

# FOCUS ARTICLE

## ACTUALISATION (*TAF'IL*) OF THE HIGHER PURPOSES (*MAQASID*) OF SHARI'AH

*Mohammad Hashim Kamali\**

### Introductory Remarks

The higher purposes, or *maqasid*, of Shari'ah are applied and actualised through their means (*wasa'il*). Since the *maqasid* are not applied directly, they are usually a step further removed from actual practice. For the *maqasid* to be actualised, the first step would naturally be to identify the *maqasid* one is having in mind. This would give rise, in turn, to a question as to how is the *maqasid* or purpose of Shari'ah actually identified, and which method, if any, is used toward that end. The *maqasid* are divided into several types. According to one of its classifications, they are divided into two types: *maqasid* of the Lawgiver (*maqasid al-Shari'*) which are mostly identified by the Shari'ah, and human purposes (*maqasid al-mukallaf*), which anyone can determine and identify for themselves. The Lawgiver's purposes are identified in the Qur'an or hadith either directly or by allusion. Sometimes the text makes numerous references to something without actually saying that it is a Lawgiver's purpose. When all such references are put together, their combined reading concurs on a certain purpose or *maqasid*. This process is known as induction (*istiqrā'*) which is a generally accepted method for the identification of *maqasid*. A learned scholar of Shari'ah would know, for instance, that trustworthiness (*amanah*), truthfulness (*sidq*), justice, compassion, good character (*adab, husn al-khuluq*), unity among the faithful (*wahah*) and God-consciousness (*taqwa*) are among the *maqasid* of Shari'ah even if the text does not specifically say so. *Istiqrā'* partakes in *ijtihad*, so it would be reasonable to say that *maqasid al-shari'ah* are identified by the scripture or by *ijtihad*.

The human purposes do not necessarily involve a juridical methodology and approach. Human beings make numerous decisions based on purely practical purposes which may or may not relate to shariah purposes. With reference to pursuit of knowledge, for instance, the Lawgiver's purpose of knowledge and education is knowledge of God and proper manner of worshipping Him and also

to explore and understand His creation. The human purpose of education may be to earn a university degree in order to secure employment. In a similar vein, the Shari'ah purpose of marriage is procreation of the human species, but the human purpose of the same for an elderly couple may only be to find companionship. The two classes of purposes are often interrelated: in such cases the Shari'ah only specifies that the human purposes do not violate *maqasid al-shari'ah*. It may be helpful to illustrate in a few examples how the Shari'ah and human purposes interact and are actualised in combination with one another:

1. Bringing of ease and removal of hardship (*taysir, raf' al-haraj*) is one of the recognised *maqasid* of Shari'ah that characterises Islam's approach generally but more so perhaps with reference to temporal affairs, say in education and teaching. The question of how is this to be actualised and through what means may be responded to as follows: Scholars and teachers should speak with simplicity in line with the receptivity of their audience's level of understanding, cultural characteristics and needs. Is it mere information or also improvement of character and combating of a particular mischief? A lecture given in a village is not the same as one delivered in a metropolis, and one that is given to a group of scholars is also not the same as one that addresses the general public. A speech that seeks to rectify existing deviations should also be focused on its purpose and avoid complex theoretical preliminaries.<sup>1</sup> All of these may be said to be the means toward actualising the Shari'ah purposes of *taysir* in the dissemination of knowledge.
2. Another recognised purpose of Shari'ah is cooperation (*ta'awun*) in good works, which is grounded in both scripture and precedent and commands high merit in the Islamic order of values. This is actualised, in turns, by means, not only of helping those in need of it in time of calamity and distress, but also by means of long term measures that sustain the effort, and widen its network through inviting others to join hands. The means (*wasilah*) toward that *ta'awun* may also be the establishment of philanthropic foundations, adoption of correct and better targeted policies that respond to people's needs, and also informing them of the value that Islam attaches to charitable work. As can be seen in this illustration, several means are utilised to secure and actualise the same purpose, that is, of cooperation in good works.<sup>2</sup>
3. Should our purpose be to raise public awareness of the *maqasid* themselves, as we think that individuals and organisations ought to be better informed of *maqasid* and pay greater attention to them, then we need to identify the means by which this can be effectively done. One

would evidently be to engage with the media to give greater exposure about the *maqasid*. Another would be to identify capable persons to write not only learned essays for academic publications on *maqasid* but also brief, succinct and targeted pieces for print media outlets. Yet another possible means would be to hold seminars and conferences. And finally if one were to think that the Arab countries should do better in this regard, one would need to find ways and means to engage with them in Arabic and identify areas to focus one's efforts. One may even do that in the selection of *maqasid* themselves, simply because *maqasid* occur in so many varieties. If one aims at the *daruriyyat* category of *maqasid*, then which one does one take as a matter of priority and so forth.

4. With reference to Islamic banking and finance (IBF), there is a groundswell of opinion among both the Shari'ah advisors and industry professionals on the need to inject the *maqasid* of Shari'ah into the fabric of IBF and that doing this is necessary if one were to protect the credibility of IBF from further erosion. IBF practices are said to have moved further away from the spirit of Shari'ah by following their conventional counterparts for a long time. IBF has furthermore followed the rules of *fiqh* in a formalistic way often at the expense of their purposes. IBF practitioners apply, in other words, the *fiqh* rules but are in disconnect with the *maqasid* of those rules. There is clearly a demand for a *maqasidi* approach to overcome the shortcomings of this *fiqhi* literalism in the IBF practices. But when turning to the *maqasid* blue print, it also tends to fall short of providing the needed input in the form of pragmatic tools to rectify the aberrations, partly because the *maqasid* have remained somewhat too theoretical to be of much help to practitioners. Most of *maqasid* are theoretical in that they do not have substantive rules of their own. Rather the *maqasid* can tell us how the *fiqh* rules should be applied, not to replace those rules. That said, one may still need to explore the resources of *maqasid* further to make a better appraisal of their relationships with the *fiqh* and *usul al-fiqh*, which is what we propose to do. One obvious question would be how to identify the valid Shari'ah purpose of a *fiqh* rule, transaction or contract.

To identify one's purpose and specify the means to actualise it may or may not always involve recourse to Shari'ah sources, but only to rational common sense methods, which is why some scholars maintain that *maqasid* can be identified by the human intellect (*al-'aql*) and also innate human nature (*al-fitrah*). When a *maqasid* is identified, the next step would be to ascertain the suitable means for its actualisation. The means that one chooses must not be disproportionate or too indirect for the purpose and that it is also permissible under Shari'ah. Both

the means and ends must be lawful. For a serious discrepancy between them can lead to distortion, or manipulation through the use of a legal trick (*hilah*) to obtain an unlawful end through a seemingly lawful means.<sup>3</sup> This would introduce complication and invoke, in turn, application of the usual *al-fiqh*'s notion of 'blocking the means' (*sadd al-dhara'ir*). In short, actualisation (*taf'il*) of *maqasid* is about identification of purposes and means by which they are actualised.

This paper begins with the definition and meaning of *maqasid* and proceeds to ascertain three discernible tendencies regarding their scope: reductionist, expansionist, and the moderate approach of *wasatiyyah/i'tidal*. Then we address the question as to whether the *maqasid* may be recognised as a proof or source of Shari'ah in its own right. Can one, in other words, extract a ruling (*hukm*) of Shari'ah directly from the *maqasid*, or should one always follow the *usul al-fiqh* approach? Responding to these questions would help the reader to know more clearly what to expect of the *maqasid*. We often speak of the *maqasid* but when it comes to actual practice, we apply the *fiqh* rules. Can one just ignore the latter and refer directly to *maqasid*? Then we explore the relationship of *maqasid* to the Qur'an and hadith, and to *usul al-fiqh* respectively. We also ascertain the roles respectively of the human intellect ('*aql*) and innate human nature (*fitrah*) in the identification of *maqasid*. Our following review of the means and actualisation of *maqasid* elucidates this subject through several illustrations. *Maqasid*-based *ijtihad*, or *ijtihad maqasidi*, is also discussed in a succeeding section, which is followed, in turn, by a conclusion and a set of actionable recommendations.

## Definition and Meaning of *Maqasid*

*Maqasid* is the plural of *maqasid*, from the root word *qasada* (to intend), or that which one intends to reach one's objective or purpose. Muslim scholars have given different definitions to *maqasid*. The renowned Andalusian Ibrahim al-Shatibi (d. 790/1388) who wrote much on the *maqasid* did not actually define it. Commonly cited definitions of *maqasid* are those of Muhammad Tahir ibn 'Ashur (d. 1974), Muhammad al-Zuhayli, Yusuf al-Qaradawi and Ibn Bayyah, all of whom describe *maqasid* as the "wisdom and meaning" that underlie the rulings (*ahkam*) of the Lawgiver. Ibn 'Ashūr defined the general objectives (*maqāsid 'āmmah*) of the Shari'ah as "the deeper meanings (*ma'ānī*) and inner wisdom (*hikam*) that the Lawgiver has contemplated in respect of all or most of the Shari'ah ordinances."<sup>4</sup> For Qaradawi, "*maqasid al-shariah* refer to the final ends and purposes (*al-ghayat*) aimed at by the textual commands, prohibitions and permissibilities, and the detailed rulings (*al-ahkam al-juz'iyah*) seek to realise them in the life of competent individuals, families and communities of the Muslim *ummah*."<sup>5</sup> Simply put, *maqasid* is another term for the meaning and

wisdom sought by the textual rulings of Shari'ah. Qaradawi's definition clearly seeks to relate the *maqasid* closely to the detailed textual rulings of Shari'ah in their totality. The *maqasid* are thus to be found in the *ahkam* and have no separate existence outside them. For 'Abd Allah Bin Bayyah, *maqasid* refer to "the spirit of Shari'ah, its meanings, wisdom, purposes and objectives." These meanings arise from the original address of the Lawgiver (*min kitab al-shari' ibtida'an*), as well as those arrived at through inferences and interpretations.<sup>6</sup> Bin Bayyah's definition not only relates the *maqasid* closely to the text but is inclusive of rational inferences from the textual sources that can also determine and identify the *maqasid*. Muḥammad al-Zuhaylī defined *maqasid* as "the ultimate goals, aims, consequences and meanings which the Shari'ah has upheld and established through its laws, and consistently seeks to realise, materialise and achieve at all times and places".<sup>7</sup>

### **Approaches to *Maqasid*: Reductionism, Expansionism and Moderation (*tafrit, ifrat, i'tidal*)**

Three tendencies are noticeable in the contemporary discourse on *maqasid*, one of which is the neo-Zahiri approach which tends to be reductionist (*tafriti*) of *maqasid* and confine them to the clear text and immediate meaning and purpose thereof. For a *maqsad* to exist, in other words, there must be a clear text to say so. The second tendency is expansionist (*ifrati*) that exaggerates in the identification of *maqasid* at the expense even of scripture-creating and identifying new *maqasid* without clear supportive evidence. The third and the correct approach is the moderate (*wasati*) approach opting for *maqasid* that find support in the scripture and valid precedent. For instance, elimination of harm (*raf' al-darar*) is a valid Shari'ah purpose which has wide-ranging applications and there are guidelines on how a harm can be correctly measured and evaluated - and that is how moderation is also ascertained. A careful approach to moderation is to be guided by valid precedent, knowledge and good judgment.<sup>8</sup>

There is general agreement that the Qur'an and hadith are the most authoritative sources of *maqasid*, but there is disagreement as to whether rational inference from these sources can also introduce and identify *maqasid*, and if so, to what extent.

The five essential *maqasid*, namely of protection of religion, life, intellect, lineage and property are the salient purposes of Shari'ah by general consensus. Prominent scholars, including Shaykh Muhammad al-Ghazali (d. 1996), Yusuf al-Qaradawi, Ahmad al-Raysuni, Isma'il Hasani, and Ahmad al-Khamlishi have added justice, equality, freedom, social and economic rights to the higher purposes of Shari'ah upon saying that the five essential *maqasid* were based on

the *ijtihad* of Abu Hamid al-Ghazali (d. 508/1111) based on his reading of the prescribed penalties (*hudud* and *qisas*) and the value points the Shari'ah sought to protect through them.<sup>9</sup> Other scholars have included human dignity, mercy and compassion, unity, and fraternity (*ukhuwwah*) to the range. Support for most of these can be found in the Qur'an and hadith, yet many text book writers have excluded them on the analysis that they are too general and need to be specified and related to particular cases. Khadimi and Raysuni have also spoken of adding fundamental human rights and protection of the environment to the list of essential *maqasid* but registered differences of opinion as to whether most of these can be subsumed under the five *daruriyyat* through a wider reading thereof. Protection of life would thus include human dignity and basic rights as well as the right to environmental safety. A great deal of human dignity and environmental protection can also be subsumed under the protection of religion and that of property. One can add, they say, separate headings for these new *daruriyyat*, or else subsume them under the existing five.<sup>10</sup> In our view, adding these new headings under the *daruriyyat* is likely to dilute an existing consensus over the five *daruriyyat*, hence it may be preferable to seek fresh consensus for these new additions. Jamal al-Din 'Atiyah (d. 2016) has made an attempt to include most of them either under the higher objectives of Shari'ah or place them under his expanded classifications of the *maqasid*.<sup>11</sup>

It is reasonable and moderate to note what some commentators have observed that the *maqasid* should not be confined to *ijtihad* and *mujtahidin*; it should be possible instead for everyone who can utilise the resources of *maqasid* in due proportion to their knowledge and experience to do so. For the *maqasid* are guidelines to purposeful thinking, analysis and evaluation generally, not confined to any particular discipline as such. Every researcher, interpreter, mufti, and judge could gain from the knowledge of *maqasid al-shari'ah*.<sup>12</sup> Clear goal identification then becomes a strategy of thinking that enhances one's resources and guides one's progress in meaningful ways. This is what is often lacking on the part of many competent researchers in the economic and development fields – they construct the economic aspect at the expense, however, of human development, and may even be inflicting harm. One may also find people who defend individual rights often at the expense of community rights; food experts introduce and promote food and beverage varieties at the expense, at times, of harming people's physical and even moral health. Individuals and states may be constructing one thing but destroying another – which is what is happening in the space and weapon technologies and some of the questionable scientific advances.

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'Atiyah has aptly noted that traditional Islamic scholarship in the area of theology (*'ilm al-kalam*) has almost totally ignored the potential contributions

of *maqasid*, whereas contemporary opinion actually demands this. He adds that the prospects of extending the *maqasid* to theology have increased in the light of enhanced scholarly contributions in recent decades that pave the way toward that end.<sup>14</sup>

A similar neglect of the *maqasidi* approach is noted in the field of politics. Since leadership is a religious imperative, establishing a system of rule is one of the *maqasid* of Shari'ah. Thus it is suggested that *siyashah shar'iyah* (Shari'ah-oriented polity) that subsumes political leadership must be guided by the ethical norms of Islam. This has not, however, been the case in the longer history of Islamic government.<sup>15</sup>

A debate has also arisen as to whether *maqasid* constitute a proof of Shari'ah side by side with the other recognised proofs, and if so, can a ruling of Shari'ah be founded on *maqasid* and acted upon without looking at any other evidence. Subhi Mahmassani's affirmative response to this question came under scrutiny, however, by 'Allal Fasi (d. 1964). In his *Falsafat al-Tashri' al-Islami*, Mahmassani had recognised the *maqasid* as an additional proof (*dalil*). Al-Fasi's response is that the *maqasid* is not another proof the like, for example, of natural law and natural justice in western jurisprudence - on which a judicial decision may be based. *Maqasid* is not a proof in itself, but one which stands with every other proof and a part thereof. Al-Fasi added that the Shari'ah consists of laws and rules (*ahkam*) which have their own purposes; *ahkam* are also sometimes taken from *maqasid*. Anyone learned in Shari'ah should read the text and laws of Shari'ah in the light of their purposes so that his or her understanding becomes deeper, coherent and mature. The Qur'an is the first proof, together with its *maqasid*, which is also true of the Sunnah. Analogy (*qiyas*) is also a proof that must stand on its purpose. Some instances of analogy are found to have departed from its rationale and *maqasid*, in which case a correction is attempted by recourse, for instance, to juristic preference (*istihsan*) or consideration of public interest (*istislah*) so as to integrate the proper *maqasid* therein. In the event where an issue is encountered for which no relevant text or analogy is found, reliance on *maqasid* will be greater. Recourse is to be had in that case to broad and general guidelines of the scripture to extract a ruling in the light of their *maqasid*.<sup>16</sup>

Ibn 'Ashur thought that the *maqasid* should be given an independent status. This was not entirely without precedent as earlier scholars, including the Maliki scholar Shihab al-Din al-Qarafi (d.684/1283), Ibn Taymiyyah and Ibn Qayyim al-Jawziyyah of the Hanbali school had made comments that pointed in the same direction.<sup>17</sup> A critic suggested, however, that al-Shatibi had not given the *maqasid* an independent status when he discussed the *maqasid* in the fourth of his four-volume *al-Muwafaqat* and treated it as an extension of *usul al-fiqh* for the other three volumes are on *usul al-fiqh*. Al-Shatibi had, in other words, accentuated

the importance of *maqasid* without claiming that it is either separate from or independent of *usul al-fiqh*.<sup>18</sup>

Bin Bayyah's opinion on the relationship of *usul al-fiqh* to *maqasid* is that they are inseparable from one another, albeit that *maqasid* is a distinctive chapter in the larger matrix of *usul*, alongside other chapters such as *istislah*, conflict and preference (*al-ta'arud wa'l-tarjih*) and *qiyas* etc. Having discussed both Ibn 'Ashur and Bin Bayyah, Raysuni is inclined to side with the former, adding that *maqasid* is being taught, in recent decades, as a separate course in many countries and universities including Morocco, Algeria, Mauritania, Pakistan, Saudi Arabia, al-Azhar of Egypt and many more and is treated as a distinctive subject in its own right.<sup>19</sup> In our view teaching a separate course on *maqasid* is not a proof of its independence from *usul al-fiqh*. We take the view that it is a distinctive discipline of shariah without claiming, however, that it is independent.

### ***Maqasid, Scriptural Sources and Usul al-Fiqh***

Traditionally textual interpretation (*tafsir*) and analogy (*qiyas*) served the principal vehicles of delivering the meaning of the scripture and its analogical extension to similar cases. Yet the scope of this exercise was restricted by a plethora of conditions that *usul al-fiqh* attached to almost every aspect of interpretation and analogy.<sup>20</sup> The *usul* methodology subsumed the *maqasid* mostly under the effective cause ('*illah*), saying that the cause and rationale of a ruling also indicates its purpose. Thus we read in a legal maxim: "The effective causes of Shari'ah rules indicate the purpose of the Lawgiver and should be followed whenever they are known."<sup>21</sup> Yet in our view subsuming the *maqasid* under '*illah* would effectively place the *maqasid* back under the umbrella of conventional *usul al-fiqh*.<sup>22</sup> What we propose instead is to read the '*illah* and *maqsad* together and draw appropriate conclusions from them in the construction of *ijtihad*, but not to subsume the one under the other. To subject the *maqasid* to the *usuli* process of *ta'lil* (search for the '*illah*) is also not straightforward. For it is not easy to identify the '*illah* to begin with, and then also that '*illah* and *maqsad* are different in certain respects: '*illah* is usually tied to status quo ante and it looks to an existing *hukm*, whereas a purpose (*maqsad*) also looks to the future and seeks to extend the Shari'ah beyond existing precedent. The *maqasid* are also evolving and changeable in tandem with the progress of science and civilisation. '*Illah* is a more restrictive concept by comparison.

We propose therefore that '*illah* and *maqsad* should inform rather than substitute one another. To illustrate, the Qur'an enjoins just retaliation (*qisas*) in terms of 'life for life (*al-nafsu bi'l-nafs*),' in one place (al-Maidah, 5:45), but also provides that the law of *qisas* is meant to protect life (al-Baqarah, 2:179). The former expounds the '*illah* and the latter expounds the purpose and wisdom

(*hikmah*) of the law of *qisas*. In the event where several persons collude in murdering one, an '*illah*-based approach will make only one person liable to *qisas*, which is not satisfactory, as it was shown, in fact, during the time of 'Umar al-Khattab in a murder case in Yemen. He concluded after much deliberation that people's lives cannot be protected unless all who colluded in the murder of one are made liable to *qisas*. This position is sound as it reads the '*illah* together with the *maqсад* or *hikmah*, and it represents a standard Islamic law in both its Sunni and Shia branches. A similar example may be the punishment of apostasy, which is provided in the hadith, "One who changes his religion shall be killed." This is a much-debated text, but if the ruling of this hadith is based only on its '*illah* (i.e. change of religion), it will be less than satisfactory and could even lead to distortion. But if one reads the hadith in its proper context, and note that the Prophet uttered it in response to a situation expounded also in the Qur'an: the head of a tribe would embrace Islam and all of his tribe would follow suit early in the day and would renounce it collectively by the day's end with the intention to weaken Islam – he would understand the reason of the Prophet's utterance of that hadith. The purpose of the hadith was to protect Muslim unity and penalise acts of treason that seek to destroy Islam. A dry '*illah*-based reading of the hadith should therefore be informed by its purpose. This purpose is incidentally indicated in another hadith, which made apostasy liable to death by one who 'boycotts the community' (*mufariq li'l-jama'ah*) and attacks its unity and leadership.

Reflecting on al-Shatibi, he did not resort to *ta' lil* (search of the correct '*illah*) in his construction of the theory of *maqasid*. When he proposed induction (*istiqrā'*) as an identifier of *maqasid*, for instance, he was of the view that induction cannot be subsumed under *ta' lil*. In rational terms, induction could also be extended to ideas and values that society may embrace in the course of history and time. Thus when one says that the essential *maqasid* should also include human rights or protection of the environment, one can find support for them in the sources of Shari'ah in a way that can hardly be tied to the '*illah*. Then more recently when Ibn 'Ashur and some other scholars added rationality, and innate human nature (*'aql* and *fitrah*) as additional identifiers of the *maqasid*, the whole of their effort was geared toward equipping the theory of *maqasid* with its own methodology and approach rather than subjecting it to any *usul al-fiqh* method, including the '*illah*.<sup>23</sup>

Twentieth century scholarship has actually sought to expand the scope of *maqasid* from a purely juristic context to the wider arenas of modernity and civilisation.<sup>24</sup> The *maqasid* should naturally have a higher profile as a goal-setter and determinant of values. The *usul al-fiqh* can be seen in a fresh light as a facilitator of *maqasid* by providing it with ideas and resources to help with the actualisation of *maqasid*. Yet the *usuli* doctrines are almost all in the nature of probabilities and have not been recognised as the final arbiters of goals and values.

Hasan Jabir elaborates on this to say that the Qur'an is the most authoritative source of the *ahkam*. While the *usul al-fiqh* shows the ways of extracting rules from that source, *usul al-fiqh* is by itself not enough without the aid of *maqasid* - if the Qur'an and Sunnah were to guide the way of the Muslim *ummah* to new times and climes. For this would necessitate studying the primary sources in light of the broader universals of *maqasid*.<sup>25</sup> Moreover, since the *maqasid*, as a discipline, consist of an articulation of the spirit and purpose of Shari'ah, it helps to guide the *usul al-fiqh* doctrines by removing or minimising instances of apparent conflict and burdensome elaborations therein. The *maqasid* also aspires to greater consensus among the wider spectrum of schools and scholars of Shari'ah - even of other traditions and ideologies.<sup>26</sup>

The idea of *maqasid* has in reality been the prime mover in bringing the letter and spirit of the law closer together. With regard to the consolidation of hadith, for instance, unlike the Qur'an which is equipped with detailed information on the occasions of its revelation (*asbab al-nuzul*), most of the hadith do not elaborate their own occasion and context. This is often left to the speculation of the narrator and jurist. By paying attention to the *maqasid* and the overall knowledge of the subject, hadith scholars were able to sift through and isolate much of the superfluous material in hadith.<sup>27</sup> *Maqasid* can also play the same role as criteria of evaluation of legal rulings obtained through interpretation and *ijtihad*. The *ijtihadi* rules of Shari'ah and fatwa are changeable with the change of time. Almost all jurists understand, as Ibn Qayyim al-Jawziyyah explains, that justice is not done by the formal application of law regardless of circumstances that may present pressing situations of necessity and need. A competent scholar therefore assesses a situation and decides whether or not there is a need for an exception to the law. With knowledge of the purposes and objectives of the law, the scholar would know whether there is a need for fresh *ijtihad*, or for grant of relaxation (*rukhsah*) to formal application of the law.

### **Human Intellect ('*aql*) and Innate Human Nature (*fitrah*) as Identifiers of *Maqasid***

Can human intellect and judgment validate the *maqasid* side-by-side with the text – or even in the absence of a clear text? Different responses have been given by both the early and contemporary jurists. Few would agree that '*aql* alone can validate the *maqasid* without any textual evidence. Most jurists have agreed, on the other hand, that reason can evaluate human conduct on temporal affairs, but that reason cannot provide a reliable basis of evaluation on devotional matters (*'ibadat*).<sup>28</sup> The discourse on this point tends to run parallel, for the most part, with the one that has arisen concerning the proof of *maslahah*. Al-Ghazali has

observed: “It is by means of ‘*aql* that people know the benefits of this world.”<sup>29</sup> Credibility is given, however, he added, to the intellect of those with sound judgment and knowledge of the custom and culture of society. ‘Izz al-Dīn ‘Abd al-Salām (d. 660/1262) observed that “temporal benefits and harms are mostly known and identified by ‘*aql*, not only in the Shari’ah of Islam, but in most other traditions. A person of sound judgment would know, even before the existence of a revealed text, that realisation of pure benefit or prevention of pure harm is praiseworthy. Learned scholars in most traditions would also agree on the prohibition of murder, theft, adultery and the like. As for the benefit or harm of concern to the hereafter, these can only be known by means of transmitted proof (*naql*).”<sup>30</sup> Ibn Taymiyyah’s view on the authority of ‘*aql* is similar but it adds a reference to innate human nature (*al-fiṭrah*)<sup>31</sup> that also plays a role in the identification of *maqasid*. The Shāfi‘ī school holds unrestricted reasoning (*istidlāl*) as a valid basis of judgment even if it cannot be traced to a proof text, provided that it operates close to the meaning and spirit of those proofs.<sup>32</sup> Imām al-Shāfi‘ī referred to the precedent of Companions saying that whenever they could not find a textual ruling on a matter they would resort to *istidlāl*.<sup>33</sup>

Human intellect is informed by the senses, but has the capacity to go beyond the data of the senses, although it falls short of the wider reaches of revelation (*wahy*). The intellect performs a number of functions. It perceives that which is unseen based on that which is seen, derives universals from particulars, recognises self-evident truth, and associates causes and effects. It is a criterion of responsibility, and the criterion by which God Most High has honoured humankind above the rest of His creation. It is also the only means by which humans can know the essence of responsibility and *taklif*. Human reason is therefore a credible basis of judgment in the absence of revelation, provided that the judgment arrived at is in harmony with the general spirit and guidance of the revealed scripture.

Innate *Human Nature* (*fiṭrah*)<sup>34</sup> is a Qur’anic term denoting a human disposition that inheres in every person and thus is universal by the fact of its commonality. The Qur’anic assignment of the vicegerency of man in the earth (*istikhlāf*—al-Baqarah, 2:30) makes everyone carrier of a Divine trust and mission to build the earth. *Fiṭrah* thus refers to the innate nature of God’s trusted vicegerents, all of whom partake in a sparkle of the Divine (Q 38:72), and excel in ranks over the rest of His creatures (al-Isra’, 17:70). This is also manifested in Islam’s designation of itself as *dīn al-fiṭrah*, a religion that strikes harmony with enlightened human nature. *Fiṭrah* is intuitive but matures with insight and experience. Ibn Sina (d. 1037) equated *fiṭrah* with ‘*aql* when he spoke of intuitive intellect (*fiṭrah*) endowed in someone who is brought into this world without prior exposure to society. Then he perceives and comprehends concrete realities and customs. He admits, however, that not everything affirmed by *fiṭrah* is true;

what is true is the capacity of innate human reason to discern value, good and bad, in what is perceived by the senses.<sup>35</sup>

Natural *fitrah* is thus an inherent endowment, and Islam bears essential harmony with it. The natural *fitrah* in our human make-up is not all of it known to us, but our intellect can learn much from our inner organism and bodily architecture, genetic, cellular and intercellular communication, and physiological interactions in and between organs. *Fitrah* is not sufficiently studied for us to know how it communicates with our intellect. We do not know well enough the physiological workings of our mental faculties within our *fitrah*. One can assume, however, that when they go against one another, knowingly or otherwise, a corrective is likely fall due.<sup>36</sup> It goes against the *fitrah* of a young child of two, for instance, to be pushed into premature tutoring, for children ought to learn by playing; it also goes against our *fitrah* to be deprived of our natural needs for sleep, family ties and friendship.

Whereas rationality is testable through closer scrutiny, *fitrah* is not so clearly testable due to our insufficient knowledge of it. Social custom and consensus of people of sound nature may be said, however, to be a reasonably reliable external indicator of *fitrah*.

Ibn ‘Ashur linked the *maqasid* to *fitrah*, quoting a Qur’anic text, and concluded that both the Shari’ah and its *maqasid* bear harmony with *fitrah*:<sup>37</sup>

And so, set thy face steadfast towards the one true faith, turning away from all that is false, in accordance with the natural disposition (*fitrah*) which God has endowed in humankind. Allow no change to alter (or corrupt) what God has endowed (al-Rum, 30:30).

*Fitrah* also refers, according to Ibn ‘Ashur, to the natural disposition (*khilqah*) and the natural order (*nizām*) that God endowed in every creature. The human *fitrah* consists both of inward and outward manifestations. Walking on two feet is just as much an aspect of man’s physical *fitrah* as is his intellect and reason. Similarly, relating effects to their causes and drawing conclusions from them is an intellectual *fitrah*. In sum, the Shari’ah objectives, or *maqasid*, according to Ibn ‘Ashur, are mostly embedded in man’s innate *fitrah*.

### **Actualisation of *Maqasid* and the Role of *Wasā’il***

The whole of Shari’ah consists of purposes (*maqasid*) and the means (*wasā’il*, also known as *mukammilāt*) that seek to attain them. A *wasīlah/mukammil* is the means that helps to achieve the particular *maqasid* it is attached to, be it essential (*daruri*), complementary (*haji*) or a desirable (*tahsini*). When a suitable means is used to secure a correctly identified purpose, the latter is actualised as a result. Means and accomplishes are sometimes, but not always, identified by the Shari’ah directly or through the fulfillment of certain causes and conditions.

Where means are liable to change with the change of circumstances, whereas purposes tend to command greater stability and permanence.<sup>39</sup> Yet it is the means that help to establish the relevance of the *maqasid* to a particular context or circumstance. The *maqasid* are also desired in themselves, whereas the *wasā'il* are not. Moreover, the means are subsumed by their purposes, depending on the strength or weakness of the relationship between them. If the means in question is indispensable to securing its relevant purpose, then according to a legal maxim, "That without which a *wajib* (obligatory command) cannot be accomplished also becomes a *wajib*." This maxim refers to means that is instrumental to its end but not to one that may be related only to a subsidiary or incidental aspect thereof.<sup>40</sup> The reverse of this is also true in that the means to *haram* also partakes in *haram*. Unlawful means cannot therefore bring about lawful results - both the purpose and its means must be lawful.<sup>41</sup>

The means to a certain purpose may have been identified in the text of the Qur'an or hadith, failing which it is identified through rationality and *ijtihad*. To illustrate the means/accomplisher of an essential purpose, the Qur'an (al-Baqarah, 2:283) enjoins that a future obligation (*dayn*) should be reduced into writing. This is to ensure protection of property (*hifz al-mal*), which is one of the essential *maqasid*. Documentation in this case is the means toward the protection of that purpose, and both are textually identified.

Accomplisher of a purpose signifies a complementary means or factor in securing a purpose. To illustrate this point, we refer to contractual options (*khiyārat*, sing. *khiyār*) that can be appended to a sale's contract. Upon concluding a sale, for instance, the purchaser may stipulate an option that he will ratify the deal in three days. Inserting an option into a sale contract serves as an accomplisher (*mukammil*) of the sale, which ensures that it is free of uncertainty and misrepresentation (*gharar*) - sale itself being a complementary (*haji*) purpose of Shari'ah. To illustrate the accomplisher of a *tahsini*, or a desirable *maqasid*, in relationship to the permissibility of sale, one may refer to market regulations requiring, for instance, that only clean and lawful food may be offered for sale.<sup>42</sup>

The means must not exceed nor overrule its purpose. To take our previous example of sale and option again, the purpose of an option is to prevent uncertainty and *gharar* in a sale, but if one were to exaggerate and demand total exclusion of *gharar*, it would be difficult to achieve and may even obstruct the sale. For a slight *gharar* is unavoidable and is usually tolerated in a sale. To give another example, the existence of counter-values in an exchange contract is desirable - as it accomplishes the purpose of sale very well. Yet if this were to be demanded in a contract of lease (*ijarah*) on the assumption that this is just another type of sale, it would nullify the deal - as only one of the two sides of the contract is usually present in *ijarah*, not both.<sup>43</sup>

An instance of excessive and exaggerated use of the means can be seen in the IBF practices, for instance, of *murabahah* (cost plus profit sale) and *bay' bi-thaman aajil* (deferred payment sale), which are primarily trading tools, or *wasa'il*, yet both are so frequently being used as means, not of trading, but of financialisation reduced into paper transactions and exchange of documents, and procurement of *riba*-oriented revenues. This is tantamount to excessive, even distorted, uses of means for procurement of questionable purposes. The main part of the narrative of dissatisfaction we have depicted regarding the IBF practices is due, in our view, to careless and distorted uses of the *wasa'il* and *maqasid*. We have also seen excessive reliance in the IBF practices on *bay'al-'inah*, which is widely seen as a disguise to *riba*. In Malaysia, a corrective measure was taken by Bank Negara Malaysia, which issued orders in 2014 that *bay'al-'inah* should be substituted by *tawarruq*. Unlike *bay'al-'inah* which is concluded between two parties, *tawarruq* involves a third party intervention. Since then, *tawarruq* has become even more pervasive than *murabahah* for the same purpose: financialisation and disguised *riba*. The end-result is about the same, and so is the public criticism of the IBF practices.<sup>44</sup>

When there are numerous means for the realisation of one and the same purpose, the one that is most efficient and direct must be selected. Should there be several equally good means available to realise a particular *maqсад*, then more than one means may be selected. The Shari'ah thus provides certain guidelines with regard to the selection of means, this being an area where flexibility and choice exists for a competent person, such as a scholar or judge, to make appropriate choices in light of the attendant circumstances.<sup>45</sup> No text has given a definitive list of the means and purposes, which is why we proceed to provide a few additional illustrations that help to develop a certain insight into the subject matter.

An instance of *ijtihad* in the selection both of the means and purpose was the *ijtihad* of caliph 'Umar al-Khattab in his treatment of the spoils of war. The issue was whether the fertile lands of Iraq that the Muslim fighters had conquered should be distributed among them. For the Qur'an had entitled the warriors to it (Cf., al-Anfal, 8:41). Yet the caliph did not distribute the said land in due regard to another Qur'anic ruling that wealth 'many not be concentrated among the wealthy' (al-Hashr, 59:7). 'Umar interpreted the two verses so as to say that the former (on war booty) referred to movable assets, not to land. He reasoned that distributing that land would turn the Muslim warriors into settled land-owners, which was not an appropriate option at that time. He consequently let the land remain with their owners, but they had to pay the *kharaj* tax.<sup>46</sup>

The caliph thus used *ijtihad* in the selection of both the purpose and its means. It would be possible to distribute the war booty according to the first verse in surah al-Anfal on the assumption that this was how wealth was distributed to

prevent its concentration, but his *ijtihad* followed a different path, and no one has opposed him on this. The initial means would have been distribution of the war spoils but the caliph used taxation as an alternative means of preventing undue concentration of wealth among the wealthy.

Another example was the moratorium on the prescribed punishment of theft that caliph 'Umar al-Khattab imposed during the year of drought in Madinah. This also entailed a temporary suspension of a Qur'an verse for a broader Qur'anic purpose, namely justice. For imposing the said punishment seemed unjust during the famine. The means (*wasilah*) used here was suspension of punishment – which involved, once again, a measure of reflection and *ijtihad*. The initial purpose was justice and the means toward it was implementation of the prescribed punishment, but the caliph used suspension of that same punishment instead as the means to attain justice.

In yet another example, 'Umar al-Khattab made a decision to impose *zakah* on horses, despite the Prophet's clear instruction that exempted horses from *zakah*, as horses were used in *jihad*. However due to change of time and the fact that horses had become valuable assets for their wealthy owners, they were required to support the poor through the payment of *zakah*.<sup>47</sup>

Next we look at instances of contemporary *ijtihad* that either proceed on the basis of *maqasid* or were strongly influenced by it. These illustrations may also help to provide insight into our discussion over the independence or otherwise of *maqasid* and how they relate to, or interact with, their means. But first, a word about *ijtihad maqasidi*.

### ***Ijtihad Maqasidi***

*Ijtihad maqasidi* is a relatively new phrase that has found expression in the works of twentieth century scholars, including Raysuni, 'Atiyah and the Shia scholar Mahdi Shamsuddin, who recommend a certain expansion of the *usuli ijtihad* to embrace the wider idea of *ijtihad maqasidi* also known as *ijtihad maslahi*. In this effort, the scholar/*mujtahid* develops new rulings based on his understanding of *maslahah* and *maqasid*, provided that he/she is endowed with a comprehensive knowledge of Shari'ah, its priorities, methods of conflict resolution and so forth. When *ijtihad maqasidi* is recognised as a valid form of *ijtihad*, it will, to a large extent, subsume and overshadow the argument for the independence or otherwise of the *maqasid* as a proof of Shari'ah separately from *usul al-fiqh*.

With reference, for instance, to the protection of intellect (*hifz al-'aql*), which is an essential Shari'ah purpose, one may include, the introduction of modern sciences into the educational programmes of institutions of learning, as well as the use of new methods of enquiry that promote the faculty of intellect. This

would mean actualisation of *hifz al-'aql* in a novel way rather than sticking to the hallowed example of prohibition of wine-drinking given as a means of protection of intellect. It may also mean that the religious madrasahs would be more open, as many have already been so, to the reform and modernisation of their teaching programmes.<sup>48</sup>

The leading Lebanese scholar, Mahdi Shamsuddin has also stressed in this connection the importance of inference (*istinbat*). Thus, he wrote that the Qur'an and Sunnah provide us with important sources of *istinbat*, but the modalities of inference have been exceedingly restricted by the *usuli* stipulations, which need to be revised and made more receptive to the influence of new developments in education and science. A wider understanding of *istinbat* is therefore recommended. Two areas of interest highlighted in this connection are the legal maxims of *fiqh*, which can be a rich resource for *maqasid*-based *ijtihad*.<sup>49</sup> The other and even more important is the general principles of the Qur'an, such as justice, being good to other, human dignity, and equality etc., which have been sidelined, on the whole, in the *maqasid* discourse through the *usuli* restrictions on rules of interpretation, or through stipulations attached to the application of *istihsan*, *istislah*, and *qiyas*.<sup>50</sup>

With reference to *qiyas*, Raysuni, Hasan al-Turabi (d.2016) and Shamsuddin have looked into the prospects of how a more flexible reading of *qiyas* can be attempted to connect *qiyas* with the *maqasid*. The prohibition of liquor drinking in the Qur'an (al-Ma'idah, 5:90), for instance, has been rather narrowly constructed in traditional *usul al-fiqh* manuals. The respective writers took a fresh look at *qiyas* through a combined reading of the *usul al-fiqh* and *maqasid* so as to extend the rationale of the text to new subjects and areas. One of the *maqasid al-shari'ah*, namely the protection of intellect is thus used to prohibit all substances that compromise the intellectual faculty of a person even if the substance in question is not an intoxicant: Irrational ceremonies and superstitious practices in the name of ancestral legacy, and use of amulets for curing illnesses etc., are also to be proscribed. Moving further, one may even refer to broader textual dispensations on the elimination of harm and prejudice (*darar*) to arrive at the same conclusion, without necessarily stretching the meaning of the particular text on drinking.

### **Maqasid-based Ijtihad: Case Studies**

Instances of *maqasid*-based *ijtihad* that revise certain *fiqhi* positions in the light of new realities are found in some of al-Qaradawi responses to particular questions, which may be summarised as follows.<sup>51</sup>

### *Christmas greeting*

1. A PhD student from Germany wrote to Qaradawi informing him that he is a practising Muslim alongside many others. Was it permissible for them to send Christmas greeting cards to their non-Muslim friends and neighbours and also exchange gifts with them: “We receive gifts from them and it is discourteous if we do not respond in a similar fashion.”

In his response Qaradawi began with quoting the Qur'an where Muslims are permitted to act justly and be good to those who have not been aggressive toward them, but which also prohibited them from doing so if the non-Muslims had been aggressive toward Muslims (Cf., al-Mumtahanah, 60:8-9). Qaradawi added that the prohibition in this verse contemplated the polytheists of Makkah who committed acts of aggression toward the Prophet and his Companions. The verse so referred to advises the believers to be good (*tabarru*) to all non-aggressors, which means something better than a measure-for-measure response. Al-Qaradawi also cited the hadith in which Asma' the daughter of Abu Bakr came to the Prophet and asked him about the fact that her mother, who was an associator (*mushrikah*) at the time, keeps on showing her affection – should she also reciprocate in the like manner– to which the Prophet responded that she should. The Qur'an also refers to non-Muslims “and if they greet you then you greet them with a greeting more courteous or equal.” (al-Nisa', 4:86). Al-Qaradawi discussed Ibn Taymiyyah's restrictive views on this in some detail but then commented: “Had Ibn Taymiyyah lived in our time” and saw how the world has shrunk and Muslims are in constant interaction with non-Muslims, he might have revised some of his views. Al-Qaradawi also relied on the point that many Christians themselves celebrate Christmas as a social occasion rather than a particularly religious one.

What we have seen here is a recourse directly to the Qur'an, especially to the *maqсад* of fairness and good relations with peaceful non-Muslims. The means (*wasilah*) at issue was exchange of Christmas cards and gifts. Qaradawi offered a fresh interpretation that delivered the desired response and purpose.

### *Inheritance*

2. In another question, a Muslim convert asked Al-Qaradawi whether a Muslim may inherit from a non-Muslim, adding that he was a British Christian and embraced Islam ten years earlier. His mother died and left a little inheritance which he refused to take based on the ruling that Muslims and non-Muslims may not inherit one another. Now his father also died and left a big estate behind of which he was the sole heir. British law entitled him to all of it. Should

he refuse it and leave it to non-Muslims while he was in need of it himself and could spend it on his Muslim family and other Islamic welfare objectives?

Al-Qaradawi responded that the majority position on this was based on the hadith according to which Muslims and non-Muslims do not inherit from one another. This has also been the practice of Companions and upheld by the leading schools of Islamic law. Some of the leading Companions, including ‘Umar al-Khattab, Mu’adh b. Jabal and Mu’awiyah Abu Sufian entitled the Muslims, however, to inherit from non-Muslims but not vice versa. Al-Qaradawi wrote that he also preferred this latter position even if the majority have not supported it, just as he also preferred the Hanafi interpretation of the hadith whereby ‘*kafir*’ in the hadith at issue is understood to mean a *harbi* at war with Muslims, but not all non-Muslims. He further added that the criterion and purpose of inheritance was material assistance (*al-nasrah*) and not unity in faith. This is why a *dhimmi* does not inherit a *harbi* even if they are of the same religion. To entitle a Muslim to inherit from his non-Muslim relative will also help prospective converts not to turn away from Islam for reasons only of losing their inheritance rights.<sup>52</sup>

In this ruling, assistance is the purpose; the means (*wasilah*) is inheritance of a Muslim from a non-Muslim relative, and the *hukm* (ruling) so issued actualises that purpose.

### *Organ donation*

3. Is it permissible to graft a part of the human body into that of another who is in dire need of it with the donor’s consent?

Qaradawi’s response: There are two views on this, one prohibitive and the other permissive. The former maintains that the norm of Shari’ah is that a Muslim does not have the right to destroy or mutilate a part of his own body (cf., al-Baqarah, 2:195), and also the renowned hadith: “all that belongs to a Muslim is prohibited to another Muslim, his blood, his property and his honour.” This is unlike personal property whose owner is entitled to give, sell, or donate as he wishes. The permissive view maintains that the criterion or purpose here is the greater benefit that may accrue the proposed donation especially when the harm is minor or negligible to the donor but which may well save the recipient’s life. Modern medicine has also changed the conditions of earlier times whereby grafting or mutilation of a body part could be fatal to the donor, which is no longer the case. Hence the prohibition collapses when the fear of fatality is no longer present.<sup>53</sup>

Al-Qaradawi concludes: “we concur with the permissive position provided that the surgical operation is carried by qualified and skilled physicians as there is greater benefit and saving of human life therein.”<sup>54</sup>

In this *maqasid*-based *ijtihad*, the purpose is saving life, and transfer of a body part through surgical mutilation is the means. The affirmative ruling or *fatwa* so issued actualises the purpose in question.

### *Cloning*

4. Questions have arisen with regard to cloning and other modes of genetic engineering applications. In response, we may say that if our study of the nature of cloning leads us to the conclusion, as it has in fact, that human cloning tends to fundamentally alter human nature and the God-ordained design of the human constitution, then it will broadly be considered a violation and prohibited. This may briefly be explained as follows: Whereas the normal child has twenty-three chromosomes from the mother and twenty-three from the father, a cloned child has twenty-three chromosomes from just one person. The Qur'an on numerous occasions refers to the natural way of human creation from a male and a female, and entitles the child to both mother and father. Human cloning violates these Qur'anic postulates. Another aspect of concern over cloning and other human genetic engineering applications, or eugenics, would be that science could become an instrument of discrimination whereby those who have access to means can eventually select their genealogies.

The two leading *maqasid* that are relevant here are protection of life, (*hifz al-nafs*) and protection of lineage (*hifz al-nasab*), and the means (*wasilah*) in the picture is human cloning. Both must be lawful and bring benefit. The means here interferes with the integrity of both these purposes and fails to actualise them in a shariah compliant way.<sup>55</sup>

5. The Shari'ah response may be totally different to other aspects of scientific developments. For instance, if new methods of fact finding, such as the DNA analysis, can resolve confusion over paternity, or identification of the war dead and those who die in a plane crash, or in the depth of open seas - this will serve in a better way the Shari'ah objective of the preservation of lineage (*hifz al-nasab*), and observance of the ties kinship (*sillat al-rahim*) in the family, who may need to know the facts of death of their deceased relatives.

In this illustration, the purpose is clearly stated to be the protection or preservation of lineage, and the means (*wasilah*) here is the use of DNA analysis, which is also applied in a lawful way, and the purpose is duly actualised through the affirmative ruling we have arrived at.

6. Finally, one may pass a permissive fatwa or ruling in regard to another technological application that concerns the *maqasid*. For instance, if computerised timing and location indicators can show, as they do indeed, the direction of Qiblah and determine precise time and location in unknown places and in outer space for prayer and fasting, this will evidently help to promote and protect religion (*hifz al-din*), which is one of the *daruriyyat*, and would demonstrate an instance of harmony between shariah and science. A Shari'ah purpose has been served here through the use of computer, which is the means (*wasilah*) in this example, and its application is also clear of impermissible elements. The person who prays in outer space, or one who observes the fasting of Ramadan in this way would have actualised the *maqsad* in question. The affirmative ruling here serves to actualise the said *maqsad*.

## Conclusion and Recommendations

The foregoing illustrations serve to show that the argument for the recognition of *maqasid* as a separate or independent proof of Shari'ah is not entirely devoid of substance. The focus of independence in this case is from the *usul al-fiqh*, which has traditionally dominated the *maqasid* and subsumed it under its various other proofs (*adillah*), such as juristic preference (*istihsan*), general custom (*'urf*), consideration of public interest (*istislah*) and even analogy (*qiyas*). Each of these are separate formulas for *ijtihad*. Then there should be no issue if one adds the *maqasid* also as separate proof or heading to the list without, however, suggesting that the *maqasid* should replace the *usul al-fiqh*.

Islamic banking and finance is clearly a show-case of the contemporary discourse on the actualisation of *maqasid*, due partly to its extensive market presence and the public's engagement with its operations. It is also due to global financial crises that IBF became the centre of attention as a possible alternative. That said, the *maqasid* discourse is by no means confined, as the examples we have given clearly show, to the IBF or to *mu'amalat*.

Public opinion has clearly been provoked to expect that the IBF regulatory authorities to bring in important reforms to integrate *maqasid* into the IBF operations. However, there has also been scepticism that Islamic banks are unlikely to be the prime movers of the expected reforms, dominated as they are by the capitalist model. It has even been said that banks are not an ideal institutional model for operationalisation of profit and loss sharing, equity based and *riba*-averse principles of the Islamic economy and finance.

This weaker presence of *maqasid* in contemporary IBF practices can be shown perhaps by the Shariah Governance Framework (SGF) that Bank Negara

Malaysia introduced in June 2011 and has energetically pursued it ever since. BNM has been active to make shariah the governing principle of IBF in Malaysia more comprehensively than before. This was a significant reformist step under the circumstances. Yet it is also clear that the *maqasid* discourse has been conspicuously absent in the spate of SGF related publications on perimeters and operational modalities of the various *fiqh* contracts - and then also in the Islamic Financial Services Act in 2013 that followed suit. Instead, the focus in all of this has basically been on the regulatory and procedural aspects of IBF without assigning any visible role to the *maqasid*. Six years down the line, public demand for the implementation of *maqasid* in the IBF sector has not subsided; one might even say it has become more pronounced because only a *maqasid*-anchored IBF is likely to curb the ubiquitous dominance of the capitalist model.

Transition to a *maqasid*-anchored IBF, if and when it becomes a reality, would require careful preparation. It would also require, proactive and innovative leadership, and a supportive institutional attitude. It is also likely to be a journey without a clear end as it can take progressive stages of refinement. In such an eventuality, the system would still be operating the existing *fiqh* contracts, simply because the *maqasid*, as a discipline, does not offer a substantive *fiqh* of its own. The changes will most likely be in the *maqasid*-anchored regulatory regimes and how the existing *fiqh* contracts are practiced in the IBF institutions.

If there is a transition to a *maqasid*-anchored IBF in Malaysia, one would expect that it would focus, in its initial stages at least, on the primary and general (*asliyyah*, 'aamah) purposes of the *fiqh* contracts, or at least those that are most commonly criticised for their neglect of the *maqasid*. One would presumably need to know and be able to identify what exactly are the primary and general purposes, say of *murabahah* (cost plus profit sale), *bay' bithaman aajil* (deferred payment sale) etc. For only then can one meaningfully attempt to address and rectify their respective shortfall on the *maqasid*. This would also entail fresh research to identify the primary objectives of the commonly-practiced *fiqh* contracts.

Moving away from the IBF, *maqasid al-shariah* also holds the promise of offering a counter-narrative in the application of Shari'ah law to minimise the erosive effects of the prevailing materialist culture, its capitalist underpinnings, and globalisation (largely of western values) that have also aroused public criticism and demand among the Muslim masses for authenticity. This demand was spearheaded by the Islamic revivalist discourse in the latter part of twentieth century that called for changes to bring law and government in post-colonial Muslim countries closer to their Islamic heritage. Ironically, flagrant violations of the higher purposes of Shari'ah on the protection of life have been committed by the very protagonists of Islamic revivalism, who became increasingly radicalised and violent.

Based on the foregoing, we now propose the following by way of actionable policy recommendations:

- A purpose-oriented approach and utilisation of the resources of *maqasid* are important simply because issues keep arising with the rapid advancement of science and civilisation. With regard to contemporary human rights, for instance, many questions have arisen that require fresh responses, and they relate closely to the *maqasid*.
- Twentieth century Islamic scholarship has enhanced the hitherto underdeveloped methodology of *maqasid*. It is justified to say therefore, that a ruling of *ijtihad* can be founded on *maqasid* by a duly qualified scholar who is knowledgeable of the jurisprudence of *maqasid*, *fiqh* and *usul al-fiqh*.
- *Maqasid al-shari'ah* arises from the Shari'ah and does not have a separate existence. Shari'ah is a unified whole but has many separate yet interrelated branches and disciplines. The *maqasid* may be recognised as a separate proof of Shari'ah, which recognition should not in any way derogate or negatively affect the integrity of Shari'ah.
- *Ijtihad maqasidi* should be recognised as a valid form of *ijtihad*. For it is in many ways the end result of the scholarly efforts for a revised methodology of the *maqasid*. Many of the instances of *ijtihad* we have reviewed above are in fact of *ijtihad maqasidi*.
- The proponents of *maqasid* who argued for a more open approach to their identification also sought to find an easier access to the primary sources of Shari'ah away, to some extent, from the technicalities of *usul al-fiqh*. Easier access to these sources through revised methods of interpretation and inference merit recognition and support.
- *Usul al-fiqh* and *maqasid al-shari'ah* should be seen as complementary to one another. Such complementarity should also acknowledge and allow an expanded role and scope for the *maqasid* in the formulation of new rules.
- A distinction should be drawn between practical purposes (*maqasid 'amaliah*) and juridical purposes (*maqasid al-shar'iah*). This is a near parallel distinction, perhaps, to an existing binary classification of purposes into those of the human purposes (*maqasid al-mukallaf*) and those of the Lawgiver (*maqasid al-shari'*). In temporal affairs of concern to the individual and society, such as government policy on economic affairs and international relations etc., rationality and *fitrah* can be

accepted as identifiers and determinants of means and purposes, provided they do not in any way violate the scriptural sources of Shari'ah.

- Notwithstanding the complementarity of the various parts of Shari'ah, space should be created for an expanded version of *maqasid* beyond, for instance, the five headings of *daruriyyat*. It is also proposed that new additions on key significance to *maqasid* such as protection of the natural environment and basic human rights, should be recognised individually on its own merit, and not necessarily subsumed under an expanded reading of one or the other heading of *daruriyyat*.
- Purposes and means are in changeable relations to one another such that a means can turn into a purpose and vice versa depending on their role and the context in which they operate. Care should therefore be taken to ensure that one is not mistaken for the other, and that the way purposes and means relate to one another is clear of exaggeration, distortion and neglect.
- Notwithstanding the proposed complementarity of *usul al-fiqh* and *maqasid*, it is proposed, nevertheless, that the scope of interpretation and inference (*istinbat*) should not be subjected to the restrictive requirement of traditional *usul al-fiqh*, nor should the *usuli* concept of effective cause ('*illah*) limit the more dynamic outlook of the *maqasid*.
- The use of questionable means for the procurement of *maqasid* have become frequent and often misleading. Due care is therefore called for to avoid distortion in the pursuit and enforcement of alleged but unproven *maqasid* through questionable means.
- Initial reformist steps in IBF may well consist of minimising instances of replication of the conventional products and practices. Thus it is proposed that the IBF regulatory authorities and decision-makers make necessary preparation, planning and implementation time lines for the purpose.
- Any transition to a *maqasid*-anchored IBF should have clearly defined targets as the *maqasid* are internally diverse and may need to be separately implemented for each of its various divisions.
- Every country and jurisdiction should find its own bearings with the *maqasid al-shari'ah* and avoid generalisation. The macro and micro aspects of *maqasid*-based decision making should be adequately informed by, and coordinated with, one another.

## Notes

- \* *Mohammad Hashim Kamali*, Founding CEO of IAIS Malaysia, graduated from Kabul University, and then obtained his PhD in Islamic and Middle Eastern Law at the University of London in 1976. He served as Professor of Islamic Law and Jurisprudence at the International Islamic University Malaysia (1985–2004), then Dean of the International Institute of Islamic Thought and Civilization (ISTAC) from 2004-2006. He was Asst Professor at McGill University's Institute of Islamic Studies; Visiting Professor at Capital University, Ohio; and the Wissenschaftskolleg, Berlin. He was a member of the Constitution Review Commission of Afghanistan (2003), and a UN shariah expert on the constitutions of Iraq, the Maldives and Somalia (2004-2005). He has published over 200 academic articles and 35 books. He can be contacted at ceo@iais.org.my.
1. Cf., Nur al-Din Mukhtar al-Khadimi, *Fusul fi'l-Ijtihad wa'l-Maqasid* (Cairo: Dar al-Salam li'l-Nashr wa'l-Tawzi', 2010/1431), 176.
  2. Ibid., 177.
  3. Typical examples of such tricks include the double sale of 'inah (to buy e.g at \$80 now and sell back at \$100 with the price payable in one year's time) which effectively amounts to charging the prohibited interest (*riba*). Exaggeration occurs when the normal order of priorities is ignored. For instance, a Muslim woman who observes the *hijab* is permitted in the meantime to expose herself during a medical examination to a stranger, or non-muhrim, physician. If she insists, on the other hand, not to do so and runs the risk of death, that would be an exaggeration that consists of confusing a *tahsiniyat* rule of *fiqh* by raising it to the level of *daruriyyat*.
  4. Muhammad al-Tahir Ibn 'Ashur, *Maqāṣid al-Sharī'at al-Islāmiyyah*, ed. Muhammad al-Tahir al-Messawi (Amman: al-Basa'ir li-'l-Intaj al-'Ilmi, 1998), 171.
  5. Yusuf al-Qaradawi, *Dirasah fi-Fiqh Maqasid al-Shariah: Bayn al-Maqasid al-Kulliyah wa'l-Nusus al-Juz'iyyah* (Cairo: Dar al-Shorouq, 2012), 20-1.
  6. 'Abd Allah bin Mahfuz bin Bayyah, *Mashahid min al-Maqasid* (Riyadh: Dar Wujuh, 2010/1431), 165.
  7. Muḥammad al-Zuhaylī, *Maqāṣid al-Sharī'ah: Asās li-Huqūq al-Insān* (Doha: Ministry of Awqāf and Islamic Affairs of Qatar, 2003), 70.
  8. Al-Khadimi, *Fusul*, 191-2. See also Muhammad al-Shatiwi, 'Manhajiyatu maqasid al-shariah bayn as'ilat al-madi wa as'ilat al-waqi', in ed. Mohamed Salim El-Awa, *Taf'il Maqasid al-Shariah fi Majal al-Siyasi, Maju'ah Buhuth* (London: Mu'ssasah al-Furqan li'l-Turath al-Islami, 2014), 79-81.
  9. Cf., al-Khadimi, *Fusul*, 190. See also 'Abd Allah al-Qasimi, *Madkhal 'Aam li-Dirasat al-Maqasid* (Cairo: Dar al-Kalimah li-Nashr wa'l-Tawzi', 2015/1436), 16-7.
  10. Al-Khadimi, *Fusul*, 56-7; Ahmad al-Raysuni, *Muhadarat fi Maqasid al-Shari'ah* (Cairo: Dar al-Kalimah li'l-Nashr wa'l-Tawzi', 2014/1435), 178.
  11. Cf., Jamal al-Din 'Atiyah, *Nahwa Taf'il Maqasid al-Shari'ah* (Damascus: Dar al-Fikr, 2001/1422), 187.
  12. Ahmad al-Raysuni, *al-Fikr al-Maqasidi* (Morocco: Manshurat al-Zaman- Kitab

- al-Jayb, 1999), 99 & 115.
13. Cf., 'Atiyah, *Nahwa Taf'il Maqasid*, 230.
  14. 'Atiyah, *Nahwa Taf'il Maqasid*, 229.
  15. Cf., Isma'il al-Hasani, *Nazariyyat al-Maqasid 'ind al- Imam Ibn 'Ashur* (Herndon, VA: International Institute of Islamic Thought, 1995/1416), 407.
  16. Al-Raysuni, *Mahadarat*, 123-4.
  17. Al-Qarafi observed that "the foundations of shariah are of two types, one is the *usul al-fiqh* and the other the legal maxims of *fiqh*, which are numerous and enormously helpful in ascertaining the wisdom and underlying meanings (*asrar al-shar' wa hikamuh*) of shariah." (*al-Furuq*, vol. 1-2, p. 3). As an explanatory note, it may be said that at that time, legal maxims were an integral part of the *maqasid* but have since been recognised to belong mainly to *fiqh*. Ibn Taymiyyah observed that in addition to the rulings (*ahkam*) of shariah that are evidently important, the wisdom and meanings (*al-hikam wa'l-ma'ani*) on which they are founded is the most noble of all shariah sciences (*min ashraf al-'ulum*). Ibn Qayyim pointed at the textual injunctions of shariah are inclusive of comprehensive purposes and one who masters them would not need to rely on speculative evidences, opinion and analogy (Ibn Taymiyyah and Ibn Qayyim as quoted in Jamal al-Din Atiyah, *Nahwa Taf'il Maqasid al-Shariah*, 235).
  18. Al-Shatiwi, *Manhajyyatu Maqasid*, 87.
  19. Ahmad al-Raysuni, *Muhadarat fi Maqasid*, 272.
  20. See for details on analogy and the rules of interpretation, Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 2003).
  21. The Arabic version is: '*ilal al-ahkam tadullu 'ala qasd al-shari' fiha fahaythuma wajadat ittaba'at*'.
  22. See for detail Mohammad Hashim Kamali, *Maqasid, Ijtihad and Civilisational Renewal*, Occasional Paper Series 20 (London and Kuala Lumpur: IAIS Malaysia and IIIT London), 32-3,
  23. By methodology is meant the definition of *maqasid*, its conditions of validity, methods of identification, classifications, and how it relates to means and accomplishers (*wasa'il*) and so forth.
  24. Cf., Mazin Muwaffaq Hashim, *Maqasid al-Shariah: Madkhal 'Umrani* (Herndon VA, International Institute of Islamic Thought, 2014/1435), 91.
  25. Cf., Hasan Jabir, *al-Maqasid al-Kulliyyah fi daw' Qira'ah al-Manzumiyyah li'l-Qur'an al-Karim* (Beirut: Dar al-Hiwar, 2011), 107; Hashim, *Maqasid: Madkhal 'Umrani*, 108-109.
  26. Cf., al-Raysuni, *Muhadarat*, 291. See also Islamic Education Trust Nigeria, *Shari'ah Intelligence* (Kuala Lumpur: Interactive Dawah Training, 2015/1436), 207.
  27. Cf., *Shari'ah Intelligence*, 189.
  28. This is the view of al-Juwaynī, al-Sarakhsī, al-Sulamī and Ibn Taymiyyah. It is also noted that since Imam Mālik accepted *maṣlaḥah mursalah* as a basis of law and judgment, he can be assumed to have accepted '*aql* as a proof also of *maqāsid*. See for details Zahir al-Dīn bin 'Abd al-Rahmān, *Maqāsid al-Shari'ah fi-Ahkam al-Buyu'* (Kuala Lumpur: International Islamic University Malaysia Press, 2009), 10.

29. Abū Hāmid al-Ghazālī, *Ihyā' 'ulūm al-dīn* (Cairo: al-Maktabat al-Tijāriyyat al-Kubrā, n.d.), 4:115.
30. 'Izz al-Dīn 'Abd al-Salām, *Qawā'id al-Ahkām fī Masāliḥ al-Anām*, ed. 'Abd al-Laṭīf 'Abd al-Rahmān (Beirut: Dār al-Kutub al-'Ilmiyyah, 1999), 1:8.
31. Cf., 'Abd al-Rahmān, *Maqāšid al-Shari'ah*, 104.
32. Imām al-Ḥaramayn al-Juwaynī, *al-Burhān fī Uṣūl al-fiqh* (Doha: Dār al-Qalam, 1978), 2:114.
33. *Ibid.*, 2:117.
34. We understand *fitrah* as innate human nature, although *fitrah* can refer to innate nature generally, not necessarily confined to human nature as such. Compare (Q al-Rum, 30:30) as discussed in the next page below.
35. Abū 'Ali Ibn Sīnā, *Kitab al-Najāt fī 'l-Ḥikmah al-Manṭiqiyyah wa'l-Ṭabī'iyyah wa'l-Ilāhiyyah*, (Beirut: Dār al-Āfāq al-Jadīdah, 1985), 99.
36. Cf., Mohammad Hashim Kamali, 'Reading the Signs: A Qur'anic Perspective on Thinking,' *Islam and Science* 4, 2 (2006): 141-65. See also Elma Berisha, 'The Qur'anic Semio-Ethics of Nature,' *Islam and Civilisational Renewal* 8, No.1 (2017): 58.
37. Ibn 'Ashūr, *Maqāšid*, 58.
38. *Ibid.*, 266.
39. 'Abd Allah Bin Bayyah, *Maqāšid al-Shari'ah fī'l-Mu'āmalāt*, Lecture series no. 6, *al-Maqasid Research Centre in the Philosophy of Islamic Law*, London, 2008, 52 and 54. See also al-Shaikh-Ali & Khan, *Ibn Ashur Treatise*, 18.
40. Cf., Atiyah, *Towards Realisation*, 109. See also for a discussion of *Maqasid* and *Wasa'il*, Mohammad Hashim Kamali, "Goals and Purposes of Islamic Law," in ed., Imam Feisal Abdul Rauf, *Defining Islamic Statehood* (New York and Basingstoke UK: Palgrave Macmillan, 2015), 200-34 & 228-30.
41. Sayf al-Din 'Abd al-Fattah, *Nahw Taf'il al-Numuzij al-Maqāšidi fī'l-Majal al-Siyasi wa'l-Ijtima'i*, in al-Maqāšid Research Centre, *Maqāšid al-Shari'ah wa Qadaya al-'Asr*, 187-8.
42. Cf., Riyad Mansur al-Khalifi, 'al-Maqāšid al-shar'iyyah wa atharuha fī'l-fiqh al-mu'amalt al-maliyyah,' *Majallah Jami'ah al-Malik 'Abdulaziz al-Iqtisad al-Islami* 17, 1 (2004/1425): 14.
43. Al-Shatibi, *Muwāfaqāt*, 13-14; see also al-Khalifi in the previous note at 16.
44. See for a critical assessment of the ubiquitous *tawarruq* practice, Mohammad Mahbubi Ali, 'Toward Islamic Banking without *Tawarruq*,' *Islam and Civilisational Renewal* 8, No.2 (2017): 260.
45. See for details, Ibn 'Ashūr, *Maqāšid al-Shari'ah*, 419-20.
46. See for detail Yusuf al-Qaradawi, *Dirasah fī Fiqh Maqasid al-Shari'ah: Bayn al-Maqasid al-Kulliyyah wa'l-Nusus al-Juz'iyyah* (Cairo: Dar al-Shuruq, 2012), 173.
47. *Ibid.*, 177.
48. Al-Raysuni, *al-Fikr al-Maqasidi*, 96, also cited in 'Atiyah, *Nahwa Taf'il*, 191.
49. Legal maxims such as "Harm must be eliminated," "Necessity makes the unlawful lawful," "Necessity is to be measured according to its [true] proportions," and "credibility is attached to purposes and meanings, not to words and forms," can enrich the contemporary expositions of human rights from an Islamic perspective. Atiyah, *Nahwa Taf'il*, (190-1) has discussed Mahdi Shamuddin's views in some

- detail. See also al-Khadimi, *Fusul fi'l-Ijtihad*, 55.
50. Cf., 'Atiyah, *Nahwa Taf'il Maqasid*, 189-91. See also al-Khadimi, *Fusul fi'l-Ijtihad*, 152.
  51. Al-Qaradawi, *Dirasah fi Fiqh Maqasid*, 276-275.
  52. Al-Qaradawi, *Dirasah fi Fiqh al Maqasid*, 280-1.
  53. This also illustrates the maxim that “the *ahkam* of shariah are founded on their effective causes and collapse when the effective cause is no longer obtained.” Fear of fatality is the effective cause in this case.
  54. *Ibid.*, 229-32.
  55. See for details Mohammad Hashim Kamali, *Shariah Law: Questions and Answers* (Oxford: Oneworld Publications, 2017), 185-9.
  56. *Ibid.*