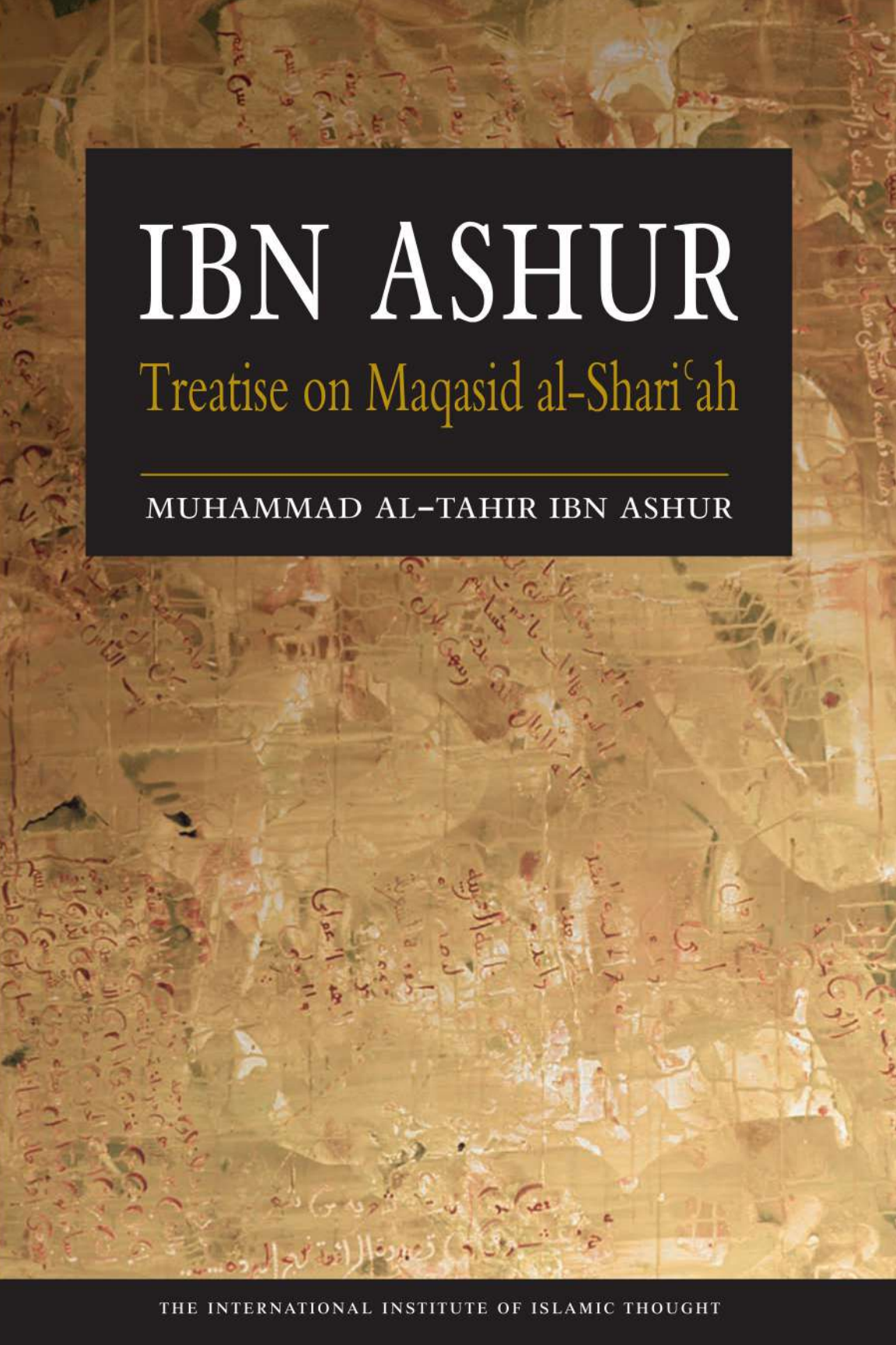

IBN ASHUR

Treatise on Maqasid al-Shari'ah

MUHAMMAD AL-TAHIR IBN ASHUR

THE INTERNATIONAL INSTITUTE OF ISLAMIC THOUGHT

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FOREWORD

Of knowledge, we have none, save what
You have taught us. (The Qur'an 2:32)

The International Institute of Islamic Thought (IIIT) has great pleasure in presenting this scholarly work on the topic of *Maqāṣid al-Sharīʿah*. The author of the work, Shaikh Muhammad al-Tahir ibn Ashur, is the most renowned Zaytuna Imam and one of the great Islamic scholars of the 20th century.

The publication of the English translation of Shaikh Ibn Ashur's *Treatise on Maqāṣid al Sharīʿah** is a breakthrough in the studies on Islamic law in the English language.

In this book, Ibn Ashur proposed *Maqāṣid* as a methodology for the renewal of the theory of the Islamic law, which has not undergone any serious development since the era of the great imams, starting with al-Shāfiʿī in the second/eighth century and ending with al-Shāṭibī in the eighth/fourteenth century. Ibn Ashur's methodology takes a centrist position between two contemporary extremes, namely, 'neo-literalism', which ignores rationales and valid re-interpretations of the Islamic rulings for the sake of literal traditional views, and 'neo-rationalism', which ignores the religious and cultural identity of Muslims in its quest for 'modernization' and 'rationality'. *Maqāṣid* of the Islamic law highlights rationales, purposes and common good in the Islamic rulings and stresses their importance, while basing itself on the Islamic scripts and observing the Islamic faith.

* It was a challenging effort to render the term *Maqāṣid* in English. We chose to leave it as it is in the book's title. However, throughout the book, it was translated as: goals, objectives, higher objectives, principles, intents, purposes, and ends, depending on context. A glossary of the more common terms is included at the end of this book.

Ibn Ashur also addressed the sensitive topic of the intents/*Maqāṣid* of Prophet Muhammad (*ṢAAS*)* behind his actions and decisions. He introduced criteria to differentiate between the Prophetic traditions that were meant to be part of the Islamic law, and the Prophetic actions/sayings that were meant to be for the sake of specific purposes such as political leadership, court judgment, friendly advice, and conflict resolution, etc. But Ibn Ashur's most significant contribution in this book has been the development of new *Maqāṣid* by coining contemporary terminology that were never formulated in traditional *uṣūl al-fiqh*. For example, Ibn Ashur developed the theory of the 'preservation of lineage' into 'the preservation of the family system', the 'protection of true belief' into 'freedom of beliefs', etc. He also introduced the concepts of 'orderliness', 'natural disposition', 'freedom', 'rights', 'civility', and 'equality' as *Maqāṣid* in their own right, and upon which the whole Islamic law is based. This development opens great opportunities for the Islamic law to address current and real challenges for Muslim societies and Muslim minorities.

The IIIT, established in 1981, has served as a major center to facilitate sincere and serious scholarly efforts based on Islamic vision, values and principles. Its programs of research, seminars and conferences during the last twenty four years have resulted in the publication of more than two hundred and fifty titles in English and Arabic, many of which have been translated into several other languages. IIIT has given especial attention to the topic of *Maqāṣid* and has published several books and theses in Arabic and English on the topic, the latest of which is *Imam al-Shāṭibī's Theory of the Higher Objectives and Intents of Islamic Law* by Ahmad al-Raysuni (published in English by the IIIT in 2005).

We would like to express our thanks to the editorial and production team at the IIIT London Office who labored tirelessly to check and ensure the accuracy of the translation, the references cited, as well as revising some of the complex and difficult passages; they include, Sylvia Hunt, Maryam Mahmood, Shiraz Khan, and Fouzia Butt.

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* *(ṢAAS) – Ṣallā Allāhu ʿalayhi wa sallam*. May the peace and blessings of God be upon him. Said whenever the name of Prophet Muhammad is mentioned.

We would also like to express our thanks to the translator of the work, Mohamed El-Tahir El-Mesawi, who, throughout the various stages of production, cooperated closely with the editorial team. His extensive notes added valuable and useful contemporary and scholarly dimensions to Shaikh Ibn Ashur's masterpiece on *Maqāṣid*.

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Muhammad al-Tahir Ibn Ashur

(1879–1973)

Muhammad al-Tahir ibn Ashur was born in Tunis in 1879 to an affluent family of high social standing. Originally of Andalusian origin dedication to the pursuit of knowledge seems to have been a continuous and established tradition throughout the successive generations of the family's ancestors.

Although Ibn Ashur's father is not mentioned by Tunisian biographers as one of the *ʿulamā'* elite of his time, his paternal grandfather, Muhammad al-Tahir ibn Ashur (1815–1868) is usually referred to as one of the finest and most authoritative scholars of his time. Ibn Ashur, however, was born into the household of his maternal grandfather, the eminent scholar and statesman, Shaikh Muḥammad al-ʿAzīz Bū ʿAttūr (1825–1907), one of the foremost collaborators of the renowned statesman Khayr al-Dīn Pasha (1822–1889) during his reform efforts of the 1860s and 1870s, before French colonial occupation. The young Ibn Ashur thus entered a family milieu that was at once familiar and, to a reasonable extent, aligned with the reformist movement that had been germinating in Tunisia for decades.

In 1892 Ibn Ashur entered the Zaytūna (a formal educational establishment, like al-Azhar in Cairo) and arrangements were made for the appointment of his future teachers. An eminent senior professor was chosen for this task. As their biographical data clearly show, almost all the teachers appointed for the young Ibn Ashur were reform-minded *ʿulamā'* involved in the 1860s–70s reform attempts led by Khayr al-Dīn.

During these year Ibn Ashur achieved a number of high level qualifications, which he considered merely formal requisites to consolidate

his scholarly capacity and prove his personal worth. His real aim was general presence amongst the Zaytūna's permanent teaching staff and particularly close contact with its authoritative professors, notably his foremost teachers, ʿUmar ibn al-Shaikh (1826–1911)and Sālim Bū Hājib (1828–1924). It was a valuable opportunity for it allowed him to deepen and broaden the scope and nature of his knowledge in a manner more specialized and focused than general formal classes would have made possible.

This type of extensive contact study was also crucial in qualifying Ibn Ashur to earn what is known in classical Islamic scholarship as an *ijāzah*, an attestation by a prominent scholar(s) that a student has mastered a specific branch of knowledge and become a reliable authority in it. Nevertheless, whatever formal training Ibn Ashur might have received and whatever the influence of his teachers, personal dedication and natural talent always played an equally essential role in developing his excellent academic and scholastic abilities as well as mastery of an amazingly wide range of disciplines. Ibn Ashur quickly rose to various prominent positions and in 1927 was promoted to the office of chief judge and within a few years (1932), named Shaikh al-Islam, an illustrious post which conferred upon him the highest scholarly rank and authority in the country.

Despite his administrative duties and teaching commitments at the Zaytūna and elsewhere, Ibn Ashur was a prolific writer and author publishing many articles and works. He was an almost regular contributer to most of the leading journals and magazines published in Tunisia as well as others published in Egypt and Syria.

The long and varied list of his works include *Tafsīr al-Taḥrīr wa al-Tanwīr* (a fifteen-volume commentary on the Qur'an), *Kashf al- Mughaṭṭā* (a commentary on the *Muwaṭṭa'* of Mālik ibn Anas), *al-Naẓar al-Fasīḥ* (a commentary on *al-Jāmiᶜ al-Ṣaḥīḥ* of Muḥammad ibn Ismāᶜīl al-Bukhārī), *Alaysa al-Ṣubḥ bi-Qarīb* (an historical and critical study of Islamic education accompanied by a project for reforming it), *Uṣūl al-Niẓām al-Ijtimāᶜī fī al-Islām* (a study of the principles and enduring values of the Islamic socio-political system), *Ḥāshiyat al-Tawḍīḥ wa al-Taṣḥīḥ* (a critical and elaborate commentary on *Sharḥ Tanqīḥ al-Fuṣūl*, a treatise on *uṣūl al-fiqh* by the Mālikī jurist Shihāb al-Dīn al-

Qarāfī) and *Maqāṣid al-Shariᶜah al-Islāmiyyah* the translation of which is provided in this publication.

This latter work on the higher objectives of the Shariᶜah was first published in 1946 in Tunis. It was the outcome of a deep and serious study of the possible ways and means for revitalizing Islamic jurisprudence. The issue had become a major concern for the author as early as 1903 when he met Shaikh Muhammad Abdu, the spokesman for modern Islamic reformism in Egypt and the Arab world, during his visit to Tunisia. The meeting sealed Ibn Ashur's alignment with the spirit of the Islamic reform movement and shortly thereafter he began to publish articles on the need for reforming Islamic education (in terms of content, method and administration etc.) laying special emphasis on the place that *maqāṣid al-Shariᶜah* should occupy in the teaching and study of Islamic jurisprudence. Indeed interest in the subject had been growing since *al-Muwāfaqāt,* the work of Abū Isḥāq al-Shāṭibī (d. 790/1388) was first published in Tunis in 1883.

Ibn Ashur's work on *Maqāṣid al-Shariᶜah* is a pioneering study of the Shariᶜah's higher objectives and it is not known whether any modern jurist prior to Ibn Ashur has made any attempt to develop a comprehensive and systematic study of its different aspects. The work stands as a testament to his deeply cherished objective of establishing *maqāṣid al-Shariᶜah* as an independent discipline in its own right, under the title *ᶜIlm Maqāṣid al-Shariᶜah*.

Ibn Ashur worked tirelessly to the end, never laying down his pen nor losing the great pleasure that reading and research afforded him until he breathed his last on 13 Rajab 1393 (12 August 1973) at the venerable age of ninety-four. He left behind him a wealth of long and detailed experience in public and administrative life as well as a rich legacy of diverse and scholarly publications and articles absolutely unmatched in nineteenth and twentieth century Tunisia, many of which still await critical study and publication today.

Author's Preface

All praise be to God for guiding us to His Law and Way, and for inspiring us with the means of realizing His higher objectives (*maqāṣid*) and outlining systematic argumentation to establish them. May the blessings of God be upon our Prophet Muhammad *(ṢAAS)*, through whom God has laid the solid foundations for reform. May His Mercy be upon the Prophet's Companions and the members of his household, luminaries of Islam and jewels in its crown, and upon the leading scholars through whom divine knowledge has radiated following the advent of Islam.

I intend in this book to develop some important discourses on the *maqāṣid* of the Islamic Shariᶜah and to illustrate them and argue for their affirmation. The objective of these discourses is that those seeking to study and understand the religion of Islam will take them as a guide and frame of reference when faced with differences of opinion and change in time. I also intend these discourses to be a means of minimizing disagreement between the jurists of the different areas of Islam. My purpose is, moreover, to train the jurists' followers, when facing such a situation, to be just in preferring one opinion over another, so that fanaticism is rejected and truth accepted. Likewise, the aim of this book is twofold. It consists of assisting Muslims with a healing legislation for their contingent interests when new cases (*nawāzil*) emerge and matters become complicated, and of providing them with a decisive opinion in the face of conflicting arguments by different juristic schools (*madhāhib*) and the competing views of

their respective scholars. My awareness of the difficulties confronting the contending jurists in their argumentation and reasoning concerning Shari^{c}ah-related matters prompted me to devote my attention to this subject. The case of the jurists is unlike that of the scholars of the rational sciences. The latter base their logical and philosophical reasoning on necessary evidence, or on established observation or taken-for-granted postulates that force all contestants to stop arguing, thus resolving all points of dispute between them.

In contrast, the jurists do not in their juridical reasoning draw on necessary and categorical (*ḍarūriyyah*) evidence or on evidence bordering need, that the obstinate is forced to yield and the confused is guided. In my opinion, the scholars of the Shari^{c}ah have a stronger right to such compelling reasoning, and the Hereafter is better than this worldly life.

One might believe that the propositions and rules (*masā'il*) of the science of *uṣūl al-fiqh* are sufficient to guide anyone seeking the above-mentioned objective. However, when one masters *uṣūl al-fiqh*, one will certainly realize that most of its propositions are contested among scholars, whose differences over the basic principles (*uṣūl*) continue owing to their disagreement on applied legal rulings (*furū^{c}*). In other words, this situation exists because the general rules and universal principles of *uṣūl al-fiqh* were derived from the particular qualities of those rulings. This is because the systematic compilation (*tadwīn*) of the science of *uṣūl al-fiqh* was completed only nearly two centuries after the codification of fiqh (moral law). It has to be mentioned, furthermore, that a number of jurists were weak in matters of *uṣūl*, and thus they engaged in the field of fiqh with inadequate knowledge. In fact, when new cases requiring original legal rulings presented themselves, only a few jurists could make use of the general rules and universal principles of jurisprudence laid down in *uṣūl al-fiqh*. Accordingly, *uṣūl al-fiqh* has never been the final arbiter whose verdict is accepted by those disagreeing on matters of fiqh. Bringing the jurists to one unified opinion or at least reducing their differences of opinion thus proved difficult, if not impossible.

In addition, most of the propositions and inquiries of *uṣūl al-fiqh* hardly serve the purpose of expounding the underlying wisdom

(*ḥikmah*) and establishing the goals of the Shariᶜah. Rather, they revolve around the deduction of provisions (*aḥkām*) from the literal expressions and words (*alfāẓ*) of the Lawgiver by means of methodological rules enabling the person knowing them to derive positive legal rulings from those expressions, or to extract certain attributes and qualities (*awṣāf*) suggested by them. These qualities and attributes would then be considered a means of legislation. Hence, many new cases would be subsumed under one particular expression of analogical deduction on the basis that all these cases have in common the attribute that is thought to be the intended meaning of the words of the Lawgiver, which is called the ᶜ*illah* (*ratio legis*).

To express this point more clearly, those methodological rules would enable whoever is conversant with them to argue for the sake of detailed legal rulings (*furūᶜ*) derived by the jurists before the founding of the science of *uṣūl al-fiqh*. Therefore, thanks to those rules, the rulings become acceptable to those practising them from among the followers of the different juristic schools (*madhāhib*). In brief, the most important purpose those methods can serve is to explicate the meanings of the texts of the Shariᶜah under their different conditions of isolation (*infirād*), association (*ijtimāᶜ*), or separation (*iftirāq*), so as to allow the person skilled in them to reach almost the same understanding as that of a native Arabic speaker. Those methods include issues concerning the requisites and different connotations of words such as being general (ᶜ*umūm*), absolute and unrestricted (*iṭlāq*), explicit (*naṣṣ*), apparent (*ẓuhūr*), real meaning (*ḥaqīqah*), and the opposites of all these. They also include questions of the conflict of legal proofs (*taᶜāruḍ al-'adillah*), such as specification (*takhṣīṣ*), qualification (*taqyīd*), interpretation (*ta'wīl*), reconciliation (*jamᶜ*), preponderance (*tarjīḥ*), etc.

All this deals with the Shariᶜah dispositions (*taṣārīf*) in isolation from any consideration of its universal wisdom (*ḥikmah*) and the general and particular goals of its commands and rulings. Scholars of *uṣūl al-fiqh* have thus confined their inquiries to the external and literal aspects of the Shariᶜah and to the meanings readily conveyed by its letter, that is, the underlying causes (ᶜ*ilal*) of analogy-based rules. Then again one might come across many important rules concerning

the *maqāṣid* of the Shariʿah in advanced works of fiqh, none of which could be found in *uṣūl* works. These *maqāṣid*-related rules, however, deal only with the particular higher objectives of the various types of the Shariʿah prescriptions (*mashrūʿāt*) at the beginning of the respective sections of fiqh-compendia, not with the general objectives (*maqāṣid ʿāmmah*) of legislation.

Furthermore, there are hidden insights in the discourses dealing with some of the propositions of *uṣūl al-fiqh*, or in its unnoticed sections. These sections are either unstudied or deemed tedious; and when dealt with, it is at the end of the books on *uṣūl*. When authors reach them, it is with weariness that they write them down, if ever, and only the most patient and persevering students will manage to read them. Therefore, these insights have always remained scarce and forgotten, although they are worthy of being included in the constituent elements of the discipline dealing with the higher objectives of the Shariʿah (*ʿilm maqāṣid al-Shariʿah*). These insights can be found in the discussions of the notions of suitability (*munāsabah*) and imagination (*ikhālah*) in the inquiries into the methods of identifying and confirming the underlying cause (*masālik al-ʿillah*). They are also to be found in the discussions on textually unregulated benefits (*maṣāliḥ mursalah*), the multiple contiguous narrations (*tawātur*), matters of necessary knowledge (*maʿlūm bi al-ḍarūrah*), and interpreting unrestricted terms (*muṭlaq*) as qualified ones (*muqayyad*), whether there is similarity or difference between the motive (*mūjib*) and the requisite (*mūjab*). In the introductory part of his book *al-Burhān*, Imām al-Ḥaramayn al-Juwaynī[1] apologized for including what was not categorical in the study of *uṣūl* matters. He wrote:

> It might be objected that the detailed discussion of isolated traditions (*akhbār āḥād*) and the varieties of analogical deduction (*aqyisah*) is not found except in the *uṣūl* works, though they are not categorical (*qawāṭiʿ*). Our answer is that the task of the legal theorist (*uṣūlī*) is to establish the necessity (*wujūb*) of acting upon these proofs in general. Yet, it remains necessary to mention such details in order to clarify the intended meaning (*madlūl*) and connect it with its indicant (*dalīl*).[2]

However, this answer is unconvincing, for we do not find that scholars have included in *uṣūl al-fiqh* only those categorical rules and principles (*uṣūl qawāṭiᶜ*) which can halt any contestant who goes against their requisites, as they have done in respect of the fundamentals of belief (*uṣūl al-dīn*). In fact, we find only a few categorical principles, such as the necessary universals (*kulliyyāt ḍarūriyyah*), consisting of the preservation of religion (*ḥifẓ al-dīn*), the preservation of life (*ḥifẓ al-nafs*), the preservation of intellect (*ḥifẓ al-ᶜaql*), the preservation of progeny (*ḥifẓ al-nasl*), the preservation of property (*ḥifẓ al-māl*) and the preservation of honor (*ḥifẓ al-ᶜirḍ*). Apart from these, all the principles of jurisprudence are conjectural and probable (*maẓnūnah*).

Abū ᶜAbd Allāh al-Māzarī[3] realized this problem in the course of his commentary on al-Juwaynī's discussion in his *al-Burhān* concerning the proofs of legal commands (*'adillat al-aḥkām*) as consis-ting of "the unequivocal (*naṣṣ*) texts of the Qur'an, the unequivocal texts of *mutawātir* traditions (Sunnah) and consensus (ijmaᶜ)."[4] Thus, al-Māzarī wrote:

> The formulations of legal theorists (*uṣūliyyūn*) differ in this regard. Some of them do not accept this qualification (by using the restrictive term "unequivocal") and simply refer to the texts of the Qur'an, the Sunnah (that is, they mention them without qualifying them as unequivocal) and consensus. When they are asked if they also mean texts of probabilistic connotations (*ẓawāhir*) and isolated reports (*akhbār āḥād*), their answer is that they mean by that statement what they are certain is intended by the Book [that is, the Qur'an]. They say this although we, so they argue, may not be completely certain that a particular instance of general applicability (*ᶜumūm*) is intended by it. They also say the same concerning isolated reports, that we may not be sure that a specific report is part of the corpus of the Sunnah. Others do not use this qualification to remove the ambiguity. Yet, a third group of scholars maintain that anything indicating a command (*ḥukm*) is a legal proof, even if it is merely conjectural (*maẓnūnah*), and this does not require any qualification.[5]

According to Qarāfī's[6] commentary on *al-Maḥṣūl* [of Fakhr al-Dīn al-Rāzī],[7] when dealing with commands (*amr*) and prohibitions (*nahy*) in the second issue of expressions (*lafẓ*), al-Abyārī[8] said in his commentary on *al-Burhān*:

> The propositions of *uṣūl* are categorical, allowing for no conjecture (*ẓann*). They derive from categorical evidential ground that is not to be found in books. This means that whoever is thoroughly cognizant with the juridical cases (*aqḍiyah*) and debates of the Prophet's Companions and their edicts (*fatāwā*), and is familiar with the sources of the Shariᶜah and their provenance, will attain certain knowledge of what constitutes the principles of jurisprudence (*qawāᶜid al-uṣūl*); and whoever falls short of this will gain nothing except mere conjecture.[9]

This is also non-productive, for what we are concerned with here is evaluating the status of the actual propositions of *uṣūl al-fiqh* not what might be experienced by certain scholars of the Shariᶜah. Moreover, in Qarāfī's commentary on al-Rāzī's *Maḥṣūl* in the second chapter dealing with the premises, it is mentioned that Abū al-Ḥusayn al-Baṣrī[10] said in his *Sharḥ al-ᶜUmad* that adoption and imitation (*taqlīd*) are not permissible in matters of *uṣūl al-fiqh*, just as not every *mujtahid* in this respect is right; there is rather just one *mujtahid* whose opinion is correct. Furthermore, he who is wrong in matters of *uṣūl al-fiqh* commits a sin, which is different from fiqh matters. To this Qarāfī retorted by maintaining that there are in *uṣūl al-fiqh* certain propositions that have a weak basis, such as implicit consensus (*ijmāᶜ sukūtī*), anyone contesting them will in fact contest conjecture, not certainty. That person should not, therefore, be accused of sin. This is similar to our position concerning the fundamentals of faith (*uṣūl al-dīn*), for we do not consider sinful anyone asserting that accidents continue to exist for more than one moment (*alᶜaraḍ yabqā zamānayn*)[11] or rejecting the idea of a vacuum *khalā'*)[12] and other issues which are not important elements of the fundamentals of religion; this is because they are mere supplements to the discipline dealing with *uṣūl al-dīn*.[13] In the first premise of his book *al-Muwāfaqāt* Abū Isḥāq al-Shāṭibī[14] also attempted to demonstrate

that the principles of jurisprudence are categorical, although his effort was unsuccessful.[15]

In my opinion, the reason for disagreement between the scholars of *uṣūl al-fiqh* over reducing legal indicants (*'adillah*) to what is categorical stemmed from the confusion arising from the status of legal indicants for they were actually familiar with them and their desire to make *uṣūl al-fiqh* as categorical and certain as the textually established foundations of faith (*uṣūl al-dīn al-samᶜiyyah*). As they embarked on this task and collected the rules and propositions of *uṣūl al-fiqh* and systematized them, they realized that only very few of them were categorical. Indeed, the number was so small that it was hardly worth including them in the propositions of *uṣūl al-fiqh*. How could it have been otherwise, when there are differences of opinion among scholars over most of the propositions of *uṣūl al-fiqh*?

Likewise, if we want to lay down definitive and categorical principles for the understanding of the Shariᶜah, we need to return to the traditionally accepted propositions of *uṣūl al-fiqh* and reformulate them. We should critically evaluate them, rid them of the alien elements that crept into them, and supplement them with the results of thorough comprehension and careful thought. Then, we need to reformulate the whole and classify it as an independent discipline called "science of the higher objectives of the Shariᶜah" (*ᶜilm maqāṣid al-Shariᶜah*). In other words, we should leave the discipline of *uṣūl al-fiqh* as it is, a source from which the methods of formulating legal argumentation could be derived. As for those elements of it which fall within the purview of our purpose of systematizing the study of *maqāṣid al-Shariᶜah*, we should incorporate them as part of the foundational principles of this noble discipline: *ᶜilm maqāṣid al-Shariᶜah*.

We ought therefore to state that *uṣūl al-fiqh* must be categorical, in the sense that scholars have the right to include in its propositions only what is categorical, either by being a matter of necessary and self-evident truth (*ḍarūrah*) or as the result of compelling sound reflection. This issue has always been a matter of debate, and the protagonists' attempts to come up with satisfactory solutions to it

are abundant in the lessons of Hadith studies during the month of Ramadan.[16]

Some Muslim scholars have indeed made felicitous statements that have become cogent and definitive rules for engaging in jurisprudence. However, their diffusion and submersion in the course of reasoning over particular juristic issues (*juz'iyyāt*) have made them difficult to access by whoever wants to benefit from them when need be. These insights include maxims such as: "there is no harm nor return of harm"[17] and the statement by ʿUmar ibn ʿAbd al-ʿAzīz that "people incur as many court cases as the iniquity they perpetrate."[18]They also include statements as Mālik's saying in *Muwaṭṭaʾ* that "God's religion is based on easiness."[19] To the same category belongs Mālik's comment on the Prophetic tradition according to which God's Apostle *(ṢAAS)* said: "Do not ask for a woman in marriage when another Muslim has already done so."[20] According to Mālik, this tradition means that "when a man has asked for a woman in marriage, and she has inclined to him… It does not mean that when a man has asked for a woman in marriage and his proposal is acceptable to her and she does not incline to him that no one else can ask her for marriage. That is a door to misery for people."[21]

These were joined by some peerless scholars who also, I believe, had a strong desire to pursue such a course, like the Shāfiʿī, ʿIzz al-Dīn ibn ʿAbd al-Salām,[22] in his *Qawāʿid* and the Mālikī, Shihāb al-Dīn Aḥmad ibn Idrīs al-Qarāfī, in his book *al-Furūq*. These two scholars specifically tried more than once to lay the foundations for the discipline of the higher objectives of the Shariʿah. However, the genius who applied himself to systematizing this discipline is the Mālikī jurist Abū Isḥāq Ibrāhīm ibn Mūsā al-Shāṭibī. He devoted the second volume of his book *ʿUnwān al-Taʿrīf bi-Uṣūl al-Taklīf fī Uṣūl al-Fiqh*, to its explanation[23] and entitled it *Kitāb al-Maqāṣid* [Book of the Higher Objectives of the Shariʿah]. However, in dealing with its methodological precepts, he fell into the trap of longwinded and confused analysis. He also omitted some crucial aspects of the Shariʿah's higher objectives and thus failed to reach the target that he had set himself. None the less, he made a great contribution. I for my part, follow in his footsteps, not neglecting what he has contributed.

However, I do not intend merely to quote or to summarize what he said.

Moreover, my aim in this book is confined to the study of the objectives of Islam concerning the laws and rules governing civil transactions (*muʿāmalāt*) and manners (*ādāb*). These laws, I think, deserve to be exclusively called the Shariʿah, for they reflect that aspect to which Islam has paid great attention in specifying and identifying the various levels of benefit (*maṣāliḥ*) and harm (*mafāsid*) and the criteria for assessing them. This aspect is also a clear manifestation of the greatness of the Islamic Shariʿah in comparison with other religious teachings (*sharāiʿ*), civil laws, and social policies whose aim is to preserve the order of the world and reform human society.[24]

Therefore, when I use the term legislation (*tashrīʿ*), my terminology is specific to what constitutes the general law of society, and I do not mean by it all prescribed matters in an absolute sense. Thus, the recommended (*mandūb*) and the repugnant (*makrūh*) are not intended in my discourse. In this connection, I think that the commands and rules pertaining to the devotional acts of worship (*ʿibādāt*) should appropriately be called 'religiousness' (*diyānah*).[25] As such, they comprise different inner meanings concerned with managing and refining the soul and reforming the individual who constitutes society. For this reason, we have given it a technical term: the order of Muslim society. I have devoted a book to this subject by the title *Uṣūl Nizām al-Mujtamaʿ fī al-Islām* [Basis of the Order of Human Society in Islam].[26]

None the less, dealing with the issue of *maqāṣid* in this specific way has faced us with some difficulty when seeking support from the works of early scholars, owing to the scarcity of helpful relevant material in the discourses of the scholars of fiqh, *uṣūl al-fiqh* and *jadal* (juristic polemics). The reason is that they confined most of their polemics, legal argumentation, and inquiries concerning causation and rationalisation (*taʿlīl*) to questions of devotional acts of worship and to a few instances of the lawful and unlawful relating to contracts of sale. These limited topics are not of much help to someone seeking to discover the inner wisdom and underlying purposes of the rules and commands regulating civil dealings and transactions (*muʿāmalāt*).

They may be appropriate for legal theorists in illustrating their precepts and rules, for polemicists in conducting their debates, or for jurists in developing the premises of the first chapters of their (fiqh) treatises, when they are still enthusiastic and not yet wearied or bored. These topics, however, remain inappropriate for someone who wants to comprehend the rules of *muʿāmalāt*.

For this reason, I took the trouble of providing examples of *muʿāmalāt* dealings, which my reflection led me to discover or which I came across in my readings. Nevertheless, sometimes I have been compelled to use examples of matters of "religiousness" (*diyānah*) and devotional acts of worship (*ʿibādāt*). This is because in these examples there are some hints and clues to one or other general objective of the Lawgiver, or there are associated with them some insights expressed by the luminaries of the Shariʿah in detecting the intent of the Lawgiver.

I have divided this book into three parts. The first part is concerned with establishing the existence of the Shariʿah's higher objectives and proving the need of the jurist to know them, the categories of these goals and the methods of identifying and confirming them. The second part examines the universal or general objectives of legislation. Finally, the third part deals with the particular objectives of the different types of dealings, designated *abwāb fiqh al-muʿāmalāt* in the literature of applied jurisprudence (fiqh).

PART I

Establishing *Maqāṣid al-Shariʿah*

1

Prefatory Note

Nobody would contest that the provisions and ordinances of any divine law (Shariʿah) instituted for humankind aim at certain objectives intended by God (SWT)*, the Wise Lawgiver. It is proven beyond any dispute that God does not act in vain, as is plainly shown in His fashioning of the creation. Thus, we are informed in the Qur'an: "For [thus it is:] We have not created the heavens and the earth and all that is between them in mere idle play. None of this have We created without [an inner] truth: but most of them do not understand it" (44:38–39), and, "Did you, then, think that We created you in mere idle play, and that you would not have to return to Us...?" (23:115). Moreover, one of the most important qualities of human beings is their God-given disposition for, and acceptability of, civilization, whose greatest manifestation is the making of laws to regulate their lives.

God sent messengers and revealed laws (*sharā'iʿ*) only for the purpose of establishing human order. As He says:

> Indeed, [even afore-time] did We send forth Our apostles with all evidence of [this] truth; and through them We bestowed revelation from on high, and [thus gave you] a balance [wherewith to weigh right and wrong], so that men might behave with equity. (57:25)

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* (SWT) – *Subḥānahu wa Taʿālā*: May He be praised and may His transcendence be affirmed. Said when referring to God.

The Islamic Shariʿah is the greatest and most upright of all laws, as indicated by the Qur'an: "Behold, the only [true] religion in the sight of God is Islam" (3:19). This is expressed by the use of the grammatical form denoting both exclusivity and intensity.

Hence, when we find that God has described the revealed Books preceding the Qur'an as books of guidance and called them "religion" (*dīn*), as in this verse: "O followers of the Gospel! Do not overstep the bounds [of truth] in your religion" (4:171), referring to Moses' law, and when He says: "In matters of religion, He has ordained for you that which He had enjoined upon Noah – and into which We gave thee [O Muhammad] insight through revelation – as well as that which We had enjoined upon Abraham, and Moses, and Jesus: Steadfastly uphold the religion, and do not break up your unity therein" (42:13), and when we find that He calls what is mentioned here *sharā'iʿ*, as in the following verse: "Unto every one of you is appointed a [different] law and way of life. And if God had so willed, He could surely have made you all one single community" (5:48); when we find, on the other hand, that God describes the Qur'an as the best of all of them, then we know for certain that the Qur'an is the best and most exalted of all guidance.

In this connection, God says [about the Torah]: "Verily, it is We who have bestowed from on high the Torah, wherein there was guidance and light" (5:44), after which He says [about the Gospel]: "And We caused Jesus, son of Mary, to follow in the footsteps of those [earlier prophets], confirming the truth of whatever there still remained of the Torah, and as a guidance and admonition unto the God-conscious" (5:46). Thus, God attributes two properties to the Qur'an: its confirmation of the truth of earlier revelations, that is, the laws brought by the Torah and the Gospel that have not been abrogated by the Qur'anic Revelation; and its guidance over previous revelations concerning those laws in the Torah and the Gospel that it has abrogated as well as the fundamentals of the Shariʿah that it has introduced.

Accordingly, the Qur'an is superior in the sense that it bears witness to the truth and reveals alterations of previous revelations. All divine laws, and particularly the Islamic Shariʿah, have come down

for the benefit of humankind both now and in the future. By "the future" we are not referring to matters of the Hereafter, for divine laws do not determine how people should behave in the afterlife. Instead, God has made people's status in the Hereafter the result of their conduct in this world. What we rather mean is that some provisions (*aḥkām*) of the Shariʿah, such as the prohibitions of drinking or selling wine, may seem to entail hardship and harm to those under obligation and that the latter are thus made to forsake some benefits. However, when we reflect on these provisions, we discover their real benefits in relation to the ultimate consequences of things.

From an inductive examination (*istiqrā'*) of numerous indicants in the Qur'an and the authentic Prophetic traditions, we can with certainty draw the compelling conclusion that the rules of the Islamic Shariʿah are based on inner reasons (*ḥikam*) and causes (*asbāb*) that devolve upon the universal goodness and benefit of both society and individuals, as we shall see below. Our aim here is to prove that the Shariʿah in general has intended higher objectives, although we leave the elaboration of those goals to its appropriate place. In the Introduction to the section on *Maqāṣid al-Shariʿah* of his book *ʿUnwān al-Taʿrīf*, Abū Ishāq al-Shāṭibī mentioned a number of textual indicants to this effect.[1] Of them only the following are appropriate and productive.

In conclusion to the verse instituting ritual ablution, God says, "God does not want to impose any hardship on you, but wants to make you pure, and to bestow upon you the full measure of His blessings, so that you might have cause to be grateful" (5:6).

On a different occasion, He says "For in [the law of] just retribution, O you who are endowed with insight, there is life for you, so that you might remain conscious of God" (2:179). To these indicants we can add many others, such as the following verses. Concluding the prohibition of the consumption of alcohol and gambling, God says, "By means of intoxicants and gambling, Satan seeks only to sow enmity and hatred among you" (5:91). In other contexts, we read, "This will make it more likely that you will not deviate from the right course" (4:3), "and God does not love corruption" (2:205).

Other examples will be mentioned in the next discourse on the

methods of establishing *Maqāṣid al-Shariʿah*, and also in the third part of this book which is devoted to a detailed exposition of the specific higher objectives of the Shariʿah in the different spheres of legislation.

2

The Jurists' Need to Know *Maqāṣid al-Shariᶜah*

The disposition of the *mujtahid* to comprehend the Shariᶜah takes five modes:

1. The first mode is to understand its expressions (*aqwāl*) and grasp the meanings (*madlūlāt*) of those expressions in accordance with the language use and legal polysemy (*naql sharᶜī*),[1] by applying the linguistic rules governing juristic argumentation. Most of this has been taken care of in the discipline of *uṣūl al-fiqh*.

2. The second mode is to search for anything that clashes with the indicants (*'adillah*) advanced by the *mujtahid* and in respect of which he has exhausted all possible effort to discover their meanings. The purpose of this search is to make sure that those indicants are free from anything nullifying their connotations or requiring their invalidation (*ilghā'*) or emendation and refinement (*tanqīḥ*).[2] When he is certain that an indicant (*dalīl*) is free from any contradiction, he applies it. If, on the contrary, he finds a counter-indicant (*muᶜāriḍ*), then his task is to see how to reconcile the two and apply them together or to decide the superiority of one to the other.

3. The third mode is to give, by means of analogy, that whose rule (*ḥukm*) has not been given in the texts of the Lawgiver the same rule of that which has been mentioned therein, once the effective

causes of the Shariʿah legislative rules have been known by any of the methods of identification and confirmation of the *ratio legis* laid down in *uṣūl al-fiqh*.

4. The fourth mode is to give a specific rule to a certain act or event whose rule has not been provided by the textual indicants of the Shariʿah as known to the *mujtahids*, nor is there an equivalent to which it can be connected by analogical deduction.[3]

5. The fifth mode is to accept some textually established rules of the Shariʿah simply as someone who does not know their causes or the inner wisdom of the Shariʿah in enacting them. Here, the *mujtahid* acknowledges his incapacity to comprehend the Lawgiver's wisdom in prescribing such rules, and belittles his knowledge in relation to the vastness of the Shariʿah. He then considers this kind of provisions as merely devotional.

Thus, the jurist needs to know *Maqāṣid al-Shariʿah* on all these levels. His need for that knowledge on the fourth level is quite obvious. This, in fact, ensures the continuity of the rules of the Islamic Shariʿah throughout the ages and generations following the age of Revelation until the end of the world. It is in this context that Mālik, may God have mercy on him, established the authoritativeness of the principle of *maṣāliḥ mursalah* or textually unspecified benefits.[4] It is also in this context that the scholars of jurisprudence ascertained the consideration of the necessities (*kulliyyāt ḍarūriyyah*), and appended them with the needs (*ḥājiyyāt*) and embellishments (*taḥsīniyyāt*). All this is called *munāsib*[5] (suitable), as established in *uṣūl al-fiqh* in the context of the discussion on the methods of the identification and confirmation of the *ratio legis*.

It is again in this context that rationalists (*ahl al-raʾy*) resorted to independent opinion (*raʾy*) and juristic preference (*istiḥsān*),[6] but were faced by the vociferous opposition of the traditionists (*ʿulamāʾ al-athar*). The latter were aware of indicants from traditions and past practices containing the rules (*aḥkām*) of the situations and cases that had escaped the attention of the rationalists, as was the case with Mālik who rejected the opinion of Shurayḥ[7] concerning the

invalidity of public endowment (*ḥabs*).[8] Scholars combining the knowledge of traditions (*āthār*) with rational thinking and reasoning (*naẓar*) also protested against the views of the speculative jurists regarding the issues which conflicted with the Shariᶜah's objectives as established by inductive inference. It is in this context that Mālik opposed the views of the Predecessors (*Salaf*) who had maintained that the buyer and seller have the right to withdraw from their sale agreement before parting company (*khiyār al-majlis fī al-bayᶜ*).[9] Thus, he said in *Muwaṭṭa'*: "In our view, this has no specific limit, nor is there any established practice supporting it."[10] His followers explained that what he meant is that the time of agreement (*majlis*) cannot be accurately defined and that this contradicts the purpose of the Shariᶜah regarding creation of contracts.[11]

We now need to examine the first three modes. The jurist needs to know the *maqāṣid* in the first mode in order to decide, for example, whether a given word, or expression, has undergone legal polysemy (*naql sharᶜī*). As for the second mode, his need for that knowledge is more pressing for the following reason. The motive compelling the jurist to think about the existence of counter-indicant and then to search for it in its likely sources, intensifies and weakens in proportion to what strikes him – while examining the indicant before him – as to the inappropriateness of the indicant to be intended by the Lawgiver without any modification. His search for a counter-indicant therefore intensifies in proportion to the degree of his doubt concerning the sufficiency of the available indicant to yield the Shariᶜah ruling on the case in hand. By the same token, his conviction about the end of his search, upon not finding any counter-indicant, is proportionate to the extent of the doubt that has assailed him. This can be illustrated by the following authentic tradition. ᶜAbd Allāh ibn ᶜUmar heard the following report by ᶜĀ'ishah:

> God's Apostle said to her: "Do you know that when your people [the Quraysh] re-built the Kaᶜbah, they reduced it from its original foundation laid by Abraham as they ran short of money?" She said, "O God's Apostle! Why don't you rebuild it on its original foundation laid by Abraham?" He replied, "Were it not for the fact that your people are

close to the pre-Islamic period of ignorance [that is, they have recently become Muslims], I would have done so." Upon hearing this, ʿAbd Allāh (ibn ʿUmar) stated: "ʿĀ'ishah must have heard this from God's Apostle for, in my opinion, God's Apostle had not placed his hand over the two corners of the Kaʿbah opposite *al-ḥijr* only because the Kaʿbah was not rebuilt on its original foundations laid by Abraham."[12]

Therefore, we learn from what he said that the evidence that had reached him concerning the practice of the Prophet, namely, not placing his hands on the two corners, perplexed him. He thought that there was a reason implied by that evidence (*mūjib*) that he did not know. When he heard ʿĀ'ishah's report, he realized that what she had reported was that reason, and this reassured him.

Similarly, the jurist's conviction, in case of the existence of a counter-indicant, is fast or slow in tandem with the degree of his doubt about whether or not the counter-indicant suits the purpose of the Shariʿah. Does one not see that when Abū Mūsā al-Ashʿarī[13] sought permission, three times, to enter ʿUmar ibn al-Khaṭṭāb's house and as the latter did not answer him, he simply left. Then, ʿUmar sent after him. When he came back, ʿUmar reproached him for leaving, upon which Abū Mūsā mentioned that he had heard from God's Apostle that if a person requests permission to enter, and upon the third request is not granted such permission, he should leave. However, ʿUmar asked him to provide evidence for his statement and pressed him so much that Abū Mūsā had to look for one of the *Anṣār* (Supporters of the Prophet in Madinah) to testify that God's Apostle had indeed said so. The elders of the *Anṣār* told him: "By God, only the youngest person will go with you [as a witness]," and Saʿīd al-Khudrī[14] was the youngest of them. When Abū Saʿīd testified to ʿUmar that the Prophet had said so, ʿUmar was satisfied and realized, furthermore, that many of the *Anṣār* also knew about this. ʿUmar acted in that way because he had a great doubt that the counter-indicant could consist in qualifying the principle of asking permission three times, upon which one should leave if permission is not given upon the third time, since there is in Abū Mūsā's report a clarification of the ambiguity in the verse in which God says "Do not

enter it until you are given leave" (24:28).[15] On the contrary, when ʿUmar was in doubt about collecting the poll-tax (*jizyah*) from the Magians (Majūs) and ʿAbd al-Raḥmān ibn ʿAwf informed him that he had heard God's Apostle saying: "Follow the same way (sunnah) with them as you follow with the People of the Book (*Ahl al-Kitāb*),"[16] ʿUmar accepted his testimony and did not require him to provide evidence for his statement. This was because he did not entertain any serious doubt concerning the existence of counter-evidence, which was not the case regarding Abū Mūsā's seeking of permission.

In respect of the third mode, the jurist's need to know the *maqāṣid* is because deduction by analogy depends on the affirmation of underlying causes (*ʿilal*), which may require the knowledge of *Maqāṣid al-Sharīʿah*,[17] for example, suitability (*munāsabah*), that is, the extraction and specification of the *ratio legis* (*takhrīj al-manāṭ*), the emendation and refinement of the *ratio legis* (*tanqīḥ al-manāṭ*), and the invalidation of difference (*ilghā' al-fāriq*).[18] Clearly, when the scholars stipulated that the *ratio legis* (*ʿillah*) must be a defining element for some deeper wisdom, they were also referring us to inference of the different aspects of *sharʿī* rationales, which are themselves among the Sharīʿah objectives.

Furthermore, jurists need to know the higher objectives of the Sharīʿah as criteria for the acceptance of Prophetic Traditions and for the consideration of the opinions of jurists from among the Companions and early scholars, and also in the different ways of juristic reasoning and argumentation. One has to remember that ʿUmar refused to accept the report of Fāṭimah bint Qays regarding the maintenance of a woman in her waiting period.[19] ʿĀ'ishah also rejected the report of Ibn ʿUmar, stating that a deceased person is punished because of his family's weeping over him,[20] and recited as evidence for her view the Qur'anic verse in which God says: "And no bearer of burdens shall be made to bear another's burden" (6:164).

As for the fifth mode, the jurists need to have that knowledge because, the greater their awareness – and therefore their understanding – of the Sharīʿah objectives, the fewer the cases of *taʿabbudī* which produce perplexity, they will face.

Having said this, it should be mentioned that not every *mukallaf* (legally competent and responsible person) is required to know *Maqāṣid al-Shariʿah*, for this is a subtle kind of knowledge. The duty of lay people is to learn the ordinances of Shariʿah and accept them without being required to know their purposes (*maqāṣid*), for they do not possess the capacity and skill to identify and apply them accurately in their proper context. Ordinary people should be introduced to the knowledge of the *maqāṣid* gradually in tandem with the increase of their studies of the various Islamic disciplines. This is to avoid their incorrect application of the *maqāṣid* that they are taught, with undesirable results, thus defeating the true purpose of this knowledge. It is the duty of the learned to comprehend these *maqāṣid*; as we have already mentioned, scholars vary in this according to their intelligence and interest.

Shaikh Muhammad al-Tahir ibn Ashur is the most renowned Zaytuna Imam and one of the great Islamic scholars of the 20th century. The publication of this translation of Shaikh Ibn Ashur's *Treatise on Maqasid al-Shari'ah* is a breakthrough in studies on Islamic law in the English language. In this book, Ibn Ashur proposed *Maqasid* as a methodology for the renewal of the theory of Islamic law, which has not undergone any serious development since the era of the great imams. Ibn Ashur – quite courageously – also addressed the sensitive topic of the intents/*Maqasid* of Prophet Muhammad (*SAAS*) behind his actions and decisions. He introduced criteria to differentiate between the Prophetic traditions that were meant to be part of Islamic law and the Prophetic actions/sayings that were meant to be for the sake of specific purposes such as political leadership, court judgment, friendly advice, and conflict resolution. But Ibn Ashur's most significant contribution in this book has been the development of new *Maqasid* by coining new, contemporary, terminology that were never formulated in traditional *usul al-fiqh*. For example, Ibn Ashur developed the theory of the 'preservation of lineage' into 'the preservation of the family system', the 'protection of true belief' into 'freedom of beliefs', etc. He also introduced the concepts of 'orderliness', 'natural disposition', 'freedom', 'rights', 'civility', and 'equality' as *Maqasid* in their own right, and upon which the whole Islamic law is based. This development opens great opportunities for Islamic law to address current and real challenges for Muslim societies and Muslim minorities.

Muhammad al-Tahir ibn Ashur was born in Tunis in *1879* and died in *1973*. He left behind a wealth of long and detailed experience in public and administrative life as well as a rich legacy of diverse and scholarly publications and articles absolutely unmatched in nineteenth and twentieth century Tunisia, many of which still await critical study and publication today.

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