MAṢLAḤAH MURSALAH IN THE THOUGHT OF MUḤAMMAD 'ABDUH AND RASHĪD RIḌĀ

Nazly Hanum Lubis

A lecturer at the Syari'ah Faculty, IAIN Ar-Raniry, Banda Aceh.

ملخص

تبحث هذه المقالة عن مفهوم المصلحة المرسلة التي هي طريقة من طرق استنباط الأحكام الشرعية. بخلاف العلماء القدماء الذين اشترطوا شروطا صعبة في تطبيق المصلحة المرسلة فإن الشيخ محمد عبده وتلميذه السيد رشيد رضا لم يشترطا شروطا صعبة في تطبيقها علما بأنها تعتبر وسيلة من وسائل استنباط الأحكام الشرعية في سبيل مواجهة التغيرات الاجتماعية. لقد فضّلا قوة العقل في فهم الشريعة الإسلامية اعتقادا منهما أن الإسلام دين عقلي، فلا شك في أنه يتطلب أهمية دور العقل في فهم تعاليمه. إن المنهج الذي فضلها الشيخ محمد عبده والسيد رشيد رضا في الحقيقة يمكن استخدامها لمواجهة التغيرات الاجتماعية ولكن في نفس الوقت قد يترتب على ذلك علمنة الشريعة الإسلامية نفسها.

Abstrak

Artikel ini membahas konsep maṣlaḥah mursalah (salah satu metode istinbāṭ hukum Islam) yang dikembangkan oleh Muḥammad 'Abduh dan muridnya Rashīd Riḍā. Konsep yang mereka kembangkan berbeda dengan apa yang telah dirumuskan oleh para 'ulama terdahulu, yang memberikan beberapa syarat yang ketat dalam pengaplikasian maṣlaḥah. Menyadari bahwa maṣlaḥah dapat dijadikan sebagai media dalam memformulasikan hukum Islam, kedua reformis ini mengadopsi konsep ini dalam mengantisipasi perubahan sosial tanpa memberikan persyaratan ketat sebagai yang telah ada sebelumnya. Mereka lebih menekankan

kemampuan akal dalam memahami syari'at, dilandasi atas kepercayaan bahwa Islam merupakan agama rasional dan, dengan demikian, menuntut peran akal yang besar dalam memahami ajarannya. Pendekatan yang dirumuskan oleh 'Abduh dan Riḍā sesungguhnya mampu mengantisipasi perubahan sosial, namun pada saat yang sama ia secara tidak langsung dapat berakibat kepada sekularisasi hukum Islam itu sendiri.

Keywords: *Maṣlaḥah Mursalah*, Modernization, Muḥammad 'Abduh, Rashīd Riḍā, *sharī'ah*, *ijtihād*.

A. Introduction

Modernization of Islamic law (*fiqh*) is an inevitable phenomenon confronting Muslims in order to anticipate social changes. This is not an easy task, since Islamic law, as a source-based law, should be derived from the Qur'ān and *Ḥadīth*, while at the same time some principles, which are deduced by pure reason with the consideration of worldly utility, hold sway. It is certain that there would be no problem arising when these principles are in harmony with religious teachings. However, when they violate the teachings, the established Islamic law, as a guide for human life, is put into question. In the early period the law was to bring about social change in accordance with the requirements laid out in the *sharī'ah*. In the present day, by contrast, the principles of Islamic law are often reinterpreted in order to justify the changes of socio-religious issues.

There are two trends that exist in the Muslim world in the context of its socio-religious problem. The first is the movement that tries to restore religion to the simplicity and effectiveness of its early days. The proponents of this movement argue that Islamic law offers all human needs. Whenever there is a gap between religious teachings and social needs it is due to the negligence on the part of Muslims in comprehending the teaching itself. To them, "the nearer a man stood to the Prophet and his Companions the more likely he understood the context, meaning and the application of sacred text."[1] Reformists, on the other side, represent the other trend. They seek to reformulate

[1]J. N. D. Anderson, "Recent Development in Sharī'a Law," *The Muslim World*, 40 (1950), p. 249.

traditional doctrines that need to be adapted to the modern times.[2] For this purpose, *ijtihād* is a must in order to expand legal provision to accommodate new cases. This is done by taking into account the needs in accordance with times and places.[3] In such a case, they strive to loosen the rigidity of Islamic law by reinterpreting some Islamic doctrines.

In Egypt this reform movement started in the nineteenth century under the leadership of Muḥammad 'Abduh. This coincided with the introduction of modern knowledge by European as well as the colonization of this country by Western power. The interaction between Muslims and Westerners has accordingly raised issues concerning the relationship between Islam and modern society.

This article is devoted to the study of the ideas of this famous scholar and his disciple, Muḥammad Rashīd Riḍā, whose efforts in confronting the above-mentioned problems brought about some changes in the intellectual life of Egyptians. The discussion focuses primarily on the concept of *maṣlaḥah mursalah* (consideration of public interest, which is neither supported nor nullified by textual evidence), which constitutes their legal principle in reforming Islamic law.

B. 'Abduh, Islamic Reform, and *Maṣlaḥah Mursalah*[4]

Muḥammad 'Abduh (1849-1905) was the disciple of Jamāl al-Dīn al-Afghānī for about eight years. Yet, his influence on Muslim mind seemed to be greater than his teacher's did, as he was also a more systematic thinker. Unlike his teacher, who put more emphasis on the political aspect of reform, 'Abduh paid more attention on education in which he propagated the use of reason in understanding religious tea-

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[2]Malcolm Kerr, "Rashīd Riḍā and Islamic Legal Reform: an Ideological Analysis," *Muslim World*, 50 (1960), p. 100.

[3]Ṣubḥi Maḥmasānī, "Muslims: Decadence and Renaissance," *Muslim World*, Vol. XLIV (954), pp. 186-201.

[4]When viewed in relation to its legal role as a legal reference, *maṣlahah* is divided into three categories. The first is *maṣlaḥah mu'tabarah*, which Lawgiver has explicitly upheld and enacted laws for its realization. The second is *maṣlahah mulghāt*, which had been nullified either explicitly or implicitly in the textual sources. The third category is *maṣlahah mursalah*, which is neither supported nor nullified by textual evidence. Any discussion about *maṣlahah* in this article refers to this last category.

chings and strongly opposed the idea of mere acceptance of authoritative teaching (*taqlīd*). Yet, being a *qāḍī* his contribution in Islamic legal thought was also significant.

In legal theory, 'Abduh's ideas in reforming Islamic law lay midway between two groups of thinkers who might have influenced his life. On the one hand stood the secularists, represented by Shibli Shumayyil and Farāḥ Antūn. Both blamed religions for provoking conflict in society. Therefore, religious teaching for them was "more of a hindrance than a guide to right action."[5] Shumayyil, for instance, believed that "theocracy and despotism were not only wicked, they were unnatural and false: theocracy because it raised some men above others and used spiritual authority to prevent the true development of human mind, autocracy because it denied the rights of the individual."[6] On the other hand, there was a conservative group led by the Shaykh of al-Azhar who accused modern sciences of abandoning God's commands. Therefore, these religious scholars claimed that the weakness and decay of Muslim countries constitutes "a sign of God's wrath because His true path has been forsaken."[7]

One of the most substantial problems faced by 'Abduh was the reform agenda propagated by powerful groups, including Khedive Ismā'īl and Muḥammad 'Alī. Both boldly attempted to reform Egypt by introducing European ideas and institutions that in fact could not be adopted by the society. Yet, 'Abduh sought to find solution in Islam itself. While he was not in position to stop the reform movement advocated by both Ismā'īl and 'Alī, 'Abduh would not let Muslims going back to their own past. He seemed to be successful in this task by way of creating a link between the changes and the principles of Islam. In such a case, he raised the issue of the relation between reason and revelation in which he argues that the spirit of science does not contradict the spirit of religion. Islam is a religion that encourages rational understanding, while science is the result of the activity of

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[5]Jamal Mohammed Ahmed, *The Intellectual Origin of Egyptian Nationalism* (London: Oxford University Press, 1960), p. 41.

[6] Albert Hourani, *Arabic Thought in the Liberal Age* (London: Cambridge University Press, 1983), p. 250.

[7]Ahmed, *The Intellectual*, p. 41.

reason.[8]

Islam, to this *'ālim*, is a rational religion and faith is true only when it is achieved through reason. Indeed, by reason alone man can know which is good or bad for human life.[9] 'Abduh used the term *ḥasan* and *qabīḥ* to describe both good and bad not only in a moral sense but also in an aesthetic meaning as well as in the sense that indicates the utility or harmfulness of something. The first and the last sense are closely related to law, whose existence is meant to preserve that is good and beneficial for man and to prevent that is bad and harmful.[10] 'Abduh believes that these two values can be determined by rational categories, and the revelation comes only to point out the good among what has already existed. A thing is good because it is good in itself, not because of God's command.

This idea seems to be similar to that of the Mu'tazilite. Yet, it is too premature to term him as a Mu'tazilite, since he only adopts the notion of free will without taking Mu'tazilah's other central views, such as the idea of intermediary position.[11] Nor can he be included as a naturalist, as in the case of Shumayyil and Antūn, for he was only "intermittently and incidentally naturalist on certain salient points while still marked with traditional nominalism on others. The naturalist elements are thus the impetus to reinterpretation in Islamic legal and constitutional doctrine."[12]

Dealing with the method of interpretation, 'Abduh maintains that since revelation was revealed for human welfare, its interpretation should therefore be guided by the principle of interest — one of the general principles laid down in the Qur'ān and *ḥadīth*.[13] This principle is known as *maṣlaḥah* (public interest) that comprises his method of *ijtihād*.

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[8]Hourani, *Arabic Thought*, p. 151.

[9]Muhammad 'Abduh, *Tafsīr al-Manār,* Vol. VI (Cairo: Dār al-Manār, 1911), p. 74.

[10]*Ibid.*, Vol. II, p. 204.

[11]Harun Nasution, *Muḥammad 'Abduh dan Teologi Rasional Mu'tazilah* (Jakarta: Penerbit Universitas Indonesia, 1987), p. 96.

[12]Malcolm Kerr, *Islamic Reform: The Political and Legal Theories of Muḥammad 'Abduh and Rashīd Riḍā* (Los Angeles: University of California Press, 1966), p. 107.

[13]Hourani, *Arabic Thought*, p. 233.

By and large, *maṣlaḥah* has always been adopted by reformists in their efforts at reforming Islamic law, in particular when new cases have emerged. They could hardly use *ijmā'* and *qiyās*, the secondary sources, due to their limited nature. *Qiyās* should be derived from the Qur'ān and *ḥadīth* by scrutinizing the established *'illah*. When new cases do not have similar *'illah* with that of the *uṣūl*, *qiyās* cannot be applied. Similarly, the *ijmā'* of the previous generation cannot embrace all new cases because it was used to solve a particular case of certain time and place.[14] Moreover, the Prophet's statement "my community will never agree upon an error," that legitimizes the infallibility of *ijmā'*, has left a difficult question, since "there is no way of knowing who is or is not righteous enough to be included in Prophet's community."[15] Nevertheless, it must be remembered that although the principle of *maṣlaḥah* provides the flexibility of Islamic law, it also opens an opportunity to violate the divine law. Indeed, once legal obligation is merely based on utility, it may lead to arbitrariness and hence cannot be universally applied.[16]

The principle of *maṣlaḥah mursalah* has been adopted by traditional jurists, in particular the Mālikīs and Ḥanbalīs. The Shāfi'īs and Ḥanafīs however do not use it as a technical term.[17] Yet, the process which they applied in the application of the extension of hidden *qiyās* and *istiḥsān* is similar to that of *istiṣlāḥ* for in deciding a case the public interest is adopted as a basic consideration.[18] As reported by al-Juwaynī, a Shāfi'ī jurist, al-Shāfi'ī always upheld *maṣlaḥah mursalah* when a case was similar to *maṣlaḥah mu'tabarah*.[19] Most sunnī jurists always put this kind of *maṣlaḥah*, which originally represented independent judgment of public utility, among the purposes of the law to be discovered. In such a case, its function is primarily to "fill the gaps in the matrix of

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[14]Maḥmasānī, "Muslim Decadence," p. 188.

[15]Kerr, *Islamic Reform*, p. 11.

[16]Muhammad Khalid Masud, *Islamic Legal Philosophy* (Islamabad: The Islamic Research Institute Press, 1977), p. 169.

[17]Rudi Paret, "Istiḥsān," *SEI*, 1961, p. 185.

[18]Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 1991), pp. 276-278.

[19]Abū Zahrah, *Mālik* (Cairo: Maktabat al-Anjlū al-Miṣriyyah, 1936), p. 403.

specific rules."[20]

Among the four founders of great schools, Mālik is the most far-reaching in adopting *maṣlaḥah mursalah* as an independent proof in legal reasoning. Nevertheless, his idea is not as liberal as 'Abduh's. Mālik permits this principle as long as it performs three conditions: it should be (1) both in the realm of social affairs (*mu'āmalāt*) and reasonable (*ma'qūlāt al-ma'nā*); (2) in conformity with the objectives of the *sharī'ah* and may not contradict any *dalīl shar'ī* that has already been approved conclusively; and (3) in the scope of necessity in the sense that people will be in trouble if the *maṣlaḥah* is not applied.[21]

Although he is a Mālikī in rite, 'Abduh neither requires all such conditions nor mentions the requirements in order to validate *maṣlaḥah*. To him, in social matters *maṣlaḥah* (public utility) can take precedence over other considerations when the former is achieved through reason.[22] There is no doubt that this *'ālim* accepts the Qur'ān and *ḥadīth* as guidance, but in matters which are not explicitly treated in these sources, he asserts, individual reasoning plays an important role to adjust to social rules which are governed by general rational ideas and human ethical considerations.[23] When the literal meaning of the divine law contradicts the reason, the latter takes precedence over the former because "the inner meaning of religion should not be sacrificed to an over eagerness to keep its external intact."[24] At this point, he does not only try to solve the problems which do not exist in the *nuṣūṣ*, but also employs allegorical interpretation (*ta'wīl*). By so doing, this reformist tries to distinguish the essentials of religion from its non-essentials that have came into existence due to *taqlīd* and the influence of certain type of mysticism.[25] He is therefore responsible for reintroducing *ijtihād* in Muslim law, but with *maṣlaḥah* as a criterion.

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[20]John Makdisi, "Hard Cases and Human Judgement in Islamic and Common Law," *Indiana International and Comparative law Review*, 2, 1 (1991), p. 215.

[21]Abū Zahrah, *Mālik*, p. 402.

[22]Ahmed, *The Intellectual*, p. 38.

[23]Ira M. Lapidus, *A History of Islamic Societies* (Cambridge: Cambridge University Press, 1989), p. 621.

[24]Ahmed, *The Intellectual*, p. 39.

[25]Hourani, *Arabic Thought*, pp. 149-150.

With respect to *maṣlaḥah* he reformulates also some established concepts, i.e. the concept of *ijmā'* and *talfīq* (eclecticism). *Talfīq*, as is known, is "combining part of the doctrine of one school or jurist with part of the doctrine of another school or jurist in a provision which would not have been approved, in its entirety, by any of the schools of jurists of the past."[26] The *talfīq* that 'Abduh applies, however, is not just borrowing the doctrines and combining them, but comparing all of them and producing a synthesis from all their good points.[27]

This course of action ultimately led to a reformation which had no clear textual basis and which was grounded solely on "public interest." The elements combined are sometimes taken from conflicting legal premises which produce a complex legal rule unsupported by, and even incompatible with, many of the sources from which the elements have been drawn.[28] This kind of *ijtihād*, which is described by N.J. Coulson as "legal opportunism"[29] seems to point to one purpose, viz. to make the *sharī'ah* conform to the spirit of time. As an example of this is his *fatwā* that allow Muslims to co-operate with non-Muslims in framing charitable works for society.[30]

Dealing with *ijmā'*, 'Abduh argues that this proof is not an infallible consensus as one that grew up in time but the expression of collective rational judgment and conscience with the public interest as a basic consideration.[31] But, he still asserts that the agreement which has been achieved should be obeyed because it is not impossible to be free from error. The infallibility that he suggests is not a matter of dogma but of reasonable expectation and it cannot close the door of *ijtihād*.[32] This reformist realized that human opinion could not be completely unified on any single point.[33] In this respect, *ijmā'* loses its

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[26]J.N.D. Anderson, *Law Reform in the Muslim Wold* (London: The Athlone Press, 1976), p. 51.

[27]Hourani, *Arabic Thought*, p. 152.

[28] N.J.Coulson, *A History of Islamic Law* (Edinburgh:Edinburgh University Press, 1990), pp. 197-201.

[29] *Ibid.*, p. 221.

[30]Rashīd Riḍā, *Tārīkh al-Ustādh al-Imām al-Shaykh Muḥammad 'Abduh*, Vol. I (Cairo: Dār al-Manār, 1931), pp. 648-649.

[31]Kerr, *Islamic Reform*, p. 144.

[32]*Ibid.*

[33]'Abduh, *Tafsīr al-Manār*, Vol. IV, pp. 23-25.

revelationary infallibility and therefore can be reviewed. Intentionally or not, this process could gradually transform *maṣlaḥah* into utility and *ijmā'* into public opinion, and accordingly, "Islam itself becomes identical with civilization and activity, the norms of nineteenth-century social thought."[34]

The method that 'Abduh adopts is probably influenced by modern European thinkers such as Comte "whose positivism had exalted scientific objectivism even in the analysis human of culture."[35] Comte's positivism also offers a religious system that answers human needs and harmony with sciences. But, 'Abduh claims the only religion that could provide this new system is Islam with its principle of *maṣlaḥah*. It is due to this consideration that his commentary on the Qur'ān demonstrates "the possibility of a cautious but firm reinterpretation of the sacred text in line with modern needs."[36] To him, law is changeable due to the changes of time.

Therefore, it can safely be assumed that there are two reasons behind his adoption of this principle, as opposed to those of his predecessors. Firstly, he wanted to preserve the unity and social peace of the *ummah*. The unity of Egypt was indeed in danger because of the dichotomy of educational system that divided Muslims into two brands of people. The first brand was produced by traditional schools, well represented by al-Azhar and other religious schools that resisted changes and produced students who lacked scientific knowledge. The other brand constituted the products of modern institutions, which applied foreign curriculum and system and whose students tended to accept all changes and ideas of the West yet were poor in both religious and national spirit. Indeed, these two types of institutions did not share common ideas that could link them together.[37] Secondly, 'Abduh was indeed eager to bridge the gap between religion and science, keeping in perspective the dangers of the debate being held in Europe at that time that eventually led to the separation of these two subjects.[38]

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[34] Hourani, *Arabic Thought*, p. 144.

[35] Marshall G. S. Hodgson, *The Venture of Islam*, Vol. 3 (Chicago: The University of Chicago Press, 1974), p. 275.

[36] *Ibid.*

[37] Hourani, *Arabic Thought*, pp. 137-138.

[38] *Ibid.*, p. 143.

In order to avoid such situations, 'Abduh attempted to reform the society by reinterpreting the law with *maṣlaḥah* as a means, since this concept is still in the range of the *sharī'ah*. Therefore, in juridical practice, it is not surprising to witness that this reformist often preceded public utility over the points of law. His *fatwā* allowing Muslims to deposit their money in the Postal Saving Banks in which interest would be drawn is an example of such reform.[39] The reason for this is merely public utility.

Perhaps it is not an exaggeration to state that 'Abduh's idea is both prudent and pragmatic. He tried to avoid breaking the link with traditional formula but, at the same time, elaborated his ideas in order to comply with present needs that, to some extent, are different from what his predecessors did.[40] His concept of *ijtihād*, for instance, comprises his theological technique which gives reason authority to interpret the *sharī'ah* within the context of problems and the needs of modern society. However, this theory lacks restriction and "conflicting rational arguments are weighed on the scale of utility."[41] When reason has authority to determine social rules based on *maṣlaḥah*, not on values upheld in the *nuṣūṣ*, it may lead to corruption and arbitrariness. It is in this respect that Sylvia G. Haim claims that this idea "ceases to be properly a religion and is transformed into a system of ethics or rules for successful conduct in this life."[42]

C. Riḍā's Thought on *Maṣlaḥah Mursalah*

One of 'Abduh's disciples who adopted his ideas and became his mouthpiece was Rashīd Riḍā, a Syrian by nationality. Riḍā launched 'Abduh's ideas in the periodical *al-Manār* which, first published in 1989, was the organ of 'Abduh's reform ideas. He also published the commentary on the Qur'ān, *Tafsīr al-Manār*, which was based on 'Abduh's lectures and writings. However, this *tafsīr* is not wholly based on the thought of 'Abduh, who passed away before it could actually be

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[39]C. C. Adams, *Islam and Modernism in Egypt* (New York: Russell & Russell, 1968), p. 80.

[40]Kerr, *Islamic Reform*, p. 105.

[41]*Ibid.*, p. 111.

[42]Elie Kedourie, *Afghani and 'Abduh* (New York: The Humanities Press, 1966), p. 3.

completed. It was Riḍā who later finished the work in a manner that was not different from that of his master.[43]

Like his teacher, Riḍā bases his legal theory on natural characteristic in which he draws the distinction between the doctrines of Islam and its social morality. The doctrines of Islam and the form of worship have been clearly found in both the Qur'ān and the practices of the Prophet and his companions. They cannot be changed and no addition can be made to them. Social morality however should be drawn out by Muslims themselves, who have the potentiality of reason. Since the Qur'ān and the Prophet only provide general principles, Muslims should conduct their interpretation in the light of circumstances with the guiding principle *of maṣlaḥah*.[44] By using this principle, which is accepted by traditional legal theory but broadened later by him, Riḍā introduced a broad and flexible process of interpretation into the law.

Maṣlaḥah mursalah, in its traditional concept, is an extended version of *qiyās* (analogical reasoning) which constitutes the chief means of rational elaboration of the revealed sources, the Qur'ān and *ḥadīth*. In *qiyās*, the starting point of identifying the *ḥukm* is *'illah* (efficient cause) which acquires its relevance from the divine wisdom. Whether or not the *'illah* has any rational basis is not an important point, since the function of jurists is to elaborate those already revealed, not to investigate value judgments. Dealing with cases which do not have any relevant *'illah*, jurists unavoidably should consider *maṣlaḥah,* since the *sharī'ah* is revealed for human welfare, and indeed there are many cases which are not clearly touched by the sacred text. In this case, jurists however applied a careful method designed to restrict human deliberation by promoting the interest that exists in the sacred law. A clear example in this case is the extended version of *qiyās* as argued by al-Ghazālī, who promotes necessity in order to enable the requirement of the *sharī'ah* and the application of *ḍarūrah*, a ruling which permits a forbidden act in order to avoid worse consequences.[45] To the traditional jurists, this *maṣlaḥah* is merely a tool of interpretation, not as a

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[43]Adams, *Islam and Modernism*, p. 199.
[44]Albert Hourani, "Rashīd Riḍā," *The Encyclopedia of Religion*, XII, p. 217.
[45]Kerr, "Rashīd Riḍā," p. 103.

substantive source in its own right.

Riḍā, by contrast, seems to have shifted this principle from its function as a tool of interpretation to be a substantive source. In his legal reform, which was inspired by 'Abduh's idea of natural justice, this reformist contends that in *mu'āmalāt* matters, in the absence of textual stipulation "necessity alone would suffice as a legal source to justify the process of drawing conclusion, known today as legislation (*tashrī'*)."[46] This also means that in the absence of textual evidence, the principle of necessity can be the basis for independent legal deduction. This idea is based on two principles: the first is the principle of protection against distress and constriction (*'usr wa kharāj*) that are found in the sacred texts; and the second is the principle set forth by the *ḥadīth*: *la ḍarar wa lā ḍirār* (do not inflict injury no repay one injury with another). These two principles act as general guide for men in deducing the law, for God does not reveal Qur'ānic verses corresponding to any particular cases. Indeed, He only provides a measure by which people — in this case jurists — ascertain truth on the basis of probability.[47] Current social needs and circumstances are therefore the unavoidable considerations to achieve this aim.

In this legal theory, Riḍā tries to move the law from total dependence on revelation to the combination of both reason and revelation.[48] He attempts to put the theory (in the *sharī'ah*) in practice by freeing its jurisprudence from the shackles of the highly established technical and rigid procedure such as al-Shāfi'ī's legal theory. The judicial process that al-Shāfi'ī suggested indeed answers all the questions of legal system, yet when hard cases and new circumstances arise the system fails to solve them since it is too technical.[49] Accordingly, this theory fails to fill the gap between the ideal and the practice. It is in this regard that Riḍā devotes his works, namely to reformulate the established relationship between the textual sources of law and the consideration of utility (*maṣlaḥah*) and adopt the latter as the basis for

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[46]Ridhā, *al-Khilāfah aw al-Imāmah al-'Uẓmā*, as quoted in Kerr, "Rashīd Riḍā," p. 174.

[47]Kerr, *Islamic Reform*, p. 199.

[48]Makdisi, "Hard Cases", p. 218.

[49]Ihsan A. Bagby, "The Issue of *Maṣlaḥah* in Classical Islamic Legal Theory," *International Journal of Islamic and Arabic Studies*, 2 (1985), p. 9.

Islamic jurisprudence.[50]

To Riḍā, previous jurists indeed accepted the principle of *maṣlaḥah mursalah* as their basic consideration, yet they only put it in the range of *qiyās*. The Ḥanafī's principle of *istiḥsān*, for example, is essentially an application of the spirit of *maṣlaḥah mursalah*. However, to guard the law from any human deliberation, Ḥanafī, like any other jurists, traced the law back to revealed sources by claiming this principle as hidden *qiyās*, although it is not really a kind of *qiyās*.[51] In supporting this view Riḍā quotes Ibn Qayyim's statement that

> they [the proponents of *qiyās*] widened the paths of *ra'y* and *qiyās*; they advocated the method of *qiyās al-shabah* [purely external analogy], linking rulings to attributes to which it is unknown whether the Lawgiver linked them or not, and identified *'illah* on whose account it is unknown whether the Lawgiver issued laws or not...[They also erred] in their belief that many rules of the *sharī'ah* were at variance with justice and analogy....[52]

This statement does not in anyway indicate that Ibn Qayyim is a liberal proponent of *maṣlaḥah mursalah*. What he means here is to find the middle way between the two extremes of total rejection and total acceptance of *maṣlaḥah*. This jurist still acknowledges that *istiṣlāḥ* is a logical extension of *qiyās*.[53] However, Riḍā quoted the above rational statement with the purpose of, at least, supporting his idea that "the conclusions of *istiṣlāḥ* were accordingly not legally binding in the manner of a firmly grounded *qiyās*."[54]

The classification of *maṣlaḥah mursalah* into the hidden *qiyās* is made because of the fear of *'ulamā'* -as Qarafī says- that the tyrannical leaders would exploit it as a means to justify their personal ambition on power and property.[55] Hence, when jurists convert this principle into the systematic legal reasoning of *qiyās*, *maṣlaḥah mursalah* is not subject to the interpretation of the governors or princes.

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[50]Kerr, "Rashīd Riḍā," p. 104.
[51]Riḍā, *Yusr al-Islām* (Cairo: Maṭba'at al-Nahḍah, 1956), p. 75.
[52]*Ibid.*, p. 50.
[53]Masud, *Islamic*, pp. 163-164.
[54]Kerr, *Islamic Reform*, p. 194.
[55]Riḍā, *Yusr al-Islām*, p. 74.

For Riḍā, the real problem of *maṣlaḥah mursalah* does not lay in the *maṣlaḥah mursalah* itself but rather in political matters. The solution to the problem is therefore to reformulate the political structure in such a way that the decisions of public law will rest in the hands of proper persons. By this Riḍā means the *ahl al-ḥall wa al-'aqd*, or *ūl al-amr*, the body of people mentioned in the Qur'ān whom Muslims should consult in matters where there are no clear injunctions in the sacred texts. This body consists of qualified *'ulamā'* and religious leaders. When political authority is in their hands, there is no fear that *maṣlaḥah mursalah* will be abused for the sake of one's ambition.[56] This revision is preferable to denying the principle of *maṣlahah* or restricting the derivation of law from it.[57]

The political structure that Riḍā proposes is a revolutionary one, for by thinking the *'ulamā'* as an organized body he also acknowledges *ijtihād* as a formal procedure in which the making of laws should be exercised by consultation (*shūrā*) among them with *maṣlaḥah* as a basic consideration. The consensus that this body achieves should be binding.[58] By saying that its consensus is binding, Riḍā introduces a new kind of *ijmā'* with a new characteristic, which is legislative, in addition to its judicial principle. At this point, it seems that he equates *ijmā'* with *shūrā*.[59] To him, this is the original concept of Islamic legislation, which could not be performed in the early time due to lack of communication.

In his *Islamic Reform*, Malcolm Kerr argues that Riḍā seems to have failed in his reform for several reasons. The first is his adoption of 'Aduh's reform theology. Riḍā's general doctrine of the criteria of legal interpretation which appeal so widely to human value judgment in the form of *maṣlaḥah* is also responsible for this failure, for on the one hand it is "virtually to negate the supposed ideal and imperative character of the law, while on the other hand his attempts to find positive means of effectively instituting such interpretation were

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[56]*Ibid.*, p. 85.
[57]*Ibid.*, p. 75.
[58]Kerr, *Islamic Reform*, p. 161.
[59]Hourani, *Arabic Thought*, p. 234.

crippled by a hangover of idealism."[60]

D. Concluding Remarks

The main aim of 'Abduh's and Riḍā's reforms was obvious, namely to create a system of law which could be a law in a real sense. This was to be done by creating law that could be applied in the modern world. The traditional doctrines of both constitutional organization and jurisprudence were strong in methodology but weak in implementing procedure. Their focus was more on their divine origin rather than on their possible function in regulating human life.[61]

Clearly, these two modernists had no intention of promoting the secularization of Islamic law. Nevertheless, the ideological infrastructure and technical-procedural mechanism that they suggested in reforming Islamic law might have created grounds for disruption of traditional doctrines on one hand, and a basis for a parliamentary secular legislation on the other.[62] A case in point is the reform in the matter of matrimony. Monogamy, according to 'Abduh, is the original concept of marriage in Islam. Although it is mentioned in the Qur'ān, polygamy is not mandatory since it is only permitted in reluctance. Restriction of polygamy is also found in orthodox exegesis. Permission is granted only to the husband who can provide equal treatment to his wives. This can be gauged by measuring such things as maintenance, which includes the provision of dwelling and conjugal duties. Yet, in the matter of sentiment (*mayl al-qalb*), which can not be measured, the issue is left to the individual conscience and subject only to ethical rules.

This modernist, however, includes sentiment as one of the subjects requiring equal treatment. Hence, their prohibition on polygamy was based on the rational that an ordinary mortal cannot be expected to treat his wives equally in the matter of sentiment.[63] By giving this positive character to the ethical provision of textual sources, one of

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[60]Kerr, *Islamic Reform*, p. 204.

[61]Kerr, "Rashīd Riḍā," p. 174.

[62]Aharon Layish, "The Contribution of the Modernists to the Secularization of Islamic Law," *Middle Eastern Studies*, 14, 3 (1978), p. 263.

[63]'Abduh, *Tafsīr al-Manār*, IV, pp. 348-349; Qāsim Amīn, *Taḥrīr al-Mar'ah* (Cairo: Matba'at Rūz al-Yūsuf, 1941), pp. 138-140.

the basic peculiarities of Islamic law has been altered.[64] In other words, polygamy was basically *ḥarām* (unlawful) except in cases of extreme necessity (*al-ḍarūrah al-quswah*) such as when the wife was incapable of conceiving (*'aqūm/ 'aqīr*).[65] The demand for the prohibition of polygamy was based on the argument that preventing injustice is preferable to its redress and is, therefore, a matter of *maṣlaḥah*.

This idea has indeed influenced the law of marriage and divorce in Muslim countries, such as Morocco and Tunisia. In The Personal Status Codes of 1957 and 1958 in Morocco, it is stated that polygamy is forbidden if the husband cannot provide equal treatment to his wives. In a case where the husband has a second marriage which causes harm to his first wife, a legal action could therefore be taken against him.[66] The Tunisian Code of Personal Status goes even further when it declares polygamy to be a criminal act. In article 18 of a Decree of 13 August 1956, it is stated that "polygamy is prohibited. Whosoever being marriage contracts another marriage before dissolution of the first shall be liable to imprisonment for one year or fine of 240,000 Francs or both, even if the marriage has not been concluded in accordance with the law."[67] This ban of polygamy constituted a new departure in the *shari'ah* and showed the modernists' independence in interpreting the Qur'ānic precepts. Although this code invokes the Qur'ānic admonition that a man cannot be just if he has more than one wife, this law obviously contradicts the Qur'ānic rule that permits polygamy.[68]

The institutionalization of *ijtihād* that Riḍā proposed in order to achieve *maṣlaḥah* also led to an innovation in Islamic legal theory. In its traditional view, *ijtihād* was exercised by independent *'ulamā'*, *fuqahā'* and *muftīs* without any enforcement by the government. Due to their personal scholarly authority, their views were accepted and their consensus was considered general and infallible. This modernist,

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[64] Layish,"The Contribution," p. 264.

[65] Muḥammad 'Imārah, *Al-Imām Muḥammad 'Abduh: Mujaddid al-Islām* (Beirut: al-Muassasah al-'Arabiyyah lī al-Dirāsah wa al-Nashr, 1981), p. 240.

[66] Liebesney, *The Law of the Near and Middle East*, p. 152.

[67] *Ibid.*, p. 151.

[68] Majid Khadduri, "*Maṣlaḥah* (Public Interest) and *'Illa* (Cause) in Islamic Law," *New York University Journal of Islamic Law and Politics*, 12, 2 (1979), p. 216.

however, proposed institutionalizing *ijtihād* by suggesting mutual consultation among the elite *'ulamā'*, the *ahl al-ḥall wa al-'aqd*, on social matters. In the eyes of this scholar, consensus does not grow from the principle of accidental agreement (*ittifāq 'aradī*), which is the characteristic of traditional *ijmā'*, but it is grounded in intentional (*maqṣūd*) agreement. In this sense *ijmā'* is identical with the ancient *shūrā*.[69]

Therefore, it is not surprising that some later modernists adopted the principle of *shūrā* as the basis for reforming Islamic law. One of them was Maḥmūd Labābīdī who links the idea of *shūrā* to the concept of *nasakh* (abrogation). He contends that Islamic rulings are subject to change. The rulings (*aḥkām*) of abrogation, which are mentioned in the verse: "None of Our revelation do We abrogate or cause to be forgotten but We substitute something better or similar"[70] should continue even though the Prophet had died. They continuously prevail since the Qur'ān has stated that the *ummah* (community) is the source of *siyādah* (sovereignty) and *sulṭah* (power).[71] The Qur'ānic verse which says: "... who (conduct) their affairs by mutual consultation..."[72] constitutes a mandate given by God to the *ummah* to regulate their own lives. God is only the initial legislator (*al-mushri' ibtidāan*) while the completion of the legislation is left to the *ummah*.

In the final analysis it can be stated that the application of *maṣlaḥah mursalah*, which 'Abduh and Riḍā suggested, contains two themes. One is the notion that Islam carries its own revealed messages in order to preserve human welfare. The other is that Islam endorses, in effect, modern liberal values familiar to the West which leads *maṣlaḥah* to become the basis consideration in legal decisions. Accordingly, the

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[69] Layish, "The Contribution," p. 266.

[70] Ali, *The Glorious Kur'an*, II: 106, p. 46.

[71] Maḥmūd al-Labābīdī, "Niẓām al-Islām al-Siyāsī," *Risālat al-Islām*, 4, 1 (1952), p. 393. This view is similar to that of Abdullahi Ahmed al-Na'im, the proponent of the concept of *nasakh*, who claims that contemporary Muslims have the competence in reforming Islamic law, even in matters that had clearly regulated in the Qur'ān and *ḥadīth* as long as the outcome of the *ijtihād* is compatible with the essential message of Islam. Abdullahi Ahmed al-Na'im, *Toward an Islamic Reformation* (Syracuse: SyracuseUniversity Press, 1990), pp. 28-29.

[72] Ali, *The Glorious Kur'an,* XLII:38, pp. 1317.

methods that they founded were easily utilized by their successors in order to secularize Islamic law by reforming selected parts of the teachings that were compatible with social needs. This constitutes the result of the essential contradiction of 'Abduh's and Riḍā's method, that is "to ascribe to Islamic doctrine possibilities that were incompatible with its very nature."[73]

[73] P. J. Vatikiotis, *The History of Modern Egypt*, 4th ed., (Baltimore: Johns Hopkins University Press, 1992), p. 97.

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