

**A COMPARATIVE APPRAISAL OF 'VALUE' IN  
CONVENTIONAL AND ISLAMIC JURISPRUDENCE**

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**Abstract**

No meaning can be assigned to any part of law and apply it to specific cases without taking into cognizance the purpose (or purposes) which that part of the law is designed to serve; that purpose constitutes the value (or values) reflected in the law. 'Value' is theoretically and arguably similar within the framework of both conventional and Islamic jurisprudence. It is inspired by fairness and conscience authorizing departure from a rule of positive law when its enforcement leads to unfair results. Values are discoverable through the use of reason. Under Islamic law however, they are discovered through revelation and reason.

**Keywords:** Values, *Maqasid al-Shari'ah*, conventional and Islamic Jurisprudence, reason and revelation and communality of purpose.

**Introduction**

From perspective of social and psychological notion, moral values have two elements, namely, virtue and guilt. They are characterized by positive and negative attributes respectively.<sup>1</sup> These values mark a significant distinction between the Western and Islamic legal cultures. Western jurisprudence recognizes reason; Islamic jurisprudence recognizes both revelation and reason. Every system or community has a range of values that consist of principles and ideas about the way people should live, conduct themselves and mutually deal with each other. It is the function of the law to both reflect and reinforce these values.<sup>2</sup> Therefore, value, in legal sense concerns the operational mechanism of laws in society. 'Value-judgment', it is argued, symbolizes the choice of a particular benchmark of assessment as well as the result of appraising and determining interests with reference to the chosen value.<sup>3</sup> When a case arises with entirely a new fact that goes beyond the ambit of the existing legal order, the elucidation has to be sought from external sources. In the process of analyzing or taking decision on cases, jurists and judges operate within certain legal parameters, namely, statutory rules, customs, precedents and of course interpretation. The legal luminaries develop ideas to explicate their thoughts and chart path toward arriving at decisions on the basis of those

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<sup>1</sup> Shavell, S., Law versus Morality as Regulators of Conduct, *American Law and Economic Review*, Vol. 4 No. 2 (2002), p. 230.

<sup>2</sup> <http://lawgovpol.com/how-values-shape-our-laws/> (accessed 29<sup>th</sup> October, 2014).

<sup>3</sup> Dias, R.W.M., *Jurisprudence*, (5<sup>th</sup> ed.), Butterworth London, (1985), p. 196.

parameters. It has been argued that valid rules do not necessarily decide cases or disputes.<sup>4</sup> In other words, and as Lord Reid observes, ‘legal principles cannot solve the problem’.<sup>5</sup> Lord Macmillan also notes that ‘in almost every case, except the very plainest, it would be possible to decide the issue either way with reasonable legal justification’.<sup>6</sup> Dias notes that ‘the judicial oath does not enjoin a judge simply to do justice, nor simply to apply law; it requires him to do justice according to law.’<sup>7</sup> Therefore, the driving spirit behind ‘justice according to law’ is provided by *values* described as ‘the inarticulate major premise of judicial reasoning.’<sup>8</sup>

If values serve as operational mechanism of laws in society, it follows that law has to be studied with reference to cases which emanate with new elements or facts otherwise there will be need to introduce variation to an existing legal norm. Here lies the importance of analyzing the philosophy of legal value.

It is argued that the *Maqasid al-Shari’ah* is conceptually entrenched in the basic sources of Islamic law – the *Qur’an* and *Sunnah*. Its philosophical importance goes beyond the purview of literal understanding of the textual injunctions. It rather takes into cognizance the general philosophy and objectives of these injunctions. It has been described as ‘beyond the specialties of the text.’<sup>9</sup> The emphasis is not essentially on the literal expressions of the texts rather, it is on the ultimate objectives aimed at achieving through legislative and judicial mechanisms. Thus, this concept is not burdened with methodological technicality and literalist reading of the text.<sup>10</sup> It aims at providing answers to basic fundamental questions of living and of course mutuality in this living; for example, the link between the texts and modern notions of human rights, ‘development’ and civility.<sup>11</sup>

This paper aims at exploring the concepts of legal values under the conventional legal norms which is translated to *Maqasid al-Shari’ah* under Islamic jurisprudence. It is intended to do a comparative analysis of the concept and determine the communalism of the concept within the frameworks of the two legal systems.

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<sup>4</sup> Dias, R.W.M., *ibid* at p. 194.

<sup>5</sup> *British Railways Board v Herrington*, [1972] AC, 877 at 897; [1972], 1 All ER, 749 at 756

<sup>6</sup> See generally, Macmillan, Lord, *Law and Other Things*, Cambridge University Press, (1938).

<sup>7</sup> Dias, R.W.M., *supra*.

<sup>8</sup> Holmes J. in *Lochner v US*, (1905), 118 US 45 at 74.

<sup>9</sup> Kamali, M.H., *Maqasid al-Shari’ah Made Simple*, *International Institute of Advance Islamic Studies (LAIS)*, Malaysia, [http://i-epistemology.net/attachments/-01\\_Maqasid\\_Shariah%20-%20hashim%20kamali.pdf](http://i-epistemology.net/attachments/-01_Maqasid_Shariah%20-%20hashim%20kamali.pdf) (accessed 23<sup>rd</sup> October, 2014).

<sup>10</sup> *Ibid*.

<sup>11</sup> Auda, J., *Maqasid Al-Shariah, as Philosophy of Islamic Law – a Systems Approach*, The International Institute of Islamic Thought, USA and UK, (2008), p. 1.

### Definition and Theory of 'Value'

Literally, values are those things considered by men while shaping "vision of social life."<sup>12</sup> 'Interests', as synonyms of 'values' had been defined as "all things that man holds dear and all ideals which guide man's life."<sup>13</sup> Some notable characteristics of values include *inter alia*, equality, autonomy, dignity, respecting and venerating one's parents, self-reliance, honesty, security, self-contentment, ownership, freedom, solidarity, personal responsibility, not obstructing the path of the blind, and self-preservation.<sup>14</sup>

In jurisprudence, law consists of some basic elements, namely, norms and values. No meaning can be assigned to any part of law and apply it to specific cases without taking into cognizance the purpose (or purposes) which that part of the law is designed to serve; that purpose constitutes the value (or values) reflected in the law. For example, the fundamental purpose of prohibiting murder is to safeguard human life. In translating this value into law, it is referred to as 'sanctity of human life.'<sup>15</sup> Also, the prohibition of theft is aimed at protecting right of ownership to property.<sup>16</sup> It has been argued that laws can be constitutive of values, and thus no one can hold values as separate from the law in the same way he can hold the goal of reaching a destination as separate from the route he chooses to drive. Similarly, it is may not be possible to separate the ideals about equality from the treatment of equality in the law.<sup>17</sup> One cannot also maintain an insular position from the community that has been structured through the law. Legal rules do not simply serve values but help define them and bring values into our lives.<sup>18</sup>

As far back as 1965, Felix Cohen had argued that:

When we recognize that legal rules are simply formulae describing uniformities of judicial decision, that legal concepts likewise are patterns or functions of judicial decisions, that decisions themselves are not products of logical parthenogenesis born of pre-existing legal principles but are social events with social causes and consequences, then we are ready for the serious business of appraising law and legal institutions in terms of some standard of human values.<sup>19</sup>

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<sup>12</sup> Singer, J., *The Player and the Cards: Nihilism and Legal Theory*, 94 *Yale Law Journal* 1, (1984), p. 11.

<sup>13</sup> See generally Heck, P., *The Jurisprudence of Interests: An Outline*, in *The Jurisprudence of Interests: Selected Writings of Max Rümelin, Philipp Heck, Paul Oertmann, Heinrich Stoll, Julius Binder and Hermann Isay* 29, 33 (M. Magdalena Schoch ed. & trans., (1948).

<sup>14</sup> Shiffrin, J.B., *A Practical Jurisprudence of Values: Re-Writing Lechmere, Inc. v. NLRB*, *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 41 (2006), p. 188.

<sup>15</sup> Dror, Y., *Values and the Law*, *The Antioch Review*, Vol. 17, No. 4 (1957), pp. 442.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Cohen, F., *Transcendental Nonsense and the Functional Approach*, 35, *Columbian Law Review*, Vol. 35, No. 6, p. 847.

Duncan Kennedy has also noted with emphasis that: ‘we used to understand law in a different way than we do today. At the turn of the last century, legal doctrine was understood as implicitly true, entirely knowable, and intrinsically just. We understood rules, and their application to particular cases was to follow deductively from abstract categories such as contract, property, and tort.’<sup>20</sup> He further argued that ‘a judge’s role in deciding a case was to engage in an “objective, quasi-scientific” technique of applying legal doctrine to the facts of a case and rule on the case accordingly, regardless of what justice may otherwise seem to require.’<sup>21</sup> This mode of thinking could be described as “classical legal thought,” popularly called “formalism” which had been critically criticized by both the legal realism and legal studies movement.<sup>22</sup>

Legal realists contend that judges are not sheer passive contraptions who merely apply legal concepts, but rather are actors who shape legal rules on the basis of “justice and policy.”<sup>23</sup> They are not mere neutral arbitrators of disputes but architects of the rules of society.<sup>24</sup> This goes to confirm the contention that judges would always tilt their creative legal thought towards assessing in ethical terms the social values at stake where there is choice between two precedents.<sup>25</sup> Critical Legal Studies group share this view holding that fundamentally contradictory values lie at the center of human experience.<sup>26</sup> It is further argued that ‘law is politics, and politics is a self-contradictory mess that cannot be resolved with scientific, or pseudo-scientific, means... Rather than worry about nihilism, we should embrace the different possibilities for communal life that law as politics provides.’<sup>27</sup>

Joseph Singer notes in this regard that ‘We should no longer view the project of giving a “rational foundation” for law as a worthwhile endeavor. If morality and law are matters of conviction rather than logic, we have no reason to be ashamed that our deeply felt beliefs have no “basis” that can be demonstrated through a rational decision procedure or that we cannot prove them to be “true” or “right.”’<sup>28</sup>

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<sup>20</sup> Kennedy, D., *The Rise and Fall of Classical Legal Thought*, at Vol. 8 (reformatted 1998), (1975) (unpublished manuscript, available at [http://www.duncankennedy.net/legal\\_history/essays.html](http://www.duncankennedy.net/legal_history/essays.html)) p. 34 or <http://www.duncankennedy.net/topics/index.html> (accessed 31st October, 2014).

<sup>21</sup> *Ibid.*

<sup>22</sup> Shiffrin, J.B., *supra* note 14 at p. 181.

<sup>23</sup> Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L.J.* 16 (1913), p. 59.

<sup>24</sup> Cohen, F., *supra* note 12.

<sup>25</sup> *Ibid* at p. 833.

<sup>26</sup> See generally Unger, R.M., *The Critical Legal Studies Movement*, Harvard University Press, Cambridge, Massachusetts, and London, England, (1986).

<sup>27</sup> Shiffrin, J.B., *supra* note 15 at p. 182.

<sup>28</sup> Singer, J., *The Player and the Cards: Nihilism and Legal Theory*, 94 *Yale Law Journal* 1, (1984), p. 38.

In the light of the above basic analysis of ‘value,’ law, arguably is part of the ethical venture of building a social world structure according to the good life, and “the instrumental value of law is simply its value in promoting the good life of those whom it affects.”<sup>29</sup> However, this social world structure is composed of copious values which by the way are irreconcilable, eluding standardization. Shiffrin notes that ‘we create them, define them, and refine them to express what is important to us. We give meaning to them through law, which, in turn, structures our understanding of them. There is no neutral place from which we can judge these values and the way we order society; we are inescapably situated in this world, in our lives. Given this background, we turn to our central question: what does a jurisprudence of value look like?’<sup>30</sup>

### ‘Value’ as *Ratio* in Judicial Decision

The arguments about ‘value’ had been put to judicial tests in a number of cases. Judicial pronouncements in these cases unreservedly admit and recognize a contest between contradicting social values. For example, in the American case of *State v. Shack*,<sup>31</sup> two men entered private land in order to aid migrant farmworkers. The owner asked them to leave, but they refused. The men were charged with trespass. The rule is that trespass does not include a situation where representatives of recognized charitable groups enter private land in order to provide government aid to those workers that need it. The question before the court was whether trespass on real property includes the right to bar access to governmental services available to migrant workers? The court held that title to real property does not include control over the destiny of people the owner permits to come onto his premises. Their well-being is the paramount concern of the law.<sup>32</sup> There is no need for a farmer to deny his worker the chance to receive aid from government services or charity groups, so representatives from those groups may enter the land and see the worker in his living place. Though an employer of migrant farm workers may reasonably require the visitors of his employees to identify themselves, the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens.<sup>33</sup>

In other words, “a decision in non-constitutional terms is more satisfactory, because the interests of migrant workers are more expansively served in that way than they would be if they had no more freedom than these constitutional concepts could be found to mandate if indeed they apply at all.”<sup>34</sup> Hinging its argument on the issue of values

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<sup>29</sup> Cohen, F. S., *Ethical systems and legal ideals : an essay on the foundations of legal criticism* (1933). (Reprint ed.), Westport, Conn.: Greenwood Press, at p. 42 as quoted by Shiffrin, J.B., supra note 14 at p. 198.

<sup>30</sup> Shiffrin, J.B., supra note 14 at p. 199.

<sup>31</sup> 58 N.J. 297, 277 A.2d 369, (1971), N.J. 77 L.R.R.M. 2408.

<sup>32</sup><http://www.casebriefs.com/blog/law/property/property-law-keyed-to-singer/trespass-and-public-rights-of-access-to-property/state-v-shack-2/2/> (accessed 31<sup>st</sup> October, 2014).

<sup>33</sup> Ibid.

<sup>34</sup> 277 A.2d 369 (N.J. 1971) at p. 372.

protected by the laws of property, the court noted that “[t]itle to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises.”<sup>35</sup>

*United States of America v. Progressive, Inc.*<sup>36</sup> is another celebrated case in which a lawsuit was brought against *The Progressive* magazine by the United States Department of Energy (DOE) in 1979 for an injunction to prevent the publication of an article by activist Howard Morland that purported to reveal the "secret" of the hydrogen bomb. Though the information had been compiled from publicly available sources, the DOE claimed that it fell under the "born secret" clause of the Atomic Energy Act of 1954. This application for an injunction was granted by the court. Due to the sensitive nature of information at stake in the trial, two separate hearings were conducted, one in public, and the other in camera. The defendants, Morland and the editors of *The Progressive*, would not accept security clearances, which would put restraints on their free speech, and so were not present at the *in camera* hearings. Their lawyers did obtain clearances so that they could participate, but were forbidden from conveying anything they heard there to their clients.

The court found that *Pentagon Papers* did not compel a conclusion, and therefore addressed the “basic confrontation between the First Amendment right to freedom of the press and national security.”<sup>37</sup> In considering the particular interests that had been asserted by the parties, the court tried to make sense of the relationship between national security interests and the freedom of the press in the “hierarchy of values” that is attached to our “panoply of basic rights.”<sup>38</sup> The court was seriously challenged by the significant nature of the competing values at stake and seriously considered the magnitude of the conflicting interests presented by the case.<sup>39</sup>

The article was eventually published after the government lawyers dropped their case during the appeals process, calling it moot after other information was independently published. The court’s decision in this case failed to address the issue of ‘value’. Shiffrin notes that ‘although these cases are examples of value talk in judicial opinions, I would contend that they are anomalous. Rather than explicitly confronting difficult choices, or acknowledging the values at stake in a particular decision, opinions often dismiss value decisions or gloss over their implications.’<sup>40</sup> This case has been described as

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<sup>35</sup> Shiffrin notes that “property rights serve human values. They are recognized to that end, and are limited by it” Shiffrin, J.B., *supra* note 14 at p. 199 footnote no. 90.

<sup>36</sup> 467 F. Supp. 990 (W.D. Wis. 1979),

<sup>37</sup> 467 F. Supp. 990, 995 (W.D. Wis. 1979).

<sup>38</sup> *Ibid.*

<sup>39</sup> Shiffrin, J.B., *supra* note 14 at p. 200.

<sup>40</sup> *Ibid.*

hypothetically designed to test the limits of the presumption of unconstitutionality attached to prior restraints,<sup>41</sup> and of course, the issue of conflicting 'values' and 'interests'.

*Lechmere, Inc. v. National Labor Relations Board*<sup>42</sup> is a landmark US Supreme Court case which although, does not confront the complicated nature of the conflicting values under consideration, it however heavily relied on its superficial doctrinal structure for its decision.<sup>43</sup> In this case, Lechmere, Inc. owned a retail store in a shopping plaza in Newington, Connecticut and also was part owner of the plaza's parking lot. Employees of Lechmere, Inc. who drove to work used this lot to park their vehicles during their shifts. This parking lot was separated from a public highway by a strip of land which was almost entirely public property. Local union organizers, not employees of Lechmere, Inc., attempted to organize Lechmere employees by placing promotional handbills on the windshields of cars parked in the employee area of the lot. After this, Lechmere denied the organizers access to the lot. This act caused the organizers to instead distribute their handbills from the aforementioned strip of public land between the lot and the highway.

Local 919 of the United Food and Commercial Workers instituted an action claiming that Lechmere had violated Section 7 of the National Labor Relations Act (NLRA) by barring them access to the parking lot. The NLRB affirmed the union's grievance, and the Court of Appeals enforced the NLRB's decision. Reversing the appeal court's decision, the Supreme Court held, *inter alia*, that the NLRA "confers rights only on employees, not on unions or their nonemployee organizers." They reasoned that the NLRA, while guaranteeing that employees would be free to organize if those so chose, the employer is not obligated to allow nonemployee union representatives access to their private property. Secondly, section 7 of the NLRA does not apply to nonemployee union organizers except when, "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." The Court reasoned it was improper to even begin a balancing test with regards to the provision under section 7 and private property rights unless "reasonable access to employees is infeasible."

Commenting on this decision as relates to conflict of values, Singer observes: 'my opinion treats values as contested, conflicting things. The goal of this exercise was to dispel the illusion that cultural harmony exists and dispense with the notion that courts

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<sup>41</sup> Doug, L., "Prior Restraints and the Presumption of Unconstitutionality", University of Missouri-Kansas City Law School. (2012), <http://law2.umkc.edu/faculty/projects/frtrial/conlaw/priorrestraints.htm> (accessed 3rd November, 2014).

<sup>42</sup> 502 U.S. 527 (1992).

<sup>43</sup> Shiffrin, J.B., *supra* note 14 at p. 201.

have special insight regarding the way that our world works that authorizes them to pronounce the values that “everybody knows.” The goal was to show what makes these decisions difficult. I perhaps did not state the conflict as strongly as I could have. The difficulty was that ultimately, a decision was necessary. The decision was not arbitrary. It was based on a weighing of the values and my understanding of the situation. The opinion was also meant to persuade others that this was a correct, but not neutral, decision. I have in mind Walzer’s<sup>44</sup> method of making philosophical argument — “to interpret to one’s fellow citizens of the world of meanings that we share” — hoping that, if my interpretation is apt, then my decision will be accepted.<sup>45</sup>

Shiffrin concludes by noting that a jurisprudence of values that answers the judgment is possible and that the plea is to make the value choices underlying the law explicit so that we can approach them responsibly and perhaps make better choices.<sup>46</sup>

### **Dias’ Postulates of ‘Values’**

Dias has written extensively on ultimate value of the law as identified in the conventional Western jurisprudence. According to him, the principal yardsticks by which conflicting interests and values are measured may tentatively be listed under nine principal headings.<sup>47</sup> They include the following:

- i) *Sanctity of the person*; in *Sommersett’s Case*<sup>48</sup>, the claim of ownership by a slave-owner over his slave was rejected by the court. Lord Mansfield declared that ‘slavery was so repugnant to English ideas that *Sommersett* should go free.<sup>49</sup> Similarly, in *Horwood v. Millar’s Timber and Trading Co., Ltd.*<sup>50</sup> the court rejected as unreasonable a contract which would have reduced a person to a condition of virtual slavery.<sup>51</sup>
- ii) *Sanctity of property* - respect for property has given rise to the rule that there should be no deprivation without compensation.<sup>52</sup> In *Attorney General v. De Keyser’s Royal Hotel, Ltd.*<sup>53</sup>

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<sup>44</sup> Walzer, M., *Spheres of Justice: A Defense of Pluralism and Equality*, New York: Basic Books, Inc., (1983), at p. 97.

<sup>45</sup> Singer, J., W., *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1, 38 (1984), p. 20; Shiffrin, J.B., *supra* note 14 at p. 212.

<sup>46</sup> Shiffrin, J.B., *supra* note 14 at p. 217.

<sup>47</sup> Dias, R.W.M., *Jurisprudence*, (3<sup>rd</sup> ed.) London, Butterworths, (1970), p. 166.

<sup>48</sup> (1772), 20 State Tr. 1; see also *Chamberline v. Harvey* (1696), 5 Mod. 186; *Forbes v. Cochrane* (1824), B. & C. 448.

<sup>49</sup> Dias, R.W.M., *supra* note 47 at 167.

<sup>50</sup> [1917] 1 K.B. 305.

<sup>51</sup> Dias, R.W.M., *supra* note 47 at p. 167. See also a more recently decided case of *Eastham v. Newcastle United Football Club, Ltd.* [1964] Ch. 413; [1963] 3 All E.R. 139 where the court invalidated a contract whereby it was sought to operate the retention and transfer system of engaging professional footballers on grounds of unreasonable restraint of trade.

<sup>52</sup> Dias, R.W.M., *supra* note 47 at 169.

the court held that a prerogative power in the Crown to expropriate private property without compensation has to give way to a statutory power of expropriation subject to compensation.<sup>54</sup>

iii) *National and social safety* - both sanctity of the person and of property give way when the safety of the nation or of society is at stake.<sup>55</sup> In *Liversidge v. Anderson*<sup>56</sup> the statutory provision that empowered the Home Secretary to incarcerate *Liversidge* under the belief that the safety of nation was at stake was given a subjective interpretation by the majority of the House of Lord and thus validated.<sup>57</sup>

iv) *Social welfare*; - in *Edgington, Bishop and Withy v. Swindon Borough Council*,<sup>58</sup> it has been held that the utility of a public shelter outweighed the degree of interference with private rights that it caused.

v) *Equality* – the popular notion of “justice” is based, however vaguely, on a sense of equality, either distributive or corrective.<sup>59</sup> Lord Hewart, C.J. in *R. V. Sussex JJ., Ex parte McCarthy* said that: “Justice should not only be done, but should manifestly and undoubtedly be seen to be done”.

vi) *Consistency and fidelity to rules, principles, doctrine and tradition* – this is considered to be conformity with existing rules and conformity with principles.<sup>60</sup> The value of consistency means that a judge usually prefers to translate the facts of the instant case into an existing type-situation rather than play a new variation, and the question for simple reasons that people often regulate their conduct with reference to existing rules, and it is important that judges should keep to them.<sup>61</sup> Similarly, innovations can be unsettling and lead to a loss of confidence.<sup>62</sup> Due to apathy, human inclination usually prefers control and guidance to taking personal decision which sometimes may be painful.<sup>63</sup>

vii) *Morality* – moral considerations do influence rules of law.<sup>64</sup> Allen observes that: “our judges have always kept their fingers delicately but firmly upon the pulse of the accepted

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<sup>53</sup> [1920] A.C. 508; see also *Re Petition of Right*, [1915] 3 K.B. 649; *Universities of Oxford and Cambridge v. Eyre & Spottiswood*, [1964] Ch. 736; [1963] 3 All E.R. 289; *Minister of Housing and Local Government v. Hartnell*, [1965] A.C. 1134; [1965] 1 All E.R. 490.

<sup>54</sup> Dias, R.W.M., *supra* note 47 at 169.

<sup>55</sup> Dias, R.W.M., *ibid*.

<sup>56</sup> [1942] A.C. 206 ; [1941] 3 All E.R. 338.

<sup>57</sup> Dias, R.W.M., *ibid*; but this decision was contrasted by the case of *Roberts v. Hopwood*, [1925] A.C. 578.

<sup>58</sup> [1939] 1 K.B. 86; [1938] 4 All E.R. 57; see also *Oakes v. Minister of War Transport* (1944), 60 T.L.R. 319; *Ching Garage, Ltd. V. Chingford Corporation*, [1961] 1 All E.R. 671; [1961] 1 W.L.R. 470.

<sup>59</sup> Dias, R.W.M., *supra* note 47 at p. 180.

<sup>60</sup> *Ibid* at p. 189.

<sup>61</sup> *Ibid* at p. 190.

<sup>62</sup> *Ibid*.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid*.

morality of the day.”<sup>65</sup> Lord Mansfield went a step further stated with emphasis that “the law of England prohibits everything which is contra *bonos mores*”<sup>66</sup>

viii) *Administrative convenience* – convenience may form a major factor in determining how to interpret a particular rule.<sup>67</sup> It may also assist in deciding an issue.<sup>68</sup>

ix) *International comity* – the question of interdependence has made it imperative for nation states to wish to maintain friendly relations with each other especially now that the world has become a global village. This has gone a long way in shaping a number of domestic rules. For instance, statutes will be constructed in such a way to avoid conflict with international order.<sup>69</sup> In the absence of any statutory or common law rule, a court may adopt a rule of international law.<sup>70</sup>

### ***Ijtihad*: Path to discovering ‘Value’**

The process that makes Islamic law dynamic is its evolution in the changing circumstances possible, results from a particular type of academic research and intellectual effort which, is known in legal terminology as *Ijtihad*.<sup>71</sup> *Al-Shafi’i* remarked that “*Qiyas* and *Ijtihad* represent the intellectual process whereby a finite body of revealed texts may be rendered relevant to the infinite complexity of human events. Every event that befalls a Muslim has its necessary religious value (*hukm lazim*), and there is evidence as to the true path in that matter. It is incumbent on the Muslim if there is a specific ruling on a matter to follow it. If there is no specific ruling then evidence as to the true path must be sought by *Ijtihad*.”<sup>72</sup>

Literally *Ijtihad* means ‘the expending of maximum effort in performance of an act’<sup>73</sup> or ‘the expending of effort and the exhaustion of all power.’<sup>74</sup> In technical sense however, it means ‘the expenditure of effort in seeking and arriving at rules from the various sources of law’,<sup>75</sup> or the effort made by the *Mujtahid* in seeking knowledge of the *abkam* (rules) of

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<sup>65</sup> Allen, C.K., *Legal Duties and Other Essays in Jurisprudence*, Oxford: The Clarendon Press (1931), p. 201.

<sup>66</sup> *Jones v. Randall* (1774), 1 Cop. 17, at p. 39; see also *R. V. Delaval* (1763), 3 Burr. 1434, at pp. 1438-1439.

<sup>67</sup> See *Fry v. Inland Revenue Commissioners*, [1959] Ch. 86; [1958] 3 All E.R. 90; *Gatehouse v. Vise (Inspector of Taxes)*, [1956] 3 All E.R. 772, at pp. 776-777.

<sup>68</sup> *Adams v. National Bank of Greece S.A.*, [1961] A.C. 255, at p. 276; [1960] 2 All E.R. 421, at p. 426.

<sup>69</sup> *Dias*, R.W.M., note 47 at p. 40.

<sup>70</sup> *Ibid* at pp. 40-42.

<sup>71</sup> Maududi, S.A.A., *The Islamic Law and Constitution*, Taj Company, New Delhi, (1986), p. 76.

<sup>72</sup> Calder, N., *Interpretation and Jurisprudence in Medieval Islam*, (ed. By Mojaddedi, J. and Rippin, A.) Ashgate Variorum, (2006), pp. 61-2.

<sup>73</sup> *Ibid* at p. 263.

<sup>74</sup> Mahmassani, S., *Falsafah al-Tashri’ fi al-Islam – The Philosophy of Jurisprudence in Islam*, Penerbitan Hizb, Malaysia, (1987), p. 92.

<sup>75</sup> *Ibid*.

the *Shari'ah* through interpretation.<sup>76</sup> It is defined as the total expenditure of effort made by a jurist in order to infer, with a degree of probability, the rules of *Shari'ah* from their detailed evidence in the sources.<sup>77</sup> It is also defined as the application by a jurist of all his faculties either in inferring the rules of *Shari'ah* from their sources, or in implementing such rules and applying them to particular issues.<sup>78</sup>

### ***'Closure' of the Door of Ijtihad***

In the early period of 'Abbasid dynasty the schools of Islamic law had emerged. Not only that, Islamic law itself had approached the end of its formative phase. And, with active patronage of the government, the whole sphere of law had been brought to its horizon.<sup>79</sup> It was shortly after lapse of that formative period that the question of *Ijtihad* and who was capable or qualified to exercising it was raised.<sup>80</sup> By the early part of the fourth century of the *Hijra* (about A.D. 900), Islamic law had attained a pinnacle of development. During this formative period, the first two and a half centuries of Islam (or until about the middle of the ninth century A.D.), scholars or specialists of law had unfettered right and freedom to explore Islamic law to solving legal issues.<sup>81</sup>

Shortly afterward, the administration of the state and religious law drew apart again.<sup>82</sup> Similarly, scholars of all schools felt that all essential questions had been thoroughly examined and conclusively determined. Consequently, unanimity unwittingly emerged to the effect that henceforth, no one might be eligible to form independent legal opinion – implying that all subsequent activity would have to be strictly restricted to the explanation, application, and, at the most, interpretation of the doctrine that had been laid down once and for all.<sup>83</sup> This marked the beginning of the notion of the 'closure of the door of *Ijtihad*' and again implying asking for the adoption of *taklid*. *Taklid* itself is a term which had originally denoted the kind of reference to Companions of the Prophet that had been customary in the ancient schools of law, and which now came to mean the unquestioning acceptance of the doctrines of established schools and authorities.<sup>84</sup>

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<sup>76</sup> Nyazee, I.A.K., *Islamic Jurisprudence, (Usul al-Fiqh)*, the Other Press, The Institute of Islamic Thought, and Islamic Research Institute, Islamabad, Pakistan, (2000), at p. 263.

<sup>77</sup> Amidi, S. D. A. M., *al-Ihkam fi Usul al-Ahkam*, vol. IV, Beirut: al-Maktab al-Islami, (1402/1982), p. 162; Kamali, M.H., *Principles of Islamic Jurisprudence*, The Islamic Texts Society, Cambridge, (2003), p. 469.

<sup>78</sup> Abu Zahrah, M., *Usul al-Fiqh*, Cairo: Dar al-Fikr al-'Arabi, (1973), p. 301; Kamali, M.H., *ibid*.

<sup>79</sup> Schacht, J., *An Introduction to Islamic Law*, Clarendon Press, Oxford, (1982), p. 69.

<sup>80</sup> *Ibid* at p. 70.

<sup>81</sup> *Ibid*.

<sup>82</sup> Schacht, J., *supra* note 79 at p. 70

<sup>83</sup> Hallaq, W.B., *Was The Gate of Ijtihad Closed?* *International Journal of Middle East Studies*, Cambridge University Press, 16 (1984), p. 3.

<sup>84</sup> *Ibid*.

Schacht argues that the first indications of an attitude which denied to contemporary scholars the same liberty of reasoning as their predecessors had enjoyed are noticeable in *Shafi'i*, and from about the middle of the third century of the *Hijrah* (ninth century A.D.) the idea began to gain ground that only the great scholars of the past who could not be equaled, and not the epigones, had right to 'independent reasoning'.<sup>85</sup> J. N. D. Anderson, like many others, contended that about the end of the third/ninth century it was commonly accepted that the gate of *Ijtihad* had become closed.<sup>86</sup> And to confirm this assertion, H. A. R. Gibb argued that the early Muslim scholars held that the gate "*was closed, never again to be reopened.*"<sup>87</sup> W. M. Watt doubted the accuracies in the standard account about this subject without suggesting an alternative view.<sup>88</sup> Some historical accounts relate the subject in explaining the immunity of the *Shari'ah* against the government interference, and others use it to establish a link between the problem of decadence in Islamic institutions and culture.<sup>89</sup>

Against what appears to be the general and traditional position however, Wael, B. Hallaq, argues that a systematic and chronological study of the original legal sources reveals that these views on the history of *Ijtihad* after the second/eighth century are entirely baseless and inaccurate.<sup>90</sup> He contended further that the gate of *Ijtihad* was not closed in theory nor in practice. According to him, *Ijtihad* was indispensable in legal theory because it constituted the only means by which jurists were able to reach the judicial judgments decreed by God. In order to regulate the practice of *Ijtihad* a set of conditions were required to be met by any jurist who wished to embark on such activity. All these put together serve as evidence to disprove the argument of closure of the door of *Ijtihad*.<sup>91</sup> He argued further that the idea of closing the gate of *Ijtihad* or the notion of the extinction of *Mujtahids* did not appear during the first five Islamic centuries. According to him, this is entirely in consonance with the fact that the practical and theoretical importance of *Ijtihad* had not declined throughout this period: *Ijtihad* and *Mujtahids* were

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<sup>85</sup> Schacht, J., supra note 79 at p. 70.

<sup>86</sup> Anderson, N. D., *Law Reform in the Muslim World* (London, 1976), p. 7. See also M. Khadduri, "From Religious to National Law," in J. H. Thompson and R. D. Reischauer, eds., *Modernization of the Arab World* (Toronto, 1966), p. 41; F. Rahman, *Islam* (Chicago, 1966), pp. 77-78; H. A. R. Gibb, *Mohammedanism* (New York, 1962), p. 104; A. S. Triton, *Materials on Muslim Education in the Middle Ages* (London, 1957), p. 163; N. J. Coulson, *A History of Islamic Law* (Edinburgh, 1964), p. 81. See also the introduction of G. L. Lewis to *Katib Chelebi's The Balance of Truth* (London, 1957), pp. 18-19. For additional citations on this, see notes 6 and 7 below.

<sup>87</sup> Gibb, H. A. R., *Modern Trends in Islam* (Chicago, 1947), p. 13; idem., *Mohammedanism*, p. 98.

<sup>88</sup> Watt, W. M., "The Closing of the Door of *Ijtihad*," *Orientalia Hispanica*, I (Leiden, 1974), 675-678.

<sup>89</sup> Watt, W. M., *Islam and the Integration of Society* (Evanston, 1961), pp. 206-207, 242-243; H. Liebesny, "Stability and Change in Islamic Law," *Middle East Journal*, 21 (1967), 19; Coulson, *History*, pp. 80-81; Schacht, supra note 79 at, p. 75; Rahman, *Islam*, pp. 77-78.

<sup>90</sup> Hallaq, W.B., supra note no. 83 at p. 4.

<sup>91</sup> *Ibid.*

employed in the domain of law and were required in the higher ranks of government.<sup>92</sup> That *Ijtihad* constituted the backbone of the Sunni legal doctrine was manifest in the exclusion from *Sunnism* of all groups that spurned this legal principle.<sup>93</sup>

Wael Hallaq's argument that the '*gate of Ijtihad was not closed in theory nor in practice. ...Ijtihad was indispensable in legal theory because it constituted the only means by which jurists were able to reach the judicial judgments decreed by God*' is correct against the background of the historical challenges Islamic law had encountered and survived.

Benjamin Jokisch holds similar view. He first noted that Western accounts of Islamic law is that 'door of *Ijtihad*' was closed in about the fourth/tenth century and since then, *Shari'ah* has been unable to take account of changes through time because it has lost its flexibility.<sup>94</sup> Contrary to this traditional view and agreeing with recent research,<sup>95</sup> he explains that *Ijtihad* in reality continued to exist after the fourth/tenth century.<sup>96</sup>

Be that as it may, the fact remains that Islamic law, which until the early 'Abbasid period, had been adaptable and growing, from then onwards, became subjected to rigidity and put in a final mold.<sup>97</sup> This stagnating position of the law has remained till the present time. This is very obvious in a comparative assessment of Islamic law with other modern legal systems. Schacht maintained in this regard that taken as a whole, Islamic law reflects and fits the social and economic conditions of the early 'Abbasid period, but has grown more and more out of touch with later developments of state and society.<sup>98</sup> Muhammad Hashim Kamali reached the same conclusion.<sup>99</sup>

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<sup>92</sup> Ibid at p. 33.

<sup>93</sup> Ibid.

<sup>94</sup> Goldziher, I., 'Muhammedanisches Recht in Theorie und Wirklichkeit, *Zeitschrift für vergleichende Rechtswissenschaft*, 8, (1989), pp. 406-23, esp. 409; Bousquet, G., *Du droit musulman et de son application effective dans le monde*, Algiers, (1949), p. 7; Coulson, N., *A History of Islamic Law*, Edinburgh, (1964), p. 2; *ibid* 'Doctrine and Practice in Islamic Law', *BSOAS* 18, (1984), p. 69; Crone, P., *Roman Provincial and Islamic Law*, Cambridge, (1987), p. 18; Sjukijajnan, I., *Musuljanskoe Pravo*, Moskau, (1986), p. 97.

<sup>95</sup> Hallaq, W., *Usul al-Fiqh: Beyond Tradition*, *Journal of Islamic Studies*, 3 (1992), pp. 172-202, esp. 182; Krawietz, B., *Die Hurma, Schariatrechtlicher Schutz vor Eingriffen in die körperliche Unversehrtheit nach arabischen Fatwas des 20. Jahrhunderts*, Berlin, (1991), p. 323; North, A., 'Die Scharia, das religiöse Gesetz des Islam Wandlungsmöglichkeiten, Anwendung und Winkung', in Fikentstcher, Frank and Kohler eds, *Entstehung und Wandel rechtlicher Traditionen*, Freiburg/München, (1980), pp. 415-37 esp. 429; Johansen, B., *The Islamic Law on Land Tax and Rent*, London, (1988), p. 21; Hallaq, W., *Usul al-Fiqh: Beyond Tradition*, *Journal of Islamic Studies*, 3 (1992), pp. 172-202, esp. 182.

<sup>96</sup> Jokisch, B., *Ijtihad in Ibn Taymiyya's fatawa* in 'Islamic Law, Theory and Practice, ed. by Gleave, R., and Kermili, E., I.B. Tauris Publishers, London and New York, (2001), p. 119.

<sup>97</sup> Schacht, J., *supra* note no. 79 at p. 75.

<sup>98</sup> Ibid.

<sup>99</sup> Kamali, H.M., *supra* note no.77 at pp. 494-95.

Al-Tamawi has expressed similar view when he stated that Ijtihad by individuals in the manner that was practiced by the *fuqaha* of the past is no longer suitable to modern conditions. He then recommended the setting up of a council of qualified *Mujtabidun* to advice in the preparation and approval of statutory law so as to ensure it harmony with *Shari'ah* principles.<sup>100</sup>

Abdur Rahman I. Doi, also held the same view when he observed that: '*if the process of Ijma, Qiyas, Masalih al-Mursalah, Istislah and Istidlal are properly made to work, the Shari'ah will meet the challenges and the necessities of the modern life.*'<sup>101</sup>

The decline in the growth of Islamic law becomes more manifested in the subject of *Ijma*. Under classical theory, *Ijma* had been subjected to conditions that virtually consigned it to the realm of utopia.<sup>102</sup> Hashim Kamali noted that the unreality of the classical formulations of *Ijma* is reflected in modern times in the experience of Muslim nations and their efforts to reform certain areas of the *Shari'ah* through the medium of statutory legislation. He further observed that: 'the classical definitions of *Ijtihad* and *Ijma* might, at one time, have served the purpose of discouraging excessive diversity which was felt to threaten the very existence and integrity of the *Shari'ah*. But there is no compelling reason to justify the continued domination of a practice that was designed to bring *Ijtihad* to a close.'<sup>103</sup>

As earlier stated, there is element of accuracy in the assertion of Wael Hallaq.<sup>104</sup> This assertion will however, be put into further test when the issue of law-making in a Muslim majority state like Saudi Arabia is considered. It is intended to examine a number of local legislations of Saudi Arabia (the bastion of *Sunni*) against the argument of the classical essentialist school which vehemently opposed interpretation and reinterpretation of Islamic law.

### *Ijtihad and Modern Legislation*

As could be seen from the above, *Ijtihad* is primarily a practical tool for legislation. *Ijtihad* had effectively played this role in the course of historical development of Islamic law. However, when legislation became a monopoly of the state, any rule emanating from *Ijtihad* made by later days *Mujtabidun* are no long relevant except it is accepted by the state and converted into law through legislation.<sup>105</sup> In the same vein, an *Ijtihad* ruling may be accorded judicial recognition by the state judiciary. The *Mujtabid* in such a case would

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<sup>100</sup> Al-Tamawi, S.M., Al-Sultatt al-Thalath fi'l-Dasatir al-'Arabiyyah wa fi'l-Fikr al-Sihasi al-Islami, 2<sup>nd</sup> ed. Cairo: Dar al-Fikr al-'Arabi, (1973), p. 307; Kamil, H.M., *ibid*.

<sup>101</sup> Doi, A. R., *Basis of Shari'ah* (Islamic Law), Gaskiya Corporation, Zaria, Nigeria, (1983), p. 635.

<sup>102</sup> Kamali, H.M., *supra* note no. 77 at p. 259.

<sup>103</sup> *Ibid*.

<sup>104</sup> *Supra*

<sup>105</sup> Nyazee, I.A.K., *supra* note no. 76 at p. 272.

be the state through its legal or judicial apparatus and not the individual.<sup>106</sup> The trend in Muslim majority states of the present is that various councils or commissions of scholars are created and financed by the states under an officially appointed *Mufti* who in most instances may not be officially recognized as a qualified *Mujtahid* in the traditional Islamic scholarship. Their opinions on issues are, in most cases, advisory and sometimes recommendatory, since those Councils or Commissions are part and parcel of the state. At international levels, there are a number of such bodies like, the Muslim World League, the Islamic *Fiqh* Academy of the Organization of Islamic Co-operation whose opinions are mere advisory and recommendatory. Their opinions on issues may not enjoy official enforcement and sanction.<sup>107</sup>

### ***Maqasid al-Shari'ah*: Literalism versus Empiricism**

As stated in the previous paragraph, the importance of *Ijtihad* in the development of Islamic law cannot be overemphasized. The theory of *maqasid* is an independent theme of the *Shari'ah*, it however has direct connection to *Ijtihad* even though the *maqâsid* have not been treated as such in the conventional theoretical analysis of *Ijtihâd*. Perhaps the reason being that Islamic legal thought is, broadly speaking, preoccupied with concerns over conformity to the letter of the divine text, and the legal theory of *Usûl al-Fiqh* has advanced that purpose to a large extent.<sup>108</sup>

This traditional attitude of the juristic thought was generally more pronounced among the *traditionist* or *literalists* (the *Ahl al-Hadîth*) than that of the Rationalists or liberalists (the *Ahl al-Ray*). The literalists were inclined to view the *Shari'ah* as a set of rules, commands and prohibitions that were addressed to the competent individual *mukallaf* and all that the latter was obliged to strictly comply with to its dictates.<sup>109</sup>

In the first three centuries of Islam, the literalists tradition attitude was not much interested in the theory of *maqâsid al-Shari'ah* and it was not until the time of *al-Ghazâlî* (d. 505/1111) and then *al-Shâtibi* (d. 790/1388) that significant developments were made in the formulation of the theory of *maqâsid*.

One of the main goals of Islamic Jurisprudence is to provide a set of guidelines with a view to ensuring that *ra'y* (reason) plays a supportive role to the values of *wahy* (revelation).<sup>110</sup> In other words, it works towards achieving harmony and communality

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<sup>106</sup> Ibid at p. 273.

<sup>107</sup> Ibid.

<sup>108</sup> Kamali, H.M., <http://www.sunniforum.com/forum/showthread.php?6176-Maqasid-al-Shariah-The-Objectives-of-Islamic-Law> (accessed 17/03/2012). See also Kamali, H.M., *Maqasid al-Shari'ah Made Simple*, International Institute of Advanced Islamif Studies (IIAIS), (2009).

<sup>109</sup> Ibid

<sup>110</sup> Kamali, H.M., supra note no. 77 at p. 513.

between revelation and reason in the interest of mankind. *Shari'ah* is fundamentally assertive of the benefits of the individual and that of the community. Rules under its system are thus, designed so as to protect these benefits with a view to facilitate improvement and perfection of the conditions of human life on earth.<sup>111</sup> Thus, the Qur'an, though, through a process of induction (*istiqrā'*) rather than through deduction,<sup>112</sup> is expressive of this as well when it singles out the most important purpose of the Prophethood of Muhammad in such terms as: "We have not sent you but a mercy to the world".<sup>113</sup> This is also affirmed perhaps when the *Qur'an's* characterizes itself as: "a healing to the (spiritual) ailment of the hearts, guidance and mercy for the believers" (and mankind)."<sup>114</sup>

Principally, the inner dynamics of the Qur'an and *Sunnah* can be figured out in their assertion on principles of justice and equity, equality and truth, on commanding good and forbidding evil, on the promotion of benefit and prevention of harm, on charity and compassion, on fraternity and co-operation among ethnic, tribal groups and nations of the world community, on consultation and government under the rule of law, mutual respect and observance of rights of all.<sup>115</sup> Details of their guidelines expressed as *Shari'ah* are geared towards achieving these objectives.

Generally speaking, theoretical methodology of Islamic law is explicit. But, it is devoid of meaning if it lacks human face. In other word, its literal rules have to be given practical expression to serve as truly social engineering which is fundamentally meant to be. This explains the paradigm shift in modern time from the structures of literalism towards empirical attainment of the goals set, *ab initio*, by the Law-giver.

Al-Ghazali in one of his testamentary legal theories emphasized the importance of the *Maqasid al-Shari'ah* and the need to consider the texts collectively to benefit from the spirit of the law.<sup>116</sup> By this Al-Ghazali opened a new field for scholars to explore. Thus, those who followed him in this subject occupied themselves with the refinement of the *maqasid*.<sup>117</sup> Al-Razi was one of them. Similarly, *Sadr al-Shari'ah*, in his *al-Tawdih fi Hall al-Ghawamid al-Tanqih*, was fascinated with this theory and tried to assess the Hanafi position with respect to the *maqasid*.<sup>118</sup> It was however, *al-Shatibi*, a Maliki jurist who built his extensive study on rules of interpretation around the principle of *maqasid al-*

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<sup>111</sup> Ibid.

<sup>112</sup> Al-Shatibi, al-Muwafaqat, vol. 2, p. 7.

<sup>113</sup> Qur'an 21: 107.

<sup>114</sup> Qur'an 10: 57.

<sup>115</sup> Kamali, H.M., supra note no. 77 at p. 513.

<sup>116</sup> Nyazee, I.A.K., Theories of Islamic Law, Islamic Research Institute, International Islamic University, Islamabad, Pakistan, (2009), p. 225.

<sup>117</sup> Ibid.

<sup>118</sup> See Al Sadr al-Shari'ah, U.A.M.M., al-Tawdih fi Hall al-Ghawamid al-Tanqih, Cairo: Dar al-Ahd al-Jadid li'l-Taba'ah, (1377/1957); Nyazee, I.A.K., ibid.

*Shari'ah*.<sup>119</sup> The combined effect of these juristic efforts had come a long way in the refining the understanding of the *maqâsid al-Shari'ah* and also revealed their significance for Islamic community as a whole.<sup>120</sup>

The term '*maqâsid*' was first used in the early fourth century and appeared in the juristic autography of Abû 'Abd Allâh al-Tirmidhî al-Hakîm (d. 320/932) and it was regularly referred to in the works of Imâm al-Haramayn al-Juwaynî (d. 478/1085) who was said probably the first to have classified the *maqâsid al-Shari'ah* into the three categories of essential, complementary and desirable (*darûriyyât, hâjjiyyât, tahsîniyyât*).<sup>121</sup> His classification enjoyed general recognition ever since. Abu Hamid al-Ghazali, a student of al-Juwaynî later developed his idea and wrote in details on public interest (*maslahah*) and ratiocination (*ta'lîl*) in his works, *Shifâ' al-Ghalîl* and *al-Mustasfâ*.<sup>122</sup>

Ghazâlî was prepared to recognize *maslahah* if it was to promote the *maqâsid* of the *Shari'ah*. That explained why he was categorical in his treaty on the subject contending that the *Shari'ah* pursued five values, namely, faith, life, intellect, lineage and wealth or property all of which were to be protected as a matter of absolute priority.<sup>123</sup> It was at a later stage that a number of leading jurists began to contribute in expanding the scope of the theory. For instance, Sayf al-Dîn al-Âmidî (d. 631/1233) identified the *maqâsid* as criteria of preference *al-tarjîh* among conflicting analogies and elaborated on an internal order of priorities among the various classes of *maqâsid*.<sup>124</sup> He also restricted the essential *maqâsid* to only five.<sup>125</sup>

The Mâlikî jurist, Shihab al-Din al-Qarâfî (d. 684/1285) added a sixth to the existing list, namely the protection of honor (*al-'ird*)<sup>126</sup> and this was endorsed by Taj al-Din 'Abd al-Wahhab ibn al-Subki (d. 771/1370) and later by Muhammad ibn 'Alî al-Shawkânî (d. 1250/1834). The list of five essential values was evidently based on a reading of the relevant parts of the *Qur'an* and the *Sunnah* on the prescribed penalties (*budud*). The value that each of these penalties sought to vindicate and defend was consequently identified as an essential value. The latest addition (i.e. *al-'ird*) was initially thought to have been covered under lineage (*al-nasl*, also *al-nasab*), but the proponents of this addition relied on the fact that the *Shari'ah* had enacted a separate *hadd* punishment for slanderous

<sup>119</sup> See Al-Shatibi, A.I.I., *al-Muwafaqat fi Usul al-Ahkam*, ed Muhammad Hasnayn Makhluḥ, Cairo: al-Matba'ah al-Salafiyyah (1341 A.H.); Nyazee I.A.K., *ibid*.

<sup>120</sup> Nyazee, I.A.K., *supra* note 116 at p. 225

<sup>121</sup> Kamali, H.M., *supra* note no. 77 at p. 513.

<sup>122</sup> Al-Ghazali, A.H. M.M., *Shifâ' al-Ghalîl fi Bayan al-Shabah wa-al-Mukhil wa Masalik al-Talîl*, Baghdad, (1971).

<sup>123</sup> *Ibid*.

<sup>124</sup> See Al-Amidi, S. D. A. M., *al-Ihkam fi Usul al-Ahkam*, 4 vols., ed. 'Abd al-Razzaq 'Affi, 2<sup>nd</sup> edn. Beirut: al-Maktab al-Islami, (1402/1982).

<sup>125</sup> *Ibid*.

<sup>126</sup> Al-Qarafi, S.D.A., *Sharh Tanqil al-Fusul fi Ikhtisar al-Mahsul fi al-Usul*. Cairo, (1393/1973).

accusation (*al-qadhif*), which justified the addition. ‘Izz al-Dîn ‘Abd al-Salâm al-Sulami’s (d. 660/1262) renowned work, *Qawa’id al-Ahkam*, was in his own characterization a work on ‘*maqasid al-ahkam*’ and addressed the various aspects of the *maqasid* especially in relationship to ‘*illah*’ (effective cause) and *maslahah* (public interest) in greater detail. Thus he wrote at the outset of his work that "the greatest of all the objectives of the *Qur’ân* is to facilitate benefits (*masâlih*) and the means that secure them and that the realization of benefit also included the prevention of evil." Sulamî added that all the obligations of the *Shari’ah* (*al-takalif*) were predicated on securing benefits for the people in this world and the next. For God Most High is Himself in no need of benefit nor is He in need of the obedience of His servants. He is above all this and cannot be harmed by the disobedience of transgressors, nor benefit from the obedience of the righteous. The *Shari’ah* is, in other words, concerned, from the beginning to the end, with the benefits of God’s creatures.

Taqi al-Din ibn Taymiyyah (d. 728/1328) was probably the first scholar to depart from the notion of confining the *maqasid* to a specific number and added, to the existing list of the *maqasid*, such things as fulfillment of contracts, preservation of the ties of kinship, honoring the rights of one’s neighbor, in so far as the affairs of this world are concerned, and the love of God, sincerity, trustworthiness, and moral purity, in relationship to the hereafter. Ibn Taymiyyah thus revised the scope of the *maqasid* from a designated and specified list into an open-ended list of values, and his approach is now generally accepted by contemporary commentators, including Ahmad al-Raysuni, Yusuf al-Qaradawi and others. Qaradawi has further extended the list of the *maqasid* to include social welfare and support (*al-takaful*), freedom, human dignity and human fraternity, among the higher objectives and *maqasid* of the *Shari’ah*. These are undoubtedly upheld by both the detailed and the general weight of evidence in the *Qur’an* and the *Sunnah*

### ***Classification of Maqasid***

The values or objectives of law as specified by Al-Ghazali with approval of majority of jurists including al-Shatibi, are first of two types, namely, *dini* or values of the Hereafter and *dunyawi* or values pertaining to this world.<sup>127</sup> The worldly values (*dunyawi*) are further classified into four, namely, the preservation of *nafs* (life), the preservations of *nasl* (progeny), the preservation of ‘*aql*’ (intellect), and the preservation of *mal* (wealth or property).<sup>128</sup> The totality of these classifications yield five ultimate values of the law, namely, *din* (religion), life, progeny, intellect, and wealth or property.<sup>129</sup> The entire range is thus classified into three in order of importance - the essential (*daruriyyat*), followed by the complementary benefits (*hajiyyat*), and then the embellishment (*tahsiniiyyat*).<sup>130</sup> The first

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<sup>127</sup> Nyazee, I.A.K., supra note 116 at p. 231.

<sup>128</sup> Nyazee, I.A.K., *ibid*.

<sup>129</sup> Nyazee, I.A.K., *ibid*.

<sup>130</sup> See Al-Shatibi, A.I.I., *ibid*, ii, pp. 8-13; Kamali, H.M., <http://www.sunniforum.com/forum/>, *ibid*.

category is that of the necessities (*darurat*), which jurists believe have been maintained by all societies and without which existence of any kind of society is difficult.<sup>131</sup> This category is considered the primary *maqasid* and thus, the jurists pay particular attention on all the units of this category.<sup>132</sup> The remaining two categories play supportive role to this major category.

*The Essentials (daruriyyat)*: The essential interests are classified into five, namely, faith, life, lineage, intellect and property. These are, by definition, essential to normal order in society as well as to the survival and spiritual well-being of individuals, so much so that their destruction and collapse will precipitate chaos and collapse of normal order in society.<sup>133</sup> The *Shari'ah* seeks to protect and promote these values and validates measures for their preservation and advancement.<sup>134</sup> *Jihad* has thus been endorsed and authorized with a view to protect religion, and so is just retaliation (*qisas*) which is designed to protect life.<sup>135</sup> The *Shari'ah* takes affirmative and also punitive measures to protect and promote these values. Theft, adultery and wine-drinking are punishable offences as they pose a threat to the protection of private property, the well-being of the family, and the integrity of human intellect respectively. In an affirmative sense again, but at a different level, the *Shari'ah* encourages work and trading activity in order to enable the individual to earn a living, and it takes elaborate measures to ensure the smooth flow of commercial transactions in the market-place.<sup>136</sup> The family laws of the *Shari'ah* are likewise an embodiment largely of guidelines and measures that seek to make the family a safe refuge for all of its members. The *Shari'ah* also encourages pursuit of knowledge and education to ensure the intellectual well-being of the people and the advancement of arts and civilization. The essential *masalih*, in other words, constitute an all-encompassing theme of the *Shari'ah* as all of its laws are in one way or another related to the protection of these benefits. These benefits are an embodiment, in the meantime, of the primary and overriding objectives of the *Shari'ah*.<sup>137</sup>

The essentials or necessities (*daruriyyat*) are followed by other categories under the *maqasid al-Shari'ah*. These fall under the heading of needs (*hajjiyyat*). They are not regarded as indispensable necessities; they are needed for maintaining an orderly society and for laying the grounds to achieving the successful implementation of *daruriyyat*.<sup>138</sup> *Hajjiyyat*, or complementary interests, are not an independent category as they also seek to protect

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<sup>131</sup> Nyazee, I.A.K., supra note 116 at p. 236.

<sup>132</sup> Ibid

<sup>133</sup> Hallaq, W.B., *Shari'a, Theory, Practice and Transformations*, Cambridge University Press, (2009), p. 104.

<sup>134</sup> Kamali, H.M., supra note no. 77 at p. 513.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Hallaq, W.B., supra note no. 133.

and promote the essential interests, albeit in a secondary capacity.<sup>139</sup> These are defined as benefits, which seek to remove severity and hardship that do not pose a threat to the very survival of normal order. *Hajjiyyat* are illustrated in the area of criminal justice where a *hadith* is said to proclaim that "prescribed penalties are suspended in all cases of doubt". The rule in this *hadith* protects a secondary interest in that it regulates the manner in which punishments are enforced. These punishments are in turn designed to protect the essential interests through judicial action.<sup>140</sup> In the sphere of *mu'amalat*, the *Shari'ah* validated certain contracts, such as the sale of *salam*, and also that of lease and hire (*ijarah*) because of the people's need for them notwithstanding a certain anomaly that is attendant in both.<sup>141</sup>

The third categories are those known as embellishments, adornment, improvements or desirabilities (*tahsinīyyat*). They are those that include legal elements related to issues not directly connected with the *necessary* and *needed* goals of the law.<sup>142</sup> *Tahsinīyyat* seek to attain refinement and perfection in the customs and conduct of people at all levels of achievement.<sup>143</sup> For example, the *Shari'ah* encourages gentleness (*rifq*), pleasant speech and manner (*husn al-kehulq*) and fair dealing (*ihsan*). The judge and the head of state are similarly counseled not to be too eager in the enforcement of penalties, such a course being considered a desirable one to take.<sup>144</sup> Attainment of beauty and perfection in all spheres of human conduct are the primary objectives of *tahsinīyyat*.

Illustrating the practicality and applicability of the *maqasid* to general welfare of man, Muhammad Hashim Kamali has this to say:

*It should be obvious, then, that the classification of masalih need not be confined to the ahkam of the Shari'ah or to religious matters alone as it is basically a rational construct that applies to customary, social, political, economic and cultural affairs and so forth. To build the first hospital in a town is likely to be necessary and essential, but to build a second and third may be only complementary and desirable. And then to equip each one with the latest and most efficient health care facilities may fall under the category either of the second or the third classes of interests, depending, of course, on the general conditions of each locality.*

### ***Maqasid: Between Textualists and Rationalists***

In the course of exercising *Ijtihad* to identify the goals (*maqasid*) of the law, two camps, along the line emerged, namely, the classical/textualists and the liberalists. In this regard,

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<sup>139</sup> Kamali, H.M., supra note 134.

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.

<sup>142</sup> Hallaq, W.B., supra no. 133.

<sup>143</sup> Kamali, H.M., supra note 134.

<sup>144</sup> Ibid.

the *Zahiri* jurists maintain the position of textualists approach while the majority of jurists maintain the liberalist position.<sup>145</sup>

The textualists' approach restricts the identification of the *maqasid* to the clear texts, commands and prohibitions, which in their argument are the conveyers and bearers of the *maqasid*.<sup>146</sup> According to them, *maqasid* have no separate existence outside the textual framework. They further argue that provided that a command is explicit and normative, it conveys the objective intended by the Law-giver in the affirmative sense, while prohibitions are indicative of the intended goals of the Law-giver in the negative sense in that the purpose of a prohibitive injunction is to suppress and avert the evil that the text in question has contemplated.<sup>147</sup>

The majority of jurists on the other hand takes into consideration both the text and the underlying *'illah* and rationale of the text.<sup>148</sup> For instance, the chief exponent of the *maqasid*, *Shatibi*, has spoken affirmatively of the need to observe and respect the explicit injunctions, but then he added that adherence to the obvious text should not be so rigid as to alienate the rationale and purpose of the text from its words and sentences.<sup>149</sup> He contended further that rigidity of this kind was itself contrary to the objective (*maqsud*) of the Lawgiver, just as would be the case with regard to neglecting the clear text itself.<sup>150</sup> According to him, when the text, whether in form of a command or a prohibition, is read together with its objective and rationale, it certainly bears greater harmony with the intention of the Lawgiver.<sup>151</sup> He then classified the *maqasid* into two main categories, namely, primary (*asliyyah*) and secondary (*tab'iyyah*). The former are the essential *maqâsid* or *darûriyyât* which the *mukallaf* must observe and protect regardless of personal predilections, whereas the supplementary *maqâsid -bajiiyyat-* are those which leave the *mukallaf* with some flexibility and choice.<sup>152</sup>

According to *Shatibi*, induction is the main methodology of identifying the *maqasid* from the texts. As an example, the notion of *maqasid* and classification into three are based on induction since there is no direct authority to that effect from the text.<sup>153</sup>

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<sup>145</sup> Al-Shatibi, A.I.I., *al-Muwafaqat fî Usul al-Shari'ah*, ed. Shaykh 'Abd Allah Diraz, Cairo, al-Maktabah al-Tijariyyah, al-Kubra, (n.d.) 2:393; Kamali, H.M., *Ibid*.

<sup>146</sup> Kamali, M.H., *supra* note 116 at p. 513.

<sup>147</sup> *Ibid*.

<sup>148</sup> *Ibid*.

<sup>149</sup> *Ibid*.

<sup>150</sup> Al-Shatibi, A.I.I., *supra* note 145; see also Kamali, H.M., *ibid*.

<sup>151</sup> Kamali, H.M., *supra* note 116 at p. 9.

<sup>152</sup> *Ibid*.

<sup>153</sup> *Ibid* at p. 11.

### ***Maqasid and Ijtihad – Any Connecting Nexus?***

As stated earlier, only people with pre-requisite qualifications can engage in the exercise of *Ijtihad*. There is no gainsaying that a nexus exists between the concept of *Maqasid* and *Ijtihad*. Ordinarily, *Maqasid* should have been taken as a by-product of *Ijtihad*. Shatibi instead, espoused the knowledge of the *maqasid* as a pre-requisite of attainment to the rank of *Mujtabid*. He argued that those who disregard the necessity of knowledge of *maqasid* may be liable to fall into error while engaging in the exercise of *Ijtihad*. For instance, jurists have expressed different views on the question as to whether the *zakah* on commodities such rice, corn, or dates could be given in kind or whether they could be given in their monetary value. Jurists of Hanafi School approved giving out *zakah* in monetary value, while the *Shafi'i* held contrary view. *Hanafi's* ratio for this view was based on the notion of *maqasid* to the extent that the purpose of *zakah* is to meet the need of the poor and this can also be attained by paying the monetary value of grains and other valuable materials required to be paid as *zakah*.<sup>154</sup> Supporting this view, Ibn Qayyim al-Jawziyyah contended that the common purpose in this regard was to satisfy the need of the poor rather than to restrict its payment to a particular commodity.<sup>155</sup> This is a practical illustration of the importance of knowledge of *maqasid* before dabbling into the exercise of *Ijtihad*.

Shatibi's proposition therefore, implies that the concept of *maqasid* which should have been considered as a product of *Ijtihad*, itself is one of the basic requirements that a *mujtabid* should possess before embarking on *Ijtihad*. That explains why a *Mujtabid* is also required, while exercising *Ijtihad* to pay particular attention to the end result and consequence of his ruling on a particular matter.<sup>156</sup> This is where a nexus between *Ijtihad* and *Maqasid* is established.

### **Legal Value: A Comparative Analysis**

The questions of good and evil, right and wrong which are basically issues of morality mark a distinction between the value systems of both Western and Islamic Jurisprudence. In the Western jurisprudence, all these values are discoverable through the use of reason. Under Islamic jurisprudence, majority of Muslim jurists held that the guide for right and wrong is the *Shari'ah* and reason alone is not sufficient and thus, not a

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<sup>154</sup> Kamali, H.M., *ibid* at p. 16.

<sup>155</sup> Ibn Qayyim, A.M.A.J., *I'lam al-Muwaqqi'in 'an Rabb al-'Alamin*. Ed. Muhammad Munir al-Dimashqi, Cairo: Idarah al-Tiba'ah al-Muniriyyah, vol 3 (n.d.), p. 12, Raysuni, *Nazariyyat al-Maqasid*, 336; Kamali, H.M., *ibid* at p. 16.

<sup>156</sup> One of the examples usually quoted in support of this requirement is contained in *Sahih al-Bukhari*, *Kitab al-Manaqib*, *Ban Ma Yunha min Da'wah 'l-Jahiliyyah*, where the Prophet was reported to have the knowledge of the subversive activities of the hypocrites but he did not pursue them for reasons, as he stated himself, that: "I fear people might say that Muhammad kills his own Companions".

reliable guide.<sup>157</sup> It follows that the values asserted under Western jurisprudence are based on human reason; while under Islamic jurisprudence the value systems upheld by the *Shari'ah* have been defined and divinely ordained by the Law-giver.<sup>158</sup>

The value systems under Western Jurisprudence as identified by Dias are, to some extent, identical to the five goals of law under Islamic jurisprudence. It shows the possibility of harmony between revelation and reason. Secondly, it is also interesting to note that their use is also similar and so is the methodology.<sup>159</sup> This confirms the dynamic nature of Islamic law. It debunks argument of the literalist jurists that since Islamic law is fundamentally divine; any attempt towards its interpretation or re-interpretation would be contrary to the spirit and letter of the law. It also confirms the argument that under the Western jurisprudence values systems are discoverable through the use of reason, whereas under Islamic jurisprudence the guide for right and wrong is determined by the *Shari'ah* value; thus, reason alone is not sufficient and thus, not a reliable guide.

Therefore, the point of convergence between the two legal systems in this regard is that the value system under the Western jurisprudence and *Maqasid al-Shari'ah* under *Usul al-Fiqh* of Islam were developed through the mechanism of reason and *Ijtihad* respectively. Both Dias and other jurists in this camp evolved the idea through reason based on empirical phenomena of their society. Al-Ghazali and Shatibi the pioneering jurists of *Maqasid* also developed their notion by exercising *Ijtihad*. The point of divergence however, is that, while the Western jurists based their own idea on personal reasoning, their counterparts in the Islamic jurisprudence based their notion on the *Shari'ah* values that are divine and transcendental, namely, the *Qur'an* and *Sunnah*.

In a nutshell, the brief comparison is a proof that there are quite similarities in both Islamic and Western jurisprudence and there as well several critical differences too. However, there are points of convergence between the two legal systems.

## Conclusion

It can be concluded from this analysis that law may be meaningless when it comes to a straight-jacket application of its rules to cases without taking into account the underlined value or values within which such legal rules or principles exist. This reality is acknowledged by jurists of both the conventional and Islamic jurisprudence. The concept of value is inspired by fairness and conscience authorizing departure from a rule of positive law when its enforcement may likely lead to unfair results. However, under

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<sup>157</sup> Nyazee, I.A.K., *Theories of Islamic Law*, Islamic Research Institute, International Islamic University, Islamabad, Pakistan, (2009), pp. 314-4.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

the conventional legal norm, values are discoverable through the use of reason; while under Islamic system they are discovered through revelation and reason. The two are communally unanimous in their desire to achieve the ultimate justice.