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When Shari'a Becomes a Science of Law

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A Thesis Submitted to the

Department of Law

in Partial Fulfilment of the Requirements for the
L.L.M. Degree in International and Comparative Law

By

Heba Abdel Halim Sewilam

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List of Abbreviations

AKP	The Justice and Development Party
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CR	Civic Reason
ER	Eternal Recurrence
FT	Fiqh al-Tamkīn
HRs	Human Rights
IMR	Independent Moral Realism
MB	Muslim Brotherhood
PIL	Public International Law
PR	Protection of religion
RoL	Rule of Law
TS	Twelver Shīʿīs
TV	Theistic Voluntarism
UDHR	Universal Declaration of Human Rights
VF	*Velayat-e-Faqih*

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Supervised by Professor Jason Beckett

Abstract

The Sharīʿa codification, privatization and reconciliation present three reform movements to scientize Sharīʿa in the manner of liberal positivism. The scientism of Sharīʿa makes Islamic law predictable, rational and objective. Its final goal is to protect Sharīʿa from the political encroachments of the ruling elites and facilitate Sharīʿa implementation in a post-colonial era. The three reform movements are, however, incapable of harmonizing Sharīʿa with the liberal norms of a scientized law. Sharīʿa codification makes the law predictable but neglects Sharīʿa's undemocratic methods of decision-making. Sharīʿa-compliant legislation is still the monopoly of the Muslim jurists and the ruling caliph. Sharīʿa privatization secularizes Sharīʿa-based arguments in the public sphere, but in the meantime, creates a politics of mistrust due to the suspicion of an Islamist hidden agenda. Sharīʿa reconciliation endeavors to unite Sharīʿa with universal human rights through a Muʿtazilī search for objective values. Yet, doubts in the ever existence of objectivity is likely to abort Sharīʿa's reconciliation attempts. In all this, the scientism of Sharīʿa is not arriving at its target of reconciling Sharīʿa with liberal laws and purposes but rather eliminating its competitive edge to a hegemonic liberalism.

Keywords: scientism, Sharīʿa reforms, codification, civic reasoning, objective morality, liberalism.

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Introduction

How to deal with Sharīʿa (Islamic law) in modern polities is a question that surfaces every time a violent or non-violent showdown occurs between Muslim-majority governments and Islamist militant/political groups. Islamists around the world have been advocating a return to Sharīʿa in the post-colonial age (1950s onwards). They reason that the independence of almost all Muslim-majority countries in the second half of the 20th century is propitious to the resumption of Islamic legal culture that colonialism has temporarily interrupted. The return to Sharīʿa, as the Islamist argument goes, is the first step towards rebuilding the Muslim countries and polities that have been devastated by years of colonial exploitation and oppression respectively.[1] Muslim-majority governments, however, are finding it hard to deliver. The Sharīʿa revival proposition is mostly nebulous, costly and controversial.[2]

The Islamists' list for advocates of Sharīʿa revival is long and mostly differ over the degree of militancy needed to realize such cause. There are the Muslim Brotherhood (MB), the Salafīs, the Wahhābīs, the Qaeda and Taliban to name but a few. The fight for power between these groups and their governments encourages Sharīʿa reform advocates to rethink methods for the revival of Sharīʿa law, albeit in a modernized form.[3] It is hoped that the inclusion of a modernized Sharīʿa, or the so-called Sharīʿa reforms, in the national laws of Muslim countries would sideline Islamist militancy and insurrections.

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[1] Former Egyptian Judge ʿAbd al-Qādir ʿAwda finds Islam *dīn wa dawlah* (religion and state) in the sense that Islam has to rule all aspects of the Muslim's life for his/her success on earth and salvation in the hereafter. Kuwaiti political scientists ʿAbdullah al-Nefeisī, on the other hand, ascertains that the history of Islam provides precedents for public oversight of the executive actions and law enforcement. See ʿAbd al-Qādir ʿAwda, *Al-Islām wa Awdāʿina al-Siyāsiyya* 60-80 (Dar al-Risālah, 1981). ʿAbdullah al-Nefeisī, *ʿIndama Yaḥkum al-Islām* 47-90 (3rd ed., Maktabat Afāq, 2013).

[2] For instance, in 1978, Egyptian parliament passed a resolution forming a special committee to review proposals to revising the Egyptian Civil Code in accordance with the dictates of Sharīʿa. The committee delivered drafts of civil and criminal laws. Yet, the draft laws were never passed for undeclared reasons. Enid Hill, *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of ʿAbdel Razzaq al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971 [Part II]*, 3 Arab Law Quarterly 182, 210-1, (1988).

[3] Islamic law reforms in the Middle East went through three phases: reforms to withhold the encroachments of legal capitulations to powerful colonists; reforms to revive the indigenous culture following independence from colonial powers and finally reforms to meet the demands of an Islamized society.

The proponents of Sharīʿa modernization hold different views over the expected reforms. Some are sceptic that reforms are currently possible.[4] Others, who are of particular interest to this thesis, form two opposites and a reconciliatory movement. The three reform movements are reconfiguring pre-colonial Sharīʿa to suit their reform purposes. The first movement advocates a total Sharīʿa enforcement through a codification of its rulings to replace the current positive laws of the Muslim countries. It aims at providing predictability of Sharīʿa law in accordance with the legal demands of the modern nation-state. The second movement proposes to oust Sharīʿa from any legal debate and relegate it to the private sphere. Its goal is to establish a non-religious justification for legislative decisions. The third is an attempt to found objective values within Sharīʿa that would reconcile Islam with universal human rights (HRs).

The three reform proposals suggest three aspects of the scientific foundation of law: predictability, reasoning and objectivity. The question that this thesis tries to answer is what are the possible effects of legal scientism on the development of Sharīʿa? Put differently, what happens to Sharīʿa when it becomes a science of law in the way these movements propose? I am here to argue against the viability of these movements. They are ineffective in modifying Sharīʿa to agree with a liberalist perception of law as possessing a democratic standard for decision-making, a non-metaphysical deliberation for vote-taking and a progressive morality.

The Sharīʿa codification movement introduces predictability as a solution to the confusing multiplicity of Sharīʿa. However, it does not help mitigate the excessive authority of Sharīʿa jurists. These legal experts have maintained a firm grip over Sharīʿa legislation under a protection-of-religion pretext. The Sharīʿa/HRs reconciliatory movement proposes an ambiguous Muʿtazilī objectivity in Sharīʿa to concur with HRs. Nevertheless, it refrains from giving any position on how this objectivity can influence Sharīʿa's controversial corporeal punishments. The Sharīʿa privatization movement appeals to secular reasoning in legislative decisions. Muslims are required to refrain from arguing Islam in their law-establishing deliberations. This condition undermines

[4] Wael Hallaq, for instance, is sceptic that the *realpolitik* of the modern state in the 21st century can abide by the doctrines of Sharīʿa, especially those related to the total independence of legislation from state control. Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* 37-73 (Columbia University Press, 2013).

Sharīʿa in face of atheism and liberal values, especially that the latter places additional constitutional limitations to proposing Sharīʿa in the public sphere.

To prove my claim, I am dividing this thesis into four chapters. The first chapter outlines the ideas of the three reform movements: Sharīʿa codification, privatization and reconciliation. I focus on the ideas of what I regard as the core reformists of every movement to give an adequate review of their proposals in the given space. The second chapter tackles codification's main concern with predictability. I show that predictability necessitates the singularity of the state's law, a matter easy to accomplish by official jurists. However, who gets to decide the law is still a matter to be resolved by traditional undemocratic means: the expertise of the jurist and the power of the caliph. No mention of the laity.

The third chapter deals with the Sharīʿa privatization movement's suggestion of civic reasoning (CV). CV imposes on Muslims the moral duty to use secular reasoning rather than religious in their public deliberations on legal issues. Liberally perceived constitutionalism, citizenship rights and HRs further delineate law-constituting deliberations. These secular restrictions make the movement likely to promote hypocrisy in the public sphere rather than civic solidarity.

The fourth chapter discusses the objectivity thesis of the Sharīʿa reconciliation movement. The movement leans towards founding natural law in Islam by reviving the defunct Muʿtazilī school of theology. The school emphasizes reasoning in discovering objective values that appeal to all humans and religions. Nonetheless, the movement faces serious challenges, notably, from the dearth of Muʿtazilī works and doubts over the universality of the HRs in Western thought. I conclude my thesis with an affirmation that Sharīʿa and liberalism cannot be reconciled. Despite the endeavors to harmonize both through scientizing Sharīʿa, both Sharīʿa and liberalism maintain irreconcilable first principles. The hegemony of one over the other or their continuous struggle, as happened in Turkey/EU relations, is their likely destiny.

I situate my text in an Islamic law studies and borderline Western legal thinking. The choice is not optional as all the legal thinking of the reform movements are a Western transplant. In referring to Western thought, I am not conducting a comparative

study between Sharīʿa and Western jurisprudence but simply verifying the origins of the reform movements. My aim is to show that the borrowed reform thoughts lack true engagement with their foreign sources. These sources, if revisited, have unresolved problems that may complicate Sharīʿa's reform proposition when left ignored.

I. Sharīʿa Reform Movements

The scientism of Sharīʿa is an attempt to reconfigure Sharīʿa along lines of the Western science of law. The ultimate aim is to enforce the currently marginalized Sharīʿa in Muslim-majority countries. The scientism movement, which was never identified as such, has started in the late 19th century and continues to date. It comprises many sub-reform movements wishing to show that Sharīʿa could live up to the Western challenge that law is a science. As Malcolm Kerr rightly comments the Western model has placed a double-standard imperative on Islamic reforms in the last 200 years: to be no less advanced than Europe and no less Islamic than the conservative tradition of Islam.[5] In this chapter, I give a brief survey of three scientism of Sharīʿa movements: the codification, the privatization and the reconciliation. The three movements experiment with the double-standard imperative to make a modernized Sharīʿa appealing to Muslim legislators.

A. The Codification of Sharīʿa

Codifying Sharīʿa rulings was first contemplated in Sunnī Islam in the 8th century. Ibn al-Muqaffaʿ (d. 757), a Muslim author and translator, urged caliph Abū Jaʿfar al-Manṣūr to unify the ever-multiplying Sharīʿa law across the Muslim lands through codification. His view was that a Sharīʿa code would recognize a single ruling on every particular issue and forbid the application of all others. This way, equality before the law would be possible throughout the Islamic caliphate.[6] Ibn al-Muqaffaʿ's proposal was never put into practice especially that renowned jurists, such as, Imām Mālik (711-795)[7] refused the request of caliph Harūn al-Rashīd to codify the Mālikī law as the recognized law of the caliphate.

[5] Malcolm H. Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad ʿAbduh and Rashid Reda* 16 (University of California Press, 1996).
[6] Fāṭima Selīm al-ʿAwwa, *ʿAqd al-Taḥkīm fī al-Sharīʿa wal-Qānūn: Dirāsa li-Taqnīn al-Fiqh al-Islāmī wal-Taʾthīr al-Tashrīʿī li-Majalat al-Aḥkām al-ʿAdliyya* 46-7 (al-Maktab al-Islāmī, 2002).
[7] The Mālikīyya school, one of the extant four schools of law in Sunnī Islam, is named after Imām Mālik.

Imām Mālik's reasoning was that unifying Sharīʿa law would replace the people's customary laws with unknown ones in non-Mālikī regions.[8] Only in the 19th century did codification of Sharīʿa come to life. At the hands of the Ottomans, the first civil law code, known as the Mejelle, was drafted and ratified in 1876. The code included contracts, sales, evidence and civil law procedure. The Mejelle's lifespan was short as it was abolished in 1926 and replaced by a Swiss-patterned civil law code in Turkey, following the abolishment of the Ottoman caliphate in 1924.[9]

The codification of Sharīʿa law is an idea that never really died out. ʿAbdel al-Qādir ʿAwda (1906-1954), former Egyptian judge and MB member, sought the enforcement of Sharīʿa through a codification of its rulings. This time, however, it was the codification of Islamic Criminal Law that formed the topic of his Sharīʿa reforms. His attempt produced a criminal law code known as *al-Tashrī' al-Jināʾī* (criminal law legislation). The code is a compilation of the *ḥudūd* laws (textually specified crimes and their punishments). These laws, complains ʿAwda, are mentioned in an unsystematic way in the various books on Islamic law and jurisprudence. Thus, comes his task of compiling and rearranging them along lines of Western codification.[10]

ʿAwda's code comprises chapters on the famous seven *ḥudūd* laws of theft, wine drinking, adultery/fornication, apostacy, slander (a false claim of committing fornication or adultery), highway robbery and armed rebellion. *Qiṣāṣ* (*jus talionis*/retaliation for homicide and battering) is given a separate section for it does not fall under *ḥudūd*. Every chapter commences with the Qurʾānic and the Prophetic text on the crime. It then defines the crime according to the ordinance of the divine text; it delineates its conditions and exceptions and finally it states its punishment. From ʿAwda's perspective, a codified criminal law of Islam may enhance knowledge of the law and facilitate its enforcement.[11]

ʿAwda's code was never adopted in his home country, Egypt. Since the end of the 19th century, Egypt has been following consecutive French-patterned criminal law

[8] *Id.* at 48.
[9] *Id.* at 69-83.
[10] ʿAbdel Qadir ʿAwda, *Al-Tashrīʿ al-Jināʾī al-Islāmī Muqāranan bil-Qānūn al-Waḍʿī* 9-11 (vol.1, Maktabat Dār al-Turāth, 2005).
[11] Id.

codes. The 1937 code, for example, approved the penal concepts of fines, incarcerations and death by hanging. ʿAwda himself studied these laws in Cairo University and followed their categorization of crimes according to punishments in codifying Sharīʿa's criminal law. Nevertheless, ʿAwda's code is of great significance as it concretizes the possibility of enforcing Sharīʿa's corporeal punishments in a post-colonial context. Through the code, Sharīʿa's punishments of flogging, stoning, amputations and crucifixion made a comeback, at least culturally, in the modern times.

Today, the code is cited in every textbook as the ought to-be norm for Muslim-Majority countries.[12] Although countries, such as Saudi Arabia, shied away from codifying its Sharīʿa-based substantive criminal law,[13] countries like the United Arab Emirates codified the *ḥudūd* alongside a positive criminal law. The Emirati Criminal Law is thus divided into codified positive law crimes and punishments and uncodified *ḥudūd*.[14] A person committing a *ḥudūd* crime, such as, adultery would receive a Sharīʿa-based corporeal punishment, while a person committing a non-*ḥudūd* crime, such as, libel would be fined or incarcerated. In Shīʿī Islam, Iran has already introduced the *ḥudūd* in its Criminal Law Code of 1991. The code classifies crimes along lines of Sharīʿa's corporeal punishments of *ḥudūd* (death, flogging and crucifixion) and *non-ḥudūd crimes*, known as *taʿzīrāt* (flogging). The penalties, however, are not strictly observed. Stoning for adultery, for example, is replaced by a death penalty or a prison term and *taʿzīrāt* by incarceration and fines.

B. The Privatization of Sharīʿa

Restricting Sharīʿa to the private sphere is a concept that developed in many Muslim-majority countries around the time of abolishing the Ottoman empire in 1924. Secularists in Muslim countries introduced nationalism to fill the identity gap that the Ottoman fall had left behind. Kemalism in Turkey, Nasserism in Egypt and Baathism in Syria and Iraq were all nationalist movements that based their laws on secular

[12] Muḥammad ʿAlī Maḥgūb, *Al-Tashrīʿ al-Islāmī wa Naẓariyyātuhu al-ʿAmma al-Jināʾiyya wal-Madaniyya fi al-Sharīʿa wal-Qānūn* 212 (Akadimiyyat al-Shurṭa, no given date).
[13] Only Saudi Procedural Criminal Law is codified.
[14] Butti Al-Muhairi, *The Islamisation of Laws in the UAE: The Case of the Penal Code*, 11 Arab Law Quarterly 350, 350-1 (1996).

arguments away from the precepts of Sharīʿa. Yet, the separation of church and state that gave rise to the relegation of religion to the private sphere in secular Europe was never contemplated in Islam. Islam does not have a church nor an ecclesiastical order to conduct the retreat. It is, as many Islamist reformists claim, a religion and a system of government. It comprises rulings on *ʿibādāt* (rituals) and *muʿāmalāt* (transactions/dealings). None of them may be followed separately.[15]

Secular Muslims were, according to the Islamist claim, oblivious of the temporal/spiritual union in Islam because colonialism has made them erroneously believe that Islam has no role to play in their public life.[16] Islamist arguments of this type have sparked a forceful return to Sharīʿa, albeit in different degrees. In 1980, Egypt amended its 1971 Constitution to recognize the principles of Sharīʿa as "the" main source of law. Saudi Arabia applied more conservative laws following the 1979 occupation of Mecca's holy shrine, al-Kaʿba. Iran enforced a *ḥudūd* law after the success of the Iranian revolution in ousting the secular rule of the Shah in 1979.

No matter the counter arguments, the privatization of Sharīʿa or its ousting from the public realm is a reform leitmotif. ʿAbdullahi Ahmed An-Na'im (1946-), professor of Islamic law in the US, has been for decades promoting the ideas of his late professor Maḥmūd Muḥammad Ṭaha (1909-1985), a Sudanese religious thinker and politician, executed in 1985. Ṭaha contends that Sharīʿa's reform ought to be conducted by following the early Meccan verses of the Qurʾān rather than the late Medinan ones. The Meccan verses, observes Ṭaha, focus on the spiritual relationship between man and God, while the Medinan on human interaction and transaction. By grounding Sharīʿa reforms in the Meccan spirituality rather than the Medinan legality, Sharīʿa is not the law of the Muslim countries but a source of moral guidance to their societies and governments alike.[17]

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[15] ʿAwda, *supra* note 1, at 60-4.

[16] Blaming the marginalization of Sharīʿa on colonialism is a recurring theme in many Islamist writings, whether of Sunnī or Shīʿī orientation. For the Shīʿī blame discourse, *see* Imām Khomeini, *Islamic Government* 7-10 (trans. Hamid Algar, The Institute for Compilation and Publication of Imām Khomeini's Works, no given date). For the Sunnī, *see* also Muḥmūd Muḥammad Ṭaha, *Taṭwīr Sharīʿat al-Aḥwāl al-Shakhṣiyya* 7-9 (3rd ed., no given publisher, 1979).

[17] ʿAbdullahi An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* 52-68 (The American University in Cairo Press, 1990).

Ṭaha calls the Meccan verses *ayāt al-uṣūl* (the founding verses) and the Medinan *ayāt al-furūʿ* or *al-wiṣāya* (the ancillary or guardianship verses). Following the Meccan not the Medinan, the legislator may avert the controversial Sharīʿa laws on gender inequality, such as those on marriage, divorce and inheritance and the relegation of religious minorities to the level of second-class citizens. Instead, she may adopt more dignified and equality-based laws, while still subscribing to Sharīʿa principles.[18]

Later in his research, An-Na'im furthers the distance between Sharīʿa and legislation by advocating CV,[19] a term that refers to a rationale in legal reasoning common among all citizens of a given Muslim state. An-Na'im maintains that citizens wishing to enforce any Sharīʿa law must argue the validity of that law through a common reasoning acceptable to all fellow citizens, Muslims and non-Muslims alike. Otherwise, the adoption of Sharīʿa morality, without sound reasoning and acceptance, would jeopardize An-Na'im's argument for state neutrality.[20] This is because the state in adopting a Sharīʿa-based legal argument would be siding with Islam, while neglecting other religions.

In a CV sense, the morality of Sharīʿa must be rationalized or rather secularized to become part of state legislation. An-Na'im does not explain how he reconciles this later view with his early advocacy of Ṭaha's Meccan verses. Although Ṭaha eliminates the Medinan law of subordination, such as those of half inheritance for women and obedience-for-maintenance in marriage, he still affirms the use of a Meccan Islam-based argument to sanction gender equality laws and their like in Muslim-majority countries.[21] This contradiction is soon explained away once we think that An-Na'im's proposition for the secular rationalization of Sharīʿa arguments to make them appeal to the dictates of CV will have to be carried through Ṭaha's Meccan method of interpreting Islamic principles and laws.[22]

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[18] Ṭaha, *supra* note 16, at 53.
[19] ʿAbdullahi An-Na'im, *Islam and the Secular State: Negotiating the Future of Sharīʿa* 7 (Harvard University Press, 2008).
[20] An-Na'im's position on state neutrality is to too brief to give a clear thesis on the issue. What he appears to be advocating is the separation of the state powers from a particular partisan politics. *Id.* at 6-8.
[21] Ṭaha, *supra* note 16 at 55-8.
[22] Badredine Arfi, *Pluralism to-come and the Debates on Islam and Secularism*, 49 Philosophy and Social Criticism 655, 656 (2015).

C. The Reconciliation of Sharīʿa with HRs

Like positivism, Sharīʿa is a pedigree law.[23] To certify a law as Islamic, the law must be directly or indirectly derived from or confirm with a set of rules entrenched in a compendium, known in Sharīʿa as *al-naṣṣ* (the text). The Text here is that of the revealed word of God, the Qurʾān, and the sayings and actions of Prophet Muḥammad, the Ḥadīth or Sunna. And like positivism, Islam would only accept justice in the absolute insofar as it does not offend a repugnancy clause. Thus, any justice principle, like equal treatment before the law, has to run through the filter of Sharīʿa standards before being sanctioned as state law.

This textual testing has driven many Muslim intellectuals to come up with different methods to align Islam with HRs' principles. Ṭaha's abovementioned employment of Meccan verses is one of these methods. Other reformists have attempted a direct reading of the Text or an interpretation of a particular Qurʾānic verse. Founding HRs in Islam through the use of the Medina Charter is an example of the first. Prophet Muḥammad drafted the Charter in 622 following his migration to Medina. It recognizes protection rights for all the tribal inhabitants of the Medina, regardless of their religion, by endorsing an alliance among them. Today, the Charter is taken as the basis for a constitutional government in Islam. The government is constitutional in that it provides equal citizenship rights to inhabitants of different religious affiliations living within its jurisdiction.[24]

Of the second method, i.e., expounding the meaning of a certain verse, the reading of verse 3:104 on "enjoining the good and forbidding the bad" is of incomparable fame. The verse is often coupled with the Ḥadīth that orders a Muslim to change any wrong she encounters "with her hand, her tongue or her heart." To date, both texts legitimate the right to fight a *jihadi* war against misguided Muslims and non-Muslims, to speak truth to power and, legally, to file *al-ḥisba* lawsuit. *Al-Ḥisba* permits any plaintiff, without capacity or interest, to bring an action in court against a person,

[23] For the Pedigree Thesis in positivism, *see* Kenneth Einar Himma, *Inclusive Legal Positivism in* The Oxford Handbook of Jurisprudence & Philosophy of Law 128 (eds. Jules Coleman & Scott Shapiro, Oxford University Press, 2002).
[24] For the Charter and its HRs' implications in Islam, *see* Walid Nuwayhid, *The Medina Charter in* Human Rights in Arab Thought: A Reader 229-49 (ed. Salma K. Jayyusi, I.B. Tauris & Co. Ltd, 2011).

whom she finds wronging a generic other (the public or a third party).[25] *Al-ḥisba* defenders find it legitimating the fight against any injustices and not necessarily an anti-Islamic behavior.

From among the Sharīʿa/HRs reconciliation attempts, the revival of Muʿtazilism is a forcefully suggested method. ʿAbdulaziz Sachedina (1942-), professor of Islamic Studies in the US promotes this reconciliation through the restoration of the Muʿtazilī doctrines that were once prominent in the 9th century Islam. Muʿtazilism posits the value of an action in the action itself and not in its surroundings. A good deed, for example, stems from the nature of the deed and not from its subjective evaluation by its agent. It is thus possible to have an objective evaluation of actions, perceived by the human mind without religious instructions. The point that the Muʿtazilīs try to make through the objective evaluation of actions is to prove that man does not need revelation (the religious text) to distinguish the good from the bad.[26] The human mind, from a Muʿtazilī standpoint, is capable of perceiving that murder is a heinous crime as much as it is capable of learning the same value from the revelatory ordinance "thou shalt not kill."[27]

Sachedina uses Muʿtazilī thought to demonstrate that Islam is prone to adopting universal ethics that are in concordance with non-Muslim perception of HRs.[28] His assumption is that since values are intrinsic to action, then contemporary Muslims may adopt international HRs laws without having qualms about flouting Muslim ethics. This proposition is not new to Islamic reform attempts. A century ago, the renowned Islamic scholar, former Muftī of Egypt Muḥammad ʿAbdou (1849-1905) advocated Muʿtazilī theology to enhance the role of reason in founding Sharīʿa-compliant laws and ethics.

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[25] Maḥmūd Yūnus, *Ruʾya Jadīda ḥawla Dawr al-Niyāba al-ʿAmma fi Masāʾil al-Murāfaʿāt al-Madaniyya wal-Aḥwāl al-Shakhṣiyya* 13-18 (Dār al-Nahḍa al-ʿArabiyya, 2005). A banal example of *al-ḥisba* case is the claim that an Islamist lawyer brought to court in 1995 against Muslim intellectual Hamid Nasr Abou Zayd to divorce the latter from his wife. The lawyer accused Abou Zayed of apostacy from Islam due to his controversial writings on the interpretation of the Qurʾān. The lawyer founded his claim on Egypt's Sharīʿa-based Personal Status law which forbids the marriage of a Muslim woman to a non-Muslim.

[26] ʿAbdulaziz Sachedina, *Islam and the Challenge of Human Rights* 60-1 (Oxford University Press, 2009).

[27] Verse 17:33 in the Qurʾān bears the same prohibition. "Do not kill the soul which God had made sacred except in the course of justice."

[28] *Supra* note 26, at 78-80.

In his *Risālat al-Tawḥīd (Treaties on the Oneness of God)*, ʿAbdou argues that any mind is capable of perceiving the beauty of flowers.[29]

The simplicity of ʿAbdou's example is perhaps intended to show that there are commonalities that all people may agree on, regardless of the degree of their intelligence and expertise. An important teleological difference, however, holds between Sachedina's proposition and that of ʿAbdou. ʿAbdou adopts Muʿtazilī thinking to escape the restriction of founding laws based on the Islamic text. Sachedina uses the Muʿtazilīs' historical argument on objective values to assure Muslims that they would experience historical continuum with their traditions when they adopt HRs values. For ʿAbdou's purposes, objective values ought to be followed because they can produce Islamic laws as much as the text. For Sachedina, objective values are not new to Islam.

[29] Muḥammad ʿAbdou, *Risālat al-Tawḥīd* 67 (ed. Muḥammad ʿImāra, Dār al-Shurūq, 1994).

II. Predictability and the Monopoly of Sharīʿa Legislation

Predictability in the sense of postulating the law's position on a future act and knowing the reasons for it is one of Max Weber's criteria for a rational law.[30] A law lacking predictability, coupled with a legislation drawn from prophetic or revelatory decisions, is in a Weberian sense a formally irrational law. The contrast between the irrational and the rational law does not negate their legal nature but explains their contributions to their respective societies. A rational law, argues Weber, has contributed to the rise of capitalism in Europe but an irrational one has not.[31]

As 19th century Ottomans were set on joining the capitalist world system, codification was their way to rationalize their Sharīʿa-based law in a Weberian logic.[32] They introduced the Ottoman Penal Code and the Land Code of 1858, the Civil Code (the Mejelle) of 1876 and the Commercial Code of 1906. Yet, Weber dismissed Ottoman codification as an untrue act of rationalizing the law; a law based on religious precepts in the administration of justice defies his putative rationality standard.[33]

A. The Importance of Predictability to Sharīʿa Enforcement

Weber's objection, however, misses the importance of Ottoman codes in solving or rather exposing Sharīʿa 's particular problem. Sharīʿa is a 1400-year old tradition. Throughout that period, it has witnessed divisions, revisions and development of its doctrines, principles and underlining theological beliefs. These divisions produced different legal rulings that eventually grouped into *madhāhib* (schools of law) within every denomination.[34]

The multitude of these schools' rulings creates confusion for modern Muslim laymen and legal professionals alike. Which ruling is the authentic Islamic position is a

[30] David M. Trubek, *Weber on Law and Capitalism*, 1972 WIS. L. REV. 721, 729 (1972).
[31] *See Id.* 729-31.
[32] Avi Rubin, *Modernity as a Code: The Ottoman Empire and the Global Movement of Codification*, 59 Journal of Economic and Social History of the Orient 828, 843 (2016).
[33] *Id.* at 842.
[34] For a concise history of the schools in the Sunnī denomination, *see* Aḥmād Taymūr Pasha, *Naẓra Tarīkhiyya fi Ḥudūth al-Madhāhib al-Fiqhiyya al-Arbaʿa* 50-84 (ed. Muḥammad Abū Zahra, Dār al-Qādrī, 1990).

question that is difficult to answer. Although many schools died out in a kind of historical natural selection within Sharīʿa,[35] the schools' pool is still too big to manage. The Sunnī denomination alone has a final four: the Ḥanafī, the Mālikī, the Shāfiʿī and the Ḥanbalī. The last two centuries added the Ṣūfī, the Wahhābī and the Salafī. Meanwhile, the Shīʿī denomination has the Jaʿfarī, the Durzī, the Ismāʿīlī and the Yazīdī.

Sunnī jurist Diyāʾ al-Dīn al-Juwaynī (1028-1085) demonstrates the possible conflict among Sharīʿa rulings due to the differences among the schools of law. In a hypothetical divorce case, a Shafiʿī husband divorces[36] his Ḥanafī wife in a moment of anger. The Shafiʿī school does not recognize an unintentional divorce, while the Ḥanafi school does. Accordingly, the husband considers himself married and the wife divorced.[37] Since both schools have valid interpretations of what constitutes Sharīʿa law, the solution to this problem is dependent on the discretion of the judge or rather her school. The agreed upon principle is that *ḥukm al-Qāḍī yarfaʿ ul-khilāf* (the rule of the judge ends the dispute).

Yet, the judge's power to end the dispute is originally derived from her officialdom rather than any legal justification. Sunnī jurist ʿAbdul Raḥmān Shaykhzāde (d. 1667), for example, agrees that a *qādī* (judge) should uphold the decision of an arbitrator if the decision agrees with that of the *qādī's* school and reverse it, if not. However, the *qadī's* decision is not to be reversed by any other *qādī* for she has the *wilāya ʿamma* (official authority), that the arbitrator obviously lacks.[38] Article 1849 of the Mejelle, conditions this resolve by stating that the decision of the state-appointed *qādī* is sustained insofar as it does not conflict with the ruling of an *uṣūl* (sources of Sharīʿa law). Ali Ḥaydar, an Ottoman jurist/exponent of the Mejelle, limits these sources to the first three: the Qurʾān, the Ḥadith and the consensus of the Muslim nation.[39]

[35] The Jarīrī and the Ẓāhirī schools are two of the defunct schools of the Sunnī denomination.
[36] Sharīʿa recognizes the husband's exclusive right to the repudiation of the marriage contract.
[37] Diyāʾ al-Dīn al-Juwaynī, *Kitāb al-Ijtihād min Kitāb al-Talkhīs li-Imām al-Ḥaramayn* 36 (Dār al-ʿUlūm wal Thaqāfa, 1987).
[38] ʿAbdul Raḥmān Shaykhzāde, *Majmaʿ al-Anhur fi Sharḥ Multaqa al-Abḥur* 241-2 (ed. Khalīl al-Manṣūr, Dār al-Kutub al-ʿIlmiyya, 1998).
[39] For the Article and its exposition, *see* ʿAlī Ḥaydar, *Durar al-Ḥukkām Sharḥ Majallat al-Aḥkām* 4:702-3 (4 vols., trans. Fahmī Ḥusnī, Dār ʿĀlam al-Kutub, 2003).

Predictability is even more important to the modern enforcement of Islamic criminal law. To maintain the modern constitutional principle of legality (no crime and no punishment without law), criminal law must be known through official dissemination before the commission of the crime, to which the law will be applied. ʿAwda's compilation of Islamic Criminal Law in an organized codex does the first step to legality. It ensures that the officially recognized crimes and punishments of Sharīʿa are known to laymen and lawyers once the criminal code is promulgated. Neither judge nor layman will have to consult the endless hornbooks of Sharīʿa schools of law trying to identify the Islamic position on a certain criminal action.[40] The code will answer intricate and consequential questions to ensure legality. The status of *al-moḥṣan* (the married culprit) in a *zinā* (fornication/adultery) crime,[41] for example, would have to be settled in the code.

In realizing criminal law predictability, singularizing Sharīʿa law is an imperative. Every crime must have a single definition and punishment. Singularity is thus a means to predictability in Sharīʿa but also a step to end its pluralism. Sharīʿa codification trumps so many alternative rulings to singularize the law. ʿAwda, for instance, drafts his code with the aim of having a single ruling for every crime. The controversial issue of the *qādī* deciding according to her eyewitness knowledge of a crime is a case among many that undergo ʿAwda's singularization surgery. ʿAwda takes sides with the common juristic opinion that a *qādī* should not adjudicate a case based on her special eyewitness knowledge. ʿAwda's choice, however, neglects the opinions of some Shafiʿīs and Ẓahirīs, who rule otherwise. Their logic is that the *qādī's* knowledge of the truth concerning the events of a case is the whole purpose of presenting evidence in court. If that knowledge is attained with certainty by other means, then she should act accordingly.[42]

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[40] *Supra* note 10, at 1:9-10.

[41] In *zinā*, Sharīʿa jurists distinguish between the punishment of a married and a non-married culprit in terms of the due punishment. The former receives a death by stoning penalty, while the latter a number of lashes depending on her status as a free person or slave. The underlying reason for the distinction is the availability of a lawful sexual outlet for the married and none for the unmarried. The questionable case is the punishment for the previously married at the time of committing the *zinā* crime. The previously married may receive the married culprit's punishment of death by stoning or the flogging punishment of the unmarried. The choice between the two depends on the interpretation of every school of law in Sharīʿa.

[42] *Supra* note 10, at 2:382-3.

B. Who Decides the Law?

Now, the pressing question is: who gets to decide which rule to follow in the process of singularizing Sharīʿa law? Three individuals come to mind: the Sharīʿa scholar (*sheikh/faqīh/ʿālim*), the caliph or the public representative. Sharīʿa jurists already exclude the public from legislative decision-making. Their view of the public is deprecating. Both Sunnī and Shīʿī jurists regard the lay Muslim believer a total *muqallid* (follower of jurists). They require her to follow juristic decisions on any Islam-related matter to absolve herself of blame for any wrongdoing.[43] *Shūra,* (consultation) mentioned in the Qurʾān,[44] is often argued as an Islamic doctrine to ensure public consultation on policy making decisions. Tentative reform proposals have been trying to extend *shūra's* scope of practice to make it legislatively binding. However, the marginalization of Sharīʿa in the post-colonial era has discouraged *shūra's* development. Hence, the classical view of the passive laity still stands.

With the public excluded, we are left with jurist and caliph. The jurist has the Sharīʿa knowledge to produce a Sharīʿa-compliant legislation and the caliph has the essential power to enforce that legislation. Muslim sociologist Abū Zayd Ibn Khaldūn (1332-1406) calls caliphal might *al-ʿasabiyya* (tribal solidarity).[45] *Al-ʿasabiyya* empowers kings to meet the demands of sovereignty, which in Ibn Khaldūn's view, boils down to making unchallenged decisions and executing them.

Sharīʿa-based legislation is thus a jurist-caliph enterprise. The Mejelle drafting committee, for instance, was comprised of four officials from the Ottoman ministry of justice and two from the state advisory committee.[46] All knowledgeable in Sharīʿa. Article 1801 of the Mejelle recognizes their decisions as the uncontestable rulings of the sultan. Ottoman judges are forbidden from executing other juristic interpretations. Yet, it is this very need for a jurist-caliph cooperation that reproduces the expert-power monopoly over Sharīʿa legislation.

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[43] For the Sunnī view of the Muslim laity, *see* Shah Walliullāh al-Dahlawī, *ʿIqd al-Jīd fī al-Ijtihād wal-Taqlīd* 72-4 (ed. Muḥammad al-Atharī, Dār al-Fatḥ, 1995). For the Shīʿī position, see Robert Gleave, *Conceptions of Authority in Iraqi Shiʿism: Baqir al-Hakim, Ha'iri and Sistani on Ijtihad, Taqlid and Marjaʿiyya,* 24 Theory, Culture & Society 59, 66 (2007).
[44] Verse 42:38.
[45] Ibn Khaldūn, *Muqaddimma* 187-8 (Dār al-Qalam, 1989).
[46] For the names of the Mejelle's drafters and their titles, *see supra* note 39, at 1:13.

Historically, political leadership and juridical expertise were inseparable and thus necessitated no expert-ruler cooperation. As Michel Foucault argues, power and knowledge were united in the character of the ruler. The ruler had to have might and exceptional knowledge in order to claim rightful leadership. Foucault cites on this matter the character of the king in Sophocles' Greek drama *Oedipus Rex*. Oedipus the king claims leadership rights over his city by virtue of solving the riddle of the Sphinx at the gates of that city. Otherwise, the citizens of the city would have been dead. Oedipus' knowledge saves the city and thereby earns him kingship rights.[47] Individuals witnessing Oedipus' background, however, empower the public in speaking truth to power. They tell Oedipus how he killed the former king, his father. Their narration gives rise to a history told through the juridical form (witnesses, defendants and judges).[48]

In Islamic history, power and knowledge were likewise inseparable. The rightful caliph in any Muslim denomination is the one who has the proper Sharīʿa knowledge that would secure the protection of Muslims on earth and their salvation in the hereafter. The most revered caliphs in the Sunnī denomination, known as the rightly guided caliphs,[49] earned leadership rights for being the companions of Prophet Muḥammad. Their companionship status made them the most knowing of Sharīʿa rulings. Their narrations of the Prophet's sayings and doings authenticate what came to be known in the 9th century as the science of Ḥadīth.[50] The companions were thus perceived the most eligible to succeed the Prophet in the leadership of Muslims.

The unity of knowledge and power is even more stressed for the current Shīʿī denomination; the *imām* (the rightful leader) for the Shīʿīs has to be endowed with divine knowledge of Sharīʿa. From a Shīʿī perspective, only a male offspring of the Prophet from his daughter Fāṭima possesses this knowledge as he inherits the Prophet's infallibility. The *imām* is further identified from among his family members by

[47] Michel Foucault, *Truth and Judicial Forms in* Power 29 (ed. James D. Faubion ed., trans. Robert Hurley and others, vol.3, Editions Gallimard, 2000).
[48] *Id.* at 33.
[49] These are the Companions of the Prophet and the first four caliphs in Sunnī Islam. They are in due order: Abū Bakr, ʿUmar, ʿOthmān and ʿAlī.
[50] Ḥadīth is the sayings and/or the actions of Prophet Muḥammad narrated by his Companions and their followers. The absence of a Companion's name in the chain of narration weakens its authenticity.

designation, an act in which the current *imām* identifies the rightful heir to his infallible knowledge.[51]

The last of the rightly guided caliphs Alī b. Abī Ṭālib died in 661. The last of the Shīʿī *imāms*, al-Mahdī, is said to have been concealed from mankind (occultation) in 941. Around these dates, knowledge and power depart in Islam. Later Muslim generations were deemed incapable of delivering the man with either the eccentric qualities of the *imām* or the fortunate circumstance of the Prophet's companionship. Knowledge had to be established by other means. The knowledge intended here differs, however, from Foucault's beginning of history theory. It is not the juridical truth concerning events, learned through the testimonies of witnesses from the public.[52]

Rather, it is the knowledge of the divine law that is sought after. The public was not speaking truth to power, as Foucault argues in the rise of Greek democracy, but the Muslim jurists speaking *divine law to power*. Already in the 7th and 8th centuries, the Sunnīs had compiled the Qurʾān and the Sunna, while the Shīʿīs codified their Ḥadīths around the 11th century. These texts required and delivered experts on different fields of Sharīʿa: Uṣūl (sources of law), Tafsīr (Qurʾānic exegesis) and Ḥadīth (Prophetic sayings). The expertise for these so-called sciences is different from the simple policy planning of lay politicians.

The divine codices, the first codification in Islam, place divine law in a somewhat ultra-legislative position in an Islamic polity. They set three juristically interpreted limits on positive law legislation, i.e., laws of non-divine origin. First, the post-divine codices of caliphs/states/legislatures must apply the textual Sharīʿa laws to gain the legitimacy of Islamic rule. Indeed, the reason for the investiture of a caliph is to uphold Sharīʿa. Sunnī jurist Abū al-Ḥasan al-Māwardī (972-1058), in his renowned work *al-Aḥkām al-Sulṭāniyya* (The Ordinances of Government), ascertains the necessity of instating a caliph to apply Sharīʿa. This is because Muslims are not expected to voluntarily comply to Sharīʿa law and that would lead to *fawḍa* (anarchy).[53] Second,

[51] Moojan Momen, *An Introduction to Shi'i Islam: The History and Doctrines of Twelver Shi'ism* 11-22 (Yale University Press, 1985).
[52] *Supra* note 47, at 32-3.
[53] Abū al-Ḥasan al-Mawardī, *Al-Aḥkām al-Sulṭaniyya* 15 (ed. Aḥmad Jād, 2006).

any enacted positive law is conditioned on the repugnancy clause of not violating a clear textual ordinance. The clause puts caliphal positive laws in a position of uncertainty; the laws always run the risk of amendments or total abrogation. Third, the caliph cannot alter the codices in wording. Yet, she can negotiate with Sharīʿa jurists over their hermeneutics.

The separation of knowledge and power has politically empowered jurists. Noah Feldman asserts that Islam had witnessed a balance of power exhibited in the separate functions of the caliph and the jurist. The caliph held the administrative authority to appoint the judges and enforce their judgments. But the jurists expatiated the laws applied in Muslim courts.[54] Feldman cites al-Māwardī for historical proof to his Islamic constitutionalism claim. Al-Māwardī approved the de-facto governorship of the powerful princes of the Buyid dynasty (r. 934-1062)[55] insofar as they recognized the ʿAbbāsid caliph as the ultimate ruler and enforced Sharīʿa in their usurped regions. Al-Māwardī's decision is criticized for reducing the caliphate to a papacy, i.e., a spiritual and powerless leadership. Feldman, however, insists on the effectiveness of his example on grounds that al-Māwardī was preserving Sharīʿa.[56]

How divine law speaks to power in Feldman's example is not clear to me. Nevertheless, the example is telling in other ways. As will be seen, the scientism of Sharīʿa in the sense of creating a self-contained legal knowledge insulated from the personal whims/interests of politicians had started long before the European age of Enlightenment. Muslim jurists since al-Māwardī's time have identified five necessities that Muslims ought to preserve for the betterment of their lives and their eschatological salvation. These in due order are religion, life, mind, progeny and property.[57] The protection of religion (PR) is what concerns us here. In mapping PR's boundaries, the abovementioned jurist al-Juwaynī, *inter alia*, restricts PR to Islam, finds it the caliph's

[54] Noah Feldman, *The Fall and Rise of the Islamic State* 36-7 (Princeton University Press, 2012).
[55] The Buyid was a Shiʿī dynasty that ruled present-day Iran and parts of Iraq. Its rulers did not receive appointment from the Sunnī ʿAbbāsid caliphs, who were too weak to subdue them. Feldman copies the example in its entirety from Khaled Abou El Fadl, who uses it in a rebellion/quietism context. Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* 9 (Cambridge University Press, 2001),
[56] *Supra* note 54 at 42-3.
[57] Lay Muslims are familiar with these necessities. *See* https://www.newmuslimguide.com/en/preliminaries/218

first duty, approves killing infidels and apostates for PR violation and preaches situational quietism or revolution against an unjust caliph.[58]

On quietism and revolution, al-Juwaynī elaborates that it is the duty of a Muslim to revolt against an unjust caliph, presumably a non-Sharīʿa compliant one. Yet, if this revolt would lead to more corruption *(fasādun akbar)*, like a civil war or the loss of Islamic rule, then quietism is preferable.[59] With PR in mind, the acquiescence of the Sunnī jurist al-Māwardī to the rule of the Shīʿī Buyids is comprehensible. The preservation of Sharīʿa is the first duty of a Muslim jurist. If the Buyid governors enforce Sharīʿa, and the caliph is too weak to remove them from office, then quietism is the right law. PR also explains the jurists' historical change of hearts; at times they stand by the victimized Shīʿīs and at another the unjust Sunnī caliphs.[60]

C. The Scientism of Sunnī Sharīʿa: Old and New

The scientism of Sharīʿa in Sunnī Islam originated with debates over the rightful *imām* (leader) in Islam. While the Shīʿīs believe in the leadership of the infallible descendants of the Prophet, the Sunnīs uphold the rulership of a fallible Muslim, provided she meets certain leadership qualifications.[61] Among these qualifications is her knowledge of Sharīʿa to the level of *ijtihād* (finding the law through the direct study of its textual sources of the Qurʾān and the Sunna).[62] *Ijtihād* is the highest degree of Sharīʿa studies that any jurist can attain. A scholar reaching the *ijtihād* level is known as a *mujtahid*. Lower rank scholars and laymen follow his decisions compared to those of a *muqallid* (a follower of other scholars' determinations).[63]

Thus, Muslim jurists, by requiring the ruler to be a *mujtahid*, have somewhat secured themselves the post of her legal advisor. A number of reasons substantiates this

[58] Muhammad Khayr, *Al-Kulliyyāt al-Khams ʿInda al-Imām al-Juwaynī,* 2 Majallat Mīzān lil-Dirāsāt al-Islāmiyya wal-Qanūniyya 10, 19-23 (2014).
[59] *Id.* at 20.
[60] For quietism and revolution in Sharīʿa's history, *see supra* note 55, at 8-30.
[61] *Supra* note 53, at 17-20. Al-Mawardī counts seven qualifications for holding a Sunnī caliph's office: justice, knowledge, sane senses, body and mind, courage and a Qurashite lineage (from the Prophet's tribe, Quraysh). *Id.* at 19-20.
[62] *Id*.
[63] For a classical definition of *ijtihād*, *see* al-Dahlawī, *supra* note 43, *at* 20.

claim. Obtaining the status of a *mujtahid* is totally dependent on the generous recognition of fellow jurists, and that has *not* been granted to anyone since almost the 16th century. By that time, the standard for meriting a juristic scholarship the rank of *ijtihād* has dismayingly burgeoned. Additionally, the highest rank of a *mujtahid muṭlaq* (absolute *mujtahid*) has been preserved for the scholars whose names are given to the abovementioned four schools of law.[64] The last scholar to be an eponym of a relatively surviving school, Ibn Ḥanbal, died in 855 (3rd century Islam).

Ranks next in line to the absolute *mujtahid* include: the school-affiliated absolute *mujtahid*, the *mujtahid* within the school and the learned within the school. As their titles show, lower-rank *mujtahids* have to be affiliated to a certain school.[65] This new condition made it even harder for any jurist to reach an *ijtihād* rank than it was for the absolute *mujtahid*; whereas the absolute *mujtahid* had only to study the textual sources of Sharīʿa, the lower-rank *mujtahids* had to be learned in the rulings of their school in addition to the textual sources. The Andalusian jurist of the defunct Ẓāhirī school Abū Muḥammad Ibn Ḥazm (994-1064) unsuccessfully tried to liberate *ijtihād* from school affiliation.[66] By the end of the ʿAbbāsid rule (750-1517), *ijtihād* rank died out altogether, entrusting *muqallids* with Sharīʿa.[67]

The ending of Sunnī *ijtihād* is known today as the closing of the door of *ijtihād*. The closure meant that a high-rank *muqallid* jurist must follow the *mujtahid's* legal methods in deciding on any Sharīʿa-related issue, while a low-rank *muqallid* must only copy the *mujtahid's* ruling on a similar issue. In modern terms, the first would use the *mujtahid's* set standards to reach a decision and the second would use her final decisions. Many reformists see the closure as the reason for the marginalization of Sharīʿa in the colonial and post-colonial age. However, modern Sharīʿa scholar Muḥammad Abū Zahra defends it in a revealing rationalization. Sharīʿa jurists, claims Abū Zahra, deliberately closed the door of *ijtihād* without any Sharīʿa precedent to

[64] For example, the Mālikī school is named after the abovementioned Mālik b. Anas (711-795).
[65] For these ranks and their scholastic requirements, *see Id.* at 48-72.
[66] *Id.* 40-2.
[67] Muḥammad al-Khudarī, *Tārīkh al-Tashrīʿ al-Islāmī* 312-22 (8th ed., Dār al-Fikr, 1967).

protect Sharīʿa from the whimsical rule of despotic kings.[68] In this sense, divine law is immune from political interventionism and its guardians are the jurists.

The 19th century Sharīʿa codification movement was a continuation of Sharīʿa scientism. This time, the preservation of Sharīʿa was not in the face of an intervening local power but an encroaching European colonialism. The 19th century was the height of European domination over Muslim lands. The weak Ottoman empire was forced to grant extra-territorial rights (capitulations) to foreign nationals wishing to trade in Ottoman lands. While residing in the empire, the foreigners and their dragomans enjoyed the legal privilege of being subject to their national laws and courts. No taxes were imposed on them without their prior consent and tariffs on their imported goods were reduced to the bare minimum.[69] The Ottomans deemed capitulation a violation of their sovereignty and a means to empty their coffers to keep them outside Europe.[70]

To replace capitulatory laws, the codification of Sharīʿa-based Ottoman law attempted to modernize the empire's law. It was part of the overall Ottoman *Tanzimat* (reforms), that the 19th century superpowers forced on the Ottomans. The apparent purpose of the codes' drafters was the preservation of Sharīʿa as a symbol of Islam and the *raison d'etre* of the Ottoman empire. Although Ottoman codification failed to end capitulation, it planted the idea of making Sharīʿa more accessible to a modernizing legal system.[71]

D. *Velayat-e-Faqih*: The Union of Power and Knowledge

While Medieval Sunnism has struggled to shield divine law from political transgressions, modern Shiʿism is the most successful in that domain. *Velayat-e-faqih* (VF) (the viceregency of the jurist), entrenched in Article 5 of the Iranian constitution, is the doctrine that unifies power and knowledge, as in the early years of Islam. It gives

[68] Muḥammad Abū Zahra, *Rūḥ al-Sharīʿa al-Islāmiyya wa Wāqiʿ al-Tashrīʿ al-Yawm fī al-ʿĀlam al-Islāmī in* al-Multaqa al-Sābiʿ lil-Taʿarruf ʿala al-Fikr al-Islāmī 431-2 (Manshūrāt Wizārat al-Taʿlīm al-Aṣlī wal-Shuʾūn al-Dīniyya, 1973).
[69] Feroz Ahmad, *Ottoman Perceptions of the Capitulations 1800-1914*, 11 Journal of Islamic Studies 1, 3-7 (2000).
[70] *Id.* at 11.
[71] The Mejelle, for instance, was drafted to furnish Ottoman commercial courts with precise and accessible civil law rulings in Sharīʿa. *Supra* note 39, at 1:10.

the jurists of the Twelver Shīʿīs (TS)[72] the right to abolish any state law repugnant to Shīʿī Sharīʿa. Ayatollah Khomeini (1902-1989), the leader of the 1979 Islamic revolution in Iran, developed VF and its constitutional institution.

TS's belief in the exclusive leadership of the infallible *imām* facilitated the development of VF. For TS, the *imām* is a male descendant of Prophet Muḥammad from his daughter Fāṭima and his cousin ʿAlī.[73] All TS are required to know the *imām* of their times and acknowledge his leadership to attain salvation in the hereafter. This knowledge is accomplished by designation; the current *imām* names his successor, usually his son. Historically, however, the imamate went into several crises due to the death of the *imām* without naming a successor.[74]

More importantly, the followers of the deceased *imām* refused to recognize his death. They believed him alive and will return to eliminate evil and establish justice. All Shīʿīs call the returning *imām* al-Mahdī (the guided) or al-Qāʾim (the standing).[75] Although TS call several *imāms* al-Mahdī, the title is often associated with the 12th *imām* Ibn Ḥasan. Ibn Ḥasan, whose existence is doubtful, experienced two *ghayba/s* (occultations) a minor in 874 and a major in 941. Early contact with al-Mahdī was through his *sufarāʾ* (ambassadors) but that ended with an alleged decree from Ibn Ḥasan before his grand occultation.[76]

The *imām's* return to disseminate justice on earth gave reason to develop the doctrine of *intiẓār* (waiting). Since the return is expected sometime in the far future, it is the duty of Shīʿī believers to wait patiently for him. Throughout history, *intiẓār* sentiment has become a source of Shīʿī passivism and revolution. It grounds the rejection of upholding Sharīʿa in al-Mahdī's absence. Leading the communion of Friday

[72] This is the largest group of Shīʿīs in the world. They are called the Twelvers because they believe in the divine leadership of twelve male descendants of the Prophet.
[73] Some early Shīʿīs believed in the imamate of ʿAlī's son from his second wife, Muḥammad b. al-Ḥanafiyya.
[74] Said Amir Arjomand, *The Crisis of the Imamate and the Institution of Occultation in Twelver Shiʿism: A Sociohistorical Perspective in* Shiʿism 109-20 (ed. Etan Kohlberg & Lawrence I. Conrad, Taylor and Francis Group, 2003).
[75] *Id.* at 113.
[76] *Id.* at 126.

prayers and the calling for *jihād* are the *imām's* prerogatives.[77] They are doubted as unlawful performances in his absence.

However, Iranian leftist sociologist ʿAlī Sharīʿatī (1933-1977) interprets *intiẓār* to be a thesis between two antitheses: truth and reality. The truth is that Shīʿism safeguards man's salvation, but the reality is that the Shīʿīs' political and economic conditions are not conducive to redemption. Sharīʿatī suggests adopting an active view of the passive *intiẓār* to overcome the downside of its reality. He urges Shīʿīs to reiterate their historical "no" to Sunnī imperialism against their modern-day oppressor, Iran's Shah. This way, defends Sharīʿatī, the collective agency of the Shīʿīs would realize the promise of salvation in their destined future.[78]

The occultation served well the development of VF. It justified Shīʿī jurists' claims to authority. They argued that Shīʿīs must be governed by Sharīʿa at all times. In the absence of the rightful governor (al-Mahdī), a person who is just and knowledgeable of Shīʿī laws and doctrines must lead the Shīʿī community.[79] VF was first suggested and practiced as a *wilāya khaṣa* (limited agency) of al-Mahdī. The jurist would lead Friday prayers and collect the *khums* (special alms for the needy and the Prophet's descendants). Khomeini, however, expanded the jurist's deputyship to a *wilāya ʿamma* (full agency).[80] A Shīʿī jurist who is just and knowledgeable of Sharīʿa is qualified to this position.

TS insist that the jurist holding VF does not share in the *imām's* perfectionism. Nevertheless, the leading jurist in Shīʿism enjoys authority and mystic reverence, unusual to Sunnism. Primarily, he is designated as *marjiʿ al-taqlīd* (the emulated). This is a top *ijtihādi* rank in Shīʿism. It entails the authority of its holder to issue legal responsa *(fatāwa)* and religious decrees.[81] The *marjiʿ* acts as an intermediary between the *imām* and the Shīʿī believer. The believer is ordered to follow the *mujtahid* on all

[77] Liyakat Takim, *From Partial to Complete: Juristic Authority in Twelver Shiʿism*, 43, Journal of South Asian and Middle Eastern Studies 6, 11 (2020).
[78] Cara Hinkson, *The Messianic Idea in Shīʿī Islam and its Modern Politicization,* 43/44 Arena Journal 135, 144 (2015).
[79] Khomeini *supra* note 16, at 39-40, 45-6.
[80] Khomeini used a doubtful but acceptable tradition known as the *maqbūla* of ʿUmar b. Ḥanẓala to prove his point. The tradition states an order from the 6th *imām* Jʿafar al-Sādiq to Shīʿīs to refer their disputes to Shīʿī arbitrators, as he designates them rulers of the Shīʿīs. *Id.* at 87.
[81] Afshin Shahi, *Paradoxes of Iranian Messianic Politics,* 21 Digest of Middle East Studies 108, 115 (2012).

ritual and temporal issues and refrain from any direct contact with the *imām*.[82] Afshin Shahi considers the *marjiʿiyyat* (source of emulation) and the *velāyat* (the deputyship) the two components of the VF. The former expresses the jurist's exceptional knowledge and the latter his power.[83] United, power is subserviant to divine law. Scientism is superfluous.

[82] Gleave *supra* note 43.
[83] *Supra* note 81.

III. Reasoning: An infinitely Regressing Logic

CR or reasoning is indeed a reform proposition peculiar to Abdullahi An-Na'im.[84] He defines it as "the requirement and the rationale and purpose of public policy or legislation be based on the sort of reasoning that most citizens can accept and reject and use to make counterproposals through public debate without reference to religious belief as such."[85] Additional conditions are that: 1) it must function according to the safeguards of constitutionalism, HRs and citizenship rights and 2) it must follow the golden rule of reciprocity among citizens of the Muslim-majority state.[86]

Interpreting this definition, CR requires Muslims to adjust any Sharīʿa principle or law, they wish to advance in the public sphere, to a reasonable argument, acceptable to their fellow citizens, regardless of their religious beliefs. This new common reasoning must not, however, oppose agreed-upon principles like mutual respect and civility among citizens, equality, freedom of consciousness and speech and individual autonomy. The moral behind CR is the principle of reciprocity. It dictates upon citizens to advance policies and laws that are acceptable to others as much as they are acceptable to their promoter.

CR definition obviously mimics John Rawls' idea of public reason.[87] An-Na'im, however, claims creativity by showing a difference between the two concepts. Public reason, explains An-Na'im, bars the promotion of any comprehensive religious doctrine in its limited public fora of the judiciary, the administration and political candidacy. CR, however, is inclusive of these doctrines and has broader public platforms. For An-Na'im, CR permits any comprehensive doctrine, whether religious or secular, insofar as the doctrine adjusts to the standard of common reasoning. Its platform welcomes the deliberation of any topic, whose outcomes will be imposed on

[84] To my knowledge, Muslim secularists, who reject the modern enforcement of Sharīʿa in Muslim-majority states, simply restrict Sharīʿa to private practice. Unlike An-Na'im, they do not suggest alternative methods to Sharīʿa application in the public sphere. Egyptian writer Farag Fouda (1946-1992), for example, rejects calls for Sharīʿa enforcement on the premises that it fails to solve the political, social and economic problems of modern Egypt. Farag Fouda, *Al-Ḥaqīqa al-Ghāʾiba* 29-31 (3rd ed., Dār al-Fikr lil-Dirāsāt wal-Nashr wal-Tawzīʿ, 1988).
[85] *Supra* note 19, at 100.
[86] *Id.* at 139, 136.
[87] For Rawls' public reasoning definition, *see* John Rawls, *Idea of Public Reason Revisited*, The, 64 U. CHI. L. REV. 765, 769 (1997).

the society or a group of it.[88] This difference, I argue, is not entirely true. Like An-Na'im, Rawls accepts the deliberation of any comprehensive doctrine on the condition of common reasoning. He even cites An-Na'im and Ṭaha on the use of the universal Meccan verses as a successful Islamic example for the modification of a comprehensive doctrine to suit his public reason requirements.[89]

A. Hypocrisy in the Public Discourse

An-Na'im's CR proposal appears to establish a morality of deliberation; all public discourse in his utopian state must be reasonable, considerate of the views and beliefs of others and non-repugnant to the principles of the three conditions of constitutionalism, HRs and citizenship rights. The changes that this morality imposes on Sharīʿa are liberalist in their conceptual content. They coincide with Jurgen Habermas' modification of Rawls' public reason. Habermas accepts the democratic participation of monotheistic beliefs in the public sphere. Yet, he invites monotheisms to undergo self-modernization to realize their moral duty of recognizing other denominations and religions, adapting to the authority of science and agreeing with constitutional principles that are based on profane morality.[90]

Like Habermas, An-Na'im argues that *modern* readings of Sharīʿa, which happen to be liberalist, should be taken into account when arguing for any Sharīʿa-based legislation. An-Na'im, for example, contends that the modern reading of the Islamic principle of *shūra* must be considered when citizens deliberate a constitutional government. Modern *shūra* reading deems it a binding principle versus its historically non-binding understanding.[91] An-Na'im makes the same argument with religious minority rights, freedom of belief and gender equality.[92] These rights will eventually have a liberalist reading in An-Na'im's reform proposal.

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[88] *Supra* note 19, at 97-101.
[89] *Supra* note 87, at 782-3.
[90] *See* Jurgen Habermas, *Faith and Knowledge*, https://socialpolicy.ucc.ie/Habermas_Faith_and_knowledge_ev07-4_en.htm
[91] *Supra* note 19, at 107-8.
[92] *Id.* at 108, 111, 136.

An-Na'im's liberal amendment of historical Sharīʿa gives content to the three conditions of constitutionalism, HRs and citizenship rights. The conditions in turn govern the rules of the game for the use of CR. As such, a citizen with Islamist leniencies deliberating with a liberalist is at a double disadvantage. First, the three conditions have already leaned towards modern liberal readings. Second, the Islamist cannot initially suggest her classical Sharīʿa views on the three conditions or change the established ones. CR's reasoning standard considers it inadmissible to argue Islam in its own right on public affairs issues. This restrictive environment, in which Muslims cannot express the *whole truth* about their ideas,[93] is all too familiar atmosphere for them. Ironically, they have a long history in developing methods to live with it and even overcome it. *Taqiyya* (precautionary dissimulation) and *Fiqh al-Tamkīn* (FT) (empowerment jurisprudence) are two known methods that dissenting Muslims have been using to cope with their secularly oppressive environments.

Taqiyya has been a traveling concept since its beginning at around 8th century Islam.[94] At that time, *Taqiyya* rose among the doctrines of Shīʿism and it meant concealment of one's beliefs to avoid Sunnī persecution. The fight for power between the Shīʿis and Sunnīs had often culminated in the assassination of the Shīʿi *imāms* and the persecution of their followers. The slaying of the Prophet's grandson, the third *imām* al-Ḥusayn and his followers in 680 at the hands of the second Sunnī caliph Yazīd b. Muʿāwiya (647-683) is a constant reminder of Sunnī brutality.[95] To escape Sunnī oppression, Shīʿī jurists permitted Shīʿī followers to pretend belief in Sunnism. Verse 16:106 of the Qurʾān gives religious validity to *Taqiyya*.[96] The verse pardons true believers who are forced to renounce God from the sin of disbelief.

With time, *Taqiyya* gained a more mystical meaning as the protection it gave the *imām* was extended to his knowledge. It sheltered his esoteric beliefs from the

[93] Rawls is criticized for his reasonableness restriction on the whole truth. Lee Ward, *Rekindling "Radical Democratic Embers": Rawls and Habermas on Public Reason*, 24 The European Legacy 819, 825-6 (2019).
[94] *Supra* note 51, at 39.
[95] Shīʿīs around the world annually commemorate the martyrdom of al-Ḥusayn by processions of men and women wailing and beating themselves. For brief accounts on al-Ḥusayn's murder incidents and commemoration, *see* Fayaz S. Alibhai, *Twelver Shia in Edinburgh: Marking Muharram Mourning Husayn*, 13 Contemporary Islam 325, 327-8 (2019).
[96] *Supra* note 51, at 183.

violation of those inferior in spirit. Shīʿī acolytes are to prove their worth before lifting the veils of *Taqiyya* in order to initiate them into the *imām's* knowledge.[97] Today, *Taqiyya* bears the meanings of hypocrisy and deception for personal gain.[98] Orientalists, Islamophobes and American military personnel fighting Muslims view *Taqiyya* in its new meaning an inherent quality in Muslim character. They often invoke it to justify their intended positions towards Muslims like rescinding on international agreements and supporting anti-Islamist oppressive governments.[99]

FT is a more developed stratagem to face oppressive secularism. It is not a new practice in Muslim history, but its term is. FT was coined in the 20th century following the demise of the Ottoman caliphate in 1924. Islamist movements, like MB, consider it a religious duty to establish a caliphal succession to the Ottomans. Meanwhile, native nationalist movements have been thwarting Islamist designs. They opt for a secular republic in place of a religious caliphate. This clash of ideologies has hardly witnessed any civil deliberations. Rather, bloodshed and persecution.[100]

In this oppressive environment, modern Sharīʿa scholars forward FT as a means towards realizing their rule-of-Islam goal. FT proposes Islamist participation in secular politics until a complete Islamic *tamkīn* (empowerment) is possible.[101] Following FT stratagem, Islamists temporarily accept secular mores that are not repugnant yet unfamiliar to Islamic conventions. The doctrines of FT, thus, tolerate election candidacy, majority rule and partisan rivalry as a means towards advancing Islamic laws and politics. Critics of MB participation in a secular democracy denounce FT tactics. They view it unethical for MBs to democratically climb the ladder of power and

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[97] Yarden Mariuma, *Taqiyya as Polemic, Law and Knowledge: Following an Islamic Legal Term through the Worlds of Islamic Scholars, Ethnographers, Polemicists and Military Men,* 104 The Muslim World 86, 93 (2014).
[98] *Id.* at 97-103.
[99] Claims of *Taqiyya* tactics were invoked against Iran to discredit its negotiations over a nuclear inspection agreement. The US Congress also cited *Taqiyya* as MB practice to acquiesce to the MB's ouster from power following Egypt's 2013 military coup. *Id.* at 103, 101.
[100] Two of the intellectuals cited above were victims of this ideology clash. ʿAwda was executed for an alleged MB assassination attempt of Egyptian President Gamal ʿAbdel Nāsir. Secularist intellectual Farag Fouda was assassinated by Islamist zealots in 1992. The Hama massacre of 1982 is often remembered in modern Syrian history as the bloodiest national-scale confrontation between the MB and the secularist Arab Syrian army. The death toll among civilians ranged from 20,000 to 40,000 and a thousand among the army personnel.
[101] For the debate over the validity of FT, *see* Muḥammad al-Ṣalabī, *Fiqh al-Naṣr wal-Tamkīn fil-Qurʿān al-Karīm* 85-9 (Dār al-Maʿrifa, 2009).

then pull it up behind them.[102] Once empowered, so the critics warn, the MBs will "fix" the country.[103] Depending on the gazer's political orientation, the fix is either to end secular corruption or democratic rule.

B. Reasoning: Logic *in Infinitum*

"Reasoning" in CR seems the wonder solution to all Sharīʿa's opposition to liberal constitutionalism. For An-Na'im, reasoning will contribute to rethinking Sharīʿa's old position on constitutional rights for religious minorities and equality before the law.[104] Reasoning these positions would, for instance, sideline Sharīʿa's poll tax for non-Muslims and allocate an equal share of inheritance between men and women. What is astounding in this reasoning proposal is the omission of the historical *ʿaql/naql* (reason/revelation) debate in Islam. The debate, if revisited, shows that reconfiguring Sharīʿa along CR lines may have to confront reason-in-revelation debate anew.

Reason-in-revelation is a reason that leads to acceptable logics within the religious assumptions that God's speech is plausible, His creation is perfect and more importantly He is the First Principle for any logical argument. These assumptions are likely to rationalize Sharīʿa's anti-liberal positions on issues like women and minority rights rather than modify them. The reason/revelation debate centers around the question whether divine law is known through critical thinking or the Qurʾān and the Sunna. The Ashʿarīs, the currently dominant theological sect in Sunnī Islam, argue that reason may be the source of laws but not those of the divine. Knowledge of divine law must be known through revelation.[105] The Muʿtazilīs along with Islamic philosophers contend, however, that knowledge of divine law is attainable through reason as much as revelation.

Andalusian Islamic philosopher, jurist Ibn Rushd or Averroes (1126-1198) subscribes to the view that reason is a guide to divine truth by revelatory ordinance.

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[102] Maher Hamoud, Editor's Letter: *Tamkeen At-Tamkeen and the Islamists' Escalation,* Daily News Egypt, Dec. 20, 2012.
[103] *Id.*
[104] An-Na'im raises concerns over these particular issues. *See supra* note 17, at 88-91.
[105] Ṭaha Ghāzī ʿAwaḍ, *Durūs fi Falsafat al-Qānūn: Al-Qānūn al-Ṭabīʿī bayna al-Munādīn bihi wal-Munkirīn lahu* 133 (4th ed., Dār al-Nahḍa al-ʿArabiyya, no given date).

Verse 16:125 of the Qurʾān states: "Call onto the way of thy Lord with wisdom and fair exhortation, and reason with them in the better way."[106] Ibn Rushd interprets the verse to be encouraging Muslims to guide people to belief by using three methods of persuasion: the rhetorical persuasion *(al-Khaṭābī)*, the dialectical statement *(al-Jadalī)* and the demonstrative reasoning *(al-Burhanī)*.[107] Each method, comments Ibn Rushd, is appropriate for a certain group of people. Whereas rhetorical persuasion is the method for the public, demonstrative reasoning is the method for the philosophers. The latter entails the use of philosophic syllogism *(qiyās ʿaqlī)* as a distinct method of learning truth away from Sharīʿa's juristic syllogism *(qiyās sharʿī)*.[108] In this sense, reasoning boils down to logical statements that the Islamic philosophers learned from Greek philosophy particularly that of Aristotle.[109]

For Ibn Rushd, these logical deductions are irrefutable even if they contradict the statements of *al-sharʿ* (religious texts). Both *al-sharʿ* and logic, states Ibn Rushd, demonstrate truth. If they occasionally contradict, their contradiction must be erased by a hermeneutical rereading of *al-sharʿ* rather than disproving logic.[110] According to Richard Taylor, Ibn Rushd sees no discord between Aristotelian rationalism and Islam.[111] In fact, this rationalism aids man in learning the nature of beings, which are in turn indicative of their divine artisan, God.[112] Indeed, in *Bidāyat al-Mujtahid* (Distinguished Jurist's Primer), Ibn Rushd subscribes to the divine laws that are contestable from An-Na'im's perspective. Some of these are on gender inequality, stated in the Qurʾān: female descendants receiving half the inheritance share of the male progeny[113] and a male felon receiving a commuted punishment for female homicide.[114]

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[106] The translation is Muḥammad Pickthall's.
[107] Abū al-Walīd b. Rushd, *Faṣl al-Maqāl fima bayna al-Ḥikma wal-Sharīʿa min al-Ittiṣāl* 31 (ed. Muḥammad ʿImāra, 3rd ed., Dār al-Maʿārif, 1999).
[108] This form of *qiyās* compares a hard case to a decided one based on the similarities in circumstances and actions in order to apply the decision of the decided to the undecided. *Id.* at 23.
[109] Among the logical constructions is the particular-necessity logic deduced from the general. An example of this is the statement that every man is an animal and thus it is necessary that part of an animal is human. Abū Ḥamid al-Ghazzālī, *Al-Munqiẓ min al-Ḍalāl wal-Muwaṣṣil ila zi al-ʿIzza wal-Jalāl* 82 (eds. Jamīl Ṣalība & Kāmil ʿAyyād, 7th ed., Dār al-Andalus, 1967).
[110] *Supra* note 107, at 32.
[111] Richard C. Taylor, *Ibn Rushd/Averroes and "Islamic" Rationalism*, 15 Medieval Encounters 226, 233 (2009).
[112] *Id.* at 228.
[113] The share is allocated in the Qurʾānic verse 4:11. Abū al-Walīd Ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* 4:187 (4 vols., ed. Muḥammad Ḥallāq, Maktabat Ibn Taymiyya, 1993).
[114] This is a controversial question in Islam that Ibn Rushd does not resolve. Some scholars refuse to have a man receiving capital punishment for killing a woman because they are unequal in social status.

Relevant to my argument is that reasoning in Islamic philosophy is dependent on logic that ends with God as its axiom. To make a persuasive argument that reaches the truth with certitude is to make a set of logical deductions. Islamic philosophers urged their students to study logic not only to formulate persuasive arguments but also to arrive at the fountain of happiness, *al-ḥikma* (wisdom/philosophy).[115] Philosophy will eventually lead to more knowledge of beings and their divine creator. However, one of the problems for Islamic philosophers/logicians, I claim, is to stop logical arguments from infinitely multiplying for want of an *a priori* concept, a first principle that cannot be disputed and thus forms a premise for logical statements.

For Muslim philosophers, the solution to the initial premise problem, albeit imagined, is borrowed from Islam. Philosophers, such as, Abū Naṣr al-Farābī (872-950) in *Taḥṣīl al-Saʿāda (The Attainment of Happiness)* posits God as the uncaused cause or the ultimate/first principle to all classifications of beings and causalities. All beings, argues al-Farābī, possess different mixtures of the four causes of intelligible beings: the formal, the final, the efficient and the material. These causes correspond to the layman's question in the respective order of *how*, *why*, *by whom* and *from what*. If a layman is able to answer these questions concerning an intelligible being, then she has full knowledge of that being. [116] The celestial beings have the first three and lack the material. God, on the other hand, has none of these causes for He is the uncaused cause and the ultimate being who ends the hierarchy of existence.[117] Commenting on al-Farābī's retention of the first principle in the cosmos, Friedrich Ueberweg concedes to the view that the necessary being (God) is an essentiality to the existence of the possible being (all beings). He reasons:

> If the possible is to exist in reality, a cause is necessary thereto. The world is composite, hence it had a beginning, or was caused. But the series of causes and effects can neither recede *in infinitum*, nor return like a circle into itself; it must, therefore, depend upon some necessary link, and this link is the first being *(ens*

Other jurists find the souls of men and women equal and thus uphold the punishment. The difference stems from the contradictory Qurʾānic verses of 2:179 and 5:45. *Id.* at 4:302.

[115] *See*, for example, Abū Naṣr al-Farābī, *Directing Attention to the Way of Happiness*, *in* Classical Arabic Philosophy: An Anthology of Sources 119-20 (trans., John McGinnis & David C. Reisman, Hackett Publishing Company, 2007).

[116] Abū Naṣr al-Farābī, *Taḥṣīl al-Saʿāda* 29-45 (ed. ʿAlī Bū Mulḥim, Dār wa Maktabat al-Hilāl, 1995).

[117] *Id.*

primum). The first being exists necessarily; the supposition of its non-existence involved a contradiction.[118]

This divine intervention into the ontological classification of beings plays also an epistemic role in validating Sharīʿa law. In almost all law books on Islam, Sharīʿa is known to be divided along religious-rational lines into *ʿibādāt* (rituals) and *muʿāmalāt* (interactions). *ʿIbādāt* include rulings on all Muslim rituals, such as, ablution, prayers, fasting and pilgrimage. These rulings are known to be devoid of rationale and thus no *qiyās* (analogy) can be established based on them. For example, Sharīʿa jurists find no reason in performing two prostrations for the morning prayer and four for the noon. The number of prostrations for any additional prayers will thereby have to be a random choice or an emulation of the Prophet's *nawāfil* (additional rituals). The validity of these rulings is a "God's will" argument.

Muʿāmalāt comprise all non-ritual legal interaction among Muslims. This category includes commercial, civil and criminal law interactions. Reasoning for analogy, amendment and legislative intent is applicable to *muʿāmalāt* rulings. Slavery and female concubinage were abolished from *muʿāmalāt* in the 19th century and the punishment for slander was applied to wine drinking in the 7th. This category, however, carries us to a different level of reasoning other than al-Farābī's abovementioned cosmic logic.[119]

This time, the logic is closer to that of the Islamic philosopher Shihāb al-Dīn al-Suhrawardī (1154-1191). Al-Suhrawardī classifies logic into two: *fiṭra* (lit. natural/instinctive) and *iʿtibārāt ʿaqliyya* (lit. intellectual considerations).[120] *Fiṭra* logic forms the direct knowledge of intelligible beings whether simple or composite, such as, "apples are red."[121] This logic depends on sensory perceptions. *Iʿtibārāt ʿaqliyya* constitute an indirect logic that individuals attain through a chain of inferences from

[118] Friedrich Ueberweg, *History of Philosophy: From Thales to the Present Time* 1:412 (trans. Geo Morris, Charles Scribner's Sons, 2 vol., 1889).
[119] Islam uses different logics for different Islamic disciplines: law, philosophy, theology and philology. *See* Musa Akrami, *From Logic in Islam to Islamic Logic,* 11, Logica Universalis 61, 69-83, (2017).
[120] John Walbridge, *A Response to Seyed N. Mousavian, "Did Suhrawardi Believe in Innate Ideas as A Priori Concepts? A Note,"* 64 Philosophy East and West 481, 481-4 (2014).
[121] *Id.* at 481.

what has been acquired by means of *fiṭra*. Knowledge from an indirect logic can be known by deliberation or though the instructions of a sage.[122]

What relates to our *muʿāmalāt* argument is that al-Suhrawardī's *fiṭra* logic ends the infinite regress from a being to another that is needed to prove the origins of every being (the created/creator relationship).[123] The end is interestingly at a sensory temporal level, that concords with the functionality of the *muʿāmalāt* rulings. Let us take a hypothetical example of a car sale contract. The contract serves the function of exchanging a car for an X sum of money. What is a contract can be known through al-Suhrawardī's indirect logic, which requires breaking up the elements of the transaction: car, money and exchange. The three are known through his direct logic, the *fiṭra*.

Parties to the agreement may successfully transact their car for the money based on the validity of their contract. They need no regressing beyond their temporal logic. This certitude in the validity of the law lasts insofar as no dispute or a revolution occurs. But, if either occurs, then the validity regression would pull an endless chain of causation. A contract is valid because the law upholds the principle of respect for contracts. Respect for contracts is valid because the law upholds the constitutional right to property. Property rights are valid because they are part of the social contract. The social contract is valid because it is the agreement made in the original condition. This regression would go on, unless a decision is made to choose an imagined *a priori* concept equivalent to God in Islam.

C. Can Civic Reasoning Unite the Odds?

Divine omnipresence is not inevitable for every doctrine. Although, God thankfully prevents the chain of logic from a fateful regression, His elimination has been seriously contemplated outside Islam. German philosopher Friedrich Nietzsche (1844-1900) reveals that God is dead.[124] In *Thus Spoke Zarathustra,* Nietzsche renounces God as a

[122] *Id.* at 481-4.
[123] *Id.* at 483.
[124] Friedrich Nietzsche, *The Gay Science* 199 (trans. Josefine Nauckhoff, Cambridge University Press, 2001)

ghost from this world and not from the beyond.[125] God, in Nietzsche's thought, has no metaphysical existence. He is but a creation of the human mind to seek order to the chaos of being. Although, this image of God is not new in the history of philosophy,[126] Nietzsche's renunciation of God and truth at the dawn of the 20th century impacted modernism's rejection of transcendental escapes.[127] In An-Na'im's public deliberation, Nietzschean thought would formulate the extreme end that a reasoned Sharīʿa would have to reconcile with. While the former rejects God and truth, the latter ascertains them. But, is this reconciliation tenable?

Solomon is one of Nietzsche's examples of how the idea of God comes about in human thinking. Contemplating life, Solomon discovers that everything has a transitory and circular character. Everything passes away and all things that come into existence are not new. This state of repetitiveness and circularity in the world makes Solomon think of its futility. To overcome his despair, he seeks redemption by turning away from earthly things towards the eternal God. He believes in a monotheistic God who divides all things into good and evil and protects him from the agonies of mortal existence in return for his obedience.[128]

Nietzsche disproves Solomon's creation of God to face the transitory nature of being. He rather deems it man's duty to courageously confront the chaos of being. Following Nietzsche's line of thinking, seeking out God would only add to man's servitude and not his emancipation from fear. However, this godly removal leaves us with the question: what is the *a priori* concept for a disbeliever in divine existence? As Stanley Rosen argues, Nietzsche offers none. Rosen recognizes that the foundational thought for ratiocination *(Grundgedanke)* in Nietzsche's thought is that humanity constructs itself.[129] He does not, however, clarify this self-constructivity.

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[125] Friedrich Nietzsche, *Hakadha Takallam Zradisht* 53 (trans. Felix Faris, Dār al-Qalam, no given date).
[126] Xenophanes, for example, reports that mortals envision Gods in their own human image. Paul Feyerabend, *Reason, Xenophanes and the Homeric Gods,* 9 The Kenyon Review 12, 15 (1987).
[127] Matthew Edward Harris, *Nietzsche's 'Death of God,' Modernism and Postmodernism in the Twentieth Century: Insights from Altizer and Vattimo,* 59 Heythrop Journal 1, 2 (2019).
[128] John Kress, *The Alliance of Laughter and Wisdom: Nietzsche's Gay Science,* 91 An Interdisciplinary Journal, 109 111-3 (2008).
[129] Stanely Rosen, *Unsystematic Reason in Nietzsche,* 14 The Journal of Nietzsche Studies 65, 68-9 (2011).

One suggestion to self-constructivity is eternal recurrence (ER).[130] ER proposes that man will live life anew in an endless rejuvenation. As seen with Solomon, man will relive his frustration and agonies in a limitless multiplicity.[131] ER mirrors a number of key concepts in Nietzsche's thinking. Life is immortal for there is no afterlife that will succeed it. It centers around the renewable man not God. Man should embrace life as the ultimate existence. He must not mortify his body, suppress his desires and sacrifice his life to earn a hollow eschatological salvation.[132]

To this point, CR is a successful reform project. Nietzsche rids reasoning of logic's infinite regression. We could take his superman's project as the foundation for that logic. Towards the end of his journey to guide humanity, Zarathustra calls upon the higher men to travel the mountain of human future. The higher men are those who have learned contempt for the commoners' petty virtues of patience and diligence. They have forsaken the idea of equality before God because He is dead and that "we (the higher men and Zarathustra) desire the superman to live."[133] The superman is this fearless man, who wills his freedom from the shackles of moral conventions and religious beliefs and above all face the chaos of being.[134]

Yet, until the superman project accomplishes its end, Nietzsche's criticism of man's knowledge appears to be the object of our research. The death of God means that all values are no longer the creation of an eternal being but that of humans. Truth and certainty are perspectival and changing.[135] Foucault digs deeper in understanding Nietzsche's view on the human acquisition of knowledge. He argues that man's knowledge in Nietzsche's thinking is not derived from its object but rather from power struggle and conflict and then imposed onto its object. It is the spark that comes out from striking swords.[136] It is to be found with politicians in their relations of struggle and power rather than with philosophers.

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[130] Nietzsche mentions ER in 341 in Gay Science. *Supra* note 124, at 194-5.
[131] Emrys Westacott, *Nietzsche's Idea of Eternal Recurrence*, ThoughtCo. 12/2/2020.
[132] For these principles, *see supra* note 125, 52-61.
[133] *Supra* note 125, at 312-3.
[134] *See* William Salter, *Nietzsche's Superman,* 12 The Journal of Philosophy, Psychology and Scientific Methods 421, 430 (1915).
[135] Stijn Latre, *Nietzsche, Heidegger, Girard on "The Death of God,"* 57 Revista Portuguesa de Filosofia 299, 302 (2001).
[136] *Supra* note 47, at 12,

The philosophers, observes Foucault, mistakenly think that knowledge is to be perceived in wisdom, unity, love and logocentrism.[137] The last is the doctrine that all sciences are united in a single science, the Logos.[138] Whereas, in reality, Nietzsche from a Foucauldian perspective sees that knowledge is the outcome of the hatred and the derision of power struggle. It is thus arbitrary and constantly changing depending on power relations.[139] Moreover, Nietzsche declares in 109 of *The Gay Science* that the world has a chaotic existence. It lacks order, organization, beauty and wisdom. It does not observe any laws.[140]

Nietzsche's positions on the source of human knowledge, the disorganization of the world and above all the death of God pose a challenge for Islam. They are the total opposite of the orthodox Islamic perceptions on knowledge, the world and God. Truth in Sharīʿa has a static existence but a dynamic exploration. This is outlined in the Ḥadīth: "Whoever practices *ijtihād* and he is correct, then he will be twice rewarded. Whoever practices *ijtihād* and he is mistaken, then he will receive a single reward."[141] The Ḥadīth gives the *mujtahid* a reward for *ijtihād* and another for finding the right divine law on her issue.

The Prophet's reward distribution reveals that there is a fixed truth discoverable by *ijtihād*. Although *ijtihād* in practice may succumb to power struggle in the production of knowledge, the common notion is that the *mujtahid* is only deriving truth form the revelatory sources of the Qurʾān and the Sunna. Moreover, the abovementioned Muslim philosophers think in terms of unity of knowledge; all sciences are interrelated, and they can be reduced to theology. The world is God's creation. Every intelligible being came into existence through emanation from the Divine.[142] Since the world eventually emanates from His perfect being and it is proof

[137] *Id.*
[138] Giuseppe Tanzella-Nitti, *Unity of Knowledge*, http://inters.org/unity-of-knowledge
[139] *Supra* note 47, at 12.
[140] *Supra* note 125, at 119-20.
[141] Ṣaḥiḥ al-Bukhārī's Ḥadīth compilation no. 6919.
[142] The Islamic theory of emanation assumes that the world was created by the higher intellect contemplating the lower one, with God being the primary intellect to do so. *See* Abū Naṣr al-Farābī, *Arāʾ Ahl al-Madīna al-Fāḍila wa Muḍādātiha* 21-2 (Muʾassasat Hindāwī lil-Taʿlīm wal-Thaqāfa, 2016).

to the greatness of His craftsmanship, then the world is perfectly organized even if it may appear otherwise.[143] To contemplate the world is to know God.

How can a CR-practicing polity reconcile Islam with Nietzschean thought? Habermas promotes a solution that An-Na'im's reciprocity doctrine is likely to uphold; both the religious and the secularist citizens would metamorphose to meet on a middle ground. The religious would yield to the fallibilism of her belief and the secularist to cognitive openness.[144] As such, the religious would cease to believe that her religion monopolizes truth and the secularist would be ready to learn from the religious experiences of her opponent. Would followers of these determined thinkers compromise? Could this self-modernization occur without self-annihilation? It remains to be seen.

[143] In Hayy b. Yaqzān by Ibn Tufayl (1110-1185), a boy grows up on a deserted Island. His observation of the order in his environment guides him to the existence of a careful creator, God. The parable is intended to show that God may be known through reasoning as much as revelation. *See* Abu Bakr Ibn Tufail, *The History of Hayy Ibn Yaqzan* (trans. Simon Ockley, Chapman and Hall, 1929).
[144] Melissa Yates, *Rawls and Habermas on Religion in the Public Sphere*, 33 Philosophy & Social Criticism 880, 887 (2007).

IV. Objectivity: Real or Imagined?

HRs advocates view Islam as the source of objectionable laws. Michael Ignatieff, for example, counts Islam as one of the three ideologies that challenge the prevalence of HRs across the globe.[145] He cites the example of Saudi Arabia's objection to Articles 16 and 18 of the Universal Declaration of Human Rights (UDHR) to prove his Islamic challenge claim. Article 16 relates to the right of free marriage choice and 18 to the freedom of religion. Saudi Arabia refuses to ratify both articles on grounds that limiting women's choice in marriage maintains patriarchal property[146] and that Sharīʿa forbids apostacy.

A more scathing criticism of the Saudi government comes from the Committee Against Torture, the body that supervises the member states' compliance to the Convention Against Torture (CAT). In 2016, the Committee criticized the corporal punishments of Saudi Criminal Law. It cited precisely Sharīʿa-based penalties of flogging, stoning and amputations as punishments in violation of the Convention.[147] These penalties are not only confined to the *ḥudūd* crimes, but extend to *taʿzīr* and *qiṣaṣ*. Whereas the *ḥudūd* are prescribed in the Qurʾān, *taʿzīr* is left to the discretionary powers of the judge and *qiṣaṣ* is a *jus talionis* punishment. An infamous *taʿzīr* punishment in Saudi Arabia is the sentencing of Saudi blogger Ra'if Badawi to 10 years in prison and 1000 lashes for the charge of insulting Islam.[148] Another *qiṣaṣ* case sentenced a man to partial paralyses for paralyzing another in a knife fight.[149]

A. Reconciling the Contraries

How to resolve the contradiction between Sharīʿa and HRs laws is the concern of the Sharīʿa reconciliation movement. The Sharīʿa reconciliation reformists are many and few at the same time. They are many in that they embrace HRs principles but a few in

[145] The other two challenges come from East Asia and the West itself. Both challenge the hegemonic culture of HRs. Michael Ignatieff, *Human Rights as Politics and Idolatry* 58 (Princeton University Press, 2001).
[146] *Id.* at 59.
[147] Article 1 of CAT forbids any act causing severe pain or suffering as punishment for an act that the victim has committed. Committee Against Torture Reviews Report of Saudi Arabia, 12/4/2016. https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19876&LangID=E
[148] *Id.*
[149] Ruaim Muaygil, *The Role of Physicians in State-Sponsored Corporal Punishment: A View from Saudi Arabia*, 25 Cambridge Q. Healthcare Ethics 479, 479 (2016).

suggesting methods to implement these principles in a Sharīʿa context. Every suggestion is abandoned in its infancy due to too many valid criticisms. The reformists, for example, neglect Ṭaha's technique of Meccan/Medinan distinction. Ṭaha builds his technique on the proposal that the Meccan principles on piety, justice and mercy abrogate the Medinan laws, stipulating Sharīʿa's criminal, commercial and personal status laws.[150] Ṭaha's proposition has a serious drawback. The abrogation of Sharīʿa laws is a controversial issue in Islam.[151] A further delving into it is likely to face opposition. This is especially true as the Medinan verses were revealed after the Meccan, whereas the rule for the abrogated and the abrogating is that the former precedes the latter in time.

Sachedina is one of the HRs advocates in Islam, who suggest a Qurʾān-based alternative solution to reconciling classical Sharīʿa with universal HRs. In *Islam and the Challenges of Human Rights*, Sachedina argues that the conception of man in Islam is that of an upright individual. Verse 30:30 defines man as born "a human by nature upright-God's original [nature] upon which He created humankind."[152] Sachedina deems this upright conception *fiṭrat-allah* (the nature of God), which God has created in man. *Fiṭrat-allah* is man's original nature. It induces him to achieve a balance between the known convictions and the unknown moral judgements through a reflective process.

Sachedina concludes from the *fiṭrat* scheme that the moral norms in Islam are not a decided sum of rules to be known from the Islamic texts. Rather, these norms are to be learned through reflection and deliberation of their consequences in their social context. Additionally, Sachedina asserts that the Qurʾān invites all humankind of different cultures to seek a universal ideal out of the diverse human conditions.[153] This

[150] *Supra* note 17, at 56-7.
[151] Debates over the abrogating and the abrogated rules revolve around the relationship between contradictory text-based rules. Jurists, who reject abrogation, suggest other explanations for the contradiction, such as, the specific rule limiting the general. See Abū Bakr al-ʿArabī, *Al-Nāsikh wal-Mansūkh fil-Qurʾān al-Karīm* 198 (ed. ʿAbdel Kabīr al-Madʿary, Maktabat al-Thaqāfa al-Dīniyya, 1992).
[152] *Supra* note 26, at 50.
[153] Sachedina is referring to verse 49:13 that states: "O mankind! Lo! We have created you male and female and have made you nations and tribes that ye may know one another. Lo! The noblest of you in the sight of Allah, is the best in conduct."

invitation would encourage people to construct a common ethical language as they work together to create the just society.[154]

Khaled Abou El Fadl, another advocate of HRs in Islam, provides a more precise argument and a decisive position on Sharīʿa's controversial law than those of Sachedina. He asserts human agency in determining divine law. This agency is already divinely recognized in the Qurʾānic verse 2:30. The verse narrates that, upon the creation of Adam, God announces to the angels that He will create a viceroy on earth.[155] Accordingly, man, by divine ordinance, is God's viceroy. He is responsible for his action, even if his action is simply the application of a ruling, ordained by divine text.

Man is also bound by the dictates of mercy, which Abou El Fadl explains as "a state in which the individual is able to be just with him- or herself and others by giving each individual person his or her due."[156] For Abou El Fadl, mercy is a principle in Islam that requires justice with others despite differences of creed and race. This is necessarily so as God states in verses 49:13 that He has created humankind in diverse nations and tribes. Abou El Fadl finds this verse sanctifying human diversity. Hence, humans are obligated to genuinely perceive each other with patience and respect.[157]

Abou El Fadl proposes that Muslims put primacy to justice over law. In this order, divine law would be known if it agrees with justice, instead of justice being known from Sharīʿa law. This order would force Muslims to question what constitutes justice according to their temporal context to arrive at their moral commitments.[158] But what if the perceived moral commitment contradicts with a divine law? What if Muslims arrive at the principle that people have the right to their intellect, while Sharīʿa stipulates the killing of an apostate?

Abou El Fadl offers the Muʿtazilī answer that the authenticity of divine text ought to be reviewed or its meaning re-interpreted to agree with a perceived human

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[154] *Id.*
[155] Khaled Abou El Fadl, *Islam and the Challenge of Democracy* 6 (eds. Joshua Cohen & Deborah Chasman, Princeton University Press, 2004).
[156] *Id.* at 20.
[157] *Id.* at 22.
[158] *Id.* at 21.

right.[159] Although Abou El Fadl does not necessarily recommend following the Muʿtazilī solution, he concurs with Muʿtazilism on the need for Muslims to recognize the existence of moral values, such as, justice and goodness.[160] He also sees importance in developing the Muʿtazilī principle of enjoining the good and forbidding the bad to become the basis for natural law in Islam. This law would recognize unassailable rights that override any opposing Sharīʿa laws.[161]

B. Muʿtazilism and the Quest for Objective Values

It is surprising for those who believe that divine law embodies the ultimate justice to seek a natural law for Sharīʿa. Sharīʿa, the divine law for Muslims, in a pre-colonial encounter (18th century) did not recognize a positive/natural law bifurcation. No higher law like natural law was ever thought to be needed to save Muslims from Sharīʿa laws. Ṭaha ʿAwaḍ, a pro-Muʿtazilī academic,[162] explains that the Ashʿarīs and Ahl al-Sunna[163] theologians believe that God is the *ḥākim* (adjudicator/decider/ruler/legislator). There is no place for a positive/natural law legislation. Sharīʿa, according to these theologians, is the positive law for Muslims. It is the expression of God's will, articulated in the Qurʾān and the Sunna. Where the text is silent on a questionable issue, *ijtihād* (juristic exposition of God's law) is tasked with learning God's will to solve this issue.[164] To think of a higher law in an Ashʿarī context is to engage in the absurd.

Not all Muslims, however, subscribe to this old Ashʿarī thinking. Muslims appear to be split into shades of conservatism and liberalism. The conservative

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[159] Khaled Abou El Fadl, *A Distinctively Islamic View of Human Rights: Does it Exist and Is it Compatible with the Universal Declaration of Human Rights?* https://www.searchforbeauty.org/2005/07/01/a-distinctly-islamic-view-of-human-rights-does-it-exist-and-is-it-compatible-with-the-universal-declaration-of-human-rights-vol-27-no-2-csis/

[160] David Johnston, *Islam and Human rights: A Growing Rapprochement?*, 74 American Journal of Economics and Sociology 113, 132 (2015).

[161] Abou El Fadl regrets that the Christian Philosopher Thomas Aquinas developed natural law concepts from the borrowed Islamic principle of enjoining the good and forbidding the bad, while Muslims failed to do so. *Supra* note 159.

[162] ʿAwaḍ is a professor of legal philosophy at Ain Shams University in Cairo.

[163] These are 10th century theological schools of thought that opposed the Muʿtazilī hermeneutics of revelation and prioritized a literal reading of the text. Today, the majority of Sunnī Muslims are Ashʿarī in creed. These technical distinctions, however, hardly bear significance for lay Muslims.

[164] *Supra* note 105, at 119.

"extreme" advocates *al-ḥākamiyya lillah* (sovereignty to God)[165] to reject the application of secular laws where the text articulates a position. The liberal "extreme" considers the text a historical work, whose laws are no longer applicable, except perhaps on the ritual plane. "Moderate" liberals seek a higher law, call it natural or divine, to save them from the perceived injustices and rights infringements of Sharīʿa application. They even need it to protect the right to dissent from mere Sharīʿa law enforcement.

The search for bioethics in Islam reflects liberal revulsion to the application of Sharīʿa's corporeal punishments. Countries applying Sharīʿa's criminal law penalties, like Saudi Arabia, seek out hospitals and physicians to amputate and maim convicted felons. The request has been shocking for many doctors operating in Saudi Arabia.[166] Physicians, who refuse to cooperate on this issue, make the excuse that felons are no patients and amputating them has no medical benefit.[167] Their objection has initiated the search for bioethical precedents in Islamic history to support their dissent. Some scholars came up with the four principles of beneficence, nonmaleficence, justice and autonomy. They entrench them in Qurʾānic arguments to justify the physicians' rights to refrain from physically harming healthy people.[168]

The way out of this medical impasse is the employment of nonmedical professionals to carry out Sharīʿa's corporeal punishments.[169] Yet, Muʿtazilī thinking is seen as the greater savior of Muslim liberals from the reprehensible outcomes of Sharīʿa enforcement. ʿAwaḍ cites Muʿtazilī theology as counter Ashʿarī thinking. In his view, the Muʿtazilīs believe that there is a perceivable divine wisdom that guides nature and the cosmos.[170] Deeds have intelligible intrinsic values that agree with this wisdom and that the human mind is capable of learning, independent of the religious text. This proposal suggests the existence of knowable objective values like the evaluative

[165] This is a moto that the Khawārij, a group opposing the arbitration between ʿAlī b. Abī Ṭalib, the first *imām* in Shīʿism the fourth rightly guided caliph in Sunnism, and his governor in Syria Muʿāwiya b. Abī Sufyān over the legitimate caliph. The khawārij consider the arbitration that reinstated Muʿāwiya not ʿAlī a decision opposing divine law. Sovereignty to God became a common 20th century moto for those who took up arms against "heretic" Muslim governments.
[166] One of the requests was to paralyze a person. *Supra* note 145, at 479.
[167] Id.
[168] *Id.* at 484-5.
[169] *Id.* at 487-8.
[170] *Supra* note 105, at 119-20.

statements that "murder is bad" and "charity is good." The human mind is capable the learning the badness in murder and the goodness in charity independent of any divine ordinance and prohibition. God's law is simply an indicator to these values rather than a foundation for them.[171]

In Muʿtazilī thought, claims ʿAwaḍ, there are two modes of knowledge acquisition: an *a priori (al-badāha)* and an inquisitive *(al-iktisāb)*. An *a priori* knowledge is that which needs no proof. It encompasses general values, such as, the ugliness of deceitfulness and the goodness of truthfulness.[172] The inquisitive knowledge is that which requires investigation to reach a decision. This knowledge covers all particular acts that do not qualify as generalities. According to the Muʿtazilīs, the two modes are interrelated as every inquisitive knowledge has an *a priori* origin supporting it.[173] If a Muslim, for example, thinks that corporeal punishments are good, then it must go back to a certain general value that she has learned *a priori*, such as, deterrence from crime necessitates harsh punishments.[174]

The question for us today is whether the Muʿtazilīs would flout Sharīʿa's criminal law injunctions, if found disagreeing with today's perceived objective values? It is difficult to find an answer to this question from the few extant Muʿtazilī works, which mostly focus on broad theological issues. Historically, the Muʿtazilī exegete Abū al-Qāsim al-Zamakhsharī (1075-1144) takes corporeal punishments for granted. For instance, on *qiṣaṣ,* he accepts an eye for an eye punishment. He only takes issue with the inequality between the souls of women and men. Men are superior to women. Killing a man for murdering a woman defies *qiṣaṣ'* equality principle. Al-Zamakhsharī resolves this issue by suggesting that the avenger (the woman's relative) pardons the male aggressor out of charity.[175]

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[171] *Id.* at 136.
[172] This example is not a typical Islamic position on the values of truth and deceit. Islamic jurists question the value of lying for a good cause. Truth tellers in duress are the revered contenders *(ulū al-ʿazm)* and liars are the pardoned license-users *(ahl al-rukhaṣ)*. During the createdness of the Qurʾān inquisition, Sunnī jurist Ibn Ḥanbal (780-855) was revered for refuting Muʿtazilī doctrines, while other scholars were excused in conceding to these doctrines to save their own skin. Walter Patton, *Aḥmad Ibn Ḥanbal and the Miḥna* 64, 111 (E. J. Brill, 1897).
[173] *Supra* note 105, at 137.
[174] ʿAwda subscribes to this deterrence axiom. *Supra* note 10, at 1:618-9.
[175] Abū al-Qāsim al-Zamakhsharī, *Tasfīr al-Kashshāf* 1:625-6 (2 vols., Dār al-Kutub al-ʿIlmiyya, 1995).

Most of the other extant Muʿtazilī works are political and theological. It is difficult to relate them to specific HRs rulings without fresh hermeneutics. Politically, the Muʿtazilīs use the Qurʾānic principle of enjoining the good and forbidding the bad to license Muslim uprisings against an unjust ruler. Their only revolt condition is acquiring sufficient force to withstand the ruler's aggression.[176] Additionally, the Muʿtazilīs promote man's free will against the determinism of the Jabriyya theologians. The principle of free will recognizes man's autonomy in choosing his action and renders him responsible for their outcomes. Determinism claims that all actions are God's creation and man is hardly responsible for committing them. The Umayyad rulers (r. 661-750) are said to have advocated Jabriyya to absolve themselves of the atrocities committed against their opponents,[177] especially the Shīʿīs. Free will was the Muʿtazilī method to avert determinism and highlight the Umayyad's political and criminal responsibility.

Theologically, the Muʿtazilīs argue the createdness of the Qurʾān to distinguish God from His divine word.[178] The distinction is crucial for Muslims because it maintains the fundamental precept of the oneness of God. The confession of faith in Islam is through the oneness declaration: God is the only eternal being and He begets not nor is He begotten. To believe that anyone or anything shares His eternity is to become a disbeliever from an Islamic perspective.

Avoiding an act of disbelief, the Muʿtazilīs insisted that God's Qurʾānic word was created at a certain time. It does not share in God's eternity and thus subject to a hermeneutical reading of its text. Most of the Muʿtazilī hermeneutics focus on exalting God by denying the literalism of His anthropomorphic attributes, mentioned in the Qurʾān. The Muʿtazilīs read God's Qurʾānic attributes like the Seer, the Listener and the Seated as figurative definitions of His ultimate power and perfection. For example, verse 48:10 which states that "God's hand is over their hands" is an expression of divine omnipotence.[179] Muʿtazilism witnessed a sharp fall in fame and name due to the official

[176] Mazher-Ud-Din Siddiqi, *Some Aspects of the Muʿtazilī Interpretation of the Qurʾān,* 2 Islamic Studies 95, 97 (1963).
[177] *Id.* at 98.
[178] Saʿīd Murād, *Madrasat al-Baṣra al-Iʿtizāliyya* 203-4 (Maktabat al-Anglo al-Maṣriyya, 1992).
[179] For the divine attributes in Mu'tazilī thought, *see id.* at 275-302.

adoption of the Qurʾānic createdness creed in 827. All judges and jurists were required to submit to the createdness creed or face torture and imprisonment. [180] This inquisition tarnished the Muʿtazilīs' reputation, led to their persecution in the post-inquisition period and contributed to the extinction of their theological school around the 10th century.

C. Is Objectivism Tenable?

The purported purpose for reviving Mu'tazilism is to converge with universal HRs as expounded in UDHR and subsequent instruments, such as, civil and political, child and women's rights. Islamic HRs reformists view many of the values rooted in HRs instruments as carrying no cultural bias. Hence, Muʿtazilī objective values would easily accord with HRs, once the putative Muʿtazilī hermeneutics are applied to Sharīʿa's rulings. Naturally, the objectivity of HRs values has its critics, who argue that most HRs mirror Western values.[181] Yet, none of these critics asks the question whether attaining objectivism is possible. As will be discussed below, the differences over the objectivity of morality and our perception of values prove that objectivism is untenable, perhaps none existent.

Objectivity sceptics in non-Muslim cultures fully believe that objectivity is a fictional concept, made to universalize a purely subjective viewpoint through the powers of false persuasion. Alasdair MacIntyre, for example, regards human knowledge of truth a movement among narratives. Every human realization of a previously unknown knowledge is a movement from one narrative to another. Hamlet, the Shakespearean tragic hero, is MacIntyre's example on narrative traveling. Hamlet lives multiple revelations of the truth concerning the murder of his father, the innocence of his mother and the culpability of his uncle. In each revelation, he journeys from one narrative to another. His realization that there is no existence outside these narratives

[180] Sunnī jurist Ibn Ḥanbal, the eponym of the Ḥanbalī school of law, was tortured and imprisoned during the createdness of the Qurʾān inquisition. Ibn Ḥanbal refused to take a position on whether the Qurʾān is created or eternal for lack of textual evidence. For Ibn Ḥanbal's response, *see supra* note 172, at 120-1.

[181] The Saudi delegation to the UDHR, for example, criticized the UDHR's Committee for proclaiming "the superiority of one civilization over all others." *Supra* note 145, at 59.

to enable him to learn the truth is, from MacIntyre's viewpoint, a sign of true knowledge.[182]

Those who think otherwise, like Jane Austen's *Emma*, are living a fiction in MacIntyre's opinion. Emma finds "truth" by exposing all deceptions. But upon reaching this point, Emma does not arrive at the state of objectivity from which everyone ought to view the truth. Rather, Austen, the author, has replaced one interpretation with another.[183] Hence, for MacIntyre and other deconstructionists, the objectivity problem is with the reader or the legal actor who places herself outside and even above her contemplated text. She falsely stands somewhere at a vantage point from which she can deconstruct all texts but her vision of them. While everybody is subjective, she is objective. Placing herself outside the range of deconstruction undermines deconstruction itself. It reduces deconstruction to an instrument or a theory among many, rather than an all-encompassing criticism.[184]

MacIntyre does not trump objectivity altogether. He suggests new but rather cryptic narratives towards objectivity: the tradition and the comparative.[185] The tradition narrative assumes that traditions are not monolithic blocks of a single narrative. They rather contain an accumulation of narratives, each built on the other. An evaluation of the theory that shapes each narrative within a tradition is continuous and dialectic and hence capable of discovering an objective argumentation.[186] The comparative narrative recognizes human capacity for constructing histories. These histories form comparative narratives that can expose the anomalies of each tradition and even force a crisis into it by suggesting a cognitive method.[187]

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[182] Alisdair MacIntyre, *Epistemological Crises, Dramatic Narrative and the Philosophy of Science*, 60:4, The Monist 453, 453-7 (1977).
[183] *Id.* at 456. I find Emma's position more mature than Hamlet's. Whereas Emma realizes the non-existence of objective truth and thus settles for the first accommodating fiction, Hamlet remains tormented by his want for an objective truth to decide on the right narrative. Her fault, however, is her ignorance of her subjectivity.
[184] Pierre Schlag, *"Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631, 1643 (1990).
[185] Jason Blakely, *The Forgotten Alasdair MacIntyre: Beyond Value Neutrality in the Social Sciences*, 45 The Northeastern Political Science Association 445, 452-4 (2013).
[186] *Supra* note 182, at 468.
[187] *Id.* at 470.

The Marxists are the strongest skeptics of PIL and its concomitant claims of universality and objectivity. Soviet legal philosopher Evgeny Pashukanis argues that law comes into existence through a commodity exchange form,[188] when two parties claim ownership rights over a certain property and are willing to exchange the one for the other. The dictates of this form give rise to moralities like justice and equality. These moralities are not the demands of humanity but that of the market. Their purpose is to maintain the efficiency of commodity exchange among supposedly equal participants within that market.[189]

Pashukanis cites the Roman laws of *ius gentium* (law of nations) and *ius civile* (law of citizens) as examples of how law and morality are in the service of commodity exchange. The Romans introduced *ius gentium* next to *ius civile* for mercantile purposes. Like today's conflict of laws, *ius gentium* takes into consideration non-Roman laws to promote international trade. Contrastingly, *ius civile* privileged Roman citizens over foreigners and thus proved unconducive to trading with non-Romans. Pashukanis, however, views *ius gentium* a law rising out of despise for foreigners, whom the Romans think ought not to enjoy the same Roman citizenship rights.[190]

For Pashukanis, legal norms, such as, equity, justice, freedom and fairness together with the concept of the state are lifeless abstractions,[191] meant to conceal the coercion of the commodity exchange form. Those who trade in the market are not all autonomous nor all equal individuals. They vary in their bargaining power commensurate to their potential to employ self-help. Workers are a good example of this concealed inequality. While they sell their labor in the market, the only autonomy they enjoy is the freedom to die of starvation.[192] This is because if they do not contract at the market's unfair price, they are sure to die of hunger.

Yet, the principles of free competition and equality are required to establish a successful exchange market. These principles must appear to exist and be enforced by

[188] China Mieville, *The Commodity-Form Theory of International Law: An Introduction,* 17 L JIL 271, 281 (2004).
[189] *Id.* at 286.
[190] Evgeny Pashukanis, *The General Theory of Law & Marxism* 156 (Transaction Publishers, 2003).
[191] *Supra* note 188, at 283.
[192] *Supra* note 190, at 157.

a public authority that also appears distant from all market actors and neutral to their personal interests. This market requirement for a public authority is, in Pashukanis' view, what instituted the abstraction of the state.[193] State law appears impartial towards market actors, whereas in reality, its neutrality benefits the resource-privileged actors by not interfering to tip the balance between these actors and the resource-deprived ones. PIL is no different to domestic law, if viewed from a legal form perspective. Its moralities, i.e., HRs, are those that benefit the market. PIL has been erroneously regarded otherwise simply because it has been viewed from a content-based perspective.[194]

Supporters of objective values, on the other hand, have to deal with the challenge of the values' foundation. The challenge is often framed in the question: what are the origins of morality? Answering this question provokes an array of unresolvable debates with no tradition-independent criterion for objectivity. Two main camps stand out in these debates: theistic voluntarism (TV) and independent moral realism (IMR). [195] TV proponents maintain that morality stems somehow from a theistic being. God, broadly defined,[196] is that being, and His morality could be known through either His divine will or command. As divine will appears to deliver more universal morality in face of the particulars of divine commands, it is the preferable source to follow in learning objective morality. The question, however, is how to learn God's will without His command? Indeed, believers know His will through His spoken command. But what if the perceived will contradicts with the command? Like the Muʿtazilīs, hopeful believers in non-Muslim cultures argue that through a "correct use of human reason," the human mind can arrive at the same conclusions of religious texts.[197]

Meanwhile, IMR promotes the existence of objective morality, without being the creation of either God or man. IMR advocates are thereby free to originate morality anywhere outside the pale of the divine and the human. A trend in IMR thinking, for example, renders science and reason of the age of Enlightenment the foundation for

[193] *Id.* at 141.
[194] *Supra* note 188, at 275-6.
[195] Christian B. Miller, *Morality is real, Objective, and Supranatural,* 1384 Annals of the New York Academy of Science 74, 77 (2016).
[196] He is omnibenevolent, omnipotent, omniscient, creator of the universe and takes interest in His creation. *Id.* at 74-5.
[197] *Id.* at 76.

today's objective morality.[198] For this trend, moral progress is possible today because of the historical development of natural science. IMR advocate Michael Shermer argues that French legal philosopher Montesquieu (1689-1755) deduces his legal ideas from the natural laws that govern societies. An instance of these deductions is the inclination of the hunting and herding nations to war and the trading to peace.[199] This is because the hunting and herding peoples remain independent of each other, while the trading nations are interdependent for the purposes of exchanging their goods. This distinction has resulted in today's trade theory of peace, which is, in Shermer's view, a moral progress deduced from the objective source of natural science.[200]

Muslim HRs reformists hardly tackle any of the ideas proposed by objectivity skeptics or advocates. Both groups pose relevant questions to the Sharīʿa reconciliation thesis. From the skeptics' perspective, Muslim reformists could be falling in Emma's trap, a situation where they reject the subjective conservative narrative only to follow a likewise subjective liberalist narrative. In a Pashukinian sense, the reformists have moved from conservative religious morality to liberal market morality. Both are equally subjective. The only achievement is Emma's deceptive self-complacency. Also, objectivity advocates place a challenge to objectivism rather than a solution. The correct use of human reason in Western culture has been lending progressive moralities from the abolishment of slavery in the US to civil rights movement in the 1960s.[201] Yet, what makes objective morality progress is likely to be a subjective factor, such as people's interests, sympathy or antipathy. In the slavery example, the humanity of the slaves could not have undergone any change. Rather the perception of that humanity or may be the interest in slave labor is the changing factor. Small wonder that the HRs reformists are reluctant to agree with objectivity advocates on contentious issues like recognizing LGBT rights or the prostitution profession. Both sides are supposedly objective, but their objectivity does end them with the same conclusion.

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[198] Michael Shermer, *Morality Is Real, Objective and Natural,* 1484 Annals of the New York Academy of Sciences 57, 59 (2016).
[199] Shermer takes these historical accounts for granted despite evidence to the contrary. The Vikings, for example, were known as both raiders and traders, which defeats Shermer's pacific traders' claim. http://realscandinavia.com/raiders-traders-and-settlers-a-brief-history-of-the-vikings/
[200] *Supra* note 198.
[201] *Id.* at 57.

Conclusion

The three reform movements of Sharīʿa codification, privatization and reconciliation are tragic in their endeavors to universalize Sharīʿa in accordance with liberal scientism. The movements have been developing their reform proposals in a background of a globally predominant liberalism. Both Sharīʿa and liberalism legitimize their legal orders based on irreconcilable first principles. Sharīʿa posits God a First Principle, from which all laws gain their validity. Liberalism insists on the futility of finding an originary cause and thus assigns an empty slot for the First Principle. Any elected cause can fill that slot.[202] The current is humanism.[203] The conflicting First Principles, God versus humanism renders Sharīʿa and liberalism simultaneously different and similar. They are different in their legal foundations but similar in their *modus operandi*. Both claim a universal message and are adamant to continue their intellectual and physical conquest of the world until its *full* and *voluntary* subjugation. What is ahead of them is an apocalyptic future: either the one exterminating the other or a continuous fight to the bitter end.

The three reform movements discussed in this thesis, if successful, are but facilitating the elimination of Sharīʿa's competing edge in face of liberalism. Sharīʿa Codification eliminates the multiple narratives of classical Sharīʿa in favor of an expert-caliph determination. Historically, this determination has been ordering quietism whenever revolt builds up among an aggrieved public such as Shīʿi Muslims. Sharīʿa privatization shifts HRs from the topic of legal deliberation between Islamists and secularists to the rules of conducting that very deliberation. The move makes it impossible for Sharīʿa proponents to argue for Sharīʿa's contestable issues, such as, apostasy or gender inequality. Ironically, resolving these issues were the main reason for proposing CR deliberation. Finally, Sharīʿa reconciliation is trusting in the existence of an objective narrative in which Sharīʿa would come to terms with liberal HRs. Yet,

[202] Ignatieff finds foundational HRs arguments, i.e., those that question the HRs origins, fruitless. He proposes to abandon them altogether and focus on the effects of HRs on human beings. See *supra* note 145, at 54.
[203] William Rasch, *Sovereignty and Its Discontent: On the Primacy of Conflict and the Structure of the Political* 32-3 (Taylor & Francis Group, 2004).

the movement is actually traveling from the visibly subjective Sharīʿa narrative to the invisibly subjective HRs narrative. [204]

Liberal scientism with its aims of making national laws neutral, reasonable and objective developed in the last century as part of liberalism's meta narrative on the universalization of a cosmopolitan law. The law is grounded in HRs, enunciated in UDHR and its subsequent treaties. It transcends the civil laws of the world's nation-states by addressing individuals *qua* human beings rather than citizens of specific nations. Its purpose is to establish a *global perpetual peace* to prevent the recurrence of the horrors that the world has witnessed in the two global wars of the 20th century.[205] As happened in the Nuremburg and Tokyo trials, individuals of any nationality are to be held liable for their criminal actions before an international court of law. Expounding this originally Kantian peace project,[206] Habermas finds the First World, i.e., the winning allies of World War II, the standard for HRs protection that must be emulated by the rest of the world.[207] To guarantee global compliance, Article 2(4) of the UN charter outlaws war except in self-defense.

Liberalism's peace project is detrimental to Sharīʿa as the source of legal culture for many second and third world Muslim countries in Habermas' state stratification.[208] International criticism of Sharīʿa is increasing by the day. It censures Sharīʿa for, *inter alia*, stipulating corporeal punishments and jihad; legalizing crimes against morality, gender inequality and differential treatment of non-Muslims; prohibiting apostasy from Islam, LGBTQ rights, interfaith marriage, prostitution and alcohol consumption; imposing a female dress code; permitting female genital mutilation, polygamy and rote learning of Islamic texts for minors. Although by adopting an empty-slot First Principle, liberalism accedes to the absence of an ultimate truth, the natural outcome of being open to pluralist cognitive suppositions does not follow from this concession. Liberalism's humanism taints international conflicts with a good/evil moral binary.

[204] HRs moralism, for example, does not permit the right to freedom of speech for those designated as terrorists. This is despite the fact that the right is originally made to protect offending/opposing speech.
[205] *See* Jurgen Habermas, *Kant's Idea of Perpetual Peace: At Two Hundred Years' Historical Remove,* https://www.jus.uio.no/smr/om/aktuelt/arrangementer/2015/habermas.-kant-s-perpetual-peace-with-the-benefit-of-200-years--hinsight.pdf
[206] Immanuel Kant, *Perpetual Peace: A Philosophical Essay* (trans. M. Campbell Smith, George Allen & Unwin Ltd., 1917).
[207] *Supra* note 205.
[208] *Id*.

Any opponent to liberalism is deemed an absolute enemy. War against that opponent is justified until she is subdued, and peace prevails.[209]

Yet, the peace that ensues from the predominance of liberal humanism has its insightful critics. William Rasch finds it the "peace of the graveyard."[210] This is because after liberalism annihilates true opposition through its good/evil moralism, it imposes a sham pluralism under the rule-of-law (RoL) pretense.[211] True pluralism, argues Carl Schmitt, inculcates the existence of two adversaries with opposing beliefs. The adversaries form a friend/foe political binary rather than humanism's good/bad division. No moral attributes are attached to the enemy in Schmitt's political binary. She is never demonized and thus retains her equal right to fight a war in the existential sense in order to impose her beliefs.[212] The de-moralization of war is due to the absence of an impartial truth or sovereign that can evaluate conflicting beliefs. Who is good? Who is bad? It cannot be decided for there is no universally acknowledged good.[213]

In place of Schmitt's pluralism, liberal democracies, argues Rasch, have propagated a sham pluralism of the government/opposition binary.[214] This binary presupposes the existence of opposing views advanced in peaceful debates in recognized platforms like parliaments, unions and media outlets. Each side has the right to come to power through a defined peaceful procedure. This form of peace politics is carried out under the RoL rubric, a legal order that claims calculability, rationality and neutrality through the scientism of law. Yet, the RoL is deceptively neutral and pacifist.[215] As in Sharīʿa privatization proposals, opposition within a RoL must be homogenized with the conditions of liberal constitutionalism, citizenship rights and HRs. These conditions thwart debates on almost all of the abovementioned contested Sharīʿa issues. Since these conditions cannot be intellectually valid within a discourse that recognizes the lack of an absolute truth, then their imposition cannot be by persuasion.

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[209] *Supra* note 203, at 2.
[210] *Id.* at 20.
[211] *Id.* at 91.
[212] Carl Schmitt, *The Concept of the Political* 27-37 (trans. George Schwab, University of Chicago Press, 2007).
[213] *Supra* note 203, at 30.
[214] *Id* at 45.
[215] Jason Beckett, *Conflicting Orders: How Peace Is Waged*, 20 Leiden Journal of International Law 281, 285-8 (2007).

If not by persuasion, then the question now is how does the RoL rule? Forced suicide seems to be the answer coming from Muslim-majority nations, where the RoL doctrine and liberalism are struggling to make a footing in a thriving friend/enemy politics. Turkey is one of these nations, whose Islamist politicians have endeavored to reconcile Islamism with liberalism in an environment of hostility between the two camps. Yet, reviewing Turkey's modern politics exposes the impossibility of reconciling Islamist and liberalist ideologies. MB Turkish President Recep Tayyib Erdogan, who promised the reconciliation, proved to be committing a forced suicide; he had to negate his ideology and embrace that of his opponents to disempower them. But, by doing so, he neither upheld the rule of Islam nor the RoL.

Following the abolishment of the Ottoman caliphate in 1924, the Turkish Constitution embraced French-modelled secularism *(Laiklik)*. Turkish secularism is defined as assertive in that it is aggressive towards religion rather than neutral.[216] As the Turkish Constitutional Court affirms, "[t]he dominant and effective power in the state is reason and science, not religious rules and injunctions."[217] The Turkish army deems itself the guardian of secularism against reactionary and unscientific thought, a common reference to the socialist and Islamic propositions in the public sphere. From 1960 to 2016, the military has conducted about five coup d'états against democratically elected governments.[218] The 1960 coup aimed to thwart any political concessions to Islam in the public sphere. It resulted in the execution of prime minister Adnan Menderes.[219] The 1997 coup deposed the Islamist government of Necmettin Erbakan for wanting, *inter alia*, to strengthen ties with the Islamic East instead of the secular West. Erbakan's party (Welfare Party) was disbanded by a court order in the following year.

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[216] Ergun Ozbudun, *Secularism in Islamic Countries: Turkey as a Model in* Constitutionalism in Islamic Countries: Between Upheaval and Continuity 138 (Eds. Reiner Grote & Tilmann Roder, Oxford University Press, 2012).
[217] *Id.* at 140.
[218] Spyridon Kotsovilis, *Between Fedora and Fez: Modern Turkey's Troubled Road to Democratic Consolidation and the Pluralizing Role of Erdogan's Pro-Islam Government in* Turkey and the European Union: Internal Dynamics and External Challenges 48 (ed. Joseph S. Joseph, Palgrave Macmillan, 2006). Kotsovilis is missing the 2016 coup.
[219] The Democratic Party sanctioned Islamic publications and lifted the ban on calling to prayers in Arabic and on Sūfī orders. Although the party was secularist, it granted these concessions to appeal to the Muslim constituency. *Id.* at 46.

Turkey's application for EU membership in the 1999 Helsinki summit changed the fortunes of Islamist politics in Turkey. To gain accession in the EU, Turkey had to meet the Copenhagen criteria, which insist on the adoption of thin and thick democracies. The former is procedural and amounts to a fair electoral process, while the latter is substantive and demands a true polyarchy and RoL.[220] These values, comments Turkish scholars, have to be not just implemented but "internalized" in the sense of being perceived as intrinsically valuable.[221] For Turkish Islamists, thin democracy is an advantage but the thick is problematic. On the thin side, the inclusion of Islamists in the electoral process meant the protection of their parties from continuous disbandment at the hands of the secularist military and judiciary. The thick side, however, is boon and bane. It is advantageous in keeping the Turkish military, a staunch opponent to Islamism, out of politics.[222] Yet, it is disadvantageous in counting Islam not as an overarching truth but an ideology among many in a pluralist system.

The drawback of thick democracy puts Islamist politics in a difficult situation; while their Islamist constituency expects an Islamic role in the public sphere, the EU presumes an undefined pluralism. In 2002,[223] the Justice and Development Party (AKP), a branch of the Welfare, came to power through parliamentary elections. Its leader and the then prime minister Erdogan presented Islam as a system of personal values rather than political governance.[224] This proposal received a warm welcome from Turkish secularists and the Europeans. It meant that Islam is finally absorbed in a consolidated liberal democracy by containing it within the private sphere.[225]

However, how Islamic is AKP's proposal is still a contested issue. Erdogan and his mentor Erbakan are followers of the MB's Islamist ideology.[226] It is part and parcel

[220] *Id.* at 52-3.
[221] Ziya Onis, *Domestic Politics, International Norms and Challenges to the State: Turkey-EU Relations in the Post-Helsinki Era in* Turkey and the European Union: Domestic Politics, Economic Integration and International Dynamics 24 (eds. Ali Carkoglu & Barry Rubin, Taylor & Francis Group, 2003).
[222] *Id.* at 13.
[223] The party won a majority, enabling Erdogan to form the government. *Supra* note 218, at 53.
[224] *Id.* at 57.
[225] *Id.* at 64.
[226] Omer Taspinar, *The Conflict within Turkey's Islamic Camp,* 20 Global Turkey in Europe 1, 2 (2014).

of their political participation goals to establish the Islamic caliphate and to enforce Sharīʿa in the manner of ʿAwda's codification.[227] Since Erdogan's accession to power in 2002, none of these major goals have been achieved. Quite the contrary, his government has banned capital punishment as part of the "harmonization laws" with the EU's HRs requirements.[228] The ban is in stark contrast with ʿAwda's criminal code that stipulates capital punishment for homicide and some *ḥudūd* crimes (adultery, apostasy and armed robberies).

Erdogan did not quit his Islamization project altogether. His Islamic reforms focus more on minor MB issues. He, for example, lifted the ban on headscarf for police officers, expanded the Sunnī Muslim religious schools and restricted the sale and consumption of alcoholic drinks.[229] In explaining the evolution of Islamist partisan thinking in Turkey, Ziya Onis observes that Islamist politicians are usually "reformist fundamentalists" at the beginning of their career but shift to "liberal Islamists" as they become seasoned in real politics. This difference is between politicians wanting to overturn the political system and those wishing to introduce mere cultural changes.[230]

The price for this ideological change is a political suicide in Erdogan's case. Erdogan could not deliver his promises on either side. Today, he is criticized for failing in the EU accession negotiations, blocked in 2013, and for changing his authority from democratic to authoritarian. He would not leave office at the end of his term.[231] His fears of a Menderes-like execution, imprisonment or loss of social status once out of office have driven him to conduct a zero-sum game politics. Karabekir Akkoyunlu et al. define these fears as "existential insecurities" to explain Erdogan's intensifying authoritarianism in the 2010s. [232] Erdogan used the 2016 coup to round up thousands of his Islamist, secularist and Kurdish opponents. He also made the Turkish parliament

[227] Ḥasan al-Banna, *Majmuʿat Rasāʾil al-Imām al-Shahīd Ḥasan al-Banna* 212, 227 (Dār al-Daʿwa wal-Nashr, 1998).
[228] *Supra* note 221, at 12.
[229] Karabekir Akkoyunlu & Kerem Oktem, *Existential Insecurity and the Making of a Weak Authoritarian Regime in Turkey,* 16 Southeast European and Black Sea Studies 504, 512-4 (2016).
[230] Ziya Onis, *Political Islam at the Crossroads: From Hegemony to Co-existence,* 7 Contemporary Politics 281, 291 (2001).
[231] In 2014, Erdogan changed the Turkish political system from parliamentarian to presidential as he changed office from prime minister to president.
[232] *Supra* note 229, at 507-9.

abandon its immunity only to press charges of terrorism and treason against its opposition members.[233]

The fall of Turkish democracy is often attributed to reasons peculiar to Turkey. Akkoyunlu et al. find the Turkish failure due to the all-or-nothing politics of Islamism and liberal secularism in the absence of a societal power to put an end to this vicious circle. [234] The scholars, however, stop short from explaining why is Turkish democracy an all-or-nothing politics? The reason is nothing peculiar to Turkey and is thus likely to occur elsewhere. Combining the RoL and the rule of Islam is an enterprise doomed to failure. Each belongs to an ideology that claims a domineering first principle and is willing to fight a "just" or a jihadi *war* to realize that dominance. And war is exactly what Turkey has been creating in the last 10 years. Apart from its domestic fights with Kurds and Gulenists,[235] Turkey occupies northern Syria to establish safe zones;[236] sends militias to support the internationally recognized MB government in Libya, occasionally bombs Kurdish outposts in northern Iraq and supports Azerbaijan's fight against Armenian separatists in Nagorno-Karabakh. Ironically, instead of Turkey becoming a source of Habermas' perpetual peace, it has become a source of perpetual violence, conducted at times under the banner of "Islamism," "nationalism" and at others under "humanism."

[233] Michael M. Gunter, *Erdogan's Train to Authoritarianism,* 8 Sociology of Islam 127, 131-6 (2020).
[234] *Supra* note 229, at 520.
[235] This is a reference to ʿAbdullah Gulen's Islamist group. Erdogan accuses the group of planning the 2016 coup to topple his rule.
[236] These are areas, where Syrian civilians can seek refuge from Syria's civil-war fights.