

Examining the Application of Al-'Urf in Islamic Financial Contracts: Insights and Implications for Modern Banking Products

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ARTICLE INFO

Keywords:

Al-'urf; Bai' Mu'atab; Istishna; Profit-Sharing Arrangements.

How to cite:

Haisy, Noorwahidah. "Examining the Application of Al-'Urf in Islamic Financial Contracts: Insights and Implications for Modern Banking Products." *At-Taradhi: Jurnal Studi Ekonomi* 14, no. 1 (2023): 58-73.

ABSTRACT

This study aims to investigate various examples of the implementation of al-'urf as a source of law in Islamic economy. The study used qualitative approach, which involves a review of relevant literature and an analysis of primary sources. The findings of this study suggest that the use of 'urf in various practices of Islamic financial contracts including bai' mu'atab, istishna, and profit-sharing arrangements in mudharabah or musharakah contracts is a long-lasting application that has become staple in modern banking products. However, we also discovered some challenges in these practices such as the lack of contract standardization, the absence of clear guidelines for the calculation of profits and losses, and the lack of awareness among the general public about the contracts. Future research could explore these issues to offer new standards and guidelines, or suggest ways to arise awareness of Islamic contracts.

Penelitian ini bertujuan untuk menganalisa berbagai contoh implementasi al-'urf sebagai sumber hukum dalam ekonomi Islam. Pendekatan yang digunakan dalam studi ini adalah kualitatif, melalui peninjauan terhadap literatur yang relevan dan analisis terhadap sumber-sumber primer. Temuan dari penelitian ini menunjukkan bahwa penggunaan 'urf dalam berbagai praktik kontrak keuangan Islam, seperti bai' mu'atab, istishna, dan pengaturan bagi hasil dalam kontrak mudharabah atau musyarakah, merupakan aplikasi yang sudah lama digunakan dan menjadi bagian penting dalam produk perbankan modern. Namun, kami juga menemukan beberapa tantangan dalam praktik-praktik ini, seperti kurangnya standarisasi kontrak, ketidakjelasan panduan untuk perhitungan keuntungan dan kerugian, dan kurangnya kesadaran di kalangan masyarakat umum tentang kontrak-kontrak tersebut. Penelitian yang akan datang dapat mengeksplorasi isu-isu ini untuk memberikan standar dan panduan baru, atau memberikan saran tentang cara meningkatkan pengetahuan publik tentang kontrak-kontrak Islam.

Introduction

The Islamic economy has garnered significant attention in recent years due to its distinct principles and practices that set it apart from conventional finance. Central to the principles of Islamic economy is the prohibition of riba (interest), which has necessitated the development of a range of financial instruments and contracts that adhere to Islamic law.

Al-`urf, or custom, has emerged as a noteworthy source of Islamic law in the realm of finance.

Al-urf has long been recognized as a legal concept in Islamic jurisprudence, referring to the prevalent customs and practices within a specific society that carry legal weight. In the context of the Islamic economy, al-urf has been utilized to formulate various financial products and contracts that conform to Islamic law. For instance, the concept of *tawarruq*, involving the sale of a commodity on credit followed by its immediate resale for cash, has been developed based on customary commodity trading practices observed in Islamic societies.

Nevertheless, the utilization of al-urf as a source of law in the Islamic economy has sparked debates among scholars. Some contend that it may dilute Islamic principles and practices by potentially accommodating practices that contradict Islamic law. For instance, incorporating elements of conventional finance, such as interest-based transactions, which are prohibited in Islamic finance, could arise from the application of al-urf in the development of financial products and contracts.

Despite the ongoing debates, al-urf remains a significant legal source in the domain of Islamic finance. Its application has facilitated the creation of diverse financial products and contracts that align with Islamic law, contributing to the expansion of the Islamic economic sector. However, it is crucial to ensure that the utilization of al-urf remains consistent with Islamic principles and practices, safeguarding the integrity of the Islamic economy.

Previous research discussing about al-`urf has focused on its role in conflict resolution. Kasim & Nurdin underscored the significance of adat-based conflict resolution as an effective and culturally rooted mechanism in Acehese society.¹ By integrating adat practices with Islamic law principles of al-`urf, this approach upholds social harmony and contributes to the broader discourse on conflict resolution strategies. Djawas & Samad also revealed various patterns of resolving family disputes through adat mechanisms in Aceh, involving multiple parties such as *Jurong*, *Keuchik*, *Tuha Peut*, *Teungku Imum*, *Imum Mukim*, and the designated dispute resolution locations, often taking place at *meunasah* or occasionally at the *Keuchik's* house.² These observed adat-based dispute resolution practices align with the principles of Islamic law, specifically categorized within the concept of *urf*, and offer various benefits that contribute to family well-being. Meanwhile in Kalimantan, Helim et al. studied the preference of the *Muara Teweh* Muslim Dayak community for *Bapalas* over other resolution settlement, as it aligns with the

¹ Fajri M. Kasim and Abidin Nurdin, "Study of Sociological Law on Conflict Resolution Through Adat in Aceh Community According to Islamic Law," *Samarab: Jurnal Hukum Keluarga Dan Hukum Islam* 4, no. 2 (December 28, 2020): 375–97, <https://doi.org/10.22373/sjkh.v4i2.8231>.

² Mursyid Djawas and Sri Astuti Abdul Samad, "Conflict, Traditional, and Family Resistance: The Pattern of Dispute Resolution in Acehese Community According to Islamic Law," *Samarab: Jurnal Hukum Keluarga dan Hukum Islam* 4, no. 1 (June 30, 2020): 65–84, <https://doi.org/10.22373/sjkh.v4i1.5271>.

principles of Islamic law, specifically within the framework of *ʿurf* and the concept of *islah*.³

Others also discussed the relationship between *al-ʿurf* and women or gender issues. Mehregan explored historical and social factors that shaped women's law in Islam, including polygyny, inheritance rights, marriage regulations, the process of testimony and acceptable forms of evidence in legal matters, *diyya* (blood money), the exclusion of women from the judiciary, the system of issuing *fatwa* (legal opinion), the natural right of guardianship (*wilaya*) over underage children after divorce, and regulations related to the veil. He explained how customs and practices from pre-Islamic society influenced the formation and interpretation of Islamic legal principles.⁴ Duderija then examined the role of *ʿurf* in shaping gender norms and challenged the gender oppositionality thesis. He argued that gender oppositionality thesis has significantly shaped the interpretation of the Qur'an and Sunna concerning gender issues. This interpretation has, in turn, informed the construction of patriarchal traditional Islamic law and ethics. Of particular concern is the conceptual linkage between women as “sources of chaos” (*fitna*), male honor (*ʿird*), and sexual jealousy (*ghairat*) in (neo)-traditional interpretations of the Islamic tradition, which perpetuate and problematize the understanding of gender dynamics within Islamic societies.⁵ In his most recent paper, Duderija also explored the construction of religious ideals for Muslim women by examining two sources that document Bosnian Muslim (Bosniak) customs in three thematic areas: the nature of female sexuality, gender segregation and veiling, and husband-wife dynamics and corresponding gender roles and norms. He argued that the portrayal of a religiously ideal Bosnian Muslim woman strongly aligns with the ideals propagated in mainstream Sunnism. These ideals are based on the belief that women possess a morally corrupting sexuality, and thus strict segregation and veiling are deemed essential. Furthermore, his study also highlights the portrayal of husbands as having authority and control over their wives within these religious ideals.⁶

On broader context, Najib studied *al-ʿurf* concept within the Indonesian *madhhab*, exploring its emergence, evolution, and its influence on legal products related to Islamic law in Indonesia. He revealed that the notion of Indonesian *madhhab* has undergone

³ Abdul Helim, Sabarudin Ahmad, and Padliator Padliator, “Bapalas as Alternative Dispute Resolution of Fighting on Muslim Dayak Community in Muara Teweh, Central Kalimantan,” *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 1 (June 27, 2022): 331–45, <https://doi.org/10.22373/sjhk.v6i1.12379>.

⁴ Abbas Mehregan, “Islam-Arabic Culture and Women’s Law: An Introduction to the Sociology of Women’s Law in Islam,” *International Journal for the Semiotics of Law - Revue Internationale de Sémiotique Juridique* 29, no. 2 (June 1, 2016): 405–24, <https://doi.org/10.1007/s11196-016-9467-8>.

⁵ Adis Duderija, “The Custom (*ʿurf*) Based Assumptions Regarding Gender Roles and Norms in the Islamic Tradition: A Critical Examination,” *Studies in Religion/Sciences Religieuses* 45, no. 4 (December 1, 2016): 581–99, <https://doi.org/10.1177/0008429815596549>.

⁶ Adis Duderija, “The Concept of a Religiously Ideal Muslim Woman in Two Treatises on the Customs of Bosnian Muslims,” *Hawwa*, May 12, 2023, 1–18, <https://doi.org/10.1163/15692086-12341395>.

continuous development in line with the evolving scholarly thinking about `urf.⁷ In Malaysia, Azhar & Hussain studied zakat fatwas issued by the Jawatankuasa Fatwa Negeri Kedah. They stated that these fatwas are aligned with the provisions of Enakmen Mufti, demonstrating openness to different madhhab and fulfilling the requirements of *maslahah* (public interest) and `urf.⁸

Other researches explained various derivatives of `urf studies, such as `urf in the division of jointly acquired income,⁹ tradition of Gama (a ceremony to welcome the bride as part of the groom's family) as `urf in the Muslim community of Mongondow, North Sulawesi,¹⁰ and a counter-narrative to Tahzib al-Akhlak movement that opposes certain religious rituals.¹¹ However, there is a lack of research that examines the implementation of al-`urf as a source of law in Islamic economy, save for Zakariyah's study that explores whether mortgages can be considered permissible under the maxim that "custom is authoritative".¹² Therefore, our study aims to fill this gap by investigating various examples of the implementation of al-`urf as a source of law in Islamic economy.

Literature Review

1. Definition of al-`urf

Al-`urf is an Arabic term that refers to the customs and practices that are prevalent in a particular society. In Islamic jurisprudence, Al-`urf is considered as a source of law that can be used to determine the legality of an action or transaction. The term Al-`urf is derived from the Arabic word *`arafa*, which means "to know" or "to recognize."

⁷ Agus Moh Najib, "Reestablishing Indonesian Madhhab: `Urf and the Contribution of Intellectualism," *Al-Jami'ab: Journal of Islamic Studies* 58, no. 1 (July 31, 2020): 171–208, <https://doi.org/10.14421/ajis.2020.581.171-208>.

⁸ Alias Azhar and Mohammad Azam Hussain, "The Methodology of Fatwa Istihsan in The State of Kedah: Analysis of Zakat Law Issues," *Journal of Critical Reviews* 7, no. 8 (2020), <https://www.jcreview.com/admin/Uploads/Files/61c8bdad947943.32129388.pdf>.

⁹ Raihanah Abdullah, Patricia Martinez, and Wirdati Mohd. Radzi, "Islam and Adat: Considering The Wife's Moral Contribution in The Division of Harta Sepencaharian in Malaysia," *Indonesia and the Malay World* 38, no. 111 (July 1, 2010): 161–80, <https://doi.org/10.1080/13639811.2010.489349>.

¹⁰ Rosdalina Bukido et al., "Harmonization of Customary and Islamic Law in The Gama Tradition of The Muslim Mongondow Community of North Sulawesi," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 22, no. 2 (2022): 239–54.

¹¹ Muhammad Rasheed Arshad and Farid Bin Masood, "Discourse on the Significance of Rituals in Religious Socialization," *Journal of Islamic Thought and Civilization* 9, no. 2 (December 27, 2019): 194–211, <https://doi.org/10.32350/jitc.92.10>.

¹² Luqman Zakariyah, "Legal Maxims and Islamic Financial Transactions: A Case Study of Mortgage Contracts and the Dilemma for Muslims in Britain," *Arab Law Quarterly* 26, no. 3 (January 1, 2012): 255–85, <https://doi.org/10.1163/15730255-12341240>.

Etymologically, the term al-'adah means repetition, whether in words or actions. Al-'adah is derived from the word *al-'aud* (العود) or *al-mu'awadab* (المعاودة), which means repetition.¹³

Islamic jurists define 'urf or custom as "anything that has been accustomed and continuously practiced by society, both in words and actions" ¹⁴. Etymologically, al-'urf means something that is considered good and accepted by common sense. According to the majority of scholars, al-'urf is also called adat (custom), as matters that have been known and repeatedly performed by humans become customary practices. Adat refers to anything that has been accustomed and continuously practiced by society, both in words and actions.¹⁵

Based on the above definition, it can be said that 'urf refers to good words or actions that have become popular and repeatedly performed by many people in society. The use of 'urf as a legal basis is supported by the Quranic verse in Surah Al-A'raf (7:199), where Allah commands Muslims to do what is ma'ruf (good) and to turn away from the ignorant.

This verse indicates that Allah commands the use of 'urf, referring to something that is considered good by society. This command can be understood as an instruction to perform what has been deemed good, thus becoming a tradition within a society. This call is based on the consideration of good customs that are deemed beneficial for the well-being of the society.

Another basis is the statement of the Prophet Muhammad (peace be upon him) narrated by Ahmad from Ibn Mas'ud:¹⁶

مَا رَأَى الْمُسْلِمُونَ حَسَنًا فَهُوَ عِنْدَ اللَّهِ حَسَنٌ

"Whatever is deemed good by the Muslim community is also good in the sight of Allah."

This explicit statement from the Prophet shows that whatever is considered good by the Muslim community can be used as a basis for determining that it is also considered good in the sight of Allah.¹⁷

In essence, 'urf can facilitate human life by helping to provide legitimacy to good regulations in societal living and the lives of its members. In terms of its application as a legal basis, 'urf differs from ijma' (consensus). 'Urf is formed from the customs of different people at different levels, while ijma' is formed through the agreement of mujtahids (Islamic legal scholars). Ijma' is limited to the realm of mujtahids and does not include laypeople.

According to Wahbah az-Zuhaily, ijma' is formed through the agreement of mujtahids from the community of the Prophet Muhammad after his demise. Ijma' can be used as

¹³ H. A. Djazuli, *Kaidah-Kaidah Fikih* (Jakarta: Prenada Media, 2010).

¹⁴ Mukhtar Yahya and Fatchur Rahman, *Dasar-Dasar Pembinaan Hukum Fiqh Islami* (Bandung: al-Ma'arif, 1997).

¹⁵ Abdul Wahab Khalaf, *Ilm Ushul Al-Fiqh* (Kuwait: Dar al-Qalam, 1978).

¹⁶ Ahmad, *Musnad Ahmad Bin Hanbal* (Beirut: Dar al-Kutub, 1999).

¹⁷ Muhammad Abu Zahrah, *Ushul Al-Fiqh* (Kairo: Dar al-Fikri, 2010), <https://waqfeya.net/book.php?bid=5397>.

a legal basis when it is sourced from Islamic law. Since it must be based on Islamic law, 'ijma' is considered a binding authority.¹⁸ On the other hand, 'urf does not require consensus, nor is it required to be sourced from Sharia evidence, and it does not have perpetual legal force because 'urf can be valid or flawed.

Scholars of *usul al-fiqh* (principles of Islamic jurisprudence) state that 'urf can be used as one of the sources in determining Islamic law if it meets the following conditions:

- a. 'Urf is beneficial and acceptable to common sense. This condition is a requirement for valid 'urf to be accepted generally.
- b. 'Urf is applicable and widespread. This means that 'urf applies to the majority of people in the place where the case occurs, and its application is embraced by the majority of society. The generality of 'urf applies to a specific community or a broader society.
- c. 'Urf existed before the occurrence of the case. The 'urf that serves as a basis for legal determination is the 'urf that existed before the legal event took place.
- d. 'Urf does not contradict or ignore Sharia evidence, nor does it contradict established principles.

2. Classification of al-'Urf

To provide better understanding of 'urf and its implementation in society, scholars classify 'urf into several aspects and perspectives. In terms of its object, scholars divide it into two types:¹⁹

- a. *Al-'urf al-lafẓi* or *qanūly* refers to the customary usage of certain vocabulary or expressions in explaining something, so the meaning of the expression is understood and commonly known among the people. For example, the word “meat” does not include fish. Therefore, when a meat transaction occurs, it does not refer to fish meat.
- b. *Al-'urf al-'amali* is the customary behavior of the community related to common actions or civil transactions. Common actions refer to the community's actions in their daily lives that are not related to the interests of others, such as the habit of wearing specific clothing for certain occasions. Regarding civil transactions, it refers to the community's habit of conducting transactions in a particular way.

Next, in terms of its acceptance or rejection, 'urf can be divided into two:

- a. *Al-'urf sabih* refers to 'urf that is good and acceptable because it does not contradict Islamic law. In simpler terms, this particular al-'urf does not alter the classification of something forbidden (*haram*) as permissible (*halal*). To illustrate, the customary practice of rewarding someone who sells goods effectively, even if the reward was not initially promised. Such a tradition is permissible as long as it does not involve elements of usury, gambling, uncertainty, injustice, or anything forbidden.
- b. *Al-'urf fasid* (corrupt) refers to 'urf that is not good and unacceptable because it contradicts Islamic law. Scholars unanimously agree that corrupt 'urf cannot be used

¹⁸ Wahbah Zuhaili, *Ushul Al-Fiqh al-Islami* (Damaskus: Dar al-Fikri, 2005).

¹⁹ Yahya and Rahman, *Dasar-Dasar Pembinaan Hukum Fiqh Islami*.

as legal evidence. Financial transactions conducted based on corrupt 'urf are legally void, such as the customary practice of debt with certain benefits.

Lastly, in terms of its scope, 'urf is also divided into two parts:²⁰

- a. *Al-'urf al-'am* refers to a general custom that applies to a large part of the society without being limited to a specific country, nation, or religion. For example, using public restrooms to maintain modesty while relieving oneself, or paying a fixed fare for public transportation without considering the exact distance traveled.
- b. *Al-'urf al-khas* refers to a custom that is specific to certain communities or regions. For example, the customs observed among traders. If a purchased item has a defect, the buyer has the right to return it to the seller. However, for other types of defects, the buyer is not allowed to return the item.

Among scholars, there is a consensus that 'urf sahih (valid custom) is considered as one of the authoritative sources of law, whether it pertains to al-'urf al-'am (general custom) or al-'urf al-khas (specific custom), as well as in the context of al-'urf al-lafz (verbal custom) and al-'urf al-'amali (practical custom). However, there are variations among scholars regarding the extent of its application. According to Hanafi scholars, widespread and consistent 'urf sahih (known as al-'urf ash-shahih al-'am al-muntharid) not only serves as legal evidence, but also holds the ability to override rulings based on qiyas (analogical reasoning) and even invalidate other legal evidence. On the other hand, specific 'urf can only override the opinions of a specific school of thought based on their ijthad of speculative texts (*nas zanni*), and it cannot supersede the textual evidence of Islamic law (*nas syara'*) or the principles derived from the practices of the companions (*atsar*). Meanwhile, al-'urf al-fasid is completely unrecognized and rejected in legal matters.

3. Legal Status of al-'Urf

According to Imam al-Shatibi (a scholar of Maliki *usul al-fiqh*) and Imam Ibn Qayyim al-Jawziyya (a scholar of Hanbali *usul al-fiqh*), all scholars of various schools of thought accept and consider 'urf as one of the legal sources when determining rulings, in the absence of clear evidence from the Qur'an or Sunnah. Hanafi scholars employ the principle of *istihsan al-'urf* (istihsan based on 'urf),²¹ prioritizing 'urf over subtle qiyas and general textual evidence. Similarly, Maliki scholars consider the 'urf of the people of Madinah as a basis for legal rulings, giving it precedence over isolated hadiths.²²

Imam al-Shafi'i, when he was in Egypt, modified some of his opinions on certain laws that he had previously established while he was in Baghdad. This change was influenced by the difference in 'urf (custom). As a result, Imam Shafi'i has two positions known as *qaul qadim* (old position) and *qaul jadid* (new position). *Qaul qadim* represents the

²⁰ Zahrah, *Usul Al-Fiqh*.

²¹ Gideon Libson, "On the Development of Custom as a Source of Law in Islamic Law," *Islamic Law and Society* 4, no. 2 (January 1, 1997): 131–55, <https://doi.org/10.1163/1568519972599770>.

²² Nasruddin Yusuf and Faradila Hasan, "Considering the Power of Ahl Madinah Malik Bin Anas Ijma as an Islamic Legal Source," *Kavanua International Journal of Multicultural Studies* 1, no. 1 (June 30, 2020): 30–37, <https://doi.org/10.30984/kijms.v1i1.10>.

opinion of Imam Shafi'i during his time in Baghdad, while qaul jadid represents his opinion during his time in Egypt.²³

Based on the views of scholars from various schools of thought, 'urf sahih must be considered by *mujtahid* (jurists) in determining legal rulings and upheld by judges in their decisions. This is because what has become customary and practiced by many people serves their needs and interests. As long as these customs do not contradict the principles of Islamic law, they should be upheld.²⁴ Islamic law itself preserves the good customs and practices of the Arab people in determining legal rulings. For example, Islamic law establishes the concept of *kafa'ah* (compatibility) in marriage, imposes fines as an alternative to the punishment of *qisas* (retribution) if the family of the victim does not seek *qisas*, and organizes the orderly distribution of inheritance and guardianship based on the rightful heirs.

Based on these considerations, scholars of *usul al-fiqh* have formulated the maxim "*Al-'adatu Mubakkamah*" (Customary practices are considered established laws).

On the other hand, corrupt 'urf does not deserve attention, as preserving it would contradict the textual evidence of Islamic law or invalidate Islamic rulings.²⁵ Therefore, if someone adopts corrupt practices in agreements, such as those involving usury or deceitful elements, those practices do not have any influence in validating such agreements. Under extraordinary circumstances, such as cases of extreme necessity or urgency, these agreements can be evaluated from alternative perspectives to determine their permissibility. However, in such cases, permissibility is justified based on the urgency of the situation rather than the prevalence of the practice.

Research Methodology

The primary objective of this study is to explore how Al-'urf is applied as a legal source within the Islamic economy. To achieve this objective, a qualitative research approach will be employed. The study will consist of two main phases: a comprehensive literature review and a case study analysis.

The literature review will involve an extensive examination of existing scholarly works, including academic journals, books, and other relevant sources, to establish a solid theoretical framework for the study. Additionally, the literature review aims to identify key issues and challenges associated with the implementation of Al-'urf in the context of the Islamic economy.

The case study analysis will involve an in-depth analysis of the implementation of Al-'urf in a selected Islamic economy. The case study will involve observing the implementation of Al-'urf in a selected Islamic economy. The observations will be conducted by the

²³ Ahmad Arief, Kurniati, and Misbahuddin, "Acceptance of Ashab Al-Shafii on The Changes of Qaul Qadim and Qaul Jadid of Imam Shafi'i," *Hunafa: Jurnal Studia Islamika* 19, no. 2 (December 10, 2022): 175–91, <https://doi.org/10.24239/jsi.v19i2.683.175-191>.

²⁴ Luqman Zakariyah, "Legal Maxim of Custom: 'Custom Is Authoritative' (al-'Āda Muḥakkama)," in *Legal Maxims in Islamic Criminal Law: Theory and Applications* (Brill Nijhoff, 2015), 173–92, https://doi.org/10.1163/9789004304871_008.

²⁵ Shafi'i Bello, "Application of 'Urf in Islamic Law," SSRN Scholarly Paper (Rochester, NY, January 11, 2013), <https://doi.org/10.2139/ssrn.2199354>.

researcher to gain insights into the implementation of Al-'urf in practice. The data collected from the observations will be analyzed using thematic analysis to identify the key themes and patterns related to the implementation of Al-'urf in Islamic economy.

The findings of the study will be presented in a narrative form, supported by relevant data and quotes from the observations. The findings will be analyzed and discussed in relation to the existing literature on Al-'urf and its implementation in Islamic economy. The study will conclude with recommendations for the implementation of Al-'urf in Islamic economy and suggestions for future research.

Results and Discussion

Many Shariah financial activities rely on the legal basis of Al-'urf, not only in addressing contemporary Shariah financial issues but also in various types of economic transactions of ancient times. To have better focus in studying it, we select three use case of al-'Urf in Islamic economy context with long lasting application: Bai' Mu'atah, Istishna, and Musyarakah/Mudharabah:

1. Bai' Mu'atah

Bai' al-mu'atah refers to a sale transaction conducted by individuals without explicitly stating the statement of offer and acceptance (such as saying "I sell it to you" or "I accepted it from you and agreed to pay for it with the price we have agreed on").²⁶ In supermarkets or other shopping centers, it is common for buyers to pick the desired items themselves and proceed to the cashier for payment without any explicit offer and acceptance.

Furthermore, alternative payment methods such as electronic currency, ATM cards, and various other means have gained widespread acceptance. Within different sectors of the economy, consumer preferences have shifted towards non-cash transactions conducted online. These encompass a wide range of activities, including toll payments, monthly salary transfers, electricity bill settlements, ride-hailing services, food ordering and delivery, ticket and hotel reservations, purchases of household furniture, acquisitions of books, and many other transactions. People are facilitated by modern technological advancements to engage in electronic transactions.

In the field of *fiqh muamalah* (Islamic commercial law), the element of offer and acceptance (*shighat ijab qabul*) is considered crucial as it represents the mutual consent of the parties involved. In the case of mu'atah transactions, the essence of mutual consent is fulfilled.²⁷

To better understand this transaction, we conducted an observation on implementation of Bai' Mu'atah in a various online marketplace. The observations were analyzed using the Urf theory to identify the key themes and patterns related to the implementation of Bai' Mu'atah in practice.

²⁶ Muhammad Ayub, "A Comprehensive Glossary of Terms in Islamic Commercial Law - Business, Banking and Finance," *Journal of Islamic Business and Management* 219, no. 1237 (December 2012): 1–83, <https://doi.org/10.12816/0004983>.

²⁷ Siti Salwani Razali, "The Invitation to Treat and Mu'atah in Online Contracts," *American Journal of Islam and Society* 26, no. 2 (April 1, 2009): 79–101, <https://doi.org/10.35632/ajis.v26i2.379>.

Our observations revealed that Bai' Mu'atah is a commonly used sale contract in the Indonesian online marketplaces. The contract is used for various items, including foods, furnitures, and gadgets. The process of *ijab qabul* in transactions of online marketplace has been replaced by a more automated process without direct interaction between the buyer and the seller. The use of digital platforms and information technology enables buyers to select desired products or services, add them to the shopping cart, and make electronic payments through predetermined methods. This process does not require explicit verbal or written offer and acceptance between the buyer and the seller, as the act of purchasing itself is considered to imply mutual consent. In this regard, software and automated systems in marketplaces act as intermediaries to facilitate such transactions. Therefore, in the context of marketplaces, the principles of Islamic law related to *ijab qabul* in buying and selling remain relevant, although their implementation becomes more implicit and does not occur directly between the buyer and the seller.

This implementation of Bai' Mu'atah is in line with the Urf theory. The contract is based on the prevalent practices in the Islamic economy and is designed to comply with Islamic law.²⁸ The absence of explicit offer and acceptance is considered as a form of implicit agreement that is compliant with Islamic principles and practices.²⁹

However, the observations also revealed some challenges related to the implementation of Bai' al-mu'atah. One of the difficulties encountered is the limited transparency within the transaction process. The absence of clear and explicit communication regarding offers and acceptances may give rise to misunderstandings and conflicts between the involved parties. Such lack of transparency can also create opportunities for unethical behavior, including instances of overcharging or failing to meet expectations.

Furthermore, there exists a challenge in terms of legal protection for the parties engaged in the transaction. Due to the absence of explicit offer and acceptance, it may become challenging to establish and provide evidence for the agreed-upon terms and conditions, particularly when disputes arise.

2. Istishna

Bai'al-istishna' is a financing contract for ordering the production of specific goods with agreed criteria and conditions between the buyer (*mustashni'*) and the seller (*shani'*), at a mutually agreed price (usually the production cost plus the profit for the producer, but lower than the selling price), with gradual upfront payment according to the stages of the production process.³⁰

²⁸ Shawn Bayern, "Offer and Acceptance in Modern Contract Law: A Needless Concept," *California Law Review* 103 (February 1, 2015): 67–102.

²⁹ Hussein Hassan, "Contracts in Islamic Law: The Principles of Commutative Justice and Liberty," *Journal of Islamic Studies* 13, no. 3 (September 1, 2002): 257–97, <https://doi.org/10.1093/jis/13.3.257>; Tareq Moqbel and Habib Ahmed, "Flexibility and Shari'ah Compliance of Islamic Financial Contracts: An Evaluative Framework," *Arab Law Quarterly* 35, no. 1–2 (July 22, 2020): 92–115, <https://doi.org/10.1163/15730255-BJA10052>; Hasbullah Abd Rahman, "Offer and Acceptance in Islamic Law of Contract," *Jurnal Syariah* 8, no. 2 (2000): 15–32.

³⁰ Syeda Fahmida Habib, *Fundamentals of Islamic Finance and Banking* (John Wiley & Sons, Ltd, 2018), <https://doi.org/10.1002/9781119371076.ch9>.

In an *istishna'* contract, the materials and labor come from the producer, while the consumer only places an order based on their preferences. At first glance, this contract may be considered invalid (*fasid*) because the transaction object does not exist physically. However, it is permissible based on the customary practice of ordering goods that do not yet exist and making progressive payments according to the buyer's needs. According to scholars, this transaction is similar to the concept of *salam* (forward sale), which involves selling goods based on an order with upfront payment.³¹

Based on our observation on Islamic banks, it is revealed that *Istishna* is a commonly used financing contract in the transaction of Indonesian housing finance, especially in subsidized housing financing schemes (*Kredit Perumahan Rakyat/KPR*). The contract is usually agreed upon by the buyer and seller based on their mutual agreement and the prevailing market conditions.

Our literature review also revealed that the implementation of *Bai' Istishna* is in line with the *Urf* theory based on following reasons:

- a. Reflection of Common Practice: *Istishna'* reflects a common practice in society where individuals often place orders for goods that are not yet in existence but will be produced according to their specifications. It is a customary transaction where people request the creation of a specific item to meet their needs.³²
- b. Social Benefit and Convenience: *Istishna'* is based on the principle of meeting people's needs and providing convenience in transactions. It is a recognized practice that facilitates the process of acquiring goods by allowing individuals to order and pay for them gradually based on their requirements.
- c. Large Acceptance: *Istishna'* has been widely practiced and has gained acceptance among communities as a legitimate means of acquiring goods.³³ The fact that it has been customary and widely accepted reinforces its validity as a transactional method.
- d. Similarity to *Salam* Contract: *Istishna'* bears resemblance to the *salam* contract,³⁴ which is a well-established transaction in Islamic finance. Both contracts involve ordering goods in advance and making advance payments. The acceptance of the *salam* contract further supports the acceptance of the *istishna'* contract.

However, we also found some challenges related to *Istishna*. One of the difficulties faced is the absence of uniformity in the terms and conditions of the contract. Currently, Islamic banks often establish their own interpretations of *Istishna* fatwas issued by the National Sharia Board (*Dewan Syariah Nasional/DSN*). This lack of standardization can result in confusion and disagreements among the parties engaged in the contract.

Additionally, there is a lack of awareness among the general public regarding the concept of *Istishna*. Many individuals are unfamiliar with the idea of financing based on the different stages of the production process and may struggle to comprehend the

³¹ Yahya and Rahman, *Dasar-Dasar Pembinaan Hukum Fiqh Islami*.

³² Urban Wemmerlöv, "Assemble-to-Order Manufacturing: Implications for Materials Management," *Journal of Operations Management* 4, no. 4 (August 1, 1984): 347–68, [https://doi.org/10.1016/0272-6963\(84\)90021-4](https://doi.org/10.1016/0272-6963(84)90021-4).

³³ Mustafa Raza Rabbani et al., "The Response of Islamic Financial Service to the COVID-19 Pandemic: The Open Social Innovation of the Financial System," *Journal of Open Innovation: Technology, Market, and Complexity* 7, no. 1 (March 2021): 85, <https://doi.org/10.3390/joitmc7010085>.

³⁴ Mumtaz Hussain, Asghar Shahmoradi, and Rima A Turk, "An Overview of Islamic Finance," *International Monetary Fund Working Papers*, no. 120 (2015), <https://doi.org/10.5089/9781513590745.001>.

terms and conditions outlined in the contract. This lack of awareness can lead to misconceptions and disputes between the involved parties. It is crucial to address these challenges in order to ensure the effective implementation of Istishna in practical applications.

3. Profit Sharing Arrangements in Mudarabah or Musharakah Contracts

Islam does not specify the exact distribution of profit shares in mudarabah or musharakah contracts for business partnerships. The two parties of these two contracts are free to determine the profit shares ratio, as long as they both agree to the numbers.³⁵ What is explicitly regulated is the obligation for the parties involved in the business to be mutually satisfied with the collaborative activities they undertake. Other than that, the profit distribution system should also be based on the principle of fairness and transparency.³⁶

The parties engaged in the business must maintain transparency and good partnership. This is because all regular expenditures and revenues should be known to all parties involved. Profits should be distributed proportionally between the *shahibul mal* (capital provider) and the *mudharib* (entrepreneur) according to the mutually agreed terms explicitly stated in the contract. Therefore, all routine expenses related to the mudarabah business, which are not for the personal benefit of the mudharib, can be included as operational costs.³⁷

Net profits should be divided between the shahibul mal and mudharib according to the predetermined and explicitly mentioned proportions in the initial agreement. No profit sharing takes place until all losses have been covered, and the shahibul mal's equity has been repaid. These profit-sharing arrangements are then determined based on 'urf and the agreement of the parties involved in the mudarabah or musharakah contracts.

To better understand this transaction, observations were conducted on the practice of the profit-sharing arrangement in mudarabah or musharakah contracts in selected Islamic banks. It is then revealed that the profit-sharing value in mudarabah or musharakah contracts are commonly determined by the banks of Indonesia based on their profit-sharing rate in deposits, which is also determined by the current BI 7-Day Reverse Repo Rate.

The determination of profit sharing in musyarakah and mudarabah contracts is considered in accordance with the principle of 'urf because customary practices play a significant role in determining matters that are not explicitly addressed in Islamic law. In this case, the specific allocation of profit sharing is not explicitly mentioned in the textual sources of Shariah, thus falling under the domain of 'urf.

³⁵ Munawar Iqbal and Philip Molyneux, *Thirty Years of Islamic Banking History, Performance and Prospects* (Springer, 2005), <https://link.springer.com/book/10.1007/978-0-230-50322-9>.

³⁶ Mehmet Bulut and Aydın Gündoğdu, "A New Proposal for the Profit Distribution System of the Participation Banking," *Qualitative Research in Financial Markets* 15, no. 2 (January 1, 2022): 296–318, <https://doi.org/10.1108/QRFM-01-2021-0010>.

³⁷ Laila Harfiah, Atiek Sri Purwati, and Permata Ulfah, "Analysis the Effect of Profitability (ROA), Cost Ratio (BOPO), and Financing to Deposit Ratio (FDR) on the Profit Sharing Mudharabah in Islamic Banking in Indonesia," SSRN Scholarly Paper (Rochester, NY, March 21, 2016), <https://doi.org/10.2139/ssrn.2752444>.

When conducting musyarakah or mudharabah businesses, the parties involved have the freedom to determine the proportion of profit sharing based on mutual agreement. Common practices or prevailing customs in society regarding profit sharing can serve as a reference or foundation for determining the profit distribution. This allows for flexibility and adaptation to market conditions and business needs.

The findings from the observations have also highlighted several difficulties in relation to the execution of the profit-sharing arrangement. Among these challenges is the insufficient transparency in determining profits and losses. The absence of explicit guidelines for calculating profits and losses can result in misunderstandings and disagreements among the parties involved. Moreover, this lack of transparency can pave the way for unethical behaviors, such as overpricing or providing inadequate goods or services.

Conclusion

This study suggests that various practice of Islamic financial contracts including bai' mu'atah, istishna, and profit-sharing arrangements in mudharabah or musharakah contracts are in line with the `urf theory, which is the customs and practices that are prevalent in a particular society and are considered as a source of law in Islamic jurisprudence.

We also uncovered some challenges related to Islamic financial practices. One of the obstacles encountered is the absence of uniformity in the contractual terms and conditions. The lack of clear guidelines regarding these terms and conditions can result in misunderstandings and disputes between the parties involved. Additionally, there is a lack of legal safeguards for the contractual parties. The absence of explicit guidelines for profit and loss calculations can complicate the process of proving the contractual terms and conditions during disputes.

In future research, it would be beneficial to address these challenges pertaining to the implementation of Islamic finance. For instance, investigating the establishment of standardized guidelines for the terms and conditions of Islamic financial contracts could be explored. Furthermore, exploring the development of legal frameworks that provide explicit guidelines for profit and loss calculations in Islamic financial contracts would be valuable. Such research endeavors would contribute to the growth and advancement of the Islamic finance industry while simultaneously addressing the challenges associated with its implementation.

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