

Ibn Ashur

Treatise on *Maqāṣid al-Shariʿah*

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IBN ASHUR
TREATISE ON
Maqāṣid al-Shariʿah

Muhammad al-Tahir Ibn Ashur

Original Edition Translated from the Arabic and

Annotated by Mohamed El-Tahir El-Mesawi

Abridged by Alison Lake

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Ibn Ashur Treatise on *Maqāṣid al-Sharī'ah* (an English translation of the original Arabic) was published in complete form in 2006. In the work Shaikh Muhammad al-Tahir ibn Ashur proposes *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.

Ibn Ashur – quite courageously – 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, conflict resolution, etc. But Ibn Ashur's most significant contribution in this book has been the development of new *Maqāṣid* by coining new (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

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

based. This development opens great opportunities for Islamic law to address current and real challenges for Muslim societies and Muslim minorities.

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INTRODUCTION

Shaikh Muhammad al-Tahir ibn Ashur is the most renowned Zaytuna Imam and one of the great Islamic scholars of the 20th century. This book is a breakthrough in Islamic law studies in the English language. Ibn Ashur proposed *Maqāṣid* as a methodology for renewing the theory of Islamic law, which has not undergone any serious development since the era of the great imams from al-Shāfi‘ī in the 8th century to al-Shāṭibī in the 14th century. Ibn Ashur’s methodology takes a centrist position between two contemporary extremes: ‘neoliteralism,’ which ignores rationales and valid re-interpretations of the Islamic rulings in favor of literal traditional views, and ‘neorationalism,’ which ignores the religious and cultural identity of Muslims in its quest for ‘modernization’ and ‘rationality.’

Maqāṣid of the Islamic law is based in the Islamic scripts and Islamic faith, and highlights rationales, purposes, and common good in Islamic rulings. Ibn Ashur also addressed the sensitive topic of the intents/*Maqāṣid* behind the actions and decisions of the Prophet Muhammad. Ibn Ashur introduced criteria to differentiate between the Prophetic traditions intended for Islamic law and Prophetic actions and sayings intended for specific purposes. This book’s most significant contribution is the development of new *Maqāṣid* with contemporary terminology never before formulated in traditional *uṣūl al-fiqh*. Ibn Ashur’s contributions open 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 to a scholarly Andalusian family. He studied with reform-minded ‘*ulamā*’ and mastered classical Islamic scholarship. He became a judge then Shaikh al-Islām in 1932, and was a prolific writer and author in the area of reforming Islamic education and jurisprudence. Ibn Ashur’s 1946 work on *Maqāṣid al-Sharī‘ah* is a pioneering, systematic study of Shari‘ah’s higher objectives.

PREFACE

This book develops important discourses on the *Maqāṣid al-Sharīʿah* to provide a guide and frame of reference when addressing differences of opinion. The book intends to help Muslims develop a healing legislation for their contingent issues when new cases emerge, and provide them with a decisive opinion in face of conflicting arguments by different juristic schools. Differences over the basic principles (*uṣūl*) continue regarding applied legal rulings, because the general rules and universal principles of *uṣūl al-fiqh* are derived from the particular qualities of those rulings.

Uṣūl al-fiqh has never been the final arbiter whose verdict is accepted by those disagreeing on matters of fiqh. In addition, most propositions and inquiries of *uṣūl al fiqh* hardly serve the purpose of expounding underlying wisdom, or *ḥikmah*, and establishing the goals of the Shariʿah. Scholars of *uṣūl al-fiqh* have thus confined their inquiries to the external and literal aspects of the Shariʿah. We are concerned with evaluating the status of the actual propositions of *uṣūl al-fiqh*.

To present definitive and categorical principles for understanding Shariʿah, we should return to the traditionally accepted propositions of *uṣūl al-fiqh* and reformulate them. Then we should reformulate the whole and classify it as an independent discipline called “science of the higher objectives of the Shariʿah.” This book studies the objectives of Islam concerning the laws and rules governing civil transactions and manners. These laws deserve to be exclusively called the Shariʿah, for they reflect Islam’s aim to specify and identify the various levels of benefit and harm and the criteria for assessing them.

Part I: Establishing *Maqāṣid al-Sharīʿah*

We aim to prove that the Shariʿah in general has intended higher objectives and prove why the jurist should know them, as well as the goal categories and methods to identify and confirm them. The provisions and ordinances of any divine law are instituted for humankind and aim at certain objectives intended by God. He sent messengers and revealed laws to establish human order. Furthermore, humans possess a God-given disposition for civilization, whose greatest manifestation is the making of laws to regulate their lives. When examining the Qur’an and the authentic Prophetic traditions, we can conclude that the rules of the Islamic Shariʿah are based on inner reasons that devolve upon the universal goodness and benefit society and individuals.

The jurist needs to know *Maqāṣid al-Sharī'ah* on the following levels. First, he should understand its expressions and meanings by applying the linguistic rules governing juristic argumentation addressed in *uṣūl al-fiqh*. He should then seek any dissonance in the indicants advanced by the *mujtahid*, and further investigate the intents and rules of Shari'ah. Deduction by analogy depends on the affirmation of underlying causes that may require the knowledge of *Maqāṣid al-Sharī'ah*. The higher objectives of the Shari'ah are criteria for the acceptance of Prophetic Traditions, consideration of the opinions of jurists from among the Companions and early scholars, and methods of juristic reasoning and argumentation.

Methods of Establishing *Maqāṣid al-Sharī'ah*

Shari'ah has higher objectives in its legislation by virtue of evidence and proofs. We already know the various *Maqāṣid al-Sharī'ah* that are based on conventional proofs in *uṣūl al-fiqh*. Although these proofs are derived from the Qur'an, whose text is definitively established by contiguous multiple transmission, most Qur'anic indicants belong to the category of literal connotations that are probabilistic, not definitive and categorical. The *mujtahids* disagreed upon the rules and provisions they derived from it.

The jurist's utmost guiding principle in this respect is to abide by objectivity and justice and shun bias to a prejudgment, past ijthihad opinion, or view of a great scholar or teacher. The important method of thematic inference of *Maqāṣid al-Sharī'ah* lies behind its various dispositions and measures. When we conduct an inductive survey of numerous causes, which share the quality of one underlying wisdom (*ḥikmah*), we can infer from them one specific objective and ascertain an intended purpose of the Shari'ah.

Furthermore, we may examine the numerous textual proofs of Shari'ah commands and rules that have a common *ratio legis*. Then we can infer with certainty that this *ratio legis* represents an objective intended by the Lawgiver.

The statements of the Predecessors generally bear clear evidence of the necessity of considering *Maqāṣid al-Sharī'ah*. Their abundant statements also indicate that they searched for *Maqāṣid al-Sharī'ah* in its legislative pronouncements by inductive inference. The most accurate *mujtahids* and ijthihad-based opinions of each *mujtahid* depend on the

depth and thoroughness of their efforts to search for *Maqāṣid al-Sharī'ah*.

Some scholars fail to consider the context of the speech act, which consists of contextual evidences, speech conventions, and general context. Jurists differ clearly in paying attention to these considerations. However, none can dispense with a thorough examination of the Prophet's acts and dispositions. Consideration should be given to the opinions of the Companions in those juristic matters depending on transmission and practice. Thus, when faced with different probabilities of interpretation, jurists used to seek clarification from God's Messenger just as they used to observe those circumstances that would give them insight into the Lawgiver's intent.

The Prophet's Intent of Legislation

An essential skill for the seeker of *Maqāṣid al-Sharī'ah* is to distinguish the different intents of the words and actions of the Prophet. Scholar Shihāb al-Qarāfī was the first to be aware of this distinction and put it into practice, and wrote, "God's Messenger (ṢAAS) is the supreme imam, the most judicious judge and the most learned jurisconsult (mufti)...We cannot think of any religious function without thinking of him as its perfect model and prototype..." He continued, "...his actions and conduct in the abovementioned capacities have different consequences in the Shari'ah. Thus, everything he said or did by way of transmission and conveyance is a binding general rule..."

The Companions clearly distinguished between the commands of God's Messenger that ensued from his position as legislator and those that did not. Statements or actions ensued from God's Messenger in the following capacities: legislation, issuing edicts (fatwa), adjudication, political leadership of the state, guidance, conciliation, advice to those seeking his opinion, counseling, spiritual inspiration, teaching high and lofty truths, disciplining, and non-instructive ordinary statements.

All these capacities are clear evidence of legislation and vary with the categories of the Shari'ah rules belonging to them. Issuing fatwas and administering justice are both examples of the application of legislation. The capacity of supreme leadership of state in most instances cannot be confused with those pertaining to the capacity of legislation. The capacity of guidance and instruction is more general than that of legislation because God's Messenger may command and prohibit while

his intention is not decisiveness, but rather indicating different ways to goodness and righteousness. The jurist should examine thoroughly the circumstances and circumstantial evidence of the Prophet's various actions. Contextual indications pertaining to legislation include the Prophet's concern about conveying his words to the general public, his commitment to act upon what he said, and the legal command's formulation in universal propositions.

Certain and Probable *Maqāṣid al-Sharī'ah*

Jurisprudential errors have very grave consequences for individuals or societies. Scholars should never determine any Shari'ah objective before undertaking a comprehensive thematic study of the dispositions of the Shari'ah concerning the genre of teachings chosen for the legislative purpose, and before consulting the works of the scholars of Islamic jurisprudence for enlightenment. A systematic process of determining objectives and considering all potential aspects is crucial for avoiding error.

The knowledge acquired by the seeker of the Shari'ah objectives might appear in different forms: certain, highly probable, or conjectural. Jurists should identify a number of definitive higher objectives as a frame of reference and ultimate criteria in fiqh and juristic polemics. The aim is to formulate a set of definitive rules as a frame of reference in case of disagreement or obstinacy, producing *ʿIlm Maqāṣid al-Sharī'ah*, which differs from *uṣūl al-fiqh*. The probable and conjectural objectives can easily be attained by induction of the rules of the Shari'ah.

A thematic inference is sufficient for scholars to assert that promoting ease is one of the higher objectives of the Shari'ah. All the indicants examined on the basis of inductive survey are both recurrent and general and are found in definitive text of the Qur'an. The degrees of probability and conjecture in understanding *Maqāṣid al-Sharī'ah* depend on the varying levels of the thematic survey of its sources and the indicants available to investigating jurists.

Rationalized and Non-Rationalized Shari'ah Injunctions

The method developed by the jurists for reasoning and argumentation in fiqh and *uṣūl al-fiqh* has confined their reasoning to the literal wording of the Qur'an, the Prophet's sayings, acts, and silence. Those statements might denote universal rules and provisions. Jurists derived

various specific rulings either by establishing the effective cause of the universal rules or by analogical deduction in specific rules. After exerting all possible effort and failing to discover the specific intent of the Lawgiver, the *mujtahid* concludes that the Shari‘ah requires us simply to submit to God’s commands as part of our faith.

Jurists contend that Shari‘ah commands are either rationalized or devotional. While *mujtahids* differ in affirming the latter kind, jurists who addressed the question of analogical deduction classified the Shari‘ah commands into three categories: necessarily rationalized commands stipulated or alluded to in the textual sources of the Shari‘ah; devotional commands whose underlying causes are beyond human grasp; and a middle category of commands with covert underlying causes but which the jurists can rationally infer though they might disagree on the inferred causes.

Once jurists are certain a command is purely devotional, they are bound to preserve its form and not alter it. Jurists must carefully scrutinize and analyze those Traditions with hidden reasons and objectives to find a suitable way to construe a specific Shari‘ah objective. They should also consider the overall situation of the Muslim community when those Traditions were spelled out. We are certain that all the Shari‘ah commands embody the Lawgiver’s purposes, which consist of underlying reasons, benefits, and interests.

Part 2: On the General Objectives of Islamic Legislation

The Determinant Characteristic of *Maqāṣid al-Sharī‘ah*

The general objectives of Islamic legislation consist of the deeper meanings and inner aspects of wisdom considered by the Lawgiver in areas and circumstances of legislation. They include the general characteristics of the Shari‘ah. *Maqāṣid al-Sharī‘ah* take form of real ideas or universal conventional ideas that must be certain, evident, regular, and constant. Universal conventional ideas are time-tested notions that are familiar and acceptable to the general public owing to their conformity with the public good. Some notions might lack constancy and oscillate between good and harm, and therefore cannot be absolutely accepted or rejected as Shari‘ah objectives. Instead, they must be referred to the Muslim community’s scholars and rulers, who have the authority of

both abolition and compulsion. Once such notions are established with their stipulated conditions, we can be sure they constitute Shari‘ah objectives.

If the Lawgiver is considered to have intended their application as a mere possibility, then the jurists must confirm them as particular cases closely linked to the general principles and should not venture to extend them beyond their specific and proper contexts. However, if they probably constitute invariably intended Shari‘ah objectives, the jurists can take them as general rules that can be extended beyond the specific context. Since the Shari‘ah rejects illusions and fancies of the imagination, basing its commands on illusions is unacceptable to the Shari‘ah except in need. Imaginary or intangible things, though inappropriate as objectives of legislation, might be useful for achieving certain Shari‘ah objectives, such as inviting people to Islam or arousing interest or fear as a mode of persuasion.

Grounding of *Maqāṣid al-Sharī‘ah* on *Fiṭrah* and Magnanimity

Fiṭrah is the natural disposition and order that God has instilled in every created being. Thus, the *fiṭrah* of human beings is the inward and outward condition of their creation, in intellect and body. Similarly, relating effects to their causes and drawing conclusions from their proper premises are part of a human being’s intellectual and mental disposition, whereas drawing conclusions from causes that are not real contradicts that intellectual disposition. Islam consists of beliefs and legislations that are all rational matters or matters according to what is perceived and confirmed by reason. Shari‘ah calls its followers to safeguard the *fiṭrah* and preserve its acts in civilization. When the requirements of the *fiṭrah* conflict and are irreconcilable, then priority must be given to what is stronger and more significant for the preservation of the *fiṭrah*. Resorting to established custom in legal judgment flows from the meaning of the *fiṭrah*, for it is a precondition that when used for this purpose, custom must not contravene the established rules of the Shari‘ah.

Magnanimity (*samāḥah*) is the ease in dealing with one another in moderation. Standing between sternness and indulgence, *samāḥah* derives its meaning from the ideals of moderation, justice, and temperance. Moderateness constitutes the backbone of all virtuous qualities. *Samāḥah* is commendable ease in matters where people tend toward

sternness, and does not cause harm or corruption. Qur'an and the Sunnah confirm Islam's magnanimity. The underlying wisdom is that God has made Islam the religion of the *fiṭrah*, and matters of the *fiṭrah* pertain to humankind's constitution and inborn disposition. As a result, the Shari'ah brings comfort to both individuals and societies. Magnanimity has manifested its great importance in the spread and unbroken historical continuity of the Shari'ah. And this provides further evidence that ease is a matter of the *fiṭrah*.

General Objectives of Islamic Legislation

The Shari'ah's general rules and specific proofs indicate that the all-purpose principle of Islamic legislation is to preserve the social order of communities and insure their health. Explicit textual proofs confirm that the overall objective of the Shari'ah is to remove corruption in all kinds of human activity.

The righteousness intended and praised by the Lawgiver is not confined to righteousness of belief and acts of ritual worship. Rather, it sets things to rights in people's worldly condition and social affairs, as Islam has done by addressing the affairs of both individuals and communities and reforming matters pertaining to faith and belief. Islam then addressed purifying the human psyche and uplifting the human soul. From the beginning of the Prophet's call to the post-Hijrah period, Islamic legislation gradually developed a sufficient guide concerning the strategy of the Shari'ah for achieving its desired reform.

We focus on the specific aspects of reform pertaining to the public affairs of Muslims in the rules and laws regulating civil and social dealings. This is known in Islamic jurisprudence as the attainment of what is good and beneficial and ejection of the evil and harmful.

Maṣlahah and *Mafsadah* in the Shari'ah

Maṣlahah means utmost righteousness and goodness and an attribute of the act whereby righteousness and goodness takes place in public or in private. It is also useful and beneficial for the public or individuals. *Mafsadah* is the opposite of *maṣlahah*, an attribute of the act whereby corruption or harm happens to the public or to individuals. Public interest pertains to collective obligations that can strengthen the Ummah. Private interest benefits individuals and is concerned with the righteousness and goodness of individuals' acts to benefit society. Part

of the Qur'anic legislation and most of that of the Sunnah are concerned with this category of *maṣlaḥah*.

This prescription aims to achieve a more general and important objective of consolation in times of hardship so that it becomes a norm in society, whereby people shoulder one another's burdens in great calamities and are able to face future misfortunes. To preserve the well-being and order of the world, the Shari'ah has surrounded the vital and invariable interests of human beings with permanent means of protection even in situations where there is apparently no benefit. To formulate a clear-cut definition by which a characteristic of action would determine whether the action should be considered a *maṣlaḥah* or *mafsadah* is a delicate matter requiring very careful and precise expression.

To consider an action *maṣlaḥah* or *mafsadah*, the benefit or harm must be definite and regular, and so prevalent and evident that rational and wise people acknowledge it, and the action characteristics cannot be replaced with something else, either in creating benefit or incurring harm. One of the two aspects of benefit and harm, though equivalent to its opposite, must be corroborated by something of its genus that makes it outweigh the other aspect; one of the two aspects of benefit and harm must be definite and certain, whereas the other is indefinite and uncertain. Legislation covering the perception of *maṣāliḥ* does not incur any *mafsadah*, and legislation concerning the prevention of *mafasid* does not result in the omission of any *maṣlaḥah*. Rather, all Islamic legislation aims at awareness of *maṣlaḥah*. Absolute and preponderant *mafsadah* outweighing *maṣlaḥah* varies clearly regarding its genus.

With all its variants, *maṣlaḥah* is of two main kinds. One consists of obvious benefits for human beings. These are so ingrained in people's innate disposition that people are inherently driven to pursue and acquire them because they seem acceptable. The other kind consists of benefits that are less obvious. The Shari'ah is more concerned with removing obstacles to achieving the obvious benefits. The *maṣlaḥah* of the less obvious benefits has been handled positively by Islamic legislation, which has prescribed it and enacted specific penalties for abandoning and violating it.

Some variants of the obvious benefits may be subsumed under the less obvious category owing to certain corrupting influences that might affect people's innate disposition. Those upholding the Shari'ah and

who can explain its legislative rules should firmly prevent these deviations and discrepancies by teaching that will eradicate them and expose superficial ideas and corruption. When abnormalities are confined to the person committing them, moral exhortation and proper education are the solutions. If, on the contrary, they infringe upon others and cause harm to them by word or action, punishment is the remedy. The Shari'ah operates its strategy for protecting the different kinds of *maṣāliḥ* with tolerance and restraint, depending on its evaluation of people's behavior regarding the two categories of *maṣlahah*.

The Shari'ah always protects the underrated *maṣlahah*, whether public or private, as a means to safeguard both public and private rights. When conflict arises between two different aspects of *maṣlahah*, preference is given to the greater and more important of them. The Shari'ah seeks to realize its objectives regarding the whole community without causing difficulty and hardship, by reconciling as much as possible the different aspects of the purposes intended by its prescriptions and laws. It thus ascends by the community from the lower to the higher levels of those objectives as much as circumstances allow. *Fiṭrah* can provide us with the basis for linking the Shari'ah rules concerning the conflict of *maṣāliḥ* and *mafāsīd* to the question of the preservation or undermining of human nature.

Following are examples and analogies for kinds of *maṣāliḥ* the Shari'ah considers and the *mafāsīd* it avoids, so that students of *maqāṣīd* can learn to discover the intent of the Lawgiver and follow His way in addressing different *maṣāliḥ* and *mafāsīd* in acquisition and rejection, depending on community circumstances. This skill is important to acquire because *maṣāliḥ* are numerous and vary in their impact on community righteousness and well-being. Therefore, only those *maṣāliḥ* we know were included by the Shari'ah are considered.

Maṣāliḥ can be classified according to their impact on and necessity for the existence of the community and individuals. Our aim is to familiarize ourselves with varieties of *maṣāliḥ* as intended by the Shari'ah to gain full knowledge of their universal genres. Then we can classify and judge them according to the relevant rules. The Shari'ah has left these textually unqualified but sound as a reference principle. The particulars of *maṣāliḥ* are subject to probability and uncertainty based on evidence supporting the different types of appropriate analogy, identification of common properties, and accuracy of established similarity between the original and new cases. Conversely, evidence for the genera

of *maṣāliḥ* derives from the thematic inductive study of the Shariʿah, which yields certainty.

Comprehending the idea of *maṣāliḥ* is the clearest and most straightforward way for the jurists to deal with community affairs. If *maṣāliḥ* are contradicted by other *maṣāliḥ* they should be assessed according to appropriate rules that require greater independent judgment. This judgment varies according to the importance of both the *maṣāliḥ* that are followed and conflicting *maṣāliḥ*, as well as in the degree of certainty concerning their weight and strength.

Universal Principles of the Islamic Shariʿah

The Shariʿah, the last revealed law, is universal and its rules and commands should apply equally to all human beings as much as possible. God based the Shariʿah on inner wisdom and underlying causes that can be perceived and do not change according to nations and customs.

While agreeing on the universality of the Shariʿah, Muslim scholars did not show how that suitability is manifested. The fundamental rules, universal principles, commands, and injunctions of the Shariʿah apply to all circumstances without any difficulty or hardship, and the situations of peoples and nations throughout the ages have been receptive to the teachings of Islam without any difficulty or hardship. These modes of Shariʿah suitability are interconnected and complementary. Inherent Shariʿah wisdom and benefits can be projected into various rulings that are diverse in form but unified in purpose.

One of the most important consequences of the universality of the Shariʿah is the question of equality in the community. However, the Shariʿah avoids imposing equality and similarity on anything that varies in primal human nature. Variation is left to be handled by the social and civil systems according to the politics of Islam rather than by its fundamental legislative rules. Human equality is insured in Islamic legislation. To establish the equality of individuals or groups in Islamic legislation, we are not required to search for its underlying reasons; it is sufficient to insure that nothing contravenes equality.

Impediments to equality necessitate the suspension or abolition of equality because of certain predominant *maṣlahah* or *mafsadah* resulting from its implementation. Those impediments are considered accidental owing to their effect on suspending this fundamental principle that is

the norm in Islamic legislation. The criteria for evaluating the extent obstacles could remove equality between human beings stem from careful rational consideration or the rules of codified law.

Obstacles preventing equality in certain areas of the Shari‘ah can be inborn and natural, legal, social, or political. These considerations might be permanent or temporary, major or minor. The natural, legal, and social considerations relate to moral conduct, respect of others’ rights, and orderly and ethical management of Muslim community affairs. Political considerations aim to protect Islamic political power. The Shari‘ah is the reference and guide in specifying these impediments and determining their effects by considering specific legislative rules whose implementation overrides the realization of equality.

Equality in conducting personal affairs is one of the primary goals of the Shari‘ah. The Arabic term *hurriyyah* denotes two meanings, one deriving from the other. The first meaning is the opposite of slavery and refers to the original ability of all rational and mature people to handle their affairs. The second meaning derives from the first by metaphorical usage. It denotes one’s ability to act freely without opposition from anyone. These two meanings of freedom have been intended by the Shari‘ah, for both stem from *fitrah* and reflect the notion of equality.

The usage of the first meaning in the Shari‘ah is common and well-established. The diligence of the Shari‘ah in considering public and shared interests and safeguarding social order prevented it from abolishing the factors of slavery all at once, due to its historic entrenchment at the advent of Islam. In pursuing its objectives, Islam aimed at striking a balance between spreading freedom and preserving order by promoting the means to freedom over those of slavery. It combated slavery’s causes by reducing its numbers and abolished many factors leading to slavery.

Freedom of expression and pursuit of knowledge were best manifested during the first three centuries of Muslim history, when scholars could express their views and doctrines. Without freedom of expression, confessions, contracts, obligations, divorce pronouncements, and wills would have no legal effect. These actions are ineffective if they occurred under coercion. Freedom of action that affects others is lawful if it does not cause harm. In many of its dispositions the Shari‘ah has guarded freedom to act by blocking all means leading to its violation.

Objectives, Attributes and Purposes in the Shari‘ah

Islamic legislation has adopted a double method consisting of both alteration and confirmation. One method consists of removing decadence and declaring its corruption. Alteration might mean further restriction with human welfare in mind. It may also result in leniency to put an end to extremism. One aspect of wise and purposeful change in human affairs is taking care to implement it without deviation, for indulgence threatens to undermine it from both sides. The other method consists of confirming good practices that have been followed by human beings.

The affirmation of the legislative rule of permissibility is needed to end the excessiveness of extremists by encouraging them to follow what is normal and acceptable to the majority of reasonable and good people. Confirmation also requires removing any illusions that people might have, under which they are led to believe that good deeds are evil when unrighteous persons do them. Except for these and similar reasons, the silence of the Lawgiver is considered to indicate the confirmation of what people are doing. Therefore, permissibility is the foremost rule of the Shari‘ah because its subject matter comprises innumerable varieties. Alteration and confirmation apply to the whole of humankind.

The purpose of the Shari‘ah in all its rules and injunctions is to associate the genera of those rules and injunctions with states, attributes, and actions in human conduct, individually and collectively. This association is based on the essential meanings of those states, attributes, and actions resulting in righteousness and benefit or unrighteousness and harm. Likewise one should beware of the wrong belief that some rules and injunctions are linked merely to the names of things or to their external forms without consideration of the essential meanings intended by the Shari‘ah, thus falling into grave error in fiqh. Islamic legal terms should be interpreted only according to the meanings intended by the Lawgiver concerning practices designated by those terms when Islamic terminology was established. When the designated practice changes, the term has no value in itself.

The inductive study of the Shari‘ah in its dispositions convinced the scholars of the Ummah that they did not treat multiple particular cases and details equally by subsuming them under one general rule except where they covered common specific attributes. Scholars apply the Shari‘ah-given rules governing the earlier practices to the later

practices, based on the attributes behind legislation and when enacting the Shari‘ah injunctions. The significance of analogs concerning the meaning intended by the Lawgiver is precise and clear and is further accompanied by its example. Adducing parables and analogs by scholars was crucial to revealing subtle meanings and hidden truths. Parables and analogs thus spare jurists the effort of searching for the deeper meanings and their higher genera. The leading scholars of Islamic jurisprudence disagreed over the applicability of analogy to categorical penalties, expiations, and exemptions as well as causes, conditions, and impediments.

Manipulation in the Shari‘ah context relates to practices whose prohibition is canonical. However, manipulation does not include seeking to perform a lawful act in a different way or by providing its means. Bukhārī cited the Prophetic Traditions abolishing stratagems and classified them, in the manner of the jurists, according to the different actions of the human agents.

In the different stratagems used to evade the Shari‘ah injunctions and that lead to the partial or total omission of Shari‘ah objectives, manipulation does not follow a single pattern. Stratagems in Shari‘ah sources can do the following: cause total omission of a Shari‘ah objective without replacing it with another; omit a lawful practice to shift to another lawful thing; employ to omit something prescribed by the Shari‘ah to shift to another easier prescribed practice; be used in acts that do not contain important meanings intended by the Lawgiver; and not contravene the Lawgiver’s intent.

Nullification of those acts that would cause considerable harm but are not evil therein is closely related to manipulation. However, some people employ stratagems to lawfully evade certain obligations so that their behavior apparently conforms to the Shari‘ah rules. The Shari‘ah aims to balance the inherent good of the act used as a means and its possible evil consequences. Thus, the question falls under the rule governing the conflict of *maṣāliḥ* and *mafāsīd*.

The Shari‘ah is concerned with means to what is good and allowed them by subsuming them under the rule of what is obligatory, even when their formal appearance might entail their prohibition or mere permissibility. This is known in *uṣūl al-fiqh* under the dictum “that which is a means to something obligatory is also obligatory” and is a means to protecting the security of the Muslim community.

Precision, Determination, and Mercy in Islamic Legislation

Since the Shari'ah has intended its ordinances to be easily implemented by the people under all circumstances, it has also included precision and determination to make its meanings clearly understood. Likewise, it has established those attributes to indicate to scholars the meanings underlying the legislation. Jurists focus on the evident and regular attributes as the basis of the Shari'ah ordinances and provisions. They also explicitly acknowledge that the existence of those attributes indicates the underlying meaning that may be called wisdom. The Shari'ah uses these methods to clearly define essences and meanings to prevent confusion.

The Shari'ah intends that its legislation be implemented and followed in the community, because its intended benefits cannot be achieved without implementation and observance of its rules. To achieve this objective, two techniques have been applied equally. One is the application of strictness and determination in the implementation of its rules. The other is the application of ease and mercy in a way that would not cause omission of its objectives.

Shari'ah law uses all possible means of ease and mercy to encourage people to pursue what is good for them by implementing its rules. The Shari'ah's rules and ordinances are grounded in ease out of consideration of the general circumstances of human beings. Under certain circumstances the Shari'ah changes its rules and provisions from strictness and restriction to ease and indulgence, thus attenuating what might bear hardship and difficulty.

The Shari'ah does not seek to burden human beings. It is a practical law seeking the realization of achievable objectives, which can happen only by applying leniency. Avoiding sheer vindictiveness in legislation is a major characteristic of Islamic law. When Islam authorizes a practice or relaxes its legislation, it actually runs according to its manifest characteristic of magnanimity.

Jurists have omitted certain aspects of license. They agree that license consists in changing an act prescribed for an individual or a community from strictness and difficulty to ease and indulgence, owing to compelling circumstances requiring the Shari'ah to forgo its purpose of realizing a benefit or removing an evil.

Need is usually general and permanent. This constitutes the basis of universal legislation on practices belonging to general categories of acts that were originally forbidden. Despite the harm resulting from some practices and the likelihood that they might result in financial loss requiring their prohibition, they have been allowed because of society's great need of them. Jurists should consider a permanent general necessity whereby the whole community or most of it might be in a situation requiring the permissibility of a prohibited act to achieve a specific objective.

Enforcement and observance of the Shari'ah invokes inborn self-restraint. Human beings instinctively seek certain benefits or avoid certain evils. Religio-spiritual self-restraint is not difficult to transform into natural instinct by condemning all types of undesirable behavior. When religio-spiritual self-restraint weakens then state control is the next recourse. It is the rulers' responsibility to salvage this self-restraint and protect it from being neglected and undermined.

One of the main objectives of the Shari'ah is to base its injunctions on different attributes necessitating them and to vary those injunctions accordingly. The Islamic Shari'ah is universal and eternal, and changing circumstances is a very obvious aspect of the permanent Divine law.

The Shari'ah's explanation of transactions has a twofold purpose. Sometimes its aim is to bind people with a permanent and universal rule, such as prohibition of usury; other times its aim is to formulate judgments between people, whereby the particular judicial decision constitutes an implementation of a universal legislative rule. Since we have considered the blocking of means as one of the fundamental rules of Islamic legislation, and since this rule operates under specific circumstances, the *mujtahids* must consider when such means must be blocked and when they can be left open.

The Shari'ah's Aim in Building a Solid and Stable Social Order

The main objective of the Shari'ah is to establish a strong community with a stable social system and promote the orderly functioning of its affairs by achieving welfare and preventing evil. We should imagine the Muslim community as one individual Muslim and subject its conditions to the rules of the Shari'ah just as we do for individuals, to gain clear insight regarding how Islamic legislative rules should apply to the

community's public affairs. The blocking of means, the consideration of textually unregulated interest, and the rule of license are essential characteristics that concern the whole of the community and rarely apply to individuals.

The duty of scholars is to provide Shari'ah-inspired solutions to the community's problems. God has criticized many communities for accepting only the superficial meanings of matters and failing to consider them more carefully and search for deeper meanings. Accordingly, *ijtihad* is a collective obligation on the Muslim community according to the needs and circumstances of its different peoples and countries. The whole Muslim community therefore sins by failing to fulfill this obligation when its means and instruments are available.

The negative impact of failing to exercise *ijtihad* is clearly visible in those aspects of Muslim life that have changed since the time of the great *mujtahid* scholars. Muslims need scholars who can assess the different juristic schools and decide which should receive priority so the community can act in unison. On all these levels there is an urgent need for a thorough study and discussion of the Shari'ah to determine its primary and secondary objectives as well as the adaptability or rigidity of the doctrines of the early *mujtahids*.

The first step toward this crucial intellectual and scholarly objective is to form a specialist body of eminent Shari'ah scholars from all the juristic schools in Muslim countries. These scholars should study and discuss the vital needs of the Ummah to produce agreed-upon resolutions for the Muslim community. Another duty is to identify Shari'ah scholars around the world who have attained or nearly attained the level of *ijtihad*. Besides knowledge, this group of scholars must combine integrity and observance of the Shari'ah in their personal lives so that the Ummah will have full confidence in their scholarly erudition.

Part 3: *Maqāṣid al-Sharī'ah*: Human Dealings

Following are some particular objectives of the different types of dealings in the literature of applied jurisprudence that focus on the specific higher objectives of the Shari'ah in the different spheres of legislation and human transactions.

Ends and Means in Transactions

This topic is a prerequisite for examining the Shari‘ah rules for human conduct and social interaction. Its aim is to distinguish between ends, which the Shari‘ah prioritizes for realization and prevention, from means, which take second place because they depend on something else. The subject of the Shari‘ah rules falls into two categories: ends and means. Ends (*maqāṣid*) consist of *maṣāliḥ* and *mafāsid*, while means consist of the ways and methods leading to them.

Ends are types of conduct intended for their own sake and are divided into actions based on the purposes of the Lawgiver and those based on human purposes. These objectives are the methods intended by the Lawgiver for realizing the useful purposes or preserving public interests related to private conduct. The second category, which is less important and less widespread, consists of objectives pursued by a specific group of people or individuals. The above two categories of objectives are again divided into the rights of God and the rights of human beings. The nature of these rights is such that no one is allowed to ignore them, because they serve as a means of preserving the universal and ultimate objectives of the Shari‘ah.

The term *wasā’il* refers to the rules instituted by the Lawgiver as a means to the realization of interim objectives, constituting means to the final objectives. Without them, the purpose of the Shari‘ah might be totally missed or not fully achieved. Means include the causes indicating the Shari‘ah rules, the conditions necessary for their implementation, and the absence of impediments. That is why it has become one of the maxims of Islamic jurisprudence that if an objective is nullified, then so is its means. This discussion concerns the means required for realizing the Shari‘ah objectives.

Principles and Categories of Rights in the Shari‘ah

Specifying the principles of entitlement is the best and most solid grounds for legislating people’s transactions. It fulfills two important objectives that are the basis for granting rights to those entitled to them. Laying down such principles consolidates and clarifies rights for judges, rulers, and litigants.

A major objective of the Shari‘ah is to specify the different rights according to the categories of people entitled to them, determine the

priority of some people over others in certain rights, and demonstrate how people should share the benefits of resources that are to be shared. The essence of the rules governing the specification of rights can be traced to two basic principles: inborn constitution or inalienable rights, and preponderance, or preference to one individual or group of individuals over another in certain rights that were easily exploited. Rights can be classified into these categories based on the strength of their underlying reason, including original inborn rights, rights of lineal identity, and rights to resources.

Different systems of law emphasize the founding principle of the family unit to protect descendants from doubt about their lineal identity. Overriding all truthful laws, the Islamic Shari‘ah has instituted the most just, sound, and sublime rules for the regulation and functioning of the family. The most important principle underlying any legislation for the family should focus on consolidating bonds of marriage and kinship, and elucidate how to dissolve these bonds if they are liable to dissolution. One of the most important objectives of the Shari‘ah is to emphasize marriage, because it constitutes the basic principle of the family.

The contractual form required to solidify the marriage bond in the most appropriate manner is incidental to the essence of marriage. Our thorough analysis of the material consisting of the primary and secondary rules regulating marriage, and from which the Shari‘ah objectives pertaining to this institution can be inferred, has enabled us to trace two fundamental principles. The first principle aims at establishing a clear-cut distinction between the specific form of the marriage bond and all other possible forms of association between man and woman. The second principle consists of ensuring that marriage is not contracted on a temporary basis. Marriage is a form of moral protection.

Transactions

The Shari‘ah has the highest regard for economic wealth. The Qur’anic verses and Prophetic Traditions address property and wealth as the mainstay of human society’s activities and the solution to its problems. We find ample supporting evidence that property and wealth have an important status according to the Shari‘ah. Indeed, zakat on economic property is the third pillar of Islam. A primary objective of the Shari‘ah concerning the community’s wealth is to ensure its preservation and growth.

The Shari‘ah has identified the following factors as the only means to acquisition and property: exclusive possession of something to which no one else has the right; working on a piece of land with its proprietor; and exchanging one item for another. Marketability implies the fair circulation of wealth in the hands of as many people as possible. It thus constitutes one great objective of the Shari‘ah. To achieve the purpose of marketability, contracts relating to the various kinds of dealings have been instituted to regulate the transfer of financial rights.

The objectives of the Shari‘ah concerning all kinds of economic wealth can be summarized under marketability, transparency, preservation, durability; and equity. One of the meanings of circulation intended by the Shari‘ah is the transfer of wealth in the community among as many hands as possible without causing any harm to those who have acquired it lawfully. The Shari‘ah has acknowledged the exclusive right of people to their wealth and has allowed them to use it as they wish during their lifetime. By so doing, it encourages earning and saving of money. In this way, the Shari‘ah hopes to achieve its purpose of increasing the community’s general wealth and removing any impediments to its progress.

The aim of requiring transparency in wealth and property is to avoid harm and disputes as much as possible, for which reason pledges and documentation have been prescribed. Anyone entrusted with any kind of wealth should protect it in accordance with God’s commands. Shari‘ah rules govern the validity and validation of contracts and the fulfillment of stipulations. It is in accordance with the purpose of the Shari‘ah pertaining to financial transactions that the rules governing the validity and invalidity of contracts related to ownership and acquisition have been legislated.

The Shari‘ah objective in the different kinds of financial transactions is the creation of wealth for both the individual and the community. Labor constitutes one of the basic elements of wealth and is the means to the utilization of the other two. Some who are capable of labor and production include many who do not have any capital enabling them to carry out productive labor or lack sufficient capital matching their productive potential. Capital and labor are very likely to be prevented from being put to productive use in many cases. This indeed constitutes a great loss for the workers, owners of capital, and the entire society.

To overcome this situation, right-thinking people have been guided to

discover ways of combining capital and skilled labor to benefit both parties. Thus, it has been a higher objective of Islamic legislation not to prevent either of the two parties from following the best method of achieving this objective in a just manner. It has been the purpose of the Shari'ah in all these types of contracts to protect the workers' rights by stipulating specific conditions so that their work is not wasted or undervalued.

Shari'ah supports the following principles: increasing labor-based contracts; allowing risk that is common in similar transactions; shunning anything that overburdens the worker in such contracts; not considering the contracts verbally binding; allowing stipulation of giving the workers extra benefits beyond what they receive in lieu of their labor; paying the workers their due immediately upon completion of work, without any delay; providing the worker with the means necessary to complete the work, for he must not be forced to complete it by himself; and shunning all kinds of conditions and contracts that resemble slave labor.

Gift and donation contracts are based on the notion of mutual help among the members of society. They reinforce citizenship, serve the higher Shari'ah objectives, and embody a noble Islamic virtue. Along the way they achieve help for the destitute and the enrichment of the poor. Shari'ah supports the following principles: increasing donations and gifts in view of their public and private benefits; donations made voluntarily and not accompanied by any hesitation; tolerance and flexibility applied to the means of validating donation contracts according to the wishes of donors; and the act of donating that does not lead to the violation and loss of the rights of others.

Judgeship, Testimony, and Penalties

The Muslim community should have rulers who run its public affairs, administer justice, and implement the Shari'ah rules in its ranks. This is because the Islamic Shari'ah, being a code governing people's inter-relationships and entitlement to specified rights, was sent down only so that these purposes might be achieved. One of the highest objectives of the Shari'ah, after conveying it, should be to establish its authority, implement its rules, and promote its supremacy.

To ensure the implementation of any legal system (Shari'ah), people should be deeply imbued with a sense of its sanctity. In fact, people's

conviction of the soundness of the law enables their willing obedience. The Shari‘ah objectives for the category of people responsible for implementing its rules designed to deliver rights to their true claimants according to its established fundamental principles and specific rules. No one appointed to any office is allowed to act in that capacity unless it is to promote a benefit (*maṣlahah*) or prevent evil (*mafsadah*).

All the dispositions of the Shari‘ah center on reforming the condition of the community in all its affairs. The deterrent, punishment, and fixed penalties instituted by the Shari‘ah are exclusively meant to rectify people’s conditions. One of the higher objectives of the Shari‘ah is to preserve the social order of the community and it is only by blocking all sources of discord and aggression that this objective can be achieved. The blocking of these sources itself is a fair policy only when it is based on the infallible Shari‘ah and implemented by a legitimate authority. Reformation of individuals and society is the highest objective of the Shari‘ah. It aims to bring satisfaction to victims in the form of punishing culprits and deterring imitators.

Conclusion

Hopefully this book will be helpful to jurists and seekers of profound knowledge to raise their thinking and perception to loftier heights and to strengthen their resolve to pursue and achieve the higher objectives of *Maqāṣid al-Sharī‘ah*.

The Author

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.

IIIT Books-In-Brief Series is a valuable collection of the Institute's key publications written in condensed form to give readers a core understanding of the main contents of the original.

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 Maqāsid al-Shari'ah* is a breakthrough in studies on Islamic law in the English language. Ibn Ashur proposes *Maqāsid* 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 also addressed the sensitive topic of the intents/*Maqāsid* of Prophet Muhammad ﷺ 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, and conflict resolution. But his most significant contribution in this book has been the development of new *Maqāsid* by coining new, contemporary, terminology that were never formulated in traditional *usūl 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 *Maqāsid* 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.

