Maqāṣid al-Sharī'a in Contemporary Shī'ī Jurisprudence

Liyakat Takim
McMaster University

In recent times, there has been a growing awareness of the need to apply the concept of *maqāṣid al-sharī'a* (aims or objectives of Islamic law) in the derivation of juridical rulings. This need has been felt most acutely among those who advocate revisiting or reinterpreting the *sharī'a* (Islamic moral-legal law). Interest in the concept of *maqāṣid al-sharī'a* seems to have been ignited because many Muslim thinkers see it as a hermeneutical tool that can be deployed to solve some of the major social and political challenges facing the contemporary Muslim world. This chapter explores the role and the significance of the concept of *maqāṣid al-sharī'a* as a legal *cum* hermeneutical tool in modern Shī'ī legal thought. It will also explore the current discourse on reformation in Shī'ī circles.

There has been much debate in Muslim circles regarding the question of reformation in the Muslim world. More specifically, questions that have been posed include: how can a religion, which is believed to be immutable and constant, regulate and serve the needs of a changing community? How can a legal system that was formulated over a thousand years ago respond to the requirements of twenty-first century Muslims? Is there a need for reformation in Islam? If so, where should it begin and in which direction should it proceed? These are some of the most challenging questions facing contemporary scholars of Islam. This paper will examine the question of *maqasid al- sharī'a* and *maṣlaḥa* in Shī'īsm. Before that, I will preface my discussion with a review of reformation in Shī'ī Islam.

Reformation in Contemporary Shī'ī Thought

Within Shī'ī circles, there have been important voices calling for a radical rethinking of the religious tradition. Many of these have emerged after the Iranian revolution in 1979. Such formulations have come from religious intellectuals like 'Abdolkarim Soroush, but importantly, others emanate from within the religious seminaries itself. Scholars like Ayatullah Sanei, Ayatullah Jannati, Ayatullah Mohagheg Damad, Hujjatul-Islam Muhsin Sa'idzadeh and Mohsen Kadivar have called for a re-evaluation of traditional juridical pronouncements on many issues. As a matter of fact, in my discussions with some *marāji'*[1] in Qum, Iran, I detected a distinct silent revolution within in the seminaries. The views of the *marāji'* are, on many important issues, polarized.

A major feature of reformist thinkers like Ayatullah Sanei, Muhammad Ibrahim Jannati and Fadlullah is the positioning of the Qur'ān as the primary and the foundational textual source in formulating new legal opinions, empowering reason to uncover the rationale and the wisdom (*'illa*) behind a divine injunction and taking into account the context of time (*zamān*) and space (*makān*) associated with particular decrees that were legislated. This is evident in the existing legal corpus dealing with issues such as apostasy, status of non-Muslims, and gender justice, many of which contradict the Qur'ānic ethos but are given legal currency primarily on the basis of prophetic traditions (*ḥadīth*), consensus (*ijmā'*) and the science of jurisprudence (*uṣūl al-fiqh*). According to Ayatullah Sanei, this has stultified the onward progression of Islamic legal theory

---

[1] The term *marāji'* refers to the most learned juridical authority in the Shī'ī community whose rulings on Islamic law are followed by those who acknowledge him as their source of reference or *marji'*.

and Islamic law that ought to be harmonious and compatible with new context and circumstances.[2]

Many Shī'ī scholars lament the fact that current legal treatises (*risāla* '*amaliyya*) do not discuss issues that are relevant today. Thus, issues like human rights, *mustahdathāt* (new issues), socio-political issues are largely avoided in these treatises. Instead more attention is paid to topics like *kurr* (the amount of water that is required to purify an object), details of distance traveled to pray *qaṣr* (shortened prayers) etc.[3]

Shī'ī scholars have advocated a renewed *ijtihād*[4] keeping in mind the dictates of contemporary times. For example, in his discourse on *ijtihād*, Ayatullah Khumayni urges the theological centers to promote *fiqh* (jurisprudence) in a better form. He states that the seminaries should bear in mind that domestic and foreign problems will not be resolved by sufficing with a presentation of impractical theories and an expression of impractical generalities and views.

By stressing that *ijtihād* should be optimally pursued in the theological centers by the *fuqahā*' and religious scholars, Khumayni hints at the deficiencies of the *ijtihād* prevalent in the theological centers and at its inadequacy to meet the different and complex needs of human communities in the contemporary era. He further states that the modern jurist should always hold the pulse of the community's future reflections and requirements with profound foresight and

---

[2] Yusuf Sanei, *Berabari-ye diyah* (Qum: Mu'assasah-ye farhangi-ye fiqh-e thaqalayn, 2005), 9-12.

[3] See Mustafa Ashrafi Shahrudi, "Hamsuy-e fiqh ba tahavvulat va Niyazhay-e Jami-e", in *Ijtihād va Zaman va Makan* 14 vols. (Qum: Mu'assi Chap va Nashr Uruj, 1995), vol 1, 119.

[4] *Ijtihād* is defined as a jurist's exertion of his mental faculties to arrive at an absolute proof based on the interpretation and application of the authoritative sources of Islamic law: the Qur'ān, *sunna* (Traditions of the Prophet and, in the Shi'i case, Imams), and *ijmā*'(consensus of the scholars). The purpose of the exercise is to arrive at a legal injunction that reflects God's will.

insight.[5] As Ayatullah Mutahhari poignantly asks, "if a living mujtahid does not respond to modern problems, what is the difference between following a living and a dead [religious authority]"?[6]

Khumayni castigated the jurists for their insistence on abstract principles at the expense of tangible changes in real life situation. He said that in addition to safeguarding the sanctity and integrity of Islam, their responsibility is to assure the teachings of Islam are not rendered irrelevant in managing the world of economics, ministry, political, and social relations.

Ayatullah Sanei too, is of the opinion that there has been a tendency on the part of the jurists to take extreme positions that prevent them from employing the institution of *ijtihād* to resolve challenges confronting the Muslims living in the 21st century. On one extreme, there are jurists who have sanctified substantive law (*fiqh*) and its principles to such an extent that there is little room for creative re-interpretation. They are oblivious that the purpose of Islamic law is to provide ease and comfort to the people in every age along with spiritual guidance, and not to impose on them difficulty and hardship or rulings that are incompatible with the present age.[7] The other polarized position is adopted by those who are inattentive to the Islamic legal principles and are eager to satisfy all groups without evaluating whether the positions adopted by them are in harmony with the Islamic principles or not. Instead, he proposes a middle ground that accords reverence and respect to the Islamic legal principles but at the same time is cognizant that the law must have relevance and be applicable in the present-day context with its special

---

[5] The discussion is based on an email received. The lectures of Imam Khumayni were translated by al-Sayyid Muhammad al-Hijazi.

[6] Hamid Dabashi, *Theology of Discontent: The Ideological Foundation of the Islamic Revolution in Iran* (London: New York Press, 1993), 164.

[7] *Berabari-ye diyah*, pp. 9-12.

circumstances.[8] This position is akin to the one adopted by the eminent Iranian reformist scholar, Dr. Abdolkarim Soroush, in the articulation of his theory of expansion and contraction of religious knowledge.[9] He argues that a distinction needs to be made between any religion per se and our understanding of that religion. While the former is, in the view of its beholders, a set of sacred and unchanging truths, the latter is an ever changing set of personal experiences and publicly accessible ideas and theories which, at any given time, reflects the state of our knowledge. Religious knowledge is theory-laden, time-bound and context-bound. Our understanding of the ideal "Islam" is, by definition, something human and this-worldly and as such is being influenced by, among other things, our background knowledge, our place in history and our geographical location, our social, cultural and political environment, and the like.

Contemporary Reformation in Shī'īsm

Reforms in Shī'īsm have been suggested and enacted in different realms. Here, I will cite just a few examples of reformist thinking in Shī'ī circles. Ayatollah Dr. Seyed Mohammad Bojnourdi, a former member of the Supreme Judicial Council in Iran, maintains that the current method of administering certain Islamic punishments will weaken Islam and present a distorted image of the religion to the world. He proposes that in the execution of Islamic punishments, it would be better to take advantage of the views of psychologists, sociologists and other experts.[10]

Bojnourdi further states that the criterion in the Islamic penal law is based on the principle of "elimination of obscene deeds." It is not mandatory, he argues, to resort to

---

[8] Ibid.

[9] Abdokarim Soroush, *Qabz wa bast-e ti'urik-e shari'at: Nazariyyah-ye takamul-e ma'rifat-e dini* (Tehran: Mu'assasah-ye farhangi-ye sirat, 1996).

[10] Based on an email I received.

punishment if someone commits an offense, since the principle in Islam is based on correction and development of mankind. "The life style of the Holy Prophet and Imām 'Ali attest to the fact that at the time of punishment, they would first resort to admonition and guidance in order to lead the convict to repent. In many cases, punishment would be averted if the offender repented"[11] Thus, in many cases of punishment, if the convict repents prior to the approval of the case by the court, the responsibility of the court to look into the offense would be dropped as well."

Bojnourdi further maintains that if the process for execution of penalty results in the denigration of Islam and causes the people, especially the youth, to demean the religion, then the process should then be revised so that no causes of such denigration would remain. If certain punishments such as flogging in the public create a negative impression regarding Islam, such a practice should be abandoned. This is because the preservation of the dignity and prestige of Islam is the prime task and a duty that has priority over other obligations.

Bojnourdi also states that in 1981-82, he talked to Ayatullah Khumayni about the issue of *rajm* (stoning). He told Khumayni that under the status quo, *rajm* would cause the weakening of Islam and others would use it as a tool to mock the religion. Not only had *rajm* lost its intended effects, but it had also allowed people to ridicule Islam. Therefore, other options had to be sought in order to substitute it. The Imām stated that as *rajm* at that time was destroying the image of Islam, courts had to be instructed not to issue the verdict but issue other options such as the death penalty. Bojnourdi continues, "I even told the Imām that when applying the *rajm*, there is a possibility for the convict to come out of the pitch and escape. If the death penalty were to be enforced, escape would not be possible. I asked what had to be done in that case and the Imām

---

[11] Ibid.

stated that the convict should be guided towards expressing penitence so that he/she would be pardoned."[12]

The Iranian scholar and jurist Ayatullah Mohagheg Damad is also known for his reformist ideas. For example, on the question of slavery, he maintains that laws pertaining to slavery have to be radically reformed. He states that since the international community has agreed to abolish slavery, the institution has disappeared. It is now necessary to conclude that slavery is also forbidden by Islamic law, for the basis of application of the law of slavery has changed. The jurist cannot claim that since in the past prisoners of war were enslaved, they must be enslaved today too. Islamic countries have readily signed the international conventions on slavery, and the abolition of slavery is not in any way inconsistent with Islamic law.[13]

Another area of much debate and discussion is that of the age of puberty for girls. Among Shī'ī jurists, there is much dispute as to when a girl attains puberty. Damad states that the most widely accepted *(mashhūr)* view among scholars is that girls reach puberty at the age of nine. Damad argues, "when all the various opinions are taken into account, one realizes that one is faced with a case of an "external standard,' since the rulings have been conditioned by climate. Had a petitioner from a certain tribe and another living some distance away come and enquired of the Imām concerning this matter, the answers they received would no doubt have been different. Does this not tell us that puberty should be regarded as consisting of radical changes in the physical development of a young person? One simply cannot compare an Arab girl living in a hot climate with another from the north of Sweden in this respect. The difference is due to the

---

[12] Ibid.

[13] Ayatullah Muhaghegh-Damad, "The Role of Time and Social Welfare in the Modification of Legal Rulings," in *Shi'ite Heritage: Essays on Classical and Modern Traditions*, edited by Lynda Clarke (Binghamton: Global, 2001), 219.

fact that each girl lives in a different part of the world, a girl who lives in Kufa in Iraq might not have reached puberty at the age of nine, quite different from a girl from the Arabian peninsula [sic]. Thus the condition of puberty is the actual reaching of the stage of puberty in physical terms; this is what is meant in the Qur'ān by the phrase "they reached..." *(balaghna).'* [2:231-234] This is the true meaning of the word; it does not refer to the fixed age of nine or, in the case of boys, fourteen."[14]

Another field where there has been much debate is the question of the ability of a woman to divorce her husband. Perhaps the most revolutionary position is held by the reformist Ayatullah Sanei who states that, "..since the subject [women's situation] has changed, the framework of civil laws must change too. Our current laws are in line with the traditional society of the past, whereas these civil laws should be in line with contemporary realities and relations in our own society."[15] Sanei states that, even without a marriage contract, a woman can unilaterally annul a marriage if she feels she cannot live with a man. She can simply annul the marriage without the need for a formal divorce although it is better for her if the *talāq* is recited. "Islam does not say that a woman must stay and put up with her marriage if it is causing her harm – never." The problem, according to Sanei, is that the laws are still in the process of evolution.[16] According to Sanei, in response to a question posed, Khumayni stated that a husband should be

---

[14]Ibid. Ayatullah Bojnourdi also rules along similar lines. See Liyakat Takim, "*Ijtihād* and the Derivation of New Jurisprudence in Contemporary Shī'īsm: the Rulings of Ayatollah Bujnurdi," in *Alternative Islamic Discourses and Religious Authority* ed. Carool Kersten & Susanna Olsson, (Farnham, Ashgate, 2013), 17-34.

[15] Ziba Mir-Hosseini, *Islam and Gender: The Religious Debate in Modern* Iran, Princeton: Princeton University Press, 199), 160.

[16] Ibid., 162.

persuaded to grant a divorce if his wife seeks it. If he refuses that request, then the divorce can be affected with the permission of a judge.[17]

Shī'ī scholars have also argued that there is a need to expand the scope of their juristic vision and revisit some of the earlier rulings based on the need of the times and interests of the community. As the socio-political situations change, juridical rulings issued must reflect the newer circumstances. For example, Ayatullah Makarim Shirazi argues that in the past, it was forbidden to sell blood since it had no value. However, in today's world, blood has become a valuable commodity as it can be used for transfusion, to cure wounds, and save lives. Due to this, he argues, that it is now permissible to sell blood. This is because blood has now become a valuable commodity. As an example of how a ruling can change according to time and place, Shirazi quotes Tusi's (d. 1067) *fatwa* (religious edict) that it is prohibited to charge for water in winter, whereas it is permissible to do so in the summer. This is because it has value in the summer but not in winter.[18]

Maqāṣid al-Sharī'a and Shī'īsm

The previous discussion on reformist thinking is intertwined with the discussion on the objectives of law. This is because the purpose of the law is to ensure of the well-being of its adherents. As socio-political circumstances change, laws have to be revised to ensure that the purposes of the law are not compromised. *Maqāṣid al-sharī'a*, or the objectives of Islamic law, is an important and yet somewhat neglected discipline of Islamic jurisprudence. Those who

---

[17] Ibid., 165

[18] Abd al-Hadi al-Fadhli, *al-Taqlid wa'l ijtihād: Dirasatu'l Fiqhiyya Li-Dhahirati al-Taqlid wa'l ijtihād al-Shari'iyin* (Beirut:Makaz al-Ghadir,2007), 267-9 quoting Makarim Shirazi, *Anwar al-Usul*, 3/632-668.

advocate this approach view the *sharīʿa* as a vehicle to benefit Muslims, and its laws as designed to protect these benefits. Although Muslims accept that textual injunctions must be treated as expressions of the intentions of the lawgiver, consideration should be given not only to the text but also to its rationale (*ʿilla*) and the purpose of the rulings the text promotes. Thus, although the objectives of the law are rooted in the sacred texts, it is essential to look beyond the particularities of the text and focus on the philosophy and purpose behind its rulings. As such, the *maqāṣid* incorporate a degree of hermeneutics and versatility into the reading of the texts that transcend the vicissitudes of time and space.

Maqāṣid did not receive much attention in the early stages of the development of Islamic legal thought, and, as such, represents a later juristic innovation. Even in modern times, many texts on *uṣūl al-fiqh* (Islamic legal theory) do not include a discussion on *maqāṣid al-sharīʿa*. This is probably because, rather than engaging in textual and contextual analysis, the apparent meaning of words, and explicating the methodology of reconciling contradictory traditions, the *maqāṣid* is largely concerned with discerning and elucidating the purposes of the law.

Maqāṣid and *al-Maṣāliḥ al-Mursala* in Shīʿī Legal Theory

Due to their close connection, in Shīʿī legal theory, *maqāṣid al-sharīʿa* is generally discussed under the rubric of *maṣlaḥa*. Since the objective of the law (*maqṣad*) is seeking what is in the interest of the Muslim community, in the works on *uṣūl al-fiqh,* the principle of public good is also referred to as *al-maṣāliḥ al-mursala*, that is, seeking what is in the benefit of the people in the absence of textual evidence. This suggests that laws can be legislated based on the principle of the public good, without any textual proof to support its validity. Moreover, because the purpose of *maṣlaḥa* (being or doing good) is discernible by reason, it has God's approval too,

because in Islamic theology, there is a correlation between reason and revelation in matters concerning the common good.[19]

Another reason for this appellation of "public good that is free from textual evidence," is that promoting the public good is rationally derived. It is a positive obligation that requires people to act beneficently whenever possible, and hence, is not in need of scriptural justification. For this reason, *maṣlaḥa* has been admitted as a principle of reasoning to derive new rulings or as a method of suspending earlier rulings out of consideration for the interests and welfare of the community.[20]

The extent to which *maṣlaḥa* can be used to enact legal change depends on a jurist's view regarding the role of reason and revelation in interpreting the law. A jurist who accepts reason as a valid tool in deciding legal matters is more likely to use hermeneutical tools and resort to interpretive activity in determining whether a concrete situation is beneficial or harmful in issuing a ruling.

Shī'ī scholars like Ayatullah Mohammad Fadlallah, Muhsin Kadivar, Mojtahid Shabistari, and Mohagheg Damad have argued that there is a need to articulate a jurisprudence that addresses contemporary concerns and issues. They maintain that what is essential to a proper understanding of Islam is not the letter of the text but instead the spirit of the Qur'ān and the Prophetic traditions. For them, and for many other scholars, there is no single, valid interpretation of the Qur'ān or the *ḥadīth*. Scholars have also argued that changes in the conditions of time and place require a re-examination of laws formulated in the classical period

---

[19] For a Shi'i critique of *al-maṣāliḥ al-mursala see* Mustafa Ashrafi Shahrudi, "Hamsuy-e fiqh ba tahavvulat va Niyazhay-e Jami-e", in Ijtihād va Zamān va Makān 14 vols. (Qum: Mu'assi Chap v Nashr Uruj, 1995), vol 1, 142-3.

[20] Abdulaziz Sachedina, Islamic Biomedical Ethics: Principles and Applications (Oxford: Oxford University Press, 2009), 49.

of Islam, the eighth – tenth centuries. Mojtahed Shabistari, a contemporary Iranian scholar, for example, states that a new reading of texts is required, one that goes beyond traditional *fiqh* (Islamic jurisprudence) and *uṣūl* and embraces subjects such as society, history, economics, politics, and psychology.[21] To derive these laws, he states that Muslim thinkers need to construct a comprehensive theory of human nature and social change. Similarly, Sa'idzadeh, a contemporary jurist in Iran, argues that laws pertaining to women and the apparent lack equality with men are products of the Islamic hermeneutical tradition which has favored men. For Sa'idzadeh, such laws are amenable to change based on the needs and interests of the times.[22]

Jurists who argue for the reformulation of Islamic laws also maintain that the interpretations of Islamic revelation were interwoven to the specificity of those times and places. Jurists can only pronounce general principles, not rulings that are to be enforced at all times and places. They also argue that hermeneutical principles such as *maṣlaḥa* allow for a different reading of the classical texts. For the reform-minded jurists, it is essential that Muslims continue to review and revise the law in keeping with the needs and dictates of their changing circumstances.[23]

---

[21] Ayatullah Muhammad Mujtahid Shabistari, "Religion, Reason and the New Theology," in Shi'ite Heritage: Essays on Classical and Modern Traditions, ed. Lynda Clarke (Binghamton: Global, 2001), 249.

[22] Muhammad Qasim Zaman, The 'Ulama' in Contemporary Islam: Custodians of Change (Princeton: Princeton University Press, 2002), 186.

[23] See Liyakat Takim, "Revivalism or Reformation: The Reinterpretation of Islamic Law in Modern Times." In *American Journal of Islamic Social Sciences* 25 no. 3 (2008): 61-81.

Maqāṣid and *Maṣlaḥa* in Shīʻī Legal Theory

Muslim jurists have resorted to interpretation in order to apply the sources of the law to the actual legal cases that need to be ruled upon. This interpretive activity includes extending the existing law to new situations and changed circumstances that are not explicitly addressed in the scripture. One of the key principles in this extension is that of *maṣlaḥa*. The application of *maṣlaḥa* rests on a jurist's ability to objectively determine standards of benefit and harm in a society.

A jurist has to also provide justification for any given ruling by appealing to principles and rules that are established in the legal theory. These principles are utilized in all situations about which the *sharīʻa* has neither ruled explicitly nor provided any relevant precedents. In other words, in matters on which the law has not ruled, a legal judgment that falls outside the framework of general rules derived from *maṣlaḥa* is justified based on Qur'ānic verses and traditions that exhort justice and avoidance of wrongdoing. The verse "God commands justice and good deeds," (Q 27:90) and the legal maxim "No harm, no harassment" are rules that flow from the principle of common good.

To be sure, *maṣlaḥa* is based on the notion that the ultimate goal of the *sharīʻa* necessitates doing justice and preserving people's best interests in this and the next world. It is also premised on the view that the intellect is able to determine what is good and that this leads ultimately to the divine intent. However, many Shīʻī jurists have questioned the applicability of a ruling which has been deduced independently of a revealed text based solely on a jurist's assessment of what constitutes the public good. Is it possible to extract the rulings' objectives and evaluative tools based on these texts and formulate general principles and rules that could be employed in future contingencies and situations? Why has the lawgiver not made these

objectives and evaluative measures explicitly clear so that there would be no dissent and disagreement? Once the objectives that are in consonance with wisdom *(ḥikma)* are discovered, is it possible to prioritize them so that the jurist would know which one to incline toward and favor if there were a clash between any two of them? These are some of the daunting issues discussed by jurists in the works of Islamic legal theory. Thus, because of such misgivings, discussions on *al-maqāṣid*, as a science remained on the fringes of the Shīʻī juristic thought that was manifested in the various theories and doctrines of *uṣūl al-fiqh*.[24]

Objections to the Principle of *al-Maṣāliḥ al-Mursala*

For various reasons, most Shīʻī jurists have not accepted the legal authority of twin concepts of *maqāṣid al-sharīʻa* and *maṣlaḥa* since these are considered to be based on practises of the companions that were not endorsed in the Qur'ān or traditions from the Prophet or Imāms.[25] Other jurists maintain that *maṣlaḥa* cannot be known with certainty based on an inductive reading of the scripture and that since human reason cannot fathom the divine intent, it cannot legislate on behalf of the lawgiver. Discerning and deploying the objectives of the *sharīʻa* and the concomitant principle of public good, according to them, is too arbitrary and inductive for a jurist to formulate a response based on his personal assessment of a particular case.[26] For example, Ayatullah Milani, a prominent contemporary scholar in Qum, says that Shīʻī *fuqahā*'(jurists) do not accept *maṣlaḥa* as it is seen as a component of political jurisprudence, which is premised on the interests and needs of the state. Decisions made by reference to

[24] Sachedina, Islamic Biomedical Ethics, 49.

[25] For a Shi'i understanding of *al-maṣāliḥ al-mursala* see Ja'far al-Subhani, *Maṣādir al-Fiqh al-Islāmī wa Manābiuhu* (Qum: Mu'assasat al-Imām al-Ṣādiq, 2007), 296-297.

[26] See for example, Ja'far ibn Yahya ibn al-Hasan Muhaqqiq al-Hilli, *Ma'ārij al-Uṣūl* (Qum: Sayyid al-Shuhadā', 1983), 221-3.

maṣlaḥa are necessarily based on conjecture, which cannot be relied upon to derive religious ordinances. For him, Shīʻī jurists (*fuqahā*') do not accept *maṣlaḥa* as it is a law based on the view of the majority.[27]

Some scholars further argue that the analogical deduction founded upon human and divine actions leads to a false notion about God's actions: i.e., that they are informed by ends. God does not act in accordance with a good or bad end. God, being omnipotent and omniscient, does not need to evaluate divine acts in terms of their good or bad consequences for humankind. Hence, God is not bound to do the best or the worst for humankind. God simply does what He wishes to do. More pertinently, if one were to believe that God works in the interest of humanity based on public good to protect people from possible harm, the possibility of such speculation and its application in the matter of divine ordinances could lead a jurist to change or commit an error in these ordinances. It is for these reasons that, in Shīʻī jurisprudence during the classical age (ninth to eleventh centuries), there is hardly any discussion on this topic.Thus, the *uṣūl* works of prominent Shīʻī figures like Shaykh al-Mufid (d. 1022), Sharif al-Murtada (d. 1044), Muhammad Jaʻfar al-Tusi (d. 1067), and ʻAllama al-Hilli (d. 1325), have nothing to say about *maqāṣid* or *maṣlaḥa*.

However, some contemporary scholars like Muhammad Taqi al-Hakim (d. 2002) argue that there is nothing to indicate that early Shīʻī jurists completely rejected the idea of seeking what is in the interests of the community. He cautions that the public good principle only applies when one does not have any revelatory proof to establish its validity first.[28] This view is seconded by the contemporary Iranian jurist Muhammad Ibrahim al-Jannati who maintains that

---

[27] This observation is based on my conversations with him in August 2011.

[28] Muhammad Taqi al-Hakim, *al-Uṣūl al-ʻĀmma lil Fiqh al-Muqāran* (Beirut: al-Dār Andalus, 1983), 386.

although *al-maṣālih al-mursala* is admitted as a source of legislation, it cannot be regarded an independent source of law like the Qur'ān or traditions. [29]

Acceptance of *Maṣlaḥa* in Shī'īsm

Contemporary Shī'ī thinkers like Ayatullah Sanei, Shabistari, Kadivar, and Mohagheg Damad believe that the lawgiver has granted recognition to the interests of humanity in the laws of the *sharī'a*. Thus, they rely on the principle of *maṣlaḥa* and other rationally derived rules like forestalling harm in deriving new rulings and to accommodate the needs of a modem society. In their view, the need to respond to people's religious and worldly interests is in accordance with the belief that God's guidance for humanity in Islamic revelation applies to all times and places. This view implies that the laws enacted with regards to the welfare of the community are necessarily mutable. There is an intrinsic relationship between public good and the most effective and just formulation of laws. Thus, certain Islamic legal rulings may change according to the harm or benefit involved.

For instance, Islamic law forbids dismembering a believer's body or removing his/her organs. Thus, any kind of organ transplant is religiously prohibited. However, by invoking the principle of *maṣlaḥa*, and contextualizing the reason for its prohibition, jurists would be able to override traditions that prohibit organ transplantation on the ground that the benefit accruing from such a procedure to save a life far outweighs the utility obtained by preserving and burying the dead body in its entirety.

Another example of the acceptance and application of *maṣlaḥa* would be the following. Shī'ī jurists have general agreed that it is impermissible to work for an unjust ruler. The main

---

[29] See Muhammad Ibrahim Jannati, *Manabi Ijtihād dar didgah-e Madhāhib-e Islāmī* (Tehran: Intishārāti Kayhan, 1991), 336.

reason behind such impermissibility is the prohibition against assisting an oppressive or unjust ruler. However, a prominent jurist of the nineteenth century, Shaykh Murtada Ansari (d. 1864) claimed that the theory which justified the permissibility to work for an unjust ruler was *al-qiyām bi-maṣāliḥ al-ʻibād* (undertaking what is in the Muslims' best interests). Ansari quoted an opinion rendered by a sixth century/twelfth-century text that read, "Acceptance of an unjust ruler's agency is permitted in [exclusive] occasions where the so called agent would be able restore an entitled individual's violated rights." Ansari then claimed both the consensus of the jurists and the support of the authentication traditions on the validity of such qualification and argued:

"Prior to invoking such consensus, rational injunctions and reasoning indicate that if the agency of an unjust ruler is prohibited because of its *muḥarramat li-dhātihā* (innate essence), accepting it is [also] permitted. Because there are occasions in which the importance of meeting the best interests and repulsion of detriments outweigh the [subjective status of] being outwardly included among the agents of such ruler."[30]

Ansari also believed that in the interests of Muslims, there are duties whose undertaking does not require permission from the ruler. He argues that the incumbency of certain duties in the realm of the best interest of society is also free from the complexities of juristic debates. [31]

It should also be noted, however, that, in the Shīʻī school of law, the principles of benefit and harm are determined on the basis of textual evidence of legal rules *(adilla)* taken from the sacred texts (*nuṣūṣ*). It is only when a jurist distinguishes the considerations of benefit and harm

---

[30]See Murtada Ansari, *Kitāb al-Makāsib*, 2, 72. Also quoted in Amirhassan Boozari, *Shiʻi Jurisprudence and Constitution* (New York: Palgrave Macmillan, 2011), 66.

[31]Boozari, *Shi'i Jurisprudence,* 67.

that are rooted in the textual sources that he can be sure that the rule revolves around those considerations.[32] Sunnī jurists, on the other hand, have greater scope for determining the purpose of a law; they do not require, as Shīʻī scholars do, that the legal ruling be based on explicit proof in the text. In their view, a jurist can issue a legal ruling regardless of the method used to determine the cause of the ruling and the benefit or harm on which it depends. Thus, they consider methods such as analogy (*qiyās*) and discerning the public interest (*istiṣlāḥ*) as actual sources of law.[33]

After the establishment of the Islamic Republic in Iran, *maṣlaḥa* has found acceptance in some Shīʻī quarters, especially those connected with the government. The discourse on discovering the *ratio-legis* and benefit of a ruling has surfaced in recent times because Iran was confronted with socio-political issues that erstwhile Shīʻī jurists did not have to face. Earlier jurists were primarily concerned with guiding people towards moral uprightness and following *sharīʻa* laws in their personal lives rather than with socio-political rulings that would lead to the establishment of a just society.

One of the most prominent voices for a revision of traditional *fiqh* (*fiqh-e sunnati*) and an advocate of the principle of *maṣlaḥa* was Ayatullah Khumayni (d. 1989). For Khumayni, the needs of the state and its interests override the primary creeds of the *sharīʻa*. From 1988 to 1989, he adopted some radical positions on the issues of *maṣlaḥa* and the priority of the interests of the state over even the most fundamental Islamic principles, such as *ḥajj* (pilgrimage to Mecca) and daily prayers. Khumayni not only revived the principle of *maṣlaḥa* but even called for the formation of an expediency council to operate as an arbitration body between the

---

[32] Ayatullah Muhaghegh-Damad, "The Role of Time and Social Welfare," in *Shiʻite Heritage: Essays on Classical and Modern Traditions*, ed. Lynda Clarke, 215.

[33] Ibid.

parliament and the Guardian Council. The new council was called the council for the Interest of the Islamic Order (*majlis-e takhsis-e maslahat-e nezam-e eslami*). Its mandate was to facilitate the government's implementation of legislation passed by the parliament (*majlis)* without the impediments of Guardian Council's oversight.[34]

The commission was entrusted to investigate public welfare to guide policy decisions. Addressing the council, Khumayni stated:

"Honorable gentlemen,"

The expediency of the existing order (*maṣlaḥat-e nizām*) is the paramount issue whose neglect may cause the downfall of our precious Islam. Today the world of Islam regards the Islamic Republic of Iran as the best model whereby they may resolve their problems. The expediency of the system is of the highest importance, resisting it may weaken the Islam of the barefooted [wretched] of the earth and will lead to the triumph of American Islam, the Islam of the arrogant and the powerful with the support of the billions of dollars of their domestic and foreign agents [...] The discernment of the *maṣlaḥat* of the system, in my opinion, must be under the supervision of experts who are knowledgeable about specific matters.[35]

Khumayni went further, ruling that all government ordinances are to be classified as part of the primary ordinances and incumbent for all to follow. In other words, state laws were no longer to be treated as secondary ordinances that could be invoked only at times of emergencies or need. In many ways it signaled a revision of traditional Shī'ī jurisprudence which had only known primary and secondary ordinances. The supreme leader could now legislate Islamic laws,

---

[34] Behrooz Ghamari-Tabrizi, *Islam and Dissent in Post-revolutionary Iran* (London: I.B. Tauris, 2008), 86.

[35] As quoted in ibid., 146.

and declare them to be legally binding on all believers, based on what he deemed to be the interests of the community. The *maṣlaḥa* council could not only override the *sharī'a*, it could even suspend it temporarily.[36]

Khumayni also wrote to the Council of Guardians, advising them on how to overcome many of the issues dealing with governance. He states,

'I subscribe to the widespread *fiqh* that is current amongst the jurists, and the method of *ijtihād* adopted by the late Sahib-i Jawahir (Shaykh Muhammad Hasan Najafi). This type of *fiqh* and *ijtihad* is unavoidable; however, it does not mean that the Islamic *fiqh* is not in need of adapting with the time (*zamān*), rather the factors of time (*zamān*) and place (*makān*) do affect and influence *ijtihād*. Often a situation would have a particular judgment (*ḥukm*) at one time but the same situation on the basis of the fundamental laws that apply on the social, political, and economic spheres would render a different judgment (*ḥukm*).'[37]

Khumayni also states that, in the interests of the state, it may shut the doors of mosques; it may demolish a mosque or a home tubular road and compensate the owner for his house; the state may unilaterally annul contracts with people if it thinks that the contract threatens the interests of the country and Islam. The state may even temporarily prevent people from going on pilgrimage if it is deemed to be against the interest of the country.[38] By invoking the principle of public interest, any act could be considered necessary for the prevalence of Islam and the

---

[36] See Hashemi, *Hoquq-e Asasi-ye Jomhuri-ye Eslami-ye- Iran*, (Qum, 1996/1375), 1:211, 213. See also, Said Amir Arjomand, "Authority in Shiism and Constitutional Developments in the Islamic Republic of Iran" in *The Twelver Shi'a in Modern Times* eds. Rainer Brunner and Werner Ende (Leiden: Brill, 2001), 319.

[37] Ayatollah Khumayni, *Sahifehy-i nur* (Tehran: Sazman-i madarik-i farhanghi-ye inqilab-i Islami, 1990), pp. 21-98.

[38] Muhammad Jawad Arasta, *Tashkhis Masleḥa Nizām: Azdidghahe fiqhi – Ḥuqūqi* (Tehran: Intisharat Kanun Andisheh Jawan, 2009),105.

implementation of its ordinances. Stated differently, if it is in the interests of the community and to preserve the needs of the state, the government can change any law. Thus, *maslahat-e nezam* or national exigencies is invoked to resolve state related issues even if they go against traditional *fiqh* rulings. The reasons maybe politically motivated, but to be sure, the ramifications have been felt in Shī'ī jurisprudence.

Other Shī'ī scholars have endorsed not only the need to revise rulings but also to use the principle of *maṣlaḥa*. For example, like Ayatullah Damad and Bojnourdi, Ayatullah Sanei rejects the view that girls attain puberty at the age of nine. He mentions that this age was fixed from Tusi's time onwards.[39] Sanei then notes that other scholars, including Tusi, have mentioned ten to be the correct age of puberty. After rejecting the age stipulation, Sanei argues on the basis of hardship and what is in the best interests of the girl. He states that puberty at the age of nine puts a lot of hardship on a girl and that normally, puberty should start when a girl experiences her period, which, depending on various factors, can be at the age of thirteen. This is in the best interest of the girl since it removes the hardship which an earlier age imposes on her.[40]

Ayatullah Muhammad Husayn Fadlallah (d. 2010) was an important Lebanese cleric who was followed by millions of Shī'ī s throughout the world. He maintains that acts of worship (*'ibādāt*) are constant and are not subject to change. However, he also subscribes to the view that this did not preclude the possibility of understanding the reasons behind the acts. In the realm of human inter-relationships, he argues, legal rulings can be modified since it is possible to

[39] Ayatullah Yusuf Sanei, *Bulūgh al-Banāt* (Qum: Mua'ssis Farhabg-i fiqh al-Thaqalayn, 2003), 28.

[40] Ibid., 35-6.

ascertain the rationale behind a religious ruling by having recourse to the precept's text, contextual evidence or signs, and indications *(qarā'in).*[41]

In Shī'ī legal theory, the principle of *maṣlaḥa* has also been correlated with secondary rulings (*al-aḥkām al-thānawiyya*), those rulings that may be invoked under dire circumstances. This concept has been promoted by many jurists. According to Shaykh Abu al-Qasim ʻAli Doost, a prominent jurist in Qum, secondary rulings can be used to preserve the interests of the people when such a need arises, even if this entails overriding normative laws stated in the classical *fiqh* works. For example, like Bojnourdi, ʻAli Doost states that if a particular form of punishment creates a negative image of Islam, the state can alter that punishment so as to portray a more positive image for this is in the interests of Islam.[42] When two laws conflict, when for example, the laws of privacy conflict with the need to protect the security of the country, then, Ali Doost states, the government has the right to invade and even take over private property. This is called the principle of *aham* and *muhim* (important and that which is even more important).[43] Another Iranian jurist, Shaykh Muhammad Jawad Arasta, says it is essential to discern the objectives of law so as to derive fresh rulings in modern times. Arasta further claims that "there is no proof to substantiate the view that Shī'īs should reject *al-maṣāliḥ al-mursala*. Shī'ī scholars who rejected it in the past did not define or understand the principle correctly.[44] For Arasta, *maṣlaḥa* merely outlines universal *shar'ī* laws, like the view that the preservation of life is obligatory. It is up to individual jurists to deploy the principle when the occasion demands it.

---

[41] Muhammad al-Husayni ed. *al-Ijtihād wa al-Ḥayāt,* (Lebanon: Markaz al-Ghadīr lil-Dirāsat al-Islāmiyya, 1998), 44-45.

[42] Based on a personal discussion with him in Qum, September, 2011.

[43] Abu'l Qasim'Ali Doost, *Fiqh va Maslahat* (Qum: Sazman-i Intisharat Pejushghah Farhang, 2000), 397.

[44] Muhammad Jawad Arasta, *Tashkhīs Masleḥa*, 121-2.

However, not all Shīʻī scholars accept the new rulings under the guise of *maṣlaḥa*. Other prominent scholars like Gulpaygani rejected this notion.[45] Jurists like Mohammed Emami Kashani, once the Friday Imām (prayer leader) of Tehran, voiced opposition to the principles of *ḍarūra* (necessity) and *maṣlaḥa* especially when these were seen as opposing the traditional jurisprudential views stated by previous scholars. These would include the state's ability to legislate rulings like labor laws that would be in the state's interests and even revoke a binding contract if it was not in the interest of the state. Jurists were especially perturbed by the powers given to the expediency council. They saw an inherent contradiction between the interests of the state on the one hand and the mandates of Islam on the other.[46] For example Mohammed Yazdi, the one-time chief of the Judiciary stated that *maṣlaḥa* means committing acts against the *sharīʻa* and against the law in response to necessities of the time.[47]

It was only after the Iranian revolution in 1978-79 that Shīʻī jurists admitted that the public good principle was an important source for legal-ethical legislation. The relatively late acceptance of *maṣlaḥa* by Shīʻī is because, unlike the Sunnīs, they were a minority and thus did not have to provide practical guidance needed by the government or the people in everyday dealings.

Maṣlaḥa and *Maqāṣid* in the view of two Recent Shīʻī scholars

The renewed interest in *maqāṣid* and *maṣlaḥa* among Shīʻī scholars is also seen in the views of two prominent Shīʻī jurists, Ayatullah Mahdi Shams al-Din (d. 2001) and Ayatullah Fadlallah.

---

[45] Behrooz Ghamari-Tabrizi, *Islam and Dissent*, 86-7.

[46] Ibid., 153.

[47] Ibid.

Mahdi Shams al-Din complains that the social-political dimension of Islamic jurisprudence has not been as emphasized as it should be. This is partly because, due to unfavorable political circumstances, Shī'ī jurists have, in the past, withdrawn themselves from socio-political affairs so much so that *fiqh* has been separated from society. Consequently, they have not contributed to the evolution of political and social jurisprudence. Jurists have, instead, immersed themselves in personal issues such as prayers and fasting.[48] He claims that this is a greater problem for Shī'ī scholars than Sunnī jurists since the latter were politically engaged and have developed legal mechanisms and antecedents to assist them in this process. As a result, argues Shams al-Din further, a cleavage had occurred in Shī'ī jurisprudence between the understanding of the law (including its derivation and the processes - *manāhij*) and the *wāqi'* (actual situation). For Shams al-Din, due to the corruption affecting Muslim societies and politics, Shī'ī law has focused primarily on issues affecting the hereafter (*al-mashrū' al-ukhrawi*) and questions of personal salvation. Mahdi Shams al-Din further emphasizes that a jurisprudence that impacts the society in general and people at a personal level is required.[49] In his exposition, he also lays out the principles of *'usr* (hardship) *and al-haraj* (difficulties) which cannot be limited or specified since they are absolute general principles that cannot be revoked.

Sunnī jurists have collectively affirmed that the *aḥkam* (rulings) follow general principles of *maṣāliḥ* and *mafāsid* – those which promote the welfare and prevent corruption in society. The *sharī'a* is concerned with these two key objectives.[50] Shī'ī jurists follow a similar trajectory, but

---

[48] 'Abd al-Jabbar al-Rifa'i ed., *Maqāṣid al-Sharī'a: Taḥrīr wa Ḥiwār* (Beirut: Dār al-Fikr al-Mu'āṣir, 2002), 17. This work is a collection of interviews and excerpts of writings of a number of scholars regarding *maqāṣid al-shar'īyya*. I am grateful to my research assistant, Vinay Khetia, for sharing his research on this section with me.

[49] Ibid.,18.

[50] Ibid.,19.

they emphasize that such principles are subject to ethical constructs such as the goodness of an act in itself (*ka-ḥusna al-ḥusn*) and the repulsiveness of oppression (*qubḥ al-ẓulm*). Shams al-Din cites the example of smoking, agriculture, and commerce (*tijāra*), or medicine. These are societal matters whose rulings must be premised on *maṣāliḥ* and *mafāsid*.[51]

These two excerpts show that, from the very early period, Shī'ī jurisprudence saw *maṣāliḥ* to be a key component of the objective of the law and the mission of the Prophet. Shams al-Din vehemently argues that the principles of *maṣāliḥ* and *mafāsid* are directly connected to human life, society and are applicable to individuals. He also raises the issue of "the wisdom behind the *ḥukm*" as part of the *maqāṣid*. He asks whether the wisdom of a ruling can be determined and understood. He argues that "wisdom or *ḥikma*" is not an evidentiary tool in the derivation of Islamic law from its sources. Why is this the case? Like other Shī'ī scholars, he argues that wisdom is not something consistently understood or a constant, i.e. we are not always able to discern the *ḥikma* behind a ruling. Therefore, if the sources do not tell us what the operative wisdom is, can we then derive it on our own? The answer is no, because Shams al-Din distinguishes between two types of *'ilal - al-'illa al mustanbiṭa* (a derived cause which involves the process of *qiyās*) and *al-'illa al-manṣūṣa* (a cause that is found in textual sources). He further states that when dealing with the *maqāṣid* a scholar must be careful not to stray from the textual sources of Islamic law.[52]He bemoans the atomistic nature of Shī'ī law which has been designed by jurists for individuals rather than communities (*dīn al-afrād wa laysa dīn al-jamā'a*). For him, we need a *fiqh* that is connected to the surroundings (*fiqh al-bī'a*) and whose laws should be derived with social, political, economic, and medical benefits in mind. Furthermore when *fiqh* is

---

[51] Ibid.

[52] Ibid., 23.

formulated without a clear context or site of application in mind it becomes *al-tajrīd al-naẓari* (abstract thinking) and the context and place of application is lost. In other words, jurisprudence becomes overly cerebral. Thus, Shams al-Din argues, *fiqh* must be contextual—and its derivation must involve a clear awareness of its application. This approach involves interacting with the spirit of the Qur'ān and Sunna. It is a problem which plagues contemporary *fiqh* and the *fuqahā'*.[53]

He then lays out the problems of the contemporary method of derivation (*istinbāṭ*) more clearly: The study of *fiqh* is done in an atomistic fashion (*al-fardiyya al-tajzi'iyya*). Juridical discourse is directed at individuals and in doing so jurists lose sight of the message directed to the *umma*. They express the *sharī'a* in terms of the hereafter- i.e., with a focus on the next world. The process of deriving the law is disconnected from the realization of its changing context i.e., where and for whom it will be implemented, and thus they do not interact with *ṭabī'a* (what is 'normal' and peopled are accustom to). Observing the *maqāṣid* of the *sharī'a* is absent in many parts of jurisprudence. Thus, the process of *istinbāṭ* itself does not take into account the broader picture of the public good.[54]

For Shams al-din the process of deriving laws should not be restricted to the derivation of rulings from texts. On the contrary, there must be an understanding of the *wāqi* (actual situation) and a contemplation over it (*tadabaruhu*). This contemplation involves being aware of the relationship between the context and the text and the context and the issues that matter in people's lives. *Ijtihād* will not be proper without contemplating and grappling this contextual

[53] Ibid., 24.

[54] Ibid., 23-4.

relationship.[55] He emphasizes that a jurist must have an overall vision of the law (*al-ru'ya al-kulliyya lil-sharī'a*). He mentions again that the *sharī'a* is a complete, integrated structure thus it must be connected to its various domains and that each system connects to another; thus family life, economics, purity, impurity etc are the various domains under which the *sharī'a* operates. They are all akin to interconnected bodies. The *mu'āmalāt and 'ibādāt* do not differ in this regard. He goes on to cite more examples of areas in which jurists must develop further understanding and provide contextual *fatāwā*, these include: price fixing, monopolization or capitalism (*al-iḥtikār*).[56]

To give further credence to his views on *maṣlaḥa*, Shams al-Din then cites from al-Sayyid al-Murtada's *al-Dharī'a*: "Know that the act of worship according to divine legislations follows the *maṣāliḥ* and the legislations are [based on] goodness and grace and *maṣāliḥ*. This is because the Prophet was sent to make us aware of that which is related to our welfare." He further quotes al-Murtada as stating: "Surely the *'ilal* (causes) of the law (*al-shar'*) are separate from the causes of the intellect (*'ilal al-'aql*) because the effective causes of the law follow what is required and [what is conducive to] the welfare [of the people]. The same cannot be stated of that which is based on the reasoning of the intellect (that is *'ilal* based on reason)."[57]

Like Shams al-Din, Ayatullah Fadlallah complains that Shī'ī *fiqh* has focussed on personal rather than social issues. He states that "our works of jurisprudence from the beginning century of compilation, have followed an imitative style in so far as they emphasize individual

---

[55] Ibid., 25.

[56] Ibid., 27.

[57] As cited in ibid.,21. Sharif al-Murtada was one of the foremost Shi'i scholars in the ninth and tenth centuries. Known for his penchant for rationalism, he compiled a number of Shi'i works on theology, jurisprudence, and legal theory.

and particular issues that impact people. They do not follow the method of emphasizing general principles which the law has ruled regarding society except for a few instances."[58] This, in part, is due to the fact that it is largely reliant on the genre of traditions narrated from the Imāms. These traditions consist primarily of companions asking the Imāms questions pertaining to personal issues. This tendency to focus on the *juz'iyya* (particulars) is because these are areas that impact people most in their lives; i.e., the particulars of *fiqh* and its application to specific circumstances of their lives.[59] The second question posed to Fadlallah deals more directly with the *sharī'a* and its overall objectives in deriving the law (*maqāṣid al-kulliyya fī istinbāṭ*).The questioner states that the study of the texts is myopic, at the expense of the broader objectives. Fadlallah is asked how can a jurist balance a *ḥadīth* which discourages marriage with certain groups of people like Negroes and Kurds keeping in mind the spirit of the *sharī'a*?

He responds that scholars must distinguish between the *ḥarfī* (literal-linguistic approach) and the *'urfī* (customary) understanding of the law. Jurists have not emphasized the latter. He discusses the principle of comparing traditions to the Qur'ān and specifically how scholars may interpret traditions indicating *kirāha* (detesting) in marrying Kurds and Negroes while the Qur'ān clearly states "And We have honoured the children of Adam (17:70)" If a jurist approaches this position from a literalist perspective he would say that the tradition restricts (*takhṣīṣ)* the verse and thus the verse is not applicable to everyone. However, in Fadlallah's view, by approaching it from the *'urfī* perspective one is able to determine that this verse can be used a principle, thus, any *fatwa* or *ḥadīth* indicating that a certain group of people are inherently deficient would be tantamount to it being against the spirit of the law (*mukhālafan li-rūḥ al-sharī'a*). Fadlallah takes

[58] Ibid., 47.

[59] Ibid.,46.

17:70 to be indicative of the spirit of the *sharī'a* and hence he uses it as an important litmus test in matters of racial-ethnic bias.[60]

Fadlallah's concern to apply the principles of *maqāṣid* and *maṣlaḥa* is evident in another question. He is asked his view regarding the current status of Islamic marital laws and their apparent inequities. For example, if a husband is absent for more than four months due to work and during that time he marries another wife abroad and continues to send financial support to his first wife, it would seem that his first wife has no choice but to stay married to him despite her displeasure. How do the *fatāwā* which allow such behavior accord with the Qur'ānic demand that a husband either live with his wife in accordance with customary norms (*ma'rūf*) or leave her based on *ma'rūf*? He states that there is no doubt that these rulings need to be revised and require further investigation. For instance, a woman's desire (*shahwa*) is greater than that of a man. However, every situation must be examined separately, and patience is needed on both sides. Nevertheless, cases such as these can be solved by recourse to *qā'ida nafī al-haraj* (the principle that averts harm). He then cites 2:185, "Live with them in a kind manner (*bi l-ma'rīf*)" *Ma'rūf* must be understood in its *'urfī* form and thus it must act as a guiding principle over these rulings. In other words, Fadlallah appeals to the common sense and the spirit of the law which states that a marriage must be based upon a common understanding of decency and kindness. Thus, the problem lies with a vast array of jurists who examine texts in an atomistic rather than an *'urfī* manner. This is because their method is imitative (*taqlīdī*) and follows previous interpretations of the *nuṣūṣ*. In many instances, it is the '*urf* that can best determine the normative standards and what is in the best interest of society.[61]

---

[60] Ibid.,49-50.

[61] Ibid.,60.

Customary Law and *Maṣlaḥa*

An important tool that can be utilized in the application of the principle of *maṣlaḥa* is that of the "custom of reasoned persons" *(sīra al-'uqalā'iyya).* The term refers to that which is customarily perceived as reasonable - that which is agreed upon by those possessed of reason. *Al-Sīra al-'uqalā'iyya* replaces the need for a written text and become a "binding *sunna*" for the community. Although no reported text is essential for the *sīra*, the practice of reasonable people is sufficient proof for a jurist to rule that the lawgiver approbated the practice. It is assumed that all reasonable beings accept and behave according to common norms and values. It is also assumed that they act based on what is in the collective interests (*maṣlaḥa*) based on a common understanding of right and wrong. This being the case, a particular principle can be established by arguing that the pattern of behavior was common to all rational beings, whether they lived in the times of the Imāms or not, and that no objection had been raised by the lawgiver.[62] *Al-Sīra al-'uqalā'iyya* is connected to *maṣlaḥa* because it is assumed that reasonable people will act based on the benefit that accrues to them and harm that is averted.

The source of legal norms for policy matters such as contracts of purchase, rental and sale, discharge of debts, inheritance, compromise between debtor and creditor *(sulḥ)*, limited partnership *(mudaraba*), etc is based primarily on the custom of reasonable persons. Thus, legal rulings may change according to the harm or benefit involved. The desire to maximize benefit when issuing legal opinions affects the evolution of the legal system.

---

[62] On this see Liyakat Takim, The Heirs of the Prophet: Charisma and Religious Authority in Shi'ite Islam (Albany: State University of New York, 2006), 132-4.

Maṣlaḥa and Civil Rules

The concept of *maṣlaḥa* also plays an important role in legislating civil rules (*al-aḥkām al-wilāyatiyya*). It is to be noted that rulings in Islamic jurisprudence are generally divided into two general categories. The first category consists of fixed rules *(al-aḥkām al-thābita*) which do not change with time and place and are not determined by the government. These are related primarily to matters pertaining to individual worship (prayers, fasting, pilgrimage etc.). The second category consists of legal rules that are subject to change. These rules depend on some underlying premise *(*"primary principle"); for instance, rules relating to private property depend on the underlying premise of the right to control one's own wealth. In this example, the principle is expressed in the legal maxim *al-nās muṣallaṭūn ʿalā amwālihim* (people have sole authority over their property). The exact determination of rules in this category, in contrast to the first, is left to the discretion of the government, which may either extend or limit them in accordance with the social benefit or harm involved.

As previously noted, if the government deemed that a property entailed some harm to others, those rights could be curtailed, in accordance with the maxim *"lā ḍarar*" no harm [to other parties should result from a ruling]." Another example is the imposition of taxes; in this instance the ruler or judge might decide that failure to pay taxes causes harm to society, so that payment would become obligatory in order to remove that harm.[63]

Shīʿī scholars cite many other examples of *maṣlaḥa* based on the principles of increasing benefit and reducing harm. For example, if some Muslims were taken prisoners of war and used as human shields, then, are Muslim soldiers allowed to kill innocent Muslims knowing that failure to kill them would enable the enemy to use them and to endanger the entire Muslim

[63]Ayatullah Muhaghegh-Damad, "The Role of Time and Social Welfare," 215-6.

village or neighbourhood? In such a scenario, Muslim jurists have ruled that it is allowed to kill innocent Muslims for a greater good, i.e., to save an entire village or city of Muslims from destruction and from coming to harm.[64]

Shī'ī scholars have argued that there is a need to expand the scope of their juristic vision and revisit some of the earlier rulings based on the need of the times and interests of the community. As the socio-political situations change, juridical rulings issued must reflect the newer circumstances. According to the contemporary jurist Ayatullah Mohagheg Damad, since civil rules are variable, Islamic laws must change accordingly. Thus, in our own times, Islamic legal rulings must be reinterpreted based on the principle of harm and benefits and other principles established in *uṣūl al-fiqh*. Stated differently, there is a need to enact laws that are conducive to the welfare of the community even though such laws are not found in earlier texts. Due to such principles, Islamic sacred texts have to be read in different ways.

As an example of the possible re-interpretation of the law, Mohagheg Damad states that in the Qur'ān we encounter the phrase addressed to men concerning their marital life: "Live with them in accordance with that which is recognized as good (*al-ma'rūf*)" (4:19). The Qur'ān indicates that cohabitation in what is perceived as "good" is the foundation of Islamic family law and the foundation of individual laws pertaining to the rights of married women. In the past, when social and economic lives were much different and women were confined at home without economic responsibility or the need to earn a living, this Qur'ānic phrase had a particular meaning. Damad asks, "Does cohabitation in accordance with that which is recognized as good have the same connotation

[64] See Ja'far al-Subhani, *Maṣādir al-Fiqh al-Islāmī*, 297.

today?" In the past, maintenance (*nafaqa*) that was payable to the wife if she was divorced was calculated by jurists at a very low rate." This rate is contingent on the needs of the time.[65]

Mohagheg Damad continues, "If, for instance, one of the Imāms had been asked a thousand years ago about the maintenance due to a woman after divorce, he might have mentioned clothes, dwelling, or food, basing that on the standard of living at that time. Maintenance consisted of something like the fixed payment mentioned above. Neither the education of women nor means of transportation was as important as it is today. Thus, maintenance is an external and not an objective standard. On the other hand, "marriage in accordance with that which is recognized as good" is a general legal rule *(ḥukm)* of the *sharī'a*, and since times always change and social and economic conditions evolve, the Qur'ān here lays down a standard whose criteria are subject to change."[66] Stated differently, the maintenance of divorced woman must now include not only food and shelter, it must also award the wife back pay for housework she has done and other benefits that she had to forgo so as to look after the children. In addition, due to the different roles of women today, the costs of transportation and education must also be taken into account.

Mohagheg Damad further argues that what were once private rights have now become of general or public relevance. Until recently, the concept of labor relations was unknown and the relationship between an employer and employee was conducted entirely on the basis of a contract of hire. That is, a contract was concluded strictly on the basis of hire of labor for wages, with no government oversight. Now, however, the private rights of employer and employee have become public rights. Government intervention has now resulted in labor laws limiting the freedom of both parties. The rationale is that if a worker is allowed to enter into a contract as an agent, he is liable to

---

[65]Ayatullah Muhaghegh-Damad, "The Role of Time and Social Welfare,"218-9.

[66] Ibid., 219.

get himself into a situation in which he eventually becomes disabled and possibly a burden on society. Thus, in the interests of the community, the head of society can intervene and limit the freedom of the parties to conclude a contract. The *maṣlaḥa* of the community dictate that what was at one time considered a private transaction between an employer and employee become a public right for all in the civil service.[67]

Conclusion

For a long period, Shī'ī jurists confined their discourse to the text of the revelatory sources and, consequently, did not derive general principles that could be invoked for a variety of other situations by taking into account such factors as contextual indication and any change of circumstances that would have an impact upon defining the subject. To be sure, there is hardly any detailed analysis in the Islamic legal literature of the principles of *ijtihād* or *maṣlaḥa* with regard to newer issues. There is a dearth of analysis of the objectives of *sharī'a* rulings or how jurists arrive at their rulings. This is probably due to the fact that historically, Shī'ī jurists were not required to rule on political *maṣlaḥa* since they were not in involved in the political process or decision making of the state.

What constitutes a radical departure in Twelver Shī'ī legal theory is the insistence of contemporary reformers that the litmus test for the validity of the *ḥadīth* reports is the Qur'ānic core values and human reason (*'aql*). Any *ḥadīth* citation, no matter how strong its chain of transmission, cannot be accepted as valid if it does not comport with the Qur'ān, and human faculty of reason. Moreover, according to Sanei, a God that categorically denounces and

[67] Ibid., 220.

distances himself from injustice, and assures His creatures that they should not fear an iota of injustice from Him cannot possibly decree laws that betray his promise.[68]

In the works of contemporary reformists like Ayatollahs Khumayni, Fadlallah, Sanei, and Mohagheg Damad there is a major epistemological shift in the Twelver Shī'ī legal theory by privileging the Qur'ān, empowering reason as a legitimate source to discover the rationale or *ratio legis* of a legal directive and mindful that legal rulings were issued based on a particular context of time (*zamān*) and space (*makān*) and, as such, lack universal applicability for all times and places. Also the jurists are concerned with the objective of a ruling and what is conducive to the welfare of the community or needs of the state. The relationship between ethics and law along with distinguishing features between verses that are of universal and particular import, and taking into account present-day context and circumstances are important hermeneutic devices that are employed by jurists to challenge and revise erstwhile legal rulings.

The reforms that have been discussed above are important in conveying the view that far from being a static and rigid tradition, there is much discourse within the Muslim community and that the community is attempting to distance itself from the extremist and even archaic articulation of Islam. It is only through such self-critique and an admission of past failings that reformation can generate a fresh understanding of Islamic revelation and Prophetic practices.

Bibliography

Arasta, Muhammad Jawad. Tashkhīs Masleha Nizām: Azdidghahe fiqhi – Ḥuqūqi. Tehran: Intisharat Kanun Andisheh Jawan, 2009.

---

[68] Ibid., p. 87.

Arjomand, Said Amir. "Authority in Shiism and Constitutional Developments in the Islamic Republic of Iran" in The Twelver Shi'a in Modern Times eds. Rainer Brunner and Werner Ende. Leiden: Brill, 2001.

Boozari, Amirhassan. Shi'i Jurisprudence and Constitution. New York: Palgrave Macmillan, 2011.

Damad, Ayatullah Mohagheg. "The Role of Time and Social Welfare in the Modification of Legal Rulings," in Shi'ite Heritage: Essays on Classical and Modern Traditions ed. Lynda Clarke. Binghamton: Global, 2001.

Doost, Abu'l Qasim'Ali. Fiqh va Maslahat. Qum: Sazman-i Intisharat Pejushghah Farhang, 2000.

Hashemi, Ḥuqūq-i Asās-i Jumhūr-i Islām-i- Iran. Qum: 1996.

al-Hakim, Muhammad Taqi. al-Uṣūl al-'Āmma lil Fiqh al-Muqāran. Beirut: al-Dār Andalus, 1983.

al-Hilli, Ja'far ibn Yahya ibn al-Hasan. Muhaqqiq. Ma'ārij al-Uṣūl. Qum: Sayyid al-Shuhadā', 1983.

al-Husayni, Muhammad ed. al-Ijtihād wa al-Ḥayāt. Beirut: Markaz al-Ghadīr lil-Dirāsat al-Islāmiyya, 1998.

Khumayni, Ayatollah. Saḥīfeh-i Nūr. Tehran: Sazman-i madārik-i farhanghi-ye inqilab-i Islāmī, 1990.

al-Rifa'i, Abd al-Jabbar ed. Maqāṣid al-Sharī'a: Taḥrīr wa Ḥiwār. Beirut: Dār al-Fikr al-Mu'āṣir, 2002.

Sachedina, Abdulaziz Islamic Biomedical Ethics: Principles and Applications. Oxford: Oxford University Press, 2009.

Sanei, Ayatullah Yusuf. Bulūgh al-Banāt. Qum: Mua'ssasah Farhangi -ye fiqh-e Thaqalayn, 2003.
----------, Berabari-ye diyah. Qum: Mu'assasah-ye Farhangi-ye fiqh-e Thaqalayn, 2005.

Shabistari, Ayatullah Muhammad Mujtahid. "Religion, Reason and the New Theology," in Shi'ite Heritage: Essays on Classical and Modern Traditions, ed. Lynda Clarke. Binghamton: Global, 2001.

Shahrudi, Mustafa Ashrafi. "Hamsuy-e fiqh ba tahavvulat va Niyazhay-e Jami-e", in Ijtihād va Zamān va Makān 14 vols. Qum: Mu'assi Chap v NashrUruj, 1995.

Soroush, Abdokarim . Qabz wa bast-e ti'urik-e shari'at: Nazariyyah-ye takamul-e ma'rifat-e dini. Tehran: Mu'assasah-ye farhangi-ye sirat, 1996.

al-Subhani, Ja'far. Maṣādiq al-Fiqh al-Islāmī wa Manābi'uhu. Qum: Mu'assasat al-Imām al-Ṣādiq, 2007.

Tabrizi, Behrooz Ghamari. Islam and Dissent in Post-revolutionary Iran. London: I.B. Tauris, 2008.

Takim, Liyakat. "Revivalism or Reformation: The Reinterpretation of Islamic Law in Modern Times."American Journal of Islamic Social Sciences 25 no. 3 (2008): 61-81.

----The Heirs of the Prophet: Charisma and Religious Authority in Shi'ite Islam. Albany: State University of New York, 2006.

Zaman, Muhammad Qasim. The 'Ulama' in Contemporary Islam: Custodians of Change. Princeton: Princeton University Press, 2002.