THE MÂLIKÎ DOCTRINE OF MAṢLAḤAH MURSALAH

Noor-Ul-Amin Leghari

Institute of Islamic Studies

McGill University

A Thesis Submitted to the Faculty of Graduate Studies and Research in Partial Fulfillment of the Requirements for the Degree of Master of Arts

Abstract

Author: Noor-Ul-Amin Leghari

Title of thesis: The Mâlikî Doctrine of Maslahah Mursalah

Department: Islamic Studies, McGill University, Montreal

Degree: Master of Arts

This thesis is an attempt to study the Mâlikî concept of maslahah mursalah. Mâlik was a Muslim scholar of Medina, who founded the Mâlikî school of law. This school is known for its steadfast reliance on maslahah mursalah, which has occasioned the criticism that Mâlik and his disciples ignored textual sources in order to protect a maslahah (public interest). Our analysis, however, shows that this objection is unfounded. Mâlikî jurists, drawing from Mâlik's fatâwâ, have laid down conditions for the validity of a maslahah, the main condition being its conformity with the objectives of the Sharî^{c}ah.

My interest in this subject was aroused by the relevance of this juridical principle of Islam to modern times. Properly applied, it would serve as a basis for legal construction to meet the requirements of a growing society, without compromising the divine nature of the Sharî^{c}ah.

Résumé

Auteur: Noor-Ul-Amin Leghari

Titre de la thèse: The Mâlikî Doctrine of Maṣlaḥah Mursalah

Département: Islamic Studies, McGill University, Montreal

Degré: Maîtrise en Arts

Cette thèse est une étude du concept Mâlikî de Maṣlaḥah Mursalah. Mâlik était un savant de Medina qui fonda l'école juridique Mâlikî. Cette école est renommée pour sa dépendance constante de Maṣlaḥah Mursalah ce qui lui doit la critique que Mâlik et ses disciples ignorent les sources des Ecritures afin de protéger une Maṣlaḥah (intéret publique). Notre analyse cependant montre que cette critique n'a pas de fondement. Les juristes Mâlikî, tirant des Fatâwâ de Mâlik, ont demontré les conditions de validité d'une Maṣlaḥah, la condition principale étant qu'elle soit conforme aux objectifs de la Sharî^{c}ah.

Dans le sujet ce qui à eveillé mon attention, c'est la pertinence que peut avoir ce principe juridique dans l'Islam des temps moderne. Appliquée correctement, ce principe pourrait servir comme fondement de construction juridique pour faire face aux exigences d'une société grandissante sans pour autant compromettre la nature divine de la Sharî^{c}ah.

Dedication

With deep filial love and respect

to my dear father

Sardar Muhammad Amin Khan Leghari

No education and intellectual experience has been more rewarding than the one I have had under your kind guidance. If this academic effort of mine evidences clarity of thought and grasp of the issues involved, you deserve the primary credit. As for the confusion and the muddle that this work may contain, it is mine — and it is there in spite of you.

N.A. Leghari

Acknowledgements

I would like to express my gratitude to Dr. D.P. Little, Director Institute of Islamic Studies and Dr. I.J. Boullata, the acting director, for the fellowship awarded to me that helped make this work possible. Through the years of my study at the Institute, Dr. Turgay has been a source of encouragement, both in academic and personal matters. My appreciation goes to my former supervisor, Dr. M.H. Kamali, who helped formulate my thoughts as to the substance of the topic I was going to deal with. Under his guidance, I was able to finish the first half of this work. My present supervisor, Dr. Bernard Weiss, rendered me valuable suggestions as to the content and the arrangement of the second chapter. I thank him for his constructive criticism and comments throughout the completion of this work.

Sincere thanks are also due to the staff of the library, especially Salwa Ferahian and Emile Wahbah who were always willing to assist me in tracing out books. The last, but not least, I am indebted to my friends for keeping my spirits high, particularly Edward F. Barbezat who also translated the abstract into French.

Montreal, December, 1983. N.A. Leghari

Table of Contents

Introduction

Maṣlaḥah mursalah is a prominent source of law in the Mâlikî legal theory. It is considered as a vital tool for the Sharîᶜah to keep pace with the ever changing circumstances of life, and it provides the Islamic legal theory with the required flexibility and adaptability to new situations.

Since an overt recognition of maṣlaḥah as a source of law raises the question of human preference and interference in the divine law, the majority of Muslim jurists have played down the significance of this doctrine. Maṣlaḥah, as a result, has not been given due prominence by the jurists, although they have acted on it in one form or another. Shâfiᶜî considers maṣlaḥah as no more than acting upon one's own whims against revelation. The Hanafîs do not go beyond the scope of qiyâs (analogical deduction) and istiḥsân (juristic preference) to give their legal theory a necessary measure of flexibility. The Mâlikî emphasis on maṣlaḥah as a source of law appears to be a step forward in the direction of enlarging the sphere of human choice in formulating the Sharîᶜah rules. It serves as a basis for the exercise of human reasoning in the absence of revelation.

without violating the maqâṣid (objectives) of the Sharī'ah. My attempt has been to highlight the significance of this approach and the role which it could play in order to bring the legal doctrine closer to social realities and to prevent stagnation in the growth and development of the law itself.

Keeping in view the nature of the work undertaken, the first chapter is devoted to a brief understanding of the life of Mâlik and of the political and juristic context of his thought and activity. This chapter also includes a brief discussion on the concepts of the practice of the people of Medina and the fatwâ (legal opinion) of a companion as methods of legal construction. These two principles of conservatism in the Mâlikî legal theory tend to counter balance a heavy reliance on human reason on the basis of maṣlaḥah.

The second chapter is a detailed description of the doctrine of maṣlaḥah mursalah as extracted by Mâlikî jurists, particularly Shâtibî, from Mâlik's fatâwâ. Ghazâlî and Tûfî's views vis-à-vis maṣlaḥah mursalah have been discussed at the end of this chapter to give the reader a comparative overview of the subject.

The last chapter contains an analysis of the views

of Ibn Ḥazm and Shâfi^{c}ī, who reject maṣlaḥah mursalah as a principle of legal theory. An attempt has been made in this regard to demonstrate the lack of realism in their approach on account of which they acted upon maṣlaḥah while at the same time disapproving of reliance on human reason independent of textual sources.

It is unfortunate that very little material is available in English on the doctrine of Maṣlaḥah mursalah. It is hoped, therefore, that this work would help English readers towards a better understanding of this important principle of the Islamic legal theory.

Mâlik and the Juristic Milieu of His Time

The study of the life of a jurist, a politician or a reformer does not call simply for a recording his habits of eating or the way he lived and dressed himself. Rather it concerns itself with those aspects of his life that distinguish him from his fellow human beings. If he is a jurist, his legal theory would surely attract critical attention, and if he happens to be a politician or reformer, his political and social ideas would stand critical judgement.

However, a brief account of the life history and the circumstances that he lived in often contributes to a better understanding of the views and the motives of the man under consideration.

This thesis purports to analyze and evaluate a particular aspect of the Mâlikî legal theory, namely the concept of maslahah mursalah. Before embarking on this endeavour, however, it will be appropriate first to devote an initial chapter to a consideration of Mâlik as a man, the sources of knowledge that guided him and the intellectual and political trends prevalent during his time that influenced his thought and outlook. Fortunately, the early works dealing with Mâlik and his legal thought contain a fairly

balanced account of his life and views in contrast to the works written about Abû Ḥanîfah and Shâfi^{c}î by their disciples. The latter works were composed in the setting of the struggle for dominance in various parts of the Islamic world between the Ḥanafî and Shâfi^{c}i schools. The Ḥanafî fiqh, being the official madhhab (legal school) of the ^{c}Abbâsid empire, was under constant challenge from the Shâfi^{c}îs. Consequently, the disciples of both schools indulged, unduely, in the eulogizing of their imâms.

a. Life History

The majority of historians agree that Mâlik's ancestors belonged to a Yemanite tribe called Dhû Aṣbaḥ. His mother descended from another Yemanite tribe, Azud. Qâḍî ^{c}Ayâḍ contends that his mother was a maulâ (client) of ^{c}Ubaid Allah b. Mu^{c}ammar.[1] Likewise it is said that his paternal grandfather, Abû ^{c}Âmir, was a maulâ of a Quraishite tribe Banû Taym.[2] Abû Zahrah denies this fact saying that Abû ^{c}Âmir had entered into wilâ (friendship treaty) with Banû Taym and not muwâlât (clientage) as claimed by Qâḍî ^{c}Ayâḍ.[3]

Conflicting reports have come down to us regarding

Mâlik's year of birth ranging from 90 A.H. to 98 A.H. The modern biographers of Mâlik, such as Amîn al-Khaulî[4] and Abû Zahrah,[5] have preferred the year 93 A.H. Whatever may be the date, the fact remains that Medina, his place of birth, was the centre of religious studies at that time. It had been the home of many eminent companions and their companions. Mâlik was not only influenced by the thought of the early Medinan scholars he was also deeply moved by the religio-intellectual environment of this city. This influence seems to be reflected in some of the principles of the Mâlikî legal theory, to which reference will be made later in this chapter.

b. Influences on Mâlik

1. Family

Mâlik's character and inclinations were largely shaped by influences from his immediate family. He was born in a home that was deeply involved in studying and preserving the ḥadîth of the Prophet, the traditions (âthâr) of the companions and their legal opinions (fatâwâ). It is reported that his grandfather, Mâlik Abû ᶜÂmir, was a tâbiᶜî (companion of a companion) and had narrated

aḥâdîth through ᶜUmar b. Khattâb and ᶜUthmân.[6] His uncles and elder brother, Nadr, were accomplished scholars of ḥadîth, though his father did not take active part in religious studies.[7] Perhaps the first school that determines the intellectual and religious inclinations of any child is his home, and Mâlik's home definitely played a vital role in this respect.

2. Medina

Beyond the confines of his home, the larger environment of Medina played an important part in shaping his ideas. Medina was the centre of Islam during the last eleven years of the life of the Prophet. A good part of the Qur'ân and the Sunnah was revealed and established there. Most of the principles dealing with worldly affairs were enunciated by the Prophet in this city. It served as the capital of the nascent Islamic state after the death of the Prophet. During the caliphate of ᶜUmar, the Islamic state had expanded far beyond the boundaries of Arabia proper. Political, social and legal problems were bound to arise as the Muslims came into contact with new peoples. ᶜUmar, who did not allow the companions to emigrate to other parts of the empire, sought their legal opinion as new issues

arose. This seems to have been a starting point for the development of the Islamic fiqh, and Medina was the centre of gravity for this activity. Though very soon other centres of fiqh sprang up when ᶜUthmân allowed the companions to move to other places, and even more so after the transfer of the capital to Kûfah by ᶜAlî, the fact remains that Medina continued to be an important seat of learning. This claim is further strengthened by the fact that the 'pious group' began to move back to the calm and peaceful atmosphere of Medina during the turbulent years of conflict between ᶜAlî and Muᶜâwiyah and then between the Sufyânids and Marwânids. Medina continued to enjoy an important position as a home of hadîth and fiqh during the early Umayyad period, as two incidents indicate. It is narrated that ᶜAbd Allah b. Masᶜûd, on whose legal opinion the Iraqî school of law is based, used to give fatâwâ in Iraq, and whenever he visited Medina he would seek the opinion of the fuqahâ' (jurists) there. If it happened to be against his opinion, he would abandon his own view and inform the people in Kûfah of his latest position.[8] Similarly, ᶜUmar b. ᶜAbd al-ᶜAzîz requested the jurists of Medina to disperse in

various parts of the Islamic world to teach people the science of fiqh.[9] This also suggests that the juristic doctrines of Medina influenced other centres of Islamic learning. Medina, as a centre of Islamic law, left definite marks on Mâlikî legal theory. However, Mâlik's sentimental attachment to the place, which he seldom left, culminated in the formulation of certain juristic principles, such as the ijmâ^{c} of the people of Medina, which aroused great controversy among his contemporaries.

3. Teachers

The third element that contributed to the moulding of Mâlik's thinking was his teachers. Medina had been an important seat of learning from the time of the companions. Great scholars of diverse orientations made this city their abode. The seven scholars of Medina, for example, are too well known to be mentioned. They based their fiqh on such great personalities among the companions as ^{c}Umar, Ibn ^{c}Umar and Zayd b. Thâbit. Their successors such as Ibn Shihâb Zuhrî, Ibn Rabî^{c}ah, Ibn Hurmuz and Yaḥyâ b. Sa^{c}îd were men of great calibre. At the time when Mâlik entered the educational scene more and

more scholars were flocking into Medina to avoid involvement in political disturbances that led to the downfall of the Umayyads so much so that Abû Hanîfah migrated to Mecca only to return to Kûfah when the ᶜAbbâsids had gained control of the turbulent situation of the empire.

Mâlik received his education from two kinds of teachers, both of whom influenced his thinking. On the one hand there were those who taught him the science of ḥadîth and, on the other, those who taught him fiqh. The former were inclined towards literalism and traditionalism, and the latter encouraged the exercise of reason in solving new juristic problems. The emergence out of Mâlik's thinking of two seemingly contradictory principles, that of the ᶜAmal (practice) of the people of Medina and that of maslahah mursalah can best be understood by taking into account these two major influences in his intellectual training. The above two principles are, on closer examination, only apparently contradictory; in reality they balance each other, thus preventing extremism in either direction. It is this balanced approach to jurisprudence that distinguishes

the legal theory which emerged out of Mâlik's thinking from that which emerged from the thinking of Abû Hanîfah and Shâfi^{c}î, who rely heavily on reason and traditions respectively.

Mâlik learned the science of hadîth from Ibn Hurmuz, Zuhrî and Nâfi^{c} whereas he studied fiqh with Yahyâ b. Sa^{c}îd and Ibn Rabî^{c}ah. Ibn Nadîm claims, in al-Fihrist, that Ibn Rabî^{c}ah had learned the use of ra'y (considered opinion) from Abû Hanîfah,[10] but this seems to be a far-fetched proposition. Ibn Rabî^{c}ah did not ever leave Medina until he was quite advanced in age and had already acquired reputation as a great faqîh (jurist). His only journey was to the city of al-Hâshimiyyah where he served as a judge till his death.[11] However, the fact is that Ibn Rabî^{c}ah's influence is very much visible in the fiqh of Mâlik. He strongly advocated the use of reason in the absence of a tradition in order to maintain the adaptability of legal doctrine to new problems. Maslahah mursalah, which is a cardinal pillar of the Mâlikî concept of Islamic law, is an extension of Ibn Rabî^{c}ah's thoughts.

4. Intellectual Environment of His Time

Finally, a review of the late Umayyad and early ᶜAbbâsid intellectual environment will be helpful in understanding the juristic milieu of the period and its influence on Mâlik's legal thought, with special reference to maṣlaḥah mursalah. Ibn Khaldûn has aptly remarked that "the sciences develop with urbanization and civilization",[12] a statement which is equally applicable to the period under consideration. With the advent of Islam, Muslims began paying attention to the acquisition of and research in the traditional sciences. The attention of the early Muslim scholars was directed mainly to the study of the Qur'ân and its interpretation, ḥadîth and its narration and fiqh and the solution of juristic problems based solely on the former two sources. Their focus of attention and the scope of their activity was circumscribed within the boundaries of traditional sciences.

With the expansion of the Islamic empire and the influx of new people, who belonged to different cultural backgrounds, into the body-politic of Islam the community was forced towards new kinds of sciences based entirely on reason (ᶜAql). These sciences permitted

greater rational activity, thereby promoting an outlook and methodology which was totally different from that of the traditional sciences. Interaction and cross-fertilization between the two kinds of sciences had begun during Mâlik's time, though at a moderate pace due to the diverse nature and the methodologies of the two. Religious studies could not remain immune to this process. The science of fiqh in particular had its share in it, in varying degrees of course, according to the circumstances of different places and the willingness of the persons representing the two trends to accomodate each other. Mâlik appeared on the scene at the beginning of this development.

Interaction between traditional and rational sciences was somewhat less intense in Medina than at the other centres of learning in the Islamic world. Two explanations can be advanced in this regard:

a) The Greeko-Roman and Persian intellectual centres, characterized by rationalism and philosophy, were geographically removed from Medina. Therefore, the interaction between the religious and rational sciences here was not as extensive as in Iraq and Syria. However,

this does not imply that Medina remained totally aloof from these emerging trends. Mâlik's emphasis on such rational principles as maslahah mursalah seems, to a certain extent, a manifestation of this influence.

b) Medina, in pre-Islamic period, never came into close contact with old civilizations as Syria did with the Greeko-Roman and Iraq with the Chaldean and Persian civilizations. The last two countries had inherited certain customs and traditions from these civilizations that left clear marks on various aspects of their lives. Perhaps the most significant impact of this contact was felt on the psychological level. The people of these countries felt little mental reservation in accepting foreign ideas as compared to the people of Hijâz, who had developed a tendency to introversion during their long isolation in pre-Islamic times. This introversion must, however, be viewed in relative terms. The first tidings of rationalist trend had reached Medina by the time of Mâlik, and were gradually affecting the mental attitude of the religious scholars. Mâlik's emphasis on the ijmâ^{c} of Medina and maslahah mursalah may be interpreted as an attempt to synthesize the religious and rational trends

in Islamic law. The unique position of Medina, as a spiritual centre and cross-roads for people from all corners of the Islamic world, contributed towards the formulation of the principle of maslahah mursalah. The later Medinese jurists further injected adaptability into the legal theory in order to accomodate to the requirements of people of diverse backgrounds who sought guidance in juristic matters from them as the religious leaders of the holy city.

c. Characteristics of Mālik's Legal Theory

Having discussed the conditions and the factors that influenced Mālik's thought and juristic outlook, it is appropriate at this point to examine briefly the principal characteristics of his legal theory. The first impression that comes to mind in this regard is that, in spite of the flexibility of his approach and the consideration which he gave to masālih, he seldom indulges in hypothetical questions, in contrast to Abū Hanīfah and his disciples. Being in Medina he came into contact with people of diverse backgrounds who visited him during their pilgrimage. Students converged on him from all over the

Islamic world to study the Qur'ān, ḥadīth and fiqh, which provided him with an excellent opportunity to acquaint himself with their ways of life. This helped broaden his mental approach and sharpened his intellectual faculties. The great number and diversity of his students and visitors, who sought his legal opinion in solving their day to day problems, spared him the need to conjureup questions through the sheer exercise of his imagination. He was confronted with actual problems that required realistic and practical solutions.

His unwillingness to indulge in purely hypothetical questions gave rise to the impression that he opposed the use of ra'y. Consequently, he was included among the ahl al-ḥadīth (those who relied only on traditions). The fact of the matter is that he had to resolve so many practical questions, which were posed to him by visitors, that he had no need to invent hypothetical problems. Otherwise, he was very much in favour of the use of ra'y. The very fact that the school which was to bear his name was distinguished by its emphasis on maṣlaḥah mursalah and the role of reason in determining the maṣāliḥ of the people bears this out.

Ibn Qutaybah in his book, al-Maᶜârif, includes Mâlik among the ahl al-ra'y. Someone asked him: who in Medina gives fatwâ based on ra'y after Rabiᶜah and Yahyâ b. Saᶜîd? -He mentioned the name of Mâlik.[13]

There is no doubt that Mâlik places such traditionalist principles as the ᶜamal of the people of Medina in the forefront of the sources of Islamic law. But the significance that he attaches to ra'y based on the masâlih is equally important. The part which ra'y played in his jurisprudence can be gauged by:

(a) The number of juridical problems solved by him through ra'y whether on the basis of istihsân (juristic preference) or maslahah mursalah. The mudawwanah, a compilation of his fatâwâ, is full of such instances.

(b) His rejection of certain âhâd (traditions narrated on the authority of single narrators) on the basis of qiyâs (analogical deduction). His disciples agree that on many occasions he rejected an âhâd, because it opposed a qiyâs. Qarâfî, a leading Mâlikî jurist, goes to the extent of claiming that he (Mâlik) favoured rejection of âhâd against any kind of qiyâs.[14] Shâtibî, though

less categorical, has not denied that Mâlik disapproved certain ahâd because they happened to contradict a qiyâs based on a conclusively established principle.[15] Even if we agree with Shâtibî and reject the contention of Qarâfî, the fact remains that Mâlik did assign greater scope to reason in solving juristic problems than is generally recognized.

A few examples where he did not ratify ahâdîth of the âhâd type because they contradicted qiyâs will prove the point:

a) He did not accept an âhâd hadîth that says that a utensil should be washed seven times, once at least with dust, if it is licked by a dog. How is it possible, argued Mâlik, that God, in the Qur'ân, should allow eating the catch or the prey of a dog and yet declare its saliva to be undesirable (makrûh). Qiyâs, therefore, requires that as dog's catch is clean so also is its saliva. Thus this hadîth, according to Mâlik, does not stand up to reason when compared with the Qur'ânic passage and is therefore unacceptable.[16]

b) According to hadîth if a dead person fails to keep (obligatory) fasts, his walî (heir) should keep fast on

his behalf. Similarly, another ḥadîth, attributed to Ibn ᶜAbbâs, relates that a woman came to the Prophet and said,

> O Prophet of Allah, my mother has died and she had to keep fast for a month. The Prophet replied, What if your father had left a debt, would you pay it? The woman answered, Yes, upon which the Prophet said that the debt of Allah is more worthy to be paid than the debt of the people.17

Mâlik disapproves these two aḥâdîth of the âḥâd type arguing that they contradict a general principle of individual responsibility deduced from many verses of the Qur'ân such as, "Nor doth any laden bear another's load",[18] and "Man hath only that for which he maketh effort".[19]

c) Mâlik rejects another âḥâd ḥadîth which entitles the parties to a contract to annul the contract during the time of meeting (majlis). He contends that this ḥadîth does not lay down a criterion with which to determine whether the meeting is still in progress, hence unacceptable. The general principle is that a contract is held invalid if there is an ambiguity with regard to its terms, or it is based on deception. The acceptance of

the above ahâd hadîth would amount to the nullification of this general principle; therefore Mâlik disapproves it.[20]

This, however, does not mean that his reliance on such traditional sources as the fatwâ of a companion and the ʿamal of the people of Medina is open to question. He emphasized these principles along with maslahah to counter-balance one against another. His legal theory contains elements of conservatism which were the subject of great criticism among his contemporaries. What these principles really mean and how they have come to be associated with the Mâlikî fiqh are questions that need to be discussed.

To begin with, the concept of the fatwâ of a companion may be analysed. Muwatta' contains innumerable fatâwâ on which Mâlik has relied either to approve an already accepted opinion contained in a particular fatwâ or to solve a new legal problem on its basis. Before describing Mâlik's views on this subject, it would be appropriate to refer briefly to the views of Shâfiʿî and Abû Hanîfah in this regard. Shâfiʿî divides the fatâwâ of the companions into two kinds: Firstly there are

those fatâwâ that have been arrived at on the basis of a narration from the Prophet. Such fatâwâ constitute a binding source of law because they are derived from a Sunnah of the Prophet. In the second category fall those fatâwâ that they have given on the basis of their personal opinions. Shâfi^{c}î validates such fatâwâ on the basis of taqlîd (unquestioning acceptance) but does not consider them as a binding source of law.[21]

Two opinions have been attributed to Abû Hanîfah in this regard. Barâdh^{c}î reports that Abû Hanîfah considers taqlîd of the fatâwâ of a companion obligatory (wâjib) as against qiyâs. Karakhî reports, on the other hand, that Abû Hanîfah acted upon the fatwâ of a companion in those matters that could not be determined by qiyâs such as the timing of prayers etc.[22] This implies that only such fatwâ of a companion would necessarily be acted upon that is in the form of a narration from the Prophet. As for those fatâwâ that he gives on the basis of his personal opinion, they are not binding.

Mâlik, like Ahmad b. Hanbal, considers the fatwâ of a companion as a source of law and almost equates it

with the Sunnah of the Prophet. He argues that the fatwâ of a companion can be classified only in six categories. (1) Either he has heard it from the Prophet (2); or he has heard it from someone who has heard it from the Prophet. (3) He has understood it from a verse of the Qur'ân the implications of which remain obscure to us (4); or the companions, as a body, are unanimous on an issue but it has been related to us by a single companion who served as their spokesman. (5) The companion may have arrived at a legal opinion with the help of his long association with the Prophet and better understanding of the circumstances when the Qur'ân was being revealed and the Sunnah being established (6); or he formed his own opinion but did not arrive at a right conclusion. Mâlik contends that in the first five categories the companion is, in attempting to reach a right conclusion with regard to a legal problem, in a position of great advantage. There is a marginal possibility of error in the last category, and he dismisses it on the ground that such error cannot be ruled out even in the case of the narration of a hadîth.[23]

Mâlik advances this explanation for considering

the fatwâ of a companion as Sunnah and not merely a taqlîd of an individual. This also explains why he sometimes rejects a hadîth of the âhâd type when it contradicts the fatwâ of a companion. He considers such rejection as prefering one Sunnah against another. Shâfi^{c}î, not agreeing with him for elevating the fatwâ of a companion to the position of the Sunnah charged him, in al-Umm, with disregarding a hadîth of the Prophet in favour of a fatwâ of a companion.[24] Two examples would clarify their difference of opinion. Mâlik disapproves the performance of ^{c}umrah[25] during the month of hajj (pilgrimage) based on the opinion of ^{c}Umar b. al-Khattâb He does not accept a hadîth mentioned on the authority of Sa^{c}d b. Abî Waqqâs who claims that he saw the Prophet performing ^{c}umrah during the month of hajj. Shâfi^{c}î gives preference to the hadîth narrated by Sa^{c}d, but Mâlik argues that ^{c}Umar knew the intention and the practice of the Prophet better than Sa^{c}d. Had he (the Prophet) forbidden ^{c}umrah during this period ^{c}Umar would have never allowed its performance.[26] In another case a hadîth allows a muhrim[27] to use perfumes before the rituals of hajj are over. Mâlik disapproves this act on

the basis of the fatwâ of ᶜUmar who forbade to do so. Again he argues that ᶜUmar would not have forbidden had there not been a clear cut guidance to him from the Prophet.[28]

Mâlik's heavy reliance on the fatwâ of a companion was due to the peculiar circumstances that he lived in. His was the time of great political and social upheavals. New political and religious sects had appeared on the scene. The fabrication of aḥâdîth was in full swing, each group propagating its views among the Muslims. Different theological issues such as the question of predestination and free-will were raised during this period. Factions, like the Shîᶜah and Khawârij who had started as political groupings, were looking for theological foundations for their beliefs. In such a situation Mâlik might have felt more secure by relying on the legal opinion of the companions.

The other traditional source that became the characteristic of Mâlikî fiqh is the ᶜamal of the people of Medina. Before describing its nature and the general misunderstanding surrounding this principle, it seems appropriate to show how much importance Mâlik attaches to

it as a source of law in his legal theory. This can be illustrated by quoting an excerpt of a letter that he wrote to Layth b. Sa^{c}d, an eminent jurist of his time. Criticising him for ignoring the ^{c}amal of Medina as a source of law he writes:

> From Mâlik b. Anas to Layth b. Sa^{c}d, may God bless you... I have come to know that you give your legal opinion to the people on different issues and that your fatâwâ are contrary to what people act upon and practice in our city (Medina). You are fully aware of your moral and social standing among your people and you also know that the people rely upon your opinion. Therefore, you should be afraid of yourself (meaning thereby that you should be extremely cautious of what you say and tell the people) and follow the path in which lies salvation for us... People are followers of the people of Medina. To this city the Prophet migrated, the Qur'an was revealed here... they witnessed the revelation while the Prophet was among them. He enjoined them and they followed his commands. He paved them a way and they followed it until he passed away and was succeeded by those who followed the same practice. If this is the case, then I don't see any reason for someone to act otherwise (contrary to the practice of this city). This is such a privilege that cannot be claimed by any other place.[29]

The above quotation leaves no doubt about the importance that Mâlik attaches to the ^{c}amal of Medina.

He considers it a vital source of the Islamic fiqh and, on many issues, bases his legal opinion on it. But what does the ᶜamal of Medina really imply? Mâlikî jurists have divided it into two kinds. Firstly, there is an ᶜamal that is based on a traditional (naqlî) source that is a practice that came into vogue on the basis of a saying, act or an approval of the Prophet. Secondly, an ᶜamal that gained recognition on the basis of an ijtihâd (personal reasoning) or a deduction of the jurists of Medina. There is a consensus among the Mâlikî jurists that Mâlik considers the first kind of ᶜamal as a valid source of law, because it virtually amounts to a Sunnah of the Prophet that has come down in the form of the practice of the people of the city that he lived in. It is impossible for such a large number of people who lived in Medina to attribute their practice to the Prophet falsely. If, in case, the hypothesis of false attribution is accepted, then the whole hadîth literature would lose authenticity. Mâlikîs are not alone in upholding this kind of ᶜamal.[30] Abû Zahrah says that even Shâfiᶜîs hold the same opinion.[31]

Three opinions have been ascribed to Mâlik with

regard to the second kind of ᶜamal i.e. the one based on an ijtihâd of the jurists of Medina:

(a) He does not consider such an ᶜamal as a source of law. This claim has been made by Abû Bakr al-Abharî. He denies that Mâlik had ever relied on this kind of ᶜamal in attempting to arrive at a legal opinion.[32]

(b) Some other Mâlikî jurists are of the opinion that Mâlik does not recognise such ᶜamal as a source of law, but he does give preference to the ijtihâd of the Medinese jurists over the ijtihâd of others.[33]

(c) Others claim that Mâlik considers ᶜamal based on the ijtihâd of the jurists of this city as a binding source of law. This position has been adopted by the majority of the Mâlikî jurists who come from the Maghrib (Africa and Spain). They quote in support of their claim Mâlik's letter to Layth and argue that the language of the said letter is general in nature. Mâlik, according to them, has not differentiated between the two kinds of ᶜamal of Medina, therefore, there is no need to single out the first category of ᶜamal as binding.

The above analysis shows that there is no disagreement among the Mâlikîs that an ᶜamal of Medina based

on a saying, act or approval of the Prophet is as binding as the Sunnah itself. As for the second kind of ʿamal that is based on an ijtihâd of the jurists of Medina, there is no unanimity among them. Some of them put both kinds of ʿamal in the same category and claim that Mâlik upholds the same position, but this proposition has been challenged by the majority of the Mâlikî jurists.[34]

The above explanation should clarify the misconception that is generally ascribed to Mâlik that he prefers an ʿamal to a ḥadîth of the Prophet. What seems to be the case is that he prefers only ʿamal that is based on a saying or practice of the Prophet and not ʿamal established by an ijtihâd of the jurists of Medina. Furthermore, he prefers the first kind of ʿamal only over aḥâdîth of the âḥâd type. He contends that this kind of ʿamal of Medina amounts to a Sunnah of the Prophet which is based on the authority of a great number of people. If it contradicts a ḥadîth of the âḥâd type the latter should, as a matter of principle according to the science of ḥadîth, be disregarded. This would amount to prefering a stronger ḥadîth to a weaker one. Had it been otherwise, the Mâlikî jurists would not have differentiated between the two kinds

of a^{c}mâl defining their respective strengths and validity.

To sum up the discussion, one may conclude that Mâlik was born at such a time when the traditional sciences were firmly rooted. The religious scholars of the time were deeply influenced by the traditional approach to fiqh. But rational sciences had also begun appearing on the scene and had started affecting the mental attitudes of the scholars, especially in Iraq and Syria. It was in these two countries that the interaction of these two types of sciences was felt strongly and their scholars, due to their geographical closeness and psychological affinity, showed less restraint in assimilating this emerging trend. This does not imply that Medina remained immune to this development.

It goes to the credit of Mâlik that, realising the impact of changing circumstances and the special religious position of Medina, he took a bold step of synthesising the traditional and rational principles into his legal theory. This approach gave his fiqh the necessary degree of flexibility and assured it continuity with the passage of time. All this he tried to accomplish without compromising the basic characteristics of Islamic Shar^{c}ah.

The two traditional elements, namely the ʿamal of Medina and the fatwâ of a companion, have been discussed in considerable detail. However, it remains to be seen what he meant by the principle of maṣlaḥah mursalah which he used as an instrument of rationalism to accomodate the needs of people of diverse backgrounds. It will be the subject of our next chapter.

Footnotes

1. Abû Zahrah attributes this claim to Qâdî ᶜAyâḍ in his book entitled Mâlik, Cairo: Dâr al-Fikr al-ᶜArabî, n.d., p.23.

2. Ibn Ḥajar, Fatḥ al-Bârî, Cairo: Maṭbaᶜat al-Bahiyyah, 1348 A.H., p.91.

3. Abû Zahrah, p.2.

4. Amîn al-Khaulî, Mâlik b. Anas, Cairo: Dâr Iḥyâ' al-Kutub al-ᶜArabiyyah, n.d., p.19.

5. Abû Zahrah, p.22.

6. ᶜAbd al-Ḥalîm Jundî, Mâlik b. Anas, Egypt: Dâr al-Maᶜârif, n.d., p.50.

7. Abû Zahrah, p.27.

8. Ibid., p.28.

9. Muᶜîn al-Dîn Nadavî, Târîkhi Islâm, v.11, ᶜAzam Garh: Maᶜârif Press, 1948, p.237.

10. Ibn Nadîm, al-Fihrist, Egypt: Maktabah Raḥmâniyyah, n.d., p.285.

11. Ibn Nadîm's claim can also be refuted on the historical fact that Ibn Rabîᶜah established his juristic circle sometimes during the first decade of the second century A.H., whereas Abû Ḥanîfah established his circle in 120 A.H. after the death of his teacher Ḥammâd.

12. Ibn Khaldûn, Muqaddimah, Egypt: Maṭbaᶜat al-Bahiyyah, n.d., p.304.

13. Ibn Qutaybah, al-Maᶜârif, 2nd ed., Egypt: Dâr al-Maᶜârif, n.d., p.488.

14. Abû Zahrah, p.274. Also see Qarâfî, Sharḥ al-Tanqîḥ, p.261.

15. Abû Ishâq al-Shâṭibî, al-Muwâfaqât, v.III, Cairo: al-Maktabah al-Tijâriyyah al-Kubrâ, n.d., p.17.

16. Ibid., p.21.

17. Ibid., p.22.

18. Marmaduke Pickthall, The Holy Qur'ân (VI:165), Karachi: Dawood Foundation, 1975, p.91.

19. Ibid. (LIII:39), p.348.

20. Shâṭibî, p.22.

21. Abû Zahrah, p.286.

22. Ibid., p.286. Also see Uṣûl Fakhr al-Islâm al-Bazdawî, v.III, p.927.

23. Abû Zahrah, pp.287-8.

24. Muḥammad b. Idris al-Shâfi^{c}î, al-Umm, Egypt: al-Maṭba^{c}ah al-Kubrâ al-Amîriyyah, 1325 A.H., p.200.

25. A mini-pilgrimage that could be performed at any time of the year, but does not have all the rituals of ḥajj.

26. Shâfi^{c}î, "Kitâb Ikhtilâf Mâlik", al-Umm, v.VII, p.199.

27. Iḥrâm is a state of mind and body during which a person abstains from certain acts and wears a special kind of dress, consisting of one or two unstitched cloths. This state continues for the duration of ḥajj and ^{c}umrah. Muḥrim would be the person who is in the state of iḥrâm.

28. Shâfi^{c}î, al-Umm, p.200.

29. Amîn al-Khaulî, pp.753-5.

30. ^{c}Umar ^{c}Abd Allah, "Mâlik's Concept of "^{c}Amal" in the Light of Mâlikî Legal Theory", v.II, Ann Arbor: University Microfilms International, 1978, p.414.

31. Abû Zahrah, p.307.

32. Ibid., p.308.

33. Qâḍî ᶜAyâḍ, Tartîb al-Madârik, v.I, Beirut: Maṭbaᶜat al-Ḥayât, 1967, pp.69-70.

34. Amîn al-Khaulî, p.151.

The Mâlikî View of Maslahah Mursalah

In order to dispel any misunderstanding that may arise during the course of reading this chapter it seems pertinent to make an observation before embarking upon the analysis of the concept of maslahah mursalah in the Mâlikî legal theory.

The general concept of maslahah, under which the more particular concept of maslahah mursalah is subsumed, will be discussed briefly in the beginning of this chapter. The remainder of the chapter will be devoted to a general description of the doctrine of maslahah mursalah. The evaluation of the views of its critics will form the subject of the third chapter.

a. Definition of Maslahah

Etymologically the word maslahah is an infinitive noun of the root s-l-h. The verb saluha is used to indicate when someone or something becomes good and upright. Maslahah, in its relational sense, means a cause, an occasion or a goal which is good. In Arab usage it is said: nazara fi masâlih al-nâs, which means: he looked into the well-being of the people. The sentence fil-amri

maṣlaḥah is used to say: there is benefit in this affair.[1]

In the Qur'ân various derivatives of the root ṣ-l-ḥ are used, the word maṣlaḥah, however, does not appear there. The Qur'ân uses the active participle of ṣ-l-ḥ very frequently. On one such occasion the meaning of this term is elaborated thus: "They believed in Allah and in the Last Day and enjoin right conduct and forbid indecency and vie one with another in good words. They are of the righteous (ṣâliḥûn)".[2]

Bûtî, in defining maṣlaḥah, points both to its positive and negative aspects. "Anything", he elaborates, "that contains naf^{c} (utility, benefit) is fit to be called maṣlaḥah, no matter this naf^{c} is obtained through exertion (jalb) or abstention (ibqâ')".[3]

Shâtibî, a Mâlikî jurist, explains maṣlaḥah as follows: "I mean by maṣlaḥah that which concerns the subsistence of human life, the completion of man's livelihood and the acquisition of what his emotional and intellectual qualities require of him, in an absolute sense".[4] Ghazâlî, a follower of the Shâfi^{c}î school, narrows down the scope of maṣlaḥah by saying, "We mean by maṣlaḥah (any manfa^{c}ah) that is in consonance with the

objectives of the Shâri^{c} (law-giver)".[5] Though Mâliki legal theory articulates the same condition for the validity of maslahah in Islamic law, Ghazâlî lays greater emphasis on this point so as to play down the role of human choice in solving juridical problems.

Muslim jurists generally agree that the acquisition of maslahah and the avoidance of mafsadah (communal harm) . is the prime consideration of all the Qur'ânic and the prophetic commandments. The following verses are quoted to support this contention. Allah says, "We sent thee not save as a mercy for the peoples".[6] "O mankind, there hath come unto you an exhortation from your Lord, a balm for that which is in the breasts, a guidance and a mercy for believers".[7] The Prophet says, "Do not inflict injury nor repay one injury with another".[8]

b. Kinds of Maslahah

In the Islamic legal theory masâlih have been divided into three categories:

(a) Masâlih Mu^{c}tabarah: (benefits textualy relevant) are the ones that have been explicitly recognized by the Sharî^{c}ah such as jihâd (struggle) for the protection of the faith, retaliation (qisâs) for the protection of life and the prescribed

penalties of theft, drinking and adultery for the protection of property, intellect and chastity respectively. Muslim jurists recognise the validity of this kind of maṣâlih and the aḥkâm (rules) based thereon.[9]

(b) Maṣâlih Mulghât: (benefits textualy excluded) are the ones that have been ruled out by the Sharî^{c}ah e.g. disproportionate distribution of heritage between a man and a woman on the basis of the following verse of the Qur'ân, "Allah chargeth you concerning (the provision for) your children: to the male the equivalent of the portion of two females".[10] Or the prohibition of usury regardless of the apparent loss that may accrue to a money lender as a result. The jurists agree that this kind of maṣlaḥah cannot serve as a source of law. Prima facie they may seem beneficial, but in reality they are based on false assumptions (mawhûmah) and thus harmful to an individual and society.[11]

(c) Maṣâlih Mursalah: This is the kind of maṣâlih that have generally been defined as the manâfi^{c} (things beneficial to men) that have neither been explicitly recognised nor ruled out by the Shâri^{c}.[12] Malcolm Kerr puts it this way, "The maṣlaḥa is therefore a more specific term for ḥikma, and since it is known in each case not by direct

indication in the textual source but by the jurist's own judgement, it is maṣlaḥa mursala".[13] Shâtibî and Bûtî take a restrained approach to maṣlaḥah mursalah by emphasising the point that such a maṣlaḥah may also be in conformity with the objectives of the Sharî^{c}ah.[14]

As indicated earlier there exists no significant disagreement among the jurists with regard to the first two kinds of maṣâliḥ. As for the validity of maṣlaḥah mursalah, however, there exist, theoretically at least, four trends of thought. Their views may be summarised as follows:

Firstly, there are the rejectionists such as Shâfi^{c}î and Ibn Ḥazm who argue that the acceptance of such maṣâliḥ would amount to admission that the Shâri^{c} has not taken into account all the maṣâliḥ of the people, thus attributing imperfection to the Sharî^{c}ah in spite of the divine declaration: "This day I perfected your religion for you and completed my favour unto you".[15] Their second criticism is based on the apprehension that the recognition of maṣlaḥah mursalah would open the door for personal likes and dislikes to infiltrate Islamic law, thus undermining its divine nature. Their point of view

will be discussed in greater detail in the third chapter.[16]

Secondly, there are the Hanafîs who advocate the use of juristic preference (istihsân) along with analogy (qiyâs). The concept of juristic preference, irrespective of how they define it, is based on maslahah mursalah. Therefore, it can be said that they have relied on maslahah mursalah in their legal theory, even though they have not acknowledged this as much as they should have. In theory, the Hanafîs do not give much credence to maslahah mursalah as a source of law, but in practice they, like the Shâfi^{c}îs, have resorted to it in solving unprecedented legal problems.[17]

Thirdly, there are the extremists who rely too heavily on maslahah mursalah. In matters relating to transactions (mu^{c}âmalât) they uphold that in cases where a maslahah and a nass contradict each other the maslahah takes precedence. Tûfî, a Hanbalî jurist (d. 716 A.H.) initiated this trend of thought, but did not receive much support from traditional scholars. Tûfî's views will be discussed at some length at the end of this chapter to mark the difference between his approach to maslahah mursalah and the Mâlikî perception of this principle.[18]

Fourthly, there are the Mâlikîs who accept maṣlaḥah mursalah as a source of law in the conviction that Mâlik himself "Uses this principle extensively in his legal theory, albeit with due regard to the objectives of the Shâriᶜ and without violating any principle of the (Sharîᶜah)".[19]

c. Mâlikî Arguments in Favour of Maṣlaḥah Mursalah

Mâlik's disciples justify their recognition of maṣlaḥah mursalah on the following grounds:

1. All the Sharîᶜah aḥkâm contain maṣâliḥ of the people. If in any given situation a particular ḥukm is based on a text, consensus or analogy it would be accepted by the believers as such. However, if a ḥukm is not explicitly based on any of the above three sources it would be determined on the basis of maṣlaḥah mursalah. A study of the Sharîᶜah aḥkâm would indicate that they revolve around the concept of maṣlaḥah. Any change in maṣlaḥah causes a corresponding change in aḥkâm, therefore by basing the Sharîᶜah aḥkâm on maṣlaḥah a jurist fulfils the intention of the Shâriᶜ.[20]

2. Experience shows that society undergoes change. New

events occur, situations vary and new problems emerge. People at a given time may face a situation that did not exist in the past. Society may attach importance to certain masâlih that were not considered important before. In such a flexible situation if the door is not opened for a jurist to solve juristic problems on the basis of maslahah the Sharī^{c}ah will no longer guarantee benefit for the people, will not solve their genuine problems or conform to the requirements of changing times, places and conditions in spite of the fact that it is considered to be valid for all times.[21]

3. The companions of the Prophet were faced with new situations after his death. They encountered new problems that had no precedents in the Sharī^{c}ah. The fact that a particular problem was not specifically dealt with by the Sharī^{c}ah did not deter them from exercising their ra'y (considered opinion) in the light of the spirit of the Sharī^{c}ah. They were concerned only with the fact that anything that ensures benefit and avoids harm is maslahah, hence a valid ground to base their juridical opinion on it. Abū Bakr, ^{c}Umar, ^{c}Uthmân and ^{c}Alī solved juridical problems on the basis of maslahah such as the compilation of the Qur'ân, the pronouncement of three divorces on a

single occasion and the second call (ādhān) for the jum^{c}ah (Friday) prayer. These examples will be discussed in detail later in the chapter.[22]

The above discussion shows that the Mālikīs are quite flexible in the use of maṣlaḥah mursalah as a principle of jurisprudence. However, they subject all maṣāliḥ to the objectives of the Sharī^{c}ah. A violation of any of these objectives would render a maṣlaḥah into a mafsadah (opposite of maṣlaḥah), hence unacceptable as a source of law in Islam.

d. Maqāṣid of the Sharī^{c}ah

The maqāṣid (objectives) of the Sharī^{c}ah have been categorized into five, that is the protection of faith (dīn), life (nafs), intellect (^{c}aql) and property (māl). Mālikī jurists were convinced that a study of the Sharī^{c}ah aḥkām leads one to the conclusion that they are meant to protect and advance these maqāṣid. Therefore, they concluded that a new ḥukm given on the basis of maṣlaḥah mursalah should not violate any of the above maqāṣid; if it does, such ḥukm would be considered as void. It must be pointed out here that the above categories of maqāṣid would receive

priority in the same order as mentioned above. For example a maṣlaḥah relating to faith will be prefered to a maṣlaḥah relating to life and a maṣlaḥah relating to life will receive the same preferential treatment against a maṣlaḥah which relates to intellect.[23]

The above maqâṣid can be divided, from the point of view of positive and preventive manners of protection, into two groups. Falling into the positive group are ᶜibâdât, ᶜâdât (habits, customs) and muᶜâmalât (transactions). Falling into the preventive group are jinâyât (penalties).

ᶜIbâdât aim at the protection of faith. Examples of ᶜibâdât are profession of beliefs, prayers, almsgiving, fasts and pilgrimage. ᶜÂdât aim at the protection of life and intellect. Seeking food, drink, clothing and shelter are examples of ᶜâdât. In jinâyât may be included those acts which concern the above five maqâṣid in a preventive manner. They prescribe the removal of what prevents the realization of these interests. To illustrate jinâyât, the examples of retaliation and blood money may be given for the protection of life and punishment for drinking intoxicants for the protection of intellect.[24]

e. Kinds of Maslahah Mursalah

Mâlikî jurists divide maslahah mursalah into darûrî (necessary), hâjî (needed) and tahsînî (commendable). Darûrî masâlih are necessary because they are indispensable in sustaining the masâlih of dîn (faith) and dunyâ (this world), in the sense that their disruption results in the termination of life in this world. In the Hereafter they result in losing spiritual salvation and blessings.

Hâjî are so called because they are needed in order to give broader application (tawassu^{c}) to the purpose of the masâlih and to remove the strictness of their literal application which leads to impediments and hardships and eventually to the disruption of the maqâsid. Thus if hâjî are not taken into account along with darûrî people on the whole will face hardship. The disruption of hâjî does not necessarily mean disruption of the whole of masâlih as is the case with darûrî. Examples of hâjî are as follows: in ^{c}ibâdât, concession in prayers and fasts (siyâm) on account of sickness or journey which otherwise may cause hardship in prayer, fasting etc. In ^{c}âdât, the lawfulness of hunting, in mu^{c}âmalât, permission

of money lending (qirâḍ), agrarian association (musâqât) and in jinâyât, allowances for weak and insufficient evidence in decisions affecting public interest.

Taḥsîniyyât imply the adoption of what conforms to the best of customs (ᶜâdât) and to avoid those manners which are disliked by decent people. This type of maṣlaḥah covers noble habits of ethics and morality. Examples of this type are as follows: in ᶜibâdât, cleanliness (ṭahârah) or decency in covering the privy parts of the body (satr) in prayer. In ᶜâdât, etiquette, table manners etc., in muᶜâmalât, prohibition of the sale of unclean (najis) articles or the sale of the surplus food and water.[25]

The above maṣâliḥ, as a structure consisting of three grades, are interconnected. There are two aspects of their relationship with one another. First, every grade separately requires implementation of certain elements which supplement and complement this grade. Second, every grade is related to others.

Every one of the three grades requires certain elements to achieve complete realization of its objectives. These elements are known in Mâlikî legal theory as takmilah.

For instance, qiṣâṣ cannot realise its full objective without a condition of tamâthul (parallel evaluation). This statement, however, needs two clarifications. First, a lack or inadequacy of these complementary elements does not amount to a negation of the original objective. Second, if the consideration of a complementary element results in the annulment of the original objective its consideration will not be valid. The reason for this stipulation is that the complementary element is like a quality (ṣifah). If the consideration of a quality results in the negation of the qualified (mawṣûf) the qualification is negated as well. Secondly, even if it is supposed that the consideration of the complementary results in the realization of its interests at the cost of the original objective it is stressed that the realization of the original be prefered. The above situation can be explained thus: The eating of carrion is allowed in the Sharî^{c}ah to save life. The reason is that the preservation of life is of utmost importance and the preservation of murû'ah (honour) is only complementary (takmîl) to the protection of life. Impure things are prohibited to preserve dignity and encourage morality,

but if the preservation of the complementary leads to the negation of the original interest the consideration of the complementary is forsaken.

Another example may be seen in the act of sale which is a maṣlaḥah ḍarûriyyah while the prohibition of risk and ignorance in sale transactions is complementary. If the complete absence of risk is stipulated the result will be complete negation of the act of sale.

The relationship of the three grades of maṣlaḥah mursalah (ḍarûrî, ḥâjî, taḥsînî) with one another is the same as that of the complementary maṣâliḥ to the original objective of the law. Taḥsîniyyât are thus complementary to ḥâjiyyât which, in turn, are complementary to ḍarûriyyât. The ḍarûriyyât are the basic maṣâliḥ. Keeping in mind the above explanation Shâtibî deduces the following five rules in this relationship:

1. Ḍarûrî is the basis of all maṣâliḥ.
2. The disruption of ḍarûrî necessitates the disruption of other maṣâliḥ absolutely.
3. The disruption of other maṣâliḥ does not necessarily entail disruption of ḍarûrî.
4. In a certain sense, however, the disruption of taḥsînî

or ḥâjî absolutely necessitates the disruption of ḍarûrî.

5. The preservation of ḥâjî and taḥsînî is necessary for the sake of ḍarûrî.[26]

Examining Mâlik's fatâwâ Shâtibî divides maṣâliḥ ḍarûriyyah into two kinds; aṣliyyah (primary) and tabᶜiyyah (secondary). Aṣliyyah: are of general nature. They are valid for all times, situations and conditions. This kind of maṣlaḥah ḍarûriyyah is ᶜainî that is incumbent on every Muslim. Examples of such maṣlaḥah is the protection of faith etc. Tabᶜiyyah: This kind of maṣâliḥ, though ḍarûrî, are not incumbent on every Muslim individual. They are important for the smooth running of a society, but a limited number of its members may take care of them and thus fulfill the requirement. For instance, commerce, industry, education and agriculture are necessary professions for the welfare of a people, but every person is not obliged to undertake them to ensure personal or collective maṣlaḥah. In a way the last kind of maṣâliḥ ḍarûriyyah are subservient to the former (ᶜainî) and serve as complementary to them.[27]

f. Scope of Maṣlaḥah Mursalah

Before going on to the qualifications of maṣlaḥah mursalah as expounded by the Mâlikîs, it seems appropriate to discuss its scope within which it operates and serves as a source of law.

Muslim jurists generally and the Mâlikîs in particular point out that maṣlaḥah mursalah does not operate in matters relating to ᶜibâdât. Its field of operation is limited to matters relating to muᶜâmalât which in legal terminology are also called ᶜâdât. Why should this distinction be made? Shâtibî, explaining the Mâlikî point of view, argues that the purpose of ᶜibâdât is to regulate man's relation with his creator. To achieve this purpose certain ᶜibâdât (rituals), such as prayers etc., have been prescribed by the Shâriᶜ which are to be performed in a given form and cannot be reasoned out. The basis of such nuṣûṣ is taᶜabbud (mere obedience) both in letter and spirit. Supporting his claim with regard to ᶜibâdât Shâtibî advances two arguments:

(a) ᶜIbâdât such as prayers, fast and pilgrimage are required to be performed in a particular manner that is laid down by the Qur'ân or the Sunnah. For example if someone does not say prayer according to the prescribed

form or changes the timings of keeping fast or the manner in which hajj is to be performed his act will not be considered as ᶜibâdah. In these matters the Sharîᶜah does not look only to the intention (niyyah) of the doer but also to the way he performs that ritual.[28]

(b) The Shâriᶜ has not explained ᶜilal (reasons, causes) for acts of worship as he has done for matters pertaining to ᶜadât. This makes it clear that he wants us to perform ᶜibâdât in the prescribed form.[29]

Keeping in mind the above explanation the Mâlikîs generally advocate strict adherence to the form of an ᶜibâdah. For instance Ibn Rushd says that Mâlik emphasizes that the prayer should be started with takbîr (Allah akbar) and ended with taslîm (Al-salâm ᶜalaikum). Other words conveying the same meaning are not acceptable.[30]

As for matters relating to ᶜâdât the Sharîᶜah does not call for strict adherence to their form. Fulfillment of the objective of the law-giver and the purpose for which a particular hukm was given is more important than the way it is carried out. Arguments in support of this claim may be summed up as follows:

(a) A study of the Sharîᶜah would show that the law-giver

in matters relating to ᶜâdât attaches importance to the causes of such aḥkâm which ensure maṣlaḥah of the people. Aḥkâm change when such causes do not exist. Qarâfî, an eminent Mâlikî jurist, explains this principle thus: "Everything in the Sharîᶜah follows ᶜâdât. With a change in ᶜâdah a ḥukm changes to what the new ᶜâdah requires...all juristic matters based on ᶜâdât change when such ᶜâdât undergo change".[31] This establishes the fact, according to Qarâfî, that the importance of aḥkâm relating to ᶜâdât lies in the purpose which caused their enactment and not in the form of their implementation. Mâlik, drawing on this fact, uses maṣlaḥah mursalah and istiḥsân extensively in matters relating to ᶜâdât which, according to him, form "nine tenths of the knowledge".[32] Muṣṭafâ Aḥmad Zarqâ', in his article on the sources of Islamic law, quotes ᶜAllâmah Ibn ᶜÂbidîn who says that "there are many issues that a mujtahid decides on the basis of conditions and maṣâliḥ of a particular time. With changing circumstances, these aḥkâm keep changing too. This is so because the people whose requirements were taken into consideration no longer exist".[33] Ibn ᶜÂbidîn illustrates this principle with an example that jurists, at one point in time, had

given fatwâ that the teachers of the Qur'ân should not accept any remuneration from the people they teach. But later on they reversed their position, because teachers in the old days used to receive salaries from the government. After some time this practice was discontinued. Therefore, if the old opinion was upheld they (teachers) would have not been able to support themselves or their families.

(b) Man, from time immemorial, has tried to solve issues by looking into their maʿânî (inner meanings, reasons) in order to secure his maṣâliḥ. This has been the method of all the wise men and philosophers in the past. The Sharîʿah upholds this principle. Many ʿâdât, in vogue before the advent of Islam, were recognised by the Sharîʿah because they ensured maṣâliḥ of the people. The Sharîʿah did not change them, because the basis of such aḥkâm is not the way they are carried out but the purpose which they are meant to fulfill. Aḥkâm relating to blood money and money lending (girâḍ) may serve as examples in this respect.[34]

To sum up the discussion one may conclude that ʿibâdât are outside the scope of maṣlaḥah mursalah, be-

cause they are meant to be performed in a particular way which can be prescribed only by the Shari^{c}ah. ^{c}Âdât, on the other hand, are meant to regulate man's relations with his fellow-beings, therefore more stress is laid on the purpose which a hukm is meant to achieve and not the form in which it is to be carried out. Besides that, in ^{c}ibâdât the extension of the scope of ta^{c}abbud is not intended. In the case of ^{c}âdât, however, the extension of the ahkâm is the purpose. Hence the lawgiver generously explains the rules of law relating to ^{c}âdât in respect to their ^{c}ilal and ma^{c}ânî.

g. Conditions of Maslahah Mursalah

Having concluded our brief examination of the concept of maslahah mursalah and the scope of its application, we may now turn to a consideration of the conditions which the Mâlikî jurists attached to the actual use of maslahah mursalah as a source of law.

(a) The first limitation imposed on the application of maslahah mursalah is that it should be in conformity with the objectives of the Shari^{c}ah. It may not contradict any Shar^{c}î dalîl (proof, evidence) that has already been proved conclusively (qat^{c}î). It is not necessary

that there may exist any specific dalîl for such maṣlaḥah. The absence of proof does not necessarily entail the negation of maṣlaḥah as such.[35]

(b) A maṣlaḥah mursalah should appeal to human reason. The general criterion in this regard is that people may not reject it as something abnormal.[36]

(c) A maṣlaḥah mursalah may not cause an impediment in any matter relating to dîn. Matters relating to faith as compared to a maṣlaḥah mursalah are of higher value, hence worthy of preference.[37]

The above conditions for the validity of maṣlaḥah mursalah are generally ascribed to Mâlik. However, a more restrained view is adopted, among the classical scholars, by Ghazâlî and, among the modern scholars, by ᶜAbdul Karîm Zaidân and Bûtî. Ghazâlî's viewpoint will be discussed at the end of this chapter. However, Zaidân and Bûtî's views are discussed here.

Zaidân adds two more qualification to validate a maṣlaḥah. Firstly, it should be ḥaqîqî (real, conclusive) and not wahmî (presumptive).[38] This implies that only such maṣlaḥah would be legally recognised as valid the benefit of which is beyond doubt. This condition seems superfluous.

It is included in the second qualification mentioned above. It reflects an attitude of mind that calls for unnecessary protective walls to be built around the Sharī^{c}ah to guard against any supplement. This, sometimes, blocks the way to genuine progress in law. Adding unnecessary limitations defeats the purpose for which Mālik introduced maṣlaḥah mursalah into his legal theory.

Secondly, Zaidān articulates that the maṣlaḥah be ^{c}āmm (general) and not limited to a particular person or to a group.[39] This condition is meant to check the rulers of the Islamic state from using this principle for their personal ends.

Būtī, in his Ph.D. dissertation, adds a long list of the qualifications of maṣlaḥah. Two of them deserve mention. Firstly, a maṣlaḥah that defeats the purpose of another maṣlaḥah of higher importance cannot be accepted as valid.[40] Secondly, a maṣlaḥah mursalah should not contradict, among other things, a qiyās. Būtī argues that a qiyās is always deduced from a naṣṣ whereas maṣlaḥah mursalah contains an element of uncertainty, because it is not specifically approved nor disapproved by the Sharī^{c}ah.[41] Baltājī contends that this condition

cannot be accepted as a general principle:

> A study of the fiqh of Mâlik shows that sometimes he gave more credence to maslahah as against qiyâs... there is no Sharî^{c}ah doctrine or agreed upon principle that forbids reliance on maslahah when it opposes a qiyâs. Qiyâs, as a source of law, does not stand on a higher footing than maslahah which is in conformity with the objectives of the Sharî^{c}ah and its established facts. After all qiyâs is not but an end product of the ijtihâd of a jurist and the same is the case with maslahah mursalah.[42]

As for the conflict of maslahah with a nass a distinction has to be made whether the nass is definitive (qat^{c}î) or based on a weak evidence (zannî). If it is definitive and there is no possibility of reconciling it with the maslahah under consideration the former should be acted upon and the latter rejected. In certain situations, however, the law-giver allows acting upon maslahah as against a definitive nass where there is an absolute necessity involved.[43] This principle is laid down in the Qur'ân, "He hath explained unto you that which is forbidden... unless ye are compelled".[44]

As for a nass zanniyyah, it stands on a weaker ground than maslahah. Their mutual contradiction will be resolved either by limiting (takhsîs) the scope of such

nass, if possible, or suspending its operation so long as the maslahah persists. To illustrate this principle one may quote a hadîth of the Prophet that "A lost camel may not be disturbed. It may graze wherever it may like and may drink from whatever well it may please until its owner finds it out".[45] Mâlik, quoting Ibn Shihâb al-Zuhrî says that this remained the practice during Abû Bakr and ᶜUmar's caliphate. However, ᶜUthmân, to protect public meadows and property, ordered such camels to be sold and their price to be kept for the rightful owner. ᶜAlî ordered these camels to be kept in a stable which was financed by the government. When the owner was found the animal was restored to him after recovering the expenses incurred.[46] The above example proves that a nass zanniyyah, when in conflict with maslahah, was not acted upon by the companions.

Mâlik acted upon this principle on many occasions. His fatwâ that a woman reserves the right to abstain from feeding her baby if she apprehends that this would affect her social status adversely or her husband would dislike it can be quoted as an example in this respect.[47] Mustafâ Zayd comes out with other instances where

Mâlik has either limited the scope of a nass or set aside its operation as against a maslahah mursalah.[48]

Consideration must, of course, be given to the argument that the acceptance of maslahah as a source of law will eventually cause abrogation of the Sharî^{c}ah or subject the Sharî^{c}ah ahkâm to ra'y. Ibrâhîm Zulamî, defending Mâlik's position, contends that this argument is based on a misconception of the terms abrogation (naskh) and change (taghayyur). The Sharî^{c}ah rules are not abrogated by a maslahah mursalah. They retain their old hukm, however, their application is temporarily suspended or undergoes change due to change in masâlih for which they were formulated by the Sharî^{c}ah. If old conditions were to return, the hukm will revert to its previous position as well.[49] Shâtibî goes a step further and says that "Change of ahkâm due to change in ^{c}âdât is not, in reality, a change of (Sharî^{c}ah) proclamation. The Sharî^{c}ah is laid down forever... the same is the case with obligations (takâlîf) of such ahkâm".[50] According to him not only the Sharî^{c}ah ahkâm but, theoretically, individual obligations (takâlîf al-^{c}ibâd) also remain valid. However, their applicability is discontinued on the basis of maslahah.

h. Mâlik's Fatâwâ on the Basis of Maslahah Mursalah

So far we have discussed the concept of maslahah mursalah as expounded by the Mâlikî jurists with a particular reference to Shâtibî, who wrote extensively on the subject. We may now turn to an investigation of the evidence justifying the attribution of the doctrine to Mâlik himself. The greatest difficulty that one encounters in this regard is created by the absence of any work produced by Mâlik on usûl al-fiqh (principles of jurisprudence). The only source through which the principles of his legal theory may be discerned is the fatâwâ which he gave during his long juristic career. Before quoting some of the fatâwâ that indicate Mâlik's reliance on the principle of maslahah mursalah, two observations are in order.

Firstly, a brief introduction of the two compilations of his fatâwâ, namely the Muwatta' and the Mudawwanah, from which the Mâlikîs, generally, draw evidence on the basis of which to attribute a juristic principle to Mâlik. The Muwatta' is a collection of ahâdîth, legal opinions of the companions and points of doctrine on which there is consensus of the scholars of Medina. It also

records numerous juristic problems for which Mâlik offered solutions on the basis of his ijtihâd. Since it gives a detailed account of his fatâwâ, with some indication of the sources he has relied on, its importance as a primary source of reference is immeasurable.

The Mudawwanah, on the other hand, is concerned exclusively with juristic problems solved by Mâlik. As against Muwatta', it was not compiled by Mâlik himself, but by Asad b. Furât, a well-known Mâlikî scholar. Later on, Sahnûn edited it after reading it over under the supervision of his teacher, ᶜAbd al-Rahmân Ibn Qâsim. Ibn Qâsim, being a pupil of Mâlik, enjoys the same position in the Mâlikî school as does Ibn al-Shaibânî in the Hanafî school. Mâlik's fatâwâ, as transmitted by Ibn Qâsim, have received general recognition by the Mâlikî scholars because of his long association with Mâlik over a period of some twenty years. The Mudawwanah, therefore, is regarded as the second most authentic source for the study of Mâlik's views on juristic issues.

Secondly, the substance of the doctrine of maslahah mursalah is traceable back to Mâlik. As for the details and precise terminology, they are the work

of later Mâlikî scholars who extracted them from Mâlik's fatâwâ. It is perhaps best to say that the seeds were present in Mâlik's juristic opinions and that scholars like Shâtibî systematized them, moulding them into the official doctrine of the Mâlikî school. It also seems likely that Shâtibî's exposition of the different types of maṣlaḥah mursalah is based on fatâwâ in which Mâlik set aside a less important maṣlaḥah i.e. ḥâjî in favour of a more important one i.e. darûrî.

1. In the presence of a Muslim who fulfills all the requirements of an ideal caliph Mâlik allows bayᶜah (formal acknowledgement as leader) to a less suitable person who imposes himself as a caliph. Supporting his view Mâlik argues that deposing the wrong person will lead to chaos and bloodshed which is a greater evil than accepting a wrong person as caliph. The maṣlaḥah of the people, therefore, requires that the stability of the state be maintained even at the cost of putting up with a less favourable situation.[51] Shâtibî in Iᶜtiṣâm, says that:

> Somebody enquired from Yahyâ b. Yahyâ if (such) bayᶜah is makrûh (reprehensible). He replied, no. He was asked again, even

> if such (caliph) is a dictator? He answered that Ibn ᶜUmar had entered into bayᶜah with ᶜAbdul-Malik b. Marwân though he had assumed power with the help of the sword. Bayᶜah is better than anarchy, he continued, ᶜUmarî came to Mâlik and said that people of Mecca and Medina have entered into my bayᶜah, but you favour Abû Jaᶜfar. What do you think now? Mâlik replied, do you know what prevented ᶜUmar b. ᶜAbd al-ᶜAzîz from appointing a good person as his successor? ᶜUmarî said, no. Mâlik answered, I know (why he did not do that). Actually Yazîd had been appointed his successor even before ᶜUmar b. ᶜAbd al-ᶜAzîz became caliph. He realised that if he changed the order of succession, Yazîd shall have no alternative but to rebel against him, consequently there would be chaos with no chance of remedying the situation. ᶜUmarî after listening to Mâlik's arguments changed his mind.[52]

Mâlik's fatwâ on this issue is based on maṣlaḥah. It also serves as an example of prefering an important maṣlaḥah to a desired one, thus suggesting that Mâlik had a conception of the different categories of maṣlaḥah mursalah.

2. Children injure one another when they play. Very often adults are not present at the scene of the incident to give evidence for or against the children involved. If such acts go unpunished the life and the safety of other children will be in danger, the preservation of which is one of the ḍarûrî objective of the Sharîᶜah.

Keeping in mind this maslahah, Mâlik opined that children can testify against one another for such acts of violence that they commit against fellow-children.[53] This example indicates that Mâlik forsook a Shar^{c}î principle if its application, in a given situation, had put a maslahah darûriyyah at stake.

3. Taking into account maslahah of the soldiers, Mâlik says that they can consume the edibles that they may come to possess while the war is in progress. "Upon entering the enemy land", he argues, "I do not see any reason why Muslim soldiers should not eat their (enemy's) food before it is officially distributed... I consider camels, cows and goats as food that the soldiers can bring into their use upon entering the enemy land".[54] He seems to suggest that denial of this right would cause great hardship to the soldiers which is unwarranted in the Sharî^{c}ah.

4. If the public treasury of a Muslim state goes bankrupt or does not have sufficient funds available to meet the requirements of the army the caliph, in such a situation, can levy a tax on the rich people to defray the cost of the defense of the country. This tax shall

subsist till the government acquires an alternate source of income. Mâlik contends that the defense of the country is too important a maslahah to justify imposing tax on a certain section of the society. However, he (Mâlik) suggests that this tax be collected during the harvest season when people have enough money to be able to pay it.[55] Mâlik's critics argue that the government, instead of imposing a tax on the rich, may raise a loan to meet its expenses. Mâlikî jurists, however, contend that loans are raised in those situations when there is a prospective income to the public treasury. In the absence of any such income, imposing a tax remains the only alternative.[56]

5. There are six types of persons whose property is looked after by a custodian appointed by the court. One of them, according to Mâlik, is a safîh (mentally incompetent person). Mâlik arrives at this opinion on the basis of maslahah mursalah. If the above arrangement is not approved, he argues, the property of such person would be endangered. Shâfi^{c}î upholds the same opinion too. Ibn Rushd, a leading Mâlikî scholar, claims that most of the Iraqi jurists also agree with Mâlik on this

point.[57]

Was Mâlik the first to apply maṣlaḥah mursalah, as a principle of jurisprudence? Perhaps not. The companions took this principle into consideration while solving unprecedented juristic problems. Zulamî observes:

> ᶜUlamâ' and the jurists have examined the fatâwâ of the companions, their legal judgements and ijtihâds... they have reached the conclusion that from the time of Saqîfah b. Sâᶜidah to the death of the last companion they have relied, after the Qur'ân and the Sunnah, mostly on maṣâliḥ in deducing (new aḥkâm).[58]

Mâlik was not an innovator in this respect. His contribution lies in bringing maṣlaḥah mursalah into limelight as an important element of Islamic legal theory. In this, as indicated in the first chapter, he was influenced by his teacher Rabîᶜah al-Ra'y who advocated rationalistic approach to law and by the peculiar circumstances of the city and the time that he lived in. Given below are some of the issues that the companions solved on the basis of maṣlaḥah.

1. The Qur'ân was not compiled in the form of a book

at the time of the Prophet. After his death when many huffâz (reciters) died in the battle of Yamâmah ᶜUmar suggested to Abû Bakr that the Qur'ân be compiled in the form of a book. The latter did not agree in the beginning as he said that he cannot do a thing that the Prophet had not done. But ᶜUmar was not to give up. He persisted in his demand until Abû Bakr realised the maṣlaḥah inherent in doing so. He, then, sent for Zayd b. Thâbit and asked him to chair the council that was going to be appointed to do this job. Zayd was hesitant too in the beginning but became convinced as Abû Bakr explained the importance of the task under consideration. Consequently, the Qur'ân was compiled in the form of a book. Abû Bakr's decision had no precedence in the Qur'ân or the Sunnah. He acted solely to preserve a maṣlaḥah that was at stake otherwise.[59]

2. The first four caliphs decreed that an artisan is responsible to compensate the owner for a partial or total damage that may accrue to the thing entrusted to him. This opinion is based on the fact that people need artisans to work for them. The artisans will not demonstrate responsibility if absolved from their acts

of negligence. Technically such things are amânah (trust) with artisans and they should not be asked to pay compensation. But the caliphs decreed otherwise to protect a maslahah of the people.[60]

3. If a number of people are involved in the murder of a person they all shall meet death penalty. This decision was given by ᶜUmar b. Khattâb and was upheld by other companions. This judgement is based on the fact that the life of an innocent person has been taken intentionally. If death penalty is not given to all the participants it may encourage others to commit the crime in similar circumstances and thus defeat the law. Mâlik extends this principle to those situations also where a part of the body of a person is amputated by a number of people.[61]

The above examples indicate that the companions used maslahah as a basis for the operation of the law whenever they could not get explicit guidance from the Qur'ân and the Sunnah. Mâlik carried this principle farther and gave it a prominent place in his legal theory.

i. Ghazâlî on Maslahah Mursalah

Before concluding the chapter, it seems appro-

priate to describe briefly the point of views of Ghazâlî and Tûfî vis-à-vis maṣlaḥah mursalah. The former narrows down reliance on maṣlaḥah to extreme situations of necessity. The latter stands out for using the concept of maṣlaḥah mursalah to justify setting aside the texts. He even goes to the extent of making it a general rule. These two extreme views will help understand Mâlik's point of view better.

Ghazâlî believes that every maṣlaḥah that does not consist of implementing the understood intent of the Qur'ân, the Sunnah and ijmâ^{c} is foreign and inappropriate to the operation of the law. It is, therefore, void and rejected. Whoever has recourse to it is arrogating the power of legislation just as whosoever uses istiḥsân is legislating. Every valid maṣlaḥah is based on implementing the intent of the law which is determined by the Sharî^{c}ah and ijmâ^{c} and must not fall outside the scope of these sources. However, if the Sharî^{c}ah is silent on the use of maṣlaḥah in a particular situation, then one must distinguish between cases of necessity (ḍarûrî, ḥâjî) and cases in which only improvements and embellishments are in question.[62] He

gives an example where necessity overrules the text. An example is the case of:

> the unbelievers who shield themselves with a group of Muslim captives. If we hold back from them they will fall back upon us, overwhelm the territory of Islam and kill all the Muslims. If, however, we strike at their shield we should kill an innocent Muslim who has committed no wrong and their is no permission in the Sharîᶜah for such an action. But otherwise the unbelievers would gain mastery over all the Muslims, kill them and then kill the prisoners as well. So it may rightly be said that the captives will be killed in either case. Therefore, preserving the greater body of Muslims is closer to the intent of the law. This would be a case of resorting to a maṣlaḥah known as necessary.[63]

This example of maṣlaḥah, according to Ghazâlî, is not determined by analogy from any particular source but is inspired by three considerations (1) it is a matter of vital necessity (ḍarûrî), (2) it is a case of absolute certainty (qaṭᶜiyyah) and (3) its importance is universal (kulliyyah). Ghazâlî prescribes these three limitations that justify resorting to maṣlaḥah as a source of law.[64] As opposed to Ghazâlî, Mâlik adopts a more flexible approach and permits the operation of maṣlaḥah in all those cases where the Sharîᶜah is silent, no matter the

maṣlaḥah under consideration is ḍarûrî, ḥâjî or taḥsînî.

j. Tûfî on Maṣlaḥah Mursalah

As opposed to Ghazâlî, Tûfî adopts a radical view in favour of istiḥsân (legislation on the basis of maṣlaḥah). He asserts that every maṣlaḥah is a necessity and must, therefore, take precedence over anything else. Tûfî's doctrine is set forth in his commentary on the thirty-second of forty aḥâdîth listed by al-Nawawî. Ḥadîth No. 32 says, "Do not inflict injury nor repay one injury with another".[65] Tûfî takes this to be the first principle of the Sharî^{c}ah, enabling maṣlaḥah to take precedence over every other consideration. As for the texts and ijmâ^{c}, if they happen to conform to the maṣlaḥah in a particular case they should be applied forth with. But if they oppose it, then consideration of the maṣlaḥah must take precedence over them.[66]

Three reasons are given by Tûfî for the precedence of maṣlaḥah over the text and ijmâ^{c}:

(1) As for ijmâ^{c}, even the opponents of the method support the concept of maṣlaḥah, therefore it has a wider backing and is more worthy of use as a basis for legislation.[67]

(2) The textual sources, the Qur'ân and the Sunnah, are diverse and subject to interpretation which is the reason for the difference among the schools in the rules they follow. Consideration of the maṣlaḥah, on the other hand, is a consistent matter which brings out agreement demanded by the law.[68]

(3) Examples are found in the Sunnah of the Prophet in which the textual sources conflicted with the maṣâliḥ and the latter was prefered. In one such case, the Prophet ordered Abû Bakr and ᶜUmar to put to death a man whose behaviour in the mosque was objectionable. They hesitated to do so, because the man was praying and the Prophet approved their judgement.[69]

These arguments are open to criticism. The first argument is misleading if it implies that maṣlaḥah enjoys universal support in the manner in which Tûfî uses it. At most he can claim an ijmâᶜ in support of the fact that the Sharîᶜah was revealed in support of man's material and moral well-being. But the jurists infer from this that the maṣâliḥ are already contained in the Sharîᶜah, therefore Tûfî's method is unnecessary and unwarranted.

On the second argument, that the textual sources,

due to their diversity, caused differences among the schools of law, Ibn al-Qayyim explies that the disagreement among the madhâhib (schools of law) is not necessarily because of contradiction among textual sources but due to varying degree of understanding on the part of each madhhab. It could also be due to change in the masâlih themselves from one time or place to another.[70]

His third argument that the Sunnah was subjected to maslahah is a misunderstanding on his part. In the case cited above, the Sunnah was restricted or suspended by another Sunnah. The approval of the act of Abû Bakr and ʿUmar by the Prophet is a Sunnah as well, hence there does not arise a question of contradiction but rather a preference of one textual source to another.

Commenting on Tûfî's views Malcolm Kerr observes:

> Taken as a whole, Taufi's theory of maslaha can only be considered an extreme exception to the traditional view. While insisting that his system is securely grounded in a hadith and that therefore he can not be accused of disrespect toward the revealed law, it seems questionable whether his claim was made entirely in good faith. The hadith was not generally in use and by Taufi's own implied admission was con-

sidered a weak one. Other writers on maṣlaḥa do not base their arguments on it.[71]

ᶜAbd al-Wahhâb Khallâf opines that Tûfî "Opened the door to suppression of the revealed texts and made the texts and ijmâᶜ liable to cancellation by opinion".[72]

Mâlik's concept of maṣlaḥah mursalah, as against Ghazâlî and Tûfî, stands out for its realistic approach to the Sharîᶜah. It neither restricts the genuine growth of law nor disregards the revealed texts. None of the jurists, Mâlik, Ghazâlî and Tûfî, discussed in this chapter rejected maṣlaḥah as a source of law. Opposed to them are those who refuse, theoretically at least, to recognise it as a valid ground for legislation. Their views will be discussed in the third chapter.

Footnotes

1. Edward W. Lane, An Arabic-English Lexicon, v.IV, London: William Norgate, pp.1714-5.

2. Mohammad Marmaduke Pickthall, Holy Qur'ân III:114), p.41.

3. M.S.R. Bûtî, Ḍawâbiṭ al-maṣlahah fî al-Sharî^{c}ah al-Islâmî, Beirut: Mu'assasat al-Risâlah, 197?, p.23.

4. A.I. Shâtibî, al-Muwâfaqât, v.II, Cairo: Maktabah Tijâriyyah, n.d., p.25.

5. M. Ghazâlî, al-Mustaṣfâ, Baghdad: Maṭba^{c}at Bulâq, 1970, p.286.

6. Pickthall, Holy Qur'ân (XXI:107), p.210.

7. Ibid.(X:57), p.31.

8. Appendix to Muṣṭafâ Zayd's book al-Maṣlaḥah fî al-Tashrî^{c} al-Islâmî, p.14.

9. ^{c}Abd al-Karîm Zaidân, al-Wajîz fî Uṣûl al-Fiqh, 5th ed., Baghdad: Maṭba^{c}at Salmân al-A^{c}ẓamî, 1974, p.198.

10. Pickthall, Holy Qur'ân (IX:11), p.50.

11. Zaidan, p.199.

12. Abû Zahrah, Mâlik, Cairo: Dâr al-Fikr al-^{c}Arabî, n.d., p.356.

13. Malcolm Kerr, "Idealism in Traditional Jurisprudence", Islamic Reform, The Political and Legal Theories of Muhammad ^{c}Abduh and Rashîd Ridâ, California: University of California Press, 1966, p.81.

14. Bûtî, p.330; Shâtibî, al-I^{c}tiṣâm, v.II, Cairo: Maktabah Tijâriyyah, n.d., p.98.

15. Pickthall, Holy Qur'ân (V:3), p.66.

16. Mustafâ Zayd, al-Maslahah fî al-Tashrîᶜ al-Islâmî, Cairo: Dâr al-Fikr al-ᶜArabî, 1954, p.39.

17. Abû Zahrah, p.357.

18. Ibid.

19. Shâtibî, al-Iᶜtisâm, v.II, p.113.

20. ᶜAbd al-Wahhâb al-Khallâf, Masâdir al-Tashrîᶜ al-Islâmî fî-mâ lâ Nass fîhi, Egypt: Maṭâbiᶜ Dâr al-Kitâb al-ᶜArabî, 1954, p.74.

21. Zaidân, p.202.

22. Ibn Khallâf, p.75.

23. Shâtibî, Muwâfaqât, v.II, pp.10-3.

24. Ibid., pp.8-10.

25. Mustafâ Zarqâ', "Ma'âkhidh al-Fiqh al-Islâmî", Chirâghi Râh, Karachi: June 1958, p.278.

26. Shâtibî, Muwâfaqât, v.II, pp.16-7.

27. Ibid., p.176.

28. Ibid., pp.300-1.

29. Ibid., pp.302-3.

30. Ibn Rushd, Bidâyat al-Mujtahid, v.I, Egypt: Maktabat Mustafâ al-Bâb al-Ḥalabî, 1960, p.123.

31. Shahâbuddîn al-Qarâfî, al-Ihkâm, 1st ed., Maṭbaᶜat al-Anwâr, 1938, p.67.

32. Subhî Mahmasânî, Falsafat al-Tashrîᶜ fî al-Islâm, 2nd ed., Beirut: Maṭâbiᶜ Dâr al-Kashshâf, 1952, p.131.

33. ᶜAllâmah Ibn ᶜÂbidîn in Risâlat Nashr al-ᶜUrf, v.XXII,

p.125, as quoted by Dr. Zarqâ in his article "Ma'âkhidh al-Fiqh al-Islâmî", mentioned above.

34. Shâtibî, Muwâfaqât, v.II, p.307; Abû Zahrah, p.342.

35. Shâtibî, al-I^{c}tisâm, v.II, p.110.

36. Ibid.

37. Ibid., p.114.

38. Zaidân, p.204.

39. Ibid.

40. Bûtî, p.248.

41. Ibid., pp.216-7.

42. M. Beltâji, Manâhij al-Tashrî^{c} al-Islâmî, v.II, Saudi Arabia: Jâmi^{c}at Imâm Muḥammad b. Sa^{c}ûd, 1977, p.633.

43. Shaikh Zakariyâ Barrî, "Al-Maṣlaḥah Asâs al-Tashrî^{c}", al-Fiqh al-Islâmî, Egypt: Lajnat al-Tajliyah Mabâdi' al-Shari^{c}ah al-Islâmiyyah, May 1971, p.119.

44. Pickthall, Holy Qur'ân (VI:119), p.87.

45. Zakariyâ Barrî, pp.119-20.

46. Ibid., p.120.

47. Mâlik b. Anas, al-Mudawwanah, v.II, Baghdad: Maktabat al-Muthannâ, n.d., p.416.

48. Muṣṭafâ Zayd, p.53.

49. M. Ibrâhîm Zulamî, Asbâb Ikhtilâf al-Fuqahâ', 1st ed., Baghdad: 1976, p.382.

50. Shâtibî, Muwâfaqât, v.II, p.285.

51. A. Jundî, Mâlik b. Anas, Cairo: Dâr al-Ma^{c}ârif, n.d.,

p.219.

52. Shâtibî, al-I^{c}tisâm, v.II, pp.109-10.

53. Mâlik b. Anas, Muwatta', v.II, Egypt: Maktabat Muṣṭafâ al-Bâb al-Ḥalabî, 1951, p.111.

54. Ibid., p.300.

55. Abû Zahrah, p.365.

56. Ibid.

57. Ibn Rushd, v.II, p.279.

58. Zulamî, p.383.

59. Shaikh Muḥammad Ṭâhir Ibn ^{c}Âshûr, Maqâṣid al-Sharî^{c}ah al-Islâmiyyah, Tunis: 1978, p.85.

60. Shâtibî, al-I^{c}tisâm, v.II, p.102.

61. Ibid., pp.107-8.

62. Ibn Khallâf, p.85; Maḥmaṣânî, p.132.

63. Ghazâlî, p.294.

64. Ibid., p.296.

65. Quoted in Abû Zahrah, p.358.

66. Ibid.

67. Muṣṭafâ Zayd, p.121.

68. For a detailed discussion on Tûfî's views see Muṣṭafâ Zayd's book al-Maṣlaḥah fî al-Tashrî^{c} al-Islâmî wa-Najm al-Dîn Tûfî, and Abu Zahrah's biography of Mâlik.

69. Kerr, p.98.

70. Ibid., p.99.

71. Ibid., p.101

72. Ibn Khallâf, p.84.

The Critics of Maslahah Mursalah

This chapter deals with the point of views of Ibn Ḥazm and Shâfi^{c}î vis-à-vis maslahah mursalah. The selection of these two early jurists for discussion is based primarily on two factors. Firstly, the main opposition against the use of ra'y in law, whether under the rubric of istiḥsân or maslahah mursalah, came from them. The Ḥanafîs are known for their extensive use of ra'y in law, and the majority of the Ḥanbalîs are in agreement with the Mâlikîs as far as the doctrine of maslahah mursalah is concerned. Modern Muslim scholars, generally, do not reject the principle of maslahah mursalah categorically. Rather the trend seems to be towards tacit acceptance of it, if not outright general recognition.

Secondly, Ibn Ḥazm and Shâfi^{c}î have written books in which they have explained the principles of their legal theories. Ibn Ḥazm's al-Iḥkâm and al-Muḥallâ and Shâfi^{c}î's al-Risâlah and al-Umm enable us to determine conclusively their opinions on any juristic principle. In the case of many other jurists, there has been a considerable difficulty in attributing a juristic

principle to them.

Before embarking upon the discussion of Ibn Ḥazm and Shâfi^{c}î's views it seems pertinent to make an observation. Neither of the above two jurists has used the term maṣlaḥah mursalah in criticising Mâlik's legal theory. As noted in the second chapter, the term maṣlaḥah mursalah, as a principle of jurisprudence, was devised by later Mâlikî scholars. However, the substance of the said principle is traceable back to Mâlik's time. Ibn Ḥazm and Shâfi^{c}î have used the term istiḥsân to denote all those methods of extracting rules (istinbâṭ al-aḥkâm) that rest on the use of ra'y such as maṣlaḥah mursalah and sadd dharâ'i^{c}.

a. Ibn Ḥazm

Although Ibn Ḥazm lived in a much later period than Shâfi^{c}î, his views are relevant to this study because his juristic differences with the Mâlikî legal theory are so very profound. Ibn Ḥazm categorically rejects the use of ra'y in juristic matters. "It is not permissible for any one to decide (a legal issue) on the basis of ra'y".[1] As against the majority of Muslim jurists he confines the sources of Islamic law to the Qur'ân, the Sunnah and ijmâ^{c}.

Beyond that he does not recognise any method of extracting rules whether based on analogical deduction, juridical preference or maslahah mursalah. Maslahah mursalah as expounded by the Mâlikî jurists involves reliance on ra'y to a considerable degree. It comes into play in attempts to resolve a juristic problem in the absence of a textual source. Human reason plays a vital role in such a situation. Such flexibility of approach in matters of dîn (religion) is repugnant to Ibn Hazm and the Zâhirî school which he represents. To prove his point of view, Ibn Hazm draws support from the Qur'ân, the Sunnah and the sayings of the companions (aqwâl al-sahâbah). The Qur'ân says, "Obey Allah, and obey the messenger and those of you who are in authority and if ye have any dispute concerning any matter, refer it to Allah and the messenger".[2] This verse, according to Ibn Hazm, prescribes that the Qur'ân, the Sunnah and ijmâ^{c} are the sources of law and in case of disagreement a Muslim is obliged to refer only to the first two sources. If there was any room for the use of ra'y, Ibn Hazm contends, Allah would have laid it down in the text. He also quotes many ahâdîth such as "...Knowledge (of religious sciences) disappears with the death of knowledgeable persons (^{c}ulamâ'). In the

absence of knowledgeable persons people entrust their affairs to ignorant men who express their opinions (in religious matters) on the basis of ra'y, thus leading themselves and others astray". As for the sayings of the companions Ibn Hazm quotes Abû Bakr, ᶜUmar and ᶜAlî. Abû Bakr is said to have said, "What earth would bear me and what sky would shelter me if I say something about the book of Allah on the basis of my ra'y..." ᶜUmar is quoted as saying, "Beware of the people of ra'y (ahl al-ra'y) because they are the enemies of the Sunnah". ᶜAlî once said that "If religion is based on ra'y the rubbing with water (mash) of the lower part of one's half boots (khuff) seems more logical than the upper one, whereas I saw the Prophet rubbing the upper part of his half boots".[3]

Defending the point of view of the majority of the jurists, including the Mâlikîs, Abû Bakr Râzî,[4] Khaṭîb Baghdâdî[5] and Ibn ᶜArabî[6] have argued that none of the above verses suggest that the use of ra'y is prohibited in the absence of a text. As for those situations for which an injunction from the textual sources is available, non-Zâhirîs are in agreement with Ibn Hazm in not relying on ra'y to solve that particular problem. The Mâlikîs,

in return, come up with verses of the Qur'ân, the Sunnah and the sayings of the companions to justify their reliance on secondary sources such as istihsân and maslahah mursalah that contain a considerable element of ra'y. From the Qur'ân they quote the verse that says, "So consider, O ye who have eyes".[7] They also quote Mu^{c}âdh b. Jabal's dialogue with the Prophet during which Mu^{c}âdh says that he would use his considered opinion (ajtahidu ra'yî) in the absence of any guidance from the Qur'ân and the Sunnah to solve a juristic problem. ^{c}Umar is also said to have advised Abû Mûsâ al-Ash^{c}arî to try to "discern similarities in situations and things and then draw analogies between them".[8] Arguments and counter-arguments have been advanced from both sides. This is no place to go into their details. However, the basic difference boils down to the fact that Ibn Hazm disapproves the use of ra'y absolutely and the Mâlikîs permit its use in those situations where there is no guidance in the textual sources. Maslahah mursalah, according to the Mâlikîs, falls into the last category; hence it is well within the approved limits of the Sharî^{c}ah.

In accordance with his central thesis (as just described) Ibn Hazm goes a step forward and negates the

concept of ta^{c}lîl al-nuṣûṣ (determining the effective cause derived from, or residing in, the texts. He argues that a text is meant to protect the particular maṣlaḥah on account of which it is revealed. Therefore, no attempt should be made to discover independently its effective cause (^{c}illah) and extend it to similar situations. Expounding his point of view in al-Iḥkâm Ibn Ḥazm says

> We do not say that all the Sharî^{c}ah rules are revealed for certain asbâb (grounds, reasons). We say that none of them was revealed for any cause except the one the law-giver has specifically mentioned as such... It is not permissible for us to ask about any of His rules (ḥukm), Why it was revealed like this? Therefore, all causes (asbâb) stand repudiated.[9]

Ibn Ḥazm concludes that Allah is not obliged to reveal His rules for any cause. He does so by His sheer will. Therefore, we should not go after the raison d'être of such rules. The only explanation for their existance is that Allah willed them to be so and their objective is not necessarily the securing of a maṣlaḥah but the fulfilment of the commandment of the law-giver.

The Mâlikîs, on the other hand, contend that Allah, though omnipotent, does not reveal his rules in

vain. These rules are generally meant to secure a maslahah. In a given situation which does not contain a clear guidance from the Sharî^{c}ah the doctrine of maslahah mursalah should come into play, albeit with due regard to the objectives of the Sharî^{c}ah.[10]

Ibn Hazm's negation of ta^{c}lîl al-nusûs, if accepted, would deal a severe blow to all the secondary sources of Islamic law, including maslahah mursalah, thus virtually halting the process of legitimate growth in law to meet the needs of an expanding society and changing circumstances.

Among modern scholars Abû Zahrah claims that Ibn Hazm adopted a narrow approach to the Sharî^{c}ah. He refutes Ibn Hazm's point of view on two grounds. Firstly, there are many verses in the Qur'ân that explain the effective cause for which they were revealed. This indicates that the law-giver permits us to apply the same rule to those new situations that contain the same effective cause. Had it not been so Allah would have not specifically mentioned them. Among such verses may be mentioned "And there is life for you in retaliation" and "That which Allah giveth as spoil unto His messenger...

it is for Allah and His messenger and for the near of kin and the orphans...that it becomes not a commodity between the rich among you".[12]

Secondly, Ibn Hazm does not differentiate between an effective cause of a Sharī^{c}ah text and a cause of an act (*fi^{c}l*) of Allah. It is not only permissible to extrapolate the former but well-warranted, in order to maintain the universality and the relevance of the Sharī^{c}ah to new situations and times. The attempt to determine the reason behind an act of Allah, on the other hand, is neither necessary nor recommended.[13]

Why did Ibn Hazm adopt such a narrow approach to law, suggesting that all the details of law which do not rest directly on tradition and revelation must be rejected? Different factors seem to have contributed to the shaping of his viewpoint.

Firstly, Ibn Hazm was deeply affected by the political climate of his time. He, an Andalusian Arab, was an ardent supporter of Umayyad caliphate in Andalus which was on the verge of collapse due to internal squabbling between the Arabs and the Berbers. Like his father, he had served as vizier under Hishâm, the last

Umayyad caliph. He saw the Umayyads as a cohesive force in the country. Muslim history is a witness to the fact that rebels always seek religious authenticity for their action in order to rally public support behind them. Since the majority of the people in Andalus followed the Mâlikî school, it would not have been difficult for anti-Umayyad forces to give moral justification for their action against the corrupt rulers on the basis of maslahah. Ibn Hazm might also have anticipated the danger inherent in the internal weakness of the caliphate, which was in constant struggle against its Christian neighbours in the north. He seems to have attempted to rally people behind the literal meanings (zawâhir al-nusûs) of the Qur'ânic and the Sunnah injunctions in order to rule out any possibility of rebellious action on the part of the Berbers. This rigid approach to law might have been justified during that turbulent period, but to include it as a permanent feature of Islamic legal theory was unrealistic. Hence it failed to command general recognition.

Secondly, Andalus, being situated between the Eastern caliphate and the Christian states, was in physical and intellectual contact with both areas. Ibn Hazm wit-

nessed Christian and Jewish scholars flocking into Cordova to receive education in sciences in which Muslims had made great advancements. However, this interaction was not one way. The incomers had left the imprint of their ideas on the minds of many Muslims. Ibn Hazm, perceiving the consequences of this, wrote against Christian and Jewish dogma and practices, trying to establish the superiority of Islam in this respect.[14]

On the Eastern front the predominant position of the Mâlikî school was gradually being eroded by the Shâfi^{c}î school. Andalusian students who travelled to the East, where the Shâfi^{c}î school was predominant challenged the authority of the Mâlikî school when they came back home. Sometimes this engendered bitter feelings. Though there was no difference between two schools as far as the basic issues of the Sharî^{c}ah were concerned, minor issues gained prominence and aggravated the problem.

Ibn Hazm's heavy reliance on the textual sources tends to be an outcome of the reaction against the intellectual environment of his time. In my opinion he goes to extremes in confining the Sharî^{c}ah to literal meanings of the Qur'ân and the Sunnah. Secondly, he fails to realise

that a temporary remedy to temporary problems, if necessary at all, should not have been given a permanent place in the legal theory.

b. Shâfi^{c}î

Unlike Ibn Hazm, Shâfi^{c}î does not negate the use of ra'y in law nor does he disapprove of ta^{c}lîl al-nusûs. However, he recognizes analogical deduction as the only method of ta^{c}lîl. In this respect he goes a step forward than Ibn Hazm but falls far short of Mâlik or Abû Hanîfah, who validate other principles of legal construction such as istihsân and maslahah mursalah.

Shâfi^{c}î contends that a jurist may use his considered opinion to solve a juristic problem that has not been dealt with in the Qur'ân and the Sunnah, but he can do so only by applying the principle of analogical deduction. He disapproves all other methods of reasoning by charaterizing them as istihsân. In his treatise on the principlesof jurisprudence, al-Risâlah, he poses a hypothetical question to himself and says "If someone were to ask me 'Do you approve that a person should form his opinion on the basis of istihsân without relying on qiyâs'? I would say, no. It is not permissible".[15]

Denying the validity of all secondary principles of legal construction except analogical deduction he says "To say anything not based on a textual source or qiyâs is not permissible".[16] Two things come out clearly from the above statements:

(a) An ijtihâd not based on the Qur'ân, the Sunnah, consensus or analogical deduction is istihsân, because the person exercising such ijtihâd uses his juridical preference (yastahsinu) without seeking evidence from a text or anything derived from text.

(b) An ijtihâd based on juridical preference (istihsân) is totally invalid (bâṭil)

To support his thesis Shâfi^{c}î argues that:

(a) Allah says in the Qur'ân "Does man think that he will be left aimless (without guidance)".[17] The Prophet says, "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".[18] This Qur'ânic verse and the tradition, according to Shâfi^{c}î, indicate that Allah has conveyed to us, through the Prophet, all what we are supposed to do or refrain from. If any problem is not specifically dealt with in the above two sources it can

be solved only on the basis of analogical deduction in order to maintain some link with the textual sources. To disregard this method would tantamount to contradicting the statement of the Shâri[c] that He has provided us with comprehensive guidance.[19]

(b) Whenever the Prophet was asked a juridical question he did not give his opinion on the basis of istihsân. If he did not find the answer in the Qur'ân he would keep silent until the revelation came to him. On one such occasion the wife of Aus b. Sâmit complained to him that her husband had put her away by saying under oath that he considered her as his mother, implying thereby that he would not maintain sexual relationship with her. The Prophet did not reply until the following verses were revealed to him,[20]

> Allah hath heard the saying of her that disputeth with thee (Muhammad) concerning her husband... Such of you as put away your wives (by saying they are their mothers) they are not their mothers; none are their mothers except those who gave them birth...those who put away their wives and afterwards go back on that which they have said, (the penalty in that case is) the freeing of a slave before they touch one another...[21]

(c) The Prophet did not approve the opinion of those

companions who used their juridical preferences no matter whether such opinions were based on maslahah or not. For instance, a companion killed a person who accepted Islam in the heat of war, thinking that he has done so merely to escape death. Shâfi^{c}î contends that had an ijtihâd been permissible without reliance on nass or an analogical deduction from it the Prophet would not have disapproved the act of this companion, who presumably acted in the best interest (maslahah) of the community.[22]

(d) No regulations can be laid down for the doctrine of juridical preference including maslahah mursalah. These principles do not ensure uniformity in the application of law. If every jurist is allowed to use his ra'y on the basis of istihsân or maslahah mursalah, different answers would be given for a problem that has not been explicitly solved by the textual sources, thus leading to a sort of juridical anarchy.[23]

(e) Allah says in the Qur'ân, "O ye who believe. Obey Allah, and obey the messenger"[24] "Whoso obeyeth the messenger obeyeth Allah"[25] "So judge between them by that which Allah hath revealed and follow not their desires".[26]

All these verses suggest that a believer is obliged to follow the book of Allah and the Sunnah of His Prophet. As for the validity of qiyâs it is a well regulated deduction from a text, and hence is within the approved limits of the Sharî^{c}ah. Ijmâ^{c}, similarly, derives its sanction from a tradition of the Prophet (My community will never agree on an error). Since other secondary principles of legal construction do not fall within the above categories they are unacceptable. Maslahah mursalah does not have an explicit link with a textual source, therefore it stands disapproved.[27]

To refute Shâfi^{c}î's point of view the Mâlikîs, who recognise the validity of secondary sources such as maslahah mursalah, quote the following traditions. The Prophet says "A ruler (hâkim) decides a case on the basis of ijtihâd. If he arrives at a right conclusion he gets extra (spiritual) reward, and if he errs in his judgement he (still) deserves reward". As mentioned earlier Mu^{c}âdh b. Jabal told the Prophet that he would use his considered opinion in the absence of a text to solve a juridical problem. The Mâlikîs also quote an incident when a group of the companions ate a dead salmon

because they had nothing else to eat, and the Prophet approved their judgement. Similarly the Prophet entrusted Sa^{c}d b. Mu^{c}âdh, a former ally of Banî Quraizah, to decide their fate after the famous battle of "Khandaq". Had the use of ra'y, based on maslahah, been prohibited he would have not asked Sa^{c}d to decide the case.[28]

The Mâlikîs agree with the Shâfi^{c}îs that the use of ra'y is not permitted where there is a clear injunction in the Qur'ân or the Sunnah. However, they (Mâlikîs) do not insist as strongly on analogical deduction as Shâfi^{c}î does. They argue that in certain situations a jurist is obliged, by way of necessity, to base his opinion on istihsân, maslahah mursalah or any other secondary source to avoid an injustice that would accrue by a strict application of the principle of analogical deduction.

Considering the arguments of both sides, one may assume that Shâfi^{c}î attaches more importance, at least theoretically, to the letter of the law and confines the manoeuvrability of a jurist within the boundaries of analogical deduction. He terms an attempt to override the textual sources, no matter how great the necessity or maslahah which is at stake, as "indulgence". The Mâlikîs,

on the other hand, pay more attention to the spirit of the law. Their doctrine of maslahah mursalah is based on the fact that sometimes a jurist has to overlook the literal meaning of a text in order to secure the ends of justice. They, therefore, rely on a jurist's general understanding of the spirit and the objectives of the Sharî^{c}ah.

The Mâlikîs tend to show that certain elements of Shâfi^{c}î's legal theory are unrealistic, thus obliging him to contradict his own principles. They quote examples where he (Shâfi^{c}î) and his followers based their judgements on maslahah without any reliance on a text, consensus or analogical deduction. Some of such examples may be given below:

Shâfi^{c}î, like Mâlik, allows the death penalty to be applied to a group of people who have jointly taken part in the murder of one person. Mâlik considers protection of the life of a person as a darûrî (necessary) maslahah; therefore he sanctions the application of this penalty to every member of the group who has participated in this crime. Though Shâfi^{c}î contends that he bases his opinion on a fatwâ of ^{c}Umar, the fact is that ^{c}Umar

upheld this opinion on the basis of maslahah. No textual evidence is available that deals with this particular situation.[29]

The Shâfi^{c}î scholars permit killing animals of unbelievers which they use in war against Muslims. They also allow the destruction of their (unbelievers') trees and crops in order to cripple them economically. There is no text available to support this opinion nor can the principle of analogical deduction be applied in this case.[30] In another instance, they agree with Mâlik that Muslim soldiers can appropriate things from the spoils of war, such as food etc., for their personal use, before they are officially distributed. This opinion is given in consideration of the maslahah of the soldiers, who would otherwise face extreme hardship.[31] Finally the Shâfi^{c}îs overlook a tradition of the Prophet and base their fatwâ on the doctrine of maslahah. They contend that pilgrims can cut trees and plants within the boundaries of the Haram (sacred precincts around Mecca and Medina) and feed them to their animals. Has this not been allowed, they argue, the pilgrims would face difficulty. The Prophet is known to have forbidden

cutting plants within the Haram.[32]

Some of the later Shâfi^{c}î scholars who realised the difficulties involved in confining the sources of the Shari^{c}ah to analogical deduction modified their point of view. Imâm Juwaynî maintained that Shâfi^{c}î had permitted the making of rules on the basis of such maṣâliḥ as are akin to (shabîh) maṣâliḥ specifically recognised by the Shari^{c}ah.[33] Another leading Shâfi^{c}î scholar, Ibn ^{c}Abd al-Salâm, goes to the extent of saying that

> the study of the objectives of the Shari^{c}ah in securing maṣâliḥ and avoiding mafâsid (difficulties, harm) has convinced me that maṣâliḥ may not be ignored in any circumstances... even if (such maṣâliḥ) are not derived specifically from a consensus, text or analogical deduction.[34]

Ibn ^{c}Abd al-Salâm's position is not very different from that of Mâlik. As indicated in the first chapter, Mâlik's realistic approach to law is attributable to the fact that he lived a practical life in Medina. People of different orientations flocked to him during the pilgrimage. He had to deal with situations not specifically dealt with by the Shari^{c}ah. This helped broaden his approach and

introduce flexibility into his legal theory. Shâfi^{c}î's hard stance on this issue forced his disciples to change their earlier position in order to bring their thinking closer to the realities of life. Juwaynî's attempt to ascribe his recognition of maṣlaḥah to Shâfi^{c}î may serve as an instance in this regard.

Footnotes

1. Abû Zahrah, Ibn Ḥazm, Egypt: Dâr al-Fikr al-ᶜArabî, n.d., p.32.
2. Pickthall, Holy Qur'ân (IV:59), p.55.
3. Ibn Ḥazm, Al-Iḥkâm fî Uṣûl al-Aḥkâm, v.VI, Egypt: Maṭbâᶜat al-Imâm, n.d., pp.772-8.
4. Abû Zahrah, Ibn Ḥazm, p.386. He quotes Abû Bakr Jaṣṣâṣ from his book al-Fuṣûl.
5. Ibid., p.386. He quotes Khâtib Baghdâdî from his book Al-Fiqh wa al-Mutafaqqih.
6. Ibid. He quotes Ibn ᶜArabî from his book Al-ᶜÂriḍah.
7. Al-Qur'ân (LIX:2).
8. Ibn Ḥazm, Al-Nabadh, Egypt, n.d., p.51.
9. Ibn Ḥazm, Al-Iḥkâm, v.VIII, p.1130.
10. Shâṭibî, Iᶜtiṣâm, v.II, p.113.
11. Pickthall, Holy Qur'ân (II:179), p.18.
12. Ibid. (LIX:7), p.363.
13. Abû Zahrah, Ibn Ḥazm, p.396.
14. C. van Arendonk, "Ibn Hazm," Encyclopedia of Islam, Leiden: E.J. Brill, 1934, pp.384-6.
15. Shâfiᶜî, Al-Risâlah, Egypt: Maṭbaᶜat Muṣṭafâ al-Bâb al-Ḥalabî, 1969, p.219.
16. Ibid., p.220.
17. Pickthall, Holy Qur'ân (LXXV:36), p.393.
18. Shâfiᶜî, Al-Umm, v.VII, Egypt: Maṭbaᶜah al-Kubrâ

al-Amîriyyah, 1325 A.H., p.271.

19. Ibid., p.271.

20. Ibid., p.271.

21. Pickthall, Holy Qur'ân (LVIII:1-4), p.360.

22. Shâfi^{c}î, al-Umm, v.VI, p.205.

23. Ibid., v.VII, p.273.

24. Pickthall, Holy Qur'ân (IV:59), p.55.

25. Ibid. (IV:80), p.57.

26. Ibid. (V:49), p.71.

27. Shâfi^{c}î, Al-Umm, v.VII, pp.273-4.

28. Shâfi^{c}î discusses these arguments in the seventh volume of his book al-Umm under the section "Ibṭâl al-Istiḥsân".

29. Shâtibî, I^{c}tiṣâm, v.II, p.107.

30. Muṣṭafâ Zayd, Al-Maṣlaḥah fî al-Tashrî^{c} al-Islâmî, p.43.

31. Ibn Rushd, Bidâyat al-Mujtahid.

32. Muṣṭafâ Zayd, p.43.

33. Ibid., p.40. Also see Juwaynî's al-Burhân, p.331.

34. Muṣṭafâ Zayd, p.42. He quotes Ibn ^{c}Abd al-Salâm from Qawâ^{c}id al-Aḥkâm, v.VII, p.181.

Conclusion

In conclusion, the examination of the doctrine of maṣlaḥah mursalah has brought a better understanding of the importance of maṣlaḥah as a basis for new aḥkâm in the Sharîᶜah and of the role of reason in this regard. Mâlik applied this principle in attempting to solve new juristic problems, keeping in mind the objectives of the Sharîᶜah. His reliance on this principle of Islamic jurisprudence is substatiated by the fatâwâ that he gave during his long juristic career.

The Mâlikîs have often been criticised for neglecting the textual sources in favour of maṣlaḥah. However, our analysis leads to the conclusion that they (Mâlikîs) have suggested restrictions on the arbitrary use of ra'y by laying down conditions for the application of maṣlaḥah mursalah. These conditions are neither so rigid as to block the extension of law nor so flexible as to distort the true nature of divine law, the Sharîᶜah.

Among the critics of maṣlaḥah mursalah, Shâfiᶜî recognizes the necessity for the extension of the divine law to new situations, but his solution i.e. a rigid reliance on analogical deduction is marked by lack of realism. He fails to appreciate that every new situation does not

necessarily have its parallel in the Sharî^{c}ah. This compelled him, at times, to contradict his own legal theory.

The relevance of maṣlaḥah mursalah as a method of legal construction has never been more obvious than today. Since the closure of the gate of ijtihâd in the fourth century A.H. the process of the growth of law has come to an end. Considerable gap exists between the Sharî^{c}ah aḥkâm as expounded by the early jurists and the requirements of the present-day life. Originality and creativity have given way to blind following. Muslim scholars of today must update the work left undone for centuries.

It goes to the credit of Mâlik that he included the principle of maṣlaḥah mursalah in his legal theory which may be employed as a positive instrument of legal construction. Since the justification of the doctrine of maṣlaḥah is derived from the textual sources, the question of theoretical validity should not arise. It is quite heartening to observe that there is a growing realization among modern Muslim scholars of the importance of this method of legal reasoning. The next logical step in this direction should be to take concrete action towards its application.

Bibliography

Arabic Sources

ᶜAbd al-Qâdir, A.A. Nazrah ᶜÂmmah fî Târîkh al-Fiqh al-Islâmî. Cairo: 1965.

Abû Ḥanîfah. Kitâb al-Kharâj. Cairo: Maṭbaᶜat al-Nahḍah, n.d.

Abû Zahrah. Mâlik. Cairo: Dâr al-Fikr al-ᶜArabî, n.d.

_____. Shâfiᶜî. Cairo: Dâr al-Fikr al-ᶜArabî, 1948.

_____. Abû Ḥanîfah. Cairo: Dâr al-Fikr al-ᶜArabî, 1947.

_____. Ibn Ḥanbal. Cairo: Dâr al-Fikr al-ᶜArabî, 1947.

_____. Ibn Taymiyyah. Cairo: Dâr al-Fikr al-ᶜArabî, 1952.

_____. Ibn Ḥazm. Cairo: Dâr al-Fikr al-ᶜArabî, 1954.

Âmidî, Sayf al-Dîn. al-Iḥkâm fî Uṣûl al-Aḥkâm. Cairo: Maktabat al-Imâm, n.d.

ᶜAyâḍ, Qâḍî. Tartîb al-Madârik. Beirut: Maṭbaᶜat al-Ḥayâh, 1967.

Beltâjî, M. Manâhij al-Tashrîᶜ al-Islâmî. Saudi Arabia: Jâmiᶜat Imâm Muḥammad b. Saᶜûd, 1977.

Bûtî, M.S.R. Ḍawâbiṭ al-Maslahah fî al-Sharîᶜah al-Islâmî. Beirut: Muᶜassasat al-Risâlah, 1977.

Ghazâlî, Abû Ḥâmid. al-Mustaṣfâ. Baghdad: Maṭbaᶜat Bûlâq, 1970.

Ibn ᶜÂshûr, M.T. Maqâṣid al-Sharîᶜah al-Islâmiyyah. Tunis: 1978.

Ibn Ḥajar. Fatḥ al-Bârî. Cairo: Maṭbaᶜat al-Bahiyyah, 1348 A.H.

Ibn Ḥazm. al-Iḥkâm fî Uṣûl al-Aḥkâm. Egypt: Maṭbaᶜat al-Imâm, n.d.

_____. al-Muḥallâ. Egypt: Idârat al-Ṭibâᶜah al-Munîriyyah, 1347 A.H.

_____. Ibṭâl al-Qiyâs wa al-Ra'y wa al-Istiḥsân wa al-Taqlîd wa al-Taᶜlîl. Damascus: Maṭbaᶜat Jâmiᶜah, 1960.

Ibn Khaldûn. Muqaddimah. Egypt: Maṭbaᶜat al-Bahiyyah, n.d.

Ibn Khallâf, A.W. Maṣâdir al-Tashrîᶜ al-Islâmî fî mâ lâ Naṣṣ fîhi. Egypt: Maṭâbiᶜ Dâr al-Kitâb al-ᶜArabî, 1954.

Ibn Nadîm. al-Fihrist. Egypt: Maktabah Raḥmâniyyah, n.d.

Ibn Qutaybah. al-Maᶜârif. Second Edition. Egypt: Dâr al-Maᶜârif, n.d.

Ibn Rushd. Bidâyat al-Mujtahid. Egypt: Maktabat Muṣṭafâ al-Bâb al-Ḥalabî, 1960.

Ibn Taymiyyah and Ibn al-Qayyim. al-Qiyâs fî al-Sharîᶜah al-Islâmiyyah. Cairo: Maṭbaᶜat al-Salafiyyah, 1375 A.H.

Ibn Taymiyyah. al-Siyâsah al-Sharᶜiyyah. Beirut: Dâr al-Kutub al-ᶜArabî, 1966.

Jundî, ᶜAbd al-Ḥalîm. Mâlik b. Anas. Cairo: Dâr al-Maᶜârif, n.d.

Jurjânî, ᶜAlî Aḥmad. Ḥikmat al-Tashrîᶜ wa Falsafatuhû. Cairo: Dâr al-Kutub, 1938.

Khaulî, Amîn. Mâlik b. Anas. Cairo: Dâr Iḥyâ' al-Kutub al-ᶜArabiyyah, n.d.

Mâlik b. Anas. al-Muwaṭṭa'. Egypt: Maktabat Muṣṭafâ al-Bâb al-Ḥalabî, 1951.

_____. al-Mudawwanah. Baghdad: Maktabat al-Muthannâ, n.d.

Maḥmaṣanî, S. Falsafat al-Tashrîᶜ fî al-Islâm. Second Ed. Beirut: Maṭbaᶜat Dâr al-Kashshâf, 1952.

Mukhtâr, Muḥammad. al-Ra'y. Cairo: Jâmi^{c}at Fu'âd al-Awwâl, 1949.

Nadavî, Abû Ḥasan. Târîkh-i Islâm. Vol.I. India: Nadwat al-^{c}Ulamâ', 1978.

Qarafî, Shihâbuddîn. al-Iḥkâm. Egypt: Maṭba^{c}at al-Anwâr, 1938.

Shâṭibî, Abû Isḥâq. al-I^{c}tiṣâm. Egypt: Maṭba^{c}at Muṣṭafâ Muḥammad, n.d.

_____. al-Muwâfaqât. Cairo: Maktabat al-Tijâriyyah al-Kubrâ, n.d.

Shâfi^{c}î. al-Risâlah. Egypt: Maṭba^{c}at Muṣṭafâ al-Bâb al-Ḥalabî, 1969.

_____. al-Umm. Egypt: Maṭba^{c}at al-Kubrâ al-Amîriyyah, 1325 A.H.

Suyûṭî, Jalâl al-Dîn. al-Ashbâh wa al-Naẓâ'ir. Hyderabad, Deccan: Dâ'iratul Ma^{c}ârif, 1359 A.H.

Turkî, ^{c}Abd al-Muḥsin. Asbâb Ikhtilâf al-Fuqahâ'. Riyâḍ: Maṭba^{c}at al-Sa^{c}âdah, 1974.

Zaydân, ^{c}Abd al-Karîm. al-Wajîz fî Uṣûl al-Fiqh. Baghdad: Maṭba^{c}at Salmân al-A^{c}ẓamî, 1974.

Zanjânî, Shihâbuddîn. Târîkh al-Furû^{c} ^{c}alâ al-Uṣûl. Damascus: Maṭba^{c}at Jâmi^{c}ah, 1962.

Zayd, Muṣṭafâ. al-Maṣlaḥah fî al-Tashrî^{c} al-Islâmî. Cairo: Dâr al-Fikr al-^{c}Arabî, 1954.

Zulaimî, Ibrâhîm. Asbâb Ikhtilâf al-Fuqahâ'. Baghdad:1976.

English Sources

^{c}Abd al-Raḥîm. The Principles of Muhammadan Jurisprudence. London: Lusac and Co., 1911.

^{c}Umar ^{c}Abdullah, Fârouq. "Mâlik's Concept of "^{c}Amal" in the Light of Mâlikî Legal Theory." Ph.D. disser-

tation. Ann Arbour: University Microfilms International, 1978.

Aḥmad, Aziz. Islamic Law in Theory and Practice. Lahore: Law Publishers, 1956.

Bosworth, C.E. and J. Schacht. The Legacy of Islam. London: The Clarendon Press and Oxford University Press, 1974.

Coulson, N.J. A History of Islamic Law. Edinburgh: Islamic Survey, 1964.

Fyzee, A.A. Outlines of Muhammadan Law. London: Oxford University Press, 1955.

Farûkî, K.A. Islamic Jurisprudence. Karachi: Pakistan Publishing House, 1962.

Goldziher, I. Muslim Studies. 2 vols. Tr. C.R. Barberand and S.M. Stern. London: George Allen and Unwin, 1971.

Hasan, Aḥmad. The Early Development of Islamic Jurisprudence. Pakistan: Islamic Research Institute, 1970.

Kerr, Malcolm H. Islamic Reform: The Political and Legal Theories of Muḥammad ʿAbduh and Rāshid Riḍā. London: Cambridge University Press, 1966.

Khadûrî, Majîd. Islamic Jurisprudence: Shâfiʿî's Risâlah. London: Oxford University Press, 1961.

Lane, E.W. An Arabic-English Lexicon. London: William Norgate, 1863-1885.

Masʿûd, Khâlid. Islamic Legal Philosophy. Pakistan: Islamic Research Institute, 1977.

Pickthall, M. The Holy Qur'an. Karachi: Dawood Foundation, 1975.

Qâdrî, A. Anwâr. Islamic Jurisprudence in the Modern World. Lahore: Ashraf Press, 1973.

Raḥmân, Fazlur. Islam. Chicago: University of Chicago Press, 1979.

Ramadân, Sa^{c}îd. Islamic Law: Its Scope and Equity. Second Ed. London: 1961.

Schacht, J. The Origins of Muhammadan Jurisprudence. London: The Clarendon Press, 1950.

_____. An Introduction to Islamic Law. London: The Clarendon Press, 1964.

Articles

Abû Zahrah. "Ta^{c}liqât ^{c}alâ Awhâm Schacht." Typescript. Cairo: 1964.

Anderson, J.N.D. "Recent Developments in Sharî^{c}ah Law." Muslim World 40(1950), 244-56.

Adams, C.C. "Abu Hanifah, Champion of Liberalism and Tolerance in Islam." Muslim World 36(1946), 217-227.

Eric, E.F. Bishop. "al-Shâfi^{c}î (Muḥammad Ibn Idrîs) Founder of a Law School." Muslim World 19(1929), 156-75.

Ḥasan, Aḥmad. "The Sources of Islamic Law." Islamic Studies 7(1968), 165-84.

Fârûqî, K.A. "Evolution of Law in Islam." Iqbal 6(1957), 44-67.

Muḥammad Ḥamîdullah. "Sources of Islamic Law: A New Approach." Islamic Quarterly 1(1954), 205-211.

Ma^{c}sûmî, M.S.A. "Ibn Ḥazm's Allegations Against the Leading Imâms." Islamic Studies 7(1968), 113-28.

Muṣleḥuddin Muḥammad. "Islamic Jurisprudence and the Rule of Necessity and Need." Islamic Studies 12(1973), 37-51.

Maḥmaṣanî, S. "Muslim Decadence and Renaissance: Adaptation of Islamic Jurisprudence to Modern Social Needs." Muslim World 44(1954), 186-201.

Y., Linant de Bellefonds. "The Formal Sources of Islamic Law." Islamic Studies 15(1976), 187-194.