library methods which is a means of understanding and exploring the meaning of what happens to various individuals or groups, originating from humanitarian or social problems. Based on the research results, it can be concluded that business practices in the current era of free market globalization are a challenge for legal practitioners who are active in carrying out the constant ijihad to develop thoughts on shari'ah economic law, in addition to trying to reconstruct the principles of economic law, actualize and contextualize in various contemporary shari'ah economic law issues such as transaction of buying and selling orders ('aqd bai' al-salm) through online applications; buying and selling contracts without pronouncing sigat al -'aqd which is done online; and others. Such practice of contract transactions has become a tradition and a necessity for the business world in this contemporary era. From here, an academic problem arises: how are shari'ah economic law and the legal istinbat process able to answer various legal cases that continue to occur? Among the alternative solutions, one of them is to apply 'urf as an ijihad method in extracting contemporary shari'ah economic law.*

Keywords: *implications, the economic case of shari'ah and Application of 'urf*

Abstrak: Artikel ini bertujuan penerapan 'urf pada problematika kasus hukum ekonomi syari'ah kontemporer, dan implikasi eksistensi 'urf itu pada penetapan hukum terhadap kasus-kasus hukum ekonomi syari'ah. Penelitian ini menggunakan metode penelitian kualitatif. Metode kualitatif merupakan metode dengan pemahaman dan penggalian makna terhadap apa yang terjadi pada berbagai individu atau kelompok, yang bersumber dari permasalahan kemanusiaan atau sosial, sedangkan jenis penelitian yang digunakan dalam penelitian ini ialah dengan *library research* (kepuustakaan). Berdasarkan hasil penelitian dapat disimpulkan bahwa praktik bisnis di era globalisasi pasar bebas saat ini menjadi tantangan tersendiri bagi para praktisi hukum yang giat melakukan ijihad secara kontinyu untuk mengembangkan pemikiran hukum ekonomi syari'ah. Di samping berupaya merekonstruksi prinsip-prinsip hukum ekonomi, mengaktualisasikan, dan mengkontekstualisasikan pada berbagai kasus hukum ekonomi syari'ah kontemporer, seperti transaksi akad jual beli pesanan ('aqd bai' al-salm) melalui aplikasi *daring*, akad jual beli tanpa pengucapan *sigat al-'aqd* yang dilakukan secara *online*, dan lain-lain. Praktik akad transaksi seperti ini sudah menjadi tradisi dan kebutuhan dunia bisnis era kontemporer ini. Dari sini

muncul problem akademik, bagaimana secara hukum ekonomi syari'ah, dan proses istinbat hukumnya sehingga mampu menjawab berbagai kasus hukum terus terjadi. Di antara solusi alternatifnya, dengan mengaplikasikan 'urf sebagai metode ijihad dalam penggalian hukum untuk menetapkan hukum pada kasus-kasus hukum ekononomi syari'ah kontemporer yang terjadi.

Kata kunci: Implikasi, kasus ekonomi syari'ah dan Penerapan 'urf

▪ Introduction

Among classical and contemporary Islamic legal theorists (*uūlūyyin*), the debate over the issues and debates of 'urf as a proposition and method of ijihad is always relevant and interesting. The presence of 'urf among *jumhr al-aliyyin* in the context of istinbat al-ahkm is framed as a contentious legal topic (*adīllah al-ahkām al-mukhtalaf fihā*). Meanwhile, for some contemporary *uṣūl* scholars, 'urf is seen as a form of ijihad. Beginning with the debate over this 'urf, law seekers (*mujtabidin*) are obliged to use intellectual *ijtihād* inventiveness to interpret the texts of revelation (al-Qur'an and sunnah/Hadith) such that numerous difficulties not expressly stated in it can be answered using the 'urf. The two sources are restricted in quantity, whereas numerous legal difficulties continue to develop in large numbers.¹ It can be observed that there is a close relationship between revelation and developing culture (local wisdom). The methodological aspect, including what is known as 'urf, is the answer to these difficulties in the theoretical realm, which must be explored first.

According to the notion of legal interpretation (*uūl al-fiqh*), the main sources of Islamic law are the al-Qur'an and

sunnah (*hadī*). Others, like as *ijmā'* and *qiyās*, are secondary arguments whose existence is questioned. According to Fazlur Rahmān (d. 1988 AD), the true foundation or material source is the Qur'an and Sunnah. In the meantime, *ijmā'* is a formal basis, and *qiyās* is a useful analogous inference activity.² However, after the legal theory was composed, particularly during the ash-Syafi'i period (150-204 H), the legal sources and arguments were chronologically organized into al-Qur'an, sunnah, *ijmā'*, and *qiyā*.³ The selection of sources and legal reasoning forms a doctrine that is agreed upon by the majority of scholars (*jumhūr al-'ulama'*) and must be followed in istinbat law.⁴ Furthermore, *istiṣhāb*, *istiṣnā*, *maṣlahah mursalah*, *qaul ṣhābī*, *ijmā' ahli Madīnah*, 'urf, *sad al-ḥarī'ah*, and *syar'u man qablanā* are propositions contested among *uṣūl* scholars.⁵ However, the 'urf is the focus of this paper. Therefore, the problems to be studied

²Fazlur Rahmān, *Islām*, diterjemahkan oleh Senoadji Saleh (Jakarta: PT Bina Aksara, 1987), p. 106.

³Muhammad bin Idris al-Syāfi'i (selanjutnya ditulis al-Syāfi'i), *al-Risālāh*, pengedit Ahmad Muhammad Syakir (Mesir: Dār al-Fikr, t.t.), h. 39. Al-Syāfi'i, *al-Umm*, Juz ke 5 (Mesir: Maktābah al-Kāllīyah, 1961), p. 246.

⁴Zāky al-Dīn Sya'bān, *Uṣūl al-Fiqh al-Islāmī* (Mesir: Dār al-Ta'līf, 1964), p. 27.

⁵Lihat, Muhammad Sa'īd Alī 'Abd Rabbih (selanjutnya ditulis 'Abd Rabbih), *Bubūṣ fī al-Adīllah al-Mukhtalaf Fihā 'Ind al-Uṣūlīyyin* (Mesir: Mātba'ah as-Sa'ādah, 1400 H/1980 M).

¹Muhammad Abū Bakar al-Syāhrastānī, *'al-Milāl wāan-Nihāl* (Mesir: Mustafā al-Bābī al-Halabī wā Aulādūh, 1967), p. 199.

are, how is the application of 'urf to the difficulties of contemporary shari'ah economic law cases, and to what extent is the implication of 'urf on the legal decision of shari'ah economic law cases?

▪ Discussion

1. 'Urf as the Foundation of Legal Ruling

a. The Definition of 'Urf

Etymologically, 'urf means good traditions (*al-ma'rūf al-mustabsin*), as can be read in the al-Qur'an:

وَبَيْنَهُمَا حِجَابٌ وَعَلَى الْأَعْرَافِ رِجَالٌ
يَعْرِفُونَ كُلًّا بِسِيمَانِهِمْ وَنَادَوْا أَصْحَابَ الْجَنَّةِ
أَنْ سَلِّمُوا عَلَيْنَا لَمْ يَدْخُلُوهَا وَهُمْ يَطْمَعُونَ

Between them shall be a veil, and on the heights will be men who would know everyone by his marks: they will call out to the Companions of the Garden, "peace on you": they will not have entered, but they will have an assurance (thereof). (Q.S. al-A'rāf (7): 46)

It is also defined as a recurring tradition (*at-tatābu*),⁶:

وَالْمُرْسَلَاتِ عُرْفًا

"By the (Winds) Sent Forth one after another (to man's profit)." (Q.S. al-Mursalāt (77): 1)

'Urf It also implies performing good deeds (*al-ma'rūf*),⁷ which is based on the word of Allah in the Qur'an as follows; *"Hold to forgiveness; command what is right; but turn away from the ignorant." (Q.S. al-A'rāf (7): 199)*

Meanwhile, al-Jarjani describes 'urf as *"something that has been established in the*

soul since doing so is following logic and can be accepted by human character. It may also be utilized as evidence because it is recognized more swiftly."

Muṣṭafā Ahmad al-Zarqā' (w. 1357 H) defines 'urf as: *"Traditions of the majority of the people (society) both words and deeds."*⁸

Zakaria al-Barri defines 'urf as *"Something that is known by the general public. They usually practice both words and deeds"*.⁹

Ba'ad al-uṣūliyyin, like an-Nasafi, Ibn 'Abidin, al-Rahāwi, and Ibn Nujaim al-Hanafi believe that *al-'urf* is synonymous with *al-'ādab (al-mutarādijāt)*.¹⁰ *Al-'ādab* terminologically is *"Something done repeatedly (continuously) without any rational relationship."*¹¹

Some of the preceding definitions demonstrate that something done (*al-amr*) is universal in nature, taking the shape of deeds (*al-afāl*) and words (*al-aqwl*). Something that is done continuously (*at-tikrār*) cannot be defined as *al-'dab* if it is done occasionally. As a result, the problem of *al-'ādab* is very broad and complex because it encompasses various 'ādab carried out by individuals (*al-'dab al-fardiyyah*), such as sleeping, eating, drinking, dressing, grooming, and the habits of the majority of people (*al-'ādab al-jamā'ah aw al-'ammah aw al-jumbūr*) that result from good or bad thoughts,

⁸ Muṣṭafā Ahmad al-Zarqā', *al-Madkhal al-Fiqh al-'Am*, Juz ke 2 (Damaskus: Maṭba'ah Ṭarbain, 1387 H/1968 M), p.840.

⁹ Zakaria al-Barri, *Maṣādir al-Abkām al-Islāmiyyah* (Mesir: Dūr al-Ma'ārif, 1395 H/1975 M), p. 145.

¹⁰ Wahbah al-Zuhaili, *Uṣūl al-Fiqh...*, p. 830.

¹¹ 'Ādil bin 'Abd al-Qādir Qūṭah, *Aṣr al-'Urf wa Taṭbiqātub al-Mu'aṣirah fi Fiqh al-Mu'āmalāt al-Maliyyah* (Jiddah: Fahrasah Maktabah al-Mulk, 1428 H/2007 M), Cet. ke 1, h. 32.

⁶ Wahbah al-Zuhaili, *Uṣūl al-Fiqh al-Islāmi*, Juz ke 2 (Bairut: Dūr al-Fikr al-Mu'āṣir, 1418 H/1998 M), p. 829.

⁷ Ali bin Muhammad al-Jarjāni, *Kitāb at-Ta'rifāt* (Singapura-Jiddah: Al-Haramain, t.t.), h. 149.

such as holding *balal-bibahal* events. Meanwhile, some that are not good and are considered cultivated culturally are collusion, corruption, and nepotism.

With the aforementioned descriptions of *al-'dab* and *'urf*, Jumbr *al-'uliyin* concluded that *al-'dab* is more general than *'urf* because *al-'dab* comprises traditions and culture that originate in society and are carried out naturally, both *al-'dab al-fardiyyah* and *al-'dab al-jumbr*. *Al-'dab* generality is absolute, but *'urf* specificity is also known as the limited term *al-'dab (al-'dab muqayyadah)*.

Thus, every *'urf* is *al-'dab*, but not every *'adab* becomes an *'urf* because *al-'dab* can assume both individual (*fardiyyah*) and collective (*musytarakah*) forms.¹²

b. The Division of 'Urf

At the theoretical-normative level, *'urf* can be seen from various aspects as follows:

1). Viewed from the point of view of the object, Muṣṭafā Ahmad az-Zarqā', *'urf* is divided into *'urf lafẓi* and *'urf 'amali*.¹³ Furthermore, *al-'urf al-lafẓi* is a community tradition in using *lafaz* or particular terms in expressing something so that the meaning of the expression can be understood and transpired in people's minds despite the lack of indication and reasonable relationship.¹⁴ For example, if someone walks into a store and says, "I'd like to buy a pack of GV cigarettes. The shop owner and the general public know that the customer wishes to purchase a pack of Surya Kretek

cigarettes." Another example: "Sir, may I have a kilogram of meat?" By stating this, the meat supplier and the general public understand that someone is purchasing beef.

Furthermore, *al-'urf al-'amali* is a community tradition related to ordinary actions or actions related to civil matters.¹⁵ For example, someone's habit of leading an unrelated lifestyle to others, such as sipping coffee or tea every morning before breakfast. Some people drink coffee or tea after breakfast, and so on. These actions are referred to as usual actions. Furthermore, deeds relating to civil concerns (*al-mu'āmalāt al-madaniyyah*) are making transactions of giving each other without saying consent and *qabul (al-bai' al-mu'āṭah)*, carrying out a marriage contract according to each tribe's tradition, and others.

2). In terms of scope, *'urf* by az-Zarqā' is divided into two types, namely *al-'urf al-'ām* and *al-'urf al-khāṣ*. *Al-'urf al-'ām* is a tradition known by the public or the general public for all time, such as using the bathroom (public toilet) by paying a certain rate without a time limit. Users rent these public toilets for a period of time according to their needs, and tenants can likely use them for a short time or a long time.

Al-'urf al-khāṣ is a custom that locals in a country or members of a specific community are familiar with. For instance, customs that transform (*al-'al-mutabādilah*) from good to bad

¹²Muṣṭafā Ahmad al-Zarqā', *al-Madkhal...*, h. 841. 'Abd al-Qādir Qūṭah, *Aṣr al-'Urf...*, p. 33.

¹³ Al-Zarqā', *al-Madkhal...*, p. 844.

¹⁴*Ibid.*, p. 845.

¹⁵*Ibid.*, p. 846.

or vice versa in a given country or local community. For instance, inappropriate clothing for women is problematic for *murū'ah* in Eastern nations but not for women in Western nations. Additionally, customs like getting a dowry in marriage before the couple engages in sexual activity and contracts for buying and selling through orders (*as-salm* or *al-istiṣnā*).

- 3). Regarding its validity in the view of *syara'*, Wahbah al-Zuhaili, *'urf* is categorized into *al-'urf al-ṣābiḥ* and *al-'urf al-fāsid*.¹⁶ *Al-'urf al-ṣābiḥ* is a community tradition that does not support what is illegal, or vice versa, such as a society's tradition in which the male presents something as a symbol of the official proposal to the woman (future wife). If the man cancels the proposal, the token is not returned to him. If the woman cancels the proposal, everything she gives as a token of the official proposal is returned to the man. Another example is when a society's tradition prohibits a girl married to a man from moving to her husband's house until at least half of the dowry is paid. This is an *'urf* that can be followed. and used as a basis by court judges if a problem arises in the marriage one day.

Meanwhile, *al-'urf al-fāsid* refers to a communal tradition that opposes statutory provisions and *syara'*'s legal reasoning. In practice, it is the inverse of *al-'urf al-ṣābiḥ*, forbidding what is permissible and making what

is forbidden by religion lawful. In a wedding ceremony, the bride and groom and the party organizing committee leave the *alat*. Despite the fact that the legal position of holding a party (*al-walimah al-'urus*) is just permissibility (*al-ibāḥah*), and the highest is the law, especially for some scholars who regard the responsibility to carry out *al-walimah as sunnah (al-nadb)*. Most *ul al-fiqh scholars (Jumbūr al-uṣūliyyin)* agree that *al-'urf al-fāsid* cannot be employed as a legal argument or *hujjah asy-syar'iyyah*.

c. Application Requirement for *'Urf*

Jumbūr al-uṣūliyyin emphasized that *'urf* can be used as one of the legal arguments, or *hujjah asy-syar'iyyah* if it meets the requirements, at least according to Muṣṭafā Ahmad az-Zarqā'. The four requirements are as follows:

- 1). *'Urf* applies in general. *Al-'urf* applies and operates in the center of people's lives, not in a sectoral (*juṣ'iyyah*) or atomistic manner, but its legitimacy is widely accepted by society.
- 2). *'Urf*, which has long been accepted and socialized, can be used as the foundation for constructing a law when a new legal situation develops.
- 3). *'Urf* is not in conflict with what is plainly stated in a contract agreement.
- 4). *'Urf* does not contradict the *naṣ* (al-Qur'ān and *sunnah*) so that the law contained in the *naṣ* cannot be applied to legal problems.¹⁷

According to Zakaria al-Barri, the fourth requirement mentioned by al-Zarqā' above is *naṣ*, which is *qaṭ'iyy*.

¹⁶ Wahbah al-Zuhaili, *Uṣūl al-Fiqh...*, p. 834-835.

¹⁷ Al-Zarqā', *al-Madkhal...*, p. 873-874.

Therefore, it is not justified that *'urf* contradicts *naṣ*, which is *qat'iy*, like eating *riba*. Consuming usury is a contradiction with *naṣ* and includes *'urf fāsid*.¹⁸

... وَأَحَلَّ اللَّهُ الْبَيْعَ وَحَرَّمَ الرِّبَا ...

“But Allah has permitted trading and forbode interest.” (Q.S. al-Baqarah (2): 275)

Furthermore, if *'urf* contradicts the *naṣ* based on *ẓanny* arguments, either legal ruling of *dalālah*; therefore, *'urf* acts as *takhsīṣ* in *ẓanny* arguments.

d. *'Urf* as Proposition and Method of Determining Law

In general, Islamic legal methodology (*uṣūliyyin*) and Islamic legal thought (*al-fuqahā'*) believe that *al-'urf al-'ām* or *al-'urf al-khāṣ* that can change (*mutagayyirāt*) caused by certain situations or conditions (*al-aẓminah wa al-amkinah*) can be one of the legal grounds in the framework of *istinbāṭ al-abkām*. They differed, however, in terms of the intensity with which they used it as a proposition.

Among the *Hanafīyyah mujtabid ulama*, *'urf* can be used as legal basis in *ijtihād*. However, the *'urf* they concern is *istihsān bi al-'urf* (*istihsān* based on *'urf*). In its application, *istihsān bi al-'urf* is concerned with the issues that do not have *naṣ* basis. Husain Hamid Hasan stressed that the use of *istihsān bi al-'urf* genuinely returns to the issue of public interest because the foundation is the preservation of community traditions. Maintaining these traditions entails making

things easier and removing obstacles.¹⁹ *Mujtabid Malikiyyah ulama* made the *'urf* living among the people of Medina a legal argument. They prefer to keep *'urf* in usage if it contradicts *qiyās*.²⁰

Syāfi'iyyah ulama makes *'urf* as a *hujjah* in determining the law if they do not find the limit provisions in the *syara'* and the use of language. Therefore, they construct a rule: “Everything that comes from *syara'* is absolutely (used), there is no provision in religion and not also in language, then it is returned to *'urf*.”²¹

Mujtabid Hanābilah ulama also make *'urf* a legal basis in *istinbāṭ al-abkām* if there is no *naṣ* that explains a certain problem.²²

The majority of *ulama*, especially among *al-a'immah al-arba'ah*, employ *'urf* as a legal basis. Their argument is based on, **first**, explained in the word of Allah in the Qur'an as follows:

حُذِ الْعَفْوَ وَأْمُرْ بِالْعُرْفِ وَأَعْرِضْ عَنِ

“Hold to forgiveness; command what is right; but turn away from the ignorant” (Q.S. al-A'rāf (7): 199)

This verse implies that Muslims are instructed to perform *ma'ruf* deeds, or in this context, is a good tradition that

¹⁹Husain Hamid Hasan, *Nazariyyah al-Maṣlahah fī Fiqh al-Islami* (Bairut: Dār an-Nahḍah al-'Arabiyyah, t.t.), p. 521,588.

²⁰Muhammad Abū Zahrah, *Malik Hayātuh wa 'Aṣrūh Arā'uh wa Fiqhuh* (Mesir: Dār al-Fikr al-'Arabi, 1963-1964 M), p. 420.

²¹Jalāl al-Din 'Abd al-Rahman bin Abi Bakar al-Suyūṭī, *al-Aṣyāb wa al-Nazā'ir fī al-Furū'* (Suabaya-Indonesia: Maktabah Muhammad bin Ahmad Nubhān wa Aulāduh, t.t.), p. 69.

²²Ibn Qayyim al-Jauziyyah, *A'lām al-Muwaqqi'in 'an Rabb al-'Ālamīn* (Bairut: Dār al-Kutub al-'Ilmiyyah, 1425 H/2004 M), p.522.

¹⁸ Zakaria al-Barri, *Maṣādir al-abkām...*, p. 148

is consistently carried out by the community and does not violate *naṣ*, as well as the general principles of Islamic teachings.

Second, the hadith of Rasulullah, which was narrated by Imām Ahmad from ‘Abd Allah bin Mas’ūd:

*“What is considered good by Muslims, then it is also good in the presence of Allah.”*²³

According to the verses and hadiths given above, excellent traditions are carried out consistently by Muslim communities, and if they follow the guidance of Islamic teachings, then these traditions are something that Allah approves of.

After the ‘urf was accepted as one of the *dalil* in *istinbāt al-abkām*, particularly by *Hanafīyyah* and *Mālikīyyah* scholars, they formulated the principles of *fiqhīyyah* related to ‘urf, among others: "The tradition can be a legal consideration." (2) "Human deeds that have been carried out continually must contain good deeds." (3) "Something that applies in 'urf is like something that has been required." (4) "Determining something based on ‘urf is equal to determining something based on *naṣ*." It means, "It cannot be denied that changes in time induce changes in the law."²⁴

2. The Implications of 'Urf in Determining Several Contemporary Sharia Economic Law Cases

“Urf as an *ijtihad* method in determining sharia economic laws (*al-mu‘āmalah al-māliyah*) turns out to have significant implications because many law enforcement practices are based on

local wisdom values, in which substantially the main law (*al-aṣl*) of legal determination of the problems is not permissible. However, present sharia economic law scholars tend to tolerate it based on considerations of local wisdom regularly applied by society. This argument is demonstrated in the examples below.

- a. In the context of property ownership (*al-tamlīkāt*), for example, mutual acceptance agreements (*‘aqd al-mu‘āwadhāt* or *al-mubādalah*), such as sale and purchase agreements (*‘aqd al-bai’*), leasing, or wages (*‘aqd al-ij‘rah*).
- b. In the context of an agreement that is not carried out reciprocally or as a substitute handover from both parties (*‘aqd al-tabarru‘āt*), such as interest-free lending (*‘aqd al-qard*, or *‘aqd al-i‘rah*), transferring property ownership to Allah (*‘aqd al-waqf*), giving property ownership to others voluntarily (*‘aqd al-hibbah*), giving ownership of the property to a beneficiary of a testator who has passed away (*‘aqd al-waṣīyah*), and giving property ownership to someone by delegating it to another person (*‘aqd al-wakālah*).
- c. In the context of trade or other business cooperation carried out by two or more people (*mu‘āmalāt al-musyārakah*), such as in the cooperation agreement to build a joint business (*‘aqd al-syirkah*), profit cooperation between capital owners (*ṣāhib al-māl*) and the manager of capital (*mudārib*) jointly benefit, and the manager is entitled to work (*‘aqd al-mudārabah*), agricultural cooperation and sharing of produce from sharecroppers with landowners (*‘aqd*

²³ Ahmad Ibn Hanbal, *Musnad al-Imām Ahmad*, Jld. ke 1, (Bairut: Dār al-Kutub al-‘Ilmiyyah, 1413 H/1993 M), p. 379.

²⁴ Keempat kaidah tersebut dapat dilihat dalam al-Burnu, *al-Wajīz*, p.152, 1168, and 182.

al-muẓāra'ah), and cooperation agreements in the sharing of plantation fruit, or the sale of fruit (*'aqd al-musāqāṭ*).

- d. In addition to the different agreements listed above (a,b,c), there is also an agreement to strengthen confidence due to indebtedness known as *'aqd al-tanṣiqah*. In this context, for example, pawning (*al-ruhn*), debt transfer (*hiv'alah*), and dependents or guarantees (*al-kafālah* or *al-ḍamān*).²⁵

To demonstrate how the use of *'urf* has ramifications for the provisions of Shari'ah economic law in this modern day, the author presents instances in contracts classified as *al-mu'āwadhāt/al-mubādalah* are *bai' al-salm*, *bai' al-mu'āṭah*, *bai' al-juẓ'āf*.

First, Bai' al-salm. *Bai' al-salm* refers to purchasing and selling products whose nature is specified in the agreement with advance payment.²⁶ So the agreement is made, and money is paid in advance, but the items are not delivered and might be received by the customer after they are dispatched and arrive at the designated address. At the theoretical-normative level, *bai' al-salm* is also known as *bai' al-ma'dūm*, which is buying and selling when the things being traded are not in place, but there is an agreement to pay in advance. According to the majority of academics (*jumhūr al-'ulamā'*), according to the initial law (*al-aṣl*), such buying and selling

transactions are illegal because they create legal doubt (*al-garar*). Meanwhile, determining laws with components of uncertainty (*al-garar*) should be avoided to the greatest extent practicable. Essentially, the hadith reported by Ahmad from Ibn Mas'd state that Rasulullah stated, "Do not buy fish in a pool of water since it is *garar*."²⁷

According to one methodological interpretation, contemporary *uṣūl* scholars study and respond to *bai' al-ma'dūm*, which has *garar* aspects. If it is fully prohibited, it will contradict other benefits, specifically *maṣlahah al-hājjiyyah*. Because *bai' al-salm* (*bai' al-ma'dūm*) has become a necessity and tradition (*al-'urf/al-'ādah*) practiced continuously by society. Suppose the *maṣlahah al-hājjiyyah* is abolished because *bai' al-salm* is prohibited, which has established a tradition and is required. In that case, it will bring enormous difficulties for humanity in the period of global and modern trade.

According to *maqāṣid al-syari'ah*, the prohibition of *bai' al-salm* is intended to realize *maṣlahah al-tahsinīyyah*, meaning to preclude the chance of *al-garar* happening while also eradicating *maṣlahah al-hājjiyyah*. In *istinbat* law, *maṣlahah al-tahsinīyyah* does not need to be maintained because it will harm *maṣlahah al-hājjiyyah*.²⁸

²⁷Al-Hāfiẓ Ibn Hajar al-'Asqalāni, *Bulḡ al-Marām* (Ahmad bin Sa'id bin Nubhānwa Aulāduh, t.t.), p. 168.

²⁸Lihat, Abū Hāmid al-Gazālī, al-Mustaṣfā min 'Ilm al-Uṣūl (Mesir: Syirkah al-Ṭibā'ah al-Fanniyyah al-Muttahidah, 1391 H/1871 M), h. 251. Muhammad Sa'id 'Abd Rabbih, *Buhūs* ..., p. 86-88.

²⁵Lihat, 'Abd al-Qādir Qūṭah, *Aṣr al-'Urf* ..., p. 5-7.

²⁶Sayyid Sābiq, *Fiqh al-Sunnah*, Jld.ke 3, Cet. Ke 4 (Bairut: Dār al-Fikr, 1403 H/1983 M), p. 171.

Normatively, concerning *bai' al-salm*/*bai' al-ma'dūm*, Rasulullah Saw. once forbidden in his statement, which was reported by five narrators of hadith from Hakim bin Jazam, that a man contacted me and asked about purchasing and selling commodities that were not in my hands, which I sold to him, and then I bought them at the market. So Rasulullah SAW advised, "Do not sell what you do not have in your hands."²⁹ In another story from Ibn 'Abbās, he said that when he arrived in Medina and found its citizens performing *bai' al-salm* in the form of fruits every one to two years, he replied, "Whoever wants to perform *bai' al-salm* is welcome as long as the measurements, scales, and time are clear."³⁰ His statement in the first hadith prohibiting *bai' al-ma'dūm* is general in nature (*al-kullī*); however, in the second hadith, the prohibition of *bai' al-salm* is a specific prohibition (*al-juẓ'ī*) and as an exception.

Based on the *istihsān* approach, Ibn al-'Arabi claims that *istihsān*, according to Malikiyyah and Hanafiyyah scholars, is a charity with one strong reason that applies in general, but if not, then the general proposition can be abandoned by becoming *takhsīṣ* by applying other propositions. Malikiyyah shifted from *kullī* to *juẓ'ī*, with the term of *istihsān bi al-maṣlahah*. On the other hand, Hanafiyyah sticks to *qiyās khafī* by abandoning *qiyās jāly*, with the term of *istihsān bi al-*

'urf.³¹ It is difficult to entirely abolish *al-garar* in the context of *mu'amalah* in its technical application of *istinbāṭ al-ahkām*, keeping in mind that the current global era and the free market are challenges to the understanding of shari'ah economic law that must be met. What needs to be built in this scenario is refining and separating items that give rise to paradoxes. The hierarchical application of *maqāṣid al-syarī'ah* prioritizes *al-bāḥiyyah* that supports *darūriyyah* by rejecting *al-tahsinīyyah* in its entirety. *Al-garar*, in this context, is categorized as *al-tahsinīyyah*. Therefore, the legality of *bai' al-salm* or *bai' al-ma'dūm* is founded on legal standards (*al-qanā'd al-fiqhiyyah*) and *al-'urf* consideration.

Second, *bai' al-mu'āṭah*. *Bai' al-mu'āṭah*, etymologically, taking or handing over (*al-akhẓ wa al-i'ṭā'*) something. *Bai' al-mu'āṭah* is etymologically defined as taking or giving over something from the seller (*al-bā'i*) to the buyer (*al-musytarī*) when the buyer gives up the price (money) to the seller without *ijāb* and *qabūl*. For example, if the seller says, "I will sell you this book for ten riyals," the buyer gives the seller the money without uttering *qabūl*, and the buyer takes the book.³²

Based on this terminology, it is important to note that the practice of *bai' al-mu'āṭah* is carried out not verbally (utterance) with the statement "accept the selling and accept the

²⁹Al-Syaukāni, Nail al-Auṭār, Juz ke 5 (Bairut: Dār al-Jail, 1973), p. 175.

³⁰ *Ibid*, p. 255.

³¹Abū Ishāq al-Syāṭibi, *Kitāb al-I'tisām*, Juz ke 2 (Bairut: Dār al-Fikr, 1424 H/2003 M), h. 97.

³²Muhammad Uṣmān Ṣubair, *Al-Madkhal fi Fiqh al-Mu'āmalāt al-Mālīyyah* (Yordania: Dār al-Nafāis, 1422 H/2004 M), h. 218.

buying," but by deed (*al-mu'aṭab*). The seller hands over the items to the buyer. The buyer obtains the products by turning over a specified quantity of money for which the price or bandrol is already known. The academic debate among Islamic economic law specialists is whether it is permitted to buy and sell using activities such as the example above.

Shari'ah economic law scholars have conflicting viewpoints regarding the legitimacy of *bai' al-mu'aṭab*. There are two schools of thought: The first group of Hanafi, Māliki and Hanābilah viewpoints contends that the *bai' al-mu'aṭab* contract is legal regardless of whether the things being traded are present or absent because it has become a community tradition in terms of trading. This is the person who is in the contract, the seller and the buyer, and there is a clear indication (*dalālah zāhirah*) in the implementation of the contract that reveals the realization of mutual consent between the seller and the buyer.³³ Even among Hanafi academics, the price of the *bai' al-ta'āṭi* contract must be fully recognized to avoid ambiguity, which has a negative consequence and promotes disagreement.³⁴

According to the second group of Syāfi'i scholars, *bai' al-ta'āṭi* contract is illegal since there is no solid indication that the contract between the seller and the buyer is by deed, and based on the principle law (*al-aṣḥ*) that the sale and purchase agreement (*uqḍ al-bai'*) and ṣiḡat

(*ijāb wa al-qabūl*) must be said clearly, with "accept for sale and accept for purchase."³⁵

Criticizing the views of the two groups of opinion about the validity of the *bai' al-mu'aṭab* contract mentioned above, the author believes that the majority of scholars (*jumbūr fuqahā'*) argue that the *bai' al-mu'aṭab* contract is legal and permissible because it has become a tradition of society in general in Indonesia in transacting with deeds (*ta'āṭi*). Besides, *bai' al-mu'aṭab* contract adheres to the legal requirement of "preventing obstacles and difficulties (*raf' al-haraj wa al-masyaqah*)." Buying and selling transactions have become necessary in the current era of free market globalization, which entrepreneurs technically carry out, traders and other business communities with clear labels on the goods being traded, and potential consumers already understand how to make transactions or not on the desired item. Sayid Sabiq appears to have underlined in this context that "clear words are not required in the realization of *ijāb* and *qabūl*, because what is considered in the contract is the purpose (will) and its meaning, not the conversation and the statement."³⁶

Meanwhile, the author believes that the opinions of the second group of Syāfi'i scholars are not practical or contextual enough, given that the business world of commerce in the global age and the contemporary free market have altered dramatically in response to the changes and advancements

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Sayid Sābiq, *Fiqh al-Sunnah* ..., h. 127.

of the times. Entrepreneurs in the business sector have produced item labels that consumers can understand so that buying and selling transactions are usually carried out with deeds. This practice has ramifications for legal reforms and development in Indonesia, particularly sharia economic law. Al-Burnū contends in his book that "changes in law arise as a result of changes in place, time, and circumstances."³⁷ Ibn Qayyim al-Jauziyyah added, "changes and variances in fatwas (*'illah al-hukm*) might emerge due to differences in time, place (environment), circumstances, objectives, and customs."³⁸

Third, *bai' al-juz'āf*. *Bai' al-juz'āf* refers to a sale and purchase transaction whose exact size is uncertain.³⁹ This purchasing and selling transaction model was historically recognized and practiced (*al-'urf bi al-fi'ly*) among companions during the Prophet Muhammad's time. They carry out a *bai' al-juz'āf* contract between the seller and the buyer in trading centers where the goods are visible, but the amount is unknown, and the community as a whole has done this without questioning the practices, even though it is predictably suspected of containing speculative (*al-garar*) and fallacies.

Methodologically *uṣūl al-fiqh* scholars have built a theory of understanding of the texts of al-Qur'ān and hadith with the *al-qawā'id al-luġawīyah* approach, including

that the texts of al-Qur'ān and hadith show *'ām*, and *khāṣ*. Among *uṣūl* Hanafi scholars, *dalālah 'ām* can be applied in its generality. However, according to *uṣūl* Syāfi'i scholars, *dalālah 'ām* cannot be applied in its generality but must be through *takhṣiṣ* first.⁴⁰ According to the author's understanding, some hadith writings on *bai' al-juz'āf* contain general prohibitions and exceptions. So it's similar to a prohibition on *bai' al-salm* or *bai' al-ma'dūm*. The text of the hadith was reported by Imam Bukhri and Muslim from Ibn Umar, who said: "The companions used to buy food when they were in a vehicle on a *juz'āf* trip until Rasulullah SAW prohibited them from practicing *bai' al-juz'āf* so that the contract has migrated from its original site."⁴¹

The hadith appears to indicate a broad restriction. As a result, it can be comprehended and specified through *takhṣiṣ*. *Takhṣiṣ* These general premises can be accomplished via the *qiyās*, *istihsān*, *istiṣlāḥ*, and *'urf/al-'ādah*. A legal process like this can conclude that the *bai' al-juz'āf* contract is permissible as long as the pillars, terms, and items being traded (*al-ma'qūd 'alaiḥ*) are met. *Bai' al-juz'āf* has become a trend and a tradition in the modern business world, particularly in this period of globalization and free markets.

Nonetheless, in the discussion and study of *bai' al-juz'āf* among traditional scholars, there are conflicting perspectives

³⁷Muhammad Sidiq bin Ahmad al-Burnū, *al-Wajiz fi Idāb Qawā'id al-Fiqhyal-Kullīyah* (Bairut: Mu'assasah al-Risālah, 1404 H/1983 M), h. 182.

³⁸ Ibn Qayyim al-Jauziyyah, *A'lām al-Munawwi'īn* ..., h. 483.

³⁹ Sayyid Sābiq, *Fiqh al-Sunnah* ..., h. 137.

⁴⁰Zaky al-Din Sya'bān, *Uṣūl al-Fiqh* ..., p. 229-231.

⁴¹Sayyid Sābiq, *Fiqh al-Sunnah* ...,p. 138.

on whether or not *bai' al-juz'āf*. *Al-a'immah al-arba'ah* (Abū Hanifah, Malik, Syāfi'i, and Ahmad) generally do not accept it, but 'Aṭā' bin Abi Rabbah and Ibn Abi Malikah do. In this situation, the author agrees with and supports the last-mentioned scholars' viewpoint, arguing that the problem of *bai' al-juz'āf* is not overtly restrictive but rather focuses on traditions performed by mankind, or society in general, in the contemporary business world. Al-Suyūṭī verifies and binds with a legal norm that "all that comes from syara' is absolute (used as a reference), but there are no stipulations in religion and no semantic (linguistic) research. Therefore, everything is restored to '*urf*'".⁴²

■ Closing

Based on the preceding description and discussion, the following conclusions can be drawn:

1. The position of '*urf*', both as a legal argument and as a means of *ijtihād* in imposing law, is crucial and has consequences for constructing present Shar'ah economic law.
2. The *bai' al-salm* (*bai' al-ma'dūm*), *bai' al-mu'āṭah*, and *bai' al-juz'āf* are permissible and considered valid transaction contracts in the context of Shari'ah economic law as long as the pillars and requirements are met because it has become a public tradition and is practiced in the business world in the contemporary free market global era.

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⁴² Al-Suyūṭī, *al-Aṣyāb* ..., p. 93.

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