

MAQĀSĪD AND THE CHALLENGES OF MODERNITY

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Abstract

A central feature of public Muslim discourse over the past three decades has been the call to restore the sharī'a in one form or another. Some reformers have proposed a new theoretical underpinning for this restoration, arguing for the adoption of foundational concepts that bear little, if any, resemblance to their pre-modern counterparts. A central question that ineluctably emerges in this aporia is: What narrative must be adopted as the representation of the historical sharī'a, the sharī'a that prevailed until the early portion of the nineteenth century? If the colonial narrative is ipso facto programmatic and teleological, and if it served and still serves the purposes of all but those of the subaltern majority, then what other narrative must be adopted in the project of creating the new symbiosis? And if the jural voices of the subaltern are to come in for serious consideration, then how are we to represent them, if we can at all? And if we cannot, then into what epistemic predicament, if not a perennial aporia, does this throw both the privileged scholar and the reformer/intellectual? This article does not provide answers to these questions but rather addresses the problematics that these and related questions raise in dealing with the challenge of introducing into the modern Muslim condition one form of Islamic law or another.

Keywords: Islamic jurisprudence, *maqāṣid*, modernization, *maṣlaḥa*

A. Introduction

A central feature of public Muslim discourse over the past three decades has been the call to restore the *sharīʿa* in one form or another. Some reformers have proposed a new theoretical underpinning for this restoration, arguing for the adoption of foundational concepts that bear little, if any, resemblance to their pre-modern counterparts.¹ The majority of writers and movements, however, and almost all political platforms appear to espouse a revival of the historical *sharīʿa* or a modernized version thereof. What is notable about this espousal is that, despite its variants, it seems to hold a perception of pre-modern *sharīʿa* that makes serious claims to objectivity. Put differently, a particular practice anchored in a particular law and theory is posited to have actually existed, and all that is needed now is simply to revive this practice subject only to certain modifications that accommodate the exigencies of the modern world. In a sense, the recent intense focus on the *maqāṣid* represent an attempt at partaking in this very discourse.

It is, I believe, accurate to argue that any serious project aiming at refashioning a conception of the *sharīʿa* must claim history and pre-modern legal culture as its frame of reference. But which history? This is an eminently urgent and fundamental question. And to the extent of seeking such reference, several of the modernizing Sharfī-minded reforms seem to be, in principle, on the right track. The Western model has provided, for the past two centuries, the parameter for jurial experiment, one that now appears to have failed as an exclusive alternative to Muslim indigenous traditions. Yet, because the need for legal modernization remains little contested, an aporia has resulted. The reconciliation between the exigencies of modernity and the placing of a premium on legal “heritage” thus not only gives rise to this aporia but also exacerbates it epistemically. For what is involved is not merely the challenge of bringing the one to coexist with the other --if not coexist in a necessary state of symbiosis, but also of informing this symbiosis with a particular construction, or a particular narrative, of legal history.

¹ A radical example is Muḥammad Shaḥrūr whose views, intellectually impressive as they are, have not been received well. For a summary of his proposed reform, see Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997), pp. 245-54. See also Dale Eickelman, “Islamic Liberalism Strikes Back,” *Middle East Studies Association Bulletin*, 27 (1993), pp. 163-68.

That the latter constitutes a colonialist product makes the challenge all the more formidable. A central question that ineluctably emerges in this aporia is: What narrative must be adopted as the representation of the historical *sharīʿa*, the *sharīʿa* that prevailed until the early portion of the nineteenth century? If the colonial narrative is *ipso facto* programmatic and teleological, and if it served and still serves the purposes of all but those of the subaltern majority, then what other narrative must be adopted in the project of creating the new symbiosis? And if the jural voices of the subaltern are to come in for serious consideration, then how are we to represent them, if we can at all?² And if we cannot, then into what epistemic predicament, if not a perennial aporia, does this throw both the privileged scholar and the reformer/intellectual? This article does not provide answers to these questions but rather addresses the problematics that these and related questions raise in dealing with the challenge of introducing into the modern Muslim condition one form of Islamic law or another.

B. The Theory

Yet, although these questions are not answerable at this stage of scholarly and intellectual-reformist development, a beginning must be made somewhere, preferably at a site that can claim centrality in the dialogic intersection between legal history and tradition, on the one hand, and the theoretical and substantive imperatives of modernity, on the other. Accordingly, there is perhaps no better site to accomplish these analytical tasks than what has inductively emerged in post-classical jurisprudence as the *maqāṣid al-sharīʿa*, rendered into English best as the “universal aims of the law.” The claim of this site as a supreme and, indeed, foundational analytical unit is due in good part to the fact that these aims sum up the range of desiderata produced by the law, its theory and practices over several centuries, but desiderata that have been inferred through a spatiotemporal and empirical means. Induction in the law, having its own rules of logic,³ was seen to yield conclusions that

² Gayatri Chakravorty Spivak, “Can the Subaltern Speak?” in Patrick Williams and Laura Chrisman, eds., *Colonial Discourse and Post-Colonial Theory: A Reader* (New York: Columbia University Press, 1994), pp. 66-111.

³ Namely, that for purposes of the law, incomplete induction acts as a categorical and perfect induction, yielding conclusions that are demonstrative. For a detailed

would become, under certain conditions, the basis of further deductive arguments. It is in this sphere that the theory of *maqāṣid* provided, no less than the *mukhtaṣarāt*,⁴ the closest simulacrum of codification (though the many crucial differences must bar claims to further analogies). But more importantly, it is in this sphere --which squarely belonged to the *maqāṣid*-- that the meaning, intent, purposes and *weltanschauungen* of the law were articulated. In the context of the dialogic intersection of the post-classical and modern legal imperatives, to what extent do these *maqāṣid* retain value in terms of modern relevance?

An instructive point of entry into the theory of *maqāṣid* is the paradigmatic domain of *ta'ālil*, the theoretic that aims to identify and verify the *ratio legis* lying behind a particular ruling. *Ratios* come in various shapes and forms, depending on the semantic-hermeneutic connection between the “novel” case at hand and the language of revelation, be it Quranic or Sunnaic. The connection itself, Arabicate in form and content, is therefore determined by the quality of the text’s relevance, that semantic-conceptual bridge which presumably permits the jurist to cross the divide between social order and what is nothing less than God’s textual episteme. The bridge may lie at any point on a spectrum that ranges from relatively clear textual evidence to a textual hint or cue. But God, insofar as the two primary sources are concerned, can also be silent. What if such connections, however faint, are not to be found? What if no textual evidence can attest, affirmatively or negatively, to a case for which a legal norm is sought?

The absence of a text that bears upon a new case does not leave the jurist stranded. In addressing this issue, Ghazālī begins with the prototypical case involving the consumption of inebriants.⁵ In the Quran, wine is forbidden because it possesses the property of intoxication, deemed prohibited as it prevents the mind from exercising normal cognition, thereby leading its victim into misconduct, including the neglect of religious duties and an increasing tendency to violence. If

discussion of this matter in Shatibi’s thought, see Wael B. Hallaq, *History*, p. 169.

⁴ Cf. Mohammad Fadel, “The Social Logic of *Taqīd* and the Rise of the *Mukhtaṣar*,” *Islamic Law and Society*, 4 (1996), pp. 193-233.

⁵ Abū Ḥāmid al-Ghazālī gives a detailed discussion of *munāsaba* and *maqāṣid* in his *Shijā’ al-Ghālil fi Bayān al-Shabāh wal-Mukhbūl wa-Masālik al-Ta’ālil* (Baghdad: Maṭba’at al-Irshād, 1390/1971), pp. 142-266.

we were to assume, for the sake of argument, that the Quran did not stipulate the reason for the prohibition, we would still, Ghazālī argues, come to the conclusion that the consumption of alcohol is prohibited, and this we know because of the harmful consequences of inebriants. This, Ghazālī insists, amounts to reasoning on the basis of suitability (*munāsaba*), since we, independently of revelation, know that there is a certain harm in allowing the consumption of alcohol and a particular benefit that accrues from its prohibition.

Since suitability is rationally conceived and emanates neither from the direct nor oblique meaning of the revealed texts, its applicability to the law cannot be universal. In other words, since the law cannot always be analyzed and comprehended in rational ways, reason and its products are not always in agreement with the legal premises and their conclusions. Suitability, therefore, may at times be relevant (*mulā'im*) to the law, and irrelevant (*gharīb*) at others. No *ratio legis* may be deemed suitable without being relevant. Any irrelevant *ratio* becomes, ipso facto, unsuitable, and this precludes it from any further juristic consideration. The obligation to pray, for instance, is waived under circumstances of hardship. The *ratio* of hardship is deemed relevant to the spirit and positive commands of the law, since a great number of obligatory acts cease to be obligatory under extreme circumstances, such as illness and travel. But in the case of barring guardianship over divorced women who are of minor age, suitability is irrelevant, and therefore inadmissible. A divorcee who has reached the age of majority may remarry without a guardian, since she is thought to have acquired a sufficient degree of experience of worldly affairs during her last marriage. This reasoning, however, though equally applicable to the divorcee who is a minor, is considered inappropriate in the context of the *sharī'a* since it runs counter to the aims of the law in protecting the interests and welfare of minors. Thus, the validity of suitability rests on whether or not God took it into consideration as a legal norm, and whether or not it can be shown that the norm became operative when the feature of suitability in question was also present in the case attested by the revealed sources. Both the operative legal norm and the feature of suitability must coexist in order to satisfy the

requirements of the *ratio*.⁶

Be that as it may, the ultimate goal of suitability is thus the protection of public interest (*maṣlahā*) in accordance with the fundamental principles of the law.⁷ But in determining the *ratio legis* by the method of suitability, the jurist does not deal directly with the texts, since the *ratio* is not, strictly speaking, textual. Rather, he infers it through his rational faculty, though it must be in agreement with what may be called the spirit of the law. The law is known to prohibit that which is harmful and to protect and promote that which is beneficial to Muslims in this world and in the hereafter. For after all, if God is a merciful and rational being—the assumption being that he is preeminently so—then the combination of these attributes must rationally yield the conclusion that He aims to promote the interests of his ‘*ibād*. Although we have no demonstrative proof that He should do so as a rational necessity, we are nonetheless left with the predominant likelihood that He does act to promote these objectives. In fact, the majority of, if not all, jurists held that God acts according to the best interests of his subjects. As Shāṭibī put it: “The *sharī‘a* was instituted for [the promotion of] the good of believers.”⁸

It thus follows that, in the jurist’s reasoning, what is deemed detrimental to this good, the objective of the law, must be avoided, and whatever promotes harm must be prohibited. The constant and consistent promotion of benefit and avoidance of harm are the aims of the law, and it is to these aims that the rational argument of suitability must conform. The protection of life (*nafs*), property (*māl*), religion (*dīn*), mind (*‘aql*) and offspring (*nasl*) represents a central aim of the law. Accordingly, the penalty of the murderer is death, a penalty instituted with the aim of deterring homicide and preserving life. “Had it not

⁶ See also Sayf al-Dīn al-Āmidī’s discussion in Bernard Weiss, *The Search for God’s Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī* (Salt Lake City: University of Utah Press, 1992), p. 619.

⁷ In fact, the Zaydite Shawkānī, expressing a Sunnite *uṣūlī* view, states that the term “*munāsaba*” (suitability) is interchangeable with “*maṣlahā*,” “*istiḍlāl*,” and the “protection of the law’s aims” (*ri‘āyat al-maqāsid*). See Muḥammad b. ‘Alī al-Shawkānī, *Irshād al-Fuḥūl ilā Tahqīq al-Ḥaqq min ‘Ilm al-Uṣūl* (Surabaya: Sharikat Maktabat Aḥmad b. Sa‘īd b. Nabḥān, n.d.), p. 214.

⁸ Abū Ishāq al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Aḥkām*, Muḥyī al-Dīn ‘Abd al-Ḥamīd (ed.), 4 vols. (Cairo: Maṭba‘at ‘Alī Muḥammad Ṣubayḥ, 1970), II, 3: “*al-Sharī‘a nuḍī‘at li-maṣāliḥ al-‘ibād*.”

been for this penalty, people would rise up, threatening with collapse the order of public interest.”⁹ The protection of property is effected in “civil” matters through imposing compensatory damages upon the wrongdoer or unlawful appropriator (*ghāṣib*), while in criminal matters the thief is punished with amputation or a stiff discretionary penalty. All of these measures are intended to protect property, the prop of sustenance. Offspring are protected by prohibiting fornication and adultery (*zīnā*), and by imposing another stiff penalty upon those who commit them. Fornication and adultery furthermore constitute not merely the diametrical moral and logical opposites of marriage, but they stand vis-a-vis this institution as mutually exclusive. Nor is this exclusivity limited to the logical and the moral, for the law, with its deliberate designs, consciously battles *zīnā* through the promotion of marriage. Religion is protected and promoted through a) the application of the death penalty to those Muslims who apostate (*murtadd*), and b) warring against nonbelievers (*jihād*). Finally, the preservation of the mind, quintessential for any act of obedience, is brought about through the prohibition on the consumption of inebriants. Shawkānī reports that some later jurists (*al-muta’akbkhirūn*) added a sixth category, namely, honor. For people in general are customarily known to sacrifice their lives and property for the sake of preserving and protecting their honor, a fact that *a fortiori* bestows on honor a position superior to that of property. A false accusation of unchastity (*qadhf*)¹⁰ has thus come to be punishable by the law precisely in order to promote and preserve honor.

Being many, the aims of the law are multi-faceted, and some are more fundamental than others. Ghazālī offers a hierarchical classification consisting of three levels, the first of which includes those aims that he calls essential (*darūriyyāt*), i.e., those which we have just enumerated,

⁹ Shawkānī, *Irshād al-Fuḥūl*, p. 216.

¹⁰ i.e., accusing someone of *zīnā*. For an accusation to hold, the evidence to be satisfied must consist of four male witnesses who testify as eye witnesses to the act of sexual intercourse. Should the four witnesses offer contradictory testimonies or should one of the four be disqualified as a witness (due to being a slave or to some criminal past) or withdraw his testimony (leaving only three witnesses), all four would be liable to the *ḥadd* punishment, which consists of eighty lashes. See Abū Zakariyyā Yahyā b. Sharaf al-Dīn al-Nawawī, *Rawḍat al-Tālibīn*, ‘Adil ‘Abd al-Mawjūd and ‘Alī ‘Awad (eds.), 8 vols. (Beirut: Dār al-Kutub al-‘Ilmiyya, n.d.), VII, p. 322.

complemented by a class of subsidiary aims that seek to sustain and enhance the essential aims. For instance, the consumption of a small quantity of wine is prohibited because it invites the consumption of a larger quantity. Similarly, the acts of looking at or touching females are prohibited in an effort to sustain and bolster the sanction against adultery and fornication, to give added support to the principal prohibitions on sexual misconduct. Any *ratio legis* determined by suitability and falling within these areas of the law must be treated according to the principles governing this level of *maqāṣid*.

The second level, consisting of necessary aims (*ḥājīyyāt*), is distinguished from the first in that its neglect causes a secondary harm, indirectly detrimental to the categories and imperatives of the first level. Examples of necessary aims are the interests served by contracts of rent, for without them the owners of real property would not be entitled to protect the commercial value or usufruct of their assets, leaving them exploited by others without compensation.¹¹ This secondary but necessary aim – of regulating rent – has come to serve and enhance the interests of the higher and essential aim of protecting property. The same can be said of the necessity to appoint a guardian who is charged with the responsibility of giving a female of minor age in marriage. Here, no life is threatened and no property endangered; nevertheless, protecting certain interests, including those of minors, are necessary for ensuring justice in, and the orderly functioning of, society.

Finally, the third and least important level is what Ghazālī calls “improvements” (*taḥsīn, tawṣīʿa*), which enhance the implementation of the higher aims of the law in secondary ways. The slave, for instance, is denied the capacity to act as a witness because his menial social status and servitude impede his independent testimony (the assumption being that evidentiary rectitude is normatively guaranteed by the threat of losing social capital or social standing). While this denial neither serves nor harms the indispensable and necessary aims (first and second levels), it does serve to enhance the aims of the *sharīʿa* on the whole by confirming its principles.

Now, the aims of the law play a significant role in determining the so-called *al-maṣāliḥ al-mursala*, a type of reasoning applied to cases upon

¹¹ Shawkānī, *Irshād al-Fuḥūl*, p. 216.

which no text can be brought to bear. This was also known as *istidlāl bil-mursal*, and more generally, *istidlāl*.¹² Shawkānī, one of the last of the classical jurists who had the benefit of a cumulative knowledge of the *uṣūlī* tradition, could sum up the various stances of the jurists on *maṣlaḥa mursala*. For many, he observed, *maṣlaḥa* generally meant the preservation of the objectives of the law by means of averting harm, the aim of the law being social order. Yet, as Ghazālī held, instead of being grounded in a text of revelation, its rationale is founded in rational suitability. While on the one hand this type of reasoning has been rejected by many jurists, Qarāfī asserted that a thorough investigation into the matter reveals that all legal schools heavily resorted to the test of suitability, the cornerstone of *maṣlaḥa*.¹³ When the derivation of legal rules is predicated upon the test of suitability-cum-relevancy, a good number of jurists, including the Ḥanafites, admit it as a valid form of reasoning. The Shāfi‘ite legist Ibn Barhān added that this position is the choice of the jurists (*al-ḥaqq al-mukhtār*). The position seemingly adopted by the majority insists on *maṣlaḥa* being “necessary, certain and universal.” By necessary it is meant that it must be subsumable under the five *ḍarūriyyāt* enumerated above, namely, the preservation and promotion of life, property, religion, mind and offspring, and by universal, that it should encompass all Muslims. Ghazālī illustrates the meaning of universality by the example of a military conflict between Muslims and non-Muslims, wherein the unbelievers’ army is assumed to have captured a group of Muslims and to be using them as a shield. If the shield is not attacked, the army of the enemy will succeed in its design to destroy the Muslim community. In order to repulse the enemy, it is necessary to attack the shield, an act that is sure to result in killing many, if not all, the Muslims forming the shield. Although the individuals are not guilty of any offense, and therefore do not deserve any penalty, much less capital punishment, *maṣlaḥa* dictates that the killing of fellow Muslims is “rationally relevant” (*mulā‘im*) in light of the accruing benefits, namely, the protection of the wider Muslim community. For if such a sacrifice is not made, the enemy will defeat the Muslim army, destroy the community, and annihilate the shield at any rate.

¹² Abū al-Muẓaffar Maṣū‘ b. Muḥammad al-Sam‘ānī, *Qawāṭi‘ al-Adilla fil-Uṣūl*, 2 vols. (Beirut: Dār al-Kutub al-‘Ilmiyya, 1997), II, p. 259; Shawkānī, *Irshād al-Fuḥūl*, p. 242.

¹³ Shawkānī, *Irshād al-Fuḥūl*, p. 242: “*qāla al-Qarāfī biya ‘inda al-taḥqīq fi jamī‘ al-madbāhib li‘annahum yaqūmūn wa-yaq‘idūn bil-munāsaba.*”

Entailed by Ghazālī's example (famously known as *mas'alat al-turs*) is the certainty that the *sharī'a* aims at minimizing killing when killing cannot be averted at all. The killing of the persons forming the shield thus emerges as a rational certainty that is at once suitable, a certainty that must be so compelling as to override the legal consideration that no innocent soul should be punished in any manner, much less killed.¹⁴ However, the claim to certainty and its "suitable" conclusions will not stand should there be any chance that the army of the enemy may not, in any case, win the battle. On the other hand, the claim to universality is rendered problematic should the situation in question not pose a threat to the entire community. If a ship were to be on the verge of sinking, it is deemed categorically prohibited to jettison some passengers in order to save the ship even though it might appear that such an act will save the day.¹⁵ Needless to say, the extremely hypothetical nature of *mas'alat al-turs* did not escape Ghazālī's colleagues who retorted, *inter alia*, that the average case in the law does not involve the entire community. Ghazālī's point, however, appears to be the balance in favor of certainty that bears on what might be called general public interest, that which affects the community at large.

C. Modern Encounters

There is little doubt that one of the major problems facing Muslim legal thinkers today is coping, under modern conditions, with the weight of what I have elsewhere called the Arabicate hermeneutic,¹⁶ that juristic tradition which assumes a dense linguistic link between the law and the revealed sources. The link is also specifically Arabicate in the sense that, irrespective of the identity of the national and ethnic group that aims to apply the *sharī'a* to itself, the sources of the law and the means of their interpretation remain bound by the rules of the Arabic language. Even when the ethnic and national character of the group is seen to predetermine the law, as happened in the case of certain Indonesian legal

¹⁴ Abū Ḥāmid al-Ghazālī, *al-Mustasfā min 'Ilm al-Uṣūl*, 2 vols. (Cairo: al-Maṭba'at al-Amīriyya, 1324/1906), I, p.284; Shawkānī, *Irsbād al-Fuḥūl*, p. 242.

¹⁵ Shawkānī, *Irsbād al-Fuḥūl*, p. 242-43.

¹⁶ Wael B. Hallaq, *Sharī'a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), pp. 500-42.

thinkers (mainly with regard to the rules of inheritance),¹⁷ the reasoning which aimed to bring the Quran to bear on this specific character could not avoid addressing the hermeneutics and linguistic structures of the revealed text. Thus, even in this radical nationalist exercise, the point of departure was a struggle with the Arabicate hermeneutic.

The linguistic hegemony of Arabicate *fiqh* appears to be daunting. It would not be an exaggeration to state that almost all modern legal thinkers attempting to make sense of Islamic law in the face of modernity, be they Malaysian, Indonesian, Arab or otherwise, have grappled with this hegemony. Rashīd Riḍā, one of the first modern legal “reformers,” resorted to a notion of *maṣlaḥa* that culminated in a near-total abandonment of the revealed texts in favor of a utilitarian construction of positive law.¹⁸ Arguably, his juristic rationalization either led to or, at least, encouraged the westernization of both the substance and form of law in many Arab countries, a phenomenon seen today as intrusive and alien. The Pakistani intellectual Fazlur Rahman proffered his Double-Movement Theory in a clear effort to thwart the Arabicate linguistic hegemony, reducing the constitutive Islamic legal element to an understanding of the situational “intent” of the Lawgiver. His project is one about contexts and general intentionalities, but certainly not about the meaning and significance of individual words and prepositions.¹⁹ Judging by the manner in which he was received in his native country, and by what the course of “Islamicization” in Pakistan has been, his project can hardly be described as successful. Likewise, the Syrian engineer-turned-jurist Muḥammad Shaḥrūr managed to develop a theory of law that entirely escapes the Arabicate hermeneutics, although it does erect an interpretive apparatus of its own.²⁰ Of all these proposed programs, Shaḥrūr’s has – now with the benefit of hindsight -- been the least well-received.

The most salient problem facing legal modernizers may be captured in the contrast between the essential qualities defining language, especially

¹⁷ See Mark Cammack, “Islamic Inheritance Law in Indonesia: The Influence of Hazairin’s Theory of Bilateral Inheritance,” *The Australian Journal of Asian Law*, 4, 1 (2002), pp. 295-315.

¹⁸ Wael B. Hallaq, *History*, pp. 214-20.

¹⁹ Wael B. Hallaq, *History*, pp. 241-45; Tamara Sonn, “Fazlur Rahman’s Islamic Methodology,” *Muslim World*, 81 (1991), pp. 212-30.

²⁰ Wael B. Hallaq, *History*, pp. 245-53.

one of Quranic pedigree, and modernity. However much we believe that the reader constructs the text, it is at least equally true that words have meanings whose range cannot but stop at a particular point in the semantic field. For any (legal) reasoning to gain legitimacy, it must, as a first and minimal condition, be believable to its intended audience. Believability is also a necessary, though clearly insufficient, condition for acquiring legitimacy; and legitimacy, or lack of it, is after all constitutive of what may accurately be called a Muslim legal predicament. Especially with the centuries-old weight of linguistic tradition, Quranic-Sunnaic language has been endowed with meanings whose semantic range is perforce narrower than that which emerged during the twentieth century. The modern condition has pushed back the limits of this range, but only to a limited extent. Despite its malleability, the semantic field remains limited: a word's connotation, as a rule, cannot be turned into its opposite.

It is precisely in the "liquidity" and "progress"²¹ of modernity that the contrast becomes clear. A run away train,²² so to speak, modernity has brought about ever-changing conditions with which the semantic fields of the Quran and the Sunna cannot hope to catch up. The changes brought about by nation-states in the field of positive law can hardly be said to emanate from any legitimate hermeneutic, especially as their basis and method are constituted by no more than the will-to-power of the state itself. And the proposed projects of the so-called intellectual Islamic and Islamist reforms have all been caught up, without a successful conclusion, in the opposition between the relatively limited semantic field and the constantly changing conditions of modernity, be they social, moral, economic, technological or otherwise.

If the semantic field is no longer able to constitute the hermeneutical foundations of the law, then what alternative is there? The utilitarian/secularist approach to legal construction, we have already intimated, has proven to lack legitimacy in most parts of the Muslim world. Can, then, the five universals of *darūriyyāt*, together with *maṣāliḥ mursala*, form a new foundation of legal reasoning? After all, these universals -- having been

²¹ See, among others, Zygmunt Bauman, *Liquid Modernity* (Oxford: Polity Press, 2000); Jean-François Lyotard, *The Post-Modern Condition* (Minneapolis: University of Minnesota Press, 1985); Anthony Giddens, *The Consequences of Modernity* (Stanford: Stanford University Press, 1990).

²² In all likelihood, the expression is not mine.

inductively constituted on the basis of both the revealed texts and the law that has presumably emanated therefrom over the centuries -- represent the total sum of values upon which the *sharī'a* as well as Islam as religion and culture have placed a premium.

If we subsume Shawkānī's category of "honor" under that of "offspring" (as they are interconnected in many ways), it will become obvious that out of the five *maqāṣid* universals, no less than four (religion, life, property and offspring) present significant challenges in coping with modernity's condition. First, little need be said about religion which stands in paradigmatic antithesis with a largely secular modern world. Once a criterion by which communities defined themselves and were defined by others, it has become, under the secularism of the nation-state, a marginalized definitional element. It is no longer required of the by-gone denizen to believe in religion, this requirement having been replaced by a national ideology whose main objective is the near-total pacification of an otherwise materially productive citizen. The upshot of all this is that the category of the "national citizen" has displaced religious loyalty as the hallmark of political identity, with the distinct implication that the protection and promotion of religion as defined by the *maqāṣid* universals is no longer compatible with the status of religion under the *modern* nation-state. Under the latter, it is true, religion has become a private matter, a natural right of which no individual should be deprived. But this right cannot, at least in theory and in law, be turned into a political privilege. Accordingly, with this transmutation into the political ideology of national citizenry, the *abl al-dhimma* laws of *fiqh* are rendered problematic, at least as set by the standards of the so-called universal human rights and as these standards continue to be harnessed as a means of pressure and interference by the colonialist and quasi-colonialist western states. The fact that the laws of the Muslim countries of today have largely been determined by the direct and indirect control of these states complicates all possible options, which in their oppositions and syntheses may not prove viable. In other words, the practice of an exclusively classical *abl al-dhimma* doctrine has been thoroughly quashed by the socio-economic and legal transformations in most parts of the Muslim world, especially as manifested in the collapse of local community structures (exemplified by villages and city quarters) and the pre-modern

legal sociology and laws that governed them. On the other hand, the transplantation of a purely western-type law, which would – in theory -- fully accommodate the demands made by the universal conception of human rights, has proven to be antithetical to indigenous interests and ways of life. It is an option for which Muslims in general seem to have lost taste. And the synthesis between (and admixture of) these two extremes has not proven to be a happy mean, assuming that the post-colonial condition is a synthesis at all.

Second, and related to the first, is the “preservation of life,” where the challenge is posed by the deterrent of capital punishment. This latter is increasingly facing opposition from several international quarters, despite the egregious indifference of the United States (with about three dozen states that continue to mete out this punishment). However, the difficulty arising in this context is representative of multiple problems running the full gamut of the law, namely, the role of the state in the criminal sphere. Whereas Islamic law and the Quran defined homicide as a private wrong to be settled by mediation and arbitration, and regulated by general guidelines that allowed for retaliation, compensation or forgiveness (the middle category being the most commonly practiced), the nation-state appropriated this sphere both in Europe and the colonized Muslim world. In fact this appropriation (together with commercial law) was consistently one of the first acts of colonialist legal change. Retaliation became at that point the prerogative of the state, which not only claimed entitlement to the lives of its subjects but also introduced its own evidentiary procedures, declared to be more “effective” than their “lax” equivalent propounded by Islamic law.²³ This is not to say that deterrence, the central point of *maqāṣid*, cannot be achieved through the agency of the modern nation-state, but it is to assert the point that, inasmuch as dealing with homicide is a fundamental function of the law, dealing with punishment and its social ill-effects are just as important. Islamic law dealt with it within communal bounds, and in terms set by the community’s internal interests, needs and desires. The modern nation-state has progressively ignored the interests of these communities whose structures and ways of life it has never stopped transforming.

²³ See, for example, Radhika Singha, *Despotism of Law: Crime and Justice in Early Colonial India* (Delhi: Oxford University Press, 1998), 2, pp. 49-75.

The third challenge is the range of implications arising from the universal principle of “protecting offspring,” the prohibition on fornication and adultery and their dialectical relationship with the laws of marriage in particular and those related to public morality in general. With the emergence of a modern type of public sphere and the role of women in it, these restrictions – which essentially govern females – have been largely forced out of the nation-state’s law. Many of the new codes of family law in Muslim countries have come to encompass labor laws that permit women to engage in a range of conduct in the public space and have excluded from their purview all quasi-ritual rules about touching and looking at the female body.²⁴ Very few codes nowadays continue to prohibit women from exercising their right to work, so that with this newly acquired right, a husband’s control over his wife’s freedom of movement has, in some spheres, diminished considerably. These changes, effected as much by legislation as by the fundamental transformations in the mode of economic production, have altered religious morality in structural ways, and have significantly reduced both its scope and qualitative effects. That morality once regulated sexuality and that the latter has invariably had a direct bearing on the category of “offspring,” are matters that hardly need comment. What needs to be addressed is rather the compatibility of modern morality -- or more accurately, counter-morality -- with the paramount status Muslims had assigned to sexuality and “offspring.” And the same problematic that has arisen earlier with other *maqāṣid* universals must be addressed here too. How do the massive waves of legal westernization in the Muslim world square with the socially-embedded cultural ideals and desiderata that Muslims have developed over the centuries? How does any change in positive law, most particularly those occurring in line with the broad program of western feminism, reduce the centrality and effect of this universal, rendering it devoid of any substantive significance? Can

²⁴ But I argue, along with Chatterjee, that these acts do not amount to women’s liberation, for the state and its nationalism “conferred upon women the honor of a new social responsibility and by associating the task of female emancipation with the historical goal of sovereign nationhood, bound them to a narrow, and yet entirely legitimate, subordination.” See Partha Chatterjee, “Colonialism, Nationalism, and Colonized Women: The Contest in India,” *American Ethnologist*, 16, 4 (1989): 622-33, at 29, but also see pp. 63-32.

western feminism, with its colonialist stance,²⁵ as well as so-called Islamic feminism, be accommodated – howsoever partially – while keeping the constitutive elements of this socio-moral category intact? This no doubt constitutes an immediate challenge, and one with which great many Muslim countries will have to deal sooner than later.

A significant obstacle impeding a forthright examination of this challenge is the close connection between morality and the nature of the material system that evolved in tandem with modernity in a complex dialectical way; for it is undeniable that modernity arose out of capitalism as much as capitalism arose out of modernity. One can safely argue, I think, that the modern project in any society cannot succeed or sustain itself for long without the adoption of an essentially capitalist economy.²⁶ The recent collapse of the Soviet Union, the doomed struggle of Castro's Cuba, and the subsequent economic transformations in China and Vietnam are abundant testimonies to this. And if we accept this premise, we are faced with a double-pronged challenge: How will Muslims cope with the direct and massive indirect effects of capitalism on their culture-specific moralities, and, more importantly (which is our fourth point), how do they aim to deal with the *maqāṣid* universal relative to property defined as encompassing more than the reductionist notion of the sacrosanct entitlement to own wealth and protect it? How can "Islamic capitalism" – which grew in the shadow of the *sharī'a* and was for centuries highly conducive to the evolution of a distinct yet grandiose material, intellectual and spiritual culture – be prevented from slipping into the socially and morally troublesome forms of unrestrained modern capitalism?

Except for the category of "mind," therefore, all *maqāṣid* universals are plagued by considerable dilemmas, all of which in turn stem from

²⁵ Chandra T. Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourse," in P. Williams and I. Chrisman, eds., *Colonial Discourse and Post-colonial Theory: A Reader* (New York: Columbia University Press, 1994), pp. 462-82; M. Dube, "Postcolonial, Feminist Spaces, and Religion," in L. E. Donaldson and K. Pui-lan, eds., *Postcolonialism, Feminism, and Religious Discourse* (New York: Routledge, 2002), pp. 100-17; Uma Narayan, "The Project of Feminist Epistemology: Perspectives from a Nonwestern Feminist," in S. Harding, (ed.), *The Feminist Standpoint Theory Reader* (London: Routledge, 2004), pp. 213-24.

²⁶ In this context, see I. Wallerstein, *The Modern World-System, vols. I and II* (New York: Academic Press, 1974, 1980); vol. III (San Diego: Academic Press, 1989).

trenchant features of modernity. I have suggested that modern, western-style capitalism has ineluctably reshaped the social landscape which pre-modern Islamic law had presupposed as its operative setting. Yet, the effects of capitalism can hardly exceed those brought about by the importation of the concept and practice of the nation-state into the Muslim world. And it is precisely here that a further complication to the significance of *maqāṣid* and their place in remapping the legal landscape arises. It would hardly be an exaggeration, I believe, to suggest that there is virtually no problem or issue in the modern legal history of Islam that does not hark back to the discord between the thoroughly indigenous Islamic/customary law and the European-grown import that was the nation-state.²⁷

D. An “Ecological” Misfit?

A conceptual analysis of the disharmony between Islamic law and the nation-state (mainly after the middle of the nineteenth-century) is foundational, in that all chronological accounts of the permutations in modern Islamic legal systems presuppose and rest upon the analytical difference between the pre-existing *system* (largely, but by no means exclusively, defined by the *sharīʿa*) and the *system* that came to replace it (i.e., the nation-state).²⁸ The first and starkest feature that renders them incompatible is that both essentially belong to the same genus in that they are, in their own way, machines of governance. Both are designed to organize society and to resolve disputes that threaten to disrupt their respective orders – however different from each other these orders are.

Second, and more specifically, both are legally productive mechanisms or, to put it simply, law-givers. But couldn't they, as organs bearing the same specialization, co-exist? The short answer must be in the negative. Judged by historical experience (a venue that perforce

²⁷ There is a great merit to the argument that one of the chief problems that encounter the recently fashionable projects of “nation-building” is the fact that the nation-state that is being exported to Muslim countries has required over five centuries of history to develop in Europe, when nowadays it is expected to be adopted and fully incorporated in non-Western countries within a decade, if not less.

²⁸ For a general background essay, see Wael B. Hallaq, “Juristic Authority vs. State Power: The Legal Crises of Modern Islam,” *Journal of Law and Religion*, 19, 2 (2003-2004), pp. 243-58.

renders complex any definition), Islamic law could and did accommodate a measure of legal intervention by the political sovereign, but never did this measure exceed the peripheral and the marginal, especially in terms of determining the substance of the law. (This relative jurial independence is not to be confused with the proposition that the formation of Islamic law was to some degree affected by the institutions of political governance, a proposition which renders the *sharīʿa*'s marked independence even more remarkable.) While it is a given that Islamic law under the Ottomans – the most state-like dynasty of Islam --²⁹ was administered by means of state apparatus, the *corpus juris* applied was overwhelmingly of *sharīʿi* pedigree. Thus, while Islamic law is tolerant of administrative competition, it is only thinly tolerant of substantive juristic intervention. The nation-state, on the other hand – also judged by the very fact of its historical evolution --³⁰ had developed even less tolerance to legislative, administrative and bureaucratic competition. Its staunchly centralized nature *ab initio* precluded any palpable tolerance of other governing systems.³¹

Third, in theory as well as in practice, both systems claim ultimate sovereignty, and it is precisely this opposition that gives rise to serious questions as to *who* determines the *maqāṣid*'s content, form or otherwise. For, at least in juristic political theory, government (*siyāsa*) is subservient to the *sharīʿa*.³² The *raison d'être* of *siyāsa* (whose invocation must *always* presuppose and announce the presence of the civil population) is to serve the interests of the law, not the other way round. That legal sovereignty

²⁹ It is imminently arguable that the Ottoman Empire during the fifteenth century and all of the sixteenth had developed as efficient bureaucracy and administration as Atlantic Europe had done during the same period. For an insightful analysis, see Rifa'at Abou-El-Haj, *Formation of the Modern State: The Ottoman Empire, Sixteenth to Eighteenth Centuries* (Albany: State University of New York Press, 1991).

³⁰ For an excellent account of the rise of the nation-state, see Martin van Creveld, *The Rise and Decline of the State* (Cambridge: Cambridge University Press, 1999).

³¹ It is of course readily admitted, as Sally Merry argues ("Legal Pluralism," *Law and Society Review*, 22, 5 [1988], pp. 869-901), that there exist "competing, contesting, and sometimes contradictory orders outside state law," but the overwhelming scholarly attention to the centrality of state law, and the relatively faint struggle to bring in the discipline of legal pluralism to counterbalance it, are, in themselves, abundant testimony to the pervasive nature and dominant weight of the state and its law.

³² See 'Alī b. Muḥammad al-Māwardī, *al-Aḥkām al-Sulṭāniyya* (Cairo: Dār al-Fikr, 1983), p. 3.

remained, in both theory and practice, within the realm of the *sharī'a* is a fact that hardly squares with the modern nation-state's totalistic appropriation of this paramount form of sovereignty. A nation-state without jural sovereignty is no state at all.

Fourth, Islamic law and the nation-state operated in two opposing directions, the latter compelling and pushing towards an exclusive and ultimate center, and the former demonstrably centrifugal. As typical of Islamic structures (evident in social organization, urban and rural economic organization, mosque architecture, and pre-modern dynastic bureaucracies),³³ the law operated horizontally, so to speak. Aside from judicial appointments which were nominally, if not symbolically, hierarchical, the administration of justice was largely, if not exclusively, limited to the self-structured legal profession. If there was a hierarchy, it was within the profession itself, and was in nature epistemic rather than political or social. Yet, the hierarchy within Islamic law was largely³⁴ universal and self-sufficient, unlike the hierarchy existing in the judicial system of the nation-state, a hierarchy that ultimately reports to the higher corporate orders of the nation-state. The referential authorities of the *qāḍī* were learned *mufīis* and author-jurists. Hard cases were decided with the juristic assistance of the *mufīi*, and appeals did not usually travel upwards in a hierarchy, but were heard by the succeeding judge.³⁵ And even when some complaints were made to the highest offices of the "state" (as happened in the Ottoman Empire), they were made directly and given – with explicit intention – the personal attention of the ruler. Yet more often than not the ruler would send them back to the *sharī'a* judge. This was a personal form of justice, not corporate. By contrast, the nation-state's jural system is perforce hierarchical from within, and

³³ With the partial exception of the Ottomans (see n. 29, above). More generally, see Louise Marlow, *Hierarchy and Egalitarianism in Islamic Thought* (Cambridge: Cambridge University Press, 1997).

³⁴ This is to allow for the occasional but informal complaints that were made to the ruler or provincial governor, a practice falling under the rubric of *maẓālim*. See J. Nielsen, *Secular Justice in an Islamic State* (Leiden: Nedelands Historisch-Archaeologisch Instituut, 1985); F. Zarinebaf-Shahr, "Ottoman Women and the Tradition of Seeking Justice in the Eighteenth Century," in M. Zelfi (ed.) *Women in the Ottoman Empire* (Leiden: Brill, 1997), pp. 253-96.

³⁵ The successor review system was made tenable by virtue of the fact that judges served for short periods of time, an average of six months to two years.

answers to a state hierarchy that is external to it, but one that both sustains and envelops it.

Fifth, and stemming from the preceding consideration, is the central fact that Islamic law is a grass-root system that takes form and operates within the social universe; it travels upward with diminishing velocity to effect, in varying degrees and forms, the *modus operandi* of the pre-modern “state” (by definition a minimal political, bureaucratic, administrative organization). The jurists emanate from the very society and societal culture that they serve, and the law as ideology and doctrine requires that they be, and continue to be, so. It is one of the most striking features of Islamic law, as a substantive and jural system, that it is generated at the very social level on which it was applied. In sharp contradistinction, the law of the nation-state (however democratically representative of the “people’s concerns”) is superimposed from a center in a downward direction, first originated by the mighty powers of the state apparatus and thereafter deployed – in a highly structured but deliberately descending movement -- to the individuals of the social order, those individuals who are harnessed as national citizens (fathers and mothers in the nation’s families; economically productive agents; tax-payers; soldiers, etc.). A society subject to Islamic law is one that is largely self-governing, whereas a society subject to the nation-state is one that is ruled³⁶ from above. If men (and now women) run the modern bureaucracy and make law on behalf of the corporate entity that is the nation-state, then the latter, as M. Weber and S. Quṭb aptly observed, is little more than “the rule of man over man.”³⁷

Sixth, and finally, while Islamic law and the nation-state shared the general goal of organizing society and adjudicating disputes, they did so to significantly different effects. Intrinsic to its behavior, the nation-state is systemically and systematically geared towards the homogenization of both the social order and the national citizen; and to accomplish these

³⁶ Wael B. Hallaq, *Shari‘a*, pp. 159-221.

³⁷ For Weber, see Peter Lassman, “The Rule of Man Over Man: Politics, Power and Legitimation,” in Stephen Turner (ed.), *The Cambridge Companion to Weber* (Cambridge: Cambridge University Press, 2000), p. 83-98; For Sayyid Quṭb, *Milestones* (Cedar Rapids: The Mother Mosque Foundation, 2003), pp. 94-95, and *passim*.

goals, it engages in systemic surveillance, discipline and punishment.³⁸ Its educational and cultural institutions are designed to manufacture the “good citizen” who is respectful of the law, submissive to notions of order and discipline, industrious and productive. Discipline-cum-punishment is integral to, and a unique feature of, the modern nation-state. The resultant “good citizen” is one who can *efficiently* serve the state, the father – and much less frequently the mother -- of all. Obedience to the law, which presupposes submission and – more importantly -- discipline, is then the prop upon which the state rests. Without the law and its tools of surveillance and punishment, no state apparatus can exist. Ergo, the centrality of the element of violence, and of the threat to use it, in the definition of the nation-state. The state, insofar as I am aware, is the only entity in human history that has arrogated to itself the exclusive right to exercise violence or to threaten its use. That the citizen has accepted – or has been conditioned into accepting – this right of the state is perhaps the most salient success of its project. Islamic law, by contrast, has not concerned itself with creating the national citizen, and to this extent, it shares none of the features of the nation-state in this regard. Aside from its higher transcendental aims, Islamic law had little interest in the social order beyond resolving disputes in the least possible disruptive manner to this order. Obedience to God, the nominal and theoretical function of Islamic law, was manifested in communal existence. He who breached communal harmony was deemed to have violated God’s law. That the general goal of Islamic law has always and everywhere been to restore individuals -- to the best extent possible – to their social positions remains one of the most valid generalizations about this legal system.³⁹ Put differently, unlike the punitive-oriented state which created the citizen only to subdue him/her along with society at large, Islamic law mediated conflicts and arbitrated disputes in a constant effort to mend the ruptures of the social fabric. Its prescribed harsh punishments, whenever applied (and mostly they were not), were conceived of as exemplary, intended to deter the forces of corruption which nearly always translated into disrupting social harmony. But it seems also true that, because Islamic law

³⁸ M. Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995); *ibid*; Paul Rabinow (ed.), *The Foucault Reader* (New York: Pantheon Books, 1984), pp. 169-256.

³⁹ Wael B. Hallaq, *Shari‘a*, pp. 164-76.

never constituted part of a machinery of coercive justice, its prescribed penalties represented the furthest limit to human conduct. This did not mean that punishment was applied wherever an infraction took place (which explains why every large Middle Eastern city boasted, among other subversive features, a healthy population of prostitutes) but the limit was designed as a possible invocation against excesses whenever there was enough social force to call for the strict application of penalties. (This feature of Islamic law perhaps explains why the British, among other colonialists, thought of Islamic criminal law as unduly lenient, lacking in punishments, inefficient, and conducive neither to the propagation of discipline nor to the imposition of “law and order.” This also explains why Islamic penal law was one of the first corpuses of law to be replaced by western criminal codes.)

While both Islamic law and the nation-state were constituted as governing organs that by necessity were law-givers, they fundamentally differed in the articulation of their *modus operandi* and ultimate objectives (a fact that should constantly be borne in mind when speaking of the modern functions of the *maqāṣid*). As universal lawgivers, the two systems are mutually exclusive. And since their aims and *weltanschauungen* were so different, such coexistence was precluded *a priori*. It is this teleological difference that pitted the state against Islamic law. In this competition, the latter had no chance of withstanding the assault, much less of winning the jural war, against an entity that is powerfully capitalistic, intrusively bureaucratic-administrative and intensely militaristic. The victory of the nation-state was not only one of displacing Islamic law, but also one which *entailed* the “reordering” of Muslim social structures. The Muslim believer *had* to be converted into the “good national citizen.” The rest is legal history.

On a more specific analytical level, the nation-state confronted Islamic law as a purely legislative entity, our second point above. The nation-state’s jural *modus vivendi* was codification, a method that entails a conscious harnessing of a particular tool of governance. The *maqāṣid*, however articulated or interpreted, must now fit into this new reality. Codification is a deliberate choice in the exercise of legal and political power, a choice that at once accomplishes a multitude of tasks. The most essential feature of the code is the *production* of order, clarity, concision

and authority.⁴⁰ Modern codes and acts, the legal experts agree, have come to replace “all previous inconsistent customs, mores, and law,”⁴¹ those very relations that produced Islamic law and its *maqāṣid* philosophy. This replacement is also totalistic, since codes must also fulfill the requirement of completeness and exclusivity. They must comprehensively cover the area they claim to regulate, an act that perforce precludes both the substantive application and – equally significant -- the authority of any competing law. Where exceptions are made permitting the co-existence of other forms of (pre-existing) law, it is only by virtue of permission granted by such codes. In other words, modern codes always claim exclusive and superior authority, over and above all previous law.

Nor is this all. Codes must be systematic and clear, arranged rationally and logically, and rendered easily accessible to lawyers and judges;⁴² and it is into this legal landscape that the *maqāṣid*, once again, must be fitted. By their very nature, codes are not only declaratory and enunciating of their own authority, but also universal in their statement of rules; hence their conciseness. They pay no direct attention to the individual, whether it is the particular case or the human individual. As an enhancement of this feature, they are always abstract, “to the point,” and deliberately preclusive of the concrete. It was, for instance, held to be a virtue that the “French and German Civil Codes could be held within the boards of a volume while the common law required a full library.”⁴³ But the premium attribute of the code is its capacity to create uniformity, an attribute subsidiary to the universal modern condition as an uncompromisingly homogenizing one. This also explains why it was to the civil codes of Western Europe – and not to the English Common Law -- that the Afro-Asian reformers turned. Thus, codes must create uniformity not only within themselves, but also in their application. The

⁴⁰ Ferdinand F. Stone, “A Primer on Codification,” *Tulane Law Review*, 29 (1954-55), pp. 303-10, at pp. 303-04, acknowledges that codification is a tool of the state, including its reformers, as well as a means to effect a “new economic and social order,” but all this harks back at a single function of codification, namely, “to state the law clearly and concisely.”

⁴¹ S. A. Bayitch, “Codification in Modern Times,” in A. N. Yiannopoulos (ed.), *Civil Law in the Modern World* (Kingsport: Louisiana State University Press, 1965), pp. 161-91, at 164.

⁴² This, according to Stone (“Primer,” 303-04), being the *raison d’être* of the code.

⁴³ Stone, “Primer,” p. 306.

sway of the code's authority therefore overextends its own definition and encroaches upon the administration and implementation of justice.⁴⁴

Islamic law, on the other hand, runs counter to the great majority of the code's attributes. First, Islamic law did not lay any claim to exclusive authority. In fact, it *depended* on the cooperation of customary and royal law (*siyāsa sharʿiyya*), the former being the systemic prop upon which morality meshed into law as a “rational” system. Nowhere did Islamic law operate exclusively, and everywhere customary law was entwined with it in the realm of practice. Nor, in this connection, was Islamic law declaratory, in that it never pronounced itself as the bearer of exclusive authority, as having come to replace others in the field. By its hermeneutic and highly individualistic nature, Islamic law was not systematic according to the European perception of the world, although an expert in it might have viewed the matter entirely otherwise. Similarly, from a modern perspective, Islamic law has been described as obscure and complex, unlike the “clear and accessible” code. While the code is clearly more accessible than treatises of *fiqh*, the argument of clarity is no more than a relative one. An expert in *fiqh* may find it as clear as the modern lawyer finds the code. Admittedly, however, Islamic law cannot be said to have internal uniformity, since plurality of opinion – the so-called *ijtibādhī* pluralism – is its defining feature par excellence. It is on the diversity of its own character that, interestingly, it thrived (and insisted), and it is *in* it that it found the flexibility to accommodate, through variant legal norms, different situations that would otherwise come under the same codified rule. The plurality of opinion answered not only the multiplicity of particular and special situations but the exigencies of legal change.⁴⁵ Its plurality ran counter to the spirit of uniformity, since homogenization – in its modern meaning and effect -- was largely absent from its agenda. And since its interest lay in the individual as a singular worshipper of God, there was no need for an abstract and universalizing language. Most importantly, however, it is the declaratory nature of the code as well as its uniformity of substance and legal effect that betrayed a will-to-power that emanated from the higher offices of the nation-state; by contrast, in

⁴⁴ See Bayitch, “Codification,” pp. 162-67.

⁴⁵ Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), pp. 121-235.

Islamic law such a will-to-power could not exist on any level beyond the purely abstract and theoretical (if not the metaphysical and theological).

That codes must be systematic, clear and accessible is also a function of the difference in roles played by the *faqīh*, on the one hand, and the modern lawyer-judge, on the other. The modern lawyer-judge is the representative and agent of the nation-state, an extension of its agency, and one who studies and applies the code as technocrat. But she does not produce the law of the code, a fact leading to far-reaching effects. The nation-state apparatus of control and surveillance produced the obedient lawyer and judge – obedient, that is, to the commanding powers of the state. Being a technocrat and a specialist in what has been termed “the province of law,” the lawyer-judge is confined to the technical study of law, which is the nation-state’s tool to accomplish control and order for the sake of efficient management of an economically productive citizenry. The *faqīh*, on the other hand, served a different imperative, for long and for most of the time transcending the limitations of technocracy. Among the *faqīhs*, the *qāḍīs* tended to serve as technocrats, but never all of them. For *qāḍīs* wore other hats, so to speak, such as those of the *mufīṭī* and the author-jurist.⁴⁶ Thus a significant number, if not a majority, of the *faqīhs* were intellectuals who routinely engaged in specialized studies of other disciplines, from history, theology and literature, to philosophy, logic, medicine and astronomy. Their desideratum was the discovery and articulation of the law, and they marshaled their interdisciplinary knowledge toward the accomplishment of that goal. They produced the law, and they accumulated the highest form of authority, namely, the epistemic. They, the *mujtahids* and the leading *mufīṭīs*, were thus the public intellectuals who spoke truth to power. This can never be claimed to be an attribute of the modern lawyer-judge.⁴⁷

⁴⁶ Wael B. Hallaq, *Authority*, pp. 166-74.

⁴⁷ The judge’s judicial independence in the modern state, and thus his competence --as a judge-- to speak truth to power, are limited by the very law that the state installs to regulate the judge’s office and function. In other words, the judge’s empowerment (or delegated authority) to speak the truth cannot exceed that empowerment itself (or the bounds of that authority). In contrast, in Islamic legal and political cultures, there was no such empowerment since the state in its modern meaning never existed, and the Shari’a was itself largely independent of all legal and juristic constraints. Therefore, in the Islamic context, speaking truth to power was not predetermined by power’s power to delimit the scope of truth.

E. In Lieu of a Conclusion

With this conceptual background in mind, the *maqāṣid*, if they are to be revived, must be refitted in a new world, which is dramatically different from its pre-modern counterpart and one that shows no signs of disappearing any time soon.⁴⁸ The refitting efforts must adopt one of two options, although neither can represent a mechanical arrangement. The readjustment is one that involves no less than a transplantation into a profoundly new legal ecology. The first option involves a recognition of the permanency of the status quo. Assuming that the *maqāṣid*'s link with Arabicate *ijtihādīc* hermeneutics is successfully severed – the whole point of their rejuvenation as a viable way out of the hermeneutical impasse -- they cannot escape being accommodated within a body politic, the modern state, wherein legal power is above and beyond them. They must, in other words, depend on an alternative hermeneutic that issues, not from an individualistic, socially-embedded, Arabicate-driven *ijtihād*, but from state-designated councils or committees that operate under the shadow of state interests. Having been formed out of the soil of *ijtihādīc* pluralism, they must now cope with the processes and effects of being recast into a code-like forms, the essential *modus operandi* of the nation-state. All this is inescapable, unless the state itself undergoes major transformations.

In terms of content, on the other hand, the sources (*uṣūl*) of the *maqāṣid* will, under the state, cease to be a hermeneutic that is dialectically based on society and text (which are located in opposition to political power), but rather a hermeneutic that incorporates the will of the state and a vision of enacting the “good citizen.” The text – however defined here -- and the hermeneutic are largely shaped by the state on behalf of the citizen as a social being. The social order *qua* social order does not in and by itself generate any law, nor does it remotely have the agency which had produced the *mufīṭī*, the author-jurist and the *faqīh*. If law is a reflection of its sources, of its hermeneutic, of the kind of legal profession producing it, then how can the *maqāṣid* continue to preserve a certain Islamic character (however it may be defined) under dramatically

⁴⁸ Even if the theory of the decline of the state is to be taken seriously, any decline will not occur soon enough to minimize the urgency of this “refitting.” On this theory, see van Creveld, *Rise and Decline*.

different conditions where the sources, the hermeneutic and the legal profession share little, if anything, with their pre-modern counterpart? How, no less importantly, can the *maqāṣid* law (if we were to add to this mix the inevitable effects of capitalism) under the nation-state order accommodate and give voice to the subaltern?

Furthermore, when once they were seen as the moral underpinning of the social order and as an exemplary guideline of conduct which generated willing submission – but by no means a systematic implementation of “law and order” --, they would now, under the nation-state, acquire a disciplinarian fixity with which they had not been associated. Hand mutilation or capital punishment (protecting property and life, respectively) would not be a flexible hermeneutical exercise sporadically used to maintain social harmony (in a specific, localized social group) whenever the jurists and judges felt a limit had been breached, but the all-or-none punishment that must reflect the much cherished blind-justice. How could the cherished values that characterized -- indeed distinguished -- Islamic societies and made them what they are be, *mutatis mutandis*, maintained in the face of such hegemonic transformations? How would the *maqāṣid* maintain that minimalist essence that makes a society Muslim/Islamic, and distinct from others, in the face of modernity’s powerfully homogenizing effects? The overarching estrangement of the *maqāṣid* from their native soil does not alter only their form but also their substantive meaning and material contents. Perhaps most central in this transformation is the loss of the moral *order*, or the moral community, upon which the application of Islamic law depended and which it presupposed. If the *maqāṣid* universals are to have any genuine Islamic meaning and content, they must be situated in a morally-based community, in the sense that the socially-embedded moral code is systematically maintained as the driving engine of the law, not the other way around. The loss of the moral community is the quintessential triumph of modernity. How this community can be revived under the clutches of the modern project is perhaps the most central and urgent question of all.

These challenges are formidable enough in the presence of the irretrievable modern nation-state -- whatever form it may take in the

future.⁴⁹ To install the *maqāṣid* in a legal system in which the state is subservient to the Shari'a –as many Muslims call for today-- is to argue for a more radical solution, and thus to face an even more formidable challenge. This is the second option, which would require the construction of a new conception of the law and legal morality, a new legal system, a new legal culture and education, a new economy, and a new moral community. All this, in other words, would require transcending modernity, the ultimate challenge facing the entirety of humankind today.

⁴⁹ *Ibid.*

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