

**APPRAISING *AL-MASLAHAH AL- MURSALAH* AS A SOURCE OF ISLAMIC LAW IN
JUDICIAL PROCEEDINGS UNDER THE MALIKI LAW**

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DECLARATION

I solemnly declare that the work in this Dissertation entitled **Apprising *Al-Maslaha aLMursala* as a Source o of Islamic Law in Judicial Proceedings Under the Maliki Law** has been performed me in the Depertment of Islamic Law. The information derived from literatures has been fully acknowledged in the text and the list of references provided. No part of this Dessertation was previously presented for another degree or diploma at this or other institution. .

Bashir SALE

Signature

Date

CERTIFICATION

This Dissertation entitled: “**APRISING AL-MASLAHA LLMURSALA AS A SOURCE OF ISLAMIC LAW IN JUDICIAL PROCEEDINGS UNDER THE MALIKI LAW**” by Bashir SALE meets the regulations governing the award of the degree of Master of Laws (L.L.M) at the Ahmadu Bello University, and is approved for its contribution to Knowledge and Literary presentation.

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DEDICATION

This research work is dedicated to my beloved mother, Aishatu Uthman of blessed memory for inculcating the sense of discipline in me. May Allah grant her *Jannatul Firdaus*.

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ABSTRACT

Al Maslahah al mursala is a Maslahah which is neither acknowledged nor rejected by the Law Giver. It is called (Mursalah) that is absolute or free from any restriction because it is not qualified or based on a specific Nass. al-Maslahah al-Mursalah can also be any benefit which can be inferred from the five purposes of Islamic Law, but they are neither directly acknowledged nor rejected by the Law Giver al-Maslah al-Mursalah is one of the sources of Islamic law recognized and applied by the Maliki School of law, Some Muslim jurists do not recognize al-Maslah al-Mursalah as a source of Islamic law that is why it is categorized as one of the disputed source of Islamic law. The Maliki school is the leading jurists in terms of the application of al-Maslah al-Mursalah, .This research work examines al-Maslah al-Mursalah as a source of Islamic law, position of al-Maslah al-Mursalah in Nigerian Legal System, Extent of powers of the Shari'ah court judges to practice Ijtihad while applying al-Maslah al-Mursalah and practical examples of the application of al-Maslah al-Mursalah in judicial proceedings was discussed in this research, it was observed that the Sahabah , the Tabi'un and their followers applied al-Maslahah al-Mursalah in most of their Fatawa and adjudication due to its importance in dealing with new issues that might have come during their time, though they did not give it the nomenclature "al-Maslah al-Mursalah" but a careful look at what they did clearly shows that their verdicts were based on the concept known today as al-Maslahah al-Mursalah..It was also observed that the suspension of hadd punishment for theft by caliph Umar due to famine based on Maslaha gives rise to the development of somany principles of Islamic law such as Aldharurat tabihu It was recommended that the present Ulama should imitate the Sahabah , the Tabi'un and their followers in basing their fatawa on matters that are not specifically sanctioned or covered by a specific Nass by applying the Al-Maslahah al-Mursalah It is also recommended that the judges should use Maslaha Murdala to develop ptinciple of Islamic law that will take care of the emergine issues that are brought before them. .

GLOSSARY

<i>Al-madh'hab</i>	Method followed by a particular jurist to do <i>Ijtihad</i>
<i>Da'awa</i>	Claim
<i>Al-Dharuriyya</i>	Necessaries
<i>Diyya</i>	Blood money
<i>Hadd</i>	Fixed punishable offence
<i>Hadith</i>	Prophetic tradition
<i>Hajiyyat</i>	Equitable needs
<i>Hukm</i>	Legal position
<i>Ijtihad</i>	Exertion of one's understanding to arrive at an opinion
<i>Kadi</i>	Shari'ah court Judge
<i>Al-Mafsadah</i>	Harmful or injurious
<i>Malik school</i>	Islamic school of thought lead by Imam Malik bin Anas
<i>Al-Mash'hur</i>	Popular view
<i>Mulgha</i>	Rejected
<i>Maslahah</i>	<i>Public interest</i>
<i>Muslim ummah</i>	Muslim community
<i>Al-Mu'utabirah</i>	Recognized
<i>Nass</i>	Textual authority
<i>Qisas</i>	Law of equality
<i>al-Qiyas</i>	Analogy
<i>Al-Qur'an</i>	Book of Allah revealed to the Prophet Muhammad (S.A.W.)
<i>Al-Sahabah</i>	Companions of the Prophet (S.AW)
<i>al-Shari'ah</i>	Islamic law
<i>Al- Taazir</i>	Discretionary punishment
<i>Al-Tabi'un</i>	Successors of the Companions of the Prophet (S.A..W.)
<i>Al-waqi'I</i>	New issue
<i>Tahsiniyyat</i>	Complementary
<i>Sunni schools</i>	Hanafi, Maliki, Shafii and Hambali Schools
<i>Zina</i>	Adultery or fornication

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LIST OF ABBREVIATIONS

(C.V)	Civil
(K.N)	Kano
(M.K.D)	Makoda
(No.)	Number
(R.A)	Radiyallhu ‘anhu
(S.Q.L.R)	Shari’a Quately Law Report
(S.W.A)	Salallahu Alaihi Wa sallam
(S.W.T)	Subhanahu wa Taala
(V.S)	Varsus

LIST OF STATUTES

- 1) Constitution of the Federal Republic of Nigeria 1999 (as Amended) Cap C23, Laws of the Federation of Nigeria 2004)
- 2) The law to Establish Sharia Courts in Jigawa State (2001)
- 3) Kano State Sharia Courts Laws (2000)

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background of the study

Al-Maslahah al-Mursalah is a method employed by the jurists and Islamic scholars in dealing with new issue (*al-waqi'ah*) not sanctioned by Allah or His Apostle on its face value, while at the same time not indicating that such an issue is unacceptable in the context of the *Shari'ah*¹

Al-Maslahah al-Mursalah as a legal concept is also known as *al-istislah*, that is, public interest or social welfare, which has been decided upon so as to serve the public interest or social welfare of the *Muslim Ummah*²

As an important principle of the *Shari'ah*, *al-Maslahah al-Mursalah* is capable of legitimizing new developments thoughts and institutions, the adoption of which is designed to promote the public interest and the welfare of the *Muslim Ummah* by securing for them some advantages and averting injury from them.³

The *Maqasid* is the plural form of *maqsid* which means the (intents or purposes of *al-Shari'a*) which is to ensure the well being of Mankind, In other words, *Maqsid* comes to promote public interest and social welfare of the Muslim community by providing anything beneficial to them, keeping them in a good state of affairs, and protecting them against any harmful or injurious situation or event.⁴ The public interest and welfare of mankind is endless and flexible, same changes with the change of time and environment, a particular state of affairs may be considered to be the best interest of the public in one community, and harmful or injurious in another

¹ Salih, S.M. (2010), *Usul-aF fiqh al-Islami: A Brief and concise Approach to Understanding Islamic Jurisprudence*, Essam International Nigeria Ltd, Ikeja, Lagos. P.10

² Dauda, A. (2005), *An Introduction to Shari'ah*, Benchmark Publishers Limited, Kano, p. 134.

³ Ibid.

⁴ Khallaf, A. (2002), *Ilm Usul Al fiqh*, Dar Al hadith Publishers, Alqahira, p.93.

community. Also a particular state of affairs may serve the public interest and social welfare in one time and be harmful or injurious in another time within the same community.⁵

The concept of *al-Maslahah al-Mursalah* is recognized and regarded as a source of Islamic law by the Muslim jurists such as Maliki School because it intends to further enforce the *Maqasid al-Shari'a* in eradicating injustice and making life comfortable and smooth for mankind.⁶

The courts of law may be faced with new issues on which there is no specific sanction by Allah or His Apostle (S.A.W) on their face value, but, never the less, they require judicial pronouncement sanctioning them, hence the need for *Shari'a* Court Judges to understand this concept very well and apply same accordingly, therefore the court should not be striking out cases or matters for the simple reason that such matters have not been covered by a specific *Nass*.

This research also intends to discuss the relevance of *al-Maslahah al-Mursalah* in judicial adjudication under the Maliki School of law. It is needless to say that the limit of this research does not give room for the comprehensive discussion on the generality of the sources of Islamic law and as such, this research focuses on *al-Maslahah al-Mursalah* as a source of Islamic law and its relevance in judicial proceedings under the Maliki School of law.

1.2 Statement of the Problem

Some Shari'a Court judges in Nigeria restrict themselves to application of specific texts while determining cases that are brought before them. Sometimes cases that are not sanctioned by a specific text are brought to them and, instead of determining those cases based on public interest

⁵ Ibid

⁶ Salih, S.M. (2010), *Opcit* p.101.

(*al-Maslahah*) they claim to be “*Muqallidun*” (i.e followers, not eligible to practice independent reasoning) and refuse to determine those cases in line with *Maslahah*.

Some judges also apply texts strictly while determining cases before them without considering the *Maslahah* behind such application on a particular person in a particular time or circumstance.

The judges who understand the concept of the *Maslahah Mursalah* sometimes find it difficult to apply same if the matter borders on *Ta'azir* punishment because there is no legislation to that effect, and the position of law in Nigeria is clear in this respect, that a person can only be punished if the offence he has committed is contained in a written statute and the punishment also contained thereat. The legislators in the Sharia State also do not consider *al-Maslahah al-Mursalah* while making their laws.

1.3 Aim and Objectives of the Research

The aim of the research is to study, analyze and examine *al-Maslahah al-Mursalah* as a source of Islamic law under the Maliki principles.

The objectives of this research are as follows:

1. 3.1 To analyse the concept and dimensions of *al-Maslahah al-Mursalah*.
- 1.3.2 To determine the application of *al-Maslah al-Mursalah* in Nigerian courts.
- 1.3.3 To Examine the extent of the powers of the Shari'a Court judge to practice *al-Maslah al-Mursalah* as a form of *Ijtihad* ;
- 1.3.4 To analyse the application of *al-Maslahah al-Mursalah* in judicial adjudication under Maliki law.

1.4 Justification and Significance of The research

This research is geared towards studying, analyzing and examining *al-Maslahah al-Mursalah* as a source of Islamic Law and its relevance in matters of adjudication under the Maliki School of law.

The purpose of *al-Shari'a* is to promote *al-Maslahah*. therefore, it is the duty of judges to ensure that they employ *al-Maslahah* while determining cases that are brought before them. they should also consider *al-Maslahah* while applying the *Nusus al-Shar'iyah* on a particular person, time and circumstance, this can only be achieved if they understand the concept of *al-Maslahah* very well. It is on this premise this search is intended to be carried out. This work is further justified in the sense that the realization of justice can only come about when the law is applied alongside with the equitable principles to which *Maslahah* pertains

1.5 Scope of the Research

The research focuses on examination of *al-Maslah al-Mursalah* as a source of Islamic law and its relevance in matters of adjudication under the Maliki School of law. However, recourse may be had to other schools of law and other sources of Islamic law for the purpose of clarification and comparison, therefore this research is limited to discussion of *al-Maslah al-Mursalah under the Maliki School of law..*

1.6 Research Method

In carrying out this research a study of authoritative texts by learned Muslim Jurists on the topic was resorted to, journals and articles written on the topic were also be resorted to as such, the research is doctrinal.

1.7 Literature Review

There exists a lot of literature on sources of Islamic law, but this research work seeks to discuss the relevance of *al-Maslahah al-Mursalah* in adjudication specifically under the Maliki School of law. For instance:

The renowned scholar Muhammad Abu Zahrah⁷ wrote a book entitled “*Usul al-Fiqh*” the book was written in Arabic, and is a very good material for the researchers of Islamic jurisprudence, it discusses the sources of Islamic law in an explicit manner he discussed *Qur’an* its revelation in piece meal and wisdom behind that, relationship between *al-Qur’an* and *al-Sunnah*. Classification of *Sunnah*, conditions for the acceptability of *Sunnah* position of *Sunnah*. The author also discussed *Ijma*. Essential element of *ijma* and classification of *ijma al-Qiyas* essential element of *al-Qiyas*, *al-Urf al-Maslah al-Mursalah Istishab* and *Istihsan*. However, this research will pay attention on the practical application of *al-Maslahah al-Mursalah* in matters of adjudication.

Salih, S.M.⁸ wrote his book in 2010, entitled *Usul – al – Fiqh – al Islami, a brief and Concise Approach to Understanding Islamic Jurisprudence*. In the course of writing this book the author was able to conduct a very good research wherein he dealt with sources of Islamic law exhaustively. He discussed the guidelines in the interpretation of the Holy *Qur’an* development of the madhhaba History of *usu al Fiqh al islam* The *Sunnah* of the prophet (S.A.W) *al -Ijma al- Istihsan al- Istislah al- al-Urf* and *al- Maqasid* However, the author did not discuss the relevance of *al-Maslah al-Mursalah* judicial proceedings which is the intent of the present research work.

⁷ Abu Zahra, M.A. (N.D) *Usul ai fiqh*, Dar al-Fikr p. 21

⁸ Salih S.M. (2010), *Op cit*, P.101

Khallaf A.⁹ wrote a book entitled “*Ilm-Usul-al-Fiqh*”. The book was written in Arabic, and the author conducted an extensive research on *Usul al-Fiqh* and discussed sources of Islamic law extensively in chapter one wherein he discussed *al-Qur’an al Sunnah al Ijma al-Qiyas al-Istihsan, al- al-Maslah al-Mursalah al-‘Urf* , but the book fell short of discussing the application of *al-Maslah al-Mursalah* in adjudication which is the focus of this research work.

Dauda A.¹⁰ wrote a book entitled “An Introduction to *Al-Shari’a*” wherein he discussed *Al-Shari’a* in general but in a brief manner wherein he discussed sources of *al-Shari’a* in a concise form. For instance, he discussed *al-Maslahah al-Mursalah* in less than ten lines, and the book did not discuss the relevance of *al-Maslahah al-Mursalah* in adjudication which is the aim of the present research work.

Doi A.¹¹ wrote a book in 1984 entitled *Shari’ah; the Islamic Law*, in which he discussed the sources of Islamic law in Chapter Two, Three and Four but throughout his discussion in that book, the author did not discuss the relevance of *al-Maslahah al-Mursalah* in matters of adjudication..

Al-Khadimy. N¹² wrote a book entitled *al -Maslah al-Mursalah, Haqiqatuha Wa Dawabituha*. The book was written in Arabic and the author discussed *Maslahah al Mursala* but the book falls short of discussing the relevance of *al-Maslah al-Mursalah* in adjudication which is the intent of the present research work.

⁹ Khallaf A. (2002), Op cit

¹⁰ Dauda A. (2010), Op cit, Ipss.

¹¹ Doi A.I *Shari’a the Islamic law*. AS Noordeen publishers, Kuala Lumpur Malaysia

¹² al -Khadimy N. (1998), *AlMaslaha Murrsala Haqiqatuha Wadhawabiduha*, Daru bin Hazm Bairut

Al-khudhiry M.¹³ wrote a book entitled *Usul al-Fiqh* in 1998 wherein he discussed exhaustively the sources of Islamic law, but failed to discuss the relevance of *al-Maslahah al-Mursalah* in Adjudication under the Maliki School of law which is the intend of this research work.

Al-Gazali A.H. wrote a book entitled “*al-Mustaspha Min Ilm al- Usul*, the book was written in Arabic and is a very good material for the researchers of Islamic jurisprudence and discussed *al-Maslah al-Mursalah* in details¹⁴ but the book did not provide the applicability of *al-Maslahah al-Mursalah* in matters of adjudication

al-kafi, M.Y.¹⁵ wrote his book “*Ihkam al- Ahkam ala Tuhfatul Hukkam*, the book is a commentary of *Tuhfatul al- Hukkam* which is a book of practice and procedure governing the adjudication under the Maliki School of law, Shari’a Court judges mostly rely on this book to determining cases before them. The book is a good material for this research but the book did not provide a specific chapter dealing with the application of *al-Maslah al-Mursalah* in a matter of adjudication.

Al Kashnawi, A.H.¹⁶ wrote a book *As halul mada rik Sharh Irshadussalik Fi Mazhab Imam Malik*, the book was written in Arabic and provide details explanation on practice and procedure governing the adjudication under the Maliki school, but the book did not discuss the application of *al-Maslahah al-Mursalah* in matters of adjudication.

From the above, it can be seen clearly that there are significant literature on the subject matter, but they all fell short of discussing and examining the relevance of *al-Maslah al-Mursalah* in

¹³ Akhudhiry.M , (1998), *Usul al-fiqh*, Darul Fikra

¹⁴ Gazali A.H. (2008), *Almustasfa min ilm al-usul*, Maktabah Al asariyya Bairuit vol, p. 481

¹⁵ Alkafy, M.Y. (2012), *Ihkamul Ahkam Ala Tuhfatil Hukkam*, Darul Fikr, Beirut, Lebanon.

¹⁶ Alkashnawy, A.H. (2003), *Ashalul Madarik*, Almaktabat al- Asriyya, Beirut, Lebanon.

judicial matters. This research work aims at discussing and examining the relevance of *al-Maslah al-Mrsalah* in judicial matters with particular reference to Maliki School of Law under the Nigerian Legal system. :

1.8 Organizational Layout

This research is divided into five chapters. Chapter one wuhch is the general introduction, the chapter consists of statement of the research problems, objectives, justification, scope, research method and literature review. Chapter two concept of *al-Maslah al-Maslahah* this chapter discusses *al-Maslah*, classification of *al-Maslah* based on its inner strength and its recognition. Chapter three discusses *al-Maslah al-Maslahah* as a source of Islamic Law, views of jurists on the application of *al-Maslah al-Maslahah* as a source of Islamic law and the authorities relied upon by them. Chapter four discusses relevance of *al-Maslah al-Maslahah* in judicial proceedings under this chapter a brief history of administration of justice in Islam was discussed, practical example of the application of *al-Maslah al-Maslahah* in judicial proceedings and its application in Nigerian court. Chapter five consists of summary, findings and recommendation.

CHAPTER TWO

CONCEPT OF AL-MASLAHAH

2.1 Introduction

Al-Maslahah al-Mursalah is a product of a larger doctrine of *Maslahah*, the larger doctrine will be discussed briefly so that would serve as a key or an introduction to *al-Maslahah al-Mursalah* which is the target of this research work.

2.1.1 Definition of *Maslahah*

Maslahah literally means, benefit, interest, utility or enjoyment ¹⁷

2.1.2 Technical meaning

Muslim jurists have defined *Maslahah* in several ways, for example;

Imam al-Ghazali defined *Maslahah* as a protection of the purposes of law and those purposes are five in number they are:

2. Protection of religion
3. Protection of lives
3. Protection of intellect
4. Protection of property
5. Protection of progeny

Anything that consists of the protection of those five interests is *Maslahah*, and anything that goes against them is *al-Mafsadah* (Harmful or injurious situation) and the prevention of *al-Mafsadah* is *Maslahah* ¹⁸.

Abdulkareem Bin Aliyu¹⁹ defines *Maslahah* as a benefit which Allah the most high provides to the people for the protection of their religion.their lives, their intellect their property and their

¹⁷ See lisan al'arab

¹⁸ al-Ghazali, A.H, (2008)Opcit, P. 481-

progeny. Anything that forms part of those five mentioned interests is called *Maslahah* and anything that goes against them is *al-Mafsadah* and the prevention of *al-Mafsadah* is *Maslahah*.²⁰

Mustpha Taib al- Bigha²¹ defined *Maslahah* as a (*Manfa'a*) benefits, enjoyment or anything that leads to it, and the prevention of hardship or anything that leads to it.²² This definition is in parimaterial with that of al Gazali.²³

From the foregoing definitions one can easily conclude that *Maslahah* is anything that provides benefit to the public whether the public identify it or not. The promotion of *Maslahah* is the main purpose of Islamic law. In line with the foregoing Ibn Farhun in his book says.²⁴

“Allah the most high made laws for wisdom some of which we may know while some we may not know that is done for the purpose of promoting public interest that is *Maslahah*”

2.2. Classification of *Maslahah*

Muslim jurists classified *Maslahah* in several ways, below are some of those classifications

Classification of *Maslahah* based on its inner strength and importance

Under this heading Muslim jurists classified *Maslahah* into three categories. they are as follows:

- a. *Maslahah Dharuriyyah* (necessaries)
- b. *Maslahah Hajiyyah* (Equitable needs)
- c. *Maslahah Tahsiniyyah* (complementary interests)²⁵

¹⁹ Abdulkareem bin Aliyu is a lecturer in the Department of Islamic Jurisprudence College of sharia, University of Muhammad Sa ud. Riyadh Saudi Arabia

²⁰ Aliyu B.A. (1999), *Al-muhazzab fi ilm usul alfigh al-muqaran* . Maktabah arrushd, Riyadh Saudi Arabia, vol3 p. 1003

²¹ Mustapha Daib al-bigha is a lecturer in the college of sharia Damuscuss University.

²² Al-bigha M,D (N.D)*Athar Adillah al Mukhtalifih*. Daar ima bukahri, Damuscuss, p. 29

²³ Al- Ghazali A,H.(2008) *Op cit* p.481

²⁴ Ibn Farhun. M. (2009), *Tabsiratul hukkam fi usul al-aqdhiya wa minhaj al-ahkam alqadas*, publishes, Vol. 2 p. 190

²⁵ al-Gazali, A.H. (2008) *Op cit*, p. 482

2/2.1 Maslahah Dharuriyyat

This *Maslahah* aims at protecting some interests necessary for the existence of human beings. The protection of those interests is the purpose of Islamic law. Where those interests are not protected, human existence will not be possible.

It is for the protection of those interests that Allah, the most High upholds for the protection of religion, life, intellect, progeny and property.²⁶

For the protection of religion the law of war was revealed, prohibition of apostasy, and punishment of those who invite people to engage in (*bid`a*) *havesies* in religion.

For the protection of life, the law of *Qisas* was revealed, payment of *diyya* in case of unintentional killing, the obligation of consuming prohibited foods and drinks for survival in case of desperation.²⁷ For the protection of progeny Islam prohibits *Zina* (adultery or fornication). In the same vain, Islam encourages marriage and provides rules governing the custody and maintenance of children.²⁸ For the protection of property, Islam prohibits theft, robbery, usurpation and any other means through which the property of others may be used or destroyed without their consent; similarlaly Islam encourages commercial activities and other lawful businesses. Islam also provides punishment for the breach of properties rights and the payment of compensation.²⁹

The protection of the five interests listed above is necessary, just as the punishment for going against them is. It is impossible for any law or religion that wants to promote the interest of people to pay no attention in protecting those interests, that is why the religion of Allah right

²⁶ Aliyu, B.A.. (1999) *op cit*, p. 1004

²⁷ *Ibid*

²⁸ Al-bigha M.D (N.D)*opcit*, P. 30

²⁹ *Ibid*

from the first Prophet to the last Prophet (P.B.U.H) prohibits apostasy, Murder, adultery, theft, and taking wine.³⁰

It should be noted that Ibn Farhun in his book *Tabsiratul-Hukkam* added one more interest which must be recognized and protected that is “protection of human dignity”³¹ he went ahead to support his view with Qur`anic verse which says:

“Those who made false allegation against a chaste women and produce not four witnesses give them eighty lashes³²

From the forgoing it is clear that the interests which must be protected are six according to Ibn Farhun. The protection of each of those interests is necessary because anyone of them forms an integral part of human existence.

2.2.2 *Maslahah Hajiyyat*- (Equitable needs)

This is an interest which the life does not depend on it, in other words supporting needs are those interests without which the life can still continue but with some difficulties. *Masalih Hajiyyat* are the activities approved by Law Giver for the equitable needs of human life and to do away with difficulties and hardship.³³

The *Hajiyyat* are required for the smooth operation and implementation of the necessary interests, and where those supporting needs are not protected, there would be a hardship in the performance of social and religious functions.

Examples of equitable needs can be found in an act of worship where a traveler is exempted from observing fasting during the journey and concession given to a sick person during the

³⁰ Al-Ghazali A.H. (2008) *op cit*, P. 483

³¹ Ibn Farhun M. (2009), *op cit*, vol. 2 P191

³² Al-Qur`an 24 v 4

³³ Al-Ghazali A.H. (2008) *op cit*, P. 485

period of his sickness.³⁴ Thus observance of fasting during the journey will only cause hardship to such a traveler, therefore the equitable need comes in to ease such hardship and difficulties.

Another example can be found in the requirement of *wali* (marriage guardian) to give out a little girl who does not reach the age of puberty in marriage to a person of her equal and the dowry of her equal.³⁵

2.2.3 *Maslahah Tahsiniyyat* (complementary interests)

These are the interests without which life can still continue without much difficulty or hardship, but these interests come to complement the two interests discussed above that is necessities and equitable needs³⁶

Example of *Maslahah Tahsiniyyat* can be found in the rules governing the (*Kafa`a*) equality in marriage that is the husband and wife should be equal to each other in terms of everything. Also the Islamic ethic of taking foods and drinks with a right hand forms part of *Maslahah Tahsiniyyat* complementary needs³⁷

2.3 Classification of *Maslahah* based on its recognition.

This is another classification of *Maslahah* based on its recognition by the Law Giver or otherwise. Below is the explanation of this type of *Maslahah*.

2.3.1 *Maslahah mu`utabira* (Recognised)

This is a *Maslahah* recognized and approved by the Law Giver, the basis of this type of *Maslahah* is an analogy (*al-Qiyas*) for example where the Law Giver provides or states a position of a particular case, the *mujtahid* will look into the cause (*'illah*) of that declaration or

³⁴ Aliyu B.A. (1999) opcit, p. 1005

³⁵ Al- Ghazali A.H. (2008) opcit vol. p.484

³⁶ ibid. P 485

³⁷ AL-bigh M.D. (ND), opcit P 31

decision and where such (*'illah*) is found in another case the *mujtahid* will apply the same ruling as declared in the first case because the *Maslahah* is the same.³⁸

Jurists cite the following Prophetic *Hadith* as an example; “The judge shall not decide between two parties while he is angry”

In this case, the judge is ordered not make any decision while he is angry, the cause or (*'illah*) in this case is that he cannot think rationally and understand the arguments canvassed by both parties and their submissions because of the change of his mood. By way of analogy, Muslim jurists have held that anything that will deprive the judge from thinking rationally will be given the same ruling (*hukm*), for instance, when the judge is hungry. In this *hukm* there is a clear *Maslahah* to both parties.³⁹ The *Maslahah* provided by this *Qiyas* is called *Maslahah mu`utabira*, acknowledged by the Law Giver.

2.3.2 Maslahah Mulgha (Rejected)

This is a *Maslahah* declared by the Law Giver as rejected; all Muslim jurists are of the view that this type of *Maslahah* cannot be used.⁴⁰

Where Allah the Most High decides over a particular issue or event and some people decide otherwise thinking that their decision will serve the interest of public better than the decision of Allah the most high, their decision is called *Maslahah Mulgha*(rejected) because it goes against the intendment of Almighty Allah.

For example the idea of giving male and female children of a deceased person equal share while distributing the estate of their deceased parent, this type of *Maslahah* is rejected because it is in conflict with the *Qur'an* ic verse which says;

³⁸ Aliyu B. A.(1999) opcit, p. 1007

³⁹ Ibid

⁴⁰ Al-bigha M.D. opcit, P. 33

“Male child is entitled to double share of female child⁴¹

From the foregoing it is cleared that *al-Maslahah* based on its inner strength is divided into three that is *al-Maslahah Dharuriyat*, *al Maslahah Hajiyyat* and *al-Maslahah Tahsiniyyat*. While on the other hand *al-Maslahah* based on its recognition is divided into three that is *al-Maslahah Mu'tabira* (acknowledged), *al-Maslahah Mulgha* (rejected) and *al-Maslahah al-Mursala* (free). *Al-Maslahah al-Mursala* will be discussed in the next chapter.

⁴¹ Q 4 v 11

CHAPTER THREE

AI MASLAHA AL MURSALA AS A SOURCE OF ISLAMIC LAW

3.1 Introduction

Muslim Jurists classified sources of Islamic law into two that is agreed and disputed sources of Islamic law. Agreed sources of Islamic law are *al- Qur'an* and *Sunnah* while the disputed sources of Islamic law includes *al- Qiyas* , *al- Istihsa* , *al- Istishab*, *Sad al-Zaria* *al-Urf* *al-Mursalah* *al-Mursalah*. This chapter discusses *al-Mursalah* *al-Mursalah* as a source of Islamic law.

3.2 *Al-Maslahah al-Mursalah*

Al Maslahah al mursala is a *Maslahah* which is neither acknowledged nor rejected by the Law Giver. It is called (*Mursalah*) that is absolute or free from any restriction because it is not qualified or based on a specific *Nass*..⁴² *al-Maslahah al-Mursalah* can also be defined as any benefit which can be inferred from the five purposes of Islamic Law, but they are neither directly acknowledged nor rejected by the Law Giver.⁴³ Some jurists are of the view that *al-Maslahah al-Mursalah* has been given such description so as to distinguish it from *al-Qiyas* , because *al-Qiyas* requires a specific *Nass* upon which it will be based but *Maslahah murshala* does not require a specific *Nass* in fact it falls between *Maslahah* recognised and the *Maslahah* rejected.⁴⁴

Muslim jurists classified sources of Islamic law into two; that is agreed and disputed sources of law *al-Maslahah al-Mursalah* falls within the disputed sources of Islamic law. The doctrine of *al-Maslahah al-Mursalah* comes to do away with or rather mitigate the hardship that may affect

⁴² Khallaf A. (2002), *Opcit*, p 93

⁴³ Aliyu B.A (1999) *Opt cit* ,V3,p 1003

⁴⁴ Abbasi N (2008) *Ijtihad Al-istislahee*. Daar Bin Hazm, Bairut, p. 112

the Muslim *Ummah* while conducting their day to day activities, this is in line with the following *Qur'anic* verses;

1. "Allah intends for you ease, and does not intend to things difficult for you ..."⁴⁵
2. "...And He has not laid upon you in religion any hardship..."⁴⁶

Unlike the perception of some scholars *al-Maslahah al-Mursalah* can be used even if there is a specific *Nass* on a particular matter the *Mujtahid* can embark on *Ijtihad* to determine the application of that *Nass* in a particular circumstance or situation, bearing in mind the purpose of Islamic law, this is in line with the practice of Caliph Umar (R.A) wherein he suspended the application and execution of *Hadd* punishment for theft in the year of starvation ('*Am- al- maja*')⁴⁷

Another example of this nature can be seen in relation to those entitled to be given *Zakat*, One of them is (*Muallafatu qulubuhum*) to attract the heart of those who have been inclined towards Islam. When Islam developed and the Islamic territory expanded Caliph Umar (R.A) canceled the share of *Muallafatu Qulubuhum* and applied such portion to enhance the welfare of Muslim *Ummah* on the basis that the purpose of giving share to *Muallafatu Qulubuhum* was over⁴⁸

Caliph Umar (R.A.) also approved three divorce pronouncements in one utterance as three, contrary to what was obtainable during the lifetime of the Prophet (S. A.W) and Caliph Abubakr (R.A.),⁴⁹ On this point Shaikhul Islam Ibn Taimiyyah (R.A) reported to have said Caliph Umar approved three divorce in one pronouncement as three so that people should not be

⁴⁵ *Al-Qur'an* 21 v 178

⁴⁶ *Qura'n* 2 verse

⁴⁷ Abdullahi S. (2006) *al-Madkhal ila ilmil fiqh*, Maktabat Malik Fahad, Riyadh p.98

⁴⁸ *ibid*

⁴⁹ *ibid*

reckless with divorce, had it been people did not change he would have left them on the same position obtainable during the time of the Prophet (S.A.W.).⁵⁰

Application of *al-Maslahah al-Mursalah* where there is a specific *Nass* on the issue is not only restricted to *Maslahah Daruriyyat* but also in the *Hajiyyat*, for instance it is prohibited for a man to inspect the private part of a woman, but it will be lawful for a doctor to inspect the private part of a woman with a view to discovering or ascertaining the nature of her sickness.⁵¹

3.3 Scope of the application of *al-Maslahah al-Mursalah*

Maslahah Mursala can only be applied in matters that has to do with *mu`amalat* and customs because these are the only areas in which *Ijtihad* is allowed, therefore *al-Maslah al-Mursalah* cannot be used or applied in matters that have to do with *Ibadat*⁵²

3.4 Position of *al-Maslahah al-Mursalah*

Muslim jurists classified sources of Islamic Law into two, that is agreed and disputed sources of Islamic Law *al-Maslah al-Mursalah* falls within the disputed sources of Islamic Law.

Muslim jurists have held different opinions as to whether *Maslahaha Mursala* can be used or regarded as a source of Islamic law. There seems to be two major views on this point.

a) Those who support the application of *al-Maslahah al-Mursalah* as a source of law.

Imam Malik is the head or leader of those who support the application of *al-Maslah al-Mursalah* and consider same as a source of Islamic law followed by Imam Ahmad and other jurists.

⁵⁰ ibid

⁵¹ Abu Zahrah M. (N.D) *Muhadhara fi Tarikh al-mazahib al-Fiqhiyya*, Matbaa al-madany, p104.

⁵² Al Bigha M.D. (ND) opcit p.

The Malikis and Hambalis are of the view that *al-Maslahah al-Mursalah* should be considered as a source of law on its own even if it is not based on a specific *Nass* provided that it satisfies certain conditions.⁵³

3.5 Conditions for the application of *al-Maslahah al-Mursalah*

Those who allow the application of *al-Maslahah al-Mursalah* stipulate the following conditions for its application

1. The *Maslahah* must not contradict a specific *Nass*, *Ijma'* or *al-Qiyas*, as done by yahya allaithee in the case of King Abdulrahman bin al- Hakm. In this case King Abdulrahman bin al- Hakm had a sexual intercourse with his slave during the day time in the month of Ramsdhanm, he repeated the something for some days, whenever he had sexual intercourse during the day time of Ramadhan he freed a slave in line with the *Hadith of al A'rabi*. But the jurist Yahya bin Yahya allaithee gave a *fatwa* that he must observe sixty days fasting as *Kaffara*, he stated the reason for his *fatwa* that the *kaffara* is stipulated to serve as deterrent, if a king is compelled to free a slave as *kaffara* it would be easier for him to repeat what he did that is why we gave this *fatwa*. The Yahya bin Yahya allaithee was thinking that there was a *maslaha* in that *fatwa*, but this *Maslahah* contradicts a specific text which is the *Hadith of al- A'rabi* which shows the stages of *kaffara*, and is done based on the ability of the person observing it. Firstly freeing a slave, if he does not have the ability to do that, he should observe Sixty days fasting, if he could not do that he should feed Sixty needies.⁵⁴

⁵³ Abu Zahra M. *Usul al-Fiqh opcit* P. 280

⁵⁴ Aliyu B.A. (1999), *opcit*, p.1007

2. The *Maslahah* should be general, in the sense that it will provide benefit to the general *Ummah* not an individual or particular ethnic group or class of persons, that is the majority of people should benefit from such a *Maslahah* not just a few of them.
3. The *Maslahah* should be a real *Maslahah* which provides benefit to the *Muslim Ummah* and prevents or protects them against any harmful or injurious situation. The benefit provided by the *Maslahah* must be greater than the harm it brings and therefore, there is a need to weigh between the benefit and the harm of a particular *Maslahah* before its application. For example, the *Maslahah* that attempts to seize the power of divorce from a husband and vest it exclusively on the judge is not a real *Maslahah*.⁵⁵
4. The application of *al-Maslahah al-Mursalah* must not introduce a new way of worship (*Ibadat*).⁵⁶

3.6 Those who reject the application of *al-Maslahah al-Mursalah* as a source of law.

The Hanafi and shafi' jurists do not recognize *al-Maslahah al-Mursalah* as a source of law on its own, but they consider it as part of *al-Qiyas* which is based on a specific *Nass* , but if there is no specific *Nass* upon which it is based they reject it.⁵⁷

Among the jurists who oppose the application of *al-Maslahah al-Mursalah*, are Ibn Hajib and Aliyu bin Muhammad al -Amidee. Ibn Hajib is reported to have said

“The best position is that *al-Maslahah al-Mursalah* is not recognized at all⁵⁸

In reaction to the statement of Ibn Hajib al-Amidee said

“That is the true position upon which the jurists agreed.”⁵⁹

Amidee also stated in his book that

⁵⁵ Khallaf A. (2003), *Opcit* P. 95.

⁵⁶ Aliyu B.A (1999), *Opcit*, Vol. 4 P.

⁵⁷ Abu Zahra M. (N.D) *Usul al-fiqh*. opcit p. 280.

⁵⁸ Al-Baidawi. N.A(N.D) *Nihayatul Suul fi Sharhi Minhaj al – Usul* vol.4 p. 387.

⁵⁹ *ibid*

There is consensus among Shafi'i and Hanafi jurists on the rejection of *al-Maslahah al-Mursalah*, and it is true and correct position, except what was reported from Imam Malik who is of the view that *al-Maslahah al-Mursalah* is recognized as a source of Islamic law despite the objection raised by his followers to that effect⁶⁰

Ibn Hazm al-Zahiri also among those who rejected the application of *al-Maslahah al-Mursalah*, he devoted the whole chapter in his book *al-Ihkam fi Usul-al-Ahkam* and spent considerable time to criticize and reject *al-maslaha al mursala*, *al-Istihsan* and their like⁶¹

Imam al-Ghazali is of the opinion that where the *Maslahah* is among those classified as necessary ones (*dharu'riyyat*) it is recognized and accepted but if it does not fall within the necessary ones it is rejected⁶²

3.7 Authorities of Those Who Support the Application of *Al-Maslahah al-Mursalah* as a source of Islamic law,

Those jurists who support the application of *al-Maslahah al-Mursalah* supported their views with the following authorities

1. Where *al-Maslahah al-Mursalah* is not recognized the scope of Islamic law will be so restricted because new issues and events happen in this world almost on a daily basis due to the developments in the world, some of those issues are not specifically sanctioned by *Nass* and they require judicial pronouncement or *Fatwa*, and it is only the *Maslahah al-Mursalah* that will be employed to make such a pronouncement or *Fatwa*, failure to do that will subject the *Muslim ummah* to a difficulties and Allah the Most High, did not make our religion to be so harsh on us. Also refusal to apply *al-Maslahah al-Mursalah* to

⁶⁰ Amidee A.M (2003) *al-Ihkam fi Susul al-Ahkam* Daar al Samigee publishers, val 11 P 196.

⁶¹ Ibn Hazm A.A. (2009) *al-ihkam fi Usul al- ahkam_i* Daar al-gahad al-gadeed, Egypt, vol/ 6 p.702.

⁶² Al-Baidhawy, N.A(N.D) *Nihayatul Suul fi Sharh Minhaj al- Usul* vol 4 p. 387.

suit the current situation contradicts the Islamic jurisprudential maxim which says; “Islam suits every time and place⁶³”

2. Whoever follows the *Fatwa* of the companions of the Prophet (P.B.U.H) will find out the they applied *al-Maslah al-Mursalah*, because they took into consideration the purpose of Islamic law in their *Fatwa* and *Ijtihad* which is the promotion of public interest. Below are some examples:

a) Caliph Abubakr (RA) made the *Qur'an* ic compilation, waged war against those who refused to pay *Zakat*, and appointed caliph Umar as a second caliph, He did all those on the basis of *Maslahah*.

b) Caliph Umar (RA)

Approved three divorces in one pronouncement as three, established the prison services and tax collection system.⁶⁴ All those were done for the *Maslahah* of *Muslim Ummah*.

Caliph Uthman (R.A):

Approved that a women who was divorced by her husband so as to deprive her from inheriting him, shall be entitled to her share from his estate after his death as if he did not divorce her all.⁶⁵

This was also done for the sake of *Maslahah*.

d- Caliph Aliyu (R.A):

Burnt the *Gulat* and *Rafidha* from shia sect to death for the *Maslahah* of the *Muslim Ummah*.

⁶⁶All the se were done on the basis of *Maslahah*

⁶³ Khallaf. A. (2003), *opcit* P 96

⁶⁴ *ibid*

⁶⁵ *ibid*

⁶⁶ *ibid*

3.8 Authorities against the Application of *al-Maslahah al-Mursalah*

Those who oppose the application of *al-Maslahah al-Mursalah* argue and support their position with the following authorities:

- 1- Allah the Most High does not leave people in darkness, Islamic law takes care of all the public interests through the *Nass* and analogical deduction, there is no *Maslahah* unless Allah the Most High acknowledges it, and any *mashalaha* which is not acknowledged by a specific *Nass* is not a *Maslahah* and cannot be applied in Islam.⁶⁷
- 2- If the application of *al-Maslahah al-Mursalah* is allowed it will give room to judges and Muslim jurists to be deciding cases or giving legal advice based on their whims and caprices hiding under the doctrine of *al-Maslahah al-Mursalah*.⁶⁸

These are the authorities relied upon by the supporters and opposers of *al-Maslahah al-Mursalah*

3.9 *Nass*

As it was mentioned earlier that *al-Maslahah al-Mursalah* is a *Maslahah* which is not directly covered by a specific *Nass*, that is why the *Nass* is briefly discussed here so that the reader of this research work would have the clear picture of the topic Ibn Hazm al-Zahiri in his book *Ihkam fi Usul al-Ahkam* defined *Nass* as follows;

“*al-Nass* is a text of the *Qur'an* or *Sunnah* which is relied upon to determine the position of a particular matter”⁶⁹

From the above discussion *al-Maslahah al-Mursalah* is considered and recognized by Maliki School as a source of law on its own even if it is not based on a specific *Nass*. *Scope and*

⁶⁷ Ibid p.97

⁶⁸ ibid

⁶⁹ Ibn Hazm A.A (2009), *opcit*, vol 1 p 41

conditions of its application was also discussed. Relevance and practical application of al-Maslahah al-Mursalah will be discussed in the next chapter

CHAPTER FOUR

RELEVANCE OF AL- MASLAHA AL- MURSALAH IN JUDICIAL PROCEEDINGS

4.1. Introduction

This chapter seeks to succinctly discuss the historical development of the administration of justice in Islam from the period of the Prophet (S.A.W), the Sahabah , the Tabi'un and the A'immatul Mujtahidin citing practical examples of al Maslaha applied during those period . The chapter equally elaborated on the practical application of al Maslaha al Mmursala in judicial proceedings and its applicability in Nigerian courts.

Historical Development of Administration of justice in Islam

4.1. 2. Development during the Period of the Prophet (S.A.W)

This period consists of twenty two years and some months.⁷⁰ This period could be divided into two in terms of development of administration of justice, namely: development before Hijra and development after Hijra.

4.1.2 .1 Development before *Hijra*

During this period the Prophet (S.A.W) began in Mecca by inviting individuals secretly to accept the religion of Allah and desist from worshipping anything but Allah the Most High. After the expiration of three years of secret invitation to the religion of Allah, he was ordered to open up his call when the following verse was revealed.

⁷⁰ Madkur, M.S. (1996), *Almudkhal Lil Fiqh Al Islamy* Daar Alkutub Alhadith, Alqahira, p.60

“ And warn your tribe (O Muhammad (S.A.W.), near kindred)”.⁷¹

The Prophet (S.A.W) opened up his call, inviting people to oneness of Allah and not associating Him with any partner. He spent a period of thirteen years in Mecca inviting people to accept the Islamic religion. Most of the verses revealed unto the Prophet (S.A.W) during that period centered on oneness of Allah (Tauheed) and the Ayatul Ahkam were very few.⁷² This period ended when Allah the Most High ordered the Prophet (S.A.W) to migrate from Mecca to Madina.

4.2.2.2. Development after *Hijra*

This period begins with the Hijra of the Prophet (S.A.W) and those who accepted the Islamic Religion from Mecca to Madina the second city of Islamic Da'awa.

When the Prophet (S.A.W) and his followers migrated to Madina, it became an Islamic state. The people of Madina did not have a specific law regulating their affairs prior to the Hijra of the Prophet (S.A.W) and when the Prophet (S.A.W) went there, it became an Islamic state, hence the need for the law to regulate the affairs of the Muslim community living in Madina⁷³ such as administrative law, judicial system, economics and financial system e.t.c.

To take care of the situation, Allah the Most High revealed the verses of legal import (Ayatul Ahkam) to the Prophet (S.A.W) in piecemeal and the situation continued up to the time when Allah the Most High revealed the following verse. This day I have perfected your Religion for you, completed my favour upon you, and have chosen for you Islam as your Religion.⁷⁴

⁷¹ Quran 26, v 214

⁷² Madkur, S.M.,(1996), Opcit p.60

⁷³ Ibid, P.61

⁷⁴ Quran 5 v 3

The above mentioned verse was the last verse revealed in Ayatul Ahkam.⁷⁵

It should be noted that the Prophet (S.A.W) stayed in Madina for a period of ten years and during that period the power of adjudication was vested exclusively in him; he decided cases of the companions and answered their questions. This is in line with the Qur'anic verse which says:

But no! by your Lord! they do not believe until they make you a Judge of all that which has become a matter of disagreement among them, and then do not find any resistance against your decision and accept with full submission.”⁷⁶

The companions resorted to the Prophet (S.A.W) for their questions and cases in line with the Qur'anic verse which says:

“...And if you differ in anything among yourselves, refer it to Allah and His messenger (S.A.W)”.⁷⁷

Whatever comes from the Prophet (S.A.W) remained the law as binding.⁷⁸

It should be noted that no one among the companions of the Prophet (S.A.W) had a power of adjudication or Ijtihad during the lifetime of the Prophet (S.A.W)⁷⁹, though it is reported that some of the companions decided some cases using their own Ijtihad during the lifetime of the Prophet (S.A.W) such as caliph Aliyu Bin Abi Talib (R.A) and Mu'az Bin Jabal (R.A) who was sent to Yemen when the Prophet (S.A.W) asked him, which law will you apply when a case is brought before you? Mu'az (R.A) answered that I will apply the Qur'an. The Prophet (S.A.W) asked him how he would decide the case if he could not find the position in the Qur'an? Mu'az (R.A) answers “I will apply the Sunnah of the Prophet (S.A.W),” The Prophet (S.A.W)

⁷⁵ Madkur, S.M. (1996), *Opcit* P.61

⁷⁶ Quran 4 v. 65

⁷⁷ Quran 4 v. 59

⁷⁸ Khallaf, A. (n.d) *Khulasah Tarrikh Al Tashrii Al Islamee*, Daar Alqalam, Alqahira, P.11

⁷⁹ Ibid

further asked him how he would decide if he could not find the position in the Sunnah too?, Mu'az (R.A) replies “ I will apply my own personal Ijtihad and leave no stone unturned” The Prophet (S.A.W) thanked Almighty Allah for guiding the messenger of the Prophet to what pleases Allah and His Apostle!⁸⁰

Similarly there was a time when the Prophet (S.A.W) appointed Amr Bin As (R.A) to decide over a particular matter, and Amr Bin As (R.A) asked the Prophet (S.A.W) that shall I decide while you are present?The Prophet (S.A.W) said yes. If you decide rightly you have two rewards but if you decide otherwise you have only one reward⁸¹.

It is our intent to state here that the above instances and their like do not mean that any of the companions had the power of adjudication during the life time of the Prophet (S.A.W) because whatever decision they made is not bound on all the Muslim unless it got a judicial seal of approval from the Prophet (S.A.W) that is why you cannot have two different opinions on one single issue during the life time of the Prophet (S.A.W)⁸²

4.2.2.3 Sources of Law during the Period

The sources of law during the period are as follows:

The Quran: which is the foundation of Islamic religion and the first source of Islamic law⁸³.

The Prophet (S.A.W) delivered the Qur'an in line with instruction of Allah:

“O Messenger (Muhammad) proclaim that which has been sent down to you from your Lord”.⁸⁴

⁸⁰ Ibid, P.12

⁸¹ Ibid.

⁸² Ibid, P.13

⁸³ Abalkhail, S.A._(2006),_ *Almudkhal Ila Ilm Alfiqh*, Maktabatu Malik Fahad, Riyadh P.113

⁸⁴ Quran 5 v 67

The Sunnah which is a second source of Islamic law, next to the Qur'an.⁸⁵

This period ended when Allah the Most High received His Messenger (S.A.W) back to Him.

4.2.2.4. Examples of Development of *Maslahah* during this Period

Imam Muslim has reported that Umar bin al -Khattab asked the Prophet (S.A.W/) to kill the munafiqun (hypocrites), the Prophet (S.A.W) said "Leave him so that people will not say that Muhammad is killing his companions".⁸⁶

The above Hadith shows that those hypocrites deserved to be killed, but the Mafsadah behind killing them is greater than the Maslahah of killing them at that time, because other people will not understand or differentiate between hypocrites and the real companions, they will only say that the Prophet (S.A.W.) kills his companions.. This may deter others from accepting the religion.

From the foregoing the hypocrite were not executed due to the Maslahah in that..

Another example could be seen in hadith of Aisha (R.A) wherein the Prophet (S.A.W) said:

*Had it been your people were not new to Islam I would have moved the Ka'aba to place it at the exact foundation of prophet Ibraheem.*⁸⁷

From the above Hadith, the Ka'abah was left where it was, because of Maslahah.. This is because the removal of the Ka'aba from its position may cast doubt in the minds of some other people particularly the new Muslims.

⁸⁵ Abalkhail, S.A. (2006), Opcit P.113

⁸⁶ Muslim A.H. (1999), *Sahih Muslim Kitab al -Birr wasilatul*_Babu Nasrul Akh Zailiman Au al-Mazlum Vol. 4 p.

⁸⁷ Ibid p. 147

al-Shatibee said :The Prophet (S.A.W) did not execute the hypocrites even though their true picture was manifested, and he left the Ka'aba not at the exact position in which Prophet Ibrahim put its foundation to prevent a greater Mafsadah and to promote Maslahah ⁸⁸

4.3.1. The Period of the Sahabah

After the Prophet (S.A.W) had delivered the message of Allah the Most High, and Almighty Allah had received him back, the period of the Sahabah started immediately after the Prophet (S.A.W) had left this world.

The period of the Prophet (S.A.W) was the time of legislation or revelation of laws, while the time of the Sahabah was a period of protecting, reporting and developing the law. ⁸⁹

During this period judicial power was vested in the Caliph while the power to give Fatwa (legal opinion) was vested in the learned among the Sahabah The jurists among the Sahabah engaged themselves in al-Tafsir al-Ahkam, teaching the Sunnah of the Prophet (S.A.W) and embarked on Ijtihad in matters not directly covered by a specific Nass ⁹⁰.

The caliph served as a judge and the leader of the Muslim Ummah, he also had the power to appoint other judges. While the learned among the Sahabah took the responsibility of teaching the Qur'an , Sunnah and giving Fatwa, because the Prophet (S.A.W) left the Qur'an and Sunnah for the Muslims and it was not every Muslim that could resort to those sources and understand them without guidance from others. Those Sahabah considered it as their obligation to explain the Nusus and give Fatwa on issues not directly covered by Nass .⁹¹

⁸⁸ Al-Shatibee A. (2003), *opcit*

⁸⁹ Basha, A.T. (2001), *Almazahib Alfiqihyya Al Arba*, Daar Afaq Al Arabia, Aliskandariyya, P.11

⁹⁰ Khallaf, A. (n.d) *Opcit*,P.20

⁹¹ Ibid

4.3.1.1. Renown Jurists of the *Sahabah*

The renowned jurists of the *Sahabah* include:

The Four rightly guided caliphs, Abdullahi bin Mas'oud, Aisha (Mother of believers), Zaid bin Thabit, Abdullahi bin Abbas, Abdullahi bin Umar, Ummu Salama, Abu Saeed Alkhudiri, Abu Musa al-Ash'ari, Mua'z b`in Jabal, Abdullahi bin Amr bin al-As, Abdullhi bin al-Zubair, Abud – Darda'i, Abu Ubaidata bin Jarrah, Abu al-Zarr, Safiyya bint Huyay, Hafsat bint Umar, Ummu Habibah, May Allah be pleased with them all.⁹²

4.3.1.2. The Period of Caliph Abubakr al-Siddiq (R.A).

The First caliph after the Prophet (S.A.W) was caliph Abubakr al-Siddiq (R.A) and his method of adjudication was, when a matter was brought before him he would search for the relevant applicable law in the Qur'an . If he found it he would apply the same, but if he could not find the position in the Qur'an he moved to the Sunnah and get the relevant law. Thus, if he found the law in the Sunnah he applied the same, but if he could not find the position in the Sunnah , he would ask the *Sahabah* whether any of them knew a Prophetic tradition applicable to the situation. If they told him the decision of the Prophet (S.A.W) on a similar matter he applied the same. Otherwise, he held a meeting with the learned and leaders of the *Sahabah* , and whatever they agreed upon remained the applicable law for the Muslim Ummah.⁹³

For instance, it was reported that a grand mother went to Caliph Abubakr seeking for her share in the estate of a late son of her daughter whose mother died before him. Caliph Abubakr (R.A) told her that her share is not mentioned in the Qur'an . But he turned to the *Sahabah* and asked them

⁹² Abalkhail, S.M. (2006), *Op cit*, P.114

⁹³ Khalil, M., *Manna'al Qattan* (1996) *Tarikh al- Tashrii al-Islamiy*, Maktabatul Maarif, Riyadh. P.130.

whether they knew of any Prophetic tradition on the matter? Mugira bin Shu'uba (R.A) said I know that the Prophet (S.A.W) gave her one sixth. Caliph Abubakr further asked whether he has any witness to his assertion? Another person stood up and corroborated what Mugira said and Caliph Abubakar applied the said Hadith⁹⁴.

4.3.1.4 . Caliph Umar

Caliph Umar was the second caliph after caliph Abubakar (R.A) When caliph Umar came into power, he followed the Qur'an , the Sunnah of the Holy Prophet (S.A.W) and the practice of caliph Abubakar and consultation of al-Sahabah to solve legal and administrative issues.

It should be noted that during this period the Islamic territory was largely expanded whereby most of the largest cities came under the leadership and control of Islam, such as Faris, Sham, Misra and Rum. This development presented challenges to Caliph Umar in terms of arrangement of soldiers and administration of cities that came under the control of Islam. Caliph Umar was able to overcome those problems and came up with a good system of administration irrespective of whether the province was close or far away from the headquarters⁹⁵

It should be stressed that during the period of caliph Abubakr and the early period of caliph Umar most of the Sahabah were in Madina, that is why during that period the decision was based on Ijtihad of Jama'a when the position could not be found in the Qur'an or Sunnah in explicit terms.

⁹⁴ Ibid.

⁹⁵ Ibid.

When the Islamic territory was expanded, many of the Sahabah moved to other places in those cities and were saddled with the responsibility of teaching, rendering legal Fatwa and adjudication.⁹⁶

Among those who were saddled with the responsibility of giving Legal Fatwa in Madina include the Khulafa al-Rashidun, Zaid bin Thabit, Ubayyu bin Kaab, Abdullahi bin Umar, and Ummul Muminin A'isha (R.A).

In Mecca, Abdullahi bin Abbas, while In Kufa Aliyu bin Abi Talib and Abdullahi bin Mas'oud. In Basra Anas bin Malik, Abu Musa al-ash'ari and Amr bin al-As, in Sham, Mu'az bin Jabal and Ubadatu bin al- Samit (R.A).⁹⁷

The enlargement of the Islamic territory brought about new developments to the Islamic law, because people from different places with different racial and cultural backgrounds came under the sway of Islam. The coming together of those people brought about new issues which did not exist during the lifetime of the Prophet (S.A.W) and the learned among the Sahabah considered it as an obligation upon them to embark on Ijtihad and come up with the legal verdict on the new issues.⁹⁸

As mentioned earlier, during the period of caliph Abubakr and the early period of caliph Umar most of the Sahabah were living in Madina the city of the caliph, and when a new event occurred and no ruling of such event could be found in the Qur'an or the Sunnah, the caliph used to hold a meeting with the leaders and jurists among the Sahabah with a view to finding out the position of such event, and whatever those al-Sahabah unanimously agreed on remained

⁹⁶ Khallaf, A. (n.d), Opcit P.22

⁹⁷ Ibid.

⁹⁸ Abu Zahra, M. (n.d), *Muhadharat Fi Tarikh Mazahib Al fiqhiyya*, Matbaatul Madnee, Alraudha, P.10

the law for the Muslims, that is why the areas of disagreement during that period were limited.⁹⁹

However, when many of the jurists moved to different places in the world during the period of Caliph Umar, it was not possible again for them to meet whenever a decision was to be taken. The needs and the Maslahah of people of the area and places of living of those al-Sahabah were different. For example, Abdullahi bin Umar in Madina could not know what Abdullahi bin Mas'oud was doing in Kufa. It is on this premise that different opinions of the Sahabah on one single issue came about, each one of them had a reason for his decision, and all the decisions aimed at promoting the public interest (Maslahah) by making life easier for the Muslim Ummah.¹⁰⁰

The Sahabah followed two methods while doing their Ijtihad namely:

The Qiyas method: that is Ijtihad using the method of analogy (al-Qiyas).

The Maslahah method that is Ijtihad using the method of Maslahah, taking into consideration the public interest.

Among those who followed the method of al-Qiyas are caliph Aliyu bin Abi Talib (R.A) and Abdullahi bin Mas'oud (R.A) although sometime they followed the method of Maslahah while doing their Ijtihad ¹⁰¹.

The Sahabah that followed the method of Maslahah in their Ijtihad are many and led by Caliph Umar bin al-Khattab (R.A) for example the decision of Caliph Umar to kill a group of people for killing one single individual¹⁰²

⁹⁹ Khallaf, A. (n.d), Opcit P. 41

¹⁰⁰ Ibid, P.44

¹⁰¹ Abu Zahra, M. (n.d),Opcit P.10

The Sahabah took this position because of their long standing companionship with the Prophet (S.A.W) from whom they learnt a lot and he also sought for the advice of some of them during his lifetime. For those reasons the Sahabah were in a position to explain the Qur'an and Sunnah to the Muslim Ummah and apply Ijtihad in matters not directly covered by Nass ¹⁰³

From the foregoing, it can be rightly concluded that the application of the al-Maslahah al-Mursalah emanated from the time of the Sahabah though not known with the nomenclature al-Maslahah al-Mursalah and even those who followed the Qiyas method of Ijtihad sometimes resorted to al-Maslahah al-Mursalah.

During the period of caliph Uthman (R. A) and that of caliph Ali(R.A.) the same trend continued and the jurists among the Sahabah in Madina and other provinces engaged themselves in the teaching of the Qur'an, Sunnah of the holy Prophet (S.A.W) and embarked on Ijtihad in matters not covered by Nass .

Each of the Sahabah had several Tabi'un studying under him. For example, in Madina the Tabi'un that reported the knowledge and Fatwa of Umar bin al-khattab was Sa'id bin al-Musayyib while the one that reported the knowledge of Abdullahi bin Umar was Nafi'u, (his freed slave)¹⁰⁴.

In Iraq the knowledge and Fatwa of Abdullahi bin Mas'oud was reported by Alqama and Ibrahim al-Nakha'iy.¹⁰⁵

In Mecca the knowledge of Abdullahi bin Abbas was transmitted by Mujahid and Ikrima¹⁰⁶

¹⁰² Ibid.

¹⁰³ Khallaf, A. (n.d), Opcit P32

¹⁰⁴ Basha, A.T. (2001), Opcit P.14

¹⁰⁵ Ibid.

4.3.1.5. Sources of Law during this Period

The sources of law during this period are as follows:

The Qur'an

The Sunnah

*Opinion of the Sahabah on matters not directly covered by a specific Nass, such opinion may be based on al-Qiyas or al-Maslahah.*¹⁰⁷

4.3.1.6. Development of *al-Maslahah al-Mursalah* during this Period

The Sahabah played a vital role to the development of *al-Maslahah al-Mursalah*, they did Ijtihad based on Maslahah on many occasions. Below are some examples.

4.3.1.7. Stoppage of the Allocations to the *Muallafatu Qulubuhum*

Allah the Most High in the holy Qur'an mentions the *Mu'allafatu Qulubuhum* (those whose hearts need to be reconciled) as one of the beneficiaries of Zakat.¹⁰⁸ However, the share of the *Mu'allafatu Qulubuhum* was stopped by Caliph Umar who stated that the Prophet (S.A.W.) was giving them allocations when the Muslims were weak, but now Allah has enriched Islam and, therefore, the position of giving the *Mu'alfatu Qulubuhum* is restricted to a situation where the Muslims are few in number and non Muslims are many.¹⁰⁹

The Caliph understood that the application of that text during that period will not conform with the purpose of the Shari'a because the reason for giving them in the first place, was that the Muslims were few and weak but when the Islam developed and Muslims became strong, the

¹⁰⁶ Ibid.

¹⁰⁷ Abu Zahra, M. (*n.d.*), *Opcit*, P.28

¹⁰⁸ Qur'an 9 v. 60

¹⁰⁹ Al Hassas *Ahkamul Al Qur'an* vol.4 p.325

Mu'allafatu Qulubuhum should not be given, and the shares should be used to promote Islam and Muslims. This position was held based on Maslahah.

4.3.1.8. Suspension of permissibility of women to go to the mosques

Imam Bukhari reported a Hadith which says:

“Do not deprive female servants of Allah the mosques of Allah¹¹⁰

However, when the situation changed and the people changed their character after the period of the Prophet (S.A.W.) and new issues and Mafasid arose which did not exist during the period of the Prophet (S.A.W.) and if the permissibility remained the al-Mafsadah greater than the Maslahah of going to mosque by women would occur. In view of the above, Ummul muminina A'ishah (R.A.) said:

“Were the Prophet (S.A.W) to see what the women have created he would have prohibited them the way women of Bani Israil were prohibited.”¹¹¹

Another example of al-Maslahah al-Mursalah is that Caliph Umar forbade a Muslim to marry a kitabiyyah¹¹² This was done when caliph Umar observed that if some Muslims were allowed to marry from the Ahlul kitab, that will lead to a al-Mafsadah among the believers he stopped it for the sake of Maslahah.

¹¹⁰ Al Bukhari M.I. (1978), *Sahih Al Bukhari Kitabal Jumua Al Maktabatul Asariyya* Bairuit, vol.1. p.268

¹¹¹ Ibid Kitabal izn vol 2 p.262

¹¹² Ibn Rushd M.A. (1995), *opcit*, vol.1, p.745

4.3.1.9. Holding three divorces in one pronouncement as three.

This was done by caliph Umar to serve as a deterrent ¹¹³ Caliph Umar did that to compel people to comply with a laid down procedure of divorce in line with the purposes of al-Shari'a that is to find Maslahah

4.4.1. The Period of the *Tabi'un*

The *Tabi'un* were the followers of the *Sahabah* and the name "al-*Tabi'un*" was given to them by Almighty Allah in the holy Qur'an where He says:

*"And the first to embrace Islam of the Muhajirun and the Ansar and also those who followed them exactly, Allah is well pleased with them..."*¹¹⁴

The *Tabi'un* were the followers of, and, the students of the *Sahabah*, they learnt from them, and reported the knowledge of the *Sahabah* such as Abdullahi bin Mas'oud in Iraq, Umar bin Kattab, Zaid bin Thabit and Abdullahi bin Umar in Madina.

Sheikh Ibn al-Qayyim reported to have said:

"The religion and Fiqh came to the Ummah through the students of Ibn Mas'oud, Zaid bin Thabit, Abdullahi bin Umar, and Abdullahi bin Abbas. As for the people of Madina their knowledge was from Zaid bin Thabit and Abdullahi bin Umar, while the people from Iraq their knowledge was from Abdullahi bin Mas'oud."¹¹⁵

During this period there were two major schools of law, namely:

¹¹³ Ibn Hajar (N.D.), *Talkhisul Jubair kitabul Qadha,i* vol 4 p,187

¹¹⁴ *Al-Qur'an* 9: v.100

¹¹⁵ Abalkhail, S.M. (2006),Op cit P.96

School of Ahlul ra'ayi in kufa (Iraq).

School of Ahlul Hadith in Madinah (Hijaz) ¹¹⁶.

The Ahlul Ra'ayi based most of their Fatwa on opinion (Ra'ayi) this is because the Hadith in Iraq was limited compared to the profuse reports obtainable in Madina, and the Sahabah living in Madina were also more numerous than those in Iraq. Furthermore, many issues that were not covered by Nass occurred in Iraq more than in Madina. This necessitated the jurists of this school to apply their opinion and placed so much reliance on a -Qiyas .¹¹⁷ Another factor that encouraged the jurists of this school to apply their opinion on many issues is that, in Iraq, there were heretical sects such as the Shi'a and Khawarij, and there were so many crises there. Some people begun to fabricate Hadith to support their group, this compelled the jurists of the school of Ahlul Raayi to minimize transmission of Hadith so that they will not promote lies against the Prophet (S.A.W) and resort to their own opinion over matters for which there was no direct Nass and apply Qiyas .¹¹⁸ Ibn Abdil Barri reported that Ibrahim al-Nakhaiy (who was one of the jurists of school of Ahlul Ra'ayi) said:

“I could hear one Hadith and deduce a hundred matters based on it by way of Qiyas ” ¹¹⁹

The Ahlul Hadith, on the other hand were situated at Madina the city of the Holy Prophet (S.A.W), the jurists of Madina were more reliable in terms of Fiqh and reporting Hadith. the jurists of this school when asked about something for which there was no known Qur'an ic verse or Prophetic tradition on the issue they gave Fatwa based on that, otherwise they will not give

¹¹⁶ Khalil, M. (1996), Opcit P.289

¹¹⁷ Ibid, P.290

¹¹⁸ Ibid, P.291

¹¹⁹ Abdulbarr, I. (n.d) *Jamiu Bayanul ilm Wa Fadhlilhi*, Daar Al fikra, P.82

Fatwa based on their opinion.¹²⁰The jurists among the Tabi'un from Ahlul Hadith and Ahlul ra'ayi were students of some Sahabah who had studied their knowledge, fatawa, and method of Ijtihad .¹²¹

Some Tabi'un selected one or more companions to study from, for instance Mujahid and Ikrima studied from Ibn Abbas in Makkah,¹²² while Sa'eed bin al Musayyib and Nafi'u (the freed slave of Ibn Umar) studied from the Sahabah of Madina such as Umar bin Alkattab and Abdullahi bin Umar. Alqama and Ibrahim al-Nakha'ey studied from Abdullahi bin Mas'oud in Iraq.¹²³

The Tabi'un reported Prophetic traditions which they learnt from the Sahabah and considered the Ijma' of al-Sahabah as binding, but where the Sahabah had different opinions on a particular issue the Tabi'un selected one of those views and applied it, but they would not go beyond all of them, and in most cases each student subscribed to the opinion of his teacher among the Sahabah .¹²⁴Some of the Tabi'un taught and gave Fatwa even during the lifetime of the Sahabah , such as Sa'eed bin al-Musaiyib in Madina, Alqama bin Qais and Saeed bin Jubair in Kufa.¹²⁵It was reported that when people from Kufa went on Hajj and sought Fatwa from Abdullahi bin Abbas, he used to say: "Don't you have Sa'eed bin Jubair among you"?¹²⁶

The Tabiun taught their students what they learnt from the Sahabah , for instance the leading jurists in Madina among the Tabi'un were Sa'id bin al-Musayyib, Utbata bin Zubair and others, their students included Muhammad bin Shihab al-Zuhri and Yahya bin Sa'eed.¹²⁷

¹²⁰ Khalil, M. (1996), Opcit P.292

¹²¹ Abu Zahra, M. (n.d)Opcit P.31

¹²² Basha, A.T. (2001),Opcit P.14

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Khallaf, A. (n.d) Opcit P.61

¹²⁶ Ibid.

¹²⁷ Ibid.

The jurists among the Tabi'un in Mecca were Ikrima and Mujahid, while their students included Sulaiman bin Uyayna and Muslim bin Khalid.

The jurists among the Tabi'un in Iraq included Alqama bin Qais and Shuraih al-Qadhi. Their students included Ibrahim al-Nakha'iy. While In Egypt the jurists among the Tabi'un was Mufti Misra Yazid bin Habib and his students included Laith bin Sa'ad.¹²⁸

The Tabi'un embarked on Ijtihad on matters not specifically covered by Nass or opinion of the Sahabah.

This period is also known as the period of the seven jurists (Fuqaha al- saba') this is because there were seven popular jurists of Madina, namely:

Saeed bin al-Musayyib;

Urwatu bin al-Zubair;

Qasim bin Muhammad;

Kharija bin Zaid;

Abubakr bin Abdil rahman bin al-Harith;

Sulaiman bin Yasar; and

Ubaidullah bin Abdillah bin Utbata bin Mas'oud.¹²⁹

4.4.1.2. Sources of Law during this Period

The sources of law during the period of Tabi'un were as follows:-

¹²⁸ Ibid.

¹²⁹ Khalil, M. (1996), opcit P.294

The Qur'an

The Sunnah

Opinion of the Sahabah .

Ijtihad ¹³⁰

It should be noted that the Hijazian jurists (Makkah, Madina and environs) based their Ijtihad on the basis of Maslahah, while the jurists of Iraq based their Ijtihad on Qiyas and even those who adopted the Qiyas method among the Tabi'un sometimes resorted to the Maslahah method. ¹³¹

From the foregoing it is clear that the Tabi'un applied the concept of Maslahah in their decisions

4.4.1.3. Development of *al-Maslahah al-Mursalah* During this Period

The Tabi'un being the students of the Sahabah followed the footsteps of the Sahabah in making Ijtihad based on Maslahah, and decided some cases based on Maslahah. Below are some examples:

Rejection of the Evidence of Close Relatives ¹³²

The Tabi'un rejected evidence of close relatives such as testimony by a father in favour of his son and vice-versa, wife for her husband and vice versa. During the period of the Sahabah there was no such restriction, but when the attitude of people changed during the time of the Tabi'un, they placed such restriction for the promotion of the Maslahah 'ammah

¹³⁰ Basha, A.T. (2001), Opcit P.15

¹³¹ Ibid.

¹³² Sha abi Ta alil Al Ahkam p.74

The Tabi'un Approved the Application of Price Control in Certain Circumstances ¹³³

The application of price control is not allowed in Islam, but the Tabi'un permitted it in a situation whereby the businessmen engage themselves in excessive increase of the price of food items artificially, and the people are in drastic need of same. This is done for the sake of Maslahah 'ammah and prevails over the Maslahah Khassah.

4.5.1 The Period of the Followers of *Tabi'un* and *A'immatul Mujtahidin*

Leading jurists after the period of the Tabi'un their followers and the A'immatul Mujtahidin stepped into the shoes of the Tabi'un and continued to develop the Islamic law as their predecessors did.

The jurists of this period included Rabi'atul Raayi, Abu Hanifa, Malik bin Anas, al-Auza'iy, Sufyan al-Thauri, Laith bin Sa'ad and others.¹³⁴

Those jurists were the students of al-Tabi'un, for instance, Abu Hanifa studied under Ibrahim al-Naka'iy, Hammad bin Sulaiman and others, while Imam Malik learnt from Nafi'u (freed slave of Abdullahi bin Umar), Ibn Shihab al-Zuhri, Qasim bin Muhammad and others.¹³⁵

During that period, the Islamic law grew rapidly and developed to the extent that enough rules regulating all the affairs of a Muslim, despite the large population of Muslims and vast territory under the control of Islam and the divergence and distance between the inhabitants and interests (Masalih) of the people.¹³⁶

¹³³ Ibid p.78

¹³⁴ Ibid, P.16

¹³⁵

¹³⁶ Khallaf. (n.d), Op cit P.58

The jurists during this period engaged themselves in teaching and inculcated the habit of writing, they wrote so many books on Islamic law and Hadith, Fatwas al-Sahabah , Tabi'un and followers of Tabi'un were also written.

Some of those jurists were appointed as judges such as Shuraih al-Qhadhi Abu Yusuf and Sha'abi while some of them rejected the appointment like Abu Hanifa¹³⁷.

The A'immatul Mujtahidin were many but the most popular among them includes''

Imam Abu Hanifa

Imam Malik;

Imam al-Shafi'i;

Imam Ahmad bin Hambal

These jurists worked hard in teaching and developing the Islamic law to the extent that each and every one of them has his own school of law, The same jurists wrote many books on Islamic law and taught many students,

Many principles of Maslahah were developed by the four sunni school of law, although the scope of this work does not give room for comprehensive discussion on the development of Maslaha Mursala in the other school except that of Maliki school, but few examples of the principles developed by those school shall be given, .

Hanifi School

This school developed the following principle

¹³⁷ Ibid, P.64

“Prevention of harm or hardship prevails over providing benefit.” Hanafi jurists developed this principle and is being used frequently in al-Maslahah al-Mursalah by all the Sunni School of law.

It is based on this principle that the Maliki jurists discourage the observance of the six day fasting in the month of Shawwal. A detailed explanation on this is in the next chapter

Shaii School

This school employed the principle which says: “Prevention of al-Mafsadah prevails over providing benefit” and held that Adhiyyah should not be performed, The wisdom behind taking this position is just to let the public know that it is not compulsory¹³⁸.The Maslahah in this example is dharuriyyat as it relates to protection of religion.

Hambali School

Ibn al- Qayyim stated that Imam Ahmad bin Hambali held that the hand of a thief should not be amputated if a theft is necessitated by hunger to save his life from the danger of death.¹³⁹

Imam Ahmad considered Maslahah and exempted any person that finds himself in the above condition from being subjected to the prescribed punishment which is amputation of hand. .

4.5.1.5. Imam Malik

He was Malik bin Anas al-Asbahi, his origin was from Yemen, his great grand father, Abu Amr, was a companion of the Prophet (S.A.W).¹⁴⁰

¹³⁸ Al-Shatibee A (2003)opcitvol.3 p.242

¹³⁹ Ibn Qayyim Ilamul Muwaqqien vol. 4 p.287

¹⁴⁰ Khallaf, A. (n.d), Opcit P.88

Imam Malik born in the year 93 after Hijra, and was the leading jurist in both Hadith and Fiqh¹⁴¹

Malik memorized the holy Qur'an when he was young. He studied Hadith and Fiqh from the jurists of his period such as Abdurrahman bin Hurmuz, Nafi'u Maula ibn Umar, Ibn Shihab, al-Zuhri. He studied Fiqh from Rabi'atu bin Abdirrahman popularly known as Rabi'atur Ra'ayi, he also studied from Yahya bin Sa'eed al-Ansari, the judge of Madina who studied from the Seven jurists. ¹⁴²

Imam Malik became the jurist of his own period. Imam Shafi'i is reported to have said.

“When the jurists are mentioned Malik is the star among them¹⁴³.

Malik engaged himself in teaching Sunnah and Fiqh. He had many students from different parts of the world; some of them are as follows:

Abu Abdillahi, Abdurrahman bin al-Qasim Al-Atqha, he studied from Malik for 40 years, and died in Egypt in the year 191 A.H

Abu Muhammad, Abdullahi bin Wahab bin Muslim, he studied for 20 years under Imam Malik and died in 197 A.H.

Ashhab bin Abdilazeez he studied from Malik and Laith bin Sa'ad and died in 204.

Asbagu bin Faraj, he studied from Ibn al-Qasim, Ibn Wahab and Ashhabu. He died in 225 A.H.

Abu Muhammad, Abdillahi bin Abdilhakam.

The above mentioned jurists are the Maliki jurists who resided in Egypt. ¹⁴⁴

¹⁴¹ Ibid.

¹⁴² Khalil, M. (1996), Opcit P. 246

¹⁴³ Abalkhail, S.A. (2006), Opcit P.144

The students of Malik in Magrib include:-

Abul Hassan, Aliyu bin Zayyad, al-Tunusi, he studied from Malik and Laith bin Saad. He died in 193 A.H

Abu Abdillahi, Zayyad bin Abdirrahman al-Qurtubi, he studied the Muwatta from Malik and died in 193 A.H.

Isa bin Dinar al-Qurtubi, al-Andulusi, the jurist of Andulus, he died in 212 A.H.

Asad bin Farat bin Sinan al-Tunusi, he studied the Muwatta from Malik and died in 213 A.H.¹⁴⁵

Among the students of Imam Malik in Hijaz and Iraq are:-

Abu Amr bin Abdil Malik bin abi Salama, al-Majishun, who was the Mufti of Madina during his period and died in 212.

Ahmad bin Adil bin Gilan al-Abdee who was the leading Maliki jurist in Iraq.¹⁴⁶

The students of Imam Malik contributed to the development of Maliki School in their respective places and the world in general, they taught their students and wrote many books in the school.

4.5.1.6. Sources of Shari'ah in this school

The following are the sources of law in Maliki School.

al-Qur'an

al-Sunnah

¹⁴⁴ Ibid, P. 155

¹⁴⁵ Ibid, P. 156

¹⁴⁶ Ibid.

al-Ijma

Amal Ahlil Madina

Qaul al-sahab

al-Qiyas

al-Masalih al- Mursala

Sadd al-dhari'a

*al-Istihsab.*¹⁴⁷

4.5.1.7. Some of the Books Relied Upon by this School

Muwatta. This is a book of Hadith and Fiqh, it was the first book written on Hadith in Islam. Many students of Imam Malik reported the *Muwatta* from him.

Al Mudawwanah:- Imam Malik was asked many questions on *Fiqh* and he answered them and his students wrote them down and titled it Mudawwanah. Mudawwanah was considered as a foundation of Fiqh of Maliki School.

Al-Mustakhrijyyat:- This is a book written by Muhammad bin Ahmad al-‘utbee based on what he heard from Imam Malik and his students.¹⁴⁸

4.5.1.8. Places that Apply Malik Mazhab

The Malik Mazhab was the applicable Madhhab in Spain, Magrib, Egypt and some other countries in Africa.¹⁴⁹ Imam Malik died in 179 A.H¹⁵⁰.

¹⁴⁷ Abalkhail, S.M. (2006),Opcit P.150

¹⁴⁸ Ibid, P.159

Some principles developed by this school:

Amal Ahlil Madina

Sadd al-dhari'a;

Al-Masalih al Mursalah;

Sadd al-dhari'a and Masalih are equitable doctrines aimed at promoting public interest and doing away with hardship befalling on the Muslim Ummah

4.5.1.9. Development of Maliki Jurisprudence

Among those who played a vital role to the development of Maliki law are his students and their students such as Ibn Wahab, Ibn al-Qasim, Suhnun, Ibn Rushd and later on, Ibnu Habib, and al-Baji made significant contribution to the School.

4.5.1.10. Ibn Wahab

He was Abdullahi bin Wahab bin Muslim, al- Faqih al- Maliki al-Msiri. Ibn Wahab studied from Imam Malik and the jurists of his period in Egypt and Iraq. Ibn Wahab studied under more than four hundred jurists, but he spent more time with Imam Malik more than any other jurist as he spent more than twenty years with Imam Malik¹⁵¹

Ibn Wahab studied under Imam Malik until he became an accomplished jurist. Imam Malik loved and respected him; he even referred to him as al- Faqih. (Jurist)

¹⁴⁹ Khallaf, A. (n.d), Opcit P.89

¹⁵⁰ Ibid, P.88

¹⁵¹ www.wikipedia.org/wiki. assessed on 08/08/2015

Ibn Wahab is the leading jurist who developed the Maliki school in Egypt and whenever there was a dispute pertaining to the Maliki school the people of Egypt waited for the arrival of Ibn Wahab to ask him. Ibn Wahab was appointed judge but he refused to take up the appointment. Ibn Wahab had many students and wrote many books. His students include¹⁵²

Ahmad bin Salih al-Misri

al- Rabi’u bin Sulaiman

Sa’eed bin Waki’u

Abdurrahman bin Mahdi

His books include

al- Jami’u

al-Qada

4.5.1.11. Ibn al- Qasim

His name was Abdurrahman bin al-Qasim Abu Abdullahi, born in 123A.H. Ibn al- Qasim studied under Imam Malik for 40 years. Ibn al-Qasim was the leading student of Imam Malik in terms of Fiqh. Malik was asked about Ibn al -Qasim and Ibn Wahab, he said:

“Ibn Wahab is learned while Ibn al-Qasim is a faqih”¹⁵³

Imam Malik once told Ibn al- Qasim that:

¹⁵² Ibid

¹⁵³ Abdurrahman A.J Tarjamat al-sheikh Abdurrahman bn Qasim. www.saaid.net/Doat/bingasem assessed on 08/08/2015

“Fear Allah and publish this knowledge”

Ibn al- Qasim was recognized as the leading faqih even by his colleague, Ibn Wahab, who said:

“If you want the Fiqh of Malik go to Ibn al-Qasim, that is the area of his specialization.”

After the death of Imam Malik, Ibn al- Qasim continued to teach the knowledge of Malik and the Fiqh of his school. Ibn al-Qasim was the first disciple of Imam Maliki who compiled al-Mudawwanatul Kubra which is one of the prominent source books in the Malik School, and is considered as the highest reference in the Fiqh al- Maliki. It contains views and opinions of Imam Maliki himself on issues affecting act of worship, family affairs, contractual transaction and other principles of Fiqh al-Maliki narrated by his disciple Ibn al-Qasim.¹⁵⁴

Many people studied under Ibn al- Qasim. They include the following

Asbagu

al-Harith bin Miskeen

Suhnun

Muhammad bin Abdillahi bin Abdirrahman

And many more.

*Ibn al-Qasim died in 191 A.H.*¹⁵⁵

¹⁵⁴ Anas. M. (2005). Mudawwanatul Kubra . Vol.I Darr al-Hadith, al-Qahira p. 14.

¹⁵⁵ Ibid

4.5.1.12. Suhnun

His name was Abdussalalam, Abu Sa'eed. Suhnun bin Sa'eed bin Habib, Suhnun was born in the year 161 A, H,¹⁵⁶ He studied in Qirawan under many jurists of his time which include the following:

Abu Harija;

Aliyu bin Zayyad;

Ibn Hassan.

Suhnun also went to Egypt wherein he studied under great students of Imam Malik such as:¹⁵⁷

1) *Ibn al-Qasim;*

2) *Ibn Wahab;*

3) *Ash'habu;*

4) *Abdullahi bin Abdilhakam;*

5) *Sufiyan bin Uyaynah;*

6) *Waki' u, and*

7) *Abdurrahman bin Mahdi*

Isa bin Miskeen is reported to have said:

¹⁵⁶ www.fatwa.islamweb.net/fatwa/index, assessed on 08/08/2015

¹⁵⁷ Ibid

“Suhnun is the gift of this Ummah, and no jurist ever existed between Malik to the time of Suhnun like him (Suhnun)”¹⁵⁸

Aliyul Basari said

“Suhnun was the leading jurist of his period”¹⁵⁹

4.5.1.13. Ibn Habib

His name was Abdullahi bin Habib born in the year 174 A.H,¹⁶⁰ Ibn Habib studied from the jurists of his period such as:

Abdullahi Bin Wahab;

Ashhabu binAbdilAzeez bin Dawoud;

Abu Muhammad Habib bin Marzuq, the secretary of Imamu Malik;

Abu Abdullahi Sa’a Sa’a bin Salam al- Andulusi al- Dimashqi;

Asbagu bin Faraj bin Saeed;

Aliyu bin Jaafar al-Sadiq, and many more.

Ibn Habib studied from his teachers until he become a learned jurist. Many jurists studied under Ibn Habib and he wrote many books which Promoted the Maliki law in particular and the Islamic religion in general.¹⁶¹

The students of Ibn Habib includes¹⁶²

¹⁵⁸ Ibid

¹⁵⁹ Ibid

¹⁶⁰ Abdulkarim A.N. Al-Ahkam. www.mosowarat.com assessed on 05/08/2015

¹⁶¹ Ibid

Mutarrif bin Qais

Muhammad bin Qamar

Muhammad bin Abdil Malik bin Habib

Ibrahim bin Khallad

Mutarrif bin Abdurrahman bin Ibrahim

Malik bin Ma'aruf

Ibn Habib wrote many books which includes the following

a- Wadhihatu fil Fiqh wal Sunan

Minhajul Qadhaa

a- War' u

a- Talkhees fil Fara'idh

a- Wadhihatu fil-Mafqud Munzu Qurun

Tabaqatul Fuqahaa

Tafsiiru Garibil Muwatta

Adabun Nisaa a- Gaya wal Nihaya, and many more.

a- Qardhee in his book The History of Jurists in Andulus said

¹⁶² Ibid

Ibn Habib died at the age of sixty four in the year 238 A.H.¹⁶³

4.5.1.14. al- Baji

Among the Maliki jurists that played a vital role in the development of Islamic law in Andulus in particular and the world in general is Sulaiman bin Khallaf bin Said bin Ayyub al- Qadi Abu al-Walid, al Baji al Andulusi, al- Qurtubi, al- Tamimi, al- Maliki, born in 403 A.H¹⁶⁴

al-Baji studied from the following jurists, namely; Yunus bin Mugith, Makki bin Abi Talib, Muhammad bin Ismail, Abubakar and Muhammad bin al-Hassan, bin Abdil Warith.

When al-Baji was 26 years old he traveled for Hajj and stayed in Mecca for three years studying under al-Hafiz Abi dharr, he studied Hadith and Fiqh and, thereafter, he moved to Dimashqi and studied from Ibn al-Qasim and Hassan bin Samsar. He then moved to Bagdad and studied from Umar bin Ibrahim al- Zuhri, Muhammad bin Gilan, Abil Qasim al-zuhri and Muhammad bin Abdil Wahid. He also studied from al-Qadi Abu Tayyib al-Tabari, al-Qadi Ibn Abdillahi al-Samari and Abul Fadil Ibn Umar al-Maliki¹⁶⁵.

al- Baji studied Hadith, Fiqh and usul al-Hadith from al-Qadi Jaafar al-Sammani Sahib Bin Baqillani.

al-Baji came back to Andulus after thirteen years with vast knowledge. He went to Majorca where he defeated ibn Hazm in debate. According to Ibn Bassam Ibn Hazm is reported to have said: if the Malikis had only Abal al-walid bin Ali Ibn Nasr al-bagdadi and al- Baji they would suffice them.

¹⁶³ Ibid

¹⁶⁴ Azzahaby M.S.U. *Siyar A alam al Nubala a al-maktaba al- Mufitiyya* Cairo, Egypt vol 14 p.62.

¹⁶⁵ Ibid

al-Baji engaged himself in teaching and taught many students such as Abu Amr bin Abdil Barr, Abu Muhammad bin Hazm, Abubakr al-katib, Aliyu bin Abdillahi al- Thaqali, Abu Ala bin Sakar, and many more.

al- Baji was appointed as a judge over some parts of Andulusia and published many works on administration of justice in Islam. He wrote the Muntaqa fi al- Fiqh which is regarded as the best book ever written in the Maliki school. Some of the works in the Maliki school on al-Shari'a after this book make reference to it such as the Tabsiratul Hukkam and the Fathul Aliyyil Maliki, to mention but a few. He also wrote a book titled Kitab al- maani which is a commentary upon the i contains in twenty volumes. He also wrote the Mukhtasar al Mukhtasar fi Masail al-Mudawwana., and many more.¹⁶⁶

4.5.1.15. Ibn Rushd

His known was Abul Walid Muhammad bin Abil Qasim Ahmad bin Sheikh, Muhammad bin Ahmad bin Ahmad bin Rushd al- Maliki al-Qurtubi born in the year 520 A.H,¹⁶⁷

Ibn Rushd studied the Muwatta from his father and studied also from Marwan bin Masra and many more until he become a learned jurist and authority in the field of Fiqh, Ibn Rushd then studied medicine from Marwan bin Hazayul until he become authority in the field too,¹⁶⁸

Al-Abra said

“Andulus has never witnessed a learned jurist like Ibn Rushd”¹⁶⁹

People went to Ibn Rushd for their Fatwa both in Fiqh and medicine, Ibn Rushd

¹⁶⁶ Ibid

¹⁶⁷ www.multaqaalmazahibalfiqhiyya/multaqaalmazahbalMaliki.com assessed on 07/080/2015

¹⁶⁸ Ibid

¹⁶⁹ ibid

Played a vital role to the development of Maliki law, He had many students and wrote many books, His books include the following:

Bidayatul Mujtahid Wa Nihayatul Muqtasid

al- Mukhtasarul Mustasfa

Sharhu Kitab al-Nafs

Kitab Manhajul Adillah Fil Usul

Kitab Faslul Maqal Fima bainash Shari'a wal Hukma min Ittisal

And many more

Having discussed the evolution of the concept of *Muslahah Muralah* it is relevant, at this juncture, to examine more elaborately the relevance and practical examples of *al- Maslahah al-Mursalah*

4.6. Practical Examples of *Al-Maslahah Al-Mursalah*

The foundation of the Shari'a is justice, *Maslahah* and wisdom. The best Shari'a is the one which does not remain static where there is no specific *Nass* applicable to a particular situation or event but it searches for a *Maslahah* and resolves the issue in consonance with that *Maslahah*. The *Sahabah* and the *A'immatul Mujtahidin* did *Ijtihad* based on what they believed to be a *Maslahah* giving priority to public interest over that of the private or individual.¹⁷⁰

The *Sahabah* protected and developed this religion, they derived *Ahkam* from their origin, and whenever they observed that a strict application of *Nass* on a particular matter, situation or

¹⁷⁰ Fatahi A.B (1983) *Al-siyasatul Jinaiyyah fi shariatul Islamiyya*. Daar Al-shuruq, Al-gahira P. 165

circumstance, will not be in line with the intendment of the Shari'a or the strict application of that *Nass* will lead to a greater Mafsadah, in such a situation they suspended the application of the *Nass* on a particular person or situation. There are a lot of cases decided by *Sahabah* based on that.¹⁷¹

The *A'immatul Majtahidin*, and Muslim jurists applied *Maslahah al-Mursalah* in their Fatawa and decisions, Below are some of the examples of *al-Maslah al-Mursalah* and its application.

4.6.1 Suspension of the Hudud Penalty for Theft

Where a person finds himself in the state of hunger and does not get what to eat to sustain or save his life from the danger of death, if he steals food to eat, in that situation such a person should not be subjected to the penalty of amputation of the hand.

The above position was upheld and practiced by Caliph Umar (R.A) wherein he suspended the execution of theft punishment in the ('am al-maja'). Caliph Umar understood that the punishment of amputation of hand is executed against those who steal or take property of others without necessity.¹⁷²

In the above exemple, the punishment provided by Chapter Five of the Holy *Qur'an*¹⁷³ was suspended for the sake of *Maslahah* which is the protection of life.

Where a woman gets married without a guardian (wali) such marriage is void, but if the marriage was consummated she is entitled to her dower, and if she gets a child as a result of such

¹⁷¹ Mustapha T. (1981) Taalil al ahkam. Daar al-jamdja al-arabiyya, Bairuit) P. 37

¹⁷² Fatahi A.B. (1983) Op.cit. P. 242

¹⁷³ Al-Qur'an 5 verse

cohabitation, such a child is a legitimate child and entitled to inherit both his mother and the father.¹⁷⁴

4.6.2 Suspension of the Application of the Law of Equality (*Qisas*)

Where a person finds another person committing adultery (*Zina*) with his wife and killed him, such a person shall not be subjected to *Qisas* punishment if it is established with evidence that he killed him when he found him committing *Zina* with his wife.¹⁷⁵

The basis behind the above decision or suspension of the application of law of *Qisas* on that person is the *Maslahah* which is the protection of progeny (*Nasab*)

4.6.3 Admissibility of the Testimony of the Non Honourable Witness

Maliki jurists allow the admissibility of evidence of non honourable witnesses in cases other than *Qisas* and *hudud* punishable offences. When all the members of a particular community are not honourable and a case comes to court from that community and the only witnesses are the members of that community, the judge is allowed to take the evidence of those people as many as possible and rely on their testimony to pass his decision.¹⁷⁶

The general rule of evidence under Islamic law is that a witness must be honourable (*Adil*)¹⁷⁷ but Maliki jurists allow this exception for the sake of *Maslahah*. If the evidence of those people is not admitted for and against themselves, all their dealings shall not be valid such as their marriages and other commercial transactions, because, for a marriage to be valid, it must be witnessed by at least two witnesses; and, normally, the marriage witnesses come from the

¹⁷⁴ Fiqul Maslaha wa tatbiqatiha al-muasirah P. 60 – 61

¹⁷⁵ Abu Zahra M. (1998), *Aljarima wal uquba fit fiqh al-islamee*. Daar at fikra al-arabi Alqhira, P. 175

¹⁷⁶ Ibn Farhun S.M. (1995), *Tabsiraul hukkam Wa Usulul Aqdhiya wa Mana hijul Ahkam*, Darul kutabul Ilmiyya Beirut vol. P. 12

¹⁷⁷ Al-Qur'an verse

members of the community in which the marriage is conducted. Furthermore, if the testimony of those people is not admitted there, would be a serious problem in that community because they would be cheating one another and if the victim goes to court he will not get redress as he would not have a witness to prove his case, and this may lead some of them to taking the law into their hands and turn the community to be lawless community. To prevent the above Mafsadah and promote *Maslahah* the jurists allow and admit the testimony of non honourable witnesses.

4.6.4 Permissibility of Inspection of the Genitalia of a Woman by a Male Doctor

The Muslim Jurists permit the inspection of the private part of a woman by a Doctor with a view to determining the nature of her sickness or whether she was raped or committed Zina.¹⁷⁸ The permissibility to inspect a private part of a woman to determine her sickness is a *Maslahah Hajiyya Khassa* aimed at doing away with hardship which may ensue.

4.6.8 Execution of a Group for Killing One Single Person

Jurists have held that a group of people shall all be executed if they kill one single person, despite the *Qur'an* ic verse on equality of retaliation which says.

“If you are retaliating, do it in an equal proportion¹⁷⁹” Muslim jurists suspended the application of the above verse in a situation of this nature due to universal wisdom (*Hikma Kulliyya*) and *Maslahah*. This is because if the law of equality of punishment is applied here, the purpose of the *Shari'a* would be lost which is the protection of life, because if a person wants to kill another and escape the *Qisas* he may invite others to participate in that killing and all of them

¹⁷⁸ Al-Mausuli. A M. (N,D) Alrichtiyar li taalil al-Mukter vol. 4 P. 154 see also ibn qudama Almuqni vol. 7 P.77

¹⁷⁹ Al-Qur'an 17, v. 126

shall escape death. This *Maslahah* is not sanctioned by any specific *Nass* in the *Qur'an* or *Sunnah* but is based on the general principle of the *Shari'a* which is protection of life.¹⁸⁰

4.6.9 Giving Money to a Non Islamic State for the Release of Muslim Captives

Muslim jurists permit an Islamic state which does not have a power to fight non Islamic state, to give money to that non Islamic state in order to release Muslim captives. The jurists give this permission because the *Mafsadah* behind leaving those Muslim in the hands of their enemy is greater than giving them money.¹⁸¹

4.6.10 Deeming the Impeachment of character of the *Sahabah* as a Non Compoundable Offence

Defamation of character of any of the *Sahabah* is a strict liability offence and the offender must be punished. Neither a judge nor the ruler has a power to forgive such offender¹⁸² The wisdom behind taking this position is that if the offence of this nature is not taken so seriously those people may go ahead and attack the personality of our noble Prophet (Peace be upon him). Therefore, this decision is based on *Maslahah Dharuriyya* which is protection of religion.

4.6.11 Killing of the *Ahlul bid'a*

Imam Malik and some jurists from the Shafi'i and Hambali schools are of the view that those who invite others to *Bidi'a* be killed, such the Rafidha and Jahmiyya¹⁸³

4.6.12 Permissibility of Giving Bribe in the Face of Being Cheated.

¹⁸⁰ Al- zanjali. *Takhrij al-furu alal usul*. P. 321, shatibee – almuwafaqat vol. 2 P. 710

¹⁸¹ Jalaluddeen AA (1990), *Al-ishbabu wal Naziir fi qawaid wa furuul shafiyyah* Darr al-fikra al-islamiyya, P. 87

¹⁸² Ibn Al-Qayyim M.A(1993), *Ilamul Muwaqqyieen An Rabbil Alameen* Daar Kutubul Ilmiyya Bairuit, Vol. 4 P. 287

¹⁸³ Abdullahi B. A (1415 A.H) *Al-Hudud Wal Taazir* Fat Ind Ibn Al Qayyim Daar Al Asima Riyadh P. 80

Muslim jurists permit giving out a bribe where a person will be cheated if he does not give, and does not have any other means of protecting himself other than giving such a bribe.¹⁸⁴ Giving bribe is allowed in this circumstance for the sake of *Maslahah*. (Necessity)

4.6.13 Allowing a Muslim to Inherit a Non Muslim.

The Muslim jurists have allowed a Muslim to inherit a non Muslim but did not allow a non Muslim to inherit a Muslim, and this is done based on *Maslahah* because Islam always serves as a means of promoting welfare of Muslim not otherwise. the great *Sahabah* such as Caliph Umar (R.A), Mu'az bn Jabal (R.A) and Muawiyya bin Abi Sufyan (RA) allowed Muslims to inherit non Muslims and not vice versa.¹⁸⁵

The same position was held by Muhammad bin al-Hanafiyya, Aliyu bin Hassan, Saeed bin al-Musayyib, Sha'abee, Masrooq, Abdullahi bin Muga'ffal. and Yahya bin ya'amur¹⁸⁶

Among those who supported the above position are Shiekhul Islam, ibn Taymiyya, and his student ibn Al-Qayyim.

Al-Qardhawi said:

“This position has a positive impact to the development of Islam in the global world.”¹⁸⁷ This permission was given based on Maslahah

4.6.14 Postponement of Execution of *Hadd* Punishment

Where a Muslim commits a *Hadd* offence while residing in a non Islamic state, the execution of such punishment should be postponed till he comes back to an Islamic state, because if the

¹⁸⁴ Abu Zahra M. Opcit P. 178

¹⁸⁵ Al- Qardhawi Y (2001) *Fiqhul Aqalliyyat al Mulima, Hayatul Muslimeen Wasta al-Mujtabuatul ukhra*. Daarul shurqu Al-qahira P. 127

¹⁸⁶ Ibid

¹⁸⁷ Ibid

punishment is to be carried out in non Islamic state there is a fear that the culprit may decide to change his religion. Muslim jurists such as Imam Ahmad bin Hambal and ibn al-Qayyim considered this *Maslahah* and opined that the punishment be postponed in the circumstance of this nature¹⁸⁸

4.7 Practical Application of *Maslahah Mursla* in Judicial Proceedings under the Maliki School

Under this heading we seek to discuss and cite examples of the application of *al-Maslahah al-Mursalah* in matters of adjudication with particular reference to Maliki School of law below are the examples;

4.7.1 *Ta'azir*

Apart from *Qisas* and *Hudud* punishable offences all other offences are punishable by *Ta'azir*. According to Imam Malik *Ta'azir* is given based on what the Judge considers to be the *Maslahah*, taking into consideration the nature of the offence, the offender and the circumstances under which the offence was committed. There is no limit to it, it can be more than *Hadd* punishment if a judge considers *Maslahah* on that.¹⁸⁹ From the foregoing, Imam Malik vested a discretionary power on a judge in cases bordering on *Ta'azir* punishment, but while exercising such a power the judge must take into consideration the *Maslahah*.

4.7.2 Stipulation of Condition in the Process of Administration of Oath upon Defendant.

It is a known principle of Islamic law that where a claimant cannot produce witnesses to prove his claim, the defendant must take an oath to exonerate himself from that claim. The principle is based on the Prophetic tradition thus:

¹⁸⁸ Abdullahi BA *Op cit* P. 39 -40

¹⁸⁹ *Alhudu wal taa'zir fil islam* P. 44

“The Claimant is to produce a witness while on the part of the Defendant oath is taken.”¹⁹⁰

But Imam Malik opined that oath should not be administered on the Defendant by mere *Da'awa* of the claimant until the claimant proves that there was a dealing between him and the Defendant.¹⁹¹ Malik held this position for the sake of *Maslahah*, because if this condition is not stipulated some people will be taking others to court just to subject them to hardship of taking oath unnecessarily.

4.7.3 Exempting an Unmarried Woman Who Committed *Zina* from the Penalty of Exile.

Imam Muslim reported the *Hadith* on the punishment for *Zina*, wherein the Prophet (SAW) stated the punishment of offenders of fornication (*Zina* committed by unmarried persons) as one hundred lashes and exile for one year.¹⁹² The Maliki School held that a woman shall not be subjected to exile because if you subject her to exile you are exposing her to a greater *Mafsadah* which is bigger than commission of *Zina* itself and the reason for this exclusion is based on *Maslahah*, as pointed out by Ibn Rushd.¹⁹³

4.7.4 Giving Priority to Maternal Females Over The Father in Matters of Custody.

Where a marriage between spouses comes to an end by way of divorce, *Khul'u* or any other means and there are children between them, the right to custody of those children is vested in the mother, and, in her absence, the maternal grandmother, and in her absence, the maternal aunty until those from the mother's side have been exhausted, then the custody shifts to the paternal grandmother, and thereafter the father. This is the view of the maliki jurists.¹⁹⁴ The basis behind

¹⁹⁰ Muslim A.H (1978) *Sahihu Muslim. Kitabul qadhaya. Babu yaminul mudda'a alaih*. Daar al Fikra Bairuit (1978 Vol. 3

¹⁹¹ Ibn Rushd, M.A. (1995) *Bidayatul Mujatahid Wa Nihayatul Muqtasid* Daar al Maarifa Riyadh) vol. 2 p. 844

¹⁹² Muslim A.H. *Opcit*, kitab AL-Hudud, babu had Alzina P. 169

¹⁹³ Ibn Rushd M.A. (1995) *Opcit*. Vol. 2 P. 774

¹⁹⁴ Al-kafi M. Y. (2009) *Ihkamul Ahkam Ala Tuhfatul Hukkam* Daar Al-Fikra Bairuit P.124

vesting this right in the maternal side is because they are more sympathetic than paternal relations a man.¹⁹⁵ Women also know the *Maslahah* of a child or children more than males.¹⁹⁶

4.7.5 Admisibility of Evidence of Non Honourable witnesses

Maliki jurists allow the admissibility of evidence of non honourable witnesses in cases other than *Qisas* and *Hadd* punishable offences where all the members of a particular community are not honourable and a case comes to court from that community and the only witnesses available to prove the case are the members of that community, the judge is empowered to take evidence of as many of those people as possible and rely on their testimony to base his decision.¹⁹⁷

The above position is based on the *Maslahah* because, if the testimony of those people is not admitted between themselves, there will be a serious risk of turning the community to a lawless community because they will cheat one another and the affected individual will not get redress in the court of law due to lack of competent witnesses, this may cause him to take law into his hands, and even if he takes the law into his hands, his actions can not also be proved because the only witnesses are still the members of that community. To prevent this, Maliki jurists admit evidence of those people between themselves, for the sake of *Maslahah*.

This is similar to what is happening in our society today. Many of the witnesses are not qualified strictly speaking.

4.7.6 Commencing an Action Before a Court Situate Not in the Area where the Defendant Resides

In Islamic law an action is instituted in a court of the area where the defendant resides.¹⁹⁸

¹⁹⁵ Muhammad U.D. (N.D) *Jagoran Masu Hukunci*_Ayub Printing Press Kano (N.D) vol. 1p.

¹⁹⁶ Alkafi M.Y _ (2009)Opcit 125

¹⁹⁷ Ibn Farhan. S.M. (1995), Opcit p.12

¹⁹⁸ Abdulkadir M.S. (1998), *Al-Bahjah fi Shar Tuhfat al-Hukkam*_Dar al-Maktat al-‘ilmiyyah, Bairut, p58

Maliki jurists provide an exception to that rule for the sake of *Maslahah*. Where, for instance, there is a fear of insecurity in the area in which the defendant resides, the claimant can file an action in the court of the area where he (claimant) resides and the judge of that court takes his *Da'awa*. Thereafter, the judge shall write a letter to a judge in the area where the defendant resides to invite the defendant and take all necessary steps. After that he should write back to the other judge and the case would be determined based on the facts gathered by the two judges¹⁹⁹

The *Maslahah* behind this is that the claimant is not prevented from claiming his rights if he has any, and has not been exposed to danger of insecurity. At the same time the defendant has not been subjected to unnecessary hardship of transporting himself to the area where the plaintiff resides and the matter is determined accordingly.

4.7.8 Where a Summons Issued by a Court is Dishonored

Whoever dishonores a summons issued to him by the court to appear, the judge is empowered to order for closure of his place of business or eject his family out of his house and lock up the house or do anything that will compel him to appear.²⁰⁰

Where two Parties Claim the Ownership of One Single Subject Matter which is not in Possession of any of them and None of them has a Witness to Prove his Claim

Where two parties claim the ownership of one single subject matter which is not in possession of any of them and none of them has a witness to prove his claim, the court shall ask both parties to

¹⁹⁹ Sharhu mayyaratul fasi P. 39

²⁰⁰ Ibid

take an oath to support their claim. thereafter, the subject matter shall be divided and shared between them in equal proportion.²⁰¹

4.7.10 Application of *Maslahah al-Mursalah* in Nigerian Courts

As mentioned earlier, Imam Malik is the leading jurist of *Maslahah al-Mursalah*, it should be noted, here, that prior to the advent of colonial rule to Nigeria, the Islamic law of the Maliki school was the only applicable law in the territories known today as the northern part of Nigeria, bearing in mind that all the four *Sunni* schools are equally acceptable and stand on equal footing, but the Maliki law was applied by the Sokoto caliphate in both private and state affairs.²⁰²

Garzali Abdullahi quoted Gwandu (1988) on this point saying thus:

“The Sokoto *Jihad* leaders were all very aware of course that all the four *Sunni* schools of law are equally acceptable and stand on equal footing. However, the confusion that could arise if *qadis* would be allowed to base their decision on more than one school of law would be obvious. The possibility of some *qadis* using that to give incompatible verdicts on identical cases brought before them is strong. In order to forestall this, Sheikh Abdullahi bin Fodio in particular insisted that all decisions of *qadis* must be based not only on the Maliki school of law but only on the (*Mash-hur of al-madh-hab*) or most widely known view of the school in cases where there is more than one view”.²⁰³

The Maliki law remains the applicable law in Nigerian courts since that time up to the present day, this could be clearly seen in the decision of the apex court of the land in the case of

²⁰¹ Muhammad U.D. *Opcit* Vol. 1 P. 85

²⁰² Garzali A. *Maliki law: the Predominant Muslim Law in Nigeria* available at www.lostislamicstory.com access on 6/8/2015

²⁰² *Ibid*

²⁰³ *Ibid*

Akamawa vs Bello.²⁰⁴ Where their lordships learned justices of the supreme court of Nigeria held that, the applicable Muslim law in Nigeria is that of the Maliki School of law.

The Constitution of the Federal Republic of Nigeria establishes the Shari'a Court of Appeal in all states that require it, and empowers the court to hear and determine appeals from *Shari'a* and Area courts in cases bordering on Islamic law of personal status.²⁰⁵ The same constitution vests power on the Grand *Kadi* of every Shari'a Court of Appeal to make practice and procedure (practice direction) to be followed or observed by the Shari'a and Area courts in the state.²⁰⁶

In exercising the power conferred upon him by the Constitution of the Federal Republic of Nigeria, and for the purpose of promoting the *Maslahah al-Mursalah*, the Grand Kadi of the Kano State Shari'a Court of Appeal applied the *Maslah al-Mursalah* and issued a Practice Direction on 8th November 2013 entitled Circular no (07)²⁰⁷

This circular is to the effect that in proving any case of inheritance involving pension and gratuity or any other funds in the account of a person to be inherited, one of the witnesses to prove the death of the deceased the relationship with his heirs and ownership must be a village head or Ward head of the area where the deceased and the heirs reside. By a mere look at the above circular one can easily say that the circular stipulates an additional condition on a witness which is not found in any source book of the Maliki School. Furthermore, whoever knows the reason for the issuance of that circular would believe undoubtedly that it was issued for purpose of promoting public interest. The Circular was issued as a result of misrepresentation engaged in

²⁰⁴ Akamawa vs Bello (2013) 1 SQLR (PART 1) 65.

²⁰⁵ Section 274 C.F.R.N,(1999)

²⁰⁶ See section.C.F.R.N,(1999)

²⁰⁷ Circular No (07) 8th November 2013 with Reference No DSC|CIR|27|11|36|2013

by some people of bad character who go to court and claim to be the heirs of a deceased and ask the court to order for the release of his funds for onward distribution to them. when the funds are released to the court and the court shares same to them, the real heirs would appear at a subsequent date and discover that their entitlement has already been given to others. the court will be looking for those who presented themselves in the first place as the heirs of the deceased and could not trace them. this causes the real heirs to lose their interest in the property of their deceased relatives. To prevent this *Mafsadah*, the above Circular was issued in case of any misrepresentation the Village head or Ward head can be easily traced and will be held responsible in case of any loss of property as a result of his attestation..

It is clear from the foregoing that the circular aims at promoting *Maslahah* which is protection of property.

Some Shari'a Court judges also apply *Maslahah al-Mursalah* while deciding cases brought before them. For instance, in the case of **Hadiza Ajumawa vs Alhassan Tsamiyar Boka**.²⁰⁸ This case was decided by Makoda Shari'a Court Kano presided over by Mallam Salis Muhammad Isa (Shari'a Court Judge).

The plaintiff in this case was a wife to the defendant; they had one daughter who was in the custody of the plaintiff after dissolution of their marriage. Later on the daughter run away from the custody of the plaintiff to that of the defendant.

The plaintiff filed an action seeking for the custody of her daughter since Islam gives priority of custody of children to their mothers and not fathers.

²⁰⁸ Unreported CV|KN|139|2014

The defendant stated in his defence that the daughter was initially in the custody of the plaintiff but she ran away from her to his house as a result of maltreatment she received from the plaintiff who turned her to a salesgirl and if she was not able to sell out, the plaintiff beat her and that is what forced the daughter to run away from the custody of the plaintiff to his house.

The Court took evidence on this, and confirmed from the daughter that the statement of the defendant was true and correct.

The Court held that although the *Shari'a* vested custody of children in their mothers and the wisdom behind this is that when custody is given to a mother, she will keep a child in merciful and sympathetic care as pointed out in the *Ihkamul Ahkam*²⁰⁹

The court further held that for a female child to run away from her mother to a father shows lack of sympathy and mercy, because the closeness of a daughter to her mother is stronger than that of a father.

Since the girl fled to her father, if we insist that she must remain with her mother she may run away again, and fall into bad hands thereby destroying her life.

To prevent the above *Mafsadah*, and obtain *Maslahah*, the court held that the reason for giving custody to a mother is missing therefore the daughter should remain with her father.

In the case of **Usman Ahmad Jaen vs Muktar and the Estate of Late Ahmad Usman**²¹⁰. In this case the plaintiff filed an action before the *Shari'a* Court, City No.2 Kano seeking for the distribution of estate of his late father. One of the wives to the deceased was pregnant, all the heirs desired to have the estate distributed. One of the heirs told the court that he needed his share to

²⁰⁹ Abdulkadir . M.S. (1998) ,opcit p645.

²¹⁰ Unreported suit No. CV/KN|City no.1|309/2016

pay for his school fees, while another heir told the court that she needed her own share to settle her medical bill. The judge took all necessary steps laid down by *Shari'a* but deferred the distribution of estate to the time of delivery of that pregnant woman,

It is clear from the above that the court did not take *Maslahah* into consideration because the judge could have distributed the estate and given all the heirs their shares and kept the share of the unborn child to the time of its delivery.

Al-Maslaha al-Mursala was practiced during the time of the prophet (S.A.W.), the Sahaba and the tabiun, the Nigerian law permits the application of *Al-Maslaha al-Mursala* in Nigerian courts therefore, the sharia court judges should study and learn how to apply *Al-Maslaha al-Mursala* to determine cases that are brought before them.

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary

Al-Maslahah al-Mursalah is one of the sources recognized and relied upon by Muslim jurists both in matters of adjudication and *Fatwa*. *Maslahah al-Mursalah* aims at promoting justice, fairness and the welfare of the *Muslim Umma*.

The applicable Islamic law in Nigeria prior to colonization²¹¹ and even up to the present day²¹² is that of the Maliki School of Law but unfortunately some of the Shari'a court judges, lawyers, and even some academicians, seem to misconceive the concept of *Maslahah al-Mursalah*.

Al-Maslahah al-Mursalah and its application in the matters of adjudication under Maliki School of law is the focus of this research work.

The concept of *Maslahah al-Mursalah* and its application as articulated in the classical texts of Muslim jurists was discussed and analyzed in this research.

Chapter one of this research dealt with the general introduction, statement of the research problems, objectives of the research, scope and methodology of the research. The chapter further discussed the justification for conducting the research and finally discussed literature review.

Chapter two concept of *al-Maslah al-Maslahah* this chapter discusses *al-Maslah*, classification of *al-Maslah* based on its inner strength and its recognition. Chapter three discusses *al-Maslah al-Maslahah* as a source of Islamic Law, views of jurists on the application of *al-Maslah al-Maslahah* as a source of Islamic law and the authorities relied upon by them. Chapter four discusses relevance of *al-Maslah al-Maslahah* in judicial proceedings, under this chapter a brief

²¹¹ Garzali.A, opcit

²¹² Alkamawa Vs Bello (supra)

history of administration of justice in Islam was discussed, practical example of the application of *al-Maslah al-Maslahah* in judicial proceedings and its application in Nigerian court. Chapter five concluded the research with a summary of the research, observations and recommendations proffered by the researcher.

5.2 Observations

From the discussion and analysis done so far in this research, the following observations were made:

- 5.2.1 It is observed that the *Sahabah* , the *Tabi'un* and their followers applied *al-Maslahah al-Mursalah* in most of their *Fatawa* and adjudication due to its importance in dealing with new issues that might have come during their time, though they did not give it the nomenclature "*al-Maslah al-Mursalah*" but a careful look at what they did clearly shows that their verdicts were based on the concept known today as *al-Maslahah al-Mursalah*.
- 5.2.2 It is also observed that the suspension of hadd punishment for theft by caliph Umar due to famine based on Maslaha gives rise to the development of so many principles of Islamic law such as *Aldharurat tabihu*

5.3 Recommendations

Based on the above observations the following recommendations are made:

- 5.3.1 It is recommended that the present *Ulama* should imitate the *Sahabah* , the *Tabi'un* and their followers in basing their *fatawa* on matters that are not specifically sanctioned or covered by a specific *Nass* by applying the *Al-Maslahah al-Mursalah* .
- 5.3.2 It is also recommended that the judges should use Maslaha Murdala to develop principle of Islamic that will take care of the emergine issues that are brought before them. .

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