Maqasid al-Shari'a: A tool of mediation in the politics of the Egyptian Supreme Constitutional court

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MAQASID AL-SHARI’A: A TOOL OF MEDIATION IN THE POLITICS OF THE
EGYPTIAN SUPREME CONSTITUTIONAL COURT

A Thesis Submitted to the

Department of Law

in partial fulfillment of the requirements for
the LL.M. Degree in International and Comparative Law

By

Reem Khalil

September 2016
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MAQASID AL-SHARI’A: A TOOL OF MEDIATION IN THE POLITICS OF THE EGYPTIAN SUPREME CONSTITUTIONAL COURT

Reem Khalil

Supervised by Professor Nesrine Badawi

ABSTRACT

Maqasid al-Shari’a is a term that is widely used nowadays in the field of Islamic law. However, since the beginning of the 1990s, the Supreme Constitutional Court (SCC) of Egypt, in its interpretation of Article 2 of the Egyptian Constitution, started endorsing the maqasid as a framework through which it conceptualizes the application of Islamic law. Also, with Islamists and religious figures using the maqasid as a framework to use reason and adopt the traditional Islamic jurisprudence to the modern contexts, it is essential to trace how the classical theory of maqasid was developed and what are the constituents of that theory. This paper, accordingly, traces the classical theory of maqasid versus how it has been used since the ‘revival’ of the theory in the late 19th century by Rashid Rida. Accordingly, with such investigation of the roots of the theory and how the classical jurists conceptualized its application, this paper analyzes the SCC’s use of maqasid to demonstrate how the maqasid was a tool used by the court to mediate between different political actors, specifically between the militant Islamists in the 1990s and the secular government.
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I. INTRODUCTION

Examining almost any of the cases of the Egyptian Supreme Constitutional Court (SCC) that are related to Islamic law or Shari’a\(^1\), one would encounter the term “maqasid al-Shari’a” or the goals of the Shari’a as part of its reasoning. Thus, digging more behind what the maqasid are, or the doctrine of maqasid is, one would be overwhelmed by the amount of literature on the topic. What is interesting, is that the literature on maqasid is either classical, so from around the eleventh century till the fifteenth century, or from the late nineteenth century onwards. However, the interest in the doctrine of maqasid in the second half of the twentieth century is intriguing, where the published literature on maqasid is massive.

The second half of the twentieth century has witnessed the intense use of the doctrine of maqasid al-Shari’a by multiple players, the most important of which is the Egyptian SCC starting the 1990’s. Other significant key players who intensely write on maqasid and encourage the revival of the doctrine are modernist Islamic reformers. While both the SCC judges and Islamic reformers employ the doctrine of maqasid, they do so differently, and for different goals. The SCC judges in Egypt, use the maqasid, amongst other tools, as a ‘semblance of Islamicity’\(^2\) as a means to evade the traditional jurisprudence, while maintaining the freedom of legislation from having to commit or adhere to the traditional jurisprudence in Islamic law, where in some cases they could even contradict it. By Islamicity, I mean that judges of the SCC use the doctrine of the maqasid, and its technical terminology, to demonstrate their respect for classical Islamic law theories, and their utilization of such a classical theory as cornerstone in the jurisprudence of the court.

The doctrine of maqasid al-Shari’a was developed by classical jurists to escape the rigidity of the tradition, abuses of the law, and as a tool in order to grant jurists the

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\(^1\) I like to use Ziba Mir-Hosseini’s distinction between shari’a and fiqh in her article “The Construction of Gender in Islamic Legal Thought and Strategies for Reform,” where she explains that “. . . shari’a is the totality of God’s law as revealed to the Prophet,” while “. . . fiqh is the legal science which aims to discern and extract sharia legal rules from Qur’an and sunna….it has its legal theories and methodologies.’

\(^2\) Lama Abu-Odeh, Modernizing Muslim Family law: The Case of Egypt, at 1050.
space for more subjectivity and interaction with the sacred texts in order to meet the
needs of the new contexts. The ‘re’interest in maqasid started in the late 19th Century
through the discussion of the concept of al-maslaha al-‘ammah or public benefit by
Mohammed ‘Abdu and even more so by his disciple Mohammed Rashid Rida. Rida
argued for the importance of the use of the concept of maslaha in legislation and put forth
some criteria or a methodology for such use. Rida’s discussion could be argued to be the
spark for the resurgence or revival of the classical doctrine of maqasid. Accordingly,
many religious scholars, political actors, reformers and then legalists, endorsed the
doctrine of the maqasid in multiple ways to advocate for different purposes.

Although the literature on maqasid is huge, especially literature encouraging its
use as the primary framework for modern ‘Islamic’ legislation, it is remarkably intriguing
that there is almost no scholarly work analyzing the SCC’s endorsement and use of the
theory. In addition, it is interesting to investigate how religious scholars classically
perceived how the theory should be applied, how modern reformers elaborate on the
theory and how they expect it to be used, versus how the SCC conceptualizes it. Thus,
with the prominence of the theory of maqasid in most contemporary religious scholarly
work, and with calls for its adoption as the foundational methodology to come up with
new religious rulings (ahkam) that are compatible with the modern context, it is essential
to see how the very same methodology is employed by the SCC judges to pass its
political choices. The maqasid is perceived to be the sound methodology for adapting
Shari’a to the modern context by both religious scholars and reformers, as well as the
SCC judges since unlike other methods, like talfiq, employed by the court, the maqasid is
a classical tool that was developed by classical jurists. According to the scholar Wael
Hallaq, it is “accurate to argue that any serious project aiming at refashioning a
conception of Shari’a must claim history and pre-modern legal culture as its frame of

4 Clark B. Lombardi; Nathan J. Brown, Do Constitutions Requiring Adherence to Shari’a Threaten Human
Rights - How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law, 21 Am. U.
5 The only exception here is Nathan Brown & Clark Lombardi’s article Supra note 4; and Clark Lombardi’s
book State law as Islamic law in modern Egypt: the incorporation of the Shari’a into Egyptian
constitutional law (2006).
This is arguably true because it provides the new/modern arguments with the outlook of the classical jurisprudence which is perceived by many to be the true and authentic Shari’a. As a result, it is essential to investigate how such a classical tool is refashioned in the modern context to meet the expectations of its endorsers.

Accordingly, this paper argues that the doctrine of *maqasid al-Shari’a* is often used by the SCC judges in a manner that is deviant from the classical methodology as a tool of mediation between different political actors. In other words, in circumstances where the court was faced with multiple pressures, from either the secular government or the militant Islamists in the 1990’s, the court employed the *maqasid* as one of its tools to mediate between the different political actors. Moreover, by endorsing the terminology of the *maqasid*, the court maintained the outlook of its choice to adhere to Islamic law, as the public was expecting. On the other hand, the *maqasid*, as a classical liberating tool, was the court’s leeway, or ‘Islamic framework’ under which it managed to support secular legislation.

Chapter I of this paper chronicles the history of the *maqasid* theory, its classical conceptualization and evolution and its resurgence and development in the 20\textsuperscript{th} Century as a prominent theory. Chapter II attempts at giving a detailed historical and political background of the SCC, and when and how it endorses the theory of *maqasid*. Finally, chapter III includes the discussion and analysis of two prominent SCC cases, where the *maqasid* was used as an integral part of the court’s reasoning.

II. *MAQASID AL-SHARI’A*

This chapter is divided in two sections. The first section will focus on giving a thorough account of the classical theory of *maqasid* and its contextual background in order for the reader to have the foundation of the classical theory when the discussion proceeds with how SCC uses the theory in later chapters. Then, the second section will proceed with when and how the theory was revived in the late nineteenth century and twentieth century. In other words, it will explore how the ‘modernists’ perceived the theory and refashioned it to their contexts. The discussion will include a number of key figures that were influential in the proliferation and endorsement of the theory of *maqasid* like Mohamed Rashid Rida, Sanhuri and how it could be argued that he used the *maqasid* in a covert form, and other influential figures like Mohamed al-Tahir Ibn ‘Ashur, Youssef al-Qaradawi. Finally, this chapter aims at familiarizing the reader with the technical terminology that is related to the *maqasid* theory.

A. Historical and Contextual Background


The amount of classical literature on *maqasid* is huge where many prominent jurists have engaged with the theory and wrote about it at length. For example, scholars like al-Qarafi, Ibn Taymiyyah and Ibn al-Qayim have all written about *maqasid.* However, the focus in this paper, and this section, will be solely on the main contributors or developers of the theory.

*Maqasid al-Shari’ā* are simply the aims/goals or (higher) objectives of *Shari’ā* or Islamic law. The goals that the theory refers to is what jurists perceived could be achieved by the process of induction from the scriptural sources in order to promote a certain benefit (sing. *maslaha*, plur. *masalih*) or to prevent a result that would cause harm (*darar*). The doctrine of *maqasid* was developed over a long period of time and many prominent scholars have contributed to its development.

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9 *Id.* at 193.
In order to understand the reasons for the prominence of the theory of *maqasid*, it is essential to dedicate a brief section on the ‘pre-*maqasid*’ era as well as the contextual background of the formative period when the theory was developed.

**Pre-*maqasid* Era**

In *al-Risala*, which is considered to be the first work on Islamic legal theory (*usul al-fiqh*), al-Shafi’i articulated a theory through which “he specifies and prescribes the methods by which laws are formulated.”\(^{10}\) Shafi’i was concerned with establishing a theory that based the methodologies, through which the law is discovered, in the divine texts.\(^{11}\) Moreover, Shafi’i was preoccupied with establishing and justifying how the Qur’an, Prophetic Sunna, consensus (ijma’) and *qiyaṣ* were the authoritative sources of law. More specifically, Shafi’i was aiming at justifying “the authoritative bases of, first, the Sunna, and, second, consensus and *qiyaṣ*.”\(^{12}\) Shafi’i’s theory or methodological framework of *usul al-fiqh* greatly restricted the use of *ijtiḥad* by scholars and had limited *ijtiḥad* to *qiyaṣ*, which is analogical reasoning, to argue against the traditionalists at that time who “spurned reason as a means of expounding the law.”\(^{13,14}\) Moreover, Shafi’i, amongst other scholars, were countering a tendency, that had already become prevalent at that time, of ignoring Prophetic reports and claiming that when the Qur’an is silent on an issue, human reason would become the final judge.\(^{15}\)

However, by time, Shafi’i’ came to be known as the master and founder of *usul al-fiqh*, and his methodology was adopted by the other juristic guilds or *madhahib* (Hanafi, Hanbali and Maliki) and the use of reason and *ijtiḥad* became greatly limited by the sources of law that Shafi’i put forth.\(^{16}\) Thus, from the time of Shafi’i’s theory, which is around the second/eighth century till the sixth/twelfth century, there were no new theories or methodologies that would give jurists the authority to engage with the scriptures the


\(^{11}\) *Id.* at 22.

\(^{12}\) *Id.*

\(^{13}\) *Id.*

\(^{14}\) *Supra* note 8, at 44-7.

\(^{15}\) *Supra* note 10, at 21.

\(^{16}\) *Supra* note 8, at 61.
way maqasid did. Accordingly, with taqlid being the norm, the expression of the “Closure of the Gates of Ijtihad” was coined to reflect the restriction on ijtihad.

**Closure of the Gates of Ijtihad**

It is debated as whether there was such a thing as the “Closure of the Gates of Ijtihad,” where the jurisprudential tradition was inclined towards restricting jurists to following (imitating) the existing juristic opinions rather than doing ijtihad. Ijtihad, in broad terms, is the process through which jurists identify rulings (ahkam) directly from the Qur’an and hadith literature. Many scholars argue that taqlid or imitation, rather than engagement with the scriptural texts had become the norm for centuries after Imam Shafi’i came up with his theory of the sources of law, usul al-fiqh. On the other hand, several scholars have pointed out that the “Closure of the Gates of Ijtihad” is a legal fiction that was developed by the guilds (madhahib) arguing that there were “no longer ‘independent’ mujtahids [jurists who can perform ijtihad] that were sufficiently skilled in textual scholarship to derive rulings in every case through ijtihad.” Accordingly, jurists were forced or driven by necessity to “work from the established precedents laid down by earlier mujtahids.” However, arguing against these arguments, some scholars have advocated that the move to taqlid maintained the jurists control or hegemony over the interpretation of Shari’a from possible competition. As taqlid tended to restrict the interpretive subjectivity and discretion of jurists, some have also argued that it was a mechanism through which fiqh was made more stable in order to feasibly become the law or the state or caliphate.

**The Formative Period of the Maqasid: al-Juwayni and al-Ghazali**

The fifth/eleventh century is associated with the most extensive record of works on legal theory. It is in the fifth/eleventh century that many legal problems of legal theory start being addressed, and also “some of the most creative and brilliant legal theorists

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17 *Id.*
18 *Supra* note 12 at 41.
19 *Id.* at 40.
20 *Id.* at 41.
21 *Id.*
22 *Id.*
23 *Id.*
24 *Supra* note 10 at 36.
(usulists) of Islam” produce their works. One of the essential players in the formative period of the maqasid is the Shafi’iite scholar Imam al-Haramayn al-Juwayni (d.478/1085). Al-Juwayni’s main contribution to the maqasid was in fact indirect; his main contribution in that period was coming closer to the Greek philosophical tradition and introducing logic to usul al-fiqh.\(^{25}\) It was Juwayni’s student, Abu Hamid al-Ghazali, who is considered seminal to that era for making “clean break, at least in theory, with the established tradition and incorporating” Greek logic and philosophical principles such as the Aristotelian theory of definition, and introduced such principles in his works.\(^{26}\) Moreover, it is during that period that al-Ghazali elaborated on the theory of maqasid, and presented a thorough discussion of it and its underlying principle of maslaha.

Al-Ghazali argued that the ultimate aims (maqasid) of the law are the “constant and consistent promotion of benefit [maslaha] and exclusion of harm [darrar].”\(^{27}\) However, Ghazali believed that aims of the law are numerous and multi-faceted. Thus, he divided the maqasid in three categories.\(^{28}\) The first category included the aims of the law that are considered indispensable (darurat), where he lists five (sub)-categories/aims which are the protection of life (nafs), private property (al-mal), mind (al-‘aql), offspring/progeny (al-nasl) and religion (al-din). The second level consists of aims that are considered necessary (hajiyyat). These aims in the second category are “distinguished from the first in that the neglect of the indispensable aims causes severe harm to life, property mind, etc., whereas aims classified as belonging to the second levels are needed for maintaining an orderly society properly governed by the law.”\(^{29}\) The third category includes those aims that Ghazali labels “improvements” (tahsin), which basically “enhance the implementation of the aims of the law.”\(^{30}\)

**Maslaha and al-Masalih al-Mursala**

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\(^{25}\) Id. at 39.

\(^{26}\) Id.

\(^{27}\) Id. at 89.

\(^{28}\) Id.

\(^{29}\) Id.

\(^{30}\) Id. at 90.
Istislah is reasoning on the basis of maslaha or public interest.\(^{31}\) One of the methods of inferring the ratio legis (‘illa) of a certain scriptural text is suitability (munasaba).\(^{32}\) Ghazali vehemently defends this method of inferring the ratio of a scriptural text which is not explicitly stated, and argues that the “ultimate goal of suitability is . . . the protection of public interest (maslaha) in accordance with the fundamental principles of the law.”\(^{33}\) Accordingly, due to the “relationship between the ration and suitability that maslaha [and istislah] . . . is deemed an extension of qiyas, and thus most works of legal theory do not devote to it an independent section . . .”\(^{34}\)

An issue that arises in the context of istislah is that of “cases whose rules are derived on the basis of a rationally suitable benefit that is not sustained by textual evidence. This is called al-masalih al-mursala”\(^{35}\) In other words, such benefits are not defined by a scriptural text, but rather rationally, and subjectively, defined by the jurist. Most jurists refused to accept any conclusions that were not based on a scriptural text even if they were advancing public interest.\(^{36}\) Ghazali, however, has a rather interesting argument about al-masalih al-mursala, where he argued that “[i]f the feature of public interest in a case can be defined as serving any of these principles [the principles of protecting life, private property, etc.], and if it can be shown to be certain (qat’i) and universal (kulli), then reasoning in accordance with it is deemed valid.” Universality here is meant to ensure that the use of this type of reasoning would lead to the protection of the interests of the Muslim community as a whole and not cater to the desires of a specific group.\(^{37}\)

Al-Shatibi: Social Context

The discussion of Abu Ishaq al-Shatibi (d. 790/1388) and his development of the theory of maqasid in al-Muwafaqat is perhaps the most important in our account of the classical theory of maqasid. Shatibi is closely associated with the doctrine of maqasid since his elaboration and development of the theory “represented the culmination of an intellectual

\(^{31}\) Id at 112.
\(^{32}\) Id. at 88.
\(^{33}\) Id. at 89.
\(^{34}\) Id. at 112.
\(^{35}\) Id at 112.
\(^{36}\) Id.
\(^{37}\) Id.
development that started as early as the fourth/tenth century." It is argued that Shatibi’s development of the theory of maqasid was primarily his reaction to address the different social contexts taking place in eighth/fourteenth century Andalusia.\textsuperscript{38} Hallaq argues that Shatibi’s theory, “for all its ingenuity and novel character” was aiming to restore the "true law of Islam, a law which he thought was adulterated by two extreme practices in his day, namely, the lax attitudes of the jurisconsults and, far more importantly, the excessive legal demands imposed by what seems to have been the majority of contemporary Sufis, in whose ranks must have been a certain population of legal scholars. . . A careful reading of his works al-Muwafaqat and al-I’tisam, demonstrate that the main motive behind his theories was attacking the Mystics of his time, who seemed to have been a powerful force propagating what he perceived as a rigid and unduly demanding application of the law."\textsuperscript{39}

Thus, the background that Shatibi reacts to, of perceiving the law as being abused by different (legal) actors and accordingly leading to its failure, becomes relatable to the modern reformers like Rashid Rida when they face the new challenges of modernity. In other words, they (modernist Islamist reformers) see in Shatibi, and the challenges of his context, a similarity with the challenges they face of adapting the law to the new modern context. Accordingly, this led to Shatibi, and his legal theory of maqasid, playing an integral role in the modern reform movement.\textsuperscript{40}

**Shatibi’s Methodology**

Shatibi uses Ghazali’s categories of maqasid of darurat, hajiyyat and tahsiniyat as foundations to his theory and thus builds his theory on what Ghazali had put forth.\textsuperscript{41} Thus, Shatibi also views that "the existential purpose of the Shari’a to be the protection and promotion of [those] three legal categories."\textsuperscript{42} Shatibi, like most theorists, conforms to the idea that certitude is the epistemological source of the different sources of the law.\textsuperscript{43} However, Shatibi additionally makes the argument/postulate that the fundamental premises (muqaddimat) of legal theory are also certain.\textsuperscript{44} The premises that Shatibi

\textsuperscript{38} Id. at 162.
\textsuperscript{39} Id. at 163.
\textsuperscript{40} Id. at 162-3.
\textsuperscript{41} Id. at 169.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 164.
\textsuperscript{44} Id. at 165.
address are certain whether they are rational, revelational or conventional.\textsuperscript{45} However, more specifically, the revelational premises are considered to be certain due to the fact that their “meaning is unequivocal and because they have been transmitted, either through recurrent thematic reports (\textit{tawatur ma'nawi}) or through recurrent verbal reports (\textit{tawatur lafzi}) . . .” or through an “exhaustive inductive survey of the entirety of Shar'i material.”\textsuperscript{46}

Unlike other theorists, the epistemic foundations of Shatibi’s theory are based on “comprehensive inductive surveys of relevant evidence” and not on any specific Prophetic reports or Qur'anic verses.\textsuperscript{47} In other words, the evidence that Shatibi’s theory is based on, could be textual or non-textual. Thus, Shatibi proposes that the "truly reliable premises . . . are those that have been culled through a broad inductive survey of a large number of probable pieces of evidence all sharing one theme, so large in fact that their totality they yield certitude."\textsuperscript{48} Accordingly, the five pillars of Islam, such as prayer and pilgrimage, are identified with certainty to be obligatory through such a survey of different (textual and non-textual) pieces of evidence.\textsuperscript{49} Thus, the focus in Shatibi’s theory is not based on the certainty of the various premises but rather the common theme that is shared by the different and relevant material.\textsuperscript{50} Shatibi’s method of “evidential corroboration” resembles that of the "multiply transmitted Prophetic reports of the thematic kind (\textit{tawatur ma'nawi}).”\textsuperscript{51} However, the material that Shatibi's inductive corroboration draws on such as the Qur'an, Sunna, consensus, \textit{qiyas} and contextual evidence (\textit{qara'in al-ahwal}) is much more diverse than just Prophetic reports.\textsuperscript{52} Accordingly, when a large, or sufficient, number of pieces of evidence are found to support or confirm a specific “idea, notion, or principle, the knowledge of that idea or principle becomes engendered in the mind with certainty because the confluence of evidence has the effect of virtually complete, if not perfect, inductive corroboration”.

\begin{flushright}
\textsuperscript{45} Id.  \\
\textsuperscript{46} Id.  \\
\textsuperscript{47} Id.  \\
\textsuperscript{48} Id.  \\
\textsuperscript{49} Id.  \\
\textsuperscript{50} Id.  \\
\textsuperscript{51} Id.  \\
\textsuperscript{52} Id. at 166.
\end{flushright}
This demonstrates how when attempting to identify a *maqsid* (aim), Shatibi prescribed a methodology of collecting all the different pieces of evidence that support a common theme. In other words, a jurist cannot simply claim that a certain concept is an aim of the law without actually going through the inductive survey that Shatibi prescribes and thus having the sufficient evidence to prove his claim. However, that does not imply that Shatibi’s method did not open the door for subjectivism; this is demonstrated by how his theory became the cornerstone of the modernist Islamist (reformist) utilitarianism.

**Critique and Reactions to al-Shatibi’s Theory**

As mentioned earlier, Shatibi’s main motive for the development of his theory was to counter the forces of the two different legal players at his time: the Sufis, for the rigidity, and the jurisconsults, for their extreme leniency and lack of a sound and coherent methodology. Accordingly, he was critiqued and accused with several accusations that we know of from his book al-I’tisam where he refutes some of the accusations of the jurists.\(^{53}\) For instance, Shatibi was accused of being “stringent in his legal views, demanding the application of laws that lead to hardship.”\(^{54}\) Shatibi however defends himself by clarifying the reason for such accusations are due to his ""commitment to issue legal opinions in conformity with the dominant and widely accepted (*mashhur*) doctrines in our [Malikite] school . . . But they do transgress the limits of the school's doctrines no issues legal opinions that deviate from the *mashhur*, opinions agreeable to the people and their pleasures.""\(^{55}\) This defense is very interesting since it shows how Shatibi although was proposing an arguably novel methodology or theory, he was also defending being bound to a specific doctrine (madhab) and attacking/criticizing the jurisconsults for their inconsistent and incoherent ways of issuing opinions. Thus, Shatibi was not revolting against the traditional or classical legal theory or methodology as a whole, but rather defending it. However, he was proposing a methodology that, if used consistently and coherently in the manner that he prescribed, would make the law more adaptable to new contexts.

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\(^{53}\) *Id.* at 163.

\(^{54}\) *Id.*

\(^{55}\) Abu Ishaq Ibrahim al-Shatibi al-I’tisam, ed. Muhammad Rashid Rida, Vol I, at 11-12 as cited in *Id.* at 163.
Shatibi was also accused of animosity towards Sufis and that he preached against their practices, which he viewed as heretic and not following the example of the Prophet.\footnote{Supra note 10 at 163-4.} Moreover, he was accused of "deviating from the religious community (jama’a).”\footnote{Id.} However, Shatibi defends himself by clarifying that the community which is to be followed, is that which adheres to the Prophetic example and that of the companions, and thus it is a matter of the "quality of practices prevailing in society" that counts, rather than just a matter of the size of the community or number of people.\footnote{Id.} In other words, he defends the Sufi’s accusations of his deviation from the religious community (jama’a), which was highly controlled or dominated by Sufis, by arguing that their understanding of the jama’a is flawed, where it is not the number of people in the jama’a that matters but rather the quality of the practices prevalent amongst them. Shatibi here is obviously twisting the prevalent understanding the jama’a by stressing on the quality of jurists or their practices rather than the quantity or number of jurists.

2. Modern ‘Reconceptualization’ of Maqasid al-Shari’a

The modern literature on maqasid is massive. The literature on maqasid can be divided in three categories: Scholarship which discusses the origins of the maqasid; Scholarship which advocates the use of maqasid as a modern tool for legislation and lastly; Scholarship that critiques the maqasid as a classical tool to be applied nowadays, which is very little.

i. Mohamed Rashid Rida

As mentioned earlier, Mohamed Rashid Rida could be credited for the resurgence or revival of the theory of maqasid in the 20\textsuperscript{th} Century, by elaborating on the theory systematically. Like his mentor, Rida rejected the system of taqlid and advocated for the return to ijtihad and the engagement with the scriptural sources.\footnote{Mohamed Rashid Rida, al-Manar, at 1873.} Rida was occupied with the need to Islamic legislation that would be compatible with the needs and context of the modern world, in the first half of the 20\textsuperscript{th} Century. As a result, Rida systematically
published extracts from works of al-Shatibi in the periodical *al-Manar*. In addition, believing in al-Shatibi’s theories, he later edited and published his book *al-’I’tissam* in 1913/1914.60

Accordingly, Rida articulated a methodology of *ijtihad* that was based on utility, which Clark Lombardi elaborately labels “utilitarian neo-*ijtihad*.”61 Rida thus proposed: 1) Identifying the rules and goals of the *Shari’a*; and 2) Developing codifiable state legislation that served the public interest, without violating the established rules and goals of the *Shari’a*.62 In other words, Rida was proposing that modern states, that wanted to have *Shari’a* applied in its legal systems, did not need to ask their legislators to derive rules from the existing classical tradition of *fiqh*.63 Moreover, he asserted that, unlike the tradition in *fiqh*, states are required to respect exclusively the rulings (*ahkam*) that were absolutely certain (*qat’i*) with respect to both their authenticity (*thubutih*) and meaning (*dalalatiha*).64 By this new proposition, Rida departed from the tradition, where classical jurists had looked for rules that were either certain or probable (*zanni*) with respect to their authenticity or meaning.65 In addition, whereas classically jurists had to respect uncertain rulings on which there had been binding consensus (*’ijma’*), Rida, following a minority opinion, argued that only the consensus of the Prophet and companions could be considered binding and thus establish the certainty, and universality, of such rulings.66

The issue of the certainty (*qat’i*) and uncertainty (*zanni*) with respect to the authenticity and meaning of a text is important to clarify since it is an essential part in the SCC cases, and it is Rida who influenced how the SCC respects only the scriptural texts (pl. *nusus*, sing. *nass*) that are certain with respect to both authenticity and meaning.67 A text that is *qat’i* with respect to both authenticity and meaning, “left the reader with absolute certainty about what God wanted them to do. . . [and] they provided the reader with rulings that were “absolutely certain” to be rulings of the *Shari’a*.68 Below the

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60 *Supra* note 34 at 9.
61 *Supra* note 4 at 10.
62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.*
66 *Id.*
67 *Id.*
68 *Supra* not 4 at 25.
absolutely certain came three other categories of revealed texts: texts that were certain with respect to their authenticity, but probable with respect to their meaning (*qat‘i al-thubut wa zanni al-dalalah*) like certain Qur‘anic verses whose meanings were not certain; texts that were probable with respect to the authenticity (*zanni al-thubut wa qat‘i al-dalalah*), but certain with respect to their meaning like certain hadiths; and finally texts that were probable with respect to both their authenticity and meaning (*zanni al-thubut wa zanni al-dalalah*).69 Before Rida’s proposal, jurists accepted rulings from the second and third categories to be valid and thus binding rulings of the *Shari‘a* unless there was a contradiction with other epistemologically more valid or secure evidence. Thus, this shows how Rida, wanting to free legislation from what he perceived as the rigidity and ‘shackles’ of the tradition, opened the door for legislators to not follow except a limited number of scriptural commands through his extremely high benchmark for what constituted a scriptural command that states had to respect.

As mentioned earlier in the section discussing Shatibi’s theory of *maqasid*, Shatibi was not concerned with the certainty of the premises; however, he was concerned with the thematic evidence that existed through various pieces of evidence regardless of their certainty. Thus, in the inductive corroborative survey, probable pieces of evidence could be used if found to support the same theme as other pieces of evidence. This demonstrates how Rida departs even from Shatibi’s theorization of the certainty of texts and their importance in his theory of *maqasid*.

Rida highly encouraged the use of *maslaha*, and utilitarian reasoning in general, to develop ‘Islamic’ rules that would apply to the various fields that were not governed by scriptural commands.70 In addition, he argued that the principle of acting in the service of public benefit (*al-maslaha al-‘ammah*) was a clear from the hadith “no harm and no retribution” (*la darara wa la dirar*).71 Moreover, he asserted the use of reason in knowing what the public good/benefit or *maslaha* . In addition, whereas universal goals or commands are to be identified in the scriptural texts, and accordingly72 respected, Rida argues that no universal command is ultimate such that if at some point it time it

69 Id. At 25.
70 Supra note 4 at 10.
71 Id.
72 Id.
commands people to act in such a way that “reason reveals to be harmful, people were obliged to ignore the supreme utilitarian command requiring exceptions to be made in such circumstances.”

Although, in Rida’s methodology, *ijtihad* was to be performed by a “religio-legal” specialist, who would be responsible for identifying the universal rulings and goals of the *Shari’a*, the method in which the SCC relies on his methodology as the primary framework in its application of Islamic jurisprudence demonstrates how Rida’s methodology allowed for more space for the secularly trained, rather than religio-legal, legalists to perform his conceptualization of *ijtihad*. Thus, Rida’s proposal for the reliance on concepts of *maslaha* and *darura* for legislation, and his call for abandoning almost most of the rules of the classical legal tradition or theory, allowed the new secularly trained jurists to frame their secular arguments as Islamic using Rida’s utilitarian modes of reasoning. In other words, it could be well-argued that Rida served as the link for modern legalists to pass legislation or issue rulings that were in essence secular but maintained an outlook of the traditional jurisprudence.

In an answer to a question about the foundations, or literally roots (*usul*), of Islam that are of benefit (*musliha*) in all times and in any place, in the periodical al-Manar, Rida gives a detailed ten rules or roots, the seventh of which is

“basing political and civil rulings on the concept of avoiding harm and promoting good or benefit, [basing] judicial rulings on ultimate justice and equality, and the obligation of the protection of religion, human being, reason, property and honor (accompanied by progeny and any assault on it).”

The terminology or rhetoric used by Rida in this quote is almost identical to that of the SCC rulings that we will investigate in later chapters. However, what is essential here is how Rida, a huge endorser of al-Shatibi’s *maqasid* as mentioned earlier, played the crucial role of reducing the classical discussions in such a utilitarian centered approach with almost no reference to the huge debates of the stakes of such an approach as opposed to how al-Shatibi and most classical scholars were weary of the use of a utilitarian theory in Islamic law. Although, the limitation on subjectivity and relativity that al-Shatibi includes in his theory, which is asserting that the *masalih* that the goals are

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73 *Id.*
74 Mohamed Rasid Rida, Al-Manar at 1873.
based on are absolute, includes in itself an element of subjectivity, and thus not a sufficient limitation, the claim here is that Rida is responsible for the reduced and simplistic form in which *maslaha* and *maqasid* are applied in the legal system in Egypt. **Critique of Rashid Rida and the Theory of Maqasid**

Although Clark Lombardi argues that Rida expected his methodology to be used to draft codifiable rules which would be applied consistently in courts, Rida did not expect that it would be employed by judges “to develop rulings on a case-by-case basis,” Even though Rida had argued that constitutional safeguards should be put forth to prevent subjectivity and manipulation, Rida’s approach is still heavily criticized by many scholars. For example, Wael Hallaq has criticized Rida’s approach for being arbitrary where he chooses to accept causes such as welfare, interest and necessity from the revealed scriptures in order to reject nearly most classically accepted rulings without a proper theoretical justification. Moreover, in his article, “*Maqasid and the Challenges of Modernity*” discusses this issue of whether the *maqasid* can form a new foundation of legal reasoning, and after thorough analysis he argues for the incompatibility of the five universal/essential *maqasid* of al-Ghazali and discusses how each one of them does not fit in the modern context of the nation-state. Moreover, he argues that what most scholars who try to argue for the applicability of Islamic law in the modern state system do is basically revive a particular (classical) practice and modify this practice slightly to accommodate it to the “exigencies of the modern world.” Other scholars, however, have argued that endorsing utilitarian reasoning or theories of Islamic law. And using concepts such as public interest “can be an unconstrained, dangerously relativistic activity.” It is interesting to see how al-Shatibi’s theory has also been criticized from the contemporary advocates of the theory of *maqasid* in the religious circles but for completely different

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76 *Id* in footnote 89 at 31.
77 *Id*. At 2.

reasons. The discussion of their criticism will follow the part that tackles what such figures, and their institutions, call for.

ii. Abd el-Razzak al-Sanhuri

Before proceeding with the discussion of how the *maqasid* theory was further developed in the 20th Century, it is essential to briefly investigate Sanhuri’s methodology and whether he used or contributed to the endorsement of the *maqasid* theory by legalists. Known for drafting the Egyptian Civil Code and for his calls in his early works for Islamic legislation and laws, Sanhuri was a highly influential and key figure in the Egyptian legal system. Even more so than being an influential figure, many scholars argue that Sanhuri’s ideas still continue to influence the thought of legalists who attempt to have any form of a modern Islamic legal system.

Like Rida, Sanhuri rejected the classical traditional fiqh and believed for the need to draft legislation that is consistent with the percepts of Islam. In addition, he also viewed that Islamic law promoted certain useful social goals. However, unlike Rida, Sanhuri rejected the idea that Muslims, in their era, were qualified to perform *ijtihad* like the classical jurists. In other words, Sanhuri sort of adhered to the “taqlid” argument. However, he maintained that there were higher or universal principles that implicitly or explicitly existed in the traditional or classical jurisprudence. Thus, Sanhuri inducted from the writings of classical jurists a number of principles that are to be accepted by all Muslims and that legislation would necessarily be consistent. Although Sanhuri does not adopt or endorse the theory of *maqasid* or Rida’s reconceptualization of the theory, Sanhuri also depends on inductive reasoning which fortified this type of utilitarian thinking in modern Egyptian legal profession as a whole.

It is very interesting to see that Sanhuri’s inductive reasoning is actually methodologically more sound and a lot closer to Shatibi’s inductive corroborative survey

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79 Amr Shalakany, Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise, 8 Islamic Law and Society, (2001), at 201-2.
80 *Id.*, at 202.
81 Enid Hill, Al-Sanhuri and Islamic law: the place and significance of Islamic law in the life and work of ‘Abd al-Razzaq Ahmad al-Sanhuri, Egyptian jurist and scholar, 1895-1971 (1987), at 34.
82 *Id.*
83 *Id.*
84 *Id.*
than Rida’s methods of utilitarian reasoning, who used Shatibi as his main reference in his discussion of the *maqasid* and the need to adapt to new contexts. Sanhuri, as opposed to Rida, like Shatibi believed that the modern secularly trained judge does not have the tools to do *ijtihad* or engage with the scriptural sources directly, even when trying to induce the aims of the *Shari’a*, and thus he has to depend on the classical jurists’ works. This is more in line with Shatibi’s limitations on the non-trained jurist or “pseudo”-*mujtahid.* In addition, the method that Sanhuri defines through it the general principles that should be respected by the legislator is based on an inductive survey of the classical jurists’ works, which is closer to what Shatibi calls for. Since both Sanhuri and Rida had a great influence on the legal field in Egypt, it is interesting to investigate if the SCC rulings show any signs of the adoption of Sanhuri’s method of inductive reasoning, which has more resemblance to the classical theory of *maqasid*.

iii. Influential Religious Figures

The *maqasid* discourse was widely used in the 20th Century such that figures like Hassan al-Banna, the founder of the Muslim Brotherhood used the discourse of *maqasid* to interpret certain verses of the Qur’an and relate them to political and religious contexts that were happening during his lifetime.\(^{85}\) Also, Sayyed Qutb’s interpretation of the Qur’an and views of Islamic legislation is viewed by some authors to have been mainly based on the *maqasid*.\(^{86}\) Thus, most of the religious scholarship about *maqasid* is mainly about its importance as a tool for modern legislation that would be Islamic yet modern. However, this part will involve the discussion of how certain religious key figures have influenced the theory of *maqasid* in the 20th Century. After Rida, the most cited modern scholarly work on *maqasid* is by a Tunisian religious scholar called Muhammad al-Tahir Ibn ‘Ashur.

**Muhammad al-Tahir Ibn ‘Ashur**

Although it was Rida who re-introduced or highlighted the theory of *maqasid* as the ‘Islamic’ utilitarian theory, Ibn ‘Ashur, who wrote extensively on the *maqasid* in the mid-

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twentieth century reconceptualized the theory and argued that it had to be modified in order to be suitable to the new contexts. Like Rida, Ibn ‘Ashur also critiqued the traditional/classical (usuli) rules and methodologies for being too concerned with the technicalities of the jurisprudential (fiqhi) process and for failing to serve the higher purposes and wisdom of the Shari’a.\textsuperscript{87}

The fact that Ibn ‘Ashur is widely cited in all contemporary writings calling for the adoption of the theory of maqasid is due to the fact that unlike Rida, Ibn ‘Ashur deeply engaged with al-Shatibi’s theory in al-Muwafaqat and tried to take the theory a step further. Consequently, Ibn ‘Ashur, reflecting the dominating modern influence on his ideas, argued that more ideals or concepts should be added to what al-Ghazali and al-Shatibi included in their hierarchy of needs for example freedom, equality, moderation, the maintenance of order and securing the strength of the nation or ‘ummah.’ In other words, it is Ibn ‘Ashur who introduced the idea of developing the theory of maqasid such that it would include new values to it that match the modern contexts, and this is why he is cited by most religious reformers.

What Ibn ‘Ashur proposes though is not nothing of novelty and he is arguably not very different from Rida. For instance, Ibn ‘Ashur makes very similar arguments to Rida like the argument that all the scriptural texts are reasoned and that it is the role of human beings to use their reason to know what the ultimate goals or maqasid are from the texts.\textsuperscript{88} Thus, Ibn ‘Ashur engaged with the scriptural texts to induce the maqasid that match the new contexts. However, Ibn ‘Ashur, unlike Rida, does not call for the theory to be endorsed by the state or in other words a secular body, for legislation or other purposes. Ibn ‘Ashur’s assertion on the importance of the use of the maqasid theory is clear in his exegesis (tafsir) of the Qur’an, which takes the maqasid as the theoretical or foundational framework for interpretation and application of the text in the modern context.\textsuperscript{89} His use of maqasid as the framework for the employment of human reason to comprehend and apply the Qur’an in ways that are more compatible or in harmony with the modern context is one of the main reasons that Ibn ‘Ashur is considered by the

\textsuperscript{87} Bashir M. Nafi, Tahir Ibn ‘Ashur: The Career and Thought of a Modern Reformist ‘Alim, at 17.
\textsuperscript{88} \textit{Id.} At 17.
\textsuperscript{89} \textit{Id.} At 22.
religious reformers to have succeeded at reviving the theory of maqasid.\textsuperscript{90} For instance, Tariq Ramadan, when discussing a new approach to the maqasid, says that Ibn ‘Ashur’s “new approach and categorization of the higher objectives . . . is very useful for us today.”\textsuperscript{91} Ibn ‘Ashur, however, does not attempt to advance any radical interpretations through his use of maqasid. For example, defends polygamy by claiming that the maqsid or purpose behind polygamy in Islam is that it is a means to increase the Muslim population and the expansion of the ummah.\textsuperscript{92} Finally, the reason Ibn ‘Ashur is discussed here, although he did not come up with a new theory or even develop the theory in a significant manner, where it could be argued that what he did was merely a reiteration of classical debates in a modern rhetoric, is because of the role he is perceived to have played in ‘modernizing’ maqasid and sort of taking it a step further to be endorsed in the mentalities of contemporary religious scholars, who as will be shown in the coming section, played a crucial role in introducing the theory of maqasid as a classically sound theory to (the Islamist) audiences which affected how the Islamists would perceive the use of the maqasid by the SCC judges.

\textbf{Yusuf al-Qaradawi}

Yusuf al-Qaradawi could be considered as one of the huge supporters, if not the leader, of the use of the maqasid theory as a modern methodological framework for Islamic law. Qaradawi has authored and co-authored dozens of books that discuss the maqasid and the crucial role that they should play as the contemporary sound methodology modern Islamic jurisprudence.\textsuperscript{93} According to Qaradawi, he has focused his efforts in the last quarter of the twentieth century to disseminate knowledge about maqasid.\textsuperscript{94}

Accordingly, it is worth investigating how Qaradawi conceptualizes maqasid and its application. Qaradawi perceives the maqasid doctrine as the “new jurisprudence (fiqh) . . . that would enlighten the path of the Islamic awakening movement and ‘clarify’ its

\textsuperscript{90} \textit{Id} at 22-26.

\textsuperscript{91} \textit{Supra} note 8, at 333.

\textsuperscript{92} \textit{Id.} At 21.


ultimate objective,” and that it is the most crucial knowledge that a jurist must acquire.95 In addition, he heavily criticizes scholars who refuse to endorse the doctrine and insist on the literal meanings if scriptural commands. However, to prove the authenticity of the maqasid and its soundness as a channel to a new jurisprudence, Qaradawi gives a list of both classical scholars (other than al-Shatibi) such as ibn Taymiyah, Ibn al-Qayim and modern scholars such as Rashid Rida, Mahmoud Shalut, Mohamed al-Ghazali, Sayyed Sabek and Mohamed Abu Zahra, who all depended on utilitarian reasoning or the maqasid in their understanding of the scriptural sources.96

Qaradawi then discusses the categorizations of Ghazali and how to induce the rulings form the texts. Then, he asks whether modern jurists have to strictly follow the classical methodology and Ghazali’s categories, and answers by asserting that jurists should not be bound with the five categories of Ghazali and demonstrates how Rashid Rida has identifies different categories of maqasid.97 Also, dedicating a whole chapter in one of his books on Rida’s opinions on maqasid, Qaradawi chooses an excerpt in which Rida discusses the importance of departing the classical methodologies and to be more realistic (not perfectionist) in accepting the fact that judges and legalists do not have to meet all the classical criteria exactly the same way that many of the caliphs did not meet the criteria of the ‘good’ caliph, where “parliament members who would be elected in a democratic government should be aware of the juristic opinions and the maqasid.”98

Qaradawi then classifies how people perceive or apply the maqasid in three categories. The first category includes what he labels as the “neo-Zahiris” or the literalists who basically refuse to accept the maqasid and any kind of utilitarian reasoning as their methodological framework.99 Qaradawi criticizes this group very heavily for how they insist on sticking to the literal meanings of texts and for being against any form of reform or other creative methods of preaching (da’wa).100 Moreover, he mentions

96 Id. At 12.
97 Id. At 21.
98 Id. At 221.
99 Id. At 61.
100 Id. At 46-7.
classical scholars like Ibn-Hazm who shared the same “rigid” mindset.101 The second category includes those who “abuse” the maqasid doctrine, like secularists, who use the maqasid to hinder the application of the Shari’a.102 When describing this group, Qaradawi is mainly concerned about their use of maqasid to encourage Muslims not to do their obligatory worships (‘ibadat) like fasting Ramadan or praying the five prayers if the ultimate or higher objective of such worships are attained without doing the specific act of worshipping.103 The third category, which Qaradawi tackles the most extensively, is what he calls the “Moderate” school.104 Apparent from its title, this is the school of thought that he encourage readers to subscribe to. This school is highlighted by its ability to link specific texts to the general or higher objectives, and by not stressing on the mere application of the letter of the law or scriptural texts.105 Furthermore, he argues against the division or categorization of fiqh in separate categories such as the jurisprudence of worship, jihad, and other categories and calls for linking texts of the Shari’a and its rulings to each other.106 Lastly, he stresses on the ability of the jurist to: differentiate between fixed objectives and certain temporary objectives that would make the higher objective more attainable; identify the necessities (daruriyyat) from the needs (hajjiyyat) from the refinements (tahsiniiyyat); and to always search for the higher objective before deciding on what the ruling would be.107

Qaradawi’s Background and Influence
A member of the Islamist opposition to the Nasserist regime and the following regimes, Qaradawi gained immense popularity in the Muslim world from his appearance on al-Jazeera channel’s program al-Shari’a wa al-Hayah starting in the 1990’s.108 Thus, Qaradawi has been able to reach audiences worldwide also through his presidency of the Islamic Union of Muslim Scholars (IUMS) and the European Council on Fatwa and Research (ECFR) that were all aiming at helping Muslims integrate themselves in their

101 Id. At 50.
102 Id. At 198.
103 Id.
104 Id. At 135.
105 Id. At 137.
106 Id at 149.
107 Id. At 176.
respective societies in a modern context.\textsuperscript{109} Qaradawi thus, through his direct connection to mass audiences, was able to not only introduce the juristic reasoning based on \textit{maqasid} (\textit{al-fikr al-maqasidi}), but even more so to frame it as an authentic classical methodology that was the solution to modernizing Islamic jurisprudence the ‘right’ way. Thus, even if Qaradawi had no influence on the Egyptian judiciary or legal system in general, it could be argued that he played a major role in introducing the \textit{maqasid} doctrine to the public, Islamists included, as an inherently classical and coherent methodology of applying Islamic law. Accordingly, it could be argued that Qaradawi familiarized the audiences, specifically Islamists in Egypt, with the whole \textit{maqasid} rhetoric, that the SCC would start employing in the 1990’s.

In addition, al-Qaradawi is one of the founders of al-Furqan Islamic Heritage Foundation, in which a research center in the name of “Al-Maqsad Research Center in the Philosophy of Islamic Law” (\textit{markaz dirasat maqasid al-shari’a al-Islamiyya}) was established in 2005 for the purpose of producing literature (lectures, workshops and books) on the application of the \textit{maqasid}, and to take the \textit{maqasid} from the realm of theories to the realm of application.\textsuperscript{110,111} It is very interesting though that one of the biggest series of lectures were prepared with the collaboration of the Law Faculty of Alexandria University, where many of the research papers presented were done by legalists or graduate law students.\textsuperscript{112} This demonstrates the way in which Islamist reformers have realized the importance of proliferating ‘their’ conceptualization of the \textit{maqasid} doctrine and how it should be applied. It is worth mentioning, however, that in a lecture by Mohammed Selim el-Awwa, who is also one of the founders of the \textit{Maqsad} Research Center, he discusses the importance of adopting the mindset or theory of \textit{maqasid} in the judiciary and he mentions the SCC’s use of \textit{maqasid}. However, he makes

\begin{itemize}
\item \textsuperscript{109} Id. At 4.
\item Supra note 77 at 8-9.
\end{itemize}
a very shallow statement of praising the SCC judges for their use of *maqasid* without any analysis of their methodology.\(^{113}\)

III. THE EGYPTIAN SUPREME CONSTITUTIONAL COURT (SCC)

This chapter will discuss (supreme) constitutional courts in general, and the different arguments or theories about their roles in the legal system. Next, the discussion will focus on the case of the SCC in Egypt and its political and historical background. Accordingly, the chapter will tackle how the court came to existence and possible reasons behind its creation. Then, the discussion will move to how the court took upon its shoulders a role that is different from the one that was prescribed for it. This period, the 1990’s often called the ‘Golden Age’ of the Egyptian SCC is the main focus of the chapter, and thesis. Lastly, the chapter will discuss how the Mubarak regime curbed the defiant political activity of the court.

The reason the Egyptian Supreme Constitutional Court is the focus of this paper is mainly because it has earned a reputation of “being the most powerful court in the Arab world and at times stood on a global level for the audacity of its rulings.”114 In addition, with the exception of Clark Lombardi, almost no other scholar focuses on the methodology of the SCC with respect to Islamic law. Even more so, there is a gap in the literature that analyzes and contextualizes the court’s use of the maqasid in specific.

There is a lot of the literature that addresses the SCC and how the court applies personal status law to trace its development.115 In addition, the SCC’s rulings have been greatly analyzed, especially reading the unlimited powers of the judges to take on the tasks of classical jurists with no clear methodology to follow.116 The literature on the SCC can be divided in two categories: 1) Literature that traces the development of the court in an authoritarian regime and analyzes the political role that the court played since its establishment and 2) Literature that analyzes the SCC’s theory of Islamic law and its application. However, the literature that specifically focuses on the SCC’s methodology and application of Islamic law is much less that which examines the court’s political role.

The scholarly views on the SCC’s methodology and application of Islamic law are mainly about the inconsistent and often incoherent juristic logic of the court with regards

115 See for example Elisa Giunchi, Adjudicating Family Law in Muslim Courts, Routledge, 2014, at Ch. 5 at 87-8.
116 Supra note 12 at 10.
to its methodology in applying Islamic law\textsuperscript{117}. Some scholars argue that the court departs from the classical theory and does not even “fit neatly in the modern tradition of neo-	extit{ijtihad}”\textsuperscript{118} which was developed by Rashid Rida in the early 20\textsuperscript{th} Century. The scholarly analyses on the SCC’s use of \textit{maqasid} mainly traces the development of the concept since Rashid Rida started advocating for its use and how the court has adopted the concept such that it became one of the most important parts of the SCC’s method. Later in this chapter the reviewing and discussing in details the SCC and its conception and use of Islamic law.

A. Supreme Constitutional Courts: Theory and Practice

Theoretically, constitutional courts are irrelevant of the political setting in a state.\textsuperscript{119} In other words, if there is “no constitution, or if the document is suspended, or if the entire political system appears to be operating outside of constitutional channels,” this should not be of relevance to a constitutional court since they are adjudicative bodies.\textsuperscript{120} However, due the important role that constitutional courts occupy in addressing fundamental questions, “constitutional courts and their justices take on an aura that extends beyond the strictly adjudicative: they often serve as ultimate symbols of the state. . . [as] the last resort for those searching for the locus of sovereignty.” Practically though, constitutional courts do get involved in political contests. The twentieth century marked the worldwide creation of constitutional courts, where strong and independent constitutional courts were often a sign of a functional rule of law system.\textsuperscript{121} Accordingly, the way in which people perceive verdicts of the SCC is unlike any other court in the Egyptian legal system, where they are perceived as quintessentially reflective of the judiciary’s ideological inclinations. However, that does not imply that the SCC is perceived to be less political than any other court, but rather that it perceived to reflect the judiciary’s mindset or political choices.

Some scholars argue that the role of constitutional courts is vague or hard to define due to their ‘prescribed’ involvement in politics.\textsuperscript{122} In other words, constitutional review,

\begin{itemize}
\item \textsuperscript{117} See Clark and Lombardi \textit{Supra} note 4.
\item \textsuperscript{118} \textit{Id.} at 16.
\item \textsuperscript{119} \textit{Supra} note 115, at 1.
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} Maria Haimeri, \textit{The Supreme Constitutional Court of Egypt after Mubarak}, 2014, at. At 2.
\item \textsuperscript{122} \textit{Id.} At 3.
\end{itemize}
which is one of the main functions of constitutional courts, “constitutes a political control of political powers by the means of law.”123 Thus, politics and law become meshed through the constitutional courts role. Constitutional courts are often described as “reactive institutions” because of the fact that they are only allowed to influence political decisions if cases are brought before them.124 Furthermore, another crucial aspect to how influential a court can be in politics is the selection procedure of justices.125 The issue of the selection of judges played a key role in how the Mubarak regime manages to curb or restrain the liberal political agenda of the SCC, where President Mubarak used his right to appoint judges to fill the court with judges that were affiliated with his regime.126 Accordingly, the ‘new’ justices manages to constrain the activities of the rather liberal justices.

Furthermore, the argumentation that a court depends on to support its decisions is a critical aspect as well, where the approach that a court chooses to present its argumentation is one of the strategies to gain the acceptance of the society as a whole. Consequently, “judges have to act strategically, finding the right balance of “judicial self-restrain” in different situations” in order to win political actors’ confidence as well as that of the society as a whole.127 In other words, by producing decisions or methods of reasoning that are “accepted” by the public, the court can establish trust and confidence in the institution, where the public’s perception of the court, and its justices, as a neutral and competent entity greatly affects how the public’s expectations of the court.128 Finally, the need, and utilization, of a specific “idealized” way of presenting its decisions highly influences the process of producing decisions.129 This demonstrates how the SCC’s adoption and use of the theory of the maqasid is not just a haphazard but rather a closely calculated choice of argumentation. In other words, the court’s choice of the discourse or rhetoric of the maqasid as the form of utilitarian reasoning through which they pass their political choices under the umbrella of Islamic law is no arbitrary one. As discussed in the

123 Id.
124 Id.
125 Id.
127 Id.
128 Id.
129 Id.
previous chapter, the *maqasid* rhetoric and discourse was heavily used by religious reformers in the last quarter of a century of the 20th century, where many scholars were presenting it as the contemporary sound, coherent and authentic methodological framework that should be adopted by jurists to interpret the Islamic scriptural sources in order to meet the new realities of the modern context. Accordingly, it could be argued that the fact that the SCC chose the *maqasid* in its argumentation was one of the methods of choosing an “idealized” or accepted method that the public was being familiarized with by the religious reformers. Moreover, this specific choice of accepted argumentation that the public has confidence in would then allow the court to pass its political choices in a socially ‘accredited’ rhetoric.

**Historical and Political Context**

When examining the roles of constitutional courts, many scholars trace the reasons behind the establishment of constitutional courts. Accordingly, scholars have examined the political context at the time of the establishment of the SCC under President Anwar el-Sadat in 1979 and the purpose it was supposed to serve at that time.\(^{130}\) The Supreme Constitutional Court in Egypt replaced the Supreme Court, which had been established under the Nasserist regime in 1969.\(^{131}\) The SCC was established by the passing of Law 48 of 1979.\(^{132}\) The ‘new’ SCC was entrusted to perform three main functions: First, it is expected to serve as the final authority in any case of dispute between two Egyptian courts; Second, “it has the power to issue authoritative interpretations of legislative texts if different judicial institutions . . . have disagreed about their proper interpretation and ‘they have an importance that necessitates their uniform interpretation’;”\(^{133}\) and finally, the SCC has the right to perform constitutional review, especially when lower courts identify a challenging or demanding constitutional question.\(^{134}\)

Law 48 provides details about the high qualifications of SCC justices such that the court would maintain its prestige. Moreover, Law 48 also provides protections and

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\(^{130}\) See generally *Id.*, & *Supra* note 4.

\(^{131}\) *Supra* note 122, at 9.

\(^{132}\) *Id.* at 9.

\(^{133}\) *Supra* note 12, at 240.

\(^{134}\) *Id.*
guarantees of independence for the SCC justices.\textsuperscript{135} However, Law 48 gives the executive almost complete control over the appointments of justices.\textsuperscript{136} For, example, the Chief Justice is chosen based on the complete discretion of the President, given that he meets the criteria of the position.\textsuperscript{137} In addition, also in appointing associate justices, the President has the final choice from two justices nominated by the Chief Justice and the other by the general assembly of the court.\textsuperscript{138} Furthermore, Law 48 does not specify the number of justices, which is a very crucial point and has been used by the regime as a method of taming the court. In other words, if the President and Chief Justice are unsatisfied by the justices for any reason, the Chief Justice can nominate as many justices as he wishes and the President would appoint them.\textsuperscript{139}

The reasons behind the establishment of the court are debated. However, Tamir Moustafa makes a compelling argument that President Sadat established the SCC as a mean of attracting foreign investment.\textsuperscript{140} In other words, to build more trust in the new regime, given the history of Nasser’s nationalization of the vast majority of the private sector, Sadat was attempting to legitimate his new regime and give Egypt the outlook of the state of institutions’ and rule of law. Thus, by creating the SCC, which would theoretically have some form of control over the executive, Sadat made sure by his appointment of justices that such an institution was under his control.\textsuperscript{141} Sadat was mainly concerned with creating guarantees of property rights and the task that this court can perform to take serious steps in the economic liberalization of Egypt. However, Sadat was aware of the potential political role that the court could take by also attempting to advance political liberalization as well.\textsuperscript{142} Thus, Sadat tried to ensure the cautious choice of justices, and accordingly, when he died in 1981 the court was not of any concern to the Mubarak regime until the late 1980’s. Throughout the 1980’s the court was mainly concerned with showing its

\textsuperscript{135} Id., at 241.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id at 242.
\textsuperscript{141} Supra note 122, at 9.
\textsuperscript{142} Supra note 12, at 242.
independence and powers however mainly through its attention to challenges to economic legislation.\textsuperscript{143}

**B. The SCC’s Golden Age: mid-1980s till the late 1990s**

Many scholars have analyzed the “puzzling phenomenon”\textsuperscript{144} of a liberal court that functioned in an authoritarian setting, where it is argued that studying such courts “makes us understand why such courts are needed and also helps to demonstrate the fragility of such institutions.”\textsuperscript{145} By the mid-1980s, the court started challenging the regime and showing off its powers. In 1985, demonstrating its abilities in challenging the executive, the court struck down the family reforms that Sadat had passed in 1979 under the “interminable” state of emergency.\textsuperscript{146} The court was making a clear statement to the Mubarak regime that it was willing to take a stance against the executive if it used the emergency cards. By the late 1980s, the old justices who were appointed by Sadat, and were an invaluable support to the regime, started retiring and being exchanged by new justices.\textsuperscript{147} The process of appointment of the new justices, who came to challenge Mubarak’s regime, is not known, and scholars have wondered about how Mubarak was unable to do what Sadat had done.\textsuperscript{148} The new justices thus came to embrace a new and more expansive approach to the liberal ideals that they wanted the court to promote, where the protection of civil and political rights became a focus of the court as well.\textsuperscript{149} As a result, in the late 1980s, the court struck down election laws which resulted in the dissolution of parliament and forced new parliamentary elections. In the 1990s, however, the court expanded its vision even more to protect individual rights.

Some scholars have noted their admiration to the strategies in which the court was able to challenge the Mubarak regime.\textsuperscript{150} In other words, the court managed to ‘exploit’ the need of the regime to its economic liberalization support to challenge the regime in other aspects such as political and civil rights. Accordingly, when the regime was in dire

\begin{flushright}
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Supra} note 12, at 235.
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} See For example Lama Abu Odeh \textit{Supra} note 123.
\end{flushright}
need of the role that the court was meant to perform, the court used its autonomy to deliver judgements that would leash the authoritarian powers of the regime over political and civil right and then later individual rights.\textsuperscript{151} Accordingly, successive SCC rulings tacked different issues like “electoral candidacy, pert registration, freedom of expression, and human rights advocacy.”\textsuperscript{152} The role that the SCC was playing thus brought it worldwide attention and a reputation for its audacity of challenging an authoritarian regime. Accordingly, activists were attempting to push the court further in order to pressure the regime to allow for more individual rights.

Unable to utilize provisions in the constitution that would advance individual/citizen rights outside the realms of politics and property, due to the vagueness of provisions and contradictions, the SCC introduced its rather new jurisprudence by arguing that they had to respect international human rights standards.\textsuperscript{153} The court based its interpretation of the ‘rule of law’ provisions of the constitutions, where they interpreted it as a requirement for the executive to apply the international standards.\textsuperscript{154} SCC judges in the 1990s even promoted the use of international human rights and sponsored conferences and lectures to encourage other legalists to endorse such doctrines as sources of law and, also encouraged legalists to use the new comparative law methods that were used in other constitutional courts around the world.\textsuperscript{155} This demonstrates the rather creative methodologies or reasoning that the court deploys when it has (wants) to advance a certain agenda and the text/constitution does not tackle or serve that agenda.

\textbf{C. The SCC, Islamists & Article 2}

Surprisingly, as the confrontation with the executive increased and the pressures increased on the court, the court embarked on resorting to the Islamist opposition by using Islamic legal arguments.\textsuperscript{156} In order to address the politics of the court with the Islamists, the discussion needs to trace the adoption of Article 2 of the 1971 constitution, its development and consequences. When adopted in 1971, Article 2 stated that, “Islam is

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\begin{footnotesize}
\textsuperscript{151} Id.
\textsuperscript{152} Id., at 989.
\textsuperscript{153} Supra note 12, at 245.
\textsuperscript{154} Id.
\textsuperscript{155} Id at 245.
\textsuperscript{156} See Clark Lombardi Supra note 12, at 235.
\end{footnotesize}
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the religion of the state, Arabic is the official language, the principles of the Islamic Shari’a shall be a chief source of legislation (mabadi’ al-Shari’a al-Islamiyya masadr ra’isi li-’l tashri’).” Thus, Islamists and the ‘ulama (religious scholars) perceived it as the window for legislative reforms of existing secular laws. The ‘ulama, in the 1970s under Sadat, became more assertive in taking a role in legislation. Accordingly, they formed a committee and developed a draft code that was based on fiqh and in 1976, wishing to revise the existing codes such that they would be based on Islamic law. However, obviously, such reforms did not take place, but this demonstrates how high the aspirations of applying Shari’a were at that time by all the interested parties.

Not in harmony with the ‘ulama, where there had been tensions in 1972, the Islamists, consisting mainly of the Muslim Brotherhood and the more militant jama’at, were also pressuring the regime to make more concessions and reforms to apply the Shari’a. The pressures on the regime and the judiciary by Islamists were very intense to the extent that in 1976, the SCC issued an opinion stating that Article 2 “might require all Egyptian law to be consistent with the essential principles of the Shari’a.” Regardless of the fact that there is nothing new in this statement, Clark Lombardi argues that such a decision, at that time, when the court was still very weak and generally did not challenge the Sadat regime, signaled that “there were Islamists in the upper reaches of the judiciary. . . [and] that the government was permitting them to speak out.”

In 1980, after immense pressures from both the Islamists and the ‘ulama, Article 2 gets amended, when one-third of the members of the parliament propose in 1979, under the influence of the regime, to amend the article such that it would include the Shari’a as the “chief source of legislation.” What that precisely implied in term of applicability was extremely vague, especially that the court at that time a fairly weak institution and was primarily seeking to merely establish its independence and gain the prestige and respect that the judiciary always fought for. Thus, although the SCC was responsible

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158 Supra note 12, at 126.
159 Id at 127-8.
160 Id at 129.
161 Id. At 129
162 Id. At 133.
163 Id. 144
for giving an authoritative interpretation of Article 2, in the beginning of the 1980s, it was tried to avoid having to side with either the regime on one hand or the Islamists on the other.\(^{164}\)

Starting the 1990s however, the court’s attitude towards Islamists changed, where they became key players in how the court performed its politics. Building on its role of curbing the executive and promoting the rights of speech and association, the court also started employing Islamic law as a key element in its jurisprudence. How the court was applying Article two and its understanding of what constitutes the principles of the Shari’a is a very interesting discussion, where only by 1993 the court began to issue opinions that engaged deeply with Article 2. Contextualizing the court’s decision or choice to use Islamic law as a cornerstone of its argumentation in the 1990s, Clark Lombardi argues that Egypt was witnessing unprecedented political upheaval and that the confrontation between the secularist executive and militant Islamists jama’at was had soared where the jama’at had resorted to violence.\(^{165}\)

For example, the jama’at had started targeting the secularist opposition as well as tourism, which were an integral part of the economy. Tourism, more importantly here, was one of the main sources of income for the Egyptian economy. Egypt was (is) considered to be a rentier or semi-rentier state due to the fact that a substantial portion of the economic revenues were based on the ‘rent’ of multiple resources.\(^{166}\) Thus, rent from tourism alongside that from the Suez Canal, and USAID formed the main bulk of the sources or revenues for the Egyptian Economy that did not require much economic efforts.\(^{167}\) In other words, this rent was of strategic value given that the state deployed “a minimal of its national labor to extract such resources.”\(^{168}\)

Thus, when the militant Islamist groups were targeting tourists, it was a major threat to the regime and the new outlook it had been trying to create for years of being liberal, and thus safe for foreigner. As a result of such militant attacks on the sources of income of the state, Lama Abu Odeh argues that “Egypt moved from an

\(^{164}\) Id. 141

\(^{165}\) Id, at 178.

\(^{166}\) Supra note 123, at 988.

\(^{167}\) Id.

\(^{168}\) Id.
ideology of national socialism to the non-ideology of “security plus rentierism”. . .” Thus, the state focused its efforts to crack down on the militant jama‘at.

The SCC, thus, in 1993, with the Islamist violence and turbulent political context, felt the need to clarify its stance with regards to its understanding and application of the Shari‘a being “the chief source of legislation”. Having discussed how the court had sided with the activists against the executive, and given the militancy of the Islamists, some scholars argue that the court chose to also contain the Islamists by demonstrating that it was serious about the interpretation and application of Article 2. As a result, “the SCC may have felt pressure to open a dialogue....and to offer the courts as a forum in which Islamists could get a real hearing for their concerns. For it do this, the SCC had to demonstrate that it was committed to developing a theory of Article 2 that reflected a serious respect for (and facility with) the Islamic legal tradition.”

Thus, the SCC seems to have carefully designed its rhetoric and theory of Islamic law such that it would appeal to the Islamists, especially militant opposition, meanwhile it made sure to maintain some of form of vagueness in its rhetoric with respect to its interpretation of Article 2. The maqasid then, was one of this carefully chosen theories, where the court used the rhetoric of the maslaha and maqasid, discussed by Rashid Rida, as its methodological framework for identifying what would be considered ‘Islamic’. However, its choice of framing Rida’s methodology as a classical one, where there is no reference to Rida in any of the cases demonstrates how the court was careful in its choice of a rhetoric that would be seem to be authentic and classically derived. In the next chapter, the discussion will move to the analysis of SCC cases and how the court deployed the theory of maqasid. However, it is worth mentioning how Mubarak then in the new millennium managed to tame the court.

D. Mubarak packing the SCC with Affiliated Judges
Scholars often trace how Mubarak packed the court with judges affiliated with regime in 2001 in order to restrict its increasing activism. As Lama Abu Odeh puts it, “The SCC’s 1990s jurisprudence surpassed the limit of liberalization the regime was willing to tolerate, leading eventually to the replacement of the Chief justice of the court with a

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169 Supra note 12, at 178.
170 Id. in footnote 10, at 178.
171 See Maria HaIemerl Supra note 122, at 1.
regime insider.” The Mubarak regime, in the late 1990’s, was able to attack the court first by quashing the supportive activists and civil society. Then, destiny played its role when the SCC’s Chief Justice passed away in 2001. Mubarak thus seized the opportunity to appoint a new Chief Justice who would be “an unapologetic political ally of the executive and an outspoken critic of the court’s earlier attempts to interfere with repressive executive action.” Accordingly, the court was finally curbed, and since then, scholars have analyzed the court’s jurisprudence and role in facilitating the transition to neo-liberalism in both politics and economics as the Mubarak regime had hoped.

172 Supra note 123, at 986.
173 Supra note 12, at 250.
174 Id.
175 See Lama Abu Odeh, Supra note 123, at 1.
IV. THE SCC’s CONCEPTUALIZATION OF MAQASID: CASE STUDIES

This chapter will examine two prominent SCC cases, and will focus on the court’s application of the maqasid theory as its theoretical framework, or rather as an integral aspect of its interpretation of Article 2. The chapter is divided in two sections. The first section will briefly discuss the two cases and their backgrounds. The second section will then be the analysis of the cases and the court’s jurisprudence, or logic, in both cases. Moreover, the analysis will focus on common themes or patterns that are present in the court’s jurisprudence versus how such themes were perceived by the classical theorists of maqasid, specifically Ghazali and Shatibi, to trace how the court used such classical notion(s) as a tool in its politics to mediate between conflicting political forces.

Although the rhetoric of maqasid is present in almost all cases in which Article 2 is discussed until the present time, the chapter will focus on cases that were brought forth to the court in the court’s “Golden Age”. This is apparently due to: the significance of that time period in the history of the court’s jurisprudence, to the importance of examining the context of why and how the court first embarked on deploying the maqasid as its framework to interpret Islamic law. For the translation of cases, I have mainly depended on Clark Lombardi and Nathan Brown’s translation of cases due to the scarcity of proper legal translations of cases. In every case, the discussion will start with a brief account of what the case was about and then an analysis of the use of maqasid.

A. Case No. 7 of Judicial Year 8, May 1993

Having the political background in mind, this case is the first case\textsuperscript{176} in which the SCC gave a detailed decision of its interpretation of Article 2 and thus, starting using the maqasid doctrine in its conception of Shari’\textasciiacute{a}.

**Background**

Case no. 7 was brought to the SCC after a case of divorce in which Articles 18 and 20 of Personal Status Law 25 as amended by Law 100 of 1985, were challenged as being unconstitutional and inconsistent with Article 2 of the constitution.\textsuperscript{177} Article 18 of

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\textsuperscript{176} In the discussion section, I will refer to this case as the “Mut’\textasciiacute{a}” case.

\textsuperscript{177} Supra note 12, at 202.
Personal Status Law 25 “granted special custody rights to women who had been divorced their husbands without cause (in other words, when the woman was not at fault).”\textsuperscript{178} Meanwhile, Article 20, “permitted a judge to order a man to pay his divorced wife a sum of money analogous to an alimony payment. . . \textit{(mut’\’a)}.\textsuperscript{179} Having applied these two articles, the judge then gave the mother permanent custody of the children and also ordered that a \textit{mut’\’a} would be paid to her by the husband. Unsatisfied with the court’s decision, the husband challenged that the two applied articles on the Personal Status Law 25 were inconsistent with Article 2 and thus the case was referred to the SCC.\textsuperscript{180}

In this case, more specifically, the father argued that from 1929 until 1979, the Hanafi doctrine was the basis of personal status law, and accordingly, when Article 2 was drafted, the principles of the \textit{Shari’a} are expected to also follow the Hanafi doctrine. Because the challenged law had adopted the Maliki doctrine for custody laws, and unwilling to be limited to the Hanafi doctrine, the court rejected the father’s claim that Article 2 had to follow solely the Hanafi doctrine.\textsuperscript{181} Moreover, the court even asserted that modern Muslims are not bound anymore to apply only a specific classical doctrine, and also ruled that both Articles 18 and 20 of Personal Status Law 25 were constitutional.\textsuperscript{182}

\textbf{B. Case No. 8 of Judicial Year 17, May 1996}

Although there are other cases in which the \textit{maqasid} rhetoric was used between the previous case and this one\textsuperscript{183}, I chose this specific case for its prominence and in order to examine if there were changes in the court’s (political) inclinations or choices between the executive and the Islamists that could be implied from the court’s decision.

\textit{Background}

This case was referred to the SCC by the Administrative court of Alexandria when a guardian of two girls challenged a series of administrative decisions by the Minister of Education regulating the wearing the of the face veil (\textit{niqab}), where it was prohibited for

\textsuperscript{178} \textit{Id.}.
\textsuperscript{179} \textit{Id.}.
\textsuperscript{180} Case No. 7, Judicial Year 8 (May 15, 1993).
\textsuperscript{181} \textit{Id.}.
\textsuperscript{182} \textit{Id.} as cited in \textit{Supra} note 12.
\textsuperscript{183} In the discussion/analysis section, I will refer to this case as the “Veil” case.
girls wearing the *niqab* to enter schools.\textsuperscript{184} This case was very popular as the administrative rulings by the Minister of education were very controversial due to the widespread Islamism. The Mubarak regime, however, was defying the Islamists and the spread of the ideals that they called for, especially the more conservative *niqab* than just the head cover (*hijab*). Thus, the Ministerial decision specified a uniform for school girls which prohibited both the hijab and *niqab*, but then amended to accept the hijab if the girl would bring an authorization from her guardian allowing her to wear it.\textsuperscript{185} However, the *niqab* continued to be outlawed by the new decision, as it was seen as an ideal of the more extreme or militant Islamists.

The father of the two girls then argued that expelling his daughters from school because of the new decision was a violation of Articles 2 and 41 of the Constitution.\textsuperscript{186} Article 41 “guarantees the preservation of personal freedom [and bars] violation of it.”\textsuperscript{187} Surprisingly, the Administrative Court of Alexandria ruled in favor of the father against the Minister until the SCC ruled in the constitutionality of the new Ministerial decisions.\textsuperscript{188} The SCC ruled in favor of the Ministerial decision. However, its argumentation in this case is thorough and detailed regarding its methodology of the use of reason and promoting *maslaha*, the *maqasid*, and the limits on the powers of *ijtihad*.

**C. Analysis, Interpretations and Criticisms**

Some scholars, specifically Brown and Lombardi, have analyzed the court’s methodology and have demonstrated how it is a mix of Rida and Sanhuri’s methodologies.\textsuperscript{189} Thus, the focus here alternatively will be on the court’s conception of *maqasid*, *ijtihad*, the *mujtahid*, *maslaha*, and the certainty of texts versus how Ghazali and Shatibi perceived such concepts. Accordingly, such comparisons would enable us to trace (in)consistent and (in)coherent patterns in the court’s methodology and use of classical notions. The


\textsuperscript{185} Supra note 12, at 244.

\textsuperscript{186} Id.

\textsuperscript{187} Id.

\textsuperscript{188} Id.

\textsuperscript{189} Supra note 4, at 11-14.
reason the discussion will start with concepts like *ijtihad*, the certainty of texts and *maslaha* before the *maqasid* is due to the fact that such concepts were integral to how the *maqasid* was to be used. In other words, if such concepts are all misapplied, then the methodology of the *maqasid* becomes hollow of its constituents and limitations.

Although Rida relied on Shatibi’s work heavily in his writings and in his attempts to put forth a theory/methodology for modern Islamic legislation to the extent that he republished Shatibi’s book al-‘Itisam as mentioned earlier, it is very interesting to see how Rida almost contradicted most of what Shatibi had theorized. In other words, Rida, and accordingly the SCC, took only a very superficial part, and arguably negligible portion, of Shatibi’s theory and disregarded all of his criticism of the misapplication of the law. Accordingly, while Shatibi addressed issues like who has the criteria to do *ijtihad* and interpret the scriptural texts, the incoherence of jurists when they mix different doctrines (*madhahib*) and use legal stratagems (*hiyal*) to avoid the application of the law, and how the concept of *maslaha* should be understood, Rida disregarded the whole of Shatibi’s work and only endorsed the fact Shatibi called for the use of reason and the *maqasid* to come up with new rulings that would meet the new contexts. However, in doing so, Rida and then the SCC were not only unfaithful and deviated from Shatibi’s classical methodology or framework, but actually abused his theory, which addressed the incompatibility of the law, to achieve their own agendas. Accordingly, in the following discussion will explain how Rida and the SCC applied Shatibi’s theory different from how he theorized.

1. *Ijtihad* and the *Mujtahid*

In both cases examined here, the court, in its interpretation of Article 2, has generally adopted Rida’s general theory and conceptualization of *ijtihad* to refer to the use reason to interpret the scriptural texts that are not absolutely certain and of ambiguous authenticity in order to come up with rulings that are generally considered presumptive.\(^{190}\) Moreover, the court also adopted Rida’s use of the concept of *maslaha* and his restrictive understanding of what the legislator has to respect: only legal rulings that are absolutely certain in their authenticity and meaning.

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\(^{190}\) Supra note 185, at 437.
Shatibi asserted that in order for a jurist to re-engage with the scriptural text, the Qur’an specifically, the jurist has to meet three criteria: first is adequate knowledge of Arabic; second, is knowing the circumstances of revelation; and third, is a holistic reading of the text, where he argues that the Qur’an should be treated as an integral whole. Moreover, he adds that a “full-fledged” mujtahid must have acquired a thorough knowledge of “consensus and disagreement, abrogating and abrogated verses, the Prophetic Sunna, and the methods of legal reasoning and causation,” in order to do ijtihad. However, he adds that a jurist/mujtahid facing a new issue can adopt legal premises already established and proven by earlier mujtahids, whom he calls a “partial” mujtahid. Thus, Shatibi is clear that when a jurist is faced with a new issue that requires the derivation of a rule from the Qur’an, then knowledge of Arabic is indispensable, whereas any other field of knowledge may be compensated for through the reliance on the works of other jurists. It is then intriguing to see the deviation of the SCC and the use of the theories and ideas of Shatibi, when they completely contradict what he calls for. The significance of discussing Shatibi’s conceptualization of the mujtahid and the criteria he puts forth for the mujtahid to come up with new rulings that meet the new contexts is because Shatibi then it is this mujtahid who is expected to also acquire knowledge of the maqasid and its process of inductive corroboration of different sources to identify a goal of the Shari’a, which according to Shatibi should be a universal goal.

Shatibi then criticizes what he calls a “pseudo”-mujtahid, who does not have the necessary knowledge to do conduct ijtihad and who diverges from the “authoritative doctrines of predecessors” and asserts that genuine mujtahids do not generally diverge from precedent. Accordingly, according to Shatibi, a pseudo-mujtahid will eventually always produce a body of knowledge that is self-contradictory due to his use of reason to serve personal interests. Thus, it is very clear that with the exception of the use of the

191 Supra note 10 at 195.
192 Id. at 199.
193 Id.
194 Id. at 200.
195 Id. at 188.
196 Id at 188-9.
word ‘maqasid’ in the SCC’s reasoning, the do not meet Shatibi’s criteria for ijtihad and mujtahids.

2. Certainty of Texts and the Mixing of Doctrines
Moreover, on the certainty of texts, Shatibi asserts, unlike the SCC and Rida, that ambiguous language in the Qur’an is few, and that it only pertains to particular rulings and not universal principles. This, could be the biggest contradictory between the SCC’s theoretical premises and Shatibi’s since the certainty/ambiguity of scriptural texts (accepting texts that are certain with respect to both authenticity and meaning) is one of the main pillars on which the court frees itself from the whole classical jurisprudence. Thus, whereas the court affirms in the Mut’a case that,

A legislative text is not permitted to contradict Islamic legal rulings that are absolutely certain in their authenticity and meaning (al-ahkam al-shar’iyya al-qat‘iyya fi thubutiha wa dalalatiha). It is these rulings alone in which ijtihad is not permitted. . . . [It may only contravene] the rulings that are probable whether with respect to their authenticity or meaning or both (al-ahkam al-ahkam al-zanniyya fi thubutiha aw dalalatihu aw fihmiha). The sphere of ijtihad is limited to them [the probable rulings of the Shari’a] . . . And they [the rulings that are merely probable] change with the change of times and place in order to guarantee their malleability and vigor in order to face new circumstances and in order to organize the affairs of the people, with respect to their welfare from the consideration of law . . . And when there is not [Qur’anic] text that is certain in its meaning and authenticity that determines an age for custody (hadana), it is not permissible for the holder of power (wali al-amr) to overstep them. He (the wali al-amr) must derive a rule that protects the broad interests of the parties involved as demanded by the goals of the Shari’a. . . . The wali al-amr must weigh what he sees best and most beneficial for the little boy. . . .

Shatibi would not disagree that the jurist should have the benefit of the child in mind when issuing a ruling; however, in that case, of an untrained jurist, Shatibi asserts that the jurist should perform taqlid and thus be a jurist-imitator (muqallid). However, the court’s limitation on what is considered certain is a deviation from what Shatibi calls for, where he asserts that it is only pseudo-mujtahids claim that ambiguous verses are many in order to serve their personal interests. Moreover, the court adds,

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197 Supra note 181.
198 Id.
199 Id.
And whereas: It is clear from examining the doctrines of the jurists regarding the meaning of the Qur’anic texts (dalalat al-nusus al-Qur’aniyya) which have come to us in the matter of mut’a that they differ on their scope of their application and on whether giving it [mut’a] is, on the one hand, obligatory, or on the other hand meritorious [but not requires] And this only means that since these texts are probable in meaning, they are unclear about the desire of God, may He be exalted . . . [thus when] There is nothing in the Qur’anic texts informing us that God, may he be exalted, decreed it [a particular type or amount of mut’a] or set limits on it, inasmuch as they signify permission to organize it [the mut’a] so that he [the wali al-amr] realizes for the people, their benefits [that are] stipulated by the Shari’a (masalihum al-mu’tabira shar’an). . . [B]eing compassionate to [the divorced wife] is part of the generosity (muru’a) which is demanded by the Islamic Shari’a . . .

Thus, the court did resort to the classical jurisprudence regarding the issue at hand, and did a survey that matches Sanhuri’s methodology, where they induced from the survey that generosity (muru’a) is demanded by Shari’a. However, unlike what Shatibi calls for, the court did not choose/imitate any of the opinions from the classical jurisprudence. The court’s endorsement Rida’s total rejection of the totality of classical jurisprudence, except on matters that the companions of the Prophet had consensus, is reflected in the court’s ruling in the Veil case where it states,

. . . The statements of the classical Islamic jurists (fuqaha’) on a matter related to the shari’a are not granted any sanctity or placed beyond review or reexamination. Rather, they can be replaced by other [interpretations of Islamic law]. Opinions based on ijtihad in debated questions do not in themselves have any force applying to those who do not hold them. It is not permitted to hold [such opinions] to be firm, settled shari’a law that cannot be contravened. . . Perhaps the opinion with weaker support is the most appropriate of all [the competing opinions] for the changing circumstances, even if it [this weaker opinion] violates the settled and established opinions of the past.

This is very interesting when contrasted with how Shatibi perceives taqlid. According to him, the jurist should choose one of the doctrines (madhab) and chose a credible opinion from that madhab. In other words, according to Shatibi not only does the mujtahid or muqallid have to stick to one madhab, but even when performing taqlid, he should use

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200 Id.
201 Supra note 181.
202 Id.
reason to choose the more “weighty” view. Shatibi, in his critique of the jurists of his time, attacks jurists who use legal stratagems (*hiyal*) by choosing the most convenient doctrines from the different schools in order to achieve results that are otherwise impossible within the boundaries of one school. The court clearly rejects to abide to Shatibi’s strict limitations on *ijtihad*. More importantly, the court here is not simply rejecting to follow/imitate the classical jurisprudence. However, it is a rejection of having to stick to a clear methodology, especially the classical doctrines because then the court would eventually succumb to the pressures of the Islamists. Thus, as much as the court’s statements are a rejection of Shatibi’s *ijtihad* methodology for the mujtahid to be able to follow his methodology of the inductive survey to identify different aims of the law that would match the new realities, they are also a rejection of being bound by a specific doctrine or classical methodology. Thus, the court makes sure to use the language of the classical jurisprudence while freeing itself from any adherence to the methodologies to which they entail.

3. *Maslaha*
It is very interesting to see how Shatibi conceptualized *maslaha* versus how Rida and accordingly the SCC conceptualize it and use it as a main tool in its jurisprudence.

Shatibi, like Ghazali, saw that the ultimate goal (*maqsud*) of the *Shari’a* is for the benefit (*maslaha*) of the people. However, Shatibi elaborates on *maslaha* by explaining that it is “intended to work for the benefit of man, but in a way that is determined by God, not man. . . it is defined by revealed law and not by “secular” or utilitarian need of man.” This conception of *maslaha* is completely contradictory to the court’s conceptualization of *maslaha* in this excerpt:

> And whereas: Use of the rule of reason, where there is no [scriptural] text, develop practical rules (*qawa’id ‘amliyya*) that are, in their ramifications, gentler for the people and more concerned with their affairs and [that] better protect their true interests (*masalihhim al-haqiqiyya*). Legislative provisions seek to realize [such true interests] in a manner that is appropriate for [the people], affirming that the essence of God’s *shari’a* is truth and justice. . .

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203 *Id.*
204 *Supra* note 10 at 182.
205 *Id.*
As Brown and Lombardi have argued, *maslaha* stands as a pillar in the court’s mode of utilitarian reasoning, through which it comes up with new ruling when there is no certain text with respect to authenticity and meaning.\(^{206}\) However, the way in which is the court defines a *maslaha* would be under Ghazali’s category of *al-masalih al-mursala* or scripturally unregulated benefits. However, as discussed earlier, a *maslaha* of that kind is accepted if it can be proven to promote a universal goal of the Shari’a, and in order to prove that it promotes a universal goal, the jurist has to go through a detailed inductive survey of the different sources and prove that there is sufficient evidence from the scriptural that attest to this one theme protected under a universal goal or principle. This is different from how the court defines a maslaha purely according to reason rather than the scriptural sources. Thus, according to the classical theory, of *maslaha*, the way in which the court is identifying the *maslaha* deviates from both Ghazali and Shatibi’s methodologies. However, the court, through its reiteration of *maslaha* as the basis its issuance of a new ruling or performing *ijtihad* does not follow a specific methodology like that of Ghazali, where there are no restrictions on how they identify a benefit and they reject one. Accordingly, by not following a clear methodology like the classical one, the court remains free of any shackles that could be imposed on it by the different political forces, especially the Islamists.

4. *Maqasid* and Universal Principles

The way in which Shatibi discusses the *maqasid* and universal principles is framed as a theoretical framework of inductive survey of different evidential material to identify goals (*maqasid*) and also the universal principles or universals (*kulliyat*). The *kulliyat* are simply fundamental principles that do not necessarily find attestation in the scriptural sources, however knowledge of these universals is “enshrined with certainty in the collective mind of the Muslim community as well as in the minds of Muslim individuals.”\(^{207}\) In other words, a universal principle is made up of various particulars (*juz’iyyat*) which all attest to one theme or value that is represented in that universal.\(^{208}\)

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\(^{206}\) *Supra* note 4.

\(^{207}\) *Supra* note 10 at 166.

\(^{208}\) *Id.*
For instance, Ghazali’s five categories of the *maqasid* (the protection of life, religion, mind, property, and progeny) which are a sub-category of his first category of necessities are considered universal principles.\(^{209}\) It is also important to note that the process of inductive corroboration of a wide variety of evidence is what gives legal theory or more explicitly the theory of the “roots of the law” (*usul al-fiqh*) its certainty; where it is grounded on a large body of evidence that might consist of many probable particulars but certainty is found through the common theme in all the different pieces of evidence.\(^{210}\) On the other hand, substantive laws, known as the branches of law (furu’), are based on a limited number of particular pieces of evidence.\(^{211}\)

In light of the previous discussion of Shatibi’s *maqasid* methodology, the following discussion will tackle how the SCC conceptualizes the *maqasid*, how it defines a *maqsid* or a universal principle, and whether the rulings show any patterns of a methodology that it follows to reach its conclusions of what constitutes a *maqsid* or universal principle. In the *Mut’a* case, the court used the *maqasid* when stating that,

It is necessary that *ijtihad* occur within the frame of the universal roots of the Islamic *Shari’a* (al-*usul al-kulliyya li-’l shari’a al-Islamiyya*) . . . building practical rulings and, and in discovering them, relying on the justice of the *Shari’a*, [and] expecting the result of them to be a realization of the general goals of the *Shari’a* (al-*maqasid al-‘amma li-‘l Shari’a*), among which are the protection of religion, life, reason, honor and property.\(^{212}\)

The method which the court specifies in order for their rulings to realize the goals of the *Shari’a* is vague and superficial, where what it states technically means that when they perform *ijtihad* in the realm of the universal roots of the *Shari’a*, relying on its justice, they will then expect the ruling to protect the five categories of Ghazali (with the substitution of honor instead of progeny). The first question that arises from this passage, with the conception of the universal principles in mind is: What is the court’s conception of *ijtihad* done in the universal roots of *Shari’a*? According to Shatibi, “the major

\(^{209}\) Id.
\(^{210}\) Id.
\(^{211}\) Id.
\(^{212}\) *Supra* note 181.
constituents of legal theory, such as consensus and public interest, are made up of universal principles.” Thus, notions of consensus and public interest have become sources/roots of the law due to the universal principles that have been found, through the corroborative survey, to support such concepts to become constituents of legal theory. However, it is vague, and even incoherent, to add “universal” to the “roots of the Shari’a”, where it is unclear what the court means. In other words, the universals, or universal principles, here are like a sub-category of the roots of the law, where they are the evidence that prove or support that consensus for example is a source of law. Thus for the SCC’s statement of “ijtihad [to] occur within the frame of the universal roots of the Islamic Shari’a” to be coherent, it should have omitted the word “universal”, where their statement would be much clear implying that their ijtihad should be based/framed on usul al-fiqh or simply the (theory of) sources of the law, where Shafi’i and also Shatibi and Ghazali have all agree on them being the Qur’an, Sunna, qiyyas, and ijma’, which the court clearly refuses to strictly adhere to. Thus, the term “universal” here is somehow irrelevant and misleading, where its use in this statement mixes up different concepts of the theory of the roots of the law. This, however, demonstrates how the court employs the language of the classical theory, sometimes in an incoherent manner, even when it does not to adhere to the theories from which it adopts such concepts. Accordingly, it communicates to the Islamist dominated audience that it is abiding by the classical jurisprudence.

Another interesting passage from the Veil case regarding universal principles states that,

It is not permitted for a legislative text to contradict those shari’ rulings that are absolutely certain with respect to their authenticity and meaning (al-ahkam al-shari’iyya alqat’iyya fi thubutha wa dalalatiha), considering that these rulings alone are those for which ijtihad is forbidden, because they signify [the Islamic shari’a’s] universal principles (mabadi’ aha al-kulliyya) and its fixed roots (usulaha al-thabitah), which accept neither interpretation nor substitution. . . And accordingly, it is unimaginable that the understanding of [such rulings] would change with a change of time and place. They cannot be amended. It is forbidden to contravene them or twist their meaning.214

213 Id. at 167
214 Supra note 185.
The fact that the court states that rulings that are absolutely certain texts with respect to authenticity and meaning signify the Shari’a’s universal principles is another misleading, incoherent and inconsistent statement, where, as discussed above, the universal principles are part of the usul al-fiqh while the rulings (certain or not) are part of the furu’ or substantive law. Thus, this statement not only mixes up premises of legal theory with substantive law, but it is also inconsistent with other parts of the same case where the court identifies general goals, also considered universal goals by Shatibi and Ghazli, in which it adds modesty as will be shown below, which is a form of amendment or twisting of the meaning. In addition as mentioned in the maslalih mursala section, a principle can be found in new contexts to be of universality if there is enough evidence to support it. Thus, the court is inconsistent and incoherent in its language and methodology.

The next interesting point in this passage is: Why did the court exchanged Ghazali’s progeny with honor? Adding honor to the five categories of Ghazali is a minority opinion amongst classical jurists.215 What is interesting here is that this case was the case of custody and alimony (mut’a), and thus it would make more sense if the concept of progeny was perceived as one of the goals that the ruling would protect. Again, in this case it is unclear why the court did so and there are no indicators in this case that would suggest that the court wanted to convey something through this choice of words. However, it shows that the court is not consistent and careful in its use of the maqasid, even in the very limited and inconsistent way in which it uses it.

In another instance however, in the Veil case, the court puts a significant notion, modesty, in its conception of the maqasid, where the court states,

It [ijtihad] must pursue methods of reasoning out the rulings (alahkam) and binding supports (al-qawa ’id al-dabita) for the branches of shari’a (furu ’iha), guarding the general goals of the shari’a (maqasid al’amma li al-shari’a) so that religion, life, reason, honor/modesty, and worldly goods are protected.216

215 See footnote 19 in Brown & Lombardi Supra note 4.
216 Supra note 185.
The court here adds modesty to the universal principles of Ghazali. An interesting question that arises from such addition is whether the court is thus considering modesty a universal principle? In other words, the five categories of Ghazali are considered both necessities and universals. It is interesting to point that Shatibi actually sees that people’s customary and daily practices, including clothing, are intended to preserve the *maqsid* of life, and thus in this case clothing, and modesty, are particulars that are subsumed under the protection of life.\textsuperscript{217} The following passage is a significant part of the Veil case in which it its survey of the various related evidence of women’s dress.

It cannot be concluded from this that a woman's dress falls among those matters of piety that cannot be altered. Rather, so long as they do not contradict an absolutely certain [scriptural] text, the *wali al-amr* has absolute authority to legislate practical rules within its/their boundaries, limiting the form of [a woman's] attire or dress in light of what prevails in her society among the people so that it is appropriate with their traditions and customs. Indeed, its content changes according to time and place. As long as the covering realizes the conception, the dress of the woman shall be considered an expression of her belief. And whereas: the classical Islamic jurists (*fuqaha*) disagreed among themselves in the subject of the interpretation of Qur'anic texts and of what has been transmitted from the Prophet in the form of strong and weak *hadiths*.\textsuperscript{218}

Although the court states that it performed some form of an (inductive) survey of the scriptural texts and of the different opinions of the classical jurists when it states that, it is highly probable that it meets Shatibi’s criteria of the inductive corroborative survey to identify a goal. Moreover, modesty cannot be a one of the universal goals, or general goals as they are referred to, because it lacks the universality aspect which is the fact that it should be applicable and targeting to all Muslims and not benefit a segment. Here, modesty is clearly targeting women only, and it is not a benefit that is being protected, where in this case the court is imposing its interpretation of modesty and endorsing it in the state apparatuses. Thus, the court is affirming that a woman’s attire is not only not her personal choice, but rather affirms that the legislator has the right to limit her choices regarding her choice of dress. Moreover, the fact that modesty is used by the court as a general goal of the *Shari’a* demonstrates how the court communicates placates the conservative Islamist audience for whom the issue of the dress of the woman was

\textsuperscript{217} Supra note 10 at 173.
\textsuperscript{218} Supra note 185.
becoming an integral one. Thus, although the court ruled in favor of the ministerial
decision (the secular forces of the state) and banned the *niqab* in schools, it managed to
frame its ruling in a way that maintained the outlook of respect for the conceptions and
methodologies of the classical jurisprudence, especially the *maqasid* theory. Accordingly,
the terminology of the *maqasid* theory were highly employed by the court in its rulings as
a tool of mediation between the secular state apparatus and the militant Islamists in order
to maintain its power pass its different political choices. Thus, the court, while
challenging the state apparatuses, also maintained not to be subsumed under the umbrella
of the Islamists and bind itself to any theory (the *maqasid*) or methodology that would
limit its interpretation of what constitutes *Shari’a*. 
V. CONCLUSION
In conclusion, the *maqasid* al-*Shari’a* doctrine was the classical theory that was developed to escape the curbing forces of the tradition, abuses of the law, and to meet the needs of changing contexts. However, as any other utilitarian theory, it carried the stakes of threatening the tradition by uncontrolled subjectivity and discretion. The *maqasid* classical theorists, especially Shatibi, articulated a methodology and theory through which the jurist would be able to induce the aims of the law in order to meet new contexts or challenges. In other words, although Shatibi was developing a utilitarian tool, which he knew would allow for more subjectivities, he also clearly articulated who and how could embark on the use of it.

However, with modernization and colonialization, and the perceived need by Islamic reformers to reform the *Shari’a* in order for it to correspond to the new contexts, the *maqasid* was revived and reintroduced as the new compatible methodology for the twentieth century by Rashid Rida. However, with Rida prescribing the *maqasid* to be used without any of the classical limitations, he offered the secular trained legalists a methodology that would serve as their most efficient tool to use reason. Thus, Rida, when propagating Shatibi’s theory and methodology of *maqasid* was unfaithful to it by only taking the part that allowed for utilitarian reasoning and completely disregarding the whole framework and limitations in which such type of reasoning was intended to function.

Moreover, the endorsement of the *maqasid* by the different influential religious figures, especially Yusuf al-Qaradawi, and the propagation of the concept as the classically sound methodology that would allow Islamic law to meet the needs of Muslims in the modern contexts. Accordingly, by introducing the *maqasid* doctrine to the public, Islamists included, as an inherently classical and coherent methodology of applying Islamic law, it could be argued that Qaradawi familiarized the audiences, specifically Islamists in Egypt, with the whole *maqasid* rhetoric, that the SCC would start employing in the 1990’s.

As a result, in the SCC’s ‘Golden Age’, when the court starts elaborating on its interpretation of Article 2, it used the *maqasid* and its terminology to issue its
interpretation which was different from what the Islamists had expected. In other words, the *maqasid* functioned as the perfectly appropriate tool for the court to pass its political choices under a seemingly authentic and credible Islamic methodology. Thus, when the Islamists had predicted the court to follow the classical Islamic jurisprudence, the court offered them an understanding of Article 2 that left a lot of discretion in the hands of the judges meanwhile it affirmed that its use of reason and not following the classical jurisprudence is inspired by the classical, authentic theory of *maqasid*. Accordingly, the SCC, emptying the *maqasid* theory of all its constituents and limitations put forth by the classical jurists, used it as tool for the mediation between the opposing secular government and militant Islamists. Finally, in the use of *maqasid* by the SCC, there were both elements of continuity and change, as Hallaq argues about law in general.\(^{219}\) The *maqasid* as a classical theory continued be perceived as the authentic method of using reason and getting away with the rigidity of the law, while it changed by all its endorsers such that it matched their agendas.

\(^{219}\) Wael Hallaq, Authority, Continuity and Change. At ix.