

# *MAQASID AL-SHARIAH*

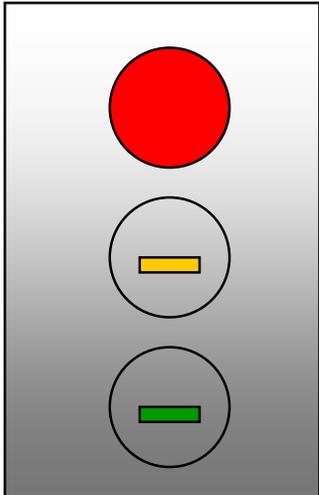
## AN INTRODUCTORY GUIDE

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## 1. What is Maqāsid?

### The Levels of ‘Why?’



Children often come up with deep philosophical questions, and one cannot tell whether they mean these questions or not! However, the beauty of a child’s question is that it is often not bound by pre-set ‘facts’ or ‘this is the way things are’ logic. I often start introductory courses on *maqasid al-shariah* with the story of a little girl who asked her father about why he stops their car at the traffic light! The following Box illustrates.

Girl: ‘Dad, why do you stop the car at the traffic light?’

Father replied, with an educative tone: ‘Because the light is red, and red means stop.’

Girl: ‘But why?’

The Dad replies also with a tone of education: ‘So the policeman does not give us a ticket.’

The girl went on: ‘But why would the policeman give us a ticket?’

The Dad answered: ‘Well. Because crossing a red light is dangerous.’

The girl continued: ‘Why?’

(Now the Dad thought of saying: ‘This is the way things are,’ but then decided to be a bit philosophical with his little beloved daughter.) Thus, he answered: ‘Because we

cannot hurt people. Would you like to be hurt yourself?’

The girl said: ‘No!’

The dad said: ‘And people also do not want be hurt. The Prophet (peace be upon him) said: “Love for people what you love for yourself.”’

But instead of stopping there, the girl asked: ‘Why do you love for people what you love for yourself?’

After a bit of thinking, the father said: ‘Because all people are equal, and if you would like to ask why, I would say that God is The Just, and out of His Justice, He made us all equal, with equal rights, and that it is the way He made the world!’

The question of ‘why’ is equivalent to the question of ‘what is the *maqasid*?’ And the ‘levels of why,’ as philosophers has put it, are the ‘levels of *maqasid*,’ as Islamic jurists has put it. These levels of why and the exploration of maqasid will take us from the details of simple actions, such as stopping at a red traffic light, to the level of the overall principles and basic beliefs, such as justice, compassion, and the attributes of God.

Therefore, maqasid al-shariah is the branch of Islamic knowledge that answers all questions of ‘why’ on various levels, such as the following questions:

Why is giving charity (*zakah*) one of Islam’s principle ‘pillars’?

Why is it an Islamic obligation to be good to your neighbours?

Why do Muslims greet people with *salam* (peace)?

Why do Muslims have to pray several times every day?

Why is fasting the month of Ramadan one of Islam’s principle ‘pillars’?

Why do Muslims mention the name of God all the time?

Why is drinking any amount of alcohol a major sin in Islam?

Why is smoking weed, for example, as prohibited as drinking alcohol in Islam?

Why is the death penalty a (maximum) punishment in the Islamic law for rape or armed robbery?

*Maqāṣid al-sharīah* explain the ‘wisdoms behind rulings,’ such as ‘enhancing social cohesion,’ which is one of the wisdoms behind charity, being good to one’s

neighbours, and greeting people with peace. Wisdoms behind rulings also include ‘developing consciousness of God,’ which is one of the rationales behind regular prayers, fasting, and supplications.

*Maqāṣid* are also good ends that the laws aim to achieve by blocking, or opening, certain means. Thus, the *maqāṣid* of ‘preserving people’s minds and souls’ explain the total and strict Islamic ban on alcohol and intoxicants, and the *maqāṣid* of ‘protecting people’s property and honour’ explain the Quran’s mention of a ‘death penalty’ as a (possible) punishment for rape or armed robbery.

*Maqāṣid* are also the group of divine intents and moral concepts upon which the Islamic law is based, such as, justice, human dignity, free will, magnanimity, facilitation, and social cooperation. Thus, they represent the link between the Islamic law and today’s notions of human rights, development, and civility, and could answer some other type of questions, such as:

What is the best methodology for re-reading and re-interpreting the Islamic scripts in light of today’s realities?

What is the Islamic concept of ‘freedom’ and ‘justice’?

What is the link between today’s notions of human rights and Islamic law?

How can the Islamic law contribute to ‘development’ and ‘civility’?

Let us, next, study the terminology and theory of maqasid more formally.

## ***‘Maqāsid’ and ‘Maṣāliḥ’***

The term ‘*maqāsid*’ (plural: *maqāṣid*) refers to a purpose, objective, principle, intent, goal, end,<sup>1</sup> *telos* (Greek), *finalité* (French), or *Zweck* (German).<sup>2</sup> *Maqāsid* of the Islamic law are the objectives/purposes/intents/ends/principles behind the Islamic rulings.<sup>3</sup> For a number of Islamic legal theorists, it is an alternative expression to people’s ‘interests’ (*maṣāliḥ*). For example, Abdul-Malik al-Juwaini (d.478 AH/ 1185 CE), one of the earliest contributors to *al-maqāṣid* theory as we know it today (as will be explained shortly) used *al-maqāṣid* and public interests (*al-maṣāliḥ al-‘āmmah*) interchangeably.<sup>4</sup> Abu Hamid al-Ghazali (d.505 AH/1111 CE) elaborated on a classification of *maqāṣid*, which he placed entirely under what he called ‘unrestricted interests’ (*al-maṣāliḥ al-mursalah*).<sup>5</sup> Fakhruddin al-Razi (d.606 AH/1209 CE) and al-Amidi (d.631 AH/1234 CE) followed al-Ghazali in his terminology.<sup>6</sup> Najmuddin al-Tufi (d.716 AH/1316 CE), defined *maṣlaḥah* as, ‘what fulfils the purpose of the Legislator.’<sup>7</sup> Al-Qarafi (d.1285 AH/1868 CE) linked *maṣlaḥah* and *maqāṣid* by a ‘fundamental rule’ that stated: ‘A purpose (*maqāṣid*) is not valid unless it leads to the fulfilment of some good (*maṣlaḥah*) or the avoidance of some mischief (*mafsadah*).’<sup>8</sup> Therefore, a *maqāṣid*, purpose, objective, principle, intent, goal, end, or principle in the Islamic law is there for the ‘interest of humanity.’ This is the rational basis, if you wish, for the *maqāṣid* theory.

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1 Mohammad al-Tahir Ibn Ashur, *Ibn Ashur-Treatise on Maqasid Al-Shariah*, trans. Mohamed El-Tahir El-Mesawi, vol. 1st (London-Washington: International Institute of Islamic Thought (IIIT), 2006), p. ii.

2 Rudolf von Jhering, *Law as a Means to an End (Der Zweck im Recht)*, trans. Isaac Husik, 2nd reprint ed. (New Jersey: The Lawbook Exchange (Originally published 1913 by Boston Book Co.), 2001) p.xxxv.

3 Ibn Ashur, *Maqasid Al-Shari‘ah Al-Islamiyah* p 183.

4 Abdul-Malik al-Juwaini, *Ghiath Al-Umam Fi Iltiyath Al-Zulam*, ed. Abdul-Aziz al-Deeb (Qatar: Wazarat al-Shu’un al-Diniyah, 1400 H) p. 253.

5 al-Ghazali, *Al-Mustasfa* vol. 1, p. 172.

6 Abu Bakr al-Maliki Ibn al-Arabi, *Al-Mahsoul Fi Usul Al-Fiqh*, ed. Hussain Ali Alyadri and Saeed Foda, 1 ed. (Amman: Dar al-Bayariq, 1999) vol. 5, p. 222. al-Amidi, *Al-Ihkam* vol. 4, p. 286.

7 Najmuddin al-Tufi, *Al-Ta‘in Fi Sharh Al-Arba‘in* (Beirut: al-Rayyan, 1419 H) p. 239.

8 Shihabuddin al-Qarafi, *Al-Dhakheerah* (Beirut: Dar al-Arab, 1994) vol. 5, p. 478.

## Dimensions of *Maqāṣid*

Purposes or *maqāṣid* of the Islamic law themselves are classified in various ways, according to a number of dimensions. The following are some of these dimensions:

1. Levels of necessity, which is the traditional classification.
2. Scope of the rulings aiming to achieve purposes.
3. Scope of people included in purposes.
4. Level of universality of the purposes.

Traditional classifications of *maqāṣid* divide them into three ‘levels of necessity,’ which are necessities (*ḍarūrāt*), needs (*ḥājīyāt*), and luxuries (*taḥsīnīyāt*). Necessities are further classified into what ‘preserves one’s faith, soul, wealth, mind, and offspring.’<sup>9</sup> Some jurists added ‘the preservation of honour’ to the above five widely popular necessities.<sup>10</sup> These necessities were considered essential matters for human life itself. There is also a general agreement that the preservation of these necessities is the ‘objective behind any revealed law,’<sup>11</sup> not just the Islamic law.

Purposes at the level of needs are less essential for human life. Examples are marriage, trade, and means of transportation. Islam encourages and regulates these needs. However, the lack of any of these needs is not a matter of life and death, especially on an individual basis.

Purposes at the level of luxuries are ‘beautifying purposes,’ such as using perfume, stylish clothing, and beautiful homes. These are things that Islam encourages, but also asserts how they should take a lower priority in one’s life.

The levels in the hierarchy are overlapping and interrelated, so noticed Imam al-Shatibi (who will be introduced shortly). In addition, each level should serve the level(s) below.<sup>12</sup> Also, the general lack of one item from a certain level moves it to the level above. For example, the decline of trade on a global level, for example during the time of global economic crises, moves ‘trade’ from a ‘need’ into a ‘life necessity,’

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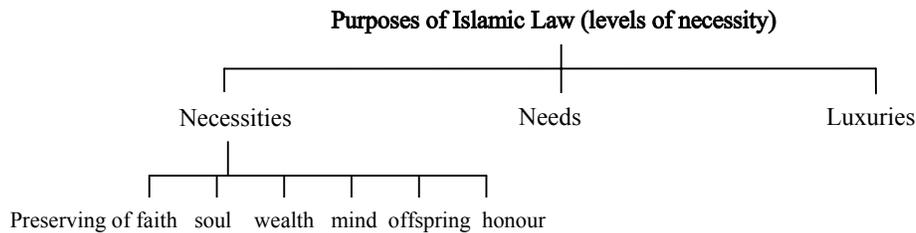
9 al-Ghazali, *Al-Mustasfā* vol. 1, p. 172, Ibn al-Arabi, *Al-Mahsoul Fi Usul Al-Fiqh* vol. 5, p. 222, al-Amidi, *Al-Ihkam* vol. 4, p. 287.

10 al-Ghazali, *Al-Mustasfā* vol.1, p. 172, al-Shatibi, *Al-Muwafaqat* vol. 3, p. 47.

11 al-Shatibi, *Al-Muwafaqat* vol.3, p. 5.

12 Ibid. vol.1 p. 151.

and so on. That is why some jurists preferred to perceive necessities in terms of ‘overlapping circles,’ rather than a strict hierarchy.<sup>13</sup> Refer to the next chart.



**Hierarchy of the purposes of the Islamic law (dimension of levels of necessity).**

I find the levels of necessity reminiscent of the twentieth century’s Abraham Maslow’s hierarchy of human (rather than ‘divine’) objectives or ‘basic goals,’ which he called, ‘hierarchy of needs.’<sup>14</sup> Human needs, according to Maslow, range from basic physiological requirements and safety, to love and esteem, and, finally, ‘self-actualisation.’ In 1943, Maslow suggested five levels for these needs. Then, in 1970, he revised his ideas and suggested a seven level hierarchy.<sup>15</sup> The similarity between al-Shatibi’s theory and Maslow’s theory in terms of the levels of goals is interesting. Moreover, the second version of Maslow’s theory reveals another interesting similarity with Islamic ‘goal’ theories, which is the capacity to evolve.

Islamic theories of goals (*maqāṣid*) evolved over the centuries, especially in the twentieth century. Contemporary theorists criticised the above traditional classification of necessities for a number of reasons, including the following:<sup>16</sup>

1. The scope of traditional *maqāṣid* is the entire Islamic law. However, they fall short to include specific purposes for single scripts/rulings or groups of scripts that cover certain topics or ‘chapters’ of Islamic law.

13 Jamal Atiyah, *Nahwa Taḥīl Maqāṣid Al-Sharī‘ah* (Amman: al-Ma‘had al-‘Ali lil-Fikr al-Islami, 2001) p. 45.

14 A. H. Maslow, ‘A Theory of Human Motivation,’ *Psychological Review*, no. 50 (1943): 50, p. 370-96.

15 A. H. Maslow, *Motivation and Personality*, 2 ed. (New York: Harper and Row, 1970), Maslow, ‘A Theory of Human Motivation.’

16 According to a discussion with Sheikh Hassan al-Turabi (Oral Discussion, Khartoum, Sudan, August 2006).

2. Traditional *maqāṣid* are concerned with individuals rather than families, societies, and humans, in general.
3. The traditional *maqāṣid* classification did not include the most universal and basic values, such as justice and freedom.
4. Traditional *maqāṣid* were deduced from the Islamic legal heritage itself, rather than the original sources/scripts.

To remedy the above shortcomings, modern scholarship introduced new conceptions and classifications of *al-maqāṣid* by giving consideration to new dimensions. First, considering the scope of rulings they cover, contemporary classifications divide *maqāṣid* into three levels:<sup>17</sup>

1. General *maqāṣid*: These *maqāṣid* are observed throughout the entire body of the Islamic law, such as the necessities and needs mentioned above and newly proposed *maqāṣid*, such as ‘justice’ and ‘facilitation.’
2. Specific *maqāṣid*: These *maqāṣid* are observed throughout a certain ‘chapter’ of the Islamic law, such as the welfare of children in family law, preventing criminals in criminal law, and preventing monopoly in financial transactions law.
3. Partial *maqāṣid*: These *maqāṣid* are the ‘intents’ behind specific scripts or rulings, such as the intent of discovering the truth in seeking a certain number of witnesses in certain court cases, the intent of alleviating difficulty in allowing an ill and fasting person to break his/her fasting, and the intent of feeding the poor in banning Muslims from storing meat during Eid/festival days.

In order to remedy the individuality drawback, the notion of *maqāṣid* has been expanded to include a wider scope of people – the community, nation, or humanity, in general. Ibn Ashur (also introduced shortly), for example, gave *maqāṣid* that are concerned with the ‘nation’ (*ummah*) priority over *maqāṣid* that are concerned with individuals. Rashid Rida, for a second example, included ‘reform’ and ‘women’s rights’ in his theory of *maqāṣid*. Yusuf al-Qaradawi, for a third example, included ‘human dignity and rights’ in his theory of *maqāṣid*.

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17 Numan Jughaim, ‘Turuq Al-Kashf ‘an Maqasid Al-Shari‘ (International Islamic University, Malaysia. Published by Dar al-Nafaes, 2002) p. 26-35.

The above expansions of the scope of *maqāṣid* allows them to respond to global issues and concerns, and to evolve from ‘wisdoms behind the rulings’ to practical plans for reform and renewal.

Finally, contemporary scholarship has introduced new universal *maqāṣid* that were directly induced from the scripts, rather than from the body of *fiqh* literature in the schools of Islamic law. This approach, significantly, allowed *maqāṣid* to overcome the historicity of *fiqh* edicts and represent the scripts’ higher values and principles. Detailed rulings would, then, stem from these universal principles. The following are examples of these new universal *maqāṣid*:

1. Rashid Rida (d.1354AH/1935 CE) surveyed the Quran to identify its *maqāṣid*, which included, ‘reform of the pillars of faith, and spreading awareness that Islam is the religion of pure natural disposition, reason, knowledge, wisdom, proof, freedom, independence, social, political, and economic reform, and women rights.’<sup>18</sup>
2. Al-Tahir Ibn Ashur (d.1325 AH/ 1907 CE) proposed that the universal *maqāṣid* of the Islamic law is to maintain ‘orderliness, equality, freedom, facilitation, and the preservation of pure natural disposition (*fiṭrah*).’<sup>19</sup> It is to be noted that the purpose of ‘freedom’ (*ḥurrīyah*), which was proposed by Ibn Ashur and several other contemporary scholars, is different from the purpose of ‘freedom’ (*‘itq*), which was mentioned by jurists.<sup>20</sup> *Al-‘itq* is freedom from slavery, not ‘freedom’ in the contemporary sense. ‘Will’ (*Mashṭah*), however, is a well-known Islamic term that bears a number of similarities with current conceptions of ‘freedom’ and ‘free will.’ For example, ‘freedom of belief’ is expressed in the Quran as the ‘will to believe or disbelieve.’<sup>21</sup> In terms of terminology, ‘freedom’ (*al-ḥurrīyah*) is a ‘newly-coined’ purpose in the literature of the Islamic law. Ibn Ashur, interestingly, accredited his usage of the term *ḥurrīyah* to ‘literature of the French revolution, which were

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18 Mohammad Rasheed Rida, *Al-Wahi Al-Mohammadi: Thubut Al-Nubuwwah Bil-Qur’an* (Cairo: Mu’asasat Izziddin, without date) p.100.

19 Ibn Ashur, *Maqasid Al-Shari’ah Al-Islamiyah* p183.

20 As in, for example, Kamaluddin al-Siwasi, *Sharh Fath Al-Qadir*, 2nd ed. (Beirut: Dar al-Fikr, without date) vol.4, p.513.

21 For example, Surat al-Kahf, 18:29.

translated from French to Arabic in the nineteenth century CE,<sup>22</sup> even though he elaborated on an Islamic perspective on freedom of thought, belief, expression, and action in the *mashḥah* sense.<sup>23</sup>

3. Mohammad al-Ghazaly (d.1416 AH/ 1996 CE) called for ‘learning lessons from the previous fourteen centuries of Islamic history,’ and therefore, included ‘justice and freedom’ in *maqāṣid* at the necessities level.<sup>24</sup> Al-Ghazali’s prime contribution to the knowledge of *maqāṣid* was his critique on the literalist tendencies that many of today’s scholars have.<sup>25</sup> A careful look at the contributions of Mohammad al-Ghazaly shows that there were underlying ‘*maqāṣid*’ upon which he based his opinions, such as equality and justice, upon which he had based all his famous new opinions in the area of women under the Islamic law and other areas.
4. Yusuf al-Qaradawi (1345 AH/ 1926 CE - ) also surveyed the Quran and concluded the following universal *maqāṣid*: ‘Preserving true faith, maintaining human dignity and rights, calling people to worship God, purifying the soul, restoring moral values, building good families, treating women fairly, building a strong Islamic nation, and calling for a cooperative world.’<sup>26</sup> However, al-Qaradawi explains that proposing a theory in universal *maqāṣid* should only happen after developing a level of experience with detailed scripts.<sup>27</sup>
5. Taha al-Alwani (1354 AH/ 1935 CE - ) also surveyed the Quran to identify its ‘supreme and prevailing’ *maqāṣid*, which are, according to him, ‘the oneness of God (*tawḥīd*), purification of the soul (*tazkīyah*), and developing civilisation

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22 Mohammad al-Tahir Ibn Ashur, *Usul Al-Nizam Al-Ijtima’i Fil Islam*, ed. Mohamed El-Tahir Mesawi (Amman: Dar al-Nafais, 2001) p.256, 268.

23 Ibid, p.270-281.

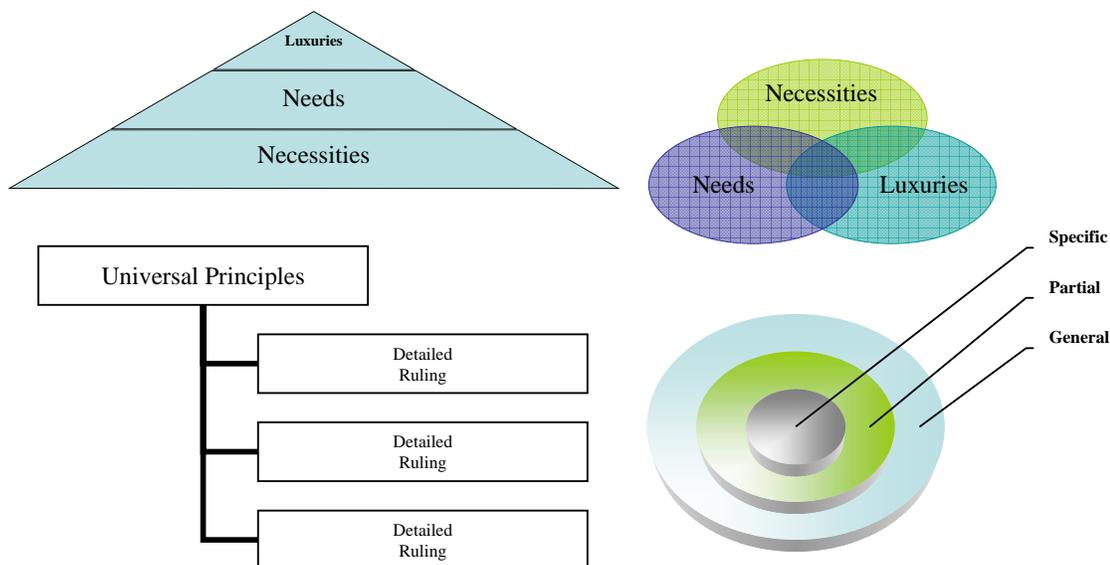
24 Jamal Atiyah, *Nahwa Taf’il Maqasid Al-Shari’ah*, p. 49.

25 Mawil Izzi Dien, *Islamic Law: From Historical Foundations to Contemporary Practice* (Edinburgh: Edinburgh University Press Ltd, 2004) p.131-132.

26 Yusuf al-Qaradawi, *Kayf Nata’amal Ma’a Al-Quran Al-’Azeem?* 1st ed. (Cairo: Dar al-Shorouk, 1999).

27 Oral Discussions, London, UK, March, 2005, and Sarajevo, Bosnia, May, 2007.

on earth (*‘imrān*).’<sup>28</sup> He is currently writing a separate monograph to elaborate on each of these three *maqāṣid*.<sup>29</sup>



All of the above *maqāṣid* were presented as they appeared in the minds and perceptions of the above jurists. None of the above classic or contemporary classifications and structures could claim to be ‘according to the original divine will.’ If we refer to nature that God created, we will never find natural structures that could be represented in terms of circles, pyramids, or boxes, as the above diagram shows. All such structures in science and humanities too, and the categories they include, are human-made for the sake of illustration for themselves and other humans.

Therefore, *al-maqāṣid* structure is best described as a ‘multi-dimensional’ structure, in which levels of necessity, scope of rulings, scope of people, and levels of universality are all valid dimensions that represent valid viewpoints and classifications.

The above twentieth-century views also show that *maqāṣid al-sharī‘ah* are, actually, representations of each scholar’s own viewpoint for reform and development of the Islamic law, despite the fact that all these *maqāṣid* were ‘induced’ from the scripts. This fusion of the scripts and contemporary needs for reform gives *al-maqāṣid* special significance.

<sup>28</sup> Taha Jabir al-Alwani, *Maqāṣid Al-Sharī‘ah*, 1 ed. (Beirut: IIIT and Dar al-Hadi, 2001), p.25.

<sup>29</sup> Oral Discussion, Cairo, Egypt, April, 2007.

### *Al-Maqāsid in the Companions' Ijtihād*

The history of the idea of speculating a certain underlying purpose, aim, or intent of Quranic or Prophetic instructions goes back to the companions of the Prophet, as narrated in a number of incidents. One clear and popular example is the multi-chained hadith of ‘afternoon prayers at Bani Quraizah,’ in which the Prophet sent a group of companions to Bani Quraizah,<sup>30</sup> and ordered them to pray their afternoon (*aṣr*) prayer there.<sup>31</sup> The span of time allowed for *aṣr* prayers had almost expired before the group reached Bani Quraizah. Thus, they found themselves divided into supporters of two different opinions, one opinion entailed praying at Bani Quraizah’s anyway and the other opinion entailed praying on the way (before the prayer time was over).

The rationale behind the first opinion was that the Prophet’s instruction was clear in asking everybody to pray at Bani Quraizah, while the rationale of the second opinion was that the Prophet’s ‘purpose/intent’ of the order was to ask the group to hasten to Bani Quraizah, rather than ‘meaning/intending to’ postpone prayers until after its due time. According to the narrator, when the companions later narrated the story to the Prophet, he approved both opinions.<sup>32</sup> The approval of the Prophet, as jurists and Imams said, entails the permissibility and correctness of both views. The only prime jurist who disagreed with the companions who prayed on the way was Ibn Hazm al-Zahiri (the literalist), who wrote that they should have prayed the ‘afternoon prayer’ after they reach Bani Quraizah, as the Prophet had said, even after midnight!<sup>33</sup>

Another incident, which shows a more serious consequence of taking a ‘purpose-oriented’ approach to the Prophetic instructions occurred during the days of Omar, the second caliph. The status of Omar in Islam and his continuous and wide-ranging consultation of a large number of companions, make his opinions of special significance. In this incident, the companions asked Omar to distribute the newly-‘conquered’ lands of Egypt and Iraq amongst them as some sort of ‘spoils of war.’

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30 Around the seventh Islamic year AH. The location was a few miles away from Medina.

31 Mohammad al-Bukhari, *Al-Sahih*, ed. Mustafa al-Bagha, 3rd ed. (Beirut: Dar Ibn Kathir, 1986) vol.1, p. 321, Abu al-Hussain Muslim, *Sahih Muslim*, ed. Mohammad Foad Abdul-Baqi (Beirut: Dar Ihya al-Turath al-Arabi, without date) vol. 3, p. 1391.

32 Narrated by Abdullah Ibn Omar, according to al-Bukhari, vol. 1, p. 321, and Muslim. Vol. 3, p.1391.

33 Ali Ibn Hazm, *Al-Muhalla*, ed. Lajnat Ihiya’ al-Turath al-Arabi, 1st ed. (Beirut: Dar al-Afaq, without date) almuhallā vol.3, p. 291.

Their argument relied on the clear and specific verses of the Quran that allowed fighters their ‘spoils of war.’<sup>34</sup> Omar refused to divide whole cities and provinces over the companions by referring to other verses, with more general expressions, stating that God has a ‘purpose’ of ‘not making the rich dominate wealth.’<sup>35</sup> Therefore, Omar (and the companions who supported his opinion) understood the specifics of the verses of ‘spoils of war’ within the context of a certain purpose (*maqṣid*) of the law. This purpose was, ‘diminishing the difference between economic levels,’ to use familiar contemporary terms.

Another telling example is Omar’s application of a moratorium on the (Islamic) punishment for theft during the famine of Medina.<sup>36</sup> He thought that applying the punishment prescribed in the scripts, while people are in need of basic supplies for their survival, goes against the general principle of justice, which he considered more fundamental.

A third example from Omar’s *fiqh* (application of the law) is when he did not apply the ‘apparent meaning’ of the hadith that clearly gives a soldier the right to the spoils of war from opponents.<sup>37</sup> He decided to give soldiers only one-fifth of these spoils, if they were ‘significantly valuable,’ with a purpose to achieve fairness amongst soldiers and enrich the public trust.

A fourth example is Omar’s decision to include horses in the types of wealth included in the obligatory charity of *zakāh*, despite the Prophet’s clear instruction to exclude them. Omar’s rationale was that horses at his time were becoming significantly more valuable than camels, which the Prophet included in *zakāh* at his time.<sup>38</sup> In other words, Omar understood the ‘purpose’ of the *zakāh* in terms of a form of social assistance that is paid by the wealthy for the sake of the poor, regardless of the exact

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34 Yaqub Abu Yusuf, *Al-Kharaj* (Cairo: al-Matba‘ah al-Amiriyah, 1303 H) p. 14, 81, Yahya Ibn Adam, *Al-Kharaj* (Lahore, Pakistan: al-Maktabah al-Ilmiyah, 1974) p. 110.

35 Quran, Surat al-Hashr, 59:7. I preferred ‘domination of wealth’ to express ‘*dūlatan bayn al-aghniyā’ minkom*,’ rather than ‘a circuit between the wealthy’ (as in Yusuf Ali’s translation) or ‘commodity between the rich’ (as in Picktall’s translation).

36 Mohammad Biltaji, *Manhaj Omar Ibn Al-Khatāb Fil Tashree’*, 1st ed. (Cairo: Dar al-Salam, 2002) p. 190.

37 al-Waleed Ibn Rushd (Averröes), *Bedāyat Al-Mujtahid Wa Nihayat Al-Muqtasid* (Beirut: Dar al-Fikr) vol. 1, p. 291.

38 al-Siwasi, *Sharh Fath Al-Qadir* vol. 2, p. 192, Abu Omar Ibn Abdul-Barr, *Al-Tamheed*, ed. Mohammad al-Alawi and Mohammad al-Bakri (Morocco: Wazarat ‘Umum al-Awqaf, 1387 AH) vol.4, p. 216.

types of wealth that were mentioned in the Prophetic tradition and understood via its literal implication.<sup>39</sup>

All known schools of law, except for the Hanafis, are against such expansion of ‘the pool of charity,’ which illustrates how literalism had a strong influence on traditional juridical methods. Ibn Hazm, again, asserted that, ‘there is no *zakāh* on anything except eight types of wealth, which are mentioned in the tradition of the Prophet, namely, gold, silver, wheat, barley, dates, camels, cows, sheep and goats. There is no *zakāh* on horses, commercial goods, or any other type of wealth.’<sup>40</sup> It is clear how such opinion hinders the institution of *zakāh* from achieving any meaningful sense of justice or social welfare.

Based on a ‘methodology that considers the wisdoms behind the rulings,’ Qaradawi rejected classic opinions on the above matter in his very detailed study on *zakāh*. He wrote: ‘*Zakāh* is due on every growing wealth ... The purpose of *zakāh* is to help the poor and to serve the public good. It is unlikely that The Legislator aimed to put this burden on owners of five or more camels (as Ibn Hazm had said), and release businessmen who earn in one day what a shepherd earns in years ...’<sup>41</sup>

The above examples are meant to illustrate early conceptions of *maqāṣid* in the application of the Islamic law and the implications of giving them fundamental importance. However, this purpose-oriented approach does not simply apply to all rulings of the Islamic law.

Bukhari narrates that Omar, again, was asked: ‘Why do we still jog around the *ka‘bah* with our shoulders uncovered even after Islam had prevailed in Mecca?’ The story behind the question is that after the ‘conquest of Mecca,’ the people of Mecca claimed the Prophet and his companions lost their health during their prolonged stay in Medina. The Prophet, therefore, ordered the companions to jog around the *ka‘bah* with their shoulders uncovered in a show of strength. Omar, however, did not take a purpose-oriented approach to this question. He answered: ‘We do not cease doing

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39 Yusuf al-Qaradawi, ‘Fiqh Al-Zakah’ (Ph.D. diss, al-Azhar University, Egypt, Published by al-Risalah, 15th ed, 1985) vol. 1, p. 229.

40 Opinion strongly expressed in: Ali Ibn Hazm, *Al-Muhalla*, ed. Lajnat Ihiya’ al-Turath al-Arabi, 1st ed. (Beirut: Dar al-Afaq, without date) almuḥalla p. 209.

41 al-Qaradawi, ‘Fiqh Al-Zakah’ vol.1, p. 146-148.

anything we used to do at the Prophet's time.<sup>42</sup> Omar, thus, made a distinction between 'acts of worship' (*'ibādāt*) and 'transactions' (*mu'āmalāt*).

Later, Imam al-Shatibi, for another example, expressed this distinction when he wrote: 'Literal compliance is the default methodology in the area of acts of worship (*'ibādāt*), while the consideration of purposes is the default methodology in the area of worldly dealings (*mu'āmalāt*).'<sup>43</sup>

Therefore, generally speaking, the area of 'acts of worship' (*'ibādāt*) should remain a fixed area, in which the believer refers to the literal example of the Prophet (peace be upon him). However, it is the very example of the Prophet and his companions not to imitate them, literally, in the various areas of 'transactions' (*mu'āmalāt*) and, rather, to go by the principles and '*maqāṣid*.'

### **Early Theories of *Maqāṣid***

After the companions' era, the theory and classifications of *maqāṣid* started to evolve. However, *maqāṣid* as we know them today were not clearly developed until the time of the later *uṣūlīs* of the fifth to eighth Islamic century, as I will elaborate in the next subsection. During the first three centuries, however, the idea of purposes/causes (Arabic: *ḥikam*, *'ilal*, *munāṣabāt*, or *ma'ānī*) appeared in a number of reasoning methods utilised by the Imams of the classic schools of Islamic law, such as reasoning by analogy (*qiyās*), juridical preference (*istiḥsān*), and interest (*maṣlaḥah*). Purposes themselves, however, were not subjects of separate monographs or special attention until the end of the third Islamic century. Then, the development of the theory of 'levels of necessity' by Imam al-Juwaini (d.478 AH/ 1085 CE) took place much later in the fifth Islamic century. The following is an attempt to trace early conceptions of *al-maqāṣid* between the third and fifth Islamic centuries.

1. **Al-Tirmidhi al-Hakeem (d. 296 AH/908 CE)**. The first known volume dedicated to the topic of *maqāṣid*, in which the term '*maqāṣid*' was used in the

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42 al-Bukhari, *Al-Sahih*, Kitab al-Hajj, Bab al-Raml.

43 al-Shatibi, *Al-Muwafaqat* vol.2, p. 6.

book's title, is *al-Ṣalāh wa Maqāṣiduhā* (*Prayers and their Purposes*), which was written by al-Tirmidhi al-Hakeem.<sup>44</sup> The book is a survey of the wisdoms and spiritual 'secrets' behind each of the prayer acts, with an obvious Sufi inclination. Examples are 'confirming humbleness' as the *maqṣid* behind glorifying God with every move during prayers, 'achieving consciousness' as the *maqṣid* behind praising God, 'focusing on one's prayer' as the *maqṣid* behind facing the direction of the Kabah, and so on. Al-Tirmidhi al-Hakeem also wrote a similar book on pilgrimage, which he entitled, *al-Hajj wa Asrāruh* (*Pilgrimage and its Secrets*).<sup>45</sup>

2. **Abu Zaid al-Balkhi (d.322 AH/933 CE)**. The first known book on the *maqāṣid* of dealings (*mu'āmalāt*) is Abu Zaid al-Balkhi's *al-Ibānah 'an 'īlal al-Diyanah* (*Revealing Purposes in Religious Practices*), in which he surveys purposes behind Islamic juridical rulings. Al-Balkhi also wrote a book dedicated to *maṣlahah*, which he entitled, *Maṣāliḥ al-Abdān wal-Anfus* (*Benefits for Bodies and Souls*), in which he explained how Islamic practices and rulings contribute to health, physically and mentally.<sup>46</sup>

3. **Al-Qaffal al-Shashi al-Kabeer (d. 365 AH/975 CE)**. The oldest manuscript that I found in the Egyptian *Dar al-Kutub* on the topic of *al-maqāṣid* is al-Qaffal's *Maḥāsīn al-Sharā'ic* (*The Beauties of the Laws*).<sup>47</sup> After a 20-page introduction, al-Qaffal proceeds to divide the book into the familiar chapters of traditional books of *fiqh* (i.e., starting with purification, and then ablution and prayers, etc). He mentions each ruling briefly and elaborates on the purposes and wisdoms behind it. The manuscript is fairly clear and contains around 400 pages. The last page mentions the date of the book's completion, which is the 11<sup>th</sup> of Rabiul-Awwal 358 H (7<sup>th</sup> of February, 969 CE). The coverage of the rulings of *fiqh* is

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44 According to: Ahmad El-Raisouni, *Nazariyat Al-Maqasid 'ind al-Imam al-Shatibi*, 1st ed. (Herndon, VA: IIIT, 1992).

45 Also according to Ahmad el-Raisouni, in: Mohamed Saleem El-Awa, ed, *Maqasid Al-Shariah Al-Islamiya: Dirasat Fi Qadaya Al-Manhaj Wa Qadaya Al-Tatbeeq* (Cairo: al-Furqan Islamic Heritage Foundation, al-Maqasid Research Centre, 2006) p.181.

46 Mohammad Kamal Imam, *Al-Daleel Al-Irshadi Ila Maqasid al-Shari'ah al-Islamiyyah* (London: al-Maqasid Research Centre, 2007), Introduction, p.iii.

47 I learnt about the the book from Professor Ahmad al-Raysuni of the Organization of Islamic Conference (OIC), Fiqh Council, in Jeddah (Oral Conversation, Jeddah, Saudi Arabia, April 2006). I obtained a microfilm of the manuscript with the help of Professor Ayman Fouad, who edits manuscripts for Al-Furqan Islamic Heritage Foundation, London, UK (Cairo, July 2006). Al-Qaffal al-Shashi, 'Mahasin Al-Sharaei,' in *Fiqh Shafie, Manuscript No. 263* (Cairo, Dar al-Kutub: 358 AH/ 969 CE).

extensive, albeit strictly addressing individual rulings without introducing any general theory for the purposes. Nevertheless, the book is an important step in the development of *al-maqāṣid* theory. The following is my translation of an excerpt from the introduction (from the first page shown in Chart 2.3.):

... I decided to write this book to illustrate the beauties of the revealed Law, its magnanimous and moral content, and its compatibility with sound reason. I will include in it answers for those who are asking questions about the true reasons and wisdoms behind its rulings. These questions could only come from one of two persons. The first person attributes the creation of the world to its Creator and believes in the truth of prophethood, since the wisdom behind the Law is attributed to the Wise Almighty King, who prescribes to His servants what is best for them ... The second person is trying to argue against prophethood and the concept of the creation of the world, or maybe is in agreement over the creation of the world while in rejection of prophethood. The logical line that this person is trying to follow is to use the invalidity of the Law as proof for the invalidity of the concept of a Law-Giver ...

One part of a different manuscript of al-Qaffal's '*Maḥāsīn al-Sharā'ī'*' was edited and analysed, earlier, by Abd al-Nasir al-Lughani in his Ph.D. thesis that he wrote in the University of Wales, Lampeter, 2004.<sup>48</sup> Mawil Izzī Dien, who supervised the above-mentioned thesis, addressed the significance of the manuscript and al-Shashi's contribution to the theory of Islamic law. He writes:

According to Shashi, the importance of other injunctions is based on their meanings, which are often highlighted by the legislator. The prohibition of alcohol is an example of this, whereby drink is perceived as a tool with which the devil may create animosity between people, thus preventing them from remembrance of God and prayer ... Shashi's discussions leaves little doubt that he was providing a further step to his Shafi'i school by establishing a plethora of abstract legal theories to set up reasons for the legal injunctions.<sup>49</sup>

Thus, these 'meanings' and 'reasons,' which al-Qaffal al-Shashi is basing the legal rulings on, represent an early conception of *al-maqāṣid* theory, which was a development in the Shafie school. I would add that al-Shashi's developments of the concepts of necessities (*ḍarūrāt*), polity (*siyāsah*), or moral actions (*al-makrumāt*) set up the stage for al-Juwaini's and al-Ghazali's contribution to both the Shafie theory and *al-maqāṣid* theory, via further developments of these terms, as explained shortly.

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<sup>48</sup> Al-Lughani, Abd al-Nasir, 'A Critical Study and Edition of the First Part of Kitab Mahasin al-Shari'ah by al-Qaffal al-Shashi.' Ph.D. diss., University of Manchester, 2004.

<sup>49</sup> Izzī Dien, *Islamic Law*, p. 106.

بسم الله الرحمن الرحيم  
الحمد لله العلي العظيم الذي العرش المحمد النعمان لما أراد الخلق  
الرحيم الذي لا يعقب حكمه ولا يراد انقصه ولا يسمع مما اراد به  
اراد شيئا ان يقول له ان فعلون حلو وصنع فاقص ما عرى في جان الرحيم  
المصر هل يرى من فطور ثم ارجع المصر لربن نقلت الملك المصر حاشا وهو حاشا  
الغيب والسهادة فلا يظهر عليه غيبه احدا الا من ارضى من رسوله ولا يحطون  
من علمه الا بما اتوا وسع رسيه السموات والارض ولا يوده حفظها وهو العلي العظيم  
لا يسأل عما يفعل وهم يسألون ولقد نزلنا جميع ما خلقنا شهد له في العصور بالوحدة  
وابعاد القدرة وطال الحكمة وسعة الرحمة والعلم بالغيب والسهادة والاحتياط بالبد  
والعافية على الهدى والاخر وظاهره واصبا سبحانه لا اله الا هو وحده لا شريك له  
وصلى الله على ابنا رسول الله اجمعين وعلى محمد خاصة حاتم النبيين وسيد المرسلين  
وسلم تسليما تاما بالما صدر باطاب احمد هذا النوع من الحمد في ان كانت كلاما  
لا يحصى ولا ينسى لما طنته عرض العباد لبي قد رنا والله التقدير بالعبه في الدلالة  
بحسن السرعة ودخولها في السياسة العاصلة السجدة واصفونها بالعبه كالتسليم  
ووفوع ما بورد من الجواب لمن سئل عن علمها موفوع الضوابع والحكمة ومعلوم ان هذا  
السؤال مما صدر من صاحبه على الحمد وجهين ايعامع اسات حدت العالم وسخه النبوة اد  
الشرايع مصانفها ليعاينها الي متعبد ملك قادر حكيم مستصلي لعباده ما هم لعمري التمس  
في دار المحنة مدة بقاها واستحققون بطاعتهم له حرر في النواب في الاولى والاخره فلا وحده  
للبلاد في معنى السرعة وجهها بها الا بعد تسليمها في انفسها الا بعد سوت من يوجد عنه ولا  
توت من يوجد عنه الا بعد تسليم المتعبد لها فهذا وحده والوحده الثاني على معنى العلق على  
القدح في النبوة وفي القواك محدث العالم والقدح في النبوة مع تسليم حدت العام وحسنه  
الوجه هو ان تستدل بفساد النوع على فساد اصله اذ الصحيح لا يفسد الا بفساد اصله ولا يفسد  
الطاب بما يقع على الوجه الاول لان المقصد فيه نبوت الشرايع من العصور في الاساقع ووار  
وفوع السياسة فيها لما بينا انها وقعت من حكم علم بالعبوات مستصلي واهلها الصفت

The first page of Egyptian Dar al-Kutub's manuscript of al-Qaffal al-Kabeer's '*Maḥāsīn al-Sharā'i'*' (*The Beauties of the Laws*).

4. **Ibn Babaweah al-Qummi (d. 381 AH/991 CE).** Some researchers claim that research on *maqāṣid al-sharīʿah* was restricted to the Sunni schools of law until the twentieth century.<sup>50</sup> However, the first known monograph dedicated to *maqāṣid* was, in fact, written by Ibn Babaweah al-Sadouk al-Qummi, one of the main Shia jurists of the fourth Islamic century, who wrote a book of 335 chapters on the subject.<sup>51</sup> The book, which was entitled ‘*ʿilal al-Sharāʿiʿ*’ (*The Reasons behind the Rulings*), ‘rationalises’ believing in God, prophets, heaven, and other beliefs. It also gives moral rationales for prayers, fasting, pilgrimage, charity, caring for parents, and other moral obligations.<sup>52</sup>

5. **Al-Amiri al-Failasuf (d. 381 AH/991 CE).** The earliest known direct theoretical classification of purposes was introduced by al-Amiri al-Failasuf in his ‘*al-Iʿlām bi-Manāqib al-Islām*’ (*Awareness of the Traits of Islam*).<sup>53</sup> Al-Amiri’s classification, however, was solely based on ‘criminal punishments’ in the Islamic law (*ḥudūd*).

Classifications of *maqāṣid* according to ‘levels of necessity’ were not developed until the fifth Islamic century. Then, the whole theory reached its most mature stage (before the twentieth century CE) in the eighth Islamic century.

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50 Hassan Jaber, *Al-Maqasid Fi Al-Madrasah Al-Shiʿyyah*, In: El-Awa, Mohamed Saleem, ed. *Maqasid Al-Shariah Al-Islamiya: Dirasat Fi Qadaya Al-Manhaj Wa Qadaya Al-Tatbeeq (Studies in the Philosophy of Islamic Law: Theory and Applications)*. 1st ed. Cairo: al-Furqan Islamic Heritage Foundation, al-Maqasid Research Centre, 2006, p.325. Also: Oral Discussion over the issue in Alexandria, Egypt, August, 2006.

51 According to Prof. Mohammad Kamal Imam of Alexandria University’s Faculty of Law (Oral Discussion, Cairo, Egypt, August, 2006).

52 Ibn Babaweah al-Sadouk al-Qummi, *ʿIlal Al-Sharaʿiʿ*, ed. Mohammad Sadik Bahrul-Ulum (Najjaf: Dar al-Balaghah, 1966).

53 According to Prof. Ahmad el-Raisouni, oral discussion, Jeddah, November 2006. He referred me to: Abul-Hassan al-Failasuf al-Amiri, *Al-Iʿlam Bi-Manaqib Al-Islam*, ed. Ahmad Ghurab (Cairo: Dar al-Kitab al-Arabi, 1967).

## 2. The ‘Imams of Maqasid’ (Fifth to Eighth Islamic Centuries)

The fifth Islamic century witnessed the birth of what Abdallah Bin Bayyah called ‘a philosophy of the Islamic law.’<sup>54</sup> Literal and nominal methods that were developed, until the fifth century, proved incapable of coping with the complexities of the evolving Islamic civilisation. The theory of ‘unrestricted interest’ (*al-maṣlaḥah al-mursalah*) was developed as a method that covers ‘what was not mentioned in the scripts.’ This theory filled a gap in the literal methodologies and, later, gave birth to the theory of *maqāṣid* in the Islamic law.

The jurists who made the most significant contributions to the *maqāṣid* theory, between the fifth and eighth Islamic centuries, are: Abu al-Maali al-Juwaini, Abu Hamid al-Ghazali, al-Izz Ibn Abdul-Salam, Shihabuddin al-Qarafi, Shamsuddin Ibn al-Qayyim, and, most significantly, Abu Ishaq Al-Shatibi.

### Imam al-Juwaini and ‘Public Needs’

Abu al-Maali al-Juwaini (d.478 AH/1085 CE) wrote ‘*al-Burhān fi Uṣul al-Fiqh*’ (*The Proof in the Fundamentals of Law*), which was the first juridical treatise to introduce a theory of ‘levels of necessity’ in a way that is similar to today’s familiar theory. He suggested five levels of *maqāṣid*, namely, necessities (*darūrāt*), public needs (*al-ḥājah al-‘āmah*), moral behaviour (*al-makrumāt*), recommendations (*al-mandūbāt*), and ‘what cannot be attributed to a specific reason.’<sup>55</sup> He proposed that the purpose of the Islamic law is the protection or inviolability (*al-‘ismah*) for people’s ‘faith, souls, minds, private parts, and money.’<sup>56</sup>

Al-Juwaini’s ‘*Ghiāth al-Umam*’ (*The Salvage of the Nations*) was, in my view, another important contribution to *al-maqāṣid* theory, even though it primarily addresses political issues. In that book, al-Juwaini makes a ‘hypothetical assumption’ that jurists and schools of law eventually disappeared from Earth, and suggested that the only way to salvage Islam would be to ‘re-construct’ it from the bottom up, using

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54 Oral discussion with Sheikh Bin Bayyah in Mecca, Saudi Arabia, April 2006.

55 al-Juwaini, *Al-Burhan* 4th ed, vol.2, p. 621, 22, 747.

56 Ibid.

the ‘fundamental principles, upon which all rulings of law are based and to which all rulings of law converge.’<sup>57</sup> He wrote that these fundamentals of the law, which he explicitly called ‘*al-maqāṣid*,’ are ‘not subject to opposing tendencies and difference of opinion over interpretations.’<sup>58</sup>

Examples of these *maqāṣid*, on which al-Juwaini ‘re-constructed’ the Islamic law are ‘facilitation’ in the laws of purification, ‘elevating the burden of the poor’ in the laws of charity, and ‘mutual agreement’ in the laws of trade.<sup>59</sup> I view al-Juwaini’s ‘*Ghiāth al-Umam*’ as a complete proposal for the ‘re-construction’ of the Islamic law based on *maqāṣid*.

### **Imam al-Ghazali and ‘Order of Necessities’**

Al-Juwaini’s student, Abu Hamid al-Ghazali (d.505 AH/1111 CE), developed his teacher’s theory further in his book, *al-Mustaṣfā* (*The Purified Source*). He ordered the ‘necessities’ that al-Juwaini had suggested in a clear order, as follows: (1) faith, (2) soul, (3) mind, (4) offspring, and (5) wealth.<sup>60</sup> Al-Ghazali also coined the term of ‘preservation’ (*al-ḥifẓ*) of these necessities.

Despite the detailed analysis that he offered, al-Ghazali refused to give independent juridical legitimacy (*ḥujjīyah*) to any of his proposed *maqāṣid* or *maṣāliḥ*, and even called them ‘the illusionary interests’ (*al-maṣāliḥ al-mawhūmah*).<sup>61</sup> The reason behind that is related to the *maqāṣid* being, sort of, read into the scripts, rather than being implied literally, as other ‘clear’ Islamic rulings are.

Nevertheless, al-Ghazali clearly used the *maqāṣid* as a basis for a few Islamic rulings. He wrote, for example: ‘all intoxicants, whether liquid or solid, are forbidden based on analogy with liquor, since liquor is forbidden for the purpose of the preservation of people’s minds.’<sup>62</sup>

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57 al-Juwaini, *Al-Ghayyathi*, p. 434.

58 Ibid. p 490.

59 Ibid. p 446, 73, 94.

60 al-Ghazali, *Al-Mustasfā* p 258.

61 Ibid. p 172.

62 Ibid. p 174.

Al-Ghazali also suggested a ‘fundamental rule,’ based on the order of necessities he suggested, which implies that the higher-order necessity should have priority over a lower-order necessity if they generate opposite implications in practical cases.<sup>63</sup>

### **Imam al-Izz and ‘Wisdoms behind the Rules’**

Al-Izz Ibn Abdul-Salam (d.660 AH/1209 CE) wrote two small books about *al-maqāṣid*, in the ‘wisdoms-behind-rulings’ sense, namely, *Maqāṣid al-Ṣalāh (Purposes of Prayers)* and *Maqāṣid al-Ṣawm (Purposes of Fasting)*.<sup>64</sup> However, his significant contribution to the development of the theory of *al-maqāṣid* was his book on interests (*maṣāliḥ*), which he called, *Qawā'id al-Ahkām fī Maṣāliḥ al-Anām (Basic Rules Concerning People's Interests)*. Beside his extensive investigation of the concepts of interest and mischief, al-Izz linked the validity of rulings to their purposes and the wisdoms behind them. For example, he wrote: ‘Every action that misses its purpose is void,’<sup>65</sup> and, ‘when you study how the purposes of the law brings good and prevents mischief, you realise that it is unlawful to overlook any common good or support any act of mischief in any situation, even if you have no specific evidence from the script, consensus, or analogy.’<sup>66</sup>

### **Imam al-Qarafi and ‘Classification of the Prophetic Actions’**

Shihabuddin al-Qarafi (d.684 AH/1285 CE) contributed to the theory of *maqāṣid*, as we know it today, by differentiating between different actions taken by the Prophet based on the ‘intents’ of the Prophet (peace be upon him) himself. He writes in his ‘*al-Furūq' (The Differences)*:

There is a difference between the Prophetic actions as a conveyer of the divine message, a judge, and a leader ... The implication in the law is that what he says or does as a conveyer goes as a general and permanent ruling ... [However,] decisions related to the military, public

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63 Ibid. p 265.

64 al-Izz Ibn Abdul-Salam, *Maqasid Al-Sawm*, ed. Iyad al-Tabba`, 2nd ed. (Beirut: Dar al-Fikr, 1995),

65 al-Izz Ibn Abdul-Salam, *Qawaid Al-Ahkam Fi Masalih Al-Anam* (Beirut: Dar al-Nashr, without date) vol.2, p. 221.

66 Ibid. vol.2, p. 160.

trust, ... appointing judges and governors, distributing spoils of war, and signing treaties ... are specific to leaders.’<sup>67</sup>

Thus, al-Qarafi defined a new meaning for ‘*al-maqāṣid*’ as the purposes/intents of the Prophet in his actions. Later, Ibn Ashur (d. 1976 CE) developed al-Qarafi’s above ‘difference’ and included it into his definition of *al-maqāṣid*.<sup>68</sup> Al-Qarafi also wrote about ‘opening the means to achieving good ends,’ which is another significant expansion of the theory of *maqāṣid*. Al-Qarafi proposed that while means that lead to prohibited ends should be blocked, means that lead to lawful ends should be opened.<sup>69</sup> Thus, he did not restrict themselves to the negative side of ‘blocking the means’ method. More details are presented later.

### **Imam Ibn al-Qayyim and ‘What Shariah is all About’**

Shamsuddin Ibn al-Qayyim (d. 748 AH/1347 CE) was a student of the renowned Imam Ahmad Ibn Taymiyah (d. 728 AH/ 1328 CE). Ibn al-Qayyim’s contribution to the theory of *maqāṣid* was through a very detailed critique of what is called legal tricks (*al-ḥīyal al-fiqhīyah*), based on the fact that they contradict with *maqāṣid*. A trick is a prohibited transaction, such as usury or bribery, which takes an outlook of a legal transaction, such as a sale or a gift, and so on. Ibn al-Qayyim wrote:

Legal tricks are forbidden acts of mischief because, first, they go against the wisdom of the Legislator, and, secondly, because they have forbidden *maqāṣid*. The person whose intention is usury is committing a sin, even if the outlook of the fake transaction, which he used in the trick, is lawful. That person did not have a sincere intention to carry out the lawful transaction, but rather, the forbidden one. Equally sinful is the person who aims at altering the shares of his inheritors by carrying out a fake sale [to one of them] ... *Sharī‘ah* laws are the cure of our sicknesses because of their realities, not their apparent names and outlooks.

Ibn al-Qayyim summarised his juridical methodology that is based on ‘wisdom and people’s welfare’ with the following strong words:

The Islamic law is all about wisdom and achieving people’s welfare in this life and the afterlife. It is all about justice, mercy, wisdom, and good. Thus, any

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<sup>67</sup> Shihabuddin al-Qarafi, *Al-Furuq (Ma‘a Hawamishih)*, ed. Khalil Mansour (Beirut: Darul Kutub al-‘Ilmiya, 1998) vol.1, p. 357.

<sup>68</sup> Ibn Ashur, *Maqasid Al-Shari‘ah Al-Islamiyah* p 100.

<sup>69</sup> al-Qarafi, *Al-Dhakheerah* vol.1, p. 153. al-Qarafi, *Al-Furuq (Ma‘a Hawamishih)* vol.2, p. 60.

ruling that replaces justice with injustice, mercy with its opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to the Islamic law, even if it is claimed to be so according to some interpretation.<sup>70</sup>

The above paragraph, in my view, represents a very important ‘fundamental rule,’ in the light of which the whole Islamic law should be viewed. It places the *maqāṣid* principles in their natural place as ‘fundamentals’ and a philosophy of the whole law. Imam al-Shatibi expressed this view in clearer terms.

### Imam al-Shatibi and ‘Maqasid as Fundamentals’

Abu Ishaq Al-Shatibi (d. 790 AH/1388 CE). Al-Shatibi used, more or less, the same terminology that al-Juwaini and al-Ghazali developed. However, I argue that in his ‘*al-Muwāfaqāt fī Uṣūl al-Sharī‘ah*’ (*Congruencies in the Fundamentals of the Revealed Law*), al-Shatibi developed the theory of *al-maqāṣid* in the following three substantial ways:

- i. **From ‘unrestricted interests’ to ‘fundamentals of law.’** Before al-Shatibi’s ‘*Muwāfaqāt*,’ *al-maqāṣid* were included in ‘non-restricted interests’ and were never considered as fundamentals (*uṣul*) in their own right, as explained above. Al-Shatibi started his volume on *al-maqāṣid* in *al-Muwāfaqāt* by quoting the Quran to prove that God has purposes in His creation, sending His messengers, and ordaining laws.<sup>71</sup> Hence, he considered *al-maqāṣid* to be the ‘fundamentals of religion, basic rules of the law, and universals of belief’ (*uṣūl al-dīn wa qawā‘id al-sharī‘ah wa kullīyat al-millah*).<sup>72</sup>
- ii. **From ‘wisdoms behind the ruling’ to ‘bases for the ruling.’** Based on the fundamentality and universality of *al-maqāṣid*, al-Shatibi judged that, ‘the universals (*al-kullīyat*) of necessities, needs, and luxuries cannot be overridden by partial rulings (*al-juz‘īyāt*).’<sup>73</sup> This is quite a deviation from traditional fundamentals, even in al-Shatibi’s Maliki

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70 Shamsuddin Ibn al-Qayyim, *I‘lam Al-Muwaqī‘een*, ed. Taha Abdul Rauf Saad (Beirut: Dar Al-Jeel, 1973) vol.1, p. 333.

71 al-Shatibi, *Al-Muwāfaqāt* vol.2, p. 6.

72 Ibid. vol.2, p. 25.

73 Ibid. vol.2, p. 61.

school, which always gave precedence to ‘specific’ partial evidences over ‘general’ or universal evidences.<sup>74</sup> Al-Shatibi also made ‘knowledge of *maqāṣid*’ a necessary condition for the correctness of juridical reasoning on all levels.<sup>75</sup>

- iii. **From ‘uncertainty’ (*ẓannīyah*) to ‘certainty’ (*qaṭʿīyah*).** In order to support the new status that he gave to *al-maqāṣid* amongst the fundamentals, al-Shatibi started his volume on *maqāṣid* by arguing for the ‘certainty’ (*qaṭʿīyah*) of the inductive process that he used to conclude *al-maqāṣid*, based on the high number of evidences he considered,<sup>76</sup> which is also a deviation from the popular ‘Greek-philosophy-based’ arguments against the validity and ‘certainty’ of inductive methods.

Al-Shatibi’s book became the standard textbook on *maqāṣid al-sharīʿah* in Islamic scholarship until the twentieth century, but his proposal to present *maqāṣid* as ‘fundamentals of the *sharīʿah*,’ as the title of his book suggests, was not as widely accepted.

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74 El-Raisouni, *Nazariyat Al-Maqasid* p169.

75 al-Shatibi, *Al-Muwafaqat* vol.4, p. 229.

76 Ibid. vol.2, p. 6.

### 3. Maqāṣid for Current Islamic Renewal

*Maqāṣid* is one of today's most important intellectual means and methodologies for Islamic reform and renewal. It is a methodology from 'within' the Islamic scholarship that addresses the Islamic mind and Islamic concerns. The following sections address this topic from various points of view.

First, current research in maqasid is introduced as a project for 'development' and 'human rights,' in the contemporary sense. Secondly, maqasid is introduced as basis for new opinions in the Islamic law. Thus, the important idea of 'differentiating between means and ends' is explained next. Then, the importance of maqasid for the re-Interpretation of the Quran and prophetic traditions is illustrated. The juridical method of 'opening the means' as an extension of the classic method of 'blocking the means' is introduced. The 'universality' of the Islamic law is explained next, and finally, maqasid is introduced as common grounds between schools of Islamic law and even different systems of faith.

#### Maqasid as a Project for 'Development' and 'Human Rights'

Contemporary jurists/scholars also developed traditional *maqāṣid* terminology in today's language, despite some jurists' rejection of the idea of 'contemporarisation' of *maqāṣid* terminology.<sup>77</sup> The following are some examples.

Traditionally, the 'preservation of offspring' is one of the necessities that Islamic law aimed to achieve. Al-Amiri had expressed it, in his early attempt to outline a theory of necessary purposes, in terms of 'punishments for breaching decency.'<sup>78</sup> Al-Juwaini developed al-Amiri's 'theory of punishments' (*mazājjir*) into a 'theory of protection', as mentioned above. Thus, 'punishment for breaching decency' was expressed by al-Juwaini as, 'protection for private parts.'<sup>79</sup> It was Abu Hamid al-Ghazali who coined

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<sup>77</sup> For example, Sheikh Ali Jumah, Mufti of Egypt (Oral Discussion, Cairo, Egypt, December 2005).

<sup>78</sup> al-Amiri, *Al-Islam* p 125.

<sup>79</sup> al-Juwaini, *Al-Burhan* vol.2, p. 747.

the term ‘preservation of offspring’ as a purpose of the Islamic law at the level of necessity.<sup>80</sup> Al-Shatibi followed al-Ghazali’s terminology, as explained above.

However, in the twentieth century, writers on *maqāṣid*, significantly, developed ‘preservation of offspring’ into a family-orientated theory. Ibn Ashur, for example, made ‘care for the family’ to be a *maqṣid* of the Islamic law, in its own right. In his monograph ‘*The Social System in Islam*,’ Ibn Ashur elaborated on family-related purposes and moral values in the Islamic law.<sup>81</sup> Whether we consider Ibn Ashur’s contribution to be a sort of re-interpretation of the theory of ‘preservation of offspring,’ or a replacement of the same theory with a new one, it is clear that Ibn Ashur’s contribution had opened the door for contemporary scholars to develop the theory of *maqāṣid* in new ways. The orientation of the new views is neither al-Amiri’s theory of ‘punishment’ nor al-Ghazali’s concept of ‘preservation,’ but rather the concepts of ‘value’ and ‘system,’ to use Ibn Ashur’s terminology. Nevertheless, some contemporary scholars are against the idea of incorporating new concepts, such as justice and freedom, in *maqāṣid*. They prefer to say that these concepts are implicitly included in the classic theory.<sup>82</sup>

Similarly, the ‘preservation of mind,’ which until recently was restricted to the purpose of the prohibition of intoxicants in Islam, is currently evolving to include ‘propagation of scientific thinking,’ ‘travelling to seek knowledge,’ ‘suppressing the herd mentality,’ and ‘avoiding brain drain.’<sup>83</sup>

Likewise, the ‘preservation of honour’ and the ‘preservation of the soul’ were at the level of ‘necessities’ in al-Ghazali’s and al-Shatibi’s terms. However, these expressions were also preceded by al-Amiri’s ‘punishment’ for ‘breaching honour’ and al-Juwaini’s ‘protection of honour.’ Honour (*Al-ʿird*) has been a central concept in the Arabic culture since the pre-Islamic period. Pre-Islamic poetry narrates how Antarah, the famous pre-Islamic poet, fought the Sons of Damdam for ‘defaming his honour.’ In the hadith, the Prophet described the ‘blood, money, and honour of every Muslim’ as ‘sanctuary’ (*ḥarām*) that is not to be breached.<sup>84</sup> Recently, however, the expression of ‘preservation of honour’ is gradually being replaced in the Islamic law

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80 al-Ghazali, *Al-Mustasfā* p 258.

81 Ibn Ashur, *Uṣul Al-Nizam Al-Ijtimaʿi Fil Islam* p206.

82 For example, Sheikh Ali Jumah, Mufti of Egypt (Oral Discussion, Cairo, Egypt, December 2005).

83 Auda, *Fiqh Al-Maqasid*, p. 20.

84 al-Bukhari, *Al-Sahih* vol.1, p. 37.

literature with ‘preservation of human dignity’ and even the ‘protection of human rights’ as a purpose of the Islamic law in its own right.<sup>85</sup>

The compatibility of human rights and Islam is a topic of a heated debate, both in Islamic and international circles.<sup>86</sup> A Universal Islamic Declaration of Human Rights was announced in 1981 by a large number of scholars who represented various Islamic entities at the United Nations Educational, Scientific and Cultural Organisation (UNESCO). Supported by a number of Islamic scripts mentioned in its references section, the Islamic Declaration essentially includes the entire list of basic rights that were mentioned in the Universal Declaration of Human Rights (UDHR), such as rights to life, freedom, equality, justice, fair trial, protection against torture, asylum, freedom of belief and speech, free association, education, and freedom of mobility.<sup>87</sup>

However, some members of the United Nations High Commission for Human Rights (UNHCHR) expressed concerns over the Islamic Declaration of human rights because they think that it ‘gravely threatens the inter-cultural consensus on which the international human rights instruments were based.’<sup>88</sup> Other members believe that the declaration ‘adds new positive dimensions to human rights, since, unlike international instruments, it attributes them to a divine source thereby adding a new moral motivation for complying with them.’<sup>89</sup> A *maqāṣid*-based approach to the issue of human rights supports the latter opinion, while addressing the concerns of the former, especially if *al-maqāṣid* terminology is to be ‘contemporarised’ and made to play a more ‘fundamental’ role in juridical reasoning, as this thesis is suggesting in Chapter Six. The topic of human rights and *maqāṣid* requires further research in order to

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85 Yusuf al-Qaradawi, *Madkhal Le-Dirasat Al-Shari'ah Al-Islamiyah* (Cairo: Wahba, 1997) p. 101, Atiyah, *Nahwa Ta'fil Maqasid Al-Shari'ah* p. 170, Ahmad El-Raisouni, Mohammad al-Zuhaili, and Mohammad O. Shabeer, ‘Huquq Al-Insan Mihwar Maqasid Al-Shariah,’ *Kitab al-Ummah*, no. 87 (2002), Mohamed El-Awa, *Al-Fiqh Al-Islami Fi Tariq Al-Tajdeed* (Cairo: al-Maktab al-Islami, 1998) p. 195.

86 Mohammed Osman Salih, ‘Al-Islam Huwa Nizam Shamil Lihimayat Wa Ta'ziz Huqouq Al-Insan’ (paper presented at the International Conference on Islam and Human Rights, Khartoum, 2006).

87 University of Toronto Bora Laskin Law Library, *International Protection of Human Rights* (2004 [cited Jan. 15<sup>th</sup>, 2005]); available from <http://www.law-lib.utoronto.ca/resguide/humrtsgu.htm>.

88 United Nations High Commission for Human Rights UNHCHR, *Specific Human Rights Issues* (July, 2003 [cited Feb. 1<sup>st</sup>, 2005]); available from [http://www.unhchr.cAH/Huridocda/Huridocda.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.NGO.15.En](http://www.unhchr.cAH/Huridocda/Huridocda.nsf/(Symbol)/E.CN.4.Sub.2.2003.NGO.15.En).

89 Ibid.

resolve the ‘inconsistencies’ that some researchers have suggested in terms of the application level.<sup>90</sup>

In the same way, the ‘preservation of religion,’ in al-Ghazali’s and al-Shatibi’s terminology, had its roots in al-Amiri’s ‘punishment for giving up true faith.’<sup>91</sup> Recently, however, the same theory for that purpose of the Islamic Law has been re-interpreted to mean a dramatically different concept, which is ‘freedom of faiths,’ to use Ibn Ashur’s words,<sup>92</sup> or ‘freedom of belief,’ in other contemporary expressions.<sup>93</sup> Presenters of these views often quote the Quranic verse, ‘No compulsion in matters of religion,’<sup>94</sup> as the fundamental principle, rather than what is popularly called ‘punishment for apostasy’ (*ḥadd al-riddah*) that used to be mentioned in traditional references in the context of the ‘preservation of religion.’

Finally, al-Ghazali’s ‘preservation of wealth,’ along with al-Amiri’s ‘punishments for theft’ and al-Juwaini’s ‘protection of money’ had recently witnessed an evolution into familiar socio-economic terminology, such as ‘social assistance,’ ‘economic development,’ ‘flow of money,’ ‘wellbeing of society,’ and ‘diminishing the difference between economic levels.’<sup>95</sup> This development enables utilising *maqāṣid al-Sharī‘ah* to encourage economic growth, which is much-needed in most countries with majority of Muslims.

‘Human development,’ the development concept that the UN Development Reports adopt, is much more comprehensive than economic growth. According to the latest United Nations Development Program (UNDP) reports, most countries with a Muslim majority rank lower than the ‘developed’ range of the comprehensive Human Development Index (HDI). This index is calculated using more than 200 indexes, including measures for political participation, literacy, enrolment in education, life expectancy, access to clean water, employment, standard of living, and gender equality. Nevertheless, some countries with majority of Muslims, especially oil-rich

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90 Salih, ‘Al-Islam Huwa Nizam Shamil Lihimayat Wa Ta‘ziz Huqouq Al-Insan’. Murad Hoffman, *Al-Islam ‘Am Al-Fen (Islam in the Year Two Thousand)*, 1st ed. (Cairo: Maktabat al-Shourouk, 1995) p.56.

91 al-Amiri, *Al-Islam* p. 125.

92 Ibn Ashur, *Maqasid Al-Shari‘ah Al-Islamiyah* p. 292.

93 Atiyah, *Nahwa Taf‘il Maqasid Al-Shari‘ah* p 171, El-Raisouni, al-Zuhaili, and Shabeer, ‘Huqouq Al-Insan Mihwar Maqasid Al-Shariah.’

94 Quran, Surat al-Baqarah, 2:256. This is my translation for ‘*lā ikrāha fī al-dīn*.’ I understand that it means that there are no compulsion in any matter of the religion, rather than merely ‘in religion,’ as in other translations (for example, Yusuf Ali’s and Picktall’s).

95 Quttub Sano, *Qiraat Ma‘rifiyah Fi Al-Fikr Al-Usuli*, 1 ed. (Kuala Lumpur: Dar al-Tajdeed, 2005) p.157.

Arab states, show ‘the worst disparities,’ the UN Report says, between their levels of national income and measures for gender equality, which includes women’s political participation, economic participation, and power over resources.<sup>96</sup>

In addition to Muslim minorities who live in developed countries, a few countries with Muslim majorities were ranked under ‘high human development,’ such as Brunei, Qatar, and the United Arab Emirates. However, the above groups collectively represent less than one percent of Muslims. The bottom of the HDI list includes Yemen, Nigeria, Mauritania, Djibouti, Gambia, Senegal, Guinea, Ivory Cost, Mali, and Niger (which collectively represent around 10 percent of Muslims).

I suggest ‘human development’ to be a prime expression of *maṣlahah* (public interest) in our time, which *maqāṣid al-sharī‘ah* should aim to realise through the Islamic law. Thus, the realisation of this *maqāṣid* could be empirically measured via the UN ‘human development targets,’ according to current scientific standards. Similar to the area of human rights, the area of human development requires more research from a *maqāṣid* perspective. Nevertheless, the evolution of ‘human development’ into ‘purposes of Islamic law’ gives ‘human development targets’ a firm base in the Islamic world, instead of presenting them, according to some ‘neo-literalists,’ as ‘tools for western domination.’<sup>97</sup>

### **Maqasid as Basis for New Ijtihad**

In Islamic juridical theory, there is a differentiation between opposition or disagreement (*ta‘ārūḍ* or *ikhtilāf*) and contradiction (*tanāquḍ* or *ta‘anud*) of evidences (verses or narrations).<sup>98</sup> Contradiction is defined as ‘a clear logical conclusion of truth and falsehood in the same aspect’ (*taqāsum al-ṣidqī wal-kadhib*).<sup>99</sup> On the other hand, conflict or disagreement between evidences is defined as an ‘apparent contradiction between evidences in the mind of the scholar’ (*ta‘ārūḍun fī dhīhn al-mujtahid*).<sup>100</sup> This means that two seemingly disagreeing (*muta‘āriḍ*) evidences are not necessarily in

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96 United Nation Development Programme UNDP, *Annual Report 2004* (2004 [cited Feb. 5th, 2005]); available from <http://www.undp.org/annualreports/2004/english>.

97 Mohammad Shakir al-Sharif, *Haqiqat Al-Dimuqratiyah* (Riyadh: Dar al-Watan, 1992), p.3, Mohammad Ali Mufti, *Naqd Al-Judhur Al-Fiqriyyah Lil-Dimoqratiyyah Al-Gharbiyyah*. Riyadh: al-Muntada al-Islami and Majallat al-Bayan, 2002, p.91.

98 al-Ghazaly, *Al-Mustasfā Fi Usul Al-Fiqh* p279, al-Shatibi, *Al-Muwafaqat* vol.4, p.129, Ibn Taymiyah, *Kutub Wa Rasa’il Wa Fatwa* vol.19, p.131.

99 al-Ghazaly, *Maqasid Al-Falasifah* p.62.

100 Ibn Taymiyah, *Kutub Wa Rasa’il Wa Fatwa* vol.19, p.131.

definite non-resolvable contradiction. It is only the perception of the jurist that they are in non-resolvable contradiction which can occur as a result of some missing part of the narration or, more likely, missing information regarding the evidence's timing, place, circumstances, or other conditions.<sup>101</sup>

However, usually, one of the 'opposing' narrations is rendered inaccurate and rejected or cancelled. This method, which is called 'abrogation' (*al-naskh*) suggests that the later evidence, chronologically speaking, should 'abrogate' the former. This means that when verses disagree, the verse that is revealed last is considered to be an abrogating evidence (*nāsikh*) and others to be abrogated (*mansūkh*). Similarly, when prophetic narrations disagree, the narration that has a later date, if dates are known or could be concluded, should abrogate all other narrations. Therefore, a large number of evidences are cancelled, one way or the other, for no good reason other than that the jurists' failing to understand how they could fit them in a unified perceptual framework.

The concept of abrogation itself does not have supporting evidence from the words attributed to the Prophet in traditional collections of hadith.<sup>102</sup> The concept of abrogation always appears within the commentaries given by companions or other narrators, commenting on what appears to be in disagreement with their own understanding of the related issues. According to traditional exegeses, the principle of abrogation does have evidence from the Quran, although the interpretations of the related verses are subject to a difference of opinion.<sup>103</sup>

For example, Abu Hurairah narrated, according to Bukhari: 'Bad omens are in women, animals, and houses.'<sup>104</sup> However, (also according to Bukhari) Aisha narrated that the Prophet had said: 'People during the Days of Ignorance (*jāhiliyyah*) used to say that bad omens are in women, animals, and houses.'<sup>105</sup> These two 'authentic'

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101 Abdul-Aziz al-Bukhari, *Kashf Al-Asrar* (Beirut: Dar al-Kutub al-ilmīyah, 1997) vol.3, p.77.

102 Etimologically, abrogation (*naskh*) is derived from the root *na sa kha*. I carried out a survey on this root and all its possible derivations in a large number of today's popular collections of hadith, including, Al-Bukhari, Muslim, Al-Tirmithi, Al-Nasa'i, Abu Dawud, Ibn Majah, Ahmad, Malik, Al-Darami, Al-Mustadrak, Ibn Hibban, Ibn Khuzaimah, Al-Bayhaqi, Al-Darqutni, Ibn Abi Shaybah, and Abd al-Razzaq. I found no valid hadith attributed to the Prophet that contains any of these derivations of the root *na sa kha*. I found about 40 instances of 'abrogations' mentioned in the above collections, which were all based on one of the narrators' opinions or commentaries, rather than any of the texts of the hadith.

103 For example, refer to: al-Razi, *Al-Tafsir Al-Kabir* vol.3, p.204, al-Fadl Ibn al-Hussain al-Tubrusi, *Majma' Al-Bayan Fi Tafsir Al-Quran* (Beirut: Dar al-ulum, 2005) vol.1, p.406, Nada, *Al-Naskh Fi Al-Quran* p.25.

104 al-Bukhari, *Al-Sahih* p69.

105 Ibid.

narrations are thought to be in contradiction. It is telling that most commentators rejected Aisha's narration, even though other 'authentic' narrations support it. Moreover, it is obvious that Abu Hurairah, somehow, missed a part of the complete narration.<sup>106</sup> However, Ibn al-Arabi, for example, commented on Aisha's rejection of the above hadith as follows: 'This is nonsense (*qawlun sāqit*). This is rejection of a clear and authentic narration that is narrated through trusted narrators.'<sup>107</sup> This example shows the implicit bias in the process of 'resolving contradictions.'

Another revealing example is verse 9:5 of the Quran, which has come to be named, 'The Verse of the Sword' (*āyat al-saif*). It states: 'But when the forbidden months are past, then slay the pagans wherever you find them, and seize them.'<sup>108</sup> The historical context of the verse, in the ninth year of *hijrah*, is that of a war between Muslims and the pagans of Mecca. The thematic context of the verse in chapter nine is also the context of the same war, which the chapter is addressing. However, the verse was taken out of its thematic and historical contexts and claimed to have defined the ruling between Muslims and non-Muslims in every place, time, and circumstance. Hence, it was perceived to be in disagreement with more than two hundred other verses of the Quran, all calling for dialogue, freedom of belief, forgiveness, peace, and even patience. Conciliation between these different evidences, somehow, was not an option. To solve the disagreement, based on the method of abrogation, most exegetes concluded that this verse (9:5), which was revealed towards the end of the Prophet's life, abrogated each and every 'contradicting' verse that was revealed before it.

Therefore, the following verses were considered abrogated: 'no compulsion in the religion;' 'forgive them, for God loves those who do good to people;' 'repel evil with that which is best;' 'so patiently persevere;' 'do not argue with the People of the Book except with means that are best;' and '(say:) You have your religion and I have my religion.'<sup>109</sup>

Likewise, a large number of prophetic traditions that legitimise peace treaties and multi-cultural co-existence, to use contemporary terms, were also abrogated. One such tradition is 'The Scroll of Medina' (*ṣaḥīfat al-madīnah*), in which the Prophet and the Jews of Medina wrote a 'covenant' that defined the relationship between

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<sup>106</sup> Auda, *Fiqh Al-Maqasid* p106.

<sup>107</sup> Abu Bakr al-Maliki Ibn al-Arabi, *ʿAridat Al-Ahwadhi* (Cairo: Dar al-Wahy al-Mohammadi, without date) vol.10, p.264.

<sup>108</sup> Trans. M. Asad.

<sup>109</sup> Verses 2:256, 6:13, 23:96, 30:60, 41:46, 109:6, respectively. (trans. M. Asad)

Muslims and Jews living in Medina. The scroll stated that, ‘Muslims and Jews are one nation (*ummah*), with Muslims having their own religion and Jews having their own religion.’<sup>110</sup> Classic and neo-traditional commentators on the *ṣaḥīfah* render it ‘abrogated,’ based on the verse of The Sword and other similar verses.<sup>111</sup> Seeing all the above scripts and narrations in terms of the single dimension of peace versus war might imply a contradiction, in which the ‘final truth’ has to ‘belong’ to either peace or war. The result will have to be an unreasonable fixed choice between peace and war, for every place, time, and circumstance.

What added to the problem is that the number of cases of abrogation claimed by the students of the companions (*al-tābi‘īn*) is higher than the cases claimed by the companions themselves.<sup>112</sup> After the first Islamic century, one could furthermore notice that jurists from the developing schools of thought began claiming many new cases of abrogation, which were never claimed by the students of the companions (*tābi‘īn*). Thus, abrogation became a method of invalidating opinions or narrations endorsed by rival schools of law. Abu al-Hassan al-Karkhi (d. 951 CE), for one example, writes: ‘The fundamental rule is: Every Quranic verse that is different from the opinion of the jurists in our school is either taken out of context or abrogated.’<sup>113</sup> Therefore, it is not unusual in the *fiqhī* literature to find a certain ruling to be abrogating (*nāsikh*) according to one school and abrogated (*mansūkh*) according to another. This arbitrary use of the method of abrogation has exacerbated the problem of lack of multi-dimensional interpretations of the evidences.

A *maqāsidī* approach, could offer a solution for the dilemmas of opposing evidences. The following are typical examples from the classic literature. It will be shown that the ‘opposition’ claimed could be resolved via a consideration of the *maqasid*.

1. There is a large number of opposing evidences related to different ways of performing ‘acts of worship’ (*‘ibādāt*), all attributed to the Prophet. These opposing narrations have frequently caused heated debates and rifts within Muslim communities. However, understanding these narrations within a *maqasid* of magnanimity (*taīsīr*) entails that the Prophet did carry out these

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<sup>110</sup> Burhan Zuraiq, *Al-Sahifah: Mithaq Al-Rasoul*, 1st ed. (Damascus: Dar al-Numair and Dar Ma‘ad, 1996) p. 353.

<sup>111</sup> Ibid. p. 216.

<sup>112</sup> Based on the same survey of the books of hadith that I carried out, as mentioned above.

<sup>113</sup> al-Alwani, ‘Maqasid Al-Shari‘ah,’ p.89.

rituals in various ways, suggesting flexibility in such matters.<sup>114</sup> Examples of these acts of worship are the different ways of standing and moving during prayers,<sup>115</sup> concluding prayers (*tashahhud*),<sup>116</sup> compensating prostration (*sujūd al-sahū*),<sup>117</sup> reciting ‘God is Great’ (*takbīr*) during *Ṣalāt* prayers,<sup>118</sup> making up for breaking one’s fasting in Ramadan,<sup>119</sup> details of pilgrimage, and so on.

2. There is a number of opposing narrations that address matters related to customs (*al-ʿurf*), which were also classified as ‘in opposition.’ However, these narrations could all be interpreted through the *maqṣid* of ‘universality of the law.’<sup>120</sup> In other words, differences between these narrations should be understood as differences in the customs for which the various narrations attempted to show consideration, rather than ‘contradiction.’ One example is the two narrations, both attributed to Aisha, one of which forbids ‘any woman’ from marriage without the consent of her guardian, while the other allows previously married women to make their own independent choices on marriage.<sup>121</sup> It is also narrated that Aisha, the narrator of the two narrations herself, did not apply the ‘condition’ of consent in some cases.<sup>122</sup> Hanafis explained that, ‘the (Arabic) custom goes that a woman who marries without her guardian’s consent is shameless.’<sup>123</sup> Understanding both narrations in the context of considering customs based on the law’s ‘universality’ resolves the contradiction and provides flexibility in carrying out marriage ceremonies according to different customs in different places and times.
3. A number of narrations were classified under cases of abrogation, even though they were, according to some jurists, cases of gradual application of rulings. The purpose behind the gradual applications of rulings on a large

<sup>114</sup> As suggested by a number of jurists. For example: al-Shafie, *Al-Risalah* p272-75, Mohammad al-Zurqani, *Sharh Al-Zurqani ‘Ala Muwatta Al-Imam Malik*. 1st ed. Beirut: Dar al-Kutub al-ʿilmiah, without date vol.1, p.229

<sup>115</sup> al-Siwasi, *Sharh Fath Al-Qadir* vol.1, p.311, al-Sarkhasi, *Usul Al-Sarkhasi* vol.1, p.12, al-Kasani, *Badaiʿ Al-Sanaiʿ* vol.1, p.207.

<sup>116</sup> al-Shafie, *Al-Risalah* p272-75.

<sup>117</sup> Mohammad Ibn ʿissa al-Tirmidhi, *Al-Jamiʿ Al-Sahih Sunan a-Tirmidhi*, ed. Ahmad M. Shakir (Beirut: Dar Ihya al-Turath al-ʿarabi, without date) vol.2, p.275.

<sup>118</sup> al-Nawawi, *Al-Majmouʿ* vol.4, p.145.

<sup>119</sup> al-Ghazali, *Al-Mustasfa* vol.1, p.172-74.

<sup>120</sup> Ibn Ashur, *Maqasid Al-Shariʿah Al-Islamiyah* p 236.

<sup>121</sup> Ibn Nujaim, *Al-Bahr Al-Raʿiq* vol.3, p.117, Al-Mirghiyani, *Al-Hidayah Sharh Bidayat Al-Mubtadi* vol.1, p.197.

<sup>122</sup> al-Siwasi, *Sharh Fath Al-Qadir* vol.3, p.258.

<sup>123</sup> Ibn Abidin, *Hashiyat Radd Al-Muhtar* vol.3, p.55.

scale is, ‘facilitating the change that the law is bringing to society’s deep-rooted habits.’<sup>124</sup> Thus, ‘opposing narrations’ regarding the prohibition of liquor and usury, and the performance of prayers and fasting, should be understood in terms in the prophetic ‘tradition’ of gradual application of high ideals in any given society.

4. A number of opposing narrations are considered ‘contradictory’ because their statements entail different rulings for similar cases. However, taking into account that these prophetic statements addressed different people (companions) could ‘resolve the opposition.’ In these cases, the juridical *maqsid* of ‘fulfilling the best interest of people’ would be the key to interpreting these narrations based on the differences between these companions. For example, a few narrations reported that the Prophet told a divorcee that she loses her custody of her children if she gets married.<sup>125</sup> Yet, a number of other ‘opposing’ narrations entail that divorcees could keep their children in their custody after they get married. The opposing narrations included Umm Salamah’s case; Umm Salamah kept custody of her children after she married the Prophet.<sup>126</sup> Thus, relying on the first group of narrations, most schools of law concluded that custody is automatically transferred to the father if the mother gets married. They based their elimination of the second group of narrations on the fact that the first group was ‘more authentic,’ being narrated by Bukhari and Ibn Hanbal.<sup>127</sup> Ibn Hazm, on the other hand, accepted the second group of narrations and rejected the first group based on his suspicion of one of the narrator’s capability of memorisation.<sup>128</sup> However, after citing both opinions, al-Sanaani commented: ‘The children should stay with the parent who fulfils their best interest. If the mother is the better caregiver and will follow up on the children diligently, then she should have priority over them ... The

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<sup>124</sup> Mohammad al-Ghazaly, *Nazarat Fi Al-Qur’an* (Cairo: Nahdat Misr, 2002) p.194.

<sup>125</sup> al-Naisaburi, *Al-Mustadrak ‘Ala Al-Sahihayn* vol.2, p.255.

<sup>126</sup> Ibn Rushd, *Bedāyat Al-Mujtahid* vol.2, p.43.

<sup>127</sup> Mohammad Ibn Ismail al-Sanaani, *Subul Al-Salam Sharh Bulugh Al-Maram Min Adilat Al-Ahkam*, ed. Mohammad Abdul Aziz Al-Khouli, th ed. (Beirut: Dar Phya’ al-Turath al-‘arabi, 1379AH) vol.3, p.227.

<sup>128</sup> Ibid.

children have to be in the custody of the more capable parent, and the Law cannot possibly judge otherwise.<sup>129</sup>

### **Differentiating between Means and Ends**

Mohammad al-Ghazaly differentiated between ‘means’ (*al-wasāʾil*) and ‘ends’ (*al-ahdāf*). He allowed the ‘expiry’ (*intihāʾ*) of the former and not the latter. Al-Ghazaly mentioned the system of spoils of war, despite the fact that it is mentioned explicitly in the Quran, as an example of these ‘changeable means.’<sup>130</sup> Recently, Yusuf al-Qaradawi and Faisal Mawlawi, elaborated on the importance of the ‘differentiation between means and ends’ during the deliberations of the European Council for Fatwa and Research. They, both, applied the same concept to the visual citation of the *hilāl* (Ramadan new moon) being mere means for knowing the start of the month rather than an end in its own right. Hence, they concluded that pure calculations shall be today’s means of defining the start of the month.<sup>131</sup> Yusuf al-Qaradawi had applied the same concept to Muslim women’s garment (*jilbāb*), amongst other things, which he viewed as mere means for achieving the objective of modesty.<sup>132</sup>

In my view, ‘differentiating between means and ends’ opens a whole lot of possibilities for radically new opinions in the Islamic law. For example, Taha al-Alwani proposed a ‘project for reform’ in his ‘*Issues in Contemporary Islamic Thought*,’ in which he elaborated on his version of the method of ‘differentiation between means and ends.’ The following illustrates how al-Alwani applied this approach to the issue of gender equality.

The Qur’an transported the people of those times to the realm of faith in absolute gender equality. This single article of faith, perhaps more than any other, represented a revolution no less significant than Islam’s condemnation of idolatry...In the case of early Muslim society, given the long established customs, attitudes and mores of pre-Islamic Arabia, it was necessary to implement such changes in stages and to make allowances for society’s capacity to adjust itself accordingly ... By establishing a role for a woman in

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<sup>129</sup> Ibid.

<sup>130</sup> Al-Ghazaly, *Al-Sunnah Al-Nabawiyah* p.161.

<sup>131</sup> Oral Discussion, Sarajevo, Bosnia, May 2007, 18<sup>th</sup> regular session for the European Council for Fatwa and Research.

<sup>132</sup> Refer to Qaradawi’s article in: Mohamed Saleem El-Awa, ed, *Maqasid Al-Shariah Al-Islamiya: Dirasat Fi Qadaya Al-Manhaj Wa Qadaya Al-Tatbeeq* (Cairo: al-Furqan Islamic Heritage Foundation, al-Maqasid Research Centre, 2006) p.117-121.

the witnessing of transactions, even though at the time of revelation they had little to do with such matters, the Qur'an seeks to give concrete form to the idea of woman as participant ... The objective is to end the traditional perception of women by including them, 'among such as are acceptable to you as witness' ... the matter of witnessing served merely as a means to an end or as a practical way of establishing the concept of gender equality. In their interpretations of 'mistake' and 'remind', Qur'anic commentators have approached the issue from a perspective based on the assumption that the division of testimony for women into halves is somehow connected with women's inherent inequality to men. This idea has been shared by classical and modern commentators alike, so that generations of Muslims, guided only by *taqlid* (imitation), have continued to perpetuate this faulty understanding. Certainly, the attitudes engendered by such a misunderstanding have spread far beyond the legal sphere ...<sup>133</sup>

A similar expression is Ayatollah Mahdi Shamsuddin's recommendation for today's jurists to take a 'dynamic' approach to the scripts, and 'not to look at every script as absolute and universal legislation, open their minds to the possibility of "relative" legislation for specific circumstances, and not to judge narrations with missing contexts as absolute in the dimensions of time, space, situations, and people.'<sup>134</sup> He further clarifies that he is 'inclined to this understanding but would not base (any rulings) on it for the time being.' Nevertheless, he stresses the need for this approach for rulings related to women, financial matters, and *jihād*.<sup>135</sup> Fathi Osman, for another example, 'considered the practical considerations' that rendered a woman's testimony to be less than a man's, as mentioned in verse 2:282. Thus, Osman 're-interpreted' the verse to be a function to these practical considerations, in a way similar to al-Alwani's way mentioned above.<sup>136</sup> Hassan al-Turabi holds the same view regarding many rulings related, again, to women and their daily-life practices and attires.<sup>137</sup> Rouget Garoudi's expression of this approach was to 'divide the scripts into a section that could be historicised,' such as, yet again, 'rulings related to women,' and another section that 'represents the eternal value in the revealed message.'<sup>138</sup> Similarly, Abdul-Karim Soroush suggested that the scripts should be 'divided into two parts,

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133 Taha Jabir al-Alwani. *Issues in Contemporary Islamic Thought*. London-Washington: International Institute of Islamic Thought (IIIT), 2005, p.164-166.

134 Quotes are his. Shamsuddin, *Al-Ijtihad Wal-Tajdid Fi Al-Fiqh Al-Islami* p128.

135 Ibid. p.129.

136 El-Affendi, ed, *Rethinking Islam* p45.

137 Hassan al-Turabi, *Emancipation of Women: An Islamic Perspective*, 2nd ed. (London: Muslim Information Centre, 2000) p.29. Also, oral discussion, Khartoum, Sudan, August 2006.

138 Roger Garaudy, *Al-Islam Wal Qarn Al-Wahid Wal Ushroon: Shurut Nahdat Al-Muslimeen*, trans. Kamal Jadallah (Cairo: al-Dar al-Alamiyah lil Kutub wal Nashr, 1999) pp.70, 119.

essentials and accidentals, accidentals being functions of the cultural, social, and historical environment of the delivery of the main message.’<sup>139</sup> Other similar views regarding the prophetic traditions included Mohammad Shahrur’s, who argued that some prophetic traditions in the transactional law are ‘not to be considered Islamic law, but rather a civil law, subject to social circumstances, that the Prophet practiced organising society in the area of permissibility, in order to build the Arabic State and Arabic society of the seventh century,’ and thus, ‘could never be eternal, even if it were true one hundred percent and authentic one hundred percent.’<sup>140</sup>

It is important to note here that some researchers and writers extend the above consideration of historical conditions into what is called the ‘historicisation’ of Islamic scripts, which is the abrogation or cancellation of their ‘authority’ *in toto*. This ‘historicist’ approach suggests that our ideas about texts, cultures and events are totally a function of their position in their original historical context as well as their later historical developments.<sup>141</sup> Applying this idea, borrowed from literature studies, to the Quran entails that the Quranic script is a ‘cultural product’ of the culture that produced it, as claimed by some writers.<sup>142</sup>

Therefore, it is claimed, the Quran would become a ‘historic document’ that is only helpful in learning about a specific historic community that existed in the prophetic era.<sup>143</sup> Haida Moghissi, further, claims that ‘the *sharī‘ah* is not compatible with the principle of equality of human beings.’<sup>144</sup> For her, ‘no amount of twisting and bending can reconcile the Quranic injunctions and instructions about women’s rights and obligations with the idea of gender equality.’<sup>145</sup> Similarly, Ibn Warraq claims that the Islamic human rights scheme shows ‘inadequate support for the principle of freedom.’<sup>146</sup> Thus, for Moosa, Islamic jurisprudence could not be evidence for an ‘ethical vision,’ in the contemporary sense.<sup>147</sup>

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139 Soroush, ‘The Evolution and Devolution of Religious Knowledge,’ p.250.

140 Shahrour, *Nahwa Usul Jadeedah*, p.125.

141 Taylor, ed, *Encyclopedia of Postmodernism* p.178, Friedrich Meinecke, *Historicism: The Rise of a New Historical Outlook*, trans. J. E. Anderson (London: 1972).

142 Abu Zaid, ‘Divine Attributes in the Quran,’ p 199, Arkoun, ‘Rethinking Islam Today,’ p 211.

143 Abu Zaid, *Al-Imam Al-Shafī‘ī* p.209, Moosa, ‘Debts and Burdens,’ p114.

144 Moghissi, *Feminism and Islamic Fundamentalism: The Limits of Postmodern Analysis* p141.

145 Moghissi, *Feminism and Islamic Fundamentalism: The Limits of Postmodern Analysis* p140.

146 Ibn Warraq, ‘Apostasy and Human Rights,’ *Free Inquiry*, Feb/March 2006 without date, p.53.

147 Moosa, ‘Introduction,’ p.42.

However, I think that rendering the Quran ‘unfair’ and ‘immoral’ goes against the very belief in its divine source. Having said that, I also believe that historical events and specific juridical rulings detailed in the Quran, should be understood within their cultural, geographical, and historical context of the message of Islam. The key for this understanding is, again, to differentiate between changeable means and fixed principles and ends. Means could ‘expire,’ as Mohammad al-Ghazaly had put it, while ends and principles are non-changeable. Based on such understanding, Quranic specifics could very well apply universally in every place and time and could very well present an ‘ethical vision’ for today.

### **Maqasid and Thematic Interpretation of the Quran**

The ‘thematic exegesis school’ took steps towards a more purposeful, or *maqāṣidī*, Quranic exegesis. The method of reading the Quranic text in terms of themes, principles, and higher values, is based on a perception of the Quran as a ‘unified whole.’<sup>148</sup> Based on this holistic approach, the small number of verses related to rulings, which are traditionally called the ‘verses of the rulings’ (*āyāt al-aḥkām*), will extend from a few hundred verses to the entire text of the Quran. Chapters and verses addressing faith, prophets’ stories, the hereafter, and nature, will all comprise parts of a holistic picture and, thus, play a role in shaping Islamic juridical rulings. This approach will also allow principles and moral values, which are the main themes behind the Quranic stories and sections on the hereafter, to become juridical basis for the rulings, in addition to the literal traditional methods.

A purpose-oriented approach to the narrations of hadith proceeds from a similar holistic and *maqāṣidī* perception of the Prophet’s life and sayings. Thus, the authenticity of individual narrations that are incoherent with obvious Islamic values and principles would be put into question. If jurists are not able to reconcile the (linguistic) implication of the two narrations, the authentication of one or another of prophetic narrations is ‘based on how much they agree with the principles of the

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<sup>148</sup> al-Turabi, *Al-Tafseer Al-Tawheedi* p20, Jabir, *Al-Maqasid Alkuliyyah* p35.

Quran.’<sup>149</sup> Thus, ‘systematic coherence’ should be added to the conditions of authenticating the content (*matn*) of these narrations.

Finally, a *maqāṣid*-based approach could fill a crucial gap in the narration of hadith, in general, which is the gap of missing contexts. The vast majority of prophetic narrations, in all schools, are composed of one or two sentences or the answer of one or two questions, without elaborating on the historical, political, social, economical, or environmental context of the narration. In some cases, the companion or narrator ends his/her narration by saying: ‘I am not sure whether or not the Prophet said ... because (we were in the context) of ....’ Usually, however, the context and its impact on how the narration is understood and applied are left to the speculation of the narrator or jurist. A ‘holistic picture’ helps in overcoming this lack of information through understanding the general purposes of the law.

### **Interpretation of the Prophetic Intent**

In addition to the above, *al-maqāṣid* or the ‘intents’ of the Prophet, could also be utilised in contextualising narrations. It was explained how al-Qarafi differentiated between the Prophet’s actions ‘as a conveyer of the divine message, a judge, and a leader,’ and suggested that each of these intents has a different ‘implication in the law.’ Ibn Ashur added other types of ‘prophetic intents,’ which is a significant expansion of al-Qarafi’s work.

Ibn Ashur demonstrated the prophetic intents that he proposed via a number of hadith narrations.<sup>150</sup> The following are some examples, according to Ibn Ashur.<sup>151</sup>

1. The intent of legislation. One example is the Prophet’s sermon at the farewell pilgrimage, during which he, reportedly, said: ‘Learn your rituals from me [by seeing me performing them], for I do not know whether I will be performing

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<sup>149</sup> For example: Al-Alwani, ‘Madkhal Ila Fiqh Al-Aqaliyyat (an Introduction to Minorities Jurisprudence)’, p.36, Al-Ghazaly, *Al-Sunnah Al-Nabawiyah* pp.19,125,61, Al-Ghazaly, *Nazaraat Fi Al-Qur’an* p.36, al-Nimr, *Al-Ijtihad* p.147, al-Turabi, *Qadaya Al-Tajdeed* p.157, Yassin Dutton, *The Origins of Islamic Law: The Qur’an, the Muwatta’ and Madinan ‘Amal* (Surrey: Curzon, 1999) p.1, John Makdisi, ‘A Reality Check on Istihsan as a Method of Islamic Legal Reasoning,’ *UCLA Journal of Islamic and Near Eastern Law*, no. 99 (fall/winter) (2003), A. Omotosho, ‘The Problem of Al-Amr in Usul Al-Fiqh’ (Ph.D. diss, University of Edinburgh, 1984), Safi, *Imaal Al-‘Aql* p.130, Shamsuddin, *Al-Ijtihad Wal-Tajdid Fi Al-Fiqh Al-Islami* p.21.

<sup>150</sup> Ibn Ashur, *Maqasid Al-Shari’ah Al-Islamiyah* Chapter 6.

<sup>151</sup> I referred here to Mohamed al-Tahir Mesawi’s translation of Ibn Ashur’s book on maqāṣid: Mohammad al-Tahir Ibn Ashur, *Ibn Ashur-Treatise on Maqasid Al-Shariah*, trans. Mohamed El-Tahir El-Mesawi (London-Washington: International Institute of Islamic Thought (IIIT), 2006).

pilgrimage after this pilgrimage of mine.’ He also said after concluding the same sermon: ‘Let those present inform those who are absent.’ This type of prophetic tradition should be followed exactly.

2. The intent of issuing edicts/*fatwā*. One example is the Prophet’s edicts during his farewell pilgrimage, as well, when a man came to him and said: ‘I sacrificed before throwing the pebbles.’ The Prophet advised: ‘Throw, and don’t worry.’ Then another man came and said: ‘I shaved (my head) before sacrificing,’ and the Prophet answered: ‘Sacrifice, and don’t worry.’ The narrator said that he was not asked about anything that one would do after or before without his saying, ‘Do it, and don’t worry.’ This type of prophetic tradition should also be followed exactly, in addition to learning certain methods of issuing edicts from them. In the above example, we learn that the order of details of pilgrimage rites, in general, is not a necessary condition for their correctness.
3. The intent of judgeship. Examples are: (1) the Prophet’s settlement of the dispute between a man from Hadramawt and a man from Kindah regarding a piece of land; (2) the Prophet’s settlement between the Bedouin and his adversary, when the Bedouin said: ‘O Messenger of God, judge between us;’ and (3) the Prophet’s settlement between Habibah and Thabit. Habibah bint Sahl, Thabit’s wife, complained to the Prophet that she did not love her husband and that she wanted to divorce him. The Prophet said: ‘Will you give him back his walled garden?’ She said: ‘I have all that he has given to me.’ Then, the Prophet said to Thabit: ‘Take it from her.’ And so he took his walled garden and divorced her. This type of prophetic tradition is not general legislation, as al-Qarafi had said, and the related verdicts should be up to the judge according to each case.
4. The intent of leadership. Examples are the permission to own barren lands that one cultivates, the prohibition of eating donkey meat in the battle of Khaybar, and the Prophet’s statement at the battle of Hunayn: ‘Whoever has killed an enemy and has evidence of his actions can claim the enemy’s property.’ In general, the traditions that are related to the socio-economic-political realm should be understood in terms of their higher purposes of serving public interests.
5. The intent of guidance (which is more general than that of legislation). An example is found in Ibn Suwayd’s narration, in which he said: I met Abu

Dharr, who was wearing a cloak, and his slave, too, was wearing a similar one. I asked the reason for it. He replied, 'I scolded a slave by calling his mother bad names.' The Prophet said to me, 'O Abu Dharr! Did you abuse him by calling his mother bad names? You still have some characteristics of the age of pagan ignorance. Your slaves are your brethren.' In this example, the prophetic guidance was leading the companions towards freeing slaves. Jurists frequently said: The Legislator aims to accomplishing freedom (*al-shāri' mutashawwif lil-ḥurrīyah*).

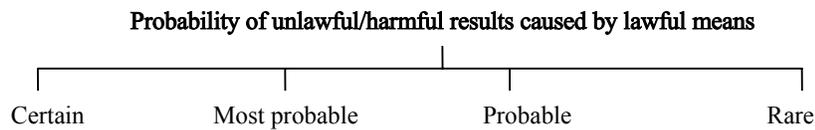
6. The intent of conciliation. One example is when the Prophet requested Barirah to return to her husband after she divorced him. Barirah said: 'O God's apostle! Do you order me to do so?' He said, 'No, I only intercede for him.' She said, 'I do not need him.' Also, Bukhari reported that when Jabir's father died, Jabir asked the Prophet to speak with his father's creditors so that they might waive some of his debt. The Prophet then accepted their refusal to do so. Another example of conciliation is when Kaab Ibn Malik demanded repayment of a debt from Abdullah Ibn Abu Hadrad, the Prophet asked Kaab to deduct half of the debt, and Kaab agreed. In these cases, the companions understood that the Prophet did not mean to place any obligation on them.
7. The intent of giving advice. One example is when Omar Ibn al-Khattab gave someone a horse as charity and the man neglected it. Omar wished to buy the horse from the man, thinking that he would sell it cheaply. When he asked the Prophet about it, he told him: 'Do not buy it, even if he gives it to you for one dirham, for someone who takes back his charity is like a dog swallowing its own vomit.' Also, Zayd narrated that the Prophet said: 'Do not sell the fruits before their benefit is evident,' but Zayd commented that this was, 'only by way of advice, for some people had quarreled too much over that matter.' In these cases, as well, the companions understood that the Prophet did not mean to place any obligation on them.
8. The intent of counseling. For example, Bashir informed the Prophet that he had given one of his sons a special gift. The Prophet asked him: 'Have you done the same with all your sons?' He said: 'No.' The Prophet said: 'Do not call me as a witness to injustice.' Also, in these cases, the companions understood that the Prophet did not mean to place any obligation on them.

9. The intent of teaching high ideals. For example, the Prophet asked Abu Dharr: ‘Do you see (the mountain of) Uhud?’ Abu Dharr replied: ‘I do!’ The Prophet said: ‘I do not wish that I have the like of Uhud in gold to spend [in the way of Allah] all except for three pieces of gold that I keep for myself.’ Similarly, Al-Bara Ibn Azib said: ‘God’s Messenger commanded us to practice seven things and prohibited us from practicing seven. He commanded us to visit the sick, to walk behind funeral processions, to pray for someone upon sneezing, to approve of someone’s oath, to help the oppressed person, to spread the greeting of peace, and to accept the invitation of the invitee. On the other hand, he prohibited us from wearing gold rings, using silver utensils, using red saddlecloth made of cotton, wearing Egyptian clothes with silky extensions, clothes made of thick silk, thin silk, or normal silk.’ Similarly, Ali Ibn Abi Talib narrates: ‘God’s Apostle forbade me to use gold rings, to wear silk clothes and clothes dyed with saffron, and to recite the Quran while bowing and prostrating in prayer. I am not saying he forbade you these things.’ Likewise, with the same educational intent, the Prophet told Rafie Ibn Khadij: ‘Do not rent your farm, but cultivate the land yourself.’ Also, in these cases, the companions understood that the Prophet did not mean to place any obligation on them.
10. The intent of disciplining his companions. For example, the hadith: ‘By God! He does not believe! By God! He does not believe!’ It was said, ‘Who is that, O Messenger of God?’ He said: ‘The person whose neighbour does not feel safe from his evil.’
11. Intent of non-instruction. This includes the hadith that described the way the Prophet ate, wore his clothes, laid down, walked, mounted his animal, and placed his hands when prostrating in prayer. Another example is the report that the Prophet stopped on the farewell pilgrimage at a hill overlooking a watercourse in Bani Kinanah, on which Aishah commented: ‘Camping at al-Abtah is not one of the ceremonies of hajj, but was simply a place where the Prophet used to camp so that it might be easier for him to leave for Madinah.’

Ibn Ashur’s ‘re-interpretation’ of the above narrations of hadith raises the level of ‘purposefulness’ in traditional methods and allows much flexibility in interpreting and applying the scripts.

## ‘Opening the Means’ in addition to ‘Blocking the Means’

Blocking the means (*sadd al-dharāʾiʿ*) in the Islamic law entails forbidding, or blocking, a lawful action because it could be means that lead to unlawful actions.<sup>152</sup> Jurists from various schools of Islamic law agreed that in such case ‘leading to unlawful actions’ should be ‘more probable than not,’ but they differed over how to systemise the comparison of probabilities. Jurists divided ‘probability’ of unlawful actions into four different levels.<sup>153</sup>



**Four ‘categories’ of probability, according to jurists who endorsed blocking the means, namely, certain, most probable, probable, and rare.**

The following are examples that jurists mentioned to illustrate the above categories:

1. A classic example of an action that results in a ‘certain’ harm is ‘digging a well on a public road,’ which will certainly harm people. Jurists agreed to block the means in such case, but had a difference of opinion over whether the well-digger, in this example, is liable for any harm that happens to people because of his/her action. The difference of opinion is actually over whether prohibiting some action entails making people liable for the resulting damage if they carry that action out, or not.
2. An example of an action that results in a ‘rare’ harm, according to al-Shatibi, is selling grapes, even though a small number of people will use them to make wine. ‘Blocking the means’ does not apply to such action, jurists agreed, ‘since the benefit of the action is more than the harm, which happens in rare cases in any case.’<sup>154</sup>

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152 al-Shawkani, *Irshad Al-Fuhood* p 246, Abu Zahra, *Usul Al-Fiqh* p 268..

153 Abu Zahra, *Usul Al-Fiqh* p 271.

154 al-Shatibi, *Al-Muwafaqat* vol.2, p. 249.

3. Harm is ‘most probable,’ jurists argued, when ‘weapons are sold during civil unrest or grapes are sold to a wine-maker.’<sup>155</sup> The schools of Malikis and Hanbalis agreed to block these means, while others disagreed because, as they argued, harm has to be ‘certain’ to justify blocking its means.
4. Harm is ‘probable,’ some jurists claimed, ‘when a woman travels by herself,’ and ‘when people use legally-correct contracts with hidden tricks as means to usury.’<sup>156</sup> Again, Malikis and Hanbalis agreed to block these means, while others disagreed because the harm is not ‘certain’ or ‘most probable.’

The above classic examples show that, again, ‘means’ and ‘ends’ are subject to variations in economic, political, social, and environmental circumstances, and not constant rules. ‘A woman travelling by herself,’ ‘the selling of weapons,’ or ‘selling of grapes’ could lead to probable harm in some situations, but could definitely be harmless or even beneficial for people in other situations. Therefore, it is inaccurate to classify actions according to probabilities of harm in ‘hard’ categories, as shown above.

Ethically speaking, ‘blocking the means’ is a consequentialist approach.<sup>157</sup> It could be useful in some situations, but could also be misused by some pessimistic jurists or politically-motivated authorities. Today, ‘blocking the means’ is a recurring theme in current neo-literalist approaches, which is utilised by some authoritarian regimes for their own ends, especially in the areas of laws related to women. For example, in the name of blocking the means, women are prohibited from ‘driving cars,’ ‘travelling alone,’ ‘working in radio or television stations,’ ‘serving as representatives,’ and even ‘walking in the middle of the road.’<sup>158</sup> To illustrate one such mis-application of ‘blocking the means,’ the following is a *fatwā* issued by the Saudi High Council of *Fatwā* regarding women driving cars.<sup>159</sup>

**Question:** Under circumstances of necessity, is it permissible for a woman to drive an automobile by herself, without the presence of a legal guardian, instead of riding in a car with a non-*mahram* man [stranger]?

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155 Abu Zahra, *Usul Al-Fiqh* p273.

156 Ibid. p 273.

157 Wolfe, *About Philosophy* p90.

158 Wajanat Abdurahim Maymani, *Qa'idat Al-Tharai'e*, 1 ed. (Jeddah: Dar al-Mujtama', 2000) p.608, 22, 32, 50.

159 Copied from: Abou El-Fadl, *Speaking in God's Name* p275.

**Fatwa:** It is impermissible for a woman to drive an automobile, for that will entail unveiling her face or part of it. Additionally, if her automobile were to break down on the road, if she were in an accident, or if she were issued a traffic violation she would be forced to co-mingle with men. Furthermore, driving would enable a woman to travel far from her home and away from the supervision of her legal guardian. Women are weak and prone to succumb to their emotions and to immoral inclinations. If they are allowed to drive, then they will be freed from appropriate oversight, supervision, and from the authority of the men of their households. Also, to receive driving privileges, they would have to apply for a license and get their picture taken. Photographing women, even in this situation, is prohibited because it entails *fitnah* [mischief] and great perils.

In the area of Muslim women, in fact, ‘opening the means’ for them to learn, drive, and have their independent lives is more appropriate to their situation today. Indeed, some classic jurists proposed ‘opening the means’ (*fāṭḥ al-dharāʾiʿ*) in addition to ‘blocking’ them (*sadd al-dharāʾiʿ*).<sup>160</sup> Al-Qarafi divided rulings into means (*wasāʾil*) and ends/purposes (*maqāṣid*), and suggested that means that lead to prohibited ends should be blocked, and means that lead to lawful ends should be opened.<sup>161</sup> Thus, al-Qarafi linked the ranking of means to the ranking of their ends, and suggested three levels for ends, namely, ‘most repugnant’ (*aqbah*), best (*afḍal*), and ‘in between’ (*mutawassitah*). Ibn Farhun (d. 769 AH), also from the Maliki school, applied al-Qarafi’s ‘opening the means’ to a number of rulings.<sup>162</sup>

Most repugnant ends: Forbidden means	Ends ‘in between’: Lawful means	Best ends: Obligatory means
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**Levels of ends and alternative levels of means, according to al-Qarafi.**

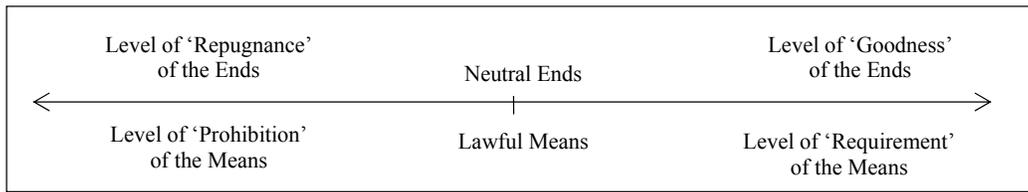
Thus, Malikis do not restrict themselves to the ‘negative side of consequentialist ethics,’ to borrow a term from moral philosophy. They expand this method of thinking to the positive side of it, which entails opening means to achieving good ends, even if these ends were not mentioned in specific scripts. And in order to give al-Qarafi’s *maqāṣid*-based expansion of blocking the means more flexibility, the following chart suggests a ‘continuous’ measure of ‘goodness’ and ‘repugnance’ of

160 al-Qarafi, *Al-Dhakheerah* vol.1, p. 153. al-Qarafi, *Al-Furuq (Maʿa Hawamishih)* vol.2, p. 60, Burhaneddin Ibn Farhoun, *Tabsirat Al-Hukkam Fi Usul Al-ʿAqdiyah Wa Manahij Al-ʿAhkam*, ed. Jamal Marʿashli (Beirut: Dar al-Kutub al-ʿilmiyah, 1995) vol.2, p. 270.

161 al-Qarafi, *Al-Dhakheerah* vol.1, p. 153. al-Qarafi, *Al-Furuq (Maʿa Hawamishih)* vol.2, p. 60.

162 Ibn Farhoun, *Tabsirat Al-Hukkam* vol.2, p. 270-.

ends, to use al-Qarafi's expressions. 'Neutral' ends, then, would entail 'lawful' means.



**A spectrum of levels between good ends/required means and repugnant ends/prohibited means.**

### **Achieving the 'Universality' Maqsid**

*Al-Urf* literally means custom or, more accurately, a 'good' custom that the community approves.<sup>163</sup> In the First Encyclopaedia of Islam, Levy confirms his conceptual separation between *urf* and *shar'*. He writes:

**'URF** (A.), defined by Djurdjani (*Ta'rifat*, ed. Flügel, p. 154) as "[Action or belief] in which persons persist with the concurrence of the reasoning powers and which their natural dispositions agree to accept [as right]". It stands therefore to represent unwritten custom as opposed to established law, *shar'* though attempts have not been lacking to regard it as one of the *uṣūl*.

However, the relationship between the Islamic law (*shar'*) and *urf* is far more complex than the above dichotomy. Arabic *urf*, especially during the early era of Islam, had indeed influenced a number of *fiqhi* provisions.

Al-Tahir Ibn Ashur proposed a novel view of the fundamental of 'custom' (*al-urf*) based on the purposes of Islamic law. He wrote a chapter in his '*Maqāsid al-Sharī'ah*' on *al-urf*, which was entitled with a *maqsid* that he called, 'The Universality of the Islamic Law.'<sup>164</sup> In this chapter, Ibn Ashur did not consider the effect of custom on the application of narrations, as is the traditional view. Instead, he considered the effect of (Arabic) customs on narrations themselves. The following is a summary of Ibn Ashur's argument.

First, Ibn Ashur explained that it is necessary for the Islamic law to be a universal law, since it claims to be 'applicable to all humankind everywhere on earth at all

<sup>163</sup> al-Mubarak al-Jazri, *Al-Nihayah Fi Gharib Al-Hadith Wal-Athar* (Beirut: al-maktabah al-Ilmiyah, 1979) vol. 3, p. 216.

<sup>164</sup> Ibn Ashur, *Maqasid Al-Shari'ah Al-Islamiyah* p. 234.

times,' as per a number of Quranic verses and hadith that he cited.<sup>165</sup> Then, Ibn Ashur elaborated on the wisdoms behind choosing the Prophet from amongst Arabs, such as the Arabs' isolation from civilisation, which prepared them, 'to mix and associate openly with other nations with whom they had no hostilities, in contrast to Persians, Byzantines, and Copts.' Yet, for the Islamic law to be universal, 'its rules and commands should apply equally to all human beings as much as possible,' as Ibn Ashur confirmed. That is why, he wrote, 'God had based the Islamic law on wisdoms and reasons that can be perceived by the mind and which do not change according to nations and custom.' Thus, Ibn Ashur provided explanation as to why the Prophet forbade his companions to write down what he says, 'lest particular cases be taken as universal rules.' Ibn Ashur began applying his ideas to a number of narrations, in an attempt to filter out Arabic customs from popular traditional rulings. He wrote:<sup>166</sup>

Therefore, Islamic law does not concern itself with determining what kind of dress, house, or mount people should use ... Accordingly, we can establish that the customs and mores of a particular people have no right, as such, to be imposed on other people as legislation, not even the people who originated them ... This method of interpretation has removed much confusion that faced scholars in understanding the reasons why the law prohibited certain practices ... such as the prohibition for women to add hair extensions, to cleave their teeth, or to tattoo themselves ... The correct meaning of this, in my view ... is that these practices mentioned in hadith were, according to Arabs, signs of a woman's lack of chastity. Therefore, prohibiting these practices was actually aimed at certain evil motives ... Similarly, we read: ... 'believing women should draw over themselves some of their outer garments' (*Surat al-Aḥzāb*) ... This is a legislation that took into consideration an Arab tradition, and therefore does not necessarily apply to women who do not wear this style of dress ...

Therefore, based on the purpose of 'universality' of the Islamic law, Ibn Ashur suggested a method of interpreting narrations through understanding their underlying Arabic cultural context, rather than treating them as absolute and unqualified rules. Thus, he read the above narrations in terms of their higher moral purposes, rather than norms in their own right.

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165 Ibn Ashur mentioned, for example: 'Now [as for you, O Mohammad,] We have not sent you otherwise than to mankind at large' (34:28), 'Say [O Mohammad]: 'O mankind! Verily, I am an Apostle to all of you'' (7:158), and the hadith: 'An apostle used to be sent specifically to his own people, while I have been sent to all of mankind.'

166 Ibn Ashur, *Maqasid Al-Shari'ah Al-Islamiyah* p 236.

## Maqasid as Common Grounds between Schools of Islamic Law

Today, in the beginning of the twenty-first century, sharp ‘scholastic’ divisions take place between each pair of schools of Islamic law. The sharpest and most devastating of these divisions is the Sunni-Shia division, which many like to perceive as a ‘sectarian’ division, for various motives. The apparent differences between various Sunni and Shia schools, as people familiar with Islamic law could assert, boil down to their ‘differences over politics’ rather than their ‘pillars of faith.’ However, today, deep divisions between Sunni and Shia are constructed through courts, mosques, and social dealings in most countries, causing these divisions to develop into violent conflict in a number of countries. These divisions have added to a wide-spreading culture of civil intolerance and inability of coexistence with the ‘Other.’

I carried out a survey on the latest studies on *al-maqāṣid*, which were written by key Sunni and Shia scholars. The survey revealed to me an interesting identicalness between both approaches to *maqāṣid*.<sup>167</sup> Both approaches address the same topics (*ijtihād, qiyās, ḥuqūq, qāim, akhlāq*, and so on), refer to the same jurists and books (al-Juwaini’s *Burhān*, Ibn Babaweah’s *‘ilal al-Sharā’i’*, al-Ghazali’s *Mustaṣfā*, al-Shatibi’s *Muwāfaqāt*, and Ibn Ashur’s *Maqāṣid*), and use the same theoretical classifications (*maṣāliḥ, ḍarūrāt, ḥājīyāt, taḥsīnīyat, maqāṣid ‘āmmah, maqāṣid khāṣṣah*, and so on). Most of the juridical differences between Sunni and Shia *fiqhī* schools are due to differences over a few narrations and a handful of practical rulings.

A *maqāṣidī* approach to *fiqh* is a holistic approach that does not restrict itself to one narration or view, but rather refers to general principles and common ground. Implementing the ‘higher’ purposes of unity and reconciliation of Muslims has a higher priority over implementing *fiqhī* details. Accordingly, Ayatullah Mahdi Shamsuddin prohibited aggression along Shia-Sunni lines based on ‘the higher and fundamental purposes of reconciliation, unity, and justice.’<sup>168</sup>

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167 For example, refer to Mohammad Mehdi Shamsuddin, ‘Maqasid Al-Shariah,’ in *Maqasid Al-Shariah*, ed. Abduljabar al-Rufa’i (Damascus: Dar al-Fikr, 2001), Mohammad Hussain Fadlullah, ‘Maqasid Al-Shariah,’ in *Maqasid Al-Shariah*, ed. Abduljabar al-Rufa’i (Damascus: Dar al-Fikr, 2001), Abdulhadi al-Fadli, ‘Maqasid Al-Shariah,’ in *Maqasid Al-Shariah*, ed. Abduljabar al-Rufa’i (Damascus: dar al-Fikr, 2001), al-Alwani, ‘Maqasid Al-Shari‘ah,’ Qaradawi, *Madkhal*.

168 Shamsuddin, ‘Maqasid Al-Shariah,’ p. 26.

A *maqāsidī* approach takes the issues to a higher philosophical ground and, hence, overcomes differences over the political history of Muslims and encourages a much-needed culture of conciliation and peaceful co-existence.

### **Maqāsid as Common basis for Inter-Faith Dialogue**

Systematic theology is an approach to religion or a certain system of faith that attempts to draw an overall picture. It is an approach that considers all aspects related to that religion or faith, such as history, philosophy, science, and ethics, in order to come up with a holistic philosophical view. The approach that bears the name ‘systematic theology,’ is becoming increasingly popular, especially in Christian theology with all of its denominations.

Christian systematic theology asks the following question: ‘what does **the whole** Bible teach us today about a given topic?’<sup>169</sup> As such, it involves a ‘process of collecting and synthesizing all the relevant Scriptural passages for various topics,’<sup>170</sup> such as prayers, justice, righteousness, compassion, mercy, unity, diversity, morality, salvation, and a variety of other themes.<sup>171</sup> Thus, systematic theology uses an ‘inductive method’<sup>172</sup> that results in ‘grouping, classifying, and integrating’ of ‘disconnected truths,’ even referred to as ‘undigested facts,’ until their interrelations and the underlying ‘dogmas,’<sup>173</sup> or ‘coherent summaries’ become evident.<sup>174</sup>

The necessity of a systematic approach to theology is justified by Charles Hodge (1797-1878 CE) based on the following:<sup>175</sup>

1. The constitution of the human mind cannot help endeavouring to systemise and ‘reconcile the facts which it admits to be true.’
2. The accumulation of isolated facts results in a much higher kind of knowledge.

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<sup>169</sup> Wayne Grudem, *Systematic Theology*, (Leicester and Grand Rapids: Inter-Varsity Press and Zondervan Publishing House, 1994, 2000), p.21.

<sup>170</sup> Ibid. p. 22.

<sup>171</sup> For example, Ibid. p. 67, 65, 110, 119, 123, 135, 143, 164, 172, 189, 208.

<sup>172</sup> Charles Hodge, *Systematic Theology*, edited by: Edward Gross (New Jersey: P & R Publishers, 1997), p.26.

<sup>173</sup> Louis Berkhof, *Systematic Theology*, (Grand Rapids: Wm. B. Eerdmans, 1996), p.15.

<sup>174</sup> Roger Olson, *The Mosaic of Christian Beliefs: Twenty Centuries of Unity & Diversity* (Downers Grove: InterVarsity Press, 2002), p.74.

<sup>175</sup> Charles Hodge, *Systematic Theology*, p.24-25.

3. This process is necessary for a satisfactory exhibition of the truth and ‘defending it from objections.’
4. This is the ‘nature’ of the physical world and the revelation, as defined by God, who ‘wills that men should study His works and discover their wonderful organic relation and harmonious combination.’

Systematic theology, in the above sense, bears a lot of obvious practical similarities with the maqasidi approach to Islam that this book has been illustrating all along. Both approaches deploy the concept of ‘re-interpretation’ to provide bases for dynamism and flexibility to changing worldviews, without compromising the basic references of believers to their Scriptures.

The classic theory of *maqāṣid* defines areas of necessities (*darūrat*) that are meant to be preserved and protected by the *sharī‘ah*, such as ‘the preservation of faith, life, wealth, minds, and offspring.’<sup>176</sup> Similarly, systematic theologians write on similar concepts, such as the importance of protecting life and health, protecting souls by ‘prohibiting drunkenness’ (even though the Islamic approach is to prohibit all amounts and forms of intoxicants, as a form of ‘blocking the means’ to drunkenness), the necessity of nurturing the family, and so on.<sup>177</sup>

A holistic (maqasidi) view allows theologians to place specific religious teachings and commands within a general framework of their underlying principles and governing objectives, rather than focusing on a piece-by-piece understanding and, therefore, a literal application of these teachings and commands. Thus, moral values intended by various commands will not be different across the religious spectrum, despite the fact that they take different forms in their specific practical environments.

Hence, I believe that the above purpose-based approach to theology could play a significant role in inter-faith dialogue and understanding. It reveals commonalities that are necessary for such dialogue and understanding.

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<sup>176</sup> al-Ghazali, *Al-Mustasfā* vol. 1, p. 172, Ibn al-Arabi, *Al-Mahsoul Fi Usul Al-Fiqh* vol. 5, p. 222, al-Amidi, *Al-Ihkam* vol. 4, p. 287.

<sup>177</sup> Wayne Grudem, *Systematic Theology*, p.124, 208, 241, 781, 1009.