THE MAQṢAD OF ḤIFẒ AL-DĪN: IS LIBERAL RELIGIOUS FREEDOM SUFFICIENT FOR THE SHARĪ‘AH?

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Abstract: This article examines some treatments of the meaning and extension of the Islamic legal purpose (*maqṣad*) of protecting religion (*ḥifẒ al-dīn*), with an eye towards Islamic legal theorists' explicit or implicit encounter with modern liberal and secularist understandings of what it means to 'protect religion'. The theory of the 'purposes of divine law' (*maqāṣid al-sharī‘ah*), which the author refers to as a form of 'Complex Purposivism' in legal interpretation and argumentation, is often viewed as a panacea for modern reformers and pragmatists who want to establish Islamic legitimacy for new substantive moral, legal and political commitments in new socio-political conditions, because it allows Muslims to ask not whether a given norm has been expressly endorsed within the texts, but whether it is compatible with the deeper goods and interests which God wants to protect through the Law.

Introduction: *Maqāṣid al-Sharī‘ah* and Muslim Minorities in Liberal Democracies

The theory of the 'purposes of Divine law' (*maqāṣid al-sharī‘ah*) is perhaps the most popular trend in contemporary Islamic legal and political thought, with dozens of books and doctoral dissertations written on the theory of the *maqāṣid* and its application in every possible area from criminal law to the ethics of genetic engineering. It is a fully legitimate and popular discourse even amongst very conservative scholars,¹ but the idea that the *sharī‘ah* should not be understood solely as embodied in specific rules (e.g., the thief's hand must be cut off) nor in terms of a painstaking, thorough extraction of those rules from the revelatory texts according to the methods of classical legal theory (*uṣūl al-fiqh*), but rather defined in terms of the overall 'purposes' (*maqāṣid*) for which God revealed the Law is often viewed as a panacea for modern reformers and pragmatists.² For those who want to establish Islamic legitimacy for new substantive moral, legal and political

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commitments in new socio-political conditions, this idea allows Muslims to ask not whether a given norm has been expressly endorsed as compatible with the texts, but whether it is compatible with the deeper goods and interests which God wants to protect through the Law. Consider a few statements to this effect:

Among the ways in which *maqāṣid* and *maqāṣid*-based thinking can serve the Islamic call and those engaged in it is by giving them greater flexibility and innovativeness in relation to the means and approaches which they employ. Things which can be classified purely as methods and means, including those which are mentioned explicitly in revelation, admit of change, modification and adjustment.³

I understand Islamic law to be a drive for a just, productive, developed, humane, spiritual, clean, cohesive, friendly, and highly democratic society. [...] The validity of any method of *ijtihād* [juridico-ethical reasoning and argumentation] is determined based on its degree of realization of *maqāṣid al-sharī'ah*. The practical outcome is Islamic rulings which are conducive to the values of justice, moral behavior, magnanimity, co-existence, and human development, which are '*maqāṣid*' in their own right.⁴

Towards realizing the features of openness and self-renewal in the system of Islamic law, this book suggests the *change of rulings* with the change of the jurist's worldview or cognitive culture.⁵

The attractiveness of the *maqāṣid* approach to Islamic normativity is particularly stressed in the context of the Muslim minority condition. A prominent Muslim think tank, based in London and the Washington DC area, the International Institute of Islamic Thought (IIIT), has an on-going publication series in Arabic and English of prominent texts on the *maqāṣid* and a translation series of *maqāṣid* texts from Arabic to English (and other languages spoken by Muslim communities). The coordinator of this translation project declares that "knowledge of the *maqāṣid* is a prerequisite for any attempt to address and resolve contemporary issues challenging Islamic thought. Indeed such knowledge can help in the process of developing a much needed objectives-based fiqh for minorities."⁶

In this vein, consider Tunisian Islamist activist Rāshid al-Ghannūshī's statements about political legitimacy and participating in non-Islamic governments:

An Islamic government is based on a number of values which if accomplished in their totality would result in a perfect or near-perfect system. But it may not be possible for all such values to be implemented, and therefore some must suffice in certain circumstances in order for a just government to exist. A just government, even if not Islamic, is considered very close to the Islamic one, because justice is the most important feature of an Islamic government, and it has been said that justice is the law of God.⁷

Ghannūshī's argument, based on his understanding of the theory of the *maqāṣid*, holds that the Muslim's duty is "to work towards preserving whatever can be preserved of the aims of *sharī'ah*" understood broadly as the five basic human interests of life, religion, property, intellect and lineage. This emphasis on the ultimate purposes of divine Law serves to deflect attention from both particular, technical rulings of Islamic law and the un-Islamic forms of behaviour permitted in non-Muslim states. Instead, non-Islamic governments can be seen as *sufficiently* just because of the general human interests which they protect (such interests include for Ghannūshī, both in Muslim majority and minority political contexts, "independence, development, social solidarity, civil liberties, human rights, political pluralism, independence of the judiciary, freedom of the press, or liberty for mosques and Islamic activities"), possibly resulting in a legitimate form of governance which he calls "the government of rationale" as opposed to "the government of *sharī'ah*". The crucial measure of Ghannūshī's doctrine of how to share political space with non-Muslims is how he addresses the question of social coalitions with non-Muslims. Here, he sides firmly with liberal secular groups over other non-liberal religious ones:

Can any Muslim community afford to hesitate in participating in the establishment of a secular democratic system if it is unable to establish an Islamic democratic one? The answer is no. It is the religious duty of Muslims, as individuals and as communities, to contribute to the efforts to establish such a system.⁸

This goes for Muslim minorities in particular, who have no hope of establishing Islamic rule.

The best option for such minorities is to enter into alliances with secular democratic groups. They can then work towards the establishment of a secular democratic government which will respect human rights, ensuring security and freedom of expression and belief – essential requirements of mankind that Islam has come to fulfil.⁹

The centrality of the *maqāṣid* for theorising an Islamic approach to the minority condition which is itself not "political in the wrong way" from an Islamic juridical perspective is stressed by the most prominent scholars to have written on both Islamic legal theory and the jurisprudence of Muslim minorities, such as 'Abd-Allāh Ibn Bayyah,¹⁰ Yūsuf al-Qaraḍāwī¹¹ and Ṭāhā Jābir al-'Alwānī.¹² The idea of the *maqāṣid* also figures prominently in the thought of non-traditional scholars writing for a broader audience, such as Tariq Ramadan¹³ and the American convert Umar Faruq Abd-Allah.¹⁴

Perhaps the core ethical question for the encounter between Islamic and Western conceptions of political ethics, both for Muslims and for non-Muslims, pertains to the appropriate understanding of religious freedom. Short of full legal and political

autonomy for Muslim minorities, within which they would be allowed to apply Islamic law to themselves, how is it possible for believing Muslims to regard the non-Islamic politico-legal system, particularly with regard to its distribution of freedom to Muslims to ‘manifest’ or ‘uphold’ their religion (*iẓhār al-dīn*, *iqāmat al-dīn*), as just or as acceptable for deeper reasons than mere *ḍarūrah* or the obligation to obey the social contract?

It is natural to turn to the idea of the *maqāṣid* here, as evidenced in some of the above quotations. Given that the *sharī‘ah* exists to protect or preserve religion (*ḥifẒ al-dīn*) as the most central and basic of its five primary purposes, that Islamic scholars have often used the theory of the *maqāṣid* to justify a principled and purposive flexibility in legal reasoning, and that scholars concerned with the minority condition have declared an eagerness to turn to the theory of the *maqāṣid* to theorise a permanent Muslim presence in non-Muslim polities, it is natural to ask how this general purpose of the Law can be attained in a secular liberal state. Just as very few Muslims will insist on the canonical punishments for homicide (*diyyah* or *qīṣās*) or theft (*qaṭ‘ al-yad*) but rather accept that the protections secular positive law enacts for life and property are acceptable, why can ‘liberal religious freedom’ not be said to protect and preserve religion as the *sharī‘ah* demands?

But, of course, religious freedom is much more complex than murder or theft. Just what are Muslims being asked to accept when they are asked to assert that ‘liberal’ religious freedom fulfils the *maqṣad* of *ḥifẒ al-dīn*?

For reasons of simplicity, let us begin with a mainstream liberal perspective on toleration, secularism and religious pluralism. Such a perspective will involve a commitment to quite substantial self-restraint on the part of the state and the majority culture. A liberal will assume that citizens have rights to cultural and religious freedom, that the state should not demand that citizens make public proclamations which might violate their conscience and that cultural assimilation should be limited in purpose and strictly non-coercive. Such a perspective will also, however, involve quite substantial limits to that self-restraint. A liberal will be sceptical of *radical* legal pluralism in a single society if that pluralism is likely to lead to concerns about the equal civil rights of some citizens. She will not assume that all non-coercive cultural and religious assimilation is *prima facie* an injustice or misfortune. And she will likely have a concern for the social and moral agreement which contributes to the long-term stability of a sufficiently just, sufficiently democratic political community. Many areas of detail in the legal and public policy application of these broad commitments will, of course, be the subject of disagreement even amongst individuals who share this broadly liberal perspective.

Such a conception of religious freedom places the following demands and constraints on Muslim minorities:

- that Islamic conceptions of morality may only be cultivated and encouraged within Muslim families and communities through non-coercive means;
- that the public sphere in non-Muslim liberal democracies cannot be expected to accommodate all Islamic religious sensibilities by limiting freedom of expression.

This is the most familiar liberal conception of religious freedom, which inclines towards a negative conception of liberty. The more general beliefs associated with this conception of liberty include the following:

- Religious communities do not determine the civil rights of their members.
- Religious communities cannot be *guaranteed* protection from public criticism of their beliefs, from ‘moral injury’ inflicted by the disapproved behaviour of others (including blasphemy or mockery), or from the exit of individual members from the group.
- ‘Religious freedom’ cannot be interpreted as the right of a religious community to fully and successfully realise its entire conception of the good without regard for the preferences of those who dissent from the interpretation of that conception.
- Religious freedom implies a right not only to reject one’s own religion in favour of another, but to reject religion altogether.

This writer believes that almost all of the disputed areas of the application of free religious practice – including the rights of religious groups to discriminate within their own institutions, the right to religious dress in schools, the right to parallel religious schooling, the right to religious arbitration of civil contracts and the issue of offensive speech – fall within this broad understanding of the ‘(religious) freedom of the moderns’.

What is required in order to argue that the *maqṣad al-sharī‘ah* of ‘preserving religion’ is satisfied by this modern, liberal conception of religious freedom? Let us first take a quick look at the classical treatment of what is meant by ‘*ḥifẓ al-dīn*’.

***Ḥifẓ al-Dīn* in Mainstream Islamic Legal Theory: The Philosophical Logic of ‘Preserving Religion’ as Positive Religious Liberty**

To this point, we have referred to the *maqāṣid* as a framework which justifies legal change in reformist discourses. However, it should not be understood that the function of *maqāṣid*-reasoning is to liberalise the *sharī‘ah* by making it less restrictive in all cases. In fact, the opposite is more likely insofar as the mandate to ‘protect and preserve’ various fundamental interests turns the jurist’s attention away

from the justification of rulings through reference to specific texts and towards the policy of ‘blocking the means’ (*sadd al-dharāʾi*) to the corruption of those interests. It is true that *maqāṣid*-reasoning opens the door to considering new means for advancing stable goals and interests, but it is also simply the case that the jurist now sees more things as harmful to reason, religion and the other ‘universal necessary interests’. If before the jurist clung to a narrow, formalist prohibition on alcohol based on the Qur’ān, he now sees countless potential sources of harm to reason.¹⁵ In a sense, this does in fact make the Law less restrictive – less restrictive on those who seek to ‘command the right and forbid the wrong’ rather than less restrictive on those who might seek to dip their toes in the waters of the wrong.

It is certainly the case that classical and modern traditionalist legal theorists have generally used the idea of ‘preserving religion’ as one of the five core objectives of the Law as a way of demonstrating the underlying logic and wisdom of the traditional rulings of criminal and public law. As such these discussions tend to be an invaluable source of the philosophy of religious freedom in orthodox Islamic thought. This is a philosophy of a deeply communitarian, ‘positive’ conception of religious freedom where ‘preserving religion’ refers to fully realising all of its possible objectives and removing any and all potential sources of harm. Or, in the words of al-Shāṭibī, “preserving religion involves calling to it with promises and warnings,¹⁶ fighting those who resist it and those tumours who rot it from within, and repairing any accidental unforeseen defects”.¹⁷

What is ‘Religion’?

Islamic scholars tend to regard important concepts as having various definitions depending on their sphere of use, for example, ‘linguistic’ meanings versus ‘legal’ (*sharʿi*) meanings. What is relevant for our purposes is the meaning of “religion” as the scholars understand it for juridical and theological purposes. This *sharʿi* definition of religion is the most expansive possible: “Religion consists of divine rules which God has revealed through prophets to guide mankind to truth in matters of belief and to good in matters of behaviour and social relations. Religion constrains mankind by these rules and brings them into submission to their commands and prohibitions so that they may attain the happiness of this world and the next.”¹⁸ Complete, perfect religion is composed of four elements: faith (*īmān*), external submission (*islām*), belief in right doctrines (*iʿtiqād*) and works (*ʿamal*).

The jurists clearly specify the necessary human personal and social goods which are advanced by the various elements of religion, beginning with the metaphysical, or perhaps theologico-anthropological claim that “since religiosity is part of innate human nature (*fiṭrah*), all mankind must affiliate itself with some religion or another and opposing this innate nature is pure deviation”.¹⁹ The only question is whether it is the true one or one of the false ones. The only sense in which the jurists

believe ‘preserving religion’ to be one of the aims of the *sharī‘ah* is insofar as it is understood that only Islam is recognised by God as the final religion valid for all time. Thus:

Religion in the sense of divine revelation sent down through prophets is necessary to guide human minds to truth. Religion in the sense of belief in God is necessary for individual human life in order for the soul to find security and tranquillity from the kind of anxiety and stress which can lead to a nervous breakdown or even suicide. It is also necessary for social life because it guarantees the establishment of legislation which protects social relations from all ills which might corrupt them. Religion in the sense of divinely legislated laws is necessary in order to provide rules of justice and equality between persons and to protect them from the traps of human whims and passions. Indeed, mundane interests alone suffice to prove the necessity of religion in the lives of individuals and societies.²⁰

Following al-Shāṭibī, the jurists then divide the modes through which the *sharī‘ah* protects the interest humans have in the integrity and flourishing of religion into the positive establishment of certain elements of religion (*al-ḥifẓ min jānib al-wujūd*) and the removal of potential harms (*al-ḥifẓ min jānib al-‘adam*). The former has a literal meaning of providing for the ‘existence’ and the latter has a literal meaning of providing for the ‘absence’. We shall call them ‘positive preservation’ and ‘negative preservation’, respectively.

‘Positive Preservation’ (*al-ḥifẓ min jānib al-wujūd*): Creation of Necessary Elements

Consistent with the general structure of *maqāṣidī* thinking, jurists discuss three levels of goods necessary for the preservation of religion – the necessities (*ḍarūriyyāt*), the needs (*ḥājīyyāt*) and the improvements (*taḥsīniyyāt*) or embellishments (*tazīniyyāt*).

Some accounts of the ‘positive preservation’ of religion emphasise the individual perfection of faith and works as a believer. On this account, the first level (*ḍarūrī*) consists of faith in God which is necessary for any act to be valid, or to ‘count’ with God. God has provided for two primary paths for the attainment of this foundational good – first, human reason itself which is capable of perceiving empirical, sensory truths, and, second, revelation which is necessary for attaining knowledge of the unseen world. The first, necessary level of protecting religion is thus the “establishment of faith in the hearts” of human subjects and includes the ‘first pillar’ of Islam, the declaration of God’s unity and Muḥammad’s prophethood. Building on this faith, the second level (*ḥājī*) consists of worship, that being “obedience with the goal of submission and self-abasement (*al-khudū‘ wa ‘l-tadhallul*), both considered a basic necessary part of the establishment, perfection and preservation of religion because they include both the inner and outer aspects of mankind’s behaviour”.²¹ This second level of worship includes the remaining basic pillars of

Islam, prayer, *zakāh*, fasting and the pilgrimage to Mecca. Finally, the third level (*taḥsīnī*) consists of supererogatory prayers, pilgrimages, good works and acts of charity which might contribute to the perfection of religion when the earlier stages of belief have been achieved.²²

Other accounts of the ‘positive preservation’ of religion are more expansive and collective, describing it as ‘upholding its pillars and establishing its rules’. A common approach is to view the ‘positive preservation’ of religion as consisting of three broad fields of thought and action: (1) acting in accordance with it (*al-‘amal bihi*), (2) judging in accordance with it (*al-ḥukm bihi*), and (3) calling others to it (*al-da‘wah ilayhi*).²³ Contemporary Saudi Arabia-based scholar Muḥammad al-Yūbī, author of a widely-read study of the *maqāṣid*, adds (4) *jihād* (*fī sabīlihi*), which more commonly appears in other accounts of the *maqāṣid* as belonging to ‘negative preservation’.²⁴

The first (*al-‘amal bihi*) simply refers to the performance of all individual and collective religious obligations at a minimum and the performance of all encouraged acts as an aspiration. The second (*al-ḥukm bihi*) is a statement of revelation’s absolute authority over all moral, legal and political values. “How can religion be preserved if it is not the judge over human acts?” Al-Yūbī uses this obligation to register a strong rejection of any form of secularism: “Judging by other than that which God has revealed, removing religion from [any area of] life and substituting for it human whim and individual opinions – what possible greater loss for religion or crime against it could there be?”²⁵ Referring all moral questions to revelation preserves religion in three specific forms: it preserves the faith, and thus salvation, of the individual; it preserves religion in society by applying the entirety of Islamic laws and rituals and making them sovereign over all aspects of life; and it prevents all other ideas, religions and moralities from appearing and spreading in an Islamic society.²⁶ Iḥmaydān carefully catalogues the deleterious effects of abandoning the *sharī‘ah* in the areas of spirituality/religiosity,²⁷ society,²⁸ politics,²⁹ economics³⁰ and the afterlife.

Calling to Islam (*al-da‘wah ilayhi*) is equally a prerequisite for upholding and spreading religion. This obligation is given a grounding in revelatory texts, but is also linked both to the obligation to spread an inherently universal religion and to the need to constantly confront and repel the tireless efforts of Islam’s enemies to ‘distort the truths of Islam’. *Da‘wah* is given four specific tasks linked to the ‘positive preservation of religion’: educating the ignorant, uncovering and dispelling errors in circulation about Islam, disrupting the opportunity of the enemies of Islam to spread false and destructive ideas about Islam, and realising Islam’s universality for all times and places.³¹ However, “calling to this religion will not always meet with acceptance but also with rejection. Indeed, some will impose stumbling blocks and powerful obstacles in its way, forbidding others to enter, blocking their access

to its concepts, all insurmountable obstacles which those who wish to accept Islam cannot overcome. [...] In fact, things will always progress beyond this to the point of domination over Muslims and warfare against them [for their religion].”³² And thus *jihād* is necessary for the protection and preservation of religion.

Al-Yūbī’s discussion of *jihād* and its importance for the *maqṣad* of preserving religion includes some observations which are instructive for our consideration of the minority condition. As part of his explication of the necessity of *jihād*, al-Yūbī notes various evils associated with non-Muslims ruling over Muslims (*tasalluṭ al-kuffār ‘alā al-mu‘minīn*): (a) Muslims are forbidden from upholding the rites of their religion (*qiyām bi-sha‘ā’ir dīnīhim*) and in general are restricted and oppressed (*taḍyīq ‘alayhim*); (b) laws and rulings contrary to and incompatible with Islam are implemented; (c) religion is renounced and forsaken thus debasing and degrading the religious in the eyes of others; (d) the face of religion is distorted and thus an aversion is created towards it on the part of others; and (e) religion is encircled and restricted to a certain sphere. This condition and its dangers arising from the rulership of non-Muslims over Muslims is al-Yūbī’s primary argument for linking the communal obligation of *jihād* to the *sharī‘ah* objective of preserving religion.

‘Negative Preservation’ (*al-ḥifẓ min jānib al-‘adam*): Removal of Harms

Generally, jurists speak of four forms of preserving religion via the removal of harms:

1. *jihād*³³ (although as we saw above some include *jihād* amongst the positive forms of preserving religion),
2. the killing of self-declared and self-obscuring apostates,³⁴
3. combating “pernicious innovations” (*bid‘ah*) and punishing such innovators (*mubtadi‘ūn*) and occultists, and
4. forbidding sinful behaviour and punishing its perpetrators through both *ḥudūd* and *ta‘zīr* punishments.³⁵

A single principle of religious obligation underlies all of these modes of preserving religion: the idea of ‘commanding the right and forbidding the wrong’ (*al-amr bi’l-ma‘rūf wa’l-nahī ‘an al-munkar*), the activist and interventionist conception of enforcing religious morality which might be said to be the single principle underpinning all Islamic political, ethical and legal thought, particularly when we consider the claim that the *maqṣad* of preserving religion “is the most important of the *maqāṣid*, indeed the core, spirit, foundation and root of all the *maqāṣid*”.³⁶ Indeed, ‘commanding the right and forbidding the wrong’, particularly through *jihād* in its wider sense, is often held to be the characteristic of the Muslim community which distinguishes it as superior to all prior religious communities.

An important point follows here. Strictly speaking, then, there is no separate, distinct branch of legal and ethical thought concerned with how Muslims are commanded to “preserve religion”. Rather, the entire edifice of Islamic public and criminal law is what is meant by the obligation to preserve religion through the removal of specific harms – “preserving religion by ‘providing for the absence’ (*min jānib al-‘adam*) is simply to repel *everything which opposes religion in word and deed*”.³⁷ “Preserving religion means salvaging it [...] from *anything* that might undermine and confuse beliefs and distort behavior.”³⁸

The function of *maqāṣid* reasoning is thus primarily to explicate the wisdom and rationale of the rules, “revealing the perfection of Islamic law”.³⁹ For example, hostile apostasy that openly challenges the validity of Islam invokes the ultimate penalty, whereas the mere unbeliever by birth (*kāfir aṣlī*) is allowed to live because

Apostasy is a means by which cracks enter the ranks of the Muslims and their internal front is fractured. This is a great evil and corruption because the most dangerous thing for a community is chaos, disruption in its [common] beliefs, intellectual disarray and a lack of trust in what preserves its order. The apostasy of a Muslim is much more dangerous than mere unbelief because the apostate has had the full opportunity to be exposed to the proof and evidence which made him believe in Islam by free choice alone and thus there is no excuse for him as there is for the unbeliever by birth who has not had this opportunity. We thus view atheist ideas circulating in Muslim lands as much more dangerous than mere transparent unbelief in Islam [on the part of non-Muslims] because doubt in one’s system and the fragmentation of the internal ranks is one of the primary reasons for the victory of the enemy. It is for this reason that Islam does not leave the apostate freedom to apostatise in contrast to its firm respect for the freedom of conscience of the unbeliever by birth.⁴⁰

Blasphemy is punished and the honour of the Prophet Muḥammad is protected because

When the honour of the Prophet is violated then respect for and aggrandisement of the Prophet’s mission collapses, and thus so collapses everything which he achieved. [...] The collapse of the honour and glorification of the Prophet is the collapse of religion itself. This demands vindication [...] He who blasphemes against the Prophet and attacks his honour (*yasubb al-rasūl wa yaqā ‘fī ‘irdihī*) is trying to corrupt people’s religion and by means of that to also corrupt their worldly existence. Whether or not they succeed, the person trying to corrupt another’s religion is therefore seeking to ‘sow corruption on Earth’.⁴¹ Defaming religion and casting ugly aspersions on the Prophet so that people will have an aversion towards him is amongst the greatest of corruptions. Furthermore, blasphemy is a form of sacrilege against the Prophet and a wrong⁴² against God, His Prophet and His believers. It is an attempt on the part of infidels to subvert the Islamic order, to humiliate

believers, to remove the glory of religion and debase the word of God [...] all of which are amongst the most grievous forms of 'corruption on Earth'.⁴³

Similar communitarian-consequentialist justifications for suppressing deviant behaviour are commonly given for the cases of heretics, "hypocrites", "shameless muftis"⁴⁴ and all those who sin by violating the most important tenets of the Law.

What is Involved in Arguing to Modern Religious Liberty from the *Sharī'ah* Objective of 'Preserving Religion'?

I introduced earlier the theory of the *maqāṣid* as a potential device for creative, reformist Islamic thinking about norms and legitimacy in new conditions. The preceding section should convince us that, if what we mean by 'reform' is something along the lines of modern human rights standards regarding freedom of religion and conscience, the move from the *maqāṣid* to 'human rights' (in the modern liberal formulation) is hardly an easy move. In fact, we can see how the *maqāṣid* can be used to justify classical *madhhab*-rulings which are not originally grounded in clear textual commands, like the ruling on apostasy. As is well-known, and as I will discuss below, the textual foundation for the ruling of death for the apostate rests on no qur'ānic text and the *ḥadīth* involved are easily interpreted not as grounding a permanent principle of executing apostates merely for apostasy but rather a temporally-limited policy of confronting political and military treason mixed with religious apostasy. The point to be stressed here is only that the *maqāṣid* discourse is one open to a wide range of methodological and ideological trends.

When discussing the relationship of the *maqāṣid* to 'human rights', conservative scholars usually invoke the *maqāṣid* theory in an apologetic vein. This can take a few forms, which I paraphrase here as: (1) "Islam invented human rights. We have our own authentic standards."⁴⁵ And: (2) "The *maqāṣid* remind us of our God-given rights to criticize the government and have security of person and property which are presently being denied by autocratic secular regimes."⁴⁶ The human rights which are discussed are those convenient for a conservative Muslim conscience, but knotty issues such as apostasy, blasphemy, heresy and the general right of persons to reject Islamic morality or religion altogether are not brought into question.⁴⁷

However, still speaking of the human rights debate for Muslim majority societies, it is most certainly the case that when joined with other values and the motivation to move beyond strict adherence to the classical rulings and categories on issues of religious freedom and equality, the *maqāṣid* are a helpful and valuable framework. Rāshid al-Ghannūshī, quoted earlier, states in a well-known work that "the Universal Declaration of Human Rights, in its broad outlines, meets with wide acceptance among Muslims, if their legal framework (*fiqh*) has been correctly interpreted".⁴⁸

This correct modernising interpretation of Islamic law in the conditions of modern international law is declared to rest largely on al-Shāṭibī's conception of the *maqāṣid*: "And if we are to offer the best interpretations of the *sharī'ah* in order to set up a legal framework for the liberties and duties of humankind, we will find that the contemporary scholars of Islam almost all agree with the lucidity of the theoretical framework assembled by the venerable al-Shāṭibī in his *Muwāfaqāt*."⁴⁹ Unlike more conservative scholars who formulaically assume that the classical legal rulings represent the *sharī'ah*'s wisdom on matters of religious freedom, Ghannūshī is willing to reopen even core issues of apostasy and the right of non-Muslims to proselytise (*da'wah*).

A much more explicit statement for the reform of Islamic criminal law in the direction of modern human rights standards based to a large extent on reference to the logic of the *maqāṣid* has come in the writings of prominent Islamic legal theorist Mohammad Hashim Kamali. In a forceful critique of the implementation of the traditional Islamic criminal code in the Malaysian state of Kelantan, Kamali writes:

At its present time in history and in the face of the crisis that has afflicted the liberality and calibre of Islamic thought, the *ummah* is faced with difficult choices. We either choose to retain the eternal message of Islam, to uphold its civilisational ideals, and invest our energy in the task of reconstructing a society in that image, or lower our sights to see only the concrete rules and specific details. This latter alternative is not only unwise but also methodologically unsound as it attaches higher priority to details and makes them the focus of attention at the expense of the broader and more important objectives of Islam. [...] To fall into the trap of literalism such that would blur our vision of the ideals and objectives of *Sharī'ah* (*maqāṣid al-sharī'ah*) in total dedication to specific details violates the wisdom (*ḥikmah*) of Islam which takes such a high profile in the Qur'an and the exemplary *Sunnah* of the Prophet. To devise effective deterrents against criminality and aggression must be the overriding objective of an Islamic penal policy, just as they are of the *ḥudūd* penalties. The deterrent and punitive efforts need also to be moderated with considerations of care and compassion, such that would nurture the prospects of reformation and return, whenever possible, to normal life in society. If this is undertaken with diligence, then I believe that the Muslim community would have observed the basic purpose and meaning of *ḥudūd* Allah. If the specific punishments [of classical criminal law] are temporarily suspended for fear of indulgence in uncertainty and doubt, while in the meantime efforts are made which would pave the way for a more comprehensive understanding and implementation of *Sharī'ah*, this would be a worthwhile endeavour and, I believe, ultimately more meaningful.⁵⁰

Kamali has developed similar arguments about the capacity for *maqāṣid* reasoning to move Islamic law, including criminal law, on the most sensitive matters of religious transgression, in a liberalising direction throughout his many writings.⁵¹ Whereas for

more conservative traditionalists, the imperative of preserving religion allows them to use the *maqāṣid* as warrant for restrictions on more and more behaviours which might at variable distances serve as the means to undermining religious morality, for Kamali the logic of the *maqāṣid* provides Muslims with a firm intellectual framework for *replacing* traditional rules or practices with others less offensive to a modern conscience.

Evidence for the capacity of *maqāṣid*-style reasoning to facilitate reforms of Islamic law which we might justly refer to as ‘liberalising’ can be found in two important areas: just war doctrine, and treatment of the punishment for apostasy. In both cases, many jurists in the modern period have argued that the underlying purposes behind the traditional doctrines demonstrate that if those purposes can be achieved through other means, it is permissible to replace even doctrines which have grounding in revelatory texts. Thus, for many legal ‘Modernists’, the underlying purpose behind the *jihād* doctrine was not the eradication of disbelief or the universalisation of Islamic legal order, but the preservation of Islam in a hostile world and the spreading of the Islamic mission (*da‘wah*) to new communities. Such Modernist jurists argue that in the contemporary period, Islam is no longer in danger of eradication and that where the right to proselytise is protected there is no need for aggressive warfare.⁵² Similarly, many scholars argue that the original purpose of the capital punishment for apostasy was solely to protect the community from outright armed rebellion (*fitnah*). Where apostasy is merely a matter of private conscience and is not linked to a general rebellion against the state and the social order, there is no justification for executing the apostate.⁵³

However, the primary concern of this article is not with legal change in Muslim majority societies where the burden of proof to justify revisions of long-standing understandings of the Law sits so heavily on the side of reformers but rather in Muslim minority contexts where it is not quite so clear what the conservative status quo on issues of public and criminal law is. Here I believe that the least one can say is that the idea of seeing Islamic law as a set of rulings which advance certain purposes and objectives gives even very conservative Muslim thinkers (those who might be reluctant to argue for the revision of traditional rulings for the majority context) a framework for creative engagement with the non-Muslim political and legal contexts from an Islamic jurisprudential perspective, bearing in mind that concepts such as *maṣlaḥah* and the *maqāṣid* are most conventionally invoked by Islamic jurists as tools for extending the Law into new social contexts where the original texts of revelation are silent. The notion of *maqāṣid* reasoning as ‘Complex Purposivism’ underscores this: the five most important necessary interests protected by the Law – religion, property, reason, progeny and life – all have their echoes in the legal and political systems of secular liberal democracies, but what their protection

requires is bound to be informed even in the minority context by the long-standing jurisprudence developed in the majority context.

What we are proposing here is thus an understanding of *maqāṣid*-reasoning as a *framework of argumentation* about the relative legitimacy of various legal and political institutions in non-Muslim liberal democracies given that even very conservative Islamic jurists (including those contributing to the *fiqh al-aqallīyyāt* discourse) regard the Muslim presence in Europe and North America as a social phenomenon requiring original jurisprudence.⁵⁴ The plausibility of this is demonstrated also in the way that jurists speak of the jurisprudence of the minority condition as itself having certain *maqāṣid* which are served and advanced by certain conceptual tools from classical legal theory. For example, ‘Abd-Allāh Ibn Bayyah, along with al-Qaraḍāwī the most prestigious senior scholar writing on *fiqh al-aqallīyyāt*, posits that the very idea of a minoritarian jurisprudence has the ‘*maqāṣid*’ of (1) preserving religious life at the group and individual levels; (2) subtle and gradual *da‘wah*; (3) civil interaction with the Other; and (4) good relations between the individual and the group.⁵⁵ Iraqi scholar (and politician) Ṣalāḥ ‘Abd al-Razzāq begins his study into the ethics of the minority condition by positing the following *maqāṣid* of *fiqh al-aqallīyyāt*: (1) treating problems such that the solutions are in perfect harmony with Western reality in terms of culture, law, politics, society, and economy; (2) the preservation of Islamic identity; (3) highlighting Islam’s flexibility and dynamism and its ability to co-exist with and acclimate to other cultures and civilisations; (4) making sure that Islam remains capable of great personal influence in people’s lives and that *da‘wah* remains a powerful force; and (5) that Muslim minorities in the West should play an influential role in their societies and participate in public life, especially in politics, economics, and culture.⁵⁶ Al-Qaraḍāwī echoes these goals through vaguer statements about the insufficiency of majoritarian jurisprudence and the need for law to change with circumstance. For all of these writers, the tools provided by classical legal theory include the theory of the *maqāṣid* conjoined with other tools such as Islamic legal maxims which stress ease and facilitation (*taysīr*) in enforcing the Law. “This *fiqh* must balance between looking at individual texts on the one hand, but also at the spirit of Islam, the goals of *sharī‘ah*, the universal ends (*al-maqāṣid al-kullīyyah*), and the general goals.”⁵⁷

However, as noted above, it appears that to this point such scholars have not mobilised these jurisprudential tools for a *general theoretical inquiry* into what kind of conception of religious freedom in the West could be regarded as sufficient (if not ideal) for the goal of preserving religion. What might be the components of such a framework of argumentation which is cautiously and critically open to Western legal frameworks while using the theory of the *maqāṣid* to structure Islamic moral inquiry and political action?

Most obviously, this would be a framework which would begin by taking seriously distinctions between different types of *goals*, *agents*, *means* and *obstructions* as part of a process of unpacking the cohesive and integral logic of ‘preserving religion’-as-positive-liberty elaborated earlier.

Conclusion and Recommendations for the Muslim Minority Context

An intellectually serious account of whether the *sharī‘ah* ‘purpose’ of preserving religion can be attained within non-Muslim societies might proceed by imagining all of the possible ways in which religion might *not* be preserved in a non-Muslim society (from a society which merely protects Muslim apostates to one which actively persecutes Muslims merely for proclaiming belief in Islam), by positing a principled ‘minimum’ which falls short of full self-governance on majoritarian *sharī‘ah* lines but also represents a coherent account of fair religious liberty, by ranking and prioritising various components of the communal ‘preservation of religion’, by interrogating existing legal and political arrangements according to those standards, and then by considering how different *means* of advancement and resistance are appropriate for different kinds of obstructions.

A framework of this kind might replicate the classical dichotomy between how a non-Muslim environment sets out to provide ‘positive’ protections for religion and remove ‘negative’ ones (*ḥifẓ min jānib al-wujūd*; *ḥifẓ min jānib al-‘adam*). By way of positive provision (*wujūd*), liberals and Muslims might agree that a religiously diverse society ought to provide equal access to the public sphere, representation in media outlets and access to the institutions of state. Areas where the state *allows* groups and communities to provide for their own institutions might also fall under the rubric of positive provision (*wujūd*), and thus liberals and Muslims might agree that Muslim communities ought to be allowed to: create religious schools, proselytise, enjoy full rights of speech and dissemination subject only to the same restrictions as other groups, and build mosques, seminaries and research centres. By way of restrictions or removal of harms (‘*adam*’), liberals and Muslims might agree that in a religiously diverse society where Muslims are a minority there should be no coerced public declarations of controversial metaphysical views in shared institutions, no faith tests or requirements of religious homogeneity for public officials and no punishment for conversion out of the majority religion. Areas where the state *allows* groups and communities to respond to harms might also fall under the rubric of negative provision (‘*adam*’), and thus liberals and Muslims might agree that Muslim communities ought to be allowed to: publicly dissuade individuals from leaving their religious community, impose non-violent deterrent punishments on apostates and sinners such as boycotts or exclusion from institutions, arrange internal institutions such as mosques and seminaries on hierarchical and

authoritarian grounds, or publicly condemn dissenters, sinners and heretics even in theologically harsh terms.

However, here is exactly where such a framework will inevitably come into contact with any kind of liberal secular one. By way of positive provision (*wujūd*) Muslims might argue that in order for religion to be genuinely preserved the state must provide them with mandatory religiously homogeneous schools to the exclusion of public education, legal recognition for the right of Muslim communal and religious leaders to represent exclusively all Muslims in dealings with the state, and full legal and political autonomy to apply Islamic law within the Muslim community, including criminal law. By way of restrictions or removal of harms (*‘adam*), Muslims might argue that ‘preserving religion’ requires that the non-Muslim state suppress all speech offensive to a Muslim sensibility, including novels, cartoons and source-critical historical scholarship, prevent non-Muslims from actively proselytising amongst Muslims and create a common public space free of sexually immoral behaviour. They might even argue that a commitment to ‘religious freedom’ *requires* all of these things lest the ‘religious freedom’ on offer be dismissed as an arbitrary, sectarian, liberal-secular conception of ‘freedom’ no more intuitively justifiable than the one demanded by Islamic law.

Between these two extremes – perfect consensus and perfect antagonism – the kind of *maqāṣidī* framework that we have outlined is a likely candidate for structuring Islamic juridical thought on inevitable ‘hard cases’ like schooling and offensive speech. Ideally, an Islamic juridical theory would be able to distinguish between blasphemous or offensive speech which the state inscribes as part of its public language of justification, from offensive speech which public officials routinely feel free to engage in, to offensive speech in civil society which the state merely refrains from suppressing and punishing. Moreover, a minoritarian Islamic juridical theory ought to be able to distinguish various forms of political action in response to such speech: from protest to positive public representations of religion to political bargaining to murder. Similarly, such a theory ought to be able to distinguish the right to religious schooling from the right to restrict all community members to this form of schooling, and state regulations of religious schooling based on certain civic public interests from state regulations based on purely theological objections to Islamic teachings.

Indeed, there is evidence of the use and attractiveness of this form of argumentation by Islamic intellectuals. In addition to the above-quoted remarks by Rāshid al-Ghannūshī on the potential legitimacy and justness of certain non-Muslim legal systems, Tariq Ramadan has argued for the justness of present European positive law treatments of religious freedom. Using the language of Islamic legal theory, in particular the notion of Purposivism, he writes that “the Islamic sciences were but a means for meeting Muslims’ needs to protect their Faith, lives and

religious practice”.⁵⁸ In this context, he argues that European positive law provides a framework both for protecting religion and for negotiating the boundaries of religious practice. He also advances a hierarchy inspired by the theory of Purposivism for evaluating the relative losses at stake in those *sharī‘ah*-derived practices which are not protected.

Thus, “it is possible to assert that five fundamental rights are secured: (1) the right to practice Islam; (2) the right to knowledge; (3) the right to found organizations; (4) the right to autonomous representation; (5) the right to appeal to the law”.⁵⁹ And, although “Muslims obviously cannot apply all the global principles and rulings prescribed by the Qur’ān and the *Sunnah* in the field of social affairs [...] it should be noted that the majority of [religiously prohibited activities] *are not imposed* on Muslims but are rather *legally allowed* [...] [and thus] the abode of Europe appears as a space within which Muslims can live in security with some fundamental rights both acquired and protected. As a minority in a non-Muslim environment they are able to practice and to respect the more important rulings of the Islamic teaching.”⁶⁰

The purpose of my presentation here of a possible framework is not to suggest that the only intellectually serious use of the theory of the *maqāṣid* to approach the possibilities for preserving religion in a secular liberal democracy will exactly replicate the kinds of distinctions and evaluations which liberal theories of religious freedom make. Rather, what I would like to suggest is that if we are interested in the views of more conservative and traditionalist believers towards religious freedom and public space in a religious and morally diverse society, as well as already semi-secularised ‘post-legal’ Muslims, then we ought to look to the theory of the *maqāṣid* as a flexible, complex form of legal argumentation which has the capacity to provide for an Islamic response to the modern liberal conception of religious freedom which is somewhere in between enthusiastic full endorsement and a mere agreement to obey the law out of unfortunate social and demographic necessity (*ḍarūrah*).

In closing then, I would like to offer some recommendations as to the yardstick for the contemporary discussion of *maqāṣid*-oriented policies:

- Clear *goals* belonging to a moral obligation to ‘preserve religion’ would include ensuring access to knowledge of Islam, perpetuating religiosity across generations, the construction of the religious institutions of a Muslim civil society (mosques, publishing houses, centres of research, seminaries, lobbying groups), minimising social costs for living a Muslim life and for converting into Islam, and enlarging the ranks of Muslim communities.
- *Maqāṣid* reasoning would have to identify when preserving religion is the obligation of various kinds of *agents*, including: individual Muslims, individual

non-Muslims, Muslim communities and civil society institutions, non-Muslim communities and civil society institutions, and the non-Muslim state.

- There would have to be serious consideration of appropriate *means* for advancing this goal, including: coercive laws, persuasion, proselytism, Islamic religious schools, direct action, political participation, methods of social pressure, or violence.
- Finally, a strong theory would have something to say about the different kinds of *obstructions* to preserving religion which Muslim minority communities face: the mere impact of a dominant non-Muslim culture, the ‘moral injury’ of others acting in alien and disapproved ways, the temptation of social and personal freedoms, the lack of communal control over the circulation of information and beliefs, direct efforts of other groups to ‘seduce’ (*fitnah*) Muslims away from Islam, laws which limit communal or family control over the education and rights of members, laws which limit the right to worship and behave Islamically in public, hostile representations or descriptions of Islam and Muslims in non-Muslim media, and coercive state laws which force Muslims to declare abandonment of Islam.

Notes

1. See David L. Johnston, “*Maqāṣid al-Sharī‘a*: Epistemology and Hermeneutics of Muslim Theologies of Human Rights”, *Die Welt des Islams* 47, no. 2 (2007), 149–87, for a typology of various trends in the treatment of human rights in Islamic legal thought which includes discussion of how ‘traditionalists’ and ‘progressive conservatives’ (two different groups for Johnston) use the *maqāṣid*.
2. “The approach to scriptural interpretation that proceeds from what classical jurists identified as the *maqāṣid al-sharī‘ah* has acquired almost panacean expectations among modern Muslims. This is based on the belief that interpretations that are violent, intolerant or misogynistic, or culturally, economically or politically stultifying or ineffective are almost invariably grounded in a literalism that cannot stand in the face of appeals to the broader aims and objectives of the law” (Sherman A. Jackson, “Literalism, Empiricism, and Induction: Apprehending and Concretizing Islamic Law’s *Maqāṣid al-Sharī‘ah* in the Modern World”, *Michigan State Law Review* (2006), 1469–86, at p. 1470).
3. Aḥmad al-Raysūnī, *al-Fikr al-maqāṣidī* (Rabat: Jarīdat al-Zaman, 1999), 129.
4. Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (London and Washington: International Institute of Islamic Thought, 2008), xxii–xxiii. Emphasis added.
5. *Ibid.*, 256. Emphasis added.
6. Anas S. Al-Shaikh-Ali, “Foreword” to Gamal Eldin Attia, *Towards Realisation of the Higher Intent of Islamic Law. Maqāṣid al-Sharī‘ah: A Functional Approach*, tr. Nancy Roberts (Herndon VA: International Institute of Islamic Thought, 2007), ix.
7. Rachid Gannouchi, “Participation in Non-Islamic Government”, in: Charles Kurzman (ed.), *Liberal Islam: A Sourcebook* (Oxford: Oxford University Press, 1998), 92.
8. *Ibid.*
9. *Ibid.*, 94. Occasionally, scholars will go so far as to say that because of the freedom Muslims enjoy in the West and the proliferation of Islamic societies and foundations available to them Western countries should be viewed as part of the ‘Abode of Islam’ (*dār al-islām*); see Ṣalāḥ ‘Abd al-Razzāq,

- al-Aqalliyyāt al-muslimah fī 'l-gharb* (Beirut: Dār al-Hādī li 'l-Tibā'ah wa 'l-Nashr wa-'l-Tawzī', 2007), 45, quoting a Moroccan scholar, 'Abd al-'Azīz b. Šādīq, who based his position partially on Ghannūshī's views.
10. 'Abd-Allāh Ibn Bayyah, *Šinā'at al-fatwā wa-fiqh al-aqalliyyāt* (Jedda and Beirut: Dār al-Minhāj, 2007), 168–9, 181–2.
 11. Yūsuf al-Qaraḏāwī, *Fī fiqh al-aqalliyyāt al-muslimah* (Cairo: Dār al-Shurūq, 2001), 36.
 12. Taha Jabir al-Alwani, *Towards a Fiqh for Minorities: Some Basic Reflections* (London: The International Institute of Islamic Thought, 2003), 13.
 13. "The great responsibility of Muslims in the West is to give an adapted European shape to their identity [...]. Keeping in mind [...] the three levels of *mašlahā*, namely the [three levels of interests theorized to be the *maqāṣid* of Islamic law] [...] Muslims, whether scholars or organization leaders, must provide European Muslims with the appropriate teachings and rulings to enable to protect and fulfil their identity" (Tariq Ramadan, *To Be a European Muslim* (Leicester UK: The Islamic Foundation, 1999), 196. See also Tariq Ramadan, *Western Muslims and the Future of Islam* (New York: Oxford University Press, 2004), 161–3.
 14. See Umar Faruq Abd-Allah, "Living Islam with Purpose", available online at <http://www.nawawi.org/downloads/article6.pdf> (accessed on 4 October 2010).
 15. Attia, for example, notes that "*maqāṣid*-based thinking contributes to the expansion of the process of assessment in *qiyās*". Using the example of the prohibition on wine being linked to the *maqṣad* of preserving reason (*hiḏḏ al-'aql*), Attia notes that one possibility emerging from this is a "process of broad *qiyās* [whereby] we apply the legal prohibition to everything which negatively influences one's reasoning capacity even if it does not inebriate as drugs do. Indeed, we can expand it still further by applying the same prohibition to everything which harms the mind, including superstitions, magic arts, brainwashing operations, baseless imitation of one's forebears, and the like" (Attia, *Towards*, 165–6.)
 16. *al-targhīb wa 'l-tarhīb*: this common phrase means to 'incite desire and fear', or to use the carrot and the stick. The idea here is that Muslim proselytisers should inspire desire for what God gives and promises and at the same time fear of His disapproval and punishment.
 17. Abū Ishāq Ibrāhīm b. Mūsā al-Shātibī, *al-Muwāfaqāt fī uṣūl al-sharī'ah*, ed. 'Abd-Allāh Darrāz, 4 vols (Beirut: Dār al-Ma'rifah, 1975, 2nd ed.), 4:27.
 18. 'Abd-Allāh Muḥammad al-Amīn al-Na'īm and Yūsuf al-Bashīr Muḥammad, *Maqāṣid al-sharī'ah al-islāmiyyah* (Khartoum: al-Markaz al-Qawmī li 'l-Intāḡ al-Islāmī, 1995), 26.
 19. Muḥammad al-Yūbī, *Maqāṣid al-sharī'ah al-islāmiyyah wa 'l-'alāqatuhā bi 'l-adillat al-shar'īyyah* (Riyadh: Dār al-Hijrah, 1998), 192.
 20. al-Na'īm and Muḥammad, *Maqāṣid al-sharī'ah*, 27–8.
 21. Ibid., 29.
 22. For this account of the 'positive preservation' of religion, see *ibid.*, 28–31. According to a recent reconstruction, the views of the theologian Ibn Taymiyyah (d. 1328) bear comparison. His conception of the 'positive preservation' of religion consists of two main pillars: "belief in God, love for Him, exaltation of Him, and knowledge of His names and characteristics" and "seeking protection in religion, studying it and calling to it" (Yūsuf Aḥmad Muḥammad al-Badawī, *Maqāṣid al-sharī'ah 'ind Ibn Taymiyyah* (Amman: Dār al-Nafā'is, 2000), 448–50).
 23. Ziyād Muḥammad Iḥmaydān, *Maqāṣid al-sharī'ah al-islāmiyyah: Dirāsah uṣūliyyah wa taḥbīqāt fiqhīyyah* (Beirut: Mu'assasat al-Risālah, 2004), 91–105; and al-Yūbī, *Maqāṣid al-sharī'ah*, 194.
 24. al-Yūbī, *Maqāṣid al-sharī'ah*, 194.
 25. Ibid., 198. Iḥmaydān's views bear comparison: "The *sharī'ah* must be integral and not fragmented. No abrogation, replacement, distortion or equivalence [with other systems] will be accepted, for there is no law above the Law of God" (Iḥmaydān, *Maqāṣid al-sharī'ah*, 95).
 26. "Judging according to religion and applying its rulings closes the door to the 'people of arbitrary whim' (*ahl al-ahwā'*), destructive schools of thought and misguided ideas, and forbids them from spreading their beliefs and manifesting their edicts for when they know that they are in a state which upholds the laws of God and repels everything contrary to it, they will refrain from their

- erroneous writings out of fear of punishment. Whereas when religion is constrained and removed from judgment and replaced with positive law, then they can spread their poisonous ideas under the veil of academic research or intellectual freedom” (al-Yūbī, *Maqāṣid al-sharī‘ah*, 199).
27. Including the hardening of hearts, the spreading of error and hypocrisy and loss of desire for repentance (Iḥmaydān, *Maqāṣid al-sharī‘ah*, 96).
 28. “The chaos and disruption of aggression against life, property and honor, the spreading of enmity and rancour, and the misery of fear and hunger” (ibid., 97). Here Iḥmaydān invokes the common claim that the preservation of religion is the linchpin for the preservation of the other four primary universal necessities advanced by the *sharī‘ah*: life, property, honour and reason.
 29. In effect: strengthening unbelievers and enemies of Islam over Muslims in various ways.
 30. Opening the door to corruption through usury, disrupting the balance of social justice, breaking the bonds of family and society and killing the spirit of monetary *jihād* in society.
 31. al-Yūbī, *Maqāṣid al-sharī‘ah*, 202. Iḥmaydān, *Maqāṣid al-sharī‘ah*, 97, followed by a long discussion (to p. 105) on various technical issues related to the performance of *da‘wah* with heavy scriptural citation.
 32. al-Yūbī, *Maqāṣid al-sharī‘ah*, 203.
 33. The most constant definition of which is something like: “Fighting unbelievers for the glorification of the word of God” (al-Na‘īm and Muḥammad, *Maqāṣid al-sharī‘ah*, 33; Iḥmaydān, *Maqāṣid al-sharī‘ah*, 106).
 34. I am translating *zandīq* (pl.: *zanādiqah*) as ‘self-obscuring apostates’ consistent with al-Na‘īm and Muḥammad’s explication as “manifesting Islam while hiding unbelief”. I understand this term to refer to theologians and philosophers who publicly proclaim their orthodoxy but convey heterodox beliefs through their writings esoterically. For example, Abū Ḥamid al-Ghazālī’s classical text *Faysal al-tafrīqah bayn al-islām wa ‘l-zandaqah* treats the problem of the Ismā‘īlīs and philosophers who refer to themselves as Muslims but advance unacceptable doctrines esoterically. I refrain from translating this term as ‘heretics’ since I believe this to be expressed by the term ‘*mubtadi‘ūn*’: purveyors of *bid‘ah* or *ibtidā‘*, literally ‘innovation’. I believe the idea of persons openly advancing new theological doctrines in defiance of existing orthodoxy to best reflect the concept of ‘heresy’.
 35. The *ḥudūd* are the mandatory punishments for certain crimes (adultery, theft, drinking wine, false accusation of adultery) stipulated in the revelatory texts. *Ta‘zīr* punishments are discretionary punishments which judges and rulers may impose on grounds of public policy.
 36. al-Yūbī, *Maqāṣid al-sharī‘ah*, 192.
 37. Ibid., 206. Emphasis added.
 38. Muḥammad al-Ṭāhir Ibn ‘Āshūr, *Treatise on Maqāṣid al-sharī‘ah*, tr. Mohamed el-Tahir el-Mesawi (London: International Institute of Islamic Thought, 2006), 120.
 39. Attia, *Towards*, 153.
 40. al-Na‘īm and Muḥammad, *Maqāṣid al-sharī‘ah*, 35. For a similar account, see Iḥmaydān, *Maqāṣid al-sharī‘ah*, 116.
 41. This phrase ‘*fasād fi ‘l-arḍ*’ is taken from a verse in the Qur’ān often used to establish capital punishment for those who rebel against the state or provoke such rebellion through propaganda or incitement. It has served as a very flexible and supple legal tool in the hands of Islamic governments, including most recently the Islamic Republic of Iran, to justify charges of treason against political and ideological dissenters.
 42. *Ādhā* is more commonly used for ‘harm’ or ‘injury’ but out of concern for the theological complexities arising from the idea that God could be harmed or injured by human actions I will translate it as ‘a wrong against’. God can certainly be wronged by humans (Islamic law speaks of many public, communal or ritual obligations as ‘the rights of God’) even where He cannot be harmed by them.
 43. al-Badawī, *Maqāṣid al-sharī‘ah*, 455–6.
 44. Iḥmaydān includes as his fifth means for preserving religion the thwarting of “shameless muftis” (*al-muftī al-mājin*), those who “corrupt religion and exploit the ignorant” by devising juridical ruses (*hiyal*) to get around religious obligations (Iḥmaydān, *Maqāṣid al-sharī‘ah*, 128). It is common

- for *maqāṣid* works to devote long sections or even chapters condemning the practice of devising such legal ruses (*al-tahāyul*); see for example, Ibn 'Āshūr, *Treatise*, ch. 22, especially 180–3.
45. See Johnston, “*Maqāṣid*”, 165–6. Such texts include Muḥammad Fathī 'Uthmān, *Huqūq al-insān bayn al-sharī'ah al-islāmiyyah wa-l-fikr al-qānūnī al-gharbī* (Beirut: Dār al-Shurūq, 1982) and Muḥammad al-Ghazālī, *Huqūq al-insān bayn ta'līm al-islām wa-l'lān al-umam al-mutaḥḥidah* (Cairo: Dār al-Kutub al-Islāmiyyah, 1984).
 46. Johnston describes the position of Egyptian writer Muḥammad 'Amārah in this way (Muḥammad 'Amārah, *al-Islām wa huqūq al-insān: ḍarūrāt...lā huqūq* (Cairo: Dār al-Shurūq, 1989)).
 47. See also Muḥammad al-Zuhaylī, et al., *Huqūq al-insān: miḥwar maqāṣid al-sharī'ah* (Doha: Doha: Ministry of *Awqāf* and Islamic Affairs of Qatar, 2002), where human rights are defined exclusively in terms of the interests God has chosen to protect through the Law.
 48. Rāshid al-Ghannūshī, *al-Hurriyyāt al-'āmmah fī 'l-dawlah al-islāmiyyah* (Beirut: Markaz Dirāsāt al-Waḥdat al-'Arabiyyah, 1993), 320; quoted also in Johnston, “*Maqāṣid*”, 173.
 49. al-Ghannūshī, *al-Hurriyyāt*, 38.
 50. Mohammad Hashim Kamali, “Punishment in Islamic Law: A Critique of the *Hudud* Bill of Kelantan, Malaysia”, *Arab Law Quarterly* 13 (1998), 203–34.
 51. Including: *Shari'ah Law: An Introduction* (Oxford: Oneworld, 2008); *Equity and Fairness in Islam* (Cambridge: Islamic Texts Society, 2005); *Freedom, Equality and Justice in Islam* (Cambridge: Islamic Texts Society, 2002); *Freedom of Expression in Islam* (Cambridge: Islamic Texts Society, 1997).
 52. The main works are: Maḥmūd Shaltūt, *al-Qur'ān wa 'l-qitāl* (Beirut: Dār al-Fath, 1983); Muḥammad Shadīd, *al-Jihād fī 'l-islām* (Cairo: Mu'assasat al-Maṭbū'āt al-Ḥadītha, n.d.); Muḥammad Abū Zahrah, *al-'Alāqāt al-duwaliyyah fī 'l-islām* (Cairo: al-Qawmiyyah, 1964); 'Alī 'Alī Maṣṣūr, *al-Sharī'ah al-islāmiyyah wa 'l-qānūn al-duwalī al-'āmm* (Cairo: Lajnat al-Khubarā', 1971); 'Uthmān al-Sa'īd al-Sharqāwī, *Sharī'at al-qitāl fī 'l-islām* (Cairo: al-Zahrā', 1972); Wabbah al-Zuhaylī, *al-'Alāqāt al-duwaliyyah fī 'l-islām* (Beirut: Mu'assasat al-Risālah, 1981); and Muḥammad al-Būṭī, *Jihad in Islam: How to Understand and Practise It* (Damascus: Dār al-Fikr, 1995). See also, from the literature introduced here, Iḥmaydān, *Maqāṣid al-sharī'ah*, 109–10, where he gives an account of the *maqāṣid* of *jihād* more similar to the one presented here than the classical account reaffirmed by Yūbī and others.
 53. See, for example, S.A. Rahman, *Punishment of Apostasy in Islam* (New Delhi: Kitab Bhavan, 1973). However, a knotty issue for Islamic thinkers who argue against the punishment for apostasy in this way is identifying exactly when public proclamation of un-Islamic beliefs and doctrines becomes a form of harm to the integrity of the social order even short of armed rebellion.
 54. Because these populations are largely the result of immigration over the past fifty years jurists do not tend to treat them the way they might treat ‘native’ Muslim minorities in such countries as India, Israel or various Africa countries, where juridical reflection tends to focus on communal self-governance.
 55. Ibn Bayyah, *Ṣinā'at al-fatwā*, 168.
 56. 'Abd al-Razzāq, *al-Aqalliyyāt*.
 57. al-Qaraḍāwī, *Fī fiqh al-aqalliyyāt*, 36; see also Ibn Bayyah, *Ṣinā'at al-fatwā*, 169 and 'Abd al-Razzāq, *al-Aqalliyyāt*, 15.
 58. Ramadan, *To Be*, 131.
 59. Ibid., 135–7.
 60. Ibid., 139–40. Emphasis in original.