ARTICLES

RETHINKING ISLAMIC LEGAL METHODOLOGY WITH REFERENCE TO *MAQĀṢID AL-SHARĪ‘AH*

*Ahmad Kazemi-Moussavi**

Abstract: Alternative approaches to Islamic law made 'Islamic legal methodology' a locus of scrutiny and re-examination by contemporary Muslim authors. This 'methodology' (*uṣūl al-fiqh*), which is more than 1,200 years old, developed out of consideration for the authority of the Qur'ān and the *Sunnah* as the fundamental sources of the law. Although fascinating at the beginning, the rules of literal demonstration could not solve problems arising from the sheer text-based reading of the law. Muslim scholars of the classical period occasionally took different approaches such as consideration of higher objectives of the law (*al-maqāṣid*) and knowledge of priorities (*al-awlawiyyāt*) to harmonise the applicability of the law with varying situations facing them. This genre of efforts got a new momentum in the recent decades as it seems heading towards rethinking the method of reading Islamic law. The purpose of this article is to provide a critical survey of what these efforts offered to rethink Islamic legal methodology.

Introduction

Centuries of text-based reading of the Islamic law ultimately centred its methodology on a chief formula, i.e. 'the authority of literal demonstration' (*hujjiyyah zawāhir al-alfāz*). This process has begun with typology of religious statement (*bayān*) and address (*khiṭāb*), and ended up with assertion of the authority of literal demonstration.¹ The assumption behind this formula is that each statement of the text represents an eternal truth which should be discovered and applied regardless of time and space differences. Muslim scholars of the early period had no choice but to assume a sacred authority for the texts; because the nascent Muslim communities were so attached to their customs and arbitrary laws which made impossible introducing a new system of law without connecting it to the sacred mandate. Al-Shāfi‘ī's *al-Risālah* points to the fact that he had a hard time to establish a legal sense or an

* Ahmad Kazemi-Moussavi is Professor of Islamic law and Persian language in the University of Maryland, United States.

accountable feeling amongst the emergent Muslims of time. To do so he upheld the supreme authority of the Qurʾān and especially the *Sunnah* of the Prophet against the personal opinions of *ahl al-raʾy* and living traditions of the community. Al-Shāfiʿī's method of text-based reasoning, especially his way of founding the *Sunnah* on *ḥadīth* reports, set a pattern for the later scholars who practically left little room – let alone any constituent role – for human reasoning except for the re-arranging of what had already been established.

Nevertheless, Muslim scholars ever since the eleventh century adopted certain notions from Greek logic which equipped them with a stronger epistemological introduction of *uṣūl al-fiqh* although did not change the structure of their methodology. It was Abū Ḥāmid al-Ghazālī (d. 1111) who, after sporadic touches on logic by Ibn Ḥazm (d. 1064)² and al-Juwaynī (d. 1085),³ incorporated some basic concepts of formal logic in the introduction of his last work on legal methodology.⁴ Moreover, al-Ghazālī praises human reason and likens it to a judge who may never be dismissed or substituted. He adds: '*aql* is a witness (*shāhid*) for the *sharīʿah*, a spectator which refines and accommodates.'⁵ Thus no wonder if the same al-Ghazālī was an important precursor for bringing to the fore the idea of consideration of public interest and higher objectives of the law which actually added a reason-based facet to Islamic legal methodology.

Considering the Higher Objectives of the Law

Before al-Ghazālī, Imām al-Ḥaramayn al-Juwaynī and Shihāb al-Dīn al-Qarāfi (d. 1285) touched upon the idea of consideration. It was al-Ghazālī, however, who expanded the chapter of analogical reasoning (*qiyās*) to the extent that new notions of suitability of *ratio legis* (*munāsabah*) and consideration of public interest (*maṣlaḥah*) found a solid ground in the legal methodology. If a *ratio legis* ('*illah*') has not been fixed through the text or consensus, al-Ghazālī argued, the underlying '*illah*' would be discerned by rational reasoning what suits the case.⁶ Al-Ghazālī eventually links the practice of suitability to *maṣlaḥah* to serve the higher objective of the law. It is particularly the case where a remote suitability overrules other textual or contextual signs due to the underlying *maṣlaḥah* based on the main purpose of the law (*maqṣid al-sharʿ*).⁷ It is noteworthy that al-Ghazālī identifies *maṣlaḥah* with the protection of the end goals of the law which include the life, religion, intellect, property and the family.⁸ The authority of this *maṣlaḥah* is divided into three levels of *ḍarūrāt* (lit. 'necessities'), *hājāt* (lit. 'needs') and *taḥsīnāt* or *tazyīnāt* (lit. 'embellishments').⁹ It is striking that al-Ghazālī allows the consideration of *maṣlaḥah* by way of *qiyās* and suitability only. He already excluded *istiṣlāḥ* (seeking *maṣlaḥah*) from the *adillah* (lit. 'indicants', sources of the law) because of its wide and undefined application.¹⁰ Other juridical formulas that al-Ghazālī excludes from

the *adillah* are *istihsān* (juristic preference) and the same topic of *qiyās* because al-Ghazālī considered them as a means of setting rules, not a source of the law. This demonstrates that al-Ghazālī's re-adoption of *maṣlaḥah* in *qiyās* was due to its conformity to the higher objectives of the law (*maqāṣid*) which in his view can be better devised by the principles of *qiyās*.

After al-Ghazālī, Abū Ishāq al-Shāṭibī (d. 1388) is the next important figure who revised the structure of Islamic legal methodology. He actually wrote one of the most inspiring works on legal methodology and its relation to the philosophy of the law. In his *al-Muwafaqat* (The Congruences), al-Shāṭibī presents *uṣūl al-fiqh* as a method not only to extrapolate rules from the sources, but also to serve aims and objectives of the law what he describes as *maqāṣid al-sharī'ah*. He makes consideration of higher objectives of the law an essential part of legal methodology. By offering twelve theoretical premises as introduction, he elaborates on theories of harmonising the legal norms with the philosophy of the law that he identifies with the notion of *maṣlaḥah* or public welfare.¹¹ The primary intention of the Lawgiver, according to al-Shāṭibī, is the good of the people (*maṣlaḥah*). He divides the *maṣlaḥah* into three categories of necessity, needed and improvements which may go parallel with the typology of the respective legal norms depending on the circumstances. The category of 'necessity' consists of the protection of the following five: religion, self (*nafs*), family, property, and intellect. The category of *ḥājīyyāt* includes a variety of rituals and transactions whose purpose is to mitigate hardship. Similarly *tahṣīniyyāt* refers to the best of conducts and customs ('*ādāt*').¹² Before al-Shāṭibī, this categorisation was employed by Muslim jurists such as Juwaynī, al-Ghazālī, and al-Qaraḥī in their respective chapters of *qiyās* to mainly justify the appropriate application of *ratio legis* ('*illah*') to new legal cases. By commensurating this category with the public good of the people (*maṣlaḥah*), al-Shāṭibī introduces a new rational approach to the sources of law in which social realities are taken into consideration for determining suitable legal norms. As a result, adherence to the text of law, according to al-Shāṭibī, must not be so rigid as to alienate the rationale and purpose of the *sharī'ah*.¹³

The Contemporary Genre of 'Consideration of the Higher Objectives of the Law' (*Maqāṣid al-Sharī'ah*)

Contemporary works on the *maqāṣid* mainly aim at providing an Islamic response to the requirements of modern developments in Muslim societies. Al-Shāṭibī's proposal to include the *maqāṣid* among the fundamental sources of the law could not find enough plausibility among Muslim scholars as none dared to commensurate *maqāṣid* with the text-based sources. Neither did al-Shāṭibī's emphasis on consideration of public good receive enough attention until the twentieth century when Ibn 'Āshūr

(d. 1973), a Tunisian student of the Egyptian reformist thinker Muḥammad ‘Abduh (d. 1905), allocated his major work to the subject.

Ibn ‘Āshūr’s point of departure is the idea that the contested propositions of *uṣūl al-fiqh* are not realistic enough to capture the wisdom or hidden insights of religious norms. “Rather, they revolve around the deduction of provisions (*aḥkām*) from the literal expressions and words (*alfāz*) of the Lawgiver.”¹⁴ He proceeds then to ground *maqāṣid* on *fiṭrah* or human nature. The *fiṭrah* in Ibn ‘Āshūr’s opinion is closely related to *al-dīn* (the religion) whose definitive article denotes the familiarity of human natural disposition with the truth of both the *sharī‘ah* and faith.¹⁵ He refers to al-Zamakhsharī (d. 1144) a Mu‘tazilite thinker who claimed that “human nature is always bent on right judgment and understanding such as understanding the principle of monotheism”.¹⁶ With these introductory remarks, Ibn ‘Āshūr proceeds to elaborate on his own understanding of *maqāṣid* which principally includes the five categories of *maṣāliḥ*, equality and freedom in the *sharī‘ah* and finally social order. Furthermore, Ibn ‘Āshūr tries to find out the *maqāṣid* in the applied law of Islam such as family law, financial transactions and penal law.¹⁷ Besides elaboration of al-Shāṭibī’s theory of *maqāṣid*, Ibn ‘Āshūr’s work contains considerable references to the role of *fiṭrah*, reason, freedom in the *sharī‘ah* and the necessity of *ijtihād*.

Muhammad Khalid Masud (b. 1939) is the author who in fact re-introduced al-Shāṭibī’s philosophic work on legal theory to the interested English-reading milieu. He evaluates al-Shāṭibī’s approach to *uṣūl al-fiqh* in the context of adaptability of Islamic law to social changes. For this purpose he holds al-Shāṭibī’s theory of *maqāṣid* as the defining feature of his conception of Islamic law. In his introduction, Masud quotes arguments holding Islamic law to be theologically grounded and authoritarian to the last degree.¹⁸ However, he later keenly deliberates on the space provided by al-Shāṭibī for consideration of *maqāṣid* and *maṣāliḥ* – in fact for the role of human reason to balance the authoritarian nature of purely text-based reading of the *sharī‘ah*. Following al-Shāṭibī, Masud elaborates on three notions of *maṣlaḥah*, *dalālah* (lit. ‘indication’) and ‘*ādah* (lit. ‘convention’) as core concepts of his methodological discourse. In al-Shāṭibī’s analysis, Masud argues, *maṣlaḥah* appears as a primary objective of law. Therefore it is interchangeable with *maqāṣid*. The meaning of *maṣlaḥah* however – although it may vary in different contexts – is aimed at the protection of public interest.¹⁹

Masud considers *dalālah* in terms of al-Shāṭibī’s theory of language and meaning. He stated that “Shatibi regarded the indication (*dalālah*) as the most essential aspect of language” and that he maintained that the question of the clarity of the text (the Qur’ān) is not the problem of vocabulary, but rather that of ‘indication’ and ‘understanding’.²⁰ On the whole, Masud concludes that al-Shāṭibī’s theory of language can be compared more appropriately with the ‘ordinary language theory’

which allows a 'word' or a 'sentence' to be understood only in a 'context' and by 'usage'.²¹

Another interesting topic that Masud sets forth is about *ʿādah* or conventional practices of society that are confirmed by the *sharīʿah*. Masud examines *ʿādah* as contrasting *bidʿah* (lit. 'innovation') in the context of continuity and change. Social *ʿādah* such as *diyāh* (blood money), *qasāmāh* (compurgation) and *qard* (loan) "can change in certain cases, but more important is the fact that when a change takes place within an *ʿādah* it also affects a change in the rule of the *sharīʿah*".²² It is noteworthy that al-Shāṭibī, who had already distinguished rituals (*ibādāt*) from customary practices (*ʿādāt*), assigns the former to Meccan stage and the latter to Medinan period. *Ibādāt*, according to al-Shāṭibī, are acts of devotion (*taʿabbudī*) and immutable where as *ʿādāt* are variable and subject to human choice.²³ This kind of dichotomous treatment of concepts according to the Meccan and Medinan phases of revelation is typical of al-Shāṭibī's work.

In connection with *maqāṣid*, Mohammad Hashim Kamali (b. 1944) after his far-reaching engagement with 'principles of Islamic jurisprudence' comes up with a number of suggestions particularly in two neglected areas of *uṣūl al-fiqh* where improvement could be made. First, there is the qurʾānic concept of *shūrā* (lit. 'consultation') which has never been integrated in the *uṣūl* doctrines and procedures.²⁴ In addition to the tradition of the Prophet, the Qurʾān (42:38) equates 'consultation' (*shūrā*) on a par with 'obligatory ritual prayer' (*al-ṣalāh*) as important characteristics of the nascent Muslim community. Nevertheless, the notion of *shūrā* did not receive one per thousand elaborations that the prayer did. Even a number of contemporary Muslim thinkers disqualify the concept of *shūrā* as unfit for consideration in the modern political thought. The constituent components of *shūrā* seem inadequate now owing to one millennium of Muslims' negligence during which Europe could evolve its semi-consultative bodies into the modern parliamentary system. The second suggestion of Hashim Kamali rests on the qurʾānic dictum of accepting the legitimacy of *uluʾl-amr* or those who are in charge from among Muslims. Kamali entertains the proposition of *uluʾl-amr* in order to find a solution to the historical detachment of jurisprudence from the practicalities of governance.²⁵ It seems, however, that the problem lies in the historical crisis of legitimacy facing Muslim societies which has long alienated Muslims intellectuals from the governmental practicalities. These two concepts, after all, belong originally to the area of Islamic political thought, and legal methodology in its conventional framework can hardly offer an answer for them.

Concerning the present gap between the theory and practice of Islamic law, Hashim Kamali also encourages the widening of the scope of *maqāṣid*, but at the same time he warns that without the aid of the methodological tools, the *maqāṣid* procedure may lead to arbitrary conclusions. Kamali restates the history

of the development of *uṣūl al-fiqh* to show how it vacillated between two goals of promoting *ijtihād* and disciplining *taqlīd* (following the opinions of others).²⁶ In fact, *uṣūl al-fiqh* has shouldered the double duty of setting meters for legality of divine ordinances (*al-aḥkām*) and at the same time to update them according to their end-goals and new requirements of the changing situations. The latter part still awaits new meters to be set for its promotion.

We now turn to the work of Jasser Auda (b. 1966), who claims introducing a new approach to Islamic law particularly to the theory of *maqāṣid*. Jasser Auda dismisses 'Islamic modernism' as being unnecessarily apologetic about traditional Islam. 'Islamic modernism', Auda argues, was by and large a reaction to European modernism which endorsed the ideas of the centrality and supremacy of modern sciences.²⁷ Furthermore Auda criticised the way Muslim reformists (such as 'Abduh, al-Ṭaḥṭāwī and Muhammad Iqbal) incorporated the concept of 'causality' in order to re-interpret or re-word the Islamic philosophy of religion. That is to say, they 're-interpreted' Islamic articles of faith (the Qur'ān and *Sunnah*) in a way that 'fits' the conclusions of (pre-twentieth century) science, whereas 'causality' served as the logic of modernist *kalām* (philosophy of religion). 'Abduh's *Risālat al-tawḥīd* is the clearest example of the above changes in attitude.²⁸ Auda then explains the contemporary changing status of philosophic thought as follows:

In the west, the second half of the twentieth century witnessed postmodernism's complete rejection of all modernist 'meta-narration' [...]. [A]ll streams of postmodernism agreed on the 'deconstruction of centrism.' Thus, according to postmodernists, the center should remain void of anything, whether it is science, man, the West, or even God. 'Rationality' itself, according to postmodernists, became an undesirable from of centrism and marginalization. 'Irrationality' became a desirable and 'moral' alternative.

'Islamic postmodernists,' in turn, utilized deconstructionist concepts in order to criticize central and basic Islamic articles of faith in a radical way. The centrality of the Qur'an and the Prophet in Islam and Islamic law was made subject to a 'free play of the opposites,' to borrow an expression from Derrida.²⁹

Auda then defines 'systems theory' before offering his proposal for an 'Islamic systems philosophy' as a rational and non-Eurocentric 'postmodern' philosophy:

Systems theory and philosophy emerged in the second half of the twentieth century as an anti-thesis of both modernist and postmodernist philosophies. Systems theorists and philosophers reject the modernist reductionist view that all human experiences could be analyzed into indivisible causes and effects. On the other hand, systems philosophy also rejects postmodernist irrationality and deconstruction, which are 'meta-narration' in their own right. Thus according to systems philosophy, the universe is neither a huge deterministic machine nor a totally unknown being, complexity can be explained neither

via a series of 'nothing-but' cause and effect operation nor via claims of 'non-logocentric irrationality, and the problems of the world could be solved neither via more technological advances nor via some sort of nihilism.' Hence, thanks to systems philosophy, the concept of 'purposefulness,' with all of its teleological shadows, was back to philosophical and scientific discourses.³⁰

By cherishing 'the concept of purposefulness', Auda provides a space for the *maqāṣid* theory in his 'system approach'. Despite the multi-dimensionality of efforts made by Auda to re-philosophise Islamic law, 'the implication of purpose' remains the most tangible part of his work. He first refers to the difference between goal and purpose as the latter produce 'the same outcome in different ways and different outcome in the same or different environment. Thus, purpose-seeking systems could produce different outcomes for the very same environment as long as these different outcomes achieve the desired purpose.'³¹ Islamic theology (*kalām*) discussed the problem in the context of 'causation' in divine actions (*ta'ālīq al-Allāh*). After quoting some Mu'tazilite and Ash'arite views, Auda finally arrives at al-Māturīdī's view that "divine actions have causes/purposes out of God's grace."³² Finally as the core of his methodology of systematic analysis, Auda presents the following outline of the relationship between purposefulness and other features of the system of Islamic law.

- (i) Purposefulness is related to the cognitive nature of Islamic law because various proposals for the nature and structure of the purposes of the Islamic law (*maqāṣid al-sharī'ah*) reflect cognitions of the nature and structure of law itself.
- (ii) Universal purposes of Islamic law (*al-maqāṣid al-āmmah*) represent the law's holistic characteristics and universal principles.
- (iii) Purposes of the Islamic law play a pivotal role in the process of *ijtihād*, in all of its various forms, which is the mechanism by which the system of Islamic law maintains its 'openness.'
- (iv) Purposes of the Islamic law are perceived in a number of hierarchical ways, which correspond to the hierarchies in the system of Islamic law.
- (v) Purposes provide multiple dimensions that help resolve and understand 'apparent contradictions' and 'opposing tendencies' in the scripts and the fundamental theories of the law.³³

As seen above, Auda relates his doctrine of purposefulness to 'the cognitive nature' of Islamic law, and 'pivotal role of various forms of *ijtihād*'. By 'cognitive nature', he means that Islamic law (*fiqh*) is a result of human reasoning and reflection of *ijtihād* upon the scripts.³⁴ This way of characterisation of Islamic law seems to be

in line with what a number of Muslim reformist thinkers had already offered, but Auda refuted them as deconstructionists of the modern and post modern periods. It is not clear to what extent ‘human reasoning and reflection’ could or should use modern disciplines and methods without ignoring the centrality and superiority of the revealed sources. Number four of Auda’s outline refers to a number of hierarchical ways, which correspond to that “in the system of Islamic law”, i.e. they should be observed in a purpose-based reading of the law. If these hierarchies refer to those presented in the traditional *uṣūl al-fiqh*, then, a conventional limitation is discernable in the proposed system. Auda acknowledges there are ‘apparent contradictions’ and ‘opposing tendencies’ in the script which require multiple dimensions to help in understanding the fundamental theories of the law and resolving problems arising from purpose-based reading of the *sharī‘ah*.

Knowledge of Priorities

Closely connected to the *maqāṣid* theory is the new idea of knowledge of priority (*fiqh al-awlawiyyāt*) discussed currently among Muslim scholars. This idea was initially entertained by the contemporary Egyptian scholar Yūsuf al-Qaraḍāwī (b. 1926), and elaborated by al-‘Alwānī. The etymological roots of *awlawiyyah* can be traced in the Qur’ān and *Sunnah*, and in a number of parallel concepts; but what is meant in the contemporary context – according to al-Qaraḍāwī – is “to place things in their seats (*martabah*) so that the proper or important bid will not be deferred or down played”.³⁵ By examining the roots and precedents of *awlawiyyah* in the works of scholars such as al-Ghazālī, al-Qaraḍāwī arrives at the conclusion that is necessary to observe the priority among the binding duties prescribed by the religion.³⁶ Al-Qaraḍāwī, as the title of his work suggests, is more concerned with the future of political Islamic movements rather than setting legal rules. His concluding priorities, therefore, include the necessity of ‘dialogue’ with different groups such as seculars, orientalist, Christians etc.³⁷

Ṭāhā Jābir al-‘Alwānī (b. 1935) sets forth the notion of *awlawiyyāt*, as a supplementary to the *maqāṣid* theory, to deal with questions facing today’s Muslim societies. Al-‘Alwānī’s continuous search for an appropriately Islamic context led him to envisage some principles for the idea of priorities. In a work published under the rubric of *maqāṣid al-sharī‘ah* al-‘Alwānī signifies the important role that knowledge of ‘rational priorities’ can play in balancing and stabilising Islamic jurisprudence. He justifies this idea with examples taken from topics of ‘conflict of laws’ (*ta‘āruḍ*) and preferences (*tarājih*) that originally stem from reason rather than revelation. What he interprets as ‘*awlawiyyāt*’ in this context is much broader than the conception some contemporary Muslim authors identify with the

term. A comprehensive knowledge of the *sharī'ah* i.e. Islamic theology as well as jurisprudence is needed to acquire the wisdom of 'priorities'.³⁸

The negative effects that result from disregarding the 'priorities' constitute a topic from which al-'Alwānī had extracted 24 unwanted outcomes. The first outcome is that Muslims have plunged into details (of the *sharī'ah*) to the extent they are not able to systematise them and to address the subtle relation between cases and principles. The second is the fact that they preferred to adhere to blind following (*taqlīd*) rather than carrying out their initiatives (*ijtihād*). Third, they placed too much significance upon supererogatory or optional undertakings, before obligatory actions. Fourth, Muslim jurists often rely upon their presumptions, and decline to find out the causality of things; and to seek the relationship between cause and effect. Fifth, the over-reliance upon the names of iconic scholars from whom Muslims expect to hear the truth instead of verifying the authenticity of what they said. This is in fact a kind of idolatry (*ṣanamiyyah*) that deters Muslims from thorough contemplation. In the rest of his elaboration, al-'Alwānī signifies how trivial trends of thought and superfluous spiritual displays occupied the minds of Muslims without making a real contribution to religion and society.³⁹ Al-'Alwānī does not hesitate to point out the fact that his concept of priorities should indeed be understood along with the higher objectives of the *sharī'ah* as the title of his book suggests.

Another noteworthy work on 'priorities' belongs to Muḥammad al-Wakīlī (b. 1960). In his 2006 publication, al-Wakīlī examines the definition, roots, ways and principles of priorities in cases of conflict of law and antagonism, all juridically with a lexicographical approach.⁴⁰ His work seems good to review the legal norms of the *sharī'ah* from the standpoint of 'priorities', but he does not pay much attention to the role of human reasoning in determining priorities. He repeatedly refers to the works of al-Qaraḍāwī and al-'Alwānī, however, he does not engage with the 'philosophy of priorities in today's context' as the two above-mentioned authors did.

Concluding Remarks and Recommendations

The above overview of the existing accounts on consideration of 'higher objectives and priorities' in interpretation of Islamic law points to the fact that the need for new ways of reading the *sharī'ah* is inflicting additional changes on the framework of Islamic legal methodology. Both formulas of *maqāṣid* and *awlawiyyāt* had no title in the conventional legal theory although a number of parallel notions may be traced in the *uṣūl al-fiqh*. The important difference, to me, is the vantage point taken by the contemporary authors to incorporate more 'timely reasoning' into the largely 'text-based' reading of the law. Although equipped with rich language and propositions, the conventional legal methodology is still essentially based on the principles of literal demonstration (*hujjiyāt al-zawāhir*) of the texts. The rise

of rational considerations seems presently to be making its way into the legal methodology to fill the vacuum created by limitation of literal reading of the law. Regardless of their sources of inspiration, the new considerations are necessitated by varying situations in the Muslim societies.

We have surveyed the history of consideration of the *maqāṣid* or higher objectives of the law as an introduction for the direct role of ‘human reason’ in Islamic legal methodology. No doubt that al-Ghazālī and particularly al-Shāṭibī played significant roles in employing reason and *purpose-based* reading of the *sharī‘ah*. But their efforts to rationally re-arrange or to update topics of *uṣūl al-fiqh* did not outlive the traditional course of literal arrangement of legal methodology. The ambiance created by Sheikh Muḥammad ‘Abduh for a rational approach to the religion, however, drove his student Ibn ‘Āshūr to write a treatise on *maqāṣid al-sharī‘ah*.⁴¹ The publication of Masud’s English work on *maqāṣid* as the philosophy of Islamic law followed by the translation of Ibn ‘Āshūr and al-Raysūnī’s works on al-Shāṭibī, made the theory of *maqāṣid* a locus of attention for Muslim intellectuals such as al-‘Alwānī, Abū Sulaymān (b. 1935) and Wahbah Zuḥaylī (b. 1932) who wrote chapters on the necessity of consideration of higher objectives of the law along with observation of rational priorities. However, none of them have so far tried to structure *maqāṣid* as an essential part of the legal methodology as al-Shāṭibī did.⁴²

The currently rising attention to *maqāṣid* and *awlawayyāt* points to the fact that Islamic legal thought is heading towards a purpose-based reading of the law. But a question remains of how the conventional legal methodology may accommodate this way of reading the law.

- The idea of consideration of higher objectives of the law and observing rational priorities may be regarded as the first step towards rethinking Islamic legal methodology, and thus must be taken seriously. As we saw above, Jasser Auda after his multi-layered research came up with the meaningful proposal of ‘purpose-based reading of the *sharī‘ah*’, which should correspond to the hierarchies in the system of Islamic law. The latter part of Auda’s proposal, though limiting the scope of free reasoning, shows the necessity of the presence of ‘tradition’ in the Muslim jurisprudence.
- It seems reasonable to assume that the end-goals of the law-giver correspond to the wellbeing of the society. If the purpose-based reading of the law is taken seriously, it should produce its methodical devices how to find out the higher objectives of the law in the light of time-space requirements of a given society. Here, we see Kamali’s emphasis on the necessity of procedural devices for recognition and harmonising the *maqāṣid*. The new trend, Kamali argues, while indicative of the desire to rejuvenate *ijtihād*, should not move to

the other extreme and “to think that *maqāṣid* could by themselves satisfy the reformist demand without the aid of methodological tools of *uṣūl al-fiqh*”.⁴³

Another problem facing purpose-based reading of the *sharī‘ah* is the confusion caused by unstructured elaboration of traditional sources concerning both concepts of *maqāṣid* and *awlawiyyāt*. These concepts, as mentioned above, have a variety of parallel concepts in the *sharī‘ah* whose real contexts have been different from that of today. We can easily lose the point by sheer reliance on the rich terms and expressions of Arabic language without providing meaningful contexts for them. We have examples of Arabic works on *maqāṣid* and *awlawiyyāt* rich in drawing parallel notions from the conventional sources, but poor in providing a meaningful context for their application in practice. There are scholars who were confused by several rubrics for one and the same concept, and complained from the *khuda‘ al-‘anāwīn* (deception of titles) which had misled or confused them.⁴⁴

- On the practicality of purpose-based reading of the law, it is necessary to emphasise that the divine laws are to be understood in their social context of time.
- We know that the nature of ‘law’ in Islam is *ḥukm* which was conventionally understood as ‘divine ordinance’, not a ‘social norm’. To carry out the divine *ḥukm* in a given society needs a degree of recognition of ‘public’ and respect for public opinion and public interest of time.

The notion of ‘public’ was not historically recognised – let alone respected – by Muslim governments.⁴⁵ The failure to recognise the status of public brought about the current ‘lack of legitimacy’ from which Muslim governments have suffered. In Islamic jurisprudence, ‘public practices’ are recognised in terms of ‘*urf*’ and ‘*‘ādah*’ (conventional and habitual practices) as secondary criteria to determine minor rules.

- For understanding the higher objectives (*maqāṣid*) and consideration of public interest (*maṣlaḥah*) a fuller recognition of the existing public practices, institutions and even public requirements are needed.

This recognition was not covered in the traditional *uṣūl* methodology except for the work of al-Shāṭibī. He not only focused on *maqāṣid*, but equipped it with recognition of a range of ‘*‘ādāt*’ and *al-taṣarruḥāt al-‘ādiyyah*’ or valid current practices of the community which show his understanding of the necessity of accommodating the divine law with the timely normative practices of the society. Thus, it seems appropriate to conclude that the work of al-Shāṭibī still stands as the best example of

today's course for improving the legal methodology and initiating a purpose-based reading of law.

Notes

1. The process of linguistic typology can be seen in al-Shāfi'ī's first chapter under the rubric of 'kayf al-bayān' in his *al-Risālah* (Cairo: Dār al-Turāth, 1979), 21–79, and in al-Jassās al-Rāzī's account on legal language and *al-khiṭāb* or the 'divine address'; see his *Uṣūl al-Jassās* (Beirut: Dār al-Kutub al-'Ilmiyyah, 2000), 3–197. See also Taqī al-Dīn al-Subkī, *Mabāḥiṭh al-alfāz* in: 'Abd al-Rahmān al-Banānī, *al-Hāshiyah 'alā matn jāmi' al-jawāmi'* li-'l-Imām Taqī al-Dīn al-Subkī (Beirut: Dār al-Kutub, 1998), 2:528–50.
2. Abū Muḥammad 'Alī b. Aḥmad b. Sa'īd Ibn Ḥazm, *al-Iḥkām fī uṣūl al-aḥkām*, 2 vols (Beirut: Dār al-Kutub al-Islāmiyyah, n. d.), 15–30.
3. Imām al-Haramayn 'Abd al-Malik b. 'Abd-Allāh al-Juwaynī, *al-Burhān fī uṣūl al-fiqh*, 2 vols (Doha: Dār al-Ṭibā'ah wa 'l-Nashr, 1992), 1:77–123.
4. Abū Hāmid al-Ghazālī, *al-Mustasfā min 'ilm al-uṣūl*, 2 vols (Beirut: Dār al-Kutub al-'Ilmiyyah, 1983), 1:3.
5. Ibid. Al-Ghazālī's treatment of 'aql here is in line with his account on 'aql in his major work *Iḥyā' 'ulūm al-dīn* (Beirut: Dar al-Kutub al-'Ilmiyyah, n. d.), 1:99–106, excluded *qiyās* from among the indicants (*adillāh*).
6. al-Ghazālī, *al-Mustasfā*, 2:318.
7. Ibid., 2:318–20.
8. Ibid., 1:287.
9. Ibid., 1:286.
10. Ibid., 1:284–314. Other juridical formulas that al-Ghazālī excludes from the sources of the law are words of the Companions of the Prophet and the status of acts before the Revelation of Islam.
11. Abu Ishāq Ibrāhīm al-Shāṭibī, *al-Muwāfaqāt fī uṣūl al-Aḥm*, 4 vols in 2 books (Cairo: Dār al-Fikr, n.d.). Al-Shāṭibī notes that he had initially entitled his work 'The Secrets of Religious Obligation' (*al-Ta'rif bi asrār al-taklīf*), but eventually he changed it to *al-Muwāfaqāt* because of a dream; *ibid.*, 1:7.
12. al-Shāṭibī, *al-Muwāfaqāt*, 2:2–5. See also Muhammad Khalid Masoud, *Shatibi's Philosophy of Islamic Law* (Kuala Lumpur: Islamic Book Trust, 2000), 152. This book is based on his PhD dissertation submitted to the Institute of Islamic Studies of McGill University, Montreal, Canada, in 1973 and was first published in 1977.
13. Mohammad Hashim Kamali, *Issues in the Legal Theory of Usul and Prospects for Reform* (Kuala Lumpur: International Islamic University Malaysia, 2000), 17.
14. Muhammad al-Tahir Ibn Ashur, *Treatise on Maqasid al-Shari'ah* (London and Washington: International Institute of Islamic Thought, 2006), xvii–xviii (author's preface).
15. Ibid., 80.
16. Maḥmūd b. 'Umar al-Zamakhsharī, *al-Kashshāf 'an ḥaq 'iq ghawāmid al-tanzīl*, 4 vols (Beirut: Dār al-Kutub al-'Ilmiyyah, 1995), 1:299.
17. Ibn Ashur, *Treatise*, 229–340.
18. Masoud, *Shatibi's Philosophy*, 4–9.
19. Ibid., 151–6.
20. Ibid., 170–1.
21. Ibid., 175.
22. Ibid., 212–14.
23. al-Shāṭibī, *al-Muwāfaqāt*, 2:158 and 280.
24. Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 2003), 508.

25. Ibid.
26. Ibid., 501–2.
27. Jasser Auda, *Maqasid al-Shari'ah as Philosophy of Islamic Law: A Systems Approach* (London and Washington: International Institute of Islamic Thought, 2008), 27. Auda is introduced as the founding director of the Al-Maqsid Research Centre in the Philosophy of Islamic Law, a branch of the Al-Furqan Foundation, London.
28. Ibid.
29. Ibid.
30. Ibid., 28–9.
31. Ibid., 51 quoting Jamshid Gharajedaghi's article "Systems Methodology: A Holistic Language of Interaction and Design", available online at <http://www.acasa.upenn.edu/JGsystems.pdf> (accessed on 10 October 2010), 38.
32. Auda, *Maqasid*, 53. Auda adds that many Muslim jurists including al-Āmidī, al-Shātibī, Ibn Taymiyyah, Ibn Qayyim and Ibn Rushd have been closer to the Māturīdī position than to the official Ash'arite position.
33. Ibid., 54–5.
34. Ibid., 46.
35. Yūsuf al-Qarāḍāwī, *Awlawiyyāt al-ḥarakat al-islāmiyyah fī 'l-marḥalat al-qadīmah* (Cairo: Maktabat al-Wahbah, 1992), 34.
36. Ibid., 35.
37. Ibid., 167–78.
38. Ṭāhā Jābir al-'Alwānī, *Maqāṣid al-sharī'ah* (Beirut: Dār al-Hādī, 2001), 63–6.
39. Ibid., 78–82.
40. Muḥammad al-Wakīlī, *Fiqh al-awlawiyyāt: Dirāsah fī ḍawābiṭ* (Beirut: International Institute of Islamic Thought, 2006).
41. Before the reformist movement of 'Abduh (and Sayyid Jamāl al-Afghānī, d. 1897), we had scholars such as Shāh Walī-Allāh of Delhi (d. 1762) and Shaykh Murtaḍā Anṣārī (d. 1864), respectively, who offered principles on human development (*al-irtifāq*) and practical maxims (*al-uṣūl al-'amaliyyah*). However, they did not intend a reform or change in the legal methodology.
42. Wahbah Zuḥaylī, who wrote a specific book on legal methodology, does not provide a suitable context for *maqāṣid*; see his *Uṣūl al-fiqh al-islāmī*, 2 vols (Damascus: Dār al-Fikr, 2004), 2:1045–57.
43. Kamali, *Principles*, 516.
44. Muḥammad Riḍā al-Muzaffār (d. 1964), *Uṣūl al-fiqh*, 2 vols in one book (Qum: Markaz al-Nashr, 1993) 1:289, 2/120.
45. Among contemporary Muslim authors, Fazlur Rahman paid some attention to above mentioned problem. See his "The Principle of *Shura* and the Role of *Ummah* in Islam", in: Mumtaz Ahmad (ed.), *State, Politics, and Islam* (Indianapolis IN: American Trust Publications, 1986).