THE THEORY OF PRIORITY OF *MAṢLAḤAH* OVER THE LEGITIMACY OF *NAṢṢ* OF THE QUR'AN AND THE HADITH: A CONCEPTUAL DISCUSSION

By:

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Abstrak

Isu mengutamakan maṣlaḥah berbanding daripada rujukan terhadap teks al-Qur'an dan al-Hadith sebenarnya merupakan satu teori fiqh yang telah dibincangkan daripada zaman yang lampau sehinggalah ke zaman kini. Teori fiqh ini dilihat telah menjadi isu yang sensasi dan kontroversi apabila terdapat sebilangan sarjana yang menggunakan pendekatan emosional di dalam membincangkan teori ini. Walau bagaimanapun, terdapat pula sebilangan sarjana yang menggunakan pendekatan objektif di dalam mengkaji teori ini. Justeru, artikel ini tidak akan melebarkan aspek sensasi dan kontroversi daripada teori ini. Sebagai satu pendekatan akademik, artikel ini akan menfokuskan kepada sejarah ringkas kewujudan teori ini, aspek hipotetikal yang mendasari teori ini dan hubungan di antara maṣlaḥah mursalah dengan teks naqli daripada al-Qur'an dan al-Hadith.

Introduction

A topic frequently debated amongst Muslim jurists regarding the concept of *al-Maṣlaḥah wa al-Naṣṣ*,[1] is the theory of the priority of

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1 This theory has been discussed in the previous Journal of *Bayān* (vol. 3) under the topic 'The Juristic Concept of *al-Maṣlaḥah wa al-Naṣṣ*: An Approach to Analyse the *Aḥādīth Nabawī s.a.w'.*

maṣlaḥah as a form of legal principle in Islamic law, over the legitimacy of *naṣṣ* in the Qur'an and the Sunna or the Hadith in particular, as well as the *Ijmā'*. Nevertheless, in line with the theme of this journal, the article will only focus on the two primary sources in Islam i.e. the Qur'an and the Hadith.

As the topic has been discussed and debated by Muslim jurists as a controversial topic from the past until the present time, it is important to seek the main point on this regard within the framework of academic discussion. In order to achieve this objective, thus the article will elaborate the topic on the theory of priority of *maṣlaḥah* over the legitimacy of *naṣṣ* of the Qur'an and the Hadith within the approach of conceptual discussion. For this reason, some topics will be highlighted in this article such as the historical background in the formation of the theory, the hypothetical form of the theory and the connection of *maṣlaḥah mursalah* with the legitimacy of *naṣṣ* of the Qur'an and the Hadith.

The Brief of Historical Background in the Formation of the Theory

It is suggested that the juristic discussion regarding the theory of priority of *maṣlaḥah* over the legitimacy of nass commenced historically during the life of Imam Malik, the eponym of the Maliki school of law, when he formed *maṣlaḥah mursalah* as a legal principle in Islamic legal theory. This is shown by Muṣṭafā Zayd in his Ph.D thesis (1964) in which he claims there were many juristic opinions made by Imam Malik himself and his disciples which uphold the theory of priority of *maṣlaḥah* over the legitimacy of *nass*.[2] Moreover, Muṣṭafā Shalibi, in his book entitled *Ta'līl al-Aḥkām*, shared the same view as Muṣṭafā Zayd regarding this theory; that is in some ways Imam Malik's legal opinions, (fatwa) as well as the form of *maṣlaḥah mursalah* that he designed and legalised, obviously contradict *nass*.[3]

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2 Muṣṭafā Zayd (1964), Dr., *al-Maṣlaḥah fī al-Tashri' al-Islamī*, Second Edition, Qaherah, p.128-136.

3 Muṣṭafā Shalibi (1981), Dr., *Ta'līl al-Aḥkām*, Beirut: Dār al-Nahdah al-'Arabiyyah, p.367.

The accusation made against Imam Malik and his disciples of giving some sort of priority to *Maṣlaḥah Mursalah* in particular, over the legitimacy of *naṣṣ*, has subsequently been juristically debated, particularly among later Muslim jurists such as Hussein Hamid Hassan in his Ph.D thesis entitled "*Naẓaria al-Maṣlaḥah fī al-Fiqh al-Islamī*" (1981), as well as Yushau Sodiq in his Ph.D thesis entitled "Malik's Concept of *Maṣlaḥah* (The Consideration of The Common Good): A Critical Study of This Method as a Means of Achieving the Goals and Purposes of Islamic Law with Special Reference to its Application at The Shari'a Courts in Northern Nigeria" (1991).

In addition, not only Imam Malik and his disciples have to be said formulated to the theory of the priority of *maṣlaḥah* over the legitimacy of *naṣṣ*, but Najm al-Dīn al-Tufi, a Hanbali scholar also accepted this theory. To some extent, Tufi's point of view pertaining to this theory appears to have become a controversial issue, particularly among later jurists. The debate involves not only Tufi's point of view on this within the framework of Islamic jurisprudence, but also involves his life and credibility as a Muslim scholar. Some later Muslim jurists seem obviously to oppose Tufi both as a legitimate Muslim jurist and also in his view on this theory, whilst others seem to support him and his theory. For instance, al-Buti's work entitled *Ḍawabit al-Maṣlaḥah* (1987) seems juristically to undermine the credibility of Tufi as a Muslim jurist and particularly his point of view on this theory. However, 'Abdallah M. al-Husayn al-'Amiri's work entitled "At-Tufi's Refutation of Traditional Muslim Juristic Sources of Law and His View on the Priority of Regard for Human Welfare as The Highest Legal Source or Principle" (1982) seems to support Tufi's choice of life as jurist and encourage his work as well as supporting his point of view pertaining to the theory of priority of *maṣlaḥah* over the legitimacy of *naṣṣ*.

In order to help clarifying the discussion about the theory of the priority of *maṣlaḥah* over the legitimacy of *naṣṣ*, this article will first examine the hypothetical form of this theory in the light of Islamic jurisprudence. Secondly, an analysis will be undertaken of the form of *Maṣlaḥah al-Mursalah* suggested by Imam Malik, which has been claimed to give it some sort of priority over the legitimacy of *naṣṣ*.

The Hypothetical Form

It is to be borne in mind that *al-Maṣlaḥah wa al-Naṣṣ* was a direct outcome of the theory of the priority of *maslahah* over the legitimacy of *naṣṣ*.[4] For Ahmad al-Raysunī, recent developments in Islamic jurisprudence explore the theory of the priority of *maṣlaḥah* over the legitimacy of *naṣṣ* as well as its application.[5] This is due to the theory can be openly interpreted and examined by all Muslim jurists as it has been expressed in hypothetical form[6] by Najm al-Dīn al-Tufi in his analysis of the Hadith of the prophet:

حَدَّثَنِي يَحْيَى عَنْ مَالِك عَنْ عَمْرِو بْنِ يَحْيَى الْمَازِنِيِّ عَنْ أَبِيهِ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: لاَ ضَرَرَ وَلاَ ضِرَار [7]

Translation of the text: "You should neither harm yourself nor cause harm to others."

According to Ahmad al-Raysunī, there was no juristic evidence or absolute example given by Tufi in his analysis of the application of the Hadith of the prophet; "You should neither harm yourself nor cause harm to others." The only exception that Tufi mentioned was in the area of transaction (*muāmalah*) and custom (*'adat*), which in some circumstances is connected with the theory of the priority of *maṣlaḥah* over the legitimacy of *naṣṣ*.[8]

For Muṣṭafā Zayd, Tufi himself wrote no specific work referring to the theory of *maṣlaḥah* and he made no detailed explanation of *maṣlaḥah* except in his work about the explanation of the forty Hadith of al-Nawawī in which he made a brief statement in his analysis of the Hadith of the prophet; 'You should neither harm your-

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4 Al-Raysunī (2002), *Al-Ijtihād: al-Naṣṣ, al-Wāqi', al-Maṣlaḥah,* Damsyiq: Dār al-Fikr, p.49.

5 *Ibid.*, p.37-38.

6 *Ibid.*

7 The Hadith is categorized as *Ḥasan* and narrated by 'Amru b. Yahya deriving from his father and from the Prophet. It is reported by Imam Malik in his *al-Muwatta'* (*Kitab al-Aqdiah: Bab al-Qada' fi al-Marfiq ;* no. 1234).

8 Al-Raysunī, *op.cit.*

self nor cause harm to others.' Muṣṭafā Zayd adds that at this stage, Tufi claimed that this Hadith legalises *maṣlaḥah* as the objective of Islamic law, giving it priority over the nass, as well as the *Ijmā'* in the area of transaction (*muāmalah*) and custom (*'adat*). To some extent, Muṣṭafā Zayd believed that Jamal al-Dīn al-Qasimi was a person who quoted Tufi's point of view theory until it became controversy particularly amongst later Muslim jurists.[9]

It is worth noting that Muṣṭafā Zayd also claimed that not only Tufi had the theory of priority of *maṣlaḥah* over the legitimacy of *naṣṣ* but Imam Malik had previously held the same opinions about the theory by means of a form of *Maṣlaḥa Mursalah*.[10] Therefore, later jurist such as Hussein Hamid Hassan has juristically debated on Muṣṭafā Zayd's arguments regarding Imam Malik's stand on the priority of *Maṣlaḥah Mursalah* over the legitimacy of *naṣṣ*.[11] The juristic debate between both jurists pertaining to this theory clearly indicates its hypothetical form within the framework of Islamic jurisprudence. In the following section, the theory of *Maṣlaḥah Mursalah* and its connection with *naṣṣ* is examined in order to elucidate the juristic debated amongst Muslim jurists regarding this theory.

The Connection of *Maṣlaḥah Mursalah* with the Legitimacy of *Naṣṣ*

As has been discussed in the previous sub topic, a form of *Maṣlaḥah Mursalah* was designed by Imam Malik and extensively applied, particularly by Muslim jurists of the Maliki school of law to establish their legal opinion of Islamic law. Imam al-Shatibi, a leading scholar of Maliki school of law, defines *Maṣlaḥah Mursalah* as a form of Islamic legal principle that no specific *Naṣṣ* (legal text) confirms or denies[12] but in general, the *maṣlaḥah* itself is formed to secure the

9 Muṣṭafā Zayd, *al-Maṣlaḥah,* p.113.

10 *Ibid.*

11 Hussein Hamid Hassan (1981), *Nazariya al-Maṣlaḥah fi al-Fiqh al-Islamī,* Qaherah: Maktabah al-Mutannabi, p.108-183.

12 Al-Shāṭibī (2000), *al-I'tiṣām,* Qaherah: Dār al-Hadith, v.ii, p.362.

preponderance of benefit for the people that is in accordance with the objectives of the Lawgiver.[13] At this stage, Imam Shāṭibī employs the term *al-munāsib*[14] that is synonymous with *Maṣlaḥah Mursalah*, which in connection with the *Maqāṣid al-Sharī'ah*, means the ultimate objectives of Islamic law.

It is believed that the above definition of the concept of *Maṣlaḥah Mursalah* is unanimously accepted by the majority of Muslim jurists in the Sunni legal schools. The concept of *Maṣlaḥah Mursalah* is interrelated with the objectives of the Lawgiver, although it does not necessarily conform to any specific legal text (*Naṣṣ*). At this stage, Muslim jurists of Maliki school of law in particular, laid out the criteria of *Maṣlaḥah Mursalah* in order to establish its validity as an Islamic legal principle.

To this effect, Imam al-Shatibi has set out three criteria of *Maṣlaḥah Mursalah* in *al-I'tiṣām* under the heading of the distinction between heresy and *Maṣlaḥah Mursalah*, or in Arabic; *"Fī al-Farq bayna al-Bad' wa al-Masalih al-Mursalah."* Imam al-Shaṭibī insists that the first criterion of *Maṣlaḥah Mursalah* states that to be validated as an Islamic legal principle through the objectives of Islamic law (*Maqāṣid al-Sharfa*) there should be no contradiction with any textual evidence, dalil or *nass*, juristically referred to in the Qur'an, the Sunna and the Ijmā'. According to Imam al-Shaṭibī, the second criterion by which the validity of *Maṣlaḥah Mursalah* can be judged is that it concerns rational matters and has no connection with the area of worship, *'ibādah*. As the third criterion, Imam Shaṭibī emphasizes the correlation between *Maṣlaḥah Mursalah* and *Maqāṣid al-Sharfa* or the ultimate objective of Islamic law regarding the matters of *Ḍaruriyyah* (lit. necessities) that is to preserve the five safeguards for human beings; religion, life, lineage, intellect and property as well as the matters of *raf al-hardj*; alleviating hardship.[15]

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13 Al-Shāṭibī (1994), *al-Muwafaqāt fi Uṣūl al-Sharī'ah*, Beirut: Dār al-Ma'rifah, v.ii, p.2.

14 Al-Shāṭibī, *op.cit.*, v.ii, p.362

15 Al-Shāṭibī, *al-I'tiṣām*, v.ii, p.375-379.

Through these criteria, Imam Shāṭibī seeks to validate *Maṣlaḥah Mursalah* as a legal principle in Islamic law by developing the theory of *Maṣlaḥah Mursalah* being interconnected with *Maqāṣid al-Sharī'ah* in some way, which is referred juristically to the legal principle that is laid down by the legal text or *naṣṣ*. Though *Maṣlaḥah Mursalah* has been legalised as a legal principle independent of legal texts of *dalil*, evidence and *nass*, to some extent it must, nevertheless be connected, or parallel with, the basic legal principle of the theory of the *Maqāṣid al-Sharī'ah.* Many of Imam Malik's legal opinions were developed with no opposition or contradiction of *dalil* or *naṣṣ* from the Qur'an, the Hadith or Ijmā, which means they follow juristically, the parallel line between *Maṣlaḥah Mursalah* and *Maqāṣid al-Sharī'ah* mentioned above.

Moreover, Imam al-Shāṭibī gives ten examples of *Maṣlaḥah Mursalah* which he discusses in the light of Maliki's legal opinions.[15] It is interesting to note that in order to justify these ten examples of *Maṣlaḥah Mursalah,* Imam al-Shāṭibī draws on, uses as evidence some verses from the Qur'an and the Hadith that indirectly verify Maliki's legal opinions on *Maṣlaḥah Mursalah*.[16] It is believed that not only Imam al-Shāṭibī employs method of elaborating *Maṣlaḥah Mursalah*, Imam Malik himself used this method in which the elaborating of the legal opinions through the form of *Maṣlaḥah Mursalah* is undertaken. In *al-Mudawwanah,* Imam Malik emphasizes the legal opinion in which the Qur'an and the Hadith in particular, are silent on the new ruling that was formed by *Maṣlaḥah Mursalah*. In other way, the connection of *Maṣlaḥah Mursalah* with the legitimacy of nass is based on principles of non-existence whereby if the Qur'an and the Hadith are silent on the legal opinions that are formed by *Maṣlaḥah Mursalah*, then they are valid.

The following point exemplify how Imam Malik and his disciples juristically refer to principles of non-existence of a concept in the Qur'an and the Hadith when forming their legal opinions through *Maṣlaḥah Mursalah,* as follows:

16 *Ibid.*, p.364-384

(a) The obligation of the husband in providing the basic needs such as shelter, food and clothing for his wife is based on the husband's capacity and his wife's social status.[17]

Pertaining to the legal opinion of the Maliki school of law stated above, the consequences can be cited in two examples or cases as follows. In the first case, the husband is incapable of affording the basic needs for his wife; and in the second case, the wife is richer than her husband, therefore, she can afford the basic needs including supporting her husband. Thus, these two cases affect the following questions. In the former case, does the wife have full right to seek basic needs for the family? And does she have a right to appeal for divorce from her husband? In the latter case, is it the wife's right to seek a refund from her husband, thus, considering the husband to be indebted to his wife?

In order to facilitate the acceptance of those two cases as well as alleviate questions arising from them, Imam Malik and his disciples used the form of *Maṣlaḥah Mursalah* as the legal principle for their legal opinions. In the first case, the Maliki jurists are in agreement that the wife has two choices, either she remains with her husband and seeks the basic needs for the family, or she may appeal for a divorce from her husband.[18] The form of *Maṣlaḥah Mursalah* has been applied to this case in accordance with the concept of *Maslahah* itself, that no harm is caused on either party, therefore the wife is given a choice due to the incapability of her husband to provide for the basic needs of the family.[19] According to Imam Malik, the form of *Maṣlaḥah Mursalah* applies to this particular case, as the basic principle of the Qur'an and the Hadith is silent about whether the wife should remain with her husband, or whether she should leave her husband.[20] In the second case, the wife has two choices. Firstly,

17 Al-Dardir (n.d.), *Sharh al-Kabīr 'ala Mukhtasar Khalīl,* Cairo: Dār Iḥyā' al-Kutub al-'Arabiyya, v.ii, p.729

18 *Ibid.,* v.ii, p.745.

19 Mālik ibn Anas (1994), *al-Mudawwanah al-Kubrā,* Beirut: Dār al-Kutub al-'Ilmiyyah, v.2, p.259.

20 *Ibid.*

if the wife chooses not to leave her husband for the sake of her marriage, then, she may choose not seek or a refund from her husband whether he is rich or poor. Secondly, the wife may leave her husband and if the husband is rich, the wife has the right to seek a refund from her husband, which makes him indebted to her.[21] According to Imam Malik, in the second case, the form of *Maṣlaḥah Mursalah* is applied in consideration the interests of both parties as no evidence or nass exists either to up hold or to oppose this legal opinion in this particular case.[22]

The clarification above made by Imam Malik in his *al-Mudawwana* regarding this particular legal opinion, clearly indicates that in order to legalise the form of *Maṣlaḥah Mursalah* in accordance with the objectives of Islamic law, and *Maqāṣid al-Sharī'ah*, the consideration of legal principles from the Qur'an and the Hadith has to be undertaken as to whether they are silent or in opposition to the case in question. Hussein Hamid Hassan claims that it is incorrect to claim that most of Imam Malik's legal opinions are overruled by the legitimacy of *naṣṣ*. In fact, it is demonstrated clearly that the principles of non-existence that are laid down by the Qur'an and the Hadith, are always utilized in forming his legal opinions through *Maṣlaḥah Mursalah.*[23] In more detail, Hussein Ḥamīd Ḥassan cites ten examples of Imam Maliks' legal opinions that he claims have no priority over the legitimacy *naṣṣ*.[24] He also argues that apart from *Maṣlaḥah Mursalah,* Imam Malik's legal opinions have been formed by *'Urf* (customary practices) as well as *Manāt al-Ḥukm* (the cause of the ruling).[25] However it should be borne in mind that it is not the main intention of this topic to further Hussein Hamid Hassan's arguments on the form of *'Urf* the *Manāt al-Ḥukm* that is concerned with Imam Malik's legal opinions.

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21 *Ibid.*

22 *Ibid.*

23 Hussein Ḥamīd Ḥassan (1981), *Nazariya,* p.108-183

24 *Ibid.*

25 *Ibid.*, p.116 and p.127.

Conclusion

In conclusion, the Qur'an and the Hadith are always referred to in as far as no dalil or nass is either verified or opposed in forming *Maṣlaḥah Mursalah* in connection with *Maqāṣid al-Sharī'ah.* Consequently, the theory of *Maṣlaḥah Mursalah,* which in some ways is indirectly interconnected with the legitimacy of nass has been proven from the juristic discussion above. Furthermore, it can be seen that the theory of *al-Maṣlaḥah wa al-Naṣṣ* has been further developed by later Muslim jurists particularly by al-Tufi, as he claims that in some ways *maṣlaḥah* has priority over the legitimacy of *naṣṣ.*