

- not to be performed (2:242).
49. Gratitude for blessings engenders an awareness of the (divine) intention that human beings receive such blessings, take pleasure in them, and give thanks for them (1:117 and 126).
  50. Every principle which is in keeping with the actions of the Lawgiver and whose meaning is derived from sufficiently numerous and varied pieces of evidence that it may be affirmed with definitive certainty may be built upon and treated as authoritative even if it is not attested to by any specific text (1:39).
  51. The establishment of causes necessitates that the One who established them (that is, God Almighty) intend their outcomes as well (1:194).
  52. Whatever serves to complement and reinforce an objective of the Law may be viewed accordingly as an objective of the Law (2:397).
  53. If the Lawgiver is silent on a given matter despite the existence of a situation which calls for a ruling thereon, this silence may be taken as evidence that the divine intention is for human beings to stop at the presently existing limits and legislation just as they are (2:410 and I, 1:361).
  54. If we understand a legal ruling to have a particular wise purpose which will stand on its own, this does not necessarily preclude the same ruling's having numerous other wise purposes as well (2:311).

## [ II ]

### Higher Objectives / Intents and Ijtihad

Throughout the course of this book, in our presentation of al-Shāṭibī's theory of higher objectives, in our discussion of its extensions into and implications for various *uṣūl*-related discussions, in our treatment of its fundamental issues, as well as in the course of highlighting its innovative aspects, we have had occasion to elucidate

the importance of what this theory has to offer. However, what we are about to touch upon in the coming pages is by far the most significant contribution made by al-Shāṭibī's theory; it is the theory's *raison d'être* and the greatest benefit it has to offer. Specifically, what I am referring to is its influence on our understanding of Islamic Law and the application of independent reasoning, or *ijtihād*, to its rulings, as well as our ability to receive its guidance and live in accordance with its purposes. In this respect, the brilliant al-Shāṭibī<sup>77</sup> has made it possible for those who concern themselves with Islamic Law and the proper understanding thereof to explore its secrets and wise purposes. He has prepared the way for them to deal with its universals and overall purposes alongside its texts and particulars. And in so doing, he has provided Islamic jurisprudence and thought with a means of rebirth and renewal which they had sorely lacked.

One thinker who has labored in this field, namely, Mustafa al-Zarqa, draws attention to the major role al-Shāṭibī has come to play today for scholars and students of Islamic Law, saying,

From the time he published his book, *al-I'tiṣām* on heresies and his other book, *al-Muwāfaqāt fī uṣūl al-Sharī'ah*<sup>78</sup> – both of which were like hidden treasures [now unearthed] – al-Shāṭibī's name was on the lips of scholars and jurists. These two books, particularly *al-Muwāfaqāt*, became the primary mainstays of the heritage to which professors and advanced students of Islamic Law appealed as a means of deepening their understanding of their studies and providing support and documentation for what they wrote. Al-Shāṭibī's star thus began to rise in the East, after which it grew brighter and brighter until its light was sought out in studies of the fundamentals and higher objectives of Islamic Law and as a means of clarifying arguments and establishing the proper path.<sup>79</sup>

These last lines of al-Zarqa are reminiscent of words by al-Shāṭibī which, oddly, appear to have been the last thing he wrote. Writing in *al-I'tiṣām* not long before his death, he states, "Having established that the truth is that to which consideration is due regardless of what human beings have to say, it must likewise be affirmed that the truth

nevertheless can only be known through human mediation; indeed, it is [only] through human beings that the truth can be reached, since it is they who serve as the guides along its path.”<sup>80</sup>

In keeping with this established fact of human history in general, and of the academic realm in particular, al-Shāṭibī has become a recognized authority on Islamic Law, a signpost along the path leading to its objectives and purposes, and a guide to its wise purposes and mysteries. In the course of discussing *al-Muwāfaqāt*, Muḥammad al-Fāḍil ibn ʿĀshūr writes,

By means of this work, al-Shāṭibī has erected a towering pyramid to Islamic culture and civilization, and from this vantage point he has been able to envisage methods and approaches to the immortalization and safeguarding of the religion which few before him perceived. Consequently, those who delve into the meanings and mysteries of the Law owe him no small debt. The distinctiveness of this book emerged in a remarkable way during the last two centuries when, in the course of recovering from a period of decline, the Islamic world was finding it difficult to harmonize the rulings of the religion with the realities of modern life, and [for those facing this challenge], al-Shāṭibī's *al-Muwāfaqāt* proved to be a refuge and a source of authoritative counsel.<sup>81</sup>

However, al-Shāṭibī did not content himself with broadening and deepening the science of *maqāṣid al-Shariʿah*, nor with constructing an integrated theory on this basis or forging new paths for research and discovery in the study of the higher objectives of the Law. Rather, not willing to leave the benefits of what he had done exclusively to the intellectual elite or to the initiative of those well-versed in Islamic jurisprudence, he took it upon himself to ensure that his efforts had achieved their purpose and yielded their intended fruits. To this end, he persevered in his labors until he had introduced the discipline of *maqāṣid al-Shariʿah* into the realm of ijtihad and introduced ijtihad into the world of *maqāṣid al-Shariʿah*, thereby reviving and strengthening the intimate ties which had always bound them.

### Objectives and the Prerequisites for the Practice of Ijtihad

Al-Shāṭibī appears to have been the first to stipulate, as the first prerequisite for ijtihad, that one have “a thorough understanding of the higher objectives of the Law,”<sup>82</sup> while his second and final condition was “the ability to draw inferences based on one’s understanding thereof,”<sup>83</sup> that is, based on one’s understanding of these objectives.

For a number of centuries, *uṣūliyyūn* were engaged in drawing up a long list of conditions which had to be met by the mujtahid and the academic degrees he had to have completed, with some of them lengthening the list and others shortening it.<sup>84</sup> When al-Shāṭibī appeared on the scene, he spurned such lists, both long and short, choosing instead to limit the prerequisites for the practice of ijtihad to a single, inclusive qualification, namely, an understanding of the higher objectives of the Law so thorough that one could draw inferences in light thereof.

In making this observation, my intention is not to say that the scholars of jurisprudence and its fundamentals who preceded al-Shāṭibī lacked an awareness of the objectives of the Law and their essential importance to the *mujtahid*. Rather, I simply mean to say that between al-Shāṭibī and those who preceded him in the discussion of ijtihad and its prerequisites, there are significant differences which will become increasingly clear in what follows. Nor do I mean to express agreement with the position taken by ‘Abd Allāh Darrāz when, by way of comment on al-Shāṭibī’s stipulation that in order to qualify for the practice of ijtihad, one must have an understanding of the objectives of the Law, he states,

Among *uṣūliyyūn*, we have encountered no one who mentions the condition to which he [al-Shāṭibī] gives highest priority, and which, indeed, he makes into the basic foundation [for ijtihad]. As for the ability to draw inferences, this is the condition to which the well-known books on *uṣūl* limited themselves, and proof of which they sought in [one’s] knowledge of the Qur’an and the Sunnah, that is to say, those aspects thereof which pertain to legal rulings. In addition, they looked

for a knowledge of those points on which there is consensus [among Muslim scholars], the conditions for the validity of analogical induction, the means by which investigations are to be conducted, the science of the Arabic language, those verses of the Qur'an which have abrogated other verses thereof, and knowledge of how to assess the reliability of narrators... I then found in al-Shawkānī's *Irshād al-Fuḥūl* that al-Ghazālī quotes al-Shāfi'ī as making statements to the effect that universal principles are to be given priority over particulars.<sup>85</sup>

Contrary to Darrāz's assertion here, there are, in fact, those who preceded al-Shāṭibī – in some cases explicitly and in others, implicitly – in stipulating knowledge of *maqāṣid al-Sharī'ah* as a prerequisite for the practice of ijtihād. This condition is stipulated expressly in some well-known books on the fundamentals of jurisprudence, the most famous of which is *Jam' al-Jawāmi'* including, Ibn al-Subkī's *Jam' al-Jawāmi'*. After discussing the sciences with which the *mujtahid* needs to be familiar, Ibn al-Subkī quotes his father's definition of the *mujtahid*: “[He] stated that he [the *mujtahid*] is someone who has a natural aptitude for these sciences, who is acquainted with most of the principles pertaining to Islamic Law, and who has applied these principles with sufficient regularity that he has acquired the ability to discern the Lawgiver's intent.”<sup>86</sup>

In his commentary on al-Bayḍāwī's *Minhāj al-Wuṣūl ilā 'Ilm al-uṣūl*, Ibn al-Subkī declares that when a scholar fulfills the conditions for becoming a *mujtahid*, including “familiarity with the higher objectives of the Law and experience in exploring their depths,”<sup>87</sup> it becomes permissible to emulate him as al-Shāfi'ī and other imams have been emulated. It is clear that, as Ibn al-Subkī himself declares forthrightly, he stipulates knowledge of the objectives of the Law as a prerequisite for ijtihād in emulation of his father 'Alī ibn 'Abd al-Kāfī. In his introduction to *Sharḥ al-Minhāj*, Ibn al-Kāfī states that full qualification for the rank of *mujtahid* depends on three things, the third of which is “that one have sufficient experience in the investigation of and adherence to the higher objectives of the Law that one is able to perceive whence the Law springs, and what would be an appropriate ruling in this or that situation even if this is not directly stated...”<sup>88</sup>

Al-Suyūṭī quotes Amīn al-Dīn ibn Muḥammad al-Tabrīzī in his *al-Tanqīḥ* as saying that “the knowledge of how to enumerate the evidences in support of a legal ruling depends upon a thorough, inductive reading of the entire contents of both the Qur’an and the Sunnah and an understanding of their objectives.”

As noted by ‘Abd Allāh Darrāz earlier, al-Shawkānī’s quote from al-Ghazālī,<sup>89</sup> indicating that al-Shāfi‘ī made note of universal principles and gave them priority over particulars,<sup>90</sup> this is mentioned by al-Ghazālī in *al-Mankhūl*, pp.366-367.

As we have noted, *al-Mankhūl* is based in its entirety on the writings of al-Juwaynī. And in fact, al-Juwaynī deals with this topic in *al-Burhān*, where he lists the sources on which al-Shāfi‘ī based ijtihād. Specifically, he relied (first) on the Qur’an, followed by reports classified as *mutawātirah*,\* followed by reports classified as *āḥād*,\* followed by the apparent meanings of the Qur’an (unless they are passages addressed to a particular individual or group), followed by the apparent meanings of traditions passed down on the authority of the Prophet or his Companions (first those classified as *mutawātirah*, then those classified as *āḥād*). Then he states,

If one does not find what one is looking for by moving through these steps, one should not yet resort to *qiyās*. Rather, one should look to the universals of the Law and the overall interests it is intended to serve. Al-Shāfi‘ī considered this art to include application of the law of retaliation to cases of murder committed with a heavy object, since its negation<sup>91</sup> violates the principle of deterrence. If one perceives no general interest in the event or action concerned, one should look to those points on which there is unanimous agreement, and if this also is not to be found, one may resort to *qiyās*.<sup>92</sup>

My concern here is not with this particular manner of ordering and prioritizing different types of evidence, or whether it represents the way in which Imam al-Shāfi‘ī actually approached the process of ijtihād or is simply a reconstruction based on inferences drawn by al-Juwaynī. Rather, what is of concern to me in this quotation is the evidence it provides of the fact that when he engaged in ijtihād,

Imam al-Shāfi'ī "looked to the universals of the Law and the overall benefits which it seeks to achieve." In other words, he looked to the overall objectives of the Law and employed them as the basis for his interpretations and decisions. What makes this all the more significant, moreover, is the fact that of all the four imams,<sup>93</sup> al-Shāfi'ī depended the least on the notions of interests and objectives.

Explicit statements by Shafi'ite *uṣūliyyūn* affirming that Imam al-Shāfi'ī followed this approach to *ijtihād* is an implicit acknowledgment that (1) the practice of *ijtihād* requires knowledge of the higher objectives of the Law and (2) that it is necessary to observe and build upon these objectives. Moreover, in keeping with this recognition is al-Juwaynī's statement that if a given instance of *qiyās* is inconsistent with the preservation of the five essential interests recognized by Islamic Law, the *qiyās* should be abandoned in favor of the general principles which (apply to the situation at hand and which) call for the preservation of these essentials. Al-Juwaynī states, "One of the distinguishing features of this approach is that if an analogy (*qiyās*) applicable to a particular situation or action runs counter to a general rule, the analogy in question must be abandoned – however obvious it happens to be – in favor of the general rule."<sup>94</sup>

In illustration of this type of situation, he cites the example of putting an entire group to death in retaliation for the death of a single individual, which runs counter to the *qiyās* which requires parity (one life for another). The preservation of human life, which is among the most foundational objectives of the Lawgiver, requires that an entire group be put to death if they took part jointly in murdering a single person, since otherwise, others would be tempted to resort to joint murder as a means of escaping the law of retaliation. This type of ruling manifests clear reliance on the essential objectives of the Law, which are given priority over the results obtained from *qiyās* based on particular situations.

Al-Ghazālī states, "We sometimes treat human interests as a sign which points to a given ruling, while at other times we treat the ruling as a sign which points to particular human interests."<sup>95</sup> As we have seen, al-Ghazālī only recognizes human interests if it is apparent that they are intended by the Lawgiver. Hence, what this state-

ment of his means is that the objectives of the Lawgiver may be taken as evidence in favor of a given ruling, while a given ruling may likewise be taken as evidence of the Lawgiver's higher objectives, which requires that the person engaged in *ijtihād* be familiar with the objectives of the Law.

As we have seen, *uṣūliyyūn* have introduced the objectives of the Law into the practice of prioritizing (among various interests, rulings, etc.), stipulating that essentials are to be given priority over exigencies, and exigencies over embellishments; in addition, they prioritize among the essentials themselves. In so doing, they are stipulating implicitly that knowledge of the objectives of the Law is necessary for anyone who wishes to engage in *ijtihād* and to prioritize among various bases (for legal rulings) and objectives. After all, no one can properly prioritize among the objectives of the Law but those with a proper knowledge thereof.

Al-Qarāfī stipulates explicitly the importance of knowledge of the objectives of the Law, not only for those who engage in *ijtihād*, or independent reasoning, but even for jurists who are imitating their forebears; he also acknowledges, of course, that each group – those who engage in independent reasoning and those who imitate them – has its own unique role and status. He states,

However, if he [i.e., the jurist who is emulating the example of his imam] encounters a case which he has not memorized, he should not base his judgment on the cases which he has memorized; nor should he say, "This is similar to such-and-such a case," since this is only permissible for someone who has a thorough, detailed familiarity with the perceptions of his imam and the evidences, analogies and *ʿilal* upon which he relied, as well as knowledge of the ranking of such *ʿilal*, how they are related to legally recognized human interests, and whether such interests are classified as essentials, exigencies or embellishments. The reason for this is that the individual who studies the teachings of his school and who bases rulings on the fundamentals established by his imam will be related to his school and his imam as his imam is related to the Originator of the Law in terms of adhering to its texts and basing rulings on its objectives.<sup>96</sup>

Hence, the objectives of the Law must be known by those who engage in *ijtihād* in order for them to be able to base rulings thereon. Moreover, they must also be known by the jurist who is emulating his imam, since his imam's understanding was based on these objectives; hence, he will not be able to issue fatwas in accordance with this understanding or base rulings upon it unless he is familiar with the objectives upon which it is founded and the human interests which it seeks to preserve.

\* \* \* \* \*

And now, let us return to al-Shāṭibī. As we saw earlier, the first and most important prerequisite which al-Shāṭibī stipulates for the ability to engage in *ijtihād* is an irreproachable knowledge of the higher objectives of the Law. He states, "If one reaches a point where he perceives the Lawgiver's intention as it pertains to every question of the Law and every area thereof, he will have achieved a station which qualifies him to serve as the Prophet's vicegerent in the realms of instruction and the issuance of legal decisions and rulings concerning what God wills."<sup>97</sup>

What qualifies one person to represent another and to speak in his name is that he possess intimate knowledge of this person's intentions and objectives, from the most general to the most specific. By comparison with this, all else is merely auxiliary. Hence, the person who engages in *ijtihād*, who judges and issues legal decisions in the name of the Lawgiver must, first and foremost, be thoroughly knowledgeable of His overall objectives, as well as of the specific aim – or objectives – which pertain to the issue in relation to which he is engaging in *ijtihād* and issuing a ruling.

And thus it is al-Shāṭibī that has elevated the role and status of *maqāṣid al-Sharī'ah* as they pertain to the practice of *ijtihād* to the loftiest heights. As a result, the objectives of the Law are no longer a matter of a few nebulous words which might, or might not, be tacked onto the end of a long list of conditions required of the mujtahid and which hardly receive any notice from the serious student, much less the superficial reader. (Even Darrāz – himself a seasoned

*uṣūl* scholar – disregards them entirely.) On numerous occasions and by means of various approaches, al-Shāṭibī seeks to affirm and establish the importance and necessity of attention to the objectives of the Law on the part of those engaged in *ijtihād*. In this connection, he draws attention to the fact that a scholar engaged in *ijtihād* might in some situations be unmindful of the higher objectives of the Law despite his knowledge of them, and that should this happen, he is bound to err in his conclusions. He states, “Errors committed by scholars most frequently occur when they fail to take account of the objectives of the Law as they pertain to the particular situation to which they are applying independent reasoning.”<sup>98</sup>

And if this is the situation of a scholar with expertise in the higher objectives of the Law, then how much more prone to error will be those who fall short of this standard! Consequently, we find that when al-Shāṭibī rails against those with a distorted understanding of the religion and its Law, he identifies ignorance of *maqāṣid al-Shari‘ah* as the cause, or at least, one of the causes behind the problem. Among those whom he criticizes are individuals who consider themselves qualified to engage in *ijtihād* and who, as a consequence, approach the religion’s Law and legal rulings with a kind of recklessness. In fact, there are those who

take some of its particulars and proceed, by means of these particulars, to tear down its universals in order to support the conclusion which agrees with their initial, unstudied impression of things. They do this without a full understanding of the meanings of the Law or even an acknowledgement of their need for such an understanding. Moreover, this phenomenon is reinforced by ignorance of the objectives of the Law and the illusion that one has attained the rank of *mujtahid*.<sup>99</sup>

In the same vein, al-Shāṭibī refers to those who advocate heretical teachings<sup>100</sup>; such people, follow their own caprices and support “adherence to the superficial meanings of the Qur’an without reflection on or investigation into its objectives and that which binds its various parts into a consistent whole.”<sup>101</sup>

Such people also include those who adhere to allegorical texts of

the Qur'an (*al-mutashābihāt*),<sup>102</sup> who take particular texts and isolate them from the fundamentals and universals of the religion, after which, by means of these allegorical texts, they launch assaults on those texts which are clear in and of themselves (*al-muḥkāmāt*) and the religion's most fundamental premises. Al-Shāṭibī states, "The basis for the errors committed in this connection is, quite simply, ignorance of the higher objectives of the Lawgiver and a failure to bring together their various strands. As for those imams who are firmly established in knowledge, they approach evidence by treating the Law as an integrated whole based on its established universals, with its particulars being ordered in accordance therewith." He then continues, saying, "Hence, those firmly established in knowledge view the Law as an integrated whole whose every part – like the members of the human body – is in the service of every other. As for those who cling to *al-mutashābihāt*, they arbitrarily latch onto some piece of textual evidence and treat it as their point of reference even if it happens to be in conflict with some universal or another specific text. However, a single member cannot yield a reliable judgment rooted in a genuine understanding of the rulings of the Law."<sup>103</sup>

A comprehensive, harmonious perspective on the Law and its rulings is only possible for those who have an intimate, thorough familiarity with the higher objectives of the Law and who have mastered its universals and who view legal rulings in light of this knowledge and understanding. Those who fail to attain this vision are bound to fall into confusion and turmoil, as a result of which they either utter statements which run counter to the objectives of the Lawgiver, or end up in a state of impotence and withdrawal, leaving to Caesar that which is not Caesar's. After all, the higher objectives of the Law are not merely a means of correcting and developing the process of *ijtihād* but, in addition, of expanding this process and enabling it to absorb life in all of its vicissitudes and ramifications. Concerning this al-Shāṭibī writes, "By identifying and paying proper attention to the bases of legal rulings (*al-ʿilal*), the *mujtahid* expands the domain of his *ijtihād*. Otherwise, he will only be able to issue judgments in accordance with human interests based on a specific text or the consensus of the Muslim community."<sup>104</sup> If we simply take texts literally

or at face value, we restrict their domain and diminish what they have to offer. If, on the other hand, we understand them in light of their bases and objectives, they become an abundant reservoir of aid and guidance: the door to *qiyās* is opened wide, as is the door to *istiṣlāḥ*, and legal rulings take their natural course in achieving the higher objectives of the Lawgiver by bringing benefit and preventing harm.

As a result of al-Shāṭibī's having given *maqāṣid al-Shari'ah* this lofty status and weighty significance in the practice of *ijtihād*, scholars today have adopted his approach as well. That is to say, they highlight the necessity and usefulness of the objectives of the Law for all independent reasoning, be it in the realm of jurisprudence (that is, the process of deriving legal rulings), or in the realm of intellectual activity in general. Allal al-Fasi declares:

...the objectives of the Law are the enduring, authoritative source of all that is needed for legislation and judicial functions in Islamic jurisprudence. They are not external to Islamic Law; on the contrary, they lie at its very core. Nor are they obscure like natural law, whose limit and source are not known. Moreover, when necessary, the objectives of the Law exert influence even over that which is stated explicitly [in legal texts].<sup>105</sup>

In illustration of this point, al-Fasi cites the example of 'Umar ibn al-Khaṭṭāb's decision during a year of famine to suspend the prescribed punishment for theft, since he realized that the Lawgiver's intention in prescribing such a punishment is to penalize transgressors and to deter them from further transgression. However, someone who steals out of necessity is not a transgressor; rather, the transgressor is someone who is wealthy while others around him are hungry to the point of dire need. God has pardoned those who are in dire need; hence, how could He impose on them the prescribed punishment for theft?

In his book, *Falsafat al-Tashrī' al-Islāmī*, al-Fasi criticizes Subhi Mahmasani for declaring the higher objectives of the Law to be among the external sources of Islamic legislation.<sup>106</sup>

Similarly, distinguished scholar Ibn ʿĀshūr stresses the importance of the objectives of the Law for jurisprudence-related ijtiḥād. In a chapter entitled, “The jurist’s need for familiarity with the objectives of the Law,” Ibn ʿĀshūr breaks down ijtiḥād in the realm of Islamic Law into the following five tasks or areas:

1. Arriving at an understanding of the Law’s affirmations and texts in accordance with the dictates of the Arabic language and of Islamic legal terminology.
2. Investigating whether there are considerations which would conflict with the text in question, such as another text which is said to abrogate it, restrictions on or specifications of its meaning or application, or some other text which there is good reason to give priority over the text at hand.
3. Ascertaining the bases, or *ʿilal*, of legal rulings and engaging in *qiyās* on the basis thereof.
4. Arriving at judgments concerning situations which are not mentioned in any specific legal text and concerning which there is no consensus.
5. Affirming those rulings which are classified as *taʿabuddiyah* just as they are.

These, then, are the five areas of ijtiḥād in which, according to Ibn ʿĀshūr, “the scholar of jurisprudence needs to be familiar with the higher objectives / intents of the Law...”<sup>107</sup> There follows a lengthy explanation of these areas; despite its length, however, I would like to quote what Ibn ʿĀshūr has to say concerning the importance of the higher objectives of the Law for the fourth ijtiḥād-related area mentioned above, namely, independent reasoning relating to situations which receive no mention in any particular legal text or instance of *qiyās*. In this connection he states,

The need for knowledge of the higher objectives of the Law in the fourth area is self-evident. It is labor in this area which has ensured the ongoing issuance of Islamic legal rulings throughout the ages and generations since the time of the Lawgiver, and which will ensure the same

for all ages and generations till the end of time. It was in relation to this area that Mālik, may God have mercy on him, demonstrated the validity and relevance of unrestricted interests; moreover, it was concerning this area that the [four] imams affirmed the importance of preserving the [five or six] essential universals of the Law as well as the exigencies and embellishments.<sup>108</sup>

In another chapter entitled, “Verbal evidence pertaining to the Law is no substitute for knowledge of its objectives,” Ibn ‘Āshūr affirms the need to interpret texts in accordance with their objectives as indicated by various sorts of external contextual signs. He reproaches those who deal with texts in the abstract, that is, in isolation from the contexts which indicate their objectives and true meanings, saying,

... certain scholars are remiss, embroiling themselves in untold errors due to the fact that, in the process of deriving legal rulings, they restrict themselves to a consideration of verbal evidence, content to base their views on words alone. Such scholars ponder, reflect on and analyze such words, hoping to extract their inner meaning, yet all the while neglecting to make use of the connections, associations, agreed-upon terms and contexts which encompass speech from all sides and the importance of which we have noted.<sup>109</sup>

### Approaches to *Maqāṣid*-Based Ijtihad

A great deal has already been said about *Maqāṣid*-based ijtihād, examples of which show that this practice is deeply rooted in our juristic heritage and that it grows out of the nature of Islamic Law itself, being attested to in its texts and principles. What I wish to do now, then, is to gather together the scattered references to this theme and to add whatever I can in the hope of, at the very least, approaching the goal I have set myself, namely, to identify the most important approaches to objectives-based ijtihād. It will not suffice for us simply to stress the importance of the higher objectives of the Law, affirming their necessity in the practice of ijtihād and reiterating the

fact that the leading imams adopted an objectives-based approach in their practice of *ijtihād*. Rather, we need to work, little by little, toward specifying the areas in which such objectives-based *ijtihād* is applicable and identifying the signposts which can guide us along the path. This is a task of manifest difficulty and solemnity; even so, though, we have no choice but to rise to the challenge and overcome the obstacles which we are bound to encounter, if only in the early stages. To this end, then, let us rely upon Muslim scholars for assistance and encouragement.

### *1. Texts and Rulings are Inseparable from their Objectives*

As opposed to the Zahirites, or literalists, the majority of Muslim scholars affirm the principle that “texts and rulings are inseparable from their objectives.” However, within this majority, we find that individual scholars (as opposed to the schools of jurisprudence they adhere to) differ in the degree to which they affirm this principle and the consistency with which they apply it.

The need to understand texts and rulings in light of their overall objectives rather than basing one’s interpretation of them solely on their self-evident meanings, verbal content and outward formulations is based on the conclusion which was affirmed in our discussion of the practice of *ta’līl*, namely, that the texts and rulings of Islamic Law may be understood in light of the higher objectives and human interests on behalf of which they were brought into existence. Consequently, it is essential that such objectives not be neglected when affirming judgments and investigating the meanings of texts.

In this connection – in addition to the examples already cited – we have a statement by Abū Zayd al-Dabbūsī (d. 432 AH/1040 AC), who writes,

The principle agreed upon among our scholars<sup>110</sup> is that if *zakah* is due from a given individual, and if this individual distributes the *zakah* he owes in a form which fulfills what the relevant texts require of him, he will have fulfilled his obligation under Islamic Law. In his view,<sup>111</sup> however, this individual will not have fulfilled his legal obligation. Our

companions [in the Ḥanafite school] assert that if someone who owes zakah in dirhams chooses instead to distribute it in the form of wheat or something else, he will have fulfilled his legal obligation, since the objective of the relevant legal texts is to meet the needs of the poor, and by distributing one's zakah in the form of wheat or whatever else, this need has been met. According to Imam Abū 'Abd Allāh al-Shāfi'ī, however, this is not acceptable.<sup>112</sup>

This principle has been applied across the board to all types of financial obligations, such as the fast-breaking charity (*zakāt al-fiṭr*), atonements, vows, etc., such that different types of material wealth may be substituted for each other provided that there is equality among them and that the substitution causes no injustice to the recipient. Ibn al-Qayyim applies this principle to a number of cases which call for ijtihad. Concerning the fast-breaking charity which the Prophet specified as consisting of a  $\text{ṣā}^c$ <sup>113</sup> of either dates, raisins or cottage cheese, Ibn al-Qayyim states, "These foods were the main staples in Madinah [at that time]. As for the inhabitants of places in which these are not the staple foods, however, they are required to donate a  $\text{ṣā}^c$  of whatever the staple food happens to be, since the objective of the fast-breaking charity is to meet the need of the unfortunate on the holiday."<sup>114</sup>

Ibn al-Qayyim issues a similar judgment regarding the practice of *taṣriyah*,<sup>115</sup> in connection with which the Prophet stipulated that if someone had purchased a she-goat, cow or she-camel with gorged udders, the buyer should give the original owner a  $\text{ṣā}^c$  of dates in return for what he had milked from the animal. Based on the literal content of this hadith, most Shafi'ite and Ḥanbalite scholars have ruled that the compensation for the milk derived from such an animal must be a  $\text{ṣā}^c$  of dates and that nothing else can be substituted for this. "In so doing," states Ibn al-Qayyim, "they are treating the Prophet's ruling as *ta'abbudī*, that is, one which admits of nothing but unquestioning obedience; moreover, they have specified a  $\text{ṣā}^c$  of dates as the only quantity acceptable as compensation in such a situation based on the literal content of the text. However, others have disagreed with them, saying: Rather, the buyer should repay the

animal's owner with a *ṣāʿ* of whatever happens to be the staple food in the region where they live. This latter view, moreover, is the valid one."<sup>116</sup> He then adds,

There can be no doubt that this [latter] point of view most accurately reflects the higher objective of the Lawgiver and the best interests of those involved in such a transaction. The same principle, moreover, applies to the substances which the Lawgiver has specified for use in various situations and which may be substituted with other substances, some of which may be more suitable than the substance originally specified. An example of this is the Lawgiver's specification of the use of stones in the practice of *istiḥmār*<sup>117</sup> even though it can easily be seen that toilet paper, cotton or wool would be more effective in achieving the same end and, therefore, more suited for this purpose. The same applies to the specification of soil as the agent with which one is to cleanse substances which have come in contact with a dog's saliva when, in fact, potash would achieve this purpose more effectively. All of this depends, of course, on our knowledge of the Lawgiver's intention behind such rulings; our aim is to achieve the Lawgiver's intention as fully as possible, either with the substance specified in the original ruling, or with another, more effective, one.<sup>118</sup>

The positions taken by Abū Zayd al-Dabbūsī and Ibn al-Qayyim bring us to the Malikite school's stance on whether it is permissible to distribute the value of one's *zakah* (rather than the particular substance prescribed in the rulings of the Law). As many will be aware, the Malikite school, like the Shāfiʿite school, favors prohibiting the substitution of one substance for another, or the substitution of a substance with money of equal value. Rather, they only allow such substitution in cases in which it is absolutely necessary to do so. The judgments issued by Malikite jurists on this matter range from undesirability to complete prohibition, and from ruling that this practice fulfills one's religious obligation to ruling that it does not.<sup>119</sup> There are also varying points of view as to how this stance is to be explained. Is it because *zakah* is a form of worship whose bases one is not permitted to explore – that is, in relation to which *taʿlīl* is

not acceptable?<sup>120</sup> Or is it, rather, based on the notion that if the person who owes the zakah pays the zakah's monetary value, this will be tantamount to purchasing the charity he intends to distribute,<sup>121</sup> which is prohibited?

Whatever the case may be, such a hard-line position on this is inconsistent with the interest-based perspective and objectives-based ijthad for which the Malikite school has been known! Imam Mālik was once asked for a ruling on a man who had paid zakah on his money before the prescribed time (that is, before it had been in his possession for an entire year), the question being: Should the man return the zakah he paid? And surprisingly, Mālik replied, "Yes, I believe that he should. Take, for example, someone who prays the noon prayer before noon, or someone who prays the dawn prayer before dawn. Are they not required to repeat it? And this man's situation is parallel to theirs."<sup>122</sup> Ibn Rushd comments on this statement by Imam Mālik, saying,

It would appear that the payment of one's zakah shortly before the prescribed time would still be acceptable, since the requirement that money be in one's possession for an entire year before zakah is due on it involves some latitude. It is not like ritual prayer, the time period for which is limited and because of which, it is not permissible to perform it either before the time period has begun or after it has ended. If zakah were like prayer in this respect, it would be necessary for us to know at exactly what hour of the day one acquired the money in order to know at exactly which hour zakah will become due on it. However, this is unduly restrictive.<sup>123</sup>

Ibn al-ʿArabī has a number of things to say on this point. He first explains the dispute in terms of whether one bases one's judgment on a consideration of zakah as *taʿabbudī* in nature, or on a process of *taʿlīl*. He states,

For those who view zakah as a form of worship, it follows that it cannot be distributed early, since acts of worship may not be performed before their prescribed times. This position is taken by Mālik in al-ʿUtbiyah,

where he states, "Have you not noted what the ruling would be if someone performed the noon prayer before noon?" And Ashhab<sup>124</sup> takes the same position. As for those who base their judgment on consideration for the fact that the objective of zakah is to meet the needs of the poor and to fulfill the human right [to material provision], it follows that it is permissible to distribute one's zakah before the money on which the zakah is due has been in one's possession for an entire year; this is the position taken by al-Shāfi'ī and Abū Ḥanīfah. There is, in addition, a group of scholars who take a middle position. According to some of them, it is permissible to distribute one's zakah up to two days before the prescribed time (this is stated in "the book of Muhammad"), while others hold that it is permissible to distribute it up to ten days early (this position is held by Ibn Ḥabīb). Still others hold that one may distribute one's zakah up to 15 days early, while according to Ibn al-Qāsim, it may be distributed as much as an entire month early, to which he adds, "[However,] the most valid point of view is to refrain from considering such early distribution as the norm, or even to approve it whatsoever."<sup>125</sup>

One gets the impression here that Ibn al-<sup>c</sup>Arabī is somewhat annoyed by all these specifications, which neither stop at consideration of zakah as *ta<sup>c</sup>abbudī* in nature and an acceptance of the Imam's (Imam Mālik's) stated position, nor open the door to greater lenience and consideration for human interests; in fact, they fail to agree on any one position. Be that as it may, my purpose in quoting this passage is to draw attention to the fact that virtually none of the scholars in question – with the exception of Ashhab – adheres to the position taken by Imam Mālik.

It is clear that Imam Mālik has relied on nothing here but an analogy which he draws between zakah and ritual prayer, the common element between them being that both of them are forms of worship. However, his thinking is subject to dispute, since he has based an analogy on a ruling which is *ta<sup>c</sup>abbudī*.<sup>126</sup> If we refer back to Imam Mālik's *al-Muwatta'*, we will find that it opens with a section entitled, *Wuqūt al-Ṣalāh* (The book of Prayer Times.) We also find that the angel Gabriel specified for the Apostle the beginning and ending

times for each of the prescribed ritual prayers. The Messenger of God then announced these times to the Muslim community, informing them of the commencement and conclusion of the time period for each of the five prayers and adding, "And between these two there is time [during which the prayer concerned may be performed]." The beginning and ending of the time period for each prayer have thus been defined with full precision, just as there are known passages in which believers are urged, sometimes through words of encouragement and enticement and at other times with words of threat and warning, to adhere to and preserve these limits. No such exhortations, however, are to be found in connection with zakah; and herein lies a significant distinction between zakah and ritual prayer.

Among the zakah-related issues in relation to which Imam Mālik grants consideration to the higher objectives of the Law and bases his rulings on *ta'lil* (is the question of whether zakah is required of non-Muslim subjects of a Muslim state). Concerning this he writes, "None of the *dhimmis* [non-Muslim subjects living in a Muslim country], including Zoroastrians, are required to pay zakah on their date palms, their grapevines and other produce, or their livestock, since zakah was imposed on Muslims in order to purify them and in response to [the needs of] their poor."<sup>127</sup> Hence, Imam Mālik identifies two objectives of zakah, namely, the purification of the person who distributes it, and solidarity between those who distribute zakah and their needy brethren. He then concludes from this that non-Muslims are not included in either of these objectives, as a result of which no zakah is required of them. As for the *jizyah*, or poll tax, imposed on non-Muslims, it is their obligation to the state.

Another issue which may be examined in light of the higher objectives of the Law is the dispute over whether individuals referred to in the Qur'an as "those whose hearts are to be won over" (9:60) are still to receive a share of zakah funds, or whether this no longer applies. As in relation to other questions as well, we find that Mālik accommodates the *ahl al-ra'y*<sup>128</sup> and those who engage in *ta'lil* by saying that this group's share in zakah no longer applies. This view is based on the interpretation of this share in terms of the interests of Islam and Muslims, and by affirming it, Imam Mālik appears to be

adhering to the ruling arrived at by 'Umar ibn al-Khaṭṭāb and others of the Companions. Be that as it may, it is founded upon an interest-based interpretation which goes beyond the superficial view of zakah as simply a form of worship which must not be subjected to *ta'lil*.

A number of other scholars, by contrast, adhere to the view that the right of "those whose hearts are to be won over" to a share in zakah funds is still valid, and that its discontinuation by 'Umar and other Companions of the Prophet was a circumstantially based interpretation of the manner in which zakah funds were to be disposed of. There is a consensus among Muslims that there has been no abrogation since the time of the Messenger of God; it follows from this, then, that 'Umar's ruling was, in actual fact, based on the circumstances in which he found himself. This perspective allows for the revival of the practice of setting aside a share of zakah funds for "those whose hearts are to be won over" whenever the need arises.

Al-Ṭabarī has a well-founded view of this matter based on the overall objectives of zakah. He holds, and rightly so, that zakah has two objectives, concerning which he states,

One of these objectives is to meet Muslims' material needs, while the other is to support and strengthen Islam. Whatever serves to support and strengthen Islam is for the sake of preserving the religion. This includes, for example, what is given to those engaged in jihad for God's sake; it is given to such individuals whether they are wealthy or poor, since its purpose is to enable them to wage war, and not to meet their material needs. Similarly with respect to "those whose hearts are to be won over," they are given a share of zakah funds even if they are wealthy, as a means of supporting Islam and promoting its well-being and strength. The Prophet gave to those in this group [even] after he had conquered a number of geographical areas, Islam had spread, and its adherents had grown powerful and respected. Hence, there is no basis on which anyone can object, saying, "There is no one today whose heart needs to be won over to Islam [by this means], since Muslims now, by virtue of their great numbers, are capable of defending themselves and ensuring the religion's survival without such measures," when the Prophet himself gave to those to whom he did under the circumstances described above.<sup>129</sup>

Hence, the share of zakah funds due to “those whose hearts are to be won over” belongs to the same category as that due to those struggling in the way of God; as such, both are a form of jihad whose purpose is to support and strengthen Islam. This perspective is affirmed by al-Qurṭubī who, after listing various categories of “those whose hearts are to be won over,” says,

The purpose behind [distributing zakah among] all of these is to give to those whose Islam cannot truly take root except in this way. Hence, it is a type of jihad, since those who do not affirm the one God may be classified into three groups: those who can be won over by the presentation of evidence and proofs, those who can be won over by means of force, and those who can be won over through kindness and generosity. In relation to each of these groups, the insightful Muslim leader will employ the approach which he believes most likely to result in their salvation and their deliverance from unbelief.<sup>130</sup>

Malikite scholars who affirm the continued practice of setting aside a share of zakah funds for “those whose hearts are to be won over,” holding that its validity depends on its intent and wise purpose, include the two judges ‘Abd al-Wahhāb and Ibn al-‘Arabī.<sup>131</sup> Ibn al-‘Arabī, after expressing his support for the continued distribution of this share whenever necessary, states, “Everything which the Prophet did, he did for a wise purpose, in response to a need, and for a reason. It follows, then, that if the reason or need for a given practice ceases to exist, the ruling calling for such a practice likewise ceases to apply; however, if the need recurs, the ruling comes to apply once again.”<sup>132</sup>

In the same vein, it may be helpful here to examine a number of other instances in which Abū Bakr ibn al-‘Arabī engages in ijtihad based on the principle that “texts and rulings are inseparable from their objectives.” He seeks, for example, to explain the Prophetic traditions which prohibit a woman from traveling a long distance without being escorted by a *maḥram*.<sup>133</sup> After explaining the wise purpose behind this prohibition, that is, to protect the woman from any sort of insult to her dignity or violation of her honor, he continues,

Once this principle was established, scholars understood the basis for the prohibition, as a result of which some of them said that it would be permissible for a woman to travel in the company of a large number of trustworthy, virtuous men.

However, Abū Ḥanīfah objected to this ruling, saying, "Rather, the only acceptable travel companion for a woman is one of her unmarried male relatives." As for me, I am amazed that he [Abū Ḥanīfah] would trace acts of worship to their logical bases, saying that the purpose behind the sanctity of worship is [to teach us] reverence and that the purpose behind the act of worship embodied in zakah is to meet the needs of the poor [as a result of which it is permissible to distribute the monetary value of what one owes in zakah (rather than distributing it in-kind)], after which he comes to this prohibition and, instead of interpreting it in terms of human interests and objectives, he claims that only an actual unmarried male relative may validly accompany a woman on a lengthy journey! This is truly amazing.<sup>134</sup>

As further evidence in favor of permitting a woman to travel without a *mahram*, Ibn al-ʿArabī cites the Prophet's auspicious declaration that there would come a day when the Muslims would enjoy such security that it would be possible for a woman to travel from Ḥīrah to Makkah with nothing to fear but God Almighty. Then, in confirmation that the aforementioned prohibition is to be understood in light of its wise purpose and objective, he states, "The goal in all of this is, as we have noted, the existence of security, in whatever sense this may be understood."<sup>135</sup>

In light of the foregoing, every individual can assess his own situation and preserve his religion and honor without discomfort or distress. Each believer (is capable of functioning as) a scholar of jurisprudence both for himself and his family. Hence, what this judge says is not a call to become lax in protecting people's honor; rather, it is the embodiment of fairmindedness and of sound, moderate objectives-based jurisprudence.

## 2. *Combining Universal Principles and Evidence Applicable to Particular Cases*

By ‘universal principles,’ I mean both those universals enunciated explicitly in this or that text, and those derived through the inductive process. The first type of universals are those which are affirmed in the texts of the Qur’an and the sound Prophetic hadiths; they include, for example, the words of the Qur’an which read, “Behold, God bids you to deliver all that you have been entrusted with unto those who are entitled thereto, and whenever you judge between people, to judge with justice” (4:58); “Be true to your covenants” (5:1) and “whatever [wrong] any human being commits rests upon himself alone; and no bearer of burdens shall be made to bear another’s burden” (6:164). It also includes words of the Prophet such as, “The believer causes no harm either to himself or to others”; “Verily, God requires kindness of everything that exists”; “I have declared injustice unlawful for myself, just as I have declared it unlawful amongst you; therefore, be not unjust”; and, “Actions consist in the intentions behind them.” As for inductive universals, they are those which are arrived at by means of an inductive reading of a number of specific texts and rulings, such as the preservation of the essentials, exigencies and embellishments, as well as all of the general objectives of the Law and overarching principles of jurisprudence, such as, for example, the principle according to which “Necessity renders the forbidden permissible,” and “Hardship brings ease.”

By particular types of evidence (*al-adillah al-khāṣṣah*), I mean evidence which pertains to specific issues, such as a verse which conveys such-and-such a meaning, or a Prophetic hadith which serves as evidence in favor of such-and-such a ruling on such-and-such a question, or particular instances of analogical reasoning. When someone engaged in *ijtihād* is examining these types of particulars, he or she must bear in mind the universals of the Law, its overall objectives, and its overarching principles. In other words, one must recognize both levels at once, and one’s ruling must be based on both, that is, on evidence which is both universal and particular. This, then, is a type of objectives-based *ijtihād* and one approach thereto. Al-Shāṭibī

draws attention in a number of different places to this hermeneutical approach, which coordinates the universals of the Law with its particulars. Numerous references have been made to this approach thus far; however, the principle place in which al-Shāṭibī treats this theme is his discussion of Question 1 in his *Kitāb al-Adillah* (Book of Evidence).<sup>136</sup> Al-Shāṭibī opens his discussion of this question with the reminder that the entire Law is founded “on the intention to preserve the three levels of essentials, exigencies and embellishments...,” and that these universals “govern every particular beneath them...since there is no higher universal under which these three universals may be subsumed; rather, they themselves are the fundamentals of the Law.” He then continues, saying,

If this is the case, and if particulars – which are the fundamentals of the Law and whatever falls beneath them<sup>137</sup> – are derived from these universal principles (just as particulars are derived from their universals in other aspects of existence), then they should be considered together with these universals whenever particular types of evidence are being taken from the Qur’an, the Sunnah, the consensus of the Muslim community, and *qiyās*. After all, it would be impossible for particulars to operate independently from their universals. Hence, whoever interprets a text concerning a particular matter, yet without lending attention to its universal, is in error.

He then continues, “Moreover, just as it is an error to adhere to the particular without reference to its universal, so also is it an error to adhere to the universal without reference to the particular... Rather, they must both be considered together in relation to every question.”

This is the true, most complete *ijtihād*, since every question which comes up for consideration must be examined in light of both particular and universal evidences, as well as the overall objectives of the Law. Hence, those who, in their practice of *ijtihād* and their issuing of legal decisions rely exclusively on their understanding of some particular type of evidence (a verse from the Qur’an, a Prophetic hadith, an analogy drawn between one ruling and another, etc.) are

engaged in a type of *ijtihād* which is no less inadequate and flawed than those who have come to understand some aspect of the objectives of the Law in its preservation of essentials, exigencies and embellishments and its prevention of harm and corruption, after which they proceed to issue legal opinions and rulings without reference to the types of evidence particular to each question and case. Both of these groups – those who focus on the universal at the expense of the particular, and those who focus on the particular at the expense of the universal – fall short of the standard of the ideal *ijtihād*. It follows, then, that consideration must be given to particulars together with their universals, and vice-versa. This is the perspective agreed upon by virtually all those who engage in (sound) *ijtihād*, and the conclusion to which their independent reasoning leads them without fail.

Al-Shāṭibī concludes his discussion of the first question raised in the *Kitāb al-Adillah* (Book of Evidence) with the following cautions:

It is not acceptable to disregard such considerations, since the sum total of Islamic jurisprudence is contained therein, and it is due to the failure to lend them the proper attention that errors occur. Islamic jurisprudence is, in essence, an all-encompassing view of the higher objectives of the Lawgiver. We thus have the obligation to adhere to its texts – both those which pertain to particular circumstances and those which are universally applicable. When this approach is followed, it is valid to rule on legal questions in accordance with the principles of the Law, a process which yields perspectives which are reliable and accurate.

In his discussion of Question 2 in *Kitāb al-Adillah*<sup>138</sup> al-Shāṭibī affirms principles which serve to complement and detail what he has said about *ijtihād* as a process which requires simultaneous consideration of universals and particulars. One such principle states that if speculative evidence is not based on definitive evidence, “it must be treated with caution, and one may not make an unqualified declaration of its validity.” In so saying, al-Shāṭibī is subjecting evidence which is particular and speculative in nature to the authority of evi-

dence which is universal and definitive in nature, foremost among which are the overall higher objectives of the Law.

This approach to *ijtihād* is affirmed by a modern scholar as well, namely, Abd al-Hayy ibn al-Siddiq, who states,

There are two ways in which someone engaged in *ijtihād* may arrive at an understanding of what the Lawgiver intends to communicate through a given text. One of these two ways is to look at the text's linguistic meaning in light of universal legislative principles, while giving these principles priority over particular evidence if it is not possible to combine them. The second way is to look to the higher objectives of the Law.<sup>139</sup>

This approach to *ijtihād*, numerous examples of which are cited by al-Shāṭibī in his discussion of Question 1 in his "Book of Evidence," is firmly rooted in the jurisprudence of the Companions and the (four) imams, most particularly Imam Abū Ḥanīfah and Imam Mālik.

Concerning Abū Ḥanīfah, al-Ḥāfiẓ ibn 'Abd al-Barr states, "Many hadith scholars have considered it permissible to challenge<sup>140</sup> Abū Ḥanīfah due to the fact that he rejected many reports passed down on the authority of reliable, trustworthy individuals. He would compare reports with agreed-upon hadiths and the meanings of the Qur'an, and whatever proved inconsistent with these, he would reject and refer to as 'irregular' (*shādhah*)."<sup>141</sup> Nevertheless, this practice of Abū Ḥanīfah's is an example of the examination of particular evidence in light of what is affirmed by universals. And if this practice is applicable to reports passed down within the Islamic heritage, it is all the more necessary that particular evidences and legal rulings be viewed in light of the universals of the Law and its overall higher objectives.

This approach to *ijtihād* may be illustrated with reference to two other issues as well, namely, restriction of the freedom to act in accordance within one's legal rights, and restrictions on the degree to which contracts are binding upon the parties to them. In speaking of rights here, I am referring to legitimate, established rights, and in

speaking of contracts, I am referring to valid agreements which fulfill the formal conditions prescribed by the Law. When considering a legal question and the evidence pertaining thereto, the individual engaging in *ijtihad* – be he a judge or an individual in some other capacity – may find that the individual concerning whom the question was raised is fully within his established, legal rights and that he is entitled to conduct himself in accordance with these rights however he sees fit because, in so doing, he will be disposing of that which is lawfully his and within his domain. However, when such conduct is viewed in light of the higher objectives and overall principles of the Law, it may become apparent that it conflicts with them, at least in certain cases. Hence, in keeping with the practice of considering universals and particulars in tandem, it will be necessary in such a situation to restrict the degree to which the individual may act in accordance with his rights lest this result in a violation of universal principles and overall objectives.<sup>142</sup>

Of relevance to this theme is what is termed in legal circles, “the prohibition against the arbitrary use of rights,” which is also a well-established principle in Islam and Islamic jurisprudence. Wahbah al-Zuhayli has listed the following five cases in which limitations on rights may be imposed:<sup>143</sup> (1) the intention to harm another, (2) seeking an illegitimate end, (3) resulting harm which is greater than the resulting benefit, (4) uncustomary use (of rights) with resulting harm to others, and (5) the use of rights negligently or incorrectly. What all five cases have in common is that a legitimate right is in conflict with the Lawgiver’s intention to eliminate harm, as a result of which there is no alternative but to seek a compromise between the two even if this requires the restriction or invalidation of the particular in favor of the universal.

As for the matter of placing restrictions on the degree to which contracts are binding upon the parties to them, it is based on the Lawgiver’s intention to establish justice and to abolish injustice in transactions among people in general, and in contracts in particular. If a contract includes provisions which entail a clear injustice to one of the parties thereto, then whoever is engaging in *ijtihad* with respect to the contract in question must not disregard this fact on the

pretext that the contract fulfills the outward or formal requirements for validity. For if the Law recognized unjust contracts which otherwise meet the requirements for valid legal agreements, it would thereby validate contracts involving usury, the sale of unknown merchandise, and all other transactions involving purchase and sale with an element of risk or uncertainty.

The Lawgiver's intention to prevent injustice is fully established in its general application, and likewise as it applies to contracts. This being the case, contracts which are manifestly unjust constitute a blatant, serious violation of the objectives of the Law. It cannot be said that "contracts are the Law of those party to them" unless the contracts themselves conform to the Law of Islam, its limitations and its objectives; after all, the Law of God is above the law that governs those who are party to this or that contract, and if a contract contravenes the Law of Islam, it must be nullified or modified in such a way that it fulfills the requirements of justice for all.

Injustice in a contract may not be visible at first to those who are party to it, or at least, to the party who stands to be harmed by it; however, it may come to light later, as, for example, in the case of contracts involving *bay' al-gharar*, or the sale of merchandise which turns out to be damaged or flawed. In other cases the injustice may be apparent from the start, but one of the parties to it may be obliged to enter into the agreement for one reason or another. In still other situations, the contract may be fair in the beginning, after which circumstances change in such a way that if it continues to be adhered to as it is, it will be unfair or harmful to one of the parties. In all of these cases, what is required of the *mujtahid*, be he a judge or some other individual, is to examine the situation and arrive at a judgment which will achieve balance and fairness.

Among the texts which provide guidance in this connection are those which have to do with compensating the purchaser of land or crops for crop damage. According to a hadith passed down on the authority of Jābir "the Prophet provided compensation for damaged crops,"<sup>144</sup> and he "gave instructions that compensation should be provided for damaged crops."<sup>145</sup> Also on the authority of Jābir we have the report according to which the Messenger of God said, "If

you were to purchase some crops from your brother, after which they were damaged,<sup>146</sup> you would not have the right to demand any money from him.<sup>147</sup> On what basis would you take your brother's money unrightfully?"<sup>148</sup> My concern here is not to discuss the details of legal rulings pertaining to crop damage, nor those pertaining to any of the other types of contracts mentioned thus far. Rather, what concerns me is simply to set forth principles, and in this connection, I believe what I have presented thus far to be sufficient.

### 3. *Achieving Benefit and Preventing Harm*

Whenever and wherever an interest has been identified, efforts must be made to achieve and preserve it; similarly, wherever a source of harm has been determined to exist, efforts must be made to avert it and contain it even if it is not addressed by any specific legal text. In support of this statement, suffice it to note the general texts which urge the pursuit of righteousness, reform, benefit to others and goodness, as well as those which condemn corruption and prohibit evil and harm. Suffice it to note also the consensus among Muslim scholars that the most all-inclusive higher objective of the Law is to bring benefit and to prevent harm both in this world and the next.

This, in short, is the realm of unrestricted interests concerning which, despite the conflicting views which have been expressed concerning them by scholars of *uṣūl al-fiqh*, have nevertheless been adopted by all recognized schools of jurisprudence. Moreover, the validity of unrestricted interests is the subject of unanimous agreement among modern *uṣūl* scholars,<sup>149</sup> as is their importance to Islamic jurisprudence. The detailed research on unrestricted interests by such scholars, much of which I have had occasion to refer to at various points throughout this work, is well-known and in wide circulation.

The validity of unrestricted interests has been affirmed by a number of Shafi'ite *uṣūl* scholars, who stipulate conditions for their application which have met with unanimous acceptance. The most important of these conditions is that they be consistent with the higher objectives of the Lawgiver; al-Ghazālī states in this connection, and

as we have quoted him as saying before, "...if we interpret 'interest' to mean the preservation of the Law's intent, then there is no basis for disagreement over whether it is to be heeded; on the contrary, it must be stated unequivocally to have an authoritative claim over us."<sup>150</sup> Similarly he states, "We sometimes treat human interests as a sign which points to a given ruling, while at other times we treat the ruling as a sign which points to particular human interests."<sup>151</sup> In this context, what concerns us is the first part of this statement by al-Ghazālī, that is, his reference to the fact that human interests can serve as evidence in favor of a particular ruling. In further affirmation of this principle, he states elsewhere, "Every meaning which is appropriate to a ruling, which recurs in a variety of other legal rulings and which is not negated by a definitive, prior principle from the Qur'an, the Sunnah or the consensus of the Muslim community is to be affirmed even if it is not attested to by any specific text."<sup>152</sup>

Nor does al-Shāṭibī go beyond this when he states, "Any legal principle which is not attested to by a specific text but which is in keeping with the actions of the Lawgiver and whose meaning is derived from the [cumulative] evidence found in the Law, is valid and may therefore be built upon and treated as authoritative if it has, by virtue of such accumulated evidence, become a matter of definitive certainty."<sup>153</sup> As examples of what he is saying, al-Shāṭibī cites the practices of *al-istidlāl al-mursal* (reasoning or argumentation based on unrestricted interests) and of *al-istiḥsān*, or juristic preference, both of which revolve around concern for human interests. Hence, concern for human interests – provided that these interests are genuine interests and in keeping with the higher objectives of the Lawgiver – is a principle characterized by definitive certainty which must, therefore, be employed as a guide in and basis for the issuance of legal rulings. Indeed, not even *qiyās*, or analogical deduction, is of greater importance in this process than are unrestricted interests. It was noted earlier that according to al-Juwaynī the preservation of essential interests is to be given priority over even an obvious analogy, while *istiḥsān* is simply the practice of giving human interests priority over *qiyās*. Al-Shāṭibī states, "Similarly, the established practice of *istiḥsān* is, in Mālik's view, based on this principle,

since its meaning consists in giving priority to *al-istidlāl al-mursal*, that is, reasoning based on unrestricted interests, over *qiyās*, or analogical deduction.”<sup>154</sup> In his *Kitāb al-Ijtihad* (Book of Ijtihad), al-Shāṭibī discusses the Malikite form of *istiḥsān*, saying that “what it requires is a return to assigning priority to *al-istidlāl al-mursal* over *qiyās*.”<sup>155</sup> This process does not involve reliance on mere opinion or a personal decision to base legal rulings on unrestricted interests; rather, it is an application of the Law and its overall higher objectives. For, as al-Shāṭibī states,

Those who engage in *istiḥsān* do not rely simply on their own tastes and preferences. Rather, they rely upon what they know to be the Lawgiver’s higher objective overall. *Istiḥsān* is called for, for example, when they are dealing with a question in relation to which the outcome of analogical deduction would require action that would lead to the forfeiture of some human interest or cause some form of harm or corruption...<sup>156</sup>

Once a given human interest has been identified, and once it has been established that it is in keeping with the higher objectives of the Lawgiver, it makes no sense to stipulate that it not violate the outcome of analogical deduction as does al-Buti.<sup>157</sup> After all, a human interest of this nature is a principle in and of itself and an end in itself; on what basis, then, should it be subjected to particular instances of *qiyās* which are not only speculative in nature, but means rather than ends?!

It should be noted, in addition, that reliance on genuine human interests which are recognized by the Law is a type of universal analogical deduction, or *qiyās kullī*. Moreover, as we have seen, the universal is to be given priority over the particular if there is a conflict between the two. It is this universal *qiyās*, or let us say, aim-based *qiyās*, which is referred by Ibn Rushd the grandson as “unrestricted *qiyās*.” Ibn Rushd notes, for example, that a debtor who is claiming bankruptcy but whose bankruptcy and financial straits are not known is to be imprisoned until his bankruptcy has been demonstrated or until the creditor acknowledges it. He also mentions that

there is consensus on this ruling even though it is not mentioned in any authentic text of Islamic Law. Then he adds, "This, then, is evidence in favor of that type of analogical deduction which is required by human interests, and it is to this that we refer as 'unrestricted analogical deduction.'" 158

This unrestricted *qiyās* does not rest on a specific, particular source text; rather, it "is required by human interests." Hasan al-Turabi has called for an expansion of this type of *qiyās* – to which he refers as "broad *qiyās*" – saying,

It might also be helpful for us to expand our *qiyās* based on particulars to include all manner of texts, and to derive from them a specific aim of the religion or a specific human interest. Having done this, we seek to fulfill this aim wherever and whenever it is applicable to new circumstances and events. This is a type of jurisprudence which will enable us to emulate the jurisprudence of ʿUmar ibn al-Khaṭṭāb since it is a jurisprudence of broad, general interests whose aim is not to treat particular cases in such a way that they must conform in detail to a set model, or such that a case is evaluated based on an analogy which is drawn between it and a similar, previous case; rather, it seeks to reconstruct the overall directions and objectives of the Law from its earliest beginnings and, in light of this, to guide our present way of life.<sup>159</sup>

Al-Turabi has also referred to this practice as 'comprehensive *qiyās*' and 'the *qiyās* of unrestricted interests.' Hence, we are brought back to the original name, the name which is well-known and prevalent among scholars of *uṣūl al-fiqh*, namely, unrestricted interests. This multiplicity of designations serves to confirm the agreement which exists concerning the entity being designated and to clarify its content, that is, consideration for human interests and efforts to achieve and preserve them even if they are not named explicitly in specific texts of the Law.

An example of the interest-based fatwas issued by al-Shāṭibī is cited by al-Wansharīṣī in his *al-Mi'yār*, where he relates that al-Shāṭibī was once asked about a man who had been assigned to do all of the slaughtering and skinning for the butchers in the market, with

the stipulation that all of the butchers would be required to pay his wages. However, the butchers were unhappy with this arrangement and wanted to do their own slaughtering and skinning, both of which were tasks they performed with competence and skill. The question, then, was: Is it permissible for this man to undertake this work? And is he entitled to wages in this situation?

He [al-Shāṭibī] replied: “With regard to the man who has been assigned to undertake the slaughtering, he will have been assigned to this task either with a view to serving human interests, or for some other reason. In the former case, he will have been assigned to this job due to the fact that he observes the daily ritual prayers and the proper Islamic procedures for slaughter, as well as other, related, considerations. And if this is the case, there is no objection to his being authorized to perform this work; similarly, it is permissible for him to receive wages for his labor, since the general populace must accept that which is in their best interest, and if he were dismissed for the sake of all of the other butchers, the slaughtering would be left to those who neglect ritual prayer, get drunk, neglect to utter the *bismillah* when slaughtering, and the like. Such things have actually happened, so great is the corruption which reigns these days. If, on the other hand, he has been assigned to this task without a view to serving human interests<sup>160</sup> and despite the fact that someone else is more qualified for the job, then woe to the man who has thus been assigned, and particularly if he takes the wages by force. Such a person must repent of this trade and return what he has taken from the other butchers.”<sup>161</sup>

Not unlike the fatwa just cited is another ruling issued by al-Shāṭibī, likewise based on unrestricted interests, according to which it is permissible to impose a tax if the state treasury is unable to provide for the needs of the populace. A well-publicized disagreement arose over this issue between al-Shāṭibī and his shaykh, Abū Saʿīd ibn Lubb, who held that such a measure is not permissible.<sup>162</sup> In the context of discussing this question, al-Wansharīṣī quotes a fatwa which was requested of the judge Abū ʿUmar ibn Manzūr.<sup>163</sup> A model fatwa which exemplifies a balanced, well-thought out, and

objectives-based perspective, the legal considerations upon which it is based are presented as follows:

The established principle of relevance here is that Muslims are not to be required to pay levies which are not required by Islamic Law; rather, they may only be required to render zakah and what is imposed by the Qur'an and the Sunnah, such as war booty which has been gained without fighting, *rikāz*<sup>164</sup>, and the bequests of those who have bequeathed money to the state treasury. This is what makes it possible to bear the burdens of the homeland, to provide for its soldiers, to preserve Muslims' interests, and to defend and support Islam and the larger Muslim community. If the state treasury is unable to pay soldiers' salaries and to provide what it needs by way of arms and other war materiel, this lack may be distributed among the people. In this type of situation, some hold that a legal ruling calling for such a measure may be derived from the words of God Almighty: "They said: 'O thou Two-Horned One! Behold, Gog and Magog are spoiling this land. May we, then, pay unto thee a tribute on the understanding that thou wilt erect a barrier between us and them?'" (Qur'an, 18:94).

However, such a tax may only be levied under the following conditions: (1) There must be a genuine need. Hence, if there are sufficient funds in the state treasury for it to fulfill the aforementioned functions, it is not permitted to impose anything on the people in keeping with the words of the Prophet, "No poll tax shall be levied upon Muslims," and, "No one who has levied taxes will enter Paradise," which applies to the unjust imposition of duties or taxes. (2) The state must dispose of the proceeds justly; hence, it is unacceptable for the state treasury to keep the money for itself rather than distributing it among its Muslim subjects, nor may it spend the money wastefully, give it to those who do not truly deserve it, or give anyone more than he deserves. (3) The funds must be disbursed in accordance with existing needs, not with an aim to achieving some purpose of its own. (4) Taxes may only be levied on those who are able to pay them without suffering harm or injustice as a result. As for those who have little or nothing, no taxes may be required of them. (5) The state treasury must monitor its financial status at all

times, since there may come a time when it no longer needs to increase its available funds.<sup>165</sup>

There is nothing which our jurisprudence, both past and present, needs more than this type of rightly guided, objectives-based assessment and this keen concern for the interests of Islam and Muslims. Such things require ample experience in discerning between what is beneficial and what is harmful, as well as a thorough understanding of the objectives of the Law. According to al-Shāṭibī, this is all that is required for the ability to assess and order human interests by means of independent reasoning. He states, “If *ijtihād* is employed in order to derive rulings from texts, knowledge of the Arabic language will be required. If, on the other hand, it is for the purpose of discerning sources of benefit and harm regardless of what particular texts have to say, or is based on some ruling which is accepted by all on the authority of a scholar who has already engaged in *ijtihād* based on particular texts, this does not require knowledge of the Arabic language. Rather, all it requires is a complete, detailed knowledge of the higher objectives of the Law.”<sup>166</sup>

#### 4. *Consideration of Outcomes*

Whenever someone engages in *ijtihād*, makes judgments and issues legal decisions, it is imperative that he assess the final outcomes of the actions concerning which he is ruling; in other words, he must have an appreciation of the consequences of his rulings and fatwas. In other words, a *mujtahid* must not consider his mission to be limited to that of “issuing a legal ruling.” Rather, his task is to rule on the action in question while bearing in mind the outcomes and consequences to which his ruling is likely to lead. Otherwise, it will mean either that he is not competent to engage in *ijtihād*, or that he is neglecting his duty in his capacity as *mujtahid*.

These considerations are an outgrowth of the principle that “rulings are inseparable from their objectives.” Hence, the *mujtahid* who has been appointed as a spokesperson for the Law must seek conscientiously and faithfully to ensure that rulings achieve their objectives

and that the obligations imposed on us by the Law lead to the best possible outcomes. Imam al-Shāṭibī establishes the foundation for this principle, saying, "Heeding the outcomes of actions is consistent with the higher objectives of the Law, whether the actions concerned are in accordance with the Law or in violation thereof. Therefore, the person engaging in *ijtihād* is not to judge a human action, be it one of commission or omission, until after he has given careful thought to the consequences to which the said action will lead."<sup>167</sup>

The Prophetic *Sunnah* contains a number of instructive applications of these truths. We find, for example, that the Prophet refrained from putting hypocrites to death despite his awareness of who they were and of the fact that they deserved to die, saying, "I fear that people will say that Muhammad kills his friends."<sup>168</sup> Similarly, he abandoned the idea of rebuilding the Ka'bah lest he stir up confusion among the Arabs, many of whom were new to Islam. In explanation of his concern, he said to 'Ā'ishah, "Have you not noted the fact that when your people built the Ka'bah, they disregarded the foundations laid by Abraham?" 'O Messenger of God,' she replied, 'will you not then restore it to those foundations?' 'Were it not for the fact that your people were only recently delivered from unbelief,' he replied, 'I would do so.'<sup>169</sup> And when a certain Bedouin urinated in the mosque and the Companions rose to rebuke and prevent him, the Prophet said, "Do not prevent him. Leave him alone."<sup>170</sup>

Had it not been for the Prophet's allowance for outcomes, he would have been duty bound to put the hypocrites to death, rebuild the Ka'bah on the foundations laid by Abraham, and prevent the Bedouin Arab from completing his reprehensible act in the mosque. However, the first course of action would have caused people to repudiate Islam for fear that they might be killed on suspicion of being hypocrites. The second would have led the Arabs to believe that the Prophet was someone who razes holy sites and alters their features (for no good reason), while the third was bound to cause the person urinating to soil his body and clothing and may also have contaminated other areas of the mosque as well, not to mention posing potential danger to his health.

This concern for outcomes is similarly reflected in the decision

issued by Ibn ‘Abbās when he was approached by a man who asked him, “Is repentance possible for someone who has murdered a believer with premeditated intent?” “No, only hellfire” replied Ibn ‘Abbās. When the inquirer had departed, someone said to Ibn ‘Abbās, “So is this the kind of fatwa you give us?! You used to tell us that it is possible for someone who has committed murder to repent, and for his repentance to be accepted!” Ibn ‘Abbās replied, “I suspect that this is a disgruntled man who wants to murder a believer.” And when they investigated the situation, Ibn ‘Abbās’s suspicion was borne out.<sup>171</sup>

A woman once came to ‘Abd Allāh ibn Mughaffal and asked him for his ruling on a woman who had conceived as a result of engaging in sexual misconduct and who, after giving birth, killed her son. Ibn Mughaffal replied, “What! Hers is the hellfire!” The woman departed in tears, whereupon he summoned her back and said, “I see that your situation is reflected in the words, ‘Yet he who does evil or [otherwise] sins against himself, and thereafter prays to God to forgive him, shall find God Much-Forgiving, a Dispenser of Grace’ (Qur’an, 4:110).” The woman then dried her eyes and went on her way.<sup>172</sup> Thus we see that after responding to the woman with a severe rebuke in order to deter her from further conduct of this sort and move her to repentance, Ibn Mughaffal saw from her condition that his response might drive her to despair of God’s mercy and that this, in turn, could lead her to suicide, to further sexual misconduct, or other unwanted outcomes. Hence, he modified his initial response to one more suited to her condition and circumstances.

Scholars have determined that in order for a fatwa to be sound, it must reflect an appreciation of time, place and persons. Moreover, consideration for outcomes, which is our concern in this discussion, requires all of these things as well: It requires a knowledge of conditions pertaining to times, places and people which will enable the *mufti* to engage in an accurate assessment of actions’ consequences and the effect which his fatwa will have upon them.

Also of relevance in this connection is what al-Shāṭibī refers to as *taḥqīq al-manāt al-khaṣ* (determination of the particular basis).<sup>173</sup> The scholar’s determination of the basis for a ruling may be general,

as when he defines what is meant by a poor person who merits a share of the zakah funds, or what is meant by an adulterer who is *muhṣan*,<sup>174</sup> or what is meant by reliability in relation to legal testimony and the narration of historical accounts. In other cases it will be specific; that is, it will relate to a particular person and depend on the scholar's knowledge of what is appropriate to such a person and which legal rulings would apply to him or her, as well as the extent of such appropriateness or application.

The process of *ijtihād* at this level of specificity requires a special type of individual. It is not sufficient for him or her to be a legal specialist with expertise in dealing with legal texts and their intricacies; rather, this process calls for someone with expertise in the realm of human psychology and the ability to read people's souls with their subtleties and peculiarities. Similarly, it calls for someone who is knowledgeable about social realities and influences. Al-Shāṭibī states,

The person undertaking this type of specific determination must be someone endowed with a divine light by means of which he knows people's souls and recognizes their aspirations, their disparate levels of understanding, their ability, or lack thereof, to tolerate the Law's requirements and bear its burdens, and the importance, or lack thereof, which they attach to earthly satisfactions. Such a scholar applies to each individual the rulings contained in the texts of the Law which are appropriate to him or her, knowing that this is the divine purpose for which the requirements of the Law have been conveyed to humankind.<sup>175</sup>

Elsewhere al-Shāṭibī states, "The individual who has attained this rank may be described as lordly (*rabbānī*), wise (*ḥakīm*), firmly established in knowledge (*rāsikh fil-ilm*), knowing (*alim*), and a man of understanding (*faqīh*) and discernment (*aqil*)." Moreover, among the distinguishing features of the independent reasoning in which he engages is that he "looks to outcomes before making a reply to the question asked of him," whereas others reply to the question without regard for outcomes.<sup>176</sup>

There is a relevant lesson for scholars in the words of the Prophet,

“When a ruler issues a ruling and, in the process, engages in *ijtihad*, or independent reasoning, then if he is correct in his judgment he will merit two rewards, whereas if he is mistaken, he will merit one reward.”<sup>177</sup> What this hadith tells us is that whenever a ruler (or any scholar) issues a ruling, that is to say, whenever he prepares to do so, he must engage in independent reasoning. Moreover, the conclusion he reaches by means of his *ijtihad* on one occasion will not exempt him from engaging in the process anew in relation to similar questions in the future since, no matter how great the similarities between one case and another, each one has its own distinguishing characteristics and peculiarities. As al-Qurṭubī expresses it, “This [hadith] attests to the correctness of *uṣūl* scholars’ assertion that the person who engages in *ijtihad* must look anew at each case which emerges and not depend on the conclusions he reached based on a previous *ijtihad*.”<sup>178</sup>

Hence, determination of the specific basis for the ruling in question as it pertains to individuals, events, actions, times and places can help in making a proper assessment of outcomes on which to base one’s *ijtihad* and resultant legal decision. In this manner, one will be all the more likely to achieve the outcomes which he intends to achieve, and to avoid those consequences which he aims to prevent.