

# A Systems Approach to Islamic Juridical Theories

## Overview

How can *maqāṣid al-sharī'ah* play an actual role in the juridical methods of *ijtihad*? How does the system feature of ‘purposefulness’ relate to the *fiqhī* feature of the ‘*maqāṣid*-isation’? How can we utilize the proposed ‘Islamic systems philosophy’ in the juridical theory, in order for the Islamic law to stay ‘renewable’ and ‘alive’? How can a systems approach utilise the system features of cognition, holism, multi-dimensionality, and openness in the theory of Islamic law? How can we address the shortcomings of the classic, modernist, and post-modernist theories, which Chapters Three, Four, and Five, respectively outlined?

This chapter attempts to answer the above questions by taking a systems approach to the fundamentals of Islamic law:

- It identifies those specific areas where systems philosophy could contribute to these fundamentals.
- Systems features previously introduced in Chapter Two, purposefulness, cognition, holism, multi-dimensionality, and openness, will be recalled.
- Finally, methods for realising these features in the fundamental methodology of the Islamic law will be proposed.

## 6.1. TOWARDS VALIDATING ALL 'COGNITIONS'

## 'Revealed' Ijtihad?

Jurists generally define fiqh as the outcome of human 'understanding' (*fahm*),<sup>1</sup> 'perception' (*taṣawwur*),<sup>2</sup> and 'cognition' (*idrāk*).<sup>3</sup> However, *fiqhī* methods and outcomes are often depicted as 'God's rulings.' Various sections of this book that addressed implications and interpretation show that although the script is heavenly, its interpretation is subject to the exegete's or jurist's worldview. Nonetheless, interpretations are often presented as 'God's commands' in order to be (mis)used for the interests of a powerful few.<sup>4</sup>

In addition, outcome of ijtihad is often included in the category of 'revealed knowledge,' even though the very definition and validity of the methods of ijtihad are subject to wide differences of opinion, as we have seen. A primary example in this regard is consensus (*ijmāʿ*). Despite the great many differences over the very definition of consensus, as previously explained, many past and present jurists considered it 'an evidence as certain as the script' (*dalīlun qaṭʿiyyun kal-naṣṣ*), 'an evidence constructed by The Legislator' (*dalīlun naṣabah al-Shārīʿ*), and even counted its rejectors amongst 'infidels' (*jāhid al-ijmāʿi kāfir*).<sup>5</sup> Readers familiar with traditional fiqh literature know that an *ijmāʿ* is often claimed, in rulings of clear difference of opinion, in order to sanction one opinion or the other. Ibn Taymiyah, for example, reviewed Ibn Ḥazm's '*Marātib al-Ijmāʿ*' (Levels of Consensus) in his '*Naqd Marātib al-Ijmāʿ*' (that is, Critique of Levels of Consensus). Ibn Taymiyah mentioned numerous examples of inaccurate claims of consensus that Ibn Ḥazm had made regarding a number of *ijtihādī* issues, despite much difference of opinion around them. Examples are 'judging rejectors of *ijmāʿ* to be apostates,' 'not allowing women to lead men in collective prayers,' and even 'enforcing the payment of four golden Dinars as *jiziyah* tax.'<sup>6</sup>

I argue, however, that consensus is not a 'S/source of law,' but is merely a mechanism of consultation or, to use systems terminology, multiple-participant decision making. However, *ijmāʿ* was (mis-)used by some latter-day scholars in order to monopolise fatwa and restrict it

to a specific 'centrist' elite, to use a postmodern concept. I also agree with modernists who suggested that the principle of consensus could be utilised today as a 'mechanism for making collective fatwa,'<sup>7</sup> especially with 'modern technology and instant worldwide communication.'<sup>8</sup> I further agree with other proposals that develop *ijmā'* to become a form of 'societal participation in the state's affairs.'<sup>9</sup>

On the other hand, some jurists considered the reasoning method of analogy (*qiyās*) to be 'divinely sanctioned.' They suggested that, 'making an analogy between a primary and a secondary case is an analogy carried out by the Legislator Himself' (*tashbīhu far' in bi 'aṣlin tashbīh al-Shāri'*).<sup>10</sup> Therefore, even in clear cases of *ijtihād* via analogical reasoning, some jurists considered themselves to be 'speaking in God's name.'<sup>11</sup> This was a 'disaster,' to quote Garoudi, 'in which the limits between the words of God and the words of humans were erased.'<sup>12</sup>

### *Separating the Revealed from its 'Cognition'*

The position of a group of jurists, known in the literature of Islamic law by '*al-muṣawwibah*' (The Validators), is that rulings are 'assumptions' (*ẓunūn*) on the part of *mujtahidūn* when they reflect upon the scripts. This position makes a clear and much needed distinction between human ideas and the scripts.<sup>13</sup> Furthermore, *al-Muṣawwibah* concluded that different juridical opinions, however contradictory they might be, are all valid expressions of the truth and are all correct (*ṣawāb*).<sup>14</sup> *Al-Muṣawwibah* went further to conclude that, 'there are multiple truths,'<sup>15</sup> an idea that had later influenced medieval 'western philosophy' through Ibn Rushd.<sup>16</sup> Jurists who, often, subscribed to this position were from the jurist/philosopher category, such as Abū al-Hasan al-Ash'arī, Abū Bakr ibn al-'Arabī, Abū Ḥāmid al-Ghazālī, Ibn Rushd, and a number of Mu'tazilīs, such as, Abū al-Huza'īl, Abū 'Alī, and Abū Hāshim. Al-Ghazālī expressed their view by saying: 'God's judgement, from the jurist's perspective, is what the jurist judges to be most probably true.'<sup>17</sup> However, al-Ghazālī excluded rulings that are 'prescribed according to a *naṣṣ*.'<sup>18</sup> We have demonstrated above how any '*naṣṣ*' could bear a number of interpretations and implications, which would make all judgements be in accordance with what the jurist 'judges to be most probably true.'

A systems approach to the Islamic law, entails viewing it as a 'system,' in the ontological sense of the word. Hence, applying the 'cognitive nature of systems' feature would lead to a conclusion identical to *al-Muṣawwibah*'s, i.e., rulings are what the jurist judges to be most probably true, and different juridical opinions are all valid expressions of the truth(s) and are all correct.

In order to systematically separate the 'revealed' from its fiqh or 'cognition,' Chart 6.1 re-draws the relationships between fiqh, shari'ah, 'urf, and *qānūn*, which had been drawn in Chart 3.1. The new relationship-chart reflects the 'cognitive nature' of human systems. Thus, fiqh is shifted from the realm of 'revealed knowledge' to the realm of 'human cognition of that revealed knowledge,' which falls outside the circle of 'revealed knowledge.' Hence, a clear differentiation is suggested between shari'ah and fiqh, which implies that no *fiqhī* (practical) opinion is qualified to be a 'matter of belief,' regardless of the considerations of authenticity (*thubūt*), linguistic implications (*dilālah*), consensus, or analogical reasoning.

Moreover, based on the differentiation between types of prophetic actions according to their *maqāṣid*/intents, a section of the prophetic tradition is shifted outside the circle of 'revealed knowledge,' and another section would fall in the 'rough set' on the border of the circle, to borrow a term from systems theory.<sup>19</sup> This 'rough set' is the section of prophetic traditions that were made with specific 'intents,' as al-Qarāfī and Ibn Ashur had suggested, and hence, falls on the 'border' between 'revelation' and 'human decision making.'

Hence, prophetic traditions would fall under one of the following three categories, illustrated on Chart 6.1, from (a) to (c). Category (c) is excluded then from the realm of 'jurisprudence.'

- (a) The Prophet's direct conveyance of the message, which al-Qarāfī had called, 'actions in the capacity of conveyance' (*al-taṣarrufu bi al-tablīgh*).
- (b) Traditions with specific 'intents,' other than the direct conveyance of the message. Related narrations should be understood and applied in the law in the context of the intent.

- (c) Traditions that fall in the realm of human everyday decisions/actions, which Ibn Ashur had referred to as, ‘the intent of non-instruction.’

On the other hand, Chart 6.1 suggests that the intersection between *‘urf* and *fiqh* should be understood on a level deeper than a ‘consideration’ in application. An upcoming section elaborated on the relationship between *‘urf* and *fiqh* in light of the *maqāsid* of universality of the Islamic law, as Ibn Ashur had proposed in his ‘*Maqāsid al-Sharī‘ah*.’ Thus, *fiqh* would practically accommodate *‘urf* that fulfils the requirements of *maqāsid*, even if this *‘urf* is different from the ‘implication’ (*al-dilālah*). This Chapter will also propose an extension of the notion of *‘urf* in light of the notion of ‘worldview.’ Finally, both *‘urf* and *fiqh* should contribute to *qānūn*, while giving human legislators the freedom to convert *‘urfī* customs and *fiqhī* rulings into detailed statutes that best suit the society and its needs. One should not copy and paste *fiqhī* rulings or *‘urfī* stipulations verbatim into the law.

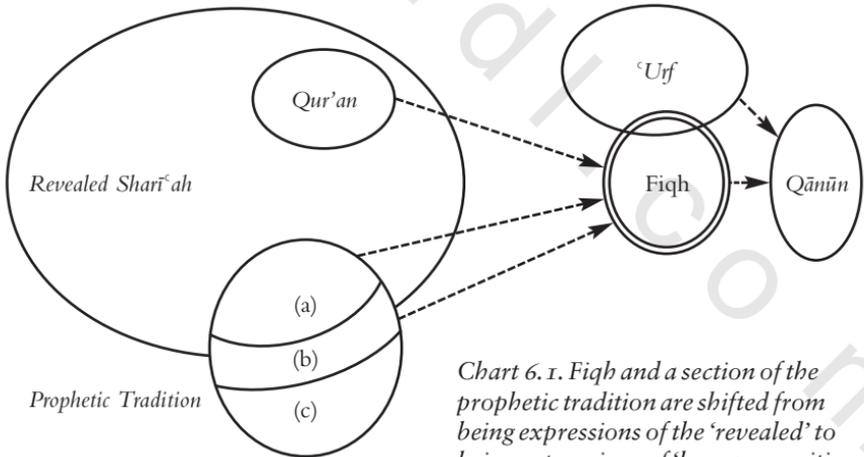


Chart 6.1. *Fiqh* and a section of the prophetic tradition are shifted from being expressions of the ‘revealed’ to being expressions of ‘human cognition of the revealed.’

## 6.2. TOWARDS 'HOLISM'

*The 'Uncertainty' of Individual Evidence*

A few jurists noticed the limitation of the reductionist and atomistic approach that fundamental methodology usually takes. However, their criticism of 'atomism' was based only on its inherent 'uncertainty' as opposed to its binary opposite, 'certainty.' In his book on the fundamentals of law, Fakhr al-Dīn al-Rāzī summarised the different reasons that jurists had mentioned for why any single 'linguistic evidence' (*dalīlu khitāb*) of a *naṣṣ* could only be 'probable' (*ẓannī*).<sup>20</sup> Below is a summary of these reasons.

1. There is a possibility that the ruling that we conclude from the single *naṣṣ* has been restricted to certain circumstances, without our knowledge.
2. There is a possibility that the expression of the single *naṣṣ* is metaphoric.
3. Our reference in language is linguists, which are people who could err.
4. Arabic grammar is conveyed to us via ancient Arabic poetry, which was narrated through individuals' narrations (*riwayāt āḥād*). These narrations are not certain and the original poets themselves could have made grammatical mistakes.
5. There is a possibility that one or more of the words of this single *naṣṣ* have multiple meanings.
6. There is a possibility that one or more of the words of the single *naṣṣ* have been altered, over time, in a way that alters the original meaning.
7. There is a possibility that the expression has a hidden (*khafī*) meaning that we do not understand.
8. There is a possibility that the ruling that we conclude from the single *naṣṣ* has been abrogated, without our knowledge.
9. There is a possibility that a ruling that we conclude from a single *naṣṣ* is at odds with 'reason.' In such case (al-Rāzī says), if both reason and narration are confirmed, then one of them is wrong.

Moreover, reason is our means to confirm the validity of narration itself. Therefore, reason has precedence over narrations. Thus, we should follow reason, in such cases, and not the linguistic evidence of the narration.

I would add the following possibilities to the above nine.

1. There is a possibility that a single *naṣṣ* could imply a meaning that ‘contradicts’ other single *nuṣūṣ*. This did happen in a large proportion of *nuṣūṣ*, and is studied as the standalone subject of ‘opposing scripts’ (*al-muta‘ārid*).
2. There is a range of possibilities of error in conveying *āḥād* hadith narrations, which comprise most of the prophetic narrations.
3. There is a range of possibilities for the ‘interpretation’ of any single *naṣṣ*, which affects the way we conceive its meanings and implications.

Al-Rāzī’s ‘philosophical background’ contributed to his appreciation of how profound it is to claim ‘certainty’ in single verbal evidences. However, al-Rāzī’s concern with the ‘uncertainty’ of single evidences did not allow him to see the prime problem of single-evidenced approach, which is the partiality and atomism of its ‘causation’ basis.

### *Limitation of ‘Causation’ in Traditionalist and Modernist Theories*

It was previously explained how theologians/*kalāmīūn* debated the ‘principle of causation’ (*al-sababiyyah*) in God’s actions. They divided ‘God’s actions’ into creation-related actions (*al-fi‘l al-khalqī*) and law-related actions (*al-fi‘l al-tashrī‘ī*).<sup>21</sup> The majority of jurists, who were Ash‘arites, Salafīs, or Zāhirīs, believed that God’s ‘creation-related’ actions are ‘above causes.’ Yet, some of them assigned ‘causes’ (*‘ilal*) to God’s ‘law-related’ actions, with which the rulings were correlated. On the other hand, Mu‘tazilīs, Shia, and Maturidites believed in the causality of all of God’s actions. Therefore, a ‘causation-based’ way of thinking has dominated methodology of Islamic law in all schools and tendencies until today.

Some jurists have stressed the importance of ‘holistic evidence’ (*al-dalīl al-kullī*). Yet, this evidence had no impact on methodology itself, which remained largely causation-based in, both, theology and law. Al-Juwaynī, for example, considered referring to a ‘holistic feature’ of the Islamic law for evidence of rulings to be a valid procedure that he called ‘holistic analogy’ (*qiyās kullī*).<sup>22</sup> Al-Shāṭibī, for another example, considered the fundamentals of the Islamic law (*uṣūl al-fiqh*) to be based on the universal/holistic features of the revealed law (*kullīyyat al-sharīʿah*).<sup>23</sup> He also gave priority to ‘holistic/universal fundamentals’ (*al-qawāʿid al-kullīyyah*) over ‘single and partial rulings’ (*āḥād al-juzʿīyyāt*). His rationale was that, ‘single and partial rulings are there to support holistic fundamentals, which are the purposes of the law that must be maintained.’<sup>24</sup> Again, the implication of these views on the jurists’ and theologians’ ‘causation-based’ methodology never materialised.

Islamic modernism pointed to the general deficiency of ‘partial and individualistic approaches to Islamic law.’<sup>25</sup> For example as explained earlier, contemporary scholars tried to remedy the ‘individuality drawback’ (*al-fardiyyah*) in the notion of *maqāṣid*. Such included Ibn Ashur’s giving priority to ‘societal’ over ‘individual’ *maqāṣid*, Rashid Rida’s inclusion of society’s ‘reform’ and ‘rights’ in his theory of *maqāṣid*, Taha al-Alwani’s inclusion of the *maqāṣid* of ‘developing civilisation on earth’ in his theory, and Yusuf al-Qaradawi’s Qur’anic-based ‘universal *maqāṣid*’ of building good families and nations.<sup>26</sup> However, again, due to its nineteenth-century philosophical ‘ceiling’ put on modernism, twentieth century Islamic modernism could not break out of the traditional causation-based theological framework.

Islamic modernism, however, recently introduced a significant application of the principle of holism, which is ‘thematic exegesis.’ Hasan Turabi’s ‘*al-Tafsīr al-Tawḥīdī*’ (The Unifying Exegesis) is the clearest example of this approach.<sup>27</sup> Turabi explained that a unifying (*tawḥīdī*) or holistic (*kullī*) approach entails a number of methods on various levels. On the level of language, it entails ‘dealing with the Qur’anic language as an integral whole’ and ‘unifying the language of the Qur’an with the language of the receivers of the message at the time of the revelation.’ On the level of human knowledge, it entails a holistic

approach to both the unseen and seen worlds with all their multitude of components and rules that govern them. On the level of topics, it entails dealing with themes regardless of the order of verses, in addition to applying them to everyday life. In terms of scope, it has to include people regardless of their space and time. It also entails unifying law with morality and spirituality in one holistic approach.<sup>28</sup>

### *Towards a 'Holistic' 'Ilm al-Kalām*

Contemporary systems philosophy argues a 'synthetic' and 'holistic tendency' that is 'fundamental in nature.'<sup>29</sup> Systems philosophers assert that 'our expanding of the too simple, two-term relation "cause-effect" into a complex series is closer to the structure of this world, as far as we know it.'<sup>30</sup> Thus, in systems philosophy literature, the principle of causation is criticised, along with all theological views that were associated with it, such as, the 'God of Berkeley,' 'divine Substance of Spinoza,' and 'Leibniz's appeal to Pre-established Harmony.'<sup>31</sup> The same systems-based critique could apply to the method of causation in Islamic philosophy of religion (*ilm al-kalām*), including the 'causation-based' theological arguments proposed by jurists and philosophers.<sup>32</sup> For the most recent major 'causation-based' argument, this could include theological arguments proposed by Ibn Ḥanbal, Ibn Sīnā, al-Rāzī, al-Ash'arī, Abdul-Jabbār, al-Ghazālī, al-Māturīdī, al-Āmidī, al-Shāṭibī, Ibn Taymiyah, Ibn Rushd,<sup>33</sup> and Mohammad Abdu.<sup>34</sup>

Systems philosophers mention a number of 'fallacies' that could be counter-arguments for causation thinking based on holistic thinking. In his 'Corpus Errorum,' Korzybski, for example, mentioned a number of these fallacies. These include 'the fallacy of attributing to one cause what is due to many causes,' 'the fallacy of concluding that because one factor plays a role, another does not,' 'the fallacy of drawing negative conclusions from positive observations,' and 'the fallacy that the characteristics of organisms are divisible into two distinct classes; one due to heredity, the other to environment.'<sup>35</sup>

However, in my view, there is no association between theological concepts and the method of 'causation' except in the minds of theologians who used 'the principle of causation' to address the question of

the ‘existence of God’ and other theological questions. Therefore, if ‘causation’ is to evolve into ‘holism’ in human science and philosophy, so should theological arguments.

I propose that the ‘principle of holism,’ as explained in systems philosophy, could play a role in contemporary renewal proposals, not only in Islamic law but in Islamic *‘ilm al-kalām* (philosophy of religion). Roughly speaking, the ‘evidence of creation’ (*dalīl al-ikhtirā‘*) would rely on the ‘impossibility of an action without a purpose,’ rather than the ‘impossibility of an action without a cause,’ as traditionally argued. The ‘evidence of sustenance’ (*dalīl al-ri‘āyah*) would rely on the balance and ‘human-friendliness’ of earth’s ecosystems and sub-systems, rather than classic arguments of direct sustenance. Similarly, the ‘evidence of existence’ (*dalīl al-wujūd*) would, then, rely on the systematic and integrative design of the universe, as we know it today, rather than the classic ‘First Mover’ cosmological argument, to use Mohammad Abdu’s expression.

### 6.3. TOWARDS OPENNESS AND SELF-RENEWAL

It was previously explained (in Chapter Two) that a system must maintain a degree of openness and self-renewal in order to ‘stay alive.’ This section proposes two mechanisms towards a desired openness and self-renewal in the Islamic law, respectively. First, change of rulings with the change of the jurist’s ‘worldview’ or ‘cognitive culture’ is proposed as a mechanism of openness in the system of Islamic law. Second, ‘philosophical openness’ is proposed as a mechanism of self-renewal in the system of Islamic law.

#### *Change of Rulings with ‘Cognitive Culture’*

‘Worldview’ is the translation of the German term ‘Weltanschauung,’ a hundred year old term literally meaning ‘world outlook.’<sup>36</sup> A worldview is ‘a set of pre-suppositions which we hold about the basic makeup of the world,’<sup>37</sup> ‘a frame of reference for human experience,’<sup>38</sup> and ‘a system of belief.’<sup>39</sup> Thus, a worldview is the product of a number of factors that shape human ‘cognition’ of the world. The following are examples of ‘theories’ that make up a human worldview.

1. God, the world, human beings, afterlife, knowledge, morality, and history.<sup>40</sup>
2. Myth, doctrine, ethics, rituals, and society.<sup>41</sup>
3. Beliefs, concepts, sense of order, social constructs, role-models, and moral precepts.<sup>42</sup>
4. The natural world, ethics, politics, biology, psychology, methods of scientific investigation, and many other factors.<sup>43</sup>
5. God, oneself, nature, space, and time.<sup>44</sup>

All of the above theories show that a worldview is shaped by everything around us, from religion, self-portrayal, geography, and the environment, to politics, society, economy, and language. Using the word ‘culture’ in a broad sense, worldview represents ‘cognitive culture.’<sup>45</sup> Cognitive culture is the mental framework and sense of reality through which people view and interact with the outside world.

Traditionally, the fundamental of *al-ʿurf* (customs) in the theory of Islamic law deals with the ‘interaction with the outside world.’ A Ḥanafī fundamental rule states that ‘an implicit condition according to custom is similar to an explicit condition according to scripts’ (*al-maʿrūfu ʿurfan kal-mashrūʿi naṣṣan*).<sup>46</sup> Various schools of law agree to this rule on the application level, ‘when there is no specific *naṣṣ* to refer to.’<sup>47</sup> The purpose behind *al-ʿurf* consideration is to accommodate the circumstances of some people that are different from Arabic customs, which are the jurists’s ‘default’ customs.<sup>48</sup> However, the practical implication of *al-ʿurf* on fiqh itself is quite limited. Standard examples mentioned in the book of *uṣūl* of what is subject to *ʿurf* in the Islamic law is the value of a dowry, the currency used in trade transactions, covering or uncovering a (man’s) head, and common usage of some Arabic words.<sup>49</sup> It is clear that these standard examples do not reflect, in any significant way, variations in human life other than the ‘default’ medieval Arabic world.

Thus, many Islamic rulings remained coupled with Arabic customs of the first two or three Islamic centuries and that era’s political borders, geography, food, economic resources, and social system, i.e., worldview. For example, the forms of charity one pays to the poor at the end of Ramadan (*ṣadaqah al-fiṭr*) is still stipulated according to common foodstuffs of the seventh century CE mentioned in the related

hadith, i.e., dates, raisins, and barley.<sup>50</sup> According to many scholars even today, a number of Islamic rulings continue to be based on the ‘political borders’ between ‘the land of Islam’ and ‘the land of war.’<sup>51</sup> According to all written legal systems driven from the Islamic schools of law, a Muslim girl cannot get married unless she delegates her father (or a close male) to pronounce the marriage vows on her behalf, as was the Arabic tradition. Usually, marriage vows themselves could only be in Arabic. A compensation paid for unintentional killing is still the responsibility of one’s ‘tribe’ (*al-‘āqilah*) even in non-tribal social systems.<sup>52</sup> Similarly, in some remote areas, liability for murder for an unknown perpetrator is determined according to *qasāmah* (which is a form of ‘territorial liability,’ according to Ḥanafīs and Zaydīs, and a ‘next of kin liability,’ according to the rest of classic schools).<sup>53</sup>

The clearest example that I came across demonstrating ‘closeness’ within an Arabic ‘worldview’ is Ibn Taymiyah’s *Iqtidā’ al-Ṣirāṭ al-Mustaqīm* (Requirements for the Straight Path). He claims that, ‘the People of the Tradition (*ahl al-sunnah*) believe that the Arabic race (*jins al-‘arab*) is better than other non-Arab races (*jins al-‘ajam*).’ He, then, described people who disagree with that as ‘nationalists’ (*shu‘ūbiyyūn*), since they ‘prefer some other nations over Arabs.’<sup>54</sup> Similar prejudices exist in almost every nation and ethnic group. However, they led Ibn Taymiyah to issue rulings that were ‘discriminatory,’ despite the well-known principle (*aṣl*) of equality of races in numerous Qur’anic verses and prophetic narrations. He disapproved of non-Arabs leading Arabs in governments or even collective prayers, prescribed Arabic attires for all Muslims and made non-Arabic styles ‘detested,’ favored Arabs in government allowances (*al-‘aṭā’*),<sup>55</sup> and rendered non-Arab men ‘incompetent’ (*aqallu kafā’ah*) to marry Arab women.<sup>56</sup> These views are obviously contrary to the *maqāṣid* of equality of human beings expressed in numerous scripts.

Based on the ‘cognitive nature of the law’ proposed above, *al-‘urf* is what the jurist views as *‘urf*, according to his/her worldview, as long as it does not contradict the basic principles of *maqāṣid al-sharī‘ah*. Hence, the ‘jurist’s worldview’ is proposed here as an expansion to *al-‘urf* method for accommodating changes from the ‘default Arabic customs’ (of the first few Islamic centuries).

Chart 6.2 shows the place that the ‘jurist’s worldview’ takes in the system of Islamic law. This chart illustrates the centrality of the role of the jurist, which is a result of the inclusion of ‘worldview’ in the system of Islamic law. The Qur’an and the sections of the prophetic traditions that are law-related are the jurist’s ‘sources’ and part of his/her ‘worldview’ too. The other components of a jurist’s worldview are combined with ‘sources’ in order to produce *fiqh*. A ‘worldview,’ however, has to be ‘competent,’ i.e., built on a ‘scientific’ basis, as explained below. A jurist without a ‘competent worldview’ is not ‘competent’ enough to make accurate *fiqhī* judgements. This competence is another expansion to the skills of ‘*fiqh al-wāqī*’ (understanding the status quo), which Ibn al-Qayyim set as a condition for competence in *ijtihād*.<sup>57</sup> This proposal has the following two impacts on the law.

First, considering changes in the jurist’s ‘worldview’ will decrease literalism in the Islamic law. A literal following of a ruling turns it into some sort of ‘ritual.’ I argue that it is necessary to maintain constancy in the area of rituals (*‘ibādāt*) in the Islamic law, such as prayers, fasting, and pilgrimage. However, exaggerating the area of *‘ibādāt* always happens at the expense of the *maqāṣid*. A balance between these two ends is required.

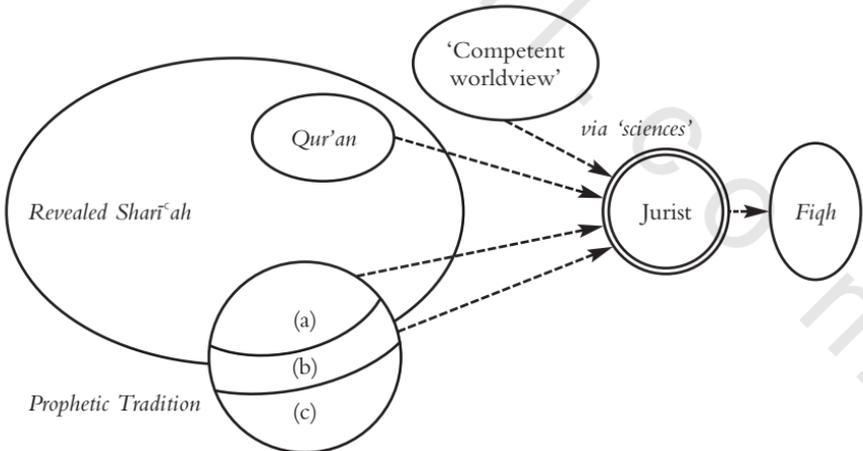


Chart 6.2. The jurist’s ‘worldview’ is a prime factor in shaping *fiqh*.

The following examples illustrate this point. The purpose behind the end-of-Ramadan charity (*ṣadaqah al-fiṭr*) is to help the poor. It is reported that the Prophet had said, 'on that day, give the poor enough so they do not have to beg.'<sup>58</sup> However, this charity was placed under the category of 'ibādāt' and, therefore, applied in every place and time to the letter. When geography and society change to the extent that dates, raisins, and barley become of no use to the poor (and 'aqiṭ' no longer exists), a literal and 'ritualistic' application of this charity would defeat the purpose behind it.

Similarly, in some developing countries with a majority of Muslims, one's relatives are held responsible for paying the compensation for unintentional killing (*diyyah*) because they are supposed to be of his or her 'tribe' ('āqilah), as mentioned above.<sup>59</sup> But if little significance is accrued to one's tribe or ethnic group, due to a different 'worldview' of social structures, then a literal application of *al-āqilah* goes against the purpose of justice itself.

Finally, (Arabic) marriage vows and Friday sermons are generally not understood in non-Arab speaking communities.<sup>60</sup> Conducting these in the Arabic language is due to the rulings that decreed that vows and sermons are rituals ('ibādāh) in their own right. Thus, the sentimental meaning of the vows and the social meaning of the sermons are compromised. This analysis is not suggesting that acts of worship ('ibādāt) and purposes of the law (*al-maqāṣid*) are in contradiction. 'Worship' is a purpose of the Islamic law in its own right. However, it has to be balanced with other social purposes.

The second impact of the proposed condition of a 'competent worldview' is 'opening' the system of Islamic law to advances in natural and social sciences. Judgements about some status quo or 'reality' can no longer be claimed without proper research that is based on sound and 'competent' physical or social sciences methodology. We have seen how issues related to legal capacity, such as 'the sign of death,' 'maximum pregnancy period,' 'age of differentiation,' or 'age of puberty,' were traditionally judged based on 'asking people.' Since 'methods of scientific investigation' are part of one's worldview,' as Richard DeWitt argued,<sup>61</sup> I would say that 'asking people' cannot be claimed today without some statistical proof! This takes us to the

realm of science (natural and social), and defines a mechanism of interaction between the Islamic law and other branches of knowledge. Therefore, a jurist should consult specialists in medical fields and ask them to determine the signs of death and the minimum and maximum periods of pregnancy, etc. Empirical data should have ‘authority’ (*ḥujjah*) in this area, even if it were ‘uncertain’ according to traditional logic. Similarly, specialists in the field of psychology should define the concept and age of ‘differentiation.’ And so on.

It is true that ‘science’ evolves with time, and this will entail regular updating of our scientific decisions and answers. Nevertheless, the evolution of science is part of the natural evolution of the jurist’s ‘world view,’ and accordingly must be reflected in the law. This maintains ‘openness’ in the system of Islamic law.

### *Self-Renewal via Philosophical Openness*

Islamic law could achieve self-renewal through openness to another component of a competent jurist’s ‘worldview,’ which is philosophy. Since the ‘fundamentals of the Islamic law’ is, more or less, the philosophy of Islamic law, it is necessary that the ‘fundamentals’ maintain a degree of openness to philosophical investigation, which evolves with the evolution of human knowledge, in general.

However, historically, the vast majority of Islamic scholars, in traditional schools of law, rejected any attempt to utilise philosophy in developing Islamic law or Islamic knowledge, in general. Usually citing examples of some Greek metaphysical theories that go against popular Muslim beliefs,<sup>62</sup> some scholars issued *fatāwā* to ban studying and teaching philosophy in educational institutes because it was based on ‘non-Islamic metaphysics.’<sup>63</sup> Based on these *fatāwā* forcing a choice between philosophy and ‘following the path of the Qur’an,’ philosophers are accused of apostasy, and philosophy books are not to be owned, sold, or honored. The issuers of such *fatāwā* have been amongst the key jurists in Islamic schools of law, such as Ibn ‘Aqīl (d. 1119 CE), al-Nawawī (d. 1277 CE), al-Suyūṭī (d. 1505 CE), al-Qushāirī (d. 1127 CE), Ibn Raslān (d. 1595 CE), al-Shirbīnī (d. 1579 CE), and Ibn al-Ṣalāḥ (d. 1246 CE).<sup>64</sup> Ibn al-Ṣalāḥ’s fatwa is the most cited on the topic in the literature of Islamic law. In his fatwa, Ibn al-Ṣalāḥ declared philosophy

to be ‘the root of foolishness and promiscuity,’ and ‘the sword’ to be the best way to deal with teachers of philosophy.<sup>65</sup> This violent reaction had suppressed interest in philosophy in most Islamic circles.<sup>66</sup> Scholars would have to study philosophy or logic in secret, would inform only their closest students, and would never disclose such activities in their writings.<sup>67</sup> Ibn Rushd (Averröes, d. 584 AH/1189 CE) was an example of jurists/philosophers who was persecuted and whose books were burnt because he violated the above *fatāwā*.<sup>68</sup>

Simultaneously, a few scholars announced their dislike to Greek philosophy and its ‘non-Islamic methods,’ and put an effort in formally criticising it and even suggesting alternative ideas, especially in logic, from their own viewpoints. This was the position taken by Ibn Ḥazm<sup>69</sup> and Ibn Taymiyah.<sup>70</sup> Ibn Ḥazm did not denounce logic as other scholars did. In fact, he believed that logic is the criterion by which ‘one could evaluate any knowledge (*mi’yāru kulli ‘ilm*).’<sup>71</sup> Ibn Ḥazm explained how modal logic could correspond to logic of duties in the Islamic law, an idea he perhaps owes to al-Ghazālī’s *Mustasfā*.<sup>72</sup> Nevertheless, Ibn Ḥazm’s *Taqrīb al-Mantiq* (Facilitating Logic) was, to my knowledge, the first attempt to elaborate on the correspondence between possibility and permissibility, implication and obligation, and impossibility and prohibition,<sup>73</sup> eight centuries before contemporary ‘deontic logic.’<sup>74</sup> Ibn Ḥazm presented a controversial reconstruction of Aristotle’s syllogism itself to fit his own philosophy, which is the school of Islamic law known as literalism (*al-ḡāhiriyyah*).<sup>75</sup> For example, he supported ‘causation’ in natural phenomena but not in ‘revealed law’ and, hence, he rejected all forms of analogical reasoning and criticised others who endorsed it.<sup>76</sup>

On the other hand, Ibn Taymiyah’s critique of Aristotle was detailed and everlasting.<sup>77</sup> He rejected Aristotle’s distinction between essence and accident as arbitrary and, therefore, rejected any truth ‘by definition’ in universal propositions<sup>78</sup>. According to Ibn Taymiyah, the differences between *busr* (unripe dates), *ruṭab* (somewhat ripe dates), and *tamr* (mature dates) do not reflect three different ‘essences,’ as Aristotelians suggest.<sup>79</sup> These would be three ‘mental universals’ (*kulliyyātun fī al-dhihn*), to use Ibn Taymiyah’s words.<sup>80</sup> Hence, Ibn Taymiyah criticised the restriction of legal reasoning to syllogistic

reasoning, which proceeds from ‘universal propositions.’ He gave ‘analogy by resemblance’ (*qiyās al-shabah*) as a counter-example.<sup>81</sup> Like Ibn Ḥazm, Ibn Taymiyah also used his critical analysis in support of his own ‘philosophical project,’ which was nominal at heart.<sup>82</sup> He further criticised al-Ghazālī and other scholars, who claimed to have endorsed Greek philosophy as a mere logical tool without endorsing its metaphysical basis.<sup>83</sup>

Yet, a few jurists decided to reject Greek metaphysics and accept Greek logic. Al-Ghazālī (d. 504 AH/1111 CE) harshly criticised Greek philosophy for its ‘paganism’ and accused Muslim philosophers of apostasy, on one hand.<sup>84</sup> On the other hand, al-Ghazālī accepted Aristotle’s logical ‘tool’ (Greek: Organon, Arabic: *ālah*), and even judged it to be a ‘necessary introduction to all branches of knowledge,’ without which there is ‘no confidence in a scholar in any field of knowledge.’<sup>85</sup> Al-Ghazālī ‘internalised’ Greek logic as a way of thinking and, thus, eventually was able to introduce a way of merging logic of reasoning/ijtihād into Islamic law. In *al-Qistās* (The Scale), al-Ghazālī ‘proved’ several of Aristotle’s inferences, such as Modus Ponens and Modus Tollens, via referring to the Qur’anic ‘logical arguments.’<sup>86</sup> For example, after citing the verse, ‘If there were other gods in either heavens or earth besides God alone, they would both dissolve in chaos,’<sup>87</sup> al-Ghazālī made the following Modus Tollens reasoning: ‘More than one god<sup>88</sup> implies disorder. And since there is no disorder, there is no more than one god.’ Thereafter, al-Ghazālī used Arabic roots derived directly from the Qur’an, or familiar Islamic law terminology, instead of the usual philosophical terminology. For example, he developed *al-mahmūl* (attribute predicate) into *al-ḥukm* (ruling), *al-ḥadd al-awsaṭ* (middle term) into *al-‘illah* (cause), *al-muqaddimah* (premise) into *al-aṣl* (fundamental rule), *al-natījah* (conclusion) into *al-far‘* (detailed ruling), and *al-mumkin* (possible) into *al-mubāḥ* (permissible).<sup>89</sup> The most creative idea that al-Ghazālī developed was incorporating syllogistic deduction in the methodology of *qiyās*.<sup>90</sup> To ‘formalise’ *tanqīḥ al-manat* (the search for the ‘illah of the ruling), al-Ghazālī applied a series of disjunctive syllogisms to the first situation.<sup>91</sup> For example, he made the following reasoning: ‘One value compared to another has to be greater, equal, or less. If we prove one of them,

then the other two are necessarily false.’<sup>92</sup> Then, al-Ghazālī used hypothetical syllogism, considering the middle term of the two propositions to be the *‘illah* itself, in order to pass the judgment of the first situation to the second.<sup>93</sup> For example, he wrote: ‘Every wine intoxicates. Everything that intoxicates is forbidden. Therefore, wine is forbidden.’<sup>94</sup> Note here that he considered intoxication to be the ‘middle term,’ or, in his ‘Islamic’ expression, the *‘illah*.’

Thus, despite al-Ghazālī’s harsh attack on Greek philosophy, his incorporation of Aristotle’s logic in his Islamic juridical reasoning process was faithful and creative, even though it brought upon him the harsh criticism of, both, nominalists and literalists.<sup>95</sup> Al-Āmidī (d. 1236 CE), al-Subkī (d. 1374 CE), and a few other scholars, especially from the Ash‘arite and Shāfi‘ī schools, to which al-Ghazālī belonged, concurred with al-Ghazālī in differentiating between ‘abstract tools’ that Muslims could borrow from non-Muslims and other ideas and concepts, which could not be borrowed.<sup>96</sup> This opinion is similar to some present-day ‘neo-literalist’ *fatāwā*, which permits imitating knowledge only related to ‘technology from the West,’ rather than knowledge related to humanities and social sciences.

Despite al-Ghazālī’s popularity, the general ban on philosophy contributed to stagnation in the theory and reasoning methodology of the Islamic law across the board. *Uṣūl* continued to focus on direct linguistic implications and superficial logical derivations. The *fiqhī* system of reasoning continued to be more or less a ‘mechanical propositional system’ that deals with duties and prohibitions.

The closest analogy to the traditional *fiqhī* reasoning system in modern times is deontic logic. Although ‘deontic logic’ is a term coined by von Wright in the middle of the twentieth century,<sup>97</sup> one notices that von Wright’s standard system, its relation to modal logic, and its main axioms are actually quite similar to traditional *fiqhī* reasoning. For instance, von Wright’s ‘law of commitment’ that states: ‘if doing what we ought to do commits us to do something else, then this new act is also something that we ought to do,’<sup>98</sup> is the same fundamental rule, *‘mā lā yatimmu al-wājibu illā bihi fahuwa wājib.*’<sup>99</sup> Contemporary philosophy of law does not accept deontic logic as a valid legal reasoning system.<sup>100</sup> The main reasons are deontic logic’s strict binary

classification of duties, its insensitivity to the factor of time, and its monotonic exclusion of exceptional cases.<sup>101</sup>

On the other hand, the theory of Islamic law did not benefit from original contributions that Islamic philosophers made to Greek philosophy and, especially, logic as a science. For example, Avicenna (Ibn Sīnā, d. 1037 CE) made an original contribution to logic by carefully reconstructing Aristotle's theory of modal syllogism after distinguishing various temporal (time dependant) cases.<sup>102</sup> This contribution could have been useful in adding a temporal dimension to standard syllogistic derivations and, potentially, adding a much-needed time dimension to the logic of the Islamic law. Another original contribution, made by Islamic philosophers and not utilised by Islamic jurists, was al-Fārābī's (d. 338 AH/950 CE) syllogistic theory of inductive argumentation,<sup>103</sup> which could have added an also much needed inductive dimension to reasoning in the Islamic law. Similarly, Ibn Ḥazm and Ibn Taymiyah's critiques of Aristotelian logic 'set the stage for the rise of the inductive logic of J.S. Mill,'<sup>104</sup> of which Islamic law itself did not make use.

Contrary to most jurists, Averröes (al-Walīd ibn Rushd) articulated a stand that was most open to human knowledge. Out of a Qur'anic obligation on Muslims to reason and reflect upon God's creation, Averröes endorsed all sound philosophical reasoning, 'regardless of the religion of its conveyer.'<sup>105</sup> Averröes's solution for any apparent contradiction between reason and the scripts is to 'reinterpret' the scripts, as much as language permits, in order to 'fit the conclusions of reason.'<sup>106</sup> He also blamed al-Ghazālī and other jurists for hastily accusing philosophers of heresy without attempting to understand their positions. Averröes's method in matching reason and scriptures, openness to the 'Other,' refusal of hasty accusations of heresy, and his calls for the utilisation of philosophy in realistic reform, had a clear impact on the modern Islamic reformist movement of the past century.<sup>107</sup> Nevertheless, according to the manuscripts that we now know about,<sup>108</sup> Averröes did not discuss the relationship between his views in philosophy and his views in Islamic law. Hence, contrary to some researchers' views,<sup>109</sup> I think that there is a gap between Averröes, the 'Commentator' and 'Second Teacher,' who defended

philosophical reasoning in his *'Faṣl al-Maqāl'* and his renowned commentary on Aristotle's works,<sup>110</sup> and Averröes, the judge and jurist, who mostly supported his traditional Mālikī *madhhab* in his comprehensive encyclopaedia on Islamic fiqh which he called *Bidāyah al-Mujtahid*. Therefore, for the system of Islamic law to maintain its self-renewal, it is necessary to adopt Averröes's openness to all philosophical investigation and to extend this openness to the theories of the fundamentals/*uṣūl* themselves.

#### 6.4. TOWARDS MULTI-DIMENSIONALITY

Chapter Two explained, in abstract terms, the limitations of binary categorisations, and also the importance of multi-dimensionality as a principle systems feature and a more realistic, i.e., everyday, way of thinking. Multi-dimensionality, as explained before, entails a spectrum of levels between binary opposites. Chapter Five applied this concept to *'hujjiyyah,'* which varies from 'authority' to 'radically criticised,' and to sources of legislation, which varies from rational to heavenly. This section will take the system of Islamic law further steps towards multi-dimensionality by applying it to two 'fundamental' concepts, namely, certainty (*al-qaṭʿ*) and opposition (*al-taʿāruḍ*).

##### *Spectrum of Certainty*

The treatment of every topic in the *uṣūlī* literature had to start with a 'definition' (*taʿrīf*) of concepts. Typically, and obviously under the effect of Aristotelean logic, a definition is either by 'essence' (*al-ḥadd*) or by 'description' (*al-rasm*). An essence-based definition typically includes an etymological analysis of the word, in order to define the 'whatness' of its related concept.<sup>111</sup> The *Mashshāʾūn* (Peripatetics) 'description' defined concepts/terms in terms of attributes that 'discriminates' them from other concepts/terms.<sup>112</sup> However, in his critique of (Greek) philosophy, Ibn Taymiyah elaborated on the discriminative role of definitions and criticised the Ashʿarites, Muʿtazilīs, and the Jaʿfarīs who followed al-Ghazālī in his 'essence-oriented' approach.<sup>113</sup> Ibn Taymiyah criticised al-Ghazālī's 'logical

introduction' of his *Mustaşfā*, and argued that the purpose of an essence-based definition is 'discrimination' (that is, *al-tamyīz*) between concepts, in any case.<sup>114</sup>

Thus, the jurists' method of *tamyīz* between concepts, whether essence- or description-based always resulted in defining every concept in relation to a 'binary opposite.' The popular Arabic saying goes: 'Things are distinguished based on their opposites' (*biḍiddihā tata-mayyaz al-ashyā*).

Chart 6.3. Traditionally, juridical evidences are divided between 'certain', and 'uncertain' categories.

certain	uncertain
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'Certainty' (*al-qaṭʿ*) versus 'uncertainty' (*al-ẓann*) is a powerful and dominant dichotomy in various methodologies and schools of Islamic law (Chart 6.3).<sup>115</sup> Al-Ghazālī defined logic itself as the 'law that identifies definitions and analogies, and differentiates certain (*yaqīnī*) knowledge from other knowledge.'<sup>116</sup> Some fundamental 'evidences' were legitimised for a sole goal of 'expanding the area of certainty' in Islamic law. For example, Ali Juma argues for the necessity of *ijmāʿ* (consensus) since, 'restricting fundamental tools to understanding the implications of scripts made the area of certainty less than adequate, and created a real problem that required giving legitimacy to *ijmāʿ* as an evidence that expands the area of certainty and transfers doubtful implications to the circle of absoluteness.'<sup>117</sup> Always sought after and often claimed, 'certainty' contributed an attitude of absolutism that had generated a range of problems. Certainty was claimed in various forms, including linguistic implication (*qaṭʿiyyah al-dilālah*), historical authenticity (*qaṭʿiyyah al-thubūt*), and logical implication (*al-qaṭʿ al-mantiqī*). These forms are introduced and their negative implications outlined below.

First, 'clear' instructions of the Qur'an and hadith were claimed to be 'certain' in their linguistic implication (*qaṭʿī al-dilālah*). Consider the following four narrations, as they appear in collections of hadith.

1. The Prophet heard that two men had a fight (over renting a farm). Thus, he said: 'If this is going to be your attitude, then do not rent farms.'<sup>118</sup>
2. A woman said: 'O Messenger of God. This is my son whom I carried in my belly, fed from my breast, and laid on my lap. His father divorced me and now wants to take him from me.' The Messenger of God, peace be upon him, told her: 'You have priority to his custody unless you get married.'<sup>119</sup>
3. The Prophet said: 'A Muslim does not pay charity for his horse.'<sup>120</sup>
4. The Prophet said: '... And blood money for a soul is one hundred camels ...'<sup>121</sup>

Therefore, according to the linguistic *dilalah* of the above four narrations and their implied certainties:

1. Renting farms is forbidden.<sup>122</sup>
2. A divorcee loses custody of her child if she gets married.<sup>123</sup>
3. There is no zakah charity due on horses.<sup>124</sup>
4. Blood money is one hundred camels.<sup>125</sup>

The method of extracting rulings from 'clear,' and thus, 'certain' scripts actually does take into consideration the fact that 'another narration' might imply a change of status in what is thought to be an obligation. Nevertheless, scholars maintained that this other factor has to be at the same level of certainty (*daraja al-qat'iyah*) as the first narration;<sup>126</sup> otherwise, the obligation remains in effect. Because the first order was given by God or the Prophet, any other statement that could have influence in the matter should come from the same source, even if it is a prophetic approval (*iqrār*) and not a clear command. Let us assume that one interpretation of a prophetic command suggests that it was not meant to be certain and definite, but had a specific context that necessitates issuing such a command (for example, an economical, political, or environmental context). The following are examples of such interpretations or specifications for the above four examples:

1. The Prophet forbade the companions from renting farms only because of the fight that had happened and, therefore, this order applies only when there is a possibility of disputes.<sup>127</sup>
2. The Prophet knew that this custody arrangement is best for the specific social case he was dealing with. The Prophet was not issuing a general command. In other words, he was acting with an ‘intent of judgeship’ and not with an ‘intent of conveyance’ in this case.<sup>128</sup>
3. If horses amount to a significant fortune, then zakah applies to them.<sup>129</sup>
4. The conditions of blood money and the one hundred camels are dependent upon the dominant culture in Arabia.<sup>130</sup>

In traditional schools of law, none of the above four arguments is generally accepted, except for the first. However, the reason behind accepting the first argument is that there are ‘equally authentic’ narrations that imply that the Prophet approved some other farm rentals. The other three interpretations, which were not supported by other ‘certain’ evidences, are rejected. The implications of the commands are certain (*qaṭʿiyyah*) while the hypothesised circumstances that were not clearly stated in any narration do not have the same status of certainty (*darajah al-qaṭʿiyyah*) and are, therefore, speculative (*maznūn*). After all, another fundamental rule states: ‘Certainty cannot be removed by doubt’ (*al-yaqīnu la yazūlu bi al-shak*). So therefore, since stated commands are usually mentioned in the Qur’an or collections of hadith without necessarily elaborating on all underlying circumstances, as explained before, the binary concept of ‘certainty’ in linguistic implication (*qaṭʿiyyah al-dilālah*) creates a problem of narrow, out of context, and partial views in many *fiqhī* rulings.

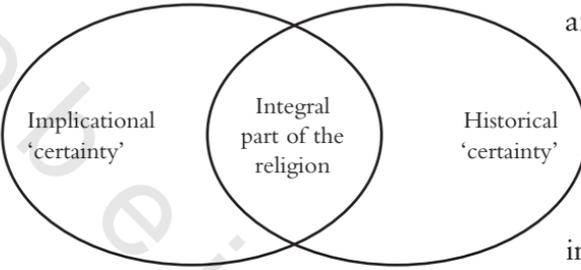
Certainty in historical authenticity (*qaṭʿī al-thubūt*) is also claimed on various levels, ranging from the ‘most well-known’ level (*al-mutawātir*, frequently recurring narrations) to the individual narrations (*khobar al-wāḥid*). *Al-mutawātir* level of authenticity is reached when a narration is conveyed through a ‘large number of people who could not possibly agree to lie’ (*jamʿun yastahīlu tawāṭu’uhum ʿalā al-kadhib*).<sup>131</sup> The Qur’an as a whole and a few prophetic traditions fall

under this category.<sup>132</sup> In addition, most scholars believe that an *āḥād* narration that the ‘Muslim nation approves’ (*khābar al-āḥād al-ladhī talaqqathu al-ummah bi al-qabūl*) is also ‘certain.’ In his authoritative Introduction to the Terminology of Narrations, Ibn al-Ṣalāḥ states that narrations that both Imam Bukhārī and Imam Muslim agree upon are authentic with ‘certainty’ (*maqṭū‘un bi-ṣiḥḥatih*). Ibn al-Ṣalāḥ claims that these two scholars’s approval of a narration ‘logically entails’ (*lāzimun min dhālik*) the whole ummah’s approval. Then, since the ummah is ‘infallible’ (*ma‘ṣūmah*), he proceeds, these narrations entail ‘absolute theoretical knowledge’ (*al-‘ilm al-yaqīnī al-naẓarī*).<sup>133</sup> Most scholars agree with Ibn al-Ṣalāḥ.

Ibn Taymiyah, for example, uses the same argument for *āḥād* narrations, which ‘the ummah approves,’ for proving the ‘fundamentals of creeds’ (*ithbātu uṣūl al-diyānāt*).<sup>134</sup> In matters of belief (*i‘tiqād*), he, therefore, includes issues, such as ‘ascribing to God attributes’ (*ṣifāt*), ‘showing patience with sultans from Quraish,’ ‘wiping one’s shoes during ablution,’ and rendering Sufi songs (*qaṣā’id*) ‘an innovation in the faith.’<sup>135</sup> The danger in these claims manifests when these *āḥād* narrations, such as the ones that Ibn Taymiyah is referring to, undergo formal authentication procedures (*al-ḥukmu ‘alā al-hadīth*). These procedures, and the credibility of many of the narrators from various generations, are widely disputed even within each traditional school. Hence, irreconcilable differences in the ‘fundamentals of faith’ occur, which might lead to serious conflicts and wars, as had happened recurrently in the Islamic history. Therefore, it is pertinent to foster a culture of tolerance and mutual co-existence to, at the very least, separate *āḥād* narrations from fundamentals of faith. ‘What remains,’ Khaled Abou El Fadl writes, ‘is the empirical claim – what remains is sociology.’<sup>136</sup>

Jurists created a new category for the intersection of the two categories of certainty mentioned above (Chart 6.4), historically authentic and linguistically implied (*qaṭ‘ī al-thubūti qaṭ‘ī al-dilālāh*). It is a category of highest certainty, ‘integral part of the religion’ (*ma‘lūmun min al-dīni bi al-ḍarūrah*), which are ‘absolute matters of the faith’ (*qaṭ‘iyyāh al-i‘tiqād*). Consequently, most scholars agree that the definition of an ‘apostate’ is the person who rejects any of these ‘highly certain’ matters.<sup>137</sup> Now, ‘consensus of scholars’ (*ijmā‘ al-‘ulamā’*)

started to undergo a process of historical authentication (*al-taḥaqququ min wuqūʿ al-ijmāʿ*) as well. Then, despite the great many differences over the very definition of *ijmāʿ*, it was used to add many controversial issues to the ‘highly certain’ category. Historically, this resulted in a number of dramatic conflicts based on accusations and counter-



accusations of ‘apostasy’ amongst followers of different schools of law, as mentioned before. These conflicts were over rulings that were included in *al-maʿlūmu min al-dīni bi al-ḍarūrah*.

*Chart 6.4. An evidence that is historically ‘authentic’ and linguistically ‘implied’ entails being an ‘integral part of the religion.’*

Finally, certain logical implication (*al-qaṭʿ al-mantiqī*, *al-luzūm al-mantiqī*, or *al-yaqīn al-mantiqī*) is another binary claim of ‘certainty.’ In the methodology of Islamic law, logical implication is used in the area of analogical reasoning (*qiyās*), which is based on similar ‘causes’ (*ʿilal*), as explained before. However, in addition to the Shia, Zaydīs, Literalists, and some Muʿtazilīs, who do not approve analogical reasoning in the Islamic law to start with,<sup>138</sup> some Sunni scholars expressed unease about the ‘certainty’ of *ʿilal*. Al-Ghazālī, for example, wrote that there are six reasons for ‘probability’ (*iḥtimāl*) in an *ʿillah* of a certain ruling:<sup>139</sup>

1. We assume a certain cause for a ruling that does not have a cause, according to God.<sup>140</sup>
2. The ruling has a cause, according to God, but we make a mistake in concluding it.
3. The ruling has more than one cause, according to God, but we make a mistake in restricting it to one cause.
4. The ruling has one cause, according to God, but we make a mistake in adding invalid causes to it.

5. We succeed in defining the cause of one ruling precisely, but make a mistake in considering this ruling analogous to another, which is not, according to God.
6. We make the mistake of claiming a certain cause behind a ruling by pure speculation, without putting the right amount of effort (ijtihad).

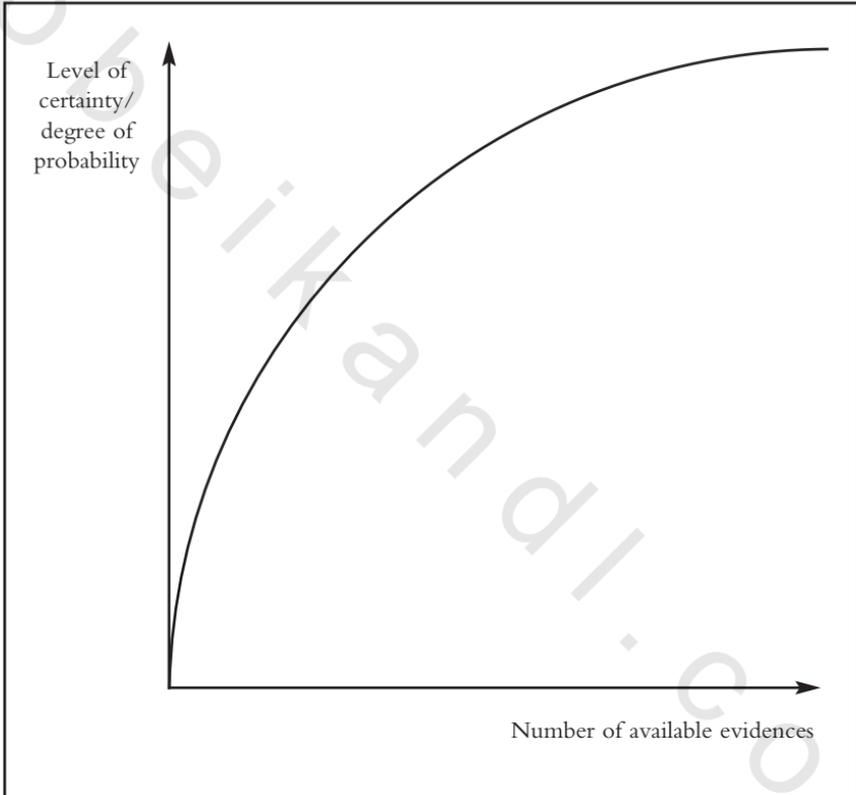


Chart 6.5. Certainty/Probability increases (non-linearly) with the number of available evidences

Finally al-Ghazālī actually added *al-muṣawwibah*'s opinion as another possibility, which is that God did not assign a single correct cause for every ruling and that the correct cause is what every *mujtahid* perceives to be a correct cause. Al-Ghazālī's separation between correctness

‘according to God’ (*‘ind Allāh*) and according to the *mujtahid*, in the above analysis of the *‘illah*, supports the human cognitive nature of reasoning and fiqh, in general, as Section 6.1 had proposed. Thus, it places reasoning by analogy amongst ‘uncertain,’ rather than ‘certain,’ evidences.

The above binary approach to the concept of certainty is history! Today’s basic mathematics assigns probability for any parameter based on the number of evidences supporting it. Therefore, there is a ‘spectrum’ of certainties for any evidence, rather than a binary dichotomy. Certainty (or probability, if you wish) increases in a non-linear mode with the number of available evidences (Chart 6.5). I would argue that the Qur’anic logic for proving the existence of God takes a ‘continuous,’ rather than ‘binary,’ approach to certainty; the more evidence humans find, the greater certainty (*yaqīn*) they acquire. Accounting for the amount of ‘uncertainty’ inherent in legal reasoning allows flexibility in the produced rulings.

### *Resolving ‘Opposition’ Through Multi-Dimensionality*

In Islamic juridical theory, there is a differentiation between opposition or disagreement (*ta‘āruḍ* or *ikhtilāf*) and contradiction (*tanāquḍ* or *ta‘ānuḍ*) of evidences (verses or narrations).<sup>141</sup> Contradiction is defined as ‘a clear logical conclusion of truth and falsehood in the same aspect’ (*taqāsum al-ṣidqi wa al-kadhib*).<sup>142</sup> On the other hand, conflict or disagreement between evidences is defined as an ‘apparent contradiction between evidences in the mind of the scholar’ (*ta‘āruḍun fī dhīhn al-mujtahid*).<sup>143</sup> This means that two seemingly disagreeing (*muta‘ārid*) evidences are not necessarily in contradiction. It is the perception of the jurist that they are in contradiction which can occur as a result of some missing information regarding the evidence’s timing, place, circumstances, or other conditions.<sup>144</sup>

On the other hand, true contradiction takes the form of a single episode narrated in truly contradicting ways by the same or different narrators.<sup>145</sup> This kind of discrepancy is obviously due to errors in narration related to the memory and/or intentions of one or more of the narrators.<sup>146</sup> The ‘logical’ conclusion in cases of contradiction is that one of the narrations is inaccurate and should be rejected (perhaps

both narrations, if one could prove that). For example, Abū Hurayrah narrated, according to Bukhārī: ‘Bad omens are in women, animals, and houses.’<sup>147</sup> However, (also according to Bukhārī) ‘Ā’ishah narrated that the Prophet had said: ‘People during the Days of Ignorance (*jāhiliyyah*) used to say that bad omens are in women, animals, and houses.’<sup>148</sup> These two ‘authentic’ narrations are at odds and one of them should be rejected. It is telling that most commentators rejected ‘Ā’ishah’s narration, even though other ‘authentic’ narrations support it.<sup>149</sup> Ibn al-‘Arabī, for example, commented on ‘Ā’ishah’s rejection of the above hadith as follows: ‘This is nonsense (*qawlun sāqit*). This is rejection of a clear and authentic narration that is narrated through trusted narrators!’<sup>150</sup>

According to various traditional and contemporary studies on the issue of *ta‘āruḍ* contradiction in the above sense, is rare.<sup>151</sup> Most cases of *ta‘āruḍ* are disagreements between narrations because of, apparently, a missing context, not because of logically contradicting accounts of the same episode.<sup>152</sup> There are six strategies that jurists defined to deal with these types of disagreements in traditional schools of law:

1. Conciliation (*al-jam‘*): This method is based on a fundamental rule that states that, ‘applying the script is better than disregarding it (*ī‘māl al-naṣṣi awlā min ihmālih*).’<sup>153</sup> Therefore, a jurist facing two disagreeing narrations should search for a missing condition or context, and attempt to interpret both narrations based on it.<sup>154</sup>
2. Abrogation (*al-naskh*): This method suggests that the later evidence, chronologically speaking, should ‘abrogate’ (juridically annul) the former. This means that when verses disagree, the verse that is (narrated to be) revealed last is considered to be an abrogating evidence (*nāsikh*) and others to be abrogated (*mansūkh*). Similarly, when prophetic narrations disagree, the narration that has a later date, if dates are known or could be concluded, should abrogate all other narrations. Most scholars do not accept that a hadith abrogates a verse of the Qur’an, even if the hadith were to be chronologically subsequent. This is related to comparing ‘degrees of certainty.’

The concept of abrogation, in any of the above senses, does not have supporting evidence from the words attributed to the Prophet in traditional collections of hadith. Etimologically, abrogation (*naskh*) is derived from the root *na sa kha*. I carried out a survey on this root and all its possible derivations in a large number of today's popular collections of hadith, including al-Bukhārī, Muslim, al-Tirmithī, al-Nasā'ī, Abū Dawūd, Ibn Mājah, Aḥmad, Mālik, al-Dāramī, al-Mustadrak, Ibn Ḥibbān, Ibn Khuzaymah, al-Bayhaqī, al-Dārquṭnī, Ibn Abī Shaybah, and 'Abd al-Razzāq. I found no valid hadith attributed to the Prophet that contains any of these derivations of the root *na sa kha*. I found about 40 instances of 'abrogations' mentioned in the above collections, which were all based on one of the narrators' opinions or commentaries, rather than any of the texts of the hadith. The concept of abrogation always appears within the commentaries given by companions or other narrators, commenting on what appears to be in disagreement with their own understanding of the related issues. According to traditional exegeses, the principle of abrogation does have evidence from the Qur'an, although the interpretations of the related verses are subject to a difference of opinion.<sup>155</sup>

3. Elimination (*al-tarjih*): This method suggests endorsing the narration that is 'most authentic' and dropping or eliminating other narrations. The 'eliminating' narration is called *al-riwāyah al-rājihah*, which literally means the narration that is 'heavier in the scale.' According to scholars of hadith, an eliminating (*rājihah*) narration must have, as compared to the other narration, one or more of the following characteristics: a larger number of other supporting narrations, a shorter chain of narrators, more knowledgeable narrators, narrators more capable of memorisation, more trustworthy narrators, first-hand account versus indirect accounts, shorter time between the narration and the narrated incident, narrators able to remember and mention the date of the incident versus others, less ambiguity, less rhetoric, and a number of other factors.<sup>156</sup>
4. Waiting (*al-tawaqquf*): This method recommends that the scholar is not to make any decision until one of the above three methods is evident.

5. Cancellation (*al-tasāquṭ*): This method recommends that the scholar is to disregard both narrations because of the uncertainty in both.
6. Choice (*al-takhyīr*): This method allows the scholar to choose whatever is rendered suitable for the situation at hand.

Ḥanafīs apply abrogation before any other method, followed by the method of elimination.<sup>157</sup> All other schools of law give priority, theoretically, to the method of conciliation (*al-jamʿ*). Although most schools of law agree that applying all scripts is better than disregarding any of them, most scholars do not seem to give priority, on a practical level, to the method of conciliation. The methods that are used in most cases of *taʿāruḍ* are abrogation and elimination.<sup>158</sup> Therefore, a large number of evidences are cancelled, one way or the other, for no good reason other than that the jurists' failing to understand how they could fit them in a unified perceptual framework. Thus, invalidating these evidences is more or less arbitrary. For example, narrations are invalidated (outweighed) if narrators did not happen to 'mention the date of the incident,' the wording related to the Prophet happened to be more 'metaphoric,' or a narrator happened to be female – in which case the male's 'opposing' narration takes precedence.<sup>159</sup> Therefore, *al-naskh* and *al-tarjih* reflect the general feature of binary thinking in fundamental methodology. It is essential that the method of conciliation make use of the concept of multi-dimensionality in overcoming this drawback.

One practical consequence of cancelling a large number of verses and prophetic narrations in the name of *naskh* and *tarjih* is a great deal of 'inflexibility' in the Islamic law, i.e., inability to address various situations adequately. Reflection upon pairs of *mutaʿāriḍ* narrations show that their disagreement could be due to a difference in surrounding circumstances, such as war and peace, poverty and wealth, urban and rural life, summer and winter, sickness and health, or young and old. Therefore, the Qur'anic instructions or the Prophet's actions and decisions, as narrated by his observers, are supposed to have differed accordingly. Lack of contextualisation limits flexibility. For example, eliminating the evidences that occurred in the context of peace for the

sake of evidences that occurred in the context of war, combined with literal methods, limits the jurist's ability to address both contexts. When this is combined with a strict binary methodology, the outcomes result in specific rulings for specific circumstances that are made universal and eternal.

One revealing example is verse 9:5 of the Qur'an, which has come to be named, 'The Verse of the Sword' (*āyah al-sāif*). It states: 'But when the forbidden months are past, then slay the pagans wherever you find them, and seize them.'<sup>160</sup> The historical context of the verse, in the ninth year of *hijrah*, is that of a war between Muslims and the pagans of Makkah. The thematic context of the verse in chapter nine is also the context of the same war, which the chapter is addressing. However, the verse was taken out of its thematic and historical contexts and claimed to have defined the ruling between Muslims and non-Muslims in every place, time, and circumstance. Hence, it was perceived to be in disagreement with more than two hundred other verses of the Qur'an, all calling for dialogue, freedom of belief, forgiveness, peace, and even patience. Conciliation between these different evidences, somehow, was not an option. To solve the disagreement, based on the method of abrogation, most exegetes concluded that this verse (9:5), which was revealed towards the end of the Prophet's life, abrogated each and every '*muta'āriḍ*' verse that was revealed before it.

Therefore, the following verses were considered abrogated: 'no compulsion in the religion;' 'forgive them, for God loves those who do good to people;' 'repel evil with that which is best;' 'so patiently persevere;' 'do not argue with the People of the Book except with means that are best;' and '(say:) You have your religion and I have my religion.'<sup>161</sup> In addition, a large number of prophetic traditions that legitimise peace treaties and multi-cultural co-existence, to use contemporary terms, were also abrogated.

One such tradition is 'The Scroll of Madinah' (*ṣaḥīfah al-madinah*), in which the Prophet and the Jews of Madinah wrote a 'covenant' that defined the relationship between Muslims and Jews living in Madinah. The scroll stated that, 'Muslims and Jews are one nation (ummah), with Muslims having their own religion and Jews having their own religion.'<sup>162</sup> Classic and neo-traditional commentators on the *ṣaḥīfah*

render it ‘abrogated,’ based on the Verse of the Sword and other similar verses.<sup>163</sup> Seeing all the above scripts and narrations in terms of the single dimension of peace versus war might imply a contradiction, in which the ‘final truth’ has to ‘belong’ to either peace or war. The result will have to be an unreasonable fixed choice between peace and war, for every place, time, and circumstance.

What added to the problem is that the number of cases of abrogation claimed by the students of the companions (*al-tābi‘īn*) is higher than the cases claimed by the companions themselves.<sup>164</sup> After the first Islamic century, one could furthermore notice that jurists from the developing schools of thought began claiming many new cases of abrogation, which were never claimed by the *tābi‘īn*. Thus, abrogation

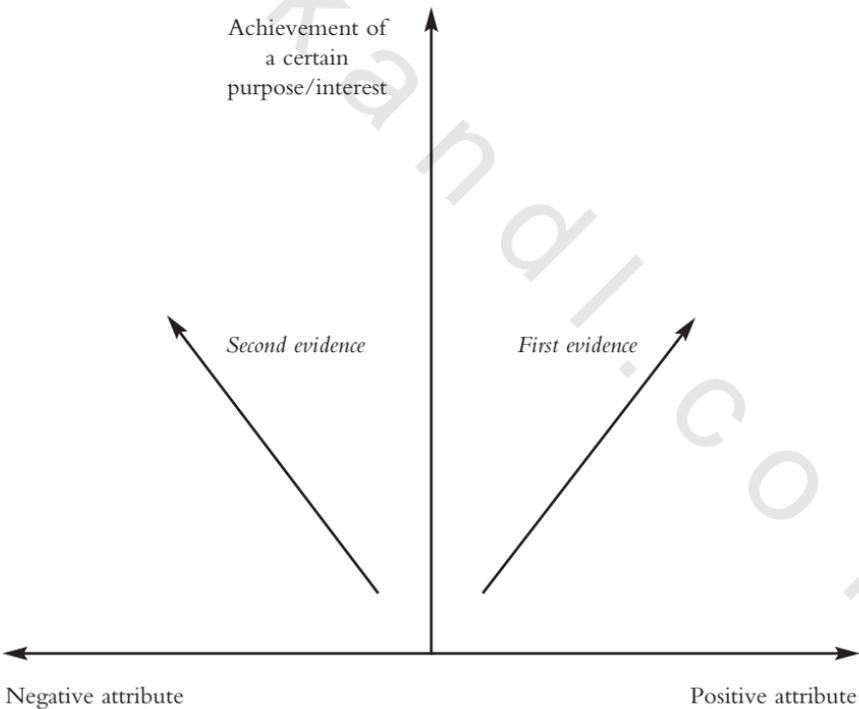


Chart 6.6. Seemingly contradicting ‘attributes’ in one dimension could be positively contributing to a different dimension related to purposes.

became a method of invalidating opinions or narrations endorsed by rival schools of law. Abū al-Ḥasan al-Karkhī (d. 951 CE), for one example, writes: ‘The fundamental rule is: Every Qur’anic verse that is different from the opinion of the jurists in our school is either taken out of context or abrogated.’<sup>165</sup> Therefore, it is not unusual in the *fiqhī* literature to find a certain ruling to be abrogating (*nāsikh*) according to one school and abrogated (*mansūkh*) according to another. This arbitrary use of the method of abrogation has exacerbated the problem of lack of multi-dimensional interpretations of the evidences.

Multi-dimensionality, combined with a *maqāṣidī* approach, could offer a solution for the dilemmas of opposing evidences. Consider, for example, one attribute, with a positive and negative dimension (Chart 6.6). Two evidences might be ‘in opposition,’ in terms of this one attribute, such as war and peace, order and forbiddance, standing and sitting, men and women, and so on. If we restrict our view to one dimension, we will find no way to reconcile the evidences. However, if we expand the one-dimensional space into two dimensions, the second of which is a *maqṣid* to which both evidences contribute, then we will be able to ‘resolve’ the opposition and understand/interpret the evidences in a unified context.

The following are typical examples from the classic literature on *ikhṭilāf al-adillah* (opposition of evidences), which also represent some traditionalist and modernist views today. However, it will be shown that the ‘opposition’ claimed could be resolved via the multi-dimensional and purposeful method proposed above.

1. There is a large number of opposing evidences related to different ways of performing ‘acts of worship’ (*‘ibādāt*), all attributed to the Prophet. These opposing narrations have frequently caused heated debates and rifts within Muslim communities. However, understanding these narrations within a *maqṣid* of magnanimity (*taṣīr*) entails that the Prophet did carry out these rituals in various ways, suggesting flexibility in such matters.<sup>166</sup> Examples of these acts of worship are the different ways of standing and moving during prayers,<sup>167</sup> concluding prayers (*tashahhud*),<sup>168</sup> compensating prostration (*sujūd al-sahū*),<sup>169</sup> reciting ‘God is Great’ (*takbīr*)

during 'Īd prayers,<sup>170</sup> making up for breaking one's fasting in Ramadan,<sup>171</sup> details of pilgrimage, and so on.

2. There is a number of opposing narrations that address matters related to customs (*al-urf*), which were also classified as 'in opposition.' However, these narrations could all be interpreted through the *maqṣid* of 'universality of the law,' as Ibn Ashur had suggested.<sup>172</sup> In other words, differences between these narrations should be understood as differences in the customs for which the various narrations attempted to show consideration, rather than 'contradiction.' One example is the two narrations, both attributed to 'Ā'ishah, one of which forbids 'any woman' from marriage without the consent of her guardian, while the other allows previously married women to make their own independent choices on marriage.<sup>173</sup> It is also narrated that 'Ā'ishah, the narrator of the two narrations herself, did not apply the 'condition' of consent in some cases.<sup>174</sup> Hanafis explained that, 'the (Arabic) custom goes that a woman who marries without her guardian's consent is shameless.'<sup>175</sup> Understanding both narrations in the context of considering customs based on the law's 'universality' resolves the contradiction and provides flexibility in carrying out marriage ceremonies according to different customs in different places and times.
3. A number of narrations were classified under cases of abrogation, even though they were, according to some jurists, cases of gradual application of rulings. The purpose behind the gradual applications of rulings on a large scale is, 'facilitating the change that the law is bringing to society's deep-rooted habits.'<sup>176</sup> Thus, 'opposing narrations' regarding the prohibition of liquor and usury, and the performance of prayers and fasting, should be understood in terms of the prophetic 'tradition' of gradual application of high ideals in any given society.
4. A number of opposing narrations are considered 'contradictory' because their statements entail different rulings for similar cases. However, taking into account that these prophetic statements addressed different people (companions) could 'resolve the opposition.' In these cases, the juridical *maqṣid* of 'fulfilling the best

interest of people' would be the key to interpreting these narrations based on the differences between these companions. For example, a few narrations reported that the Prophet told a divorcee that she loses her custody of her children if she gets married.<sup>177</sup> Yet, a number of other 'opposing' narrations entail that divorcees could keep their children in their custody after they get married. The opposing narrations included Umm Salamah's case; Umm Salamah kept custody of her children after she married the Prophet.<sup>178</sup> Thus, relying on the first group of narrations, most schools of law concluded that custody is automatically transferred to the father if the mother gets married. They based their elimination of the second group of narrations on the fact that the first group was 'more authentic,' being narrated by Bukhārī and Ibn Ḥanbal.<sup>179</sup> Ibn Ḥazm, on the other hand, accepted the second group of narrations and rejected the first group based on his suspicion of one of the narrator's capability of memorisation.<sup>180</sup> However, after citing both opinions, al-Ṣanaʿānī commented: 'The children should stay with the parent who fulfils their best interest. If the mother is the better caregiver and will follow up on the children diligently, then she should have priority over them ... The children have to be in the custody of the more capable parent, and the Law cannot possibly judge otherwise.'<sup>181</sup>

Multi-dimensionality also entails considering more than one *maqṣid*, if applicable. In this case, the way of 'resolving oppositions' that fulfils these *maqāṣid* in the highest order should be given priority.

### *Multi-dimensionality and Postmodernism*

Multi-dimensionality is also an important feature that resolves one of postmodernism's primary contradictions. Despite the goal of 'deconstructing binary opposites' in all streams of postmodernism, postmodern approaches themselves tend to be binary, reductionist, and uni-dimensional. It is true that postmodern approaches to the Islamic law have raised important questions about the ill-deserved 'centricity' of some juridical concepts, schools, and powerful characters and groups. They have also strived to uncover the cultural and historical

dimensions of juridical theories and rulings, and the ‘discursive traditions’ that evolved over the course of the history of the Islamic law.

However, postmodernists tend to focus on one dimension/approach to the whole theory of Islamic law, whether it is linguistic, logical, historical, or cultural, and ignore all other dimensions. An ‘Islamic feminist’ approach, for example, raises essential questions that beg for fundamental answers. However, the he-she struggle is not the only dimension or force that shaped the Islamic law over its long history, as appears in some of their writings. Thus, a number of other essential dimensions and forces, as for example, political and economic, etc., which has shaped the law are overlooked in much of their discourse.

Similarly, post-colonial critiques tend to restrict their assessment of western scholarship in Islamic Studies to ‘classic’ essentialist Orientalism. They often overlook a large number of serious research projects and useful contributions to Islamic scholarship that also originated from western scholarship.

This book calls for a critical and multi-dimensional approach to the theory of Islamic law, in order to avoid reductionist views and binary thinking. As such, I have attempted to account for a number of dimensions of the Islamic schools/theories of law, including sources, linguistic derivations, reasoning methods, and schools/streams of thought, in addition to the dimensions of culture and history, or space and time. Disconnected and ‘deconstructed’ segments cannot form a whole picture, unless we account for the systemic inter-relations and structural connections between them.

Thus, despite the postmodernist war on macro-theories, I believe that a critical, multi-dimensional, systems-based, and purpose-oriented approach offers an adequate framework for analysis and development of the theory of Islamic law.

## 6.5. TOWARDS ‘PURPOSEFULNESS’

Chapter Two explained how this research considers ‘purposefulness’ to be the principle feature of its systems approach. It was also shown

how ‘purposefulness’ is a common link amongst all other basic system features, such as cognition, holism, openness, hierarchy, interrelationship, and multi-dimensionality. On the other hand, Chapter One introduced the theory of ‘purposes,’ or *maqāṣid*, of the Islamic law, as a contemporary project for development and reform in the Islamic law. Chapter One, furthermore, demonstrated how *al-maqāṣid* theory meets the basic methodological criteria of rationality, utility, justice, and morality. Based on the survey of traditional and contemporary theories of Islamic law presented previously this section will show how the ‘purposefulness’ feature, or a purpose/*maqāṣid*-based approach could contribute to the development of the fundamentals of Islamic law and current attempts to address some of its inadequacies. Each subsection will deal with one area within the fundamental *uṣūl*.

### *The ‘Implication of the Purpose’*

Perhaps under the influence of ‘the principle of causation’ in Greek philosophy, traditional ‘implications’ of terms and expressions from the scripts did not include a purpose, or *maqṣid*, implication. A ‘clear expression’ (the Ḥanafī ‘*ibārah*’ or the Shāfi‘ī ‘*ṣarīḥ*’), which was given priority over all other expressions, is a direct reading of the script. This reading applies the literal meaning in the name of being *muhkam*, *naṣṣ*, or *zābir*. The ‘purpose’ of the expression would probably fall under one of the ‘non-clear’ categories: ‘in need of explanation’ (*mufassar*), ‘indirect implication’ (*ishārah*); ‘omitted expression’ (*iqtida*); or ‘alluding (to the appropriateness factor)’ (*iīmā*). These types of terms, as explained before, lack juridical authority (*hujjiyyah*) because of their ‘uncertainty’ (*ẓanniyyah*).

Moreover, contrary implications, applied by all schools except for the Ḥanafīs, were restricted to the categories of title (*al-laqaḅ*), attribute (*al-waṣf*), condition (*al-shart*), limit (*al-ghāyah*), and number (*al-‘adad*). This means that if one of these expressions is used in a script, the ‘contrary’ expression is excluded, regardless of the ‘purpose’ consideration. Thus, any ‘title,’ ‘attribute,’ ‘condition,’ ‘limit,’ or ‘number,’ that is different from what is mentioned in the script, is unacceptable, even if it happens to achieve the ‘purpose’ of the same script

in a similar or better way. The purpose is, again, too 'uncertain' to 'oppose' the 'logical' contrary evidence. This added to the general literal character of linguistic evidences, which were also given priority over all other rational evidences. Thus, as Ibn Ashur writes, 'jurists gave themselves unnecessary trouble by seeking to clarify the ambiguous and qualify the unrestricted ... even though ... scripts covering the particulars of individual cases are equally open to generalisation and particularisation.'<sup>182</sup>

Lack of an 'implication of purposes' is a general drawback in dealing with 'legal texts,' even in contemporary schools of philosophy of law.<sup>183</sup> The German school, especially Jhering,<sup>184</sup> and French school, especially Géný,<sup>185</sup> called for greater 'purposefulness' in the law. Both schools called for a 'reconstruction' of the law based on 'interests' and the 'purpose of justice.'<sup>186</sup> Jhering called for the replacement of the 'mechanical law of causality' with the 'law of purpose.' He articulated his view as follows:

In 'Cause,' the object upon which the effect is produced is passive. The object appears simply as a single point in the universe at which the law of causality is carried out in that moment. In 'purpose,' on the other hand, the thing which is set in motion by it appears as self-active; it acts. Cause belongs to the past, purpose to the future. External nature, when questioned regarding the reason of its processes, directs the questioner to look back; whilst the will directs him forward ... But however the purpose may be combined with the act, and whatever the nature of the purpose may be, without a purpose action is unthinkable. *Acting, and acting with a purpose, are synonymous.* An act without a purpose is just as much an impossibility as is an effect without a cause.<sup>187</sup>

Moreover, Géný called for a method that gives more significance to 'legislative intent,' which is 'derived from the text' and, thus, 'dictates the interpreter's decision.'<sup>188</sup> However, these calls did not materialise into major changes in the general methodology of today's positive law.<sup>189</sup> Thus, the enhancing of 'purposefulness' is a much needed component for philosophy of law, in general.

In Islamic jurisprudence, ‘*dilālah al-maqṣid*’ (The implication of the purpose) is a new expression that has recently appeared in Islamic modernist expressions of *uṣūl al-fiqh*.<sup>190</sup> So far, however, this implication is generally not considered ‘certain’ (*qaṭ‘iyyah*) enough to be given specific juridical authority (*ḥujjiyyah*). Chapter Five showed that many ‘modernists’ criticise contemporary ‘literalism’ in Islamic law, and even define themselves as a center between the ‘extremes of literalism and secularism.’ Nonetheless, literalism remains a general feature in modernist trends, including its reformist stream, as long as it gives ultimate theoretical authority (*ḥujjiyyah*) to the category of ‘clear’ linguistic evidence over ‘unclear and uncertain’ expressions of *maqāṣid* and higher values.

Moreover, Islamic modernism did not take a clear position on the issue of ‘uncertainty’ of *maqāṣid* and *maṣāliḥ*. Al-Shāṭibī’s position was more supportive of *al-maqāṣid* when he described them as the ‘fundamentals of religion, basic rules of the revealed law, and universals of belief’ (*uṣūl al-dīn wa qawā‘id al-sharī‘ah wa kullīyyah al-millah*).<sup>191</sup> Ibn Ashur, the leading modernist ‘*maqāṣidī*,’ described *al-maqāṣid* as ‘certain or uncertain close to certain’ (*qaṭ‘ī aw ḥuṣūlī qarīb min al-qaṭ‘ī*).<sup>192</sup> Yet, so far, ‘purposefulness’ is proscribed, theoretically speaking, from playing a primary role in the derivation of rulings from related scripts.

On the other hand, Islamic postmodernism ‘deconstructed’ *al-maqāṣid* of the scripts, much as it deconstructed the scripts themselves. Chapter Five explained how ‘Islamic postmodernists’ call a modernist

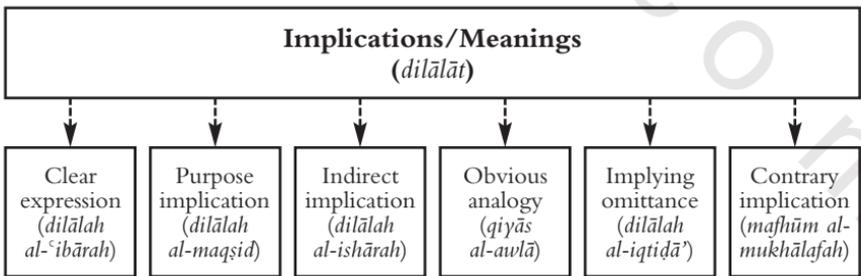


Chart 6.7. Adding the implications of the purpose (*dilālah al-maqṣid*) to valid implications/meanings. Its priority should depend on the importance of the implied purpose.

interpretation based on *maṣlahah* or *maqāṣid* ‘twisting and bending,’<sup>193</sup> ‘a secular movement disguised by religious discourse,’<sup>194</sup> and a ‘justification for oppressive rulers.’<sup>195</sup> Postmodernists accuse modernists of encouraging ‘fundamentalism’ via such interpretations.<sup>196</sup>

Nevertheless, the sub-system of linguistic evidences in the fundamentals of Islamic law could achieve more ‘purposefulness’ through the following specific suggestions:

1. The ‘implication of the purpose’ (*dilālah al-maqṣid*) should be added to the types of linguistic implications of the scripts (Chart 6.7). However, its ‘priority,’ relative to the other implications, should not be pre-set. It should be subject to the situation at hand and the importance of the *maqṣid* itself.
2. The possibility of specification (*takhṣīṣ*), interpretation (*ta’wīl*), and abrogation (*naskh*) were the three criteria that differentiated types of ‘clear expressions,’ namely, ‘firmly constructed’ (*muḥkam*), ‘text’ (*naṣṣ*), ‘apparent’ (*ẓāhir*), and ‘explained’ (*mufassar*). In addition to the above levels of clarity being ‘arbitrary,’ as I had argued in Chapter Four, *al-maqāṣid* themselves could be bases for specification and interpretation. An expression could be specified, or interpreted, via its purpose or purposes of other ‘opposing’ expressions. On the other hand, ‘abrogation’ is a form of gradual application of the rulings that should be understood in line with the purpose of ‘magnanimity’ of the Islamic law.
3. The purpose of the expression should also decide the validity of its ‘contrary implication,’ as opposed to the way this validity is decided via a ‘logical’ debate over whether or not ‘one ratio legis could imply two opposite rulings simultaneously.’<sup>197</sup> Thus, if ‘contrary’ expressions are implied by other scripts, then all ‘opposing’ implications should be considered within a higher purpose or *maqṣid*.
4. A scriptural expression of a higher purpose of the law, which is usually a ‘general’ and ‘unqualified’ expression, should not be, as a general rule, ‘specified’ or ‘qualified’ by individual scripts. Nor should individual scripts be ignored for the sake of ‘general’ and ‘unqualified’ scripts. All expressions should be considered within a general framework of their purposes.

5. The relationship between ‘qualified’ and ‘non-qualified’ terms addressing the same ruling in different cases, which is a matter of difference of opinion, should be defined based on the achievement of *maqāṣid*, rather than on a general linguistic or logical rule.

### *Purposeful Interpretations of Primary Sources*

The ‘thematic exegesis school’ took steps towards a more ‘purposeful/ *maqāṣidī*’ Qur’anic exegesis. The method of reading the Qur’anic text in terms of themes, principles, and higher values, is based on a perception of the Qur’an as a ‘unified whole.’<sup>198</sup> Based on this holistic approach, the small number of verses related to rulings, which are traditionally called the ‘verses of the rulings’ (*āyāt al-aḥkām*), will extend from a few hundred verses to the entire text of the Qur’an. Chapters and verses addressing faith, prophets’ stories, the hereafter, and nature, will then all comprise parts of a holistic picture and, thus, play a role in shaping juridical rulings. This approach will also allow principles and moral values, which are the main themes behind the Qur’anic stories and sections on the hereafter, to become *ratio legis* (*‘ilal*) for the rulings, in addition to the literal ‘causes’ that are ‘extracted’ via traditional methods of extraction of the grounds (*takhrīj al-manāṭ*). This would aid in eliminating the alternatives (*tanqīḥ al-manāṭ*), and asserting the realisation of the *ratio legis* (*taḥqīq al-manāṭ*), as explained earlier.

A purpose-oriented approach to the narrations of hadith proceeds from a similar holistic perception of the Prophet’s life and sayings. This method also attempts to draw a holistic picture of the prophetic tradition (Sunnah). The authenticity of individual narrations that are incoherent with obvious Islamic values would be put into question. This type of ‘systematic incoherence’ is different from the ‘content incoherence’ (*shudhūdh al-matn*) criterion in the traditional ‘invalidating the content’ (*taḍwīf al-matn*) process. ‘Content incoherence’ means that a narration is in ‘opposition’ (*ta‘ārud*) with some other narration (by the same or a different narrator). If jurists are not able to reconcile the (linguistic) implication of the two narrations (or the implication of their ‘causes’/*‘ilal*), then the ‘less certain’ narration is

considered incoherent. However, 'systematic incoherence' is inconsistency with the general principles of 'Islam,' as concluded via a holistic understanding of its scripts. Hence, 'systematic coherence' could be a name given to the method suggested by many modern reformists, which would then authenticate prophetic narrations, 'based on how much they agree with the principles of the Qur'an.'<sup>199</sup> Thus, 'systematic coherence' should be added to the conditions of authenticating the *matn* of prophetic narrations (which were previously summarised in Chart 4.6).

Finally, a *maqāṣid* approach could fill a crucial gap in the narration of hadith, in general, which is the gap of missing contexts. The vast majority of prophetic narrations, in all schools, are composed of one or two sentences or the answer of one or two questions, without elaborating on the historical, political, social, economical, or environmental context of the narration. In some cases, the companion or narrator ends his/her narration by saying: 'I am not sure whether or not the Prophet said ... because (we were in the context) of ....' Usually, however, the context and its impact on how the narration is understood and applied are left to the speculation of the narrator or jurist. The 'holistic picture' that was mentioned above helps in overcoming this lack of information through understanding the general purposes of the law.

### *Prophetic Purposes and Intents*

Moreover, *al-maqāṣid*, in the sense of the intents of the Prophet, could also be utilised in contextualising narrations. It was explained, in Chapter Four, how al-Qarāfī differentiated between the Prophet's actions 'as a conveyor of the divine message, a judge, and a leader,' and suggested that each of these intents has a different 'implication in the law.' Ibn Ashur added other types of 'prophetic intents,' which is a significant expansion of the scope of *dilālāt* via *maqāṣid*. Ibn Ashur demonstrated the prophetic intents that he proposed via a number of hadith narrations.<sup>200</sup> The following are some examples, according to Ibn Ashur.<sup>201</sup>

1. The intent of legislation. One example is the Prophet's sermon at the farewell pilgrimage, during which he, reportedly, said: 'Learn your rituals from me [by seeing me performing them], for I do not know whether I will be performing pilgrimage after this pilgrimage of mine.' He also said after concluding the same sermon: 'Let those present inform those who are absent.'
2. The intent of issuing edicts/fatwa. One example is the Prophet's edicts during his 'farewell pilgrimage,' when a man came to him and said: 'I sacrificed before throwing the pebbles.' The Prophet advised: 'Throw, and don't worry.' Then another man came and said: 'I shaved before sacrificing,' and the Prophet answered: 'Sacrifice, and don't worry.' The narrator said that he was not asked about anything that one would do after or before without his saying, 'Do it, and don't worry.'
3. The intent of judgeship. Examples are: (1) the Prophet's settlement of the dispute between a man from Hadramawt and a man from Kindah regarding a piece of land; (2) the Prophet's settlement between the Bedouin and his adversary, when the Bedouin said: 'O Messenger of God, judge between us;' and (3) the Prophet's settlement between Ḥabībah and Thābit. Ḥabībah bint Sahl, Thābit's wife, complained to the Prophet that she did not love her husband and that she wanted to divorce him. The Prophet said: 'Will you give him back his walled garden?' She said: 'I have all that he has given to me.' Then, the Prophet said to Thabit: 'Take it from her.' And so he took his walled garden and divorced her.
4. The intent of leadership. Examples are the prohibition of eating donkey meat in the battle of Khaybar, the permission to cultivate barren lands, and the Prophet's statement at the battle of Hunayn: 'Whoever has killed an enemy and has evidence of his actions can claim the enemy's property.'
5. The intent of guidance (which is more general than that of legislation). An example is found in Ibn Suwayd's narration, in which he said: 'I met Abū Dharr, who was wearing a cloak, and his slave, too, was wearing a similar one. I asked the reason for it. He replied, "I scolded a slave by calling his mother bad names." The Prophet said to me, "O Abū Dharr! Did you abuse him by calling

his mother bad names? You still have some characteristics of the age of pagan ignorance. Your slaves are your brethren.”

6. The intent of conciliation. One example is when the Prophet requested Barīrah to return to her husband after she divorced him. Barīrah said: ‘O God’s Apostle! Do you order me to do so?’ He said, ‘No, I only intercede for him.’ She said, ‘I do not need him.’ Also, Bukhārī reported that when Jābir’s father died, Jābir asked the Prophet to speak with his father’s creditors so that they might waive some of his debt. The Prophet then accepted their refusal to do so. Another example of conciliation is when Ka‘ab ibn Mālik demanded repayment of a debt from ‘Abdullāh ibn Abū Ḥadrad, the Prophet requested Ka‘ab to deduct half of the debt, and Ka‘ab agreed.
7. The intent of giving advice. One example is when ‘Umar ibn al-Khaṭṭāb gave someone a horse as charity and the man neglected it. ‘Umar wished to buy the horse from the man, thinking that he would sell it cheaply. When he asked the Prophet about it, he told him: ‘Do not buy it, even if he gives it to you for one dirham, for someone who takes back his charity is like a dog swallowing its own vomit.’ Also, Zayd narrated that the Prophet said: ‘Do not sell the fruits before their benefit is evident,’ but Zayd commented that this was, ‘only by way of advice, for some people had quarreled too much over that matter.’
8. The intent of counseling. For example Bashīr informed the Prophet that he had given one of his sons a special gift. The Prophet asked him: ‘Have you done the same with all your sons?’ He said: ‘No.’ The Prophet said: ‘Do not call me as a witness to injustice.’
9. The intent of teaching high ideals. For example, the Prophet asked Abū Dharr: ‘Do you see (the mountain of) Uḥud?’ Abū Dharr replied: ‘I do!’ The Prophet said: ‘If I had gold equal to the mountain of Uḥud, I would love that, before three days had passed, not a single Dinar thereof remained with me if I found somebody to accept it, excluding some amount that I would keep for the payment of my debts.’ Similarly, al-Barā’ ibn ‘Āzib said: ‘God’s Messenger commanded us to practice seven things and prohibited us from practicing seven. He commanded us to visit the sick, to

walk behind funeral processions, to pray for someone upon sneezing, to approve of someone's oath, to help the oppressed person, to spread the greeting of peace, and to accept the invitation of the invitee. On the other hand, he prohibited us from wearing gold rings, using silver utensils, using red saddlecloth made of cotton, wearing Egyptian clothes with silky extensions, clothes made of thick silk, thin silk, or normal silk.' Similarly, 'Alī ibn Abī Ṭālib narrates: 'God's Apostle forbade me to use gold rings, to wear silk clothes and clothes dyed with saffron, and to recite the Qur'an while bowing and prostrating in prayer. I am not saying he forbade you these things.' Likewise, with the same educational intent, the Prophet told Rafi' ibn Khadij: 'Do not rent your farm, but cultivate the land yourself.'

10. The intent of disciplining his companions. For example, the hadith: 'By God! He does not believe! By God! He does not believe!' It was said, 'Who is that, O Messenger of God?' He said: 'The person whose neighbor does not feel safe from his evil.'
11. Intent of non-instruction. This includes the hadith that described the way the Prophet ate, wore his clothes, laid down, walked, mounted his animal, and placed his hands when prostrating in prayer. Another example is the report that the Prophet stopped on the farewell pilgrimage at a hill overlooking a watercourse in Banī Kinānah, on which 'Ā'ishah commented: 'Camping at al-Abṭaḥ is not one of the ceremonies of hajj, but was simply a place where the Prophet used to camp so that it might be easier for him to leave for Madinah.'

Ibn Ashur's extension of the *dilālāt* of the hadith, as shown in the above examples, raises the level of 'purposefulness' in traditional methods and allows much flexibility in interpreting and applying the narrations.

### *Analogy via Purposes*

The majority of schools and jurists allow analogy based on the 'illah (cause) of the ruling and not the 'wisdom' (*ḥikmah*) behind the ruling, as previously explained. Their rationale is to preserve 'indibāt' (that is

exactness) of the ratio legis, which is its ‘constancy with the change of time and place.’ In other words, in order to preserve formality on a procedural level, jurists decide that the ratio legis behind a ruling should never change with circumstances. Even those who allow *al-ḥikmah* to become a ratio legis for rulings, made a condition that it should be ‘exact.’<sup>202</sup>

However, a careful analysis of the ‘exactness’ of the ‘*illah*’ reveals that it is usually changeable and cannot be precisely defined, as Ibn Qudāmah, a key Ḥanbalī jurist, argued.<sup>203</sup> Ibn Qudāmah referred to the classic example of allowing an ill person to break his/her fasting based on the ‘exactness’ of the ‘*illah*’ of ‘sickness,’ and commented: ‘But sickness is not “exact,” because diseases vary. Some diseases harm a fasting person and some others are unrelated to fasting, such as toothaches, small wounds, blisters, minor ulcers, etc. Thus, “sickness” cannot be a valid criterion in its own right, and the wisdom, which is avoiding possible harm, should be endorsed as the criterion.’<sup>204</sup> Ibn Qudāmah’s argument actually applies to all kinds of ‘*ilal*’. In addition, the ‘wisdom’ that he referred to in the above example is what jurists called *al-munāsabah*, or ‘appropriateness,’ of the ‘*illah*’, or the ‘fulfilment of the interest’ (*taḥqīq al-maṣlahah*). As explained earlier in Chapter One, jurists began defining *maṣāliḥ* in terms of *maqāṣid* from the fifth Islamic century, and hence, they identified ‘appropriateness’ with ‘purposefulness.’

However, once more, the ‘uncertainty’ of purposes prevented them from their approval as ‘*ilal*’, in their own right. Perhaps under the effect of Greek logic, especially Aristotle (through Ibn Sīnā), most jurists agreed to prefer deduction (*al-istinbāt*) over induction (*al-istiqrāʾ*) as their means for ‘logic certainty’ (*al-yaqīn al-mantiqī*). Aristotle had argued that induction could be either complete (covering every related incident) or incomplete (not covering every related incident). Thus, he argued that given the ‘uselessness of complete induction’ and the ‘uncertainty of incomplete induction,’ induction is not a feasible tool for logical certainty.<sup>205</sup> This is the same argument, word for word, which jurists in various schools have used, from al-Rāzī and al-Ghazālī to al-Suyūṭī and al-Āmidī.<sup>206</sup> Thus, formal partial analogy, which is based on one evidence, has been given precedence over holistic

purpose-based concepts, which are based on (incomplete) inductive surveys. The multi-dimensional view of ‘certainty’ which was presented in a previous section aims to support ‘purposefulness’ in the reasoning-by-analogy subsystem of the Islamic fundamentals of law.

### *Interests Coherent with Purposes*

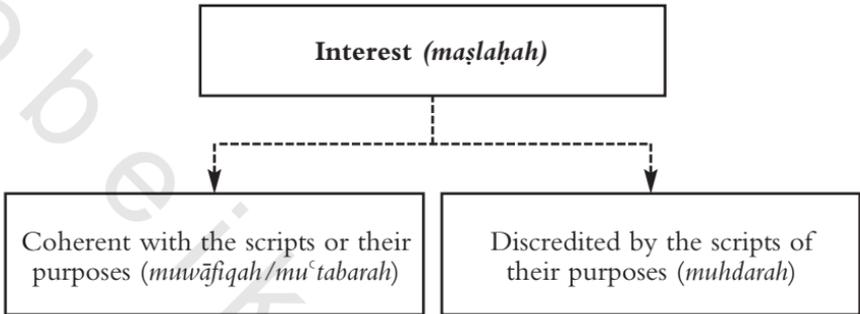


Chart 6.8. Classification of interests based on their coherence with the scripts or their purposes.

Many jurists were concerned that giving independent legitimacy to ‘interests’ might contradict with the scripts.<sup>207</sup> The same concern is expressed in philosophy of law regarding the relationship between claimed ‘intents’ and statutes. As such, the United States Supreme Court, and several British jurists, made a condition to the claiming of any intent. They maintain that, ‘the only admissible source of evidence as to the legislator’s specific intent is the text of the statute.’<sup>208</sup> I argue that this condition could also resolve the controversy over the independent legitimacy of ‘*maṣāliḥ*’ in Islamic law. Since *maqāṣid* is ‘induced’ from the scripts, *maṣlaḥah* would have juridical legitimacy if it were identified with *maqāṣid*, as many jurists have suggested.<sup>209</sup> Hence, supported (*muṭabarāh*) and unrestricted (*mursalah*) interests will merge into one category of interests that are mentioned either explicitly or implicitly in the scripts, as long as they achieve ‘purposefulness’ in the system of law. Chart 6.8 represents this re-classification of interests.

### *Juridical Preference Based on Purposes*

Schools of Islamic law that endorsed juridical preference (*istiḥsān*) claimed that they were trying to mend a gap in formal (syllogistic) analogy/*qiyās*.<sup>210</sup> In my view, the gap is not in the process of formal analogy, but rather in the literal definition of the cause/*illah*, which frequently misses the ‘point’ or the ‘purpose’ behind the ruling. Hence, *istiḥsān* simply meant to overlook the formalities of ‘implications’ and apply the purpose directly. The following are illustrative cases from Ibn al-Ḥasan al-Shaybānī’s *al-Mabsūt*.<sup>211</sup> Note the ‘historicity’ of many of these cases, which are recalled here only for illustrative purposes.

1. Abū Ḥanīfa applied *istiḥsān* in pardoning criminals, such as looters, after a long period of time, in which a looter, ‘moved away, proved to have changed, and repented.’ He decided not to apply a punishment in this case, despite the existence of its *illah* (cause), because, ‘the purpose of punishment is to deter people from crime, which no longer applies to such cases.’<sup>211</sup>
2. Trade transactions with payments postponed until certain events take place (at an undefined time) are ‘void,’ according to Ḥanafīs. However, for people’s best interest, Ibn al-Ḥasan al-Shaybānī applied *istiḥsān* to legalise this transaction on condition that the buyer pays the due amount immediately.<sup>212</sup>
3. Abū Ḥanīfa allowed ‘ambiguities’ in contracts that ‘do not lead to disputes according to local customs,’ such as, ‘the ambiguity in the width or height of a building.’ A literal application of the narrations that ‘did not allow ambiguities in contracts’ goes against Abū Ḥanīfa’s opinion. However, Abū Ḥanīfa applied *istiḥsān* by considering the ‘purpose’ of the narrations, which is to ‘prevent disputes.’<sup>213</sup>
4. Similarly, Abū Ḥanīfa allowed rental contracts that were timed with ‘inexact’ timings, for instance, ‘the time when the pilgrimage caravan leaves from Kufa to Makkah.’ Unknown elements in a contract make it void, according to direct analogies with related hadith, but *istiḥsān* allows ambiguity in timing for the purpose of facilitation.<sup>214</sup>



Therefore, as the above examples clearly show, *istiḥsān* is basically a form of adding ‘purposefulness’ to juridical reasoning. Nevertheless, schools of law that did not endorse *istiḥsān* had attempted to realise ‘purposefulness’ via other methods.

### ‘Opening the Means’ to Achieve Good Ends and *Maqāṣid*

Some Mālikīs proposed ‘opening the means’ (*fath al-dharā’i*<sup>c</sup>) in addition to ‘blocking’ them (*sadd al-dharā’i*<sup>c</sup>).<sup>219</sup> Al-Qarāfi divided rulings into means (*wasā’il*) and ends/purposes (*maqāṣid*). He suggested that means that lead to prohibited ends should be blocked, and means that lead to lawful ends should be opened.<sup>220</sup> Thus, al-Qarāfi linked the ranking of means to the ranking of their ends, and he suggested three levels for ends, namely, ‘most repugnant’ (*aqbah*), best (*afdāl*), and ‘in between’ (*mutawassīṭah*), as Chart 6.9 illustrates. Ibn Farḥūn (d. 769 AH), also from the Mālikī school, applied al-Qarāfi’s ‘opening the means’ to a number of rulings.<sup>221</sup>

Thus, Mālikīs do not restrict themselves to the negative side of ‘consequentialist’ thinking, to borrow a term from moral philosophy. They expand this method of thinking to the positive side of it, which entails opening means to achieving good ends, even if these ends were not mentioned in specific scripts. And in order to give al-Qarāfi’s *maqāṣid*-based expansion of blocking the means more flexibility, Chart 6.10 suggests a ‘continuous’ measure of ‘goodness’ and ‘repugnance’ of ends, to use al-Qarāfi’s expressions. ‘Neutral’ ends, then, would entail ‘lawful’ means.

### *Customs and the Purpose of ‘Universality’*

Al-Tahir ibn Ashur proposed a novel view of the fundamental of ‘custom’ (*al-urf*) based on the purposes of Islamic law. He wrote a chapter in his *Maqāṣid al-Sharī‘ah* on *al-urf*, which was entitled with a *maqṣid* that he called, ‘The Universality of the Islamic Law.’<sup>222</sup> In this chapter, Ibn Ashur did not consider the effect of custom on the application of narrations, as is the traditional view. Instead, he considered the effect of (Arabic) customs on narrations themselves. The following is a summary of Ibn Ashur’s argument.

First, Ibn Ashur explained that it is necessary for the Islamic law to be a universal law, since it claims to be ‘applicable to all humankind everywhere on earth at all times,’ as per a number of Qur’anic verses and hadith that he cited.<sup>223</sup> Then, Ibn Ashur elaborated on the wisdoms behind choosing the Prophet from amongst Arabs, such as the Arabs’ isolation from civilisation, which prepared them, ‘to mix and associate openly with other nations with whom they had no hostilities, in contrast to Persians, Byzantines, and Copts.’ Yet, for the Islamic law to be universal, ‘its rules and commands should apply equally to all human beings as much as possible,’ as Ibn Ashur confirmed. That is why, he wrote, ‘God had based the Islamic law on wisdoms and reasons that can be perceived by the mind and which do not change according to nations and custom.’ Thus, Ibn Ashur provided explanation as to why the Prophet forbade his companions to write down what he says, ‘lest particular cases be taken as universal rules.’ Ibn Ashur began applying his ideas to a number of narrations, in an attempt to filter out Arabic customs from popular traditional rulings. He wrote:<sup>224</sup>

Therefore, Islamic law does not concern itself with determining what kind of dress, house, or mount people should use ... Accordingly, we can establish that the customs and mores of a particular people have no right, as such, to be imposed on other people as legislation, not even the people who originated them ... This method of interpretation has removed much confusion that faced scholars in understanding the reasons why the law prohibited certain practices ... such as the prohibition for women to add hair extensions, to cleave their teeth, or to tattoo themselves ... The correct meaning of this, in my view ... is that these practices mentioned in hadith were, according to Arabs, signs of a woman’s lack of chastity. Therefore, prohibiting these practices was actually aimed at certain evil motives ... Similarly, we read: ... ‘believing women should draw over themselves some of their outer garments’ (*Surat al-Aḥzāb*) ... This is a legislation that took into consideration an Arab tradition, and therefore does not necessarily apply to women who do not wear this style of dress ...

Therefore, based on the purpose of ‘universality’ of the Islamic law, Ibn Ashur suggested a method of interpreting narrations through understanding their underlying Arabic cultural context, rather than treating them as absolute and unqualified rules. Thus, he read the above narrations in terms of their higher moral purposes, rather than norms in their own right. This method of dealing with customs enhances ‘purposefulness’ in the system of Islamic law.

### *Presumption of Continuity*

The principle of ‘presumption of continuity’ (*istiṣhāb*) is a ‘logical evidence’ (*dalīl ‘aqlī*), as jurists say. However, the application of this principle could be viewed as an implementation of the higher purposes of Islamic law. For example, the ‘presumption of innocence until proven guilty’ is aimed to maintain the purpose of justice,<sup>225</sup> the presumption of permissibility until proven forbidden is aimed to maintain the purposes of magnanimity and freedom of choice,<sup>226</sup> and the presumption of continuity of certain attributes, such as, limited financial ability,<sup>227</sup> and intention for worship (*niyyah al-‘ibādah*),<sup>228</sup> are aimed to maintain the purpose of facilitation.

In addition, al-Turabi suggested an expansion of the traditional presumption of continuity to a ‘wide presumption of continuity,’ where ‘all values, such as justice, family, and even rituals, as they were known and practiced by people according to their sincere disposition,’ are to be ‘presumed as default.’ The only exception from this rule of ‘presumption of continuity,’ is what the revealed law had corrected and amended.<sup>229</sup> Thus, the principle of ‘presumption of continuity,’ in its classic and modernist forms, is a form of realisation of the purposes of Islamic law.

### *‘Purposefulness’ as Common Grounds for Schools of Law*

Today, in the beginning of the twenty-first century, sharp ‘scholastic’ divisions take the shape of a Sunni-Shia division, which many like to perceive as a ‘sectarian’ division, for various motives. The juridical and ‘narrational’ differences between various Sunni and Shia schools, as outlined in the previous chapters, boil down to their ‘politics’ rather

than their 'faith.' However, today, deep divisions between Sunni and Shia are constructed through courts, mosques, and social dealings in most countries, causing these divisions to develop into violent conflict in a number of countries. These divisions have added to a wide-spreading culture of civil intolerance and inability of coexistence with the 'Other.'

I carried out a survey on the latest studies on *al-maqāṣid*, which were written by key Sunni and Shia scholars. The survey revealed to me an interesting identicalness between both approaches to *maqāṣid*.<sup>230</sup> Both approaches address the same topics (*ijtihād*, *qiyās*, *ḥuqūq*, *qiyam*, *akhlāq*, and so on), refer to the same jurists and books (al-Juwaynī's *Burhān*, Ibn Bābawayh's *Ilal al-Sharā'i*, al-Ghazālī's *Mustaṣfā*, al-Shāṭibī's *Muwāfaqāt*, and Ibn Ashur's *Maqāṣid*), and use the same theoretical classifications (*maṣāliḥ*, *darūrāt*, *ḥājīyyāt*, *taḥsīniyyat*, *maqāṣid 'āmmah*, *maqāṣid khāṣṣah*, and so on). Most of the juridical differences between Sunni and Shia *fiqhī* schools are due to differences over *āḥād* narrations and detailed rulings. A *maqāṣidī* approach to *fiqh* is a holistic approach that does not restrict itself to one narration or partial ruling, but rather refers to general principles and common ground. Implementing the 'higher' purposes of unity and reconciliation of Muslims has a higher priority over implementing *fiqhī* details. Accordingly, Ayatullah Mahdi Shamsuddin prohibited aggression along Shia-Sunni lines based on 'the higher and fundamental purposes of reconciliation, unity, and justice.'<sup>231</sup> A *maqāṣidī* approach takes the issues to a higher philosophical ground and, hence, overcomes differences over the political history of Muslims and encourages a much-needed culture of conciliation and peaceful co-existence.

### *Purposefulness as the Fundamental Criteria for Ijtihad*

Based on the above analysis of 'purposefulness' in various fundamental linguistic and rational evidences/methods, it is clear that the realisation of purposes is not specific to a few *uṣūl* methods, such as analogy or interest, the latter of which many traditional and contemporary theories suggested. I argue that the realisation of the purposes/*maqāṣid* of the Islamic law is the core objective of all fundamental

linguistic and rational methodologies of *ijtihād*, irrespective of their various names and approaches. Moreover, the realisation of *maqāṣid*, from a systems point of view, maintains openness, renewal, realism, and flexibility in the system of Islamic law.

Therefore, the validity of any *ijtihād* should be determined based on its level of 'purposefulness,' i.e., the level of its realisation of *maqāṣid al-sharī'ah*. Likewise, the validity of a ruling should be determined based on its level of the realisation of *maqāṣid*. A choice between alternative rulings, or outcomes of *ijtihād*, is traditionally carried out through a fixed ranking of the fundamental methods involved in that *ijtihād*, such as, consensus, analogy, companion's opinion, or the tradition of the People of Madinah. Schools of law differed over the ranking of fundamental methods. However, based on the above analysis of 'purposefulness' in fundamental methods, a choice between alternative outcomes of *ijtihād* should be carried out based on the fulfilment of *maqāṣid*, regardless of the jurist's school or tendency. The outcome that achieves its *maqṣid* should be validated. Thus, if the implication of one *maqṣid* goes against the implication of another, the *maqṣid* that is deemed higher, based on the hierarchies previously explained in Chapter One, should be given precedence. In conclusion, hence the process of *ijtihād* becomes, effectively, a process of realising 'purposefulness' in Islamic law.