

Fiqh Awlawiyyat in Retakaful¹ **Between RBC (Risk-Based Capital) Standards and Islamic Institutions**

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Abstract

Fiqh awlawiyyat, the science of priority jurisprudence, is very relevant in Islamic financial services, more so in takaful and retakaful whose principal purpose is risk management. Indeed there is a strong relationship between fiqh awlawiyyat and risk management and the latter is inherent in maqasid al-shariah especially when viewed in the context of the various mafasid and madhar. This paper discusses the development of both fiqh awlawiyyat and risk-based capital (RBC) and the application of the former in retakaful in the context of the latter and Islamic financial institutions.

Fiqh Awlawiyyat dalam Retakaful: Antara Standard Risiko Berpangkalan Modal dan Aplikasi di Institusi Kewangan Islam

Abstrak

Fiqh awlawiyyat atau fikah keutamaan, amat relevan dalam kewangan Islam, terutama sekali dalam takaful dan retakaful, yang mana tujuan utama kedua-duanya ialah pengurusan risiko. Sesungguhnya, terdapat hubung kait yang rapat antara fiqh awlawiyyat dan pengurusan risiko yang mana pengurusan risiko wujud dalam maqasid al-shari'ah, terutama apabila dilihat dalam konteks pelbagai mafasid dan madhar. Kertas kerja ini membincangkan sejarah pembangunan fiqh awlawiyyat dan risiko berpangkalan modal atau risk-based capital (RBC), dan penggunaan fiqh awlawiyyat dalam takaful semula, dalam konteks piawaian RBC dan tuntutan Syariah.

Pendahuluan

Sheikh Yusuf al-Qaradhawi,² who was the first person to coin and popularize the term priority jurisprudence (فقه الأولويات) or action hierarchy jurisprudence (فقه مراتب الأعمال) defined it as putting everything in its actual order and hierarchy with justice, whether relating to rules, values, or action. Therefore he said, one must not prioritize the unimportant over the important and the important over the most important; and the minor over the major, and the worst over the worse or the worse over the better one. Indeed one must put first things first and last things last not make the small big and vice versa and must put everything in its proper place according to the *shariah*.³ Indeed priority jurisprudence has a strong relationship with jurisprudence of objectives (فقه مقاصد),⁴ textual jurisprudence (فقه نصوص),⁵ and jurisprudence of balances (فقه موازنات),⁶. Among others, the fundamentals of priority jurisprudence are as follows:⁷

- a. To balance between the various *masalih* (plural of *maslahah*) or *manafi'* (plural of *manfa'ah*⁸) or the comparison of all goodness.
(الموازنة بين المصالح أو المنافع أو الخيرات المشروعة بعضها وبعض)
- b. To balance between the various *mafasid* (plural of *mafsadah*) or *madhar* (danger or harm) or the comparison of all vice.
(الموازنة كذلك بين المفاسد أو المضار أو الشرور الممنوعة بعضها وبعض)
- c. To balance between the various *masalih* and *mafasid* or the comparison of all goodness and vice when there exists conflict between them.
(الموازنة أيضاً بين المصالح والمفاسد أو الخيرات والشرور إذا تصادمت وتعارضت بعضها ببعض)

Development of *Fiqh Awlawiyyat*

Although the writer considers Sheikh Yusuf al-Qaradhawi as the father of *fiqh awlawiyyat* as he is the first person to coin the term and to formalize and explain it in a structured manner,⁹ he was not the first person to come up with the concept as both the *mutakallimun*¹⁰ and the *fuqaha* of the *usuliyyun* have discussed these ideas before under the ambit of

usul fiqh. It was known as the “method of the *mutakallimun*” because these authors introduced their books with discussions of theological and philosophical issues and used deductive method in defining the principles of source methodology, in ascertaining the validity of those principles, and in refuting those whose opinions differed with them without paying much attention to the issues and details which stem from the application of these principles.¹¹ It is also known as the *Shafi’iyah* method following Imam *Shafi’i’s* methodology. This was the method followed by the *Shafi’iyah*, the *Malikiyah*, *Hanabilah* and the *Mu’tazilah*.¹² Among the books written by the *mutakallimun* are *al-Mu’tamad* by Abu Husein Muhammad Bin Ali al-Basri of the Mu’tazilah (d 413 AH), *al-Burhan* by Imam al-Haramain al-Juwaini (d 487 AH) and *al-Mustasfa* by Imam al-Ghazali (d 505 AH), *al-Ahkam* by Abu Husein al-Amidi (d 631 AH) and *al-Minhaj* by al-Baidawi al-Shafii (d 685 AH).¹³

The *fuqaha* or the *Hanafiyun* were so named because they use induction to derive principles from Abu Hanifa’s juristic decisions. It involved defining the principles of *al-Usul* from the details of legal issues with which their earliest predecessors had already dealt. Thus, the basis for their studies of *al-Usul* was derived from the details of previously settled legal issues, and not the other way round.¹⁴ Jurists have discussed these ideas under *maqasid al-shariah*, particularly under the concepts of *maslahah* and *mafsadah*. Among the books written by them are *al-Usul* Abu Hasan al-Karkhi (d 340 AH), *Usul* Abu Bakr al-Razi also known as al Jassas (d 380 AH) and by Abu Zaid al-Dabusi (d 430 AH), *al-Usul* by Fakhrul Islam al-Bazdawi (d 430 AH) and *al-Manar* by al-Hafiz al-Nasafi.¹⁵

Following the two groups, there exists a third group that integrated the two schools. Among books that belong to this category are *Badi’ al-Nizam al-Jami’ Baina al-Bazdawi and al-Ahkam* by Mazfaruddin al-Baghdadi al-Hanafi (d 693 AH), *Jami’ al-Jawami’* by Abdul Wahab al-Subki al-Shafi’i (d 771 AH), *al-Tahrir* by Kamaluddin Ibnu al-Hamam (d 861 AH). Among the books by recent scholars – *Irshad al-Fuhul ila Tahqiq al-Haq min ilm usul* by Imam Shaukani (d 1250 AH = 1834/1835 AD), *Usul Fiqh* by Sheikh Muhammad Khudari Bek (d 1927) and *Tahsil al-wusul ila ilm usul* by Sheikh Abd al-Rahman Eid al-Mihlawi (d1920).¹⁶

Among the *mutakallimun*, Imam al-Haramain al-Juwaini used the word *istislah*,¹⁷ the tenth form of the root *sa-lu-ha*, which is the same as *maslahah*,¹⁸ and considered it in his scheme of *'illah* and divided it into five categories.¹⁹ However, it was his disciple, Imam al-Ghazali²⁰ who elaborated and developed the concept of *maslahah*²¹ and provided the clearest framework around which this question was to be discussed, and this is still the case today.²² He defined *maslahah* as the preservation of the objective of the *shariah*²³ which consists of the preservation of five principles i.e. religion, life, reason, progeny, and property²⁴ and also graded it into *dharurah*, *hajiyyah* and *tahsiniyyah*.²⁵ This definition has been agreed by as Saif al-Din al-Amidi, Al-Baidhawi, Al-Isnawi, Ibn al-Hajib and al-Qarafi²⁶ whilst *ird* (honour) was included by Ibn Subki in his *Jami' al-Jawami'* and by al-Tufi in his *al-Musannaf* and mentioned by al-Qarafi in his *Sharh Tanqih al-Fusul* although he did not adopt it.²⁷ In any case, the five have been generally accepted by the *usuliyyun* and adopted by modern day Muslim economists.²⁸ Adud al-Din al-Iji defined *maslahah* as what is agreeable to human nature and purpose,²⁹ while Sheikh Izzudin Ibn Abd Salam³⁰ defined it as *ladhdha* (pleasure) and *farah* (happiness) and the means leading to it³¹ and included the attainment of reward and deliverance from chastisement in the context of *masalih al-akhirah* and every *dharurah*, *hajiyyah* and *tahsiniyyah* in the context of *masalih al-dunya*.³² It was al-Shatibi who was the chief exponent of the *maqasid*,³³ who defined *maslahah* in its absolute sense by saying that *maslahah* is that which concerns the subsistence of human life, the completion of man's livelihood, and the acquisition of what his emotional and intellectual qualities require of him.³⁴

I am not able to obtain the definition of *maslahah* by the *fuqaha*, but to be fair, they have also contributed to the current thinking on *fiqh awlawiyat* through their various books on *usul fiqh* as mentioned above. Anyway, from the 4th century AH, the *mutakallimun* took over the discipline of *usul fiqh*. Consequently, their methods gained ascendancy over that of the *fuqaha* and, due to the intimate contact between the science of *usul fiqh* on the one hand, and logic and philosophy on the other, the effects of the latter two disciplines crept into the former.³⁵

Between the *mutakallimun* and the *fuqaha* and those that integrated the two methods, Al-Imam al-Shatibi who initially seek to integrate the

schools of Ibn al-Qasim, a disciple of Imam Malik,³⁶ and Abu Hanifah,³⁷ inadvertently developed a new trend on its own which may be called *tariqat al-maqasidiyun*³⁸ or *al-Shatibiyah*³⁹ when he went further by putting *maslahah* as the pillar of *al-maqasid al-shariah* through his book *al muwafaqat*.⁴⁰ Raisuni categorized al-Shatibi, who aimed at fusing *maqasid* and *usul fiqh*,⁴¹ as belonging to the trend of *usuliyun fuqaha*,⁴² i.e they are both *usuliyun* and *fuqaha* at the same time and he specifically mentioned Izzudin Ibn Abd al-Salam and his student al-Qarafi and Ibn Taimiyah and his student Ibn Qayyim alongside al-Shatibi who belong to this school.⁴³

In the context of acceptance of *maslahah* as a source of *shariah*, al-Ghazali categorized it into *mu'tabarrah* (accredited), *mulgha* (discredited) and *mursalah* (unrestricted).⁴⁴ The *maslahah mu'tabarrah* and *maslahah mulgha* are approved or rejected by a textual evidence respectively. On the other hand, the *maslahah mursalah* has no textual evidence in favour of or rejecting it⁴⁵ and has provoked so many debates and polemics.⁴⁶

It is from all the above that al-Qaradhawi drew upon to formulate the concept of *fiqh awlawiyyat* and its principles. That is possibly the reason why he did not define these terms as it is already in the *fiqh* books. He did, however, summarized the thoughts of the *mutakallimun*, the *fuqaha* and the *maqasidiyun* and consolidated them through his various books such as the one we are discussing and *Islamic Revival: Between Rejection and Extremism*⁴⁷ (الصحوۃ الإسلامیة بین الجحود والتطرف). In these books, al-Qaradhawi reiterated the position of prioritizing the *maqasid* over the *zawahir*⁴⁸ (apparent) which is similar to al-Shatibi's intermediate position between the *Zahiris* and the *Batinis*; including the neo-*batinis*, in which al-Shatibi advocated the consideration for the meanings which gave rise to them.⁴⁹ Indeed al-Qaradhawi stressed the importance of putting *ijtihad* over *taqlid*⁵⁰ and in choosing the various juristic opinions, one must follow the principles as expounded by the scholars known as "conflict and conciliation" (التعارض والترجيح) in the science of *usul fiqh*.⁵¹

Al-Qaradhawi devoted a whole section when explaining the importance of differentiating the decisive (*qat'i*) and doubtful (*zhanni*) where at times the *dalalah* may be decisive in transmission but not

in meaning, at other times it may be decisive in meaning but not in transmission whilst at other times the *dalalah* may neither be decisive in transmission nor meaning⁵² and that the *dalalah* that are *zhanni* in transmission are not recurrent (*mutawatir*) in the context of the *ahadith* although *zhanni dalalah* covers both the *Sunnah* and the Quran because Arabic words contains several meanings; actual (*haqiqi*) and allegorical (*majazi*) and allegorical (*kinayah*); specific (*khas*) and general (*am*), absolute (*mutlaq*) and qualified (*muqayyad*) and contains *dalalah mutabaqah*, *dalalah tadamunniyah* and *dalalah iltizamayah*.

(لأن ألفاظ اللغة بطبيعتها فيها الحقيقة والمجاز والكناية، والخاص والعام، والمطلق والمقيد، وتحتل الدلالة المطابقيه، والدلالة التضمنية، والدلالة الالتزامية⁵³)

Principles in *Fiqh Awlawiyyat*

Before we discuss further, it would be beneficial to understand the trends in the field of *usul fiqh* in relation to the theory and application of *maslahah* in the context of the *maqasid al-shariah* especially in the period between early 6th century AH and late 8th century AH i.e. between Fakhruddin al-Razi and before al-Shatibi. The trends, in brief, are as follows:⁵⁴

- a. The first is the al-Ghazali or al-Razi trend that 1) accepts *maslahah* that has a textual evidence in favour of its consideration, 2) rejects *maslahah* that is rejected by a textual evidence and 3) accepts *maslahah mursalah* that has no textual evidence but has the qualities of *dharuriyah*, *qat'iyyah* and *kulliyah*.⁵⁵
- b. The second trend is similar to the above except that it rejects *maslahah mursalah* as a basis of valid reasoning.
- c. The third trend is the *tasawwuf* trend illustrated by Ibn Abd Salam who validates *maslahah mursalah* but noted that different levels of people will conceive *maslahah* differently.
- d. The fourth trend is the Ibn Taimiyah or Ibn al-Qayyim trend that tried to find a middle way between the first and second trend and accepts the fatwa and opinions of the *sahabah* in addition to textual evidence. Ibn Taimiyyah also revised the scope of *al-maqasid*, from a designated and specified list to a completely open-ended list of value.

- e. The fifth trend is the al-Tufi trend that regards the use of *maslahah* as a fundamental principle and justified its use even to the extent of setting aside the text.

Al-Shatibi, who had so much respect for al-Ghazali, validated *maslahah mursalah* if a) it is in line with the *maqasid al-shariah*,⁵⁶ b) it does not conflict with the fundamentals of the *shariah* or with the *adillat al-shariah*,⁵⁷ and c) it protects the *dharuriyah*, removes the impediments which are harmful to the din and protects an indispensable means to the end of law.⁵⁸ More recently Ibn Ashur⁵⁹ validated *maslahah mursalah* by arguing that it is more appropriate compared to *'illah istinbatah* in *qiyas* which is acceptable whereas it is a partial and conjectural *maslahah*.⁶⁰ Turabi also argued for *masalih mursalah* which he called *qiyas masalih mursalah*, *qiyas ijmal* or *qiyas wasi*.⁶¹

In contemporary books of *usul fiqh*, *maslahah mursalah* or *istislah*⁶² which is claimed to have first been used by Imam Malik,⁶³ is a valid doctrine of definitive nature⁶⁴ although some consider it to be not unanimous as some scholars such as the *Zahiris*, *Shiah*, some from the *Shafi'iyah* such as al-Amidi, some from *Malikis* such as Ibn Hajib and some *Hanafis* reject *maslahah mursalah*.⁶⁵ However, the contemporary scholars who, in some respects, integrated the thoughts of Al-Ghazali, Ibn Abd Salam and al-Shatibi in varying degrees, accepted *maslahah mursalah* with the conditions that it must be a) *haqiqiyah* and not *wahmiyah*,⁶⁶ b) *'ammah* and not *shakhsiyah*,⁶⁷ and c) not conflict with principle or value upheld by *nas* or *ijmak*.⁶⁸ These three are the main conditions⁶⁹ although there are other secondary conditions.⁷⁰

Having said that, it was al-Ghazali who first stated that the *dharuriyah* preserved the abovementioned five principles and is the strongest kind of *maslahah*; the *hajiyyah* is not essential in itself but is necessary to realize the *maslahah* in general; and the *tahsiniyah* exists only for the refinement of things.⁷¹ The grading has been followed by others until today; among the *salafiyyun*⁷² are al-Amidi⁷³ and al-Baidawi (Arabic 60),⁷⁴ while al-Shatibi would seem the greatest proponent; and among the *khalafiyyun* names like Ibn Ashur,⁷⁵ Raisuni⁷⁶ and Qaradawi⁷⁷ are among the advocates as we have seen earlier. Indeed Yusuf al-Qaradhawi

dealt with *maslahah* in a number of his books and articles⁷⁸ particularly *Shariat al-Islam* and *al-Ijtihad fi al-Shariah al-Islamiyah*.⁷⁹ Based on the above classification by al-Ghazali, the *dharuriyah* is prioritized above the *hajiyah* and the *hajiyah* is prioritized over the *tahsiniiyah*. In addition, the scholars have also formulated the following rules in prioritizing among conflicting *masalih*:⁸⁰

- a. The lesser of two *maslahah* should be forfeited in order to preserve the greater of the two.
- b. Collective *maslahah* are to be given priority over individual *maslahah*.
In particular al-Qaradhawi stated the following rules in prioritizing:⁸¹
- c. Putting precedence of the *dharuriyah* over the *hajiyah* and also the *tahsiniiyah*.
(تقديم الضروريات على الحاجيات، ومن باب أولى على التحسينيات)
- d. Putting precedence of the *hajiyah* over the *tahsiniiyah* or completer.
(وتقديم الحاجيات على التحسينيات والمكملات)
- e. Putting precedence of the certain *maslahah* over the uncertain *maslahah*.
(تُقدَّم المصلحة المتيقنة على المصلحة المظنونة أو الموهومة)
- f. Putting precedence of the big *maslahah* over the small one.
(تُقدَّم المصلحة الكبيرة على المصلحة الصغيرة.)
- g. Putting precedence of the *maslahah* of the group over the individual *maslahah*.
(تُقدَّم مصلحة الجماعة على مصلحة الفرد.)
- h. Putting precedence of the *maslahah* of the many over the *maslahah* of the few.
(تُقدَّم مصلحة الكثرة على مصلحة القلة.)
- i. Putting precedence of the lasting *maslahah* over the temporary or intermittent *maslahah*.
(تُقدَّم المصلحة الدائمة على المصلحة العارضة أو المنقطعة.)

- j. Putting precedence of the fundamental and basic *maslahah* over the marginal and subsidiary *maslahah*.
(تُقدَّم المصلحة الجوهرية والأساسية على المصلحة الشكلية والهامشية)
- k. Putting precedence of the potent future *maslahah* over the immediate weak *maslahah*.
(تُقدَّم المصلحة المستقبلية القوية على المصلحة الآنية الضعيفة.)

Some of the other rules of prioritizing that al-Qaradhawi mentioned are:

- a. Priority of the lasting action over the temporary action.
(أولوية العمل الدائم على العمل المنقطع)
- b. Priority of the action that brings long term benefits over short term ones.
(أولوية العمل المتعدي النفع على القاصر)
- c. Priority of the fundamentals over the peripherals.
(أولوية الأصول على الفروع)
- d. Priority of the rights of the group over the rights of the individual.
(أولوية حقوق الجماعة على حقوق الأفراد)

Unlike the concept of *maslahah*, which has been discussed profusely on its own, the discussion on *mafsadah* usually goes hand-in-hand with *maslahah*.⁸² Indeed *mafsadah* is defined as the opposite of *maslahah*⁸³ and revolves around the concept of *nahy* (proscription) while *dharurah* (danger or harm or necessity depending on the context) has brought about a set of *qawaid fihiyyah* (legal maxims). Like *masalih*, *mafasid* and *madhar* are not equal and are different and have their own levels. For example, a *mafsadah* that impedes a *dharuriyah* is not of the same level with one that impedes a *hajiyyah* which in turn is not of the same level with one that impedes a *tahsiniyyah*.⁸⁴ Likewise, a *mafsadah* that befalls property is lower compared to one which befalls life which in turn is lower in status than one that befalls religion (din).⁸⁵

The concept of *nahy* concerns *mafsadah*⁸⁶ and serves as one of the *qaidah usuliyah*⁸⁷ which in turn are derived from the rules of

literal interpretation⁸⁸ and it states, “Proscription (*nahy*) necessitates prohibition.”⁸⁹ However the scholars are not unanimous on this⁹⁰ and a reading of the books of *usul fiqh* indicates that some scholars have categorized it into different levels; two levels relate to *haram* (prohibition) and another two relate to *makruh* (disapproved). The two levels of *haram* are a) *haram* by itself and b) *haram* due to an external factor.⁹¹ Examples of the first type are unlawful sexual intercourse, theft, and selling of carrion. An example of the second type is the sale that involves *riba*; where a sale is legal in itself but prohibited if *riba* is made a condition.⁹² Likewise, there are two levels of *makruh*; a) *makruh tahriman* and b) *makruh tanzihan*.⁹³ *Makruh tahriman* is near to *haram* and *makruh tanzihan* is simple *makruh* where omission is better than commission.⁹⁴

Since the *madhar* are not equal and have different levels, our scholars have derived several legal maxims.⁹⁵ One of the legal maxims comprises one of the five normative legal maxims⁹⁶ and states, “Harm must be eliminated” (الضرر يزال). This legal maxim is derived from the following verses of the Quran such as, “...and do not do mischief on this earth after it has been set in order...”⁹⁷ and “...Allah does not like the *mufsidun*.”⁹⁸ and the *hadith* narrated by Ibn Abbas, “Neither harm nor be harmed (لا ضرر ولا ضرار).”⁹⁹ Some of the variant renderings of this maxim “الضرر يزال” read as follows: “Harm must be eliminated but not by means of another harm” (*Ad-dararu yuzalu wa lakin la bi-darar*); and “Harm is not eliminated by another harm” (*Ad-dararu la yuzalu bid-darar*).¹⁰⁰ Other maxims that are derived from the *hadith* include, “A specific harm is tolerated in order to prevent a more general one” (*Yutahammal ad-darar al-khaas li-daf’al-darar al ‘aam*), “Harm is eliminated to the extent that is possible” (الضرر يُزال بقدر الإمكان) and “A greater harm is eliminated by means of a lesser harm”.¹⁰¹ It should be noted that the concept of *dharurah* (harm or necessity) does not allow one to commit a specific harm if there does not exist a more general harm nor commit lesser harm in the event that it does eliminate a greater harm. In this respect our scholars also include the maxims that “Harm cannot be eliminated by an equal or greater harm”. (الضرر لا يُزال بضرر مثله أو أكبر منه) and that one must “Choose the lesser of two harms or evils”.¹⁰² (يُرتكب أخف الضررين وأهون الشرين). Depending on

the context, the Arabic word “*dharurah*” also refers to indispensability and in this context the legal maxims, a) “Indispensability renders prohibited things permissible”,¹⁰³b) “Indispensability is measured in accordance with its true proportions”, (*Ad-daruratu tuqdaru bi-qadriha*),¹⁰⁴ c) “Indispensability does not invalidate the right of another.¹⁰⁵”, and d) “A thing which is permissible by reason of the existence of some excuse thereof, ceases to be permissible with the disappearance of that excuse”.¹⁰⁶ are also acceptable by contemporary scholars. However, sometimes there is no necessity in an action but there is a need to do so. In this respect, the scholars say that, “Necessity is treated as indispensability, whether general or specific¹⁰⁷”.

Similarly there are several legal maxims with respect to prioritizing *mafsadah*. One such maxim is, “In the presence of two *mafsadah*, the one whose harm is greater is avoided by the commission of the lesser”. Indeed al-Qaradhawi devoted a whole chapter on prioritization of prohibitions. For example he differentiated the of the kufr of the atheist and rejectionist (*kufr al-ilhad*) with that of the polytheist (*kufr shirk*), the people of the book, (*kufr ahl kitab*), the renegade (*kufr murtad*) and the hypocrite (*kufr munafiq*). He also differentiated between major and minor infidelity, polytheism and hypocrisy. (التفريق بين الأكبر والأصغر من الكفر والشرك والنفاق)

Whilst it takes some common sense to prioritize between the various *masalih*, *manafi*, commandments, *mafasid*, *madhar* and proscriptions among them, it is more difficult for a lay person to prioritize between a *maslahah* and a *mafsadah*, between a *manfa'ah* and a *dharurah* or between a command and a prohibition. In this respect, al-Qaradhawi stated that Izzudin Ibn Abd Salam had explained clearly in his book, ‘قواعد الأحكام في مصالح الأنام’ how to identify the *masalih* and *mafasid* and their different levels and grade so that the majority of them can be known through ‘*aql*’.¹⁰⁸ (Al-Qaradhawi further explained that *masalih* can be divided into three types: the permissible *masalih* (المباحات مصالح), the recommended *masalih* (المنذوبات مصالح), and the obligatory *masalih* (الواجبات بمصالح) while *mafasid* is of two types: the undesirable *mafasid* (المكروهات مفاسد) and the forbidden *mafasid* (مات المحر مفاسد).¹⁰⁹

The *usuliyyun* have also established several legal maxims where both the *masalih* and the *mafasid* are involved and how these legal maxims are used to resolve any conflict among them. These are:¹¹⁰

- a. Eliminating *mafsadah* is prioritized over bringing *maslahah*.
(إن درء المفساد مقدم على جلب المصالح)
- b. A small *mafsadah* is allowed to bring a great *maslahah*.
(إن المفسدة الصغيرة تغتفر من أجل المصلحة الكبيرة)
- c. A temporary *mafsadah* is allowed for a lasting *maslahah*.
(تغتفر المفسدة العارضة من أجل المصلحة الدائمة)
- d. A genuine *maslahah* cannot be forsaken for an apparent *mafsadah*.
(لا تترك مصلحة محققة من أجل مفسدة متوهمة)

Risk-Based Capital (RBC) Standards

(RBC) is the buzzword nowadays¹¹¹ and RBC standards are becoming the custom for capital regulation in the insurance industry¹¹² despite, or rather due to, the current financial crisis affecting the insurance world such as the American International Group and the Fortis group following the heels of the other giant corporations like Enron, MCI Worldcom, Parmalat in the last decade. Defined as “an amount of capital that an insurance company holds to be able to fulfill its obligations against policyholders in the future with a high probability”,¹¹³ RBC¹¹⁴ or similar standards such as the Solvency,¹¹⁵ MCCR, Capital Adequacy have been introduced in Canada (1992), United States (1994), Japan (1996), Australia (2001), United Kingdom (2001) and Switzerland (2006).¹¹⁶ In ASEAN, countries that are in the process of implementing standards similar to the RBC include Malaysia,¹¹⁷ Singapore,¹¹⁸ Thailand,¹¹⁹ and Indonesia¹²⁰ in line with Insurance Core Principles framework issued by the International Association of Insurance Supervisors which among others, requires insurers to comply with the prescribed solvency regime including capital adequacy requirements and requires suitable forms of capital that enable the insurer to absorb significant unforeseen losses.¹²¹

The concept of RBC has been around for about 50 years in Europe while in the U.S., detailed risk-based capital have recently been adopted and are now undergoing a phase-in period.¹²² In the USA, the RBC concept gained ground in 1990 after the failure of insurance regulation to detect, mitigate or prevent four large insurance insolvencies.¹²³ At the same time, a working group consisting of regulators and industry representatives was formed to determine the feasibility of developing statutory RBC requirements.¹²⁴ It was recognized that RBC concepts can be used in regulating insurer solvency.¹²⁵ In September 1990, the working group reported that RBC requirements were feasible and recommended that the Examination Oversight Task Force amends the Working Group's charge to include the development and implementation of these requirements.¹²⁶ Since then a various working groups such as the have been formed Joint Risk-Based Capital Work Group,¹²⁷ The National Association of Insurance Commissioners (NAIC) and the Federal Reserve System (FRS) joint Troubled Company Subgroup.¹²⁸

Among others, the objective of the US RBC and similar standards is to enable regulators to detect companies in poor financial condition, to take corrective actions to cure a problem situation and to limit the exposure of the guaranty funds although it was not designed to prevent all insurer insolvencies¹²⁹ but to ensure that the promised insurance protection is available to an acceptable degree of certainty¹³⁰ and regulation must determine how best to compensate for this deficiency¹³¹ in addition to intensifying competition and increase risk-taking by financial institutions in the 1980s.¹³² Other objectives by different jurisdictions include:¹³³

- a. To establish a "minimum" capital level based on company specific risks, which allow regulators to monitor insurers' capital level and require supervisors, and companies to take specific action once a company triggered a certain level.
- b. To ensure that the financial institution has adequate capital to support the risks it undertakes, safeguard policyholders and depositors from undue loss and to enhance the safety and soundness of the financial system.

- c. To address asset and mismatching risks that are not adequately reflected in the existing framework, as well as refining the allowance for liability risk. The capital requirement aims to reflect all relevant risks faced by the life insurance business.
- d. To maintain the financial soundness of the insurance company by addressing the specific risks that the insurer may face.
- e. To maintain the financial soundness of the insurance company by addressing the risk of asset default, cash flow mismatch, foreign currency mismatch, adverse claims experience, premium insufficiency due to unfavorable investment experience, and inability for reinsurers to fulfill their obligation.

In Malaysia, the RBC framework for insurers has been developed based on the following principles:¹³⁴

- i. Allowing greater flexibility for an insurer to operate at different risk levels in line with its business strategies, so long as it holds commensurate capital and observes the prudential safeguards set by the Bank Negara Malaysia (the Bank);
- ii. Explicit quantification of the prudential buffer with the aim of improving transparency;
- iii. Providing incentives for insurers to put in place appropriate risk management infrastructure and adopt prudent practices;
- iv. Promoting convergence with international practices so as to enhance comparability across jurisdictions and reduce opportunities for regulatory arbitrage within the financial sector; and
- v. Providing an early warning signal on the deterioration in capital adequacy level, hence allowing prompt and preemptive supervisory actions to be taken.

In this context, regulators that enforce the RBC framework may intervene when the capital of a supervised insurance company below a designated level.¹³⁵ In the USA, this value is 50% of the total RBC. The following gives an overview of the intervention process for the USA.

- a. RBC ratio >200% : Capital requirements are fulfilled.
- b. RBC ratio <200% : Insurer must file a plan with proposals to correct financial problems (company action level).
- c. RBC ratio <150% : The commissioner can perform such analyses and institute such corrective action as deemed appropriate (regulatory action level).
- d. RBC ratio <100% : The commissioner has the legal grounds to rehabilitate or liquidate the company (authorized control level).
- e. RBC ratio <70% : The commissioner is required to seize the company for rehabilitation or liquidation (mandatory control level).¹³⁶

In the USA, the property/casualty insurance formula was released in April 1991¹³⁷ but was revised with significant changes in June 1993, and it was adopted by the NAIC in December 1993 after several revisions including the significant incorporation of a “covariance adjustment”.¹³⁸ The “covariance adjustment” was incorporated in the RBC after several actuaries, most notably Robert Butsic¹³⁹ of the Fireman’s Fund Insurance Companies, argued that the simple summation presumes that the various risks facing insurance enterprises might all occur simultaneously, which obviously is not true.¹⁴⁰ It was then pointed out that in practice, there is some dependence among the risk factors and the square root rule may underestimate the capital requirements; but in response, Butsic argued that:

- a. The square root rule, by itself, overestimates the amount of capital needed to achieve a given “expected policyholder deficit” ratio if the risk elements have normal or lognormal probability distributions.
- b. The correlation among the risk factors is very weak, so the underestimate of the needed capital is small.
- c. The one important interdependence, between the risk of adverse reserve development and the risk of reinsurance collectability, is accounted for by the movement of one-half of the credit risk charge into the reserving risk category.¹⁴¹

He further argued that the first two effects are largely offsetting, so the unadjusted square root rule gives a reasonably accurate result.¹⁴²

Following this, the Actuarial Advisory Committee to the NAIC P/C Risk-Based Capital Working Group therefore recommended a formula to combine the RBC for independent risk categories for the treatment of covariance between risks in the RBC calculation. The latest RBC formula, after incorporating the covariance adjustment now becomes:¹⁴³

$$\text{Total RBC} = R_0 + (\sqrt{R_1^2 + R_2^2 + R_3^2 + R_4^2 + R_5^2}).$$

Where:

R_0 = Investments in insurance affiliates

= Non-controlled assets

= Guarantees for affiliates

= Contingent liabilities

R_1 = Fixed income securities

= Cash

= Bonds

= Bond size adjustment factor

= Mortgage loans

= Short term investments

= Collateral loans

= Asset concentration adjustment for fixed income securities

R_2 = Equity investments

= Common stocks

= Preferred stocks

= Real estate

= Other invested assets

= Aggregate write-ins for invested assets

= Asset concentration adjustment for equity investments

R_3 = Credit risk
= Reinsurance recoverables
= Other receivables

R_4 = Reserving risk
= Basic reserving risk charge
= Offset for loss-sensitive business
= Adjustment for claims-made business
= Loss concentration factor
= Growth charge for reserving risk

R_5 = Written premium risk
= Basic premium risk charge
= Offset for loss-sensitive business
= Adjustment for claims-made business
= Premium concentration factor
= Growth charge for premium risk

In the above formula, one notices that the risk charge for investments in affiliates is outside the square root formula. The rationale for this is that the risk-based capital requirement for an insurance company should not depend upon the organizational structure of the company¹⁴⁴ whereas the square root formula implies that each risk charge on the total capital requirements is marginal.¹⁴⁵

Some other jurisdictions do not use the square root formula. Instead, they use the straightforward addition formula. For example, the Malaysia RBC framework states that the total adequacy ratio is computed as:

$$CAR = \frac{\text{Total Capital Available}}{\text{Total Capital Required}} \times 100\%$$

Where the Total Capital Required (TCR) is determined as follows:¹⁴⁶

$$TCR = \text{Max} [\text{surrender value capital charges}, [(\text{credit risk capital charges} + \text{market risk capital charges} + \text{insurance liability capital charges} + \text{operational risk capital charges})]]$$

The credit risk capital charges (CRCC) in turn is computed as:

$$CRCC = \sum_{\text{all } i} [(\text{exposure to counterparty}_i \times \text{credit risk charge}_i)]$$

The CRCC for receivables from and reinsurance deposits with insurers/reinsurers are as follows:¹⁴⁷

- i. AAA 1.6%
- ii. AA 2.8%
- iii. A 4%
- iv. BBB 6%
- v. Unrated or with lower rating 12%

Fiqh Awlawiyyat in retakaful

The application of *fiqh awlawiyyat* in *retakaful* includes comparing between rated conventional insurers and *takaful or retakaful* companies. *Retakaful* is a risk management tool used by *takaful* operators to transfer, or rather to “share” some of their risks to other third parties, which can be another *takaful* operator or a specially-formed *retakaful* operator. The main benefits of *retakaful* are:¹⁴⁸

- a. Risk spreading;
- b. Capacity boosting;
- c. Financial advantage;
- d. Financial stability; and
- e. Protection against catastrophe.

The Accounting and Auditing Organisation of Islamic Financial Institutions (AAOIFI) does not include guidelines for *retakaful* (Islamic reinsurance) in its latest *shariah* standards¹⁴⁹ but it was included in an earlier draft where it was required that Islamic insurance (*takaful*) companies put preference on *retakaful* companies over conventional reinsurance.¹⁵⁰ This is logical as a *retakaful* company should assist one another in righteousness and *taqwa*.¹⁵¹ This is *qat'i* in meaning and transmission (*qat'i al thubut wa al-dilalah*) whereas the effectiveness of RBC as an early warning tool is *zhanni* in nature as it has been called into question by empirical studies which found that the predictive accuracy of the RBC ratio was low and that few companies that later failed had the RBC ratios within the NAIC's ranges for regulatory actions.¹⁵² They further found that the risk measure produced by A. M. Best, Capital Adequacy Relativity Ratios, had better predictive abilities than RBC and that two of the overall risk measures (FAST scores and Best's rating) were superior in predictive ability to risk-based capital measures¹⁵³ compared to RBC which is ineffective in predicting an insurer's solvency or insolvency.¹⁵⁴ The reasons for the ineffectiveness can be inaccurate risk charges, wrong correlation specifications, the usage of local valuation methodology, and the static nature of RBC.¹⁵⁵ The RBC model was also unable to reflect accurately the insurers' problem of optimal capital,¹⁵⁶ probably prompting the NAIC to suggest that the RBC results should not be used to compare, rank, or assess the relative financial strength of insurers.¹⁵⁷ It was also related that few companies that had high RBC ratios and later failed. This implies that one could use the ratio of actual capital to RBC plus a number of variables to construct a multiple logistic regression prediction models that could be more effective than using RBC alone.¹⁵⁸

Therefore, in prioritizing *retakaful*, *takaful* operators should put preference on unrated *retakaful* companies over rated conventional reinsurers as the evidences for *retakaful* are much greater when comparing the *masalih* and *maqasid* between the two. Indeed the *retakaful* component is marginal when we look at the various RBC standards especially ones with the covariance adjustment resulting in the square root formula. In a recent study on 302 insolvencies, A.M. Best Company identified that reinsurance failure was seventh in a list of eight

factors.¹⁵⁹ Having said that however, it is noted that there is a rationale for reinsurance charge as reinsurance collectability problems contributed to several major insurance company insolvencies in the mid-1980s.¹⁶⁰ However, it should be noted that these involved “sham” reinsurance transactions with affiliated companies to hide their financial problems.¹⁶¹ In fact, several criticisms were leveled against the charge for reinsurance recoverables in the risk-based capital formula including the fact that the RBC formula does not differentiate between reinsurance recoverables that are secured (or “collateralized”), such as by letters of credit or by funds deposited with the ceding company, and reinsurance recoverables that are not secured.¹⁶² In addition, the Reinsurance Association of America (RAA) reported that failing reinsurers formed about 4% of the reinsurance industry by premium volume, implying that the appropriate risk-based capital charge for reinsurance recoverable should be about 4%.

Even if we apply the Malaysian RBC framework, the *retakaful* portion to *retakaful* companies would not be that significant as the overall *retakaful* component ceded out will be marginal. This is obvious as the following formula shows :

$TCR = \text{Max} (SVCC, \Sigma (RT + RI + C + D + OC + OS + MRCC + ILCC + ORCC))$ where

RT = *retakaful* ceded out to unrated *retakaful* companies

RI = *retakaful* ceded out to rated conventional insurers or reinsurers

C = cash in hand

D = deposit in banks

OC = outstanding contributions

MRCC = market risk capital charges

ILCC = insurance liability capital charges, and

ORCC = operational risk capital charges

Even if the RT component is above 55% which was recommended in the earlier AAOIFI *shariah* standard,¹⁶³ the overall *retakaful* ceded out would be overshadowed by the MRCC, ILCC and the ORCC components

especially those related to insufficient loss reserves, inadequate pricing, rapid growth and significant change in business as evidenced by the AM Best report on the 302 insolvencies.¹⁶⁴ Empirical studies would need to be done on particular takaful companies or particular jurisdictions but in its absence, if we assume a uniform distribution across the risk capital charges and again on the components of the credit risk capital charges, the RT to be at least 55% as recommended, it would only comprise less than 3% of the TCR.

Furthermore, the Islamic Financial Services Board (IFSB) and the International Association of Insurance Supervisors (IAIS) recognized the differences between Takaful and conventional insurance and their regulatory implications¹⁶⁵ and that the takaful risk profile is different from the standard insurance product which has implications both for capital adequacy¹⁶⁶ which was developed for conventional insurance and should not be applied uncritically to takaful.¹⁶⁷ The two bodies further recognize that retakaful assets may also need consideration since the pressure to use retakaful companies needs to be balanced against the quality of the security.¹⁶⁸

Conclusion

Retakaful ceded out to conventional reinsurers is either based on the principles of *dharurah* or *hajah muta'ayyinah*. The principles of *dharurah* is inherent in the legal maxims of "Harm must be eliminated but not by means of another harm" and "Harm cannot be eliminated by an equal or greater harm". and that "A genuine *maslahah* cannot be forsaken for an apparent *mafsadah*". It should therefore be seen in this context as it is not an absolute right. When compared to prioritizing between an unrated takaful company and a rated conventional insurer/insurer under the RBC standards, one must look at the *maqasid al-shariah* as expounded by the *usuliyyun*.

Despite weaknesses in the RBC standards, its aim is in line with *maqasid al-shariah* and efforts are being made to improve on the current RBC formula to improve on actuarial analysis of financial strength which can be used by takaful operators. However, most takaful operators would not need to put priority on rated conventional insurers/reinsurers

over non-rated Islamic financial institutions at the moment because the *retakaful* component, when linked to the other components and viewed in the context of the overall RBC standards, is insignificant. However, *takaful* operators that are low capitalized, whose *retakaful* contributions ceded out is considerable and has a portfolio that comprises a substantial long tail and/or large and special risks component, may need to put preference on rated conventional insurers/reinsurers over non-rated Islamic financial institutions. Having said that, they would need to satisfy the requirements of the *shariah* based on the principles of “conflict and conciliation” when comparing among the various *masalih* and *mafasid*. Meanwhile, *takaful* operators not under RBC jurisdictions would need to justify their preference of a conventional insurer/reinsurer over an Islamic financial institution based on the acceptable principles of *dharurah* or *hajah muta’ayyinah*.

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Nota hujung

- 1 The term *retakaful* is usually used by companies in the ASEAN region whereas the term used in the Middle East is generally Islamic reinsurance.
- 2 He is one of the most well known Islamic scholars alive and the most prolific writer and has written about 100 books on Islamic worldview and solutions for contemporary society. He graduated from the famed Al-Azhar University and was reported to be the best undergraduate student in all subjects although this cannot be confirmed.
- 3 http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=878&version=1&template_id=89&parent_id=1 viewed on 27th October 2008
- 4 http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=887&version=1&template_id=89&parent_id=1 27th October 2008
- 5 http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=888&version=1&template_id=89&parent_id=1 27th October 2008
- 6 Said, Zaharuddin bin Muhammad. "Fiqh Awlawiyyat – Dawabit wa Tatbiqatihu" (M.A. diss Cairo University, 2001/2002), 17
- 7 http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=881&version=1&template_id=89&parent_id=1 viewed on 27th October 2008
- 8 The words *maslahah* and *manfa'ah* are treated as synonymous but not its technical meaning. Nyazee, Imran Ahsan Khan. *Islamic Jurisprudence (Usul al-Fiqh)*. Kuala Lumpur : Islamic Book Trust, 2003, 196.
- 9 This is similar to Imam Shafi'i who is considered by many to be the Father of Usul Fiqh and Imam Shatibi who is considered the Father of Maqasid whereby they were the first persons to discuss the above respective ideas in a comprehensive and coherent manner.
- 10 Ibn Khaldun (d 808AH), known as the Father of Sociology, observed that there were two trends or methodologies in Usul Fiqh, (Ibn Khaldun, *Muqaddimah*, 431 quoted in Muhammad Khalid Masud, *Shatibi's Philosophy in Islamic Law*, Islamic Book Trust, Kuala Lumpur, 2005, 117) i.e *tariqat al-mutakallimun* and *tariqat al-fuqaha*. Al-Raisuni however, uses the term *usuliyyun* instead of *mutakallimun* (al-Raisuni, 2) and and at times means it to be the scholars of *usul fiqh* (ibid).

- 11 Jabir, Taha. *Usul Al Fiqh Al Islami (Source Methodology in Islamic Jurisprudence)*. English Edition by Yusuf Talal DeLorenzo and A. S. Al Shaikh-Ali. Herndon : The International Institute of Islamic Thought, 1990 (doc), 42.
- 12 ibid
- 13 Abu Zahrah, al-Imam Muhammad. *Usul al-fiqh*. Qahirah : Dar al-Fikr al-'Arabi, 2003, 20 and Khalaf, Abdul Wahab. *Ilm Usul Fiqh*, Kuwait : Darul Qalam, 1978, 18. Dr Yunus
- 14 Jabir, 42.
- 15 16 Abu Zahrah, 2003, 23 ; Khalaf, 18
- 16 Abu Zahrah, 2003, 24 ; Khalaf, 19
- 17 Masud, Muhammad Khalid. *Shatibi's Philosophy of Islamic Law*. Kuala Lumpur: Islamic Book Trust, 2005, 137
- 18 Ramadan, Tariq. *To Be A European Muslim*. Leicester : Islamic Foundation, 2005, 105n
- 19 Masud, 137
- 20 The writer considers him as one of the greatest usuliyun but not many books on usul fiqh have properly credited him and he is more well known as a mystic rather than a jurist. This could be due to his alleged use of weak traditions and the supposed influence of Greek philosophy, particularly Aristotelian philosophy, in his works on philosophy and logic, especially in his monumental work *Ihya Ulumuddin* which was ordered to be burnt through fatwas by prominent jurists (Masud, 64n). However, one should read his works in their proper perspectives. As to the allegation that he is influenced by Greek philosophy, he himself had criticized Aristotle's philosophy when he said in his book, *Incoherence of the Philosophers* (تَهافت الفلاسفة) ليعلم أن الخوض في حكاية اختلاف الفلاسفة تطويل، فإن (تهافت الفلاسفة) خبطهم طويل، ونزاعهم كثير، وآراءهم منتشرة، وطرقهم متباعدة متدبرة، فلنقتصر على إظهار التناقض في رأي مقدمهم الذي هو الفليسوف المطلق، والمعلم الأول، فإنه رتب علومهم وهذبها بزعمهم، وحذف الحشو من آرائهم، وانتقى ما هو الأقرب إلى أصول أهوائهم، وهو ((أرسطاطاليس))؛ وقد رد على كل من قبله حتى على أستاذه الملقب عندهم بأفلاطون الإلهي، ثم اعتذر عن مخالفته أستاذه بأن قال: ((أفلاطن صديق والحق صديق ولكن الحق أصدق منه)). The above book has

been strongly criticized by Ibn Rushdi in his book “Incoherence of the Incoherence” (تَهافت التَهافت) and by Ibn Taimiyyah in his book “Refuting the Logicians.” However, al-Ghazali’s thoughts have permeated Shatibi’s thought and Shatibi held him in high esteem and in the context of maqasid, mentioned him with the greatest frequency with al-Razi a distant second followed by al-Ghazali’s teacher al-Juwaini, then Ibn Abd Salam and his student al-Qarafi and that al-Ghazali can be considered as one of al-Shatibi’s foremost Sheikh despite the span of three centuries (al-Raisuni, 291-293) between them. Indeed al-Raisuni is of the opinion that al-Ghazali has a position of distinction both in the history of usul fiqh and maqasid (al-Raisuni, 16). Indeed he did not write one, but four books on usul. (Jabir, 39)

- 21 Nyazee, Imran Ahsan Khan. *Islamic Jurisprudence (Usul al-Fiqh)*. Kuala Lumpur : Islamic Book Trust, 2003, 201
- 22 Ramadan, 76
- 23 Al-Ghazali, *al-Mustasfa min ‘ilm al-usul*, Barrut: Dar Sadir, 1995, 286
- 24 Masud, 139. Indeed this definition has been agreed by the other usuliyun after him such as Saif al-Din al-Amidi, Ibn al Hajib, Al-Baidhawi, Al-Isnawi, while Fakhrudin Razi & Ibn Subki changed al-nasl to al-nasb (al-Raisuni, 21-33)
- 25 Masud, 139. Imam al-Ghazali was the first to classify it as such (al-Ghazali vol 1, 286-287) but Ibn Ashur seems to infer that it can be traced to al-Juwaini. (Ibn Ashur 2006, 379n)
- 26 Ibn Ashur, Muhammad al-Tahir. *Treatise on Maqasid al-Shari’ah*. Kuala Lumpur : Islamic Book Trust, 2006, 114
- 27 ibid, 28
- 28 Chapra, M Umer. *Islam & Economic Development*. Islamabad : International Institute of Islamic Thought and Islamic Research Institute, 1993, 85. See also Chapra, M Umer. *The Future of Economics. An Islamic Perspective*. Leicester : Islamic Foundation, 2000, 77n and Ahmad, Ziauddin, *Islam Poverty & Income Distribution*. Leicester : Islamic Foundation, 1991, 19 & 86.
- 29 Ibn Ashur, 92
- 30 Known as Sultan al-‘Ulama and well known for his outspoken sanction against the Mamaluks.

- 31 Masud 146. He, however differentiated between the two. (al-Raisuni, Imam, 2)
- 32 Qawaid, 2/72 quoted in Al-Raisuni, Ahmad. *Nazariyah al-maqasid 'inda al-Imam al-Shatibi*. Riyad: Al-Dar al-'Alamiyah li'l-Kitab al-Islami, 1995, 67
- 33 Kamali, Mohammad Hashim. *Qawa'id al-Fiqh : The Legal Maxims of Islamic Law*, Association of Muslim Lawyers, pdf, nd, 4
- 34 Masud, 151
- 35 *Tarikh al-Falsafah al-Islamiyah*, Sheikh Mustafa A Razzaq, 249, quoted in Al-Raisuni, Ahmad. *Imam al-Shatibi's theory of the higher objectives and intents of Islamic law*. Kuala Lumpur: Islamic Book Trust, 2006. 11. Sheikh Mustafa A Razzaq held the post of Minister of Endowments for eight times from 1930-1945 before assuming the title of the Sheikh of al-Azhar in that year.
- 36 Al-Raisuni, Ahmad. *Nazariyah al-maqasid 'inda al-Imam al-Shatibi*. Riyad: Al-Dar al-'Alamiyah li'l-Kitab al-Islami, 1995, 100
- 37 Al-Shatibi. *Muwafaqat fi usul al-shari'ah*. Bayrut: Dar al-Kutub al-'Ilmiyah, 2005, 24
- 38 Ibn Ashur is the most vocal advocate, calling for a new definitive science which he termed *maqasid al-shariah*. (Soualhi, 61)
- 39 Ibn Khaldun did not mention al-Shatibi in his *Muqaddimah*. At the time of writing the *Muqaddimah*, he may not have read al-Shatibi's works such as *al-Muwafaqat* and *al-I'tisam* as the *Muqaddimah* was written in 1377AD and al-Shatibi died in 1388 AD. Possibly the books have not been written yet or that Ibn Khaldun did not have access to it at the time of writing the *Muqaddimah*, but the writer has not been able to confirm this.
- 40 He had initially titled the book as "An Introduction to the Mysteries of Accountability Before the Divine Law" (عنوان التعريف بأسرار التكليف) but changed the name of the book to *muwafaqat* after his teacher told him about a dream in which his teacher asked him about the book and he explained that it is "Reconciliation" as it a reconciliation of the school of Ibn al-Qasim and Abu Hanifah (al-Shatibi, 24)
- 41 Soualhi, Yunus. *Maqasid al-Shariah and Its Realisation in Contemporary Societies*, International Islamic University Malaysia, Vol 3, 2006, 61

- 42 The term *usuliyun fuqaha* has to be differentiated from the term *al-usuliyun al-fuqaha* which comprises of jurists of the *tariqat al-fuqaha*. (Raisuni, 29)
- 43 Al-Raisuni, Ahmad. *Nazariyah al-maqasid* (inda al-Imam al-Shatibi. Riyad: Al-Dar al-*Alamiyah li*-l-Kitab al-Islami, 1995.30
- 44 Masud, 128
- 45 Khalaf, 84-85.
- 46 Ramadan, 78
- 47 http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=878&version=1&template_id=89&parent_id=1 viewed on 27th October 2008
- 48 http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=2181&version=1&template_id=89&parent_id=1 viewed on 27th October 2008
- 49 Al-Raisuni, Imam, 135 ; Al-Raisuni, *Nazariyat*, 169
- 50 http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=2182&version=1&template_id=89&parent_id=1 viewed on 27th October 2008
- 51 http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=2184&version=1&template_id=89&parent_id=1 viewed on 27th October 2008. Those interested to know further may consult any book on *usul fiqh*. Kamali, Mohammad Hashim. *Principles of Islamic Jurisprudence*. Cambridge : Islamic Texts Society, 1991, 78 and 356-365.
- 52 *ibid*
- 53 http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=2184&version=1&template_id=89&parent_id=1 viewed on 27th October 2008
- 54 Masud, 146-150
- 55 *Ibid*, 139
- 56 *Ibid*, 220
- 57 *ibid*
- 58 *ibid*

- 59 Indeed Ibn Ashur went one step further whereby maqasid al-shariah should be separated from usul fiqh but it is methodologically impossible. (Soualhi, 61)
- 60 Ibn Ashur, 122
- 61 Al-Raisuni, Nazariyah, 377-378
- 62 Abu Zahrah, 289.
- 63 Nyazee, 201 ; Ramadan, 76. See note 19.
- 64 Soualhi, 61
- 65 Al-Zuhayli, Wahbah. Usul al-fiqh al-Islami. Dimashq : Dar al-Fikr, 2001, 2:758
- 66 Khallaf, 86
- 67 Khallaf,87
- 68 Abu Zahrah, 219
- 69 Ramadan, 80
- 70 Ibid, 106n : Kamali, Principles, 274
- 71 Al-Ghazali quoted in Masud, 139
- 72 The term refers to the classical scholars and not contemporary scholars and activists who claimed the title. Ramadan refers to this latter group as “salafi” traditionalists. (Ramadan, 241)
- 73 Al-Raisuni, Imam, 22-23,
- 74 Ibid, 25
- 75 Ibid, 113
- 76 Ibid 108-109
- 77 Kamali, Maqasid, 4,
- 78 Al-Raisuni, Imam, 260
- 79 Ibid
- 80 Ibid, 261
- 81 http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=881&version=1&template_id=89&parent_id=1 viewed on 27th October 2008

- 82 Ibn Ashur, 95-102
- 83 Ibn Ashur, 92
- 84 http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=881&version=1&template_id=89&parent_id=1 viewed on 27th October 2008
- 85 Ibid
- 86 Ibn Ashur, 102
- 87 Nyazee, Islamic, 35
- 88 Ibid, 36
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- 92 Ibid, 68-73
- 93 Ibid, 71
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- 95 http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=882&version=1&template_id=89&parent_id=1 viewed on 27th October 2008
- 96 Kamali, Qawaid, 2
- 97 7:56
- 98 5:64
- 99 Ibn Majah. Kamali did not mention the narrator in his Qawaid and Qaradawi just mentioned that it is a legal maxim.
- 100 Kamali, Qawaid, 3
- 101 As-Sabuni, 'Abd ar-Rahman, et al, *Al-Madkhal al-Fiqhi wa Tarik at-Tashri' al-Islami*, Maktabah Wahbah, Cairo 1402/1982, 389 quoted in Kamali, Qawaid, pg 3. Qaradawi mentioned the maxim, "الضرر يزال بقدر الإمكان" just after the hadith and the maxim, "A greater harm is eliminated by means of a lesser harm" with the version, لا الضرر لا يزال بضرر مثله أو أكبر منه"

- 102 http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=882&version=1&template_id=89&parent_id=1 viewed on 27th October 2008
- 103 Al-Majalla Al-Ahkam Al-Adliyyah, (The Ottoman Courts Manual (Hanafi)), pdf. Article 21
- 104 Al-Majalla, Article 22 ;Kamali. Qawaid, 3. The English translation does not jive between the two but Kamali's translation gives a better understanding.
- 105 Al-Majalla, Article 33
- 106 Al-Majalla, Article 23
- 107 Ibn Nujaym, al-Sheikh Zayn al-Din bin Ibrahim bin Muhammad. Beirut: Al-Ashbah Wa al-Naza'ir 'ala Mazhab Abu Hanifah al-Nu'man. Dar al-Kutub al-'Ilmiyyah, 1999, 78
- 108 ومعظم مصالح الدنيا ومفاسدها معروف بالعقل، وذلك معظم الشرائع؛ إذ لا يخفى على عاقل قبل ورود الشرع أن تحصيل المصالح المحضة، ودرء المفاسد المحضة من نفس الإنسان وعن غيره محمود حسن، وأن تقديم أرجح المصالح فأرجحها محمود حسن، وأن درء أفسد المفاسد فأفسدها محمود حسن، وأن تقديم المصالح الراجحة على المرجوحة محمود حسن، وأن درء المفاسد الراجحة على المصالح المرجوحة محمود حسن. واتفق الحكماء على ذلك. وكذلك الشرائع على تحريم الدماء والأبضاع والأموال والأعراض، وعلى تحصيل الأفضل فالأفضل من الأقوال والأعمال.
- 109 http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=884&version=1&template_id=89&parent_id=1 viewed on 27th October 2008
- 110 http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=883&version=1&template_id=89&parent_id=1 viewed on 27th October 2008
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- 126 Ibid, 133-134
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