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EDITOR'S NOTE

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**ANY RULE THAT DEPARTS FROM JUSTICE TO INJUSTICE IS
INCOMPATIBLE WITH SHARI'AH EVEN IF ARRIVED AT BY LITERAL
INTERPRETATION: AN APPRAISAL**

I. INTRODUCTION

A cursory look at the issue(s) involved in this "Islamic jurisprudential maxim" would reveal that the object contained therein is to examine analytically the goals, objects or purposes of Shari'ah referred to in Arabic as (Maqasid-ash-Shari'ah).

It thus becomes necessary to state in the very beginning that, purposes of Shari'ah, as an issue, falls within the five legal principles of Islamic jurisprudence (Al-qawa'id al-usuliyyah at-tashri'iyyah)¹. It infact occupies the first position among the said principles².

Purposes of Shari'ah or the goals behind Shari'ah (Al-maqsad min at-tashri'i) aim at revealing to an inquiring mind the very purpose which the laws of Allah were revealed to serve. This purpose, without unnecessary details, is into three major forms as classified long before now by the early classical giants in the field of Islam Jurisprudence (Usul-al-Fiqh). It shall be the writer's pre-occupation in this academic paper to dwell on these basic and fundamental classifications comprehensively.

II. THE GENERAL PURPOSES/DEVELOPMENT OF THE LAW

It is a veritable fact that generally the system of interpretation or theories of law in various quarters tended to be more and more literal. Nevertheless, it can not be said on the basis of this conclusion that the law had become rigid, as maintained by some western writers, on the basis of such literal tendencies. This is due to the fact that, some of these theories, especially that of the Hanafis, employed general principles, and it would have been difficult though such theories to extend the Shari'ah into the area taken over by the state³.

Meanwhile, the idea of the literalist influence was explored further, by suggesting that it is a literal system of interpretation that falls back on the purposes of law and flexible ultimate values.

The traditional theory however was examined and indicated that, had the rules of literal interpretation as determined by the traditional theory been combined with the narrow forms of analogical deduction that the traditional theory has approved, it would indeed be difficult to extend the law very far beyond what is laid down in the texts.

As this point was further emphasized by showing the majority of the texts used by the priests related to 'ibadat or the laws of worship and rituals. All others centered majorly on the personal law, such as marriage, divorce and inheritance⁴. Thus, this theory is based on the interplay of general principles and the purposes of law, and provides such flexibility for the jurist that the law based on the texts can be extended to any conceivable situation that may face the Muslim community.

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¹ Khallaf Abdul-Wahab, 'Ilm usul al-Fiqh, Dar al-hadith Pulication Cairo, (2003) Pg 229.

² The remaining four principles are: (1) between Allah's right(s) and the right(s) of Mukallaf. (2) where there is room for Ijtihad (3) on abrogation of rules and (4) on ta'rud and tarjih.

³ I.A.K Nyazee, Theories of Islamic Law, Islamic Research Institute, Islamabad (1945) Pg 229

⁴ Ibid

III. CLASSIFICATION INTO THREE (3) BASIC PURPOSES

A large number of theories of interpretation were formulated and practiced by jurists. The last of which was by Al-Ghazali who emphasized the importance of the purposes of law and the need to consider the texts collectively to benefit from the spirit of the law. As observed and said that "it will not be an act or verbosity or exaggeration to say that the Maqasid-al-Shari'ah (purposes of Shari'ah) became more popular with the Jurist than the theory itself"⁵. Thus attempts by various jurists on the subject led to further refinements in the understanding of the purposes of law and also bring to fore their significance for Islamic society in general.

To highlight the three fundamental purposes, namely –

- A – Satisfaction or realization of man's necessities (Darurriyyah) (primary purposes of the law).
- B – Additional purposes needed by the primary purpose (Hajat).
- C – Actualization of complementary accessories which occupies the least position of importance.

On the first purpose, five (5) areas of necessity have been identified. These are said to be the primary purposes of law as determined by Al-Ghazali, and agreed to by most jurists including Al-Shatibi⁶. It is said to be basically of two types: Dini (purposes of the hereafter) and Dunyawī (purposes pertaining to this world)⁷. The worldly purposes were further categorized / divided into four (4) types: the preservation of Nafs (life) / the preservation of Nasl (progeny), the preservation of 'Aql (intellect), preservation of 'Ird (integrity or reputation) and the preservation of Mal (wealth). The five put together are the ultimate purposes of the law and are technically referred to as "Darurat" or "Daruriyyah" (necessities) and are the primary purposes of the law.

IV. FURTHER ANALYSIS

(i) **Preservation of Faith/Religion** – This is to strengthen man's relationship with his creator (Allah). To actualize this purpose, the five pillars of Islam were established as (testifying that there is no deity worthy to be worshipped other than Allah and that Muhammad^{SAW} is His servant and His messenger, observance of prayers, payment or giving of Zakat, observance of fast in Ramadan and Pilgrimage to Makkah).

Similarly, the article of faith was put in place to enhance it further. In the same vein, it is for the protection of this purpose that laws of Jihad and Apostasy were made. And to give a divine backing, the prophet said, "it is unlawful to take the life of a Muslim except in three things, whoever kills another, an elder who commits adultery (Zina) and an apostate (Murtad) should all be killed"⁸. In another tradition, the Prophet was reported to have said:

"Whoever changes his religion (for another) then put him to death"⁹.

The Quran speaks on this as well in the following words:

And fight them until there is no persecution, and religion is (freely professed) for Allah. But if they desist, then (remember) that no hostility is allowed except against the aggressors"¹⁰.

⁵ Ibid, pg 231

⁶ Ibid, pg 238

⁷ Ibid

⁸ Hadith

⁹ Ibid, pg 95

¹⁰ Quran 2 vs 193

(ii) **Preservation of Life/Progeny** – The institution of marriage and procreation were established for this purpose and thus the prophet stated thus,

“marriage is my practice and whoever turns away from my practice is not of me” and that there is no celibacy in Islam.

The Qur’anic injunctions also on the concept of Qisas (Laws of retribution)¹¹, Diyah (Blood money)¹² as well as laws against self-destruction, when Allah says: “And do not kill yourselves, for verily He (Allah) is merciful towards you (all)”¹³. Are all for this purpose of preserving life / progeny.

No wonder therefore when the law on fasting stated that: (fasting is prescribed for you)¹⁴. If literally taken, everybody who believes in Allah and His ordinance must, as of compulsion, fast irrespective of any excuse, but the Shari’ah, in order to maintain justice and to preserve life declares:

“but whosoever is ill or on a journey should fast in other days”¹⁵.

Similarly, on forbidden foods, if for the purpose of necessity and to save life, what ordinarily is forbidden is allowed to be taken¹⁶. Thus the literal interpretation is suspended in such a situation - for a purpose –

(iii) **Preservation of Intellect** – To establish this purpose, we have the laws against alcohols or anything that intoxicates¹⁷. Even it is said that:

“Every intoxicant is alcoholic and every alcoholic is forbidden”¹⁸

Again it is said:

“Anything whose consumption in large quantity intoxicates, then its consumption even in a small dose is forbidden”¹⁹.

And to establish this purpose further, we have the prescribed sanctions for intoxication related offences. It was reported that Hadrat Ali put the punishment for whoever consume alcohol/wine to eighty stripe/lashes – he who drinks, get intoxicated, he who is intoxicated raves, he who raves accuses falsely and he who accuses falsely should be given eighty lashes – thus, we have the sanction against intoxication based on the Qur’anic punishment for the offence of Qodhf (a false accusation of adultery)²⁰.

(iv) **Preservation of Integrity/Reputation** – under the Shari’ah, the issues relating to defamation is considered as a grave offence and thus its punishment fall under the Hadd (divinely ordained punishments). The Quran states in relation to Qodhf/Zina:

“And those who calumniate chaste women but bring not four witnesses – flog them with eighty stripes, and never admit there evidence thereafter, and it is they that are the transgressors”²¹

And for offences of defamation, the Quran says:

¹¹ Ibid, 2 vs 178

¹² Ibid, 4 vs 92

¹³ Ibid, 4 vs 29

¹⁴ Ibid, 2 vs 183

¹⁵ Ibid, 2 vs 184

¹⁶ Ibid, 2 vs 173

¹⁷ Ibid, 5 vs 90-91

¹⁸ Ibn Arabiy, Abu Bakr Muhammad Ibn Abdullah, Ahkam-Al-Quran, Vol. 2, pg 184

¹⁹ Ibid

²⁰ Ibid, Chapter 24 vs 4

²¹ Ibid

“O ye who believe! Let not one people deride another who may be better than they, nor let women deride other women, who may be better than they. And defame not your own people, nor call one another by nick names. Bad indeed in evil reputation after the profession of belief, and those who repent not are the wrong doers”²²

The Prophet of Islam, in his farewell speech, emphasized this:

“Your blood, properties and honour are forbidden on you (to be toyed with) as the forbiddance or sanctity of this day of yours, in this (noble) month of yours and in this city of yours.”²³

It is obvious from the above that the standard of proof is that of availability/testimony of witnesses. The issue of defenses in form of fair comment, justification, qualified and or absolute privileges as obtainable under the common law are irrelevant in relation to man's reputation or integrity and its safeguard as one of the primary purposes of the law.

(v) Acquisition or Preservation of Wealth/Property – To achieve this lofty purpose under the Shari'ah, all legal forms of trading activities and other permitted transactions as well as acquisition of property(ies) are established.

The Quran states:

“And do not devour your property/wealth among yourselves through falsehood or unjustly, and offer it not (as bribe) to the authorities that you may knowingly devour a part of the wealth of (other) people with injustice.”²⁴

Also it states:

“O ye who believe! Devour not your property among yourselves by unlawful means, except that (you earn) by trade with mutual consent . . .”²⁵

In addition, issues relating Sarqah (Theft)²⁶, Gisshu (Cheating), Khiyanah (Deception), property destruction and Riba (Usury or Interest). Of great significance is the concept of interest as it is widely practiced in the contemporary economic system and thus a fundamental issue in relation to protection of property or wealth under the Shari'ah.

It is seen as prejudicial to the interest of the people and thus the prohibition. This becomes necessary in order to protect the weak, the poor as well as investors against the prejudicial financial dispositions of the capitalists.

This will prevent the society from winning into topsy-turvy and ultimately protect people's property from misappropriation by way of exploitation. The purpose equally extends to ensuring the rights of the masses to profitable investments, devoid of any kind of deceit, uncertainty and unnecessary risk(s). By this, the masses is made to easy the ugly side of the concept of interest as succinctly put by Mirza Tahir:

“Little do people know or realize that borrowing from the loan – sharks, the likes of Shylock and prestigious finance houses and

²² Ibid, Chapter 49 vs 11

²³ Sahih Bukhari, Vol. 2, Hadith No. 26

²⁴ Ibid, 2 vs 188

²⁵ Ibid, 4 vs 29

²⁶ Ibid, 5 vs 38

banks is tantamount to borrowing from their own future earnings."²⁷

All the above, among others, are disallowed under the Shari'ah in order to give way to the actualization and maintenance of this purpose (Hifz-al-Mal) i.e. protection of property/wealth.

The Darurat (necessities) which are the primary purpose of the law are followed by those referred to as Hajat (needs), which are additional purposes needed by the primary purposes.

The third category is that of purposes that seek to establish ease and facility. These are referred to as Tahsinat or complementary purposes.²⁸

V. CONCLUSION

The purpose of law as agreed by most jurists is first of two types, namely, Dini and Dunyawī (Purposes of the Hereafter and purposes pertaining to this world. While the worldly purposes are further divided into four types; Hifz-an-Nafs (Preservation of Life) or Hifz-al-Nasl (Preservation of progeny), Hifz-al-'Aql (Preservation of Intellect), Hifz-al-'Ird (Protection of Integrity/Honour) and Hifz-al-Mal (Protection of Wealth/Property).

Where the purpose of Daruri is defeated, the implication is that the whole essence of human existence is gone.

Where the purposes of Hajat is defeated however, the essence of human existence is not gone, but the particular man in question is made to undergo tribulation and hardship. And in a situation where the purpose of Tahsini is defeated, the essence of man's existence is still there and intact and no harm is inflicted on the person, but such a man would not be said to have attained stage of human completeness. The case of a traveler who is expected to fast during Ramadhan giving earlier is apposite as an example of Hajiyat (need) as he is exempted from fasting, as well as a sick man. Shortening of a four raka'h prayer while on journey is another example of Hajiyah. While the example of Tahsinat – in prayer for instance is purity of cloth, place of prayer and to cover the body. And there is the room for self-imposed prayer, fasting and sadaqah to be dropped if leading to hardship²⁹

With the above as explained, one thing becomes crystal clear, and that is the fact that, in interpreting the legal provisions in Islamic law (Shari'ah) sources, attempt should be made through allegorical exercise (Ta'wil) to avoid a conclusion which would bring about absurdity or injury or harm to man's welfarism, as the prophet was reported to have said: (The best of religion is that which creates ease and facility for the people). So the focus of the law is (Avoidance of Hardship).

To this extent, one can conveniently mark a line of distinction between interpretational approach in Islamic Law and Common Law. It will be recalled that under the Common Law, especially legal system, literal interpretation connotes adherence to the clear literal interpretations of legal provisions even where doing so would bring about absurdity, the case under the Shari'ah is different.

²⁷ H.M.T. Ahmad, *Islam's Response to Contemporary Issues*, Islam International Publications Ltd, (1997) pg 171
²⁸ Al-Shatibi, in *Al-Muwafaqat*, vol 2, pp 8 – 13
²⁹ Ibid, pg 22