

INTERNATIONAL INSTITUTE OF ISLAMIC
THOUGHT AND CIVILIZATION (ISTAC)

THE CONCEPT OF THE CONSIDERATION OF PUBLIC INTERESTS
(AL-MASA'ILAH AL-UMMIYAH) IN ISLAMIC JURISPRUDENCE:
AN ANALYSIS OF THE CONCEPT IN THE SCHOOL OF SHAFI'I

A THESIS SUBMITTED TO
THE INTERNATIONAL INSTITUTE OF ISLAMIC
THOUGHT AND CIVILIZATION (ISTAC)
AS PARTIAL FULFILLMENT FOR THE DEGREE OF
MASTER OF ARTS

BY
WAN AZIZAH BINTI WAN AHMAD

KUALA LUMPUR, MALAYSIA
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Dedication

TO MY FAMILY

The encouragement I received from my wife, her understanding and sacrifices towards the well-being of our family further motivated the accomplishment of this writing. I do not forget to mention my son, Fitri, whose fondness gave me all sorts of entertainment during the intervals.

ABSTRACT

This study is an attempt to study the origin and the development of the concept called the consideration of public interests (*al-maṣāliḥ al-mursalah*) in the school of al-Shāfi'ī. It will be arranged in the following manner:

To begin with, I raise the issue of the adaptability of Islamic law within changing situations followed by a discussion on the definition of the term *maṣāliḥ* in general and *al-maṣāliḥ al-mursalah* in particular. Then, in relation to the objectives of Islamic law, I pay attention to the significance of this term as a basic concept in understanding the *Shari'ah*.

Next, I devote the discussion on the historical survey of the application of *al-maṣāliḥ al-mursalah*. It covers the periods of the Rightly Guided Caliphs (*al-Khulafā' al-Rāshidūn*) or the Companions (*Aṣḥāb*), the Successors (*al-Tābi'ūn*) and the Followers of the Successors (*Tābi'ū al-Tābi'in*). Apart from showing how our earlier jurists perceived the principle, this chapter provides instances throughout Islamic history which prove that the concept of *al-maṣāliḥ al-mursalah* was already applied long before Imām al-Shāfi'ī and the rise of his school, even prior to Imām Mālik and Imām Abū Ḥanīfah.

Particular treatment is given to Muḥammad b. Idrīs al-Shāfi'ī. Here, I attempt to put forward a discussion with arguments and evidence which show that as a concept, the consideration of public interests was indeed reflected in the legal theories of al-Shāfi'ī. In fact, he applied the concept in various places though without stating it in any specific term. I include a number of remarks by different Shāfi'ī jurists to support the claim. Since those remarks are supportive in nature, i.e., just to show that the consideration of public interests has been maintained by al-Shāfi'ī, there is no need for a lengthy discussion on the contributions of these scholars to the evolutionary process of the principle.

I also select four prominent Shāfi'ī jurists and discuss their contribution on the evolutionary process of the consideration of public interests. Those jurists are Abū Ḥusayn al-Baṣrī, Imām al-Ḥaramayn al-Juwaynī, Abū Ḥāmid al-Ghazālī and Fakhr al-Dīn al-Rāzī. I regard these four as adequate examples to show how the principle materializes itself in the school of Shāfi'ī. I pay particular attention to al-Ghazālī since he appears to be the earliest Shāfi'ī jurist who systematically discusses the principle of *al-maṣāliḥ al-mursalah*.

GENERAL FORMAT AND SYSTEM OF TRANSLITERATION

I generally follow Kate L. Turabian's *A Manual for Writers* for the entire format of this thesis with certain modifications on the footnotes. The numbering of the footnotes is put in the far left while the notes are indented a few spaces to the right to make the numbers clearly seen. Any traditional sources that are mentioned in later works are cited together. The English translations of the Arabic references are mentioned side by side in which case the former is put in parentheses (). For quotations, I always indicate my additions with this mark: [].

In Chapter Two, I regularly refer to Majid Khadduri's translation of al-Shāfi'ī's *al-Risalah* besides the original Arabic work. In a number of places, my quotations are Khadduri's verbatim. To indicate this in the footnotes, I always mention Khadduri first followed by al-Shāfi'ī. In cases where I mention al-Shāfi'ī first and Khadduri next, it means I rely on the Arabic first and the English translation second in my understanding on the subject-matter. As for the translation of the Quranic verses quoted, I compare Khadduri's translation with Muhammad Assad's *The Message of the Quran* and when necessary changes are made for the purpose of clarity and simplification.

The system of transliteration of Arabic words adopted in this study is the one used by the editors of the *Encyclopaedia of Islam* with slight variations where *q* is used instead of *k* and *j* for *dj* since these are closer representation of the original Arabic letters. *Tā marbūṭah* is indicated by the ending of *h* or *t*, as the case may be. Names beginning with the particle "al" is maintained throughout this thesis.

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First and foremost, it is indeed an honour for me to become one of the students of Professor Syed Muhammad Naqib al-Attas, the Founder-Director of ISTAC, who through his profound exposition of various pressing issues that confront the Muslim community, inspired me a lot to delve into and enjoy this academic endeavour. A most outstanding Muslim scholar-thinker, he has opened my mind towards a better understanding of the Islamic worldview and has enlightened me as to the great responsibilities and duties that lie ahead.

A number of people were consulted in the preparation and completion of this study. In its initial stage, I am obliged to thank Dr. Hasan al-Nagar, whose help enabled me to understand portions of some of the Arabic texts better. My appreciation goes to Professor Mehdi Mohaghegh who patiently helped me in reading al-Juwayni's work as well as some other Arabic texts and sent me supporting materials including articles from Iran. The correspondence with Dr. Ahmad Hasan of Pakistan was meaningful since he directed me to some other relevant sources and cleared some of my doubts on Islamic jurisprudence in general as well as on al-Shāfi'ī in particular.

I wish to express my special gratitude to my main supervisor, Professor Ahmed Kazemi Moussavi, for his guidance and painstaking assistance during the one year period of this study. It is my pleasure to acknowledge his numerous valuable suggestions concerning the methodology and organization of this thesis. My indebtedness extends to Dr. Selahattin Eroglu for his precious time to read my draft with great care and to offer detailed comments and criticism, not only on the contents and arrangement of this work, but also the language used. From both of them, I received many invaluable advice and reviews on this manuscript, again and again, for improvements and changes which have guided me away from a number of lapses or unnecessary discussion. Their help and guidance aided substantially in making this study a reality.

This study was also possible through a generous scholarship and fellowship support from ISTAC. My gratitude, too, must be expressed to Professor Wan Mohd Nor Wan Daud, Deputy Director of the Institute, who paid particular interest and concern, even before I began to embark on this study, on the progress and the finalization of this thesis. The facilities and references that are available in the Library of ISTAC contributed greatly towards the culmination of this study.

Finally, my fellow colleagues deserve my gratitude as well. Without stating each of them, I wish to thank them all. While happily acknowledging my deepest appreciation to all parties involved, either directly or indirectly, I wish to point out that I am fully responsible for any shortcoming or defect in this study.

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INTRODUCTION

The question of the adaptability of Islamic law vis-à-vis social changes and needs has been long debated by a considerable number of scholars and writers. It arises because any kind of law, either divine or man-made, has to face the challenge of social changes which require adaptability from it.¹ In line with this, we notice that Roman Law provides flexibility by differentiating between *jus civile* (civil law), which is strict; and *jus honorarium* (law of equity), which is elastic. Similarly, in English Common Law, the required flexibility is provided by the Law of Equity.² Even in Constitutional Law, some countries prescribe that any provision of the Constitution may be amended if it is beneficial to the public provided the requirement of a two-thirds majority vote of the parliamentary members is met. This shows that various legal systems have mechanisms providing flexibility in response to social changes.

In relation to Islamic law, Muhammad Iqbal has phrased the question facing Muslims as, "Is the Law of Islam capable of evolution?"³ Scholars and writers who discuss the issue may be divided into two opposing camps: those who claim that Islamic

¹ Muhammad Khalid Masud, *Islamic Legal Philosophy* (Islamabad: Islamic Research Institute, 1977), 1, hereafter cited as *Philosophy*.

² *Ibid.*, 18.

³ Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (Lahore: Iqbal Academy Pakistan and Institute of Islamic Culture, 1989), 130, hereafter cited as *Reconstruction*.

law is static, immutable and unchangeable as opposed to those who hold that Islamic law is both changeable and adaptable to social changes. The first view is held by some orientalist of our time such as C. Snouck Hurgronje, Joseph Schacht, N. J. Coulson,⁴ H. A. R. Gibb, and H. J. Liebesny, including some non-Muslim Arab writers such as Majid Khadduri and George Makdisi.⁵

The second opinion has been held by the majority of Muslim jurist-scholars since the early days of Islam and has been maintained by generations of scholars throughout the ages up to our contemporary writers like Muḥammad Abū Zahrah, ⁶Abd al-Karim Zaidān, ⁶Abd al-Wahhāb Khallāf, Muḥammad Saʿīd Ramaḍān al-Būṭī, Wahbah al-Zuhāilī, Ṣubḥī Maḥmaṣānī and Muhammad Iqbal. A study of the ideas put forth by them reveals that the consideration of public interests (*al-maṣāliḥ al-mursalah*), though expressed in variety of ways, is at the core of all discussions and has been regarded as the most practical means, method or principle in relation to the adaptability of Islamic law to social changes.⁶

The jurists and writers of the second camp also stress—explicitly or implicitly—that the door of personal reasoning (*ijtihād*)⁷ remains open for all generations. Wael B. Hallaq argues that the claim that the gate of *ijtihād* has been closed is mere conjecture, having no concrete evidence as basis.⁸ What actually happened in the history of Islamic jurisprudence was that at a certain time jurists were no longer deemed qualified to use *ijtihād* to address the problems encountering the Muslim community. In consequence, *ijtihād* ceased to be

⁴ N.J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 1, 2.

⁵ Masud, *Philosophy*, 1, 7.

⁶ For the sake of convenience, we will apply simply 'public interests' or 'the consideration of public interests' for *al-maṣāliḥ al-mursalah* in this thesis. In all cases, they are to be understood in the implied sense of the word, i.e. in the absent of any clear indications from the Holy Qurʾān or the *Sunnah*, unless otherwise qualified.

⁷ *Ijtihād* basically means personal effort to understand the meaning implied in certain rule of law in order to form an opinion.

⁸ Wael B. Hallaq, "Was the Gate of *Ijtihād* Closed?" *The International Journal of Middle East Studies* 16 (1984): 3-41.

practiced. This stagnancy, however, is not to be regarded as the closure of the gate of *ijtihād*. Iqbal writes:

The closing of the door of *ijtihād* is pure fiction suggested partly by the crystallization of legal thought in Islam, and partly by that intellectual laziness which, especially in the period of spiritual decay, turns great thinkers into idols. If some of the later doctors [jurists] have upheld this fiction, modern Islam is not bound by this voluntary surrender of intellectual independence.⁹

Iqbal supports his view with a statement of Badr al-Dīn Muḥammad al-Zarkashī (d. 794/1392), a Shāfiʿī jurist, which runs:

If the upholders of this fiction mean that the previous writers had more facilities, while the later writers had more difficulties, in their way, it is nonsense; for it does not require much understanding to see that *ijtihād* for later doctors [jurists] (*muta'akhirūn*) is easier than for the earlier doctors. Indeed the commentaries on the Koran and *sunnah* have been compiled and multiplied to such an extent that the mujtahid of today has more material for interpretation than he needs.¹⁰

The above arguments, we think, adequately show that Islamic Law is adaptable to social changes and needs. Our jurists, traditional or contemporary, in their efforts to place those changes and needs within the provisions of Islam, have produced several legal principles or theories through their use of *ijtihād*. Though the formulation of those principles may differ, they are essentially similar in concept and share a common underlying objective, that is, the preservation of public interests. When we come to the teachings of the four established *Sunni* schools of jurisprudence, we notice that this attitude has been adopted and incorporated by all.

It is generally known to writers and researchers on Islamic jurisprudence that the idea of taking public interests into consideration was warmly welcomed by Imām Mālik (d. 179/795) and his followers. Prior to him, the concept was referred to by the term *istiḥsān* (juristic preference) by Imām Abū Ḥanīfah (d. 150/767) and his companions-followers. However, Imām al-Shāfiʿī used no specific term for this. Rather, he seemed to denounce

⁹ Iqbal, *Reconstruction*, 141.

¹⁰ This saying of al-Zarkashī was quoted in the writing of Muḥammad b. ʿAlī al-Shawkānī (d. 1255/1839), *Irshād al-Fuḥūl*, quoted and translated in Iqbal, *Reconstruction*, 141.

both *al-maṣāliḥ al-mursalah* and *istiḥsān* since they, according to him, were based on mere reason.

Since this study will be focusing on the school of Shāfi'ī, some general remarks about its imām are, perhaps, helpful. As we have indicated above and shall be elaborating, al-Shāfi'ī refutes any principle which is not based on the Holy Qur'ān and the *Sunnah*. Therefore, he rejects the concept of juristic preference of Abū Ḥanīfah and refuses to use the term *al-maṣāliḥ al-mursalah* of Mālik. However, the nature of *istiḥsān* and *al-maṣāliḥ al-mursalah* refuted by al-Shāfi'ī was not what was intended by Abū Ḥanīfah and Mālik. Both principles, as enunciated by these two predecessors of al-Shāfi'ī--and later maintained by their followers--were not based on wantonness or mere opinion, without reference whatsoever to the textual evidences. In fact, both were grounded on Revelation as well. The problem that arose was that the connection to Revelation was not explicitly spelled out by the proponents of those two principles.

Al-Shāfi'ī put forward several reasons for rejecting *al-maṣāliḥ al-mursalah*. Among others, he feared that corrupt leaders would apply this principle as an effort to legitimize their own wantonness and impose their absolute power on their subjects.¹¹ It is probable that al-Shāfi'ī, desiring to prevent the possible abuse of such a concept, emphasized the usage of the divine sources to provide a sense of legality to laws and legal principles based on the Holy Qur'ān and the *Sunnah*. This emphasis on the divine sources, however, does not necessarily mean that as a concept, the principle of *al-maṣāliḥ al-mursalah* is totally absent in al-Shāfi'ī's legal thought. To the contrary, though he does not use the term *al-maṣāliḥ al-mursalah*, he does in fact employ this concept on many occasions in his discussion of analogy (*qiyās*).

¹¹ Muḥammad Abū Zahrah, *Uṣūl al-Fiqh* (Qāherah: Dār al-Fikr al-'Arabī, n.d.), 264, hereafter cited as *Uṣūl*; 'Abd al-Karīm Zaidān, *al-Wajīz fī Uṣūl al-Fiqh* (Istanbul: Dār Sa'ādat, 1396/1986), 240, hereafter cited as *Wajīz*; 'Abd al-Wahhāb Khallāf, *'Ilm Uṣūl al-Fiqh* (Istanbul: Eda Nesriyat, 1388/1968), 88, hereafter cited as *Uṣūl*.

The followers and successors of al-Shāfi'ī realized that *al-maṣāliḥ al-mursalah* was the best way to maintain the dynamism of Islamic law in response to changing circumstances and that it was not at variance with the teachings of al-Shāfi'ī. Since this principle was practiced by the Mālikis, the early followers of al-Shāfi'ī took the idea from them and cherished it until it finally matured for the first time at the hand of Abū Ḥāmid al-Ghazālī.

The connection between al-Shāfi'ī and his followers on the question of *al-maṣāliḥ al-mursalah* has not been sufficiently studied. Thus, we take up the task to elucidate this connection in the following chapters. Our purpose is to point out that the consideration of public interests is affirmed by the school of Shāfi'ī.

Definitions

It is through the principle of *al-maṣāliḥ al-mursalah* that the adaptability of the *Shari'ah* with social changes seems to be justified. What, then, are *al-maṣāliḥ al-mursalah*? To answer this, we will examine the literal as well as technical meanings of the term, including other linguistic etymological variances. We also will attempt to look into indications (*dalā'il*, sing. *dalīl*) from the Holy Qur'ān and the *Sunnah* in order to know whether or not the grounds or bases for the application of this principle are to be found in them.

The root word of *maṣlaḥah* is *ṣ-l-ḥ* (*ṣalaḥa* or *ṣaluḥa*), one definition of which is "to be good, right, to repair or improve."¹² *Maṣlaḥah*, is the verbal noun of the former. One of its synonyms is *manfa'ah*; and both may mean "utility." Both *ṣalaḥa* and *ṣaluḥa* can mean a thing or man which/who becomes "good, incorrupt, right, just, righteous, virtuous,

¹² For more meanings, see Hans Wehr, *A Dictionary of Modern Written Arabic*, ed. J. Milton Cowan (Beirut: Librairie Du Liban, repr. 1980), 521-2, hereafter cited as *Dictionary*.

or honest."¹³ *Maṣlaḥah* also means a cause, a means, or an occasion, which is good; as well as a thing, an affair, or a business which is conducive to good, or that is for good. Hence it may often be rendered simply as an affair, when the context shows it to mean what is conducive to good or done for a good purpose. *Maṣlaḥah* further means "benefit" or "interest." Its antonyms are *maḍarrah* and *mafsadah*, meaning "evil" or "harm." The plural form of *maṣlaḥah* is *maṣāliḥ* and these two words will be used interchangeably throughout this study. In most cases, however, the plural form will be employed. One may say: *Naẓara fī maṣāliḥ al-nās*, meaning "He considered the things that were for the good of the people at large." Another expression is: *Hum min ahl al-mafāsīd lā al-maṣāliḥ*, meaning "They are of the people who occupy themselves in the things conducive to evil, not the things conducive to good."¹⁴ Thus, *maṣāliḥ* always refers to something good.

Juridically, *maṣlaḥah* carries the meaning of "welfare," and the jurists applied the term to mean "general good" or "public interest"¹⁵ or the acquisition of goodness, utility, benefit and the removal of harm or evil.¹⁶ In this essential meaning, public interests cover all kinds of interests. However, since we are dealing with religio-legal matters, we have to divide those interests into three categories. They are, first, the public interests which are supported or approved by the divine sources. The majority of jurists hold that these kinds of public interests fall within the scope of analogy (*qiyās*). Second are the interests which are rejected by the sources. Two illustrations for this category are: firstly, the equal distribution of inheritance between male and female beneficiaries, contrary to the Quranic injunction which states that "The male shall have the equal of two females' share" (*Sūrat al-Nisā'*, 4: 11); and secondly, the transactions which involve interests or usury (*ribā*) contrary to another Quranic order which runs that "The Almighty God has made buying and selling

¹³ Edward William Lane, *An Arabic-English Lexicon*, 8 pts., (Beirut: Librairie Du Lihān, 1980), 4: 1714-5, hereafter cited as *Lexicon*.

¹⁴ *Ibid.*; Masud, *Philosophy*, 149.

¹⁵ Madjid Khadduri, "Maṣlaḥa," *Encyclopaedia of Islam*, new ed. (1991), VI: 738, hereafter cited as *Ency. Isl.*

¹⁶ Zaidān, *Wajiz*, 236.

lawful and usury unlawful" (*Sūrat al-Baqarah*, 2: 275). Third are the interests which are neither supported nor rejected by the sources. Our further explanation to this categorization will come later as we proceed to the following discussion.

In this study, when the term *al-maṣāliḥ al-mursalah* is used, it refers to the third category, i.e. the public interests which are neither favoured nor rejected by any specific legal text of the divine sources but in line with the objectives of the *Shari'ah*.¹⁷ They are *maṣāliḥ* since they deal with the acquisition of benefit or utility and removal of harm or evil. The term *mursalah* indicates the absence of textual evidence.¹⁸ Kamali simplifies this definition by stating that the term "refers to the unrestricted public interest in the sense of its not having been regulated by the Law giver insofar as no textual authority can be found on its validity or otherwise,"¹⁹ i.e., where there is no clear injunction found either in the Holy Qur'ān nor the *Sunnah*. Therefore, it is clear that the interests are called '*mursalah*' or '*irsāl*' because they are not explicitly connected with any of those divine sources. They are so called because it is not immediately intelligible to the mind that they come from the established legal sources. We need a kind of reasoning before we can relate them to those sources. In other words, those interests are regarded as 'implied' because they are not based on any particular or specific legal text, in which case when a dispute arises, its position is left to reason to be determined.²⁰ On occasions we call them 'implied public interests' owing to the lack of clear textual reference, but at the same time not contrary to the intention of these sources.

After the completion of the Revelation and the death of the Prophet, the Companions, the Successors and jurists in later generations applied *al-maṣāliḥ al-mursalah*

¹⁷ *Ibid.*; Abū Zahrah, *Uṣūl*, 261; Khallāf, *Uṣūl*, 84.

¹⁸ Zaidān, *Wajiz*, 237. This definition is also indicated and agreed by Wahbah al-Zuhāli, *Uṣūl al-Fiqh al-Islāmi*, 2 vols., (Dimashq: Dār al-Fikr, 1406/1986), 2: 757, hereafter cited as *Uṣūl*.

¹⁹ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Text Society, 1991), 270, hereafter cited as *Principles*.

²⁰ Muḥammad Taqī al-Ḥakīm, *al-Uṣūl al-ʿĀmmah li al-Fiqh al-Muqāran* (n.p.: Mu'assasah Āl al-Bayt, 1979), 381.

based on the assumption that if both Revelation and Prophet were still in existence, their judgments would be validated and justified by these two sources. This also explains why the public interests which are directly supported by the Holy Qur'ān or by the Prophet are not called *al-maṣālahal-mursalah* because they become part of the established laws of God or normative practice known as *Sunnah*.²¹ It is not necessary to discuss at length the consideration of public interests which are supported by the Holy Qur'ān or the *Sunnah*. Our concern is on the interests which are not explicitly mentioned by them. As for *al-maṣāliḥ al-mursalah*, they are divided into three kinds, namely the interests which fall under: (i) essential necessity (*al-maṣāliḥ al-ḍarūriyyah*); (ii) general needs (*al-maṣāliḥ al-ḥājiyyah*); and (iii) embellishments (*al-maṣāliḥal-taḥsiniyyah*).²²

According to al-Ghazālī, the essential application of public interests is divided into two aspects: positive and negative.²³ The first one deals with the seeking or acquiring of a certain benefit, goodness, utility or beneficence, while the second concerns the removal of evil, harm or injuries from the life of the individual and ultimately the public. However, in legal discussion, the question does not stop there; but it goes a step further, embracing the preservation of the five principles, namely religion, life, reason, lineage and property. We will discuss this more as we proceed further.

The Significance of *Maṣāliḥ* vis-à-vis the Objectives of the *Sharī'ah*

Ibn al-Qayyim al-Jawziyyah states that the objectives of *Sharī'ah* (*maqāsid al-Sharī'ah*) are: (i) to educate the individuals; (ii) to establish justice, i.e., to hinder injustice in life, and last but not least; (iii) to promote the interest of the public.²⁴ The purpose of the

²¹ Kamali, *Principles*, 270.

²² These three categories of *al-maṣāliḥ al-mursalah* will be treated in full together with our references in Chapter Three below.

²³ Abū Ḥamid al-Ghazālī, *al-Mustaṣfā min 'Ilm al-Uṣūl*, 2 vols. (Cairo: Bulaq, 1322/1902), 1: 286, hereafter cited as *Mustaṣfā*; Zaidān, *Wajiz*, 236.

²⁴ Ibn al-Qayyim al-Jawziyyah, *I'lām al-Muwaqqi'in 'an Rabb al-'Ālamīn*, 4 vols., ed. Muḥammad Muḥyi al-Dīn 'Abd al-Ḥamid (Beirut: Dār al-Fikr, 1397/1977), 3: 14,

consideration of *maṣālih* embraces all of them and regulates both interests in this world and in the Hereafter. They are equally important and interdependent on each other. In the Holy Qur'ān, Allah says that He has bestowed a direction (*mau'izah*) as a cure to the internal diseases, as well as mercy and guidance to mankind (*Sūrat Yūnus*, 10: 57); that He has sent down the Prophet Muḥammad (s.a.w.) not only as mercy to the human being, but to all God creatures (*Sūrat al Anbiyā'*, 21: 107). The word 'mercy' (*rahmah*) in both verses connotes the meanings of kindness, compassion, goodwill and beneficence. The mercy ceases to exist if it does not aim at the preservation of public interests.²⁵ In the same way, the sending of Prophet Muḥammad (s.a.w.) can only be considered as mercy if the *Sharī'ah* revealed to him promotes the interests of the public and brings happiness to them.²⁶ Thus, both institutions of Revelation and Prophethood aim at establishing a harmonious life for all creatures of God, ultimately resulting in the preservation of public interests.

The above two verses are supported by another verse when God states that He has laid no hardship (*ḥaraj*) on people in anything that pertains to religion (*Sūrat al-Ḥajj*, 22: 78) and that He will ease on people, not otherwise (*Sūrat al-Baqarah*, 2: 185). This objective is further strengthened by another more general verse which states that Allah does not want to impose any hardship on human being, but rather to make him better (*Sūrat al-Mā'idah*, 5: 6).²⁷ A number of Quranic commentators interpret *ḥaraj* as *dayq*, the meanings of which includes hardship, narrowness, harshness, an evil state or condition,²⁸ tightness, restriction, constraint, oppression, annoyance, irritation, exasperation, confinement, scarcity, etc.,²⁹ all of which are of negative connotations and thus not in agreement with the

hereafter cited as I'lām; Abū Zahrah. *Uṣūl*, 341-4. See also an article by Kamali, "Source, Nature and Objectives of Sharī'ah," *The Islamic Quarterly* xxxiii, no. 4 (1989): 215-35.

²⁵ Al-Zuhaili, *Uṣūl*, 2: 762.

²⁶ Muḥammad Sa'īd Ramaḍān al-Būṭī, *Dhawābiḥ al-Maṣlaḥah fī al-Sharī'ah al-Islāmiyyah* (Kaherah: Mu'assasah al-Risālah, 1982), 75, hereafter cited as *Dhawābiḥ*.

²⁷ The word *ḥaraj* (hardship) is mentioned 15 times in the Holy Qur'ān, all of which give the impressions that the Revelation is not to cause difficulties to human being, either in his personal or collective capacity.

²⁸ Lane, *Lexicon*, 5: 1815-6.

²⁹ Wehr, *Dictionary*, 548-9.

objective of the *Shari'ah*. The removal of those evil circumstances brings happiness to people and preserves their interests.³⁰ If the *Shari'ah* fails to observe this, it means that Islam fails to serve its followers which is an absurdity. Al-Qurtubī (d. 671/1272) comments that difficulty is not the purpose of Islam.³¹ Rashid Riḍā (d. 1354/1935) says that religion is revealed not to impose any difficulty or inconvenience on people, no matter how trivial they are. He adds further that God would not prescribe any law except for their goodness, benefit and utility (*khayr, naf'*).³² Al-Zuhailī comments that Islam is a religion of convenience and magnanimity because it aims at removing hardship from its followers.³³ All of the commentaries above are in line with the said purpose of the consideration of public interests. Therefore we hold that the foundation for the principle of *al-maṣāliḥ al-mursalah* is there in the divine words of God.

To educate individuals, Islam prescribes to its followers a number of ritual devotional duties (*'ibādāt*) and some of them constitute the pillars of the religion, the performance of which are extremely necessary and fundamental.³⁴ All duties regardless of their classifications form a section of the educational training programme of Islam and put as such to educate its subjects to be good, self-disciplined, grateful, willing to sacrifice, sensitive for others, etc., which finally leads to form a good society.³⁵

As for the second above mentioned objective, Islam indeed is revealed to establish justice (*al-'adālah*). Justice, as put by a modern author:

³⁰ Al-Būṭī, *Dhawābiḥ*, 77.

³¹ Abū 'Abdillāh Muḥammad b. Aḥmad al-Anṣārī al-Qurtubī, *al-Jāmi' li al-Aḥkām al-Qur'ān*, 19 vols., ed. Aḥmad 'Abd al-'Alīm al-Bardawnī (n.p.: Dār al-Kitāb al-'Arabī, 1985), 6: 108.

³² Muḥammad Rashid Riḍā, *Tafsīr al-Qur'ān al-Ḥakīm: al-Shahīr bi Tafsīr al-Manār*, 12 vols., (Beirut: Dār al-Ma'rīfah, n.d.), 6: 258.

³³ Al-Zuhailī, *Tafsīr al-Munīr*, 31 vols., (Beirut: Dār al-Fikr al-Murāṣīr, 1411/1991), 6: 114.

³⁴ In Islam, all ritual duties (*'ibādāt*) are basically classified into obligatory (*wājib, farḍ*) and recommended (*mandūb, sunnah*).

³⁵ The devotional duties are not only aimed at physical fitness but more than that to purify the soul from internal diseases such as selfishness, arrogance, greediness etc. This is flamboyantly manifested in the duties of prayers, fasting, alms giving and pilgrimage.

... is to establish an equilibrium by way of fulfilling rights and obligations and by eliminating excess and disparity in all spheres of life. The *Shar'ah* seeks to establish justice not only in its corrective and retributive sense of adjudicating grievances, but also in the sense of distributive justice, establishing an equilibrium of benefits and advantages in society.³⁶

Syed Muhammad Naquib al-Attas, a contemporary Muslim thinker, however, widens the concept of justice to include the individual as well. In this regard, Professor al-Attas explains in the Quranic spirit that a man is not supposed to violate the boundaries set by God. When he transgresses the limit, he is doing injustice to himself. He in fact, should not allow his animal or carnal soul to get rid of his rational soul which consequently leads him to commit acts prohibited by God and displeasing to the Almighty or denying belief in God altogether.³⁷ Therefore, according to him,

*Justice in Islam is not what refers to a state of affairs which can operate only within a two-person-relation or a dual-party-relation situation, such as: between one man to another; or between the society and the state; or between the ruler and the ruled; or between the king and his subjects.*³⁸

but "a harmonious condition or state of affairs whereby everything is in its right and proper place . . . ; or similarly, a state of equilibrium, whether it refers to things or living beings."³⁹ With relation to man, he says that "justice means basically a condition and situation whereby he is in his right and proper place. 'Place' here refers not only to his total situation in relation to others, but also to his condition in relation to his self."⁴⁰ Therefore, justice in Islam, as indicated by Prof. al-Attas means placing things in their right place where they belong. It covers both individual as well as the public at large.

For the third objective, i.e. the preservation of public interests, it relates to people's affairs both in this world during their lifetime as well as after their death in the Hereafter.⁴¹

³⁶ Kamali, "Source, Nature and" 226.

³⁷ Syed Muhammad Naquib al-Attas, *Islam and Secularism* (Kuala Lumpur: ISTAC, 1993), 77. This book has first been published by ABIM., 1978.

³⁸ *Ibid.*, 76 & 141.

³⁹ *Ibid.*, 76.

⁴⁰ *Ibid.*

⁴¹ Al-Būṭī, *Dhawābiṭ*, 25.

It is unanimously agreed that all aspects of *Shari'ah* lead people to secure certain benefit and protect them against evil, harms and injuries. The jurists-scholars from classical period to modern times are in consensus that there is no judgment (*ḥukm*) in the *Shari'ah* which does not aim at securing a genuine public interest. All its legal judgments (*al-aḥkām al-shar'īyyah*), in the form of permission, either obligatory (*wājib*, *farḍ*), recommended (*mandūb*, *sunnah*) or permissible (*mubāḥ*), ultimately are prescribed to materialize the interests of the public. On the other hand, the judgments in the form of prohibition, either forbidden (*ḥarām*) or reprehensible (*makrūh*), are laid down to remove or prevent evil, harms and injuries,⁴² the removal of which is also a realization of public interests.

As a means of adaptability, the principle called *al-maṣāliḥ al-mursalah* is of significant value since scholars like Ibn al-Qayyim al-Jawziyyah (d. 751/1350) puts it that the foundation of Islamic law is wisdom and interests of mankind. He says:

In its entirety, it is justice (*ʿadl*), mercy (*rahmah*), utility (*maṣāliḥ*) and wisdom (*ḥikmah*). Anything which leads justice to injustice (*al-jawr*), mercy to its contrary (*ḍiddihā*), utility to evil (*mafsadah*), wisdom to stupidity (*al-ʿabth*), it is not from the *Shari'ah*, even if it is included in the Law by means of interpretation (*ta'wīl*). Indeed, the *Shari'ah* is God's justice to His servants, and mercy to His creatures.⁴³

Ibn al-Qayyim is not alone to say that because the same argument is shared by many other jurists and writers. Abū Ishāq al-Shāṭibi (d. 790/1388), a Mālikī scholar who paid particular attention to the question of *al-maṣāliḥ al-mursalah* states that the consideration of public interests is the most important objective of the *Shari'ah*. He says, "The *Shari'ah* is not revealed except for the preservation of public interests, and removing evil from them."⁴⁴ Al-Shujā' al-ʿIzz al-Dīn b. ʿAbd al-Salām (d. 660/1263), a Shāfiʿī jurist,

⁴² Kamali, "Source, Nature and . . .," 228.

⁴³ Ibn al-Qayyim, *Iʿlām*, 3: 14-5.

⁴⁴ Abū Ishāq al-Shāṭibi, *al-Muwāfaqāt fi Uṣūl al-Aḥkām*, 4. vols., ed. Muḥammad Muḥyi al-Dīn ʿAbd al-Ḥamid (Qaḥerah: Maṭbaʿah al-Madani, n.d.), 2: 3 & 37; *Iʿtiqād*, 1: 36.

mentions that the entire *Shari'ah* aims at the welfare of the public, either in securing benefit or avoiding harm.⁴⁵

The attitude of those traditional jurists on the objectives of the Lawgiver is further maintained and agreed upon by modern jurist-writers such as al-Būṭī, Abū Zahrah, Zaidān, Khallāf, and others.⁴⁶ Therefore, if Islamic law aims at the *maṣāliḥ* of man, it is logical, as summed up by Masud that "... it should welcome any social change that serves this purpose. Furthermore, with such an objective in view Islamic law cannot be rigid and inert in regard to social change."⁴⁷ The same tone of expression is reported from Iqbal when he says that:

... from about the middle of the first century up to the beginning of the fourth not less than nineteen schools of law and legal opinion appeared in Islam. This fact alone is sufficient to show how incessantly our early doctors [jurists] of law worked in order to meet the necessities of a growing civilization. With the expansion of conquest and the consequent widening of the outlook of Islam these early legists had to take a wider view of things, and to study local conditions of life and habits of new peoples that came within the fold of Islam.⁴⁸

Thus, generally speaking, most injunctions of God, either in permitting or prohibiting something, ultimately aim at the interests of the public. Therefore, from the foregoing discussion we know that the *Shari'ah* in all of its aspects aims at securing certain benefit for the people or protecting them against corruption and evil. This objective is well materialized, for instance, in God's injunctions on retaliation punishment (*qiṣāṣ*), fixed penalties (*ḥudūd*) and the law of inheritance (*farā'id*). So, when we confront certain matters which are not explicitly mentioned by God, we have to solve them in light of the above objective.

⁴⁵ 'Izz al-Dīn b. 'Abd al-Salām, *Qawā'id al-Aḥkām fi Maṣāliḥ al-Anām*, quoted in Zaidān, *Wajiz*, 240. Abū Zahrah states that 'Izz al-Dīn divides public interests into three: obligatory, recommended and permissible. See Abū Zahrah, *Uṣūl*, 351.

⁴⁶ Al-Būṭī, *Dhawābiḥ*, 116; Abū Zahrah, *Uṣūl*, 259, 260, 341, 344, 348, 354; also *Tārīkh al-Madhāhib al-Islāmiyyah* (Kaheerah: Dār al-Fikr al-'Arabi, n.d.), 291-305; Zaidān, *Wajiz*, 239; Khallāf, *Uṣūl*, 84.

⁴⁷ Masud, *Philosophy*, 2.

⁴⁸ Iqbal, *Reconstruction*, 131.

However, we have to bear in mind that it is unlikely for the Holy Qur'an or the *Sunnah* to mention each and every single case of public interests in detail. They do not provide clear answers to all problems from the very first day of Islam up to the Day of Resurrection. The *Shari'ah* covers only part of them.⁴⁹ It is to be put in that way because the occasions in which the application of public welfare may occur is infinite and unpredictable as one cannot anticipate its occurrence inasmuch as it may differ from time to time, place to place and circumstances. It does not stop with the completion of the Revelation or with the death of the Prophet. In cases where the consideration of public interests is indicated by any of the divine sources, it lessens ~~the~~ problem in justifying them, compared to the cases which interests are not touched upon by any. The only thing that we have to bear in mind, as those sources themselves indicate, is that the resorting to the consideration of public interests is valid in all times as long as it is not contrary to the will of the Lawgiver.

Therefore, when a jurist comes across certain interests in favour of people at large and at the same time the textual evidences are silent on it, he has to take all necessary efforts to uphold it. It is due to this reason that *maṣlahah* or the action of resorting to it (*istiṣlah*) is considered as valid and legitimate in Islamic jurisprudence. It is our submission that the foundation for the consideration of public interests is well grounded in the Holy Qur'an--as we have seen above, and then testified by the Prophet himself. As history goes on, the consideration of public interest continues to take place and to be recognized until its concept finally matured at a much later time.

⁴⁹ Zaidān, *Wajiz*, 239; Khali'f, *Usul*, 88.

Chapter One

THE CONCEPT OF AL-MAŞĀLIḤ AL-MURSALAH BEFORE IMĀM AL-SHĀFI'Ī

The consideration of public interests has experienced an evolutionary process throughout the history before it appeared to be a mature principle at certain stage of its journey. Though historical survey is not the most important part of this thesis, it is necessary to give a considerable sketch to this aspect to enable us to understand the subject-matter more comprehensively.¹ Thus this historical section will cover: (i) the period of the Rightly Guided Caliphs (*al-Khulafā' al-Rāshidūn*) or the Companions (*Aṣḥāb*), with special attention to Caliph 'Umar b. al-Khaṭṭāb (r.a.); (ii) the period of the Successors (*al-Tābi'ūn*); the period of the Followers of the Successors (*Tābi'ū al-Tābi'īn*)² which includes Abū Hanifah, Abū Yūsuf as well as Muḥammad b. Ḥasan al-Shaybānī with particular treatment on their concept of juristic preference (*istiḥsān*) and Mālik. We need to discuss *istiḥsān* here because, as we shall see, in reality it is a means to preserve the public interests which

¹ Iqbal says that "No people can afford to reject their past entirely, for it is their past that has made their personal identity." See *Reconstruction*, 132.

² The classification is of particular importance in Islam since it divides Muslim scholars according to their periods of living. The *Aṣḥāb* are those who met the Prophet (s.a.w.) and were directly acquainted with him. The *Tābi'ūn* are the people of the next generation or contemporaries of the Prophet. They, however, did not know him personally but met and learned religious knowledge from one or more of his Companions. The *Tābi'ū al-Tābi'īn* are those of the subsequent generation who met and received knowledge from one or more of the *Tābi'ūn*. For more information on the classification, see al-Hujwiri, *Kaṣh al-Mahjūb*, transl. R. A. Nicholson (Leyden-London: 1911); also B. Carra de Vaux, "Tābi'", *First Encyclopaedia of Islam* (Leiden-New York: E. J. Brill, 1987), vii: 583.

are supported by the legal textual evidence, either in particular or general or by a number of texts with similar meaning. It also means that it is a ruling in which certain benefit to the public is confirmed. In this section, we will also briefly examine Mālik's doctrine of the consideration of public interests.

The Period of the Rightly Guided Caliphs

After the death of the Prophet, the consideration of public interests was practically invoked for the first time in the event of Saqifah Banī Saʿādah, on the question of appointing the successor of the Prophet as the leader of the whole Muslims. In this particular situation, all Muslims, regardless of their social status and political inclination unanimously agreed that the appointment of the successor was necessary to avoid disharmony, chaos and instability in the society. Although controversial from certain viewpoints of the Muslims, the appointment of Abu Bakr (r.a.) as the first caliph was a result of what might be called the Consultative Council (*Majlis al-Shūrā*) through consensus of almost all leading Companions at the Saqifah. His appointment took place with the agreement of both representatives from the Muhājirūn and Ansār and later followed by the public at large. The event of Saqifah, therefore, is not only a place for political decision, but a symbol of unity as well as a centre of social justice, from which many methods of personal reasoning owe their origins such as consensus, consultative meeting (*shūra*), and of course *maṣlaḥah* etc.

During his rulership, Caliph Abū Bakr (r.a.) did few things which were not mentioned by the Holy Qurʾān or the *Sunnah*, in which he considered the interests of the general public as the basis to establish his rulings and decisions. The first collection and compilation of the Holy Qurʾān, the nomination of ʿUmar as his successor and the declaration of war against those who refused to pay legal alms (*ḥaḍq*) were done in the