

THE THEORY OF AL-MASALIH AL-MURSALAH IN ISLAMIC LAW

BY

JUMA MIKIDADI OMARI MTUPAH

A THESIS PRESENTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY (Ph.D)  
IN THE FACULTY OF ARTS, UNIVERSITY OF EDINBURGH.  
JUNE 1990.



## ACKNOWLEDGEMENTS

I would like to express my appreciation and thanks to all those people and institutions who have contributed to my interests and efforts and to those who have helped me with advice and criticism.

My first thanks go to my supervisor, Dr. I.K.A. Howard, Senior lecturer in Arabic and Islamic Studies at the Department of Islamic and Middle Eastern Studies, for his guidance, patience and kindness.

I acknowledge with deep appreciation the generosity of Sheikh Ibrāhīm Afandī of Saudi Arabia and The Africa Muslim Agency of Kuwait who have provided the funds for this study. I also would like to thank my guardian and my former professor Dr. Muḥammad Abū al-Faṭḥ al-Bayānūnī for his kind assistance in my course. Many thanks also go to my advisor Dr. ʿAlī Jurayshah for his vital advice and efforts. The same kind of thanks go to Dr. M.M. Aḥsan, the Director of Islamic Foundation in U.K. for his advice and assistance. My best regards are due to Miss Crawford, the Secretary of the Department of Islamic and Middle Eastern Studies, for her endless hospitality, good services and gentle handling of the departmental matters.

Most of all, I am indebted to my wife, Zubeda Mahugu, and my family who have sustained me with unfailing encouragement and support during our stay in Edinburgh.

## ABSTRACT

### THE THEORY OF AL-MAŞĀLIḤ AL-MURSALAH IN ISLAMIC LAW.

This thesis seeks to analyse the concept of al-maṣlahah al-mursalah (unrestricted utility) as it has been developed by Muslim jurists. Chapter one discusses the legal background in which the concept developed and the area of Islamic law in which it might be deemed appropriate. It also provides the linguistic and legal definitions of the term. In chapter two, the primitive uses of the principle as used by early Muslim scholars are analysed. Although there is as yet no systematic theory, applications of al-maṣlahah al-mursalah can be clearly seen to be emerging. Chapter three outlines the systematic development of the theory in which the jurists categorise the kind of benefits appropriate to this legal principle. In chapter four, this systematisation is studied in terms of the contribution of individual thinkers including al-Ghazālī and al-Rāzī but also several other important thinkers who made their own contributions to the theory of al-maṣāliḥ al-mursalah are dealt with.

Chapter five is devoted to the work of al-Shāṭibī whose contribution to the theory is probably the most significant and lasting. Chapter six contains an analysis and critique of the work of al-Ṭūfī, who made this principle the paramount principle in Islamic law. The theory put forward by al-Ṭūfī led to the developments and redactions in the Modern Islamic World and the principle came to be discussed by modern scholars. These aspects are reviewed in chapter seven.

Chapter eight draws the distinction between the Islamic understanding of "public interest" or "utility" and Western theories on the subject.

Finally, the conclusion draws together the aspects of the study and establishes the role of al-maṣlahah al-mursalah in Islamic law as it has been developed over the years.

## LIST OF ABBREVIATIONS

El. 1 = Encyclopaedia of Islam 1st Edition.

El. 2 = Encyclopaedia of Islam 2nd Edition.

ed. = edited by / edition.

tr. = translated by / translation.

app. = appendix.

### DECLARATION.

I, Juma Mikidadi Omari Mtupah, declare that the contents of this thesis have been composed by myself.

### NOTE ON THE TRANSLITERATION.

This study follows the system of transliteration of the United States Library of Congress as outlined in the Cataloguing Service Bulletin No. 49 (November, 1958).

## TABLE OF CONTENTS

CHAPTER 1. THE ISLAMIC LEGAL BACKGROUND TO THE THEORY OF AL-MASALIH AL-MURSALAH.	6
1.1 [A]. The Shari ah	6
1.2 [B]. Fiqh: The Classical Theory	10
1.3 The Definition of Fiqh	11
1.4 The Four Major Sources of Islamic Law	12
1.5 The Divisions of Fiqh	17
1.6 The Distinction between the Shariah and Fiqh	18
1.7 The Root of Maslahah and its Meaning	19
1.7.1 The Definition of Mursalah	21
1.8 The Role of Al-masalih Al-mursalah	21
1.9 The Position of Al-masalih Al-mursalah in the Sources of the Shariah	23
1.10 Legal Ordinances in the Qur'an and Sunnah	26
CHAPTER 2. THE POSITION OF THE EARLY MUSLIM SCHOLARS AS TO THE UTILIZATION OF THE THEORY OF AL-MASALIH AL-MURSALAH	33
2.1 [A] The Position of the Companions of the Prophet (The Sahabah)	33
2.2 [B] The Position of the Tabiin (The Followers of the Sahabah) Regarding to the Theory of Al-masalih Al-mursalah	35
2.3 [C] The Position of the Imams of the Schools of thought as regards the Theory of Al-masalih Al-mursalah	36
2.3.1 Imam Malik (The Malikis) and Al-masalih Al-mursalah	37
2.3.2 The Position of Imam Ahmad ibn Hanbal (The Hanbalis) as regards the Theory of Al-masalih Al-mursalah	39
2.3.3 Imam Abu Hanifah (The Hanafis) and the Theory of Al-masalih Al-mursalah	41
2.3.4 Imam al-Shafii (The Shafiis) and the Theory of Al-masalih Al-mursalah	45
2.3.5 General Conclusion of the Four Imams' Attitude	49
CHAPTER 3. THE DEVELOPMENT OF THE LEGAL UNDERSTANDING OF MASLAHAH	52
3.1 [A] The Legal Definition of Maslahah	52
3.2 [B] Al-maslahah Al-mursalah as a means of Decision Making	57
3.3 [C] The Main Reservations in the Application of the Theory of Al-masalih Al-mursalah	60
3.4 [D] The Scope and Classification of Benefits	64
3.4.1 The Necessary Benefits	70
3.4.2 The Reasonable Benefits	74
3.4.3 The Luxurious Benefits	75
3.4.4 The Cancelled Benefits	77
3.4.5 The Unrestricted Benefits	81

CHAPTER 4. MASLAHAH AS A GENERAL AND A TECHNICAL TERM	85
4.1 Maslahah as a General Term	85
4.2 Maslahah as a Technical Term	88
4.3 Two Main Stages in the Development of the Concept of Maslahah	90
4.3.1 Al-Ghazali's Concept of Maslahah	90
4.4 The Influence of al-Ghazali on other Jurists	98
4.5 Al-Razi's Concept of Maslahah	99
4.6 The Main Trends of the Concept of Maslahah During the Period between al-Razi and al-Shatibi	106
CHAPTER 5. AL-SHATIBI'S TREATMENT OF MASLAHAH	118
5.1 The Maqasid Doctrine	118
5.2 The Meaning of Illah in Usul	120
5.3 The two Approaches of observing the Masalih of this World	130
5.4 How the Masalih of the Hereafter are determined	136
5.5 Maslahah should be Universal	139
5.6 Al-masalih Al-mursalah are not identical with Bidah	144
CHAPTER 6. NAJM AL-DIN AL-TUFI AND MASLAHAH	147
6.1 Al-Tufi's Treatise on Maslahah	147
6.2 The Meaning of the Hadith "La darar wala dirar"	147
6.3 The Opinion of al-Tufi concerning the Consideration of Benefit	149
6.4 The Consideration of Maslahah and ijma	152
6.5 Maslahah is the Intention of the Lawgiver	153
6.6 Maslahah in the Sunnah	156
6.7 The Consideration of Maslahah by Qiyas	157
6.8 The Root of ijma and Its Basis	159
6.9 Objections to the Proofs of ijma	167
6.10 The Source of Dispute among the followers of the Madhahib	172
6.11 Al-Tufi's Conclusions on Maslahah	174
CHAPTER 7. MODERN STUDIES AND DEFINITIONS ON THE CONCEPT OF MASLAHAH	217
CHAPTER 8. THE DIFFERENCE BETWEEN THE THEORY OF AL-MASALIH AL-MURSALAH AND THE WESTERN THEORIES OF PUBLIC INTEREST	236
8.1 The Basis of Difference between the Theory of Al-masalih Al-mursalah and the Western Theories of Public Interest	242
CONCLUSION	246
BIBLIOGRAPHY	254

## INTRODUCTION

There is a common misconception about Islamic Law that there is no room in it for any progress or advancement. It is not that only non-Muslims are a prey to this misunderstanding, but even many Muslims have been influenced by this idea who are unacquainted with character and spirit of Islamic law. What mainly is responsible for this attitude is the concept that generally exists in the mind of the common man with regard to Islamic Law and man-made law. About man-made law every one knows that its composition and compilation are primarily influenced by the needs and exigencies of society. Therefore, changes in the law kept pace with the changes in social conditions. Likewise, in future, too, it will probably undergo changes at the same speed as that of social environment.

On the other hand, Islamic Law is not at all bound by any changes that might occur in society. Its foundations rest on Divine revelation, on the wisdom of the Prophet and on its understanding of the eternal values of logic and human nature. The nature of Islamic law is such that human desires and day-to-day events should not influence its composition in the least, for it has been sent down to human beings by their Creator. His Messenger then elucidated and elaborated it to mankind. And no one except God the Almighty and His Prophet has

any power to alter His law in the slightest degree. Thus, as far as this conception of Islamic law is concerned there can be no doubt that Islamic Law is not susceptible to changes in society. On the contrary, society is regarded as subordinate to Islamic Law. However, in spite of this fact, it is not at all correct to assume that Islamic Law is a static thing and lacks elasticity, and that it does not possess the potential to accommodate itself to the growing needs of society.

Since there is a great divergence of opinion among the Muslim as well as the non-Muslim scholars on this subject, one section believing Islamic Law to be truly rigid, while another section, overzealous to prove it progressive, tends to render it more unenduring and capricious than even the man-made law. It is, therefore, all the more necessary that while scholars remain aware of its strength and stability, there should be a thorough examination of its potential for change and adjustment to the advancing forces, so that its true character be properly understood.

The relationship between legal theory and social change is one of the basic problems of the philosophy of law. "Law" which, having its associations with physical laws, is assumed to be unchanging, always faces the challenge of social changes which demand adaptability from it. Most often the impact of social change is so

profound that it affects legal concepts as well as institutions and thus creates a need for a fresh philosophy of law. The problem of social change and legal theory is of particular significance in Islamic legal philosophy. Islamic Law is generally defined as religious, sacred and hence immutable. How does such a law face the challenge of change?

The above question has brought to the fore the problem of the adaptability of Islamic Law which has been so widely discussed, yet remains debatable. The problem has been generally formulated in the form of the following question: Is Islamic Law immutable or is it adaptable to the extent that the change and modernization sought can be pursued under its aegis?

Broadly speaking, there have been two points of view in answer to this question. One view, which is shared by a large number of Islamicists such as C.S. Hurgronje and J. Schacht, and by the most of the traditionalist Muslim jurists, maintains that in its concept, and according to the nature of its development and methodology, Islamic Law is immutable and hence not adaptable to social changes. A second view, which is upheld by a few experts on Islamic Law such as Linant de Bellefonds and by the majority of Muslim reformists and jurists such as Şubhī Maḥmaṣānī, contends that such legal principles as the consideration of maṣlaḥah (roughly translated, benefit,

or utility), the flexibility of Islamic Law in practice and the emphasis on ijtihād (independent legal reasoning) sufficiently demonstrate that Islamic Law is adaptable to social change.

This research is a contribution towards the solution of the paradox of the dilemma of Islamic Law, namely: that of being immutable and yet adaptable to social changes. The theory of al-maṣāliḥ al-mursalah is a solution to this paradox. The nature of the essence and spirit of Islamic Law is explained in chapter one to shed light on the question of its sublimity and immutability in the establishment of facts and truths. The Islamic legal background to the theory of al-maṣāliḥ al-mursalah is discussed here in order to show that the principles of Islamic law have equally remained the same since the dawn of the first Islamic society right through the ages up to our days without being affected by the changes in the society. The position of the early Muslim scholars as regards the application of the theory of al-maṣāliḥ al-mursalah is discussed in chapter two to indicate that although the theory in question was not elaborated by then, it was extensively applied by the scholars to show how important a device of Islamic law it is.

As the Islamic legal theory developed so differing attitudes and understanding of the concept of maṣlahah appear in the work of different scholars, this is dealt

with in chapter three. The concept of maṣlaḥah as a general as well as a technical term is discussed in chapter four.

Chapter five is about al-Shāṭibī's treatment of the concept of maṣlaḥah defining the goals and the objectives of the Sharī<sup>c</sup>ah (maqāṣid al-Sharī<sup>c</sup>ah) which have to do with the consideration of the benefits of people. This means that the laws and rules of the Sharī<sup>c</sup>ah are for the attainment of the people's benefits at the same time as preserving them from injuries. No law therefore is to be enacted in the Sharī<sup>c</sup>ah without the consideration of the maṣlaḥah of the people. Chapter six discusses Najm al-Dīn al-Ṭūfī's concept of maṣlaḥah highlighting his peculiar opinion on the concept in question and giving a critique of most of his ideas concerning the concept.

The modern works and definitions of the concept of maṣlaḥah have been discussed at length in chapter seven, and chapter eight is a comparison between the theory of al-maṣāliḥ al-mursalah and the Western theories of public interest.

It is hoped that after this study, the role of al-maṣāliḥ al-mursalah in Islamic law and its scope for providing the immutable laws of Islam with the possibilities of meeting the challenges of changing social needs, will be more clearly understood.

Chapter 1  
THE ISLAMIC LEGAL BACKGROUND TO THE THEORY OF  
AL-MAŞĀLIḤ AL-MURSALAH

1.1 A. THE SHARĪCAH

It is necessary to remember that there are two different conceptions of law. Law may be considered to be of divine origin as is the case with Islamic law, or it may be conceived as man-made. The latter conception is the guiding principle of all modern legislation; it is, as Count León Ostrorog has pointed out, the Greek, Roman, Celtic or Germanic notion of law.<sup>1</sup> We may be compelled to act in accordance with certain principles because God desires us to do so, or, alternatively, because the king or the assembly of wise men or the leaders of the community or social custom demand it of us for the good of the people in general.

Now, what is the Islamic notion of law? Man in his weakness cannot understand what Good and Evil are unless he is guided in the matter by an inspired Prophet. Good and Evil, technically as the Muslim scholars have it, ḥusn (beauty) and qubḥ (ugliness), are to be taken in the ethical acceptation of the terms. What is morally beautiful must be done; and what is morally ugly must not be done. That is law and nothing else can be law. But

---

<sup>1</sup> C.L. Ostrorog, The Angora reform, p. 15

what is absolutely and indubitably beautiful, what is absolutely and indubitably ugly? These are the important legal questions; and who can answer them? Certainly not man, say the Muslim legists. There is Qur'ān which is the very word of God as believed by the Muslims.

Supplementary to it there is Sunnah, which is the model life of the Prophet - the records of his actions and his sayings - from which a help and inspiration are derived in arriving at legal decisions. If there is nothing in either the Qur'ān or the Sunnah to answer a particular question, then the dictates of reason in accordance with certain definite principles have to be followed.

These principles give assistance to the comprehension of sacred law or shari'ah as the Muslim jurists understand it. And it is these fundamental juristic notions which we must try to study and analyse in consonance with the theory of al-maṣāliḥ al-mursalah.

Modern jurists emphasize the importance of law for understanding the character and ethos of a people.

"Law" says a modern jurist, "streams from the soul of a people like national poetry, it is as holy as the national religion, it grows and spreads like language; religious, ethical, and poetical elements all contribute to its vital force";<sup>2</sup>

---

<sup>2</sup> C.K. Allen, Law in the making, p. 54; 5th ed., p. 90

it is,

"the distilled essence of the civilization of a people";<sup>3</sup>

"it reflects the people's soul more than any other organism".<sup>4</sup>

This is true of Islam more than of any other faith. The Shari'ah is the central core of Islam; no understanding of its civilization, its social history or its political system is possible without a knowledge and appreciation of its legal system.<sup>5</sup>

Shari'ah (lit., the road to the watering place, the path to be followed) as a technical term, signifies the Canon law of Islam, the totality of God's commandments. Each one of such commandments is called hukm (pl. aḥkām). The law of God and its inner meaning are not easy to grasp; and Shari'ah embraces all human actions. For this reason it is not "law" in the modern sense; it contains an infallible guide to ethics. It is fundamentally a DOCTRINE OF DUTIES;<sup>6</sup> a code of obligations. Legal considerations and individual rights have a secondary place in it. Above all, the tendency towards a religious evaluation of all the affairs of life is supreme.

---

<sup>3</sup> A.S. Diamond, Evolution of Law and Order, p. 303

<sup>4</sup> D.H. Parry, Haldane memorial lecture, p. 3

<sup>5</sup> J.Schacht, Esquisse, p. 9; and S.G.V. Fitzgerald, Nature and sources of the Shari'ah in Law in the Middle East, vol. 1, p. 28

<sup>6</sup> This was pointed out by Snouck Hurgronje, who according to Goldziher, is the founder of historical criticism of fiqh. See the EI. 1, vol. 2, p. 105; and Fitzgerald, op. cit., vol.1, p. 31

In the Sharīḥ, the Muslim scholars have classified religious injunctions into five kinds, al-aḥkām al-khamsah<sup>7</sup> Those strictly enjoined are fard, and those strictly forbidden are ḥarām. Between them we have two middle categories, namely, things which you are advised to do mandūb, and things which you are advised to refrain from makrūh, and finally there are things about which religion is indifferent jā'iz.<sup>8</sup>

The daily prayers, five in number, are fard; wine is ḥaram; the additional prayers like those on the ʿīd, (festival) are mandūb; certain kinds of fish, such as crabs, are makrūh, and there are thousands of jā'iz things, such as travelling by air etc. Thus the Sharīḥ is universal; all human activity is embraced in its sovereign domain. This fivefold division must be carefully noted; for, unless this is done, it is impossible to understand the distinction between that which is only morally enjoined and that which is legally enforced. Obviously, moral obligation is quite a different thing from legal necessity, and if in law these distinctions are not kept in mind, error and confusion are the inevitable result. Thus, the study of the theory of al-maṣāliḥ al-mursalah helps to comprehend those

---

<sup>7</sup> Kemāl A. Fārūkī, Al-aḥkām al-khamsah: The five values; Islamic Research Institute, pp. 43-8

<sup>8</sup> EI. 1, s.v. Sharīḥ, vol. 4, p. 322

distinctions and make demarcations between moral obligations and legal necessities.

## 1.2 B. FIQH: THE CLASSICAL THEORY

Fiqh is the name given to the whole science of jurisprudence because it implies the exercise of intelligence in deciding a point of law in the absence of a binding naṣṣ (textual command) from the Qur'ān or Sunnah. Fiqh literally means "intelligence", and faqīh is a jurist, a person skilled in the law. There is thus a difference between ʿilm (knowledge), and fiqh, which requires both intelligence and independent judgment. A man may be learned, ʿālim (pl. ʿulamā'), but to be a faqīh (pl. fuqahā'), he must possess the quality of independent judgment, the capacity to discern between the "correct" and binding rule of law, and the "weak" or unsupported opinion of a classical author. The terms fiqh and fuqahā' may also have been suggested by the Latin terms (juris) prudentia and (juris) prudentes; for a study of fiqh reveals that some traces of similar cases are to be found also in Roman, Jewish and Persian laws.<sup>9</sup>

---

<sup>9</sup> Wensinck, Muslim creed, p. 110 - has a valuable discussion on the term fiqh in ḥadīth literature. But the idea of the incorporation of Roman, Jewish and Persian laws in the Islamic law as suggested by Goldziher in his article on Fiqh - EI.1, vol. 2, p. 102 - seems misleading

### 1.3 THE DEFINITION OF FIQH

We have now to see how the Muslim lawyers have defined the term fiqh. Abū Ḥanīfa's definition stresses the moral aspect:

"fiqh is the soul's cognizance of its rights and obligations".<sup>10</sup>

The Turkish Mejlle (Art. 1) defines it as:

"the knowledge of practical legal questions".<sup>11</sup>

Most Islamic authorities, however, define it in terms of its four basic constituents,<sup>12</sup> and we may therefore say that:

"Fiqh or the science of Islamic law is the knowledge of one's rights and obligations derived from the Qur'ān, or the Sunnah of the Prophet, or the consensus of opinion among the learned (ijmā<sup>c</sup>), or analogical deduction ("qiyās)".<sup>13</sup>

This is the classical view and is said to be founded on the oft-quoted tradition of Mu<sup>c</sup>ādh. The Prophet is reported to have sent Mu<sup>c</sup>ādh, one of his companions, as a governor of a province and also appointed him as a distributor of justice. No trained lawyers existed then and the Prophet asked:

"According to what shalt thou judge? He replied: "According to the scriptures of God". "And if thou findest nought therein? "According to the

---

<sup>10</sup> Taftazānī, Talwīh, vol. 1, p. 10

<sup>11</sup> S.Mahmaṣānī, Philosophy of Jurisprudence in Islam, p. 8

<sup>12</sup> J.Schacht, Esquisse, p.53; <sup>c</sup>Abd al-Raḥīm, Muḥammadan Jurisprudence, p. 48

<sup>13</sup> al-Shafi<sup>c</sup>i, Al-risālah, tr. by M. Khaddūrī, p. 78

Tradition of the Messenger of God" "And if thou findest nought therein?" "Then I shall strive to interpret with my reason". And thereupon the Prophet said: "Praise be to God who has favoured the messenger of his Messenger with what His Messenger is willing to approve".<sup>14</sup>

Possibly of late origin, this is an important tradition to explain the Islamic understanding of the methods of arriving at law as it emphasizes the principle that the exercise of independent judgement, within certain limits, is not only permissible but praiseworthy. The Qur'ān has to be interpreted, the actions and sayings of the Prophet duly considered, and judgment exercised in accordance with legal theory in case the Qur'ān and Sunnah are silent on the question. A noteworthy feature of the Sunnah is that the Qur'ān is given pre-eminence and next comes the practice of the Prophet. Although consensus is not mentioned specifically, it prepares the way for it, for ijmā'<sup>c</sup> emphasizes the importance the Arabs gave to the "prevalent usage" of the community.

#### 1.4 THE FOUR MAJOR SOURCES OF ISLAMIC LAW

The Qur'ān, according to this theory, is the first source of Islamic law. Its importance is religious and spiritual, no less than legal, as it is, in Muslim belief, the Word of God. When a verse of the Qur'ān is

---

<sup>14</sup> Ostorog, op. cit., p. 21; Wensinck, op.cit., p. 156; Khaddūrī, Law of war and peace in Islam, p. 28; <sup>c</sup>Abdu al-Raḥīm, Muḥammadan jurisprudence, pp. 140-1

cited, the Muslim authors say: "God says, Mighty and Glorious is He" or "Says God, the Blessed and Exalted". It is for this reason that the verses of the Qur'ān (āyāt), although only a few of them deal specifically with legal questions, are held to be of paramount authority. In interpreting the Qur'ānic verses, one important principle has to be observed. Some verses are deemed to be the abrogating (nāsikh) verses and some to be the abrogated (mansūkh) ones. Generally speaking, the earlier verses are deemed to be repealed by the later ones. The textbooks on Islamic law give a good deal of attention to problems of interpretation and discuss exhaustively the question of how the rule of law is to be deduced when several Qur'ānic verses deal with the same or a similar problem, or when one verse affects another, directly or indirectly.<sup>15</sup>

The second source of Islamic law is the Sunnah, the practice of the Prophet. The word sunnah was used in pre-Islamic times for an ancient and continuous usage, well established in the community (sunnat al-ummah); later, the term was applied to the practice of the Prophet (sunnat al-nabī). The word sunnah must be distinguished from the term ḥadīth, for a careless use of the two terms leads sometimes to confusion of thought. A

---

<sup>15</sup> Mahmaṣānī, op.cit., p.66; <sup>c</sup>Abd al-Raḥīm, op. cit., p.77

ḥadīth is the report of a particular occurrence; sunnah, the rule of law deduced from it is the "practice" of the Prophet, his "model behaviour". The two sources, Qur'ān and Sunnah, are often called naṣṣ (textual ordinance), and represent direct and indirect revelation respectively.<sup>16</sup> According to Wensinck, ḥadīth is the mirror of Muslim society.<sup>17</sup>

The third source of Islamic law is ijmāʿ, consensus of opinion among the learned of the community. Although the modern critics consider it to be the most important element in Islamic law, and an examination of the corpus of the fiqh reveals that a major portion of the law consists of the concurrent opinions of scholars on legal questions, the Muslim legists give it the third place in descending order. Snouck Hurgronje considers it to be

"the foundation of foundations" and the movable element in the law.<sup>18</sup>

A tradition of the Prophet tersely summarizes the principle:

---

<sup>16</sup> J. Schacht, Esquisse, p. 16 and p. 58; U.P. Azamgadh, Distinction between Ḥadīth and Sunnah, p. 91; al-Shāfiʿī said that Sunnah explains the Qur'ān, Al-risālah [tr. by Khaddūrī], p. 72. See also S.M. Yūsuf, The Sunnah: Its transmission, Development and Revision, pp. 271-82; and Ḥadīth by J. Robson, EI. 2, vol. 3, pp. 23-8

<sup>17</sup> Wensinck, Muslim Creed, p. 1; and generally see EI.1, vol. 4, p. 555

<sup>18</sup> S. Hurgronje, Selected Works, p. 289

"My community will never agree on an error"<sup>19</sup>  
and several Qur'ānic texts are adduced in its support.<sup>20</sup>  
But ijmā<sup>c</sup> as it stands in Islamic law, representing as it does the majority view among the Muslim scholars, was allied to the pre-Islamic sunnah, the prevalent usage, and thus it should not be taken as an original source of the Shari<sup>c</sup>ah like the Qur'ān and Sunnah but as an aid to understand and supplement these twin origins of the Shari<sup>c</sup>ah.<sup>21</sup>

The fourth and last source of Islamic law is qiyās, analogical deduction. It is derived from Hebrew term (hiqqish), from an Aramaic root, meaning "to beat together".<sup>22</sup> In Arabic usage the word means "measurement" and therefore "analogy". The term ra'y and qiyās are often used by lawyers and it is well to know their exact significance. According to Schacht,

"Individual reasoning in general is called ra'y (opinion). When it is directed towards achieving systematic consistency and guided by the parallel of an existing institution or decision is called qiyās. When it reflects the personal choice of the lawyer, guided by the idea of appropriateness, it is called istihsān or

---

<sup>19</sup> Wensinck, op. cit., p. 113; According to al-Shāfi<sup>c</sup>ī, qiyās and ijtihād run parallel and have equal value, M.H. Kerr, Islamic Reform, p. 76; <sup>c</sup>Abdu al-Raḥīm, op. cit., p. 115

<sup>20</sup> Mahmaṣānī, op. cit., p. 76

<sup>21</sup> For ijmā<sup>c</sup> generally, see Schacht, op. cit., p. 82; and D.B. Macdonald, EI. 1, vol. 2, p. 448

<sup>22</sup> Schacht, op. cit., p. 99

istislāh (preference)".<sup>23</sup>

The exercise of opinion, the drawing of conclusions, and the use of discretion were used in the law of Islam from the earliest days, and in Sunnite law, the method of deduction forms the fourth and last source of law. This is the type of source in which a jurist may consult the theory of al-maṣāliḥ al-mursalah to draw his conclusions and formulate his opinions. There are other sources of law as well, often in the nature of judicial discretion exercised by English judges on matters of public policy, such as istiṣlāḥ , istidlāl, istiṣhāb and istiḥsān, which will be discussed later on. They mainly reflect the difference of opinion among jurists in matters where discretion can be exercised and lead to refinements and distinctions which have become questions of controversy among the adherents of various schools. Qiyās, like ijmā', is a secondary source of the Sharī'ah and is therefore a supplement of Qur'ān and Sunnah.<sup>24</sup>

In addition to the four formal sources, there are others which may be termed as the material sources of law, and these cannot be neglected, such as pre-Islamic

---

<sup>23</sup> Schacht, op. cit., p. 98

<sup>24</sup> Generally see Schacht, op. cit., p. 98; and Ency. of Islam, under subject matter "Qiyās"; also see Mahmaṣānī, op. cit., p. 79. For Shiite doctrine see Fitzgerald, Law in the Middle East, vol. 1, p. 122

custom. There is considerable authority for the proposition that beneficial customs, although ancient and pre-Islamic, are to be retained.<sup>25</sup> But it is important to bear in mind that those customs which are directly or indirectly at loggerheads with a binding ordinance from the Qur'ān or Sunnah will not be considered as material sources of law in Islam. Evidence of the retention of the customs of different peoples and countries is also to be found, as in Java and Indonesia, Africa, Egypt and India; this is known as ḥādah or ḥurf.<sup>26</sup> Customs are also accepted under the guise of ijmā'.

#### 1.5 THE DIVISIONS OF FIQH

While we are discussing the nature of fiqh, it must also be pointed out that this science has been divided into two sections. The uṣūl, literally the roots (or the foundations) of the law, and the furū', the branches (or the applications) of the law. The science of uṣūl deals with the first principles of interpretation and may be likened to our modern jurisprudence, while the science of furū' deals with particular injunctions - aḥkām - or the substantive law, as we would call it, which really follows from the science of uṣūl. The science of uṣūl

---

<sup>25</sup> Fitzgerald, op. cit., p. 28; Maḥmaṣānī, op. cit., p. 91

<sup>26</sup> See "Ḥamal", E.I. 2, vol.1, p. 427. On custom in general, see Levy, Social structure of Islam, chap. vi; Maḥmaṣānī, op. cit., p. 130; S. Hurgronje, Selected Works, p. 290 and Fitzgerald, Law in the Middle East, vol. 1, p. 110; Coulson, History of Islamic law, p. 147

deals with the sources of the law and its interpretation; the science of furū<sup>c</sup> deals with the law as it is actually applicable in courts of justice, for instance, the law of marriage, the law of waqf (charitable foundation) or the law of inheritance. It is, therefore, necessary to realize that in Islamic law there is a very clear distinction between the first principles and the rules deduced from their application.<sup>27</sup>

#### 1.6 THE DISTINCTION BETWEEN THE SHARĪ<sup>c</sup>AH AND FIQH

We have now seen what Sharī<sup>c</sup>ah is and what, in essentials, is the definition of fiqh. What is the distinction, if any, between them? Sharī<sup>c</sup>ah is the wider circle, it embraces in its orbit all human actions ; fiqh is the narrower one, and deals with what are commonly understood as legal acts. Sharī<sup>c</sup>ah reminds us always of revelation, that ilm (knowledge) which we could never have possessed but for the Qur'ān and Sunnah; in fiqh, the power of reasoning is stressed, and deductions based upon ilm are continuously cited with approval. The path of Sharī<sup>c</sup>ah is laid down by God and His Prophet; the edifice of fiqh is erected by human endeavour. In fiqh, an action is either legal or illegal, (mā yajūz wa mā lā yajūz) permissible or not permissible. In the Sharī<sup>c</sup>ah,

---

<sup>27</sup> I. Goldziher, on Fiqh, E.I. 1, vol. 2, p. 104; this is a most valuable general article on the subject; Mahmaṣāṭī, Philosophy of Jurisprudence in Islam, p. 63; <sup>c</sup>Abd Rahim's Muḥammadan Jurisprudence is a modern textbook on uṣūl

there are various grades of approval or disapproval. Fiqh is the term used for the law as a science; and Sharīḥ, for the law as the divinely ordained path of rectitude. It must, however, be candidly confessed that the line of distinction is by no means clearly drawn, and very often the Muslim scholars themselves use the terms synonymously; for the criterion of all human action, whether in the Sharīḥ or in the fiqh, is the same - seeking the approval of Allah by conforming to an ideally perfect code.<sup>28</sup>

#### 1.7 THE ROOT OF MAŞLAḤAH AND ITS MEANING

Before discussing the role of al-maṣāliḥ al-mursalah, it seem appropriate to define the words maṣlaḥah and mursalah. Etymologically, the word maṣlaḥah is a noun of a root "ṣ-l-ḥ". The verb "ṣaluḥa" is used to indicate when a thing or man becomes good, uncorrupted, right, virtuous, honest, or alternatively to indicate the state of possessing these virtues. When used with the preposition "li" it gives the meaning of suitability. Maṣlaḥah in its relational sense means a cause, a means, an occasion, or a goal which is good. It is also said of a thing, an affair or a piece of business which is conducive to good, or that is for good. Its plural form

---

<sup>28</sup> Levy says that fiqh plus kalām [scholastic philosophy] combine and constitute the Sharīḥ, Social Structure, p. 150, which is a wrong definition of the Sharīḥ

is "maṣāliḥ". Mafsadah is its exact antonym. In Arab usage, it is said: "naẓara fī maṣāliḥ al-nās" which means: "He considered the things that were for the good of the people". The sentence "fī al-amr maṣlaḥah" is used to say: "In the affair there is that which is good (or a cause of good)."<sup>29</sup>

In the Qur'ān various derivatives of the root "ṣ-l-ḥ" are used, the word maṣlaḥah, however, does not appear there. The Qur'ān uses "ẓalama" (he did wrong)<sup>30</sup> and "fasada" (he/it corrupted)<sup>31</sup> as opposite terms to "ṣaluḥa". "Ṣāliḥ" the active participle of "ṣ-l-ḥ", occurs very frequently in the Qur'ān. On one occasion the meaning of this term is elaborated textually as follows:

"They believe in God and in the last day and enjoin goodness and forbid evil and hasten to do good deeds and these are the righteous ones (ṣāliḥīn)."<sup>32</sup>

Whereas it is clear that its use in the early period and in the Qur'ān was essentially related to the meanings of good and utility, there can be no doubt that the word had not yet become a technical term.

<sup>29</sup> See E. Lane, An Arabic-English lexicon, [London: Williams and Norgate 1863-93], vol. 4, pp. 1714-15

<sup>30</sup> See Qur'ān, 5:39

<sup>31</sup> Ibid., 26:125; 27:142; 2:220

<sup>32</sup> Ibid., 3:114. Rāghib al-Isfahānī, Al-mufradāt fi gharīb al-Qur'ān, [Karachi: Tijārat al-kutub, 1961], p. 286, also confirms that in the Qur'an "ṣalah" is often opposed to "fasad" and "sayyia"

### 1.7.1 THE DEFINITION OF MURSALAH

In Arabic language the word "mursalah" means independently judged, or unrestricted. The word also indicates a state of being left alone which is normally expressed in Arabic by the term "muṭlaq al-ḥāl". The word "mursalah" appears neither in the Qur'ān nor in the Sunnah; it only appears in the books of "uṣūl al-ḥikm" used concurrently with the word "maṣlaḥah" to formulate the term "maṣlaḥah mursalah" {pl. maṣāliḥ mursalah} (unrestricted benefit) as a means of determining unspecified benefits in Islamic law.

### 1.8 THE ROLE OF AL-MAṢĀLIḤ AL-MURSALAH

For the term "al-maṣāliḥ al-mursalah" some Muslim lawyers, jurists and scholars use other terms. Some call it as "al-munāsib al-mursal" (unrestricted suitability), while others use the term "istiṣlāḥ". (seeking the better) and still others use the term "istidlāl" (seeking proof). Although these terms may seem different, in reality they imply the same objective. Yet, each term looks at the same objective from a different angle. This is due to the fact that every rule which is based on "maṣlaḥah" (benefit) could be observed in three aspects: (i) as a resulting benefit; (ii) as a suitable description which necessitates the legislation of a rule to obtain a certain benefit; and (iii) as a deciding benefit.

Those who perceive "maṣlahah" through the first aspect use the term "al-maṣāliḥ al-mursalah"; while those who discern "maṣlahah" through the second aspect use the term "al-munāsib al-mursal" such as Ibn al-Ḥāḥib in his book "Al-mukhtaṣar" where he divides the "al-munāsib al-mursal" into: (a) an effective benefit, (b) a consistent benefit, (c) a strange benefit, and (d) an unrestricted benefit.<sup>33</sup> Whereas those who perceive "maṣlahah" within the scope of the third aspect use the term "istiṣlāḥ"<sup>34</sup> or "istidlāl"<sup>35</sup>

Some Muslim scholars regard "istidlāl" as being superior to all types of evidences, excluding evidences from the Qur'ān, Sunnah, ijmā' and qiyās, such as istiḥsān and istiṣhāb. Hence this group of scholars refer to al-maṣāliḥ al-mursalah by the term "al-istidlāl al-mursal".<sup>36</sup>

In spite of the differing perceptions amongst the Muslim lawyers, jurists and scholars on the three aspects of maṣlahah mentioned above, notwithstanding, the end product is the same - i.e. a maṣlahah which enters in the intention of the Lawgiver without having an evidence for

---

<sup>33</sup> See Ibn al-Ḥāḥib, Al-mukhtaṣar, vol. 2, p. 342; and al-Ghazālī, Shifā' Al-ghalīl, p. 34

<sup>34</sup> See al-Ghazālī, Al-mustaṣfā, vol. 1, p. 139

<sup>35</sup> See Imām al-Ḥaramain, Al-burhān, vol. 2, p. 329

<sup>36</sup> See al-Zarkashī, Al-baḥḥ Al-muḥīt, vol. 3, p. 166

it from the ordinances of the Qur'ān and Sunnah, or ijmā<sup>c</sup> or qiyās, which acknowledges its consideration or proves its nullification.

#### 1.9 THE POSITION OF AL-MAṢĀLIḤ AL-MURSALAH IN THE SOURCES OF THE SHARĪ<sup>c</sup>AH

It is important to remember that the theory of al-maṣāliḥ al-mursalah is not a primary source of the Sharī<sup>c</sup>ah, hence it cannot stand alone in legislation except by conditions. Some Islamic jurists have outlined nineteen sources for Islamic law in which al-maṣāliḥ al-mursalah could be described as one of these sources. These sources are: (i) The Qur'ān; (ii) The Sunnah; (iii) Ijmā<sup>c</sup> of the Islamic Ummah; (iv) Ijmā<sup>c</sup> of the Medinah people; (v) Qiyās; (vi) A saying of the Companion of the Prophet; (vii) al-Maṣāliḥ al-Mursalah; (viii) Istiṣhāb (continuation of a practice); (ix) Al-Barā' al-aṣliyyah (original exemption); (x) Al-<sup>c</sup>awāid (customs); (xi) Al-istiqrā' (induction); (xii) Sadd al-dharā'ī<sup>c</sup> (preventive measures); (xiii) Istidlāl (deduction); (xiv) Istiḥsān (equity); (xv) Ikhtiyār al-aysar (taking the simple); (xvi) Al-<sup>c</sup>iṣmah (immunity from sins); (xvii) Ijmā<sup>c</sup> of the people of Kūfah; (xviii) Ijmā<sup>c</sup> of al-<sup>c</sup>Iṭrah (the house of the Prophet) for Shi<sup>c</sup>as; and (xix) Ijmā<sup>c</sup> of the four caliphs.<sup>37</sup>

---

<sup>37</sup> See <sup>c</sup>Abd al-Wahhāb Khallāf, Maṣādir al-tashrī<sup>c</sup> al-Islāmī fī mā lā naṣṣ fīh, p. 109

Some of these sources are accepted by all Muslim jurists and lawyers and some of them are disagreed upon. In order to know their boundaries, scopes, realities and their rules in detail one has to consult the books on u-sūl al-fiqh. Clearly the strongest out of these nineteen sources are the Qur'ān and Sunnah, which are the prime origins of the Sharīḥ. As far as al-maṣāliḥ al-mursalah is concerned, it is derived from the saying of the Prophet which states: "Do not inflict injury, nor repay one injury by another" (Lā ḍarar walā ḍirār) this indicates the importance of confirming the consideration of benefits and the negation of injuries; and since the injuries are detested in the Sharīḥ and benefits are confirmed it thus formulates the basis of the theory of al-maṣāliḥ al-mursalah. In spite of this, if an injunction is enjoined in the Qur'ān or Sunnah which seems to conflict with some benefit thought of by the use of the theory of al-maṣāliḥ al-mursalah, in that case it is the injunction that will be executed and not this theory simply because the injunction comes from the primary source whereas the theory in question is a secondary source. Moreover, the ordinances either from the Qur'ān or Sunnah are not meant to harass people or deprive them of their rights and legal benefits as the Qur'ān states clearly:

"And (God) has imposed no difficulties on you in

religion";<sup>38</sup>

and also the Prophet is reported to have said:

"When I command you to do something do it according to your ability".<sup>39</sup>

It goes without saying therefore that the nature of the theory of al-maṣāliḥ al-mursalah in the strict sense of the terminology is limited within the environment of benefits which have neither been dealt with by the main origins of the Shari'ah nor cancelled by them. The benefits should be independently judged by a mujtahid and weighed out without referring to previous experience, simply because when new cases are referred to old ones bearing the same causes, the whole exercise develops into analogy and ceases to work under the theory of al-maṣāliḥ al-mursalah. The Islamic understanding is that God has made rules in the best way to fit the lives of people by providing general principles and guidance and has left out the details of things to be discovered by the people themselves through observation and the use of common sense. He has dealt with the primary issues of life in general and has left the secondary ones to be tackled by the human beings themselves (as a mercy to them and not through forgetfulness or failure). The Qur'an says:

"O ye who believe! Ask not questions about things

---

<sup>38</sup> Qur'an, 22:78

<sup>39</sup> Reported by al-Bukhārī and Muslim

which may cause trouble. But if you ask about things when the Qur'ān is being revealed, they will be made plain to you, God will forgive those: for God is Oft-forgiving, Most Forbearing. Some people before you did ask such questions, and on that account lost their faith".<sup>40</sup>

The Prophet is also reported to have said:

"...And (God) has kept silent over some things as a mercy to you without forgetting them, so do not ask about them".<sup>41</sup>

#### 1.10 LEGAL ORDINANCES IN THE QUR'ĀN AND SUNNAH

It follows that the sphere in which the theory of al-maṣāliḥ al-mursalah could operate is that in which the Qur'ān and Sunnah are silent. In actual fact the ordinances of the Qur'ān and Sunnah which deal with legal issues are quite scanty compared to the injunctions which deal with other aspects of life in general. The main purpose of this is to give enough room to accommodate every benefit possible without the need of altering anything in the main structure of the Sharī'ah. The Qur'ān, for instance, has not gone into detail of laying each and every rule, but instead it has just laid down general principles for the legislation of practical rules whether in matters concerning civil rights, constitution, criminology or economics. We see, for example, in trade the Qur'ān has limited its rules to four things only:-  
(i) its legality:

---

<sup>40</sup> Qur'ān, 5:104-5

<sup>41</sup> Reported by al-Bukhārī

"...And God has permitted trade and forbidden usury...";<sup>42</sup>

(ii) the condition of mutual agreement:

"O ye who believe! Eat not your property among yourselves in vanities: but let there be amongst you traffic and trade of mutual good-will...";<sup>43</sup>

(iii) the act of witnessing:

"...And take witnesses whenever ye make a commercial contract...";<sup>44</sup>

and (iv) its prohibition:

"O ye who believe! When a call is made for the prayer of Friday, rush for the remembrance of God, and leave trade...".<sup>45</sup>

Whereas we find, for example, in the Egyptian code for civil rights one hundred and twenty rules for trade; and the rules concerning trade in detail are still numerous in Islamic jurisprudence which differ from one school system to another.

In connection with the constitutional matters the Qur'ān has confined itself to three major principles for every just political institution; these are: (i) consultation and counselling: God commanded the Prophet:

"...And ask for (God's) forgiveness for them; and consult them in affairs (of moment)...";<sup>46</sup>

"And those who answer the call of their Lord and

---

<sup>42</sup> Qur'ān, 2:275

<sup>43</sup> Ibid., 4:29

<sup>44</sup> Ibid., 2:282

<sup>45</sup> Ibid., Sūrat al-Jumu'ah:9

<sup>46</sup> Ibid., 3:159

establish worship, and whose affairs are (decided by) counsel among themselves...";<sup>47</sup>

(ii) justice:

"God commands you to render back the trusts to those to whom they are due, and that when you judge between people you judge with justice...";<sup>48</sup>

and (iii) equality:

"The believers are but brethren, therefore make peace between your brethren...".<sup>49</sup>

The Islamic understanding of this is that the Qur'ān has not gone into details concerning legal rules in constitutional matters so as to give an ample space for every generation to acquire what is beneficial and decide for themselves what is suitable to them according to their environment and situation.

In connection with punishments, the Qur'ān has restricted itself to five punishments for five major offences:- (i) murder:

"And it does not behove a believer to kill a believer; but (if it so happens) by mistake, (compensation is due): if one so kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely. If the deceased belongs to a people at war with you, and he was a believer, the freeing of a believing slave (is enough). If he belonged to a people with whom you have a treaty of mutual

---

<sup>47</sup> Qur'ān, 42:38

<sup>48</sup> Ibid., 4:58

<sup>49</sup> Ibid., 49:10

alliance, compensation should be paid to his family, and a believing slave be freed. For those who find this beyond their means, a fast for two months successively (is prescribed): by way of repentance to God; for God hath all knowledge and all wisdom. If a man kills a believer intentionally, his recompense is Hell, to abide therein (for ever): and wrath and the curse of God are upon him, and a dreadful penalty is prepared for him";<sup>50</sup>

(ii) theft:

"As to the thief, male and female, cut off his or her hands: a punishment by way of example from God for their crime: and God is Exalted in Power";<sup>51</sup>

(iii) transgression:

"The punishment of those who wage war against God and His Apostle and strive to make mischief on the land is only this, that they should be murdered or crucified or their hands and their feet should be cut off on opposite sides or they should be sent into exile from the land; this shall be as a disgrace for them in this world, and in the hereafter they shall have a grievous chastisement";<sup>52</sup>

(iv) adultery:

"The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes...";<sup>53</sup>

and (v) slander of chaste women:

"And those who launch a charge against chaste women, and produce not four witnesses (to support their allegation),- flog them with eighty stripes; and reject their evidences ever after, for such men are wicked transgressors".<sup>54</sup>

---

<sup>50</sup> Qur'ān, 4:92-93

<sup>51</sup> Ibid., 5:38

<sup>52</sup> Qur'an, 5:33

<sup>53</sup> Ibid., 24:2

<sup>54</sup> Ibid., 24:4

It can be noticed here that the punishments of many kinds of offences and crimes have been left to be decided upon by the responsible people in every generation as they see fit for their benefits as to go hand in hand with the principle: "The recompense for an injury is an injury equal thereto (in degree)...".<sup>55</sup>

In connection with economic matters the Qur'ān has limited itself from its multifarious rules by establishing the right of poor to a share in the wealth of the rich and the state. The right of poor over the wealth of the rich is enunciated by many verses such as:

"And those in whose wealth is a recognised right. For the (needy) who asks and him who is prevented (for some reason from asking)";<sup>56</sup>

"By no means shall ye attain righteousness unless ye give (freely) of that which ye love...".<sup>57</sup>

And the right of the poor to a share in the wealth of the state is decided by verses - such as:

"And know that out of all the booty that ye may acquire (in war), a fifth share is assigned to God, - and the Apostle, and to the near relatives, orphans, the needy, and the wayfarer...";<sup>58</sup>

"Alms are for the poor and the needy, and those employed to administer the (funds), for those whose hearts have been (recently) reconciled (to truth), for those in bondage and in debt, in the cause of God, and for the wayfarer; (thus is it)

---

<sup>55</sup> Qur'ān, 42:40

<sup>56</sup> Ibid., 70:24-25

<sup>57</sup> Ibid., 3:92

<sup>58</sup> Ibid., 8:41

ordained by God...".<sup>59</sup>

It could also be discovered that the legal injunctions of the Sunnah, like those of the Qur'ān, are limited to three categories only:- (i) to establish and emphasize the injunctions of the Qur'ān, e.g. concerning trade, the Prophet is reported to have said:

"The seller and the buyer have an option before they depart (i.e. either to accept the deal or to reject it)";<sup>60</sup>

(ii) to exemplify and elaborate that which has been ruled by the Qur'ān, e.g. the Prophet is reported to have said:

"The value of the compensation to the family of the person slain by mistake, as a hundred camels, or one thousand golden dinars, or ten thousand dirhams of silver";<sup>61</sup>

(iii) to give a new rule in a situation where the Qur'ān is silent, e.g. the saying of the Prophet on the representation of the Muslim community on legal matters:

"The Muslims are (all) liable to the conditions of their contracts, except a condition which legalizes an unlawful thing or a condition which illegalizes a lawful thing".<sup>62</sup>

This illustrates how the Qur'ān and Sunnah have

---

<sup>59</sup> Qur'ān, 9:60

<sup>60</sup> Reported by al-Bukhārī, Muslim, Abū Dāwūd, al-Tirmizī, al-Nasāī, Aḥmad ibn Ḥanbal, Mālik ibn Anas and al-Dārmī

<sup>61</sup> Reported by Abū Dāwūd, al-Nisāī and Mālik ibn Anas

<sup>62</sup> Reported by al-Bukhārī, al-Tirmizī and Abū Dāwūd

given broad lines to the tackling of the legal problems leaving so much space to accommodate every sensible legislation which considers public interest in the strict sense of the word. In this way the theory of al-maṣāliḥ al-mursalāh has a great role to play. It stands as a useful tool to a faqīḥ without which his potential to solve new problems according to the Shari'ah could not work. The Qur'ān and Sunnah have not mentioned all legal cases known to mankind and thus have not given ready made answers to all possible problems which could occur. This gives scope for a mujtahid to find answers to the daily questions of the society. For the very nature of the theory of al-maṣāliḥ al-mursalāh demands that a mujtahid has to consider the unrestricted benefits in the light and according to the intentions of the Lawgiver.

Chapter 2  
THE POSITION OF THE EARLY MUSLIM  
SCHOLARS AS TO THE UTILIZATION OF THE THEORY OF  
AL-MAṢĀLIḤ AL-MURSALAH

In our search for the position of the early Muslim scholars in connection with the application of the theory of al-maṣāliḥ al-mursalah as a device of decision making in Islamic Law, it would be useful for us to look into the history of Islamic Law in order to find out the attitudes of the early Muslim scholars towards it. Although the theory of al-maṣāliḥ al-mursalah was by then not known as a technical term, it was actually applied in general terms in the legislation of the Ṣaḥābah (the Prophet's Companions). After looking at this general application, we shall investigate the position of the followers of the Ṣaḥābah who were the intermediaries between the Ṣaḥābah and those who came after them so as to complete the chain till the advent of the Imāms of the major schools of thought (jurisprudence).

2.1 A. THE POSITION OF THE COMPANIONS OF THE PROPHET  
[ṢAḤĀBAH]

There are several evidences which justify the view that the Ṣaḥābah used the concept of al-maṣāliḥ al-mursalah and istiṣlāḥ as a device of legislation without defining it. They have always looked for the corresponding ḥukm (judgment) of cases resembling those which took place at the Prophet's time for issues which the Shari'ah has not given any injunctions. However, if

ever they ~~did not~~ find anything corresponding to the cases in the time of the Prophet, they in fact depended upon the theory of al-maṣāliḥ al-mursalah for the enactment of laws although that theory had not yet been presented in any elaborate form. The Companions of the Prophet did not hesitate to adopt and legislate a rule on whatever appeared to possess benefit and had not been mentioned by the Qur'an and Sunnah but fell within the general range of the intention of the Shari<sup>c</sup>ah.

An example of the application of the theory of al-maṣāliḥ al-mursalah by the Ṣaḥābah is the verdict of <sup>c</sup>Umar ibn al-Khaṭṭāb in killing a group of people who had co-operated in killing an individual (in qiṣāṣ). <sup>c</sup>Umar depended upon the benefit of the preservation of people's blood in his verdict as the basis of his decision. Were the fact that it had been a group of people who participated together in killing an individual to be considered as a nullification of the crime and an acquittal by virtue of them being a group, then there would have arisen so much killing in the society and loss of human rights, apart from the discarding of the law of qiṣāṣ which had been enunciated by the Shari<sup>c</sup>ah. That also would have meant opening the door to such crimes insofar as when there was a desire for somebody to be killed, a group of people could come together to kill him knowing that reprisal would have only been taken against individuals and not groups (as was the case in the time

of ignorance - jāhiliyyah). Nevertheless, this rule is not mentioned in the Qur'an or Sunnah. So, what ʿUmar did in his verdict is a clear example of the application of the theory of al-maṣāliḥ al-mursalāh since there is no injunction in the Sharīʿah which commanded that, and no evidence is found of its type on which analogy could be applied to.<sup>1</sup>

## 2.2 B. THE POSITION OF TĀBIʿĪN {THE FOLLOWERS OF ṢAḤĀBAH} REGARDING TO THE THEORY OF AL-MAṢĀLIḤ AL-MURSALĀH

The Tābiʿīn followed the path of the Ṣaḥābah in applying the theory of al-maṣāliḥ al-mursalāh to new problems which they confronted. A conspicuous example of the Tābiʿīn's application of the theory in question is the method which ʿUmar ibn ʿAbd al-ʿAzīz (a great follower of the Ṣaḥābah who is also considered as the fifth of the rightly guided Caliphs of Islam) used in solving so many problems, especially in returning people's possessions (wealth and land) to the owners after they had been taken unjustly by the Umayyad rulers. He was just content with slight evidence of the wronged party to verify the truth of his claim to property without going into details.<sup>2</sup> Without any shadow of doubt, his method was based on the theory of al-maṣāliḥ al-mursalāh.

---

<sup>1</sup> See al-Shatibi, Al-iʿtiṣām, vol. 2, p. 107; see also al-Zinjānī, Takhrīj al-furūʿ ʿalā al-uṣūl, pp. 107-109

<sup>2</sup> M.A.Ṣāleḥ, op. cit., p. 479

Another example of the application of the theory of al-maṣāliḥ al-mursalāh by the Tābiʿīn is also the way ʿUmar ibn ʿAbd Al-ʿAzīz had established hostels to accommodate travellers throughout the seasons of the year.<sup>3</sup> This act was neither practised at the time of the Prophet nor even at the time of the Ṣaḥābah; the whole idea of these hostels to ease the travellers' difficulties and provide them with services was based upon the theory of al-maṣāliḥ al-mursalāh.

### 2.3 C. THE POSITION OF THE IMĀMS OF THE SCHOOLS OF THOUGHT AS REGARDS THE THEORY OF AL-MAṢĀLIḤ AL-MURSALĀH

After our examination of the position of the Ṣaḥābah and the Tābiʿīn in relation to the theory of al-maṣāliḥ al-mursalāh, we must examine the position of the great Imāms of the schools of thought in Islamic jurisprudence in order to be fully aware of the general application of the theory under discussion. Some ambiguities have arisen in identifying the viewpoints and the position of some Imāms in this issue; eg. the position of Imām al-Shāfiʿī on the validity of al-maṣāliḥ al-mursalāh as a device of legislation, and the standpoint of Imām Abū Ḥanīfah in using istiḥsān in the place of the theory of al-maṣāliḥ al-mursalāh in most of his expositions.<sup>4</sup>

---

<sup>3</sup> M.A.Ṣāleḥ, op. cit., p. 479

<sup>4</sup> M.S.R. al-Būṭī, Dawābiṭ al-Maṣlaḥah fī al-Sharīʿah al-Islāmiyyah, p. 381

## 2.4 IMĀM MĀLIK {THE MĀLIKĪS} AND AL-MAṢĀLIḤ AL-MURSALAH

Imām Mālik [d. 179/795] is known as being in the vanguard of those who apply the theory of al-maṣāliḥ al-mursalah in their legal transactions. Whenever istiṣlāḥ is mentioned the first one to be associated with it from the great Imāms is Mālik ibn Anas. He was so deeply drawn to this theory that he is even claimed to be the one who elaborated it as a legal principle as noted by al-Shāṭibī.<sup>5</sup> Mālik saw that an interpreter of Sharīḥah or a mujtahid who was versed in Sharīḥah and its origins was indebted to the knowledge of the theory of al-maṣāliḥ al-mursalah - in order to distinguish between different types of benefits and have a clear conception that any benefit which conflicts with the Sharīḥah or its intention is cancelled.<sup>6</sup> Imām Mālik is also said to have permitted the imprisonment of a suspect who is thought by a judge through analogy to be guilty.<sup>7</sup> Imprisonment is a heavy punishment and should not be applied to a person just by a simple accusation. Nevertheless, Imām Mālik saw that the attainment of justice is paramount, and he considered the imprisonment of a suspect was a means of attaining this justice.

---

<sup>5</sup> See al-Qarāfī, Tanqīḥ al-fuḥūl in al-Dhakhīrah, vol. 1, pp. 142-144; Mālik, by Abū Zahrah, p.290; Al-rasāil by Ḥusain al-Khiḍr, vol.3, p. 66

<sup>6</sup> Al-Shāṭibī, Al-iḥtiṣām, vol.2, p.114

<sup>7</sup> M.A. Ṣāleḥ, op. cit., p. 481

The Mālikī school has applied the theory of al-maṣāliḥ al-mursalah in the question of a Muslim land being threatened by an enemy while there was a deficiency of funds in the exchequer to prepare soldiers for defence purposes. A group of Andalusian scholars has resorted to the public benefit side of this issue and has produced a verdict allowing the leader of the country concerned to put extra tax on the rich people in order to equip the army with the necessary armament for the defence of the country. This tax was in addition to the ordinary poor-rate (zakāt) which is compulsory and required by the Shariḥ. Those scholars considered that to repel the danger of a foreign attack, to strengthen the state's security and to preserve the people's independence was a strong reason for the legislation of an extra tax.

Another case where the Mālikīs applied the theory of al-maṣāliḥ al-mursalah was when the enemy put Muslim prisoners of war in the front line of his army on the battle field as a hindrance between him and the Muslim army. The Mālikī school gave its verdict in this issue allowing the shooting at the army of an enemy even if that action would end up with killing those Muslim prisoners of war who are at the front line.<sup>8</sup> This was due to the fact that if the Muslim army ceased to shoot at

---

<sup>8</sup> Ḥusein al-Khiḍr, Al-rasāil, vol. 3, p. 67

the army of the enemy because of the fear of killing those Muslim captives, the enemy would use this loop-hole to cause a great harm to the Muslim army and to the people as a whole. So, the public benefit in this situation lies with the killing of those few Muslims in order to save the lives of the many - i.e committing the lesser of the two evils.

## 2.5 THE POSITION OF AḤMAD IBN ḤANBAL {THE ḤANBALĪS} AS REGARDS THE THEORY OF AL-MAṢĀLIḤ AL-MURSALAH

Although Imām Ibn Ḥanbal [d. 241/855] is considered to be the second person after Imām Mālik in applying this theory in legislation, some Ḥanbalite scholars do not consider it as one of the Imām Ibn Ḥanbal's devices of legislation.<sup>9</sup> The major reason for their argument is that Imām Ibn Ḥanbal considered that al-maṣāliḤ al-mursalah could only come within the terms of Qur'ān, Sunnah, ijmā' and qiyās. Thus, the maṣlahah which was recognized by him is that which was incorporated in the general term of analogy to formulate a special meaning. In this case the maṣlahah was considered as a basis for the enactment of rules within the general origins of the Shari'ah - i.e the Qur'ān, Sunnah, ijmā' and qiyās.

However, even before the specification of descriptions and terminologies in the field of the

---

<sup>9</sup> M.A. Ṣāleḥ, op. cit., p. 482

structure of Islamic jurisprudence which came after marḥalat al-takwīn (the period of formation), analogy was generally taken to encompass a wide range of meanings at the time of the beginning of the period of the Imāms in the second century of Hijrah. Most of the Ḥanbalīs including Ibn Taymiyyah and his student Ibn Qayyim gave detailed attention to analogical issues. They put more emphasis on the general objectives and intentions of the Shariḥah and attempted to give definitions upon which legitimate analogies could be based and from which judgments would emerge, which emanated from the intentions of the Shariḥah.<sup>10</sup>

Among the examples of the application of the theory of al-maṣāliḥ al-mursalah by Imām Aḥmad ibn Ḥanbal is that which has been reported to us by Ibn Qayyim in the case of the one who casts doubt on the truthfulness of the Companions of the Prophet. Imām Ibn Ḥanbal considered that the one who does that action must be punished by the Sultan (ruler) and the ruler should make him repent to God. If he repents for it, well and good, but if he doesn't, the ruler is obliged to repeat the punishment.<sup>11</sup> It can be seen here that the demanding of repentance and the repetition of the punishment by the ruler is a matter

---

<sup>10</sup> Ibn Qayyim, Iḥlām Al-muwaqqiḥīn, vol. 1, pp. 29-33; <sup>c</sup>Abd al-Qādir Badrān, Al-madkhal, p. 138; Abū Zahrah, Ibn Ḥanbal p. 297

<sup>11</sup> Ibn Qayyim, op.cit., vol.4, p. 377; Abū Zahrah, Mālik, p. 300 and so on

of the application of the theory of al-maṣāliḥ al-mursalāh since there is neither a binding ordinance (naṣṣ) for that nor is there any evidence from qiyās. It is just done so as to preserve the unity of the Muslim Ummah from disintegration and in order to appreciate the position of the Ṣaḥābah who passed the Sharī<sup>c</sup>ah on to the Muslims from the Prophet. In doing so there is maṣlahah to the Muslims which needed to be attained by meting out severe punishment to prevent such disintegration and not allowing the ruler to forgive a person responsible for it as stipulated by Imām Ibn Hanbal.

#### 2.6 IMĀM ABŪ ḤANĪFAH {THE ḤANAFĪS} AND THE THEORY OF AL-MAṢĀLIḤ AL-MURSALĀH

It would seem, at first, that the Ḥanafīs do not consider the theory of al-maṣāliḥ al-mursalāh as one of the devices of legislation in Islamic Law due to the fact that their school does not mention this theory by this name. But the truth is that the difference is only in the name for what amounts to the same technique. In fact Imām Abū Ḥanīfah [d. 150/767] puts forward the doctrine of istiḥsān (equity) and considers it as one of the bases of legislation. Muḥammad ibn al-Ḥasan al-Shaybānī (one of the two great companions of Abū Ḥanīfah) says:

"The companions of Abū Ḥanīfah were at loggerheads with him (i.e. Abū Ḥanīfah) when dealing with analogical issues but when he talked of istiḥsān no one quarrelled with him any

more".<sup>12</sup>

Now the istihsān by which Imām Abū Ḥanīfah was talking about was based on the selection of a strong inference against a weak one. Indubitably, the criterion used on the selection of a strong inference, in a situation void of a binding naṣṣ from the Qur'ān or from the Sunnah, would be in favour of public benefit (maṣlaḥah). Thus it is found that in most of the supplementary rules which are drawn up for the method of istihsān, the sole basis used is maṣlaḥah in terms of the intentions and objective of the Sharī'ah, i.e the attainment of benefits and the prevention of injuries. It is appropriate to mention here also that customs which do not conflict with any ordinances either from the Qur'ān or Sunnah or ijmā' or qiyās, were given great scope within the Ḥanafī School system. Customs as they are shed light on the utilization of maṣlaḥah by Abū Hanīfah, because customs are built for the benefits of people's life. Thus, it would, in most cases, be found that, the Ḥanafī books are full of analogical issues based on maṣlaḥah but using the name of customs in one place, and the name of istihsān in another.

If we go deeper into what we have discussed about maṣlaḥah as it was dealt with by Imām Aḥmad ibn Ḥanbal we

---

<sup>12</sup> M.A. Ṣāleḥ, Maṣādir al-tashrī' al-Islāmī wa manāhiḥ al-istinbāt, p. 484

find that at the beginning of the four great Imāms' period the term "maṣlahah" did not attain a precise and a standard definition, but we further also find that Imām Abū Hanīfah laid great emphasis on the process of deduction. This means that the theory of al-maṣāliḥ al-mursalah had an enormous role in the analogical methodology of Imām Abū Ḥanīfah provided that a particular maṣlahah did not come into conflict with any ordinance from the Qur'ān or Sunnah. Thus, Imām Abū Hanīfah could be considered to be one of the great advocates of the theory of al-maṣāliḥ al-mursalah according to the analysis given above even though he used the term "istiḥsān" instead of al-maṣāliḥ al-mursalah.<sup>13</sup>

Among the many examples of Imām Abū Ḥanīfah's application of the theory of al-maṣāliḥ al-mursalah in his analogical deductions is his verdict to take the value of a produce before its production without fixing a particular period; but once the duration is fixed the deal changes to a normal transaction where a reservation for exchange in commodity and its value has to be observed,<sup>14</sup>. So, the consideration of maṣlahah in making

<sup>13</sup> See al-Shāṭibī, Al-iḥtiṣām, vol. 2, p. 324; Abū Zahrah, Abū Ḥanīfah, p. 372; Muṣṭafā al-Zarqā', Al-madkhal al-fiqh al-cām, vol. 1, pp. 60-76

<sup>14</sup> It is noted in "Badāi' Al-ṣinā'ī" by al-Kasānī, vol. 4, p. 223, "if a certain period is fixed for the produce, it becomes a normal transaction whereby a condition of exchange should be stipulated, i.e taking the value for the goods hand in hand; and this is what Abū Ḥanīfah says"

the people's affairs and transactions simple is the sole basis of the verdict of Imām Abū Ḥanīfah in the above case.

Another example in which Imām Abū Ḥanīfah applied the theory of al-maṣāliḥ al-mursalāh by the name of istiḥsān was his view of holding a sharing employee as responsible for damage occurring in his work. This was so even though the work of this employee differed from what had been stipulated in the agreement between him and his employer; except that which was damaged without his intention eg. by theft or death. In that case he had to produce evidence for his claim, and his word would not be accepted except through that evidence. This was what was reported by al-Sarakhsī (one of the great propounders of the Ḥanafī school system) when he said:

"If a sharing shepherd herds sheep, according to Abū Ḥanīfah, he is responsible and liable to pay for any damage caused by him to the sheep since the participating employee is responsible for what he does with his own hands \_\_\_\_".<sup>15</sup>

It is noted here, as has been noted in the previous example, that the case of the responsibility and liability of a sharing employee bases its foundation on the maṣlahah of the people and the necessity of these demands for the development and the prosperity of their lives.

---

<sup>15</sup> Al-Sarakhsī, Al-mabsūt, vol. 15, p. 161

## 2.7 IMĀM AL-SHĀFI<sup>C</sup>Ī {THE SHĀFI<sup>C</sup>IS} AND THE THEORY OF AL-MAṢĀLIḤ AL-MURSALAH

It was due to the standpoint of Imām al-Shāfi<sup>C</sup>ī [d. 204/819] in regard to istiḥsān (equity) as manifested in his books: al-Risālah, al-Umm and especially that which has come in the book entitled Ibtāl al-Istiḥsān (nullification of equity) that made many people believe that this Imām did not accept the theory of al-maṣāliḥ al-mursalah as a device of legislation in Islamic Law. Nonetheless, the istiḥsān which has been denied by Imām al-Shāfi<sup>C</sup>ī is not the same as that which has been applied by Imām Abū Ḥanīfah as we have seen when we talked about the standpoint of the Ḥanafī school as regards the theory of al-maṣāliḥ al-mursalah. Moreover, the method of legislation to which Imām al-Shāfi<sup>C</sup>ī was opposed was neither istiḥlāḥ (public good) nor al-maṣāliḥ al-mursalah. What Imām al-Shāfi<sup>C</sup>ī opposed was "the following of lusts and passions which result in going astray from the ordained injunctions (nuṣūṣ); and innovating laws which are not decreed by either the Qur'ān or Sunnah or ijmā<sup>C</sup> or qiyās"; and for this reason came his famous utterance:

"He who applies istiḥsān is really innovating laws".<sup>16</sup>

---

<sup>16</sup> Al-Shāfi<sup>C</sup>ī, Al-risālah, p. 186

However, we learn from a statement of one of the great disciples of the Shāfi<sup>c</sup>ī school system - Imām al-Haramayn al-Juwaynī (d. 478 A.H.): "that he who follows al-Shāfi<sup>c</sup>ī's explanation will find that he (i.e. al-Shāfi<sup>c</sup>ī) accords judgments with public benefits; and whenever he doesn't find that accordance he turns to principles of resemblance". Al-Juwaynī went further by elucidating that whatever al-Shāfi<sup>c</sup>ī stipulated in his judgments, al-maṣāliḥ al-mursalah or its equivalent is innately envisaged. Al-Juwaynī also added, "al-Shāfi<sup>c</sup>ī and most of the Ḥanafī school system embrace the view of attaching judgments to the theory of al-maṣāliḥ al-mursalah with the condition of suitability to the considered benefits".<sup>17</sup>

The dictum that al-Shāfi<sup>c</sup>ī was opposed to was the sole dependence on benefits which did not fall within the circle of the Lawgiver's common usage and acknowledgment. That is why we see Imām al-Ghazālī saying in this connection:

"Every benefit which does not preserve the intention understood from the Qur'ān, Sunnah and ijmā<sup>c</sup>, itself being one of the alien benefits which do not agree with the intentions of the Lawgiver, is void and nullified; and the one who resorts to it has already made himself a lawmaker (i.e. a rival with God)".<sup>18</sup>

The thing which Imām al-Shāfi<sup>c</sup>ī recognizes in the theory

---

<sup>17</sup> Al-Shawkānī, Irshād Al-fuḥūl, p. 242

<sup>18</sup> Al-Ghazālī, Al-mustaṣfā, vol. 1, p. 310

of al-maṣāliḥ al-mursalāh is therefore a dependence of the considered benefits which are accepted by the Sharī<sup>c</sup>ah and the enactment of laws connected with them in terms which have not been considered by the Lawgiver as accepted or cancelled.

In the 7th century A.H a scholar of Arabic Language and a member of Shāfi<sup>c</sup>ī school, Shihāb al-Dīn Muḥammad al-Zanjānī (d.656 A.H.), presented the position of Imām al-Shāfi<sup>c</sup>ī as regards the theory of al-maṣāliḥ al-mursalāh by the following words:

"al-Shāfi<sup>c</sup>ī held the opinion that it is right to hold steadfast to the benefits which have reference to the general principles of the Sharī<sup>c</sup>ah even though not closely connected to a particular section of it".<sup>19</sup>

Does this not mean the utilization of the theory of al-maṣāliḥ al-mursalāh which of course is a principle not closely connected to a special part of the Sharī<sup>c</sup>ah?

One of the examples in which al-Zanjānī gives to explain al-Shāfi<sup>c</sup>ī's acceptance of the theory of al-maṣāliḥ al-mursalāh is his adoption of the idea of killing a group of people who have killed an individual as decided by <sup>c</sup>Umar ibn al-Khaṭṭab. Al-Zanjānī says:

"\_\_ and killing a group of people for one person in this case, according to al-Shāfi<sup>c</sup>ī, is an act of aggression and injustice in its true sense".

He still goes further elucidating the point by saying:

---

<sup>19</sup> Al-Zanjānī, Takhrīj al-furū<sup>c</sup> Calā al-usūl, p. 169

"Truly, if similarity were to be observed in this case, the whole issue would result in blood-shedding and massive killing. Whereas the practice commanded by the Shari<sup>c</sup>ah is to kill a group of people for a group like it, and an individual for an individual; nevertheless, to wait for such an occurrence would render the whole practice unjust and inapplicable. The justice in this case is therefore to apply severity to the wrong incurred; thus, to kill a group of people who have killed an individual is an obligatory act in order to repel a gigantic injustice. In so doing a public interest which has not been enunciated by a particular principle in the Shari<sup>c</sup>ah is maintained. The benefit is neither dependent upon an injunction of the Qur'<sup>'</sup>ān nor the Sunnah of the Prophet; but it has only depended upon the general outlook of the Shari<sup>c</sup>ah i.e to safe-guard its canon and rule from the danger of massacre, to exaggerate its detestation towards unjust killing and to preserve mankind from anguish and annihilation".

Al-Zanjānī goes further saying:

"Daily happenings know no boundaries and so should their rules and judgments; and to confine oneself to particular principles from which restricted meanings and causes are derived would mean that nothing could face the extremist except the use of similar methods. Therefore, there should be another methodology of accomplishing particular rules in a general mode though not connected to a particular principle; and this is possible only by the general utilization of benefits attached to the Shari<sup>c</sup>ah and its intentions".<sup>20</sup>

Another example whereby Imām al-Shāfi<sup>c</sup>i applied the theory of al-maṣāliḥ al-mursalah is as mentioned in his book Al-umm concerning witnesses' renouncing their testimony. He says:

"If witnesses testify that a man divorced his

---

<sup>20</sup> Al-Zanjānī, op. cit., pp. 170-71

wife three times so that a judge revoked the marriage; then the witnesses renounced and abandoned their testimony, the judge had to impose a fine on them an amount equal to the wife's required nuptial gift (if the husband had had a sexual contact with her), but if he hadn't had any sexual contact with her, the judge will fine them an amount equals to the half of her required nuptial gift. This is because they have forbidden her from her husband and therefore she deserves an amount equal to her required nuptial gift. The judge should not inquire into the actual amount given by the husband (at the time of marriage) as nuptial gift whether small amount or large, but he should rule according to the amount cherished by the jurists (i.e an amount equal to another woman's required nuptial gift who is of her status), and so he should make a decision on that value".<sup>21</sup>

It can be noticed here that what has been observed by Imām al-Shāfi<sup>c</sup>i in the process of imposing a fine on the witnesses is the dependence of the benefit of the wronged husband, and this benefit lies within the circle which the Lawgiver demanded to be preserved and considered; even though this particular benefit does not depend on an ordinance from the Qur'ān or Sunnah. So, in this way, Imām al-Shāfi<sup>c</sup>i can be reckoned to be one of those who applied the theory of al-maṣāliḥ al-mursalah in his interpretations of a number of cases recorded from him.

## 2.8 GENERAL CONCLUSION OF THE FOUR IMĀMS' ATTITUDE

At this point we are able to summarise the

---

<sup>21</sup> Imām al-Shāfi<sup>c</sup>i, Al-umm vol. 7, p. 50

fore-going account as follows: That the four celebrated Imāms of the school systems, viz. Mālik, Aḥmad ibn Hanbal, Abū Ḥanīfah and al-Shāfi<sup>cī</sup>, as noted from their expositions and impressions, do accept the theory of al-maṣāliḥ al-mursalāh as a means of legislation in Islamic Law inspite of their difference in the method of application and degree of utilization. Everybody gives it a different name. As we have seen al-Zanjānī (a propounder of the Shāfi<sup>cī</sup> school system) considered the killing of a group of people for an individual as an application of the theory of al-maṣāliḥ al-mursalāh in al-Shāfi<sup>cī</sup>'s judgments, whereas the Ḥanafīs take the same decision but upon the dependence of istiḥsān (equity). Although the judgment given by both of the school systems is one, the name given to the methodology is different.<sup>22</sup>

A degree of dissimilarity, however, is observed amongst these Imāms in the extent of the utilization of the theory of al-maṣāliḥ al-mursalāh; the leading and the paramount one is Imām Mālik ibn Anas, followed by Imām Ahmad ibn Ḥanbal after which come the two Imāms Abū Hanīfah and al-Shāfi<sup>cī</sup>.

A prominent example of those who explained this issue is Ibn Daqīq al-<sup>cī</sup>Id (an apologist of the Shāfi<sup>cī</sup>

---

<sup>22</sup> See al-Sarakhsī in his book Al-mabsūṭ, vol. 26, p. 126, for a detailed discussion

school system) who said the following:

"The truth without doubt is that Imām Mālik is the most likely person (to apply the theory of al-maṣāliḥ al-mursalāh) of any of the Imāms. After him follows Imām Aḥmad ibn Ḥanbal; but this does not exclude the other two Imāms in the general application of the theory, except the former two Imāms have a preference for its utility and application over the latter ones".<sup>23</sup>

Al-Qarāfī (an apologist of the Mālikī school system) said regarding this issue:

"There are some people who oppose the theory of al-maṣāliḥ al-mursalāh, nevertheless, you will see them in their derivations (of laws) give account for absolute benefit without inquiring from themselves about the process of deduction and generalizations to produce evidence for such a consideration, but they depend solely on the proportion and suitability (of the ʿillah (cause)); and this by itself is a real application of the theory of al-maṣāliḥ al-mursalāh".<sup>24</sup>

<sup>23</sup> Al-Shawkānī, Irshād al-fuḥūl, pp. 242-43

<sup>24</sup> Al-Qarāfī, Tanqīḥ al-fuṣūl muqaddimat al-dhakhīrah, vol. 1, p. 144



Chapter 3  
THE DEVELOPMENT OF THE LEGAL UNDERSTANDING OF  
MAŞLAḤAH

3.1 A. THE LEGAL DEFINITION OF MAŞLAḤAH

The Muslim lawyers have differing definitions of maşlahah and its specifications. To al-Ghazālī (d. 1111) the word "maşlahah" denotes "obtaining benefit and preventing injury". He goes further adding after that,

"We do not mean by interpreting maşlahah as obtaining benefit and preventing injury only \_\_\_\_\_ because these are human aims concerned with human welfare in human terms only, whereas what we actually mean by maşlahah is the preservation of the aims of the Shariḥah. The aim of the Shariḥah in regard to man is fivefold: viz: (i) to preserve his religion, (ii) to preserve his life, (iii) to preserve his mind (reason), (iv) to preserve his offspring, and (v) to preserve his material wealth. Everything which secures the preservation of these five elements is a maşlahah, and everything which jeopardizes them is a "mafsadah" (injury), the prevention of which is a maşlahah.<sup>1</sup>

It could be said that there is no clear cut difference between the general meaning of maşlahah and the definition given by al-Ghazālī, because the obtaining of benefit and the prevention of injury is the real intention of the Shariḥah. Still, there is not anything which brings benefits and repels injuries that is not encompassed in the intention of the Shariḥah and is

---

<sup>1</sup> A.M. al-Ghazālī, Al-mustaşfā, vol. 1, pp. 286-87; Kerr, Islamic Reform, pp. 92-93

directly or indirectly connected with religion, or life, or mind, or offspring, or material wealth. Nevertheless, does it not happen that an individual person considers a thing to be beneficial to himself while the Lawgiver considers it the other way round? We read, for instance, in the Qur'ān:

"Fighting is prescribed for you, and ye dislike it. But it is possible that ye dislike a thing which is good for you, and that ye love a thing which is bad for you. But God knoweth and ye know not".<sup>2</sup>

On the other hand, al-Khwārizmī (d.850) defines maṣlaḥah by saying:

"It is the preservation of the objective of the Shari<sup>c</sup>ah to prevent injuries to human beings".<sup>3</sup>

Maṣlaḥah or the preservation of the objectivity of the Shari<sup>c</sup>ah does not only mean the prevention of injuries to human beings because this is one aspect of it only. The other aspect which is equally important is the positive side of maṣlaḥah - the obtaining of benefits. Although the Islamic juristic principle has stressed the prevention of injury more than the attainment of benefit by saying: "Prevention of injury precedes the attainment

---

<sup>2</sup> Qur'ān, 2:216

<sup>3</sup> Al-Shawkānī ascribed this definition to al-Khwārizmī in his book "Irshād Al-fuḥūl", p. 213; Jamāl al-Dīn al-Qāsimī mentioned it in his commentary on the treatise of al-Ṭūfī on maṣāliḥ [Al-manār journal, M9, p. 747] without ascribing it to its author; while the author of "Ta<sup>c</sup>līl Al-aḥkām" has ascribed the definition to its author but has not notified from which reference he quoted. See p.378 of Ta<sup>c</sup>līl

of benefit", in reality they are two different things altogether and are therefore not the same; nonetheless it is necessary, in order to understand them both, that they should be considered as complementary.

However, in defining maṣlahah ʿIzz al-Dīn ibn ʿAbd al-Salām (d.660/1263), the Egyptian scholar, puts a check and says:

"He who wants to know the rights, the benefits and the injuries, strong amongst them as well as the weak, has to review his mind with a visualization as to why the Sharīʿah hasn't mentioned the solution or judgment of a particular problem he is confronted with in spite of the fact that the Sharīʿah manifested rules in which every single rule demands the subservience of human beings to their Creator and has not necessarily informed them of the benefit or injury of a thing in particular".

Then he goes on to define benefits and injuries saying:

"Benefits are four kinds:- needs and their causes; and happinesses and their causes. Injuries are also of four kinds:- pains and their causes and worries and their causes".<sup>4</sup>

Elsewhere, ʿIzz al-Dīn ibn ʿAbd al-Salām discusses real benefits and the allegorical ones in which he says: "Benefits are two types: real (happinesses and desires), and the allegorical (their causes). Sometimes the causes of benefits inflict injuries, they are commanded or allowed, not because they are injuries "per se" but they are a means to secure benefits, such as the amputation of

---

<sup>4</sup> I. ʿAbd al-Salām, Qawāʿid Al-aḥkām, vol. 1, pp. 9-10.

a thief's hand to protect people's wealth and the warning before jihād to protect people's lives. As is also the case with all legal punishments which are in actual fact not pleasant due to their injury, nonetheless, they are enforced to attain peace and security which is in one way or the other meant to attain benefits - such as killing the transgressors, stoning the married adulterers and lashing or deporting the unmarried adulterers etc. All these injuries have been legalised in the Shari<sup>c</sup>ah to attain real benefits, and they are called allegorical benefits, although this seems to be calling them "means" when it is "ends" that is really meant.<sup>5</sup>

The Muslim lawyers have defined maṣlaḥah in this way for the first seven centuries, whereby they did not agree to one general standard definition. Their difference on the definition of maṣlaḥah has also reflected the difference in their views about benefits inclusively or exclusively.<sup>6</sup> But this situation is not a necessary result in every condition. In spite of the difference of opinion of these scholars in considering "public interest" as a device of decision making, they never differ in the recognition of benefit wherever it existed

---

<sup>5</sup> Ibn <sup>c</sup>Abd al-Salām, op. cit., p.12

<sup>6</sup> It is meant by this elaboration that what the Muslim lawyers have pointed out about the difference of Imāms in the decision making process by putting into account "public interest", is that their difference is mainly caused by the specification of its indications.

and did not confuse it with injury.

From the Muslim lawyers we learn: (i) that maṣlaḥah (benefit), however defined, is neither a sheer desire nor a passion, nor is it a personal objective; and that is why al-Ghazālī insists that maṣlaḥah is the preservation of the intention of the Sharī<sup>c</sup>ah; (ii) that the prevention of injury is as important as the obtaining of benefit since both of which constitute collectively the meaning of benefit. This does not contradict with al-Khwārizmī's restricting his definition of maṣlaḥah to the prevention of injury only, because the preservation of the intention of the Sharī<sup>c</sup>ah already considers the positive aspect of benefit - i.e obtaining happiness. Perhaps, this consideration has prompted Khwārizmī to define maṣlaḥah negatively so as to include within its canopy the objective and not to confine the intention therein; and (iii) that the Lawgiver (God) has considered each and every benefit in the Sharī<sup>c</sup>ah in a sense that all benefits are connected, whether directly or indirectly, to the preservation of the five fundamentals, viz: religion, life, mind, offspring and material wealth. There is no difference of opinion between the Muslim scholars in that whatever preserves these fundamentals is a benefit and therefore must be taken into consideration, and whatsoever jeopardizes them has to be eradicated.

### 3.2 B. AL-MAṢĀLIḤ AL-MURSALAH AS A MEANS OF DECISION MAKING

It has already been noted that the theory of al-maṣāliḥ al-mursalah owes its origin to the conception that the Shari<sup>c</sup>ah is for social utility, and its function is to promote benefit and prevent evil. As we have seen that Imām Mālik approved the idea of public interest as one of the means of decision making in the Shari<sup>c</sup>ah and names this new device "al-maṣāliḥ al-mursalah".<sup>7</sup> According to MacDonald, the theory of al-maṣāliḥ al-mursalah, corresponds to utility, while in the words of <sup>c</sup>Abd al-Raḥīm, the author of Muḥammadan Jurisprudence, it is somewhat similar to juristic equity or preference (istiḥsān). He says that Imām Mālik would allow a deduction of law to be based on general considerations of public good. But it does not appear that the Mālikī jurists took full advantage of this principle, and it would seem that many followers of that school like the Hanafī doctors consider the doctrine to be too vague and general to be useful in making legal deductions".<sup>8</sup>

Ijtihād or interpretation of the text, according to this theory, is to consider the underlying or hidden meaning of the revealed text in the light of the public interest. Qiyās (analogy) is the primary method of

---

<sup>7</sup> Abū Zahrah, Mālik, p. 290

<sup>8</sup> A. Raḥīm, Muḥammadan Jurisprudence, p. 166

tracing the effective cause of a similar nature. If the cause is apparent it will be admittedly extended to similar cases; but the difficulty arises when the cause is not apparent. The Orthodox Caliphs, in such a case, are claimed to have resorted to reason and tried to discover the cause with reference to the meaning of the words of the revealed text, the context and the traditions of the Prophet. The application of this theory demands the interpretation of the text according to reason with regard primarily to social utility. Here lies the major difference between the principle acted upon by the Orthodox Caliphs and the use of independent judgment known as "ḥikmah" (act of wisdom). Thus the users of this theory base their "qiyās" or analogy on "ḥikmah" which they call the underlying reason of the text. "ʿIllah" (cause) is therefore replaced by ḥikmah in this theory.

"Modern Muslim scholars, says Kerr, are anxious to convey the humanism of the Shari<sup>c</sup>ah and tend to emphasize the rational comprehensibility of the ḥikmah and its relevance to the promotion of man's material interest. In this process the distinction between ḥikmah and ʿillah is sometimes lost, the latter term being employed to cover the meaning of the former".<sup>9</sup>

Here we must refer to the twentieth century

---

<sup>9</sup> Kerr, Islamic Reform, p. 67

commentator, ʿAbd al-Wahhāb Khallāf who emphasizes the social utility of Shariʿah. He draws a sharp difference between ʿillah and hikmah. "ʿillah", he says, must not only be suitable (munāsib) but also objectively recognizable (zāhir) and clearly defined (munḍabit); hikmah lacks these qualifications, yet it represents the true motive for (God's) enactment of the ruling. Hikmah is the main thing and the underlying reason without which ʿillah will serve no purpose. Thus, he equates hikmah with what al-Qarāfī referred to as the "promotion of benefit".

In order to show the difference between the ʿillah of a ruling and its hikmah, Khallāf gives an instance of the Qur'ānic verse:

"(Fasting) is for a fixed number of days, but if any of you is ill, or on a journey, the prescribed number (should be made up) from the days later".<sup>10</sup>

Relief from hardship, according to him, is the hikmah, while travelling or illness is the cause.<sup>11</sup> But he seems to ignore the fact that hikmah in this case is implicit in ʿillah and not separate from it, because hikmah ceases to exist if the ʿillah is taken away. Besides, ʿillah or cause is the ground of action, if it is considered to be without hikmah it would amount to folly. Therefore,

---

<sup>10</sup> Qur'ān, 2:184

<sup>11</sup> Khallāf, Masādir, p. 49

ʿillah covers ḥikmah, and the interpreter has to take into consideration ʿillah which is the effective cause of the revealed ruling so as to extend it to similar cases. He is not primarily concerned to identify the ḥikmah of the ruling, but to identify the ʿillah that occasions the ruling.

Relying on the ḥikmah, further more, would lead to certain legal judgments being contradicted by the conclusions of consensus. The prohibition of adultery, for example, might be ascribed to the ḥikmah of the necessity to protect genealogy; but on this basis, it would be logical also to prohibit intermarriage between persons of unknown parentage, which by consensus is not in fact the case. The ḥikmah, in other words, is an unacceptable criterion for judgment because of its generality and uncertain character; reliance on it is therefore presumptuous and likely to lead to distortion.<sup>12</sup>

### 3.3 C. THE MAIN RESERVATIONS IN THE APPLICATION OF THE THEORY OF AL-MAṢĀLIḤ AL-MURSALAH

The theory of al-maṣāliḥ al-mursalah does not stand aloof as an independent device of decision making (judgment) in Islamic law. It is a supplementary tool which helps an interpreter or a mujtahid to make up his

---

<sup>12</sup> Kerr, op. cit., p. 74

mind in the process of judging or giving verdicts to cases for which no clear cut ordinance is specified in the Qur'ān or Sunnah. So, the Muslim scholars have stipulated conditions and reservations in order to guide the interpreter or mujtahid so that he would arrive at the right decision and reach a safe conclusion in the process of his decision making through the help of the theory of al-maṣāliḥ al-mursalah, and at the same time to hinder him from attacking the Qur'ānic and Sunnah injunctions and keep him away from perversity. The main reservations are as follows: (i) He should not build his judgment, in which he finds public interest, upon anything which has been abrogated by the Sharīḥ, since that excludes the case from the circle of public interests. This will be shown later to apply to the verdict of Yaḥyā ibn Yaḥyā al-Laythī who thought of a public interest which conflicted with a Qur'ānic injunction and was therefore cancelled. (ii) The benefit should be a result of a well established principle and not a result of a probable proposition or of fanciful imagination. A typical example of this condition is, for instance, to take away the right of divorce in an Islamic marriage from a husband and vest it in the hands of a wife; which is in clear opposition to the ordinance of the Qur'ān (2:230-32); so it is not considered a public interest in this case and therefore is invalid. This is simply because any benefit which conflicts with any

injunction whether in the Qur'ān or Sunnah is rendered void. (iii) The benefit should be observed in a universal manner and should not be deemed in a particular mode. A rule or law in Islam is not established for an individual or a particular family or for a specific group, but it is generally promulgated for all individuals; because one of the most important qualities of the legislating nature of Islam is universality. The laws in the Sharīḥ are prescribed to suit and include all mankind the world over. No reservations or privileges should be reserved for a special group of people, all the responsible human beings (believers) are equal before the Sharīḥ in the eyes of the Lawgiver.

For that reason, the Muslim scholars have recommended the attacking of an enemy who shields himself with the Muslim prisoners of war even though that action would mean the killing of those Muslims. This is due to the dependence of public interest in this issue. The Muslim scholars have established that the enemy is, in any case, to be attacked except where the danger is general and reaches all the people. Were it possible to encircle the enemy within a fort to stop him from endangering Islam and the Muslims present within the region of this fort, then it is not recommended to depend on public interest to attack the enemy and cause death to

those Muslim prisoners of war.<sup>13</sup> (iv) It is an object of common sense to apply the theory of al-maṣāliḥ al-mursalah to a case where there is no conflict with a clear injunction whether from the Qur'ān, Sunnah or ijmā' or qiyās. For we do not need to turn to the theory of al-maṣāliḥ al-mursalah except when we fail to find direct rules or ordinances from these sources. (v) The benefit should neither be superseded by another important benefit nor should it be equal to it in preference. This means that there should be a criterion by which a certain benefit, as distinguished by a mujtahid, may be assessed. The standard which is agreed upon by most of the Muslim jurists and scholars is the consideration of benefits according to the order of the five fundamental principles of the aim of the Sharī'ah in regard to man; viz: The preservation of his religion, his life, his mind, his offspring and his material wealth.

If two benefits come into conflict where one of them needs be selected while the other is discarded or suspended, the two benefits should be examined and assessed in three aspects:- (i) to have a clear vision of the value of each benefit in respect of their importance; (ii) to have a general understanding of the extent of each benefit's utility; and (iii) to have a clear

---

<sup>13</sup> M.A. Şāleḥ, Maṣādir al-tashrī' al-Islāmī wa manāhiḥ al-istinbāt, p. 485

assurance of whether their results will actually happen or not.

The preference of one benefit over the other as regards importance, extent of general utility and the anticipation of its good results is made through the following procedure:- "The benefit which preserves man's religion takes precedence over the one meant to preserve his life if the two benefits conflict with each other; that which preserves man's life takes precedence over the one which preserves his mind; that which preserves man's mind takes precedence over the one which preserves his offspring; and that which preserves man's offspring takes precedence over the one which preserves his material wealth.<sup>14</sup>

#### 3.4 D. THE SCOPE AND CLASSIFICATION OF BENEFITS

Muslim jurists consider that the intention of the Shari<sup>h</sup>ah is to attain lawful benefits for human beings, the attainment of which will bring them happiness here in the world and in the hereafter. Added to this is a clear conception that the Shari<sup>h</sup>ah is a revealed code of law from God, the All-Wise and the All-Knowing who knows what suits mankind best and that which does not suit them. It goes without saying, therefore, that the

---

<sup>14</sup> For a detailed elucidation of these reservations see M.S.R. al-Bu<sup>h</sup>arī, in his Dawābiṭ al-maṣlahah fī al-Shari<sup>h</sup>ah al-Islāmiyyah, pp. 119-275

Sharīḥ contains all the legal aspects which help people to procure benefits and repel injuries. Public interest is therefore something inherent in the actions of the Lawgiver (God) and His intentions provided that there is no indication in the Sharīḥ for a particular thing to be considered or discarded.

It is important to bear in mind that legal obligations in the Sharīḥ are divided into two divisions: (i) that which concerns the organisation of the relationship between man and his Creator, i.e the acts of worship; and (ii) that which concerns the organisation of relationship between human beings - individuals as well as groups, societies and nations - i.e laws governing behaviour and transactions (muḥāmalāt). The underlying principle for the first division is obedience to God (to acquire God-consciousness) through following the ordained acts of worship by observing their provision as well as knowing the methods of performing them without looking into their causes and effects because that exercise is applicable to laws governing behaviour and transactions and not to acts of worship. Moreover, it is not essential for one who worships to know the cause and effect or even the reason for a particular act of worship, because by doing so it deprives him of servitude. It is also not permitted to him to innovate new acts of worship instead of the ordained ones because the Prophet of Islam has said,

"\_\_\_ every innovation (in the acts of worship) is perversion and the abode of every perversion is hell fire".<sup>15</sup>

The issue in connection with the acts of worship is clear since the Shari<sup>h</sup> requires, in the first place, the attainment of subservience to God, the Almighty. Subservience to God implies the liberation of an individual from any servitude except that of God alone. To prepare the soul for this is one of the objectives of the Shari<sup>h</sup> - i.e the preparation of a good individual in society. This division of obligations (i.e acts of worship), therefore, does not enter into the orbit of our research on benefits, though an individual may discover and try to interpret some implications of benefit in various acts of worship. It is without doubt that God has not ordained rules for nothing; we read, for instance, these verses in the Qur'<sup>ān</sup>:

"O ye who believe! Fasting is prescribed to you as it was prescribed to those before you, that ye may (learn) self-restraint";<sup>16</sup>

"\_\_\_ verily prayer restrains (one) from shameful and unjust deeds \_\_\_";<sup>17</sup>

"From their goods take alms, that so thou mightest purify and sanctify them; and pray on their behalf, verily thy prayers are a source of

---

<sup>15</sup> Reported by Muslim

<sup>16</sup> Qur'<sup>ān</sup>, 2:183

<sup>17</sup> Ibid., 29:45

security for them".<sup>18</sup>

However, the implications and clear intention of the Lawgiver may appear in some or most of the acts of worship, there is also a great portion of acts of worship with implications which are hidden or unknown to the human mind. For the human mind in connection with faith in God sometimes cannot perceive its implications, and it is not necessary to know the wisdom behind a particular injunction in matters of faith since the material comes from God who does not lay a rule except for the good of human beings. God does not oblige human beings to do or leave something except for the success and prosperity of an individual and a group: and the mind does not find any oddity in accepting such a faith as long as the acts of worship, in their various forms, are free from absurdities. Perhaps it is better to mention here that the difference between an act of worship with an abstruse implication (wisdom) and the one which is absurd is clear. It goes without saying, therefore, that acts of worship are mainly meant for the adoration of and the obedience to God alone, and the reasons for their enforcement are primarily confined to the knowledge of the Lawgiver (God) alone, that is because almost all the acts of worship have hidden benefits in them.

---

<sup>18</sup> Qur'ān, 9:103

As for the second division of legal obligations in the Shari<sup>h</sup> comprising of rules of behaviour and transactions, its scope and range is the organization of the relationships between people in terms of society and also internationally. A mujtahid or an interpreter could discover very easily that the underlying principles for transactions are based upon the consideration of worldly benefits which appeal to the mind and are recognized to be the supreme tenets of individual and communal life. So, this is the reason why we find that the Muslim scholars, in matters concerning customs and transactions, unanimously agree with each other that the consideration of causes and reasons should be dominant.<sup>19</sup> This is because the intention of the Shari<sup>h</sup> is to ensure the correct structure of society where its network is encompassed by justice, tranquility and prosperity so as to assure the success of an individual and of the society at large.

Take prayer, for instance, it is not permissible for its structure, the number of raka<sup>at</sup> (prostrations), duration, their circumstances etc. to be influenced by a change of place, season, generation or race. We neither need to find out the reason for its structure and conditions so that we could get rid of it nor can we add

---

<sup>19</sup> A.S. Muḥammad, Maṣādir al-tashrī<sup>h</sup> al-Islāmi wa manāhiḥ al-istinbāṭ, p. 465

anything new to it, simply because the Prophet of Islam has said,

"Pray in the way you have seen me praying".<sup>20</sup>

and God said,

"Verily, prayer is ordained to the believers at prescribed times".<sup>21</sup>

Whereas in matters concerning customs and transactions we are in need of knowing the cause and reason by which a certain contract is sanctioned or becomes null in order to legalize its execution and give allowance to a new rule for a new contract; or to give room for an emergency in the society which is ever changing and developing.

Wherever legal benefits are found to exist free from the encroachment of passions and lusts, the Shari<sup>h</sup> acknowledges and recognizes them and encourages people to obtain them; and wherever injuries are found the Shari<sup>h</sup> fights and checks them and enjoins people to refrain from them. Once it becomes clear that the injunctions of the Shari<sup>h</sup> concerning transactions and personal dealings aim at bringing benefits to human beings and repelling injuries from them, it should be realised that the benefits according to the Muslim jurists are categorized into three kinds: (1) Considered benefits (maṣāliḥ mu<sup>t</sup>tabarah) - these are benefits which have been laid

---

<sup>20</sup> Reported by al-Bukhārī and Muslim

<sup>21</sup> Qur'ān, 4:103

down by the Lawgiver with clear legal proofs; (2) Cancelled benefits (maṣāliḥ mulghāh) - these are benefits which have been cancelled by the Lawgiver; and (3) Unrestricted benefits (maṣāliḥ mursalah) - these are the ones which no injunction is given to consider them or to discard them; they are left to be judged independently.<sup>22</sup>

The considered benefits are further divided into three kinds: (i) The necessary benefits (al-darūriyyāt); (ii) The reasonable benefits (al-ḥājiyyāt); (iii) The luxurious benefits (al-taḥsīniyyāt).

### 3.5 THE NECESSARY BENEFITS

These are the benefits which people cannot do without, for their lives would become chaotic in their absence. To preserve these benefits is therefore an urgent need of human existence on earth and they are attained through the ascertainment of their principles. According to Muslim scholars these benefits concern the preservation of religion, life, mind, offspring and material wealth. The preservation of each one of these five things is considered necessary and essential.

The preservation of religion is a considerable benefit which the Shariḥ has dealt with extensively.

---

<sup>22</sup> Al-Shāṭibī, Al-muwāfaqāt, vol. 2, pp. 2-11; Al-iḥtiṣām, vol. 2, pp. 95-108

The Shari<sup>c</sup>ah has obliged able Muslims to fight for the cause of God (jihād) to preserve religion, so that the doctrine of monotheism should reign supreme and eradicate all the impediments and shackles confronting humanity at large. The Qur'<sup>ā</sup>n says:

"And fight them (the transgressors) until there is no more tumult or oppression, and there prevail justice and faith in God. But if they cease, let there be no hostility except to those who practise oppression".<sup>23</sup>

The preservation of life is a legal benefit which has been dealt with by the Shari<sup>c</sup>ah at length; and a severe penalty has been specified by the Shari<sup>c</sup>ah for those who illegitimately take life in order to secure the life of mankind and preserve it from extinction. The rule of legal retaliation (qiṣāṣ) has been laid down by the Shari<sup>c</sup>ah in order to prevent any hostility among human beings. The Qur'<sup>ā</sup>n says:

"\_\_\_ And if anyone is slain wrongfully, we have given his heir (next of kin) authority (to demand qiṣāṣ or to forgive); but let him not exceed bounds in the matter of taking life; for he is helped (by the Law)".<sup>24</sup>

In order to assure the security of mankind and the right to life for every human being and to crush cruelties and transgressions the Qur'<sup>ā</sup>n says:

"O ye who believe! the law of equality is prescribed to you in cases of murder: The free

---

<sup>23</sup> Qur'<sup>ā</sup>n, 2:193

<sup>24</sup> Ibid., 17:33

for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty".<sup>25</sup>

The Qur'ān has laid underlying principles for the preservation of human life, prevention of committing sins, removal of severity in duties, in addition to the illegalization of committing suicide; all these show clearly that the Shariḥah is deeply concerned with the preservation of life.

The enactment of taking vengeance (qiṣāṣ) is a modification of the prevailing custom before the advent of Islam, which could lead to uncontrolled bloodshed. When the Qur'ān came into existence it was made clear that the taking of revenge in a legal way is not aimed at the preservation of the life of an individual only but as a deterrent to preserve society. The Qur'ān says:

"In the law of Equality there is (saving of) life to you, O ye men of understanding; that ye may restrain yourselves".<sup>26</sup>

In order to preserve a balanced mind, the Shariḥah has prohibited intoxicants and has enjoined the Muslims to refrain from all activities which make the mind vicious and speculative. The Qur'ān says:

---

<sup>25</sup> Qur'ān, 2:178

<sup>26</sup> Ibid., 2:179

"O ye who believe! Wine and gambling, (dedication of) stones, and (divination by) arrows, are an abomination of Satan's handiwork; Eschew such (abomination), that ye may prosper".<sup>27</sup>

The Prophet of Islam is reported to have said:

"Every intoxicant is liquor and every liquor is forbidden".<sup>28</sup>

Above all, there are several rules governing the whole issue of the preservation of a balanced mind and empowering its faculties so as to prepare grounds for its activities; those rules have been expounded at length by the Muslim jurists.

In connection with the preservation of offspring, which is named by some scholars as - the safeguarding of kinship and chastity - the Shari<sup>c</sup>ah has ordained the act of marriage as a positive measure. We read in the saying of the Prophet of Islam:

"Intermarry extensively and spread so that I may stand proudly with you as the best of the nations on the Day of Judgment".<sup>29</sup>

The Shari<sup>c</sup>ah permitted polygamy as a motivation, and an alternative, to attain the preservation of offspring, and has entrusted to the husband the obligation of doing justice to all the wives equally. Says the Qur'<sup>'</sup>ān:

---

<sup>27</sup> Qur'<sup>'</sup>ān, 5:90

<sup>28</sup> Related by al-Bukhārī and Muslim; also refer to al-Shawkānī, Nail al-awṭār, vol. 7, p. 148

<sup>29</sup> Related by al-Bukhārī and Muslim. Another wording of this saying as related by Aḥmad ibn Ḥanbal and narrated by Anas ibn Mālīk reads, "Marry the virgins so that I possess more population above all the Messengers of God on the Day of Resurrection"

"Marry women of your choice, two or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then (marry) only one".<sup>30</sup>

To the same end, the Shari<sup>c</sup>ah has prohibited adultery and fornication and laid down a painful punishment to those who do it and has legislated it in order to close all the doors leading to this sinful act which, in the long run, breaks down the bonds of kinship and demolishes good character and generates recklessness and irresponsibility in society.

Concerning the preservation of material wealth, the Shari<sup>c</sup>ah has imposed a severe punishment to thieves and robbers and laid down various rules to enable people to earn their living legally, and prohibited them from plundering the belongings of others. The Qur'<sup>a</sup>n says:

"As to the thief, male or female, cut off his or her hand; a punishment by way of example from God for their crime; and God is Exalted in Power".<sup>31</sup>

### 3.6 THE REASONABLE BENEFITS

These are the benefits which people need to avoid inconvenient conditions only. The absence of these benefits neither harms people's lives nor causes disequilibrium in their worldly and religious welfare but only generates inconvenience. Ease and simplicity are

---

<sup>30</sup> Qur'<sup>a</sup>n, 4:3

<sup>31</sup> Ibid., 5:38

the general features of the Shari'ah. We see, for instance, permission is granted to a sick person and a traveller, to break the fast during the month of Ramaḍān:

"But if anyone is ill or on a journey, the prescribed period (should be made up) by days later. God intends every facility for you; He does not want to put you to difficulties".<sup>32</sup>

We see also in connection with prayer that a four prostration prayer may be reduced to two prostrations in particular circumstances; eg. on a journey or in jihād.

The Qur'ān says:

"When ye travel through the earth, there is no blame on you if ye shorten your prayers for fear the unbelievers may attack you".<sup>33</sup>

With regard to transactions we see the Lawgiver allowing trade and commerce and forbidding usury. We do not need to visualize much in order to comprehend the demand of people for these two principles - i.e allowing trade and commerce and forbidding usury. There are numerous examples of this type in the Shari'ah which give scope for mankind to accommodate all the new circumstances of life.

### 3.7 THE LUXURIOUS BENEFITS

These are benefits which are neither necessary for the smooth running of people's lives nor important for the development of the individual's life or the

---

<sup>32</sup> Qur'ān, 2:185

<sup>33</sup> Ibid., 4:101

community's prosperity. They are embellishers of an already comfortable life. The taking, for instance, of sophisticated ornaments and adopting highly cultured customs which make the community look at ease are not necessities of life; they are a surplus to normal life. In spite of this lack of necessity, the Shariḥ has taken this issue into consideration in order to provide the opportunity of happiness and success in this life as well as in the hereafter. We see, for instance, the Prophet of Islam commanding the Muslims to observe strictly the rules of tidiness, wearing new clothes on ḥīd (festival) celebrations, putting on clean white clothes on occasions of some gathering. As we find also, in order to attain luxurious benefits, harmful food-stuffs have been forbidden and the eating of bad smelling foods is abhorred.

We therefore find that the thing which is necessary for life is categorized in the essentials (al-ḍarūriyyāt), that which makes life more enjoyable is in the category of embellishers (al-taḥsīniyyāt), and that which lies between the two is in the category of ordinary needs and requirements (al-ḥājiyyāt).<sup>34</sup>

---

<sup>34</sup> Al-Ḥizz ibn ḤAbd al-Salām, Qawāḥid al-aḥkām fī maṣāliḥ al-anām, vol. 1, pp. 60-61

### 3.8 THE CANCELLED BENEFITS

These are the benefits which have been discarded in the Shari<sup>C</sup>ah. They are secondary benefits which conflict with the primary ones, or they are primary benefits which create grave injuries. An example of this type of discarded benefits is to surrender to an enemy when one is capable of defending oneself. It may appear, at the first glance, that surrendering to an opponent brings peace to people and stops the shedding of innocent blood and so on; nonetheless, the Lawgiver considers this act to lead to successive injuries; such as the domination of the enemy over the conquered, the exploitation of the wealth of the conquered and the oppression of the subject population etc. For these reasons and others, the Lawgiver has ordained the obligation of self defence to safeguard the liberty and the security of the Ummah as an imperative thing and has urged the preservation of the boundaries and the maintenance of the Ummah in order to achieve the Ummah's sovereignty and keep the intruders aloof. The act of not yielding to the enemy helps in bringing victory and stability to the Ummah and prepares it to succeed in the difficulties of life.

Another example of the discarded benefits is that of committing suicide for somebody who finds difficulty in earning his living, or for someone who is seriously sick and who despairs of recovering. It would seem at first glance that committing suicide by these people is an

individual benefit which puts an end to the torment of the disease or to the misfortune of life. Nevertheless the injuries caused by this act are numerous the least of which would be the termination of human perseverance and the assassination of character in the society and the creation of inordinate uncertainty in the hearts of individuals as well as communities. It also causes narrowness of optimism and disbelief of the natural fatality of man which surrounds him from all angles. The disbelief in the natural fatality of man generates passiveness and negativity in the mind, while belief in it imbues man with positiveness and faith.

The Shari<sup>c</sup>ah has forbidden committing suicide and abhors those who do it and it has declared its exercise like killing an innocent person with no cause; the Qur'<sup>ān</sup> says:

"Take not life which God hath made sacred except by way of justice and law";<sup>35</sup>

"And do not kill (destroy) yourselves; for verily God hath been to you most merciful".<sup>36</sup>

The Prophet of Islam is reported to have prohibited the killing of oneself, and considered it to be the action of removing oneself from true faith in God, His judgment and His decision.<sup>37</sup>

---

<sup>35</sup> Qur'<sup>ān</sup>, 6:151

<sup>36</sup> Ibid., 4:29

<sup>37</sup> The tradition has been related by al-Bukhārī

Among the examples of cancelled benefits is the issue of polygamy; a right which rests in the hands of a husband. Polygamy may appear to bring injuries and grievances to women, and it would be of great benefit to them if it did not exist at all. Nevertheless, the Shari<sup>c</sup>ah has cancelled this benefit to provide for the needs of a husband: eg. the need to get children in case the first wife was barren; the need for social intercourse which would not be possible to a long term diseased wife; the need for social welfare and wellbeing of women whose husbands have died, either being killed in wars or by calamities, etc.

In this same field of cancelled benefits we bring forward the verdict of Yaḥyā ibn Yaḥyā al-Laythī, a famous Andalusian scholar, and the standpoint of other Muslim scholars towards his verdict. The ~~Amir~~ of al-Andalus, <sup>c</sup>Abd al-Raḥmān ibn al-Ḥakam, had sexual contact with his wife during the day time of the fasting month of Ramaḍān after which he felt sorry for his action and collected jurists to ask them what would be the necessary remedy for his action. So, Yaḥyā ibn Yaḥyā al-Laythī, being a prominent jurist of his time, replied:

"I find no remedy for you except to fast two consecutive months without breaking a single day".<sup>38</sup>

---

<sup>38</sup> M.A. Ṣāleḥ, Maṣādir al-tashrī<sup>c</sup> al-Islāmī wa manāhij al-istinbāt, p. 472

While it is known in the Sharīḥ that he who breaks the fast in this way has the choice of either setting a slave free, or fasting two consecutive months or feeding sixty poor people.<sup>39</sup> When other jurists questioned him on his verdict, he replied by saying:

"Were we to open the door of choice to him, it would be simple for him to have sexual contact with his wife daily in the month of Ramaḍān and simply set free a slave or feed sixty poor people (because of his richness); so, I have made the remedy more difficult in order that he should not repeat the same action again".<sup>40</sup>

What is noteworthy in this verdict is that it is based upon a vested benefit which has not been considered by the Lawgiver. Yes, it might seem that in making the *Amīr*, <sup>c</sup>Abd al-Raḥmān, fast two months consecutively was to provide a great benefit to him and deter him from following his passions which made him disobey God and to set an example to others. Nonetheless, the Sharīḥ has not approved this benefit and cancelled it simply because the choice for remedy applies to all believers regardless of their economic or social status. The Sharīḥ has just made unlawful and sinful to have sexual intercourse during the day in Ramaḍān to all Muslims equally without segregation between the ruler and the ruled, and has sanctioned any one of the three mentioned penalties. The

---

<sup>39</sup> The ḥadīth is related by Aḥmad ibn Ḥanbal in his Musnad

<sup>40</sup> M.A. Ṣāleḥ, op. cit., p. 472

Sharīḥ has depended in this matter upon the view of fear of God which acts as the first guard in an individual's soul besides the punishment for the remedy, to assist the safeguarding of the Law of God and its executions. So, since the Sharīḥ has cancelled the benefit which has drawn the attention of Yahyā ibn Yaḥyā al-Laythī, the Muslim scholars have rendered his verdict null and void.

### 3.9 UNRESTRICTED BENEFITS

These are the benefits which enter the realm of the consideration of the Lawgiver and His intentions. There is no evidence in the Sharīḥ which specifies the necessary utility of these benefits nor is there any indication which suggests their removal. These benefits are called "unrestricted benefits" due to the fact that the Sharīḥ has not given direct injunctions on whether to act upon them or discard them as opposed to the considered benefits which the Sharīḥ has commanded to be acted upon, and the cancelled benefits which have been rejected by it. For this reason there are some scholars who use the term "al-istiḥlāḥ" to mean al-maṣāliḥ al-mursalāh.

If the meaning of al-maṣāliḥ al-mursalāh tallies with the meaning of istiḥlāḥ as put forward by some scholars, and since the Sharīḥ does not command man to do anything except for the benefit of human beings, it

seems appropriate therefore to take al-maṣālih al-mursalāh as one of the devices of decision making in Islamic Law.<sup>41</sup>

As we have seen previously in chapter one that the original sources of the Shariḥ are: The Qur'ān, the Sunnah, the ijmā' and qiyās; and if a rule is to be given for a certain case whether wājib (compulsory) or mandūb (recommended), or jā'iz (lawful), or makrūh (loathsome), or ḥarām (illegal), we look in the Qur'ān for its enactment; if we do not find it therein, we look in the Sunnah for its decision. If we do not find in the Sunnah, we look in the ijmā'. But if we do not find a rule for a certain case in one of these three sources, we resort to the fourth source qiyās (analogy). We have seen clearly, when we talked about analogy in chapter one, that decisions and judgments are connected to causes (ḥilāl); and ḥillah (the singular of ḥilāl) is a qualification which if ever found in a particular action or occurrence of a certain decision or judgment is made similar to another occasion bearing the same ḥillah.

In this way we find the Shariḥ connects these qualifications with causes but without connecting decisions or judgments with benefits which cannot be

---

<sup>41</sup> M.S.R. al-Buḥārī, Dawābiḥ al-maṣlaḥah fī al-Shariḥ al-Islāmiyyah, p. 387 and so on

defined on certain occasions. Moreover, there is a problem of difference of opinion in demarcating the limits of benefits. So, the genuine methodology which could be applied by a jurist or a mujtahid is first of all to identify the suitable ʿillah which would be approved by the Shariʿah and then give a decision or judgment to that particular occasion and other new occurrences bearing the same ʿillah.

But events and occurrences are limitless. A jurist or a mujtahid might face a new event daily; does he make new decisions depending on benefits for new events and occurrences which do not bear similar ʿilal to the previous ones which have ordinances or is he to stand still without making any decision, knowing that it is incumbent upon him to give legal decisions to those occurrences so that people are kept aware of the rightness or wrongness of their actions?<sup>42</sup>

Were it to be discovered that some type of drink makes the mind sluggish, slow in thinking and creates bad character but does not make a person drunk; are we to permit it as a lawful drink due to the lack of intoxication or are we to make it unlawful for the benefit of the preservation of mind and character and get

---

<sup>42</sup> See al-Shāṭibī, Al-muwāfaqāt, vol. 1, pp. 15-17; also Abū Zahrah, Mālik, p. 398 and so on

rid of all the impurities which contaminate the integrity of an individual as well as that of the society at large? Without any shadow of doubt, according to the intention of the Shari<sup>c</sup>ah, we have to declare the drink unlawful to ensure the legal benefit; and in doing so we have already applied the theory of al-maṣāliḥ al-mursalah.

Chapter 4  
MAŞLAḤAH AS A GENERAL AND A TECHNICAL TERM

4.1 MAŞLAḤAH AS A GENERAL TERM

It is quite often claimed that "maşlahah" as a principle of legal reasoning - broadly speaking, to argue that "good" is "lawful": and that "lawful" must be good - came to be used at a very early period in the development of fiqh. The use of this principle is attributed, for instance, to the early jurists of the "Ancient schools of law" or even to the Companions of the Prophet. Among the founders of the schools of law, it is associated with Mālik b. Anas. There seems, however, to be a confusion in these statements in equating the use of "maşlahah" as a general term with its use as a technical term. The early use of maşlahah may have been in its general sense similar to other terms such as ra'y. Rudi Paret has observed that the word maşlahah as a technical term is not used by Mālik or al-Shāfi<sup>cī</sup>; hence this concept must have developed in the post-al-Shāfi<sup>cī</sup> period.<sup>1</sup>

Paret's observation, however, does not refute the possibility already discussed that considerations similar to maşlahah were employed by pre-al-Shāfi<sup>cī</sup> jurists. Such considerations do not seem to have been formulated in

---

<sup>1</sup> R. Paret, Istiḥsān and Istiṣlāḥ, Shorter Encyclopedia of Islam, [Leiden: Brill, 1961], p. 185

technical legal terms. The proponents of the use of maṣlaḥah in the early period have, apparently, confused the early similar considerations with maṣlaḥah. It is, therefore, not incorrect to say that the post-al-Shāfi<sup>cī</sup> development of the concept of maṣlaḥah was a continuation of such early methods of reasoning which were not yet formally defined. Later, when al-Shāfi<sup>cī</sup>'s definition of the method of reasoning in terms of "sources" and his insistence that the reasoning be linked with the revealed texts through qiyās, prevailed over other methods the concept and method of maṣlaḥah was also seen, especially by Shāfi<sup>cī</sup> jurists in terms of "sources".

From Imām al-Ḥaramayn al-Juwaynī's (438/1047) Al-burhān, it appears that by his time the validity of reasoning on the basis of maṣlaḥah had become a problem controversial enough to bring forth three schools of thought. In this respect some Shāfi<sup>cī</sup>s and a number of "mutakallimūn"<sup>2</sup> are claimed to have maintained that the acceptable maṣlaḥah is only that which has a specific textual basis (aṣl). The mursalāh (a maṣlaḥah not based on such an aṣl and such as are contradictory to the textual evidence (dalīl) are not valid. The second school of thought is attributed to Imām al-Shāfi<sup>cī</sup> and to the majority of Ḥanafīs in general. They believe that

---

<sup>2</sup> A group of uṣūliyyūn in the mediaeval period of Islam who were influenced by theological exposition in their legal interpretations.

maṣlaḥah even if it is not supported on a specific basis, can still be used, provided that it is similar to those maṣāliḥ which are unanimously accepted or which are textually established. The third school is attributed to Imām Mālik who held that a maṣlaḥah existed without any consideration of the condition of similarity or whether it corresponded with the texts or not.<sup>3</sup>

This comment by al-Juwaynī does not help us in determining the dates of the use of maṣlaḥah but it is very significant to note what divides these schools on maṣlaḥah. First, the comment shows that it was the method of reasoning which sought its basis in the revealed texts. Secondly, if we accept the attribution of maṣlaḥah to the names of the jurists given in this comment, it also shows that the method of maṣlaḥah in its early formulation by Imām Mālik and his followers was independent of the consideration of "sources" or "basis" and further that maṣlaḥah was accepted by others if it conformed to "sources" - to the text in the case of the first group and to ijmā' in case of the second group. They rejected only al-maṣlaḥah al-mursalāh because it did not conform with the sources. This explains why the concept of maṣlaḥah which originally was not necessarily

---

<sup>3</sup> Imām al-Ḥaramayn al-Juwaynī, Al-burhān fī Uṣūl al-fiqh, MS. III Aḥmet 1321, photo. I.R.I. no: 219, fol. 135a; see also Muṣṭafā al-Shalabī, Ta'ālīl Al-aḥkām, [Cairo: al-Azhar, 1949], pp. 292ff

conceived and confined within the framework of "sources", came to be seen, particularly by later Shāfi<sup>c</sup>īs, in reference to "sources". This confused the discussion of the concept of maṣlaḥah as we shall see later. One indication of this confusion that may be noticed in the following analysis, is the tendency to discuss maṣlaḥah at two levels, i.e first in terms of need and effectiveness, and second in reference to sources. When discussed in terms of validity, these two levels were confused.

#### 4.2 MAṢLAḤAH AS A TECHNICAL TERM

Al-Juwaynī analysed maṣlaḥah as an extra-textual basis of reasoning in the context of analogy by ‘illah into five categories. First is the category where its ma<sup>c</sup>nā (significance) is rationally understandable and where it is related to certain essential necessities (ḍarūrāt) which are inevitable. The second category concerns what is a general need (ḥājāt ‘āmmah), but below the level of ḍarūrī. Third is the category which belongs to neither of the above, but rather concerns something which is noble (mukarramah). The fourth category is similar to the third, call it less noble, yet in terms of priorities, the fourth comes later. The fifth category concerns those uṣūl whose ma<sup>c</sup>nā is not obvious, and is not demanded by ḍarūrah, nor by ḥājah; nor is it required by a mukarramah. Examples of this category are the

purely physical <sup>ḥ</sup>ādāt.<sup>4</sup>

Maṣlahah as a technical term is not used in the Ḥāhirī jurist Ibn Ḥazm's (456/1065) Al-iḥkām fī Uṣūl al-aḥkām, or in the Ḥanafī jurist, Pazdawī's (d. 482/1089) Uṣūl.

The terms maṣlahah and maṣāliḥ are used by the Muḥtazilī Abū al-Ḥusayn al-Baṣrī (d. 478/1085) both in general and in technical sense. To him maṣāliḥ are good things, and maṣlahah means goodness. Al-Baṣrī discusses maṣlahah in reference to istidlāl and ḥillah, and in arguments against his opponents who maintain that maṣāliḥ cannot be known through reasoning at all. At one point he defines al-maṣāliḥ al-sharḥiyah as those acts which we are obliged to do by the Sharīḥ such as ḥibādāt.<sup>5</sup> Related to these acts are the means to achieving the Shārḥ commands; these means are also connected with maṣāliḥ. These means are dalīl (evidence), amārah (sign), sabab (cause), ḥillah (reason) and sharḥ (condition). The illustrations of these terms are given as follows: the validity of consensus, analogy, measurability for ribā (usury) and the conditions in contracts of sale. All of these means are connected with maṣlahah.<sup>6</sup> For instance,

<sup>4</sup> See al-Juwaynī, op. cit., fols. 108ff

<sup>5</sup> See Abū al-Ḥusayn al-Baṣrī, Al-muḥtamad fī Uṣūl al-fiqh, {Dimashq: Al-maḥad al-ḥilmī al-Firansī, 1964}, vol. 2, p. 888

<sup>6</sup> See al-Baṣrī, op. cit., p. 888

the connection of amārah and ʿillah is evident in what follows: When a correct sign indicates a quality (waṣf) as a reason (ʿillah), we decide that it is the basis of maṣlaḥah ... It indicates that the basis of maṣlaḥah is not to be found wherever an ʿillah is found.<sup>7</sup>

For al-Baṣrī, then, maṣlaḥah is an end for which ʿillah and other related terms are means. Al-Baṣrī, however, does not elaborate what these maṣāliḥ are and what the connection is between al-maṣāliḥ al-sharʿiyyah which he mentions, and the other maṣāliḥ which he does not mention.

#### 4.3 TWO MAIN STAGES IN THE DEVELOPMENT OF THE CONCEPT OF MAṢLAḤAH

In the following centuries, however, the concept of maṣlaḥah advanced quite significantly. There are two main stages in the development of this concept. One is represented by al-Ghazālī in the early twelfth century, the other by al-Rāzī in the early thirteenth century.

##### 4.3.1 AL-GHAZĀLĪ'S CONCEPT OF MAṢLAḤAH

In al-Ghazālī's (d. 1111) Al-mustaṣfā, the problem of maṣlaḥah is discussed more clearly and fully than by al-Baṣrī. Al-Ghazālī defines maṣlaḥah as follows:

"In its essential meaning (aṣlan) it (maṣlaḥah) is an expression for seeking something beneficial (manfaʿah) or removing something harmful (maḍarrah). But this is not what we mean, because

---

<sup>7</sup> Al-Baṣrī, op. cit., p. 805

seeking benefit and removing harm are the objectives (maqāsid) (in uṣūl al-figh) at which the creation (khalq) aims and the goodness (ṣalāh) of creation consists in realizing their goals (maqāsid). What we mean by maṣlahah is the preservation of the maqṣūd (objective) of the law (sharḥ) which consists of five things: preservation of religion, of life, of reason, of descendants and of property. What assures the preservation of these five uṣūl (principles) is maṣlahah and whatever fails to preserve them is mafsadah and its removal is maṣlahah".<sup>8</sup>

Maṣlahah as understood in the above definition is then divided into the following three categories. First, the type of maṣlahah which has a textual evidence in favour of its consideration; second, the type which is denied by a textual evidence; third, the type where there is neither a textual evidence in favour, nor in contradiction. The first category is valid and can be the basis of qiyās.<sup>9</sup> The second is obviously forbidden. It is the third category which needs further consideration. Accordingly, the element of maṣlahah contained in the third category is further examined from the viewpoint of its strength. From this angle there are three grades of maṣlahah as we have seen before, viz: darūriyyāt, ḥajiyyāt and taḥsiniyyāt or tazyīnāt. The preservation of the above-mentioned five principles is covered in the grade of darūriyyāt. This is the strongest kind of

<sup>8</sup> See al-Ghazālī, Al-mustaṣfā min ʿilm al-uṣūl, {Baghdād: Muthannā, 1970}, vol. 1, pp. 286-87

<sup>9</sup> Ibid., p. 284

maṣlaḥah. The second grade consists of those maṣāliḥ and munāṣabāt (occasions) which are not essential in themselves but are necessary to realize the maṣāliḥ in general. The third grade is neither of the above but exists only for the refinement of things.<sup>10</sup>

Keeping this classification in mind, only that al-maṣlaḥah al-mursalāh i.e that which is not supported by textual evidence, will be accepted which has three qualities: darūrah (essential), qaṭʿiyyah (decisive) and kulliyyah (totality). The other two grades of maṣlaḥah, however, are not admissible if they are not supported by a specific textual evidence. If these are supported by the text, the reasoning is then called qiyās, otherwise, it is called istiṣlāḥ which is similar to istiḥsān,<sup>11</sup> and, hence invalid.

Al-Ghazālī counts istiṣlāḥ along with istiḥsān among the methods of reasoning which do not have the same validity that qiyās has. He calls such methods "uṣūl mawhūmah" - those principles in which the mujtahid relies on imagination or on his discretion rather than on Tradition.<sup>12</sup>

The above definition and classification of maṣlaḥah

---

<sup>10</sup> Al-Ghazālī, op. cit., vol. 1, p. 290

<sup>11</sup> Ibid., vol. 2, p. 306

<sup>12</sup> Al-Ghazālī, op. cit., vol. 1, pp. 274, 284

have a particular place in al-Ghazālī's structure of the discussion of uṣūl al-fiqh. A brief analysis of this structure will reveal the place that al-Ghazālī gave to the concept of maṣlaḥah. Al-Ghazālī divides the discussion of uṣūl in his book Al-mustaṣfā into six parts. Apart from the first two parts which deal with introductory matters such as definition of uṣūl and an introduction to methods of logic, the remainder of the parts discusses the following subject matters of uṣūl: ḥukm (command); al-adillah al-arbaʿah (the four evidences) i.e Qur'ān, Sunnah, ijmāʿ and ʿaql; - interpretation and analogy; and taqlīd (imitation) and ijtihād. The above treatment of maṣlaḥah appears as an annex to the discussion of the four evidences.<sup>13</sup> Also it is significant that it is not discussed in the part dealing with methods of interpretation and analogy, although its connection is implied.

References to maṣlaḥah, however, appear in other parts also. In the part of ḥukm, where al-Ghazālī discusses its essential meaning (ḥaqīqah) and its four components, maṣlaḥah is mentioned occasionally. The four components of ḥukm, according to al-Ghazālī are the following: (1) ḥākim (the one who gives judgment; the legislator, sovereign); (2) ḥukm (the judgment); (3)

---

<sup>13</sup> Al-Ghazālī, op. cit., pp. 284-315

maḥkūm <sup>ʿ</sup>alayh (subject of judgement (4) maḥkūm fīh (the object of judgement, the act of mukallaf).

Discussing the meaning of ḥukm, he deals with the question of whether the goodness or badness of acts (both human and divine) is known objectively or through sharʿ (law). His description of ḥasan (goodness) is similar to his above definition of maṣlahah in its essential meaning.<sup>14</sup> At one point he even uses the term maṣāliḥ in place of ḥasan.<sup>15</sup> He frequently refers to mafsadah in the course of his analysis of maḥkūm fīh, in dealing with the question whether only voluntary acts are objects of judgement or not. He regards it as a mafsadah for involuntary acts to be considered as objects of command.<sup>16</sup>

Reference to maṣlahah is made again in the part of methods of reasoning. Dealing with the method of qiyās, he explains that qiyās has four components: (1) aṣl (the root to which analogy is made); (2) farʿ (the branch for which analogy is sought); (3) ʿillah (the reason or the basis of which analogy is made); and (4) ḥukm (the judgment to which analogy leads). Al-Ghazālī maintains that qiyās, here, must be distinguished from qiyās in

---

<sup>14</sup> See al-Ghazālī, op. cit., vol. 1, pp. 56-57

<sup>15</sup> Ibid., p. 60

<sup>16</sup> Ibid., p. 87

philosophy. This distinction lies, apart from the difference in the form of reasoning, in the conception of ʿillah itself. The ʿillah in fiqh is not "cause" but merely a "sign".<sup>17</sup> Naturally then the methods of finding the ʿillah are also different. The evidence in which the ʿillah is sought is "naqliyyah" (traditional), meaning the Qur'ān, Sunnah and ijmāʿ. The ʿillah is either explicit (ṣarīḥ) , or it is implicitly indicated (imā'), or it is known from the sequence and order of the command (sabab wa tartīb). The fourth manner of finding the ʿillah is istinbāt (inference). The only valid methods of istinbāt are two: (1) al-ṣabr wa al-taqsīm (observation and classification; method of exclusion), and (2) munāsabah (suitability).<sup>18</sup> It is in reference to munāsabah that maṣlaḥah as a main element of suitability with sharʿ is frequently discussed.

Al-Ghazālī defines "munāsib" as that which, like maṣāliḥ, is achieved rationally (intadhama) as soon as it is connected with the command (ḥukm).<sup>19</sup> For a discussion of the meaning, classification and grades of munāsib, al-Ghazālī refers to the annex which is significantly enough the discussion of maṣlaḥah and its grades. Munāsib and maṣlaḥah are, however, not identical.

---

<sup>17</sup> See al-Ghazālī, op. cit., vol. 2, p. 230

<sup>18</sup> Ibid., vol. 2, 295ff

<sup>19</sup> Ibid., p. 297

Although al-Ghazālī analyzes munāsib also in terms of effectiveness and validity in the same way as he does with maṣlahah, yet the details vary. Among the various classifications of munāsib, one is of particular significance for us, as it explains the relationship of munāsib to maṣlahah as well as the difference between istiḥsān and istiṣlāḥ in the eyes of al-Ghazālī. Munāsib is divided into four categories: first, the munāsib which is suitable and is supported by a specific textual evidence. Second, that munāsib which is neither suitable nor is supported by the textual evidence. Third, that munāsib which is not suitable but is supported by textual evidence. Fourth, that munāsib which is suitable but is not supported by textual evidence.<sup>20</sup> Al-Ghazālī adds that in the above classification the first category is acceptable to all jurists. The second category is called istiḥsān which clearly means to make law according to personal discretion. The fourth is called istiṣlāḥ or al-istidlāl al-mursal. It is clear from this classification that maṣlahah is the basic consideration for deciding the suitability or munāsabah of something which istiḥsān lacks. But again the munāsabah of maṣlahah further depends on its suitability or conformity to the text in general; otherwise it will fall into the category of istiḥsān.

---

<sup>20</sup> Al-Ghazālī, op. cit., vol. 2, p. 306

From al-Ghazālī's treatment of maṣlaḥah, it can be concluded in general that his predilection for examining fiqh in terms of theology<sup>21</sup> and for qiyās as a method of reasoning, led him to examine the concept of maṣlaḥah with reservations. From the point of view of theology, he rejected the concept of maṣlaḥah in terms of human utility; furthermore, he subjected it to scrutiny on the basis of revealed texts. Secondly, he made the method of reasoning by maṣlaḥah subordinate to qiyās. He did not reject maṣlaḥah altogether, as he did with istiḥsān, but the qualification he provided for the acceptance of maṣlaḥah, did not allow it to remain an independent principle of reasoning.

Furthermore, with the above limitations on the concept of maṣlaḥah, he could now bring into focus the other elements which are in his discussion quite relevant to maṣlaḥah, such as taklīf (legal obligation), haqīqat al-ḥukm (the reality of a rule), fahm al-khiṭāb (the understanding of speech), niyyah (intention), ta<sup>c</sup>bbud (self consecration to God), etc. The discussions of these elements are scattered through various chapters in his Al-mustaṣfā. In addition, al-Ghazālī did not see the necessary relationship among different categories of

---

<sup>21</sup> Al-Ghazālī, op. cit., vol. 1, pp. 5 - 7. Al-Ghazālī complains that the Transoxian jurists, such as Abu Zayd have tried to bring too much fiqh into uṣūl al-fiqh [p. 10]

maṣlahah.

Some of the above points were taken into consideration by some jurists after al-Ghazālī, but more systematic consideration was given to them by al-Shāṭibī, as we shall see later.

#### 4.4 THE INFLUENCE OF AL-GHAZĀLĪ ON OTHER JURISTS

Al-Ghazālī's classification and definition were followed by a number of jurists. His influence, particularly in reference to maṣlahah, is very strong. As Ibn Khaldūn noticed, al-Baṣrī's book Al-muṭamad and al-Ghazālī's Al-mustaṣfā remained major sources of influence for later writers on uṣūl, until the appearance of al-Rāzī's monumental work Al-maḥṣūl.<sup>22</sup>

Al-maḥṣūl combined the above two works and reformulated a number of concepts. Al-Rāzī's Al-maḥṣūl then in turn became a source of considerable influence for later uṣūl works. This influence is evident from the number of commentaries and abrigements on Al-maḥṣūl that were written in later periods. This work influenced even Mālikī and Ḥanafī uṣūl which has so far taken exception to Shāfi<sup>c</sup>ī influence. We need not go into details, but it must be mentioned that al-Qarāfī (684/1285), Ibn Ḥājib (646/1249) and Ibn <sup>c</sup>Abd al-Salām with whom al-Shāṭibī was

---

<sup>22</sup> See Ibn Khaldūn, Al-muqaddimah, [Cairo: Bulāq, 1320 A.H], p. 431

familiar and in general opposed, were largely under the influence of Fakhr al-Dīn al-Rāzī's (606/1209) Al-maḥṣūl.

Al-Rāzī's Al-maḥṣūl<sup>23</sup> is structured more on the pattern of al-Baṣrī's Al-mu<sup>c</sup>tamad than on al-Ghazālī's Al-mustaṣfā. Al-Rāzī deals with the definitions of the basic terms in the introduction. Significantly enough, the discussion about the meaning and classification of ḥukm and the question of the goodness of acts constitute more than half of this chapter. The scheme of the rest of the chapter is exactly the same as that of al-Baṣrī. The references to maṣlaḥah are made, therefore, in the introduction, where the question of goodness of acts is discussed, in the chapter concerning qiyās where the question of munāsabah as a manner of finding ḥillah is dealt with, and in the last chapter where al-maṣāliḥ al-mursalah are discussed as one of the ways of knowing the commands of the Shari<sup>c</sup>ah in addition to qiyās.

#### 4.5 AL-RĀZĪ'S CONCEPT OF MAṢLAḤAH

Al-Rāzī does not define maṣlaḥah, but it seems that in his thinking munāsib and maṣlaḥah are quite closely associated with each other. First, munāsib is defined as "what leads man to what is agreeable (yuwāfiq) to him both in "acquisition" (taḥṣīl) and "preservation"

---

<sup>23</sup> Fakhr al-Dīn al-Rāzī, Al-maḥṣūl fī uṣūl al-fiqh, MS. Yale University, Nemoj, A - 1039 [L- 643]

(ibqā').<sup>24</sup> He explains that taḥṣīl means to seek "utility" (manfa<sup>c</sup>ah), and manfa<sup>c</sup>ah is pleasure (ladhdhah) or its means. Ladhdhah is to achieve what is suited (mulāim). Ibqā' is explained similarly as removing harm (maḍarrah), which is alam (pain) or its means. Both ladhdhah and alam are evident and need not be defined. Thus munāsib in its final analysis is related to ladhdhah in the positive sense and to alam in the negative sense.

The second definition of munāsib is given as that which is usually suited (fī al-<sup>c</sup>ādah) to the actions of the wise.<sup>25</sup>

Al-Rāzī then maintains that the first definition is accepted by those who attribute ḥikam and maṣāliḥ as causes of God's commands. The second definition is employed by those who do not accept the above causality.<sup>26</sup> This explanation takes us back to al-Rāzī's own view on the problem of causality and God's commands. This question is first dealt with in the course of discussion of whether the goodness or badness of things is rational or established by law. He argues that in as much as the definition and understanding of good as something "suitable to nature (of man)" or as "a quality

---

<sup>24</sup> See Fakhr al-Dīn al-Rāzī, op. cit., part II, f. 87a

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

of perfection" is concerned, undoubtedly good and bad are rational. The point in question is, however, whether good and bad can be defined with reference to praise or blame as the Mu<sup>c</sup>tazilah have done.<sup>27</sup> Al-Rāzī, after detailed analysis, concludes that, if defined in the latter sense, good and bad can be established only by law.<sup>28</sup> The question then is whether what is praised in God's commands corresponds with the rational good or not. If it corresponds, can this correspondence be understood as cause or motive?

Al-Rāzī answers this question in detail in his discussion of munāsabah. He argues that to prove that munāsabah can be cillah, there are three premises to be established: first, that God issued the commands for the maṣāliḥ of the people; second, that the case in question consists of a maṣlahah; and third, that it can be shown that the probable reason for God issuing this particular command is this particular maṣlahah.<sup>29</sup> Giving six proofs, he establishes the first condition that the commands are issued because of maṣāliḥ. He explains, however, that in contradiction to the Mu<sup>c</sup>tazilah the fuqahā' do not regard maṣlahah as gharaḍ (human need); they rather view it in terms of the general significance (ma<sup>c</sup>nā) or ḥikmah

---

<sup>27</sup> Al-Rāzī, op. cit., part I, f. 9a

<sup>28</sup> Ibid., f. 13a

<sup>29</sup> Al-Rāzī, op. cit., part II, f. 90b

(philosophical basis). In fact, there is not much difference between the two positions. The difference is as follows: whereas the Mu<sup>c</sup>tazilah believe that God is obliged to consider maṣlahah, the fuqahā' stress that He is not obliged to do so. God has done so because of His grace.<sup>30</sup> The second condition needs no explanation. The third condition, that this particular command attributes a specific motive to God's acts and commands, is a position which al-Ghazālī does not accept.<sup>31</sup> Al-Rāzī resolves this problem by explaining it in the following terms:

"Muslims believe that the revolving of the heavens, the rising and the setting of the stars, the continuity of their forms and the lights are not obligatory, yet it has been God's custom to continue them in one state. Inevitably it provides the probability that this (i.e what happens today) will continue tomorrow and after tomorrow with the same qualities... To sum up, if a certain thing occurs repeatedly many times, it gives the probability that when it happens (next) it will happen the same way... Now, when we observe sharāi<sup>c</sup> (laws), we find that the commands and maṣāliḥ occur together, without being separated from each other, this is known inductively...<sup>32</sup>

To sum up, al-Rāzī stresses that no motive or cause can be attributed to God's acts or commands; yet he admits that God's commands are for the maṣlahah of the

---

<sup>30</sup> Al-Rāzī, op. cit., part II, f. 91b

<sup>31</sup> Al-Ghazālī, op. cit., part II, f. 92a

<sup>32</sup> Ibid., f. 92b

people, and this maṣlahah or munāṣabah can be considered as an ʿillah for that command. The paradox in this position is resolved in two explanations: first, that these maṣāliḥ are coincidental with God's acts, only accidentally, not in terms of cause and effect and, secondly, that it has happened this way not as a necessary correlation between maṣlahah and command, because God is not obliged to act in this way. Rather, God has acted as He has as a Grace, so that a sign may be established to make His command known.

Al-Rāzī has offered these explanations in view of the possible objections against his admission of taʿlīl afʿāl Allah (to attribute causes to God's acts). It is significant to note that al-Rāzī recounts the possible criticism of his position in detail while his own defence is very short and quite unsatisfactory. The criticism consists of more than ten objections.<sup>33</sup>

Al-Rāzī's answer to this criticism is very brief, two main points in his answer are as follows:

"We have explained that God's commands are issued (mashrūʿah) because of the maṣāliḥ. As to the rational arguments that you have enumerated, they are not applicable here (ghair masmūʿah). Because if they are established, they would infringe upon the legal obligation (taklīf), whereas the controversy over analogy whether in favour or in opposition, is based on the acceptance of the obligation. This well-considered answer is

---

<sup>33</sup> See al-Rāzī, op. cit., ff. 92 - 97

sufficient for all what you have mentioned".<sup>34</sup>

"Secondly, your criticism applies to those who maintain that to attribute maṣāliḥ as ʿillah to God's commands is rationally necessary. It is not applicable to the one who holds that it is not obligatory for God but He has done so because of His Grace".<sup>35</sup>

Thus al-Rāzī could maintain that munāsabah or maṣāliḥ were evidence for ʿillah, and could still insist that God's commands had no motives. It is with this reservation that al-Rāzī apparently accepted the first definition of munāsib. This is also the reason that he divides munāsib into two categories: ḥaqīqī (true) and iqnāʿī (seemingly convincing). Ḥaqīqī is that munāsib which consists of either a maṣlaḥah in this world or one in the hereafter. Iqnāʿī only appears to be a munāsib; in fact it is not.<sup>36</sup>

Like al-Ghazālī, al-Rāzī also divides maṣlaḥah into darūrī, ḥājī and taḥsīnī. He divides munāsib according to ta'thīr (effect) and shahādat al-sharʿ (textual evidence), and mulāʾamah (suitability).<sup>37</sup> With the exception of certain differences of detail, he is generally in agreement with al-Ghazālī.

---

<sup>34</sup> Al-Rāzī, op. cit., f. 97b

<sup>35</sup> Ibid.

<sup>36</sup> Ibid., f. 88b

<sup>37</sup> Ibid., ff. 87 - 90

In general, the attempt at expressing the concept of maṣlaḥah in theological terms by al-Ghazālī was completed by al-Rāzī with much more emphasis. Al-Ghazālī objected that a conception of maṣlaḥah with reference to human benefit alone and independent of God's determination, is not theologically possible. Al-Rāzī gave this general objection a specific theological content. He made it clear that even to attribute the consideration of maṣlaḥah in terms of human benefit to God's commands, is to attribute causality to His acts and hence theologically impossible. Both of these positions led to a kind of ijbār (determination)<sup>38</sup> Both implied that God's commands demand obedience in their own right, not because of maṣlaḥah. If there existed the content of maṣlaḥah in Shariḥah, it was to be explained by the grace of God or by accident, as al-Rāzī held. These positions rendered the question of moral and legal responsibility meaningless. Al-Rāzī admitted such implications of his position for the question of taklīf as well as for the problem of reasoning by analogy, but he did not elaborate it further.

Briefly, the concept of maṣlaḥah which was originally a general method of decision for jurists and as such a free principle, came to be limited by the

---

<sup>38</sup> Most probably this is the ijbār which al-Shāṭibī refers, see Al-muwafaqat, vol. 1, pp. 19 - 20

opponents of this concept through two considerations. First, there was a theological determinism which tended to define maṣlaḥah as whatever God commands. Second, there was a methodological determinism which, aiming to avoid the apparent arbitrariness of the method, tried to subject maṣlaḥah to qiyās so as to link it with some more definite basis. Both considerations were inadequate. First, in order to decide that something is maṣlaḥah, even to say that God's commands are based on maṣlaḥah, some criterion outside these commands has inevitably to be accepted. This was precisely what theological determinism denied. Second, to proceed by qiyās, one must seek the ʿillah, which was either denied because of theological reasons or was interpreted so as to mean "sign". The implication of this position is obvious. On the one hand, it insisted that further extension of rules must be in units; every new deduction must have a specific link in Sharīʿah. It denied the extension of law as a whole. On the other hand, it refused to take social needs into consideration, because it insisted upon deducing laws from specific rulings of Sharīʿah, not even from the general intent of the law.

#### 4.6 THE MAIN TRENDS OF THE CONCEPT OF MAṢLAḤAH DURING THE PERIOD BETWEEN AL-RĀZĪ AND AL-SHĀṬIBĪ

If we may take general note of major works on uṣūl during the period between al-Rāzī and al-Shāṭibī, we can see further trends in these works. The first trend refers

to those whose conception of maṣlaḥah is either similar to that of al-Rāzī or those who have simply juxtaposed al-Ghazālī's and al-Rāzī's definitions of munāsib and maṣlaḥah. Among Mālikī jurists Shihāb al-Dīn al-Qurāfī (684/1285)<sup>39</sup> and among Ḥanafīs Ṣadr al-Sharīḥ al-Maḥbūbī (747/1346)<sup>40</sup> stay closer to al-Rāzī. Accepting al-Rāzī's criticism of maṣlaḥah, al-Qurāfī even went further. He raised serious doubts whether maṣlaḥah could ever be defined and justified in clear terms.<sup>41</sup>

Jamāl al-Dīn al-ʿAsnawī (771/1370)<sup>42</sup> and Tāj al-Dīn al-Subkī (771/1369)<sup>43</sup> combine al-Ghazālī and al-Rāzī. Saḥd al-Dīn al-Taftazānī (792/1290)<sup>44</sup> interprets the Hanafī position, mainly that of Pazdawī (482/1089), in reference to al-Rāzī.

The second trend refers to those jurists who reject al-maṣlaḥah al-mursalah as a valid basis of reasoning. In

<sup>39</sup> Al-Qurāfī, Tanqīḥ al-fuṣūl fī ʿilm al-uṣūl, in Al-dhakhīrah [Cairo: Maṭbaʿah Kulliyyat al-Sharīḥ, 1961], pp. 144-46

<sup>40</sup> Ṣadr al-Sharīḥ al-Maḥbūbī, Al-tawdīḥ wa al-tanqīḥ [Cairo: Maṭbaʿah Bosanawī, 1304 A.H.], pp. 536-540

<sup>41</sup> See M. Khālīd Masʿūd, Islamic legal Philosophy, [Islamabad, 1977], p. 235

<sup>42</sup> Jamāl al-Dīn al-ʿAsnawī, Nihāyat al-uṣūl, Commentary on Baiḍāwī's Minhāj al-wuṣūl on the margin of Ibn Amīr al-Ḥajjī's Al-taqrīr wa al-taḥbīr [Cairo: Bulāq, 1317 A.H.] vol. 3, pp. 134-140

<sup>43</sup> Tāj al-Dīn al-Subkī, Jamʿ al-Jawāmiʿ in ʿAbd al-Raḥmān al-Bannānī, Hāshiyah ʿalā matn jamʿ al-jawāmiʿ, [Cairo: Muṣṭafā Bābī, 1937], vol. 2, pp. 270-285

<sup>44</sup> Saḥd al-Dīn al-Taftazānī, Sharḥ al-tawdīḥ wa al-tanqīḥ [Cairo: Bosanawī, 1304 A.H.] vol. 2, pp. 548-683

this category fall the Shāfi<sup>cī</sup> jurist Sayf al-Dīn al-Āmidī (646/1249)<sup>45</sup> and the Mālikī, Ibn Ḥājib (646/1249)<sup>46</sup> In their arguments against al-maṣlahah al-mursalah both follow al-Ghazālī rather than al-Rāzī. To them a maṣlahah is acceptable only if it is textually supported.

The third trend is illustrated by the Shāfi<sup>cī</sup> jurist, <sup>c</sup>Izz al-Dīn ibn <sup>c</sup>Abd al-Salām (660/1263). He was inclined towards taṣawwuf.<sup>47</sup> There is a noticeable inclination towards Ṣufistic interpretation of law in his treatment of the concept of maṣlahah.

To Ibn <sup>c</sup>Abd al-Salam maṣlahah means ladhdhah (pleasure) and farah (happiness) and the means leading to them.<sup>48</sup> The maṣāliḥ are then divided into two kinds: maṣāliḥ of this world and the maṣāliḥ of the hereafter. The former can be known by reason, while the latter can only be known by naql (tradition, revelation).<sup>49</sup> In view

---

<sup>45</sup> Sayf al-Dīn al-Āmidī, Al-iḥkām fī uṣūl al-aḥkām, {Cairo: Maṭba<sup>c</sup>ah Ma<sup>c</sup>ārif, 1914}, vol. 4, pp. 215-217

<sup>46</sup> Ibn Ḥājib, Mukhtaṣar muntahā al-uṣūl {Cairo: Bulāq, 1317 A.H.} vol. 2, p. 289

<sup>47</sup> Ibn <sup>c</sup>Abd Al-Salām was initiated into the Suhrawardiyyah Ṭarīqah [Ṣufistic order]. He is also claimed to have joined the Shādhīliyyah Ṭarīqah. His relationship with Ibn <sup>c</sup>Arābī has, however, been a subject of dispute. For details see Riḍwan <sup>c</sup>Ali al-Nadawi, al-<sup>c</sup>Izz ibn <sup>c</sup>Abd al-Salām, {Damascus: Dār al-fikr, 1960} pp. 103 - 110

<sup>48</sup> See Ibn <sup>c</sup>Abd al-Salām, Qawā<sup>c</sup>id al-Aḥkām fī maṣāliḥ al-anām, {Cairo: Istiqāmah, n.d.} vol. 1, p. 10

<sup>49</sup> Ibn <sup>c</sup>Abd al-Salām, op. cit., vol. 1, p. 10

of the people's knowledge, however, the maṣāliḥ differ according to the level of the approach of the people. The lowest level of maṣāliḥ is that which is common to all men. Higher than this is the level on which the adhkiyā' (the wise people) conceive the masalih. The highest level is peculiar to the awliyā' Allah (friends of God, the Sufis) alone. The awliyā' and asfiyā' (pure) prefer the maṣāliḥ of the hereafter to those of this world. The reason is that the awliyā' are anxious to know His commands and laws (in their reality), hence their investigation and reasoning (ijtihād) is the most complete.<sup>50</sup>

Elsewhere, Ibn ʿAbd al-Salam divides masalih as "rights" into two major divisions. First are the rights of God, and second, the rights of men. The rights of God fall into three categories: rights which belong purely to God such as maʿārif (gnosis) and aḥwāl (mystic states); second, rights which combine rights of God and those of men such as zakāt (alms); and third, those which combine rights of God, and of His Prophet, and of the people in general. The rights of men are also of three categories: rights of nafs (self), rights of men toward each other, and rights of animals toward men.<sup>51</sup>

---

<sup>50</sup> Ibn ʿAbd al-Salām, op. cit., p. 24

<sup>51</sup> Ibid., p. 129

The above references which are recurrent themes in his Qawā'id al-aḥkām, indicate that Ibn 'Abd al-Salām's legal thinking was deeply influenced by mysticism. For instance, although he did not reject huqūq al-nafs (rights of the soul), he considered a maṣlahah aiming at the realization of such rights as lower in rank than one which aimed at ma'rifah and aḥwāl.

In fact, Ibn 'Abd al-Salām represents the stage where the Sufi conception of maṣāliḥ came to permeate uṣūl al-fiqh. It is not possible at this point to go into details of the Sufi conception of human maṣāliḥ and its history. It must, however, be pointed out that at a very early stage in Sufism, rejection of huzūz al-nafs (pleasures of the animal soul) became significant as a means of controlling the nafs. In Sarraj's (378 A.H.) al-Luma', huzūz al-nafs are frequently opposed to huqūq al-nafs.<sup>52</sup>

Zuhd (denial of worldly pleasures) is defined as abandoning the huzūz.<sup>53</sup> The huqūq are defined as aḥwāl,

<sup>52</sup> R. A. Nicholson [Ed. Comm.], in Abū Naṣr al-Sarrāj, Kitāb al-Luma' fī al-taṣawwuf, [London: Luzac, 1914], p. 134. For this opposition of terms cf. Abū Bakr al-Kalabādhī, Al-ta'arruf li Madhhab ahl al-taṣawwuf [Cairo: 'Isā al-Bābī, 1960], p. 23; Najm al-Dīn Kubrā, Fawā'id al-jamāl, ed. Fritz Meier, [Wiesbaden: Steiner, 1957], p. 71 [Introduction], pp. 5 - 6 [text]

<sup>53</sup> See Sarraj, Kitāb al-Luma' fī al-taṣawwuf p. 47, {quoting Ṣūfī Ruwayn b. Aḥmad}

maqāmāt (high ranks), etc.<sup>54</sup>

Huzūz had its apparent connection with maṣāliḥ, and more particularly, with the question of rukhsah (legal allowance) in case of hardship. The Sufi stress on zuhd, waraʿ (piety) and ikhlāṣ (devotion) required abandoning of huzūz. An obvious example of this encroachment of taṣawwuf on fiqh and uṣūl al-fiqh may be seen in al-Qushayrī's waṣiyyah (will) to his disciples where he advised them against opting for such allowances because "when a faqīr (holy man) falls down from the level of haqīqah (reality) to that of rukhsah of Sharīʿah, he dissolves his covenant with God and violates the mutual bond between him and God.<sup>55</sup>

Closer to the period of al-Shāṭibī, the opposition to huzūz appears still stronger. Abū al-Ḥasan al-Shādhilī (656 A.H.) with whom Ibn ʿAbd al-Salām is claimed to have connections,<sup>56</sup> used to define tawḥīd (oneness of God) in terms of abandoning the huzūz al-nafs.<sup>57</sup> He also explained it as a curse from God when someone is found indulging in the huzūz so to be barred from ʿubūdiyyah

---

<sup>54</sup> Ibid., p. 336

<sup>55</sup> Abū al-Qāsim al-Qushayrī, Al-risālah fī ʿilm al-taṣawwuf, {Cairo: Muḥammad ʿAlī, 1948}, p. 181

<sup>56</sup> See above n. 54

<sup>57</sup> See ʿAbd al-Ḥalīm Maḥmūd, Al-madrasah al-shādhiliyyah wa Imāmuḥā Abū al-Ḥasan al-Shādhilī, {Cairo: Dār al-kutub al-ḥadīthah, 1387 A.H.}, p. 130

(servitude).<sup>58</sup>

Ibn ʿAbbād al-Rundī (792/1390), the famous Shādhulī, with whom al-Shāṭibī was in correspondence on matters relating to taṣawwuf and fiqh, also stressed the rejection of ḥuḏūz. Commenting on the Ḥikam (wise sayings) of Ibn ʿAṭā' Allah, Ibn ʿAbbād said that "the nafs always seeks ḥuḏūz and turns away from ḥuḏūq; hence if you are confused in two matters, always choose what is harder for the nafs."<sup>59</sup> Elsewhere in commenting on the ḥikam he says: "the coming of fāqat (trial by wants and needs) is a happy occasion for the disciples", Ibn ʿAbbād explained that the Ṣūfī, contrary to an ordinary Muslim, finds pleasure by loosing his ḥuḏūz. Situations of neediness provide a disciple with purity of heart, which is not achieved by ṣawm (fasting) or ṣalāt (praying), because in ṣawm and ṣalāt there is a possibility of hawā (desire) and shahwā (lust).<sup>60</sup>

The Ṣūfī view of obligation to God, thus, had serious implications for maṣlahah in terms of human utility. It not only denied human interest as a basis of consideration, but also insisted on abandoning human

---

<sup>58</sup> ʿAbd al-Ḥalīm Maḥmūd, op.cit., p. 137

<sup>59</sup> Ibn ʿAbbād al-Rundī, Sharḥ al-ḥikam li al-Imām Abī al-Faḏl Aḥmad b. ʿAṭā' Allah al-Iskandarī, {Cairo: Muṣṭafā Afandī, 1320 A.H.}, p. 99

<sup>60</sup> Ibid., p. 106

interests to purify the obligations as "complete obedience to God". These implications were not generally recognized by the jurists. Ibn ʿAbd al-Salām accepted the Sūfī view, but in his attempt to synthesize the two, he was led either to deny the maṣāliḥ of this world altogether, or to accept the two on separate grounds.

The fourth trend is represented by Ibn Taymiyyah (728/1328) and his student Ibn Qayyim al-Jawziyyah (751/1350). Ibn Taymiyyah tried to find a middle way between the two extremes of total rejection and total acceptance of maṣāliḥ. He considered al-maṣlaḥah al-mursalah similar to the methods of ra'y, istiḥsān, kashf (mystic revelation) and dhawq (mystic taste) of whose validity he was suspicious,<sup>61</sup> and hence rejected them. On the other hand, he refuted the moral implications of the denial of maṣlaḥah to the commands of God.

Ibn Taymiyyah also counts al-maṣlaḥah al-mursalah as one of the seven ways of knowing the commands of God, along with the traditional sources of law. He defines al-maṣlaḥah al-mursalah as follows:

"(It is a decision) when a mujtahid considers that a particular act seeks a benefit which is preferable, and there is nothing in sharʿ that

---

<sup>61</sup> See Ibn Taymiyyah, Qawāʿid fī al-muʿjizāt wa al-karāmāt wa anwāʿ khawāriq al-ʿādah, in Majmūʿat al-rasāʾil wa al-masāʾil [Cairo:Maṭbaʿah Manār, 1349 A.H.], vol. 5, p. 22

opposes this (consideration).<sup>62</sup>

Ibn Taymiyyah, however, concludes that to argue on the basis of al-maṣlaḥah al-mursalāh is to legislate in matters of religion, and God has not permitted this. To do so is similar to istiḥsān and taḥsīn ʿaqlī (legislation through reasoning).<sup>63</sup> He admits that Sharīʿah is opposed to maṣlaḥah, but when human reason finds maṣlaḥah in a certain case where there is no supporting citation in the text to be found, only two things are meant. Either there definitely is a text which the observer does not know or one is not dealing with maṣlaḥah at all.<sup>64</sup> The obvious assumption in Ibn Taymiyyah's arguments is that all the possible maṣāliḥ are already given in the text. The other assumption is, of course, that all of God's commands are based on maṣlaḥah. The latter assumption is of particular significance to Ibn Taymiyyah, as it has to do with the moral responsibility of man, a matter which he stressed very much. He condemned both the Muʿtazilah and the Jabriyyah in reference to the question of maṣlaḥah. The Muʿtazilah argued that God is obliged to command only

---

<sup>62</sup> Ibn Taymiyyah, op. cit., vol. 5, p. 22

<sup>63</sup> Ibid., p. 23

<sup>64</sup> Ibid.

what is good for man. They conceived God's actions as analogous to man's actions. They assumed that whatever is morally obligatory for man must be obligatory for God. Ibn Taymiyyah refuted this. But he also refuted the Jabriyyah position that God's commands are not based on maṣlahah. He questioned their assumption that the intention of maṣlahah is a limitation upon God's acts. The Jabriyyah argued that a command does not necessitate irādah (will). Ibn Taymiyyah saw in this argument a theological advantage, but morally such a doctrine was harmful. He clarified that in reference to God there are two kinds of irādah; al-irādah al-shar<sup>c</sup>iyah al-dīniyyah (the legal and religious will) and al-irādah al-qadriyyah al-kawniyyah (the potential creative will). When God commands He wills the first kind of will.<sup>65</sup>

The consideration of maṣlahah, or as Ibn Qayyim, following Ibn Taymiyyah, often calls it, siyāsah (polity), plays an important part in explaining legal obligations, legal reasoning and legal change in Ibn Qayyim's I<sup>c</sup>lām al-muwagqī<sup>c</sup>īn. He expounds the principles of Ḥanbalīs fiqh, and enumerates the following five as sources and principles: (1) Nasṣ; (2) The fatāwā of the Companions of the Prophet; (3) Selection from the opinion of the Companions; (4) Ḥadīth mursal (a report of a

---

<sup>65</sup> See Ibn Taymiyyah, op. cit., p. 30

saying of the Prophet which lacks a link in the chain going back to the Prophet); and (5) Qiyās li al-darūrah.<sup>66</sup> Thus it is in reference to the three sources that the consideration of maṣlahah is expounded. Ibn Qayyim explains that it is valid to attribute ‘illah to the commands of God, because the Qur'ān and the Sunnah of the Prophet themselves are replete with examples where reasons are given to explain the command.<sup>67</sup> The larger part of the I‘lām is devoted to illustrating how various commands are based on certain reasons which he calls ḥikmah or maṣlahah.

The following passage contains a clear statement of his views on maṣlahah. In a chapter where he explains how "fatāwā may change according to the change in time and place, etc..." he says:

"This chapter is of great significance. Due to the ignorance of the matters [to be discussed in this chapter] grave errors have been committed in reference to Shari‘ah. As a result hardship and severity has been brought forth [upon people]. Such obligations have been imposed as are not required, if one judges by the magnificent Shari‘ah which keeps the highest level of maṣāliḥ. The foundations of Shari‘ah are laid on the ḥikmah and maṣāliḥ al-‘ibād, in this world of living (ma‘āsh) and in the world of return (ma‘ād). The Shari‘ah is all justice, kindness, maṣāliḥ and ḥikmah. Hence any case which departs from justice to injustice ... from maṣlahah to mafsadah ... is not part of Shari‘ah even though it has entered there by ta'wīl

<sup>66</sup> See Ibn Qayyim, I‘lām al-muwaqqi‘īn, [Cairo: Sa‘ādah, 1955], vol. 1, pp. 29-32

<sup>67</sup> *Ibd.*, p. 197ff

(interpretation).<sup>68</sup>

---

<sup>68</sup> Ibn Qayyim, *op. cit.*, vol. 3, p. 14

Chapter 5  
AL-SHĀṬIBĪ'S TREATMENT OF  
MAṢLAḤAH

5.1 THE MAQĀṢID DOCTRINE

The Islamic jurisprudence regards "maqāṣid al-Sharīḥah" or the ends and goals of the Sharīḥah as its basic doctrine. The laws of the Sharīḥah are promulgated because they conform with the objectives of God and the objectives of God are also the maṣāliḥ of mankind. Maqāṣid al-Sharīḥah or the goals and ends of Law are thus one, and that is maṣlaḥah or the good and welfare of human beings.

The "maqāṣid doctrine" is based on a generally agreed premise which is theological in its origin. The premise is that God instituted the sharāiḥ (laws) for the maṣāliḥ (benefits, good) of the people, both immediate and future.<sup>1</sup> There exists, however, a difference of opinion among scholars concerning the details of this premise.

The mutakallimūn accept the general and apparent meaning of the premise, yet they differ from one another about whether the maṣāliḥ are to be understood in terms of ḥilal (causes). As we have seen in the case of

---

<sup>1</sup> See al-Shāṭibī Al-muwāfaqāt, [Cairo: Muṣṭafā Muḥammad, n.d.], vol. 2, p. 6

al-Ghazālī and al-Rāzī, the Ash<sup>c</sup>arī theologians reject explicit as well as implicit causality in reference to God. For them, the premise implies that God is obliged by the consideration of maṣāliḥ to act in a certain way. Since such an obligation proposes limitation on God's omnipotence, the Ash<sup>c</sup>arīs reject the idea that the maṣāliḥ are the <sup>c</sup>ilal of sharāi<sup>c</sup>. They, however, accept the premise by interpreting the maṣāliḥ to be the "grace" of God, rather than the "cause" of His acts. On the other hand, the Mu<sup>c</sup>tazilah, even though they too maintained God's omnipotence, yet believe that God is obliged to do good. Consequently they accepted maṣāliḥ as the <sup>c</sup>illah of Sharī<sup>c</sup>ah.<sup>2</sup>

The theological disagreement initially concerned God's acts, but it was extended to God's commands in the Qur'ān as they constitute His acts of speech. Thus the theological disagreement manifested itself in uṣūl al-fiqh as well. Theological arguments penetrated into uṣūl al-fiqh also because a number of writers on uṣūl were theologians.

Uṣūl al-fiqh, however, required a manner of thinking and a method of reasoning different from that of kalām.<sup>3</sup>

---

<sup>2</sup> See M. Khālīd Mas<sup>c</sup>ūd, Islamic legal philosophy, [Islamabad: Islamic Research Institute, 1977], p. 222

<sup>3</sup> Kalām is that part of theology which deals with dialectical exposition

Legal thinking necessitated that the volition for voluntary human acts must be attributed to man himself if man is to be held legally responsible for his acts. Since obedience to Divine Commands thus depends on human volition, the Command must be shown to be motivated by the consideration of human interests. Consequently, the premise of maṣāliḥ must be accepted in uṣūl in terms of "cause".

The premise of maṣāliḥ came to be generally accepted in uṣūl. Some uṣūliyyīn (lawyers), such as al-Ghazālī and others, in order to be consistent with their theological views, redefined the term "ḥillah" so as to rid it of the connotation of "causality" and "motivation" in which sense it was used and disputed in kalām. Passing from kalām to uṣūl, the term ḥillah thus underwent a semantic change. For the explanation of the meaning it acquired in uṣūl, we now turn to al-Shāṭibī.

## 5.2 THE MEANING OF ḤILLAH IN UṢŪL

Al-Shāṭibī explains that al-Rāzī<sup>4</sup> held that like His acts, God's commands also cannot be analyzed in terms of ḥilal (causes) whereas the Muḥtazilah believed that His Commands were caused (muḥtallalah) by the consideration of the maṣāliḥ of the people. Since it was inevitable that ḥilal be established for al-aḥkām al-sharḥiyyah (the

---

<sup>4</sup> For al-Rāzī's views on this point see chapter four above

rules of Shari<sup>c</sup>ah), the ʿillah as used in connection with the uṣūl came to be interpreted as "the sign that makes a rule known specifically".<sup>5</sup>

Al-Shāṭibī argues that the premise of maṣāliḥ can be established in Shari<sup>c</sup>ah by method of induction, both as a general theme in Shari<sup>c</sup>ah and in the description of the ʿilal of various commands in detail. For instance, the Qur'ān explains the reasons for ablution, fasting and jihād as being cleanliness, piety and eradication of oppression, respectively.<sup>6</sup>

After explaining this premise, let's now proceed to explain the details of maqāṣid al-Shari<sup>c</sup>ah in relation to the theory of al-maṣāliḥ al-mursalah. There are five aspects; four in relation to the Lawgiver, and one in relation to the mukallaf (subject of command).

The doctrine of maqāṣid al-Shari<sup>c</sup>ah is an attempt to establish maṣlaḥah in particular and al-maṣāliḥ al-mursalah generally as essential elements of the ends of law. The primary objectives (maqāṣid) of the Lawgiver is the maṣlaḥah of the people. The obligations in the Shari<sup>c</sup>ah concern the attainment of the maqāṣid of the Lawgiver which in their turn aim at the people attaining their maṣāliḥ. Thus maqāṣid and maṣlaḥah (or al-maṣāliḥ

---

<sup>5</sup> See al-Shāṭibī, op. cit., vol. 2, p. 6

<sup>6</sup> Ibid., p. 7

al-mursalāh) become interchangeable terms with reference to the obligations of the Sharī<sup>c</sup>ah.

Al-Shāṭibī defines the concept of maṣlaḥah as follows:

"I mean by maṣlaḥah that which concerns the subsistence of human life, the completion of man's livelihood, and the acquisition of what is emotional and intellectual qualities require of him, in an absolute sense".<sup>7</sup>

This is the definition of maṣlaḥah in its absolute sense. Al-Shāṭibī, however, takes into account various other senses in which maṣlaḥah can be studied. The maṣāliḥ belong either to this world or to the world hereafter. Further, the maṣāliḥ can be seen as a system; belonging to different grades and with a definable relationship with each other.

The second element in the meaning of maṣlaḥah is the idea of "protection of interest". Al-Shāṭibī explains that the Sharī<sup>c</sup>ah deals with the protection of maṣāliḥ either in a positive manner as when, in order to preserve the existence of maṣāliḥ the Sharī<sup>c</sup>ah adopts measures to support their bases. Or in preventative manner; to prevent the extinction of maṣāliḥ it adopts measures to remove any elements which are actually or potentially

---

<sup>7</sup> Al-Shāṭibī, op. cit., vol. 2, p. 25

disruptive of maṣāliḥ.<sup>8</sup>

Al-Shāṭibī, as do most of the uṣūliyyīn, divides the maqāṣid like the maṣāliḥ into ḍarūrī (necessary), ḥājī (needed) and taḥsīnī (commendable). The maqāṣid ḍarūriyyah are called necessary because they are indispensable in sustaining the maṣāliḥ of dīn (religion and the hereafter) and ḍunyā (this world) in the sense that if they are disrupted the stability of the maṣāliḥ of the world is disrupted too. Their disruption results in the termination of life in the world, and in the hereafter it results in losing salvation and blessings.<sup>9</sup>

As we have seen before with regard to maṣāliḥ that the ḍarūrī category consists of the following: dīn (religion), nafs (self), nasl (family), māl (property) and ‘aql (intellect).<sup>10</sup> Scholars, says al-Shāṭibī, have observed that these five principles are universally accepted. Analysing the aims of the shar‘ī obligations, we find that Sharī‘ah also considers them as necessary. The shar‘ī obligations can be divided into two groups which can be termed positive and preventitive. The positive group includes ‘ibādāt (acts of worship), ‘ādāt (practices) and mu‘āmalāt (transactions); and falling

---

<sup>8</sup> Al-Shāṭibī, op. cit., p. 8

<sup>9</sup> Ibid.

<sup>10</sup> Ibid., p. 10

into the preventive group are jināyāt (penalties).

<sup>°</sup>Ibādāt aim at the attainment of the maṣāliḥ of dīn. Examples of <sup>°</sup>ibādāt are belief and the declaration of faith (the oneness of God and the prophethood of Muḥammad) ṣalāt (prayer), zakāt (alms), siyām (fasting) and hajj (pilgrimage). <sup>°</sup>Ādāt aim at the protection of nafs (self) and <sup>°</sup>aqḷ (intellect). Seeking food, drink, clothing and shelter are examples of <sup>°</sup>ādāt. Mu<sup>°</sup>āmalāt also protect the nafs and <sup>°</sup>aqḷ. Al-Shāṭibī defines jināyāt as those which concern the above five maṣāliḥ in a preventive manner; they prescribe the removal of impediments which prevent the realization of these interests. To illustrate jināyāt, he gives example of qisās (legal retaliation) and diyāh (blood money) for nafs, and ḥadd (punishment for drinking intoxicants) for the protection of <sup>°</sup>aqḷ.<sup>11</sup>

The ḥājiyyāt are so called because they are needed in order to expand (tawassu<sup>°</sup>) the purpose of the maqāṣid and to remove the strictness of literal sense the application of which leads to impediments and hardships and eventually to the disruption of the maqāṣid (objectives). Thus if the ḥājiyyāt are not taken into consideration along with the darūriyyāt the people on the whole will face hardship. The disruption of ḥājiyyāt is,

---

<sup>11</sup> See al-Shāṭibī, op. cit., vol. 2, pp. 8 - 10

however, not disruptive of the whole of maṣāliḥ, as is the case with the darūriyyāt. Examples of ḥājiyyāt are as follows: in ʿibādāt, concessions in ṣalāt and ṣawm on account of sickness or journey which otherwise may cause hardship in prayers, fasting etc.; in ʿādāt, the lawfulness of hunting; in muʿāmalāt, permission for qirād (money lending), musāqāt (irrigation) and in jināyāt, allowances for weak and insufficient evidence in decisions affecting public interest.<sup>12</sup>

Tahsīniyyāt means to adopt what conforms to the best of practices (ʿādāt) and to avoid those manners which are disliked by wiser people. This type of maṣlahah covers noble habits (ethics, morality). Examples of this type are as follows: in ʿibādāt cleanliness (ṭahārah) or decency in covering the private parts of the body (sitr al-ʿawrah) in prayer; in ʿādāt, etiquette, table manners, etc.; in muʿāmalāt, prohibition of the sale of unclean (najs) articles or the sale of surplus food and water, and depriving a slave of the position of witness and leadership, etc.; for jināyāt, the prohibition of killing a freeman in place of a slave, etc.<sup>13</sup>

Al-Shāṭibī regards the above division of maqāṣid as a structure consisting of three grades, connected to one

<sup>12</sup> See al-Shāṭibī, op. cit., vol. 2, pp. 10-11

<sup>13</sup> Ibid., pp. 11-12

another. His detailed analysis reveals two aspects of their relationships with one another. First, every grade separately requires annexion of certain elements which supplement and complement this grade. Second, every grade is related to the others.<sup>14</sup>

Every one of the three grades requires additional elements to achieve the fuller realization of its objectives. For instance, qisās (legal retaliation) cannot be realized without a condition of tamāthul (parallel evaluation). This position, however, calls for two clarifications: first, a lack of these additional elements does not amount to a negation of the essential objectives; second, the consideration of the additional elements must not bring about a negation of the original objectives - that is to say, if the consideration of an element results in the annulment of the original objective, its consideration will not be valid. The reasons for this stipulation are, first, because the additional element is like a quality (ṣifah). If the consideration of a quality results in the negation of the qualified object (mawṣūf), the qualification is negated as well. Second, even if it is supposed that the consideration of the additional element results in the realization of its interests at the cost of the original

---

<sup>14</sup> Al-Shāṭibī, op. cit., p. 12

objective, it is stressed that the realization of the original objective be preferred.<sup>15</sup>

The above situation is illustrated by the following example. The eating of carrion is allowed in the Shari'ah to save life. The reason is that the preservation of life is of utmost importance, and preservation of murūah (manliness, honour) is only additional (takmīlī) to the protection of life. Impure things are prohibited in order to preserve honour and to encourage morality. But if the preservation of the additional element, i.e to preserve honour by avoiding eating impure things, leads to the negation of the original interest, i.e the preservation of life, the consideration of the additional element is forsaken.

Another example may be seen in the act of sale which is a necessary maṣlahah while the prohibition of risk and ignorance in sale transactions is additional. If the complete negation of risk is stipulated, the result will be complete negation of the act of sale.

The relationship of the above three grades of maqāsid with one another is the same as that of the additional maṣāliḥ to the original objective of the law. The taḥsīniyyāt are thus additional to the ḥājiyyāt which

---

<sup>15</sup> Al-Shāṭibī, op. cit., p. 14

are additional to the ḍarūriyyāt. The ḍarūriyyāt are the fundamentals of maqāṣid. In view of the above explanation, al-Shāṭibī deduces the following five rules in this relationship: (i) the ḍarūrī is the basis of all maqāṣid; (ii) the ikhtilāl (disruption) of ḍarūrī necessitates the ikhtilāl of other maqāṣid absolutely; (iii) the ikhtilāl of other maṣāliḥ, however, does not necessitate an ikhtilāl of, the ḍarūrī itself; (iv) in a certain sense, however, the ikhtilāl of taḥsīnī or of ḥājī absolutely necessitates the ikhtilāl of ḍarūrī; and (v) the preservation (muḥāfaẓah) of ḥājī and taḥsīnī is necessary for the sake of ḍarūrī.<sup>16</sup>

These rules may be illustrated by the rule of qīṣāṣ (lex talionis). Qīṣāṣ is ḍarūrī, and tamāthul (consideration of equality) in qīṣāṣ is taḥsīnī and takmīlī.

To illustrate the first rule, tamāthul (taḥsīnī) exists only because of qīṣāṣ (ḍarūrī). Thus a maṣlahah ḍarūriyyah (qīṣāṣ) is the basis of a maṣlahah taḥsīniyyah (tamāthul).

To illustrate the second rule, if there is no qīṣāṣ, there is no consideration of tamāthul. In other words, the ikhtilāl of the ḍarūrī means the same for the other

---

<sup>16</sup> See al-Shāṭibī, op. cit., vol. 2, pp. 16-17

grades of maqāṣid necessarily.

To illustrate the third rule, the ikhtilāl of tamāthul does not require ikhtilāl of qīṣāṣ.

The fourth and fifth rules can be appreciated if one grasps the sense in which darūrī is affected by the ikhtilāl of other maqāṣid. Al-Shāṭibī explains the effect of other maqāṣid on necessary maqāṣid with the following four arguments: (1) The relationship of other maqāṣid to necessary maqāṣid is like that of protective zones (ḥimā). The interruption of one protective zone amounts to the interruption of the next zone and eventually to the disruption of the necessary maqāṣid which are at the centre of these zones; (2) This relationship may also be understood as that of the part and the whole; other maṣāliḥ together with the darūrī maṣāliḥ make one whole. The disruption of the parts obviously means the same as the disruption of the whole. (3) The ḥājiyyāt and taḥsīniyyāt can be understood as individuals in relation to the universal, i.e. darūriyyāt. (4) The ḥājiyyāt and taḥsīniyyāt serve the maṣāliḥ darūriyyah as a prerequisite (muqaddimah), or as interrelated (muqārin).<sup>17</sup>

As mentioned above, the maṣāliḥ are also divided

---

<sup>17</sup> See al-Shāṭibī, op. cit., pp. 16-24

into those belonging to this world and those concerning the hereafter.

### 5.3 THE TWO APPROACHES OF OBSERVING THE MAŞĀLIḤ OF THIS WORLD

There are two angles from which the maşāliḥ of this world can be observed. The first angle is to observe them as they actually exist, and the second is to observe them on the basis of a clear statement of the Sharīḥ.

Examining maşāliḥ as they exist in this world, they are not found as pure maşāliḥ. Rather, they are mixed with discomfort and hardship, however big or small, which may precede, accompany or follow the maşāliḥ. Similar are the mafāsīd (opposite of maşāliḥ) which also are not pure but are found to be mixed with a certain amount of comfort and enjoyment. The entire phenomenon in this world points to the fact that this world is created from a combination of opposites and that it is impossible to abstract (istikhlāṣ) only one aspect. It is for this reason that the maşāliḥ and mafāsīd in this world are known only on this basis of the pre-dominant aspect; if the aspect of maşlahah dominates, the matter at issue is considered, customarily, a maşlahah; otherwise it is considered a mafsadah. In these matters thus, the determining factor is the prevalent aspect.<sup>18</sup>

---

<sup>18</sup> See al-Shāṭibī, op. cit., vol.2, p. 26

It must be noticed here that this principle is applicable only to acts relating to ʿādah, and only to the determination of maṣlahah or mafsadah in this world through knowing them as they exist. Acts which are not ʿādāt are not affected by this principle.<sup>19</sup>

The second approach to considering the maṣāliḥ of this world is to observe them in reference to their connection with clear statement of the Sharīʿah (khiṭāb). The basic rule in this approach is that the maṣāliḥ or mafāsīd as taken into consideration by the Lawgiver are pure. If they are supposed to be mixed (mashūbah), they are not so in the reality of the Sharīʿah.<sup>20</sup> As explained above, maṣlahah or mafsadah in this world is determined by the predominant aspect (al-jihah al-ghālibah) of the matter. It is the predominant aspect which is the object of the clear statement of the Sharīʿah. The dominated (al-maghlūbah) aspect, whether maṣlahah or mafsadah is not the objective of the Lawgiver. Why is it then that the dominated elements, even though they may be maṣlahah, are not the objectives of Sharīʿah? On other hand, how can they, when they are not the objectives of Sharīʿah, still be maṣāliḥ? Al-Shāṭibī solves this apparent contradiction with the following explanation.

---

<sup>19</sup> Al-Shāṭibī, *op. cit.*, vol. 2, p. 26

<sup>20</sup> *Ibid.*, p. 27

He argues that al-maṣlaḥah al-maghlūbah is that which is considered as such according to the acquired habitude (al-i<sup>c</sup>tiyād al-kasbī) alone, i.e. without adding the Lawgiver's requirements of maṣlaḥah. Customarily, such a maṣlaḥah is not taken into consideration. This is the part of maṣlaḥah which is also not the objective of the Lawgiver insofar as the shar<sup>c</sup>iyyah (legality) of rules (aḥkām) as a whole is considered. Further, if the dominated aspect were also taken into account by the Lawgiver, no act could have been the subject of command alone or of prohibition alone. Obviously such is not the case. If it is supposed that the dominated aspect in a mixed maṣlaḥah is the object of prohibition and the dominating aspect that of command, then one and the same act becomes the object of command and prohibition at one and the same time, which would have been a taklīf mā lā yuṭāq (impossible obligation) as well as absurd situation.<sup>21</sup>

The above explanation, however, does not clarify the existence or occurrence of mafsadah despite the Shāri<sup>c</sup>i's (Lawgiver's) intention to the contrary. Al-Shāṭibī elaborates the matter further by saying that the above position may appear to be that of the philosophers and of the Mu<sup>c</sup>tazilah on the existence and occurrence of evil.

---

<sup>21</sup> See al-Shāṭibī, op. cit., vol. 2, p. 28

According to the philosophers, God created a world in which the good is mixed with evil. It is the good, however, which is the purpose of creation. He did not create the world for evil, even though evil may occur along with the good.

The Mu<sup>c</sup>tazilah believed that evils are not intended to occur; their occurrence is against God's will (irādah).

Al-Shāṭibī first discusses the apparent similarity between his and the above positions. He argues on the basis of a distinction between two intentions (qaṣd) of God. First, there is the intention of creation (al-qaṣd al-khalqī al-takwīnī); and second, the intention of legislation (al-qaṣd al-tashrīcī). The position of the philosophers and the Mu<sup>c</sup>tazilah concern the former, and al-Shāṭibī's the latter. As he argues, the occurrence of mafsadah, despite God's will and intention for maṣlahah, is justifiable in the case of al-qaṣd al-tashrīcī, because a man is held free (mukhtār) so as to be legally responsible for his acts. This position is not justified in the case of al-irādah al-takwīniyyah, as this would imply imperfection in God's powers.<sup>22</sup>

The above discussion of maṣlahah has been concerned

---

<sup>22</sup> See al-Shāṭibī, *op. cit.*, p. 30

with the cases where the actual practice may be used as the basis of determining a maṣlahah. There are cases where the judgment of general actions is not so definitive for specific reason. For instance, eating carrion in case of dire need and killing a murderer for the prevention of crimes, are considered maṣlahah despite the fact that the acts themselves are not so. In other words, unlike the cases in the above discussion where the acts, despite their consisting of certain aspects of mafsadah, are regarded as maṣlahah in themselves on the whole, the acts in the above examples, though mafsadah in themselves, become maṣlahah because of certain external considerations. The supposition in this case is that the external consideration can dominate the internal consideration. How this domination is decided needs elaboration.

In view of the above situation, logically, there are two positions; either both considerations are equal in such a manner that one cannot be preferred to the other, or one of them can be preferred. The former position probably does not exist in Sharīḥ because it necessitates that Sharīḥ should intend prohibition and permission simultaneously.

Furthermore, if one consideration is preferable, it is still possible that the Lawgiver might have intended the other side. Both sides will always remain to be

weighed by a mujtahid. We are obliged only to do what, after weighing both considerations, we consider to be the intention of the Lawgiver, not what is intended by Him in reality (in His mind).<sup>23</sup> In this way, after the decision of a mujtahid, the possibility of the other consideration being intended has to be disregarded insofar as fulfilling an obligation is concerned. The possibility is, however, not disregarded insofar as nazar (examination, investigation) is concerned.

A group of scholars who believed the above possibility to be applicable in the case of obligations as well, maintained the principle of murā<sup>c</sup>āt al-khilāf (the consideration of opposition). As mentioned elsewhere, this principle, to al-Shāṭibī, meant an impossible and hence void obligation.

Al-Shāṭibī sums up the above discussion by saying that al-jihah al-maghlūbah (the dominated aspect), is not the objective of a legal obligation. This principle governs all problems which are subject to ijtihād irrespective of whether one believes a mujtahid to be always correct or not.<sup>24</sup>

---

<sup>23</sup> See al-Shāṭibī, op. cit., vol. 2, p. 31

<sup>24</sup> Ibid., p. 32

#### 5.4 HOW THE MAŞĀLIḤ OF THE HEREAFTER ARE DETERMINED

So far the discussion has been concerned with the masāh of this world. The maşāliḥ of the hereafter are also pure (such as the attainment of the blessings of paradise) as well as mixed (such as the punishment of hell) sometimes meted out even to those who believe in the oneness of God.

The basic rule in such maşāliḥ and mafāsīd is that they are all determined according to Shariḥ, because the reason cannot grasp matters relating to the hereafter due to being beyond its scope and horizon.

Sometimes a confusion may arise because of considering the pure maşāliḥ or mafāsīd as mixed. For instance, the blessings bestowed upon the prophets in paradise differ from those given to others. Those in lower ranks may be regarded as being punished by the absence of the blessings given to those in higher ranks. According to al-Shāṭibī, this confusion arises because a distinction is not maintained between a species and its individual members. The individual members may differ in special characteristics, etc., but they do not differ in relation to their species; they are members of the same species. This membership is the fact that determines their waṣf (quality).<sup>25</sup>

---

<sup>25</sup> See al-Shāṭibī, op. cit., vol. 2, p. 36

From the above discussions, al-Shāṭibī deduces the following rules as characteristics of maṣlaḥah: (i) The purpose of legislation is to establish maṣāliḥ in this world and in the hereafter, but in a way that they do not disrupt the system of sharḥ; (ii) the Shāriḥ intends the maṣāliḥ to be absolute; and (iii) the reason for the above two considerations is that Sharīḥ has been instituted to be abadī (eternal, continuous), kullī (universal) and ḥāmm (general) in relation to all kinds of takālīf (obligations), mukallafīn (subject of command) and aḥwāl (conditions, states).<sup>26</sup>

The above three characteristics thus require maṣlaḥah to be both muṭlaq (absolute) and kullī (universal). The absoluteness means that maṣāliḥ should not be relative and subjective. Relativity is usually based on equating a maṣlaḥah with one of the following: aḥwā' al-nufūs (selfish inclinations), manāfiḥ (selfish advantages), nayl al-shahawāt (fulfilment of desires) and aghrād (personal interests). According to al-Shāṭibī all of the above considerations render the concept of maṣlaḥah relative and subjective, which is not the consideration of the Lawgiver with regard to maṣlaḥah, though it may be so in customary law.

He argues on the following grounds: First, the

---

<sup>26</sup> Al-Shāṭibī, op. cit., p. 37

objective of Shari<sup>c</sup>ah is to bring the mukallafīn out of the dictates of their desires so as to make them servants of God. This objective negates the consideration of personal liking as an element in the consideration of maṣlahah.

Second, the maṣāliḥ cannot be considered as mere manāfi<sup>c</sup> because in ‘ādah as well as in shar<sup>c</sup> they are mixed with disadvantages. The point of emphasis here is that selfish benefit is not essential in the consideration of maṣāliḥ in ‘ādah nor is it in shar<sup>c</sup>..

In ‘ādah some higher goal like the subsistence of life constitutes the basic consideration in determining maṣlahah. In shar<sup>c</sup> the consideration must still be higher, and that is the attainment of the blessings of paradise.

Third, the consideration of the fulfilment of personal desires also renders the concept of maṣlahah highly relative. The consideration of personal desire varies from state to state, person to person, and time to time. It is so relative that it cannot be a criterion for determining maṣlahah.

Fourth, consideration of individual interests leads not only to a divergence but, more significantly, also to a conflict with others and to the deprivation of others' interests.

Consequently, relativity and subjectivity are excluded from the shar<sup>c</sup>i consideration of maṣlahah; it must, therefore, be absolute. In shar<sup>c</sup> this absoluteness is provided by the stipulation that maṣlahah must aim at the subsistence of life in this world in such a way as not to harm life in the next world.

#### 5.5 MAṢLAḤAH SHOULD BE UNIVERSAL

The second characteristic of maṣlahah is its universality. This universality is not affected by the takhalluf (falling short) of its particulars. For instance, the penalties are imposed on the basis of the universal rule that they generally restrain people from committing crimes. Yet, there are people who, despite being punished, do not abstain from committing a crime. Nevertheless, such exceptions do not affect the validity of the general rule about the penalty.<sup>27</sup> In the Sharī<sup>c</sup>ah it is al-ghālib al-aktharī (the major dominant) which is the general-definitive element (al-<sup>c</sup>āmm al-qaṭ<sup>c</sup>i) in the consideration of maṣlahah. This is the characteristic (sha'n) of inductive universals (al-kulliyyāt al-istiqrāiyyah). An illustration of this universal may be found in the universal rules of a language. The universals of a language are closer to those of the Sharī<sup>c</sup>ah, because both are waḍ<sup>c</sup>i (instituted,

---

<sup>27</sup> See al-Shāṭibī, op. cit., vol. 2, p. 52

conventional) not ʿaqlī (speculative). The inductive universals (in Arabic grammar, for instance) remain valid even if some of their particulars do not conform to the majority of particulars.<sup>28</sup>

In reference to the characteristics of maṣlaḥah, al-Shāṭibī takes into account consideration of the criticism of this concept by other jurists. Among them he specifically refers to Fakhr al-Dīn al-Rāzī, Shihāb al-Dīn al-Qurāfi and Ibn ʿAbd al-Salām. He has answered their criticisms. As these criticisms and answers are quite relevant to the discussion of maṣlaḥah, a brief summary of this debate is given below.

Analysing the position of those who favour maṣlaḥah, al-Rāzī refers to their argument that the basic rule in manāfiʿ is idhn (permission, lawfulness) and in maḍārr is manʿ (abstention).<sup>29</sup>

Al-Shāṭibī rejects this analysis as an unfaithful representation of the maṣlaḥah-view. It is not possible to speak about manāfiʿ and maḍārr only in absolute terms as they do not exist as absolutes in reality; actually they are largely relative. Secondly, since the maṣāliḥ refer to the clear statements of the Sharīʿah which take into consideration the differences among persons, times

---

<sup>28</sup> See al-Shāṭibī, op. cit., pp. 52-53

<sup>29</sup> Ibid., p. 40

and states, it is inadequate to talk in absolute terms. Third, since no manāfi<sup>c</sup> are to be found that are not mixed with maḍārr, if we accept al-Rāzī's principle, we will have also to accept that idhn and nahy (prohibition) can apply to one and the same thing - which is absurd.

Shihāb al-Dīn al-Qarāfī, the commentator on al-Rāzī's Al-maḥṣūl, had some doubts about the principle that maṣlaḥah constituted the basis of legal obligations. He argued that maṣlaḥah cannot be the basis of ibāḥah (permission). This is so first, because maṣlaḥah cannot be realized and hence defined in simple and absolute terms, because no maṣlaḥah can be gained without alam (pain) and mafāsīd (evils). Thus to maintain that every mubāḥ (permissible thing) must be based on maṣlaḥah amounts to a complete negation of mubāḥ. Second, in order to argue that maṣlaḥah is the basis of obligation, maṣlaḥah must be defined in absolute terms and not in reference to certain specific factors, because this process of preference of one specific consideration to another is never ending and because it does not provide a universally accepted basis of definition. Furthermore, this position cannot be supported on the grounds that maṣlaḥah is that whose violator is punished by God. This definition is not acceptable because it is based either on the assumption that God punishes only evil and this manner of argument is dawr (arguing in a circle), or on the assumption that every obligation from God is a

maṣlaḥah simply because it is an obligation.

Al-Qurāfī adds that the maṣlaḥah view is difficult to maintain for aṣḥābunā (our colleagues - the Ash<sup>c</sup>arīs) as well. They cannot say that God takes maṣlaḥah into consideration over against mafsadah, because there are many mubāḥāt in which this consideration is lacking. The only proof they have is an argument on the basis of the induction of the obligations, and this also is based on a claim to know the asrār (secrets, rational explanation) of fiqh. They are thus necessarily led to the position that God's actions, commands and considerations are entirely dependent on His will and nothing else. The Mu<sup>c</sup>tazilah were also led to the same conclusion.<sup>30</sup>

To answer al-Qurāfī, al-Shāṭibī refers to his own discussion of the relativity of maṣlaḥah. Second, he answers that a survey of the rules of Sharī<sup>c</sup>ah by the method of induction proves that Sharī<sup>c</sup>ah has taken into consideration what is regarded as maṣlaḥah in customary practice as well. He argues that such a survey on the basis of the method of induction provides the dawābiṭ (determining factors) of maṣlaḥah. The examination of the events by way of induction where al-takālīf al-shar<sup>c</sup>īyyah (legal obligations) have been realized in practice shows that these takālīf and mubāḥāt did not harm human

---

<sup>30</sup> See al-Shāṭibī, op. cit., vol. 2, p. 42

interests (or maṣāliḥ) but have conformed to them and established them.

Ibn ʿAbd al-Salām had distinguished between maṣāliḥ al-dār al-ākhirah (the hereafter) and al-maṣāliḥ al-dunyawiyyah (benefits belonging to this world) on the basis that the former can be known only by sharḥ while the latter are known by needs, experience, practice and by consideration of probability. He even says that when one wants to know a maṣlahah, he may simply find it rationally, supposing that the Shāriḥ has given no indication. Judgment is reached rationally in this manner except in the case of taʿabbudāt (acts of worship) where maṣāliḥ or mafāsīd are not given.

Al-Shāṭibī, quoting Ibn ʿAbd al-Salām here, refers to him not by name but by terms such as baʿd al-nās (some person) and hādhā al-qāil (this speaker). To al-Shāṭibī maṣāliḥ in the hereafter are not independent of the maṣāliḥ of this world. Hence not only al-maṣāliḥ al-ukhrawiyyah but also al-dunyawiyyah, as long as they are obligations, are known by Sharīḥ alone. If the distinction between the two maṣāliḥ were absolute, the sharḥ would have been concerned only with al-maṣāliḥ al-ukhrawiyyah. In fact, to realize the ukhrawiyyah, the establishment of the dunyawiyyah is inevitable. Al-Shāṭibī refutes the implication in Ibn ʿAbd al-Salām's statement that the dunyawiyyah are rational and hence the

consideration of shar<sup>c</sup> is additional.<sup>31</sup>

Al-maṣāliḥ al-mursalāh illustrate the type of new things where the intention and the act both conform to the purpose of Shari<sup>c</sup>ah. <sup>32</sup>. An example of this type is the levying of new taxes in addition to those prescribed in the texts. The conformity of the act with the purpose of Shari<sup>c</sup>ah and the intention in this case show the right understanding of Shari<sup>c</sup>ah, and further, the intention does not conflict with the objectives of Shari<sup>c</sup>ah.

#### 5.6 AL-MAṢĀLIḤ AL-MURSALĀH ARE NOT IDENTICAL WITH BID<sup>c</sup>AH

In fact it is this conformity of al-maṣāliḥ al-mursalāh with the maqāṣid al-Shari<sup>c</sup>ah that disassociates them from bid<sup>c</sup>ah (innovation in religion). Al-Shāṭibī disagreed with the jurists who identified al-maṣlahah al-mursalāh as bid<sup>c</sup>ah<sup>33</sup> To him the two were

---

<sup>31</sup> See al-Shāṭibī, Al-muwāfaqāt, vol. 2, p. 48

<sup>32</sup> Ibid., pp. 341-42

<sup>33</sup> Al-Shāṭibī, here, refers to Imām Mālik whose reliance on al-maṣāliḥ al-mursalāh is strongly criticised by other jurists. Al-Shāṭibī defends Imām Mālik in the following manner: "Mālik, adhering to the principle of not applying rational explanations in matters of ḥibādāt revolves entirely around his [approach to] stop at the limit prescribed by Shari<sup>c</sup>ah, [and thus] disregarding what munāsib requires... [This is] in contradiction to ḥādāt which are governed according to suitable reason (al-ma<sup>c</sup>nā al-munāsib) which is evident to human reason. He employed laxity (istirsāl) with self-confidence and with deep insight in reasoning by maṣlahah... [He employed this laxity so frequently] that the scholars often condemn him because of this laxity. They imagined that Mālik threw off the yoke of Shari<sup>c</sup>ah and opened the gate of law-making. How far it is [from truth], see Al-i<sup>c</sup>tiṣām, p. 113

completely opposed to each other.<sup>34</sup> To refute such views he argued that first of all the jurists are not agreed upon an exact definition of al-maṣāliḥ al-mursalah. Even al-Ghazālī expressed two different views on this point.<sup>35</sup> Secondly, al-Shāṭibī explains, al-munāsib al-mursal (synonymous with al-maṣlahah al-mursalah in al-Ghazālī's terminology) which is neither specifically supported by the legal text nor is it rejected, is not a bid'ah. On the contrary it is supported by the existence of the genus which is common between al-Sharī'ah and al-maṣlahah al-mursalah, and, futhermore, this genus is considered valid by Sharī'ah. Its validity is not based on specific evidence but on its consideration as a whole.<sup>36</sup>

Al-Shāṭibī illustrates al-maṣāliḥ al-mursalah with ten examples. Among them are the following events from Islamic legal history: the collection of the Qur'ān; determining the penalty for using intoxicants; allegiance to a less qualified person for an office in the presence of a better qualified one.<sup>37</sup> He finds three elements common in all the ten examples. First is the element of suitability with the objectives (maqāṣid) of the

<sup>34</sup> Al-Shāṭibī, Al-i'ṭiṣām, p.115

<sup>35</sup> See al-Shāṭibī, Al-muwāfaqāt, vol. 2, p. 96

<sup>36</sup> Ibid., p. 98

<sup>37</sup> Al-Shāṭibī, op. cit., vol. 2, pp. 99-110

Sharīḥ.<sup>38</sup> Al-maṣāliḥ al-mursalāh do not conflict with the fundamentals or with the evidences of Sharīḥ. Second, they are rationally intelligible. Al-maṣāliḥ al-mursalāh do not belong to taʿabbudāt (acts of worship) because the latter are not rationally intelligible in detail. Al-Shāṭibī gives more than ten examples to prove this point.<sup>39</sup> Thirdly, al-maṣāliḥ al-mursalāh refer to the following principles: protection of (human) necessities; removal of impediments which are harmful to religion; and protection of an indispensable means to the end of law.<sup>40</sup>

Al-Shāṭibī, thus, shows that the acceptable maṣāliḥ cannot be equated with bidʿah and that they are not limited to the category of ḍarūrī, as some jurists have maintained; they cover other categories as well. In fact, the above explanation of al-maṣāliḥ al-mursalāh conforms to al-Shāṭibī's concept of maṣlaḥah which is of fundamental significance to the doctrine of maqāṣid al-Sharīḥ.

---

<sup>38</sup> Al-Shāṭibī, op. cit., p. 111

<sup>39</sup> Ibid., For instance, al-Shāṭibī explains, Lawgiver's prescriptions about cleanliness from human excretions are not rationally uniform. In case of urine and stool one is obliged only to wash certain parts of one's body, [ i.e to make ablution], but in case of nocturnal discharge, washing of the whole body is obligatory

<sup>40</sup> Ibid., vol. 3, pp. 113-115

Chapter 6  
NAJM AL-DĪN AL-ṬUFĪ AND  
MAṢLAḤAH

6.1 AL-ṬUFĪ'S TREATISE ON MAṢLAḤAH

Najm al-Dīn al-Ṭufī is a Ḥanbalī scholar who died in 716 A.H. His treatise on maṣlaḥah is connected with his commentary on the thirty second of a group of forty sayings of the Prophet compiled by Imām al-Nawawī which states: "Do not inflict injury nor repay one injury by another". Since the whole analysis was embedded within his commentary on the group of forty sayings of the Prophet mentioned above, there was a need to separate al-Ṭufī's opinion on the concept of maṣlaḥah from the rest of the commentary. A Damascus scholar called Jamāl al-Dīn al-Qāsimī did that work and published it in a special treatise with a short commentary on the margin. The treatise was also published in the al-Manār journal in its ninth volume of the tenth part which was issued in October, 1906.<sup>1</sup>

6.2 THE MEANING OF THE ḤADĪTH "LĀ ḌARAR WALĀ DIRĀR"

Al-Ṭufī began his views on maṣlaḥah by justifying the above mentioned ḥadīth which he made the core of his treatise. He said that the ḥadīth in question is a sound

---

<sup>1</sup> The text of the treatise of al-Ṭufī can also be found in "Maṣādir al-tashrīḥ fī mā lā naṣṣ fih" by <sup>C</sup>Abd al-Wahhāb Khallāf, pp. 106 - 144; and in "Al-maṣlaḥah fī al-tashrīḥ al-Islāmī wa Najm al-Dīn al-Ṭufī" by Muṣṭafa Zayd, at the appendix, pp. 14 - 48

one. Then he went on to say that this ḥadīth has many chains of authority (asānīd) which, although individually weak, when taken together give strong support to the ḥadīth. So he concluded by saying that the ḥadīth is sound and accordingly necessitates practice. As for the meaning of the ḥadīth, al-Ṭūfī held it to mean the prohibition of someone causing injury to another person in any circumstances whatsoever. This means that preventing evil on one side and stopping the making of mischief to others on the other side. In explaining the meaning of that ḥadīth, al-Ṭūfī asserts that the Sharīḥ<sup>c</sup>ah forbids any harm to be caused to any body except as a result of legal measures which require special proofs. He argues that the negation of injury in the case of the Lawgiver (God) in His divine decree is not inevitable simply because God judges things with the utmost justice and impartiality in His Omnipotence. He further says that there are some types of injury which are lawful and permissible, such as ḥudūd (revealed punishments) and punishments for various offences. On the question of the prohibition of injury according to the Sharīḥ<sup>c</sup>ah, al-Ṭūfī puts forward some ordinances from the Qur'ān and Sunnah such as:

"God wants simplicity for you and does not want hardship over you";<sup>2</sup>;

---

<sup>2</sup> Qur'ān, 2:185

"God wants easiness for you"<sup>3</sup>

The Prophet is reported to have said:

"Religion (Islam) is simplicity";<sup>4</sup>

and

"I have been sent with a simple way of life"<sup>5</sup>

Al-Ṭūfī has mentioned these nuṣūṣ (texts) as an introduction to prove that the religion of Islam has been ordained to mankind in order to attain easement and benefit in life; for had the causing of injury and the making of mischief not been prohibited by the Sharī<sup>c</sup>ah, there would have been a lack of balance in some of the ordinances of Islamic legislation, which is impossible for the divine revelation. Thus the prohibition of injuries by the law is the sole meaning of the ḥadīth "lā ḍarar walā ḍirār", which implies a general prohibition of all kinds of injury except for that which has been legalised by a special proof.<sup>6</sup>

### 6.3 THE OPINION OF AL-ṬŪFĪ CONCERNING THE CONSIDERATION OF BENEFIT

Al-Ṭūfī maintains that the consideration of benefit

---

<sup>3</sup> Qur'ān, 4:38

<sup>4</sup> Reported by al-Bukhārī, Muslim, Abū Dāwūd, Aḥmad ibn Ḥanbal, al-Nasāī and al-Tirmidhī

<sup>5</sup> Reported by Aḥmad ibn Ḥanbal

<sup>6</sup> See Muṣṭafā Zayd, Al-maṣlahah fī al-tashrī<sup>c</sup> al-Islāmī wa Najm al-Dīn al-Ṭūfī, p.116; and <sup>c</sup>Abd al-Wahhāb Khallāf, Maṣādir al-tashrī<sup>c</sup> al-Islāmī fī mā lā naṣṣ fih, p. 110

and the prohibition of injury is a paramount and unique aspect of the Shari<sup>c</sup>ah which goes beyond and above of even the ordinances of the Qur'<sup>a</sup>n, Sunnah and ijmā<sup>c</sup>. He supports his opinion by saying, "Suppose we thought that some of the texts of the Shari<sup>c</sup>ah contain some injury (i.e the harm is caused by some of its dictates as we shall see later), if we expel that injury by the use of this ḥadīth it would mean exercising both this ḥadīth and the text; but if we did not expel the injury by using this ḥadīth, it would then mean a neglect of one of the evidences, in this case it is the ḥadīth in question that will be made useless. No doubt, the combination of evidences in solving problems is better than neglecting some of them.<sup>7</sup> In this connection, he enumerates the evidences of Shari<sup>c</sup>ah and restricts them by means of induction to nineteen viz., (1) the Qur'<sup>a</sup>n, (2) the Sunnah, (3) ijmā<sup>c</sup> of the Islamic Ummah, (4) ijmā<sup>c</sup> of the people of Medīnah, (5) qiyās, (6) a saying of the Companion of the Prophet, (7) al-maṣāliḥ al-Mursalah, (8) istiṣhāb (continuation of a practice from the time of ignorance to Islam), (9) al-barā' al-asliyyah (original exemption), (10) al-<sup>c</sup>Awāid (customs), (11) al-istiqrā' (induction), (12) sadd al-dharāi<sup>c</sup> (preventive measures), (13) istidlāl (deduction), (14) istiḥsān (equity), (15)

---

<sup>7</sup> See Muṣṭafā Zayd, op. cit., p.117; <sup>c</sup>Abd al-Wahhāb Khallāf, op. cit., p. 109

ikhtiyār al-aysar (taking the simple), (16) al-<sup>c</sup>ismah (immunity from error), (17) ijmā<sup>c</sup> of the people of Kūfah, (18) ijmā<sup>c</sup> of the <sup>c</sup>itrah - the house of the Prophet (for the Shi<sup>c</sup>as); (19) ijmā<sup>c</sup> of the four caliphs.

After referring the knowledge of the demarcations of these evidences, their methodology and their rules in detail to the books of uṣūl al-fiqh, al-Ṭūfī goes on to explain that the ḥadīth before us implies the assurance of obtaining benefit and the denial of injury. This is simply because the denial of injury necessitates the confirmation of benefit due to the fact that they are contrary to one another. After this he asserts that the textual ordinances (whether from the Qur'ān or Sunnah) are the strongest evidences out of those nineteen; however, they might agree with maṣlaḥah or disagree with it. Nonetheless, it is not necessary for al-Ṭūfī that maṣlaḥah has to be in agreement with naṣṣ (textual evidence) or ijmā<sup>c</sup> but it might go against them. After making this assertion, al-Ṭūfī does not hesitate to require the pre-eminence of al-maṣāliḥ al-mursalah over a naṣṣ and an ijmā<sup>c</sup> if it does not agree with them. He describes this pre-eminence as the specification (takḥṣīṣ) of a naṣṣ and an ijmā<sup>c</sup> and not as a domination over them, corresponding to the pre-eminence of Sunnah over the Qur'ān as a means of explanation and clarification.

Then al-Ṭūfī goes to explain that there is no problem if a naṣṣ and an ijmā<sup>c</sup> are in agreement with a maṣlaḥah so that no injury at all is found in them, except in the ḥudūd, which must have been exempted from the ḥadīth "lā ḍarar walā ḍirār". However, if some injury seems to be implicit in the naṣṣ and ijmā<sup>c</sup> due to particular evidence, then it is obligatory to follow that evidence, or else it is necessary to restrict naṣṣ and ijmā<sup>c</sup> by the ḥadīth in question.

#### 6.4 THE CONSIDERATION OF MAṢLAḤAH AND IJMĀ<sup>c</sup>

Here al-Ṭūfī raises an objection which might be made that ijmā<sup>c</sup>, according to most Muslim scholars, is a clear-cut evidence whereas the consideration of maṣlaḥah is not so, simply because its foundation is uncertain and therefore it cannot have pre-eminence over ijmā<sup>c</sup>. But al-Ṭūfī argues that maṣlaḥah is stronger than ijmā<sup>c</sup> because it is based on a sound ḥadīth while ijmā<sup>c</sup> is based only on the opinion of the mujtahids. Thus, maṣlaḥah is the strongest proof of Sharī<sup>c</sup>ah simply because one of the strongest arguments supported by another becomes a strong argument. Then he goes on talking about maṣlaḥah and ijmā<sup>c</sup> in detail to support his claim taking into account two aspects: (i) the literal meaning of maṣlaḥah which signifies that law should be applied as it ought to be and not according to what it is. and (ii) its descriptive meaning which implies that law should be beneficial. He does this by putting forward

some evidences to raise the status of maṣlaḥah to show how important it is in the eyes of the Lawgiver, and at the same time he mentions the evidences of ijmāʿ and weakens them.

#### 6.5 MAṢLAḤAH IS THE INTENTION OF THE LAWGIVER

Al-Ṭūfī argues that if the literal meaning of maṣlaḥah is a thing which is fully utilized according to the intended objective, such as a pen being fully utilized if it is used in writing; and this is accepted in ordinary usage as resulting in benefit - like trade resulting in profit - it follows also that maṣlaḥah in relation to the Sharīʿah is a cause leading to the fulfilment of the intention of the Lawgiver whether in terms of acts of worship or customary law. While the acts of worship are the right of the Lawgiver, the practices are for the benefit of mankind and for the organization of their affairs ... Al-Ṭūfī makes it clear that the Lawgiver has cared very much for maṣlaḥah in the Sharīʿah as a whole; and he quotes the following verses:

"O mankind! There hath come to you an admonition from your Lord and a healing for the (diseases) in your hearts, - and for those who believe, a Guidance and a Mercy. Say (O Muhammad): "In the bounty of God, and in His Mercy, - in that let them rejoice": that is better than (the wealth) they hoard".<sup>8</sup>

It is clear that the thing which has come to human

---

<sup>8</sup> Qur'ān, 10:57,58

beings from their Creator as an exhortation, a healing of their hearts and a guidance and mercy for those who believe in it (i.e the Qur'ān) should be something which considers the benefits of people at their fullest. Thus, the ordained injunctions and rules in the Sharī<sup>c</sup>ah are for the accomplishment of those benefits.

Then al-Ṭūfī poses a hypothetical question: "Why is it not possible to presume that naṣṣ and ijmā<sup>c</sup> contain the general consideration of the benefits of mankind so as to be a proof of their knowledge of the Sharī<sup>c</sup>ah? He responds by saying that this is true with the acts of worship, but with transactions and customary law naṣṣ and ijmā<sup>c</sup> must be in agreement with maṣlahah. He then recapitulates the differences between the acts of worship and transactions in this connection and says that the former belong to the will of God whose techniques can only be known from God Himself through either naṣṣ or ijmā<sup>c</sup>; whereas the latter, the consideration of benefit in them is the prime intention of the Lawgiver.

As al-Ṭūfī clarifies the concern of the Lawgiver on maṣlahah in detail, he, at the same time, investigates four things. First of all he surveys the actions of God and asks, "Are the God's actions accounted for or not? He answers this question by bringing forward the arguments of those whose response is affirmative as well as of those whose answer is negative. Then he says, "The

actions of God are directed towards the beneficence and perfection of His creatures and not to His benefit and perfection due to the fact that He is Self-sufficient". Secondly, he discusses the issue concerning the decision of God on the consideration of benefits for His creatures and asks, "Is it a matter of favour from Him as it is held by the Sunnis or a question of obligation on Him as it is held by the Mu<sup>c</sup>tazilahs? After establishing that the opinion of the Mu<sup>c</sup>tazilahs is based on taḥsīn (approval) and taqbiḥ (detestation) which both have to do with a mere exercise of the mind - a speculative method - al-Ṭūfī argues, "The truth is that the consideration of benefits by God is a matter of His favour to His creatures and it is not a matter of compulsion over Him". Thirdly, he talks about the benefits which the Lawgiver has laid down and examines, "Are they absolute benefits in all aspects and cases or are they the best ones in all aspects and cases or are they the suited and the perfect ones in each and every situation?" Al-Ṭūfī establishes that the last type of benefits (i.e the suited and the perfect ones) is the best and is likely to be the correct one. Fourthly, he puts forward the proofs which indicate the consideration of maṣlaḥah by the Lawgiver as manifested in the Qur'ān, Sunnah, ijmā<sup>c</sup> and qiyās...

Al-Ṭūfī gives as a proof of the consideration of maṣlaḥah from the Qur'ān verses concerning the law of qiyās (legal retaliation) and punishments for theft and

adultery for examples, and then he says, "Generally speaking there is no verse in the Qur'ān which does not consist of benefit or benefits as we have explained in another place"<sup>9</sup> When commenting on these verses of the Qur'ān he has mentioned that the principles of the philosophy of Islamic jurisprudence have verified that the textual ordinances (nuṣūṣ) have been ordained to accomplish these principles. He went on to maintain that the fundamentals of Islamic religion are sufficient and stand well above all that which has been said by the dialecticians, sophists and the philosophers.

#### 6.6 MAŞLAḤAH IN THE SUNNAH

In his observation of the consideration of maşlaḥah in the Sunnah, al-Ṭūfī presents the ḥadīth on the prohibition of mudābarah (i.e to sell or buy goods which have already been purchased by someone else) which he considers to be maşlaḥah. He also considers maşlaḥah to be involved in the traditions: that a townman should not sell to a countryman and a woman should not be married together with her aunt or her mother's sister, so that one's kinship is not disrupted.<sup>10</sup> Then he goes further establishing the fact that there are many of such types of cases in the Sunnah where individual as well as

---

<sup>9</sup> It may be he means his book, Al-irshādāt al-ilāhiyyah ilā al-mabāhith al-uṣūliyyah

<sup>10</sup> Reported by al-Bukhārī and Muslim

community interests have been considered; simply because the Sunnah is an explanation of the Qur'ān, so the explainer must collaborate with the explained. This means that the Sunnah takes maṣlaḥah into account as much as the Qur'ān does no more no less.

#### 6.7 THE CONSIDERATION OF MAṢLAḤAH BY QIYĀS

In his discussion as to the proof of the consideration of maṣlaḥah by qiyās, al-Ṭūfī has put forward the argument that God is concerned with the benefits of His creatures prior to this life, as well as in this life and in the life to come. As to the beginning, God has created human beings from nothing in a form by which they could secure benefits in their lives, while living in this world. God has made easy for them the means of their sustenance by creating the heavens and the earth and all that is found therein and between them; and eventually God has led those who follow His guidance and do good deeds to the success of being subservient to Him so as to win His pleasures and acquire His reward in the bliss of paradise in the hereafter. As long as God has considered these benefits for His creatures, it goes without saying that it is not possible for Him to neglect their benefits in His commandments and legislation (the basis of Shariḥah) which is an overall action of guidance to control their social system and to maintain order in their community so as to secure safety for their material wealth, blood and prestige without which their lives will

fall a prey of chaos and animosity. It follows therefore, that God has considered the benefits of His creatures in all aspects and it is improbable to think that God has neglected them in any case whatsoever...

Al-Ṭūfī supposes for the third time as he did twice before that naṣṣ and ijmā<sup>c</sup> might disagree with maṣlaḥah; and if it so happens then it is maṣlaḥah which should be given priority. He says that it is important in this case to restrict naṣṣ and ijmā<sup>c</sup> by this maṣlaḥah or to clarify them by it ... It is quite a natural procedure to al-Ṭūfī that all evidences of the Sharī<sup>c</sup>ah have to be restricted by maṣlaḥah due to the fact that the strongest of these evidences (naṣṣ and ijmā<sup>c</sup>) could not face such a challenge. Al-Ṭūfī has defined maṣlaḥah by explaining how the Lawgiver has cared for it, and therefore it should be the axis of all the evidences of Sharī<sup>c</sup>ah.

As al-Ṭūfī observes the consideration of maṣlaḥah by ijmā<sup>c</sup>, he argues that "salam" (forward selling) and "ijārah" (the renting transaction) are permitted by the Sharī<sup>c</sup>ah though opposed to analogy (which requires transactions to take place hand in hand at the same time); nevertheless, the two mentioned transactions are allowed on the basis of the consideration of the benefits of people. The case is also the same with the right of pre-emption (shuf<sup>c</sup>ah) and many other Islamic laws. He then says that most of the chapters concerning

transactions in Islamic jurisprudence are proved by means of maṣāliḥ which are accepted by the majority of the Muslim scholars, except those who do not rely upon such method such as the scholars of the al-Ẓāhiriyyah school system, as well as those who suspend judgement on the question of ijmā<sup>c</sup> being one of the evidences of Sharī<sup>c</sup>ah have agreed on this fact.

#### 6.8 THE ROOT OF IJMĀ<sup>c</sup> AND ITS BASIS

Then al-Ṭūfī goes on to discuss ijmā<sup>c</sup> in detail and says that its wording is of "if<sup>c</sup>āl" class form from an Arabic verb "jama<sup>c</sup>" - which means resolution or agreement. When defined terminologically, ijmā<sup>c</sup> means consensus of the mujtahids of the Muslim Ummah on a particular legal rule. The evidence for it stems out of the Qur'ān, Sunnah and qiyās; and al-Ṭūfī remarks that the proof of ijmā<sup>c</sup> from the Qur'ān has been based on three verses. He criticises this interpretation in the following manner.

The first verse is:

"If anyone contends with the Apostle even after guidance has been plainly conveyed to him, and follows a path other than that becoming to men of faith, We shall leave him in the path he has chosen, and land him in Hell, - what an evil refuge".<sup>11</sup>

Al-Ṭūfī says that it is clear in this verse that God

---

<sup>11</sup> Qur'ān, 4:115

threatens the one who wrangles with the Prophet and makes his choice another path rather than the believers' path. Actually, a threat is given against an evil deed or leaving an obligation. The path of the men of faith here - which is the basis of this threat - is that one which is agreed upon. It follows therefore that to follow ijmā<sup>c</sup> is an obligation. Al-Ṭūfī opposes this argument from six aspects: (i) that if a threat is given for two things collectively (as is the case with this verse - viz. to dispute with the Prophet and to depart from the path of the believers) it is not necessarily applicable to each of them individually; since one of them could be a condition or a pillar of the other, and therefore the verse does not mean that to follow ijmā<sup>c</sup> is obligatory...; (ii) that the definite article (al) used in the word "al-mu'minīn" might mean special kind of people, which could then imply the Ṣahābah or some of them only; since the address was made to them and in their time. As it is established in uṣūl al-fiqh that "al-iḥtimāl yusqit al-iḥtijāj" (probability demolishes argument) so this means that the argument is nullified; (iii) that the annexation in the expression (a path other than that of the believers - (ghair sabīl al-mu'minīn) is not absolute, due to the ambiguity of the word "other than - ghair". The verse could be interpreted as "he follows a different path from the path of the believers" i.e opposed to their belief (which means non-belief); and

this meaning is witnessed by the logical sequence of the verse itself before and after the expression. Thus, there is no proof in the verse of the obligation to follow ijmā<sup>c</sup>; (iv) that there is a mid-path between the path of the believers and the non-believers and that is the path of lawfulness which is free from both threat as well as promise. So, the verse is not a proof for the obligation of following the path of the believers. (v) that the verse in question corresponds to the verse before it and is joined to its conditional nature... We find in the verse prior to it three things: (1) exhortation to a deed of charity; (2) exhortation to do justice; and (3) exhortation to make conciliation between people. So the act of not following the path of the believers means doing things contrary to these ones mentioned in the verse. As long as there is this possibility of interpretation the proof for ijmā<sup>c</sup> is rejected..; (vi) that even if we accept that the verse is a proof for the obligation of following ijmā<sup>c</sup>, yet there is no impediment in it which prevents the pre-eminence of maṣlaḥah over ijmā<sup>c</sup> due to the fact that maṣlaḥah is a stronger proof of the Shari<sup>c</sup>ah than it.

The second verse which has been presented by al-Ṭufī as a proof of ijmā<sup>c</sup> is:

"Thus have we made of you an Ummah justly balanced that ye might be witnesses over the

nations...".<sup>12</sup>

Where "justly balanced " means the people of justice whose dealings are righteous. As long as ijmā<sup>c</sup> is a consensus of the mujtahids of this Ummah who have got this noble quality, it follows therefore that ijmā<sup>c</sup> is a just means of legislation and must be followed...

Al-Ṭūfī also argued that this verse is an unfounded evidence for ijmā<sup>c</sup>. The reason he gives is that justice is a necessity for righteousness in matters of truthfulness and falsehood which applies to the act of narration and giving evidence. Whereas in matters concerning right and wrong through the exercise of deduction of laws and diligence which incorporates in its totality ijmā<sup>c</sup>, this qualification does not hold water. He furthermore raises an objection that the reality of the justice of the Ummah necessitates its consensus on a firm basis which obligates its application. However, most of those who assert the validity of ijmā<sup>c</sup> have accepted its formation on the basis of mere indications (imārāt mujarradah) like qiyās and the narration of a single man (riwāyat āḥād). Still many amongst them have accepted its formation on the basis of a mere research i.e without a firm basis; but just on the pretext of the immunity of the Ummah, and that whatever its consensus might be,

---

<sup>12</sup> Qur'ān, 2:143

whether on a firm basis or not must be followed. Thus, it is not an agreed upon opinion that the Ummah does not come together except on a firm basis i.e it can make a consensus even on a weak basis...

Al-Ṭūfī goes on to argue that even if it is admitted that the Ummah does not come together except on a decisive measure, the question still remains concerning what does that decisiveness purport! If by decisiveness is meant rationality (which does not contain contradiction), this is hardly non-existent in the proofs of the Sharīḥ; and if ever it happened to exist it would not be expected to go against maṣlahah. On the other hand if by decisiveness is meant legal absoluteness, it won't be anything other than one of the three evidences of the Sharīḥ, viz. (i) al-naṣṣ, or (ii) ijmā or (iii) the consideration of maṣlahah. With regard to ijmā, it is not possible to accept it on the basis of another ijmā lest it becomes a proof proved by its own existence - which is void. As regards al-naṣṣ, it is divided into four categories: (i) clear cut and well-established (mutawātir ṣarīḥ) which is decisive in its wording and verification, yet it might be dubious in terms of its generalization and unrestricted nature. However, if the "mutawātir ṣarīḥ" does not have a specific possibility in that case he prevents it from opposing the consideration of maṣlahah; (ii) well-established but dubious (mutawātir muḥtamil); (iii)

clear cut but isolated (āḥād ṣarīḥ); and (iv) isolated and dubious (āḥād muḥtamil). As it could be seen clearly that the last three categories of naṣṣ are not decisive...

If the basis of the decisiveness of one ijmā<sup>c</sup> upon another ijmā<sup>c</sup> and naṣṣ is rejected and excluded - which we have agreed upon previously - then there only remains the consideration of maṣlahah and the dependence of the decisiveness of ijmā<sup>c</sup> on it.

The third verse which al-Ṭūfī gives as a proof for ijmā<sup>c</sup> is:

"Ye are the best of people evolved for mankind, enjoining what is right, forbidding what is wrong and believing in God ...".<sup>13</sup>

The manner in which this verse is considered to be a proof for ijmā<sup>c</sup> is that God's eulogy of the believers signifies His justification for them; and therefore their consensus should be a proof (of the Shari<sup>c</sup>ah).

Nevertheless, al-Ṭūfī opposes this verse as the proof for ijmā<sup>c</sup> in the same manner as he has done to the previous one.

He tries to verify the proof of ijmā<sup>c</sup> by Sunnah quoting a saying of the Prophet which states:

"My followers will not agree upon a perversion or

---

<sup>13</sup> Qur'ān, 3:110

something wrong".<sup>14</sup>

Al-Ṭūfī establishes that the various wordings and versions in which this saying has been reported have made it to attain the status of "al-tawātur al-ma<sup>c</sup>nawī" (the established in its meaning) and therefore it becomes a decisive proof which necessitates the following of ijmā<sup>c</sup>. He says that it is as strong as a decisive naṣṣ in its wording and its basis and therefore deserves practice. In spite of this fact, al-Ṭūfī opposes this proof and says that the attainment of this ḥadīth to the status of "al-tawātur al-ma<sup>c</sup>nawī" is not conceded simply because it has not reached in strength the position of an Arabic simile " the generosity of Ḥātim and the bravery of <sup>c</sup>Alī and its like in celebrity. So anything less than the status of "al-tawātur al-ma<sup>c</sup>nawī" is not so a strong proof even if it acquires the quality of majority transmission (al-ifāḍah) among people.

Suppose somebody might argue, says al-Ṭūfī, that the proof of the firmness of this ḥadīth is that the Muslim Ummah has accepted its validity. Nevertheless, al-Ṭūfī argues that this assertion could be refuted in three ways: (i) that those who rejected ijmā<sup>c</sup> have not accepted this ḥadīth because of their opposition to ijmā<sup>c</sup>; thus the claim that the Muslim Ummah has unanimously accepted

---

<sup>14</sup> Reported by Ibn Mājah

it is not valid; (ii) that the implication of unanimity of the Ummah in accepting this ḥadīth is mere proving ijmā<sup>c</sup> by another ijmā<sup>c</sup> which is invalid; and (iii) that the acceptance of the ḥadīth by the Ummah on the probability of our agreement is, in actual fact, a supposition and not decisiveness. A supposition cannot formulate the basis of ijmā<sup>c</sup> which is alleged to be one of the strongest proofs of the Shari<sup>c</sup>ah simply because by being so it is deprived of its strength...

Al-Ṭūfī goes on to say: "Even if we accepted that the ḥadīth in question has reached the status of being firmly established (tawātur), nonetheless, this does not mean that we hold it to require the obligation of following ijmā<sup>c</sup>, because of the possibility that what was meant by the word "perversion" might refer especially to non-belief. The lack of the consensus of the Muslim Ummah on perversion in this special meaning does not exclude its agreement on another perversion. Thus, this ḥadīth is not a suitable proof for the obligation of following ijmā<sup>c</sup> other than interpreting faith as opposed to non-belief. In the same way, it is not suitable a proof for ijmā<sup>c</sup> to base on another ḥadīth which states:

"Follow the majority (of my Ummah), verily he who keeps aloof (from it) will be thrown in hell fire, and the hand of God is over the entire body",<sup>15</sup>

---

<sup>15</sup> Reported by Aḥmad ibn Ḥanbal and Ibn Mājah

simply because this ḥadīth means to obey the rulers and the Imāms and not to go against them.

#### 6.9 OBJECTIONS TO THE PROOFS OF IJMĀ<sup>C</sup>

After completing his argument concerning ijmā<sup>C</sup> based on the Qur'ān and Sunnah, al-Ṭūfī puts forward two general objections to the proofs which he has mentioned: (i) that the proofs of ijmā<sup>C</sup> are apparently hearsay upon which some problems in interpretation occur and need be proved by the consensus of the Muslim scholars due to lack of conclusiveness. Thus, to prove ijmā<sup>C</sup> by these proofs is a circular argument (i.e. proving ijmā<sup>C</sup> by another ijmā<sup>C</sup>); (ii) the word "believers" in the above mentioned verse include all the believers; and the word "my followers" in the ḥadīth encompasses the whole Ummah. Nevertheless, the Ummah, according to another ḥadīth<sup>16</sup> is divided into seventy three sects and does not come together except on the belief of God and His Messenger and other few basic fundamentals. These basic fundamentals are therefore the ones which ijmā<sup>C</sup> is concerned and not all the rules of the Shari<sup>C</sup>ah. It is then obvious that this is not a place where ijmā<sup>C</sup> is claimed, and the verse and the ḥadīth are not applicable for its proof...

Then al-Ṭūfī winds up the proofs for ijmā<sup>C</sup> based on

---

<sup>16</sup> Reported by al-Dārmī

reason and establishes that it is generally impossible for the pious and intellectual people to agree on an error in magnitude after striving diligently and researching the law. Nevertheless, this acceptance is not to be taken as a proof for ijmā<sup>c</sup> simply because it is found that people of different faiths do agree on an error in great numbers and after hard work in research carried out with diligence and high intellectual capacities, because they become a prey of error in connection with faith in God as visualized by Muslims.

After this al-Ṭūfī discusses four aspects in which he manifests the contradiction of the proofs with regard to the verification of ijmā<sup>c</sup> in the following manner: (i) that if ijmā<sup>c</sup> is considered one of the proofs of the Sharī<sup>c</sup>ah it is necessary for the assembly (of the mujtahids) to attain immunity from making mistakes and sins; or at least the Sharī<sup>c</sup>ah should attest their immunity - which is not the case. The protection of the consensus of the Muslim Ummah or mujtahids from making errors in themselves is invalid simply because the possibility of making mistakes is not ruled out. As regards the witness of the Sharī<sup>c</sup>ah to their exemption from making errors, it has only been reported to us by some individuals, which are insufficient to establish it; (ii) that the term "my Ummah" in the ḥadīth which states: "My Ummah will not agree on a perversion ..." does not mean to include all the sects of the believers due to the

fact that some of these sects have been deemed to be out of the pale of Islam because of their innovations in the belief. They are not therefore to be included in the circle of the assembly; and still some sects do not hold ijmā<sup>c</sup> as one of the proofs of the Shari<sup>c</sup>ah and therefore their assembly is not to be taken into consideration even if they do so. The term "my Ummah" in the ḥadīth is not suitable to mean the sect which is saved (al-firqah al-nājiyah) only amongst the seventy three sects simply because this will lead to make an estimation in proportion so as to be read: "Eighth of the nine parts of my Ummah will not agree on an error"; which is too weak a style of speech to be accredited to the Messenger of God. It follows therefore, that the meaning of "perversion" in the ḥadīth should be especially "non-belief"; and thus the proof does not confirm ijmā<sup>c</sup>. (iii) that Ibn <sup>c</sup>Abbās preferred the clearly stated naṣṣ (zāhir al-naṣṣ) over ijmā<sup>c</sup> in the question of debarring a mother from taking one third (1/3) of inheritance so that she took one sixth (1/6) with the existence of two brothers. He cited the verse:

"If the deceased left brothers (or sisters)..."<sup>17</sup>

and he debated with <sup>c</sup>Uthmān ibn <sup>c</sup>Affān (the third caliph) saying that God has judged in the Qur'ān that if

---

<sup>17</sup> Qur'ān, 4:11

the deceased left brothers (or sisters) the mother has to take one sixth of the inheritance, therefore, since the two brothers are in the plural form in Arabic language, the mother should deserve one sixth only and not one third.<sup>18</sup> ʿUthmān ibn ʿAffān agreed with the opinion of Ibn ʿAbbās contrary to his own opinion and ijmāʿ. This means that the clear meanings of nuṣūṣ are stronger than ijmāʿ; (iv) that Ibn Masʿūd went against the ijmāʿ of the Ṣaḥābah on the question of the permission to use sand for purification "tayammum" while in sickness and said: "Were we to allow the sick people to use tayammum instead of making ablution, then a person would resort to it because of coldness when there was water". Although this opinion of Ibn Masʿūd was widespread at the time of the Ṣaḥābah, no criticism of it has been received from them. If Ibn Masʿūd was right in going against the naṣṣ<sup>19</sup> and the ijmāʿ of the Ṣaḥābah because of the general maṣlahah, this implies that the pre-eminence of maṣlahah upon naṣṣ and ijmāʿ is possible and permissible. On the contrary, if Ibn Masʿūd was wrong in his opinion, then the assembly of the Ṣaḥābah is erroneous for not criticising him; and in both the situations the proof of ijmāʿ is repudiated.

---

<sup>18</sup> See M. Zayd, Al-maṣlahah fī al-tashrīʿ al-Islāmī wa Najm al-Dīn al-Ṭufī, p. 126

<sup>19</sup> The naṣṣ in question is the ḥadīth which states: "The earth is made a mosque for me and its sand is a purification, wherever time for prayer comes I purify myself with the sand and pray on it". Reported by Muslim.

Al-Tūfī goes on to maintain that first of all, the difference of opinion of Ibn Mas<sup>c</sup>ūd is contrary to the ijmā<sup>c</sup> of the Ṣaḥābah; and secondly, although Ibn Mas<sup>c</sup>ūd was criticized by Abū Mūsā al-Ash<sup>c</sup>arī, it was an individual criticism and only indicated the Ṣaḥābah's mistake in not repudiating Ibn Mas<sup>c</sup>ūd. Since the consensus of the Ṣaḥābah as a community did not reject the opinion of Ibn Mas<sup>c</sup>ūd, it follows that the disapproval of Abū Mūsā al-Ash<sup>c</sup>arī was merely a contention. Therefore, the opinion of Ibn Mas<sup>c</sup>ūd which is against the naṣṣ that formulated the basis of the ijmā<sup>c</sup> of the Ṣaḥābah remains paramount and intact.

Before finishing his analysis of ijmā<sup>c</sup>, al-Ṭūfī establishes the fact that his opposition to the ijmā<sup>c</sup> and its proofs should not be taken as a complete rejection of it due to the fact that he himself talks of it in connection with ʿibādāt (acts of worship) and the like. All that he means in this regard is to clarify that the consideration of maṣlaḥah which is deduced from the . hadīth "lā ḍarar walā ḍirār" is a stronger proof in the Shari<sup>c</sup>ah than ijmā<sup>c</sup> simply because its basis is stronger than the basis of ijmā<sup>c</sup>. He further tries to prove in favour of the opinion which he has put forward, that the consideration of maṣlaḥah takes precedence over naṣṣ and ijmā<sup>c</sup> in three respects: (i) that those who rejected ijmā<sup>c</sup> have accepted the consideration of maṣlaḥah. This means that maṣlaḥah is a matter agreed upon by all

whereas ijmā<sup>c</sup> is a subject of disagreement; and to maintain something which is agreed upon is better than that about which there is disagreement; (ii) that the nuṣūṣ do contradict and disagree with each other thus causing difference in judgments and decisions which would appear to be blameworthy in the Shari<sup>c</sup>ah; whereas the consideration of maṣlahah is an item of agreement in itself where none is different, and this quality of agreement is desired in the Shari<sup>c</sup>ah. Thus to follow it is better and safer.

#### 6.10 THE SOURCE OF DISPUTE AMONG THE FOLLOWERS OF THE MADHĀHIB

After putting forward some nuṣūṣ which demand accordance and agreement in judgments and decision making, al-Ṭūfī digresses and points out what happened to the followers of the celebrated Imāms of the four schools of jurisprudence who, later, began to dispute and argue with each other due to competition between them, preferring the apparent meanings of the nuṣūṣ rather than taking maṣlahah into consideration. Had they agreed with each other in their methodology of dealing with the nuṣūṣ, then there would have been neither dispute nor difference of opinion... Al-Ṭūfī goes further maintaining that one of the main causes of the Muslim scholars' disagreement is the contradiction of the narrations of hadīth and the divergent interpretations of the nuṣūṣ of Qur'ān. He mentions the assertion of some

people who said that the sole cause of the contradictions in ḥadīth is ʿUmar ibn al-Khaṭṭāb who prevented the other

Ṣaḥābah from compiling the Sunnah when they asked permission from him and he replied:

"I don't write the Qur'ān along with something else".<sup>20</sup>

Nevertheless, ʿUmar's opinion is contrary to some sayings of the Prophet such as:

"Write for Abū Shāh the farewell sermon";<sup>21</sup>

and

"Preserve knowledge by writing down".<sup>22</sup>

Al-Ṭūfī quotes from those people who say: "Had ʿUmar allowed the Ṣaḥābah to write down what they heard from the Prophet, then the Sunnah would be fully preserved and every ḥadīth which reached the Imāms would have the authority of the Companion who transmitted it, and those books would be known to us as we know the books of al-Bukhārī, Muslim and others. (iii) that there are some instances in the Sunnah in which contradiction occurs between nuṣūṣ and maṣāliḥ. Al-Ṭūfī gives eight examples in which he finds clear opposition. Then he concludes by saying that the consideration of maṣlaḥah must precede all the rest proofs of the Sharīʿah in order to improve

---

<sup>20</sup> See Muṣṭafā Zayd, op. cit., p.128

<sup>21</sup> Reported by al-Bukhārī and Aḥmad ibn Ḥanbal

<sup>22</sup> Reported by al-Dārmī in Muqaddimah, p. 43

the people's welfare, organise their affairs and procure all the goodness which God has bestowed upon them by binding all the rules together in a systematic order and getting rid of all contradictions. Then he states that the pre-eminence of al-maṣāliḥ al-mursalāh over all the other evidences of Sharīḥ is a question of the use of reason or rather a special preference. The inference that al-Ṭūfī reaches after discussing these three aspects is that al-maṣāliḥ al-mursalāh is a stronger legislative device in the Sharīḥ than ijmāʿ and should be made to take precedence over all the evidences of the Sharīḥ if there is any contradiction between them.

#### 6.11 AL-ṬŪFĪ'S CONCLUSIONS ON MAṢLAḤAH

After this assertion, al-Ṭūfī gives four answers to suggested objections to his exposition of the pre-eminence of the consideration of maṣlaḥah over all the proofs of Sharīḥ. He maintains that: (i) his conclusion in favour of the precedence of al-maṣāliḥ al-mursalāh is not to diminish the proofs of Sharīḥ by a mere mischievous analogy resembling satanic thinking, rather it is an assertion of the precedence of a stronger proof (i.e the consideration of maṣlaḥah) over a strong one (i.e ijmāʿ) which is an accepted principle (in uṣūl al-fiqh). (ii) the Lawgiver (God) is well versed in all the benefits of His creatures as His bounties to them depict this reality. Nonetheless, the pre-eminence of the consideration of maṣlaḥah over the proofs of the Sharīḥ

is never a denial of this truth simply because maṣlahah is one amongst these proofs and the most preferable. Moreover, as long as God has given us the talent of recognizing our benefits normally, it is therefore not reasonable to discard it and depend on an ambiguous thing which might be a doubtful method towards the attainment of maṣlahah; (iii) he refutes the claim of those who allege that the difference of opinion of the Imāms on the question of legal rules and judgments is a mercy "ikhtilāf al-Aimmah raḥmah". He says that there is no sound naṣṣ to support this claim; and even if there were a sound naṣṣ to support this opinion, the agreed maṣlahah must take preference over the disagreed one because the former is more probable than the latter. Moreover, the disagreed maṣlahah makes possible two harmful effects: (a) some people would be given to use the dispensations of a certain madhhab (school of law) which could lead them to deem some unlawful things as lawful ones and therefore involve themselves in great wickedness; (b) that some of the non-believers who are in need of embracing Islam might be prevented by the differences within the Ummah, because those differences are thought to involve error and naturally a man would be repulsed from them. It is without doubt that in following the principle of the consideration of maṣlahah the ways towards making beneficial judgments are unified and the causes of differences are demolished; (iv) he further

establishes that his analysis is not erroneous but is not necessarily the only method due to the fact that the foundation of this analysis is the use of reason which assumes probability only and not decisiveness.

Notwithstanding, there is an urgent necessity to follow it simply because probability in question of customary law (and transactions) is equal to decisiveness in other matters. The argument that by doing so implies that the Ummah before this generation must have been wrong is just a misunderstanding which could be arrived at by anybody who comes to a new methodology which has never existed before. With regard to the vast majority (al-sawād al-a<sup>c</sup>ẓam) which the ḥadīth commands us to follow, there is a clear poof and a great argument in favour of the consideration of maṣlahah in the sense that had it not the case been so, then it would be necessary for the scholars (who are few) to follow the masses whenever they went against them as the masses are the majority.

Al-Ṭūfī maintains that his theory of the pre-eminence of maṣlahah over all the proofs of the Shari<sup>c</sup>ah is different and unique from the theory of Imām Mālik on al-maṣāliḥ al-mursalah in the sense that his theory is more comprehensive... He goes on to say: "The consideration of maṣlahah is in actual fact a support of the nuṣūṣ (of the Qur'ān and Sunnah) and ijmā<sup>c</sup> in the acts of worship whereas its consideration in transactions, customary law and general social

obligations, it is a basic condition". In connection with acts of worship says al-Ṭūfī, the rules and judgments are verified either by single clear cut proofs or by a variety of proofs which are congruent in meaning, or by contradicting proofs which could be grouped together without affecting the nuṣūṣ. But if the contradicting proofs could not be grouped together, then ijmā<sup>c</sup> takes precedence over the rest of the proofs, or else naṣṣ takes precedence in the absence of ijmā<sup>c</sup>.

When the proof is singled out from the Qur'ān for a particular judgment, whether it be a clear cut ordinance or an apparent meaning of a verse, it has to be exercised by giving the precedence to the most probable of its suitable meanings. If the possibilities of the apparent meaning of the verse are of equal strength, then any of those possibilities may be exercised in the acts of worship... If the proofs from the Qur'ān for the same particular thing are two or numerous, then they will be taken as if they were one verse only if all their implications are congruent. But if their implications are multifarious, the verses are grouped together by the method of particularisation or by means of restriction and the like, if at all there is a possibility of grouping the verses together; but in cases where their grouping together becomes difficult, then one or some of the verses are deemed abrogated and the case is verified by the agreement of the Sunnah.

When the Sunnah becomes the only evidence in a judgment and the proof is verified by one sound ḥadīth, then it is necessary to carry out that ḥadīth without any further research. But if the proof from the Sunnah is based on more than one ḥadīth and all the aḥādīth are equal in correctness and their implications are unified, then all the aḥādīth will be applied as if they were one hadīth only. If their implications are divergent nonetheless they could be grouped together, then they will be merged with one another; and if grouping is impossible some of them will be deemed abrogated. If the meaning is specific just in the Sunnah itself, then there is no need to go beyond it for another proof; but if the meaning is not specific, then proof should be sought and verified with the conjunction of the Qur'ān and ijmā' or more than that amongst the proofs of the Sharī'ah. If some of the aḥādīth are not sound it is a natural practice that only the correct ones are to be applied; but if the aḥādīth compete with each other in soundness, it is necessary to give precedence to the most correct ones as far as possible... When the Qur'ān and Sunnah both provide evidence in a particular case, one of the two things should take place, either they agree with each other or they disagree. If they agree with each other, then one (i.e Sunnah) is a clarification and an emphasis of the other. But if they disagree with each other, a way should be found to bind them together as much as

possible; and if grouping them together is impossible, then one should be deemed abrogated by the other if that is suitable; but in case abrogation it is not applicable, then the Qur'ān should take precedence over the Sunnah simply because it is the origin and logic demands that the origin should not be discarded for its derivative.<sup>23</sup>

This is how al-Ṭūfī defines rules in connection with the acts of worship. Whereas in connection with transactions and practices the established norm is the consideration of maṣlaḥah of people in the first place before all else, then if any other proof agrees with it, no word is to be added as is the case with the five fundamentals (al-aḥkām al-khamsah) where naṣṣ, ijmā' and maṣlaḥah have all agreed together - eg, to kill the killer, or to amputate the hand of a thief, or to flog or stone an adulterer... In the case of divergence between the Qur'ān and the Sunnah when there is the possibility of merging some of the proofs into others in some judgments or conditions while excluding the others or of taking into account the consideration of maṣlaḥah, then they could be grouped together. If grouping together is not possible, maṣlaḥah takes precedence over the rest of the proofs due to the fact that the ḥadīth "lā ḍarar walā dirār" states categorically the negation of injury which

---

<sup>23</sup> See Muṣṭafā Zayd, op. cit., appendix, pp. 43-46; <sup>c</sup>Abd al-Wahhāb Khallāf, op. cit., pp. 138-141

prompts the consideration of maṣlaḥah, and thus it must take precedence due to the fact that maṣlaḥah is the main objective as far as people are concerned in the legislation of laws, whereas the rest of the proofs are in reality a means to this objective. Logically, the ends should take pre-eminence over the means...

Al-Ṭūfī here perceives the possibility of opposition between benefits (maṣāliḥ) and injuries (mafāsīd); and he therefore lays down a canon to avoid that contradiction... He begins by saying that every proposed rule or law constitutes maṣlaḥah only, or mafsadah alone, or contains both maṣlaḥah and mafsadah together. If it constitutes a single maṣlaḥah or several, then it has to be acquired as much as possible. But if it is not possible to acquire more than one and the maṣāliḥ were contending against each other in degrees of importance, then the most important ones are to be acquired; and if there is no competition one only will be obtained by means of preference, but if there happens to be doubt about which, then drawing lots will take place... If ever a mafsadah is the only quality within a thing in one or more forms, then it must be expelled and checked as much as possible. But when it is not possible, then only that which is possible has to be expelled. If it becomes difficult to stop more than one mafsadah then an effort has to be made to expel the most injurious mafāsīd if they are at different levels of harm; but if they are

equal, then only one amongst them will be debarred by means of selection or by drawing lots if doubt occurs. If the maṣlaḥah and the mafsadah altogether do exist in a thing, it is incumbent and necessary to deter the mafsadah as much as possible, but if it is difficult to do so then precedence should be given to the one which is important to obtain or expel if they are at different levels of importance. But if they are apparently equal in importance, then anyone could take precedence in selection but if doubt occurs, then drawing lots will take place... If two maṣāliḥ oppose each other or two mafāsīd contradict each other, or a maṣlaḥah counteracts a mafsadah and one outweighs the other respectively, then the weightier one (al-arjaḥ) will be preferred either to be obtained or expelled. If both are equal in importance, only one of them will be considered in the selection by means of preference or drawing lots...".<sup>24</sup>

As a conclusion to his analysis of the theory of the pre-eminence of the consideration of maṣlaḥah in Islamic law, al-Ṭūfī emphasizes the point that this theory is applicable only to transactional operations (mu<sup>c</sup>āmalāt) and customary law and not to the acts of worship due to the fact that the rules and laws concerning mu<sup>c</sup>āmalāt are in the realm of political affairs whose enactment depends

---

<sup>24</sup> See Muṣṭafā Zayd, op. cit., appendix, pp. 46-47; and <sup>c</sup>Abd al-Wahhāb Khallāf, op. cit., pp. 141-142

on the benefits of the people. Thus, it is important that in mu<sup>c</sup>āmalāt the consideration of maṣlaḥah should take precedence and formulate its basis. Whereas the acts of worship are the rights of the Lawgiver (God) alone and no one can know His rights in terms of quality, quantity, time and place except through His decree and will. It is obligatory therefore to perform acts of worship in the way they have been laid down for us by the Lawgiver Himself or by His Prophet and not as it has been stipulated by the philosophers who worshipped through their reason denying the code of laws from God and so made Him angry, and consequently they lead astray and perverted other people... Then al-Ṭūfī winds up his analysis by emphasizing once again that maṣlaḥah is one of the devices of the Sharī<sup>c</sup>ah, its strongest proof and special one. He ends up by saying that maṣlaḥah is a distinct feature to the people who have been given responsibility (mukallafīn) in the light of customs and common sense. If we find that any proof of the Sharī<sup>c</sup>ah has neglected it or has not considered it, then we should know that we are prompted to obtain that maṣlaḥah through our own consideration as it is clear that the nuṣūṣ of the Sharī<sup>c</sup>ah have not encompassed all the rules and judgments of the everchanging events as much as we know that we are required to complete those rules and judgments by means of qiyās.

## THE CRITIQUE OF AL-ṬUFĪ'S THEORY

Al-Ṭufī's theory of the pre-eminence of the consideration of maṣlaḥah is based on three propositions: (i) that maṣlaḥah is the pivot of the intention of the Lawgiver, thus it is the special and the strongest of all the proofs of the Sharīḥ; (ii) that it is not necessary for maṣlaḥah to coincide with a decisive naṣṣ or the ijmā<sup>c</sup> of the Muslim Ummah, but it can go against the naṣṣ and ijmā<sup>c</sup>, in which case it should take precedence over them on the basis of the first assumption; (iii) that the sphere of action within which his theory could operate is in transactions (mu<sup>c</sup>āmalāt) and customary law which are concerned with the people's polity and social obligations. As regards the acts of worship, their rules should be directly received from God due to the fact that they belong to His will.

Al-Ṭufī presented proofs for each of these propositions at the beginning of his explanation of the hadīth "lā ḍarar walā ḍirār", due to the fact that the hadīth itself is the first proof for the first proposition and the basis of his analysis. Then he produces detailed proofs showing that the Lawgiver has considered maṣlaḥah in every thing, basing his proof for this on the Qur'ān, Sunnah, ijmā<sup>c</sup> and qiyās. He does this again and again to emphasize his position. In trying to establish the precedence of maṣlaḥah al-Ṭufī weakened

ijmā<sup>c</sup> and made it a point of divergence amongst the four celebrated Imāms of the schools of Islamic jurisprudence. He referred the cause of the divergence of opinion of these Imāms to the nuṣūṣ of the Qur'ān and the Sunnah. He also presented the proofs of ijmā<sup>c</sup> and after discussing them he eventually rejected them so that he could come out with the idea that maṣlahah is stronger than ijmā<sup>c</sup> simply because the former is an issue on which there is agreement whereas the latter is the subject of disagreement. In order to be just in our discussion on the al-Ṭūfī's theory, it is imperative to observe the sequence of the logical progression of his analysis.

Al-Ṭūfī begins with the explanation of the ḥadīth "lā ḍarar wala ḍirār" in which he establishes its meaning to be: "No injury should be caused (whether legally or illegally) except by a specialised measure". Then he clarifies this meaning by discussing the limitations and exclusions therein and says: "As regards the Shari<sup>c</sup>ah's limitation of causing injury it is due to the fact that infliction of injury by God's decree is inevitable. The same is the case with the exclusion of causing harm by a special legal measure. The ḥudūd (revealed punishments) and other remedies for various crimes do cause injuries to those inflicted, as they are acts of justice legalized by a special proof. Then he mentions some precise nuṣūṣ which he maintains confirm the maṣāliḥ. It is clear here that it means that the

proofs of the Shari<sup>c</sup>ah do not conflict with maṣlahah in any case whatsoever simply because all types of injuries are initially excluded by the Shari<sup>c</sup>ah. As regards the ḥudūd and other punishments for the different crimes, although they seem to appear as injuries in themselves, they are in actual fact applied to attain important benefits such as security and peace without which the lives of people will be under great threat. In this case the ḥadīth "lā ḍarar walā ḍirār" is not a proof of the pre-eminence of maṣlahah over naṣṣ.

In spite of this, al-Ṭūfī bases his opinion upon the implication that this ḥadīth makes maṣlahah override all the evidences of the Shari<sup>c</sup>ah. He tries to support this by saying that if some evidence of the Shari<sup>c</sup>ah contained injury, we should get rid of that injury by applying this ḥadīth. Thus that evidence of the Shari<sup>c</sup>ah would be particularised by the application of this ḥadīth and reconciled with it. Otherwise, it would result in a suspension of one of these evidences - in this case it would be this ḥadīth. There is no doubt that to apply all the evidences collectively is better than suspending some of them.

Most Muslim scholars would argue that even if some evidence of the Shari<sup>c</sup>ah contained injury and therefore in such a case we would require this ḥadīth especially to get rid of that injury, it does'nt necessarily oblige the

precedence of maṣlahah over naṣṣ but it would rather be an application of one naṣṣ coming before another naṣṣ by means of takhṣīṣ (particularization). Moreover, they would argue that in the method of general particularization (takhṣīṣ <sup>ḥ</sup>āmm) in which a general evidence like this ḥadīth stands together with a particular evidence, it is the particular one which restricts the general one yuhmal al-khāṣṣ <sup>ḥ</sup>alā al-ḥāmm and not vice versa.

Al-Ṭūfī sees that the pre-eminence of the consideration of maṣlahah over the nass as a type of particularizing naṣṣ by maṣlahah or a clerification of naṣṣ by maṣlahah and claims that this method, as a principle, has its origin in uṣūl al-fiqh whereby sometimes the Sunnah takes precedence over the Qur'ān by means of bayān (clerification) while in actual fact the Qur'ān has to precede the Sunnah in legislation and not to come after it. Most Muslim scholars do agree that some evidences of the Sharīḥ do restrict others - this is an agreed factor in uṣūl al-fiqh - but they would argue that it is not an agreed matter that the implication of naṣṣ and ijmā<sup>ḥ</sup> could contain injury. As regards the ḥudūd and other punishments, they have already said above that they are exercised in order to obtain important benefits whereby the injuries which are caused by these punishments are far less significant as compared to the expected benefits in them. The case is not also

understood with the dictum in which al-Ṭūfī asserts that the consideration of maṣlaḥah which is implied from the hadīth "lā ḍarar walā ḍirār" has to take precedence above naṣṣ by means of particularization or clarification! It seems that al-Ṭūfī himself has felt this ambiguity when he cast some doubts on the strength of the consideration of a maṣlaḥah, which is based on a weak basis, as compared to the ijmāʿ which is based on a strong basis.<sup>1</sup> In spite of this fact, al-Ṭūfī tries to refute this truth by giving a detailed account of maṣlaḥah and ijmāʿ to forward his case.

Al-Ṭūfī defines maṣlaḥah according to the common usage as well as in accordance with the technical usage in the Shariʿah and remarks that there is no objective difference between the two definitions... As regards the common usage, he notes, maṣlaḥah is "a cause which brings about goodness and advantage, such as trade which brings profit; whereas in accordance with the technical usage in the Shariʿah, maṣlaḥah is "a cause which leads to the intention of the Lawgiver whether being acts of worship or customs...";<sup>2</sup> and the literal meaning of its wording could give light to both the definitions. Maṣlaḥah, to

---

<sup>1</sup> See Muṣṭafā Zayd, Al-maṣlaḥah fī al-tashrīʿ al-Islāmī wa Najm al-Dīn al-Ṭūfī, appendix, p. 15; and ʿAbd al-Wahhāb Khallāf, Maṣādir al-tashrīʿ fī mā lā naṣṣ fih, p. 111

<sup>2</sup> See Muṣṭafā Zayd, op. cit., appendix, p. 19; and ʿAbd al-Wahhāb Khallāf, op. cit., p. 112

al-Ṭūfī, is: "the quality of a thing in its perfection as it is expected to be, such as a pen becomes a utility when its quality is expressed through being writing with". It is quite obvious that a pen could not be of any benefit unless it is used for writing; the same is the case with trade, profit is the corner-stone of its existence. But the question arises: "Is the benefit so obtained the main cause leading to the intention of the Lawgiver or is it the purpose which is embedded in its own existence?" Al-Ṭūfī has argued here that the benefit so obtained is the sole basis to which the intention of the Lawgiver owes its rationality; and has formulated his opinion by making maṣlahah pre-eminent above all the evidences of the Sharīḥah so that it stands alone as the pivot of its rationale. However, if his theory is based on the consideration of the maṣlahah as a cause of legislation in the Sharīḥah as he has argued, then it is not proper for him to hold it unique amidst the rest evidences of the Sharīḥah due to the fact that all the evidences do share this common factor. But his theory is based on the consideration of maṣlahah as the sole and pivot of the intention of the Lawgiver as he has argued in so many places in his treatise.<sup>3</sup> It is clear that al-Ṭūfī aimed at emphasizing the general outlook of

---

<sup>3</sup> See Muṣṭafā Zayd, op. cit., appendix, pp. 21 & 46; and <sup>c</sup>Abd al-Wahhāb Khallāf, op. cit., pp. 110, 129 & 141

maṣlahah as he perceived it, and the maṣlahah which he considered to be the strongest of all the evidences of Shari<sup>c</sup>ah is by no means the same as "maṣlahah mursalah" as it has been defined by the jurists. This could be easily discovered from his technical definition of maṣlahah when he said: "Maṣlahah is a cause leading to the intention of the Lawgiver whether being in the acts of worship or customary law."<sup>4</sup> By this, al-Ṭūfī has made maṣlahah a general feature encompassing both the fields - i.e acts of worship and customary law; while he himself said that the realm in which the consideration of maṣlahah operates concerns transactions and customary law and not acts of worship..."<sup>5</sup> In this he seems to be arguing with himself.

Secondly, it is also obvious in al-Ṭūfī's assertion that he reckoned "al-maṣāliḥ al-mursalah" with the nineteen evidences of the Shari<sup>c</sup>ah when he made his comment on the ḥadīth "lā ḍarar walā ḍirār"<sup>6</sup> and at the introduction of his book "Al-ishārāt al-ilāhiyyah"<sup>7</sup> after which he established that the strongest evidences of the Shari<sup>c</sup>ah are naṣṣ (Qur'ān and Sunnah) and ijmā<sup>c</sup> which if

---

<sup>4</sup> See reference above

<sup>5</sup> See Muṣṭafā Zayd, op. cit., appendix, p. 19; and <sup>c</sup>Abd al-Wahhāb Khallāf, op. cit., p. 112

<sup>6</sup> See Muṣṭafā Zayd, op. cit., appendix, pp. 16, 17; and <sup>c</sup>Abd al-Wahhāb Khallāf, op. cit., pp. 109, 110

<sup>7</sup> Najm al-Dīn al-Ṭūfī, Al-ishārāt al-ilāhiyyah, p. 3

they disagree with maṣlaḥah it is obligatory to make it take precedence over them. Here again al-Ṭūfī seems to have contradicted himself by making maṣlaḥah weaker than naṣṣ and ijmā<sup>c</sup>, and at the same time making it the strongest evidence above all.

Thirdly, he has expressed his method in connection with the consideration of maṣlaḥah and said that his theory is not the same as what Imām Mālik held of al-maṣāliḥ al-mursalah<sup>8</sup> in the sense that the Mālikis have maintained that a maṣlaḥah which conflicts with naṣṣ is void.<sup>9</sup> Thus the type of maṣlaḥah, even in its form of unrestrictness (mursalah) i.e the benefit which has neither been considered by the Shari<sup>c</sup>ah nor cancelled it - which al-Ṭūfī is keen to analyse is a general maṣlaḥah free from any reservations and conditions. He visualises that every kind of maṣlaḥah enters the realm of the intention of the Lawgiver without distinction or categorization into the different kinds of maṣlaḥah. Never does he demarcate between the necessary benefits (ḍarūriyyāt) from the reasonable ones (ḥājiyyāt) and from the luxurious ones (taḥsīniyyāt) though he points out the agreement between naṣṣ, ijmā<sup>c</sup> and maṣlaḥah in the five basic fundamentals (i.e the preservation of religion,

---

<sup>8</sup> Muṣṭafā Zayd, op. cit., appendix, p. 43; and <sup>c</sup>Abd al-Wahhāb Khallāf, op. cit., p. 138

<sup>9</sup> Muṣṭafā Zayd, op. cit., pp. 51-53

soul, mind, offspring and material wealth).<sup>10</sup> Al-Ṭūfī went even further than that, in his commentary on Mukhtaṣar al-Rawḍah written by Ibn Qudāmah by saying that the division of maṣlaḥah into categories is unnecessary and a uselessly painstaking, and states that the best method to judge maṣāliḥ (benefits) should be more comprehensive than that and more precise. Let us quote here what he says there in order to cast some light on the issue regarding his opinion. Al-Ṭūfī says: "Be informed that those who divide maṣlaḥah into considerable, cancelled and unrestricted; necessary and unnecessary - have just flattered the issue and taken pains for nothing while the way to judge maṣlaḥah is quite general and concise. Thus we have established that the Lawgiver has considered maṣlaḥah in absoluteness and has excluded injury in its entirety. So upon this we say that if an action consists of pure maṣlaḥah we have to do it, and if it consists of total injury we must discard it. But if an action envelopes maṣlaḥah on the one hand and bears injury on the other - and it appears in our mind that the attainment of maṣlaḥah is as equal as the repelling of injury in that action - we either prefer the side which carries more weight or we make our choice by mere selection. An example of this issue is like the one

---

<sup>10</sup> See <sup>c</sup>Abd al-Wahhāb Khallāf, op. cit., p. 141; and Muṣṭafā Zayd, op. cit., appendix, p. 46

who does not possess enough clothes to cover his body in prayer except a piece which suffices one of his private parts only (the front or the back of his body); in this case, is he to cover his rump due to the fact that it is an unveiled shameful evil, or has he to cover his front part because of facing the qiblah (the direction of the holy shrine in Makkah), or is he to choose between the two because of the conflict between the two maṣlahahs and the two injuries? But if the maṣlahah is not as equal as the injury and either the attainment of maṣlahah is weightier than the repelling of injury or vice versa, then we adhere to the weightier one simply because such an exercise is attested by the Sharīḥ. By this rule every division of maṣlahah which has been mentioned by its advocates becomes redundant. With regard to legal consideration, whether pure or preferable, maṣlahah is apparent. As to the cancelled maṣlahah such as the prohibition of growing grapes (to avoid the making of wine), or to share residence (by a man and a woman) - this is so because of the conflict between maṣlahah and mafsadah inherent in them. Nonetheless, the maṣlahah found therein is weaker than the enormous mafsadah, and thus its prohibition is weightier than its permission, which necessitates the blocking of the benefit which could be obtained by growing grapes and the companionship of the unmarried couple in the same apartment due to the expected mafsadah of distilling wine and committing

adultery. Were it to be admitted that this mafsadah is just a suspected one not real and decisive whereas the conflicting maṣlahah is decisive, then the attainment of maṣlahah would be more appropriated than vice versa".<sup>11</sup>

Al-Ṭūfī neglects the divisions and categories of maṣlahah. He casts away all that which has been mentioned by those who divide maṣlahah into a number of types and he sets a new criterion for the decision of whether a thing or an action bears maṣlahah which ought to be obtained or bears mafsadah which must be expelled - i.e according to the quantity of maṣlahah or mafsadah therein. Thus, any action which is totally beneficial and bears no injury or its maṣlahah is weightier than its mafsadah, its enforcement is obligatory. The same is the case also with anything which is completely harmful and bears no maṣlahah therein, or the mafsadah side is heavier than the maṣlahah side; its eradication is compulsory. But as regards an action or a thing which contains maṣlahah and mafsadah in equal proportions its judgment, according to al-Ṭūfī, is to remain in suspension awaiting the discovery of which among the two is probable, or making preference between doing it and not doing it... In other words, al-Ṭūfī observes actions and things from this angle and this consideration - i.e

---

<sup>11</sup> See Ibn Badrān al-Dimashqī, Nuzhat al-khāṭir al-Ḍāṭir, vol. 1, p. 416

actions which contain pure maṣlahah or the maṣlahah in them is weightier than their mafsadah, must be put into practice no matter how awkward they may appear and even if no naṣṣ is ordained in their favour or no ijmā<sup>c</sup> is enunciated. In fact it is obligatory to put into practice even if they go against naṣṣ and ijmā<sup>c</sup>. Whereas if the actions bear total mafsadah or the mafsadah found therein is heavier than their maṣlahah, it is compulsory to forego them even if they are ordained by naṣṣ and ijmā<sup>c</sup>. As regards the actions in which their maṣlahah and mafsadah are in equilibrium in every aspect - as presumed by al-Ṭūfī - their judgment will be suspended for a while till probabilities are found and preferences are made; and in this case it is not recommended to go against naṣṣ or ijmā<sup>c</sup> simply because those actions are not stronger over naṣṣ and ijmā<sup>c</sup> due to the weakness caused by the conflict between maṣlahah and mafsadah therein.

In spite of this criterion by which al-Ṭūfī casts away all the divisions of maṣlahah in his commentary to the book "Mukhtaṣar al-Rawḍah" of Ibn Qudāmah, nonetheless, al-Ṭūfī himself mentions this very criterion in his commentary to the ḥadīth "lā ḍarar walā ḍirār" but in different terms - in which he establishes that the nuṣūṣ and ijmā<sup>c</sup> are applicable to the acts of worship; but as regards the judgments of transactions and customs

maṣlaḥah is paramount.<sup>12</sup> Then he puts a rule to avoid the opposition of the maṣāliḥ by the mafāsīd<sup>13</sup> and supposes there also that there could be a state of equilibrium of maṣlaḥah and mafsadah in every aspect of an action, but here he doesn't stop from making a decision as he stopped there (see above), instead, he enunciates and fixes that the judgment should be made by preference and in case of suspicion it should be made by drawing lots.<sup>14</sup>

Most Muslim scholars are of the opinion that an action which bears maṣlaḥah and mafsadah in equal proportions in every aspect does not exist. With regard to the example which al-Ṭūfī has given i.e that of the one who misses clothing for prayer except a piece which could cover one of his private parts, their opinion is that, the covering of his front part is paramount due to the fact that it is a particular one in which male and female differ.

Moreover, a contemporary of al-Ṭūfī who is one of the celebrated Ḥanbalī scholars called Ibn Qayyim whose opinion on the issue in which its maṣlaḥah is as equal as its mafsadah could give more light in support of the view

---

<sup>12</sup>See Muṣṭafā Zayd, op.cit., appendix. p. 43; and <sup>c</sup>Abd al-Wahhāb Khallāf, op. cit., p. 138

<sup>13</sup> See Muṣṭafā Zayd, op. cit., p. 47; and <sup>c</sup>Abd al-Wahhāb Khallāf, op. cit., p. 142

<sup>14</sup> Ibid.

of the majority of the Muslim scholars. He says:

"As regards the second issue - the one in which its maṣlahah is equal to its mafsadah - there is difference and dispute as to its existence and its judgment; some people affirmed it while the others denied it. The answer to this question is that this situation seems unlikely to happen even though people are divided upon it. To clarify this assertion further, either this issue's existence demands to be practised because of being its maṣlahah weightier (than its mafsadah) or it is a non-existent one which ought not be practised due to the fact that its mafsadah is heavier than the maṣlahah inherent therein. A thing is done because of its maṣlahah and not done due to its mafsadah. However, to get a thing in which its maṣlahah weighs equal to its mafsadah is a dictum whose existence is hardly to be proved; but proof rather stands against it. Actually, maṣlahah and mafsadah, benefit and injury and pleasure and pain, if they are in opposition to each other, one should prevail over the other and the judgment will be in favour of that which prevails. To get a situation in which the two opposing qualities are equal in such a way that one does not prevail over the other is unlikely. The case should be stated either: the two contending qualities are together in existence, which is impossible to occur in a single place; or it should be said that the two qualities are together non-existent - which is also impossible, simply because it is a preference between the two without a qualifier. This impossibility is a result of a supposition of the contention between the two qualities thrusting back each of them which is an invalid case; thus, one of them should subdue its opponent and take with it the right of judgment".<sup>15</sup>

Al-Ṭūfī maintains that God has considered maṣlahah in every ordinance as implied in the following verses:

"O mankind! There hath come to you a direction from your Lord and a healing for the (diseases)

---

<sup>15</sup> See Ibn Qayyim, Miftāh dār al-saCādah, vol. 2, p. 17

in your hearts, and for those who believe, a Guidance and a Mercy. Say: "In the bounty of God and in His Mercy, - in that let them rejoice; that is better than the (wealth) they hoard".<sup>16</sup>

He deduces from these two verses seven aspects which verify the consideration of maṣlaḥah by the Lawgiver.<sup>17</sup> He then establishes that if we were to study the nuṣūṣ of the Qur'ān thoroughly, we would be able to find many evidences which indicate this. Al-Ṭūfī elaborates the point that the Lawgiver has cared for maṣlaḥah so much that His deeds are connected to the ultimate objectives for mankind's beneficence. Thus, God's consideration for the maṣāliḥ of His creatures is a necessity and a favour and not an obligation upon Him. God's care for maṣlaḥah is comprehensive, extended to all places and situations in the most suitable way... Al-Ṭūfī infers from this and says that it is impossible for God to consider maṣlaḥah for His creatures at the time of their creation, in the mundane life as well as in the hereafter, and after that become oblivious of their maṣāliḥ in the rules and judgments of the Shari'ah, which are imperative to be cared for and which are part of the maṣlaḥah of their lives. Not only this, but those rules and judgments are the means for the security of their material wealth, their blood and their honour; and without which their

---

<sup>16</sup> Qur'ān, 10: 57, 58

<sup>17</sup> See the details of these aspects in the appendix of Al-maṣlaḥah fī al-tashrīḥ al-Islāmī wa Najm al-Dīn al-Ṭūfī, by Muṣṭafā Zayd, pp. 19-20; and <sup>C</sup>Abd al-Wahhāb Khallāf, op. cit., pp. 112 - 113

whole existence on earth will be in chaos. Thus, it goes without saying that God has considered maṣlaḥah in all its aspects in the ordinances of the Sharī<sup>c</sup>ah. If the case is so, it therefore becomes commendable and obligatory to follow the nuṣūṣ where they exist.<sup>18</sup> However, although it is inappropriate to subject the nuṣūṣ to maṣlaḥah, God has left some scope for ijtihād in the elaboration of the law.

Although this explanation in its general and detailed nature is clear, the surprising thing is that al-Ṭūfī goes on to say immediately after this: "If it (i.e. maṣlaḥah) agrees with naṣṣ and ijmā<sup>c</sup> or any other evidence of the Sharī<sup>c</sup>ah it's well and good, but if it conflicts with any evidence of the Sharī<sup>c</sup>ah then a reconciliation is made between them as we have mentioned by means of particularising maṣlaḥah over the other evidence and making it take precedence through the method of clarification.<sup>19</sup> The reason for this ambiguity is that al-Ṭūfī contradicts himself in the sense that he presumes and confirms the impossibility of the Lawgiver neglecting maṣlaḥah in one hand, and assumes the conflict of the evidences of the Sharī<sup>c</sup>ah in the other hand; and then bases his judgement on this assumption. Since the

---

<sup>18</sup> See Muṣṭafā Zayd, op. cit., appendix, p. 25; and <sup>c</sup>Abd al-Wahhāb Khallāf, op. cit., p. 118

<sup>19</sup> Ibid.

Lawgiver has considered maṣlaḥah in every aspect of His creatures' lives, it therefore goes against logic for al-Ṭūfī to think that the nuṣūṣ of the Sharī<sup>c</sup>ah (which are His own dictates) could conflict with maṣlaḥah, especially when he has not given one example of such a situation.

The contradictions in al-Ṭūfī's theory become clearer when we see that he himself has said: "As regards the Qur'ān, there is no verse in it except it contains maṣlaḥah or maṣāliḥ".<sup>20</sup> As to the Sunnah he says: "Since it is a clarification of the Qur'ān, it has therefore to agree with it (in containing maṣāliḥ)".<sup>21</sup> In connection with ijmā<sup>c</sup>, says he: "All the authentic Muslim scholars do verify the rules (aḥkām) either to bring about maṣāliḥ or expel evils. This principle is accepted even by those who do not profess to the fact that ijmā<sup>c</sup> is one of the evidences of Sharī<sup>c</sup>ah"; and in connection with common sense, al-Ṭūfī says that every being who possesses a sound mind knows for sure that the objective behind the rules of transactions (mu<sup>c</sup>āmalāt) and customary law in any just law is for the attainment of the benefits of people; and there is no law which is more just than the Islamic law, it is therefore, the best of all the laws in

---

<sup>20</sup> See Muṣṭafā Zayd, op. cit., appendix, pp. 22 - 23; and <sup>c</sup>Abd al-Wahhāb Khallāf, op. cit., pp. 115 - 116

<sup>21</sup> Ibid.

the consideration of the maṣāliḥ...<sup>22</sup> This is the assertion of al-Tūfī in the issue where he declares categorically that there is no naṣṣ either in the Qur'ān or Sunnah which does neither contain maṣlaḥah nor expel evil; and that ijmā' of the Muslim mujtahids is supplementary to the nusūs.

It would seem that he should regard the Sharī'ah as capable of accommodating all types of maṣāliḥ which no naṣṣ has mentioned or which no ijmā' has approved of. Nonetheless, those maṣāliḥ should not go against what has been ordained in the Sharī'ah either directly or indirectly. Above all, those maṣāliḥ, whatever they might be, could not be termed as primary ones due to the fact that the fundamental benefits have been considered by the Sharī'ah and indicated by more than one evidence. Actually, those maṣāliḥ are regarded as secondary ones emerging after the epoch of legislation ('ahd al-tashrī') and therefore it was necessary to lay down some rules for their consideration. Those maṣāliḥ are regarded as annexures and supplements to the primary ones and not opponents of them.

As regards the question of an enemy shielding himself with a band of Muslim prisoners of war which has

---

<sup>22</sup> See Muṣṭafā Zayd, op. cit., appendix, p. 23; and 'Abd al-Wahhāb Khallāf, op. cit., p. 116

been mentioned by al-Ghazālī (see chapter three above)<sup>23</sup> which could seem a real contradiction of what we have mentioned here; most Muslim scholars would argue that in this issue the conflict lies between two benefits and not between maṣlahah and naṣṣ. Its explanation is that when that band of Muslims is kept alive and the enemy is left to pass through, the maṣlahah is just to preserve the lives of those few people; but when that band is killed and the enemy resisted, the maṣlahah in this case is greater which has to do with the preservation of the lives of the entire Muslim Ummah. No doubt, the preservation of the lives of all the Muslims precedes that of a small group. That is why we see al-Ghazālī putting conditions on the issue in question showing the necessity, decisiveness and its primary status which makes it deserve pre-eminence over the other maṣlahah.<sup>24</sup>

Suppose al-Ṭūfī claimed that his theory of the pre-eminence of maṣlahah over all the evidences of the Shariḥ is in reality particularising a naṣṣ by another naṣṣ and not by maṣlahah due to the fact that the ḥadīth "lā ḍarar walā ḍirār" is a decisive naṣṣ in the necessity of the consideration of maṣlahah to the extent of restricting every naṣṣ which bears injury. This would mean that it is not maṣlahah which is preceding naṣṣ but

<sup>23</sup> See al-Ghazālī, Al-mustaṣfā, vol. 1, pp. 294-296

<sup>24</sup> See al-Khiḍr, Uṣūl al-fiqh, p. 391

it is another naṣṣ that takes precedence... Nonetheless, most Muslim scholars would argue that this claim (which could be adopted to elaborate the theory of al-Ṭūfī) reverses the situation in the method of particularization as it was pointed out earlier that it is a special naṣṣ which restricts a general one and not vice versa. The naṣṣ "lā ḍarar walā dirār", which is quite general and comprehensive, is before al-Ṭūfī a particularizing naṣṣ which could be used to restrict any other naṣṣ on a derived issue (mas'alat far<sup>c</sup>iyah) whose application results in causing injury. Whereby it was necessary for him to restrict the derived issue, if it ever existed, by a special naṣṣ excluded from this general naṣṣ so that some injuries are made legal to serve some purpose.

In order to complete this point in the survey of relationship between maṣlaḥah and nuṣūṣ let us discuss the three claims which have been put forward by al-Ṭūfī in his assertion of the precedence of maṣlaḥah over naṣṣ, which are as follows: (i) that the nuṣūṣ are diversely opposed to each other and are the cause of difference in judgments which is detested by the Sharī<sup>c</sup>ah...; (ii) that the consideration of maṣlaḥah is a matter which is agreed upon in itself and there is no disagreement therein, thus it is a cause of accordance which is required by the

Sharīḥ;<sup>25</sup> (iii) that it is established in the Sunnah that there is a conflict between maṣāliḥ and nuṣūṣ in a number of issues.<sup>26</sup>

Al-Ṭūfī has presented the first two arguments together and deduced from them that the consideration of maṣlaḥah is worth following rather than the application of nuṣūṣ due to the fact that the matter which is agreed upon deserves the right to be followed and commanded to be adopted rather than the one on which there is disagreement. Then he put forward as a proof of his argument some verses of the Qur'ān and aḥādīth. He also pointed out the difference of opinions which happened between the Imāms of the four celebrated madhāhib and the disagreement between the followers of these madhāhib as a proof of his argument about the contradiction of the nuṣūṣ and their diversity... Possibly, what al-Ṭūfī meant about nuṣūṣ here are the nuṣūṣ of Sunnah particularly, because he has mentioned after that, that some people claimed that the cause of difference in ḥadīth is ʿUmar ibn al-Khaṭṭāb who rejected the idea of compiling the Sunnah from his colleagues as reported by some narrators... As regards the third argument, he has pointed out an alleged conflict with miscellaneous

---

<sup>25</sup> See Muṣṭafā Zayd, op. cit., p. 35; and ʿAbd al-Wahhāb Khallāf, op. cit., p. 129

<sup>26</sup> See Muṣṭafā Zayd, op. cit., appendix, pp. 39 - 40; and ʿAbd al-Wahhāb Khallāf, op. cit., pp. 133 - 134

examples which he considers to be connected with his argument.

Al-Ṭūfī seems reasonable when he demands agreement of opinion in legal judgments. Nevertheless, it seems incorrect in his assertion that the nuṣūṣ do contradict each other in diversity so as to be the cause of difference of opinion detested by the Lawgiver; whereas most Muslim scholars see that the nuṣūṣ are in harmony with each other and comprehensive enough to accomplish the benefits required for mankind. If the nuṣūṣ were in contradiction with each other as al-Ṭūfī claimed, it would not be enough to depend on the consideration of maṣlaḥah to get rid of this contradiction, and if it were assumed that this claim was true, then our own benefits would become the principal source of the Sharī<sup>c</sup>ah, and not the Qur'ān.

There is no instance in which some nuṣūṣ rendered a thing legal and some of them declared the very same thing illegal. In other words all the nuṣūṣ do complement each other. Secondly, most Muslim scholars would argue that the consideration of maṣlaḥah is not an agreed upon maxim in itself in which no difference of opinion is viewed as compared to the nuṣūṣ, which, as al-Ṭūfī claims, are full of tensions. They assert that it is the consideration of maṣlaḥah which is a disagreed issue due to the fact that maṣlaḥah keeps on evolving with changes in environments,

places, times, peoples and societies. As regards the nuṣūṣ, no change is found therein to different environments, places, times, peoples, societies etc... The nuṣūṣ are constant and standard.

As regards the narrations of the traditions of the Prophet, it is true that not all of them have reached the status of tawātur (narrated by a vast number). Nonetheless, most Muslim scholars would argue that this does not mean that most of the traditions are not decisive. Still they would not admit to speculate that the nuṣūṣ of Qur'ān and Sunnah in their totality do not formulate a decisive verified homogenous corpus - after restricting a general naṣṣ by a special one (takḥṣīṣ al-<sup>c</sup>āmm) and clarifying the aggregate whole (bayān al-mujmal). Even al-Ṭūfī himself, when talking about the evidences for the rules of acts of worship within the context of the nuṣūṣ which seem to conflict with each other as a result of their multiplicity, lays down a criterion to bring accord between the different nuṣūṣ from the Qur'ān and Sunnah.<sup>27</sup> The seemingly conflicting nuṣūṣ could therefore be brought into accord without reference to the consideration of maṣlaḥah. As al-Ṭūfī talks about the evidences of the rules of customary law and transactions, he again puts a measure to which the

---

<sup>27</sup> See Muṣṭafā Zayd, op. cit. appendix, pp. 43 - 46; and <sup>c</sup>Abd al-Wahhāb Khallāf, op. cit., pp. 138 - 141

maṣāliḥ and the mafāsid are brought into adjudgment if ever they seem to conflict with each other so that their tensions are avoided.<sup>28</sup>

Furthermore, al-Ṭūfī is not satisfied with the general reconciliation of the nuṣūṣ and maṣlahah but he shows the weakness of maṣlahah as he is forced to resort to drawing lots.<sup>29</sup> Is it therefore proper to say after this that maṣlahah, as a device of legislation in Islamic law, is stronger than naṣṣ? Al-Ṭūfī has insisted in his theory on the decisiveness of the consideration of maṣlahah in his verification of various evidences which he put forward in clarifying the care of the Lawgiver for maṣlahah. At the same time he categorised naṣṣ into: (i) mutawātir ṣarīḥ (a clear cut narration from a vast

---

<sup>28</sup> The scholars of uṣūl al-figh use a number of canons in this issue some of which have been mentioned by al-Ghazali in his book Al-mustasfā which could be summarised as follows: "...if it is possible to accord together the two contending nuṣūṣ it's well and good, but if it becomes difficult and the date of enactment of each naṣṣ is known, then the last to be enacted abrogates the first one, but in case the date is not known then verification by those nuṣūṣ will fall and judgment is sought from other naṣṣ [or evidence]. If another naṣṣ [or evidence] is not found then the mujtahid is at liberty to choose one out of the two. [Al-Ghazali, Al-mustasfā, vol. 2, pp. 392 - 394]. He has also mentioned how one naṣṣ could be preferred from the other in seventeen ways which are connected with sanad [chain of narrators], matn [text] and five ways which are connected with other issues. See the details in vol. 2, pp. 395 - 398 of Al-mustasfā. We should not forget also that the conflict of nuṣūṣ is just a mere surface perception only as far as our comprehension and knowledge are concerned and not in reality as we have mentioned above. See al-Shaṭibi, Al-muwāfaqāt, vol. 4, p. 63; Qur'ān, 4:32 and Uṣūl al-tashrīḥ al-Islāmī, p. 273

<sup>29</sup> You will find this in four places of p. 47 of the appendix of "Al-maṣlahah fī al-tashrīḥ al-Islāmī wa Najm al-Dīn al-Ṭūfī" by Muṣṭafā Zayd; and <sup>C</sup>Abd al-Wahhāb Khallāf, op. cit., p. 142

number), (ii) mutawātir muḥtamal (a dubious narration from a vast number), (iii) āḥād ṣarīḥ (a clear cut isolated narration) and (iv) āḥād muḥtamal (a dubious isolated narration). Then he judges all these categories of naṣṣ to be undecisive even the mutawātir ṣarīḥ simply because, as he puts it in his own expression, "it might be dubious in its generality or unrestrictness...<sup>30</sup>

It is obvious that the differentiation which al-Ṭūfī has presented between naṣṣ and the consideration of maṣlahah is not equitable and just due to the fact that if the evidences which he has applied to confirm and establish the consideration of maṣlahah in general are decisive enough to make it one of the devices of legislation in Islamic law, the same is true with the nuṣūṣ in general that they are decisive and one of the origins of the Sharīḥ and the strongest source without any need of proof or verification. If al-Ṭūfī intends to give the quality of decisiveness to every secondary maṣlahah just because it is in the realm of maṣāliḥ which have received the care of the Lawgiver, it would therefore be more appropriate to attribute the quality of decisiveness to every naṣṣ in every secondary issue simply because it is in the realm of the nuṣūṣ of the Sharīḥ. Al-Ṭūfī's consideration of maṣlahah as a whole

---

<sup>30</sup> See Muṣṭafā Zayd, op. cit., appendix, p. 30; and <sup>c</sup>Abd al-Wahhāb Khallāf, op. cit., p. 123

to be the only decisive device of the Shari<sup>c</sup>ah and then to judging all the nuṣūṣ to be undecisive is a vacuous differentiation. It follows therefore that his theory of the pre-eminence of the consideration of maṣlaḥah over nuṣūṣ which is based on this differentiation is not correct. The right attitude towards this issue should be that both the proofs - i.e the nuṣūṣ and the consideration of maṣlaḥah - are decisive devices of the Shari<sup>c</sup>ah. They both consist of juz' iyyāt (partial cases) which are either qaṭ<sup>c</sup> iyyah (decisive) or ẓanniyyah (speculative); and so do the rest of the evidences of the Shari<sup>c</sup>ah.

Al-Ṭūfī has judged the nuṣūṣ to contradict each other so as to result in the laws which are abhorred by the Lawgiver. The question of the difference of opinion between the Imāms of the Islamic schools of jurisprudence due to the apparent meanings of the nuṣūṣ is not an astonishing feature, but the truth is that he does'nt sight even a single instance in which such a difference shows that these Imāms do not agree to the fact that the Lawgiver has cared for the maṣāliḥ of mankind in His commandments concerning either acts of worship or social obligations. But as we have seen in chapter three when we were discussing the position of the Imāms of the schools of jurisprudence in relation to the theory of al-maṣāliḥ al-mursalāh, that they all agree to the point that maṣlaḥah should duly be considered in every judgment and

is one of the devices of the Shari<sup>c</sup>ah in matters where:  
(i) neither naṣṣ nor ijmā<sup>c</sup> nor qiyās is found, and (ii)  
there is need and necessity (ḍarūrah) to consider  
maṣlahah to the exclusion of naṣṣ and ijmā<sup>c</sup>.

It goes without saying therefore that the difference of opinion between the Imāms has not been caused by the preference of the apparent meanings of the nuṣūṣ over the consideration of maṣlahah, but by the difference of the levels of knowledge and understanding of the nuṣūṣ as well as the degree of ijtihād and observation. For this reason it is not proper to blame the nuṣūṣ for the misinterpretation of a mujtahid.

Al-Ṭūfī has differentiated in the application of nuṣūṣ between the acts of worship and mu<sup>c</sup>āmalāt (transactions) by establishing that the acts of worship are the right of the Lawgiver (God) as such in which neither the time nor place and methodology are known except from Him only; thus it is obligatory to take evidences of the acts of worship from the nuṣūṣ.<sup>31</sup> He then asserted that the nuṣūṣ are in a state of opposition and conflict in such a way that they cause difference in rules and judgments. Most Muslim scholars would argue that al-Ṭūfī seems to contradict himself in that he

---

<sup>31</sup> See <sup>c</sup>Abd al-Wahhāb Khallāf, op. cit., pp. 114, 140; and Muṣṭafā Zayd, op. cit., appendix, pp. 21, 46

proclaims the nuṣūṣ to be the main source for the evidences of the acts of worship while at the same time he judges these very nuṣūṣ to be in conflict with each other in the rules and judgments for social obligations. Their argument is based on the fact that it is illogical to accept something to be right in one place and at the same time to be wrong in another place. It was necessary for him to take the nuṣūṣ as contradicting to each other in the acts of worship too and so not to make them the source for the evidences of their rules and judgments; or rather to accept these nuṣūṣ as not conflicting with each other at all and base upon them the laws concerning social obligations as is the case with the rules concerning acts of worship.

This is the stand-point of al-Ṭūfī in connection with the nuṣūṣ as well as with the ijmā<sup>c</sup> when he discussed its evidences in relation to the rules of the acts of worship and the laws of social obligations. He went further to refute every evidence of ijmā<sup>c</sup> and invalidated it in such a way that at the end of his analysis the whole bunch of its evidences became demolished, saying: "Be informed that our intention from all this is not to slander ijmā<sup>c</sup> and to totally demolish it, because we do speak of it in the acts of worship, nonetheless, our intention is to clarify that the consideration of maṣlahah which is based on the ḥadīth "lā ḍarar walā ḍirār" is stronger than ijmā<sup>c</sup> due to the

fact that the former's base is stronger than the latter's base as is apparent in its proof and from what could be concluded in our refutation of the evidences of ijmā<sup>c</sup>".<sup>32</sup> He weakens ijmā<sup>c</sup> by raising various objections to its evidences so that the strength of maṣlahah and its evidences which he has put forward becomes very strong. Then upon this unfounded hypothesis, al-Ṭūfī bases some rules and judgments in which he considers it to be the strongest evidence in the acts of worship simply because maṣlahah is not rejected there.

This leads to the question: "Why should it be supposed that there is a conflict between ijmā<sup>c</sup> and maṣlahah? Most Muslim scholars would argue that such a supposition is merely theoretical simply because nothing has been presented as actual instances in which such a situation occurred. They would also argue that even if a conflict between ijmā<sup>c</sup> and maṣlahah occurred in some questions another ijmā<sup>c</sup> would have been made which would take into consideration that maṣlahah which seems to conflict with the previous ijmā<sup>c</sup>. In reality it is only in the opinion of al-Ṭūfī in which ijmā<sup>c</sup> is restricted to water-tight compartments, whereas most Muslim scholars

---

<sup>32</sup> Thus, goes the expression of al-Ṭūfī as he raises an objection on his claim that the consideration of maṣlahah is stronger than ijmā<sup>c</sup>, while he maintained that his objection is only to point out the strength of maṣlahah and not to revile ijmā<sup>c</sup> and totally demolish it... See <sup>c</sup>Abd al-Wahhāb Khallāf, op. cit., p. 111; and Muṣṭafā Zayd, op. cit., appendix, p. 18

are of the opinion that ijmā<sup>c</sup> has a capacity to accommodate within its scope any maṣlahah in any environment and at any period due to the fact that there can be a consensus of the mujtahids of the Islamic Ummah on a legal judgment at any particular time after the death of the Prophet.<sup>33</sup> It follows therefore that it is incorrect to think that there is a conflict between ijmā<sup>c</sup> and maṣlahah and base on this thought an opinion of the precedence of the consideration of maṣlahah over all the evidences of the Shari<sup>c</sup>ah.

More astonishing is the case in which al-Ṭūfī claims that the consideration of maṣlahah is an agreed source of legislation in Islamic law saying that even those who oppose ijmā<sup>c</sup> accept its validity. Most Muslim scholars would argue that the al-Ṭūfī's dependence on the agreement of those who reject ijmā<sup>c</sup> is not a proof to show that the consideration of maṣlahah is an agreed source of legislation. It is as if those who reject ijmā<sup>c</sup> are the only ones from whom opposition is feared most and that the attainment of their consent will cast away every type of opposition therein... In reality the two issues are different from each other. In other words, it would be accepted from al-Ṭūfī that the Shi<sup>c</sup>ites, the Khārijites and the Naẓẓām (among the Mu<sup>c</sup>tazilites) who

---

<sup>33</sup> See <sup>c</sup>Alī Ḥasab-Allah, Uṣūl al-tashrī<sup>c</sup> al-Islāmī, p. 51

reject the ijmā<sup>c</sup>, do accept and agree upon the consideration of maṣlahah. It would be accepted from him also that maṣlahah is an item of agreement before most of the Muslim scholars.

It seems more appropriate to consider maṣlahah as one of the recognised devices of Shari<sup>c</sup>ah. It also seems appropriate that this device can act as an independent basis upon which laws could be based in the absence of naṣṣ and ijmā<sup>c</sup>. Wherever a secondary maṣlahah is found in which there is neither naṣṣ nor ijmā<sup>c</sup> nor qiyās could be applied, a rule should be exercised for its attainment and its maintenance. If the Lawgiver has provided an ordinance for a certain thing or issue, or the Muslim mujtahids have made a consensus in its favour, it is primarily presumed that this ḥukm (law) is liable to attain maṣlahah. Nonetheless, it could sometimes happen, through need and necessity, that there existed another maṣlahah stronger than the one enunciated by the Lawgiver or envisaged by the consensus of the Muslim mujtahids and these two seemed to contradict each other. In this case a ḥukm could be enacted to attain the stronger maṣlahah even if it goes against the naṣṣ and ijmā<sup>c</sup>, and that is so due to the submission and accommodation of that need and necessity only. A typical example is the decision of <sup>c</sup>Umar ibn al-Khattāb (the second caliph of Islam) not to amputate the hand of a thief in the year of famine ḥām

al-majāh,<sup>34</sup>

In this connection, it is useful to reproduce the verdict of Yaḥyā ibn Yaḥyā al-Laythī, a student of Imām Mālik, to one of the kings of al-Andalus, <sup>ʿ</sup>Abd al-Raḥmān ibn al-Ḥakam, which we have previously mentioned in chapter two. The king intentionally broke his fast in the month of Ramaḍān by having a sexual contact with his wife. Afterwards he felt sorry and wanted to expiate for his sin by emancipating a slave. But Yaḥyā went against the text of the ḥadīth which necessitates the remedy in a descending order, starting with the emancipation of a slave, or the fasting of two consecutive months and ending up with the feeding of sixty indigent people; instead of following this order Yaḥyā obliged the king to fast the two consecutive months only. Al-Ṭūfī said in this issue: "To particularise fasting to an affluent person for the remedy of Ramaḍān is not far (from the right path) as a result of diligence of a mujtahid. It is not a type of enacting laws by a sheer opinion, but it is either a kind of diligence to look for maṣlahah or a type of restricting a general feature deduced from the discarding of the details envisaged in the ḥadīth of al-A<sup>ʿ</sup>rābī<sup>35</sup> which is a general one and weak. Thus, the

---

<sup>34</sup> See Muḥammad b. <sup>ʿ</sup>Abd al-<sup>ʿ</sup>Azīz al-Hillāwī, "Fatāwā wa Uqdiyāt Amīr al-mu'minīn <sup>ʿ</sup>Umar b. al-Khaṭṭāb", p. 164

<sup>35</sup> Reported by al-Bukhārī and Muslim

whole exercise is being particularised by the suitable beneficial use of reason (al-ijtihād al-maṣlaḥī al-munāsib). The particularisation of the generality is a praiseworthy method. In actual fact, the Shariḥ has differentiated between the rich and the poor in so many a place, let this therefore, be one of those places".<sup>36</sup>

Most Muslim scholars would argue that first of all the hadīth of al-A<sup>c</sup>rābī which al-Tufi has mentioned is not a weak one but a strong one being reported by al-Bukhārī and Muslim - which is the highest category of the divisions of Ḥadīth. Secondly, if the objective of the beneficial use of reason is to confirm the attainment of maṣlaḥah, then maṣlaḥah in this issue is found in the emancipation of a slave due to the fact that a member of society is granted his liberty whose skills and knowledge in the building of a better Ummah will be of great benefit to the entire community. Whereas the remedy of fasting the two consecutive months remains as a terrifying agent for an individual person only. Even if such an effect is attained after fasting the two months, still the maṣlaḥah seems immaterial here due to the fact that an affluent person who performs sexual relations out of no fear in Ramaḍān may not be able to fast the two consecutive months to expiate for his sin since he has

---

<sup>36</sup> See Ibn Badrān al-Dimashqī, Nuzhat al-khāṭir al-Ḍāṭir, vol. 1, p. 417, as quoted from Sharḥ Mukhtaṣar al-rawḍah

not been able to be patient in one month only. But in the emancipation of a slave, a trace of fear will be found in his heart for by liberating a slave for each day he breaks the fast in Ramaḍān, he would be reduced in wealth.

Chapter 7  
MODERN STUDIES AND DEFINITIONS ON THE CONCEPT OF  
MAŞLAḤAH

In modern times the concept of maşlaḥah has undergone still further formulations. With the great social changes affecting all departments of life utilitarian philosophies became popular. The movement of modernism in Islam searched in Islamic tradition for a principle that would help them grapple with the changing conditions. They found in maşlaḥah such a concept. Naturally therefore more attention has been given to the study of this concept in modern times than ever before.

In 1857 the ʿAhd al-Amān, a document of reforms in Tunisian law, was issued. This document later became the fundamental legal instrument in the 1860 constitution - "the first constitution to be issued in any Muslim country in modern times."<sup>1</sup> In its preamble, maşlaḥah was referred to as the principle of interpretation of law:

"God has given justice as a guarantee of the preservation of order in this world, and has given the revelation of law in accordance with human interests (maşāliḥ)."<sup>2</sup>

The document then expounded the following three principles as the components of the concept of maşlaḥah:

---

<sup>1</sup> Albert Hourānī, Arabic thought in the liberal age, 1798-1939, [London: Oxford, 1962], p. 65

<sup>2</sup> See Muḥammad Bayram, Şafwat al-iʿtibār, vol. 2. p. 11, vide Hourānī, op. cit., p. 64

liberty, security and equality.<sup>3</sup>

In 1867 Khayr al-Dīn Pāshah, in his Aqwām al-masālik, reaffirmed that the principle of maṣlahah must be the supreme guide of the government.<sup>4</sup> He found this principle extremely significant as it could be used to justify a change of institutions in the interest of the public as well as to condemn a change when it opposed public interest.<sup>5</sup>

In 1899, in his speech of the reforms in the court systems in Egypt and the Sudan, Muḥammad °Abduh also stressed the use of maṣlahah as a guiding principle in law making.<sup>6</sup> J. Schacht has argued that the principle of maṣlahah, according to °Abduh, was preferable to the literal application of Islamic law.<sup>7</sup>

It is to be noted that Khayr al-Dīn and Muḥammad °Abduh both referred to maṣlahah as a principle of interpretation of law - and as such a principle of change, dynamism and adaptability.

The same theme, in varying versions, has been

---

<sup>3</sup> Muḥammad Bayram, op. cit., vol. 2, p. 11

<sup>4</sup> Ibid., p. 92

<sup>5</sup> Ibid., p. 93

<sup>6</sup> Muftī Muḥammad °Abduh, Tagrīr Muftī al-diyār al-Misriyyah fī iṣlāh al-mahākīm al-shar°iyyah, [Al-manār] vol. 2 {1899}, p. 761

<sup>7</sup> See Schacht, Muḥammad °Abduh, in The Shorter Encyclopaedia of Islam, [Leiden: Brill, 1961], p. 406

repeated by a large number of modern Muslim scholars of Islamic law. Among them the following are notable illustrations: Rāshid Riḍā, Şubḥī Mahmaşānī, °Abd al-Razzāq al-Sanhūrī, Ma°rūf al-Dawālībī, Muşţafā al-Shalabī, °Abd al-Wahhāb Khallāf, Muḥammad al-Khiḍr and Muşţafā Zayd.<sup>8</sup>

In 1906, al-Manār journal of Islamic knowledge published Najm al-Dīn al-Ṭūfī's treatise on maşlahah. However, the application of the radical views of al-Ṭūfī raised a strong reaction among the conservative group of scholars in Egypt. Only to illustrate this opposition, we quote Zāhid al-Kawtharī's criticism of al-Ṭūfī as follows:

"One of their spurious methods in attempting to change the shar° in accordance with their desires is to state that 'the basic principle of legislation in such matters as relating to transactions among men is the principle of maşlahah; if the text opposes this maşlahah, then the text should be abandoned, and maşlahah should

---

<sup>8</sup> The following works by the authors enumerated below stress the dynamism of maşlahah as a principle of interpretation of Islamic law: Rashid Riḍā, Yusr al-Islām, [Cairo: Nahḍah, 1956], pp. 72 - 75; Şubḥī Mahmaşānī, Falsafat al-tashrī° fi al-Islām, transl. by F. J. Ziyadah [Leiden: Brill, 1961], [Arabic Ed. Bayrut, 1952], pp. 130 - 133, 205f; °Abd al-Razzāq al-Sanhūrī, Wujūb tanqīh al-qānūn al-madani al-Miṣri, in "Majallat al-qānūn wa al-iqtisād", vol. 6 [196] 3 - 144 [vide Kerr, op. cit.]; Ma°rūf Dawālībī, Al-madkhal ilā °ilm uşul al-fiqh [Bayrūt: Dār al-°ilm li al-malāyin, 1965] pp. 442 - 450; Muşţafa al-Shalabī, Ta°līl al-aḥkām, °ard wa taḥlīl li ṭarīqat al-ta°līl wa taṭawwurātihā fī °uşūr al-ijtihād wa al-taqlīd, [Cairo: al-Azhar, 1949], pp. 278 - 384; °Abd al-Wahhāb Khallāf, Maşādir al-tashrī° al-Islāmī fi mā lā naşş fih, [Cairo: Dār al-kutub al-°Arabī, 1955], pp. 70 - 122; Muşţafā Zayd, Al-maşlahah fi al-tashrī° al-Islāmī wa Najm al-Dīn al-Ṭūfī, [Cairo: Dār al-fikr al-°Arabī, 1954]; Muḥammad al-Khiḍr, Uşul al-fiqh, [Cairo: Muşţafā Muḥammad, 1933]

be followed'. What an evil to utter such statements, and to make it a basis for the construction of a new shar<sup>c</sup>? This is nothing but an attempt to violate divine law (al-shar<sup>c</sup> al-Ilāhī) in order to permit in the name of maṣlaḥah what the shar<sup>c</sup> has forbidden. Ask this libertine (al-fājir) what is this maṣlaḥah on which you want to construct your law?... The first person to open this gate of evil... was Najm al-Dīn al-Ṭufī al-Ḥanbalī... No Muslim has ever uttered such a statement... This is a naked heresy. Whoever listens to such talk, he partakes of nothing of knowledge or religion".<sup>9</sup>

Al-Kawtharī did not deny the fact that the shar<sup>c</sup> took into consideration the interests and good of the people, but he insisted on that what is good and what is bad can only be known through revelation. Maṣlaḥah as an independent principle for the interpretation of law has, therefore, no validity whatsoever.

Al-Kawtharī's criticism of maṣlaḥah is typical of the traditional view of the concept. To him maṣlaḥah is arbitrary and merely personal. Infact, this fear of arbitrariness concerning the reasoning on the basis of regard for human interests, and hence considered to be the violation of Divine law is a familiar feature in the history of the Islamic legal theory. Maṣlaḥah and similar legal principles which were employed in favour of the adaptability of Islamic law, were opposed on the same grounds.

---

<sup>9</sup> Zāhid al-Kawtharī, Maqālāt al-Kawtharī, [Posthumous Publication in 1372 A.H] as quoted by Muṣṭafā Zayd, op. cit., pp. 164-66

Recent studies on maṣlaḥah can be generally divided into two groups. First, there are studies dealing with al-maṣlaḥah al-mursalāh and istiṣlāḥ and, second, those dealing with maṣlaḥah as such. The focus in the first group of studies is not on maṣlaḥah proper but on al-maṣlaḥah al-mursalāh, yet it is significant to note that for them istiṣlāḥ is in no way different from al-maṣlaḥah al-mursalāh.

Ignaz Goldziher compared istiṣlāḥ with istiḥsān saying that the latter is a Ḥanafī principle according to which a decision reached by analogy can be dismissed when the legislator finds that this decision opposes a certain matter which he believes is beneficial. That is to say that istiḥsān removes the rigidity of law depending upon the discretion of an individual jurist. Istiṣlāḥ, on the other hand, depends on a rather objective method; it removes the rigidity of law in consideration of general human "interests" (maṣāliḥ) which are sufficiently defined. He also suggests that istiṣlāḥ partially resembles the Roman legal principle of utilitum publicum as well as Rabbinic law".<sup>10</sup>

---

<sup>10</sup> I. Goldziher, Das prinzip des istiṣḥāb in der Muhammedanischen Gesetzwissenschaft, Wiener Zeitschrift für die Kunde des Morgenlandes, vol. 1 [1887], pp. 128 - 236; vide summary in French by G. H. Bousquet, in Arabica, VII [1960], pp. 12 - 15. The points of resemblance with Roman and Rabbinic law are not elaborated but most probably Goldziher refers to certain areas of flexibility in contrast to the strict application of law

N. P. Aghnides and G. H. Bousquet also refer to istiṣlāḥ in the same sense. Aghnides defines it as a principle that consists in recommending a thing because it serves a useful purpose, although there is no express evidence in the revealed sources to support such action.<sup>11</sup> Bousquet's definition is as follows:

"Istiṣlāḥ consists of discarding by exceptional disposition the rules deduced by qiyās in cases where the application of general rules would lead to illogical, unjust and undesirable results".<sup>12</sup>

Joseph Schacht's treatment of maṣlahah is not much different from that of the above writers. He described istiṣlāḥ as a special form of analogy, or rather a type of istiḥsān used by early Mālikī scholars and which later came to be called istiṣlāḥ.<sup>13</sup> Schacht re-emphasises that istiṣlāḥ is identical with the Roman legal principles of utilitum publicum which characterises jus honorarium.<sup>14</sup>

R. Paret also finds istiṣlāḥ to be connected with istiḥsān, but the former is more limited and definite as it replaces a general principle such as "finding good",

---

<sup>11</sup> N. P. Aghnides, Mohammedan Theories of Finance, [London: Longman, 1916], p. 102

<sup>12</sup> G.H.Bousquet, Precis de Droit Musulman, [Alger: Maison du Livre, 1947], p. 37

<sup>13</sup> J. Schacht, The Origins of Muhammadan Jurisprudence, [Oxford: Clarendon, 1959], p. 111

<sup>14</sup> J. Schacht, "Classicisme, traditionalisme, et ankylose dans la loi religieuse de l'Islam" in Classicisme et declin culturel dan l'histoire de l'Islam, [ed] Brunschvig et als, [Paris: 1957], p. 158

by a rather specific principle, such as "according to the demand of human welfare (maṣlahah)". Maṣlahah thus is the material principle underlying istiṣlāḥ which is a method of reasoning. In actual details where Paret traces the history of istiṣlāḥ, he specifically refers to al-maṣlahah al-mursalāh, rather than maṣlahah as such. This is why he finds nothing of much importance after al-Ghazālī had theorized about istiṣlāḥ. His references to uṣūl are confined to the discussions of al-maṣlahah al-mursalāh.<sup>15</sup>

Analysing the treatment of maṣlahah by modern Muslim scholars such as Muḥammad ḤAbduh and others, A. Hourānī criticised their use of maṣlahah in a utilitarian sense. He argued that such an interpretation of maṣlahah was not justified; "for the traditional thought, maṣlahah had been a subordinate principle, a guide in the process of reasoning by analogy rather than a substitute for it".<sup>16</sup>

Von Grunebaum, in his study of the concept of reason in Muslim ethics, concluded that istiṣlāḥ (public interest) is unmistakably one point at which human "reason" is permitted to impinge on traditional or systematic considerations that would normally be viewed

---

<sup>15</sup> Rudi Paret, Istiḥsān and Istiṣlāḥ, in Shorter Encyclopaedia of Islam, p. 185

<sup>16</sup> Albert Hourānī, *op. cit.*, p. 234

as the determining factors of shar<sup>c</sup> development.<sup>17</sup>

Although all of the above opinions agree in regarding maṣlaḥah as a principle that removes rigidity and that suggests adaptability to changes based on human needs, yet according to the same writers, its function is restricted to exceptional cases or to the use of a special form of analogy. The reason for such a limited view of maṣlaḥah in these studies is that they have studied only al-maṣlaḥah al-mursalah to the exclusion of other aspects of maṣlaḥah.

There are, however, a few studies which evince an integral approach to the problem of maṣlaḥah as such. Among such studies, the following four are relevant to our point. G. F. Hourānī has examined maṣlaḥah as an ethical concept. M. H. Kerr and Muḥammad Sa<sup>c</sup>īd Ramaḍān al-Būṭī have analyzed it in particular reference to legal theory. E. Tyan has studied it as a principle of methodology.

Tyan describes maṣlaḥah as "general interest", "social utility" and "good", and has defined istiṣlāḥ as "to recognize a rule as useful".<sup>18</sup> He distinguishes two conceptions of istiṣlāḥ. In the original conception of

---

<sup>17</sup> G. E. Von Grunebaum, Concept and Function of Reason in Islamic Ethics, Oriens, vol. 15, [1962], p. 15

<sup>18</sup> E. Tyan, Methodologie et Sources du Droit en Islam, "Studia Islamica", vol. 10, [1959], p. 97

istiṣlāḥ, the interests (maṣāliḥ) were divided into three categories according to its recognition by the law, the last category being al-maṣāliḥ al-mursalāh. The directing principles in this kind of research consisted essentially in considering the elements of social utility (maṣlaḥah) and of suitability (munāṣabah). The speculation according to this conception of istiṣlāḥ remains within the limits of law.

The other conception of istiṣlāḥ is more extensive.<sup>19</sup> According to this conception of istiṣlāḥ it can be employed not only in relation to matters which are not regulated by the precise texts of law, but also in those matters which have been subjected to such regulations, so that it be legitimate to make it prevail over precise rules or over conflicting or contradicting regulations, provided that, in the final analysis, they (the rules derived from this method of reasoning) remain in conformity with the objections of law, i.e they accord with the above-mentioned five major interests viz. religion, physical integrity, descendance, patrimony and mental faculty.<sup>20</sup>

Tyan, thus, concluded that istiṣlāḥ is a method of interpreting the already existing rules by disengaging

---

<sup>19</sup> E. Tyan, op. cit., vol. 10, p. 97

<sup>20</sup> Ibid.

the spirits of these rules from the letter; exceptions and extensions are reached which command practical utility and correspond to the fundamental goals of the law.<sup>21</sup>

G. F. Hourānī has studied maṣlahah as an ethical concept in medieval Islam, but his study bears significant connection with the present conception of maṣlahah.<sup>22</sup> He observes that there were two theories of value in medieval Islam: one, that of objectivism, i.e. that the value has real existence; the second theory of value was that of theistic subjectivism, that the values are determined by the will of God. The theory of objectivism was expounded by Mu<sup>c</sup>tazilah; the idea of rational good was called by them hasan or maṣlahah. The theory of theistic subjectivism was maintained by the Ash<sup>c</sup>arīs. The position of these two theories manifested itself in the field of fiqh also. Jurists in the early period used certain methods which did not correspond with "theistic subjectivism". Principles such as istiḥsān and istiṣlāḥ tended rather towards "objectivism". The ethical basis of these principles, however, remained unarticulated. The Mu<sup>c</sup>tazilī theory of rational good [that there is an objective good including a real public interest (maṣlahah) and a real justice (ʿadl), and that

---

<sup>21</sup> See E. Tyan, op. cit., p. 98

<sup>22</sup> See G. F. Hourānī, "Two Theories of Value in Medieval Islam", Muslim World, vol. L, [1960], pp. 269-278

they could be recognized by human reason] could have provided a basis to support the above principles. But the theory of objectivism was superseded by theistic subjectivism. Why? Hourānī suggests that, apart from religious and political factors that prevented objectivism from being adopted by the lawyers, the Mu<sup>c</sup>tazilī theory of objectivism had its own deficiencies. First it could not show how moral judgment operates. Second, it could not fill up the theoretical gap between means (moral and legal acts) and the end (the eternal happiness, which is the happiness in the world and hereafter for Muslims).

On the other hand, the theory of theistic subjectivism corresponded with Shāfi<sup>c</sup>ī and Ḍāhirī views on legal reasoning, which opposed the use of ra'y and any judgment independent of the revelation. Shāfi<sup>c</sup>īs denied the objective value of idle fancy, zann and hawā. Theologically also the theory of objectivism appeared to curtail the omnipotence and omniscience of God, which the theory of theistic subjectivism promoted.

Hourānī's study of maṣlahah, choronologically, is confined to the early period of Islamic tradition. Because of this limitation he could not take into consideration the development in the treatment of maṣlahah by later uṣūliyyīn such as al-Shāṭibī. In fact, Hourānī's criticism of objectivism is mainly ethical. The

three deficiencies that he ascribed to maslahah as an objective value are not found in al-Shāṭibī's conception of maṣlaḥah as a legal value. Muḥammad Saʿid Ramaḍān al-Būṭī presented his doctoral dissertation, Dawābiṭ al-maṣlaḥah fī al-Sharīʿah al-Islāmiyyah at al-Azhar University in 1965. In his introduction to the published edition of this dissertation al-Būṭī explains that the critics of Islam have adopted a new measure to destroy it. They are urging the Muslims to open the gate of ijtihād, and in order to accomplish this end they refer to the concept of maṣlaḥah as the fundamental principle of Sharīʿah. He is, however, convinced that real motive behind this proposal for ijtihād is the destruction of Islam. He admits that the gate of ijtihād has never been closed and that the Lawgiver has given full consideration to the principle of maṣlaḥah, but this principle has always been restricted with a number of qualifications.<sup>23</sup> After a detailed analysis of the etymology and concept of maṣlaḥah, he deduces the qualifications which the traditional jurists had suggested in the application of this principle. He also compares this concept with the concept of "utility" and "pleasure" in the philosophies of Stuart Mill and J. Bentham. He concludes that maṣlaḥah in its unqualified sense is identical with the above

---

<sup>23</sup> M. S. R. al-Būṭī, Dawābiṭ al-maṣlaḥah fī al-Sharīʿah al-Islāmiyyah, [Dimashq: Umawiyah, 1966/67], pp. 12 - 14

concepts which he considers as purely hedonistic. The qualified concept of maṣlaḥah, however, contradistinguishes itself from utility and pleasure as it takes into consideration the following three characteristics. First, it is not limited in this world only but equally includes the hereafter. Second, the Islamic value of good is not material. Third, the consideration of religion dominates other considerations.<sup>24</sup> He has thus concluded that if these and other qualifications are disregarded and the term maṣlaḥah alone is held up as a light post and a criterion, then an ijtihād such as that will descend upon Muslims from all sides. [To prove such terrifying results after opening the gate of ijtihād it suffices to observe the evil that brings the laws of Sharī<sup>c</sup>ah out of the fortress of texts into the open, exposed to desires and arbitrary opinions that deceive (us) behind the name of maṣlaḥah and manfa<sup>c</sup>ah.<sup>25</sup>

If al-Būṭī's expositions of maṣlaḥah and its qualifications are accepted, maṣlaḥah, as a matter of fact, becomes superfluous as a legal concept. The consideration of maṣlaḥah by the Shāri<sup>c</sup> (Lawgiver), then only means that maṣlaḥah is what the Shāri<sup>c</sup> commands.

---

<sup>24</sup> Al-Būṭī, op. cit., pp. 23 - 60

<sup>25</sup> Ibid., p. 414

In other words, maṣlahah has no objective value. This is the logical conclusion from al-Būṭī's view of Islamic law according to which he rejects a distinction between this world and the hereafter. He does not separate mu<sup>c</sup>āmalāt (transactions) from ḥibādāt (acts of worship) but rather considers the former part of the latter. He does not distinguish between ḥuqūq Allāh and ḥuqūq al-ḥibād. In fact, his conception of Islamic law is that of ta<sup>c</sup>abbud (mere obedience). On all these points he is in disagreement even with the jurists who employ the concept of maṣlahah in reference to human needs. His disagreement becomes particularly evident if his conclusions are compared with al-Shāṭibī's conception of maṣlahah.

Al-Būṭī has frequently referred to al-Shāṭibī in his dissertation, but these references are selective and often out of the context. Al-Būṭī's study fails to bring out the real significance of the concept of maṣlahah mainly because he has not given full consideration to the proponents of this concept such as al-Shāṭibī.

The same deficiency is found in M. Kerr's study of maṣlahah, which also offers a detailed analysis of the concept. Examining Rāshid Riḍā's legal doctrines, Kerr observed that the logical conclusion of Riḍā's arguments for the use of maṣlahah would be that it is something equal to natural law and that istiṣlāḥ does not depend on

texts and qiyās. Such conclusions, however, are not spelled out by Riḍā himself.<sup>26</sup> Why? According to Kerr, the failure to spell out the full implications of the argument has to do with theological nature of Islamic law which influences even maṣlaḥah, theoretically the most liberal principle of legal interpretation in Islamic jurisprudence. The theological foundations of Islamic law insist on minimizing the part of human reason in the formulation of law.<sup>27</sup>

Before he goes into a detailed analysis of the concept of maṣlaḥah in traditional jurisprudence, Kerr clarifies two general aspects of Islamic law which, in turn, affect the function of maṣlaḥah. Firstly, Islamic law has its basis in revelation and thus is an expression of the will of God. Kerr refers to the theological differences between Ash<sup>c</sup>arī and Mu<sup>c</sup>tazilāhs about the will of God. In contrast to the Mu<sup>c</sup>tazilāh, Ash<sup>c</sup>arī denied freedom in man's acts. Consequently, the intellectual spirit and method of Islamic jurisprudence "could not entirely escape the influence of the law's theological underpinnings, which proclaimed that reason is essentially irrelevant to the substance, determination

---

<sup>26</sup> See M. Kerr, "Rāshid Ridā and legal reform", Muslim World, [1960], p. 108

<sup>27</sup> M. Kerr, Islamic Reform, p. 56

and obligatory character of moral principles".<sup>28</sup>

The second aspect that affected maṣlaḥah was the emphasis on qiyās. According to Kerr, the method of qiyās itself is a means of protecting the authority of revelation.<sup>29</sup> In fact, the term ʿillah in jurisprudence is not applied in usual sense of cause and effect. ʿillah is not a value judgment, but only the attribute or the characteristic of the matter under consideration that gives rise to the judgment.<sup>30</sup> Further, the limitations of the means to identify ʿillah are also confined to the use of indication within the text. Munāsabah (suitability) is the only means that goes beyond the indications of the texts. Kerr finds even munāsabah to be a conservative, circumscribed and timid acknowledgement of the place of social utility (maṣlaḥah) in God's commands. In fact, he concludes in the final analysis that even munāsabah is subordinate to the indications of the text.<sup>31</sup>

Kerr thus treats maṣlaḥah as one of the aspects of munāsabah. He also divided maṣlaḥah on the basis of the conformity to the sources, and thus it is only al-maṣlaḥah al-mursalah which really needs to be discussed. According to him al-maṣlaḥah al-mursalah is a

---

<sup>28</sup> Kerr, op. cit., p. 60

<sup>29</sup> Ibid., p. 77

<sup>30</sup> Ibid., p. 67

<sup>31</sup> Ibid., p. 73

form of qiyās, because whereas qiyās looks for the ʿillah, al-maṣlaḥah al-mursalāh seeks ḥikmah, a more general ʿillah. Kerr concludes that because it is not based on a specific ʿillah, istiṣlāḥ has been a subsidiary and occasional technique of disputed validity.<sup>32</sup>

In the final analysis Kerr comes to equate maṣlaḥah with al-maṣlaḥah al-mursalāh. He says

"The maṣlaḥah is therefore a more specific term for ḥikmah and since it is known in each case not by direct indication in the textual source but by the jurist's own judgment, it is a maṣlaḥah mursalāh.<sup>33</sup>

Kerr also confines maṣlaḥah to its correspondence with the textual sources. It is noteworthy that Kerr, in his discussion, refers to such jurists as al-Ghazālī and al-Qurāfī who viewed maṣlaḥah in the above terms. He also discusses the views of Ibn Taymiyyah and Ibn Qayyim whom he chose as opponents of the validity of maṣlaḥah as a principle of legal interpretation. But these jurists, too, regarded maṣlaḥah as subordinate to textual sources and qiyās. The consideration of maṣlaḥah according to them, would prevail over the text and qiyās only when the latter are harmful to obey.

---

<sup>32</sup> See Kerr, *op. cit.*, p. 76

<sup>33</sup> *Ibid.*, p. 81

Kerr has not taken into account jurists such as al-Shāṭibī, who favour maṣlaḥah as an independent legal principle. The significance of studying al-Shāṭibī's views is evident from Tyan's analysis of istiṣlāḥ which gives a more integral picture of maṣlaḥah.

The absence of al-Shāṭibī from Kerr's analysis of maṣlaḥah is regrettable. According to Kerr, Rāshid Riḍā, whose view led Kerr to study the concept of maṣlaḥah in detail, characterises al-Shāṭibī "as exceptionally outspoken in his defence of istiṣlāḥ".<sup>34</sup>

It comes a further surprise that al-Shāṭibī was not only disregarded but also suffered a sort of indifference when Kerr, probably following Paret,<sup>35</sup> confused him with Abū al-Qāsim al-Shāṭibī.<sup>36</sup>

To sum up, the present studies on maṣlaḥah generally present an unbalanced analysis of this concept. They have failed to see the real significance of this principle as

---

<sup>34</sup> See Kerr, op. cit., p. 107

<sup>35</sup> R. Paret, op. cit., mentions 1194 as the year of al-Shāṭibī's [d. 1390] death, which is in fact the year in which Abū al-Qāsim Muḥammad b. Fīrah al-Shāṭibī died. See Brockelmann G.A.L [Brill, 1943], p. 520, and F. Knenkow, "Shāṭibī", in E.I.I, vol. IV, pp. 337 - 338. Unfortunately, the same error is repeated in the heavily edited and revised version of Paret's article in the Urdu Encyclopaedia of Islam. Urdu dāirah maḥārif Islāmiyyah [Lahore: Danishgah Punjab], vol. II, [pp. 586 - 591], p. 589

<sup>36</sup> See Kerr, op. cit., p. 194, referring to Riḍā's mention of al-Shāṭibī rightly quotes his year of death, but in his index on p. 247 identifies him as Abū al-Qāsim b. Fīrah al-Shāṭibī

it was conceived and employed by those jurists who viewed it as an independent principle, but not to the extent to which al-Ṭūfī has gone making it override all the evidences of the Sharīḥ. The independence of the concept of maṣlaḥah depends on the absence of the validity of the textual evidence, as is the case with the theory of al-maṣāliḥ al-mursalah due to the fact that this theory is part and parcel of the concept of maṣlaḥah. Hence, in Islamic law it would seem more appropriate that there should be no consideration of maṣlaḥah or application of the theory of al-maṣāliḥ al-mursalah with the presence of textual evidence either from the Qur'ān and Sunnah or from ijmāḥ.

Chapter 8  
THE DIFFERENCE BETWEEN THE THEORY OF  
AL-MAŞĀLIĤ AL-MURSALAH AND THE  
THEORIES OF PUBLIC INTEREST

Here it should be pointed out that there is a great difference between the nature of the theory of al-maşāliĤ al-mursalah in Islamic law and the theories of "public interest" as propounded by the Western writers. In Islamic law "public interest" is determined by the highest degree in seeking the pleasures of God through fulfilling His commandments and performing virtuous deeds. Any action which meets the approval and satisfaction of the will of God, or any rule or judgment that is just and unbiased which could be applied or executed to all people without any reservations could be named as public interest in Islamic law. In Islam the sublime good lies with God and not with human beings and so is the case with the specification of evil. For instance, if the majority of people, or all the people, are in favour of wine and demand a policy or rule be enacted for its manufacture so that money could be obtained to meet the running costs of health and social services. This is not considered as a public interest in Islamic law simply because it is opposed to the commandment of God and thus against His will and pleasure.

Whereas the nature of "public interest" as viewed by

the Western writers refers to or stands for a body of substantive truths or principles. These truths or principles are not formal tests that any public policy must meet; however general they may be and however much skill may be required to apply them in particular cases, they provide substantive guidance to the proper content of public policy. They are akin to what some philosophers now call "rules" as opposed to "principles". The problem of determining what is in the public interest is first and foremost a problem of attaining knowledge of this body of supreme truth. One who does not have such knowledge could only stumble onto the right policy as a blind man might stumble onto the right road at a junction.<sup>1</sup> Plato asserts:

"...the Sun not only makes the things we see visible, but also brings them into existence and gives them growth and nourishment; ... so with the objects of knowledge; these derive from the Good not only their power of being known, but their very being and reality..."<sup>2</sup>

Plato's position minimizes the "contextual" dimension of the descriptive meaning of "public

---

<sup>1</sup> Plato, Memo 97; Republic, 506, translated by Francis M. Cornford [London: Oxford University Press, 1941]

<sup>2</sup> Plato, Republic, 508, p. 220

interest".<sup>3</sup> The justifiability of a particular public policy turns not upon the relationship between that policy and features peculiar to the problem or circumstances to which or in which the policy is to be applied. It turns upon its relationship to a truth or a body of truths which exists and has been discovered antecedent to the emergence of the problem, circumstances, or policy. It is the time that a statesman has been trained to know this timeless "Good" which equips him to decide questions of common concern. This view raises questions about the relationship between the particular policy enacted now, which is held to be in the public interest, and the timeless truth or truths which the philosopher-king must know. Whether we ever speak of the public interest in the sense of a body of substantive truths such as those Plato denominates the Good, we do say, in these circumstances, is a justifiable or commendable public policy - because of its relationship to the Good or for some other reason. A theory of "public interest" that is to account for the manner in which the concept functions must be able to account for the manner

---

<sup>3</sup> If the metaphysical and epistemological substructure of Plato's theory is set aside, it becomes clear that many theories of "public interest" in the West are closely akin to Plato's. Whenever it is argued that "public interest" stands for a body of substantive truths or proposition about public policy, the theory can be likened, however enormous the other differences may be, to Plato's theory. For this reason, conclusions reached about by Plato will prove to be applicable to a large number of theories as well

in which we justify this policy, not a set of highly abstract metaphysical or moral truths.<sup>4</sup>

Plato's conclusion is that "public interest" and "common good" are concepts which would be appropriately employed only by philosopher-kings in discussion with other philosopher-kings. If it is true that "public interest" functions to commend and justify public policy, and if only the philosopher-kings are capable of fully understanding the justifications and commendations, it follows that there would be no occasion to use the concepts outside of the circle of philosopher-kings.

Benn and Peters argue that "public interest" is not a substantive concept at all, not a goal of public policy, but simply a procedural principle or requirement which is one of a number of conditions that a justifiable public policy must satisfy. In their words: "... the prescription "seek the common good" is not of the same type as "maintain full employment". Whereas the latter is a counsel of substance, the former is one of procedure. We may have different ideas about the way to maintain employment, but we are clear what the world would be like with it or without it. "Seek the common good" is different, not because it is vague or more general, but because it does not describe a determinate goal at all.

---

<sup>4</sup> Richard E. Flathman, The Public Interest, p. 54

It is an instruction to approach policy-making in a certain spirit, not to adopt a determinate policy. To say that the state should seek it is to say only that political decisions should attend to the interests of its members in a spirit of impartiality".<sup>5</sup>

Bertrand de Jouvenel argues that the descriptive meaning of "common good" consists in what he calls "social tie".<sup>6</sup> If this is justified, any conflict between freedom or justice and the "social tie" must be decided in favour of the latter - or else we must alter the commendatory force of "common good". Jouvenel defines the "social tie" broadly enough to win wide agreement about its importance. However important it may be, it does violence to the highly pluralistic value system of Western societies to suggest that service of the "social tie" will always take precedence. Determination of the descriptive meaning of "public interest" will involve examination of substantive considerations of a highly general sort - norms, values, precepts - but its nature and meaning cannot be equated with a single norm, value or precept.

These conclusions lead to the theory of "public

---

<sup>5</sup> S.I. Benn and Richard Peters, Social Principles and the Democratic State, p. 273

<sup>6</sup> B. de Jouvenel, Sovereignty, chap. 7 [Chicago, University of Chicago Press, 1957]

interest" argued by Peter Drucker. Drucker suggests that "public interest" is purely "an organizing concept", a concept that provides a framework within which substantive values and procedural norms are related to one another and to the contextual considerations peculiar to specific policy decisions.<sup>7</sup> Once again, this view has much to recommend it. "Public interest" does not supply the values, formal principles, and contextual facts relevant to determining its descriptive meaning in particular cases; it provides a heading or category under which values, etc., can be brought together and evaluated. To this extent it is enlightening to think of "public interest" as an organizing concept.

Julius Cohen suggests that "public interest" is ... used in a dual sense; first in a logical sense - i.e., to explicate the meaning of the established basic values of the community. Thus it would be in the public interest to pursue a certain goal because it would be consistent with the meaning of a basic community value. Second, it is used in an instrumental sense - i.e., that a policy would be in the public interest if its consequences would implement one or more of the established basic values of

---

<sup>7</sup> Drucker's view is reported in Wayne Leys and C. M. Perry, Philosophy and the Public Interest, [committee to Advance Original Work in Philosophy, Chicago, 1959] p. 31

the community.<sup>8</sup>

Cohen recognizes that the general norms and standards are necessary to determine the descriptive meaning of "public interest"; he also asserts that we look to "community values" to find those norms and standards - as opposed, perhaps, to the laws of nature, the products of an autonomous reason, or the patterns of history.

Whereas David Truman equates "public interest" with social unanimity , and, finding no issue on which the latter prevails, dismisses "public interest" as a mere "datum" of politics.<sup>9</sup>

#### 8.1 THE BASIS OF DIFFERENCE BETWEEN THE THEORY OF AL-MAŞĀLIH AL-MURSALAH AND THE THEORIES OF PUBLIC INTEREST

It could be easily found that the nature of the theories of "public interest" in the western framework of thinking differs immensely vis-a-vis the nature of the theory of "al-maşālih al-mursalāh" in Islamic law. While the basis of "public interest" in the western theories is the "givens of community values" or "the social ties", the basis of the theory of al-maşālih al-mursalāh is the

---

<sup>8</sup> J. Cohen, A Lawman's view of the Public Interest, in Carl Friedrich, editor, The Public Interest, [Nomos V] New York, Atherton Press, 1962, pp. 155-6

<sup>9</sup> D. Truman, The Government Process, [New York: Alfred A. Knopf, Inc., 1951], pp. 50 - 51, 358 - 9

"intentions of the Lawgiver" in preserving the five fundamentals of human existence viz. religion, life, reason (mind), offspring and material wealth. The meaning of "public interest" in Islam is therefore quite different from the meaning of the same terminology in the West. To judge a case or to legislate a rule in Islam requires a full knowledge of "Divine Guidance" simply because God (the Lawgiver) alone deserves the right to command:

"...the command rests with none but God; He declares the truth, and He is the best of judges".<sup>10</sup>

It follows therefore, that no rule or judgment in Islamic law in favour of "public interest" could be legislated without the spirit and appreciation of the divine revelation due to the fact that the real truth of everything rests with God alone and so is the case with the real benefits.

It should be born in the mind that there are various frameworks within which interpreters and propounders are working. Some of these frameworks take this cosmos as the only source of their knowledge while the others take the inside as well as the outside of this universe as the sources of knowledge. As far as a mujtahid in Islamic law is concerned, he bases his interpretation within the

---

<sup>10</sup> Qur'ān, 6 : 57

Islamic framework which obtains its knowledge from the inside of this universe through observation and reasoning as well as from outside this universe by means of divine revelation. Thus it is a grave mistake to venture to refute a rule or a judgment in Islamic law without the light and knowledge of the divine guidance and basing the argument within the Western framework which obtains its knowledge from within this universe only. The case is also true with benefits. In Islam benefits are two fold: (i) worldly and (ii) hereafter. Those who condemn and accuse Islamic law of rigidity, uncouthness and cruelty are viewing the issue within the Western framework which considers worldly benefits only and ignores and rules out the hereafter all together. As we have seen in our short survey of the Western theories of "public interest" that their basis is either "community values" or "social ties" only which have nothing to do with divine guidance or revelation.

It goes without saying that the theory of al-maṣāliḥ al-mursalah in Islamic law is not a theory in the western sense of the word like the theories of "public interest", due to the fact that there are no theories in Islam which develop into laws or principles as is the case with the Western theories. Theories in Islam are simply expositions of interpreters elucidating their findings and expressing their opinions. What all the theory of al-maṣāliḥ al-mursalah is about is to illustrate the

attitude of a mujtahid in the attestation of the divine wisdom in the judgment of cases and in the process of legislation to the ever changing circumstances of human existence on earth.

## CONCLUSION

As a problem of legal theory the question of adaptability to social change has been a controversial one in the history of uṣūl al-fiqh. The qāḍīs in the early courts of law, particularly in the Umayyad period, relied mostly on ra'y (consideration of opinion). The use of ra'y generally amounted to a general consideration of human needs. Ra'y was, thus a method that kept the then institution of law adaptable to social change.

There was, however, opposition to ra'y among the scholars who specialized in ḥadīth and in local practice. These scholars considered the use of ra'y as an arbitrary and therefore unreliable method of making decision. The diversity of laws that resulted from the exercise of ra'y by the qāḍīs in various cities increased the number of opponents to the use of ra'y.

The general attitude of the ḥadīth group was to adhere strictly to the Qur'ān and Sunnah (of the Prophet as well as that of his companions), and thus to reject any idea of the adaptability of Islamic law. This attitude was motivated by the religious apprehension of distortion of Islamic tradition by the use of ra'y. It was, however, impossible to maintain in the face of the enormous degree of social changes that had taken place in Islamic society by the end of the eighth century.

The literal provisions of the Qur'ān and Sunnah were insufficient to accommodate the growing number of social changes. Even the method of extending these provisions by accepting the ijmā' of the past generation of scholars on certain matters failed to meet the demand. The need to accommodate the changes could not be denied, but how to extend the limited legal provisions to adapt to these changes?

The method of qiyās developed as an answer to the need for the adaptability of Islamic law. Even among the ḥadīth group, a large number of scholars recognized this need and accepted the validity of the method of qiyās for this purpose. The religious and theological implications of the attitude of the ḥadīth group, however, spelled out the same fear of arbitrariness for the method of qiyās as it has done for ra'y. Consequently, the Ḍāhirīs who still adhered to the older trend of rejecting anything beyond the literal provisions, opposed the use of qiyās and departed from the mainstream of the ḥadīth) group.

Although initially a method of adaptability, yet in reaction to the Ḍāhirī and similar criticism, qiyās was soon ushered into the protection of strict formality. It was sought as a foolproof corrective of the method of ra'y. To remove the fear of arbitrariness, qiyās was connected with the "sources" - the Qur'ān and ḥadīth. The appeal of this method was so strong that it overshadowed

its opposition as well as any other methodological development in Islamic legal theory.

Nevertheless, the method of ra'y was not completely swept away by qiyās. Trends similar to the use of ra'y survived in the form of principles such as istiḥsān, istiḥlāḥ, darūrah, munāsabah etc. Incidentally, rules derived from these principles constitute the basis of a considerable part of Islamic law - probably even more than those based on qiyās.

The qiyās which was the basis of a number of other methods in extending or adapting legal doctrines to social changes, was itself hampered by at least two limitations: One was the attitude of formalism which required that in order to be conclusive, the analogy must be derived explicitly from the original sources (Qur'ān, Sunnah or ijmā' of the early generations). In other words, the basis of analogy must be explicitly expressed as a "cause" or "reason" for the original ruling. This attitude discouraged the use of implicit cause in the original ruling as a basis of analogy. Also this attitude required reference to specific original rulings, rather than encouraging the search for, and the application of, general principles or the intent and "spirit" of the law in original rulings.

The second limitation, which further strengthened the attitude of formalism, stemmed from the theological

view of the problem of causality in reference to the attributes of God. The Ash<sup>c</sup>arīs opposed the idea of there being any causality behind God's actions and speech. Thus, since the command of God, being one of His acts, cannot have any cause or motive, the entire method of qiyās came to be suspected as wrongly or arbitrarily seeking to appoint causes for the commands of God.

One of the major consequences of the above limitations - i.e formalism and denial of causality - was that the discussion on the problem of social change and legal theory became essentially a question of inference from the "sources of law".

To escape this dilemma, the Zāhirīs rejected qiyās altogether. The Shāfi<sup>c</sup>īs, who did not entirely reject qiyās, imposed limitations on its application. They rejected any method of reasoning or any form of qiyās which was not linked with certain specific rulings in the Qur'ān or Sunnah. Nevertheless, they could not deny the occurrence of social changes, nor could they refuse to accept these changes in practice. They had, therefore, to adopt methods such as istiṣhāb (presumption of continuity of a legal evidence) to justify these changes. Hanafīs and Mālikīs employed certain methods which did not strictly adhere to the requirements of the theory of the sources of law, principally methods of qiyās. Two such methods are istiḥsān (to decide in favour of something

which is considered ḥasan, good, by the jurist, over against the conclusion that may have been reached by qiyās), attributed to the Ḥanafīs, and istiṣlāh (to decide in favour of something because it is considered maṣlaḥah, more beneficial, than any alternative rule decided on another basis). These methods were not accepted by all the schools. Yet the concept of istiḥsān and istiṣlāh have in common the consideration of human good. Invariably the underlying principle in the reasoning of these schools was to favour the adaptability of Islamic law to social changes.

In order to render the concept of maṣlaḥah suited to their legal philosophy, the Shāfi<sup>c</sup>ī jurists imposed upon this concept the approach of the "source of law". They divided maṣlaḥah into categories according to its basis in the sources. If maṣlaḥah accorded with the sources, it was not disputable, since it was somehow justifiable as a method of qiyās, when it was literally derived from the sources. The only category which was questionable was that which was not based on the sources. This category was called al-maṣlaḥah al-mursalah which is the core of this treatise. Naturally for the Shāfi<sup>c</sup>ī jurists the only discussion of maṣlaḥah that mattered was a discussion of al-maṣlaḥah al-mursalah. This view came to dominate other schools, and even the Mālikīs eventually accepted it.

The significant consequence of the above

categorization of maṣlaḥah was that the original idea of maṣlaḥah as a principal independent source came to be disregarded, and istiṣlāḥ came to be equated with al-maṣlaḥah al-mursalah. This is contrary to the recent studies related to maṣlaḥah as we have seen before.

Eventually, the concept of maṣlaḥah with its simple beginnings unfolded its various aspects as it came into contact with theology, taṣawwuf, logical analysis and, most significantly, with social and legal changes. Theological determinism introduced by Ash<sup>c</sup>arī jurists appears largely in the discussion of taklīf (obligation). To Ash<sup>c</sup>arīs, taklīf is created by divine command. The Mu<sup>c</sup>tazilah refuted this sense of theological determinism. They differentiated between two senses of obligation: taklīf and wujūb (obligatoriness); the latter was rational and ethical, while the former was theological. In other words, mere command does not oblige man to act; it only informs him. What obliges man is the knowledge of good and bad, or of useful and harmful. It might be concluded that this interpretation should have been acceptable to the legal concept of obligation. Yet there were certain complexities. First, if legal obligation is based on one's knowledge of utility, it may lead to arbitrariness, and furthermore this criterion in its absolute sense is not universally applicable. All the things which are apparently useful also have certain elements which are harmful either to the person concerned

or to others. Second, all the rules of Shari<sup>c</sup>ah do not conform to the rule of utility; there are obvious hardships and disadvantages in obeying them. Third, to preserve an order and a system the decision of utility cannot be left to the individual. Who should then decide?

Still another aspect of the relationship of maṣlaḥah and taklīf was brought forth by Ṣūfīs. The consideration of seeking utility and avoiding harm leads one to view obligation in a formal sense. Whenever there is a choice between hard and soft, a maṣlaḥah oriented person chooses the latter. Not only that, to avoid harm to himself, he seeks devices which are legal; and since he is a utility seeker, he feels satisfied by escaping the full implications of legal obligation. To Ṣūfīs, this attitude, even in its lawful aspects, was quite opposite to the meaning of obligation towards God. They opposed this attitude as ḥuzūz of nafs (lower soul) who is one of the enemies of the traveller on the path of God. However, such an interpretation of the application of the Shari<sup>c</sup>ah can only be regarded as appropriate to committed Ṣūfīs.

Finally, it would seem that the al-Shāṭibī's treatment of the concept of maṣlaḥah deserves a paramount status for the modern understanding of maṣlaḥah. The growing needs of the Islamic society today to cope with the modern advancement of science, technology, economics,

politics, etc., demand a thorough and comprehensive examination of the concept in question. Since the whole development process of society depends mostly on the principles which give guidance to do constructive and creative activities in all aspects of life, it is therefore necessary that these principles should be determined through a methodology which is competent and capable of analysing and differentiating between good and bad, benefit and injury, constructive and destructive, civilized and uncivilized etc. Al-Shāṭibī's comprehension of maṣlahah as that which concerns the subsistence of human life, the completion of man's livelihood, and the acquisition of what is emotional and intellectual qualities require of him, in an absolute sense; is actually "food for thought" for a modern mujtahid to exercise his independent thinking to discover such unrestricted interests (maṣāliḥ mursalah) in order to meet the ever-growing demands of the society.

## BIBLIOGRAPHY

### PRIMARY SOURCES

- Abū Ishāq, I.A., Al-tabṣīrah fī uṣūl al-fiqh, Dār al-fikr, Damascus, 1980.
- ʿAlawī-al, M.A., Qawā'id al-fiqh, al-Matba'ah al-ʿAṣriyyah, Fez, 1976.
- ʿAmidī-al, S., Al-iḥkām fī uṣūl al-aḥkām, Cairo, 1347 A.H.
- Anas, M., Al-mudawwanah al-kubrā, Cairo, n.d.; Al-muwatta', version of al-Shaybānī, ed. by ʿAbd al-Wahhāb ʿAbd al-Laṭīf, Cairo, 1962.
- Anṣārī-al, M.N., Fawātiḥ al-raḥmūt sharḥ musallam al-thubūt, published on the margin of al-Ghazālī's Al-mustaṣfā, Cairo, 1334 A.H.
- Asnawī-al, A.H., Al-tamhīd fī takhrij al-furū' ʿalā al-uṣūl, Muassasat al-risālah, 1980; Nihāyat al-uṣūl fī sharḥ minhāj al-uṣūl, ʿĀlam al-kutub, Beirut, 1982.
- ʿAynī-al, B., ʿUmdat al-qārī sharḥ ṣaḥīḥ al-Bukhārī, Cairo, 1348 A.H.
- Baṣrī-al, A.M.A., Kitāb al-muʿtamad fī uṣūl al-fiqh, ed. by Muḥammad Ḥamīd Allah, Damascus, 1964.
- Bayhaqī-al, A.A.A., Sunan al-kubrā, Hyderabad, 1352 A.H.
- Bayḍāwī-al, A.U., Kitāb minhāj al-uṣūl ilā ʿilm al-uṣūl, Cairo, 1969.
- Bazdawī-al, A.M.M., Kitāb uṣūl al-dīn, Cairo, 1963.
- Bazdawī-al, A.M.H., Uṣūl al-Bazdawī, Cairo, 1937.
- Bukhārī-al, A., Kashf al-asrār fī uṣūl al-Bazdawī, Turkey, 1307 A.H.
- Bukhārī-al, M.I., Ṣaḥīḥ al-Bukhārī, published with its English translation by Dr. Muḥsin Khan, Ankara, 1976-7.
- Fayrūzabādī, S.M.H., ʿInāyat al-uṣūl fī sharḥ kifāyat al-uṣūl, Qumm, 1400 A.H.
- Ghazālī-al, A.M., Al-mustaṣfā min ʿilm al-uṣūl, Cairo, 1937; Shifāu al-ghalīl, Cairo, 1946.
- Ibn ʿAbd al-Salām, I., Qawā'id al-aḥkām fī maṣāliḥ al-anām, Cairo, 1934.
- Ibn ʿAbidīn, M.A., Radd al-mukhtār, Cairo, 1324 A.H.
- Ibn Amīr, H.M.M., Al-taqrīr wa al-taḥbīr, Cairo, 1316-18 A.H.
- Ibn Farḥūn, I.M., Tabṣirat al-ḥukkām, Cairo, 1302 A.H.
- Ibn Ḥājib, A., Al-mukhtaṣar, Cairo, 1935.
- Ibn Ḥazm, A.A., Al-iḥkām fī uṣūl al-aḥkām, ed. by Aḥmad Shākīr, Cairo, n.d.; Marātib al-ijmā', Dār al-āfāq al-jadīdah, Beirut, 1978.

- Ibn Kathīr, 'I.A., Tafsīr al-Qur'ān, Beirut, 1969.
- Ibn Malak, A.A., Sharḥ al-manār wa hāmishih min 'ilm al-uṣūl, Cairo, 1315 A.H.
- Ibn Mutahhar-al, H.H.Y., Mabādi' al-wuṣūl ila 'ilm al-uṣūl, edited and annotated by A.M.A. al-Baqqa, Matba'ah al-adab, Najaf, 1970.
- Ibn Nujaym, Z., Al-ashbāh wa al-naẓāir, Cairo, 1322 A.H.
- Ibn Qudamah, 'A.A., Rawḍat al-nāẓir wa jannat al-munāẓir, Madinah, 1385 A.H.
- Ibn Rushd-al, M.A., Bidāyat al-mujtahid wa niḥyat al-muqtaṣid, 3rd edition, Cairo, 1960; Kitāb al-muqaddimah al-mumahhidah, Cairo, n.d.
- Ibn Taymiyyah, T., Al-siyāsah al-sha'īyyah, Cairo, 1969; Al-ḥisbah fi al-Islām, Madinah, n.d.; Majmū'at al-rasāil al-kubrā, Cairo, 1323 A.H.; Majmū'at al-fatāwā, Riyād, 1381 A.H.
- Imām Ḥaramayn-al, 'A.'A., Al-burhān fī uṣūl al-fiqh, ed. by 'Abd al-'Azīz al-Dīb, Qatar, 1979.
- Jamāl al-Dīn, M., Al-qiyās, Matba'ah al-Nu'mān, Najaf, 1972.
- Jawziyyah-al, Ibn Qayyim, I'lām al-muwaqqi'īn 'an Rabb al-'ālamīn, Cairo, 1955; Al-ṭuruq al-ḥukmiyyah, Cairo, 1317 A.H.
- Jazīrī-al, A., Kitāb al-fiqh 'alā al-madhāhib al-arba'ah, Cairo, n.d.
- Kasānī-al, 'A., Badāi' al-sinā'ī fī tartīb al-sharī'ah, Cairo, 1327-28 A.H.
- Kāẓimī-al, M.M., 'Anāwīn al-uṣūl, Baghdad, 1432 A.H.
- Khāllāf-al, 'A., Maṣādir al-tashrī' al-Islāmī fī mā lā naṣṣ fīh, Kuwait, 1972; Khulāṣat tārikh al-tashrī' al-Islāmī, Dār al-qalam, Kuwait, 1971.
- Mahmaṣānī, S.R., Falsafat al-tashrī' fī al-Islām, 4th edition, Dār al-'ilm li al-malāyīn, Beirut, 1975.
- Māwardī-al, A.'A., Al-aḥkām al-sultāniyyah, Cairo, n.d.
- Marghinānī, B., Al-hidāyah, Cairo, 1326-27 A.H.
- Munāwī-al, 'A.M., Kanz al-ḥaqāiq, Cairo, 1305 A.H.
- Nasafī-al, A.A., Al-Manār fī uṣūl al-fiqh, Cairo, 1315 A.H.
- Nawawī-al, A., Al-tashrī' al-jināī fī al-Sharī'ah al-Islāmiyyah, Dār al-thaqāfah, Beirut, 1974.

- Qarāfī-al, M.I., Sharḥ tanqīḥ al-fuṣūl fī ikhtisār al-maḥṣūl fī uṣūl al-fiqh ed. by ʿAbd al-Raūf Saʿd, Cairo, 1973; Al-dhakhīrah, Cairo, 1961.
- Qurtubī-al, A.M., Al-jāmiʿ li aḥkām al-Qurʿān, Cairo, 1937.
- Rāzī-al, F., Al-tafsīr al-kabīr, Cairo, n.d.; Al-maḥṣūl fī ʿilm al-fiqh, ed. Ṭāhā Jābir al-ʿUlwānī, Riyāḍ, 1979.
- Sarakhsī-al, S., Al-mabsūt, Cairo, 1906-13.
- Shāfiʿī-al, M.I., Al-umm Bulāq, 1320-25 A.H.; Al-risālah, Cairo, 1940.
- Sharʿānī-al, A., Al-mizān al-kubrā, Cairo, 1932.
- Shātibī-al, A.I., Al-iʿtisām, Dār al-maʿrifah, Beirut, n.d.; Al-muwāfaqāt, Cairo, n.d.
- Shawkānī-al, M.A., Irshād al-fuḥūl, Cairo, 1347 A.H.; Nayl al-awṭār, Beirut, 1973.
- Sijistānī-al, A.S.A., Sunan, Cairo, 1863.
- Subkī-al, T., Jāmiʿ al-jawāmiʿ, Cairo, 1354 A.H.
- Suyūtī-al, A., Al-ashbāh wa al-naẓāir, Cairo, 1936; Al-jāmiʿ al-saghīr, Cairo, 1352 A.H.
- Ṭabarī-al, M.J., Tafsīr al-Ṭabarī, Cairo, 1955.
- Taftazānī, M., Talwīḥ, Cairo, 1346 A.H.
- Tirmidhī-al, M.I.S., Al-jāmiʿ, Cairo, n.d.
- Zarkashī-al, M., Al-baḥr al-muḥīṭ, Cairo, 1927.
- Zinjānī-al, I., Takhrij al-furūʿ ʿala al-uṣūl, Cairo, 1969.

## SECONDARY SOURCES

- ‘Alī, A.Y., The Commentary of the Holy Qur’an, New York, 1946.
- ‘Abduh, M., Tafsīr al-Manār, Cairo, 1330 A.H.
- Abū Bāṭin, A.U., Nazarāt fī al-Sharī‘ah al-Islāmiyyah, Riyād, 1978.
- Abū Jayb, M., Mawsū‘at al-ijmā‘ fī al-fiqh al-Islāmī, Dār al-‘Arabiyyah, Beirut, 1974.
- Abū Najā-al, M.A., ‘Ilm uṣūl al-fiqh, Cairo, 1966.
- Abū Zahrah, M., Uṣūl al-fiqh, Cairo, 1958; Muhāḍarat fī uṣūl al-fiqh, Cairo, 1956; Tārikh al-madhāhib al-Islāmiyyah, Dār al-fikr al-‘Arabī, Cairo, 1976.
- Aghnides, N.P., Muḥammadan Theories of Finance with an Introduction to Muḥammadan Law and Bibliography, Lahore, n.d.
- Allen, C.K., Law in the making, London, 1968.
- Amīr Badsha, M.A., Taysīr al-taḥrīr ‘alā kitāb al-taḥrīr fī uṣūl al-fiqh, Cairo, 1351 A.H.
- Anderson, J.N.D., Islamic Law in the Modern World, London, 1958.
- Anṣārī-al, M.N., Fawātiḥ al-raḥmūt sharḥ musallam al-thubūt, published on the margin of al-Ghazālī’s Al-mustaṣfā, Cairo, 1334 A.H.
- Arnold, A. and Guillaume A., The Legacy of Islam, Oxford, 1931.
- Arsalān, M.S., Al-qaḍā’ wa al-quḍāt, Dār al-irshād, Beirut, 1969.
- ‘Assāf, A.M., Al-aḥkām al-fiqhiyyah fī al-madhāhib al-Islāmiyyah al-arba‘ah, Dār iḥyā’ al-‘ulūm, Beirut, 1979.
- Azamgadh, U.P., Distinction between Ḥadīth and Sunnah, Oxford, 1954.
- A‘zamī-al, M.M., On Schacht’s Origins of Muḥammadan Jurisprudence, King Sa‘ūd University, Riyād, 1985.
- A‘zamī-al, H., Al-murshid fī ‘ilm uṣūl al-fiqh wa tārikh al-fiqh al-Islāmī, a general work on Islamic law, Cairo, 1949.
- Ayyūbī-al, M.H., Al-ijtihād wa muqtaḍayāt al-‘aṣr, Dār al-fikr, ‘Ammān, 198 .
- Badrān, A.A.B., Uṣūl al-fiqh al-Islāmī, Cairo, n.d.; Bayān al-nuṣūṣ al-tashrī‘iyyah, Alexandria, 1969.
- Bakkah-al, A., Al-ḥukm wa al-ḥaqq bayna al-fuqahā’, Maṭba‘ah al-ghāli al-hadīthah, Najaf, 1976.
- Bentham, J., The Theory of Legislation, ed. C.K. Ogder, London, 1931.
- Bodenheimer, E., Jurisprudence, Harvard, 1967.

- Būṭī-al, M.S.R., Dawābit al-maṣlaḥah fī al-Sharī'ah al-Islāmiyyah, Damascus, 1966-67.
- Comte, A., The Positive Philosophy, tr. by H. Martineau, London, 1874.
- Coulson, N.J., A History of Islamic Law, Edinburgh, 1964; Conflicts and Tensions in Islamic Jurisprudence, Chicago, 1969.
- Curzon, L.B., English Legal History, London, 1968.
- Dahlawī-al, S.W.A., Hujjat Allah al-bālighah, Cairo, 1352 A.H.
- Darīnī, F., Al-manāhij al-uṣūliyyah fī al-ijtihād bi al-ra'y fī al-tashrī' al-Islāmī, Damascus, 1976.
- David, R. and Brierley, J.E.C., Major Legal Systems in the World Today, London, 1968.
- Dawālibī-al, M.M., Al-madkhal ilā 'ilm uṣūl al-fiqh, Cairo, n.d.
- Diamond, A.S., Evolution of Law and Order, Cambridge, 1968.
- Durant, W., Outlines of Philosophy, London, 1962.
- Encyclopaedia of Islam, 1st edition, 1927; 2nd edition, 1965 and shorter edition, 1961.
- Fahmī, M.A.M., Al-ḥudūd bayna al-Sharī'ah wa al-qānūn, Maktabat al-nūr, Tripoli, 1972; Umar ibn al-Khattāb qāḍiyan wa mujtahidan, Tripoli, 1972; Umar ibn al-Khattāb qāḍiyan wa musharri'an, Anglo-Egyptian Bookshop, Cairo, 1970.
- Faḍlī-al, A., Mabādi' al-fiqh, Matba'ah al-adab, Najaf, 1967.
- Fārūqī, K.A., Al-aḥkām al-khamsah, Lahore, 1964.
- Fāsī-al, A., Difā'an al-Sharī'ah, 2nd ed., Beirut, 1972.
- Fawzī, S., Mabādi' al-tashrī' al-Islāmiyyah, Jeddah, 198\_.
- Fitzgerald, S.G.V., Nature and Sources of the Shari'ah in Law in the Middle East, ed. by Khadduri and Liebesny, Washington, 1955.
- Friedmann, W., Legal Theory, 5th ed., London, 1967.
- Fyze, A.A.A., Shi'ite Creed, Oxford, 1942.
- Gibb, H.A.R., Constitutional Organization in Law in the Middle East, ed. Khadduri and Liebesny, Washington, 1955.
- Haitū, M.H., Al-wajīz fī uṣūl al-tashrī' al-Islāmī, Muassasat al-risālah, Beirut, 1983.
- Hallāq, W.B., The Gate of Ijtihād, a Ph.D thesis at the University of Washington, 1983.

- Ḥasab Allah, A., Uṣūl al-tashrīf al-Islāmī, 5th ed., Dār al-ma‘ārif, Cairo, 1976.
- Hirschfield, P., New Researches into the Composition and Exegesis of the Qur’an, London, 1902.
- Ḥulw-al, Y., Dāirat al-ma‘ārif al-fiqhiyyah, Matba‘ah al-adab, Najaf, 1971.
- Ḥusain, H.H., Nazariat al-maṣlaḥah fī al-fiqh al-Islāmī, Cairo, 1971.
- Hurgronje, C.S., Selected Works, Leiden, 1962.
- Jackson, R.H., Foreword to Law in the Middle East, ed. by Khadduri and Liebesny, Washington, 1955.
- Jammāl-al, M.A., Maṣlaḥah fiqhiyyah wa dirāsāt Islāmiyyah, Ma‘had al-dirāsāt al-Islāmiyyah, Cairo, 1969.
- Kerr, M.H., Islamic Reforms, California, 1966.
- Khaddūrī, M., Islamic Jurisprudence: al-Shāfi‘ī’s Risālah, Baltimore, 1961; The Islamic Conception of Justice, The John Hopkins University Press, 1984.
- Khinn, M.S., Athar al-ikhtilāf fī al-qawā‘id al-uṣūliyyah fī ikhtilāf al-fuqahā’, Muassasat al-Risālah, Beirut, 1982.
- Kirrū, H., Uṣūl al-tashrīf al-Islāmī, al-Dār al-‘Arabiyyah li al-kitāb, Tunis, 1976.
- Lane, E., An Arabic-English Lexicon, London, 1863-93.
- Levy, P., Social Structure of Islam, Oxford, 1971.
- MacDonald, D.B., Development of Muslim Theology: Jurisprudence and Constitutional Theory, London, 1903.
- Maghniyah, M.J., ‘Ilm uṣūl al-fiqh fī thawbih al-jadīd, Dār al-‘ilm li al-malāyīn, 1975; Al-fuṣūl al-shar‘iyyah ‘alā madhāhib al-Shī‘ah, 2nd edition, 1974; Al-fiqh ‘alā al-madhāhib al-khamsah, Beirut, n.d.
- Mawdūdī, S.A., Islamic Law and Constitution, tr. by Khurshid Aḥmad, Lahore, 1967.
- Muḥammad, K.B., Uṣūl al-fiqh, Cairo, 1969.
- Muḥammad, A.I., Uṣūl al-fiqh al-Ḥanafī, Cairo, 1980.
- Murtaḍā-al, A., Al-dharīlah ilā uṣūl al-Sharī‘ah, ed. by Abū al-Qāsim, K., Iran, 1346 A.H.
- Muṣleḥuddīn, M., Islamic Jurisprudence and the Rule of Necessity and Need, Islamic Research Institute, Islamabad, 1975.
- Nabaḥān-al, M.F., Al-madkhal li al-tashrīf al-Islāmī, Wakalat

al-maṭbū‘āt, Kuwait, 1977.

Nallino, C.A., Hal li al-qānūn al-Rūmānī ta’tḥīr ‘alā al-fiqh al-Islāmī?, Dar al-buhuth al-‘ilmiyyah, Beirut, 1973.

Ostrorog, C.L., Angora Reform, Oxford, 1934.

Paton, G.W. and Derham, D.P., A Text-book of Jurisprudence, Oxford, 1972.

Parry, D.H., Haldane Memorial Lecture, New York, 1924.

Pond, R., An Introduction to the Philosophy of Law, London, 1953.

Qayrawānī-al, A.A., Al-risālah, a Mālikī Shari‘ah text, translated by Alh. Bello M.D.Z., Northern Nigerian Publishing Company, 1983.

Qardāwī-al, Y., Al-Shari‘ah al-Islāmiyyah, Dawhah, 1973.

Qutb, S., Fī zilāl al-Qur‘ān, Beirut, 1971.

Rahāwī-al, Y., Sharḥ al-manār wa ḥawāshihā min ‘ilm al-uṣūl, printed on the margin of Sharḥ al-manār of Ibn al-Malak, Cairo, 1315 A.H.

Rahīm-al, A., Muḥammadan Jurisprudence, Lahore, 1963.

Ramaḍān, R.K., Islamic Politics & Political Theory, New York, n.d.

Riḍwān, F., Min falsafat al-tashrī‘ al-Islāmī, 2nd ed., Beirut, 1975.

Russell, B., Human Society in Ethics and Politics, London, 1954;  
History of Western Philosophy, London, 1971.

Sabine, G.H., A History of Political Theory, 3rd ed., London, 1964.

Ṣadr-al, R., Al-ijtihād wa al-taqlīd, Dār al-kitāb al-Lubnānī, Beirut, 1976.

Ṣāleḥ, M.A., Maṣādir al-tashrī‘ al-Islāmī wa manāhij al-istinbāt, Cairo, 1976.

Salmond, J., Jurisprudence, 7th ed., London, 1924.

Schacht, J., An Introduction to Islamic Law, Oxford, 1964; The Origins of Muḥammadan Jurisprudence, Oxford, 1950; Pre-Islamic Background and Early Development of Jurisprudence, in Law in the Middle East, ed. by Khadduri and Liebesny, Washington, 1955.

Tuffāḥah, A.Z., Falsafat al-tashrī‘ al-Islāmī, Dār al-kitāb al-Lubnānī, Beirut; Dār al-kitāb al-Misrī, Cairo, 1979.

Tūnisī-al, Z., Al-Qur‘ān al-qānūn al-awwal, Tunis, 1974.

Turkī-al, A.A., Asbāb ikhtilāf al-fuqahā’, Maṭba‘ah al-sa‘ādah, Cairo, 1974.

Tyan, E., Judicial Organization, in Law in the Middle East, ed. by

- Khaddūrī and Liebesny, Washington, 1955.
- Watt, W.M., Islam and the Integration of Society, London, 1961.
- Wensinck, A.J., The Muslim Creed, Cambridge, 1952.
- Yakan, Z., Al-qānūn al-Rūmānī wa al-Sharī'ah al-Islāmiyyah, Dār Yakan li al-nashr, Beirut, 1975.
- Yamānī, A.Z., Al-Sharī'ah al-khālidah, Al-dār al-Su'ūdiyyah li al-nashr wa al-tawzī', Riyad, 1970.
- Yūsuf, S.M., The Sunnah: Its transmission, Development and Revision, Lahore, 1967.
- Zagday, G., Modern Trends in Islamic Law in Current Legal Problems, London, 1948.
- Zaydān, A., Al-madkhal li dirāsāt al-Sharī'ah al-Islāmiyyah, 5th edition, Maktabat al-Quds, Muassasat al-risālah, Beirut, 1976.
- Zayd, M., Al-maṣlahah fī al-tashrī' al-Islāmī wa Najm al-Dīn al-Tūfī, Cairo, 1954.
- Zaylā'ī-al, U.A., Tabyīn al-ḥaqāiq, Cairo, 1313-35 A.H.
- Zuhaylī-al, W.M., Nazariyyat al-darūrah al-shar'īyyah, Maktabat al-Fārābī, Damascus, 1969.