

AL-ṬUFİ- CENTRED APPROACH TO AL-MAŞLAHAH AL-MURSALAH (PUBLIC INTEREST) IN ISLAMIC LAW

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Maslahat-ı Mürsele'ye (Public Interest) et-Ṭufi- Merkezli Bir Bakış

Bu araştırma, İslam Hukuku'ndaki Maslahat-ı Mürsele'nin (public interest) Nejmeddin el-Ṭufi (657-716/1259-1316) bakış açısıyla metodolojik bir değerlendirmesidir. Maslahat konseptine genel bir atıf yaptıktan sonra Ṭufi'nin köktenci fikirlerini, bu konudaki seçkin risalesi "Risale el-Maslahah" yi göz önünde bulundurarak, tercümesiyle birlikte inceleyip ortaya koymak.

Ṭufi'nin maslahat anlayışı daha çok nass ve ijmâ' ile karşı karşıya geldiği zaman "tahsis" ve "beyân" yoluyla tercihinin yapıyor olması dikkatleri üzerine çekmektedir ki bu İslam Hukuku'nun gelişmesine maslahat prensibiyle önemli bir katkı sağlamaktadır.

Introduction:

Najmaddin al-Ṭufi as a leading personality in the concept of maşlahah, he had emphasised the importance of the concept of maşlahah, which is suitable to apply to all other social areas related to the actual human relations, the exceptions upon the areas which deal with ibādāt (worshipping) and the muqaddarāt-i shar'iyyah (determined values of sharī'ah). His fundamental views about maşlahah made him well known and brought the attention to the intellectual atmosphere not only in his school of law, Ḥanbali madhhab, but also the whole schools of law in general. According to his studies, maşlahah, is preferred through the methods of takhşış (particularization) and bāyân (clarification) to prevent the possible contradictions between maşlahah and the other two principles naş (text) and ijmā' (consensus).¹

Ṭufi's work "*Risālah al-Maşlahah*" is the best explanation from his observations of maşlahah. Since the concept of maşlahah is a very essential component for the development of Islamic law, Ṭufi's work has not put in

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¹ Najmaddin al-Ṭufi Abur Rab' Sulaymān b. 'Abdulqawī b. 'Abdulkarīm b. Sa'īd (657-716/1259-1316) "*Risālah fil Maşlahah al-Mursalāh*", p: 46-48, Beirut, 1324.

much account for centuries only until the last century which some works have been done, as will be mentioned later, that transformed Tūfī's maşlahah in the intellectual agenda. No body has overtaken him in the extremely methodological investigation about maşlahah, legal principles where in rulings, compatibility to maşlahah of the legal principles in rulings.²

Tūfī addresses the ḥadīth "no harm shall be inflicted or reciprocated in Islām"³ which explains the concept, maşlahah is stronger than all other Shar'ī evidences and that does not necessarily mean to abolish the naş and ijmā'. It is obvious that in the process of the first creation, in the hereafter and in the continuation of life, Allah (swt) consider the maşlahah of human beings. How could it be possible not to consider the Shar'ī maşlahah alongside with human beings? As Shar'ī maşlahah are related with the protection of five essential values of humans -namely, religion, life, intellect, lineage, and property-, it becomes more crucial for further consideration. Nevertheless, it is not possible to ignore the maşlahah. When naş, ijmā' and other shar'ī evidences contradict to maşlahah, maşlahah becomes the primary sources through the methods of takhşış (particularization) and bāyān to mediate shar'ī evidence.⁴

Tūfī articulated his manifestation in a resālah (thesis) with a great detail when he was interpreting the thirty second ḥadīth, "Harm is neither inflicted nor reciprocated in Islam"⁵, of Nawawī's (676/1277) forty ḥadīth (al-Arba'in an-Nawawīyyah). Jamāleddīn al-Qāsimī (1332/1914), Syrian scholar, had published the resālah in a new version with that selected parts of the interpretation which is related to the maşlahah, he included footnotes and another three resālah that is called "*Resalah fil-Maşlahati Mursalah*" under the name of "*Majmū' Resāil fī Uşūlil Fiqh*" in Beirut 1324/1906. In addition to al-Qāsimī's work, Rashīd Rezā had published the resālah with al-Qāsimī's footnotes in Majallah al-Manar in volume 9, part 10 dated 1906. Later Muştafā Zayd had prepared an independent work about al-Tūfī and he published its wholly elucidated, criticized text with considering different copies of the resālah. 'Abdulwahhāb Khallāf (d.1375/1956) quoted Muştafā Zayd's elucidation in his work "*Maşādir al-Taşhrī' al-Islāmī fī mā lā Naşṣah fihī*" (Dār al-Qalam 1993, Kuwait) between 105-144 pages. Once again it was published by Kāşif Hamdi Okur in Islamic legal philosophy researches book,

² Khallāf 'Abdulwahhāb (d.1375/1956) "*Maşādir al-Taşhrī' al-Islāmī fī mā lā Naşṣah fihī*" p: 105, Dār al-Qalam 1993, Kuwait

³ Ibn Mājah "*Sunan*" II, 784, Ḥadīth no: 2340; Shātibī, Abū Ishāq Ibrāhīm bin Mūsā Al-Ghimāṭī (d.790/1388) "*al-Muwāḍa'āt*", III, p:17. Ed. Abd-Allah Diraz. Dār al-Ma'rifa, Beirut. 1997.

⁴ Koca Ferhat "*İslam Hukukunda Maslahat'ı Mursalah ve Necmeddin el Tūfī'nin bu konudaki görüşlerinin değerlendirilmesi*", İLAM Research Magazine, v: 1, no:1, p: 93-122. İstanbul, 1996; Rıza Rāshit "*al-Manā'ir*" v: 9, no: 10. Cairo, 1909; Uyanık Mevlüt "*Qur'ân'ın Tarihî ve Evrensel Okunuşu*" translated by Kasif Hamid Okur, p: 219. Ankara, 1997; Kayadibi Saim "*İstifisān (Juristic Preference) the forgotten Principle of Islamic Law*", p:310, unpublished PhD dissertation, University of Durham, 2006.

⁵ Ibn Mājah "*Sunan*", II, 784, ḥadīth no: 2340.

"*Maqāṣid wa Ijtihād*" between 275-291 pages in 2002 with Turkish translation.

Najmaddīn al-Tūfī's actual name is Abur Rabī' Sulaymān b. 'Abdulqawī b. 'Abdulkarīm b. Saīd. He was born in a village called Tūfa near to Baghdād in Iraq, lived during the Mamluk dynasty in Egypt. He is one of the pupils of Ibn Taymiyyah (d.728/1328), distinguished, giving attention to an intellect value, well known by his high intelligence and having good memory in Hanbali school of law. He spent all his live obtaining knowledge in Baghdād, Damascus, Hijaz, Egypt and Palastine; he lived in a modest life. He was a man of independent thought, brave for presenting his ideas in every discussion. He had written more than fifty books in several fields; Ḥadith, Tafsīr (interpretation of the Qur'ān), Principles of the religion, fiqh (rulings), Uṣūl al-fiqh (Principles of Islamic Jurisprudence), polemics, linguistic, literature, history, etc. Because all his writings are in the method of Hanbali school of law, he was considered as one of the focal personalities in the school. He was, an extremist leading personality in the concept of maṣlaḥah according to Abū Zahrah and was condemned, exiled, imprisoned due to his extremist ideas of maṣlaḥah and was accused of being rebellious to his "School", being inclined to Shi'ī and Rāfizi.⁶

After mentioning maṣlaḥah in general, Tūfī's "*Resālah fīl-Maṣlaḥatīl Mursalah*" will be illustrated in detail that expresses the main idea of his regarding the concept of maṣlaḥah.

Maṣlaḥah in general:

Maṣlaḥah, one of the controversial sources of Islamic law in principle, is based on benefit and avoiding hardship. The istiṣlah is a proper basis for legislation, when the maṣlaḥah is identified and the mujtahid does not find an explicit ruling within the texts, the Qur'ān, sunnah, ijmā', and qiyās, then the jurist can resort for further steps to protect the human's benefit and to prevent corruption on earth.⁷ There is an important point of maṣlaḥah which is, it should not be contradictory with the Sharī'ah, it actually means that the performed ruling should never contradict the spirit of the Sharī'ah and its general objectives.

For this Shātibī (d.790/1388) point out⁸ that the purpose of the Sharī'ah is to promote people's welfare and prevent corruption and hardship, it is

⁶ Khallāf "*Maṣādir*"; p:96; Ibnul 'Imad al-Hanbalī "*Shazarā'uz Zahab*", 6/39-40, Beirut; Ibn Hajar al-Asqalānī "*al-Durar al-Kāminah*", 2/154-157, Beirut; Abū Zahrah "*Imām Mālik*", p: 376, translated by Osman Kesioğlu, Ankara, 1984; Al-Būṭī, M. Sa'īd Ramaḍān "*Dawābiḥul Maṣlaḥah fī al-Shar'atīl Islāmiyyah*" p: 202, Beirut, 1986; Ismā'īl, Sha'bān Muḥammad "*Uṣūl al-Fiqh Tārikhuhi wa Rijāluhi*", p:322, Dār al-Salam, 1998, Cairo.

⁷ Kamālī, Muḥammad Hāshim, "*Principles of Islamic Jurisprudence*", p: 268, Islamic Text Society, 1997, Cambridge.

⁸ Al-Shātibī "*al-Muwāfaqā*", v: 2, p: 3.

clearly explained in the Qur'ān "We have not sent you but as a mercy for all creatures"⁹, and "Allah never intends to impose hardship on people"¹⁰, also Allah (swt) describes to mankind in the sūrah al-Mā'idah (5/6) that His main purpose of revelation in religion is to remove hardship "Allah does not want to place you in difficulty, but He wants to purify you".¹¹

Definitions of maşlahah:

Etymologically it means: benefit/beneficial, appropriate/suitable, convenient etc. Literally, maşlahah (benefit) is opposite mafsadah (evil) according to Lisān al-Arab. In al-Mu'jam al-Wasīf, maşlahah is removal of evil. The word maşlahah is an infinitive noun of the root (ş-l-h). Its plural form is maşāliḥ and it is synonymous with istiṣlāḥ. Mafsadah is its precise antonym. The verb "şaluḥa" means something has become beneficial or suitable. When somebody "aşlaḥa", means he removes the evil and when something is "işlaḥa" it means it became ready to get rid of the evil in it.¹²

Mursalah means unrestricted. According to Lisān al-Arab, the verb "arsala" something means he removed the restriction or ignored it.¹³

Technically, maşlahah mursalah is defined by Shāṭibī as "I mean by maşlahah that which concerns the subsistence of human life, the completion of man's livelihood, and the acquisition of what his emotional and intellectual qualities requires of him, in an absolute sense".¹⁴

It is precisely more technically defined as "a consideration which is proper and harmonious (wasf munāsib mulā'im) with the objectives of the lawgiver; it secures a benefit or prevent a harm; and the Qur'ān or sunnah provides no indication as to its validity or otherwise."¹⁵

It is obvious that the concept of maşlahah has very close relationship with maqāṣid al-Sharī'ah (objectives of the Sharī'ah) as maqāṣid briefly defined: obtaining the maşlahah (benefit) and preventing mafsadah (evil). These two concepts (maşlahah and maqāṣid) may sometimes be interchangeably used. The first significant work has been done by Ghazālī (d.505/1111) since his master al-Juwaynī, in Ghazālī's following expressions, the direct relation between the two could be realized: "in a real sense

⁹ Qur'ān: al-Anbiyā': 21/107.

¹⁰ Qur'ān: Sūrah Al-Ḥajj, 22:78.

¹¹ Qur'ān: an-Mā'idah: 5/6.

¹² Haḳkālī Abdurrahman: "İslam Hukuk Tarihinde Maşlahat Tanımları ve Bunların Analizi", p: 47-61, İslami Araştırmalar Magazine, v: 13, no: 1, 2000.

¹³ Ibn Manzūr, Jamāluddīn Muḥammad ibn Mukarram al-Anşārī, (d.711/1311) "Lisān Al-'Arab", Ṭaba'ah Bulāq, Maṣṣūrah, Cairo.

¹⁴ Al-Shāṭibī "al-Muwāfaqāt", v: 2, p: 25.

¹⁵ Badrān, Abū al-'Aynāyn Badrān "Uṣūl al-Fiqh al-Islāmī", p: 210, Muassasah Shabāb al-Jāmiyah, Alaxandria, 1404/1984..

maṣlaḥah consists of obtaining manfa'ah (benefit) and prevent maḍarrāt (evils). However, we do not use that meaning... by the term of maṣlaḥah, we mean, to protect the objectives of the Sharī'ah (maṣlaḥah al- Sharī'ah) which consist of five essential values, namely religion, life, intellect, lineage and property."¹⁶

Types of Maṣlaḥah

Ibni Āshūr (d.1973), first of all, divides maṣlaḥah into two types: a- al-Maṣlaḥah al-Āmmah (public benefit) which is a benefit that is useful to all, or to the majority of the community, b- al-Maṣlaḥah al-Khāṣṣah (specific benefit): individual consideration of the benefits for people.¹⁷

With regard to the social order, it is considered in three groups: a- Darūriyyāt (essentials), b- Ḥājiyyāt (complementary), Taḥsīniyyāt (embellishments) also known as Kamāliyyāt.

In another consideration regarding to the whole community, its groups and individuals, it is a- Kullī (whole), b- Juz'ī (partial). Lastly it is considered in three types in respect of the people's situations a-Qaṭ'ī (definite), b-Zānnī (speculative), c- wahmī (superstitious).¹⁸

Briefly the main division of the maṣlaḥah is as follow:

Darūriyyāt (essentials): those which the lives (life) of people depend and whose neglect causes total disruption and anarchy. Ibn-ul Ḥājib, al-Qarāfī, and al-Shāṭibī considered the five essential values namely religion, life, intellect, lineage and property, Qarāfī adds the sixth essential, protecting honour which is attributed to Tūfī.¹⁹ The first five essentials must not only be upheld but also protected against any real or unexpected threat to their safety. Destroying one of the five essential values is ḥarām according to Ghazālī.²⁰ The five values would be protected in two ways: a- maintaining the subsistence, b-removing the disruptions.²¹

Ḥājiyyāt (complementary-needed): if the gaining of this maṣlaḥah is neglected it might cause hardship in the life of the community but does not cause its collapse. Shāṭibī (d.790/1388) says ḥājiyyāt those are needed for tawassī (widen) and ra'ul ḥaraj (avoiding the hardships). If those are not taken into consideration subjects would face harm and difficulties. However,

¹⁶ Ghazālī, "al- Muṣtaṣṣaf", p: 174-179.

¹⁷ Ibn Āshūr, Muḥammad Tāhir (d.1973) "Maqāṣid al-Sharī'ah al-Islāmīyyah" (Islam Hukuk Felsefesi, Gaye Problemi), p: 123, Raḡbet, translated by Vecdi Akyüz, Mehmet Erdoğan, İstanbul, 1999.

¹⁸ Ibn Āshūr., ibid: p: 138.

¹⁹ Ibn Āshūr, ibid: p: 139.

²⁰ Ghazālī, "al-Muṣtaṣṣaf", 1/288.

²¹ Shāṭibī "al-Muwāḥḥaḍ", 2/8.

those difficulties are not as dangerous as neglecting the essentials."²² Thus contain the field of *ibādāt* (worship) the concessions (*rukhaṣ*) that the *sharī'ah* has granted for the sick, for the travellers, permitting them not to indulge in fasting and to shorten the prayers (*salāt*), as the aims are to avoid hardship.

Tahsīniyyāt: also known as **Kamāliyyāt** (embellishments): this one is a completion to the first two *maṣlaḥahs*. It represents interest and awareness of the *mukallaf* (subject). As *Shāṭibī* indicated that it may be summarized as part of the moral constitutions in the field of *ibādāt* such as eliminating dirties; considering all types of cleanness, in the field of customary matters such as good conduct in eating, avoiding wastefulness in consumption, in the field of transactions such as preventing to sell something which is impure, leftover of water and food and in the field of *jināyat* (criminal offence) such as prohibition of killing women, children and religious man whilst in *jihād* fall within the scope of *tahsīniyyāt*.²³ Therefore *sad al-ḍarāi'* (blocking the means) is considered as a kind of *tahsīniyyāt*.

Shurūt (Conditions) of Maṣlaḥah Mursalah

Some strict and indisputable conditions have been set for *maṣlaḥah* to be a valid source.

A vital condition of *maṣlaḥah* is that it must be appropriate to the objectives of *Shārī'* (lawgiver). *Ghazālī* remarked "interpreting the *maṣlaḥah* as protecting the *maqāṣid al-Sharī'ah* (objectives of Islamic Law) objectives of the lawgiver, nobody would oppose obeying the *maṣlaḥah* unless they could produce positive evidence"²⁴. "We occasionally consider *maṣlaḥah* and rulings when indications interchangeably reflected one another".²⁵

Following the conditions intended to ensure that the concept of *maṣlaḥah* is not arbitrarily established out of an individual's desire in legislation.

1- *Maṣlaḥah* must not be in conflict with a principle or value which is sustained by the *naṣ* (text) or *ijmā'* i.e. it is not contradictory to a definitive indication or evidence.²⁶

2- *Maṣlaḥah* must be genuine (*haqīqīyyah*) as opposed to inaccurate (*wahmīyyah*), which is an improper ground for legislation. For example the recording of marriages in the court and issuing marriage certificates,

²² Ibid, 2/10-11.

²³ *Shāṭibī* "al-Muwāḍḍa'at", v: 2, p: 327.

²⁴ *Ghazālī* ibid, v: 1, p: 311.

²⁵ *Ghazālī*. "Al-Mankhūl min Ta'liqāt Al-Uṣūl", p: 355, Al-Tab'ah Al-Thānīyah, Dar Al-Fikr Al-Arabi, Damascus.

²⁶ *Aṭṭār*, Ḥasan bin Muḥammad bin Maḥmūd (d.1250/1835) "Ḥāshiyah 'alā Sharḥ Jalāl al-Maḥallī 'alā Jam'u Al-Jawāmi'", part 2, p: 339, Maṭba'ah 'Ilmiyyah, Egypt, h.1316.

recording contracts in the registry department prevents shahādāt al-zur (false testimony) and stabilizes the mu'āmalāt (trade contracts)²⁷.

3- Maṣlahah must be kullī (general) so as to secure its benefits and prevent harm as a whole, not to a particular person or group of people.²⁸ Besides these conditions, Imām Mālik (d.179/795) considers further two other conditions as follows;

4- The Maṣlahah must be ma'qūlah (rational) and acceptable for the people of comprehend.

5- Maṣlahah must prevent or eradicate hardship from people, which the Qur'ān expresses in the sūrah al-Mā'idah (5:6) "God never intends to impose hardship upon people"²⁹, yet Ghazālī (d.505/1111) maintained that maṣlahah must be ḍarūriyyāt (essentials) for its validation.³⁰

Consequently, the main purpose of the law is to obtain the benefits (jalbul ṣalāh) and avoid evils (daf'ul fasād). Maṣlahah would be obtained by improving the man's situation and removing its evils, because man is the vicegerent on the earth and holder of His truth therefore making him peaceful would reflect in world peace too.³¹ If the evaluation of the maṣlahah and mafsadah were the responsibility of mankind Shārī's objectives would be facing the danger of not being practiced. In that sense, Shāṭibī says "in the religious context the aim of obtaining the benefits (jalbus ṣalāh) and avoiding evils (daf'ul fasād) are to provide the needs of this world for the sake of the hereafter and not providing personal desires or avoiding personal hatreds. Religion prevents people from following their desires and guides them to be a servant of Allah".³² Allah indicates this clearly in the Qur'ān as: "And if the truth had been in accordance with their desires, verily, the heavens and the earth, and whosoever therein would have been corrupted."³³

Resālah fil-Maṣlahah al-Mursalah

Tūfī commences with the ḥadīth "Harm is neither inflicted nor reciprocated in Islām"³⁴, attempting to evaluate by its sanad (source), lafīz (enunciate) and ma'nā (meaning) emphasizing that it would not be doubted

²⁷ Zuhailī, "Uṣūl", part 2, p: 799.

²⁸ Khallāf "Ilm" p: 87; Badrān "Uṣūl", p: 214.

²⁹ Shāṭibī, "al-I'tisām", part 2, p: 307-314, Beirut.

³⁰ Ghazālī, "al-Mustasfā", part 1, p: 141.

³¹ Ibn Ashur, "Maqāṣid", p: 121.

³² Shāṭibī "al-Muwāḥḥaḍ", v: 2, p: 29-30.

³³ Qur'ān: al-Mu'minūn 23/71

³⁴ Ibn Mājah "Sunan", II, 784, Ḥadīth no: 2340.

about the reality of the *ḥadīth*, then starts the subject with the title of "legal proofs" (*adillah al-shar'iyyah*)³⁵

Know that the sources of law (*adillah al-shar'iyyah*) are 19 that are determined by induction.³⁶ As far as the scholars are concerned, no more sources are available. These sources are in sequence; first one is the *Qur'ān*, then *sunnah*, consensus of the community (*ijmā' ummah*), consensus of the *Madīnīes*, analogy, opinion of the Companions, public interest (*maṣlaḥati mursalah*), presumption of continuity (*istishāb*), original purity (*barā'ati aṣliyah*), custom (*'urf*), induction (*istiqrā'*), blocking the means (*sad al-dharā'i'*), inference (*istidlāl*), juristic preference (*istiḥsān*), accepting lesser (*akhz bil akhaf*), prevention (*iṣmah*), consensus of *Kūfa*, consensus of the *ahl al-bayt* and consensus of the four caliphs that are some accepted unanimously and some controversially. Understanding of these sources with their scope, extent, reality, detail of rulings is mentioned in the principle of Islamic Law.

Later, the Prophet's *ḥadīth* "Harm is neither inflicted nor reciprocated in Islām"³⁷, requires obtaining benefits (*maṣāleḥ*), and refuting (*nafy*) evils.³⁸ Since *ḍarar* (harm) is an evil itself, *sharīaḥ* avoids the evil and requires the benefit that is *al-maṣlaḥah*, because these two concepts, *maṣlaḥah* and *mafsadah*, are contradict, there is not exist intermediary between them.

The strongest proof:

Investigation of *al-maṣlaḥah al-mursalah* (public benefit) in the side of Najmaddin al-Ṭūfī requires its original source. Therefore his prominent text "*Risālah al-Maṣlaḥah*" will be presented here. His fundamental views about the concept are as follows:

The strongest proof of the 19 proofs is *naṣ* and *ijmā'* that are either conform to *maṣlaḥah* or oppose to it, if these two ratify *maṣlaḥah*, how well the recompense! then no dispute. In three proofs, *naṣ*, *ijmā'* and obtaining *maṣlaḥah* which is deduced from the *ḥadīth*, "Harm is neither inflicted nor reciprocated in Islām", have met in one ruling. Nevertheless, it is not possible to ignore the *maṣlaḥah* when *naṣ* *ijmā'* and other *Shar'ī* evidences contradict

³⁵ See Khallāf "*Maṣādir*", p: 106-109; the translation of Ṭūfī's *Maṣlaḥah*, Qasimī's work was considered as a basis, some mistakes in this work are revised comparing it with Muṣṭafa Zayd's work. It was translated by Kasif Hamdi Okur into Turkish with pointing the sign of "krs" (cf) in related points. In addition to that some necessary sub-titles, which was put by Muṣṭafa Zayd, were added to explain the focal points and some explanatory notes were added when its necessary. Thus, final published work by Kasif Hamdi Okur is also taken into consideration during this work.

³⁶ Ṭūfī had quoted these proofs from Qaraṭī (d. 684/1285), the last sentence is an inclusion of Ṭūfī. Qasimi had claimed that he discovered extra 26 proofs by induction (*istiqrā'*), increased the amount of proofs 45, see: Kasif Hamdi Okur (*Naṣ ve Maṣlaḥat*) "*Maqaṣid ve İjtihād*" p: 275.

³⁷ Ibn Mājah "Sunan", II, 784, *ḥadīth* no: 2340.

³⁸ Cf 17.

to maṣlaḥah, maṣlaḥah becomes the primary sources through the methods of takhṣiṣ (particularization) and bāyān (clarification) to mediate Shar'ī evidence. However, it does not mean to violate naṣ and ijmā' or no longer to be a part of an activity in rulings, as priority of sunnah to the Qur'ān in rulings due to its elucidatory role.

Determination of the hypothesis is that naṣ and ijmā' either wholly obtain harm, evil or vice-versa, if they do not obtain harm, evil then, are conformed to care of maṣlaḥah,³⁹ if they require harm; harm either would be whole of the meaning or some part of it, when the meaning of them is wholly acquired, it must be excluded from the ḥadith of the Prophet (pbuh) "Harm is neither inflicted nor reciprocated in Islām" such as prescribed penalties (al-ḥudud), punishments (al-'uqūbāt) crime, on property, life and chastity, when the meaning of the harm is partly acquired that requires a specific proof, then it is applied, however, if it does not necessitate a specific evidence, since consideration of the total of the evidence is preferred, naṣ and ijmā', then, have to be particularized based on the ḥadith "Harm is neither inflicted nor reciprocated in Islām".⁴⁰

Perhaps, you may say that the principle of acting upon maṣlaḥah by the way of takhṣiṣ (particularization) and bāyān (clarification), based on the ḥadith of the Prophet (pbuh) "Harm is neither inflicted nor reciprocated in Islām" is not dominant over ijmā', because ijmā' is a definite source, however the principle of acting upon maṣlaḥah is not definite, because the indication acting upon maṣlaḥah and the ḥadith that is indicated, from the standpoint of imply, is not definite, then it is more appropriated⁴¹ Evidently, we respond to your enquiry that that action upon maṣlaḥah is stronger than ijmā', then as a result it is deduced that maṣlaḥah is the most stronger evidence,⁴² because the strongest than stronger is the strongest. It becomes obvious when maṣlaḥah and ijmā' are considered.

Al-Maṣlaḥah:

Albeit, maṣlaḥah is concerned with its terminology, meanings, explanation of an attention that is given by religion and ground for is elaborated as below:

³⁹ Cf 17.

⁴⁰ Cf 18.

⁴¹ "Harm is neither inflicted nor reciprocated in Islam" of this ḥadith and its evaluation is considered in general see: 'Abdurrahman b. Shihābuddīn b. Aḥmad ibn Rajab al-Ḥanbalī, "*Jāmi'ul 'Ulūm wal Ḥikam*", Dārul Fiqr, Beirut 1992. 301-303. For the conditions of accepting Aḥad (solitary ḥadith) traditions see: Muḥammad Ibrāhīm al-Ḥafnawī, *Dirāsāt Uṣūliyyah fī Sunnah an-Nabawiyyah*, 264-279, 297-299, Egypt, 1991.

⁴² Cf 18

a- It is derived from "ṣalaḥa" in the mould of "maḥalah", a virtual form of something that is perfect in conformity with the requisite such as a pen that its form is suitable in conformity with writing, a sword that its form is suitable in conformity with hitting.⁴³

b- Definition of maṣlaḥah based on 'urf (custom), it is a cause which guides to the ṣalaḥa (virtuous, suitable) and benefit as trade causes to profit. In account of the religion, it is a reason, whether it is a devotional matter ('ibādāt) or custom, which conveys to the objectives of the Lawgiver, and then it is divided into two that is what the Lawgiver requires for Himself as a devotional matter ('ibādāt) and is of what is the Lawgiver requires that benefit for creatures to regulate their circumstances as customs (al-ādāt).⁴⁴

c- Consideration of the religion about maṣlaḥah would be able to identify into two ways, outlining (ijmāl) and detailing (tafṣil). Elucidating the outlining is with the verse "O mankind! There has come to you a good advice from your Lord, and a healing for that is in your healing....."⁴⁵ This refers to the following meanings below:

First aspect: with the expression of "There has come to you a good advice" the statement that the Lawgiver had concerned to give advice to mankind that is the biggest maṣlaḥah (benefit) for mankind, yet in nature of advice to avoid mankind from evils and to guide them to the righteousness.

Second aspect: The Qur'ān describes that it is a shifā (healing), whatever is in your heart, the disease of ignorance, doubt, hypocrisy and etc. That is an enormous maṣlaḥah.

Third aspect: described as al-Hudā (the guidance).

Fourth aspect: described as al-Raḥmah (mercy), explains lawful and unlawful things. There is a highest degree of maṣlaḥah in the guidance (hudā) and mercy (raḥmah).

Fifth aspect: it is an attribution to the mercy and bounty (faḍl) of Allah; aught would be originated from these two apart from an enormous maṣlaḥah.

Sixth aspect: "therein let them rejoice" it is in the meaning of congratulation for them that are the two, congratulation and happiness, are distinctively an enormous maṣlaḥah.

Seventh aspects: "That is better than what (the wealth) they amass", what is accumulated is because of their benefits, the Qur'ān and its benefits

⁴³ Cf 18

⁴⁴ Cf 19.

⁴⁵ Qur'ān: Yunus: 10/57/58.

are more beneficial than their benefits. The most beneficial maṣlaḥah is the ultimate limit of maṣlaḥah.

These seven aspects of the verses indicate that the religion (al-shar') concerns the benefits of the responsible person, pays attention to them, when naṣ (text) is investigated, using the method of induction, you would come across many proofs related to this context.

Determination of naṣ and ijmā' as a determiner source for the indication of the rulings that is not considered as maṣlaḥah of mukallaf (subject) that is related to the religious responsibilities, when it is questioned, we then response as such: as we agreed upon, naṣ and ijmā' are determiner sources that deal with ibadāt (devotional matters) and a part of non devotional matter that is conformed to maṣlaḥah.⁴⁶ Nevertheless, we preponderate the concern of maṣlaḥah in the customary matters, transactions and the similar, because the concern of maṣlaḥah in such matter is an axis of the objective of the religion, yet it is the opposite to the devotional matters that is a right of the religion, which is unknown of their fulfilment except from the side, with the guidance, of naṣ and ijmā'.

Our investigation is as follows:

The First search: Can Allah's deeds be justified (mu'allal) or not? Supportive group's argument is that a deed which has not have a reason ('illah) is absurd; Allah (swt) is free from absurd (abas). The Qur'ān is full of justification of deeds for example "and that you may know the number of the years and the reckoning."⁴⁷ Argument of the opponents is that whoever does anything for a reason must require that cause for him to become complete. Since he has not had the cause before he is incomplete by himself and requires other to complete him. Attribution of deficiency to Allah (swt) is unfeasible. It is responded that the evidence is not prevalent. The claim can be only suitable for creatures (makhlūqāt). In fact, Allah's deeds are questioned (mu'allal) for a ruling a purpose that is returned to the benefits and completions of the accountable person. This is not a benefit for Allah (swt) and His completion, because of His existence, the Self Sufficient Master.

The second search: consideration of maṣlaḥah is a grace of Allah (swt) to the creature according to the ahl al-Sunnah, it is an obligatory to Allah (swt) according to Mu'tazilah. First group's argument is that Allah (swt) rules over creatures through possession, for Him nothing to be an obligatory. An obligation demands a higher obligatory authority, thus there is not any higher obligatory authority but Allah (the high exalted). The other group's argument is that Allah (swt) obligated His creatures to worship; therefore He

⁴⁶ Cf. 20.

⁴⁷ Qur'ān: al-Isrā': 17/12.

should consider their maṣlaḥah to dissolve away the obstacles they faced in obligation, otherwise, it would be an unachievable responsibility (taklīf mā lā yutaq) or as such. This approach can be responded as, it is based on the concept of the adornment of intellect and its condemnation (taḥsīn al-aql wa taqbīḥuh)⁴⁸, this is invalid according to the majority.

In fact, the consideration of maṣlaḥah is a grace obligation from Allah (swt), because He maintained condescension with it, not a grace that is obligated to Him. As we said in "...it is they whom Allah (swt) will forgive..."⁴⁹ that its acceptance is an obligation from Him, not to Him, as such the mercy (al-Raḥmah) in "To Allah (swt) He has prescribed mercy for Himself."⁵⁰

The third search: The religion, as it considers the creatures' maṣlaḥah, wondering whether the religion absolutely has committed to consider in them all or the highest one sometimes, in the middle sometimes. All these assumptions with their types are possible.

Investigation of the consideration of Maṣlaḥah in detail in terms of its source:

Fourth search: its detailed investigation is grounded on the Qur'ān, sunnah, ijmā', and intellect (nazar). We will provide some examples for each one, investigating them in many details are beyond the scope of this paper.

Qur'ān: "And there is (a saving of) life for you in al-qisāṣ"⁵¹, "And (as for) the male thief and the female thief, cut off their hands"⁵², "The woman and the man guilty of illegal sexual intercourse, flog each of them with a hundred stripes"⁵³ etc. its examples are so vast. As it is obviously seen in the mentioned verses that human's maṣlaḥah, in their life, property, honour, is considered. In sum, there is not any verse in the Qur'ān that it is not including human's maṣlaḥah (benefit) or maṣāleḥ (benefits) as we explained it in a different concept.

Sunnah: "do not purchase among you on other's purchase", "do not purchase townsman behalf of Bedouin", "women would not get married on her aunt and aunty if you do that you had broken your kinship", and this and similar examples are so may in the sunnah because sunnah is the

⁴⁸ See about taḥsīn wa taqbīḥ in Abu Arrīsh, Musa Āyish sabih "*Qaidah al-Tahsin wa al-Taqbih wa atharuha fi Usul al-Fiqh*", unpublished PhD dissertation, University of al-Azhar, 1407/1987.

⁴⁹ Qur'ān: an-Nisā: 4/17

⁵⁰ Qur'ān: An'ām: 6/12.

⁵¹ Qur'ān: al-Baqarah: 2/179.

⁵² Qur'ān: al-Mā'idah: 5/38.

⁵³ Qur'ān: an-Nūr: 24/2.

explainer of the Qur'ān. As I pointed out every verse contains a maṣlaḥah, hence the explanation conforms to the explained.

Ijmā': Scholars are all in agreeing with the consideration of obtaining maṣlaḥah and avoiding evils except inflexible the Zāhiri school of thought. The leading personality in this concept is Mālik who with al-Masāliḥ al-Mursalāh. In fact this concept is not only specific to Mālik, but also all of them embraced it, yet Mālik had used it much more than others.⁵⁴ Even though some are despite of rejecting ijmā', they accepted maṣlaḥah, then explain obligating the right of pre-emption (shuf'ah)⁵⁵ with considering right of neighbour and its maṣlaḥah, permission of salam⁵⁶ (forward sale) and ijārah⁵⁷ (lease) for the sake of peoples maṣlaḥah despite of contradicting analogy (qiyās) and rest of sections for naqd (currency) with its cases in detail are related to reason (mu'allel) of maṣlaḥah.⁵⁸

Intellect (Reasoning): There is no doubt in the consideration of every person who is having common sense, discretion that Allah (swt) considers particularly and generally His creatures' maṣlaḥah. From the first aspect of the consideration of maṣlaḥah that is general concept, in their first creation and maintaining sustenance, Allah (swt) had considered their maṣlaḥah. Hence, in their first creation, He brought them from non-existence to existence form so that they can maintain their maṣlaḥah as it is explained in the following verse in total "O man! What has made you careless about your Lord, the Most Generous? Who created you, fashioned you perfectly, and gave you due proportion. In what ever form He willed, He put you together."⁵⁹ "Our Lord is He Who gave to each thing its form and nature, then guided it aright."⁶⁰ Then in their maintaining sustenance, prepared for them reasons, creation of the earth, sky, and what is in between them, to live with them and have pleasure, as these are indicated wholly in the Qur'ān "Have We do not made the earth as a bed, And the mountains as peg?..."⁶¹ "We pour forth water in abundance..."⁶² "He it is Who created for you all that is on earth"⁶³ "And has subjected to you all that is in the heavens and all that is in the earth; it is all as a favour and kindness from Him"⁶⁴

From the second aspect that is a specific concept, for the blessed servants maṣlaḥah for the hereafter is considered. Allah (swt) has guided

⁵⁴ Cf: 23.

⁵⁵ Shuf'ah (right of pre-emption): Pre-emption consists of acquiring possession of a piece of property held in absolute ownership which has been purchased, by paying the purchaser the amount he gave for it. Majallah clause: 950

⁵⁶ Salam: see: Majallah clause: 123

⁵⁷ Ijarah: see: Majallah clause: 405.

⁵⁸ Cf: 23.

⁵⁹ Qur'ān: Infītār: 82/6-8.

⁶⁰ Qur'ān: Tāha: 20/50.

⁶¹ Qur'ān: Naba: 78/6-16.

⁶² Qur'ān: Abasah: 80/25-32.

⁶³ Qur'ān: al-Baqarah: 2/29.

⁶⁴ Qur'ān: al-Jāthiyah: 45/13.

them to right way, have them achieved to get enormous reward in the prosperous place.⁶⁵ In fact, He considered the whole servant's maşlahah, hence invited the whole to the maşlahah of the servants that is the believe (al-īmān). However some of creators rejected the invitation without responding. The following verse stress this point "And as for Thamūd, we showed and made clear to them the path of truth, but they referred blindness to guidance...."⁶⁶ Its clarification is as, the invitation was general, the completion of the maşlahah, ratifying its existence by the success was specific with an evidence of Allah (swt) "Allah (swt) calls it the home of peace and guides whom He wills to the straight path."⁶⁷ In this verse Allah (swt) called is general, the guidance and success to the right path are specific to His will.

When this is acknowledged then it is impossible that Allah (swt) considered His creature's maşlahah in their first creation, hereafter and maintaining sustenance, and later He neglects their maşlahah in legal rulings (al-ahkām al-shar'iyyah) which are more general and for that reason this generality it has to be considered first and since it is also part of their sustenance that is protection of their property, life and their honour and since they can not carry out without it therefore it must be accepted that Allah considered legal rulings already.⁶⁸ Thus it is said that Allah considers creature's maşlahah in the legal rulings. Hence, as far as His consideration of maşlahah is confirmed then it is not possible neglecting maşlahah in anyhow. There is no point of any conflict in the case of naş, ijmā' and the other sources are conformed to the maşlahah, however any legal proof if contradicts to maşlahah, as we indicated earlier, maşlahah becomes the primary sources, then conciliate them through the methods of takhşiş (particularization) and bāyān (clarification).

As such, what we have mentioned earlier concerning the religion on maşlahah, its evidences indicate that as for the consideration of maşlahah has been substantiated.

In this part of the article, Tūfi approaches to the concept of ijmā' under a new title attempted to identify its nature as he used the same method while identifying the concept of maşlahah to substantiate maşlahah's privilege that is the maşlahah is preferred to ijmā'.

After explaining its definition linguistically and technically, providing evidences from the Qur'ān, sunnah, intellect and their objections was illustrated, he then concluded his argument with "....you know that, our

⁶⁵ Cf: 24.

⁶⁶ Qur'ān: Fuşşilat: 41/17.

⁶⁷ Qur'ān: Yūnus: 10/25

⁶⁸ Cf: 25.

objective all from this is not to damage the *ijmā'* or to grumble it completely, in contrast, we approve *ijmā'* in the field of devotional matters (*ibādāt*), determined values of *sharīah* (*mukaddarāt*), etc. our objective is only to demonstrate that the principle of consideration of *maṣlaḥah* that is deduced from the ḥadīth "no harm shall be inflicted or reciprocated in Islām"⁶⁹, is stronger than *ijmā'* and its basis is also stronger than *ijmā'*'s basis. As for this, it is obvious that from our explanation of the evidences of *maṣlaḥah* and the responses that we made to the objections for the evidences of *ijmā'* ...⁷⁰

Why Maṣlaḥah has priority to Naṣ and Ijmā'

As for the concept of the consideration of *maṣlaḥah*, as we mentioned earlier, many aspects demonstrate its priority over *naṣ* and *ijmā'*.

First aspect: As for deniers of *ijmā'* while rejecting it they approved the consideration of *maṣlaḥah* over *naṣ* and *ijmā'*, therefore it is a unified concept, unlike the *ijmā'* is a disputed concept. Holding something that is an agreed upon is much better than something which is disputable.⁷¹

Second aspect: indeed texts (*naṣ*) are divergent and inconsistent that is a reason for disagreement in the rulings that condemned by law. The consideration of *maṣlaḥah* is a reality itself, it would not be disagreed upon.⁷² Implementation of *maṣlaḥah* provides the unity that is required by law (*sharī'ah*); thus it is worthier to be followed as Allah (swt) express "And hold fast, all of you together, to the rope of Allah, and be not divided among yourselves,"⁷³, "Verily, those who divide their religion and break up into sects, you have no concern in them in the least"⁷⁴, the Prophet (pbuh) said "Do not dispute among you, if so your hearts will dispute", for the praise of the context of unity Allah (swt) says "And He has united their hearts. If you had spent all that is in the earth, you could not have united their hearts, but Allah (swt) has united them."⁷⁵ Finally, the Prophet (pbuh) said "O you Allah's servants be brothers".⁷⁶

Third aspect: contradicting the *naṣ* to the *maṣāleh* and its similar is established in the *sunnah*, one of them, as preceded, is about Ibn Mas'ūd's application that he contradicted to *naṣ* and *ijmā'* in the case of *tayammum*

⁶⁹ Ibn Mājah "Sunan" II, 784, ḥadīth no: 2340; Shāṭibī "al-Muwāḍḍa'ah", III, p:17.

⁷⁰ Khallaf "Maṣādir" p: 119-129, Qāsimī did not include the *ijmā'* in his work see: *Risālah fil maṣāliḥ al-Mursalāh*: 55.

⁷¹ Cf: 35.

⁷² Cf: 35. according to Qāsimī's work "it is agreed upon" see: *Risālah fil maṣāliḥ al-Mursalāh*, 55.

⁷³ Qur'an: Ali-Imran: 3/103.

⁷⁴ Qur'an: An'am: 6/159.

⁷⁵ Qur'an: Anfal: 8/63

⁷⁶ Tūfi, after providing the verses related to oneness and unity, he gives some examples of the disagreements and disputes. Expressing that the ḥadīths that were made up for denigrating the leading Imams, are made up only for the sake of mazhāb fanaticism. He exemplifying all this, despite of the existing of the verse for unity, how the unity is not achieved. See: Khallaf "Maṣādir", p:130-133.

(to wash with clean sand or earth where water is unavailable) for the sake of caution for *maṣlaḥah* in the devotional matters (*ibādāt*). Another example of them is as the Prophet (pbuh) when at the return of the Handaq war he ordered "nobody could perform *aṣr* prayer until you arrive to Banu *Kurayzah*", despite this, some of them had performed before arrival⁷⁷ responded with "The Prophet (pbuh) did not ask this for this from us", yet he required from us to arrive there as soon as possible, that is a similar case of what we mentioned. It is exemplified with another example, the Prophet (pbuh) had said to *Āishah* "I would have destroyed the *Kabah* and rebuilt it on the basement of *Ibrahim's* basement". It shows that *Kabah* has to be rebuilt on the grounds of *Ibrahim's* basement, due to people's *maṣlaḥah*, he had discontinued. When the Prophet (pbuh) ordered to change *ḥajj* (pilgrimage) to *umrah*, the Companions responded saying "how it could be? We have called it as *ḥajj*" then they hesitated. This case is a contradiction to *naṣ* in following a present custom, which looks like our case. As the similar case was in *Hudaybiya*, when the Prophet (pbuh) ordered them to take off *iḥrām* dress, the Companions hesitated because of the prevailed custom, it would not be taken off from *iḥrām* before the completing of *ḥājj* rituals, event the Prophet enraged by saying "what is up? I order something it is not implemented".

According to *Abu Yālā al-Mavsili's* *Musnad*, the Prophet (pbuh) employed *Abu Bakr* to announce "whoever declare that there is no god but Allah, will embrace paradise", then 'Umar prevent him doing this with saying "so then they will be lazy", as it is mentioned in an authentic *ḥadith* 'Umar, in a similar case, had prevent *Abu Hurayrah* too. These conducts, contradict *naṣ* of the religion due to *maṣlaḥah*.

As for this, whoever make precede the care of *maṣlaḥah* for people (commanded) against other legal sources (*adillah al-shar'iyyah*), with his opinion he aimed to make better people's situation, to obtain benefits that were endowed by Allah (swt), to combine rulings from separation, to unite them from disagreement. So it must be at least valid if not it is compulsory. The consideration of *maṣlaḥah* is at least prior to rest of the other legal evidence, as we mentioned, related to *ijtihād* issues otherwise it has to be *rajaḥ muta'ayyin* (preponderant by necessity).

Consequently, as we determined it is obvious that the proof of the consideration of *maṣlaḥah* is stronger than the proof of *ijmā'*, it is preferred to *ijmā'* and to others from the legal sources in the occurrence of conflict through the way of *bāyān* (clarification).

⁷⁷ Cf. 39.

Objections and Responses

If it is said, the opinion what you are claiming is only disruption of the religion by a mere analogy (qiyās) that it is like a satanic analogy which is spoiling the situation and opinions. We responded as, it is an illusion and ambiguity of a person who wake up from asleep. Verily, it is only what we do is that, necessity of practicing with a stronger evidence, to put forward the legal evidence which is stronger than a legal evidence *ijmā'*⁷⁸, as you prefer the *ijmā'* over *naṣ*⁷⁹, *naṣ* over *zāhir* (apparent). So *qiyās iblīs* (satan) is "I am better than him you created me from fire but him from clay" not supported by certain evidence like the consideration of *maṣlahah*. Our claim, as we mentioned, is not related to spoiling the situation yet it is a category that prior one which is preferred.⁸⁰

If it is said, the religion knows better people's *maṣlahah*, its consideration is conditioned to the legal evidence (*adillah al-Shār'*) is practiced and it made the legal evidence as focal point for illustrating *maṣlahah*, thus absconding the legal evidence, grasping something else is that being obstinate, and daring the religion. We respond for this, it is true that the religion knows better people's *maṣlahah*, however, we do not accept the allegation that the consideration of *maṣlahah* means absconding the legal evidence, grasping something else, in contrast to that it is departed by the much more stronger legal evidence that is based on the ḥadith of the Prophet (pbuh) "Harm is neither inflicted nor reciprocated in Islām"⁸¹ as you claimed that *ijmā'* is prior to other proofs. Then Allah (swt), habitually, rendered us a way to obtain our benefits, as for that we do not abandon it because of an ambiguous situation, which is possible to conduct to *maṣlahah* or not.

If it is said, the consensus of the Muslim community is absolutely proven evidence that won't be contradicted. As we respond that if you mean with absolute (*qat'i*) that there is not any possibility of its contrary as in a saying "one is half of two" then, in that meaning we do not accept that *ijmā'* is absolute, however if you mean with it that *ijmā'* is based on an absolute evidence, its response was already illustrated earlier. For us, contradicting to *ijmā'* by a stronger evidence (*dalīl*) is valid.

If it is said, disagreement of the Muslim community, in the legal matters, is mercy and easiness.⁸² Confining them to one sided perspective,

⁷⁸ See: Khallaf "*Maṣādir*", p: 135; Sayyid Bey "*Uṣūlī Fikih Dersleri Mebāhisinden İrade Kaza ve Kader*", 293, Kader Matbaası, Dersaadet, 1338; Muṣṭafa Zayd "*al-Maṣlahah*", p: 153.

⁷⁹ See about these terms: Dīrīnī Muḥammad Faṭḥī "*al-Manāḥij al-Uṣūlīyyah fī l-jihād bir Ra'y fī Tashrī' al-Islāmī*", p: 62, 142, 144, Al-Risālah, Beirut, 1418/1997; Kamali, Muḥammad Hāshim "*Principles of Islamic Jurisprudence*", p:91, Islamic Text Society, 1997, Cambridge.

⁸⁰ Cf: 41.

⁸¹ Ibn Mājah "*Sunan*", II, 784, ḥadith no: 2340.

⁸² Cf: 42.

which shrinks the limit of easiness, is not confronted with the notion of disagreement. We respond for that, this argument is not stipulated that would it be followed?⁸³ Even if it is, unity becomes prior to disagreement because of that the benefit of the unity is stronger than the divergence. Later your claim, the divergence provide a tolerance for people, is conflicted with an evil which is originated from the same reason, that would cause, when the opinions is differed, to moral crumple due to some people preferring to obtain permitted rulings. Moreover, exceeding disagreements, and variety opinions cause undesired results which discourage non-Muslims from their intentions when they inclined to convert to Islām because conflict in its nature is not desirable as Allah (swt) indicates "Allah (swt) has sent down the Best Statement, a Book, its parts resembling each other (in goodness and truth) oft-repeated."⁸⁴ a Book parts resembling each other (kitābun mutashābihan) means it is a book that its verses are the similar and substantiate each other. It is only disputed in the mutashābih verses⁸⁵ in the Qur'ān, these are then comprehended through the light of the muḥkam verses (the firm)⁸⁶ according to its principle. If your judgment is based on the principle of the consideration of maṣlaḥah that is deduced from the Prophet's (pbuh) ḥadith "Harm is neither inflicted nor reciprocated in Islām"⁸⁷, and then you are not confused with the method of your judgement, as the dispute is removed.

If it is said, the method that you are pursuing either wrong, thus; is not given attention upon, or vice-versa. If your claim is true, the trueness might be either confined to your method or not, if it is then the whole Muslim community, since the preceding of Islām up to the occurrence of this method, would have been in erroneous because non of them had propounded this method. If the trueness is not confined to your method, then your method become an ordinary method to be followed, yet the doctrine of the imāms that is agreed upon by the Community to be pursued is much worthier as the Prophet (pbuh) indicates "O you comply with the majority (al-sawād al-aḥḥam) because who is detached, will be in the hell." As for the response we say that our method, which is based on the evidences that we mentioned earlier, is not wrong. The trueness is not absolutely, yet is probably and interpretative (ijtihādy) specified to the method; even if it is so it is obligated upon because the probability in customary matters is like absolute in other matters⁸⁸. As for the necessitating for the Muslim community being erroneous, it would persevere in every opinion and establishing a discipline

⁸³ He points out this "divergence of my community is a mercy", according to Qasimi it is an untrue statement. Related to this saying, should you look at Ajluni "*Kashf al-Khafa*" I, p: 64-66.

⁸⁴ Qur'ān: al-Zumar: 39/23.

⁸⁵ See about the term Mutashābih (Intricate): Kamali, Muḥammad Hāshim "*Principles of Islamic Jurisprudence*", p:102. Islamic Text Society, 1997, Cambridge; Ramic, Sukrija Husejin "*Language and the Interpretation of Islamic Law*". p:126. The Islamic Text Society, Cambridge 2003.

⁸⁶ See more about Muḥkam (perspicuous) verses: Kamali, "*Principles of Islamic Jurisprudence*", p:94; Sukrija, ibid, p: 81.

⁸⁷ Ibn Mājah "Sunan", II, 784, ḥadith no: 2340.

⁸⁸ Devotional matters.

that is newly raised. The majority (al-sawād al-a'ẓam) whom obligating to be followed is the proof and obvious evidence, otherwise, the scholars should have followed the common people who contradicting with them, because the common people are much more than the scholars in amount.

You know that the method that we deduced from the mentioned ḥadith⁸⁹ is different from the method, al-maṣlahah al-mursalah that Mālik espoused it, yet even the method is much more substantial than Mālik's opinion.

Consequently, in devotional matters and determined rules (muqaddarāt'i shar'iyyah),⁹⁰ ijmā' and naṣ are considered whilst in transactions (muāmalāt) and others, maṣlahah is considered.

The proofs of devotional matters ('ibādāt)

As for its determination, the argument in the legal rulings either occurs in the devotional matters, determined rulings (muqaddarāt'i shar'iyyah), similar to them or in the transactions (mu'āmalāt), customary matters (al-'ādāt) and similar to them. If the first one takes place, it is deemed that there is naṣ, ijmā' and the similar to them from evidence (adillah). Apart from the evidences mentioned above its evidences would be either one⁹¹ or more. Hence, if the one that would be a verses from the Qur'ān, a ḥadith, analogy or otherwise, it is then proven by them. If the evidence becomes more than one such as a verse from the Qur'ān a ḥadith, an analogy, istishāb and similar to them that are agreed upon whether verifying or nullifying then the ruling is proven according to that unity, yet if the rulings are not agreed upon, that would accept either unity or not. If they accept compromising then compromise them because the notion of the legal evidence is the practise (al-i'māl) not the invalidate (ilghā'). However, the compromising should be made by the way of obvious and reasonable not a way that playing a game with some evidences. If the evidences are not suitable for compromising then ijmā' will take priority to the other nineteen evidences, yet naṣ will prior to other sources apart from ijmā'.

Accordingly, naṣ is confined to the Book and the sunnah. These are can determine a ruling by them together or individual.

In a situation that the Book determines a ruling by itself, evidence would be one or more. If the dalīl is only one, a verse which is related to the ruling, then it is implemented by this verse whether it is naṣ or ṣāḥih

⁸⁹ "Harm is neither inflicted nor reciprocated in Islam"

⁹⁰ See about the scope of the Mukaddarāt: Mehmet Erdogan, "Islam Hukukunda Ahkāmın Değişmesi", p: 114, İstanbul, 1994.

⁹¹ Its original word is yattaḥida, yet it means yatawaḥḥada which means only one evidence (dalīl).

(apparent), yet it is mujmal (ambiguous)⁹² then one of the two possibilities or more possibilities, the one which is more ethical religion is practiced that is accepted as bayān. If the possibilities are equal in moral aspect in respect of religion these are become valid. The preferred state is that each one has to be practiced then if the moral aspect of them is not obviously seen, eventually the case is suspended on the consideration of bayān.

If there are more then one evidence from the Book, which means two or more than verses indicate to a ruling, inferences of the verses are combined each other then these are considered as one verse, if not, if the differences are appropriated for reconciling then the verses are conciliated by the way of taqyīd (binding) and takhṣiṣ (specifying the general) etc. in the circumstances that the differences are not appropriated for reconciling, if some of the verses are certainly known that they are abrogated, the other one is implemented. If it is not certainly known the mansūkh (abrogated) is mubham (unknown), in this circumstances, for the identification of the mansūkh, sunnah's approval with the other verses is considered as evidence, in nature sunnah is commentator of the Book, thus it explains what it is set of its ruling not what it is abrogated.

The case where the sunnah is an authority making a rule as a source, the case will be treated aḥād ḥadīth (solitary tradition) just as of the āyah (verse) if the ḥadīth is authentic (ṣaḥiḥ). And when the ḥadīth is not valid then it is unreliable, in which case the ruling will be deduced from the Qur'ān where available, otherwise ijtihād is sought where appropriate, in a manner similar to that of adab (respect) of the Sharī'ah glorifying such it (Shar') where ijtihād is not appropriate, issuing a ruling should be withheld for the consideration of bayān (explanation).

And in the case where there is more than a tradition (ḥadīth), presents us with the following possibilities:

First, if all the traditions are ṣaḥiḥ (authentic) they will either be of equal or variant authenticity. If there are of equally authentic and have the same context, they amount to the same status of aḥād ḥadīth. If the authenticity varied, then they will either be combined where applicable; otherwise some of them (traditions) are considered abrogated based on a proof from the Qur'ān otherwise it was changed by ijmā' or other type of evidence.

Second, if some of the traditions are authentic: if only one ḥadīth is correct, the basis of the ruling will be that of aḥād tradition. If more than one

⁹² Mujmal (the Concise, the ambiguous): see: Kamali, "Principles of Islamic Jurisprudence", p:101; Dīrīnī Muḥammad Fathī "al-Manāḥij al-Uṣūliyyah fil Ijtihād bir Ra'y ft Tashrī' al-Islāmī", p:108; Omar Nasūhi Bilmen "Hukuk-I Islamiyye ve Istilaḥāt-I Fikhiyya Kamusu", v:1, p: 79, İstanbul, 1985; Ramıc Sukrija Husejn "Language and the Interpretation of Islamic Law" p: 119-123.

ḥadīth is authentic and they are in agreement, they will all be acted upon. If they vary they will be combined where possible, otherwise some of these traditions are abrogated, and then the case will be treated as that where all of them are authentic.

Third, if the authenticity varies: If some traditions are more authentic than others and they agree in content, there is no controversy as the case of aḥād ḥadīth. If the content differs then either the traditions will be combined or where applicable, otherwise the traditions will be acted upon in sequence according to the degree of authenticity. Further, if the traditions that are more authentic are in line with each other there are acted upon. If, however, they vary then those are in agreement will be treated as in the case of aḥād ḥadīth. And if they disagree with each other, they will be combined if applicable otherwise some are abrogated either through assignment or through other methods of evidence (dalīl) as stated earlier for unclear abrogation.

Forth, when a ruling has a reference in both the Qur'ān and the Sunnah: if they agree then the ruling is acted upon, and in this case each will either explain or confirm the other. If they differ, then they will be combined, where possible, otherwise, one will abrogate the other as a course of action. If abrogation does not apply, the case will be put to more detailed scrutiny, in which the Qur'ān is adopted first since it is the greater original source and cannot be departed from for the sunnah that comes second.

This completes the illustration of the ruling in 'ibādāt (devotional matters).

Proof of the Transactions

As far as transactions and related issues are concerned the basis of the proof is public interest (maṣlahah), as shown before. Maṣlahah and the rest of proofs of jurisprudence (adillah sha'iyah) either agree or differ. If they agree on a particular ruling on transaction as in most cases where the text (naṣ), ijmā', and maṣlahah confirmed the main essential five rulings i.e. killing the killer, and the murtad (apostate), obliterating the hand of the thief, and the ḥudūd (punishment) of qathf (accuse of) and drinking alcohol. And so is the case for other rulings where the adillah sha'iyah agree with public interest, If the adillah however differs with maṣlahah combination is sought, where adillah are acted upon in some rulings and circumstances rather than other cases, in such away that does not have adverse effect on maṣlahah and or leads to misuse of all or part of the proves of sharī'ah. Where combination is not applicable, maṣlahah is put before any other dalīl; conforming to tradition "Harm is neither inflicted nor reciprocated in Islam"⁹³

⁹³ Ibn Mājah "Sunan", II, 784, ḥadīth no: 2340.

This is particular for dispelling the dharar (inflicted reciprocated harm) for the sake of maṣlaḥah. Also it is because maṣlaḥah is the main objective of administering the affairs of mukallaḥīn through the confirming the rulings and the remaining adillah such as the means, Of course, maqāṣid (objectives) are always put before means.

The Case of Disparity of Public Interest

Public interests (maṣlaḥah) and mafsadah are contradictory to each other and require monitoring to dispel the disparity, and here we say:

Every ruling we arrive at either contains maṣlaḥah or mafsadah or both. If the outcome of the ruling contains maṣlaḥah it is adopted (this is the case where only public interest is obtained), where there will be more than one maṣlaḥah they will all be sought. Otherwise all, whatever possible, will be sought. The one that interest the public most is considered if a number of interests are of equal value, one will be considered by selection. If allegation against a particular choice is suspected then the selection will be at random.

If a ruling happen to contain mafsadah and it is adopted then that that mafsadah is dispelled. If the ruling contains a number of mafsadah, all will be dispelled if possible otherwise as much as possible. If only one mafsadah could be dispelled while others not, the most harmful will be dispelled. When the harm is equal, one is dispelled by selection and in case of any suspicion; random selection is adopted to dispel the mafsadah.

When both maṣlaḥah and mafsadah are the outcome of a ruling, the maṣlaḥah is sought and mafsadah is dispelled where possible. If that is not possible then the action will be according to the importance of obtaining or dispelling. If they are equal then one is selected, and where suspicion is raised, random selection is adopted.

This is a useful controller derived from the saying of the Prophet (pbuh) "Harm is neither inflicted nor reciprocated in Islam"⁹⁴ to arrive at the most preferred rulings and to remove disagreements by the several chain of narrations. The benefits of disagreement among scholars, discussed without being intended as the main aim of the discourse, involves the knowledge of the facts relating to the rulings, and their characteristics and counterparts as well as the difference between them.

Why Maṣlaḥah is not a proof in respect to 'ibādāt (devotional matters)?

⁹⁴ Ibn Mājah "Sunan", II, 784, ḥadīth no: 2340.

Maṣlahah is accredited in transactions and similar issues but not in 'ibādāt devotional matters, since 'ibādāt are specific commands in its own right, whose amount, ways of practice, time, and place, can only be realized through sharī'ah. The believer has to follow them as prescribed because for him they are obligatory and in his own interest. The right of mukallaḥīn (subjects) are contained in the ruling of sharī'ah which manages the interests of the mukallaḥ and consequently it is accredited and the aims rest.

The argument that "the shār'ī knows better the public interest and this is where the proof should be sought" is not valid as we have shown that consideration of public interest is not only from the proves of shār'ī, but also the most powerful and specific one and so it is put before any other proof in getting the maṣāliḥ. 'Ibādāt are sought in shār'ī proof because interest of the public in 'ibādāt is not conceivable through mind and custom. The interest in managing the mukallaḥ rights is known to them through custom and mind. Therefore, if we see the dalīl of shār'ī is silent we will know that we have to search for maṣlahah to protect it, just as the case of the text that does not detail the ruling and we have to complete that by means of qiyās, which is the attachment of the case where the sharī'ah is silent to the text statement, with the jāmi' (connection) between them ('illah).

God knows better.

Conclusion:

The principle of maṣlahah had been gained a different interpretation by Tūfī. In terms of devotional matters and muqaddarāt al-shar'iyyah (specific injunctions) naṣ and ijmā', and in terms of mu'āmalāt the notion of maṣlahah are main principles. If maṣlahah tends to differ with naṣ, maṣlahah becomes initial principle on the bases of the ḥadīth "Harm is neither inflicted nor reciprocated in Islām"⁹⁵ if there is no possibility a compromise between them. Because this ḥadīth is a special instruction, thus it is necessary to take maṣlahah in to the consideration in order to avoid any kind of harm.

Shar'ī evidences exist, as a whole, for materializing of the objectives of the lawgiver via obtaining of maṣlahah and avoiding harm. Tūfī defines maṣlahah as "the reason leads to the objectives of the lawgiver in the way of either 'ibādāt (devotional matters) or ādāt (customs)."⁹⁶

Tūfī's ideas, which are described above has started to be echoed among the scholars especially after Jamāluddīn al-Qāsimī published Tūfī's Risālah,

⁹⁵ Ibn Mājah "Sunan", II. 784, ḥadīth no: 2340.

⁹⁶ Zayd Muṣṭafā "al-Maṣlahah fī-Tashrī'" al-Islāmī wa Najmaddīn al-Tūfī", p: 210, Dārul Fiqr al-'Arabī, 1964

although it did not evoke a similar reaction among Tūfī's contemporaries.⁹⁷ The majority of Islamic jurists consider his claims contradictory and excessive in general while others accept them on certain conditions even though there are some subjective evaluations which are based upon Tabaqāt Books where Tūfī was accused of perversion, mulhīd, a member of Rāfizīs.⁹⁸ For example, as Abdulkadir Şener said that it is impossible not to agree with Tūfī when one examines 'Umar's decisions and he added that the specifying of certain naş with maşlahah would not be contradicted with nous and logic on the condition of being suitable to the Islamic notions and objectives.⁹⁹

One of the late Ottoman scholars is Ismâ'il Hakkı İzmirli, uses this description about Tūfī's ideas; "Najmaddīn al-Tūfī's opinions about maşlahah provides great deal of easiness for handling many problematic issues in transactions (mu'āmalāt) areas."¹⁰⁰ According to Maştafā Zayd it is possible to evaluate Tūfī's opinions in three different points: 1- maşlahah emerges as the axes of the lawgiver for this reason it is the strongest and the most special of all Shar'ī evidences. 2- There are conditions in which naş and maşlahah might contradict in such circumstances in respect to the first point, maşlahah gains priority. 3- Giving priority to maşlahah is valid in the mu'āmalāt matters only.¹⁰¹

The scholars such as M. Abū Zahrah, al-Būtī, Kawtharī (d.1952) criticizes Tūfī's opinions, according to them Tūfī is wrong when he is suggested that maşlahah contradicts with a definite naş. Al-Kawtharī accuses him of infidelity (mulhīd) and criticized him to be the first one as the first opener of the doors of evil; "because Tūfī and his followers use the methods which has no any Shar'ī bases in order to justify their own interests and desires. And what a terrible sin is to use such statements. This attempt is nothing but an effort towards rendering prohibitions of Shar'ī'ah permissible, in the name of maşlahah, ask this uninhibited person what is maşlahah and on what grounds you want to establish your law? Najmaddīn al-Tūfī is the first person who left the door of evil ajar. No Muslim has ever made such statement, this account to nothing but a perversion, those who follows such ideas may never gain anything from the religion and knowledge."¹⁰² According to Kawtharī no one should level with such degenerate who tries to adopt a principle that would annihilate the very bases of the Shar'ī'ah.¹⁰³ Abū Zahrah (d.1974) approaches with a different criticism and he stated his wish as if only Tūfī was living in this era he would have seen social

⁹⁷ Zayd Muştafa "al-Maşlahah", p: 161-163.

⁹⁸ Al-Kawtharī, M. Zāhid "Maqālāt" p: 257-259, 1388.

⁹⁹ Şener Abdülqadir "İslām Hukukunun Kaynaklarından Qiyās, İstihsān ve Istisnā'ı", p: 155, Ankara, 1974

¹⁰⁰ Uyanık Mevlüt "Kur'anın Tarihsel ve Evrensel Okunuşu", p: 221, Ankara, 1997.

¹⁰¹ Ibid p: 222-223.

¹⁰² Al-Kawtharī, M. Zāhid "Maqālāt", p: 257-259.

¹⁰³ Ibid p: 259.

dilemmas, efforts and desperations of scholars in the face of obstacles so he could have realized how the understanding of maṣlahah differs on a great scale. And he wonders how Tūfī would have approached the issue towards the determination of what maṣlahah is. "Shall we abandon definite naṣ for maṣlahah which is variable and being open to different interpretations? You must be informed that what is ḥalāl (permissible), what is ḥarām (prohibited) are very clear. What is going to protect us from suspicious elements between these two is consideration to certain naṣ. Both liberation and enlightenment are in definite naṣ. It is unmistakeable straight main road. To embrace it is to grasp an unbreakable handle."¹⁰⁴

While Mehmet Erdoğan accepts Tūfī's opinions as a bit excessive, he also signifies the extremity of the accusations and criticisms towards Tūfī based upon Tabaqāt sources and these are not type of the judgments which deduced from an overall examination of all Tūfī's works.¹⁰⁵

It is obvious that Tūfī's approach has provided a different angle to the history of Islamic law. While the previous jurists were prerequisiting maṣlahah not to contradict shar'ī evidences, Tūfī was motivated by the principle that Shāri's aim is to fulfil maṣlahah of subjects. For that reason maṣlahah is preferable by the support of necessary judicial method and maṣlahah is the strongest evidence among other shar'ī basis. According to Tūfī if naṣ and ijmā' contradict each other, maṣlahah has priority over naṣ and ijmā'. For that reason, it is a very significant requirement to determine the objectives of the Shāri'.

¹⁰⁴ Abu Zahrah "Imām Mālik", 380; al-Shāṭibī Abū Ishāq Ibrāhīm b. Mūsā b. Muḥammad al-Ghimāṭī "Al-Muwāḍḍa'āt fi Uṣūl al-aḥkām", 2/309, edited by 'Abdullāh Dirāz, Cairo.

¹⁰⁵ Erdoğan Mehmet "Islam Hukukunda Ahkāmın Değişmesi", p: 95, second edition, Marmara University Faculty of Divinity, 1994.