



THE APPLICATION OF *MAŞLAHAH* IN DECIDING
FASKH AND *ḤADĀNAH* CASES IN *SHARĪ'AH* COURT OF
FEDERAL TERRITORY OF KUALA LUMPUR

BY

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A dissertation submitted in fulfilment of the requirement for
the degree of Master of Islamic Revealed Knowledge and
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ABSTRACT

This research seeks to analyse the application of *maṣlaḥah* in settling the cases of *faskh* and *ḥaḍānah* in the *Sharī'ah* Court of the Federal Territory of Kuala Lumpur. Another primary focus of this research is to address the importance of the applicability of *maqāsid al-sharī'ah* and *maṣlaḥah* in family conflicts without rigidly applying a certain view of an Islamic school of thought. A total of 20 decided court cases were collected and analysed, ten *faskh* and another ten *ḥaḍānah* cases, which constitute as supporting data. Two methodological instruments were adopted to collect data; the first instrument was library research where various sources including books, documents, court cases and statutes were reviewed. The second instrument was analysis of court cases retrieved from the *Sharī'ah* Court of Federal Territory of Kuala Lumpur. The findings indicate that the Court acknowledges the various sources of law which were not mainly and solely articulated based on the view of the *Shāfi'ī* school of thought. The judge in some occasions had duly applied the concept of *maṣlaḥah* in the sense that he was exercising his *ijtihād* if he found that there was a *lacuna* in the statutory law. He was capable of coming up with a departing reference from the provision in order to reach a just decision. These results demonstrate the success of the proposed examination in achieving the objectives of this study.

ملخص البحث

يسعى هذا البحث إلى تحليل تطبيق المصلحة في حل قضايا الفسخ والحضانة في المحكمة الشرعية بولاية كوالا لمبور. يركز هذا البحث في عرض أهمية تطبيق مقاصد الشريعة والمصلحة في القضايا الأسرية بدون تعصب لأي رأي من آراء الفقهاء في مذهب واحد. وقد جمعت عشرين قضية من المحكمة وقمت بتحليلها: عشرة منها حول قضية الفسخ وعشرة منها حول الحضانة. من أجل تحقيق أهداف البحث، فقد اعتمدت الباحثة على منهجين؛ المنهج الأول الدراسة المكتبية وتم هذا باستقراء الكتب المختلفة ووثائق متعلقة بقضايا المحكمة والقوانين. أما المنهج الثاني فالدراسة الميدانية التي تمت بتحليل قضايا المحكمة الشرعية بولاية كوالا لمبور. قد وجد البحث أن المحكمة تعتمد على آراء العلماء الفقهية المختلفة ولا تقتصر على آراء الفقهاء الشافعية فقط. القاضي في بعض الأحوال طبق المصلحة والاجتهاد في حل مسألة لا يجدها في القانون، وله حرية في الخروج عن مذهب معين، والتمسك بآراء الفقهاء الآخرين حتى يحصل على قرار موثوق ومعتدل. تلك النتائج تدل على نجاح البحث في تحقيق أهداف هذه الدراسة.

APPROVAL PAGE

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This dissertation is dedicated to my beloved husband and parents

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Indeed, all praise is due to Allah (s.w.t.) and may His peace and blessings be upon the final Messenger Muḥammad (s.a.w.). Firstly, it is my utmost pleasure to dedicate this work to my dear parents, Naping bin Rais and Nati binti Baco, and my family, who granted me the gift of their unwavering belief in my ability to accomplish this goal: thank you for your support and patience.

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Roslaili bt Abd Ghani and anor v Ahmad Azman b. Yaacob [2006] 21 JH (1) 113.

Sakdiah v. Ahmad [1981] 2 JH 101.

Wan Abdul Aziz v Siti Aishah (2) [1980] 1 JH (1) 52.

Wan Mohd Kamil bin Wan Abd. Ghani v Rosliza@Mazwani binti Mohamed Mustapha [2006] 21 JH (1) 146.

Islamic Family Law (Federal Territories) Act, 1984 (Act No. 303 of 1984).

TABLE OF ARABIC TRANSLITERATIONS

b = ب	z = ز	f = ف
t = ت	s = س	q = ق
th = ث	sh = ش	k = ك
j = ج	ṣ = ص	l = ل
ḥ = ح	dh = ض	m = م
kh = خ	ṭ = ط	n = ن
d = د	ẓ = ظ	h = هـ
dh = ذ	ʿ = ع	w = و
r = ر	gh = غ	y = ي

Short vowels	Long vowels	Diphthongs
a	ā = ا	ay = ا ي
i	ī = ي	aw = ا و
u	ū = و	

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

The human nature and its needs change from time to time. In order to reconcile with this change, Islamic law has to play a significant role to adapt and accommodate to people's needs and demands. *Maṣlaḥah* aims to nurture the human needs based on time, people, place and condition. It appreciates the values of flexibility, dynamism, productivity as well as creativity. Generally, *maṣlaḥah* is defined as securing any benefit, preventing any harm and defending the benefit¹ to protect *maqāṣid al-sharī'ah* as well as avoidance of its abuse.² Since *maṣlaḥah* requires the exercise of thinking skills in deliberating good and bad for society³, it should be applied diligently with due care, consideration and full attention to its guidelines and conditions.

Looking at the Islamic legal system in Malaysia, Islam as a matter governs under the State law as conferred by the highest law of the Federation, the Federal Constitution. The Ninth Schedule, List II of the State List, Item No. 1 of the Federal Constitution states that any matter or case pertaining to Islamic law should be referred to the State. In this legal system, there are three institutions that deal with Islamic law, namely the Islamic Religious Council, *Fatwā* Council, and *Sharī'ah* Court. For the purpose of this study, this research will only cover on the institution of *Sharī'ah* Court. As a judicial body, one of the main powers of the Federation, the judge, bears a vital responsibility to interpret laws and make judgment wisely as it gives a big impact

¹ Muhammad Sa'īd Ramaḍān al-Būṭī, *Ḍawābiṭ al-Maṣlaḥah fī al-Sharī'ah al-Islāmiyyah*, (Bayrūt: Mu'assasat al-Risālah, 1982), 23.

² Roslina Che Soh and Nora Abdul Hak, "Application of Maslahah (interest) in Deciding the Right of Haḍānah (Custody) of a Child: The Practice in the Sharī'ah Court of Malaysia", *Journal of Applied Sciences Research*, v. 7, no.13 (2011), 2187.

³ Mahmood Zuhdi Abdul Majid, *Transformasi Fikah Semasa*, (Selangor: PTS Islamika Sdn. Bhd., 2010), 40.

throughout the land. In relation to that, the principle of *maṣlaḥah* is a tool for the judge in serving the best interest of conflicting parties. The institution should be capable and competent of upholding justice while facing and dealing with numerous new issues in this multi-racial society. Lack of uniformity in its laws and jurisdictions throughout the Federation affects both the conflicting parties and lawyers, especially when dealing with local jurisdiction⁴.

One of the jurisdictions of the *Sharī'ah* Court is to hear and determine all actions and proceedings which relate to Islamic family matters⁵. In relation to this research, it will analyse two Islamic family matters, namely *faskh* and *ḥaḍānah*. *Faskh* may be defined as the rescission of marriage contract by judicial decree⁶. It differs from *ṭalāq* because it (*faskh*) takes place with the permission of the judge after the party or plaintiff proves the case while *ṭalāq* with the pronouncement of *ṭalāq* of a husband⁷. Meanwhile, *ḥaḍānah* is seen to be in a conflict between spouses after their separation in claiming the custody of children. The main aspect in this conflict is to serve the best interest of the child after the separation. Therefore, this study aims to examine the extent to which the concept of *maṣlaḥah* has been applied in the Malaysian *Sharī'ah* Court specifically in the issues of *faskh* and *ḥaḍānah*. In doing so, the law which is formulated on the basis of presumption as it falls under *ijtihād* issue and known to be rebuttable would become a substantial component in formulating legal foundation in *faskh* and *ḥaḍānah* issues.

⁴ Ahmad Hidayat Buang, "Mahkamah Syariah di Malaysia: Pencapaian dan Cabaran Alaf Baru" in *Mahkamah Syariah di Malaysia: Pencapaian dan Cabaran*, edited by Ahmad Hidayat Buang (Kuala Lumpur: Universiti Malaya, 2005), 16.

⁵ Section 46-47 of the Administration of Islamic Law (Federal Territories) Act, 1993 (Act No. 505 of 1993).

⁶ Ahmad Ibrahim, *Family Law in Malaysia and Singapore*, (Singapore: Malayan Law Journal Pte. Ltd., 1984), 232.

⁷ Nurhidayah Muhd Hashim, *Perceraian secara fasakh: Konsep dan amalan di Malaysia*, (Selangor: Pusat Penerbitan Universiti, UITM, 2006), 16.

1.2 PROBLEM STATEMENT

The Malaysian Islamic legal system has granted permission and recognition for the *Sharī'ah* Court to refer to any opinion from any recognised *madhhab*. The Islamic law directs a reference to *ḥukm Sharī'ah* in making judgment by referring to any recognised *madhhab*⁸. Here, the law provision has given a room for *maṣlaḥah* to be applied in the Court's institution.

However, Malaysia already has its own set of Islamic law in the statutory form. On one hand, it is easy for the Court to refer to it. On the other hand, its codification in the statutory form reflects fewer references to *maṣlaḥah* when deciding cases in the *Sharī'ah* Court. Moreover, many of the Court's decisions have been criticised as not serving the best interest of women⁹ who are basically its main clients. Adopting literal understanding of Islam as discussed in classical *fiqh* books seemed to strengthen the less favourable stand towards women¹⁰ as these books are often interpreted in line with patriarchal culture¹¹. In other words, the Court is accused to be inclined favourably towards men over women and issues of biasness¹² arise here. Such situations lead to negative perceptions of the *Sharī'ah* Court as it is comprehended as a partial institution. Moreover, it is seen that in the presence of the statutory law, the Court's exercise of the principle of *ijtihād* is less since it inclines to follow the classical views. This situation invites a stagnant *fiqh* system as well as an intellectual and thought vacuum. Each generation has to be capable of solving its own issues

⁸ Section 2 of the Islamic Family Law (Federal Territories) Act, 1984 (Act No. 303 of 1984).

⁹ Sayed Sikandar Haneef and Mek Wok Mahmud, "Women and Malaysian Islamic Family Law: Exploring the Gender Sensitive Path of Jurisprudential Reform", *Global Jurist*, v. 11, no. 1 (2011): 4-5.

¹⁰ Noor Zanariah, "Gender Justice and Islamic Family Law Reform in Malaysia", *Kajian Malaysia*, v. XXV, no. 2 (2007): 125.

¹¹ Syafiq Hasyim, "*Hal-hal yang Tak Terfikirkan Tentang Isu-isu Keperempuanan dalam Islam*", (Bandung: Penerbitan Mizan, 2001), 81-83.

¹² Sayed and Mek Wok, 4.

without adopting blindly and literally the classical texts¹³. Thus, contemporary *fiqh* has to be built to satisfy the demand of current local issues¹⁴. Therefore, in the cases of *faskh* and *ḥaḍānah*, *maṣlaḥah* is believed, as a relevant principle, to be used as a benchmark in affirming whether the Court has arrived at a just decision or not. In exercising *ijtihād*, it can avoid an inclination towards an opinion of a single *madhhab* as well as the straightforward prescribed statutory law. It is also to suggest that even though Malaysia predominantly refers to the Shafi'ite school of thought¹⁵, by virtue of the *ḥukm* and the law, other views from various schools of thought should also be referred to and applied in the Court's judgment in searching for the best approach principle.

At this point, the concept of *maṣlaḥah* based on the real situations of conflicting parties should be prioritised over adopting literal views of classical *fuqahā'*. The true understanding of *maqāsid al-sharī'ah*, *maṣlaḥah*, and their relationship must be construed in order to serve the best judgment for them. A good apprehension of these subjects will lead to a good application in the cases of *faskh* and *ḥaḍānah*. Therefore, it is necessary to grasp the application in the Malaysian *Sharī'ah* Court as the institution's decisions will form the law of the land. The judge also should exercise his *ijtihād* and not merely look at the statutory law as it is. By adopting this approach, it is believed that it will not deprive the flexible nature of Islamic law¹⁶.

¹³ Rahimin Affandi Abd. Rahim, Paizah Ismail & Norhayati Mohd Dahlal, "Reformasi Undang-undang Keluarga Islam di Malaysia: Satu Analisis Terhadap Gagasan Konsep Fiqh Semasa", *Jurnal Syariah*, v. 16, no. 2 (2008): 190.

¹⁴ Mahmood Zuhdi Hj. Ab. Majid, "Pengajian Syariah: Satu Pentakrifan", in *Dinamisme Pengajian Syariah* edited by Mahmood Zuhdi Hj. Ab. Majid, (Kuala Lumpur: Berita Publishing Sdn. Bhd., 1997), 10-12.

¹⁵ Anisah Ab. Ghani, "Kedudukan Mazhab Syafi'ī dalam Ibadat di Malaysia", *Jurnal Fiqh*, no. 4 (2007): 185.

¹⁶ Sayed and Mek Wok, 13.

1.3 RESEARCH QUESTIONS

This study will attempt to answer the following questions:

1. What are the principles of *maqāsid al-sharī'ah* and *maṣlaḥah* and their relationship?
2. How is *maṣlaḥah* applied in the context of *faskh* and *ḥaḍānah*?
3. Has *maṣlaḥah* been applied widely in the judgments of the Malaysian *Sharī'ah* Court in the cases of *faskh* and *ḥaḍānah*?

1.4 RESEARCH OBJECTIVES

The objectives of this study are:

1. To discuss the meaning of *maqāsid al-sharī'ah* and *maṣlaḥah* and the co-relation between them.
2. To study the application of *maṣlaḥah* in the context of *faskh* and *ḥaḍānah*.
3. To analyse the extent to which *maṣlaḥah* has been applied in the Malaysian *Sharī'ah* Court through judgments in the cases of *faskh* and *ḥaḍānah*.

1.5 SIGNIFICANCE OF THE RESEARCH

This study will attempt to examine the application of *maṣlaḥah* in decision-making on the part of the *Sharī'ah* Court to reduce an inclination towards a single *madhhab* i.e. the Shafi'ite school of thought or *madhhab*.

The second significance of this study is that it can widen the application of the reasoning faculty of the *Sharī'ah* Court by looking at the *maṣlaḥah* of the involved parties rather than merely adopting the literal meaning of any text of *Sharī'ah* or statutory provisions or Shafi'ite views.

Other than that, it can enhance the scopes of jurisprudential interpretation when dealing with family conflicts.

Furthermore, it appreciates the flexible nature of Islamic law and helps the local *fiqh* of Malaysia to develop throughout the ages.

Subsequently, it helps the Court to build a more progressive institution by shifting the paradigm from inclining towards a single *madhhab* to exercising *ijtihad*.

1.6 RESEARCH METHODOLOGY

This study will adopt the following methodological approaches:

1. **Library research:** Data will be collected from various sources, including books, decided cases, documents and statutes. The study of *maqāsid al-sharī'ah* and *maṣlaḥah* will expound on Shāṭibī, Ibn 'Āshūr, Muhammad Sa'īd Ramaḍān al-Būṭī, and Wahbah al-Zuhaylī and thus, their texts will be referred to. The data analysis will include qualitative, content and comparative analyses.
2. **Analysis of court cases:** Data of *faskh* and *ḥaḍānah* cases will be collected from the *Sharī'ah* Court of Federal Territories, Kuala Lumpur in order to study the application of *maṣlaḥah* in the Court judgments. Meanwhile, the data analysis will include the qualitative approach.

1.7 LIMITATIONS OF THE STUDY

This study is limited to:

1. A collection of decided cases in the *Sharī'ah* Court of Federal Territory of Kuala Lumpur only.

2. Areas of Islamic family law that only cover the issues of *faskh* and *ḥaḍānah*. Although the sample is relatively small, it will serve as supporting data and not constitute primary data.
3. A collection of decided cases of *faskh* and *ḥaḍānah* from 2009 to 2013 which will be discussed since the Court's administration only allows to access to these data.

1.8 LITERATURE REVIEW

It is realised that so many books have been written on *maṣlaḥah* but study on its application in any particular area is limited. Currently, a few works and articles are written to propose the application of *maṣlaḥah* in areas such as Islamic banking¹⁷, finance,¹⁸ and others. Nevertheless, the inclination towards more study on this research topic is still less among researchers in Malaysia. In this literature review, the research will provide brief descriptions of several writings which will enhance the credibility and necessity of this study. The literature review is retrieved from books and articles.

Firstly, Muhammad Sa'īd Ramaḍān al-Būṭī, in his dissertation "*Ḍawābiṭ al-Maṣlaḥah fī al-Sharī'ah al-Islāmiyyah*",¹⁹ has discussed the issues of *maṣlaḥah*. He has divided his work into three chapters. The first chapter talks about the relationship between *al-Sharī'ah* and *al-maṣlaḥah*. The second chapter elaborates the conditions to be fulfilled before applying *al-maṣlaḥah*. Meanwhile, the third chapter discusses *al-maṣālih al-mursalah* with reference to various Islamic scholars' views and, lastly,

¹⁷ Amir Shaharuddin, "Maṣlaḥah -Mafsadah Approach in Assessing the Sharī'ah Compliance of Islamic Banking Products", *International Journal of Business and Social Science*, v. 1, no. 1 (2010), 135.

¹⁸ Asyraf Wajdi Dusuki and Nurdianawati Irwani Abdullah, "Maqāsid al-Sharī'ah, Maṣlaḥah and Corporate Social Responsibility", *The American Journal of Islamic Social Sciences*, v. 24, no. 1, (n.d.), 35-38.

¹⁹ Muhammad Sa'īd Ramaḍān al-Būṭī, *Ḍawābiṭ al-Maṣlaḥah fī al-Sharī'ah al-Islāmiyyah*, (Bayrūt: Mu'assasah al-Risālah, 1982).

concludes that this principle is accepted. This work is a major reference and guidance in order to safeguard the usage of the concept of *maṣlaḥah* from being misused or blindly used without any guideline. It also provides a tool to construe proper and accurate applications. However, it does not deal with the practicality aspects of *maṣlaḥah* and its application in modern context.

Ihsan Abdul-Wajid Bagby, in his doctoral dissertation entitled “*Utility in Classical Islamic Law: The Concept of Maṣlaḥah in Uṣūl al-Fiqh*”,²⁰ has enlightened the theoretical aspects of this concept. It explains the definitions and thoroughly discusses the arguments on *maṣlaḥah mursalah* among Islamic scholars. This book mainly focuses on the theoretical framework and instances from the past that have already been extensively studied. Therefore, it is understood by the researcher that this theoretical aspect would become more valuable if works are done to implement its practical aspect, especially in light of contemporary times and issues.

In another book published by the Islamic Research and Training Institute, Islamic Development Bank (IDB), entitled “*Jurisprudence of Maṣlaḥah and Its Contemporary Applications*”,²¹ the concept of *maṣlaḥah* and its division are elaborated. This book discusses its application and describes some examples of it. However, it only discusses its general applications in many areas, such as marriage, transaction, *jihād* and crime. Therefore, this study will focus on one area, which is family issue, but with the limitation of cases of *faskh* and *ḥaḍānah* as practiced by the *Sharī‘ah* Court of the Federal Territories of Malaysia.

²⁰ Ihsan Abdul-Wajid Bagby, *Utility in Classical Islamic Law: The concept of Maṣlaḥah in Uṣūl al-Fiqh*, (n.p., 1986).

²¹ Hussein Hamid Hassan, *Jurisprudence of Maṣlaḥah and Its Contemporary Applications*, (Jeddah: Islamic Research and Training Institute Islamic Development Bank, 1994).

H. Said Agil Husin al- Munawar, in his article “*Konsep al-Maṣlaḥah Sebagai Salah Satu Sumber Perundangan Islam*”²² (*The Concept of al-Maṣlaḥah as One of the Sources of Islamic Jurisprudence*), has discussed the definition of *maṣlaḥah*, different views of Islamic scholars pertaining to its application as well as its scopes and roles as a source of ruling. From the beginning of the article, he has tried to elaborate on the theoretical aspect of the concept of *maṣlaḥah*. The researcher maintains that a substantial number of books and articles (primary data) are already written by well-established scholars and they are readily available. Thus, it is important for the academia to extend the discussion of this theory to its implementation. Consequently, a field work should be conducted to comprehend the scenario, particularly in the judicial institutions.

Mohd. Noor b. Deris, in his article entitled “*Kekaburan Tentang Konsep Maṣlaḥah Dalam Perundangan*”²³ (*Ambiguity of the Concept of Maṣlaḥah in Islamic Jurisprudence*), has attempted to clarify as well as restore the misunderstanding about the accurate concept of *maṣlaḥah* in a legal context briefly. He has explained that the application of *maṣlaḥah* has to be grounded on the *Sharʿ*. He has suggested that *maṣlaḥah* plays an important role in the judicial institutions and should be applied according to the guidelines provided by the *Sharʿ*. This article gives an impulse to broaden the discussion on the concept of *maṣlaḥah* along with its application. As he has not discussed the application of this concept in the judicial body, this study will serve as a platform to enhance his idea and study its application in the field.

²² H. Said Agil Husin al- Munawar, “Konsep al-Maṣlaḥah Sebagai Salah Satu Sumber Perundangan Islam”, *Islāmiyyāt*, 18&19 (1998).

²³ Mohd. Noor b. Deris, “Kekaburan Tentang Konsep Maṣlaḥah Dalam Perundangan”, *Jurnal Syariah*, v. 1, no. 1 (1993).

Anisah Ab. Ghani, in her article “*Kedudukan Mazhab Syafi’i dalam Ibadat di Malaysia*”²⁴ (*Position of the Shafi’ite School of Thought in Ibadah in Malaysia*), has realised that the position of the Shafi’ite school of thought has dominated practices among Muslims in Malaysia. She has highlighted that the domination is not only available in *ibādah* but also in the *Sharī’ah* Courts. The judges are still dependent on the views of this *madhhab* which highly influence them in making any judgment. Later, she has recommended that an assessment of any judgment from the authorities should be broadened on the basis of *maqāṣid al-sharī’ah* in order to generate *maṣlaḥah* and set aside *maḥṣadah*. She has tried to identify problems in the judicial body but, nevertheless, has not elaborated further on this issue. Thus, there is a need to look further on this issue and promote the concept of *maṣlaḥah* as a matter of priority in the judgment-making process. In fact, this is what the researcher is trying to propose and study on.

Wan Zulkifli Wan Hassan, in his article “*Nilai-nilai Fleksibiliti dalam Sumber Perundangan Islam*”²⁵ (*Flexibility Values in the Source of Islamic Jurisprudence*), has highlighted the values of some Islamic sources of law and its flexibility to prove that Islamic laws are responsive to changes in contemporary communities. He has acknowledged that *al-maṣāliḥ al-mursalah* is one of the most suitable sources with values of this flexibility. He has given some cases from past judgments to illustrate that it is relevant for *al-maṣāliḥ al-mursalah* to be applied in law. However, he has discussed this briefly. Hence, further observations and attention should be paid on this concept and its practicality in current situations.

²⁴ Anisah Ab. Ghani, “Kedudukan Mazhab Syafi’i dalam Ibadat di Malaysia”, *Jurnal Fiqh*, no. 4 (2007).

²⁵ Wan Zulkifli Wan Hassan, “Nilai-nilai Fleksibiliti dalam Sumber Perundangan Islam”, *Malim*, no. 10 (2009).