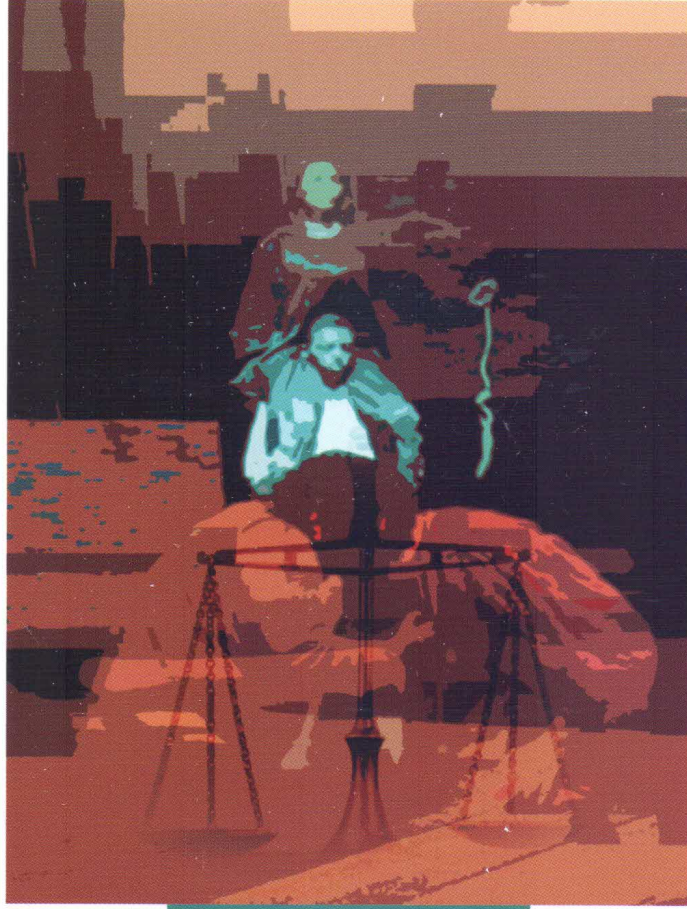


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# الدولة المدنية

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## *Maqāṣid al-Sharīʿah* and Constitutions in Muslim-Majority Countries: The Egyptian Constitution as a Case Study

Jasser Auda

### Abstract

This article proposes a common ground to bridge a serious political and social gap that is the result of a divide between two concepts, namely, the “Islamic state” versus the “civil state.” These two concepts appear in the constitutional language of some Muslim countries in terms of the “rules (*aḥkām*) of the Shariʿa” versus the “principles (*mabādiʿ*) of the Shariʿa,” respectively. We have witnessed heated debates over the choice between these two prefixes in the post-revolution constitutions in Egypt, which is taken here as a case study. These debates reflect the deep division over how to answer the question of the relationship between Islam and its law (Shariʿa) and a modern nation state. By focusing on *maqāṣid al-sharīʿah* (the Shariʿa’s higher objectives), I will show how “civil” and “Islamic,” as well as “rules” and “principles,” need not be contradictory or mutually exclusive. I will argue that there is an area of intersection between what is “religious” and what is “civil,” and that sound Islamic juridical reasoning (*ijtihād*) in the area of legal texts should be based on the *maqāṣid al-sharīʿah*, which includes its principles. Thus, these objectives are presented as common ground between ideological extremes, a common ground that is very much needed in the current struggle against tyranny and corruption.

### Introduction

The status of the Shariʿa in the constitutions of Muslim-majority countries has recently been a subject of heated debate and the cause of political and social divisions.<sup>1</sup> In Egypt, for example, especially since the January 2011 revolution and the subsequent constitutional changes, there is a general agreement over two well-known concepts. However,

there are also deep divisions over their interpretation. That is, there is general agreement across the political spectrum that Egypt is a "civil state" (*dawlah madaniyyah*) and that Shari'a is a/the "reference" (*maṣḍar*) for legislation.<sup>2</sup> However, the exact meanings of "civil state" and "reference to the Shari'a" are highly disputed. "Civil state" is interpreted by some as "secular state" (*dawlah 'ilmāniyyah*) and by others as "Islamic state" (*dawlah islāmiyyah*).<sup>3</sup> On the other hand, "reference to the Shari'a" means the "rules of the Shari'a" (*aḥkām al-sharī'ah*) to some, but the "principles of the Shari'a" (*mabādī' al-sharī'ah*) to others.<sup>4</sup>

Disputes along the above two dividing lines were exploited by authoritarian status quo regimes to favor the currents of counter-revolution and authoritarianism.<sup>5</sup> Ironically, the status quo ruling regimes in Egypt and the rest of the Arab world belong to none of the above extremes, for they do not call for a secular state or an Islamic state, or for the rules or principles of the Shari'a. Arab regimes in the form of military elites (e.g., Egyptian generals in alliance with business and religious elites), or tribal elites (e.g., monarchs and emirs) have been consistently closer to any method of interpretation that serves their material and political interests, in any case.<sup>6</sup> That is why, as will be illustrated below, they oscillate between opposite positions and don Islamic or secular masks based upon what will usurp power toward their political ends. We witnessed how some Arab authoritarian regimes donned an Islamic mask while oppressing Islamic parties and groups to ward off accusations of being against Islam or helping Islam's enemies. Their objective in these instances is to appeal to the masses at a time of an election or public protests. At other times, the same authoritarian regimes put on a secular mask to appeal to secular/Western powers as their allies and ideological extensions.<sup>7</sup>

This article seeks to illustrate that the apparent secular state versus Islamic state conflict is baseless and that the concept of rules and the principles of the Shari'a is, conceptually speaking, a false dichotomy. A common ground is proposed between these two concepts, one based on the *maqāṣid al-sharī'ah*. In a *maqāṣidī* understanding, the Shari'a's rules and principles should not be considered contradictory or mutually exclusive, for I contend that sound Islamic juridical reasoning (*ijtihād*) in the area of rules must be based on the *maqāṣid* of the Shari'a, which includes its principles. This will be demonstrated

according to a formal analysis of the methodology of *al-ijtihād al-ta'īlī* (reasoning via causes) and then according to many precedents from the well-established tradition of Egypt's constitutional court. On the other hand, we will argue, based on the above, that the nature of the Egyptian state, when it comes to Islam, should continue to include an area of intersection between what is religious" and what is civil and should not deal with these two circles as if they are neither overlapping nor mutually exclusive. It will be evident, therefore, that ideological bias and propaganda is behind much of the conflicts around these concepts, rather than genuine political differences.

Before analyzing the nature of the state and methods of reasoning and interpretation according to *maqāṣid al-sharī'ah*, the following basic concepts will be introduced, namely, Shari'a, *fiqh*, and *maqāṣid al-sharī'ah*, in order to separate the divine truth, which all believers believe in, from human understanding and interpretations, which are subject to error and bias. It will be also explained why the *maqāṣid* must be included in this discussion.

### Differentiating between Shari'a and *Fiqh*

Empirically speaking, Shari'a defines how Islam is lived for a Muslim and therefore is a major component of his/her identity and what he/she would like to see as a legitimate "source of legislation."<sup>8</sup> However, two important questions need to be asked: What exactly is Shari'a? And how do we differentiate between its immutable principles and interpretations, which could be subject to differences of opinion and thus belong to *fiqh* (lit. understanding)? It is essential, in the context of legislation, to differentiate between Shari'a and *fiqh*, for they are often confused and inaccurately translated into English as "Islamic law."<sup>9</sup> However, "Islamic law" in Arabic is "*al-qānūn al-islāmī*," a term that simply does not exist in the Islamic or Arabic legal or juridical terminology.

However, the word Shari'a is used in the Quran to mean a "revealed way."<sup>10</sup> On the other hand, the word *fiqh* is used in the Qur'an and Hadith in various forms to refer to the process of understanding, comprehension, and gaining knowledge of Islam in general. Eventually, and since the end of the era of the founders of the Islamic *fiqh* (legal) schools around the third Islamic century, *fiqh* has typically

been defined as “knowledge of practical rulings extracted from “detailed evidences” (*al-adillah al-tafsīliyyah*, i.e., Qur’anic verses and Hadith narrations).”<sup>11</sup> A *faqīh* (derived from *fiqh*) is someone with understanding (*fahm*),<sup>12</sup> perception (*taṣawwur*),<sup>13</sup> and cognition (*idrāk*).<sup>14</sup> This word is never used for God,<sup>15</sup> because *fiqh* is an attribute of deficiency, rather than an attribute of perfection that defines God. On the other hand, the term *Al-Shārī‘* (The Legislator) refers only to God<sup>16</sup> and thus cannot be used for humans, except for the Prophet, when he “conveys a message from God.”<sup>17</sup>

Despite the obvious difference between the divine origin of the Shari‘a and the human origin of *fiqh*, research in Islamic law within Islamic studies and oriental studies often confuse them. In Islamic studies, the “implementation of the Shari‘a” is confused with the implementation of specific *fiqhī* opinions that are subject to differences of opinion.<sup>18</sup> In traditional orientalist studies, Shari‘a and *fiqh* were sometimes considered “synonymous.”<sup>19</sup>

However, blurring the line between them does not allow the changeable parts of the rules to evolve in interpretation with the change of place and time. Moreover, it gives way to claims of “immutability” in human juridical *ijtihād*/opinions. Historically, these claims have resulted in two serious phenomena, namely, mutual accusations of heresy between the *fiqh* schools and resistance to any renewal of Islamic rules. Mutual accusations of heresy or apostasy (not just error or sin) have frequently occurred between groups of scholars who differed on what they held as fundamental/essential/ divine parts of the law. A large number of bloody conflicts were instigated by such accusations, among them the following: (1), the violent conflict between the Asharite and Mutazili schools of thought during the eighth century; (2) the Sunni-Shia and the Hanafi-Shafi‘i “battles.” Although these “battles” were more about power than the methodology of jurisprudence, the legal rhetoric was always used to favor one side over the other<sup>20</sup>; and (3) Ibn al-Salah’s (1181-1245) recommendation to his students that they use “the sword” on teachers of philosophy. Similar accusations of heresy over differences of legal opinion continue to breed ideologies of violence and intolerance as well as to suppress freedoms and a culture of co-existence in our own time.

In addition, inflexibility and resistance to any renewal in *fiqh* has continued to intensify as the circle of the “sanctified,” and hence “un-



changeable,” widened over time. Gradually, these two circles started to include opinions of imams from various schools of law, and eventually, the “door of *ijtihād*” was declared closed. As a result, *fiqh* began to lag behind the real-life changes that have been occurring since the medieval era.<sup>21</sup> Today, in the context of state legislation that claims to refer to the Shari‘a, it is essential to differentiate *fiqh* from Shari‘a in order to make the discussion about policy rather than about faith, and about the public good rather than about identity.<sup>22</sup>

### Maqāṣid al-Sharī'ah

The term *maqṣid* (plural: *maqāṣid*) refers to a purpose, objective, principle, intent, goal, end,<sup>23</sup> *telos* (Greek), *finalité* (French), or *Zweck* (German).<sup>24</sup> *Maqāṣid* are the objectives/purposes behind Islamic rulings.<sup>25</sup> A number of Islamic legal theorists consider it an alternative expression for the people’s interests (*maṣāliḥ*). Abu Hamid al-Ghazali (d.505 AH/1111 CE) elaborated on a classification of *maqāṣid*, which he placed entirely under what he called “unrestricted interests” (*al-maṣāliḥ al-mursalah*, as will be explained later).<sup>26</sup> Fakhruddin al-Razi (d.606 AH/1209 CE) and al-Amidi (d.631 AH/1234 CE) followed his terminology.<sup>27</sup> Najmuddin al-Tufi (d.716 AH/1316 CE), who gave *maṣlaḥah* precedence even over the “direction implication of the (specific) script” defined *maṣlaḥah* as “what fulfils the purpose of the Legislator.”<sup>28</sup> Al-Qarafi (d.1285 AH/1868 CE) linked *maṣlaḥah* and *maqāṣid* by a fundamental (*uṣulī*) “rule” that stated: “A purpose (*maqṣid*) is not valid unless it leads to the fulfilment of some good (*maṣlaḥah*) or the avoidance of some mischief (*mafsadah*).”<sup>29</sup>

Purposes or *maqāṣid* themselves are classified in various ways, whether in the traditional or the new classifications, based on the following considerations: (1) Levels of necessity (i.e., the traditional classification), (2) Scope of the rulings seeking to achieve purposes; (3) Scope of people included in purposes; and (4) Level of universality of the purposes.

Traditional classifications of *maqāṣid* divide these purposes into three levels of necessity: necessities (*ḍarūrāt*), needs (*ḥājīyyāt*), and luxuries (*taḥsīniyyāt*). Necessities are further classified into what preserves one’s faith, soul, wealth, mind, and offspring.<sup>30</sup> Some *uṣulīs* added the preservation of honor to the above five widely popular necessities.<sup>31</sup>

These necessities were considered essential matters for human life itself. There is also a general agreement that their preservation is the objective behind any revealed law.<sup>32</sup> Purposes at the level of needs are less essential for human life, such as, according to al-Shatibi, trade, roads, and marriage. Purposes at the level of luxuries are “beautifying purposes” (*taḥsīniyyāt*), in the traditional expression, such as, and also according to al-Shatibi, etiquette and clothing styles.<sup>33</sup>

Islamic theories of goals (*maqāṣid*) have evolved over the centuries, and especially during the twentieth century. Contemporary theorists have criticised the above traditional classification of necessities for a number of reasons.<sup>34</sup> One of them is that the scope of traditional *maqāṣid* is the entire Islamic law, and thus they neither explain many of the specific purposes for particular *naṣṣ* (Qur’an or Hadith) or rule nor cover the purposes of certain topics or “chapters” of *fiqh*. Other critiques are that the traditional *maqāṣid* are concerned with individuals rather than families, societies, and humans in general; do not include the most universal and basic values (e.g., justice and freedom); and were generally deduced from studying *fiqhī* literature, rather than the original sources/scripture.

To remedy the above shortcomings, modern scholarship<sup>35</sup> has introduced new conceptions and classifications for the *maqāṣid* by considering new dimensions. First, considering the scope of rulings they cover, contemporary classifications divide *maqāṣid* into three levels: (1) General *maqāṣid* (*al-maqāṣid al-āmmah*), which are observed throughout the entire body of the Islamic law, such as the necessities and needs mentioned above and newly proposed *maqāṣid*, such as justice and facilitation; (2) Specific *maqāṣid* (*al-maqāṣid al-khaṣṣah*), which are observed throughout a specific *fiqh* chapter, such as the welfare of children in family law, preventing criminals in criminal law, and preventing monopoly in financial transactions law; and (3) Partial *maqāṣid* (*al-maqāṣid al-juz’iyyah*), which are the intents behind specific scripture or rulings (e.g., the intent to discover the truth in seeking a certain number of witnesses in certain court cases, of alleviating difficulty in allowing an ill and fasting person to break his/her fast, and of feeding the poor by banning Muslims from storing meat on the Eid days).

Therefore, the notion of *maqāṣid* has been currently expanded to include a wider scope of people – the community, nation, or hu-

manity, in general. For example, Ibn Ashur prioritized the *maqāṣid* concerned with the nation (*ummah*) over those concerned with individuals, Rashid Rida included reform and women's rights, and Yusuf al-Qaradawi included human dignity and rights. These expansions of the scope allow the *maqāṣid* to respond to global issues and concerns and to evolve from the wisdoms behind the rulings to practical plans for reform and renewal. Thus, *maqāṣid* have formed the basis of a number of new propositions made in the realm of contemporary Islamic thought that have addressed topics such as new Islamic approaches to the nature of the state, civil society work, public health, and development.<sup>36</sup>

Finally, contemporary scholarship has introduced new universal *maqāṣid* that were directly induced from the scripture instead of from the body of *fiqh* literature in the schools of Islamic law. Significantly, this approach has allowed the *maqāṣid* to overcome the historicity of *fiqh* edicts and represent the scripture's higher values and principles. Detailed rulings would, then, stem from these universal principles. Some examples are Rashid Rida, Al-Tahir Ibn Ashur, Muhammad al-Ghazaly, Yusuf al-Qaradawi, and Taha Al-Alwani.

Rashid Rida (d.1354 AH/1935 CE) surveyed the Qur'an in order to identify its *maqāṣid*, which included "reform of the pillars of faith, and spreading awareness that Islam is the religion of pure natural disposition, reason, knowledge, wisdom, proof, freedom, independence, social, political, and economic reform, and women's rights."<sup>37</sup> Al-Tahir Ibn Ashur (d.1325 AH/1907 CE) proposed that the Islamic law's universal *maqṣid* is to maintain "orderliness, equality, freedom, facilitation, and the preservation of pure natural disposition (*fi-trah*)."<sup>38</sup> Importantly, the purpose of freedom (*ḥurriyyah*), proposed by Ibn Ashur and other contemporary scholars, differs from the purpose of freedom (*'itq*), which was mentioned by jurists.<sup>39</sup> *Itq* is freedom from slavery, not freedom in the contemporary sense. Will (*mashī'ah*), however, is a well-known Islamic term that bears a number of similarities with current conceptions of freedom and free will. For example, freedom of belief is expressed in the Quran as the will to believe or disbelieve.<sup>40</sup> In terms of terminology, freedom (*ḥurriyyah*) is a newly-coined purpose in the literature of the Islamic law. Ibn Ashur, interestingly, accredited his usage of *ḥurriyyah* to "literature of the French revolution, which were translated from French to Ara-



bic in the nineteenth century CE,"<sup>41</sup> even though he elaborated on an Islamic perspective on freedom of thought, belief, expression, and action in the *mashī'ah* sense.<sup>42</sup> Mohammad al-Ghazaly (d.1416 AH/ 1996 CE) called for "learning lessons from the previous fourteen centuries of Islamic history," and therefore included "justice and freedom" in *maqāṣid* at the level of necessities.<sup>43</sup>

Yusuf al-Qaradawi (1345 AH/1926 CE) also surveyed the Qur'an to identify the following universal *maqāṣid*: "Preserving true faith, maintaining human dignity and rights, calling people to worship God, purifying the soul, restoring moral values, building good families, treating women fairly, building a strong Islamic nation, and calling for a cooperative world."<sup>44</sup> He notes that proposing a theory in universal *maqāṣid* should occur only after developing a level of experience with detailed scripture.<sup>45</sup> Taha al-Alwani (1354 AH/1935 CE – 1437 AH/2016 CE) also surveyed the Qur'an to identify its supreme and prevailing *maqāṣid*, which are, according to him, "the oneness of God (*tawhīd*), purification of the soul (*tazkiah*), and developing civilisation on Earth (*imrān*)."<sup>46</sup> He is currently writing [as of April 2007] a separate monograph to elaborate on each of these three *maqāṣid*.<sup>47</sup> These scholarly contributions updated the terminology of *maqāṣid* and opened them further to dealing with contemporary issues.

The next section, which takes Egyptian legislation as a case study, will illustrate that *maqāṣid al-sharī'ah* is a primary tool for interpreting the Shari'a for legislative purposes. The following example, however, will illustrate that this is not a new concept. There is an authentic legal tradition of speculating about a certain underlying purpose, aim, or intent of a Qur'anic or Prophetic instruction and basing the interpretation of the practical rules on that supposed intent. This dates back to the time of the early Companions,<sup>48</sup> as narrated in a number of incidents.

The hadith known as the narration of the "afternoon prayers at Bani Qurayzah" states that the Prophet sent a group of Companions to the Bani Qurayzah<sup>49</sup> and ordered them to pray their afternoon (asr) prayer there.<sup>50</sup> As the span of time allowed for asr prayers had almost passed before they reached their destination, they found themselves divided into two groups about how to fulfill the Prophet's directive: Should they wait and pray at Bani Qurayzah or pray right then, before the prayer time ended. The rationale behind the first

opinion was that the Prophet had clearly told them to pray at Bani Qurayzah, while the rationale of the second opinion was that the Prophet's "purpose/intent" (*qaṣd*) underlying the order was to ask them to hasten to Bani Qurayzah, rather than "intending" to postpone the prayer until after its due time. According to the narrator, when the Companions later narrated the story to the Prophet, he approved both opinions.<sup>51</sup> The only jurist who disagreed with the Companions who prayed on the way was Ibn Hazm al-Zahiri (the literalist), who wrote that they should have prayed after they reached Bani Qurayzah, as the Prophet had clearly said, even if they arrived after midnight.<sup>52</sup> Every other scholar agreed to the soundness of interpretation according to the perceived intent.

Another important incident illustrating the use of intent/purpose in interpretation occurred when Umar ibn al-Khattab was caliph (c. 642 CE/21 AH). In this incident, some Companions sought his permission to enslave the indigenous people and distribute the lands of Egypt, Syria, and Iraq amongst themselves. This incident occurred after the wars in those regions had ended. The Companions' argument relied on specific Qur'anic verses and traditions of the Prophet that allowed fighters to divide their "spoils of war."<sup>53</sup> Umar rejected their request on the basis that God has purposes of "freedom for people" and "not making the rich dominate wealth."<sup>54</sup> In my opinion, this ruling was an early attempt to abolish slavery, for Umar based his position upon his interpretation of God's purposes. This anti-slavery effort was, unfortunately, reversed after his assassination in 23 AH/644 CE.

Another important example is Caliph Umar's moratorium on the punishment for theft during the famine of Medina. He thought that a literal application of the prescribed Qur'anic punishment while people are in need of basic supplies for their survival would violate the general principle of justice, which he considered more fundamental.<sup>55</sup> This was an interpretation of the Qur'an in light of the *maqāṣid*.

The significance of *ijtihād* in the above incidents and many others<sup>56</sup> is that the Companions' interpretations were based on purpose, namely, the "spirit of the law," and not the "letter of the law." This approach enables greater flexibility in understanding the scriptural terms and placing them in their circumstantial contexts, which is especially important when interpreting rules in the context of legislation in a modern nation-state as defined in an "Islamic" constitution.

The above discussion is also meant to illustrate how *ijtihād* could be legitimately based on *maqāṣid*, and thus establishes the *uṣūlī*/methodological basis for the following examples of referring to the *maqāṣid* in the *ijtihād* of the Egyptian constitutional court.

### The *Maqāṣid* and the Constitution

Article 2 of Egypt's 2014 constitution states: "Islam is the religion of the state and Arabic is its official language. The principles (mabadi') of Islamic Shari'a are the principle source of legislation."<sup>57</sup> Whether the "principles" imply "rules" (*aḥkām*) or "objectives" (*maqāṣid*) is – and has been – a subject of heated debate.<sup>58</sup>

The "Al-Azhar document around the future of Egypt" (or "Al-Azhar Document") an 11-clause declaration read by Grand Shaykh of al-Azhar Ahmad Al-Tayyib on national television on June 20, 2011, is significant, for it is the height of al-Azhar's engagement with post-2011 Egyptian politics. The text is the result of consultations between its scholars and "Egyptian intellectuals from diverse intellectual trends and religious affiliations, as well as important ulama and thinkers from al-Azhar."<sup>59</sup>

When this document attempted to address the relationship between the Shari'a and the new constitution, it referred to the Shari'a "principles" of rights, prosperity, and consultation. It states in pertinent part:

First: Al-Azhar supports establishing a modern and democratic state according to a constitution upon which Egyptians agree and which separates 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 legislative power to the people's representatives in accordance with true Islamic aspects. Islamic states, whether culturally or historically, differ from other states that rule by oppressing their people and from which we humans have suffered a lot in the past. Islamic states let people manage their societies and choose their ways and techniques to achieve their interests, provided that Islamic jurisprudence is the main source for the legislation and in a way that guarantee for the followers of other divine religions to appeal to their religions in their personal issues. Second: Al-Azhar embraces democracy based on free and direct voting, which represents the modern formula to achieve the Islamic principle of *shūrā* (consultation).<sup>60</sup>

The above quote shows how al-Azhar scholars view the role of the Shariʿa in the Egyptian constitution in terms of principles and values, rather than of particular rules and details.

More significantly, it has been the tradition of the country's Supreme Constitutional Court to refer to *maqāṣid al-sharīʿah* when dealing with legal texts that are controversial in terms of compliance with the Shariʿa. The following is a list of such cases, presented here as examples:

The Supreme Constitutional Court of Egypt (7/1993) states that *ijtihād* "must fall within the frame of the *maqāṣid al-sharīʿah* as built on the standard inference of the practical rulings from the legal arguments with the aim of achieving the higher objectives/*maqāṣid al-sharīʿah*."<sup>61</sup>

The Supreme Constitutional Court of Egypt (35/2000) concluded that *ijtihād* is "tolerated in controversial issues whose judgments shall not be rigid leading them to conflict with the perfection and flexibility of Shariʿa. This is so long as it complies with the frame of the universal principles of Shariʿa without the least violation, is derived from the textual and the rational legal indications of the Shariʿa, and guarantees the *maqāṣid al-sharīʿah*."<sup>62</sup>

The Supreme Constitutional Court of Egypt (29/1994) states that *ijtihād* must "fall within the frame of the *maqāṣid al-sharīʿah* and guarantee the *maqāṣid al-sharīʿah*."<sup>63</sup>

The Supreme Constitutional Court of Egypt (8/1996) states that "*ijtihād* must guarantee the higher *maqāṣid* of preserving faith, human life, intellect, honor and wealth." It adds: "Enacting against the laws of Islamic Shariʿa in its universal fundamentals and principles ... is a form of following desires and denial of the necessarily well-known rules of the religion."<sup>64</sup>

The Supreme Constitutional Court of Egypt (12/1999) states that "the legally considered benefits are the ones that suit and conform to the higher objectives of Shariʿa ... the particulars of these benefits are endless and so are the countless possible implementations of these benefits."<sup>65</sup>

The Supreme Constitutional Court of Egypt (164/1999) states that "when the legal text follows the universal higher objectives of Shariʿa and its general principles, any challenge against it on the basis of its opposing to the second article of the constitution shall rather be denied."<sup>66</sup>

The Supreme Constitutional Court of Egypt (203/2002) states that, "the way of *ijtihād* must remain free inasmuch that it abides by the higher objectives of Shariʿa."<sup>67</sup>

The Supreme Constitutional Court of Egypt (231/2002) states: "It has become a judicial custom of the Supreme Court that the principles of Islamic Shari'a, as assigned by the constitution, is the reference for which legislative texts must be referred to guarantee their constitutionality. These Shari'a principles make it compulsory to prevent harm from affecting people and permit the ruler to interfere and organize the right of ownership with a view of achieving the public benefit and meet their needs."<sup>68</sup>

These court opinions indicate a direct link between the *maqāṣid* and the correctness of the process of inferring rulings (*ijtihād*), prove the existence of a well-established court custom that indicates the importance of these higher objectives and the duty of considering them in contemporary legislations, and establish that what the constitutional language calls the "rules of the Shari'a" never contradict the "*maqāṣid* of the Shari'a" because they are always understood, interpreted, and applied via an *ijtihād* that is coherent with the *maqāṣid*. Thus, the debate between the "supporters of the rules" and the "supporters of the *maqāṣid*" is counter-productive and only serves the forces of counter-revolution, as mentioned above.

#### A "Civil State" with a *Maqāṣid* Reference

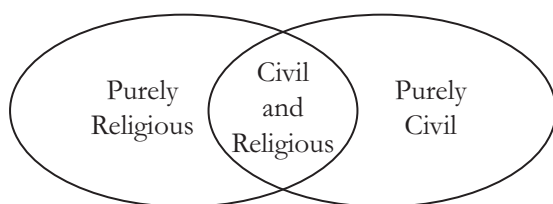
In the debates leading up to drafting the 2013 constitution, the 2014 constitution, and until today, some are calling for a "civil state" (*dawlah madaniyyah*), which is interpreted as a "secular state" (*dawlah 'ilmān-iyyah*), and others are calling for a "civil state," which is interpreted as an "Islamic state" (*dawlah islamiyyah*).<sup>69</sup> And after much debate over the inclusion of the wordings "civil state" to describe the Egyptian state,<sup>70</sup> the 2014 Muslim Brotherhood-drafted constitution ended up stating that Egypt is "a modern democratic state with a civil government (*ḥukūmah madaniyyah*)."<sup>71</sup>

Western political theorists typically propose that what is civil is free of what is religious, especially Islamic. This opinion has been adopted by Samuel Huntington, Bernard Lewis, Elie Kedourie, Mehran Kamrava, and many other neo-conservatives.<sup>72</sup> This is also echoed by a number of Egyptian individuals who imagined civil and Islamic to be two circles with no area of intersection.<sup>73</sup> At the other extreme, some recent Islamic opinions have presented the circles of civil and



Islamic as two overlapping circles that are one and the same, which means that an Islamic state is by definition a civil state.<sup>74</sup>

*Maqāṣid al-sharī'ah* could help bridge this gap between the secular and "Islamic approaches to statehood and governance. We often tend to perceive concepts and ideas in inaccurate binary paradigms or false dichotomies, even though it is possible to move beyond the black and white paradigm by conceptualizing a gray area or an area of intersection (see the figure below). It is possible to accomplish the objectives of what is civil by means of what is religious, and the objectives of what is religious by means of what is civil.



In this proposal, we need to differentiate the following three different concepts/domains.

The purely religious domain: This area includes the Islamic components related to the individual adherence to the faith in a way that should have nothing to do with the role and structure of the state. Examples are matters of belief, rituals, culture, and many ethical matters that are not related to the public order. This category is not limited to Muslims; it exists in the Christian and other religious contexts as well. The adherents of any given religion refer to their respective religious provisions. This area is "the private," to use political science language. The *maqṣid* of these rules, for believers, is pure devotion (*al-ta'abbud*), and the general principle here (*mabda'*) for all citizens is personal liberties.

The purely civil domain: This area incorporates those matters related to the state and its official and semi-official institutions, in which the specific rules of Islam have no direct interference (e.g., the state's structure; the division of the different authorities; and the laws and regulations governing the relationships among individuals, organizations, and communities). This area, which roughly falls under the "intent of leadership" (*maqṣid al-siyāsah*) in the Shari'a, is therefore open to human creativity in seeking the means

to achieve the people's best interest. This area is related to religion (Islam, in this case) in terms of ethics, values, and philosophy upon which good governance and sound policy is based. Examples on these values are justice, equality, various forms of freedom and other values and principles that fall under the universal *maqāṣid* mentioned above. This area is "the public," to use political science language, and the *maqāṣid* that govern it are the objectives of priorities mentioned above.

The religious/civil domain: There is an area of intersection, a gray area, in which the religious and civil overlap in detailed Islamic provisions related to laws and public institutions and/or relationships among the citizens. The translation of these Islamic rules and provisions into legislations and laws, binding on Muslims and non-Muslims, entails a detailed discussion

In order to avoid undesirable political conflicts and social divisions, I have suggested elsewhere that this religious-civil domain be divided into the following distinct areas, which can form a common and widely accepted framework.<sup>75</sup>

1) The area of parallel legislation: Here, religious/civil matters of every religion are dealt with parallel laws and parallel courts. One clear example is the personal status (family) law. It is well established that the vast majority of Arabs, be they Muslim or Christian, Sunni or Shia, religious or liberal, do not accept the idea of civil marriage in the sense of rejecting any reference to their religion's provisions (Islam or Christianity in the Egyptian context). This area entails that the law and state institutions should respect the particularities of each religion, sect, and doctrine.

2) The area of wide social agreement: This comprises those religious rulings and provisions (Islamic, in this context) that the entire nation agrees are in their best interest, even if they were originally derived from specific *fiqhī* rules. For example, the penalty for a first-degree murder in Egypt and most of the Arab countries is identical with the prescribed retribution in cases of premeditated murder in the Shari'a. Although it is an Islamic ruling, the nation collectively agrees that it be made a binding law on both Muslims and non-Muslims. There are other laws that enjoy a wide acceptance related to mosques, Islamic endowments, and official pilgrimage missions, all of which are organized and funded by the state. This category, how-

ever, should not infringe upon non-Muslim specificities or compromise their basic rights.

3) The area of wide social disagreement: This refers to those religious rulings and provisions (Islamic, in this context) on which the nation has not reached wide agreement. The source of the laws and/or institutions in this case is the Sharī'a, and yet there is no popular agreement to support its conversion from *fiqh* to law. This is an area in the "Islamic project" that the Islamist parties should simply stop trying to convert from Sharī'a to state law. A clear example is the traditional interpretation of the corporal punishments (*ḥudūd*). If a nation does not accept a certain Islamic provision as a binding law, there is no way to impose it without disrupting the society's order.

Therefore, *maqāṣid al-sharī'ah* could help build a much needed social agreement over the nature of the state. A "civil state with a *maqāṣid* reference" (*dawlah madaniyyah dhāt marji'iyah maqāṣid-iyyah*) is a possibility.

### Conclusion

The goal of this paper was to propose ideas derived by reflecting on the *maqāṣid* of the Islamic sources in order to promote what I call "a civil state with a *maqāṣid* reference."<sup>76</sup> The forces of reform must succeed in their attempt to develop a civil and pluralistic model for the state. A common ground and a general agreement between all civil forces cannot be reached without this civil state. This is the only way to overcome the nightmare of tyranny in all of its forms and define a political system that could be a tool to fulfill the needs and interests of Muslim-majority populations, while promoting the values of diversity and tolerance.

The question I have attempted to answer relates to a possible definition of an Islamic approach to the concept of the political system in order to define it as Islamic and civil at the same time. We think that the aims and purposes of the Sharī'a have a central role in this definition since, while promoting and safeguarding the freedom of consciousness, balance, family and property, they also promote common sense, diversity, and human dignity. This is essential for imagining a pluralistic and stable society in Egypt and other Muslim-majority countries in general.

## NOTES

1. Jasser Auda, *Al-Dawlah al-Madaniyyah: Nahwa Tajāwuz al-Istibdād wa Taḥqīq Maqāsid al-Sharī'ah* (Civil State: Toward Overcoming Authoritarianism and Realizing the Objectives of the Shari'a) (Beirut: Arab Network for Research, 2015), pp.7-9.
2. Jasser Auda, *Bayn al-Sharī'ah wa al-Siyāsah* (Between Shari'a and Politics) (Beirut: Arab Network for Research, 2013), pp.24-29.
3. Abdul-Majid al-Shahawy, "Bi al-Dustūr al-Maṣriyyūn al-Masaḥiyyūn Yadafūn al-Jizyah" ("Egyptian Christians Pay Religious Tax by Constitution"), *Al-Ḥiwār al-Mutamaddin* 3884 (October 2012): pp.23-24.
4. Bashir Abdul-Fatah, *Ishkāliyyat al-Sharī'ah fī al-Dustūr al-Miṣrī* (The Problem of the Shari'a in the Egyptian Constitution) (Qatar: Al-Jazeera Analysis Series, (November 8, 2012), accessed December 30, 2015, www.aljazeera.net.
5. Auda, *Al-Dawlah al-Madaniyyah*, pp.7-11.
6. Evageena Novicova, *Al-Dustūr al-Miṣrī al-Jadīd bayn Tamīz al-ʿAskar wa al-Idrār bi al-Islamiyyīn* (The New Egyptian Constitution between Privileging the Army and Marginalizing the Islamists), trans. Manal Al-Suwaifi, *Nizavesmaya Gezzetta* (Moscow), March 12, 2013.
7. Ibid.
8. See, for example, the large-scale polling project presented in John L. Esposito and Dalia Mogahed, *Who Speaks For Islam?: What a Billion Muslims Really Think* (Washington, DC: Gallup Press, 2008), pp.95.
9. For example, Mohammad Abdul-Khaliq Omar, *Reasoning in Islamic Law*, 3d ed. (Cairo: M. Omar, 1999); WLUM, "Women Living under Muslim Laws," cited January 5, 2006, www.wluml.org/english, Haideh Moghissi, *Feminism and Islamic Fundamentalism: The Limits of Postmodern Analysis* (New York: Zed Books, 1999) p.141; Aharon Layish, "Interplay between Tribal and Shari Law: A Case of Tibbāwī Blood Money in the Sharīa Court of Kufra," *Islamic Law and Society* 13, no. 1 (2006), p.63.
10. For example, "To each of you We prescribed a law and a way" (5:48) and "Then We put you, [O Muhammad], on an ordained way concerning the matter [of religion]; so follow it and do not follow the inclinations of those who do not know" (45:18). Yusuf Ali translated the word as "Law" and "Way," Picktall translated them as "divine law" and "road," and Irving translated them as "code of law" and "highroad."
11. For example, Mohammad Abu Zahra, *Uṣūl al-Fiqh* (Fundamentals of Islamic Jurisprudence) (Cairo: Dar al-Fikr al-Arabi, 1958), p.5.
12. Ahmad Ibn Taymiyyah, *Kutub wa Rasā'il wa Fatwā*, ed. Abdur-Rahman al-Najdi, 2d ed. (Riyadh: Maktabat Ibn Taymiyyah, n.d.) vol.13, p.113.
13. Ali Al-Subki, *Al-Ibḥaj fī Sharḥ al-Minhāj* (Beirut: Dar al-Nashr, 1983), vol.1, p.39.
14. Ibn Amir al-Haj, *Al-Taqrīr wa al-Taḥbīr fī 'Ilm Uṣūl al-Fiqh* (Beirut: Dar al-Fikr, 1996), vol.1, p.26.

15. For example, Abdel-Rahman Shaikhi-Zadah, *Majma' al-Anhur* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1998), vol.1, p.11.
16. For example, Ibid.
17. Ibn Ashur, al-Tahir, *A Laysa al-Ṣubḥ bi Qarīb?* (Tunis: Al-Sharikah al-Tunusiyyah li Funun al-Rasm, 1988), chap. 6.
18. For example, WLUML, "Women Living under Muslim Laws."
19. J. Schacht, "Shari'ah," *First Encyclopaedia of Islam 1913-1936*, ed. M. Th. Houtsma, T. W. Arnold, R. Basset, and R. Hartmann (Leiden, New York, Copenhagen, and Koln: E.J. Brill, 1987), vol.4, p.320. Schacht writes: "SHARI'A (A) also SHAR' (originally infinitive), the road to the watering place, the clear path to be followed the path which the believer has to tread, the religion of Islam, as a technical term, the canon law of Islam, the totality of Allah's commandments ... Fikh (along with the sciences of tafsir and hadith and the ancillary sciences) is the science of the shari'a or the shar'i' (c.f. FIKH) and sometimes be used as synonymous with it, and the usul al-fikh are also called usul al-shar'.
20. Refer to Ismail Ibn Kathir, *Al-Bidāyah wa al-Nihāyah* (n.d.) vols. 11 and 12; Ali al-Shaybani, *Al-Kāmil fī al-Tārīkh*, 2d ed. (Beirut: Dar al-Nashr, 1994) vols. 2, 8, and 10.
21. A more detailed discussion can be found in Jasser Auda, *Maqāṣid al-Sharī'ah as Philosophy of Islamic Law: A Systems Approach* (London: International Institute of Islamic Thought, 2008), chap. 3.
22. Auda, *Al-Dawlah al-Madaniyyah*, pp.95-100.
23. Mohammad al-Tahir Ibn Ashur, *Ibn Ashur: Treatise on Maqāṣid al-Sharī'ah*, trans. Mohamed El-Tahir El-Mesawi (London and Washington: International Institute of Islamic Thought, 2006), p.ii.
24. Rudolf von Jhering, *Law as a Means to an End (Der Zweck im Recht)*, trans. Isaac Husik, 2d reprint ed. (New Jersey: The Lawbook Exchange, 2001) p.xxxv. (Originally published in 1913 by Boston Book Co.)
25. Ibn Ashur, *Maqāṣid al-Sharī'ah al-Islāmiyyah*, p.183.
26. Al-Ghazali, *Al-Mustasfā*, vol.1, p.172.
27. Abu Bakr al-Maliki Ibn al-Arabi, *Al-Maḥsūl fī Uṣūl al-Fiqh*, ed. Hussain Ali Alyadri and Saeed Foda, 1st ed. (Amman: Dar al-Bayariq, 1999) vol.5, p.222; al-Amidi, *Al-Iḥkām*, vol.4, p.286.
28. Najmuddin al-Tufi, *Al-Ta'īn fī Sharḥ al-Arba'īn* (Beirut: al-Rayyan, 1419 AH) p.239.
29. Shihabuddin al-Qarafī, *Al-Dhakhīrah* (Beirut: Dar al-Arab, 1994) vol.5, p.478.
30. Al-Ghazali, *Al-Mustasfā*, vol.1, p.172, Ibn al-Arabi, *Al-Maḥsūl fī Uṣūl al-Fiqh*, vol.5, p.222, al-Amidi, *Al-Iḥkām*, vol.4, p.287.
31. Al-Ghazali, *Al-Mustasfā* vol.1, p.172, al-Shatibi, *Al-Muwāfaqāt*, vol.3, p.47.
32. Al-Shatibi, *Al-Muwāfaqāt*, vol.3, p.5.
33. Ibid. vol.3, p.17.
34. According to a discussion with Sheikh Hassan al-Turabi (Oral Discussion, Khartoum, Sudan, August 2006).



35. Numan Jughaim, *Turuq al-Kashf ‘an Maqāṣid al-Sharī‘*, (International Islamic University, Malaysia: Dar al-Nafaes, 2002) pp.26-35.
36. “Shari’a, Ethical Goals and the Modern Society,” *MUIS Academy Occasional Series*, no. 10 (Singapore 2016)
37. Mohammad Rashid Rida, *Al-Waḥīy al-Muḥammadī: Thubūt al-Nubuwwah bi al-Qur’ān* (Cairo: Mu’asasat Izziddin, n.d.) p.100.
38. Ibn Ashur, *Maqāṣid al-Sharī‘ah al-Islāmiyyah*, p.183.
39. As in, for example, Kamaluddin al-Siwasi, *Sharḥ Faṭḥ al-Qāḍir*, 2d ed. (Beirut: Dar al-Fikr, n.d.) vol.4, p.513.
40. For example, Qur’an 18:29.
41. Mohammad al-Tahir Ibn Ashur, *Uṣūl al-Niẓām al-Ijtimā‘ī fi al-Islām*, ed. Muhammad El-Tahir Mesawi (Amman: Dar al-Nafa’is, 2001) pp.256, 268.
42. Ibid, pp.270-281.
43. Jamal Atiyah, *Naḥwa Tafīl Maqāṣid al-Sharī‘ah*, p.49.
44. Yusuf al-Qaradawi, *Kayfa Natā‘amal ma’a al-Qur’ān al-‘Azīm?* 1st ed. (Cairo: Dar al-Shuruk, 1999).
45. Oral Discussions, London, UK, March 2005 and Sarajevo, Bosnia, May 2007.
46. Taha Jabir al-Alwani, *Maqāṣid al-Sharī‘ah*, 1 ed. (Beirut: International Institute of Islamic Thought and Dar al-Hadi, 2001), p.25.
47. Oral Discussion, Cairo, April 2007.
48. In this article, the prayer “peace be upon him” is assumed whenever the Prophet’s name is mentioned.
49. Around the seventh Islamic year. The location was a few miles outside Medina.
50. Muhammad al-Bukhari, *Al-Ṣaḥīḥ*, ed. Mustafa al-Bagha, 3d ed. (Beirut: Dar Ibn Kathir, 1986), vol.1, pp.321; Abu al-Hussain Muslim, *Ṣaḥīḥ Muslim*, ed. Muhammad Fuad Abdul-Baqi (Beirut: Dar Ihya’ al-Turath al-Arabi, n.d.), vol.3, pp.1391.
51. Narrated by Abdullah Ibn Umar, according to al-Bukhari, *Al-Ṣaḥīḥ*, vol.1, p.321, and *Ṣaḥīḥ Muslim*, vol.3, pp.1391.
52. Ali Ibn Hazm, *Al-Muḥallā*, ed. Lajnat Ihya’ al-Turath al-Arabi, 1st ed. (Beirut: Dar al-Afaq, n.d.), vol.3, pp.291.
53. Yaqub Abu Yusuf, *Al-Kharaj* (Cairo: al-Matba‘ah al-Amiriyyah, 1303 AH), pp.14, 81; Yahya Ibn Adam, *Al-Kharaj* (Lahore: al-Maktabah al-‘Ilmiyyah, 1974), pp.110.
54. Qur’an 59:7. I preferred to translate the verse as “domination of wealth” to express “*dūlatan bayn al-aghniyā’ minkum*,” rather than “a circuit between the wealthy” (Yusuf Ali) or “commodity between the rich” (Picktall).
55. Mohammad Biltaji, *Manhaj ‘Umar ibn al-Khaṭṭāb fi al-Tashrī‘*, 1st ed. (Cairo: Dar al-Salam, 2002), p.190.
56. Refer to Jasser Auda, *Fiqh al-Maqāṣid: Ināṭat al-Aḥkām al-Sharī‘ah bi Maqāṣidihā (Jurisprudence of Purpose: Basing Rules on Their Purposes)* (London and Washington, DC: International Institute of Islamic Thought, 2006), chap.1.
57. The Egyptian Constitution, accessed December 31, 2015, [www.constituteproject.org/constitution/Egypt\\_2014.pdf](http://www.constituteproject.org/constitution/Egypt_2014.pdf), p.12.
58. Abdul-Fatah, *Ishkāliyyat al-Sharī‘ah*.

59. Video archived on <https://onislamandpolitics.wordpress.com/2011/09/01/>, accessed December 30, 2015.
60. Refer to the extensive reference to "the principles of the Shari'a" in the famous Al-Azhar Document. Visit the Egypt State Information Service (SIS) website: [www.sis.gov.eg](http://www.sis.gov.eg). I translated the original document from Arabic to English, and would like to thank the editors of this volume for revising it.
61. The same session witnessed another judgment that followed the same principles in Case No. 18. Judicial Year 10 (see the *Official Gazette*, issue 23, app. June 10, 1993; Session of June 19, 1993, whose judgment was issued concerning Case No. 9, Judicial Year 11, including the same principle (see the *Official Gazette*, issue 23, app. June 10, 1993).
62. See also the judgment (session of August 5, 2000, in Case No. 2, Judicial Year 20 (see the collection of the court's judgments, 9:688);
63. Also the judgment (session of January 6, 1996) in Case No. 5, Judicial Year 8 (see the collection of the court's judgments, 7:347).
64. See the *Encyclopedia of Constitutional Principles*, People's Assembly, October 2000, 1:165 and the judgment (session of November 16, 1996) in Case No. 26, Judicial Year 12, *Encyclopedia of Constitutional Principles*, 1:167.
65. See the collection of the court's judgments, 9:126.
66. *Ibid.*, 9:328.
67. *Ibid.*, 10: 308.
68. For another example, see the court's judgment (session of June 9, 2002) in Case No. 231, Judicial Year 21 (see the collection of the court's judgments, 10:437).
69. Sabri Hasanien, *Miṣr Islāmiyyah am 'Ilmāniyyah? (Is Egypt Islamic or Secular?)*, London, accessed on January 1, 2016, <http://elaph.com> (September 18, 2013); al-Shahawy, "*Bi al-Dustūr al-Maṣriyyūn al-Masaḥiyyūn*," pp.23-24.
70. Sami Said, "*Al-Dawlah al-Madaniyyah' bayn al-Dustūr wa Ḥurriyyat al-I'tiqād*" ("Civil State' between the Constitution and Freedom of Belief), [elbadil.com](http://elbadil.com) (16-12-2014).
71. The Egyptian Constitution, p.11.
72. Sheila Carapico, "Yemen between Civility and Civil War," in *Civil Society in the Middle East*, ed. Richard Norton, vol.2 (Leiden: Brill: 1996), p.288.
73. Al-Shahawy, "*Bi al-Dustūr al-Maṣriyyūn al-Masaḥiyyūn*," pp.23-24.
74. A survey in Auda, *Al-Dawlah al-Madaniyyah*, chap. 3.
75. *Ibid.*, chap. 6.
76. *Ibid.*, pp.7-9.