

What are *Maqāṣid al-Shariah*?

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## Maqsid or Maqsad or Maqsud

The term '*maqsid, maqsad, maqsud*' (all correct in the Arabic language and plural: *maqāsid*) 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 intents, objectives and purposes behind Islamic rulings.<sup>3</sup>

Purposes or *maqāsid* of the Islamic law themselves are classified into three 'levels of necessity,' which are necessities (*darūrāt*), needs (*hājīyāt*), and luxuries (*taḥsīnīyāt*). Necessities are further classified into what preserves one's faith, soul, wealth, mind, honour, and offspring.<sup>4</sup>

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>5</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 and added spirituality as an essential 'need', which brings his theory closer to the Islamic conception of human needs. 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 (*maqāsid*) evolved over the centuries, especially in the twentieth century, as discussed next. However, first, we will present a brief historical account of the ideas of *maqāsid*, from the companions of the Prophet's (pbuh) era to our current time.

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> Ibn Ashur, *Maqasid Al-Shari'ah Al-Islamiyah* p 183.

<sup>4</sup> al-Ghazali, *Al-Mustasfa* vol. 1, p. 172, Ibn al-Arabi, *Al-Mahsul Fi Usul Al-Fiqh*, al-Amidi, *Al-Ihkam* vol. 4, p. 287.

<sup>5</sup> A. H. Maslow, "A Theory of Human Motivation," *Psychological Review*, no. 50 (1943): 50, p. 370-96.

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 (pbuh), 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 (pbuh) sent a group of companions to Bani Quraizah,<sup>6</sup> and ordered them to pray their afternoon (*aṣr*) prayer there.<sup>7</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 (pbuh) instruction was clear in asking everybody to pray at Bani Quraizah, while the rationale of the second opinion was that the Prophet’s (pbuh) ‘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 (pbuh), he approved both opinions.<sup>8</sup> The approval of the Prophet (pbuh), 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 (pbuh) had said, even after midnight!<sup>9</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.’ Their argument relied on the clear and specific verses of the Quran that allowed fighters their ‘spoils of

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<sup>6</sup> Around the seventh Islamic year AH. The location was a few miles away from Medina.

<sup>7</sup> 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.

<sup>8</sup> Narrated by Abdullah Ibn Omar, according to al-Bukhari, vol. 1, p. 321, and Muslim. Vol. 3, p.1391.

<sup>9</sup> Ali Ibn Hazm, *Al-Muhalla*, ed. Lajnat Ihya’ al-Turath al-Arabi, 1st ed. (Beirut: Dar al-Afaq, without date) *almuhalla* vol.3, p. 291.

war.’<sup>10</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>11</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.

The significance of Omar’s *ijtihād* is that it could, traditionally, be considered as a ‘collective *ijtihād*’ carried out by (a large number of) the companions. This *ijtihād* has its significance in *fiqh*, regardless of the ‘authority’ of a companion’s opinion, which is a matter of difference of opinion within traditional schools of the law (as will be explained later).

Another telling example is Omar’s application of a moratorium on the (Islamic) punishment for theft during the famine of Medina.<sup>12</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>13</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 (pbuh) 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>14</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

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<sup>10</sup> 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.

<sup>11</sup> 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).

<sup>12</sup> Mohammad Biltaji, *Manhaj Omar Ibn Al-Khatāb Fil Tashree’*, 1st ed. (Cairo: Dar al-Salam, 2002) p. 190.

<sup>13</sup> al-Waleed Ibn Rushd (Averroës), *Bedāyat Al-Mujtahid Wa Nihayat Al-Muqtasid* (Beirut: Dar al-Fikr) vol. 1, p. 291.

<sup>14</sup> 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.

of the exact types of wealth that were mentioned in the Prophetic tradition and understood via its literal implication.<sup>15</sup>

All known schools of law, except for the Hanafis, are against such expansion of ‘the pool of charity’ (*wiḍʿ al-zakāh*), 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 *sunnah*, 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>16</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>17</sup>

However, Omar did not take this purpose-oriented approach to all rulings of the Islamic law. Bukhari narrates that Omar was asked: ‘Why do we still jog around the *kaʿbah* 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 (pbuh) and his companions lost their health during their prolonged stay in Medina. The Prophet (pbuh), therefore, ordered the companions to jog around the *kaʿbah* 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 anything we used to do at the Prophet’s time.’<sup>18</sup> Omar, thus, made a distinction between ‘acts of worship’ (*ʿibādāt*) and ‘worldly transactions’ (*muʿāmalāt*), a distinction that was later endorsed by all schools of *uṣūl al-fiqh*. Shatibi, for example, expressed this distinction when he wrote: ‘Literal compliance is the default methodology in the area of acts of worship (*ʿibādāt*), while the consideration of purposes is the default methodology in the area of worldly dealings (*muʿāmalāt*).’<sup>19</sup>

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<sup>15</sup> Yusuf al-Qaradawi, “Fiqh Al-Zakah” (Ph.D. diss, al-Azhar University, Egypt, Published by al-Risalah, 15th ed, 1985) vol. 1, p. 229.

<sup>16</sup> 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.

<sup>17</sup> al-Qaradawi, “Fiqh Al-Zakah” vol.1, p. 146-148.

<sup>18</sup> al-Bukhari, Al-Sahih , Kitab al-Hajj, Bab al-Raml.

<sup>19</sup> al-Shatibi, Al-Muwafaqat vol.2, p. 6.

Aisha Bint Abu Bakr (the Mother of the Believers) was a strong, highly learned, and independent woman. Her character showed on a number of her *fatāwā* and opinions, in which she advocated women's independence and rights, notably against some of the other companions' direct narrations. Badruddin al-Zarkashi wrote a book dedicated to Aisha's critiques to the other companions' narrations, which he called, '*Ayn al-Iṣābah Fī Istidrāk Ḍa'iṣḥah alā al-Ṣaḥābah*' (*The Accurate Account on Aisha's Amendments to the Companions' Narrations*).<sup>20</sup>

In a number of hadith, Aisha corrected the meaning of the narrations given by the companions themselves, may Allah be pleased with them, based on her reference to meanings of *maqasid* as the fundamental and fixed part of the shariah. The following are some examples.

In the Bukhari authentic collection, Narrated 'Abdullah bin 'Ubaidullah bin Abi Mula: One of the daughters of 'Uthman died at Mecca. We went to attend her funeral procession. Ibn 'Umar and Ibn Abbas were also present. I sat in between them (or said, I sat beside one of them. Then a man came and sat beside me.) 'Abdullah bin 'Umar said to 'Amr bin 'Uthman, "Will you not prohibit crying as Allah's Apostle has said, 'The dead person is tortured by the crying of his relatives.?' " Ibn Abbas said, "Umar used to say so." Then he added narrating, "I accompanied Umar on a journey from Mecca till we reached Al-Baida. There he saw some travelers in the shade of a Samura (A kind of forest tree). He said (to me), "Go and see who those travelers are." So I went and saw that one of them was Suhaib. I told this to 'Umar who then asked me to call him. So I went back to Suhaib and said to him, "Depart and follow the chief of the faithful believers." Later, when 'Umar was stabbed, Suhaib came in weeping and saying, "O my brother, O my friend!" (on this 'Umar said to him, "O Suhaib! Are you weeping for me while the Prophet said, "The dead person is punished by some of the weeping of his relatives?" Ibn Abbas added, "When 'Umar died I told all this to Aisha and she said, 'May Allah be merciful to Umar. By Allah, Allah's Apostle did not say that a believer is punished by the weeping of his relatives. But he said, Allah increases the punishment of a non-believer because of the weeping of his relatives.' " Aisha further added, "The Quran is sufficient for you (to clear up this point) as Allah has stated: 'No burdened soul will bear another's burden.' " (35.18). Ibn Abbas then said, "Only Allah makes one laugh or cry." Ibn Umar did not say anything after that.

Here, Aisha is resorting to the principle *maqsid* of the Shariah, which is justice. She referred the questioner to the Quran and rejected therefore the accuracy of the narration that the deceased is tortured because of other people's weeping that is not in his control.

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<sup>20</sup> Badredin al-Zarkashi, *Al-Ijabah Li'irad Ma Istadrakathu Ḍa'iṣḥah alā Al-Saḥābah*, ed. Saeed Al-Afghani, 2nd ed. (Beirut: Al-Maktab al-Islami, 1970).

In another instant, Abu Hurairah (r) narrated that, ‘bad omens are in women, animals, and houses,’<sup>21</sup> Aisha relied on the Quranic verse that, ‘No calamity can ever befall the earth, and neither your own selves, unless it be [laid down] in Our decree before We bring it into being’ (57:22). This verse, and there are a few similar other verses, set a universal principle that go against the idea of ‘bad omens’ altogether. This is in addition to the other hadith that says, ‘no bad omens in Islam,’ and other similar narrations.<sup>22</sup>

Moreover, Aisha narrated in other narrations that the Prophet (pbuh) had said, instead: ‘People during the Days of Ignorance (*jāhilīyah*) used to say that bad omens are in women, animals, and houses.’<sup>23</sup> There is another narration where she is saying that Abu Huraira heard the second part of the narration but missed the first part. All these ‘authentic’ narrations are at odds with Abu Huraira’s, which Aisha rejected, not out of mistrust of Abu Huraira, but out of realising the error that he made in the narration.

Yet, it is telling that most commentators rejected Aisha’s narration, rather than Abu Huraira’s, even though other ‘authentic’ narrations supported her. Ibn al-Arabi, for example, commented on Aisha’s rejection of the above hadith as follows: ‘What she said is nonsense (*qawluha qawlun sāqit*). This is rejection of a clear and authentic narration that is narrated through trusted narrators.’<sup>24</sup> Ibn Al-Arabi’s defence of his sanad-based method of authentication disabled him from showing the appropriate respect for the Mother of Believers in this context!

Aisha’s method outlined in these two examples is not unique in the history of the Islamic legal theory. Imam Malik, for one example, rejected the (authentic) narration of washing your plate seven times if a dog drinks from it based on the verse that states: ‘They will ask thee as to what is lawful to them. Say: "Lawful to you are all the good things of life." And as for those hunting dogs which you train.’ (5:4). Ibn Rushd, for another example, rejected the (authentic) narration of ‘killing black dogs’ based on the Quranic and Prophetic principles of being kind to animals and not to transgress against living beings. And so on.

In today’s scholarship, the criteria that Aisha utilised to critique hadith could apply to some hadiths that have significance. In such cases, although the hadith are authentically chained, in terms of their *sanad*, they do contradict some Quranic principles in terms of their *matn*. Sheikh Taha Al-Alwani

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<sup>21</sup> al-Bukhari, *Al-Sahih* p69.

<sup>22</sup> Auda, *Fiqh Al-Maqasid* p106.

<sup>23</sup> Ibid.

<sup>24</sup> Abu Bakr al-Maliki Ibn al-Arabi, *Aridat Al-Ahwadhi* (Cairo: Dar al-Wahy al-Mohammadi, without date) vol.10, p.264.

rejected the authenticity and/or the common understanding of the narration, ‘Whoever changes his religion, kill him,’ based on its contradiction to the principle verse, ‘no compulsion in matters of faith’ (2:256). Sheikh Mohammad Abu Zahra rejected the authenticity and/or the common understanding of the narrations of ‘stoning the adulterer’ (*rajm al-zani*) based on the general principles of mercy in the Quran in addition to the verse that prescribed ‘half of the punishment’ in some cases (and ‘stoning cannot be divided in half’, he said). Sheikh Al-Ghazali rejected the authenticity and/or the common understanding of the narration, ‘a people who entitle their affairs to a woman will never be successful,’ based on its contradiction with a number of verses and other narrations that support the juridical principle of equality of men and women. Sheikh Al-Ghazali also rejected the authentication of Sheikh Nasser Al-Albani to such hadiths as, ‘there is disease in cow meat’, and ‘do not travel by sea’, based on their contradiction with Quranic verses such as, ‘And likewise they declare as unlawful either of the two sexes of camels and of cows. Ask [them]: "Is it the two males that He has forbidden, or the two females ...' (6:144), and ‘And His are the lofty ships that sail like [floating] mountains through the seas. Which, then, of your Sustainer’s powers can you disavow?’ (55:24-25).

The methodology that Aisha, may Allah be pleased with her, has followed in the examination and critique of the *matn* of *ahad* hadith, even they were claimed to be authentically transmitted, is needed for today’s projects of renewal in the Islamic law in order to align the details of the law to its firmly based *maqasid* of justice, mercy, wisdom, or common good.

Regarding the narrations themselves of the degree *aḥād*, their content (*matn*) has to follow the following conditions:<sup>25</sup>

- (1) The hadith is conveyed in complete and sound sentences.
- (2) The hadith cannot contradict with other ‘certain’ scripts.
- (3) The hadith cannot contradict with analogy (according to Malikis, and unless the narrator is considered a ‘*faqīh*,’ according to Hanafis).
- (4) The hadith cannot contradict with the narrator’s practices.
- (5) The hadith cannot contradict with ‘reason’, which al-Ghazali, amongst other jurists, included in the definition of reason, ‘what is acceptable according to common sense and experience.’<sup>26</sup>

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<sup>25</sup> Mohammad al-Basri, *Al-Muṭamad Fi Usul Al-Fiqh*, ed. Khalil al-Mees, 1st ed. (Beirut: Dar al-Kutub al-‘ilmiya, 1983) vol. 2, p. 153.

<sup>26</sup> al-Ghazali, *Al-Mustasfa* vol. 1, p. 142.

Despite the above theories, authenticity of hadith, in practice and especially in today's scholarship, was judged merely based on the chain of narrators (*al-sanad*) and not on the *matn*/content. Today's scholarship could learn from Aisha's critique of the *matn* of some narrations based on *maqasid*.

The significance of *ijtihād* in the above incidents is that the companions did not always apply what *uṣūlīs*, much later, called *dilālat al-lafẓ* (the implication of the term). Practical implications were sometimes based on the purpose, which could be termed '*dilālat al-maqṣid*.' This *dilālah* enables greater flexibility in understanding terms (*alfāẓ*) and placing them in their circumstantial contexts, as the above examples illustrate.

Nevertheless, the (neo-)traditionalist school<sup>27</sup> of Islamic law does not consider the above changes according to purposes to be against the direct linguistic implication (*dilālah*) of the scripts. A typical opinion claims that there were certain 'causes' (*illah*) behind these rulings, and that the rulings simply no longer applied when these causes no longer existed or when they were 'specified' (*mukhaṣṣaṣah*) by other scripts.<sup>28</sup> For example, the related *illah* of the application of the punishment for theft is 'theft carried out by a person who is not in need.' Therefore, the punishment for theft just does not apply to the thieves that Omar pardoned. If such interpretation of some of Omar's *ijtihād* is not possible, current (neo-)traditionalism would discredit these incidents of Omar's *ijtihād* as 'contrary to the scripts.'<sup>29</sup> However, I would say that such criteria included in the *illah*, such as the 'in need' criterion, are not 'consistent' (*munḍabiṭ*), since they might 'change with the change of circumstances.' Therefore, the criterion is not an *illah*, in the technical sense of the term, but indeed a *maqṣid*. Therefore, from a technical point of view, it is more 'appropriate' (*munāsib*) to relate the change that Omar applied to the *maqṣid* of social assistance, rather than the above claimed *illah*. Similarly, it is claimed that the *illah* of the application of the individual spoils of war is the 'leader's consent according to public interest.'<sup>30</sup> However, again, this claimed *illah* is not 'consistent' (*munḍabiṭah*) since it 'changes with the change of circumstances.' Thus, it is more appropriate to relate the change that Omar made to the *maqṣid* of fairness amongst soldiers and the *maqṣid* of achieving public interest.

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. The role that *maqāṣid*

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<sup>27</sup> A proposed classification of the contemporary schools of Islamic law is provided in Chapter 5.

<sup>28</sup> M. Saïd Ramadan al-Bouti, *Dawabit Al-Maslahah Fil Shariah Al-Islamiyah*, 6th ed. (Damascus: al-Risala Foundation, 2001) p.129-43.

<sup>29</sup> Ibid. p143.

<sup>30</sup> This is Malik's opinion, but all other schools disagreed with Omar on this issue. Refer to: Ibn Rushd, *Bedāyat Al-Mujtahid*, p. 290-91.

could play in various techniques for *ijtihād* and the relationship between the *ṣillah* and *maqṣid* are discussed in detail later in Chapter Six.

### 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*, *ṣilal*, *munāsabāt*, 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 (*maṣlahah*). 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 book's title, is *al-Ṣalāh wa Maqāṣiduhā* (*Prayers and their Purposes*), which was written by al-Tirmidhi al-Hakeem.<sup>31</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>32</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 ṣilal 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*

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<sup>31</sup> According to: Ahmad El-Raisouni, *Nazariyat Al-Maqasid* and al-Imam al-Shatibi, 1st ed. (Herndon, VA: IIIT, 1992).

<sup>32</sup> 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.

for *Bodies and Souls*), in which he explained how Islamic practices and rulings contribute to health, physically and mentally.<sup>33</sup>

3. Al-Qaffal 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 *Maḥāsin al-Sharā'i*. (*The Beauties of the Laws*).<sup>34</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 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 1.3.):

... 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 ...

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<sup>33</sup> Mohammad Kamal Imam, *Al-Daleel Al-Irshadi Ila Maqasid al-Shari'ah al-Islamiyyah* (London: al-Maqasid Research Centre, 2007), Introduction, p.iii.

<sup>34</sup> 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).

4. Ibn Babaweah al-Qummi (d. 381 AH/991 CE). Some researchers claim that research on *maqāṣid al-sharī'ah* was restricted to the Sunni schools of law until the twentieth century.<sup>35</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>36</sup> The book, which was entitled ‘*Ilal al-Sharā'i*’ (*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>37</sup>

5. Al-Amiri al-Failasuf (d. 381 AH/991 CE). The earliest known theoretical classification of purposes was introduced by al-Amiri al-Failasuf in his ‘*al-I.lām bi-Manāqib al-Islām*’ (*Awareness of the Traits of Islam*).<sup>38</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.

### The Emergence of a Philosophy for Islamic Law

The fifth Islamic century witnessed the birth of what Abdullah Bin Bayyah called ‘a philosophy of the Islamic law.’<sup>39</sup> Literal and nominal methods that were developed, until the fifth century, proved incapable of coping with the complexities of the evolving civilisation. This is why unrestricted in-

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<sup>35</sup> Hassan Jaber, *Al-Maqasid Fi Al-Madrasah Al-Shi`yyah*, 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.

<sup>36</sup> According to Prof. Mohammad Kamal Imam of Alexandria University’s Faculty of Law (Oral Discussion, Cairo, Egypt, August, 2006).

<sup>37</sup> Ibn Babaweah al-Sadouk al-Qummi, *Ilal Al-Shara'i*, ed. Mohammad Sadik Bahrul-Ulum (Najjaf: Dar al-Balaghah, 1966).

<sup>38</sup> According to Prof. Ahmad el-Raisouni, oral discussion, Jeddah, November 2006. He referred me to: Abul-Hassan al-Failasuf al-Amiri, *Al-I.lam Bi-Manaqib Al-Islam*, ed. Ahmad Ghurab (Cairo: Dar al-Kitab al-Arabi, 1967).

<sup>39</sup> Oral discussion with Sheikh Bin Bayyah in Mecca, Saudi Arabia, April 2006.

terest (*al-maṣlaḥah al-mursalah*) was developed as a method that covers ‘what was not mentioned in the scripts,’ and thus, compensates for the limitations of *qiyās*. I had argued, however, that *qiyās* could not handle all ‘new situations,’ despite the *uṣūlī* attempts to develop it through the ‘appropriateness’ (*munāsabah*) consideration, because it was restricted with the exactness/consistency (*indibāt*) condition.<sup>40</sup> *Al-maṣlaḥah al-mursalah* helped to fill this gap and also gave birth to the theory of *maqāṣid* in the Islamic law. A few jurists made the most significant contributions to the *maqāṣid* theory between the fifth and eighth Islamic centuries, namely, Abu al-Maali al-Juwaini, Abu Hamid al-Ghazali, al-Izz Ibn Abdul-Salam, Shihabuddin al-Qarafi, and, most significantly, Abu Ishaq Al-Shatibi.

Abu al-Maali al-Juwaini (d.478 AH/1085 CE)

Al-Juwaini’s ‘*al-Burhān fī Uṣul al-Fiqh*’ (*The Proof in the Fundamentals of Law*) was the first *uṣūl* 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 (*ḍarūrāt*), public needs (*al-ḥājah al-‘āmah*), moral behaviour (*al-makrūmāt*), recommendations (*al-mandūbāt*), and ‘what cannot be attributed to a specific reason.’<sup>41</sup> He proposed that the purpose of the Islamic law is the protection (*al-‘ismah*) for people’s ‘faith, souls, minds, private parts, and money.’<sup>42</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 *al-Ghayyathi* (a popular short name for 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 the ‘fundamental principles, upon which all rulings of law are based and to which all rulings of law converge.’<sup>43</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>44</sup>

<sup>40</sup> Gasser Auda, “Dawaran Al-Ahkam Al-Shar’iyyah Ma’a Maqasidiha Wujudan Wa ‘Adaman: Dirasah Usuliyah Naq-diah Tatbiqiyah (Change of Statutes According to Their Purposes: A Methodological, Critical and Applied Study)” (M.Jur. diss., Islamic American University, 2004).

<sup>41</sup> al-Juwaini, *Al-Burhan* 4th ed, vol.2, p. 621, 22, 747.

<sup>42</sup> Ibid.

<sup>43</sup> al-Juwaini, *Al-Ghayyathi*, p. 434.

<sup>44</sup> Ibid. p 490.

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>45</sup> I view al-Juwaini’s ‘*Ghiāth al-Umam*’ as a project for the ‘re-construction’ of the Islamic law based on *maqāṣid*, which he had to express in a way that would save him from academic and political persecution.<sup>46</sup> Certainly, this view requires more research and a more extensive analysis of the text itself.

Abu Hamid al-Ghazali (d.505 AH/1111 CE)

Al-Juwaini’s student, Abu Hamid al-Ghazali, developed his teacher’s theory further in his book, *al-Mustasfā* (*The Purified Source*). He ordered the ‘necessities’ that al-Juwaini had suggested as follows: (1) faith, (2) soul, (3) mind, (4) offspring, and (5) wealth.<sup>47</sup> Al-Ghazali also coined the term ‘preservation’ (*al-ḥifẓ*) of these necessities.

Despite the detailed analysis that he offered, al-Ghazali, obviously under the influence of his Shafie school (which views analogical reasoning as the only valid method of *ijtihād*), refused to give independent legitimacy (*ḥujjiyah*) to any of his proposed *maqāṣid* or *maṣāliḥ*, and even called them ‘the illusionary interests’ (*al-maṣāliḥ al-mawhūmah*).<sup>48</sup> Yet, al-Ghazali presented some interesting analogies (*qiyās*), in which he used the *maqāṣid* as *ratio legis* (.illah), despite the Shafies’ critique of *maqāṣid* as ‘non-exact’ (*ghair munḍabiḥah*). For example, he wrote, ‘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>49</sup>

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>50</sup> Thus, al-Ghazali’s *ijtihād* diverges from the

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<sup>45</sup> Ibid. p 446, 73, 94.

<sup>46</sup> Refer to the introduction of *Giath al-Umam*, written by Abdul-Azim al-Deeb, which outlines the historical and political context of the book.

<sup>47</sup> al-Ghazali, *Al-Mustasfa* p 258.

<sup>48</sup> Ibid. p 172.

<sup>49</sup> Ibid. p 174.

<sup>50</sup> Ibid. p 265.

strict Shafie adherence to formality, in the logical sense, in the procedure of analogical reasoning, which he himself supported in his *al-Mustasfā* and his other books on the theory of the law.

Al-Izz Ibn Abdul-Salam (d.660 AH/1209 CE)

Al-Izz 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>51</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. For example, he wrote: ‘Every action that misses its purpose is void,’<sup>52</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>53</sup>

Qutbuddin al-Qastalani (d.686 AH/1287 CE), following the example of al-Izz, wrote two books dedicated to the topics *maqāṣid* for prayers and fasting. Both books are written in the same ‘wisdoms-behind-the-rulings’ approach.<sup>54</sup>

Shihabuddin al-Qaraḥī (d.684 AH/1285 CE)

Al-Qaraḥī’s contribution to the theory of *maqāṣid* is his differentiation between different actions taken by the Prophet (pbuh) based on his ‘intents.’ 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

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<sup>51</sup> al-Izz Ibn Abdul-Salam, *Maqasid Al-Sawm*, ed. Iyad al-Tabba', 2nd ed. (Beirut: Dar al-Fikr, 1995),

<sup>52</sup> al-Izz Ibn Abdul-Salam, *Qawaid Al-Ahkam Fi Masalih Al-Anam* (Beirut: Dar al-Nashr, without date) vol.2, p. 221.

<sup>53</sup> Ibid. vol.2, p. 160.

<sup>54</sup> Imam, al-Daleel al-Irshadi, p. 54-60.

to the military, public trust, ... appointing judges and governors, distributing spoils of war, and signing treaties ... are specific to leaders.’<sup>55</sup>

Thus, al-Qarafi defined a new meaning for ‘*al-maqāṣid*’ as the purposes/intents of the Prophet (pbuh) himself 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>56</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>57</sup> Thus, he did not restrict themselves to the negative side of ‘blocking the means’ method. Chapter Six explains.

Shamsuddin Ibn al-Qayyim (d. 748 AH/1347 CE)

Ibn al-Qayyim’s contribution to the theory of *maqāṣid* was through a very detailed critique of what is called juridical tricks (*al-ḥīyal al-fiqhīyah*), based on the fact that they contradict with *maqāṣid*. He wrote:

*Fiqhi* 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:

*Sharī’ah* is based on wisdom and achieving people’s welfare in this life and the afterlife. *Sharī’ah* is all about justice, mercy, wisdom, and good. Thus, any 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 *Sharī’ah*, even if it is claimed to be so according to some interpretation.<sup>58</sup>

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<sup>55</sup> Shihabuddin al-Qarafi, *Al-Furuq* (Ma’a Hawamishih), ed. Khalil Mansour (Beirut: Darul Kutub al-Ilmiya, 1998) vol.1, p. 357.

<sup>56</sup> Ibn Ashur, *Maqasid Al-Shari’ah Al-Islamiyah* p 100.

<sup>57</sup> al-Qarafi, *Al-Dhakheerah* vol.1, p. 153. al-Qarafi, *Al-Furuq* (Ma’a Hawamishih) vol.2, p. 60.

<sup>58</sup> Shamsuddin Ibn al-Qayyim, *Ilam Al-Muwaqqi’een*, ed. Taha Abdul Rauf Saad (Beirut: Dar Al-Jeel, 1973) vol.1, p. 333.

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*' (*Congruences 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 (*uṣūl*) in their own right. 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>59</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>60</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>61</sup> This is quite a diviation from traditional fundamentals, even in al-Shatibi's Maliki school, which always gave precedence to 'specific' partial evidences over 'general' or universal evidences.<sup>62</sup> Al-Shatibi also made 'knowledge of *maqāṣid*' a condition for the correctness of juridical reasoning (*ijtihād*) on all levels.<sup>63</sup>
- iii. From 'uncertainty' (*ẓannīyah*) to 'certainty' (*qaṭ'īyah*). 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' (*qaṭ'īyah*) of the inductive process that he used to conclude *al-maqāṣid*, based on the high number of evi-

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<sup>59</sup> al-Shatibi, *Al-Muwafaqat* vol.2, p. 6.

<sup>60</sup> Ibid. vol.2, p. 25.

<sup>61</sup> Ibid. vol.2, p. 61.

<sup>62</sup> El-Raisouni, *Nazariyat Al-Maqasid* p169.

<sup>63</sup> al-Shatibi, *Al-Muwafaqat* vol.4, p. 229.

dences he considered,<sup>64</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-sharī’ah* in Islamic scholarship until the twentieth century, but his proposal to present *maqāṣid* as ‘fundamentals of the *sharī’ah*,’ as the title of his book suggests, was not as widely accepted.

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<sup>64</sup> Ibid. vol.2, p. 6.

### 1.3. Contemporary Conceptions of Maqāṣid

#### From ‘Protection’ and ‘Preservation’ to ‘Development’ and ‘Rights’

Contemporary jurists/scholars developed traditional *maqāṣid* terminology in today’s language, despite some jurists’ rejection of the idea of ‘contemporarisation’ of *maqāṣid* terminology.<sup>65</sup> The following are some examples from the area of *ḍarūrāt*.

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 *fiqh*.
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 studying ‘*fiqhi* literature,’ 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>66</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

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<sup>65</sup> For example, Sheikh Ali Jumah, Mufti of Egypt (Oral Discussion, Cairo, Egypt, December 2005).

<sup>66</sup> Numan Jughaim, “Turuq Al-Kashf ‘an Maqasid Al-Shari.” (International Islamic University, Malaysia. Published by Dar al-Nafaes, 2002) p. 26-35.

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 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, 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*. These 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>67</sup>
2. Al-Tahir Ibn Ashur (d.1325 AH/ 1907 CE) proposed that the universal *maqṣid* of the Islamic law is to maintain ‘orderliness, equality, freedom, facilitation, and the preservation of pure natural disposition (*fiṭrah*).’<sup>68</sup> It is to be noted that the purpose of ‘freedom’ (*hurriyah*), 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>69</sup> *Al-itq* is freedom from slavery, not ‘freedom’ in the contemporary sense. ‘Will’ (*Mashī·ah*), 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 be-

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<sup>67</sup> Mohammad Rasheed Rida, *Al-Wahi Al-Mohammadi: Thubut Al-Nubuwwah Bil-Qur’an* (Cairo: Mu’asasat Izziddin, without date) p.100.

<sup>68</sup> Ibn Ashur, *Maqasid Al-Shari·ah Al-Islamiyah* p183.

<sup>69</sup> As in, for example, Kamaluddin al-Siwasi, *Sharh Fath Al-Qadir*, 2nd ed. (Beirut: Dar al-Fikr, without date) vol.4, p.513.

lieve or disbelieve.’<sup>70</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 translated from French to Arabic in the nineteenth century CE,’<sup>71</sup> even though he elaborated on an Islamic perspective on freedom of thought, belief, expression, and action in the *mashī’ah* sense.<sup>72</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>73</sup>
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>74</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>75</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 on earth (*imrān*).’<sup>76</sup> He is currently writing a separate monograph to elaborate on each of these three *maqāṣid*.<sup>77</sup>

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

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<sup>70</sup> For example, Surat al-Kahf, 18:29.

<sup>71</sup> 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.

<sup>72</sup> Ibid, p.270-281.

<sup>73</sup> Jamal Atiyah, *Nahwa Taf’il Maqasid Al-Shari’ah*, p. 49.

<sup>74</sup> Yusuf al-Qaradawi, *Kayf Nata’amal Ma’a Al-Quran Al-’Azeem?* 1st ed. (Cairo: Dar al-Shorouk, 1999).

<sup>75</sup> Oral Discussions, London, UK, March, 2005, and Sarajevo, Bosnia, May, 2007.

<sup>76</sup> Taha Jabir al-Alwani, *Maqasid Al-Shari’ah*, 1 ed. (Beirut: IIIT and Dar al-Hadi, 2001), p.25.

<sup>77</sup> Oral Discussion, Cairo, Egypt, April, 2007.

terms of ‘punishments for breaching decency.’<sup>78</sup> Al-Juwaini developed al-Amiri’s ‘theory of punishments’ (*mazājir*) into a ‘theory of protection’ (*iṣmah*), 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 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.

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 (*ʿirḍ*) 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

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

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

<sup>80</sup> al-Ghazali, *Al-Mustasfa* p 258.

<sup>81</sup> Ibn Ashur, *Usul Al-Nizam Al-Ijtimaʿi Fil Islam* p206.

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

<sup>83</sup> Auda, *Fiqh Al-Maqasid* , p. 20.

his honour.’ In the hadith, the Prophet (pbuh) 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 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 ‘contemporarized’ and made to play a more ‘fundamental’ (*uṣūlī*) role in juridical reasoning, as this book is suggesting in Chapter Six. The topic of human rights and

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<sup>84</sup> al-Bukhari, *Al-Sahih* vol.1, p. 37.

<sup>85</sup> Yusuf al-Qaradawi, *Madkhal Le-Dirasat Al-Shari'ah Al-Islamiyah* (Cairo: Wahba, 1997) p. 101, Atiyah, *Nahwa Taf'il Maqasid Al-Shari'ah* p. 170, Ahmad El-Raisouni, Mohammad al-Zuhaili, and Mohammad O. Shabeer, “Huquq Al-In-san 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.

<sup>86</sup> Mohammed Osman Salih, “Al-Islam Huwa Nizam Shamil Lihimayat Wa Ta'iz Huqouq Al-Insan” (paper presented at the International Conference on Islam and Human Rights, Khartoum, 2006).

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

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

<sup>89</sup> *Ibid*.

*maqāṣid* requires further research in order to 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 development, which is much-needed in Muslim majority countries and Muslim communities.

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

<sup>91</sup> al-Amiri, *Al-Islam* p. 125.

<sup>92</sup> Ibn Ashur, *Maqasid Al-Shari’ah Al-Islamiyah* p. 292.

<sup>93</sup> Atiyah, *Nahwa Taf’il Maqasid Al-Shari’ah* p 171, El-Raisouni, al-Zuhaili, and Shabeer, “Huquq Al-Insan Mihwar Maqasid Al-Shariah.”

<sup>94</sup> 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).

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