Maqasid - Al- Shariah and Protection of Women's Rights

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Abstract

'Maqasid al-Shariah' are masalih that provide answers to the questions about the hierarchy of interests in Islamic law. Maqasid include the wisdoms behind rulings, such as 'enhancing social welfare,' which is one of the wisdoms behind charity, and 'developing consciousness of God,' which is one of the wisdoms behind fasting. Maqasid are also good ends that the laws aim to achieve by blocking, or opening, certain means. Thus, the Maqasid of 'preserving people's minds and souls' explain the total and strict Islamic ban on alcohol and intoxicants. Maqasid are also the group of divine intents and moral concepts upon which the Islamic law is based, such as, justice, human dignity, free will, magnanimity, facilitation, and social cooperation. Thus, they represent the link between the Islamic law and today's notions of human rights, development, and civility. The term 'maqsid' (plural: Maqasid) refers to a purpose, objective, principle, intent, goal, end [16: a, ii], telos (Greek), finalité (French), or Zweck (German) [21]. Maqasid of the Islamic law are the objectives/purposes behind Islamic rulings. [17: 183] For a number of Islamic legal theorists, it is an alternative expression to 'people's interests' (masalih).

Keywords: Maqasid; *masalih;* darurat*;* hajiyat*;* tahsiniyat.

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1. Introduction

Modern scholarship introduced new conceptions and classifications of *al-Maqasid* by giving consideration to new dimensions. First, considering the scope of rulings they cover, contemporary classifications divide Maqasid into three levels [22: 26-35]:

1- **General *Maqasid***: These *Maqasid* are observed throughout the entire body of the Islamic law, such as the necessities and needs mentioned above and newly proposed Maqasid, such as 'justice' and 'facilitation.'

2- **Specific *Maqasid***: These Maqasid are observed throughout a certain 'chapter' of the 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 *Maqasid***: These *Maqasid* 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 and fasting person to break his/her fasting, and the intent of feeding the poor in banning Muslims from storing meat during Eid days.

In order to remedy the individuality drawback, the notion of Maqasid has been expanded to include a wider scope of people - the community, nation, or humanity, in general. Ibn Ashur, for example, gave *Maqasid* that are concerned with the 'nation' (*ummah*) priority over Maqasid that are concerned with individuals. Rashid Rida, for a second example, included 'reform' and 'women's rights' in his theory of *Maqasid*. Yusuf al-Qaradawi, for a third example, included 'human dignity and rights' in his theory of *Maqasid*.

The following are examples of these new universal *Maqasid*:

1- Rashid Rida (d.1354AH/1935 CE) surveyed the Quran to identify its Maqasid, 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, and economic reform, and women rights' [25: v. 7: 100].

2- Al-Tahir Ibn Ashur (d.1325 AH/1907 CE) proposed that the universal *maqsid* of the Islamic law is to maintain 'orderliness, equality, freedom, facilitation, and the preservation of pure natural disposition (*fitrah*)' [17:183]. It is to be noted that the purpose of 'freedom' (hurriyah), which was proposed by Ibn Ashur and several other contemporary scholars, is different from the purpose of 'freedom' (`itq), which was mentioned by jurists [10: v. 4: 513]. Al-`itq is freedom from slavery, not 'freedom' in the contemporary sense. 'Will' (*Mashi'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 Quran as the 'will to believe or disbelieve' (for example, Al-Kahf 18:29).

In terms of terminology, 'freedom' (*al-hurriyah*) is a 'newly-coined' purpose in the literature of the Islamic law. Ibn Ashur, interestingly, accredited his usage of the term hurriyah to 'literature of the French revolution, which were translated from French to Arabic in the nineteenth century CE' [16: 268], even though he elaborated on an Islamic perspective on freedom of thought, belief, expression, and action in the *mashi'ah* sense [16: 270-281].

1- Mohammad al-Ghazali (d.1416 AH/ 1996 CE) called for 'learning lessons from the previous fourteen centuries of Islamic history,' and therefore, included 'justice and freedom' in *Maqasid* at the necessities level [11: 49].

2- Yusuf al-Qaradawi (1345 AH/1926 CE -) also surveyed the Quran and concluded the following universal *Maqasid*: 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 [8]. However, al-Qaradawi explains that proposing a theory in universal Maqasid should only happen after developing a level of experience with detailed scripts (Oral Discussions, London, UK, March, 2005, and Sarajevo, Bosnia, May, 2007).

3- Taha al-Alwani (1354 AH/ 1935 CE -) also surveyed the Quran to identify its 'supreme and prevailing' *Maqasid*, which are, according to him, 'the oneness of God (*tawhid*), purification of the soul (*tazkiyah*), and developing civilisation on earth (*imran*)' [3: 25]. He is currently writing a separate monograph to elaborate on each of these three Maqasid (Oral Discussion, Cairo, Egypt, April, 2007).

All of the *Maqasid* in the diagram were presented as they appeared in the minds and perceptions of the above jurists. None of the following classic or contemporary classifications and structures could claim to be 'according to the original divine will.

If we refer to nature that God created, we will never find natural structures that could be represented in terms of circles, pyramids, or boxes, as the above diagram shows. All such structures in science and humanities too, and the categories they include, are human-made for the sake of illustration for themselves and other humans.

Therefore, *al-Maqasid* structure is best described as a 'multi-dimensional' structure, in which levels of necessity, scope of rulings, scope of people, and levels of universality are all valid dimensions that represent valid viewpoints and classifications.

The above twentieth-century views also show that *Maqasid* al-Shariah are, actually, representations of each scholar's own viewpoint for reform and development of the Islamic law, despite the fact that all these *Maqasid* were 'induced' from the scripts.

This fusion of the scripts and contemporary needs for reform gives *al-Maqasid* special significance. We view Maqasid as one of today's most important intellectual means and methodologies for Islamic reform. It is a

methodology from 'within' the Islamic scholarship that addresses the Islamic mind and Islamic concerns. This approach is radically different from projects for Islamic 'reform' and 'renewal' that come from 'without' the Islamic terminology and scholarship.

We shall now present a brief historical account of the ideas of *Maqasid*, from the Companions of the Prophet's (peace be upon him) era to our current time.

2. Al-Maqasid *in the Companions' Era*

The history of the idea of speculating a certain underlying purpose, aim, or intent of Quranic or Prophetic instructions goes back to the Companions of the Prophet, as narrated in a number of incidents.

One clear and popular example is the multi-chained hadith of 'afternoon prayers at Bani Quraizah, one of the Jewish tribes resided in Madinah,' in which the Prophet sent a group of Companions to Bani Quraizah, and ordered them to pray their afternoon (asr) prayer there (Al-Bukhari). The span of time allowed for asr prayers had almost expired before the group reached Bani Quraizah. Thus, they found themselves divided into supporters of two different opinions, one opinion entailed praying at Bani Quraizah's anyway and the other opinion entailed praying on the way (before the prayer time was over).

The rationale behind the first opinion was that the Prophet's instruction was clear in asking everybody to pray at Bani Quraizah, while the rationale of the second opinion was that the Prophet's 'purpose/intent' of the order was to ask the group to hasten to Bani Quraizah, rather than 'meaning/intending to' postpone prayers until after its due time.

According to the narrator, when the Companions later narrated the story to the Prophet, he approved both opinions. The approval of the Prophet, as jurists and Imams said, entails the permissibility and correctness of both views. The only prime jurist who disagreed with the Companions who prayed on the way was Ibn Hazm al-Zahiri (the literalist), who wrote that they should have prayed the 'afternoon prayer' after they reach Bani Quraizah, as the Prophet had said, even after midnight [19: 291].

Another incident, which shows a more serious consequence of taking a 'purpose-oriented' approach to the Prophetic instructions occurred during the days of Umar, the second caliph. The status of Umar in Islam and his continuous and wide-ranging consultation of a large number of Companions, make his opinions of special significance.

In this incident, the Companions asked Umar to distribute the newly-'conquered' lands of Egypt and Iraq amongst them as some sort of 'spoils of war.' Their argument relied on the clear and specific verses of the Quran that allowed fighters their 'spoils of war' [2: 14, 81; 14: 110].

Umar refused to divide whole cities and provinces over the Companions by referring to other verses, with more general expressions, stating that God has a 'purpose' of 'not making the rich dominate wealth. Therefore, Umar

(and the Companions who supported his opinion) understood the specifics of the verses of 'spoils of war' within the context of a certain purpose (*maqsid*) of the law. This purpose was, 'diminishing the difference between economic levels,' to use familiar contemporary terms.

The significance of Umar's *ijtihad* (personal reasoning) is that it could, traditionally, be considered as a 'collective ijtihad' carried out by (a large number of) the Companions. This *ijtihad* has its significance in fiqh (Islamic Jurisprudence), regardless of the 'authority' of a Companion's opinion, which is a matter of difference of opinion within traditional schools of the law .

Another telling example is Umar's application of a moratorium on the (Islamic) punishment for theft during the famine of Medina [12: 190]. He thought that applying the punishment prescribed in the scripts, while people are in need of basic supplies for their survival, goes against the general principle of justice, which he considered more fundamental.

A third example from Umar's fiqh (application of the law) is when he did not apply the 'apparent meaning' of the hadith that clearly gives a soldier the right to the spoils of war from opponents [20: 291]. He decided to give soldiers only one-fifth of these spoils, if they were 'significantly valuable,' with a purpose to achieve fairness amongst soldiers and enrich the public trust.

A fourth example is Umar's decision to include horses in the types of wealth included in the obligatory charity of zakah, despite the Prophet's clear instruction to exclude them. Umar's rationale was that horses at his time were becoming significantly more valuable than camels, which the Prophet included in *zakah* at his time [10: v. 2:192; 13: v. 4: 216]. In other words, Umar understood the 'purpose' of the zakah in terms of a form of social assistance that is paid by the wealthy for the sake of the poor, regardless of the exact types of wealth that were mentioned in the Prophetic tradition and understood via its literal implication [8 : 229].

All known schools of law, except for the Hanafis, are against such expansion of 'the pool of charity' (*wi`a' al-zakah*), which illustrates how literalism had a strong influence on traditional juridical methods. There is no zakah on horses, commercial goods, or any other type of wealth' [19: 209]. It is clear how such opinion hinders the institution of zakah from achieving any meaningful sense of justice or social welfare.

However, Umar did not take this purpose-oriented approach to all rulings of the Islamic law. Al-Bukhari narrates that Umar was asked: 'Why do we still jog around the Kabah with our shoulders uncovered even after Islam had prevailed in Makkah?' The story behind the question is that after the 'conquest of Makkah,' the people of Makkah claimed the Prophet and his Companions lost their health during their prolonged stay in Madinah. The Prophet, therefore, ordered the Companions to jog around the Kabah with their shoulders uncovered in a show of strength. Umar, however, did not take a purpose-oriented approach to this question. He answered: 'We do not cease doing anything we used to do at the Prophet's time' [5].

Umar, thus, made a distinction between 'acts of worship' (*ibadat*) and 'worldly transactions' (*muamalat*), a

distinction that was later endorsed by all schools of usul al-fiqh. Al-Shatibi, for example, expressed this distinction when he wrote: 'Literal compliance is the default methodology in the area of acts of worship (*ibadat*), while the consideration of purposes is the default methodology in the area of worldly dealings (*muamalat*)' [9: v. 2: 6].

The above examples are meant to illustrate early conceptions of *Maqasid* in the application of the Islamic law and the implications of giving them fundamental importance.

3. Maqasid-al-shariah and protection of women's rights

Prejudices against women are a universal phenomenon, found in almost every human society. When such prejudices are sought to be given religious sanction, it becomes much more difficult to do away with them. Lamentably, certain views and prescriptions contained in the corpus of traditional Muslim jurisprudence or fiqh do indeed militate against women, and even go against the spirit and teachings of Islam, a religion that stresses women's rights and equal status.

Things, however, are beginning to change today. Some Muslim scholars, based in certain Arab countries and in the West, are developing a contextually-relevant fiqh for women, or what is called fiqh al-nisa. One of the leading scholars in this regard is the well-known Allamah Yusuf al-Qaradawi, an Egyptian alim who is now based in Qatar. He has issued numerous fatwas related to women's issues that depart, in significant ways, from traditional fiqh prescriptions. For instance, he argues that it is not prohibited for a man to shake a woman's hand as a customary greeting, for a woman to take up employment outside the home and even to become the head of state of a country. He engages in contextual ijtihad or personal reasoning based on the principal sources of the Islamic tradition—the Quran and Hadith—to come up with such novel views.

It is reported that, in the context of the death of the Emperor of Persia, who was succeeded by his daughter, the Prophet mentioned that a people who were ruled by a woman would not succeed. This hadith report has been taken by most ulema to imply that a woman should never become the head of state of a country.

Allamah al-Qaradawi engages in a contextual analysis of this report to come out with a fiqh prescription that is precisely the opposite of what most traditionalist ulema uphold. He argues that this report has to be understood in the backdrop of the context that the Prophet was addressing. That was a time when many countries, such as Persia, were ruled by male monarchs, some of whom claimed to be divinely-appointed. They enjoyed dictatorial powers, and could do just as they pleased. There was no concept of democracy then. That was the context in which the Prophet had made his remark. Today, Allamah al-Qaradawi argues, the political context is totally different. Most countries today are, at least in theory, no longer ruled by dictatorial monarchs, and pay at least lip-service to democracy. Today, a single person cannot decide the fate of an entire country. Rather, governance has now become a vastly complicated affair. There is a whole system or apparatus for this, a set of formal rules, a massive bureaucracy, parliaments, courts and so on. Hence, Allamah al-Qaradawi argues, in today's context it is indeed permissible for women to become the head of state. He backs this conclusion by pointing to the reference in the Muslim tradition to Bilquis, Queen of Sheba, who was permitted to rule by the Prophet

Sulaiman or Solomon. Since Muslims believe that Solomon was a divinely-appointed Prophet and that all prophets must be respected and their example followed, obviously the practice of Solomon in allowing Bilquis to rule cannot be considered to be un-Islamic.

If you see the countries that have had women heads of state, such as India, Bangladesh, Ireland, Pakistan and Sri Lanka, you will have to admit that these women did not rule any worse than their male counterparts before or after them. These countries did not decline just because they had female rulers.

Sadly, we have few ulema of the caliber of Allamah al-Qaradawi in South Asia who are seeking to evolve contextually-relevant understandings of women with regard to fiqh-related issues. Take, for instance, the All-India Muslim Personal Law Board, which sees itself as the apex body of the Indian ulema with regard to Muslim personal law issues, including, and especially, those related to women and family matters. The vast majority of the members of the Board are very traditionalist-minded. I personally feel that the Board must include more ulema, as well as Muslim social activists, who are better aware of the contemporary social context and demands, including the many problems faced by Muslim women, and who are able to engage in ijtihad with regard to a number of problematic issues. Sadly, there are very few such ulema in the Board, and their views are silenced by the conservatives, who are averse to ijtihad and insist on taqid or blindly following the prescriptions of the medieval ulema of the different maslaks or schools of Muslim jurisprudence.

Take the case, for instance, the issue of three talaqs in one sitting, which the Board has yet to resolve. This practice has led to literally thousands of Muslim women being arbitrarily divorced by their husbands. Most traditional jurists are of the view that three talaqs in one sitting constitute an irrevocable and final divorce. But, there are others today, as well as in the past, such as Ibn Taimiyah, Ibn al-Qaiyyim, Allamah Showkani and so on, and the ulema of the Ahl-e Hadith and Shia Jafari schools, who take this as one, revocable talaq. There are also statements of the Prophet to back their argument. The traditionalists refuse to listen to their claims, however, because they are wedded to the doctrine of taqlid.

One way to win them over is to consider the issue in the backdrop of the spirit or aims of the shariah, whose basic thrust is establishing justice. When the matter is understood in this way, and if the ulema can be convinced that the practice of triple talaq in one sitting is resulting in a gross violation of justice, the fundamental principle of the shariah, by causing such great suffering to divorced women and their children, it might make them change their views or cause them to allow for talfiq, or resorting to the opinions of other schools of Muslim jurisprudence, in such matters. There is a desperate need for our Indian ulema, including those associated with the Board, to expand their thinking about these issues, and to give particular attention to social realities, needs and problems, rather than advocating rigid taqlid.

In such matters, taqlid can amount to ignoring the aims of the shariah (maqasid al-shariah). Sadly, the issue of maqasid al-shariah is not given much attention to in the madrasas where our ulema are trained. This is a reflection of the fact that our madrasas, and traditional Islamic thought more generally, have remained stuck in a narrow framework defined by medieval fiqh. Today, however, some Muslim scholars, in Egypt and America, for instance, are trying to revive the tradition of articulating fiqh prescriptions in the light of maqasid al-shariah,

and this is also reflected in some of their fatwas on women-related issues. Some of them resort to, and freely take from, other schools of Muslim jurisprudence, not being bound by the opinions of just one school that they might find too strict or inappropriate as regards issues related to women, for instance. Others advocate what is called fiqh us-sunnah, that is approaching the Quran and the genuine Hadith directly, instead of being bound by the prescriptions of the established schools of fiqh. In other words, and this is an approach we agree that, they take what they find useful in the established fiqh but abandon what they might feel is against the Quran and Prophetic Sunnah. In this way, they have been able to open up new spaces and opportunities for Muslim women and to uphold their rights, as given in the Quran, which may have been overshadowed, neglected or suppressed in the traditional corpus of fiqh.

This approach is in accord with the established principle in usul al-fiqh, the principles of Muslim jurisprudence, that changing conditions and times might necessitate changes in some ahkamat or juridical rules. This principle validates new solutions to new social contexts and social problems, and is related to the wider issue of ijtihad. The noted eighteenth century South Asian Muslim scholar, Shah Waliullah Dehlawi, advocated the same sort of approach. He critiqued taqlid and argued that only those prescriptions of the corpus of medieval fiqh should be accepted that were in accordance with the Quran and the genuine Hadith. He was also open to the idea of ulema of one maslak borrowing from other maslaks where the need so arose. Ironically, although all the major Sunni traditions in South Asia, including the Deobandis, Barelvis and Ahl-e Hadith, claim to follow in the tradition of Shah Waliullah, they have not shown the same broadmindedness as he in the matter of ijtihad and fiqh. The Deobandis and Barelvis still insist on rigid taqlid of Hanafi jurisprudence, some aspects of which clearly militate against women's rights, even those that are granted to them by the Quran.

4. Conclusion

In this context, as a Muslim female I appeal to our ulema to learn from the example of Shah Waliullah, whom they hold in high esteem, and to adopt a less rigid and more expansive approach to the question of taqlid versus ijtihad, including on some very problematic issues concerning women.

The expansion of the scope of Maqasid allows them to respond to global issues and concerns, and to evolve from 'wisdoms behind the rulings' to practical plans for reform and renewal.

Finally, contemporary scholarship has introduced new universal *Maqasid* that were directly induced from the scripts, rather than from the body of fiqh literature in the schools of Islamic law. This approach, significantly, allowed *Maqasid* to overcome the historicity of fiqh edicts and represent the scripts' higher values and principles. Detailed rulings would, then, stem from these universal principles.

References

[1] Abu al-Hussain Muslim. Sahih Muslim. ed. Mohammad Fouad Abdul-Baqi. Beirut: Dar Ihya al-Turath al-Arabi, no date.

[2] Abu Yusuf Yaqub. Al-Kharaj. Cairo: al-Matbah al-Amiriyah, 1303 AH.

[3] Taha Jabir al-Alwani. Maqasid Al-Shariah. 1 ed. Beirut: IIIT and Dar al-Hadi, 2001.

[4] Ali Abu al-Hasan Al-Amidi. Al-Ihkam fi Usul al-Ahkam. Beirut: Dar al-Kitab al-Arabi, 1404 AH. 287.

[5] Muhammad al-Bukhari. Al-Sahih. ed. Mustafa al-Bagha. 3rd ed. Beirut: Dar Ibn Kathir, 1986.

[6] Abu Hamid al-Ghazali. Al-Mustasfa fi Ilm Usul Al-Fiqh. ed. Mohammed Abdul- Risalah, 15th ed, 1985.

[7] Muhammad al-Ghazali. Kayf Nata`amal Ma`a Al-Quran Al-Azeem. 1st ed. Cairo: Dar al-Salam Abdul Shafi. 1st ed. Beirut: Dar al-Kutub al-Ilmiyah, 1413 AH.

[8] Yousuf Al-Qaradawi. Fiqh Al-Zakah. Cairo: Al- Shorouk, 1999.

[9] Abu Ishaq Al-Shatibi. al-Muwafaqat fi Usul ash-Shariah. ed. Abullah Diraz. Cairo: al-Maktabah al-Tawfiqiyyah, 2003.

[10] Kamal al Din Ibn al-Humam al-Siwasi. Sharh Fath Al-Qadir. 2nd ed. Beirut: Dar al-Fikr, no date.

[11] Jamal Atiyah. Nahwa Tafil Maqasid Al-Shariah. Amman: al-Mahad al-Ali lil-Fikr al-Islami, 2001.

[12] Mohammad Manhaj Biltaji. Umar Ibn Al-Khatab Fil Tashree`. 1st ed. Cairo: Dar al-Salam, 2002.

[13] Abu Umar Ibn Abdul-Barr. Al-Tamhid. ed. Mohammad al-Alawi and Mohammad al-Bakri. Morocco: Wazarat Umum al-Awqaf, 1387 AH.

[14] Yahya Ibn Adam. al-Kharaj. Lahore, Pakistan: al-Maktabah al-Ilmiyah, 1974.

[15] Abu Bakr Ibn al-Arabi. Al-Mahsoul Fi Usul Al-Fiqh. ed. Hussain Ali Alyadri and Saeed Foda. 1st ed. Amman: Dar al-Bayariq, 1999.

[16] Mohammad al-Tahir Ibn Ashur. Ibn Ashur-Treatise on Maqasid Al-Shariah. trans. Mohamed El-Tahir El-Mesawi. vol. 1. London-Washington: International Institute of Islamic Thought, 2006.

[17] Mohammad al-Tahir Ibn Ashur. Maqasid Al-Shariah Al-Islamiyah. ed. Mohamed El-Tahir El-Mesawi. Kuala Lumpur: Al-Fajr, 1999

[18] Mohammad al-Tahir Ibn Ashur. Usul Al-Nizam Al-Ijtimai Fil Islam. ed. Mohamed El-Tahir Mesawi. Amman: Dar al-Nafais, 2001.

[19] Ibn Hazm. Al-Muhalla. ed. Lajnat Ihiya' al-Turath al-Arabi, 1st ed. Beirut: Dar al-Afaq, no date.

[20] Ibn Rushd, (Averroes). Bidayat Al-Mujtahid wa Nihayat Al-Muqtasid. Beirut: Dar al-Fikr, no date.

[21] Rudolf von Jhering. Law as a Means to an End (Der Zweck im Recht). trans. Isaac Husik, 2nd reprint ed. New Jersey: The Lawbook Exchange (Originally published 1913 by Boston Book Co.), 2001.

[22] Nauman Jughaim. Turuq Al-Kashf an Maqasid Al-Shari. Malaysia: Dar al-Nafais, 2002.

[23] A.H Maslow, "A Theory of Human Motivation," Psychological Review, no. 50, 1943, pp. 370-96.

[24] A.H. Maslow Motivation and Personality, 2 Ed. New York: Harper and Row, 1970.

[25] Rashid Rida, Tafsir al-Manar. 8vols. Cairo: Bulaq, 1901.