

Civil State

**Towards overcoming tyranny
and achieving Maqasid al-Shari'ah**

Jasser Auda

Translated and Abridged by: Sabrina Lei

****** Draft - Under Revision ******

Introduction

Arab revolutions between the dream of justice and the reality of tyranny.

1-Rights and the crisis of the State

“The people want to bring down the system” and “Bread, freedom and social justice”: these are the slogans heard in the Arab streets, mainly in 2011, shouted by the people demanding for a change towards a better political, social and economic “system”. It was a great feeling of surprise when, after only days of protest and rage, some powerful leaders seemed to have disappeared amidst a spirit of joy and celebration that was widely spread. The whole world, East to West, expressed the need to learn from the “Arab Spring”, and wished that this phenomenon could be soon repeated elsewhere.

The dream lasted for a few months and some people thought that: “the strong has been defeated by the weak”, “the spring finally arrived after the winter”. Moreover, some people started thinking, after a great deal of enthusiasm which accompanied some elections, that: The project of an “Islamic government” was finally becoming a reality, as well as a whole new “Islamic phase” in world politics. However, very soon after, the dreams met the crude reality, and the truth emerged.

Very soon after, it became clear to everybody that the “system” was deeply rooted in the state and the tyranny in the Arab societies has not disappeared but simply mutated. It became clear that the slogans of “social justice” were closer to dreams than reality and, at the same time, became clear that what Arabs call “the State” in today’s historical context is only a system created merely for the service of some civil, economic and military lobbies. These lobbies represent some minorities groups or tribes, which are extremely dangerous. They proved that they will not hesitate to employ brutal violence in order to abort every attempt of reform or change, and to prevent every effort to overcome corruption. The uprising to obtain rights and freedoms, which have been widely supported by the “people” at the time of the “apparent” fall of the tyrannical political power, was aborted.

It became, at the same time, quite clear that the balances and calculations of the regional and global powers will not allow a “democratic” change in the Arab world, and that all strategic assets, both moral and physical, will have to be

exhausted by global powers and their agents in the region, before such change happens.

This is what happened after 2011, both at the economical and political levels, notwithstanding that the Arab streets are still full of a feeling of rage and anger, and the revolutionary passion is still alive in the hearts of the Arab people, even though this passion now assumes different and conflicting forms, between naïve reformists and criminal extremists.

On the one hand, some naïve ‘reformists’ sacrificed some of the finest young men and women, in the Arab world and Muslim community at large. They subjected them to the brutal force of the state and caused them to lose their lives for the sake of a naïve revolutionary dream, a dream they pursued without a strategy or a real backing from the rest of the society. On the other hand, there is an emerging extremist outburst that calls itself an ‘Islamic State’, despite the fact that it involves various forms of criminality. It further preys on the victims of family disintegration, economic monopoly and religious extremism, to recruit soldiers who are being useful only to the enemies of Islam, Arabs and humanity.

What happened in 2011 taught us a very important lesson: a fast and final change is not historically possible: the real change in the Arab World cannot be reached without overriding many obstacles.

I personally believe that two principle changes are extremely important and much needed: one related to the ‘human’ him or herself and the other to the ‘State’ itself.

The ‘human’, as the latest events confirmed, has some major problems, culturally, intellectually, ethically, religiously, hygienically, professionally, educationally, and socially. Partial reform, in the political arena, that a ‘revolution’ brings to the top of the political pyramid, even through an ‘election’, will never defeat tyranny and will never last without major reforms in the areas of education, ethics, culture, society, professionalism, art, and media. Such comprehensive reform is the only guarantee for the success of the political reform, because the trio of poverty, ignorance and illness is the real enemy of revolution and reform. No real success is attained as long as this trio is dominating the scene in the Arab/Muslim world. Poverty compromises people’s dignity and values, ignorance compromises their wisdom and faith, and illness compromises their will and life itself. Thus, we are in dire need of an ‘ethical and cultural

revolution“ that extends its deep roots in these societies first, and that becomes the basis of civil institutions that protects the continuity of any serious political reform.

The “State” in the Arab world is largely a system of tyranny, corruption, intolerance and a promoter of the interests of powerful lobbies. The most essential problem is the Sykes-Picot-based definition of these “nation states” themselves, which their citizens are trained to be so patriotic about.

The decisions taken at the different levels, respectively military, political and economical, are more finalized to the promotion and protection of the interests of politicians and their families and clients than to fulfil the needs of the ordinary citizen for the benefit of the public interest. They employ brutal force to tear away the hopes from the people, who has been violated through their own blood on the ground of the opposition and political ideology.

In the Islamic thought has been recently introduced the idea according to which the State should be rooted in the civil society, while the State system on the concept of “political pluralism”. In the present work, we will show on which parts we agree or simply disagree from this approach, concentrating the attention mainly on the development and the reformulation of these concepts. We will also make reference to the civil society, the pluralism and the Islamic values, in order to solve this crisis, inshAllah.

The attention will be concentrate mainly on the nature of the National State in the light of the Maqasid al-Shari’ah. However, personally I believe that this is only a phase in the process of going back to the Islamic solidarity and unity, in order to get rid of the tribal and military tyranny and to build finally a political pluralism and, then, to start imaging the long-awaited National State.

The notion of National State will be examined and discussed according to its principles, values and aims, in order to give priority to political choices who could benefit the people and would be a valid help in attaining justice, according to the purposes of the Islamic Law.

2-The need of a moral revolution

The previous analysis demonstrated that the issues, we are called to face in our daily life, and the crisis at different levels-religious, political, economical, social and environmental-are mainly synonyms of moral and intellectual chronic diseases affecting both the individual components and the Muslim and Arab society as a whole, who is extremely weak in the ethical practise, while authoritarianism

prevails at several levels, both Islamic and non. Notwithstanding the dynamicity and the will of change, which activated a revolutionary movement against both tyrannical and corrupt governments, the Arab and Muslim World need a revolution both at the level of intellectual approach and in the system of moral values, on which build a policy having concrete and lasting effects on the life of the people.

The Modern world is currently suffering from a very dreadful crisis at every level. The major crisis are not of economic nature but mainly ethical, since they involve both theory and praxis. For example, countries like Syria, Palestine, Egypt, Lybia, Iraq, Burma, Bangladesh and some African countries, are suffering from a moral crisis and are not the only ones: East and West are part of this process as well. The State terrorism which gets rid of the legitimate opposition through corporal punishments, persecution and violation of Human rights, at the same time justifies its actions on the ground of the prestige of the State, legitimacy of the power, on the rules of sovereignty, on the national security and international laws. All these justifications are completely unrelated to morality and ethics. This means that there is a serious problem not only at the political level but also- and mainly- both in the praxis and philosophical definition of politic. Then, those who practise the politic of the "survivors" are actually promoting the same circle of tyranny, maintaining the control of the power on the limits of morality and public good.

This perspective needs an approach rooted on the *Maqasid al-Shari'ah* in order to amend perceptions, political praxis and to give attention to political choices meeting the real needs of the citizens and not those one of minoritarian groups of power, in order to revive the genuine Islamic Thought, which is almost totally absent even from the so- called "Islamic parties".

Another word crisis is related to the "health" and the immoral politics carried out by the Pharmaceutical Industries, which consider medicines a kind of luxury available only to rich people and of which, consequently, poor people are deprived, provoking the death of millions of innocents due to the lack of an adequate medical care. Actually, governments avoid to take serious political measures to prevent Pharmaceutical Industries to monopolize the science in order to test the harmful effects of some medical treatments. The same can be said about food industry. Both these industries have got the tendency to modify God's creation and nature without taking into consideration the impact of their praxis respectively at the environmental, psychological and sanitary levels. Furthermore, education became

subject to policy interpreting the search of knowledge as a luxury more and more dependent on the logic of the market, as a ware among other ones.

The Digital Industry also became a great political issue due to the new technologies, which deprive more vulnerable people from communicating using the same tools in order to keep them into poverty and social marginalization. Furthermore, very often the majority of inventions and discoveries are the result of the capacity and the genius of some people living in these impoverished areas of the world, who are forced to sell their professionalism and skill to a lower price, increasing at the same time the millionaire income of these multinationals and their deep influence on the life of millions of people. At the end, this economical process promotes the more savage form of Capitalism, which denies the value of concepts as distributive justice and equal opportunities. The Industry of Entertainment, through the culture of film stars, corrupt the youth all over the world, and also the Industry of Video-Games promote mainly violence and discrimination and never compassion, social cooperation and kindness.

Unfortunately, the Islamic Thought seems to be quite far from all these questions and issues, which in the contemporary world assumed instead a fundamental importance. At the same economical level, the situation is not at all easy. The Multinationals and the Giants of Economy, which both kill and deprive, are the direct result of a moral crisis! The majority of them, specially the ones connected with the word of Industry, interfere in the world policy as never before, while millions of people living under the level of poverty consume the crumbs falling down from the rich countries, who at the same time organize forums and conferences dedicated to the world economy. In these occasions, however, speakers avoid to discuss about usury, monopoly, and the exploitation of the poor people, who are deprived also of the necessary to live. All these questions, which can be considered the result of a deep moral crisis, don't find any space in the reformist islamic thought.

The crisis at economical level is directly responsible of the environmental one. The residues and the waste resulting from the Oil Industries and the waste of the Nuclear reactors are stored in the poorest countries of Africa, Asia and Latin America without any consideration of the disastrous impact they have on the environment. The economies of the Industrialized Countries, together with the Multinationals, devastate irresponsibly the natural resources as water, minerals and air. At the same time, however, the same countries are very active in organizing

summits and conferences to discuss the issue of Global environment, the ethical parameters and to remind the necessity of political choices aimed at the attaining of social justice. Due to the corruption of soil' basic components, the Multinationals employ immoral technologies which modify and alter the creation of God, animals and plants, and also human beings for commercial ends, without any control and care towards human beings and the environment, in which they live. This happened only to satisfy the needs and the surplus of a small portion of world population, while the remaining one does not have the possibility to eat adequately and consequently, every year, millions of human beings died for the lack of drinking water and bread, that "bread" asked for in the slogan of Arab revolutions.

About the women condition, both in the muslims countries that in the western ones, considering themselves more progressive and liberal, both in the East and in the West, statistics show the presence of a dramatic difference between women and man according to the following parameters: access to scholarization, to sanitary care and economical sources. In the modern world, women are sometimes considered as a kind of luxury, which can be sold and bought, or that can be employed in the marketing and promotion of other goods. To this situation, we can add the violence against women, their marginalization in the scientific, religious, intellectual, and economic institutions, which became unfortunately a global phenomenon, assuming several forms in different cultures.

Finally, it is important to make a reference to Media. We can ask: Where is the truth? How is it possible to have access to the real news? What is seen in the Media it is not a reality but a kind of projection and interpretation of the events. Where are the news related to human civilization, to its achievements, to its successes and improvements? Or, we should think that the world is reduced to deaths, natural disasters and political elections in the different countries?

3-The crisis of Islamic thought: the needs of Maqasid al-Shari'ah

In this book, the *Maqasid al-Shari'ah* are introduced as a reference and a methodology to reach a consensus at the Community level in order to answer to the humanitarian crisis from an Islamic point of view, and finally supporting the idea of an ethical revolution in both the Muslim and non-Muslim world.

A serious Islamic approach to these issues implies the focalization on the human dimension of Islam instead on the ones considered by tradition “strictly Islamic”. This humanitarian dimension is certainly “Islamic”, but intellectuals and scholars do not concentrate their attention on them as priorities to discuss and reflect upon. This is a big difficulty, which weakens the presence and the impact of the Islamic teachings mainly among the young generation.

Even when they have been always quite aware of the aims and proposals of *Shari’ah*, today the majority of scholars started to rethink *Shari’ah* in terms of the comprehensive law revealed by the Creator. Until now, *Shari’ah* has been confined in the jurisprudence (*Fiqh*) but, thanks to God, is starting to come out of this tight frame and opening towards contemporary social and humanitarian issues. The *Maqasid al-Shari’ah* answer to the questions on “Why”, and the scholars of *Fiqh* responded in different ways to the issue, formulating theories related to the public *maslahah* in order to protect both religion and life, to prevent injustice, for a responsible growth of the family, to safeguard children, for marriage, housing and other questions.

However, conditions are changed as the world and in the contemporary era we are in need of new legal ruling in the different fields. The purposes of Islamic Law not only have a very important role in the *Fiqh* but also in the fields of Medicine, Politics, Economy, Arts, Education, Media and so on. If we ask about the reason of the State, Art, Media, and Politics, we can suggest ethical points of view through the *Maqasid al-Shari’ah*, which forms the system of Islamic Values. However, Islamic Values, as are represented in the *Maqasid al-Shari’ah*, constitute a very complicate and complex theme respect to the other systems of philosophical values, specially on the issue of priorities, which will have a fundamental role in the development and promotion of determinate political and legislative choices.

The different priorities related with the *Maqasid* are necessary for the development of political choices and a legislation finalized to a moralization and to the questions related to the priorities, which are consequently interpreted in terms of values and ethical choices, mainly in relation with funds, aims and tools. This kind of perspective directs aims, research and political choices towards a methodology finalized to the integration and to a multi-dimensional and multi-disciplinary approach.

In fact, this attitude, rooted on *Maqasid al-Shari'ah*, broaden beyond the strict specialization and extend its point of view, integrating the different methodologies in order to harmonize the disciplines related to human life.

A good part of the attention will be given to the divine religious cult, the miracle of Creation and the apostolic mission of Prophet Muhammad (pbuh), taking into the due attention also the wisdom of the legislation and the ethical practises, in order to offer a solution of the contemporary issues rooted on the wisdom of Law, on moral values and on the consciousness of God. This is the reason why, it is necessary, God willing, to examine the methodology employed in the so called "Islamic politics", mainly in relation with a "reconstruction" of Muslim mentality. The final aim of this process is meeting the contemporary needs on the light of ethical practises, the Sunna of God the Most High, and the Revelation leading out of darkness into light, to eternal rights and to justice. I am not a scholar of social science, notwithstanding I will try to suggest and offer proposals based on the aims of Islamic Law in order to advance, God willing, some useful proposals to solve the contemporary intellectual crisis affecting almost the totality of the Muslim world. I hope readers will forgive my inexperience in the language of political science. The truth is that the complexity of contemporary world issues need a multidisciplinary approach, where the different disciplines and research subjects are harmonized. Instead, until science will be forcefully splitted and divided in different specializations, each of them with a peculiar methodology and a teaching method, will be actually placed restrictions on the freedom and creativity of scientific and intellectual research.

For example, regarding the State, some scholars seem to think that the National State according to the parameters of different countries, is a well-defined concept, which do not need a new definition and a further development. For example, in the case of countries like Egypt, Sudan, Giordania, Pakistan, Bangladesh or Saudi Arabia, their political boundaries are the result of political choices taken in a not very remote past. Sudan, for example, as well as Gaza, were part of a Egypt for a long time. Although the bond with the homeland, the soil, the people and the civilization is a reasonable human feeling and not contrary to Islamic teachings, however, there is a difference between the belonging to a Nation and a State, even when the politicians have got the tendency, for their personal aims, to politicize the feeling of National affiliation.

The majority of the Arab and Islamic nations are in need of a gradual change, at the same time, deep, affecting and involving several dimensions. There is a kind of politicization, which turns to be very dangerous for people's interests, since it is not aimed to the establishment of a Civil Society, instead is responsible for the politicization of public policy of a State, related to an ideology at a superior level than the one appropriate for the political context. This point of view implies the separation of the public policy from State's institutions and consequently their independence from the fluctuations and conflicts, at the same time focusing the attention mainly on the "social service", in order to reach the common good, the public welfare and social justice. This is the reason why it should have a clear priority next to the strictly "political role" of the State.

The issue related to the political pluralism will be discussed in the course of this research through the different schools and methodologies. Some schools completely deny every kind of pluralism in the political context, while others assume a partial point of view, without however all the dimensions of pluralism having a special importance in the political renaissance.

4-The historical roots of the contemporary tyranny

God created human beings and endowed them with inalienable rights, whether they live under the same circumstances, share the same geographical area or cooperate in the same working environment. Human beings, who are bond by a common descent or by a strictly cultural community, have the tendency to organize themselves in group inside a determinate territory. The principal aim of this "State", "Kingdom", or "Princedom" is to guarantee public order, protecting the rights of the dwellers and allowing them to live in a relative peace and security. However, Human History, and Muslim History as a part of it, demonstrated that this original aim has been often exploited by those, who employ the political power for personal aims and to control the economic power and the natural sources of a territory in order to provide benefits to families of powerful lobbies. All countries of the world, during their history, have been called to face a tyrannical and despotic political power and the philosophical and political thought took a great effort in reflecting on the limits of State's authority in the political activity in order to protect the interest of the people and reach a balance between the different classes, groups and parties.

When Prophet Muhammad (pbuh) died, the Islamic community found herself a very difficult and vulnerable situation. Abu Bakr, after he became imam and khalifa (successor) of the Prophet (pbuh), implemented a policy which took care, before everything else, of the wellbeing of people, trying to reach at the same time an harmony between the different political forces, promoting cohesion, cooperation and coordination for the sake of God and the benefit of human beings. After Abu Bakr, the role of successor of Prophet Muhammad (pbuh) was assumed by Umar ibn al-Khattab, Uthman and Ali. All of them left, with various degrees, an historical proof of good governance, which did not have any parallel neither in the ancient history neither in the modern one, mainly because of the importance assigned to the principle of *Shura* (Consultation). The later history of Caliphate, instead, showed a prevalence of dynastic interests at the expense of the welfare of the whole *umma* (Muslim community). The role of consultation became soon a simple formality devoid of every political weight. At the end, this state of affair lead to tyranny and dictatorship and, while the Islamic civilization flourishing in other parts of the world, the Muslim-Arab nations started their inexorable decline.

In the political context, the long history of tyranny and corruption has been interrupted only for limited periods of time through the justice and impartiality of some leaders. This History involved the Muslim Community and, in general, all the Middle Eastern Countries. The end of the parable is constituted, during the XX century, by the struggle between the democratic capitalistic model and the totalitarian socialist one, which is later concluded with the predominance of the western capitalist model, now widely spread almost all over the world and that claims falsely to be ‘‘ the end of History’’.

Islamic Community awakened from the deep sleep and tried to find back a place among other nations. Jamaluddin Afghani, Muhammad Abduh, Muhammad Iqbal, Hasan Banna and Omar ibn Badis tried to free the muslim consciences from the power of Colonialism, which crossed the boundaries of other countries, ravaging and destroying other people sources. However the concept of freedom, to which these thinkers point their attention, went against the interest of tribal and military powers and their clients. In reality, the political systems of these countries were only a replacement of the colonial power, which deeply influenced the colonized countries not only politically, economically and militarily, but also linguistically and mentally. The same concepts of ‘‘Global order’’, ‘‘Economical help’’, and ‘‘security’’ hide the dominant colonial imprint, which employes also powerful

people and those benefitting of the wealth, supporting at the same time their corruption and exploiting the different contradictions in order to justify the maintenance of the status quo.

Scholars often consider a very simple and reductive way the role of the concept of “civil” in the “Islamic State”. The concept of “civil”, in fact, is considered something totally unrelated to Islam and even contrary to its teachings, while the Arab Renaissance grant the right of citizenship without taking into consideration the religion professed. The political state tried to overcome the tyrannical power in order to express all the nuances of political life for a safe and peaceful transfer of power and an healthy competition towards attaining the common good. Political pluralism is one of the features contemplated in Islam, coherent to both nature and needs of human beings, the natural law and the lessons of History. The same political pluralism, however, in the contemporary reality assumed an authoritarian character. Even when we consider the National State as a necessary step towards the unity of both Arabs and Muslims, hoping in a collaboration and a coordinance to reach aims and superior interests, the political pluralism does not mean necessarily a multi-parties system, applied however only in some western countries. Notwithstanding, several scholars insist on the necessity of following the dominant model in Western Europe, where pluralism is identified with the necessary belonging to a political party, while other understand secular state according to the French Model, which don’t allow in the political arena religious parties neither religious activity, in particular as regard to the Islamic community. They adopt the western pluralistic model, without taking into consideration the conflicts inside this system, while other tried to get close to this model, without however thinking of the criticism of the party system.

Historically speaking, Muslims know very well that institutions and political and associative models are part of their identity and personality. It is necessary to became aware that the future of this community and its ability to benefit all humanity depends on the capacity to be creative inside the Islamic Thought in order to build Modern Political Institutions, which are deeply rooted in different people’s consciousness inasmuch grounded, finally, on their identity and culture. The aim of this research is to suggest and propose ideas derived by the reflection of *Maqasid al-Shari’ah* and on the *Sunna* of the Prophet (pbuh), in order to promote what is here called “a Civil state according to the purposes of Islamic Law”. In this context, will be also criticized the contemporary Islamic thesis on politics in

order to start drafting a civil and pluralistic model. This is the main purpose of my research, even when it is not at all the end of my reflection, but rather a necessary step to prevent the import of a model contrasting with the national feeling. The unity, which Islam is teaching at the level of human development, cannot be reached without a civil state, in order to overcome the nightmare of tyranny in all his forms and define a political system, which could be a tool to reach the needs and interests of population, promoting at the same time the values of diversity and tolerance.

The question we need to answer is related to the definition of “Islamic approach” both in politics and contemporary society. This is a very important question, which will have a great and meaningful impact in the conception of the political system defined as “Islamic”. We think that the aims and purposes of the Law have a central role in this reflection since, while promoting and safeguarding freedom of consciousness, spiritual and mental balance, family and property, Islamic values, which have been revealed by God to different Prophets, promote and take into great consideration common sense, diversity and human dignity, as have been embodied in the Prophetic *Sunna*. The purposes of the Law have a very important role in the contemporary world in relation with the promotion of a pluralistic society. The aims of the Law constitute a tool to analyse and measure the different criterias for building a real “Islamic society”.

This research is divided in three chapters, discussing about the following topics: methodology and application of the concept of “Civil society”. The first chapter offers a theoretical analysis of the issue through a reference to the theory of systems, while the other chapters deal mainly with the concept of “Civil society” before discussing directly the political concepts in the context and methodology of *Maqasid al-Shari’ah*. Civil society represents, in fact, a necessary step, soon after the revolutionary one, towards overcoming persecution and tyranny.

We have analyzed and examined a whole series of Islamic approaches, concentrating the attention specifically on the question related with pluralism, its acceptance and refusal, in order to formulate a more inclusive and accommodating concept, through the contemporary thesis formulated in this context, for the plurality of contemporary streams, introducing, at the same time, some *Maqasid*, which will be extremely useful in the context of ethics and morality. We humbly demand to God the Most High to lead this community through His mercy. We demand Him to put us on the route of salvation in this world and the next one. We

would also like to express our gratitude towards the scholars, the thinkers, those killed, dead or injured only because they were demanding justice, and those who are persecuted along with their families.

God in the Quran said: “If you have been wounded, know that the other side has been similarly wounded. We alternate such days between people, so God may know those who believe and to choose from among them some who (with their lives) will bear witness with the Truth” (Holy Quran 3:140).

Praise be to God, the Lord of the all Worlds,
Jasser Auda,
While crossing Atlantic Ocean, between East and West
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Chapter I: Systemic Analysis of the concept

1-Introduction to the concept of Analysis

The “Islamic” political discourse in the modern time is centered mainly on the following concepts: *Dar al Islam*, i.e. the abode of Islam, the notion of alliance or covenant, the condition of dhimmis and others, which are actually historically surpassed. However, the same concepts are considered under other points of view so that, in an other system, while changing the name, maintain the same substance. For example, the notion of *Shura* could be interpreted as a modern Parliament, the concept of covenant as electoral mandate, while the *Dar al Islam* can be revisited in terms of both national and international cooperation between Muslim countries, while the ethnic and religious minorities can be considered as dhimmi.

All these concept, however, could led to a series of contradictions and it became very urgent to start a process of revision of the methodology related to the concept of legitimacy policy as has been discussed in the traditional texts. All of them discuss about the concepts of Islamic policy, conditions, systems, theoretical premises and methodologies, which are however historically outdated. This is the reason why it is necessary to change the methodology, consequently to the changing times, through which some issues are dealt with.

Let’s take into consideration, for example, the concept of Prophetic *Sunna*, which mainly in the political context, has been interpreted as a bounding legislation for every muslim, independently from time and space. Instead, the reflection on *Maqasid al-Shari’ah* teaches us that there are actions of Prophet Muhammad (pbuh), which cannot be included into a legislation since they are affected by historical times and the cultural milieu, in which Prophet Muhammad actually lived. There are, also, many other actions which should be considered as strictly “political” ones, but at the same time are subject to variables and are not constant. This is the reason why they cannot be included into a legislation.

The study of phenomena, concepts and political systems of our time should be subject, first of all, to a kind of analysis, in order to examine every concept carefully in its historical, ideological and philosophical developments. This operation will allow us to understand if a concept or a notion is compatible or not with Islam, its main doctrines and its history. The importance of these concepts’

analysis will be clarified in the process of studying and developing of concepts and political systems.

The word “analysis” derived from the ancient Greek noun, which means “to dissolve” and to “to loosen”. The common definition of the meaning of analysis is decompositional, regressive and interpretative. However, none of these methods have been explicitly used in any philosophical school and each of them could be correctly explained in one of the two terms. I personally believe that the classical methodology of analysis could be described as “decompositional”, since it is rooted on cause-effect relations, as has been previously explained.

The concept of decomposition has got its roots in the methodology of Greek Philosophy and Geometry. In the *Mathematical Collections* of Pappus, written based on centuries of development of geometry, after Euclides’ Elements, analysis has been described as follows: “We suppose the thing sought as being and being true, and then we pass through its concomitants in order, as though they were true and existent by hypothesis, to something admitted; then, if that which is admitted be true, the thing sought is true, too, and the proof will be the reverse of analysis”.

The Platonic version of *Analysis* developed the classificational trees. Plato draft these trees “dividing the genus into its constitutive species” through a series of dichotomies. Aristotle’s *Analytics* constitutes a further development of the method of division and composition, in which has been developed also the concept of “structure”. Aristotle started his analysis through the construction of classifiers trees of the arguments in their logical elements. Later, he examined their structures through the elaboration of syllogistic logical relationships among the elements.

The methods of Plato and Aristotle have had a great impact both in the Western and Islamic Thought. Can be considered as examples: the division in categories of Ibn Rushd, the Resolution of Thomas Aquinas, the reduction in simple terms of Cartesio, the reduction of ideas to simple sensible impressions of Locke, the reduction of propositions in self-evident truths, the subclass of synthetic a priori truths of Kant, logical analysis of Frege, the deductive chains of Russell and the grammatical investigation of Wittgenstein.

In the context of Islamic Philosophy it is necessary to switch from a vision, belonging to the science and ancient philosophy, to another one overcoming the bilateral and simplicist point of view in order to open towards an holistic and comprehensive one. Thinkers as Ibn Sina, al Farabi, Shatibi and others, tried to build an intellectual system, where Quranic teachings are put in relation with the

mechanism of cause and effects. In the Western Philosophy, for example, Aristotle interpreted nature as ruled by a “hierarchy Pyramid”, while Hegel argued that the “whole” is something more of the simple sum of its parts. However, western philosophers, at the end of the XX century, moved a radical critic to the logic of decomposition, which tries to find the founding element or “essence” in the resolution of the whole in its constitutive parts, opening instead towards an analysis, which considers systems in their totality.

While aristotelian logic interprets the thought in terms of simple, direct and bilateral logical relations, the logic of systems instead introduces a variety of elements, interacting between each other according to different types of relation and under different dimensions. The logic of systems reads the relation between different elements as a multidimensional relationship and not as a simple cause-effect relation.

In the context of the reflection on Islamic political philosophy, this kind of logical approach helps us to avoid to focus the attention exclusively on binary terms in a relation of opposition as, for example, religious or civil, *Dar al Islam* and *Dar al Harb*, muslims or non-muslims.

This extremely reductive point of view overshadows the multidimensional character of the reciprocal relations between these terms. To assume this perspective is extremely necessary in the process of renovation of Islamic thought, specially in the jurisprudential dimension.

The systems’ analysis, since relates with different elements in terms of reciprocal relations, has at the same time a dynamic vision of different aspects of these relationships, while observing them in their mobility and development. This kind of analysis, differently from the traditional analytic model, pays particular attention to the dynamic of change inside the analyzed system. For example, the analysis of concepts, which will be introduced in the current study, will include the development of a concept. Terms and concepts as: state, legitimacy of power, caliphate, justice, freedom, and also policy, have got a story, developing and changing over time.

In this book, it will be analyzed the holistic concepts and the political systems in general, employing the philosophy of analysis’ system, which has been developed in the XX century, in order to overcome the limitations of atomistic logic. This kind of analysis seems to be applicable successfully not only in the context of

natural science, but also in the humanistic and social ones, as have been proved different studies in the contemporary context.

2-The conception and application of the concept of governance

As every other mental concept, also the concepts employed in the course of political reflection, are endowed of what could be defined a nature, an essence, even when cannot be considered eternal and immutable. The political concepts, infact, take on a complexity according the historical, sociological and cultural contexts in which they emerged for the first time. This is the reason why, inside our research, concepts will not be considered and examined in their fixed meaning, but will be placed in their historical development.

The same reflection is applicable in the linguistic context, since a word does not have a fixed and univocal meaning, but, just like the concepts, interacts with other terms in the linguistic context of reference.

Another important element in the context of our research is constituted by the nature of jurisprudential concepts regarding mainly Islamic policy. The *Fiqh*, or jurisprudence, is formed by the set of norms and legal pronouncements resulting from the understanding of Quran and *Sunna* by a single scholar. God the Most High cannot be called *Faqih*, since nothing is hidden from His knowledge, but the same word can be adequately used in the case of human beings, who have a partial and limited knowledge.

Consequently, no branch of *Fiqh*, including the one dealing with principles and forms of governance, can be considered as divine revelation- in arabic *Shari'ah*- eternal and immutable.

A scholar defined *Fiqh* as an ‘understanding needing a good capacity of perception, which in turn enables the jurist to draw near different mental images. The cognitive nature of Islamic jurisprudence is an essential feature, which should be underlined in order to enlighten the diversity of approaches, points of view and opinions.

It is however necessary to underline that, relatively to the meaning of a concept, it is possible to assume two main points of views, which philosophy differentiates in nominalist and realist. According to the realist one, the definition of a term endowed with a fixed meaning naming an entity, coincide with its real nature. Instead, according to the nominalist theory, the word and its definition are both mental constructions and conceptions, which are related to the human experience

in a given context. The connection between the name and its reference cannot be defined as a simple juxtaposition relation but rather as an understanding and perception of the surrounding world.

The organization of our thoughts about the real world does not constitute an abstract philosophical proposal, but can be considered propaedeutics to a study finalized to the development and modernization of political concepts, adapting them to the contemporary condition of nations and civilizations. If instead, the political concepts formulated in the classic era are not analyzed and reformulated according to the contemporary context, can turn against people's interest and, consequently, could not overcome the confrontation with reality.

Further, different concepts inside a single theory are build in order to entertain a quite complex causal relationship, shaping the whole structure. The different elements and components are, then, regarded from a multidimensional point of view and, consequently, can be distributed in different classes and categories.

The concept, then, creating determined mentale images, does not have necessarily clear and univocal bounds, but could vary in the limits of what is reasonable. These considerations do not belong to abstract philosophy, but rather can be applied at the same concept of "State", which has got a dynamic meaning instead of a univocal one. To say that the term has got a dynamic meaning means that is subject to an historical process and development and, consequently, can vary according different epochs and situations. If, instead, we consider the State or the Political System as "fixed" and "immutable", we prevent the researcher from starting a process of revision. In this context, it is not our intention to de-structuralize the concept of State supporting an anarchic point of view, but we would like to undertake an historically detailed analysis of the same concept in order to create the conditions for a reformulation of the same one for the realization the Maqasid al-Shariah.

3-The evolution of the concept and his renewal in time

In the Holy Quran it is written: "To Him turn everyone in the heavens and on the earth for their needs; and everyday He manifests Himself in yet another way" (Holy Quran 55:29).

Everything that exists is in a stream of perpetual change: nothing is static or inevitably fixed. This truth is applicable both in the nature and in the moral life. Every being or meaning renew himself and evolve through the interaction with reality and the outside world. The same applies to the Islamic religious context.

According to Islamic teachings, infact, God sends every century a ‘renovator’ to read religious text with different eyes.

The english word ‘worldview’ translates the german one ‘Weltanshauung’. A worldview can be defined as a range of presuppositions about world’s general features or a system of beliefs. The following ones are examples of theories related to the worldview:

- 1-God, the world, human beings, life after death, knowledge, morality and History.
- 2-Myth, doctrine, ethics, rituals and society.
- 3-Faith, concepts, sense of order, social constructs, models and moral precepts.
- 4-Natural world, ethics, politics, biology, psychology, methodology of scientific investigation and several other factors.
- 5-God, oneself, nature, space and time.

All the previous theories show that a worldview is shaped by everything around us, from religion to self-awareness, to geography, politics, society, economy and language. Using the word ‘culture’ in a wider meaning, worldview represent a cognitive culture, constituting a mental frame through which human beings perceive and interact with the world interpreted as a whole.

5-The dimension of Maqasid and the field of Ethics

The *Maqasid al-Shari’ah*, the theological dimension and the system of values represent an essential part of our analysis of political concepts and of their meaning both inside the limits of a reflection properly Islamic and not. The aims and purposes try to answer to the question related to ‘why’. This is a fundamental question both in the context of our research and in the contemporary studies dedicated to Islamic political thought. When it is avoided to formulate a question about ‘why’, it is closing the door of understanding of purposes and, consequently, the scholars are prevented from concentrating the attention on the ‘reasons why’ in contexts different from each other as: religion, art, medicine, media, politics, and etc.

All these questions will made possible the understanding of ideas, in order that can be use to develop concepts’ analysis and the terminology related to ‘causal relationship’ , for correcting the shortcomings and weaknesses of the research in the context of Islamic political thought.

At this stage, it is important to remember the teaching of Ibn Ashour, who has always been critical towards the theological dimension. The majority of the questions debated in the context of traditional jurisprudence assigns a very marginal space to the purposes and reasons behind rules. Instead, a wider space and attention has been given to the linguistic issues about Arabic language, which has considered as the principal tool to understand the two sources of Law: the Sunna of the Prophet (pbuh) and the Holy Quran.

A linguistic analysis, however, even if necessary, cannot be sufficient, since it overshadows the dimension of aims and purposes of Law, constituting the center and the core of the Jurisprudential philosophical reflection.

The consideration of purposes and aims of Islamic Law will be fundamental also in the context of the reflection on the Islamic Political Thought. Before starting a study on this direction, we should remember that in this context is hidden a more radical question: Do the commandments of God have an aim and a purpose?

The divine actions are above the notion of cause-aims. Asharites and salafites, as well as Hanabalites, have a point of view which is opposite to the mutazilite one. They argue that an action can be “beautiful” or “repulsive”, “good” or “bad” by itself. Asharites argue that God’s actions are beyond aims, since the one who performs an action, is actually in need of it, but God is free from every need. They also argue that God is the “Creator” of all the causes and the effects and, consequently, can perform whatever He wills without taking into consideration or being bound by cause-effect laws.

Al-Ghazali, for example, considered the Aristotelian theory of principle of moderation valid because “the script commands it and not because, as philosophers argue, is approved by rationality”.

Divine actions have causes and aims through God’s Grace. Maturidis, instead, a section of hanafites, with less followers of the previous schools, choose a medium point of view. They argue that Mutazilites are right when they attribute purposes to God’s actions, but at the same think that they are wrong in imposing obligations to God. Maturidis argued that Asharites were right, when they argued that God doesn’t need any purpose, just because they agree that aims and benefits are human needs and not belong to God. Maturidis, instead, argue that reason doesn’t have the necessary autonomy to judge what is good and what is wrong, but instead it is a tool given by God, through which human beings can recognise what is morally good or repulsive.

Several jurists, considered asharites by their schools, did not share the radical position on divine aims and assumed a point of view closer to the Maturidis' one. However, both for political reasons and for fear of persecution, when this scholars expressed their point of view on finality, all of them assume a security distance from Mutazilis, denying the doctrine of "beauty" and "repulsion" of actions. Among these scholars we can find: al-Amidi (631 AH/1234 d.C.), al-Shatibi (790 AH/1308 d.C.), Ibn Taymiyah (728 AH/1328 d.C.), Ibn al-Qayyim (728 AH/1347 d.C.) and Ibn Rushd (584 AH/1189 d.C.).

6-The intent of the Divine Law

When we start examining the concepts of Islamic origin, it is necessary to give a particular attention, after having carefully distinguished the so called "obligatory duties", from that part of *Shari'ah* representing the wisdom and morality shared by every human being, even when its origin is completely Islamic. In this way it will be avoided to focus the attention on the forms the same concepts assumed in other cultures and environments. Natural laws, which in Islam are described as the "Sunna of Allah", rule everything existing in the universe: from plants to animals, organisms and civilizations appeared during the course of World History.

The historical development of different communities is governed by the same law. The Law of God, mainly in relation with society and state, has the purpose to allow human beings to live accordingly with the constitution of their nature both at individual and community level, without sacrificing any natural dispositions, but rather trying to harmonize them in the context of human society. In the contemporary world, we could observe that political systems contradicting human nature reach decadence and later extinction more quickly than others.

For example, the social studies analyze some phenomena based on statistical studies or which manifest themselves in particular circumstances and then, later, through certain procedures, formulate certain laws. These laws, however, have a value bound to the time and context in which have been formulated, since are affected by the culture and society where this studies are actually performed. To this fundamental consideration, we should add the possibility of a mistake in the process of data-collection and, later, in the process of elaboration. Instead, general laws, which could be deduced by Quranic text are necessary, eternal and immutable.

In the Holy Quran is written: “Do they expect anything different, given what happened to earlier people? You will never find any change in the way of God, and you will never find any deviation in His way” (Holy Quran 35:43); “This has been God’s way with those who went before, and you will not find any change in the way of God” (Holy Quran 33:62); “The Prophet should have any uneasiness about that which God has ordained for him, since this is God’s way with those (prophets) who passed away before. God’s will is absolute destiny” (Holy Quran 33: 38).

Every component of Divine Creation is an interconnected unity and, this is the reason why it is not possible to change nothing inside universe without the latter being influenced as a whole. Consequently, the policy and decision related to a special case should not be separated by the reality as a whole, but at the same time should be taken into considerations all the others variables involved according to a perspective which prefers unity instead of division.

In the Holy Quran is written: “God knows what every female bears and what the wombs carry for a shorter or longer term. And everything with Him has a due measure” (Holy Quran 13:8); “God is the Creator of all things, and He is the One, the All-Compelling” (Holy Quran 13:16); “There is nothing which does not glorify Him with praise, but you human fail to understand the manner of their glorification. He is All-Forbearing, Most-Forgiving” (Holy Quran 17:44).

Human nature should be taken into consideration in the process of policy formulation theories or, for example, when are taken political choices, since all human beings, even when came from different cultures, share the same thoughts, perceptions and aspirations. To take into consideration this truth is very important, while relating with non-muslims as brothers in humanity.

In the Holy Quran it is written: “Human beings were (once) all one nation. God sent prophets carrying good news and warnings, and with them He sent the Book in Truth to judge between people in matters on which they differ...” (Holy Quran 2:213).

For example, in the same matrimonial relationship, this unity is clearly manifested, as in the rest of creation: plants and animals, wealth and poverty, life and death, knowledge and ignorance, peace and war. Integration and unity, which should be reached through marriage, is a source of balance. The feminine and masculine elements inside the family can differ, but their union is however finalized to attain serenity and equilibrium. Capitalism and socialism, even when they differ in the economic sphere in relation with the role of the State, however

agree on equality of distribution and, even when disagree on distribution and decentralization of power, agree instead on the maintenance of public order and on the promotion of citizens welfare.

Universe itself is an image of this truth since in it can be seen both diversity and unity. For example, in the same way plants and animals, even when different from each other, have in common the same origin, in the same way every forms of life existing in the universe came from the same source.

In the Holy Quran is written: “Every beast that crawls on the earth and every birds that flies with its two wings have formed communities like you. We have left nothing out of the Book. Later, they will be gathered to their Lord” (Holy Quran 6:38).

This Quranic verse teaches us to respect every kind of animal life, the diversity of species and peculiarities proper of each of them, which have got the right to be preserved through a concrete commitment by human beings. Islamic law takes into consideration the diversity in the creation and never propose among its teachings to delete or promote the extinction of any living species. Islamic law invites to faith, justice, wisdom, power and moderation, but does not aim to delete the difference between people in the different live’s dimensions. For example, the dispositions related to solitude and those ones related to the human couple, are integrated by those related to diversity. There is no contradiction between diversity and the unity reached in the marriage, since these two dimensions are, however, preserved.

Some political systems, instead, deny every form of racism and never assign pre-eminence to arab people compared to the other. For example, the policy actuated in Sudan against the minorities in the South of the country, did not follow the Islamic teaching which, instead, promotes the protection of cultural and ethnical features of every people, and especially of a minoritarian group residing in a given territory. The failure in reaching a balance in the unity of diversity represents, from my own point of view, a feature of strong opposition towards the revealed law. In the Holy Quran it is written: “Had your Lord willed, He could have made all of humanity one single community, but (He willed it otherwise, and so) they continue to have divergent views, except those on whom your Lord has mercy” (Holy Quran 11:118-119).

The question related to religious and political minorities is very important in our time and a reflection on the role and the characteristics of a National State cannot avoid to take them into consideration. Often, however, the concept of unity into

diversity is not adequately taken into consideration, especially in those contexts, where the diversity is denied in the name of patriotism or the power of the majority.

In the arab and muslim countries, instead, the different doctrines and distinctions, as, for example, between Sunni and Shia, cannot be deleted by the stroke of a pen but, at the same time, the political power cannot impose a determined doctrine of school of thought. This system failed because not only led to well known issues and troubles, emerging when a single doctrine is rejected or choose only on the ground of political motivations. In the Holy Quran it is written: ‘If two groups of believers should fight each other, then try to reconcile them. But if one of them oppresses the other, then fight the oppressing group until it complies with God’s command. Once it has complied, make peace between them with justice and be equitable. God loves those who are equitable” (Holy Quran 49:9).

The change, about which it is widely discussed in the contemporary world, is not a random process, but it is ruled by certain laws. The change happened, first of all, in cycles, and every cycle is located in a circle. The cycle of seasons is located in that one of months, which by itself is part of the cycle of years. The cycle of human life goes from weakness to strength and from strength to weakness. The same happens in the case of civilizations. We should also comprehend the law of God the Most High, which roles the same Creation, in order to understand the laws related to the history of human communities. This is also a very important political issue, since change needs time and is cyclical in its character: from the defeat to the victory, from contradictions to expansion, from backwardness to progress. Ibn Khaldun speaks, in the introduction to his work, about the mercy of God. The state starts with strong and young people who sacrifice themselves and die for the sake of a principle; later the community reaches a condition of stability, followed by an epoch of prosperity, after which decadence starts.

The major part of the terminology, discussing contemporary political issues, is derived from the western one, which has been translated into Arabic during the Colonial time and in the later time. This is the reason why, it is fundamental to take into consideration the methodology through which these terms and concepts are used. The different attitudes and approaches, through which people related with western concepts and terms, can be translated as follows: refusal, utilization, adoption and conflict.

7-The relation with non-Islamic concepts

1- The total refusal of western concepts

Salafits argue that the Western cognitive model is completely different from the Islamic one and, consequently, they avoid using a non-islamic concept, since according to them muslims have got cognitive models, which are different both in structure and relation from the western ones. Salafits propose to come back to the example of Companions and of the first muslims and, even when in modern time they took different forms, the core of their point of view is characterized by an oppositional and hypercritical attitude towards the West. In the political context, furthermore, they seem to refuse completely every form of democratic principles as, for example, constitution, freedom, human rights, suggesting instead to return to the caliphate of origin, a process, which could involve in their opinion also an utilization of violence and oppression.

Personally, I believe that, when we take into consideration an idea or a concept coming from Muslims, it is fundamental to differentiate between what is compatible with the values and the aims of Islam, while, at the same time, we can avoid everything is negatively related to the beliefs and ethics of muslims.

The concepts and questions related to the “cognitive model” and the different islamic approach, resulted from divine revelation, are not necessarily separated, since it is possible to find between them an area of intersection, which is not necessarily in conflict with the revealed law of Islam.

2- The utilization of western concepts

Several Islamic Movements are characterized by a very free use of several western concepts and this happened mainly to the ones operating in the political context. However, the difference between these Islamic movements and the salafis is that the former employ these concepts, often re-interpreted on different levels, for the benefits, aims and purposes of the political movement.

In this case, however, we can underline the presence of an attitude, which is characterized by the inability to think out of categories inherited by the West in order to reflect on the contemporary issues under the light of the vision of the Islamic world.

3- The adoption of western concepts

The adoption of western concepts shapes the style of the contemporary liberalism and secularism. In the IX century, researchers, writers and students travelled in Europe in order to complete their own education and professional preparation and, once back in the East, they started thinking that the best way to promote a social and political progress in these countries is to follow the West, even in the different stages of its historical development, included the one related to the separation between Church and State, which has been followed by Modernism. It is true that muslims have to learn from the West, in the same way the West learned by Muslims, before Renaissance. The problem arises when we examined the notion of ‘secular’ inside the Muslim world, when religion is confined in a separate context not only at the state level but also at that one of individual’ life, in order to fight consequently the same concept of religion through different political institutions. This method produces intellectual subordination, which have a very negative impact on Muslim identity literally assailed by western economic powers, by the western military machine and by the culture of Media.

On the basis of these *Fatawa*, which were pushing towards the choice between Philosophy and Quranic teachings, philosophers have been accused of apostasy, while has been established that the texts of philosophical arguments could be neither sold neither own.

Those who formulated these *fatawa* have been the most important jurists in the schools of Islamic Law as: Ibn Aqil (d. 1119 d.C.), Al-Nawawi (d. 1277 d.C.), al-Suyuti (d. 1505 d.C.), al-Qushairi (d. 1127 d.C.), Ibn Raslan (d. 1595 d.C.), al-Shirbini (d. 1579 d.C.) and Ibn al-Salah (d. 1246 d.C.).

The *fatwa* of Ibn Salah is the most quoted on the subject in the literature of Fiqh. In this *fatwa*, Ibn Salah declared that philosophy is ‘the root of Atheism and of promiscuity’ and recommended the sword as the best way to deal with those who spread its teachings. This violent reaction suppressed the interest for philosophy in several islamic circles. Scholars studied philosophy and logic secretly, informing only the students closer to them, but avoiding, at the same time, to reveal this knowledge in their writings.

Ibn Rushd (Averroes’ d. 584 AH/118 CE) is an example of those jurists and philosophers, who has been persecuted and whose books have been burned since they violate these kind of *fatawa*.

At the same time, some scholars showed their disapproval towards the teachings of Greek philosophy, criticizing their methods, and suggesting alternative ideas in the context of Logic as, for example, Ibn Taymiyah and Ibn Hazm did.

Chapter II

The analysis of the concept of State

Before we clearly stated that there is no an univocal definition of the political concept. So, even when the notion of Civil state doesn't have a clear definition neither academic neither in the political science, notwithstanding after Arab spring the discussion on the same subject among Muslims and Arabs took a specific form in the historical process still in fieri.

Let's start analysing the concept of State. However, we can notice that the meaning of the word changed in modern time, when it became part of the political lexicon in Arabic language. For example, in many modern dictionaries the concept of "State" is defined as follows: "A wider community of individuals, who grow and lived in the Western culture, resides permanently in a given territory, enjoy legal personality and a system of government". This definition influenced even the Academic language inside the Western world.

In the western languages the word "State"- Stato in Italian, Estado in Spanish, Etat in French, and Staat in German, result from the Latin word "Status". The term "civitas", instead, have been used to refer to the people's legal status, but later it lost its original meaning and has been associated with the legal system applied to the whole society. Then, at the beginning of the XVI century, when have been written the *Prince* of Machiavelli, the word "State" took a different meaning much more close to the modern one. Hegel, in the work entitled *Philosophy of Right* said that the State have got the function of substituting the acute conflict mechanism between people through the interaction in a civil society, giving them the opportunity to participate in the political public will.

Max Weber, instead, argue that the State can be defined as the legal monopoly to employ the power of coercion, implying however, at the same time, the independence from any other authority to the international level.

Since the "State" is an abstract idea, it is need a specific government in order to turn this idea in a real application of dominant authority. The State exercises his authority through the Law and the Modern Western State can be defined as a kind of traditional legal system, according to the definition given by Max Weber. However, the distinctive feature of the Modern State is the ideology considering it as an abstract idea separate from the power and its exercise. C. Skinner in the

Foundation of Political Thought wrote: “The State substitutes the role of a legislative doctrine of the State and this is true also inside the evolution of the modern principle of the people sovereignty which, according to this principle, assumes a quite abstract feature. In several cases, however, these theories cannot express the difference between state and government and, in this way, they are identified and confused”.

According to Bowden, the concept of sovereignty includes, first of all, the authority inside the borders of National state, which do not allow any other element to administer the Law. He argue that the sovereignty, understood as the supreme authority in the country, cannot be bounded by anything except the Natural Law.

According to Hobbes, who wrote in the XVI century, the State is characterized prevalently by the coercive power, above the religious teachings and values. This point of view has been unfortunately assumed also by the Islamic world, mainly when started to appear some political *fatwas* which gave legitimacy to the sovereignty of the State, often above the same religion. The Thirty Years War ended in 1648 with the peace of Westphalia, which is considered extremely important since it constitutes the turning point in the standard model of the State dominant until then. The international community built the Peace of Westphalia on the absolute authority of the states involved, implying at the same time the adoption of the principle of the equality of the states, without considering their religious affiliation, both catholic and Lutheran. In this way, the concept of free State in the medieval society for the administration of a hierarchical organization, has been substituted by the concept of nation, which has been considered a source of authority which, at the same time, relates with and obey to the International Law.

This form became a reality even inside the Arab-muslim world, but the absolute sovereignty of the state turned into corrupt and authoritarian which, at the same time, hide his own real interests behind the religious screen or, which, in the name of security and fight against terrorism, ends up in denying and suppressing every freedom of expression.

This, in turn, demonstrates the importance of pluralism and of the condision of power inside a civil state. The most important theory related to the State is the one expressed by Ibn Khaldun.

While the Caliphate became more and more weak, the plans of western powers became, instead, more and more efficient, leading in the end to the military

occupation by western countries of several areas belonging to the ex Islamic Empire, with the consequent misappropriation of the sources of these geographical areas and the implementation of a foreign legislative system. After the fall of the Ottoman Caliphate and under the pressure of those who won the wars both political and military, have been signed the two Treaties of Lausanne, respectively in 1912 and 1923, tracing the borders between what is today called "Islamic world" or "Muslim States", which has got a parallel in the convention Sykes-Picot Sazanov of 1916, confirmed later, on 1920, which consequently led to the adoption from the Nations League of the Mandate in 1922, very well known in the Colonial history.

Personally, I believed that western theories related to the concept of the State and its role can be distinguished in three groups: the liberal theory, the conservator capitalism, which is grounded on Liberalism, according to which the State is a separate entity both from the society and the economy. The second theory is the leftist one, historically derived from Marxism, according to which the State has got the function of controlling both economy and society for the public good. In this kind of theories are very important the economic relationships, on the light of which are interpreted all the social and political functions. The third theory, instead, considers the society as a neutral reality, which represents simply the will of the group or party, who won the elections. However, inside a pluralist system, as has been argued by Robert D. in *Who rules?*, a conception of the State as a neutral entity ends in promoting the interests of determined groups, in a society where the power is organized in a competitive way.

We can note that the reality of Arab and Islamic countries in the contemporary world can be considered as a confused mixture of three typologies of systems, which ends up in supporting tyranny. Today, in the Arab World, is felt and it is discussed the necessity of creating a "Civil State". The development of this scientific project, despite the incompatibility with the original concept and the role of language in the western culture respect to the political history of Islamic countries, is however necessary, specially in this very sensitive historical time, when the people are mobilized in search of bread, freedom and justice.

2-The concept of "Civil State"

Which is the concept of "Civil"? "Civil" means that something is not derived from what in the social politics, both in the East and in the West, is defined as "State", except that in some specific cases, where the concepts of authority and

civil sovereignty are kept distinct. For example, in the Roman Law there is a distinction between the civil law to which are subjected respectively roman citizens and not. Jacques Rousseau instead called "Civil" that part of the law dealing with rights and duties of individuals. Hobbes, instead, with the same adjective means a context outside of the Catholic Church, and defines "civil service" as a phase where the rights are adequate to the concept of what is called "Civil society".

Hegel interprets adjective "civil" as synonym of natural, i.e related to human instincts, which are controlled through the bureaucratic part of the State. John Rawl, instead, developed a thesis of Kant related to the Civil State in order to work out a new theory related to social justice, which has been built in the same way of the Social contract, starting from the original condition of human beings, which is also defined "Natural condition". In this condition human beings are not still gathered in a community and live their existence in a way closer to natural world than the civilize one. In this condition, they are not aware of the reciprocal relationships and the way they can get advantage from the public order and they do not understand this until they don't develop their capacity and intelligence until a determinate stage. Rawls argues that people in this natural condition need a society, allowing them to enjoy the essential freedoms and some economic guarantees. Later, after the construction of a Modern State, are created the conditions, through a social contract, among different people, on the basis of the following principles: cooperation, equality, self-respect, respect for others and their property.

These principles, in turn, constitute also the foundation of modern society, which could be virtually accepted by all their components, if they wish to build it on the ground of social contract. However, scholars tried to consider equality and equal opportunity as concept of major impact in the philosophical and political thought of the XX century. Finally, there is a legal definition of the contemporary religious state, which preserved the justice and the rights of citizens in a civil society.

The concept of "Civil state" it has been politicized in the context of the Arab spring and the debate is focused on the nature of contemporary National State. In relation to this point, has been formulated several definitions: some argue that the civil state coincide with the secular state, in which religion is totally separated from the State, while, according to others, should be identified with the Liberal State, which is focused on the rights and freedoms of citizens, while others interpret it as a state ruled by civilians as opposite to a state ruled by military. Other scholars instead identify it with the National State, while other oppose it to

the theocratic state ruled by religious leaders. According to others, the Civil State is very close to the islamic state of Medina at the time of the spreading of the Message of Islam and the signing of the constitution of Medina. However, despite it could not be identified a stable definition, both historical and philosophical, of Civil State, I personally believe that this concept constitutes an excellent opportunity to try to reach some sort of agreement inside the community, which found an agreement in the form of State ruled by so called civil values. These values can, in turn, assume a religious, liberal, socialist form. This means, for example, that the military institution and any other state institution, whatever is their religion, cannot be placed above others in the constitution, in order to prevent the reaching of justice and the principles ensuring freedom, rights for the citizens and equality in front of the Law. Some people think that this could lead to the freedom to each institutions of the State, respect in the constitution for the values of Shari'ah, if it is a Muslim majority country. The political ideologies, which have the right to intervene in the definition itself of civil state, have in turn became part of the definition of philosophies, of movements and political parties which identified it respectively with the secular, the liberal, social or islamic state. According to my point of view, we should speak about the contemporary national state since the form, which some people think could be defined as Islamic State, simply does not exist. The forces of political parties, which called themselves secular, wished the separation between the Church and the State, or the neutrality of the State towards religion and so on, but this could not however be included inside the definition of State or in its constitution, but can remain a political trend, which can take part to the political decision without monopolize the nature of Civil State. The same discourse can be applied to the liberal and socialist values.

The call to apply some disposition of *Shari'ah*, having an effect on the life of all citizens, both muslims and non-muslim, before citizens accept it, cannot be included in the definition of State and of its constitution: instead could be kept as a political trend, contributing to the general politics of the so called "civil state". If some people refuse these considerations and insist that in the Islamic World and in the different contemporary national states, the application of some dispositions of *Shari'ah* is legitimate from the Historical point of view, we can repeat that this is possible only in the case is reached some sort of agreement or consensus. Instead, the revolutionaries, who led to the present condition, were not necessarily Islamists, which in this way tried to change the statal system in an Islamic one,

even when it is another discourse not to be agree with the people, who did not go in the street to support it.

The answer to this question need a very detailed study. In this context, however, we can say that there is any conflict between the concept of civil and that of religious. If we want to represent the finalities of what is both religious and civil, we can use concentric circles as in the following picture.

1-The pure religious circle: This area includes the religious components related to a particular faith, which does not interfere in any way with the structure of the State and of laws. Examples of these categories are the questions related to the faith and belief and, then, according the terminology of political science they are “private”.

2-The pure civil circle: This area includes the questions related to the organization of the State and its institutions, in which religion does not have any direct interference: structure of the State, the division of powers, the laws regulating the relations between individuals, the organizations and the communities, which re-enter- specially in the case of Islam- in the context of the issues related to the daily life and to the non-legislative acts performed by the Prophet in his role of leader.

3-Intersection between religious and civil: There is an area of intersection (the gray part of the diagram), where the aims of civil and religious are overlapped. There are, in fact, some religious commandments which are related to the State, its institutions and the relations between citizens.

The main principle in relation to these religious dispositions and injunctions should be translated in the general laws and in the regulations they are called to obey. The intersection between the two areas, the civil and the religious one, raise at this stage some questions, since the translation of the religious regulations- in this case the islamic ones- in the legislation binding both for muslims and non-muslims, needs of a detailed discussion.

For example, in the context of the family law, the majority of Arab people- muslims, christians, sunnis, shias, liberals, conservators- don't accept the idea of a “civil marriage” in the sense that the couple decided to marry without any reference to the faith and, consequently, without a religious legitimation of the marriage union. Then, inside the family right and the institutions involved, the jurists should own a deep knowledge of the religious belief related to a specific faith. We should, then, refer to the religious pronouncements accepted by the majority of the people. The same should be said about the issues related to the

heredity, to the maintenance, to the paternity etc. This area, then, imply that the law and the State's institutions should respect the peculiarities of a particular faith.

The area of intersection between civil and religious should be subjected to the consensus of the community. This area, in turn, on which the community reached the consensus, is considered functional to the interests of the community, even when it derived from the Islamic *Shari'ah*. For example, the penalty for first degree murder in the majority of the arab countries coincides with the one of premeditated murder according to the Islamic Law. Even when it is an Islamic regulation, the community agree in order it becomes bound both for Muslims and non-muslims. The same can be said about the dispositions related to the case of immorality or the consume of intoxicants, on which the community again agreed and that are accepted in several arab countries.

Besides, the constitutional article according to which *Shari'ah* is a "source" and the "principal source of legislation" constitutes another example of statute, on which all the community, or at least the majority, reached the consensus, without at the same time prejudice the peculiarities and the diversities of non-muslims, but keeping in the right consideration the specific differences. There is, however, that area of intersection, on which the community does not agree. This is an debated issue since the interested areas have as a source *Shari'ah* itself, without however the community reaches a determinate agreement. In this category can be located: the payment of *jizyah* by non-muslims, the negation of every right to serve in the army, to run for the presidency, or to be appointed as a judge in the Supreme court, enforcement of some islamic rituals and ritual manifestations, abolition of the loan at interest and its criminalization.

The Islamic proposals should be aware of the seriousness of the questions and of the danger of losing the consensus of the community in relation to the issues previously listed. The Islamic proposal should wide the horizon of this area in order to get out of the limited purposes of the criminal laws in order to open towards the wider one related to education and culture. Islamic values, for example, can be materialized in the community through Islamic cultural institutions and there is any need to formulate laws and regulations in order to impose legal penalties on the offenders. This is the reason why, in fact, the Sunna of the Prophet teaches that the principal factor in this regard is represented by the behaviour of the individual rather than the authority of the State.

Chapter III

What do we mean by “Islamic” in the context of the “Civil State” ?

Have been written thousand of books and researches on what can be defined properly “Islamic” in the context of policy, state, government, political parties and resolutions.

We can, however, notice that the adjective “Islamic” appears in several aspects of our daily life: bank, food, art, markets, schools, books, tourism and clothing. However, can be noted, at the same time, that quite rarely is put the following question: What does we mean when we say that a product, an organization or an activity can ben labelled as “Islamic”?

We can start our research taking into consideration the aim of the State meant as a tool to attain *Maqasid al-Shari’ah*. Later, we will continue examining the values and the laws underlined the different policies and institutions, and the necessity of a change both in the jurisprudence and in the leadership. These themes are widely discussed both in the Islamic context and non. A special space will be reserve to morality, since it is extremely important to take into consideration also the moral context in the process of constitution of an individual and the fulfilment of his existence inside the State structure.

What we could image as a part of an “Islamic State”, i.e. names, images, and designations is in itself very far from being “Islamic”, but assume some features of the Official Islam according to some religious groups, which are based on the sources themselves as a proof and a model to follow, even when sometimes they contradict it. This happens in the case of some groups usurping the name of Islam and its symbols. Most of the time, however, are only exteriors features without any content which could be positively connected with Islam.

The word “legitimacy” is often employed to promote and support the opinion according to which it is better to adopt a legitimate government on the basis of the evidences in the Quran and in the *Sunna*. It is, however, necessary to differentiate

between what can be qualified as “Islam” and what has got a wider meaning than the one of *Fatwa* and the difference between these two areas is similar to the one existing between the Islamic Thought, concentrating the attention on ideas and institutions and the Islamic Jurisprudence, which instead is interested in determinate dispositions and regulations.

Later we will turn the discussion to what can be defined “partial approach to the fatwa”, restricting its methodology to the context of resolutions of social issues to the *Fiqh*, even when the intellectual ones are wider and more complicated than the simple individual perspective. The legal pronouncement, in fact, in the field of the political issues can involve different conditions and cannot be simplified in several cases.

This is what, unfortunately, happens in the case of those deviant groups defining themselves, both Islamic and Government, without be in the reality none of them, assuming of Islam only the exterior feature without however any positive content.

1-Reference to Islamic History

Some people suggested to go back to the study of the featured events characterizing the Islamic history from the time of the Right Guided Khalifa to the time of Decadence, in order to discover which decision making system was actually endorsed at the policy level. However, there is a difference between the legal evidence, which points towards the legitimacy of the Government, which has been previously introduced, and the Historical proofs indicating the legitimacy of the judgements happened in a particular historical context. This, however, means that the legitimacy falls in the context of jurisprudence since history itself guaranteed the necessary legitimacy. Consequently, scholars have taken into consideration determinate conditions and made them bounding for every muslim, independently from the historical and social context in which he or she lives.

At this stage it is necessary to specify that, being the sources of the Islamic Law both Quran and *Sunna* of the Prophet (pbuh), *Shari'ah* cannot be considered a cultural product of its time and bounded by certain conditions, but constitute the revelation of God, which is above all occurrences. However, the historical proof in this context assumes a primary role and, even when cannot be defined a source of legitimation, inside the Islamic Law there are several interesting topics, sound judgements and example of rational policy, which can be very inspiring in different contexts.

However, the interest towards the historic proof is related mainly with the issue of Islamic identity. In the interest of national policy there is a central issue in the Islamic political thought: the question of identity.

Islamic identity can be defined as the unicity of the Islamic *umma*, which owns some special characterizing features compared to other nations as, for example: language, culture, religion, custom, traditions and values, which from a long time assumed some nuances defined as “Islamic”. This quality and features should be distinguished from those belonging to the religion and those one belonging instead to the history.

The scholars agree then the history is the most important factor constituting the identity of a nation. So, every discourse related to the concept of what can be defined as Islamic inside a political system is interpreted in the perspective of the identity of a Nation, falling consequently into a contradiction.

This certainly does not mean to be bound to historically outdated forms in the social practises and at the political level, but mean to use these sources as a kind of foundation for a further development. The Islamic *umma* has and always will promote and save its own distinctive feature, despite the differences from other people and nations.

An example of these islamic disposition, which constitutes part of a wider variety of the aspects of the life and identity of the nation of Islam, which always played a great role in the social context is the system of *Waqf*. It has been recognised that the system of *Waqf* played a great, a fundamental and an independent role in the safeguard of the Islamic values and institutions during all the history of the *umma* in several areas: cultural, educational, sanitary and every other public service.

We can now concentrate again our attention on the Islamic History in order to discuss the issue of political pluralism.

After the conquest of Mecca, different tribes became part of the Islamic *umma* but, after the death of the Prophet (pbuh), rose again the issues related to the different factions. The message was spread out of Arab peninsula through the work of the Companions and the community succeeded in maintaining itself as one nation under the leadership of Abu Bakr, until an epoch when the Message have been brought until Andalusia.

Very soon issues related to the different nationalities and people who embraced Islam and became part of the “Umma”, have been raised, at the time of Uthman

and Ali, while with Muawiyah the power became hereditary and the *Shura* was deprived of every authority, assuming an eminently formal role.

Later, the social injustice rooted on the predilection of an ethnic group respect to an other one, the trade monopoly, the lack of consultation with other muslims, and despite the lack of efficiency and the tyrannical power, did not considered them sufficient reasons to isolate the power and go and spread violence and tyranny even among the later generations. The Quranic teachings shaped a superior civilization and well-known by history and its main features, even from an historical point of view, draw the way to reformation, the development and the political pluralism.

However, when we take into consideration the history books, it is possible to take a pluralist point of view, which can be summarize in the following way:

1-The historical text are focused mainly on the events related to the power and the conflicts, which leaves a very little space to the considerations related to history of civilization and to the form of social, scientific, technical and cultural mobility. Al Tabari, for example, said in the introduction to his work that his work will have as a main theme ‘‘the history of kings, their pronouncements and their enterprises’’, focusing the attention on famous characters and overshadow the internal movements in the society and civilizations.

The history of the Arab countries is traced and described exclusively in the limits of conquests, riots and political disorder. Ibn Khaldun in the introduction speaks about the encounter of civilizations, constituting a qualitative development inside storiography, even when the history written by Ibn Khaldun reflects a model already present in Tabari, Ibn Kathir and others. The general characteristics of Islamic storiography have been widely overshadowed by the informations related to royal dynasties, without considering which economical, cultural or popular features denoted the different epochs. In his work, Ibn Khaldun, as other contemporary scholars as Dr. Ismail Faruqi and Imad al Din Khalil did, tried to propose a different point of view. If should be put forward a set of proposals for the renewal of Islamic storiography and to support the idea of pluralism in a ‘‘Civil state’’, we should first of all expand the subjects of research related to the History of Islam in order to include also the remnant of Muslim world as, for example, China, India, Eastern Europe, Africa and America, in order to start to understand history through the wide cultural change and to reach a balance among the different, both military, political, social, scientific, technical and environmental aspects. A special attention should be dedicated to some specific aspects, which

will be later analyzed, as for example the dialogue with the *ahl al Kitab*, the gender questions, etc.

The biography of the Prophet (pbuh) constitutes a very important part of the historical element characterizing the identity of the Islamic *umma*, which should be interpreted according to the new theories of renewal. In this context, should be dedicated space to that part of political Islamic theory, which concerns the forms of successions after the Prophet. The Sunni theory is distinguished in terms of Iman, very differently from Shias, according to which the Khalifate belongs rightly to Ali and his descendants. Today, in the context of historiography and historical criticism, we can divide the different orientations as follows:

First: The Islamic Political History from the rights guided khalifas to the epoch of colonization.

It is necessary to submit to a careful exam this twisted and immaculate image, which is not true and does not belong to reality at all. At the same time, however, it is necessary to avoid the exaggerated statement according to which the majority of political systems have been bloodthirsty, tyrannical and ready to employ religion as a tool to induce people to accept fatalistically tyranny, and both the moral and economical corruption, in which they fell after the age of the rightly Guided Khalifas.

Second: The apologetic tendency

It became a tendency quite generalized to read the perfection of political system, specially European model, reflected in the Islamic policy of the Classical time. The Islamic Political History is studied searching all the features of these modern systems. This leads to an interpretation of political pluralism in the Islamic History, according to which Islam knew a political pluralism very close and similar to the contemporary democratic one. The supporters of this point of view interpret the *Shura* system, supporting the idea that Muslims invented the Parliamentary system, or they read the biography of Umar ibn al-Khattab, *amir al muminin*, in order to argue that Muslims at the historical time were applying the democratic system of the electoral vote, or they read the cooperation between believers according to the American model in the system of civil society. However, this tendency, which tries to develop these western concepts and systems on the ground of an Islamic point of

view, ends up, at the same time, in justifying and legitimizing some features of Islamic History, which can result however more dangerous than beneficial.

Fourth: The post-modernist tendency

This tendency is placed inside the Postmodernism and has got the propensity to deconstruct completely Islamic History, which is consequently interpreted as a set of occurrences characterized mainly by the marginalization of more vulnerable people and seem to be unable to see any positive element. This tendency, however, put in danger the same Islamic identity and this is the reason why cannot be considered acceptable.

In my opinion we should build an historical frame contemporary to Islam. First of all it is necessary to underline those aspects of Islamic history worthy of praise, especially if they brought vantages to humanity. This operation, however, should not distract us from the recognition of those aspects which, instead, being quite problematic, need an honest critic. This research will be concluded with the exam of contemporary history of the nation and its identity.

This recognition, however, should led to the reflection and the correction of the mistakes committed in the past, but can not constitute the reason of the refusal of Islamic History in its totally. It is necessary however to be aware that Islamic history is not totally free from marginalizing elements and even racist, which promoted the interests of some ethnical groups compared to others.

This is the reason why it has been necessary to go back to to this second method. The second perspective, which could be defined “’apologetic”, is appropriated to the level of public discourse in islamic context in order to get the popular support, but cannot be employed at every level. It can be employed in the public programs and debates in order to justify the contemporary choices, but cannot be employed neither to justify injustice neither the mistakes at the political level. Instead, the perspective dedicated to the critical studies constitutes a serious proposal of research finalized to the analysis and understanding of the Islamic history, in order to build a propaedeutics to the future studies.

The Islamic Jurisprudence

Furthermore, the result of *ijtihad* is often included in the category of the revealed knowledge, even when the definition of the validity of the methods of *ijtihad* is

subject to a wider difference of opinion. An example in this regard is constituted by the consensus (*ijma*). Despite the variety and the difference in relation to the same definition of consensus, many past and present jurists considered it an “evidence certain as the script”, “an evidence formulated by the Legislator”, counting the rejecters among the infidels. The readers, having familiarity with the traditional jurisprudential literature, know that often is claimed the *ijma* in rules, which have not been accepted unanimously, in order to endorse and sanction an opinion respect to another one. Ibn Taymiyah, for example, reviewed the levels of consensus of Ibn Hazm in the work entitled *Critic to the level of consensus* (Naqd Maratib al-Ijima). Ibn Taymiyah mentions several examples of inaccurate claims of consensus which Ibn Hazm moved in relation with several issues, on which scholars did not reach unanimity as, for example: to judge rejecters of *ijma* to be apostates, not to allow the women to lead man in the congregational prayer and the payment of four golden dinars as *jiziyah*.

From the other side, other jurists consider the method of analogy (*qiyas*) as “divinely approved”. They argue that to “make an analogy between a primary case and a secondary one corresponds to an action performed by the Legislator Himself”. Then, even when in several cases of *ijtihad* through an analogical reasoning, some jurists consider themselves to be “speaking in the name of God”. This claim ends up in a disaster, quoting Garoudi, “in which the limits between the words of God and the words of humans were erased”.

Furthermore, the *al-Musawwibah* concluded that different juridical opinions, even when they could be contradictory, are all valid expression of truth and, then, should be considered correct. The *al Musawwihab* then deduced by these premises that there are several truths, an idea which later influenced the Medieval western philosophy through Ibn Rushd. The jurists, who, often, shared this position, belong to the category of jurists/philosophers as: Abu al-Hasan, al-Ash’ari, Abu Bakr ibn al-Arabi, Abu Hamid al-Ghazali, Ibn Rushd and several other mutazila as, for example, Abu al-Huzail, Abu Ali, and Abu Hashim. Al Ghazal, at this regard, wrote: “God’s judgement, from the jurist’s perspective, is what the jurist judges to be most probably true”.

A wide number of conflicts in the Islamic History raised as a consequence to the reciprocal accusations between the followers of both the Hanafi and Shafi schools in Khurasan in 1000, in Nisaphur in 1159, in Esfahan in 1186, and in Jerusalem in 1670. In Khorasan, around 1000, the conflict started after the Khalifa, positively

impressed by the culture of Abu Hamid al-Ghazali decided to change the official school of Law from the Hanafi to shafi', to which actually Al-Ghazali belonged. The differences of Fiqh between the two schools could explain the reason of the conflict, but it is clear that politic played a very significant role.

Gradually, the area of what is sacralized and consequently made immutable, started to include also the opinions of imams belonging to different schools of Law. After, it has been pretended to close the door of *ijtihad* and this is the reason why the Islamic jurisprudence in the end tarried at the medieval historical conditions.

In this section we will try to present a brief summary of the historical development of the nine schools of law taken into consideration from the epoch after the Prophet's death until the era of decadence. This report tried to represent the historical context related to the development of the fundamental theories. In this context will be raised also a critic to the unidimensional categorization based on the features of the classical schools of law.

At the beginning of the post-prophetic era, the different historical reports related to the *ijtihad* of companions demonstrate a general tendency to reach an agreement in the juridical matter on the ground of a direct quotation of the quranic verses or the Traditions of the Prophet (pbuh) in relation to the actions performed or the decisions taken in similar situations.

Later, after the expansion of the Islamic state and throughout the interaction with people belonging to different civilizations, jurists started to face new situations.

First of all, it is necessary to remember that the major conflicts following the murder of Uthman ibn Affan (d. 35 AH/655 CE), the third Khalifa, splitted the community of Companions in several rival political factions. The political rivals became very soon fighting parties and political conflicts became "sectarian divisions", when the political divergences raised the philosophical ones in matter of faith. The political and sectarian rivalry then gave life to a phenomenon, which had a major impact on the Law: the fabrication of the Traditions of the Prophet. According to several scholars, which took a part in the process, different political rival sects tried to confer legality to their convictions or to their leaders through the fabrication of false prophetic traditions.

Furthermore, the personality of the imam of the time influenced students and the schools developing in the different countries belonging to the Empire. A typical example is constitute the different personality of Abdullah ibn Umar and Abdullah ibn Abbas.

Aishah, the wife of the Prophet, was a strong and independent woman and her character emerges in several of its *fatwas* and opinion, where she defends the rights and the independence of women, often in opposition to the Traditions reported by the Companions. Badr al-Din al-Zarkashi wrote a book dedicated to the critics moved from Aishah to the narrations of other companions, entitled *The Accurate Account on Aisha's Amendments to the Companions' s narrations*. I note that the opinion of Aishah are been accepted prevalently in the Hanafi school may be because the two teachers of Abu Hanifa, al-Shi'bi and Hammad have been both disciples of Aishah.

In the end, the first century of Islamic era has been witness of a wide movement of migration, starting with the Companions themselves, especially to Iraq, Syria and Egypt, and ending with Arabian soldiers who travelled to far off lands and, eventually, decided to stay in these places. Iraq became a territory where the majority of the Companions settled: Ali ibn Abu Talib and his children, Abdullah ibn Abbas, Muhammad ibn Maslamah, Usamah ibn Zayd and Abu Mas'ud ibn al-Ansari. In Egypt, instead, moved Amru ibn al-Aas and his sons, Qays ibn Sa'ad, Mohammad ibn Abu Bakr, Ammar ibn Yassir and others. In Yemen, decided to go and live Mu'adh ibn Jabal, Ubayd Allah ibn al-Abbas and others. In the end, in Syria moved Muawiyah and several other ummayas: Abdullah ibn Umar, Shurahbil, Khalid ibn Walid, al-Dahhak ibn Qays and others. Hudhayfah ibn al-Yaman and other moved to Oman, while Abu Ayyub al-Ansari reached today Istanbul, where he died. Several other Companions, instead, preferred to stay in Mecca and Medina. Through the civilizations in which the new immigrants merged, the Islamic jurisprudence began to include new dimensions both geographical and cultural.

The second and third century of the Islamic era can be defined the "epoch of the Imam". The traditional schools of Islamic Law (*Madhahib*), as we know them today, took the name of some imam of the time. The Maliki, Hanafi, Shafi, Hanbali, Jafari and Zaydi schools have been founded respectively by: Mohammad ibn Idris al-Shafi'i (d. 240 AH/854 CE), Malik ibn Anas (d.179/795 CE), Abu Hanifa al-Nu'man ibn Thabit (d. 150/767 CE), Ahmad ibn Hanbal (d.241/855 CE), Ja'far al-Sadiq ibn Mohammad al-Baqir (d.148 AH/765 CE), Zayd ibn Ali Zayn al-Abidin (d.121 AH/739 CE), Abdullah ibn Ibad (d. 86 AH/705 CE).

The notion of the Sunna of the Prophet

The sunna is constituted by what is narrated on the authority of Companions about the sayings, actions and decisions of the Prophet (pbuh). Prophet's witnessing of some actions without raising objections is considered a kind of approval. The Sunna, in relation with the Quran, implies a content, whose meaning is: 1-Identical to the Quran, 2-Constitutes an explanation and elaboration of a general meaning mentioned in the Quran, 3-Specify certain conditions for the applications of implicit rules in the Quranic text, 4-Propose restrictions to the general expressions in the Quran and finally 5-Initiation of the independent legislation. The schools of law agree on the first three definitions, but differ respect to the last two.

If we consider a pronouncement in the Quran general and one in the Sunna specific respect to the same argument, as the Hanafi, Shafi, Zahiris, Zaydis and Ja'faris schools argue, we are also bound to say that a specific *sunna*, even when is reported by a single chain of narrators, has got the power to limitate the meaning of general Quranic expressions.

According to the hanafi school, this specification represents a kind of invalidation of the expression of the Quran and this is the reason why this school refuse the traditions of the Prophet (pbuh) through a single chain of narrator. According to imam Malik it is necessary to look for supportive evidences to the single-chained hadith that specifies the general meaning of the verse before rejecting it. The proof given as support can be constituted by some traditions of the citizens of Medina, even when it is considered invalid by all others schools of law, or by an analogy. On the contrary, Malik prefers to apply weighed preference and invalidates a narration with a single *isnad*.

Instead, if the tradition of the Prophet implies a rule of behaviour which does not have any relation with the Quranic revelation, all the other schools of law accept it only on the conditions, that it does not fall under actions that are specific to the Prophet. Actions specific to the Prophet could be actions exclusive to him out of prophethood considerations or actions that he did out of custom ('*adah*) of a "man living in seventh century's Arabia".

Some scholars of the maliki and hanbali schools added other two type of prophetic actions, which do not follow under generally abiding legislation: the actions performed respectively as a leader and judge. Al-Qarafi, for example, places all the actions performed by the Prophet during the wars in the category of leadership actions, as well as the decisions related to the government. He argues

that to identify the actions of the Prophet (pbuh) according to his classification can have implication for the law.

Ibadis include also the “acts of worship” in the actions “specific” to the Prophet, even when he did not performed them regularly. Instead, all other schools of law consider these same action as recommended. Some Mu’tazilis scholars, instead, differentiated between the Prophet’s acts of worship as binding for all muslims, versus all of his other actions, which they considered matters of “worldly judgements”. However, even in the Mu’tazili theory, remains an open questions the method to employ to distinguish the actions classified as Ibadat from those classified as mu’amalat.

The purpose of *ijtihad* (independent reasoning) of the Prophet has been subject to several opinions, even when I personally argue that it is today itself an open question, to which has not been given a satisfying answer. Zahiris and other scholars belonging to other schools of law, are in disagreement with the majority of the opinions according to which the *ijtihad* of the Prophet is possible. Ibn Hazm, for example, justify his disagreement on the uncertainty of human reason as opposed to the certainty of the Revelation always available to the Prophet. Al-Ghazali, however, criticizes this point of view arguing that “the Prophet’s description of the revelation entails that it did not occur based on his request but rather as an occasional contact initiated by the Angel”..

The disagreement on the principle of *ijtihad* of the Prophet is related also to the scope of the revelation mentioned in the Quran. Some scholars argue that the verses mean that “every sentence pronounced by the Prophet” is a revelation”. This interpretation, however, is rejected by the majority of the schools, who have outlined instead a typology of actions of the Prophet not directly related to divine revelation.

Among jurists, who agree about the possibility of the *ijtihad* of the Prophet, is also discussed if the last one is subject to mistake. Even when in Quran is clearly mentioned that God corrected the Prophet (pbuh) on several occasions, some jurists totally refuse the possibility that the Prophet could commit mistakes in his independent judgments, founding their argument on the concept of infallibility. Several schools, however, recognise the possibility of mistake in prophetic deliberations provided that “they are immediately amended by divine revelation, unless they are connected with some practical issues or worldly affairs”.

This statements however is quite ambiguous and there is any agreement between scholars relatively to its meaning. Let's report an example related to this type of mistake in the context of practical issues, reported in the tradition of the pollination of the palm trees. Muslim, on the authority of Tahla has reported: "I was walking with the Prophet (pbuh) when he passed by some people at the tops of their palm trees. He asked: "What are they doing?" They answered: "Pollenating the male into the female". He replied: "I do not think that this will be of benefit". When they were told about what the Prophet said, they stopped what they were doing. Later, when the trees shed down their fruits prematurely, the Prophet was told about that. He said: "If it is good for them they should do it. I was just speculating. So, pardon me. But if I tell you something about God, then take it because I will never lie about God".

Another narrator added: "You know your worldly affairs better then me".

Another tradition complicating the definition of what falls in the context of practical issues or worldly affairs is related to the *al-ghilah*. Both Muslim and Malik reported that the Prophet said: "I had almost intended to forbid ghilah. Then, I noticed that the Byzantines and Persians do that without it causing any harm to their children".

This hadiths, in my view, keep the question of "what is to be considered a worldly affair" an open question.

The Noble Quran

The *hadith sahih*, (famous), can be distinguished in: most famous, famous and reported according with a single isnad. The first category comprehends the so called *hadith mutawatir*, who all the schools consider as absolutely sound as the Quran, since they are reported on the authority of a wide number of Companions, who could not possibly and logically agree to lie. The traditions, included in this category, are related to the most famous acts of worship: prayer, pilgrimage and fasting.

The soundness of this kind of traditions, according to all the schools of law, imply the obligation for every muslim to consider them valid and to act accordingly. The number of hadith mutawatir oscillate between 12 and 80.

The second category of narrations include those reported by a good number of narrators, in a way it would be impossible for them to agree to lie. This category

includes a limited number of traditions, less than 100, reported in the traditional sources, which however makes their impact on the law very limited from the practical point of view.

The category, which includes the majority of the traditions, is that with a single isnad. All the schools of Islamic law, except for some Mu'tazilis jurists, relied on this type in their derivation of their fiqh. These hadith have been reported through one or few chains of narrations, usually with slightly different wordings. The procedure of verification of narrators and the content of the tradition has been examined in a very detailed way in the science of Hadith. The tradition narrated should be valid in relation with the isnad of narrators and its content. An Hadith, in order to be acceptable from the point of view of the content, should be linguistically correct and its matn should not be in disagreement that one of another hadith, with reason or with analogy in a way that cannot be reconciled. However, from a practical point of view the authenticity of a tradition was judged simply on the basis of the chain of narrator. The different opinions on the sanad involves implications in the legal context.

The acceptable traditions, according to Zahiris, are certain and absolutes, i.e. "valid for juridical deduction" and "required" for a correct belief., even when they are reported through a single isnad. All the other schools consider this typology of tradition juridically valid, but not part of Islamic belief. Some Mu'tazilis differentiate between the words and the actions reported in the hadith, and do not consider actions of resources valid for the legislation and binding for every muslim, except in the context of worship. On the other hand, they consider the hadith valid proof for the legislation both in the area of ibadat and mu'amalat. The question related to how differentiate the ibadat from mu'amalat is however still open.

A person, in order to be considered an acceptable narrator, should be mature- according to some seven years is the minimum age- and owning a good memory and between he and the Prophet should be reported a continuous chain of narrators (*muttasil*). The specification of each of these conditions is subject to some difference of opinions among the scholars, also among those belonging to the same school. There are also clear distinctions between Sunni schools of law and the Shia ones in terms of trusted narrators. The Sunni schools of law accept all the companions and their students, included the Shia imam and their students, who only later have been labelled as Shia or Ibadat, after the establishment of these two

separate groups. For Sunnis, however, later generations of Shia, Mu'tazilis and Ibadis, generally are not accepted as narrators because of their alleged innovations. On the other hand, both Jafaris and Zaydis do not accept the traditions reported by the Companions, except in the case of the family of the Prophet. This is due mainly to the conflict between Ali and Muawiyah and Aisha, which ends up in the civil war and in the battle of the Camel fought in 37 AH.

The last condition, which a narrator should fulfill in order to be considered acceptable, is the ability to relate a connected chain of narrators/teachers up to the Prophet. This last condition is discussed among scholars belonging to the different schools. An *isnad*, missing narrators in the beginning, in the middle or in the end, has been classified according to different level of credibility and according to different terminologies in the science of the *hadith*. For example, the *hadith* called *mursal*, i.e. the traditions date back directly to the Prophet without quoting the middle narrators, have a different impact in the different *fiqh*. The schools of law assumed different opinions on the validity of *mursal hadith*. Al-Shafi'i did not accept this kind of tradition if there would not be a proof to support, as other narrations of the same *hadith*, even if *mursal*. Maliki and Hanafi accept this typology of *Hadith* only in the case they would be reported by the students of the Companions of the Prophet. Jafari and Zaydites, instead, accept them if they are transmitted on the authority of the imam. The imam Ahmad ibn Hanbal considers a "mursal" *hadith* weak in terms of authenticity, but usable only and exclusively on the lack of other traditions. In fact, to the *hadith mursal* is given priority respect to secondary methodologies as, for example, the analogic reasoning. These traditions, however, should be reported with complete wordings and should be not found in contradiction to the practices, the behaviour of the narrator and the dictate of reason. However, from my point of view, the definitions of "contradiction", "certainty" and "reason", as have been formulated in the traditional schools of law are in need of what can be called "philosophical renewal". However, the requirement that reason should not be in contradiction with the commandments of reason is quite a problematic one, and al-Ghazali, among other scholars, includes in their definition of "reason" "what is acceptable according to the common sense and the experience".

When jurists spoke about an "evidence", which have been taken respectively from the Quran or the Traditions of the Prophet, they mean a rule deducted by a specific expression present in a verse or in a tradition, according to one of the

categories of linguistic expression explained in this section. The expression or the terms can be distinguished according to the clearness, implication and the scope. The study of these expressions and the methods to deduce meanings and rules is common to all the schools of Fiqh. During the evolution of the schools of law and the increased popularity of Greek philosophy among the jurists, these classifications ended up resembling the “conceptions” sections within medieval treatises on logic, both in the content and in the structure.

The majority of the schools agree on the classification of the expressions according two main categories i.e. clear rules and confused ones. The jurists then distinguish the first according to four level of clarity: “firmly constructed”, “text”, “apparent” and “explained. This distinction is made based on a triple criteria: the possibility of specification, interpretation and abrogation.

The term “firmly constructed” can be defined as “a clear expression which did not need any specification or interpretation”, which according to certain proof does not have been abrogated at the time of the Prophet. This kind of implication is considered superior to that one of all other expressions: specific, interpreted, and abrogated from opposite expressions. The condition related to the proof of non-abrogation is quite problematic, since both the abrogation and opposition are often justified without a probant justification.

The text “nass” is instead, constituted by a clear expression, which can be specified through an other expression or can be abrogated by an opposite one. The textual evidence, which can specify, interpret or abrogate a nass can be only a nass or a muhkam expression. This purely linguistic approach in assigning priority and application of textual evidences is supported by the majority of the schools of law. However, some scholars suggests also some evidence other than nass, which have capacity opponent as: interest, and custom. For example, al-Tufi, a prominent hanbali jurist, gave to al masalah the precedence on specific nass. Ibn Abidin, a prominent hanafi jurist, instead restricted the meaning of nass to that one of urf. All these opinions raise, however, a serious question about the absoluteness of the direct implication of nass supported by all the schools of law, which later ended up in the attitude of inflexibility toward a reality in evolution. The next level of clarity is constituted by the manifest meaning, which only in the hanafi school is defined as a separate category from nass. According to hanafi scholars the difference between al nass and al zahir is in: “the meaning of al-nass is intended in the script, while the meaning of al-zahir in the law is understood as a secondary implication”.

The implication of al-Zahir in the legal context is certain, unless a nass or a muhkam oppose it. The lowest level of clarity is what is defined as “explained term”. With this word jurists mean an obscure expression, which is explained by clear ones. The level of clarity after the explanation depends on the level of the explaining term, which can be respectively muhkam, nass o zahir.

Similarly, jurists divide unclear terms (ghayr al-wahid) into four categories, depending on whether the lack clarity comes respectively from the structure of the term or to the aim, ie. its capacity to include certain meaning. These four categories are: implicit, ambiguous, general and resembling.

An implicit term is unclear in terms of what should be included in its scope. For example, jurists have different opinions about the word “thief”, mentioned in Quran’s verse 5:38, if it includes also the “shoplifters” and “fraudulents” or not.. The schools of law provided different answers to this questions based on their different methodologies. Hanafis, except Abu Yusuf, do not include shoplifters in the category of thieves because of the difference in the linguistic designation, assuming a quite literalistic point of view. Instead, Malik, Shafi’i and Ahmad ibn Hanbal consider what they define “meaning of thief” to be the final criteria for considering someone a thief or not. They further asserted that this “meaning” should be “defined according to custom”.

A similar example is constitutes by the word “murder”, in the following tradition: “A killer does not inherit (from the murdered)”.

The difference of opinions arises when is questioned if someone, who kills by “mistake”, “instigation” or “association” should be included in the category of murder. For example, al-Shafi’i includes in the term all the people who committed murder, without taking into consideration the intention to kill or not. Malik instead insists on the necessity of the presence of the intention to commit murder and, consequently, do not assume under the same category the “killing by mistake”. Hanafi took on the question a quite literalist point of view, arguing that the implicit meaning of the word “murder” is related mainly with the action of killing itself. Then, according to this point of view, are part of the category mentioned in the hadith all kind of murders, both intentional and unintentional. Instead, even when someone helped another one to commit murder, is not part of the same category, even if his action has been voluntary. These are examples of incomprehensible rulings often issued by jurists on the basis of their linguistic theories. The negative

implications of these kind of rulings on the higher objectives of justice and social order are quite clear.

A term structurally ambiguous implies more than one meaning and ‘‘could not be understood except with outside evidence’. A classical example is constituted by the word ‘‘period’’, in arabic quru, mentioned in the Quran 2:228. The schools of law differ over this expression due to the different evidences used to explain the ‘‘ambiguous’’ word. Once again the different opinions are related to the different methodologies dealing with the ‘‘opposing evidences’’.

A ‘‘whole’’ term, instead, include in its meaning several situation and possible rulings, which should be clarified through other expressions or evidences. Examples of this kind of approach are respectively ‘‘pray’’ and ‘‘pilgrimage’’ as have been employed in the Quranic text. These two words, however, imply a certain number of detailed rulings know from other scripts. According to the jurists, a term ‘‘mujmal’’, after having been adequately explained, became a nass, a muhkam or a mufassar.

Finally, a resembling term (mutashabih) is referable to an expression in Arabic language which, according to the jurists, cannot be rationally understood as, for example, the letters mentioned at the beginning of some chapters of the Quran, or some word referring to God. In these cases should be employed some kind of interpretation or ‘‘ta’wil’’ in order to clarify the meaning of these expressions.

In my view, the classifications of clear and unclear expressions, previously explained, are completely arbitrary! I justify my radical point of view on the ground of the differences between the different levels of muhkam, nass and zahir, depending, according to the jurists themselves, from the specification, interpretation and abrogation. However, countless instances in the juridical literature of the different schools prove that almost every muhkam or nass expression is subject to different opinion on whether it is actually ‘‘specified’’, ‘‘interpreted’’ or ‘‘abrogated’’ by other expressions. The categories of muhkam, nass and zahir merge all in that one of al zahir which, if explained or interpreted, will dependent of the level of clarity of the explaining expression. In the same way, the majority of scriptural expression can be subject to a different opinion or can need a clarification about their components or can be ambiguous and in need of a clarification as to its meanings, even if among these categories there are no differences.

The second classification of the term is according to the implications and meanings implied by them (Dilalat). The two classifications of the implications, which are endorsed by all other schools of law, are the Hanafi's and Shafi's. After analysing both, I realised that the two schools endorse very similar categorizations of the implications, even when slightly different in their articulations.

According to Hanafi a clear expression implies a certain meaning, which can be muhkam, nass, zahir and mufassar, as has been previously explained. On the other hand, an indirect implication (isharah) implies a meaning based on an understanding of the relation between, respectively, a direct and an indirect meaning. For example, the "verse of debt" not only implies that the consent should be written in agreement with the parts, but also indirectly that the contract is binding to both parties in front of a court of justice, even though this is not explicitly stated in the verse. Another example is related to the verse of "consultation" (shura), which implies a governing system based on people's consent, but could indirectly imply "transparency" and "accountability". These two examples intend to demonstrate how the extension of the direct implication to the indirect one can contribute to a much need expansion and contemporisation in the context of the scriptural interpretation. However, a clear and direct ibarah has got an absolute priority on the indirect isharah according all the schools of law. Moreover, the clear and direct ibarah is considered certain and definitive, while the indirect isharah is only probable (zanni) and, formally speaking entails a juridical obligation of the implied rulings as, for example, "legal transparency" or "legal abidance", The level of regulamentation will be introduced and discussed later.

Obvious analogy (qiyas jali) in an implication derived from an expression by common sense and for this reason some jurists define it "the implication of implication". For example, the prohibition of consuming what belongs to orphans without any right, as in the 4:10 verse, implies also that this wealth should not be squander in any other way. Another example is the implication of the verse, which orders to a son to not to say a word of grumbling to their parents. In this case, the evident analogy implies the obligation not to harm parents by any means. This form of analogy is less formal of the syllogistic one and its implication is widely used by most jurists. Furthermore, Ibn Taymiyah utilized the validity of the obvious analogy to criticize the claimed certainty of Aristotle's syllogistic analogy.

In the Hanafi classification a final implication is constitute by the implication of an omitted word (Iqtida) or of words, which are interpreted according the common

sense. Omission is a form of eloquency in the Arabic expressions, and a form of ambiguity, too, which could result in juridical flexibility and, also, difference of opinion. For example, the expression “forbidden upon you is anything that dies by itself” implies the omission of the word “eating”: in fact, it is prohibited to consume the flesh of animals dead of violent death. The same expression could employ also the noun “utilise” and in this case could refer to the prohibition to employ the skin and the bones of animals dead for natural causes. In this particular example, the word “utilise” has got a more general meaning than “eat”. At this regard the schools of law differ in assigning the priority respectively to the “general substitution” or the “specific substitution” of the omitted term. Shafi’i endorsed the “general” choice while Hanafis endorsed the “specific”.

The classification of the implications of Shafi’i school show direct similarities with the hanafi one, since the meaning of the expression “clearly stated” (sarih) is similar to the hanafi expression “understood by implication” (ibarah, mafhum), which is also similar to the qiyas al-awla (obvious analogy) and to the iqtida (implying omission). The difference between the two classifications is a level added by the Shafi’i school to determine if the “unclearly stated” expression is intended by the expression or not and, therefore, if the “direct meaning” should be considered an indirect implication (isharah) or implicit one (iima). The technical difference between isharah and iima is that, while the latter is related directly with the illah (appropriate cause/reason) of the expression, the first one is deduced from the “meaning of the language” without following the formal procedure of extracting the illah. However, in terms of juridical implications, the additional category of Shafi’i does not involve any practical difference.

Jafarites and Zaydites introduced a different classification of the “firmly constructed” terms (muhkam), which can be however considered very similar to the Shafi’i and Hanbali schools. The categories employed by the two schools are the following: clear (jali), apparent (zahir), implied (mafhum), specific (khas), rationally embellished (thasin ‘aqli) and allegorical (majaz).

The definition of each of these categories is similar to the corresponding categories of the Hanafi and Shafi schools. The only significant addition is constituted by the category of tahsin aqli “rationally embellished”, which opens the door for free ijtihad, on condition that there is no related clear, apparent, implied or specific script.

All the traditional schools of law, except the Hanafi one, agree with the Shafi one in dividing the implication (mafhum) respectively in: a-mafhum al-muwafaqah, coherent implication including the obvious analogy previously mentioned, b-mafhum al-mukhalafah, contrary implication. The expression “contrary implication” indicates “the existence of a fact implying the absence of the contrary”. The schools of law, which endorse the contrary implication, divided in five different typologies: title (al-laqaab), attribute (al-wasf), conditions (al-shart), limit (al-ghayah) and number (al-adad). This means that the mention of one of these types in a script implies, according a contrary implication, the logical absence and the juridical invalidity of its opposite. The Hanafi school rejects this type of implication since a “ratio legis” (illah) of a script cannot imply at the same time two opposite rulings.

It is also true that all the schools of law exclude the attributes mentioned for allegorical purposes and also contrary implications opposite to the scriptures. However, this method shows a kind of “Exclusive-Or” in order to use a logical term implicit in the reading of the scripture and, then, does not allow a gamma or variety of regulations, which are applied according to the different situations. This method added to the inability of the traditional Islamic law to change with changing circumstances and, thereby, hindered the nass (textual evidence) to contribute to this change. For example, the implication of numbers resulted in an opposition (ta’arud) between different traditions related to the zakah, which varied within a certain range. This forces jurists to abrogate certain numbers openly quoted in the traditions in order to apply the method of implication of numbers consistently. For example, there is a difference between the “Book of Abu Bakr”, the “Book of Ali” and the “Book of Amr ibn Hazm” in relation to the numbers for what should be taken as zakah out of camel herds.

Due to these differences in the narrations and implications of numbers, jurists disagree about the numbers to endorse and, then, to which reject based on contrary implication. Only few scholars, included al-Tabari, sustain that a valid choice could be based on any of the above traditions.

Nevertheless, if we take into consideration a different dimension, we will not have to face or solve any contradiction. The purposes of the zakah (maqasid) include also the element of “facilitation”. Some contemporary jurists, based on this maqsid, argue that the principle of facilitation implies that the number differ on

the basis of the consideration regarding the circumstances of the donors themselves.

The quranic verses have been revealed in order to meet determined needs and to reach specific objects and finalities. One of the most important Maqasid or higher purpose, for example, is that one of Justice. God said in the Quran: ‘We sent Our Messengers with clear evidence and We sent down with them the Book and the Balance, that people may establish justice. (The Holy Quran 57:25). The article ‘L’, pronounced as Lam- in the arabic word (L)iyaqum indicates a relation of causality and this means that to establish justice and equality is a fundamental aim in sending messengers and revelations to humanity.

The Maqasid al-Shari’ah

One of the general maqasid of Islamic Law is justice, already widely mentioned by most of the muslim scholars. Infact, whoever loses his or her life in the attempt to establish justice, in Islam is considered a martyr. In this sense, Maqasid or purposes of Shari’ah constitute a deep understanding of Islamic law, even when cannot be identify easily with Shari’ah as a whole. In the Shari’ah, in fact, the aims can be related to the necessities (darurat), needs (hajiyyat) and embellishments (tahsiniyat). The necessities refer to those basic needs to human life from which depends existence itself and, if they lack, humankind could face extinction. The needs, which are posed on a stage followed to that one of necessities, are less essential then the former 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, scholars argue that they include the preservation of: 1-faith (religion), 2-soul (life), 3-mind, 4-progeny, 5-honor and 6-property. Scholars have different opinions about the details and the priority of each of these terms. Imam al-Ghazali argues that preservation includes two dimensions: a negative and a positive one. The negative dimension involves the protection of interests in relation to a probable loss, while the positive one in their promotion. For example, the preservation of faith can be identify with that one of the foundations of Islam, ie the articles of the faith in God, since in Islam everything is associated with the

faith itself. However, the preservation of the faith, understood in this way, is one of the priority and the aims of Shari'ah and it is realized protecting the purity of the Islamic doctrine respect to possible external contaminations.

As for what concerns non-muslims, the preservation of the faith is one of the rights guaranteed by Shari'ah according to the following quranic verses: "There is no compulsion in religion. The difference between guidance and error has been made clear. Whoever rejects false gods and believes in God has grasped a firm, unshakable support. God hears and knows all. (Holy Quran 2:256); "And say: "The Truth is from your Lord. Whoever wills-let him believe; and whoever wills-let him deny the truth" (Holy Quran 18:29).

These two verses demonstrate that non-muslims cannot be forced to embrace Islam and, at the same time, to perform some duties specifically assigned to muslims. This is the meaning of the "protection of faith" (hifz) in relation to non-muslims. The term coined by Imam al-Tahir ibn Ashur, "freedom of faith" express very clearly this conception.

As for the "protection of life", Shari'ah contains dispositions to safeguard it from every danger, included diseases and incidents. In fact, the purpose of the protection of life in Islam is situated beyond the dimension of protection and it is extended to the positive one involving and promoting, for example, health through the protection from diseases both organic and infectives. The aim of preservation of life in Islam is extended to the safeguard of different forms of life, including plants and animals. Everything, which could prejudice the life both of animals and human beings is by itself prohibited by Shari'ah. Classical scholars associated the protection (hifz) of mind specifically with the prohibition of alcohol and other intoxicant substances, independently from the substance and the form.

In the teachings of Islam and of the Quran, the notion of the protection of "mind" has got a wider positive dimension if compared to the previous one, and included also the research of knowledge, the care of mind and the protection from superstition. At the same time, furthermore, this same notion includes also the safeguard from every type of gregarious mentality and blind imitation, keeping active and watchful the minds of new generations.

In our contemporary context, the family constitutes the foundation of the protection of umma and of the care of offsprings. The protection of the offspring in the contemporary reflection on Maqasid al-Shari'ah ended in including also the

preservation of family as it has been discussed in contemporary studies and also in other relevant social, cultural and legal systems.

As for the “protection” of honor, this last one is a concept extended beyond the safeguard of the individual reputation against every type of slander and calumny, and includes also that one of human dignity and the fundamental human rights, as have been recognised in the contemporary declarations on human rights. However, it is necessary to make a difference between the basic human rights, as right to life, freedom of choice, protection from torture, freedom of expression, social justice and their application in the different cultures, which could vary from East to West and inside the muslim community in respect to others. This is the reason why it is not possible to compel an other culture to follow this Islamic concepts in their concrete application.

As for the jurisprudence (fiqh), the hifz of property should be interrelate with the corporal punishments imposed by Shari’ah in case of fraud, misappropriation and monopoly. The contemporary juridical meaning of hifz of property reached a positive dimension, which includes the safeguard of rights and property, and the intellectual and economic ones, against unemployment and economic collapse.

Shaikh Muhammad al-Tahir ibn Ashour differentiated between the “necessities of an individual” and the “necessities of a nation”, adding that the interests (masalih) of the nation should have the priority on those of individuals and assigning the same priority on the Maqasid themselves. According to this perspective, the preservation of faith, mind, honor, property and progeny of the community should have the precedence respect to the safeguard of that of an individual. This is a very important consideration in the application of the dispositions of Shari’ah specially in the area of priorities. In modern sense, this means that should be assigned priority in the public interest instead of the individual one. The complementary need (hajiyyat) instead is related to everything is needed, even when according to the definition, they are less essential to the safeguard of life respect necessities (daruriyyat). The scholars proposed the following example of hajiyyat: marriage, freedom of movement, and commerce. However, some scholars of Usul al-Fiqh argue: “Whenever a complementary need became extremely spread it became a kind of necessity”. In other words, if there is a general recession in the commerce, the commercial activity became a necessity, while if the percentage of the married people decreases vertiginously, then consequently marriage becomes part of the hajiyyat.

As for the ‘unnecessary goods’ (tahsiniyat), we can say that they constitute a manifestation of the love and mercy of God, which is contemplated in Maqasid themselves of the revealed Law, besides necessities and needs. Example of unnecessary goods are: luxury houses, decorations in the mosque, permitted arts, perfumes, drinks and food both permitted and refined. The enjoinder of these goods is regulated inside Shariah, even when they belong to a category located beneath the complementary needs. This is the reason why should not be assigned to them any precedence respect to priorities, especially in the context of economic policy.

In addition of the classification of Maqasid al-Shari-ah, we can mention also the one related with the universal needs. Scholars agree in affirming that justice is one of the universal Maqasid of Shari’ah, and that natural laws, which are established by God in order to rule the universe and life in general, is one of the aims of Shari’ah, whose teachings promote peace and harmony between the natural laws and the legislation. These scholars argue that the maintenance of the ‘order’ of the umma is a universal and general aim of Shari’ah, which has got a peculiar importance in the context of political priorities in the context of the legislation.

The universal and general Maqasid of Shari’ah include infact: tolerance, wisdom, public interest, cooperation, coesistency, solidarity, honesty and cooperation, which can also be defined as ‘civil values’. To refer to Maqasid al-Shariah implies a reference to all those values and objectives that in the Islamic law are considered priority, and that actually have got a central role in ‘all religions’, as it has been argued by Imam al-Shatibi, since can be easily understood by common sense and are not bound to any religion or ideology.

The instruction and decisions taken by the Prophet Muhammad as messenger of God are considered by Muslims divinely inspired and are not subject to change, while those taken as human being cannot be considered part of Shari’ah and consequently binding for all muslims. These actions and saying are called by scholars ‘Non legislative Sunna’ (Sunna ghayr tashri’yyah) and they include also the daily activities in relating to drinkings, food, furnitures, means of transportations, medical treatments and typology of houses which can change in different times and cultures. In this regard, Muslims are not bound to follow the personal choices and the preferences of the Prophet, even when some believers could do it due to the love felt towards him.

As for the instructions given by the Prophet (pbuh) in the role of Imam, ie the different political choices taken in certain areas, it is always necessary to refer to the principles and the finalities which motivated them, avoiding an extremely literal approach.

Scholars introduced also another distinction of objectives and maqasid, which also motivated the actions, the decisions, and instructions of the Prophet (pbuh). They distinguished between acts with a legislative nature and those that, instead, have a non-legislative one, even when in some case they overlap. There are specific legislative acts and instructions of the Prophet (pbuh) which are well known by Muslims, as in the case of prayer and pilgrimage according the two following traditions: “Pray as you have seen me praying” and “Take your (*ḥajj*) rites from me.”

There are also acts which are completely out of the legislative context as, for example, the style of clothes and the kind of food, which were deeply influenced by the geographical and historical dimension of the environment in which Prophet was actually living.

Imam al-Qaraḥi distinguished between different actions of the Prophet (pbuh) on the basis of the intention. In the word entitled *al-Furuq* he wrote: “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 bear different implications in the Sharia. All what he says or does as a deliverer of the 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*.

Then, every muslim is from the juridical point of view bounded to the actions and sayings of the Prophet (pbuh) as messenger, while the dispositions and the decisions stated or taken in the role of judge and leader are binding, with the due clarifications, only for those who in the community cover the same roles.

For example, as it is concerned with the distribution of the bounty, in the Quran is clearly written: “You should know that whatever spoils you acquire, one-fifth belongs to God and the Messenger, to close relatives and orphans, to the needy, and to the stranded travelers. (This you must observe) if you believe in God and what We revealed to Our servant on the day of distinction (when Truth was distinguished from falsehood)- the day when two forces met in battle. God has power over all things (Holy Quran 8:41).

The Prophet (pbuh), for example, used to divide the spoils of war according to specific aims and purposes as, for example, to provide of determinate economic revenues for the soldiers. This means that the muslim leader or the nation in the modern terminology can decide to change this system to guarantee a fixed salary to every soldier based of his rank in the army. This new system and the new forms of retribution are not “irreconcilable” with the system of the spoils of war, since the system itself falls into the category of the “political choices” and cannot be considered binding for every time and space. The aim and the purpose behind this method of distribution was based on the political discretion. In this case, however, it is not binding and should be examined according to determinate aims and purposes.

This considerations are very important in relation to some controversial issues, which raised heated debates and are mainly related to the political decisions taken by the Prophet with the intention to reach some purposes respect to some non-muslim communities. Some of these decisions and political choices are dependent on a specific time and space and are not binding for the muslims, living and acting in a different social and historical contexts. These decisions are not part of the acts of worshipping and are not purposes in themselves. This is the reason why it is necessary to become aware that in the modern time there are some religious pronouncements finalized to reach some Maqasid, while other are considered only as means or tools.

For example, in the Quran, God says: “Prepare whatever forces you can so that you might frighten God’s enemies and your, and to frighten others unknown to you but known to God. Whatever you may do in God’s cause, will be repaid to you in full and you will not be wronged” (Holy Quran 8:60).

The warhorses in this case are a simple mean, even when are clearly nominated in the verse. This is the reason why it is very important observe that it is not necessary be consistent with everything stated in the Quran as aim, both in literal and instrumental sense. The scholars of jurisprudence should ask if a determinate question constitutes an aim or a final object. So, if an horse, a blade, the spoils of war, the jizyah are considered as means, than they can change also according with the time and the circumstances. Instead, if it is an objective in itself, we should be aware that they should not be subject to any change. This methodological principle should be taken into consideration when we reflect on the role of Shari’ah in the contemporary world.

In this regard, the Imam al-Shatibi, a very important scholar in the context of Maqasid al-Shariah, stated: “Literal compliance is the *aṣl* (i.e. governing rule/default methodology) in the area of acts of worship (‘Ibadāt) 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.

Al-Shatibi uses the word ‘*asl*’ because in the general rule there can be some exceptions. Scholars, as al-Tufi, an hanbali scholar, said that the prescribed numbers, which are part of the acts of worship are fixed and should be followed literally. We can refer to 2,5% as percentual in the context of the payment of Zakat, the period of Iddah or the pronouncement of divorce. These numbers are fixed and established by Sharu’ah and scholars expressed a full agreement.

The Zakat has got determinate aims and purposes of economic nature, while the percentage of wealth, which should be donated, belong to the acts of worship. The literal approach inspired several legal pronouncements (fatawa) by Zahirites from scholar both ancient and contemporary, which are closer to comedy than to jurisprudence and consequently cannot be used for a serious proposal in context of a contemporary application of Shari’ah. We should remember that Imam Ibn Hazm is a well known scholar, a great philosopher, a deep expert in the science of Fiqh and Hadith, without mentioning his great talent in poetry. However, some of his legal pronouncements are quite odd, as for example the comment on the following hadith: “No one among you should urinate into stagnant water.” Ibn Ḥazm said, “If he urinated in a vessel and then poured it into the stagnant water, it does not become ritually impure.”

Let us then take into consideration the comment to Tradition where the Prophet (pbuh) states that the silence is part of the consent to the marriage by a virgin. Ibn Hazm in the al-Muhalla bi al-Athar clearly says: ““If the virgin girl verbally confesses her consent to the marriage, the marriage contract is invalid!”

If this approach, literal and formal, is utilized in the context of the contemporary reality in the area of muamalat, we will be totally distressed by the unacceptable and illogical results, which can be seen unfortunately in some islamic political movements, which have been described by Shaikh al-Qaradawi as “modern zahirites”.