MAQASID AL SHARI'AH (THE OBJECTIVES OF ISLAMIC LAW)

AN EXAMINATION OF HOW *USUL AL FIQH* (THE PRINCIPLES OF ISLAMIC JURISPRUDENCE) ARE APPLIED TO PROGRESSIVE TRENDS AND PRESENT-DAY SITUATIONS

Ridwan al Sayyid

I

From the second century AH, ideas on the *usul* (principles) of the Shariah began to be shaped by two basic objectives – firstly, "*ilzam wa taklif*" ("compulsion and obligation"), and, secondly, a correct understanding of the Shariah texts and *'urf* (accepted custom) so that they could be defined and applied in practice.

Due to lack of space, it would be inappropriate to go into great detail here, but I should like to refer to two works that played a pivotal role in this connection – i.e. in explaining the thinking behind these two objectives. The first of these is *Al Risalah* by Imam al Shafi'i (d. 204AH/849CE)[1], while the second is *Al 'Ilal* by 'Ali bin al Madini (d. 235AH/849CE)[2].

1 Imam al Shafi'i: *Al Risalah*. Published by Ahmed Mohammed Shaker, 1940. Second impression, Dar al Turath 1399AH/1979CE. See also Mohammed Abu Zahra: *al Shafi'i*, Dar al Fikr al Arabi, Egypt, 2nd impression, pp. 19-21.

2 Ali bin al Madini: *Kitab al 'Ilal*, al Maktab al Islami, Beirut, 1973.

Thinker and academic from Lebanon, and editorial adviser to *Al Tafahom* magazine.

The main theme running through both these works – and this is also true of subsequent texts on the general subjects of *usul* and *fiqh* (jurisprudence) – was the question of *sultah* (authority). Where "compulsion and obligation" were concerned, there was never any question about where the authority lay; that is to say, it was universally recognized that the "Compeller and Obliger" was none other than Allah, Glory be to Him. That is why al Shafi'i devoted little time and effort in *Al Risalah* to this issue. Instead, his concern was with the sources of legislation – or with those texts regarded as Divine or as having "Divine connotations".

Scholars familiar with the history of Islamic legislation know that al Shafi'i established his position on "compulsion" by relating the Prophet's Sunnah to the appropriate texts of the Qur'an. Meanwhile, where the question of "understanding" the Scriptures (or their practical application) was concerned, his focus was on the study of semantics and the basic grammar needed in order to interpret the language correctly.

In al Shafi'i's view *qiyas* (analogical reasoning) was the only feasible way of relating the text to changing realities on the ground, though he was less certain about the question of *ijma'* (consensus) – about whether it should be derived from the text and source material, or from the "means" of understanding and implementing the text (i.e. through the use of tools such as *qiyas*).

In his work *Al 'Ilal* the only topic that concerned 'Ali bin al Madini was what he called the "*Tabaqat Ahl al 'Ilm*" ("Classes of People of Knowledge") who were qualified (or "authorised") to understand the text. In his view the only people eligible to prescribe laws were those who were well versed in the three relevant subject areas: knowledge of the Qur'an, the collation of reports and narrations from the Prophet, and the possession of knowledge inherited from the blessed generations of the early days of Islam – the generations of the Companions, *Tabi'iyn* (Followers) and *Tabi'iy al Tabi'iyn* (Followers of the Followers).

During the 3rd century AH (9th century CE) there were starkly conflicting views on almost every subject. The *fuqaha* (jurists) of the *Ahl al Ra'iy* ("People of Opinion" – opponents of the "People of Hadith") and

the Mu'tazilites debated the Sunnah and discussed questions such as whether as a source of legislation it was in the same class as the Qur'an.[1] There was also serious debate on the qualifications of a *faqih* (jurist), Hadith scholar or *mutakallim* (theologian) that made him eligible to give an opinion on the Scripture, and on which of those scholarly categories should be accorded priority to pronounce on it.[2] However, as the different schools of *fiqh* took shape by around the middle of the 4th century AH (10th century CE), the positions of al Shafi'i, Ibn al Madini and their pupils on the main issues became clearly established, though from that time on noticeable differences emerged over how to approach the second element of the *usul* – specifically the "means" and tools that should be adopted (regardless of the terminology used) in order to understand and implement the text or the rulings derived from it.

The Hanafi *fuqaha* insisted on the principle of *istihsan* (juristic preference) – which was disputed by al Shafi'i and the "People of Hadith". The Malikis based their rulings on *'amal ahl al Madinah* (the practice of the people of al Madinah) and *masalih mursalah* (considerations of public interest), while the Hanbalis gave absolute priority to the recorded utterances or opinions of the Companions.[3] There were also those who believed that all these issues could be dealt with by *qiyas* and that there was no need to concern oneself with primary or secondary sources of legislation. However, other scholars maintained that, rather than focusing solely on specific and "partial" issues, what really mattered was the general theory behind the concept of *fiqh* and the meaning and functions of the Shariah.[4] It was during this period – i.e. the 3rd and 4th centuries AH – that scholars of *usul al fiqh* began to discuss the thinking, or *maqasid* (objectives),

1 Ridwan al Sayyid: *Al Ummah wa'l Jama'ah wa'l Sultah*, Beirut, Dar Iqra', 2nd impression, 1984, pp. 62-68.

2 Wa'il Hallaq: *Nash'atu'l Fiqhi'l Islami wa Tatawwuruh*, Beirut, Dar al Madar al Islami, 2007, pp. 245-264, and Wa'il Hallaq: *Al Sultah al Madhhabiyyah: al Taqlid wa'l Tajdid fi'l Fiqhi'l Islami*, Beirut, Dar al Madar al Islami, 2007, pp. 101-138.

3 Abdul Majid al Saghir: *Al Fikr al Usuli wa Ishkaliyyat al Sultah al 'Ilmiyyah fi'l Islam*, Beirut, Dar al Muntakhab al Arabi, 1994, pp. 153-219.

4 Wa'il Hallaq: *Tarikh al Nadhariyyati'l Fiqhiyyah fi'l Islam*, Beirut, Dar al Madar al Islami, 207, pp. 117-170.

behind Shariah legislation and assert that the Shariah was divinely ordained to safeguard the interests of mankind. This was also the period of Mu'tazilites such as Abu'l Qasim al Ka'bi (d. 317AH/929CE), al Qadi 'Abdul Jabbar (d. 415AH/1024CE) – in his book *Al 'Umad* and his commentary on *Al Mu'tamad* by Abu'l Hasan al Basri (d. 436AH/1044CE) – and Abu Bakr al Jassas, the Hanafi *'alim* (religious scholar) and author of the book *Ahkam al Qur'an*, who was influenced by the Mu'tazilites. Today we have none of al Ka'abi's texts; nor do we have any records of him that mention the term "*maqasid*". However, some fragments of 'Abdul Jabbar's and al Basri's writings refer to three terms which, in the contexts in which they appear, are synonymous with it – "*'ilal*" (literally "reasons"), "*masalih*" (literally "interests") and "*dhururiyyat*" (literally "necessities" or "obligations").[1]

II

As far as we know, the term "*maqasid*" was first used by al Hakim al Tirmidhi (from the end of the 3rd century AH) in the titles of several of his books, including *Al Salat wa Maqasidha*, *Maqasid al 'Ubudiyyah aw 'Ilaliha* and '*Ilal al Shari'ah wa Maqasidha*.[2] It also occurs in *Ma'akhid al Shara'i'* by al Maturidi (d. 333AH/944CE), *Mahasin al Shari'ah by* Abu Bakr al Qaffal al Shashi (d. 365AH/975CE) and *Mas'alat al Jawab wa'l Dala'il wa'l 'Ilal* by *Abu Bakr al Abhari al Maliki* (d. 375AH/985CE). Historians of *'Ilm al Usul* (the "Science of Principles") claim that al Baqillani (d. 403AH) refers to "'*ilal*" and "*maqasid*", but I have not found these two terms in any of his printed works.[3]

It was Imam al Haramayn al Juwayni (d. 478AH/1085CE) who first outlined the salient features of what came to be known as "'*ilm*

1 Abdul Majid al Saghir: *Al Fikr al Usuli wa Ishkaliyyat al Sultah al 'Ilmiyyah fi'l Islam*, See above. Pp. 292-298 and 347-441.

2 Ahmed al Raysouni: *Nadharaiyyat al Maqasid 'inda'l Imam al Shatibi*, Beirut, al Mu'assasat al Jami'iyyah, 1992, pp. 32-34. And see al Hakim al Tirmidhi on *fiqh al ta'lil* and *fiqh al maqasid* in Khalid Zuhri: *Ma'alimu'l Ijtihadi'l Maqasidi 'inda'l Hakimi'l Tirmidhi* in *Maqasid al Shari'ah wa'l Ijtihad*, London, Mu'assasat al Furqan, 2008, ed. Jaser Awdah, pp. 157-221.

3 *Al Iqtibasat 'ani'l Maturidi wa'l Qaffal wa'l Baqillani*, taken from al Raysouni: *Nadharaiyyat al Maqasid*. See above. Pp. 34-37.

al maqasid" (the "science of objectives") – a term he used in his books *Ghiyath al Umam* and *Al Burhan fi'l Usul*.[1] He states: "The Shariah is concerned with five matters [related to] the *dhururat* (obligatory conditions) needed for sustaining human life, such as *qisas* (retributive justice), as well as matters related to the public need. It is not limited to obligatory matters such as dealings between people, or to what is not [in the categories of] *dhururiyy* (obligatory) and *haji* ('need-related'), since it also covers *makrumat* (desirable moral behaviour) such as acts of purification and matters in the *mandubat* (recommended) category. Finally, there are [those things] that do not have a clear [rational] explanation or a specific objective [Arabic '*maqsad*'] such as acts of worship."

Al Juwayni then goes on to say: "These matters are generally applicable and undeniably [represent] the Legislator's (i.e. Allah's) purpose of religious worship."[2] He defines the five "Major Obligations" (*Dhururiyyat*) – or Higher Goals – of the Shariah as: protecting the Faith, protecting human life, protecting the mind, protecting progeny and protecting property.[3] Al Juwayni's pupil al Ghazali (d. 505AH/1111CE) says the same thing in almost the same words in *Shifa' al 'Alil* and *Al Mustasfa;*[4] however, he treats the concept as a "philosophy of legislation", while al Juwayni (in *Ghiyath al Umam*) assigns the *dhururat* a practical role in two exceptional circumstances: when there is no Sultan or ruling authority and when there is no scholarly elite.[5]

There were no significant additions to al Juwayni's and al Ghazali's propositions until the 8th century AH (15th century CE), with a few possible exceptions including al Amidi (d. 631AH/1233CE), who wrote: "The five

1 Al Juwaini: *Al Burhan fi Usuli'l Fiqh*, ed. Abdul Adhim al Dib, Qatar, 1400 AH, vol. 2 pp. 1112-1128, and al Juwaini's *Ghiyath al Umam* ed. Abdul Adhim al Dib, Qatar, 1401 AH pp. 318-326.

2 Al Juwaini: *Al Burhan.* See above, 2/1150.

3 Al Juwaini: *Al Burhan.* See above, 2/1151.

4 Al Ghazali: *Shifa'u'l 'Alil*, ed. Hamad al Kubaisi, Baghdad, Matba'at al Irshad 1971, p. 159, and *Al Mustasfa* 1-2, Beirut, Dar al Fikr, 1/286. See *Al Maqasid 'inda'l Ghazali* in Muhammad Abduh: *Maqasid al Shari'ah Qiblat al Mujtahidin – Abu Hamid al Ghazali Namudhajan* in *Maqasid al Shari'ah wa'l Ijtihad*, ed. Jaser Awdah, London, Mu'assasat al Furqan, 2008, pp. 101-155.

5 See Abdul Majid al Saghir: *Al Fikr al Usuli wa Ishkaliyyat al Sultah al 'Ilmiyyah fi'l Islam*, pp. 354-430.

maqasid which no religious community (*millah*) or legal system fails to observe are: the Faith, human life, the mind, progeny and property."[1] Another possible exception was 'Izz al Din bin 'Abdul Salam (d. 660AH/1261CE), who wrote a book entitled: *Qawa'id al Ahkam fi Masalih al Anam* (*Principles of Rules in the Interests of Creation*) which begins with the observation that laws are revealed to promote the public interest and deter wrongdoing and corruption. Elsewhere he states: "Most of the Qur'an's *maqasid* enjoin the promotion of the public interest and what is conducive to it, and the prevention of wrongdoing and corruption and what is conducive to it."[2] Ibn Taymiyyah and Ibn Qayyim al Jawziyya did not write anything specifically on *maqasid*, though their works include several references to public and private life in which they detail the public interests upheld by the Shariah.[3]

When we speak about *Maqasid al Shari'ah* (and this has been the case since the 19th century), we understand it as meaning what Ibrahim bin Musa al Shatibi (d. c. 790AH/1388CE) meant by it in his book *Al Muwafaqat*[4] (*Reconciliation*), which he wrote in the 8th century AH. He divided it into two major categories: the objective of the Lawgiver and the objective of the "commandee" (i.e. the person commanded to comply with the Shariah). In his Introduction he mentions that he wrote his book for three reasons: to demonstrate that the Shariah was revealed to safeguard the interests of mankind, that this can be explained in detail in a series of individual chapters, and that he had come to understand this through reasoned investigation. (This suggests that, unlike its other branches, this branch of *'Ilm al Usul* may be seen as a distinct and separate discipline.)

Using reasoned investigation, al Shatibi established that the *maqasid* or interests in the *dhururiyyat* category are five in number: protecting the Faith, protecting human life, protecting progeny, protecting property and

1 Izz al Din ibn Abdul Salam: *Qawa'id al Ahkam fi Masalih al Anam*, Ed. And commentary by Taha Abdul Rauf Sa'ad, Beirut, Dar al Jil, 1966,1/46-47.

2 Ibn Abdul Salam: *Qawa'id al Ahkam* 1/8-11. See above.

3 From Ahmed al Raisouni: *Nadhariyyat al Maqasid*, pp. 53-57. See above.

4 Al Shatibi: *Al Muwafaqat fi Usuli'l Shari'ah*, ed. Abdullah Diraz, Egypt, Maktabat al Usrah, 4 vols. 1978.

protecting the mind – "which is something that every religious community is [committed to] protecting." After the "*dhururiy*" ("obligatory/essential") come the "*haji*" ("required") and "*tahsini*" ("ameliorative") categories.

There are two aspects to "protecting" – "protecting" from "existence" and "protecting" from "non-existence".

Al Shatibi then moves on to examine all *usul*- and *fiqh*-related issues on the basis of these principles and their implications. He was thus the first person to offer a comprehensive theory of the Shariah and the reasons, wisdom and objectives behind it.[1]

In al Shatibi we find a virtually conclusive formulation of the theory of Islamic Law, which may be regarded as a branch of *Usul al Fiqh*. At the same time, he approaches the subject from an independent angle while incorporating the best of everything that has previously been written about it, particularly by al Juwayni, al Ghazali and some of the Maliki jurists such as al Qarafi. He insists repeatedly that his theory comes under the heading of "*fiqh al ta'lil*" (*fiqh* of "explanatory justification"), but that its main principles are based on reasoned investigation.[2]

At this point some comment might be useful in order to enable the reader to gain a clearer understanding of the differences between the old, original *maqasid* and opinions and the way they are applied in a modern or contemporary context.

---

1 Over the past five decades numerous studies have been published on "*al maqasid al Shatibiyyah*". In his thesis entitled *Maqasid al Shari'ah* (Beirut, Dar al Tali'ah, 2000) Nur al Din Buthawri presents a good review of the studies on this subject. Mohammed Kamal Imam has published a handbook in several volumes on *maqasid al Shari'ah* and material on that topic by al Shatibi and various other scholars (London, Mu'assasat al Furqan, 2007-2010). Specialists in *fiqh al maqasid* who based their work on al Shatibi's writings included – in particular – al Tahir bin Ashour (in the 1940s) and Allal al Fassi (in the 1960s). The best known studies since then include Ahmed al Raisouni and Hamadi al Obeidi. For a different angle on the subject see Wa'il Hallaq: *Tarikh al Nadhariyyati'l Fiqhiyyah*, pp. 217-268. See above.

2 For a new view on the relationship between *maqasid* and *usul al fiqh* see Abdullah bin Biyyah: *'Ilaqat Maqasid al Shar 'ah bi Usuli'l Fiqh*, London, Mu'assasat al Furqan, 2006. For a comparative view of *fiqh al ta'lil* and *fiqh al maqasid* see Salim Yafut: *Hafariyyat al Ma'rifah'l 'Arabiyyah al Islamiyyah: al Ta'lil al Fiqhi*, Beirut, Dar al Tali'ah, 1990.

Firstly: The basic theory of *maqasid* shows that the *usul* scholars had reached maturity. Previously their discipline had not been regarded as valid, although – or possibly because – it represented a new way of thinking and a shift from "*fiqh al ta'lil*" to "*fiqh hikmat al tashri'*" ("*fiqh* of the wisdom of legislation").

Secondly: The relationship between *usul al fiqh* and *maqasid al Shari'ah* remained somewhat obscure, since the latter were regarded as being outside the sphere of *usul*. In other words, *fiqh al maqasid* and *'ilm usul al fiqh* were treated as parallel and separate disciplines.

Thirdly, *fiqh al maqasid* had no direct impact on *usul* or *fiqh* scholarship, or on the way that *qadi*s approached the issues that fell within their remit. In other words, it had no "legislative consequences".

Fourthly, like his contemporary Ibn Khaldun, al Shatibi's contribution was in a class of its own. It is probable that this is mainly because of the theoretical nature of *'ilm al maqasid*, and its lack of impact on *fiqh* scholarship in general, though like the older Maliki *'ulama* (religious scholars) and *fiqh* scholars of other schools, al Shatibi issued fatwas that influenced those who came after him. His book *Al I'tisam*[1] gained a high reputation as a work of reference and was constantly used by *'ulama* (scholars), though *Al Muwafaqat* – while it attracted praise, amazement and admiration – was not regarded as a practical handbook.

III

When I read Rifa'a Rafi' al Tahtawi's *Takhlis al Ibriz* (*A Paris Profile*, published in 1834) and *Al Murshid al Amin li'l Banat wa'l Banin* (*The Honest Guide for Education of Girls and Boys*, published in 1847), I found frequent references to the term "*masalih*" – and sometimes "*al manafi' al 'umumiyyah*" ("public interests")[2]. I subsequently realized that he had

1 Al Shatibi: *Al I'tisam* 1-2, Egypt, published by al Manar Printing Press in 1922 with an Introduction by Muhammad Rashid Rida. My own copy was published by Al Riyadh Modern Library (undated). In his Introduction al Shatibi states that he wrote it "[to counter] *bid'a* and [heretical] innovations".

2 See my book *Siyaasaat al Islam al Mu'asir*, Beirut, Dar al Kitab al Arabi 1997, pp. 236-244.

taken it from *Tuhfat al Turk fima Yajib al Yu'mal fi'l Mulk*[1] by the Hanafi judge al Tarsusi (d. 758AH/1356CE), where it occurs in several substantial excerpts which he quoted from that book. Al Tahtawi saw no need for religious reform; what he regarded as essential was civil reform, because it was this sphere that he saw as relevant to Muslim *masalih*.

In his *Aqwam al Masalik* Khayr al Din al Tunisi reviewed the experiences of the major European states and wrote a "*Muqaddimah*" (Introduction/Prolegomenon) similar to Ibn Khaldun's in which he observed that the Shariah of Islam was able to protect Muslim *masalih* in this world and the next and that the creation of "*tandhimat*", or institutions, would provide a solid basis for religious rectitude and integrity. It was this view that led him to decry the fact that some Islamic *'ulama* – men entrusted with the task of promoting the interests of the community – were reluctant to look seriously at the state of their society and knew nothing of the outside world.

The notion of "*i'tibar*" – that is to say, drawing analogies by comparing one situation with another – is a well recognized Khaldunian concept. However, Khayr al Din al Tunisi wanted the *'ulama* to give their support to the state institutions for two reasons. The first of these was that the Shariah was well qualified to protect Muslim *masalih* in this world and the next; therefore, if they ignored the affairs of this world, they would be in breach of one of the two fundamental elements of the Faith (i.e. the material world and the spiritual world) and this would disrupt the whole structure of the Islamic Faith.

The second reason was that that Europe's progress – which was now spreading across the world – had created a situation which required everybody to play a part, including the political and religious elites.

Briefly speaking, this meant that a two pronged response was required. The general Muslim public – who were still inclined to reject anything that was non-Muslim in origin – should be encouraged to embrace those

1 Al Tarsusi: *Tuhfat al Turk*, ed. Ridwan al Sayyid, Beirut, Dar al Tali'ah, 1993. Al Tahtawi copied four chapters from al Tarsusi without attribution.

positive aspects of European progress that were compatible with the Shariah. Meanwhile, the *'ulama* should declare that the "new *masalih*" – i.e. the conditions (including institutions) that were essential for improving the Muslim situation – were a commendable demonstration of *maqasid al Shari'ah*.

This meant that there was a need for practical co-operation between the religious and political leaders.[1]

In Section No. 34 of *Aqwam al Masalik*[2] al Tunisi cites the *fiqh* source on which he bases his demand for the *'ulama* to contribute to their country's progress and development as being the *Risalah* (*Epistle*) on the politics of the Shariah[3] by Mohammed Bayram I – a man he describes as "the Leader of the Hanafi Sheikhs and Tunisia's Ultimate Fatwa Authority". In his *Risalah* Bayram defines politics as "doing that in which people are nearer to goodness and further from corruption, even if it has not been instituted by the Messenger or mentioned in [Divine] Revelation."[4]

Interestingly, this Hanafi Mufti (or Tunisia's "Sheikh of Islam") took his definition of politics from the Hanbali Ibn Qayyim al Jawziyya (d.751AH/1330CE), who was also his source for the excerpts he quoted on *masalih* and their importance.[5] He also quoted Maliki *fuqaha* such as al Muwaffaq al Andalusi and al Qarafi al Maliki al Misri ("al Qarafi the Egyptian Maliki"). However, neither he nor al Tunisi refer to al Shatibi and his book *Al Muwafaqat*. Bayram I's *Risalah* was printed at the Tunisian State Printing Press in 1886, while al Tunisi's book was published in 1867. This would mean that when Bayram made his *Risalah* available to

1 Khayr al Din al Tunisi: *Aqwam al Masalik fi Ma 'rifat Ahwal al Mamalik*, 1-2, ed. Al Munsif al Chennoufi, Tunis, Al Majma' al Tunisi li'l 'Uloom (Bait al Hikmah), 1972.

2 *Aqwam al Masalik*, vol. 1, pp. 148-150.

3 I have in my possession Bayram I (Mohammed bin Husayn Bayram)'s *Risalah fi'l Siyaasah al Shar' iyyah*, edited by Mohammed al Saleh al Asali, revised with an Introduction by Izz al Din bin Raghibah, Dubai, Markaz Jum'ah al Majid, 2002.

4 *Risalah fi'l Siyaasah al Shar' iyyah*, p. 121. See above.

5 Ibn al Qayyim (d.751AH/1331CE) took his definitions of politics and *masalih* from the 5th century AH Hanbali *faqih* Ibn 'Aqil. He mentions this in his books *A'lam al Mawqi'in 'an Rabbi'l 'Alamin* and *Al Turuq al Hikmiyyah fi'l Siyasati'l Shar'iyyah.*

al Tunisi it was still in manuscript form. In his description of it, he (Bayram) explained that it contained a summary of material taken from al Qarafi's *Kitab al Ahkam* and Ibn al Qayyim's *Al Turuq al Hikmiyyah*, with additional input from books of Hanafi *furu'* ("secondary" *fiqh*).[1]

So al Tunisi bases his argument for the establishment of modern administrative and constitutional state institutions on *fiqh al masalih*. Although the basis for this is completely modern, he resorts to *fiqh al masalih* (possibly inspired by Bayram I and his fellow scholars) to sell the idea to traditional clerics and the public. In doing so he gives the concept of *masalih* a modern character or function that did not exist in the classical age of al Qarafi and al Shatibi. We do not know if the Egyptians were familiar with Bayram's *Risalah*. However, al Tahtawi, who was still writing at the time, mentions al Tunisi's book in the late 1870s.[2] Moreover, as we know, at that time both Tunisia and Egypt were going through a major modernising phase, though the Egyptians did not yet consider it necessary to involve the Islamic clerical class in the process, while the Tunisians recognized their importance and were endeavouring to ensure that they played a role. In 1884 al Shatibi's book *Al Muwafaqat* was also printed at the Tunisian State Printing Press with the active support of the *Da'irat al Islah* (Reform Department).

Muhammad Abduh – who had been exiled from Egypt after the failure of Orabi's revolution and the British occupation of the country in 1882 – passed through Tunis on his way to Beirut and Paris and came across al Shatibi's book, which he took with him on his travels. Consequently, when he returned to Egypt in 1889 his colleagues and pupils were also able to read it.[3] He tried repeatedly to have it republished in an improved format, but the Egyptian edition did not eventually appear till 1911, some six years after Muhammad Abduh's death.

As well as using al Shatibi's book for his lessons on *tafsir* (exegesis)

1 Bayram's *Risalah*, pp. 119-120. See above.

2 See Fahmi Jad'an: *Siyaasaatu'l Islami'l Mu'asirfi'l Azminah al Hadithah*, 3rd impression, Beirut Al Shabakah al 'Arabiyyah, 2010, pp. 118-131.

3 See my book *Siyaasaat al Islam al Mu'asir*, Beirut, Dar al Kitab al Arabi 1997, pp. 221-225.

and in his fatwas, Muhammad Abduh passed on his interest in it to his pupils Qasim Amin and Muhammad Rashid Rida. He also gave *fiqh al maqasid* an additional significance when he applied it to his call for religious reform, and this can be clearly seen in the articles that were published in *Al Manar* after 1898, as well as in Qasim Amin's books: *Hurriyyat al Mar'ah* (*The Liberation of Women*) and *Al Mar'ah al Jadidah* (*The New Woman*). All these writings contain a strong appeal for a new approach to Islamic *fiqh* and the modernisation of Al Azhar – Egypt's oldest university.

During this period the Tunisians were endeavouring to modernise the University of Al Zaytuna and launched a new institute – Al Sadiqah; meanwhile, the Egyptians established the School of Shariah Jurisprudence in Egypt after setting up Al Ahliyyah University, which later became the Egyptian University,.

We should note here that after the start of the 20th century the movement for reform and modernisation split into two separate trends which became distinctly more marked after Muhammad Abduh's death in 1905. The politicians and intellectuals who wanted to establish a new kind of state embraced the notion of "*tamaddun*" – or "civil society" – based on practices and laws comprising two fundamental elements: "*al masalih al 'umumiyyah*" (the public interest) proposed by al Tahtawi, and the "*tandhimat*" recommended by Khayr al Din al Tunisi. As far as their approach within the Islamic context was concerned, this group did not base their ideas on *maqasid*; instead, they referred back directly to the Qur'an.

On the other hand, *fiqh al maqasid* was the major driving force for the group that was interested in religious and educational reform. They originally adopted it as a tool for promoting al Tahtawi's and al Tunisi's ideas; then it became ideologically associated with progress and the establishment of a civil society. The main proponents of this concept were Rafiq al Adham, Muhammad Abduh, Abdul Hamid al Zahrawi, Qasim Amin, Abdul Qadir al Maghribi, Muhammad Kurd Ali, Shakib Arslan, Abdul Aziz Jawish and Mustafa al Ghailani. All these intellectuals and thinkers used *maqasid al Shari'ah* in one form or another when developing their ideas

on civil society and "civilization" in the modern sense of the word.[1] Rashid Rida, on the other hand, remained focused on religious reform and used *fiqh al maqasid* as a tool for furthering this objective. However, neither he nor his "Neo-Salafist" supporters went beyond *fiqh al ta'lil* or analogy as a means of deducing their conclusions.

IV

Al Manar Printing Press published al Shatibi's *Al Muwafaqat* in 1911 and Rashid Rida published his (al Shatibi's) other book – *Al I'tisam* – in 1922.[2] The two books differ from each other in their spirit as well as their aims. *Al Muwafaqat* is about Shariah theory and maintains that the Shariah was revealed to safeguard the "*dhururiy*" ("obligatory/essential"), "*haji*" ("required") and "*tahsini*" ("ameliorative") interests of mankind. *Al I'tisam*, on the other hand, urges Muslims to adhere strictly to the Qur'an and the Sunnah and in this respect it is similar to the old Hanbali books on the Sunnah and the Maliki writings aimed at deterring Believers from *bida'* (heretical innovation). Historians attribute the difference between the two books to the changing political and social situation in al Andalus in the eighth century AH and suggest that Rashid Rida's decision to publish *Al I'tisam* was due to his own growing Salafist tendencies and the changes in the eastern Arab region's circumstances after the First World War.

Here we might also add several further factors during that time such as the abolition of the Caliphate, rising misgivings about Westernisation and the widening gap between the religious clerical class and those engaged in building a modern state that was inimical to Islam – or at least lukewarm in its attitude towards it.[3] There were strong calls for *ijtihad*[4], but along

1 See the brief overviews of the two groups in Fahmi Jad'an's *Usus al Taqaddum* and Ridwan al Sayyid's *Siyaasaat al Islam al Mu'asir*. Albert Hourani's *Al Fikr al 'Arabi fi 'Asri'l Nahdhah* is another useful source of reference on this subject.

2 See Footnote No. 21 of this article.

3 Ridwan al Sayyid: *Siyaasaat al Islam al Mu'asir*, pp. 126-145. See above.

4 See Muhammad Rashid Rida: *Yusr al Islam wa Usul al Tashri'i'l 'Aam*, 1932. I have an edition of this book dated 1957. See also M. Kerr: *Islamic Reform: the Political and Legal Theories of Muhammad Abduh and R. Rida,* 1969.

Salafist lines, and nothing was written in Egypt or the Levant about *fiqh al masalih* or *maqasid* until the early 1970s, when Mohamed Said Ramadan al Bouti – the well-known Syrian *faqih* – wrote his thesis on *maslaha* (singular of *masalih*) and the conditions governing it.[1] He was neither a Salafist nor an Islamic party political activist.

Between the 1850s and the 1930s the main problem facing reformers and *fiqh* scholars was: "What form should our progress take and how should we achieve it?"Subsequently, the problem the Salafists and Islamic revivalists had to face between the 1930s and the 1960s was: "How can we preserve our distinct identity?"[2] In this context al Shatibi's book *Al Muwafaqat* came to be seen as embodying the problems of reform and renewal, while his other book *Al I'tisam* symbolised the preservation of the Muslims' distinct identity within the boundaries of the Shariah.

While the Mashreq – the eastern region of the Arab world – embraced the "*fiqh* of imitation" instead of the "*fiqh* of creativity", the Maghreb, or western end, only followed suit after the 1960s. I do not endorse Professor Mohammed Abed al Jabri's notion of the Maghreb's special status – historically and in the present day – and his views on thought, philosophy and *fiqh*. At the same time, however, we must concede that, ever since Khayr al Din al Tunisi, Bayram I, Salim Bouhajib, Ibn Abi Diyaf, al Hajawi and al Tha'alibi, the people of the Maghreb have always linked political progress to religious reform.[3] Moreover, for several decades in the 20th century national political action in the Maghreb countries involved the participation of the clerical class alongside their non-clerical counterparts. Consequently, while interest in *fiqh al masalih* and *maqasid* waned in the Mashreq, two highly significant books were published in Tunisia and Morocco within the space of twenty years. In 1947 al Tahir bin Ashour – Tunisia's leading Islamic scholar – published a treatise in three parts, entitled *Maqasid al Shari'ah al Islamiyyah*. Part 1 established the validity

1 Al Buti: *Dhawabit al Maslahah fi'l Shari'ah al Islamiyyah*, Damascus, Dar al Fikr, 1973. I have a copy of this book published in 1992 (6th impression).

2 Ridwan al Sayyid: *Siyaasaat al Islam*, pp. 142-145. See above.

3 See Sa'id Binsa'id al 'Alawi: *Al Ijtihad wa'l Islah wa'l Tahdith bi'l Maghreb*, Beirut, Dar al Kitab al Jadid al Muttahidah, 2007.

of *maqasid al Shari'ah* and explained why it was necessary for a *faqih* to understand the subject; Part 2 examined the general objectives (*al maqasid al 'ammah*) of Shariah legislation, while Part 3 focused on the specific objectives (*al maqasid al khassah*) of the different kinds of transactions covered by *fiqh al mu'amalat* (Islamic commercial jurisprudence).[1] Bin Ashour asserted that his book had a progressive purpose and that he wanted it to be a "guiding light" for students of *fiqh* when faced with *nawazil* (new and unfamiliar situations) on which they were unable to reach consensus. While he saw it as being similar to the books on *nawazil* and fatwas written by Maliki scholars, what he actually did was make *fiqh al maqasid* an integral element of the discipline of *usul al fiqh* – not only theoretically but also as a practical tool for extrapolating rulings.

In 1963 – sixteen years after Bin Ashour – the Moroccan national leader and *faqih* Allal al Fassi published a book entitled *Maqasid al Shari'ah al Islamiyyah wa Makarimuha* (*Objectives and Virtues of the Islamic Shariah*)[2]. Unlike Bin Ashour, in this book he declared that his purpose was to revive the Shariah sciences and look beyond the limits set by the author of *Al Muwafaqat* seven centuries earlier.

If Bin Ashour was the pioneer who explored the potential legislative functions offered by *fiqh al maqasid*, al Fassi's focus was on the philosophy of Shariah legislation – or the theory of the Shariah. Unprecedentedly, he devoted a long chapter to human rights in the Shariah, which he based on the "five *dhururat*", adding the principle of freedom[3] as one of the fundamental *masalih*.

It would therefore be fair to say that Bin Ashour and al Fassi were the founders of the present-day approach to *maqasid al Shari'ah* and the first writers to generate interest in the subject – both in theory (by including

1 Mohammed al Tahir bin Ashour: *Maqasid al Shari'ah*, pp. 13-33. See above. The cover of the first edition of this book states: "Set text for the first year of al Zaituna University's Shari'ah Department (Higher Education)."

2 I have an edition of the book published by Dar al Gharb al Islami, Beirut, 1993. The Introduction states that al Fassi presented his book as a series of lectures to the students of al Qarawiyin's Shari'ah Faculty in Fes and the Faculty of Law at Mohammed V University in Rabat.

3 Al Fassi: *Maqasid al Shari'ah*, pp. 3-4. See above.

maqasid al Shari'ah as part of the *fiqh* system) and in practice (by using *fiqh al maqasid* as a tool for *ijtihad* – or interpretative judgment – and as a means of "rejuvenating" Islamic *fiqh*; this was something that had never happened before – neither in the history of Islam nor in the present day).

V

Over the years following Allal al Fassi's book there was a long period of silence, but since the 1980s there has been a spate of publications on *fiqh al maqasid* – initially by writers who were not traditional *fuqaha* but young and middle-aged party political Islamists, including Salafists and revivalists. These publications had their own agendas and objectives. As their aim was first and foremost to establish and reaffirm the Islamic identity, their primary purpose was to show that it was possible to set up an independent Islamic intellectual and cultural system capable of tackling every aspect of the modern world – theoretical as well as practical – from an Islamic point of view. Hence the large number of dissertations and articles on *maqasid* that focused on the Islamisation of knowledge, the Islamisation of the financial system, Islamic political constitutions and the Islamisation of human rights. Subsequently the focus shifted more towards ideas on the implementation of the Shariah – a cherished goal of all Islamic movements. Eventually, *maqasid al Shari'ah* came to be used as a tool for reforming and updating *usul al fiqh* and establishing a form of Islamic *fiqh* capable of tackling contemporary issues and problems ranging from economics and finance to the law, and including modern medical research, the areas of *fiqh* dealing with Muslim women, the miraculous scientific nature of the Qur'an etc.[1]

1 Including al Raisouni's book referred to above, Jamal al Din 'Atiyah: *Nahwa Taf'il Maqasidi'l Shari'ah*, Hamid al 'Alam: *Al Maqasid al 'Aamah li'l Shari'ah al Islamiyyah*, Abdul Rahman Ibrahim al Kailani: *Qawa'id al Maqasid*, and Abdul Nur Baza: *Masalih al Insan*: *Muqaranah Maqasidiyyah*, al Raisouni, al Zuhaili and Shbair: *Huquq al Insan: Mihwar Maqasid al Shari'ah*, Mohammed al Wakili: *Fiqh al Awlawiyyat*, Sheikh al Qaradhawi: *Fiqh al Awlawiyyat*, Jaser Awdah: *Fiqh al Maqasid: Inatat al Ahkam al Shar'iyyah Bimaqasidiha*, Ra'id Nasri Jamil Abu Mu'nis: *Manhal al Ta' lil bi'l Hikmah wa Atharuh fi'l Tashri' al Islami*, and Misfir bin Ali al Qahtani: *Al Wa'iy al Maqasidi: Qira'ah Mu'asirah li'l 'Amal Bimaqasidi'l Shari'ah fi Manahi'l Hayat.* There is also a study in English about al Shatibi and *Al Muwafaqat* by Khalid Masoud (1977), which may originally have been a doctoral thesis. There are also several other unlisted studies and papers.

Dr. Mohammed Kamal Imam has produced an index in several volumes entitled *Al Dalil al Irshadi ila Maqasidi'l Shari'ah* (*A Guide to the Objectives of Islamic Law*), which includes details of thousands of studies and *ijtihad* initiatives on the application of *maqasid*.[1]

So what is the significance of this new phenomenon after such a long period of silence?

Aspects of this new phenomenon are reflected in numerous book titles. The period between the 1960s and 1980s saw the completion of the revivalists' project to "Islamise modernity and the Islamic State" – a project that generated hundreds of publications which we can class under the general heading of "the Islamic System". Then in the 1980s (after a preliminary "lead-in" period) *fiqh al maqasid* was applied to the Islamic system as a "general umbrella term" covering two categories – the symbolic and the practical/applied.

Just as was the case in the early Islamic period, the *furu'* ("branches") appeared before the *usul* ("roots") – that is to say, the specifics preceded the general principles. They were then followed by the "*usul al fiqh li'l taq'id wa'l tandhim*" ("principles of jurisprudence as applied to the foundations and system"). This can be seen in the "new Islamic system", particularly in its concepts of Islamic "*hakimiyyah*" (Divine Governance) and "*shumuliyyah*" (comprehensiveness). Subsequently – or so it is said – *fiqh al maqasid* came along and rearranged the "*furu'*" in their respective categories of general and established *usul* – a process they called "*fiqh al tashri'*" ("the jurisprudence of Shariah legislation") or "*hikmat al tashri'*" ("the wisdom of Shariah legislation").

The Islamists came up against two problems with *maqasid* and *fiqh al maqasid*. The first of these was due to the nature of the origins of *usul al fiqh* and a lack of clarity in its relationship with *maqasid*, while the second arose from the way in which the "progressives" exploited *fiqh al maqasid* as a tool for religious and political/institutional reform. For some three decades the Islamists responded to these problems

1 See Footnote No. 19.

with a two-pronged approach: referring back to the original texts, while simultaneously Islamising modern phenomena by treating them as part of the general *maqasid* of Shariah legislation. When it came to the question of detailed, specific rulings, they took the *fiqh* texts of the established schools of jurisprudence and drew parallels between them and the role of *masalih* in the "new *fiqh*".

Needless to say, there has never been any connection whatsoever between al Qarafi and al Shatibi (or indeed Muhammad Abduh and Rashid Rida) and the concept of an "Islamic system".

* * *

So as we have seen, *fiqh al masalih*, *al maqasid* and *hikmat al tashri'* developed in three phases. In the initial phase, which lasted for some four centuries, the original *usul* scholars established a "*maqasid* structure" that existed in parallel with *'ilm usul al fiqh* but had no significant impact on it. During the second phase – from the mid-19th century to the 1930s – attempts were made to give *maqasid* and *fiqh al maqasid* a "theological status" outside the general structure of *fiqh* and *usul al fiqh* – that is to say, to make them the theological force behind progress and religious reform. However, this situation was short-lived. While it continued in some form or other in the Arab Maghreb, it was not long before the Arab Mashreq began to lose interest in the "objectives, spirit and wisdom" of the Shariah.

Over the past three decades there has been an upsurge in the fortunes of *fiqh al maqasid* and its impact has grown significantly. Today it provides a "symbolic umbrella" and frame of reference for the concept of the "Islamic system" in neo-Islamist thinking. For the neo-Islamists it is gradually replacing the old *usul al fiqh* as a modern tool for dealing with contemporary issues.[1] Hence it can justly be described as "a new *fiqh* for a new era".

---

1 In an article he wrote about his Handbook (See Footnote No. 19), Dr. Mohammed Kamal Imam objects to the replacement of "*maqasid*" by "*usul*". See Mohammed Kamal Imam: *Nahwa Qira'ah Maqasidiyyah Usuliyyah* in *Maqasid al Shari'ah wa'l Ijtihad*, ed. Asser Awdah, London, Mu'assasat al Furqan, 2008, pp. 30-33.