



## The Concept Of Maslahah By Al-Imam Malik And Al-Imam Al-Tufi (Comparative study of Maslahah Al-Imam Malik and Al-Imam Najm al-Din Al-Tufi)

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### ABSTRACT

Among the sources of Islamic law which is still disputed by Scholars argument is maslahah. Some scholars reject it, but most agree to make maslahah as one of the sources of Islamic law in matters of ijtihad. Imam Malik considered as a Pioneer Scholar who makes maslahah as one source of his law ijtihad. His view was followed by the other Scholars, one of whom is Najm al-Din al-Tufi, a cleric' Hambali. However, the two leaders of thought are not the same, even in certain cases the difference is very sharp, although in certain parts have in common. In the view of Malik, maslahah serve as a source of Islamic law in matters which are not discussed formally by nas and ijma', but must not conflict with the spirit of the passage as a whole. In contrast, al-Tufi used maslahah both in matters discussed by nas/ijma' or not. As for the area of applying maslahah, both agree that maslahah is only used in the matter of mu'amalah.

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### 1. Introduction

There are two kinds of categories of Islamic law, namely shari'ah and fiqh. Shari'ah is an Islamic law affirmed directly by the Qur'an and or hadith, while fiqh is an Islamic law produced by ijtihad.<sup>1</sup> Islamic law in the Shari'ah category is universal, both in value and system. It applies to any time, anywhere and under any circumstances. Shari'ah is purely derived from revelation, therefore there is no opportunity for humans to enter this region. Included in this category are issues of faith, value systems, and some amaliah laws. While the source of fiqh is a combination of revelation and human reason. Therefore, the universalism of this teaching lies only in its value, namely benefit, while the system is particular. The events of qawl qadim and

<sup>1</sup> Ijtihad is an effort carried out by Scholars in seeking legal conclusions.

qawl jadid of Imam al-Shafi'i are one of the particularistic evidence of fiqh in the system.<sup>2</sup>

Islamic law both shari'ah and fiqh is intended to realize benefit in human life.<sup>3</sup> No single Muslim has ever denied this. The Qur'an it self expressly says that Islam is a mercy for all nature (Q.S.21: 107). Therefore, the central theme of Islamic law is informed by *jalb al-maslah{ah wa daf 'al-mafsadah* (attracting the benefit and resisting the destruction).<sup>4</sup>

Maslahah as a central point of Islamic law has always been a foothold in every law. He is the soul of Islamic law itself. Therefore, in efforts to realize the benefits that actually become the 'strength' of Islamic law so that Islamic law becomes flexible and able to answer any problems that arise along with the development of human civilization.

However, making maslahah as a source of Islamic law (read: fiqh), still disputed by the scholars'. Al-Imam al Shafi'i and al-Imam Abu Hanifah did not include maslahah in the source of the law of their ijtiha<sup>5</sup>. Al-Imam al-Ghazali even strongly condemned it as an act of 'making shara' (*man istaslaha faqad tasyarra'a*).<sup>6</sup>

In contrast to al-Shafi'i or Abu Hanifah, Al-Imam Malik is known as the owner of the concept of maslahah as a source of Islamic law. He placed him in seventh position in the hierarchy of the legal sources of his ijtiha<sup>7</sup>. In Malik's view, maslahah is used as a legal source in matters that are not formally discussed by the nas (Al-Qur'an and hadith) or ijma' ',<sup>8</sup> but not to contradict the nas soul as a whole.<sup>9</sup>

Malik's views received a lot of support from other scholars, one of whom was Najm al-Din al-Tufi, a scholar of the Hambali's school.<sup>10</sup> However, he came up with a new concept offer, which is new and different from the

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<sup>2</sup> Atho Mudzhar, "Universalisme Islam dan Kehidupan Modern" ("Islam dan Sekularisi", BPKM-IIQ, Jakarta, 16 september 1990).

<sup>3</sup> Abd al-Wahhab Khallaf, *'Ilm Usul al-Fiqh* (Kuwait: Dar al-Kuwaitiyah, 1968), 197.

<sup>4</sup> Ibid., 198.

<sup>5</sup> Muhammad Idris al-Syafi'i, *al-Risalah* (t.t.: Dar al-Fikr, t.t), 21 etc. See also Muhammad Musa Towana, *al-Ijtiha<sup>5</sup> wa Madha Hajatina Ilayh fi hadha al-'Asr* (t.t.: Dar al-Kutub al-Hadthah,t.t.), 5964. However, Some Scholars' witnessed that Hanafi and Shafi'i were 'anti-maslahah'. More details will be discussed in the discussion.

<sup>6</sup> Abu Hamid bin Muhammad bin Muhammad al-Ghazali, *al-Mustashfa* (Bairut: Dar al-Kutub al-'Ilmiyah, t.t.) 197. in the view of Islam, the essential legislator is Allah. As for the mujtahid, only in order to 'translate' the law desired by Allah. Therefore, the law that is 'produced' by mujtahid is only up to the level of zann (strong suspicion). While the Apostle also 'only' spoke based on revelation. Learn more in Khallaf, 'Ilm, 96. see also Jalal al-Din al-Ma halli, *Syarh al-Waraqat* (Semarang: Maktabah Usaha Keluarga, t.t.),237.

<sup>7</sup> Ibid., 73.

<sup>8</sup> Abd al-Wahhab Khallaf, *Masadir al-Tashri' al-Islami fi Ma La Nass Fih* (Kuwait: Dar al-Qalam, 1972) 89.

<sup>9</sup> Muhammad Abu Zahrah, *Usul al-Fiqh* (t.t.: Dar al-Fikr al'Arabi, t.t.), 279.

<sup>10</sup> About the Madhhab which is adopted by al-Tufi, many scholars doubt it. More details will be discussed in the discussion.

concept of *maslahah* Malik which is the reference of other scholars of *maslahah*. In the view of al-Tufi, if there is a conflict between *nas/ijma'* 'on the one hand, with *maslahah* on the other side, then *maslahah* must take precedence.<sup>11</sup>

This idea is a bold and very unpopular idea because it has violated the signs that have been the agreement of the *ulamas* 'that in establishing the law, *nas* and *ijma'* must take precedence.<sup>12</sup> No wonder the idea then gave birth to an extraordinary wave of condemnation. No less than 'Abd al-Wahhab Khallaf who accused him of being the one who opened the door to destruction of the passages.<sup>13</sup> Al-Kawthari even sadistically called him the first person to open the door of evil.<sup>14</sup> However, on the opposite side, al-Tufi's theory also received support. Some of its supporters even make it as a foundation for the ideas of reforming Islamic law.

## 2. Method

The method used in this article is normative analysis, in which its resources come from secondary documents, such as books, journals, thesis, and internet. The juridical method is also applied for this article and during the research process, the Author reviews regulations regarding the topic.

## 3. Analysis *Maslahah* in Islamic Law

### 3.1. Application of *Maslahah* in Islamic Law

Among *ulama* 'there is a kind of consensus to divide Islamic law into two, namely worship and *mu'amalah*. Worship is a law that regulates human relations with their God. Included in the category of worship is *muqaddarat* (law that has been determined by levels), such as provisions in inheritance, period of *'iddah*, and others. For this category they agreed that the texts did not have *'illat*. That is, humans cannot analyze the reasons and purpose of establishing a law in this field. Therefore, a *mukallaf* must not oblige something that is not obligatory on him, with the reason that there is a similarity between *'illat* and wisdom in it with other services established by *nas*. Thus, the human obligation is to believe that the laws of worship are in order to realize human benefit.<sup>15</sup>

Malik's firmness in this case is the same as the other scholars' firmness. In his view, the texts about worship must be understood textually. Man can not make legal decisions about worship on the basis of *maslahah* considerations, although according to the reach of reason it can realize *maslahah*. For example, purification must be done with absolute water, although there are other tools that can be used and ensured the results are clean.

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<sup>11</sup> Najm al-Din al-Tufi, "Risalah al-Maslah{ah}" in *al-Manar*, vol. 9, juz 10, ed. Muhammad Rasyid Rida (Mesir; al-Manar, 1324 Hukum /1906 M), 753-4.

<sup>12</sup> Khallaf, *'Ilm*, 21

<sup>13</sup> Khallaf, *Masadir*, 101

<sup>14</sup> Husain Hamid Hasan, *Nazariyat al-Maslahah fi al-Fiqh al-Islami* (Beirut: Dar al-Nahdah al-'Arabiyah, 1971), 529 on footnote no. 1.

<sup>15</sup> Zahra, *Malik*, 298. Look also Khallaf, *Masadir*, 89.

In matters of worship, the ability of human reason will not lead him to arrive at the instructions he needs. Therefore, often the terms of worship seem 'irrational'. For example, the provisions regarding taharah (purification). If a person is urinating or large in ablution, he is required to purify all members of ablution', not just confined to qubul and rectum alone as the unclean outlet. He is also not required to purify all members of the body. Meanwhile, if someone menstruating or out of semen, then he is required to purify the whole limb. Not only limited to the place of blood or semen discharge, and also not limited to members of wudu' only. Another example, the relationship between prayer with time. Likewise, the 'reason' is used as land instead of water in purification, and so on.<sup>16</sup>

The second category is mu'amalah, which is the law that regulates human relations. For this field, which is used as a foothold in the establishment of law is maslahah and the reason for the enactment of the law. It is a scholars' agreement that taklif in this field is aimed at creating a peaceful and peaceful Islamic society based on justice and virtue,<sup>17</sup> on the grounds that:

1. Based on the research, Shari's aim is to realize the benefit for his servants. While the law of mu'amalah always rotates following the turn of the maslahah. Therefore, it is always seen that a thing that is not worthy of maslahah is prohibited, while the value of maslahah is permissible. Example: advice on buying and selling, prohibition of usury, prohibition for judges to decide cases in a state of anger, and others.
2. Shari 'always gives a clear explanation of' illat-'illat the law of *mu'amalah* and adat. While the 'illat-'illat law is a trait that can realize benefit and are rational. This shows that Shari'ah wants us to follow its meaning, not just stop at the text except in the field of worship.
3. Based on maslahah, it has been valid since the fatrah period (a time when there is no apostle because the next apostle has not yet appeared). In general it is proven that their lives can work well. The Shari'a then came to perfect the morals and customs that had been the basis of their lives. Therefore, Islam recognizes a number of laws that apply in the time of jahiliyah, such as diyat, oath, qirad contract, and others.<sup>18</sup>

Al-Tufi agreed on this matter. According to him, the scope of maslahah is only in the field of mu'amalah and tradition. As for the field of worship and muqaddarat (the law which has been determined) is the right of Shari 'fully which can not be reached by human reason, either form, content, or place and time. Therefore, the legal references in worship are nas and ijma'. In worship, a servant must perform according to his provisions, for a messenger can not be called obedient unless he carries out his superior orders in accordance with what he commands and does what he knows his master wishes. Therefore, if one tries to 'rationalize' syara '(worship), then it is certain that they are misguided and misleading. This is different from

<sup>16</sup> Al-Shatibi, *al-I'tisam*, vol. 2, 130-2.

<sup>17</sup> Zahrah, *Malik*, 298.

<sup>18</sup> Al-Shatibi, *al-Muwaffaqat*, vol. 2, 212.

mukallaf's rights. The law against them is *siyasa shar'iyah* which is intended for their benefit, therefore *maslahah* which serve as a foothold.<sup>19</sup>

### 3.2 The Role of Intellect in Defining Maslahah

Although Malik argues that *maslahah* is used as the main reference in the matter of *mu'amalah*, however, as mentioned above it does not mean that *maslahah* does not have any connection with *nas* at all. In Malik's view, *maslahah* is used as a legal proposition if it is in line with Shari'ah's purpose by not violating the principles of Shari'ah and the arguments that He has set.<sup>20</sup> Meanwhile, to find out the purpose of Shari' both in the form of protection of religion, soul, mind, descent, and property, is carried out through in-depth research based on information from *nas* and *ijma'*.

However, the conclusion that a *maslahah* is a *maslahah* which is the goal of Shari' in matters that are not formally discussed by *nas*, cannot be based on one argument or one point of view. The conclusion of the Shari'ah goal was obtained based on texts in the form of general, absolute, *muqayyad*, etc., from various events and various problems.<sup>21</sup>

For example, people may appoint a head of state (*al-Imamah al-Kubra*) who is not qualified *mujtahid*. This is to avoid the possibility of a greater danger if the community is left in a state without a leader. No special passage speaks of this issue. But some passages speak of the necessity of avoiding greater danger. For example *jihada mashru'* in which contain the danger to the soul, the law of murder for people who disbelieve *zakat*, the law of killing for rebels, and others. While the absence of a leader is a far greater danger than the danger of choosing a leader who is not qualified by the *mujtahid*. In addition, the existence of a head of state is a *maslahah daruri*, while the requirement as a *mujtahid* is *maslahah tahsini/takmiliyyah*. When there is a conflict between quality *maslahah daruri* with *maslahah tahsini*, then *maslahah daruri* that must take precedence.

Another example is that *qisas* law was applied to a number of people because it killed one person. Such provisions have also been stated by 'Umar bin al-Khattab. In this case, there is also no specific passage that talks about it. He was included in the category of 'protecting the soul' whose arguments are scattered in several places. Malik's reason is because the victim is deliberately killed. Leaving the killer without being punished by *qisas* will cause the *qisas* law to be ignored. It is quite possible that anyone intent on killing others seeks help to avoid the law of *qisas* so that human life is threatened.<sup>22</sup>

Therefore, al-Shatibi firmly stated that the provisions of *maslahah* and *mafsadah* cannot be seen based on customary law.<sup>23</sup> The argument of reason if

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<sup>19</sup> Al-Tufi, *Risalah*, 764,9.

<sup>20</sup> Al-Shatibi, *al-I'tisam*, vol. 2, 39.

<sup>21</sup> Al-Shatibi, *al-Muwaffaqat*, vol. 2, 39.

<sup>22</sup> *Ibid.*, vol. 1, 23-4.

<sup>23</sup> Al-Shatibi, *al-Muwaffaqat*, vol. 2, 29.

used in this problem must be by following the argument of *sam'iyah* (*naql/nas*), or it has a role to formulate a method for understanding *nas*, or something like that. He does not stand alone, because the problem is the issue of *shar'i*, while reason is not *Shari'ah*.<sup>24</sup> Thus, it is clear that Mallah's *maslahah mursalah* is a *maslahah* that does not deviate from *nas*, because it is a form of understanding *nas*. Because of that, there will be no contradiction between *maslahah* and certain passages, whether it is *dalalah zanni* (meaning more than one), or *qat'i* (cannot be interpreted in other meanings). If there is a contradiction between *maslahah* and *nas*, it means that it is not *maslahah mursalah*, because it has damaged the meaning of *the irsal*.<sup>25</sup>

Al-Tufi does not deny that *maslahah* should be in accordance with the purpose of *Shari'* as seen in the definition of *maslahah* which he proposed. The difference with Malik is when he suggests a way of knowing whether a *maslahah* is *Shari'*'s goal or not. In the view of al-Tufi, human reason has enough competence to determine what is *maslahah* and what is *mafsadah* along within the boundary of *mu'amalah*. The existence of *maslahah* can be addressed by empirical verification through customary laws.<sup>26</sup> According to him, God has created a 'means' for us to know the ins and outs of our own benefit. Thus, we do not need to refer to the extremely abstract *nas* speculation which only yields the conclusion 'the possibility of producing *maslahah* and possibly not'.<sup>27</sup>

Al-Tufi as mentioned above firmly refused to divide the *maslahah* into *mu'tabarah mulghah*, and *mursalah*. That is, the provisions on *maslahah* have no dependence on the *nas* at all. Thus meaningful *maslahah* does not require confirmation of the passage, so it appears as an independent legal proposition.

Methods to know *maslahah* that not have no shortcomings. When it comes to the third theorem, that if an act is *maslahah* and *mafsadah* at the same time with a balanced level such as the absence of cover of the nakedness except for just one of two genitals, we can choose to cover the rectum or qubul, get the spotlight from Mustafa Zayd. According to him, qubul is a more special aurat, because it closes it is clearly more important. That is, in this case the level of *maslahah* and *mafsadahnya* is not balanced. Besides it is highly questionable, is it possible that the events as exemplified by al-Tufi are?

Ibn Qayyim al-Jawziyah, a scholar of 'Hanbali as quoted by Zayd even explicitly said that there is no action which contains *maslahah* and *mafsadah* at the same level. If such an act is then considered more feasible to do, it means that the *maslahah* is superior. Conversely, if leaving the act is considered better, it means that the *mafsadah* is greater. In addition, in his research there is no argument that talks about an act that has a balanced level

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<sup>24</sup> Ibid., vol. 1, 23-4.

<sup>25</sup> Hassan, *Nazariyah*, 107.

<sup>26</sup> Al-Tufi, "Risalah", 770.

<sup>27</sup> Ibid., 7623.

of *maslahah* and *mafsadah*. Because, *maslahah* and *mafsadah* are two opposing camps, making it impossible to unite. If both meet, it can be ascertained that one of them is superior. Thus, the law is based on the superior.<sup>28</sup>

Reading al-Tufi's opinion about the power and independence of reason in determining *maslahah* and *mafsadah* somehow raises a question, because the teaching is the Mu'tazilite teachings,<sup>29</sup> while he is considered a Hambali believer. In fact he also expressly stated that he agreed with the teachings of Ash'ari. Besides that, he also seemed very pragmatic, even rash and oversimplified.

### 3.3 *Maslahah* Qualification as a Legal Source

All ummah and even all religions agree that the Shari'ah comes to provide protection for five basic issues, namely: religion, soul, mind, descent, and property. There is no specific argument that states this, but the conclusion is produced from a number of propositions so that the truth can be ascertained.<sup>30</sup>

The protection of the five basic problems is quality, there are those who are qualified for Hajj, and there are those who are qualified. This division is adjusted to the importance and dangers. Protection of quality religion, soul, mind, descent, and property from the side of efforts to realize and preserve its sustainability, each such as the obligation to carry out the pillars of Islam and the obligation of jihad, the ability to eat all kinds of halal foods and *penyari'atan qisas*, skill drink all kinds of drinks that do not damage the mind and legal advice for drinkers of *Khamr*, marriage advice and legal punishment for adulterers and advice on various types of *mu'amalah* and the law of cutting off hands for thieves. This neglect of this type of benefit will cause human life to be destroyed. Among the verses that indicate this is Q.S. 6: 151-3, 17-32, 60:12, and others.

As for efforts to protect religion, soul, mind, descent, and property that are at the level of Hajj, each such as *penyari'atan* some rukhsah in prayer and fasting, may be hunting and enjoying delicious food, may some types of transactions in *mu'amalah* such as *qirad* covenant and *salam*, as well as *penyari'atan talak*. While efforts to protect quality religion, soul, mind, descent, and property are in their respective stages, such as the obligation to cover genitalia, procedures for eating and drinking, prohibition on buying unclean goods, and manners of husband and wife relationships.<sup>31</sup>

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<sup>28</sup> Zayd, *al-Maslahah*, 140-1

<sup>29</sup> Harun Nasution. (1986). *Teologi Islam, Aliran-Aliran, Sejarah, Analisa, Perbandingan*, Jakarta: UI-Press, 80

<sup>30</sup> Al-Shatibi, *al-Muwafaqat*, vol. 2, 8. Look also al-Yubi, *Maqasid*, 183.

<sup>31</sup> Al-Buti, *Dawabit*. (1997). Look also Wahbah al-Zuhayli, *Konsep Darurat Dalam Hukum Islam, Studi Banding Dengan Hukum Positif*, Said Agil Husain al-Munawwar and Hadri Hasan, Jakarta: Gaya Media Pratama, 51-5.

*Maslahah* pilgrims depart from efforts to eliminate difficulties in human life. Eliminating difficulties is the goal of Shari'a.<sup>32</sup> Several verses of the Qur'an that indicate this are among others Q.S. 5: 6, 22:78, 2: 185.

In Malik's view, *maslahah* which is used as a legal proposition is a qualified *maslahah* of *daruri*, and *hajj*. Protection of this *daruri maslahah*, *maslahah* function is as 'media', not purpose. While in the protection of Hajj pilgrimage is in order to 'lighten', not 'inauguration'.<sup>33</sup>

Malik refused to make *maslahah* the quality of *tahsini* as legal proposition. In his view, qualified *maslahah* can be used as a legal proposition if there is a specific text that recognizes it. This is understandable given that leaving *Maslahah* is not going to cause human life to be destroyed or hit by difficulties.<sup>34</sup>

Example *maslahah mursalah* Malik qualified *daruri* is the enforcement of *qisas* law against a number of people who together kill one person. As for the example of *maslahah mursalah* Malik who has the quality of *Hajj* is the guarantee of the goods ordered from the producer. During the time of al-Khulafa 'al-Rashidun,' Ali ibn Abi Talib said: "man cannot *maslahah* without an order transaction (*istisna'*)". That is, people need the existence of an industry expert who will produce their goods needs. In general, they tend to ignore the interests of consumers, so that it is not uncommon to order items into the hands of consumers in a state of disability. If it is ignored, it will be very harmful to society. But if you have to eliminate this type of order transaction, people will experience much greater difficulties. Therefore, the guarantee on the goods that have been ordered is viewed as a benefit.

This decision cannot be seen as a punishment to the producer for wrongdoing that could not have been done. After all he is the one who is responsible for the transactions he has made. Thus, this includes part of giving priority to the common good of the special welfare whose arguments are spreading in several places.<sup>35</sup>

Unlike Malik, al-Tufi does not distinguish whether a *maslahah* qualities *daruri*, *hajj*, or *tahsini*, because he refused the division. Thus, means that *maslahah* which is used as a legal argument by al-Tufi is a type of *maslahah* of any quality. As long as he is considered *maslahah*, then he is legitimately used as a legal proposition.

### **3.4 Authority Maslahah before Nass and Ijma'**

In Malik's view, *maslahah* is used as a legal source in matters which are not formally discussed by *nas* and *ijma'* 'but cannot be contradictory to the soul as a whole. Therefore, when an event has been discussed by *nas/ijma'*, then

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<sup>32</sup> Salih bin 'Abd bin Hamid, *Raf' al-Haraj*, (Makkah: Jami'ah Umm al-Qura, 1403 H), 93.

<sup>33</sup> Al-Shatibi, *al-I'tisam*, 129.

<sup>34</sup> Al-Yubi, *Maqasid*, 329.

<sup>35</sup> Al-Shatibi, *al-I'tisam*, vol. 2, 119. Look also Hamid, *Raf*, 315.



masalahah is not used.<sup>36</sup> According to al-Shatibi, if there is a conflict between reason and naql, then the naql must be followed, for reasons:

1. If reason can cancel the naql, then the boundaries determined by naql, are of no use. And this is null and void in the view of Shari'ah.
2. In the science of wisdom, reason does not have the authority to determine good and bad, because if possible, reason becomes a determinant of good and bad.
3. If reason can determine good and bad, then religion can be abrogated by reason. That is, shari'ah passes limits on their mukallaf's actions, speeches, and beliefs. If reason has the authority to violate these boundaries, it means that reason has the authority to cancel all religious teachings. And this is clearly not true. Therefore, reason cannot do takhsis.<sup>37</sup>

While the people judge that Malik takhsis nas' nas with masalahah, and prioritize masalahah on khabar ahad. This opinion is incorrect. Based on al-Buti's research, Malik's attitude in dealing with the story of ahad is as follows:

1. Preface *zahir* Al-Qur'an on *khabar ahad*, except if khabar ahad is supported by other propositions. For example, Malik put *zahir* Q.S. 6: 145, rather than the hadith of the Prophet who forbade eating beasts. Because of this, he allows eating wild animals. In *Bidayat al-Mujtahid* it is stated that jumhur ulama 'argues wild beasts of bird species, law is lawful. It's just that some scholars' punished him illegally based on the hadith. It should be explained that the hadith was not narrated by al-Bukhari and Muslim.<sup>38</sup>
2. Leaving every *khabar ahad* and such a *zanni* if it violates the general principles of *shari'ah* that *qat'i*, on the basis that the hadith is doubtful comes from the Prophet. While the *shari'ah* principles are based on strict texts, both from the Qur'an and *mutawatir* hadiths. This is based on the attitude of 'A'ishah who rejected the hadith which stated that everybody would be punished for the cries of his family. The hadith was judged to violate Q.S. 53: 38-9. Along with that, Malik rejects that heirs should replace his heirs fast if he has a debt fasting, as opposed to the above verse. Malik also rejects the hadith which commands the washing of dogs with water seven times, in which one is mixed with the ground, according to the Qur'anic verse which permits feeding game (Q.S. 5: 4). Malik said: "The hadith came, while I did not know the nature. Is the hunt eaten, but the saliva is considered disgusting?"<sup>39</sup>
3. Put forward the charity of the people of Madinah for the news of Ahad. In Malik's view, the Madinah community's charity strengths were close to alarm, because what they did was based on the Prophet's instructions. For example, he rejects the existence of *khiyar majlis*, while there is a hadith that reads the seller and the buyer has the right of *khiyar* as long as it is

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<sup>36</sup> jma 'is a qat'i argument. The issue that has been 'decided' by ijma 'cannot be entered by Ijtihad. From this side, the power is equal to nass. Learn more in Khallaf, Ilm, 46.

<sup>37</sup> Al-Shatibi, *al-Muwaffaqat*, vol. 1, 61-3.

<sup>38</sup> Abu al-Walid Muhammad bin Ahmad bin Muhammad bin Ahmad bin Rushd al-Qurtubi al-Andalusi, *Bidayat al-Mujtahid wa Nihayah al-Muqtasid*, (t.t.:Dar al-Kutub al-Islamiah, t.t.), vol. 1, 343. See also al-Shatibi, *al-Muwaffaqat*, vol. 3, 15

<sup>39</sup> Al-Shatibi, *al-Muwaffaqat*, vol. 3, 15. See also al Buti, *Dawabit*, 188-190.

still in one majlis. It violates the practice of the people of Madinah who do not know khiyar majlis.<sup>40</sup>

Many people judge that Malik forbade the fasting of Shawal for six days on the basis of maslahah considerations because it is feared people consider it as a 'continuation' obligation of Ramadan, so the fatwa is judged to violate the hadith of the Prophet. This suspicion was denied by Ibn Rushd. He 'alleged' that Malik doubted the validity of the hadith.<sup>41</sup>

As for the 'allegations' of those who judge that Malik takhsis nas' am with maslahah is based on Malik's fatwa which does not require the mothers of the 'elite class' families to breast-feed their own children. The fatwa is considered to violate Q.S. 2: 233. The allegations are not true, because in Malik's view as well as 'Shafi'iyah scholars, the verse does not indicate a mother's obligation to breastfeed her child. The verse is in the form of mujmal, so it contains the possibility of being obliged to breastfeed and is not obliged to breastfeed. Based on the urf that was in effect at the time, he stated that mothers from the elite did not have to breastfeed. Thus, the function of 'urf is as an explanation of the mujmal-an nas, not takhsis the general nas.<sup>42</sup>

Thus, it is clear that Malik placed nas and ijma 'on maslahah. His rejection of hadith ahad as the above example, not because he prioritized maslahah on khabar ahad, but because the khabar does not meet the requirements to be accepted, so it is doubtful that he came from the Prophet. In Malik's view, zhanni, as in the case of ahad, which is contrary to the origin of the qat'i, must be rejected. Because, he means violating the principles of shari'ah, while violating the shari'ah principle is not valid. How can it be called Shari'ah if it violates the Shari'ah principle? In other words, there is a contradiction between the qat'i and zanni arguments so that the qat'i must be won. Whereas if there are other arguments that support their validity, Malik does not reject them.<sup>43</sup>

In contrast to Malik, al-Tufi firmly placed maslahah in a position that was stronger than nas and ijma '. Therefore, when there is a conflict between maslahah on the one hand and *nas/ijma'* on the other side, then maslahah must take precedence. This can be seen from his statement saying that the concept is not the concept of maslahah mursalahnya Malik, but wider than that, that is to return to the nas and ijma 'in the matter of worship, while in *mu'amalah* problem is returned fully to *maslahah*.<sup>44</sup>

Based on al-Tufi's research, there are 19 (nineteen) syar'i propositions,<sup>45</sup> some agreed while others were disputed. Of the 19 such arguments the strongest is nas and ijma '. However, sometimes both are in line with maslahah,

<sup>40</sup> Al-Shatibi, *al-Muwaffaqat*, vol. 3, 15. See also al Buti, *Dawabit*, 188-190.

<sup>41</sup> Ibn Rushd, *Bidayat.*, vol. 1, 225.

<sup>42</sup> Al-Buti, *Dawabit.*, 340.

<sup>43</sup> Abu Zahrah, *Malik*, 241.

<sup>44</sup> *Ibid.*, 764.

<sup>45</sup> For more information, see al-Tufi, *Risalah*, 746-9.

sometimes opposite with *maslahah*. If both are in line with *maslahah*, meaning there is no problem because there has been a match between the three propositions, namely *nas*, *ijma'*, and *maslahah*. If both are opposed to *maslahah*, then must be prioritized *maslahah* by way of *parrots* and *takhsis*, not by deleting, or ignoring them as the *sunna* priority over the *Qur'an* by way of the parrot. As a result *maslahah* is the strongest *syar'i* argument, because the stronger than the strongest is the strongest.<sup>46</sup>

Putting *maslahah* before the proposition cannot be called a form of deviation, because basically we leave the argument with a stronger proposition.<sup>47</sup> In addition, *maslahah* is the goal of establishing the law against *mukallaf* in the matter of *mu'amalah*, while the other arguments are only intermediaries. Thus, goals must take precedence over intermediaries.<sup>48</sup>

From here, there is a very sharp contrast between the concept of *al-Tufi* and *Malik*, since it means *al-Tufi* uses *maslahah*, either in the matter discussed by *nas/ijma'* or not. His refusal to divide the *maslahah* into *mu'tabarah*, *mulghah*, and *mursalah* gave rise to the conclusion that the position *maslahah* be parallel to the *nas* as a source of law because *maslahah* does not require confirmation of the *nas*, even stronger when it comes to *mu'amalah* problem. In other words, *nas/ijma'* is the legal source of the problem of worship and *muqaddarat*, while *maslahah* is the legal source of the problem of *mu'amalah*. While *Malik* makes *maslahah* only as 'method' in understanding the *nas*, as *qiyas*, *istihsan*, *sadd al-dhari'ah*, and others. One question arises, what kind of *maslahah* is meant by *al-Tufi*?

As mentioned earlier, *al-Tufi* refuses to divide the quality of *maslahah* into *daruri*, *haji*, and *tahsini*. He also emphatically says that the determination of *maslahah* in *mu'amalah* is entirely determined by reason. Here it is seen again the frivolity of *al-Tufi*, because then, means *maslahah* which is meant by *al-Tufi* should be on the fore of *nas* and *ijma'* is *maslahah* in any quality, whether *maslahah* quality *daruri*, *haji*, or just *tahsini*.

*Ali al-Rabi'ah* in his book *Adillat al-Tasyri'* even concludes that *maslahah* *al-Tufi* should be first on the *nas* and *ijma'* is the quality of *maslahah* pilgrims and *tahsini*, because both types of *maslahah* this is assessed have the possibility to be inconsistent with *maslahah*. It can be seen from *al-Tufi's* question that *maslahah* and other postulates may be in line with *maslahah*, but may also be contrary to *maslahah*. If it is in line with *maslahah*, it must be followed as the nasal passage with the *maslahah* in the five basic problems of *daruri*, such as *qisas*, hand-cutting law, and so on. If it turns out to be in conflict with the *maslahah*, as long as it is possible to be compromised, it must be compromised, but if it is not possible to be compromised, then *maslahah* should take precedence.<sup>49</sup> The statement in the

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<sup>46</sup> Ibid., 746-754.

<sup>47</sup> Ibid., 762.

<sup>48</sup> Ibid., 768.

<sup>49</sup> *Al-Tufi, Risalah*, 767.

view of al-Rabi'ah gave rise to the conclusion that masuriah daruri must be in line with maslahah, which means haj pilgrims and tahsini should take precedence over the nas and ijma'.<sup>50</sup> The further question is whether al-Tufi's claim that his theory is only a takhsis?

In the book 'Ilm Ushul al-Fiqh,' Abd al-Wahhab khallaf describes the difference between takhsis and naskh juz'i. Takhsis means that the law Shari meant 'from the beginning of his pensyariatan is the takhsis law, while the naskh means to abolish the law that has been established since the beginning because of the demands of the benefit.<sup>51</sup> In his theory, al-Tufi says that a *nas* which, if applied, is in violation of the mslahah, then the nas must be *takhsis*<sup>52</sup> so that, for that case, it does not apply. From the statement it appears that al-Tufi's theory is more accurately referred to as naskh (cancellation) because it is conditional. That is, the exclusion can not be claimed as a law that Shari had intended since the beginning 'because if so, then the argument is immediately accompanied by his takhsis proof. Nor can the theory be categorized in the case of an emergency, since the maslahah recognized by al-Tufi is not limited to the darla, but also the hajj and tahsini. As in relation to ijma', ijma' is the qat'i proposition from all sides,<sup>53</sup> then from which side should it be takhsis?

A further question is what text is meant by al-Tufi to be 'defeated' by maslahah? Is the text that has an indication of zhanni, or is it a text that has qat'i indications?

When interpreting the hadith of La darar wa la dirar, al-Tufi said that the hadith hinted to remove darar (danger) and mafsadah. This signal is general, unless there is a special argument. This shows the necessity of prioritizing the hadith on all kinds of shar'i propositions and takhsis of the shar'i theorem with this hadith.

That is, if there is a shar'i proposition containing darar, if we remove it from this hadith (by way of paraphrase and *takhsis*), it means we have practiced two propositions. If we do not omar means that we have ignored one of the two propositions, namely this hadith. While there is no doubt that compromising actions are more important than ignoring one. The abolition of darar is a religious necessity. Some verses of the Qur'an which indicate this include Q.S. 2; 185; 22:78; 5: 6, and others. In more detail, al-Tufi explained that, nas may not contain danger (danger) as a whole, or vice versa. If it does not contain the whole amount, it means that both are in line with maslahah. If it contains darar, and the darar includes all the madlul (the appointed) nas, then the nasalah to be followed, such as hudud in jinayah matter. But if the darar covers only a portion of the designated (madlul) by the passage, and the will is a typical proposition, then the argument must be

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<sup>50</sup> Al-Rabi'ah, *Adillah*, 200-1

<sup>51</sup> Khallaf, *'Ilm*, 187. Read more on page 225 in the same book.

<sup>52</sup> Khallaf, *Masadir*, 109.

<sup>53</sup> *Ibid.*, 46.

followed. But when there is no typical proposition that wants it, it must be takhsis with the hadith *la darar wa la dirar*, which means *maslahah* takes precedence. One thing to note is that all texts contain *maslahah*. *Ijma* 'is also based on *maslahah*. Therefore, it is impossible if then God ignores the benefit of His servants.<sup>54</sup>

Explicitly al-Tufi's statement does not refer to certain forms of *nas*. Because of that the scholars' differed on the form of the text that was meant by al-Tufi. Abu Zahrah understood it *qat'i nas*, while other scholars, including Hamid Hasan and al-Yubi, understood it as *Zanni*.<sup>55</sup> The last opinion seems stronger.

This can be seen from his statement which reads "... if the *darar* covers a part of those appointed (*madlul*) by *nas* ..." It means that *lafaz* a verse or hadith is in the form of 'am, while the *darar* only includes a portion of those designated by the text, while *lafaz* 'am it's *dalalah* is *zanni* according to *jumhur ulama' usul*.<sup>56</sup> Moreover, it is reinforced by his statement that prioritizing *maslahah* is limited to *takhsis* and  *bayan*. In addition, he also said that if there are typical arguments in the matter, it must follow the typical argument. That is, it does not presume the occurrence of contradictions between the typical postulates which *qat'i dalalah* with *maslahah*, because if what he means is a typical proposition, can not not, then the action is an act of ignoring the argument. Thus, it means that al-Tufi prioritizes *maslahah* on the argument 'am, because the proposition' am, the *dalalah* is *zanni*. But if the argument is a typical argument, then the argument must take precedence, because the typical argument, it's *dalalah* is *qat'i*.<sup>57</sup> However, it still becomes unimportant, is the passage referred to by al-Tufi in the form of *zanni* or *qat'i*, because al-Tufi's claim that his theory is limited to the incorrect hypothesis as described above.

Among the weaknesses of al-Tufi's theory is the difficulty of avoiding the contradictions in his thinking. For example, he presumes the possibility of *nas* containing *darar*. In another part he says that all passages contain *maslahah*. *Ijma* 'is also based on *maslahah* and an impossible thing that *Shari'a* ignores the benefit of His servants. This statement was attacked by al-Buti. In his statement he said, if indeed the entire text contains *maslahah*, it means that the benefit which contradicts the *nas* is an inherent benefit. Or vice versa, the basis of the foundation that the *Shari'ah* came to benefit, died.<sup>58</sup>

The next contradiction is the statement that *maslahah* is the goal while the other argument is intermediary. This statement is different from the definition put forward which states that *maslahah* is 'the cause which leads to the intention of *Shari'a*'. If the other argument is considered as an

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<sup>54</sup> Al-Tufi, *al-Risalah*, 752-3

<sup>55</sup> Abu Zahrah, *Malik*, 317. lihat juga Hassan, *Nazariyah*, 538 dan al-Yubi, *Maqasid*, 539-40.

<sup>56</sup> Zaydan, *al-Wajiz*, 317.

<sup>57</sup> Hassan, *Nazariyah*, 539-540.

<sup>58</sup> Al-Buti, *Dawabit*, 209.

intermediary, then *maslahah* must also be considered as an intermediary because he is the same as the *syar'i* argument as he mentioned above.

Another bankruptcy of al-Tufi's theory is that he does not offer one instance at all. At a minimum, it shows that he has no concern for legal products. Even worse means that he failed to prove the existence of a passage that is contrary to *maslahah*. It makes perfect sense if Zayd then falsely points out that the concept of al-Tufi was built on a dream/wishful thinking basis (the *principle of mauhum la wujud lah*).<sup>59</sup>

The reason for al-Tufi prioritizing *maslahah* on *nas* and *ijma*<sup>60</sup> is as follows:

1. *Ijma* 'is disputed by his jurisdiction, while *maslahah* is agreed upon including by those who oppose *ijma*'. Thus, *ijma* 'is something that is agreed upon. Holding on to something that is agreed is more important than holding on to something disputed. If looking at this statement, it indicates a lack of academic research conducted by al-Tufi. Because, the Shiites clearly oppose *maslahah* because *maslahah* is *ra'yu*, while religion cannot be based on *ra'yu*. Likewise *al-Nazzam*. His firmness in rejecting *Ra'yu* is the same as his firmness in rejecting the possibility of *ijma* '.<sup>61</sup> But if he saw his statement in another section, he said that all scholars agreed that *ijma* was based on *maslahah*, except opponents of *ijma*, including *Zahiriyah*.<sup>62</sup> This statement indicates that *Zahiriyah* acknowledged it does not recognize *maslahah*. From this means the statement is again contradictory. Al-Zuhayli has another opinion in dealing with this problem. He said: "If al-Tufi argued that *maslahah* was something that was agreed upon, wouldn't that mean it was part of *ijma*? 'If *ijma*' is something that is disputed, isn't it included in the disputed part? Thus, the theoretical theory is that one of the two arguments is superior."<sup>63</sup>
2. *Nusus* (more *nas*) contains many contradictions and this is the case, one of which is the cause of disagreements in the law in the view of *Shara* '. Meanwhile, maintaining *maslahah* is substantially something essential, which is not disputed. Thus, the prioritization of *maslahah* is the cause of the agreement desired by *Syara* '. It is not clear whether what is meant by al-Tufi with the passage above is related to the substance or limited to the perception of the *mujtahid* in addressing a passage. If what is meant is the first, then inevitably the statement is a very dangerous statement, because it clearly violates Q.S. 4:82. Conversely, if what is meant is the second, then the opinion is no different from the jurists' in general.<sup>64</sup> The difference, according to al-Tufi such differences are negative and reprehensible in Islam. This has led to the assumption that what Al-Tufi meant was related to the substance of *nas*. Therefore, the different understanding of the passage in the laws concerning the branch has the dimension of the *rahmah*. Or at least, tolerated by the teachings of religion as a reflection of

<sup>59</sup> Zayd, *al-Maslahah*, 135.

<sup>60</sup> Al-Tufi, *Risalah*, 760-1.

<sup>61</sup> Khallaf, *Ilm*, 48.

<sup>62</sup> Al-Tufi, "Risalah" in *al-Maslahah*, 215

<sup>63</sup> Al-Zuhayli, *Usul*, vol. 2, 820-1.

<sup>64</sup> Al-Shatibi, *al-Muwafaqat*, vol. 4, 217.

the elasticity of Islamic teachings in addressing the constantly changing social phenomenon, rather than the negative dimension as al-Tufi allegedly.

3. Indeed, there have been passages in the Sunnah that are opposed by Maslahah in several ways. For example, the Messenger of Allah ordered Abu Bakr to convey the hadith (من قال لا إله إلا الله دخل الجنة)<sup>65</sup> but was forbidden by Umar for feared by the society to be lazy to give charity for relying on the hadith. The foundation of this proposition also has weaknesses. Therefore, the attitude Umar was getting legitimacy from the Prophet. In the study of the science of hadith, what the friends do is not maslahah in an independent sense, but maslahah who have received recognition from the Prophet (taqir).<sup>66</sup>

Although not specifically reviewing al-Tufi's argument, Munawir Sjadzali supported this idea. In the case of mu'amalah, revelations descended in response to the problems of society that occurred at the time. It means he is very concerned about the situation and the conditions of the field. Therefore, the understanding of the passage must be contextually appropriate to the degree of civilization and the advancement of human intellect, for otherwise the Islamic law will lose its relevance to the world in which we live.

To legitimize his argument, Munawir pointed to the concept of naskh in the Qur'an. The concept of the naskh was introduced by the Qur'an and hadith as a result of social changes. If in the twenty-two years of the decline of the Qur'an alone Allah cancels the many legal provisions, then it is impossible that in a few hundred years after the decline there is no change of law.<sup>67</sup>

It is a pity that Munawir's support is not further elaborated. For, the theory of al-Tufi then he brought to the issues that have been determined measure (*muqaddarah*), such as inheritance division.<sup>68</sup> Whereas al-Tufi himself refused to tinker with the problems that had been determined.

It seems that few would argue that al-Tufi's arguments are poorly weighted, if not superficial, making it very easy to break. Moreover, the contradictions of his statements are very easy to capture by anyone who reads them. Al-Tufi seemed to lose his footing in building his thinking, so it was often inconsistent.

The ability of reason in determining good and bad will be very subjective. If reason can determine badly, then of course there is no need to send an Apostle. Whereas the Qur'an (QS 5:99) firmly says that the duty of an Apostle is to 'convey' His teachings. Al-Tufi's refusal to divide the maslahah into *mu'tabarah*, *mulghah* and *mursalah*, is an act that is 'rash' and impressed

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<sup>65</sup> Abu Zakariya Muhy al-Din Yahya bin Sharaf al-Nawawi, *Syarh Sahih Muslim*, (Beirut: Dari Ihya' al-Turath al-'Arabi, 1347 H), vol. 1, 59

<sup>66</sup> Ahmad Umar Hashim, *Qawa'id fi Usul al-Hadits* (t.t.: Dar al-Fikr, t.t.), 138

<sup>67</sup> Munawir Sjadzali. (1995) *Kontekstualisasi Ajaran Islam*, ed. Wahyuni Nafis, (Jakarta: IPHI-Paramadina, 70-5.

<sup>68</sup> Munawir Sjadzali, (1997). *Ijtihad Kemanusiaan*, Jakarta: Paramadina, 6-8.

'without thinking', the cause and effect are obviously very risky because he places reason (maslahah) in a position that is parallel to the, even more powerful when it comes to mu'amalah as described above. This problem is not a trivial matter. If expressed in an extreme language, it means that reason is used as a legal proposition.

As stated by al-Shatibi above, reason is not Shari'a, while this issue is a matter of shari'i. Therefore, reason must not relinquish any dependence on the passage. The Qur'an (4:59) itself says "... obey you to Allah, to the Prophet and to uli al-amr ..." which in the view of the scholars' shows that nas is the first and foremost step in drawing legal conclusions, both nas is both qat'i and zanni.<sup>69</sup> The difference is, the qat'i passages cannot be entered by human reasoning (ijtihad), while for the zhannan passages, there is a vast opportunity for human reason to enter it. From this point of view, al-Tufi's theory which is only limited to the zanni passage is not too 'scary' as it has been.

However, it needs to be recalled that ijtihad against the zanni texts remains in the sense of understanding the passage, so that logically, the conclusions that are produced, will not be contrary to the text in question. For example, Q.S. 5: 6 concerning the duty of wiping the head in wudu '. The verse is zanni, because lafaz "bi" in lafaz bi ru'usikum, means 'all' or 'part'. Thus, the task of a mujtahid is only to know whether what is meant by the verse is the entire head or whether only a part of the head must be wiped out when someone does ablution.<sup>70</sup> Thus, he should not conclude that wiping the head can be removed in wudu ', for example.

Considering al-Tufi's claim that his theory is merely an imprecise takhsis, it does not matter whether the passage he referred to is nas qat'i or zanni, since al-Tufi's theory is more accurately referred to as nullification. In fact, anyone who believes that the right to make the cancellation of Allah's law, only Allah Himself.<sup>71</sup>

The theory of al-Tufi becomes more risky because he menggebyah-uyah all kinds of maslahah. So maslahah tahsini-its function is just a 'cheerlead' has a chance to 'fight' nas and ijma '. From this point of view, the theory of al-Tufi is inevitably very scary.

Al-Tufi's thoughts are very likely influenced by the political situation when he lived. Al-Tufi lives where Muslims are under the grip of the Mongol invaders. Islamic power which for centuries ruled the world was destroyed under the feet of the Genghis Khan. It seems that the soul of al-Tufi rebelled to see the situation and wanted to restore the pestilence of Islam that has vanished. It is very likely that he concluded that the situation was due to the

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<sup>69</sup> Khallaf, *'Ilm*, 21

<sup>70</sup> Khallaf, *Masadir*, 9.

<sup>71</sup> Manna'al-Qattan, 1991, *Mabahith fi 'Ulum Al-Qur'an* , Beirut:Mu'assasah al-Risalah, 236.



fact that Muslims were too attached to standardized passages, so he held the view that Muslims should dare to escape the 'confinement' of the passages if they were to move forward and restore the glory it had ever achieved. Moreover, the development of religious science at that time experienced tremendous lethargy in which the ulamas' preferred to be taklid. It is also possible to see that Muslims' indifference to the Qur'anic texts will cause Muslims to remain behind. But unfortunately Al-Tufi went too far so he dared to break the fence that should not be passed. Not only by him. But also by anyone who believes that the Qur'an and al-Sunnah are a foothold in every joint life of a person who claims to be Muslim.

This is very different from Malik who lived in the heyday of Islam reaching its peak. Moreover, Malik lives in Medina which is actually the 'house of the Prophet'. Watching the glory of Islam in such a way, certainly more convincing Malik that the Qur'an and al-sunnah is the guidance of Muslims who should not be defeated by anything and anyone.

Based on the above discussion, Malik's theory which only uses *maslahah* in issues not formally discussed by *nas* or *ijma* 'is clearly stronger. Because, with this theory, then *Mallah* *maslahah* will not have a chance to fight *nas/ijma*'. Moreover, *maslahah* Malik is basically a method of understanding *nas*. Didn't al-Tufi himself say that all *nas* contains *maslahah*?

#### 4. Conclusions

Malik looks much more cautious than al-Tufi. He continues to walk on the corridor that holds the clerics' hands. While al-Tufi more daring, even tend to be rash in spawning his ideas. *Maslahah* in the Malik concept is *maslahah* which is inferred from a number of passages. Thus, *maslahah* only serve as a 'method' in understanding the passage, not an independent legal source. As for al-Tufi make *maslahah* as a source of independent law, as well as the Qur'an and Sunnah.

Malik's concept is stronger than the concept of al-Tufi, because Malik still places the *nas/ijma* 'as the primary and first foundation in establishing the law. It is in accordance with Q.S. 4; 59. Malik's attitude was also in line with the practice of the Companions which basically refers to the guidance of the Prophet. Malik only uses *maslahah* in issues not formally discussed by *nass* and *ijma*' so that in Malik concept, *maslahah* have no chance to fight *nas* and *ijma*'. Moreover *maslahah* which is meant by Malik is *maslahah* excavated from a number of *nas*, because basically *maslahah* is only limited 'method' in understanding the *nas*. Unlike the Malik concept, the concept of al-Tufi has no strong foundation. Placing *maslahah* in a position parallel to *nas* is a violation of shari'ah. His inability to give one example is another side of his underlying theoretical weakness.

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