THE POSSIBLE STATE? RENEWAL OF IJTIHĀD AND ITS ROLE IN ENFORCING SHARIA THROUGH THE INTELLECTUAL PROJECT OF JAMĀL AL-DĪN ʻAṬĪYA

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Abstract

Sharia has occupied the center of attention to Muslim and non-Muslim scholars alike. The term, Sharia, in itself, is controversial, sometimes is exaggerated and often misinterpreted. When it comes to the different ways in which Sharia is to be applied, we find many suggestions and methods emanating from within the Islamic parlance. But such approaches focus, for the most part, on the renewal of the Islamic sciences. There is paucity of literature that examines the integration of Sharia into the social and, more importantly, legal fabrics of the nation-state. In this thesis, I examine the different ways in which Sharia has been applied or proposed to be applied. I examine the integrative approach advocated by Jamāl al-Dīn ʻAṭīyah in institutionalizing collective *ijtihād* and the new classification of *maqāṣid,* and its role in the new juristic system.

1. Introduction

Application of Sharia has consistently been a highly controversial topic. According to a poll reported by Pew research center, a vast population of Muslims in many Muslim majority countries firmly believe that Sharia should be applied. However, the surveyed participants expressed their concern about aspects regarding Sharia application, e.g. the penal code that includes flogging and amputation.[1] These concerns resonate with the Western depiction of Sharia in media outlets as violent and raise similar concerns with religious minorities and the secular bloc in Muslim majority countries. The predilection to apply the Sharia is coupled with various concerns, most notably two: content and structure. With regard to content, the question of which doctrinal school should be applied and the rigorous approaches to exegesis are among the primary concerns. With regard to structure, it has been a laborious task to determine how Sharia would be integrated in the institutional structure of the secular nation-state. These concerns, to name a few, have been the focus of many debates particularly in the post-colonial period and after the Middle Eastern countries have inherited the structure of the nation-state.

One instance that reflects the confusion and fear of Sharia application is the ascension of Muslim Brotherhood to presidency in Egypt in 2012. I have personally witnessed many individuals, family and friends along with public figures, express their deep concern about 'Islamization of Egypt.' Personally, I was baffled by the claims and reactions towards the application of Sharia. Through perusal of academic books, one realizes that the contention about Sharia application has been around for a while. I became invested in the topic and wondered whether it is an 'impossibility,' as some Western scholars assume, to apply Sharia in the modern

[1] Pew Research Center's Forum on Religion and Public Life, *The World's Muslims: Religion, Politics and Society*, 2013, p. 226 <http://www.pewforum.org/2013/04/30/the-worlds-muslims-2013-2/#>.

nation-state and if there is no route to synthesize Sharia and modern life. But before venturing to integrate the two concepts, one first needs to understand and unpack such loaded terms.

Sharia has been the law of the land, in one form or another, until Western modernity emerged as a world view. Modernity found its way into Muslim majority countries during the 19th century which brought radical changes to everyday life and Sharia. Under the five pillars of modernity: "sovereign nation states, science-based technology, bureaucratic rationalization, the quest for profit maximization, and secularization,"[5]/20/2019 1:59:00 PM the jurisdiction of the Sharia retracted, and its role was confined to certain aspects in Muslim societies. Such portentous impact on the Sharia urged Muslim rulers and scholars to exert their efforts to preserve the Sharia *vis-à-vis* modernity, which resulted in various movements and ideologies seeking to either prove the superiority of Sharia and assert its viability in every era, or to bridge the gap between Sharia and the nation-state through modernization of Sharia.

The several movements of revival (*iḥyāʿ*) and renewal (*tajdīd*)[2] have attempted to introduce changes to both the structure and content of Sharia to be more compatible with the secular society. These included trends emanating from within the Islamic heritage such as Rashid Rida's (1865-1935) call to renovate the practice of legal reasoning (*ijtihād*), through expanding on the concept of public interest (*maṣlaḥa*), following the footsteps of his teacher Muhammad Abduh (1849-1905). Other proposals include reinvigoration of Divine Governance (*ḥākimiyya*) advocated by

[2] The terms; *iḥyāʿ* and *tajdīd,* are generally used with different nuances in the modern and pre-modern periods. For the pre-modern period, they are associated with the Hadith that states, "The Prophet (ﷺ) said: Allah will raise for this community at the end of every hundred years the one who will renovate its religion for it" (Sunan Abi Dawud 429 Book 39, Hadith 1). In this regard, the *mujaddid* can be a scholar or a political leader. In the modern period; however, the term has become more associated with scholars, jurists and intellectuals of religious sciences. The term, in its modern sense, can be traced to multiple movements and personas such as Shah Wali Allah (d. 1762), Muhammad Abdel-Wahab (d. 1787), Muhammad Abduh (d. 1905), Jamal al-Din al-Afghani (d. 1897), and Muhammad Iqbal (d. 1938). See: 'Revival and Renewal.'

Sayyid Qutb (1906-66) and inspired by the writings of the Pakistani intellectual Abul A'la Maududi (1903–77). This trend focused on the discourse of renovation of Sharia from within by reformulating the content based on the intellectual heritage of Islamic scholars. Another trend in the study of Islamic thought is concerned with bridging the gap between positive law and Sharia through codification. A prominent scholar heading this trend is Abd el-Razzak al-Sanhuri (b. 1895 - d. 1971) in his seminal works, which include *al-Wasīṭ fī sharḥ al-qānūn al-madanī al-jadīd* (Medium Commentary on the New Civil Code) and *Masādir al-haqq fi al-fiqh al-Islamī* (Sources of Legal Right in Islamic Jurisprudence), among other publications. Al-Sanhuri tried to reconcile the differences between *fiqh* (jurisprudence) and positive law relying on his long legal experience in Western law.[3]

This raises the question of why al-Sanhuri is not an integral part of the discussion. I concur that al-Sanhuri attempted to traverse the limitations of Sharia codification in many of his publications, but he falls short in some venues that are critical to the discussion. First, al-Sanhuri is certainly knowledgeable about Islamic law and its legal methodology which is evident from his discussion in *Masādir al-haqq fi al-fiqh al-Islamī* but to what extent is this knowledge shown in the legal codes. The answer is: only to a limited extent. In a discussion on codes developed or supervised by al-Sanhuri we find al-Bishri, a renowned legal scholar and former judge in the Egyptian system arguing that "the rules taken from Sharia were of limited scope . . . and many of these had been in the old code."[4] Moreover, the approach followed by al-Sanhuri was not focused

[3] Enid Hill, 'Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd Al-Razzaq Ahmad Al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971 [Part II]', *Arab Law Quarterly*, 3.2 (1988), 182 (p. 202) <https://doi.org/10.2307/3381872>.
[4] Enid Hill, 'Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd Al-Razzaq Ahmad Al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971', *Arab Law Quarterly*, 3.1 (1988), 33–64 (p. 186) <https://doi.org/10.2307/3381741>.

on "connecting Islamic jurisprudence with religion."[5] Hence, al-Sanhuri and his works are more relevant to a discussion on comparing Sharia to modern legal systems and the production of legal systems based on the 'ethos and essence' of Sharia rather than a discussion on transforming *ijtihād* into a legal apparatus and *maqāṣid* into public policies in the machinery of the nation-state.

On a similar note, this thesis does not examine the entirety of calls for renewal (*tajdīd*) of *fiqh* but focuses on renewal attempts with proposals related to the legal structure of the nation-state. Hence, prominent figures in Islamic jurisprudence, such as Qaradawi (b. 1926), are not thoroughly investigated. For instance, we find Qaradawi has written over one hundred publications in many fields ranging from Islamic jurisprudence, activism, reform of contemporary society, and minorities.[6] Qaradawi's scholarly knowledge is primarily focused on social activism and renewal of *fiqh* from the inside, which is similar to 'Aṭīya. But Qaradawi does not venture to examine methods of integrating the *fiqh* tradition with the modern legal system of the nation-state.

The discussion on Sharia and modernity was not limited to Islamic scholars and intellectuals but included Western intellectuals and academics. In their study of the relationship between Sharia and modernity academics have researched the topic from different perspectives. For instance, Wael Hallaq contends that applying the Sharia "is both an impossibility and a contradiction."[7] Whereas other scholars argue in favor of a possible fusion between Sharia and modern legislation as long as it is in "service of the public good."[8] Similar to this approach is An-

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[5] Hill, 'Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of 'Abd Al-Razzaq Ahmad Al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971', p. 209.
[6] John L. Esposito and Emad Eldin Shahin, *The Oxford Handbook of Islam and Politics* (New York, NY : Oxford University Press, 2013), p. 225.
[7] Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (New York: Columbia University Press, 2012), p.7. <http://ezproxy.library.arizona.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=619713&site=ehost-live>.
[8] Asifa Qurashi-Landes, 'The Sharia Problem with Sharia Legislation.(Carhart Memorial Symposium)', *Ohio Northern University Law Review*, 41.3 (2015), 545–66 (p. 559).

Naʿim's argument in which he contends that "the state, and not society, [ought] to be secular" which "is intended to enhance and promote genuine religious observance, to affirm, nurture, and regulate the role of Islam in the public life of the community."[9] An-Naʿim complicates the relationship between the secular and religious by arguing that coexistence is achievable. An-Naʿim advocates for "an alternative vision to perceptions of secularism and the secular state that many Muslims find objectionable."[10] Others contend that the relationship is further complicated after the nation-state has appropriated the authority of legislation from jurists which resulted in the Sharia being applied through legislation rather than classical *fiqh* books. Thus, the Sharia has "become part of a great number of national legal systems…[and] codification was not only a means to ascertain state control over the law and to facilitate the finding of the law for judges, but also as an instrument of reform."[11]

One recent, and under-researched, scholar to address the relationship between Sharia and the modern nation-state is Jamal al-Din ʿAṭīya (1928-2017). ʿAṭīya is an Egyptian scholar with a degree in Islamic law, and also taught it, and a Ph.D. in modern law and practiced it for some time, a biographical background will be provided in chapter 3. Then the question arises of what are the contributions of ʿAṭīya to the discussion on Sharia and modernity? ʿAṭīya contributes to the discussion through two complementary proposals: a new classification for the ultimate objectives of the Sharia (*maqāṣid*) and a new proposal to amalgamate *ijtihād* and consensus (*ijmāʿ*) into a state-operated institution. The new classification for *maqāṣid* expands on the implementation of *maqāṣid* from their traditional division of five essentials, "which consists of preserving five vital

[9] ʿAbd Allāh Aḥmad Naʿīm, *Islam and the Secular State Negotiating the Future of Shariʿa* (Cambridge, MA: Harvard University Press, 2008), p. 1.
[10] Naʿīm, p. 267.
[11] Rudolph Peters, 'From Jurists' Law to Statute Law or What Happens When the Shari'a Is Codified', *Mediterranean Politics*, 7.3 (2002), 82–95 (p. 92).

goods, called the five necessities (*al-ḍarūrāt al-khamsah*): religion (*dīn*), life (*nafs*), intellect (*ʿaql*), offspring/lineage (*nasl*), and property (*māl*)."[12] According to 'Aṭīya's new classification, *maqāṣid* are divided into four realms: the individual, the family, the *Umma* (Muslim society) and all of humanity. Under each realm 'Aṭīya attempts to formulate a set of *maqāṣid* that can take the form of public policies and that are "informed by religious considerations."[13] These public policies, I presume, will be the guiding principles for the *Ijtihād* Institution to operate efficiently within the boundaries of Sharia. Moreover, 'Aṭīya proposes that collective *ijtihād*, which was present at the early period of Islam, takes an institutional form. By institutionalizing collective *ijtihād* 'Aṭīya relies on the legitimacy of both consensus (*ijmāʿ*) and *ijtihād,* as Islamic methods for formulating a legal opinion, and the institutional nature of nation-state entities. By the institutional legitimacy 'Aṭīya means that *ulū al-amr* (lit. those vested with authority), the ruler in a modern context, can regulate and impose the opinions generated by the *Ijtihād* Institution.[14] In that sense, the *ijtihād* of the Institution is legally, socially and religiously binding. In chapter three, we will investigate this process in more detail. Despite the significance of 'Aṭīya's research, there is a dearth in scholarly discussion on the ways in which his proposal can bridge the gap between Sharia and the nation-state or a comprehensive evaluation of his project. Therefore, this thesis attempts to fill in this gap.

Since my main concern in this thesis is to examine the viability of proposals to apply Sharia, I investigate the different approaches that have been produced to integrate Sharia into society. However, we need to highlight the criteria employed to select the different approaches. First, Sharia and its related sciences, *fiqh*, *uṣūl* and *ijtihād,* are key components to this process as

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[12] Felicitas Opwis, 'Maqāṣid Al-Sharīʿah', *In The [Oxford] Encyclopedia of Islam and Law. Oxford Islamic Studies Online* <http://www.oxfordislamicstudies.com/article/opr/t349/e0113>.
[13] Opwis, 'Maqāṣid Al-Sharīʿah'.
[14] Jamāl al-Dīn 'Aṭīyah, *Al-Naẓariyah Al-ʿammah Lil-Shariʿah Al-Islamiyah*, 1st edn (Matbaʿet Al-Madina Al-Munawarah, 1988), p. 195.

they constitute the religious aspect of the equation. Second, the attempts have to engage the nation-state and its legal system, either through codification as in chapter 1 or through employing juristic tools such as analogy (*qiyās*) as in chapter 2 and 3. Therefore, we have excluded the attempts of prominent individuals such as al-Sanhuri and al-Qaradawi, for the reasons highlighted earlier.

This thesis is composed of three chapters, each chapter highlighting a specific approach. The first chapter explores Sharia codification. It analyzes the major challenges in Sharia codification through examining three major attempts. Such attempts include: the Anglo-Muhammadan law, the Mecelle, and *Mashrū‘ taqnīn al-Sharī‘ah al-Islāmīyah* (Sharia Codification Project). Each of these projects offer a fresh perspective and a unique context. First, the Anglo-Muhammadan Law is a product of a colonial system that relies heavily on textual interpretation of custom and religion. Second, the Mecelle is a product of the *tanẓīmāt* period under the Ottoman Empire, an Islamic regime, at least in theory. The most recent attempt to codify Sharia is *Mashrū‘ Taqnīn al-Sharī‘ah al-Islāmīyah* conducted by *Majma‘ al-Buḥūth al-Islāmīyah* (Islamic Research Academy), al-Azhar affiliated institute, in 1970s. This project is a proposal to replace the civil law with Sharia in the context of a modern nation-state. In the first chapter, I argue that these attempts could not establish a balance between Sharia and modernity. The attempts proposed to codify the Sharia following a specific approach, however, they fall short in various aspects. Drawbacks include a structural one; rigidity in application, and a theoretical one represented in lack of a section on ‘General Principles’ which is significant in the body of positive law. The theoretical apparatus of these attempts was rather limited, or completely absent, which affects their viability as laws. This will be contrasted with ‘Aṭīya’s proposal for suggesting a new methodology for objectives (*maqāṣid*). Furthermore, ‘Aṭīya’ advocates for a compromise between

common law and the concept of precedent and civil law and its regulating articles, through proposing the establishment of the *Ijtihād* Institution, which will be discussed in chapter three.

The second chapter examines an additional method for applying Sharia through re-adapting some of the legal tools employed by scholars to conduct *ijtihād*. Therefore, I investigate *ijtihād* as a basis for legal reform. Understanding the role of *ijtihād* and the ways in which different scholars have approached this topic will enable us to better comprehend ʻAṭīya's project for renewing *ijtihād* and to evaluate the viability of his approach. Thus, I divide the chapter into three main sections. The first section is significant because it denotes the main components and conditions of *ijtihād*, which will give us an insight to the extent of change the modern scholars are proposing. The chapter proceeds to examine the general trends for *ijtihād* in the modern period. It aims to provide an overview of the different models for interpreting *ijtihād*. This classification will help us, later on, understand where ʻAṭīya's model fits within the larger spectrum of renewal and reform in the modern period. The third section narrows down our research to the different trends of integrating *ijtihād* into the legal structure of the modern nation-state. The research is limited to three concepts: analogy (*qiyās*), consensus (*ijmāʿ*) and public interest (*maṣlaḥa*), as they are the most relevant to ʻAṭīya's work and renewal model.

The third chapter investigates ʻAṭīya's project for consolidating *ijtihād* and consensus (*ijmāʿ*) into a state institution that is responsible for legislation, and renewal of objectives of Sharia (*maqāṣid*). It examines ʻAṭīya's approach in transforming the five essential elements: "religion (dīn), life (nafs), intellect (ʿaql), offspring/lineage (nasl), and property (māl),"[15] into four realms: the individual, the family, the *Umma* and humanity. In this chapter we explore ʻAṭīya's model for attempting to incorporate *ijtihād* and *maqāṣid* into the structure of the nation-state. I argue that

[15] Opwis, 'Maqāṣid Al-Sharīʿah'.

‘Aṭīya may not have provided a solution or a method through which we can plausibly argue in favor of Sharia application, but he proposes a theoretical approach that is cognizant of the internal institutional structure of the nation-state. ‘Aṭīya’s approach, whether the *ijtihād* or *maqāṣid*, keeps in mind the nation-state as a fact that Sharia has to merge with rather than overrule. ‘Aṭīya offers a possible synthesis between *ijtihād* and the modern legal structure that takes the form of the *Ijtihād* Institution, then proceeds to highlight the relationship between this Institution and judiciary and executive bodies. Furthermore, ‘Aṭīya is mindful of the complexity of codification; therefore, he suggests a method through which the *Ijtihād* Institution will play a role in legislating general guidelines for judiciary to facilitate its adjudication.

1.1. Points of Reference

Before we begin the discussion, I realize that we need to highlight few points. First, we need to draw a distinction between some terms that are essential to the discussion to avoid any confusion. The terms include Sharia, *fiqh*, *uṣūl* and *ijtihād*. Moreover, in this section we will denote what this thesis is not about to guard the reader against building up unfulfilled expectations.

Scholars have provided multiple definitions of Sharia to highlight its nature and characteristics. The term ‘Sharia’ means, lexically, “way” or “path” and refers to “God’s Law” which denotes the ideal way for Muslims to behave and interact in this world. Proponents and critics of Sharia application seem to presume that Sharia is “a set of religious rules that a Muslim government must legislate and enforce” which can convey the idea that an Islamic government should necessarily be theocratic.[16] In classical texts, Sharia is defined as “[t]he rules given by God to His servants as set forth by one of the prophets (may God bless them and grant them

[16] Qurashi-Landes, ‘The Sharia Problem with Sharia Legislation. (Carhart Memorial Symposium)’, p. 547.

salvation)."[17] Peters argues that Sharia has two main features that make its religious character distinct: the basis of Sharia's validity is God's will and it "contains rules of a purely religious character."[18] Other scholars define Sharia in the legal context as "God's eternal and immutable law—the way of truth, virtue, and justice. In essence, Shari'ah is the ideal law in an objective and noncontingent sense, as it ought to be in the divine's realm."[19]

Sharia is the overarching principle with general rules that are directly stated in the Scripture (Qur'an and Sunnah) but if the Scripture is finite and contains a limited number of rules and principles, then one may ask where do all the regulations come from? To answer this question, we move on to the next term; that is '*fiqh*.' *Fiqh* is the rigorous interpretation by Muslim scholars of Qur'an and Hadith to "extrapolate detailed legal rules covering many aspects of Muslim life, from how to pray and avoid sin to making contracts and writing a will."[20] A misuse of the term *'fiqh'* occurs when it is used to add Divine legitimacy to the legal opinions, however, "[f]iqh scholars have always been acutely aware that, although the object of their work is God's Law, they do not-and cannot-speak for God."[21] The question arises of what is the methodology for inferring the rules from the Divine Scripture? This question drives us to *uṣūl al-fiqh* (roots of law). *Uṣūl* can be defined as a "legal theory that laid down the principles of linguistic–legal interpretation, theory of abrogation (*naskh*), consensus and juristic reasoning, among others."[22] *Uṣūl* is the realm of principles and methodologies for developing rules from the Divine Scripture. *Uṣūl* examines "the

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[17] Peters, 'From Jurists' Law to Statute Law or What Happens When the Shari'a Is Codified', p. 82.
[18] Rudolph Peters, 'From Jurists' Law to Statue Law or What Happens When the Shari'a Is Codified.', *Mediterranean Politics*, 7.3 (2002), 82–96 (p. 83).
[19] Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (Lanham, Maryland : Rowman & Littlefield, 2014), p. xxxii.
[20] Asifa Qurashi-Landes, 'The Sharia Problem with Sharia Legislation. (Carhart Memorial Symposium)', *Ohio Northern University Law Review*, 41.3 (2015), 545–66 (p. 548).
[21] Asifa Qurashi-Landes, 'The Sharia Problem with Sharia Legislation. (Carhart Memorial Symposium)', *Ohio Northern University Law Review*, 41.3 (2015), 545–66 (p. 548).
[22] Wael B. Hallaq, *The Origins and Evolution of Islamic Law*, 2005, p. 210.

four sources of the law—the Quran, Hadith, consensus (*ijmāʿ*), and analogical reasoning (*qiyās*)—to provide structures for interpreting revelation." [23] This brings us to the last term; *ijtihād* which can be defined as "a process of legal reasoning and hermeneutics through which the jurist-mujtahid derives or rationalizes law on the basis of the Quran and the Sunna; during the early period, the exercise of one's discretionary opinion (*raʾy*) on the basis of *ʿilm* (q.v.)."[24] *Ijtihād* is the process of synthesizing *fiqh* and *uṣūl* to produce legal rules, which is defined by Abu Zahra (1898 – 1974) in his book, *Uṣūl al-Fiqh,* as "exerting the utmost effort to infer, and/or apply, *al-aḥkām Sharʿiyya* [Sharia ordinances]."[25] This brief overview should aid the reader in following up with the discussion in coming chapters.

It should be noted that while this thesis is concerned with application of Sharia in modern society, it falls entirely within the Sunni tradition for a few reasons. The Shi'i tradition, and within that general term a few factions can be discerned such as Zaydī and Twelvers among others, are markedly different from Sunni tradition in areas such as *ijtihād*, closing of the doors of *ijtihād*, primary sources of inference and legal methodology. These marked differences demand a separate research project and an independent treatment; hence, the legislative system in countries where Shi'ism is the dominant narrative will be excluded.

1.2. Sharia and Modernity

A conceptual investigation of the divergence between Sharia and modernity,[26] and its by-products, e.g. the secular nation-state, is foundational to the discussion. Thus, this section highlights the

[23] John L. Esposito, 'Islamic Law', 2004.
[24] Hallaq, *The Origins and Evolution of Islamic Law*, p. 208.
[25] Muhammad Abū Zahra, *Uṣūl Al-Fiqh* (dar el-fikr el-arabi, 1958), p. 379.
[26] It is difficult to identify exactly when the advent of modernity started but it can be traced back to the publications of Descartes, e.g. *Discourse on Methods*, and other works of 17th century authors. Tracing the discourse of modernity, when it started, and its evolving principles are not within the scope of this study. Nonetheless, for further reading on the rise of modernity, refer to 'Islamic Law and Modernity' by Rawaa El Ayoubi Gebara where the author provides a brief depiction of the birth and development of modernity

major and critical differences between Sharia and modernity then narrows down the discussion to the main discrepancies with regard to the legal system of the nation-state compared to Sharia.[27]

The issue of Sharia compatibility with the modern nation-state is a contentious one that has been explored by many scholars. One prominent scholar with multiple publications on Islamic law, Sharia and modernity is Hallaq. In his seminal book titled *The Impossible State: Islam, Politics, and Modernity's Moral Predicament*, Hallaq presents his argument about the impossibility of Sharia application within the structure of the nation-state, as one of the main by-products of modernity. In the introductory section we find Hallaq clearly stating his claim: "The 'Islamic state,' judged by any standard definition of what the modern state represents, is both an impossibility and a contradiction in terms."[28] Hallaq's claim rests on two main pillars: morality and the structure of the nation-state, particularly with respect to the legal system. Hallaq bolsters his account through an investigation of the historical rise of the modern state and compares it to Sharia-based ruling, which he calls "paradigmatic Islamic governance." Hallaq enumerates five principal attributes of the modern state: "(1) its constitution as a historical experience that is fairly specific and local; (2) its sovereignty and the metaphysics to which it has given rise; (3) its legislative monopoly and the related feature of monopoly over so-called legitimate violence; (4) its bureaucratic machinery; and (5) its cultural hegemonic engagement in the social order,

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and Hallaq's *Sharia: Theory, Practice, Transformation – The Sweep of Modernity* in which the author tackles the conceptual framework of modernity, its core principals and how it came to influence the Sharia.

[27] For an examination of the cultural and social impact of modernity, refer to Part III of Hallaq's *Sharia: Theory, Practice, Transformation*, where he examines the transformation in the episteme and structure of Islamic law in different social contexts and their impact on the culture and society. Other works include Abdullahi An-Na'im's book entitled *Islam and the Secular State, Negotiating the Future of Sharia*' where he discusses the public role of Sharia and how it can be accommodated in a secular context. Further works include Khaled Abou El Fadl's *Reasoning with God: Reclaiming Shari'ah in the Modern Age*, where he examines the role of colonial powers in disconnecting the Muslims from their heritage and rise of puritanical approaches to exegesis.

[28] Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament*, Paperback edition (New York, NY: Columbia University Press, 2014), p. 1.

including its production of the national subject."[29] These five attributes boost the formulation of "state subject" which creates "a personality that cannot rest on or be shaped by spirituality…[and the] distinction here is between rationality and practical ethics."[30]

Hallaq contrasts the portrait of the historical analysis of the modern state and its constituents with the paradigmatic Sharia. Sharia is an organic blend that Hallaq restates as category of governance that " was not only about law, morality, and their organic confluence; it was also and equally about a mystical perception of the world, a perception deeply anchored in a society—represented by a class of mystics-cum-jurists — that did not distinguish, in the practice of living, between the meanings of the legal, the moral, and the mystical."[31] However, Hallaq's argument falls short in some aspects.

Hallaq ventures to compare a pre-modern version of Sharia that is juristic-based with the modern nation-state and its institutional machinery. Hence, we find limited literature on modern intellectuals who discuss methods to synthesize Sharia and modernity, e.g. Iqbal and Turabi, or to renovate the pillars of Sharia to better suit the contemporary needs, e.g. Qaradawi. The significance of the proposals advanced by these scholars and intellectuals is that they situate Sharia in the modern context while attempting to preserve the 'moral' and 'spiritual' dimensions. Moreover, Hallaq contends that "the sultan possessed no real sovereignty,"[32] except for mainly controlling the tools for violence. This is contrasted by the view of many jurists who acknowledged the right of the ruler to assign a specific legal opinion to be the dominant norm. This view occurs in the context of Sharia-based policy (*Siyasa Shar'iyya*), as argued by many scholars including al-

[29] Hallaq, p. 26.
[30] Hallaq, p. 79.
[31] Hallaq, p. 98.
[32] Hallaq, p. 53.

Qarāfī.[33] This view has been adopted by modern scholars, e.g. ʻAṭīyah, in their endeavor to understand some of the ways in which Sharia could operate within the modern state, rather than replacing it.

A critical difference is the source of legitimacy. Sharia relies on the Qur'an as God's revelation to the Prophet (PBUH) and after his death Muslims collected reports of his sayings, actions and exemplary behavior which constitute the "foundation of its validity."[34] Whereas modernity manifested in different ways but mainly rested on five pillars: "sovereign nation states, science-based technology, bureaucratic rationalization, the quest for profit maximization, and secularization."[35] Sovereignty of the nation-state and secularization demanded a unified code of legislation which resulted eventually in "'legal centralism' or 'legal monism,' according to which all law is and should be state-sponsored law, which is uniform and equally applied to all citizens across the board."[36] The source of such a unified code is no longer divinity or the church but mankind. When the project of modernity was introduced, this conflict of human code *vis-à-vis* divine code posed a significant conundrum.

Moreover, the Sharia is concerned with regulating two relationships; the relationship between individuals and God, and the relationship among members of the society (by means of *fiqh*) through "the creation and extinction of rights and obligations…[t]his is done by classifying them [actions] into five categories (obligatory, commendable, indifferent, reprehensible and forbidden) indicating their effects as far as rewards and punishment are concerned."[37] This

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[33] Jamāl al-Dīn ʻAṭīyah, *Al-Naẓariyah Al-ʿammah Lil-Shariʿah Al-Islamiyah*, 1st edn (Matbaʿet Al-Madina Al-Munawarah, 1988), p. 195.
[34] Peters, *From Jurists' Law to Statute Law or What Happens When the Shari'a Is Codified*, p. 83.
[35] Karčić, p. 212.
[36] Sherman A. Jackson, *Islamic Reform between Islamic Law and the Nation-State* (Oxford University Press, 2013), p. 44 <https://doi.org/10.1093/oxfordhb/9780195395891.013.004>.
[37] Peters, 'From Jurists' Law to Statute Law or What Happens When the Shari'a Is Codified', p. 83.

characterization marks the behavior of a 'good Muslim' who shall be rewarded in this life and the Hereafter. Whereas, secularization of the nation-state does not rely on the concept of 'The Hereafter' and focuses primarily on the model of an ideal citizen abiding by state-issued legislations. In other words, "the modern state emerged to marginalize religious prejudice (and loyalty) and secure societal peace and order by monopolizing the means of violence. In effect, this constituted a transfer of ultimate authority and loyalty (and according to some a sense of the holy) from the Church to the state."[38] These points mark the practice and jurisdiction of Sharia and the secular nation-state, notably a unified legislative system through codification.

Additionally, a critical distinction between *fiqh* and modern codification is uniformity. The exegesis of Sharia by jurists does not provide a uniform system of laws. *Fiqh* developed into a number of doctrinal schools each following a legal reasoning process that differ from one school to another. This variation of opinions started as "differences in opinion that resulted in the emergence of different schools of jurisprudence (*madhhab*, plu. *madhāhib*), that ascribed their doctrines to and derived their names from famous jurists from the eighth and ninth centuries. Controversies did not only exist between these schools but also among the jurists of one single school, even on essential legal issue."[39] This legal plurality is a marked attribute of *fiqh*. On the other hand, the modern nation-state is distinguished by 'legal monism' which imposes a state-sponsored law on all citizens.

In brief, the major differences between Sharia and modernity, and the nation-state as its main by-product, can be summarized as: the question of morality, legitimacy and its source, and the legal structure and practice (legal centrality *vis-à-vis* multiplicity of opinion in *ijtihād*). These key differences have reduced the influence of Sharia in the context of the nation-state, which has

[38] Jackson, pp. 44–45.
[39] Peters, 'From Jurists' Law to Statute Law or What Happens When the Shari'a Is Codified', p. 84.

taken a number of ways: collapse of the financial support foundations (*waqf*) that boosted the juristic practices, gradual displacement of jurists with modern lawyers and judges, replacement of Sharia courts with modern courts, replacement of or supplementing *fiqh*-based laws with modern laws.[40] This has urged the Muslims scholars and intellectuals to propose some of the ways to consolidate these major differences in hope to implement Sharia in a modern context. The question which arises here is 'what are the ways in which 'Aṭīya's proposal offer a response in relation to these challenges?' I contend that 'Aṭīya's proposal clarifies some of the aspects about the opposition between the Sharia and nation-state. One major area is the concern about morality and how the nation-state takes a position contradictory to Sharia. According to 'Aṭīya, the division of *maqāṣid* into four realms; the individual, the family, the *Umma* and humanity, attempts to show us how *maqāṣid* can be formulated to respond to individual as well as collective issues of morality in society. Another major area is legal centrality of the positive law compared to the pluralism of *ijtihād* to which 'Aṭīya responds by suggesting the *Ijtihād* Institution and its operating mechanism. These proposals may not necessarily 'provide a solution' to the apparent opposition articulated by Hallaq and other scholars, but it provides a new framework for *ijtihād* and *maqāṣid* and some of the ways in which they can be integrated, which shows us some aspects that were ambivalent.

[40] Wael B. Hallaq, *Sharī'a: Theory, Practice, Transformations* (Cambridge, UK: Cambridge, UK, 2009), p. 500.

Chapter I: Limitations of Sharia Codification

The previous section discussed the ways in which Sharia and modern legal systems differ, notably in the legal structure of the nation-state. This chapter further investigates this relationship through examination of attempts to codify Sharia. The nation-state has become entrenched in many aspects of life in Muslim majority countries, therefore Muslim political thinkers and intellectuals have become more focused on "how the nation-state can or should be made Islamic" than to establish an Islamic caliphate.[41] From such tendency to integrate Sharia arises a number of challenges and limitations. Thus, this chapter begins with a discussion on the attributes of modern legal systems to evaluate the viability of Sharia codification attempts based on these attributes.[42] Then, the chapter proceeds to analyze three prominent attempts for Sharia codification: the Anglo-Muhammadan Law, the Mecelle and *Mashrū' Taqnīn al-Sharī'ah al-Islāmīyah 'alá al-Madhahib al-Arba'a* (Sharia Codification Project based on the Methodology of the Four Doctrinal Sunni Schools). I examine how each codification project followed a certain approach to traverse the divergences between Sharia and positive law and the challenges and limitations of each attempt.

First, the Anglo-Muhammadan Law which represents an early attempt by the British colonial powers to codify the Sharia in accordance with the Ḥanafī law. Second is the Mecelle in the context of the Ottoman Empire which presents an Islamic context under the influence of Western colonial powers. Third is *Mashrū' Taqnīn al-Sharī'ah al-Islāmīyah 'alá al-Madhahib al-Arba'a* (Sharia Codification Project based on the Methodology of the Four Doctrinal Sunni Schools) conducted

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[41] Jackson, p. 43.

[42] It is important to note that this is not to argue that Sharia or Islamic law are lower in status or viability. But the Muslim countries have inherited the structure of the nation-state from the colonial European powers and it has become integrated in all venues of life. It has become exceedingly difficult to abandon this structure; therefore, one possible response is to attempt to codify Sharia on the mold of positive law to fit in the modern structure. Prominent scholars, e.g. Asifa Quraishi-Landes, contend that these calls for integration have been devastating to the main core features of Sharia: 1) fiqh pluralism and 2) non-theocratic siyasa rule. See Asifa Quraishi-Landes, 'The Sharia Problem with Sharia Legislation.'

by *Majma' al-Buḥūth al-Islāmīyah* (Islamic Research Academy). I argue that while each of these attempts provide an original and a unique approach towards Sharia codification, they entail content and structural drawbacks. There are a number of issues with these codes that range from employment of incorrect translations and resemblance to *fiqh* books in a manner that impedes their application by non-jurist judges, emphasis on textuality and lack of an efficacious section on general principles, which is a significant element in modern civil law, as will be discussed later. These are some of the limitations identified in the discussed codes, which provide a precursor to the challenges that face and will face any future attempts towards Sharia codification. This prompted modern Muslims scholars and intellectuals, such as ʻAṭīya, to formulate basis for theories and legislative models with the objective of surmounting these challenges.

Certainly, there are other limitations that can be discerned in the aforementioned codes, but for the sake of this thesis an emphasis will be directed to content and organizational factors to which ʻAṭīya discusses. ʻAṭīya responded to the question of lack of general principles through his proposal to renew objectives of Sharia (*maqāṣid)* as public policies. In his proposal, ʻAṭīya contended that there is a dire need to reconstruct *maqāṣid* structurally and thematically to cope with the needs of modern legal systems. Additionally, he responds to the lack of competent judiciary by advocating for an amalgamation of *ijtihād* and *ijmāʿ* (consensus) in the form of a legislature which will be responsible for both issuing laws and supervising regulations.

1. Functionality of Positive Laws

In order to evaluate the extent to which these codes managed, or failed, to operate as positive laws, one has to be familiar with what the term 'positive law' entails. Thus, this section highlights the structure, organization and content of positive laws in hope to provide the criteria according to which one could evaluate the three attempts.

Mainly, positive legal systems fall into one of two categories; civil law and common law.[43] This thesis will focus on the features of civil law.[44] The basis of a civil law is legislation where large areas of the law take the form of a code and follows a systematic manner. Moreover, a key feature is "importance attached to the preparatory works and the draftsmen's comments, as well as the parliamentary discussions in connection [to] its initial formulation."[45] Civil law can be summarized as follows:

> A civil code is a book which contains the laws that regulate relationships between individuals. Generally, it contains the following topics: persons and the family, things and ownership, successions donations, matrimonial property regimes, obligations and contracts, civil responsibility, sale, lease, and special contracts, as well as liberative prescription (statute of limitations) and acquisitive prescription (adverse possession). A code is not a list of special rules for particular situations; it is, rather, a body of general principles carefully ranged and closely integrated. A code achieves the highest level of genralization based upon a scientific structure of classification. A code purports to be comprehensive and to encompass the entire

[43] Generally, legal systems aim to regulate the relationship between individuals in a community. A legal system can be referred to as a "living organism" which grows and develops as part of the society. There are two main legal systems in modern societies: civil law and common law. Succinctly, the main differences between the two systems are: basis and source; role of judiciary and lawyers; and methodology for adjudication. For further discussion on the difference between civil law and common law, see: Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison', *The American Journal of Comparative Law*, 15.3 (1966), 419 <https://doi.org/10.2307/838275>.

[44] I opt for civil law over common law for two main reasons. First, the focus of this study is to examine the viability of Sharia-based legal systems within Muslim majority countries (as they will be more inclined towards Sharia application). Since the legal system within a majority of these countries follows the civil law system, it would be more apt to analyze the civil law. Secondly, the three attempts to codify the Sharia follow the example of the civil law in terms of organization and content. For example, the Anglo-Muhammadan Law was based on *al-hedāya* (*fiqh* book) and *fatāwā Alamgiri* as a body of legal rules since the British officials did not have the required knowledge to issue or follow the example of judicial decisions of Muslims scholars. Therefore, the outcome was a body of legal rules rather than abstract decisions. Moreover, both the Mecelle and *Mashrūʿ taqnīn* were following the example of French codes prevalent at that time. Also, the structure of the two codes were based on a body of legal rules than precedents.

[45] Dainow, p. 421.

> subject matter, not in the details but in the principles, and to provide answers questions which may arise.

In other words, the civil law is a well-structured body of regulations drafted by legal experts (a legislature) and reviewed by another body for approval, e.g. a parliament in a modern context. The court system plays a crucial role in the interpretation[46] of the rules of law and the judges are not bound to follow previous judicial decisions (precedents). As can be seen, the body of a civil law is thematically organized with a dedicated section on general principles that can generate further regulations.

A code is not detailed but comprehensive in its principles that purport to respond to individual cases. The hierarchy of using the resources commonly starts with the body of laws or other pertinent legislation, then it considers the commentators and the treatises, and only in third place the judge will refer to cases for consideration and evaluation.[47] This signifies the crucial role of the judge and court system in the adjudication process. It is important to note that the language of the civil law is authoritative, concise and provide unequivocal provisions. For example, the Egyptian Civil Law of 1948 comes in 1149 articles with clear and concise language that can be, for the most part, understood by the layman. An example of this is article 4 that states, "A person who uses his right in a lawful manner shall not be responsible for any harm arising therefrom." In this example, the language is clear and does not entail ambivalence or contradictory opinions that were markedly observed in *fiqh* books.[48]

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[46] In the legal tradition there are two main approaches to the interpretation of a legal text; textualism and intentionalism. For further analysis between the two approaches, see: Siegel, 'The Inexorable Radicalization of Textualism'; Nelson, 'What is Textualism?'; and Fisher III, 'Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History.'

[47] Dainow, p. 430.

[48] Peters, 'From Jurists' Law to Statute Law or What Happens When the Shari'a Is Codified', p. 89.

In civil law, the judge is not bound to follow previous adjudications or judicial decisions, thus they are entitled to interpret the legal text in response to the case. Therefore, competence in interpreting the civil law starts with legal education. In civil law systems, an emphasis is placed upon legislation, codification and doctrine. The legislation formulates the starting point to a viable interpretation of the law. Thus, the educational process, for students of civil law, starts with a study of codes and textbooks. The learner is taught about the Justinian codifications and their impact on modern legal systems. Moreover, they are trained to employ general principles and how to think in abstractions.[49] In case of legislative vacuum in civil law, the judge is entitled to fill in gaps through means of interpretation, analogy and/or recourse to general principles. Primarily, the judge interacts with the body of written law through the pertinent general principles or the bases of a reasoning by analogy. For instance, in Germany the tradition dictates that the judge fills the gap through use of customary law or resorting to general principles.[50] Thus, it can be discerned that the general principles play a significant role in the construction of the civil law.

General principles can be identified as "legal principles derived from consolidated branches of law, such as private law, and from law in general. In this manner, the legal principles fill the gap left by the absence of specific legal rules applicable to the issue at stake." It plays cardinal roles to enhance and interpret legal rules and bolster the legal reasoning process underlying legal decisions.[51] The general principles serve as the foundation of any legal construction. At times, a legal issue cannot be adjudicated due to the absence of specific legal rules. Hence, the general

[49] Dainow, p. 429.
[50] Dainow, pp. 430–35.
[51] F.O. Raimondo, 'General Principles of Law in the Decisions of International Criminal Courts and Tribunals', ed. by P.A. Nollkaemper, de Wet E., and [unknown], 2007, p. 7.

principles have full applicability, "being valid for the entire system of law, while others are applicable only to private law or public law or to a certain branch of the law."[52]

It is significant to note that the difference in generality between the rule of law and the general principles is that "a rule of law is general because it is applicable to an indefinite number of acts and facts, however, in relation to some of them, it can have a special characteristic. On the contrary, a principle is general, in what concerns an indefinite series of applications."[53] In other words, the general principles are more general but pertinent to the application of the law, e.g. penal, civil or commercial, and mainly facilitate the function of the judge to revert back to in case of legal vacuum or further emphasis regarding a legal issue. For example, the Egyptian Civil Law no. 131 of 1948, the first chapter is entitled 'Preliminary Chapter – General Provisions' which includes three sub-sections of 88 articles. These articles provide general rulings for the following sections and chapters and regulate the ways in which they can be applicable; jurisdiction, persons (individual and legal) and timeframes.

Summarily put, the civil law comprises certain features that distinguish and maintain its functionality. These include a codified legislation drafted in concise, lucid and authoritative language. Also, a competent and well-educated judiciary that plays a crucial role in the success of this legal system through interpretation of the legal text in case of legislative vacuum. In order to be capable of discharging their duties, judges receive legislation and codification-focused education. The judges employ different methods in case of vacuum, notably, reliance on general principles as guidelines to facilitate the adjudication. The lack of any of these quintessential factors: competent judges, intelligible language and a facilitating section (general principles), would impede the functionality of the law.

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[52] Elena Anghel, 'General Principles of Law', *Lex et Scientia*, xxiii.2 (2016), 120–30 (p. 121).
[53] Anghel, p. 122.

2. Anglo-Muhammadan Law

This section examines the approach followed towards the production of the Anglo-Muhammadan Law (AML).[54] I argue that the AML represents a combination of positive law and *fiqh*. Notwithstanding its prominence, it contains structural and content limitations. Notably, it lacks an efficient judiciary and a robust section on general principles that would facilitate the process for non-specialist judges, who replaced the jurists, to navigate the Islamic law. Additionally, the British officials followed a textualist[55] approach for statutory interpretation of the Islamic legal texts, which impaired its viability as a legal system governing the status of Muslims and efficiently responding to legal issues.[56]

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[54] There is an abundance of literature on the making and legal process of the Anglo-Muhammadan Law. See, 'Islamic Law and Social Change: An Insight into the Making of Anglo-Muhammadan Law,' by Zubair Abbasi in which he investigates the topic of *waqf* under the British role while arguing that the AML was responding to legal and social changes; 'Indigenous Customs and Colonial Law,' by Manaf Kottak kunnummal. The author examines the intersection of gender, family and religion in colonial India and their impact on legislature in 'Formal Writing, Questionnaires and Petitions Colonial Governance and Law in Early British Malabar, 1792–1810' by Santhosh Abraham. The author examines the departure from pre-colonial legal reasoning and custom to the new and complex legal system and the way in which formal legal writing was a form of resistance to British colonialism (see, 'Islamic Law and the Colonial Encounter in British India' by Michael Anderson).

[55] Textualism refers to the process of prioritizing the text. It follows the 'plain meaning method' which "bases legal interpretation on the most readily understood, plain and literal meaning" and strips the text from the context. For further reading please refer to 'Textualism, structuralism and originalism: the art of the NPC Standing Committee's interpretations of the Basic Law' by Shigong Jiang; 'What Is Textualism?' by Caleb Nelson; and 'The Rise and Fall of Textualism' by Jonathan T. Molot.

[56] The question arises of how a *mujtahid* would interact differently with the text from the ways in which the British Officials processed it. As will be shown later on, the officials relied on two main sources; *hedāya* book and *fatāwā Alamgiri* to infer the preponderant opinion in the Ḥanafī doctrinal school. These sources, particularly *fatāwā Alamgiri* were responding to particular legal cases wherein the jurist exercised their *ijtihād*. Certainly, this constitutes a precedent that is a core principal in Common Law. While the Islamic law shares a similar structure in the way that Islamic law is judge-made law rather than statutory laws, it differs in the authority the precedent establishes. The legal reasoning process entails that a *mujtahid* will exert the effort to reach an opinion for each case on the condition that a direct order has not been stated in the Qur'an or Hadith. In other words, "every new case he [a *mujtahid*] encountered [constitutes] a legal norm." Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge: Cambridge University Press, 2009), p. 19, Cambridge Core <https://doi.org/10.1017/CBO9780511801044>. Hence, reliance on these sources reduced the fluidity and flexibility of Sharia to precedents. For further reading, see Hallaq's book entitled '*An Introduction to Islamic Law*'; Yusuf al-Qaradawi's *al-ijtihād fi al-Sharīʿa al-Islāmīyyah (*Ijtihād in Islamic Sharia); *Uṣūl al-Fiqh* by Muhammad Abū Zahra.

The Anglo-Muhammadan Law[57] (AML) can be defined as a hybrid legal system that contains concepts from the English law and principles of equity along with *fiqh*.[58] Sharia application can be divided into three main periods: under the Muslim domination, under the British colonial rule, and after the announcement of the Republic. It started with the Mughal emperors initially by Mahmoud of Ghazni, a Persian-speaking Turk and was also a "nominal vassal of the Caliph of Baghdad" who belonged and promoted the Ḥanafī -Sunni branch of law.[59] This led to the adoption of the Ḥanafī school which continued till the colonial rule of the British.[60]

Under the British colonial rule, Sharia application took the form of the AML which was drafted to serve certain intents. It was required to function as "strategy of rule" to limit the need for military intervention.[61] But the principal objective was "to have security in social conditions so as to facilitate trade."[62] Thus, the British officials had to establish a legal system to solidify their role. The AML was part of the British legal system to govern Bengal that started with the appointment of Warren Hastings (1732-1818) as Governor of Bengal in 1772. Hastings initiated a multi-tiered legal system that placed British administrators at the top, followed by a tier of British judges who would consult with local jurists with regard to issues governed by Islamic law.[63] The main

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[57] The Anglo-Muhammadan Law was drafted upon the model of the Roman legal system (Justinian model). For further information, see Anderson, 'Islamic Law and the Colonial Encounter in British India.'

[58] Anver M. Emon, Rumee Ahmed, and Syed Adnan Hussain, *Anglo-Muhammadan Law* (Oxford University Press, 2017), p. 2 <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199679010.001.0001/oxfordhb-9780199679010-e-67>.

[59] Roland Knyvet Wilson, *Anglo-Muhammadan Law a Digest Preceded by a Historical and Descriptive Introduction of the Special Rules Now Applicable to Muhammadans as Such by the Civil Courts of British India, with Full References to Modern and Ancient Authorities*, 5th ed. / revised and brought up-to-date by A. Yusuf Ali. (Calcutta: Calcutta, 1921), p. 35.

[60] Asaf A. A Fyzee, 'Muhammadan Law in India', *Comp Stud Soc Hist*, 5.4 (1963), 401–15 (p. 401) <https://doi.org/10.1017/S0010417500001821>.

[61] Emon, Ahmed, and Hussain, p. 2.

[62] Asaf Ali Asghar Fyzee, *Outlines of Muhammadan Law*, 3d ed. [London]: London : Oxford University Press, 1964), pp. 42–43.

[63] Hallaq, *Sharī'a: Theory, Practice, Transformations*, p. 372.

challenge, from a British perspective, would have been in interpreting and legally managing the local society in an economically efficient manner and without much military intervention.[64]

2.1. Drafting of the Anglo-Mohammadan Law

At the outset, Muslim rulers aspired to apply Sharia but encountered plurality in customs and religious practices. This required the Moghuls rulers to adopt more flexible regulations to cope with the diverse and unique environment of the sub-continent. The rulers ensured religious rights to non-Muslims and to be legally ruled by their respective laws.[65] While the rulers adhered to the principles of Sharia as interpreted in the Ḥanafī tradition, this did not prevent them from declaring "several kinds of rules having the force of law [that] came to be recognized and enforced. The well- known distinction between shari'at (sacred law) and qanuin (secular law) came to be recognized; and laws, during the later Moghuls"[66] were divided into categories:

- Canon Law; which deals with religious issues such as apostasy and conversion,
- Criminal Law; which deals crimes and torts,
- Royal Decrees; which organize matters of the empire such as land allotment and administrative issues,
- Customary Law; which mainly addresses the question of non-Muslim citizens who enjoy the right to be governed by their respective laws and customs. While this was issued to allow non-Muslim the freedom and equality, some Muslim converts employed this when in their advantage, e.g. "a large piece of land cannot be broken up for the benefit of a son-in-law,"
- *Fatāwā* (s. *fatwā* and translates into a legal opinion) and Precedents;

[64] Hallaq, *Sharī'a: Theory, Practice, Transformations*, p. 373.
[65] Asaf A. A Fyzee, p. 403.
[66] Asaf A. A Fyzee, p. 404.

- Justice and Right; this includes the conduct of judges and some directions and guidelines to navigate cases.[67]

This form of Sharia was adopted under the British rule, at the beginning. The earliest legislative outcomes of such policy can be found in the charter of George II in 1753 and each religious group continued to adhere to their respective legal systems. For example, it was dictated in section 27 of the 1780 regulations that cases regarding inheritance and marriage the Muslims and Hindus will be subject to their respective laws.[68]

Changes have been introduced to the AML during the reign of Warren Hastings, first Governor-General of the Bengal Presidency during 1773-1785. The AML comprised legal assumptions[69] as well as, translations, *fiqh* textbooks, and new legal technologies.[70] The British officials set up a judicial system of a Supreme Court at Fort William, in addition to maritime, military, arbitral, and equity courts. A key change was the transmutation of *fiqh* texts law to legal codes, deeply informed by utilitarian philosophy, such as the Indian Penal Code (1862), the Code of Criminal Procedure including the Evidence Act (1872), and the Contracts Act (1872).[71] Another key change was the change of judiciary. The British officials suspected the integrity of local Sharia court system. The officials did not deem the judges (*qāḍīs*) and *mufitīs*[72] (scholars who give *fatwā*) to be trustworthy due to their disregard of precedent. The reason for this position is the process

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[67] Asaf A. A Fyzee, pp. 404–7.
[68] Asaf Ali Asghar Fyzee, p. 43.
[69] The Sunni tradition derived their rulings mainly from *al-Hedāya*, "a twelfth-century text of Central Asian origin that relied primarily on Abu-Yusuf and al-Shaybani, the two pupils of Abu-Hanīfa." Other factions e.g. Shi'ite, employed their scholarly traditions. The British were encountered by such diversity and were obliged to honor these traditions. See, Akgunduz, *Introduction to Islamic Law*.
[70] Ahmed Akgunduz, *Introduction to Islamic Law* (Istanbul: IUR Press, 2010), p. 266.
[71] Emon, Ahmed, and Hussain, p. 4.
[72] For a distinction between *qāḍīs* and *mufitīs.* See al-Qarāfī's *Kitāb al-iḥkām fi tamyyīz al-fatāwā ʿan al-aḥkām wa taṣarrufāt al-qādī wal-imam* (The Book of Perfecting the Distinction Between Legal Opinions, Judicial Decisions, and the Discretionary Actions of the Judge and the Caliph). For a distinction between *ijtihād* and *Iftā'*, see Abu Zahra's *Uṣūl Al-Fiqh* and al-Āmidī's *al-iḥkām fi Uṣūl al-Aḥkām*.

through which the jurists interpreted the Islamic law. The jurists employed their *ijtihād* in response to legal cases resulting in different legal opinions for seemingly similar cases.[73] This tradition led the British to question the viability and integrity of the traditional court system. Therefore, a new legal system with minimum reliance on the jurists seemed inevitable. The British officials relied on a number of sources to produce a new law (AML): *al-hedāya, fatāwā Alamgiri* and a portion of an *Ithna 'Ashariya* (Shi'a) text, which was "translated by Neil Baillie and published in 1865 under the title of A Digest of Mohammadan Law."[74]

Hastings attempted to graft the indigenous legal norms, for Muslims and Hindus, into a British-based legal system. The process entailed that the British judges would present the Muslim scholars (*maulavi*) with a hypothetical question, void of relevant details. Then request the scholars to give their opinion, hence, outcome cannot be considered as a legal rule or a principle of law. The officials, however, would formulate it as a 'precedent,' which reduced Sharia to a rigid set of legal rules.[75] Eventually, the indigenous scholars were replaced by British officials. The British

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[73] It is essential to understand the process through which the jurist reaches their opinion in order to appreciate the complexity of Islamic law and understand the confusion on the part of British officials. The jurist would issue an opinion either to respond to a question, which was the norm during the early period, or to create a hypothetical scenario in order to test their theory, which came to be a practice in later generations. In response to a question, the jurist would initially consult the Qur'an and Sunnah in search for a direct command. If the matter is not settled, then the jurist would follow the legal reasoning (*ijtihād*) of their doctrinal school. For instance, al-Shāfiʿī school would employ Qur'an, Hadith, *ijmāʿ* and *Qiyās*, respectively. While other schools, e.g. Ḥanafī, would add more legal tools such as unrestricted interest (*al-maṣlaḥa al-mursala)*, among others. Therefore, the legal opinion differs in accordance with the legal reasoning process for each school. It may also differ according to the rank of *ijtihād* of the jurist. In some situations, depending on the ranking, the jurist would proceed evaluate the extant opinions in their doctrinal schools. For an overview of the rankings and their roles, see Abu Zahra's *Uṣūl Al-Fiqh*; Youssuf al-Qaradawi's *al-ijtihād Fi al-Sharī'ah al-Islāmīyyah*, Muhammad Zaki Abdelbar's *Taqnīnal al-fiqh al-Islāmī* al-Ghazzālī's *al-Mustaṣfá min 'ilm al-uṣūl.*

[74] M.R. Anderson, *Islamic Law and the Colonial Encounter in British India*, WLUML Occasional Paper (Women Living Under Muslim Laws, 1996), p. 175 <https://books.google.com.ua/books?id=2e-5GwAACAAJ>.

[75] Anderson, *Islamic Law and the Colonial Encounter in British India*, p. 173.

officials of the East India Companies started exercising their judicial powers through the Charter of 1661.

2.2. Limitations and Challenges

The Anglo-Muhammadan Law has two main limitations that fall within the scope of the current study; structural and methodological. With respect to the structural organization, the AML is comprised of two main sections: the "Historical and Descriptive Introduction" and the "Digest." The Historical and Descriptive Introduction is concerned with Islam in India, the divisions of doctrinal schools and factions. Hence, it can be considered as an overview of the Islamic culture and history. The second section, the Digest, is comprised of five parts divided into fifteen chapters with each chapter including its related definitions at the beginning. The first part, "Preliminary," contains a number of articles and would be expected to function as general principles. But it does not include sufficient general legal maxims (*qawāʿid fiqhiyya*) to perform this function.

Part I (The Preliminary) includes three sub-sections; Topics, Persons and Sources, and comes in sixteen articles. The statement at the introductory section declares: "[t]his chapter treats chiefly of the rules for determining in what cases, to what persons, and in which of its different shapes, Anglo-Muhammadan Law is applicable, and the relative authority of the sources from which, when applicable, it is to be ascertained."[76] However, the scope and content of the body of articles do not reflect this claimed role. For instance, articles 1-3 and 5-8 tackle the question of territorial jurisdiction of the AML with minor details on other topics such as divorce and law of gifts. This does not negate the fact that the Preliminary section includes articles that have the attributes of general principles. For example, articles 11-14 discuss on whom the law will be enforced, and which doctrinal school regulates the litigation, and the relationship between Muslims

[76] Wilson, p. 75.

and non-Muslims.[77] However, the Preliminary chapter falls short in serving as general principles, due to its limited scope.

Additionally, the Muslims judges were replaced by British colonial judges who appear to have applied the law mechanically to the cases before them, practically on third-hand information of the law from the local jurists whose sense of justice born and bred in the native social environment was not available to the officials.[78] Therefore, the British officials were not competent to interpret the *fiqh* and *fatāwā*. Taking into account the lack of a facilitating section and unfamiliarity of the legal methodology, the officials did not obtain the sufficient knowledge or scholarly experience to enforce the Islamic law as their local counterparts.

With respect to content and methodology, textbooks and translations constituted significant sources towards the production of the AML. The officials followed a textualist approach in drafting the AML. This approach entailed that "the text of a statute is the law… and it is the text that must be observed," and it conspicuously isolates the text from its context.[79] In an Islamic legal context, this approach is evidently inoperable. At the core of *fiqh* lies the concept of *ijtihād* which implies a customization of opinion based on individual cases. Each case can have a different opinion depending on the context; therefore, familiarity with the *status quo* is quintessential for a sound *ijtihād*.[80] However, if there are clear regulations present in the Qur'an or Hadiths, with a robust chain of transmitters, an abidance by the Scripture is mandatory. Nonetheless, this is more common in liturgical rituals and practices (*ʿibādāt*) than daily transactions and dealings (*muʿāmalāt*). Hence, it can be argued that Islamic legal tradition synthesizes the two approaches: intentionalism

[77] Wilson, pp. 75–93.
[78] Anderson, *Islamic Law and the Colonial Encounter in British India*, p. 173.
[79] Siegel, p. 131.
[80] Jamāl al-Dīn 'Aṭīyah, *Al-Wāqi' Wa-Al-Mithāl Fī Al-Fikr Al-Islāmī Al-Mu'āṣir*, 1st edn (Beirut: Dar al-Hadi, 2001), p. 144.

and textualism, with the former more prominent in *muʿāmalāt*. This contravenes the general tendency of textualists to assume that "statutory text is the law." Since, the application of the AML "proceeded on the basis of textual understanding which allowed the officials to ascertain general legal rules quickly, it may have meshed with understandings of Islam.[81] Thus, trying to impose textualism implied "absurdity, perpetuating errors, and enforcing interpretations that fail unnecessarily to fulfill statutory intent."[82]

The compilation of material was thematic, but the material lacked objectivity or deep insight. For instance, the compilation of *fatāwā* by MacNaghten was conducted in accordance "with his own wide-ranging generalisations under the title Principles and Precedents of Mohammadan Law."[83] But MacNaghten glossed over "areas of problematic interpretation and present a unified rule in place of genuine differences of doctrine."[84] This reduced the Islamic intellectual heritage of doctrinal differences to "a fixed body of immutable rules beyond the realm of interpretation and judicial discretion."[85] The British officials deemed the flexible *fatāwā* to be inconsistent and "their dependence on local advisors as a form of disempowerment, they soon decided to seek a direct relationship with the source texts."[86] Therefore, the translation movement started in the second half of the eighteenth century and was focused on *al-hedāya*, with various translation errors, "fatwa Alamgiri and a portion of an Itna 'Ashariya (Shi'a) text", which constituted the textual basis of the AML.[87] There have been a number of inaccuracies

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81 M.R. Anderson, *Islamic Law and the Colonial Encounter in British India*, WLUML Occasional Paper (Women Living Under Muslim Laws, 1996), p. 181 <https://books.google.com.ua/books?id=2e-5GwAACAAJ>.
82 Siegel, pp. 169–70.
83 Anderson, *Islamic Law and the Colonial Encounter in British India*, p. 176.
84 Anderson, *Islamic Law and the Colonial Encounter in British India*, pp. 175–76.
85 Anderson, *Islamic Law and the Colonial Encounter in British India*, p. 176.
86 Elisa Giunchi, 'The Reinvention of "Sharīʿa" under the British Raj: In Search of Authenticity and Certainty', *The Journal of Asian Studies*, 69.4 (2010), 1119–42 (p. 127).
87 Anderson, *Islamic Law and the Colonial Encounter in British India*, pp. 173–74.

accompanying the translation of the texts because "translators [tended] to interpose their own views with the translation, loosely paraphrase, or omit some parts original."[88]

In sum, the material used to produce the AML involved inaccuracies and the process was limited in scope and content. Moreover, the judges did not have the sufficient scholarly knowledge to interpret the Islamic rules or respond to legal issues. With these intrinsic deficiencies, the final outcome was a distorted version of *fiqh* books and a poor imitation of positive law which rendered the project "unpopular amongst many Muslims."[89]

3. The Mecelle

This section explores the production of the Mecelle as an effort towards encountering Western intervention. Despite the considerable effort by the jurists and officials, the Mecelle can be described as lacking in some areas, especially structure and organization.[90] It is argued that the Mecelle did not fully discard the *fiqh* jargon, did not include an authoritative and regulatory general principles section and also the sole reliance on the Ḥanafī doctrinal proved deficient in some areas, e.g. contracts.

The Ottoman Empire encountered several challenges that resulted in the gradual adoption of modernization. The Gülhane charter mark the starting point of a dual legal system in the Empire. Before 1839 the legal system operated in accordance with Sharia, primarily, and the Sultan enjoyed the prerogative of issuing decrees in accordance with this framework. After the declaration of the Gülhane charter in 1839 a new legal system was introduced along the lines of Western legal codes,

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[88] Giunchi, p. 128.
[89] Emon, Ahmed, and Hussain, p. 2.
[90] The Mecelle has been discussed from various perspectives. For instance, *Law and Legality in the Ottoman Empire and Republic of Turkey* by Kent F Schull et al investigates different aspects of the Mecelle such as social and political factors that influenced the production of the Mecelle, see *We're Not in Kufa Anymore: The Construction of Late Hanafism in the Early Modern Ottoman Empire, 16th - 19th Centuries CE* by Samy Ayoub, the author investigates the purpose of the Mecelle and how it represents a continuation of the late Ḥanafi scholars.

particularly the French Code.[91] The Empire aspired to establish new judicial institutions and procedural system to respond to the active relations with European persons and states resulting in the *initium* of *tanẓīmāt* era. In the year 1850 the French Commercial code was adopted to cover areas where the Sharia was silent notably "foreign exchange, corporations, and commercial transactions" to mediate the controversies between foreigners and Ottoman subjects. Other venues of reform included "admiralty, criminal law and the enforcement of court decisions."[92]

The binary extended to institutions in 1868 when two bodies were established: Council of State, which was concerned with preparation of laws and supervision of their enforcement, and the Judicial Committee, which determines the of the new Westernized system. The application of the new court system, along with the new laws resulted in some confusion. For instance, the Commercial Code was Western, while the Ottoman civil law continued to be based on Sharia. Therefore, there was a dichotomy between the traditional law of the Ottoman system and the new statutes formulated on the basis of foreign laws. This urged a more systematic approach towards legislation; hence, two proposals were advanced. First, an application and adoption of the French civil code, sponsored by Ali Pasha (1813-71). Second, the establishment of an Islamic code based on the principles of Sharia, advocated by the conservative trends and headed by Ahmed Cevdet (1822-95). The latter view prevailed and resulted in the formation of the committee responsible for preparing the Mecelle in 1869.[93] The committee convened towards the production of the Mecelle which can be described as a product of the *tanẓīmāt* period. It constitutes the first Ottoman attempt to codify the Ḥanafī jurisprudence and was produced during the period of 1869/70 and

[91] Majid Khadduri and Herbert J. Liebesny, 'The Majalla', *Law in the Middle East*, 1955, 292–308 (pp. 292–93).
[92] Khadduri and Liebesny, p. 293.
[93] Khadduri and Liebesny, pp. 294–95.

1877 and comprised of 1,851 articles in sixteen books in Ottoman Turkish covering different legal matters varying from contracts, torts, legal liabilities, and some articles on civil procedure.[94]

The Mecelle was responding to two significant issues; how Islamic jurisprudence encountered modernity and it formulated the new ideals in values in a modern context.[95] The main objective from the production of the Mecelle is explicit in Cevcdet Pasha's statement in the committee's report, which is as follows:

> "The work of compiling religious principles to make a code containing provisions to satisfy the needs of our society was vested in us by a decree of the Sultan. We met in the office of the High Court and collected the opinions and ideas of the most eminent Ḥanafī jurists on the subject of muʿāmalāt to suit the present conditions. The result of our work is classified according to various subjects of law and the code is called Majallat-i Ahkami Adliye."[96]

The Mecelle was an attempt to counter the Western intervention and legal hegemony over commercial litigation within the Ottoman Empire.[97] On a more practical level, the Mecelle aimed to "influence judicial reasoning and to expedite court proceedings" through the creation of legal genres dedicated to these functions. The Mecelle depended heavily on the legal maxims and the *fatāwā* of late Ḥanafī scholars to formulate its basis.[98]

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[94] Samy Ayoub, 'We're Not in Kufa Anymore: The Construction of Late Hanafism in the Early Modern Ottoman Empire, 16th - 19th Centuries CE' (Dissertation (Ph.D.)--University of Arizona, 2014., 2014), p. 223.
[95] Samy Ayoub, p. 224.
[96] Khadduri and Liebesny, p. 295.
[97] Khadduri and Liebesny, p. 296.
[98] Ayoub, 'The Mecelle, Sharia, and the Ottoman State: Fashioning and Refashioning of Islamic Law in the Nineteenth and Twentieth Centuries', *Journal of the Ottoman and Turkish Studies Association*, 2.1 (2015), 121 (pp. 11–15) <https://doi.org/10.2979/jottturstuass.2.1.121>.

3.1. Organization and Content

The introductory section of the Mecelle includes a collection of principles that aim to serve as guidelines for the judiciary in "applying its provision to specific cases."[99] This section comes in 100 Articles under the title 'legal maxims,' and the rest of the articles are modeled on these maxims. The first section was drafted from the legal rules of the Ḥanafī school without reference to other doctrinal schools, which is plausible since the Ḥanafī school was the official doctrine of the Ottoman Empire but also confines the vast Islamic intellectual history to one legal reasoning approach. This introductory section and its articles on general legal maxims (*al-qawāʿid al-fiqhiyya*) were expected to organize and facilitate the adjudicating process in the court system. Hence it can be argued that the 'Introductory' section could function as general principles. But such hypothesis can be refuted by reverting back to the nature and function of the general principles. The general principles constitute a reference to the judges in cases of legislative vacuum or emphasis on legal reasoning. However, these '100 principles' of the Mecelle were extracted from the *fiqh* books of late Ḥanafī scholars, such as the Ibn Nujaym.[100] These legal maxims require a high degree of jurisprudential capacity to interpret them. Sewilam argues that

> "there are two ijtihād paths before the Mejelle's legislators: the absolute ijtihād or the school-affiliated ijtihād. Had the legislators practiced the first type, they would have produced a new legislative methodology for decision-making in Sharia. Had they practiced the second, they would have produced new legislation in line with the methodology of the official Hanafi School of law. In reality, however, the Mejelle's legislators could not practice any level of ijtihād neither the

[99] Khadduri and Liebesny, p. 296.
[100] Samy Ayoub, p. 232.

> absolute ijtihād nor the takhrij [lit. extraction]. The reason for this incapacity goes back to the fact that the Mejelle's legislators did not enjoy the necessary freedom for ijtihād practice."[101]

Thus, the legislators and judges could not practice either ijtihād or extraction (*takhrīj*) due to state restrictions that confined their practices to imitation (*taqlīd*).

The reasons for such incapacity can be attributed to the Ottoman state's intervention in the codification and legislation of the Mecelle that took a number of forms. The adoption of the Ḥanafī doctrinal school limited the freedom of judges "to adopt methodologies or decisions against the recognized theses and practices of the Hanafi School."[102] In addition, the legal methodology of the Ḥanafī school may not have been the most compatible with codification. For instance, Sewilam contends that drafters of the Mecelle complained that the Ḥanafī "did not cut down the number of legal cases present in their *furuʿ* study" which made the codification process more complicated.[103] Sewilam proceeds to state that there was a Ḥanafī "tendency to decide on the cases of the *furuʿ* through the application of legal principles. The Shafi'i tendency is therefore closer to the codification style of deriving decisions on cases from legal rules. The drafters reasoned such difference had a reduction in the size of the Hanafi *furuʿ* occurred in the history of this school, their task of extracting Hanafi 'key cases for problem solving' would have been easier."[104]

The Mecelle exhibited other limitations in its content. The principles of the Mecelle, as derived from the Ḥanafī jurisprudence, were founded on morality "rather than on economic necessities" which is evident in certain chapters, e.g. sale.[105] This manifested in "[t]he theory of

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[101] Heba Sewilam, 'The Jurisprudential Problems of the Early Codification Movement in the Middle East: A Case Study of the Ottoman Mejelle and the 1949 Egyptian Civil Code', ed. by Khaled Abou El Fadl, 2011, p. 187.
[102] Sewilam, p. 181.
[103] Sewilam, p. 182.
[104] Sewilam, p. 182.
[105] Khadduri and Liebesny, p. 299.

objective responsibility wherein a situation creates a benefit for a person, that person should also be responsible for the risk involved, [whereas in the European civil law, responsibility is] based largely on the principle of negligence…[and] objective responsibility is applicable only in certain cases."[106] Moreover, the Mecelle did not acknowledge the Western principle of 'freedom of contract,' but instead provided limited choices in order to protect the individuals.[107]Additionally, the Mecelle adopted the theory of voidable (*fāsid*) contract. The Mecelle concentrated solely on the *Ḥanafī* doctrinal school and did not take benefit from the wide spectrum of opinions in other jurisprudential school, which could offer more freedom and liberalized regulations on contracts.[108] This limited the scope of contracts and caused the Mecelle to lag behind. Further, the Mecelle did not discuss personal issues such as marriage, divorce, inheritance, or waqf.[109] Al-Sanhuri offered a similar critique as he argued that the Mecelle is closer to a civil contract than it is to a comprehensive civil law and lacks a general theory of obligation. Al-Sanhuri continues to argue that the Mecelle relies completely on preponderant opinion (*al-ra'y al-rajiḥ*) of the Ḥanafī school, without reference to opinions in other doctrinal schools which made the Mecelle less flexible in responding to legal issues within the vast Ottoman Empire. He contended that the fashioning of the Mecelle includes parts that take the form of *fiqh* texts, which is not compatible with the modern legislative style that relies on commands in the form of regulations.[110]

In brief, the Mecelle constitutes a genuine effort towards the production of an Islamic code to replace Western positive laws. However, the Mecelle fell short on different levels. It focused on the transition from *fiqh* to civil law but forfeited important sections in the civil law, notably, general

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[106] Khadduri and Liebesny, pp. 297–98.
[107] Khadduri and Liebesny, p. 299.
[108] Ṣubḥī Rajab Al-Maḥmaṣānī, *Falsafat Al-Tashrī [Sic] Fi Al-Islām: The Philosophy of Jurisprudence in Islam* (Leiden: Brill, 1961), p. 45.
[109] Khadduri and Liebesny, p. 298.
[110] Atef Mazhar, *Taqnīn Al-Sharī'ah Al-Islāmīyah Fi Majlis Al-Sha'b*, 2012, p. 73.

principles. The vital role of the judge was not fulfilled due to state-imposed restrictions. Moreover, reliance on the Ḥanafī school proved a limitation than an advantage particularly with regard to inferring from particulars (*furuʿ*) in comparison to other doctrinal schools and restrictions on contracts. Ironically, the Mecelle tended to "deal with details in its body rather than broad principles which "often restricted the power of the judge and the freedom of action of the parties."[111] These limitations could not be transcended and the Mecelle leaned towards *fiqh* books than positive laws. This is not to undermine the *fiqh* tradition but to argue that the Mecelle included inherent drawbacks.

4. *Mashrūʿ Taqnīn al-Sharīʿah al-Islāmīyah ʿalá al-Madhahib al-Arbaʿa*

This section investigates a recent attempt to codify the Sharia, *Mashrūʿ Taqnīn al-Sharīʿah al-Islāmīyah ʿalá al-Madhahib al-Arbaʿa* (Sharia Codification Project based on the Methodology of the Four Doctrinal Sunni Schools), conducted by *Majmaʿ al-Buḥūth al-Islāmīyah* (Islamic Research Academy). The two previous attempts (the Anglo-Muhammadan Law and the Mecelle) are prominent codification attempts with available literature and analysis. The Sharia Codification Project, however, does not enjoy the same level of attention. Thus, the Sharia Codification Project methodology, structure and content will be examined in this section. It should be noted that this project has been proposed but has not been implemented in the Egyptian courts, thus it will be difficult to evaluate its functionality. However, it is argued that it shares drawbacks similar to those in previous attempts which would hinder its viability as a legal system. These limitations vary from *fiqh*-based content and structural setbacks, e.g. lack of a viable general provisions section, which would impede its application as a positive law.

[111] Khadduri and Liebesny, pp. 307–8.

In 1967, IRA held its 27th session in which the board agreed to draft a comprehensive set of laws (civil and criminal, and others). Application of such codes was contingent on the approval of the Egyptian parliament. A year later, in 1968, the IRA approved the recommendation for establishing a committee comprised of jurisprudence scholars and legal experts (modern practitioners) to draft laws and bills that would facilitate the adoption of Sharia as the law of the land. Hence, in 1970, the board approved a phased plan including the establishment of committee for *Mashrū‘ Taqnīn al-Sharī‘ah al-Islāmīyah*.[112] The drafters stated the main objective in the introductory section of the Mālikī book. They argued that the codification was conducted as a "step towards depicting the Sharia in its original image...applicable in this [modern] age. This is a step through which officials, responsible for legislation and judiciary in different Islamic countries, could abandon positive laws and [secular] legislations."[113] The introduction proceeds to contend that some individuals may believe that Sharia is not equipped to regulate affairs in a modern secular context, however, Sharia has managed to prevail for hundreds of years and through various regimes due to its advocacy of public interest. The introductory section can be considered as a response to the claims raised by ‘individulas’ who doubt the viability of Sharia in a modern context.

4.1. Content and Methodology

The Committee divided the Project into two phases: a. codification of the four major doctrinal Sunni schools, separately; b. synthesis of the codified doctrinal schools into one applicable law.[114]

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[112] Majma‘ al-Buḥūth al-Islāmīyah. Lajnah al-Taḥḍīrīyah li-Taqnīn al-Sharī‘ah al-Islāmīyah, *Mashrū‘ Taqnīn Al-Sharī‘ah Al-Islāmīyah ‘alá Madhhab Al-Imām Mālik*, Taqnīn Al-Sharī‘ah Al-Islāmīyah ‘alá Madhhab Al-Imām Mālik, al-Ṭab‘ah al-tamhīdīyah. (al-Qāhirah: al-Qāhirah, al-Sharikah al-Miṣrīyah lil-Ṭibā‘ah wa-al-Nashr, 1972), pp. 6–8.

[113] Majma‘ al-Buḥūth al-Islāmīyah. Lajnah al-Taḥḍīrīyah li-Taqnīn al-Sharī‘ah al-Islāmīyah, *Mashrū‘ Taqnīn Al-Sharī‘ah Al-Islāmīyah ‘alá Madhhab Al-Imām Mālik*, p. 5.

[114] It should be noted that the Committee completed a codification of a chapter on ‘Sales’ in each doctrinal school. However, the Committee never added other chapters or synthesized the chapter on ‘Sales’ into

The Committee indicated that it will choose preponderant opinion (*al-ra'y al-rajiḥ*) from each school with an annex report. The report includes the pool of opinions from which the Committee has chosen and indicate the ranking of opinions in each doctrinal school. The Committee contended that the two phases allow the option of applying the codification of one doctrinal school or the synthesized version of all schools.[115]

Similar to the contention surrounding the production of the Mecelle, the Committee received a suggestion to review the Egyptian positive law and amend the articles that may contravene with the Sharia. This suggestion aimed to complete the codification in a timely manner as many of the enacted laws were based on Sharia and differed in certain aspects. However, the Committee disregarded this proposal for a few reasons. First, the terminology of the positive law differed from the terminology employed in *fiqh* books. Second, the positive law is a product of a specific environment; Western customs and philosophy, that is different from the principles upon which Sharia is based. For instance, many articles in the positive criminal law would practically fall under the category of discretionary punishment (*taʿzīr*), however these articles do not convey Islamic traditions and morality. In addition, discretionary punishment should be closely tied to Islam's concept of punishment and reward.[116] While reviewing the positive law might be an option, it does not reflect the core of Sharia's principles and morals.

The introduction exhibited other aspects of the internal debate. It was suggested that the Committee synthesize the doctrinal schools directly and bypass the codification of each school.

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one codified book. The author did not find any information regarding any further steps that has been taken in this regard.

[115] Majmaʿ al-Buḥūth al-Islāmīyah. Lajnah al-Taḥḍīrīyah li-Taqnīn al-Sharīʿah al-Islāmīyah, *Mashrūʿ Taqnīn Al-Sharīʿah Al-Islāmīyah ʿalá Madhhab Al-Imām Mālik*, p. 8.

[116] Majmaʿ al-Buḥūth al-Islāmīyah. Lajnah al-Taḥḍīrīyah li-Taqnīn al-Sharīʿah al-Islāmīyah, *Mashrūʿ Taqnīn Al-Sharīʿah Al-Islāmīyah ʿalá Madhhab Al-Imām Mālik*, p. 10.

This proposal contended that *fiqh* books are, nearly, codified in the form of *matn*[117] and require recapitulation and minor additions. However, the Committee responded by stating that codification of doctrinal schools would have to precede the enactment of a unified Sharia law. This is due to multiple legal opinions in each doctrinal school and the difficulty to consider *matn* as a 'nearly codified.' The Committee argued that *matn* takes succinct and ambivalent forms with multiple *shurūḥ* (sing. *sharḥ* and refers to annotations and commentaries).[118] Moreover, it comprises rulings on acts of worship and citations of evidence to support each opinion, hence *matn* should be transmuted into a more pragmatic form to be an applicable code. The drafters relied pimarily on specific *fiqh* books:

- In the Mālikī doctrinal school: *al-Sharḥ al-Ṣaghīr wa al-Sharḥ al-Kabīr by al-Dardiri* (d. 1787 AD)
- In the Ḥanbali doctrinal school: *Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ by* Al-Bahūtī (d. 1641 AD) and *al-Sharḥ al-Kabīr ʿala al-Muqniʿ* by Ibn Qudāmah al-Maqdisī (d. 1223 AD).
- In the Ḥanafī doctrinal school: *Radd al-Muhtār ʿala al-Durr al-Mukhtār* by Ibn Abidin (d. 1836 AD) and *Fatḥ al-Qadīr* by Ibn al-Hammam (d. 1457 AD).
- In the Shāfiʿī doctrinal school: *Mughni al-Muḥtāj ila Maʿrifat Maʿānī Alfāẓ al-Minhāg* by Shams al-Din al-Shirbini (d. 1570 AD)

4.2. Case Study

This section explores the similarities and differences between the codification of the four doctrinal schools with regard to the section on 'Fruit Sale.' The previous codifications investigated the

[117] The term *matn* is commonly used in the context of Hadith to refer to reports of the Prophet. It constitutes one of the main pillars of Hadith studies. The other is *isnād* (chain of transmitters). In this context, the author uses the term '*matn'* to refer to the body of authoritative *fiqh* books that are comprised of the main cases and legal maxims that have been commentated and analyzed for their significance.

[118] Majma' al-Buḥūth al-Islāmīyah. Lajnah al-Taḥḍīrīyah li-Taqnīn al-Sharī'ah al-Islāmīyah, *Mashrū' Taqnīn Al-Sharī'ah Al-Islāmīyah 'alá Madhhab Al-Imām Mālik*, pp. 11–15.

limitations and challenges in codifying a single doctrinal school. This project is an attempt to codify the four doctrinal schools and then synthesize them into one code. This poses similar and different set of challenges such as transcending the legal reasoning methodologies in each school to reach a synthesis. Therefore, it will be required to exhibit some of these differences through examining the present case study. It is argued that each prospectus differs in scope, structure and the legal reasoning from other prospecti which makes the synthesis process rather complicated. Additionally, this section examines the extent to which the drafters managed to transcend *fiqh* attributes, such as jargon, classification of *fiqh* books and discussion on evidence, in order to draft a viable code.

4.2.1. Mālikī

In article 44 of Imam Mālik's prospectus, the drafters explicate the conditions for fruit sale by stating: "It is permitted for fruit to be sold without being ripe if sold with its origins [origins here indicate the plant that are multi-harvested annually, and could include the land]. However, the fruit may not be sold separately unless it appears to be, or some of it, ripe. Fruit is deemed ripe if it is about to be ripe or ready to be consumed. If the origins produce more than once a year, the yield can be sold altogether if the first yield seemed in a good condition and there is no separation period. However, if there is a separation period, then the second yield cannot be sold unless proven ripe."[119]

Article 45 regulates the relationship between buyer and seller in case of unforeseen catastrophe: "If the fruit, after being sold, was affected by an avoidable catastrophe, then the buyer is entitled to decrease the price by an amount equivalent to the damage. In case if the damage occurrs before the fruit is fully ripe or yielded, then value of the damaged fruit is equivalent to

[119] Majmaʿ al-Buḥūth al-Islāmīyah. Lajnah al-Taḥḍīrīyah li-Taqnīn al-Sharīʿah al-Islāmīyah, *Mashrūʿ Taqnīn Al-Sharīʿah Al-Islāmīyah ʿalá Madhhab Al-Imām Mālik*, p. 93.

one-third, or more, of the overall value of the fruits. Unless the catastrophe is caused by draught, in which case the buyer is entitled to request the seller to incur the value of the damage, even if the value is less than the one-third."[120] It is noticed that only two articles primarily cover the issue of fruit sale. Nonetheless, there are other articles that entail details about the fruits but under different sections, therefore, do not fall under the scope of this study.

4.2.2. Ḥanbali

In the Ḥanbali prospectus, the fruit sale comes in three articles. Article 139 discusses the conditions under which the seller is entitled to sell the fruits before being ripe: "It is not permitted for fruit to be sold before being ripe or the plant before it is close to yielding, except in the following instances: a. if the buyer is the owner of the land and origin [plant]. b. If the fruit or seeds are sold along with the origin. c. If the fruit is sold under the condition that it is collected forthwith, the yield has benefit, and the fruit is not under joint ownership."[121] Article 140 proceeds in the same vein: "a. It is permissible to sell the fruit that can be collected and picked only from plants that produce continuous harvest, under the condition that the harvest is collected or picked promptly. b. It is permissible to sell the origins, that produce continuous harvest, and the fruits fall under the same sale."[122] Article 141 further discusses the instances in which the sale might be invalid or situations that could result in disputes. It states: "a. if the buyer purchases the fruit before being ripe, or before the seeds grow in size with the condition of prompt collection, then the buyer does not collect the fruit till it ripens or the seeds grow, in which case the sale is invalid. b. if there

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[120] Majmaʿ al-Buḥūth al-Islāmīyah. Lajnah al-Taḥḍīrīyah li-Taqnīn al-Sharīʿah al-Islāmīyah, *Mashrūʿ Taqnīn Al-Sharīʿah Al-Islāmīyah ʿalá Madhhab Al-Imām Mālik*, p. 94.

[121] Majmaʿ al-Buḥūth al-Islāmīyah. Lajnah al-Taḥḍīrīyah li-Taqnīn al-Sharīʿah al-Islāmīyah, *Mashrūʿ Taqnīn Al-Sharīʿah Al-Islāmīyah ʿalá Madhhab Al-Imām Aḥmad Ibn Ḥanbal.*, Taqnīn Al-Sharīʿah Al-Islāmīyah ʿalá Madhhab Al-Imām Aḥmad Ibn Ḥanbal, al-Tabʿah al-tamhīdīyah. (al-Qāhirah: al-Qāhirah, al-Sharikah al-Miṣrīyah lil-Ṭibāʿah wa-al-Nashr, 1972), p. 214.

[122] Majmaʿ al-Buḥūth al-Islāmīyah. Lajnah al-Taḥḍīrīyah li-Taqnīn al-Sharīʿah al-Islāmīyah, *Mashrūʿ Taqnīn Al-Sharīʿah Al-Islāmīyah ʿalá Madhhab Al-Imām Aḥmad Ibn Ḥanbal.*, p. 215.

is a new crop mixed with a crop whose origin was transferred to another owner, or with another crop bought after appearing to be ripe, then the new crop could not be distinguished, in which case if the portion is known then the ownership is joint with the former buyer, otherwise they ought to reach an agreement, and the sale is valid."[123]

4.2.3. Ḥanafī

In the Ḥanafī school, there is only one article that is under the section ascribed to fruit sale. Article 29 states: "fruit sale is valid if the fruit appears and is not ripe. The buyer is bound to collect the fruit promptly. If the buyer sets the condition to keep the fruit, then the sale is invalid unless it becomes ripe."[124]

4.2.4. Shāfiʿī

The Shafi'i code is by far the most developed in terms of volume and details. With respect to the fruit sale, it is divided into different sections on agricultural lands, types of seeds, plants, and agriculture-related activities. However, with respect to fruit sale there are 15 articles; 119-121; 123-134.[125] For instance, article 123 discusses the fruit sale after appearing to be ripe as it states, "a. It is permitted to sell the fruit after appearing to be ripe, generally. b. It is not permitted to sell the fruit apart from the tree before it appears to be ripe unless collected promptly, with the possibility of benefiting from it."[126] Moreover, article 128 discusses the case in which the fruit is

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[123] Majmaʿ al-Buḥūth al-Islāmīyah. Lajnah al-Taḥḍīrīyah li-Taqnīn al-Sharīʿah al-Islāmīyah, *Mashrūʿ Taqnīn Al-Sharīʿah Al-Islāmīyah ʿalá Madhhab Al-Imām Aḥmad Ibn Ḥanbal.*, p. 216.

[124] Majmaʿ al-Buḥūth al-Islāmīyah. Lajnah al-Taḥḍīrīyah li-Taqnīn al-Sharīʿah al-Islāmīyah, *Mashrūʿ Taqnīn Al-Sharīʿah Al-Islāmīyah ʿalá Madhhab Al-Imām Abu Ḥanīfa.*, Taqnīn Al-Sharīʿah Al-Islāmīyah ʿalá Madhhab Al-Imām Aḥmad Ibn Ḥanbal, al-Tabʿah al-tamhīdīyah. (al-Qāhirah: al-Qāhirah, al-Sharikah al-Miṣrīyah lil-Ṭibāʿah wa-al-Nashr, 1972), p. 80.

[125] For the purpose of this paper that is focused on the effort in incorporating the various opinions in each school, the concentration will be paid to articles with content discussed in books of the other schools to elucidate the differences and similarities.

[126] Majmaʿ al-Buḥūth al-Islāmīyah. Lajnah al-Taḥḍīrīyah li-Taqnīn al-Sharīʿah al-Islāmīyah, *Mashrūʿ Taqnīn Al-Sharīʿah Al-Islāmīyah ʿalá Madhhab Al-Imām Al-Shafiʿī.*, Taqnīn Al-Sharīʿah Al-Islāmīyah ʿalá Madhhab Al-Imām Mālik, al-Ṭabʿah al-tamhīdīyah. (al-Qāhirah: al-Qāhirah, al-Sharikah al-Miṣrīyah lil-Ṭibāʿah wa-al-Nashr, 1972), p. 302.

damaged: "If the fruit and the plant are damaged due to poor irrigation from the seller, then the buyer has the option [to continue the deal or rescind it]."[127]

4.3. Challenges and Limitations

The prospecti present a genuine effort to codify the Sharia along the lines of positive laws, but not without limitations. Similar to the previous codification projects, the challenges and limitations fall mainly into two categories; structure and content.

There are some differences between the four schools in articles related to rescinding the sale agreement or in case of damage. For instance, the Shāfiʿī school grants the buyer the option to rescind the sale agreement if there is damage resulting from negligence on part of the seller, whereas the Mālikī school does not rescind the contract, but obliges the seller to incur the damage costs. The codification attempts do not indicate how these differences will be consolidated. Generally, there are specific approaches applicable in this context, e.g. *talfīq*[128] (piecing together), however, the Committee did not clarify which approach is to be followed in amending the divergencies among the doctrinal schools. The need for a method to synthesize the differences between the doctrinal schools is dire. For instance, the Shāfiʿī prospectus, has a much larger scope than the Ḥanafī prospectus. These discrepancies are the product of different methodological legal reasoning practices in each doctrinal school. Eventually, the synthesis of the prospecti came to a hault without any verfiable data.

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[127] Majmaʿ al-Buḥūth al-Islāmīyah. Lajnah al-Taḥḍīrīyah li-Taqnīn al-Sharīʿah al-Islāmīyah, *Mashrūʿ Taqnīn Al-Sharīʿah Al-Islāmīyah ʿalá Madhhab Al-Imām Al-Shafiʿī.*, p. 309.

[128] Piecing together. Legal term describing the derivation of rules from material of various schools of Islamic law. In modern times *talfīq* was advocated by Muhammad Abduh (d. 1905) and his student Muhammad Rashid Rida (d. 1935) as a means to reform Islamic law. *Ikhtilāf* (differences of opinion) were a source of intellectual wealth, they reasoned, that ought to be utilized for the benefit of the whole community.

With respect to strucutre, it is noticed that the prospecti could not overcome certain drawbacks. The project iniates with a discussion on the sources of Sharia; introduction to the characteristics of the Qu'ran and Hadith and the construction of their authority. The four prospecti are not organized in the same manner. For instance, the Mālikī and Ḥanafī prospecti include a section which discusses the general regulations of the rules on sales. Whereas the Ḥanbali and Shāfiʿī prospecti do not include such section. While there are sections containing articles concerning the general principles, they are limited in scope with only seventeen articles in the Mālikī and twenty in the Ḥanafī. Moreover, the general principles section includes regulations that have been derived directly from *fiqh* books and convey a religious nature. For instance, article 8 of the Ḥanafī prospectus states, "If Ḥalal is blended with Ḥaram, then the Ḥaram prevails."[129] Other articles are not, directly or indirectly, related to Sales and Contracts, which is the focus of the prospecti. For instance, article 10 of the Ḥanafī prospectus discusses the authority of ruler, "Actions of the Imam with regard to the citizens are contingent on public interest."[130]

In conclusion the prospecti constitute a genuine effort exerted by the scholars to codify the Sharia. They attempted to codify each school separately and synthesize them into one code, nonetheless, the project came to a halt. The scholars did not highlight the process through which they would synthesize the four doctrinal schools. Moreover, the prospecti were not consistent with the organization and structure. Moreover, the prospecti suffer from a lack of an efficacious section dedicated the general principles to facilitate the production and development of legal reasoning and adjudication in a modern context.

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[129] Majmaʿ al-Buḥūth al-Islāmīyah. Lajnah al-Taḥḍīrīyah li-Taqnīn al-Sharīʿah al-Islāmīyah, *Mashrūʿ Taqnīn Al-Sharīʿah Al-Islāmīyah ʿalá Madhhab Al-Imām Abu Ḥanīfa.*, p. 27.

[130] Majmaʿ al-Buḥūth al-Islāmīyah. Lajnah al-Taḥḍīrīyah li-Taqnīn al-Sharīʿah al-Islāmīyah, *Mashrūʿ Taqnīn Al-Sharīʿah Al-Islāmīyah ʿalá Madhhab Al-Imām Abu Ḥanīfa.*, p. 28.

5. Conclusion

This chapter ventured to explore the challenges and limitations in different codification projects. Each of the projects discussed here is a representative of a unique culture in which the legislature was addressing a unique social context. It is argued that each of these projects was responding to the question of where and how Sharia would fit in the structure of the nation-state and its legal system. The chapter contended that each of these codification projects fell short in various aspects such as using *fiqh* jargon, lack of a facilitating section (general principles) and restricting the jurisdiction of judiciary. These are essential features to the functionality of modern laws. For instance, the general principles section performs as guidelines for the judges to facilitate the process of legal reasoning. Legislators comprehend that the law is not complete; thus, the presence of such principals rectify the situations where the law falls short. The absence of an efficacious body of general principles is detrimental to the application of law as it will certainly encounter legal issues that are not covered by the law. Since the law reacts to social needs, it does not proactively produce legal rules, therefore, general principals are significant due to their flexibility to respond to nascent legal issues.

The chapter examined three main features: general principles section, judiciary and presence of *fiqh* jargon in each of the codification projects. For instance, the Anglo-Muhammadan Law included a Preliminary Chapter; however, the scope and content fell short in establishing a comprehensive theory of reference. Similarly, the Mecelle included 100 principles that are based on legal maxims (*al-qawāʿid al-fiqhiyya)* within the Ḥanafī doctrinal school. The incapacity of the '100 principles' to perform as a general principles stem from the legal methodology of the Ḥanafī school, level of complexity of the maxims and state-imposed restrictions. In the same vein, M*ashrūʿ Taqnīn al-Sharīʿah al-Islāmīyah* includes similar setbacks. The Mālikī and Ḥanafī

prospecti contain a section where some articles can, arguably, be referred to as general principles, while such a section is completely absent in the Ḥanbali and Shāfiʿī codifications.The sections in the Mālikī and Ḥanafī projects have legal provisions that entail religious rules. This would not provide an aide to the judge, who would have been required to be specialized in the legal reasoning of the doctrinal schools and traditions of *fiqh*.

In order to respond to these limitations, two factors are necessary: an efficacious legislature and a viable body of laws, with practical general principles. While ʻAṭīya does not offer a detailed legal code, he proposes a methodology to extrapolate legal maxims from different doctrinal schools to avoid some of the limitations present in some doctrinal schools, as in the Ḥanafī school, which may jeopardize the codification. Furthermore, ʻAṭīya advocates for an amalgamation of *ijtihād* and *ijmaʿ* (consensus) into an institution which he calls 'the Ijtihād Institution' which will be responsible for generating broad legal principles (*kulliyyāt*) rather than particular legal maxims (*juz'iyāt*) to allow judiciary the freedom to practice *ijtihād*.

Chapter II:

Formation, Trends and Renewal of *Ijtihād*

Ijtihād is the exertion of effort to interpret the Divine Scripture and provide legal opinions and regulations for the community. *Ijtihād* is guarded by a number of prerequisites established by Muslims scholars over the course of history to ensure a high probability of reaching the right legal opinion. Many scholars in the modern period have investigated *ijtihād* and the different ways in which it evolved. Scholars, including ʻAṭīya, build up on the efforts of previous scholars while preserving the nature of *ijtihād* as an ever-evolving practice. In this sense, this chapter provides a gateway to understanding ʻAṭīya's project of renewal (*tajdīd*) and *ijtihād* by providing an overview of the concept and the ways in which it has been understood and implemented.

This thesis investigates the different ways Muslim scholars and intellectuals have proposed to apply Sharia. One method of applying Sharia is through codification of *fiqh*, which was the primary focus of the first chapter. In the first chapter, I have examined three prominent attempts to codify Sharia: the Anglo-Muhammadan law, the Mecelle and *Mashrūʻ Taqnīn al-Sharīʻah al-Islāmīyah* (Sharia Codification Project). Despite the ingenious approach followed in each of the attempts to transform Sharia into a modern code, they have not been fully successful due to some inherited limitations. Another method for applying Sharia, as envisaged by scholars, is through re-adapting some of the legal tools of *uṣūl al-fiqh*. Therefore, in this chapter I examine some of the attempts that employ legal tools a basis for legal reform in the modern nation-state. Understanding the role of *ijtihād* and the ways in which different scholars have approached this topic will enable us to better comprehend ʻAṭīya's project for renewing *ijtihād* and to investigate the viability of his

approach. Therefore, I have divided this chapter into three main sections. The first section examines the concept of *ijtihād*, and the prerequisites required to practice it. It focuses on the formative period and the different conditions set by prominent scholars. It highlights the key principles of *ijtihād*: Qur'an, Hadith, analogy (*qiyās*) and consensus (*ijmāʿ*) and the extent to which *mujtahids* should be familiar with each principle. The first section is significant because it denotes the main components and conditions of *ijtihād* in the classical sense, which will give us an insight into the extent of change the modern scholars are proposing. The second section investigates the general trends for *ijtihād* in the modern period. It aims to provide an overview of the different models of interpreting *ijtihād* from within the *fiqh* tradition or through reliance on modern sciences. This classification will help us, later on, understand where 'Aṭīya's model fits within the larger spectrum for renewal and reform in the modern period. The third section narrows down the research to investigate the different trends for *ijtihād* with the aim of integrating *ijtihād* into the legal structure of the modern nation-state. The research is limited to three concepts: analogy (*qiyās*), consensus (*ijmāʿ*) and public interest (*maṣlaḥa*), as they are the most relevant to 'Aṭīya's model. Therefore, the third section will examine the different ways prominent scholars, e.g. Rida, Turabi and Iqbal, have expanded or re-interpreted legal tools, e.g. public interest (*maṣlaḥa*), analogy (*qiyās*) and consensus (ijmāʿ) respectively, to achieve their aims in a modern context.

1. *Ijtihād* in the Formative Period

This section examines the concept of *ijtihād*, its legal and social functions in the formative period.[131] Then, the section proceeds to highlight the main prerequisites laid down by scholars to

[131] Modern scholarship has examined the concept of *ijtihād* from different perspectives. For instance, Hallaq explicates the process of *ijtihād* through its theoretical basis: *uṣūl al-fiqh* and argues that Qur'an and Sunna do not specify the law but refer to its through *aḥkām* (rulings) and *dalālāt* (indications) to which the jurist, directly or indirectly, builds upon to adjudicate new cases. Hallaq contends against the notion of closing the gates of *ijtihād* by referring to practices that can be deemed as *ijtihād* over the course of Islamic history. See: Hallaq, *Was the Gate of Ijtihād Closed?* Weiss highlights the process of deriving the

regulate the practice of *ijtihād*. The section is meant to aid the reader in two ways: first, the discussion on the prerequisites will enable us to evaluate later attempts, particularly in the modern period; second, it will briefly indicate the role and function of *ijtihād* to verify if the modern attempts towards renewal (*tajdīd*) show resemblance to or difference from the classical nature of *ijtihād*.

Ijtihād can be defined as "a process of legal reasoning and hermeneutics through which the *mujtahid* derives or rationalizes law on the basis of the Quran and the Sunna; during the early period, the exercise of one's discretionary opinion (*ra'y*) on the basis of *ʿilm*."[132] The Qur'an and Sunnah do not represent "specialized law manuals" but rather a set of rulings and indications that can aid scholars to infer further ordinances. Therefore, "[o]n the basis of these indications and causes the mujtahid may attempt, by employing the procedure of analogy (*qiyās*), to discover the judgement (*ḥukm*) of an unprecedented case (*farʿ pl. furūʿ).* But before embarking on this original task, he must first search for the judgement in the works of renowned jurists."[133] Some scholars contend that "*ijtihād* presupposes that the process of producing rules is a process of elucidating that which is present but yet is not self-evident."[134]

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rules by arguing that the Holy Law is "the totality of rules" but few ordinances are clearly stated and man has a duty to derive from the sources. The process of deriving (or extracting) the legal rules from by man is termed *ijtihād.* Weiss discusses the similarities and differences between the Roman law and Islamic law in the way they are drafted by 'lay specialists,' but differ in the monopoly of legislation as the state in Islam "upholds the Law and enforces it but has no right to make the law." See: Weiss, *Interpretation in Islamic Law: The Theory of Ijtihād*. Another position is held by the eminent Joseph Schacht in his seminal work titled *An Introduction to Islamic Law.* Schacht explores pre-Islamic background of the legal and social customs, then proceeds with development of Islamic jurisprudence and contends that the gates of independent reasoning (*ijtihād*) have been closed. Schacht, then, highlights the development of *ijtihād* and legal reform in the modern context and the ways in which the 'purists' reacted to the compromise between legal theory and practice.

[132] Hallaq, *The Origins and Evolution of Islamic Law*, p. 208.

[133] Hallaq, *Was the Gate of Ijtihād Closed?* 4.

[134] Weiss, *Interpretation in Islamic Law: The Theory of 'Ijtihād*, 200.

Ijtihād required a legal theory to regulate its practice which came in the form of *uṣūl al-fiqh*,[135] with legal tools and principles as its main components. The primary objective of this legal theory "was to lay down a coherent system of principles through which a qualified jurist could extract rulings for novel cases. From the third/ninth century onwards this was universally recognized by jurists to be the sacred purpose of *uṣūl al-fiqh*."[136] While the legal methodology did not take an elaborate form at the end of the first century, it was practiced in accordance with rules of inference from the Scripture _Qur'an and Hadith_ and non-binding legal opinions (*fatāwā*) of the companion-scholars. The legal methodology further developed in the following years at the hands of school eponyms who laid down legal theories for their respective doctrinal schools.[137] The main function of the legal theory was to establish a coherent system of principles that would enable proficient *mujtahids* to "extract rulings for novel cases" and "[t]hroughout the third, fourth, and fifth Islamic centuries, *ijtihād*, the only channel of legal development, was rejected by various elements. Among these were extreme legal and theopolitical groups (or sects) that called for *taqlīd* or condemned the principle of *qiyās* - a principle that constituted the backbone of *ijtihād*."[138]

The social function of *ijtihād* took different forms.[139] In the early period, the Prophet practiced *ijtihād* as a legislative tool on the sociopolitical and individual levels in addition to

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[135] Uṣūl can be defined as "legal theory that laid down the principles of linguistic– legal interpretation, theory of abrogation (*naskh*), consensus and juristic reasoning, among others. See: Hallaq, *The Origins and Evolution of Islamic Law*, p. 210.

[136] Hallaq, 'Was the Gate of Ijtihad Closed?', p. 5.

[137] Abū Zahra, pp. 11–12.

[138] Hallaq, 'Was the Gate of Ijtihad Closed?', pp. 5–7.

[139] The question arises of whether *ijtihād* was the only method for legislation. In brief, there is not a clear-cut answer and the reason is that the other method for legislation is entangled with the practice of *ijtihād*. The other component for legislation in Sharia is *al-Siyasa al-Shar'iyya* (Sharia-based policy). *Al-Siyasa al-Shar'iyya* can be defined as "a broad doctrine of Islamic law which authorizes the ruler to determine the manner in which Shari'ah should be administered… provided that no substantive principle of the Shari'ah is violated thereby. The ambivalence in answering the question lies in the fact that *Siyasa* is suggested to facilitate the task of the ruler to respond to matters absent from Sharia's main sources: Qur'an and Hadith. In that sense, *Siyasa* fulfills the public interest within the boundaries of Sharia, which falls under the

delegating the right of adjudication to the companions who were deployed as judges (*qāḍīs*). The deployed companions performed multiple administrative roles including acting as governors, such as Mu'adh b. Jabal and Abu Musa al-Ash'ari.[140] The role of the judge (*qāḍī*) continued to exist during the caliphate of the Four Rightly Guided Caliphs: Abu Bakr, Umar, Uthman, and Ali, and developed further in following Muslim dynasties. For instance, during the Umayyad dynasty the office of *qāḍī* became more structured and separate from the role of governor.[141] However, the assignment of *qāḍīs* did not stop scholars from engaging in practicing *ijtihād* in legal cases but the opinion, in this case, falls under the category of non-binding legal opinion (*fatwā*).[142] The *fatwā* entails that the individual requiring the opinion could comply with the *fatwā* or seek the opinion of another scholar. It is noticed that there is a distinction between the roles of *qāḍīs* and jurists,[143] however, both *qāḍīs* and jurists are required to meet a number of prerequisites to practice *ijtihād*.

Scholars have set different conditions for individuals to be capable of conducting *ijtihād*. Nonetheless, there are a few basic, and essential, conditions agreed upon by many scholars of the early as well as contemporary periods. A fundamental prerequisite is knowledge of the Qur'an and Hadith. Scholars, however, debated the extent to which one should be knowledgeable in Qur'an

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domain of *maṣlaḥa*. Thus, the ruler should display a level of *ijtihād*, which is suggested by many scholars notably Rashid Rida in his seminal book *al-Khilāfa* (The Caliphate).

[140] Hallaq, *The Origins and Evolution of Islamic Law*, p. 34.

[141] Mathias Rohe, *Islamic Law in Past and Present* (Leiden, The Netherlands : Koninklijke Brill, 2015), pp. 43–44.

[142] Rohe, p. 34.

[143] Scholars have noted a distinction between *ijtihād*, as a general practice, *iftā'* and *qaḍā'*. For instance, Abu Zahra notes that *ijtihād* is inferring regulations and the process can be a response to a legal case or a hypothetical scenario. Whereas *iftā'* is more specific and case-based and is issued in response to a legal question and requires that the *mufti* meets the general requirements for *ijtihād*, which will be discussed later, in addition to having familiarity with society and nature of cases. See Abū Zahra, pp. 401–2. Another distinction is made between *qāḍī* and *muftī*. On the one hand, a *muftī* exerts an effort to infer a legally non-binding opinion while the *qāḍī* offers a legally binding adjudication which prompts the *qāḍī* to take more time in adjudication and more effort in inferring an opinion due to the social implications resulting from the adjudication. Hence, the *qāḍī*'s decision enjoys a higher status in the realm of legal traditions. See: http://uṣūl.dar-alifta.org/ar/ViewFatawaConcept.aspx?ID=%2080.

and Hadith. For instance, al-Ghazālī (b. 1058 - d. 1111) does not require the complete memorization of the Qur'an and sets few conditions: "First, it is not required to memorize the entire Qur'an, but to memorize the verses related to Sharia Ordinances (*aḥkām*), around five hundred verses. Second, it is not mandatory to memorize such verses but to be familiar with their location in the Qur'an in order to be able to revisit them when needed."[144] However, earlier scholars adopted a more conservative position which requires the *mujtahid* to be well-informed (in memorization) of the legal verses and obtain an overall knowledge of the whole Qur'an. This position contends that the Qur'an is an integrated unit and its ordinances are connected, predominantly.[145]

With regard to Hadith, the *mujtahid* is required to be familiar with "all legal Hadith and must acquire proficiency in Hadith criticism, so as to be able to scrutinize credible and sound Hadith from those that are not."[146] The *mujtahid*, however, does not have to memorize the Hadiths but can rely on canonical books, e.g. Sunan Abi Dawud or other acknowledged books specialized in legal Hadiths.[147] It is noticed that there is a high level of complexity in the way some of the scholars, particularly in the early period, have set the conditions for practicing *ijtihād* to ensure that it does not become a common practice or become accessible by laymen.

Conditions for practicing *ijtihād* also include a well-established command of the Arabic language and its sciences to discern figures of speech and complexity of sentence structures. But the *mujtahid* is not required to show mastery of the language at the level of specialized

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144 Abū Ḥāmid al-Ghazzālī, *Al-Mustaṣfá min 'ilm al-uṣūl*, ed. by Aḥmad Zaki Ḥammad (Riyad: Dar Al-Maiman), I, p. 6.
145 Abū Zahra, p. 381.
146 Hallaq, *The Origins and Evolution of Islamic Law*, p. 146.
147 al-Ghazzālī, I, p. 7,8.

grammarians but to exhibit "sufficient knowledge to examine the Qur'an and Sunnah and fully comprehend the context."[148] Further conditions include familiarity with the consensus (*ijmāʿ*) cases, but such cases are highly controversial. *Ijmāʿ* occupies the third rank of legitimacy and authority after the Qur'an and Sunnah. *Ijmāʿ* can be defined as "consensus of the scholars of a particular region as embodying their Sunnaic practice, by definition exemplary; in later theory, consensus of the mujtahids (q.v.) – as representatives of the community of Muslims – on a legal matter."[149] The great majority of Muslim scholars do not differ on its authority but the disagreement lies on which group of *mujtahids* whose consensus is legal and binding to the Muslim society.

Some scholars argue that consensus (*ijmāʿ*) occurred exclusively at the time of the *Saḥaba* (first generation of Muslims) and that *fiqh* books on *khilāf*[150] attest to such.[151] Whereas, other scholars state that the concept of *ijmāʿ* developed through three main phases: a. the time of the *Saḥaba* in which they gathered and reached a consensus; b. at the time of school founders, when school founders honored the traditions followed in their regions (e.g. Abu Ḥanīfa in Kufa and Malik in Medina); c. later generations of scholars who investigated thoroughly for *ijmāʿ* cases that occurred at the time of *Saḥaba* to avoid issuing opinions that contradict them.[152] Hence, *ijmāʿ* is extant and treated as a viable legal source. But the conundrum remains of how *ijmāʿ* could be reached. In his book entitled *Jimāʿ al-ʿIlm*, al-Shāfiʿī argued that it is difficult to find *mujtahids* who are agreed upon and accepted by the entirety of the Muslim society without any objections. Moreover, the dispersion of *mujtahids* after the first generation adds to the difficulty of reaching

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[148] al-Ghazzālī, I, p. 12.
[149] Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge, UK: Cambridge, UK, 2005), p. 208.
[150] *Khilaf*: Fiqh books highlighting juristic disagreement.
[151] Abū Zahra, p. 212.
[152] Abū Zahra, pp. 197–200.

an *ijmāʿ* and disparity between the newly-established Muslim communities with their different customs adds to the complexity of a general *ijmāʿ*. In addition to queries of who is identifiable as '*mujtahids'* and whether other scholars in fields such as *Kalām* (scholastic theology) could be considered *mujtahids*.[153] In essence, Shāfiʿī investigated the complexity surrounding the concept of *ijmāʿ* but approves its viability in matters related to obligatory liturgical actions that are proven by decisive ordinances (from the Qur'an and Sunnah).[154] It is noteworthy that *ijmāʿ*, at the time of the *Saḥaba*, was based mainly on the Scripture, except in rare cases. e.g. a man cannot marry a woman and her aunt (maternal or paternal) due to kinship ties.[155] In such cases, the *ijmāʿ* was directly or indirectly dependent on Scripture.

Analogy (*qiyās*) can be defined as "the deduction of legal prescriptions from the Quran or Sunnah by analogic reasoning. *Qiyas* provided classical Muslim jurists with a method of deducing laws on matters not explicitly covered by the Quran or Sunnah without relying on unsystematic opinion (*ra'y* or *hawā*)."[156] A key element to borrow the ordinance is presence of *ratio legis* (*al-ʿilla*[157]) between two cases. The *ratio legis*, however, requires basis from the Scripture for the analogy to be viable.[158] The role of *ratio legis* and analogy will be discussed in more detail in the third chapter as ʿAṭīya advocates for a different basis of *qiyās*, but within the general framework of traditional scholars.

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[153] Muḥammad ibn Idrīs Shāfiʿī, *Jimāʿ Al-ʿilm* (Talbiya - El Haram: maktabah ibn taymiyyah'), pp. 46–59.
[154] Abū Zahra, p. 201.
[155] Abū Zahra, p. 201.
[156] John L. Esposito, 'Qiyas', 2004.
[157] AL-*ʿilla* is defined by Hallaq as *ratio legis*: "cause" or "factor" occasioning – in analogical *qiyās* (q.v.) – a rule in the original case; the presence of the same ratio in the new case requires the transfer of the rule from the original case to the new. See: Hallaq, *The Origins and Evolution of Islamic Law*, p. 209.
[158] Abū Zahra, pp. 218–24.

Summarily put, the concept of *ijtihād* features profound significance since it is the human interaction with Divine Scripture to guide society. Thus, scholars wanted to ensure that the walls of *ijtihād* are elevated to prevent involvement of unqualified individuals. This tendency added a level of complexity to *ijtihād* which increased over time to render *ijtihād* into an arduous process. *Ijtihād* was performed as an individual practice regulated by a collective tradition. In the later periods, late pre-modern and modern periods, Muslim scholars have shouldered the daunting task of reinvigorate traditional concepts of *ijtihād* to be more compatible with the modern nation-state.

2. Modern Trends towards the Practice of *Ijtihād*

In this section we investigate the question of *ijtihād* in the early and late modern periods. We will seek to respond to questions such as: what are the different trends of *ijtihād* in the modern period? What methodologies were followed to enforce Sharia through *ijtihād*? Do we simply comply with the modernist *vis-à-vis* traditionalist postulates envisaged by many scholars? This section will aid us in better understanding these questions, identifying the ways in which ‘Aṭīya’s model is comparable to such models, and pinpointing where ‘Aṭīya fits into the spectrum of scholars who aspired to implement Sharia. In addition, this section provides an overview of the different *ijtihād* trends which prepares us for the next section where we will discuss the ways in which modern scholars have tried to integrate *ijtihād* into the legal and political structures of the nation-state. I argue that scholars in the modern period scholars were threatened by loss of their authority to the state. Therefore, different trends towards interpreting the role of *ijtihād* have been proposed to balance the power dynamics and restore the lost grandeur of scholars and integrate the traditional methodology into the nation-state. Thus, *ijtihād* has taken, at least, four forms: abiding by the classification of doctrinal schools; abandoning the school classification and deriving regulations directly from Divine Scripture with an emphasis on the literalist interpretation of the

Scripture; devising a new theoretical model that is based on modern sciences; and redefining the legal tools employed by the doctrinal schools but without subscribing to any school.[159] Each of these trends provide valuable insights to bridging the gap between Sharia, as an ethical and a legal system, and the nation-state, as a product of modernity.

During the eighteenth and nineteenth centuries many Muslim countries (or countries where Muslims constituted a substantial percentage) were plagued by colonial systems that threatened the Islamic culture and identity. In response to colonialism and the modernization project, Muslim scholars and intellectuals responded in varying degrees. One is tempted to divide the scholarly response into modernist/progressive *vis-à-vis* traditionalist. Such division, however, detracts from the significance and ingenuity of responses offered by Muslim scholars. One could argue, nonetheless, that the majority of these projects held one major objective: Sharia application. The downside to such multiplicity is that there is no consensus on what or how the Sharia should be applied. Whenever "an Islamic government or authority claims to be applying divine law (such as Iran, Pakistan, or Saudi Arabia), some group or party challenges this claim and asserts a rival model of what constitutes the Sharī'ā."[160]Another principal factor is 'who' will shoulder the responsibility of Sharia application. For instance, the scholars formulate the legal structure in their respective schools and judges, affiliated with such schools, adjudicate accordingly. But the ruling

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[159] Reform from within and from outside the Islamic legal tradition has been adapted from Kazemi-Moussavi's article titled *Modern Intellectual Approaches to Islamic Law* where he examines the Islamic reform of four scholars who represent the two categories. However, I have found that other scholars, e.g. 'Aṭīya, advocate for the same division. 'Aṭīya contends that reform can stem from within or outside the Islamic traditions and advocates for the significance of reform from within, in his book titled *Tajdīd al-Fiqh al-Islami.*

[160] Sami Zubaida, *Contemporary Trends in Muslim Legal Thought and Ideology*, ed. by Robert W Hefner (Cambridge: Cambridge: Cambridge University Press, 2010), p. 270 <https://doi.org/10.1017/CHOL9780521844437.012>.

regimes (caliphate or dynasties) were responsible for social affairs which falls under the umbrella of Sharia-based governance (*al-siyasa al-shar'iyya*).

Muslim scholars have followed, at least, four trends in applying Sharia through *ijtihād*. The first trend portrays the compliance to the traditional classification of doctrinal schools. This trend is more prevalent in the Indian subcontinent and crystalized through the works of many earlier scholars who were proponents of this position, notably Shah Wali Allah (b. 1703 - d. 1762). The adherence to the legal doctrine of the school can be discerned during Rida's visit in 1912 to the Deobandi school, who were proponents of the Ḥanafī school and most of the scholars were firm adherents to the practice of imitation (*taqlīd*). Muhammad Anwar Shah Kashmiri noted that the Deobandi scholars adhered to the ideas of Wali Allah who sought to "re-introduce the Muslims of India to the foundational texts of Islam. To this end, he [Wali Allah] had translated the Qur'ân into Persian and written a commentary on the Muwatta' of Mãlik b. Anas (d. 179/795), one of the earliest extant works of law."[161] Shah Wali Allah's legal methodology exhibits adherence to the basic principles of *ijtihād* within the division of Ḥanafī doctrinal school, while not rejecting views from other doctrinal schools.

The second trend in conceptualizing *ijtihād* can be identified in the abandonment of school classification and deriving regulations directly from Qur'an and Hadith. Some would contend that this approach towards *ijtihād* can be attributed to Salafism. I would argue that a labeling such as 'Salafism' is an exaggeration. The term 'Salaf' is a loaded term that does not necessarily typify a specific approach towards interpreting religion, despite acquiring certain features in a modern context. For instance, Salafism can imply two conceptualizations: a purist and a modernist model

[161] Muhammad Qasim Zaman, 'Evolving Conceptions of Ijtihad in Modern South Asia.(Report)', *Islamic Studies*, 49.1 (2010), p. 9.

that both emerged and evolved with distinct viewpoints on *ijtihād*.[162] Key Islamic thinkers representative of this approach are Muhammad Abduh and Rashid Rida who ascribe themselves to the 'Salaf' but their approach towards employing *ijtihād* is different from other scholars belonging to the conservative model. The conservative trend is characterized by an aversion from 'opinion' (*al-ra'y*) and leans towards inferring ordinances directly from Scripture. A key figure of the *ijtihād* relying on direct inferences from the Scripture is al-Shawkani[163] (b. 1759- d. 1834). Al-Shawkani believes in "the absolute necessity of applying *ijtihād* as a means of combating the sectarian and antagonistic tendencies amongst different schools of law."[164]Al-Shawkani contends that soliciting evidence from the Scripture is what separates "*ittibāʿ* [verifiable-following] qua *ijtihād* from *taqlīd* [precedent following]: the former is always based on textual evidence, albeit, in the form of a legal pronouncement (*fatwā*) of a *mufti*, while the latter refers to an opinion or even a fatwa that is not corroborated in the same way."[165] To al-Shawkani "reason, or more accurately, rational discourse not related to the establishment of the primacy of textual evidence in any given matter, is an inappropriate mechanism in the Law."[166] Al-Shawkani preferred a direct interaction with the Divine Scripture to practice *ijtihād*, "or at least an access to, or knowledge of, those sources."[167] He advocated for "a return to the principal sources—the Qur'an and the

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[162] Henri Lauzière and Henri Lauzière, *The Making of Salafism : Islamic Reform in the Twentieth Century* (New York : Columbia University Press, 2016), p. 235.

[163] Yemeni scholar, jurisprudent, and reformer. He rejected the Shi'i Zaydi school of law into which he was born. Influenced by Salafi thought, he called for a return to the textual sources of the *Quran* and hadith. He viewed himself as a *mujtahid muṭlaq*, i.e. an authority to whom others had to defer in religious law and developed a series of syllabi for attaining various ranks of scholarship. He used a strict system of legal analysis based on Sunni thought. Despite his Shi'i background, he is regarded as a great revivalist of Sunni Islam in his time by various Salafi and Wahhabi movements. See: Esposito, 'Shawkani.'

[164] Bernard Weiss, *Studies in Islamic Legal Theory*, 2001, p. 340.

[165] Muneer Goolam Fareed, *Legal Reform in the Muslim World : The Anatomy of a Scholarly Dispute in the 19th and the Early 20th Centuries on the Usage of Ijtihād as a Legal Tool* (San Francisco: San Francisco : Austin & Winfield, 1996), pp. 111–15.

[166] Fareed, pp. 115–17.

[167] Iik Mansurnoor, 'Shawkani and the Closed Door of "Ijtihad"', *Hamdard Islamicus: Quarterly Journal of the Hamdard National Foundation, Pakistan*, 11.2 (1988), 57–65 (p. 62).

Sunnah— which must be literally understood; any interpretation that draws one away from the texts is forbidden."[168] The basic premise, of al-Shawkani, that a "*mujtahid* can find in these evidence or proof to substantiate his legal decisions without recourse to any other source, be it consensus (*ijmāʿ*), most forms of analogical reasoning (*qiyās*), or independent reasoning (*ra'y*)."[169]

The third trend can be identified through the works of intellectuals who proposed to interpret *ijtihād* through modern sciences. The contemporary Egyptian intellectual Nasr Hamid Abu Zayd can be considered a proponent of this trend. Abu Zayd attempted to apply hermeneutics as a method of analyzing the legal texts. Abu Zayd ventured to evaluate Islamic methods of semantics and their further implications for text interpretation through a variety of hermeneutics frameworks based on the works of Friedrich Schleiermacher (d. 1834) and Wilhelm Dilthey (d. 1911). Abu Zayd applies semantics to the Qur'an through understanding the text in its cultural context which will eventually aid the reader in eliciting legal injunctions. Abu Zayd proceeds to contend that the Scripture has two levels: statement (*manṭūq*), which is fixed and conception (*mafhūm*) which is changeable and open to variable approaches. Therefore, Abu Zayd urges for a new form of *ijtihād* based on the social and cultural context which constitutes a change from the normative viewpoint of *ijtihād*.[170]

The fourth trend is redefining the function of legal reasoning tools, e.g. analogy (*qiyās*) or public interest (*maṣlaḥa*),[171] to fit into the modern society. This trend includes a considerable

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168 Weiss, *Studies in Islamic Legal Theory*, p. 341.
169 Weiss, *Studies in Islamic Legal Theory*, p. 342.
170 Ahmad Kazemi-Moussavi, 'Modern Intellectual Approaches to Islamic Law', *Islam and Civilisational Renewal*, 1.3 (2010), 474 (pp. 488–91).
171 The term maṣlaḥa (public interest) was employed by Imam Malik as *al-maṣālih al-mursala* (unrestricted interest) to a public good that has not been directly stated in the Scripture; however, it can be traced to a certain basis (aṣl). See: khadduri, 'The 'Maṣlaḥa' (Public Interest) And' 'Illa' (Cause) in Islamic Law,' 214. *Maṣlaḥa* went through a transformative breakthrough in the 5th century at the hands of al-Ghazali who defined *maṣlaḥa* in a "tangible manner" as he argued that "*maṣlaḥa* was God's objective (*maqṣad*, pl. *maqāṣid*) in revealing the divine law, and, more concretely, that this intention was to preserve for humankind the five essentials of their well-being, namely their religion, life, intellect, and property.

number of scholars, notably Muhammad Abduh and Rashid Rida who advocated for a new form of *ijtihād* based on the concept of *maṣlaḥa*.[172] Abduh and Rida restructured the concept to cope with the social challenges imposed by modernity. For instance, Rida attempted to "adapt the Sharī'ā to the exigencies of the age, and that is where *maṣlaḥa* played an important part. This concept of maṣlaḥa was developed in the new context of public advocacy through the new print media, in particular his own influential magazine, al-Manār."[173] Rida departed from the historical employment of *maṣlaḥa* as a subordinate principle to presenting it as a leading principle in making decisions and issuing *fatāwā* (non-binding legal opinions). Rida's view on *maṣlaḥa* will be discussed in depth in the following section as it addresses how scholars have employed *ijtihād* in a legal sense.

In sum, the four trends towards *ijtihād* indicate the different ways in which Muslim scholars have tried to accommodate Sharia into modern society. Scholars have tried to purify, integrate and renovate Sharia but a key component is lacking; that is participation of the state and highlighting the role the state will play in the enforcement of Sharia. The following section addresses the ways in which *ijtihād* can be integrated into the legal structure of the nation-state.

3. *Ijtihād* and the Modern Legal Structure

Islam is a religion that is viable for every era and time,' is a statement promulgated among many scholars and jurists. The basis for such statement of continuity is the flexibility of regulations in Islam. Permanence lies in objectives and objectives of the Sharia to preserve the religious principles and morality. Permanence can take different forms such as the five main pillars of Islam,

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The term evolved in the later writings of other Muslim scholars notably al-Razī, al-Shāṭibī, al-Ṭufī and al-Qarafi. See: Opwis, *Maṣlaḥa in Contemporary Islamic Legal Theory*.

[172] Rachel Anne Codd, 'A Critical Analysis of the Role of Ijtihad in Legal Reforms in the Muslim World', *Arab Law Quarterly*, 14.2 (1999), 112–31 (pp. 121–22) <https://doi.org/10.1163/026805599125826354>.

[173] Zubaida, p. 282.

according to Sunni scholars, and prohibitions that have been stated in clear commands in the Qur'an and Hadith. Whereas, change is evident in means and methodologies and is related to particular injunctions of cases (j*uz'iyāt al-aḥkām*), particularly in Sharia-based policy (*al-Siyasa al-Sharʿiyya*).[174] In their search to prove the continuity statement, Muslim scholars have followed different *modi operandi*. A key approach is to employ *ijtihād* and its legal tools from *uṣūl al-fiqh* to revitalize religious discourse and implement Sharia.[175] In this section I pay closer attention to three principles in the process of *ijtihād:* consensus (*ijmāʿ*), analogy (*qiyās*) and public interest (*maṣlaḥa*), and the ways in which these principles have been proposed to integrate *ijtihād* into the legislative arena. I examine three prominent scholars and intellectuals: Rashid Rida and his understanding of *maṣlaḥa*, Mohammad Iqbal and his interpretation of *ijmāʿ*, and Hassan al-Turabi and his expansion on the concept of *qiyās*.

Rida, Iqbal and Turabi have proposed different methods to synthesize *ijtihād* and modern society and bridge the gap between modernity and tradition. For instance, we find Rida expand on the scope of *maṣlaḥa* to establish an Islamic caliphate (as a political and a legal system) derived from the Divine Scripture while preserving the traditions of the early generation through consideration of what best suits the contemporary society. Similar to Rida's approach in focusing on the structure of the state is al-Turabi who preaches for renewal (*tajdīd*) and reinterpretation of Islam while persevering Islam's main principles. Al-Turabi holds that the state has a central role in this model as the state incurs "responsibility for that interpretation through the introduction and

[174] Jamāl al-Dīn ʻAṭīyah, *Al-Naẓariyah Al-ʿammah Lil-Shariʿah Al-Islamiyah*, pp. 46–47.
[175] It is important to note that this aspect does not include codification of Fiqh as codification was the primary focus of Chapter One in which we indicated some of the prominent attempts to codify Sharia, the challenges they encountered and where they exhibited limitations.

enforcement of the *Shari'ah*."[176] In his endeavor, al-Turabi argues in favor of an expansion on the concept of *qiyās* to allow the needed reinterpretation. Another significant figure in the context of legal reform is Muhammad Iqbal who interpreted *ijtihād* as the concept of movement and deemed it key to the modern legal system. *Ijtihād*, to Iqbal, is a process that contains four essential sources, but he places greater emphasis on *ijmāʿ* and provides a new interpretation of the term to adapt to the modern state. Iqbal contends that *ijmāʿ* should be in the form of a parliament. The following pages will provide a detailed discussion on the project of each scholar.

A controversial, yet highly flexible, concept that has surfaced in the discussion on Islamic reform during the 19th century is *maṣlaḥa* (public interest). A key figure to reinvigorate this concept is Rashid Rida (b. 1865 - d. 1935) whose legacy and ideology has been profound in establishing many of the Islamic reform movements of the 21st century. The significance of *maṣlaḥa* lies in the fact that it can be considered as a channel for objectives of Sharia (*maqāṣid*),[177] in addition to serving as a "vehicle for legal change."[178] *Maṣlaḥa* does not rely on *ratio legis* (al-*ʿilla*), like analogy (*qiyās*), which allows the jurist to expand on the ordinances of the Divine Scripture (finite texts) to the ever-changing life events (infinite), thus facilitating the derivation of rulings which could provide *maṣlaḥa* with a context in which it can be the basis of a legal system, argues Rida.[179] Furthermore, Rida implies that *qiyās* adds a level of complexity that is not

[176] John L. Esposito, Emad El-Din Shahin, and Peter Woodward, 'Hasan Al-Turabi', 2013, p. 206 <https://doi.org/10.1093/oxfordhb/9780195395891.013.0029>.
[177] Maqāṣid al-Sharīʿa means the objectives or intentions of the divine law. A detailed account on the development of Maqāṣid will be examined in Chapter 3.
[178] Opwis, 'Maṣlaḥa in Contemporary Islamic Legal Theory', p. 183.
[179] Opwis, 'Maṣlaḥa in Contemporary Islamic Legal Theory', pp. 199–200.

necessary in inferring ordinances and scholars could have arrived "at the same conclusions that could be reached by the equally valid (but much simpler) process of *istiṣlāḥ*."[180]

Moreover, Rida's view on consensus is unorthodox. Some scholars, such as Kerr, would argue that the concept of consensus (*ijmāʿ*) "has not been formally expressed and suggests even that for lack of such expression it is doubtful to what extent it can be said truly to have existed in relation to particular points."[181] Other scholars would contend that Rida did not necessarily suspended *ijmāʿ* to elevate the application of *maṣlaḥa*. But "Rida's line of thought against *ijmāʿ* and *qiyās* is based on his view that there are no clear Qur'ānic or *ḥādīth* references to the commitment to the scholarly consensus or analogy as the only two legal sources after the Qur'ānic or *ḥādīth.*"[182]. However, we do not find Rida articulating a clear, or a unified, statement about *ijmāʿ*. For instance, in his book titled *al-Khilāfa* we find Rida includes sound *ijmāʿ* in his discussion about Shura: "I [Rida] say that the Imam [ruler] should seek *mushāwara* [consultation] in every matter where there is no evidence in Qur'an or Hadith, a sound *ijmāʿ* to rely on, or in case of *ijtihād* based on decisive evidence, particularly in matters related to *siyasa* and war that are concerned with public interest."[183] Later on, Rida addresses the question of authority and argues that *ijmāʿ* can take two forms: *ijmāʿ* of the *Umma* and *ijmāʿ* of those who loosen and bind (*ahl al-ḥall wa-l-ʿaqd*).[184] Rida contends that if a referendum can be held to identify the opinion of the *Umma* on a

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[180] Malcolm H Kerr, *Islamic Reform* (Berkeley: Berkeley, University of California Press, 1966), p. 194. The term *istiṣlāḥ* is another term for maṣlaḥa, the term refers to A legal doctrine seeking to ensure the application of law in a manner consistent with values of equity and public interest. See: Christie S. Warren, *Istiṣlāḥ*.

[181] Kerr, p. 198.

[182] Yasir S. Ibrahim, 'Rashīd Riḍā and Maqāṣid Al-Sharī'a', *Studia Islamica*, 102/103, 2006, 157–98 (p. 198).

[183] Muḥammad Rashīd Riḍā, *Al-Khilāfa* (Hindawi Publishing Co.), p. 33.

[184] Ahl al-ḥall wa-l-ʿaqd, the "people who loosen and bind," is a term commonly used by classical scholars to signify those members of the religious and the political elite whom they expect to play some role in the selection and deposition of the ruler, though some classical and modern commentators assign a broader range of functions to those encompassed by this term. See: Muhammad Qasim Zaman, 'Ahl Al-Ḥall Wa-l-

certain issue, then the public opinion is mandatory and is enforced, and the ruler is not entitled to overrule or reverse such opinion.[185] Similarly, the agreed-upon opinion of those who loosen and bind, as representatives of the public, constitutes an *ijmāʿ*, acknowledged by jurists, provided that those who loosen and bind can conduct *ijtihād*. If those who loosen and bind disagree among themselves, then the opinion that is based on stronger evidence from the Qur'an and Hadith will prevail.

To Rida, caliphate is the source for legislation (or *al-Ishtirāʿ*) and comprises three main pillars: those who loosen and bind (*ahl al-ḥall wa-l-ʿaqd*), Shura council and the caliph. These entities should exhibit the qualifications of *mujtahids* for they will be responsible for legislation, which is a necessity to human societies. Therefore, creation and change of morality in social and legal matters is the role of the caliphate and its affiliated entities. Hourani reflects on Rida's comments regarding the legislative powers of the caliphate by stating:

> The rulers of the community have not only the executive and judicial powers, they can legislate in the public interest. Thus there can be a body of 'positive law' (qanun) subordinate to the Shari'a in the sense that if there is conflict it is the latter which is valid, but otherwise independent and with a binding force which derives ultimately from the general principles of Islam; for it is not only the right but the duty of a Muslim nation to give itself 'a system of just laws appropriate to the situation in which its past history has placed it.[186]

'aqd', in *Encyclopaedia of Islam, THREE*, Encyclopaedia of Islam (Brill), p. 000 <http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-3/ahl-al-hall-wa-l-aqd-COM_0027>.

[185] Riḍā, p. 89.

[186] Albert Hourani, *Arabic Thought in the Liberal Age, 1798-1939* (Cambridge [Cambridgeshire]: Cambridge Cambridgeshire, 1983), p. 234.

It can be argued that Rida rejected the traditional position on *ijtihād*, but within certain limits and a certain extent.[187] For instance, Rida advocated for a return to the Divine Scripture and less inclination towards the division of doctrinal schools. Nonetheless, Rida has not suggested the "complete abandonment of the four traditional schools, but rather a gradual approximation and amalgamation of them. Like 'Abduh he appeals to the principle of piecing together *(talfīq)*, but he wants it to be applied more systematically than before."[188] Rida's position on *ijtihād* is reflected in his legal opinions *(fatāwā)*. For instance, in Islamic law, necessity (*ḍarūra*), contends Rida, has certain rulings related to it notably permitting the prohibited (*ḥaram*) and eliminating adversity and hardship in religion, thus legislation carry a high level of flexibility and responsibility to determine the permitted (*ḥalal*) and prohibited (*ḥaram*). Rida gives an example for such flexibility in the way usury (*ribā*) can be permissible if necessity calls for it, and in this situation necessity is the advancement of the Muslim community from the shackles of foreign intervention.[189] Thus, public interest (*maṣlaḥa*) in this context represents a legal tool in the hands of the caliphate (the Islamic state) to enact laws for the public good. However, the extent to which *maṣlaḥa* should be applied is ambivalent. Kerr argues that if *maṣlaḥa* becomes the dominant legal tool, then analogy (*qiyās*) can be dispensed with, and *maṣlaḥa* can be "a legal source in its own right." But Kerr continues to argue that this hypothesis is only an implication and has not been forthrightly stated by Rida.[190] While the statement has not been clearly articulated by Rida, it indicates the ways in which Rida attempted to integrate *maṣlaḥa* and *qiyās* and formulate a legal structure that is imbedded in a form of Islamic government; caliphate, composed of three constituents; *ahl al-ḥall wa-l-ʿaqd,* Shura council and the great Imam. Yet, we cannot identify the power relations between

[187] Hourani, p. 237.
[188] Hourani, p. 236.
[189] Riḍā, pp. 89–93.
[190] Kerr, pp. 196–97.

these entities and if positive law could operate as Islamic since the *maṣlaḥa* (or *ḍarūra*) deems it. *Maṣlaḥa* in its flexibility as a legal tool and in the hands of an Islamic state, caliphate, can be a productive legal tool to traverse the limitations and complexities of other legal tools or finite Scripture, and to depart from the division of doctrinal schools and adherence to *taqlīd* (precedent following).

The field of Islamic studies is replete with scholars proposing different models for change, but few scholars venture to synthesize between modern legal system and Islamic legal tools. Another prominent figure who championed the arena is the Sudanese scholar Hassan al-Turabi (b. 1932 - d. 2016). Turabi ventures to broaden the scope of analogy (*qiyās*) and consensus (*ijmāʿ*) with the final objective of establishing an Islamic system that is not isolated from society.[191] To this end, Turabi advocated for going back to "the roots, and create a revolution at the level of principles."[192] Turabi contends that it is crucial to depart from the medieval *fiqh* tradition, which was unique to that context and should be understood accordingly, and envisage a "new *fiqh* that will transcend the limitations of the old."[193] Thus, Turabi argues for a "radical expansion" of the concept of *qiyās* to remove the limitations imposed by scholars to narrow the scope of *qiyās* and expand it to be a natural *qiyās* (*qiyās fiṭrī*) free from the complicated conditions influenced by Greek philosophy. *Qiyās*, according to Turabi, can be divided into two categories: first, inferring certain objectives of Sharia (*maqāṣid*) through examination of Divine Scripture and then apply the *maqāṣid* to nascent issues; second, analyzing a set of religious ordinances prescribed to a specific

[191] John Esposito and John Voll, *Makers of Contemporary Islam* (Oxford University Press, 2001), p. 137.
[192] Esposito and Voll, p. 127.
[193] Esposito and Voll, p. 130.

context and inferring and prioritizing public interest rules (*maṣlaḥa*) which can be called *qiyās al-maṣlaḥa* (lit. analogy of public interest).[194]

Consensus (*ijmāʿ*) is also a key concept in Turabi's model for applying Sharia. *Ijmāʿ* has always been a key element in *ijtihād*, however, it has also been a controversial topic particularly with respect to what constitutes an *ijmāʿ* and whether it is feasible in contemporary contexts. Turabi complicates the concept of *ijmāʿ* by arguing that it is no longer a practice confined to scholars but extends to include Muslims experts from all scientific and social fields.[195] Turabi recognizes three primary elements to *ijmāʿ*: an organized group, Shura (consultation) among Muslims in public matters and presence of a Sultan. Turabi contends that *ijmāʿ* takes two forms: the first is the public referendum model in which a decision is made based on a poll and in accordance with the Shura principle, and the second form is the consensus of those who loosen and bind (*ahl al-ḥall wa-l-ʿaqd*). In this context, *ijmāʿ*, according to Turabi, is not final and can be overruled by another *ijmāʿ*. In other words, there is resemblance between *ijmāʿ* and the public referendum of the democratic nation-state.[196] While Turabi's model moved beyond theory to become a corner stone in reinstating the Sharia during the government of Numayri,[197] it was not without limitations. The proposed concept of *ijmāʿ*, as understood by Turabi, is not rooted in the Islamic legal traditions but serves a political agenda.[198] Despite these limitations, Turabi's model

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194 Jamīlah Bū Khātim, *Al-Tajdīd Fī Uṣūl Al-Fiqh*, al-Ṭabʻah al-ʻArabīyah 1. (al-Duqqī, al-Jīzah: al-Duqqī, al-Jīzah : Dār al-Fārūq lil-Istithmārāt al-Thaqāfīyah, 2010), pp. 351–52.
195 Esposito and Voll, p. 128.
196 Bū Khātim, p. 356.
197 Aharon Layish, 'The Transformation of the Sharīʿa from Jurists' Law to Statutory Law in the Contemporary Muslim World', *Die Welt Des Islams*, 44.1 (2004), 85–113 (p. 104) <https://doi.org/10.1163/157006004773712587>.
198 Bū Khātim, pp. 360–61.

for *qiyās* and *ijmāʿ* is a step towards reinvigorating legal tools of *ijtihād* in a way that can be applied in the modern legal structure.

Practice of *ijtihād* with an emphasis on *ijmāʿ* can be identified in a number of other models. Among scholars who concentrated on *ijmāʿ* Muhammad Iqbal (b. 1877 - d. 1938) is a prominent figure. Iqbal is a proponent of the idea of permanence and change in which he contends that there are, in Islam, ordinances that are fixed and others that are subject to change to cope with the contemporary lifestyle and to meet with the growing needs of societies. One way to implement this balance is through the principle of *ijtihād* that occupied an entire chapter in Iqbal's seminal book titled *The construction of Religious Thought in Islam*.[199] There are three levels to the practice of *ijtihād*, according to Iqbal: complete authority to legislation, which amounts to the authority of school eponyms that is "admitted by the Sunnis, but in practice it has been denied ever since the establishment of the schools, in as much as the ideal of complete *ijtihād* is hedged round by conditions which are well-nigh impossible of realization in a single individual. Such an attitude seems exceedingly strange in a system of law based mainly on the ground work provided by the Quran which embodies an essentially dynamic outlook on life,"[200] relative authority, and special authority which is concerned with particular cases unadjudicated by the founding fathers of doctrinal schools. The significance of this division, as we will observe later in chapter three, lies in the fact that it shows resemblance to the division adopted by ʿAṭīya particularly with regard to the availability of certain genres of *ijtihād*.

[199] Syed Abdul Rahman, 'IQBAL'S CONCEPT OF SOVEREIGNTY AND LEGISLATION IN ISLAM', *Islamic Studies*, 25.1 (1986), 45–58 (pp. 50–51).
[200] Ziauddin Ahmad, 'IQBAL'S CONCEPT OF ISLAMIC POLITY', *Pakistan Horizon*, 34.2 (1981), 44–58 (p. 52).

Iqbal observes that *ijtihād*, which he understands as the principle of historical movement,[201] is key to introducing any changes to the legal system, the state and the community. Iqbal states four sources of *ijtihād*; Qur'an, Hadith, analogy (*qiyās)* and consensus (*ijmāʿ)*, but presents his most influential ideas within the scope of *ijmāʿ*. With regard to Qur'an, Iqbal deems the Qur'an to be the ultimate guide entailing "lofty moral principles and positive legal rules" to which Muslims should abide.[202] Iqbal, however, maintains that contemporary generations hold the right to re-interpret Qur'anic injunctions in accordance with the circumstances of contemporary life. Iqbal seems to be less convinced about the legal import of Hadith and relies on the idea that "personal authority is quite contrary to the spirit of Islam."[203] With respect to *qiyās*, Iqbal mentions some of the early Muslims scholars but seems to hold Abu Ḥanīfa in high esteem as Iqbal describes Abu Ḥanīfa to have "made a great use of analogical reasoning in view of changing socioeconomic conditions, which arose by the extension of Muslim states."[204]

Ijmāʿ occupies a vital role in the thought of Iqbal but departs from the traditional conception of the principle. *Ijmāʿ*, in its traditional form, can be identified as "agreement of Muslim mujtahids at any era after the time of the Prophet on a legal injunction of a practical matter."[205] Iqbal departs from this definition by expanding the framework of participants from scholars to the Muslim community as a whole, and its representatives.[206] Thus, *ijmāʿ* should take the form of a legislative

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201 Iqbal contends that "the ultimate spiritual basis of all life, as conceived by Islam, is eternal and reveals itself in variety and change [and continues to argue that] society based on such a conception of Reality must reconcile in its life, the categories of permanence and change." Ijtihād, therefore, is the means through which a change can be introduced. See: Siddiqi, *Iqbal's 'Principle of Movement' And Its Application to The Present Muslim Society*.

202 Adibah Abdul Rahim and Anita Abdul Rahim, *A Study on Muhammad Iqbal's Framework of Ijtihad*, 2014, XXXVI, p. 8 <https://doi.org/10.17576/islamiyyat-2014-3602-01>.

203 Rahman, p. 53.

204 Abdul Rahim and Abdul Rahim, XXXVI, p. 9.

205 Abū Zahra, p. 198.

206 Rahman, p. 54.

assembly, and by arguing so, Iqbal integrates two major concepts in Islam: *Ijmāʿ* and Shura. Iqbal defines the Shura as "the opinion of the whole ummah with regard to affairs of common interest which are conducive to the healthy development of the state."[207] Iqbal believes that this method of applying Sharia is optimum for two reasons: first, "followers of different schools of *fiqh* are unable to perform *ijtihād* because they represent different point of views and may interpret Sharia according to their own school of *fiqh* meanwhile Sharia is for the entire Muslim community," and second God has not delegated interpretation of Sharia to a certain group.[208]

Iqbal proceeds to argue that Shura is the only possible way to apply *ijmāʿ* in the modern world. Thus, Iqbal lists a number of prerequisites for members to join the Shura council. The conditions comprise: 1. Firm belief in the tenets of Islam; 2. Integrity of character; 3. Understanding of the duties and responsibilities; 4. Good intellect and "an impressive physical personality."[209] Other conditions are required, some of which are traditional such as knowledge of Qur'an and Hadith, while others are general like knowledge of modern sciences, and national and international issues. The scope of the Shura council includes amending of existing laws to conform with Islamic injunctions, implementing Islamic laws that are not enforced and drafting new laws that are in accordance with Islamic injunctions.[210] Iqbal's proposal transforms the practice of *ijtihād* from its individualistic and doctrinal school framework to a much larger framework; Shura council, with the participation of the whole Muslim community (*Ummah)*, as the council will legislate the law and the nation will take part in deciding its applicability. Despite the striking resemblance to Western democracy, Iqbal contends that this mode of governance is not particularly democratic in a Western sense as it relies on religious grounds and through religiously accepted channel: *ijmāʿ*.

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[207] Abdul Rahim and Abdul Rahim, XXXVI, p. 10.
[208] Abdul Rahim and Abdul Rahim, XXXVI, p. 10.
[209] Abdul Rahim and Abdul Rahim, XXXVI, p. 10.
[210] Abdul Rahim and Abdul Rahim, XXXVI, pp. 10–11.

4. Conclusion

Summarily put, *ijtihād* has taken many forms and models with the final objective of integrating it in society. But the basic conundrum is how it should be incorporated in the legal structure of the modern nation-state. As Sherman Jackson rightly points out that "the bulk of reformist energy goes either into rendering Shari'ah more adaptable to the norms and dictates of the nation-state, along with its putatively inextricable trappings (viz., democracy, human rights, monopoly over law) or to pointing out its utter incompatibility with the latter."[211] Scholars have to be cognizant of the fact that authority lies in the institutional structure of the nation-state and models for renovation should take this premise into account. On the other hand, Sharia legislation through the mere codification of *fiqh* will exhibit certain complexities and problems. Therefore, a synthesis between the two entities; *ijtihād* and the legal system of the nation-state is required to produce a viable legal structure based on the principles of renovated *fiqh* and conforms to the regulations of the Sharia while preserving the institutional authority of the nation-state. In the models of integration discussed earlier we could observe that scholars have attempted different methodologies for integrating *ijtihād* into the legal structure of the modern nation-state through different legal tools: *maṣlaḥa*, *qiyās* and *ijmāʿ*. In the following chapter we investigate the ways in which 'Aṭīya provides a new model for integrating *ijtihād* into the legal and political structures of the nation-state through renewal of the tools of *ijtihād* and integrating *maqāṣid* into the process.

[211] Jackson, p. 2.

Chapter III:

The *Ijtihād* Institution and Renewal of *Maqāṣid*

1. Introduction

This chapter investigates ʻAṭīya's project for consolidating *ijtihād* and consensus (*ijmāʿ*) into a state institution that is responsible for legislation, and renewal of objectives of Sharia (*maqāṣid*). It examines ʻAṭīya's approach in transforming the five essential elements: "religion (*dīn*), life (*nafs*), intellect (*ʿaql*), offspring/lineage (*nasl*), and property (*māl*),"[212] into four realms: the individual, the family, the *Umma* and humanity. In this chapter we explore ʻAṭīya's model for attempting to incorporate *ijtihād* and *maqāṣid* into the structure of the nation-state. I argue that ʻAṭīya may not have provided a solution or a method through which we can plausibly argue in favor of Sharia application, but he proposes a theoretical approach that is cognizant of the internal institutional structure of the nation-state. ʻAṭīya's approach, whether with regard to *ijtihād* or *maqāṣid*, keeps in mind the nation-state as a fact that Sharia has to merge with rather than overrule. ʻAṭīya offers a possible synthesis between *ijtihād* and the modern legal structure that takes the form of the *Ijtihād* Institution, then proceeds to highlight the relationship between this Institution and judiciary and executive bodies. Furthermore, ʻAṭīya is mindful of the complexity of codification; therefore, he suggests a method through which *Ijtihād* Institution will play a role in legislating general guidelines for judiciary to facilitate its adjudication.

In previous chapters we have examined the different approaches towards Sharia implementation in society. In the first chapter, we discussed Sharia application through codification which included examining three attempts: the Anglo-Muhammadan Law, the Mecelle

[212] Opwis, 'Maqāṣid Al-Sharīʻah'.

and *Mashrū‘ Taqnīn al-Sharī‘ah al-Islāmīyah* (Sharia Codification Project). We denoted the inherited limitations towards Sharia codification which can be summarized as structural and theoretical limitations that impeded the judiciary from performing their *ijtihād*. In the second chapter, we examined the concept of *ijtihād* and the different ways in which scholars have redefined some legal tools to integrate Sharia into society through the intellectual projects of Rashid Rida, Hasan al-Turabi and Mohamed Iqbal and their use of public interest (*maṣlaḥa*), analogy (*qiyās*), and consensus (*ijmāʿ*), respectively. I begin the current chapter by introducing a background of ‘Aṭīya’s life and works. The first section aims to give the reader an overview of ‘Aṭīya’s intellectual journey and scholarly contributions. It highlights his affiliation with the Muslim Brotherhood and reasons for fleeing Egypt. The second section investigates the main works that have examined ‘Aṭīya’s work and identifies the gap in research. The third section examines ‘Aṭīya’s *ijtihād* and attempts to answer questions such as: How does he define *ijtihād* and in what way is his conception of *ijtihād* different from or similar to earlier scholars? The significance of this section lies in discussing the concept of “*Ijtihād* Institution” as it constitutes one of the main principles in ‘Aṭīya’s model. The fourth section investigates renewal of *maqāṣid* and the ways in which ‘Aṭīya expands on the five essential *maqāṣid* to become 24 *maqaṣid*.

2. Biographical and Intellectual Background

Born in 1928, ‘Aṭīya spent the early years of his life in the Delta area in a small village under the name of Koum al-Nour in al-Daqahlīyah governorate. In 1948, ‘Aṭīya graduated from Fuad I University (Cairo University) with a degree in law, then received another diploma in Sharia from the faculty of law in 1950. In 1945 ‘Aṭīya joined the Muslim Brotherhood as he was attracted to the intellectual and social project of al-Banna. ‘Aṭīya reflects on his affiliation to the Muslim Brotherhood by stating, “the closest Muslim Brotherhood gathering was in al-Zāher [a

neighborhood in Old Cairo], where I used to attend the Friday congregation and lessons by Sheikh Gabr al-Tamimi."[213] Due to his affiliation with the Muslim Brotherhood, ʻAṭīya was detained for two and a half years (1949-1952) as part for a mass detention wave. ʻAṭīya was deeply affected by al-Banna and other intellectuals in the Muslim Brotherhood which is evident from ʻAṭīya's statement: "I was profoundly influenced by al-Banna who enjoyed a certain personal and spiritual impact on people. I consistently attended al-Banna's Tuesday class. Moreover, I was influenced by Muhammad Farīd Abdel Khaliq as we attended his Thursday class and also by Abdelaziz Kamel."[214]

In 1960, ʻAṭīya received his PhD in law from Université de Genève, then traveled to Kuwait to practice law. ʻAṭīya occupied a number of scholarly and professional posts. For instance, ʻAṭīya was a Sharia and a legal consultant for financial transactions and banking, a consultant to the International Institute of Islamic Thought and the chief executive officer of the Islamic Bank at Luxemburg. ʻAṭīya occupied academic positions such as head of the Department of Law in the School of Sharia at Qatar University and Editor-in Chief of The Modern Muslim Journal (*Majallat al-Muslim al-Muʿāṣir*), which we will refer to hereinafter as "the Journal".[215] ʻAṭīya's academic background in law and Sharia as well as his exposure to modern systems of governance have aided him in producing remarkable publications. ʻAṭīya is a prolific writer with publications in many fields, e.g. fiqh, finance and objectives of the Sharia (*maqaṣid*). We focus on ʻAṭīya's main publications that are significant to his renewal model which includes his book titled *al-Naẓariyah al-ʿAmmah lil-Shariʿah al-Islamiyah* (General Theory of Sharia) that he authored in the year 1988

[213] Wasfy 'Ashour Abu Zaid, 'Jamāl Al-Dīn 'Aṭīyah - A Journey of Contributions and Renewal', *Islam Online* <https://archive.islamonline.net/?p=374>.
[214] Abu Zaid.
[215] Jamāl al-Dīn 'Aṭīyah and Wahbah Al-Zuhayli, *Tajdīd Al-Fiqh Al-Islami*, 1st edn (Beirut: Dar al-Fikr al-Muasir, 2000).

and in which he discusses the main characteristics of Sharia, legal maxims, application of Sharia ordinances and the details about the *Ijtihād* Institution. Another key publication is titled *Tajdīd al-Fiqh al-Islāmī* (Renewal of Fiqh), which was published in the year 2000, where ʻAṭīya engages in a debate on the basic principles and approaches of renewal with another great scholar, Wahbah Al-Zuhayli (d. 2015). A principal publication by ʻAṭīya is *al-Tanẓīr al-Fiqhī* (Theorization of Fiqh) that he authored in the year 1987 and the book is a collection of seminars that he delivered during his stay in Qatar and in his capacity as Head of the Department of Law at Sharia School in Qatar in the year 2000. In *Theorization of Fiqh*, we find ʻAṭīya formulating a classification of legal maxims and arguing that such classification could be the basis of a new theory of *fiqh*, as well as, highlighting the major works on legal maxims and how to employ them.

Another significant publication is *Naḥwa Tafʿīl Maqāṣid al-Sharīʿa* (Towards Realization of the Higher Objectives of Sharia: A Functional Approach) whicht was published in the year 2000 where ʻAṭīya proposes a new division of Sharia ultimate objectives (*maqāṣid*). In addition to a number of journal articles in *Majallat al-Muslim al-Muʻāsir*, particularly *Tajdīd al-Fikr al-Ijtihādi* (Renewal of the Process of Ijtihād) that he published in 2000 that discusses the concept of renewal in relations to *ijtihād*. The stated publications play significant and complementary roles in the renewal model. For instance, we find ʻAṭīya suggesting a methodology for the theorization of fiqh in two of his publications: *Tajdīd al-Fiqh al-Islāmī* and *al-Tanẓīr al-Fiqhī*, while advocating for a new form of *ijtihād* that takes a legislative structure in *al-Naẓariyah al-ʿAmmah lil-Shariʿah al-Islamiyah* and *Tajdīd al-Fikr al-Ijtihādi*.

ʻAṭīya is credited for his pioneering role in publicly arguing in favor of renewal of *fiqh* (*tajdīd al-fiqh*) through the Journal that he established in January 1974 and headed, till his death in 2017.

In the inaugural issue of the Journal, ʻAṭīya stressed on the need for renewal (*tajdīd*) in *fiqh* and *uṣūl* as he stated:

> The Journal is concerned with presenting the *fiqh* heritage in a new form and compare its concepts and principles with modern legal and intellectual principles. It is also focused on establishing the foundation and theorization of Islamic legal principles. Moreover, the Journal will not be limited to these goals as it will encompass the concept of *ijtihād* as defined in *uṣūl al-fiqh*.[216]

To elaborate on ʻAṭīya's approach, one could visit the website of the Journal that highlights the vision and objectives of its editor-in-chief: "The Journal is concerned with tackling Sharia-related issues in modern life. The primary focus is 'modernity' in relation to three components: *ijtihād*, theorization (*al-Tanẓīr*) and Islamization of Knowledge."[217] To this end, the Journal is focused on two fields: Islamic movements and civic research.[218] The Journal is peer reviewed by prominent scholars, e.g. Sheikh Muhammad al-Ghazali, Manal Yahya and Zaghlol al-Naggar. It is noteworthy that the Journal is authorized and situated in Beirut after ʻAṭīya fled Egypt in 1954 due to Nasser's oppressive measures against Islamist groups.

2.1. Literature Review

Despite the significance of ʻAṭīya's renewal model, one can find limited literature discussing his project. In search for works that analyzed and appraised ʻAṭīya's proposal, I came across few academic works that analyze ʻAṭīya's project. In her dissertation entitled *al-Tajdīd fī uṣūl al-fiqh* (Renewal in *uṣūl* al-fiqh), Jamilah Bu Khatim, under the supervision of Ali Gomaa,

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[216] Bū Khātim, pp. 6–7.
[217] An examination scientific fields in accordance with Islamic principles.
[218] 'Publishing Regulations' <http://almuslimalmuaser.org/index.php?option=com_content&view=article&id=56&Itemid=122> [accessed 23 January 2019].

an Egyptian ex-mufti and a prominent scholar, Bu Khatim surveyed a number of scholars who tackled the concept of *tajdīd in uṣūl* in an attempt to navigate the wide spectrum of renewal in *uṣūl* in the modern period and the ways in which such proposals provide new insights towards the application of Sharia. Bu Khatim managed to cover a wide range of scholars from progressive thinkers, e.g. ʻAṭīya, to more traditional and conservative trends in *fiqh* traditions. In the introduction to her dissertation, Bu Khatim notes that her interest in the topic of renewal of *fiqh* was inspired after reading about the debate on renewal in the Journal. This marks the extent of influence introduced by ʻAṭīya nearly two decades after establishing the Journal.[219]

In discussing ʻAṭīya's project Bu Khatim selects two books and a number of journal publications, notably: N*aḥwa Tafʿīl Maqāṣid al-Sharīʿa'* and *al-Naẓariyah al-ʿAmmah lil-Shariʿah al-Islamiyah*. Bu Khatim summarized the key concepts in the selected publications, particularly the new model for *maqāṣid* and the thematic restructuring of *uṣūl*. However, Bu Khatim overlooks key points in ʻAṭīya's model. For instance, ʻAṭīya's concept of theorization that he discusses in his book titled *al-Tanẓīr al-Fiqhī* and some of the main features of renewal of *fiqh* in his book titled *Tajdīd al-Fiqh al-Islāmī*. An additional principal concepts in ʻAṭīya's model is concerned with collective *ijtihād* and its institutionalized form to which the author briefly discusses but does not cover in much detail. It should be noted that it was a difficult process to obtain ʻAṭīya's publications as he is not publicly recognized like other figures of the Muslims Brotherhood, e.g. Qaradawi, or Islamic intellectual, e.g. Abu Zahra. Therefore, Bu Khatim may have encountered such difficulties in procuring the resources for her research.

[219] Bū Khātim, p. 7.

Ibrahim al-Ansari discusses ʻAṭīya's model for renewal (*tajdīd*) in his dissertation entitled *The Renewal of Islamic Legal Theory: Models of contemporary Ijtihād.* Al-Ansari attempts to examine the extent to which renewal in *uṣūl* has been proposed and explores its viability to solve problems in contemporary Muslim societies. Al-Ansari analyzes how close, or far, these calls for *tajdīd* can be similar to, or different from, the original form of *uṣūl*. To this end al-Ansari investigates the various attempts for renewal during the 20th and 21st century. In chapter four, al-Ansari tackles the trends of renewal in *uṣūl* through examination of two trends: objectives of sharia and general theory. Al-Ansari discusses ʻAṭīya in the section on "general theory trend" and investigates some concepts in ʻAṭīya's model such as "new classification" of sources and *uṣūl*, the synthesis between Sharia sciences, e.g. *uṣūl*, and modern sciences and scope and framework Sharia application. However, the author relies mainly on ʻAṭīya's *Al-naẓariyah al-ʿAmmah lil-Shariʿah al-Islāmīyyah* and overlooks significant concepts in ʻAṭīya's model for renewal such as the Ijtihād Institution, how ʻAṭīya uses analogy (*qiyās*), and his model for objectives of Sharia (*maqāṣid*).

Another important mention of ʻAṭīya can be found in Mohammad Hashim Kamali's seminal work titled Principles of Islamic Jurisprudence. Kamali discusses ʻAṭīya's model for renewing *uṣūl al-Fiqh* as part of his discussion of reinvigorating *ijtihād* in modern society. Kamali focuses on a certain aspect of ʻAṭīya's book *Al-naẓariyah al-ʿAmmah lil-Shariʿah al-Islāmīyyah* that is concerned with division of the main sources of Sharia. ʻAṭīya classifies the sources into five main components: 1. Transmitted proofs; 2. Ordinances of rulers; 3. Existing conditions; 4. Rationality; and 5. Original absence of liability. Kamali contends that the last two are "superfluous" and are unnecessary to the division for a few reasons.[220] Kamali argues that rationality (*ʿaql*) can fall under *ijtihād*, in general, analogy (*qiyās*) or public interest (*maṣlaḥa*).

[220] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 2011, pp. 509–10, /z-wcorg/.

Moreover, "original absence of liability…is subsumed in conventional *uṣūl al-fiqh*, under the presumption of continuity, or *istiṣḥāb*."[221] Interestingly, Kamali discusses the idea of integrating *ijtihād*, *Shūrā* (consultation) and consensus (*ijma'*) at an earlier stage of his book in an approach analogous to 'Aṭīya's model, which will be referred to later on.

It is noticed that the aforementioned innovative approaches to studying 'Aṭīya's model have not fully covered his model for integrating *ijtihād* and the legal system in the nation-state. Therefore, this chapter will attempt fill in this gap by examining 'Aṭīya's model for restructuring *ijtihād* and its relationship with his new classification of objectives (*maqāṣid*).

3. *Ijtihād* according to 'Aṭīya

In this section we examine 'Aṭīya's model for *ijtihād* and the ways in which he attempts to integrate *ijtihād* and consensus (*ijmāʿ*) to formulate an institution that is based on religious legitimacy and fits into the legal structure of the nation-state.

We have defined *ijtihād*, in chapter 2 and elsewhere, but to recapitulate, it is "a process of legal reasoning and hermeneutics through which the jurist-mujtahid derives or rationalizes law on the basis of the Quran and the Sunna; during the early period, the exercise of one's discretionary opinion (*raʾy*) on the basis of *ʿilm* (q.v.)."[222] Another important definition is introduced by Abu Zahra in his book titled *uṣūl al-fiqh*: "exerting the utmost effort to infer, and/or apply, *al-aḥkām Sharʿiyya* [Sharia Ordinances]."[223] *Ijtihād* can be practiced by *mujtahids* who fulfill a number of prerequisites that include knowledge of Qur'an and Hadith, as the main sources for legislation. The scope of the term 'knowledge' differs from one scholar to another as we have mentioned

[221] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, p. 509.
[222] Hallaq, *The Origins and Evolution of Islamic Law*, p. 208.
[223] Abū Zahra, p. 379.

earlier, in chapter 2 section 1. For instance, some scholars, such as al-Ghazālī, do not require the complete memorization of Qur'an but legal verses or at least know where they are located in the Qur'an. [224] Prerequisites also include knowledge of cases of consensus *ijmāʿ*, capacity to perform analogy (*qiyās*), knowledge of Arabic and knowledge about theory of abrogation.[225]

ʻAṭīya is a proponent of renewal (*tajdīd*), which he divides into two categories: emerging from within the Islamic tradition or imported from the outside. ʻAṭīya states Western theories, e.g. structuralism and deconstruction, are not a good fit to interpret or examine Islamic studies due to the fact that such theories will decontextualize Islamic concepts.[226] Thus, renewal, to ʻAṭīya, has three main elements: 1. content-based renewal; 2. renewal is required to stem from within an Islamic-based tradition and should be focused on the development of *fiqh* and *uṣūl*; and 3. renewal should have a clear methodology.[227] By 'an Islamic-based tradition' I presume ʻAṭīya means Muslim scholars who have knowledge and experience in Islamic jurisprudence, but he does not explicitly state it. Therefore, we find ʻAṭīya advocating for a renewal in some aspects of *ijtihād*, notably analogy (*qiyās*), consensus (*ijmāʿ*), and objectives of Sharia (*maqāṣid*).

With respect to analogy (*qiyās*), ʻAṭīya proposes to apply it in a manner that prioritizes public interest (*maṣlaḥa*). To understand ʻAṭīya's concept of analogy we need to provide an overview of the concept, as we suggested in the second chapter. Hallaq defines analogy (*qiyās*) as a "collective name for a variety of legal arguments including, *inter alia*, analogy, *argumentum a fortiori*, *reductio ad absurdum*, or deductive arguments."[228] The significance of analogy is

[224] al-Ghazzālī, I, p. 6.
[225] Hallaq, *The Origins and Evolution of Islamic Law*, p. 146.
[226] ʻAṭīyah and Al-Zuhayli, pp. 15–16.
[227] ʻAṭīyah and Al-Zuhayli, p. 16.
[228] Hallaq, *The Origins and Evolution of Islamic Law*, p. 209.

attributed to connecting legal opinions of *mujtahids* to Scripture.[229] Analogy has four major components: *al-ʻAṣl* (lit. "the origin" and indicates the case which has a direct inference from Scripture or Scripture itself), *al-Farʿ* (the case which does not have a direct inference), *al-Ḥukm* (the legal opinion which *qiyās* is extending from one case to another), and *al-ʿilla* (*ratio legis*).[230] In this section we will focus on *al-ʿilla* and what are the ways in which it has been interpreted and how does *al-ʿilla* differ from what ʻAṭīya is proposing?

The basis of *qiyās* is ratiocination of Scripture and there are two main approaches regulating this practice. The first approach is adopted by the majority of *uṣūli* scholars which states that ratiocination of Scripture should be regulated by *al-waṣf al-ẓāhir al-munḍabiṭ al-munāsib* (appropriate, apparent and constant quality) and could take the form of *ratio legis* (*al-ʿilla*). The proponent of the second trend were scholars from the Mālikī and Ḥanbalī schools, notably Ibn Taymiyya (d. 1328) and Ibn Qayyim (d. 1350), and the ratiocination is regulated by *al-waṣf al-munāsib* (appropriate quality) but without regulations and developed into *al-ḥikmah* (rationale). The key difference is that *al-ḥikmah* achieves *maṣlaḥa* in accordance with objectives of Sharia from a broad perspective.[231]

In other words, the rationale (*al-ḥikmah*) is more flexible in achieving public interest (*maṣlaḥa*) in accordance with Scripture. ʻAṭīya advocates for reliance on the rationale (*al-ḥikmah*) when conducting analogy as *ratio legis* (*al-ʿilla*) restricts achieving the benefit in a modern context.[232] ʻAṭīya suggests this application for two reasons: achieving the objectives of Sharia

[229] Abū Zahra, p. 218.
[230] Abū Zahra, p. 227.
[231] Abū Zahra, p. 238.
[232] *al-ḥikmah* "can still be used as a basis for judgment in secular matters and that both might even be useful for the maintenance of the flexibility of the law. An example is the prohibition of wine. In accordance with the *ḥikma* of the prohibition, all intoxicating substances should be prohibited on the ground that all, in varying degrees, have bad effects. In accordance with the *'illa*, however, only the substances having at

(*maqāṣid*) and adapting to the needs of modern society. ʻAṭīya justifies this conclusion by arguing that the use of *ratio legis* (*al-ʿilla*) was possible at the time of the early generations as life was far less complex and *al-ʿilla* can be established, while in modern society the situation has changed greatly and the connection between Sharia ordinances (*aḥkām*) has become difficult to establish.[233]

To continue the discussion on the prerequisites to practice *ijtihād*, ʻAṭīya states that a *mujtahid* is required to be knowledgeable about the status quo (*maʿrifat al-wāqiʿ*). This prerequisite, claims ʻAṭīya, is a fundamental condition for a sound *ijtihād*. ʻAṭīya considers *ijtihād* a continuous process of scholarly discussion and that juristic opinions are not fixed. For instance, legal opinions of school founders like Imam Shāfiʿī do not have the attribute of permanence such as Qur'an and Hadith; therefore, juristic opinions should exhibit compatibility with the era and time to achieve objectives of Sharia.[234] In this regard, ʻAṭīya proposes that *ijtihād* should be enforced on new, as well as old legal cases. ʻAṭīya bolsters his position on reviewing previous legal opinions by stating:

> It is established that a change in time, place and individuals will have an impact on *ijtihād* and *fatwā* [non-binding legal opinion] and we do not agree on limiting the role of the *mujtahid* to selecting from old opinions…the modern *mujtahid* should be entitled to reach an opinion that has not been stated by earlier generations, given the *mujtahid* can provide a Sharʿi reference [juristic basis or reference to Divine Scripture].[235]

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least the effect of wine are prohibited; anything that has an effect less than wine, beer for example would be lawful and permissible." See: Khadduri, *The 'Maṣlaḥa' (Public Interest) And' 'Illa' (Cause) In Islamic Law*, 215.

[233] ʻAṭīyah, *Tajdīd Al-Fikr Al-Ijtihādi*.

[234] ʻAṭīyah and Al-Zuhayli, pp. 19–22.

[235] Jamal Eldin ʻAṭīyah.

Moreover, ʿAṭīya proceeds, restricting the *ijtihād* process to preferment between juristic opinions (*tarjīḥ*) has no grounds in Sharia. Between ʿAṭīya's statement on the continuity of *ijtihād* and his claim that *ijtihād* is a communal obligation (*farḍ kifāya*),[236] one can safely presume ʿAṭīya to be a proponent of the notion that the gates of *ijtihād* were never closed. But ʿAṭīya does not concede that *ijtihād* is available in all its ranks.[237]

ʿAṭīya identifies knowledgeable about the status quo (*maʿrifat al-wāqiʿ*) as a condition for a sound *ijtihād* as a *mujtahid* should be an expert in both Islamic jurisprudence and technical

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[236] *Farḍ kifāya* is a communal obligation in Muslim legal doctrine. In juxtaposition to *fard al-ʿayn, fard al-kifayah* is a legal obligation that must be discharged by the Muslim community as a whole, such as military struggle: if enough members in the Muslim community discharge the obligation, the remaining Muslims are freed from the responsibility before God. However, if a communal obligation is not sufficiently discharged, then every individual Muslim must act to address the deficiency. In recent Islamic literature, this terminology is used to discuss social responsibility, such as feeding the hungry, commanding good, and forbidding evil. See: Esposito, 'Fard Al-Kifayah.'

[237] Scholars assigned ranks for *mujtahids* based on their level of efficacy. The ranking is divided into six categories; four are considered *mujtahids* while the other two are deemed *muqallid* (a jurist or layman who follows a *mujtahid*. See: Hallaq, *The Origins and Evolution of Islamic Law*, p. 209. The first rank of *mujtahids* is called *mujtahid mustaqil* who fulfill all the conditions for *ijtihād* and efficiently employs the legal reasoning tools. They formulate their own legal methods. This ranking includes the companion-scholars and the *tabʿīn* (the second generation e.g. Sa'id Ibn Al-Musayyib (d. 715)) and founders of doctrinal schools that survived (e.g. Malik and Shāfiʿī) or that did not survive (e.g. Sufyan al-Thawri (716–778)). See: Abū Zahra, p. 389. The second ranking is called *mujtahid muntasib* (affiliated *mujtahid*) and they do not enjoy the same privilege of establishing distinct methodical approaches. They are characterized by following the tradition of the school (whether established by the founder or the prominent figures) in terms of legal reasoning and construct their *ijtihād* in *furuʿ* (branches). See: Abū Zahra, pp. 393–95. The third ranking is called *mujtahid fil al-madhhab* (*mujtahid* in the school) characterized by their compliance with the process of legal reasoning established by the higher-ranking *mujtahids* in in matter of *furuʿ* and *uṣūl*. See: Abū Zahra, p. 396. If there is an opinion from a well-accredited higher-ranking *mujtahid*, they will certainly adhere to such an opinion. The fourth category is named *mujtahid murrajiḥ* (preponderant *mujtahid*) and is closely related to the third as they build on and continue to apply the process of *tarjīḥ*. However, the fourth ranking does not infer the jurisprudential rulings of *furuʿ* nor give their own opinion on cases. Therefore, they were given the title of *murrajiḥ* (a title given to scholars who examine the various reports and rulings to indicate which is stronger or closer to Sunnah or *qiyās*). The rankings that followed the tradition of *taqlid* are *muḥāfiẓīn* and *muqallidīn* who did not perform any form of *ijtihād*. The ranking of *muḥāfiẓīn* was concerned with differentiating between the *tarjīḥ* of the aforementioned rankings. They were characterized by their encyclopedic knowledge of previous works; however, they did not perform *tarjīḥ*. In other words, this category of scholars focused more on building on the previous categories and establishing close familiarity with their work. The *muqallidīn* established familiarity and understanding of *fiqh* books but without any scholarly production.

knowledge of modern sciences.[238] For instance, in order for a *mujtahid*, ʻAṭīya contends, to give their legal opinion on a medical case such as gender selection or abortion, a *mujtahid* is required to have a minimum of medical knowledge and familiarity with social norms to provide a sound *ijtihād*.[239] But to what extent does the notion of knowledge of the status quo (*maʿrifat al-wāqiʿ*) limit or allow the existence of all ranks of *ijtihād*? According to ʻAṭīya, certain ranks of *ijtihād* are not feasible. He argues that absolute *mujtahid* [*mujtahid muṭlaq*] is not an achievable rank and is unexpected to re-emerge. This is due to the proliferation of technical knowledge in modern societies which makes it close to impossible for *mujtahids* to be cognizant of many venues of social and scientific fields.[240] Then the question arises of what are the ways in which *mujtahids* will participate in modern life? ʻAṭīya responds to this question by proposing two forms of *ijtihād*: specialized or partial *ijtihād* (*al-ijtihād al-khaṣ aw al-juz'ī*) and collective ijtihād (*al-ijtihād al-jamā'ī*).[241] In other words, ʻAṭīya argues that since the absolute *ijtihād*, where *mujtahids* "presumed to be all-encompassing and thus wholly creative,"[242] is no longer available, *ijtihād* has to be performed in specific fields where *mujtahids* gain the sufficient knowledge and become experts in both jurisprudence and modern technical sciences. The other proposal is to revert to the early period where *ijtihād* was practiced collectively by the *Saḥaba* (early generation of Muslims), hence, it acquired the nature of both Shura and consensus (*ijma'*).

Firstly, specialized *ijtihād* (*al-ijtihād al-khaṣ*) is a form of *ijtihād* where the *mujtahid* specializes in giving *fatwā* in certain fields. ʻAṭīya is referring to the process of *iftāʾ* (providing a non-binding legal opinion), but the *mujtahid* will be limited to a specific field, e.g. economics or

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238 Jamāl al-Dīn ʻAṭīyah, *Al-Wāqiʻ Wa-Al-Mithāl Fī Al-Fikr Al-Islāmī Al-Muʻāṣir*, p. 145.
239 Jamāl al-Dīn ʻAṭīyah, *Al-Wāqiʻ Wa-Al-Mithāl Fī Al-Fikr Al-Islāmī Al-Muʻāṣir*, p. 146.
240 Jamāl al-Dīn ʻAṭīyah, *Al-Wāqiʻ Wa-Al-Mithāl Fī Al-Fikr Al-Islāmī Al-Muʻāṣir*, p. 145.
241 Jamāl al-Dīn ʻAṭīyah, *Al-Wāqiʻ Wa-Al-Mithāl Fī Al-Fikr Al-Islāmī Al-Muʻāṣir*, p. 145.
242 Hallaq, *The Origins and Evolution of Islamic Law*, p. 157.

medical. While al-Azhar attempted to introduce modern sciences to school and university curricula due to their significant role in understand the relationship between life and religion, ʻAṭīya contends that including few books is not sufficient. Therefore, a university major with established credit hours should be the main objective, followed by a graduate degree in the same field.[243] ʻAṭīya is proposing that students major in one modern science, e.g. economics, while studying *fiqh* books pertinent to their field of study and by doing that the gap between modern sciences and *fiqh* tradition should be bridged. This form of *ijtihād* will be significant on the individual level. ʻAṭīya seems to be more lenient, or rather less concerned, as he argues that the individual can perform their own *ijtihād* in relation ritual actions (*ʿibadāt*), if they can perform *ijtihād,* or follow the *ijtihād* of a certain scholar (*taqlīd*), whom the individual believes to be the most knowledgeable and this marks the jurisdiction for specialized *ijtihād*. ʻAṭīya states that it is not possible to enforce a legal opinion in the private sphere, hence, specialized *mujtahids* will provide the jurisprudential but legally non-binding opinion on the individual level.

Secondly, collective *ijtihād* (*al-ijtihād al-jamā'ī*) takes a legislative and an institutional form. ʻAṭīya divides the concept of *al-ijtihād al-jamā'ī* into two categories: *ijtihād* and consensus (*ijmāʿ*), then proceeds to describe how this concept will fit into the legal structure of the modern nation-state. ʻAṭīya contends that *ijmāʿ* is a contentious term since it requires the agreement of all *mujtahids* of a certain era over an issue. Then ʻAṭīya states that scholars have debated about opposing opinions and whether such opposition overrules the consensus or the extent to which it should have an impact. Even consensus of the *Saḥaba* can be debated whether it complies with the conditions of consensus established by the scholars, which require agreement of all *mujtahids* at

[243] Jamāl al-Dīn ʻAṭīyah, *Al-Wāqiʻ Wa-Al-Mithāl Fī Al-Fikr Al-Islāmī Al-Muʻāṣir*, p. 145.

the time. Hence, ʿAṭīya agrees with Abdulwahab Khalaf's (b. 1888- d. 1956) argument[244] that the *ijmāʿ* of *Saḥaba* is a form of Shūra. ʿAṭīya contends that the collective opinion, at the time of *Saḥaba,* is achieved through individual reasoning (*ijtihād*) in a collective manner and in compliance with the Divine Scripture.[245] By individual reasoning, I presume, that each of the *Saḥaba* contributes their opinion based on their *ijtihād* that relies on Divine Scripture, then debate about the most convincing evidence. Then ʿAṭīya proposes to implement this form of collective *ijtihād* in the modern nation-state through an institution which he calls 'the *Ijtihād* Institution.' ʿAṭīya states that if this form of collective *ijtihād* becomes regulated by the ruler, then it establishes a legitimacy of the opinion to acquire the rank of '*wājib'* (obligatory) and supersedes all other *ijtihād*.[246]

3.1. The *Ijtihād* Institution

Ijtihād Institution, ʿAṭīya suggests, will provide a solution to the codification conundrum. He contends that codification is a widely contested subject in the *fiqh* tradition mainly due to constraining the *ijtihād* process and confining the multiplicity of opinions. ʿAṭīya identifies two main trends in the modern period with regard to codification. The first position is advocated by Tariq al-Bishri (b. 1933) who argues for a reverse codification; scholars will have to examine positive laws, then find a juristic opinion in *fiqh* books as a basis for the opinions in positive law.

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[244] In his book titled *ʿilm Uṣūl al-Fiqh wa Khulaṣat al-Tashrīʿ al-Islāmī*, Khalaf highlights the main conditions for *ijmāʿ* and if it is conceivable in the modern period. *Ijmāʿ* is an agreement of all *mujtahids* over a specific matter in a certain era after the death of the Prophet. Khalaf lists four conditions for *ijmāʿ*: 1. availability of *mujtahids* (not just one); 2. agreement of *mujtahids* on a legal opinion; 3. articulating the opinion either through *iftāʾ*, *qaḍāʾ* or in a congregation; and 4. *ijmāʿ* has to be a complete consensus without any opposing votes. Khalaf comments that enforceability of such *ijmāʿ* is not feasible, even at the time of companions. Khalaf contends that what took place is the agreement of present members (companion-scholars) of the community on a certain issue; hence, it is a form Shūra. See: Abdulwahab Khalaf, *ʿilm Uṣūl Al-Fiqh Wa Khulaṣat Al-Tashrīʿ Al-Islāmī.*, 7th edn (Dar al-Fikr al-Arabi), pp. 45–49.

[245] Jamāl al-Dīn ʿAṭīyah, *Al-Naẓariyah Al-ʿammah Lil-Sharīʿah Al-Islamiyah*, pp. 194–95.

[246] Jamāl al-Dīn ʿAṭīyah, *Al-Naẓariyah Al-ʿammah Lil-Sharīʿah Al-Islamiyah*, pp. 194–95.

In other words, al-Bishri attempts to justify the legitimacy of positive laws through the *fiqh* traditions and argues that within the vastness of *fiqh* tradition, one can definitely find a juristic opinion complying with modern laws. If there are no opinions, then the law must be amended to conform with Sharia. The second position is espoused by al-Sanhuri who contends that positive laws do not conform with Sharia and codification should be based on *Sharʿī* sources. While the two positions are seemingly opposed, ʻAṭīya considers them complimentary. ʻAṭīya states that al-Sanhuri is addressing Sharia scholars and urging them to draft *fiqh* in accordance with the modern principles of law, whereas al-Bishri is taking a practical position while encountering the possible social issues that might arise, therefore limiting any amendments to what directly violates the ordinances of Sharia.[247]

Moreover, ʻAṭīya states that the ruler is entitled to adopt a legal opinion which will be enforced, as long as it does not contradict with the ordinances of the Divine Scripture. However, disagreement between scholars arise on the extent to which the ruler is entitled to practice this right. On the one hand, a number of scholars guarantee the right to the judge to practice *ijtihād* based on a number of hypotheses: 1. Codification will always be incomplete and restrict the judge's flexibility; 2. Amending codes is a lengthy and an arduous process; 3. Codification formulates legal maxims in response to specific cases which might hinder other cases that do not conform to the role; 4. Social affairs develop at a faster pace and the judge's decision is limited with the code; 5. Codification has become a tool at the hands of rulers to achieve their political goals and establish totalitarian regimes.[248]

[247] ʻAṭīyah and Al-Zuhayli, pp. 41–42.
[248] Jamāl al-Dīn ʻAṭīyah, *Al-Naẓariyah Al-ʿammah Lil-Shariʿah Al-Islamiyah*, pp. 204–5.

On the other hand, a number of scholars argue in favor of the codification project for a number of reasons: 1. Sharia codification enables the laymen to identify its rules and regulations which takes place through publishing new laws in news outlets; 2. Multiplicity of legal opinions renders them unenforceable, but codifying one legal opinion settles the case; 3. Codification of Sharia ordinances facilitates the adjudication process for the judge and litigants; 4. Codification eliminates possible inefficient or questionable judges; 5. Adjudication is a right guaranteed to ruler and the judge is his representative, hence, the ruler is entitled to decide; 6. Allowing freedom of *ijtihād* requires the judges to be able to practice *ijtihād* and meet the prerequisite conditions.[249] In other words, judiciary will follow the general guidelines stipulated by the *Ijtihād* Institution while maintaining the right to practice *ijtihād* for each case. This, according to ʻAṭīya, provides a framework for legal centrality and *ijtihād*.

The *Ijtihād* Institution, argues ʻAṭīya, will take a middle path in this convoluted issue. The *Ijtihād* Institution will draft an Islamic code that is applicable on broad legal principles (*kulliyyāt*) without reference to particular legal maxims (*juz'iyāt*) which will allow the judiciary some flexibility to perform *ijtihād* and meet the needs of the society. ʻAṭīya proceeds with a number of basic principles that will shed more light on the workings of the *Ijtihād* Institution. The Institution will determine the scope of codification, which will include social aspects, e.g. family and personal status and financial transactions, and will not include liturgical actions (*ʿibadāt)* and morality. While the institution will not regulate morality, it will lay the foundations of moral issues that are

[249] Jamāl al-Dīn ʻAṭīyah, *Al-Naẓariyah Al-ʿammah Lil-Shariʿah Al-Islamiyah*, pp. 206–7.

directly related to social affairs such as organizing *zakāh* (alms-giving) collection and discretionary punishment (*taʿzīr*)[250] on moral violations.[251]

The controversial aspect in this statement is the employment of *taʿzīr* to administer morality. Hence, ʻAṭīya draws a distinction between public morals in positive law and in Sharia. There are a number of demarcations between what constitutes morality in positive law and in Sharia. ʻAṭīya contends that the idea of public morals is connected with the public and private and the objective of achieving public interest. For instance, in public law all agreements that contradict public interest are null and void such as violation of personal liberty and freedom of speech which constitutes public discipline.[252] The concept of public discipline is a flexible and a changing notion that copes with every era and time to suit the needs of society. For instance, slavery was accepted as part of the social order and public discipline but in a modern context it is a violation. Thus, public discipline is based upon prevalent social ideologies that are reflected in the legal system. In Sharia the public morality is determined by the limits of Sharia itself not according to public desires. In essence, public morality in Sharia is regulated by the ordinances of what is permissible and what is prohibited, and public interest is a priority, whereas in positive law morality is regulated by what is socially acceptable, which, according to ʻAṭīya, might not comply with Sharia's ordinances.[253]

While in theory the concept seems virtuous and is supposed to improve moral code of the community, it is difficult to determine which moral code the government will be administering.

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[250] Punishment for crime not measuring up to the strict requirements of *ḥadd* punishments, although they are of the same nature, or those for which specific punishments have not been fixed by the Quran. See: Esposito, 'Tazir.'
[251] Jamāl al-Dīn ʻAṭīyah, *Al-Naẓariyah Al-ʿammah Lil-Sharīʿah Al-Islamiyah*, p. 207.
[252] Ibid. 161–62.
[253] Ibid, pp. 162–67.

For instance, the Islamic Republic of Iran has created revolutionary courts in June 1979 and their jurisdiction included unlawful detention and other political matters. Competence of revolutionary courts expanded and in 1981 the courts started trying sexual offences and prescribed punishment (*Ḥadd)* [254] crimes. Two issues of concern can be raised in dealing with the concepts of *Ḥadd* and *taʿzīr* (discretionary punishment). First, the sentences can be based on general verses from the Qur'an and Hadith which can be abused during application. For instance, "[v]ery often the charge on which convictions were based was taken from Koran 5:33, viz. "fighting God and His Messenger (muḥārabat Allāh wa-rasūlihi)" and "spreading corruption on earth (al-saʿy fī l-arḍ fasādan), for which the courts could impose punishments like alternate amputation, and the death penalty."[255] The second, which is more essential, is the fact that administering criminal law in Islam, whether *Ḥadd* or *taʿzīr*, is surrounded by many restraints which renders the application of law to be a difficult process. Peters comments on the application of Islamic criminal law in Iran by suggesting that:

> "the testimonies of eyewitnesses are generally difficult to find; it is evident that most sentences were pronounced on the strength of admissions and that one may have justified doubts as to whether these were obtained without undue pressure. For heavy reliance on confession as a means of proving crime can be an incentive for the police to apply torture on the suspect during the preliminary investigation."[256]

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[254] A punishment fixed in the Quran and hadith for crimes considered to be against the rights of God. The six crimes for which punishments are fixed are theft (amputation of the hand), illicit sexual relations (death by stoning or one hundred lashes), making unproven accusations of illicit sex (eighty lashes), drinking intoxicants (eighty lashes), apostasy (death or banishment), and highway robbery (death). See: Esposito,' Hadd.'

[255] Rudolph Peters, 'The Islamization of Criminal Law: A Comparative Analysis', *Die Welt Des Islams*, 34.2 (1994), 246–74 (p. 260) <https://doi.org/10.2307/1570932>.

[256] Peters, 'The Islamization of Criminal Law: A Comparative Analysis', p. 262.

In other words, application of prescribed punishment (*Ḥadd*) can be a difficult task and discretionary punishment (*taʿzīr*) could serve as a tool in the hands of the ruler.

In addition to determining the scope of codification, ʻAṭīya refers a number of significant principles to elaborate on the modes of operation of the *Ijtihād* Institution. First, the Institution will be responsible for dividing codified ordinances into two categories: a commanding statement which is obligatory; and a commentary and complementary report, which contracting parties refer to, but preserve contracting parties the right to choose another legal opinion as long as it has Sharʿī basis. Second, the institution will legislate the general principles and avoid minute details to allow judiciary flexibility to tailor the legal opinion and without limiting the law. Third, the institution will not be confined to one doctrinal school but will select any legal opinion that achieves the public interest (*maṣlaḥa*) provided that the opinion is in compliance with the Sharʿī approach of inference and is based on evidence from Divine Scripture. The inference methodology and evidence for each opinion will be stated in an explanatory report to facilitate the task for judges.[257] It is noteworthy that ʻAṭīya suggests a comparative approach towards *fiqh* studies that includes non-Sunni sects such as Ja'fari, Zaydi and Ibāḍi and include their opinions in the codified law. This inclusive approach, argues ʻAṭīya, is aimed to eliminate intolerance and educate the public that the disagreement among scholars is based on different inferences or exegesis of a religious text.[258] Moreover, ʻAṭīya contends that the ruler is entitled to transform the moral code into an enforceable doctrine in a manner that achieves public interest.[259]

[257] Jamāl al-Dīn ʻAṭīyah, *Al-Naẓariyah Al-ʿammah Lil-Shariʿah Al-Islamiyah*, pp. 207–8.
[258] ʻAṭīyah and Al-Zuhayli, p. 37.
[259] Jamāl al-Dīn ʻAṭīyah, *Al-Naẓariyah Al-ʿammah Lil-Shariʿah Al-Islamiyah*, p. 42.

3.2. *Ijtihād* Institution, Judiciary and Executive Bodies

Scholars of Islamic law have proposed different models to integrate Sharia into modern society. Such models have been prescribed, identified and explained, but many scholars overlook the significance of highlighting the power dynamics within the structure of the nation-state. In his endeavor to overcome this challenge, ʿAṭīya ventures to identify the roles of judiciary and executive bodies.

Judiciary and executive bodies are not tasked with legislation, argues ʿAṭīya, however, such bodies are entitled to legislate in specific situations. ʿAṭīya defines judiciary as the body that hears and adjudicates lawsuits; therefore, they are not required to legislate. Nonetheless, judiciary have the authority to legislate in two cases: legislative vacuum and precedents. With regard to legislative vacuum, ʿAṭīya argues that a judge is required to provide their legal opinion in a lawsuit. Therefore, in case of lack of direct ordinance in the Divine Scripture, the judge will perform *ijtihād* through drafting a legal maxim for the particular case that does not follow any legal maxim and employ the new particular (*furuʿ*) to adjudicate the case. With respect to precedents, ʿAṭīya identifies the precedent in this context as a source for regulations as in the "English system." However, the precedent does not constitute a source for ordinances (*aḥkām*) in Sharia for other judges, or even the same judge but their main role is to provide guidance.[260]

The executive bodies are entitled to legislate under specific conditions. By executive bodies ʿAṭīya means caliphs, rulers and ministers who derive their authority from God's sovereignty in accordance with the verse: "O you who have believed, obey Allah and obey the Messenger and those in authority among you" (4:59). Obedience, according to ʿAṭīya, includes three categories of

[260] Jamāl al-Dīn ʿAṭīyah, *Al-Naẓariyah Al-ʿammah Lil-Sharīʿah Al-Islamiyah*, pp. 208–12.

decisions issued by executive bodies: 1. Edicts in the framework of Sharia-based policy (al-*siyāsa al-Sharʿiyya*)[261] that take the form of public laws that may not necessarily require *ijtihād* but require technical and administrative expertise such as traffic law, commercial register and public notary. The *Ijtihād* Institution, however, will review such laws in order to ensure their compatibility with Sharia and the overall body of legislation. 2. Bylaws and regulations that organize internal operations within the administrative body of the state or elaborate the details of public laws. 3. Administrative decisions within state bodies and ministries.[262]

In sum, we notice that ʻAṭīya attempts to balance between the legal centrality of the nation-state and plurality of *ijtihād*. ʻAṭīya's proposal attempts to integrate the civil law, statutory law, with the common law, that is regulated based on the concept of precedent. But the precedent operates differently in the way it does not constitute a binding rule but a guiding principle. The model of ʻAṭīya's precedent resembles the concept of analogy (*qiyās*) in the way it establishes a legal precedent but not obligatory and its main function is to elaborate the legal reasoning of the adjudication. ʻAṭīya states that a supreme court will supervise the *Ijtihād* Institution and court verdicts to ensure the sovereignty of the Sharia.[263] Moreover, those who loosen and bind (*ahl al-ḥall wa-l-ʿaqd*) will supervise the decision of the ruler/caliph to ensure compatibility and conformity with Sharia. Hence, both the ruler and those who loosen and bind should be able to perform *ijtihād* to ensure familiarity with the ordinances of Sharia. ʻAṭīya does not provide new prerequisites for the ruler or for those who loosen and bind and suffices by referring to the

[261] A broad doctrine of Islamic law that authorizes the caliph/ruler to determine the ways in which the Sharia should be administered through discretionary measures, rules and policies. One principle condition in that any regulation should not violate Sharia. See: Kamali, *Siyasa Shar'īyya or the Policies of Islamic Government.*

[262] Jamāl al-Dīn ʻAṭīyah, *Al-Naẓariyah Al-ʿammah Lil-Shariʿah Al-Islamiyah*, pp. 213–14.

[263] Jamāl al-Dīn ʻAṭīyah, *Al-Naẓariyah Al-ʿammah Lil-Shariʿah Al-Islamiyah*, p. 245.

conditions established by earlier scholars in *fiqh* books.[264] This legislative model, however, does not indicate how the members of the *Ijtihād* Institution will be selected, either as members of the parliament through public selection, by appointment by the ruler, or selection by the scholars amongst themselves.

4. Objectives of Sharia (*Maqāṣid al-Sharī'ā*)

In this section we examine the role of objectives of Sharia (*maqāṣid al-Sharī'ā*) in ʻAṭīya's model. An overview of the different models for *maqāṣid* should precede our discussion of ʻAṭīya's proposal to explore the possible changes. Then we will proceed to examine the related aspects of the *maqāṣid*.

The concept of *maqāṣid* was "in inchoate and abstract form" during the first four centuries of Islam and only after that it developed through a discussion on God's objective of the law, mainly in theological debates.[265] Abū Ḥāmid al-Ghazālī (d. 1111) was the first jurisprudent to discuss the *maqāṣid* in an elaborate manner and states that "God's purpose in revealing his law to humankind is man's *maṣlaḥa*, which consists of preserving five vital goods, called the five necessities (*al-ḍarūrāt al-khamsah*): religion (*dīn*), life (*nafs*), intellect (*ʿaql*), offspring/lineage (*nasl*), and property (*māl*)."[266] A number of scholars have contributed to the discussion on *maqāṣid*. For instance, al-Qarāfī added a sixth element, to the five prescribed by al-Ghazālī, which is protection of honor "*al-ʿirḍ*." Another prominent scholar in the study of *maqāṣid* is Ibn Taymiyya who departed from the notion of confining *maqāṣid* to a certain number and argued that "the Sharīʿah promoted such other values as fulfilment of contracts, preservation of the ties of kinship, good

[264] Jamāl al-Dīn ʻAṭīyah, *Al-Naẓariyah Al-ʿammah Lil-Shariʿah Al-Islamiyah*, pp. 227–29.
[265] Opwis, 'Maqāṣid Al-Sharīʿah'.
[266] Opwis, 'Maqāṣid Al-Sharīʿah'.

relations with one's neighbours, moral purity, trustworthiness and the love of God on which the Qur'an and Sunnah were equally explicit. These he maintained should be added to the list of the maqāṣid."[267]

Maqāṣid is meant to achieve the balance between the spiritual and the material, and between the interests of the individual and the society. 'Aṭīya considers rules of *maqāṣid* to be part of the legal methodology of *uṣūl al-fiqh*; since *maqāṣid* aids the scholars in interpreting the Scripture to reach the public interest.[268] The question, then, arises, what are the ways in which 'Aṭīya suggests to employ the concept of *maqāṣid* in inferring the legal ruling? 'Aṭīya contends that public interest can be achieved through inference from *maqāṣid* without employing complicated legal tools such as *qiyās*. For instance, drinking wine is prohibited to achieve the principle of 'preserving the mind.' This ruling can be conveyed through regular analogy (*qiyās*) to include other forms of alcohol beverages. The *ratio legis* (*al-ʿilla*) in this context is 'preventing absence of mind' can be expanded through *al-qiyās al-wāsiʿ* (lit. wide-range analogy)[269] to include everything that could lead to the absence of mind, e.g. narcotics. In the regular and expanded form of analogy, a *ratio legis* has to be the basis of the ruling. However, by applying *maqāṣid*, 'Aṭīya suggests, we can further expand on the concept of 'preserving the mind' to include prohibition on issues such as superstitions and sorcery. This is possible without reference to the *ratio legis* but through inference from general Scripture ordinances that call for 'enjoining good and forbidding wrong.'[270] In this sense, 'Aṭīya suggests that scholars will be able to rely on general concepts of

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[267] Mohammad Hashim Kamali, 'Issues in the Legal Theory of Uṣūl and Prospects for Reform', *Islamic Studies*, 40.1 (2001), 5–23 (pp. 15–16).
[268] Jamāl al-Dīn 'Aṭīyah, *Al-Wāqiʿ Wa-Al-Mithāl Fī Al-Fikr Al-Islāmī Al-Muʿāṣir*, p. 149.
[269] The expanded form of qiyās (al-qiyās al-wāsiʿ) occurs when the scholar expands the scope of the ruling to achieve the maṣlaḥa.
[270] Jamāl al-Dīn 'Aṭīyah, *Naḥwa Tafʿīl Maqāṣid Al-Sharīʿa* (Damascus - Syria: Dar al-Fikr, 2001), pp. 185–91.

maqāṣid, such as 'preserving the mind,' to adjudicate legal cases without having to undergo the intricate process of relying on *ratio legis*. Therefore, 'Aṭīya proposes a new classification to expand on the scope and application of *maqāṣid* in a modern context.[271]

'Aṭīya argues that the study of *maqāṣid* has suffered a stagnation since the time of al-Shāṭibī (b. 1320 - d. 1388) as the efforts of following scholars were limited to either summarizing or rearranging what al-Shāṭibī established. 'Aṭīya contends that al-Shāṭibī followed certain methods and means to ascertain the *maqāṣid* which, according to 'Aṭīya can be summarized as:

- Explicit texts from Divine Scripture (Qur'an and Hadith) which constitute the basis for ratiocination and *ratio legis* (*al-ʿilla*) in legal rulings
- "Inductive analysis of the actions of the Lawgiver, which may be divided into two types. The first type is an inductive reading of the legal rulings whose bases (*ʿilla*) have been determined by means of recognized approaches (*māsalik al-ʿilla*), yet without an explicit text from the Qur'an or the Sunnah. The second is an inductive reading of the various pieces of textual evidence in support of legal rulings which have a common objective (*ghāyah*) and basis (*bāʿith*).
- The Companions' understanding of the rulings found in the Qur'an and the Sunnah."[272]

'Aṭīya contends that it is significant to take into account the role of reason and innate understanding (*al-fiṭrah*) advocated by other scholars.[273] For instance, 'Aṭīya gives an example of al-Juwaynī, the Imam of the Two Sacred Shrines, who devotes a chapter in his book titled *al-Burhān* to a

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[271] Jamāl al-Dīn 'Aṭīyah, *Al-Wāqi' Wa-Al-Mithāl Fī Al-Fikr Al-Islāmī Al-Mu'āṣir*, p. 150.
[272] Jamāl al-Dīn 'Aṭīyah, *Towards Realization of the Higher Objectives of Islamic Law. Maqāṣid AlSharī'a: A Functional Approach.*, trans. by Nancy Roberts, 2nd edn (London: The International Institute of Islamic Thought, 2007), p. 1.
[273] Ibid. p.2.

discussion of inductive reasoning (*istidlāl*) in which he advocates for its use in the absence of Divine Scripture.[274] By calling our attention to the role of reason and the different suggestions of earlier scholars, ʿAṭīya contends that *maqāṣid* should not be limited to Divine Scripture but the concept should be expanded to include any source or method that achieves public interest.

ʿAṭīya makes a few references before formulating the new classification. First, he argues that it is necessary to exclude some of the concepts and ideas that are related to *maqāṣid* but tend to be confused with them, including such concepts as "innate human disposition or understanding (*al-fiṭrah*) and beneficence (*al-samāḥah*), distinguishing features [of the Law] such as alleviation and the elimination of hardship, means and mechanisms such as the prohibition against legal subterfuges, closing and/or opening the door to legal artifices (*Sadd al-dharāʾiʿ*) and respect for Islamic legislation, as well as major values of relevance, the sum total of which goes to make up 'the philosophy of legislation."[275] Second, he contends that *maqāṣid* as objectives of Sharia will be the main focus; therefore, "it is necessary to adhere to the criterion laid down by al-Ghazali, namely, the search for human interests recognized by the Law, and not human interests in their non-restricted sense as understood by human beings without reference to the Law." [276] But it should also be noted that:

> "[o]f the human interests recognized by the Law, some are religious/spiritual in nature, while others are earthly/material in nature. Hence, adherence to the Law does not require that we restrict ourselves solely to so-called religious interests, since Islam does not recognize this type of distinction between the sacred and the worldly. Rather, *maqāṣid* relating to pure worship and devotion, *maqāṣid* relating to pure human interest, and those which are common to both, are all included within *maqāṣid al-sharʿ*, that is,

[274] Ibid. p. 2.
[275] Ibid. p. 104.
[276] Ibid. p. 104.

the objectives of the Law, in a single, integrated system which encompasses the realm of what has come to be termed human rights."[277]

The higher *maqāṣid*, according to ʻAṭīya, are "embodied in the worship of God, acting as His vicegerents on earth, and populating and developing the earth through faith and its requirements. Such requirements of faith include righteous action which achieves happiness both in this life and the next, which encompasses both the material and spiritual aspects of existence, and which strikes a balance between the interests of the individual and those of society, between particular national interests and the interests of humanity at large, and between the interests of the current generations and those of generations to come. All such intents, moreover, "find their expression on the respective levels of the individual, the family, the Ummah and all of humanity."[278] ʻAṭīya states that he has divided the discussion on each *maqṣid* into three sections. In the first section, he highlights the concept of the *maqṣid* under discussion. In the second section, he provides "evidence in its support in the form of texts from the Qur'an and the Sunnah, and in the form of an inductive reading of subsidiary legal rulings which have been issued toward the achievement of said intent, or *maqṣid*."[279] In the third section, he presents "an exposition of the ranks of essentials, exigencies and enhancements as they pertain to the means by which the *maqṣid* of relevance may be achieved." [280]

4.1. The *Maqāṣid* as They Pertain to the Individual

Under this category we find ʻAṭīya have enumerated the five objectives that the traditional scholars have formulated, with some differences. The five objectives include preserving religion (*dīn*), life

[277] Ibid. p. 104.
[278] Ibid p. 105.
[279] Ibid. p. 116.
[280] Ibid. p. 116.

(*nafs*), intellect (*ʿaql*), offspring/lineage (*nasl*), and property (*māl*). ʻAṭīya emphasizes three differences from the traditional view on the five principles: "(1) the definition of the content of 'religion', with consequent differences among scholars with respect to where they rank religion in relation to the other universals, (2) the choice of the word 'honor' (*ʿirḍ*) for the fourth universal [rather than either 'progeny' (*nasl*) or 'family lineage' (*nasab*)], and (3) revisions relating to the secondary *maqāṣid* for each of the five universals.[281]

First, preservation of life (*nafs*) includes protection from death, damage or harm to the body, which is equivalent to 'the right to life' in the positive law. This can be achieved through "provision of security in order to prevent attacks on people's lives, prohibitions against murder, assault, and suicide, enforcement of the law of retribution against those who commit deliberate aggression against others," and meeting the requirements of livelihood including food, drink, clothes and shelter. To fulfill this *maqṣid*, ʻAṭīya contends, there is a need for personal freedom and dignity. ʻAṭīya argues that "both animals and humans need food and drink in order to survive, however humans also have psychological and spiritual needs. Hence, the preservation of human life is not possible apart from the preservation of all these aspects together, which thereby take on the status of essentials."[282]

Second, preservation of the intellect (*ʿaql*) "is composed of three main elements, namely: (1) the development of the mind, (2) the preservation of the mind, and (3) the utilization of the mind. Hence, although scholars have traditionally referred to this objective as the preservation of the mind, or human reason, we prefer to call it consideration for the mind in order to ensure that it

[281] Ibid. p. 118.
[282] Ibid p. 119.

encompasses all of these elements at once."[283] These three elements include a variety of sub-categories that range from scientific thought and nourishing the mind with knowledge to avoiding anything that would damage the brain or cause mental breakdown. ʿAṭīya expands on this subcategory to include blind imitation, groundless speculation and superstitions, to the extent that he suggests avoiding media outlets that promote brainwashing or misleading information.[284]

Third, preservation of personal piety (*tadayyun*). ʿAṭīya argues that "it is necessary first to preserve human life, which is the basis for all human action, then the mind, which is the basis for our being held accountable before God's law, and only then personal piety [which is only possible given the soundness of the first two]."[285] Preservation of personal piety can be attained through "establishing and strengthening a sound doctrine" through contemplation and comprehension of Qur'an and Hadith, and "shunning of the major sins relating to doctrine, such as shirk, or association of partners with God, hypocrisy, showing off, unfounded religious innovations, etc."[286] It can also be achieved through performance of obligatory liturgical actions and abiding by the codes of integrity, truthfulness and sincerity in Islam.

Fourth, preservation of honor (*ʿirḍ*) has a broad scope. ʿAṭīya defines "*ʿirḍ"* as :the "aspect of a person [on the basis of] which he seeks to protect his life and [to prevent his] noble descent or reputation from being disparaged or defamed."[287] *ʿIrḍ* is not restricted to the sexual aspect of one's being but extends to include human dignity, sanctity and private life. Therefore, this subcategory aims to "prevent people from causing someone harm by the easiest of means, that is,

283 Ibid. p. 120.
284 Ibid. p. 120.
285 Ibid. p. 121.
286 Ibid. p. 121.
287 Ibid. p. 122.

through words. There are explicit texts [in the Qur'an and the Sunnah] prohibiting attacks on others' honor by means of false accusations, slander, etc."[288]

Fifth, preservation of material wealth which is close to the concept of property (*māl)* in the traditional division. 'Aṭīya contends that 'material wealth' refers to "the wealth of the individual; as for that of the family and the Ummah," and that wealth, from an Islamic perspective, belongs to God and humans are his deputies on earth and are responsible before Him for "how they put wealth to use."[289] Therefore, argues 'Aṭīya, "what follows from the first premise [i.e., that all wealth belongs to God] is that ownership, rather than being an absolute right, has a social function, while the second premise [i.e., concerning humans' role as God's deputies on earth] leads to the conclusion that work is a duty not only in order to earn one's living but, in addition, in order to populate and develop the earth."[290] To this end, Islam has established legal rulings to regulate obtaining and preserving material wealth. Such rulings include contracts, inheritance, moderation in expenditure and punishment for theft and other crimes.

4.2. The *Maqāṣid* as They Pertain to the Family

'Aṭīya states that 'family' is the nucleus of society and constitutes the most significant form of connection and organization throughout history. Therefore, Islam has attempted to provide numerous regulating rules to manage family affairs. 'Aṭīya identifies that earlier scholars have attempted to examine this aspect of *maqāṣid* but with some limitations. For instance, al-Ghazali explores the *maqāṣid* of marriage, yet very broadly. Other scholars, such as Ibn ʿĀshūr (b. 1879 - d. 1973), was concerned with the objectives of Sharia in all of its divisions and distinguished

[288] Ibid. p. 122.
[289] Ibid. p. 123.
[290] Ibid. p. 123.

between the rulings of marriage in Islam and in pre-Islamic times, such as family lineage, declaration of bond, temporality and blood relations. However, ʻAṭīya contends, the points raised by Ibn ʿĀshūr were *maqāṣid* of subsidiary, particular rulings within the framework of family relations, not the general *maqāṣid* of Sharia. ʻAṭīya states that his approach is different as it explores "family-related rulings in the context of viewing the family as one of the spheres for which we are searching for general *maqāṣid al-Sharī'a*."[291] Thus, ʻAṭīya provides seven *maqāṣid* within the framework of family.

The first objective is 'regulating the relationship between the sexes.' Sharia aims to organize the relationship between the sexes rather than leaving it to natural impulses by prescribing a permissible framework with rights and responsibilities: marriage. Therefore, a number of legal rulings have been established including "those which encourage marriage, sanction polygamy and divorce (with their associated conditions), enjoin the avoidance of relations outside marriage, whether in the form of adultery or sexual perversion, close off the paths to temptation by means of chastity and the wearing of *hījab* to prohibit a man and a woman from being alone together."[292] The second objective is preservation of offspring. Sharia affirms the objective that heterosexual relationships, within the legitimate framework, aim to preserve offspring conforming with God's way. To achieve this intent, marriage and procreation are encouraged, while other actions such as burying females and abortion are prohibited. Hence, procreation is considered among the essential *maqāṣid* and is regulated by multiple rulings within the context of marriage, divorce and polygamy.[293]

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[291] Ibid. p. 124.
[292] Ibid. p. 125.
[293] Ibid. p. 125.

The third objective is achieving harmony, affection and compassion. ʻAṭīya states that the marriage relationship between the two sexes should not be confined to a mere physical interaction but partners should find compassion and repose in each other. Therefore, "Sharia has issued rulings concerning living together as a couple in kindness and harmony, rules of etiquette governing sexual intercourse, as well as other rulings which provide the possibility of a family atmosphere filled with warmth, tenderness and refined human sentiment."[294] The fourth objective is preservation of family lineage (*nasab*). It is an essential *maqṣid*, argues ʻAṭīya, to preserve the *nasab*, therefore, Sharia has prescribed a number of ordinances which include prohibition of adultery and prescribing waiting periods for divorced women or widows.[295] The fifth objective is preservation of personal piety within the family. ʻAṭīya attempts to highlight the significance of personal piety in the framework of family by drawing examples from successful and unsuccessful experiences of Prophets such as Abraham, Jacob and Noah. ʻAṭīya notes that it is the responsibility of the head of the household to ensure religious piety starting with a religious partner, educating the offspring about their religion and morality as prescribed in the Qur'an: ""'And bid thy people [family] to pray, and persevere therein" (20:132)."[296]

The sixth objective is organizing the institutional aspect of the family and by that ʻAṭīya means that he views the family as an integrated permanent structure where members have right and obligation to fulfill. ʻAṭīya elaborates on the internal dynamics by stating that

"[t]he family is led by its head, who is assigned guardianship (*qiwāmah*) and who consults with his wife concerning the family's affairs. In this context, the spouses follow an approach laid out by Sharia for arbitration in the event of a dispute between them and for severing the marital bond if the dispute

[294] Ibid. p. 126.
[295] Ibid. pp. 127–28.
[296] Ibid. p. 129.

becomes insoluble. This organization is not restricted to the nuclear family, consisting only of the parents and their children, but applies equally to what has come to be termed the extended family which includes relatives and in-laws. Hence, Sharia has established arrangements for relations among all these various parties."[297]

Therefore, Sharia contains detailed rulings on regulating the relationship between husband, wife and children highlighting rights and duties of each member towards the other and the family, altogether. Such rulings include waiting period, living allowance and divorce. The seventh objective is organizing the financial affairs of the family. ʻAṭīya states that Sharia has prescribed details accounts and ordinances for organizing social, emotional and financial affairs of the household. This includes dowry, wife allowance, wet nurses and many other types. This aspect moves beyond the nuclear family to include wills made out on behalf of next-of-kin, endowments and paying blood money on behalf of relatives.

4.3. The *Maqāṣid* as they Pertain to the *Umma*

ʻAṭīya divides *maqāṣid* of Sharia with respect to the *Umma* into seven subsections with the objective of isolating the exact *maqāṣid* that promote the status of *Umma*, at the same time ʻAṭīya admits that there is correlation between all the *maqāṣid* on the individual and collective levels. The first objective is concerned with institutional organization of the *Umma*. ʻAṭīya agrees with Qaradawi in viewing the *Umma* as "a distinctive entity with its own particular characteristics, components and organizations."[298] ʻAṭīya contends that Sharia does not have strict procedures that would confine application in any era and gives the example of legal personality. Sharia acknowledges the concept of legal personality in certain occasions, such as *waqf*, but not in an

[297] Ibid. p. 130.
[298] Ibid. p. 131.

absolute sense. Sharia, however, focused on unifying the *Umma* under one doctrine (*ʿaqīda*) and allowed pluralism of doctrinal schools and does not contradict multi-party system in the general Islamic framework. ʻAṭīya argues that the core principle should be sovereignty of Sharia over any modern or pre-modern ideologies. After acknowledging this premise, one can derive the institutional basis such as collective organization based on the report from the Prophet that says: "If there are three of you, appoint one of the three of you to be your leader," and the recognition of Shura based on the Qur'an: "whose rule [in all matters of common concern] is consultation among themselves" (42:38).[299]

The second objective is preserving security which takes two forms: internal and external. By internal security, ʻAṭīya refers to legislation of laws and regulations to preserve life, honor and property and prescribing sanctions and punishments if violated. By external security, ʻAṭīya means ensuring the ability and forces to deter others from committing acts of aggression against the *Umma*. The third objective is concerned with establishing justice which, according to ʻAṭīya, can take multiple forms: being justice with God, with one's self and with one's family, and with others. In the context of *Umma*, justice here entails justice in adjudication (*qaḍāʾ*) and ruling (*ḥukm*). Justice, states ʻAṭīya, is a key *maqṣid* of Sharia promoted by the Qur'an in multiple occasions: "Indeed, [even aforetime] did We send forth Our apostles with all evidence of [this] truth; and through them We bestowed revelation from on high, and [thus gave you] a balance [wherewith to weigh right and wrong], so that men might behave with equity" (57:25).[300] The fourth objective is focused on preservation of religion and morals. ʻAṭīya states that Sharia does not acknowledge the separation of ethics and morals from religion, as the case in secular systems which "have a limited

[299] Ibid. pp. 132–33.
[300] Ibid. p. 134.

conception of general morality based on commonly agreed upon ethical standards which are not to be violated."[301] Preservation of religion, in the context of *Umma*, can be achieved through prevention of any action that might undermine the principles of religion and through adherence to religious teachings. To preserve religion on the collective level, Sharia has required communal prayer, Friday congregation and pilgrimage in order for the Muslim community to sense the doctrinal bond that unites them. Morals have a great importance in Islam, on the individual and collective levels, and have been promoted by the Prophet in multiple reports, such as: "I have been sent to perfect noble traits of character."[302]

The fifth objective is cooperation, solidarity and shared responsibility. ʻAṭīya argues that these terms are connected and encompass areas culture, society and economy, however, they cannot be imposed by force but can be derived from Scripture on unity and brotherhood, such as: ("All of you are descended from Adam…") and the brotherhood born of faith ("All believers are but brethren" [49:10]). Furthermore, Scripture has enumerated different ways cooperation and solidarity can take place. For instance, Scripture urges Muslims "to confirm and fulfill this intent: from the inclusive command to cooperate in furthering virtue and God consciousness rather than evil and enmity, to its practical manifestations such as the requirement to pay zakāh and spend of one's substance in charitable ways in general, and the possibility of levying a tax on the wealthy whose proceeds go to help the poor; add to this various other expressions of charity and benevolence."[303] The sixth objective is the dissemination of knowledge and preservation of reason in the *Umma*. ʻAṭīya states that this *maqṣid* can take two forms: prohibition of damage and nurturing the mind. Prohibition of damage can be through preventing the spread of drunkenness

[301] Ibid. p. 136.
[302] Ibid. pp. 136–37.
[303] Ibid. pp. 137–38.

and intoxication among members of society or misleading news outlets that brainwash the community and spread mindless bigotry. Nurturing the mind can take place through contemplating and scientific thinking. To ascertain this *maqṣid*, Sharia has prescribed a number of ordinances directly such as prohibition of consumption of intoxicants or indirectly regarding avoiding damage, mental or physical.[304] The seventh objective is populating and developing the earth and preserving the *Umma*'s wealth. This *maqṣid* is concerned with civic engagement through collective participation and financial support. ʻAṭīya contends that material wealth belongs to God and humans are his deputies; hence, "ownership has a public function and is not an unqualified right" which means that funds may be in possession of certain individuals, but they also belong to the *Umma*.[305] To achieve this intent, a number of ordinances can be found in Sharia on *Zakāh*, charitable contributions and dedicating one-third of one's will to charitable uses. Moreover, society is encouraged to participate in economic activities such as enhancing public facilities, establishing an endowment system, facilities for the homeless.[306]

4.4. The *Maqāṣid* as they Pertain to Humanity

In this *maqṣid* we find ʻAṭīya examining the international relations and to what extent an Islamic state should export its Islamic identity. First, ʻAṭīya notes that some scholars use the term 'the nation to be called' (*Ummat al-daʿwa*) instead of 'the abode of unbelief' (*dār al-kufr*) and then he proceeds to state that scholars have disputed "whether non-Muslims are addressed by the subsidiary rulings of Islamic law or whether they are simply being called to faith in God."[307] ʻAṭīya states his position as follows:

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304 Ibid. pp. 138–39.
305 Ibid. p. 139.
306 Ibid. pp. 140–41.
307 Ibid. p. 142.

> "Universal legal rulings – as opposed to Islamic law's subsidiary rulings – are not limited to calling non-Muslims to faith in God. When the Qur'anic discourse employs the address, "O mankind!" (2:21 and elsewhere) or, "O man!" (82:6 and elsewhere), this is not limited to the call to faith, although this is its primary focus. Rather, such discourse is advocating universal principles, one's response to which does not depend on prior faith but, rather, on reason and logic."[308]

'Aṭīya proceeds to state that implementation of Sharia principles and *maqāṣid* constitute the objective of Muslim government's foreign policy in dealing with other nations. Therefore, *maqāṣid* on the realm of humanity take different forms.

The first objective of Sharia is mutual understanding and cooperation. 'Aṭīya begins this section by relying on a verse from the Qur'an about complete equality between all races: "O men! Behold, We have created you all out of a male and a female, and have made you into nations and tribes, so that you might come to know one another. Verily, the noblest of you in the sight of God is the one who is most deeply conscious of Him. Behold, God is all-Knowing, all-Aware" (49:13). 'Aṭīya states that there is not any form of tribal or ethnic superiority, but the distinction is based on spiritual purity. Moreover, cooperation among the different races and ethnicities is based on the *maqṣid* of mutual understanding, which arises from interaction. The second objective is realizing human viceregency on earth. 'Aṭīya states that humans are deputies of God on earth, therefore, they have the freedom of choice and also burdened with the consequences of their choices. There are two types of succession: one humanity at large and the other to the Islamic *Umma*, which was discussed on the section on *maqāṣid* pertaining to *Umma*. Succession to humanity covers a variety

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308 Ibid. p. 142.

of subjects such as protecting the environment, fighting crime and development of agricultural lands.[309]

The third objective is achieving world peace based on justice. This objective is focused on war and peace and the ambivalence surrounding them. ʻAṭīya criticizes the claim that Islamic states are war-inclined by arguing that that the justification for war is defense against an invasion and quotes a number of verses from the Qur'an: "And [thus it is:] had thy Sustainer so willed, all those who live on earth would surely have attained to faith, all of them: dost thou, then, think that thou couldst compel people to believe?" (10:99), and "There shall be no coercion in matters of faith" (2:256)."[310] The original relation between Muslims and non-Muslims is based on peace, from an Islamic perspective, in accordance with various Hadiths and verses from the Qur'an: "But if they incline to peace, incline thou to it as well…" (8:61). Therefore, in order to fulfill this *maqṣid*, ʻAṭīya suggests "the creation of an international organization which would ensure collective security, organizing cooperation in a variety of areas arranging treaties among states and overseeing their implementation."[311] The fourth objective is international protection of human rights. This objective ensures "extending assistance to the oppressed everywhere and protection of freedoms and rights, particularly the freedom of thought and religious belief, have been among Islam's major concerns, lest tyrannical regimes prevent the Islamic message from reaching all people."[312] The fifth objective is dissemination of the Islamic message which is shouldered by all Muslims. The core message of Islam, which should be disseminated, revolves around existence and oneness of God and abiding by His rules and staying away from His prohibitions. ʻAṭīya states

309 Ibid. pp. 144–45.
310 Ibid. p. 146.
311 Ibid. p. 146.
312 Ibid. p. 147.

that the message of Islam should be communicated through "wisdom, gentle exhortation, and reasoned dialogue, but not through coercion of others to embrace Islamic doctrine."[313]

4.5. Realization of Maqāṣid

In this section we discuss what ʻAṭīya aims to achieve from his new classification and the way in which it complements his proposal for a new legislature. ʻAṭīya argues that "legal studies dealing with positive law lack discussions of *maqaṣid,* and that Islamic legal studies lack discussions of the function of positive law in the organization of society and the extent to which the state should intervene in individual freedoms."[314] Therefore, he formulates this new categorization of *maqāṣid* in hope to develop their implementation particularly in relation to "the subdivisions of Islamic law and to the modern sciences."[315]

ʻAṭīya criticizes some of the ways in which earlier scholars have investigated *maqāṣid*. For instance, ʻAṭīya begins by asking the question: "What, then, is meant by the term *maqāṣid*-based *ijtihād*? Is there some new concept which requires a designation, or are we dealing with the use of a new term to refer to an old entity, mechanism or type of evidence?"[316] ʻAṭīya refers to two prominent scholars who have examined *maqāṣid*-based *ijtihād*: al-Raysuni (b. 1953 -) Nour al-Din al-Khadimi (b. 1963 -). In his book titled *Maqāṣid-Based Ijtihād* al-Khadimi discusses *maqāṣid* and the ways in which it can be employed to infer new rulings. However, ʻAṭīya believes that "al-Khadimi's book makes no reference to any sort of new mechanism, [and that] *maqāṣid* are not independent from other types of evidence derived from Islamic law. Hence, he [al-Khadimi] offers no justification for applying this new designation and fails to make clear what it adds to

313 Ibid. p. 147.
314 Ibid. p. 151.
315 Ibid. p. 151.
316 Ibid. p. 161.

already recognized Islamic legal evidence."[317] On the other hand, ʻAṭīya states that al-Raysuni provides a much more elaborate discussion on *maqāṣid*-based *ijtihād* in his book titled *Imam al-Shāṭibī's Theory of the Higher Objectives & Objectives of Sharia.* Al-Raysuni outlines four principles of *maqāṣid*-based *ijtihād*: "1. The inseparability of texts and rulings from their intents, 2. Combining universal principles with evidence applicable to particular cases, 3. Achieving benefit and preventing harm, and 4. Consideration of outcomes."[318] However, ʻAṭīya states that *maqāṣid*-based *ijtihād*, as articulated by al-Raysuni, falls under the category of unrestricted interest (*istiṣlāḥ*) and "it would seem most fitting – given that our theme is that of 'interests' – not to allow *maqāṣid* to be treated or viewed separately from *uṣūl al-fiqh* but, rather, to preserve them as an advanced branch of Islamic jurisprudence which serves to support and assist it in developing its remaining branches."[319]

ʻAṭīya suggests developing the *maqāṣid* in order to formulate a complete juristic system which includes all branches, present and future, without waiting for the emergence of a particular case in order to issue a legal ruling appropriate thereto, which is regulated as follows:

> "1. Ascertaining the *maqāṣid* which belong to the two categories identified by al-Ghazali, namely: (a) those which are ascertained based on numerous pieces of textual evidence and which are definitive in nature, and (b) those which are in keeping with some fundamental principle which, though it is not specified in the Law, does not conflict with, and is not overridden by a definitive principle derived from the Qur'an, the Sunnah or the consensus of the Muslim community. 2. Classifying these *maqāṣid* and building them into an intellectual edifice in which similarities and parallels are brought together and divided into groups according to their subject matter, thereby

[317] Ibid. p. 161.
[318] Ibid. p.162
[319] Ibid. p. 168.

> revealing the features of the Islamic legal conceptualization in relation to each subject according to the divisions of contemporary juristic writings. 3. Adding to each of the *maqāṣid* the means which serve to lead to its realization, drawing upon whatever modern tools and approaches do not conflict with Islamic legal principles. 4. Adding to the *maqāṣid* and *wasā'il* belonging to each group those Islamic legal rules which apply specifically thereto, as well as general Islamic legal rules of relevance. Such rules of both types may be viewed as a basic part of each group's structure, since they represent Islamic legal rulings derived from other evidence found in Islamic law. 5. Constructing an integrated theory for each group from which branches may be derived, which may be drawn upon in a way which serves to achieve the *maqāṣid*, and which harmonizes with Islamic legal principles. 6. Adding to (4) and (5) above whatever *maqāṣid* are relevant to each of the human, social and natural sciences, including: (a) divine laws of creation (*al-sunan al-ilāhiyyah*) relating to the topic of the science concerned, and (b) definitive facts which have been identified by science, to ensure that the theory applicable to each science is inclusive of all normative and objective elements relating thereto. As for the normative elements being referred to here, they include: a) the Islamic conceptualization of God, the universe, human beings and life, b) general moral values and those specifically applicable to science, c) *maqāṣid* al-*Sharī'a* specific to science, and d) Islamic legal principles which pertain to [human] action."[320]

'Aṭīya proposes to employ the new classification and methodology highlighted in a number of ways, notably codification. Codification, argues 'Aṭīya, can conducted in three phases. The first phase is the study of Muslims' life circumstances to identify their needs, customs and the problems they encounter. This will differ from one country to another, therefore, legislators are encountered with two choices: "first alternative consists in working to pass standardized legislation which applies to all Islamic countries, while the second is simply to establish broad guidelines in

[320] Ibid. pp. 194–95.

conformity with which laws may differ from one country to another. Arab states have tried the first alternative – that of standardized legislation – in the area of personal status laws, as well as in civil, commercial and penal laws; however, they have yet to achieve the actual standardization of any of these laws. As for the other alternative, it has been adopted by the European Union, which has succeeded in bridging the gaps among its various laws within the parameters set by broad guidelines (known as 'directives') issued by the organization's joint bodies. This process has led to the emergence of what is termed European Law, which is not, in reality, a standardized law but, rather, a set of criteria and directives for each branch such that each European state commits itself to amending its laws in conformity with these criteria."[321] The second phase includes choosing one of the two alternatives. The third phase involves drafting the rulings chosen in the form of laws in order to be applied within the system prevalent in each country.[322]

5. Conclusion

In this chapter we have examined two main aspects in 'Aṭīya's project: *ijtihād* and *maqāṣid*. We have observed that 'Aṭīya provides an in-depth analysis of the structure and content of modern legal structure given his scholarly knowledge in both modern law and Islamic law. We have noticed that 'Aṭīya makes certain claims comparable to what scholars of the modern period have argued for, including the assumption that gates of *ijtihād* never closed but differently contends that absolute *mujtahid* (*mujtahid muṭlaq*) is not an achievable rank and unexpected to re-emerge due to the proliferation of technical knowledge in modern society. Hence, this requires a renewal of *ijtihād* in a manner that combines two of the most authoritative sources after Scripture, in Sunni tradition: *ijtihād* and consensus (*ijma'*). 'Aṭīya contends to integrate collective *ijtihād* (*al-ijtihād*

[321] Ibid. p. 191.
[322] Ibid p. 191.

al-jamā'ī) into a state institution which will be called "the *Ijtihād* Institution." The *Ijtihād* Institution will be responsible for legislation and codification, and we have highlighted the process, scope and approach for the Institution. The Institution will operate in accordance with the new classification for *maqāṣid*. *Maqāṣid* will function as the public policies required for a complete juristic system that legislate based on Sharia and prioritizes the public interest.

Conclusions

In his book, *The impossible state: Islam, politics, and modernity's moral predicament*, as well as in other publications, Hallaq presents the argument of how Sharia is not a legal tradition that is assimilable to the modern nation-state, as he argues. "The Islamic state, judged by any standard definition of what the modern state represents, is both an impossibility and a contradiction in terms."[323] In a different place, we find that Hallaq sets forth the required criteria that any attempt to implement Sharia should consider: "[i]ntegral to any conception of Sharī'a is a theoretical, methodological and, perhaps, hermeneutical system that is expected by modern Muslim intellectuals to underlie the means by which legal and norms and rules are to be derived."[324] I concur that there is a need to provide a fresh and a comprehensive model that combines theoretical, methodological and hermeneutical elements to synthesize Sharia into the institutional fabric of the modern nation-state without compromising the nature of Sharia or being in conflict with the modern structure. As Jackson puts it, "the basic structure of the nation-state has emerged as a veritable grundnorm of modern Muslim politics" and it has become an integral part of reality, thus Muslims scholars and intellectuals have become invested in "rendering Shari'ah more adaptable to the norms and dictates of the nation-state, along with its putatively inextricable trappings (viz., democracy, human rights, monopoly over law) or to pointing out its utter incompatibility with the latter."[325] Jackson proceeds to argue that attention should be directed towards the basic structure of the nation-state and "the extent to which it might promote its own set of problems for an Islamic politics, independent of and perhaps only compounded by any commitment to Shari'ah per se."[326]

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[323] Hallaq, *The Impossible State*, p. 1.
[324] Hallaq, *Sharī'a: Theory, Practice, Transformations*, p. 501.
[325] Jackson, p. 43.
[326] Jackson, pp. 43–44.

Jackson's statement about being cognizant of the constituent elements of the modern nation-state is a significant point for this thesis in evaluating Sharia codification and restructuring, as far as the legislative and codification processes are concerned.

In this thesis we have examined the different approaches or applications of Sharia, which included three main attempts: relying on codification, expanding on traditional heritage and integrating the modern and the traditional in the works of ʻAṭīya. We argued that each of these attempts provide a unique perspective into Sharia application, but, as Jackson and Hallaq implied, a viable proposal should exhibit an understanding of the specificities of the legal structure of the nation-state, on the one hand, and remodel the traditional sciences in a way that preserves the essence of Sharia. Hence, in the first chapter, we have explored the challenges and limitations inherent in Sharia codification projects. I argued that each of the codification projects evaluated fell short in various aspects such as using *fiqh* jargon, lack of a facilitating section (general principles) that aids the judiciary in performing their duties. These are quintessential features to the success of modern laws. In other words, these limitations are concerned with content and structure which render the codified Sharia a poor imitation of either the common law or civil law.

In the second chapter, I reviewed the concept of *ijtihād* and highlighted its role and function in early and modern periods. I examined the main prerequisites for conducting *ijtihād* and the main trends of practicing *ijtihād* to situate ʻAṭīya and his renewal model on the spectrum of *tajdīd*. Then the chapter proceeds to investigate a number of scholars who attempt different methodologies for integrating *ijtihād* into the legal structure of the modern nation-state through different legal tools: *maṣlaḥa*, *qiyās* and *ijmāʿ*. We notice that ʻAṭīya draws on some of their works. For instance, he emphasizes the concept of *ijmāʿ* in a manner that exhibits resemblance to Iqbal's integration of *ijmāʿ* and Shura, but ʻAṭīya's concept is more nuanced. Iqbal's Shura that is based on *ijmāʿ* and

takes the form of a parliament whose members are selected by the *Umma*. Such council will draft the laws based on Sharia but the whole *Umma* will take part in deciding their enforcement. While ‘Aṭīya’s concept is a legislating council that will be responsible for drafting Islamic-based laws and supervises the legislature of any bylaws or regulations to ensure their compatibility with Sharia. While ‘Aṭīya concentrates on the general function and role of the *Ijtihād* Institution and its relationship with judiciary and executive bodies, we find Iqbal focuses on the selection of the members of the Shura council and prerequisites that they should exhibit.

In the third chapter, we examine ‘Aṭīya’s project for *ijtihād* and *maqāṣid*. I discussed the ways in which ‘Aṭīya’s model aspires to establish a balance between codification as a requirement for legal centrality of the nation-state and flexibility of *ijtihād* through the *Ijtihād* Institution. The significance of ‘Aṭīya model lies in that it does not threaten the authority of the state nor does it compromise the essence of Sharia. I argued that ‘Aṭīya’s contributions may not have provided a solution to the seeminly antithetical entities: Sharia and nation-state, but he called our attention to key points that may lead the discussion on future projects. ‘Aṭīya proposed a state institution based on the concept of *ijtihād* and highlighted its connection to judiciary and executive bodies. Furthermore, ‘Aṭīya suggested a new classification of *maqāṣid* in hope to develop a complete juristic system. These proposals attempt to respond to the legal aspect of the nation-state and the basis for legislature and morality.

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