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AL-ṬŪFĪ'S CONCEPT OF *MAṢLAḤAH*:

A Study in Islamic Legal Theory

by

Nazly Hanum Lubis

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of the requirements for
the degree of Master of Arts

Institute of Islamic Studies
McGill University
Montreal, Canada
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ABSTRACT

Author : Nazly Hanum Lubis

Title : Al-Ṭūfī's Concept of *Maṣlaḥah*: A Study in Islamic Legal Theory

Department : Islamic Studies, McGill University

Degree : Master of Arts

This thesis studies a method of legal reasoning used in determining legal rulings guided by the principle of *maṣlaḥah* (public interest), promulgated by a liberal thinker of the medieval period, Najm al-Dīn al-Ṭūfī (d. 710/716 A.H.). His theory of *maṣlaḥah* is not confined only to cases which have no textual basis but is also applied to those problems that come within the purview of the revealed texts. His theory of *maṣlaḥah* is, no doubt, unique and original. He prefers to place *maṣlaḥah* above all legal sources, including the Qur'ān and the *Ḥadīth* which, according to him, cannot lead people to uniform rulings. He believes that only with this theory can human welfare be secured.

Due to its unique and controversial nature, al-Ṭūfī's theory of *maṣlaḥah* was not welcomed and even received severe criticism from other jurists. Indeed, this theory went beyond al-Ṭūfī's times and was much later seen as suitable for anticipating social change. Therefore, in modern times, in which law reform is needed, his theory of *maṣlaḥah* receives serious attention. This thesis also attempts to argue that, even though their concept of *maṣlaḥah* is not as liberal as that of al-Ṭūfī, the modern reformists' theory of *maṣlaḥah* is, by and large, inspired and even influenced by al-Ṭūfī's *maṣlaḥah.*

RESUME

Auteur : Nazly Hanum Lubis

Titre : Le concept du *Maṣlaḥah* d'al-Ṭūfī: Une analyse de la théorie légale islamique

Département : Institut des Etudes Islamiques, Université McGill

Diplôme : Maîtrise ès Arts

Ce mémoire analyse une méthode de raisonnement légal utilisé dans la détermination des règlementations légales selon le principe du *Maṣlaḥah* (intérêt public) établie par un penseur libéral du Moyen Age, Najm al-Dīn al-Ṭūfī (mort en 710/716 A.H.). Sa théorie du *Maṣlaḥah* n'est pas seulement confinée dans les cas ayant aucune base textuelle mais elle est aussi appliquée aux problèmes inhérents à l'objectif des textes révélés. La théorie du *Maṣlaḥah* d'al-Ṭūfī est, sans aucun doute, unique et originale. L'auteur préfère placer le *Maṣlaḥah* au-dessus de toutes les sources légales, incluant le Qur'ān ainsi que les *Ḥadīths* qui, selon al-Ṭūfī, ne peut pas conduire la population vers une règlementation uniforme. Il affirme que c'est seulement grâce à sa théorie, que le bien-être humain peut être assuré.

En raison de sa nature unique et controversée, la théorie du *Maṣlaḥah* d'al-Ṭūfī ne fut pas la bienvenue et elle fut même sévèrement critiquée par plusieurs juristes. En effet, cette théorie était nettement en avance sur le temps d'al-Ṭūfī et fut beaucoup plus tard perçue comme adéquate afin d'anticiper le changement social. Ainsi, à l'intérieur de la période moderne qui nécessite des réformes légales, la théorie d'al-Ṭūfī du *Maṣlaḥah* fait l'object d'une sérieuse attention. Ce mémoire tente aussi de soutenir que, malgré que le concept du *Maṣlaḥah* des réformistes

modernes n'est pas aussi libérale que celle d'al-Ṭūfī, il en reste que leur théorie est largement inspirée voire même influencée par le *Maṣlaḥah* d'al-Ṭūfī.

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Last but not least, I am grateful indeed to my parents, brothers and sisters whose endless love and effort enabled me to complete this work. I owe special thanks to my dear husband whose love and encouragement helped me during my hard time in finishing this thesis.

This thesis is dedicated to my mother and father.

Nazly Hanum Lubis

Montreal, August 1995

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TRANSLITERATION TABLE

Consonants: ʾ initial: unexpressed ʿ medial and final: ʿ

Arabic		Persian	Turkish	Urdu
ب	b	b	b	b
پ		p	p	p
ت	t	t	t	t
ٹ				ṭ
ث	th	s	s	s
ج	j	j	c	j
چ		ch	ç	ch
ح	ḥ	ḥ	ḥ	ḥ
خ	kh	kh	h	kh
د	d	d	d	d
ڈ				ḍ
ذ	dh	z	z	z
ر	r	r	r	r
ڑ				ṛ
ز	z	z	z	z
ژ		zh	zh	zh
س	s	s	s	s
ش	sh	sh	ş	sh

Arabic		Persian	Turkish	Urdu
ص	ṣ	ṣ	ṣ	ṣ
ض	ḍ	ẓ	ẓ	ẓ
ط	ṭ	ṭ	ṭ	ṭ
ظ	ẓ	ẓ	ẓ	ẓ
ع	ʿ	ʿ	ʿ	ʿ
غ	gh	gh	ğ	ġh
ف	f	f	f	f
ق	q	q	ķ	q
ك	k	k	k	k
گ		g	g	g
ں			n̄	
ل	l	l	l	l
م	m	m	m	m
ن	n	n	n	n
ں				ṇ
ه	h	h	h	h
و	w	v	v	v
ی	y	y	y	y

Vowels, diphthongs, etc. (For Ottoman Turkish vowels etc. see separate memorandum.)

short: ـَ a; ـِ i; ـُ u.

long: ا ā; و ū, and in Persian and Urdu also rendered ō; ی ī, and in Urdu also rendered by ē; ے (in Urdu) ē.

alif maqṣūrah: ى á.

diphthongs: ـَيْ ay; ـَوْ aw.

long with tashdīd: ـِيّ īya; ـُوّ ūwa.

tā' marbūṭah: ة ah; in iḍāfah: at.

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INTRODUCTION

There is no doubt that *maṣlaḥah* (public interest) is one of the main legal instruments designed to respond to social change. It is based on the notion that Islamic law was revealed to serve, *inter alia*, human welfare. Given this fact, it might be expected that the law would welcome any instrument that allowed it to adapt to new conditions. But since the principle of public interest is difficult to define precisely and is too easily associated with the arbitrariness of personal opinion, *maṣlaḥah* did not occupy a central position in classical Islamic legal discourse and was suspect in the eyes of many, for it was believed that it could distort and secularize Islamic law.

Numerous statements in the Qur'ān and *Ḥadīth* contain notions of ethics, justice and utility. The main problem, however, is whether or not these statements and their implications are to be considered law. If they are parts of the law, then they have the potential to shape the law and to justify legal rulings. In other words, the principle of *maṣlaḥah* can evaluate the contents of the law. Accordingly, the law ceases to be completely source-based.

Basing themselves on the Qur'ānic precepts concerning justice and utility, the Muslim jurists who supported *maṣlaḥah* attempted to defend its use and constantly tried to prove that considerations of *maṣlaḥah* are not contradictory to the law and that they have a place in legal reasoning. Najm al-Dīn al-Ṭūfī (d. 710/716 A. H.) was one of these jurists. He propounded a view which preferred *maṣlaḥah* to the textual sources and used it to restrict the application of consensus (*ijmā'*), in the name of *takhṣīṣ* (specification) and *bayān* (clarification), when the texts and *ijmā'* were harmful to public utility.

This idea, obviously, constituted a departure in Islamic legal theory, for it opposed the

established concept which permits the principle of *maṣlaḥah* only insofar as it is compatible with the textual sources and the *ijmā'*. Before analysing his concept of *maṣlaḥah*, however, we will do well to discuss briefly al-Ṭūfī's life from a historical perspective in order to understand better his ideas and thought.

A. Al-Ṭūfī's Life and Career

A sparsity of information has hampered the efforts of scholars in reconstructing al-Ṭūfī's life and career. Al-Ṭūfī's complete name was Abū Rabī' Sulaymān b. 'Abd al-Qawī b. 'Abd al-Karīm b. Sa'īd b. al-Ṣafī.[1] He was also called Ibn Abī 'Abbās al-Ḥanbalī.[2] His birth place was Ṭūfā, a village in the lower part of Ṣarṣar, a suburb of Baghdad. Yet, no agreement among scholars has been reached as to the year in which al-Ṭūfī was born. Ibn Rajab and Ibn al-'Imād suggest that al-Ṭūfī was born at the end of 670 A.H.[3], while Ibn Ḥajar insists that he was born in 657 A.H.[4] This last view is supported by the fact that al-Ṭūfī's first book, *al-Iksīr fī Qawā'id al-Tafsīr*, was copied at around the end of the seventh century A. H.[5] This suggests that this book had been compiled long before the end of the century, since it is believed that in al-Ṭūfī's

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[1]Aḥmad b. 'Alī b. Ḥajar al-'Asqalānī, *Al-Durar al-Kāminah fī A'yān al-Mi'ah al-Thāminah*, 5 Vols. (Cairo: Dār al-Kutub al-Ḥadīthah, 1966), II, 1850/249; 'Abd al-Raḥmān b. Aḥmad b. Rajab, *Kitāb al-Dhayl 'alā Ṭabaqāt al-Ḥanābilah*, 2 Vols. (Cairo: Maṭba'at al-Sunnah al-Muḥammadiyyah, 1952), II, 476/366.

[2]Ibn Ḥajar, *Al-Durar*, II, 249.

[3]Ibn Rajab, *Kitāb al-Dhayl*, II, 366; Muṣṭafā Zayd, *Al-Maṣlaḥah fī al-Tashrī' al-Islāmī wa Najm al-Dīn al-Ṭūfī* (Cairo: Dār al-Fikr al-'Arabī, 1954), 68.

[4]Ibn Ḥajar, *Al-Durar*, II, 249.

[5]Zayd, *Al-Maṣlaḥah*, 68-9.

era copying a book took a considerable period of time.[6]

While there is agreement on the place where he died, i.e. in the town of Khalīl, Palestine, the exact date of his death is unknown. Al-Suyūṭī, in his *Bughyat al-Wu'āh*, and al-Khawansārī, in his *Rawḍāt al-Jannāt*, suggest that al-Ṭūfī died in 710 A.H.[7] But this date is unlikely since it appears that al-Ṭūfī was still writing books after this date. At the end of his *Sharḥ al-Arba'īn al-Nawawiyyah*, for instance, al-Ṭūfī mentions that he had been working on this book from Monday the 13th until Tuesday the 28th of Rabī' al-Ākhir, 713, in the city of Qūṣ. In addition, he also states at the end of another of his works, *al-Ishārāt al-Ilāhiyyah ilā al-Mabāḥith al-Uṣūliyyah*, that he started writing the book on Saturday, the 13th of Rabī' al-Ākhir and finished it on Thursday, the 23rd of the same month, 716, in Bayt al-Maqdis.[8] Another theory on the date of al-Ṭūfī's death is suggested by Ibn Rajab, Ibn Ḥajar, and Ibn al-'Imād who insist that al-Ṭūfī died in the month of Rajab 716.[9] This is in conformity with what we know of al-Ṭūfī's movements, which consisted of his leaving Qūṣ to perform the pilgrimage in 714, and his later expulsion from Medina in 715. After this he returned to Shām, dwelling in the town of Khalīl for the rest of his life. Therefore, it is more probable that he died in 716,[10] a few month after the completion of his work *al-Ishārāt al-Ilāhiyyah*.

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[6]Ibid.

[7]See the section on the biography of al-Ṭūfī by 'Abd Allāh b. 'Abd al-Muḥsin al-Turkī in Najm al-Dīn al-Ṭūfī, *Mukhtaṣar al-Rawḍah*, Ed. by 'Abd Allāh b. al-Muḥsin al-Turkī, 3 Vols. (Beirut: Mu'assasat al-Risālah, 1987), I, 38.

[8]Zayd, *Al-Maṣlaḥah*, 69.

[9]Ibn Rajab, *Kitāb al-Dhayl*, II, 369; Ibn Ḥajar, *Al-Durār*, II, 252.

[10]Ibid.; Al-Ṭūfī, *Sharḥ Mukhtaṣar*, I, 38.

Al-Ṭūfī began his education in the town of his birth, rapidly progressing to a point where he was reading a book of *fiqh*, *Mukhtaṣar al-Kharaqī*, and a *naḥw* (grammar) text, the *al-Luma'* of Ibn Jinnī. He frequently went to Ṣarṣar to learn *fiqh* with Shaykh Zayn al-Dīn 'Alī b. Muḥammad al-Ṣarṣarī al-Ḥanbalī al-Naḥwī, known as Ibn al-Būqī.[11] In 691 he went to Baghdād and studied the *fiqh* work *al-Muḥarrar* under the guidance of Shaykh Taqī al-Dīn al-Zarīrānī. In this city he also took up the study of other subjects such as Arabic, *ṣarf* (morphology), *uṣūl*, *farā'iḍ*, *manṭiq*, and *Ḥadīth*. From Baghdad he moved to Damascus in 704 A.H., where he met the Ḥanbalī jurist Taqī al-Dīn Ibn Taymiyyah, thereafter leaving for Cairo, Ṣa'īd and several other towns.[12]

Al-Ṭūfī was a productive scholar who not only studied many subjects but also wrote on various disciplines. 'Abd al-Muḥsin al-Turkī, the editor of al-Ṭūfī's *Sharḥ Mukhtaṣar al-Rawḍah*, lists fifty-three titles by al-Ṭūfī,[13] while Zayd accounts for only forty-two. Zayd classifies all these works into three categories: first, works on *'ulūm al-Qur'ān* and *Ḥadīth*, numbering ten titles; second, works on *uṣūl al-dīn*, *fiqh* and *uṣūl al-fiqh*, amounting to twenty-two titles; last, works on language, literature and other subjects, totalling ten works in all.[14]

Al-Ṭūfī was known as a brave and liberal thinker. This brought him many challenges from rival jurists and personal enemies. It is reported that after leaving Damascus for Cairo in 705 he studied with 'Abd al-Mu'min b. Khalaf and Sa'd al-Dīn al-Ḥārithī. It was in this latter city that

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[11]Ibn Rajab, *Kitāb al-Dhayl*, II, 366.

[12]Ibid., 366-7; Al-Ṭūfī, *Sharḥ Mukhtaṣar*, I, 22.

[13]For the list of the titles see, Al-Ṭūfī, *Sharḥ Mukhtaṣar*, I, 24-32.

[14]Zayd, *Al-Maṣlaḥah*, 91-3.

his life began to grow more complicated due to a dispute with his teacher, al-Ḥārithī, over some rude words he had addressed to the latter. This dispute grew worse and came to a point when it needed to be settled. In settling the dispute, al-Ḥārithī was represented by his son Shams al-Dīn 'Abd al-Raḥmān, while al-Ṭūfī was represented by Badr al-Dīn al-Ḥabbāl. Eventually, the representatives reached an agreement whereby al-Ṭūfī was forced to admit that he was guilty of being a dissenter (*rāfiḍ*). Upon his release from prison, al-Ṭūfī left Cairo for Qūṣ. Another report says that al-Ṭūfī was punished and imprisoned in Cairo because in one of his poems he assaulted the Caliph Abū Bakr, and that after a trial was held the judge presiding over the case, Sa'd al-Ḥārithī, convicted al-Ṭūfī of having gone astray.[15]

Al-Ṭūfī's poem about Abū Bakr was taken by Ibn Rajab to be evidence proving that he belonged to the Rāfiḍah, a branch of Shī'ism. He rejects al-Ṭūfī's status as a Ḥanbalī since, according to him, al-Ṭūfī had admitted himself to be a Rāfiḍī in a verse which says "*Ḥanbalī Rāfiḍī Ash'arī, Hadhihi Aḥad al-'Abr*"[16] (I am a Ḥanbalī, a Rāfiḍī, and a Ash'arī, these all are one bridge). Moreover, al-Ṭūfī's argumentation in his *Sharḥ al-Arba'īn al-Nawawiyyah*, which condemns 'Umar b. al-Khaṭṭāb as the cause for disputation about the transmission of *Ḥadīth*, indicates that he was a Shī'ī. He also compiled a work censuring Abū Bakr, which he wrote during his stay in Medina where he had a close relationship with al-Sakākīnī, a famous Rāfiḍī. This might signify that al-Ṭūfī was sympathetic to Rāfiḍī doctrines and perhaps supported them

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[15]Ibn Rajab, *Kitāb al-Dhayl*, II, 369.

[16]Ibid, 368. Ibn Ḥajar also quoted this poem but in a different version, viz. "*Ḥanbalī Rāfiḍī Ẓāhirī Ash'arī, Innahā Iḥdā al-Kubar.*" Ibn Ḥajar, *Al-Durār*, II, 251.

as well.[17] Although some reports state that al-Ṭūfī had repented of his transgression after having been punished and imprisoned, Ibn Rajab nevertheless claims that this repentance was *taqiyyah* (hiding one's own beliefs to defend oneself), if not outright hypocrisy.[18] Muṣṭafā Zayd insists that it was only Ibn Rajab who considered al-Ṭūfī to be a Shī'ī while others such as al-Ṣafadī, Ibn Maktūm and al-Quṭb al-Ḥillī only blamed him for his dissent (*rafḍ*) and his liberal ideas, but not for being a Rāfiḍī.[19]

There is also a great deal of evidence suggesting that al-Ṭūfī was a Ḥanbalī, not a Shī'ī. First of all, neither al-Ṭūfī's name nor any titles of his works are to be found either in *A'yān al-Shī'ah*, the encyclopedia of the *Imāms* and *'Ulamā'* of the Shī'īs, or in the book *al-Dharī'ah ilā Taṣānīf al-Shī'ah*. Had he been a Shī'ī, some mention of him would have been expected in these two sources. Furthermore, in his *Rawḍāt al-Jannāt fī Aḥwāl al-'Ulamā' wa al-Sādāt*, al-Khawansārī al-Shī'ī affirms that al-Ṭūfī was a Ḥanbalī jurist.[20] This claim is also made by Suyūṭī.[21]

It should likewise be noted that Ibn Rajab's argument that al-Ṭūfī was a Shī'ī because of his assault on Abū Bakr is questionable since, in some of his works, al-Ṭūfī stands by this Caliph's position and even condemns the Rāfiḍīs. In his book *al-Ṣa'qah al-Ghaḍabiyyah fī al-Radd 'alā Munkirī al-'Arabiyyah*, al-Ṭūfī describes the different opinions separating the Sunnīs

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[17]Ibid., 369.

[18]Ibid., 370.

[19]Zayd, *Al-Maṣlaḥah*, 79.

[20]Ibid; Al-Ṭūfī, *Sharḥ Mukhtaṣar*, I, 36.

[21]Al-Ṭūfī, *Sharḥ Mukhtaṣar*, I, 36.

and the Shī'is concerning the inheritance of the daughter of the Prophet, Fāṭimah. Abū Bakr forbade her from inheriting the Prophet's wealth, while the Rāfiḍīs argued that Fāṭimah had a right to inherit it. Although both of these opinions were grounded in the *Ḥadīth* "*mā taraknāhu ṣadaqah*," they interpreted it differently. The core of the disagreement stems from the particle "*mā*," which Abū Bakr interpreted as *mauṣūl*, while the Rāfiḍīs identified it as *nāfiyah*.[22] In this case, al-Ṭūfī supports Abū Bakr's view and rejects the Rāfiḍī interpretation. He further asserts that the Rāfiḍīs had committed mistakes because of their hatred for the Companions, and that they always repudiated any *Ḥadīth* that was transmitted by them.[23] This is not the only example where al-Ṭūfī defends Abū Bakr and condemns the Rāfiḍīs. On another occasion, he condemns the members of this sect as *kuffār* (unbelievers).[24]

Another point which argues against al-Ṭūfī's having been a Shī'ī is that, unlike the Sunnīs, the Shī'is only accepted *Ḥadīth* that were transmitted by the *ahl al-bayt*, the family of the Prophet. Therefore, had al-Ṭūfī been a Shī'ī, he would not have admitted the validity of the *Ḥadīth*s listed in *al-Arba'ūn al-Nawawiyyah* or written a *sharḥ* (commentary) on them since the transmitters of those *Ḥadīth*s were not themselves of the *ahl al-bayt*.[25]

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[22]Since Abū Bakr considered this particle as *mauṣūl*, the meaning of this *Ḥadīth* is "everything that we left behind was *ṣadaqah*." It means that Fāṭimah and the other heirs of the Prophet did not have any right to his property since it was *ṣadaqah*, not inheritance. The Rāfiḍi who argued that this "*mā*" was a *nāfiyah*, by contrast, concluded that the meaning of this *Ḥadīth* is "everything that we left behind was not *ṣadaqah*." That being the case, they claimed that Fāṭimah had the right to inherit and blamed Abū Bakr for preventing her from her right. Zayd, *Al-Maṣlaḥah*, 79-80.

[23]Ibid., 80.

[24]For further examples of al-Ṭūfī's critiques of the Rāfiḍī, see Ibid., 79-86.

[25]Ibid., 88.

Lastly, although one can still point to some of al-Ṭūfī's ideas as being similar to Shī'ī views, there is no concrete evidence proving that he was a Shī'ī. He was, indeed, a Ḥanbalī who wrote all his works on *fiqh* and *uṣūl al-fiqh* based on the *madhhab* of Aḥmad b. Ḥanbal.

B. Al-Ṭūfī's Concept of *Maṣlaḥah* as Seen in *Sharḥ al-Arba'īn al-Nawawiyyah*

One of the concepts that al-Ṭūfī elaborates in his works is that of *maṣlaḥah*, most especially in his *Sharḥ al-Arbaīn al-Nawawiyyah*. Yet, this concept was never mentioned by his contemporaries, despite the fact that they frequently discussed his other ideas and works. This does not mean, however, that the principle of *maṣlaḥah* itself did not receive any attention from jurists during al-Ṭūfī's lifetime, since Ibn Taymiyyah and Ibn Qayyim al-Jawziyyah developed distinctive views on *maṣlaḥah* during this period. Although their views were not as liberal as those of al-Ṭūfī, it is certain that they went further than traditional theory. It can only be suggested that the reason why al-Ṭūfī's conception of *maṣlaḥah* remained obscure was probably because he did not discuss this topic in a specific book or article. By contrast, his other books such as *Daf' al-Ta'āruḍ 'ammā Yūham al-Tanāquḍ fī al-Kitāb wa al-Sunnah* and *al-Ishārāt al-Ilahiyyah ilā al-Mabāḥith al-Uṣūliyyah*, which emphasized the Qur'ān and *Ḥadīth* as the chief sources for legal theory, won the attention of his fellow jurists.[26]

Al-Ṭūfī was popular until the end of the tenth-century A.H., as some scholars during this time still refer to him and quote his ideas. However, after this period, he appears to have been forgotten. No mention of either his name or ideas was to be made until the nineteenth-century A.D. when Jamāl al-Dīn al-Qāsimī came across this medieval jurist's ideas on *maṣlaḥah* in his

[26]Ibid., 162.

commentary on the thirty-second *Ḥadīth* listed in *Sharḥ al-Arba'īn al-Nawawiyyah*. With the help of Muḥammad Rashīd Riḍā, this treatise was published with al-Qāsimī's commentary in *al-Manār*, a periodical which constituted the mouthpiece of reformism. From then on, al-Ṭūfī's ideas on *maṣlaḥah* have become popular and have received serious attention from other jurists who have adopted *maṣlaḥah* as the instrument for reforming Islamic law.

This thesis will therefore attempt to investigate al-Ṭūfī's distinctive theory of *maṣlaḥah*, concentrating on his legal reasoning in proposing the principle and its relation with textual sources. To what extent his thought influenced other jurists in modern times is a topic to which this thesis will also devote its attention.

This thesis is made up of three chapters. The first, which is entitled "The Theory of *Maṣlaḥah* Before al-Ṭūfī," deals with the theory of *maṣlaḥah* as articulated by al-Ṭūfī's predecessors, in particular the Sunnī jurists. The second chapter, entitled "Al-Ṭūfī's Concept of *Maṣlaḥah*," constitutes the main section and provides an analysis of al-Ṭūfī's theory of *maṣlaḥah*. Finally, the last chapter will explore the modern reformists' concept of this principle and the extent to which they depended on the theories of al-Ṭūfī.

CHAPTER ONE

THE THEORY OF *MAṢLAḤAH* BEFORE AL-ṬŪFĪ

The concept of *maṣlaḥah* had been assiduously investigated by the *uṣūlists* long before al-Ṭūfī. They deliberated upon its validity and the conditions that allow for, and safeguard, such a validity. Hence, it would seem appropriate to begin by considering the polemics surrounding this topic, before presenting al-Ṭūfī's own perception of the matter.

A. Definition of *Maṣlaḥah*

Etymologically, the word *maṣlaḥah* is an infinitive noun of the root *ṣ-l-ḥ.* The verb *ṣaluḥa* is used to signify a good, right, just or honest person or thing. *Maṣlaḥah* denotes a matter, affair or requirement which is beneficial and helpful. It is also said of a thing or an affair which is conducive to good or performed for a good purpose. The plural form of *maṣlaḥah* is *maṣāliḥ*, and its exact antonym is *mafsadah.* It is widely used in Arabic idioms, as in: *"naẓara fī maṣāliḥ al-nās,"* meaning a person who looks into the affairs and interests of people with a view to promoting their welfare, and *"fī al-amr maṣlaḥah"* which is used to denote a certain goodness inherent in a particular affair.[1]

The word *maṣlaḥah* does not appear in the Qur'ān. However, various derivatives of its root *ṣ-l-ḥ* are frequently used, such as *muṣliḥūn* and *ṣāliḥūn.* An example of a Qur'ānic verse which offers a contextual rendering of this term is "They believe in Allah and the Last Day. They

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[1]Edward William Lane, *An Arabic-English Lexicon*, 4 Vols. (London & Edinburgh: William Norgate, 1863-1893), IV, 1715.

enjoin what is right and forbid what is wrong and they hastened (in emulation) in (all) good works. They are in the ranks of the righteous."[2]

Not surprisingly, the *uṣūlists* have read many meanings into this simple word and have consequently defined it in several ways. Al-Shāṭibī, for instance, defines *maṣlaḥah* as "all that concerns or promotes the subsistence of human life, the completion of man's livelihood, and the acquisition of all that his physical and intellectual qualities require of him."[3] Morcover, al-Ghazālī (d. 550/1111), a Shāfi'ī jurist, offers a stricter meaning by defining it as an expression that denotes the quest for *manfa'ah* (the useful) and the removal of *maḍarrah* (the harmful) with the aim of preserving *maqāṣid al-sharī'ah* (the objectives of the law). These objectives consist of five essential values, namely: religion, life, intellect, lineage and property. Hence, any measure that protects these values falls under the scope of *maṣlaḥah*, and anything that violates it is considered *mafsadah*.[4] Thus, by stipulating that the *maṣlaḥah* must align itself with the objectives of the *Sharī'ah*, al-Ghazālī seems to confine the role of human choice to the mere solution of judicial problems.

Traditionally, Muslim jurists have always striven for what they considered to be the maximum realization of *maṣlaḥah* and the utmost avoidance of *mafsadah*. They were encouraged in this direction by their wish to comply with God's commands and the Prophet's *Sunnah*. Not

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[2]Abdallah Yousuf Ali, *The Glorious Kur'an* (Printed and Published by The Call of Islamic Society, Libyan Arab Republic, 1973), III: 114, 152.

[3]Abū Isḥāq al-Shāṭibī, *Al-Muwāfaqāt Fī Uṣūl al-Āḥkām*, 4 Vols. (Cairo: Maṭba'at al-Madanī, n. d.), II, 16-17.

[4]Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī, *Al-Mustasfā min 'Ilm al-Uṣūl*, 2 Vols. (Beirut: Dār 'Ulūm al-Ḥadīthah, n. d.), I, 286-7.

surprisingly, this religious inclination manifested itself in numerous legal works and took as its basis the Qur'ānic texts that pertain to *maṣlaḥah*. These texts promoted human welfare in a number of ways, such as by prescribing general principles and guidelines for *al-aḥkām al-'amaliyyah* (the law dealing with human behaviour and action) with the view of improving Muslim society through the prohibition of interest, the distribution of alms, the enactment of penalties, and the command to hold consultations among people before arriving at decisions. Secondly, the texts also called for adopting those rulings which are consolidated by an explicit or implicit *'illah* (underlying reason), *ḥikmah* (wisdom) or a sign from God. A case in point is the prohibition against drinking *khamr* (alcohol) because the latter can incapacitate people and lead them to evil and self destruction. Thirdly, the texts also adopted some general legal principles, such as that stipulating that "permissibility is the original state of things," or that which calls for the "removal of hardships." These principles were derived from such verses as "It is He Who hath created for you all things that are on earth,"[5] and "He has imposed no difficulties on you in religion."[6] Lastly, all the rulings in the Qur'ān and the *Ḥadīth* are said to fall under any of the three previously-mentioned categories.[7]

It is claimed that *maṣlaḥah*, which is synonymous with *istiṣlāḥ*, and in which social interest is the main consideration, had been utilized and referred to in decision-making since the early development of Islamic law. Indeed, in any discussion, the proponents of *maṣlaḥah* always call upon the *fatwā*s (formal legal opinions) of the Companions as a precedent and a justification

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[5]Ali, *The Glorious Kur'an*, II: 29, 23.

[6]Ibid., XX: 78, 872.

[7]Zayd, *Al-Maṣlaḥah*, 23-5.

of the validity of *maṣlaḥah* as a basic consideration in legal judgements. However, one has also to mention that the early use of *maṣlaḥah* displayed a certain affinity with the use of *ra'y*.[8] This assertion is based upon the fact that after the Prophet's death, the Companions issued *fatwās* that were not based upon known legal dictums, neither in their derivation nor in the rationale behind them. However, all these *fatwās* seem to have been produced *pro bono publico*. The fact that the word *maṣlaḥah,* as a technical term, was not officially mentioned in the rendering of the *fatwās* or in the works of Mālik (d. 179/795) and Shāfi'i (d. 204/820) does not negate the possibility that this principle was applied by pre-Shāfi'ī jurists.[9] If anything, it indicates that before al-Shāfi'ī *maṣlaḥah* was not formally defined as a valid method of legal reasoning.

B. Classification of *Maṣlaḥah*

Given their role in human affairs, the *maṣāliḥ* are classified into three categories. They are the *ḍarūriyyāt* (essential), *ḥājiyyāt* (appropriate) and *taḥsiniyyāt* (embellishments). All the rulings in the *Sharī'ah* aim at the realization of these *maṣāliḥ*, according to their degree of importance. Hence, the *ḍarūriyyāt* stand in the foremost position since people's lives depend upon them, and since their abandonment will ultimately lead to hardship. As such, this kind of *maṣlaḥah* should be protected against any real or unexpected threat that may undermine its position.[10] In the second place, stand the *ḥājiyyāt* which complement the existence of the

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[8]Muhammad Khalid Masud, *Islamic Legal Philosophy* (Islamabad: Islamic Research Institute, 1977), 150.

[9]Rudi Paret, "Istiḥsān and Istiṣlāḥ," *Encyclopedia of Islam*, New Ed. (Leiden: E. J. Brill, 1978), IV, 257.

[10]Al-Shāṭibī, *Al-Muwāfaqāt*, II, 4-9.

maṣāliḥ ḍarūriyyāt. However, unlike their former counterpart, the absence of these *maṣāliḥ* will not lead to destruction, even if they lead to hardship. The last *maṣāliḥ* are the *taḥsiniyyāt* which are also known as *kamaliyyāt* (complementary), and which aim at the embellishment of people's lives. They include noble habits, ethical concepts and morality.[11]

When viewed in relation to its role as a legal reference, *maṣlaḥah* can be divided into three categories; namely, *maṣlaḥah mu'tabarah, mulghāt* and *mursalah.* This division is based upon a textual authority.

1. *Maṣlaḥah Mu'tabarah*

This is the kind of *maṣlaḥah* for which the Lawgiver has explicitly upheld and enacted laws for its realization.[12] Cases in point are the punishments prescribed for the protection of human life and values. They include *jihād*, for instance, which was enacted for the protection of life, as well as the penalties for theft, adultery and drinking which were meant to protect human property, dignity, honour and intellect. Indeed, the Lawgiver has determined that violating these values constitutes sufficient grounds for receiving the punishment in question. In these cases, the validity of *maṣlaḥah* is definite and unquestionable, especially as the *'ulamā'* had agreed that protecting such values provides proper grounds for legislation.[13]

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[11]Ibid.

[12]All the kinds of *maṣāliḥ* (the *ḍarūriyyāt, ḥājiyyāt, taḥsiniyyāt*) can be included in this category as long as they are supported by textual sources. Muḥammad Muṣṭafā Shalabī, *Uṣūl al-Fiqh al-Islāmī* (Beirut: Dār al-Naḥḍah al-'Arabiyyah, 1986), 286.

[13]'Abd al-Wahhāb Khallāf, *'Ilm Uṣūl al-Fiqh* (Cairo: Maṭba'at al-Naṣr, 1954), 92-93.

2. *Maṣlaḥah Mulghāt*

This is the *maṣlaḥah* which had been nullified either explicitly or implicitly in the textual sources. A case in point is the *fatwā* of Imām Yaḥyā b. Yaḥyā al-Laythī, a Mālikī jurist, concerning a king who had sexual intercourse, intentionally, with his wife one day in the month of Ramaḍān. In this *fatwā*, al-Laythī decreed that the king should fast for two consecutive months in expiation of his act. In this respect, the jurist had neither followed the view which prefers emancipating a slave to fasting for two consecutive months and feeding the needy, nor another view which gives the offender a choice between these three alternatives. Instead, al-Laythī based his opinion on the assumption that a *kaffārah* (penance) must prevent the sinner from repeating the same mistake twice. Thus, he maintained that emancipating a slave would not have prevented the king from violating the divine law again, since the latter had many slaves and would not have encountered any hardship in atoning for his sin in such a way. Therefore, fasting for two consecutive months seemed a better solution for ensuring the king's abstinence from the same violation, he declared.[14]

Although the *maṣlaḥah mulghāt* may seem *prima facie* beneficial, in reality it is harmful to both the individual and society since it is based on a false assumption (*mawhūmah*). For example, if one were to examine the command concerning the *kaffārah* for breaking one's fast, one would notice that it has universal value and does not differentiate between royalty and

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[14]Zakariyyā Barrī, *Uṣūl al-Fiqh al-Islāmī* (Cairo: Dār al-Nahḍah al-'Arabiyyah, 1982), 141. Najm al-Dīn al-Ṭūfī is one of the few jurists to defend al-Laythī's position. His defence holds that the previously-mentioned idea is valid and that it cannot be condemned as a cancellation of the *Sharī'ah* on the basis of *ra'y*, since the *Ḥadīth* concerning the *kaffārah*, which the other jurists quoted, is a weak *Ḥadīth*. As such, this *Ḥadīth* cannot be said to provide a conclusive proof, and that in the absence of a strong proof, it becomes appropriate to establish a ruling on the basis of *maṣlaḥah*. Al-Ṭūfī, *Mukhtaṣar al-Rawḍah*, III, 216.

laymen. Moreover, the above-mentioned *kaffārah*, which also signifies compensation, does not only aim at preventing the doer from repeating his fault through a drastic measure, as this jurist had assumed, but it also extends beyond that and includes making compensation for one's mistake. Thus, compensation can be realized through drastic measures, just as it can be realized through emancipating a slave, feeding the needy or fasting for two consecutive months.[15]

3. *Maṣlaḥah Mursalah*

This category is neither supported nor nullified by textual evidence. And, unlike the other two categories, which are accepted by almost all jurists, this is the type of *maṣlaḥah* which has been the subject of debate among jurists regarding its validity as an independent source of Islamic jurisprudence. Therefore, we will now proceed to a rather lengthy discussion of this category, as it bears direct relevance to the topic of this thesis.

However, before discussing the polemic over the *maṣlaḥah mursalah*, it is important to keep in mind that this *maṣlaḥah* is not identical with utilitarianism, a concept which holds that any action is good as long as it is useful or beneficial to the greatest number of people. Indeed, all that these two concepts share is the basic assumption that law should be implemented to serve human welfare at large. Nevertheless, both inclinations are grounded on different bases; whereas the utilitarians adopt reason as the main reference in determining the benefit of anything, the proponents of *maṣlaḥah mursalah*, while acknowledging the significant role of reason, still

[15]Barrī, *Uṣūl al-Fiqh*, 141-2.

require that rulings should not lie outside the general principles and objectives of the *Sharī'ah.*[16] In general, there are three trends in Islamic legal theory concerning *maṣlaḥah mursalah.* The first sanctions the validity of this principle when no clear injunction concerning a particular case is available. The Mālikīs and the Ḥanbālīs follow this trend. The second one, on the other hand, categorically opposes this kind of *maṣlaḥah* and refuses to acknowledge it as an independent source of divine law. The Ẓāhirīs, the Shāfi'īs and the Ḥanafīs represent this tendency. Finally, the third tries to limit this principle to cases of absolute necessity. This approach is advocated by al-Ghazālī who links the application of *maṣlaḥah mursalah* to the presence of certain conditions that must be fulfilled by it.[17]

3.1. The Proponents

The Mālikīs, with the exception of Ibn Ḥājib who rejects any method not based on textual authority,[18] and the Ḥanbalīs, approve of *maṣlaḥah mursalah* as a method of legal reasoning. They validate this principle in its own right as long as it fulfils the conditions which complete its propriety. Indeed, among the four schools of law, the Mālikī is the most accepting of *maṣlaḥah mursalah,* followed by the Ḥanbalī.[19]

Mālik and his disciples provide several arguments in justifying this principle. They are:

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[16]'Abd Wahhāb Khallāf, *Maṣādir al-Tashrī' al-Islāmī fīmā lā Naṣṣa fīh* (Cairo: Dār al-Kitāb al-'Arabī, 1955), 76.

[17]Shalabī, *Uṣūl,* 289.

[18]'Aḍud al-Dīn 'Abd al-Raḥmān b. Aḥmad al-Ījī, *Ḥāshiyat al-'Allāmah al-Taftāzānī,* 2 Vols. (Beirut: Dār al-Kutub al-'Ilmiyyah, 1983), II, 289.

[19]Muḥammad b. 'Alī Muḥammad al-Shawkānī, *Irshād al-Fuḥūl ilā Taḥqīq al-Uṣūl* (Beirut: Dār al-Fikr, 1992), 403.

1. All the commands of the *Sharī'ah* contain *maṣāliḥ* for people, and for securing their welfare and preventing anything that can harm them. If in any given situation a particular ruling is based on textual sources (the Qur'ān and *Ḥadīth), ijmā'* or *qiyās,* Muslims must unquestionably accept such a ruling irrespective of its verdict. However, if the *Sharī'ah* is silent on a particular matter, such a concern should be determined on the basis of *maṣlaḥah mursalah,* since a study of the *Sharī'ah* indicates that its commands revolve around the concept of *maṣlaḥah.*[20] Moreover, whenever a *maṣlaḥah* is found in a ruling, such a ruling must become an integral part of the *Sharī'ah* and must be upheld. Neglecting it under such circumstances would be tantamount to neglecting the objectives of the *Sharī'ah.*

2. Social needs and conditions are constantly changing and evolving, and in time, many events may occur and new problems emerge. Inevitably, the dynamics of time will eventually create problems that the primary texts, *ijmā'*, or *qiyās* cannot give a solution to. In such cases, the principle of *maṣlaḥah mursalah* must be taken into consideration, because its denial would close the gate of *ijtihād* and would stop the *Sharī'ah* from guaranteeing the benefits of the *ummah.*[21]

3. The *maṣāliḥ* indicated in the *Sharī'ah* are reasonable, and enable people to comprehend the basic reasons behind the commands and prohibitions ordained by God. This indicates that God permits and even orders people to employ their reason in understanding His commands. Hence,

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[20]Barrī, *Uṣūl al-Fiqh,* 135.

[21]Ibrāhīm Muḥammad Salqīnī, *Al-Muyassar fī Uṣūl al-Fiqh al-Islāmī* (Beirut: Dār al-Fikr al-Mu'āṣir, 1991), 162.

whenever a new case emerges that had not been previously dealt with, jurists should be allowed to deliberate on it, on the basis of other methods of legal reasoning.[22]

4. After the Prophet's death, the Companions faced new situations and problems that had no precedent in the *Sharī'ah*, and in solving these problems, they became aware of the fact that anything that ensures benefit and avoids harm is *maṣlaḥah*. Hence, they often based their judicial opinions on *maṣlaḥah* and adopted this principle despite the lack of textual authority sanctioning it. Abū Bakr, for example, sanctioned the compilation of the scattered records of the Qur'ān, waged a war against the people who refused to pay the *zakāh* (almsgiving) and nominated 'Umar as his successor on the basis of the general good of the *ummah*.[23] Similarly, 'Umar suspended the punishment for theft at a time of famine, despite the clear Qur'ānic ruling concerning the amputation of a thief's hand; a ruling which was not conditional on the presence or absence of any event. Instead, the latter enacted an exceptional ruling that was meant to preserve the *maṣlaḥah* of people who steal because of *ḍarūrah* (necessity). 'Umar also approved of the decision of the Companions to execute a group of people who collectively killed a person.[24] This decision was based on the argument that people's lives would be endangered if the participants in any murder were exempted from *qiṣāṣ*. Thus, one can deduce from the previous examples that the Companions not only took cognizance of *maṣlaḥah mursalah* but also based rulings concerning theft and murder on it.

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[22]Khallāf, *Maṣādir*, 75.

[23]Khallāf, *'Ilm Uṣūl*, 86.

[24]Zayd, *Al-Maṣlaḥah*, 52.

At this point, it is worth mentioning that, in line with other Muslim jurists, the Mālikīs do not promote *maṣlaḥah mursalah* in matters related to the *'ibādāt* (devotional matters). Instead, they restrict its application to the *mu'āmalāt* (affairs of daily life). The reason being that the *'ibādāt* have been, for the most part, succinctly defined by the *Sharī'ah,* which regulates man's relationship to his creator. As such, these dictums cannot be reasoned out and should be accepted as they are.[25] By contrast, the *mu'āmalāt* rulings were not prescribed in detail in the textual sources. Instead, the *Sharī'ah* laid more emphasis on their objectives and purposes, rather than on the means of their attainment. This establishes the fact that the importance of rulings related to the *mu'āmalāt* lies in the purpose which causes their enactment, not in the form of their implementation. And, by extension, it also becomes clear that to achieve such a purpose, a ruling must change and adapt according to the particular characteristics that govern every case.

In exercising *maṣlaḥah mursalah,* the Mālikīs require the presence of several conditions that warrant its use. The first is that the *maṣlaḥah* should be construed upon grounds of reason, i.e., it should be accepted by human reason and should not be rejected as an abnormality. The second is that it should be in harmony with the spirit of the *Sharī'ah* and should not contradict any of its sources. Finally, this *maṣlaḥah* should pertain to the *ḍarūriyyāt* (essentials and necessities), and not to matters of luxury. In other words, it must prevent or remove hardships from people.[26]

Having briefly discussed the concept of *maṣlaḥah mursalah,* as expounded by the Mālikī

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[25]Al-Shāṭibī, *Al-Muwāfaqāt,* II, 222.

[26]Abū Isḥāq Ibrāhim al-Shāṭibī, *Al-I'tiṣām,* 2 Vols. (Beirut: Dār al-Kutub al-'Ilmiyyah, 1991), II, 364-7.

jurists, we may now turn to an investigation of some of Mālik's *fatwās* that were established according to the principle of *maṣlaḥah mursalah*. One of these is the allowance of a *bay'ah* (formal acknowledgement of a leader) to a less suitable person, who imposes himself as Caliph, despite the presence of a fellow Muslim who fulfils all the requirements of the ideal Caliph. The rationale for this *fatwā* was that the stability of the state and the avoidance of strife and contention should be maintained at all costs. To illustrate this point, one may cite the anecdote which claims that once a certain 'Umarī came to Mālik and asked the latter to give him the *bay'ah* for Mecca and Medina, especially after witnessing the conduct of Abū Ja'far, the contemporary ruler. Mālik then answered 'Umarī in the following terms:

> "Do you know what prevented 'Umar ibn 'Abd al-'Azīz from appointing a good person as his successor?" 'Umarī said "No." Mālik then answered "But, I know. He realized that if he were to change the order of succession, Yazīd would have no alternative but to rebel against him and consequently, there would be chaos and no chance of remedying the situation."[27]

Moreover, in judicial matters, one of the prerequisites of becoming a witness is *'adālah* (justice), which is only required of adults. Mālik, however, permits children to testify against one another in cases where no adult is present. He bases this opinion on the argument that if the child's testimony were rejected, the safety of other children would not be guaranteed; and safety is an objective of the *Sharī'ah* that must be preserved at all costs.[28] Lastly, it must be stated that this jurist was instrumental in issuing a number of *fatwās* that took the *maṣālih* of the people as

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[27]Ibid., 363.

[28]Mālik b. Anas, *Al-Muwaṭṭa'*, 2 Vols. (Cairo: Dār Iḥyā' al-Kutub al-'Arabiyyah, 1951), II, 111.

their main criteria and point of reference.

Not surprisingly, Mālik has not escaped criticism for applying this principle. He has been criticized, for example, for neglecting the general meaning of the textual sources. However, he has not been without supporters either, such as Muḥammad Sa'īd Ramaḍān al-Būṭī, a modern scholar, who defends Mālik's position in his *Ḍawābiṭ al-Maṣlaḥah*. The former does so by analyzing some of the latter's *fatwās* in great detail. Al-Būṭī maintains, for example, that the *fatwā* permitting a woman to abstain from breast-feeding her baby without any reasonable cause, or because of her husband's dislike of her, is compatible with the Qur'ānic texts, since the verse concerning this issue does not delineate an obligation on the woman's part to breast-feed her baby. This obligation is, in fact, only an *'urf* and not a religious requirement, he argues.[29] If Mālik allows her not to breast-feed her baby, he does so in the manner of clarifying a *mujmal* (general) text by *'urf*.[30] Moreover, al-Būṭī analyzes a number of other *fatwās* by Imām Mālik which seem to contradict the general meaning of the revealed text. Cases in point are the approval of killing a *zindīq* (unbeliever) who had declared a commitment to convert to Islam, and the *fatwā* allowing soldiers to eat beef and lamb during a war and before the distribution of the booty. However, we will not delve here into these issues. Rather, it is important for us at this stage to note that al-Būṭī's explanation shows that Mālik and his followers did not neglect the textual sources, *ijmā'* or *qiyās* in their application of *maṣlaḥah mursalah*, and that they only upheld the latter in the absence of the former three principles.

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[29]Muḥammad Sa'īd Ramaḍān al-Būṭī, *Ḍawābiṭ al-Maṣlaḥah fī al-Sharī'ah al-Islāmiyyah* (Beirut: Mu'assasat al-Risālah, 1977), 340.

[30]Ibid.

To safeguard the correct application of this principle, certain conditions had been suggested. These conditions were meant to restrict the use of arbitrary opinion and were neither rigid to the extent of hindering the machinations of the law, nor too flexible to the extent of distorting the true teachings of the *Sharī'ah*.

In accordance with the Mālikis, the Ḥanbalīs too approve of *maṣlaḥah mursalah* as a legitimate method for understanding the divine law. Although Aḥmad b. Ḥanbal (d. 241/ 855), the founder of this school, does not define this principle explicitly, he does not reject it as a source of law either. Indeed, in his legal theory he only adopts five sources, namely: 1) the textual sources; 2) the *fatwā*s of the Companions of the Prophet; 3) selection from the opinions of the Companions; 4) *Ḥadīth mursal* (a report of a saying of the Prophet which lacks a link in the chain of transmission); and, 5) *qiyās*.[31] *Maṣlaḥah mursalah* appears under the last category, *qiyās*, which he uses as an umbrella category covering a wide range of concepts. Thus, his followers later adopted this principle as an independent means of interpreting the *Sharī'ah*, and sanctioned such an adoption by tracing this principle back to their Imām.[32] Therefore, in order to discuss their ideas we have to discuss the ideas of the leading Ḥanbalī jurists, who lived during or after al-Ṭūfī's life. We must do so because these early scholars seem to have discussed this principle far more clearly than their successors.

Ibn Taymiyyah (d. 728/1328), a renowned Ḥanbalī *mujtahid*, maintains that in determining whether an act is permitted or forbidden, one has to analyze its benefit and its harm. If its harm

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[31]Shams al-Dīn Abī 'Abd Allāh Muḥammad b. Qayyim al-Jawziyyah, *I'lām al-Muwaqqi'īn*, 4 Vols. (Cairo: Maṭba'at al-Sa'ādah, 1955), I, 29-32.

[32]Al-Būṭī, *Ḍawābiṭ*, 369.

is greater than its benefit, the act must be *ḥarām* (forbidden), since God would never reveal a thing that harms people. Allowing such an injurious deed would contradict many principles that call for the "removal of hardship", as well as the concept of *rukhṣah* (concession).[33] This statement highlights the importance of *maṣlaḥah mursalah* in Ibn Taymiyyah's reasoning, even though he does not totally accept this principle.[34] Rather, his position seems to lie between total acceptance and rejection of the previously mentioned concept. In addition, when one analyzes the principle of *sadd al-dharā'i'* (blocking the means),[35] a theory that Ibn Taymiyyah supported, one will notice that this principle too aims at securing the good and preventing the harmful.

Following in Ibn Taymiyyah's footsteps, his disciple, Ibn Qayyim al-Jawziyyah (d. 1350 A.D.), also elaborates upon the importance of *maṣlaḥah mursalah* in his legal reasoning, and

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[33]Zayd, *Al-Maṣlaḥah*, 56-7.

[34]This jurist asserts that if human reason finds *maṣlaḥah* in a certain case, which is not supported by the *naṣṣ*, two possibilities will emerge; either that the *Sharī'ah* is misinterpreted or that it is not really useful. Taqī al-Dīn Aḥmad b. al-Ḥalīm b. Taymiyyah, *Majmū' al-Rasā'il wa al-Masā'il*, 5 Vols. (Beirut: Dār al-Kutub al-'Ilmiyyah, 1992), IV, 176.

[35]This principle wishes to prevent any *mafsadah* before it actually occurs and to provide a means for *maṣlaḥah*. In seeking *maṣlaḥah*, Ibn Taymiyyah suggests the method of the -to borrow Laoust's term- "arithmetic of profits and risks" which means that the *maṣlaḥah* involved in anything should outweigh all possible disadvantages to it. See Malcolm Kerr, *Islamic Reform: The Political and Legal Theories of Muḥammad 'Abduh and Rashīd Riḍā* (Los Angeles: University of California Press, 1966), 87-8. A case in point is a story about Ibn Taymiyyah which reports that during the Tatar invasion this jurist once passed by, with some of his companions, a group who were drinking alcohol and that one of his friends wanted to reprimand these drunkards. However, Ibn Taymiyyah prevented him from doing so. The latter's rationale was that God prohibits strong drinks because they divert people from God and from prayer; however, strong drinks in that case divert these people from murder, the kidnapping of children and plunder. Therefore, leaving them to drink halts a worse action. Ṣubḥī Maḥmaṣānī, *The Philosophy of Jurisprudence in Islam*, trans. by Farhat J. Ziadeh (Leiden: J. Brill, 1961), 117.

attributes it to Aḥmad b. Ḥanbal.[36] He contends that all matters included in the *mu'āmalāt* are based upon the principle of "securing benefit and removing harm".[37] He also attempts to illustrate the importance of this principle in his book, *I'lām*. He does so by demonstrating how various commands are based on certain reasons, which he calls *ḥikmah* or *maṣlaḥah*. He says:

> The foundations of the *Sharī'ah* are based on the *ḥikam* and *maṣālih al-'ibād* (human welfare), in this world and in the hereafter. The *Sharī'ah* is all justice, kindness, *maṣālih* and *ḥikmah*. Hence, any case which moves from justice to injustice, from kindness to apathy, from *maṣlaḥah* to *mafsadah*, or from wisdom to absurdity, is not part of the *Sharī'ah*, even if it had entered it by *ta'wīl* (interpretation).[38]

The above statement seems to indicate that Ibn Qayyim allows for changes in *fatwās* according to changes in time and place. Moreover, although Ibn Qayyim does not mention the term *maṣlaḥah mursalah* explicitly, many of his *fatwās* are, indeed, based on this principle, as clearly indicated by his idea of *al-siyāsah al-shar'iyyah*. Ibn Qayyim also quotes Ibn 'Āqil's statement to the effect that:

> The permissibility of *siyāsa shar'iyya* in a sultanate has been generally accepted on grounds of its effectiveness. No imam has failed to hold this. Thus a Shāfi'ite has said, "no *siyāsa* except that which conforms to the Law," and we reply, "*siyāsa* is an act done which brings people closer to virtue and removes them from corruption, even though it was not prescribed by the Prophet nor by any revealed message. So if you mean by saying 'that which conforms to the Law' that nothing enunciated in the Law should contradict it, you are right; but if you mean that there is no *siyāsa* except that which the Law does enunciate, you are mistaken, and have [implicitly] ascribed error to the Companions of

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[36]Al-Būṭī, *Ḍawābiṭ*, 369.

[37]Ibid.

[38]Ibn Qayyim, *I'lām*, I, 14

the Prophet themselves.[39]

Furthermore, numerous sources indicate that the Ḥanbalīs had adopted *maṣlaḥah mursalah* as a method of legal reasoning.[40] Indeed, a careful analysis of Ibn Ḥanbal's *fatwās* reveals the significant role this principle had played in his legal theory. For instance, this Imām called for the expulsion of corrupt and immoral persons to a country where their evil would cause no harm to the Muslim community. Also, in spite of the clear *ta'zīr* (punishment) stipulated for a drinker of *khamr* (alcohol), Ibn Ḥanbal declared that the *ta'zīr* should be made more severe for those who drink *khamr* during the month of Ramaḍān. He also allowed parents to give a *hibah* (a gift) to one or more of their children, as long as there is a reason for doing so, such as disability, poverty, blindness or a preoccupation with the pursuit of knowledge. Ibn Ḥanbal also permitted the withholding of an inheritance from one or more of one's children if they are corrupt, would use the money for unlawful purposes or for something which will lead them to *ma'ṣiyyah* (disobedience).[41]

In applying this principle, the Ḥanbalīs, like the Mālikīs, also lay down some conditions. In order for the *maṣlaḥah mursalah* to be approved, they believe that it should be: 1) in conformity with the objectives of the *Sharī'ah*; 2) rational and acceptable to sound intellect; and 3) in the scope of the *ḍarūriyyāt*, i.e. that people will be in grave trouble if the *maṣlaḥah* is not

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[39]Shams al-Dīn Abī 'Abd Allāh Muḥammad b. Qayyim al-Jawziyyah, *Al-Ṭuruq al-Ḥukmiyyah fī Siyāsat al-Shar'iyyah* (Cairo: 1953), 13, as quoted in Kerr, *Islamic Reform*, 88.

[40]'Abd Allāh b. 'Abd al-Muḥsin al-Turkī, *Uṣūl Madhhab al-Imām Aḥmad* (Riyāḍ: Maktabat al-Riyāḍ al-Ḥadīthah, 1977), 425.

[41]Zayd, *Al-Maṣlaḥah*, 58.

applied.[42]

3.2. The Opponents

Unlike the Mālikīs and the Ḥanbalīs, Ibn Ḥazm (d. 456/1065) and other Ẓāhirīs did not accept *maṣlaḥah mursalah* as a method of reasoning since they limit the sources of the *Sharī'ah* to the Qur'ān, *Ḥadīth* and *ijmā'* only. In Ibn Ḥazm's works, among them *al-Iḥkām fī Uṣūl al-Aḥkām* and *al-Muḥallā*, one senses his devotion to maintaining the universality and completeness of the basic sources of Islamic law. To him, deriving rulings from external sources is tantamount to attributing incompleteness to the divine law.

Indeed, this outstanding Ẓāhirī jurist categorically rejects any speculative evidence in juristic matters. It is not permissible for anyone to decide a legal matter on the basis of *ra'y*, he argues.[43] Thus, based on this very reason, he opposes the use of *maṣlaḥah mursalah* and other methods of extracting rules, such as *qiyās* (analogical reasoning) and *istiḥsān* (judicial preference). In this respect, he is against the majority of Muslim jurists who, regardless of whether they admit *maṣlaḥah mursalah* as a valid source or not, still approve of the prominent role reason plays in deducing rulings when no clear injunction has been provided in the revealed texts. Indeed, many have argued that reason must be resorted to in finding difficult *'illah*s (causes), and in taking other consideration into account. Alas, such flexibility of approach was repugnant to Ibn Ḥazm and the Ẓāhirī viewpoint that he represented.

Hence, to prove his point of view, this Andalusīan jurist cited some Qur'ānic verses and

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[42]Ibid, 60.

[43]Muḥammad Abū Zahrah, *Ibn Ḥazm*, (Cairo: Dār al-Fikr al-'Arabī, n.d.), 32.

*Ḥadīth*s, such as "Obey God, and obey the Apostle, and those charged with authority among you. If ye differ in anything among yourselves, refer it to God and His Apostle."[44] This verse clearly shows that the Qur'ān, *Ḥadīth* and *ijmā'* are the only sources of law, he argues. Moreover, if there is no known opinion concerning any particular issue, Ibn Ḥazm believes that it should be referred to the first two sources only, because they embrace all matters in human life. In this case, he advocates solving disputes by recourse to the Qur'ān and *Ḥadīth*. Unfortunately, his legal theory remains silent and non-committal with regards to controversial issues that were not mentioned in the Qur'ān or the *Sunnah*.

Concerning the practice of the Companions, he also quotes some of their sayings which oppose the use of *ra'y*. A case in point is 'Umar b. al-Khaṭṭāb's saying: "beware of the people of *ra'y* because they are the enemies of the *Sunnah*."[45] Furthermore, Ibn Ḥazm analyzes and attacks some *Ḥadīth*s, which were adopted by the proponents of *ra'y* as justifying their method. For instance, the well-known *Ḥadīth* about Mu'ādh b. Jabal was used by Ibn Ḥazm to negate the use of *ra'y*. The *Ḥadīth* reads as follows:

> When a Messenger of God sent Mu'ādh to Yaman, he asked Mu'ādh: "How do you give a legal decision when a case is presented to you?" Mu'ādh answered: "I give a decision based on the Book of God." Then the Prophet asked: "And if you do not find it in the *Sunnah* of the messenger of God nor the Book of God?" Mu'ādh said: "I exercise my personal opinion and spare no effort." The Prophet struck his chest and said: "Praise be to God who has granted success to the messenger of the Messenger of God."[46]

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[44]Ali, *The Glorious Kur'an,* IV: 59, 198.

[45]Muḥammad 'Alī b. Aḥmad b. Ḥazm, *Al-Iḥkām fī Uṣūl al-Aḥkām*, 8 Vols. (Beirut: Dār al-Kutub al-'Ilmiyyah, n. d.), VI, 218.

[46]Abū Dāwūd, *Sunan Abī Dāwūd*, 4 Vols. (Beirut: Maṭba'at al-'Aṣriyyah, n. d.), III, 303.

Unlike most jurists who adopted this *Ḥadīth* as an important base in justifying the use of *ra'y*, Ibn Ḥazm rejected its validity. He believed that this *Ḥadīth* was unsound because its transmitter, al-Ḥārith ibn 'Umar, was unknown. To support his view, Ibn Ḥazm cited al-Bukhārī's statement that al-Ḥārith is not known in any but the previously mentioned *Ḥadīth*.[47]

In order to arrive at *Sharī'ah* rulings, therefore, Ibn Ḥazm suggests a legal hermeneutical approach which examines the expressions of the text and their significance, and which quite severely rejects any other secondary sources of Islamic law, in particular *maṣlaḥah mursalah*. Although Ibn Ḥazm acknowledges in his *Iḥkām* that one can find certain *'illah*s in many rulings, he does not accept that all rulings are revealed for certain *asbāb* (reasons). In fact, he only admits the ones that are clearly mentioned in the texts and repudiates all others. People are not allowed to go beyond these or to ask why God reveals them, he affirms. All of them are *al-dīn al-maḥḍah* (pure religious affairs) and cannot be negotiated.[48] God says: "He cannot be questioned for His act, but they will be questioned (for theirs)."[49]

Many scholars disagreed with Ibn Ḥazm's approach which, according to them, was too limited and narrow. Among them is the modernist Abū Zahrah who contends that Ibn Ḥazm's method seems to ignore the fact that God mentions the *'illah* behind some of His commands. They are cited for no other reason than to show that the Lawgiver allows us to utilize our reason for new cases and to apply old rulings to new problems which contain similar *'illah*s, Abū Zahrah contends. In addition, the Ẓāhirī's approach does not differentiate between an *'illah* of a ruling

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[47]Ibn Ḥazm, *Al-Iḥkām*, VI, 211.

[48]Ibid., VIII, 605.

[49]Ali, *The Glorious Kur'an*, XXI: 23, 826.

and an *'illah* of a *fi'l* (act) of God. Whereas the former is not only permissible but also recommended in order to maintain the universality of Islamic law, the latter is neither necessary nor recommended.[50]

Furthermore, Ibn Ḥazm's insistence on prohibiting the use of *ra'y* fails to meet the challenges of new socio-religious problems because, by confining the understanding of God's rulings to the literal meaning of the textual sources, he allows many new situations to be solved by means outside the scope of the *Sharī'ah.*

Unlike Ibn Ḥazm, most Shāfi'ī jurists, who also do not adopt *maṣlaḥah mursalah*, take a more flexible approach towards *ra'y* and *qiyās*. In this regard, they are more flexible than the Ẓāhirīs. But even though al-Shāfi'ī and his followers approve of the use of *ra'y*, they confine it to *qiyās* and disapprove of all other methods of reasoning which they categorize as *istiḥsān*. In his *al-Risālah,* al-Shāfi'ī considers the application of *istiḥsān* to be an arbitrary method. Moreover, the proponents of this principle, to him, base themselves on what is agreeable to their reason, without having any basis in either the revealed texts or *qiyās* for such a position.[51] As such, it becomes clear that al-Shāfi'ī rejects *maṣlaḥah mursalah.* This can be seen from his declaration that:

> If he [the scholar] were to give an opinion based neither on a binding narrative nor on analogy, he is more liable to commit a sin than an ignorant person is, if it were permissible for the latter to give an opinion. For God has not permitted any person since the Prophet's time to give an opinion except on the strength of established [legal] knowledge. [Legal] knowledge [after the Prophet's death] includes the Qur'ān, the sunna,

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[50]Abū Zahrah, *Ibn Ḥazm*, 396.

[51]Muḥammad b. Idrīs al-Shāfi'ī, *Al-Risālah*, trans. by Majid Khadduri, 2nd ed. (Cambridge: The Islamic Text Society, 1987), 305.

consensus, narrative, and analogy based on these [texts].[52]

To al-Shāfi'ī, applying any method other than the previously mentioned would be tantamount to rejecting the revealed texts as the only sources of law. To him the application of *maṣlaḥah mursalah*, for example, indicates an admission that God does not protect the *maṣālih* of all people, and disregards the saying "Does man think that he will be left uncontrolled (without purpose)?"[53]

In addition, al-Shāfi'ī cites the Prophetic tradition saying: "Whatever Allah wanted you to do I did not neglect to order you to do so, and whatever He wanted you to abstain from I forbade you to do it."[54] This *Ḥadīth*, he believes, was consolidated by the Prophet's practices which indicate a prohibition against the use of *istiḥsān*, irrespective of whether such opinion is based on *maṣlaḥah mursalah* or not. In cases where there are no clear injunctions in the revealed text, the Prophet usually remained silent until revelation came to him. He also disapproved of a Companion who killed an unbeliever who had converted to Islam during a war. The Companion, thinking that the latter had converted in order to escape death, presumably acted in the best interests of the community. Al-Shāfi'ī argues that had *ijtihād* been permitted without reliance on the texts or *qiyās*, the Prophet would have approved of the Companion's action.[55]

The application of *maṣlaḥah mursalah*, accordingly, also leads to uncertainty and a lack

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[52]Ibid., 307.

[53]Ali, *The Glorious Kur'an*, LXXV: 36, 1653.

[54]Muḥammad b. Idris al-Shāfi'ī, *Al-Umm*, 7 Vols. (Cairo: Maṭba'at al-Kubrā al-Amiriyyah, 1325 A.H.), VII, 271.

[55]Ibid., VI, 205.

of uniformity in the *Sharī'ah*. When jurists are allowed to consider *maṣlaḥah mursalah*, a particular case may attract different rulings since it had not been decided upon by a uniform standard.[56]

Al-Shāfi'ī and his followers seem to advocate the derivation of all rulings from the revealed texts and confine the jurists' interpretation to the boundaries of *qiyās*. This was probably done in an effort to portray the *Sharī'ah* as the perfect legal paradigm, and to restrict legal reasoning to the framework of Islamic sources. However, it is impossible that all new cases should be similar to those of the *uṣūl* (the principal rulings) on which a *qiyās* had been exercised.

Realizing the difficulty of confining the sources of Islamic law to textual sources, *ijmā'* and *qiyās*, some of Shāfi'ī's followers later adopted a more flexible position. They include Imām Ḥaramayn al-Juwaynī (d. 438/1047) who asserts that al-Shāfi'ī upheld *maṣlaḥah mursalah* when a *maṣlaḥah* was akin to (*shabah*) *maṣlaḥah mu'tabarah*.[57] Like Juwaynī, Ibn 'Abd al-Salām (d. 1279 A.D.) also modified his point of view concerning *maṣlaḥah mursalah*. The latter affirmed that "anyone who studies the objectives of the *Sharī'ah* in securing *maṣāliḥ* and avoiding *mafāsid* will be convinced of the fact that the *maṣlaḥah* should not be neglected and that the *mafsadah* should be avoided, even if the law is not derived from *ijmā'*, textual sources or *qiyās*."[58] In addition, Ibn 'Abd al-Salām does not confine the use of *maṣlaḥah mursalah* to cases where it is imperative to do so (*ḍarūriyyāt*). A case in point is his *fatwā* that if a country is found to be

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[56]Ibid., 273.

[57]Muḥammad Abū Zahrah, *Mālik* (Cairo: Maktabat al-Anjlū al-Miṣriyyah, 1936), 403; Zayd, *al-Maṣlaḥah*, 39.

[58]'Izz al-Dīn 'Abd al-'Azīz b. 'Abd al-Salām al-Sulamī, *Qawā'id al-Aḥkām fī Maṣāliḥ al-Anām*, 2 Vols. (Cairo: Maṭba'at al-Istiqāmah, n. d.), II, 160.

replete with *ḥarām* and devoid of *ḥalāl*, Muslims are allowed to derive benefit from it even if there is no imperative need to do so. This *fatwā* was issued in order to secure Muslims from weaknesses and to protect Muslim lands from unbelievers.[59] Therefore, in this respect Ibn 'Abd al-Salām's position is not very different from that of the Mālikīs.

Thus, it is not without reason that al-Qārāfī, a Mālikī jurist, contends that in practice the Shāfi'īs had also adopted *maṣlaḥah mursalah* as a method of legal reasoning. He argues that if one studies the various schools of law, one will find that "when they exercise analogy or combine two questions or differentiate between them, they do so depending on the case and do not require particular evidence (*shāhid*). This is what we call *maṣlaḥah mursalah*."[60] The concept of *maṣlaḥah mursalah* was brought under the fold of *qiyās* when it was feared that it would be abused by rulers in justifying their personal whims and ambitions.[61] This view is also adopted by a modern scholar, Rashīd Riḍā (d. 1935 A.D.) who introduced a reformation of the political structure that was meant to limit the ruler's abuse of power. To Riḍā, this is preferable to denying the principle of *maṣlaḥah mursalah* or to narrowly restricting the derivation of legal ordinances from it.[62]

The Mālikīs tend to regard certain elements of Shāfi'ī's legal theory as unrealistic, thus, violating their own principles in the process. However, one must declare that within the confines

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[59]Zayd, *Al-Maṣlaḥah*, 41.

[60]Aḥmad b. Idrīs al-Qarāfī, *Sharh Tanqīḥ al-Fuṣūl fī Ikhtiṣār al-Maḥṣūl fī al-Uṣūl* (Cairo: Dār al-Fikr, 1973), 446.

[61]Muḥammad Rashīd Riḍā, *Yusr al-Islām wa Uṣūl al-Tashrī' al-Āmm* (Cairo: Maṭba'at Nahḍat Miṣr, 1956), 74.

[62]Ibid., 75.

of judicial methods, the Shāfi'īs' positivistic system works well because it can answer all questions of a legal nature. This is because of the link they establish between the other methods of legal reasoning and *qiyās*, which unifies all rulings and makes every new deduction have a specific link to the *Sharī'ah*. However, when difficult cases and new circumstances arise, this system fails to meet the challenges imposed on it because it is too mechanical. Moreover, it refuses to take social interest into consideration, and negates the possibility of deducing rulings from the general intent of the Law. Consequently, this method cannot explain the growth of or the dynamic changes necessary to law.[63]

Al-Qarāfī's claim is also supported by the claims of those who say that al-Shāfi'ī and his followers based some of their *fatwās* on *maṣlaḥah mursalah* without relying on any Islamic sources. Some examples are illustrated below.

Firstly, al-Shāfi'ī, like the Mālikīs, permits the killing of a group of people who jointly murdered a person, in spite of the lack of evidence concerning this issue. Whereas Mālik considers this a form of retaliation designed to protect human life, regardless of whether the murderer is a single person or a group of persons, al-Shāfi'ī, on the other hand, asserts that he adopts this view on the basis of an opinion by 'Umar. However, when this *fatwā* is analyzed one finds that 'Umar based his notion on *maṣlaḥah mursalah* and not on a revealed text.[64] In another instance, the Shāfi'īs allow Muslims to destroy animals and plants during a war in order to cripple their opponents, who are unbelievers, on the economic level, despite the absence of textual

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[63]Ihsan A. Bagby, "The Issue of *Maṣlaḥah* in Classical Islamic Legal Theory," *International Journal of Islamic and Arabic Studies*, 2 (1985), 9; Masud, *Islamic Legal*, 160.

[64]Al-Shāṭibī, *Al-I'tiṣām*, II, 361.

evidence concerning this particular case. Similarly, al-Shāfi'ī also agrees with Mālik that in the land of the unbelievers, Muslim soldiers can consume the spoils of war for their personal usage, before these spoils are officially distributed. And, even though there is a *Ḥadīth* which disapproves of this act, these scholars validate this right in the light of the *maṣlaḥah* of the soldiers who would otherwise face hardship. This argument, nevertheless, is not connected to *ḍarūrah* (necessity).[65]

Although many sources report that the Ḥanafīs did not adopt *maṣlaḥah mursalah* in their legal theory, one finds this difficult to believe in light of Abū Ḥanīfah's (d. 150/767) and his followers' adherence to *istiḥsān*. However, before discussing their view of this *maṣlaḥah*, it is important to present their concept of *istiḥsān*.

Istiḥsān is a branch of *ijtihād* which plays a significant role in the adaptation of Islamic law to the dynamics of social evolution. Literally, *istiḥsān* means "to approve or to deem something preferable."[66] In the juristic sense, it is "a method of exercising personal opinion in order to avoid any rigidity and unfairness that might result from the literal enforcement of the existing law."[67] It is used as an instrument for improving the existing laws and for ridding them of impractical and undesirable elements. In other words, *istiḥsān* is an extended version of *qiyās*, which is only applied after the latter analogy fails to meet the required social demands. Sarakhsī defines this principle as "a method that abandons and adopts whatever is better and more suitable for people. *Istiḥsān* is also said to be an endeavour for simplicity and ease in legal regulations

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[65]Zayd, *Al-Maṣlaḥah*, 43.

[66]Ibid., 246.

[67]Ibid.

that apply to both the privileged and the unprivileged."[68]

The above definition indicates the prominent role of *maṣlaḥah mursalah* in the application of *istiḥsān* since, in seeking *maṣlaḥah,* the proponents of this principle put aside *qiyās* and adopt a reason which may not be derived from a clear-cut method of reasoning. The affirmation of *istiḥsān* as a hidden *qiyās*, according to Rashīd Riḍā, is only a circumvention designed to avoid the accusations of the *ahl al-Ḥadīth* (the people of *Ḥadīth*) that *istiḥsān* promotes personal opinion as an independent source of law.[69] This being the case, Malcolm Kerr contends that:

> The appeal of utility, if it is to be made at all, is most congenial to the revealed-law concept of the *Sharī'a* when at least an attempt is made to show that the utility in question is an object of the law itself. The failure of the Ḥanafī proponents of *istiḥsān* to do this to justify their avoidance of *qiyās* in each case by reference to a specific *maṣlaḥa*-exposed them to the charge of "legislating."[70]

Examples of *istiḥsān* that are devoted to *maṣlaḥah mursalah* are illustrated below. It is narrated from Abū Yūsuf (d. 798 A.D.) that Abū Ḥanīfah said that if Muslims acquire a large quantity of booty (*ghanā'im*) and animals that they cannot carry with them, they are allowed to kill the animals and to burn the booty and the meat of the animals, the reason being that it is hateful to leave the booty for unbelievers to make use of. This *fatwā* was exercised in the light of the *maṣlaḥah* of Muslims and by way of preventing a *mafsadah* that would result from the

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[68]Al-Būṭī, *Ḍawābiṭ*, 382.

[69]Muḥammad Rashīd Riḍā, Ed., *Al-Manār*, 35 Vols. (Cairo: Maṭba'at al-Manār, 1898-1935), IV, 211, 860.

[70]Kerr, *Islamic Reform*, 90.

unbelievers' consumption of the animals and the booty.[71] This Imām also allowed the Banū Hāshim to receive a portion of *ṣadaqah* (almsgiving) despite the existence of *Ḥadīth*s prohibiting them from doing so. Among these traditions are the *Ḥadīth* narrated by Muslim that the Prophet had said "*Ṣadaqah* is not proper for the family of Muḥammad; because it is the leftovers of others,"[72] as well as the *Ḥadīth* narrated by al-Nasā'ī that "*ṣadaqah* is not allowed for Muḥammad or the family of Muḥammad."[73] This prohibition is due to the fact that the Prophet and his family were already entitled to a special share, one fifth, of any *ghanīmah* (booty) and thus do not need to accept the *ṣadaqah*. It is also clearly mentioned in the Qur'ān that "And know that out of all the booty that ye may require (in war), a fifth share is assigned to God, and to the Apostle, and to the near relatives, orphans, the needy, and the wayfarer...."[74] Moreover, the Prophet had said that one fifth of one fifth is enough for them.[75] Abū Ḥanīfah, however, adopted an *istiḥsān* based on *maṣlaḥah mursalah*, to justify the permission granted to the Banū Hāshim. He based his *fatwā* on the notion that prohibiting the Prophet's family from receiving the *ṣadaqah* would lead to hardship for them since the Prophet's death put an end to their special rights. That being the case, allowing them to receive *ṣadaqah* forms an alternative to their acceptance of the booty, which is also prohibited. As such, by denying them both *ṣadaqah* and booty, the Muslims community will have no other means of helping the Prophet's family. In

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[71]Zayd, *Al-Maṣlaḥah*, 46.

[72]Ibid.

[73]Salqīnī, *Al-Muyassar*, 155.

[74]Ali, *The Glorious Kur'an*, VIII:41, 425.

[75]Salqīnī, *Al-Muyassar*, 155.

addition, if the Prophet's death put an end to his family's specific rights, this condition might also be used to extend to them other rights that they had been previously denied.[76]

The Ḥanafī approach to *maṣlaḥah* is essentially the same as that of the Shāfi'īs since the former do not accept *maṣlaḥah mursalah* as an independent *dalīl* (evidence), but validate it as a variety of *istiḥsān*. However, the position of *maṣlaḥah mursalah* is more important to them than to the Shāfi'īs. In Ibn Nujaym's book, *al-Ashbāh wa al-Naẓāir*, it is said that deterring harm and preventing benefit is an integral Ḥanafī principle of legal reasoning.[77] Muḥammad b. Ḥasan also said that "*mu'āmalāt* (contemporary) affairs are encircled with the existence of *maṣlaḥah* and *mafsadah*. When a case contains something harmful, it should be avoided and when it gives some benefits, it is better for people to uphold it."[78] Lastly, one might venture to declare that Abū Ḥanīfah and his followers, known to belong to the *ahl al-ray'*, did indeed uphold *maṣlaḥah mursalah* as a method of jurisprudence.

3.3. Al-Ghazāli's Idea of *Maṣlaḥah Mursalah*

The principle of *maṣlaḥah mursalah* is also recognized by al-Ghazālī, another Shāfi'ī jurist. He deals with it in more depth and requires three qualities to uphold it: *ḍarūrah* (necessity), *qaṭ'iyyah* (absolute certainty) and *kulliyyah* (universality). Unbelievers shielding themselves with a group of Muslim captives is one example that he cites. He believes that in such a case Muslims will be forced to choose one of the following courses of action: either to attack

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[76]Zayd, *Al-Maṣlaḥah*, 46.

[77]Abū Zahrah, *Mālik*, 403.

[78]Ibid.

the shield, which would inevitably kill the innocent Muslims, or to refrain from attacking which would give the unbelievers an opportunity to advance and conquer more Muslim territory. In such a case, it is necessary to save all the Muslims, not only some of them, he declares. It is *ḍarūrī* to do so because such an action preserves one of the five principles of law, namely, the protection of life. Moreover, this action can be categorized as both a *qaṭ'ī* one, because it is the only method of saving Muslims and as a *kullī* one, because it takes into consideration the whole community, not just a part of it.[79]

In determining *maṣlaḥah*, al-Ghazālī maintains that one should not take cognizance of numbers, but must consider the *maṣlaḥah* of the entire community. As such, he disapproves of upholding *maṣlaḥah mursalah* when the consideration of necessity and certainty are absent. A case in point is a sinking ship, which endangers the lives of all the people on board. In this case, it would be unlawful to throw one person overboard to save the rest since the *maṣlaḥah* is not a universal one; i.e. it only serves a portion of the community.[80]

By declaring that a valid *maṣlaḥah* is the one grounded in necessity, al-Ghazālī is "no longer speaking of *maṣlaḥah mursalah*, but of necessity (*ḍarūrah*), which is a different matter altogether and governed by a different set of rules."[81] Furthermore, by citing "killing innocent Muslims," which is definitely rejected by God, as an example, he leads his discussion to *ḍarūrah* and not to *maṣlaḥah mursalah.*

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[79]Al-Ghazālī, *Al-Mustasfā*, I, 294-6.

[80]Ibid., 296-7.

[81]Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 1991), 278.

To sum up, the notion that the *Sharī'ah* takes full cognizance of all *maṣāliḥ* and that there is no *maṣlaḥah* outside of it is the main argument advanced by those who oppose *maṣlaḥah mursalah*. These opponents try to confine the concept of *maṣlaḥah* to two considerations. The first is theological determinism, which seems to limit this principle to whatever God commands.[82] The Ẓāhirīs represent this trend by maintaining that all *maṣāliḥ* exist in the textual sources and that when the *Sharī'ah* is silent on a matter, the *maṣlaḥah* in it is no more than a *maṣlaḥah wahmiyyah* (doubtful *maṣlaḥah*) and should be refused and disregarded as a valid ground for legislation.[83] The other consideration is methodological determinism which tries to link *maṣlaḥah* to *qiyās*.[84] This tendency is recommended by the Ḥanāfīs and most Shāfi'īs, who validate this principle in the presence of textual indications denoting the *'illah* of a given text or the general objectives of the Lawgiver. These two schools maintain that if a *maṣlaḥah* is a *maṣlaḥah mu'tabarah*, it will automatically fall within the scope of *qiyās*. However, in matters where no such authority could be found in the textual sources, it should be known as *maṣlaḥah mulghāt* and should not be taken for granted.[85]

However, the idea of refusing the concept of *maṣlaḥah mursalah* as mentioned above cannot be faithfully implemented since many new problems are continuously emerging. In such cases, the jurists would inevitably need to go beyond what they already have. Moreover, numerous pieces of evidence indicate that many of the opponents of *maṣlaḥah mursalah*, except

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[82]Masud, *Islamic Legal*, 160.

[83]Khallāf, *'Ilm Uṣūl*, 96.

[84]Masud, *Islamic Legal*, 160.

[85]Kamali, *Principles*, 277.

the Ẓāhirīs, did adopt the principle of this *maṣlaḥah*, even if they refused to acknowledge it.

The Ḥanbalīs and the Mālikīs, on the other hand, apply this principle in solving new juristic problems. They maintain that employing this principle is permissible, as long as it does not contradict the *Sharī'ah.* It is to their credit that, by including *maṣlaḥah mursalah* into their legal theory, they have provided the *Sharī'ah* with a positive instrument in solving on-going socio-juristic problems. In addition, by laying down some conditions regarding its usage, these jurists have confined the implementation of this principle to the basic teachings of the *Sharī'ah.*

CHAPTER TWO

AL-ṬŪFĪ'S CONCEPT OF *MAṢLAḤAH*

The previous chapter was devoted to a discussion of the concept of *maṣlaḥah* in Islamic law before al-Ṭūfī's time. Prior to that time, the *uṣūlists* classified *maṣlaḥah* as either *mu'tabarah, mulghāt* or *mursalah* and required the elements of utility (*maṣlaḥah*) and suitability (*munāsabah*) as the directing variables in the implementation of that principle.[1] In other words, they tried to place the concept of *maṣlaḥah* within the limits of the law. However, although they were in agreement on the position of both *maṣlaḥah mu'tabarah* and *mulghāt*, they disagreed on the *maṣlaḥah mursalah*, since there is no indication in the textual sources as to its validity. Therefore, due to the controversial nature of the latter category, the previous chapter devoted more attention to it than to both the *mu'tabarah* and *mulghāt*. Those in favour of *maṣlaḥah mursalah* believed that its implementation safeguards the flexibility of Islamic law, since the Lawgiver did not always reveal rulings for particular cases. However, scholars also recognized the potential for abuse that this concept might lead to, if scholars were to manipulate it for their own whims and fancies. If this were to happen, corruption and *mafāsid* would certainly ensue and the value upheld in the textual sources would be neglected.

At this point, it is worth mentioning that many scholars placed al-Ṭūfī's conception of *maṣlaḥah* under the broad umbrella of *maṣlaḥah mursalah*. That being the case, one is compelled to ask what their rationale was in doing so. Could they have done so because al-Ṭūfī did not recognize the division of *maṣlaḥah* into three categories? And, if so, what exactly did he

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[1]E. Tyan, "Methodologie et Sources du Droit en Islam," *Studia Islamica*, 10 (1959), 97.

recognize as *maṣlaḥah* and how does it relate to the other sources of the law? All these are questions that this chapter will attempt to answer. The chapter will also elaborate upon al-Ṭūfī's defense of *maṣlaḥah* against the attacks of other jurists.

A. The Scope of *Maṣlaḥah*

Al-Ṭūfī's definition of *maṣlaḥah* is not different from that of the linguists', which was presented in the first chapter. He defines *maṣlaḥah* as a condition of a thing by which a perfect result is achieved.[2] It connotes a cause which leads to the good and the benefit of mankind. For example, trade is recognized as beneficial because it is conducive to prosperity. He also adds that *maṣlaḥah* serves as a means for achieving the objectives of the *Sharī'ah*, which he classifies into two categories. The first category is the prerogative of God, as the supreme Lawgiver, and comprises the *'ibādāt*. The other category is designed for the benefit of man and pertains to the *mu'āmalāt*.[3]

That the *Sharī'ah* was revealed to promote *maṣlaḥah* is a theory al-Ṭūfī maintains throughout his Risālah. This theory is derived from the Qur'ān, *Ḥadīth* and *ijmā'*, which provide

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[2]Najm al-Dīn al-Ṭūfī, "Risālat fī al-Maṣāliḥ al-Mursalah," in Zayd, *Maṣlaḥah*, App., 18-19. This work by al-Ṭūfī, in fact, was not compiled with the specific purpose of discussing the topic of *al-maṣlaḥah al-mursalah* as such; rather, it constitutes a commentary on the *Ḥadīth* "*lā ḍarar wa lā ḍirār*" listed by al-Nawawī in his *Sharḥ al-Arba'īn*. However, the work indeed contains al-Ṭūfī's idea on *maṣlaḥah*. The text is to be found in several publications, such as *al-Manār*, IX, (1324 A.H.), 745-770, with some omissions and commentary by Jamāl al-Dīn al-Qāsimī, Zayd, *Maṣlaḥah*, App. 14-48, and Khallāf, *Maṣādir*, 87-122. This thesis, however, will refer only to Zayd's text, to which Malcolm Kerr in his book, *Islamic Reform*, also refers. As a commentary on the specific *Ḥadīth* mentioned above, al-Ṭūfī did not entitle the work "*Maṣlaḥah*" and the like. Yet, based on the content of the work, some scholars recognize it as the treatise on *maṣlaḥah*. Al-Qāsimī calls the work "Risālat fī al-Maṣāliḥ al-Mursalah." This thesis will refer to this title.

[3]Ibid.

several arguments supporting the existence of *maṣlaḥah* in the *Sharī'ah*. The first of these arguments is that all of God's acts are motivated by particular considerations; God does not act without a reason for his action, because if he were to act without purpose his action would amount to absurdity (*'abath*) and God is beyond absurdity. The Qur'ān, as a source of law, bears witness to this by providing us with the reasons (*'ilal*) for God's actions. A case in point is the verse "(of Our) Sign: the Sign of the Night have We obscured,... and that ye may know the number and count of the years: all things have We explained in detail."[4] It is a fact that whoever commits an act for a particular reason is seeking something which he does not have. This means that until he gets what he wants he is incomplete by himself and needs something outside of himself to make up for his deficiency. And, since imperfection is impossible in God, one can deduce that the above-mentioned argument applies to God's creature only. His acts, which have special purposes, are, indeed, motivated by His wise judgement leading to the benefit and perfection of His creatures while He is the most perfect and sufficient unto Himself.[5]

The second argument is that God has taken it upon himself to promote the welfare of his creatures and to work for their benefit. Such an obligation emphasizes the importance God has placed on the promotion of *maṣlaḥah*.[6] The third argument is that the Lawgiver secures the

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[4]Ali, *The Glorious Kur'an*, XVII: 12, 697.

[5]Al-Ṭūfī, "Risālah," 21.

[6]The Mu'tazilites assert that God is obliged to look after the welfare of His creatures, in return for asking them to worship Him. This is in direct contrast to the Sunnī view which holds that obligation implies the presence of a superior power forcing God to help mankind, and since there is no superior to God, one cannot declare that God is obliged to do anything. Rather, one can say that perhaps God has taken it upon Himself to help people out of kindness.

welfare of man in every situation according to what is appropriate to that particular situation.[7]

The last argument pertains to the presence of evidence concerning the promotion of *maṣlaḥah* in the Qur'ān, *Ḥadīth, ijmā'* and rational inquiry. As such, al-Ṭūfī quotes some Qurā'nic verses, *Ḥadīths* and *ijmā'* pertaining to such issues as *qiṣāṣ* and trade, and which clearly speak in favour of preserving *maṣlaḥah.* As for rational inquiry, he claims that no thinking man (*'āqil*) can doubt that the Lawgiver takes into consideration the *maṣlaḥah* of His people in this world and in the hereafter. Indeed, God has preserved their *maṣlaḥah* starting from His bringing them into being out of nothing, to providing them with the means of sustenance by which they can live.[8]

Besides the above mentioned arguments, al-Ṭūfī maintains that the *Ḥadīth "lā ḍarar wa lā ḍirār"*[9](do not inflict injury nor repay one injury with another) provides a clear indication that *maṣlaḥah* is the first and foremost principle in the *Sharī'ah.* It demonstrates that in the presence of conflicts between this principle and others, *maṣlaḥah* must take precedence over all other considerations.[10] This idea, however, applies to *mu'āmalāt* matters only, and not to the *'ibādāt* or to the specific injunctions and prescribed penalties.

To him, the *'ibādāt* are the prerogative of God, and man, as His creature, cannot decide on how, when and why the *'ibādāt* should be performed. Rather, man must accept what the texts

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[7]Al-Ṭūfī, "Risālah," 23.

[8]Ibid., 23-25.

[9]This *Ḥadīth,* which was narrated from Abū Sa'īd al-Khudrī, is the thirty second *Ḥadīth* listed by al-Nawāwī in his *Arba'ūn.*

[10]Al-Ṭūfī, "Risālah," 17.

and *ijmā'* say about them. If the texts and *ijmā'* endorse one another on any matter of *'ibādāt*, the ruling becomes decisive and must be followed. If, however, there is a conflict between these two sources on any matter, a reconciliation must be reached, preferably without interfering with the integrity of either sources. However, if such a reconciliation is not possible, *ijmā'* should assume precedence over all other indications.[11]

Even though the *ḥudūd* punishments and the other forms of prescribed penalties involve harm to the person they are dealt to, they do not fall within the domain of the *Ḥadīth "lā ḍarar wa lā ḍirār"*, since the textual sources and *ijmā'* are in agreement about such penalties. However, if the injurious element is only incidental and does not have any specific evidence (*dalīl*), it must be eliminated through the process of restrictive interpretation, in order to achieve a level of conformity among the sources.[12]

As for commercial transactions and temporal affairs, al-Ṭūfī maintains that if the texts and *ijmā'* conform to the *maṣlaḥah* of the people, they should be applied forthwith. If, however, they are diametrically opposed to the welfare of the *ummah*, a reconciliation should be achieved if possible; otherwise, *maṣlaḥah* should take precedence over all other injunctions.[13] In this sense,

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[11]In his "Risālah," al-Ṭūfī listed 19 sources of law; they are 1) the Qur'ān, 2) *Ḥadīth*, 3) *ijmā'*, 4) *ijmā'* of the people of Medina, 5) *qiyās*, 6) the sayings of the Companions (*qawl al-ṣaḥābah*, 7)*al-maṣlaḥah al-mursalah*, 8) *istiṣḥāb*, 9) *barā'ah al-aṣliyyah*, 10)*'Āwā'id*, 11) Observation (*istiqrā'*), 12) blocking the means (*sadd al-dharī'ah*), 13) *istidlāl*, 14) *istiḥsān*, 15) *al-akhdhu bi al-akhaff*, 16) *al-'iṣmah* 17) *ijmā' ahl al-Kūfa* 18) *ijmā' al-'atrah* 19) *ijmā' al khulafā' al-arba'ah*. The strongest among them are the textual sources (the Qur'ān and *Ḥadīth*) and the *ijmā'*. Should there be a conflict among these sources, *ijmā'* takes precedence over all other considerations. Ibid., 16-17.

[12]Ibid., 44.

[13]Ibid., 46.

maṣlaḥah becomes the ultimate source of law since it constitutes the goal of the *Sharī'ah*, while the other sources, such as *ijmā'*, *qiyās* and others, become its means. Hence, one can conclude that al-Ṭūfī lays more emphasis on the end results of actions than the means of achieving them.

B. *Maṣlaḥah* Versus the Texts and *Ijmā'*

The importance of the Qur'ān and the *Ḥadīth*, as the basic sources of law, is a fundamental belief among Muslims.[14] Many Muslims affirm that every ruling should be derived from these two primary sources and that the other secondary sources, such as *ijmā'*, *qiyās* and other principles of legal reasoning, should function as methods of deriving laws. Accordingly, the secondary sources cannot establish any law except on the basis of the primary sources, which provide either specific or general rulings; otherwise the law will be regarded as the product of arbitrary opinion and will have no validity. As such, al-Ṭūfī's conception of *maṣlaḥah* may not, as it is derived from a *Ḥadīth*, be considered to be an arbitrary opinion. However, the question

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[14]The validity of *Ḥadīth* as the sayings and deeds of the Prophet had been elucidated by Joseph Schacht in his *The Origins of Muhammadan Jurisprudence* and *An Introduction to Islamic Law*. The latter argues that the early concept of *sunnah*, which was not related to the sayings and deeds of the Prophet, was fabricated by the ancient schools in order to establish a source of authority for their views on jurisprudence. The system of *isnād* (chain of transmitters) used for the authentication of *Ḥadīth* documents has no historical value, he claims. It was only an invention of those scholars who tried to attribute their own doctrines back to the earliest authorities. Thus, this thesis brings the discussion concerning the origins of Islamic law into account and makes a comparison between the approaches of some Muslim scholars and the orientalists. Among the Muslim scholars, one may cite Muṣṭafā al-'Azamī who criticizes Schacht's theory and the latter's disregard of historical manuscripts. 'Azami also states that Schacht derives and concentrates most of his arguments on Shafi'īs writings. Moreover, the arbitrary use of source materials and overgeneralizations are among the reasons behind Schacht's failure in presenting the general historical framework of Islamic law, 'Azami claims. See Muṣṭāfā al-'Azamī, *On Schacht Origins of Muhammadan Jurisprudence* (Riyadh: King Saud University, 1985).

that this gives rise to is whether *maṣlaḥah*, as an evidence based on a *Ḥadīth*, can override the other texts or not. Unfortunately, it is beyond the purpose of this thesis to discuss the authenticity or the validity of *Ḥadīth*s in general as a basic source of law. What is more urgent and important is to analyze the validity of the *Ḥadīth "lā ḍarar wa lā ḍirār"* and to place al-Ṭūfī's method of legal reasoning in relation to it.

In studying Prophetic traditions, Muslim scholars divide the science into two branches; namely, the study of the subject matter (*matn*) and the study of the manner of transmission (*isnād*). In this chapter, we will concern ourselves with the study of *Ḥadīth* from the viewpoint of *isnād*, and in particular, the reliability of narrators.

According to the general rule, the overall acceptability of a *Ḥadīth* is determined by its proof. This being the case, the people of *Ḥadīth (ahl al-Ḥadīth)* will not accept any *Ḥadīth* until it fulfils certain requirements, such as the demand for continuity in the chain of transmission of any *Ḥadīth* (*muttaṣil, musnād*), i.e. that the *Ḥadīth* should have a complete chain of narrators, starting from the last narrators and extending all the way back to the Prophet. These scholars do not approve of a discontinuous *Ḥadīth* (*mursal*), whose chain of narration is broken or incomplete, because they do not know whether the missing link is an upright person or not.[15] Furthermore, an unbroken chain of transmission should furnish some information on the qualifications of each narrator.[16] Indeed, it is on the basis of this personal information that a

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[15]Muḥammad Ḥasan Hītū, *Al-Wajīz fī Uṣūl al-Tashrī' al-Islāmī* (Beirut: Mu'assasat al-Risālah, 1983), 316.

[16]From the viewpoint of their reliability, the narrators of *Ḥadīth* have been graded into seven categories. They are 1) the Companions, who are generally regarded as reliable; 2) *thiqāt al-thābitūn*, those who rank next to the Companions; 3) *thiqāh* (trustworthy), those whose degree is below that of the first two; 4) *ṣādiq* (truthful), the one who is not known to have committed

Ḥadīth is classified as either *ṣaḥīḥ* (sound), *ḥasan* (fair) or *ḍa'īf* (weak).[17]

Muslim scholars advocate acting upon *Ḥadīth*s that are either *ṣaḥīḥ* or *ḥasan* and agree that doing so is obligatory. Should there be a conflict of authority between the *ṣaḥīḥ* and the *ḥasan*, the former takes precedence over the latter, they state, for it is stronger with regards to its reliability and the completeness of its *isnād*. Nevertheless, when the *ḥasan* is supported by other narrations, it could achieve the rank of a *Ḥadīth ṣaḥīḥ*[18] and be placed on an equal footing with the latter.

The *Ḥadīth "lā ḍarar wa lā ḍirār"*, which is cited by al-Ṭūfī in support of his view, falls under the category of the *ḥasan*. This *Ḥadīth*, which was related by Ibn Mājah and Dāraquṭnī, was reported from the Prophet by Abū Sa'īd b. Mālik b. Sinān al-Khudrī. As such, it ranks as *musnad* since it has a complete chain of authorities extending from the narrator to the Prophet himself.[19] The same *Ḥadīth* is also related by Mālik b. Anas in his *Muwaṭṭa'*, which can be

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a serious error; 5) *ṣādiq yauham*, that is a truthful person who had committed an error; 6) *maqbūl* (acceptable) which implies that there is no evidence proving that this report is unreliable; 7) *majhūl*, a narrator whose identity is unknown. Kamali, *Principles*, 81.

[17]A *Ḥadīth* is categorized as *ṣaḥīḥ* when it is handed down by a well known Companion, and when its *isnād* is continuous and consists of upright persons who posses retentive memories and firm faiths. The *ḥasan* is a Ḥadīth that had been narrated by narrators who did not achieve the highest degree of reliability but who were not accused of falsehood either. It is handed down by more than one chain of authorities and is not contrary to what had been narrated by other reliable sources. Lastly, the *ḍa'īf* is the *Ḥadīth* whose narrators were known to have had bad memories, or whose piety had been subject to serious doubt. Muḥammad Zubayr Ṣiddīqī, *Ḥadīth Literature: Its Origin, Development & Special Feature* (Cambridge: The Islamic Text Society, 1993), 56, 66; Kamali, *Principles*, 81.

[18]Al-Ṭūfī, "Risālah," 14.

[19]Ibid., 14; Yaḥyā b. Syaraf al-Dīn al-Nawawī, *An-Nawawī's Forty Hadīth*, trans. by Ezzeddin Ibrahim & Denys Johnson-Davies (Damascus: The Holy Koran Publishing House, 1976), 106.

categorized as a *Ḥadīth mursal* with a chain of authority containing Amrū b. Yaḥyā, and his father who got it directly from the Prophet, but leaving out Abū Sa'īd.[20]

Ibn Rajab says that the above *Ḥadīth* is accepted by the majority of *'ulamā'* as a proper ground for legislation since it is supported by more than one narration. All the narrations are listed by 'Abd al-Wahhāb Rashīd Ṣāliḥ in his *Sharh al-Arba'īn al-Nawawiyyah*, and one of them is "*lā ḍarar wa lā iḍrār*" (do not inflict injury nor repay injuries with another).[21] From the above, one can infer that the position of this *Ḥadīth* is quite strong and that acting upon it is obligatory. As such, al-Ṭūfī was justified in recognizing it as an eligible piece of evidence, and a tool that can be used to clarify or specify the general meaning of textual sources.[22]

As well as having a strong textual basis, al-Ṭūfī raises several arguments in support of the usage of *maṣlaḥah* as the strongest guiding principle in the field of *mu'āmalāt.* These arguments are as follows:

1. Consideration of *maṣlaḥah* in legal matters is a point unanimously agreed upon by scholars. It is a matter which is consistent within itself and which brings about harmony and agreement, as required by the *Sharī'ah.* The textual sources, by contrast, are diverse, mutually contradictory and generate legal disagreements; an act which is condemned by the *Sharī'ah* itself. Thus, upholding *maṣlaḥah* becomes preferable to the texts.[23]

In general, the textual sources are classified into four categories; namely, *mutawātir ṣarīḥ,*

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[20]Mālik, *Al-Muwaṭṭa'*, II, 745.

[21]'Abd al-Wahhāb Rashīd Ṣālih, *Sharḥ al-Arba'īn al-Nawawiyyah* (Cairo: Dār al-Bashr, 1988), 366.

[22]Al-Ṭūfī, "Risālah," 14.

[23]Ibid., 35.

mutawātir muḥtamal, aḥād ṣarīḥ and *aḥād muḥtamal.*[24] The *mutawātir ṣarīḥ* is a text which consists of continuous and recurrent (*mutawātir*) *isnād*s, and clear (*ṣarīḥ*) implications (*dalālat*). It is also considered as *ṣarīḥ* since its words convey a concept which is intelligible and does not require recourse to interpretation (*ta'wīl*).[25]

The *mutawātir muḥtamal* is a text with an *isnād mutawātir* but whose implications are ambiguous and convey more than one meaning.[26] The words in that kind of text do not convey a clear meaning without the aid of additional evidence that can clarify them. The *aḥād ṣarīḥ* is for its part a text whose narrator is a single person and whose implications are clear. However,

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[24]Ibid., 23.

[25]Some of the verses of the Qur'ān and *ḥadīth mutawātir* are in this category. The degree of clarity of words in this category fall into four classifications. The first is the perceptible (*ẓāhir*) which has a clear meaning but is still open to interpretation since the meaning it conveys is not in line with the principle theme in which it appears. Thus, there is always the possibility that it might have another alternative interpretation. The second is the explicit (*naṣṣ*) which conveys a clear meaning and is in harmony with the text. However, since it also contains another explicit ruling (*naṣṣ*), it requires further interpretation. The third is the unequivocal (*mufassar*) whose words or texts are completely clear and in harmony with the context in which they appear. The words, basically, convey an ambiguous meaning on their own. However, they are explained by the other parts of the text, which removes any ambiguity regarding their meaning. Also, it does not need any external interpretation. The last category, which achieves the highest level of clarity, is perspicuous (*muḥkam*). This *muḥkam* is completely clear and does not need any interpretation. See Muṣṭafā Ibrahim Zalamī, *Dalālāt al-Nuṣūṣ wa Ṭuruq Istinbāṭ al-Aḥkām* (Baghdad: Maṭba'at As'ad, 1982-83), 177-80; Kamali, *Principles*, 91-2.

[26]The rest of the verses of the Qur'ān and the *ḥadīth mutawātir* fall under this category. This category is divided into four sub-categories. The first is the obscure (*khafī*) whose words have basic meanings but are partially ambiguous with respect to those who are included in obscured words. The second is the difficult (*mushkil*) whose words are inherently ambiguous. Their ambiguity can only be removed by research and *ijtihād*. The third is the ambivalent (*mujmal*). This *mujmal* has a word which is inherently unclear and does not indicate a precise meaning. The word may be a homonym or be totally unfamiliar. The last is the intricate (*mutashābih*) which is totally unknown. No one can know its meaning and the text itself does not provide any explanation by which people can understand it. Zalamī, *Dalālāt*, 205-6.

due to the uncertainty of its *isnād*, it can not be unequivocal. Lastly, there is the *aḥād muḥtamal* which is a text whose *isnād* is a single person and whose implications are unclear. Undoubtedly, the reliability of this genre of *Ḥadīth* is open to debate.

Among the four categories, the *mutawātir ṣarīḥ* achieves the highest degree of reliability in terms of its *isnād* and the clarity of its implications. This is achieved in spite of the uncertainty (*iḥtimāl*) concerning some of its meanings, which may either denote a general meaning (*dalālah 'āmmah*) or an unrestricted one (*dalālah muṭlaqah*) in which case further specification or clarification is required.[27] Hence, extreme care must be exerted when basing a judgement on this *Ḥadīth* since it offers a number of different interpretations and implications.

Al-Ṭūfī's argument is acceptable, to some extent, in the sense that it points to the disagreement that the texts can generate, and to the beneficial effect that *maṣlaḥah* can create. However, it is equally important to define the kinds of disagreements and the genres of *maṣlaḥah* that al-Ṭūfī actually means in relation to the legal (*Sharī'ah*) conception of these matters.

Many verses of the Qur'ān indicate that the textual sources are the only recourse open to quarrelling or disagreeing parties. In other words, this means that the Qur'ān and *Ḥadīth* are the only sources of solutions to the problems that Muslims face. Thus, it is impossible that, being a source of guidance, the sources might contain contradictory statements. If that were to happen, it would confuse people and create further problems by forbidding something in one instance and allowing it in another.[28] Shāṭibī refutes the possibility of contradiction by maintaining that if the texts were mutually contradictory, nobody would be able to understand what the Lawgiver had

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[27]Zayd, *Al-Maṣlaḥah*, 123.

[28]Wahbah Zuḥaylī, *Uṣūl al-Fiqh al-Islāmī*, 2 Vols. (Damascus: Dār al-Fikr, 1986), II, 821.

intended.[29] In addition, if this were the case, the texts would cease to offer religious exhortation (*maw'iẓah*), guidance (*hidāyah*), mercy (*raḥmah*) and mediation (*shafā'ah*) to people, as al-Ṭūfī himself has admitted in his "Risālah."[30]

Therefore, in light of the above argument, one can venture to say that the general implication is that what the texts offer is a welter of solutions that pertain to diverse situations, and that God created and allowed such a diversity as a sign of His mercy. People have different abilities, various backgrounds and diverse interests. Hence, it is natural that jurists should have different interpretations and solutions for matters not elucidated in the texts. The apparent inconsistencies, as Ibn Taymiyyah argues, are not logical indications of contradiction among the textual sources, but merely the result of inadequate interpretation. It is also because the texts were misinterpreted or because useless *maṣāliḥ* were found, that contradictions arose.[31] In addition, the Lawgiver did not reveal the *Sharī'ah* according to the number of occurrences befalling men or in order for people to follow the rulings unquestioningly. Rather, what He gave us is a measure by which we can discern the truth on the basis of probability,[32] i.e. that whenever we disagree on something, we should refer to the measure that He provided us with. It is in this respect that an *ijtihād* cannot be abrogated by another, since both derive from the same source, enjoy similar qualities and serve similar purposes.

As for the Prophetic traditions, it is clear that the mere oral transmission of these texts

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[29]Al-Shāṭibi, *Al-Muwāfaqāt*, II, 19.

[30]Al-Ṭūfī, "Risālah," 19-20.

[31]Ibn Taymiyyah, *Majmū'*, IV, 176.

[32]Rashīd Riḍā, Ed., *Al-Manār*, IV, 860.

creates an uncertainty regarding the degree of reliability of their contents. Unlike the writing of the Qur'ān, which does not carry the possibility of distortion, oral transmissions create an opportunity for insertions and fabrications.[33] History provides us with numerous examples of Muslims and non-Muslims who made use of this opportunity and formulated *Ḥadīth*s to propagate their personal doctrines. Among the Muslim community itself, there were four categories of people who fabricated *Ḥadīth*s. These were 1) the heretics (*zanādiqah*) who are recognized as anti-Islamic; 2) the factional and sectarian preachers who forged *Ḥadīth*s to support their own sects, or to condemn those of their adversaries; 3) the storytellers (*quṣṣāṣ*) who created *Ḥadīth*s to encourage people to do good deeds, or to promote their own personal whims; and 4) the pious traditionists who invented *Ḥadīth*s because of their love of Islam.[34]

A similar phenomenon also occurred at the time of the four great founders of the schools of jurisprudence. This phenomenon is described by al-Ṭūfī in his "Risālah", where he writes of how the followers of these schools forged *Ḥadīth*s with the purpose of justifying their own

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[33]There are some disagreements concerning the historical origin of forgery of the *Ḥadīth* literature. Some observe that fabrications started during the caliphate of Abū Bakr when he waged a war against the refusers of *zakāt*. While others date the caliphate of 'Uthmān as the starting point of forgeries. According to yet another view, forgery started in 40 A.H. when political differences between 'Alī b. Abī Ṭālib and Mu'āwiyah b. Abī Sufyān reached their peak. At the time, Muslims were divided and hostility between the two camps acquired a religious dimension when they both utilized the Qur'ān and *Ḥadīth* to support their views. However, it is most likely that forgery started during the lifetime of the Prophet himself. It is reported in Ibn Ḥazm's work that after the Hijrah, a man, who was of mind to marry a certain girl, told the girl's tribe that the Prophet had given him authority over them. He did so in order to obtain their consent to his marriage proposal, which had been previously refused before the Hijrah. Later, it was discovered that he had told a lie when a messenger had been sent to the Prophet to make inquiries concerning the former's authority. Kamali, *Principles*, 65-6; Ṣiddīqī, *Ḥadīth Literature*, 32; Ibn Ḥazm, *Al-Iḥkām*, II, 2-3, 834.

[34]Hītū, *Al-Wajīz*, 290-1; Ṣiddīqī, *Ḥadīth Literature*, 34-5.

schools and condemning those of the other schools. Some Ḥanafīs, for instance, narrated a false *Ḥadīth (mawḍū')* which says that "there will be among my people a man who is called al-Nu'mān. He is the light of my people. On the other hand, there will be another man among them who is called Muḥammad b. Idrīs who is the worst and most evil person."[35]

Interestingly, al-Ṭūfī asserts in his explanation that many people claimed that the source of *Ḥadīth* contention was the second Caliph, 'Umar b. al-Khaṭṭāb, the reason being that this Caliph, who had heard that the Prophet had asked people to document any knowledge in writing, refused to write down the Prophetic *Ḥadīth*s when his Companions asked him to do so. They contended that had he accepted that proposal, there would have been no disputations or room for forgery, since all *Ḥadīth*s would have been handed down as intact and continuously (*tawātur*) as those narrated by al-Bukhārī and Muslim.[36] However, it should not be forgotten that 'Umar's refusal was based on a Prophetic saying. Fear of negligence of the Qur'ān, as well as confusion between the Qur'ān and *Ḥadīth*s, were factors also taken into consideration by 'Umar.[37]

Based on this fact, the argument that *Ḥadīth*s can generate diversity, as al-Ṭūfī asserts, cannot be denied. This is not due to the quality inherent in the *Ḥadīth*s but rather to external factors which affect around them. Therefore, it would be unwise to conclude that all traditions are mutually contradictory *per se*. Moreover, if God condemns diversity, it is not because of the

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[35]Ibn al-Jawzī, in his *al-Mawḍū'āt*, analyzed this *Ḥadīth* and concluded that it is a forged one. It was created for the Ḥanafīs by Ma'mūm b. Aḥmad al-Salmī and Aḥmad b. 'Abd Allah al-Kawthārī. They were both liars and created this *Ḥadīth* to support Abū Ḥanīfah and to undermine al-Shafi'ī, who was well-known at that time. Al-Ṭūfī, "Risālah," 38.

[36]Ibid., 39.

[37]Ṣiddīqī, *Ḥadīth Literature*, 27.

difference it creates but because of the disagreements that differences of opinion create. These differences are usually the result of arbitrary opinions and often contradict the *Sharī'ah*.[38] Therefore, it is very important to differentiate between the texts as divine law and their interpretations which are the result of limited human understanding.

The universal support for *maṣlaḥah*, which enables this principle to take precedence over the textual sources, is refuted by the argument that the *maṣāliḥ* are already incorporated in the *Sharī'ah*.[39] This also means that it is impossible to find any valid *maṣlaḥah* that contradicts the textual sources.[40] In addition, observation proves that no *maṣlaḥah* was available to achieve an undisputed degree of certainty, except for those already provided in the *Sharī'ah*.

This observation can be analyzed from two different vantage points. The first viewpoint analyzes *maṣlaḥah* as it actually exists. Hence, it claims that, all *maṣāliḥ* in this world are not pure *maṣāliḥ*, but are mixed with discomfort and hardship, big or small. Similarly, the *mafāsid* also come with a certain degree of comfort and pleasure. This, eventually, establishes the fact that this world is created from a combination of two opposite things, and that it is unable to satisfy either side completely. For this reason, the *maṣāliḥ* and *mafāsid* can only be perceived according to one dominant side. If the *maṣlaḥah* aspect is dominant, the matter at hand will be regarded as *maṣlaḥah*; otherwise it will be considered as *mafsadah*. The determining factor in both cases is the prevalent custom (*'ādah*) of the people among whom the condition occurs.[41] This condition

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[38]Zuḥaylī, *Uṣūl*, II, 822.

[39]Kerr, *Islamic Reform*, 99.

[40]Abū Zahrah, *Mālik*, 295-6.

[41]Al-Shāṭibī, *Al-Muwāfaqāt*, II, 27.

allows for the possibility of change in rulings according to change in time and place; i.e. that what is considered to be *maṣlaḥah* in a certain place could be a *mafsadah* in another or *vice versa*.[42] Ultimately, such a premise defeats al-Ṭūfī's notion that *maṣlaḥah* is a matter which is consistent within itself, anytime and anywhere.

The second viewpoint examines *maṣlaḥah* in reference to its connection with the *Sharī'ah*. The quality of the *maṣlaḥah* that is taken into consideration in this approach is pure and free from all *mafsadah*. If it contained any *mafsadah*, it would not be part of the *Sharī'ah* itself.[43] Whereas in the first approach, the dominant side determining an act is *maṣlaḥah* or *mafsadah*, in the second approach the *Sharī'ah* and its objectives become the deciding factors. As such, no act could be prohibited in one instance and simultaneously allowed in another, since both situations would be judged according to the same standard.[44]

Moreover, while maintaining that God regards *maṣlaḥah* as an important aim, al-Ṭūfī does not state that man is capable of recognizing where his welfare actually lies; he simply indicates that God is concerned with human welfare. Malcolm Kerr asserts that "to establish the mere existence of human-welfare motives behind the revealed law does not suggest that man can apply them through his own judgement, in fact, in one sense it implies that God must have taken adequate care to incorporate all the valid *maṣāliḥ* into his revelation, so by a scrupulous adherence to the Qur'ān, *Sunnah* and perhaps *qiyās* man is assured of securing his own

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[42]Abū Zahrah, *Mālik*, 382.

[43]Al-Shāṭibī, *Al-Muwāfaqāt*, II, 18.

[44]Ibid., 27.

welfare."[45]

2. The second argument that al-Ṭūfī raises in support of his conception of *maṣlaḥah* is that the notion of *ijmā'* as a valid ground for rulings is still disputed among the scholars; while some approve of it, others reject it completely. However, that is not the case with *maṣlaḥah*, which is agreed upon by all scholars. As such, one can argue that upholding *maṣlaḥah* is preferable to *ijmā'* since the latter is still under dispute.[46]

It must also be noted that unlike the Qur'ān and *Ḥadīth*, which stem directly from divine revelation, *ijmā'* as a doctrine and proof of the *Sharī'ah* is basically a rational proof. It is a natural process of solving problems through the gradual attainment of majority opinion among the Companions. *Ijmā'* is carried out in order to check the fallibility of *ijtihād* and enjoys the support of the Qur'ān and the *Ḥadīth*. Accordingly, this doctrine is considered to be able to guarantee the infallibility (*'iṣmah*) of a united community. However, the majority of *'ulamā'* (Muslim scholars) have maintained that the textual evidence in support of *ijmā'* does not amount to a conclusive proof of its utility.[47] A verse frequently quoted in support of *ijmā'* 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

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[45]Kerr, *Islamic Reform*, 83.

[46]Al-Ṭūfī, "Risālah," 31.

[47]Kamali, *Principles*, 175.

chosen, and land him in hell, -what an evil refuge."[48]

On the other hand, the proponents of *ijmā'*, such as al-Shāfi'ī, assert that the words "a path other than that becoming to men of faith" indicates the path agreed upon by Muslims, i.e. *ijmā'*. Therefore, they conclude that following such a path is obligatory on all Muslims.[49] This conclusion, however, is refuted by the fact that the main theme of this verse is not the obligation to follow the *ijmā'* of the community, but a warning against disobedience to the Prophet and hostility towards believers. This verse, in fact, calls for supporting the Prophet against his enemies.[50] It was revealed in relation to the subject of apostasy and came down when a certain Tu'mah b. Ubayraq stole something and accused a Jew of doing so. However, as a result of this revelation, the Jewish man was acquitted of the charge, and Tu'mah renounced Islam and fled to Mecca.[51] Therefore, the aim of this verse was to prohibit apostasy and not to affirm *ijmā'*.

Al-Ṭūfī's interpretation of this verse is in line with the above argument. He argues that this verse contains two warnings, namely, disobedience against the Prophet and following a path other than that of Muslims. These two aspects should be avoided without differentiating between them, since one of them could be a prerequisite or component of the other, he states.[52] In

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[48]Ali, *The Glorious Kur'an*, IV: 115, 216. Most of the proponents of this principle conclude that this verse provides a clear support of *ijmā'*. Al-Ghazālī has also acknowledged that among all the Qur'ānic verses, this verse provides the clearest support although he does not agree that it offers a conclusive proof of the validity of *ijmā'*. Al-Ghazālī, *Al-Mustasfā*, I, 111.

[49]Al-Ghazālī, *Al-Mustasfā*, I, 111.

[50]Ibid.

[51]Muḥammad b. 'Alī al-Shawkānī, *Fatḥ al-Qadīr*, 5 Vols. (Cairo: Dār al-Fikr, 1973), I, 515; *Irshād*, 75.

[52]Al-Ṭūfī, "Risālah," 26-7.

addition, this verse outlines a requirement and a continuation of the previous verse which says that "in most of their secret talks there is no good, but if one exhorts to a deed of charity or justice or conciliation between men...."[53] As such, he believes that the meaning of "follows a path other than that becoming to men of faith" is not an exhortation to doing charitable deeds, implementing justice or reconciling between men.[54]

Besides the above verse, the proponents of *ijmā'* always refer to the *Ḥadīth* "my community shall never agree on an error" in support of their principle. Indeed, they consider this *Ḥadīth* to be the strongest basis for *ijmā'*.[55] In spite of the fact that the last word "*al-ḍalālah*" (error) is reported as "*al-khaṭa'*", in some accounts, such a difference does not undermine the reliability of the *Ḥadīth*, since it does not affect its meaning and since it was referred to by some Companions. Therefore, many scholars regard it as *mutawātir al-ma'nawī*, and perceive it to be the building block in their argument in favour of *ijmā'*.[56]

Nevertheless, the presence of the words "*al-khaṭā'*" and the article "*lā*" in that *Ḥadīth* cast a doubt as to its reliability, and by extension the authority of *ijmā'* which it is supposed to consolidate. Unlike the word "*al-ḍalālah*" which definitely means error or erroneous conduct, the word "*al-khaṭa'*" is more general and can indicate disbelief, among other things. It does not prove that what the Prophet had meant in this *Ḥadīth* is heresy (*bid'ah*) only, but may mean a mistake

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[53]Ali, *The Glorious Kur'an*, IV: 114, 216.

[54]Al-Ṭūfī, "Risālah," 29.

[55]Al-Ghazālī, *Al-Mustasfā*, I, 175. Both al-Ghazālī and al-Āmidī conclude that this *Ḥadīth* provides the strongest argument in favour of *ijmā'* if it is compared to the Qur'ān. However, they also maintain that it cannot provide a conclusive proof of *ijmā'*. Kamali, *Principles*, 175.

[56]Al-Ghazālī, *Al-Mustasfā*, I, 175, Al-Ṭūfī, "Risālah," 30.

in giving witness in the hereafter, or a mistake in a rational argument, as well as a mistake in an individual's analogical reasoning. Furthermore, the word, "*al-khaṭā'*", has not been reported by *tawātur*.[57]

The article "*lā*" in the *Ḥadīth* could also imply negation (*nafy*) or prohibition (*nahy*). If it is the former, two meanings could be concluded from it. The first is that this *Ḥadīth* confirms the infallibility of the community, while the second meaning indicates that the community cannot make a collective agreement on an error; i.e. it precludes a general agreement on errors but not the errors themselves. Shah Walī Allāh believes that this Prophetic tradition means that there will always be among the community people who perform the duty of seeking the truth. Thus, an error would never be agreed upon due to the presence of these people.[58] On the other hand, if the article '*lā*' implies prohibition, it would not maintain the infallibility of the community, but would imply prohibiting Muslims from deviation.[59] Therefore, since this *Ḥadīth* is open to such doubts, it cannot be regarded as a decisive argument in favour of *ijmā'*.[60]

Although al-Ṭūfī supports the above conclusion, he does so on the basis of a different argument. He contends that just as one cannot gain knowledge through isolated reports, one cannot reject these reports either, since they might contain a measure of truth. Thus, by extension, one can say the same thing concerning the evidence in support of *ijmā'*. This evidence may not be one hundred percent reliable or unambiguous, but it must also hold some truth. The fact that

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[57]Hasan, *The Doctrine*, 54.

[58]Ahmad Hasan, *The Early Development of Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 1988), 158.

[59]Kamali, *Principles*, 180.

[60]Ibid.

diverse scholars and people from all walks of life utilize them undoubtedly is a point in their favour.[61] Al-Ṭūfī also argues that these isolated reports cannot be categorized as *mutawātir*, since the position of *mutawātir* demands the support of other evidence. Therefore, although they cannot be used as solid grounds in support of *ijmā'*, they are not without merit either.[62]

Al-Ṭūfī further argues that if the proponents of this principle maintain that *ijmā'* is approved on the basis of the *ijmā'* of the community, this can be refuted on two grounds. First, it is impossible for *ijmā'* to be conclusive since some Muslims, such as al-Naẓẓām and the Shī'ī, reject the validity of this principle.[63] Second, if the authority of *ijmā'* is approved by *ijmā'*, this would lead to a circumlocution in which the principle would be approved by itself.[64]

In addition, another *Ḥadīth* which says that "my community will be divided into seventy-three groups"[65] also signifies the impossibility of the existence of *ijmā'*. In relation to this, al-Ṭūfī insists that it is impossible to attain the *ijmā'* of the whole community, as there will always be two groups left out of the agreement. There will always be a group to oppose *ijmā'* and to reject its validity, as well as a group of heretics. Therefore, since both groups do not contribute to decision-making, a collective agreement of the entire *ummah* cannot be said to have been

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[61]Al-Ṭūfī, "Risālah," 30-1; Al-Ghazālī, *Al-Mustasfā*, I, 176.

[62]Al-Ṭūfī, "Risālah," 31.

[63]Ibid.

[64]Ibid.

[65]Ibid., 33.

reached.[66]

The above discussion clearly delineates al-Ṭūfī's position on the doctrine of *ijmā'*. It seems that he does not approve of the validity of this doctrine. However, it should be remembered that in matters of *'ibādāt* and the specific injunctions, he regards *ijmā'*, alongside the textual sources, as one of the strongest legal tools.[67] Moreover, al-Ṭūfī places *maṣlaḥah* over *ijmā'* when they are both contradictory, since *maṣlaḥah* is conducive to harmony and agreement while *ijmā'* often leads to disputes and divisions. Having discussed the validity of *ijmā'* from the viewpoint of its evidence, the following pages will discuss the comparison of *ijmā'* and *maṣlaḥah*, in light of al-Ṭūfī's "Risālah".

Among the sects that al-Ṭūfī cites in his "Risālah" are the Mu'tazilites (represented by Ibrāhīm al-Naẓẓām), the Shī'īs, the Khārijīs and the Ẓāhirīs. These scholars, according to al-Ṭūfī, do not accept any *ijmā'* except that of the Companions.[68] The *ijmā'* of these Companions has generally been upheld by Muslims due to the former's special status rather than to their participation in the *ijmā'* itself.[69]

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[66]Al-Ṭūfī, "Risālah," 33. The majority of *'ulamā'* classify this heretical group into two categories. The first are the heretics who know the *Sharī'ah* rulings and realize that they had violated those rulings. This category is excluded from *ahl al-ijmā'* and without them *ijmā'* is considered valid. The second, which are still considered as part of the community, are the heretics whose heresy does not lead them to unbelief. Consequently, without them *ijmā'* cannot be concluded. Muḥammad Khuḍarī, *Uṣūl al-Fiqh* (Beirut: Dār al-Qalam, 1987), 276; Shawkānī, *Irshād*, 146-8.

[67]Al-Ṭūfī, "Risālah," 17.

[68]Ibid., 31.

[69]Kamali, *Principles*, 169. Dāwūd al-Ẓāhirī claims that the *ijmā'* of these people should not be rejected because they are the witnesses of revelation (*ahl al-tawqīf*). Shawkānī, *Irshād*, 149.

It is reported that the first scholar to reject the doctrine of *ijmā'* was al-Naẓẓām, who opposed the notion of *ijmā'* being determined by the majority of *'ulamā'*.[70] He favoured a broader and more democratic base for ascertaining *ijmā'* and maintained that the entire community can participate in decision making. Whether the community's decision proves to be correct or not, is another matter.[71] He did not believe that *ijmā'* can guarantee the infallibility of the community. Indeed, he declared that, at times, the community might agree on an error.[72]

Some scholars, like al-Āmidī, later clarified al-Naẓẓām's position. Al-Āmidī contends that al-Naẓẓām was not as strict as he is often considered to be, since he still recognized *ijmā'* as an authority and agreed with the notion that opposing it is unlawful. Indeed al-Naẓẓām only rejected the idea of an elitist *ijmā'* being placed solely in the hands of people in authority (*ahl al-ḥal wa al-'aqd*).[73] Moreover, al-Khayyāṭ, in his *Kitāb al-Intiṣār*, also claims that al-Naẓẓām's position concerning this principle is a creation of his opponents.[74] However, these clarifications do not determine al-Naẓẓām's real position since, except for the citation of the *ijmā'* of the Companions,

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[70]Ahmad Hasan, *The Doctrine of Ijmā' in Islam* (Islamabad: Islamic Research Institute, 1984), 169; Shalabī, *Uṣūl al-Fiqh*, 157, f. n. 1.

[71]Kamali, *Principles*, 182.

[72]Hasan, *The Doctrine*, 169; Zayd, *Al-Maṣlaḥah*, 153.

[73]Sayf al-Dīn Abū Ḥasan al-Āmidī, *Al-Iḥkām fī Uṣūl al-Aḥkām*, 4 Vols. (Cairo: Maṭba'at al-Ma'ārif, 1914), I, 280.

[74]Abū al-Ḥusayn al-Khayyāṭ, *Kitāb al-Intiṣār wa al-Radd 'alā Ibn al-Rawandī al-Mulḥid* (Cairo: Dār al-Kutub al-Miṣriyyah, 1925), 51.

they do not give any other examples in support of their views.[75]

Regardless of whether the above explanation can be accepted or not, one fact remains unequivocal and that is that al-Naẓẓām raised the issue of *ijmā'* being performed on the basis of arbitrary opinion (*ra'y*) and *qiyās*.[76] Moreover, he was well aware of the pitfalls of *ra'y* in determining religious matters, and stated that the application of *ra'y* might lead an entire community to agree on an error, if they were not guided by the values upheld in the textual sources.[77] Based on this, one finds it difficult to believe that al-Naẓẓām might have approved of *maṣlaḥah* as a method of legal reasoning.[78]

Similarly, the Shī'īs are also reported to have rejected the doctrine of *ijmā'*. Unlike the Sunnīs, who formulated the principle of *ijmā'* as a check against the fallibility of analogical reasoning, the Shī'īs take their *Imām* as a final authority.[79] Their opinion of this *Imām* "supersedes that of the agreed practice and his infallibility is diametrically opposed to the concept of probable rules of law (*ẓann*) and equally authoritative variants (*ikhtilāf*)."[80] He is the final interpreter of the law and is a leader "not by the suffrage of the people, but by divine right,

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[75]An example often cited in clarifying al-Naẓẓām's position is the *ijma'* of the Companions in electing Abū Bakr as the first Caliph. Al-Nawbakhtī reports that this Mu'tazilī leader acknowledges that the election of Abū Bakr was valid because there was an agreement of the community concerning his caliphate. Hasan, *The Doctrine*, 169.

[76]Zuhaylī, *Uṣūl*, II, 820.

[77]Ibid.

[78]Ibid.; Zayd, *Al-Maṣlaḥah*, 153.

[79]Hasan, *The Doctrine*, 174.

[80]N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1990), 107.

because he is a descendant of the Prophet."[81]

Indeed, to the Shī'īs, the Qur'ān, the *Ḥadīth* and the dicta of the *Imāms* are the only bases of legal rulings.[82] *Ijmā'* plays a role only as an indirect instrument in unveiling the opinions of the *Imām* when the latter is unknown. Indeed, it is through *ijmā'*, that his opinion becomes known, especially as he is always present in the community, the Shī'īs believe. However, when the *Imām* is known, *ijmā* is neither allowed nor necessary in the Shi'ī community since its function is subservient to that of the *Imām*. The *Imām*'s opinion alone is the supreme authority and all other considerations should be neglected.[83] This group, no doubt, refutes all other methods of legal reasoning, including *maṣlaḥah*, which they believe to be an arbitrary opinion (*ra'y*).[84]

There are two other groups mentioned in al-Ṭūfī's "Risālah", namely, the Khārijīs and the Ẓāhirīs who are believed to have opposed *ijmā'*. The Khārijīs, an early Islamic sect, believed in the authority of the whole community.[85] However, after the dispute concerning the question of arbitration (*taḥkīm*), they differed from the Islamic mainstream in numerous other legal, theological or ritualistic aspects. Not surprisingly, they still recognized the *ijmā'* of the early

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[81]Asaf A. A. Fyzee, *Outlines of Muhammadan Law* (New Delhi: Oxford University Press, 1974), 44.

[82]Ibid.

[83]Abū Ja'far al-Ṭūsī, *'Uddat al-Uṣūl*, 2 Vols. (Bombay: Duttprasad Press, 1312 A. H.), II, 64.

[84]Zuhaylī, *Uṣūl*, II, 820, Zayd, *Al-Maṣlaḥah*, 153.

[85]Hasan, *The Doctrine*, 167.

Medinese community, prior to their own succession.[86]

The theoretical basis of this group's movement was the Qur'ānic verse "*lā ḥukma illā li-llāh*" (no decision but God's). Thus, they asserted that the only authority in Islam is the Qur'ān, which is to be literally interpreted. They did not deem *Ḥadīth* to be an independent authority, and as a result many of them rejected some rulings which were mentioned in *Ḥadīth*s but not revealed in the Qur'ān, such as the stipulation of stoning adulterers and wiping one's shoes in ablution.[87] Because they were so strict in limiting their legal doctrine to the Qur'ān, it is most unlikely that they would have approved of *maṣlaḥah* in legal reasoning.

As indicated in the first chapter, the Ẓāhirīs confined the sources of law to the Qur'ān and the *Ḥadīth* only. They categorically denied any sources other than these two.[88] Based on this, al-Ṭūfī' statement that this sect adopted *maṣlaḥah* in their legal reasoning can also be rejected.

The above discussion of *ijmā'* and *maṣlaḥah* is meant to shed some light on al-Ṭūfī's rationale and his reasons for supporting the notion of *maṣlaḥah* as well as the controversial subject of *ijmā'*. The controversy surrounding the latter stems from the fear of *ijmā'* degenerating into arbitrary opinion. Therefore, it is most unlikely that *maṣlaḥah*, which is regarded as an arbitrary opinion, can ever be recognized as a reliable method of legal reasoning by those who oppose *ijmā'*.

3. The third argument given by al-Ṭūfī is that a number of examples in the *Sunnah* indicate that

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[86]Coulson, *A History*, 107.

[87]Hasan, *The Doctrine,* 167.

[88]Ibn Ḥazm, *Al-Iḥkām*, IV, 211.

the Prophet and his Companions sometimes favoured *maṣlaḥah* when this principle contradicted the texts and *ijmā'*. The following are cases in point:

a. Once, the Prophet said to 'Āishah that he would have liked to rebuild the Ka'bah on the foundations that Ibrāhim had previously established, but that he gave up this notion because his people were new converts and were, presumably, not ready for such an endeavour.[89]

b. The Prophet once ordered the Companions to convert their pilgrimage (*ḥajj*) into an *'umrah*, but they objected because they had already intended to make a *ḥajj*.[90]

c. On one occasion, the Prophet ordered Abū Bakr and 'Umar to kill a man in a mosque, but they refused to do so because the man was performing prayer and they remembered that the Prophet had earlier forbade the killing of an individual while praying.[91]

d. On the occasion of the battle of al-Aḥzāb, the Prophet sent some of his Companions to the enemy territory and asked them to perform their 'Asr prayer in the village of the Banū Qurayẓah. However, only some of them prayed in that village while the rest preferred to perform the prayer on the way there, since the time for prayer had come on the way.[92]

However, many scholars reject al-Ṭūfī's conclusion that the above constitute a permission to favour *maṣlaḥah* over the revealed texts. They argue that the first three examples are abrogational instances in which one *Ḥadīth* was abrogated by another. The Prophet's sayings (*aqwāluh*), deeds (*a'māluh*) and tacit approvals (*taqrīruh*) are all considered part of the *Sharī'ah*.

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[89]Al-Ṭūfī, "Risālah," 39.

[90]Ibid.

[91]Ibid.

[92]Ibid., 40.

Hence, even if he remained silent on an act of his Companions, his silence must be seen as part of his action. It is an action insofar as it is inaction and is an inherent part of the *Sharī'ah*. Hence, they believe that the examples al-Ṭūfī cites are nothing but instances of a prophetic sayings being abrogated by instances of prophetic approval, for instance.[93] They are not instances of Companions forsaking the Prophet's words for a course of action they deem more preferable.

In the case of Abū Bakr and 'Umar, in particular, al-Ṭūfī maintains that these two Companions did not refuse to kill the man because of a previous *Ḥadīth* saying that "I forbid you to kill praying men."[94] Rather, it was because that *Ḥadīth* had already been abrogated by the Prophet's order to kill the praying man.[95] In this respect, other scholars agree with al-Ṭūfī that the previous *Ḥadīth* had been abrogated by the Prophet's command, but, they differ from him in their conclusion. In his conclusion, al-Ṭūfī claims that Abū Bakr and 'Umar's refusal indicate the permissibility of favouring *maṣlaḥah* over a *Ḥadīth*. If the Prophet did not give any response, it is because he understood the intention and honesty of these two Companions, al-Ṭūfī reasons. However, other scholars maintain that the Prophet's silence indicates his approval, which also constitutes a part of *Sharī'ah*.

As for the last example, which is the Prophet's command to perform the 'Asr prayer in the village of the Banū Qurayẓah, some scholars argue that the Companions responded to this command in various ways because of their different understandings of the implications of that

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[93]Zuhaylī, *Uṣūl*, II, 826; Turkī, *Uṣūl Madhdhab*, 441.

[94]Al-Ṭūfī, "Risālah," 40.

[95]Ibid.

command. Those who followed the obvious meaning of the *Ḥadīth* performed the Evening prayer in the village of the Banū Qurayẓah, while those who inferred that the Prophet's aim was to prompt them to walk quickly, and not to delay the prayer until arrival, felt at liberty to pray when the time came for prayer. That being the case, one can conclude that those who upheld the implicit meaning of the *Ḥadīth* performed the prayer during their journey, even though they had not actually arrived at the intended village.[96] These Companions, then, can be said to have based their opinion on the *maṣlaḥah* and *ḥikmah* that had they understood from the *Ḥadīth*, without actually intending to ignore the text because of what they perceived to be *maṣlaḥah*.

Concerning *ijmā'*, al-Ṭūfī cites an example where Ibn Mas'ūd seems to neglect *ijmā'* for the sake of *maṣlaḥah*. The example involves the issue of *tayammum*. It is reported that the Companions were in agreement that *tayammum* was permissible as a substitution for ablution for an ill person who must avoid touching water, or for those who run out of water and cannot find it.[97] However, Ibn Mas'ūd, in opposition to his peers, suggested another opinion. He said that "if we grant a concession (*rukhṣah*) to them (the sick and the ones who run out of water), I doubt that they will perform a proper ablution after that, for fear of catching cold from the water." He suggested this notion in order to prevent people from abusing the previous concession.[98]

Ibn Mas'ūd's opinion, according to al-Ṭūfī, comprises an example of *maṣlaḥah* being preferred to the textual sources and the *ijmā'* of the Companions. He further argues that the opinion of these Companions is not an *ijmā'* since Ibn Mas'ūd was excluded from that collective

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[96]Ibn Qayyim, *I'lām*, I, 203.

[97]Al-Ṭūfī, "Risālah," 34.

[98]Ibid.

agreement. Similarly, the agreement of the Companions to refuse Ibn Mas'ūd's idea is not an *ijmā'* either since Abū Mūsā, although he had held the same opinion, did not have the same basis for refusing Ibn Mas'ūd's opinion as the others had. Hence, one can argue that Ibn Mas'ūd did not contradict *ijmā'* but violated the text in favour of *maṣlaḥah.*

In his *Uṣūl al-Fiqh al-Islāmī*, Wahbah Zuhaylī asserts that al-Ṭūfī distorts the facts of the above case, and as a result draws the wrong conclusion. In deriving his ruling, Ibn Mas'ūd did not approve of *tayammum* for those who are in *janābah* (major ritual impurity). This position is based on the verse "... or ye have been in contact with women, and ye find no water, then take for yourself clean sand or earth."[99] His position is also diametrically opposed to Ibn 'Abbās's, who interpreted the word *al-lams* as *jimā'* (sexual intercourse) and believed that *tayammum* could substitute ablution for both the minor and the major impurities.[100] However, to Ibn Mas'ūd this verse signifies that *tayammum* can substitute ablution for minor ritual impurities (*ḥadath al-saghīr*) only. As such, one can see that Ibn Mas'ūd did not violate the text as al-Ṭūfī claims. He merely arrived at a different conclusion from that of the others, due to his different understanding of the word '*al-lams*' as it is found in the Qur'ānic verse.

C. Al-Ṭūfī's Defense

The idea of *maṣlaḥah* that al-Ṭūfī suggests is so liberal and unique that many scholars criticize and reject it. It seems that al-Ṭūfī had anticipated this and had therefore provided some arguments in defense of his theory in his "Risālah".

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[99]Ali, *The Glorious Kur'an*, V: 7, 242.

[100]Zuhaylī, *Uṣūl*, II, 286.

In his defense he declares that his method of reasoning is not an imitation of a void *qiyās* (*qiyās al-fāsid*), but an attempt at selecting and adopting the most suitable legal principle; namely *maṣlaḥah* based on the *Ḥadīth* '*lā ḍarar wa lā ḍirār*'. He believes that conflicts in legal theories do not stem from the discrepancies between the revealed texts and *maṣlaḥah*, but from the discrepancies between one text and another, the latter being the *Ḥadīth* "*lā ḍarar wa lā ḍirār.*" One, therefore, must not fail to act upon that text which realizes the *maṣlaḥah.* This process would be tantamount to restricting an application of one text by reason of another text without abrogating or suspending it just as the *Sunnah,* which sometimes clarifies or specifies a verse of the Qur'ān, does.[101]

In his *al-Maṣlaḥah fī Tashrī' al-Islāmī,* Muṣṭafā Zayd argues against al-Ṭūfī's ideas. He asserts that the process of clarification or specification applies to the absolute (*muṭlaq*) and general (*'āmm*) verses only, which must be clarified in order for God's intention to be made known. If we did not first understand the intent of the verses, we would not be able to derive legal dictums, he argues. Thus, Zayd is of the opinion that al-Ṭūfī promoted an improper method of legal reasoning, and a method which is diametrically opposed to what the *Sharī'ah* had intended. The latter did so by manipulating the general implication of the *Ḥadīth 'lā ḍarar*' and using it in reference to the texts which contain secondary rulings (*mas'alah al-far'iyyah*).[102] Indeed, it is through this method that al-Ṭūfī, intentionally or not, tended to abrogate the established rulings and to substitute them with others under the guise of *maṣlaḥah.*

Moreover, unlike the other proponents of *maṣlaḥah* who laid down some conditions for

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[101]Al-Ṭūfī, "Risālah," 17, 41.

[102]Zayd, *Al-Maṣlaḥah,* 153.

its application, al-Ṭūfī allows reason a somewhat freer reign in the establishment of new *fatwās*. Unlike his peers, he does not surround *maṣlaḥah* with guidelines that restrict the *mufti*'s recourse to his own reasoning. This fact led 'Abd al-Wahhāb al-Khallāf to claim that al-Ṭūfī's method is no more than arbitrary speculation and naked opinion, which opens the door to the abrogation of the revealed texts and *ijmā'* through the exercise of individual reason.[103]

Al-Ṭūfī, however, replied to these objections by acknowledging that the Lawgiver knows best what the true *maṣāliḥ* of people are, and that there are a myriad of ways of determining the welfare of people. Finding the *maṣāliḥ* in one source does not mean that one will not find them in other sources as well. Thus, he contends that:

> What we said does not amount to discarding the proofs of the law in favour of other means, which would be forbidden. Rather, some proofs may be set aside in favour of other preferred proofs, on the authority of the *Ḥadīth 'lā ḍarar wa lā ḍirār'*; just as you would sometime give precedence to *ijmā'* over other proofs. Furthermore, God provided us with the means of determine our interests in all but exceptional cases, so we shall nor forsake these for a doubtful method which may or may not lead us to *maṣlaḥah*.[104]

For al-Ṭūfī, "the *maṣāliḥ*, by their nature, can clearly be known with certainty in any given case, and are a more reliable guarantee of a unified and systematic application of law than strict adherence to the revealed sources would be."[105] This is the difference between al-Ṭūfī and other scholars. Unlike the others, who strictly adhere to the *Sharī'ah*, and therefore subordinate *maṣlaḥah* to the *Sharī'ah*'s approval, al-Ṭūfī does not accept such a subordination. Indeed, he

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[103]Khallāf, *Maṣādir*, 84.

[104]Al-Ṭūfī, "Risālah," 41.

[105]Kerr, *Islamic Reform*, 100.

describes such a subordination as "carelessness" on the part of the legal authorities, who put people through unnecessary hardship by their very limited application and perception of *maṣlaḥah.*[106]

Hence, it becomes clear that al-Ṭūfī does not classify *maṣlaḥah* into three discrete categories, and that he recognizes everything that promotes the welfare of people as *maṣlaḥah.* As such, discussing his perception of *maṣlaḥah* in connection to *maṣlaḥah mursalah*, as some scholars have, seems rather unbalanced. In addition, his defense of al-Laythī's idea concerning the king's *kaffārah*[107] indicates that al-Ṭūfī tended to determine *maṣlaḥah* on the basis of reason and with direct reference to the case at hand. He does not judge cases on the basis of previous ones, nor does he tie himself to a limited perception of the *Sharī'ah.* Rather, he seems to advocate a unique genre of *maṣlaḥah* that is different from both the *maṣlaḥah mursalah* and the limited *maṣlaḥah* of the textual sources.

Undoubtedly, his ideas must have seemed rather avant-garde, if not bizarre, to his medieval contemporaries who believed that the purpose of revelation is to secure man from uncertainties and from following his personal whims and inclinations. Moreover, it is probably due to al-Ṭūfī's underlying theory, i.e. that *maṣlaḥah* can be known with certainty, that he then rejects the view that differences among the schools of law are a blessing. The basis of this rejection is that if these differences were to be tolerated every one would do as he pleases, finding one authority or another to support him. He definitely does not approve of textual sources as the recourse for these differences. The only way to eliminate these differences in his view is

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[106]Al-Ṭūfī, *Sharḥ Mukhtaṣar*, III, 214.

[107]Ibid., 216.

through a unanimous adoption of *maṣlaḥah*.[108]

This premise was severely criticized by his opponents who found it unacceptable that *maṣlaḥah* could single-handedly overcome the chaos found in the traditional sources. On the contrary, they believed that *maṣlaḥah* would create more confusion by examining each case separately and passing judgements that do not conform to a standard norm. Moreover, many jurists found that al-Ṭūfī contradicts his own claim since in his "Risālah fī al-Maṣlaḥah al-Mursalah" he still admits the possibility that conflicts may arise among the *maṣālih* themselves.[109] Thus, to solve this contradiction, he declares his preference for any ruling that would serve "as many benefits as possible and if this is not possible, the most important one should be chosen."[110] However, when a clear ground for preference cannot be identified, he advocates the random choice of a solution or the drawing of lots.[111]

Alas, this last method seems very frivolous since it places the selection of *maṣlaḥah* in the hands of luck and gambling.[112] It also undermines his whole theory and fails to convince the reader of a reliable alternative method to the revealed texts and *ijmā'*. Unfortunately, al-Ṭūfī built a strong argument in favour of *maṣlaḥah* only to unwittingly thwart it at the end.

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[108]Al-Ṭūfī, "Risālah," 40.

[109]Kerr, *Islamic Reform*, 100.

[110]Al-Ṭūfī, "Risālah," 47.

[111]Ibid. Ibn Qayyim does not believe that any matter can consist of an equal amount of *maṣlaḥah* and *mafsadah*. To him, every case has a pre-dominant aspect, either *maṣlaḥah* or *mafsadah*. The situation also plays a role in determining what is beneficial and what is not, i.e, what might be considered *maṣlahah* in one place, may be a *mafsadah* in another or vice versa. Abū Zahrah, *Mālik*, 382.

[112]Abū Zahrah, *Mālik*, 397.

Another weakness that besets his theory is the presence of frequent contradictions in his rationale. For example, at the beginning of his "Risālah", he defines *maṣlaḥah* as a means of achieving the aims of the *Sharī'ah*. He then states that *maṣlaḥah* is the ultimate aim of the *Sharī'ah* and that the other methods including the textual sources and *ijmā'* are nothing but vehicles facilitating the achievement of that aim.[113] In other words, al-Ṭūfī regards *maṣlaḥah* as a means of achieving itself. Similarly, he acknowledges that the strongest among the nineteen evidences found in Islamic jurisprudence are the textual sources and *ijmā'*, while *maṣlaḥah* occupies the seventh position. However, he later declares that when *maṣlaḥah* contradicts any of these strong evidences, *maṣlaḥah* should take precedence over both the textual sources and *ijmā'*. In other words, he considers this principle to be both the strongest and a weaker method at the same time.[114]

In a similar vein, al-Ṭūfī unwittingly leaves the door open for others to criticize him by failing to provide any examples that prove or substantiate the validity of his theory.[115] Furthermore, although he claims that his theory applies to the *mu'āmalāt* only, all the examples that he provides, regardless of whether he interprets them correctly or not, are *'ibādāt* matters. Not surprisingly, some jurists asserted that his theory is nothing but a flight of fancy that cannot be applied to the real world.[116]

Lastly, it is to be noted that al-Ṭūfī's endeavour, although beset with problems and

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[113]Zayd, *Al-Maṣlaḥah*, 136-7.

[114]Ibid.

[115]Al-Būṭī, *Ḍawābiṭ*, 209.

[116]Zayd, *Al-Maṣlaḥah*, 171.

contradictions, is not without its merits. One merit is the call for change and for innovation in the *Sharī'ah*. Moreover, his challenge to the established legal theories and attacks on the sanctity of the individual schools laid the ground work for subsequent reform movements. Whether the modern reformists were indeed influenced by al-Ṭūfī's penmanship or not is a subject we shall delve into in the following chapter.

CHAPTER THREE

MODERN REFORMISTS AND AL-ṬŪFĪ'S *MAṢLAḤAH*

In modern times, the idea of *maṣlaḥah* owes its importance in Islamic jurisprudence to its flexible nature as a tool for interpreting Islamic law. Yet, the modern concept of *maṣlaḥah* is rather different from the one that has been formulated by the traditional jurists. In its traditional conception, *maṣlaḥah* was understood to be an extended version of *qiyās* (analogical reasoning)[1] which constituted the chief means for the rational elaboration of the textual sources. Whenever the jurists did not find a relevant *'illah* in a case, they would consider *maṣlaḥah* as an option based on the notion that the *Sharī'ah* is revealed for human welfare. Nevertheless, great care was required in its application, given the need to restrict human deliberation by considering only the evidence existing in the sacred texts. A clear example was the extended version of *qiyās* as suggested by al-Ghazālī, which promoted necessity as a criterion in applying the *Sharī'ah*. Today, however, the concept of *maṣlaḥah* tends to be employed by the modernists as a source for legal and political reform,[2] as it is utilized as a basis for developing the social aspect of the *Sharī'ah*. This being the case, they attempt to remake those parts of the traditional concept which are considered medieval and out of step with modern times.[3]

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[1]Since it is difficult to arrive at a precise rendering of the term *qiyās*, in this thesis we have adopted the phrase "analogical reasoning," which is widely used by modern scholars. However, it must be born in mind that in practice the process of *qiyās* goes beyond the simple procedure of reasoning by analogy. For an extensive discussion of this matter see Wael B. Hallaq, "Non-Analogical Arguments in Sunni Juridical *Qiyās*," *Arabica*, 36 (1989), 286-306.

[2]Majid Khadduri, "*Maṣlaḥa* (Public Interest) and *'Illa* (Cause) in Islamic Law," *New York University Journal of International Law and Politics*, 12, 2 (1979), 215.

[3]Schacht, *An Introduction*, 100.

Reformation in Islam was inevitable. It was rendered necessary by social change which was, to some extent, influenced by the introduction of western ideas and institutions. Accordingly, Islamic law, a source-based law, which should ideally be free from human interference, was challenged by principles developed and deduced from pure reason and prompted by worldly considerations.

This chapter will analyze the above phenomenon and see how the modern reformists reformulated the concept of *maṣlaḥah*. This renewed concept will also be looked at in terms of its debt to al-Ṭūfī's theory of *maṣlaḥah*, which may have had some influence on the modernits' understanding of the topic.

A. The Pressure for Reform

Reaction against *taqlīd* (blind imitation) is believed to have been the main motive for reformation in Islamic law. *Taqlīd* was blamed for being the source of backwardness and intellectual stagnation among the Muslims in the past. Therefore, the main slogan of this movement was *ijtihād* which aimed at anticipating social changes and meeting the present needs of society.[4] In the meantime, secularism began to dominate daily affairs and, accordingly, challenged the existence of Islamic law.[5]

During the formative period of Islamic thought (i.e. from the beginning of Islam to the fourth/tenth century), theology, jurisprudence, philosophy and other branches of the religious

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[4]Muhammad Muslehuddin, *Philosophy of Islamic Law and the Orientalists* (Lahore: Islamic Publication, 1981), 82.

[5]Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (Chicago: The University of Chicago Press, 1984), 43.

sciences reached a high state of development. It was in this period, which is considered to have been the most creative, that Islamic law grew to be regarded as being very flexible and easily adapted to the existing societies of the newly conquered territories. However, starting from the fourth/tenth century this flexibility is said to have come to an end, with Islamic law becoming increasingly rigid and static thereafter. Legal decisions, which had been recorded in legal manuals, were considered to be final and unalterable.[6] *Taqlīd* became common. And although some scholars maintain that the gate of *ijtihād* has never been closed (since *fatwās* were still issued to solve juristic problems) they nevertheless admit that from this period onwards, intellectual life in the Muslim world was stagnant. Jurists were reluctant to change or reform Islamic law, basing themselves on the notion that all the important legal questions had been thoroughly discussed and, therefore, that further deliberation was no longer necessary. This period ended with the close of the thirteenth/nineteenth century, when the concept of the nation-state emerged in Muslim lands, followed by a growing consciousness of the need for legal reform.[7]

The decline of Muslim intellectual life in the medieval period can be seen in the worsening quality of education. Schools began to depend on commentaries and super-commentaries at the expense of the original texts of *fiqh* and *uṣūl al-fiqh* themselves.[8] This trend

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[6]Some scholars believe that the practice of *ijtihād* lasted until the last days of the 'Abbasid period, while others claim that the beginning of *taqlīd* coincided with the formation of the four schools of law. Still others maintain that the gate of *ijtihād* was closed after the death of Ibn Ḥanbal, the founder of the last of the four orthodox *madhhabs*. Reuben Levy, *The Social Structure of Islam* (Cambridge: Cambridge University Press, 1957), 182.

[7]Anderson, *Law Reform*, 14.

[8]Rahman, *Islam and Modernity*, 37. Wael B. Hallaq in his article "Uṣūl al-Fiqh: Beyond Tradition" classifies the commentary on uṣūl al-fiqh works into six types; they are (1) the one which is concerned with annotating the lexical connotation of words and concepts used by the

is also marked by the development of disputation (*jadal*), which became the most fashionable procedure of "winning a point."[9] Some scholars even wrote condensed versions of certain works in order to help their students to study and memorize them. Accordingly, many students developed the habit of merely producing commentaries and super-commentaries which consisted of refutation and counter refutation and of learning by rote without any deeper understanding. They focused more on established knowledge and hardly ever produced anything new.[10]

H. A. R. Gibb draws some distinctions between medieval and modern ideas on the nature of knowledge. In the medieval period, knowledge constituted a mechanical process of amassing the "known," which was conceived of as given and eternal. In modern times, by contrast, knowledge is a process of reaching out to the unknown and is conceived of as changing and expanding.[11] Gibb further argues that there are three characteristics that can be grasped as regards the nature of knowledge in the medieval period. First, knowledge was a static element and was seen as a solid and immobile mass. Second, knowledge was only regarded as true when it was in harmony with what was generally accepted. Anything that contradicted the accepted scheme of knowledge was not true and should be discarded and rejected. Third, knowledge was

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original authors or the first commentators if it is a super commentary; (2) the type which constitutes the explanation of undeveloped concepts or the clarification of ambiguous texts of the original works; (3) the one which focuses on the rebuttal of criticism of a particular text or author; (4) the type which concentrates on some doctrines in the texts which are the object of the commentary; (5) the one which is concerned with the synthesis of doctrines belonging to different legal schools or jurists; and (6) the type which comprises a commentary on abridgement where both the abridgement and the commentary are the works of the same jurists. Wael B. Hallaq, "Uṣūl al-Fiqh: Beyond Tradition," *Journal of Islamic Studies*, 3, 2 (1992), 191-193.

[9]Rahman, *Islam and Modernity*, 37.

[10]Ibid.

[11]H. A. R. Gibb, *Modern Trends in Islam* (Beirut: Librairie du Liban, 1975), 64.

acquired through the process of deductive reasoning from accepted axioms or by the simple amassing of what already existed, not by analysis or experiment.[12] The above characteristics were, certainly, rejected by the modernists who regarded knowledge as an active pursuit, a creative "reaching out" of the mind to the unknown. It is probably due to the nature of this medieval concept of knowledge that nineteenth-century Western scholars assumed that "Islam could have no future because it displayed no capacity of adaptation to new ideas."[13]

In the early history of Islam, certain dogmatic and theological doctrines arose out of political conflicts. One of the disputes concerned the status of unrighteous rulers and involved the Khārijites and the Murjiites. The former declared that under no circumstance should unrighteous rulers be obeyed, while the latter insisted on the contrary. It is suggested that this last view was proposed for the sake of maintaining the integrity of society.[14]

To the same purpose, medieval jurists also emphasized absolute obedience to the ruling authority.[15] The Sunnī jurists continued to legitimize the actual state of affairs and loosened the strict requirements of an ideal Caliph. Ibn Taymiyyah, although an orthodox thinker, even contended that "sixty days of an unjust ruler are much better than one night of lawlessness."[16]

However, this doctrine unwittingly created another problem, for once having given absolute obedience to such rulers, jurists had no means to control them. At this time, one of the

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[12]Ibid., 65.

[13]Ibid.

[14]Fazlur Rahman, *Islam*, 2nd Ed. (Chicago: The University of Chicago Press, 1979), 238.

[15]Ibid., 239.

[16]Taqī al-Dīn Aḥmad b. 'Abd al-Ḥalīm b. Taymiyyah, *Al-Siyāsah al-Shar'iyyah fī Iṣlāḥ al-Rā'ī wa al-Rā'iyyah* (Cairo: Dār al-Kitāb, 1951), 173.

doctrines that was utilized by jurists for the convenience of administration was *maṣlaḥah*, by which device rulers were liberated from the provisions of the *Sharī'ah* law and could promulgate state-made laws that were neither Islamic nor yet secular.[17] It might not have been inherently wrong if the rulers promulgated laws based on *Sharī'ah* law. However, since power always passed into the hands of ambitious men, it was always distorted towards personal whims. Thus, Fazlur Rahman is right when he affirms that "the unthoughtful perpetuation of the orthodox dogma of 'absolute obedience to the ruler' contributed both directly and indirectly to the decline of the Muslim civilization itself."[18]

From the very beginning, Islamic law has been almost purely a theoretical effort, parts of it being basically concerned with morality and depending only on human conscience.[19] Social development, politics and legal considerations, however, demanded that an effort be made to reform Islamic law. It was believed that only in this way could Islamic law be implemented as a law in a real sense, with an enforceable power in the courts. Rather than develop their own systems however, Muslim institutions began to adopt Western ideas, as can be seen in the nineteenth-century Ottoman civil code known as the *Majallah*, which was based on a French model.[20]

Indeed, the motive for reformation of Islamic law was very complex. By and large, it was

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[17]It is surprising therefore that many medieval jurists such as Ibn Qayyim, al-Shāṭibī and al-Ṭūfī discussed the doctrine of *maṣlaḥah* at a great length and introduced some new fresh ideas.

[18]Rahman, *Islam*, 240.

[19]Rahman, *Islam and Modernity*, 29.

[20]Herbert J. Liebesny, "Religious Law and Westernization in the Moslem Near East," *The American Journal of Comparative Law*, 2 (1953), 479.

caused both by the intellectual stagnation of Islamic society and the political decline of Muslim governments. The introduction of foreign ideas and institutions also constituted a conscious attempt on the part of the reformists to modernize the legal system in Islam. It is for these reasons that, in modern times, the reformists focused their efforts on reformulating Islamic thought in the light of modern conditions in order to show that they were indeed compatible with modern ideas.

B. Reformists and al-Ṭūfī's *Maṣlaḥah*

As mentioned earlier, one of the principles that was utilized by modernists as a means to prove that Islamic teachings are capable of anticipating modern ideas was that of *maṣlaḥah*. Any discussion of this process should begin with Muḥammad 'Abduh's ideas since he is considered to be the founding father of Islamic reform, in addition to the fact that he also adopted *maṣlaḥah*, as will be shown later, as a basis for his efforts. Nevertheless, he was not the one who initiated the reformation itself. Jamāl al-Dīn al-Afghānī (d. 1897 A.D.), 'Abduh's teacher, also devoted his life to improving the lives of Muslims and called for major changes. However, his contribution will not be discussed here since its emphasis was on political revolution, rather than legal reform which is the main subject of our discussion. Moreover, although he was under the influence of al-Afghānī for eight years, 'Abduh (d. 1905 A.D.) had more influence on Muslim thinking and showed himself to be a more systematic thinker than al-Afghānī.

The main basis of 'Abduh's legal thought was the notion that Islam is a religion of nature

and *'aql* (reason).[21] To him, Islam is a rational religion and faith is only true when it is achieved through reason. Only by reason can man know which things are good or bad for human life,[22] while revelation came only to point out the good among what already existed.[23] Things are good because they are good in themselves, not because of God's commandment.[24]

Since reason has an inherent capability to differentiate between good and bad, it is impossible that contradiction could occur between revelation and reason, each of which is capable of conveying one divine truth. Should there be any contradiction between the two, there must be an incorrect understanding of one or the other. In such a case, revelation is subject to interpretation (*ta'wīl*).[25] At this point, 'Abduh gives reason the authority to interpret the divine law and suggests that "the inner meaning of religion should not be sacrificed to an over eagerness to keep its external intact."[26] 'Abduh accepts the Qur'ān and *Ḥadīth* as guidance for human affairs. Yet, in those matters not explicitly treated in these sources he believes that individual reason is capable of formulating rules which are governed by general ideas and human ethical

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[21]Muḥammad 'Abduh and Muḥammad Rashīd Riḍā, *Tafsīr al-Qur'ān al-Ḥakīm al-Shahīr bi-Tafsīr al-Manār*, 12 Vols. (Cairo: Dār al-Manār, 1911), II, 454.

[22]Ibid, VI, 74.

[23]Muḥammad 'Abduh, *Risālat al-Tawḥīd* (Cairo: Maṭba'at Nahḍah, 1956), 80.

[24]This idea is similar to that of the Mu'tazilites. However, 'Abduh cannot be considered a follower of that school since he only adopted the notion of "free will" without taking its other central views such as the idea of intermediary position. Harun Nasution, *Muhammad Abduh dan Teologi Rasional Mu'tazilah* (Jakarta: Penerbit Universitas Indonesia, 1987), 96.

[25]Muḥammad 'Abduh, *Al-Islām wa al-Naṣrāniyyah Ma'a al-'Ilm wa al-Madanīyyah* (Cairo: Maktabat Nahḍah, 1956), 52.

[26]Jamal Mohammad Ahmed, *The Intellectual Origin of Egyptian Nationalism* (London: Oxford University Press, 1960), 39.

considerations.[27] In view of his declaration that reason can recognize what is beneficial and harmful for humanity, it is reasonable, then, to say that the principle of *maṣlaḥah* played a crucial role in 'Abduh's legal theory. In other words, it constituted the basis for his own *ijtihād.*

All legal decisions should depend, 'Abduh held, on the principle of *jalb al-maṣālih* (promoting advantages) and *dar'u al-mafāsid wa izālatuhā* (eliminating evil), principles which are contained in the Qur'ān. For him, wherever there is *maṣlaḥah*, there is the *Sharī'ah.*[28] Hence, any legal decision should take *maṣlaḥah* as the basic consideration. When the established doctrines cannot guarantee the *maṣlaḥah* of the people, they should be rejected and a new solution which can meet the demands of society must be found. Given that the gate of *ijtihād* has never been closed and is still "wide open to meet all the questions raised by the new condition of life,"[29] 'Abduh tirelessly called Muslims to practice *ijtihād* and reject *taqlīd.* He maintained that many classical doctrines "are no longer true in modern times and therefore obviously no longer appropriate to new legal requirements."[30] Just as early jurists interpreted the law by taking current social conditions into consideration, contemporary jurists, similarly, should also be encouraged to interpret the law by taking changing circumstances into account, for the same opinion and solution cannot always be applied to different conditions and times.

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[27]Ira M. Lapidus, *A History of Islamic Societies* (Cambridge: Cambridge University Press, 1989), 621.

[28]Zakarīyā Sulaymān Bayyūmī, *Al-Ṭayyārāt al-Siyāsiyyah wa al-Ijtimā'iyyah bayna al-Mujaddidīn wa al-Muḥāfiẓīn: Dirāsat Tārīkhiyyah fī Fikr al-Shaykh Muḥammad 'Abduh* (Cairo: al-Hay'āh al-Miṣriyyah al-'Āmmah li al-Kitāb, 1983), 110.

[29]Bassam Tibi, *Islam and Cultural Accommodation of Social Change,* Trans. by Clare Krojzl (San Fransisco: Westview Press, 1990), 65.

[30]Ibid.

'Abduh adopted *talfīq* (eclecticism) as one of the methods to be employed in deciding on *maṣlaḥah. Talfīq*, as is well-known, means "combining part of the doctrine of one school or jurist with part of the doctrine of another school or jurist in a provision which would not have been approved, in its entirety, by any of the schools of jurists of the past."[31] The *talfīq* that 'Abduh suggested, however, meant not only borrowing the doctrines and combining them. Rather, an effort had to be made to compare all of them and accordingly produce a synthesis from all their good points.[32] To him, this *talfīq* constituted a kind of modern *ijtihād* by which jurists could take advantage of the various views of many *madhhabs* in solving new problems without being obliged to adhere to any particular one. Indeed, 'Abduh did not recommend the practice of adhering to a specific *madhhab*, since the early *mujtahids*, he argued, were ordinary people who had the same abilities as the people of his day.

This course of action ultimately led to the introduction of a reformation which had no clear textual basis and which was grounded solely on "public interest". The elements combined are sometimes taken from conflicting legal premises which produce a complex legal rule unsupported by, and even incompatible with, many of the sources from which the elements have been drawn.[33] This kind of *ijtihād*, which is described by Coulson as "legal opportunism",[34] seems to point to one purpose, viz. to make the *Sharī'ah* conform to the spirit of the time.

For the purpose of achieving *maṣlaḥah*, 'Abduh also modified the notion of *ijmā'* which

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[31]Anderson, *Law Reform*, 51.

[32]Albert Hourani, *Arabic Thought in the Liberal Age 1798-1939* (Cambridge: Cambridge University Press, 1983), 152.

[33]Coulson, *A History*, 197-201.

[34]Ibid., 221.

was considered infallible by traditional jurists. As mentioned earlier, 'Abduh was a thinker who proposed the practice of *ijtihād* in worldly matters. This *ijtihād* remains individual and questionable unless it can be secured by the *ijmā'* (consensus) of the community. Yet, this consensus is not infallible as is widely assumed. The consensus that he meant consisted of the expression of collective rational judgment and conscience with *maṣlaḥah* as the basis for agreement.[35] This consensus still had to be obeyed even though it was not impossible that it be free from error. The infallibility that 'Abduh was thinking of was not a matter of dogma but only of reasonable expectation which could be refuted and which could not close the door of *ijtihād*.[36] Furthermore, he also realized that human opinion could not be completely unified on any single point.[37]

In analysing his method of *ijtihād*, one can see that 'Abduh's conception was both prudent and pragmatic. He tried to avoid breaking with the traditional formula. Yet, at the same time he elaborated an idea which, to some extent, was different from that of his predecessors in order to apply it to present needs.[38] His concept of *ijtihād*, for instance, had as one of its bases a theological technique which gave reason the authority to interpret the *Sharī'ah* within the context of the problems and the needs of society. However, this theory lacked restrictions and left conflicting rational arguments to be weighed on the scale of utility.[39] Intentionally or not, this

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[35]Kerr, *Islamic Reform*, 144.

[36]Ibid.

[37]'Abduh, *Tafsīr al-Manār*, IV, 23-25.

[38]Kerr, *Islamic Reform*, 185.

[39]Ibid., 144.

process could gradually transform *maṣlaḥah* into utility and *ijmā'* into public opinion, and, accordingly, "Islam itself becomes identical with civilization and activity, the norms of nineteenth-century social thought."[40]

In establishing his method 'Abduh was most probably influenced by two groups of thinkers who flourished in his time: the conservatives, who blamed modern science for the abandonment of God's command, and the secularists, who accused religion of being the cause of much trouble in society.[41] Realizing that these two opposite groups could endanger the unity of the *ummah*, 'Abduh attempted to build a bridge between them. He brought into debate the relation between reason and revelation, arguing that the spirit of science does not contradict that of religion. Islam is a religion which encourages rational understanding, while science is the result of the activity of reason.[42] Based on this notion, it is evident that his commentary on the Qur'ān "demonstrated the possibility of a cautious but firm reinterpretation of the sacred text in line with modern needs."[43] However, if 'Abduh failed in the end to provide a new and substantive basis for the attainment of socio-political modernity for Muslims, many scholars argue that this failure was not, in fact, caused by the enmity of the opposition of these two groups. Instead, it "was the result of the essential contradiction in the task that he undertook, namely to ascribe to Islamic

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[40]Hourani, *Arabic Thought*, 144.

[41]Ahmed, *The Intellectual*, 41.

[42]Hourani, *Arabic Thought*, 151.

[43]Marshall G. S. Hodgson, *The Venture of Islam*, 3 Vols. (Chicago: The University of Chicago Press, 1974), III, 275.

doctrine possibilities that were incompatible with its very nature."[44]

One of 'Abduh's disciples who accepted his ideas and became a spokesman for them was Rashīd Riḍā. A Syrian by origin, he may be regarded as the most effective modern protagonist of the use of *maṣlaḥah* in reforming legal theory.[45] Like his teacher, Riḍā based his legal theory on natural characteristics. He drew a distinction between the doctrines of Islam and the social morality of society. The doctrines of Islam and the forms of worship, he argues, can clearly be found in the Qur'ān and in the practices of the Prophet and his Companions. They cannot be changed and no addition can be made to them. And as far as they are concerned, the *ijmā'* of the first generation is binding. In the matter of personal religious habits which have no impact on other individuals and are not regulated by strict religious precepts, Muslims are strongly recommended to follow what has been regulated for the sake of strengthening the bonds of community. But, Rīḍā insists, it is only a voluntary act and should not put pressure on the next generation.[46] With regard to social morality, Rīḍā argues that its standards should be set by Muslims who can make use of reason. The Qur'ān and the Prophet only give general principles on this matter. Hence, Muslims should form their interpretations of social morality in the light of particular circumstances and with the aid of the guiding principles of *maṣlaḥah*.[47] By using this notion, which is accepted by traditional legal theory and was later broadened by him, Riḍā introduced a flexible process of interpretation into the law.

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[44]P. J. Vatikiotis, *The History of Modern Egypt*, 4th ed., (Baltimore: Johns Hopkins University Press, 1992), 97.

[45]Khadduri, "*Maṣlaḥa*," 215.

[46]Riḍā, *Yusr al-Islām*, 79.

[47]Albert Hourani, "Muḥammad Rashīd Riḍā," *The Encyclopedia of Religion*, XII, 217.

In the absence of textual stipulations, Riḍā argues: "necessity alone would suffice as a legal source to justify the process of deduction known today as *tashrī'*."[48] In other words, the principle of necessity can be the basis for independent legal deduction in the absence of textual evidence. Accordingly, this principle of necessity not only suspends the standing rulings in special circumstances but also creates new rules for human needs. Indeed, this is a broad use of necessity which is virtually synonymous with *maṣlaḥah*.[49]

His distinction between *'ibādāt* and *mu'āmalāt* indicates that Riḍā tried to move the law from being totally dependent on revelation to being a combination of reason and revelation.[50] Unlike the rules pertaining to purely devotional and ritual behaviour, which had been completely regulated in the Qur'ān and *Ḥadīth*, the social rules of the *Sharī'ah*, to him, are subject to interpretation and should adapt to changing circumstances. This argument is based on two premises. First, the primary purpose of social rules is to secure human welfare. It is also based on the idea that God bestows reason on humans through which they are enabled to determine what is just. When God reveals certain general guiding principles, these are meant to temper the imperfections of human reason and motivations which tend to distort natural justice.[51] That being the case, in the matter of social morality, there will be no *ijmā'*, even that of the first generation.

Riḍā realized that people's interests might vary depending on circumstances, and that the

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[48]Muḥammad Rashīd Riḍā, *Al-Khilāfah aw al-Imāmah al-'Uẓmā* (Cairo: al-Manār, 1923), 94.

[49]Ibid.

[50]Maqdisi, "Hard Cases," 218.

[51]Malcolm Kerr, "Rashīd Riḍā and Islamic Legal Reform: An Ideological Analysis," *Muslim World*, 50 (1960), 102.

whole structure of human relationships, which are very complex, cannot be regulated in the same way by an explicit text. When God reveals a clear and a well authenticated text, it should be obeyed, although this would depend on two conditions. One stipulates that the meaning of the text should not contradict the principles "*lā ḍarar wa lā ḍirār*" and that necessity permits what would otherwise be forbidden (*al-ḍarūrah tubīḥ maḥẓūrāt*). Should there be any contradiction, then these principles should be preferred to the specific injunction.[52] The other is that if the meaning of the text is not clear, its authenticity should be ragarded as doubtful; or when the cases are not covered by any specific injunction, human reason will decide what action should be taken in accordance with the spirit of Islam. In such a case, human reason will be guided by the principle of *maṣlaḥah* and the interpretation made in the light of the general principles laid down in the Qur'ān and *Ḥadīth*.[53] In other words, with *maṣlaḥah* as the guiding principle, the community has a legislative power.

Indeed, *maṣlaḥah* is not a new phenomenon for Muslim jurists since this principle has been the subject of much discussion in their legal theory. However, the *maṣlaḥah* that Riḍā proposes seems to shift this principle from its function as a tool of interpretation to that of a substantive source. In the first chapter, we mentioned that Riḍā, adopting al-Qarāfī's view, suggested that the traditional jurists' motives in placing the principle of *maṣlaḥah* in the range of *qiyās* was done merely to avoid abuse of the law by rulers. Thus, by converting this principle into the systematic legal reasoning of *qiyās*, *maṣlaḥah* would not be subject to the interpretation

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[52]Muḥammad Rashīd Riḍā, *Muḥāwarāt al-Muṣliḥ wa al-Muqallid* (Cairo: Dār al-Manar, 1324 A.H.), 126.

[53]Hourani, *Arabic Thought*, 233.

of the ruler. In supporting this view he quotes Ibn Qayyim's statement that:

> They [the proponents of *qiyās*] widened the paths of *ra'y* [personal opinion] and *qiyās*; they advocated the method of *qiyās al-shabah* [purely external analogy], linking rulings to attributes where it is unknown whether the Lawgiver linked them or not, and identified *'illah* on whose account it is unknown whether the Lawgiver issued laws or not....[They also erred] in their belief that many rules were at variance with justice and analogy....[54]

This statement does not indicate that Ibn Qayyim was a liberal proponent of *maṣlaḥah*. What he in fact attempts to do here is to find a middle way between the two extremes of total rejection and total acceptance of *maṣlaḥah*. Nevertheless he still acknowledges that *istiṣlāḥ* is the logical extension of *qiyās*. The above rational argument was, however, adopted by Riḍā to support his idea that "the conclusions of *istiṣlāḥ* were accordingly not legally binding in the manner of a firmly grounded *qiyās*."[55]

To Riḍā, it is improper to place *maṣlaḥah* in the range of *qiyās*, for the former is not subordinate to the latter. In addition, there should be no difficulty in basing rulings on the principle of *maṣlaḥah* since the real problem of *maṣlaḥah* is not in *maṣlaḥah* itself, but in political matters. The solution to the problem is, therefore, to reformulate political structures in such a way that the decisions on public law will rest in the hands of the proper persons. This means that although the community has legislative power, it is not recommended that every Muslim be free to exercise his own judgment or to create his own system of rules. The development of and change in social morality and law are, in fact, the functions of the *ahl al-ḥall wa al-'aqd* (those who have power to bind and to loosen), the body mentioned in the Qur'ān

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[54]Riḍā, *Yusr al-Islām*, 50.

[55]Kerr, *Islamic Reform*, 194.

which Muslims should consult regarding any case where there is no clear injunction in the revealed text. When the political authority is in their hands, there should be no fear that *maṣlaḥah* will be abused for the sake of one man's ambition.[56]

The idea of reforming political structures that Riḍā posed was, indeed, a revolutionary one, because by thinking of the *'ulamā'* as an organized body, he also acknowledged *ijtihād* to be a formal procedure to be exercised through consultation (*shūrā*) among the *'ulamā'*. The consensus that this body achieves is acceptably binding. It seems that in this regard he equates *ijmā'* with *shūrā*. In other words, having rejected the old conception of *ijmā'*, Riḍā introduced a new kind of *ijmā'*, namely "the *ijmā'* of *'ulamā'* of each age, a legislative rather than a judicial principle, working by some sort of parliamentary process".[57] *Maṣlaḥah* was the basis for their consultations. To him, this was the original concept of Islamic legislation which could not have been performed in earlier times due to communication problems.

It must be noted here that the main aim of 'Abduh's and Riḍā's reforms was to create a system of law which could be a law in a real sense. This was to be done by creating law that could be applied in the modern world. The traditional doctrines of both constitutional organization and jurisprudence were strong in methodology but weak in implemental procedure. Their focus was more on their divine origin rather than on their possible functions in regulating human life.[58] To remedy this partial tendency, both 'Abduh and Riḍā offered a new concept which could link the traditional ideas with present conditions.

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[56]Riḍā, *Yusr al-Islām*, 53.

[57]Hourani, *Arabic Thought*, 274.

[58]Kerr, "Rashīd Riḍā," 174.

Clearly, these two modern reformists had no intention of promoting the secularization of Islamic law. Nevertheless, the ideological infrastructure and technical-procedural mechanism that they suggested in reforming Islamic law might have created grounds for the disruption of traditional doctrines on the one hand, and a basis for a parliamentary secular legislation on the other.[59] A case in point is the reform in the matter of matrimony. Monogamy, according to 'Abduh, is the original concept of marriage in Islam. Although it is mentioned in the Qur'ān, polygamy is not mandatory since it is only permitted with reluctance.[60] Restriction of polygamy is also found in orthodox exegesis. Permission is granted only to the husband who can provide equal treatment to his wives. This can be gauged by measuring such things as maintenance, which includes the provision of a dwelling and conjugal duties. Yet, in the matter of sentiment (*mayl al-qalb*), which cannot be measured, the issue is left to the individual conscience and subject only to ethical rules. The modernists, however, include sentiment as one of the subjects requiring equal treatment. Hence, their prohibition on polygamy was based on the rationale that an ordinary mortal cannot be expected to treat his wives equally in the matter of sentiment.[61] By giving this binding positive character to the ethical provision of textual sources, these modernists have altered one of the basic peculiarities of Islamic law.[62] In other words, polygamy was basically *ḥaram* (unlawful) except in cases of extreme necessity (*al-ḍarūrah al-quswā*) such as when the wife was

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[59]Aharon Layish, "The Contribution of the Modernists to the Secularization of Islamic law," *Middle Eastern Studies*, 14, 3 (1978), 263.

[60]C. C. Adams, *Islam and Modernism in Egypt* (New York: Russell & Russell, 1968), 230.

[61]'Abduh, *Tafsīr al-Manār*, IV, 348-9; Qāsim Amīn, *Taḥrīr al-Mar'ah* (Cairo: Maṭba'ah Rūz al-Yūsuf, 1941), 138-40.

[62]Layish, "The Contribution," 264.

incapable of conceiving (*'aqūm/'aqīr*).[63]

It should be obvious from the above that the principle of *maṣlaḥah* underlay 'Abduh's reform in matters of matrimony. The demand for the prohibition of polygamy was based on the argument that preventing injustice is preferable to its redress and is, therefore, a matter of *maṣlaḥah.*

This idea has influenced the law of marriage and divorce in Muslim countries such as Morocco, Iraq and Tunisia. In the Personal Status Code of 1957 and 1958 in Morocco, it is stated that polygamy is forbidden if the husband cannot provide equal treatment to his wives. In a case where the husband has a second marriage which causes harm to his first wife, a legal action could be taken against him.[64] The Iraqi and Syrian personal status laws also insist that a married man can have a second wife only with the permission of the *qāḍī*. In such cases, the *qaḍī* is given a wide discretion to permit an additional wife when it can be proved to his satisfaction that the husband can treat the wives equally. He must be financially capable of supporting them and there must be some usefulness in this polygamous marriage.[65] The Tunisian Code of Personal Status goes even further when it declares polygamy to be a criminal act. In Article 18 of a Decree of 13 August 1956, it is stated that " polygamy is prohibited. Whosoever being married contracts another marriage before dissolution of the first shall be liable to imprisonment for one year or a fine of 240,000 Francs or both, even if the new marriage has not been concluded in accordance

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[63]Muḥammad 'Imārah, *Al-Imām Muḥammad 'Abduh: Mujaddid al-Islām* (Beirut: al-Mu'assasah al-'Arabiyyah li al-Dirāsāt wa al-Nashr, 1981), 240.

[64]Liebesney, *The Law of the Near and Middle East*, 152.

[65]Ibid., 151; J. N. D. Anderson, "The Syrian Law of Personal Status," *Bulletin of the School of Oriental and African Studies*, 17 (1955), 36.

with the law."[66]

The ban on polygamy constituted a new departure in the *Sharī'ah* and showed the modernists' independence in interpreting the Qur'ānic precepts. They had attempted to demonstrate that the gate of *ijtihād* has never been closed and that its use is necessary in order to adapt the *Sharī'ah* to the changing needs of society. They realized that the existing methods of *talfīq* and *takhayyur* were not enough to anticipate social change and, therefore, a new direction was needed, viz. reinterpreting the textual sources.

The institutionalization of *ijtihād* that Riḍā proposed in order to achieve *maṣlaḥah* also led to an innovation in Islamic legal theory. In its traditional view, *ijtihād* was exercised by independent *'ulamā'*, *fuqahā'* and *muftīs* (jurisconsults) without any enforcement by the government. Due to their personal scholarly authority, their views were accepted and their consensus was considered general and infallible. The modernists, however, proposed institutionalizing *ijtihād* by suggesting mutual consultation among the elite *'ulamā'*, the *ahl al-ḥall wa al-'aqd*, on social matters. In the eyes of the modernists, consensus does not grow from the principle of accidental agreement (*ittifāq 'araḍī*), which is the characteristic of traditional *ijmā'*, but it is grounded in the intentional (*maqṣūd*) agreement. In this sense *ijmā* is identical with the ancient *shūrā*.[67]

Therefore, it is not surprising that some later modernists adopted the principle of *shūrā* as the basis for reforming Islamic law. One of them was Maḥmūd al-Labābīdī who links the idea of *shūrā* to the concept of *naskh* (abrogation). He contends that Islamic rulings are subject to

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[66]Liebesny, *The Law of the Near and Middle East*, 151.

[67]Layish, "The Contribution," 266.

change. The rulings (*aḥkām*) of abrogation, which are mentioned in the verse "None of Our revelations do We abrogate or cause to be forgotten but We substitute something better or similar"[68], should continue even though the Prophet had died. They continuously prevail since the Qur'ān has stated that the *ummah* (community) is the source of *siyādah* (sovereignty) and *sulṭah* (power).[69] The Qur'ānic verse which says "... who (conduct) their affairs by mutual consultation..."[70] constitutes a mandate given by God to the *ummah* to regulate their own lives. God is only the initial legislator (*al-mushri' ibtidā'an*) while the completion of the legislation is left to the *ummah*.[71]

For some scholars, this idea would lead to the distortion of Islamic teaching. Ironically, the method would destroy Islamic teaching by means of Islamic teaching itself. This impression is expressed, for example, by Muḥammad Yūsuf Mūsā who claims that the verse "... who (conduct) their affairs by mutual consultation..." does not indicate a mandate given by God to the *ummah* to create law. It only signifies the obligation to carry out mutual consultation in order to avoid arbitrariness in a case which is not clearly regulated in the revealed texts.[72]

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[68]Ali, *The Glorious Kur'an*, II: 106, 46.

[69]Maḥmūd al-Labābīdī, "Niẓām al-Islām al-Siyāsī," *Risālat al-Islām*, 4, 1 (1952), 393. This view is similar to that of Abdullahi Ahmed al-Na'im, the proponent of the concept of *nasakh*, who claims that contemporary Muslims have the competence in reforming Islamic law, even in matters that had clearly been regulated in the Qur'ān and *Ḥadīth* as long as the outcome of the *ijtihād* is compatible with the essential message of Islam. Abdullahi Ahmed al-Na'im, *Toward an Islamic Reformation* (Syracuse: Syracuse University Press, 1990), 28-9.

[70]Ali, *The Glorious Kur'an*, XLII: 38, 1317.

[71]Ibid.

[72]Muḥammad Yūsuf Mūsā, *Fiqh al-Kitāb wa al-Sunnah al-Buyū' wa al-Mu'āmalāt al-Māliyyah al-Ma'āṣirah* (Cairo: dār al-Kitāb al-'Arabī, 1954), 21.

Accordingly, once this reform is analyzed, one finds that the intellectual element of this *ijtihād* is *maṣlaḥah* rather than *qiyās*, as was the case with traditional *ijtihād*. In traditional *ijtihād*, the starting point of identifying a *ḥukm* is the *'illah*, upon which its relevance to divine wisdom depends. Whether or not the *ḥikmah* has a rational basis is not an important point since the function of jurists is merely to elaborate those already revealed, and not to make a value judgement. In modern times, however, this method is not sufficient in responding to and anticipating social change. The rational basis of *ḥikmah* is seen as an important element in legislation. Ahmed Zaki Yamani affirms that unlike matters of *'ibādāt* where both *'illah* and *ḥikmah* (underlying subjective reason) are necessary, in *mu'āmalāt* a judgement depends only on the *ḥikmah* by which a ruling comes into being.[73] Here, the modernists have often invoked the concept of *maṣlaḥah*. In their efforts to revitalize Islamic law, they made use of the humanistic-liberal element which was to be found in the principle of *maṣlaḥah*. Regarded as an utilitarian human judgement not limited by textual sources, *maṣlaḥah* was used to revise or modify Islamic principles or rulings.[74] *Maṣlaḥah*, therefore, became the source of inspiration for reformation which later became a source of law in its own right and, under certain circumstances, could override an expressed provision of textual sources.[75] A case in point is the Tunisian Code which

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[73]Ahmed Zaki Yamani, "The Eternal *Sharī'a*," *New York University Journal of International Law and Politics*, 12, 2 (1979), 210. An example of this case is the abolishment of giving *zakāh* (alms) to those whose hearts have been reconciled to the truth in the period of 'Umar b. al-Khaṭṭāb. During the time of the Prophet, these people were given *zakāh* since he wanted them to adhere to Islam. However, since Islam had gained power and dignity, there was no need to wean them. They could make a choice to remain in Islam with faith or without it.

[74]Khadduri, "*Maṣlaḥa*," 216.

[75]Layish, "The Contribution," 266.

abolishes polygamy. Although this code invokes the Qur'ānic admonition that a man cannot be just if he has more than one wife, this law obviously contradicts the Qur'ānic rule that permits polygamy.[76]

A close scrutiny of the consequences of the reforms shows that the concept of *maṣlaḥah* developed by modern reformists was, essentially, no different from that of al-Ṭūfī, since the *maṣlaḥah* that they developed gradually became the basic consideration for making rulings. The only difference was that the modern reformists formulated this concept through traditional concepts such as *talfīq* and *ijmā'*, while Al-Ṭūfī insisted on the preeminence of *maṣlaḥah* directly without providing any means to build a connection with the traditional concepts. Perhaps it is worth asking whether this similarity is just a matter of coincidence or whether al-Ṭūfī's influence can be detected in the policies of the modern reformists.

As we have mentioned above the principle of *maṣlaḥah* was not new to Muslim jurists, as both Ibn Taymiyyah and Ibn Qayyim al-Jawziyyah, for instance, also developed their own concepts of *maṣlaḥah*. Both 'Abduh and Riḍā, were, no doubt, followers of these two medieval jurists and their school,[77] although in adapting *maṣlaḥah* to their own ends, these modern reformists went beyond the formulations of their masters. Riḍā in particular quotes Ibn Taymiyyah and Ibn Qayyim al-Jawziyyah frequently in support of his own views, at least by making explicit what was half-hidden in their writings.[78] It is therefore apparent that, in their

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[76]Khadduri, "*Maṣlaḥa*," 216.

[77]Zaki Badawi, *The Reformers of Egypt: A Critique of al-Afghani, 'Abduh and Ridha* (Slough Berks, UK: The Open Press Limited, 1976), 20; Hourani, *Arabic Thought*, 233.

[78]Hourani, *Arabic Thought*, 233.

development of the concept of *maṣlaḥah*, 'Abduh and Riḍā were influenced by their predecessors such as Ibn Taymiyyah and Ibn Qayyim. It was most probably due to these two Ḥanbalīs jurists that, in their development of the concept of *maṣlaḥah*, 'Abduh and Riḍā refrained from going as far as al-Ṭūfī did.

As far as concerns al-Ṭūfī's concept of *maṣlaḥah*, it was mentioned in the introductory part of this thesis that his theory remained obscure for a long time, that is until Jamāl al-Dīn al-Qāsimī discussed his contributions in the periodical *al-Manār* in 1909. This means that al-Ṭūfī's ideas were probably unknown during 'Abduh's lifetime and only began to attract scholarly attention during those of his disciples. Since 'Abduh, the founding father of reformation, never quoted al-Ṭūfī's works, it cannot be said that 'Abduh was influenced by al-Ṭūfī, although they both had similar views on the concept of *maṣlaḥah* in Islamic jurisprudence. What we do know is that the rational approach of 'Abduh was influenced by the moral law of the Mu'tazilite and Muslim philosophers concerning the capability of reason to recognize what is good and bad.[79] Yet, to suggest that 'Abduh was never influenced by al-Ṭūfī is also unwise, as it is possible that this modernist might have been acquainted with the works of al-Ṭūfī on *maṣlaḥah*. Moreover, it is known that the publisher of al-Qāsimī's treatise on al-Ṭūfī's *Sharḥ al-Arba'īn al-Nawawiyyah* was a direct disciple of 'Abduh, i.e. Rashīd Riḍā, who vigorously spread his teacher's ideas.

Unlike 'Abduh, Riḍā was certainly influenced by al-Ṭūfī's thought on *maṣlaḥah*. When he discusses the topic of *maṣlaḥah* in his works he always cites al-Ṭūfī's ideas, such as in his

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[79]Badawi, *The Reformers*, 27. Because of the influence of the Mu'tazilite on 'Abduh's thinking, R. Casper labelled 'Abduh a neo-Mu'tazilite. Badawi, *The Reformers*, p. 82, f.n. 114.

book *Yusr al-Islām.*[80] In this book, he discusses the concept of *maṣlaḥah* as it was articulated by al-Ṭūfī and al-Shāṭibī. In the course of his discussion he goes so far as to imply that much of the methodology of law, consisting mainly in meticulous analogy and the semantic study of the texts of the Qur'ān and *Ḥadīth*, was merely a round-about way of arriving at conclusions that could be reached by the equally valid process of *istiṣlāḥ*. In attempting to prove this, he cites ten examples given by al-Shāṭibī of decisions based on *maṣlaḥah.*[81] He further argues that

> it is quite clear that the *mu'āmalāt* affairs ... all fall under the principle set forth by the *Ḥadīth* '*lā ḍarar wa lā ḍirār*'... From this is taken the principle of averting evils and conserving interests, with due regard for what is known of the intent of the law... However, the jurists always declared that all ordinances are derived from the previously mentioned principle (i.e., deductive reasoning from the revealed texts)...[82]

This statement indicates that Riḍā tried to liberate the law from the shackles of literal meaning, on the basis of utilitarianism. In addition, he not only published al-Qāsimī's commentary on al-Ṭūfī's *maṣlaḥah* but also supports the latter's views in a brief introduction to this commentary. He reminds his readers that the protection of *maṣlaḥah* was the first principle of jurisprudence in *mu'āmalāt.* Cases in point were the decisions of 'Umar and other Companions who put aside the *ḥudūd* (divine ordinances) in order to preserve *maṣlaḥah*, and this certainly indicates that "*maṣlaḥah* takes precedence over textual sources."[83]

Riḍā, like al-Ṭūfī, restricts the validity of *ijmā'* in matters of *'ibādāt* to the generation

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[80]Riḍā, *Yusr al-Islām*, 71-2.

[81]Ibid., 71-4.

[82]Ibid., 74.

[83]Riḍā, Ed., *Al-Manār*, IX, 745-6.

of the Prophet. In the matter of *mu'āmalāt*, he does not recognize *ijmā'*'s validity at all and instead prefers to give the *ahl al-ḥall wa al-'aqd* the authority to legislate a ruling with *maṣlaḥah* as the guiding principle. His inclination to place the principle of *maṣlaḥah* ahead of all other considerations might also indicate that he was under the influence of al-Ṭūfī.[84]

In conclusion, it can be said that the application of *maṣlaḥah,* which the modern reformists suggested, contained two themes. One was the notion that Islam carries its own revealed messages in order to preserve human welfare. The other was that Islam endorses, in effect, modern liberal values familiar to the West which leads *maṣlaḥah* to become the basic consideration in legal decisions. Accordingly, the methods that they founded were easily utilized by their successors in order to secularize Islamic law by reforming selected parts of the teachings that were compatible with social needs.

As a matter of fact, this idea was not new in the history of Islamic legal theory. Earlier, it had been pronounced by al-Ṭūfī. His concept of placing *maṣlaḥah* ahead of textual sources may also have influenced the founders of this modern reformation, in particular Rashīd Riḍā. This proves that although al-Ṭūfī came into conflict with those of his peers who opposed the use of *maṣlaḥah* and received no support in his age, he was, indeed, ahead of his time.[85] He claimed that the traditional concept of *maṣlaḥah* was insufficient in anticipating social demands and, therefore, should be developed and changed.

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[84]Badawi, *The Reformers*, 51.

[85]Majid Khadduri, *The Islamic Conception of Justice* (Baltimore: The Johns Hopkins University Press, 1984), 181.

CONCLUSION

Najm al-Dīn al-Ṭūfī was a liberal thinker of the medieval period who adopted *maṣlaḥah* as a means to adapt Islamic law to the changing needs of society. He proposed this concept as a rational method which may be employed to identify what is in the best interests of human welfare. Unlike traditional jurists and those of his contemporaries who only permitted the application of this principle in the absence of textual sources, al-Ṭūfī approved *maṣlaḥah* with or without textual sources. To him, *maṣlaḥah* was the ultimate aim of law while other sources, including the Qur'ān, *Ḥadīth*, and *ijmā'*, were only the means. Therefore, the implementation of the former was more important in al-Ṭūfī's view than adherence to the latter.

Besides basing his ideas on the *Ḥadīth "lā ḍarar wa lā ḍirār"* which, according to him, clearly signifies the privileged status of *maṣlaḥah* in decision-making, al-Ṭūfī claimed that God provides men with reason by which they can recognize *maṣlaḥah* with certainty. To him, this is a more reliable method and one which can guarantee a unified and a systematic application of law rather than a strict adherence to the revealed sources which are always contradictory, generate diversity and provide doubtful methods which may or may not lead people to *maṣlaḥah*.

Similarly, *ijmā'*, which is considered infallible, cannot vouchsafe the *maṣlaḥah* of people. Indeed, this doctrine does not represent the universal consensus of the community, but only the agreement of a part of it. Therefore, consensus cannot represent the aspirations of the whole community. At this point the principle of *maṣlaḥah*, by contrast, is agreed upon by all schools, even by the opponents of *ijmā'* themselves. It has a universal backing and is more worthy of use as a criterion for decision-making, al-Ṭūfī maintained.

The rationale that al-Ṭūfī suggested, however, led others to criticize him, alleging that his

reasons were insufficient in arguing the superiority of *maṣlaḥah*. His argument that adherence to the textual sources only leads to an uncertain *maṣlaḥah* was regarded as a naive remark as it is refuted by the fact that there was no universal *maṣlaḥah* which had been agreed upon. Furthermore, it is the product of human reason which varies according to different times, places and conditions. Reason will analyze *maṣlaḥah* based upon a particular case and perceive it according to the different abilities, backgrounds, and interests of people. Therefore, *maṣlaḥah* of this kind cannot provide a solution which can universally be adopted. Revelation, on the other hand, comes from God Himself and was revealed for the purpose of securing human welfare. For this reason, *maṣlaḥah* must have been incorporated in it. Furthermore, when al-Ṭūfī claims that the textual sources are inconsistent and lead to diversity, it seems that he ignores the notion that this fact is only the result of different interpretations by human reason, which he believes to be capable of discovering valid *maṣlaḥah*.

With regard to the doctrine of *ijmā'*, al-Ṭūfī is right in suggesting that, except for the consensus of the Companions, Muslims are still in dispute over the infallibility of *ijmā'*. But he errs when he insists that the opponents of *ijmā'*, like the Mu'tazilites, al-Naẓẓām, and the Shī'īs, approved the validity of *maṣlaḥah*. They, indeed, agreed upon *maṣlaḥah* as the purpose of legal reasoning but not on *maṣlaḥah* as a method in legal reasoning. The reason for their rejection of the validity of *ijmā'* was that they were aware of the use of *ra'y* in deciding on many issues. This being the case, it is most unlikely that at the same time they would have approved *maṣlaḥah*, which was to be considered the equivalent of *ra'y*.

In supporting his ideas, al-Ṭūfī provides some examples to prove that *maṣlaḥah* was already long preferred by the Prophet and his Companions to the textual sources. Unfortunately,

none of the examples given represent *mu'āmalāt* affairs, although he confines his ideas to *mu'āmalāt* and excludes *'ibādāt*.

By and large, Al-Ṭūfī's thought on *maṣlaḥah* constitutes a liberal view in Islamic legal theory. It was very different from that of other jurists of the classical and medieval periods. Sunnī jurists, for example, classified *maṣlaḥah* into *mu'tabarah*, *mulghāt* and *mursalah*. Yet, they were in disagreement on *maṣlaḥah mursalah*. The Shāfi'īs and Ḥanafīs, for instance, did not adopt *maṣlaḥah mursalah* directly; rather they put it in the range of *qiyās* by attempting to establish a common ground between *maṣlaḥah* and *qiyās*. The Mālikīs and Ḥanbalīs, however, preferred to adopt it directly. Despite their differences in procedure, they are in agreement on the notion that all *maṣlaḥah* must be upheld as long as it does not contradict the objective of the *Sharī'ah*.

Al-Ṭūfī did not confine his ideas to *maṣlaḥah mursalah*, which was neither approved nor nullified by the *Sharī'ah,* but, instead, went beyond this by determining *maṣlaḥah* on the basis of reason with direct reference to the case at hand, not to the textual sources. On this point, his unique *maṣlaḥah* is clearly different from both *maṣlaḥah mursalah* and the limited *maṣlaḥah* of the textual sources. To him, classifying *maṣlaḥah* into *mu'tabarah*, *mulghāt*, and *mursalah*, would put people through unnecessary hardship.

Al-Ṭūfī's concept of *maṣlaḥah* allows human reason to play a role in formulating new *fatwās* without having guidelines restricting legal reasoning. This was a focal point for severe criticism from other jurists. This controversy, however, reached a turning point in the nineteenth-century, when some reformists focused their attentions on *maṣlaḥah* in order to respond to social change. This can be seen in the efforts of Muḥammad 'Abduh and Rashīd Riḍā. These two reformists adopted *maṣlaḥah* through the medium of *talfīq* and *ijmā'* in order to re-open the gate

of *ijtihād*, which was believed to have been closed since the formation of the four schools of law.

Inspired by the doctrine of *maṣlaḥah*, 'Abduh went on to apply the method of *talfīq* in which he not only combined one view with another but also created a synthesis which consisted of a combination of all their good points. This constituted an innovation in Islamic law since the combined elements were sometimes taken from the conflicting legal premises producing legal rulings which are incompatible with their original elements. Similarly, Rashīd Rīḍā introduced a new concept of *ijmā'* in the light of *maṣlaḥah*. To him, *ijmā'* only prevails in matters of *'ibādāt*, whereas, in matters of *mu'āmalāt*, he did not recognize its validity even though it came from the Companions of the Prophet. He preferred to allow reason to determine what is just, guided by the principle of *maṣlaḥah* in matters of social morality. This does not mean that legal rulings are made according to one's own judgement, but rather by mutual consultation among those who possessed the power to bind and loosen, the *ahl ḥall wa al-'aqd*.

The procedures that Riḍā proposed established *maṣlaḥah* as the basic consideration in decision-making. By linking it with political matters, he intended to safeguard *maṣlaḥah* from any distortion. But, by proposing that the *'ulamā'* should constitute an organized body he also acknowledged *ijtihād* as a formal procedure in which the making of law should be the result of consultation. This, accordingly, changed the concept of traditional *ijmā'* and replaced it with a new one.

Indeed, the theory of *maṣlaḥah* articulated by al-Ṭūfī seems unique and goes beyond the standard that is commonly accepted by the traditional, his contemporary, and even modern jurists. No matter how controversial this idea has been, al-Ṭūfī's *maṣlaḥah* has offered an alternative solution in order to anticipate social problems. Therefore, in modern times, al-Ṭūfī's *maṣlaḥah*

has received serious attention from some jurists and has even been adopted by them. Although it cannot be proven that 'Abduh was influenced by al-Ṭūfī's concept of *maṣlaḥah*, it is clear that his pupil Riḍā borrowed some of his ideas. Yet, 'Abduh, like Riḍā, obviously adopted *maṣlaḥah* as the basic consideration in legal decisions. In their development of this concept, however, these two reformists were not as liberal as al-Ṭūfī, an attitude which may be attributed to their commitment to Ḥanbalism which combines great rigidity of principle with much flexibility in application.

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