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# A Comparative Study of *Maṣlaḥah* and Mischief Rule: Pakistani Perspective

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## Abstract

At present, almost all the legal systems are concerned with establishing a flexible interpretive policy to make the law to resolve the everyday complex issues for the benefit of the people at large. It is, however, a matter of great concern that the higher courts in Pakistan are still following static and foreign interpretive modes like a literal rule, the golden rule, and mischief rule etc, in the presence of dynamic interpretive principles of Islam. In this context, this research aims to analyze critically, the mischief rule and to present *maṣlaḥah*, a vibrant Islamic interpretive principle. This article argues that the Holy Prophet (SAW), his companions and the traditional Muslim jurists had to decide the contemporary issues by the way of *maṣlaḥah* which led to the development of Islamic jurisprudence and resulted in the ease of the people. While interpretive rules of English common law are static and have become outdated. This research, thus, concludes that unlike mischief rule, *maṣlaḥah* is more flexible and favorable by Islam for resolving the present-day socio-economic issues of the people. It recommends the higher courts of Pakistan to follow the principle of *maṣlaḥah* during the process of interpretation. It is also acclaimed that the Renaissance of this vibrant principle of *ijtihād* would be a revival of the interpretive policy of the Prophet (SAW), his companions and the traditional Muslim jurists. It would also lead to the development of Islamic jurisprudence in the light of changed context.

**Keywords:** *maṣlaḥah*, mischief rule, judicial policy, Pakistani context, conclusions and recommendations

## Introduction

The law is considered a living phenomenon and a necessary component of every legal system which is composed of language, religion, customs, culture and legal rules of a society and aims a purposeful enterprise.<sup>1</sup> The instrument of law is used to regulate the conduct of the people and to resolve the socioeconomic, public and private, civil and criminal issues of the people.<sup>2</sup>

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<sup>1</sup>Brain Leiter, *Objectivity in Law and Morality* (Cambridge University Press, 2001), 55.

<sup>2</sup>J. A. Holland and J. S. Webb, *Learning Legal Rules* (London: Blackstone, 2003), 23; S. F. C. Milson, *Historical Foundation of the Common Law* (London: n. p., 1981), 57.

The process through which the continuity of a living law is ensured is called interpretation.<sup>3</sup> This subject, however, has been facing daunting challenges regarding the development of such policy which ensures public interest and removes the hardship of life. Owing to the stagnation and harmful effects of the strict strategy of interpretation, the contemporary jurists and the judges have rejected it and are in search of a flexible interpretive policy suitable to their own culture and society.<sup>4</sup>

Keeping in view this context, this work aims to have a comparative study between the mischief rule and *maṣlahah* in the light of the interpretive policy of the higher courts of Pakistan. This paper first elaborates the meaning, history and scope of *maṣlahah* as a principle of *ijtihād* and then discusses the pros and cons of the mischief rule and studies its scope too. This paper highlights the fact that the higher courts of Pakistan are following the mischief rule considering it a flexible rule and ignoring the dynamic principle of *maṣlahah* which is more flexible and dynamic than the mischief rule. In the end, some conclusions and recommendations are presented to reform the existing interpretive system of Pakistan in the light of the dynamic principle of *maṣlahah*.

### 1.1 Objectives of Research

1. To inquire into *maṣlahah* as a dynamic principle of *ijtihād*
2. To explore the response of the judicial interpretive system of Pakistan towards *maṣlahah*
3. To compare *maṣlahah* with mischief rule to explore the flexibility and applicability of each.
4. To draw the attention of the judiciary of Pakistan towards *maṣlahah* as a dynamic principle of *ijtihād*
5. To draw some conclusions and to put forward/propose some recommendations

## 2. Research Methodology

This research aims to utilize theoretical and empirical methods of research. It also aims to follow comparative method of research between *maṣlahah* and mischief rule to highlight the importance and flexibility of *maṣlahah* than mischief rule. Data will be collected from academic writings, books, reports and judgments of the superior courts.

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<sup>3</sup>J. G., Sutherland, *Statutes and Statutory Interpretation* (Chicago: Callaghan and Company, 1943), 2: 319.

<sup>4</sup>Michael Zander, *The Law Making Process* (London: Butterworths, 1999), 89; Holland and Webb, *Learning Legal Rules*, 27.

### 3. *Maṣlahah*, a Vibrant Principle of *Ijtihād*

The Islamic system of interpretation is declared as *ijtihād* and has taken on the meaning of striving hard, taking pains, and spending effort in search of truth.<sup>5</sup> The Qur'ān declares: "Then judge (think, consider) O you with eyes."<sup>6</sup>

Talking about the interpretive policy of the Apostle of Allah, the Prophet (SAW) adopted the flexible policy and decided the current issues in the light of *maṣlahah*.<sup>7</sup> The reason was that Apostle of Allah (SAW) was fully aware of the factual realities of the life and that in the administration of justice, different problems would occur which might not be resolved by strict rules and might cause hardship, so he left the task to be decided by the *mujtahidīn* of each generation according to the needs and circumstances of their societies.<sup>8</sup>

Moreover, a thorough study of the *Qur'ānic* policy of interpretation and system of *ijtihād* during the period of the Prophet (SAW) and his companions reveals that the whole system of interpretation/*ijtihād* was based on the *maṣlahah* of the people rather than used interchangeably. Any solution that led to the attainment of the benefit of the public was declared as *maṣlahah*.<sup>9</sup> Technically, the term *maṣlahah* is defined in the meaning of a rational reasoning which can be perceived easily by the intellect and which leads to the ease of people and remove harm from them.<sup>10</sup>

<sup>5</sup>Muḥammad bin Mukarram Ibn Manẓur, *Lisān al-Arab* (Beirut: Tab'a Dār Sadir, 1300 A.H), 4:67; Al-Āmidī, Sayf al-Din, Abu al-Husayn, *Al-Ahkām fī Uṣūl al-Ahkām* (Cairo: Mu'assisat al-Halbi, 1987), 4:141; Abū Husayn bin Fāris, *Maqā'is al-Lughah* (Misr: Al-Matba' Al-Amūriyyah Bulāq, 1390 A.H), 2:78.

<sup>6</sup>Al-Qur'ān: Al-Mujadalah, 59: 2.

<sup>7</sup>Ibarhim bin Ali Abī Ishāq Al-Shūrāzī, Farūz Ābādī, *Qāmūs al-Muḥīṭ* (Cairo: Muṣṭafā Bāb al-Halbī, 1371 A.H), 4:229; Muḥib Allāh bin 'Abd Shukūr Al-Bihārī, *Fawātih al-Rahmūt Sharah Musallam al-Thabūt* (Miṣr: Al-Matba' Al-Amūriyyah Bulāq, 1322 A. H), 2:362; Ibn Badrān 'Abd al-Qādir, *Al-Madkhal Ilā Madhhab Imām Aḥmad* (Miṣr: Idārah Ṭaba'al-Munūriyyah, 1959), 65; Muḥammad 'Alī, al-Shawkānī, *Irshād al-Fuḥūl* ( Miṣr: Muṣṭafā Bāb al-Ḥalbī, 1937), 251.

<sup>8</sup>Naseem Razi, "Implementation of the Judicial Rights of *Mustafa* (SAW): An Analysis in the light of the Judicial System of Pakistan," *Pakistan Journal of Islamic Research*, Vol. 16 (2015):89-103.

<sup>9</sup>Muḥammad bin Mukarram. Ibn Manẓūr, *Lisān al-Arab* (Beirut: Tab'a Dār Sadir, 1350 A.H), 2:348; Muḥammad bin Ya'qūb Fyrowz Ābādī, *Qāmūs al-Muḥīṭ* (Cairo: Muṣṭafā Bāb al-Ḥalbī, 1371 A.H), 1:277.

<sup>10</sup>Muḥammad bin Muḥammad, al-Ghazali, *Al-Mustasfā* (Cairo: Al-Matba' al-Amūriyyah, 1346 A. H), 1:289; Abū Ishāq Ibrāhīm bin Mūsā' al-Shātībī, *Al-I'tisām* (Beirut: Dār al-Ma'ārif, 1389 A.H), 2:309; Muḥammad bin 'Abd Allāh Ibn al-Arabi, *Ahkām al-Qur'ān*, ed., Muḥammad al-Bajāwī, 4 vol (Misr: Dār Ihyā al-Kutub, 1978), 1:185.

The judgment of Hadrat Sulaiman (RA) as mentioned in the Qur'ān was admired by Allah Almighty as it led the interest of both parties.<sup>11</sup>

By following the principle of *maṣlahah*, the Holy Prophet (SAW) had to decide the issues of the people and the majority of the current issues were to be resolved by way of *maṣlahah* what he saw appropriate and beneficial under the relevant facts and circumstances. Rather, in the worldly matters, the Prophet (SAW) declared himself as an ordinary human being in these words: “When I decide a matter on My Own, then I am only an ordinary individual (distinguished from being an apostle of Allah).”<sup>12</sup>

It is reported from Rafi' bin Khudayj that when Allah's Messenger (SAW) came to Madinah, found the people grafting their date palm trees. He (SAW) asked them about what they were doing. They informed that they were artificially pollinating the date palm trees. The Prophet (SAW) then said: “Perhaps it would be better if you do not do that.” They abandoned the practice. However, the yield of the date palm became less. So they came to the Prophet (SAW) and informed Him (SAW) about the issue. Prophet (SAW) then said: “I am a human being. So when I tell you to do something pertaining to the religion accept it, but when I tell you something from my personal opinion, keep in mind that I am a human being. Then he added: “You have better knowledge in the affairs of this world.”<sup>13</sup> Once, he remarked in that context: “If something belongs to the domain of your affairs, then you know all about it. (You are the best judge thereof, and have the right and the capacity to deal with it according to the *Sharī'ah*)”<sup>14</sup>

The issue of the status of menstruated women was also decided by the Prophet (SAW) by way of *maṣlahah*. The Jews of Madinah had a discriminatory belief that a menstruated woman became impure from all aspects physically, spiritually and in her acts. Thus, they did not allow her to have a company, to sit, to eat with them or to do any work. Rather, she was asked to confine to a specific place out of their houses till she became pure. Under that prevailing context, the companions asked the Holy Prophet (SAW) about the status of a Muslim menstruated woman, how she would be treated? Then Allah Almighty revealed:

<sup>11</sup>The event was that once, two parties brought their case before the court of Hadrat Dawud to resolve. The bone of contention was that at night, the sheep of one party damaged the crops of another one. On the basis of comparative estimate of the loss of crop and the price of sheep, Hadrat Dawud decided the case and held that the sheep would be handed over to the owner of the crops. When Hadrat Sulaiman heard this judgment, he suggested another decision that the sheep would be handed over to the owner of the crop, so that he may derive benefits from their milk and wool while the fields be placed in the custody of the shepherd till it brings it to its prior condition by expanding labour, irrigation and proper care. And thereafter to each of them, his property shall be returned. Hadrat Sulaiman thus, decided the case in the light of the benefit of both parties. Hadrat Dawud appreciated this decision and withdrew his judgment in favor of the judgment of Hadrat Sulaiman.

<sup>12</sup>Abū 'Abd Muḥammad bin 'Abd Allāh, Al-Tabrūzī, *Mishkāt al-Maṣābīh* (Hind: Matba' Lakhnaw, 1967), 2:220; Al-Āmidī, *Al-Ahkām*, 3:140-141.

<sup>13</sup>Muslim Bin Hajjaj, *Ṣaḥīḥ al-Muslim* (Beirut: Dar Sadir, 1987), 4:1259.

<sup>14</sup>Imām Hāfiz al-Qazwinī Ibn Majah, *Sunan ibn-Mājah* (Beirut: Dār al-Ma'rifah, 1997), 2:34.

“They ask you about menstruation. Say: “It is harmful as keep away from women during menses. And do not approach them until they become pure.”<sup>15</sup> This verse leads a general meaning and could be understood in the same meaning as was considered by the Jews because the wording of the text is not associated with some indication to restrict the scope of the word *fa'tazilu* (to keep away from them). However, the text was interpreted by the Prophet (SAW) for the betterment of the menstruated women by saying: “Sit with them (menstruated wife) in your houses and enjoy them except intercourse.”<sup>16</sup>

After the death of the Prophet (SAW), *Khulafa-e-Rashidūn* decided many unprecedented challenges by way of *maslahah*. The companions had to utilize the principle of *maslahah* frequently by saying: “That this is the best solution for the betterment of the people and that there is no way to resolve the issue except by way of *maṣlahah* (*Lā Yuṣliḥ al-nās illā dhāka*).<sup>17</sup> The interpretive function of the companions was based on the presumption that the primary objective of the Islamic legal system (*Sharī'ah*) is to provide ease to people and to remove harm from them.<sup>18</sup>

Owing to the changed context and the changed demands of the time, *Haḍrat* 'Umar decided many cases differently from the existing rules. For instance, the *zakat* can be given to those who embrace Islam. It is stated in the Qur'ān: “Zakat may be given to those who won over.”<sup>19</sup> And the same was exercised by the Prophet (SAW). But *Haḍrat* 'Umar rejected this interpretation of the text of the Qur'ān and adopted a different interpretation by utilizing *maṣlahah* and started to spend the amount of *zakat* for the interest of the public at large. When newly converted Muslim demanded their share from *zakat*, *Haḍrat* Umar refused to give them the *zakat* by saying: “The Apostle of Allah (SAW) used to give you when Islam was weak and the number of the Muslims was very small, but now Islam has adequate strength and you may go and do whatever you could do to oppose it.”<sup>20</sup>

In the same manners, *Haḍrat* 'Umar refused distribution of the booty of war among the members of the army while the Holy Prophet (SAW) had to administer the conquered lands in two ways, either to distribute the conquered land amongst the members of the army or to leave the land under the possession of owners.<sup>21</sup> *Haḍrat* Umar, however, decided the matter for the welfare of the public by saying: “How it is possible to distribute lands

<sup>15</sup>Al-Qur'ān: Al-Baqarah, 2:222.

<sup>16</sup>Imām Muslim, *Ṣaḥīḥ al-Muslim*, 1:178; Abū Dāwūd, *Sunan abī Dāwūd*, 1:67.

<sup>17</sup>'Izz al- Dīn, 'Abd al-Salām, *Qawā'id al-Aḥkām fī Maṣāliḥ al-Ā'nām*, ed., 'Abdul Ghani (Damishq: Dār al-Taba' li al-Nashr wa al-Tawzi', 1992), 1:31.

<sup>18</sup>Naseem Razi, “Ijtihād al-Maqāsidī or Purposive Interpretation: A Comparative Analysis in Modern Context,” *al-Qalam* 18, Issue.1 (June 2013): 22-45.

<sup>19</sup>Al-Tawba, 9:7.

<sup>20</sup>Mālik bin Anas bin Mālik, *Al-Muwattā* (Beirut: Dār al-Kutub al-Arabiyyah, 1378 A.H.), 322.

<sup>21</sup>Imām Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Kitāb al-Amwāl, 2:283; Muhammad Abū Yūsuf, *Kitāb al-Kharāj* (Cairo: Matb'a Bulaq, 1332 A.H.), 20:26.

amongst you and to leave the others who would come after you in a situation where they will have no share in these lands.”<sup>22</sup>

*Hadrat* Umar also reformed many existing laws by utilizing *maṣlahah* like the quantum of the blood money was fixed by the Prophet (SAW) with reference to the camel. *Hadrat* ‘Umar, felt it hard for the people and prescribed 2000 (two thousand) dinars or 12 (twelve thousand) *dirham* instead of the camel as the quantum of the blood money or as the case may be.<sup>23</sup> *Hadrat* ‘Umar declared it prohibited for the betterment of the Muslim women. He also postponed the prescribed penalty of theft during the famine, though there was no exceptional rule concerning the theft crime. He gave this decision by way of public interest.<sup>24</sup>

Similarly, *Hadrat* ‘Uthman permitted by way of *maṣlahah*, the rounding up of stray camels and sale thereof, after the expiry of a certain waiting period, despite the fact that such act was not permitted by the Holy Prophet (SAW).<sup>25</sup> Later on, the traditional Muslim jurists developed the subject of Islamic jurisprudence and science of interpretation in systematic manners.<sup>26</sup>

The traditional Muslim jurists declared *maṣlahah* a recommended rule of *ijtihād* and established it in technical manners. They defined and classified *maṣlahah* into many classes in the light of its authenticity, strength, and scope.<sup>27</sup>

Imam Malik prescribed some conditions to examine the validity of *maṣlahah* that it should be perceived easily by the intellectuals, based on rationale and that it must remove mischief from the people.<sup>28</sup> Imam Malik introduced the rule of *Istidlāl* as a method of juristic deduction to derive laws from the texts which do not fall within the ambit of

<sup>22</sup>Ahmad bin ‘Alī al-Rāzī Abū Bakr al-Jassas, *Ahkām al-Qur’ān* (Egypt: Matba’ h al-Bahī’ h al-Misriyyah, 1357 A.H), 3:433.

<sup>23</sup>Muhammad bin Sahl Al-Sarakhsī, *Al-Mabsūṭ* (Misr: Matba’ h al-Sa’adah, 1326 A.H), 1:127; Abū Yūsuf, *Kitāb al-Kharāj*, 89; Abū ‘Abd Allāh Muḥammad bin Abī Bakr Ibn Qayyim, *I’lām al-Mawaqqi’ in ‘an Rabb al-‘Ālamīn*, ed. Muḥayy al-Dūn, 4 vol (Miṣr: Matba’ ah al-Sa’ādah, 1975), 1:33.

<sup>24</sup>Izz al- Dūn ‘Abd al-Salām, *Qawā’id al-Aḥkām fī Maṣāliḥ al-Ā’nām*, 1:35.

<sup>25</sup>Mas’ūd bin ‘Umar bin ‘Abd Allāh al-Taftāzānī, *Al-Talwīh fī Kashf al-Haqā’iq al-Tanqīh* (Misr: Dār al-Kutab al-Arabiyyah, 1327 A.H), 403; ‘Alī bin Muḥammad bin al-Husayn al-Bazdawī, *Uṣūl al-Bazdawī: Sharah Kashf al-Asrār lil ‘Abd al-‘Aziz al-Bukhārī* (Misr: Taba’ Maktab al-Sanaī’, 1322 A.H), 3:302.

<sup>26</sup>Abū Ishāq Ibrāhīm bin Mūsā’ Al-Shāṭibī, *Al-Muwāfaqāt* (Misr: Matba’ al-Salfiyyah, 1341A.H.), 2:39; Ibn Qayyim, *I’lām al-Mawaqqi’ in*, 2:320.

<sup>27</sup>Muḥammad Husayn Al-Thālibī, *Al-Tafsīr wa al-Mufasssirūn* (Cairo: Maktabah Wahāb, 1995), 1:244.

<sup>28</sup>Ibrāhīm bin Mūsā’ Abū Ishāq al-Shāṭibī, *Kitāb al-I’tisām* (Beirut: Dār al-Ma’ārif, 1389A.H), 2:318; Al- Ghazālī, *Al-Mustasfā*, 1:31.

analogical deduction. Interpretive principles of public good, the presumption of continuity, al-‘*Urf*, were based on the principle of *maṣlahah*.<sup>29</sup>

On the basis of *maṣlahah*, Imam Abu Hanifah introduced the rule of *Istihsān*/juristic preference.<sup>30</sup> Imam Shafi’, though refuted the rules of juristic preference and *istidlāl*, yet he had to utilize the principle of *maṣlahah* by way of analogy.<sup>31</sup>

Among the disciples of the traditional Muslim jurists, Imam al-Ḥaramayn,<sup>32</sup> divided *maṣlahah* into three major categories: The first category is called as “*maṣlahah mu’tabirah*” which is recognized by *Sharī’ah* and is proved by the express texts of the Qur’ān or *Sunnah* (SAW). This category was further sub-divided into three types such as “*maṣlahah daruriyah*” (the fulfillment of the necessities of life); “*maṣlahah hajiyah*” (needs of life above in degree to *daruriyat*); and *tahsinat* (luxuries of the life).<sup>33</sup> The second category is “*maṣlahah mulghat*” as it is against the objectives of *Sharī’ah* and has been rejected by the Law Giver. The third category is declared as “*maṣlahah mursalah/leftover*”, not addressed by the law Giver.

Imam Ghazali also made a thorough study of *maṣlahah* and studied it as an interest of the human being which is hidden in the objectives of the text. To identify *maṣlahah* as a genuine (*ḥaqiqi*) interest of the public, he prescribed certain conditions that it must be among the objectives of *Sharī’ah* such as to protect *dīn*, life, intellect, progeny, and wealth. That it must be general to achieve the interest of the majority and that its permissibility must not be against the objectives of Islamic legal system.<sup>34</sup>

Later on, Ibn Taymiyyah outlines *maṣlahah* as an action undertaken by an authority who considers it appropriate in the light of the demands of the interest of the people though there is not any narrated argument in favor of such an action.<sup>35</sup> His disciple, Ibn Qayyim expresses it as nothing else than the interest based on the needs of the people.<sup>36</sup> In case of

<sup>29</sup>Imam Malik, *Al-Muwatta*, 233.

<sup>30</sup>Ibn al-Ḥājib, *Mukhtaṣar al-Muntahā* (Miṣr: Al-Maṭba’ al-Amūriyyah 1317 A.H), 281.

<sup>31</sup>Muḥammad bin Idrīs al-Shafi’, *Al-Risālah* (Egypt: Muṣṭafā Bāb al-Ḥalbī, 1358 A. H), 123.

<sup>32</sup>‘Abd al-Malik bin ‘Abd Allāh bin Yūsuf, al-Nīsā Būrī was born in 419 A. H and died in 478 A.H. He was a great Shafi’ī jurist and *Uṣūlī*. He wrote many writings such as *Al-Warqāt wa al-Talkhīṣ fī Uṣūl al-Fiqh* and *Kitābal-Burhān*. See, Abū ‘Abd ‘Allāh Muḥammad bin Sa’d, *Ṭabaqāt al-Kubra* (Cairo: Dār al-Teḥrūr, 1388 A.H.), 3:278.

<sup>33</sup>Al-Shātībī, *Al-Muwafaqāt*, 112; Muḥammad bin ‘Alī bin Muhammad al-Shawkani, *Irshād al-Fuḥūl* (Miṣr: Muṣṭafā Bāb al-Ḥalbī, 1967), 191.

<sup>34</sup>Al- Ghazālī, *Al-Mustaṣfā*, 1:140; Ibn al-Qayyim, *I’lām al-Mawaqqi’īn*, 2:59.

<sup>35</sup>Ibn Taymiyyah, *Al-Musawwadah fī Uṣūl al-Fiqh* (Cairo: Maṭba’ a-Sunnah al-Muḥammadiyah, 1953), 235.

<sup>36</sup>Ibn al-Qayyim, *I’lām al-Mawaqqi’īn*, 2:54.



contradiction between public and private interests, the public interest will prevail over private interest.<sup>37</sup>

In this way, until the 4<sup>th</sup> century of *Hijrah*, the subject of *ijtihād*/statutory interpretation was fully developed in a systematic and elaborated form which was based on the *maṣlahah*, usage and customs of people, and the principles of logic and analogy.<sup>38</sup>

As Muhammad Hamidullah pointed out that “the greatest contribution of the Muslim jurists towards the philosophy of the law is perhaps this subject of jurisprudence and rules of interpretation. The law existed even before the dawn of Islam, but the principles of jurisprudence did not exist anywhere in the world while the Western legal philosophy had no concept of this subject until the late 19<sup>th</sup> century.”<sup>39</sup>

To sum up, the world has become a global village and the Muslims reside around the globe, facing everyday complex challenges and demanding a flexible solution, so, *maṣlahah* can perform its vibrant role. Further, the scope of *maṣlahah* has been extended and many new things have been added to it such as the need to create a union of the Muslim states, getting scientific education as compulsory, preaching of Islam through modern means of communication, competing propaganda of enemies against Islam, fighting with Islamophobia, participation of the Muslim women in the development of society, etc.<sup>40</sup>

There are many spheres where issues can be solved through *maṣlahah* such as where

- (i) The current situation in operative order leads to chaos and harm;
- (ii) The traditional *gateway* and judgments could not meet the demands of the changed context;
- (iii) The practical legal and moral norms adversely affect the interests of an Islamic society such norms can be changed by way of public interest;<sup>41</sup>
- (iv) The legal rules become ineffective due to changes in the circumstances and needs of society;
- (v) The innovations are of great importance for the development of the Muslim societies;
- (vi) The strict application of Islamic legal rule cause absurdity, the scope of the rule may be widened by way of public interest; and<sup>42</sup>

<sup>37</sup>Muḥammad Sa’d bin Aḥmad al-Yūbī, *Maqāṣid al-Sharī’ah al-Islāmiyyah ‘Ilā qāti’ūhā bil ‘Adillah* (Riyādh: Dār al-Hijrah li al-Nashr wa al-Tawzī’, 1998), 388.

<sup>38</sup>Al-Shatibi, *Kitāb al-I’tisām*, 2:319; Muḥammad Bakr, al-Khidhri, *Tārīkh al-Tashrī’ al-Islāmī* (Miṣr: Al-Maktabah al-Tijāriyyah, 1967), 45.

<sup>39</sup>Muḥammad Hamīdullāh, *The Emergence of Islam* (Islamabad: Islamic Research Institute, 1993), 65.

<sup>40</sup>Tāhir bin ‘Āshūr, *Maqāṣid al-Sharī’ah al-Islāmiyyah*, ed. Muḥammad Tahir (Beirut: Dār al-Bayr li al-Intaj al-‘Ilmī, 1988), 221.

<sup>41</sup>Al-Ghazālī, *Al-Mustaṣfā*, 2:288.

<sup>42</sup>Ibn al-Qayyim, *I’lām al-Mawaqqi’īn*, 1:345; Al-Qarāfī, *Al-Furūq*, 2:134; Al-Shawkānī, *Irshād al-Fuḥūl*, 356; Ibn ‘Ābidūn, *Radd al-Mukhtār*, 4:67.

- (vii) Issues of greater interest regarding law and order, peace and war, social culture, and economic policy of a Muslim state can be treated by *maṣlahah*.

All this discussion, thus, reveals that the principle of *maṣlahah* has always been taken by the Muslim jurists as a cardinal principle of interpretation.

#### 4. Mischief Rule: The Most flexible Rule of English Common Law

The mischief rule is the most flexible and trustworthy rule of interpretation in the English legal system. Literally, the word “mischief” is defined as harm or trouble caused by someone.<sup>43</sup> It thus, bears a different and contradictory meaning from its technical meaning.<sup>44</sup> The logic behind this rule is the legislative presumption that there must be some reason behind every enactment of the parliament. The application of this rule is based on the presumption that the Parliament does not need to change the existing law if it is not defective. The defect is the “mischief” to which the Act is directed.<sup>45</sup>

The development of this rule lies in the conflicted and the dual nature of the common law. During the Norman Conquest, the statutes had to express the will of the king and most of the statutes had to deal with the relations between the king and the baron, the statutes concerned with the ordinary regulation of the society were full of defects. The king’s bailiff and the officials had unlimited powers to oppress the ordinary people. For example, they could snatch the cattle of citizens for ploughing and whenever they wanted had to demolish and pulling down the houses and towns within the king’s realm.<sup>46</sup> Under these circumstances, the mischief rule was founded by the Barons of the Exchequer in Heydon’s Case (1584). It was held by the Court that “for the sure and the true interpretation of the statutes in general, is they penal, or beneficial, restrictive or enlarging the common law, four things must be considered by the judges which are:

- (i) What was the common law before the passing of the statute?
- (ii) What was the mischief and defect in the law, which the common law did not adequately deal with?
- (iii) What remedy for that mischief had Parliament intended to provide?
- (iv) What was the reason for Parliament adopting that remedy?

It was held that the function of the judges in such cases is always to suppress the mischief and to advance the remedy, to suppress subtle invention and evasions for the continuance of the mischief for private benefits (*pro privato commodo*) and to add force,

<sup>43</sup>Cowie, *Oxford Advance Dictionary*, 912.

<sup>44</sup>Frances Benion, *Statutory Interpretation* (Sydney: Butterworth & Co., Ltd. 1984), 631; Reed Dickerson, *The Interpretation and Application of Statutes* (Toronto: Little Brown and Company, 1975), 87.

<sup>45</sup>R. C Van Caenegem, *The Birth of English Common Law* (London: Cambridge University Press, 1973), 123; John Lock, *Human Understanding* (New York: Dover Publications, Ltd, 1964), 3:123-45.

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

life and remedy according to the true intent of the makers of the Act for the public good (pro bono publico).<sup>47</sup>

The resolution of the Heydon's case played a considerable role in the development of statutory interpretation and continuously is being cited.<sup>48</sup> The term mischief is divided into three types such as social mischief, legal mischief and party political mischief.<sup>49</sup> However, what type of mischief, the important thing is to determine the precise scope or ambit of the mischief parliament intended to remedy for settling the point at issue. In *Ingham v Hie Lie* (1912), under the Victorian Act, the hours of the work of the Chinese in factories, laundries were made limited to protect other industries. The defendant was the Chinese laundry man and had been found ironing his shirt. He was charged with an offense for violation of law under the Act. It was held by the court that the purpose of the mischief found in the Act did not cover the said act of Chinese as he was ironing his cloth not of the customers. Hence, he did not commit any offense under the Act.<sup>50</sup>

Mischief rule may be applied where

- (i) The draftsmen intentionally use implied words in the enactment and leave them unexpressed which causes a mischief.
- (ii) Wording of the enactment consisted of a narrow and a wider meaning which cause a mischief.
- (iii) By way of alteration or modification of a statute only to avoid some manifest absurdity or strangeness of the result.
- (iv) A legal mischief exists in the statute.
- (v) The existing law cannot provide full treatment for a social mischief arising from the changed circumstances of social and economic conditions of the people.
- (vi) To add force and life to cure the law, according to the public good.

However, mischief rule is not applicable where a provision is clear in its scope and extent and where the:

- (v) Application of the mischief rule leads to contradictory interpretation to what was intended by the legislature.
- (vi) The deficiency of the law cannot be removed and new cases cannot be covered

<sup>47</sup>Herbert Feigl, and Wilfrid Sellars, *Reading in Philosophical Analysis* (New York: Crafts Inc, 1949), 564; Slapper and Kelly, *The English Legal System*, (London: Cavendish Publishing Ltd., 2004), 199; Heydon's Case (1584) 2 W. L R. at 1656; see also Wilfred, E. Rumble, *The Thought of John Austin: Jurisprudence, Colonial Reform and the British Constitution* (London: Athlone Press, 1985), 378.

<sup>48</sup>Bertrand Russell, *Human Knowledge*, 189-213; John Lock, *Human Understanding*, 3:123-45.

<sup>49</sup>Ibid.

<sup>50</sup>Bennion, *Statutory Interpretation*, 635.

(vii) The legal mischief leads to some confused meaning contradictory to the objectives of the Act.<sup>51</sup>

### 5. Mischief Rule, a Cardinal Principle of Interpretation: the Pakistani Perspective

The legal system of Pakistan may be defined as a mixed legal system, based upon the common law, civil law and Islamic legal systems.<sup>52</sup>

The fact is that, after getting the independence and the establishment of Pakistan, the legal system of Pakistan was founded on the colonial legal system while later on, Islamic provisions were inserted in the Constitutions to Islamize the legal system of Pakistan in accordance with the Qur'ān and *Sunnah* (SAW). To achieve this goal, certain Islamic provisions were added to the constitutions like the Constitution 1956, 1962, and 1973. To act upon the Islamic provisions of the Constitutions, the 'Ulema' Commission' was established under Article 198 of the constitution 1956, the 'Advisory Council of Islamic Ideology', and the 'Islamic Research Institute' under the Constitution 1962, and the 'Council of Islamic Ideology,' under 'articles 228-231' of the present Constitution 1973.<sup>53</sup>

Articles 228-231 of the Constitution 1973, deal with the formation and the functions of the Islamic Council. Articles 229 and 230 describe three levels of the functions of the Council. At the first level, the Council will act on the reference of the president, parliament or the Provincial Assemblies to examine the referred law in the light of the provisions of the Qur'ān and the *Sunnah* (SAW) whether or not it is repugnant to the injunctions of Islam? At the second level, the Council has to examine the existing laws to bring in conformity with the objectives of *Sharī'ah*. Lastly, the Council is bound to compile a guideline to guide the legislative assemblies. The Council was assigned in the task to complete the process of examination of the whole structure of the laws in seven years, to prepare its report and to present it before the Parliament to amend or to legislate in the light the recommendations of the council.<sup>54</sup>

It is pertinent to understand, that for the enforcement of the law, a legal system needs an interpretive system which demands the existence of the courts to explain, interpret and to apply the relevant law to a particular case brought before the court.<sup>55</sup>

<sup>51</sup>S. G. G. Edgar, *Craies on Statute Law* (London: Sweet & Maxwell, 1996), 96.

<sup>52</sup>Naseem Razi, "Islamic Law vis-à-vis Common Law – A Historical Analysis in Terms of Rigidity and Flexibility," *Hamdard Islamicus*, Vol. XXXIX, No. 4 (2015):43-66.

<sup>53</sup>See, [Penal of Ulema and Ulema members.], Omitted by the Constitution (Second Amdt.) Order, 1981 (P.O. No. 7 of 1981), Art. 3, which was previously ins. by P.O. No. 5 of 1981, Art. 2, The Constitution of Pakistan, 1956; 1962; and 1973. Notification, Gazette of Pakistan 1974, extraordinary, part, II, 165.

<sup>54</sup>The Constitution of Pakistan, 1973, Articles 227-231.

<sup>55</sup>E. Freund, *Interpretation of Statutes* (Yale: University Press, 1978), 30.

The judicial system of Pakistan consists of district courts, high courts, and the Supreme Court. The task of interpretation of the law is performed by the higher courts, i.e., the High Courts at each province and the Supreme Court, the apex court of the country.<sup>56</sup>

A specific court the ‘Federal Shari ‘at Court’ has also been established under article 203 (C) of the Constitution 1973, to speed up the process of Islamization of the legal system of the state.<sup>57</sup> The Federal *Sharī‘at* Court has jurisdiction to examine any existing law either of its motion or on the petition of a citizen, or the Federal or a Provincial Government, and decide whether or not any law is repugnant to the Injunctions of Islam, as laid down in the Holy Qur’ān and the *Sunnah* (SAW), by way of judicial proceedings and to mention in its judgment, the reasons for holding a particular opinion and the extent to which the law or provision is so repugnant.<sup>58</sup>

The primary source of interpretation is the Constitution of Pakistan 1973.<sup>59</sup> Article 2-A of the Constitution of Pakistan lays down two conditions to exercise the authority that the authority shall be exercised as a sacred trust; and secondly, that the authority shall be exercised within limits prescribed by Allah Almighty. The higher courts are also eligible to decide the cases through *ijtihād*.<sup>60</sup>

The nutshell of this discussion is that the Constitution of Pakistan 1973 has been amended several times to enable the legal system of Pakistan in accordance with the spirit of the Qur’ān and *Sunnah* (SAW).

It is, however, a matter of great concern, that despite a longtime movement to reform and to Islamize the structure of the law, the judicial policy of the interpretation could not be improved properly and could not be Islamized in the light of the interpretive principles of the Qur’ān and *Sunnah* (SAW).<sup>61</sup> Common law and civil law rules of interpretation are still forming an essential part of the interpretive policy of the higher courts in Pakistan. Except for a few, the majority of the cases are being decided by utilizing foreign rules in presence of flexible and dynamic principles of the Islamic legal system such as *ijtihād al-maqasidi*, and *maslahah*.

By ignoring such dynamic principles, the higher courts of Pakistan are following foreign rules of interpretation of such as literal rule, mischief rule, rule of restrictive

<sup>56</sup>The Constitution of Pakistan, 1973, Articles 184-188.

<sup>57</sup>Ibid., Article, 203-C

<sup>58</sup>Ibid., Article 203 (D).

<sup>59</sup>See for instance, *Zaheeruddin vs. State*, (1998), S.C.M.R. at 1752-58; P L D 1998, S.C. 139 at 146.

<sup>60</sup>The Constitution of Pakistan, 1973, Article, 2-A.

<sup>61</sup>Naseem Razi, “Interpretive Policy of the Supreme Court of Pakistan: A Critical Analysis from the Perspective of Islamic Interpretive System,” *Journal of Asian Development Studies*, Vol. 2, Issue 4, (December 2013):108-117, [https://www.researchgate.net/publication/346412291\\_Interpretive\\_Policy\\_of\\_the\\_Supreme\\_Court\\_of\\_Pakistan](https://www.researchgate.net/publication/346412291_Interpretive_Policy_of_the_Supreme_Court_of_Pakistan), (Accessed on 20-01-2021).

construction, harmonious construction, the rule of necessity, the rule of legislative history, and the rule of sociological construction etc.<sup>62</sup>

As Gupta pointed out that the courts of Pakistan frequently, exercised rules of other common law jurisdictions, particularly, Britain, USA and Australia.<sup>63</sup>

Talking about the mischief rule, the higher courts of Pakistan have to exercise this rule repeatedly to remove the defect of the statute and to avoid harm to the parties concerned. For example, in, *Nihayatullah v. Secretary Local Government*,<sup>64</sup> it was held by the High Court of Peshawar that the “fundamental principle of construing and interpreting the statute is that the court shall strive for the search of that interpretation which advances the cause and suppress the mischief.”<sup>65</sup>

The mischief rule has also been declared as one of the fundamental principles of interpretation by the courts. For instance, in a case, *Kishwar Naseem v. Hazara Hill Tract*, the question was about the validity of “Filing of revision petition beyond statutory period, on the ground of limitation, provided in S.115, proviso (2), of Civil Procedure Code. While considering mischief rule, the Peshawar High Court held that “it is, one of the cardinal principles of interpretation of statute that construction on any provision of a statute shall be made in a manner to suppress the mischief and advance the cause of justice and that the Courts shall not shut their doors for an aggrieved party, on the ground of technicalities, who has a genuine grievance.”<sup>66</sup>

Likewise, in *Bahadur and another v. The State and another*<sup>67</sup> to remove the mischief, the Supreme Court drew a distinction between administrative and judicial functions of the magistrate under CrPC., and came to the conclusion that, while passing an order of cancellation of a criminal case, the magistrate exercises administrative powers, thus not functioning as a court. Therefore, such an order was not amenable to revisional jurisdiction.<sup>68</sup>

On an appeal before the Supreme Court, *Ali Gohar, etc. V. Pervaiz Ahmed, etc., ...*<sup>69</sup>, the Supreme Court of Pakistan opined by referring Cecil Walsh J., (a foreign author) book,

<sup>62</sup>Ibid.

<sup>63</sup>O. M., Gupta, ed., *Encyclopedia of Pakistan, India and Bangladesh* (Delhi: Isha Books, D-43, Adrash Nagar), 1:170-171.

<sup>64</sup>PLD 2004, Peshawar High Court, 263.

<sup>65</sup>Ibid.

<sup>66</sup>Mst. Kishwar Naseem vs Hazara Hill Tract, (2205), Peshawar-High-Court, 2005 PLD-136, @ <https://cite.pakcaselaw.com/pld-peshawar-high-court/2005/136>

<sup>67</sup>PLD 1985, SC 62.

<sup>68</sup>Ibid.

<sup>69</sup>Criminal Petition no. 230 of 2019 and criminal Miscellaneous Application no. 301 of 2019 (On appeal against the judgment dated 21.02.2019 passed by the High Court of Sindh, Bench at Sukkur in Criminal Miscellaneous Application No. D-998 of 2018), @ [https://www.supremecourt.gov.pk/downloads\\_judgements/crl.p.230.2019.pdf](https://www.supremecourt.gov.pk/downloads_judgements/crl.p.230.2019.pdf)

"Revision and Extraordinary Jurisdiction, that "The original object of this legislation appears to have been to confer upon superior criminal Courts, in all cases where no appeal was provided, a kind of paternal or supervisory jurisdiction, without the intervention necessarily of any interested party, in order to correct any miscarriage of justice arising from the misconception of law, irregularity of procedure, neglect of proper precautions, or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand in some undeserved hardship to individuals in his instructive book on ..."<sup>70</sup>

In a recent case, *Ghulam Hussain v. The State*,<sup>71</sup> to remove the mischief and to advance the remedy, the Supreme Court has clarified the two most often misgivings about the scope and extent of the term "terrorism" under section 6 (2) of the Anti-Terrorism Act, 1997: firstly, it was clarified that no matter how grave, shocking, brutal, gruesome or horrifying the offence is, it would not fall within the scope of terrorism, if it is not committed with the design or purpose specified or mentioned in clauses (b) or (c) of subsection (1) of section 6 of the said Act; and secondly, even if an offence falls squarely within the scope specified in sub-section 2 of section 6, it would not constitute the offence of "terrorism", if the same was in furtherance of a private dispute or vendetta."<sup>72</sup>

Similarly, in another case, *Nazeem Khan v. Inspector General of Prisons*,<sup>73</sup> it was held by the Court that the court must give and pay due regard to a clear intent of the lawmaker. Ambiguity in a statute would entitle the court to make efforts by interpreting same in a manner which was in consonance with the settled principles of justice and to advance the cause of the statute, its purpose and to suppress the mischief."<sup>74</sup>

In short, since the time of establishment, the higher courts of Pakistan have been deciding the majority of the cases by utilizing the common law and civil law rules of interpretation. Cases are rare rather ceased to exist in which the courts have to refer *ijtihād al-maqasidi*, or principle of *maslahah*. Under this context, the current, interpretative policy of the courts is not only against the objectives of Islamic legal system and the constitutional spirit which has granted the higher courts right to do *ijtihād*.

It is also important to note, that this constitutional privilege has been acknowledged many times by the higher courts through different judgments. For instance, in *Bilqees Fatima V. Najm-Ul-Ikram Quraishi*,<sup>75</sup> the Lahore High Court while granting a decree for dissolution of marriage in favour of the plaintiff (wife), held that "if the courts are clear as

<sup>70</sup>Ibid.

<sup>71</sup>PLD 2020 SC 61, @ [https://www.supremecourt.gov.pk/downloads\\_judgements/crl\\_230\\_2019\\_27-29](https://www.supremecourt.gov.pk/downloads_judgements/crl_230_2019_27-29).

<sup>72</sup>Ibid.

<sup>73</sup>P L D., Peshawar, 2004, LX at 49; PLD, 2008, SC at 655; PLD, 2005, SC at 677.

<sup>74</sup>Ibid.

<sup>75</sup>PLD 1959 W.P. Lahore 566.

to the meaning of the verses, effect for that interpretation will be given irrespective of what has been said by the jurists.”<sup>76</sup>

In an appellate case *Khurshid Bibi vs. Mohammad Amin*,<sup>77</sup> the question was “whether a Muslim wife, whose husband refuses to divorce her, can be granted a decree for dissolution of marriage by a Court, by *khula*, if she satisfies the Court,” the Supreme Court of Pakistan held that the court is only bound by the Qur’ān and the *Sunnah* of the Prophet (SAW) and can decide the case accordingly.”<sup>78</sup>

Likewise, in, *HAKIM KHAN and 3 others, V. GOVERNMENT OF PAKISTAN through Secretary Interior and others*,<sup>79</sup> the Supreme Court held that judiciary is one of the three limbs of the state which exercise the delegated functions of the divine sovereignty with its sphere...the reference in the Holy Qur’ān to the obedience of *’ulū al-amr* (who hold the authority) is equally applicable to the members of the judiciary.”<sup>80</sup>

All this thus, reveals that the courts follow the mischief rule in their judgments than *maṣlahah*. And this is just because of the lack of scientific understanding of the interpretive policy of Islamic legal system/*Sharī’ah* which consists of more flexible and dynamic principles, founded by the Holy Qur’ān, the Prophet (SAW) and developed by the companions and the traditional Muslim jurists.

## 6. Conclusions

On the basis of a thorough study on the topic, this article concludes that *maṣlahah* is more dynamic and more flexible principle than the mischief rule. It is also concluded that *maṣlahah* was introduced by the Qur’ān and exercised frequently, by the Prophet (SAW), the companions and the traditional Muslim Jurists. On the basis of *maṣlahah*, the Muslim jurists introduced many other interpretive rules under different names such as *istihsān*, *istidlāl* and *’Urf*.<sup>81</sup>

<sup>76</sup>Ibid.

<sup>77</sup>P L D, 1967, Supreme Court 97.

<sup>78</sup>A suit was brought by the appellant Mst. Khurshid Bibi, for dissolution of her marriage with the respondent, Baboo Muhammad Amin, in a Civil Court at Khanpur, District Rahimyar Khan. A counter-suit for restitution of conjugal rights was brought by the husband. The appellant's suit was dismissed, while that of the husband was decreed by the Senior Civil Judge, Rahimyar Khan, on the 21st January 1960. The plaintiff-appellant then brought a suit on the 19th February 1960, for a declaration that she had been divorced by the husband or in the alternative for dissolution of marriage by way of *khula*, in the Court of Civil Judge, Toba Tek Singh, District Lyallpur.

<sup>79</sup>P L D 1992, Supreme Court 595.

<sup>80</sup>Ibid.

<sup>81</sup>Ramaḍān al-Buṭṭiy, *Ḍawabiṭ al-Maṣlahah* (Cairo: Muṣṭafā Bābī al-Ḥalabī, 1998), 45.



It is also concluded that currently, the Pakistani system of interpretation is exercising mischief rule as a flexible rule to remove the rigidity of the law by considering it a fundamental principle and by ignoring *maslahah*.

It is also concluded that the mischief rule has no worth before *maṣlahah*/public interest in terms of flexibility and scope.

On the whole, the current Pakistani interpretive system, is based upon the foreign principles and that the interpreters are performing their duties on an ad-hoc basis by ignoring vigorously, the dynamic interpretive policy of the Prophet (SAW), his companions and the traditional Muslim jurists.

## 7. Recommendations

This article suggests to reform the existing interpretive system far and wide. It, also recommends for the judges of the higher courts, members of the Council of Islamic Ideology, and members of the legislative committee to get scientific knowledge of the language and the subjects of the Qur'ān, the *Sunnah* (SAW) in the light of the changed legal context.

It is also recommended that the Renaissance of this dynamic principle of *maslahah* through *ijtihād* would be a revival of the interpretive policy of the Prophet (SAW), his companions and the traditional Muslim jurists.

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