A *Maqāṣidī* approach to contemporary application of the *Sharī'ah*

Jasser Auda*

Abstract: This paper explores how *Maqāṣid al-Sharī'ah* (higher purposes and intents of Islamic law) could contribute to the application of the *Sharī'ah* itself in contemporary Muslim societies and to making the appropriate related juridical policies. The soundness of the application of the *Sharī'ah* and related policies is subject to the degree of universality and flexibility of the Islamic rulings with changing circumstances, are discussed from various viewpoints in this paper. After a survey of the system of values that *Maqāṣid al-Sharī'ah* represent, three methods are explored: (1) differentiating between scripts that are means (*wasā'il*) to higher ends and scripts that are ends (*ahdāf*) in their own right, (2) preferring a multi-dimensional understanding for the conciliation of opposing juridical evidence, instead of reductionist methods such as abrogation (*naskh*) and elimination (*tarjīḥ*), and (3) achieving a universality of *Sharī'ah* across cultures via the consideration of customs (*al-'urf*). A number of examples are provided throughout the paper in order to explain the impact of the proposed methods on contemporary Islamic rulings and juridical policies related to them.

Keywords: *Maqāṣid al-Sharī'ah*, juridical policy-making, Islamic value system, conciliation, universal Islamic rulings.

Abstrak: Kertas kerja ini meninjau bagaimana *Maqāṣid al-Sharī'ah* (maksud dan tujuan undang-undang Islam) boleh menyumbang kepada aplikasi *Sharī'ah* itu sendiri dalam masyarakat Islam semasa dan membuat dasar-dasar perundangan yang bersesuaian. Keutuhan aplikasi *Sharī'ah* dan dasar yang berkaitan bergantung kepada tahap kesejagatan dan fleksibiliti hukum Islam dengan perubahan zaman dibincangkan daripada pelbagai sudut. Selepas

*Jasser Auda is Associate Professor, Faculty of Islamic Studies, Qatar Foundation. P.O. Box: 34110, Doha, Qatar. Email: jauda@qfis.edu.qa.

meninjau sistem nilai yang mewakili *Maqāṣid al-Sharī'ah,* tiga kaedah dikaji: (1) membezakan antara skrip yang merupakan jalan (*wasā'il*) untuk mencapai tujuan yang lebih tinggi dan skrip yang berakhir (*ahdāf*)) dengan tujuan itu sahaja, (2) mengutamakan pemahaman pelbagai dimensi untuk penyelesaian bukti perundangan yang bertentangan, bukannya kaedah reduksionis seperti pembatalan (*naskh*) dan penyingkiran (*tarjīḥ*), dan (3) mencapai kesejagatan *Sharī'ah* merentasi budaya melalui pertimbangan adat (*al-'urf*). Beberapa contoh diberikan dalam kertas kerja ini untuk menjelaskan kesan kaedah yang dicadangkan kepada perundangan Islam dan dasar-dasar kontemporari yang berkaitan dengannya.

Kata kunci: *Maqāṣid al-Sharī'ah*, pengubalan dasar perundangan, sistem nilai Islam, penyelesaian, kesejagatan perundangan Islam

Contemporary applications of the *Sharī'ah* in any given Muslim society or juridical policy requires a methodology that represents the universality of the *Sharī'ah* and flexibility with changing circumstances. Without the components of the *Sharī'ah* pertinent to accommodating various environments and cultures, or in other words the dimensions of history and geography of the people, any such application or policy would be counter-productive. This is because it would jeopardize the system of values and principles of the *Sharī'ah* itself: the principles of justice, wisdom, mercy, and common good. Shams al-Dīn Ibn al-Qayyim (d. 748 AH/1347 CE) (1973) summarized these principles with the following strong words (Vol. 1, p. 333):

> *Sharī'ah* is all about wisdom and achieving people's welfare in this life and the afterlife. It is all about justice, mercy, wisdom, and good. Thus, any ruling that replaces justice with injustice, mercy with its opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to the *Sharī'ah*, even if it is claimed to be so according to some interpretation.

Maqāṣid al-Sharī'ah (the higher purposes and intents of Islamic law) is a system of values that could contribute to a desired and sound application of the *Sharī'ah*. After a section that introduces the system of values and the various theories of *maqāṣid*, this paper suggests that it is necessary to determine the following:

1. Whether a proposed ruling of the *Sharī'ah* is an absolute and fixed end in its own right; otherwise, it is in itself the means to an end, and thus, subject to changing with changing circumstances. This method is expressed in Differentiating between Changing Means and Absolute Ends, which is dealt with in the second section of this paper.

2. Whether the verse or *ḥadīth* under consideration should be understood with another verse (s) or *ḥadīth* (s), all in a unified context; otherwise, there is no 'opposing evidence' that exists which would require such consideration. This method is expressed in A Multi-Dimensional Understanding of Opposing Evidence, which is dealt with in the third section of this paper.

3. Whether the ruling implied by the juridical evidence is subject to a specific tradition or custom, or not. This includes the traditions and customs of the original forms of some rulings, i.e., the Arab customs during the early Islamic era. This method is expressed in "the Universality of the *Sharī'ah* Across Cultures, which is dealt with in the fourth section of this paper.

The next section introduces *Maqāṣid al-Sharī'ah* as a system of values that has several theories, classifications, and viewpoints.

Maqāṣid al-Sharī'ah as a system of values

Maqāṣid al-Shariah are the objectives/purposes/intents/ends/ principles behind the Islamic rulings (Ibn'Āshūr, 1997, p. 183), which found expression in the Islamic philosophy/theory/ fundamentals of law in various ways, such as public interests (*al-maṣāliḥ al-'āmmah*) (Al-Juwaynī, 1400 AH, p. 183), unrestricted interests (*al-maṣāliḥ al-mursalah*) (Al-Ghazālī, 1413 AH, Vol. 1, p. 172), the avoidance of mischief (*mafsadah*) (Al-Qarāfī, 1994, Vol. 5, p. 478), the wisdom behind the scripts (*al-ḥikmah*) (Al-Āmidī, 1404 AH, Vol. 5, p. 391), the appropriateness of the juridical analogy (*munāsabāt al-qiyās*) (Ibn Qudāmah, 1399 AH, Vol. 3, p. 42), the basis behind juridical preference (*aṣl al-istiḥsān*) (Al-Sarakhsī, n.d., Vol. 9, p. 205), the basis behind the presumption of continuity principle (*aṣl al-istiṣḥāb*) (Ibn Abdul-Salam, n.d., Vol. 1, p. 23), and a large number of other tools for juridical *ijtihād*.

Recently, a large number of researchers from various backgrounds attempted to explore the theory and application of *Maqāṣid al-Sharī'ah* in various fields that not only belong to Islamic jurisprudence but to the social sciences and the humanities (Imam, 2010).

The purposes or *maqāṣid* of Islamic law themselves are classified in various ways, according to a number of dimensions. The following are some of these dimensions:

1. Levels of necessity, which is the traditional classification.
2. Scope of the rulings aiming to achieve purposes.
3. Scope of people included in the purposes.
4. Level of universality of the purposes.

Traditional classifications of *maqāṣid* divide them into three levels of necessity, namely, necessities (*ḍarūriyāt*), needs (*ḥājiyyāt*), and luxuries (*taḥsīniyyāt*). Necessities are further classified according to what preserves one's faith, soul, wealth, mind, and offspring. Some jurists added 'the preservation of honour' to the above five widely popular necessities. These necessities were considered essential matters for human life itself. There is also a general agreement that the preservation of these necessities is the objective behind any revealed law, not just Islamic law.

Purposes at the level of needs are less essential for human life. Examples are marriage, trade, and means of transportation. Islam encourages and regulates these needs. However, the lack of any of these needs is not a matter of life and death, especially on an individual basis.

Purposes at the level of luxuries are 'beautifying purposes,' such as using perfume, stylish clothing, and beautiful homes. These are things that Islam encourages, but Islam also asserts that they should take a lower priority in one's life.

The levels in the hierarchy are overlapping and interrelated, so noticed Imam al-Shāṭibī (who will be introduced shortly). In addition, each level should serve the level(s) below. Also, the general lack of one item from a certain level moves it to the level above. For example, the decline of trade on a global level during a time of global economic crises moves 'trade' from a 'need' into a 'life necessity,' and so on.

That is why some jurists preferred to perceive necessities in terms of 'overlapping circles,' rather than a strict hierarchy (see Figure 1).
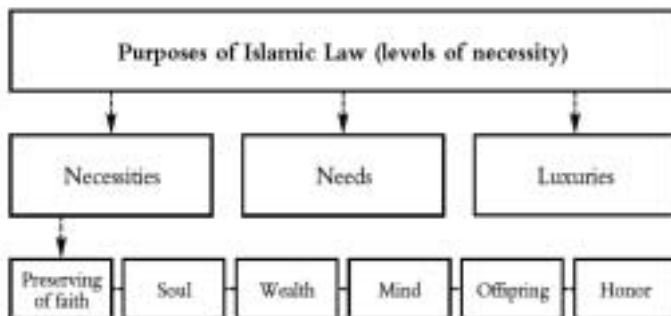

Figure1. The classification of *maqāṣid* based on the levels of necessity.

Modern scholarship introduced new conceptions and classifications of *al-maqāṣid* by giving consideration to new dimensions. First, considering the scope of rulings they cover, contemporary classifications divide *maqāṣid* into three levels (Jughaim, 2002, pp. 26-35):

1. General *maqāṣid*. These *maqāṣid* are observed throughout the entire body of Islamic law, such as the necessities and needs mentioned above, as well as newly-proposed *maqāṣid*, such as 'justice' and 'facilitation.'
2. Specific *maqāṣid*. These *maqāṣid* are observed throughout a certain chapter of Islamic law, such as the welfare of children in family law, preventing criminals in criminal law, and preventing monopoly in financial transactions law.
3. Partial *maqāṣid*. These *maqāṣid* are the 'intents' behind specific scripts or rulings, such as the intent of discovering the truth in seeking a certain number of witnesses in certain court cases, the intent of alleviating difficulty in allowing an ill person who is fasting to break his/her fast, and the intent of feeding the poor in banning Muslims from storing meat during Eid/festival days.

Moreover, the notion of *maqāṣid* has been expanded to include a wider scope of people-the community, nation, or humanity, in general. Ibn ʿĀshūr, for example, gave *maqāṣid* that are concerned with the nation (*ummah*) priority over *maqāṣid* that are concerned

with individuals. Rashīd Riḍā, for a second example, included reform and women's rights in his theory of *maqāṣid*. Yūsuf al-Qaraḍāwī, for a third example, included human dignity and rights in his theory of *maqāṣid*. The above expansions of the scope of *maqāṣid* allow them to respond to global issues and concerns, and to evolve from wisdoms behind the rulings to systems of values and practical plans for reform and renewal.

Contemporary scholarship has also introduced new universal *maqāṣid* that were directly derived from the scripts, rather than from the body of *fiqh* literature in the schools of Islamic law. This approach, significantly, allowed *maqāṣid* to overcome the historicity of *fiqh* edicts and represent the higher values and principles of the scripts. Detailed rulings would, then, stem from these universal principles. The following are examples of these new universal *maqāṣid*:

1. Rashīd Riḍā (d.1354AH/1935 CE) (n.d.) surveyed the Qur'ān to identify its *maqāṣid*, which included, "reform of the pillars of faith, and spreading awareness that Islam is the religion of pure natural disposition, reason, knowledge, wisdom, proof, freedom, independence, social, political, economic reform, and women rights" (p. 100).

2. Al-Ṭāhir Ibn 'Āshūr (d.1325 AH/ 1907 CE) (1997) proposed that the universal *maqṣid* of the Islamic law is to maintain orderliness, equality, freedom, facilitation, and the preservation of pure natural disposition (*fiṭrah*) (p. 183). It is to be noted that the purpose of 'freedom' (*ḥurriyyah*), which was proposed by Ibn 'Āshūr and several other contemporary scholars, is different from the purpose of 'freedom' ('*itq*), which was mentioned by jurists such as al-Siwāsī (n.d., Vol. 4, p. 513). *Al-'itq* is freedom from slavery, not freedom in the contemporary sense. 'Will' (*Mashī'ah*), however, is a well-known Islamic term that bears a number of similarities with current conceptions of 'freedom' and 'free will.' For example, 'freedom of belief' is expressed in the Qur'ān as the "will to believe or disbelieve" (18:29). In terms of terminology, 'freedom' (*al-ḥurriyyah*) is a 'newly-coined' purpose in the literature of the Islamic law. Ibn 'Āshūr (2001), interestingly, accredited his usage of the term *ḥurriyyah* to

"literature of the French revolution, which were translated from French to Arabic in the nineteenth century CE" (pp.256, 268), even though he elaborated on an Islamic perspective of freedom of thought, belief, expression, and action in the *mashī'ah* sense (pp. 270-281).

3. Mohammad al-Ghazālī (d.1416 AH/1996 CE) called for "learning lessons from the previous fourteen centuries of Islamic history," and therefore, included "justice and freedom" in *maqāṣid* at the necessities level ('Aṭiyyah, 2001, p. 49). Al-Ghazalī's prime contribution to the knowledge of *maqāṣid* was his critique on the literalist tendencies that many of today's scholars have ('Izzi Dīen, 2004, pp. 131-132). A careful look at the contributions of Mohammad al-Ghazālī shows that there were underlying *maqāṣid* upon which he based his opinions, such as equality and justice, and upon which he had based all his famous opinions in the area of women under the Islamic law and other areas.

4. Yūsuf al-Qaraḍāwī (1345 AH/ 1926 CE -) (1999) also surveyed the Qur'ān and concluded the following universal *maqāṣid:* preserving true faith, maintaining human dignity and rights, calling people to worship God, purifying the soul, restoring moral values, building good families, treating women fairly, building a strong Islamic nation, and calling for a cooperative world. However, al-Qaraḍāwī explains that proposing a theory in universal *maqāṣid* should only happen after developing a level of experience with detailed scripts.

5. Ṭāhā al-'Alwānī (1354 AH/ 1935 CE -) (2001) also surveyed the Qur'ān to identify its 'supreme and prevailing' *maqāṣid*, which are, according to him, "the oneness of God (*tawḥīd*), purification of the soul (*tazkiyyah*), and developing civilisation on earth ('*imrān*)" (p. 25).

All of the above *maqāṣid* were presented as they appeared in the minds and perceptions of the above jurists. Therefore, *al-maqāṣid* structure is best described as a 'multi-dimensional' structure, in which levels of necessity, the scope of rulings, the scope of people, and levels of universality are all valid dimensions that represent valid viewpoints and classifications (see Figure 2).
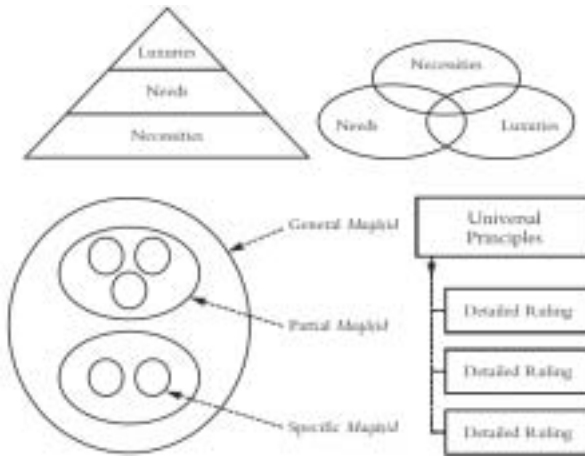
Figure 2. Various dimensions of the theories of *maqāṣid*

As explained above, the next three sections explore different ways of utilizing *maqāṣid* towards a much needed contemporary policy-making for the application of the *Sharī'ah* in various circumstances.

Differentiating between changing means and absolute ends

Some scripts (verses or *ḥadīth*) are 'scripts of means' (*nuṣuṣ wasā'il*) and are not meant as ends in their own right; hence are not meant to be applied to the latter. A *maqāsidī* understanding of these scripts helps in identifying their true meaning and intent.

For example, the Qur'ān (8:60) states: "Hence, make ready against them whatever force and horse mounts you are able to muster, so that you might deter thereby the enemies of God, who are your enemies as well". 'Horse mounts' are means and not 'ends' in their own right that should be literally sought. In fact, the whole concept of 'getting ready with force' is means to the ends of justice and peace, rather than ends in its own right as well.

The late Shaykh Mohammad al-Ghazālī extended this concept by differentiating between means (*al-wasā'il*) and ends (*al-ahdāf*), whereas he argued for the possibility of what he called 'expiry' (*intihā'*) of the former and not the latter. Mohammad Al-Ghazālī mentions the whole system of the distribution of the booty of war as

one example, despite the fact that it is mentioned explicitly in the Qur'ān (Al-Ghazālī, 1996, p. 161). The Qur'ān states:

> And know that whatever booty you acquire [in war], one-fifth thereof belongs to God and the Apostle, and the near of kin, and the orphans, and the needy, and the wayfarer. This you must observe if you believe in God and in what We bestowed from on high upon Our servant (8: 41).

The above understanding validates today's policies, in which army personnel are compensated according to a scheme of salaries, ranks, and benefits, which are categorically separate from any economic gains they achieve via warfare.

Recently, Shaykhs Yūsuf al-Qaraḍāwī and Fayṣal Mawlawī elaborated on the importance of the 'differentiation between means and ends' during the deliberations of the European Council for Fatwa and Research. They both applied the same concept to the visual citation of the *hilāl* (Ramadan's new moon) being mere means for knowing the start of the month rather than an end in its own right. Hence, they concluded that pure calculations shall be today's means of defining the start of the month. Thus, the Ministries of Islamic Affairs, Ministries of Awqāf, and Houses of Fatwa in various countries could, correctly, base their calendar decisions on official astronomical reports and findings, instead of a costly contingency plan every month, especially during the seasons of fasting and pilgrimage. Shaykh al-Qaraḍāwī had also applied the same concept to Muslim women's garb (*jilbāb*), amongst other things, which he viewed as mere means for achieving the objective of modesty (El-Awa, 2006, p. 85).

In my view, 'differentiating between means (*wasā'il*) and ends (*maqāsid*)' opens a lot of possibilities for new opinions in the Islamic law. For example, Shaykh Ṭāhā al-'Alwānī proposed a 'project for reform' in his *Issues in Contemporary Islamic Thought*, in which he elaborates on his version of the method of 'differentiation between means and ends.' The following illustrates how al-'Alwānī (2005) applied this approach to the issue of gender equality:

> The Qur'ān transported the people of those times to the realm of faith in absolute gender equality. This single article of

faith, perhaps more than any other, represented a revolution
no less significant than Islam's condemnation of idolatry…In
the case of early Muslim society, given the long established
customs, attitudes and mores of pre-Islamic Arabia, it was
necessary to implement such changes in stages and to make
allowances for society's capacity to adjust itself
accordingly…By establishing a role for a woman in the
witnessing of transactions, even though at the time of
revelation they had little to do with such matters, the Qur'ān
seeks to give concrete form to the idea of woman as
participant…The objective is to end the traditional
perception of women by including them, 'among such as are
acceptable to you as witness'…the matter of witnessing
served merely as a means to an end or as a practical way of
establishing the concept of gender equality. In their
interpretations of 'mistake' and 'remind,' Qur'ānic
commentators have approached the issue from a perspective
based on the assumption that the division of testimony for
women into halves is somehow connected with women's
inherent inequality to men. This idea has been shared by
classical and modern commentators alike, so that generations
of Muslims, guided only by *taqlīd* (imitation), have
continued to perpetuate this faulty understanding. Certainly,
the attitudes engendered by such a misunderstanding have
spread far beyond the legal sphere... (pp. 164-166).

This application of the suggested method of 'differentiating between
changing means and fixed ends' also spreads beyond the legal sphere,
in the sense of making policies that aim at changing societies and
cultures towards normalizing the value of equality between men
and women, especially in their legal capacities before the judicial
system.

A similar expression is Ayatollah Mahdi Shams al-Dīn's
recommendation for today's jurists to take a dynamic approach to
the scripts, and "not to look at every script as absolute and universal
legislation, open their minds to the possibility of 'relative' legislation
for specific circumstances, and not to judge narrations with missing
contexts as absolute in the dimensions of time, space, situations,
and people" (Shams al-Dīn, 1999, p. 128). He further clarifies that
he is "inclined to this understanding but would not base (any rulings)
on it for the time being." Nevertheless, he stresses the need for this
approach for rulings related to women, financial matters, and *jihād*

(p. 129). Fathi Osman, for another example, considered the practical considerations that rendered a woman's testimony to be less than a man's, as mentioned in the Qur'ān (2: 282). Thus, Osman 're-interpreted' the verse to be a function to these practical considerations, in a way similar to al-Alwani's mentioned above (El-Affendi, 2001, p. 45). Shaykh Hassan al-Turabi (2000) holds the same view regarding many rulings related, again, to women and their daily-life practices and attire (p. 29).

Rouget Garoudi's expression of this approach was to "divide the scripts into a section that could be historicised," such as, yet again, "rulings related to women," and another section that "represents the eternal value in the revealed message" (Garaudy, 1999, pp. 70, 119). Similarly, Abdul-Karim Soroush (1998) suggested that the scripts should be "divided into two parts, essentials and accidentals; accidentals being functions of the cultural, social, and historical environment of the delivery of the main message" (p. 250).

Some Malikis proposed 'opening the means' (*fatḥ al-dharā'i'*) in addition to 'blocking' them (*sadd al-dharā'i'*) (Al-Qarāfī, 1994, Vol. 1, p. 153). Imam Al-Qarāfī (1998) divided rulings into means (*wasā'il*) and ends/purposes (*maqāṣid*). He suggested that means that lead to prohibited ends should be blocked, and means that lead to lawful ends should be opened (Vol. 2, p. 60). Thus, al-Qarāfī linked the ranking of means to the ranking of their ends, and suggested three levels for ends, namely, most repugnant (*aqbaḥ*), best (*afḍal*), and 'in between' (*mutawassiṭah*). Ibn Farhūn (d. 769 AH) (1995), also from the Maliki school, applied al-Qarāfī's 'opening the means' to a number of rulings (Vol. 2, p. 270). Thus, Malikis do not restrict themselves to the negative side of 'consequentialist' thinking, to borrow a term from moral philosophy. They expand this method of thinking to the positive side, which entails opening means to achieving good ends, even if these ends were not mentioned in specific scripts.

It is important to note here that some researchers and writers extend the above consideration of historical conditions into what is called the 'historicization' of Islamic scripts, which is the abrogation or cancellation of their 'authority' *in toto*. This historicist approach suggests that our ideas about texts, cultures and events are totally a

function of their position in their original historical context as well as their later historical developments (Meinecke, 1972; Taylor & Winquist, 2001). Applying this idea, borrowed from literature studies, to the Qur'ān entails that the Qur'ānic script is a 'cultural product' of the culture that produced it, as claimed by some writers (Abu Zaid, 1998, p. 199; Arkoun, 1998, p. 211).

Therefore, it is claimed, the Qur'ān would become a 'historic document' that is only helpful in learning about a specific historic community that existed in the prophetic era. Haida Moghissi (1999), further, claims that "the *Sharī'ah* is not compatible with the principle of equality of human beings" (p. 141). For her, "no amount of twisting and bending can reconcile the Qur'ānic injunctions and instructions about women's rights and obligations with the idea of gender equality" (p. 140). Similarly, Ibn Warrāq (2006) claims that the Islamic human rights scheme shows "inadequate support for the principle of freedom" (p. 53). Thus, for Moosa, Islamic jurisprudence could not be evidence for an 'ethical vision,' in the contemporary sense (p. 42).

However, I think that regarding the Qur'ān as 'unfair' and 'immoral' goes against the very belief in its divine source. Having said that, I also believe that historical events and specific juridical rulings detailed in the Qur'ān, should be understood within the cultural, geographical, and historical context of the message of Islam. The key for this understanding is, again, to differentiate between changeable means and fixed principles and ends. Means could 'expire,' as Shaykh Mohammad al-Ghazālī had put it, while ends and principles are non-changeable. Based on such understanding, Qur'ānic specifics could very well apply universally in every place and time and could very well present an ethical vision and value system for today's legislation and policies.

A multi-dimensional understanding of 'opposing evidence'

In Islamic juridical theory, there is a differentiation between opposition or disagreement (*ta'āruḍ* or *ikhtilāf*) and contradiction (*tanāquḍ* or *ta'āruḍ*) of scripts (verses or narrations). Contradiction is defined as "a clear and logical conclusion of truth and falsehood in the same aspect"(*taqāsum al-ṣidq wa-al-kadhb*) (Al-Ghazālī, 1961, p. 62). On the other hand, conflict or disagreement between

evidence is defined as an "apparent contradiction between evidence in the mind of the scholar" (*ta'āruḍfīdhihn al-mujtahid*) (IbnTaymiyyah, n.d., p. 131). This means that two pieces of seemingly disagreeing (*muta'āriḍ*) evidence are not necessarily in contradiction. It is the perception of the jurist that they are in contradiction,which can occur as a result of some missing information or dimension regarding the evidence's timing, place, circumstances, or other conditions (Al-Bukhārī, 1997, Vol. 3, p. 77).

On the other hand, true contradiction takes the form of a single episode narrated in truly contradicting ways by the same or different narrators (Auda, 2006, pp. 65-68). This kind of discrepancy is obviously due to errors in narration related to the memory and/or intentions of one or more of the narrators (Al-Subkī, 1983, p. 218). The logical conclusion in cases of contradiction is that one or more of the narrations is inaccurate and should be rejected. For example, Abū Hurayrah narrated, according to Bukhārī: "Bad omens are in women, animals, and houses." However, (also according to Bukhārī) Ā'isha narrated that the Prophet (SAW) had said: "People during the Days of Ignorance (*jāhiliyyah*) used to say that bad omens are in women, animals, and houses." These two authentic narrations are at odds and one of them should be rejected. It is telling that most commentators rejected Ā'isha's narration, even though other authentic narrations support it (Auda, 2006, p. 106). Ibn al-'Arabī, for example, commented on Ā'isha's rejection of the above *ḥadīth* as follows: "This is nonsense (*qawlun sāqiṭ*). Ā'isha is rejecting a clear and authentic narration that is narrated through trusted narrators" (Ibn al-'Arabī, n.d., Vol. 10, p. 264).

According to various traditional and contemporary studies on the issue of *ta'āruḍ*, contradiction, in the above sense, is rare. Most cases of *ta'āruḍ* are disagreements between narrations because of, apparent missing context, not because of logically contradicting accounts of the same episode. There are six strategies that jurists defined to deal with these types of disagreements in traditional schools of law (Badran, 1974, Ch. 4):

1. Conciliation (*Al-Jam'*). This method is based on a fundamental rule that states that, 'applying the script is better than disregarding it (*i'māl al-naṣṣ awlā min ihmālih*)'.

Therefore, a jurist facing two disagreeing narrations should search for a missing condition or context, and attempt to interpret both narrations based on it.

2. Abrogation (*Al-Naskh*). This method suggests that the later evidence, chronologically speaking, should 'abrogate' (juridically annul) the former. This means that when verses disagree, the verse that is (narrated to be) revealed last is considered to be abrogating evidence (*nāsikh*) and others to be abrogated (*mansūkh*). Similarly, when prophetic narrations disagree, the narration that has a later date, if dates are known or could be concluded, should abrogate all other narrations. Most scholars do not accept that a *ḥadīth* that abrogates a verse of the Qur'ān, even if the *ḥadīth* were to be chronologically subsequent.

The concept of abrogation, in any of the above senses, does not have supporting evidence from the words attributed to the Prophet (SAW) in traditional collections of *ḥadīth*. Etymologically, abrogation (*naskh*) is derived from the root *nasakha*. I carried out a survey on this root and all its possible derivations in a large number of today's popular collections of *ḥadīth*, including, al-Bukhārī, Muslim, al-Tirmidhī, al-Nasā'ī, Abū Dāwūd, Ibn Mājah, Aḥmad, Mālik, al-Daramī, al-Mustadrak, Ibn Hibbān, Ibn Khuzaymah, al-Bayhaqī, Al-Dārquṭnī, Ibn Abī Shaybah, and 'Abd al-Razzāq. I found no valid *ḥadīth* attributed to the Prophet (SAW) that contains any of these derivations of the root *nasakha*. I found about 40 instances of 'abrogation' mentioned in the above collections, which were all based on one of the narrators' opinions or commentaries, rather than any of the texts of the *ḥadīth*. I concluded that the concept of abrogation always appears within the commentaries given by companions or other narrators, commenting on what appears to be in disagreement with their own understanding of the related issues. According to traditional exegeses, the principle of abrogation does have evidence from the Qur'ān, although the interpretations of the related verses are subject to a difference of opinion (Nadā, 1996, p. 25).

3. Elimination (*Al-tarjīḥ*). This method suggests endorsing the narration that is most authentic and dropping or eliminating other narrations. The 'eliminating' narration is called *al-riwāyah al-rājiḥah*, which literally means the narration that is 'heavier in the scale.' According to scholars of *ḥadīth*, an eliminating (*rājiḥah*) narration must have, as compared to the other narration, one or more of the following characteristics: a larger number of other supporting narrations, a shorter chain of narrators, more knowledgeable narrators, narrators more capable of memorisation, more trustworthy narrators, first-hand account versus indirect accounts, shorter time between the narration and the narrated incident, narrators able to remember and mention the date of the incident versus others, less ambiguity, less rhetoric, and a number of other factors.

4. Suspension of judgement (*Al-tawaqquf*). This method recommends that the scholar is not to make any decision until one of the above three methods is evident.

5. Cancellation (*Al-tasāquṭ*). This method recommends that the scholar is to disregard both narrations because of the uncertainty in both.

6. Choice (*Al-takhyīr*). This method allows the scholar to choose whatever is rendered suitable for the situation at hand.

Ḥanafis apply abrogation before any other method, followed by the method of elimination (Al-Haj, 1996, Vol. 3, p. 4). All other schools of law give priority, theoretically, to the method of conciliation (*al-jam'*). Although most schools of law agree that applying all scripts is better than disregarding any of them, most scholars do not seem to give priority, on a practical level, to the method of conciliation. The methods that are used in most cases of *ta'āruḍ* are abrogation and elimination (Auda, 2006, pp. 105-110). Therefore, a large number of evidence is cancelled, in one way or the other, for no good reason other than the jurists' failure to understand how they could fit it into a unified perceptual framework. Thus, invalidating such evidence is more or less arbitrary. For example, narrations are invalidated (outweighed) if narrators did not happen to mention the date of the incident, the wording related to the Prophet (SAW)

happened to be more metaphoric, or a narrator happened to be female-in which case the male's opposing narration takes precedence (Al-Sousarah, 1997, p. 395). Therefore, *al-naskh* and *al-tarjīḥ* reflect the general feature of binary thinking in fundamental methodology. It is essential that the method of conciliation makes use of the concept of multi-dimensionality in overcoming this drawback and considers the dimension of *maqāṣid* in the understanding of the scripts.

One practical consequence of cancelling a large number of verses and prophetic narrations in the name of *naskh* and *tarjīḥ* is a great deal of inflexibility in Islamic law, i.e., the inability to address various situations adequately. Reflection upon pairs of *muta'āriḍ* or opposing narrations show that their disagreement could be due to a difference in surrounding circumstances, such as war and peace, poverty and wealth, urban and rural life, summer and winter, sickness and health, or young and old. Therefore, the Qur'ānic instructions or the Prophet's actions and decisions, as narrated by his observers, are supposed to have differed accordingly. Lack of contextualisation limits flexibility. For example, eliminating the evidence that occurred in the context of peace for the sake of evidence that occurred in the context of war, combined with literal methods, limits the jurist's ability to address both contexts. When this is combined with a strict binary methodology, it results in specific rulings for specific circumstances becoming universal and eternal.

One important example from the Qur'ān is, "But when the forbidden months are past, then slay the pagans wherever you find them, and seize them" (9: 5) which has come to be named the Verse of the Sword (*āyāt al-sayf*) and which has been claimed to have abrogated hundreds of verses and *ḥadīth*. One significant *ḥadīth* that was claimed to have been abrogated is the Scroll of Medina (*ṣaḥīfat al-madīnah*), in which the Prophet (SAW) and the Jews of Medina wrote a covenant that defined the relationship between Muslims and Jews living in Medina. The scroll stated that, "Muslims and Jews are one nation (*ummah*), with Muslims having their own religion and Jews having their own religion" (Zuraiq, 1996, p. 353). Classic and neo-traditional commentators on the *ṣaḥīfah* render it abrogated, based on the Verse of the Sword and other similar verses (p. 216). Seeing all the above scripts and narrations in terms of the single dimension of peace versus war might imply a contradiction,

in which the final truth has to belong to either peace or war. The result will have to be an unreasonable fixed choice between peace and war, for every place, time, and circumstance. This (mis)understanding eliminates the profession, ministry, and art of foreign policy altogether!

What adds to the problem is that the number of cases of abrogation claimed by the students of the companions (*al-tābiʿīn*) is higher than the cases claimed by the companions themselves, a fact I concluded based on the survey mentioned earlier. After the first Islamic century, one may notice that jurists from the developing schools of thought began claiming many new cases of abrogation, which were never claimed by the *tābiʿīn*. Thus, abrogation became a method of invalidating opinions or narrations endorsed by rival schools of law. Abū Ḥassan al-Karkhī (d. 951 CE), as an example, writes: "The fundamental rule is: Every Qurʾānic verse that is different from the opinion of the jurists in our school is either taken out of context or abrogated" (Al-Alwani, 2001, p. 89). Therefore, it is not unusual in the *fiqhī* literature to find a certain ruling to be abrogating (*nāsikh*) according to one school and abrogated (*mansūkh*) according to another. This arbitrary use of the method of abrogation has exacerbated the problem of lack of multi-dimensional interpretations of the evidence.

Multi-dimensional thinking, introduced by the *maqāṣidī* approach, could offer a solution for the dilemmas of a large number of opposing evidence. Two pieces of evidence might be in opposition, in terms of this one attribute, such as war and peace, order and forbiddance, standing and sitting, men and women, etc. If we restrict our view to one dimension, we will find no way to reconcile the evidence. However, if we expand the one-dimensional space into two dimensions, the second of which is a *maqṣid*, to which both pieces of evidence contribute, then we will be able to resolve the opposition and understand/interpret the evidence in a unified context based on the purpose/*maqṣūd* of both pieces of evidence.

The following are typical examples from the classic literature on *ikhtilāf al-adillah* (opposition of evidence) (Ibn Qutaybah, 1978), which also represent some traditionalist and modernist views today.

However, it will be shown that the opposition claim could be resolved via the multi-dimensional and purposeful method proposed above.

1. There is a large number of opposing evidence related to different ways of performing acts of worship ('*ibādāt*), all attributed to the Prophet (SAW). These opposing narrations have frequently caused heated debates and rifts within Muslim communities. However, understanding these narrations within a *maqṣid* of magnanimity (*taysīr*) entails that the Prophet (SAW) did carry out these rituals in various ways, suggesting flexibility in such matters (Auda, 2006, Ch. 3). Examples of these acts of worship are the different ways of standing and moving during prayers, concluding prayers (*tashahhud*), compensating prostration (*sujūd al-sahw*), reciting 'God is Great' (*takbīr*) during '*īd* prayers, making up for breaking one's fasting in Ramaḍān, details of pilgrimage, and so on.

2. There is a number of opposing narrations that address matters related to custom (*al-'urf*), which were also classified as being in opposition. However, these narrations could all be interpreted through the *maqṣid* of 'universality of the law,' as Ibn 'Āshūr had suggested (Ibn 'Āshūr, 1997, p. 236). In other words, differences between these narrations should be understood as differences in the customs for which the various narrations attempted to show consideration, rather than contradiction. One example are two narrations, both attributed to Ā'isha, one of which forbids any woman from marriage without the consent of her guardian, while the other allows previously married women to make their own independent choice on marriage. It is also narrated that Aisha, the narrator of the two narrations, did not apply the condition of consent in some cases (Al-Siwāsī, n.d., Vol. 3, p. 258). Hanafis explained that, "the (Arabic) custom goes that a woman who marries without her guardian's consent is shameless" (Ibn 'Ābidīn, 2000, Vol. 3, p. 55). Understanding both narrations in the context of considering custom based on the law's universality resolves the contradiction and provides flexibility in carrying out marriage ceremonies

according to the different customs of different places and times.

The above method permits juridical policies related to family law which accommodate those socio-cultural norms that do not contradict with the fixed matters of Islam, even if they manifest in forms that are different from the forms existent during the early time of the message of Islam.

3. A number of narrations were classified under cases of abrogation, even though they were, according to some jurists, cases of gradual application of rulings. The purpose behind the gradual applications of rulings on a large scale is "facilitating the change that the law is bringing to society's deep-rooted habits" (Al-Ghazālī, 2002, p. 194). Thus, opposing narrations regarding the prohibition of liquor and usury, and the performance of prayers and fasting, should be understood in terms in the prophetic 'tradition' and 'policy' of the gradual application of high ideals in any given society that was originally far from these ideals.

4. A number of opposing narrations are considered 'contradictory' because their statements entail different rulings for similar cases. However, taking into account that these prophetic statements addressed different people (companions) could resolve the opposition. In these cases, the juridical *maqsid* of 'fulfilling the best interest of people' would be the key to interpreting these narrations based on the differences between these companions. For example, a few narrations reported that the Prophet (SAW) told a divorcee that she would lose custody of her children if she remarried (Ibn Rushd, n.d., Vol. 2, pp. 42-44). Yet, a number of other opposing narrations entail that divorcees could keep their children in their custody after they remarry. The opposing narrations included Umm Salamah's case; Umm Salamah kept custody of her children after she married the Prophet (SAW). Thus, relying on the first group of narrations, most schools of law concluded that custody is automatically transferred to the father if the mother gets married. They based their elimination of the second group of narrations on the fact that the first group was more authentic, being narrated

by Bukhārī and Ibn Ḥanbal. Ibn Hazm, on the other hand, accepted the second group of narrations and rejected the first group based on his suspicion of one of the narrator's capability of memorisation. However, after citing both opinions, al-San'ānī commented: "The children should stay with the parent who fulfils their best interest. If the mother is the better caregiver and will follow up on the children diligently, then she should have priority over them…The children have to be in the custody of the more capable parent, and the Law cannot possibly judge otherwise" (Al-San'ānī, 1379 AH, Vol. 3, p. 227).

This very issue is a subject of repeated and strong complaints from legal reformers and women's rights activists in various Muslim countries and communities. A *maqāṣidī* approach to this matter, which is al-San'ānī's approach mentioned above, puts first the welfare of children of divorce in this particular family policy. This is the policy that is closest to the Islamic system of values outlined earlier.

Multi-dimensionality also entails considering more than one *maqṣid*, if applicable. In this case, the way of resolving oppositions that fulfils these *maqāṣid* in the highest order should be given priority, according the hierarchies of *maqāṣid* that scholars had mentioned, for example, necessities (*ḍarūrāt*), needs (*ḥājīyāt*), and luxuries (*taḥsīnīyāt*), in this order.

The universality of the *Sharī'ah* across cultures

Al-Ṭāhir Ibn 'Āshūr (d.1325 AH/ 1907 CE) (1997) proposed a novel view of the fundamentals of custom (*al-'urf*) based on the purposes of Islamic law. He wrote a chapter in his important book, *Maqāṣid al-Sharī'ah* on *al-'urf*, which was named after a *maqṣid* that he called The Universality of the Islamic Law (p. 234). In that chapter, Ibn 'Āshūr did not consider the effect of custom on the application of narrations, as is the traditional view. Instead, he considered the effect of (Arabic) customs on narrations themselves. The following is a summary of Ibn 'Āshūr's argument.

Firstly, Ibn 'Āshūr explained that it is necessary for the Islamic law to be a universal law, since it claims to be 'applicable to all humankind everywhere on earth at all times,' as per a number of

Qur'ānic verses and *ḥadīth* that he cites. Then, Ibn 'Āshūr elaborates on the wisdom behind choosing the Prophet (SAW) from amongst Arabs, such as the Arabs' isolation from civilization, which prepared them, "to mix and associate openly with other nations with whom they had no hostilities, in contrast to Persians, Byzantines, and Copts." Yet, for Islamic law to be universal, "its rules and commands should apply equally to all human beings as much as possible," as Ibn 'Āshūr confirmed. That is why, he writes "God had based the Islamic law on wisdoms and reasons that can be perceived by the mind and which do not change according to nations and custom." Thus, Ibn 'Āshūr provided an explanation as to why the Prophet (SAW) forbade his companions to write down what he said, "lest particular cases be taken as universal rules." Ibn 'Āshūr then applied his ideas to a number of narrations, in an attempt to filter out Arabic customs from popular traditional rulings. He writes:

> Therefore, Islamic law does not concern itself with determining what kind of dress, house, or mount people should use...Accordingly, we can establish that the customs and mores of a particular people have no right, as such, to be imposed on other people as legislation, not even the people who originated them...This method of interpretation has removed much confusion that faced scholars in understanding the reasons why the law prohibited certain practices...such as the prohibition for women to add hair extensions, to cleave their teeth, or to tattoo themselves...The correct meaning of this, in my view...is that these practices mentioned in *ḥadīth* were, according to Arabs, signs of a woman's lack of chastity. Therefore, prohibiting these practices was actually aimed at certain evil motives... Similarly, we read:...'believing women should draw over themselves some of their outer garments' *(Sūrat al-Aḥzāb)*...This is a legislation that took into consideration an Arab tradition, and therefore does not necessarily apply to women who do not wear this style of dress...(p. 236).

Therefore, based on the purpose of universality of Islamic law, Ibn 'Āshūr suggests a method of interpreting narrations through understanding their underlying Arabic cultural context, rather than treating them as absolute and unqualified rules. Thus, he reads the above narrations in terms of their higher moral purposes, rather than norms in their own right.

Conclusion

Before calling for the application of the *Sharī'ah* in Muslim societies or juridical systems, policy and methods have to be based on new *ijtihād* in understanding and applying the evidence from verses of the Qur'ān or the *ḥadīth* of the Prophet (SAW). In order for this *ijtihād* to meet the needs of Muslims with changing circumstances, this paper suggests that it should be based on the following three criteria:

1. Differentiating between changing means and absolute ends. Some verses or *ḥadīth* are 'scripts of means' (*nuṣuṣ wasā'il*) and are not meant as ends in their own right; hence are not meant to be applied to the latter. A *maqāṣidī* understanding of these scripts helps in identifying their purposes.

2. A multi-dimensional understanding of opposing evidence. A *maqāṣidī* approach offers a solution for the dilemma of the large number of opposing evidence in our juridical heritage. If we restrict our view to one dimension, such as war and peace, order and forbiddance, standing and sitting, men and women, and so on, we will find no way to reconcile such evidence. However, if we expand the one-dimensional space into two dimensions, the second of which is a *maqṣid* to which both pieces of evidence contribute, then we will be able to resolve the opposition and understand/interpret the evidence in a unified context based on the purpose/*maqsūd* of both pieces of evidences.

3. Understanding the universality of the *Sharī'ah* across cultures. A *maqāṣidī* approach offers a method of interpreting the *ḥadīth* narrations themselves through understanding their underlying Arabic cultural context, rather than treating them as unqualified rules.

Failing to include the above criteria in that *ijtihād* would create applications (or rather, misapplications) of the *Sharī'ah* that are reductionist rather than holistic or multidimensional, and literal rather than moral. Thus, the proposed *maqāṣidī* approach takes juridical decisions and policies to a higher philosophical ground, and hence leads to a methodology that is holistic, multidimensional and moral.

This methodology achieves a much needed flexibility in Islamic rulings with the change of time and circumstances; a flexibility that is essential for the universality of Islam and its way of life.

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