AL-MAṢLAḤAH (PUBLIC INTEREST) WITH SPECIAL REFERENCE TO AL-IMĀM AL-GHAZĀLĪ

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Abstrak

Maslahah merupakan salah satu sumber perundangan dalam Islam. Perbincangan mengenai maslahah banyak dirujuk kepada penulisan al-Syāṭibī (m. 789H/1388M) dalam al-Muwāfaqāt. Walau bagaimanapun huraian secara sistemik, ilmiah telah pun dilakukan oleh Imam al-Ghazālī (M.505h./1111m). Boleh dikatakan bahawa al-Ghazālī adalah tokoh perintis yang mengutarakan konsep ini secara terperinci. Oleh itu artikel ini akan menghuraikan maslahah mengikut perspektif al-Ghazālī sama ada dari aspek kategori, syarat, contoh dan lainnya. Huraian ini dirujuk kepada beberapa buah karya al-Ghazālī seperti al-Mankhūl, Syifā' al-Ghalīl dan al-Mustaṣfā.

INTRODUCTION

The term *maṣlaḥah* (public interest) originated from the conception that Shariah is for the promotion of the social good and utility and the prevention of evil and corruption. Based on it, some schools of thought consider it as one of the sources of Islamic law. Therefore, consideration of public interest or common good plays a crucial role in deriving specific rulings for new issues for which there is no textual evidence.

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Al-Ghazali[1], a Shafi'i jurist, subjects *maslahah* to critical examination and makes it subordinate to the text. He restricts the function of the maslahah to the area within the contextual evidence or its agreement with the purposes of the Shariah.

AL-GHAZĀLĪ'S CONCEPTION OF *MAṢLAḤAH*

Maṣlaḥah as a principle of legal reasoning in the sense that good is lawful and lawful should be good, was used as early as Mālik's and his disciples' time. However, it was used in general sense. Its use in technical sense, as a principle of legal reasoning in a specific manner, surfaced only in post-Shāfi'ī (d. 204H) period, in the discussion of jurisprudence.[2] It appeared in Abū al-Ḥusayn al-Baṣrī's works *al-Mu'tamad fī Uṣūl al-Fiqh,* both in general and technical terms, where he holds it to be an end, attainable through *'illah* and other related terms. This clearly indicates treatment of *maṣlaḥah* in technical sense in arriving at new ruling through the channel of *ijtihād* (reasoning).

However, al-Ghazālī, a prominent Shāfi'ī jurist played a key role in developing the legal theory of *maṣlaḥah.* He is considered to be the first jurist who pioneered the question of *maṣlaḥah.* There are two reasons as to why he is considered as the pioneer of the concept of *maṣlaḥah.* The first reason is due to his systematic and detailed treatment of the concept in his last and definitive work on legal theory; *al-Mustaṣfā*, where he dedicates two large sections dealing with *maṣlaḥah* and *munāsib.* The second reason is due to the use of his terminologies and classifications of the concept by later jurists.

These all serve as the evidences to considering him as the pioneer of the concept of *maṣlaḥah* as a legal theory. He developed a systematic theoretical framework for its support. For instance he clarified the misconception related to *ikhālah* (reasoned conviction),[3] which is attributed to Shāfi'ī jurists and represents a clumsy attempt to explain *maṣlaḥah mursalah*[4], and placed it within a broader theory of *maṣlaḥah.* In

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[1] He is Abu Ḥamīd Muḥammad bin Muḥammad bin Muḥammad bin Aḥma al-Ṭūsī al-Shafi'ī known as al-Ghazālī. He was an oustanding jurist, theologian and sufi. It is for this reason that he is regarded as hujjah al-Islam, huliyyah al-din. He was born in 450/1058 in Taberan, a village in the district of Tus near the modern Mashhed. See al-Dhahabī (1984), *Siyar A'lām al-Nubalā'.* Beirut: Muassasah al-Risālah, p. 323.

[2] Paret R. (1961), "Istiḥsān and Istiṣlāḥ" in *Shorter Encyclopedia of Islam.* Leiden: Brill, p.185.

[3] al-Ghazālī (1980), *al-Mankhūl,* edited by Muhammad Hasan Hitu. Damascus: Dār al-Fikr, p.380.

[4] It refers to unrestricted public interest that has no textual evidence for its support or otherwise, but is in harmony with the objectives of the law.

the course of his discussion of suitability as a method of determining *'illah*, he refutes the objection raised by Abū Zayd al-Dabūsī.[5] The objection raised by him was that suitability was not a sufficient factor in determining *'illah*, for it was based on mere conjecture and hence, not persuasive for other jurists. Al-Ghazālī counters his objection, saying that *mukhīl* (adj. of *ikhālah*) was not based on mere conjecture. It has the support of the general propositions of the law, and this can be established through a rational inquiry. Therefore, it could be proved persuasive for other jurists too.[6] In his later work on *uṣūl,* he simply equates it with his view of *maṣlaḥah mursalah.* Al-Ghazālī undertaking an exhaustive systematic analysis of the concept defines it clearly and presents a clear picture of it for the latter jurists. He defines *maslahah* as follow:

> *"maṣlaḥah aṣlan* (essentially) means seeking *manfa'ah* (utility) or removing *maḍarrah* (harm) but it is not what we mean, because seeking utility and removing harm are the purposes at which the *khalq* (creation) aims and *ṣalāḥ* (goodness) of creation consist in realizing their *maqāṣid* (purposes). What we mean by *maṣlaḥah* is the preservation of religion, of life, of intellect, of descendent and of property. What assures the preservation of these five *'uṣūl* (principles) is *maṣlaḥah* and whatever fail to preserve them is *mafsadah* and its removal is *maṣlaḥah".*[7]

From the above definition, it is clear that he distinguishes between what seems to be leading to securing benefits and avoiding harm in human terms and that in divine term. This may be attributed to his meticulous concern for avoiding chaos and temperament with *shar'*(law). For, such consideration in human term will leave the door open flat before any forthcoming changes, resulting in disharmony in the realm of law under the banner of *maṣlaḥah* despite their incompatibility with its purposes. Accordingly, whatever act is assumed to secure benefits and prevent harm, if not in conformity with the purposes of law, is not included in the scope of *maṣlaḥah*, thus, is not a basis of deriving legal decision.

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5 'Abdallāh bin 'Umar bin 'Īsā, a prominent Ḥanafī jurist of high caliber, lived in Bukhara and died in 403H..

6 Imran Ihsan Khān Nyazee (1994), *Theories of Islamic Law*. Islamabad: Islamic Research Institute, p.201.

7 al-Ghazālī (1984), *al-Mustaṣfā min 'Ilm al-Uṣūl.* Vol, I, Beirut: Dār al-Kutub al-'Ilmiyyah, . pp. 286-287.

It is of significant importance to note that al-Ghazālī, theorising the concept of *maṣlaḥah* in terms of preservation of the purposes of the law, made a major breakthrough in its treatment as a legal theory. The importance of the theory lies in the fact that it includes the five principle values, which are universally recognised. The concern for their preservation has always been a common phenomenon to every human society throughout the history. No society could afford to compromise on their preservation, for they constitute the very root of the society, and interference of any type with them will lead to the disruption of the whole process of life. As such, they are the constituent elements of social reality without which an accurate explanation of society cannot be achieved.

Islam regards these five values crucial to the existence of the society and requires its adherents to undertake serious efforts in order to preserve them. In fact, its injunctions are set forth in a way that aims at the preservation of these values. In some cases, the preservation of these values, as the purposes of the law is stated clearly, while, in other cases they are referred to implicitly. Therefore, these values play a significant role in a social system.

Consequently, a theory which is based on these values enjoys epistemological certitude and therefore, it is conducive to reliable conclusions. Its application generates decisions that are consistent with the spirit of the law and bring about stability in the legal sphere. These five values constitute the very foundation of the existence of every human society, therefore, present firm and solid basis for construction of a dynamic legal theory. It is due to this fact that al-Ghazālī featured theses values into the design of his theory of *maṣlaḥah* so that it will lead to solutions that are consistent with the law and in harmony with its spirit.

Figure No.1

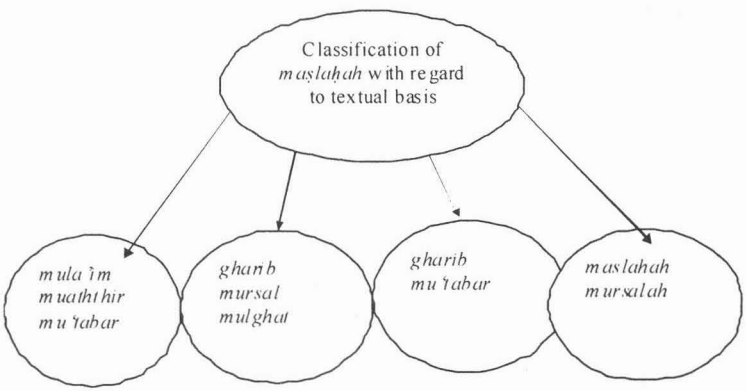

Figure no.1 illustrates the three kinds of *maṣlaḥah* as regards to its basis according to Imām al-Ghazālī.

AL-GHAZĀLĪ'S CLASSIFICATION OF *MAṢLAḤAH*

Al-Ghazālī with regard to the textual basis divides *maṣlaḥah*, as shown in figure no. 1. into four categories;

1) *maṣlaḥah* which has an established case in its support and is compatible *(mulā'im)* with the implication of the law *(taṣṣarufāt)*. This category is called effective *(mu'aththir)* hence, proof *(ḥujjah)* for all those who accept *qiyās*.
2) *maṣlaḥah* which has no established case in its support and lacks compatibility with the law. This kind of *maṣlaḥah* is called *istiḥsān*[8], or *gharīb mursal*, which he rejects categorically.
3) *maṣlaḥah* which has the support of an established case but is not compatible with the law. This is called *gharīb* and requires more investigation as to its validity.[9] In *Shifā' al-Ghalīl*, al-Ghazālī, explained this category as being derived from only one established case. As such, this category can be classified legally considered *mu'tabar gharīb*.
4) *maṣlaḥah* with no established case in its support but is compatible with the law. This is *maṣlaḥah mursalah*. Al-Ghazālī views this category to be concerned with the purposes of the law therefore, considers it as a part of the law and not independent.[10]

From the above classification, we can conclude that compatibility with the application of the law and the support of an established case are the two main factors in his classification of *maṣlaḥah*. They play an important role in its verification and validity. The coexistence of these two factors in *maṣlaḥah* renders an absolute legal force to it. The *maṣlaḥah* combining both these factors in its purview is called *maṣlaḥah mu'tabarah*. Its capacity as such is acceptable to those who accept *qīyās*. On the contrary, the *maṣlaḥah* which lacks these two factors is automatically deprived of having any legal force and is called *mulghāt*.

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[8] *Istiḥsān* in its literal sense stands for to approve or to deem something preferable. In juristic sense, it is a method of excercising personal opinion in legal reasoning with the aim of avoiding rigidity and unfairness that might be caused by enforcement of the existing law in literal sense.

[9] An example of a *maṣlaḥah* that al-Ghazālī calls *gharīb* is the alleged *maṣlaḥah* that the law should frustrate any attempt to use the law for criminal purposes. This *maslahah* is claimed to be the *'illah* of the established case that an heir who murders his banqueter in order to immediately receive his inheritance is denied the right to inherit.

[10] al-Ghazālī (1984), *al-Mustaṣfā min 'Ilm al-Uṣūl* op. cit. p.305; and Al-Ghazālī (1999), *Shifā' al-Ghalīl Fi Bayān Shubh Wa al-Mukhīl*. Beirut: Dār al-Kutub al-'Ilmiyyah, pp .92-95.

From the four mentioned classes of *maṣlaḥah* number 2 and 4 can be described as *mursal*. Number 2 is called *gharīb mursal*, for it is not found in an established case and lacks compatibility with the purposes of the law. Al-Ghazālī excludes this category from *maṣlaḥah mursalah*, because, he restricts the term only to the *maṣlaḥah* which is acceptable. He holds *gharīb mursal* to be rejected by the consensus of the jurists. He states;

> "Any *maṣlaḥah* that does not spring from the understood purpose of book (Qur'ān), *Sunnah* and *ijmā'* is *gharīb maṣlaḥah,* not compatible with the application of the law, hence, is rejected as falsehood. Whoever uses it, has legislated just as one who uses *istiḥsān*".[11]

Accordingly, in al-Ghazālī's view, conformity with the general purposes of law is the ground on which the validity of *maṣlaḥah* can be based. Thus, its compatibility with the application of the law is a requirement, which cannot be compromised. Its absence renders it weak and hence invalid. Once being stripped off compatibility, it is labeled as *istiḥsān* which according to Shāfi'ī jurists is a legislation of law based on one's own whim and desire and therefore, is rejected. For this reason, al-Ghazālī has set forth certain conditions for its validity. He emphasizes that these conditions should be strictly abided by in dealing with the concept and its application. Otherwise, it will be subjected to dispute. The conditions which he deems necessary for the validity of *maṣlaḥah mursalah* are as follow;

1. Compatibility

Al-Ghazālī describes the second type of *mursal*, as stated earlier, as being compatible (*mulā'im)*. According to him, this kind of *maṣlaḥah* is a *maṣlaḥah* that is not found in an established case and yet is compatible with the purposes of law. He uses the term *maṣlaḥah mursalah* for this type of *maṣlaḥah*. He accepts this in case of necessities (*ḍarūrāt*) and needs (*ḥājīyāt*) only and uses it as *'illah*. But in the case of embellishment (*taḥsīnīyāt*) he does not hold it as a valid ground for justification of ruling.[12] He supports *maṣlaḥah mursalah* vigorously in *Shifā'al-Ghalīl* where he states that if *maṣlaḥah* belong to the category of necessity or need. It can be used as the basis for ruling, provided that it is compatible with the application of the law. But a *maṣlaḥah* of embellishment cannot be used alone as justification for ruling. It should

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[11] al-Ghazālī (1984), *op.cit.*, pp.310-311.

[12] *Ibid.* p. 311; Al-Ghazālī (1999), *op. cit.*, p. 101.

first have been given legal consideration in a specific established case, meaning that it should be legally considered (*mu'tabar*). If there is no legal ruling for support of a particular *maṣlaḥah* of embellishment, to use it as a ground for legal ruling is not permissible. He changes his position in his later work *al-Mustaṣfā* where he states; the situation concerning the last two classes [i.e. need and embellishment] is that a ruling made solely on the basis of it is not possible unless it is supported by the confirmation of an established case (*aṣl*) or unless it is similar to the position of necessity for then there is no problem with the legal opinion (*ijtihād)* of a *mujtahid* (jurist) leading to it.[13]

He imposes new restriction on its use. Nevertheless, he retains, for the most part, the theoretical framework established in *Shifā' al-Ghalīl*. His main argument for acceptance of *maṣlaḥah mursalah* is that it concerns the purposes of the law, and in that respect it is a part of the law and not independent. So the goal of Islamic legal theory of tying up all rulings to the authoritative source is met. It is because *maṣlaḥah mursalah* as the purpose of the law is known only through the authoritative source. As he highlights:

> "Every *maṣlaḥah* that springs from the preservation of the purposes of the law is known to be a purpose by virtue of the book *(*Qur'ān*) sunnah* and *ijmā'*, so that it is not outside of these sources. It is not called *qiyās* but rather *maṣlaḥah mursalah*, since *qiyās* pertains to a specific established case. These purposes are known to be intended, not by one *dalīl* (proof) but by countless proofs taken from the *Qur'ān, sunnah* ... and various signs *(amarāt)*, as the purposes of the law, there is no cause for objection to following it. Indeed it must be considered definitive (*qaṭ'ī*), in becoming a definitive proof (*ḥujjah*)".[14]

From al-Ghazālī's wordings it is clear that *maṣlaḥah mursalah* is a purpose which is derived from authoritative sources and not a purpose determined as *'illah* in established case. The fact that *maṣlaḥah mursalah* is not established by one proof but by many proofs refer to the general purposes that underlie the legal ruling of Islamic law. For, they would be found in many instances throughout the law, while the secondary purposes would have fewer occurrences. Al-Ghazālī asserts that since the purposes are established by many proofs in the authoritative sources, therefore, they should be

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[13] al-Ghāzāli (1984), *op. cit.*, pp. 293-294.

[14] *Ibid.*, p.311.

considered definitive and thus, a strong basis for ruling. This is because, in legal theory a definitive proof overrides any conjectural proof whether in the Qur'ān or Ḥadīth. As such, *maṣlaḥah mursalah* being compatible with the purposes of law is considered proof by al-Ghazālī.

Al-Ghazālī also makes it clear that the use of *maṣlaḥah mursalah* is not a matter of applying *qiyās,* for it has no established case *(asl)*. In other words it is not used as *'illah* of an established case. In his earlier work on legal theory, *al-Shifā' al-Ghalīl,* al-Ghazālī holds that *maṣlaḥah mursalah* is not *qiyās* in the sense that it extends a judgment from an established case to undecided case, however, it can be used in deriving legal proofs (*istidlāl)*. For this reason al-Ghazālī calls *maṣlaḥah mursalah* in a number of places *istidlāl mursal* and *qiyās al-ma'nā.*[15]

Al-Ghazālī in the course of his systematic analysis of *maṣlaḥah mursalah,* states the principle purposes of the law to mainly consist of the preservation of religion (*dīn*), life (*nafs*), intellect (*'aql*), descendant *(nasl*), and property *(māl*) and whatever ensures the securing of these five purposes.[16] He affirms these purposes as the necessary purposes of the law, for they constitute the foundation for the existence of every society. However, he does not state these five purposes to be the only purposes of law. For instance, he does not stipulate that a *maṣlaḥah* be identified as belonging to one of the five primary purposes before it is validated. While arguing in specific cases, al-Ghazālī does not identify such *maṣlaḥah* as one of the five purposes. It is possible that these five general purposes are not meant to be comprehensive. But al-Ghazālī probably argues that these purposes are fundamental to society and provide basic rules for understanding and evaluating *maṣlaḥah.*

2. Necessity

Necessity constitutes another important criterion in al-Ghazālī's view in classification of *maṣlaḥah.* This criterion is drawn on the base of the different degree of *maṣlaḥah.* Based on this criterion, he divides *maṣlaḥah* into three grades: a) necessities *(ḍarūrīyāt*), b) needs *(ḥajīyāt*) and c) embellishment *(taḥsīnīyāt*). However, attached to each level are some complementary *maṣāliḥ* which perfect each level.[17] Necessities consist of those *maṣāliḥ*, which are essential to the existence of every

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[15] Al-Ghazali (1999), *op. cit.,* pp. 100,195 see also Ḥasāni, (1981), *Naẓariyyāt al-Maṣlaḥah fī al-Fiqh al-Islāmī.* Cairo: Maktabat al-Mutanabī, p. 264.

[16] al-Ghazāl ī (1984), *op. cit*, Vol. I, p. 287.

[17] *Ibid.*, p.286.

human society. They are of such a crucial importance to the society that their absence results in its collapse. It is worth to note that *maṣlaḥah* of necessary cannot be confined to things that are absolutely required for the existence of the individual only. It rather includes both the mechanism that maintains social order as well as the requirement for sustaining life.

Al-Ghazālī classifies the five general purposes of the law under the category of *ḍarūrīyāt*[18]and holds them to be as integral part of the law. He illustrates the *ḍarūriyāt* by providing examples such as the *maṣlaḥah* of executing a seditious heretic in order to preserve religion, the *maṣlaḥah* of the rules of execution and retribution for the preservation of life, the *maṣlaḥah* of punishing the fornicator for the preservation of family life and blood-line, the *maṣlaḥah* of punishing thieves for the preservation of property. Al-Ghazālī also gives as an example for those necessities that are inferior to the higher level of necessities, the ruling that a little wine is prohibited, although it may not cause intoxication. The logic of this ruling is that, drinking a little wine gradually lead to the consumption of a great deal of wine.[19]

Al-Ghazālī calls the *maṣlaḥah,* which is not essential to society as need (*ḥājah*). Although it is important to the well being of the society, it is on the whole supplementary to the five essential values. It consists of the interests which bring about ease and facilities in life and remove hardships. For instance, in the area of *'ibadāt,* concessions *(rukhaṣ*) are granted to the sick and to the traveler not to observe the fast, and shorten the prayer. The concessions are given in order to prevent hardships. By the same token the basic *ibāḥah* (permissibility) regarding the enjoyment of victuals and hunting is complementary to the main objective of protecting life and intellect.[20]

Al-Ghazālī claims that a sign of *maṣlaḥah* of need's category is that human societies will differ with regard to it acceptance. Giving the right of guardianship of a minor as example for the *maṣlaḥah* of need, he argues that giving the guardian the authority to marry off his minor is needed but not necessary, because sexual desire are not a factor, yet this ruling is needed based on the assumption that early marriage leads to material betterment by involvement with tribal groupings and in-laws.[21] Stipulation of social compatibility in a minor marriage can serve as an example for what completes

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[18] *Ibid.*, p.287.

[19] *Ibid.*, pp.287-288.

[20] Muṣṭafā Zayd (1964), *al-Maṣlaḥah Fī al-Tashrī' al-Islāmī.* Beirut: Dār al-Fikr al-'Arabī, pp.54-55.

[21] al-Ghazālī, (1984), *op. cit.,* pp. 289-290.

or perfects a *maṣlaḥah* of need. This is due to the fact that it will help maintaining the social status of the minor, by getting married to the person of the same social status which is not essential, but is something which is needed. This means that even minor's marriage to a person of lower social status may not disrupt the process of life. Nevertheless, it is required in order to bring about an appreciation to the minor's status.

Therefore, *ḥājiyāt* are called so, for they are needed in order to expand the scope of the primary purposes. Their importance lies in the fact that they eliminate the hardships which is caused as a result of strict literal application of the law, and which can gradually lead to the disruption of its primary purposes as a whole. Thus, in order to avoid hardship and attain facilities and ease, *ḥājiyāt* should be considered along with *ḍarūrīyāt*.[22]

Maṣlaḥah of embellishment is related to what facilitate worldly benefits and enhances the best type of customs and social transaction. An example of this category is the ruling that a slave cannot be witness in a court case. The reason for this, Al-Ghazālī argues, is that his low social status is not compatible with the high rank of testifying in court.[23] According to him[24], the presumed *maṣlaḥah* in this case, is that a judgment against a freeman based on testimony of a slave is socially reprehensible. In other words, the law acknowledges the slave's low status by denying him certain fundamental legal rights, as the right of giving testimony in a court of law rests with a person of high status. Other examples of this category are; the observance of cleanliness in personal appearance and *'ibādāt*, moral virtues and avoiding extravagance in consumption and moderation in enforcement of penalties. Thus, *taḥsinīyāt* means adaptation and conformity to the best customs and avoiding those habits and manners which are disliked by people of sound mind.[25]

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[22] Al-Shāṭibī (n.d), *al-Muwāfaqāt Fi 'Uṣūl al-Sharī'ah.* (Commented by Abd Allah Darāz). Cairo: Maktabah al-Tujāriyyah, p.10, see also Hashim Kamali (1989), *Principles of Islamic Jurisprudence*. Kuala Lumpur: Pelanduk Publication, p.344.

[23] al-Ghazālī (1984), *op.cit.*, pp. 290-291. See also Hashim Kamali (1989), *op. cit.* p.344.

[24] Hashim Kamali (1989), *op.cit.* p.345.

[25] However, it is worth noting that the point made by al-Ghazālī regarding the testimony of a slave is subject to dispute. The Hanbalites reject this reasoning and in contrary they accept the testimony of a slave. Ibn Taymiyyah argues, that there is no textual evidence that prohibits a slave's testimony, and that the purpose of the law in this matter is to attain truthful testimony, regardless of whether he is slave or free. (Ibn Taymiyyah (1980), *al-Qiyās fī al-Sharī'ah al-Islāmiyyah.*, Beirut : Dār al-Āfāq, p. 111).

The above division of *maṣāliḥ* can be depicted as a structure built up of three grades, interconnected to each other. Their relation to each other can be analysed from two aspects. First, every grade for its own existence requires some auxiliary elements. This is, what is meant by al-Ghazālī's statement "attached to each level are some complementary *maṣāliḥ* which perfect each level".[26] Second, every grade is related to the other.[27] Each of the three grades requires some complementary elements in order to realize its objectives fully. For example, implementation of *qisās* (retaliation) in a full sense cannot be achieved without fulfilling the condition of parallel evaluation *(tamāthul)*. A correct understanding of their relation requires the consideration of two basic premises: First, the lack of these complementary elements does not lead to the elimination of essential objectives. Second, the consideration and realization of the complementary element should not lead to the negation of the original objectives. The complementary element is like quality *(ṣifah)* if the consideration of a quality results in the negation of the qualified object (*mawṣūf*) the qualification is negated as well. If it is supposed that the consideration of the complementary would bring about the realization of its interest at the cost of the original objective, then the realization of the original has to be preferred.[28]

The above provision can be illustrated by the following examples: there is an injunction in the Qur'ān, which allows eating of carrion to save life. This is because the preservation of life is of utmost importance, and preservation of *murū'ah* (manliness, honour) is complementary (*takmīlī*) to the protection of life. The prohibition of impure things is due to consideration for preserving honour and to encourage morality. If the preservation of honour, which is complementary, by avoiding eating impure things, leads to the negation of the original interest which is the preservation of life, then the consideration of the complementary is forsaken.[29] This can be illustrated further by the act of sale which is *ḍarūrī maṣlaḥah* and the prohibition of risk and ignorance in sale transaction, which is complementary. In this case, stipulation of a complete negation of the risk will ultimately lead to the complete negation of *ḍarūrī* which is the act of sale.[30] The relation between these three grades is the same as that of complementary *maṣāliḥ* to the original objectives of the law. Thus, it can be concluded that *taḥsīniyyāt* are complementary to *ḥājīyāt* which are at the same time complementary to *darūrīyāt.*

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[26] al-Ghazālī (1984), *op. cit.* p. 286.

[27] al-Shāṭibī, *op. cit.* p. 12. See also Muhammad al-Khudarī (1981), *'Uṣūl al-Fiqh,* 7th ed. Cairo: Dār al-Fikr al-Arabī, p.302.

[28] al-Shāṭibī (n.d.), *op. cit.* p. 14.

[29] Muḥammad Khalid Mas'ūd (1984), *Islamic Legal Philosophy.* Islamabad: Islamic Research Centre, p. 228.

[30] Muḥammad al-Khuḍarī (1988), *op.cit.,* p. 303.

The *ḍarūrīyāt* in themselves constitute the fundamental *maṣāliḥ*. A right perception of the different grades of *maṣāliḥ* requires the consideration of the following rules:

1) *Ḍarūrī* is the basis of *maṣāliḥ*.
2) The disruption *(ikhtilāl)* of necessities *(ḍarūrī)* is an absolute disruption of other *maṣāliḥ*.
3) The disruption of other *maṣāliḥ*, does not result in disruption of *ḍarūrī* itself.
4) In a certain sense, a complete disruption of *taḥsīnī* or *ḥājī* necessitates the disruption of *ḍarūrī*.
5) The preservation of *ḥājī* and *taḥsīnī* is necessary for the sake of *ḍarūrī*.[31]

The consideration of these rules in analysing the concept of *maṣlaḥah* will enable us to put its three grades and their complementary elements in their right perspective.

Consequently, the unrestricted *maṣlaḥah* does not represent a specific category of its own because it could fall into any of the three types of *maṣāliḥ*. For this reason, some scholars, like al-Shāṭibī argues that all *maṣāliḥ* are relative (*nisbī, iḍāfī*), for all of its varieties, including essential ones, involve a measure of hardship and even *mafsadah*. Hence, there is no absolute *maṣlaḥah*. For, the determination of value in any type of *maṣlaḥah,* is based on preponderance of benefits that accrue from it, with the stipulation of its harmony with objectives of the lawgiver.[32]

Al-Ghazālī discusses the condition of necessity with regard to *maṣlaḥah* in both of his works; *Shifā' al-Ghalīl* and *al-Mustaṣfā*, but with different conclusions. In *Shifā' al-Ghalīl,* he states that if *maṣlaḥah* belong to the category of necessity or need, it can be used as a basis for ruling, provided that it is compatible with the application of the law. But a *maṣlaḥah* of embellishment cannot be used alone as justification for ruling. It should first have been given legal consideration in specific established case, meaning that it should be legally considered (*mu'tabar*). If there is no legal ruling for support of a particular *maṣlaḥah* of embellishment, to use it as a ground for legal ruling is not permissible.[33] Al-Ghazālī identifies this kind of *maṣlaḥah* as *istiḥsān* (personal preference or personal opinion) and rejects it.[34] In *al-Mustaṣfā* he tightens further the restriction imposed on the use of *maṣlaḥah mursalah* by stipulating that it must belong to the grade of necessity. He points out:

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[31] *Ibid.*

[32] *Ibid.*, p.21; Hashim Kamali (1989), *op. cit.*, p. 345.

[33] al-Ghazālī (1999), *op.cit.*, pp. 100-101.

[34] Abdul Wajid Bagby Ihsan (1986), "Utility in Classical Islamic Law" (Ph.D Thesis in University of Michigan), p. 110.

> "The situation concerning the last two classes [i.e. need and embellishment] is that a ruling made solely on the basis of it is not possible unless it is supported by the confirmation of *aṣl* (an established case) or unless it is similar to the position of necessity; for then there is no problem with the legal opinion; *ijtihād* of a *mujtahid* (jurist) leading to it".[35]

As it is clear from the above quotation, al-Ghazālī does not accept the *maṣlaḥah*, which belong to the last two categories namely *ḥājīyāt* and *taḥsīnīyāt*, as the basis for ruling. However, he makes an exception to his objection of *ḥajīyāt* and *taḥsinīyāt*, on the ground of their being confirmed by an established case in the law. Thus, according to him, the *maṣlaḥah* of *ḥajah* and *taḥsīni* categories cannot be considered as a valid ground for ruling exclusively. It should have the support of an established case. This means that the use of such *maṣlaḥah* becomes a question under *qiyās* and not that of *maṣlaḥah mursalah*. Al-Ghazālī possibly argues that since *qiyās* means extension of a ruling from an established case to a new case and *maṣlaḥah mursalah* lacks this meaning therefore, it can not be called *qiyās* considering its literal meaning, but it is called *istidlāl al-mursal* [36]

Al-Ghazālī provides us with a hypothetical case namely *'tatarrus'* (using Muslim captives as shield) to illustrate the use of *maṣlaḥah* that fall into the category of necessity. He states: "if an army of disbelievers who shield their attack by placing Muslim prisoners of war in front of them, since there is an injunction in the law which forbids the killing of innocent people, therefore, one could argue that killing these Muslims is forbidden. If the Muslim army, however, do not kill the Muslims captives who are used as a shield, the disbelievers will defeat the Muslim army and gain power over all the Muslims. In this case allowing the Muslim army to kill the Muslim captives who have been used as human shield is the best choice, because saving all Muslims is closer to the purposes of the law, and it is known not by one specific established case, but rather it is known through countless proofs *(adillah)* in the law."[37]

Al-Ghazālī contends that allowing the killing of innocent Muslim has no basis in the law and is therefore, apparently alien to the general proposition of the law. However, it can be justified when it fulfill three conditions namely, necessity, definitiveness and universality. He analyses the delicate nature of these conditions by providing some

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[35] al-Ghāzāli (1984), *op.cit.*, pp. 293-294.

[36] *Ibid.*, p. 294.

[37] *Ibid.*, pp. 294-295.

examples. So as to avoid confusion which may arise in respect of their scope and application. Al-Ghazālī explains that the conditions of "necessity" in the given example implies that if the disbelievers take position in a fortress and try to use the Muslim prisoners of war as a human shield, the Muslim army should not attack for this situation will not necessarily lead to their defeat in not attacking them. This is because the scope of their activity is confined to the fortress. Being restricted to the fortress, it is impossible for them to gain power over the Muslim army. By "Definitive" it is meant that if the Muslim army is not sure of its victory, then, they should not kill the Muslim captives, for the intended utility to accrue is not definitive. And by "Universal" it is meant that the concerned *maṣlaḥah* is not confined to few people but it touches the interest of a large portion of the community.

Figure no. 2.

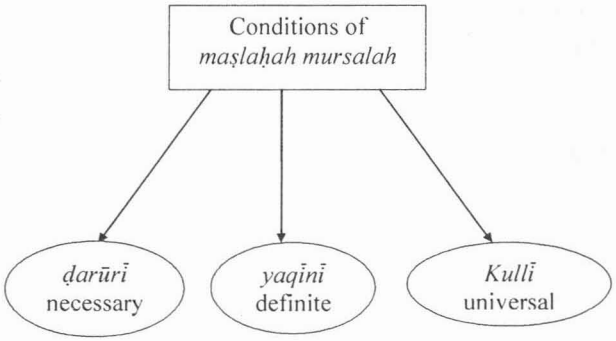

Figure no.2 illustrates the conditions for the validity of *maṣlaḥah mursalah* according to Imām al-Ghazālī. The three conditions as illustrated in the above figure are required when it happened to be in apparent clash with an individual text as stated earlier in the case of *tatarrus*. Al-Ghazālī in view of the wider implication of *maṣlaḥah mursalah* allows its consideration when it fulfils the above conditions.

To explain further al-Ghazālī provides another example of a group of Muslims on board of a ship. He argues that if a group of Muslims are on board in slowly sinking ship, and assume that throwing a member of the group overboard will save the rest of the passengers, they should not throw anyone overboard. Because the threat posed by sinking involves a few Muslims, and not all Muslims. Al-Ghazālī follows the same line of argument in respect of starving group and argues that the starving group cannot

slaughter one of their members for food in order to stay alive. Since these cases are quiet rare and do not involve a vast number of people, therefore, not justifiable.[38]

In the hypothetical example of *tatarrus* given above, it is observed that there is no specific ruling in support of *maṣlaḥah* in this case. It rather contradicts the precept of law that the blood of innocent Muslim is inviolable. However, al-Ghazālī justifies this case based on the preference of universal over the particular. Because, to save the lives of all Muslims is universal and hence, should be preferred over the particular which is the preservation of individual life.[39] Al-Ghazālī argues that this ruling does not require the support of an established case for, there are numerous ruling ascertaining the proposition that the universal is important than the particular.[40] Al-Ghazalī furthers his argument saying that no ruling is stronger than an argument which is based on universality.[41] The *maṣlaḥah* involved in this particular case is, therefore, a definitive purpose of the law that does not require the support of an established case for its validity. However, it is important to note that it is not only the number which counts for justification of *maṣlaḥah mursalah*, but also certainty and universality. This is confirmed by the consensus that prohibits throwing someone overboard, in the example mentioned earlier, to save a sinking ship, and the example that prohibits cannibalism.

As far as the *maṣlaḥah* of preferring the universal to the particular is concerned, it can be argued that the legal reasoning of *maṣlaḥah mursalah* in this case involves reasoning on the basis of general principles, as opposed to particular established cases. Then al-Ghazālī probably argues that this principle or *maṣlaḥah* is so infused in the law that it overrules or specifies a fundamental precept of the law such as innocent blood is inviolable.

Analyzing al-Ghazālī's example of *tatarrus*, it can be observed that it does not present a best example for a necessary *maṣlaḥah*. For, all jurists even those who reject *maṣlaḥah mursalah* will agree that the precept of prohibiting the shedding of innocent blood should be overruled in this special case. Their argument would be based on the principle that absolute necessities permits what is forbidden rather than being based on *maṣlaḥah mursalah*. Therefore, the law allows what is prohibited in order to save the lives. For example, the law permits a starving man to eat forbidden food in order to save his live. Here it is noticed that even those who reject *maṣlaḥah mursalah* accept al-Ghazālī's conclusion but deny its being as an example of *maṣlaḥah*

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[38] *Ibid.*, p. 296.
[39] *Ibid.*, p. 312.
[40] *Ibid.*, p. 313.
[41] *Ibid.*, p. 303

mursalah.[42] However, the distinction between the two can be made, for the necessity which al-Ghazālī stipulates in the context is broader than the necessities of life and death situation. It is therefore, through this unique feature that it can be differentiated between the principle of needs and necessities that is accepted by all the jurists and that of *maṣlaḥah* of necessity which al-Ghazālī talks about.

Consequently, the conflict between fundamental precept and the *maṣlaḥah* of necessity can be solved through consideration of their value or weight. It means that if the *maṣlaḥah* is weightier or higher in value than that of fundamental precept, it can overrule or specify the fundamental precept. Al-Ghazālī elucidates this in the context of the Muslim captives being used as human shield by suggesting the weighting of the two differing *maṣlaḥah*, the *maṣlaḥah* of preserving the whole Muslim nation and that of a few Muslims, to determine which one should be applied.[43] The criterion for this, as provided by al-Ghazālī, is possession of the conditions of necessity, certainty and universality. In view of these characteristics with regard to the example of *tatarrus,* it can be certainly concluded that the *maṣlaḥah* of preserving the whole Muslim nation is preferable over the *maṣlaḥah* of preserving the life of a few Muslims. For it fulfills all the required conditions even though it is not in agreement with the precept, which prohibits the shedding of innocent blood.

A thorough analysis of the examples of *maṣlaḥah mursalah* in *al-Mustaṣfā*, reveals that al-Ghazālī does not strictly apply the conditions of definitiveness and universality in case of every *maṣlaḥah mursalah*. For instance, in one of the examples, he states that the *maṣlaḥah* underlying the punishment of wine drinking is the principle; "establishing the likelihood of something is like establishing the thing itself.[44] He goes on saying that this principle is used as part of the legal reasoning in numerous cases like the precept of occurrence of maturity with puberty. This is in accordance with the law, therefore, is a valid basis for ruling.[45] However, the *maṣlaḥah,* as he suggests, in the case of punishment of wine drinking is neither definitive nor universal, because the "likelihood" of something happening is not the same as its actual happening, hence not definitive. It is also not universal because not everybody who reaches puberty is mature nor everyone who becomes drunk slanders, yet, al-Ghazālī supports this *maṣlaḥah*. This implies that he does not stipulate definitiveness and universality in all cases of *maṣlaḥah mursalah*.

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[42] Sa'd al-Dīn al-Taftāzānī (n.d), *Sharḥ al-Talwīḥ 'Ala al-Tawḍīh*, Vol. II, Cairo: Dār al-`Ahd al-Jadīd li al-Ṭibā'ah, p. 72.

[43] al-Ghazālī (1984), *op. cit.* pp.295-296

[44] *Ibid.*, p. 313.

[45] *Ibid.*, p. 306.

Similarly, in *Shifā' al-Ghalīl* there are some evidences from which the same conclusion can be drawn. For instance, with regard to definitiveness as a condition for validity of *maṣlaḥah mursalah,* he does not make any remark. But regarding the "universality", he clearly states that universality of *maṣlaḥah* is not a factor in its acceptance. He makes this remark in the context of dividing *maṣlaḥah* according to its generality. He says:"some *maṣlaḥah* concern all humanity, some concern the majority of humanity and some concern specific individual in rare cases." Then he concludes that all these *maṣāliḥ* can be considered *ḥujjah* (definitive proof) in legal reasoning.[46]

As to whether al-Ghazālī in his work *al-Mustaṣfā,* actually makes necessity a condition for all cases of *maṣlaḥah mursalah* or not, hence, changing his position from the previous one in *Shifā' al-Ghalīl*, two contemporary scholars al-Būṭī and Ḥussain Ḥasan provide certain details in this regard. They argue that al-Ghazālī did not make necessity a condition for all cases of *maṣlaḥah mursalah.*[47] To justify their argument they state that the issue of necessity is raised in the example of the Muslims being used as a shield, therefore, it is particularly meant for this case only. Because the *maṣlaḥah* in this example cannot overrule the principle of inviolability of innocent blood unless it is necessary. Thus, the use of necessity as a condition in the context implies that it is specifically meant for this particular case only.

The argument advanced in support of the proposition that al-Ghazālī does not actually stipulate necessity in *al-Mustaṣfā* for *maṣlaḥah*, however it is not convincing. This is because it is contrary to al-Ghazālī's own statement in the same work where he states that all *maṣāliḥ mursalah* must be necessary. And the *maṣlaḥah mursalah* of need or embellishment categories cannot be accepted as a valid basis for ruling. Meanwhile, in his early work *Shifā' al-Ghalīl* he emphasises on fulfilling the conditions of necessity and need for validity of *maṣlaḥah mursalah.*[48]

CONCLUSION

Al-Ghazālī in his attempt to develop the concept of *maṣlaḥah* to a full fledge legal theory, does not suffice on its literal dimension. In order to do this he adds a technical dimension to its design, conceptualizes in preservation of the five principles values,

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[46] al-Ghazālī (1999), *op.cit.* pp.101-102.

[47] Sa'īd Ramadān al-Būtī (n.d). *Dawābit al-Maslahah fī al-Sharī'ah al-Islaimīyyah*, Beirut: Mua'ssasat al-Risālah, pp.332-333

[48] Abdul Wajid Bagby Ihsan (1986), *op. cit.* p. 117.

namely religion, life, intellect, descendent and property. Inclusion of these values in the structure of his theory of *maṣlaḥah* is to base it on epistemologically sound foundation so that it leads to conclusions that are accurate and comprehensive in their nature. It is due to his desire for epistemological certitude that he restricts the use of *maṣlaḥah,* in his later work, to matters of necessity, despite his concession of it in matters of necessity and need both, in his earlier work.