

AL-MAŞLAHAH AL-MURSALAH AS A SOURCE OF ISLAMIC LAW AND ITS  
RELEVANCE TO POLITICAL DISPENSATION

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**Abstract**

The relevance of Islamic studies to the modern political setting cannot be undermined. This is because Islamic studies covers all aspects of human actions, be it ritual and social. It is observed that publications related to Islamic studies have not explicitly emphasised the relevance of the concept of *Maşlahah Mursalah* in *'Uşūl al-Fiqh* to the some social sciences enough. Thus, this paper attempts to relate the aforementioned concept to the political science with the view to enunciating the importance, benefit and application of this concept in modern political dispensation. The methodology applied in this paper is content analysis which incorporates both descriptive and prescriptive approaches. The examples used are not exhaustive and limited to the chosen country. The application of the concept may also be found in some Muslim countries without realization.

**Keywords:** *Maşlahah Mursalah*, *'Uşūl al-Fiqh*, Islamic Law, Political Dispensation, *'Ijmā'* and *Qiyās*

**Introduction**

Islam is a comprehensive religion that covers all aspects of human life. Mankind as well as *jinn* are given guidelines to regulate the conduct of all their activities-be it religious life, financial transactions, social behaviour, *jihad*, politics and the like. Muslims believe that the *Shari'ah* has provided the perfect as well as ideal law that clearly address all issues, either in general or specific terms. The laws that had been designed and assigned to regulate man's activities are contained in the great book, the Qur'an, the *hadith* of Prophet Muhammad and other sources such as *'Ijmā'* and *Qiyās*.

Politics or political administration through the machinery of government is one of the main areas of concern of Islam and Muslims. The establishment and administration of the first Islamic State in Madinah, where Prophet Muhammad served as the head of state, are a clear evidence of the importance that Islam attaches to governance and its administration. Islamic political theory is not only limited to governance and administration, it also covers other aspects such as leadership and appointment, legislation and regulations, programs and so on- all finding bases both in the primary and secondary sources of the Islamic law.

This paper aims to study the concept of *Maṣlaḥah Mursalah* as a source of Islamic law and its relevance to political dispensation. The paper, apart from the introduction and conclusion has seven sections which are: definition of *Maṣlaḥah Mursalah*; its legality; political dispensation in Islamic law and definition of politics and political dispensation; *Maṣlaḥah Mursalah* during Islamic period; importance of *Maṣlaḥah Mursalah*; benefits of *Maṣlaḥah Mursalah* to individuals, society and government; and applications of *Maṣlaḥah Mursalah* in Malaysia.

### Conceptual Definition of *Maṣlaḥah Mursalah*

The word *Maṣāliḥ* is the plural of *Maṣlaḥah*. Literally, the word *Maṣlaḥah* means "to be good, right, to repair or to improve".<sup>1</sup> Besides, it 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 done for a good purpose".<sup>2</sup> It generally refers to public interest.

Technically, *Maṣlaḥah Mursalah* is defined as a consideration which is proper and harmonious (*wasf munasib mula'im*) with the objectives of the Lawgiver, it secures a benefit or prevents a harm and the *Shari'ah* provides no indication as to its validity or otherwise.<sup>3</sup> However, Jurists have taken *Maṣlaḥah* to be the public welfare, its general good and interest. Besides, they define the word as acquisition of goodness, utility, benefits and the removal of harm and evil. Generally speaking, the area of public interest related to religio-legal matters will be run through unsupported sources of Islamic law. However, according to Azhar, the kind of public interests that *Maṣlaḥah Mursalah* tends to regulate are the ones which are neither favoured nor rejected by any specific legal text of divine sources, but in line with the objectives of the *Shari'ah*.<sup>4</sup>

*Mursalah* refers to the non-textual evidences. According to Kamali, the term *Mursalah* indicates unrestricted public interest in the sense that it is not being regulated by the Lawgiver insofar as no textual authority can be seen on its validity or otherwise.<sup>5</sup> In addition, the public interest should have a reason (*'illah*) which is connected to the legal sources. However, the public interest which is mentioned in Qur'an or *sunnah* is not called as *Maṣāliḥ Mursalah*.

*Al-Maṣāliḥ al-Mursalah* is divided into three kinds. There are essential necessity (*al-Maṣāliḥ al-ḍarūriyyah*), general needs (*al-Maṣāliḥ al-ḥājjiyyāh*) and embellishment (*al-Maṣāliḥ Taḥsīniyyāh*). The *Maṣāliḥ ḍarūriyyah* consist of five essential values (*al-ḍarūriyyah al-khamsah*) namely religion, life, intellect, lineage and property.<sup>6</sup> On the other hand, *al-ḥājjiyyāh* are supplementary interests to the five essential values and it refer to interests whose neglect leads to hardship in the life of the community although not to its collapse. Embellishments denote interests whose realisation lead to the attainment of that which is desirable.<sup>7</sup>

### Legality of *Al-Maṣāliḥ al-Mursalah*

*Al-Maṣāliḥ al-Mursalah* as a source of Islamic law has not been given unanimous assent by the Muslim jurists. Imam Malik supported the use of *Al-Maṣāliḥ al-Mursalah* which is similar in nature to the juristic preference (*'istiḥsān*) of Imam Abu Hanifah.<sup>8</sup> On the other hand, Imam Shafi'i rejected the use of *'istiḥsān* and does not use the term *Al-Maṣāliḥ al-Mursalah* of Imam Malik.<sup>9</sup> Additionally, he highlights several reasons for his rejection of *'istiḥsān* among which is his concern that a corrupt leader could use this source to legitimize his own wantonness and impose his autocracy on his subjects. Regarding *Al-Maṣāliḥ al-Mursalah*, however, it is implied that the concept is embedded in the use of *qiyās* (analogical reasoning). This is because *qiyās* tends to ferret out the *maṣlahah* in enacting law in Islam upon which new law can be based. Nevertheless, al-Shafi'i prefers laws to be based on divine sources to provide a sense of legality.<sup>10</sup> It should be noted however that to use *Al-Maṣāliḥ al-Mursalah* for new cases that the divine sources do not provide requires understanding the spirit of the law (*maqāṣid al-Sharī'ah*).

### Political Dispensation in Islamic Law

What usually comes to mind when the word politics is mentioned are images of government, politicians and their policies or more negatively the idea of corruption and dirty tricks. The real and definite definition seems to have been unclear and almost lost by such representations and clichés that tend not to pinpoint the true essence, which defines politics. Thus, to attempt a definition of politics, a systematic approach is required. To begin with, it will be necessary for proper understanding to trace the etymology of the word.

The word politics comes from the Greek word "*polis*" which means the state or community as whole.<sup>11</sup> Some of the great political thinker such as Plato and Aristotle believe that the concept of the "*polis*" was an ideal state. In Plato's novel "The Republic", he discusses the ideal state and the means to achieve it.<sup>12</sup> Hence, the word politics originally has connotations in the ways to create the ideal society. An ideal society is a difficult and an impossible aim to achieve. Politics implies measures which could and should, in the views of their deviser, be implemented in the hope to create a better society, than that which is already present.

Besides, there have been series of debates on 'what is politics' among different thinkers and within different traditions such that politics has been viewed from different perspectives. It is viewed as the art of governance; public affairs; compromise and consensus; and as power and the distribution of resources. As per taking politics as governance, politics is primarily associated and related with the art of government and the activities of the state whereas if it viewed as public life, it is primarily concerned with the conduct and management of community affairs. Besides, politics as conflict resolution is concerned with the expression and resolution of conflicts through compromise, conciliation, negotiation and other strategies. Last but not least politics as

power is the process through which the production, distribution and use of scarce resources is determined in all areas of social existence.<sup>13</sup>

Thus, politics can be defined as "a process by which groups of people make decisions. It consists of social relations involving authority or power and refers to the regulation of a political unit, and to the methods and tactics used to formulate and apply policy".<sup>14</sup> While dispensation means "a system of order, government, or organization of a nation and community, especially as existing at a particular time".<sup>15</sup> Hence political dispensation means political system that has control over people's lives at a particular time.

#### Application of *al-Maṣlaḥah al-Mursalah* in Politics during Early Islamic Era

After the death of Prophet Muhammad, the companions started applying *al-Maṣlaḥah al-Mursalah*. The application is clearly discernible in the practices of the four rightly guided Caliphs who engaged in *'ijtihad* to ensure a common ground between public interest and Islam. During reign of Caliph 'Abu Bakr, first of compilation of the Qur'an was made following 'Umar al-Khattab's suggestion. Reason for the suggestion was the death of many Qur'an memorizers who fell during the Battle of al-Yamamah. But Caliph 'Abu Bakr who first objected fearing accusation of introducing an innovation later approved the suggestion in order to ensure preservation of the Qur'an; and so that succeeding generations of Muslims can have access to the complete Quran.<sup>16</sup> Thus the policy of compiling the Qur'an was done in consideration for public interest (*al-Maṣlaḥah al-Mursalah*).

Furthermore, 'Abu Bakr nomination of 'Umar al-Khattab as his successor which was contrary to the Prophet's practice is another policy making done in consideration for public interest (*al-Maṣlaḥah al-Mursalah*) as the rationale behind 'Abu Bakr's action was to hand-over power to a trusted leader and save the young Muslim community from disharmony and chaos; and to forestall a repeat of the confusion that the *'Ummah* was thrown into following the death of Prophet Muhammad. Besides, if a repeat of such were allowed, it could afford enemies the opportunity to infiltrate the ranks and files of the Muslim *'Ummah* and cause further confusion and problems to take control of the Muslims.

Declaration of war against the apostates during the reign of caliph 'Abu Bakr was another policy taken in consideration for public interest (*al-Maṣlaḥah al-Mursalah*). Indeed, reason for declaring the war differed from reasons for which the Prophet declared war which was to defend Islam against the onslaught of unbelievers who were not Muslims. In the case of the war declared by Abu Bakr, it was against 'Muslim' who had refused to pay the legal alms (*zakat*). Whereas the Qur'an clearly states valid reasons for which a soul could be killed without clearly mentioning refusal to pay *zakat* by 'Muslims', caliph 'Abu Bakr considered refusal to pay *zakat* as breach of the law prescribed by Almighty God.<sup>17</sup> And, had he not in consideration for public interest (*al-Maṣlaḥah al-Mursalah*)

declared the war, the number of apostates and their activities would have ceaselessly increased with resultant detrimental effects on Islam and the nascent Muslim community.

During the caliphate of ʿUmar al-Khattab, the lifting of the fixed penalties (*ḥadd*) for theft, legalisation of the retaliatory punishment (*qiṣāṣ*) on group of murders and establishment of prison are also other well-known decisions taken by the Caliph in consideration of public interest. On the issue of theft, Allah has declared that “the man and woman who steals should have his or her hands cut off in requital for what they have done to serve as a deterrent ordained by God” (*Surah al-Maidah:38*). The *ḥadd* punishment of amputation of hand was however waved by caliph ʿUmar for a theft committed during a year of famine when some slaves of Ḥāṭib bn Abī Baltaʿah stole a camel, slaughtered and ate it. When they were brought before the Caliph, he did not order amputation of their hands; rather, he ordered the master to pay double price of camel to its owner because he made the slave starve.<sup>18</sup> In another instance, Caliph ʿUmar and ʿAli, amputation of hand was waved for someone who stole from the the *Bayt al-Mal* on the ground that he/she has portion in that public fund.<sup>19</sup> The reason is to avoid acting unjustly towards citizens due to natural disaster and mistakes done not rooted from the wrong-doer himself.

As for the retaliatory punishment for murder, the *ḥadd* as ordered by Allah is death sentence. That is, a soul for a soul (*Surah al-Maidah: 45*). But where a group of people commit murder and kill a soul, killing only one soul instead will be against natural justice, hence ʿUmar ruled in consideration for public interest that each individual making up the group of murderers is subject to the retaliatory punishment known as *qiṣāṣ* as opposed to the clear ruling of *qisas* in the Qurʾan that says: “a soul for a soul” (*Surah al-Maidah: 45*).

Caliph ʿUthman ibn ʿAffan had ordered the compilation and distribution of the verified version of the Holy Qurʾan and the burning of all other versions of the Holy Book.<sup>20</sup> The rationale behind his action was to avoid confusions and discrepancies in the reading and understanding of the revelation which ultimately could have brought disunity in the *ʿUmmah*. The standardisation of the Qurʾan had no obvious basis in the *Shariʿah* and it was considered as *al-bidʿah al-hasanah* which can be understood as to have been done for public interests.

In the same token, ʿUthman legitimised the right to inheritance of a woman who had been divorced by her husband who actually declared the divorce with the intention of depriving her rights of inheritance.<sup>21</sup> The expansion of prophet’s Mosque was another decision taken by ʿUthman based on *al-Maṣlahah al-Mursalah*.

The last of four rightly guided caliphs, ʿAli b. ʿAbi Talib also applied the *al-Maṣlahah al-Mursalah*. For instance, he once decreed that the insurance or warranty of goods (*tadmin al-sunnāʾ*) was valid so that craftsmen and merchants would be more responsible for the safety of the merchandise who put their trust to them. Besides, they realize that they had

to compensate the owners for any loss or damage. The caliph believes that “*lā yuṣliḥu al-nās ’illā dhāk*”<sup>22</sup> (only with this measure the people would be righteous) by taking all necessary actions to protect people’s good.

To sum up, it is undeniable that the companions also agreed on the usage of *al-Maṣlahah-Mursalah*. Through *’ijtiḥad*, they have made their decision to do or not do something due to public interest and to protect the Islamic teaching. Similarly, the rationality of their decisions was based on the primary sources of Islamic law which are the Qur’an and *Sunnah*.

### **Importance of *Maṣlahah Mursalah* in Politics**

As earlier asserted, *Maṣlahah* consists of considerations which secure a benefit for the community or prevent harm from them. By making *Maṣlahah* as the basis for determining the law will depict the spirit for which the Islamic law is meant. Muslim scholars believe that Islamic laws are established for the benefit of mankind. According to majority of Hanafi, Maliki and Hanbali scholars, they claimed that *Maṣlahah Mursalah* is considered as a legal source that could allow the law to be changed according to the change in the circumstance in as much there is no direct contradiction with the explicit texts.<sup>23</sup> This is because they believed that life is a continuum and ever changing. Thus, if *Shari’ah* does not adopt and adapt to *Maṣlahah* at a given time, the society will be in total chaos. That is why *Maṣlahah Mursalah* also changes from time to time and vary from one society to the other. Besides, the ‘*Ulama*’ (scholars) of ‘*Usul*’ have agreed that *Maṣlahah Mursalah* is not a proof in respect of devotional matters (‘*Ibadat*’) and in respect to specific *Shari’ah* injunctions like shares of inheritance. However, the majority of them maintain that *Maṣlahah Mursalah* is a proper ground for legislation.<sup>24</sup> For example, during the time of companions, they decided to issue currency; to establish prison and to impose *Kharāj* (agricultural land tax) to achieve *Maṣlahah*.<sup>25</sup>

In Islam, government duties are not limited and restricted to certain areas only such as maintaining internal security and defending the country from foreign attacks. It is not even as understood by some economic ideologies as protection and securing wealth or property of the rich from the harassment and disruption of the poor. In fact, the role of government, in the understanding of Islam, on its subjects extends to cover all matters and implementations that can bring about *Maṣlahah* to the society at large. Any decision making that is executed by the government needs to consider public interest that relates to individuals, society and the government in general. This indicates that legislating a rule on the ground of *Maṣlahah* must consider the benefit to the largest possible number of people. This is because the whole concept of *Maṣlahah* is meant to secure welfare of people and not to specific people only. By doing this, the government is able to eliminate and avoid injustice from occurrence, uphold justice among humans, avoid damage, disputes and quarrels that could destruct the society.<sup>26</sup> The practice of Muslim leadership in the past as vividly depicted above confirms consideration of *Maṣlahah* in political

dispensation. This is further buttressed by Shah Abdul Manan who also cited some of the examples given above.<sup>27</sup>

Appointing leader in Islam is a paramount task as God says in the Qur'an "And We appointed, from among them, leaders, giving guidance under our command, so long as they persevered with patience and continued to have faith in Our Signs."<sup>28</sup> The verse indicates that leadership in Islam is surely required and it is significant in order to live in systematic and organized ways. Thus, *Maṣlaḥah* could be achieved if the best leader is selected or chosen to govern the state in order to protect, maintain and develop the society.

The duty of choosing leader will subsume creating a more organised and peaceful society. Hence, in order to preserve a peaceful society and environment, there will be some law that are not directly based on Qur'an and *Sunnah* and the validation or otherwise of such law is not mentioned in the texts. To this effect, the role of *Maṣlaḥah Mursalah* becomes apparent.

#### **Benefits of *Maṣlaḥah Mursalah* to Individual, Society and Government**

The needs of government today are quite different from the needs of government in the past. That is because with advancement and various changes being witnessed on daily basis, new policies and laws are made by the government to cater for the ever advancing and changing society. The truth is that many of such policies are not directly based on the Qur'an, *Hadith*, *'Ijmā'* (Consensus), *Qiyās* (analogy) or the views of *mujtahidūn* (legal experts).<sup>29</sup> This happens because the people's needs in every age vary widely. Sticking rigidly to a regulation of the past without looking at the reality, *Maṣlaḥah* and needs of people in this era will put the people in hardship and difficulties to manage their affairs. Thus, by applying the principles of *Maṣlaḥah*, Islamic law could go through the development of civilization, either through the observation of the various laws that have been established or created in the past and re-examining them in light of the present situation.<sup>30</sup>

In this regard, *Maṣlaḥah* can guarantee the rights of all citizens regardless of their tribes, religion and gender. As justice is fairness, *Maṣlaḥah* as one source of Islamic law ensures fairness to all and sundry. With sense of fairness and equality of *Maṣlaḥah*, things are balanced without bias or injustice, and without favouring a section against the other.

Vivid example of the sense of fairness which could be adapted and utilizes by the modern day Islamic governments could be seen in the Prophet's administration of the Islamic state in Madinah. At the beginning of the establishment of the Islamic state, Prophet Muhammad gave freedom to non-Muslims to manage their religious affairs independently. When the rule of Islam is stronger, the need to establish diplomatic relations with non-Muslims sparked new legislation that led to payment of *jizyah*. In order to achieve *Maṣlaḥah*, the legislation makes the status of non-Muslims as *dhimmi*s

and obliged them to pay taxes to the government and in return, the government would protect as well as provide them a peaceful and harmonious place to live.

Ensuring the welfare of the general public also is one of the benefits that can be derived through the exploration of *Maṣlaḥah Mursalah* in politics. The welfare of the people should be given special attention so as to preserve and maintain a harmonious and prosperous society.<sup>31</sup> Whereas, the neglect of people's welfare by any government could lead to chaos and dissatisfaction among the people who feel that their rights were not being guaranteed and safeguarded; the citizens of a country whose rights are guaranteed and safeguarded by the government will feel grateful and proud of the administration. In a nutshell, if politics is government's actions aimed at maintaining the stability of a state through promoting public interest, then *al-Maṣlaḥah al-Mursalah* has vital roles plays in politics.

### Application of *Maṣlaḥah Mursalah* in Political Dispensation: Malaysia Experience

Malaysia is at times categorized erroneously as Islamic nation. Malaysia could best be described as a Muslim nation because of the overwhelming population of Muslims. Compared to their counterparts, Malaysia as a country does not implement full *Shari'ah* as its primary law. Only certain aspects of the *Shari'ah* have been adopted such as marriage law, inheritance law etc.; although, public interest is highly promoted and widely considered by the Malaysian government in policy-making and in discharging its responsibilities towards the Malaysian citizenry. This has largely helped to maintain peace, harmony, stability and sustainable growth in the state.

Hallmarks of *Maṣlaḥah Mursalah* can be seen in Malaysian policy in dealing with novel issues on family affairs. In Malaysia, *faraq* (zic) has been recognised in cancellation of marriage. *Faraq* means dissolution of marriage not through divorce.<sup>32</sup> It differs from normal divorce in Islamic law as the divorce occurs after valid marriage whereas *faraq* occurs because of errors in some element of marriage. Through the provisions of article 11 Administrative law Enactment no.17 Islamic family law (Federal Territory) Act 1984 section 11 provides that "A marriage shall be void unless all conditions necessary, according to *Hukum Syara'*, for the validity thereof are satisfied."<sup>33</sup> The difference between *faraq* and divorce is that the bride is not required to observe *'iddah* like divorced women would do. On the other hand, Johor imposed on the bride involving in *faraq* issue to observe *'iddah* just like divorced wife.<sup>34</sup> In *Maṣlaḥah al-Mursalah* view, the *'iddah* person will get living cost if the husband does not renew the marriage.<sup>35</sup>

Another feature of *Maṣlaḥah Mursalah* in Malaysia public policy is peaceful assembly. Peaceful assembly is a part of the political behaviour of citizens towards their government. The assembly or known as demonstration becomes common in modern era. This is because the people who involve in the demonstration do so to promote their interest and show their dissatisfaction on government actions. While there was nothing like peaceful demonstration during the early period of Islam, the Malaysian government



decides to allow it through Law of Malaysia act 736 Peaceful Assembly. Act 2012 clearly states that the action is allowed under several conditions.<sup>36</sup> Besides, it emphasized the right of people to organize and participate in the demonstration to promote their interest.<sup>37</sup> People who are participating in the demonstration should not provoke the security agency and should not act over their limit. In *al-Maṣlahah al-Mursalah* view, the approval of peaceful demonstration is a kind of promoting public interest and right of expression of feeling.

Another sensational case of *maṣlahah* in Malaysia is the issue of pronouncement of *kalimah Allah* by non-Muslim. In 2007, Ministry of Home Affairs (MOHA) instructed Catholic Weekly magazine in Sabah, the Herald Magazine to stop using the words: 'Allah', 'Baytullah', 'salat' and 'ka'bah' in their publication. This action has led them to file a claim over the restriction against MOHA. After several debates in the court, in June 2014, High Court of Malaysia ruled that Herald Church Magazine is not allowed to use the word Allah' and that the word 'Allah' is sacred and exclusively belongs to Muslims. The main purpose behind the restriction is to safeguard the *maṣlahah* of people itself especially the Muslim community. Even though Malaysia promotes religious tolerance, the application of this law is necessary since the Constitution of Malaysia states that Islam is the religion of the federation, and the ruling given by the High Court of Malaysia is in line to protect religion (*al-din*) and to avoid harms or dangers that may result from allowing non-Muslims to use the *kalimah*.

According to Jaclyn Neo, she opines that the word 'Allah' is a conception of Islam as ethnic identity which departs from the concept as a Universalist religion"<sup>38</sup> In self-criticism, it is true that Muslims and non-Muslims are eligible to utter the word 'Allah' in certain areas but such adoption should be discussed within professionals such as academics and scholars who are experts in comparative religion and related fields. If court permits the use of word 'Allah' in Christian publications, such could threaten the 'aqidah especially of those who come from lower religious background if they do not refer the materials to experts. Thus, the ruling that bans the use of the *kalimah* 'Allah' by non-Muslims in their books could be a good initiative in order to preserve the Din and protect it from any possible evil.

### Conclusion

This paper has presented the concept of *Maṣlahah Mursalah* in Islamic principles of Jurisprudence (*'uṣūl al-fiqh*) and its relevance to political science. It has shown that *Maṣlahah Mursalah* can be used to make new ruling in Islamic law for the betterment of the society as utilitarianism is used to cater for the public interest in the western political dispensation. It has been said that the divine law of Islam is meant to make life easy for mankind. While the laws in Islamic texts are not explicitly detailed or may not cover some novel issues in every period, one of the principles of Islamic law to be used to cater for such limitation is *Maṣlahah Mursalah*. The principle has been used during the early time of Islam though the term might not be pronounced.

In today political dispensation, Muslim countries can use this concept to establish justice, regulate affairs of their citizens, and legislate a meaningful and useful law to secure benefits for their society and prevent harms for them. However, caution must be exercised so that the benefits are not abused. Hence, conditions of *Maṣlaḥah* should be strictly adhered to. Firstly, the issues must be genuine and not impose any harm to the society. Secondly, the actions taken should give benefits to the society in general and not to only a section. Thirdly, it must not contradict the principle stated in *naṣṣ* or value established by *'ijmā'*. Lastly, it should be rational and prevent or remove harm.

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