

# **Sharia and Politics**

**Questions for Post-Revolution Phase**

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## Introduction

Praise be to God, praise that is abundant, pure and blessed with which He is pleased as befits the Glory of His Face and the Greatness of His Might. May Allah's Peace and Blessings be upon the most blessed of all being; the Last of all Messengers, Muhammad, and upon his Family, Companions and Successors and those who followed their example up to the Day of Judgment.

The Muslim *ummah*, especially the Arabs have been for long contending against dark decades where the *ummah* witnessed some of the worst eras ever experienced in history. The key problem that faced our nation in such dim decades has been the loss of the genuine value of human rights and dignity, and even the very essence of humanity.

Before 2011 CE/1432 AH, the Tunisians, Egyptians, Libyans, Yemenis, Syrians, and the list goes on, had been treated inhumanely as cheap commodities used to serve the interests of few monopolist tyrants who relied merely on employing violence and oppression and exercised media monopoly that acted as a conveyor belt for the tyrannical elites' lies. Alas, the Arab people in many Arab and Muslim countries and other parts of the world lost their worth and value; their blood, dignity, wealth and even religion, moral values, identity, and history became badly violable and worthless in the eyes of their own people before their enemies and in the eyes of their very rulers before rulers of other countries.

Numbers and statistics on rates of poverty, sickness and crime motivated by greed, neglect, corruption and tyranny in all its forms do not derive anyone to act nor do they call for any change in policies. They have become of no significant concern for any official, high or low in rank.

The Arab countries have grown old mirroring their old rulers. The honest among them have grown old and decrepit echoing the decrepitude of the regimes in charge. Many of these countries were actually in ruins. Left in despair, some youth brought an end to their hopeless life and others fled their countries throwing themselves into the midst of terrible seas in hopes to safely disembark at the shores of other civilizations. Those who managed to escape their countries alive have found themselves new “homelands”!

It is out of the great wisdom of God and a manifestation of His perfect grace, mercy and generosity that He caused people to pass through the different turns over history: “[...]know that] similar misfortune has touched [other] people as well...”<sup>1</sup> He also promised the unjust tyrants an ugly end: “And such is thy Sustainer's punishing grasp whenever He takes to task any community that is given to evildoing: verily, His punishing grasp is grievous, severe!”<sup>2</sup> He rendered injustice a reason for incurring destruction and ruin of civilization, as Ibn Khaldun (Ibn Chaldean) contended:

Chapter XLIII: Injustice calls for the eradication of the (human) species by leading to the ruin of civilization ... Those who unrightfully impose unjustified taxes, devour people's properties and infringe their rights are unjust oppressors. The evil consequences of such attacks (on property) are manifested in a general destruction of the state triggering the ruin of the civilization which is its very essence, as it causes people's hope to wither. You should know that this is what the Lawgiver actually had in mind when he forbade injustice. He meant preventing the ensuing destruction and ruin of civilization, which ultimately permits the eradication of the human species. This is what the religious law quite generally and wisely aims at in emphasizing five essential

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<sup>1</sup> The Quran, 3:140.

<sup>2</sup> The Quran, 11:102.

Maqasid: the preservation of the faith (religion), soul (life), mind, offspring and property...<sup>3</sup>

Indeed, such unjust state shall perish, even if it belongs to the Muslim land or its people are Muslims. Ibn Taymīyyah averred:

It is through justice that the affairs of people are best managed in this world, even when justice is mixed with a degree of sin, as opposed to injustice in the distribution of rights, even in the absence of sinfulness. Therefore, it is said that God supports the just state even if it is non-Muslim, yet withholds His help from the oppressive state even if it is Muslim. It is also said that the worldly life may be set right and sustained when justice is established; the rule can be successful and lasting despite the lack of faith, but it can never succeed when injustice dominates. The Prophet said: “There is no sin in this world that is punished quicker than oppression and severing the ties of kinship.” The oppressor shall suffer punishment in this world even if s/he be forgiven and relieved in the Hereafter. In this way, justice is made the foundation upon which everything has been established. When matters pertaining to this life are based on justice, it will function correctly and remain on the right course, even if the person who establishes this justice does not have any share in the Hereafter (i.e. is to be judged harshly in the afterlife). Conversely, if this life is not based on justice, it will not be on the right course, even if the person who does not establish justice has faith for which he shall be rewarded in the Hereafter.<sup>4</sup>

Therefore, the turn is now to truth over falsehood and the Arab spring is rising after a long bleak winter foreshadowing much prosperity. Praise be to God that the Arab peoples have rose up one after the other, calling

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<sup>3</sup> Ibn Khaldun, *al-Muqaddimah*, (Cairo: Dar Nahdat Misr, 1416), chap. (43), p. 28.

<sup>4</sup> Ahmad Ibn ‘Abd al-Halīm Ibn Taymīyyah, *Kutab wa Rasa’il wa Fatawa Shaykh al-Islam Ibn Taymīyyah*, (2<sup>nd</sup> ed. N.D.), vol.28, p.147.

for reform and offering their unjust rulers only two options: either reform or departure!

It reminded me of what Ja'far ibn Yaḥya once wrote to one of his subordinate governors under his authority, "Behold! It has come to my knowledge that fewer of your subjects commend your rule whereas many complain; you should either establish justice or else leave your office!"<sup>5</sup>

However, this fair peaceful call that began with modest demands for reform and equity, which was welcomed in some Arab countries, was unfortunately met with utter negligence in some other Arab countries and even with violence, murder, false accusations of treason and the employment of a purely police and military solution! Therefore, it was no surprising that the Arab peoples found themselves left with no other choice but to rise up.

The giant has been woken up in Tunisia, Egypt, the Yemen, Libya, Syria and other Arab people in general; they rose up against their oppressors, who failed to listen to the voice of reason and wisdom and address the winds of change duly. They failed to comprehend the divine natural laws and norms set by God in relation to the establishment of states and stable communities. Accordingly, the Arab revolutions continued to erupt in succession; the voices calling for reform and justice grew higher and stronger, and the demands grew bigger and bigger. Verily, such commendable efforts shall be proven successful, God willing: "Nor is this difficult for God."<sup>6</sup>

Praise be to God who conferred upon us the grace of witnessing the uprising of the Muslim youth of this fecund nation, supported with the elderly, to enforce change after decades of darkness. Gracious gratitude

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<sup>5</sup> Ibn Sayyid al-Batlayūs, *al-Iqtidāb Fi Sharḥ Adab al-Kuttab*, (Beirut: Dar al-Jīl, 1973), p. 102.

<sup>6</sup> The Quran, 14:20.



and appreciation are due to our youth, the pioneers and reformers who are to be credited for such accomplishment, next to God, indeed.

Notably, special gratitude and appreciation are due to our noble martyrs, young men and women and others, who willfully paid the ultimate sacrifice. What a great and invaluable sacrifice it is for one to give his own life for what he or she believes in! They have sacrificed their lives for the long-desired change to materialize, although it has been unexpected to take shape any soon. Those heroes are worthy of the refined rank of martyrdom from the Sharia-oriented perspective. Based on the Sharia-oriented definition of the term ‘martyrdom,’ they enjoy the higher status of martyrdom and even higher than martyrs who die in battlefields.

This judgment is not personal. Such matters should not be decided according to personal opinions or human discretion; rather, the status of ‘martyrdom’ is a matter of the unseen (*ghayb*) that is only decided according to religious texts in isolation from human discretion. The Prophet (May Allah's Peace and Blessings be upon him) said: “The leader of the martyrs is Ḥamzah ibn ‘Abd al-Muṭṭalib and a man who stood up before a tyrant and enjoined good and forbade evil, and he killed him.”<sup>7</sup>

When a man (male or female, because manhood in the Arabic language is different from masculinity!) stands up to the unjust tyrant, let the title be “President, head of the state, prince, king, sultan, commander-in-chief, or leader of whatsoever nature,” and commands him to establish justice, forbids him from oppression, and demands of him to implement reform and run the affairs of people duly and fairly, this is, indeed, one of the best rewarded good deeds in Islam. Were such a brave person to be killed at the hands of a tyrant, he shall be held in the same refined status of Ḥamzah, the greatest of martyrs and the Lion of Allah and of

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<sup>7</sup> Al-Ṭabarānī, *al-Mu‘jam al-Kabīr*, 3:151, al-Hakim, *al-Mustadrak*, 3:215.

His Messenger. He shall be elevated to the status of martyr as evinced by the authentic Ḥadīth.

The importance of this Ḥadīth should be emphasized in this context, because some students and teachers in the Islamic Sharia arena or those who speak in its name tend to adopt a narrow perspective dominated mainly by formality and stereotyping in addressing Islamic issues. A false illusion has been built in their minds that a martyr is only the one who dies on battlefield in fight between "Muslims" and "non-Muslims" to be worthy of the refined rank of a martyr who scarifies life for the sake of God and accordingly earns Paradise and rewards promised for a martyr in Islam. Some even labeled protesting against unjust rulers to have the voice of Truth heard as a "revolt against the Muslim ruler," and "*fitnah* (insurrection)," and "undermining and imperiling the security and safety of the Muslim state."

In fact, they ignorantly or forgetfully overlook that the Prophet urged Muslims to enjoin what is right and forbid what is wrong (for Muslim leaders and common people alike). He also said "Whoever among you witnesses an evil action (being committed) and is able to change it with his hand, he should change it with his hand (by taking action); if he cannot (do it with his hand), then with his tongue..." Indeed, numerous Ḥadīths (prophetic traditions) to the same effect are known to all Muslims. I fairly assert that this limited flawed viewpoint may be motivated by personal evil intentions and pursuit of worldly pleasures, may God guard us, not because of the lack of knowledge!

It should be underlined in this context that the Muslim scholars, thinkers, and wise figures generally have been supportive of these revolutions; many scholars have even participated in various demonstrations in person and supported them by means of their opinions and *fatawa* (juristic verdicts). They have declared this uprising a form of the enjoining of right and forbidding of evil. Allah (may He be Exalted) says:

“You are, indeed, the best community that has ever been brought forth for [the good of] mankind: you enjoin the doing of what is right and forbid the doing of what is wrong...”<sup>8</sup>

They also conceived it as a means to reform; God (may He be Exalted) says: “...I desire no more than to set things to rights in so far as it lies within my power...”<sup>9</sup>

They keenly called for just retaliation against the killers of the peaceful protesters and issued several *fatawa* on the permissibility of peaceful demonstrations and the legitimacy of self-defense against murder, torture and abuse. They have also asserted that blood money or death compensation (*diyyah*) is not admissible from the killers of the peaceful demonstrators and revolutionists, because such crimes have been committed against the Muslim people as whole, not merely against individuals. Unlike individuals who may give up their rights to retaliation, no one can waive the rights of all Muslims. They have issued many *fatawa* in this vein.

However, few Muslim scholars deviated from that supportive stance to the Arab revolutions and discouraged people from participating in demonstrations under the pretext of preventing bloodshed and violation of honor. Perhaps, they exercised *ijtihad* in search after truth but failed to attain it. Some other “scholars”, on the other hand, deemed demonstrations forbidden and aggressively attacked them, and sometimes even used improper language. They attacked the protests in general, even the peaceful ones. Others even accused the honorable and brave demonstrators and protesters (males and females) of terrible (groundless) crimes. They dressed their claims and accusations in Sharia’s clothing, yet they are significantly remote from its genuine essence. The Islamic Sharia is as Ibn al-Qayyim described it,

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<sup>8</sup> The Quran, 3:110.

<sup>9</sup> The Quran, 11:9.

Sharia is based on wisdom and achievement of people's welfare in this life and the afterlife. Sharia is all about justice, mercy, wisdom, and good. Thus, any ruling that replaces justice with injustice, mercy with its opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to the Sharia, even if it is claimed to be so according to some interpretation.<sup>10</sup>

No matter how hard they tried to misinterpret and twist the religious texts to justify the wrongful killing of the innocent, injustice, mischief on earth, the demolition of houses over the heads of their innocent inhabitants, and the suppression of the proponents of justice, and even undermining the attempts to reform and the demands of settling grievances – no matter how hard they tried— Truth is crystal clear and Justice is manifest. Wherever justice is established, the Sharia is materialized.

The above cited statement of Ibn al-Qayyim serves as a sound criterion to a proper and genuine understanding of the Sharia. It is not impermissible to misinterpret and twist religious texts to misuse the Sharia in order to justify oppression, murder, bloodshed, torture, and violations of honor using religious texts and juristic opinions (*fatawa*) to hold up such claims as seen in Egypt, Libya, Syria, Yemen and other countries! The true Muslim scholar should firmly stick to justice; God (may He be Exalted) says: "Behold, God enjoins justice..."<sup>11</sup> Indeed, justice is one of the key holistic and universal Maqāṣid (higher objectives) of the Islamic Sharia.

The concept of 'justice' in Islam is not only a "liberal," "secular," or "legal" nature, but Justice is one of the Beautiful Names of God and the kernel of religion as advocated by Prophet Muhammad at a time when this human principle was absent from the world! Justice is one of the

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<sup>10</sup> Shams al-Dīn Ibn al-Qayyim, *I'ān al-Muwaqqi'īn*, (Beirut: Dar al-Jīl, 1973), p. 333.

<sup>11</sup> The Quran, 16:90.

fundamental tenets of the Islamic faith and the Sharia-set Maqaşid, as the following pages evince.

In this critical stage, Muslim scholars and thinkers should continue to shoulder their commendable role in support of the Arab revolutions and Arab/ Islamic reform movements (those proven successful or still on the way, God willing), through intellectual and religious guidance, before everything else, and even before political work. I have developed a personal opinion on scholars' political participation (i.e. ruing for executive political offices), as I believe that it is much better for a well-versed scholar qualified for *ijtihad* to transcend executive positions and partisan politics. It is befitting them to devote undivided efforts and focus to offer sincere advice for all and guard the pillars of Islam and referential authority.

However, when a scholar shoulders an important political role upon the request of the people that none but him can shoulder in a certain political stage – it is better for him in this case to refrain from issuing *fatawa* (especially those related to obligations or proscription) on controversial religious matters that are open for Ijtihad, be they doctrinal or political. He should also enhance the scope of speech from addressing what is “permissible” and “prohibited” to address issues of “public interest/welfare (*maşlahah*)” and “mischief (*mafsadah*)” or “right” and “wrong”, which is more befitting to the executive political arena, lest Islam or the Sharia may falsely be overburdened with extraneous claims. God (may He be Exalted) says:

“Hence, do not utter falsehoods by letting your tongues determine [at your own discretion], "This is lawful and that is forbidden", thus attributing your own lying inventions to God...”<sup>12</sup>

Accordingly, such a scholar, I think, in his capacity as a politician should not declare a certain political action “obligatory” or forbidden” as per the Sharia, such as participation in a given protest, signing of a given

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<sup>12</sup> The Quran, 16:116.

statement or voting for a certain candidate. Instead, he should leave the labels of “religious obligation” or “prohibition” to the known and clear religious provisions of the Sharia which are not open for different perspectives, interpretations, and political views.

I intend my words to be sincere “advice” within the scope of the Sharia-oriented interest (*maṣlaḥah shar‘īyyah*) and not within the scope of “religious obligation” or “religious duty,” in my humble opinion. I feel an urge to devote the following pages to address a significant intellectual topic that is, actually, one of the most important “post-revolution” topics and the consequent results of having a proper understanding of it guarantees the realization of some interests (*maṣaliḥ*) of the Muslim nation and Islam. Moreover, the consequent misunderstanding of such a critical topic incurs grave evils that may even bring about public misfortunes on the Muslims’ religion, hearts, minds, honors, and wealth.

This intellectual topic is the "Islamic Sharia and Politics"; a topic that has recently become controversial giving rise to many questions and proposals, most of which, in my view, have lost sight of the consideration of the Sharia-oriented priority order, public interests (*maṣlaḥ*), Maqaṣid, purposes, and principles of the Sharia, giving precedence to that which is most important over that which is important; to the general (‘*ām*) over the specific (*khaṣ*); to the restricted (*muqayyad*) over the absolute (*muṭlaq*); to the immutable (*thabīṭ*) over the 'mutable' (*mutaghayyir*); and to the necessities (*ḍarurīyyāt*) over the qualitative luxuries (*kamālīyyāt*).

Many urgent questions were raised about the relationship between the Islamic Sharia and politics in the post-revolutions phase. These questions are in need of answers. A discussion should be initiated to investigate a number of issues, especially after the remarkable success of the candidates and parties with "Islamic" political programs in various elections held in the Arab world since the outbreak of the Arab revolutions, whether in countries that witnessed revolutions or others that decided to take serious steps towards reform and good governance

to avoid problems, and whether in elections for legislative councils, district council, or even trade unions.

In the following pages, we attempt to provide answers to these questions that can be epitomized as follows:

- 1) Does the Islamic Sharia clash with national identity?
- 2) What is the difference between the Rulings of Sharia and the Principles of Sharia?
- 3) Are Muslims legislatively bound to abide by the very policies and political decisions and discretions of Prophet Muhammad?
- 4) What is the Sharia-oriented top priority in this phase?
- 5) Does the Sharia give legitimacy to the ruler's sole political discretions over certain matters?
- 6) How to identify the relationship between that which is "religious" and that which is "civil"?
- 7) How to achieve justice in the society from the Islamic perspective?
- 8) What is the Islamists' correct stance towards "seculars" and "liberals"?
- 9) Does the Sharia differentiate between sins and crimes (punishable by law)?
- 10) What about the call for the application of the prescribed penalties set by the Sharia?
- 11) What about levying the *jizyah* from non-Muslims?
- 12) What is the Sharia's stance on the reforms of the family laws before the revolutions?

The following chapters were written in separate articles with aim to answer these questions in simplified language free from the juristic

special jargon and terms without, so I hope— the least violation of the legal contents. These proposed answers are the product of a number of lectures and discussions took place during 2011 about the religion-state and the Sharia-politics relationship. Although the context of these answers belonged to the countries in which the revolutions occurred, I hope their ideas would be of actual benefits to other countries, future revolutions and reform movements within the Arab Spring countries (e.g. Tunisia and Egypt), as examples not only for the rest of the Arab and Muslim countries, but for other eastern and western countries as well.

Praise be to God for the awakening of the Arab peoples; praise be to Him, the Lord of all Worlds.

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Cairo

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# 1

## Does Islamic Sharia clash with National Identity?

Every individual has an identity or even identities, and each nation has its distinct set of identities as well. The identity can be defined as a set of cultural, linguistic, religious, historical, geographical and social key components that distinguish one individual from others and tell apart one nation from the others. The most important constituent of the Islamic identity, which distinguishes Muslims from other nations, peoples and civilizations—is the Islamic Sharia.

It should be noted, though, that an individual may hold many identities and they are not necessarily on a collision course with one another! If we pondered over the Egyptians, for instance, they represent multiple identities and cultures, not one single identity and culture. Every Egyptian has more than one identity and these identities are not necessarily in conflict. Rather, they are integrated within the Egyptian character and conduct.

First: all Egyptians hold an “Egyptian national identity” reflecting the particular characteristics related to ancient and modern Egypt; that is to Egypt’s culture, history, and geography. This identity is shared by all Egyptians as a national identity.

However, all the Egyptians, or at least the vast majority of them, hold an Arab identity as well. This identity represent a set of components related to the Arabic language, different Arab races and tribes, and the sense of belonging to the Arab world stretching from Morocco to Iraq, its culture, history, and geography, and the shared struggles and hopes among all Arabs. This is another important component of the Egyptian identity, whether Muslim Egyptians or otherwise; they all speak Arabic and read their holy scriptures in Arabic. This indicates some sort of

affiliation to the Arab nation shared by all where the Egyptian identity and other Arab identities overlap.

The Christian identity is also a part of the Egyptian national identity; a Christian Egyptian following the Orthodox Egyptian Church or any other church in Egypt throughout ages is deeply affected in faith, family, life and worldview (of the cognitive conception of God, Man, universe, life, mind, history and other constituents and components of human consciousness).

The Egyptian identity also contains other ethnic and tribal affiliations that only some Egyptians share, e.g., the Nubian identity is a part of the Egyptian national identity whereas the Nubians display clear affiliation to their African origins, traditions and culture; they even have their own distinctive language. The Bedouin identity of the people of Sinai forms another ethical identity beside their Egyptian identity. The Bedouin identity of *Awlad 'Ali* (Sons-of-'Ali Tribes) in western Egypt forms distinct ethnicity with many cultural components shared by some Libyan brothers in the east of Libya who belong to the same tribe.

The identity of the "*Ashraf*" (noble descendants of the Prophet's family) in Egypt display their affiliation to their shared origins and find pride in this identity, congregating around it and perceiving it as part and parcel of their unique identity and an essential component of their culture and history.

Some Egyptians have other identities relating to various Eastern or Western countries to which they have migrated or in which they have settled for long periods. Egyptians who migrated or lived abroad for long periods, their children developed new Eastern and Western identities related to other civilizations (in which they lived). Those identities and the Egyptian national identity overlap, especially after the increasingly widespread phenomenon of migration of Arab and Egyptian creative minds.

Similarly, the majority of Egyptians hold an Islamic identity linking them to Islam; namely, the Islamic culture, history, geography and people

around the world. This affiliation to Islam varies according to the individual's commitment to the Islamic rituals and practices; that is according to the individual's adherence to the Islamic Sharia. It can be fairly concluded that the Islamic Sharia is the key criterion that defines the degree of proximity to or estrangement from the Egyptian Islamic identity. Consequently, the issue of Sharia is a vital and critical issue in the Egyptian context, as it directly touches the "the Egyptian national identity;" it is not a matter of luxury or a mere revival of an old tradition.

An analogy can be drawn between the previous example and other Arab and Islamic peoples in which the Islamic Sharia represents an essential component—not the solo component, of the national identity or of the identity of the Muslim majority beside other identities recognized in languages, religions, sects, tribes, phratries, regions that make up the unique character of those peoples.

Linguistically speaking, the Arabic word Sharia denotes the road or (clear, well-trodden) path to water. In the intellectual sense and as an Islamic terminology, it signifies the divine way of life set by God for human beings to follow. God (may He be Exalted) says:

“Unto every one of you have We appointed a [different] law and way of life....”<sup>13</sup>

Speaking of Muslims, He also says: “In matters of faith, He has ordained for you that which He had enjoined upon Noah - and into which We gave thee [O Muḥammad] insight through revelation - as well as that which We had enjoined upon Abraham, and Moses, and Jesus: Steadfastly uphold the [true] faith, and do not break up your unity therein. [And even though] that [unity of faith] to which thou callest them appears oppressive to those who are wont to ascribe to other beings or forces a share in His divinity, God draws unto Himself everyone who is willing, and guides unto Himself

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<sup>13</sup> The Quran, 5:48.

everyone who turns unto Him.”<sup>14</sup> This verse addresses the shared aspects of all these different divine laws.

As for Islam in particular, God (may He be Exalted) addresses His Messenger saying:

“And, finally, [O Muḥammad,] We have set thee on a way by which the purpose [of faith] may be fulfilled: so follow thou this [way], and follow not the likes and dislikes of those who do not know [the truth].”<sup>15</sup>

Hence, the Sharia is the Islamic divine way of life sent down by God to His Messenger manifested in the divine revelations (the Quran and the Sunnah). It may be useful in the context of addressing the Sharia and politics to differentiate between the terms “Sharia” and “jurisprudence (*fiqh*).” Islamic Jurisprudence (*fiqh*) denotes understanding and perception; it refers to the ideas or practical rules understood and deduced by people (jurists) from the divine Sharia revealed by God. It is a matter of human cognition and understanding of the Quran and Sunnah rather than a literal manifestation of divine commands. There is a difference between the “Lawgiver (*shari*)” and the “jurist (*faqīh*).” The Lawgiver personifies God; sometimes it is used in reference to the Prophet, as he reported the divine revelations to people either verbally in his prophetic traditions (*Sunnah qawliyyah*) or practically translated in his conduct and practices (*Sunnah fi’liyyah*). It is mainly a name for God and could not be used for humans, except for the Prophet, when he “conveys a message from God.” However, it should be noted that the Prophet’s everyday activities called “non-legislative actions and instructions” do not fall within the scope of lawgiving.

The *faqīh* (jurist), on the other hand, is held in a lesser degree compared to the Lawgiver, God, and the Prophet in the context of legislation. The term refers to human beings (scholars) who possess adequate religious

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<sup>14</sup> The Quran, 42:13.

<sup>15</sup> The Quran, 45:18.

knowledge to exercise juristic reasoning and exert intellectual inductive efforts to understand the Sharia and deduce Sharia provisions. This is why the scholars of *uṣūl al-fiqh* (fundamentals of Islamic jurisprudence) avowed that “It cannot be referred to God as ‘*faqīh*,’” in the sense of having full and profound comprehension, because this attribute does not befit His Majesty; it is an attribute befitting humans, indicating imperfection and deficiency.

Only the attributes of perfection can be ascribed to God. Given that *fiqh* represents the ‘cognitive’ part of the Islamic law, while Sharia, by definition, represents the ‘heavenly’ part of this law, the term *faqīh* is used for people with ‘understanding’, ‘perception’ and ‘cognition’ and is not to be used for God. The *faqīh* is a created human being, whereas the Lawgiver is the Creator. The *faqīh* is prone to error, but God is impeccably exalted above errors. The *faqīh* may change his juristic opinions and discretions given the change of time, place and surrounding circumstances or perhaps the emergence of new evidence guiding him to the truth; on the other hand, God is impeccably far above that imperfection.

The Sharia, as a constituent of the "identity", cannot be open for juristic reasoning (Ijtihad)! In other words, the identity should not incorporate matters and aspects which are open for juristic discretions and interpretations or issues that are subject to change based on the surrounding conditions, customs and conditions, even if they are part of the Sharia in the traditional juristic sense. None is entitled to claim that certain subsidiary (*far’i*) or partial (*juz’i*) juridical cases (*masa’i*) and provisions are "identity-related." Sharia in this identity-oriented sense incorporates the fundamental doctrinal tenets and legislations revealed to the Prophet and on which decisive creed- related matters and rulings are established beyond any potential disagreement and that are seen as foundational postulates upon which no two Muslims would disagree. In fact, this is a very limited scope, yet very significant and fundamental.

In the broader juristic sense, the Sharia tolerates many differences of opinion and different juristic discretions known to the scholars and

students in this discipline. There are hardly any subsidiary juristic issues (*fiqh-related*) about which scholars did not hold different opinions. Only very few juridical cases are agreed upon by all scholars; they refer to “fundamental tenets” that are established beyond dispute and different interpretations. The agreement of opinion in this case is known as scholarly consensus (*Ijma’*), and all Muslims accept and abide by that scholarly consensus. These juridical cases are also referred to as “unquestionable elements and principles” that can be practically considered components of the Islamic identity. The juridical cases that are open for different interpretations and may be right and wrong— are in isolation from these fundamental tenets, the scope of belief and disbelief or issue of identity.

Those who have called, or are calling, for removing any reference to Islam or Sharia in the constitutions of their Muslim-majority countries - as seen in Egypt and Tunisia, for example, under the pretext of advocating the establishment of a “civil state” – are actually contradicting a key component of the character of an overwhelming sector of their peoples and prejudicing their ‘identity.’ I do not believe that the vast majority of Muslims (who are the absolute majority of the Egyptian and Tunisian peoples, for example) would approve of the removal of the reference to Islam from their constitutions. Actually, it is against their national identities, which are integrally and commonly associated with other local, regional, tribal, and their other identities, not in conflict with any of them as stressed above.

A major question remains in need of an answer; what is the scope of the influence of "Sharia" in the society's public order? Does the Sharia include all agreed-upon detailed juristic issues, as some may argue? Are we only bound to the general universal principles, *maqasid* and essential value of the Sharia (e.g. justice, brotherhood, freedom and cooperation, etc.) as others postulate?

In fact, the accurate answer to this question needs a detailed account and calls for eliminating the blur between different types of Sharia-related issues. Some Sharia-related issues serve as fundamental

referential authority, including the universal principles, values and concepts, not applicable to all contexts. Other Sharia-related issues govern the details of everyday life affairs and laws, not in all issues. More information is to come on this topic in the context of exploring that which is "religious" and that which is "civil" and the religious-civil relationship. There, the issues controlled by the Sharia general principles, *maqāṣid*, concepts and values shared by all Muslims are made evident whereas the issues in need of the specific treatment when the juristic opinions of the traditional schools of jurisprudence are invoked—are stressed.

Any response to this question is also related to the stance of non-Muslims in the Muslim-majority community and the scope of their right to hold their divine Sharia as a referential authority in some issues to preserve their own identities that they cherish. The question also faces the stance of many Muslims who, in the name of secularism, liberalism or other political doctrines, refuse to consult the Islamic Sharia as referential authority.

## What is the difference between the Rulings of Sharia & the Principles of Sharia?

Before exploring the issues of the fundamental universal principles of the Sharia that should be referred to— as stated in “Al-Azhar Document<sup>16</sup>”, for example, and other important documents and foundational proposals in this phase, it is important to answer the following question: “What are the “principles of the Islamic Sharia”? What is their relationship with the various legal rulings? What is the scope of their juridical authority and authenticity? Does referring to those principles as "primary source of legislation" mean that we can not necessarily refer to the juristic details of the Sharia in the juristic sense in any given juridical case?

First, the technical term used in the Islamic jurisprudence jargon to signify the principles, universal rules and objectives of Sharia is the “Maqaṣid of the Sharia.” The term refers to the ultimate ends, interests,

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<sup>16</sup> See the extensive reference to "the principles of the Sharia" in the famous Al-Azhar Document. Visit the Egypt State Information Service (SIS) website: [www.sis.gov.eg](http://www.sis.gov.eg) Al-Azhar Document incorporates the following principles: "**First:** Al-Azhar supports establishing a modern and democratic state according to a constitution upon which Egyptian agreed on and which separates between the state authorities and its governing legal institutions. Such constitution should establish rules, guarantee the rights and the duties of all the citizens equally and give the legislation power to the people's representatives in accordance with the true Islamic aspects. Islamic states whether culturally or historically differ from other states which rule by oppressing its people and from which we human suffer a lot in the past. Islamic state let people manage their societies and choose their ways and techniques to achieve their interests provided that the Islamic jurisprudence is the main source for the legislation and in a way that guarantee for other divine religions' followers to appeal to their religions in their personal issues. **Second:** Al-Azhar embraces on democracy based on free and direct voting which represents the modern formula to achieve the Islamic precepts of "Shura" (consultation)."



meanings, higher objectives, wisdoms and rationales behind rulings (more details on the hairsplitting differences among these similar terms is found in the special treatment of jurisprudents) that the Sharia has come to accomplish for people. The philosophical foundation upon which the Maqaṣid are established is that God does not do anything in vain. He conferred upon us the grace of sending the Prophet and the Sharia (divine revelation) to us.

It was not a matter of vanity; revelation came to meet certain interests and accomplish specific objectives and goals. One of the most important Maqaṣid and higher goals, for example, is Justice. God (may He be Exalted) says:

“Indeed, [even aforetime] did We send forth Our apostles with all evidence of [this] truth; and through them We bestowed revelation from on high, and [thus gave you] a balance [wherewith to weigh right and wrong], so that men might behave with equity...”<sup>17</sup>

The article “*L* (pronounced: *laam*)” in the Arabic word “*(L)iyaqum* i.e. so that [men] might behave” means ‘so that’ and indicates causality. This means that establishing justice and equality is a fundamental objective and purpose for sending messengers and divine scriptures to mankind. It is one of the universal general Maqaṣid of the Sharia among other Maqaṣid mentioned by scholars in their different theories on the issue.<sup>18</sup> This calls for pondering over the fact that whoever dies for the sake of establishing justice is considered a martyr, as asserted in the previously cited Ḥadīth.

In this sense, the Maqaṣid and the principles of Sharia are thus aspects of understanding the Sharia, not the Sharia itself; they are the profound, important interpretations and understandings of the Sharia. Therefore, this cognition of the Sharia has multiple interpretations and

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<sup>17</sup> The Quran, 57:25.

<sup>18</sup> See, e.g., Jasser Auda, *Fiqh al-Maqasid*, (Beirut: IIIT, 3rd. 2008).

not only one. Although there is no enough room to detail those interpretations here,<sup>19</sup> we will highlight some of the key divisions, namely, those related to necessities (*ḍarurāt*), needs (*ḥaḥīyyāt*) and embellishments (*taḥsinīyāt*).

The necessities refer to the basic needs indispensable to human life on which the lives of people depend and whose neglect leads to total disruption. The needs come next to the necessities and include all matters outside the area of life and death i.e. less essential to human life. The third category includes the embellishments that are neither essential nor complementary to what is necessary; things only desired for consumption. The realization of all these *maṣāliḥ* of different degrees is derived from the objectives the Sharia with aim to secure them in people's lives on their different levels.

As for the necessities, the specialized scholars maintained that they include the preservation 1) faith (religion), 2) soul (life), 3) mind, 4) offspring, 5) honor, 6) and property. Scholars held slightly different opinions about the details and the order of these items. Imam al-Ghazali finely and precisely averred that such preservation includes two dimensions: positive and negative. The negative dimension is to protect the interests from loss or waste and the positive dimension is to foster and promote them. Both dimensions must be considered in application and actualization.<sup>20</sup>

For example, the preservation of 'faith' means to protect the foundations of Islam, i.e. the articles of faith in God, since everything in Islam is closely associated with faith. However, preservation of 'faith' - in this sense - is the first priority among the Sharia Maqāṣid and purposes. That is to protect the fundamental belief in God from all

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<sup>19</sup> In this area, I have some modest papers and published works. See, e.g., Jasser Auda, *Fiqh al-Maqasid*, (Washington: IIIT, 3rd. 2008); Jasser Auda, *Maqasid al-Sharia Ka falsafah Lit-Tashri' al-Islami—Yu'yah Manzumīyyah*, (Beirut: IIIT, 3rd. 2012).

<sup>20</sup> More information is available in the above cited references.

undermining false beliefs and ideas. This is as far as Muslims are concerned.

As for non-Muslims, the preservation of 'faith' is guaranteed as per the Sharia: "The non-Muslims have rights equal to that of Muslims and so are their duties and ours."<sup>21</sup> The preservation (*ḥifẓ*) of the "faith" in relation to the non-Muslims means preserving their freedom of belief. The Quran clearly states:

- "There shall be no coercions in matters of faith."<sup>22</sup>
- "And say: "The truth [has now come] from your Sustainer: let, then, him who wills, believe in it, and let him who wills, reject it."<sup>23</sup>
- "...dost thou, then, think that thou couldst compel people to believe..."<sup>24</sup>

These are verses with lucid clear-cut indications evidencing that a non-Muslim cannot be forced into embracing Islam or commitment to any of the specific provisions for Muslims. This is the due preservation (*ḥifẓ*) of 'faith' in relation to non-Muslims. The term coined by Shaykh Imam al-Ṭahir ibn 'Ashūr to the same effect: "Freedom of Beliefs."<sup>25</sup>

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<sup>21</sup> It is called in *fiqh*: "Rule: the non-Muslims have rights equal to that of Muslims and so are their duties and ours." It is a statement attributed to 'Alī ibn Abū Ṭalīb, Shaykh-ul-Islam Ibn Taymīyyah and others. It is stressed in several contexts of the books of *fiqh* and *uṣūl al-fiqh* and has various applications. It has been reported as a *marfū'* report (attributed to the Prophet), but it is not authenticated. However, its meaning is correct. See Ahmad Ibn 'Abd al-Halīm Ibn Taymīyyah, *Kutab wa Rasa'il wa Fatawa Shaykh al-Islam Ibn Taymīyyah*, (2nd ed. N.D.), vol.28, p.618; 'Alā' al-Kasānī, *Badāi' al-Sanai'*, (Beirut: Dar al-kitab al- 'Arabi, 1982), vol.7, p.111.

<sup>22</sup> The Quran, 2: 256, negating the negation is stronger in affirmation than the predicate. Denying any means to coercion in faith is more affirmative than mere announcing of the freedom of belief.

<sup>23</sup> The Quran, 18:29.

<sup>24</sup> The Quran, 10:99.

<sup>25</sup> The issue of "*Hadd* of apostasy" it is a controversial issue of so complicated details. The best contemporary books penned on that topic in my opinion are those

As for the preservation of ‘life,’ it is to protect the human life in all of its forms and stages; the prevention of all dangers that may undermine human life, such as killing or whatever incurs damage or harm on one’s life in any given form as well as all things detrimental or perilous to human beings including damage, loss of body limbs, miscarriage and diseases. In fact, the aim of preserving “life” in Islam goes beyond the negative dimension of protection and extends to the positive dimensions that foster and nurture human health and provide prevention of diseases, illnesses, infections and so on. The scope of preserving “life” in Islam extends to include the preservation of the different forms of life including animal and plant lives and ecologies. Any prejudice to life, in its various forms, is forbidden as per the Sharia whereas it is an essential aim of the Sharia to preserve and promote life.<sup>26</sup>

Early scholars have mainly associated the preservation (*ḥifẓ*) of the “mind” to the prohibition of alcohol (and all intoxicants) consumption in Islamic Sharia. For them, the preservation of “mind” requires the protection of the mind against impairments of intoxicants, drug and spoiling substances, regardless of names, methods of manufacture and effective ingredients of such intoxicants.

For Islam and the Quran, *ḥifẓ* of “mind” has a broader positive dimension compared to the narrow meaning of protection; this meaning includes some developmental concepts, such as the pursuit of knowledge, skills development, cultivation of minds and protection from superstition, sorcery and imitation. That is to focus on evidence and mental proofs supportive of all issues (in both mental and philosophical approaches) including the existence of God, the truthfulness of Apostles;

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authored by my two teachers: Sheikh Taha al-‘Ulwanī and Yusuf al-Qaraḍawī. See, Taha al-‘Ulwanī, *La Ikrāḥa fi al-Dīn: Drasah Fi Ishkalīyyat al-Riddah wal Murtaḍīn*, (Cairo: Maktabat Al-Shorouk al-Dawliyyah, 2003 CE); Yusuf al-Qaraḍawī, *Jarīmat al-Riddah wa ‘Uqubat al-Murtad*, (Cairo: Maktabat Wahbah, 2nd ed. 2005 CE). Both writers deny that there is a prescribed punishment for the mere change of one’s religion when no crime is committed as some may imagine.

<sup>26</sup> See, e.g., Sheikh al-Qaraḍawī, *Ri’ayat al-Bī’ah fi Sharī’at al-Islam*, (Cairo: Dar al-Shorouk, 2001 CE).

fighting against herd mentality and blind imitation, maintaining minds of new generations and the like meanings.

As for the *hifz* of “offspring,” it is not limited to attributing children to their biological fathers, but it also includes the rights childhood and families in both the negative and positive senses; simultaneous protection and development. In our contemporary context, the family is the foundation in the preservation of the *ummah* and in the upbringing of children. The preservation of the ‘offspring’ has expanded in the contemporary juristic reasoning with regards to the Maqasid of the Sharia to include the preservation of family, as extensively explored in the contemporary writings, and all other relevant social, cultural, and legal systems.

As for the *hifz* of the “honor”, it is a broad concept extending beyond the protection of the individual’s reputation of men and women against any libel, slander, vilification, false accusation or spying to include the preservation of human dignity and the "basic human rights" as we know in our contemporary human rights declarations. However, we should differentiate between the basic human rights agreed upon by all humans (such as the right to life, freedom of choice, protection from torture, freedom of expression, judicial justice, etc.), and the applications of these concepts in different cultures may differ from the east to the west, from Muslims to non- Muslims, without forcing any other culture to espouse these Islamic concepts and their detailed applications. Some influential or rich countries may attempt to impose their own cultures on others in the name of human rights. In the context of Sharia-related issue, this point is need of further discussion, especially the area of the family as shall be underlined later.

As far as *fiqh* is concerned, the *hifz* of “property” is related to the corporal penalties imposed by Sharia on theft, fraud, monopoly and embezzlement. The contemporary juristic meaning of *hifz* of “property” added a positive dimension that incorporates the preservation of rights and properties (including intellectual property rights) and protecting economy from collapse, unemployment and inflation and the like.

Shaykh Muḥammad al-Ṭahir ibn ‘Ashūr introduced a foundational proposal about "the necessities of the individual" and "the necessities of the nation;" he argued that the interests (*maṣāliḥ*) of the nation should be given priority over those of the individual (giving the Maqaṣid that are concerned with the ‘nation’ precedence over Maqaṣid that are concerned with individuals). Accordingly, the preservation of the nation’s “faith (religion), soul (life), mind, offspring, honor and property” should be given precedence over preserving those of the individual. This is an important meaning to be considered in the application and activation of the Sharia, especially in the area of the priorities and policies. In the modern sense, it means that the public interest – as a basic principle – should be given priority over the individual interest. This point would be further highlighted in the following pages.

The complementary needs (*ḥaḥīyyāt*) refer to the things and interests that people require, yet they are less essential than the necessities (*ḍarūriyyāt*), because they are not vital to the human existence. Scholars brought forth the following examples for *ḥaḥīyyāt*: marriage, travel and trade; in the sense that the individual would not die if he has not travelled, got married (I hope so!) or engaged in trade. However, some scholars of *uṣul al-fiqh* asserted that “When a complementary need prevails, it is equated with necessity.” In other words, if there is a general recession in trade, in this case engaging in trade is a necessity as per the Sharia. Similarly, if the rates of marriage significantly decreased in any given time, marriage becomes a necessity and so on.

Those needs are important, but their fulfillment comes after meeting the necessities in terms of importance and attention assigned to them and their fulfillment. It should be noted that while addressing the principles of the Sharia, this vital rule should be taken into consideration. The fulfillment of needs should not be given priority over that of the necessities and should not undermine their fulfillment in any given way as the logical order appealing to the common sense dictates.

As for the “embellishments” (*tahṣīniyyāt*), one of the great blessings bestowed upon us as manifestation of His mercy and love is that He

rendered the perfection and enhancement of our lives even with “embellishments” among the Maqaṣid and goals of the Sharia, not just meeting our basic necessities and needs. Examples on the “luxuries” (*taḥṣīnīyāt*) are houses and mosque decorations, road pavement, permissible entertainment means and perfumes, lawful and delicious food and beverage, comfortable furniture and beautiful colors, etc. The realization of all those “embellishments” also belong to the Maqaṣid and ultimate objectives of the Sharia, yet they rank below the complementary needs and pave the way to them. They should not be given precedence over the needs as far as the priorities, concerns, policies and budgets are concerned!

In addition to this famous classification and division of the Maqaṣid of the Sharia, there are other divisions related to the universal needs. Scholars underlined that the establishment of justice is one of the universal Maqaṣid of the Sharia and avowed that taking into consideration the innate human nature is one of the Maqaṣid of the Sharia as well. They advised that the consideration of the divine natural laws (*al-sunan al-ilahīyyah*) set by God to govern the universe and life in general, is one of the Maqaṣid of the Sharia; they emphasized that the Sharia is keen to escape conflict and in harmony with the natural laws and legislations. They even averred that keeping the “order of the *ummah*” is a general universal objective of the Sharia that carries a special importance in addressing the priorities in the post-revolutions phase.

The general universal Maqaṣid of the Sharia, as scholars advised, include tolerance, facilitation, wisdom, public interest, cooperation, coexistence, solidarity, honesty, volunteering and other societal values that are referred to in our modern time as "civil values".

Referring to the Maqaṣid of the Sharia thus implies the reference to all these values and objectives envisioned by the Sharia as higher objectives, absolute *maṣālīḥ* (interests) and rights. The reference to these principles is distinct in that it is agreed-upon by all sane people and appeals to

common sense, because these Maqaṣid are "considered in all religions" – as asserted by Imam al-Shaṭībī. They are intuitively acceptable to the sound mind and are not open for argument in whatever religion or ideology. Hence, they can be seen as common ground among all the political forces in any given general political project; this is important in the context of addressing our topic, Sharia and post-revolutions phase.

Some Sharia provisions (e.g., personal status law) cannot be overlooked, as Muslims are bound to apply them, be they the majority or the minority of any given community or country, and under all political structures. It is not adequate for Muslims that the lawgivers rely on the "general and universal principles" of the Sharia and the absolute concepts; rather, it is incumbent on Muslims to refer to the details, pillars, conditions, reasons and identified impediments stipulated by the Sharia in this regard, either individually or on behalf of the law, if possible. The interpretation of the detailed religious texts should not go beyond those universal and general principles and Maqaṣid so as to maintain harmonious balance between the authentic and specified religious texts and the universal and general Maqaṣid.

The distinction between the areas in which the reference to the universal principles and Maqaṣid of the Sharia is sufficient and those in which the reference to the detailed juristic provisions and interpretations of the different schools of Islamic jurisprudence (*madhahib*) is necessary will be detailed in the context of addressing the balance between that which is "religious" and that which is "civil" as shall be discussed.



### 3

## Are we legislatively bound to abide the very political choices and discretions of the Prophet?

It is difficult to talk about "the implementation of Sharia" in the context of the state without making a distinction between the decisions and actions put into effect by the Prophet in his capacity as a divinely inspired Prophet in order to set a precedent to be emulated and followed (legislative actions) and those done and issued in his capacity as a human being or an imam (ruler or state leader), or what we describe in our present-day language as "policies."

The stipulations and instructions of the Prophet in his capacity as a divinely inspired Prophet are established divine revelations that are not prone to change; however, those he made in his capacity as a human being are not meant to be part of the Sharia for every Muslim to follow. These actions and sayings are referred to by the scholars as non-legislative Sunnah (*Sunnah ghayr tashrī'iyah*), including the customary daily human activities of non-legislative nature such as customary practices i.e. apparel, food, beverages, tools, medical treatment, means of travel, furniture and decorations, buildings and the like matters that change in different cultures, times and context). In this area, Muslims are not legislatively bound to adhere to the very personal choices and preferences of the Prophet. Yet, one may willfully commit himself to them as an expression of love and following his example, but s/he should not oblige others to make that choice.

However, the instructions of the Prophet in his capacity as an imam (ruler) i.e. "policies and political discretions" – in their different kinds and arenas – the default methodology is to consider the above-mentioned purposes, principles and Maqasid behind the legislations instead of literal compliance to the specific forms, rulings, previous incidents and decisions.

Scholars also introduced another division of the objectives and Maqaṣid behind actions, decisions, and instructions of the Prophet. They differentiated between the acts that are of legislative nature and those of non-legislative nature. These circles are certainly overlapping. There are specific legislative acts and instructions of the Prophet that are well-known to all Muslims such as prayer. He said: “Pray as you have seen me praying.” Another example of the legislative actions is *ḥajj*; he said: “Take your (*ḥajj*) rites from me.”

There are other non-legislative acts and instructions such food preferences well known to the Arabs or clothing preferences (white Arab traditional garment). He never instructed Muslims to eat such-and-such (pumpkin, for instance) or wear such-and-such (white clothes) as he used to do, nor did he instruct them to do anything in matters of customary practices and everyday activities done by him in his capacity as a human being. Such non-legislative acts were influenced by the geographical and historical dimensions of the environment where he lived.

It should be noted that in the context of our discussion about the different nature of the Prophet's actions, there is an area regarding which different viewpoints were presented; some legislative acts and instructions of the Prophet need further investigation to find out whether he intended them to be legislatively binding on each and every Muslim or legislatively binding on a particular group serving specific terms of reference. It is a very interesting topic, indeed.<sup>27</sup> This realm between the legislative and the non-legislative instructions and acts has further subdivisions. Imam Al-Qarafi made a distinction between different actions taken by the Prophet based on his "intentions." He wrote in his valuable book “*al-Furūq*” (Nuances), (the thirty- sixth nuance):

There is a difference between the Prophetic actions in adjudication and fatwa i.e. conveying [of the divine message] and his action as the imam [leader] ... as far as the category concerned, his actions

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<sup>27</sup> See, ‘Alī al-Khafīf, *al-Sunna al-Tashrīʿiyyah in Muhammad ʿImarah (Editor), al-Sunna al-Tashrīʿiyyah wa-Ghayr al-Tashrīʿiyyah*, (Cairo: NahdatMisr, 2001).

bear different implications in the Sharia. All what he says or does as a deliverer of th message is a general and permanent ruling ... [However,] decisions related to the military, public trust... appointing judges and governors, distributing of spoils of war and signing treaties ... are all related to the imamate.<sup>28</sup>

Hence, each and every Muslim is legislatively bound to the actions and sayings of the Prophet made in his capacity as the conveyer of the divine message (being legally bound to them is a different issue that shall be discussed later on). Only judges, a part from other Muslims, are legislatively intended by the actions and sayings of the Prophet in his capacity as a judge, passing his judgment between litigants in a given case. Similarly, the actions and sayings of the Prophet made in his capacity as an imam (the realm of politics- or what we coin today as policies, operational decisions, political actions or authoritarian measures) are only mandatory on the statesmen and rulers, or the nation, as shall be explained.

There are known juristic cases in which scholars differentiate between the acts to which only the ruler is bound and those to which all Muslims are bound. The point is that not all Muslims are legislatively bound to the political actions, measures, and policies except with their specified context and not necessarily in all contexts. All Muslims are legislatively bound to the higher purposes and Maqaṣid that the Prophet intended behind his actions and not necessarily the details of the judgment he passed for given litigants, the details of a given treaty he concluded with a specific enemy, or the details of a policy he adopted in the various types of policies. This is because the criterion here is considering the public interest, which is prone to change according to the change of time, place, and circumstances.

For example, the Prophet divided the army into three sections: a vanguard, center, right flank and left flank. This is a matter of “policy”,

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<sup>28</sup> Shihab al-Dīn al-Qarafi, *al-Furūq (footnoted)*, Ed. *Khāṭil Mansūr*, (Beirut: Dar al-Kutub al-‘Ilmīyah, 1998), vol.1, p.357.

done by his capacity as the "ruler." Hence, Muslims are not legislatively bound to divide the Muslim army that way in all times and places. Rather, they may follow any given division they see fit. Muslims are required in this case to consider the "objective" or "*maqṣid*" behind such a division; that is to divide the army into different battalions in any given manner that serves their best interests on the battlefield.

The same applies to the division of war spoils. Despite the fact that it is clearly stated in the Quran, it, still, falls under the category of "policies". God (may He be Exalted) says: "And know that whatever booty you acquire [in war], one-fifth thereof belongs to God and the Apostle, and the near of kin, and the orphans, and the needy and the wayfarer. [This you must observe] if you believe in God and in what We bestowed from on high upon Our servant on the day when the true was distinguished from the false - the day when the two hosts met in battle. And God has the power to will anything."<sup>29</sup> This is because the Prophet divided the war spoils as such for specific objectives and particular goals to be like salaries and bonuses and income for the soldiers.

This means that the Muslim ruler or the nation in modern terminology can decide to change this system and give a fixed salary to each rank holder and set certain conditions for promotion and so on. This new system and salaries, promotions are not "inconsistent" with the spoils system, because the spoils system falls under the category of "policies" and not a binding legislation in all times and places. The purpose and objective behind choosing such a division or system by the Prophet was based on his political discretion. Accordingly, literal compliance is not required in this case; rather, the default methodology in this realm is the consideration of purposes and intents. No contemporary scholar can argue that Muslims are obliged to abide by the division of the spoils in the very manner stated in the Quran or the Sunnah because these means are unsuitable for our time and circumstances.

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<sup>29</sup> The Quran, 8:41.

This issue is quite similar to many controversial issues about which heated discussions and debates took place, namely, the decisions and political discretions that the Prophet intended merely to achieve certain political purposes related to non-Muslims in the community at the time, such as the *jizyah*, enslavement of prisoners-of-war and other political discretions that were not intended by the Prophet to be binding legislations for all Muslims to follow until the Day of Judgment. Rather, these discretions (as well as their likes) were meant to accomplish certain purposes and objectives; were these objectives to be achieved by other means, those means would be legitimate as per the Sharia. This is because these matters do not fall under the category of acts of worship and are not intended for themselves. Therefore, we should comprehend that in our modern times there are some religious texts intended to achieve certain Maqaṣid and others act as means and we should differentiate between the means and the Maqaṣid, even if it is a text in the Quran.

For example, God (may He be Exalted) says: “Hence, make ready against them whatever force and ‘war mounts’ you are able to muster...”<sup>30</sup> The ‘war mounts’ in this context serves as a mere means, even though it is clearly stated in the verse. It should be noted that it is not necessarily constant to regard all things mentioned and clearly stated in the Quran as an objective per se in both its literal sense and employed means.

It is significant to ask, as a duty incumbent upon the Mujtahid scholars: “Does this matter form a means to an ultimate end or an objective per se?” If it is a means, such as a horse, a sword, spoils, *jizyah* or the like, we should know that the means can change according to the time, place, circumstances and people. However, if it is an objective per se, we should know that objectives and ends are not prone to change. This principle should be taken into consideration when addressing the application of the Sharia in our contemporary world.

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<sup>30</sup> The Quran, 8:60.

Again, it should be stressed that the matters related to "political discretions and policies" do not fall in the realm of the "worship" which entails literal compliance. In the words of Imam Al-Shaṭībī, a key scholar in the al-Maqaṣid discipline:

Literal compliance is the *aṣl* (i.e. governing rule/default methodology) in the area of acts of worship (*ʿibadāt*) leaving no room for identification of reasons and thus only legally permitted acts may be observed, since intellects cannot invent new acts of worship. Whereas of customary dealings and transactions, the consideration of purposes and reasons is the *aṣl*, so the basic principle is to consider them permissible unless otherwise is proven by evidence.<sup>31</sup>

Therefore, the governing rule in the area of worldly dealings and transactions (*muʿamālāt*) among human beings is to consider their underlying meanings, principles, intentions, purposes and higher objectives, and not necessarily their literal compliance with the apparent forms and verbatim interpretations, because the forms and appearances change in terms of time, place and social customs. This gives a sense of flexibility to the understanding of Islamic Sharia of which we are in dire need the most at this stage.

On the contrary, the governing rule in the area of worship acts (the internal state of an individual that is between him and God) is the literal compliance with the legal instructions, because this compliance per se is necessary for the slave to conform to the commands of his Lord.

Al-Shaṭībī used the term "*asl*", because there must be some exceptions to the general rule. Scholars, like al-Ṭufī, a senior Ḥanbali scholar, asserted that the prescribed "numbers" that are part of the devotional acts are fixed and literal compliance with them is indispensable as part of the worship. For example, the percentage 2.5% and other percentages and rates obligatory in *zakah* in general, the number of

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<sup>31</sup> Al-Shatibi, *al-Muwafaqāt*, vol.2, p.6.

occurrences of divorce (three), the number of the months of the *'iddah* (waiting period) in matters of personal status law, etc., are all fixed and authorized by the Sharia and all scholars have agreed on their interpretations with no difference of opinion. Conformity with these numbers is part of the worship and literal compliance is required of all Muslims, as a necessary duty intended per se in acts of worship.

Although these transactions are concerned with family and *zakah* laws, namely the social transactions in the community, they are partially acts of worship, because they are part of the ordinances of Islam and religious duties and, at the same time, they are perceived as partially worldly transactions. Furthermore, they involve social transactions; in case of *zakah*, the money is paid by the rich to the poor for sake of realizing certain social objectives and economic purposes. For instance, God (may He be Exalted) says: "... so that it may not be [a benefit] going round and round among such of you as may [already] be rich..."<sup>32</sup> This means that the money would not be monopolized within the rich circles only. This objective is clearly stated in the verse. The Prophet also said: "...pay the *zakah* from their property and it is to be taken from the wealthy among them and given to the poor..."<sup>33</sup>

Zakah, in this sense, is a worldly transaction, because it has certain social and economic purposes and objectives. The specified and fixed Zakah-related numbers and percentages belong to the area of worship.

If we ponder over another *zakah*-related issue like 'the pool of charity' (*wi'a al-zakah*), which specifies the kinds of *zakatable* items of wealth? This issue is not a fixed in the Sharia nor does it entail literal compliance. For example, we find few scholars relied on the literal interpretations like Ibn Ḥazm al-Andalusi *aẓ-Ẓahiri* (the Andalusian Literalist) who attested: "There is no *zakah* on anything except eight types of wealth mentioned in the Sunnah: gold, silver, wheat, barley, dates, camels,

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<sup>32</sup> The Quran, 59:7.

<sup>33</sup> Al-Bukhaari, (Hadith Number: 1331); Chap. *Wujūb al-Zakah*.

cows, sheep and goats. There is no *zakah* on horses, slaves, honey, commercial goods or any other type of wealth.”<sup>34</sup>

This means that those specific items of wealth, as stated in the Sunnah, are the only *zakatable* ones in the view of Ibn Ḥazm. Actually, this literalist (*Ẓahiri*), narrow (reductionist) approach to religious texts losing perception of some higher purposes and Maqaṣid that underlie the ruling has led to compel a person owning five camels to pay *zakah* and exempt another one who owns an oil well, for example, from *zakah*! An individual who owns gold, for example, (reaching the due niṣab) would pay *zakah* but he who owns diamonds does not! This approach is invalid, as it contradicts the intended justice, which is a key Maqaṣid of the Sharia in the first place.

In fact, this literalist atomistic way of thinking gave rise to many *Zahiri fatawa* by late and contemporary scholars that are closer to jokes than they are to juristic opinions and are not suitable for any serious proposal related to the application of Sharia in our time. It is worth mentioning that Imam Ibn Ḥazm is an honorable scholar, great philosopher, well-established Imam in *fiqh*, *Uṣul al-fiqh*, history of religions and Ḥadīth, let alone his poetic mastership. Despite all of that, let us ponder over his commentary on the following Ḥadīth on the man who relieved himself in stagnant water. The Ḥadīth reads: “No one among you should urinate into stagnant water.”<sup>35</sup> Ibn Ḥazm said, “If he urinated in a vessel and then poured it into the stagnant water, it does not become ritually impure.” (This is quite odd!) Let us examine his commentary on the Ḥadīth in which the Prophet underlined that silence on part of the virgin girl is accepted as a valid consent to the marriage “her permission is her silence.” In his book *al-Muḥalla bi al-Athar*, Ibn Ḥazm said, “If the virgin

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<sup>34</sup> ‘Ali ibn Ḥazm, *al-Muḥalla*, Ed. Reviving Arabic Heritage Committee, (Beirut: Dar al-Afāq, 1st ed. undated), p. 209.

<sup>35</sup> Ibn Majah, sunan, (Hadith Number: 344) on the authority of Abu Hurayrah.



girl verbally confesses her consent to the marriage, the marriage contract is invalid!”

If this literalist and formalist approach is adopted in the application of Islamic transactions and political area to our contemporary reality, we would be distressed with illogical and unacceptable results as seen in some modern- day Islamic trends (Islam political movements) described by Sheikh al- Qaraḍawi as the “modern Zāhiri”!

Conversely, if we were to espouse a Maqāṣid-oriented approach only, considering the higher purposes, principles and objectives behind all rulings without limits and restrictions (renouncing literal compliance even with the fixed aspects of the worship acts), as is the case with acts of worship and the fixed numbers and percentages and the like of the above-mentioned rules governing the Ijtihād process, we would end up with loose indefinite meanings under claims of freedom, human nature (*fiṭrah*) or even justice. What we need is a moderate approach to address the Sunnah of the Prophet that reached us and the Quran texts; a balanced 'middle way' approach that takes a line somewhere between the two extremes. This is all in respect of applying the Islamic teachings to the individual and the community as well. With regard to the application of Islamic teachings, including the effectively binding legislations to the state, it entails further detailed account as will be underlined later.

## What is the Sharia-oriented top priority at this stage?

Before discussing some detailed rulings of the Sharia and their legalization, the relationship between “religion” and the so-called “civil state,” and other details of our topics, you must first shed some light on the top priority at the post-revolution stage from the Islamic perspective. I would like to anticipate the details and state that the first priority in the revival and reconstruction process in the post-revolution phase is character building, as the very basis of Islam (i.e. shaping the Muslim individual's character and personality).

How do we identify the top priority? The process of identifying the priority is based on the Maqaṣid as well. The above-mentioned theory of Maqaṣid and principles of the Sharia is all about priorities, ranks and levels, because these meanings are not mere abstract wisdoms and philosophical concepts like the wisdoms and rationales behind the acts of worship, for example. Actually, the wisdoms behind acts of worship do not affect the act of worship itself nor are they built upon it. In other words, one performs ablution for the purpose of purification and observes fasting for the purpose of attaining certain health benefits. Purification is one of the wisdoms behind prescribing ablution and fostering the individual's well-being and health is one of the rationales behind prescribing fasting; but, if the person is already clean and enjoys sound health, does this mean that he is exempted from ablution before the prayer or fasting on Ramaḍan? Of course not, because ablution and fasting are worship acts, which are not necessarily based on abstract wisdoms and rationales that we can understand and reflect on.

In the area of worldly transactions, especially in the area we call “Sharia - oriented politics (*al-siyasah al-shar'īyyah*)”, “public policy” or *maṣāliḥ*

(interests) and measures related to political issues and "proper administration of public affairs" - and "easement rights (*irtifaqāt or ḥuquq al-irtifaq*)", as scholars coined it, it is all about the Maqaṣid and wisdoms behind the pertinent rulings which are closely related to those Maqaṣid and wisdoms, revolve around them and are actually founded on them. It can be fairly stated that the major aims of *al-siyasah al-sharʿiyyah* are derived from the *maqaṣid* of the Sharia. There are no "politics" in Islam without wisdom, *maqaṣid* and higher purposes upon which they are built.

Since the Sharia-oriented politics (*al-siyasah al-sharʿiyyah*) are primarily built on wisdoms, meanings and higher purposes (*maqaṣid*), priorities, levels, and ranks of these meanings as explained above, the *ḍaruriyāt* (necessities), comes first, then *Hajiyāt* (complementary needs) and at the third level comes the *Taḥsināt* (embellishments). The preservation of faith (religion) and the freedom of belief are, in this sense, primary principals more worthy of consideration, then the preservation of "life" and all forms of life related to the human life, then the preservation of "mind", then the preservation of "offspring" and family, then the preservation of "honor" and then preservation of "property", trade and economy. This is the proper order.

The public *maṣaliḥ* (interests) of the *ummah* should be given priority over the *maṣaliḥ* of the individuals; the specific private declarations (*juzʿiyyāt*) do not provide grounds for abrogating or annulling the universal principles of Islamic law (*kulliyāt*). Moreover, carrying out the obligations should be given precedence over carrying out what is merely recommended; the elimination of the prohibitions should be given precedence over the disliked; and the elimination of evil takes precedence over the realization of benefits. The realization of the greater *maṣlahah* (interest) precedes the realization of lesser one; warding off the graver evils should be given precedence over warding off the lesser ones, and so are other priorities and principles in the area of *maqaṣid* meanings. These ranks and proprieties must be taken into account; if they are fulfilled, we would realize the priority and importance of

character building, as the individual is the basis of all these meanings and Maṣaliḥ. The question arises, does the fact that the necessities (*ḍarūriyyāt*), should be given precedence over the *ʿaḥīyyāt* mean that the individual would neglect and lose sight of the *ḥaḥīyyat* entirely?

In response, giving precedence to that which is more important and of greater priority over the less important does not entail neglecting the latter; however, it means that in case of conflict, the one of the greater priority should be given precedence.

The clash or conflict in this context means the finitude or limitedness of time, effort or money when the individual can only choose one option. In this case, s/he has to opt for that which is of greater priority to start with, paying his undivided attention to. Let us shed some light on practical examples on the topical issues to make this point clearer.

An example on the finitude of the time is the urgent need to put to trial the main figures of the former corrupt regimes in countries that witnessed the revolutions. These regimes have significantly corrupted their countries and committed a wide range of hideous crimes. In this example, those people cannot be put on trails for all their crimes at once, because of the limitedness of time and the revolutionary spirit that is still in the air, praise be to God. The mass street protests are still strongly pushing the political process; we cannot afford waiting any longer and should opt for the things of top priorities first.

Therefore, we have to begin with putting those criminals on trials for the murder and endangering people's lives before the crimes of theft, illicit gains, bribery and profiteering! Otherwise, it would go against the “priority order” and become a breach of the value of human life, human development and character building. This prejudice should be perceived as a conspiracy against the Arab Spring uprisings because the preservation of “life” and carrying out the prescribed retaliation (*qasās*) should be given priority over the preservation of “property” and carrying out the prescribed sanctions according to the sound reasoning and the Sharia. Were we to focus our attention and devote our efforts to some

of the thefts or the administrative errors, for example, and postpone their punishment for the murders, betrayals of the religion and the nation and the crimes of violating the honor, this would constitute prejudice to the “priority order” that could undermine the character building and human development; it is even somehow suspicious!

The limitedness of effort can be seen in the case when we have to choose to channel all the attention and efforts to organizing a mass protest in one of the main squares of the revolution engaging the different segments of the community. In this case, the protesters should not present all their demands all at once; the demands of the nation should be given precedence over those of certain political currents, parties, and smaller affiliations, and of course the demands and needs of the nation take priority over those of the individuals and groups, even if legitimate demands and needs. The efforts should be spent and channeled into what unites the nation and meets its necessities, and not that which is beneficial to the individuals and groups; otherwise, this would undermine the character building and the formation of the mental image of what is significant and what is insignificant. Therefore, in my humble opinion, it was not proper on part of some Islamist trends in Egypt last summer in one of the Friday’s mass protests to call for certain demands that are purely “Islamist,” most of them were formalist and did not have any priority in the eye of the Egyptians nor did they represent realistic concerns and legitimate (Sharia -oriented) priorities at the expense of the unity of the (fragmented) revolutionary row in order to realize the crucial issues and protect their revolution from being hijacked by the counter- revolutionary forces.

The limitedness of financial resources is reflected, for example, in the available economic potentials enabling the country to launch big national projects. All these big national projects cannot be financed all at once and all the big national dreams cannot be simultaneously realized. Rather, those projects and dreams should be arranged according to the proper priority order before suggesting to begin with that project or the other. The projects that help and foster the preservation of the life,

mind, and human dignity should be given precedence over those projects that serve the consumptive needs and the luxuries.

This approach should be espoused with all the priority-oriented issues related to the character building in the post-revolutions period in the desired state such as combating and eliminating corruption, the developmental projects, materializing the principles of *Shura* (consultation), fostering all forms of freedom, identification of the areas in need of dialogue and the areas in need of political, economic, legislative, and educational reform.

Indeed, the time, effort, and money in the current phase cannot accommodate all these ideas and duties. The activists in these areas must arrange the national projects according to the correct priority order and begin with those of higher priority. The necessary and agreed-upon must be handled first and those projects of strategic nature and those related to character building and the preservation of the "the nation's order" must come first.

One of the valid priorities according to the Sharia is taking into account the divine norms and natural laws (*al-sunan al-ilahīyyah*). It is inconceivable that anything in the religion of God may be on a collision course with the divine norms and natural laws. These divine norms and natural laws are universal to govern the universe and so are the social laws and norms that govern communities as stated by God in the Quran; they are similar to the norms of the universe in terms of strength and regularity.

One of the most important divine norms and natural laws that should be taken into account in relation to priorities is the law or norm of 'change' as clearly indicated in many verses of the Quran. For instance, God (may He be Exalted) says: "...Verily, God does not change men's condition unless they change their inner selves..."<sup>36</sup>

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<sup>36</sup> The Quran, 13:11.

Change is one of the governing norms that designate the order of the universe. It is a natural law that is not different from the laws of physics, gravity, and the sun and the moon movement, and astronomy laws. There can never be change in any community except after people first change themselves. The verse asserts that God shall never change the affairs of any given community unless its people changed themselves first. It is a general law; none can change the surrounding circumstances around him until he changes himself first, be it an individual, a group, a community, a state, or a nation. This is because these divine norms are fixed and binding on all levels and in all areas of change and reform that can be imagined. Therefore, rectification of the human personality and character building and development are the top priority in this phase.

According to my humble opinion, this is the most likely correct analysis of the Arab revolutions in particular. Multiple analyses have been proposed by political theorists for these uprisings, such as the social class-oriented analysis indicating the struggles between social classes in the Marxist-style, and another analysis related to the failure of the former political regime and the theory of "state failure", a third one called the "inevitability of democracy," and a fourth one connected with the international politics, etc.

I choose to dub the analysis proposed in this book as the "analysis of extraordinary events." The most accurate scientific name should be "*al-sunan al-ilahīyyah* analysis;" people or "peoples" have changed and rectified themselves within these revolutions and broke the fear barrier, and accordingly God relieved them of the burden of fear for their lives. They renounced disunity, selfishness, harassment, despotism, demagoguery, cruelty and greed on the liberation squares. Accordingly, God rectified their affairs and corrected other rampant social defects and problems in the Arab communities during the revolutions. He aided them to oust the tyrants and their corrupt regimes.

It should be noted that dictatorship and tyranny in the Arab world have not been merely confined to the former regimes, which were obsolete and violent dictatorships for sure. The honest truth is that these regimes

were not the only dictatorships in the Arab communities. Rather, there were mere reflections of many social diseases. As you are, so will your rulers be; verily, the rulers mirror the ruled.

There were many levels and manifestations of dictatorship, tyranny, oppression, and injustice within these communities and not merely on the level of political leadership. Dictatorship and tyranny have been well-established within many facets of the civil life, family, government and non- governmental organizations, individuals and groups. This is a side self- criticism by an Arab man.

When people broke the fear barrier against the dictatorship at the level of individuals and groups, we could freely express our opinions and respect the opinions of each other. We have become keener to evade injustice in all its forms and have shown greater respect for the old, the weak, the women, the disabled, the animals, the environment and even the traffic. Thus the dictatorship has been demolished. This confirms the words of God on the divine norm of 'change': "... Verily, God does not change men's condition unless they change their inner selves..."<sup>37</sup>

Respect is a cultural value and so are justice, seeking knowledge, order, and proficiency. If we succeeded in promoting the components of these cultural values within ourselves and our close circles, we would be able to change our community and our whole reality. Realizing this fact is one of the priorities that should be taken into account in the process of reform and change. This is how the human being is built and this is how we can achieve the first priority at this stage.

Changing ourselves is the first step in the character building project, because the first problem facing our nation and the only difference between our nation and other stronger nations, in my opinion, is that very factor i.e. the human factor. The Arab individual is in need of an inclusive reformulation on physical, psychological, behavioral, educational, political, mental, social, scientific, cultural and even spiritual

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<sup>37</sup> The Quran, 13:11.



levels. Our nation is rich with financial and human resources and possesses all elements and factors possessed by the leading nations and civilizations, but the problem lies in the character building and human development.

If we make the character building and human development top priority at this critical stage, we can eventually succeed. In other words, the character building project should come first before all other factional projects, be they developmental, political, legal or any others.

Freedom, for instance, as a cultural value is frankly fading or even absent within the Arab communities now at the cultural and behavioral level. How can we pretend to seek liberating all people and support the occupied and enslaved peoples everywhere shortly after the revolutions? Logically, "freedom" must be attained before "liberation", because the character building of the free individual will eventually lead to the liberalization of others; an empty hand has nothing to give.

The realization of freedom is a must before the application of the Islamic teachings. Why? Because if we want a people to apply the Islamic teachings, we should present Islam to them first and they may or may not accept it; before offering the choice for people, freedom of choice must be established. If the freedom element is missing, this means that Islam is being imposed on them by force! God (may He be Exalted) says: "... dost thou, then, think that thou couldst compel people to believe..."<sup>38</sup>

Compelling people to apply Islam begets nothing but hypocrisy. In this case, there shall be no point of the revolution in the first place, because we will be going back to the very bottom; we would be retreating back to the very old dictatorship before the revolution, yet dressed in a new garment! A group of people may advocate a certain interest (*maṣlahah*) or a certain application of Islam from a particular perspective and try to impose their perspective on others – despite the fact that Islam

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<sup>38</sup> The Quran, 10:99.

accommodates and tolerates multiple and different interpretations and views. This is unacceptable because “there shall be no coercion in matters of faith.”<sup>39</sup> It is also incompatible with the desired character building of free individuals.

People should be given the freedom of choice; if they choose Islam, it is great; otherwise, let others present to them their own calls, whether they labeled them as "Islamist" or "non-Islamist." If we focus on the character building and human development of the individuals, they will choose the best and the optimum, God willing. However, freedom of choice should be granted to all and none should be compelled into anything.

Another example, the concept of "rule of law" should be fostered in the individual's mind, conduct and culture during the character building process in the post-revolution phase. This is an important concept of great priority even before addressing any legal reforms, whether related to the Islamic Sharia or otherwise.

The law must be applied to all citizens; young and old, ruler and subjects, and the poor and the rich before talking about any legal reforms. The current laws in the Arab countries must be enforced first on all people, despite their problems and their criticism from the Sharia perspective.

The notion of “the rule of law,” also known as nomocracy, is not alien to Islam. The Prophet said: "Those who came before you were destroyed because whenever a noble person among them stole, they would let him go. But if a weak person stole, they would carry out the prescribed punishment. By God, if Faṭimah, the daughter of Muḥammad, were to steal, I would have cut off her hand."<sup>40</sup>

There are dozens of other religious evidences supportive of this very notion that we call in our contemporary thought: "the rule of law"—to indicate a basic principle of Islamic thought. The Islamic Sharia thus enjoins absolute egalitarianism of all people before the rules, strong or

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<sup>39</sup> The Quran, 2:256.

<sup>40</sup> Al-Bukhari: (Hadith Number: 3288) on the authority of ‘Ashah.

weak, ruler or subjects, old or young. Establishing the rule of law should be given priority over any legal or legislative reform.

This does not mean that we should not rectify the defective laws and legislations, yet it means that the foundational stage in the establishment of the state imposes focal emphasis on the rule of law, as it is also related to the objective of the preservation of the public order and justice upon which we would like to build the new individual and community. It is also associated with other Sharia-oriented necessities in relation to the preservation of religion, life, mind, honor, offspring and property.

## Does the Sharia give legitimacy to ruler's sole political discretions over certain matters?

Reviewing the Islamic juristic and intellectual heritage reveals a large number of debatable issues, left without the Sharia last decisive word or ruling. For them, such issues are “to be decided by the ruler” or “left to the discretion of the ruler.” Similar expressions extensively used in Islamic literature to declare certain matters within the Muslim ruler's legitimate margin of discretion.

The Islamic heritage on the Sharia-oriented politics entrusts the ruler, Sultan or Caliph with settling some matters of governance without reference to the people, i.e. *tastabid bil-amr* (exercise absolute authority over some matters), if we use al-Mawardi's expression.<sup>41</sup>

Is *Shura* binding (*al-Shura mulzimah*) or non-binding (*ghayr mulzimah*)? In response to this question, the dominant view is that it is non-binding. The majority of jurists held that the ruler has to consult with people in fulfillment of the verse: “...and whose rule [in all matters of common concern] is consultation among themselves...”<sup>42</sup> and “... And take counsel with them in all matters of public concern; then, when thou hast decided upon a course of action, place thy trust in God: for, verily, God loves those who place their trust in Him.”<sup>43</sup> However, the ruler is not obliged to abide by the determinations and decisions made by council of consultation; they maintained that the *Shura*'s opinions are only advisory, not compulsory, and after consultation, the ruler is to take the decision he likes! In support of this view, they cited some instances in

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<sup>41</sup> Abu al-Ḥasan al-Mawardi, *al-Aḥkām al-Sulṭānīyah*, (Beirut: Dar al-Fikr, undated), p. 100.

<sup>42</sup> The Quran, 42:38.

<sup>43</sup> The Quran, 3:159.

the life of the rightly guided Caliphs. For instance, Abu Bakr decided to fight against the apostates despite the objections of ‘Umar.

Actually, it is time to bring about a qualitative change of these juristic judgments on matters of governance as regards what is left to the ruler and what is decided by the people within the realm of Sharia-oriented politics.

The juristic opinion that the results of *Shura* are non-binding should be reconsidered and shifted to declaring the results of the consultative process binding, not merely advisory. The ruler must consult with his people and abide by the majority decisions. When God said: “...and whose rule [in all matters of common concern] is consultation among themselves,”<sup>44</sup> He meant to avail the ruler of the collective opinion of people; he must respect the people's opinion and abide by it.

Had the circumstances and primitive life in the past ages allowed the rulers to be right and all his advisers wrong, the complexity of modern times, fears of tyranny and dictatorship, and the fact that the modern civil state is already built on the power of people require that the *Shura* should be binding and the powers and authorities should be shifted from the "ruler" to "the nation;" the nation should be the source of authority and legitimacy in the political sense.

Many means can help the Muslims restore powers and authority. It is not necessarily to follow the traditional method and entrust *ahlul-hall-wal-'aqd* (literally “those who have the power to unbind and bind” (the influential decision-makers), who were a group of the luminaries or scholars selected by the ruler for to provide consultation and help him whenever needed. In fact, the shift of authority back to the nation (nation-state system) can be done by shifting the authority to the lawgiver as defined by the constitution of the state. This “lawgiver” is represented in the present-day legislative authority or what we call the “parliament” or “people’s assembly” or “*Shura* council,” regardless of the name. This body is an elected body that people chose to represent them from different denominations, ideologies,

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<sup>44</sup> The Quran, 42:38.

classifications and geographic influences. Resorting to the opinion of people should be based on the nature of the subject matter by consulting these specialized commissions furnished with specialized research, investigation and decision-making bodies to decide on the issue.

Sometimes the matter may be serious and the legislative change is quite critical. This requires the representatives of the nation to consult with the people (nation) through a public referendum, for example. This applies to the crucial issues that fundamentally and directly affect people's lives and require the prior recognition of their opinion before taking any decision on the ground. Such matters should be decided by the nation and everyone, including the ruler, must accept and abide by the decision of the nation.

Some argue that the consultation of the nation must be in conformity with the Sharia without the least violation of Sharia laws; it should not permit the unlawful or prohibit the lawful. However, this condition is debatable for many reasons:

Firstly, determining whether a certain decision violates the Sharia must be resorted to a competent body, entity or an individual enjoying a higher authority than the legislative bodies elected by the nation. This leads us back to the Guardianship of the jurist (*wilāyat al-faqīh*)? The guardianship of the jurist is a system of governance draws on the decisions of a particular individual or group merely because of their academic degrees in religious areas of knowledge in particular placing them in a higher authority than the nation and its (elected) legislative bodies!

As far as political issues are concerned, to declare the decisions taken by the nation as contrary to the Sharia or permitting the unlawful and prohibiting the lawful is inaccurate. Actually, the political decisions and "policies" are not directly subject to the religious provisions, given the availability of some relevant texts given for guidance of political leadership, not for strict enactment.

As for the religious matters that some claim they permitted the unlawful in the Sharia or vice versa whereas they are not decisive in indication

and open for ijtiḥad and debate, everyone must respect and accept the majority decision and the nation should take its own choices as regards the matters open for ijtiḥad. We should differentiate between declarations on the lawful/the unlawful and the texts intended for legislation and those not intended for legislation, because it is not necessarily that the Sharia-made- lawful matters must be legal. Likewise, not all that is unlawful as per the Sharia must necessarily be illegal; not all sins are considered crimes, as shall be explained in the following lines.

Finally, even if we assume that the nation or the legislative council will decide what is contrary or what constitutes a violation of the indisputably established facts and rulings of Islam, people must not be forced to accept the Truth; God (may He be Exalted) says: "... dost thou, then, think that thou couldst compel people to believe..."<sup>45</sup>

However, it should be noted that all realistic scenarios suggest that this possibility is unlikely and rather far-fetched; but what if it happened? In this case, there is no other option but to challenge the constitutionality of these decisions that supposedly violate the Sharia. In other word, the solution must be from within the legislative system itself. If the system corrected itself, that is alright; otherwise, the legislative and popular efforts must continue until the required reforms are realized. Thus, the parameters of the desired civil constitutional system are established and the authority of the nation is deeply rooted. In this context, going back to dictatorship is evaded, the ruler becomes a servant of the people and his jurisdictions are purely executive in nature.

Those who wants to impose what they perceive as part of "Islam" on the Arab peoples, who rose up to depose their dictatorships, let them start another revolution and call it an Islamic one, calling for different demands and setting different principles and formulating a different "Islamic" constitution. In fact, no sane person believes it is possible or even effective on the way to the desired reform.

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<sup>45</sup> The Quran, 10:99.

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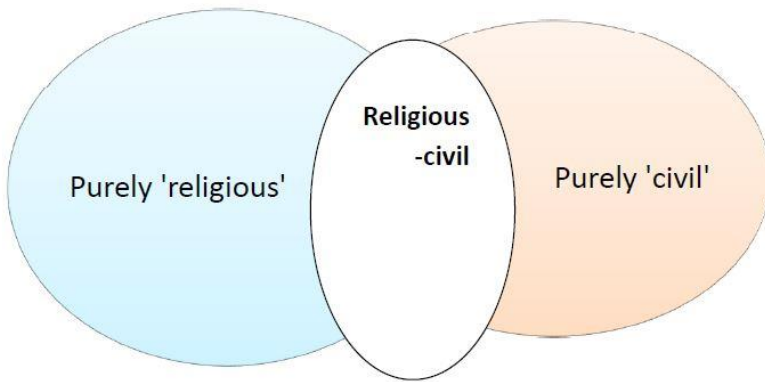
### How to identify the relationship between that which is "religious" and that which is "civil?"

Most Arab communities in Egypt, Syria, Iraq, Lebanon, Morocco, Sudan and other states are multi-religious. For example, about 6% of the Egyptian people are Christians. When the Christians are told about the "the application of the Sharia" or the establishment of an "Islamic state," they would definitely fear the potential loss of their "citizenship rights;" the principle of equality between all citizens in the society in terms of rights and duties. In fact, these fears may be legitimate in some cases, because of some (irresponsible) media statements that are aired every now and then or the statements of some Islamist figures, few as they may be.

On the other hand, there is a great percentage of Muslim Egyptians who could never accept the term "Islamic state"; they harbor the same concerns and fears for their citizenship rights and what they dub the "civil state." The question here should be: is there a conflict between the "religious" (Islamic in this case) and the "civil"? What does this have to do with non-Muslims?

The answer to this question entails a detailed account. The quick response would be that there is no conflict whatsoever between the concept of "civil" and that of the "religious (Islamic) " in this context. If we are to try envisaging the scopes of that which is religious and that which is civil in terms of overlapping and intersecting circles rather than separate circles as shown in the following figure.





### **Religious-Civil Relationship: Intersection and Distinction**

We often tend to perceive the concepts and ideas in terms of inevitable black-white binary paradigms, which is not true all the time. We should move beyond the black/white paradigm to notice the wide gray area where we can accomplish that which is “civil” by means of that which is “religious” so that religion would be one of the components of the ‘civil’ and that which is ‘civil’ would be an aid factor to that which is religious and one of its forms. Thus, the concepts of “religious” and “civil” are expanded.

However, the political theory, especially for some western theorists, provides a specific definition for that which is “civil” that is free of all “religious” aspects, essentially irreligious. This opinion is adopted by many such as Samuel Huntington, Albert Hourani, Bernard Lewis, Elie Kedourie, Mehran Kamrava, and other neo-conservatives and their followers, especially in relation to Islam.<sup>46</sup> However, this is not generally true, and especially within the Arab and Islamic frameworks because we as Arab peoples, commonly, hold that the “religious” has to contribute to the civil life one way or the other and that civil life can never be

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<sup>46</sup> Carapico, Sheila (1996). “Yemen Between Civility and Civil War,” in *Civil Society in the Middle East*, ed. Richard Norton, vol. 2. Leiden: Brill, Carapico 1996, p. 288.

entirely separated from religion. We need to make distinction between three different concepts in detail:

**(1) The purely 'religious' circle:** This area includes the religious components that are related to the adherents of a given religion only and have nothing to do with the structure of the state or its laws. Examples on this category are the matters of belief and creed and the issues related to the lawful and unlawful matters (which are not related to the affairs of the state or law). This area is not Islamic only; it exists in the Christian context as well. The adherents of any given religion refer to their respective religious provisions. This area is "private" in the political science terminology.

**(2) The purely 'civil' circle:** This area incorporates the matters that are related to the state and its official and semi-official institutions, in which religion has no direct interference. For example, the structure of the state, the division of the different authorities, and the laws and regulations governing the relationships between individuals, organizations, and communities that have no direct and detailed relations with religion; all these fall under the heading of the worldly affairs or non-legislative acts done by the Prophet in his capacity as a statesman.

No individual or party should try to apply the relevant verse or prophetic tradition literally (such as the matters of *jizyah*, war soils, mechanisms of *Shura* or terms of reference and jurisdictions of judges), because the structure of state has changed throughout the history and given the geographical changes. However, this area is related to the religion's (Islam, in this case) universal principles and *maqaşid* as well as ethics and values that govern the citizen's conduct, actions and perceptions without enforcing specific laws and detailed regulations and provisions representing these principles and values.

Examples on these principles are justice, equality, various forms of freedom and other values and principles that fall under the category of universal *maqaşid* and the prescribed moral values and rights in Islam.

This issue can be addressed from an abstract philosophical, rational and humane background or an Islamic one that share the same values and principles, yet purely “civil”, if we may say so. This area corresponds with the concept of "public" in the political theories.

**(3) The religious/civil intersection:** There is an area of intersection (the gray area in the diagram), in which the “religious” and “civil” overlap; there are detailed religious provisions relating to the state and its institutions or the relationships among the citizens. The basic principle in this case is for these religious rulings and provisions to be translated into general laws and regulations to which everyone adheres. The religious-civil intersection gives rise to a problem in this case, because the translation of the religious provisions (Islamic ones, in this case) into legislations and laws, binding on Muslims or both Muslims and non-Muslims, entails a detailed discussion.

I suggest dividing this “religious-civil” area into three distinct sections that can form a common and widely accepted framework. Thus, we can avoid societal conflict and division and severe consequences in pluralistic societies in the post-revolution period:

**First**, the religious-civil matters in relation to which the adherents of a given religion or doctrine refer to their own religion as a referential authority:

As far as the personal status law, for example, is concerned, the vast majority of the Arab peoples, be they Muslims, Christians, or others; Sunnis and Shiites, or others; Islamists, liberals or others, do not accept the idea of "civil marriage," in the sense of a marriage between a couple who agree to get married without any reference to the provisions of the relevant religion (Islam or Christianity) in terms of the religious legitimacy, conditions and various impediments as is the case with the juristic discretions (Ijtihad) of the concerned religious bodies.

Therefore, within the realm of the personal and family affairs and the concerned bodies, laws and institutions, the final word must be for legal jurists equipped with knowledge all the relevant divine laws and doctrines

in any given religion; they represent the acceptable mainstream religious opinion (of course within the framework of appropriate and contemporary juristic discretions), whether in Islam or Christianity with the reliance on the known religious authorities. The same applies to matters of inheritance, maintenance and paternity, etc. This area entails that the law and the state institutions should respect the particularities of each religion, sect and doctrine.

**Second**, religious-civil intersection which is binding on everyone based on the community consensus:

This area is of the religious rulings and provisions (Islamic, in this context) on which all the community agrees that they are in the best interest of the community (serving the public welfare), even if derived from the Islamic Sharia specifically. For example, the penalty for a first degree murder in most of the Arab countries is identical with the prescribed retribution in cases of premeditated murder in Islamic Sharia. Although it is an Islamic ruling, the community collectively agrees to become a binding law on both Muslims and non-Muslims in these communities. Similarly, the sanctions imposed by law on the blatant or 'scandalous' acts, public intoxication, publicly breaking obligatory fasting in Ramaḍan, for example, or other religious provisions that are agreed upon by all the community and are accepted in most Arab countries.

There are also laws on the regulation of the places of worship which follow the same rules, even if Muslims and non-Muslims held different opinions in this regard in some countries due to the different population proportions and demographic distribution in a manner that requires taking into account the differences, official holidays on the Islamic holidays that are considered official holidays for the whole community, as well as mosques, Islamic Endowments and official *Hajj* missions organized by the state and funded by the public treasury, etc. It is necessary in this area to refer to the "lawgiver" who represents the people and take into account the different sensitivities of both the Muslim majority and the minorities, who enjoy rights to be respected by the state.

In addition, the general and significant constitutional article stating that the Sharia is "a source" or "the (principal) source" of legislation is an important and agreed-upon article approved by the whole community (or the vast majority) without prejudice to the peculiarities of non-Muslims. It recognizes the identity of the vast majority of Muslims and must not be infringed or prejudiced; it also means taking into account the non-Muslim specificities.

**Third**, religious-civil area of intersection upon which the community does not collectively agree:

This is a critical area in the Islamic presentation to which the Islamists should be particularly sensitive, because the source of the laws or institutions in this case is the Sharia but there is no community convergence in this regard. The community is not ready to accept Islamic provisions as binding laws or a particular institution. It is similar to a call for the state, e.g. Egypt, to levy *jizyah* or a special tax from non-Muslims or deny them the right to join the army, run for the presidency or be appointed as a Chief Justice; and a call for imposing Islamic rituals and religious manifestations on everyone in the community or to apply the criminal prescribed punishments or abolish and criminalize usury in transactions, etc.

The Islamist proposal must be carefully conscious of the seriousness and peril of losing the community agreement on the demands presented. The Islamist proposal should expand the horizons of this area and step out of the narrow scope of enacting and legalizing penalties into the broader scopes of the education and culture.

Universal Islamic manners, for example, can materialize in the community through the work of Islamic educational and cultural institutions in education, media and mosques; there is no need to enact laws and regulations and impose Islamic penalties on the transgressors. It is a truism that God deters with the ruler what He does not deter with the Quran. Yet, the Sunnah of Prophet Muḥammad teaches us that the principal factor in this regard is the conduct of individuals rather than the state's authority.

Hence, the public system, as I suggest in these divisions, must be built on that which is “civil” and agreed-upon by the whole community and should not be in conflict, in any way whatsoever, with the societal consensus that serves as an inevitable practical and legitimate basis in this arena.

If we to address the concept of the "Islamic state" from a juristic and heritage-based approach that was known as “Dar al-Islam” (literally ‘abode of Islam’), we will realize that there are certain qualities required for a land or a country to be declared as *Dar al-Islam* by jurists and other specific qualities whose absence entails not declaring a land a Dar al-Islam (regardless of the majority/minority). This is a well-known issue in the Islamic heritage; none of the scholars held that the majority factor was the decisive factor in declaring a country as Dar al-Islam. The criterion has always been "the application of Islamic law", open and manifest performance of Islamic rituals (i.e. the Muslim practice Islam and carry out Islamic rituals freely and openly), security, justice and other moral standards.

The rule of Islam is essentially synonymous with the establishment of justice in principle in addition to some of the above-mentioned details, such as personal affairs, inheritance and the like. The open and free performance of manifest Islamic rituals (religious security and freedom) means that the regime allows the Muslim to perform the Islamic rituals freely and openly, such as raising the *adhan*, Friday and ‘Eid prayers, building mosques, offering animal sacrifices, *Hajj*, reciting the Quran, and various forms of rituals that scholars conditioned to label a country as Dar al-Islam, regardless of the minority and the majority factor.

As for the religious security, Imam Abu Ḥanifah has an invaluable statement in this regard: “The essence of attributing a land to Islam ‘*Dar al-Islam*’ or ‘*Kufr*’ (disbelief) is not actually belief itself or disbelief itself; it is only the security and fear that is intended.” <sup>47</sup>

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<sup>47</sup> Quoted by ‘Alā’ al-Kasānī, *Badai’ al-Sanai’*, (Beirut: Dar al-kitab al-‘Arabi, 2nd ed. 1982), vol.7, p.131.

In other words, whenever the Muslims enjoy justice and security is the land Islam (*Dar al-Islam*) but whenever fears exist, it is the abode of disbelief. The decisive factor in the establishment of the desired 'Islamic State is the establishment of justice and safe practice of religion (freedom of religion). If we want to establish an "Islamic community," these factors must be realized. These concepts and principles are 'religious' and simultaneously "civil" without any conflict whatsoever. They are points of agreements between Islamists, non-Muslims and non-Islamist Muslims as well.

As a Muslim, I do believe in justice and do believe that justice is the Sharia. The non-Muslim and the liberal, Muslim or non-Muslim, also believe in justice, even though we may disagree on some details, which are open for discussion. Yet, all agree on these key principles and there is a community consensus on them. This generates a vast common ground to reform and build the community without wasting efforts in conflicts and disagreement that benefits none but the inside and outside enemies.

Another last important point on the "civil state" is the "civil service." In the construction phase, there must be a critical separation between the spectra of politics and its variables and the "civil service," which is not limited to civil and charitable institutions of a given society. Civil service in developed countries incorporates many organizations that represent the backbone of the state, such as scientific research bodies, universities, judicial bodies, technical bodies and all the other independent bodies and "quasi- governmental" entities upon which the society is primarily drawn.

In the developed countries, if there is a constitutional or parliamentary problem and there is government for several months, for example, the community is automatically, continuously, and securely run as normal. This contrasts the situation in our countries because the basic civil services in western countries are fixed and identified regardless of the performance or even the existence or non-existence of the government. This civil service, of course, is influenced by politics at the strategic level only – and not the daily executive level. When the government is

changed from right-wing to left-wing, for example, the society will (eventually) move to the left-wing orientation on the long run, not immediately. The movement of society and the civil institutions is not conditional upon the political spectra or governments.

The Arab world has been plagued with despotic rulers who keenly wanted to control everything. To accomplish their plans, they mixed the 'political' with the 'civil' so that the 'political' would have full control of the civil society itself and even all the civil scientific, media, artistic and educational bodies; even the teacher in kindergarten, the Friday preacher, coach, news announcer and professors at the university - all have been appointed, dismissed, promoted or punished by the dictator backed by his security forces.

If we want to establish a civil society in the civilized contemporary sense, we have to separate the civil life from the vicissitudes and spectra of politics in order to foster stability and guarantee progress.

The Tunisians, Egyptians and Yemenis had pioneering experiences in creating civil services independent from the government, namely the "popular committees" at the time of revolutions. When the former regime was deposed after the Tunisian revolution, the popular committees served as the safety valve for the Tunisian people and a means of addressing emergency and crisis situations (to fill the security void left by the collapsing security forces).

When the Egyptian police leaders, unfortunately, betrayed the Egyptian people and withdrew security officers from all the Egyptian streets, leaving the unarmed people face-to-face with the thugs, the safety valve that prevented the collapse of the Egyptian society was these popular committees. The brave people automatically and simply sprang up and formed popular committees of young men and girls to protect their homes and streets and to regulate traffic. Later, these young people started providing some basic security, social and legal services to help daily life run under the quasi-absence of the state.



These popular committees were a protective shield for the revolutions and one of the most significant gains; they were not confined to providing social services, but also expressed the views of citizens about their basic rights without any partisan or ideological affiliation to uphold human and civil rights and contribute to raising the social justice level by ensuring the fundamental rights of citizens and support the civil values of cooperation, solidarity, tolerance and voluntary work; all of which are essential Islamic values and principles meant by the Sharia-set *maqāṣid*.

## How to achieve justice in the society from the Islamic perspective?

The desired civil states in post-revolution periods are primarily built on social justice, so it is indispensable to realize and establish social justice in the Arab societies after long absence! For Islam, equality and justice are two Islamic objectives and due rights to all people; God (may He be Exalted) says:

- “so that it may not be [a benefit] going round and round among such of you as may [already] be rich.”<sup>48</sup>
- “And whenever you judge between people, to judge with justice.”<sup>49</sup>  
There are many other similar verses in the Quran to the same effect.

Does justice impose absolute equality among people in all terms e.g., to eat, drink, dress and earn a living equally? The answer is “Of course not.” The desired justice means the equality of rights and duties in the sense that one should ensure his own rights and know that his rights will not be lost, because they are guaranteed for all members of the community.

If justice in the legislative philosophies is governed by certain standards known as "basic rights," we can imagine these basic rights in Islam as the realization of the necessary minimum of Sharia-maqaṣid (as previously set out). Thus, the concept of basic rights in Islam specifies the preservation of religion, life, mind, offspring, honor, and property. This means the preservation of basic and essential needs at the individual and communal levels.

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<sup>48</sup> The Quran, 59:7.

<sup>49</sup> The Quran, 4:58.

If a citizen in the community is found to live under the poverty line, for example, this constitutes injustice and contradictory with social justice, basic human rights, and even with the civil (nature of) society. The community should not tolerate such injustice. The state must strive in providing all citizens the minimum needs, which is called in the contemporary economy terminology "poverty level." Early jurists referred to it as "human rights" in the sense of the basic needs of food, clothing, housing and other basic essential needs for survival.

The preservation of the individual's honor as one of the most important rights that must be preserved in the name of social justice denotes the protection from abuse and assault, let alone torture and murder. All fall under the category of the preservation of "life." If any of these rights are violated, this constitutes a sort of injustice.

The establishment of social justice should be given top priority regardless of the perplexing vagaries of politics. It is important to form political parties and run for elections, but what is more important is for everyone to focus on the realization of social justice and civil development, before and after the elections, and that the community is well-preserved, stable and steady, where the basic material and moral rights of the ordinary citizens are guaranteed. This is how revolutions accomplish their gains.

When the community members know and comprehend their civil rights, none of the players in the political arena will be able to oppress them or infringe their basic rights when assuming power, because these rights have become a "red line" that cannot be crossed in the communal culture of the community. Any prejudice to those rights would trigger the (revolutionary) community to rise up again and hit the streets. This culture must be instilled within the collective conscience of the community.

Justice is also associated with the well-known juristic principle: "Elimination of evil takes precedence over the realization of benefit." In other words, harm and evil must be eliminated before securing

any interest (*maṣlaḥah*); warding off evils before acquiring benefits (to use the Sufi expression, *takhalli* before *tahalli*)!

A sick person must have good treatment before playing sports or resuming work; the dirty garment must to be washed first before wearing; and the dead car must to be repaired before driving it. This order is one of the divine norms of the universe, logical thinking and natural priorities.

Hence, people must continue to give priority to uprooting the profound long corruption from the post-revolution societies in conformity with the Quranic verse: "Verily, God does not change men's condition unless they change their inner selves."<sup>50</sup>

We should not get distracted with the contrived and secondary issues amplified by some malevolent people or even the important objectives on the long run that some zealous enthusiasts insist on accomplishing at this very phase, giving them priority over getting rid of other dangerous germs and diseases in the community as a short-term goal after the revolution - so that we can begin the march of change properly.

The top priority in this phase is the "settlement of grievances" in the Sharia; the establishment of justice and the restoration rights to all those wronged in the countries, giving each his due. This goal does not require a long period of time, or phases or enacting new legislations. It can be accomplished right away. It is one of the pressing needs and top priorities for quick recovery of the social and political body after the revolutions.

Let us start with the gravest injustice an individual can commit against another from a religious and logical view i.e. murder. The stability of the Tunisian, Egyptian, Libyan, Yemeni, and Syrian communities (and others in the near future, God willing,) can never be realized until those responsible for the killing of innocent people, shedding the blood of young people, and damaging the health of the people, whether during

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<sup>50</sup> The Quran, 13:11.

the revolutions or in the decades before that, are put to fair trials. This is the essence of the preservation of the “life.” It is the necessity that should be given top priority after the preservation of the “religion,” as highlighted earlier. A new culture should be promoted to criminalize murder and mischief without exception and without cheap political justifications.

Then comes the priority of the preservation of the “mind”; in the sense that all those who have been responsible for distorting the minds of the people— by drugs, political corruption that amounted to "brainwashing" of the masses to lose sight of their fateful and critical affairs, should be held accountable for their crimes, which can be fairly described in modern terminology as "major treason." It is a necessary step to build a new culture.

The realization of *maqasid*-oriented priorities also imposes the priority of preserving “properties.” Those who have stolen, looted, took bribes, exploited their powers and position must answer to their crimes. They must be made an example to serve as a deterrent to other mischief-makers who are not put to trails or discovered yet. This can promote a new culture based on transparency and integrity, to use the *maqasid* terminology: “clarity and warding off uncertainty (*gharaḥ*).” Ordinary citizens equipped with this new culture can freely say "no" to the seeker of bribe.

Demolition is significantly easier than construction; we do not want to build the desired modern civil states in the presence of these demolishing factors of murder, corruption and theft. These serious demolition factors could destroy the desired reform and renaissance and eliminate the success of revolutions.

We must make a distinction in the area of priorities between minor, short-term changes and the major, long-term ones. For example, we want to eliminate the illiteracy in a given community, which is important, but it is a significant and major change that needs long years to be realized. Accordingly, we must take into account another divine norm

and laws of nature; “gradualism.” It means devoting enough time required to accomplish the desired objective.

No matter how strong people’s resolve is, we cannot eliminate the deeply-rooted illiteracy in our Arab countries in a month or a year. However, if we start achieving social justice, settling the grievances and meeting and preserving people’s basic rights, we will find enough initiatives and energies that can enable us to realize our big dreams and face difficult challenges.

## What is the Islamists correct stance towards "Secularists" and "Liberalists"?

“Dialogue!” is simply the answer. A real dialogue between the Islamists and secularists or liberalists must be organized in the post-revolution societies. I believe that dialogue is of great importance and benefit for all on academic and practical levels. In my view, the Islamist-secularist dialogue must be given top priority over the intra-Islamist dialogue. However, this does not mean ignoring the intra-Islamist dialogue but the predominant Islamic dialogue in the past has been mostly intra-Islamist.

An Islamist would argue, for example, that democracy is prohibited and another would answer that it is not prohibited; rather, democracy is a form of *Shura* and accordingly part of Islam. They engaged in dialogues to reach a common conviction about the permissibility of democracy. Islamists would also discuss the participation in the parliamentary elections; one may argue that partaking in the parliamentary elections is prohibited, as the parliament does not apply the Sharia and the other Islamist would answer that joining the parliament would enable Islamists to have their voices heard and call for the application of the Sharia. Through dialogue, they may, or may not, arrive at a common conviction on the subject matter. They may argue about the permissibility of appointing women as judges; one would argue that it is impermissible since the Ḥadīth reads, “No people will ever prosper who entrust their leadership to a woman.” The other Islamist would answer that Imam Abu Ḥanīfah held it allowable for women to be judges. The dialogue between two Islamists with the same Islamic referential authority and perception of the desired state, yet each adopts a different methodology in thinking, interpretation and understanding of some sub-issues.

Since the dialogue is the optimal means to reach a common ground, we need a third party in the intra-Islamist dialogue with a different

intellectual referential authority. This party, for example, believes in the inconsistency of Islam with democracy. This claim may be refuted, for instance, as follows, “There have been historical mistakes in the Islamic political practice, but *Shura*, justice and realization of interests and other Islamic principles inevitably require a democratic form of governance in the Islamic state provided that Islam is a constitutional referential authority. Then, we may and may not reach a common conviction.

One may argue that the civil life should be free of religion; another would reply, “This is untrue; the civil life can incorporate the religion element that can enrich, foster and promote the civil life. It is not inconsistent with it, as explained in the previous chapter on the relationship between the “religious” and the “civil”.

One may argue that human rights have nothing to do with religion, and, therefore, with Islam. For an Islamic response to that claim, “this is untrue; human rights have been guaranteed in Islam, but the Islamic particulars differ from the cultural particulars of the countries that formulated the human rights conventions. There is no such absolute freedom anywhere. Rather, each community must restrict all the freedoms through a set of controls that preserve its culture and identity, and, therefore, they forbid certain things different from those which we forbid.

One may argue that Muslims believe in equality, yet deny Muslim women equality in inheritance, for example. The answer is, “this is inaccurate; the inheritance laws cannot be understood out of the context of the financial responsibilities in Islam. Islam has given some male heirs (such as the father or husband or brother) a bigger share of the estate, because they have to meet certain financial obligations that are not required from Muslim woman. The man is financially responsible for his female relatives while they are not. This is not favoring men over women in the slightest. Female heirs receive bigger shares of inheritance in certain cases like that of the mother; she receives higher share than her husband (the father) in many cases because she has financial obligations after losing her son, who was financially responsible for her maintenance.



Hence, the point is not giving preference to females over males. This is how to understand the inheritance and the financial duties within the context of justice that is required as a *maqāṣid* of the Sharia. This “secularist-Islamist” dialogue, in my opinion, helps imparting a “civil nature” to the Islamic political projects and contributes to bringing them closer to all citizens.

Indeed, there is significant partial and formalist perception of the Sharia that we must eliminate in the process of the desired and important Islamic renewal in the next phase. We sometimes tend to have a partial view of a certain matter, losing sight of other complementary parts and, thus, fall into the abyss of injustice. Verily, the Islamic Sharia can never call for injustice; rather, it is based on justice, as highlighted.

If it is said that the husband, for example, is entitled to certain rights without specifying his obligations, this would be injustice. Similarly, when it is said to the woman that she is entitled to such-and-such rights without specifying her obligations, this would be injustice as well. Sometimes we adopt a fractional approach to the Sharia or to the Islamic governance system in general and fail to link between the partial systems that are actually integrated in principle, such as the rights and responsibilities systems, or individual and communal systems and so on.

This Islamist-secularist dialogue as set out in examples helps to alert us about the deficiencies in understanding or applying these areas and drives us to rethink seriously about the current problems and issues in question.

The secularist-Islamist dialogue is important for study, training and answering misconceptions and accusations— many are they in the East and West, against Islam. For instance, they argue that Islam is incompatible with personal freedoms; not all forms of marriage are permissible in Islam. In reply, each civilization sets certain restrictions on marriage. For example, the American laws in most states ban first-cousin marriage. Marriages between first cousins are forbidden, criminalized and labeled as incestuous marriages. This is an example on the particulars of the American society similar to the corresponding to the

particulars of the Islamic society in some points that differ in detail, but not inconsistent with the principle of freedom of choice, which is a general principle agreed upon by everyone.

This "Islamist-secularist" dialogue will help building common ground upon which there is a societal consensus. This enables the Islamic identity in those sought civil countries to grow clearer, become well-established and evolve to incorporate important civil contemporary dimensions. We do not want for the Islamic project to be inconsistent or contrary to the agreed-upon ideas in the community labeled as civil, undermining the pillars of the society. Nor do we want the Islamic project to grow more secluded and distant from the community, giving room only to the intra-Islamist dialogue. Otherwise, the Islamic project would live in a different time limited by different geographical borders, culture and governance systems that are totally different from the Islamic-based desired modern civil system.

## Does the Sharia differentiate between sins and crimes?

There is a difference between a misdeed or a sin committed by the individual against the commandments and prohibitions set by God and the instructions of Prophet Muḥammad, and the crime punishable by law that may and may not be a sin. The difference between the sin and crime is that the crime is liable for a civil penalty. The Prophet did not address all the sins as punishable crimes. This presumed identity that some assumed between sins and crimes has no basis in Islam.

For the contemporary legislations everywhere, "No crime without a legal text," the civil penalty in our time means the presence of a legal text (law) criminalizing a particular act in and of itself and prescribing a certain punishment for it, directly through executive bodies or after the issuance of a court verdict under certain conditions.

If we are talking about employing the principles of Sharia in building the post-revolution individual, we should narrow the scopes of crimes instead of expanding them by considering sins to be punishable crimes! We should make a clear distinction between the sins that are violations of the commands of God (left to be forgiven or punished by Him) and the punishable crimes under the law. Some people claim that the full application of the Sharia means that all sins must be punishable crimes, which is simply impossible!

If we want to punish people for not performing the prayer on time, not observing fasting on Ramaḍan, non-adherence to the Islamic dress code from a particular religious view (aside from the private parts, scholars held different), prohibition of gazes to that which is unlawful or impoliteness and improprieties less than slander and libel, it would be unbearable for several reasons:

**First:** considering all sins as punishable crimes under the law contradicts the correct way and practice of the Prophet, in this regard, namely the education-oriented change of society (*tarbiyah*). The Prophet used to punish his companions sometimes for some sins as a form of discipline and education, which is known in *fiqh* as “ta‘zīr” (discretionary punishment); these were merely individual cases.

The general rule was that he educated his companions as part of the whole Muslim community. He changed the Muslim community through gradual education, enjoining good and forbidding evil. He taught the Muslims that "All of you are guardians and responsible for your wards. The ruler is a guardian and responsible for his subjects; the man is a guardian and responsible for his family; the woman is a guardian and is responsible for her husband's house and his offspring; and so all of you are guardians and are responsible for your wards."<sup>51</sup> Each person is a guardian and responsible for his wards in terms of education-oriented change and spiritual refinement, which is the basic principle in this regard.

**Second:** considering all sins punishable crimes entails forming a governmental power, criminal investigation unit and police forces to apply the relevant laws. This requires significantly huge governmental efforts in the populous multi-million countries and necessitates huge criminal investigation units and police forces that will redouble efforts so that the apparatus of government can achieve and pursue justice, address all those sins that have been considered punishable crimes and implement the law.

In fact, this is impossible, because the current situation abounds in serious difficulties and challenges faced by the criminal investigation units within the current scope of crimes, let alone expanding it to accommodate other sins and misdeeds of different types and forms!

**Third:** considering sins punishable crimes gives rise to real, practical problems as regards the application, for example, the problematic

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<sup>51</sup> Al-Bukhari, (Hadith Number: 853) on the authority of Ibn ‘Umar.

identification of a Muslim and non-Muslim. The Islamic Sharia obliges the Muslim to perform the mandatory prayers on time, but a non-Muslim is not bound to that obligation. How can we apply this 'law' without being arbitrary or without prejudice to the non-Muslim's rights (as happens in some countries and constitutes a significant disservice to the image of Islam)? Should people carry religious ID cards and display their religious affiliations all the time to make it easy to determine who should be punished for missing the obligatory prayers? This is impossible and unrealistic in our time, especially in populous countries accommodating millions of citizens!

It is true that *ta'zīr* punishment is incorporated within the Sharia laws; it is a discretionary punishment imposed by the "ruler" (or in our time imposed by the representative of "the nation") for a certain sin. However, the *ta'zīr* should not be applied unless three conditions are met:

1) The sin must be proven to imperil the public interest of the nation and a community consensus is required in this regard; otherwise, the community will be jeopardized to an outbreak of community conflicts over the law, giving rise to community unrest. For example, a blatantly illegal act (entailing a punitive action) e.g., revealing one's private parts in public which is declared improper, harmful and incompatible with the Arab customs of Muslims and non-Muslims alike, the law may prescribe a punishment for such an act as it prescribes for negligence in work or administrative corruption through exploiting one's powers or profiting from public service. These sins are deemed as prohibited acts and are declared forbidden by God and must be punishable under the law; they are also detrimental to the public interest.

As for the lesser sins that are merely violations of the ideal relationship between an individual and God, they must be changed through educational, cultural and spiritual methods, e.g. reform of education and media. This is the optimal solution; security and legal solutions, as espoused by the deposed regimes, are not effective and we should not opt for them anymore. Sometimes people would assume that

legalization is the solution to every problem, although legalization, criminalization and punishment should be the last resort.

2) No *ta'zīr* punishment should exceed the corporal prescribed penalties. This condition is well-known in Islamic jurisprudence except in some odd views. However, we find in some countries that are classified as Muslim and claim the application of the Sharia that some people are flogged thousands of lashes for a sin that is significantly less grave than the sin liable for only eighty or one hundred lashes! If a man commits adultery, four witnesses bear witness to the same, all the suspicions and doubts are eliminated and all the required conditions for applying the relevant penalty are met, the penalty is one hundred lashes; however, if a man is arrested for a crime, they labeled as "doubt of committing adultery"— that is an unproven accusation of illicit sex, he is to receive one thousand lashes! How could that be acceptable? How can they subject people to flogging merely based on doubts, while the Prophet said: "Prescribed punishments are dismissed in case of uncertainty." If the *hudud* (prescribed penalties) are to be dismissed by uncertainty, how about *ta'zīr* punishment? Verily, misapplication of the Sharia following the desires of some politicians.

3) *Ta'zīr* punishment must be decided by the nation, not the "ruler" in the executive sense. The juristic view on this matter should be changed, so no one has the power or authority to flog people and seize their wealth without a law endorsed by the elected lawgivers or the legislative entity of any form. The penalty must be properly articulated and prescribed and people are aware of it before it is implemented.

The jurisdictions of the ruler must be limited to setting and implementing the policies; he should not subject anyone to *ta'zīr* punishment at his personal discretion. The Muslim peoples have struggled with tyrants for so long, sometimes in the name of the Sharia. Verily, the Sharia never approves of dictatorship and it is about time to put an end to that.

## How can the call for the application of the prescribed penalties set by the Sharia?

There is a considerable difference between sins and crimes and between the Sharia and law. For the Sharia, as in case of *ḥudud*, the sources, differences of opinion and ijtihad and different interpretations are well-known. Scholars may or may not agree on the proper application of some or all of these penalties today. However, turning the Sharia provisions into binding laws and regulations, especially in the countries to which such a practice is quite odd and unfamiliar, depends on the constitutional and legislative mechanisms that allow the enforcement of such laws, and more importantly, on the overwhelming community consensus on their applications. None can assume that this may currently happen.

Linguistically, the Arabic word *ḥadd* denotes an interval between two things; it is used to refer to the borders of a city or city walls or the furthest parts of it. Similarly, the *ḥudud* are the ultimate punishments in the Islamic criminal law, not the only ones. In modern terminology, they are exceptional penalties enforced in emergency cases, not for ordinary crimes.

The *ḥadd* must be evidenced by explicit religious text with clear-cut conclusive (*qaṭʿī*) indications and must be fixed and specified in clear forms and numbers; otherwise, it is considered *taʿzīr* punishments, as set out earlier. For example, the punishment prescribed for the consumption of intoxicants in Islam is a sort of *taʿzīr* punishment, not a *ḥadd* as some mistakenly argue. This is because the punishment is not fixed and conclusive. The Prophet implemented different penalties for the consumption of intoxicants, or to be more accurate, for ‘public’ consumption of intoxicants. The punishment for the consumption of

intoxicants is left to the discretion of the lawmaker and the contemporary mujtahids.

The Ḥudud in the Sharia are prescribed for specific and known crimes:

1- **Theft**: God (may He be Exalted) says: “Now as for the man who steals and the woman who steals, cut off the hand of either of them in requital for what they have wrought, as a deterrent ordained by God....”<sup>52</sup>

2- **Adultery**: God (may He be Exalted) says: “And punish [thus] both of the guilty parties; but if they both repent and mend their ways, leave them alone: for, behold, God is an acceptor of repentance, a dispenser of grace....”<sup>53</sup>

“...and as for those of your women who become guilty of immoral conduct, call upon four from among you who have witnessed their guilt; and if these bear witness thereto, confine the guilty women to their houses until death takes them away or God opens for them a way [through repentance].”<sup>54</sup>

“ As for the adulteress and the adulterer - flog each of them with a hundred stripes, and let not compassion with them keep you from [carrying out] this law of God, if you [truly] believe in God and the Last Day; and let a group of the believers witness their chastisement.”<sup>55</sup>

3- **Hirabah** (armed robbery or banditry): it refers to causing mischief on earth and highway robbery. God (may He be Exalted) says: “It is but a just recompense for those who make war on God and His apostle, and endeavor to spread corruption on earth, that they are being slain in great numbers, or crucified in great numbers, or have, in result of

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<sup>52</sup> The Quran, 5:38.

<sup>53</sup> The Quran, 4:16.

<sup>54</sup> The Quran, 4:15.

<sup>55</sup> The Quran, 24:2.



their perverseness, their hands and feet cut off in great numbers, or are being [entirely] banished from [the face of] the earth: such is their ignominy in this world But in the life to come [yet more] awesome suffering awaits them.”<sup>56</sup>

- 4- **Murder and bodily injuries:** There are different categories: (deliberate killing) murder, semi-deliberate murder and manslaughter; deliberate bodily injuries and quasi-deliberate bodily injuries. There are different types and known forms specified in the Sharia. For example, the punishment for murder is death, according to the “aye for an eye” or law of retaliation in Islam; God (may He be Exalted) says: “And We ordained for them in that [Torah]: A life for a life, and an eye for an eye, and a nose for a nose, and an ear for an ear, and a tooth for a tooth, and a [similar] retribution for wounds; but he who shall forgo it out of charity will atone thereby for some of his past sins. And they who do not judge in accordance with what God has revealed - they, they are the evildoers!”<sup>57</sup>

God (may He be Exalted) says, “... for, in [the law of] just retribution, O you who are endowed with insight, there is life for you, so that you might remain conscious of God!”<sup>58</sup>

- 5- **Slander:** defamation and false accusation of committing adultery; God (may He be Exalted) says: “And as for those who accuse chaste women [of adultery], and then are unable to produce four witnesses [in support of their accusation], flog them with eighty stripes; and ever after refuse to accept from them any testimony - since it is they, they that are truly depraved!”<sup>59</sup>

There is also "*ḥadd* for apostasy", which refers to the death penalty supposedly prescribed for apostasy. Many scholars included it in the

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<sup>56</sup> The Quran, 5:33.

<sup>57</sup> The Quran, 5:45.

<sup>58</sup> The Quran, 2:179.

<sup>59</sup> The Quran, 24:4.

fixed punishments despite the fact that it is not fixed or specified.<sup>60</sup> This subject will be further discussed.

There are two important questions in this regard:

1. Can the *ḥudud* be applied in a “civil” state?
2. Some Islamists call for the application of *ḥudud* in Egypt, what are the necessary studies and *ijtihads* before today application of *Ḥudud*?

In response to the first question: “NO”, unless they are implemented under the terms of the civil state. They thus have to, as any other bills, pass through the legitimate legislative channels and must be agreed upon by the people on a larger scale, and not only merely within the scope of the legislature (legislative entities). If the people collectively agree that the *ḥudud* should be endorsed as binding legislations, they are to be regarded binding just like the rest of the legislations and laws in a given community.

Moreover, the first condition stipulated by the civil state in relation to legalized penalties is legal equality; equality among all citizens in the eyes of the law! If all the people agree on the application of *ḥudud*, this is great; otherwise, this poses a real problem in multi-religious communities, punishing non-Muslims for sins that are not considered sins in their divine law.

If someone presents another proposal to implement the *ḥudud* only to Muslims, this also gives rise to many problems; the most important of which will be its incompatibility with the judicial and legal equality among all citizens, which is the very foundation upon which the civil state is built, not just a legal doctrine.

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<sup>60</sup> See two books recently published by Dr. Taha al-‘Ulwānī and Yusuf al-Qaraḍawī. See, Taha al-‘Ulwānī, *La Ikrāḥa fī al-Dīn: Drasah Fī Ishkālīyyat al-Riddah wal Murtaḍīn*, (Cairo: Maktabat Al-Shorouk al-Dawliyyah, 2003 CE); Yusuf al-Qaraḍawī, *Jaḥīmat al-Riddah wa ‘Uqubat al-Murtad*, (Cairo: Maktabat Wahbah, 2nd ed. 2005 CE).

The realistic procedures require the lawmaker to assess the societal consensus by means of organizing a public referendum which is also quite unlikely in multi-religious societies. Practically speaking, it is unlikely to reach a societal consensus on any of the *hudud* in the contemporary Egyptian state, except the *hadd* for murder due to the poor implementation and political abuse of these penalties as seen in the few countries that incorporated them in their criminal laws.

This does not change the Sharia itself in the slightest. However, there is a difference between the Sharia and law as previously mentioned; and between the Sharia sent down by God and what we can translate into binding laws applicable in contemporary reality.

In response to the second question, before calling for the application of the Sharia in our time we should study the new interpretations and juristic discretions about the implementation of the Sharia. It should be asserted that Ijtihad is obligatory and should not be missed in any given time.

The first of these new-old ijthad is dismissing the *hadd* in case of repentance which achieves the purpose of *hadd* that is being a deterrent and a means to combat the crime and reform the offender and the community. It also paves the way to opportunities for reform and establishing good governance. It is well-known that there are two parts or sets of rights in each of these offenses; the first is the right of human beings that must be restored to the rightful owners. In case of theft, for example, the stolen item must be returned to its owner. The second kind of rights is the rights of God; the sin committed in disobedience to the Lord. God (may He be Exalted) says about those who commit the crime of *hirabah*:

“It is but a just recompense for those who make war on God and His apostle, and endeavor to spread corruption on earth, that they are being slain in great numbers, or crucified in great numbers, or have, in result of their perverseness, their hands and feet cut off in great numbers, or are being [entirely] banished from [the face of] the earth: such is their ignominy in this world. But in the life to

come [yet more] awesome suffering awaits them - save for such [of them] as repent ere you [O believers] become more powerful than they: for you must know that God is much-forgiving, a dispenser of grace.”<sup>61</sup>

No scholar has ever disagreed that the *ḥadd* of *ḥirabah* is waived in case of the doer's repentance, as per the verse. However, it is quite odd that scholars held different opinions on drawing a deductive analogy between waiving the *ḥadd* of *ḥirabah* in case of repentance and waiving other *ḥudud* despite they are punishments for less graver crimes!<sup>62</sup>

If God accepts the repentance of a sinner and the *ḥadd* for *ḥirabah*, which is prescribed for the gravest crimes, is waived, will the repentance of the sinner waive the other *ḥudud*? The proper answer for our present time and the optimal Ijtihad based on the objective of *ḥudud* in principle is 'yes.' If the repentance is verified and evidenced by supportive proofs, it must be accepted, in principle of course, after returning the rights to their owners.

Dr. Tawfiq al-Shawī is supportive of that view; he (may Allah rest his soul in peace) wrote: It is clear that encouraging the repentance is one of the most important objectives of the Sunnah. The Prophet even advised the sinner who confessed a crime to undo the confession serving as an indication of repentance. This expansion in (the acceptance of) repentance is often ignored by many ... [although] it is more effective in combating crimes and reforming the offenders and the community compared to the imposition of the prescribed penalty. When the lawbreaker proclaims his sincere repentance and seriousness, it is considered a valid element of uncertainty that the judge must accept as a valid reason for dismissing and waiving the maximum penalty whether it is a *ḥudud* or *qīṣaṣ*... repentance does not exempt the lawbreaker from

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<sup>61</sup> The Quran, 5:33-34.

<sup>62</sup> Review the opinions of Muslim Schools of Jurisprudence in 'Abd al-Qadir Auda, *al-Tashrī al-Jinā'i al-Islāmī Muqararan Bi-al-Tashrī al-Waḍ'i*, (Cairo: al-Risalah Foundation, 10th ed. 1989), Chap. Exemptions from Penalties.

returning the civil rights to their rightful owners ... the probation must be considered as a means of encouraging the lawbreaker to repent. It is entirely consistent with the Sharia Maqaṣid and principles.<sup>63</sup>

Professor Dr. Muḥammad Salīm Al-‘Awwa also supports the acceptance of repentance in waiving the *ḥudud*; he wrote: “The arguments brought forth by those who maintain that the *ḥudud* are waived by repentance i.e. the exemption of the lawbreaker from the punishment, are stronger than their contestants' view....This opinion is not criticized for opening the door for escaping the punishment by claiming repentance, because when we consider repentance a valid reason to waive the punishment, this does not mean that the judge is not allowed to weigh the claim of repentance and he is entitled to assess it and declare it either sincere or a mere claim...”<sup>64</sup>

The second important contemporary ijtihad is pertaining to the implementation of the maxim of jurisprudence: “Prescribed punishments are dismissed in case of uncertainty” in our contemporary reality.

We cannot suggest that we could apply the *ḥadd* for theft, for example, in a community that abounds in Sharia-acceptable suspicions and elements of uncertainty that prevent the application of the *ḥadd* and renders its application unfair and, actually, un-Islamic. Arab countries that witnessed the revolutions, unfortunately, abound in hunger, poverty, disease and ignorance. It is un-Islamic to punish people in such circumstances; this is a widespread uncertainty that requires the suspension of *ḥadd* for a while, for example, even if the people agreed to its application.<sup>65</sup>

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<sup>63</sup> Review Dr. Tawfīq al-Shawī's opinion, *al-Mawsū‘ah al-‘Aṣṣīyah fi al-Fiqh al-jinā‘i al-Islamī* by ‘Abd al-Qādir Auda, (Cairo: al-Shorouk, 1<sup>st</sup> ed. 2001 CE), Chap. *Al-Surū‘, ishtirāk and Tawbh* (Attempted Crime, participation in crime and repentance).

<sup>64</sup> See Muhammad Salīm Al-‘Awwa, *FiUṣūl al-Nizām al-Jinā‘i al-Islamī*, (Dar NahdatMisr, 2006 CE).

<sup>65</sup> I agree with the view of Dr. Tariq Ramadan, see Ramadan, Tariq, “*Stop in the Name of Humanity.*” *Globe and Mail (London)* Wednesday, March 30, 2005.

Before calling for the application of the *ḥadd* of theft, we are legislatively bound, pursuant to the Sharia, to enhance and improve the living standard in general and eliminate poverty and hunger; and satisfy dire needs first. It is well-known that ‘Umar ibn al-Khaṭṭab (may Allah be pleased with him) suspended the application of the *Ḥadd* for theft in the year of the famine.<sup>66</sup>

Similarly, before calling for the application of the *ḥadd* for adultery, we are legislatively bound to educate people and edify them on their religion first. ‘Umar ibn al-Khaṭṭab (may Allah be pleased with him) suspended the application of the *ḥadd* for adultery to the non-Arab woman.<sup>67</sup> We should take into account the scarcity of proper understanding and awareness in our communities, as we should not call for the application of *ḥadd* before providing adequate knowledge for people on that which is lawful and that which is unlawful and providing the suitable circumstances in which the young people get married and shield their chastity.

There are two last points related to the contemporary juristic discretions on *ḥudud* that are the stoning of the married adulterer to death (*al-rajm*) and apostasy.

As for the punishment of stoning to death (*al-rajm*), most scholars agreed on the legality of stoning the married adulterer to death. However, there is another scholarly view suggesting that this punishment was prescribed in the Jewish divine law that was abrogated by the Sharia and is not actually prescribed in Islam. Another position suggests that such a crime entails a Ta‘zīr punishment and is left for the judge to decide and stoning the married adulterer is not the basic principle. These two scholarly views are worthy of consideration and were mentioned by Sheikh Yusuf al-Qaraḍawī and others. Al-Qaraḍawī wrote (quoting verbatim for the benefit):

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<sup>66</sup> Muhammad al-Biltaji, *Manhaj ‘Umar ibn al-Khattab fi al-Tashrī‘: Drasah Mustaw‘ibah li-Fiqh umar wa Tanzīmatih*, (Cairo: Dar al-Salam, 1st ed. 2002), p. 190.

<sup>67</sup> Ibid.

In the Islamic Legislation Symposium (in Libya, on 1972), Sheikh Abu Zahrah introduced a juristic view that agitated the members of the conference as he caught them in surprise with his different and new opinion. He (may Allah rest his soul in peace) surprised the members of the seminar as he stood up and said, "I have held an opinion secret for twenty years and it is about time to share it before God holds me accountable for withholding it from people. It is about stoning the adulterers. I believe that it is a Jewish legislation and not part of the Islamic law. The Prophet has approved the punishment initially, and then the verse of Surat Al-Nūr (no. 24) abrogated it. To support his argument the Sheikh Abu Zahrah gave three points referring to parts of the Quran; he added, "First, God (may He be Exalted) says: "... And when they are married, and thereafter become guilty of immoral conduct, they shall be liable to half the penalty to which free married women are liable..."<sup>68</sup> Stoning to death is not liable for division. It is established that the punishment to which the verse referred is that mentioned in chapter 24; God (may He be Exalted) says: "As for the adulteress and the adulterer - flog each of them with a hundred stripes ... and let a group of the believers witness their chastisement..."<sup>69</sup> Second, it has been reported on the authority of 'Abdullah ibn Abi Awfa was asked about *al-Rajm* penalty (stoning to death for committing illicit sexual intercourse outside of wedlock). He replied, "The Prophet carried out *al-Rajm* penalty," It is said, "Was that before or after the revelation of Surat al-Nur?" He replied, "I do not know." It was recorded in Ṣaḥīḥ al-Bukhari. It is most likely that the stoning to death penalty had been abrogated by the verse in chapter 24. Third, the Ḥadīth they relied on and argued that it had been a verse in the Quran and was abrogated, yet the relevant religious ruling remains in effect, is actually unreasonable; why would the verse be abrogated while the religious ruling continues in effect? The claim that Quranic verses of stoning were written on a piece of paper and were lost when a goat ate it is simply

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<sup>68</sup> The Quran, 4:25.

<sup>69</sup> The Quran, 24:2.

unreasonable.” The members of the gathering were agitated, most of the attendees were furious at him, refuting his opinion with the commentary cited in the *fiqh* references about these pieces of evidence. Yet, Sheikh Abu Zahrah did not change his position ... It seems that this strong campaign Sheikh Abu Zahrah faced made him refrain from declaring his opinion, so he never recorded it written after that. Al-Qaraḍawī added, “After the commotion, I approached the Abu Zahrah and told him that I held a somewhat similar opinion to his but may be more acceptable. Explaining it, I cited the Prophet's statement: “...in case of unmarried male commits fornication with another unmarried female, there is (a punishment) of one hundred lashes and exile for one year. And in case of married persons, (the punishment) is one hundred lashes and then stoning (to death).” [Al-Bukharī] He inquired, “What do you deduce from this Ḥadīth?” Al-Qaraḍawī replied, “You know Sheikh, the Ḥanafis avowed that the first punishment mentioned in the Ḥadīth refers to the *ḥadd* that is flogging; the exile is a discretionary punishment left to the wisdom of the ruler and is not necessarily applied in all cases ... However, he did not agree with me. He turned to me and said, “O Yusuf! Was it possible for Prophet Muḥammad, the source of mercy, to stone someone to death for any crime? It is the Jewish laws ...” Sheikh al-Qaraḍawī comments saying, “I have thought deeply about Sheikh Abu Zahrah’s saying that ‘how many view are kept in chests to death.’”<sup>70</sup>

Sheikh Esam Tallima penned a thorough search on this topic; he stated that some scholars held that stoning to death is considered a *ta’zīr* punishment left to the discretion of the ruler to serve the best interests of the Muslims. Some maintained that view supported with detailed evidences explanations, such as ‘Abd al-Wahhab Khallaf, Muḥammad Abu Zahrah, Muḥammad al-Banna, Muṣṭafa al-Zarqa, Yusuf al-Qaraḍawī and Muḥammad Su‘ad Jalal. Others held the same opinion, but not all their relevant views were reported on their authority, because they were reported orally and they had informed some of their students

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<sup>70</sup> See the memoirs of Dr. al-Qaradawi, [www.qaradawi.net](http://www.qaradawi.net).



privately or in sessions without documented, e.g., Sheikh Muḥmūd Shaltūt, Sheikh ‘Ali al-Khafif and Sheikh ‘Ali Ḥasabullah.<sup>71</sup>

The second topic is the punishment of apostasy. It is misemployed and misused for political reasons in the past and the present. We must differentiate between the apostate who chooses to change his faith, which constitutes disbelief entailing the punishment of God on the Hereafter, yet still falls under the basic principle, “There shall be no coercion in matters of faith”<sup>72</sup> and the apostate who combines disbelief with other crimes, such as blasphemous libel, murder or waging war against Islam or defamation of Muslims. In this case, he must be held accountable for these combined crimes because in the second scenario the apostate combines apostasy with other crimes that must be punished. Apostasy is not considered a civil crime per se. This is another important contemporary exhaustive ijtihad. One of the best important scholars who addressed this topic was Sheikh Taha Jabir al-Ulwani; he wrote:

My study incorporated the relevant Ḥadīths, reports and the prophetic traditions. I tried to study and discuss them to demonstrate a lack of consensus on the existence of a legally prescribed punishment for apostasy in the Quran and the Sunnah. Moreover, we have previously proved that there is no *ḥadd* for apostasy reported in the practices of the Prophet. The evidences thus jointly negate the existence of *ḥadd* in the Quran or Sunnah for the change of an individual’s doctrinal beliefs without combining that with any other crime. There is no such *ḥadd* for apostasy in the Quran, the only source of Sharia rulings ... Moreover, no incident has been reported from the lifetime of the Prophet indicating that he had actually applied a punishment to someone who changes his religious beliefs despite the fact that authentic reports prove that some Muslims had actually apostatized and changed their faith during the lifetime of the Prophet and he knew of them, but did not apply any punishment to them. It has become clear that jurists addressed a different crime than what we

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<sup>71</sup> An electronic version, see [www.leadersta.com](http://www.leadersta.com).

<sup>72</sup> The Quran, 2:256.

are addressing now; they were addressing apostasy combined with other crimes involving the political, legal, and social elements. The apostate who changes his faith or religious beliefs normally changes his stance towards the nation, Muslim community, legitimate political leadership and the political systems adopted by the Muslim state in addition to the shift in belonging and affiliation and loyalty accordingly. We have also discussed that the claim to consensus in this regard is faulty. It has been established that there is no consensus of opinions reached on the existence of a *ḥadd* or a fixed legally prescribed punishment stated in the Quran or the Sunnah for apostasy in the sense explained above. Hence, it becomes clearly established that Islam celebrates and confirm the freedom of belief which is an individual freedom that God entrusted with Man. This is why the responsibility of guarding this freedom is shouldered by human beings ... The one who is forced into an action or stance is actually outside the scope of competence for religious assignments (*taklīf*) and he is not held accountable for whatever he is forced into doing, regardless of its nature, not in this worldly life or the Hereafter. When the freedom of choice decreases, responsibility and accountability for actions are narrowed down in proportion.<sup>73</sup>

Finally, there is a pressing need to the contemporary ijtihad as to the gradual implementation of legal rulings whatsoever in any society. The application of the major provisions in the community of the Prophet had been gradual. The prohibition of intoxicants and usury, for instance, was revealed over different stages. This was the Sunnah of the Prophet as regards the implementation of major Sharia provisions; moving the community from a phase to another gradually. This gradual approach in application is essential, if possible, anyway. No scholar has the authority to alter the Sharia but the calls for the application of the Sharia that do not take into account the nature of the modern civil state and the contemporary juristic discretions must be rationalized, because this leads to negative results other than the intended ones by the legislation.

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<sup>73</sup> See the website of Dr. Taha Jabir al-'Ulwani, [www.alwani.net/books.php](http://www.alwani.net/books.php).

## What about levying the *jizyah* from non-Muslims?

There are two problems with the call of some Islamists and a greater number of their followers to levy the *jizyah* from non-Muslims living in the Muslim-majority countries and deny them the right to join the military service.

First, this proposal assumes that the contemporary Arab countries are "Islamic" states in the historical sense of the word, not in a contemporary sense in which the "civil" is mixed with the "religious" as explained earlier.

The "Islamic state" in the historical sense requires a distinction in the public legal provisions between Muslims and non-Muslims in respect of the rights and duties towards the state. Accordingly Muslims pay Zakah to the state and non-Muslims pay the *jizyah* in return for exemption from military service and enjoying the protection in Dar al-Islam.

However, this assumption is inaccurate, because the nature of contemporary Arab countries is not "Islamic" in the historical sense of the word. Rather, they are Muslim countries in a contemporary sense based on the fact that most of the populations are Muslims and the Sharia is the primary sources of legislation. Yet, these countries were founded to rely on their respective constitutions upholding the citizenship rights and equality among all citizens in rights and duties (apart from the rites of each respective religion).

If people reject that and insist that Egypt, for example, is an "Islamic state" in the historical sense of the term, which requires making a distinction between the citizens in terms of the citizenship rights, so let those who want it to launch a new revolution on Islamic foundations or call for building an Islamic state with a different constitution and state-citizen relationship of a different nature. However, the 25 January 2011

revolution had been launched and produced the current stage. It did not aim at establishing an Islamic state in the historical sense of the term nor did it call for it. None of the key players in the revolution – Islamists or otherwise - claimed that the revolution aimed at changing the political system or state structure to an Islamic state in the sense historical, entailing a distinction between Muslims and non-Muslims in rights and duties. Otherwise, this is another issue the Egyptian people did not approve as they agreed upon the January 25 Revolution. Actually, it would not have succeeded in toppling the president under popular pressure.

Second, this call for levying the *jizyah* from the non-Muslims was built on the wrong perception that the *jizyah* and its implications are essential parts of the Islamic Sharia to which Muslims everywhere and at all times are bound to apply. It is true that God (may He be Exalted) says:

“[And] fight against those who - despite having been vouchsafed revelation [aforetime] - do not [truly] believe either in God or the Last Day, and do not consider forbidden that which God and His Apostle have forbidden, and do not follow the religion of truth [which God has enjoined upon them] till they [agree to] pay the exemption tax with a willing hand, after having been humbled [in war].”<sup>74</sup>

However, this verse indicates a political discretion about a changeable means rather than a fixed religious ruling that falls under the unchangeable *maqasid* of the Sharia. It is, as explained above, similar to the verse that reads:

“AND KNOW that whatever booty you acquire [in war], one-fifth thereof belongs to God and the Apostle, and the near of kin, and the orphans, and the needy, and the wayfarer.”<sup>75</sup>

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<sup>74</sup> The Quran, 9:29.

<sup>75</sup> The Quran, 8:1.

This verse indicates the ruling on war spoils; no scholar would differ that the application of these provisions has significantly changed in our present time when the armies are founded on a totally different system. This is also similar to the verse that reads:

“And [forbidden to you are] all married women other than those whom you rightfully possess [through wedlock]...”<sup>76</sup>

The same applies to the provisions on having lawful relationships with one’s female slaves, “other than those whom you rightfully possess.” No scholar disagrees that these provisions have changed in our time.

The regulations of war spoils, *jizyah* or enslavement of prisoners of war and the like are not of the immutable fixed laws of Islamic Sharia that Muslims are bound to in all times and places. They are historical regulations governed by political discretion of a given era and should be subject to the political discretion now in line with the geographical and historical contexts as well. Islam aims to guarantee freedom, equality and peace. Any violation or prejudice to these fundamental values under any circumstance is exceptional and should not be a basic principle.

Historically, the non-Muslims paid *jizyah* to the Muslim state in the same manner the Muslims paid the *zakah*; the state fairly levied the *zakah* from Muslims and *jizyah* from the non-Muslims. In fact, the Jizyah was always less than the *zakah* in value, if we were to examine its different forms throughout the history. Jizyah was a legal regulation intended to achieve a sort of justice in the state, levying these sums from the Muslim and non-Muslim citizens on equal footing to spend them in their specified channels. Today, things have changed dramatically and the state does no longer levy *zakah* or *jizyah*.

The military service for non-Muslims in a Muslim state is another ijtiḥad-based issue. Non-Muslims had been exempted from joining the military service in the past, because they used to pay the *jizyah* in return for military protection by the Muslim army when the wars were waged in

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<sup>76</sup> The Quran, 4:24.

the name of religion. Hence, it is fair for the non-Muslim citizens in the Muslim community not to participate in a war against the adherents of their very religion.

However, today the situation is completely different. Wars are of a national nature fought by soldiers, each harboring his personal intent; some are fighting for the sake of God, some for the sake of their nation, and others merely for the sake of the defense of their families only. Therefore, the matter is open for making the military service either a choice or mandatory according to the discretion of the lawmaker, for the Muslim and non-Muslim alike.

None should be forced into fighting in a war against his own beliefs whatsoever. No national citizen who loves his country should be denied the right to defend his nation. Of course, there are exceptional partial issues and there are individuals, whether Muslims or non-Muslims, who join the army with corrupt intents with the aim of violating the law and the national consensus. In this case, such individuals must be dismissed from the army, Muslims or non-Muslims alike. Otherwise, the basic principle is: the citizen must be given the freedom of option to join the army of his national country if he able and wants it.

The same applies to the non-Muslims assuming senior offices, such as presidency. This is a matter open for ijtihad as well; all the relevant religious texts, supportive or otherwise, are misinterpreted for a simple reason that there is no state in our time consider itself "Caliphate State" about which Muslim scholars discussed in relation to the basic prerequisites for being chosen as a Caliph. It should be well-established that the president is not the Caliph or the Supreme ruler. No claim to that effect has any reasonable evidence!

Anyway, the assumption that a Christian would assume presidency in Egypt, for example, or a Jew in Morocco is a theoretical issue by all realistic standards. It is unlikely that the Egyptians would elect a Christian or the Moroccans would elect a Jew as President due to some primary cultural and political considerations, not necessarily for religious considerations. However, the existence of this possibility on the

theoretical level helps to realize equality among all citizens before the law, which is very important to emphasize the civil nature of the state and the equality of all citizens in rights and duties. It is a preliminary element in building a stable and modern state.

## What is the Sharia's stance on the reforms of the family laws before the revolutions?

If the area of personal status law lies between what is "religious" and what is "civil" as mentioned in an earlier chapter, the last word in this regard of Muslims' rights must be decided at the discretion of mujtahid Muslim scholars. No room is there for the calls of "civil marriage"; the marriage done outside the religious provisions. I have recently watched a Tunisian young man on a satellite channel calling for the legalization of marriage between siblings as a form of "civil marriage" (actually no country, be it 'religious' or secular in the whole world allows such a marriage!)

Some advocates of civil marriage, as seen in Tunisia clearer than Egypt, believe that the application of the Sharia, being Islamic or not, imposes certain restrictions on the freedoms of the people and constitutes prejudice to the principle of gender and legal equality among citizens.

Indeed, the issue needs further detailed investigation. There are certain authentic religious rulings that should be turned into binding laws in line with the spirit and principles of Islam. Some baseless *fatawa* issued by some muftis against the divine revelation should also be rejected, let alone the violation of the values of justice, mercy and Sharia-considered interests.

The authentic personal status laws that may apparently reflect gender inequality are not actually injustice; actually, they establish perfect justice, as the concept of justice imposes equality between equals and distinction between the different. For instance, giving the mother the right to child custody due to her natural role in the early stages of the child's life should not seem as a biased preference of the female over the male. Rather, it is a question of distribution of roles between the mother, who carries the



child in womb and breastfeeds him/her, and the father who is responsible for spending and providing for his child, in normal situations.

The difference between the divorce proceedings in case it is issued at the request of the man and the *Khul'* (divorce at the instance of the wife who pays a compensation) requested by the woman is due to the difference between men and women in terms of dowry, alimony and other duties and responsibilities, issues, etc., and not due to the preference of females over males or vice versa.

Moreover, the restrictions laid down by the Sharia on some marriages such as prohibiting incestuous marriage, limiting the divorce to three occurrences, enjoining the '*iddah*' (post-divorce or death waiting periods for women), requiring the consent of the minor bride's parent and the like are all religious provisions with fair purposes, objectives and legitimate interests, and so free from any sort of vanity. They are all related to the Islamic social order in general.

It is a truism that some historical *fatawa*, which have been given "legitimacy", need further investigation and call for new *ijtihad* because they are not unchangeable, fixed or binding in all times and places. Rather, they were issued within specific historical contexts that differed greatly from our present-day conditions. It is possible that these juristic discretions were wrong as explained the difference between the Legislator, God, who is impeccably (Exalted far above error He is) and the *faqīh* who is prone to error.

Consequently, instead of calling for the non-compliance with religion at all in matters of personal status law leading to the loss of the nation's Islamic identity, as highlighted above, it is better to call for new contemporary juristic discretions to both realize the new interests and conform to the timeless fixed scripts. It is also necessary to call for new juristic *ijtihad* on the new issues and events to decide on the new social problems and correct the path.

Some Arab countries have incorporated the women's right to request *Khul'* into the laws in the past decades. Actually, it is a basic right of

women to demand ending the marriage bond anytime equal to men's right to divorce her whenever they wish.

Ibn Rushd (Averroes) wrote in his encyclopedia of jurisprudence (*Bidayat al-Mujtahid*): "Islamic jurisprudence allows the woman to redeem herself from the marriage bond on equal footing to man's right to divorce her if he dislikes her; similarly, the woman is given the right to *Khul'* if she dislikes the man..."<sup>77</sup>

This is a commendable revival of the basic principles of equality and justice in the Sharia; the new regimes in the post-revolution phase must not abolish such regulations simply because they were introduced by the former regimes.

Another example is related to the mother's right to the custody of her children. The mother loses her right to custody when she remarries under the current laws. In the present-day Egyptian law, for example, the divorced mother loses custody over her children to the nearest female relatives; her mother and then her sister, if she remarried. According to the laws of other Arab countries, the custody is automatically transferred to the father as soon as the mother remarries.

In fact, I believe that this matter entails new contemporary *ijtihād* given that the absence of relevant religious conclusive indication. The matter, as al-Ṣanʿanī asserts, "is centered on the interests of the child." Al-Ṣanʿanī was one of the senior Muslim jurists; he even commented on that matter saying: "However, the Sharia does not allow otherwise."<sup>78</sup>

Another example of the desired reform and renewal is what some scholars and activists call for restricting polygyny in Islam as Sheikh Muḥammad ʿAbdu wrote: "The ruler who is responsible for the

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<sup>77</sup> Abu al-Walīd Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid, Kitab al-Talaq*, (Beirut: Dar al-Fikr, undated).

<sup>78</sup> Muhammad Ibn Ismaʿīl al-Amīr al-Sanʿanī, *Subul al-Salam*, Ed. Muhammad ʿAbd al-ʿAzīz al-Khūlī, (Beirut: Dar Ihyāʾ al-Turāth al-ʿArabi, 4th ed. 1379), vol.3, p.111.

implementation of the Sharia is entitled to ban polygyny so as to ward off guaranteed mischief."<sup>79</sup>

In fact, this matter entails further study taking into account the cultural considerations; what may be suitable for Tunisia, for example, may not be so in other countries. However, the fact that the Tunisian Renaissance Party (Islamist party) endorsed the pre-issued laws limiting polygyny is actually allowed, because it is within the scope of the elimination of evil and the realization of interests as unanimously agreed upon by the people of this country. The party never meant to change the Sharia itself under any circumstance. Rather, they changed a law seen by people to be closer to the realization of the public interests of the society. ‘Umar ibn al-Khaṭṭab, in a similar discretionary decision, decided to regard the triple divorce issued in one sitting as irrevocable—as a sort of a *ta‘zīr* punishment, despite being contrary to the original ruling in this regard!

Moreover, some advocates of human rights are calling for the legal restriction of divorce so that it may not be easy a man to undo the family bond with simple words uttered in a momentary disagreement. They call for stipulating the presence of two trustworthy witnesses or being issued before a judge, for example. In this regard Sheikh Muḥammad ‘Abdu said: “The basic principle in divorce is proscription; it is prohibited unless under a valid excuse; if divorce is issued for no valid excuse, it is a sort of foolishness and ingratitude to the grace of God and abuse of the woman and her family and children.”<sup>80</sup>

These new juristic discretions should be reconsidered and the scholars introducing them should not be accused of going against the Sharia merely because they seem contrary to the apparent and literal

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<sup>79</sup> See his opinions and fatawa, Muhammad ‘Abdu, Complete Collection, Ed. Muhammad ‘Imarah, (Cairo: Dar al-Shorouk, 1993).

<sup>80</sup> Ibid.

indications of the religious evidences because they support, promote and are consistent with the *maqasid* and the principles of Sharia.

There are other problematic issues that are in need of correction in this area due to the need to develop the courts, facilitate the legal procedures, and improve the situation of judges in general. Some scholars, actually, called for the abolition of all family laws enacted by the former tyrannical regimes given the well-known pressure exerted by the wives of former presidents and those brought into their close circles and the like.

Really, the issue entails a detailed study; some of the past amendments and judicial precedents in the past regimes are actually acceptable juristic discretions compatible with Islam and the *maqasid* and principles of the Sharia. For example, the right to *Khul'* mentioned earlier and stipulation of the first wife's consent to the second marriage that limited the problems related to this issue in the community and reduced the unfair practices on part of the husbands. A dedicated wife devotes her life to her husband and then he decides to remarry without her knowledge, which entails injustice and loss of rights.

For another example, establishing affinity through the DNA testing, which, in my opinion though many would disagree, is a positive one, because it is compatible with the Sharia *maqasid* on the establishment of affinity and guarding the child's rights with due respect to the juristic discretion suggesting that it is unacceptable on the basis of the elimination of means (that lead to unfavorable results). All these juristic discretions are consistent with the principles and universal *maqasid* of the Sharia; they achieve greater degree of justice and are built on valid views within, not outside, the Islamic jurisprudence.

It should be stressed that advocating the juristic discretions and renewal in the personal status laws is not to yield to the conspiracies being hatched against the Muslims in the name of globalization with aim to obliterating the landmarks of the Muslim culture through dissolving it in the cultures of the great powers in the world. For example, the charters

of the family rights and codes of childhood meant to be imposed on the Muslim countries in the past few years. Indeed, the past governments of former regimes in Egypt and Tunisia and others took some steps in this regard!

The post-revolution Arab governments should have stood firmly against the international institutions and refuse to sign or implement these charters related to family, women or child that are contrary to Islamic Sharia and are not open for ijtilhad to preserve the Islamic identity, which is an integral part of the Egyptian identity, as above-mentioned, and to preserve the gains acquired by people in the Arab Spring.

## Conclusion

These articles aim to convey several messages to those interested in the subject of Sharia in the post-revolution phase in the wake of the success these revolutions achieved. These messages can be summarized in the following concise points:

- The issue of the Islamic Sharia in relations to Muslims, before and after the revolutions, is closely interrelated with their identity. However, it is not the only identity held by Muslims, because identities intersect and integrate and do not clash with one another. It does not mean that some would call for the application of the details of Sharia overlooking the nature of the current national and civil state as defined by the constitution that identifies the legalization mechanisms.
- Attention must be paid to the Maqaṣid and principles of the Islamic Sharia at that phase, because they meet—without the least conflict— many of the universal human and national values. They can form a common ground for cooperation in major issues between Muslims and non-Muslims, between Islamists and others and between the Islamists themselves from various political parties and ideologies.
- The top Sharia-oriented priority in this phase is the building of human beings by means of ensuring the fulfillment of individual's fundamental and basic rights and preserving religion, life, mind, offspring and property to shielding them from poverty, ignorance and disease.
- Some views and discretions in our juristic heritage related to Sharia - oriented politics must be reviewed, especially those related to giving the ruler absolute powers and authorities. These powers and

authorities must be transferred from now on to the nation or its representatives. The executive ruler must be bound to the *Shura*-based decisions.

- There must be a multi-dimensional vision rather than a simplistic reductionist one related to the issue of “religious” and “civil.” There is an area including that which is purely “religious” and has nothing to do with the state and another area incorporating that which is purely “civil”, not religious but is generally governed by the universal principles and higher values. There is also an area where the religious and civil overlap and thus in need of further details.
- The area where the “religious” and the “civil” overlap should be divided into an area in which the adherents of every religion refer to their own religious provisions as is the case with the personal status laws, rules of inheritance and so forth; and another area in which the whole community agree on the implementation of some Islamic rulings, such as the capital penalty (or retaliation for murder in the Islamic Sharia), the consideration of Muslim feelings in Ramaḍan and of public morals and the like. A third area that exclusively belongs to the Islamic Sharia, such as the prescribed *ḥudud* that should not become binding given the Sharia texts in their support due to the lack of community consensus which is a prerequisite and the presence of real and legitimate elements of uncertainty that preclude the achievement of the *maqāṣid* of justice and mercy underlying the application.
- The first step to achieve social justice advocated by the revolutions is, to use the Sharia terminology, “settlement of grievances.” The first of which should be putting the offenders on trails for murder, treason, defilement of honor and then for theft.
- The Islamist-secularist dialogue is not less important, in my mind, than the intra-Islamist dialogue in order to review both the Islamic and secular discourses and try to reach common grounds and shared

convictions for the benefit of the nation and the decisive objectives and issues on which all agree.

- Not all sins are considered crimes punishable by the law; considering all sins as per the Sharia as punishable crimes by the law will only be a source of unneeded practical, executive, legal, and constitutional problems.
- The Islamic historical and political practices that are not considered essential constituents of the Sharia, such as *jizyah*, distinguishing non- Muslims with certain provisions, war spoils and the like are not binding on us today and none should call for their application as part of the Sharia.
- It is necessary to welcome the new juristic discretions and reforms in the area of personal status law that bring the family and the society closer to realization of the higher Islamic values and Maqaṣid provided that Muslims do not fall prey to international conspiracies that plan to ignore or distort the landmarks of Islamic culture.

Praise be to God, the Lord of the Worlds.