



**ISSUES
IN
THE LEGAL
THEORY
OF
USŪL
AND
PROSPECTS FOR REFORM**

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ABSTRACT

It is widely accepted within the circle of Islamic jurisprudence that *uṣūl al-fiqh* has become a theoretical discipline studied as a part of the legal heritage rather than a tool to regulate and encourage *ijtibād*. And *uṣūl al-fiqh* is not without weaknesses. Some of the weaknesses of *uṣūl al-fiqh* are not new and had existed for almost as long as the *uṣūl al-fiqh* itself. Even Imam al-Shafi's (d. 204H) distinctive contribution to articulate the legal theory of the *uṣūl* was not devoid of weaknesses. Subsequent developments in the legal theory have not only added additional technicalities but also burdened the simplicity of the original approaches to *qiyās*, *ijmā'* and *ijtibād*. Another weakness of the legal theory was in its literalist orientations at the expense of goals and purposes of Shari'a (*maqāṣid al-Sharī'a*). The problem was that the *maqāṣid* did not receive much attention for centuries until al-Shāṭibi (d. 790H) wrote his *Muwāfaqāt* and opened a new chapter in the methodology of Islamic legal thought. It is the *maqāṣid al-Sharī'a* that can now utilised to inject flexibility and dynamism into an otherwise ossified methodology. One hardly needs to emphasize that Islam is a Shari'a-centered religion and rigidity in the legal theory will have similar consequences for the future of Islam.

قضايا في النظرية الشرعية لأصول الفقه

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ملخص البحث

إن المهتمين بعلم أصول الفقه يتفقون على أن علم أصول الفقه أصبح علماً نظرياً يُدرس باعتباره جزءاً من التراث الشرعي وليس باعتباره أداة تنظيم وتشجع على عملية الاجتهاد. وكما نعلم أن أصول الفقه لا يخلو من نقائص تشوبه، إلا أن بعض هذه النقائص ليست جديدة علينا فهي قديمة قدم علم أصول الفقه نفسه. فحتى إسهام الإمام الشافعي (توفي سنة 204 هـ) المتميز والهادف لتفصيل النظرية الشرعية لأصول الفقه لم يخلو هو أيضاً من نقائص. ولم تساهم التطورات المتتابعة في مجال النظرية الشرعية في إضافة بعض التقنيات فحسب، بل عملت أيضاً على تعقيد السبل المعتمدة في القياس والإجماع والاجتهاد. نجد كذلك عيباً آخر في النظرية الشرعية للأصول يكمن في غلبة النزعات الأدبية على حساب أهداف ومقاصد الشريعة. وتكمن المشكلة في أن مقاصد الشريعة لم يولى لها أي اهتمام لمدة قرون من الزمن إلى أن جاء الإمام الشاطبي (توفي سنة 790 هـ) وألّف كتابه المشهور "الموافقات" ففتح به فصلاً جديداً في منهجية الفكر الإسلامي الشرعي. إن مقاصد الشريعة هي التي يمكن أن تكون أداة لإشاعة المرونة والحيوية في المنهجية المتصلبة. فنادراً ما نحتاج إلى التأكيد على أن الإسلام دين يرتكز على الشريعة فحسب، فإن تصلب النظرية الشرعية ستتنتج عواقب شبيهة بمستقبل الإسلام.

ISSUES IN THE LEGAL THEORY OF *UŞŪL* AND PROSPECTS FOR REFORM

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I. Introductory Remarks

The two basic questions that I raise in this paper is whether the methodology of legal reasoning provided by *uṣūl al-fiqh* has lost its capacity to stimulate originality in legal thought and whether it has also failed in encouraging *ijtihād*. As a field of Islamic learning, *uṣūl al-fiqh* provides a set of guidelines for *ijtihād* with the purpose mainly to encourage *ijtihād* in law and governance Muslim societies. The issue at hand, therefore, is that *uṣūl al-fiqh*, in its present state, has actually failed in initiating *ijtihād*.

I begin by introducing the *uṣūl al-fiqh* and briefly reviewing the historical setting in which it was developed. I ask the question, for example, as to what prompted Imam al-Shāfiʿi (d. 204H) to articulate the legal theory of *uṣūl* in the way he did. This will be followed by a brief discussion of the doctrines of *qiyās*, *ijmāʿ* and *ijtihād* and observations as to why the methodology and resources that they offer are not functioning under the prevailing conditions of modern government.

The second part of my essay addresses the *maqāṣid al-sharīʿa* (goals and purposes of *sharīʿa*) as an aspect of the legal theory of

uṣūl which has, unfortunately, been persistently neglected. The second half of my essay also explores the prospects of integration between the *uṣūl* and the *maqāṣid*, and then puts forward proposals which seek to reform the legal theory and make that legal theory relevant to the contemporary processes of statutory legislation. One hardly needs to emphasize that Islam is a Sharīʿa – centered religion and rigidity in the legal theory will have similar consequences for the future of Islam.

II. Definition and History of *Uṣūl*

Uṣūl al-fiqh (lit. roots of Islamic law) is the science of the sources of Sharīʿa which is developed with the purpose of providing a set of guidelines by which to regulate *ijtihād*. *Ijtihād* basically aims at finding feasible solutions to new issues which have not been specifically addressed by the existing law. To regulate this exercise, the legal theory of *uṣūl* proposes a methodology by which legal rules can be deduced from the source materials of Sharīʿa. *Uṣūl al-fiqh* identifies these sources and ascertains an order of priority between them. It also expounds the rules of interpretation which ensure correct understanding of the textual evidence. The sources of Sharīʿa that two types: **revealed and non-revealed**. The revealed sources, the Qurʾān and Sunna, both contain specific injunctions and general guidelines on law and religion; However, only the broad and general directives occupy the larger part of the laws of the Qurʾān and Sunna. The revealed sources contain little by way of methodology of legal reasoning but they are rich in substantive principles and guidelines that can be used as raw materials for *ijtihād*. The non-revealed sources of Sharīʿa consist of a number of rationalist doctrines which provide, each in their own capacity, a different formula and procedure for *ijtihād*. The non-revealed sources thus consist of a variety of doctrines ranging

from analogical reasoning (*qiyās*), considerations of public interest (*istiṣlāḥ*), juristic preference (*istiḥsān*), presumption of continuity (*istiṣhāb*) and so forth. Whereas the clear injunctions of the Qur'ān and Sunna command permanent validity whereas the methodology of *uṣūl* and its non-revealed sources do not. This is because they are the product mainly of juristic thought and valid for as long as they serve their desired purpose, and may be changed when they cease to be functional.

Uṣūl al-fiqh did not develop during the time of the Prophet (s.a.w) or of the rightly-Guided caliphs principally because there was no pressing need for methodology at that time. The historical origins of *uṣūl al-fiqh* are usually traced back to the writing of Imam al-Shāfi'ī (d. 204H), who is regarded as the chief architect of this discipline. His renowned work, *al-Risālah*, was the first work of authority to articulate the broad outline of this discipline. Al-Shāfi'ī lived at a time when the controversy between the Partisans of *ra'y* and the partisans of hadith (*abl al-ra'y* and *abl al-badīth*) had reached a critical stage, to the extent that the ardent advocates of each spoke disparagingly of the other. During the latter part of the first and larger part of the second century hijrah, recourse to stray opinion and undisciplined *ra'y* by unqualified individuals in the guise of *ijtibād* had posed a threat to the integrity of Sharī'ah and a cause therefore of concern for the ulema. Al-Shāfi'ī was acutely aware of the need to stem the tide of unregulated *ra'y* and *ijtibād* by means of methodological guidelines that were designed to ensure their conformity with the letter and spirit of the *nuṣūṣ*. Two of Imam al-Shāfi'ī's distinguished predecessors, Imam Abu Hanīfa (d. 150H) and Imam Mālik (d. 179H) were respectively associated with the *abl al-ra'y* and *abl al-badīth*. The Hanafi doctrines of *qiyās* and *istiḥsān* came under criticism by the *abl al-badīth* who maintained that all issues must be referred to the *nuṣūṣ* and extrapolations in *ra'y* in the name of *qiyās* and *istiḥsān* were thus to be avoided.

Imam Shāfi'ī took an intermediate position between the two schools of thought and he is widely acclaimed to have merged the Hanafi and the Maliki tendencies in the methodology that he articulated. His intermediate but basically fragmented approach can be best be understood from the fact that he supported *qiyās* but rejected *istiḥsān*. Juristic preference or *istiḥsān* is grounded in the idea that applying the existing law can sometimes lead to rigidity or inequitable results, and when this is the case, the jurist must resort to *ijtihād* and find an alternative and a preferable solution to the issue at hand. *Qiyās* which was controversial to begin with, due to the rationalist leanings of its effective cause (*illah*), was eventually accepted but *istiḥsān* remained controversial nonetheless. Imam Shāfi'ī wrote that in his search for solution to issues, the jurist and *mujtahid* must look firstly into the Qur'ān and Sunna, and then resort to *qiyās*, which extends the rationale and purpose of the Qur'ān and Sunna to similar cases. By doing so, the *mujtahid* would have fulfilled his duty and complied with the Qur'ānic directives (al-Nisā' 4:59; al-Qiyāma, 75:36 quoted). Al-Shāfi'ī went on to equate juristic preference or *istiḥsān*, with *taladhudh wa hawā*, that is, a totally self-opinionated and capricious indulgence in personal opinion and *ra'y*.¹

Al-Shāfi'ī's enthusiasm for *qiyās* can clearly be seen in one of his widely-quoted remarks in the *Risāla* where he wrote that *qiyās* and *ijtihād* were two words for the same meaning and that "*ijtihād* is *qiyās* and *qiyās* is *ijtihād*."² What he was saying, of course, was that *qiyās* was the only correct avenue for *ijtihād*, and that no other variety of *ijtihād* outside the framework of *qiyās* was of any merit.

¹ Muḥammad b. Idrīs al-Shāfi'ī. *al-Risālah*, ed. Muḥammad Sayyid Kilāni, 2nd Edn. Cairo: Muṣṭafā al-Bābi al-Ḥalaby, 1403/1983, pp. 205-206, idem, *Kitāb al-Umm*, Cairo: Dār al-Sha'b, 1321H, Vol. VII, p. 271.

Without wishing to engage into technicality, al-Shāfi'ī's position on both *qiyās* and *istiḥsān* was somewhat lop-sided and out of tune with his purpose to strike a balance between the Traditionists and Rationalists. *Ijtihād* is obviously a wider concept than *qiyās*, and *istiḥsān* did not call for the sort of rejection that it invoked from al-Shāfi'ī.

The Hanafis who advocated *istiḥsān* saw it as an antidote of *qiyās* which was meant to moderate the possible rigidities of *qiyās*. For the Hanafis, to accept the one and reject the other was, therefore, fallacious. *Istiḥsān* advocated recourse to the basic rules of equity and fairness in the event where strict adherence to *qiyās* led to unfair results. To illustrate the place of *istiḥsān* in the overall scheme of the legal theory, we may refer to an early case of inheritance, known as *al-mushtaraka*: A woman died during the time of the Caliph 'Umar b. al-Khaṭṭāb, leaving behind two uterine, and two germane, brothers, mother and husband. Under the normal rules of inheritance, the husband took a half, the mother a sixth, and the two half brothers one-third, and nothing was left for the full brothers. The full brothers were excluded as they were in the class of *'aṣaba* who took a share only after the Qur'ānic sharers (*dhawu al-furūd*) had taken theirs. The full brothers complained to the Caliph who then decided, by way of juristic preference, that all the brothers should equally share the one-third between them. This was a typical case of *istiḥsān* whereby the Caliph devised a preferred solution that was based on his considered opinion, and it was eminently equitable.³ If such is the purpose of *istiḥsān*, a formula by which an equitable solution could be provided to a difficult case, then *istiḥsān* did not call for rejection at all. *Istiḥsān* was

² Mahmud Shaltut, *al-Islam 'Aqīda wa Shari'ā*, Kuwait, Maṭābi' Dār al-Qalam, c. 1966, pp. 558-559.

³ Ibn Rushd al-Qurṭubi, *Bidāyat al-Mujtahid Wa Nihāyat al-Muqtaṣid*, Cairo: Muṣṭafā al-Bābi al-Ḥalaby, 1401/1981, vol. II, p. 290.

indeed necessary to moderate the literalism of *qiyās*.⁴ Imam al-Shāfi'ī's rejection of *istiḥsān* was prompted perhaps by the then prevailing circumstances and his concern to curb arbitrary expatiation in *ra'y*. Imbalances were clearly noted in the bitter exchanges of the advocates of *ra'y* and hadith, and also perhaps in the response that they invoked from the Imam. A forceful response was what the Imam gave and although it was well-received at the time, we note that he sowed, in the meantime, the seeds of what became the bane of Islamic scholarship for centuries to come: Indiscriminate imitation, or *taqlīd*, found its genesis in al-Shāfi'ī's restrictive view of *ijtihād* and *ra'y* and his total rejection *istiḥsān*.

The *uṣūl* methodology that al-Shāfi'ī articulated was evidently influenced by his concern to subjugate *ra'y* to the authority of the text through the modality of *qiyās*. This literalist tendency of the *uṣūl* theory was compounded by subsequent developments which added technicality to literalism. Al-Shāfi'ī's perception of *qiyās*, one might say, was relatively free of the detailed conditions and procedures that were subsequently added to it. Each of the four pillars of *qiyās* were consequently subjected to a number of conditions, that were designed to ensure accuracy in its outcome. With reference to one of these, namely the effective cause ('*illah*'), the *uṣūl* writers have proposed over twenty conditions that were to be met. But as noted by al-Shawkānī (d. 1255/1839) most of them were unnecessary and overlapping.⁵ This would seem to beg the comment: if all of these requirements were to be met, *qiyās* itself would become redundant, and the new case for which a ruling

⁴ For a detailed presentation of the methodology, strengths and weaknesses of *istiḥsān*, see M.H. Kamali, *Istiḥsān (Juristic Preference) and Its Application to Contemporary Issues*, Jeddah: Islamic Research and Training Institutes, 1997.

⁵ Yahyā b. 'Alī al-Shawkānī, *Irsbād al-Fuḥūmin Tahqīq al-Ḥaqq ilā 'Ilm al-Uṣūl*, Cairo: Dār al-Fikr, n.d. pp. 207-208 listed 24 conditions for the '*illah*' whereas the Māliki jurist Ibn al-Ḥājjib recorded only eleven.

was sought through *qiyās* would have to be a replica of the original case. Both cases would thus be covered by the ruling (*hukm*) of the text and there would be no need for *qiyās*. Technical accuracy and formal logic was thus burdening the methodology of *uṣūl* during the subsequent periods, especially in the era of imitative scholarship and *taqlīd*.

Qiyās is also not an interminable source as it can only be constructed when there is a prototype and a ruling (*hukm*) available in the revealed sources. *Qiyās* might have been a rich source at the intend stages of the development of Shari'ca but its originality was gradually exhausted and textbook writers of the later periods began to cite the same examples of *qiyās* over and over again. *Qiyās* was, in other words, a limited source to begin with, and when it was subjected to technical conditions and procedures, its limitations became even more pronounced. If there was anything equal between *qiyās* and *ijtihād*, it was the fact that they were both in a state of stagnation and decline.

III. Issues in *Ijmā'* (General Consensus)

The problematics of *ijmā'*, especially those that relate to the requirement of universal consensus, are probably too well-known to require detailed elaboration. But before focusing on its problems, we note that the basic strength of *ijmā'* lies in the fact that it is an umbrella concept that relates to almost every aspects of the legal theory. It has equipped the *uṣūl al-fiqh* with a formula whereby the rulings of *ijtihād* and its sub-varieties such as *istiḥsān* and *qiyās* could be endorsed and elevated into definitive laws of the Shari'ca. *Ijmā'* is the only binding source and proof that is known to *uṣūl al-fiqh* next to the Qur'ān and Sunna, and it has played an important role in the development of *fiqh*, so much so that the existing body of *fiqh* may be said to be the product of a long process

of *ijtihād* and *ijmāʿ*. *Ijmāʿ* is predicated on the natural evolution of ideas, and since it is rooted in consensus of the community and its scholars, it is endowed with vast potential for mobility and dynamism. Without *ijmāʿ* almost all of the rationalist doctrines of *uṣūl al-fiqh* and *ijtihād* could lose their touch with reality and remain in the realm of perpetual speculation and debate. It would be as if one had a basic theory of enacting law without, however, having a machinery and procedure to enact it. *Ijmāʿ* is also eminently democratic as it is grounded in the affirmation that the will and consensus of the community stands in authority next to the will of God Most High.

The problematics of *ijmāʿ* are both theoretical and pragmatic. The theory of *ijmāʿ* was beset with problems from the outset and much of what is known in the name of *ijmāʿ* actually fail to meet the strict requirement, as stipulated in its definition, of universal consensus of the *mujtabidūn* of the *ummah*. Since *ijmāʿ* was recognised as a binding proof, this high status also gave rise to the requirement that only an absolute and universal consensus of the *mujtabidūn* would qualify, although in reality this has been very difficult to obtain.

The requirement of universal consensus was evidently not observed by the definition of *ijmāʿ* itself, especially when one notes that it did not require any participation, let alone approval, of the government in power. The classical definition of *ijmāʿ* stipulated for consensus only of “the *mujtabidūn* of the Muslim community,” which meant that the *mujtabidūn* could actually validate *ijmāʿ* and make it binding on the government without the latter’s participation or approval.⁶ This rather unexpected development was a reflection

⁶ *Ijmāʿ* is defined as the “unanimous agreement of the *mujtabidūn* of the Muslim community of any period following the demise of the Prophet Muḥammad on any matter.” See for further discussion of the definition and essential requirements (*arkān*) of *ijmāʿ*, M.H. Kamali, *Principles of Islamic Jurisprudence*, Kuala Lumpur (1989) and Cambridge (1991), p. 169 ff.

of the then prevailing rift between the ulema and government, which had begun with the fall of the *khilāfab* and the Umayyad dynasty's introduction of a monarchical system of government. The ulema denied the increasingly secular Umayyad rulers the legitimacy to legislate and interpret the law. The rift became more visible under the Abbasids who denied the ulema a share in political power.⁷ Thus the struggle over legitimacy had "a serious negative influence in changing the sound psychological and rational environment" which had prevailed in earlier periods.⁸ This pattern of events was also at odds with the Qur'ānic provision on obedience to the leaders, or the *ūlu al-amr*. The Qur'ānic duty to obey the *ūlu al-amr* (al-Nisā', 4:59), which was commonly quoted as textual authority for *ijmā'* naturally meant obedience not only to the ulema but also political leaders (i.e. the *umarā'*). Yet the ulema began to ignore the government, over its legitimacy and considered only themselves to be worthy of obedience. It was therefore not surprising that the definition of *ijmā'* did not make any reference to the government in power.

The ulema might have been in a position then to isolate and ignore the government in their formulation of the legal theory of *uṣūl*, but that pattern of events would seem inconceivable today. It seems that we are now experiencing the opposite of what happened then: a near-total isolation of the ulema and *mujtabidūn* from the process of statutory legislation. It is also not surprising, under these circumstances, to see that the legal theory of *uṣūl al-fiqh* plays no visible role in the legislative process of the modern nation state almost anywhere in the Muslim lands.

⁷ See for further detail M.H. Kamali, "Methodological Issues in Islamic Jurisprudence", *Arab Law Quarterly* (London) Vol. 1 (1996), 3-34, at p. 8.

⁸ Ṭāha Jābir al-'Alwāni, *Ijtihād*, Herndon: VA: The International Institute of Islamic Thought, 1993, p. 10.

The theory of *ijmā'* also failed to integrate the Qur'ānic principle of consultation (*shūrā*).⁹ For *ijmā'* was defined such that it could be reached and verified, *ex post facto*, through the writings and *fatwas* of the ulema without the need for their collective deliberation over issues. The affairs of the community could thus be determined, as it seemed, without consultation either with the community or with the fellow *mujtabidūn*.

What has just been said also touches on the practical difficulties of *ijmā'*, which are manifested in the absence of an institutional framework, such as a representative body or council of *mujtabidūn*, and the lack also of a well-defined procedure for *ijmā'*. Muhammad Iqbal's observation, made in the 1940's, still stands when he said of *ijmā'*, so important a notion, yet "rarely assumed the form of a permanent institution." He then suggested that the power to conclude *ijtihād* and *ijmā'* should be transferred "from individual representatives of schools to a Muslim legislative assembly" that comprises experts in Sharī'a and other disciplines, adding that this was "the only possible form that *ijmā'* can take in modern times."¹⁰

The practical aspect of the issue before us is also compounded by the fact that the statute book of the nation state of today has made the traditional role of the scholar and *mujtabid* in law making almost totally redundant. There is no recognition of a role that *ijtibad* and *ijmā'* may play in the prevailing pattern of statutory legislation by national assemblies and parliaments.

⁹ Al-Imrān, 3:159; al-Shūrā, 42:38. For details on *shūrā*, see M.H. Kamali, *Freedom of Expression in Islam*, Kuala Lumpur (1994) and Cambridge (1997), pp. 40-45.

¹⁰ Muḥammad Iqbal, *The Reconstruction of Religious Thought in Islam*, Lahore: Sh. Muḥammad Ashraf, reprint 1982, pp. 173-74.

IV. Issues in *Ijtihād*

Even if one considers the so-called "closure of the gate of *ijtihād*" to be somewhat of an exaggeration, the fact remains that *ijtihād* has suffered a steady decline, which probably started not too long after the crystallization of the *madhāhib*. The *madhāhib* themselves were the product of a most productive period in the history of *ijtihād*. The fact is, a new *madhhab* and school can hardly develop without a wealth of original contribution by its advocates.¹¹ This was in the second and third centuries hijra, but no new *madhhab* has emerged ever since and no one, it seems, actually offered a fresh interpretation of the Sharī'a. Once established, however, the *madhāhib* themselves became prone to condoning conformity and imitation. A climate of opinion gained ground that everyone had to follow the existing interpretations of the Sharī'a. The pressure of opinion was such that even prominent *mujtabids* that continued to emerge throughout the ages found it convenient to continue the mantle of the prevailing *madhāhib*. *Ijtihād* may not have come to a total halt, yet it lost much of its originality and dynamism with which it was associated in earlier times.

With the "closure of the gate of *ijtihād*, which Iqbal has referred to as "voluntary surrender of intellectual independence," *uṣūl al fiqh* also lost its role and purpose in the development of juristic thought and began to be studied as a theoretical discipline for its own sake. This has had the effect, as Abu Zahrah noted, of moving the people further away from the sources of Sharī'a; some even went so far as to say that there was no further need to interpret the Qur'ān and hadith now that *ijtihād* had come to a close.¹²

11 See for details M.H. Kamali, "Madhhab," *The Encyclopedia of Religion*, New York: The Macmillan Publishing Co. 1987, Vol. 9, pp. 66-70.

12 Muḥammad Abū Zahrah, *Uṣūl al-Fiqh*, Cairo: Dār al-Fikr al-'Arabi, 1377/1958, p. 318.

Another weakness of the *uṣūlī* thought, from which it never really recovered, was its almost total neglect of the general goals and purposes of Sharīʿa, that is, the *maqāṣid al-sharīʿa*. These should have been the principal theme and engagement of the legal theory from the outset, but as I shall presently explain, the *maqāṣid* remained very much on the fringes of *uṣūl al-fiqh* so much so that textbook writers on *uṣūl* did not even include it in their basic coverage of this subject.

V. Toward a *Maqāṣid*-Oriented Legal Theory

The goals and purposes of Sharīʿa (*maqāṣid al-sharīʿa*), for a long time remained as a neglected chapter of *uṣūl*, have in them in the potential of revitalising the *uṣūl* and the Sharīʿa. I propose to discuss this in some detail.

A cursory perusal of the Qurʾān would be enough to show that the Qurʾān pays much greater attention to values and objectives such as justice and benefit, mercy and compassion, upright character and *taqwā*, promotion of good and prevention of evil, affection and love within the family, charity, camaraderie and other redeeming values. The Qurʾān may thus be said to be goal-oriented and focused on a structure of values that have a direct bearing on human welfare. The Qurʾān is for the most part concerned with the broad principles and objectives of morality and law, rather than with specific detail and technical formulas that occupy the bulk of the *uṣūl* works. The Qurʾān characterises itself as “guidance and mercy-*hudan wa rahmah*” (Yunus, 10:57), and the Prophethood of Muḥammad as “a mercy to the worlds” (al-Anbiyāʾ, 21:107). God Most High declared His own illustrious purpose in such terms: “We sent Our Messengers with evidences and revealed through them the Book and the Balance in order to establish justice among people” (al-Ḥadīd, 57:25). The Qurʾān is also expressive, in numerous places

and a variety of contexts, of the goal, purpose, rationale and benefit of its laws. This idea of the identification of rationale and purpose, technically known as *ta'āl* (ratiocination), and the search for such in the context of *ijtihād*, is valid in *uṣūl al-fiqh* only with reference to worldly affairs (the *mu'āmalat*), but not with regard to devotional matters or *'ibādāt*. Yet this again is an *uṣūlī* conclusion. The Qur'ān itself is expressive of its rationale and purpose even in the area of *'ibādāt*. Thus with reference to prayer, it is declared: "Truly *Āllab* restrains promiscuity and evil" (al-'Ankabūt, 29:45). *Zakāh* is imposed on Property "so that wealth may not circulate only among the rich" (al-Ḥaṣhr, 59:7). With reference to *jihād*, the text proclaims: "permission was granted to those who fight because they have been wronged" (al-Ḥajj, 22:39), and with reference to *qiṣās*, it is declared "And in *qiṣās* (just retaliation) there is life for you O people of understanding" (al-Baqarah, 2:179).

One can add many examples to demonstrate how the Qur'ān is expressive of the goals and purposes of its laws. Even in cases where the text does not identify its own rationale and purpose, it is generally held that the underlying intention of the laws of Sharī'a is realisation of benefit (*maṣlaḥa*) or prevention of prejudice and harm (*mafsada*). Mercy (*raḥmah*) in the Qur'ānic phrase is to all intents and purposes used synonymously with *maṣlaḥa* and benefit to mankind, which is the over-riding objective of all of the laws of Sharī'a. Justice (*'adl*) on which the Qur'ān is clearly emphatic also partakes of *maṣlaḥa*.

Since the legal theory of *uṣūl* is meant to translate the value structure of the revelation (*wahy*) into operative formulas and ensure that *ra'y* and *ijtihād* are the carriers of these values, it would follow that the objectives and values, rather than technicality and literalism, should have been the overriding theme and preoccupation of *uṣūl al-fiqh*. But the legal theory of *uṣūl* actually traversed a different course, and it was not until Ibrāhīm Abū Ishāq al-Shāṭibi

(d. 790H) and his predecessors, ‘Izzuddin ‘Abd al-Salām (d. 660H) and Abū Ḥāmid al-Ghazālī (d. 505H) that *maqāṣid* was added as a new chapter to the legal theory of *uṣūl*. Yet even these developments proved to have had a limited impact. A certain degree of attention that was paid to the *maqāṣid* seems to have come somewhat late, at a time, that is, when the climate of imitation and *taqlīd* was too entrenched for this fresh development to dislodge the *uṣūl al-fiqh* from its conventional mould.

The basic notion of the *maqāṣid al-Sharī‘a* was never denied by the leading *madhbāhib*, but they differed in the degree of prominence they attached to it. Except for the Zāhiri school which took a totally literalist view of the *maqāṣid* by saying that the *maqāṣid* can only be known when they are identified by the clear text, the majority of jurists did not confine the *maqāṣid* to the clear text alone. They perceived and understood the Sharī‘a to be rational, goal-oriented and comprehensive. A dry and mechanical conformity to rules (*aḥkām*) that went against the purpose and intention thereof was consequently held to be unacceptable. Thus when a person uttered the testimonial of the faith or offered prayers in order to gain recognition and worldly gain, his performance was considered to be invalid. But even so, detailed elaboration on the objectives of Sharī‘a was generally not encouraged. Textbook writers on *uṣūl* continued to treat knowledge of the *maqāṣid* as a supplementary qualification for the *mujtahid*, and tended to subsume the *maqāṣid* under such themes as *ta’līl* and the effective cause (*‘illah*) or rationale of the *aḥkām*. References were also made to *maqāṣid* in chapters on public interest (*maṣlaḥa*); juristic preference (*istiḥsān*), blocking the means (*sadd al-dharā’i’*) and custom (*‘urf*).¹³ The ulema reticence to give prominence to the *maqāṣid* was partly due to the speculative element that was involved in the identification of *maqāṣid*. To say,

¹³ Cf. Muhammad al-Dusuqi, “*Nahw Manhaj Jadid li-Dirasat ‘Ilm Usul al-Fiqh*,” *Islamiyyat al-Ma’rifa*, vol. 1, no. 3 (1416/1996), p. 132.

for example, that this or that was the *maqṣad* and purpose of the Lawgiver naturally involved an element of prognostication that invoked a hesitant response from the ulema - unless, of course, the text clearly declared such. But the ulema contribution to the theme of *maqāṣid* continued nevertheless. Imam al-Ḥaramayn al-Juwayni (d. 478H) and then his disciple, Abū Ḥamīd al-Ghazālī (d. 505H) classified the *maqāṣid* into the three main categories of *ḍarūriyyah* (essential), the *ḥājjiyya* (complementary) and *taḥṣīniyya* (desirable) objectives and interests of the Sharīʿa. Al-Ghazālī spoke at length on considerations of public interest (*maṣlaḥa*) and *taʿlīl* (ratiocination) and was generally critical of unrestricted *maṣlaḥa* (*maṣlaḥa mursalah*) but validated it where it promoted the *maqāṣid* of the Sharīʿa. As for the *maqāṣid* themselves, al-Ghazālī wrote, probably for the first time, that the Sharīʿa pursued and promoted five essential values: faith, life, intellect, property and lineage, and that these were to be protected as absolute priorities.¹⁴ This was a different engagement, one might say, to the erudite but technical elaborations of *ijmāʿ* and *qiyās* which filled the pages of *uṣūl* texts. The *maqāṣid* discourse was not so much concerned with abstract juristic formulas but with values and realities of concern to the individual and society. This shift of focus was naturally more meaningful to *fiqh* which was naturally concerned with practical legal rulings (*aḥkām Sharʿiyya ʿamaliyya*) that promoted the people's interests.

A number of prominent scholars contributed to the theory of *maqāṣid*. Shihab al-Din al-Qarafi (d. 689H) added a sixth to the existing list of five essential *maqāṣid*, namely *al-ʿird*, that is, protection of honour. The existing list of the five values was, in turn, predicated on a reading of the *ḥudūd* prescribed penalties. The value that each of these penalties sought to protect was

¹⁴ Abū Ḥamid Muḥammad al-Ghazālī, *al-Muṣṭafa min Im al-Uṣūl*, Cairo: al-Maktaba al-Tijāriyya, 1356/1937, vol. 1, p. 287.

apparently identified as a *maqṣad* or objective of the Sharīʿa. The latest addition of *al-irḍ* was initially thought to have been covered under lineage (*al-nasl*), but since there was a separate *ḥadd* for slander (*qadhḥ*), the new addition was justified. ‘Izzuddin Abd al-Salām opened the scope of the *maqāṣid* in his important work, *Qawāʿid al-Aḥkām fi Maṣāliḥ al-Anām* where he wrote that “the greatest of all the objectives of the Qur’ān is to facilitate benefits (*maṣāliḥ*) and the means that secure them.”¹⁵ Taqī al-Dīn Ibn Taymiyya (d. 728H) was probably the first to depart from the notion of confining the *maqāṣid* to a specific number or type. He added that the Sharīʿa promoted other values such as fulfilment of contracts, preservation of the ties of kinship, good relations with one’s neighbours, moral purity, trustworthiness and the love of God on which the Qur’ān and Sunna were equally explicit. These he maintained should be added to the list of the *maqāṣul*.¹⁶ Ibn Taymiyya thus revised the scope of the *maqāṣid*, from a designated list into an open chapter and range of values. We may now add to this perhaps values that have gained more prominence in our time such as fundamental rights and liberties, the welfare state, and scientific research. These are important not only for raising the living conditions of the people but also for the standing of the *ummah* in the world community.

VI. Identification of *Maqāṣid*

The ulema differed in their approach to the identification of *maqāṣid* and the values that they sought to defend. At issue basically was the question whether the *maqāṣid* were to be confined to what was identified by the clear text. The Zāhiri school insisted

¹⁵ ‘Izzuddin Abd al-Salām, *Qawāʿid al-Aḥkām fi Maṣāliḥ al-Anām*, ed. Ṭāhā Abd al-Raʿūf Sa’d. Cairo: Maṭbaʿa al-Ḥusayniyya, 1351H, vol. I. p. 8.

¹⁶ Taqī al-Dīn Ibn Taymiyya, *Majmūʿa Fatāwa*, Beirut: Muʾassasa al-Risāla, 1398H, vol. 32, p. 134.

on this and maintained that the clear *nuṣūṣ*, especially those containing commands and prohibitions, were the carriers of the *maqāṣid*. The *maqāṣid*, according to this view, had no separate existence and was to be found in the explicit and normative (*taṣrīḥi, ibtidā'i*), as opposed to implicit and subsidiary, injunctions of the Qur'ān and Sunna. This approach was, once again inclined toward literalism and turned a blind eye to the rationale and effective cause of the text and its underlying intention. The majority of ulema on the other hand looked into both the text as well as its rationale, *'illah* and *ḥikmah* in the determination of the *maqāṣid*. Yet as already noted, their view of *'illah* and rationale was somewhat restrictive and so was their view of the *maqāṣid*.

Then came Ibrāhīm Abū Ishāq al-Shāṭibi, the chief exponent of the *maqāṣid*, who took a comprehensive view of this subject by adding the inductive method (*al-istiqrā'*) to the existing approaches. To identify the *maqāṣid*, al-Shāṭibi spoke affirmatively of the need to observe the explicit injunctions, but added that adherence to the text must not be so rigid as to alienate the rationale and purpose of the text from its words and sentences. The preferred approach was naturally the integrated approach of reading the text, in conjunction with its rationale, objective and purpose.¹⁷ The following examples highlight the *maqāṣid*-oriented approach toward *ijtihād*:

- a) According to the majority, the *Ṣadaqat al-fiṭr* (charity given marking the end of Ramadan) must be given in kind, since all the *aḥādīth* on this subject mention dates, wheat, barley and raisin. Only some Ḥanafī scholars held that it may be given in their monetary equivalent. After all, the purpose of that charity was to satisfy the need of the poor which

¹⁷ Abū Ishāq Ibrāhīm al-Shāṭibi, *al-Muwāfaqāt fi Uṣūl al-Aḥkām*, ed. Shaykh 'Abd Allah Dirāz, Cairo: al-Maktaba al-Tijāriyya al-Kubrā, n.d. vol. II, p. 393.

can also be met through contribution in cash. The first position is clearly literalist, whereas the second is purpose-oriented. The ruling of the hadith was suitable for its own time when there were shortages of staple food in the market of Madina, but that situation subsequently changed. Then again, the Prophet authorised collection and distribution of the *fiṭr* charity between the *Fajr* and 'Eid prayers on the first day of 'Eid al-Fiṭr. This was possible at the time as the community was relatively small, but it became difficult to follow the original ruling later when Madina expanded. Subsequent *ijtihād* actually changed that position and ruled that *fiṭr* charity may be given one or two days before the 'Eid, or even any time during the fasting month.

- b) The beginning of the fasting month is signified, as the Qur'ān provides (al-Baqarah, 2:185) by the sighting of the new moon. This was the only reliable method in earlier times, especially in the Arabian peninsula where clear skies were normally expected, but to insist on sighting of the new moon with the naked eye may not be necessary under the changed circumstances of today. For that would mean insisting on a literal enforcement of the text while turning a blind eye to new scientific methods. To insist on a literal reading of the text would not only lead to uncertainty, in some cases at least, but also defy the essence of the Qur'ānic directives on rational observation and empirical truth. Furthermore, there is no change in the goal and purpose of sighting the moon which is to determine the arrival of Ramadan. What changes only in the means. When better means becomes available that serves the same purpose, it should certainly be considered.

- c) There are several hadiths wherein the Prophet emphasised the use of *siwāk*, that is the toothbrush, and since it referred, at that time, to a particular type of brush that was commonly used for the purpose, pious Muslims continued to use the *siwāk* even after the more effective varieties of brushes became available. A literalist reading of the hadith would hardly seem advisable at a time when the purpose of its directive, which is cleanliness, could be achieved more effectively by alternative means. The *fuqaha*' have, in fact, subsequently upheld this latter position.
- d) At a time when food prices went up sharply in Madina, some Companions suggested if the Prophet would fix the prices of basic commodities. The Prophet declined and in a long hadith, reported by Anas b. Mālik, he explained his apprehension that such a ruling may prove to be unfair to some. Price control was thus rejected and the fear was that it may worsen the supply situation in the Madinan market, which was known to be irregular. Later during the *tābi'ūn* period, the issue of price control (*tas'īr*) became the focus of attention and the leading ulema of Madina validated *tas'īr* and reasoned that the Prophet declined *tas'īr* for fear of oppression, but that drastic change of circumstances brought forth a situation where people would suffer if the government did not intervene to regulate the prices. Although the ruling in this instance was the opposite of what was upheld in the hadith, the purpose of both rulings was the same, which was to avert oppression and abuse.¹⁸

¹⁸ See for details, M.H. Kamali, "Tas'īr or Price Control in Islamic Law," *The American Journal of Islamic Social Sciences*, Vol. II (1994), 25-38. See also Yusuf al-Qaradawi, *Kafa Nata'āmalu ma'as-Sunna an-Nabawīyya*, 2nd edn., Herndon, VA, al-Ma'had al-'Ālami lil-Fikr al-Islami, 1411/1990, pp. 134-141; idem, *al-Ijtihād fi'l-Sharī'a al-Islamiyya*, Kuwait: Dār al-Qalam, 1406/1985, pp. 120-22.

Al-Shāṭibi's major work, *al-Muwāfaqāt*, is well-known for its fresh emphasis on the philosophy of law (*ḥikmat al-tashrīʿ*) and the *maqāṣid al-sharīʿa*. The author was critical of the *uṣūlī* approaches to the exposition of the sources and proofs of Sharīʿa and their neglect of the *maqāṣid*. Al-Shāṭibi departed from that approach by placing a fresh emphasis on the *maqāṣid* and widening their scope through his inductive method. What this meant was that the *maqāṣid* could be identified through the general reading of the *nusūṣ* even in the absence of a specific text. There may be various textual references to a subject, none of which is in the nature of a decisive injunction. Yet, their collective reading leaves little doubt as to their meaning and purpose. A decisive conclusion may thus be obtained from a plurality of inclining expressions. Al-Shāṭibi illustrated this by saying that nowhere in the Qurʾān is there a specific declaration to say that the Sharīʿa is enacted for the benefit of the people, yet this is a definitive conclusion that is sustained by the collective reading of a variety of textual proclamations.¹⁹ On a similar note, there is no specific text to declare protection of the five values (of faith, life, intellect, property and lineage) as of primary importance to the Sharīʿa, yet this very conclusion has been arrived at by induction (*istiqrāʾ*) and has been generally accepted. Al-Shāṭibi then added that the inductive method also applied to the identification of commands and prohibitions, and it was not therefore confined to the *maqāṣid* and *maṣāliḥ* as such.²⁰ Al-Shāṭibi maintained that conclusions that are arrived at through induction represented the general premises and objectives of the Sharīʿa over and above the level of the specific rules.

Without wishing to engage into detail, al-Shāṭibi's theory of the *maqāṣid* also took into consideration the consequences of conduct (*maʿālāt al-afʿāl*) and he gave many examples from the

¹⁹ Al-Shāṭibi, *Muwāfaqāt*, vol. II, p. 6.

²⁰ Id., vol. III, p. 148.

Sunna to the effect that the rules of Sharīʿa are sometimes formulated in contemplation of their expected consequences. The theory of *maqāṣid* also engages the reader into the question of means and ends and whether the means to *wājib*, or the means to *ḥarām*, should also be seen as an integral part of the *wājib* or the *ḥarām* in question. He then discussed the subject of 'illah (effective cause) in the context of the *maqāṣid* and advanced a fresh understanding of it which was more conducive to his theme.

Al-Shāṭibi also emphasised the importance of the *maqāṣid* for *ijtihād*. A sound knowledge of the goals and objectives of Sharīʿa was a prerequisite of attainment to the rank of *mujtabid*. He stressed on the point that neglecting the *maqāṣid* made *ijtihād* susceptible to error. Those who looked at the apparent text of the Qurʾān without pondering over its ultimate aim, such as the advocates of pernicious innovations (*ahl al-bidaʿ*), Muʿtazila and Kharijites, did so at their own peril. Many of them held on to the literal text or even the *mutashābihāt* (the intricate segments of the Qurʾān) and premised their erroneous conclusions on them. They took a fragmented approach to the understanding of the Qurʾān which was flawed by their neglect of the *maqāṣid*.²¹

A twentieth century scholar and author of another important work on the *maqāṣid*, Ṭāhir b. ʿĀshour, also stressed that knowledge of the *maqāṣid* was indispensable to *ijtihād* in all its manifestations. Ibn ʿĀshour gave many examples of the *ijtihād* of some very prominent ulema of *fiqh* and pointed at their weaknesses on the ground specifically of their literalist orientation to *ijtihād* and their neglect particularly of the *maqāṣid*. Considerations of brevity, however, does not permit further elaboration.²²

²¹ Id. Vol. IV, p. 179.

²² Muḥammad Ṭāhir b. ʿĀshour, *Maqāṣid al-Sharīʿa al-Islamiyya*, Tunis: Maṭbaʿa al-Istiḳāma, 1966, pp. 15-16. For a discussion of some such examples, see M.H. Kamali, *Principles of Islamic Jurisprudence*, pp. 405-406.

Thus far, almost the whole of this paper's discussion of the *maqāṣid* is focused on *ijtibād*. The *maqāṣid* only serves the purpose of opening up the avenues of *ijtibād* and enhances the ideational substance and foundation of *ijtibād*, but the *maqāṣid* does not propose a procedure or methodology of its own. Having added the benefit of the *maqāṣid* to our approaches to *ijtibād*, we still need a methodology and framework for legislation. The *uṣūl al-fiqh* is rich in methodology which is, unfortunately, not functioning, and it would be pointless simply to propose a merger between *ijtibād*, the *maqāṣid* and *ijmā'*. For this would once again subjugate the new project to the difficult requirements of *ijmā'*. What we need therefore, is a modified procedure for *ijmā'* which is then utilised as a legislative vehicle for the *maqāṣid*-oriented *ijtibād*.

A reformulated *ijmā'* can provide the needed vehicle and procedure for our proposals. *Ijmā'* can, and should play a positive role in the democratisation, as it were, of the legal theory and, indeed, of the entire political system. But that *ijmā'* should no longer be confined to the consensus of the learned elite and should be opened up so as to represent the general consensus of the community which would be enlightened and supported, inevitably, by its learned members.²³ To reform *ijmā'* in this way would actually bring it close to how it was understood by Imam al-Shāfi'ī. For al-Shāfi'ī *ijmā'* had meant the consensus both the laymen and *mujtabidūn* of the Muslim community. The only departure that is hereby proposed is over the requirement of universal consensus. Even al-Shāfi'ī admitted that this was difficult to obtain and could only be realised with regard to the obligatory duties only and not on issues that were open to *ijtibād*.²⁴

²³ Cf. Abdelwahab el-Affendi, *Turabi's Revolution: Islam and Power in the Sudan*, London: Grey Seal, 1991, p. 160.

²⁴ Al-Shāfi'ī, *al-Risalah*, n. 1, p. 205.

A body of reformist opinion on *ijmā'* has developed and various proposals have been put forward by Muhammad Iqbal, al-Wahhāb Khallāf, Maḥmūd Shaltūt, to mention but a few, all of which seek to overcome the problematics of this doctrine. Khallāf proposed that modern governments are now playing a leading role in education and legal services and should therefore also play a proactive role in *ijmā'* and *ijtihād*. Khallāf proposed that a procedure of accreditation for qualified *mujtahids* should be devised and also that the agreement of the majority, as opposed to universal consensus, should be sufficient for *ijmā'*.²⁵ Muhammad Iqbal proposed that *ijmā'* and *ijtihād* should be institutionalised within the rubric of the Muslim legislative assembly, which combined both experts in the Sharī'a and other disciplines. Shaltūt warned against the prospects of politicisation of *ijmā'* and recommended that freedom of expression must be guaranteed for the constituents of *ijmā'*.²⁶ In an article that I published in 1996, I submitted that the conventional "definition of *ijmā'* is oblivious of both the Qur'ānic concepts of *shūrā* and *ūlu al-amr* especially in reference to the government and the role it might reasonably be expected to play in consultation and in taking charge of the community affairs".²⁷ I also proposed that *ijtihād* and *ijmā'* should be merged into a unified formula to be known as "ordinances (or *ahkām*) of the '*ūlu al-amr*,'" a designation which is clearly reflective of the Qur'ānic origin of the proposed formula. What is now being proposed is that in the formulation of such ordinances, the '*ūlu al-amr* should be guided both by specific injunctions as well as the general objectives, philosophy and spirit of the Sharī'a.

25 Abd al-Wahhab Khallaf, *Ilm Uṣūl al-Fiqh*, 12th edn. Kuwait, Dār al-Qalam, 1398/1978, pp. 49-50.

26 Mahmud Shaltut, *Al-Islam 'Aqida Wa Sharī'a*, Kuwait, Dar al-Qalam, 1966, p. 58.

27 M.H. Kamali "Methodological Issues," n. 7, p. 29.

VII. Conclusion

At a time when the major issue facing the *ummah* is over the prospects of the Sharīʿa being marginalised altogether, a total preoccupation with the specifics would hardly seem advisable. Neither the methodology nor the legal theory of *uṣūl al-fiqh* was formulated at a time when the fate of the Sharīʿa was not at issue. The near-total reliance that we now witness on the statute book and the role of parliamentary legislation has nowhere been envisaged in conventional *uṣūl al-fiqh*. And *uṣūl al-fiqh* itself does not have the capacity to accommodate this new reality without necessary adjustment. The rich legacy of the *uṣūl* methodology can be utilised in a new framework that opens avenues for *ijtihād* and can integrate and unify the Sharīʿa and statutory legislation within one and the same process. The new *maqāṣid*-oriented approach to *ijtihād* that is proposed here seeks to open up the scope of *ijtihād* by making the *maqāṣid* an extension of the theory of *ijtihād*. Since the *maqāṣid* is concerned basically with values and is relatively unencumbered by technicalities, it can help to make the legal theory pragmatic and relevant to the concerns of modern society. Thus, this paper proposes to retain the basic tools and methods of *uṣūl al-fiqh*, especially in reference to *ijtihād* and *ijmāʿ*, and nearly all of the sub-varieties of *ijtihād*. In the meantime, we need to discard formalism and unwarranted preoccupation with the technicalities of the conventional legal theory. To consolidate *ijtihād*, *maqāṣid al-sharīʿa* and *ijmāʿ* within the unified concept of the “ordinances of the ‘*ūlu al-amr*’” would serve the important purpose of discarding the persistent bifurcation and dualism that has prevailed during the greater part of our history, which has been viewed, erroneously, as an anomaly. The paper’s proposal is predicated on Qur’ānic guidelines pertaining to ‘*ūlu al-amr* and *shūrā*, and is in line with the spirit of unity and integration of the community. The ordinances

of *'ūlu al-amr* is a comprehensive concept which is premised on collaborative effort between all sectors of the community; it seeks to unify the task of legislation on all matters and overrule, therefore, the division between the Sharī'ah and statutory law.

What I have proposed here may in some ways sound a little remote especially in view of the prevailing duality in many Muslim countries between Sharī'ah and statutory law and between ulema and government. But there is room for optimism. Ideals may become reality when they present sufficient potential for sustained research on a wider scale that may aspire towards higher levels of refinement and hopefully usher in a new era of *ijtihād*.

Wa bi-Allah at-taufīq wa'l-hidāya.

Wassalamu 'alaykum wa rahmatullāhi wabarakātub.

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