



Moderatism Maslahah: Rereading the Concept of Maslahah at-Tufi and al-Buti in Answering Contemporary Issues

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Abstract

The *maslahah* discourse is almost always faced with the problem of Islamic legal ability to answer the challenges of the Times. The ever-dynamic complexity of life demands that every jurist can make decisions that not only get the legitimacy of revelation but also with the interests of the people who move following the changing times. Al-Tufi and Al-Buti are representations of Islamic thinkers who try to offer conceptual ideas and ideas so that Islamic law does not lose its spirit as a living institution that is always relevant to be applied in all conditions and at all times. Departing from lifetime and different community problems, the two also present offer different ideas. The concept of *maslahah* is carried by both to be the opening thesis that in every idea that is born, there must be social settings, the discourse that develops, as well as the academic problem that is to each admirer. It also appears in the notion of the two about the *maslahah*, where at-Tufi appears in a thought character that tends to be liberal in the time of unborn liberalization, while al-Buti appears to represent a more moderate character at the time of liberalization the thinking is so powerful that it haunted almost every discourse of knowledge.

Keywords: *Maslahah; Al-Tufi; al-Buti; Legal source; Nass*

Introduction

The notion of *maslahah*, both developed by at-Tufi and al-Buti, is not in a hollow space at all. Long before his second era, scholars have studied many of the concepts of *Maslahah* with different linkup spaces of study among one another.

In the III century H there were already several scholars discussing the theme of *Maslahah* and *Maqasid* in some of their works. The work of as-Syafi'i (*ar-risa>>lah*), and the work of Abu ' Abdillah Muhammad ibn Ali (*al-furu>q*), is somewhat of a work of scholars who can be traced of its circumstances. The rest believed to be lost and cannot be found in the present.

The emergence of figures such as Al-Maturidi, Al-Qaffal, and al-Baqillani increasingly jazz up the common discourse among scholars. At least, almost every work of fiqh is produced, since then, always insert a study of *maslahah* in its sub-discussion.¹

After al-Baqillani wrote the works of jurisprudence *at-Taqrīb*, the study of *maqaseed* continues to evolve and more vibrant. Major figures such as Al-Juwaini (Imam Haramain), al-Ghazali, at-Tufi, and al-Syathibi are considered to be the most notable in developing the study of the *Maslahah*, which was then "married" to the discourse on the *Maqasid al-Syariah*. Not excessive if the current works of the *Maslahah* and *Maqasid* are the fruits of the serious academic efforts of those figures.

In the modern era, the discourse on *maslahah* and *Maqasid* continues to evolve and even more vibrant. The gap between the religious text and the context of the age seems to make the scholars must give birth to the ideas that can be the answer to the various problems faced, and in the compromise between the religious texts and the context of the day, the concept of *Maslahah* and *maqasid* is often the main device of them.

The exploration of the scholars to the *Maslahah* and *Maqasid* in the modern era seems to have given birth two main sects, namely: The Liberal *sect liberal* and the *moderate sect*. For The Liberal *sect*, *maslahah* and *maqasid* must be realized to maintain the continuity of Islamic law. The main principle built by the *sect* is the rationality and the spirit of the kinship that is tried to be compromised by previous clerical methodology if possible. The *Sect* commits the birth of new theories in the discourse of unknown sites.²

As for the moderate group, they tried to compromise between religious texts and the context of the times with no exit from the frame of ancient scholars. Efforts of *rethinking* do not need to be done because it can eliminate religious sacrality. What is needed to answer the question is a further exploration of the scholars' methodology as well as performing various methods of *ijtihad* so that the formulation of the law produced can bring the community, anywhere and anytime. In terms of thought, previous scholars (classical) have given birth to "finished products" and also "methodology". From the finished product side, It is quite possibly what the classical scholars produce is irrelevant in the context of the present day. But from the methodology side, moderate groups see that classical works have unlimited reach. For when The methodology was always based on the sacred texts "*s}a>lih} li Kulli zama>n wa maka>>n*". Thus, when the main idea of the Liberal Group is *rethinking* Jurisprudence, then the moderate group offers an idea that is *revitalizing* the theory of *Maqa>sid as-syari>'ah*.³

Based on the explanation above, this article seeks to export the great idea of the two main thinkers in the discourse, namely Al-Tufi and Al-Buti. Different people of this generation will be presented in a study that tried to photograph the *angle* of liberalism and modernism from the concept of *maslahah* by not abandoning its relevance and contributions to the modern-day legal settlement. It is not

¹ Ahmad Ar-Raysu>ni, *Nazariya>t al-Maqa>s} d 'inda al-Ima>m as-Sya>t}jibi>*, (Amerika: al-Ma'had al-'Alami li al-Fikri al-Islami, 1995), hlm. 40-47.

² Characters such as Muhammadi Iqbal, Mahmud Muhammad Taha, Abdullahi Ahmed An-Naim, Muhammad Said Asmawi, Fazlurrahman and Muhammad Syahrur were included in the group of religious liberalism. See his thoughts on his jurisprudence and his methodology can be read on M. Iqbal, *The Reconstruction of Religious Thought in Islam* (Lahore: Ashraf Press, 1971). See also Abdullah Ahmed an-Naim, *The Second Message of Islam* (Syracuse: Syracuse University Press, 1987). See also Abdullah Ahmed an-Naim, *Toward an Islamic Reformation: Civil Liberties, Human Right and International Law* (Syracuse: Syracuse University Press, 1990). See also Muhammad Sai>d Asma>wi, *Usu>l as-syari>'ah* (Beirut: Dar Iqra ' 1983). See also Syahrur>r, *Al-Kita>b wa al-Qur'a>n: Qira>'ah Mu'a>siyah* (Damascus: Al-Ahab li at-thibaah Li An-nassyr wa al-Tauzi ', 1992).

³ See Wael b. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Ushul Fiqh* (Cambridge: Cambridge University Press, 1987).

impossible, from thinking that both can be dug up a more advanced and moderate perspective on how to align the norms of Islamic law to the practice of modern social life.

A. Al-Tufi and Maslahah Superiority

1. Base epistemology Maslahah al-Tufi

The general concept of Maslahah theory developed by at-Tufi is referring to the framework of thinking that the teachings that were handed down by God SWT always comes down to the realization of the welfare of mankind. Therefore, in all the matters of life, the principle taken into consideration in the sharia of law (*al-Tasyri*) is poverty. This means that if an activity performed by a person contains a value of Kemashlahahan for, then the activity should be carried out. Conversely, when an activity thus poses a danger (*mafsadat*) then it must be abandoned.

When explaining the Mashalah theory, at-Tufi several times brought about an idea that was opposite to the *mainstream mindset*. One of the originalities of the thought at-Tufi was his refusal of the Maslahah to be: (1) *Maslahah Mu'tabar* (Maslahah appointed directly by the Qur'an or al-Sunnah), (2) *maslahah mulghah* (maslahah that contrary to the text of revelation or Hadith or Ijma), (3) *al-Maslahah al-mursalah* (maslahah that not expressly opposed by revelation). At-Tufi rejects the division and confirms that any form of poverty, whether supported or not by the holy text, must be manifested. This is because the purpose of the sharia itself is to realize welfare.

The basic idea of maslahah developed by at-Tufi appears to have begun when he commented (Syarah) on the hadith of the Prophet *la djarara wa la dira* (do not harm himself and do not harm others) in the book *al-Arba'in an-Nawawi*. According to AT-Tufi, the concept of Maslahah departs from the purpose of the sharpness of Syara' (*Maqasid as-Syari'ah*), which is nurturing the interests of mankind.⁴

As with other Fiqh scholars, at-Tufi has the view that Islamic law is prescribed to realize and maintain the benefits of mankind. This concept has been recognized by the scholars so that among the members of the proposal develops a rule, "where there is a maslahat, there is the law of God."⁵ Understanding the purpose of Islamic law sharpened (*Maqasid al-Syari'ah*) is a very basic thing for a mujtahid in conducting legal proceedings. By making *Maqasid al-Syari'ah* as a foundation, then the law formulated is expected to bring good to mankind as well as able to avoid the ugliness for their lives.

In more detail, the concept of maslahah developed by at-Tufi which makes it different from the originality and character is:⁶

a. *Istiqlal al-'uquub idrak al-masalih wa al-mafasid*

In the area of Muamalah, the concept of Maslahah built by at-Tufi rests on the ability and freedom of the human mind in exploring the values of Maslahah and mafsadat of a rule of law. This concept of AT-Tufi looks similar to the principle of muktazilah about the ability of reason in determining

⁴ The theory of the Maqasid as-Syariah itself is not new in the discourse of fiqh, especially after al-Shatibi gave birth to his book, *al-Muwafaqat fi Ilmi al-Usul*. The Study of jurisprudence developed after the birth of *al-Muwafaqat* could hardly be released from the theory of *Maqasid as-Syari'ah*, especially when discussing contemporary issues faced by Muslims. See al-Sya'ibi, *al-Muwafaqat fi Usul al-Shari'ah* (Cairo: Mustafa Muhammad, T. T.), II: 4.

⁵ Muhammad Sa'id Ramadhan al-Buhārī, *Djawabit al-Maslahah fi as-Syari'ah al-Islamiyah*, (Beirut: Mu'assasah ar-Risalah, 1977), p. 12.

⁶ Mustafa Zaid, *Al-Maslahah fi at-Tasyri' al-Islami wa Najmuddi' at-Tajribi*, (Beirut: Dar al-Fikr, 1954), p. 127-132

good and bad. For at-Tufi, with good reason (healthy) man is believed to be able to determine the *maslahah* and the efficacy for him. At the methodological level, the determination of the *Maslahah* (in the field of rulings) is well - based on the ratio reasoning, without the need to consider provisions in religious texts.⁷

b. *Al-maslahah dali>l syar'iy, mustaqill 'an al-nus}u>s}*.

According to AT-Tufi, the *maslahah* is independent sharia evidence and regardless of religious texts. In this context the validity of the *Maslahah* is not dependent on the existence of a *nass* that supports, but it can use the empirical experience as it is in the Community customs. As an independent proposition of the sacred religious text, *Maslahah* gives the full authority to reason to analyze and draw conclusions from a legal case.

c. *Maja>l al-'amal bi> al-maslahah huwa al-mu'a>malah wa al-a>dat duna al-'ibadah wa al-muqaddarat.*

In terms of scope, at-Tufi confirms that the *Maslahah* can be operated on all things that are included in the category of social and customs transactions, not the worship of *Muqaddarah* (already determined). For at-Tufi the problem of worship *Muqaddrah* is purely the right of Allah SWT and not human competence to uncover the side of his *maslahah*.

d. *Al-maslahah aqwa> adillah al-syar'i.*

According to AT-Tufi, *Maslahah*, other than as an independent proposition is also the most powerful evidence. *Maslahah* is not only a *Hujjah Syar'iyah* in the event of the vaccine of verses and Hadith or *Ijma'* on an issue, but must take precedence over the *nass* and *Ijma'*. In this case, at-Tufi is not in the position of denying the existence of *nass* and *Ijma'*, but rather position the *Maslahah* as a neutralizing the generality of *nass* and *Ijma'* by doing *tah}si>s}* or *baya>n*. In this context at-Tufi appears to refer to the rule of *al-Ibrah bi khus}u>s}* *as-sabab la> bi umu>m al-lafzh*. When the community is present as *mukhassis* or *mubayyin* over *nass* and *Ijma'*, then the situation must be a precedence.⁸

The four epistemological principles above have made at-Tufi to be in The four epistemological principles above have made at-Tufi to be in the controversial zone because it positions itself opposite the *Maslahah* theory developed by the jurisprudence of the scholars.

In this context, there is no reason to say that the *maslahah* theory of al-Tufi is completely detached from religious texts. A building epistemology has a strong argument base from Islamic authoritative sources. Some Qur'anic verses referred to by at-Tufi are verses about Qishah (Q.S. Al-Baqarah (2): 179, punishment for thieves (Q.S. Al-Maidah (5): 38, and Punishment for adulterers (Q.S. An-Nur (24): 2. Based on these verses, and also other verses such as, it seems that there is a benefit behind the islamic legality of Qishah, cut hands, or whip, which is how God wants to protect the souls of mankind through the punishment of qisas, protecting the property by condemning the hand of the thief or nurturing the honour by punishing the tortures for the adultery.

⁷ H}usein H}a}mid H}asan, *Nazariyya>t al-Maslahah fi al-Fiqh al-Isla>my* (Kairo: Da>r al-Nahd}ah al-Arabiyyah, 1971), p. 529-530.

⁸ Muh}ammad Mus}t}afa> Tsalabi, *Ta'li>l al-Ahka>m* (Beirut: Da>r al-Nahd}ah al-'Arabiyyah, 1401 H./1981 M), p. 370.

The Hadith of the prophet that was made the evidence by at-Tufi among them is the hadith "not some of you sell on the sale of his brother"⁹, hadith, "We are forbidden if the people of the city sell to villagers",¹⁰ also hadith, "do not marry women with his aunt".¹¹ And other hadiths that contain elements of preserving and prioritizing the interests (Maslahah) of other people (common). In addition to the based on the Qur'an and al-Hadith, at-Tufi also bases his argument on the dealing of the Scholars ' agreement on the principle of maslahah in every Muslim product of legislation.

Nevertheless, the positioning done at-Tufi against the nass *vis a vis* maslahah is considered by many of people to be a put first masslahah in the above nasss. And this is what is then much opposed. The positioning made by al-Tufi was built on four arguments, namely:

First, put mashlahah on ijma' more relevant and strong validity, because ijma' including the evidence that debated blasphemy among scholars ', while maslahah approved by the scholar ' unanimously, including by those who oppose Ijma '. This means placing something agreed (maslahah) is more mainstream than something debated (*ijma'*).

Second, to put mashlahah on nasss is done in consideration that the nasss contains paradox (*ta'a'rud*), which is not uncommon to cause disagreements among the scholars and produce a legal product that is unclear. While maintaining a substantial mashlahah is essential and no longer has a difference.

Thirdly, in some cases, there is some content from the nasss (especially Sunnah) which is opposed by the maslahah. This is seen in the history of Abdullah ibn Mas'ud about Tayammum. Based on nasss and Ijma ', tayammum can be done due to illness or not found water. This provision was opposed by Ibn Mas'ud who said that the sick person should not perform tayammum. The problem is if the sick can do tayammum, then feared this condition will be utilized by many people on behalf of "sick", whatever the type of illness, they do not want to do *wudhu* and choose *tayammum*. The opinion of Ibn Mas'ud is opposed by Abu Musa al-Ash'ari, which reminds me that the provisions of tayammum are set in the Qur'an and cannot be personalized. In the development, Ibn Mas'ud's opinion seems to be more popular in society and no longer gets opposition among friends and scholars.¹²

2. Scope of Maslahah usage

Al-Tufi agreed that not all things can be solved by the approach and the theory of Maslahah. For him, the Maslahah can only be applied to the problems entered in the discourse of *muamalah*, not worship (*ibadah*). Because, in the case of a worship person can not be able to know the substance contained in him, either from quality or quantity, time or place, except only based on the official instructions of the Syari'.¹³

At the ideal level, it should be the conformity and harmony between nasss, Ijma', or maslahah. However, in some cases al-Tufi found a mismatch between the three. In regards to the five (5) main pillars of Islamic law (*al-mabadi' al-khamsah*) is fortified in the law of Qisas for murderers, the ruling on death for apostates, cut hands for thieves, whipping for drinkers, or limit punishment for the accusers

⁹ Abu> 'Abdila>h Muh}ammad ibn Isma>'i>l ibn Ibra>hi>m ibn al-Mughi>rah ibn Bardizbah al-Ju'fi> al-Bukha>ri>, *S}ah}i>h} al-Bukha>ri* (Beirut: Da>r Ibn Katsir, 1987), p. 614

¹⁰ Abu> 'Abdila>h Muh}ammad ibn Isma>'i>l ibn Ibra>hi>m ibn al-Mughi>rah ibn Bardizbah al-Ju'fi> al-Bukha>ri>, *S}ah}i>h} al-Bukha>ri*, p. 614

¹¹ Abu> 'Abdila>h Muh}ammad ibn Isma>'i>l ibn Ibra>hi>m ibn al-Mughi>rah ibn Bardizbah al-Ju'fi> al-Bukha>ri>, *S}ah}i>h} al-Bukha>ri*, p. 1596.

¹² Abdallah M. Al-Husein Al-Amiri, *Dekonstruksi Sumber Hukum Islam; Pemikiran Hukum Najmudin at-Tufi*, translated by Abdul basir (Jakarta: Gaya Media Pratama, 2004), p. 59-71

¹³ Mus}t}afa> Zaid, *Al-Mas}lah}ah*, p. 119

of adultery, both nass, Ijma ' and maslahah mutually. The existence of nass and Ijma' is present to protect lives, religions, possessions, intellect, and honour, where the fifth is the primary purpose of the concept of benefit.

In the circumstances where the nass, Ijma ', and maslahah appear to contradict the legal-methodological efforts that were probably first compromised were to compromise the three. But if this effort fails, then it is also permissible to put the maslahah on the nass and Ijma ' can be legally justified. The words of Prophet *la> d}arara wa la> d}irara*¹⁴ can be used as the justification and normative argument that eliminating the harm to maintain the mashlahah is the main objective of the legislation of Islamic law. The evidence should be understood as a means to achieve the intended purpose.¹⁵

The occurrence of conflict (*ta'arudl*) between maslahah with nass or *ijma '*, as explained at-Tufi, not on substantive territory. That is, it is substantially never happening *ta'arudl* between Maslahah, *nass* or *ijma'*, but it is only the exception of the general rule because it is faced with certain conditions. For example, when sharia prohibits the sentence of *kufur*, drinking *khamar*, and others, in certain conditions (emergency) it can be pronounced or done.¹⁶ Under normal (non-emergency) speech or action is strictly prohibited by a nass or Ijma '. But in the case of emergency nass or Ijma ' can be ruled out to avoid danger and realize the maslahah.

The restrictions made by Al-Tufi in making Maslahah as the legal evidence only on the territory of the rulings and not targeting the area of worship (*al-ibadah*) or *al-muqaddarat*. Base on the way of understanding about the flexibility of Islamic law is very visible in the realm of customs and rulings. At-Tufi believes that the word of Allah is eternal, continuous, and does not know the word changed. It is documented in the original religious texts, especially the Qur'an. Because the Islamic law was excavated from the texts it is also *Qadim*, precede and not be preceded, control and not controlled. This Law of eternal is manifested through the sacred texts (*al-nus}u>s} al-Muqaddatsah*) revealed to the Prophet Muhammad. At this point the transition of status from the text of the original revelation transhistorical become historical because it enters the arena of mankind with all the devices of reason owned.¹⁷

The transformation process does not cease to the prophet. After the Prophet, the companions, the Tabi'in, and the later generations were still mandated to continue to make transformational efforts the religious texts over of Generations after they continue and continuously. In such circumstances, the logical work Becomes increasingly necessary to keep the texts from losing context, and vice versa, any issues that arise can be made to the exit by not deviating from the provisions of the texts.

According to AT-Tufi, making Maslahah as the main tool in the process of legal istinbat is a necessity. Because, with the principle of maslahah, Islamic law will generally become more adaptive and aligned with the development and changing times. The consequence of this principle is that the scholars should be prepared to criticize the legal products produced by the *Mujtahidin* past which is deemed to be no longer relevant to the change and needs of the times. This critical effort can be done in a deconstructive, reconstructive, or re-formulating legal formulation that has been adapted to the needs of the times and the interests of the general benefits.

The above description confirms that some people think that al-Tufi is in the ranks of liberal Islamic thinkers seems to be not entirely true. Al-Tufi became more precise when it was positioned as a moderate figure with nothing to leave the nass in the concept of maslahah that he built. Al-Tufi is careful

¹⁴ Ma>lik ibn Anass, *al-Muwat}a'* (Mesir: Dar al-Sya'b, t.th), p. 179

¹⁵ Jala>luddi>n Abdurrah}ma>n, *Al-Mas}a>lih} al-Mursalah wa Maka>natuha> fi> al-Tasyri>*, Cet. Ke 1, (T.tp.: al-Sa'adah, 1403 H./1983 M), hlm. 97.

¹⁶ Jala>luddi>n Abdurrah}ma>n, *Al-Mas}a>lih}*, p. 98.

¹⁷ Muslihuiddin, Muhammad, *Filsafat Hukum Islam dan Pemikiran Orientalis: Studi Perbandingan Sistem Hukum Islam*, translated by Yudian Wahyudi Asmin (Yogyakarta: PT Tiara Wacana, 1997), p. 45.

enough to use principles in consideration of law, only in the issue of Mu'amalat and Adat. As for the nature of worship and Muqaddarat at-Tufi fully believes that the two areas are the prerogatives of God. Even when al-Tufi is considered as a figure that puts the Maslahah on the nass, hence the opposite appears. Al-Tufi comes with his thoughts that try to bring closer the NASS and Ijma ' with Maslahah as the main purpose of the legalization of Islamic law. The concept of *Taqdi>m al-mas}lah}ah ' ala> al-nass} wa al-ijma ' ' does more than merely interpret more broadly the theory of takhsis and tabyin which is also commonly applied by other scholars.¹⁸*

B. Maslahah Al-Buti Concept and Human Rights Problem

1. Understanding the concept of Maslahah al-Buti

The above description confirms that some people think that al-Tufi is in the ranks of Liberal Islamic thinkers seems to be not entirely true. Al-Maslahah in the thought of al-Buti identical with the benefits. Therefore, everything that contains benefits (including attempts to acquire them) or something that can prevent someone from harm can be referred to as *mashlahah*.¹⁹ For al-Buti, Maslahah is a common human race. While the teachings of Islam, present to the face of the earth is to safeguard and protect human beings. Every rule in Islam, inevitably, should pay attention to the principles of the maslahah.

Al-Buti admitted that Maslahah has a very important value and position for human survival. However, in terms of its blasphemy as the basis of Sharia, al-Buti is very strict in making boundaries. According to him, Maslahah which can be used as the *Hujjah Syar'iyah* only who have clear criteria that can be measured by, among others: *First*, the impact of *mashlahah* or *mafsadah* that is not only happening in the world but also the hereafter. *Secondly*, *mashlahah* is not judged by the enjoyment of the material, but of all that is the need of the human body and soul. *Third*, the maslahah of religion is the basis for other *mashlahah* and its position must take precedence.²⁰

From this kind of understanding, Al-Buti divided the Mashlahah into two parts, namely Mashlahah World (*Mashlahah Duniawiyah*) and mashlahah hereafter (*Mashlahah ukhrawiyah*). The distinction made by al-Buti seems to be based on the effect of a human shariah activity, both direct and paused effects. According to al-Buti, everything that is in the sphere of Islamic law (Aqidah, worship, and Muamalat) is very likely to contain two benefits at once (the World and the Hereafter). This depends on the caused by the sharia activity. This understanding is certainly different from those developed by the general scholars where they always have the question of Aqidah and worship to *mashlahah Ukhrawiyah* and the problem of rulings to *mashlahah Duniawiyah*. To clarify and strengthen the concept, al-Buti exemplifies that a man who has faith in Allah (Aqidah) and many practices of worship (worship) He will not only find the Hereafter (Heaven) will also get the world's Maslahah. The world's maslahah could be the ease of life that God has given in all earthly affairs (*muamalah*), physical health, or others.²¹

Prudence al-Buti in making maslahah as the evidence (*hujjah*) appears from his statement that although the mashlahah effect of the activity of sharia is very strong, it can not be used as independent evidence (*mustaqil*) as the Qur'an, Hadiths, Ijma ', and Qiyas. The operation of the Maslahah is also limited to the problems of the particular (juz'i). So, even if the effect of the maslahah is universal (*kulli*), then it is not another process of induction of the evidence of *juz'i* which is excavated from the cause of the sharia. Thus, al-Buti concluded that making Maslahah as the evidence of the law does not mean to abandon the evidence of sharia at all, but rather synergize the meaning of the maslahah that *kulli*

¹⁸ Muh}ammad Abu> Zahrah, *Ma>lik Haya>tuh wa 'As}ruh Ara>'uh wa Fiqhuh* (Mesir: Da>r al-Fikr al-'Arabi, 1963), p. 395.

¹⁹ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 23.

²⁰ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 45-47.

²¹ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 84-86.

with the evidence of the Syara ' which is *juz'i* created harmony between the universal law (*kulli*) and the partial (*juz'i*).

Based on the thought Al-Buti then formulated the boundaries (*D} awa > Bit*) where Maslahah can be used as evidence of the law, namely:

a. In the scope of Legislator of Islamic law (al-Syari') purpose²²

According to al-Buti, the legislation of Islamic law should not be out of context to realize five things that become the purpose of sharia, namely: Religion (*dien*), Soul (*nafs*), Intellect (*aql*), descendants (*nasl*), and treasures (*maL*). All activities that lead to the effort to keep his fifth are called *mashlahah*, on the contrary, all activities that cause the neglected or lost (destroyed) the five things are categorized as *mafsadah*. To realize the benefits, various efforts can be pursued. Creating a Maslahah is a necessity of sharia, as well as eliminating mafsadat also religious orders.

In formulating the rule of law using *maslahah* should not be out of the context of the purpose as-Syari'. That is, when one seeks to nurture religion with his believe and worship, nurture souls with clothing, food, and planks, preserve their wealth with good care and business, carrying the lineage by marriage, and foster reason with Knowledge, then all such efforts must be oriented to the main purpose, namely the blessing (*ridha*) of Allah, which with the blessing one can get happiness, both in the world and in the hereafter.

b. Not contrary to Quran²³

According to al-Buti, there are two possibilities of principles that can contradict the Qur'an, namely: *mas}lahah mawhu>mah*, namely Maslahah that does not have a legal rest at all.²⁴ This like this could be contrary to the text of Quran that is definitely (*qath'i*) and indefinitely (*zhanni*) own. When the *nass indicator* is *qath'i*, it is in itself that the alleged (uncertain/clear) will fall. The reason, not likely something *Qath'i* would be baptized to be one with something zanny, and still *mauhu>mah*.

Second, the principles are produced through the process of analogy (*qiyas*).²⁵ The possibility of opposition lies in the process of the branch problems (*maslahah*) with the underlying problem (*al-ashl*) through the method of *Qiyas*. Such opposition is as partial as *typical* and' *am*, or *mutlaq* and *muqayyad*. Thus, the *zahir an-nass* with *Qiyas* allows for the opposition, not between the *nass* and the *maslahah* itself.

c. Not contrary to Sunnah²⁶

Al-Buti divided the conflict with the as-Sunnah into two kinds, namely: *first*, the Pure principles which are set based on mere thought.²⁷ This kind of *maslahah* if contrary to al-Quran and al-Sunnah, then can not be referred to as *mashlahat haqiqiyyah* and should not be used as evidence of the *taqyid* and *takhshish* method. The position of al-Quran and al-Hadith must be preferred and the *maslahah* ruled out.²⁸

²² Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 119.

²³ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 129.

²⁴ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 131-132.

²⁵ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 139.

²⁶ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 161.

²⁷ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 173.

²⁸ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 174.

Secondly, the principles supported by the evidence or the testimony (*Shahid*) of the main source of Islamic law is al-Quran or Sunnah. The Maslahah is usually on the *qiya>s s}ah}i>h}*.²⁹ However, if it contradicts the al-Sunnah then it is not mentioned by *Qiya>s S}ah}i>h}* (*qiyas* in the *Nass* itself).

In the case of maslahah contrary to the character *qat'i as\ -s\ubu>t wa ad-dala>lah*, al-Buti agrees with the majority of the scholars that the won is a nass. But if the position of the nass is not qat'iy it should be done ijthad efforts to synergize the one with the other nass comprehensively to strengthen the position of the nass. Al-Buti still disagrees if the Maslahah is won over the nass.³⁰

d. Not contrary to *Qiyas*³¹

Maslahah that can contradict *Qiyas* is called *mashlahat mursalah*, namely principles resulting from the process of reasoning a *mujtahid* concerning the problem that there is no evidence (*Shahid*) to analogous and there is no evidence to cancel it. According to al-Buti, such an understanding is not to be understood that the *maslahah mursalah* is detached from the nass altogether. Because, without any backup of the nass at all, *maslahah mursalah* is not allowed to be evidence of the law. On that basis, *mashlahat mursalah* remains to be in the evidence, although the evidence does not relate directly to the legal activities in which there is a maslahah element. The example, in this case, is the collection of al-Quran done by Abu Bakar, where there are no origin issues (*al-aslu*) that can directly analogous, but it is included in the framework of preserving religion (*hifz ad-din*).³² In terms of *hifz ad-din* of many nass that can be used as evidence, although not directly and specifically discuss the gathering of the Qur'an.

e. No illegal Maslahat or higher Maslahat³³

The Maslahah is sometimes temporal (*duniawiyyah*) and some are the hereafter (*ukhrawiyyah*). There is also a emergency (*dharuriyyah*), needs (*hajiyyah*), and complementary (*tahsini*). In the event of a conflict between each of the categories, the higher level must take precedence and take precedence over the lower level and position. For example, one must abort temporarily maslahah and do temporarily *mafsadat* if with the earthly mafsadat it (the hereafter maslahah) can be obtained.³⁴

If the two conflicting principles are on one level, then the precedence is that has a broader legal effect. *Dharuri*, which is associated with *hifz din*, takes precedence over *dharuri*, which is associated with *hifz an-nafs* and beyond.³⁵ As for if the conflicting maslahah is related to one thing is equally general (*kulli*), such as religion or soul or reason, then a *mujtahid* should move on to the second point, which is to see the level of coverage of a maslahah.³⁶ Maslahah that is still doubtful or difficult to do however the value and degree of comprehensivity should not choose other maslahah.

In addition to the five limitations above, Al-Buti also requires the absence of instructions for nass, *Ijma'*, and *qiyas* on the issues that will be examined with the perspective of maslahah. In this case, al-Buti's terms are similar to the concept of *al-mas}lah}ah al-musralah* formulated by experts, only, al-Buti more emphasis on the maslahah which is included in *maqa>s}id syar'iyyah* and there is no evidence to organize it.³⁷

²⁹ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 193.

³⁰ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 194.

³¹ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 216.

³² Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 216.

³³ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 248.

³⁴ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 249-250.

³⁵ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 251.

³⁶ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p.252.

³⁷ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit*, p. 278-280. See also Abdul Wahha>b Khalla>f, *Ilm Us}u>l Fikih* (Beirut: Da>r al-Kutub al-Ilmiyyah, 2008), p. 63.

2. Application and Scope of Maslahah: *Hudud* and Human Rights Problems

Al-Buti is known as a consistent figure that holds a principle with no "echolalia" following the flow of thought that tends to be arbitrarily in deciding on the issues based on benefits considerations. The legal contextualized argument is often used as the reason some people dare to leave the *nass* for *maslahah*. In the case of *hudud*, for example, many thinkers assume that the law of cut hands, whip, stings, and *qisash* are no longer by the spirit of the time and human rights. The legal effect, the rules on this matter may not be enforced and replaced with penalties that have been deemed to be more appropriate and relevant to the context of the present. In other languages, the rule of law about *hudud* seems to be contextualized to preserve the *maslahah* spirit in it.

According to Al-Buti, there are at least two reasons why contemporary thinkers often consider that *hudud* rules are no longer relevant to the spirit of kinship, namely: the *first*, psychiatric condition (psychology) of someone who tends to assume that everything past is ancient (expired) and improper to be retained. *Secondly*, it is assumed that Islamic criminal law is ruthless, cruel, and in violation of human rights, not following modern humanitarian values.

For al-Buti, both of these reasons cannot be a foothold to assess whether *hadd's* punishment is relevant or not to the current social context. The *wahm* (alleged) element, in this case, seems more dominant than logical and rational considerations. The rejection of a group of people against the law of *hadd* could arise due to boredom and saturation in the law of *hadd* considered obsolete Islamic products of the past. Psychologically, one tends to ignore, discard, and even ruin everything that has long been possessed while he has felt saturated with him, then replace it with something new.

In Al-Buti's view, not all of the modern things are better than things that come from the past. More than that, thus not a few modern ones become a source of doom and otherwise the ancient source of life. The world is witnessing that the sun, water, earth, and air are the products of the past that are to this day a source of life. The sun we see today is the sun as witnessed by people who lived thousands of years ago, it rises from the eastern horizon and sets in the West horizon, completely unchanged.

When it is said that Islamic law is cruel, violent, and in no way under the values of humanity then, according to al-Buti, whether it is not better if men are freed only from all punishment so that they have the freedom to do whatever they want without worrying about punishment. It certainly infringes on human nature as a society that expects order and tranquility. If men are freed from punishment at all, then each of them can destroy the other, the strong will oppress the weak, the rich will enact the poor, and the chaos will occur everywhere. Therefore, a sentence was presented to give a deterrent effect on anyone who behaves savage, oppressive, and greedy to make life more safe, comfortable, and orderly.

The law in Islam adheres to the principle of conformity and fidelity between punishment and the kind of evil committed by a person. If it is narrated in more detail then this principle can say: "The greater the criminal offense made by a person, the greater the impact of the danger that will be inflicted. And when the impact of danger inflicted greater, then the punishment that will be accepted by the perpetrators of the crime is also heavier".

In general, the assessment that Islamic criminal law is a cruel and ruthless law of al-Buti derived from a conclusion that is too rash. The point of view of those who judge it is only from one point of view regarding cut hands, whip, or stings. They tend to close their eyes on the side of when they can be executed, what process should be passed, and whether the penalty is the only penalty that must be executed without an alternative to a substitute penalty while the criminal act is associated with the rights of Adam's children (*human right*).

The law of throwing stones to death (*rajam*) or hand-cuts, for example, can fall when there is obscurity (forgiving reasons). In history it is explained that the Caliph Umar had ever freed a woman who had committed adultery for the reason to save her soul at that time in thirsty and dying. His soul would only be saved while he was willing to commit adultery with his colleague then had enough of the sheep's milk supply, but in return, the woman would have to commit adultery with her. On another occasion, the Caliph Umar had also freed a thief from the punishment of the cutting hand by the time of the famine, forcing the man to commit theft. The free penalty given by Umar to the two perpetrators of the criminal act is nothing but obscurity (*syubhat*) that could prevent a punishment.

Although the friend of Umar had given an example of how hudud not implemented because of obscurity, al-Buti still disagrees with some thinkers who made the policy of the Chaliph Umar as an example of the ability to come out of the provisions of the nass for reasoning of reason. According to al-Buti, what was done by Umar was one of the *ijtihad* of the Hadith of Rasulullah, *idra>' al-h}udu>d ' an al-muslimi>n bi as-syubuha>t* (avoid hadd punishment against Muslims because of the *syubhat*). Thus what Umar did was in no way detached from the text. Umar only did *ijtihad* in the form of interpreting the meaning of the obscurity in the hadith.

In his book, *al-'uqu>bat al-Isla>miyyah wa ' Uqdat at-Tana> qud} Bainaha> wa Baina ma> Yusamma> bi t}abi>'at al-'as} ri*, al-Buti divides the punishment (*uqu>ba>t*) into two, namely:

- a. The definite penalty (*' Uqu>bat Muqaddarah*), which is the type of punishment that form and its size has been arranged precisely and precisely by the *Syari'* (Allah) through the al-Qur'an and Hadith and no more space to change it. Such penalties remain in force anytime and anywhere without being bound by space and time.
- b. The uncertain punishment (*'uqu>bat ghair muqaddarah*), which is the type of punishment that form and its size is not specifically set (definite) by *Syari'*, but is handed over to the judgment of the judges. Judges are given the discretion to determine the rate of punishment to a person during the judgment of the judge does not exceed the boundaries of the *Syara'*.

The punishment in the first category is closely related to a serious criminal offense, whether in violation of God's rights, human Rights (*adj-D}aru>riya>t al-khams*), as well as criminal acts that are considered very threatening and endangering the moral joints of society.

To protect human rights, Islam has established some definite rules of law and should not be changed to those who threaten the existence of the five human rights, namely:

- a. The death penalty for apostates (*murtad*). This sentence is enforced as a form of protection against religious existence. With the punishment, one would not dare to easily enter Islam religion.
- b. Penalty *qishas* implemented to ensure the right of one's life.
- c. *Hadd* sentence in the form of a whip for the drunkard, prescribed as a protection effort against one's mind.
- d. *Hadd* sentence in the form of whip/ stout for the perpetrator and whip for the accuser of adultery (*qadzaf*), in order to guarantee and protect the reproductive rights of one.
- e. *Hadd* sentence in the form of a cutting hand/foot for thieves and (*Qa>t}i ' at}-T}a>riq*), to guarantee and protect one's proprietary rights.

As for the uncertain punishment (*al-ta'zi'r*), according to al-Buti, very related to the crime other than those prescribed above or criminal acts that do not directly affect the loss of one's human rights, but only to the extent of disturbing the comfort of life, whether secondary (*hajiyyat*) or tertiary (*tahsiniyah*).

3. Al-Buti and *Counter Argument* Against al-Tufi

In *D}awa>bit} al-Mas}lah}ah*, al-Buti wrote a special study of al-Tufi which was titled "*al-T}u>fi> wa khuru>juh ' ala> al-ijma>*".³⁸ According to al-Buti, al-Tufi has clearly committed a serious academic offence by mentioning that if the Maslahah contradicts the NASS or Ijma' then the Maslahah should take precedence. This is obviously excessive because the Maslahah is seated beyond the portions of equal or even the most powerful source of Islamic law, the Qur'an and al-Hadith.

There are at least four reasons why he rejects the thought at-Tufi, namely: *first*, the basis of an argument built at-Tufi by assuming the possibility of a maslahah contrary to nass or Ijma' is unreasonable, even impressed with anomalies. At-Tufi, on the one hand, said that the maslahah should be put in place if it contradicts the nass or Ijma', but the other side of the condition he also explained that the *Khitab as-Syari* (Allah's comment) was solely oriented to create the benefit for mankind.

According to al-Buti, all Qur'anic verses contain mercy for all nature and bring benefits to mankind. This principle is believed by all scholars because it is impossible if there is a verse contrary to the intrinsic benefit. If anyone thinks the nass is contrary to the maslahah, then it is likely that the solids are influenced by the lust and the inability of reason to capture the nature of the maslahah. If at-Tufi is true that there is a contradiction between the nass and the maslahah, it infringes on the scholars' agreement.

Secondly, when at-Tufi positions the maslahah stronger than the Ijma' and the nass, then it means he has made the maslahah a source of independent law and despite from nass or Ijma'. Among the scholars, there is no such view. All agree that the maslahah is not a piece of self-progenated evidence that he can become another part of the nass and Ijma'. Maslahah is a common meaning formulated from the legal units based on the nass. Therefore, consider any kind of maslahah to assume the evidence of the underlying or at least no evidence against it.

Thirdly, one of the reasons for at-Tufi that the maslahah is stronger than the Ijma' is the existence of the Ijma' who still use the maslahah. Here, at-Tufi concludes that maslahah has been an agreement while Ijma' is still being disputed. According to al-Buti what was conveyed by at-Tufi does not correlate. This means that there is no connection between the licenses of Ijma' still using maslahah with the position of maslahah stronger than Ijma'. With his argument that the Maslahah is stronger than the Ijma'. Argument at-Tufi in this context is thus inconsistent because of he, on the one hand demeaning the position of Ijma', but on the other hand the agreement (ijma') the complainant' against the maslahah hence he made an amplifier argument to his opinion.

Fourth, when declaring the maslahah more precedence than the nass, at-Tufi gives the reason that the nass is different and contradictory while maintaining the maslahah is essential in him and is no different. The argument is erroneous because, it is unlikely that something that comes from Allah is omniscient in the form of a conflicting religious nass. If there are contradictory verses, then it is worth suspicion that the verse is not part of the Qur'an. The reality of the deferent ideas among the scholars made evidence by at-Tufi that the verses contradict each other, according to al-Buti did not indicate that the verses of the Qur'an contradict each other. There is a mere difference in understanding the nass and

³⁸ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit}*, p. 178.

the effort to capture the intent of the evidence (the attempt to capture the nature of *madlul*), not the conflict of verses.

At the end of *D}awa>bit} al-Mas}lah}ah* al-Buti again showed be very careful in using *maslahah* as a source of law. According to him there are three things to be considered by the people utilitarianis (users of *maslahah*), namely:

- a) Can not be general limiting (*takhshish*), interprets or limiting the absolute (*taqyid*) something of the Qur'an and the al-Sunnah solely with the foundation of *Maslahah*, because the problem is not to outperform and contradict the two main sources of Islamic law;
- b) The opinion of some of the scholars who asked "*tatabaddal al-ah}ka>m bi tabaddul al-Azma>n*" (change of law because of the change of time) it should not be understood and followed on an outward basis, because, a law born based on al-Qur'an, al-Sunnah, or from *Qiyas* must always exist during both (al-Qur'an and Al-Sunnah) still exist and can not change just because of the changing times; and
- c) Moral message for the scholars who have been able to state and discuss some issues of Islamic law to be more thorough and careful in understanding the characteristics of the *maslahah*, in order not to happen confusion or influenced by the laws of state, civil law (*madaniyyah*), and materialistic modern culture.³⁹

Although Al-Buti did not explicitly mention to whom the three messages above were addressed, however, the reader would easily conclude that al-Tufi was a figure referred to by al-Buti. At the first point, when al-Buti prohibits general limiting (*takhshish*), interprets, or limiting the absolute (*taqyid*) by using *maslahah*, at-Tufi thus making it as the method of the *maslahah*. As for the second point, al-Buti wanted to attack at-Tufi and its adherents which were thought to have carried the concept of *maslahah* as an independent legal resource when *nass* or *Ijma'* did not discuss it. At the third Point, al-Buti was conducting propaganda to other scholars and Muslims in general so as not to exploit excessive exploitation of the *maslahah* as was done by at-Tufi. According to al-Buti excessive exploitation of *maslahah* can destroy sharia joints.

C. The thought of Al-Tufi and Al-Buti as Problem Solving Islamic Legal Issues

The history of Islamic thought always had ups and downs. Al-Tufi's presence with the concept of "maslahah supremacy" is to reaffirm the creativity of thinking among the theorists of the Islamic law that has long stagnated and regressed. Al-Tufi had succeeded in animating the new discourse by harvesting the *usuliyyin* to criticize his thinking, blasphemy, and even criticize him with various accusations. Regardless of all, the lifetime of al-Tufi (the end of the VII-century H-early VIII century) was a time in which the history of the Islamic civilization was experiencing a decline with the conquest of Iraq by the Mongols under the leadership of Hulagu Khan. This condition has spawned massive waves of following blindly (*taqlid*) and fanaticism with a large scale among Muslims (*al-taqli>d wa al-ta'as}s>ub*). Al-Tufi's ability to celebrate the concept of *maslahah* has at least reopened the spirit of state among the scholars and jazz the discourse of Islamic law with creative ideas.

As for al-Buti, it was present in an era where liberalization of thought so strongly affects the Islamic world. The emergence of figures such as Fazlurrahman, Nassr Hamid Abu Zayd, Muhammad Syahrur who by Wael b Hallaq called "the Islamic Liberal", certainly not always beneficial for the Islamic world. Controversies from some of their ideas, instead of giving solutions to the problems of Islamic law, thus often produce ineffective legal products. Strengthening the radical (puritan) in the Islamic world also could not be ignored. For when the presence of radicalism will muzzle the scientific construction that has been so strong built by the scholars. In many ways, the presence of the thought of al-

³⁹ Muh}ammad Sa'i>d Ramad}a>n al-Bu>t}i>, *D}awa>bit}*, p. 358-359.

Buti in the middle of the discourse of Islamic law is certainly needed in the context of keeping the law of Islamic moderation vis a vis liberalization and radicalization.

Al-Buti tried to proportionally put reason before revelation. In this regard, the reason is positioned as translator, the confirmator, and the legitimator of revelation (*wahy*). Its existence can not stand independently parallel to the revelation, let alone exceed it as the liberal thinker voices. This concept also rejects a radical-puritan viewpoint that seems not to give space for the reason (*ratio*) to engage in a legal decision-making process.

Thus, both al-Tufi and Al-Buti, are present in a certain academic space which equally tries to answer the thought stagnation in the Islamic world. Only the two appear differently when entering the sense of authority over revelation (*nass*). Al-Buti comes with a more radical concept, as well as liberal boldly positioning the community can align or even exceed the *nass* as the basis of legal decision making. While al-Buti tends to be careful with not dare to remove the *maslahah* from the shadows of the *nass*. However, if in earnest scrutinized, then it is not appropriate to say that the concept of *maslahah* by al-Tufi came out of the *nass*. Even the formulation of the *maslahah* is thus a wide interpretation of the *nass* present about the obligation to spread daggers (*dharurat*) and bring about benefits (*maslahah*). In other words, the idea of the two is certainly very relevant to be developed in response to contemporary issues. The issues arose centuries after the end of the revelation. The issue continues to evolve and further demonstrates its complexity, which the Islamic thinkers prosecuting to always have a keen and meticulous analytical ability in deciding the issue. One is to make the *maslahah* as a consideration of legal decision making, when no *nass* set it.

Conclusion

Both al-Tufi and Al-Buti, both are *Maslahah* warriors with very useful originality in the disagreements of the methodology of Islamic law. How not, Al-Tufi is known as a classical thinker figure for the size of his time has certainly been in the liberal category. While Al-Buti, although living in an era where liberalization of thought is so strong spread, he thus appears as a figure that does not talkative follow the flow of liberalism, but still consistent with prudence in making *maslahah* as a legal source.

There are two differences of thought between al-Tufi and Al-Buti regarding the concept of *maslahah*, namely: *first*, al-Tufi allows the *maslahah* can be a source of independent law (*mustaqil*), while al-Buti rejects the possibility. *Secondly*, if the conflict between the *nass* and the *maslahah* is likely to win the *Maslahah*, al-Buti against every effort to win the *maslahah* on the *nass*.

Despite the differences, both al-Tufi and Al-Buti, the thought of the two seemed to meet in several respects, namely: 1. *maslahah* is an urgent thing to consider in resolving legal issues, 2. there is a possibility of conflict between the *nass* and the *maslahah*, 3. in resolving the issue of law should not be completely detached *maslahah* can only be developed in issues outside of worship and something that is certainly the legal provisions (*al-Muqaddarat*).

Taking into consideration two thoughts, both from al-Tufi and Al-Buti, the issue of stagnation and legal productivity dealing with an issue and the challenges of the times can be solved. The growing problems of life will be able to be developed by the legal solution without losing the legitimacy of *syara'* this as well as a differentiator between Islamic law and other laws.

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