

# Islam, Fundamental Human Rights, and the *Maqāṣid al-Sharī'ah*: A Reinterpretation

By

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## **Abstract**

*The Sharī'ah is regarded by many Muslims as a sine qua non for the modern state perhaps because the state established by the Prophet in Madīnah was Sharī'ah based. This paper focuses on the complexity of the popular understanding of fundamental human rights in the Sharī'ah and how this can be reinterpreted using the Maqāṣid al-Sharī'ah. While both Islamic scholars and legal positivists view fundamental human rights as an integral part of the Law, positivists have argued against the religious roots of fundamental human rights. This paper questions the position of the Islamic scholars and jurists on the fundamental human rights of non-Muslims as well as the popular reading that the Sharī'ah, which appears to confirm the position of legal positivists that religion tend to silence the rights of minorities. This paper grounding itself upon a Maqāṣid al-Sharī'ah analysis of human rights in the Sharī'ah concludes that the appropriation of the Maqāṣid al-Sharī'ah contrary to the views of classical Islamic scholars, reveals the ways through which the Sharī'ah protects and safeguards the fundamental human rights of minorities, especially non-Muslims.*

**KEYWORDS:** Sharī'ah, Maqāṣid al-Sharī'ah, Muslim, Human Rights, Madīnah, Shūrā

## **Introduction**

There are several cases of the abuse of fundamental human rights all over the Muslim world today, which apparently confirms the view of legal positivists that fundamental human rights, which is as an integral part of the Law cannot be guaranteed by the religious claims to divine “fundamental rights of men”<sup>2</sup> as well as entrench the popular view that the *Sharī'ah* silences these rights, especially of minorities such as non-Muslims that is not in tandem with the values of modern democracy.

The denial of the rights of minorities including Muslims and Christians in many Muslim majority countries includes the way many Muslim groups in the name of *Sharī'ah* commit violent, terrorist and destructive activities that contribute greatly to silencing and denying the rights of many minorities such as non-Muslims and Muslim women. The Taliban though out of power in Afghanistan still carry out untold punishments such as public executions and floggings as it used to do when in power. In power, it carried out execution, detention, and gang rape etc. of men and women for committing the crimes of not wearing beards, wearing beards of insufficient length, and cutting or shaving beards as well as not wearing *Burqa* ' (large

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<sup>2</sup> See for examples J. G. Starke, *Introduction to International* 10<sup>th</sup> edition (London: Butterworth, 1989), 23-27, Muhammad Hashim Kamali, *Freedom of Expression in Islam* (Kuala Lumpur: Ilmiah, 1998), Muhammad Khalid Masud, “Muslim Jurist’s Quests for the Normative Basis of Shariah,” *ISIM Newsletter* (Leiden: ISIM, 2001), Mashood A. Baderin *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003) and Wahabuddin Ra’ees, “In Quest for a Theory of Human Rights in the Intellectual Legacy of Classical Muslim Scholars and Jurists: General Observations” *Journal of Islam in Asia* (2005) 2 (1): 161-182.

gown that covers from head to toe), wearing decorated and bright coloured clothing and wearing noisy shoes, white socks, and shoes, respectively.<sup>3</sup>

In fact, the Islamic State in Iraq and the Levant and the Boko Haram (BH) in Nigeria have even surpassed the Taliban in the perpetration of these atrocities on the minorities by imposing the death penalty on non-Muslims, government, and security functionaries as well as Muslims who commit the crimes of advocating democracy and befriending non-Muslims etc. Such innocent and defenceless Muslims and non-Muslims alike have been executed through beheading, mass slaughtering and bombing.<sup>4</sup>

One important point that should be noted here is that women, especially Muslim women constitute the main minority group that has borne the brunt of the untold human rights abuse perpetrated by the above Islamic groups, which include the fact that many of the girls and women that have been their victims are exposed to sexual violence and are either pregnant or have had children for them, causing them stigmatization and contempt from both their families and communities. Many others have been radicalized in captivity and are therefore reluctant to return to their homes. This is coupled with those who have no homes to return to. Moreover, over one million children in Northeast Nigeria alone have been forced out of their schools and the United Nations Children Emergency Funds (UNICEF) is working in collaboration with other Nigerian government and partners to assist these children.<sup>5</sup> The abuse of fundamental human rights in Nigeria by BH in particular of non-Muslims who are killed, forced to pray, wear the *Hijāb* or even convert to Islam among others contradicts the multicultural and pluralistic Constitution of Nigeria. According to Section 38 (1) of the 1999 Constitution:

Every person shall be entitled to freedom of thought, conscience and religion, including the freedom to change religion or belief, and freedom (either alone in a community with others, and in public or private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

In the case of *Bashirat Saliu and Ors v The Provost, Kwara State College of Education, Ilorin and Ors*, the Ilorin High Court in “interpreting sub-section 1 of section 38 upheld:”

According to the LONGMAN DICTIONARY OF CONTEMPORARY ENGLISH NEW EDITION at page 867, the word “manifest” means to show, or to appear or become easy to see. While “Observance” is defined at page 973 to mean “... a part of a religious ceremony; ritual observances”. The word “practice” is defined at page 1104 to mean “Something that you do often because of your religion or religious beliefs and practices.”<sup>6</sup>

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<sup>3</sup> Vincent Iacopino et. al, *The Taliban War on Women: A Health and Human Rights Crisis in Afghanistan: A Report by Physicians for Human Rights* (Boston and Washington DC: Library of Congress, 1998), 11-14, 33 and A. Widney Brown and Farhat Bokhari, “Afghanistan Humanity Denied: Systematic Violations of Women’s Rights in Afghanistan” *A Human Rights Watch Report* (2001) 13/C: 2, 6-8 and 10-20 retrieved on November 18, 2017 from <https://www.scribd.com/document/7574245/Final-Copy-of-Master-Paper>.

<sup>4</sup> B. Richard, *The Islamic State* (New York: The Soufan Group, 2014), 18 and Fatima Mohammed Al-Majdhoub and Aziza Hamza, “Framing the ISIL: A content Analysis of the News Coverage by CNN and Aljazeera” *Malaysian Journal of Communication* (2016) 32/1: 338-355.

<sup>5</sup> The United Nations Children Emergency Funds, *UNICEF Report* (New York: UN Publications, 2016).

<sup>6</sup> Reported by Absulmumini A. Oba, “Dress Codes in Tertiary Institutions in Nigeria and the Religious Rights of Female Muslim Students,” *At-Tibyaan* (2007-2009) 1: 46-50.

In the same vein, “in *Jenebu Ojonye v Aleyi Adegbudu*, the court explained the categories of religious tenets recognized for the constitutional protection:”

We wish to explain for the guidance of lower courts that no court, authority, or person has the power to compel anybody to practice what is not recognized or allowed by his religion as long as that practice is generally known not to be allowed by his religion. This is so because a person should not be allowed to escape from his civil responsibility or civil obligations to other people on the pretext of his freedom of religion...<sup>7</sup>

The Nigerian Constitution as confirmed in the case “guarantees freedom of religion to every citizen.” A question that arises is do Islamic movements such as the Boko Haram (BH)<sup>8</sup> violate the fundamental rights of non-Muslims because it is sanctioned by the *Sharī'ah* as claimed by many people today or is Islam anti-fundamental human rights as opined by legal positivists?

To answer these questions, this paper will employ the theory of *Maqāṣid al-Sharī'ah* as a theoretical framework to analyze the centrality of fundamental human rights in Islamic Law and its provisions for the rights of non-Muslims. In the light of this, the paper is divided into five sections. The first is the introduction. The second section traces the background to the democratic and federal state of Madīnah founded by the Prophet (SAW). The third section discusses the theory of *Maqāṣid al-Sharī'ah* and Fundamental Human Rights in Islam. The fourth analyzes the *Sharī'ah* and the Five Fundamental and Irrevocable Rights of Non-Muslims. The last section is the conclusion.

### Understanding Democracy and the Madīnah Federation

Though there are many definitions of democracy, according to many scholars, the conditions in which elections are held in different countries play the chief roles in awarding the accolade ‘democratic’ to these countries.<sup>9</sup> Hence, all democracies must not only practice representative governments through one systematic form or another that entails direct or indirect elections amidst intense political engagements among political parties and aspirants to political offices, they must also ensure that these elections meet with minimal norms of conducting elections. According to Schedler, countries that hold elections can be categorized into three: liberal democracy, electoral democracy, and electoral authoritarianism. The distinction between these three is that while liberal democracy goes “beyond the electoral minimum,” the second merely manages to conduct elections rightly while failing “to institutionalize other vital dimensions of democratic constitutionalism, such as the rule of law, political accountability, bureaucratic integrity, and public deliberation.” In electoral authoritarianism however, even the elections do not reach the minimal norms of conducting elections in a democracy.<sup>10</sup>

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<sup>7</sup> Ibid, 50.

<sup>8</sup> The Islamic group formed in Maiduguri, Borno State in North East Nigeria in 2002. The term “Boko Haram” comes from the Hausa word ‘boko’ meaning ‘Animist, western or non-Islamic education’ and the Arabic word ‘haram’ meaning “forbidden” or “sinful”. The adherents follow Sunni Islam. They were previously known as Jama’atAhl as-Sunnah lid-Da’awah wa’l-Jihad (“Group of the People of Sunnah for Preaching and Jihad”). They are now known to the west as The Islamic State in West Africa, or the Islamic State’s West Africa Province (ISWA or ISWAP)

<sup>9</sup> A. R. Moten, “The 1999 General Elections in Malaysia: Towards a Stable Democracy?” *Akademika: Journal of Southeast Asia Social Sciences and Humanities* (2000) 57(1): 67-86.

<sup>10</sup> A. Schedler, “Elections without Democracy” *Journal of Democracy*(2002) 13(2): 36-49.

The argument that democracy has a basis in the *Sharī'ah* finds support in the institutionalization of elections in the Madīnah state founded by the Prophet as it has been shown that all the successors to the Prophet were elected in one form or the other.<sup>11</sup> Further, Kamaldeen Balogun explains that the Islamic “teachings are aimed at establishing, a just and peaceful society which” promotes human rights including the rights of minorities.<sup>12</sup> Further, Ahmet Davutoglu has described how the Madīnah state founded by the Prophet, which was based on the *Sharī'ah* incorporated the Jews into “the community of Islam as equals; they had the same claim to protection by the other participants in the charter and identical obligations towards them.” For this, he concludes that the Madīnah *Sharī'ah* state rested on the two fundamental rights of freedom and equality.<sup>13</sup> This remarkable integration of non-Muslim minorities into the body politic of the Madīnah state has also been rightly observed by Ilse Lichtenstadter (1958: 57-58) as “a landmark in the development of Islam as a political concept” expressed in legal terms different from just mere inspirational and ethical admonitions in the Qur'an.<sup>14</sup> Hasan al-Turābī, the leader of the Islamic National Front in the Sudan also argues that the *Sharī'ah* is totally opposed to the idea of a theocratic government. According to him, the term democracy in its representative forms can be used synonymously with *Shūrā* (mutual consultation) as it guarantees the plurality of opinions from which the people can choose and makes ultimate political authority in an Islamic state reside in the people though they cannot overrule the basic provisions of the *Sharī'ah* because political sovereignty belongs to Allah.<sup>15</sup>

As for the question of the *Sharī'ah* conception of sovereignty, according to al-Turābī, in postulating the divinely ordained *Shūrā* and God's *Hakimiyyah* (sovereignty) Islam prevents tyranny because it promotes cooperation between the people as represented by the *Shūrā* and their rulers. The people as a result resolve all knotty issues through the *Shūrā*, thereby creating a democratic system free from the flaws of liberal democracies such as imposition of sectional interests and concentration of power in the hands of small elite. Further, according to him, the observance of prayer in the mosque is the perfect example of Islamic democracy as the Imām who leads prayer cannot be imposed on the people but is rather selected by them and they can also correct him in the course of the prayer. He sees this as the Islamic prototype for political leadership in a democracy.<sup>16</sup>

Similarly, al-Turābī argues that since the *Sharī'ah* is opposed to theocratic and authoritarian government, it imposes limitations on the government and also encourages pluralism by making the *Shūrā* the prerogative of the people through the Islamic doctrine of humankind's *Istikhlāf* (vicegerency). According to him, the political and social affairs of the society can be

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<sup>11</sup> Ibrahim Olatunde Uthman, “Islamic Leadership Model and the Burden of Terrorism and Leadership in Nigeria: Issues, Myths and Realities” *Journal of Social Sciences, (JSS) National Open University of Nigeria* (2018) 2 (2): 231-268.

<sup>12</sup> Kamaldeen Balogun, “Revisioning Modernity in the Eyes of Religion,” in M. A. Folorunsho, I.O. Oyeneye and R. I. Adebayo (Eds.), *Revisioning Modernity in the Eyes of Religion* (Ijebu-Ode: National Association for the Study of Religions and Education (NASRED), 1-18.

<sup>13</sup> Ahmet Davutoglu, *Alternative Paradigms: The Impact of Islamic and Western Weltanschauung on Political Theory* (Maryland: University Press of America, 1994), 132.

<sup>14</sup> Ilse Lichtenstadter, *Islam and the Modern Age: An Analysis and Appraisal* (New York: Bookman Associates, 1958), 57-58.

<sup>15</sup> L. Cantouri and A.Lowrie, “Islam, Democracy, the State and the West: Summary of a Lecture and Roundtable Discussion with Hasan al-Turabi” *Middle East Policy* (1992) 1 (3): 52-54.

<sup>16</sup> Al-Turābī, H. *Al-Salāh 'Imād al-Dīn* (Beirut: Dār al-Qalam, 1971), 124-158.

arranged on the basis of mutual contracts in line with the commandments of the Qur'an. Thus, the people's individuality should not be subsumed by the power of the state.<sup>17</sup>

In fact, Rachid al-Ghannushi, the founder and leader of the Islamic movement in Tunisia goes further to view the Islamic sanctioned government as a government of the people guided by the dictates of Allah, which are open to plural and diverse interpretations and understandings of Islamic texts, especially in different socio-cultural, economic, and political circumstances. Thus to him, the fact that the *Sharī'ah* upholds the people's power in form of the *Shūrā* is the rationale for accepting freedom of associations and political parties, including those championing different political paradigms, systems of governance and even un-Islamic ways of life.<sup>18</sup>

For Abu'l-Al'a Mawdudi, the late founder and leader of the Islamic movement in the Pakistani subcontinent, while Allah is the sole sovereign over the universe and all creatures, the *Sharī'ah* permits the election of political leaders and the methods of election may vary as shown by the examples of the four righteous caliphs who were elected by the nobles, designated by the incumbent, appointed by an electoral college and through direct election by the people, respectively.<sup>19</sup>

In line with the above postulations and the *Madīnah* state founded by the Prophet, democracy in this paper is viewed as a catchall system of government for the protection of human life, religion, intellect, lineage, and property. It therefore refers to a system of governance that preserves the religion, dignity, security, prosperity, and all basic needs of the citizens. In fact, I view any system of democracy as untrue when it is unable to guarantee the above pillars of Islamic democracy as we see in some Western and secular democracies in the world today such as Nigeria; where for over twenty years of democracy, Nigerians are yet to averagely enjoy the fruits of democracy.

On this point, Balogun submits that "Democracy as conceived of in Western Europe and America should not therefore be applicable to the generality of the World. Certainly, the forms of democracy should vary to suit local and historical conditions." He goes further to assert that "Democracy ought to be a system that reflects the dignity and equality of all human beings that obliges governments to act on behalf of all citizens, and one that establishes a peaceful method of removing bad leaders." Finally, he affirms that "democracy should not be theoretical construct like the decimal system of the game of chess that works the same well in any place or culture. It must necessarily be overlaid with cultural and historical differences, some of which are profound."<sup>20</sup>

My major argument here is that even mature democracies such as the USA, Canada, UK, France, Germany, Switzerland, and the European Union are not insulated from contested issues of equitability, justice, religious plurality, and human rights including the rights of minorities and immigrants, though they are able to provide these rights to most of their citizens. Therefore, contrary to what the die-hard advocates of democracy may say; the success of democracies is not just a

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<sup>17</sup> A.S. Moussalli, 'Hasan al-Turabi's Islamist Discourse on Democracy and Shura,' *Middle Eastern Studies*, 1 (1994) 30: 61.

<sup>18</sup> John Esposito and J. Piscatori, "Democratization and Islam" *Middle East Journal* (Summer 1991) 45 (3): 426-437 and Azzam Tamimi, *Rachid Ghannouchi: a Democratic Within Islam* (Oxford: Oxford University Press, 2001), 87- 91.

<sup>19</sup> A. Mawdudi, *The Islamic Law and Constitution* (Lahore: Islamic Publications. 1969), 204 and *The Islamic Law and Constitution* (ed.), Khurshid Ahmad (Lahore: Islamic Publications Ltd, 1980), 249-252.

<sup>20</sup> Balogun, "Revisioning Modernity," 5-6.

function of theories and ideas. Although there are essentials of democracy, what works for one democracy may not work for others as each must be shaped by its contextual historical dynamics as seen in these mature Western democracies. More specifically, it is these dynamics that determine whether a democracy will be successful or not.

Further, as Muhammad also clarifies, while in the Islamic democracy sovereignty per se belongs to Allah, yet the people as a whole exercise it as a trust from Him to enforce His law and enact His will. The ultimate aim is to administer justice and provide security and protection for all citizens, regardless of their differences of religion, tongue, colour, or race. Hence, the question of religious or racial minorities may not arise so long as they are law abiding and peaceful citizens. The Islamic political system also gives room for individual ideas, which enabled the development of different political schools of “Thought.”<sup>21</sup>

The above constituted the Madīnah democratic foundations. In the pre-Prophetic Madīnah, there were the Jews and Arabs, the Banū Salamah, Banū Jusham, Banū Aws, al-Aws and the al-Khazraj. These different constituents of the society, with the advent of Islam, were later joined by the Muslims, Africans, Persians, and Quraysh. Of all these constituent units that formed the Madīnah state, only the Jews of Banū Qurayzah, Banū al-Nadīr and Banū Qaynuqā‘ did not enter into the pact that established it.<sup>22</sup> It is therefore noteworthy the Prophet gave these diverse constituents full autonomy in the political, military, socioeconomic and religious arrangements that he created based on the *Sharī‘ah*. This point is supported by the way facilitated the Prophet convened a constitutional assembly, in which all the parties in Madīnah were involved in the consultations that brought the nascent state into being based on the *Sahīfah al-Madīnah* (the Madīnah constitution). By the very bargaining and consultative nature of the *Sahīfah al-Madīnah*, which spelt out the essential principles governing the state established by the Prophet, I posit that a federal democracy was born.

The *Sahīfah al-Madīnah* proves, as stated by the aforementioned Islamic leaders and thinkers that the Islamic political system is not in any way theocratic. Thus, the Prophet did not impose on the citizens of the nascent the Madīnah Islamic polity but rather involved them in the development of its constitution that among other constitutional issues spelt out the rights and obligations of all the citizenry. In fact the Madīnah state was organized on the notion of modern citizenship with all the federating groups retaining “religious freedom as well as internal autonomy” as embedded in the *Sahīfah al-Madīnah* was the principle of voluntary federation or confederation that enabled the three Jewish communities to reject the initial pact.<sup>23</sup> Based on this analysis, I will now explain the theory of *Maqāṣid al-Sharī‘ah*.

### **The Maqāṣid al-Sharī‘ah and Fundamental Human Rights in Islam**

Fundamental human rights refer to permanent, eternal, and perpetual rights that are considered necessary to existence of any human irrespective of religion, race, tongue, sex, and birth etc. Just as legal positivists have upheld the centrality of laws in the realization of these fundamental human rights as today postulated by the 1948 United Nations’ Universal Declaration on Human Rights, so also have traditional Islamic legalists and jurists uphold the inseparability of

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<sup>21</sup> M. G. Muhammad, “The Rights of Non-Muslims in an Islamic State” *Journal Of Humanities And Social Science (IOSR-JHSS)* (2015) 20/ 8: 1-2.

<sup>22</sup> Haykal, 1976: 150-154 and 180-183.

<sup>23</sup> Muhammad Hamidullah, *The First Written Constitution in the World: An Important Document of the Time of the Holy Prophet* 3rd revised edition (Lahore: Shaikh Muhammad Ashraf, 1975), 18-21.

*Sharī'ah* and fundamental human rights and consider the *Sharī'ah* to be necessary for the realization of these rights, which have been vouchsafed by God.<sup>24</sup> Therefore according to Islamic scholars, the *Sharī'ah* is the instrument of the rights of human beings. This can be seen in Abū Ḥamid al-Ghazzālī's position that human rights in the *Sharī'ah* could be understood from the holistic reading of its purpose, aim, objective or goal known as (*Maqṣad*) whose plural is *Maqāṣid*, hence the term *Maqāṣid al-Sharī'ah* otherwise meaning the higher purposes or ultimate objectives of the *Sharī'ah*. Contrary to the view that Abū Ishaq Al-Shātibī introduced, identified, and developed the five higher purposes or the ultimate objectives of the *Sharī'ah*,<sup>25</sup> it has been shown by Usama Hasan that al-Ghazzālī was the first to propound these *Maqāṣid al-Sharī'ah* that are to "preserve five matters" namely the preservation of life, religion, intellect, property and lineage, a point he made six centuries before the articulation of a similar approach to Western Law by John Locke.<sup>26</sup>

Ibn Taymiyyah, the 14 century Islamic jurist and legalist adds other fundamental *Maqāṣid al-Sharī'ah*-the preservation of reputation, neighbourhoods, communities, fulfillment of contracts, moral purity, trustworthiness and love of God.<sup>27</sup> Ibn al-Qayyim al-Jawziyyah, a student of Ibn Taymiyyah goes further to make the most illustrating assessment of the significance of the *Maqāṣid al-Sharī'ah* when he argues that ignoring the *Maqāṣid al-Sharī'ah* will only cause:

Errors in understanding the *Sharī'ah* and impose hardship and unnecessary obligations, which anyone of wisdom can conclude this great *Sharī'ah* does not support or desire. The cornerstone of the *Sharī'ah* is achieving people's welfare in this life and after life. It is about justice, mercy and good. Thus any ruling that replaces justice with injustice, mercy with cruelty, common good with hardship and wisdom with nonsense is a ruling that does not belong to the *Sharī'ah*. The *Sharī'ah* represents the justice of Allah among His servants, His mercy on His creatures, his shadow on the earth as well as His wisdom that leads to faith in Him and in the truthfulness of His messenger (SAW). It is the light by which the people of sight see and the guide by which those guided by Him find the truth.<sup>28</sup>

However, the synthesis of the *Maqāṣid al-Sharī'ah* was carried out by the Andalusian Mālikī jurist al-Shātibī who developed a three-level classification of the *Maqāṣid al-Sharī'ah*- the essential/fundamental, the complementary/basic and the embellishing/beautifying levels respectively. To him, the above five *Maqāṣid al-Sharī'ah* of al-Ghazzālī, which he arranges slightly different by putting the preservation of religion before life, falls in the first level- the fundamental or necessary purposes, which he observes are the rights of human beings provided by the *Sharī'ah*.<sup>29</sup> This conception of al-Shātibī was further advanced by Muhammad Al-Tahir

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<sup>24</sup> Ra'ees, "In Quest for a Theory of Human Rights," 161-182.

<sup>25</sup> Ibid, 172 and 180.

<sup>26</sup> Usama Hasan, "The Veil: Between Tradition and Reason, Culture and Context" in T. Gabriel, and R. Hannan, (Eds.), *Islam and the Veil: Theoretical and Regional Contexts* (London: Continuum International Publishing Group, 2011), 74.

<sup>27</sup> Ibid, 75.

<sup>28</sup> Ibn al-Qayyim al-Jawziyyah, *I'lām al-Muwaqqi'īn* First edition 'Abd al-Rahmān Fahmī al-Zawāwī (ed.) 2 vols. 4 parts (Egypt: Dār al-Ghadd al-Jadīd, 1437 AH/2016), vol. 2, part 3, 14. See also Yusuf al-Qardawi, *Fiqh az-Zakat: A Comparative Study* (London: Dar Al Taqwa, 1999), first preface, xxxix.

<sup>29</sup> Masud "Shātibī's Philosophy of Islamic Law," 230-259 and "Muslim Jurist's Quests," 14.

Ibn Ashur who freed the study of the *Maqāṣid* completely from the *Usūl al-Fiqh* that he argued was not well formulated to reflect the hidden insights and purposes of the *Sharī'ah*.<sup>30</sup>

Following the above conception of the *Maqāṣid al-Sharī'ah*, a contemporary legal scholar, Muhammad Hashim Kamali has argued that the articulation of the higher purposes or the ultimate objectives of the *Sharī'ah* reveals that classical Islamic scholars did not shy away from discussing the rights of both the citizens and the state as well as the safety and sanctity of lives and property. This reveals Islamic scholars' conception of constitutional principles that enumerate the duties of the state, which they perceive as the pillars of the Islamic state. Based on the *Maqṣad* of *Rahmah* (mercy), which Kamali considers as "the all-pervasive" (objective of the *Sharī'ah* that according to him is used by Islamic scholars "synonymously with *Maslahah*" or a scheme of benefits,<sup>31</sup> the *Maqāṣid al-Sharī'ah* therefore cover fundamental human rights and liberties, public welfare, education, scientific and medical research as well as environmental safety.<sup>32</sup> For him, these *Maqāṣid* of the *Sharī'ah* are embedded in the precedents of the companions of the Prophet (SAW), who saw the *Sharī'ah* "not only as a set of rules but also as a system of values" or *Maqāṣid* "where the specific rules were the tangible manifestations of those overriding values."<sup>33</sup>

However, as mentioned above, not until the time of al-Ghazālī and later al-Shātībī; were these "overriding values" formulated into the theory of *al-Maqāṣid*. Thus, the *Maqāṣid* of the *Sharī'ah* embodies broad, general, and immutable rules and values drawn from Qur'ān and Sunnah such as the sanctity of life, security and freedom of expression, family as well as property and the inviolability of these rights. As al-Qaradāwī has explained, the adaptation of the *Sharī'ah* to exigencies of time, place and circumstance has been vouchsafed in the *Usūl al-Fiqh* (Islamic jurisprudence).<sup>34</sup> For instance, the rights of the minority in modern society, such as the freedom of religion is embedded in the Islamic concept of *Dhimmah* which means that the protection of the rights of non-Muslims who live under the *Sharī'ah* are the responsibility of Allah, His Messenger, and all Muslims. In other words, non-Muslims are referred to in the *Sharī'ah* as the *Ahl al-Dhimmah* or *Dhimmī* (the Covenant or protected people) who accept to live permanently in the Islamic state or accept its authority in accordance with the terms of any existing treaty and include the *Ahl al-Kitāb* (People of the book such as the Christians and Jews. In addition, there is the *Musta'min* singular of *Musta'minūn* (non-Muslims who stay in the Islamic state for a short or temporary period such as the ambassadors from other countries, asylum seekers and merchants. While the non-Muslim citizenship is called *Dhimmah*, the stay of the visiting non-Muslim is called *Amanah*.<sup>35</sup>

<sup>30</sup> Muhammad Al-Tahir Ibn Ashur, *Treatise on Maqāṣid al-Sharī'ah* (London and Washington: International Institute of Islamic Thought, 2006), xvii-xviii.

<sup>31</sup> Mohammad Hashim Kamali, "Law and Society: The Interplay of Revelation and Reason in the Shariah," in *Oxford History of Islam* John L. Esposito (ed.) (Oxford: Oxford University Press, 2000), see the entire introduction.

<sup>32</sup> Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Kuala Lumpur: Ilmiah, 1998), 16-18 and 22-23.

<sup>33</sup> Mohammad Hashim Kamali, "Maqasid al-Shariah: The Objectives of Islamic Law," *Islamic Studies Occasional Papers 33* (Pakistan: Islamic Research Institute, 1999), 1-3.

<sup>34</sup> Yūsuf al-Qaradāwī, *Islamic Law in the Modern World* Al-Hadi Ahmad Kahalifah (transl.) (Riyadh: World Assembly of Muslim Youth, 2000), 40-124.

<sup>35</sup> Ibn al-Qayyim al-Jawziyyah, *Aḥkām Ahl al-Dhimmah*, vol. 2, Ṭahā 'Abd al-Rauf Sa'd (ed.) (Beirut: Dār al-Kutub, al- 'Ilmiyyah, 2002), 475 and 668 and Abdullah Ibn Abdil Muḥsin (Ed.), *al-Mughnī Lī Ibn Qudāmah* vol. 8 (Saudi Arabia: Dār 'ālim ah al-Kutub, 1418 AH/1997), 445 and 535.

The question now is what practical ways are the fundamental human rights of the *Ahl al-Dhimmah* or *Dhimmī* and the *Musta'min* in conformity with the *Maqāṣid al-Sharī'ah* guaranteed in Islam? The answer to this question is the focus of the rest of this paper.

### **The Sharī'ah and the Fundamental and Irrevocable Rights of Non-Muslims**

Though several scholars<sup>36</sup> have discussed the human rights that are safeguarded in the *Sharī'ah* such as religion, life, expression, assembly and property in various degrees, they appear to gloss over the way many classical jurists limit the rights of the *Ahl al-Dhimmah* or *Dhimmī* and the *Musta'min*.<sup>37</sup> Classical Islamic jurists generally opine on the one hand that non-Muslims enjoy the protection of the *Sharī'ah* and are guaranteed the same rights with attendant obligations exactly like Muslims. On the other hand, they however tend to argue that the rights given to the non-Muslim citizens are not absolute, permanent, and irrevocable in nature. The rights of non-Muslims are covered by the general principle established by these Islamic jurists that “For them is what This juristic principle is predicated on the direct statement of the fourth *Khalīfah* (Caliph), ‘Alī Ibn Abi Tālib that “they pay the *Jizyah* (annual tax) so that their wealth can be like our wealth and their blood like our blood.”<sup>38</sup> ‘Alī was said to have made this statement after a Muslim was found guilty of murdering a *Dhimmī* and he ordered the execution of the Muslim. The brother of the deceased however, declared that he had forgiven the Muslim. But ‘Alī was reluctant to accept the forgiveness as people could have intimidated the brother of the deceased. But when he insisted that he had forgiven the Muslim and had even received the *diyyah* (blood money), ‘Alī relented and said: “Whosoever is our *Dhimmī*, his blood is as sacred as our own and his property is as inviolable as our own property.”<sup>39</sup>

The above precedents confirms that *Sharī'ah* grants the same fundamental human rights to Muslims and non-Muslims and it is, in my view the failure to broadly interrogate the rights of non-Muslim by classical Islamic scholars with the same *Maqāṣid al-Sharī'ah* they utilize in articulating the rights of Muslims that is responsible for their claim that the rights given to the non-Muslim are not absolute, fundamental, and irrevocable in nature.<sup>40</sup> For this reason, an attempt is made here to fill this gap, starting with the proclamation in the following verse:

Say O ye that reject faith! I worship not that which ye worship. Nor will ye worship that which I worship. And I will not worship that which ye

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<sup>36</sup> See for examples Hamidullah, *The First Written Constitution in the World*, Taha Jabir al-‘Alwani, “Taqlid and Ijtihad” *The American Journal of Islamic Social sciences* (1991) 8 (1): 129-142, Mohammed Hashim Kamali, “Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia” *Arab Law Quarterly* (1999), 203-234, Azzam Tamimi, “Human Rights: Islamic and Secular Perspectives” in *the Quest for Sanity: Reflections on September 11 and the Aftermath* (London: Muslim Council of Britain, 2002), 229-236, Kamali, *Freedom of Expression*, Ra’ees, “In Quest for a Theory of Human Rights,” 161-182 and Muhammad, “The Rights of Non-Muslims,” 1-7.

<sup>37</sup> Ibn al-Qayyim al-Jawziyyah, *Ahkām Ahl al-Dhimmah*, vol. 2, Ṭahā ‘Abd al-Rauf Sa’d (ed.) (Beirut: Dār al-Kutub, al- ‘Ilmiyyah, 2002), 475 and 668 and Abdullah Ibn Abdil Muḥsin (Ed.), *al-Mughnī Lī Ibn Qudāmah* vol. 8 (Saudi Arabia: Dār ‘ālim ah al-Kutub, 1418 AH/1997), 445 and 535.

<sup>38</sup> *Al-Mawsū‘ah al-Fiqhiyyah* (Kuwait: Wizārah al-Awqaf Wa Shu’ūn al-Islamiyyah, 1414 AH/1993), vol. 6, 127-139.

<sup>39</sup> Muhammad, “The Rights of Non-Muslims,” 5-6.

<sup>40</sup> *Al-Mawsū‘ah al-Fiqhiyyah* (Kuwait: Wizārah al-Awqaf Wa Shu’ūn al-Islamiyyah, 1414 AH/1993), vol. 6, 127-139.

have been wont to worship. Nor will ye worship that which I worship. To you be your way, and to me mine.<sup>41</sup>

The above chapter 109 is one of the shortest in the Qur'an and known to almost all Muslims. According to prophetic traditions, it is recommended to be read both at the beginning and end of every daily prayers, in the first unit of *raka'atal-Fajr* (the two units of voluntary prayer before the dawn prayer) and in the second unit of *Witr*, (the odd units of prayer at the end of the day), preferably in the dead of the night.<sup>42</sup> Thus, the prophet in order to entrench the irrevocable, permanent and fundamental rights of non-Muslim to life, property, religion, expression and assembly make the chapter, its words and meanings to be imbibed by Muslims through its recitation daily as it is done all over the world today, especially the last verse: "To you be your way, and to me mine" or put differently "For you is your religion and for me is mine."

However, what is the significance of "To you be your way, and to me mine" and how is it to be interpreted in terms of the irrevocable fundamental human right of religion, expression, and assembly? Although the significance, measure, and interpretation of "To you be your way, and to me mine" have amplified from the time it was first revealed to the Prophet Muhammad (SAW) in Makkah yet one significance it had then and which has not been abrogated over the centuries, not in the Qur'an and not in the Sunnah is the right to religion, expression and assembly. Creating a state of religious diversity and sustaining its religious inclusiveness, plurality and accommodation was a major issue and challenge addressed by the above Madīnah constitution that granted the Jews of their religion, almost repeating the last verse of the above chapter: "To you be your way, and to me mine" by stating that "The Jews have their religion and the Muslims theirs" and "Both enjoy the security of their own populace and clients except the unjust and criminal among them."

As a result, the accommodating religious precept of Islam in Makkah became a practical political and legal state policy in Madīnah enacted in its constitution. It thereby magnifies the spirit of many verses of the Qur'an revealed in Madīnah such as "Let there be no compulsion in religion" Q2: 256, "...to each among you have we prescribed a law and an open way" Q5:48 and "if it had been thy Lord's will, they would all have believed, all who are on earth! Wilt thou then compel mankind against their will, to believe!" (Q10: 99).<sup>43</sup> Unfortunately as stated before, one big issue that challenges the *Maqāṣid al-Sharī'ah* for non-Muslim minorities is the way many classical jurists limit the fundamental and irrevocable human rights of non-Muslims.

The challenge becomes more troubling and the tension more palpable when Christians for example are disallowed to build new churches, renovate ruined ones and ring bells or beat drums inside or outside their churches. These restrictions, which have however been traced to the time of *Khalīfah* 'Umar,<sup>44</sup> the second caliph shows the failure of Islamic jurists to apply the *Maqāṣid al-Sharī'ah*. On this, al-Shātībī has explained how the *Maqāṣid al-Sharī'ah* can be applied to benefit humanity and not just Muslims when he says that the *Sharī'ah* is premised on underlying benefits, which "can be verified by surveying the injunctions of the *Sharī'ah* and looking at the supporting evidence, whether of a universal or specific nature." He argues further: "With regard to worship, the principle is that people accept and obey without seeking explanation or reasons. As for transactions and interrelations, the principle is to look for meanings and

<sup>41</sup> A.Y. Ali, *The Qur'an: English Translation of the Meaning and Commentary*. Saudi Arabia: King Fahd Publishing Complex, 1405/2005), 2021-2022.

<sup>42</sup> S. Sābiq, *Fiqh al-Sunnah* Vol. I (Lebanon: Dar al-Kitab al-'Ilmiyyah, 1987), 388.

<sup>43</sup> Ali, *The Qur'an: English Translation*, 115-116 and 576.

<sup>44</sup> *Al-Mawsū'ah*, vol. 6, 123-124.

rationalization.”<sup>45</sup>

Since the aforementioned “To you be your way, and to me mine” is a universal principle of the *Sharī'ah*, it cannot be abrogated by the above precedent of ‘Umar, which concerns interrelations between Muslims and non-Muslims. Therefore, “the principle is to look for meanings and rationalization” of conditions that led to the above ‘Umar’s precedent. Al-Qardawi has enumerated many of such precedents of ‘Umar that appear to violate “the basic rules of *Sharī'ah*” but was in fact a reapplication of the rules to realize the underlying benefits and objectives of *Sharī'ah*. One of such precedents was ‘Umar’s decision to substitute the payment of *Jizyah* by the Christians of Banu Taghlib with *Zakāh* or the compulsory alms payable annually by Muslims and which is the third pillar of Islam. He took the decision “because he noticed their abhorrence and rejection of the word *Jizyah*” by the Christians of Banu Taghlib “and realized that no harm would be done to the Muslims by leaving aside the word...” He therefore “agreed to collect dues under the name of *Zakāh*.”<sup>46</sup>

It is clear from the above precedent of ‘Umar that the *Sharī'ah* allows non-Muslims to negotiate the conditions of their relations with the Muslims as long as it pleases the non-Muslims and “no harm would be done to the Muslims.” This is what happened to the Christian community of Arabia who wrote to its governor, ‘Abdul Raḥmān Ibn Ganam and negotiated the terms of its relations with the Muslims. In the letter it sent to the governor, the Christian community demanded for such restrictions in exchange for the protection of the Muslims. The requested restrictions therefore came about as a result of several historical dynamics and configurations of the community and were not at the behest of ‘Umar who only accepted them when the request was presented to him.<sup>47</sup> I therefore contend that the restrictions as approved by ‘Umar were appropriate to the extent that they corresponded to the demands of the Christianity community concerned as articulated by their religious leaders and to that extent they served as mutually agreed upon instruments for managing the religious diversity at the time.

Accordingly, any Muslim policy that is a re-enactment of the above agreement of Caliph ‘Umar with the Christians of the Arabia Arabian peninsula in fulfillment of their personal request would be a violation of the underlying benefits *Maqāṣid al-Sharī'ah*. It would also violate the Prophet’s peace treaty to the people of Najrān that shows that they were guaranteed the protection of Allah and His Prophet on their life, property, faith and choices. In his lifetime, they participated in all fields of commerce, trades, and medicine. The irrevocable fundamental rights granted non-Muslims by the prophet included the security of their life and property, freedom to practice their religions, freedom from being called upon to participate in the *Jihād* and freedom from being oppressed by any one or taxed beyond their capacity. In return for the payment of *Jizyah*, the Prophet offered the *ahl al-Dhimmah* that they would not be prevented from practicing their religion, their crosses and churches would not be damaged while their old people, women, children, religious leaders, and the poor would be exempted from the payment of this *Jizyah* and in return, they must not show disrespect towards the Prophet, the Qur’an and Islamic symbol and must not act contrary to the Muslim interests etc.<sup>48</sup>

Further, the Prophet declared that “whoever oppresses a non-Muslim subject or taxes him beyond his capacity, then I shall oppose him on the Day of Judgment” just as the second *Khalīfah*, ‘Umar was reported to have said that: I exhort my successor regarding the treatment to be meted out to the

<sup>45</sup> Al-Qardawi, *Fiqh az-Zakat*, xxxvii-xxxviii.

<sup>46</sup> Ibid, *Fiqh az-Zakat*, 46-50.

<sup>47</sup> Al-Jawziyyah, *Aḥkām* 668 and *al-Mawsū‘ah al-Fiqhiyyah*, vol. 6, 123-124.

<sup>48</sup> Muhammad, “The Rights of Non-Muslims,” 4-7.

covenanted people by the Messenger of Allah. They should receive the fullest security of their life and property should be defended even if it requires to go to war (with oppressors), and they should not be taxed beyond their capacity.<sup>49</sup> The blood of a *Dhimmī* is also considered as a sacred as that of a Muslim since when a Muslim kills a *Dhimmī* in the days of the Prophet, he ordered the execution of the Muslim. In the same vein, during the time of ‘Umar, a Muslim killed a *Dhimmī* and the murderer was executed. During the reign of ‘Uthman, the third *Khalīfah*, an order was issued for the execution of ‘Ubaydullah, the son of ‘Umar because he killed Hurmuzan and the daughter of Abu Lu‘lu both of whom were *ahl al-Dhimmah* under the impression that they conspired to murder his father, the second *Khalīfah*.<sup>50</sup>

## Conclusion

The paper shows that the rights of non-Muslims are protected by the *Sharī‘ah* and concludes that the appropriation of the *Maqāṣid al-Sharī‘ah* to analyze human rights in the *Sharī‘ah* shows contrary to the views of classical Islamic scholars that Islam offers many mechanisms towards the protection and realization of the fundamental human rights of minorities, especially non-Muslims. Due to the *Sharī‘ah* obligation of protecting these fundamental, eternal and immutable rights, the experience of the Madīnah state established by the Prophet also reveals that it was a federal democracy as it had the flexibility, adaptability and resilience to engage the dynamics of religious and national, political diversities etc. The experience leads to the conclusion that what makes such a state a democracy is the extent to which it addresses the challenges of equitable accommodation and management of political ethnic, tribal, religious and other diversity by giving full rights to all religions, nationalities, cultures and citizens of the state such that they all live as autonomous *Ummahs* under their religious and national laws be it the *Sharī‘ah* or the Jewish Law. It is therefore necessary to affirm that the Madīnah state gave to the non-Muslim citizens whatever rights Islam gave the Muslims.

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<sup>49</sup> A. R. Doi, *Shariah the Islamic law* (UK: Taha publishers, 1404/1990), 426-433.

<sup>50</sup> Muhammad, “The Rights of Non-Muslims,” 5-6.