Introduction

Natural law proposes to traverse boundaries set up by unique legal epistemologies. In an attempt to do so, natural law presents an opportunity for delineating a depolarizing common ground for normally incompatible and competing legal theories. To characterize the dynamic when concepts of natural law appeared within the deliberations of legal theoreticians of the Muslim traditions, this chapter shall attempt to chart those ideas that presented in Islamic legal theories when they interacted with concepts of natural law. It shall consider at the intellectual challenges this dynamic produced and the legal theories that emerged.

In terms of the organization of the chapter, it begins with the story of a boy who, to his surprise, finds himself marooned on an island. The boy attempts, based on first principles, to arrive at a formulation of law and a theory of being in the cosmos. For the second part, the chapter charts those ideas that came into being within Islamic legal traditions – from their formative period to contemporary times – that relate to natural law. The third and final part of the chapter considers how these deliberations came to form the political heritage that has articulated itself in parts of our world today.

The unexpected journey

The story of the island-marooned boy. Building a case for natural law based on first principles.

A young boy woke in his canoe as it edged itself onto the beach of a seemingly deserted island. He could not recall how it came to be that he had found himself adrift. He appeared to be in a state of amnesia. Otherwise healthy, he began to explore the island. Of the life he found were small yet organized colonies of insects. In his observation, he considered that the perpetuation of one colony was dependent on a previous one. It appeared that all living things on the island were in an existential need of a predecessor. Yet, he reasoned that to bring this chain of events into being, there must have been a moment in the past that needed no predecessor – otherwise, the boy reasoned, this chain of events could not have begun. This led the boy to hold that an absolute being must have existed, one without beginning.
Further, if it was absolute, there would be no room for a ‘second’ absolute being, as to the boy, this would mean the first was not actually absolute – a necessary condition for the life he observed around him. Thus, if the boy could not have been, by definition, made absolute, and indeed was not absolute, he asked, what was his own nature?

Given the absoluteness of the original being, the boy reasoned that the best state of being for any other being would be one that was able to derive the most, in every possible manner, from the absoluteness of the absolute being. That is, from absoluteness. For this, he reasoned that a non-absolute being would have to be the complete opposite of absoluteness, that is, a being that is absolutely and inherently in need (faqīr bi-dhātihī). Thus, the boy saw his inherent need and mortal nature as perfect for a being of his kind.

This put him as a form of ‘key’ to the ‘lock’ that was the absolute being. As another absolute ‘lock’ could never be brought into existence by definition, a key was best placed to gain maximally from the said absolute lock. Thus he reasoned that he had been given a chance to gain from the absolute in the best possible manner. It appeared to him that the absolute being had a good will towards him. This was particularly true to him given that the absolute being – in being absolute (ghanī bi-dhātihī) – had no inherent need for him, by definition.

As the boy began to live on the deserted island, he discovered more of his innate needs. Where he felt helpless and could not will for something to occur, he would consider: His own perfection, the best state of being for himself to be in, was the polar opposite of the Absolute being. Since the absolute being was by definition able to grant its own will, and since the absolute being, in wishing good for him, had made the boy its polar opposite, then by definition the boy should be inherently unable to grant his own will. The boy reasoned that the opposite of granting one’s will was to ‘ask’. The act of asking the absolute being became the ultimate realization of this polarity – one between the absolute and its opposite. In an analogy, the boy, short of being an absolute being that inherently did not require food, would find that its opposite state, one that was able to enjoy food, was the best state of being for him. Thus, to the boy, asking became a realization of the grace of the absolute being towards him, an essence of the relationship – mukh al-ʿibaḍa. This led the boy to hold that the absolute would still be influential in the world today, otherwise there would be no apparent reason for instilling such a need to ask in him.

As time passed, the boy felt an innate desire for certain elements on the island and an aversion to others. He was comfortable with what brought him benefit (maṣlaha) yet not with harm (mafsada).

For now, he could fish to his own desire; yet, he wondered, what if another like him were to appear? He could see either the domination of one over the other, with one gaining pleasure, the other sadness, or the cooperation of the two.

He held that even if he were to dominate, he would not wish to be on the receiving end of such dominance. A person seemed innately repulsed by the idea of being on the receiving end of an act of unfairness. Thus he held that all transactions would be best based on this idea, this axiom, ‘Do onto others what you would wish upon yourself’. He appeared to be able to discern a distinction between acts that he would wish for others – and by extension himself, and acts that he would not wish on others – and by extension himself. The first acts he called ‘Good’, the latter he called ‘Bad’.

It appeared to the boy that, given his innate need, he would appreciate when he was unable to fish, due to injury for example, that another boy would help him. Based on the above axiom, he held that he too should be willing to help others with the same.

Then one day a new boy appeared, then many more.
The island’s society

In living with the other boys, in enjoying the food of the island, the boy felt an innate gratitude to the original source. However, the boy then realized, that he could choose not to thank the absolute being or those around him – though he would not wish the same for himself. Thus he realized that while he had been given the opportunity to gain maximally from the absolute being, he could also fall short of what he felt was ‘owed’ based on the axiom. Thus he called these ‘rights’ – the absolute being’s ‘rights’ and those of the other boys. Further, seeing as he had not brought the other boys into existence, he held that he had no say over them; they were inherently not his, thus not at his disposal. All of the boys including himself were, however, in the mind of the boy, of the absolute. Thus he came to the conclusion that while he had the best placement – inherent – in himself to live, he could fall short of these ‘rights’. Yet, to the boy, these were not unreasonable rights. They were in accordance with the axiom and they seemed innate. Thus it appeared that the absolute being had afforded him grace by giving him the opportunity to live life in a manner that was also in line with his innate nature.

This being the case, and based on the first principles he had elaborated, the boy reasoned that any pain he endured must be due to a wisdom of the absolute that he had not yet realized.

Then came the calamities. A number of disagreements and fights broke out between the boys. His ankle was badly injured. He felt the urge to retaliate, to become bitter and vengeful. Retreating for time to consider, he came to a realization: He seemed innately cognizant that in choosing between Good and Bad, he would have wished any other boy to take the Good option. This would have been the Good thing to do since he would want it for himself. He realized that while he could take the Bad option and strike down his adversaries, he could gain by acting on the Good, given his innate appreciation for it. While he may outwardly be in pain, inwardly, he felt innately at peace in choosing this option as he felt he had gained something he would not have otherwise, namely compassion and patience. These two qualities he would wish for others. Thus it appeared that given his innate appreciation for Good, he had gained by choosing to do Good.

Yet, what about compensation? He held, according to the axiom and by extension his ‘rights’, that the boy who injured him should compensate him. Yet what ‘right’ would he have to force the boy to compensate him?

He reasoned: One boy had no right over another – he had not created him. Thus to maintain the victim’s right to not be harmed, one could use force to deflect an attack. After such an attack, the offender then ‘owed’ what he had damaged. Such was in line with the axiom and in line with his ‘rights’. Further, even though the offending boy had acted in a Machiavellian manner, seeing harm as justifiable for personal gain, the offending boy still would not wish the same to be done to him. The axiom appeared inescapable, innate. Even if a person saw being unfair as justified for gaining power, the same person would not wish it on himself. There appeared to the boy to be an innate discontentment with unfairness. Further, in the offending boy’s own innate axiom, he also recognized it as ‘Bad’. His own self could hold him to account, and at heart, the offending boy would not want it for himself.

The other boys, having subscribed to the same axiom and idea of ‘rights’, helped him obtain what was customarily known to be the amount of fish one could gain without such an injury.

From that day, the boys etched in a piece of timber two axioms: ‘No one shall harm another’ and ‘Custom serves as precedent’.

Shari‘ah, natural law and the original state
The idea of such etching was new to him and he quickly realized that the more boys that went against their innate axiom, the longer the list of ‘laws’ would become. Then an event occurred that challenged the very place of the first axiom.

One of the young men had been caught by a wild animal. Armed only with spears, the others realized it meant the death of the boy if they attempted to spear the wild animal. While the axiom was that no one is to be harmed, they knew that the animal would turn and kill the younger boys trapped nearby. Not doing anything would result in a greater harm. Thus the boy reasoned that, in this case, throwing the spears was acceptable, though in and of itself a Bad act. The spears were cast, both animal and boy perished. Thus was born a new perspective – one based in circumstance, its premise: ‘An act can be acceptable though Bad – for its own sake – due to an impinging circumstance’.

The main distinguisher between this and the axiom was that such circumstances, by virtue of the first axiom, must be ‘actively avoided and, where possible, removed’. Thus the third axiom became: ‘Harm must be removed’.

None of the boys faced punishment, as their appeared intention was Good. The fourth axiom was born: ‘Actions are considered by intention’.

These axioms continued to be etched into the plank of wood. This became useful to some, acting as a small and quick reminder where required.

A market had grown where the fish were often caught. One day a disagreement broke out over an order of fish. One boy had paid another for some. However, as it transpired, the seller had caught no fish, but had made the sale based on what he expected to catch that morning. As an axiom was to treat others fairly, this was deemed an unfair transaction, as the buyer could not collect on his purchase. Therefore, such practice was stopped, and the seller returned the buyers money.

As the number of those on the island grew, new circumstances came about. These entailed new considerations of past judgements made in light of the axioms. One such example was buying a boat to go fishing. Based on the judgement that it was unfair to sell something that was absent, the default expectation would be that a boat ought to be built first before it could be sold. However, given the great costs and time involved in constructing a new boat for fishing, a boy would find it difficult and highly risky to build if no buyer was potentially interested. This appeared to put the seller, the one with the skill to build, in a seemingly unfair position. As such, the judgement was re-evaluated. Sellers could sell an unbuilt boat but with the proviso that they provide the customer a full specification of what was expected of the boat to include, a time of delivery and guarantee. Thus the axiom: ‘Hardship brings ease’ was born, allowing for dispensations to be made where and when needed so long as the axioms were seen through. In such a case, the ‘law’ had been adjusted to meet the objective of the axiom. Hence the legal philosophy of the Island of Boys was articulated: The objectives of the axioms are of greater importance than the axioms.

As the boys grew older, it was said that the boy, now a man, heard a voice from the heavens, a voice from the absolute. A set of axioms was revealed. They were:

There should be no harming others nor the reciprocation of harm. Harm should be lifted. Actions are by intention. Certainty is not lifted with doubt. Hardship brings ease. Custom has authority. These laws are best lived according to the tradition ‘Love for your brethren what you love for your self’.

The boy was surprised to be the recipient of such a message, yet it came as no surprise to him that the axioms and the tradition were consistent with what had been practised.

Here ends the story.
Does the boy have religion?

It may appear that the five axioms arrived at by the boy are in line with the five major axioms of Islamic jurisprudence (al-qawa'id al-fiqhiyya al-kubra): the tradition ‘to wish for one’s brethren what one wishes for oneself’, appearing in the sayings of Muhammad; the uniqueness, unity and absoluteness of God, being the attestation of the Muslim belief; the legal philosophy that ‘the objectives behind the law are of greater consequence than the laws themselves’, being a formulation of the spirit of Islamic law. All of these have led some to ask: Was the original nature of religion and law, as explained by the Prophet Muhammad, one of a ‘reminder’ of what humans were innately aware of, especially given that the term ‘reminder’ is often used in the Qur'an to describe itself and the message (6:90)?

In legal terms, the revelation of the Qur'an is remembered by the community as a piecemeal affair: verses appeared in the context of situations. Qur'anic laws did not constitute a system, but pointed to the elaboration of a basic legal structure. The Qur'an often spoke of law as basically being constituted of the imperative of justice. With the lack of a set canon, the imperatives of 'adl (justice) and qaṣṭ (equity) were mentioned without being defined. The audience of the Qur'an was assumed to be naturally familiar with these terms without the need of having defining texts.

Indeed, the legal philosopher Ibn Rushd (d.595/1198) makes an observation that scholars of Islam are in wide agreement that the main tenants of belief, such as belief in God, can rest on rational deduction. Thus, he posits, why should it be the case that for other categories, such as law, one must shy away from reason? Indeed, Ibn Tufayl (d.581/1185) attempted to demonstrate with the story of Hay ibn Yaqzan that the human mind could, without any theological or intellectual instruction, attain truth.

Why was the boy marooned on the island?

In our story, the boy held that his nature was poised to gain maximally from the nature of the absolute being. The boy’s nature innately favoured Good over Bad. This was true even with the Machiavellian among the boys who were repulsed by the idea of themselves being treated unfairly. The ‘rights’ he felt he owed God and his society appeared both fair and in line with the axiom he had come to. Thus it appeared to him that his existence was one that came out of the grace of God.

What of the Islamic source material on this question of ‘why God created the world’? The chapter now turns to the opinions voiced by interpreters of the Qur'an on this topic.

Reading through the Qur'an sixty-two interspersed verses comment on the area. The key terms used in the Qur'an are: to make apparent through circumstance (yabtalı), to determine or purify (tamhıs), to reward (li-yajzi), to know (li-ya'lam), God's blessing (ni'mat Allah), and God's method (sunnat Allah). I will summarize my view of these here before producing the views of the literature held on this topic.

The crux of the verses appear to revolve around God creating humankind to have the opportunity to live a life that is both in line with what they already know to be good and right. They will experience circumstances that allow them to choose between good and bad (67:2; 3:186; 6:165; 21:35), and in doing so they will come to know, for themselves, whether they are true to what they hold to be innately good and rightful (33:24; 39:9; 3:140, 142, 166; 9:16; 29:2; 47:31; 3:141). Each circumstance will be within each person's capacity (2:286), and each of these circumstances is integral to life going on (2:251; 22:40). Through these decisions, individuals will attain characteristics that match their choices (91:9). The highest virtue in life is given
Ahmed Izzidien

as that of witnessing, knowing and worshipping God (51:56; 2:21; 5:97) in a world created in truth (6:32; 44:38; 46:3) with rights – such as the virtue of justice and abhorrence of murder (7:29, 33; 6:151–152; 55:9). In His mercy, God sent prophets to humankind so as to remind them of such (6:90; 25:56) and everyone will be rewarded fairly for their choices (53:31; 35:30; 39:35). God will never be unfair to anyone (3:108; 28:59; 41:46). The message of the Qur’an was also sent as a reminder that God wishes not for people to experience difficulty with the laws He has sent (5:6), but mercy (22:107) and grace (2:150).⁷

The chapter will now consider the main schools of thought found in the interpretation (tafalīr) literature of these verses.

The chapter’s methodology in considering and presenting the interpretations has been to use all the interpretations (tafalīr) referred to in this footnote for each of the verses,⁸ but only to quote from those interpretations (tafalīr) that present a unique ‘added value’ to their peers, one that adds to the discussion – especially given that much of the tafsīr literature is at times repetitive.

**Why create an island?**

When the early Muslims had completed their Hajj, Q. 5:3 was revealed, indicating that God completed His blessing and grace. This has been interpreted as the completion of the tenants of Islam, both their ordinary commands (ʿazāʾim) and dispensations (rukhās)⁹ – its laws.¹⁰ As such, the legal rulings (ahkām) were seen as effectively one that brought a purification (tazkiya) and ease (yusr) – in line with the narration that the ‘Religion (Dīn) of Allah is ease (yusr)’¹¹ and the narration ‘I was sent with the hanafiyya al-sambah’,¹² one that is in accordance with Q. 21:107 indicating that the essence of the message and its laws was one of mercy to all humans – given that the phrase ‘to the worlds’ (li-l ʿālamīn) refers in the verse to the word mercy (rahmā).¹³

The Qūrʾān often uses the term yabtalı and yabtalıyakum to refer to a reason for creating humankind. The two terms have often been presented within tafsīr literature as ‘He tests’ and ‘So that He may test you’. As the main schools of Islamic theology held that God has the foreknowledge of what will occur, many interpreters understood these two terms to mean that God creates a circumstance whereby it appears as if He is testing a group of people.¹⁴ Some interpreters have further said that in doing so it allows for God to establish proof for or against the person (qiyaʿal-hujja) and that such allows for actions, which in becoming realized, qualify for reward or punishment. In the view of some interpreters, being in a situation that appeared testing to the individual allowed the term to be used due to the apparent similarity (mushābahā). Articulated in his tafsīr, al-Razi (d. 606/1209) comments that ‘the nature of testing is an impossibility in respect to God. What we actually are left with is [the act of] taklīf (assigning duty)¹⁵ – assigning duty (taklīf) being the act of giving responsibility to someone to act in a particular rightful way. The phrase ‘to test’ can be seen to have been taken with this understanding,¹⁶ whereby the test would determine if one ‘passes’ or does not ‘pass’.¹⁷ It is of note that the phrase ‘to test’ appears throughout the tafsīr literature despite its absence from the actual text of the Qurʾān.¹⁸

The second way of interpreting these two phrases, yabtalı and yabtalıyakum, was given as: ‘[He] makes apparent’ and ‘[He] makes apparent to you’, in which difficult circumstances that one goes through are to allow a person to witness for themselves their own nature so that they may gain from such otherwise hidden knowledge. This interpretation rooted itself in the early usage of the terms, whereby these terms are ‘borrowed (mustaʿāna) to make apparent something that is hidden’,¹⁹ and in commenting on Q. 6:165, to indicate that it refers to ‘the manifestation
of the measure of the intellect in their making use of God’s gifts. Since God already knows the spiritual levels of people, the phrase balwā was used, as it (a person’s inner level) does not appear to individuals except after it is acted out’. Indeed, the term al-balāʾ has been defined as coming to the essence and purity of gold by melting it down to remove impurities, and the term ʾibtilāʾ, also has been defined as istikhārā j māʿ ind al muhtāl (making apparent what is within the person undergoing the circumstance). Such knowledge of oneself has been tied, especially in the more spiritually inclined tafrāsir such as Ibn ʿAjiba’s (d. 1224/1809) and al-Baydawi’s (d. 685/1286), as a blessing (niʿma), as it allows a person to gauge themselves. Qushairi (d. 465/1073) comments ‘what outwardly appears as a difficulty is in actuality a blessing (niʿma and minna) to the discerning’. He also quotes the tradition that ‘If God loves His people, He puts them through ʾibtilāʾ’. 20 Indeed, the term itself formulated as bal aʿlāʾ indicates a blessing (niʿma) since it is said ablāhu Allah iblāʾan wa-balāʾan’ (when God blesses a person with something). 21

Both interpretations do, however, come to the same conclusion that the outcome is for the benefit of the person and not for God’s own benefit, as God is believed to be omnipotent, without need, and prescient.

It may also be of note that nowhere in the Qurʾān is ʾibtilāʾ used to refer to legal rulings (ahkām). The term ʾibtilāʾ does not seem to appear in the recorded Sunnah in reference to law or law making. Rather, the term is often used to refer to testing situations that happen to humans, such as being afflicted with illness or hardship, or even in receiving good (21:35). 22 This appears to point to an ontology of Islamic law, as one that does not intend to ‘test’ its subjects, but facilitates ease and grace for them.

Although the boy came to this conclusion on ‘his being in the cosmos’, a number of ways of expressing this have been documented in books on Islamic theology. To these the chapter next turns.

The island in Muslim theological literature

While the boy in the story viewed his own nature as being the opposite to the Absolute’s, along with his ability to recognize an element of Good and Bad as an indication of a ‘blessing’, the chapter now turns to four schools of thought that emerged in early Muslim history on the question of why God created humanity.

The four schools of thought that this chapter shall consider are the Ashʿarī, Maturidi, Athari and Muʿtazili. Each attempted its own reasoning (ijtiḥād) on the topic.

All of these schools held that God created humankind through His Will, and that God is not in need of creation. They had different views on the question of what ‘motivated’ God to create, or put differently, the ultimate reason for God creating (al-ʾilla al-ghāʾiyya). The Ashʿarīs believed that it was purely God’s Will, with no reason of any kind behind it, although they held that there was a concordance between God’s Will, grace and wisdom, as will be detailed further on in the chapter. They held that it was not theologically sound to attribute a reason to any of God’s acts. The Maturidi and Athari schools believed it was God’s Will and that He created the world out of wisdom and grace (tafaddul). 23 The Muʿtazila, however, while believing it to be God’s Will and an expression of His Wisdom like the Maturidis and Atharis, believed that such wisdom was not out of choice but rather that God was compelled to act in this manner. 24

Each school expressed its reasons for taking these views, and in taking these views, they then had a premise from which to build a theory of the reason for law and law making. While a detailed account of these reasons can be found in the literature, this chapter, by virtue of its area, will focus on the legal element.
It is of note that the answer to the question on ‘the reason for God acting’ then went on to inform how each school considered the notion of *ibtilāʿ* (to test/to make apparent). Given the view of the Maturidis and Atharis, namely that God created due to wisdom and grace, they then took the stance that humans were sent messages and rulings from God for their own benefit. The Maturidis held that *ibtilāʿ* was in reality used as a metaphor for when something is made apparent and observable. Furthermore, they held that God did not command creation in order to bring benefit to Himself, nor to repel harm from Himself; rather, He commanded them for *manaḥfiʿ* (benefits) for humankind, and so that the consequences become apparent to the person, not apparent to God.25

Whereas with the Ashʿari view, that God did not create based on a reason – messages and rulings from God could not be said to be due to God wanting benefit for humankind. Rather, humankind was in a position of *takhliṣ* (responsibility) for which they would be rewarded or punished.26 However, Ashʿari scholars did accept a concordance between benefit, wisdom and God’s rulings, as will be discussed further on. Muʿtazilis further viewed *takhliṣ* as required in order for the believer to gain reward or punishment for carrying out acts (*intithān*).27

The chapter next considers the ontological authority of reason, being central to a discussion on natural law and Islam.28

---

**The good and the bad in living on the island**

When the boy, using his axiom, began to discern between acts that he would wish on others and acts he would not, and termed the former ‘Good’ and the latter ‘Bad’, he began to define an ontology that has its parallels in Islamic theology.

The Muʿtazili, Maturidi and Athari schools all accepted that one could, to a degree, discern between good and bad without scripture. The degree to which one could discern was a point of discussion between them. The technical terms used to describe qualifications were *husn* (pleasantness) and *qubh ṣ* (unpleasantness).

For the Muʿtazilis, Maturidis and Atharis, acts are either *ḥasan* (pleasant) or *qabīh* (unpleasant) either in and of themselves, or due to an inseparable characteristic, or due to other considerations. For the Muʿtazilis, textual revelation is solely to make clear those characteristics of *ḥasan* (pleasant) and *qabīh* (unpleasant). This view was also taken up by the Karamiyya and a number of Shiʿa and Yazidiyya. It is often attributed to Jahm b. Safwan (d. 128/746), who opined that elements of knowledge (*maʿārif*) can be known with the *ʿaql* (intellect) before revealed texts appear (the *Sharīʿa*), that the intellect is able to discern ‘good’ from ‘bad’, and *husn* (pleasantness) from *qubh* (unpleasantness) without revelation. The Ashʿaris, on the other hand, took the position that nothing is inherently good or bad. God only makes things fall into either category based on His Will and not because anything necessitates such allocation.29 They believed that the *ʿaql* (intellect) does not indicate the *husn* nor *qubh* of anything. Thus, for example, to the Ashʿaris, being unfair is not inherently definable as bad or good but only has the label of being ‘bad’ after God revealed that qualification to His Prophet. Legally, they held that there was nothing that obliged humans to anything without revelation.

The Atharis and Maturidis took the position that human reason had an ability to discern *husn* (pleasantness) and *qubh* (unpleasantness), however, they also held that people cannot be judged according to this distinction until revelation had its say on the matter.

This distinction has a bearing on law. Acts that are considered *ḥasan* (pleasant) or *qabīh* (unpleasant) have the capacity of causing benefit (*maṣlahah*) or harm (*mafsada*) respectively, upon which legal determinations can be made. If one were to include in this legal determination
the view of the Atharis and Maturidis, that the reason for creation was ultimately for wis-
dom and humankind’s own benefit, one arrives at a perception of what law and law making
is – one that is distinct from the view that no such reason and no determination of benefit
\(\text{masla}\.\text{ha}\) or harm \(\text{mafsada}\) are possible by humankind.

In the next section, the chapter considers the question of what indeed is required for law,
and how natural law concepts began to manifest in the Islamic legal tradition.

**What makes for law on the island?**

To the boy in the story, the axioms he arrived at appeared to go hand in hand with what was
revealed to him. This affirmation, of the non-conflict of reason and revelation, is a consistent
theme within legal and theological discourses in the Muslim tradition.

Principles seen in the Qurʾan (17:15; 53:39; 5:1; 2:188; 4:28, 58; 17:34; 2:283, 173) all posit
what appear as universal principles of justice without legally defining them.

As the Prophet migrated to Medinah, verses and hadith specific in their rulings appeared
in the context of situations, sometimes in response to Muhammad seeking guidance. Yet these
rulings often maintained, within the same texts, that their intention and objective were to
maintain the reasonableness, justice, and prosperity that stem from these universal principles.

As an example of a form of contextual ruling, the Prophet had asked the people of Medina
not to keep meat for more than three days after the Eid, but to donate what remained. The
Companions in later years asked the Prophet if such a ruling still stood, to which the Prophet
replied that the initial command was due to the presence of people in need at the time in
Medina, and that their absence meant that the Companions could now store meat for them-
selves after the Eid and beyond three days. With the change of context and public interest
came the change of the ruling, yet the universal principle of \(\text{masla}\.\text{ha}\) (benefit/well-being)
remained. Companions of the Prophet such as ʿUmar, ʿUthman and ʿAli appeared to have
employed this methodology. They would at times avoid applying a textual ruling found in
the Qurʾan or Sunnah because the context had changed. Applying the literal meaning of the
text would, to them, have resulted in a loss in the objectives of the text. Numerous cases
have been cited from the time of the Companions that appear to indicate such an approach
was accepted and practised early on: Abu Bakr’s inclusion of the category of ‘grandfather’
instead of that of the ‘siblings’ in inheritance; the reclassification of some inheritance shares
by ʿUmar; the selling of lost camels by ʿUthman b. ʿAffan (whereby proceeds would go to
the treasury); ʿUthman allowing the Companion Tamdur al-Asadiyya to inherit from her
ex-husband – who had divorced her on his death bed; the guarantee that ʿAli b. Abi Talib
ordered craftsmen to abide by. These are all cited examples of practice that went against
source texts. To them, the change they enacted allowed the law to remain true to principles
of equity and justice, all such indicating that a qualification of these principles was possible.

Shihab al-Din al-Qarafi (d. 684/1285), a 13th-century jurist, took to differentiating between
what the Prophet said depending on context \(\text{maq}\.\text{m}\.\text{āt} \text{al-khiṭṭāb al-nabawī} \) – differentiating
between what the Prophet said as a human being, what he said as a leader, what he said as a judge,
and what he said as a Prophet – all such differentiations having legal implications.

Indeed, a nature of Prophethood appears to indicate that legislation to what is just and
equitable is something that is to a degree \textit{innate}. A hadith in this regard that may provide an
indication of a framing of law and how law is expected to be is reported in the \textit{Muwatta} of
Malik, which stating that the Prophet said that he ‘was only sent to complete good character’,
indicating that ‘good character’, in principle, was already present pre-revelation. This may
also be considered with the statement of the Qurʾan describing itself as a ‘reminder for the
Ahmed Izzidien

worlds’. Such positioning of Prophethood may begin to form an indication that the prophetic mission was more corrective and descriptive than prescriptive.

It may be that given the fluid nature in which societies and contexts change and evolve, the Prophet avoided recording all the Hadith sayings. This was different to the collection of the Qur’an, where verses were written down by companions on parchments at the time of the Prophet, as well as being committed to memory and passed on in full form. Much of the Hadith remained committed to memory.

The view that early law relied on reasoning that was anchored in a few principles that were ‘natural’ and universal, such as the prohibition of oppression and injustice, appears early in the historical record of law making. Arriving at rulings (alḵām) based on scripture in the first and second centuries of Islam was not primarily a matter of textual interpretation, but rather, of interrogating good judgement, local precedents, the practices of prior Muslims, and a limited body of revealed injunctions in order to address specific legal problems.33

According to Khaled Abou El Fadl, justice and equity, as ultimate goals, tend to endow the agent with a considerable amount of discretion.34 The acceptance of disagreement on alḵām (rulings) has been attributed to the Prophet, which may imply that revelation also lent itself to individual reasoning and discretion.

The use of pure logical reasoning developed thereafter to form a school of thought known as that of reasoned opinion (ahl al-raʾi). The school also considered its method to be in line with what was practised by the scholar Companions of the Prophet ‘Abdullah b. Ma’ṣud and ‘Umar b. al-Khattab, among others. This form of reasoning also manifested itself in a specific method for arriving at law, a method that became known as istiḥsān (juristic preference). It was driven by reasonableness, fairness, common sense35 and maṣlaḥa (benefit), set as deriving the most good and mitigating the most harm, both of which involved reasoning that did not appear to be directly based on revealed texts.36 The school then evolved into the Hanafi school for the most part, although it also found itself – albeit in smaller portion – within the Maliki and Hanbali schools. It offered a methodology of understanding the texts. Especially as the ahl al-raʾi were accepting of the Hadith.

In considering the Hanafi school specifically, one comes across istiḥsān as a method for reaching legal rulings. The mechanism appeared early in the Hanafi school. Indeed istiḥsān appears to have originally represented independent human judgement of expediency or public utility; and has come to be regarded by some as vestiges of the raʾi which survived in classical theory. Wael Hallaq sees it as being employed as a method of equity, driven by reasonableness, fairness and commonsense.37 Ibn Rushd defined istiḥsān as being, in most cases, an attention to human interest and justice, one in favour of considerations of equity and justice, or in favour of a doctrine which might have been formally less systematic, but more practicable and appealing to commonsense.38

Thus one arrives at what appears as a theory of law, fluid and flexible, based on a number of universal principles. However, a second school, the School of the Texts (ahl al-athar), began to develop another method, one based more on the Qur’an and Sunnah in their fullest capacity – one that also included the full record of memorized and written records of the Sunnah.

The ahl al-athar and an effect on the character of law

The ahl al-athar or aṣḥāb al-hadith, as they also were known, were proponents of entirely scriptural authority in theology and law. Their focus was often on the literal meaning of the texts, whereas the school of raʾi often focused on reasoning in order to arrive at a ruling that was in
line with the spirit of the principles of revelation. For example, the charity given just before Eid, zakat al-fitr, is described in the source texts as being of a number of categories, such as dates and wheat. The ahl al-athar limited what could be given in charity on this occasion to these categories, whereas the ahl al-ra’i school allowed for other categories including money to be given in charity instead, seeing the reason behind such a ruling as one of provision to those who are in need.

A second illustrative example of how the two schools approached a text can be seen in a discourse on the juridical considerations of the hadith: ‘A judge must refrain from judging when in a state of anger (ghadān).’ The rationally inclined school notes that the reasoning is clear from the text, namely distraction, thus they allow judges to perform their duties in a state of anger so long as that anger is little enough so as not to be a distraction. Hence, they manoeuvre the texts based on the principal reasoning as they see it.39

If one contrasts this with the textually based school, whereby the mind (ʿaql) is supposedly solely to manoeuvre within the texts, they argue that the conclusion ‘little anger does not qualify’ actually comes from the text itself, having used the form faʿlaṁ, which implies ‘filled with anger’. The reasoning for this epistemology was that if the premise is set in reverse, whereby the intellect is given precedence over the text, then the Shariʿah, in their view, would be utterly dismissable based on the decisions of a jurist’s reasoning. Thus they formulated the position that ‘the text must lead the intellect’ (al-nasʾ yasbiq al-ʿaql).40

It has been suggested that, given the debate in the third/ninth century with ‘Isa b. Aban (d. 221/836) and Abu al-Hasan al-Karkhi (d. 340/952) and his student Abu Bakr al-Jassas (d. 370/981), a method to stem and constrain reasoning in maslahā (benefit) to tie it to the text was needed by the ahl al-athar camp. This materialized in part with the rebuttals by al-Shafiʿi (d. 204/820) that laid a foundation to constrain what fell outside of qiyās (textual analogy) and ijmāʿ (consensus) – two methods used by the ahl al-athar to arrive at rulings (ahkām). This foundation went on to give rise to maqāsid (textually based objectives of law).41 The ahl al-athar and its followers began to formalize all aspects of law, setting up uṣūl al-fiqh (principles of jurisprudence for arriving at legal rules) that essentially tied all legal thought and legal derivation to the source texts.

Where no texts existed on a matter, and no analogy or use of consensus could be made, the theory of maqāsid delineated an approach by this school of thought in order to arrive at legal rulings. In Abu Hamid al-Ghazali’s (d. 505/111) deliberation on benefit (maslahā), he restricts it to ‘the upkeep of the intention (maqsūd) of the law-maker’.42 Further, in his deliberation on unrestricted benefit (al-mursala), he comments,

thus any maslahā that does not ultimately protect an intention of the Qurʾan, Sunnah and ijmāʿ, and is of the odd mašālih that are not consistent with the ways of the law, [then in such a case, the mašlahā] is considered false and disqualified. Whereas any mašlahā that ultimately protects a sharʿī (textually based) intention, then [it becomes the case that] this then affords us the knowledge that it is [indeed] an intention of the Book, Sunnah, and ijmāʿ – and is [thus] not outside these uṣūl (principles). However, it is not termed ‘an analogy’ rather a ‘mašlahā mursala’. Indeed if we interpret mašlahā to mean the protection of the objective of the law-maker, then there is no reason for a disagreement in following it, rather one must accept definitively that it is indeed a proof.43

Of note, however, is his careful choice of words in distinguishing benefit (maslahā) as the protection of the objectives of the sharʿ (textual sources) and not the acquisition of benefit and mitigation of harm based on reasoning.
In the development of *maqāsid* (textually based objectives of law) was an attempt to prioritize, and rank, rulings (*ahkām*) from the vantage of the *Shariʿah* itself. Rulings were categorized in a three-tier system where the *maqāṣid al-dārūrī*, or *al-munāsib al-dārūrī* (necessity) takes precedence over the *maqāṣid ḥājjī* (need) followed by the *taḥsīnī* (luxuries).44

The theory on *maqāsid* was further developed by al-Shatibi (d. 790/1388). He elaborated a mechanic within *usūl* (principles of jurisprudence) using the *maqāsid* frame of reference. On the concept of the three-tier categorization mentioned earlier, al-Shatibi opined that these were *kullīyyāt* (overall principles), and thus any *juzʾīyyāt* (subsidiaries) should be considered in light of these. In particular, as the *kullīyyāt* are among the necessities, thus it cannot be the case that a *juzʾī* (subsidiary) goes against these. Should this appear to occur, then al-Shatibi holds that there must be a way to reconcile between the two because a *juzʾī* (subsidiary) does not appear except with an inherent protection of these *qawāʾid* (axioms).45

The theory of *maqāsid* formally set that the objectives of Islamic law were to protect one or more of the following: the intellect, religion, honour, wealth and lineage. Yet *maqāsid* in this textualist formulation may be said to have come from a negative reading of the texts, in that, to some jurists, such as al-Ghazali, sanctions given in the source texts against acts such as murder and libel meant that the law’s objective was to protect life and honour.

This textual formulation, it has been argued, was, in part, a method employed to restrict the open reasoning on the spirit of the law used by the *ahl al-raʾi*, which did not restrict in its practical deliberations the spirit of the law to a set.

As the chapter next shall consider, the *ahl al-athar* were to have a profound and marked effect on the portrayal of the school of the *ahl al-raʾi*.

**Influence of the *ahl al-athar* on the late *raʾi* school**

As it came to pass, the more pronounced the authority of the *ahl al-athar* became, the less freedom jurists had in expounding discretionary opinion. It was framed by the *ahl al-athar* as being antithetical to the notion of Prophetic authority, and *raʾi* inevitably acquired negative connotations. The textually based approach started to leave less room for human discretion, since its very existence appeared to demand that a choice be made between human and Prophetic authority. Despite the appeal to rationale, *raʾi* during the first century after the Prophet’s death was increasingly challenged by traditionalism, represented in the proliferation and gradual acceptance of a notion of Prophetic Sunnah expressed in the narrative of the hadith. Between the end of the second/eighth century and roughly the middle of the third/ninth century, this traditionalism was to gain the upper hand, to be tempered in turn by the acceptance of a restrained form of rationalism.46

It may be argued that the spread of the *athar* school was so influential that later Hanafi texts began to claim that the Hanafis of the early period actually ascribed to the now commonly held position of orthodoxy, namely of placing the sources before one’s own reasoning on rulings. Some also claimed that the methodology of Abu Hanifa (d. 150/767) was misunderstood and largely based on a number of misunderstood definitions.47

Many still take the view that the difference between the two schools was at heart very minor and that the Hanafi school only took the approach it did due to the lack of source material, the prevalence of fabricators in its geographical proximity, and the new societies they met.

The *ahl al-athar*, in their derivation of rulings from the revealed sources of the Qurʾān and Sunnah, relied heavily on analogy. Thus they allowed rulings for certain cases to be extended to new similar cases that had no precedent in the Qurʾān and Sunnah.48 This being the case,
istihšān (juristic preference) was re-characterized as being the method by which a source text from which an analogy can be drawn exists, yet is dismissed for another analogy based on another source text. Thus the process was presented as a form of qiyyās (analogy), one in line with the ahl al-athar school of thought.

Along these lines, al-Jassas (d. 370/980) mentions that istihšān materializes in two situations, the first being a case that is drawn to two different principles (yatajādhabuhu ašlān), with one of the principles being more worthy of the case than the other. As such, it is preferred (yustahšan) to draw the analogy from the less worthy principle rather than the more worthy principle. Thus he defines it as leaving qiyyās (analogy) for a qiyyās that is more fitting. The second situation is where a ruling is not implemented because the case is to be considered one that is specific to that context and thus draws uniqueness (takhsīs), even if the ‘illa (cause) for the ruling still persists. Al-Amidi (d. 631/1233) also joins the ranks of those late jurists who consider istihšān as little more than a form of qiyyās.

Indeed, the proliferation of this definition has led John Makdisi to the view that both early and late jurists understood it the same way, namely as a determination of a solution based on either a direct provision in the Qur’ān, Sunnah or consensus, or reasoning by analogy from one of these two sources. However, this preference, according to Makdisi, is determined by the Qur’ān and Sunnah and not by appeal to conscience for which he gives examples using Bazdawi (d. 482/1086) and Sarakhsi (d. 483/1087).

Thus, the ahl al-raʾi, in their most characteristic method for arriving at laws, are presented by later jurists as enacting the same principles as the ahl al-athar.

Was the later characterization of the ahl al-raʾi accurate?

The chapter turns to the question of why there was such vehement opposition to ahl al-raʾi and its formulations (such as istihšān), if indeed it was a school that used a similar methodology to the ahl al-athar.

When considering the early polemics on this topic, it can be seen that there is a great amount of opposition to the method of istihšān, to the general method employed by Abu Hanifa, and the school’s modus operandi. Indeed, the school of raʾi had become the target of vociferous attacks by scholars ascribed to the ahl al-athar. The scholars of raʾi were often met with skepticism by the majority of jurists as represented by the ahl al-athar. This was, in part, due to the method being devoid of direct textual reference from the viewpoint of the athari school.

The main reason given in the historical record for the opposition of the ahl al-raʾi by the ahl al-athar is that they were accused of placing ‘opinion’ before source texts. In considering the level of the attacks made on the early Hanafi school, one finds, for example, al-Qadi ʿIyad (d. 544/1149) in his Tartib al-Madarik stating that ‘Abu Hanifa would put analogy and opinion (iʿtibār) before the sunan and athar, and [in doing so] has forfeited the principle texts, and taken to reason (ʿuqūl), choosing raʾi, analogy and istihšān (juristic preference). Thereafter, he placed istihšān before analogy and [in doing so] has gone far [from what is proper].

To substantiate the claim that Abu Hanifa forgoes the Sunnah, a whole chapter (kitāb) listing these occurrences is made by Ibn Abi Shayba (d. 233/849). In addition, Abu Hanifa was also attributed with believing in the tahlīn of the ‘aqīl (declaring something pleasant by virtue of the intellect alone).

The more literalist jurists, Ibn Dawud (d. 297/910) and the Zahiris, also rejected istihšān. They thought it rendered licit what God declared forbidden. Istihšān was also generally rejected by the Shafiʿis. Al-Shafti wrote a book Ibtal al-istihsan (Annulling Juristic
Preference) and is the author of the quote ‘man isthsana fa-qad sharra’ (he who adopts istihšān has legislated’), equating it with heretical usurpation of God’s role as the sole determiner of the law.58

This opposition by al-Shafiʿi poses a question. Had istihšān been a simple matter of qiyāṣ (analogy), why was there a heavy backlash against it? Indeed, some of the ahl al-athar even claimed that later jurists deliberately reformed the original definition of istihšān to something more in line with the atharī school of thought. Abu Is-haq al-Shirazi (d. 476/1083) launches his polemic by stating that istihšān is falsehood because it is leaving qiyāṣ for that which a human prefers based on their own opinion without evidence. He then claims that later members of the school of Abu Hanifa differed among themselves, each defining it differently. However, he concludes by mentioning al-Shafiʿi and Bishr al-Marisi (d. 219/833) as having judged it as departing from qiyāṣ by way of human preference without any evidence. Al-Shirazi then makes the claim that such was their actual school of thought.59

Makdisi, as mentioned previously, stated that al-Amidi supported a view that istihšān was never more than a form of qiyāṣ.60 Yet in returning to the source text for this translation, al-Amidi lists istihšān as retracting a ruling due to the presence of a source text, consensus, or other means. Al-Amidi does not mention what the term ‘other’ refers to.

Had istihšān been as straightforward as qiyāṣ, as has been claimed, the question may be asked, why did the early raʾi school avoid a straightforward definition? Indeed, recorded definitions of istihšān given previously (p. 52 onwards) seem to indicate a departure from the qiyāṣ it has been attributed to. Also of note are the opinions expressed by al-Hattab (d. 954/1547) of the Maliki school who indeed mentions that the best definition that has been given of istihsan is that it is ‘an evidence that comes to the mind of the mujtahid and finds itself well received but difficult to express’. He quotes Ibn al-Hajib (d. 646/1249) as saying that this definition is what maʿmul (officially sanctioned) itifaqan (by agreement).

Even the claim that few sources existed at the time and location of the early school has been countered by the fact that Iraq was one of the regions most populated with Companions of the Prophet. Most of the Companions had lived in or visited Kufa and Basra. Kufa had no fewer than seven of the leading scholar Companions.61 Furthermore, it is recorded that within the geography of the ahl al-athar, such as Medina, there emerged some of the leading scholars who used raʾi such as Rabiʿa (d. 136/754) and Malik (d. 179/795).

Yet with raʾi being seen as an expression of rationalist and utilitarian tendencies, it was wholly expunged by those opposed to this form of reasoning, and hence, al-Shafiʿi’s overwhelming opposition to istihšān.62

Taqbıḥ and tahšīn in law – its relation to natural law

It may be suggested that irrespective of whether istihšān (juristic preference) is simply a qiyāṣ (analogy) or otherwise, it still does not appear to answer the question, how does a jurist decide that one qiyāṣ is more appropriate than another without actually reasoning on the outcome? What is it that makes a jurist sway away from one qiyāṣ to another? If it were the text that made the jurist sway, then arguably the jurist would not have enacted the first qiyāṣ. Furthermore, istihšān in its later formulation is said to be enacted after the outcome of the first qiyāṣ seems out of place, wrong, or incongruent to the jurist. How would this be possible without a degree of qualification of the outcome, a degree of tahšīn and taqbıḥ (considering an element pleasant or unpleasant), in the mind of the jurist?

It appears, whether directly or indirectly, that a jurist here is enacting a tahšīn and taqbıḥ on the outcome of the hukm (ruling) before deciding to seek an alternative qiyāṣ. It also assumes
the jurist is able to qualitatively and quantitatively characterize what is expected of revelation on minor rulings.

The best answer to give to this question may be to say that jurist is seeking the objectives of Islamic law (maqāṣid). The problem with this answer is that according to the promoters of the ahl al-athar, including al-Ghazali, the maqāṣid are not to be used to negate or dismiss a text; the maqāṣid are only to be used when no source text exists at all. If one were not to allow a text to be used because of the jurist’s view of maqāṣid, then he/she would be enacting a methodological error by qualifying the outcome of a text in light of the maqāṣid, and thereby dismissing the text or enacting it. It is no surprise that al-Shafi’i saw in istiḥsān a form of legislating without the source texts – a form of natural law.

Furthermore, maqāṣid, in the ahl al-athar school, are not to be used to establish the manāt (applicability) of a text. The school rather takes the position that it is the role of the text to establish the maqāṣid and not the reverse. Thus, in allowing a jurist to consider the outcome, they are inherently suggesting that, like the ahl al-ra’i did, there is a spirit of law that supersedes and overrides the source texts.

It may be of note that this observation applies to the later definition of istiḥsān, one that reframes it only as a form of analogy (qiyyās). The earlier definition of istiḥsān was even more audacious whereby a text is not enacted due to a subjective assessment of the jurist that seeks an outcome that is more reasonable than is suggested by a literal framing of a text. Perhaps this is why the early ahl al-athar exhibited such opposition to the concept at hand.

Such an opposition also appears to be in line with the accusations made of Abu Hanifa as having leanings towards tāḥṣīn (declaring something pleasant). Indeed, a narration attributed to him, ‘Ignorance is not an excuse for not believing in God due to what the person sees in the creation of the heavens and earth, and in the creation of themselves’, appears to be in line with part of the Mu’tazali view that did not require the presence of a prophet for responsibility. Although, late Hanafis tried in a number of ways to re-interpret this away from that consequence. The effects of this alleged form of tāḥṣīn (declaring something pleasant) may also be said to be present in his tā’līl (reasoning) in a number of acts of worship – acts normally considered by even the Malikis who practised maqāṣid extensively – to be out of the scope of tā’līl by virtue of them (the acts of worship) being tā’abbudī (simple commands to be carried out without rationalization). Abu Hanifa also undertook tā’līl in the masā’il (issues) of zakat and expiations, setting them in terms of ‘value’ instead of ‘specific types mentioned in the texts’.

It appears that the early form of istiḥsān lent itself to a form of natural law, whereby the jurist sought that which brings about equity and justice despite what some of the source texts said on the matter. This form of law making appeared anchored in principles of justice, compassion and equity, principles that the Qur’an also appears to see as innate to humankind.

However, as Bernard Weiss posits, from an historical vantage point, istiḥsān was eventually assimilated into the textual sources and was thereby deprived of its independent status. In fact, reason, custom, equity or public interest became concepts fettered and limited by the juristic method. Accordingly, istiḥsān was eventually considered to belong to the category of taṣrīḥ (the acceptance of one of two conflicting rules as ‘weightier’ than the other).

The Mu’tazili school had its own effects on fiqh and usūl – given their acceptance of an objective and discernible ‘good’ and ‘bad’ within nature. This was seen to permeate their discussions of law, for example, in the definitions of the five categories of responsibility (obligatory, recommended, indifferent, disapproved and forbidden), the definition of obligatory (wājib) included the term ‘aqlan (by virtue of the intellect), where the Ash’aris only used the term shar’an (by virtue of the texts). The distinctions found their way into practical considerations, for example, the difference of opinion between these schools on ‘God commanding
that which cannot be humanly carried out’ (taklīf mā lā yuṭāk) had a direct implication on the question of the ‘actions of one who is compelled by force to act against their will’ (taklīf al-mukrah), such as one being forced to inflict pain on others by a third party at pain of death or serious injury.\(^{69}\) Another example is that of the ‘status of a person to whom revelation has not reached’. The Maturidis held they are responsible (mukallaf) for believing in God (ımaān) and not attributing to God what is repulsive. Whereas the Ash‘aris held that no such responsibility exists whatsoever. The Mu‘tazilis differed by stating that they are responsible (mukallaf) for believing in God and responsible for every act that the mind can independently reach.\(^{70}\)

Thus, in their formulation, they held that acts could be accounted for without recourse to revelation, an articulation of a form of natural law in their deliberations.

**Does the logic of law making require a fixed methodology in order to work?**

Considering the nature of how the two different schools of ahl al-ra‘i and ahl al-athar approached law and law making, the question could be asked, is it humanly possible, within the cognitive mapping of the human mind, to suspend one’s evaluative judgement on fairness, purpose and reason behind law, given that many cognitive studies have determined that the perception of fairness and teleological reasoning appear in humans from an early age to be applied in their environment?\(^{71}\)

In theorizing on law, it may be possible to draw dogmatic or ideological stances that may not necessarily meet these requirements. Although, when these said stances come to interact with the real world, changes are bound to face them. Law would either have to adapt or it may, in this regard, not be applicable. In this regard several opinions within the four Madhabs arrived at notably similar conclusions to that of the ahl al-ra‘i.

**Theological investments, legal quagmires and human nature**

The ahl al-athar school realized that not all law could be based on the few occurrences found in the source texts, the Qur’an and Sunnah. Therefore, they needed to devise methods by which rules could be drawn but only from the sources.

While these jurists, and indeed later jurists, had the theological point of order that the mind cannot undertake tahṣīn or taqbióh (to declare something pleasant or unpleasant), that ‘good’ and ‘bad’ do not inherently exist, and that God created humanity as a result of a command – one with no specific reason behind it, one may ask the question, how were new laws going to be tied in to the original laws?

While the Ash‘aris believed that it was false to say that ‘the reason aḥkām (rulings) were legislated by God was to benefit humankind’, they noticed that there was, in general, an iqṭīrān (concordance) between the aḥkām and maṣālīḥ (benefits) that they brought to humankind. This concordance was one that came out of the experience of aḥkām but not one necessitated by the intellect. To the Ash‘aris, the intellect had no say as to whether such maṣālīḥ were compulsory, or even allowed.\(^{72}\) Thus they afforded a form of ta‘līl (reasoning) for rulings by expressing that such benefits were ‘what was customarily expected of rules’ (ja‘at bihi al-‘āda). Yet, they held that it was not the case that one necessitated the other. With this they then came to view that the rulings were in accordance with benefits to humankind, and that this concordance was a grace from God.\(^{73}\) Although, they maintained that ‘grace’ was not ‘the reason’ for God ordaining rulings.

Thus, even though they opposed the principle of ta‘līl, they found that it was needed for law to function, and for legislating new laws for new contexts. The Maturidis, Atharis, and
Shariʿah, natural law and the original state

Muʿtazilis did not face this issue due to their theology, which had the position that reasons (ʿilal) were inherent in rules (alḥām) and their locus was inevitably benefit (maṣāliḥ) to humankind.

Further, in the determination made by the schools of jurisprudence that emanated from the ahl al-athar school, the place of maṣlaḥa was also found to be in need of an avenue of expression even when the sources were available, though they had initially held that such maṣlaḥa cannot be considered when source texts are available. This circumstance is probably best witnessed when they faced the question ‘what course of action is to be taken when a benefit goes against the source texts?’

They categorized the source texts (nusūs) to be of two types: specific (khāṣṣ), such as the prohibition of asking for a woman’s hand in marriage after she has become engaged; and general (ʿāmm), such as the rule not allowing the sale of an unspecified item. Furthermore, they looked at these texts as having one of two characters: one that is definitive (qatī) in its meaning and its authenticity, and one of doubtfulness (ẓannī) in either its meaning or authenticity.

If a benefit (maṣlaḥa) were to contradict a non-definitive text (nass), be it in meaning or authenticity, then according to the Shafi is (those who were most opposed to raʾi), if application of the nass causes a temporary harm (darar ārid), then the benefit is permitted out of necessity, and the lesser of two evils. While in the Hanbali school, the aṣḥāb of Ahmad b. Hanbal held that benefit could act to specify (tukhassisi) a text (nass) if there is a contradiction between the benefit and the text. That is, the benefit becomes a special case not covered by the text, i.e. an exception. This also is the case for the Maliki and Hanafi schools.

In terms of scope, the Maliki school held that all general texts (nusūs) of the Qurʾan and Sunnah are considered as not being definitive in meaning. Examples where this has been applied are in not requiring a person to undertake taklīf / a qasam (to take an oath) when there is an unsubstantiated counter claim to their property. Furthermore, within the school, certain ongoing customs (al-ʿurf al-ʿanālī) can act to specify a general text as well as restrict a general source text (nass).

The later Hanafi school also allowed such exceptions to the Qurʾan and Sunnah due to benefit (maṣlaḥa), such as bearing testimony based on ‘hearing’ in certain cases. Another example is of the sale of seasonal produce ahead of its fruition where the crop is one that gives an indication of an expected produce, despite source texts prohibiting ghanar (ambiguity in contractual obligations) and the sale of what one does not have.

The Maliki school used a term known as qiyyās khafī (subtle analogy) in those situations in which normal application of analogy (qiyyās) appeared to produce an improper outcome. They used this in order to put forward a maṣlaḥa juʿf iyya (partial interest).

Where a ‘custom’ goes against the text, the later Hanafis have specified allowances whereby what is customarily known in a society is considered instead of the text on the issue. An example they use is that of the conditions of a contract (shurūt), such as the ‘sale of keeping promise (alwafa)’ as it was a customarily known, type of contract despite it being an inadmissible condition (shart fāsid). Such also applied to similar cases involving forms of interest (riḥā) in certain food stuffs.

In time, according to Mustafa al-Zarqa, analogy (qiyyās) itself began suffering from an excess of use, leading the Malikis towards relying on other forms of deduction.

Thus it appears that in setting formalized structures that did not quite fit the nature of the original character of law and law making of the early period, the ahl al-athar schools resorted to exceptions and further qualifications to try to release themselves from the quagmire that they had set up. It appears that while the ahl al-athar set out with a number of ideological and theological commitments, they found that eventually they required fine tuning in order to arrive at a more workable outcome. One that was in all possibility attainable with raʾi.
Ahl al-raʾi and a means to natural law

The early formulations of the school of raʾi, as previously described, granted a degree of ontological authority to reason by virtue of the reasoning process required of the mind in order to come to law that is just, equitable, and fair. Furthermore, as the principles of justice, equity, and fairness were recognized by the Qurʾan, giving the impression that these are expectedly innate, it may be argued that this ontological authority is much more comprehensive than has been granted to Islamic legal theory. It may be stated that with both the principles and contextual rulings that came to afford and promote justice and fairness, the expectancy that human reasoning is a must within the raʾi-based school may be seen as, at times, a form of natural law that places innate principles as central, with law making around them as fluid. Any legal rulings of the text can thus be seen as, at times, contextual demonstrations of these principles that must be continually reconsidered in light of them, but not despite them.

It appears thus that the raʾi view of law and law making allows for a more dynamic and less dogmatically restricted characterization of the legal process and law making. Furthermore, it also appears to promote a view of law that allows for the preservation of arguable universal principles common to all humankind – principles that cannot be overridden for political or ideological expediency.

The polity and humankind on the island

The discussion in Islamic literature on how government might serve justice is remarkably similar to 17th-century Western discourses on the state of nature or the original condition of human beings. One view – advanced by Ibn Khaldun (d. 808/1406) and Abu Hamid al-Ghazali (d. 505/1111) – argued that human beings are by nature fractious, contentious and not inclined towards cooperation. So, government is necessary to force people to cooperate with each other, contrary to their nature, and to promote justice and the general interest.82

Ibn Khaldun held that humans are both social beings as well as political by nature, and that humans are leaders by nature due to the istikhlāf (vicegerency) they were created for. Further, he held that the reality of kingship (mulk) is a communal necessity for humanity, and it entails dominance (taghllub) and force (qahr), which are the effects of anger and animalistic tendencies. Furthermore, given this state of being, a society, to Ibn Khaldun, needs a deterrent as well as a ruler who can judge between the various competing claims that rise due to the multiplicity of interests among the inhabitants of society, without which there would be chaos and the extinction of humankind. He finds credibility for this by stating that protection of humans is one of the necessities of the objectives of Islamic law.83 That being said, he has also been attributed with the stance that if people could live by God’s law, then there would be no need for a leader, a view also expressed by the Muʿtazilis.84

Al-Ghazali held the opinion that politics in itself does not hold the ability to undertake its stated objective except through a process of education and purification of the self. Furthermore, the direction of a human in society and society as a whole towards goodness as well as the provision of security cannot be organized except with a sultan mutāʿā (an authority that is obeyed). He draws readers to his observation of what trials and tribulations occur at the time of the death of a sultan – a situation that if left unchecked, leads to chaos, bloodshed and poverty. He builds his theory stating that

this life has been created as a means to the next, and thus had it been one where justice ran throughout [i.e. was the status quo], then no discord would occur, and the tasks of
the jurists would cease. However, it is one where desires run throughout, and thus discord was born and as such there was dire need for a sultan to manage their affairs, and the sultan was in need of a canon by which he could manage them with. 85

Competing with the above theories are al-Mawardi (d. 450/1058) and Ibn Abi al-Rabi’ (d. 688/1289) who argued that God created human beings weak and in need so that they would cooperate due to necessity. Cooperation would limit injustice by restraining the strong and safeguarding the rights of the weak. Furthermore, they believed that God created human beings different from one another so that they would need each other to achieve their aims. In this school of thought, human beings by nature desire justice and will tend to cooperate in order to achieve it. Even if human beings exploit the divine gift of intellect and the guidance of the law of God, through cooperation, they are bound to reach a greater level of justice and moral fulfilment, and the ruler ascends to power through a contract with the people, pursuant to which he undertakes to further the cooperation of the people with the ultimate goal of achieving a just society. 86 However, al-Mawardi puts forward the theory that the ruler enjoys considerable discretion over ostensible legal issues that qualified jurists have come to by virtue of duties to uphold and carry out the law, ensure continued existence of the Muslim community, and preserve the sanctity of the public sphere. 87 The Mu’tazili qadi ’Abd al-Jabbar (d. 415/1025) held that a leader’s role was twofold, the first part relating to religion, the other to the matters of ‘worldly affairs’ (dunyā), whereby the leader must bring benefit and mitigate harm in both.

On the human element of society, Islamic schools of thought held that the human ‘self’ (nafs) has the capacity for three spiritual levels: the nafs al-amma¯ra bi-l-su¯ʾ (the self that invites to bad), the nafs al-lawwa¯ma (the self that is constantly blaming and disciplining itself), and the nafs al-mut․ma․ʾinna (the self that is tranquil). Each of these is attainable, and thus, human action can lean to good or bad or both, depending on the person’s spiritual state. With such a framing, the necessity of law may have been seen, in part, contingent on how many in society had achieved which levels. Many theories on policy began to be developed by al-Farabi (d. 339/950), Ibn Sina (d. 427/1037) and Ibn Taymiyya (d.728/1328), yet they remained largely theoretical.

In one case, al-Shatibi’s theories have influenced contemporary Muslim democrats, in a manner that shifts policy from one of dogma and ideology, to one that advocates for the achievement of the maqaṣid. They use the theories of law to be able ‘to serve the interests of mankind’ to include the protection of life, religion, progeny, wealth and the intellect. 88 However, many have taken a step further and widened the scope of maqaṣid to include ‘freedom’ and ‘environmental protection’ among others. Yet some have criticized this approach of not being true to the textually based locus used by al-Shatibi. However, defenders of the approach see the theory of maqaṣid as facilitating a widening in the scope of Islam beyond texts, to allow for its own development in a manner that is also of benefit to people – whether it is mentioned by the Shariʿah or not. 89 Indeed, the maqaṣid methodology, according to Andrew March, has allowed for a practicality in relation to concrete circumstances in which Muslims live, yet claim for this practicality on a traditional foundation. 90 In such constructs, terms do not matter as much as the content and the outcome (maʿāl). A non-Muslim country that is just is more favourable than an unjust Muslim country. God upholds a just non-Muslim country but not an unjust Muslim country. 91 As such, the view taken on governance is that it ought to be based on the establishment of benefit and the mitigation of harm. 92

Indeed, al-Shatibi has been seen to offer a more realistic philosophy of religion and law by some secular writers. This can be seen, for example, in the work of Aziz al-Azmeh who commends elements of the philosophy in such terms and in particular al-Shatibi’s deliberation and use of mašlaḥa (benefit) in his discourse. 93 This formulation has, for al-Misiri, allowed
for a relative depolarizing whereby focus is shifted to the outcome of laws that have universal appeal. It has been suggested, however, that post-Westphalian models of state do not hold a compatibility with the premises of Islamic forms of governance.

Although Muslim jurists debated political systems, the Qur’an itself did not specify a particular form of government. However, it did identify a set of social and political values that are central to a Muslim polity. Three values are of particular importance: pursuing justice through social cooperation and mutual assistance; establishing a non-autocratic, consultative method of governance; and institutionalizing mercy and compassion in social interactions.

Yet while the Qur’an, when speaking on political matters such as *shūra* (consultation), holds the process in high esteem, jurists, arguably, as a result of their contexts, began to consider existential questions – those that were tied to the inevitable direction of the Muslim populous – in very legal terms instead of philosophical. With *shūra*, there was an emergence of two ‘valid’ legal arguments, one determining it to be legally binding, the other not. Given that power, at the time, was vested in a leader to choose any legal view considered valid, rarely did it become binding. Thus *shūra* neither played a central role in pre-modern Muslim reasoning on the Islamic state nor was ever institutionalized prior to the 19th century.

Had the approach to this been one that considered it in philosophical terms, based in reason, instead of fully textual in nature, that the prosperity of a community was contingent on *shūra*, a position that is largely accepted today as a pre-condition for natural progress, stability and seamless transfer of power, the question of whether *shūra* was binding or not need not have been answered given the existential repercussions of the omission of *shūra* in the world. Therefore, it may be suggested that such omission was a factor in the approach to governance given at al-Ghazali’s time, whereby he saw the necessity, as alluded to earlier, of a sultan *muta’* (an authority that is obeyed) to avoid bloodshed. Indeed, al-Mawardi, under certain conditions, recognized the legitimacy of usurpation as a means of coming to power in the provinces of Muslim lands. It is arguable that this thought began to institutionalize the idea that an unjust ruler was better than conflict. It may be suggested that the net effect this had over the centuries was to limit the possibility of civic change and institutionalize injustice, with tacit approval from many jurists.

These competing views on a divine command ethic largely remain until today. They present elements of Islamic jurisprudence – with which Islamic ethics are constructed – that are seemingly unresolved. This is in part due to the first principles upon which competing views have built their hermeneutics to approach the texts.

The epistemology that initially guided the development of the early *ra’i* jurisprudence process, a process that by its nature was welcoming of reason and new forms of knowledge and discovery, is now considered by some as largely lost, with one of the poignant consequences being the spread of trenchant authoritarianism in contemporary legal determinations. It has been found that authority lends itself to a form of legal formalism, one where the law appears to the person holding this schema as complete and univocal. Not surprisingly, it has also been found that those holding such attitudes, whereby law is seen as unchanging, exaggerate the role of the text and minimize the role of the human agent who interprets it. Nowhere can this be seen better than in the tensions today between two schools of thought. The first wishes to see the development of *fiqh* and reinstate an epistemology of reasoning in it, using the progress that the social sciences and natural sciences offer, the development of governance that best meets the aspirations and innate nature of humanity, and the continued development of international law that stemmed in part from natural law as a project that continues to hold prospects for collaborative progress around shared ground and shared principles. The second
school continues to entrench a status quo of unreasonableness in Islamic law, dogma and authoritarianism in both religion and governance, all the while relying on political precedent and the legal traditions of past centuries to do so.

While scholars, state actors, students and institutions continue to work within the field, with some attempting to adhere to authoritarian ideology and others taking more reasoned approaches, much of the discourse appears limited by a lack of consideration of first principles, and their thorough development. Herein lies opportunity for new ideas.

Notes


6 These verses either directly, or indirectly, refer to an ’illa (reason) for God’s creation of human-kind and the circumstances in which they find themselves in life.

7 The formulation comes from my own determination. It finds its parallels and precedent in early school approaches, much of the discourse appears limited by a lack of consideration of first principles, and the legal traditions of past centuries to do so.


13 Ibn ‘Ashur gives theological credence to this by referring to the Maturidis and Hanbalis.


18 Ibid., v. (6:168).


36 Ibid., 145.

37 Ibid., 252.


40 Ibid.


43 Ibid., 139–69.


49 Ahmad al-Sa`ati, *Nihayat al-Usul ila ‘Ilm al-Usul* (Mecca: Umm al-Qura University, n.d.).


51 Ibid.


58 Ibid.

60 Maksdised, ‘Legal Logic and Equity in Islamic Law’.


63 Ahmad ibn Taymiyya, *Dar Ťaʿirud al-ʾAgī̄l wa-l-Naqūl*, 9:49.


65 Khaled Abou El Fadl, *Speaking in God’s Name*, 35.


73 Ibid.


75 ʿIsmaʿil Ahmad Fahmy Abu Sinna, *Al-Urf wa-l-ʾAda fi Raʾy al-Fuqaha* (Cairo: Dar al-Basaʿir, 2004), 91–8, 123.


81 Ahmad Mustafa al-Zarqa, *Al-Madkhal al-Fiqhi al-ʾAm*.


92 Ibid.


Ahmed Izzidien

96 See also Khaled Abou El Fadl, Islam and the Challenge of Democracy, 4.
98 Ibid., 116.
99 Khaled Abou El Fadl, Speaking in God’s Name, 1.

Select bibliography and further reading

Raysuni, Ahmad al-. Imam Al-Shatibi’s Theory of the Higher Objectives and Intents of Islamic Law (Herndon, VA: International Institute of Islamic Thought (IIIT), 2005).