

# MAQĀṢID AL-SHARĪʿA: EPISTEMOLOGY AND HERMENEUTICS OF MUSLIM THEOLOGIES OF HUMAN RIGHTS<sup>1</sup>

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## *Abstract*

This essay explores the purposive strategy of modern Islamic legal theory (i.e., based on *maqāṣid al-sharīʿa*, with public benefit, or *maṣlaḥa*, as the *sharīʿa*'s main purpose) and its use in articulating an Islamic theology of human rights. After a synopsis of contemporary research on Islam and human rights, the essay highlights the main issues involved in the twentieth-century turn to a purposive approach in *uṣūl al-fiqh* (Islamic legal theory). The “*maqāṣidī*” strategy as it is applied to human rights is then monitored in three distinct currents: traditionalists (Muḥammad al-Ghazālī and Muḥammad ʿAmāra); progressive conservatives (Muhammad Talbi, Muhammad al-Mutawakkal, and Rāshid al-Ghannūshī); progressives working with a postmodern epistemology (Ebrahim Moosa and Khaled Abou El Fadl). In conclusion, this move toward ethical objectivism and an epistemological favoring of ethical values over particular formulations of the text could enable a greater number of conservatives and progressives to converge on some of the burning questions of human rights today.

“Human rights” is a concept according to which individuals, *qua* human persons, have certain inalienable rights distinct from, but also comprising corollary duties. In this paper, I will assume the validity of this concept, knowing full well that it is much contested by advocates of cultural relativity (according to whom it is a western idea not compatible with the norms and values of many non-western cultures).<sup>2</sup> What is more, its philosophical foundation is tenuous, in that its justification must either

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<sup>1</sup> Many thanks for the helpful input of Frank Griffel, Adel Allouche, and Ebrahim Moosa in this project.

<sup>2</sup> For useful discussions about the impact of cultural relativism on the idea of human rights, see Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Cambridge, UK: Polity, 2002), especially his Chapter 6, “Universality, Diversity and Difference: Culture and Human Rights”; Michael Ignatieff, *Human Rights as Politics and Idolatry*, edited and introduced by Amy Gutmann (Princeton University Press, 2001).

be found in law or in religious belief.<sup>3</sup> John Locke, the first to write on the subject, assumed along with his readers that God was the source of human rights. By contrast, the 1948 Universal Declaration of Human Rights (UDHR) claimed to speak for people all over the world and thus could not invoke any theological principles as grounding the said rights. The issue of source simply had to be by-passed.

Katerina Dalacoura, a specialist in international relations, writes about the intersection of the human rights concept and Islam as an active ingredient in the political cultures of Egypt and Tunisia.<sup>4</sup> She makes explicit what other writers on this topic assume, using their social science lens: the notion of human rights has a metaphysical dimension—only some kind of faith could guarantee the dignity of the human person. Whether this foundation is laid in a secular or religious context, it cannot be attributed to reason. But, she argues, it is naturally more hospitable to religious faith—hence, her exploration of Muslim writers' recourse to Islam on this topic in both countries. To some extent, I agree with her contention that “[a]n explanation of an interpretation of Islam in the Middle East which is firmly anchored in political, economic and social factors ... is more fruitful than reference to the immutable nature of Islam”.<sup>5</sup>

In this paper, however, I argue that to read and interpret one's sacred texts in the light of changing sociopolitical realities—as in writing about “Islam” and human rights, for instance—is a case of simply “doing theology”. People who articulate a view of the world based on their understanding of revealed texts are engaging in theology—a project always undertaken in a particular context and necessarily assuming a particular hermeneutic (theory of textual interpretation) and epistemology (theory about what we can know and how we come to know it). Though agreeing with Dalacoura and others that the sociopolitical context impinges on one's theology, I am adding here the impact of one's intellectual context. Thus the UDHR was crafted mostly by western powers that, appalled

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<sup>3</sup> Freeman, *Human Rights*, p. 10.

<sup>4</sup> Katerina Dalacoura, *Islam, Liberalism and Human Rights: Implications for International Relations*, rev. ed. (London & New York: I. B. Tauris, 2003). Her approach is useful and complementary to other approaches, but her limitations in the area of theology must be stated: She is no specialist in Islam and has to rely solely on French and English sources.

<sup>5</sup> *Ibid.*, p. 194.

by the barbarity of the Second World War, relied on the Enlightenment concept of inalienable rights to frame an international convention that might ward off such disasters in the future. This is a profoundly “modern” concept, born out of the west’s own intellectual development since the Renaissance. Naturally, it was bound to collide with the pre-modern theology inherited by Muslims, who found themselves subjected to western hegemony since the early days of colonialism.<sup>6</sup> And it clashes with a perspective that goes beyond the traditional modernism that gave rise to the UDHR, what I here call “postmodernism”.

The Egyptian law professor Muḥammad Nūr Farḥat (University of Zagazig) is representative of a widening circle of Arab intellectuals who simultaneously take hold of Islam, the concept of human rights as enshrined in the International Bill of Human Rights,<sup>7</sup> and who acknowledge the sad reality of how these rights are abused, whether by the west or by Muslim states. It is more than just a question of a state abusing its powers, he contends, for certain violations are tolerated as part and parcel of Mideastern culture, notably in the treatment of women and children. The solution Farḥat points to is the topic of this essay—a fresh approach to Islamic law, which is intimately connected in the Islamic framework to theology. In his words, this will entail “the renewal (lit. a “resurrection” *ihyāʿ*) of a movement of true and innovative legal reasoning (*ijtihād*) based on the *sharīʿa*’s injunctions but in a way that interacts authentically with contemporary realities and reduces the

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<sup>6</sup> Christians, naturally had a head start in this process, since the Renaissance was born in their midst, though ironically it was largely brought about through the work of Muslims before them who had paved the way theologically by building on Greek science and philosophy. Yet, while Christian theologians struggled over centuries to come to grips with an increasingly secular modernity, that civilizational reality was foisted onto Muslims much later—from the eighteenth century onwards. Efforts here and there have been made to rethink traditional theology in the light of modernity (as for instance by Shah Wali Allah in India and later by Muḥammad ‘Abduh in Egypt), but the post-colonial reality following the UDHR produced the greatest Muslim theological ferment yet.

<sup>7</sup> This includes The Universal Declaration of Human Rights (UDHR) of 1948, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) of 1966, and the International Covenant on Civil and Political Rights (ICCPR) also of 1966. Cf. Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics*, 3rd edition (Boulder, CO: Westview Press, 1999), pp. 18 ff.

discrepancies between traditional jurisprudence and the international documents on human rights”.<sup>8</sup>

But before delving into the heart of the matter, I will attempt to summarize the main points of convergence in the literature on Islam and human rights at this stage:

1. The human rights concept has had a strong and pervasive impact on Muslim writers from the 1970s on. From official Muslim declarations to a number of individual articles and books, the literature is impressive. In the name of Islam this concept is wholeheartedly endorsed for the most part, but for a minority of other writers, it is condemned as a western, secular intrusion.

2. Many of these writings fall into the category Ann Elizabeth Mayer calls “human rights schemes”, because, although on the surface they follow the form and content of the 1948 Universal Declaration of Human Rights (UDHR), they neither draw coherently from traditional Muslim sources, nor do they squarely face the obvious discrepancies between the two systems.<sup>9</sup> Suhail H. Hashmi deplores the fact that “much Muslim writing on this topic is hopelessly apologetic,” but that, likewise, “much Western writing ... is highly contentious, suggesting that the language of human rights is fundamentally alien to ‘Islam’.” Nevertheless, the provisions of the *shari‘a*, while in advance of their time, he avers, are broadly discriminatory from an international law perspective with regard to the treatment of non-Muslims and women.<sup>10</sup>

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<sup>8</sup> Farhat, “‘Mabādi’ huqūq al-insān bayn al-‘ālamīyya wa-l-khuṣṣīyya”, in *Huqūq al-insān: al-thaqāfa al-‘arabiyya wa-l-nizām al-‘ālamī* (Cairo: Ittihād al-Muḥāmiyīn al-‘Arab, 1993, pp. 43-51), here p. 51.

<sup>9</sup> See Mayer, *Islam and Human Rights*, especially her Chapter 9, “An Assessment of Islamic Human Rights Schemes” (pp. 175-192). One of many examples she offers is a critical document issued by a number of Arab intellectuals and human rights activists after their meeting in Tunis in 1983. This document is a stunning condemnation of the repressive state policies all across the Middle East, which cause their populations to live in fear of imprisonment, torture, and murder. The participants therefore called for the guaranteeing of freedoms of belief, opinion, expression, assembly and freedom of forming political organizations and unions. Conspicuous by its absence, however, was any mention of Islamic notions of human rights. The UDHR had just been promulgated two years earlier. Apparently, such human rights schemes seemed irrelevant to them. Cf. Mayer, *Islam and Human Rights*, pp. 189f.

<sup>10</sup> Suhail H. Hashmi, “Islamic Ethics in International Society”, in *Islamic Political Ethics: Civil Society, Pluralism, and Conflict*, ed. Sohail H. Hashmi (Princeton University Press, 2002), pp. 163f.

Ali Merad, professor of Arabic literature in Lyon, analyses the Universal Islamic Declaration of Human Rights (UIDHR) of 1981 and points out seven discrepancies between the Arabic and English/French versions of the declaration, and then several of its ambiguities: (1) it is not as “universal” as it would seem; (2) the discrepancies in translation seem to point to a desire to cater to traditional Muslim sensibilities on the one hand, and on the other, to prove to non-Muslims how progressive Muslims can be; (3) though it claims to represent the Qur’ānic message of tolerance and human liberation, in the end it turns out to be much less courageous than the 1948 UN Declaration.<sup>11</sup> This is precisely Mayer’s point in coining the phrase “human rights schemes”.

3. As advocacy movements for human rights continue to spread in the Muslim world, the reformism of thinkers like Muhammad Sa’id al-‘Ashmawi<sup>12</sup> and Abdullahi Ahmed an-Na’im is gaining recognition in Muslim circles as one possible way to reconcile Islamic tenets and respect for international law.<sup>13</sup> Significantly, the Cairo Center for Human

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<sup>11</sup> Ali Merad, “Zur ‘Allgemeinen Islamischen Menschenrechtserklärung’”, in *Freiheit der Religion: Christentum und Islam unter dem Anspruch der Menschenrechte*, ed. Johannes Schwartländer (Mainz, Germany: Matthias Grünewald-Verlag, 1993), pp. 443-9.

<sup>12</sup> He is well known as a progressive Egyptian Muslim thinker. See Muhammad Sa’id al-‘Ashmawi, *Against Islamic Extremism: The Writings of Muhammad Sa’id al-‘Ashmawi*, ed. Carolyn Fluehr-Lobban (University of Florida Press, 1998); Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Uṣūl al-Fiḥ* (Cambridge, UK: Cambridge University Press, 1997), pp. 231-41. And in French, “La Jurisprudence Islamique”, in *Contre L’Intégrisme Islamiste*, ed. Lotfallah Soliman (Paris: Maisonneuve et Larose, 1994). His thought is a logical extension of Muḥammad ‘Abduh’s reasoning, but in which the distinction between ‘ibādāt and mu’āmalāt becomes radicalized to the point of advocating what conservatives would call ‘ilmāniyya (secularism).

<sup>13</sup> an-Na’im’s thought is different from that of al-‘Ashmawi, but like him offers a bold re-interpretation of the Islamic tradition. See his controversial, yet influential book, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse University Press, 1990). Another work published by the Cairo Center for Legal Studies and Information by Maḥjūb al-Tijānī, *al-Shar‘ al-Islāmī bayna huqūq al-insān wa-l-qānīn al-dawli* (Cairo: The Cairo Center for Legal Studies and Information, 1996) seeks to harmonize Islamic law and international norms of human rights by studying the Sudanese Republican Brothers movement founded by Maḥmūd Muḥammad Ṭāhā and naturally quotes and discusses an-Na’im’s work extensively. While maintaining a good dose of respect for Ṭāhā’s “second Islamic reformation”, the author argues that in the Republican Brothers’ strategy of abrogating the Medinan passages of the Qur’ān by the Meccan ones, the holiness of God’s book is depreciated. Also devalued is the role of the *sharī‘a* in the promotion of human rights today. But he prefers al-‘Ashmawi’s definition of *sharī‘a*: it is not the particular applications (*fiqh*)—for that is a human effort, and thus fallible and changing according to the time and place—but the ethical principles of the Qur’ān (see especially pp. 24-7).

Rights published a book in which the lead and concluding chapters were written by the Sudanese al-Bāqir al-‘Affif, now a professor at the University of Manchester.<sup>14</sup> Mayer’s *Islam and Human Rights* is his most quoted source, and the essay boils down to a refinement of her categorization of Islamic human rights schemes. Note his progression: (1) the secretive method (*ikhfā’ī*)—al-Mawdūdī, Ḥasan al-Turābī, Muḥammad ‘Amāra; (2) the apologetic method (*i’tidhārī*)—Muḥammad Aḥmad Sa‘d; (3) the defensive method (*difā’ī*)—Cornelius,<sup>15</sup> al-Mawdūdī; (4) the open (frank) method (*ṣarīḥ*)—Sultan Husayn Tabandeh; (5) the method of deceit (*al-murāwigh*)—a) the UIDHR; b) the Cairo Declaration of Human Rights in Islam; (6) the “beating around the bush” method (*al-multaawī*)—Fahmī Huwaydī; (7) the selective method (*intiḳā’ī*)—Muḥammad Aḥmad Ḥasan Khān, Ṣaghīr Ḥasan Ma‘ṣūmī (Bengladesh); (8) the preaching (or “rhetorical”) method (*khiṭābī*)—Khān and Cornelius (Pakistan); (9) the comprehensive method (*shāmī*)—Abdullahi an-Na‘im.

What is lacking here, however, is the contribution of a number of Muslim scholars (mostly living in the west), who argue that the relationship between Islamic theology and law must be totally rethought. Though I mention several of them in my last section, I indicate Abulaziz Sachedina’s contribution here. His main bone of contention with those who seek to apply the corpus of Islamic law (basically intact since medieval times) in the present context is their epistemology: the many apologetic works from this perspective “have further mystified the actual import of Islamic institutions and their revival in modern times.... The call to create a Shari‘a-based state has overlooked the need to take a fresh look at a religious epistemology requiring extensive rethinking before it can guide decisions affecting the lives of Muslims in a modern nation-state”.<sup>16</sup> On the positive side, Sachedina calls for a theology that gives the ethics of the Qur’ān its rightful place: “The time has come for a fresh start from

<sup>14</sup> al-Bāqir al-‘Affif, “Kayfa istajāba al-muslimūn li-ākhir al-taḥaddīyyāt? Mu‘ālatat ḥu-qūq al-insān fī kitābāt al-muslimīn al-mu‘āshirīn: taḥlīl wa-taṣnīf” in *Huqūq al-insān fī fikr al-islāmīyyīn* (Cairo, 2000).

<sup>15</sup> A Catholic, he was also the chief justice of Pakistan, from 1960 to 1968. See Ralph Braibanti’s authoritative work, *Chief Justice Cornelius of Pakistan: An Analysis with Letters and Speeches* (Oxford University Press, 1999). Appendix 15 may be what al-‘Affif is basing his judgment on: Mayer, *Islam and Human Rights*, pp. 278-96.

<sup>16</sup> Abulaziz Sachedina, *The Islamic Roots of Democratic Pluralism* (Oxford & New York: Oxford University Press, 2001), p. 13.

the points in normative tradition where the system of Islamic law makes extensive use of judgments of equity (*istihsān*) and public interest (*maṣlaḥa*) for the common good and where ethical theology encourages human reasoned judgments of right and wrong.”<sup>17</sup> These are still minority voices, but one of the purposes of this paper is to call attention to them.

4. Many of the obstacles to a wider embracing of the international standards for the protection of human rights are cultural and sociopolitical in nature. On the one hand, Mahmood Monshipouri avers, “The Muslim world’s concern with order, moral values, and social ethics deserves recognition and respect.” On the other hand,

The criterion of legitimacy in universal human rights will be properly met when equal respect and mutual understanding exist between competing cultures, something that may be unrealistic given the present context of the politico-economic hierarchy. In view of the extant economic disparity, power differential, and technological gap between developed and developing countries, a global commitment to such a dialogue remains precarious at best.<sup>18</sup>

5. The current incompatibility of official Islamic declarations and the actual standards of the UDHR cannot be attributed to Islam as a faith. Both Monshipouri in his case studies of Iran, Turkey and Pakistan, and Dalacoura’s examination of the human rights situations in Egypt and Tunisia<sup>19</sup> demonstrate that “Islam” (its legal system and its ethical norms) in itself is not an independent factor. In fact, each country offers an array of movements using Islam as a vehicle for political discourse, and yet their respective interpretations of the Islamic texts and their corresponding political agendas vary widely. Having said this, with the spread of islamism (Islam as embracing all facets of life including the political sphere)<sup>20</sup> in the Mideast over the last two decades, it would be difficult to imagine a grassroots movement advocating the kind of human rights standards guaranteed by international law without doing so from within an Islamic framework.

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<sup>17</sup> *Ibid.*, p. 45.

<sup>18</sup> Mahmood Monshipouri, *Islamism, Secularism, and Human Rights in the Middle East* (Boulder, CO: Lynne Rienner, 1998), p. 234. See also Hashmi, “Islamic Ethics”, p. 170.

<sup>19</sup> Dalacoura, *Islam, Liberalism and Human Rights*.

<sup>20</sup> I prefer to write “islamist” or “islamism” without the capital letter, as distinct from “Islam” or “Muslim” and as an indication of its ideological nature, much as the words “fundamentalist”, “communist”, or “liberal”.

6. The role of religion in the global promotion of peace, justice and the respect of human rights is increasingly recognized by scholars as both necessary and desirable.<sup>21</sup> Though the human rights concept has definite historical roots in the west,<sup>22</sup> it has resonated deeply with religious cultures all over the globe.<sup>23</sup> Law professor and former Tunisian Minister of Education Mohamed Charfi holds that it was not the three monotheistic religions that gave birth to the concept of human rights. Yet “the Bible, the Gospels and the Qur’ān essentially contain messages of love, charity and liberty. It is said in the Qur’ān that humanity is God’s vicar on earth.<sup>24</sup> This implies both the responsibility of humankind and their freedom, which should also serve to promote the individual”.<sup>25</sup> These common concepts must be harnessed today to protect the dignity

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<sup>21</sup> This is R. Scott Appleby’s thesis in *The Ambivalence of the Sacred: Religion, Violence, and Reconciliation* (Lanham, MD: Rowman & Littlefield, 2000).

<sup>22</sup> Dalacoura argues that it resulted from the convergence of two currents: natural law, which goes back to the Greeks but was framed by the medieval theologian Thomas Aquinas as “the rational individual’s participation in the divine law, and consequently the guide to morality and ethics” (Dalacoura, *Islam, Liberalism and Human Rights*, p. 6), and Enlightenment secular rationalism. Freeman shows that the concept of *ius* in Roman law was extended in the late Middle Ages of Europe to include *legal* rights for certain peoples, but not *natural* rights for humankind. The only link between this concept and the modern concept of human rights is through the Dutch jurist Hugo Grotius (d. 1645), who held that one had moral obligations to all human beings. Cf. Freeman, *Human Rights*, pp. 16-19.

<sup>23</sup> See the work of the theologian Hans Küng as editor (with Karl-Josef Kuschel) of *A Global Ethic: The Declaration of the Parliament of the World’s Religions* (New York: Continuum, 1993), and author of *Global Responsibility: In Search of a New World Ethic* (New York: Continuum, 1996). More recently, Seyyed Hossein Nasr has argued that in the global dialogue about human rights we should not forget that the debate was framed by a predominantly secular west. The various cultures and religions of the world must be allowed to contribute their own specific views. Muslims, for instance, with other monotheists will want to emphasize “that our rights issue from the fulfillment of our responsibilities to God and His creation and that without accepting our responsibilities the emphasis upon our rights alone can turn us into a species that is at once endangered and endangering” (Seyyed Hossein Nasr, *The Heart of Islam: Enduring Values for Humanity* [New York and San Francisco: HarperSanFrancisco, 2002]).

<sup>24</sup> See David L. Johnston, “The Human *Khilāfa*: A Growing Overlap of Reformism and Islamism on Human Rights Discourse?,” in *Islamochristiana* 28 (2002), pp. 35-53 for a study of this concept within recent Muslim writings on human rights. This is the foundational issue of humanity’s intrinsic value, also intimately related to the topic at hand: many Muslim writers identify the purposes of *shar’*a as the empowering and guiding of humankind in their divine mandate to manage human society in God’s stead in harmony with the earth’s resources for the benefit of the entire human race.

<sup>25</sup> Mohamed Charfi, “Religion, Droits de l’Homme et Education”, in *Islamochristiana* 27 (2001) 23-36, here p. 24.



of the human person. Nevertheless, as the rest of Charfi's article claims, Tunisia more than any other Muslim country has had the courage to reform its public teaching of Islam: Islamic history taught without embellishments or triumphalism, Islamic law brought up to date without the *hudūd*<sup>26</sup> and in conformity with human rights standards, and an introduction to the other monotheistic religions thus promoting needed understanding.

Building on these points, in this essay I single out one interpretive strategy in Islamic law which superficially might be seen as the utilization of the legal tool of public interest (*maṣlaḥa*), but which, if drawn to its logical conclusion, often becomes a significant hermeneutical turn away from the letter of the law to a focus on its spirit—away from the specific injunctions of the text to the purpose behind them, the *maqāṣid al-sharīʿa*. The next section scrutinizes some of the theoretical questions behind this concept as they relate to the science of Islamic jurisprudence, *uṣūl al-fiqh*.<sup>27</sup>

### **The search for adaptability in *uṣūl al-fiqh***

The Creator-God in Islam is also the divine legislator (*al-shāriʿ*). Famous for his ability to expound the virtues of Sufism to educated western audiences, Seyyed Hossein Nasr is also adept at capturing the centrality of law in the Islamic worldview—all across the spectrum:

To speak of Islam on the level of individual practice and social norms is to speak of the *Sharīʿah*, which has provided over the centuries guidelines for those who have wanted or wish today to live according to God's Will in its Islamic form. When we hear in the Lord's Prayer uttered by Christ "Thy Will be done on earth as it is in Heaven," for the Muslim His Will is expressed in the *Sharīʿah*, and to live according to this Will on earth, first of all, to practice the injunctions of the Divine Law.<sup>28</sup>

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<sup>26</sup> These were all conditioned by specific historical circumstances and no longer apply today, insists Charfi. The capital punishment for apostasy, for instance, "has nothing to do with Islam. It was invented during the *ridda* wars during Abu Bakr's caliphate" (*ibid.*, p. 33).

<sup>27</sup> The next section is a summary of my essay, "A Turn in the Epistemology and Hermeneutics of Twentieth Century *Uṣūl al-Fiqh*", in *ILS* 11, 2 (2004), pp. 233-82.

<sup>28</sup> Seyyed Hossein Nasr, *The Heart of Islam*, p. 119.

The practical and theoretical efforts at jurisprudence of the first two Islamic centuries were later systematized by the disciples of Muḥammad b. Idrīs al-Shāfi‘ī (d. 820). This effort became known as the theoretical discipline of *uṣūl al-fiqh*, the “roots of law”,<sup>29</sup> and simultaneously, the theological foundation for the whole legal edifice of *fiqh*, Islamic applied jurisprudence.<sup>30</sup> The two main sources from which the rules of *fiqh* are inferred, deduced, or discovered, are the Qur’ān and Sunna. The science of *uṣūl al-fiqh*, therefore, attempts to develop a methodology that enables the *mujtahid* (an Islamic legal expert who makes new legal pronouncements through *ijtihād*) to extract from the indications (*dalālāt*) found in the sacred texts practical rules susceptible to provide the best guidance for the *mukallaf* (person in full possession of his or her mental capacities and thus addressed by the divine discourse) in both the religious rituals (*‘ibādāt*) and in human society (*mu‘āmalāt*).

Among the four main schools of Islamic jurisprudence two lesser methods for inferring laws in a *shar‘ī* way (*sharī‘a* refers equally to the spirit, content and method of extracting specific laws) were generally recognized: *ijmā‘* (consensus of the legal experts) and *qiyās* (analogy). The two words for “source” or “root” (used almost interchangeably in the literature) are *aṣl* (plural *uṣūl*) and *dalīl* (“indication” or “proof,” pl.

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<sup>29</sup> This picture of a tree has often been glossed from the parable of the tree with firm roots and branches reaching into heaven (Q. 14:24), besides its possible esoteric meanings (cf. Seyyed Hossein Nasr, *The Heart of Islam*, p. 124). The reality of the genesis of Islamic legal theory, however, may have been quite different from the official version presented here. Ebrahim Moosa writes “Historically speaking, the general purpose of legal theory was not so much to generate new laws as it was to provide a post-hoc rationalization and justification for the legal practices that were already in circulation in the post-prophetic period. In other words, legal theory provided coherence for the moral and epistemological framework of Muslim legal and ethical thought” (Ebrahim Moosa, “The Poetics and Politics of Law after Empire: Reading Women’s Rights in the Contestation of Law”, in *UCLA Journal of Islamic and Near Eastern Law* 1, 1 [Fall/Winter 2001-02], pp. 1-46, here p. 8).

<sup>30</sup> Muhammad Khalid Masud has recently argued that whereas *fiqh* has come to dominate Islamic ethical discourse (mostly through the role of the *muftīs* as purveyors of a “social construction of shari‘a”), there were five other competing ethical traditions in the early centuries of Islam: the *hadīth* literature, the *adab* tradition initiated by Ibn Muqaffā‘ (d. 756), the philosophical tradition with its *akhlāq* literature, the Sufi moral tradition beginning with al-Hārith al-Muḥāsibī (d. 857), and the multiple voices of the *kalām* tradition, whether from its Mu‘tazilī or its Ash‘arī strands. Clearly, contemporary Islamic reformism is reclaiming some of the heritage of the *akhlāq* and *kalām* traditions. Cf. Muhammad Khalid Masud, “Pluralism and International Society”, in *Islamic Political Ethics: Civil Society, Pluralism, and Conflict*, ed. Sohail H. Hashmi (Princeton University Press, 2002), pp. 136-141.

*adilla*).<sup>31</sup> The second word emphasizes the quest for certainty in the discipline. Yet in the end, certainty (and unanimity between the various schools) rests only with the first two sources, the Qur'ān and Sunna—thus their appellation *adilla naqliyya* (indications from the revealed texts).<sup>32</sup> Thus, the rest of the *mujtahid*'s array of methods are labeled *adilla 'aqliyya* (rational evidences). Historically, *uṣūlī* writers (specialists in *uṣūl al-fiqh* or *uṣūliyyūn*), depending on the school, have accepted the validity of several of the following methods: *istihsān*, “legal equity” (or “preferential choice”), *istiṣhāb* (presumption of continuity), *maṣlaḥa mursala* (social welfare not mentioned in the texts, very similar to the earlier method, *istilāh*), or its counterpart, *sadd al-dharā'ī* (“closing the gate to evil”), *'urf* (custom), *shar' man qablanā* (laws of monotheists “before us”), *madhhab al-ṣaḥābī* (the school, or juridical method of the Companions).<sup>33</sup>

Modern *uṣūlī* specialists tend to distance themselves from a particular school, freely quoting from all the schools, including from Shi'ites if they are Sunni. Mawil Izzi Dien argues that in trying to harmonize Islamic law with contemporary western law, *uṣūlīs* today often use the more logical word *maṣdar* for “source”.<sup>34</sup> He argues that as they usually add *maṣlaḥa* (and *sadd al-dharā'ī*), the latter category is wrongly called *dalīl*. All the *adilla 'aqliyya* are actually tools used to infer specific legal injunctions, and *maṣlaḥa* in particular should be seen as the guiding tool for all the “secondary sources” (or “rational sources”), as it is well construed to

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<sup>31</sup> *Adilla* and *dalālat* are sometimes used interchangeably for “indications in the sacred texts”, but only *adilla* is used for accepted legal methods for the task of inferring fresh rulings in new situations (see below).

<sup>32</sup> The consensus of the experts (*ijmā'*), sometimes extended to the community at large, was included in this category, but then only slightly inferior in terms of certainty.

<sup>33</sup> Muḥammad Muṣṭafā Shalabī's *Uṣūl al-fiqh al-islāmī* (Cairo: Maktabat al-Naṣr, 1991, 5<sup>th</sup> print.) is typical of contemporary manuals. In his outline he first presents the “four *adilla*” (Qur'ān, Sunna, *ijmā'* and *qiyās*), then “the *adilla* on which there is difference (of opinion)”: all those mentioned above, but with *maṣlaḥa mursala* in second position. Just a few years before, 'Abd al-Wahhāb Khallāf had devoted the first part of his *ʿIlm uṣūl al-fiqh al-adilla al-sharʿiyya* and listed ten (the same order as in Shalabī, but with the *sadd al-dharā'ī* subsumed under *maṣlaḥa mursala*). Cf. 'Abd al-Wahhāb Khallāf, *ʿIlm uṣūl al-fiqh*, 12<sup>th</sup> ed. (Kuwait: Dār al-Qalam, 1978, 1<sup>st</sup> ed. 1942).

<sup>34</sup> Mawil Izzi Dien, “*Maṣlaḥa* in Islamic Law: A Source or a Concept? A Framework for Interpretation”, in *Studies in Honor of Clifford Edmund Bosworth*, vol. 1, ed. Ian Richard Netton (Leiden: Brill, 2000), p. 355. He cites two *uṣūlīs* in particular: the prominent Iraqi jurist 'Abd al-Karīm Zaydān, and the Egyptian Muḥammad Abū Zahra. The other most quoted source is the landmark dissertation of Muḥammad Zayd, *al-Maṣlaḥa fī al-tashrīʿ al-islāmī* (Cairo, 1964).

provide needed legislation “for the conservation of the environment and women’s rights”.<sup>35</sup> This is because *maṣlaḥa* can be linked to the objectives of the divine legislation (*maqāṣid al-sharī‘a*), and “the avoidance of harm” can be made into a positive, pro-active “enhancement of benefit”.<sup>36</sup>

Moreover, to understand the contemporary interests in the *maqāṣid al-sharī‘a* approach one has to mention the fourteenth-century Grenadan *uṣūlī* Abū Ishāq al-Shāṭibī (d. 1388).<sup>37</sup> I offer here a brief summary of his systemization of the work on *maṣlaḥa* begun by al-Ghazālī (d. 1111), as it is simply taken for granted by today’s *uṣūlīs*.<sup>38</sup>

Al-Shāṭibī distinguished three levels of *maṣlaḥa* for those cases which are not covered by an explicit command or prohibition in the sacred text (*naṣṣ*): the *darūriyyāt*, the “essentials” that guarantee the preservation of the five categories of human existence (life, religion, mind, progeny or honor, wealth or property); the *ḥājjiyyāt*, or the “needful benefits”, which, without being essential are nevertheless necessary in order to achieve overall well-being (*maṣlaḥa*); and the *taḥsīnāt* or *tazjīmāt*, which contribute to the refinement of human life. For al-Ghazālī, *maṣlaḥa* remained subordinate to the method of *qiyās*, which he stipulated must be attached to an indication in the text, otherwise it becomes *istiḥsān* or *maṣlaḥa mursala*—both methods that reminded him of *tafsīr bi-l-ra’y* (Qur’anic interpretation based on opinion), which he rejected outright. Further, his mostly Ash‘arī theological framework would not allow for a clear statement of human

<sup>35</sup> Izzi Dien, “*Maṣlaḥa* in Islamic Law”, pp. 352f.

<sup>36</sup> *Ibid.*, pp. 348f.

<sup>37</sup> Naturally, there are other key figures from the twelfth century onwards who continue to inspire contemporary *uṣūlīs*. I single out al-Shāṭibī because of his great influence today, but also as a useful way to summarize the main issues involved in what is becoming known as the “purposive approach” to Islamic legal theory.

<sup>38</sup> On al-Shāṭibī, see Muhammad Khalid Masud’s *Islamic Legal Philosophy: A Study of Abū Ishāq al-Shāṭibī’s Life and Thought* (Delhi-6, India: International Islamic Publishers, 1989), p. 173. Maribel Fierro calls this work the “fundamental study” in the field, Maribel Fierro, “Al-Shāṭibī”, in EI<sup>2</sup>, pp. 364f. See also Izzi Dien, “*Maṣlaḥa* in Islamic Law”; Wael B. Hallaq, most notably in “*Uṣūl al-fiqh: Beyond Tradition*”, in *Journal of Islamic Studies* 3, 2, (1992), pp. 172-96, and “The Primacy of the Qur’ān in Shāṭibī’s Legal Theory”, in *Islamic Studies Presented to Charles J. Adams*, eds. Wael B. Hallaq and Donald P. Little (Leiden: E. J. Brill, 1991), pp. 69-90; Riḍwān al-Sayyid, “Contemporary Muslim Thought and Human Rights”, in *Islamochristiana* 21 (1995), pp. 27-41. On *maṣlaḥa* in contemporary Islamic legal theory, see also Hasbullah Haji Abdul Rahman, “The Origin and Development of *Ijtihād* to Solve Modern Complex Legal Problems”, in *IQ* 43, 2 (1999), pp. 73-88.

responsibility before the divine law, nor for the definition of *maṣlaḥa* as an independent variable, which reveals the intent of *sharīʿa*.<sup>39</sup>

The crucial step made by al-Shāṭibī is to be able to concede that humans, by virtue of their intellectual endowment by the Creator, can tell good from bad and know what is to the interest of humanity (*maṣlaḥa*) and what detracts from it (*mafsada*). In this he is going beyond the limits set out for human moral agency laid down by al-Ghazālī.<sup>40</sup> It is a theological move based on: (1) an ontological position (right and wrong are values which have an objective status outside of God and humankind); (2) an epistemological decision (people can know ethical values and make judgments about them;<sup>41</sup> and (3) a hermeneutical turn (a legal interpretation of the text can go beyond the literal commands in order to secure the divine intentions behind them).<sup>42</sup> In some ways, it is classical Ashʿarī epistemology being overrun by Muʿtazilī rationalism.<sup>43</sup> Several contemporary Muslim writers attribute this turn to the rediscovery of al-Shāṭibī's *Muwāfaqāt fi uṣūl al-sharīʿa*. Thus, Riḍwān al-Sayyid specifically states that Muḥammad ʿAbduh (d. 1905) was familiar with it,<sup>44</sup> and Muḥammad ʿAbdallāh Drāz (died in the 1980s), noted that ʿAbduh

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<sup>39</sup> See Masud's discussion for more details on this: Masud, *Islamic Legal Philosophy*, pp. 152-6.

<sup>40</sup> *Ibid.*, p. 156.

<sup>41</sup> For these first two points, see Albert Hourani, *Reason and Tradition in Islamic Ethics* (Cambridge University Press, 1985), and Majid Fakhry, *Ethical Theories in Islam* (Leiden: E. J. Brill, 1991).

<sup>42</sup> This is not to say that one could come up with an application that would contradict a known injunction in the Qurʾān or the Sunna. No *uṣūlī* manual, to my knowledge, teaches that textual injunctions can be overruled, but even this rule is being called into question, even in some conservative circles—for instance, Mohammad Hashim Kamali, "Issues in the Understanding of *Jihād and Ijtihād*", in *Islamic Studies* 41, 4 (2002), pp. 617-34 and Soualhi Younes, "Islamic Legal Hermeneutics: The Context and Adequacy of Interpretation in Modern Islamic Discourse", in *Islamic Studies* 41, 4 (2002), pp. 585-615.

<sup>43</sup> Richard C. Martin and Mark R. Woodward argue that "[m]odern Islamic thought, in the writings of theologians like Muḥammad ʿAbduh, has incorporated elements of both rationalism and traditionalism". Richard C. Martin and Mark R. Woodward, *Defenders of Reason in Islam: Muʿtazilism from Medieval School to Modern Symbol* (Oxford: Oneworld, 1997). This is perhaps a more careful way of defining the tensions today, rather than using the medieval terms, Ashʿarism and Muʿtazilism. Yet writers like Hashmi (cf. his "Islamic Ethics") do not shy away from using these categories (see below on ʿAbduh).

<sup>44</sup> Riḍwān al-Sayyid, "Contemporary Muslim Thought and Human Rights", in *Islamochristiana* 21 (1995), 27-41, here p. 34.

often exhorted his students to read this book.<sup>45</sup> More recently, Ebrahim Moosa asserted that al-Shāṭibī “made two major contributions”:

1) he advanced the case of purposive interpretation, arguing that the purposes (*maqāsid*) of the revealed law (Shari‘ah) can be established by way of juristic induction; and 2) he labored to prove that the legislative purpose was inscribed and sutured into the very texture of life, provided that the juristic vision was sufficiently honed to read it correctly from the “book of life.” There was now, with the advent of Shāṭibī, an alternative to the rigidity imposed by the Shafite legacy. One of the unforeseen outcomes of purposive interpretation was that it accentuated a Qur’anic intertextuality where the interpretive process itself was guided by the primary values of the Qur’an, derived inductively.<sup>46</sup>

The preceding considerations lead us to assert that the search for adaptability in Islamic *fiqh* of the modern period has emphasized above all the hermeneutical tools of *maṣlaḥa* and *maqāsid al-sharī‘a*.<sup>47</sup> Not surprisingly, the first constitution to be drafted in a Muslim country (the 1860 Tunisian Constitution) signals this shift of emphasis. Its preamble begins with the phrase, “God ... who has given justice as a guarantee of the preservation of order in the world, and has given the revelation of law in accordance with human welfare (*maṣāliḥ*)”. A similar wording is found in the opening paragraphs of the “Pact of Security” (*Ahd al-amān*) promulgated by the Tunisian ruler, Muhammad Bey, three years

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<sup>45</sup> See his “Introduction” to the four volumes he edited of Abū Ishāq al-Shāṭibī’s *al-Muwāfaqāt fī uṣūl al-sharī‘a* (Beirut: Dār al-Ma‘rifa, 1975), p. 13. Drāz compares the *Muwāfaqāt* to “a fly swatter chasing away those boastful swindlers who live like parasites off of the various disciplines of the holy *sharī‘a*, who claim to be masters of *ijtihād* though without any of the means to reach it” (p. 9).

<sup>46</sup> Moosa, “The Poetics and Politics”, p. 17.

<sup>47</sup> Malcolm H. Kerr saw *maṣlaḥa* as a principle of renewal in the work of Muslim jurists over the centuries in his classic work, *Islamic Reform: The Political and Legal Theories of Muḥammad ‘Abduh and Rashīd Riḍā* (University of California Press, 1966): “The element in their jurisprudence which the modernists have particularly seized upon as the basis for dynamism and humanism is the notion of *maṣlaḥa*” (p. 55). See also Albert Hourani’s *Arabic Thought in the Liberal Age 1798-1939* (Cambridge University Press, 1983, pp. 150f and 233f). Birgit Krawietz’s study of Muslim legal documents in the field of medicine shows that this theory has enabled some jurists to allow the removal of organs from the dead to benefit the living (“*Darūra* in Modern Islamic Law: The Case of Organ Transplantation”, in *Islamic Law: Theory and Practice*, eds. R. Gleave and E. Kermeli (London & New York: I. B. Tauris, 1999, pp. 185-93). See also her essay, “Postmortem Examinations in Egypt”, in *Islamic Interpretation: Muftis and their Fatwas*, eds. Muhammad Khalid Masud, Brinkley Messic, and David S. Powers (Harvard University Press, 1996, 278-85).

earlier.<sup>48</sup> In the same generation too, Khayr al-Dīn al-Tūnisī's *Aqwam al-masālik* (*The Surest Path*) affirms the principle of *maṣlaḥa* as the supreme guiding principle of an Islamic government.<sup>49</sup>

To be sure, the classical theological (*kalām*) debates between Mu'tazilites and Ash'arites over the role of human reason in discerning the divine wisdom behind the injunctions of the sacred texts are still not settled. The nineteenth and twentieth centuries did seem to mark a turn toward the more rationalist Mu'tazilite positions, and in fact, the intentions behind Islamic law (*maqāṣid al-sharī'a*) figure prominently in many manuals of *uṣūl al-fiqh* today. One influential jurist, the Egyptian Muḥammad Abū Zahra, writes in the beginning of his *Uṣūl al-fiqh*:

*Uṣūl al-fiqh* is the science that identifies the methods devised by the imams who engaged in *ijtihād* (*al-a'imma al-mujtahidūn*) in their inferring and exploration of the Islamic legal injunctions (*al-aḥkām al-shar'īyya*) from the texts (*al-nuṣūṣ*), and their construction on the basis of the efficient causes (*al-'ilal*) that stand behind their revelation. These injunctions, in turn, are related to the welfare (*al-maṣāliḥ*), which the Wise Law (*al-shar' al-ḥakīm*) aims to accomplish. This welfare [on behalf of human beings] is highlighted by the Noble Qur'an, and is pointed to by the Prophetic Sunna and the Muhammadan guidance (*al-hudā al-muḥammadī*).<sup>50</sup>

By way of summary, these are the ingredients I see as constituting a "maqāṣidī" or purposive approach to Islamic law:

1. A move from the majority classical position of Ash'arism toward the minority position of Mu'tazilism in ethics: God observes standards of justice and goodness, because they exist in and of themselves, i.e., ethical objectivism (ontology).
2. A Mu'tazilite position in epistemology, which teaches that human reason is able to discern right from wrong.

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<sup>48</sup> "Praise be to God who has opened up for truth a way, and brought about justice as a guarantor of the world's order and sent down the laws (*al-aḥkām*) according to people's needs (*al-maṣāliḥ*)", in *al-Qutr al-tūnisī fī ṣaḥwat al-ḥ'ibār bi-mustawḍa' al-amṣār wa-l-aqtār li-Muḥammad Bayram al-Khāmīs*, edition and notes by 'Alī Shannūfī, 'Abd al-Hafīz Maṣṣūr and Riyāḥ Marzūqī (Tunis: Bayt al-Hikma, 1989), p. 128.

<sup>49</sup> Carl Leon Brown, *The Surest Path: The Political Treatise of a Nineteenth-Century Muslim Statesman*, Harvard Middle Eastern Monographs 16 (Harvard University Press, 1967), pp. 61, 72.

<sup>50</sup> Muḥammad Abū Zahra, *Uṣūl al-fiqh* (Cairo: Dār al-Fikr al-'Arabī, 1958), p. 3.

3. It follows that human minds are able to connect with the divine mind in discovering the ethical rationale behind the injunctions of the sacred texts (Qur'ān and Sunna).
4. This procedure results in the gathering of general purposes—ethical imperatives on a universal scale—which the Creator built into His revelation and which He intends Muslims to use as guidelines for the enactment of civil laws (*mu'āmalāt*).
5. A natural distinction is then made between the universal ethical principles as enshrined in the *sharī'a* (infallible revelation), and the human (fallible and changing) attempts at applying them in the human sociopolitical sphere (*fiqh*).
6. Some contemporary Muslims—jurists or not—take this hermeneutic to its logical conclusion, claiming that even specific injunctions of the Qur'ān may be displaced—a crucial move in the realm of human rights (e.g., the full equality of women and non-Muslims before the law, or the freedom to change one's faith).

In the next two sections, among the books consulted about Islam and human rights, I have selected a handful of authors who have taken stock of this hermeneutical turn—but within two main categories. The first group is represented by those who begin to apply this principle, but who make no change of substance to the traditional corpus of Islamic jurisprudence (# 4). The writers of the second group decidedly break new ground (# 5 and # 6) by moving away from the textualist paradigm of classical Islamic jurisprudence (some more consciously than others), and by allowing for new rulings that run counter to certain literal injunctions in the sacred texts.

### ***Maqāṣid al-sharī'a* in a traditionalist setting**

Among the recent publications on Islam and human rights one finds several without any mention of this hermeneutical strategy.<sup>51</sup> Most

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<sup>51</sup> Muḥammad Aḥmad Faṭḥī, and Sāmī Ṣalāḥ al-Wākil, *Huqūq al-insān fi l-fikr al-gharīb wa-l-shar' al-islāmī: dirāsa muqārana* (Beirut: Dār al-Naḥḍa al-Islāmiyya, 1992); 'Abd al-Nabī Ḥasan 'Abd al-Wahhāb, "Huqūq al-insān wa-wājibātuhu fi l-islām", in *Qadaya al-Islāmiyya* 57 (Cairo: al-Majlis al-A'lā li-Shu'ūn al-Islāmiyya, 2000); a Palestinian legal expert, trained in Egypt, Muḥammad 'Abd al-'Azīz Abū Sakhīla, *Huqūq al-insān fi l-sharī'a al-islāmiyya wa-*



authors from a conservative perspective, however, do refer to the purposes of the divine law (*maqāṣid al-sharī'a*), and this to emphasize the need for a mechanism of adaptation to changing conditions.<sup>52</sup>

This is the case of Shaykh Muḥammad al-Ghazālī, who began his association with the Egyptian Muslim Brotherhood in the 1940s and became one of their most eloquent moderate spokesmen as an *'ālim* trained at al-Azhar. But when the movement increasingly clashed with the Sadat and Mubarak regimes, he accepted a job as rector of the newly built Constantine Islamic University (Algeria) in 1981, and became the *de facto* Grand Mufti of Algeria through his regular media appearances and high level consultations.<sup>53</sup> He returned to Egypt in the early 1990s where he died in 1996.<sup>54</sup> In a book on Islam and human rights he compared the teachings of Islam with the articles of the 1948 UDHR.<sup>55</sup> From the beginning, he emphasized that it was the Islamic civilization

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*qawā'id al-qānūn al-dawli*, (n. p.: Maṭābi' al-Khaṭṭ, 1985); Amīr 'Abd al-'Azīz *Huqūq al-insān fi l-islām* (Nablus, West Bank: Dār al-Salām, 1997).

<sup>52</sup> This is the case with Muḥammad Faṭḥī 'Uthmān, for instance: Muḥammad Faṭḥī 'Uthmān, *Huqūq al-insān bayna al-sharī'a al-islāmiyya wa-l-fikr al-qānūnī al-gharbi* (Beirut: Dār al-Shurūq, 1982), who devotes ten pages to the systematic exposition of al-Shāṭibī's theory of *maqāṣid al-sharī'a* (pp. 41-51), but ends up with the standard view of an "Islamic state" that guarantees the freedom of expression and religion for non-Muslims, yet without abolishing the apostasy law. That is an internal matter for the Islamic state to decide, he writes, and it has already been made clear by the tradition. The UN, therefore, has no right to interfere (pp. 102-106).

<sup>53</sup> Luc-Willy Deheuvels notes that al-Ghazālī was named to the Orientation Bureau (*Maktab al-Tawjīh*) of the Muslim Brotherhood in 1951 and was in the forefront of the movement to islamize Egyptian law under Sadat's presidency in the early 1970s. With his book *From Here We Know (Min hunā na' lanu)* he established himself as one of the main islamist ideologues, along with Sayyid Quṭb, 'Abd al-Qādir 'Awda and Muṣṭafā al-Sibā'ī. Cf. Luc-Willy Deheuvels, *Islam et pensée contemporaine en Algérie: la revue al-Asala 1971-1981* (Paris: Editions du CNRS, 1991), pp. 65f. While living in Algeria in the 1980s, I noticed that he always preached the Friday sermons on National Algerian television.

<sup>54</sup> Gilles Kepel writes that he maintained his television presence in Egypt during his stay in Algeria and that he was called upon by the defense as a witness in the trial of the assassins of the secular journalist Farag Foda in June 1993. To the dismay of the Mubarak regime, he called anyone who fought the imposition of the *sharī'a* an apostate worthy of the death penalty. Since there was no Islamic state to carry out the penalty, these killers are not blame-worthy: cf. Gilles Kepel, *Jihad: The Trail of Political Islam*, tr. Anthony F. Roberts (Cambridge, MA: The Belknap Press of Harvard University, 2002), p. 287. For the best recent treatment of al-Ghazālī's work, see Ibrahim M. Abū Rabi', *Contemporary Arab Thought: Studies in Post-1967 Arab Intellectual History* (London: Pluto Press, 2004), pp. 223 – 241.

<sup>55</sup> Muḥammad al-Ghazālī, *Huqūq al-insān bayna ta'lim al-islām wa-ī'lān al-umam al-muttaḥida* (Cairo: Dār al-Kutub al-Islāmiyya, 1984).

that passed on to the west both its scientific methodology and its concern for the worth of the human person. The current debate about human rights deals with principles that were laid down in the Qurʾān and Sunna many centuries ago. Sadly, he lamented, Muslims have forsaken the pristine Islam of the first generation and have now fallen behind western civilization as a result. Al-Ghazālī quotes the poet Khalīl Jibrān: “People are like two men: one is asleep in the light; and the other wakes up in the dark.” Now is the time, he asserts, for Muslims to wake up in the dark.<sup>56</sup>

What is distinctive in Islam, al-Ghazālī continued, is its stress on the value of *insāniyya* (“humaneness”)—one of several values acquired by the community’s resistance to the many dictators who have consistently trampled on human dignity. Islam “grants the human person (*insān*) an independent life—a fact which clarifies the rights bestowed on each person, and even more, which details those rights in a way that negates any ambiguity or debate”.<sup>57</sup> The human race is one (quoting a series of verses and *aḥādīth*), and whereas Muslims from the beginning treated blacks, Christians and Jews, and people of lower class as equals, Jews have discriminated against non-Jews. At this point, al-Ghazālī’s argument moves from apologetics to polemics. It is clear that the current version of the Torah has been falsified, he asserts, because in it we read that God ordered all manners of genocide and discrimination.<sup>58</sup>

But what about the UN Declaration of 1948? According to al-Ghazālī, formerly Christian nations (now secular and, ironically, controlled by Jewish power he argues) after centuries of colonialism and oppression have now declared that international relations must be controlled by a law based on human rights valid for all individuals and nations. This is hypocritical, he objects, as foreigners in western lands do not possess the same rights as local citizens. Since Christianity made no stipulation in

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<sup>56</sup> *Ibid.*, p. 6.

<sup>57</sup> *Ibid.*, p. 11. He then presents the oft-repeated contemporary gloss on *sūrat al-baqara* 2:30: “The human destiny in the shade of Islam is elevated, and their destiny is lauded, making them lords on earth and in heaven. This is because they carry within them the breath of God’s Spirit, and a spark from his holy light. That divine appointing is what prepares humans to be God’s deputies (*khalīfat Allāh*) on his earth” (cf. note 14). For a full treatment of similar interpretations, see David L. Johnston, *Earth, Empire and Sacred Text: Muslims and Christians as Trustees of Creation* (London: Equinox, 2007).

<sup>58</sup> *Ibid.*, pp. 38-42.

terms of laws and political norms, the concept of human rights cannot be attributed to its influence—this is simply an *ad-hoc* arrangement forced upon Muslim nations under Western hegemony.<sup>59</sup>

In the midst of his polemics al-Ghazālī pays tribute to the spirit of the *sharʿa* when he writes that “divine legislation (*sharʿ*) is the welfare (*maṣlaḥa*) of the individual in this life and the next”,<sup>60</sup> and to a sense of flexibility when he asserts that...

the *sharʿa* does not stipulate all the means necessary to enforce justice... But it has left that to people’s independent legal judgment (*ijtihād*) and the development of the times. And as long as justice as seen by the Legislator is an objective pursued for its own sake, then everything that strives to reach it is *sharʿa*—even if the Legislator does not mention it or lay down its details.<sup>61</sup>

With this in mind, one would expect a reinterpretation of some of the classical formulations of *fiqh*. Yet al-Ghazālī does no such thing. In fact, he asserts that whereas western influence has imposed on Muslims the reality of nation-states and of the rights of citizens within those states, Islam believes in only two states: *dār al-islām* and *dār al-ḥarb*: “And it is not expected that Muslims grant non-Muslims the same rights in every area as they enjoy in the lands (*bilād*) of Islam... And you know that the difference of religion in the Islamic Empire (*al-dawla al-islāmiyya*) is like the difference of nationality in this age.”<sup>62</sup> Thus, when it comes to the rights of non-Muslims in a Muslim state, the legal reference is to the *dhimmī* legislation (non-Muslims as “protected”) that crystallized around the third century after the *hijra*—and not in any recent international documents. Non-Muslims are, by definition, second-class citizens of the Islamic state. This is the same position he had stated more stridently in his landmark publication of the 1950s, *From Here We Know*, in which, among other concerns, he accused a malevolent gang (*ʿiṣāba*) of Egyptian Copts of fomenting a plot to gradually take over the state.<sup>63</sup>

<sup>59</sup> *Ibid.*, p. 49.

<sup>60</sup> *Ibid.*, p. 46.

<sup>61</sup> *Ibid.*, p. 30.

<sup>62</sup> *Ibid.*, p. 43.

<sup>63</sup> al-Ghazālī, *Min hunā naʿlamu* (Cairo: Dār al-Kutub al-Ḥadītha, 1965, 5<sup>th</sup> printing), pp. 149-170. The perception of a Coptic plot which was picked up by subsequent writers in Egypt is also noted by Uriah Furman in “Minorities in Contemporary Islamist Discourse”, in *Middle Eastern Studies* 36, 4 (October 2000), pp. 1-20, here p. 11.

In his chapter on “Freedoms”, al-Ghazālī proclaims that “Islam is the religion of the *fiṭra* and the mind (*‘aql*).”<sup>64</sup> They are tied together, but he offers no explanation. The rest of his book makes it clear that revelation in all instances supersedes reason, and in this case, Islam and the UDHR part ways. For instance, in the section on “Political Freedoms” he explains what this means in our day: 1) the right of each person to hold any office they are qualified to hold, and 2) the right of each person to express his opinion about general affairs. But the context reveals again that non-Muslims actually do not possess the same rights as Muslims in an Islamic state: “Prophethood is a choice made by God, but the succession of prophethood is in the hands of people according to the truth that God has made plain; so this is something God has entrusted to Muslims—that they choose for this position the most qualified and wisest.”<sup>65</sup> As for the penalty for leaving one’s Islamic faith (whether for atheism or Christianity, he makes clear), it must be capital punishment, because apostasy is essentially rebellion against Islam, its traditions, laws and regulations, and a desire to harm its reputation and the foundation of its state—it is treason, simply put.<sup>66</sup>

Muḥammad ‘Amāra is a prolific Egyptian intellectual (with over fifty titles to date) “who called for a secular and socialist understanding of Islam in the 1960s before turning to Islamist advocacy in the 1980s and 1990s”.<sup>67</sup> But his trajectory is more complex than that. Dubbed

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<sup>64</sup> *Ibid.*, p. 58. The role of the human mind comes up in the next chapter, “Freedom of Thought”. His definition is telling: “Freedom of thought begins with the Muslim’s attachment (or “link”) to his religion, for the foundation of Islam and the heart of its message is the open book, made easy to remember; and it is required of the Umma to examine it and to make good use of it for all its regulations (*sharā’i*)” (p. 71). And when it comes to choosing between the Mu’tazila or the Ash’ariyya he does not hesitate for a moment: “With regard to the drive of the human mind to follow material things and to invent laws and create values, that is to make the mind carry a burden beyond its capacity, because it is futile to expect more than this in these domains” (p. 72). The Mu’tazila give too much weight to the mind, the capacity of which is more limited than they think.

<sup>65</sup> *Ibid.*, p. 59. This is the role to be played by the Islamic parliament, called “men of the *Shūrā*” (p. 68).

<sup>66</sup> *Ibid.*, p. 90. Naturally, this is far from the UDHR definition of freedom of thought.

<sup>67</sup> As’ad Abukhalil, “Against the Taboos of Islam: Anti-Conformist Tendencies in Contemporary Arab/Islamic Thought”, in *Between the State and Islam*, eds. Charles E. Butterworth and I. William Zartman (Cambridge, UK: Cambridge University Press, and Washington, DC: The Woodrow Wilson Center, pp. 110-133), here pp. 124f. In the literature I have found his name is spelled in three ways: ‘Amāra, ‘Imāra, and ‘Ammāra.

an “enlightened” islamist by Gudrun Krämer,<sup>68</sup> in some ways he is typical of moderate islamists in allowing that a certain amount of pluralism is necessary in the Islamic community, as long as it conforms to the general welfare of the *umma*, which is the purpose of the *sharī‘a*. Then he adds “Islam is the religion of the original human nature (*ḍm al-ḥiṭra*)... And if we conform to this nature according to which God has formed us, we will find that the agreement on the purposes and intentions is among the natural possibilities that people applaud”.<sup>69</sup> The main point of his book is that from a western perspective human rights are only optional sociopolitical and cultural privileges, whereas in Islam the entitlement of human beings is a moral necessity. Yet in practice, there seems to be little room for adaptability, as the Islamic “human rights package” has already been revealed as “the necessities of duty”:

Along with the development of human societies and their growing complexity, and with the increase of needs and necessities required to free up humankind’s resources for the purpose of creativity and invention in this life, so that humanity may attain the level of civilization on their planet akin to the level of beauty and adornment of a bride ... together with this new development appear in new form the “rights” of this human race, rather, “the necessities of duty” (*ḍarūrāt wājiba*) imposed by Islam, which become “the divinely legislated necessities of duty” (*ḍarūrāt shar‘iyya wājiba*) in order to fulfill the true “life” and the true values of humanity (*al-insāniyya*) for [the benefit of] this human race, in the fashion which befits them as God’s deputies, to Him be praise, in this existence! ... And here one might well ask: what is this heinous crime which some commit when they deprive God’s deputy of “the necessities of duty” he requires in order to fulfill his mission of deputyship in the way God has ordained?<sup>70</sup>

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<sup>68</sup> Gudrun Krämer, *Gottes Staat als Republik: Reflexionen zeitgenössischer Muslime zu Islam, Menschenrechten und Demokratie* (Baden-Baden, Germany: Nomos Verlagsgesellschaft, 1999), pp. 39, 51; the French author, Olivier Carré, a specialist of Sayyid Quṭb’s writings, mentions ‘Amāra several times in his 1991 monogram, *L’Utopie Islamique dans l’Orient arabe* (Paris: Presses de la Fondation Nationale des Sciences Politiques)—but only on the basis of two writings: *al-Islām wa-l-sulṭa al-ḍiniyya* (Islam and Religious Political Power), (Cairo: Dār al-Thaqāfa, 1978), and a paper presented in a 1980 Cairo colloquium, “Critique of the *Hākimiyya* Theory”. At this stage he is still an advocate of the separation of Islam and political power, pointing to Muḥammad’s Medina Constitution, Ibn Khaldūn’s 14<sup>th</sup> century distinction between *siyāsa ‘aqliyya* and *siyāsa ḍiniyya*, and to ‘Alī ‘Abd al-Rāziq’s work in the 1920s. ‘Amāra’s “conversion” to islamism (likely a progressive shift) deserves more research.

<sup>69</sup> Muḥammad ‘Amāra, *al-Islām wa-ḥuqūq al-insān: ḍarūrāt ... lā ḥuqūq* (Beirut and Cairo: Dār al-Shurūq, 1989), p. 115.

<sup>70</sup> *Ibid.*, p. 140.

Certainly, the stripping of any person's rights as a human being is "a heinous" crime, yet 'Amāra seems hard pressed to spell out what these precise entitlements are, and how they compare to those stipulated in the UDHR. Unlike most other works on this topic, he refuses to organize his material according to the UN Declaration. Rather, he offers seven points in seven chapters as his definition of rights: necessity of freedom, of *shūrā*,<sup>71</sup> of justice, of knowledge, of engaging in public matters, of opposition, and of organized opposition.<sup>72</sup> Here, two difficulties stand out from my perspective. First, his very definition of human rights as "the divinely legislated necessities of duty" and then second, the absence of any comment on the specific injunctions of the UDHR—both facts leave the reader with some doubt as to the mutual compatibility of his understanding of Islam with the contemporary concept of human rights.

### **The *maqāṣidī* strategy of human rights in Islam**

The literature is far too large to summarize in any useful way here.<sup>73</sup> Nevertheless I have found several publications on Islam and human rights that claim to apply a *maqāṣid al-sharī'a* strategy with a resulting framework of human rights that retains the spirit of the UDHR. As said above, it is an epistemological turn toward a relative empowerment of reason over revelation supplemented by the hermeneutical decision to follow the spirit of the sacred texts—here the ethical principles—over the various historical formulations of past *ijtihād*.

Muhammad Talbi (b. 1921), for example, is a professor of medieval Islamic history at the University of Tunis, a participant in many ecumenical colloquia, and clearly the most conservative Muslim contributor to the

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<sup>71</sup> "Consultation", from the single instance in the Qur'an (42:38), the usual Islamist code word for "democracy".

<sup>72</sup> Then follows a chapter excoriating those "experts in evil" (*ulamā' al-sū*), those "preachers of the Sultans" (*wu'āz al-salaṭīn*), who teach a quiescent Islam and submission to unjust rulers. The book ends with a dozen documents of early Islam with commentary (starting with the Medina Constitution and the Prophet's farewell sermon) to show how Islam taught the respect of human dignity and the rule of the people from the start.

<sup>73</sup> Besides the well-known work of the Tunisian *usūlī* Muḥammad Ṭāhir Ibn 'Ashūr (*Maqāṣid al-sharī'a al-islāmīyya* [Tunis, 1973]), I have found five other works published since 1995 that include *maqāṣid al-sharī'a* in their titles.

intra-Muslims discussions contained in the volume *Freiheit der Religion* (cf. note 11). Yet in answer to the prodding of his more liberal colleagues, he argues that the *sharīʿa* can meet the sociopolitical needs of Muslims today if approached in a *maqāṣidī* way—using four interdependent strategies: (1) *sharīʿa* means “path”—not a set of fixed legal theories and practice; (2) priority must be given to principles enunciated in the Qurʾān, which in comparison with the Sunna proffers only a few specific rules; (3) the values of righteousness and equality will move us to modify many of the Qurʾānic punishments (*ḥudūd*) today; (4) thus *sharīʿa* can be defined as “a path in the purpose of the Qurʾān” (*Zielrichtung*), that is, the direct use of the *sharīʿa*’s *maqāṣid* (*Zielbestimmungen*). He then goes on to say “therefore when I now grasp the aims of the Qurʾān in their rightful orientation, that is, when I am able to determine the purpose of a Qurʾānic prescription, then I can keep on traveling further along my path, on the condition of course that I keep moving in the same direction. I can therefore count on the fact that I have not betrayed the *sharīʿa*”.<sup>74</sup>

Does this “purposeful” exegesis make any difference in the application of classical Islamic jurisprudence in today’s context? He answers in the affirmative, conceding that (contra al-Ghazālī) the treatment of non-Muslims in a Muslim state is indeed a problem, but that with this perspective it can be solved. Unfortunately, he offers no specifics.<sup>75</sup>

Rāshid al-Ghannūshī is an example of a political activist with a conservative Islamic agenda, who argues his case by simultaneously engaging the Islamic juridical tradition and modern ethical and political norms of human rights and democracy. After leaving religion as a young student, then turning to the study of western philosophy, and then embracing Arab nationalism, al-Ghannūshī finally became disenchanted with the failures of nationalism, liberalism and socialism, and returned to Islam. He sees this movement as parallel to that of the Islamic *umma* in the 1980s:

Our return to Islam does not mean that we isolate ourselves from the world around us or from people who do not believe as we do. To the contrary: Islam

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<sup>74</sup> Muhammad Talbi, “Zum Problem der *umma* and der *sharīʿa* in der islamischen Welt heute”, in *Freiheit der Religion*, pp. 387-391, here p. 391.

<sup>75</sup> In his last paragraph he quipped, “Don’t expect any ready-made solutions from me! I have none—I’m neither a jurist nor a true theologian. I am much more of an historian. . .” (*ibid.*).

calls for people to live together, to cooperate and to engage in dialogue in order to strengthen and support those values of freedom, democracy, and justice. These are human values, not just Muslim values.<sup>76</sup>

In 1981 he founded an opposition party called “The Movement of the Islamic Tendency” (*Harakat al-ittijāh al-islāmī*) but his political activism was so successful, and therefore threatening to the Tunisian regime, that he found himself in prison from 1981 to 1984.<sup>77</sup> It was then that he continued his studies in earnest and wrote most of his dissertation, which was later finished and published under the title, “The General Freedoms in the Islamic State” (*al-Ḥurriyāt al-‘āmma fi l-dawla al-islāmiyya*).<sup>78</sup> He was jailed again, released, and in 1989 went into self-exile. It is not difficult to understand why he and other islamists have grown to hate “despotism” (*al-istibdād*), and why the “mainstream Islamist organizations” see that their task “is to transform society by working within existing organizations”.<sup>79</sup> The contents of the above book may well justify Ghabdian’s judgment that al-Ghannūshī’s agenda is “progressive”.<sup>80</sup>

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<sup>76</sup> This quote is taken from an excerpt of an interview by Kevin Dwyer given in his book, *Arab Voices: The Human Rights Debate in the Middle East* (London and New York: Routledge, 1991), p. 42. For an introduction to islamism in North Africa (including a discussion of al-Ghannūshī’s contribution) see John O. Voll, “Sultans, Saints, and Presidents: The Islamic Community and the State in North Africa”, and John P. Entelis, “Political Islam in North Africa: The Nonviolent Dimension”, in *Islam, Democracy, and the State in North Africa*, ed. John P. Entelis. (Bloomington, IN: Indiana University Press, 1997). The most complete analysis of al-Ghannūshī’s thought is presented by Azzam S. Tamimi, *Rachid Ghannouchi: A Democrat within Islamism* (Oxford and New York: Oxford University Press, 2001).

<sup>77</sup> In the mid-1980s he founded the party that still operates clandestinely today, *al-Nahḍa*. His moderate tendencies appear in the very naming of the party (“renaissance” or “reform”). See his appendices for the founding texts of these two parties—both of which, incidentally, explicitly renounce the use of violence. For this reason Entelis categorizes *al-Nahḍa* as a “reformist” movement (along with Algerian’s Islamic Salvation Front), as opposed to a “radical”, or “fundamentalist” party cf. John P. Entelis, “Political Islam”.

<sup>78</sup> al-Ghannūshī, *al-Ḥurriyāt al-‘āmma fi l-dawla al-islāmiyya* (Beirut: Markaz Dirāsāt al-Wiḥḍa al-‘Arabiyya, 1993).

<sup>79</sup> Nagib Ghabdian, *Democratization and the Islamist Challenge in the Arab World* (Boulder, CO: Westview Press, 1997), p. 74.

<sup>80</sup> Ghabdian writes “First, any Islamic state should provide safety valves to guard civil and political liberties and prevent any form of despotism. . . . Second, while Ghannouchi would like to see Islamists reach the goal of establishing an Islamic order, he prefers to work for the creation of a pluralistic democratic system, especially where Muslims are not a majority or do not accept Islam as their frame of reference. . . . Would Ghannouchi and his party be willing to give up power peacefully if they lose an election? “Definitely,” Ghannouchi answers. “I will withdraw to an oppositional position, prepare myself again, and run again. If I am rejected, I will try again” (cf. *ibid.*).



Al-Ghannūshī's theological point of departure in *al-Hurriyāt al-ʿamma* is the trusteeship of humanity (including his power of reasoning and free will—the condition of his *taklīf*, “responsibility to obey God’s commands”), and the *maqāṣid al-sharīʿa*. Human rights stem not from a particular philosophical view of human nature in itself (as in the west, he says), but from the act of creation of the divine legislator who empowered his human creatures to use their intelligence, their will, and their freedom as his trustees on earth in order to manage its resources and their own societies according to the blueprint revealed in the sacred texts. In this context, the human answerability to the divine law (*taklīf*) is simply the freedom to become God’s servant (*al-ʿubūdiyya*) and to apply the divine plan to one’s life and society at large—that is the true meaning of *sharīʿa*.<sup>81</sup> Yet this freedom pushes the Muslim beyond the borders of the medieval worldview of *dār al-islām* versus *dār al-ḥarb*. The trusteeship (*khilāfa*) of humanity, if properly understood, commits humans to jealously watch over their fellow human beings, and to “fight for the sake of freedom, justice and the happiness of humanity”.<sup>82</sup>

The implication here is that human rights are the endowment of all human beings by virtue of their creation, and that the concept of rights as proclaimed by the UDHR is virtually the same as the one taught by Islam. “This means that the Universal Declaration of Human Rights, for instance—in its broad lines—meets with wide acceptance among Muslims, if their legal framework (*fiqh*) has been correctly interpreted.”<sup>83</sup> Though he does not say this directly, what has changed most radically since the medieval crystallization of *fiqh* is the international context. Stating the case theologically, he argues that the Qur’ānic concept of humanity’s trusteeship entails a legal framework to implement the spirit of the *sharīʿa* in the context of today’s global society. This is right at the foundation level of al-Ghannūshī’s argument, on the second page of his

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<sup>81</sup> In his words, “Humanity in this perspective is an excellent being who takes on the responsibility to steer his own vessel, to define his destiny, in accordance with the Divine plan for his life. He is an accountable being (*kā’in mukallaḥ*), God’s servant (*ʿabd*)” (Ghannūshī, *al-Hurriyāt al-ʿamma*, p. 40). Al-Ghannūshī also figures in Charles Kurzman’s anthology with a piece entitled, “Muslim Participation in a Non-Muslim State”. Cf. Charles Kurzman, *Liberal Islam: A Sourcebook*. (Oxford University Press, 1998), pp. 87-95.

<sup>82</sup> Ghannūshī, *al-Hurriyāt al-ʿamma*, p. 41.

<sup>83</sup> *Ibid.*, p. 320. Other excellent summaries on the human caliphate can be found on pages 52 and 54.

project: “And if we are to offer the best *sharīʿa* interpretations (*al-maʿānī al-tashrīʿiyya*) in order to set up a legal framework for the liberties of humankind or his duties, we will find that the contemporary scholars of Islam almost all agree with the lucidity of the *uṣūlī* framework assembled by the venerable al-Shāṭibī in his *Muwāfaqāt*.”<sup>84</sup>

He then goes on to summarize al-Shāṭibī’s contribution. Notice his wording: “the purpose of the *sharīʿa* is to achieve the greatest benefit (*maṣlaḥa*) for humanity”. And further, expanding on the five “necessities”, he explains that the *maqāṣid al-darūriyyāt* come ...

... with the assumption that religion was revealed for the carrying out of these purposes and that it represents the general framework for conceptualizing human rights and for the protection of life, together with all the necessary means to achieve this; for the protection of the mind and that which pertains to it, like education, freedom of thought and of expression; for the protection of human progeny, and that which is required for one’s right to have a family... and for the protection of property (*māl*), and the rights which flow out of this—both economic and social.<sup>85</sup>

Al-Ghannūshī subsequently offers more details on the current consensus of Islamic scholars according to which al-Shāṭibī’s theory of the *maqāṣid al-sharīʿa* is the most useful framework for the discussion of human rights in his next section, “The General Framework of Human Rights in Islam”.<sup>86</sup> It is clear that for him this is more than a traditional discussion of the foundations of Islamic law. What he is saying is that finally Muslims have a hermeneutical filter that enables them to bypass the sterile discussions and hairsplitting of the past. In his words:

Therefore the theory of the aims of *sharīʿa* offers the Muslim a scale by which he can weigh his actions, and a hierarchy of values, measured in degrees, which classify the rules of Islam, big or small. These also provide guidance and boundaries for his freedom and help to define his rights and duties.

<sup>84</sup> *Ibid.*, pp. 38f.

<sup>85</sup> *Ibid.*, p. 39. He then outlines the contributions of al-Shāṭibī’s *maqāṣid al-hājīyyāt* and *taḥṣīnāt*.

<sup>86</sup> In footnote 16 on page 43 he writes, “I have in my hands three important contemporary volumes dealing with the questions of rights and general liberties in Islam in the context of the *maqāṣid* found in al-Shāṭibī.” He lists ‘Allāl al-Fāṣī’s *Maqāṣid al-sharīʿa al-islāmiyya wa-makārimuha*, then ‘Abd al-Hakīm Ḥasan al-ʿAylī’s *al-Ḥurriyyāt al-ʿamma* (“General Liberties”), then Muḥammad Faṭḥī ʿUthmān’s *Falsafat al-ḥurriya fī al-islām* (“The Philosophy of Freedom in Islam”).

No one can object to it, so long as his behavior stays within the scope of his rights—that is, not without regard for the general welfare. All in all, the theory of freedom in Islam rests upon the granting of freedom to the individual in all things, as long as it does not interfere with the right or welfare of society. But if it goes beyond, it becomes an aggression that must be stopped and strictly contained.<sup>87</sup>

From a legal theory perspective, as stated above, al-Ghannūshī is joining other twentieth-century conservative *uṣūlīs* who have rendered the aims of the *sharīʿa* a controlling criterion for the task of law-making—an overarching principle (*mabdaʾ kullī*) which, for him, redirects even certain injunctions of the sacred texts (particulars, or *juzʾiyyāt*). Thus, starting with the purposes of the divine law, al-Ghannūshī sets out to construct a complete philosophical and sociopolitical scaffolding around the modern conception of human rights—but always in the context of an Islamic state. In a second section he defines what he sees as the parameters of Islam and the state, and in the most substantial part of the book he discusses “The Guarantees against Oppression or the General Liberties in the Islamic Regime”. In the area of religious freedom, for instance, he calls into question the classical status of the *dhimmī* (the “protected non-Muslim”, usually Jewish or Christian), quoting with approval the Palestinian-American scholar, Ismāʿīl al-Fārūqī, who wrote that non-Muslims should live out their faith in all freedom in a Muslim context—even to “propagate the values of their identity ... as long as it does not go against the general feeling of Muslims”. Al-Ghannūshī goes further:

And if it is the right, indeed the duty, of a Muslim to address his message (*dāʿwa*) to his non-Muslim compatriot, then the latter also has the same right, and if there is any fear for the faith of the Muslims, than there is no other solution for them but to grow deeper in their faith, or to submit this as a question to their scholars. For with the modern development of the means of communication it will no longer be possible to hide or to isolate oneself completely. Thus antithetical viewpoints will reach Muslims by any means, and the only means of protection against any discussion is to offer another discussion, this one better, more intelligent, and more cogent.<sup>88</sup>

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<sup>87</sup> *Ibid.*, p. 43.

<sup>88</sup> *Ibid.*, pp. 48-51. He goes on to stipulate that Muslims and non-Muslims must be equal in all respects before the law in a Muslim-majority country (his definition of the “Islamic state” remains somewhat nebulous, though strikingly more progressive in its general outline than al-Ghazālī’s). For a recent analysis of Islamist views on the issue of “*dhimmī*tude”, see Ann Elizabeth Mayer, “Citizenship and Human Rights in Some Muslim States”, in *Islam*,

Al-Ghannūshī also tackles the issue of apostasy (recall al-Mutawakkal’s reference to him). Briefly put, he argues that capital punishment is no longer justified for a person who chooses to renounce Islam. Here, one has to distinguish between Muḥammad’s role as prophet and his role as statesman. He pardoned several people he had promised to kill (and women in all cases), and both he and the first two caliphs were lenient in cases of apostasy. Unless it is outright armed rebellion against the state, apostasy is only a religious offense to be treated by the *imām* or judge by a *taʿzīr* judgment (discretionary), not a *ḥadd* one. Among the jurists he cites as supporting this position are the two Egyptian *uṣūlīs*, ‘Abd al-Wahhāb Khallāf and Muḥammad Abū Zahra. The real challenge in the Maghreb, contends al-Ghannūshī, is finding a way to fight against the “new crusader campaign”, or the cultural war waged by the west “on the minds of our youth”. Capital punishment, besides being against the spirit of Islam, would only make things worse by turning more young people against Islam.

Tariq Ramadan is perhaps the most influential—and popular<sup>89</sup>—francophone Muslim philosopher today, with positions on human rights not dissimilar to those of al-Ghannūshī. In fact, in his recent book, *Western Muslims and the Future of Islam*, Ramadan contends that the classical *fiqh* vision of the world as divided between *dār al-islām* and *dār al-ḥarb* “constituted a human attempt, at a moment in history, to describe the world and to provide the Muslim community with a geopolitical scheme that seemed appropriate to the reality of the time”.<sup>90</sup> Times have changed, he continues: “it is becoming necessary today to go back to the Qur’ān and Sunna and, in the light of our environment, to deepen our analysis in order to develop a new vision appropriate to our new context in order to formulate suitable legal opinions”.<sup>91</sup> His message can best be summarized as a plea to Muslims in the west to shake off their double inferiority complex—*vis à vis* western culture and the often dangerous

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*Modernism and the West: Cultural and Political Relations at the End of the Millenium*, ed. Gema Martín Muñoz (London and New York: I.B. Tauris), p. 1999.

<sup>89</sup> Olivier Roy told me that Ramadan regularly speaks to audiences that are not only crowded, but also largely consisting of young people. He is routinely mobbed after his speeches with youths asking him for religious advice (personal conversation, May 9, 2004).

<sup>90</sup> Tariq Ramadan, *Western Muslims and the Future of Islam* (London & New York: Oxford University Press, 2004), p. 69.

<sup>91</sup> *Ibid.*

patronage of certain Muslim countries—and actively participate in the ethical debates as fully engaged citizens of their respective nations. In so doing, Muslims will fully claim the rights that are theirs by law, and, more importantly, contribute a wealth of ethical, religious and social values for the edification of their host societies. This effort of Islamic reformation, in turn, will enrich parallel efforts in other parts of the Muslim world.

Ramadan's theological/legal building blocks are also reminiscent of those used by al-Ghannūshī: *maṣlaḥa*, *ijtihād*, and *fatwā*. The concepts of the public interest (*maṣlaḥa*), the formulation of new legal rules covering new situations (*ijtihād*—based on the texts and the methodologies of Islamic legal tradition), and the promulgation of these rulings in response to specific requests (*fatwā*)—these are the tools that enable the Muslim community in any society to adapt to the necessary evolution of sociopolitical realities. But this must be done in a comprehensive way, Ramadan reminds his readers, and here he parts ways with al-Ghannūshī. Forget the idea of the mythical “Islamic state”, Ramadan would say to him: the *sharī'a* is “the way of faithfulness”, “the path to the spring”, and it “teaches us to integrate everything that is not against an established principle and to consider it as our own”.<sup>92</sup>

Since the ethical message of Islam is entirely focused on justice (because of the fundamental dignity of each person by virtue of creation), according to Ramadan the democratic nature of western states—with their provision for human rights and the protection of the rule of law—is rather congenial to the Muslim mindset. At the same time, there are serious challenges for Muslims, but these are best met (a) by fully integrating western society, (b) by establishing alliances with other groups that share their values, and (c) by working within the system to bring about change. This still might sound like al-Ghannūshī, yet because of the end result, the long-range vision of an “Islamic order” fundamentally different from the present one, Ramadan has embarked on a shift of paradigm, an “intellectual revolution”.<sup>93</sup> True, he is interested in fulfilling

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<sup>92</sup> He explains his long term objective thus: “We must clearly overcome the dualistic vision and reject our sense of being eternal foreigners, living in parallel, on the margins or as reclusive minorities, in order to make way for the global vision of universal Islam that integrates and allows the Other to flourish confidently” (*ibid.*, p. 54).

<sup>93</sup> *Ibid.*

the overall purposes of the *sharīʿa* and thereby invokes the same traditional methodologies of the Muslim jurists,<sup>94</sup> but this is not a means to an end.<sup>95</sup> To borrow an analogy from the gospel, Islamic values for Ramadan are like a leaven that should permeate the whole dough of western culture, causing it to rise, more in conformity with the pattern revealed in the creation of humankind. What is important is the embodiment of these values, and if they are shared by Christians, Jews and persons of other faiths, including many secular people, then cooperation is possible and, indeed, desirable. Finally, his tone is different: gone is the defensiveness and apologetics of even moderate islamism.<sup>96</sup>

As this section comes to a close, where on a traditionalist-progressive spectrum of Muslim views on human rights, one might ask, would thinkers like Talbi, al-Ghannūshī and Ramadan be found? Moosa has offered a typology of human rights schemes based on three different methodological approaches. The first approach is one that “relies on the established juristic traditions as the authoritative canon of interpretation”.<sup>97</sup> In order to function in the modern context, jurists resort to an eclectic borrowing from all schools of law. A second group claims the right to essentially bypass the received corpus of pre-modern *fiqh* and interpret the sources afresh, coming to the sacred texts with the questions posed by the realities of the contemporary world. Finally, a third group attempts to combine the first two approaches. This seems to be the case with all four of these

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<sup>94</sup> His is a classic contemporary *maqāṣidī* approach, in line with the thought of Muhammad Hashim Kamali, the Afghan *uṣūlī* who teaches in Malaysia and whom he quotes several times in his section on *ijtihād*. Cf. Ramadan, *Western Muslims*, pp. 43-46; see also my essay, “A Turn in the Epistemology and Hermeneutics of Twentieth Century *Uṣūl al-Fiqh*”. Not surprisingly, in his sections “The Conditions of *ijtihād*” and “What is a *fatwa*?”, he references or quotes al-Shāṭibī six times. Ramadan, *Western Muslims*, pp. 46-51.

<sup>95</sup> Ramadan places himself in the center of the spectrum of Muslim views. His typology is based on the interaction of sacred texts and human reason. At the conservative end, he sees the “scholastic traditionalists”, then the “*salafi* literalists” and the “political literalist *salafis*” (jihadists in Gilles Kepel’s terms), and finally, the Sufis; his “*salafi* reformism” allows him to balance out humble submission to the texts and a bold use of interpretive reasoning in sociopolitical affairs. Beyond him to the other side is “liberal reformism”, the position of those for whom reason begins to lose all serious connection with the texts.

<sup>96</sup> A separate question, though relevant to this essay, is the kind of influence wielded today by progressive writers such as al-Ghannūshī and Ramadan. For a less sanguine view, see Emmanuel Sivan’s “The Clash within Islam”, in *Survival* 45, 1 (Spring 2003), pp. 25-44.

<sup>97</sup> Moosa, “The Dilemma of Human Rights Schemes”, in *The Journal of Law and Religion* 15, 1&2, (2000-2001), pp. 185-215, here p. 195.

writers, who, by focusing on the purposes of the Law, pay respect to the “canonical interpretations of the law in a non-binding manner, while also providing creative interpretations to the sources of the law”.<sup>98</sup> Yet, as Moosa’s writing suggests, there is a fourth approach, on the far side of a daunting chasm.

### **The post-enlightenment watershed**

Muslim writers can virtually employ the same legal vocabulary and invoke the above-mentioned purposive method of jurisprudence, and yet arrive at radically different conclusions on the issues of women’s rights, the legal status of non-Muslims under “Muslim rule”—indeed, on whether or not the sacred texts have anything specific to say about politics at all. Writings on human rights from an Islamic perspective could follow the procedures of Moosa’s second and third approaches and still end up like al-Ghannūshī with an Islamic state, which is “progressive” according to some contemporary norms, yet might slowly drift back into what Khaled Abou El Fadl has coined the power dynamics of “Salafabism”—the marriage of convenience between Wahhabism and Salafism in the 1970s.<sup>99</sup>

The watershed issue is over epistemology and hermeneutics.<sup>100</sup> In the west, modernity brought with it a measure of critical knowledge that, through the use of reason and experimentation, proved to be cumulative,

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<sup>98</sup> *Ibid.*

<sup>99</sup> Khaled Abou El Fadl, “The Ugly Modern: Reclaiming the Beautiful in Islam”, in *Progressive Muslims: On Justice, Gender and Pluralism*, ed. Omid Safi (Oxford: Oneworld, 2003), p. 49-62. Abou El Fadl argues that one of the consequences of the systematic sidelining and disempowering of traditional Muslim institutions by the colonial powers was the silencing of the ‘*ulamā*’ and *fuqahā*’ (legal experts and jurists) who had generally been able to curb the abusive power of tyrants. In a world of nation states, this power vacuum has in fact accentuated the oppressive nature of the state in Muslim countries and encouraged the multiplication of self-proclaimed authoritative exponents of Islam who, for the most part, have little or no knowledge of the rich and highly nuanced Islamic juridical tradition.

<sup>100</sup> This is the central concern of Abou El Fadl’s important book, *Speaking in God’s Name: Islamic Law, Authority and Women* (Oxford: Oneworld, 2001). However, because he is focused on responding to the purveyors of today’s authoritarian legal discourses on their own terms, Abou El Fadl concentrates his arguments on the epistemology of classical Islamic jurisprudence. Although he does apply a considerable amount of current hermeneutical theory (meaning is a dynamic interplay of author, text and reader) throughout, he sidesteps the issue of the ontological status of ethical values.

and, to some extent, self-reflexive. This critical method was applied to all areas of human experience, including religion. Scholars in the nineteenth century applied the tools of the historical-critical method to study the Bible in the manner of archeologists digging for layers of past civilization. The results were often seen by more conservative Christians as a deliberate attack on the divine authority of the received text. In the Muslim world, the epistemological vision of modernity was adopted wholeheartedly in matters of science and tentatively in the social sciences; yet modern epistemology bypassed the religious sphere, except to provide fuel for the apologetic enterprise that channeled much of the reformist energies.<sup>101</sup>

Yet the philosophical seeds planted by Immanuel Kant—mainly the epistemological distinction between “Reality” as it is and “reality” as constructed by the human mind—did not produce fruit-bearing trees until the twentieth century. No doubt, the west’s arrogant imperial self-image, shattered by the sheer savageness of the “Great War”, was further eroded in the scientific realm by Einstein’s theory of relativity, Niels Bohr’s quantum mechanics, and the contention of Michael Polanyi and Thomas Kuhn that science is neither cumulative nor definitive in its answers, but rather tentative, as various paradigms, or visions of reality, compete for dominance. The study of twentieth-century philosophy of science convinced the Iranian philosopher Abdolkarim Soroush (who is both a scientist and a theologian) that the idea of science as “a competitive and collective process” aptly described the sociology of religious knowledge as well.<sup>102</sup> Eventually this led him to his theory of the contraction and expansion of religious interpretation—the useful distinction between religion (here the immutable and eternal *sharī‘a*) and the human (hence fallible) effort to interpret it in legal or theological categories. The latter, by definition, is in constant need of adaptation to changing sociocultural contexts. This is precisely the direction Mohammed Arkoun’s intellectual project has taken over the last five decades. It is nicely summed up

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<sup>101</sup> See H. A. R. Gibb, *Modern Trends in Islam* (Chicago: The University of Chicago Press, 1947), and Ebrahim Moosa, “The Debts and Burdens of Critical Islam”, in *Progressive Muslims: On Justice, Gender and Pluralism*, ed. Omid Safi (Oxford: Oneworld, 2003), pp. 118ff.

<sup>102</sup> *Reason, Freedom, and Democracy: Essential Writings of Abdolkarim Soroush*, translated, edited, and with a critical introduction by Mahmoud Sadri and Ahmad Sadri (Oxford University Press, 2000), pp. 10, 13.



in the title of one of his books, *Pour une critique de la raison islamique*.<sup>103</sup> The “Islamic reason” he is so keen to deconstruct is the logic of textual literalism that went hand in hand with certain historical interpretations of early Islam, which in turn have been reclaimed and refashioned by Salafis and neo-Wahhābīs (opposition movements) on one hand, and by traditional ‘*ulamā*’ circles firmly in the grip of authoritarian regimes in the Muslim world, on the other.<sup>104</sup>

As Michel Foucault, Edward Said and others have pointed out, no writing or reading of texts—indeed, no effort toward the production of knowledge—can be dissociated from some element of power, and especially, political power. Human rights discourse is a good example of this: it has been manipulated both by western powers to achieve greater control in the Mideast, and by opposition groups in those same countries in order to resist their governments’ attempt to curtail their activism.

Where does one draw the line between the Enlightenment project, modernity (often termed “post-Enlightenment”), and the postmodernist critique of modernity that arose in the 1970s? No doubt, it would be difficult to find any wide range of agreement on this issue.<sup>105</sup> All I want to point out here is the watershed difference between even Ramadan, who still insists that the (very) few unambiguous injunctions of the *sharī‘a* must be obeyed (in some form), and Fazlur Rahman who dared to raise the issue of the historicity of the Qur’ān.<sup>106</sup> Early on in his career he criticized Islamic orthodoxy’s inability to differentiate between the revelatory character of the Qur’ān and its indelible connection to the specific personality and context of the Prophet: “it lacked the intellectual capacity to say both that the Qur’ān is entirely the Word of God and, in an ordinary sense, also entirely the word of Muhammad”.<sup>107</sup> This is the

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<sup>103</sup> Mohammed Arkoun, *Pour une critique de la raison islamique* (Paris: Mouton-Rendel, 1984).

<sup>104</sup> This could also be stated the other way around: the pronouncement of apostasy against Professor Naṣr Ḥāmīd Abū Zayd, a protégé of Ḥasan Ḥanafī, by the Egyptian High Court, demonstrated to what extent Egyptian society had been “islamized” from the bottom up since the 1980s. The Mubarak regime thought it best not to interfere.

<sup>105</sup> For an excellent, though somewhat dated, summary of these questions from a Muslim viewpoint, see Akbar S. Ahmed’s *Postmodernism and Islam: Predicament and Promise* (London & New York: Routledge, 1992).

<sup>106</sup> See Martin and Woodward, *Defenders of Reason*, pp. 200-3.

<sup>107</sup> Fazlur Rahman, *Islam*, 2<sup>nd</sup> ed. (Chicago: University of Chicago Press, 1979 [1966]), p. 31, quoted in Martin and Woodward, *Defenders of Reason*, p. 202.

modernist position, very much like the effort of historical criticism to which many scholars submitted the Bible in the nineteenth century.

The postmodern position, however, goes further. It sets out to criticize reason itself. This is how Moosa describes the current postmodern mindset in western academia:

In the past, reason was seen as universal, held by all to articulate a set of rational truths in order to distinguish reason from tradition and emotion. ... Now, reason is a contested terrain, no longer universally and uniformly accepted as self-evident. We recognize that reason is socially constructed and that it exists and is embodied in practices and discourses. In the past one understood the self to be exclusively unique and transcendent. In fact the postmodern critique of the self suggests that it too is a product of language and discourse. The correspondence between language and reality once exerted a strong influence on our thinking and imagination of the truth. In fact it was a hallmark of early notions of modernity. Today there is a healthy skepticism of what passes for the truth.<sup>108</sup>

It follows for Moosa that the “purposive approach” to the Qurʾān and Sunna is still “text fundamentalism”.<sup>109</sup> While it has provided some needed flexibility (e.g., in the human rights debates), it remains for him a recipe for turning the text into an idol, divorced from its original historical context and cut off from its present community of interpretation. The same mistake is made by well-meaning feminists, who “make too much of a few verses of the Qurʾān that suggest reciprocal rights and duties between unequal spouses and then hasten to suggest that the Qurʾān advocates egalitarianism as norm”.<sup>110</sup> Let us simply admit, says Moosa, along with all the preceding generations of jurists, that the Qurʾān “advocates patriarchal norms”. But precisely because the Qurʾān is meant to be a “performative revelation”, calling into motion an audience that interacts with its message from within its sociocultural and political location, today’s readers in conversation with the text will understand it to lay aside patriarchy and advocate “gender justice, equality, and fairness”.<sup>111</sup>

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<sup>108</sup> Moosa, “The Poetics and Politics”, p. 40.

<sup>109</sup> Moosa, “The Debts and Burdens”, p. 123.

<sup>110</sup> *Ibid.*, p. 125.

<sup>111</sup> *Ibid.* See Michel Hoebink, “Thinking about Renewal in Islam: Towards a History of Islamic Ideas on Modernization and Secularization”, in *Arabica* 46 (1998), pp. 29-62. Hoebink conceptualizes an epistemological spectrum of Muslim thinkers who take modern thought seriously. At one end, Fazlur Rahman represents the “objective” view of reality and the ability of the human mind to apprehend historical or textual “truth”. At the other end of the spectrum, Hoebink places Ḥasan Ḥanafī as representing the “subjective” view of truth

Outside of western academic institutions, few Muslim scholars would share these postmodern epistemological assumptions.<sup>112</sup>

Can the *maqāṣidī* perspective be adopted beyond the modern/post-modern chasm? I believe Abou El Fadl demonstrates that a purposive method applied with a postmodern hermeneutic to Islamic law is not only possible, but that it proves to be particularly hospitable to human rights norms. In a recent issue of the *Boston Review*, in which Abou El Fadl provides the lead article, ten scholars respond to his arguments.<sup>113</sup> Both in his lead article and in his final response, his purpose is to provide a theological rationale in Islamic terms for the values embodied in democratic theory (representative government, limits on the power of government, and the safeguarding of basic human rights). Here is how he summarizes his own argument—a good illustration of theology intentionally constructed in context:

1) Human beings are God's vicegerents on earth; 2) this vicegerency is the basis of individual responsibility; 3) individual responsibility and vicegerency provide the basis for human rights and equality; 4) human beings in general, and Muslims specifically, have a fundamental obligation to foster justice (and more generally to command right and forbid wrong), and to preserve and promote God's law? [sic]; 5) divine law must be distinguished from fallible human interpretations; and 6) the state should not pretend to embody divine sovereignty and majesty.<sup>114</sup>

In order to emphasize again the crucial nature of Abou El Fadl's hermeneutic, let us examine his response to one of his respondents, Mo-

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(truth, as a social construction, is embedded in discourses and texts which are subject to multiple readings and multilayered interpretations). This is certainly the postmodern direction Moosa is following. The "middle position" is occupied by Mohammed Arkoun, who believes that, while they cannot access truth in any exhaustive manner, human beings can nevertheless strive to approximate it more and more closely.

<sup>112</sup> This has been Arkoun's career-long plea: that Islamic studies be conducted by Muslims and non-Muslims in the light of a multi-disciplinary, postmodern epistemology. For a recent argument in this direction, see his article, "Contemporary Critical Practices and the Qur'ān", in *The Encyclopaedia of the Qur'ān*, ed. Jane Dammen McAuliffe, vol. 1 (Leiden: Brill, 2001), pp. 412-31.

<sup>113</sup> Abou El Fadl, "Islam and the Challenge of Democracy", in *Boston Review* 28, 2 (April/May 2003), pp. 6-25. An extended version was subsequently published in the *Fordham International Law Journal* 27, 4 (Dec. 2003), online, <<http://law.fordham.edu/publications/index.ihml?pubid=300>>, and a new version is now in book form (in which al-Fadl's conclusion is longer and slightly reworked): *Islam and the Challenge of Democracy: A Boston Review Book*, eds. Joshua Cohen and Deborah Chasman (Princeton University Press, 2004). In the interest of space, the present remarks are limited to the original publication.

<sup>114</sup> *Ibid.*, 25.

hammad Fadel, a conservative Muslim, who, understandably, accuses him of being a Mu‘tazilī—a charge that for many Muslims is equivalent to “heretical”: “I do not consider myself a follower of the so-called discredited school, nor do I believe that pure reason defines what is good and moral. Instead, goodness, morality, and beauty (*husn*) are defined in an interactive dynamic between revelation, human reflection upon nature and creation, and human perception of socio-historical experience.”<sup>115</sup>

Naturally, this “interactive dynamic” between revelation, reason and its socio-historical location is vulnerable to criticism. Extreme forms of postmodernism are rightly suspected of being unable to make any ethical judgment that might be considered universal. The celebration of the local might be a necessary ingredient to the kind of pluralistic society we now inhabit on a global scale, but if one crosses the line from that into cultural relativism, then the very concept of human rights and basic norms of morality are undermined.<sup>116</sup> Abou El Fadl is intent on living with that creative tension.

As I see it, in brief, the salient theological points emanating from Abou El Fadl’s essay, specifically as they pertain to the *maqāṣidī* strategy discussed above are:

1. A commitment to ethical objectivism, based on the moral pronouncements of the Qur’ān. At stake here is the notion of justice, which has “not been subject to close examination in Islamic doctrine”. Thus the basic tension: “Does the divine law define justice or does justice define the divine law? ... If the divine law is prior to justice, then the just society is no longer about rights of speech and assembly, or the right to explore the means to justice, but simply about the implementation of the divine law.”<sup>117</sup> The political consequences are far reaching.

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<sup>115</sup> *Ibid.*

<sup>116</sup> This is a concern I share with Yale political philosopher Sheyla Benhabib, who helpfully distinguished between the “strong version” of postmodernism (that undermines feminism and all progressive causes) and its “weak version”, which one can no longer escape today, but which actually thrives on the kind of tension that people caring about human rights must necessarily live with. Cf. Sheyla Benhabib, *Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992).

<sup>117</sup> *Ibid.*, p. 9. This also represents the weak point of a postmodern epistemology, as the contemporary debates about human rights illustrate. How may “justice” be defined? The “modern” certainties of an ethic with universal, objective and foundational dimensions

2. From ontology to epistemology: human beings, by virtue of their God-ordained trusteeship, have been mandated by God to “foster justice” in the world. It follows that, by virtue of creation, they are capable of understanding what justice is.
3. Abou El Fadl explains the implications of the above from a juristic standpoint: “A reasonable conclusion would be that the value of justice ought to control and guide all efforts at interpreting and understanding divine law. This requires a serious paradigm shift in Islamic thinking.” That this is a purposive strategy is clear: “In my view, justice is a divine imperative, and represents the sovereignty of the divine. God describes God’s self as inherently just, and the Qur’an asserts that God has decreed mercy upon God’s self (6:12, 54).”<sup>118</sup> Therefore, a theology of human rights flows out of the central purpose of the *sharī‘a*: “to assure the welfare of the people” (*taḥqīq maṣāliḥ al-‘ibād*). These can be summarized, not surprisingly, in the five necessities (*darūriyyāt*), together with the lower levels of “needs” and “luxuries”: “religion, life, intellect, lineage or honor, and property.” But whereas traditional juridical practice fenced these values in through technicalities, they need to be broadened today “to serve as a foundation for a systematic theory of individual rights in the modern age”.<sup>119</sup>
4. Abou El Fadl assumes that revelation came to express God’s purposes for humanity in a specific sociocultural context (like Fazlur Rahman). But he has, like Mohammed Arkoun, Ḥasan Ḥanafī, Ebrahim Moosa and others, gone beyond the modern quest for certainty (typified by Descartes) and adopted the post-

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have been seriously eroded. For some useful indications on this debate, see for instance *Human Rights: New Perspectives, New Realities*, eds. Adamantia Pollis and Peter Schwab (Boulder, CO: Lynne Rienner, 2000), and *Human Rights as Politics and Idolatry*, Michael Ignatieff with responses from K. Anthony Appiah, David A. Hollinger, Thomas W. Laqueur and Diane Orentlicher, edited and introduced by Amy Gutman (Princeton University Press, 2001).

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*, p. 10. More explicitly, he argues “that the protection of religion should be developed to mean protecting the freedom of religious belief; the protection of life should mean that the taking of life must be for a just cause and the result of a just process; the protection of the intellect should mean the right to free thinking, expression and belief; the protection of honor should mean the protecting of the dignity of a human being; and the protection of property should mean the right to compensation for the taking of property” (*ibid.*).

modern episteme and hermeneutic that define truth as “an interactive dynamic between revelation, human reflection upon nature and creation, and human perception of socio-historical experience”.<sup>120</sup>

As a result, his juristic methodology is no longer exclusively text-based. A natural distinction is then made between the universal ethical principles as enshrined in the *sharīʿa* (infallible revelation), and the human attempts (thus fallible and subject to change) at applying them in the human sociopolitical sphere (*fiqh*).<sup>121</sup>

### **A future convergence?**

Riḍwān al-Sayyid contends that it was fairly recently that the islamists resorted to a *maqāṣid al-sharīʿa* approach to human rights.<sup>122</sup> As we have seen with al-Ghazālī, many of them have confined these rights to a traditional Islamic legal framework (with the categories of *dār al-islām* and *dār al-ḥarb*, non-Muslims as *dhimmīs*, and capital punishment for apostasy), whereas al-Ghannūshī clearly saw these categories as obsolete. In his view, the Islamic state would appear to be a Muslim-majority nation-state ruled in a way that is virtually indistinguishable from any other contemporary state whose legal and political norms are congruent with those of the UDHR.

As I have argued here, the *maqāṣidi* perspective is exactly that—a “perspective”, a choice to shift one’s hermeneutical emphasis from the letter of the text to its purpose and thus, to the ethical direction behind it. It implies a primary ontological and epistemological shift—a step away from the classical Sunni-Ashʿarī tendency toward ethical voluntarism, and a step toward granting human reason more latitude in interpreting and applying the “general edicts” of the texts (*al-aḥkām al-ʿamma* or *al-uṣūl al-kulliyā*). It does, nevertheless, leave one crucial question unresolved:

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<sup>120</sup> *Ibid.*, p. 25 (cf. note 151). This is a moderate form of postmodernism, which should be seen as “critical realism”. See Hoebink’s discussion of contemporary Qurʾānic hermeneutics: Hoebink, “Thinking about Renewal in Islam”, pp. 53-8. Texts, sacred texts in particular, still have meaning, but they are dynamically constructed by readers in particular contexts.

<sup>121</sup> This is also one of Abdolkarim Soroush’s main contentions. See his one English book, *Reason, Freedom, & Democracy in Islam*.

<sup>122</sup> Riḍwān al-Sayyid, “Contemporary Muslim Thought and Human Rights”, p. 38.

where does one draw the line between the eternal, immutable, divine *sharīʿa*, and *fiqh*, the human effort to apply it to changing sociopolitical contexts? From the above, it does seem that a greater ethical convergence between the Muslim sacred texts and current international norms of human rights (also a work in progress) will require more than a modernized *maqāṣidī* approach to Islamic law.

Perhaps another way of expressing the paradigm shift evoked by both Moosa and Abou El Fadl is to say that two related hurdles must first be negotiated: (a) ethics must become the controlling impulse in the process of *ijtihād* (with justice at the top, or “beauty”, as Abou El Fadl has it); and (b), a recognition of the dynamic nature of hermeneutics, implying that “the Qurʾān as revelation requires an audience of listeners and speakers ... an interactive audience that interacts with a performative revelation”; an audience that is cognizant of the fact that the sacred text lives within the social and political reality of communities of faith and thus, that it “occurs against the backdrop of power and history”.<sup>123</sup> As “progressive” writers are apt to remark, the authoritarian, textual-fundamentalist hermeneutic prevails in much of the Muslim world. But if al-Ghannūshī’s thought is any indication, we might also wager that the *pull* of Islamic law on the one hand (especially with a *maqāṣidī* agenda), and the increasing *push* of human rights norms in a globalized international order on the other, portend a greater convergence of the two in the future. In turn, this is likely to raise more urgently the epistemological questions Muslim scholars—so far—have been able to avoid in the modern period.

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<sup>123</sup> Moosa, “The Debts and Burdens”, p. 124; see also Reinhard Schulze, “Is There an Islamic Modernity?”, in *The Islamic World and the West: An Introduction to Political Cultures and International Relations*, ed. Kai Hafez, with a foreword by Mohammed Arkoun and Udo Steinbach, trans. from the German by Mary Ann Kenny (Leiden: Brill, 2000). His last section is devoted to the “Postmodernist criticism of modernity” and concludes that “tradition” and “modernity” are both interpretive constructs, “categories of understanding” used by a particular elite in a specific historical period. Yet modernity in this sense is not particularly western. The tension between these two poles plays itself out in all societies to one extent or another.